

*Hryniak*, the 2010 Amendments,  
and the First Stages of a Culture Shift?:  
The Evolution of Ontario Civil Procedure in the  
2010s

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## Abstract

This dissertation investigates the effects of amendments to Ontario's *Rules of Civil Procedure* that came into effect on January 1, 2010 (the "2010 Amendments") and were subject to interpretation by the Supreme Court of Canada in a 2014 decision ("*Hryniak*"). *Hryniak* concerned summary judgment. However, the dissertation largely concentrates on the effects of *Hryniak* and the 2010 Amendments outside the summary judgment context, inquiring into whether *Hryniak*'s call for a "culture shift" and the 2010 Amendments' enshrinement of the principle of proportionality have had noticeable effects. It does this by analyzing three aspects of Canadian procedural law that were not amended in 2010 but were amended (or enacted) shortly thereafter and can facilitate or hinder access to justice depending on how they are used: 1) jurisdiction motions; 2) dismissals without an oral hearing, potentially *sua sponte*; and 3) interlocutory appeals. This more quantitative analysis of case law was complemented by results of qualitative surveys of lawyers about their experiences with *Hryniak* and the 2010 Amendments.

With regard to the three procedural rules analyzed, the dissertation makes suggestions for their re-interpretation to minimize unnecessary interlocutory wrangling. At a broader level, the dissertation concludes that there have been positive effects of *Hryniak* and the 2010 Amendments, but they have been limited, and tend to have been greatest in areas where tailored amendments in procedural law have occurred rather than in response to broader statements that a "culture shift" is required in the conduct of litigation. In any event, more work is required outside the realm of civil procedure reform to effectively improve access to civil justice in Canada.

*For Jane,  
Who Always Encourages Me to Desire a Better Canada...*

## Acknowledgments

In the Fall of 2015, I was sitting in my office on the 64<sup>th</sup> Floor of First Canadian Place in downtown Toronto, aspiring to return to the Canadian legal academy. Writing this dissertation has been the primary part of that return, and what a wonderful return it has been. My time in private practice at Osler, Hoskin & Harcourt LLP was thrilling and educational and I am confident I will be a better scholar for it. It also inspired my interest in the intersection of civil procedure and access to justice, which became the subject of this dissertation.

But practice experience alone could not have led to this dissertation: that required academic mentorship, which I received in spades at my two previous law schools, Queen's and Harvard. They will always have a very special place in my heart.

I chose to earn my Ph.D. at Osgoode Hall Law School because of its faculty's deep expertise in civil procedure. Janet Walker has been an ideal supervisor – giving guidance, when appropriate, and freedom, when appropriate – wherever in the world she happened to be. Her deep knowledge of conflicts of law made completing Chapter One much easier, and her invitation to contribute to work at the International Association of Procedural Law (including with Daniel Mitidiero, with whom I collaborated, inspiring a portion of this dissertation's Conclusion) and the Max Planck Institute Luxembourg have led to relationships that I am optimistic will last for many years.

Under Professor Walker's guidance, I published (or have had accepted for publication) portions of this dissertation, or work adjacent to it, in the *Queen's Law Journal*, *Windsor Yearbook of Access to Justice*, *Osgoode Hall Journal*, *Supreme Court Law Review*, and Australian National University's *Federal Law Review*. The staff of these journals, and the anonymous peer reviewers, all left their marks on this dissertation.

That publication in the *Federal Law Review* was due to a collaboration with Lorne Sossin, who was much more than an "additional committee member" even as he transitioned from dean to professor to judge. Consistently inviting me to collaborate, including through assisting in teaching a first-year course with him and Allan Hutchison, his meticulous eye as a scholar was complemented by a kindness that shines through in all his does. Agreeing to stay on my committee after being appointed to the bench leads to even greater appreciation.

Trevor Farrow's mastery of so many dimensions of the access to justice literature enabled finishing this dissertation, especially with respect to Chapter Four, where his methodological

expertise was invaluable. Nothing was missed by the scholar whose work I cite more than any other's during this dissertation. All three committee members had many other personal and professional obligations during the time when I was in the Ph.D. program, and their dedication to my work is all the more appreciated because of it.

A doctoral program requires a community beyond one's committee, however, and there are members of Osgoode's Graduate Program who need to be recognized. Dayna Scott was the Graduate Program Director when I made my decision to attend Osgoode's Ph.D. program and her assistance clinched my decision to study at Osgoode. The staff, especially Nadia Azizi, Rhonda Doucette, and Chantel Thompson, ensured that my time as a graduate student was supported administratively. Ruth Buchanan's first semester seminar got this dissertation started. Darcy MacPherson and Sarah-jane Nussbaum also warrant special mention as exemplary cohort colleagues. Most importantly, Sonia Lawrence guided the Graduate Program throughout my tenure at Osgoode and went above and beyond in ensuring that I had the best support, both as a graduate student, and as an aspiring academic on the job market. I am forever indebted.

My doctoral research was also supported by the estate of the late Willard Z Estey, the Social Sciences and Humanities Research Council of Canada, and the Pierre Elliott Trudeau Foundation. All must be thanked profusely. The staff at the Trudeau Foundation, particularly Jennifer Petrela, Morris Rosenberg, and Josée St-Martin, made the Trudeau Foundation community much more than "just another scholarship". As for the members of that community, I would like to thank all 2016 Trudeau Scholars for being a group of friends I could always count upon, and Thomas Cromwell, Neil Yeates, and Victor Young for being particularly important mentors.

As a result of the exceptionally generous financial support I received to pursue this doctorate, I was able to spend more than a year abroad finishing writing this dissertation. The first ten months were spent in the intellectually rapturous environment that is NYU School of Law's Doctor of Juridical Science Program. Not only did I fulfill a long-time dream to live in New York City, with an office off of Washington Square from which to write at that, but I learned invaluable lessons from the courses and colloquia at the law school, and the members of the JSD Program. I am particularly indebted to Karin Loevy for ensuring that I made the most of this year, and to Oscar Chase, Liam Murphy, and Joseph Weiler for providing invaluable feedback on my work.

I mostly finished writing this dissertation at the Max Planck Institute Luxembourg for International, European, and Regulatory Procedural Law. Ten years after I last lived in Europe

(again, in the Benelux countries, albeit The Hague in the Summer of 2009), I once again had the opportunity to revel in a truly international community, with generous financial support in an atmosphere ideally suited for writing. Viktoria Frumm and especially Christiane Goebel ensured that the logistics could work while Burkhard Hess must be thanked for bringing together such an impressive group of procedural law scholars who can learn from each other.

I put the truly finishing touches on this dissertation from Winnipeg, where I am about to become a new member of the faculty at Robson Hall. My colleagues' giving a deferred start date to finish writing this dissertation – and allowing flexibility to finalize it – is immensely appreciated. Now, I must immerse myself in Manitoba civil procedure...

As a result of being able to present portions of this dissertation across Canada, I received fantastic feedback in the form of sharp questions and comments. I would like to thank Eddie Clark, Deb Cowen, Rob Currie, Bailey Gerrits, Colin Jackson, Howie Kislowicz, Anna Lund, Joanna Noronha, Jen Raso, and David Tanovich, among others whose names I unfortunately forget, for particularly valuable insights and feedback. Other members of the Canadian academy, judiciary, and/or bar supported this dissertation behind the scenes through suggestions or pointing me in the direction of interesting ideas and/or articles. These include Ryan Alford, Barbara Billingsley, Adam Dodek, Nathaniel Erskine-Smith, Donald Granatstein, Thomas Harrison, Christopher Henderson, Justice Carolyn Horkins, Jasminka Kalajdzic, Dustin Klaudt, Justice Peter Lauwers, Malcolm Lavoie, Brooke MacKenzie, Murray Maltz, Michael Marin, Associate Chief Justice Frank Marrocco, Justice Fred Myers, Donald Netolitzky, Justice Ian Nordheimer, Palma Paciocco, Sagi Peari, Andrew Pilliar, Erin Pleet, David Rankin, David Sandomierski, Don Stuart, Angela Swan, and Justice (as she is now) Alice Woolley. All went out of their way to support and/or inspire and I am very grateful.

The survey in Chapter Four was only possible because Pro Bono Ontario facilitated the solicitation of subjects. Matt Cohen and Brian Houghton in particular went above and beyond in encouraging lawyers to fill out the surveys. All lawyers who completed the survey – and who provided information concerning dates of service for Chapter One – similarly went out of their way, taking time from their busy schedules and helping this dissertation's contribution to knowledge.

My uncle, Byron David Kennedy, spent literally dozens if not over a hundred hours reading drafts of this dissertation as a line editor. This was more than I ever reasonably could have expected. It is not lost on me and his deep intellectual curiosity inspires.

In my last year of my doctoral studies, I said goodbye to both of my grandmothers, who had been an extraordinary source of support for my first 34 years. Both Leonore Moore and Kathleen Kennedy supported my education in different ways and I think of them as I complete this project.

Ever since I was in high school, my parents had the suspicion that my calling was to be a university professor. Their instilling a lifelong love of learning and their unwavering support through four university degrees, to say nothing of personal challenges, has led me here. My brothers, sisters, and their spouses remind me not to take myself too seriously and consistently ground me in the little things of life and for that I cannot thank them enough. In more recent years, my parents-in-law and brother-in-law and his wife have embraced this suburbanite into their rural family with overwhelming generosity, even as I left a Bay Street job to pursue a Ph.D. in my 30s.

On the note of leaving a Bay Street job to pursue a Ph.D. in my 30s, this never would have been possible but for the support of my wife, Jane. Since I applied for admission to the doctoral program, I moved from Bay Street lawyer to Ph.D. student to law professor, and we moved from “newly dating” to “engaged” to “married” to “parents”. Always encouraging me to be my best self and being an invaluable support, I could not have done this without her. Portia: know your daddy loves you so very much. I hope that you grow up to love this country, and desire to make it even better, despite its flaws.

Gerard J Kennedy  
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## Introduction

Beverley McLachlin, on her retirement from the Supreme Court, remarked that access to justice is the greatest threat to Canada's legal system today.<sup>1</sup> Access to civil justice in particular has been described as one of the least admirable aspects of Canada's justice system, and a serious threat to the rule of law.<sup>2</sup> Precisely what the phrase "access to justice" encompasses varies according to the circumstances. At its most holistic, it can include normative questions about what values constitute "justice" and ensuring that the substantive law encompasses such values.<sup>3</sup> But at the very least, it means that civil litigation should have three characteristics: first, minimal financial costs; second, timeliness; and, third, simplicity.<sup>4</sup> Based on these values, and the value of proportionality, Ontario amended its *Rules of Civil Procedure* effective January 1, 2010 (the "2010 Amendments").<sup>5</sup> In its seminal 2014 decision *Hryniak v Mauldin*, the Supreme Court held that the 2010 Amendments should be interpreted generously to achieve access to justice. Perhaps even more importantly, Karakatsanis J, for a unanimous Court, held that a "culture shift" was required in terms of how civil litigation is conducted.<sup>6</sup> Is the spirit of *Hryniak* being heeded outside its specific context of summary judgment? Answering this question is the goal of this dissertation.

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<sup>1</sup> Bruce Champion-Smith, "Beverley McLachlin leaves chief justice post cheering Supreme Court's work on Aboriginal issues" *The Toronto Star* (15 December 2017), online: <<https://www.thestar.com/news/canada/2017/12/15/beverley-mclachlin-leaves-chief-justice-post-cheering-supreme-courts-work-on-aboriginal-issues.html>>.

<sup>2</sup> *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 ["*Hryniak*"] at paras 1, 26; Trevor CW Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 ["Farrow 2014"] reviews the literature in this area at fn 1. I do this throughout this Introduction.

<sup>3</sup> E.g., Farrow 2014, *ibid* at 970-972.

<sup>4</sup> E.g., Farrow 2014, *ibid* at 978-979; Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005) at 68-73; *Hryniak*, *supra* note 2 at paras 29-33; Trevor Farrow, "Proportionality: A Cultural Revolution" (2012) 1 J Civil Litigation & Practice 151 ["Farrow 2012"].

<sup>5</sup> RRO 1990, Reg 194 [the "*Rules*"], as amended by O Reg 438/08 [the "2010 Amendments"].

<sup>6</sup> E.g., *Hryniak*, *supra* note 2 at paras 23-28.

As such, this dissertation analyzes three elements of Ontario’s procedural law: first, jurisdiction motions (Rule 17 of the *Rules*); second, dismissals, possibly *sua sponte*, without an oral hearing (Rule 2.1 of the *Rules*); and, third, interlocutory appeals (s 19(1)(b) of the *Courts of Justice Act*<sup>7</sup>), to discover whether there have been noticeable changes in how the procedural law in these areas has been applied post-*Hryniak*. These three rules are analyzed because none was amended in 2010. As such, the 2010 Amendments and the holding of *Hryniak* are not directly applicable to them except insofar as the proportionality principle now applies to all aspects of Ontario’s procedural law. In other words, they provide some evidence of whether a “culture shift” is occurring *outside* the specific areas addressed by *Hryniak* and the 2010 Amendments. These are of course not the only ways to determine whether *Hryniak* is having its desired effects outside the summary judgment context and other areas specifically addressed by the 2010 Amendments. However, as discussed further below, all three rules have clear access to justice implications. Moreover, all are in a state of uncertainty. Analyzing the three rules is therefore useful in and of itself, and also opens an additional line of inquiry – the effects of uncertainty in the law on access to justice. Specifically, because they have recently been subject to attempts to make them more certain and less discretionary, analyzing them enables consideration of the intersection of: the “rules-standards debate”; uncertainty in the law; and access to justice.

As these parallel lines of inquiry in relation to each of the three rules are pursued, contribution will be brought to the literature on access to justice in the aftermath of *Hryniak*. Specifically, it will be analyzed whether the rules have been applied in a way that has facilitated, or impeded, the timely and inexpensive resolution of claims. A fourth line of inquiry, based upon surveys of players in the justice system, will follow with the goal to discover what the primarily quantitative analysis

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<sup>7</sup> RSO 1990, c C43 [“CJA”].

of the rules may have “missed”, and come to a holistic qualitative understanding of the effects of *Hryniak* through individuals’ lived experiences. In other words, is the “culture shift” occurring?

This Introduction summarizes key work in the Canadian access to justice literature to place the subsequent analysis in each chapter in context. Specifically, definitions of access to justice are introduced and the role of civil procedure in access to justice initiatives is considered before seeking to reconcile these definitions of access to justice with the role of civil procedure. Also noted is the importance of the principle of proportionality, the potential to use technology to achieve access to justice, and how the rise of settlement and alternative dispute resolution (“ADR”) intersects with this dissertation. Each chapter is then previewed, followed by a defence of the choice to study the three rules analyzed in the first three chapters. In conclusion, hypotheses that will be analyzed throughout each chapter are noted, along with what will be addressed in the Conclusion.

## **I) OVERVIEW: PLACING THIS RESEARCH IN THE ACCESS TO JUSTICE CONVERSATION**

### **A. Definitions of Access to Justice**

Many scholars have written extensively about the concept “access to justice”. This concept can be defined very broadly, to include issues such as whether substantive law incorporates social justice.<sup>8</sup> Concerns about substantive justice will be addressed in each chapter of this dissertation. Access to justice research and literature also frequently considers how legal professionals can deliver legal services in a more effective way.<sup>9</sup> More narrow definitions, identified by Roderick

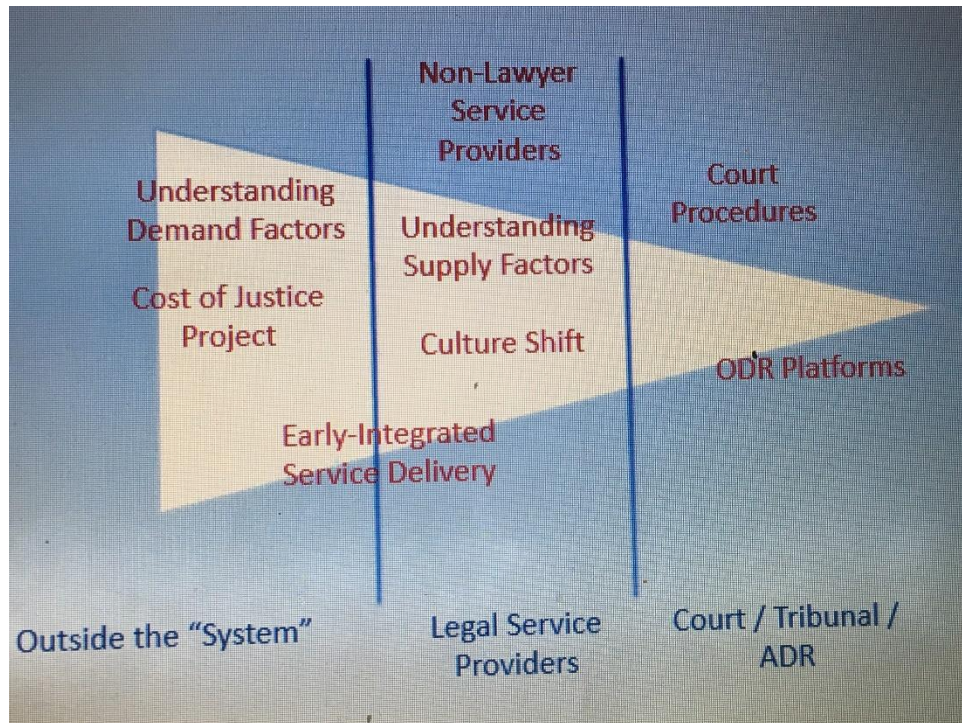
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<sup>8</sup> E.g., Farrow 2014, *supra* note 2 at 969; Sarah Buhler, “The View from Here: Access to Justice and Community Legal Clinics” (2012) 63 UNB LJ 427; Patricia Hughes, “Law Commissions and Access to Justice: What Justice Should We Be Talking About?” (2008) 46:4 Osgoode Hall LJ 773.

<sup>9</sup> Trevor CW Farrow, “A New Wave of Access to Justice Reform in Canada” in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) [“Farrow 2016”] at 164.

Macdonald and Trevor Farrow,<sup>10</sup> and embraced by Stephen Pitel and Thomas Harrison,<sup>11</sup> concentrate on resolution of legal claims while minimizing delay and financial costs.

Access to justice analysis has frequently been illustrated by a narrowing triangle,<sup>12</sup> developed by the British Columbia Civil Justice Task Force<sup>13</sup> and later used by organizations such as the Canadian Forum on Civil Justice and National Action Committee on Access to Justice.<sup>14</sup>



<sup>10</sup> Farrow 2014, *supra* note 2; Farrow 2016, *ibid.*

<sup>11</sup> Stephen Pitel & Matthew Lerner, “Resolving Questions of Law: A Modern Approach to Rule 21” (2014) 43 *Adv Q* 344 at 351-352; Thomas Stuart Harrison, “Between Principle and Practicality: A Dynamic Realist Examination of Independence in the Canadian Justice System”, PhD Thesis, Faculty of Law, Queen’s University, 2016.

<sup>12</sup> The “A2J Triangle” with this version being illustrated by Andrew Pilliar, *infra* note 15.

<sup>13</sup> Civil Justice Reform Working Group, British Columbia Justice Review Task Force, “Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force” (November, 2006), online: <[http://www.bcjusticereview.org/working\\_groups/civil\\_justice/cjrwg\\_report\\_11\\_06.pdf](http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf)> at 2.

<sup>14</sup> Rick Craig, “Public legal education and information (PLEI) in a Changing Legal Services Spectrum” (Spring 2009) 12 *News & Views on Civil Justice Reform* 9 at 10; Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil & Family Justice: A Roadmap for Change” (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) at 7-8, online: <[http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)> [“*Roadmap for Change*”] at 11-12.

<sup>15</sup> This version is found in Andrew Pilliar, “Connecting and Understanding: AJRN and the Market for Personal Legal Services”, presentation to University of Saskatchewan Access to Justice Working Group, Summer 2016 [“Pilliar SK”], slide 12.

The left-side of the triangle represents all persons encountering a justiciable legal issue. The distance from the left side towards the right tip represents the extent of time/procedural steps before resolving the justiciable issue. The rightmost tip represents an extreme case where an appeal to the Supreme Court of Canada is necessary. The triangle's narrowing reflects how a system that promotes access to justice will allow persons to resolve their disputes relatively quickly, and spend less time "in the system". The A2J Triangle also recognizes that not every dispute can be resolved early, whether due to complexity, novelty, or a party's insistence on resorting to courts.<sup>16</sup>

Much access to justice scholarship has addressed matters near the left side of the triangle – how justiciable issues arise (the left-most third), and, in the centre third, how to deliver legal services in an accessible way.<sup>17</sup> A bit further to the right (at the left edge of the right-most third) are alternatives to litigation, such as mediation and arbitration.<sup>18</sup> Some work has even taken place to the left of the left side of the triangle – how can individuals avoid encountering a justiciable legal problem in the first place through education and prevention?<sup>19</sup> A useful analogy is drawn to medicine – while "seeing a doctor" is necessary from time-to-time, and one occasionally must go to an emergency department, it is preferable to make life choices that prevent health problems from arising. An analogy can be drawn to the justice system – individuals should be encouraged to make choices that avoid a justiciable issue arising.<sup>20</sup>

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<sup>16</sup> Recognized as legitimate concerns in *Hryniak*, *supra* note 2 at para 33, accepting that "even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative".

<sup>17</sup> *E.g.*, Andrew Pilliar, "Exploring a Law Firm Business Model to Improve Access to Justice" (2015) 32(1) *Windsor YB Access Just 1* ["Pillar 2015"]; Michael J Trebilcock, *Legal Aid Review* (Toronto: Ministry of the Attorney General, 2008), Section VII, online:

<<http://www.attorneygeneral.jus.gov.on.ca.ezproxy.library.yorku.ca/english/about/pubs/trebilcock>>; Ken Chasse, "Access to Justice -- Unaffordable Legal Services' Concepts and Solutions" (September 25, 2018). Available at SSRN: <https://ssrn.com/abstract=2811627> or <http://dx.doi.org/10.2139/ssrn.2811627>.

<sup>18</sup> *E.g.*, Kent Roach & Lorne Sossin, "Access to Justice and Beyond" (2010) 60 *UTLJ* 373, summarizing the work of Michael J Trebilcock; Jeffrey S Leon & Gannon G Beaulne, "Making Up Your Mind: Trial Litigation vs. Arbitration in the Commercial World" (Summer 2015) 34 *Adv J No 1*, 10.

<sup>19</sup> Craig, *supra* note 14 at 10.

<sup>20</sup> Farrow 2014, *supra* note 2 at 980; *Roadmap for Change*, *supra* note 14.

A great deal has been written about issues such as these<sup>21</sup> on the left side of the A2J Triangle. Those issues are undeniably important. But the aforementioned scholars, who have concentrated on avoiding litigation, tend to recognize that litigation is sometimes necessary.<sup>22</sup> This is partially because civil litigation is constitutionally destined to remain part of our legal system,<sup>23</sup> as recently confirmed by the Supreme Court, which has even held that access to the civil courts is, at least in some cases, a constitutional right.<sup>24</sup> As discussed further below, public dispute resolution also plays an important role in a constitutional democracy such as Canada, specifically through developing the common law, as Karakatsanis J recognized in *Hryniak*.<sup>25</sup> In any event, even if “alternative” dispute resolution and/or avoiding litigation are generally preferable to traditional litigation<sup>26</sup> (as might be the case), studying traditional litigation can have the benefits of not only improving traditional litigation, but also incentivizing alternatives to improve themselves.<sup>27</sup> The result of improved traditional litigation and ADR is in everyone’s best interest.<sup>28</sup> And the interests of this dissertation lie close to the very right of the A2J Triangle – how do we structure our system of litigation to achieve access to justice once litigation has become a reality?

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<sup>21</sup> These are hardly exclusive: see, e.g., *Roadmap for Change*, *ibid*.

<sup>22</sup> E.g., Pilliar SK, *supra*, note 15, whose analysis is based on this assumption; *Hryniak*, *supra* note 2, attempting to salvage this medium of dispute resolution; *Roadmap for Change*, *ibid*, makes this clear as well.

<sup>23</sup> Macdonald, *supra* note 4 at 32.

<sup>24</sup> *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 39, [2014] 3 SCR 31 [“*Trial Lawyers*”]; Paul Vayda, “Chipping away at Cost Barriers: A Comment on the Supreme Court of Canada’s *Trial Lawyers* Decision” (2015) 36 WRLSI 207 at 211-212.

<sup>25</sup> *Hryniak*, *supra* note 2 at paras 1 and 26; See also the Section, *infra*, entitled “Settlement, Mediation, Arbitration, and Privatization of Justice”.

<sup>26</sup> Discussions of this are found in, e.g., April G Grosse, “The Future of Dispute Resolution: The More Things Change, the More They Really Don’t” (2013) 76 Sask L Rev 213 and Pam Marshall, “Would ADR Have Saved Romeo and Juliet?” (1998) 36:4 Osgoode Hall LJ 771.

<sup>27</sup> Joshua DH Karton, “Party Autonomy and Choice of Law: Is International Arbitration Leading the Way or Marching to the Beat of Its Own Drummer?” (2010) 60 UNB LJ 32.

<sup>28</sup> Many thanks to Janet Walker for making this point so succinctly during discussions with her in January 2017.

## B. Civil Procedure in Access to Justice Conversations

Procedure is perhaps the most common place to emphasize access to justice once litigation has commenced.<sup>29</sup> The 2010 Amendments were an effort to amend the *Rules* to promote the resolution of lawsuits in a manner that minimizes delay and expense.<sup>30</sup> This dissertation is particularly curious as to whether the 2010 Amendments have – or have not – been effective, especially outside of the areas most directly touched by the 2010 Amendments.

In 2006, Michael Bryant, then Attorney General of Ontario, tapped Coulter Osborne, retired Associate Chief Justice of Ontario, to lead the Civil Justice Reform Project. Among other things, Mr. Osborne was to recommend how “to make the civil justice system more accessible and affordable for Ontarians.”<sup>31</sup> In November 2007, Mr. Osborne produced a report with his recommendations. Many – but not all – of his recommendations have been enacted and the 2010 Amendments are largely an attempt to enact the recommendations in the Osborne Report.<sup>32</sup>

Perhaps the most notable of the 2010 Amendments concerned when a court may grant “summary judgment” – that is, disposing of all or part of a case on a motion, with affidavit evidence, and without a full trial.<sup>33</sup> Despite historic reluctance to grant “summary judgment”, the Supreme Court of Canada ruled in *Hryniak* that summary judgment powers are to be interpreted

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<sup>29</sup> See, e.g., Beth Thornburg, *et al.*, “A Community of Procedural Scholars: Teaching Procedure and the Legal Academy” (2013) 51:1 Osgoode Hall LJ 93 at 100-101.

<sup>30</sup> E.g., O Reg 43/14; O Reg 438/08.

<sup>31</sup> Brooke MacKenzie, “Effecting a Culture Shift: An Empirical Review of Ontario’s Summary Judgment Reforms” (2017) 54:4 Osgoode Hall LJ 1275 [“MacKenzie SJ”], fn 18; Coulter Osborne, QC, *Civil Justice Reform Project: Findings and Recommendations* (Ontario Ministry of the Attorney General, November 2007), online: <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>> [“Osborne Report”] at Appendices A (Terms of Reference) & B (Consultation Letter).

<sup>32</sup> See, e.g., MacKenzie SJ, *ibid.*, at 1280-1281; Janet Walker, “Summary Judgment Has Its Day in Court” (2012) 37 Queen’s LJ 697 at 700-701 and 707-708.

<sup>33</sup> Rule 20 of the *Rules*, *supra* note 5, analyzed in *Hryniak*, *supra* note 2. Rule 20’s wording can be found at Appendix R.

broadly to promote access to justice.<sup>34</sup> *Hryniak* was generally praised,<sup>35</sup> but its effects are only beginning to be analyzed. For example, Shantona Chaudhary<sup>36</sup> and Brooke MacKenzie<sup>37</sup> have argued that *Hryniak*'s expansion of summary judgment powers has a strong theoretical foundation and has had positive empirical effects. On the other hand, it is not difficult to imagine how a summary procedure could disadvantage self-represented litigants.<sup>38</sup> A recent Ontario Court of Appeal decision overturned the granting of summary judgment after a self-represented plaintiff failed to produce what the motion judge deemed an acceptable expert report in a dental malpractice claim.<sup>39</sup> Chief Justice Strathy held that the motion judge failed to grant the self-represented litigant a sufficient amount of leeway on procedural matters. But this case involved a litigant who managed to retain counsel for her appeal – Macfarlane's research suggests that rarely do these cases have such a "happy ending"<sup>40</sup> and other examples are returned to in Chapter Two.

While the effects of *Hryniak* on summary judgment are interesting, this dissertation looks into its effects outside this narrow context. Pitel, for example, has argued that the spirit of *Hryniak* – and, in particular, its call for a "culture shift" in how litigation is conducted – applies beyond summary judgment.<sup>41</sup> Thomas Cromwell has clarified this in extrajudicial comments since retiring

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<sup>34</sup> *Hryniak*, *ibid* at para 5.

<sup>35</sup> *E.g.*, Shantona Chaudhary, "*Hryniak v. Mauldin*: The Supreme Court issues a clarion call for civil justice reform" (Winter 2014) 33 Adv J No 3.

<sup>36</sup> *Ibid*.

<sup>37</sup> MacKenzie SJ, *supra* note 31.

<sup>38</sup> *E.g.*, Michelle Flaherty, "Best Practices in Active Adjudication" (2015) 28 Can J Admin L & Prac 291 at 297-298; the pitfalls facing self-represented litigants are explained thoroughly by Julie Macfarlane in Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report" (May 2013), online: <<https://scholar.uwindsor.ca/lawpub/85/>> ["Macfarlane Main Report"]; Julie Macfarlane, Katrina Trask & Erin Chesney, "The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?" (Windsor, ON: The National Self-Represented Litigants Project, The University of Windsor, November 2015).

<sup>39</sup> *Sanzone v Schechter*, 2016 ONCA 566, 402 DLR (4th) 135.

<sup>40</sup> Macfarlane Main Report, *supra* note 38.

<sup>41</sup> Pitel & Lerner, *supra* note 11.



from the Supreme Court.<sup>42</sup> Barbara Billingsley has similarly written how *Hryniak*'s effects have been felt in Alberta.<sup>43</sup> So to what extent have *Hryniak* and the 2010 Amendments had effects outside the summary judgment context in Ontario?

To answer this question, the three aforementioned unamended parts of Ontario's procedural law will be analyzed, seeking to determine how they facilitate or impede resolution of civil claims with minimal delay and financial cost, with particular attention to any post-*Hryniak* changes. Each chapter will review the literature related to the particular issues raised by the specific topics. Together, the chapters will provide insight into the question of whether the "culture shift" that Karakatsanis J called for in *Hryniak* is occurring outside the summary judgment context and whether access to justice has accordingly been improved in a broader sense. Quantitative analysis of case law in the first three chapters will be complemented by qualitative surveys in Chapter Four.

### **C. Returning to Access to Justice Definitions in Civil Procedure Analyses**

Proceeding with a relatively narrow definition of access to justice, emphasizing speed and minimal financial expense in the fair resolution of civil actions, is appropriate for this project. Scholars such as Farrow<sup>44</sup> and Pilliar<sup>45</sup> have persuasively argued that this definition is too narrow – it does not provide a holistic account of how an inability to access justice affects individuals' lives and their health. Farrow offers the example of a child's struggles at school being directly tied to her parent's termination without appropriate severance a year ago.<sup>46</sup> This critique is compelling. In a speech in 2012, Cromwell J said that access to justice "is not limited to access to courts, judges and lawyers [...] we must focus on fair and just outcomes that are reasonably acceptable to the

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<sup>42</sup> Queen's University Faculty of Law Speaker Series, Kingston, Ontario, November 4, 2016.

<sup>43</sup> Barbara Billingsley, "*Hryniak v. Mauldin* Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials" (2017) 55:1 Alta L Rev 1

<sup>44</sup> Farrow 2016, *supra* note 9.

<sup>45</sup> Pilliar 2015, *supra* note 17.

<sup>46</sup> Farrow 2016, *supra* note 9 at 166-167.

participants, not on giving everyone his or her day in court when that is neither needed nor wanted.”<sup>47</sup> Implicit in this is something Farrow and Macdonald have noted – that “access to justice” should concentrate not on the justice system itself but on outcomes for its users.<sup>48</sup>

In this vein, Lorne Sossin and Kent Roach have argued that access to justice is not “just about access to the courts but also about access to markets and regulatory regimes that would lessen the need for access to the courts.”<sup>49</sup> Sossin and I have previously noted that “[a]ccess to justice in this sense is not only about enabling individuals to access means of legal remedies [...], but also about breaking down the barriers that often prevent people from ensuring their legal rights are respected.”<sup>50</sup> This can lead to innovations within the court system, including uses of class actions, the role of small claims courts, and technology-facilitated access to dispute resolution.<sup>51</sup> The result is that a greater number of individuals can seek legal remedies.<sup>52</sup> We have also argued that this broader conceptualization of access of justice should, at the very least, inform how Crown actors exercise their discretion in the public law context.<sup>53</sup> This recognizes both that: a) civil procedure, like access to justice, must not be understood in the abstract but through the lived experiences of litigants;<sup>54</sup> and b) the line between procedural and substantive law can be “shadowy”,<sup>55</sup> and procedural rules can pose practical limits on individuals’ ability to access justice in many cases.

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<sup>47</sup> Justice Thomas A Cromwell, Address (Remarks delivered at the PLEAC Conference, 26 October 2012), [unpublished] at 2 as reported in Mary Eberts, “Lawyers Feed the Hungry: Access to Justice, The Rule of Law, and the Private Practice of Law” (2013) 76 Sask L Rev 115 at 120, fn 32.

<sup>48</sup> Farrow 2016, *supra* note 9 at 170; Macdonald, *supra* note 4.

<sup>49</sup> Roach & Sossin, *supra* note 18 at 374.

<sup>50</sup> Gerard J Kennedy & Lorne Sossin, “Justiciability, Access to Justice & the Development of Constitutional Law in Canada” (2017) 45(4) FLR 707 at 711.

<sup>51</sup> *Ibid* at 710-711, citing Shannon Salter, “ODR and Justice System Integration: B.C.’s Civil Resolution Tribunal” (2017) 34(1) Windsor YB Access Just 112.

<sup>52</sup> Kennedy & Sossin, *ibid* at 711, citing Roach & Sossin, *supra* note 18 at 376.

<sup>53</sup> Kennedy & Sossin, *ibid*: this is the article’s thesis.

<sup>54</sup> See, e.g., Lorne Sossin, “Constitutional Accommodation and the Rule(s) of Courts” (2005) 42 Alta L Rev 607 at 633.

<sup>55</sup> James Wm Moore, “The Place of the New Federal Rules in the Law School Curriculum” (1938) 27 Geo LJ 884 at 889.

Having said that, as persuasive as these calls for a broader conceptualization of access to justice are, there are likely limits. Scholars such as Thomas Harrison have observed that,<sup>56</sup> given the fairly limited constitutional role of courts,<sup>57</sup> it may be asking too much of the legal system and profession to respond to some of the systemic issues causing difficulties experienced by those who cannot access justice. The fact is that the civil justice system has evolved to deal with particular types of disputes in particular circumstances, and has not been designed to redress every injustice in society.<sup>58</sup>

For the purposes of this project, resolution of this debate is unnecessary – hence the contentedness to proceed with a relatively narrow definition of access to justice. Scholars such as Farrow and Pilliar have tended to concentrate their research on how services are delivered to persons encountering justiciable legal issues. As important as these issues are, once civil procedure is guiding an action through the court system, it is useful and appropriate to assess whether that civil procedure is leading to resolution of that action promptly and with minimal financial expense. This work is complementary, rather than an alternative, to analyses of broader issues affecting access to justice. As Farrow has written:

There is no doubt that, if a matter needs to go to court, and if a client needs to pay for a lawyer in order to get advice on that matter, access to the system will have been improved if the system and the people providing those services are available more efficiently and cost effectively, allowing more people access to those services.<sup>59</sup>

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<sup>56</sup> *E.g.*, Harrison, *supra* note 11 at s 2.4.

<sup>57</sup> *Ibid* at 55 and fn 183, citing Micah B Rankin, “Access to Justice and the Institutional Limits of Independent Courts” (2012) 30 Windsor YB Access Just 101 at Part IV.B, “referring to Alexander Hamilton’s similar and earlier observation in Federalist Papers No 78 *The Federalist Papers*, Terence Ball ed (United Kingdom: Cambridge University Press, 2003) at 378.” See Alexander Hamilton, John Jay & James Madison, *The Federalist Papers*, Project Gutenberg Etext (Champaign, IL: Project Gutenberg). Accessed November 20, 2019: <http://search.ebscohost.com.ezproxy.library.yorku.ca/login.aspx?direct=true&db=nlebk&AN=1085531&site=ehost-live>.

<sup>58</sup> Explained for a general audience in Gerard J Kennedy, “Justice for Some” *The Walrus* (November 2017) 47 [“Kennedy *Walrus*”] at 48.

<sup>59</sup> Farrow 2016, *supra* note 9 at 166.

The issues of preventing legal problems from arising, and delivering legal services to individuals, are largely separate from how civil litigation should proceed once it begins. Moreover, as noted above, it is important to analyze the public civil litigation process even if the primary method of resolving justiciable issues in the future exists independent of this process.

As far as substantive justice in the law is concerned, the relevance of this in legal analysis has been debated since Oliver Wendell Holmes Jr's critiques of Christopher Columbus Langdell.<sup>60</sup> Langdell famously argued that concerns such as morality and justice are not relevant in legal analysis except insofar as they are already embodied in particular legal rules.<sup>61</sup> Holmes found this preposterous, asserting that "[t]he life of the law has not been logic: it has been experience ... The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views."<sup>62</sup> As interesting as this debate is, it would be unrealistic and hubristic to propose that this dissertation can resolve it. The 2010 Amendments and *Hryniak* focus on a distinct component of access to justice, worth investigating in and of itself.

Accordingly, evaluating the impacts of the 2010 Amendments and *Hryniak* against a relatively narrow definition of access to justice seems appropriate. However, to the extent that analysis in each chapter provides insights on whether the 2010 Amendments and *Hryniak* have impacted access to justice, more broadly defined, this will be noted.

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<sup>60</sup> Inspiration for this paragraph was found in David Sandomierski, "Canadian Contract Law Teaching and the Failure to Operationalize: Theory & Practice, Realism & Formalism, and Aspiration & Reality in Contemporary Legal Education" (2017), SJD Thesis, Faculty of Law, University of Toronto at 52.

<sup>61</sup> Sandomierski, *ibid* at 51-52; Thomas C Grey, "Langdell's Orthodoxy" (1983) 45:1 U Pitt L Rev 1 at 5. Not everyone accepts this view of Langdell, however: see, e.g., Lewis A Grossman, "Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification" (2007) Yale J L & Humanities 149 at 151; Bruce A Kimball, "Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature" (2007) 25(2) Law & Hist Rev 345; Bruce A Kimball, "Warn Students that I Entertain Heretical Opinions, Which They Are Not to Take as Law: The Inception of Case Method Teaching in the Classroom of Early C. C. Langdell, 1870-1883" (1999) 17 Law & Hist Rev 57.

<sup>62</sup> Thomas Grey, "Holmes's Language of Judging—Some Philistine Remarks" (1996) 70:1 St John's L Rev 5 at 6; Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Proving Years, 1870-1882* (Cambridge, MA: Harvard University Press, 1963) at 156-57.

#### D. “Culture Shift”

The phrase “culture shift” also means different things in different circumstances. Fundamentally, it indicates an openness to change and not being wedded to tradition for tradition’s sake.<sup>63</sup> This is generally used to refer to matters near the left end of the A2J Triangle – such as how lawyers practise law and deliver services in a reflective manner.<sup>64</sup> Even in the context of litigation, it can refer to what is difficult to capture in case law, such as a decision not to bring an unnecessary interlocutory motion.<sup>65</sup> It can also be used to refer to matters within a court’s operations that are difficult to capture in case law, such as judicial specialization in particular areas of law<sup>66</sup> and case management, including using unsuccessful interlocutory motions to nonetheless move matters along.<sup>67</sup>

Even so, some evidence of a “culture shift” can be observed through analyzing court decisions, such as how many cases are resolved on their merits (generally, an increase will be positive, despite the benefits of settlement discussed elsewhere), and how many unsuccessful interlocutory motions are brought (causing delay and use of financial resources without helping resolve a dispute).<sup>68</sup> As such, analysis of three parts of procedural law is part – if an incomplete part – of what must be considered in determining whether *Hryniak*’s call for a culture shift is being heeded.<sup>69</sup>

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<sup>63</sup> *Roadmap for Change*, *supra* note 14 at 5, cited in, *e.g.*, Michele M Leering, “Enhancing the Legal Profession’s Capacity for Innovation: The Promise of Reflective Practice and Action Research for Increasing Access to Justice” (2017) 34 Windsor YB Access Just 189 at 192.

<sup>64</sup> See, *e.g.*, Leering, *ibid* at 220.

<sup>65</sup> *Hryniak*, *supra* note 2 at para 32.

<sup>66</sup> As will be returned to in the first two chapters, the Toronto Commercial List is viewed as a particularly good example of this: see, *e.g.*, Warren K Winkler, “The Vanishing Trial” (Autumn 2008) 27(2) Advocates’ Soc J 3 at 4.

<sup>67</sup> See, *e.g.*, Master [as he then was] Robert N Beaudoin, “University of Windsor Mediation Services 10<sup>th</sup> Anniversary: Remarks on the Civil Justice Review Task Force” (2006) 21 WRLSI 5 at 10, noting the reluctance of adopting this procedure.

<sup>68</sup> See, *e.g.*, MacKenzie SJ, *supra* note 31.

<sup>69</sup> *Ibid*.

## E. Technology and Access to Justice

A fascinating literature has emerged in recent years regarding the potential to use technology to facilitate access to justice. Some of this is to simply save court resources, as well as parties' and judges' time. Examples include:

- obtaining disclosure in criminal cases<sup>70</sup> (technology already tends to facilitate discovery in civil cases<sup>71</sup> but the need for undertakings and the asymmetrical discovery obligations of the Crown and defence has prevented this in the criminal context<sup>72</sup>);
- videoconferences for matters such as scheduling<sup>73</sup> – which the Ontario Superior Court piloted in eight locations in 2015;<sup>74</sup> and
- e-filing, thereby preventing unnecessary court attendances.<sup>75</sup>

More novelly, Pro Bono Ontario has recently implemented a helpline to enable individuals to receive summary advice from lawyers regardless of their geographic location.<sup>76</sup> This exemplifies the potential to use technology to de-mystify and de-privilege legal knowledge, another potential way to facilitate access to justice.<sup>77</sup>

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<sup>70</sup> Ken Chasse, “Electronic Discovery in the Criminal Court System” (2010) 14 Can Crim L Rev 111 [“Chasse E-Discovery”], Conclusion.

<sup>71</sup> The subject of: the E-Discovery Canada website, hosted by LexUM (at the University of Montreal), online: <<http://www.lexum.umontreal.ca.ezproxy.library.yorku.ca/e-discovery>>; and *The Sedona Canada Principles--Addressing Electronic Discovery* (January 2008), online: <[http://www.thesedonaconference.com/content/miscFiles/canada\\_pincpls\\_FINAL\\_108.pdf](http://www.thesedonaconference.com/content/miscFiles/canada_pincpls_FINAL_108.pdf)>, discussed in, e.g., Ken Chasse, “‘Records Management Law’—A Necessary Major Field of the Practice of Law” (2015) 13 Can J L & Tech 57, and incorporated in the *Rules*, *supra* note 5 at Rule 29.1.03(4).

<sup>72</sup> Chasse E-Discovery, *supra* note 70. This asymmetry is the result of the Supreme Court of Canada’s decision in *R v Stinchcombe*, [1991] 3 SCR 326.

<sup>73</sup> Jane Bailey, Jacquelyn Burkell & Graham Reynolds, “Access to Justice for All: Towards an ‘Expansive Vision’ of Justice and Technology” (2013) 31 Windsor YB Access Just 181 [“Bailey, *et al*”] at 196-197.

<sup>74</sup> Superior Court of Justice, “Superior Court of Justice Video Conferencing Pilot Project”, online: <<http://www.ontariocourts.ca/scj/practice/video-conferencing/>>.

<sup>75</sup> Bailey, *et al*, *supra* note 73 at 194-195; Hryniak, *supra* note 2 at para 71.

<sup>76</sup> Aidan Macnab, “Pro Bono Ontario launches telephone hotline” *Canadian Lawyer* (16 November 2017), online: <<http://www.canadianlawyermag.com/legalfeeds/author/aidan-macnab/pro-bono-ontario-launches-telephone-hotline-14951/>>.

<sup>77</sup> Bailey, *et al*, *supra* note 73 at 195-196.

While something is lost when shared experiences such as face-to-face interactions do not take place,<sup>78</sup> the consequences of this would seem minimal when addressing matters such as filing and scheduling.<sup>79</sup> At times, even having a hearing take place with the aid of technology would appear preferable to forcing parties that are across the country to come together in a particular location, with its associated costs.<sup>80</sup>

In more novel cases, artificial intelligence (“AI”) has been proposed as a means to make decisions more accurately than judges or lawyers.<sup>81</sup> There is evidence that AI is actually better-suited than human lawyers or judges to predict outcomes in grey areas of tax law,<sup>82</sup> or determine risks of granting an individual parole<sup>83</sup> or bail.<sup>84</sup> If AI can perform traditional tasks such as these, judges can spend more time deciding civil cases. Admittedly, there are concerns about AI’s capacity in these areas, with there being widespread concerns that AI will reinforce and even amplify racial inequalities in the justice system.<sup>85</sup> The Canadian Civil Liberties Association has accordingly come out strongly against the use of AI predictive software.<sup>86</sup>

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<sup>78</sup> See, e.g., Cass R Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (Princeton, NJ: Princeton University Press, 2017) at 7-8.

<sup>79</sup> *Ibid* at 8.

<sup>80</sup> This issue came before the Supreme Court after conflicting and divided Court of Appeal decisions in *Endean v British Columbia*, 2016 SCC 42, [2016] 2 SCR 162. This was previously discussed in Christopher P Naudie & Gerard J Kennedy, “Ontario Court of Appeal Divided on Permissibility of Hearings Outside Ontario in Multi-Jurisdictional Class Actions” (August 2015) 4 CALR 33.

<sup>81</sup> E.g., Benjamin Alarie, Anthony Niblett & Albert H Yoon, “Law in the Future” (2016) 66 UTLJ 423.

<sup>82</sup> Benjamin Alarie, Anthony Niblett & Albert H Yoon, “Using Machine Learning to Predict Outcomes in Tax Law” (2016) 58 CBLJ 231.

<sup>83</sup> *Ibid* at 234, fn 6.

<sup>84</sup> Anthony J Casey & Anthony Niblett, “Artificial Intelligence, Big Data, and the Future of Law” (2016) 66 UTLJ 429 at 432.

<sup>85</sup> See, e.g., Rebecca Wexler, “When a Computer Program Keeps You in Jail” *New York Times* (June 13, 2017), online: <<https://www.nytimes.com/2017/06/13/opinion/how-computers-are-harming-criminal-justice.html?module=ArrowsNav&contentCollection=Opinion&action=keypress&region=FixedLeft&pgtype=article>>; Mark W Bennett & Victoria C Plouff, “Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice” (2018) 51 UC Davis L Rev 745 at 765.

<sup>86</sup> Reported in, e.g., Agnese Smith, “Automatic Justice” *CBA National* (Spring 2018) 14 at 16.

The opportunities to facilitate access to justice through technology are manifold. In certain situations, it would appear absolutely wise to use technology. While this arguably seems to put lawyers and judges out of work, it seems likelier that these lawyers and judges would instead be able to use their time to deliver more services to more clients more efficiently, thus maximizing access to justice.<sup>87</sup> Admittedly, certain *Rules* regarding the numbers and colours of certain documents to be filed would have to be amended,<sup>88</sup> but these issues seem solvable.

The ability to use technology to achieve access to justice will be returned to in the Conclusion. Fundamentally, however, this appears analogous to issues such as how to deliver legal services, and largely independent from analyses of civil procedure. Civil procedure is fundamentally about how a civil action proceeds through the courts. There must always be a reasonably predictable and fair procedure to guide the action through the court system.<sup>89</sup> And it is important that that procedure be cost- and time-efficient, with or without the aid of technology.

#### **F. Proportionality**

Proportionality, now enshrined in Rule 1.04(1.1) of the Ontario *Rules*, is an overarching principle guiding all of civil procedure.<sup>90</sup> Very generally, this mandates that players in the justice system are to conduct litigation with the view to minimize financial cost and delay, specifically with regard to the issues and amounts at stake in litigation. In other words, the cost and delay must be “proportional” to those amounts and issues.<sup>91</sup> Despite overlap with the concept of efficiency,

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<sup>87</sup> This is a basic principle in economics, perhaps most famously seen in the transition from a largely agricultural based-economy to a largely manufacturing-based economy. Thanks are also due to Anthony Niblett for making this point in response to a question at the Ken McCarter Conference on Access to Justice at Massey College, the University of Toronto, 27 February 2018, citing the example of innovations within accounting firms in response to the emergence of electronic spreadsheets.

<sup>88</sup> *Supra* note 5 at, e.g., Rule 4.07.

<sup>89</sup> A balance between “reasonably fair” and “reasonably predictable” will be sought in the Conclusion.

<sup>90</sup> *Hryniak*, *supra* note 2 at paras 27-33.

<sup>91</sup> *Farrow* 2012, *supra* note 4 at 154.



proportionality and efficiency are not synonymous – while efficiency seeks to minimize delay and cost, proportionality may mandate long and arguably more tedious procedures in particular cases.<sup>92</sup>

Amounts at stake in litigation are clearly relevant to analyses of proportionality. For example, it makes little sense to spend one million dollars on discovery in a case involving only one hundred thousand dollars. But proportionality should truly concentrate on the extent to which particular expense and delay will increase the likelihood of achieving an ultimately just result, considering the amounts and issues at stake. *Burlington Resources Finance Co v Canada*,<sup>93</sup> a recent decision of the Tax Court of Canada, downplayed the proportionality principle in the context of discovery obligations in cases with vast sums of money at stake. It is difficult to quarrel with the decision’s observation that proportionality does not “trump[] relevancy in all situations”.<sup>94</sup> Moreover, one could fairly read the *Tax Court of Canada Rules*<sup>95</sup> as not incorporating the principle of proportionality. However, the usefulness and fairness of the principle have led to it being judicially incorporated in all Canadian jurisdictions, including the Tax Court.<sup>96</sup> Further, concentrating merely on the amount of money at stake seems, with respect, an impoverished view of proportionality. The very word, as well as the fact that jurisdictions such as Ontario have made the principle applicable to all civil procedure, implies that the amounts at stake in the litigation are relevant – but not determinative. Ultimately, the cost and delay caused by a particular step in litigation must be weighed against what could be gained from it.<sup>97</sup> Lorne Sossin and I have argued that litigants – particularly government litigants – must occasionally be expected to endure expensive and/or time-consuming court procedures in constitutional litigation when the issues at

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<sup>92</sup> Farrow 2012, *ibid* at 153-154; *Hryniak*, *supra* note 2 at para 33.

<sup>93</sup> 2017 TCC 144, [2017] 6 CTC 2001 [“*Burlington*”].

<sup>94</sup> *Ibid* at para 16.

<sup>95</sup> *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a.

<sup>96</sup> *Hryniak*, *supra* note 2 at para 31. D’Auray J agreed with this in *Burlington*, *supra* note 93.

<sup>97</sup> Farrow 2012, *supra* note 4 at 154.

stake have profound effects on society at large.<sup>98</sup> Though at other times, an expensive procedure early on in a piece of litigation with modest sums at stake can be proportionate if it will be determinative of the case, as suggested in Chapter Two. And the mere fact that large sums are at stake should not give parties a free reign to spend unlimited amounts of time and money on peripheral matters that will not lead to the prompt and fair resolution of a case.

Ultimately, the concept of proportionality clearly has significant overlap with the conceptualization of access to justice being used in this dissertation. The concept will be re-evaluated in the Conclusion in light of the findings from the first four chapters.

### **G. Settlement, Mediation, Arbitration, and Privatization of Justice**

The quantitative analysis of case law that will be used in this dissertation's first three chapters does not explicitly consider the possibility of settlement, mediation, and/or arbitration. This means that many actions will not be captured by this dissertation's analysis. Settlement is frequently to be applauded, as it tends to decrease costs for parties, and increases certainty.<sup>99</sup> Ontario has made mediation mandatory in many circumstances to promote settlement.<sup>100</sup> Drawing on Saskatchewan's experience, Julie Macfarlane and Michaela Keet have argued that mandatory mediation has generally been positive, with widespread support among the bench and the bar.<sup>101</sup> Ontario analysis has also suggested that mediation generally, and mandatory mediation specifically, decreases costs to the parties.<sup>102</sup> Mandatory mediation nonetheless has its critics – it

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<sup>98</sup> Kennedy & Sossin, *supra* note 50.

<sup>99</sup> *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37, [2013] 2 SCR 623 at para 11, per Abella J, citing Callaghan ACJHC (as he was then) in *Sparling v Southam Inc* (1988), 66 OR (2d) 225 (HC).

<sup>100</sup> *Rules*, *supra* note 5, Rule 24.1.

<sup>101</sup> Julie Macfarlane & Michaela Keet, "Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program" (2005) 42 *Alta L Rev* 677.

<sup>102</sup> Robert G Hann & Carl Baar, "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months" (Toronto: Ministry of the Attorney General, 2001), online: <[https://archive.org/stream/mag\\_00041982/mag\\_00041982\\_djvu.txt](https://archive.org/stream/mag_00041982/mag_00041982_djvu.txt)>, described by Martin Teplitsky, QC, "Universal mandatory mediation: A critical analysis of the evaluations of the Ontario mandatory mediation program" (Winter 2001) 20 *Advocates' Soc J* No 3, 10 ["Teplitsky 2001"]. See also Gary Smith,

can create perverse incentives for mediators to achieve settlement regardless of whether it is in the best interests of the parties<sup>103</sup> and can undermine the voluntary nature of settlement, which is one of its fundamental justifications.<sup>104</sup> Martin Teplitsky was also a vocal skeptic regarding whether mandatory mediation decreased costs for parties.<sup>105</sup>

Though settlement is frequently to be applauded, it, like arbitration (which also comes with many benefits), impedes development of the common law. This stagnation in the common law can itself be an access to justice problem as an unevolved or unclear common law jeopardizes the rule of law,<sup>106</sup> and leaves parties unable to order their affairs.<sup>107</sup> Farrow also notes that the fact that a case did not go to trial does not mean it settled – it could have been abandoned, dismissed for delay, default proceedings could have ensued, and/or a party may have capitulated.<sup>108</sup> Moreover, an unprincipled settlement to “avoid delay and costs” may help unclog the courts and make parties masters of their own destinies – but is not to be celebrated from a perspective of substantive justice. Insofar as the *Rules* incentivize such results, that is particularly problematic.<sup>109</sup>

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“Unwilling Actors: Why Voluntary Mediation Works, Why Voluntary Mandatory Mediation May Not” (1998) 36:4 Osgoode Hall LJ 847, arguing that voluntary mediation is a very good and cost-effective process – but mandatory mediation may not be.

<sup>103</sup> See, e.g., Colleen M Hanyecz, “Through the Looking Glass: Mediator Conceptions of Philosophy, Process and Power” (2005) 42 Alta L Rev 819.

<sup>104</sup> See, e.g., Patricia Hughes, “Mandatory Mediation: Opportunity or Subversion?” (2001) 19 Windsor YB Access Just 161.

<sup>105</sup> Martin Teplitsky, QC, LSM, “Mandatory Mediation” (Summer 2005) 24 Advocates’ Soc J No 1, 17; Teplitsky 2001, *supra* note 102.

<sup>106</sup> *Hryniak*, *supra* note 2 at paras 1, 26.

<sup>107</sup> This is an essential characteristic of the common law, as Cromwell J explains in *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494 at para 66 (concerning contractual obligations), as described by Shannon O’Byrne & Ronnie Cohen, “The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew*” (2015) 53:1 Alta L Rev 1 at 3.

<sup>108</sup> Described in a February 28, 2017 phone call concerning an unsuccessful research project. See also Canadian Forum on Civil Justice, “Civil Non-Family Cases Filed in the Supreme Court of BC: Research Results and Lessons Learned” (Victoria, BC, September 2015), online: <<http://www.cfcj-fcjc.org/sites/default/files//Attrition%20Study%20Final%20Report.pdf>>.

<sup>109</sup> Brooke MacKenzie, “Settling for less: How the *Rules of Civil Procedure* overlook the public perspective of justice” (2011) 39 Adv Q 222 (specifically commenting on the incentivization of settlement in the *Rules*, *supra* note 5 at Rule 49, but the sentiment is applicable more broadly).

An increase in the rate of settlement also frequently comes at the cost of partially privatizing the justice system.<sup>110</sup> Privatization has its advantages, and is also compatible with an understanding of legal pluralism, synthesized by Martha-Marie Kleinhaus and Roderick Macdonald, of state law consisting of multiple sources of law – including those that do not emanate from the state – with the result being multiple sources of legitimacy.<sup>111</sup> In his seminal book *Civil Justice, Privatization and Democracy*, Farrow acknowledges that privatization has its advantages but expresses concern that it has become too prevalent.<sup>112</sup> He notes five concerns about privatization. The first two are the common criticisms that alternative dispute resolution jeopardizes development of the common law and assumes benefits of mediation and arbitration that are debatable.<sup>113</sup> He also notes that:

- private dispute resolution vehicles frequently lack procedural protections for vulnerable parties;<sup>114</sup>
- civil dispute resolution plays a role in regulating the norms in a democratic state and, if this becomes less common, democratic norms will be weakened and systemic wrongdoing may go unacknowledged due to private resolution of particular cases;<sup>115</sup> and
- in an increasingly globalized economy, multi-state actors will attempt to “contract out” of public dispute resolution systems in attempts to avoid compliance with local laws.<sup>116</sup>

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<sup>110</sup> Jonathan Silver & Trevor CW Farrow, “Canadian Civil Justice: Relief in Small and Simple Matters in an Age of Efficiency” (2015)(4) *Eramsus L Rev* 232 at 243.

<sup>111</sup> Martha-Marie Kleinhaus & Roderick A Macdonald, “What is a Critical Legal Pluralism” (1997) 12 *Can J L & Soc* 25.

<sup>112</sup> Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) [“Farrow Book”].

<sup>113</sup> *Ibid* at 219-232.

<sup>114</sup> *Ibid* at 232-251.

<sup>115</sup> *Ibid* at 251-258. An example where this occurred may be the private settlements in the Roman Catholic Archdiocese of Boston concerning sexual abuse of children, later addressed in the film *Spotlight*, but described earlier in, e.g., Elizabeth E Spainhour, “Unsealing Settlements: Recent Efforts to Expose Settlement Agreements That Conceal Public Hazards” (2004) 82:6 *NCL Rev* 2155.

<sup>116</sup> *Ibid* at 259-268. This is not a theoretical concern, as the Supreme Court’s decision in *Douez v Facebook*, 2017 SCC 33, [2017] 1 SCR 751 illustrates – though there remains a risk that compliance with local overregulation will disincentivize persons who would otherwise contribute to a jurisdiction’s economy from innovating within

It is against this background that both the 2010 Amendments and the Supreme Court’s decision in *Hryniak* sought to ensure that public courts will be better able to resolve civil litigation on the merits. This project seeks to look at the effectiveness of these reforms – and see whether a climate is emerging that minimizes parties’ temptations to leave the civil justice system, with the associated negative consequences of doing so.

In any event, while settlement is often – though not necessarily – to be encouraged, the rules analyzed in this dissertation tend to avoid the types of cases that are likely to settle:

1. A successful jurisdiction motion means an Ontario action will not be settled (unless it is to prevent an appeal);
2. Rule 2.1 seeks to resolve an action very quickly, before settlement is likely<sup>117</sup>; and
3. Appealed cases did not settle (at least on the issue being appealed – as discussed below, interlocutory appeals leave an “issue alive”).

As such, this dissertation will be unable to comment on whether there has likely been an increase or decrease in the rate and numbers of settlements post-*Hryniak*, except through Chapter Four’s surveys. But this does not detract from all of the chapters seeking to answer the overarching question on the effects of *Hryniak* and the 2010 Amendments on public dispute resolution.

## **H. Other Elements of Access to Justice Conversation**

This Introduction has thus far sought to place this dissertation’s research in the access to justice conversation – a conversation that can and should be very wide-reaching. One could quibble that other aspects of this conversation are missing, such as lawyer knowledge and (clinical) legal

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or entering it: see, e.g., Lon Levin, “CATV Franchise Fee: Incentive for Regulation, Disincentive for Innovation” (1979) 30 Syracuse L Rev 741 at 743, explaining this phenomenon in a different context.

<sup>117</sup> *Gao v Ontario (Workplace Safety and Insurance Board)*, 2014 ONSC 6497, 61 CPC (7th) 153 (SCJ) at para 11.

education regarding access to justice,<sup>118</sup> the relationship between diversity and access to justice,<sup>119</sup> and the role of law societies<sup>120</sup> and non-lawyers<sup>121</sup> in this conversation. Even so, all of these and other considerations cannot be exhausted, both because of the need to narrow this dissertation's analysis, and because comprehensively explaining all elements of the access to justice literature would be impossible, with attempting to do so inevitably being exclusionary to some extent.

### I. Why Courts Matter

As should be apparent by now, courts are not a solution to all disputes that arise in society. Indeed, they should not be the forum of most dispute resolution. Some issues – such as tenets of religious faiths<sup>122</sup> or disputes about who is the greatest ice hockey player of all time<sup>123</sup> – are quite rightly regarded as unjusticiable.<sup>124</sup> Even among theoretically justiciable matters, other forums are likely better-suited to resolve many of them. It would also be preferable to prevent many of these issues from arising through *ex ante* interventions by teachers, nurses, doctors, or social workers rather than *post hoc* interventions by lawyers.

But courts still matter. The public court system has a unique constitutional role to develop the norms that form the basis of the rule of law in our society.<sup>125</sup> Most individuals need not resolve

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<sup>118</sup> Leering, *supra* note 63; Sarah Marsden & Sarah Buhler, “Lawyer Competencies and Access to Justice: Two Empirical Studies” (2017) 34 Windsor YB Access Just 186; Sarah Buhler, “Clinical Legal Education in Canada: A Survey of the Scholarship” (2015) Can Legal Educ Ann Rev 1.

<sup>119</sup> *E.g.*, Brian Etherington, “Promises, Promises: Notes on Diversity and Access to Justice” (2000) 26 Queen’s LJ 43; Patricia Hughes, “Advancing Access to Justice through Generic Solutions: The Risk of Perpetuating Exclusion” (2013) 31 Windsor YB Access Just 1.

<sup>120</sup> *E.g.*, Richard Devlin, “Bend or Break: Enhancing the Responsibilities of Law Societies to Promote Access to Justice” (2015) 38 Man LJ 119; Lisa Trabuco, “What Are We Waiting For? It’s Time to Regulate Paralegals in Canada” (2018) 35 Windsor YB Access Just 149; The Honourable Thomas A Cromwell & Siena Antsis, “The Legal Services Gap: Access to Justice as a Regulatory Issue” (2016) 42 Queen’s LJ 1.

<sup>121</sup> *E.g.*, Trabuco, *ibid*; Cromwell & Antsis, *ibid* at 12-13.

<sup>122</sup> *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v Wall*, 2018 SCC 26, [2018] 1 SCR 750 [“*Wall*”] at para 38; Kennedy & Sossin, *supra* note 50 at 710.

<sup>123</sup> *Wall v Judicial Committee of the Highwood Congregation of Jehovah’s Witnesses*, 2016 ABCA 255, 43 Alta LR (6th) 33 at para 82 (per Wakeling JA, dissenting in Court of Appeal, but majority overruled in *Wall*, *ibid*).

<sup>124</sup> Kennedy & Sossin, *supra* note 50 at 710.

<sup>125</sup> *Trial Lawyers*, *supra* note 24; Vayda, *supra* note 24.

most of their disputes in the public court system for it to continue to have that role. But if the public court system is fundamentally unavailable to large swaths of the population due to excessive delays and costs, that forces individuals to look for solutions elsewhere in situations that may be suboptimal and/or create the risk of procedural unfairness.<sup>126</sup> This endangers the rule of law, which requires courts being easily accessible to protect the law’s role in regulating societal norms.<sup>127</sup>

Accordingly, just as it is important to recognize that courts cannot and should not aspire to solve every problem in society, it is equally important to not throw the baby that is litigation in the public civil courts out with the bathwater surrounding it, even when that bathwater is sorely in need of change. The 2010 Amendments and *Hryniak* attempted to assist in this regard. This dissertation investigates the extent to which they have succeeded, and what that says about the capacity of civil procedure reform to achieve access to justice. There are parts of the access to justice conversation that the traditional civil justice system cannot – and may never be able to – deliver upon. But that does not mean that it should not deliver what it can deliver on, and that understanding the contours of what it can deliver on, and how it can do so, are exceptionally important.

## II) PREVIEWING THE CHAPTERS

### A. Chapter One: Rule 17 – Jurisdiction Motions

Jurisdiction motions can impede the fair adjudication of actions in a timely and cost-efficient manner. This can be so even when parties comply with the *Rules*, as Corbett J of the Ontario Superior Court recently observed in a high-profile decision used to frame this chapter.<sup>128</sup> At the

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<sup>126</sup> Farrow Book, *supra* note 112 at 232-251.

<sup>127</sup> Maxime St-Hilaire & Joanna Baron, “Introductory Essay: The Rule of Law as the Rule of Artificial Reason” (2019) 92 SCLR (2d) 1 at 30; *Trial Lawyers*, *supra* note 24.

<sup>128</sup> *Stuart Budd & Sons Limited v IFS Vehicle Distributors ULC*, 2015 ONSC 519, 66 CPC (7th) 316 (SCJ) [“*Stuart Budd*”] at para 92.

same time, if Ontario genuinely does not have jurisdiction over a case, it should not decide the case for reasons of international comity, and fairness to the parties. And if the jurisdiction motion removes a case from Ontario's court system early in the process, others will have the opportunity to use court resources that the case would have occupied. This will manifestly improve access to justice for everyone with the possible exception of the plaintiff. The benefits of successful jurisdiction motions are also not to be understated – they have the potential to dispose of a case (although not on its merits) or at least send it to a forum that can adjudicate in the fairest fashion. For all of these reasons, jurisdiction motions can promote proportionality.

It is these competing concerns that this chapter, already published,<sup>129</sup> seeks to analyze. In other words, what are the literal costs – in terms of time and money – of jurisdiction motions in Ontario? (This chapter only addresses jurisdiction/*forum non conveniens* – while conflicts of laws rules also address matters of enforcement and choice of law, they are less attached to civil procedure.) And have recent attempts to reform the common law of jurisdiction been effective?

This is a particularly timely topic to study, given recent, consistent criticisms of the common law of jurisdiction in Canada. This criticism has primarily focused on the uncertain state of the law of jurisdiction.<sup>130</sup> A potential solution to this problem, considered at a recent symposium I co-organized,<sup>131</sup> is codification of the common law through the *Court Jurisdiction Proceedings and Transfers Act*, a statute enacted in three provinces.<sup>132</sup> This analysis thus complements the research presented at that conference.

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<sup>129</sup> Gerard J Kennedy, “Jurisdiction Motions and Access to Justice: An Ontario Tale” (2018) 55:1 Osgoode Hall LJ 79 [“Kennedy Jurisdiction”].

<sup>130</sup> E.g., Tanya J Monestier, “(Still) a ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2013) 36 Fordham Int'l LJ 397.

<sup>131</sup> *The CJPTA: A Decade of Progress*, Toronto, ON: October 21, 2016 [“CJPTA Symposium”].

<sup>132</sup> The “CJPTA”: enacted in British Columbia, SBC 2003, c 28; Nova Scotia, SNS 2003 (2d Sess), c 2; and Saskatchewan, SS 1997, c C41.1.



Though the primary methodology in this chapter is a quantitative analysis of case law, potential proposals to address the access to justice concerns presented by jurisdiction motions are also considered. Given past literature in this area, four potential “solutions” are investigated. First, should rules regarding attornment – the process by which one party accepts the jurisdiction of a court – be softened?<sup>133</sup> Second, should a leave requirement be imposed to bring a jurisdiction motion?<sup>134</sup> Third, should specialist adjudicators be used to adjudicate jurisdiction motions?<sup>135</sup> Fourth, and finally, would amending the substantive law of jurisdiction assist in addressing the access to justice issues raised by jurisdiction motions?<sup>136</sup>

### **B. Chapter Two: Rule 2.1**

Enacted in 2014, Rule 2.1 of Ontario’s *Rules*<sup>137</sup> seeks to combine two potential facilitators of access to justice – civil procedure reform and more active judging – in response to a discrete but very real problem in Canadian civil litigation: litigation that is “on its face” frivolous, vexatious, and/or abusive. Cases that fall within the Rule’s ambit number in the dozens per year, causing significant expense for responding parties, and wasting substantial public resources.<sup>138</sup>

To date, no scholar has investigated Rule 2.1 (the “Rule”).<sup>139</sup> This chapter, which has also already been published,<sup>140</sup> seeks to rectify this gap. Part I explores the history of and rationale for

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<sup>133</sup> This was recently proposed by an Ontario Superior Court judge: *Stuart Budd*, *supra* note 128 at para 94.

<sup>134</sup> Leave requirements are frequently imposed to curtail procedural steps that have the potential to be abused: see, *e.g.*, the below discussion on interlocutory appeals.

<sup>135</sup> The advantages of specialization have been particularly discussed in family law: *e.g.*, *Roadmap for Change*, *supra* note 14 at 16.

<sup>136</sup> The topic of the *CJPTA* Symposium, *supra* note 131, and the papers presented in conjunction with it.

<sup>137</sup> *Supra* note 5.

<sup>138</sup> *Raji v Borden Ladner Gervais LLP*, 2015 ONSC 801, [2015] OJ No 307 (SCJ) at para 6.

<sup>139</sup> Some law firms have published professional resources on this topic: see, *e.g.*, “WHAT DO I TELL A CLIENT WHO ASKS: What Do I Do When a Debtor files a ‘Freeman of the Land’ Claim or Motion (Sub Nom: ‘Frivolous or Vexatious Claims and Motions – a Rule 2.1 Primer’)”, online: <<http://www.phmlaw.com/what-do-i-tell-client.pdf>>; Kathryn Kirkpatrick & Jeremy Ablaza, “Cautious Use of Rule 2.1 Against Vexatious Claims in *Khan v. Krylov & Company LLP*” (15 August 2017), online: <[http://blg.com/en/News-And-Publications/Publication\\_5040](http://blg.com/en/News-And-Publications/Publication_5040)>.

<sup>140</sup> Gerard J Kennedy, “Rule 2.1 of Ontario’s *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?” (2018) 35 Windsor YB Access Just 243.

the Rule, in the context of the access to justice discussion in Ontario, and in light of the perceived inadequacy of alternative mechanisms provided for in the *Rules* and the CJA<sup>141</sup> for addressing the dangers raised by vexatious litigants. Parts II and III analyze the first three years of decisions using the Rule to determine how Rule 2.1 has been applied in practice, with the goal to provide guidance for future lawyers and judges considering using the Rule. Part IV assesses the extent to which Rule 2.1 has helped provide speedy and cost-efficient resolution of civil actions on their merits. Part V considers how the Rule should be used in the future – doctrinally, institutionally, and ethically.

The conclusions are hopeful. Rule 2.1 is powerful, and its use should prompt some pause in judges and lawyers. It should be applied robustly when appropriate, but continue to be interpreted narrowly. There are also ways to constrain its improper use, such as mandating a standard form to use before the Rule is employed, or having strict requirements on when it is appropriate to dispense with the general requirement to give a litigant notice on why his or her action has been flagged for potential dismissal.

But by and large, the Rule has been very well employed. It has resulted in notable savings of time and financial expense for courts and defendants, respondents, and responding parties while almost always being fair to plaintiffs, applicants, and moving parties. Indeed, many cases are the model of fairness to vulnerable parties. In the few instances where the Rule's (attempted) use has arguably been inappropriate, the costs in terms of delay and financial expense are usually minimal. While Rule 2.1 is only applicable to a small minority of cases, they are not a trivial number. The Rule is ultimately an inspiring example of how civil procedure can be amended to facilitate access to justice – and be eminently fair to parties in doing so.

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<sup>141</sup> *Supra* note 7, s 140.

### C. Chapter Three: Interlocutory Appeals

Interlocutory appeals have the clear potential to distort access to justice, by causing unnecessary expense and delay, two prime impediments to access to justice. As such, Ontario law: a) imposes a leave requirement for interlocutory appeals; and b) legislates that interlocutory appeals be generally brought in the Divisional Court while final appeals are generally brought in the Court of Appeal.<sup>142</sup> At the same time, appeals, including interlocutory appeals, play an indispensable role in achieving justice in particular cases, righting clear wrongs. Moreover, the clarity in the law brought by appeals can help the pursuit of justice in numerous other cases. But determining whether an appeal is interlocutory or final has been the source of much controversy.<sup>143</sup> Coulter Osborne addressed this in the Osborne Report<sup>144</sup> but his recommendations have not yet been incorporated in legislation as recommended, despite requests for this by the judiciary.<sup>145</sup>

This chapter, which has also been accepted for publication,<sup>146</sup> begins with Part I's explanation of the purposes of appeals, the history of the interlocutory/final distinction, the legislation and case law governing appellate jurisdiction in Ontario, and the relationship between appeals and access to justice. Part II gives the methodology for analyzing all cases from 2010-2017 in the Divisional Court and Court of Appeal where there was dispute over the interlocutory/final distinction. Part III analyzes these figures, in terms of numbers, results, remedies, costs, delay, clarity of the law, and differences between the Court of Appeal and Divisional Court. These results are not encouraging from an access to justice perspective, with dozens of cases each year analyzing this

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<sup>142</sup> *Ibid*, s 19(1)(b).

<sup>143</sup> *E.g.*, the dissenting (on this point) opinion of Juriensz JA in *Parsons v Ontario*, 2015 ONCA 158, 125 OR (3d) 168 [*"Parsons"*] at para 209. See also [www.conductofanappeal.com](http://www.conductofanappeal.com), a blog by Mark Gelowitz and W David Rankin. Multiple blog posts discuss this issue, leading one to wonder how frequently this gets litigated.

<sup>144</sup> Osborne Report, *supra* note 31 at c 12.

<sup>145</sup> *Shinder v Shinder*, 2017 ONCA 822, 140 OR (3d) 477 at para 7.

<sup>146</sup> "Final v. Interlocutory Civil Appeals: How a Clear Distinction Became so Complicated—Its Purposes, Obfuscation and a Simple Solution?" (2020) 45(2) Queen's LJ \_\_\_\_ (forthcoming).

issue. Part IV suggests that the distinction between interlocutory and final appeals, including the leave requirement for the former, should remain. It is nonetheless suggested that this situation could be improved through simplifying the test for distinguishing interlocutory from final appeals. The experiences of England and Wales and especially British Columbia, both of which have sought to address this issue through legislation, demonstrate that this is a project worth considering. A review of British Columbia case law pre- and post-legislative amendments is a key component of this analysis. A simplification of appellate jurisdiction in terms of merging the Divisional Court and Court of Appeal is a less certain solution but also warrants consideration.

#### **D. Chapter Four: Surveys of Actors in the Justice System**

Qualitative surveys remain relatively rare in legal scholarship,<sup>147</sup> perhaps due to Langdellian views that law is a science to be discovered through primary sources, and as such surveys have little to add.<sup>148</sup> And it is indeed true that obtaining a sample of lawyers that would be representative in the eyes of a statistician was not realistic for this dissertation. But this is also an area where anecdotes matter a great deal.<sup>149</sup> So in June through August of 2019, 90 lawyers who volunteer at Pro Bono Ontario (“PBO”) were surveyed, seeking to glean their opinions on *Hryniak* and the 2010 Amendments. Lawyers at PBO were chosen as they tend to be litigators, who would be familiar with *Hryniak* and the 2010 Amendments. Many such lawyers also have a private practice on a day-to-day basis while dealing with economically disadvantaged individuals through PBO, indicating a diversity of experience.

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<sup>147</sup> Urszula Jaremba & Elaine Mak, “Interviewing Judges in the Transnational Context” (2014) 5:3 Law and Method 1 at 1.

<sup>148</sup> See, e.g., the discussions in Sandomierski, *supra* note 60 at 51-52. But also see Kimball, *supra* note 61 and Grossman, *supra* note 61, suggesting that this is a caricature of Langdell rather than an accurate description.

<sup>149</sup> Farrow 2014, *supra* note 2.

The results of the surveys were mixed. Most respondents viewed *Hryniak* and the 2010 Amendments as, overall, positive. But there were still reservations that many changes had negative consequences in terms of type and intensity of work. There was also a common view that other factors have intervened so that access to civil justice has not significantly improved in the 2010s.

### **E. Choice of Three Rules**

The three rules chosen in Chapters One, Two, and Three may appear somewhat disparate on first glance. They are probably not the most direct way of assessing the effects of *Hryniak* and the 2010 Amendments. But several factors still bring the rules analyzed in the first three chapters together. First, none were directly amended in 2010. Second, each can be a great facilitator or hindrance to access to justice, depending on how they are used. That makes them similar to summary judgment. Third, as will be developed, each relates to matters courts are institutionally capable of addressing – and as such reform presumably has potential. In other words, they are emblematic of what civil procedure reform can do. Fourth, each is in a state of uncertainty or novelty, opening up the subsidiary research question regarding the effects of uncertainty in the law on access to justice. Fifth, given their being in states of uncertainty, each rule is useful to investigate in and of itself in ways that not all elements of procedural law may be. As such, even if the answer regarding the macro-level analysis surrounding the effects of *Hryniak* and the 2010 Amendments needs to be hedged, this dissertation will still be able to make an important contribution to the conversation surrounding Ontario's procedural law.

### **III) PREVIEWING THE CONCLUSION**

In answering the overall question – have the 2010 Amendments enhanced access to justice in Ontario – the work in this dissertation will be assessed against what others have done in analyzing the 2010 Amendments. Most notably, Brooke MacKenzie has analyzed the increased use of

summary judgment in the aftermath of *Hryniak*.<sup>150</sup> This dissertation and others' findings will be assessed against the conceptualizations of access to justice and proportionality that will be developed. The research suggests three hypotheses should be tested:

- A) Civil procedure reform has real – if limited – ability to facilitate access to justice. The 2010 Amendments have indeed been positive developments. However, more profound impacts on access to justice will require broader considerations and the battle for access to justice must be waged on multiple fronts.
- B) Appellate courts in general, and the Ontario Court of Appeal in particular, have frequently interpreted procedural and/or substantive law in ways that have been an access to justice impediment. This has been motivated by a desire to ensure that substantive injustices do not occur. But it has unfortunately had negative impacts in trial judges' ability to apply procedural law to ensure the timely and cost-effective resolution of claims on their merits.
- C) It is possible to err excessively in prescribing “standards” instead of “rules”. Ontario appears to have overprescribed standards instead of rules in various aspects of its procedural and substantive law. While these have been motivated by a genuine desire to facilitate substantive justice, they have frequently caused needless complication and unnecessary litigation. Efforts to become more rules-based have had positive effects.

Finally, two other matters will be considered:

- D) what this dissertation suggests about the potential of particular reforms outside of civil procedure reform to achieve access to justice; and
- E) the extent to which this research can help inform discussions of similar issues in criminal law and family law.

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<sup>150</sup> MacKenzie SJ, *supra* note 31.

### **A. Real – But Limited – Ability to Achieve Access to Justice**

Early research suggests that there have been positive – but limited – access to justice consequences resulting from the 2010 Amendments.<sup>151</sup> This may indicate, as has been hypothesized before, that civil procedure reform can only achieve access to justice in limited ways.<sup>152</sup> This hypothesis will be tested based on this and others' research, also considering the aforementioned definitions of access to justice. This research should inform future policymakers on realistic ways to facilitate access to justice.

### **B. Resistance from the Ontario Court of Appeal?**

The Ontario Court of Appeal interpreted the 1985 introduction of summary judgment to the *Rules* very narrowly.<sup>153</sup> MacKenzie has observed that the Court of Appeal's narrow interpretation of the 2010 Amendments also resulted in a reduced effectiveness of the 2010 Amendments pending the Supreme Court's decision in *Hryniak*.<sup>154</sup> In Chapter One, it is noted that the Supreme Court's decision in *Van Breda*<sup>155</sup> was likely an access to justice improvement compared to the Ontario Court of Appeal's decision in *Muscutt*.<sup>156</sup> Similarly, in Chapter Two, it is posited that the Court of Appeal has narrowly construed the applicability of principles of Rule 2.1 in the family law context.<sup>157</sup> In Chapter Three, it is suggested that the Court of Appeal's desire to ensure substantive justice has led to an unwieldy jurisprudence on the distinction between interlocutory and final appeals. In Chapter Four, many respondents seem to lament that the Court of Appeal has restricted the ability to obtain summary judgment. On the one hand, this appears motivated by the

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<sup>151</sup> *E.g., ibid.*

<sup>152</sup> *E.g., Farrow 2014, supra note 2.*

<sup>153</sup> MacKenzie SJ, *supra* note 31 at 1278-1280, citing *Aguonie v Galion Solid Waste Material Inc* (1998), 38 OR (3d) 161 (CA) and *Dawson v Rexcraft Storage and Warehouse Inc* (1998), 111 OAC 201 (CA).

<sup>154</sup> MacKenzie SJ, *ibid* at 1300.

<sup>155</sup> *Club Resorts v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572.

<sup>156</sup> *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA).

<sup>157</sup> *Frick v Frick*, 2016 ONCA 799, 132 OR (3d) 321.

Court of Appeal’s desire to ensure that substantive injustices do not occur. This is indeed a purpose of appellate courts.<sup>158</sup> At the same time, the Court of Appeal should consider whether it is prescribing “racecar” procedural justice when a “hatchback” will suffice. Based on the analysis throughout the entire dissertation, humble suggestions will be given on how appellate courts should approach their role when prescribing procedural law with access to justice implications.

### C. The Rules-Standards Debate

While it is hypothesized that civil procedure reform may only have a limited, if real, role to play in achieving access to justice, another issue came up repeatedly throughout the first four chapters: namely, the certainty (or lack thereof) in how civil procedure rules, and underlying substantive law, should be applied in particular cases. The procedural and substantive law analyzed in the first three chapters have all been criticized for being too unpredictable.<sup>159</sup>

The tension between the need to lay down clear legal rules that provide guidance to parties (and thus minimize unnecessary litigation) and the need to allow sufficient flexibility to dispense substantive justice in particular cases has been noted for decades.<sup>160</sup> While Sunstein and others have convincingly explained how rules can be problematic, Ontario civil procedure may have erred excessively on the side of standards, with it being doubtful that this has led to many more substantively fair outcomes. Chapter One posits that some substantively fair outcomes may be worth sacrificing for the sake of others’ access to justice:

[Suppose] “Rule A” is fair and just 99% of the time, and predictable and easy to apply 95% of the time. “Rule B” is fair and just 100% of the time, but predictable and easy to apply only 75% of the time. Is the fairness and justice to the 1% achieved through adopting Rule B worth the unpredictability and uncertainty that must be endured by an additional 20%? Maybe, but maybe not. [...] It is at least

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<sup>158</sup> Gerard J Kennedy, “Persisting Uncertainties in Appellate Jurisdiction at the Supreme Court” (2013) 100 CR (6th) 96 at 101.

<sup>159</sup> *E.g.*: the dissenting (on this point) opinion of Juriensz JA in *Parsons*, *supra* note 143 at para 209; and Monestier, *supra* note 130. Dismissals *sua sponte* are a new addition to Ontario’s *Rules*, *supra* note 5.

<sup>160</sup> Cass R Sunstein, “Problems with Rules” (1995) 83(4) Cal L Rev 953.



arguable that the unfairness and injustice to the 1% is less problematic than the inability of the 20% to order their affairs predictably, and resolve their potentially justiciable issues promptly and with minimal expense.<sup>161</sup>

Obviously, toleration of substantively unfair outcomes should be minimized, but not at the cost of demanding “racecar” procedural justice if a “hatchback” will suffice. Another thought experiment, originating with Trevor Farrow<sup>162</sup> (but synthesized by me), seems apposite:

Suppose Procedure A leads to substantively fair and just results 100% of the time, but only 10% of members of the public can afford it. Now suppose Procedure B leads to substantively fair and just results 90% of the time, and 80% of members of the public can afford it. It would seem that Procedure B would be preferable, if we can justify the substantively unfair results to the 10%. While governmental aid or social support (such as New Zealand’s indemnification of many personal injury matters<sup>163</sup>) may mitigate the necessity of such tradeoffs, comprehensive civil justice legal aid is unlikely to be a government priority,<sup>164</sup> and in certain cases may not even be desirable. This necessitates maximizing the utility of resources currently invested in the civil justice system, albeit in a principled manner.

This discussion will require engaging with legal theory that touches on these issues more generally.

#### **D. Access to Justice Through Court Practices Outside Civil Procedure Reform**

This dissertation mostly seeks to separate analyses of civil procedure reform’s effectiveness in achieving access to justice from changing broader, systemic issues. As noted above, analysis of these issues is tremendously important, but it is theoretically and pragmatically sound to separate them. This can be taken to an unhelpful extreme, however, so in the Conclusion, it will be noted how this research suggests courts can use technology, increase transparency, and allocate judges to cases, with the goal of facilitating access to justice.

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<sup>161</sup> Kennedy Jurisdiction, *supra* note 129 at 109-110.

<sup>162</sup> Farrow Book, *supra* note 112.

<sup>163</sup> Tiho Mijatov, *et al*, “The Idea of Access to Justice: Reflections on New Zealand’s Accident Compensation (or Personal Injury) System” (2016) 33 Windsor YB Access Just 197.

<sup>164</sup> See, *e.g.*, Faisal Bhabha, “Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions” (2007) 33 Queen’s LJ 139 at 154-156.

### E. Transsystemic Pollination: Family Law and Criminal Law

The divides between civil, family, and criminal justice are justifiable on theoretical and practical grounds.<sup>165</sup> Having said that, the divides can also seem arbitrary: like criminal law, civil cases frequently have a dimension of punishment and/or put a party's liberty in jeopardy.<sup>166</sup> Similarly, the line between family law and property law can be difficult to draw.<sup>167</sup> While lessons from one "system" are not necessarily directly applicable to others, it is nonetheless worth considering how what has worked – and what has not – in civil justice reform could be useful in these other areas with their own access to justice issues. As such, the extent to which the four chapters suggest the civil system can inform family law and criminal law will be analyzed.

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Andrew Pilliar has described access to justice not so much as a "crisis" but rather as a "chronic problem".<sup>168</sup> The best way to consider this issue will be revisited in the Conclusion. Regardless of how we label this issue, civil courts in the common law world have been pilloried in culture since the time of Dickens,<sup>169</sup> and it would be naïve to believe that there is a catch-all solution to achieving access to justice. But by assessing particular efforts to facilitate access to justice – the 2010 Amendments – through multiple dimensions (quantitative analyses of various rules' application,

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<sup>165</sup> See, e.g., Jesse Wall, "Public Wrongs and Private Wrongs" (2018) 31 Can JL & Juris 177 (justifying criminal law's different roles from tort law); Robert Leckey, "Harmonizing Family Law's Identities" (2002) 28 Queen's LJ 221 (describing family law's unique role in the civil law of Quebec); Martha Bailey, "Judicial Jurisdiction Rules for Family Law Matters" (2016) (Paper presented to the Symposium, *The CJPTA: A Decade of Progress*, Toronto, Ontario, 21 October 2016) [unpublished] (this paper illustrates the unique considerations of family law and jurisdiction motions, and it be will returned to in Chapter One).

<sup>166</sup> See, e.g., Adam M Dodek, "Reconceiving Solicitor-Client Privilege" (2010) 35 Queen's LJ 493 at 532.

<sup>167</sup> See, e.g., Heather Conway & Philip Girard, "'No Place Like Home': The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain" (2005) 30 Queen's LJ 715 at 718.

<sup>168</sup> "what will you do about access to justice this year" *Legal Aid Ontario Blog* (4 February 2014), online: <<http://blog.legalaid.on.ca/2014/02/04/andrew-pilliar-what-will-you-do-about-access-to-justice-this-year/>>.

<sup>169</sup> Charles Dickens, *Bleak House* (London: Oxford University Press, 1971) [originally published in 1853]. This has been noticed before: see, e.g., The Honourable J Roderick Barr, QC, "The Cost of Litigation: *Bleak House* in the 1990s" (March 1993) 12 Advocates' Soc J No 1, 12; William Kaplan, QC, "The Derivative Action: A Shareholder's 'Bleak House'" (2003) 36:3 UBC L Rev 443; Kennedy *Walrus*, *supra* note 58.

surveys, and legal theory considerations), this dissertation seeks to be a real contribution to the literature in this area, so future judges, lawyers, and policymakers can consider what is – and what is not – likely to be effective in the future.

## Chapter One

### Jurisdiction Motions and Access to Justice: A View from Ontario

The relationship between jurisdiction motions and using (or refraining from using) procedural law to facilitate access to justice is not always what observers notice from the case law. For instance, the Ontario Court of Appeal’s January 2016 decision in *Stuart Budd & Sons Limited v IFS Vehicle Distributors ULC*<sup>1</sup> made headlines in the legal community.<sup>2</sup> The press was drawn to the rare finding that a motion judge had displayed a reasonable apprehension of bias in his handling of a jurisdiction motion brought by the defendants. Justice Epstein methodically explained how the motion judge’s handling of the motion displaced the presumption of judicial integrity.<sup>3</sup> It was difficult to quarrel with her conclusion that a reasonable observer, viewing the matter realistically and practically, would feel that the defendants did not receive the fair hearing of the jurisdiction motion to which they were entitled.<sup>4</sup>

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<sup>1</sup> 2016 ONCA 60, 129 OR (3d) 37 [*“Stuart Budd ONCA Decision”*].

<sup>2</sup> See, e.g., Neil Etienne, “Appeal Court makes rare finding of bias against trial judge” *Law Times* (1 February 2016), online: <<https://www.lawtimesnews.com/news/general/appeal-court-makes-rare-finding-of-bias-against-judge/262021>>. The decision was also the subject of commentary by numerous law firm blogs including Mark Gelowitz, “Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC: Supplemental Reasons Pending Appeal Lead to Reasonable Apprehension of Bias” *The Conduct of an Appeal* blog (12 July 2016), online: <<http://www.conductofanappeal.com/stuart-budd-sons-limited-v-ifs-vehicle-distributors-ulc-supplemental-reasons-pending-appeal-lead-to-reasonable-apprehension-of-bias>>; Joel Morris & Ted Murray, *Civil Litigation Update* (20 February 2016), online: <[https://www.harpergrey.com/~ASSETS/DOCUMENT/CIVIL%20LITIGATION%20UPDATE%20-%20Feb%2026\\_16.pdf](https://www.harpergrey.com/~ASSETS/DOCUMENT/CIVIL%20LITIGATION%20UPDATE%20-%20Feb%2026_16.pdf)>.

<sup>3</sup> Seen in, e.g., *Stuart Budd ONCA Decision*, *supra* note 1 at paras 53ff.

<sup>4</sup> Applying the well-known test for reasonable apprehension of bias from Justice de Grandpré’s decision in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at pp 394-395. Among other things, the motion judge:

- did not permit oral argument from the defendants on key issues, instead deciding the motion halfway through the allotted time;
- wrongly described some of the defendants’ submissions as “concessions”;
- was needlessly discourteous towards the defendants’ counsel;
- identified what he described as a “fatal flaw” in the plaintiffs’ materials, and chose to address this issue by giving the plaintiffs an unrequested adjournment to correct said flaw;
- described the motion as an “abuse of process” on his own initiative; and
- released supplementary reasons months after dismissing the motion in a way that suggested he was responding to arguments in the notice of appeal.

What became secondary in most analyses of *Stuart Budd* was its intersection with the subject matter of this dissertation, through the motion judge's expressing the view that jurisdiction motions can impede access to justice, and specifically the need to fairly adjudicate actions in a timely and cost-efficient manner.<sup>5</sup> Even if his impressions of jurisdiction motions are correct, Epstein JA properly observed that this did not excuse the manner in which he handled the motion. But jurisdiction motions could still be posing an access to justice obstacle. So are jurisdiction motions being abused? What are the access to justice costs – in terms of time and money – of jurisdiction motions in Ontario? Have efforts in the past decade to improve and clarify the common law of jurisdiction helped?<sup>6</sup> And has the bar heeded the Supreme Court's call for a "culture shift" in the conduct of civil litigation?<sup>7</sup> This chapter seeks to answer these and related questions.

Part I sets the stage for the analysis by: a) reviewing the uncertain state of the common law of jurisdiction and *forum non conveniens* in Canada in general and Ontario in particular; and b) explaining how jurisdiction motions can facilitate or hinder access to justice. In Part II, the methodology for analyzing all jurisdiction motions decided in Ontario from January 1, 2010 through December 31, 2015 is explained, keeping track of the number of motions brought, their success rates, the costs associated with them, the amount of time it took to resolve them, and whether they involved a contractual choice of forum clause. Part III analyzes the access to justice issues raised by jurisdiction motions. It is doubtful that the data can fairly suggest that jurisdiction motions are being "abused" by defendants and/or their counsel in any more than a few, isolated cases. However, it is agreed that, despite non-trivial improvements over the course of the past

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For more detail, see Gelowitz, *supra* note 2.

<sup>5</sup> *Stuart Budd & Sons Ltd v IFS Vehicle Distributors ULC*, 2015 ONSC 519, [2015] OJ No 979 (SCJ) ["*Stuart Budd* SCJ Decision"] at para 94.

<sup>6</sup> *Club Resorts v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 ["*Van Breda*"] and commentary on it, discussed below.

<sup>7</sup> *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 ["*Hryniak*"] and commentary on it, discussed below.

decade, jurisdiction motions frequently present an access to justice obstacle. Uncertainty in the law seems to be the primary reason for this. Part IV considers potential proposals to address the access to justice concerns arising from jurisdiction motions.

## I) THE BACKGROUND LAW

### A. The Law of Jurisdiction

Generally, an Ontario court will exercise jurisdiction over matters only when the parties agree that it should do so, when the defendant is a local person, or when the matter has strong connections to Ontario. To exercise jurisdiction more broadly would offend against the principles of comity, under which one court respects the authority of other courts to enjoy a similar scope of authority.<sup>8</sup> In cases with connections to more than one forum, a balancing of interests is necessary to determine when jurisdiction may be found, respecting interests of international law and comity, as well as the respective private interests of the plaintiff and the defendant.<sup>9</sup>

This balancing act has bedevilled Canadian courts since the Supreme Court’s unanimous 1990 decision, *Morguard Investments Ltd v De Savoye*<sup>10</sup> in which it was held that, in addition to the traditional grounds of the parties’ consent and the defendant’s base in the forum, jurisdiction could be founded on a “real and substantial connection” with a province or territory.<sup>11</sup> While *Morguard* was generally considered to have comprehensively and fairly considered the interests at stake in jurisdiction motions, it was criticized for not clearly stating how they were to be applied, especially given that *Morguard* only addressed intra-Canadian jurisdiction battles.<sup>12</sup> It is against this

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<sup>8</sup> Janet Walker, *Castel & Walker – Canadian Conflicts of Laws*, 6th ed (Toronto: LexisNexis, 2009) at 1-1, 1-5.

<sup>9</sup> La Forest J explains this in depth in *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 [“*Morguard*”] at 1095-1103.

<sup>10</sup> *Morguard*, *ibid.*

<sup>11</sup> *Ibid* at 1108.

<sup>12</sup> This history is explained by Stephen GA Pitel, “Six of One, Half a Dozen of the Other? Jurisdiction in Common Law Canada” (2018) 55:1 Osgoode Hall LJ 63 [“Pitel 2018”]. See also Joost Blom, QC & Elizabeth Edinger, “The Chimera of the Real and Substantial Connection Test” (2005) 38:2 UBC L Rev 373.

backdrop that the Uniform Law Conference of Canada developed the *Court Jurisdiction and Proceedings Transfer Act*.<sup>13</sup> The CJPTA is a prospective uniform statute to ensure that all common law Canadian provinces and territories have consistent rules on jurisdiction motions. Only Saskatchewan,<sup>14</sup> British Columbia,<sup>15</sup> and Nova Scotia<sup>16</sup> have enacted the CJPTA.

In its 2002 decision *Muscutt v Courcelles*, the Ontario Court of Appeal sought to give guidance on the application of the “real and substantial connection” test. Justice Sharpe identified eight non-determinative factors that a court should consider in determining whether a “real and substantial connection” is established.<sup>17</sup> *Muscutt* was applied with some regularity outside Ontario<sup>18</sup>. While Sharpe JA’s emphasis on flexibility for the purpose of maintaining fairness was doubtless well-motivated, certainty did not follow. Tanya Monestier critically wrote that “[under *Muscutt*], litigants engaged in jurisdictional battles as though this were the first time that a case like this had ever been heard”.<sup>19</sup>

In *Club Resorts Ltd v Van Breda*, the Supreme Court again revisited the law of jurisdiction.<sup>20</sup> Justice LeBel attempted to establish a predictable framework for establishing a “real and substantial connection”, by identifying four rebuttable presumptive connecting factors for tort cases. LeBel J held that the existence of any one of these factors would result in the court assuming jurisdiction.<sup>21</sup> He acknowledged that the law of jurisdiction should balance fairness to the parties against the need to have clear rules that would allow parties to govern their affairs with certainty

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<sup>13</sup> Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting* (Charlottetown, PE, August 1994) at 48.

<sup>14</sup> *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C41.1.

<sup>15</sup> *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28.

<sup>16</sup> *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2nd Sess), c 2.

<sup>17</sup> *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA) [“*Muscutt*”] at paras 75-109.

<sup>18</sup> See, e.g., Pitel 2018, *supra* note 12 at fn 19.

<sup>19</sup> Tanya J Monestier, “(Still) A ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2013) 36 *Fordham Int’l LJ* 397 at 413.

<sup>20</sup> *Van Breda*, *supra* note 6.

<sup>21</sup> *Ibid* at paras 80ff.

and predictability. He unapologetically stated that he was seeking to establish a framework that would increase order and predictability.<sup>22</sup>

*Van Breda* was generally considered an improvement over *Morguard* and *Muscutt*.<sup>23</sup> But *Van Breda* has nonetheless been subject to criticism itself, partially on the ground that it is still too uncertain and amorphous,<sup>24</sup> but also because it inappropriately restricted the ability to bring a civil action in common law Canada.<sup>25</sup> It is into this situation that jurisdiction motions brought in Ontario in the 2010s are analyzed.

Related to the doctrine of jurisdiction is *forum non conveniens*. This allows a court to stay an action despite jurisdiction, after recognizing that another forum is clearly preferable for adjudication of the dispute.<sup>26</sup> In this analysis of jurisdiction motions brought in Ontario in the 2010s, almost all defendants who bring a motion alleging that Ontario does not have jurisdiction over a case allege, in the alternative, that Ontario is *forum non conveniens*. There are only a few cases where jurisdiction was found but Ontario was nonetheless held to be *forum non conveniens*.<sup>27</sup>

## B. Access to Justice

Precisely what the phrase “access to justice” encompasses varies in the circumstances. At its most holistic, it includes normative questions about what values constitute “justice” and ensuring

<sup>22</sup> *Ibid* at, e.g., paras 82, 92.

<sup>23</sup> See, e.g., Monestier, *supra* note 19 at 411-413; Joost Blom, “New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet” (2012) 53 CBLJ 1 at 18, 26-30.

<sup>24</sup> See, e.g., Monestier, *ibid* at 415-441.

<sup>25</sup> See, e.g., Blom, *supra* note 23 at 18; Hovsep Afarian, William D Black, Christopher Hubbard & Carole J Piovesan, “The SCC Clarifies the ‘Real and Substantial Connection’ Test” *McCarthy Tétrault LLP* (23 April 2012), online: <[http://www.mccarthy.ca/article\\_detail.aspx?id=5845](http://www.mccarthy.ca/article_detail.aspx?id=5845)>.

<sup>26</sup> *Van Breda*, *supra* note 6 at paras 109-112.

<sup>27</sup> See, e.g., *Sullivan v Four Seasons Hotels Ltd*, 2013 ONSC 4622, 116 OR (3d) 365 (SCJ) [“*Sullivan*”]; *Kozicz v Preece*, 2013 ONSC 2823, [2013] OJ No 2226 (SCJ) [“*Preece*”]; *Endress + Hauser Canada Ltd v Aikman*, 2014 ONSC 3067, [2014] OJ No 2677 (SCJ); *Solloway v Klondex Mines Ltd*, 2014 ONSC 391, [2014] OJ No 285 (SCJ), aff’d 2014 ONCA 391, [2014] OJ No 4572; *Currie v Farr’s Coach Lines Ltd*, 2015 ONSC 2352, [2015] OJ No 2075 (SCJ); *Silveira v FY International Auditing & Consulting Corp*, 2015 ONSC 338, 37 BLR (5th) 308 (Master) [“*Silveira*”]; *Bouzari v Bahremani*, 2015 ONCA 275, 126 OR (3d) 223 [“*Bouzari*”], rev’g 2013 ONSC 6337, [2013] OJ No 5690 (SCJ); *Consbec Inc v Walker*, 2011 ONSC 2944, [2011] OJ No 2146 (SCJ) [“*Consbec*”] (the defendants conceded there was jurisdiction in this case).



that the substantive law encompasses such values.<sup>28</sup> But at the very least, it means that civil litigation should have three characteristics: first, minimal financial costs; second, timeliness; and, third, simplicity.<sup>29</sup> Based on these values, and the value of proportionality, which recognizes that steps taken in litigation are to be proportionate to what can realistically be gained from taking said steps,<sup>30</sup> Ontario amended its *Rules of Civil Procedure* effective January 1, 2010.<sup>31</sup>

The Supreme Court of Canada emphasized these virtues of proportionality and simplicity, as well as the desire to mitigate delay and financial costs, in *Hryniak v Mauldin*. Justice Karakatsanis, for a unanimous court, called for a “culture shift” to ensure that cases are decided on their merits in a manner that is fair, speedy, and with minimal financial cost.<sup>32</sup> *Hryniak* concerned summary judgment. But appellate courts<sup>33</sup> and notable commentators<sup>34</sup> have repeatedly emphasized that the spirit of *Hryniak* is applicable outside this narrow context. There is no reason this should not apply to jurisdiction motions. The motion judge explicitly cited *Hryniak* in *Stuart Budd*.<sup>35</sup>

Jurisdiction motions manifestly have the potential to distort access to justice. By their nature, they do not address the merits of a dispute. Brought at the beginning of a lawsuit, they can also delay resolution of an action. Affidavits, including expert evidence, are likely necessary to prove

<sup>28</sup> *E.g.*, Trevor CW Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall LJ 957 [“Farrow 2014”] at 970-972.

<sup>29</sup> *E.g.*, *ibid* at 978-979; Roderick A Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005) at 68-73. Underlying all of these, as well as an important principle in its own right, is proportionality: *Hryniak*, *supra* note 7 at paras 29-33; Trevor Farrow, “Proportionality: A Cultural Revolution” (2012) 1 Journal of Civil Litigation and Practice 151 [“Farrow 2012”].

<sup>30</sup> *E.g.*, Farrow 2012, *ibid*.

<sup>31</sup> RRO 1990, Reg 194 [the “Rules”], as amended by O Reg 43/08.

<sup>32</sup> *Hryniak*, *supra* note 7 at paras 2, 23.

<sup>33</sup> See, *e.g.*, *Iannarella v Corbett*, 2015 ONCA 110, 124 OR (3d) 523 at para 53, concerning discovery; *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289, 580 AR 265 at para 5, concerning the intersection between discovery and claims of privilege.

<sup>34</sup> See, *e.g.*, Stephen GA Pitel & Matthew Lerner, “Resolving Questions of Law: A Modern Approach to Rule 21” (2014) 43 Advocates’ Quarterly 344 at 344-346; Barbara Billingsley, “*Hryniak v Mauldin* Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials” (2017) 55:1 Alta L Rev 1.

<sup>35</sup> *Stuart Budd* SCJ Decision, *supra* note 5 at para 94.

the existence of a connection to a forum, or that another forum is obviously more convenient.<sup>36</sup> Drafting such affidavits, conducting cross-examinations on them, preparing motion materials, and the scheduling and hearing of the motion are all likely to have serious cost consequences.

This is not to suggest that there is not a place for jurisdiction motions. If Ontario genuinely does not have jurisdiction over a case, it should not decide the case for reasons of international comity, and fairness to the parties. This fairness is especially apparent if the proceedings have been commenced in breach of a forum selection clause,<sup>37</sup> or the plaintiff has chosen the forum in order to benefit unfairly from some legal or practical advantage, but could also be the case because the courts of another jurisdiction will be able to resolve the case in a more effective and efficient, and thus more access-to-justice-friendly, manner. And if the jurisdiction motion removes a case from Ontario's court system early in the process, others will have the opportunity to use court resources that the case would have occupied. This will manifestly improve access to justice for everyone with the possible exception of the plaintiff. The benefits of successful jurisdiction motions are also not to be understated – they have the potential to dispose of a case (although not on its merits) or at least send it to a forum that can adjudicate in the fairest fashion. For all of these reasons, jurisdiction motions can promote proportionality.

But given the criticism of the law of jurisdiction, it is worth concretizing what are the access to justice implications of jurisdiction motions. If the law is unclear, it is easy to imagine how a tactical motion could be brought, in an effort to “wear out” the plaintiff, causing delay and expense.

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<sup>36</sup> Such evidence is usually necessary on a jurisdiction motion. As LeBel J notes at para 72 of *Van Breda*, *supra* note 6, jurisdiction motion decisions:

must be made on the basis of the pleadings, the affidavits of the parties and the documents in the record before the judge, which might include expert reports or opinions about the state of foreign law and the organization of and procedure in foreign courts.

<sup>37</sup> See, e.g., *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, [2003] 1 SCR 450 at para 20, per Bastarache J. This issue is discussed in depth in Geneviève Saumier & Jeffrey Bagg, “Forum Selection Clauses before Canadian Courts: A Tale of Two (or Three?) Solitudes” (2013) 46:2 UBC L Rev 439.

Such a motion would be antithetical to the spirit of *Hryniak* and appears to have been the motion judge’s concern in *Stuart Budd*. It is also worth considering the costs of successful jurisdiction motions to defendants, if the state of the law of jurisdiction means a defendant needs to wage an expensive jurisdiction motion to be appropriately relieved of defending the claim in Ontario.

## II) METHODOLOGY

Throughout September and October 2016, the databases of QuickLaw and Westlaw were searched for jurisdiction motions decided in Ontario from January 1, 2010 through December 31, 2015.<sup>38</sup> Results were checked in January 2017, though 2016 motions were not added, as the appellate process for such motions was not yet complete. All cases were included where there was adversarial argument over whether the Ontario Superior Court (including the Small Claims Court) had jurisdiction over the action, or whether the Ontario Superior Court was *forum non conveniens*.

### A. Deciding What to Include

Family law decisions were not included given the widespread acknowledgement that jurisdiction rules in the family law context raise fundamentally different considerations than those raised in the civil and commercial context.<sup>39</sup> Moreover, the different procedural rules between family law and civil litigation makes comparisons between the two an inexact science at best.<sup>40</sup>

Also excluded were any cases where a plaintiff or applicant was merely seeking to enforce a foreign judgment. Though enforcement is another quintessential aspect of private international

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<sup>38</sup> The search terms were:

“forum conv!” OR (jurisdiction AND “Van Breda”) OR “forum non” OR “Rule 17!”

“Jurisdiction” required a qualifier as it otherwise led to far too many false positives – more than 3,000 results per year. Given that *Van Breda* was decided by the Court of Appeal in 2010, it appeared the best choice.

<sup>39</sup> See, e.g., Martha Bailey, “Judicial Jurisdiction Rules for Family Law Matters” (2016) (Paper presented to the Symposium, *The CJPTA: A Decade of Progress*, Toronto, Ontario, 21 October 2016) [unpublished].

<sup>40</sup> Family law cases are not governed by the *Rules*, *supra* note 31, but by the *Family Law Rules*, O Reg 99/114.

law, it is widely acknowledged that this issue raises different considerations than whether a court has jurisdiction to litigate the merits of the dispute.<sup>41</sup>

Similarly omitted were cases where the parties did not make submissions on jurisdiction but the court felt obliged to satisfy itself of its jurisdiction,<sup>42</sup> no jurisdiction was found due to failure to comply with the *Proceedings Against the Crown Act* (which are not conflicts of laws cases in any event),<sup>43</sup> if there was a dispute over service *ex juris* but not jurisdiction,<sup>44</sup> and/or if jurisdiction issues were not resolved because another issue arose preventing that.<sup>45</sup> The rationale for excluding these cases in this analysis is simple – the goal is to isolate the types of incidents seen in *Van Breda* and *Stuart Budd* – adversarial disputes over whether the court had jurisdiction to litigate a matter, and the resulting increased expense in determining whether the plaintiff should be given access to the courts or the defendant relieved from the obligation to defend in the forum.

However, cases where a party made submissions either that Ontario did not have jurisdiction, and/or whether it was *forum non conveniens* were included, even if a formal notice of motion was not served and filed.<sup>46</sup> The failure of the defendant to bring a formal motion would appear to be a “technicality” – such cases raise the concerns sought to be analyzed. Also included were cases where it was argued either that Ontario did not have jurisdiction, and/or that it was *forum non*

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<sup>41</sup> Justice Gascon discusses this in *Chevron Corp v Yaiguaje*, 2015 SCC 42, [2015] 3 SCR 69 [“*Chevron*”]. This is also discussed in commentary on *Chevron*, such as Sarah Whitmore & Vitali Berditchevski, “Jurisdiction to Enforce Foreign Judgments in Canada Clarified by Supreme Court of Canada” (2016) 31(2) *Banking & Finance L Rev* 411.

<sup>42</sup> See, e.g., *Grillo Estate v Grillo*, 2015 ONSC 1352, 127 OR (3d) 707 (SCJ); *Electro Sonic Inc (Re)*, 2014 ONSC 942, 15 CBR (6th) 256 (SCJ).

<sup>43</sup> *Babington-Browne v Canada (Attorney General)*, 2015 ONSC 6102, [2015] OJ No 5353 (SCJ).

<sup>44</sup> *Thin v Chinh*, 2015 ONSC 3406, 11 ETR (4th) 177 (SCJ). This is a distinct issue from whether a court has jurisdiction, which is an issue of local procedural law: see, e.g., Pitel 2018, *supra* note 12.

<sup>45</sup> *Moneris Solutions Corp v Groupe Germain Inc*, 2014 ONSC 6102, 34 BLR (5th) 161 (SCJ).

<sup>46</sup> See, e.g., *Toronto (City) v Tseng*, 2011 ONSC 4594, 87 MPLR (4th) 220 (Master) [“*Tseng*”]; *Umutomi c Safari*, 2012 CSON 6962, [2012] OJ No 5822; *Ghana Gold Corp (Re)*, 2013 ONSC 3284, 3 CBR (6th) 220 (SCJ) [“*Ghana Gold*”]; *Bearsfield Developments Inc v McNabb*, 2013 ONSC 7063, [2013] OJ No 5141 (SCJ).

*conveniens* – both arguments are almost always raised together, and *Van Breda* and *Stuart Budd* exemplify both issues.

## **B. Variables**

As noted above, the precise meaning of the phrase “access to justice” can be broad or narrow depending on the circumstances.<sup>47</sup> Within the context of adversarial litigation – which is constitutionally destined to remain part of Canada’s justice system<sup>48</sup> – it mandates, at the very least, that civil litigation maximize simplicity and speed, and minimize financial cost, in the resolution of civil actions on their merits.<sup>49</sup> As such, this chapter sought to analyze how jurisdiction motions “cost” parties, in terms of time and money, and how they complicated parties’ private dealings. After isolating the cases using the aforementioned criteria, the following were analyzed:

- how many motions have been brought;
- how many motions were successful;
- whether the motions involved a forum selection or choice of law clause, and how those cases are decided;
- whether the cases were appealed, and what the results of those appeals were;
- what are the costs awards associated with the foregoing; and
- whether the case was a (putative) class proceeding.

The relevance of all of these factors is explained below.

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<sup>47</sup> See, e.g., Macdonald, *supra* note 29.

<sup>48</sup> Macdonald, *ibid* at 32; Paul Vayda, “Chipping away at Cost Barriers: A Comment on the Supreme Court of Canada’s *Trial Lawyers* Decision” (2015) 36 WRLSI 207 at 211-212, analyzing the decision of the Supreme Court of Canada in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 39, [2014] 3 SCR 31, which held that access to the courts is, at least in some circumstances, a constitutional right.

<sup>49</sup> See, e.g., Farrow 2014, *supra* note 28 at 978-979.

Two actions, *David S Laflamme Construction Inc v Canada (Attorney General)*<sup>50</sup> and *Moisan v Antonio Sanita Land Development Ltd*,<sup>51</sup> had jurisdiction motions brought and argued, only to have the cases dismissed on other grounds. They are accordingly included in terms of “number of cases brought” and for the purposes of calculating average delays and costs awards, as they shed light on that issue. But they shed no light on success rates or appeal rates, so only 145 cases are included in the analysis on those points.

In order to learn how long it took these cases to proceed through the court system, I emailed counsel on each case in an attempt to learn when the originating document was served. I would first email the plaintiffs’ lawyers, but, if this was not possible, the defendants’ lawyers. However, in the following situations email was directed to the defendants’ lawyers:

- the plaintiff was a self-represented litigant;<sup>52</sup>
- the jurisdiction motion was brought in relation to a third party claim commenced by the defendant,<sup>53</sup> and/or
- it was not possible to contact the plaintiff’s lawyer because he or she:
  - could not be found;<sup>54</sup>
  - had been suspended by the Law Society of Upper Canada;<sup>55</sup> and/or
  - had died.<sup>56</sup>

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<sup>50</sup> 2014 ONSC 1379, 31 CLR (4th) 285 (SCJ) [“*Laflamme*”].

<sup>51</sup> 2010 ONSC 3339, [2010] OJ No 3220 (SCJ).

<sup>52</sup> E.g., *Canadian Imperial Bank of Commerce v Glasford*, 2015 ONSC 197, [2015] OJ No 87 (SCJ), aff’d 2015 ONCA 523, [2015] OJ No 3622, leave to appeal denied, [2015] SCCA No 40, 2016 CarswellOnt 16122 [“*Glasford*”].

<sup>53</sup> E.g., *CP Ships Ltd v Icecorp Logistics Inc*, 2015 ONSC 6243, [2015] OJ No 5319 (Master) [“*CP Ships*”].

<sup>54</sup> E.g., *West Van Inc v Daisley*, 2013 ONSC 1988, [2013] OJ No 1649 (SCJ), aff’d 2014 ONCA 232, 119 OR (3d) 481, leave to appeal denied, [2014] SCCA No 236, 2014 CarswellOnt 12119 [“*West Van*”].

<sup>55</sup> E.g., *1756670 Ontario Inc v Roxboro Excavation Inc*, 2011 ONSC 7289, [2011] OJ No 5911 (SCJ).

<sup>56</sup> E.g., *Zhang v Hua Hai Li Steel Pipe Co*, 2012 ONSC 4379, [2012] OJ No 3704 (SCJ) [“*Zhang*”]. This was actually an instance where the plaintiff’s lawyer could not be located, and the defendant’s lawyer had died.

Date of service, as opposed to issuance, of the originating document was used given that any delay between issuance and service cannot fairly be attributed to the jurisdiction motion. Lawyers on 73 cases (one short of half) responded, 65 with the requested information – the other eight indicated they did not have (easy) access to the information.<sup>57</sup> Many of the lawyers added comments about the nature of the proceeding. While one should be reluctant to draw normative lessons from these anecdotal comments, some are integrated below when they complement what the data already appears to show.

### C. Limitations of Methodology

It must be recognized that QuickLaw and Westlaw do not report every case decided in Ontario, though they report the vast majority between them.<sup>58</sup> As such, they are frequently used in quantitative analyses of case law.<sup>59</sup> Moreover, QuickLaw and Westlaw do not reflect motions and/or appeals that were threatened, or even commenced, but were resolved. Two such cases were found – one where parties from a withdrawn motion could not agree on costs<sup>60</sup> and another where a jurisdictional dispute was essentially rendered moot by certain defendants being placed into receivership.<sup>61</sup> It would be very difficult if not impossible to quantify occurrences such as these.

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<sup>57</sup> *Sun Life Assurance Co of Canada v Yellow Pages Group Inc*, 2010 ONSC 2780, [2010] OJ No 2608 (SCJ); *Moore v Vancouver Fraser Port Authority*, 2011 ONSC 3692, [2011] OJ No 2994 (SCJ); *Dempsey v Staples*, 2011 ONSC 1709, 12 MVR (6th) 30 (SCJ) [“Dempsey”]; *Sullivan*, *supra* note 27; *Elfarnawani v International Olympic Committee*, 2011 ONSC 6784, 20 CPC (7th) 412 (SCJ); *Cannon v Funds for Canada Foundation*, 2010 ONSC 4517, [2010] OJ No 3486 (SCJ) [“Cannon”]; *Di Stefano v Energy Automated Systems Inc*, 2010 ONSC 493, 68 BLR (4th) 209 (SCJ) [“Di Stefano”]; *Lazer-Tech v Dejerrey*, 2010 ONSC 1662, [2010] OJ No 1080 (SCJ).

<sup>58</sup> *Ibrahim v Robinson*, 2015 ONCA 21, 124 OR (3d) 106 [“Ibrahim”] is an appeal of an unreported trial decision.

<sup>59</sup> See, e.g., Craig E Jones & Micah B Rankin, “Justice as a Rounding Error? Evidence of Subconscious Bias in Second-Degree Murder Sentences in Canada” (2014) 52:1 Osgoode Hall LJ 109 at 121, fn 58.

<sup>60</sup> *Normerica Inc v Echo Global Logistics Inc*, 2011 ONSC 6827, [2011] OJ No 5214 (SCJ) [“Normerica”] is an instance where the motion was withdrawn but the parties could not resolve costs. Christopher Henderson, lawyer for the plaintiff, informs me that the defendant brought but withdrew an appeal in *Tseng*, *supra* note 46.

<sup>61</sup> Described in *Fraser v 4358376 Canada Inc (cob Itravel 2000 and Travelzest PLC)*, 2014 ONCA 553, 324 OAC 68.

Costs awards do not reflect all costs incurred (indeed, typically about half of the actual costs<sup>62</sup>). Some cases also awarded little or no costs for reasons such as the motion's mixed success,<sup>63</sup> the case's having raised a novel point of law,<sup>64</sup> or the party's agreement.<sup>65</sup> Moreover, as discussed below, not all cases have reported costs orders, usually due to an encouragement from the judge or master to settle the issue of costs. As such, extrapolation from an imperfect (if sizable) sample size is necessary. Regarding delay, results are extrapolated from an imperfect if sizable sample size, as delay was only quantifiable based on a sample of about 44% of cases.

There are inherent limitations of a quantitative analysis of case law. Most notably, such an analysis sheds minimal if any light on the normative values underlying the current state of the law of jurisdiction<sup>66</sup> or the significance of the expense or delay on particular litigants. It can, however, provide some indication about what the literal costs of jurisdiction motions are, and whether the decisions in *Van Breda* and *Hryniak* have had any effects on this. This information thus contributes to the literature in conflicts of laws, civil procedure, and access to justice, concretizing assumptions underlying the factors that policymakers and judges should consider in developing the law of jurisdiction.

Finally, it should be noted that the intersection of access to justice and the law of jurisdiction can sometimes be found in what cannot be seen in case law rather than what can be seen: for example, a case may not be brought due to uncertainty in the law or a party assessing that Ontario is closed to it as a forum after *Van Breda*. This will be returned to below.

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<sup>62</sup> See, e.g., P Scott Horne, "The Privatization of Justice in Québec's Draft Bill to Enact the New Code of Civil Procedure: A Critical Evaluation" (2013) 18 Appeal 55 at 61.

<sup>63</sup> E.g., *Sullivan*, *supra* note 27.

<sup>64</sup> E.g., *ibid*; *Frank v Farlie Turner & Co, LLC*, 2012 ONSC 6715, [2012] OJ No 5573 (SCJ) ["*Frank*"].

<sup>65</sup> E.g., *Shah v LG Chem, Ltd*, 2015 ONSC 2628, 125 OR (3d) 773 (SCJ) ["*Shah*"].

<sup>66</sup> See, e.g., Joshua B Fischman, "Reuniting 'Ought' and 'Is' in Empirical Legal Scholarship" (2013) 162(1) U Pa Law Rev 117.



### III) RESULTS – AND ACCESS TO JUSTICE IMPLICATIONS

#### A. Number of Motions

147 jurisdiction motions decided in Ontario between 2010 and 2015 were analyzed – 33 in 2010, 23 in 2011, 26 in 2012, 25 in 2013, 18 in 2014, and 22 in 2015. This leads to both an average and a median of 24 cases per year. All cases are listed in Appendix A, sorted by year that the motion was decided. Every case is treated as part of the “year” in which the motion was decided, even if the appeal was decided subsequently.

There was a general downwards trend in decisions per year. Perhaps this can be attributed to a particularly high number of cases in 2010, a time period in which the Court of Appeal was addressing *Van Breda*, and before the Supreme Court had weighed in on this issue. It could also be an indication that the spirit of *Hryniak* and the 2010 amendments to the *Rules* are being heeded by members of the bar, who may have become more reluctant to bring inappropriate interlocutory motions. More likely, this appears to reflect a small, but genuine, decrease in the number of jurisdiction motions brought in the aftermath of *Van Breda*. This would appear to be a positive development, suggesting that the Supreme Court’s goal in *Van Breda* to ensure order and predictability has been somewhat achieved. A related explanation would be that parties are “not even trying” to bring cases that could have perhaps passed the amorphous *Muscutt* framework, but do not fall within one of *Van Breda*’s presumptive connecting factors. This is also a positive development in terms of saving parties time and expense. But the “trade-off” would be denying plaintiffs’ ability to use the Ontario courts when it would be appropriate for them to do so. In other words, if the law is under-inclusive, it may create an insurmountable hurdle for plaintiffs, with the

result being a chilling effect on cases being brought.<sup>67</sup> This “balancing of predictability and substantive fairness” is a common theme in conflicts of laws, as evidenced by the commentary in the aftermath of *Van Breda*.

Isolating the cause of the apparent decline in the number of jurisdiction motions throughout in the 2010s with scientific precision is not possible. However, it is also worth noting that the numbers have not declined dramatically. More than twenty jurisdiction motions have been decided each year analyzed except 2014.

### **B. Ultimate Success Rates of Motions**

On average about half of motions brought were ultimately (after a first appeal, if there was one) successful – 50% in 2010, 57% in 2011, 38% in 2012, 44% in 2013, 53% in 2014, and 64% in 2015. The average of the yearly rates is 52%, with the median being 57%. The overall average is 51%, representing 74 of 145 decisions. Each case is listed in Appendix A. The relatively higher rates of success in the last two years could be a reflection of *Van Breda*’s aforementioned “closing” of circumstances in which jurisdiction can be found. But the dip in success rates immediately post-*Van Breda* (2012 and 2013 were the only years with a less than 50% success rate) could indicate that the variation between years is better explained by a simple variation in the characteristics of the cases. More hopefully, the higher success rates in recent years could be an indication that lawyers post-*Hryniak* are not bringing motions unrelated to the merits of the case that are unlikely to succeed.

A benefit of high rates of success is that parties are not wasting time and expense on fruitless motions that do not address the merits of a case. Moreover, the parties are quickly redirected to a

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<sup>67</sup> Brandon Kain, Elder C Marques & Byron Shaw, “Developments in Private International Law: The 2011-2012 Term – The Unfinished Project of the *Van Breda* Trilogy” (2012) 59 SCLR (2d) 277 [“Kain, *et al*”] at 286.

more appropriate forum. As discussed above, this indicates principles of fairness and proportionality have been heeded. But as noted elsewhere in this chapter, and authors in this area have written before, there is another obvious access to justice concern surrounding jurisdiction motions – namely, if jurisdiction is not found, it may practically end a plaintiff’s chance of achieving justice, or will otherwise drastically increase her costs.

In any event, the fact is that on average about half of jurisdiction motions have been successful. This suggests that, if brought to a hearing, jurisdiction motions are tending to raise a serious issue. That this is happening this frequently could be a consequence of the uncertain state of the law of jurisdiction, leading either the plaintiff to believe they have a reasonable basis that the claim can be tried in Ontario, or the defendant to believe that there is a reasonable basis to challenge jurisdiction. Another view would be that, following a new leading Supreme Court decision such as *Van Breda*, one would expect a brief rise in cases to establish the law. That fact that about two dozen cases a year remain suggests uncertainties persist. In any case, it is evident that uncertainty in the law has consequences.

### **C. Appellate Consequences**

A decision on a jurisdiction motion “finally decides” an Ontario court’s jurisdiction over a matter. Appeals of Superior Court decisions accordingly proceed, as of right, to the Court of Appeal instead of the Divisional Court.<sup>68</sup> An exception exists when the original decision was made by a master – in that case, the appeal proceeds, as of right, to the Divisional Court.<sup>69</sup> About 30%

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<sup>68</sup> *Courts of Justice Act*, RSO 1990, c C43 [“CJA”], s 6(1)(b). In *MJ Jones Inc v Kingsway General Insurance Co* (2003), 68 OR (3d) 131 (CA), Sharpe JA explained why, post-*Morguard*, an appeal from an order dismissing a motion for an order that Ontario has no jurisdiction or, alternatively, is *forum non conveniens*, is a final order for this purpose. Practice had been different pre-*Morguard*.

<sup>69</sup> CJA, *ibid*, s 19(1)(c). The only examples of this in this sample are *Harrowand SL v Dewind Turbines Ltd*, 2014 ONSC 2014, [2014] OJ No 2022 (Master), rev’d 2014 CarswellOnt 19177 (Div Ct) [“*Harrowand*”] and *Machado v Catalyst Capital Group Inc*, 2015 ONSC 6313, 27 CCEL (4th) 116 (Master), aff’d 2016 ONSC 6719, 34 CCEL (4th) 274 (Div Ct) [“*Machado*”].

of jurisdiction motion decisions were appealed in the 2010-2015 period – 34% in 2010, 26% in 2011, 27% in 2012, 32% in 2013, 13% in 2014, and 41% in 2015. The median and average rates of appeal are therefore 29.45%, though the overall average is 30.3% (44 of 145 decisions). These appeals are also chronicled on a case-by-case basis in Appendix A.

The number of appeals may seem high.<sup>70</sup> But there are several characteristics of jurisdiction motions that make an appeal particularly likely and, arguably, particularly appropriate:

- there is an appeal as of right;
- the facts that form the basis of the jurisdiction motion are frequently not contestable and therefore not within the particular expertise of the motion judge<sup>71</sup>;
- the standard of review for the determination of jurisdiction is generally correctness<sup>72</sup> (though a decision on whether to stay a case on grounds of *forum non conveniens* is discretionary, and thus not easily reviewed<sup>73</sup>);
- the issues decided by the motion are exceptionally important;<sup>74</sup> and
- the uncertainty surrounding the law of jurisdiction (discussed elsewhere throughout this chapter) may make an appeal not obviously futile, and thus more attractive.

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<sup>70</sup> The Divisional Court and Court of Appeal have 1,503 reported 2016 decisions, between them, based on a January 11, 2017 QuickLaw search. The Superior Court had 4,388, the Small Claims Court has 125, and the Provincial Court had 845. Crudely assuming that the former two courts are entirely separate appeals, while the former three are entirely separate trials, appellate courts have just over 28% the number of cases, akin to the jurisdiction motion appeal rate. But it seems highly likely the trial courts produce less reported decisions, meaning appellate courts likely have less of a percentage of the overall numbers of cases.

<sup>71</sup> Osborn CJ suggests this will frequently be the case in *Newfoundland and Labrador (Attorney General) v Rothmans Inc*, 2013 NLTD(G) 180, 345 Nfld & PEIR 40 at para 181.

<sup>72</sup> *Black v Breeden*, 2010 ONCA 547, 102 OR (3d) 748 [“*Black*”] at para 19, per Karakatsanis JA (as she was then). This may not apply insofar as the motion judge made findings of fact that are determinative of the legal issues: see *Trillium Motor World Ltd v General Motors of Canada Ltd*, 2014 ONCA 497, 120 OR (3d) 598 [“*Trillium*”] at para 24, per Lauwers JA. A motion judge’s determination on a *forum non conveniens* question, however, is entitled to deference: *Black* at para 77; *Trillium* at para 88.

<sup>73</sup> *Van Breda*, *supra* note 6 at para 112.

<sup>74</sup> See Part I.B above.

Of the 44 appeals, 24 were brought by defendants compared to 20 brought by plaintiffs. This represents defendants appealing 24 of 60 originally unsuccessful motions (40%) while plaintiffs appealed 20 of 65 originally successful motions (30.7%). The greater likelihood of the defendants appealing could reveal the likely tendency of defendants on jurisdiction motions to have greater financial resources.<sup>75</sup> But it could also reflect *Van Breda* seemingly restricting the ability of common law Canadian courts to assume jurisdiction. Defendants could thus form the opinion that *Van Breda* gave an appeal a greater likelihood of success.

Only ten appellate decisions overturned the motion judge – four in 2010, zero in 2011, two in 2012, three in 2013, one in 2014, and zero in 2015. This leaves an “appeal success rate” of 22.7%. This excludes *Stuart Budd*, as the reason for the first appeal’s success was unrelated to the actual question of jurisdiction, instead concentrating on reasonable apprehension of bias. As discussed in more detail below, the motion ultimately failed.

The successful appeals were equally likely to benefit the plaintiff and the defendant. Five successful appeals benefitted the plaintiff – three in 2010, and two in 2012. Five successful appeals also benefitted the defendant – one in 2010, three in 2013 (one of which was the allowing of a cross-appeal after the plaintiff appealed a motion that was originally only partially successful<sup>76</sup>), and one in 2014. Given that one defendant victory was the result of a cross-appeal, the *rates* of success were better for the plaintiffs on their own appeals – 4 of 24 (16.7%) for defendants, compared to 5 of 20 (25%) for plaintiffs. The difference correlates with the comparative number of appeals brought by plaintiffs and defendants. The decrease in number of successful appeals over the years could indicate that the law of jurisdiction is becoming more settled post-*Van Breda*. That

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<sup>75</sup> See, e.g., Vaughan Black, “Conditional *Forum Non Conveniens* in Canadian Courts” (2013) 39 Queen’s LJ 41 at 71.

<sup>76</sup> *Prince v ACE Aviation Holdings Inc*, 2014 ONCA 285, 120 OR (3d) 140, leave to appeal denied, [2014] SCCA No 273, 2014 CarswellOnt 14806 [“*Prince*”].

the more recent successful appeals have benefitted the defendants could also reflect the “closing” of jurisdiction post-*Van Breda*. But the numbers are small enough that we could instead be witnessing statistical anomalies on a year-by-year basis.

There were 13 unsuccessful applications for leave to appeal to the Supreme Court of Canada.<sup>77</sup> One leave application was granted but the appeal was not heard until December 2017 and decided in June 2018.<sup>78</sup> The only time the Supreme Court granted leave to hear a case, the appeal was allowed.<sup>79</sup> Supreme Court practice thus has little influence on the “success rates” of appeals, though it is worth observing that over a third of the losing parties on appeal (15 of 44) thought it was at least worthwhile seeking leave to appeal to Canada’s highest court.

What should be made of these appellate tendencies and success rates from an access to justice perspective? The relatively high rates of appeal is not encouraging as it leads to significant costs and delay, as discussed below. Having said that, the relatively low success rates – success rates that are decreasing in recent years – could be evidence that *Van Breda* has gone some way to clarifying the law of jurisdiction.<sup>80</sup> We may just be at the beginning, therefore, of seeing whether *Van Breda* is achieving its goal in providing clarity to the law of jurisdiction. Whether *Hryniak*

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<sup>77</sup> *Forsythe v Westfall*, [2015] SCCA No 410, 2016 CarswellOnt 3759; *Glasford*, *supra* note 52; *Prince*, *ibid*; *Kaynes v BP plc*, [2014] SCCA No 452, 2015 CarswellOnt 4021; *West Van*, *supra* note 54; *Ontario v Rothmans Inc*, [2013] SCCA No 327, 2013 CarswellOnt 17913; *Central Sun Mining Inc v Vector Engineering Inc*, [2013] SCCA No 475, 2014 CarswellOnt 3070; *Aldo Group Inc v Moneris Solutions Corp*, [2014] SCCA No 31, 2014 CarswellOnt 5661 [“Aldo Group”]; *Amtim Capital Inc v Appliance Recycling Centers of America*, [2014] SCCA No 96, 2014 CarswellOnt 7501; *Abdula v Canadian Solar Inc*, [2012] SCCA No 246, 2012 CarswellOnt 14887; *Bond v Brookfield Asset Managements Inc*, [2012] SCCA No 278, 2012 CarswellOnt 14301; *Expedition Helicopters Inc v Honeywell Inc*, [2010] SCCA No 258, 2010 CarswellOnt 8911; *Tucows.com Co v Lojas Renner SA*, [2011] SCCA No 450, 2012 CarswellOnt 6413. Supreme Court leave applications are not included in the charts in Appendix A except for *Trillium*, *supra* note 72, given that they were all refused except for *Trillium*.

<sup>78</sup> *Haaretz.com v Goldhar*, 2018 SCC 28, [2018] 2 SCR 3. Given that this chapter was already published by the time that this case was decided, the numbers were not revised, but it would only increase the ultimate success rates of the jurisdiction motions.

<sup>79</sup> *Trillium*, *supra* note 72.

<sup>80</sup> *Kain, et al*, *supra* note 67 discuss “clarification” as the principal goal of *Van Breda*, *supra* note 6, but recognized time would be necessary to see if that goal would be achieved.

has had any influence is doubtful – the overall rates of appeal do not seem to be changing and appeals in recent years have, if anything, been less successful.

#### **D. Costs Awards**

Seventy-five of the 147 jurisdiction motions analyzed had corresponding costs orders. They are listed in Appendix B. In five additional cases, no costs were awarded, due to reasons discussed above.<sup>81</sup> These five cases were not included for the purpose of calculating numbers of costs awards, and average and median costs orders – costs were obviously incurred and including a “zero” warps the average and median statistics. There were also a number of cases with no reported costs. This is likely because it is common for judges to frequently decide a motion, and then encourage the parties to settle the issue of costs.<sup>82</sup>

The overall average costs award for a motion is \$31,940 – \$23,261 in 2010, \$36,295 in 2011, \$59,941 in 2012, \$29,003 in 2013, \$21,746 in 2014, and \$15,592 in 2015. As is obviously apparent, 2012 is an “outlier”. This is because of an enormous \$575,520 costs order in *Ontario v Rothmans, Inc.*<sup>83</sup> This appears to reflect the heightened costs and delay endemic to tobacco litigation.<sup>84</sup> There were also nine decisions in cases<sup>85</sup> brought under the *Class Proceedings Act*.<sup>86</sup> The average cost order in the four class action motions that had reported cost orders is \$69,026.44. Due to the large nature of class actions, they may not be truly indicative of “typical” costs orders. When these four

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<sup>81</sup> *Sullivan*, *supra* note 27; *Frank*, *supra* note 64; *Shah*, *supra* note 65; *Forsythe v Westfall*, 2015 ONSC 1725, [2015] OJ No 1266 (SCJ); *Laflamme*, *supra* note 50.

<sup>82</sup> See, e.g., *Brisben v Lunev*, 2010 ONSC 1840, [2010] OJ No 3216 (SCJ) at para 70.

<sup>83</sup> 2012 ONSC 1804, 28 CPC (7th) 103 (SCJ) [“*Rothmans*”].

<sup>84</sup> See, e.g., Jacob J Shelley, “The Crown’s Right of Recovery Act” (2010) 18(3) Health L Rev 15.

<sup>85</sup> *Cannon*, *supra* note 57; *McKenna v Gammon Gold Inc*, 2010 ONSC 1591, 88 CPC (6th) 27 (SCJ); *Bond v Brookfield Asset Managements Inc*, 2011 ONSC 3761, [2011] OJ No 2760 (SCJ); *Frank*, *supra* note 64; *Trillium*, *supra* note 72; *Prince*, *supra* note 76; *Kaynes v BP plc*, 2013 ONSC 5802, 117 OR (3d) 685 (SCJ), var’d 2014 ONCA 580, 122 OR (3d) 162, leave to appeal denied, [2014] SCCA No 452, 2015 CarswellOnt 4021; *Shah*, *supra* note 65; *Airia Brands Inc v Air Canada*, 2015 ONSC 5332, 126 OR (3d) 756 (SCJ) [“*Air Canada*”].

<sup>86</sup> *Class Proceedings Act*, 1992, SO 1992, c 6.

class proceedings, and the *Rothmans* case, are removed from the 75 cases with costs orders, the average costs order in the remaining 70 cases is \$22,055. If the three substantial indemnity awards are also removed,<sup>87</sup> the average moves down only slightly more to \$21,556.

The overall median costs award in the 75 cases is \$15,000. The median is \$10,125 in 2010, \$15,719.50 in 2011, \$14,595 in 2012, \$20,500 in 2013, \$13,000 in 2014, and \$10,149.50 in 2015. If one removes *Rothmans* and the four class actions, the overall median becomes \$14,129. Removing the three substantial indemnity costs decision leaves the median at \$13,136.65.

Forty appeals had costs orders. The overall average appellate costs order was \$21,573 – \$14,636 for appeals of 2010 decisions, \$13,715.80 for 2011, \$64,267 for 2012, \$22,714 for 2013, \$13,125 for 2014, and \$11,313 for 2015. Again, 2012 is an outlier due to a \$237,332.50 costs award in *Rothmans*.<sup>88</sup> If *Rothmans*, and five class action appellate decisions with reported appellate costs awards, are removed from the average, it is reduced to \$13,731. These numbers all exclude the first *Stuart Budd* appeal, as that appeal was not fundamentally about the law of jurisdiction.

The median costs award from the forty appeal costs decisions is \$15,000. This does not change when one removes *Rothmans* and the five class actions. The median is \$15,000 in 2010, 2011, and 2013, \$25,000 in 2012, \$13,750 in 2014, and \$8,750 in 2015.

Excluding *Rothmans* and the class actions, the average costs awards of a motion and appeal (added together) are therefore \$35,484. The medians added together, excluding *Rothmans* and the class actions, are \$29,129. This moves down by just over than \$500 when the substantial indemnity costs decisions are also removed. It is worth remembering that costs awards (except in the cases

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<sup>87</sup> *Merill Lynch Canada Inc v Mineralogy Canada Acquisition Corp Pty Ltd*, 2011 ONSC 3032, 2011 CarswellOnt 3583 (SCJ); *Manson v Canetic Resources Ltd*, 2014 ONSC 1480, [2014] OJ No 1037 (SCJ) [“*Manson*”]; *Petrook v Natuzzi Americas, Inc*, 2013 ONSC 5855, [2013] OJ No 4376 (SCJ).

<sup>88</sup> 2013 ONCA 642, 118 OR (3d) 213.



of substantial indemnity costs) are typically about half of actual costs incurred.<sup>89</sup> As such, each party in a non-class action can reasonably expect to spend approximately \$30,000-\$45,000 on a jurisdiction motion, and \$60,000-\$75,000 if there is an appeal. This is a very substantial amount to spend on a procedure that does not address the merits of a dispute – though occasionally necessary and/or proportionate, this procedure also comes with significant financial expense.

### **E. Delay**

As noted above, 65 lawyers reported the date of the service of the statement of claim. If there were multiple dates of service due to multiple defendants, the latest date of service was chosen to calculate delay.<sup>90</sup> Some lawyers could not pinpoint the exact date of service but were able to give a range of a few days or weeks in which service would have been effected. Given that delay is being calculated in months, these cases were included with an estimate. Appendix C indicates the (latest) dates of service of the statements of claim and the dates of resolution of the motion (whether on the motion itself, an applicable appeal, denial of Supreme Court leave application, reconsideration, or an appeal from reconsideration). From there, delay would be calculated in months, rounding as appropriate; I erred on the side of “rounding down” due to a wish to not overstate the average delay. Given this, and given that certain dates of service are estimates, delay could not be calculated with scientific precision. But this does not mean that certain trends are not apparent. One case, *Airia Brands Inc v Air Canada*,<sup>91</sup> involved a delay of eight years and eleven months from the last date of service of the statement of claim to the resolution of the motion –

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<sup>89</sup> *Supra* note 62.

<sup>90</sup> *E.g.*, dates of service on different defendants in *Central Sun Mining Inc v Vector Engineering Inc*, 2012 ONSC 7331, 18 CLR (4th) 189 (SCJ) were between August 31, 2009 and May 10, 2010.

<sup>91</sup> *Air Canada*, *supra* note 85. The last date of service of statement of claim was September 21, 2006. This is a 107 month delay.

nearly twice as long the next longest delay.<sup>92</sup> Class counsel wrote that “this was not your typical jurisdiction motion - more of a contest to class definition”.<sup>93</sup> As a result of the very atypical nature of this case, the remaining 64 cases are primarily used to calculate delay.

The average delay from service of the statement of claim to resolution of the motion was 17.7 months in cases that did not involve an appeal. However, this decreases to 15.8 months when *Air Canada* is excluded. Moreover, the median was 12 months. Apart from *Air Canada*, four cases involved delays of over forty months. The parties in these cases may well have been waiting for resolution of *Van Breda* before proceeding with the motion. One lawyer explicitly wrote as much.<sup>94</sup> When the five longest delays are removed from the average, the average delay is 12.8 months. Excluding *Air Canada*, the average per year was 14.75 months in 2010 (of 4 samples), 13.3 months in 2011 (of 7 samples), 16.1 months in 2012 (of 9 samples), 17.5 months in 2013 (of 11 samples), 18.9 months in 2014 (of 9 samples), and 11.9 months in 2015 (of 7 samples).

In cases with appeals, but no leave application to the Supreme Court of Canada, the average delay from service of the statement of claim to resolution of the motion is 24.8 months. The median is 24 months. In the five cases with leave applications to the Supreme Court of Canada, the average time to resolution of the motion (one of the cases being returned to the Superior Court) is 30.6 months, with the median being 29 months. The average delay in all 65 cases is about 22.3 months. Excluding *Air Canada*, the average is just over 21 months, with the median being 16 months.

Ultimately, it is clear that jurisdiction motions cause very significant delay. The above averages may be slightly higher than a typical litigant would experience today due to a few “outliers” in the aftermath of *Van Breda*. Even so, a party facing a jurisdiction motion can

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<sup>92</sup> *Haufler (Litigation Guardian of) v Hotel Riu Palace*, 2013 ONSC 6044, 117 OR (3d) 275 (SCJ) [“*Haufler*”] had a delay of 58 months, 49 months less than the delay in *Air Canada*, *ibid*.

<sup>93</sup> Charles M Wright via email dated December 18, 2016.

<sup>94</sup> David Sloan, counsel on *Haufler*, *supra* note 92.

realistically expect a delay of over a year if there is no appeal. If there is an appeal (present in about 30% of the cases), the total delay is likely to be over two years. And in the case of a Supreme Court leave application (the case in about 10% of total cases), the total delay is about 30 months. This is all before the merits of a case are considered. Moreover, despite a decrease in delay in 2015, the overall length of delay appeared to increase over the course of the decade, suggesting that *Hryniak* is not having effects in this area of practice.

## F. Forum Selection Clauses

Both the Supreme Court of Canada and notable commentators have recognized that forum selections should be encouraged to allow parties to order their contractual affairs through selecting, in advance, the forum to adjudicate potential disputes.<sup>95</sup> Twelve of the 147 cases analyzed used forum selection clauses to grant a jurisdiction motion.<sup>96</sup> No cases explicitly declined to enforce an exclusive jurisdiction clause, though several cases held choice of forum clauses to be inapplicable<sup>97</sup> and one case declined to use a non-exclusive forum selection clause as a reason to decline jurisdiction.<sup>98</sup> There were also three cases involving defendants bringing a

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<sup>95</sup> *Supra* note 37.

<sup>96</sup> *Silveira*, *supra* note 27; *CP Ships*, *supra* note 53; *Szecsodi v MGM Resorts International*, 2014 ONSC 1323, [2014] OJ No 946 (SCJ); *Kavanagh v Magna Exteriors and Interiors Corp (cob Servicios Decoplas)*, 2014 ONSC 4540, [2014] OJ No 4949 (SCJ) [“Kavanagh”]; *Preece*, *supra* note 27; *Bale-eze Industries Inc v Frazier Industrial Co*, 2012 ONSC 4892, [2012] OJ No 3996 (SCJ); *Ironrod Investments Inc v Enquest Energy Services Corp*, 2011 ONSC 308, [2011] OJ No 544 (SCJ); *Furfari v Juncos*, 2011 ONSC 3624, 38 CPC (7th) 110 (SCJ); *Harster Greenhouses Inc v Visser International Trade & Engineering BV*, 2011 ONSC 2608, 334 DLR (4th) 481 (SCJ) [“Harster”]; *Goldmart Farms Inc v Fasig-Tipton Co*, 2010 ONSC 1631, [2010] OJ No 1683 (Master) [“Goldmart”]; *Di Stefano*, *supra* note 57; *Expedition Helicopters Inc v Honeywell Inc*, 2010 ONCA 351, 100 OR (3d) 241, leave to appeal denied, *supra* note 77, where an appeal was required to uphold a forum selection clause that was not a contract of adhesion.

<sup>97</sup> *E.g.*, *2249659 Ontario Ltd v Siegen*, 2013 ONCA 354, 115 OR (3d) 241, rev’g 2012 ONSC 3128, [2012] OJ No 3263 (SCJ); *Aldo Group*, 2012 ONSC 2581, [2012] OJ No 1931 (SCJ), aff’d 2013 ONCA 725, 118 OR (3d) 81, leave to appeal denied, *supra* note 77.

<sup>98</sup> *QBD Cooling Systems Inc v Sollatek (UK) Ltd*, 2015 ONSC 947, [2015] OJ No 1578 (SCJ).

jurisdiction/*forum non conveniens* motion despite a forum selection clause conferring jurisdiction upon Ontario. All three of these motions were dismissed.<sup>99</sup>

The predictability created by choice of forum clauses can facilitate access to justice. But this must be balanced against the access to justice concerns that the clauses can cause, particularly in the consumer protection context.<sup>100</sup> This chapter is not the place to determine how to balance these concerns. John McEvoy has recently written about this issue<sup>101</sup> and the Supreme Court recently declared a particular choice of forum clause unenforceable in *Douez v Facebook, Inc.*<sup>102</sup> The divided nature of the Supreme Court's decision in *Facebook* (with there being no majority opinion), taken in conjunction with its previous decision in *Dell Computer Corp v Union des consommateurs*,<sup>103</sup> suggests that legislative intervention may be the preferable way to resolve this area. In any event, given the fact that over 10% of jurisdiction motion decisions are brought despite a seemingly clear choice of forum clause, it would appear that forum selection clauses are not providing the certainty to parties, and the corresponding reduction of litigation, that is desirable.

### **G. Are Jurisdiction Motions Being “Abused”?**

Before turning to the concluding analysis of the variables related to access to justice connected to jurisdiction motions, a more qualitative issue will be considered – whether jurisdiction motions could be fairly said to be “abused”. This appeared to be a concern of the motion judge in *Stuart Budd*, who properly observed that technical compliance with the *Rules* does not absolve counsel

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<sup>99</sup> *Mackie Research Capital Corp v Mackie*, 2012 ONSC 3890, 3 BLR (5th) 312 (SCJ); *Misyura v Walton*, 2012 ONSC 5397, 112 OR (3d) 462 (SCJ); *James Bay Resources Ltd v Mak Mera Nigeria*, 2015 ONSC 1538, 39 BLR (5th) 313 (SCJ).

<sup>100</sup> See, e.g., John McEvoy, QC, “Conflict of Laws and Consumer Contracts in Canada” (Paper presented to the Symposium, *The CJPTA: A Decade of Progress*, Toronto, Ontario, 21 October 2016) [unpublished].

<sup>101</sup> *Ibid.*

<sup>102</sup> 2017 SCC 33, [2017] 1 SCR 751 [“*Facebook*”].

<sup>103</sup> 2007 SCC 34, [2007] 2 SCR 801.

of responsibility to conduct proceedings in a manner that is fair and proportionate.<sup>104</sup> Having said that, it is equally clear that counsel are permitted to bring cases and motions vigorously on behalf of their clients where those motions have a reasonable prospect of success, even if they do not necessarily succeed.

Having read all the jurisdiction motions decided in Ontario from 2010-2015, few if any seem to have been brought in bad faith. Almost always, there was at least an arguable case that the motion could be granted. A common response to a motion being brought in bad faith or for delay is an award of substantial indemnity costs.<sup>105</sup> But only three cases had awards of substantial indemnity costs that were not overturned on appeal.<sup>106</sup> In one of those, it was the plaintiff against whom substantial indemnity costs were awarded.<sup>107</sup>

Of course, substantial indemnity costs will not be awarded in every case where a motion has been abusive. But the better explanation for the frequency, and subsequent delays and costs, caused by jurisdiction motions would appear to be that the motions can plausibly be brought with a reasonable prospect of success given the uncertain state of the law.<sup>108</sup> It should be recognized that jurisdiction motions could be threatened and/or withdrawn. This happened at least once in 2010 and the parties could not resolve costs.<sup>109</sup> But when one compares the uncertain state of the law to the comparatively high success rates of jurisdiction motions and the few awards of substantial indemnity costs, “abuse” by defendants does not appear to be the primary reason for the access to justice concerns surrounding jurisdiction motions.

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<sup>104</sup> *Stuart Budd* SCJ Decision, *supra* note 5 at para 94.

<sup>105</sup> Sharpe JA described a purpose of costs awards to “sanction litigation behaviour” in *Fong v Chan* (1999), 46 OR (3d) 330 (CA) at para 22.

<sup>106</sup> *Supra* note 87.

<sup>107</sup> *Manson, ibid.*

<sup>108</sup> See Monestier, *supra* note 19.

<sup>109</sup> *Normerica, supra* note 60.

## H. Conclusion on Access to Justice Concerns

Some positive trends from an access to justice perspective can be seen in the case law analyzed. Most obviously, the number of motions brought seems to have declined, suggesting that *Van Breda* has gone some way to providing its goals of certainty and predictability. And possibly, *Hryniak*'s spirit is being heeded outside of the summary judgment context, though this is more doubtful – no cases other than *Stuart Budd* cited its call for a change in how litigation is conducted. Moreover, the number of successful appeals has also decreased, suggesting that motion judges are finding the *Van Breda* framework easier to apply than the *Muscutt* framework.

Having said that, the overall picture is still troubling from an access to justice perspective. The number of motions brought may have decreased. But almost all that have been brought seem to have some basis. This has occurred even when a forum selection clause was signed as an attempt to pre-empt jurisdiction battles. This suggests that uncertainty in the law is the primary culprit for the number of motions brought. Moreover, the costs are significant for a matter that does not even address the merits of a dispute – approximately \$30,000-\$45,000 on a jurisdiction motion, and \$60,000-\$75,000 if there is an appeal (which there is on over 30% of cases). Perhaps even more alarmingly, jurisdiction motions are delaying parties by an average of over a year without an appeal, and over two years with an appeal. (Some of this delay is likely due to other more mundane if real issues such as scheduling mistakes.<sup>110</sup>) So while *Van Breda* may have been a positive development in the law of jurisdiction, there is clearly much more to be done.

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<sup>110</sup> *Arsenault v Nunavut*, 2015 ONSC 4302, [2015] OJ No 3494 (SCJ), aff'd 2016 ONCA 207, 30 CCEL (4th) 46 [“*Arsenault*”], had two motion dates, three months apart, due to court scheduling problems. Michael Marin, former counsel to the plaintiff, informed of this fact during a conversation on December 20, 2016 after my email to him regarding date of service.

#### IV) WAYS FORWARD

It would be difficult and perhaps even undesirable to eliminate jurisdiction motions. Even if one accepts that a legal dispute (such as a jurisdiction dispute) has a “right answer”, there will be inevitable disagreement over what that right answer is in marginal cases.<sup>111</sup> Litigation also gives courts the opportunity to interpret ambiguities in statutes and develop the common law.<sup>112</sup> However, even if elimination of jurisdiction motions is impossible and/or undesirable, we should still attempt to mitigate the access to justice impediments that they cause. Reducing the number and complexity of jurisdiction motions would surely be welcome.

Five potential ways to mitigate the number of jurisdiction motions and, relatedly, hopefully reduce the access to justice concerns inherent in them will be analyzed: revising the common law on attornment; a leave requirement for jurisdiction motions; having specialist decision-makers; a simpler procedure for obvious claims; and reconsidering the substantive law.

##### A. Attornment

The motion judge in *Stuart Budd* particularly criticized the case law on attornment as one of the principal reasons jurisdiction motions present an access to justice problem. “Attornment” is found when defendants have taken steps that suggest they have accepted the jurisdiction of the Ontario courts, typically by taking steps to defend the merits of a proceeding.<sup>113</sup> Attornment is not difficult to establish – it can be found even when a party mistakenly acts in a way that suggests it is defending the merits of a case, and even when it explicitly states that it intends to contest

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<sup>111</sup> Ronald Dworkin famously argued that a proper legal question yields one “right answer” but that educated lawyers and judges can disagree in good faith over what that answer is: *e.g.*, “Hard Cases” (1975) 88 Harv L Rev 1057.

<sup>112</sup> *Hryniak*, *supra* note 7 at paras; Warren K Winkler, “The Vanishing Trial” (Autumn 2008) 27(2) Advocates’ Soc J 3 at 4.

<sup>113</sup> Walker, *supra* note 8 at 11-2.

jurisdiction.<sup>114</sup> Presumably implicit in *Stuart Budd*'s motion judge's criticism of the doctrine is the suggestion that motions are sometimes brought prematurely because defendants will be deemed to have "attorned" to a jurisdiction if they do not challenge jurisdiction as soon as practical. This requirement that defendants move promptly also risks creating inefficiency as a jurisdiction motion cannot generally be heard in conjunction with other pre-trial motions.

One can legitimately gripe that the current law of attornment puts a defendant in an unenviable situation early on in litigation – an expensive motion must be brought promptly, or else a desirable way to proceed is closed. But as noted above, almost all jurisdiction motions that are brought appear to have an arguable basis. Moreover, only 6 motions held attornment to be a reason to assume jurisdiction,<sup>115</sup> and in all but one<sup>116</sup> of those, there were additional reasons to assume jurisdiction. There were also six cases where attornment was found, conceded, and/or assumed, but turned out to be irrelevant.<sup>117</sup> It would not appear, therefore, that revising the law of attornment will significantly improve the access to justice problems caused by the law of jurisdiction.

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<sup>114</sup> Walker, *ibid*, citing *Stoymenoff v Aitrouts PLC* (2001), 17 CPC (5th) 387 (Ont SCJ) (concerning a party mistakenly defending the Ontario action) and *Imagis Technologies Inc v Red Herring Communications Inc*, 2003 BCSC 366, 15 CCLT (3d) 140 (finding attornment even when a challenge to jurisdiction was expressed in the pleadings).

<sup>115</sup> *Stubbs v ATS Applied Tech Systems Inc*, 2010 ONSC 2838, 87 CCEL (3d) 165 (SCJ), *aff'd* 2010 ONCA 879, 272 OAC 386; *Zhang v Hua Hai Li Steel Pipe Co Ltd*, 2013 ONCA 103, [2013] OJ No 677, *aff'g* *Zhang*, *supra* note 56 (though this was not the basis of the motion judge's decision); *Wolfe v Wyeth*, 2011 ONCA 347, 282 OAC 64, *aff'g* 2010 ONSC 2368, 84 CPR (4th) 43 (SCJ) (again, not the primary basis of the motion judge's decision); *Nadi Inc v Montazemi-Safari*, 2012 ONSC 4723, [2012] OJ No 4005 (SCJ) ["*Nadi*"]; *Title v Canadian Asset Based Lending Enterprise (Cable) Inc*, 2011 ONSC 922, [2011] OJ No 611 (SCJ), *rev'd* on other grounds, 2011 ONCA 715, 108 OR (3d) 71, where Newbould J found attornment "in addition" to jurisdiction. Similarly, attornment was a reason, but not the only reason, jurisdiction was found/assumed in *Patterson v EM Technologies, Inc*, 2013 ONSC 5849, [2013] OJ No 4249 (Master) ["*Patterson*"].

<sup>116</sup> *Nadi*, *ibid*.

<sup>117</sup> *Preece*, *supra* note 27, found attornment but allowed the motion due to a forum selection clause. *Kavanagh*, *supra* note 96 found attornment but nonetheless allowed the motion on the basis of *forum non conveniens*. *Harster*, *supra* note 96 was prepared to assume defendants had attorned but nonetheless allowed the motion on the basis of a forum selection clause. Attornment was also conceded in *Dempsey*, *supra* note 57, *Consbec*, *supra* note 27, and *Century Indemnity Co v Viridian Inc*, 2013 ONSC 4412, [2013] OJ No 3265 (SCJ), as the defendants only made a *forum non conveniens* argument.



In any event, the rules on attornment have a strong rationale. The benefits flowing from a successful jurisdiction motions are best realized if the motion is brought as soon as possible. Revising the law of attornment could be a disincentive to a prompt resolution of a claim. This is another reason to be cautious about revising the law of attornment.

## B. Leave

When there is risk of a rule of procedural law being abused, a leave requirement is frequently imposed.<sup>118</sup> Insofar as it would prevent jurisdiction motions being abused, the leave requirement could be helpful. This is one of the rationales for the leave requirements behind, for example, interlocutory appeals<sup>119</sup> and interlocutory steps in proceedings under the *Construction Act*.<sup>120</sup> However, given the importance of being able to challenge jurisdiction, the leave requirement could likely only fairly require the defendant to show that the motion has a “reasonable prospect of success” or a “fairly arguable case”.<sup>121</sup> Given the current law of jurisdiction, few of the jurisdiction motions brought seem to have been obviously inappropriate. Unless the substantive law is clarified, therefore, the leave requirement would likely be easily met in almost all cases and add just another procedural hurdle for the parties. This would serve to hinder, rather than facilitate, access to justice.

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<sup>118</sup> This is seen, for instance, in the ability to bring a claim under the Ontario *Securities Act*, RSO 1990, c S5, s 138.8 (explained by *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v Celestica Inc*, 2014 ONCA 90, 118 OR (3d) 641 at para 40, var’d on other grounds, *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60, [2015] 3 SCR 801).

<sup>119</sup> S 19(1)(b) of the CJA, *supra* note 68, explained by John Sopinka & Mark A Gelowitz, *The Conduct of an Appeal*, 3d ed (Toronto: LexisNexis, 2012) at § 1.12.

<sup>120</sup> RSO 1990, c C30, s 67(2), which holds that “Interlocutory steps, other than those provided for in this Act, shall not be taken without the consent of the court obtained upon proof that the steps are necessary or would expedite the resolution of the issues in dispute.” The Divisional Court applied this in *Atlas-Gest Inc v Brownstones Building Corp* (1996), 46 CPC (3d) 366 in the interests of upholding the prompt resolution of a dispute on its merits.

<sup>121</sup> This appears to be the standard of, *e.g.*, the leave requirement to judicially review a determination of refugee status under the *Immigration and Refugee Protection Act*, SC 2001, c 27, s 72(1): see, *e.g.*, *Bains v Canada (Minister of Employment and Immigration)* (1990), 47 Admin LR 317 (Fed CA) at paras 1, 3, explained by Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38 Queen’s LJ 1 at 8-9.

### C. Specialized Decision-Makers

Specialized decision-makers can improve access to justice, by becoming familiar with the substantive law and procedure related to a particular area of law. This expertise is likely to increase efficiency and decrease errors. This has been particularly discussed in the family law context,<sup>122</sup> but has been considered in the civil context as well. For example, the Toronto Commercial Court is considered to be a particularly good example of a specialized group of Superior Court judges working in a particular context, with the result being improved access to justice.<sup>123</sup> Could something similar happen with jurisdiction motions? Of the jurisdiction motions analyzed, the one that had the least delay – less than one month – was a Toronto Commercial List case.<sup>124</sup>

Nine of the decisions analyzed were decided by masters instead of judges.<sup>125</sup> Is there any evidence that these experts in civil procedure are adjudicating these cases differently? Only three of the nine motions were successful (less than average). Of the six with reported costs decisions,<sup>126</sup> the average costs award was \$20,393.40 (\$1,162.60 less than the average for all cases, excluding *Rothmans*, the class actions, and the substantial indemnity costs awards), but the median was \$22,783.45 (\$9,646.80 more than the median for all such cases). The average delay in the four cases about which this chapter has information on date of service was 9.5 months, slightly less than the average delay of about a year.<sup>127</sup> These are interesting observations but given the small

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<sup>122</sup> E.g., Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil & Family Justice: A Roadmap for Change” (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) at 16.

<sup>123</sup> See, e.g., Winkler, *supra* note 112 at 4.

<sup>124</sup> *Ghana Gold*, *supra* note 46.

<sup>125</sup> *Goldmart*, *supra* note 96; *Tseng*, *supra* note 46; *Kais v Abu Dhabi Education Council*, 2011 ONSC 75, [2011] OJ No 22 (Master); *Alexander v Alexander*, 2012 ONSC 2826, [2012] OJ No 2099 [“*Alexander*”]; *Kazi v Qatar Airlines*, 2013 ONSC 1370, [2013] OJ No 992 (Master) [“*Kazi*”]; *Patterson*, *supra* note 115; *Harrowand*, *supra* note 69; *Silveira*, *supra* note 27; *Machado*, *supra* note 69.

<sup>126</sup> *Goldmart*, *ibid*; *Kais v Abu Dhabi Education Council*, 2011 ONSC 100, [2011] OJ No 29 (Master); *Alexander*, *ibid*; *Kazi*, *ibid*; *Harrowand SL v Dewind Turbines Ltd*, 2014 ONSC 3388, 2014 CarswellOnt 7916 (Master); *Silveira*, *ibid*.

<sup>127</sup> See the four masters’ decisions in Appendix C.

sample size, it would be inappropriate to draw any normative implications from looking at the masters' records compared to the judges'.

Another concern about having specialized decision makers in the realm of jurisdiction motions is that there are only about two-to-three dozen motions a year. This is a sizable number but may not be enough to truly justify a “roster” of judges akin to the Toronto Commercial List. Even so, there could be judges assigned by the Regional Senior Judge to address jurisdiction motions brought in a particular area. For example, Justice Fred Myers was assigned almost all cases in Toronto that raised Rule 2.1, the summary dismissal which came into effect on July 1, 2014. This has seemingly led to a streamlined jurisprudence under the Rule.<sup>128</sup>

Ultimately, it is uncertain if specialized decision-makers – whether a set roster of judges (who could share the motions) or masters – would be a particularly good or feasible solution to access to justice concerns raised by jurisdiction motions. But a pilot project may well be a worthy experiment.

#### **D. A Simpler Procedure for Obvious Claims**

There are some instances where it is patently obvious that Ontario does not have jurisdiction over the claim.<sup>129</sup> Mandating a formal motion on notice with legal argument seems disproportionate to the difficulty in resolving the relevant legal issues in these cases. Allowing a judge to dispose of a claim merely upon being notified by the defendant that there are no connecting factors with Ontario may be appropriate. Indeed, Chapter Two will explore how Rule 2.1 of the *Rules* has permitted a similar proceeding for facially abusive matters in accordance with

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<sup>128</sup> According to QuickLaw, Myers J's analysis in *Gao v Ontario (Workplace Safety and Insurance Board)*, 2014 ONSC 6100, 37 CLR (4th) 1 (SCJ) has been cited 55 times as of January 12, 2017, including by the Court of Appeal in *Scaduto v Law Society of Upper Canada*, 2015 ONCA 733, 343 OAC 87; Gerard J Kennedy, “Rule 2.1 of Ontario’s *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?” (2018) 35 Windsor YB Access to Just 243 [“Kennedy Rule 2.1”] at 270.

<sup>129</sup> See, e.g., *Manson v Canetic Resources Ltd*, 2014 ONSC 261, [2014] OJ No 288 (SCJ).

the principle of proportionality.<sup>130</sup> As will be explored in the next chapter, this would likely need to be restricted only to matters that are clearly without connection to Ontario – but this could be a way to dispose of matters that are “abusive” of Ontario’s process by attempting to enter into the Ontario judicial system without any reason to do so.

## **E. Revisiting *Van Breda* – or Adopting the CJPTA**

### **1. Clarifying the Common Law**

There have been calls since *Van Breda* to further clarify the law of jurisdiction and/or *forum non conveniens*.<sup>131</sup> The uncertainty in the law seems to be the primary cause of the number of jurisdiction motions brought post-*Van Breda*, and it is costing significant time and money to hundreds of litigants, including those who sought to pre-empt these issues through forum selection clauses.<sup>132</sup> While some flexibility is often necessary to ensure fairness,<sup>133</sup> the law of jurisdiction seems to have erred excessively in that direction. It is a trite observation that, other things being equal, a good rule is a simple one, as a simple rule provides clarity and minimizes the likelihood of disputes.<sup>134</sup>

It also goes without saying that further clarification would be welcome. Ideas in this respect include having a court decline jurisdiction pursuant to *forum non conveniens* only when it considers itself a “clearly inappropriate” forum<sup>135</sup> to clarifying how much “presence” a defendant must have in a forum to ground a finding of jurisdiction<sup>136</sup> to making the presumptive connecting

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<sup>130</sup> Kennedy Rule 2.1, *supra* note 128.

<sup>131</sup> See, e.g., Monestier, *supra* note 19; Chilonye Nwapi, “Re-Evaluating the Doctrine of *Forum Non Conveniens* in Canada” (2013) 34 WRLSI 59.

<sup>132</sup> *Supra* Part III.F.

<sup>133</sup> See, e.g., Kain, *et al*, *supra* note 67 at 310; Blom, *supra* note 23 at 18.

<sup>134</sup> *Ibid.*

<sup>135</sup> Nwapi, *supra* note 131.

<sup>136</sup> See Kain, *et al*, *supra* note 67 at 286.

factors more objective.<sup>137</sup> This study is not the place to address which of these may be particularly valuable – but they should be seriously considered.

## 2. The CJPTA

Alternatively, the CJPTA could be considered as an alternative, clearer procedure to resolve jurisdiction matters. This attempt to promote certainty through codification has been gaining support for the past two decades.<sup>138</sup> A recent edition of the *Osgoode Hall Law Journal* was in large part dedicated to analyzing whether and how this would be a good way forward.<sup>139</sup> Stephen Pitel, once a skeptic of the CJPTA, has recently suggested that it is generally preferable to the common law.<sup>140</sup> There are undeniably disadvantages to codification of the common law, such as insufficient flexibility, the inability to cope with unforeseen circumstances, and the need for excessive litigation in the immediate aftermath of codification.<sup>141</sup> However, legislators and policymakers should think clearly whether “enough is enough” on this specific topic of jurisdiction motions. The benefits that would likely apply to clarifying the common law of jurisdiction would probably be even more applicable to the adoption of the CJPTA, as it would be part of a movement to put all of common law Canada on the same page. The *status quo* of having only three provinces use the statute can lead to potentially undesirable incentives to “forum shop.”<sup>142</sup>

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<sup>137</sup> Monestier, *supra* note 19 at 411 and 414ff.

<sup>138</sup> See, e.g., Stephen GA Pitel, “Reformulating a Real and Substantial Connection” (2010) 60 UNB LJ 177 at 178.

<sup>139</sup> Janet Walker, “Judicial Jurisdiction in Canada: The *CJPTA*—A Decade of Progress” (2018) 55:1 *Osgoode Hall LJ* 9.

<sup>140</sup> Stephen GA Pitel, “Question-and-Answer period” (Symposium, *The CJPTA: A Decade of Progress*, Toronto, Ontario, 21 October 2016).

<sup>141</sup> Evidence scholars, for example, have grappled with this issue for years: for a summary, see Ron Delisle, Don Stuart, David M Tanovich & Lisa Dufraimont, *Evidence: Principles and Problems*, 11th ed (Toronto: Thomson Carswell, 2015) at 30-34.

<sup>142</sup> While forum-shopping is frequently frowned upon as it seems antithetical to the interests of the defendant and society at large, not all forum-shopping is necessarily illegitimate: see, e.g., Nwapi, *supra* note 131 at 104; Elizabeth Edinger, “The Problem of Parallel Actions: The Softer Alternative” (2010) 60 UNB LJ 116 at 118.

The CJPTA not being implemented more broadly to date appears to be the consequence of: a) concerns that one may legitimately have about the CJPTA;<sup>143</sup> b) that it arguably reduces the power of a province's courts to uniquely develop the common law, which such reduction of powers being something many provincial Attorneys-General may be reluctant to facilitate;<sup>144</sup> and c) introducing legislation to respond to such an issue of civil procedure being unlikely to be a provincial government priority.<sup>145</sup>

Despite these limitations with the CJPTA, it appears, subject to the caveat in the next subsection, the preferred solution of those discussed in this chapter for improving the law of jurisdiction. Changing the law of attornment comes with significant disadvantages, and attempts to have judicial clarification of the law of jurisdiction appear to have had limited effectiveness to date. As such, the benefits of codification appear to outweigh the disadvantages. This is not to suggest the CJPTA cannot be complemented by specialist judges and a simpler procedure for truly obvious cases. But given that most of the access to justice problems in this area appear to be the result of uncertainty in the law, codification appears the most obvious solution.

### **3. Forum of Necessity – the Access to Justice Implications**

A *caveat* is required when discussing the adoption of the CJPTA as an alternative legal framework to consider the law of jurisdiction. As is well known, the CJPTA contains a “forum of necessity”, allowing a province to assert jurisdiction for the sole reason that it is not realistic for a

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<sup>143</sup> See, e.g., Sagi Peari, “Three Objections to Forum of Necessity: Global Access to Justice, International Criminal Law and Proper Party” (2018) 55:1 Osgoode Hall LJ 225.

<sup>144</sup> *Contra* the example of Ian Scott, discussed in W Brent Cotter, “Ian Scott: Renaissance Man, Consummate Advocate, Attorney General Extraordinaire” in *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016).

<sup>145</sup> M Jerry McHale, QC, “Access to Justice: A Government Perspective” (2012) 63 UNB LJ 351 at 355; Hazel Genn, “Understanding Civil Justice” (1997) 50(1) *Curr Legal Probs* 155 at 159.

plaintiff to access justice in another jurisdiction.<sup>146</sup> Whether this would truly improve access to justice is debatable. On the one hand, it seems obvious that a forum of necessity would help plaintiffs obtain justice in circumstances when doing so is otherwise impossible or extremely expensive. Insofar as access to justice requires considering not just procedure but substantive justice,<sup>147</sup> a forum of necessity is a clear benefit to access to justice. But even placing aside the well-known theoretical problems of a forum of necessity (much like “universal jurisdiction”, it may violate principles of public international law<sup>148</sup>), it would also likely create confusion and uncertainty about when it is to apply. It is widely accepted that a jurisdiction that would torture the plaintiff is a circumstance when a forum of necessity is warranted,<sup>149</sup> but what actions short of torture are required? The expiry of a limitation period is generally considered insufficient to invoke a forum of necessity<sup>150</sup> – except when it arguably is.<sup>151</sup> When great financial burden to the plaintiff should lead to the invocation of the forum of necessity is also an open question.<sup>152</sup> It seems inevitable that a forum of necessity would create more litigation over jurisdiction motions. The cost and time involved in that litigation causes the parties access to justice problems, as does the inability of other litigants to have their day in court as a result of that litigation. These considerations must be balanced against the fairness to the rare plaintiff who is denied a forum to

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<sup>146</sup> See, e.g., Michael Sobkin, “Residual Discretion: The Concept of Forum of Necessity Under the *Court Jurisdiction and Proceedings Transfer Act*” (2018) 55:1 Osgoode Hall LJ 203; Chilenye Nwapi, “A Necessary Look at Necessity Jurisdiction” (2014) 47:1 UBC L Rev 211.

<sup>147</sup> See, e.g., Farrow 2014, *supra* note 28 at 970-972

<sup>148</sup> See, e.g., Kimberly N Trapp & Alex Mills, “Smooth Runs the Water Where the Brook is Deep: The Obscured Complexities of *Germany v Italy*” (2012) 1 Cambridge J Int’l & Comp L 153 at, e.g., 162-165.

<sup>149</sup> *Bouzari*, *supra* note 27.

<sup>150</sup> See, e.g., Sobkin, *supra* note 146 and examples cited therein, such as *Mitchell v Jeckovich*, 2013 ONSC 7494, 28 CCLI (5th) 229 (SCJ).

<sup>151</sup> *Ibrahim*, *supra* note 58. This decision was partially based on the defendant’s action. The Court of Appeal did note that it was relevant that the law on forum of necessity had changed to the plaintiff’s detriment prior to the motion being heard.

<sup>152</sup> Sobkin, *supra* note 146.

adjudicate her claim. That plaintiff's interests may be more important and are certainly more acute, but do they outweigh the lesser but real interests of a larger group of people?

Consider this thought experiment. "Rule A" is fair and just 99% of the time, and predictable and easy to apply 95% of the time. "Rule B" is fair and just 100% of the time, but predictable and easy to apply only 75% of the time. Is the fairness and justice to the 1% achieved through adopting Rule B worth the unpredictability and uncertainty that must be endured by an additional 20%? Maybe, but maybe not. The maxim "hard cases make bad law" recognizes that the unfairness and injustice in the 1% of cases is that "hard case". It is at least arguable that the unfairness and injustice to the 1% is less problematic than the inability of the 20% to order their affairs predictably, and resolve their potentially justiciable issues promptly and with minimal expense.

This chapter should not be taken to suggest that a CJPTA without a forum of necessity would be Rule A, while a CJPTA with a forum of necessity would be Rule B. This analysis is insufficiently comprehensive to come to such a conclusion. In any event, Michael Sobkin,<sup>153</sup> Sagi Peari,<sup>154</sup> and Angela Swan<sup>155</sup> have addressed this issue more comprehensively than is possible here. But it is not controversial that, other things being equal, simple rules are preferable to complicated ones.

A forum of necessity will almost of necessity create jurisdiction battles. While *Van Breda* makes it clear that the presence of the plaintiff in a forum is an insufficient basis to give that forum jurisdiction over the case,<sup>156</sup> it nonetheless is relevant to the *forum non conveniens* analysis.<sup>157</sup> As Michael Sobkin notes, the line between "forum of necessity" and "*forum non conveniens*" can

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<sup>153</sup> *Ibid.*

<sup>154</sup> *Supra* note 143.

<sup>155</sup> "The Other End of the Process: Enforcement of Judgments" (Paper presented to the Symposium, *The CJPTA: A Decade of Progress*, Toronto, Ontario, 21 October 2016) [unpublished].

<sup>156</sup> *Van Breda*, *supra* note 6 at para 86.

<sup>157</sup> See, e.g., *Thompson v Our Lady of the Missions*, 2011 ONSC 382, [2011] OJ No 512 (SCJ) at para 17.



become blurred.<sup>158</sup> As an example, one plaintiff testified that it would be exceptionally difficult for her to pursue a wrongful dismissal claim in Nunavut (where the employment and dismissal took place, and whose law governed the employment contact) due to a risk of “re-traumatization”.<sup>159</sup> But after losing her jurisdiction battle in Ontario, she is indeed pursuing a claim in Nunavut.<sup>160</sup> Given the obvious costs in terms of time and money that uncertainty in the law has created in the realm of jurisdiction motions without an explicit forum of necessity, we should be careful before adopting a rule that has the potential to create more uncertainty and unpredictability in the law.

## IN SUM

After the Ontario Court of Appeal overturned the decision in *Stuart Budd*, the matter was returned to the Superior Court. The Superior Court proceeded to dismiss the defendants’ motion yet again,<sup>161</sup> and awarded the plaintiffs partial indemnity costs of both motions in the amount of \$50,130.33.<sup>162</sup> The defendants appealed yet again, with the Court of Appeal this time dismissing the appeal with a costs award of \$13,000.<sup>163</sup>

By the time of the second appeal, over forty-five months had passed since the statement of claim was served on the defendants, and there had been over \$84,000 in costs orders,<sup>164</sup> meaning actual costs were likely twice that. The case had become a paradigm of precisely what the first motion judge had warned about. It is ironic that he was the only one of 147 motion judges to invoke

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<sup>158</sup> Sobkin, *supra* note 146.

<sup>159</sup> *Arsenault*, *supra* note 110.

<sup>160</sup> Michael Marin, former counsel to the plaintiff, informed of this fact during a conversation on December 20, 2016 after my email to him regarding date of service.

<sup>161</sup> *Stuart Budd & Sons Ltd v IFS Vehicle Distributors ULC*, 2016 ONSC 2980, [2016] OJ No 2372 (SCJ).

<sup>162</sup> *Stuart Budd & Sons Ltd v IFS Vehicle Distributors ULC*, 2016 ONSC 3798, [2016] OJ No 3033 (SCJ). The Court of Appeal held that the costs of the first motion were to be in the discretion of the judge hearing the second motion.

<sup>163</sup> *Stuart Budd & Sons Ltd v IFS Vehicle Distributors ULC*, 2016 ONCA 977, [2016] OJ 6644.

<sup>164</sup> The defendants were awarded \$20,000 for the costs of the first appeal.

*Hryniak*, only to have his decision overturned for reasons (albeit good reasons) unrelated to the merits of the motion before him.

There is undeniably a place for jurisdiction motions in our justice system, to promote international comity and judicial economy, and give effect to parties' contractual agreements. But it is also clear that the present law of jurisdiction is posing significant access to justice problems, costing parties significant legal fees and considerable delay. *Stuart Budd* is admittedly an extreme example, but jurisdiction motions are regularly delaying the resolution of claims by years, and costing parties well over \$50,000. A small minority of this is attributable to abuse. But most of it appears to be attributable to the uncertain state of the law of jurisdiction in Canada, and/or the types of access to justice issues that plague our system of civil litigation more generally, such as delay due to excessively busy courts. The complicated nature of the law of jurisdiction resulted in this chapter, unlike the other three in this dissertation, to not keep special track of the intersection of the chapter's topic (jurisdiction motions) and self-represented litigants, with there being few cases involving self-represented litigants, possibly due to the complex nature of the law.<sup>165</sup>

*Van Breda* has gone some way to clarifying the law of jurisdiction, and thus mitigating the access to justice concerns surrounding jurisdiction motions. But the general call in *Hryniak* for a simpler and more proportionate procedure appears to have had minimal impact in this specific area. In other words, like much of Ontario procedural law, it appears as though there remains a long way to go in making jurisdiction motions, which are inevitable, less of an impediment to access to justice. The subsequent chapters and the Conclusion of this dissertation will review in more detail what that way may entail, in line with other trends in procedural law.

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<sup>165</sup> Though the presence of a self-represented litigant in one case resulted in queries regarding dates of service to be directed to a defendant's lawyer: *Glasford*, *supra* note 52.

## Chapter Two

### Rule 2.1 of Ontario’s *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?

“[The plaintiff] seeks an order requiring the government to: provide him with a job, fix issues concerning his love life, [...], allow him to carry a weapon for personal safety, [...], and to provide the plaintiff with a stealth video and audio recording device to record community thugs operating in public in violation of his rights. He also seeks damages in the amount of \$151 million.”<sup>1</sup>

“[The plaintiff]’s argument does not deserve respectful treatment. But she does.”<sup>2</sup>

Sometimes, the just way to resolve an action is obvious. Enacted in 2014, Rule 2.1 of Ontario’s *Rules of Civil Procedure*<sup>3</sup> seeks to combine two potential solutions to Canada’s access to justice crisis<sup>4</sup> – civil procedure reform<sup>5</sup> and more active judging<sup>6</sup> – in response to a discrete but real problem in Canadian civil litigation: namely, litigation that is “on its face” frivolous, vexatious, and/or abusive. Cases that fall within Rule 2.1’s ambit number in the dozens per year, potentially causing disproportionate expense for responding parties, and wasting significant public resources.<sup>7</sup>

To date, no scholar has investigated Rule 2.1 (the “Rule”).<sup>8</sup> This chapter seeks to rectify this gap. Part I explores the history of and rationale for the Rule, in the context of the access to justice

<sup>1</sup> *Asghar v Ontario*, 2015 ONSC 4071, [2015] OJ No 3326 (SCJ) [“*Asghar v Ontario*”] at para 2.

<sup>2</sup> *Lin v Rock*, 2015 ONSC 2421, [2015] OJ No 1851 (SCJ) [“*Lin v Rock*”] at para 13.

<sup>3</sup> RRO 1990, Reg 194 [the “*Rules*” or the “*Rules of Civil Procedure*” will be used interchangeably].

<sup>4</sup> See, e.g., Trevor CW Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall LJ 957 [“*Farrow 2014*”] at fn 1 for an extensive review of the literature in this area.

<sup>5</sup> Ontario extensively amended its civil procedure effective January 1, 2010 to facilitate the more timely and inexpensive resolution of civil actions on their merits: O Reg 438/08. This was largely to implement the recommendations of the “Osborne Report”: Coulter Osborne, QC, *Civil Justice Reform Project: Findings and Recommendations* (Ontario Ministry of the Attorney General, November 2007), online: <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>> at Appendix A (Terms of Reference) & B (Consultation Letter). For a discussion of this, see: Brooke MacKenzie, “Effecting a Culture Shift: An Empirical Review of Ontario’s Summary Judgment Reforms” (2017) 54:4 Osgoode Hall LJ 1275 at 1280-1281, fn 18; Janet Walker, “Summary Judgment Has Its Day in Court” (2012) 37 Queen’s LJ 697 at 700-701 and 707-708.

<sup>6</sup> See, e.g., *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [“*Hryniak*”] at paras 74-79.

<sup>7</sup> *Raji v Borden Ladner Gervais LLP*, 2015 ONSC 801, [2015] OJ No 307 (SCJ) [“*Raji #1*”] at para 6.

<sup>8</sup> Some law firms have published professional resources on this topic: see, e.g., “WHAT DO I TELL A CLIENT WHO ASKS: What Do I Do When a Debtor files a ‘Freeman of the Land’ Claim or Motion (Sub Nom: ‘Frivolous or Vexatious Claims and Motions – a Rule 2.1 Primer’)”, online: <<http://www.phmlaw.com/what-do-i-tell-client.pdf>>; Kathryn Kirkpatrick & Jeremy Ablaza, “Cautious Use of Rule 2.1 Against Vexatious

crisis in Ontario, and in light of the perceived inadequacy of alternative mechanisms provided for in the *Rules* and the *Courts of Justice Act*<sup>9</sup> for addressing the dangers raised by vexatious litigants. After explaining methodology in Part II, in Part III all 190 decisions using Rule 2.1 decided between July 1, 2014 and June 30, 2017 are analyzed, to determine how Rule 2.1 has been applied in practice, with the goal to provide guidance for future lawyers and judges considering using the Rule. Part IV analyzes the effects on access to justice of Rule 2.1, in terms of providing speedy and cost-efficient resolution of civil actions on their merits. Part V considers how the Rule should be used in the future – doctrinally, institutionally, and ethically.

The conclusions are hopeful. Rule 2.1 is powerful, and its use should prompt some pause in judges and lawyers. By and large, however, the Rule has been very well employed. It has resulted in significant savings of time and financial expense,<sup>10</sup> for both courts and defendants, while almost always being fair to plaintiffs.<sup>11</sup> As discussed in particular depth in Part V.D, despite the Rule’s potential to disadvantage self-represented and/or marginalized litigants due to its lack of in-court time, many cases are the model of fairness to vulnerable parties. In the few instances where the Rule’s (attempted) use has arguably been inappropriate, the costs in terms of delay and financial expense are usually minimal. While Rule 2.1 is only applicable to a small minority of cases, they are not a trivial number. The Rule is ultimately an inspiring example of how civil procedure can be amended to facilitate access to justice – and be thoroughly fair to parties in doing so.

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Claims in *Khan v. Krylov & Company LLP*” (15 August 2017), online: <[http://blg.com/en/News-And-Publications/Publication\\_5040](http://blg.com/en/News-And-Publications/Publication_5040)>.

<sup>9</sup> RSO 1990, c C43 [the “CJA”].

<sup>10</sup> Quantifying a comparison between Rule 2.1 and Rule 21 with scientific precision would be difficult if not impossible but the discussion in Part I.C should indicate the significantly greater costs of Rule 21.

<sup>11</sup> Unless the circumstances require more specificity, the terms “defendants”, “respondents”, and “responding parties” will be used interchangeably in this chapter when referring to parties against whom Rule 2.1 *is not* (proposed to be) used while “plaintiffs”, “applicants”, and “moving parties” will be used interchangeably when referring to parties against whom Rule 2.1 *is* proposed to be used.

## I) RULE 2.1's HISTORY

### A. Access to Justice

Precisely what the phrase “access to justice” encompasses varies according to the circumstances. At its most holistic, it includes normative questions about what values constitute “justice” and ensuring that substantive law encompasses such values.<sup>12</sup> At the very least, it means that civil litigation should have three characteristics: first, minimal financial costs; second, timeliness; and, third, simplicity.<sup>13</sup> Even those who have argued that access to justice should be interpreted in a much broader manner, such as Trevor Farrow, agree that simple and efficient civil procedure is an important tool for achieving access to justice.<sup>14</sup>

It is within this spirit of ensuring timely and cost-effective resolutions of civil claims that Ontario amended its *Rules of Civil Procedure* effective January 1, 2010.<sup>15</sup> These reforms also enshrined the principle of proportionality, which recognizes that steps taken in litigation are to be proportionate to what can realistically be gained from taking said steps.<sup>16</sup> In its seminal 2014 decision *Hryniak v Mauldin*, Justice Karakatsanis, for a unanimous Supreme Court of Canada, held that these reforms should be interpreted generously to achieve access to justice. She also called for a “culture shift” to ensure that cases are decided on their merits in a manner that is fair, speedy, and with minimal financial cost.<sup>17</sup>

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<sup>12</sup> Farrow 2014, *supra* note 4 at 970-972.

<sup>13</sup> *E.g.*, *ibid* at 978-979; Roderick A Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005) at 68-73. Related to this is the important principle of proportionality: *Hryniak*, *supra* note 6 at paras 29-33; Trevor Farrow, “Proportionality: A Cultural Revolution” (2012) 1 *Journal of Civil Litigation and Practice* 151 [“Farrow 2012”].

<sup>14</sup> Trevor CW Farrow, “A New Wave of Access to Justice Reform in Canada” in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) at 166.

<sup>15</sup> The *Rules*, *supra* note 3, as amended by O Reg 438/08.

<sup>16</sup> *E.g.*, Farrow 2012, *supra* note 13.

<sup>17</sup> *Hryniak*, *supra* note 6 at paras 2, 23.

*Hryniak* concerned summary judgment. But appellate courts<sup>18</sup> and notable commentators<sup>19</sup> have repeatedly emphasized that *Hryniak*'s spirit applies outside this narrow context. This spirit includes the recognition that a full, traditional trial is frequently not necessary for a court to justly resolve matters, and that more summary procedures that bring swift ends to proceedings can play indispensable roles in this respect.<sup>20</sup> It is against this backdrop, and with these considerations in mind, that Rule 2.1 became part of the *Rules* effective July 1, 2014: to provide an efficient and cost-and-time-effective mechanism to address a particular type of proceeding.

### **B. Frivolous, Vexatious, and Abusive**

Rule 2.1 combines the terms “vexatious”, “frivolous”, and “abusive” – terms that overlap considerably in the case law.<sup>21</sup> The former two terms are unfortunately not well defined in case law.<sup>22</sup> “Vexatious” is defined by *Black’s Law Dictionary* as “without reasonable or probable cause or excuse; harassing; annoying”<sup>23</sup> and by the Ontario Court of Appeal as “broadly synonymous with the concept of abuse of process developed by the Courts in the exercise of their inherent right to control proceedings.”<sup>24</sup> *Black’s Law* defines “frivolous” as “lacking a legal basis or legal merit; not serious; not reasonably purposeful”<sup>25</sup>, a definition accepted by the Ontario Court of Appeal.<sup>26</sup>

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<sup>18</sup> See, e.g., *Iannarella v Corbett*, 2015 ONCA 110, 124 OR (3d) 523 at para 53, concerning discovery; *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289, 580 AR 265 at para 5, concerning the intersection between discovery and claims of privilege.

<sup>19</sup> See, e.g., Stephen GA Pitel & Matthew Lerner, “Resolving Questions of Law: A Modern Approach to Rule 21” (2014) 43 Adv Q 344 at 344-346; Barbara Billingsley, “*Hryniak v. Mauldin* Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials” (2017) 55:1 Alta L Rev 1.

<sup>20</sup> *Hryniak*, *supra* note 6 at para 29; Pitel & Lerner, *ibid*.

<sup>21</sup> *Butera v Fragale*, 2010 ONSC 3702, 2010 CarswellOnt 4669 (SCJ) at para 19.

<sup>22</sup> *876502 Ontario Ltd v IF Propco Holdings (Ontario) 10 Ltd* (1997), 37 OR (3d) 70 (Gen Div) at 77.

<sup>23</sup> *Black’s Law Dictionary*, 7th ed [“*Black’s Law*”], *sub verbo* “vexatious”.

<sup>24</sup> The dissenting opinion of Blair JA in *Foy v Foy* (1979), 26 OR (2d) 220 (CA), accepted in subsequent case law: see *Dale Streiman & Kurz LLP v De Teresi* (2007), 84 OR (3d) 383 (SCJ) at para 7.

<sup>25</sup> *Black’s Law*, *supra* note 23, *sub verbo* “frivolous”.

<sup>26</sup> *Currie v Halton Regional Services Police Board* (2003), 179 OAC 67 (CA) at para 17.

The term “abusive” relates to the doctrine of abuse of process, which the Supreme Court of Canada has noted aims to preserve the integrity of the court process.<sup>27</sup> The Supreme Court has approvingly cited Goudge JA’s description of abuse of process:

[The doctrine of abuse of process] engages the inherent power of the court *to prevent the misuses of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute*. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. [...] <sup>28</sup>

These three terms overlap.<sup>29</sup> “Abusive” is the broadest, and frivolous and vexatious litigation is almost certainly also going to be abusive. However, “vexatious” is the commonly used term if referring to persons in case law. “Abusive” tends to refer to litigation itself. As such, “abusive” and “vexatious” will be used synonymously hereafter, unless circumstances call for more specificity. “Frivolous” will generally be avoided, as it seems to truly be a subset of vexatious and abusive.

Whether any of this terminology is appropriate is debatable. The National Self-Represented Litigant Project (“NSRLP”) has noted that “vexatious” can be used as an inappropriate label to dismiss the claims of marginalized persons.<sup>30</sup> And as will be discussed, many individuals who file claims that fall within Rule 2.1’s ambit appear to be suffering from mental illness and these labels may seem excessively and wrongly stigmatizing. “Ineffective” and “inappropriate” litigation may be more suitable. But these descriptions also appear less precise, and collapsing the three above

<sup>27</sup> *Behn v Moulton Contracting Ltd*, 2013 SCC 26, [2013] 2 SCR 227 [“*Behn*”] at para 40.

<sup>28</sup> *Ibid* [emphasis added by LeBel J], citing *Canam Enterprises Inc v Coles* (2000), 51 OR (3d) 481 (CA) [“*Canam*”] at para 55.

<sup>29</sup> *Maheau v IMS Health Canada*, 2002 FCT 558, 20 CPC (4th) 523 (Prothonotary), rev’d on other grounds, 2003 FCT 1, 226 FTR 269, aff’d 2003 FCA 462, 314 NR 393.

<sup>30</sup> Julie Macfarlane, Katrina Trask & Erin Chesney, “The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?” (Windsor, ON: The National Self-Represented Litigants Project, The University of Windsor, November 2015) [“NSRLP Vexatiousness”].

terms may already be leading to a lack of precision in language. In addition, such litigation remains “abusive” in that it abuses the court’s process (another reason that “abusive” is a preferable term to “vexatious”), even if through no fault of the plaintiff. In any event, “vexatious”, “frivolous”, and “abusive” appear throughout the case law and the *Rules* and it would appear distracting not to use them in this chapter, which fundamentally seeks to understand the Rule’s effects. And concerns about accuracy aside, there remains a school of thought in linguistics that attempts to change language to reduce stigma can be of limited effectiveness, transferring the stigma and perceived euphemistic connotations to the new terminology.<sup>31</sup> So while a discussion about changing terminology is worthwhile, it can also be left for another day. The terms “abusive” and “vexatious” will be used for the reasons noted above.

### C. Vexatious Litigants Prior to Rule 2.1

Rule 21.01(b) of Ontario’s *Rules of Civil Procedure* allows a party to bring a motion to dismiss a proceeding on the grounds that “it discloses no reasonable cause of action”.<sup>32</sup> This rule is a modern codification of the historic power of common law courts to prevent abuses of their processes, with actions that do not disclose a cause of action being abuses of process.<sup>33</sup> As such, this Rule can be used to strike abusive pleadings. Rule 25.11 of the *Rules*, which allows a court to strike “all or part of a pleading or other document” if it is “scandalous, vexatious, or frivolous”<sup>34</sup> or “is an abuse of process of the court”<sup>35</sup> is another tool in this respect. However, these rules have their limits. First, they require a formal motion, requiring legal argument and notice to the allegedly abusive party. In addition to being expensive and time-consuming, in the words of Myers J, this

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<sup>31</sup> Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature* (New York: Viking Penguin, 2002) [2003 paperback version] at 212.

<sup>32</sup> *Rules*, *supra* note 3.

<sup>33</sup> Pitel & Lerner, *supra* note 19 at 348.

<sup>34</sup> *Rules*, *supra* note 3, Rule 25.11(b).

<sup>35</sup> *Ibid*, Rule 25.11(c).



can lead to “the proposed cure caus[ing] a fresh outbreak of the disease”, giving the allegedly vexatious litigant a new opportunity to act vexatiously.<sup>36</sup> Second, if the vexatious party is engaged in a pattern of behaviour, these will need to be brought repeatedly.

Alternatively, s 140 of the CJA prescribes a procedure to have a litigant declared “vexatious”<sup>37</sup> if he or she has “instituted vexatious proceedings in any court” or “conducted a proceeding in a vexatious manner”.<sup>38</sup> The consequences of this are that no further proceedings may be instituted or continued by the vexatious litigant without leave of a Superior Court judge.<sup>39</sup> Once granted, a “vexatious litigant order” allows a responding party to ensure any further proceeding or step therein brought by the vexatious litigant has at least some *prima facie* merit. It also helps the vexatious litigant by ensuring judicial oversight over all litigation steps, saving all parties – including the vexatious litigant – unnecessary expense.<sup>40</sup>

Though the remedies resulting from s 140 of the CJA are more powerful than those available from Rule 21 or 25.11, they present other difficulties. First, s 140 requires a separate application to be commenced<sup>41</sup> – an expensive and lengthy process.<sup>42</sup> Though Rule 38.13 of the *Rules*, which became effective July 1, 2014, mandates that applications under this section are generally to be heard in writing, and factums are not required, an application record is still necessary.<sup>43</sup> Vexatious litigants still have many opportunities to respond vexatiously, through submitting an affidavit, and cross-examining other parties on their affidavit(s). If a vexatious litigant has acted vexatiously

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<sup>36</sup> *Raji #1*, *supra* note 7 at para 8.

<sup>37</sup> CJA, *supra* note 9, s 140(1)(a).

<sup>38</sup> *Ibid*, s 140(1)(b).

<sup>39</sup> *Ibid*, ss 140(1)(c-d).

<sup>40</sup> *Science Applications International Corp v Pagourov*, 2012 ONSC 6514, [2012] OJ No 5696 (SCJ), *aff'd* 2013 ONCA 563, 2013 CarswellOnt 12629 [“*Pagourov*”] at para 49, citing *Law Society of Upper Canada v Chavali* (1998), 21 CPC (4th) 20 (Ont Gen Div) at para 26, *aff'd* (1998), 31 CPC (4th) 221 (CA).

<sup>41</sup> S 140(1).

<sup>42</sup> *Raji #1*, *supra* note 7 at para 8.

<sup>43</sup> *Rules*, *supra* note 3, Rule 38.13.

against many different parties, it may not be in the financial interests of any one of them to bring a s 140 application. Second, a vexatious litigant declaration is difficult to obtain. It can only be granted if a person has “persistently *and* without lawful grounds”<sup>44</sup> acted in a vexatious manner. Given that it affects how a person can exercise his or her right to access the courts, it has historically been considered an extraordinary remedy.<sup>45</sup>

The limitations of s 140 of the CJA and Rules 21 and 25.11 of the *Rules* are well-founded. But they still leave parties responding to abusive actions in the unenviable position of bringing expensive motions and/or applications to address vexatious litigants. As Myers J wrote in *Raji*:<sup>46</sup>

The court has always had difficulty with the Catch-22 nature of dealing with vexatious litigants. Any time that proceedings are brought to try to end a vexatious proceeding, the vexatious litigant is provided with a fresh opportunity to conduct that proceeding in a vexatious, expensive, wasteful, and abusive manner. [...] Imposing a quick and limited written process that provides one opportunity to the plaintiff to show why the claim should not be dismissed is an important advance toward meeting the goals of efficiency, affordability, and proportionality in the civil justice system as discussed by the Supreme Court of Canada in *Hryniak*.

It was to address this situation, where it is easy to understand why a defendant would consider paying an unprincipled settlement to have the plaintiff “go away”, that Rule 2.1 was enacted.

## II) METHODOLOGY

An attempt was undertaken to find all reported cases using Rule 2.1 from its coming into force on July 1, 2014 through June 30, 2017. This was done through searching QuickLaw and Westlaw throughout 2017. There are limitations of such an approach. Notably, though QuickLaw and Westlaw report most decided reported cases in Ontario, they do not necessarily report every single

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<sup>44</sup> CJA, *supra* note 9, s 140(1) [emphasis added].

<sup>45</sup> *Kallaba v Bylykbashi* (2006), 207 OAC 60 (CA) at para 31. This is not the case across Canada. For instance, the Alberta Court of Appeal held in *Wong v Giannacopoulos*, 2011 ABCA 277, 515 AR 58 that no “substantial prejudice” results from prospective court access restrictions given that it is of course still possible to access the courts.

<sup>46</sup> *Raji #1*, *supra* note 7 at para 8.

case.<sup>47</sup> Nonetheless, quantitative analyses of case law frequently proceed from their use.<sup>48</sup> Moreover, given the summary nature of Rule 2.1, there is good reason to suspect many decisions that use it are not reported. There are also inherent limitations to a quantitative analysis of case law – notably, it is difficult to draw normative lessons from such an analysis.<sup>49</sup> However, the normative values implicated by Rule 2.1 will be addressed in Parts III, IV, and particularly V, of this chapter.

While reviewing these cases, the following facts were recorded:

- What cases have emerged as “leading” to provide guidance to members of the bar and bench on how to apply the Rule.
- How many cases were being resolved pursuant to the Rule and how many attempts to use the Rule are successful.
- The rates of appeals and successful appeals, which suggest something about the clarity of the Rule’s meaning and/or whether the judges are misapplying it (accepting that an appellate court overruling a lower court is not necessarily an indictment of the lower court decision<sup>50</sup>).
- Any costs orders involved, as costs orders shed light on financial expense, and are thus relevant to assessing whether the Rule is having a positive effect on access to justice.

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<sup>47</sup> *Khan v Krylov & Company LLP*, 2017 ONCA 625, 2017 CarswellOnt 16235 [“*Khan*”] is an appeal of an unreported trial decision.

<sup>48</sup> See, e.g., Craig E Jones & Micah B Rankin, “Justice as a Rounding Error? Evidence of Subconscious Bias in Second-Degree Murder Sentences in Canada” (2014) 52:1 Osgoode Hall LJ 109 at 121, fn 58; Gerard J Kennedy, “Jurisdiction Motions and Access to Justice: An Ontario Tale” (2018) 55:1 Osgoode Hall LJ 79 [“*Kennedy Jurisdiction*”].

<sup>49</sup> See, e.g., Joshua B Fischman, “Reuniting ‘Ought’ and ‘Is’ in Empirical Legal Scholarship” (2013) 162(1) U Pa L Rev 117; *Kennedy Jurisdiction*, *ibid.*

<sup>50</sup> Fischman, *ibid* at 142.

- How long Rule 2.1 is delaying the resolution of actions: in the case of successful uses of the Rule, it is evidence of how promptly cases are being resolved on their merits. In the case of unsuccessful uses, it can be assessed whether the Rule is in fact a hindrance to access to justice, as this must be weighed against the Rule’s ability to help achieve access to justice in other cases.
- The identity of the judge deciding the motion and whether this affects the aforementioned “access to justice”-related variables. This is particularly important to analyze given that Justice Fred Myers has decided a disproportionate number of cases, having been appointed by the Toronto Team Leader-Civil to address the Rule.<sup>51</sup> Justices Robert Beaudoin of the Superior Court in Ottawa and Ian Nordheimer sitting on the Divisional Court in Toronto (prior to his elevation to the Court of Appeal) have also decided a disproportionate number of cases using Rule 2.1.
- Whether the case was prompted by a judge’s own initiative, or referred to the judge by a responding party or the registrar, to discover who is employing the Rule.
- The reason why the proceeding was alleged to be vexatious. Very short descriptions of all cases are found in Appendix D, though certain prominent types of cases are highlighted below in Parts III.C.2 and III.C.5.
- Whether the party against whom Rule 2.1 was sought to be employed was a self-represented litigant.

All of these details are recorded in Appendix D.

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<sup>51</sup> *Goralczyk v Beer Store*, 2016 ONSC 2265, [2016] OJ No 1763 (SCJ) [“*Goralczyk #1*”] at para 6.

The *Rules of the Small Claims Court*<sup>52</sup> were also amended as of July 1, 2014,<sup>53</sup> with Rules 12.02(3) and 12.02(7) essentially mimicking Rule 2.1 of the *Rules*. Unfortunately, given that most Small Claims Court cases are not reported,<sup>54</sup> it is very difficult if not impossible to assess the effectiveness of this rule change through a quantitative analysis of case law. It is noted, however, that one Divisional Court decision allowed an appeal of a Small Claims Court case on the grounds that use of Rule 12.02(3) of the *Rules of the Small Claims Court* was inappropriate.<sup>55</sup>

### III) HOW IT WORKS

As noted above, one purpose of this analysis is to provide the first doctrinal analysis of Rule 2.1, assisting future lawyers, judges, and scholars seeking to use and/or analyze this Rule.<sup>56</sup> As such, it was necessary to analyze the cases as scientifically as possible to determine “leading” cases.<sup>57</sup> It must be recognized that “objectively” determining how a legal rule works in practice through case law is, to a certain extent, an impossible exercise.<sup>58</sup> But textbooks and articles can still be very useful to practitioners and scholars.<sup>59</sup> In this respect, this section of this chapter not only “sets the stage” for the subsequent analysis of the Rule’s utility as an access to justice mechanism, but is also useful in and of itself.

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<sup>52</sup> O Reg 258/98.

<sup>53</sup> O Reg 44/14, s 11(3).

<sup>54</sup> See, e.g., Lorian Hardcastle, “Recovering Damages Against Government Defendants: Trends in Canadian Jurisprudence” (2015) 69 SCLR (2d) 77 at 83-84.

<sup>55</sup> *Capital One Bank (Canada Branch) v Ramirez-Rodriguez*, 2017 ONSC 3536, [2017] OJ No 2917 (Div Ct).

<sup>56</sup> The utility of this endeavour was noted by Justice David Stratas in “The Decline of Legal Doctrine” (Keynote Address Delivered at the Canadian Constitution Foundation Law & Freedom Conference, Hart House, University of Toronto, 8 January 2016), online: <<https://www.youtube.com/watch?v=UxTqMw5v6rg>>; David Stratas, “The Canadian Law of Judicial Review: Some Doctrine and Cases,” March 26, 2018, online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2924049](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924049)>.

<sup>57</sup> See, e.g., Terry Hutchinson & Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 17(1) Deakin L Rev 83 at 110.

<sup>58</sup> *Ibid* at 84, drawing on Oliver Wendell Holmes Jr, “The Path of Law” (1897) 10(8) Harvard L Rev 457 at 465-466. I am bringing my biases, as are the judges who have used and will use the Rule – much of the Critical Legal Studies movement, and related feminist and critical race critiques of law, are based on observations such as these: see, e.g. Patricia J Williams, “The Pain of Word Bondage” in *The Alchemy of Pain and Rights* (Cambridge, MA: Harvard University Press, 1991), c 8.

<sup>59</sup> *Supra* note 56.

## **A. The Mechanics**

Rule 2.1.01 provides (omitting references to forms and regulations):

(1) The court may, on its own initiative, stay or dismiss a proceeding if the proceeding appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.

### ***Summary Procedure***

(2) The court may make a determination under subrule (1) in a summary manner, subject to the procedures set out in this rule.

(3) Unless the court orders otherwise, an order under subrule (1) shall be made on the basis of written submissions, if any, in accordance with the following procedures:

1. The court shall direct the registrar to give notice [...] to the plaintiff or applicant, as the case may be, that the court is considering making the order.

2. The plaintiff or applicant may, within 15 days after receiving the notice, file with the court a written submission, no more than 10 pages in length, responding to the notice.

3. If the plaintiff or applicant does not file a written submission that complies with paragraph 2, the court may make the order without any further notice to the plaintiff or applicant or to any other party. [...]

### ***Request for Order***

(6) Any party to the proceeding may file with the registrar a written request for an order under subrule (1).

### ***Notification of Court by Registrar***

(7) If the registrar becomes aware that a proceeding could be the subject of an order under subrule (1), the registrar shall notify the court.

Rule 2.1.02 prescribes a similar procedure for a frivolous, vexatious, and/or abusive motion.

The Rule's language contemplates that "unless the court orders otherwise", determinations under it are to be made on the basis of written submissions, after notice. In 13 cases, a judge has dispensed with the notice requirement and dismissed the motion or proceeding without notice. These rare instances are returned to below. In almost all other cases, the judge will either issue notice that he or she is considering using Rule 2.1 or decline to do so. The cases where notice was

neither issued nor a decision made declining to do so are three cases where Rule 2.1 was raised by a party in the context of a broader motion.<sup>60</sup>

Generally speaking, a judge becomes aware of a potentially abusive proceeding after being informed by the other side or having it otherwise come to their attention through a step in a proceeding. The judge then decides whether to order notice to the party that the Court is considering dismissing his or her action. The party is then permitted to respond as to why the action should not be dismissed. After receiving those submissions (or not receiving them<sup>61</sup>), the judge will decide whether to dismiss the action.

Appeals of dismissals of actions under Rule 2.1 proceed to the Divisional Court or Court of Appeal as per normal appellate practice.<sup>62</sup> Decisions not to use Rule 2.1 are presumably interlocutory matters where leave to appeal to the Divisional Court would be required.<sup>63</sup> However, no decision to not use Rule 2.1 appears to have been appealed. The Court of Appeal has prescribed particular procedural steps to be followed if a party wishes to employ the Rule in that Court.<sup>64</sup>

### **B. No Evidence or Legal Argument**

No evidence is permitted in Rule 2.1 considerations<sup>65</sup> as formal motions under Rule 20 allow for – very brief, if appropriate – dispositive evidence.<sup>66</sup> Legal submissions are generally forbidden

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<sup>60</sup> *Nguyen v Economical Mutual Insurance Co*, 2015 ONSC 2646, 49 CCLI (5th) 144 (SCJ) [“*Nguyen v Economical*”]; *Fine v Botelho*, 2015 ONSC 6284, [2015] OJ No 5321 (SCJ) [“*Fine*”]; *Caliciuri v Matthias*, 2017 ONSC 748, [2017] OJ No 547 (SCJ) [“*Caliciuri*”].

<sup>61</sup> This happens not infrequently: see, e.g., *Strang v Ontario*, 2017 ONSC 1625, [2017] OJ No 1297 (SCJ); *Reyes v KL*, 2017 ONSC 2304, [2017] OJ No 2195 (SCJ) [“*Reyes v KL*”].

<sup>62</sup> CJA, *supra* note 9, ss 19(1)(a) and 19(1)(c); John Sopinka & Mark A Gelowitz, *The Conduct of an Appeal*, 3d ed (Toronto: LexisNexis, 2012) at § 5.1-5.2.

<sup>63</sup> CJA, *ibid*, s 19(1)(b); Sopinka & Gelowitz, *ibid* at § 5.46.

<sup>64</sup> *Simpson v The Chartered Professional Accountants of Ontario*, 2016 ONCA 806, 5 CPC (8th) 280 [“*Simpson*”] at paras 45-46.

<sup>65</sup> *Ibid* at paras 10-12.

<sup>66</sup> Of course, submissions and evidence under Rule 20 are frequently not brief (in *Hryniak* itself, they were extensive) but there is nothing inherent about the *Rules* mandating needless detail, with the principle of proportionality suggesting that brevity can be – and in certain cases, should be – appropriate.

as well. Though the Rule's language contemplates responding submissions in certain circumstances, in practice, judges almost never ask for them.

One exception and one caveat have nonetheless emerged to this general prohibition on legal submissions or evidence when applying Rule 2.1. The exception is when the responding party's reason for submitting that the action is abusive and/or vexatious is because the issues have been finally determined in another proceeding.<sup>67</sup> The soundness of this "attempt to re-litigate" exception is discussed in Part V.A.2, below.

The caveat is when the judge deems it appropriate to ask the responding party for submissions due to concern that there may be a serious issue that warrants attention, albeit in another forum. For example, in one case, the plaintiff alleged that his child had been kidnapped. Myers J noted that the pleading left no doubt about the abusiveness of the proceeding, including racist attacks upon an obstetrician, as well as the inappropriateness of the civil courts to address any legitimate concern. He still sought submissions from the defendant's counsel, as an officer of the court, in case "something horrible was indeed happening"<sup>68</sup> that would require a prompt response, such as from the police or child protection authorities. The defendant's counsel submitted that the child had been taken into protective custody, allowing Myers J to give directions to the plaintiff on how to challenge such a decision. This is appropriate to prevent an injustice, but should have no bearing on the decision to use Rule 2.1, but rather simply give guidance to the plaintiff.

### **C. The Test to Use the Rule**

In deciding whether to order notice, two factors have emerged as relevant. First, when read extremely generously, no cause of action should be discernible. Second, there should be something

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<sup>67</sup> See, e.g., *Simpson*, *supra* note 64.

<sup>68</sup> *Kadiri v Harikumar*, 2015 ONSC 4894, [2015] OJ No 4103 (SCJ) ["*Kadiri*"] at para 7.



emerging from the pleadings that suggests the extremely attenuated process is appropriate – largely because of a fear that the litigant will act vexatiously. Myers J originally proposed these two criteria,<sup>69</sup> and the Court of Appeal endorsed them in *Scaduto v Law Society of Upper Canada*.<sup>70</sup>

### 1. “On Its Face” Being Frivolous, Vexatious, and/or Abusive

How can one say that a pleading “on its face” appears abusive? Perhaps the most common phrase is that it is for “the clearest of cases” that cannot possibly succeed,<sup>71</sup> also described as “usually obvious”<sup>72</sup> and “not for close calls.”<sup>73</sup> Summarizing this area of law, Trimble J held that a claim must be “so clearly frivolous as to make a motion under another Rule, on evidence and proper formal notice, a waste of time, money, and resources for the parties and the public.”<sup>74</sup>

Upon reading the pleadings and any submissions, a judge must look for any cause of action, even one buried in an otherwise abusive pleading. Myers J wrote the following in *Gao #2*:

It should be borne in mind however, that even a vexatious litigant can have a legitimate complaint. [...] Care should be taken to allow generously for drafting deficiencies and recognizing that there may be a core complaint which is quite properly recognized as legitimate<sup>75</sup>

The Court of Appeal has asked parties to consider whether summary judgment or pleadings motions are preferable to uses of Rule 2.1.<sup>76</sup> Even so, Rule 2.1 has been enacted for a reason and

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<sup>69</sup> *Raji #1*, *supra* note 7 at para 9.

<sup>70</sup> 2015 ONCA 733, 343 OAC 87 at para 12, leave to appeal ref’d, [2015] SCCA No 488, 2016 CarswellOnt 21905 [“*Scaduto*”].

<sup>71</sup> *Scaduto*, *ibid* at para 8.

<sup>72</sup> *Asghar v Alon*, 2015 ONSC 7823, [2015] OJ No 6573 (SCJ) [“*Asghar v Alon*”] at para 4.

<sup>73</sup> *Gao v Ontario (Workplace Safety & Insurance Board)*, 2014 ONSC 6100, 37 CLR (4th) 1 (SCJ) at para 9.

<sup>74</sup> *Beatty v Office of the Children’s Lawyer*, 2016 ONSC 3816, [2016] OJ No 3024 (SCJ) [“*Beatty*”] at para 13.

<sup>75</sup> *Gao v Ontario (Workplace Safety & Insurance Board)*, 2014 ONSC 6497, 31 CPC (7th) 153 (SCJ) [“*Gao #2*”] at para 18.

<sup>76</sup> *Khan*, *supra* note 47 at para 12.

should be applied “robustly” when appropriate<sup>77</sup> or “to its fullest extent, if applicable.”<sup>78</sup> While generous and broad readings of pleadings are warranted, “tortured” readings are not.<sup>79</sup>

## 2. Hallmarks of Abusiveness

Rules 20, 21, and 25.11 all allow for summary determination of claims that can clearly be shown to have no merit. As such, something more is generally required to employ Rule 2.1. This accords with the Rule being designed to address instances where a “proposed cure” (*i.e.*, a dispositive motion) would “cause[] a fresh outbreak of the disease.”<sup>80</sup> Essentially, there should be something in the impugned pleading or other document that suggests a party will conduct the litigation vexatiously. Myers J has suggested that the following are helpful indicia that a claim may be (but is not necessarily) likely to be abusively litigated:<sup>81</sup>

- Curious formatting
- Many, many pages
- Odd or irrelevant attachments—*e.g.*, copies of letters from others and legal decisions, UN Charter on Human Rights, all usually, extensively annotated.
- Multiple methods of emphasis including: highlighting (various colours), underlining, capitalization.
- Repeated use of “ ’”, ???, !!!
- Numerous foot and marginal notes. [...]
- Rambling discourse characterized by repetition and a pedantic failure to clarify.
- Rhetorical questions.
- Repeated misuse of legal, medical and other technical terms.
- Referring to self in the third person.
- Inappropriately ingratiating statement.
- Ultimatums.
- Threats of violence to self or others[,] directed at individuals or organizations.

While these are helpful indicia in determining whether it is appropriate to allow a responding party to short-circuit the traditional motions and need for evidence and/or legal argument, as

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<sup>77</sup> *Scaduto, supra* note 70 at para 8.

<sup>78</sup> *Beatty, supra* note 74 at para 15.

<sup>79</sup> *Ibid* at para 19.

<sup>80</sup> *Raji #1, supra* note 7 at para 8.

<sup>81</sup> *Gao #2, supra* note 75 at para 15.

discussed in the next section, this is not strictly necessary.<sup>82</sup> Moreover, as discussed below, they do not indicate, in and of themselves, that the plaintiff does not have a viable cause of action or that resort to Rule 2.1 is appropriate.

### 3. Two Non-Determinative Criteria?

A claim sufficiently devoid of merit can still be dismissed pursuant to Rule 2.1 even in the absence of indicia that a plaintiff will behave vexatiously.<sup>83</sup> This is understandable. If the action is manifestly devoid of merit – such as a claim based upon the plaintiff’s being upset that lifeguards allegedly chastised him for swimming too slowly in the fast lane of a pool<sup>84</sup> – the proportionality principle cautions against further resources being expended. The second criterion is therefore a helpful guide that Rule 2.1 is appropriate, but judges retain discretion to use the Rule regardless.

The reverse does not hold. Two decisions of Myers J illustrate why the second criterion is not a standalone basis to use Rule 2.1. In the first, a statement of claim alleged medical malpractice in a manner that was not obviously implausible. However, it was 400 pages long, and lacked a coherent narrative. When notice was ordered under Rule 2.1, the plaintiff began by explaining himself before insulting Myers J: “what started as a perfectly acceptable explanation quickly became a vexatious rant.”<sup>85</sup> Rather than dismiss the claim pursuant to Rule 2.1, Myers J struck it pursuant to Rule 25.11, but permitted the plaintiff to submit a revised pleading. He also advised the plaintiff to obtain legal advice and informed him of a resource on how to draft pleadings.<sup>86</sup>

In the second, Myers J had similarly ordered a revised pleading be submitted. After the plaintiff submitted such a revised pleading, the defendant again sought to use Rule 2.1. Myers J

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<sup>82</sup> *Raji #1*, *supra* note 7 at para 9.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Asghar v Toronto (City)*, 2015 ONSC 4650, 42 MPLR (5th) 138 (SCJ).

<sup>85</sup> *Rallis v Scarborough Hospital*, 2016 ONSC 2263, [2016] OJ No 1773 (SCJ) [“*Rallis*”] at para 3.

<sup>86</sup> *Ibid* at para 5.

declined to do so, but nonetheless noted that the Court should watch how the case unfolded. In doing so, he explained the nature between the two Rule 2.1 criteria:

In most Rule 2.1 cases the frivolous nature of the claim is clear and the real question is whether a motion to strike or to dismiss should be heard in court in the usual way or whether the motion should be dealt with under the attenuated process of Rule 2.1. Here, the issues are reversed. There is reason to fear that the plaintiff may have difficulty following the process of the court and his pleading does bear some hallmarks of a querulent litigant. However, in my view, as he may well have a cause of action, [he] should have his day in court.<sup>87</sup>

Though the defendants could quite understandably be concerned by how the plaintiffs in these two cases conducted themselves, given the interest in permitting even vexatious parties to have a day in court if they have a legitimate grievance, it would seem appropriate to not treat signs of abusiveness as a reason to use Rule 2.1, unless there truly is no viable cause of action.

#### 4. Dismissal Without Notice

Rule 2.1's language contemplates that a court may depart from the requirement that notice be given to an affected party. And in thirteen cases, the notice requirement has been dispensed with. These rare instances fall into four categories:

1. Five proceedings commenced in violation of vexatious litigant orders;<sup>88</sup>
2. Four cases where the relief sought was not available in the court where the proceeding was commenced (*i.e.*, the Divisional Court when the Divisional Court could not provide the relief, or the Superior Court when an appeal was necessary);<sup>89</sup>

<sup>87</sup> *Asgar v Alon*, *supra* note 72 at para 5.

<sup>88</sup> *Park v Short*, 2015 ONSC 1292, [2015] OJ No 926 (SCJ); *Park v Crossgate Legal Services*, 2016 ONSC 4864, [2016] OJ No 4021 (SCJ); *Reyes v Buhler*, 2016 ONSC 5559, [2016] OJ No 4635 (SCJ) [*"Reyes v Buhler"*]; *Reyes v Jocelyn*, 2016 ONSC 5568, [2016] OJ No 4642 (SCJ) [*"Reyes v Jocelyn"*]; *Reyes v Embry*, 2016 ONSC 5558, [2016] OJ No 4636 (SCJ) [*"Reyes v Embry"*].

<sup>89</sup> *Coady v Law Society of Upper Canada*, 2016 ONSC 7543, [2016] OJ No 6194 (Div Ct); *Lin v Fluery*, 2017 ONSC 3601, 2017 CarswellOnt 8926 (Div Ct), *aff'd* 2017 ONCA 695, 2017 CarswellOnt 13756 [*"Lin v Fluery"*]; *Khan v 1806700 Ontario Inc*, 2017 ONSC 3726, 2017 CarswellOnt 9122 (Div Ct); *Lin v Rock*, *supra* note 2.

3. Three attempts to re-litigate, one of which was brazenly acknowledged as such,<sup>90</sup> with the other two being plaintiffs attempting to re-litigate matters already dismissed pursuant to Rule 2.1;<sup>91</sup> and
4. A claim based on the allegation “that the military has implanted brainwashing devices in [the plaintiff and] hospital staff threw bugs on him [...] so he could be interrogated”.<sup>92</sup>

There are obvious natural justice concerns with dismissing a proceeding without giving a party an opportunity to be heard. This is codified in the common law procedural fairness principle *audi alteram partem*.<sup>93</sup> Hearings are important not only to ensure that justice be seen to be done, but also because it is likely to lead to better decision-making.<sup>94</sup>

Having said that, procedural fairness is a flexible concept. And in the case of Rule 2.1, all but the last case where a claim was dismissed without giving the plaintiff any opportunity to be heard outside his or her pleadings involved litigants who either: a) already had an opportunity to be heard and then proceeded to manifestly abuse the court system; or b) needed to be directed to another forum. As such, the opportunity to be heard was fulfilled. In the last case, Myers J reminded

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<sup>90</sup> *D’Orazio v Ontario (Attorney General)*, 2016 ONSC 4893, [2016] OJ No 4031 (SCJ) [“*D’Orazio*”].

<sup>91</sup> *Lee v Future Bakery Ltd*, 2016 ONSC 1764, [2016] OJ No 1266 (SCJ) [“*Lee v Future*”]; *Nguyen v Bail*, 2016 ONSC 2365, [2016] OJ No 1840 (SCJ).

<sup>92</sup> *Shafirovitch v Scarborough Hospital*, 2015 ONSC 7627, 85 CPC (7th) 149 (SCJ) [“*Shafirovitch*”].

<sup>93</sup> The Hon Louis LeBel, “Notes for an Address: Reflections on Natural Justice and Procedural Fairness in Canadian Administrative Law” (February 2013) 26 Can J Admin L & Prac 51 at 53, based upon a presentation to the Continuing Legal Education Society of British Columbia Administrative Law Conference 2012 in Vancouver, British Columbia on October 26, 2012. While this specifically concerns administrative law, this principle applies to civil litigation as well: e.g., *Ontario Provincial Police Commissioner v Mosher*, 2015 ONCA 772, 340 OAC 311 at paras 60-63.

<sup>94</sup> Jonathan Haidt, “Moral Psychology and the Law: How Intuitions Drive Reasoning, Judgment, and the Search for Evidence” (2013) 64:4 Ala L Rev 867 at 873, building on his work in Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012); Justice Peter Lauwers, “Reflections on Charter Values” (Keynote Address Delivered at the Runnymede Society Law & Freedom Conference, Hart House, University of Toronto, 12 January 2018), online: <<https://www.youtube.com/watch?v=H5WTRCO-u9U>> at ~18:00-18:20; The Honourable Justice Peter Lauwers, “What Could Go Wrong with Charter Values” (2019) 91 SCLR (2d) 1.

himself of the Court’s duty towards self-represented litigants, and also noted that “there is perhaps a salutary effect to allow the litigant an opportunity to be heard”.<sup>95</sup> But he then concluded:

I will not be disrespectful to the plaintiff by treating him with anything less than full candour. If the plaintiff believes that the military has implanted brainwashing devices in him and [...] hospital staff threw bugs on him to force itching so he could be interrogated, he needs assistance that a court cannot provide. The plaintiff may wish to consult with the Office of the Public Guardian and Trustee<sup>96</sup>

This dilemma about dispensing with the notice requirement is discussed below in Part V.A.

The Court of Appeal reviewed the adequacy of notice in the court below in *Van Sluytman v Muskoka*.<sup>97</sup> It took a substantive rather than formalistic approach to notice, noting that the appellant had clearly received formal notice in many of the eight actions he had commenced. Even if formal notice had not been sent in all, the Court was amply satisfied that no injustice had occurred as the purpose of notice – the right to be heard – was satisfied. The Court of Appeal also considered the notice requirement in *Okel v Misheal*, where it held that the form of notice could be flexible, as long as the party’s right to be heard was fulfilled.<sup>98</sup>

## 5. Types of Cases Dismissed Pursuant to Rule 2.1

It is fair to say that in the vast majority of successful uses of the Rule, the lack of a cause of action is obvious. In *Gao #2*, Myers J suggested seven attributes – six of them recognized as characteristics of vexatious litigants in case law under s 140 of the CJA – that would likely be apparent in cases where Rule 2.1 is employed.<sup>99</sup> Three years into the Rule’s history, many of these anticipated characteristics do describe multiple cases where Rule 2.1 was used to dismiss a claim:

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<sup>95</sup> *Shafirovitch*, *supra* note 92 at para 3.

<sup>96</sup> *Ibid* at para 5.

<sup>97</sup> *Van Sluytman v Muskoka (District Municipality)*, 2018 ONCA 32, 2018 CarswellOnt 301, leave to appeal denied, [2018] SCCA No 206, 2018 CarswellOnt 18335 [“*Van Sluytman*”].

<sup>98</sup> 2014 ONCA 699, [2014] OJ No 4842 [“*Okel*”] at para 10.

<sup>99</sup> *Supra* note 75 at paras 14, 16.

- “Bringing multiple proceedings to try to re-determine an issue that has already been determined by a court of competent jurisdiction”;<sup>100</sup>
- “Persistent pursuit of unsuccessful appeals”;<sup>101</sup>
- “Rolling forward grounds and issues from prior proceedings to repeat and supplement them in later proceedings including bringing proceedings against counsel who have acted for or against them in earlier proceedings”<sup>102</sup> – this extended to suing Myers J after he dismissed a plaintiff’s case;<sup>103</sup>
- “OPCA”<sup>104</sup> litigants who frequently assert that neither statutory nor common law applies to them;<sup>105</sup> and
- “bringing proceedings where no reasonable person would expect to obtain the relief sought”,<sup>106</sup> with examples of this including:
  - A claim alleging a conspiracy to falsely implicate the plaintiff as a terrorist, conduct human experiments, and take over Africa, with Toronto-chambered judges of the Superior Court being part of this conspiracy;<sup>107</sup>
  - An attempt to have the United States pay approximately \$510 Billion American dollars in redemption of “bank bonds” that were obviously fake;<sup>108</sup> and
  - A request that Ontario provide the plaintiff with a job and fix his love life.<sup>109</sup>

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<sup>100</sup> *Ibid* at para 14(a), exemplified in, e.g., *Hurontario Travel Centre v Ontario (Attorney General)*, 2015 ONSC 4246, [2015] OJ No 3469 (SCJ).

<sup>101</sup> *Gao #2, supra* note 75 at para 14(c), exemplified in, e.g., *El Zayat v Hausler*, 2016 ONSC 6099, [2016] OJ No 4984 (Div Ct).

<sup>102</sup> *Gao #2, ibid* at para 14(b).

<sup>103</sup> *Raji v Myers*, 2015 ONSC 4066, 75 CPC (7th) 115 (SCJ) [“*Raji v Myers*”].

<sup>104</sup> “Organized Pseudolegal Commercial Argument”: see *Meads v Meads*, 2012 ABQB 571, 74 Alta LR (5th) 1.

<sup>105</sup> *Gao #2, supra* note 75 at para 16, exemplified in, e.g., *Ali v Ford*, 2014 ONSC 6665, [2014] OJ No 5426 (SCJ).

<sup>106</sup> *Gao #2, ibid* at para 14(f).

<sup>107</sup> *Raji v Myers, supra* note 103.

<sup>108</sup> *Zeleny v Canada*, 2016 ONSC 7226, [2016] OJ No 6101 (SCJ).

<sup>109</sup> *Asghar v Ontario, supra* note 1.

These are cases where Rule 2.1 was used to dismiss an action after notice, giving litigants the opportunity to explain themselves. The Rule indeed seems to be being applied to clear cases.

## 6. Types of Cases Where Notice is Not Ordered

There are rare cases where a defendant's proposed use of Rule 2.1 has been obviously inappropriate, attempting to bring in the merits through lengthy submissions<sup>110</sup> or simply lacking any facial reason to believe the claim or motion is abusive.<sup>111</sup> This has resulted in admonishments from the bench.<sup>112</sup> More frequently, however, notice is not ordered when the claim appears badly drafted,<sup>113</sup> excessively simple,<sup>114</sup> or likely to elicit a very strong defence,<sup>115</sup> but where a plausible cause of action is nonetheless discernible. Another common example where notice is not ordered despite a judge's suspicions is where there is an allegation that the claim is an attempt to re-litigate, but this is not obvious.<sup>116</sup> At other times, a plaintiff's actions appear tactically suspicious, but are not facially illegitimate or incompatible with a cause of action. The best example of this would be a late-breaking attempt by a defendant to bring a third party claim against the plaintiff's lawyer.<sup>117</sup> There are good reasons to be apprehensive of such litigation tactics that may have an improper motive – but they are not necessarily incompatible with a legitimate cause of action, and Rule 2.1 is not the mechanism to address them.

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<sup>110</sup> *E.g., Covenoho v Ceridian Canada*, 2015 ONSC 2468, [2015] OJ No 1889 (SCJ); *Kyriakopoulos v Lafontaine*, 2015 ONSC 6067, [2015] OJ No 5029 (SCJ) [*"Kyriakopoulos"*]; *Ramsarran v Assaly Asset Management Corp*, 2017 ONSC 2394, [2017] OJ No 1937 (SCJ) [*"Ramsarran"*]; *Carby-Samuels v Carby-Samuels*, 2017 ONSC 2911, [2017] OJ No 2406 (SCJ).

<sup>111</sup> *E.g., MacLeod v Hanrahan Youth Services*, 2015 ONSC 8018, [2015] OJ No 6771 (SCJ) [*"Hanrahan"*].

<sup>112</sup> *Kyriakopoulos*, *supra* note 110; *Hanrahan*, *ibid.*

<sup>113</sup> *Posadas v Khan*, 2015 ONSC 4077, 75 CPC (7th) 118 (SCJ) [*"Posadas"*]; *Carby-Samuels v Carby-Samuels*, 2016 ONSC 4974, [2016] OJ No 4188 (SCJ); *2222028 Ontario Inc v Adams*, 2017 ONSC 690, [2017] OJ No 565 (SCJ) [*"Adams"*].

<sup>114</sup> *Ghasempoor v DSM Leasing Ltd*, 2015 ONSC 7628, [2015] OJ No 6422 (SCJ).

<sup>115</sup> *Polanski v Scharfe*, 2016 ONSC 4892, [2016] OJ No 4039 (SCJ).

<sup>116</sup> *Bisumbule v Conway*, 2016 ONSC 6138, [2016] OJ No 5209 (SCJ); *Troncanada & Associates v B2Gold Corp*, 2016 ONSC 6271, [2016] OJ No 5190 (SCJ); *Volynansky v Ontario (Attorney General)*, 2017 ONSC 1692, [2017] OJ No 1330 (Div Ct).

<sup>117</sup> *Charendoff v McLennan*, 2015 ONSC 6883, [2015] OJ No 6469 (SCJ) [*"Charendoff"*].



## D. Family Law

Having considered Rule 2.1 in the context of civil litigation, I now turn to the extent to which it or an equivalent approach applies in the family law context. In *Frick v Frick*,<sup>118</sup> the Court of Appeal cautioned against bringing the Rule into the family law context through Rule 1(8.2) of the *Family Law Rules*, which reads that a “court may strike out all or part of any document that may delay or make it difficult to have a fair trial or that is inflammatory, a waste of time, a nuisance or an abuse of the court process”.<sup>119</sup> Though family and civil litigation have much in common regarding access to justice issues, there are important distinguishing aspects.<sup>120</sup> Moreover, the *Rules of Civil Procedure* do not generally directly apply in the family law context. In Court of Appeal family law appeals, however, where the *Rules of Civil Procedure* do apply,<sup>121</sup> the Court of Appeal has used Rule 2.1.<sup>122</sup> It has also been used in the Superior Court family law context when the plaintiff was subject to a vexatious litigant order.<sup>123</sup>

## IV) CHARACTERISTICS OF THE CASE LAW

### A. Overall Numbers, Courts, and Success Rates

There were 190 reported cases indicating requests to use Rule 2.1 (whether by a judge, registrar, or responding party) between July 1, 2014 and June 30, 2017, an average of 63 per year. This compares to approximately 9,130 reported Superior Court/Divisional Court/Court of Appeal decisions per year.<sup>124</sup> Many of the 190 Rule 2.1 decisions also have reported decisions for notice,

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<sup>118</sup> 2016 ONCA 799, 132 OR (3d) 321 [*“Frick”*].

<sup>119</sup> O Reg 114/99 [*“Family Law Rules”*].

<sup>120</sup> Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) [*“Farrow Book”*] at 71, fn 86; Mary-Jo Maur, Nicholas Bala & Alexandra Terrana, “Costs and the Changing Culture of Canadian Family Justice” (February 6, 2017) Queen’s University Legal Research Paper No 087, online: <<https://ssrn.com/abstract=2919492>>.

<sup>121</sup> *Family Law Rules*, *supra* note 119, Rule 38.

<sup>122</sup> *Okel*, *supra* note 98.

<sup>123</sup> *Hawkins v Schlosser*, 2015 ONSC 646, [2015] OJ No 372 (SCJ).

<sup>124</sup> Based on February 28, 2018 Westlaw searches, *Sidhu v Knight*, 2016 ONSC 8166, 2016 CarswellOnt 21037 (SCJ) appears to be the 2016 Divisional Court/Superior Court case with the “highest” number in its neutral

disposition, and/or costs. The total numbers per year also include criminal and family cases, as well as cases that have multiple reported decisions per year. As such, it would appear that well over 1% (likely much higher) of decided civil cases per year involve Rule 2.1. While far from the norm, this is not a trivial number. Dozens of cases a year is in any event not a small number in and of itself, being well over double numbers for other procedural matters such as jurisdictional disputes.<sup>125</sup> In the absence of Rule 2.1, one can only imagine what sort of mischief – ranging from wasted court time to unprincipled settlements – these cases would have caused.

In 162 of these 190 cases, the first use of Rule 2.1 was in the Superior Court, in 21 it was in the Divisional Court, and in 7 it was in the Court of Appeal. The chart below illustrates whether the request to dismiss a proceeding, or step therein, was granted, dismissed, or subject to another remedy, depending on the court in which the use of the Rule originated:

**TABLE 2A: OVERALL RESULTS OF RULE 2.1 CASES**

<b>Disposition</b>	<b>Number of Cases</b>	<b>Superior Court</b>	<b>Divisional Court</b>	<b>Court of Appeal</b>
Granted	136	111	19	6
	<i>After Notice</i>	<i>121</i>	<i>99</i>	<i>16</i>
	<i>Unclear About Notice</i>	<i>2</i>	<i>0</i>	<i>0</i>
	<i>Without Notice</i>	<i>13</i>	<i>3</i>	<i>0</i>
Partially Granted	2	1	0	1
Notice Ordered of Dismissal Being Considered but Final Disposition Not Reported	13	13	0	0

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citation, while *DeMarco v Nicoletti Estate and Daboll*, 2015 ONSC 8155, 2015 CarswellOnt 21018 (SCJ) appears to be the 2015 case with the “highest” number in its neutral citation. Based on a February 27, 2018 Westlaw search, *JPB v CB*, 2016 ONCA 996, 2016 CarswellOnt 21847 appears to be the 2016 Court of Appeal decision with the “highest” number in its neutral citation, while *Reischer, Re*, 2015 ONCA 929, 344 OAC 132 appears to be the 2015 Court of Appeal decision with the “highest” number in its neutral citation.

<sup>125</sup> Kennedy Jurisdiction, *supra* note 48.

<b>Disposition</b>	<b>Number of Cases</b>	<b>Superior Court</b>	<b>Divisional Court</b>	<b>Court of Appeal</b>	
New Pleading Ordered	1	1	0	0	
Resolved After Claim Partially Withdrawn	1	1	0	0	
Dismissed	37	35	2	0	
	<i>No Notice Ordered</i>	27	26	1	0
	<i>After Notice</i>	4	3	1	0
	<i>In Context of Broader Motion</i>	3	3	0	0
	<i>After Amended Pleading Served</i>	1	1	0	0
	<i>After Appeal</i>	2	2	0	0
<b>Total</b>	<b>190</b>	<b>162</b>	<b>21</b>	<b>7</b>	

In 136 of 177 decisions where the result is known – over 75% of cases – Rule 2.1 was used to dismiss the action, or step therein. In four additional cases, the proceeding was partially dismissed,<sup>126</sup> a new pleading was ordered,<sup>127</sup> or the matter was resolved.<sup>128</sup> That leaves 37 of 177 cases – 20.9% – where the attempted use was unsuccessful. This is an approximately four-to-one ratio of successful to unsuccessful uses. It is worth noting that in 27 of the 37 unsuccessful uses, notice was not ordered, and in an additional three, the Rule was only raised in the context of a broader motion, implying that little costs or delay resulted from the use of Rule 2.1 *per se*.

### **B. Origin: Responding Party, Judge, or Registrar**

In 119 of the 190 cases, it appears clear or implicit that the responding party requested the use of Rule 2.1. In 14 cases, a judge appears to have raised the issue on his or her own initiative. In

<sup>126</sup> *Reyes v Esbin*, 2016 ONSC 254, [2016] OJ No 97 (SCJ) [*“Reyes v Esbin”*]; *Collins v Ontario*, 2017 ONCA 317, [2017] OJ No 1982.

<sup>127</sup> *Rallis*, *supra* note 85.

<sup>128</sup> *Clarke v Canada (Human Rights Commission)*, 2015 ONSC 2564, 2015 CarswellOnt 5611 (SCJ).

three, the registrar appears to have prompted the use of the Rule. In 54 cases, it was unclear how the matter came before the court. This could be suggestive that registrars and judges are being insufficiently proactive in using Rule 2.1. After all, the Rule’s language suggests that a court is to use it “on its own initiative”.<sup>129</sup> A suggestion on how the registrars and judges could be more proactive is given below. However, in every case where the court (whether by judge or registrar) prompted the use of the Rule, its use was successful. This minimization of inappropriate uses of the Rule is unquestionably positive from an access to justice perspective.

### C. Number of Appeals

In 175 of the 190 cases – that is, over 90% – there was no reported appellate decision reviewing the decision whether to use Rule 2.1. Insofar as there were no substantive injustices in these cases, this low rate of appeals appears positive. In all of the other fifteen cases, the appeal arose from a dismissal of the action. In thirteen of those cases, the lower court result was affirmed. Five of these decisions led to unsuccessful leave applications to the Supreme Court of Canada.<sup>130</sup>

Only two cases had successful appeals. One was *Frick*, where the trial judge sought to import Rule 2.1 jurisprudence into family law litigation.<sup>131</sup> The case’s delay and costs were unfortunate for the parties, but the Court of Appeal reached largely the same result as the trial judge, albeit by a different rationale. Moreover, it was valuable to clarify Rule 2.1’s applicability in family law.<sup>132</sup> The negative access to justice consequences of the use of Rule 2.1 in *Frick* are thus minimal.

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<sup>129</sup> Rule 2.1.01(7).

<sup>130</sup> *Lin v Springboard*, 2016 ONCA 787, [2016] OJ No 6072, leave to appeal ref’d, [2016] SCCA No 562, 2017 CarswellOnt 2700; *Lin v ICBC Vancouver Head Office*, 2016 ONSC 3934, [2016] OJ No 3223 (Div Ct), aff’d 2016 ONCA 788, [2016] OJ 6071, leave to appeal ref’d, [2016] SCCA No 561, 2017 CarswellOnt 807 [“*Lin v ICBC*”]; *Ibrahim v Toronto Transit Commission*, 2016 ONCA 234, [2016] OJ No 1631, leave to appeal ref’d, [2016] SCCA No 231, 2016 CarswellOnt 15338; *Scaduto*, *supra* note 70; *Van Sluytman*, *supra* note 97, which consolidated several different Superior Court decisions, as seen in Appendix D.

<sup>131</sup> *Supra* Part III.D.

<sup>132</sup> *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

That leaves only one case (less than 1% of the total) where a civil action was dismissed pursuant to Rule 2.1 but this was overturned on appeal. *Khan v Krylov & Company LLP*<sup>133</sup> is a cautionary tale about judges becoming overzealous in using Rule 2.1. The case concerned an allegation that the defendants, the plaintiff's lawyers in a personal injury case, forged his signature on a settlement, misappropriated settlement funds, and did not properly explain the settlement to him. While serious allegations that would likely elicit a strong defence, the appellate judges noted that the facts as pled gave rise to a cause of action, and they also saw no signs that the plaintiff would act vexatiously in the litigation. Though noting that the statement of claim was short, and implying that some sort of summary procedure may be appropriate to resolve it, the Court of Appeal held that: "Once a pleading asserts a cause of action and does not bear the hallmarks of frivolous, vexatious or abusive litigation, resort to rule 2.1 is not appropriate as a means for bringing the action to an early end. The motion judge erred in truncating the normal process."<sup>134</sup>

Though concerning, *Khan* is an outlier in terms of cases where the use of Rule 2.1 was granted. Rather, it bears similarity to cases where Myers J or Beaudoin J did not order notice pursuant to Rule 2.1.<sup>135</sup> It also gave the Court of Appeal an opportunity to remind judges to be careful when using Rule 2.1. It is suggested, therefore, that this single instance of the Court of Appeal needing to correct an overzealous Superior Court judge does not detract, in and of itself, from Rule 2.1's effectiveness.

#### **D. Costs**

The ability to accurately calculate the costs incurred as a result of uses of Rule 2.1 is limited. This is because in 134 of the 190 cases, costs are unclear, usually because the decision is silent on

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<sup>133</sup> *Khan, supra* note 47.

<sup>134</sup> *Ibid* at para 14.

<sup>135</sup> See Part III.C.6.

the issue,<sup>136</sup> the matter was referred to an assessment officer,<sup>137</sup> or submissions were called for<sup>138</sup> but the matter may have been settled.<sup>139</sup> In some cases, it is clear that costs were to be assessed on a partial,<sup>140</sup> substantial,<sup>141</sup> or even full<sup>142</sup> indemnity basis, but the quantum remains unclear. Moreover, 43 cases had no costs ordered. This is not surprising, given that defendants likely incurred minimal costs, Rule 2.1 is novel law,<sup>143</sup> and there is good reason to suspect that several plaintiffs against whom the Rule is used are mentally ill and it would be unjust to make a costs order against them.<sup>144</sup> An additional case had no costs ordered against some defendants while the costs against the others are unclear.<sup>145</sup> One case seems inapposite because the costs award was clearly related to issues other than the unsuccessful attempt to invoke Rule 2.1.<sup>146</sup> This comes to a total of 179 out of 190 cases shedding no real light on the costs actually incurred.

However, the eleven cases with reported costs (also appearing at Appendix E) are nonetheless interesting:

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<sup>136</sup> *E.g., Stefanizzi v Ontario (Landlord and Tenant Board)*, 2015 ONSC 859, [2015] OJ No 562 (SCJ).

<sup>137</sup> *E.g., Lee v Future*, *supra* note 91 at para 6.

<sup>138</sup> *E.g., Markowa v Adamson Facial Cosmetic Surgery Inc*, 2014 ONSC 6664, [2014] OJ No 5430 (SCJ).

<sup>139</sup> A phenomenon discussed in, *e.g.*, *Kennedy Jurisdiction*, *supra* note 48.

<sup>140</sup> *E.g., D'Orazio*, *supra* note 90.

<sup>141</sup> *E.g., Kadiri*, *supra* note 68.

<sup>142</sup> *E.g., Reyes v Buhler*, *supra* note 88.

<sup>143</sup> A classic reason not to order costs: *Pal v Powell* (2009), 247 OAC 205 (Div Ct) [*“Pal”*] at paras 18-19, 22.

<sup>144</sup> *Shafirovitch*, *supra* note 92; the unwellness of a party can be a reason not to order costs: *Pal*, *ibid* at paras 21-22.

<sup>145</sup> *Goralczyk #1*, *supra* note 51 compared to *Goralczyk v Beer Store*, 2016 ONSC 4416, [2016] OJ No 3597 (SCJ).

<sup>146</sup> *Fine*, *supra* note 60.

**TABLE 2B: COSTS ORDERS IN RULE 2.1 CASES**

	<b>Case Name</b>	<b>First Instance Costs</b>	<b>Appeal Costs</b>
1.	<i>Hawkins v Schlosser</i> <sup>147</sup>	\$1,148.02	None
2.	<i>Nguyen v Economical Mutual Insurance Co</i> <sup>148</sup>	\$2,000	None
3.	<i>Obermuller v Kenfinch Co-Operative Housing Inc</i> <sup>149</sup>	Unclear	\$2,000
4.	<i>Chalupnicek v The Children's Aid Society of Ottawa</i> <sup>150</sup>	None	\$17,684.83 (full indemnity)
5.	<i>Marleau v Brockville (City)</i> <sup>151</sup>	\$5,500	None
6.	<i>Jarvis v Morlog</i> <sup>152</sup>	\$2,256.39 (substantial indemnity)	None
7.	<i>Irmya v Mijovick</i> <sup>153</sup>	\$30,187.78 (full indemnity, three defendants)	None
8.	<i>Khan v Krylov &amp; Company LLP</i> <sup>154</sup>	\$2,000	\$3,000
9.	<i>Gates v Humane Society of Canada for the Protection of Animals and the Environment (cob The Humane Society of Canada)</i> <sup>155</sup>	\$8,000	None
10.	<i>Son v Khan</i> <sup>156</sup>	\$2,611.93	None
11.	<i>Hoang v Mann Engineering Ltd</i> <sup>157</sup>	\$1,500	None

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<sup>147</sup> 2015 ONSC 1691, [2015] OJ No 1346 (SCJ).

<sup>148</sup> *Nguyen v Economical*, *supra* note 60.

<sup>149</sup> 2015 ONSC 6800, [2015] OJ No 5743 (SCJ), *aff'd* 2016 ONCA 330, [2016] OJ No 2362.

<sup>150</sup> *Chalupnicek, v Children's Aid Society of Ottawa*, 2017 ONSC 1278, 2017 CarswellOnt 272 (Div Ct) [*"Chalupnicek"*].

<sup>151</sup> 2016 ONSC 5901, [2016] OJ No 4961 (SCJ).

<sup>152</sup> 2016 ONSC 5061, 2016 CarswellOnt 1269 (SCJ).

<sup>153</sup> 2016 ONSC 5276, [2016] OJ No 4372 (SCJ).

<sup>154</sup> *Khan*, *supra* note 47.

<sup>155</sup> 2016 ONSC 6051, [2016] OJ No 4957 (Div Ct).

<sup>156</sup> 2016 ONSC 7621, [2016] OJ No 6283 (Div Ct).

<sup>157</sup> *Hoang v Mann Engineering Ltd*, 2015 ONCA 838, [2015] OJ No 6316 [*"Hoang"*].

The average size of the nine first instance costs awards is \$6,133.79. But *Irmya v Mijovick* is an extreme outlier, nearly four times the quantum of the next highest award. The average excluding that case is \$3,127.04, which is still higher than the median of \$2,256.39. The average of the three appellate costs awards is \$8,561. Again, however, there is an extreme outlier in *Chalupnicek*, which is nearly six times the size of the next award. The average of the other two is \$2,500, not far from the median of all three that is \$3,000. Accordingly, while the small sample size being drawn from must be acknowledged, the typical costs awards appear in the \$3,000 range for a case without an appeal, and about double that for a case with an appeal.

Costs awards typically represent only half of costs actually incurred.<sup>158</sup> Even recognizing that, however, compared to other preliminary motions, the costs of which have been analyzed (such as jurisdiction motions), these costs are very low. Chapter One suggests that “each party in a non-class action can reasonably expect to spend approximately \$30,000-\$45,000 on a jurisdiction motion, and \$60,000-\$75,000 if there is an appeal.”<sup>159</sup> And unlike jurisdiction motions, Rule 2.1 attempts to resolve a dispute on its merits. The costs to do so appear very reasonable, according with the proportionality principle.

#### **E. Time Delay Caused by Rule 2.1**

For the purposes of calculating delay, instances where the following occurred were not included, as they shed little if any light on delay *caused by Rule 2.1*:

- where Rule 2.1 was raised but not used in the context of a broader motion;
- where notice was ordered but the final disposition is not reported; or

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<sup>158</sup> See, e.g., P Scott Horne, “The Privatization of Justice in Québec’s Draft Bill to Enact the New Code of Civil Procedure: A Critical Evaluation” (2013) 18 Appeal 55 at 61, cited in Kennedy Jurisdiction, *supra* note 48, fn 60.

<sup>159</sup> Kennedy Jurisdiction, *ibid.*



- if the use was granted but it was unclear whether notice was ordered.

Given that cases generally only note when notice was ordered (rather than when the matter was brought to a judge's attention), delay is calculated from the date that notice is ordered. This appears to be very shortly after matters are brought to a judge's attention.<sup>160</sup> If the date where notice was ordered is not clear, delay could not be calculated. In Appendix F, the above chart on results is accordingly amended to include delay.

Of the 121 cases where the motion was granted after notice, delay can be calculated in 102. The average delay is 45 days: 45 in 99 Superior Court decisions, 31 in 8 Divisional Court decisions, and 126 in 2 Court of Appeal decisions.<sup>161</sup> Where appeals occurred, the average delay was 232 days. And when a Supreme Court leave application was made, the average delay was 338 days.

Delay in cases where the use of Rule 2.1 was granted is separated from delay where it was not for two reasons. First, there are asymmetrical consequences between delay when the Rule's use is successful and when it is not. The former is the delay required to resolve the action finally, while the latter impedes the plaintiff's ability to bring his or her case promptly. The latter is accordingly much more problematic from an access to justice perspective. Second, the sample size where delay is quantifiable in cases where the proposed use of Rule 2.1 was unsuccessful is very small – only five cases. The measure of the delay in those five cases is lengthy – 126 days at the trial level alone. For these plaintiffs, the Rule was a severe access to justice obstacle. (Admittedly, in one of them an amended pleading was ordered, which was to all parties' benefit.<sup>162</sup>) But it is difficult to

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<sup>160</sup> In *Asghar v Toronto (City) Police Services Board*, 2016 ONSC 4844, [2016] OJ No 4028 (SCJ), a rare instance where the judge notes the date of the defendant's letter, the delay between the date of the defendant's letter to the ordering of notice is nine days.

<sup>161</sup> It is of course difficult to make conclusions based on the small samples of Court of Appeal and Divisional Court decisions. Proper statistical analysis (which I am not qualified to conduct independently) may be appropriate after more years of use of the Rule.

<sup>162</sup> *Rallis*, *supra* note 85.

draw many normative lessons from this small sample size. In the vast majority of cases where the proposed use of the Rule was unsuccessful, judges have simply elected not to issue notice. Having the opposing party suggest that Rule 2.1 be employed in these circumstances is doubtless annoying for plaintiffs, but it seems to have minimal access to justice consequences, beyond the plaintiff's annoyance and the judge's time. Suggestions on how to mitigate these access to justice impediments is returned to in Part V.A, below.

### **F. Self-Represented Litigants?**

It was not always clear from the decisions if parties were represented by counsel. At times, it was inferred that a litigant was self-represented: for example, if the judge referred to the plaintiff making submissions when normally counsel would be referred to as making submissions.<sup>163</sup> Self-representation was also assumed if the judge referred to submissions in a way that it seemed a fair inference that a lawyer did not draft the claim.<sup>164</sup> However, when I was reasonably uncertain, the case was classified as one where it was unclear whether a self-represented litigant was involved.

Of the 190 decisions, all parties had counsel in only nine cases. 144 (75%) appear to have been instances where Rule 2.1 was sought to be used against self-represented litigants, though in one of those, the plaintiff was a lawyer himself.<sup>165</sup> This is in line with Macfarlane's observation of "some lower level civil courts reporting more than 70% of litigants as self-represented."<sup>166</sup> In an additional three-to-five of these cases, the litigant had a law degree.<sup>167</sup> In one case, someone

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<sup>163</sup> *E.g., Asghar v Avepoint Toronto*, 2015 ONSC 5544, [2015] OJ No 4611 (SCJ).

<sup>164</sup> *E.g., Brown v Fred Victor Organization*, 2015 ONSC 3516, [2015] OJ No 3428 (SCJ).

<sup>165</sup> *Posadas*, *supra* note 113.

<sup>166</sup> Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report" (May 2013), online: <<https://scholar.uwindsor.ca/lawpub/85/>> ["Macfarlane Main Report"] at 34.

<sup>167</sup> *Reyes v Buhler*, *supra* note 88; *Reyes v KL*, *supra* note 61; *Reyes v Esbin*, *supra* note 126; *Reyes v Jocelyn*, *supra* note 88; *Reyes v Embry*, *supra* note 88.

purported to act as agent for the plaintiff but did not appear to be a licensed lawyer.<sup>168</sup> In the other 38 decisions, it was unclear whether there were self-represented parties.

It is striking that attempts to use Rule 2.1 were unsuccessful in seven of the cases where all sides had counsel.<sup>169</sup> The 22% success rate<sup>170</sup> is much lower than the typical rate of 75-80%. This could indicate that the Rule is being used unfairly against self-represented litigants. However, it is also possible – hopefully likelier – that lawyers are less likely to take on frivolous cases. After all, lawyers in Ontario swear an oath or make an affirmation upon being called to the bar that they will not commence claims on frivolous pretences.<sup>171</sup> In one of two cases where the Rule was used successfully against a party with counsel, Master MacLeod (as he then was) wrote that “it is of some concern plaintiffs are apparently represented by a lawyer licenced to practice law in Ontario.”<sup>172</sup> The lawyer at issue has subsequently been subject to investigation by the Law Society of Ontario.<sup>173</sup> One could argue that there should be costs awarded against lawyers who bring frivolous claims personally.<sup>174</sup> Ultimately, though the comparatively high success rate of Rule 2.1 against self-represented litigants could be concerning, as long as judges remain cognizant of their duties to assist self-represented litigants, a matter returned to below, there are not necessarily significant access to justice concerns with Rule 2.1 for this reason alone.

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<sup>168</sup> *Adams*, *supra* note 113.

<sup>169</sup> *Haidari v Sedeghi-Pour*, 2015 ONSC 2904, 73 CPC (7th) 191 (SCJ); *Craven v Chmura* (2015), unreported, but referred to in *Craven v Chmura*, 2015 ONSC 4843, [2015] OJ No 4088 (SCJ); *Kyriakopoulos*, *supra* note 110; *Charendoff*, *supra* note 117; *Ramsarran*, *supra* note 110; *Caliciuri*, *supra* note 60; *Frick*, *supra* note 118.

<sup>170</sup> *Chalupnick*, *supra* note 150; *Gates v Humane Society of Canada for the Protection of Animals and the Environment (cob The Humane Society of Canada)*, 2016 ONSC 5345, [2016] OJ No 4424 (Div Ct); *Hoang*, *supra* note 157.

<sup>171</sup> Law Society of Ontario, By-Law 4, *Licensing*, s 21, online: <<http://www.lsuc.on.ca.ezproxy.library.yorku.ca/WorkArea/DownloadAsset.aspx?id=2147485805>>.

<sup>172</sup> *Chalupnick v Children's Aid Society of Ottawa*, 2016 ONSC 2353, [2016] OJ No 1940 (Master) at para 8.

<sup>173</sup> *The Law Society of Upper Canada v Glenn Patrick Bogue*, Notice of Motion for Interlocutory Suspension or Restriction, filed March 24, 2017, File No: 17H-030 (LSO HT), online: <<https://lawsocietytribunal.ca/Current%20Proceedings/Bogue17H-030NMT.pdf>>.

<sup>174</sup> Permitted pursuant to Rule 57.07(1)(c) of the *Rules*, *supra* note 3, “Where a lawyer [...] has caused costs to be incurred without reasonable cause or to be wasted by [...] negligence or other default”. Thanks to David Tanovich for raising this at a Job Talk at the Faculty of Law, University of Windsor on November 19, 2018.

### G. “Frequent Flyers”

Twenty individuals represent, cumulatively, at least 63 of the 153 proposed uses of Rule 2.1 that were not dismissed – over 40%. Given that most of these individuals commenced their different actions against different defendants, it illustrates the utility of Rule 2.1 in not forcing multiple defendants into bringing motions and/or vexatious litigant applications. And this is merely among those cases that were reported – many additional cases these individuals have commenced appear unreported.<sup>175</sup> A potential way to monitor these individuals is discussed below.

### V) WAYS FORWARD

Rule 2.1 appears to have been a fundamentally positive addition to Ontario’s *Rules*, resolving particular types of actions on their merits in a timely and cost-effective matter. Though a party’s “opportunity to be heard” may not be as in-depth as is traditional, procedural fairness is a flexible concept. The dismissal of a claim without a trial, much less the dismissal without a hearing, was historically seen as the quintessential example of a procedural injustice.<sup>176</sup> But post-*Hryniak*, and bearing the principle of proportionality in mind, we have recognized that that is not always necessary – other, less formal procedures can fulfill the requirement of procedural fairness.<sup>177</sup> While the use of letters instead of formal motions may be seen to compromise the open court principle, that principle can yield to various other societal concerns<sup>178</sup> and, more importantly, formally reported decisions leave the open court principle largely respected. It should be born in mind that administrative law – which shares many of the same concerns as civil litigation regarding

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<sup>175</sup> Emily Mathieu & Jesse McLean, “‘Vexatious litigant’ continues to have her days in court” *The Toronto Star* (26 November 2016), online: <<https://www.thestar.com/news/gta/2016/11/26/vexatious-litigant-continues-to-have-her-days-in-court.html>>; *Lin v ICBC*, *supra* note 130.

<sup>176</sup> Walker, *supra* note 5 at 697; *Irving Ungerman Ltd v Galanis* (1991), 4 OR (3d) 545 at 550–51.

<sup>177</sup> Shantona Chaudhary, “*Hryniak v. Mauldin*: The Supreme Court issues a clarion call for civil justice reform” (Winter 2014) 33 Adv J No 3 (praising *Hryniak*); Farrow 2012, *supra* note 13 (concerning proportionality); MacKenzie, *supra* note 5 (also praising *Hryniak*).

<sup>178</sup> See, e.g., *R v NS*, 2012 SCC 72, [2012] 3 SCR 726 (admittedly in a different context).

procedural fairness and *audi alteram partem*<sup>179</sup> – frequently holds informal/written procedures to be sufficient to dismiss claims.<sup>180</sup>

Having said that, lessons should still be critically drawn. This section begins by suggesting how the Rule should be interpreted going forward in light of successes and failures in its application to date. It is first argued that the Rule needs to continue to be interpreted restrictively yet applied robustly when appropriate. Specific suggestions are made regarding cases where the plaintiff appears to be attempting to re-litigate a proceeding, where a cause of action appears buried in an otherwise obviously abusive pleading, the possibility of a standard form for requesting parties to use, and the dangers inherent in dispensing with notice. Having established these considerations regarding the interpretation of the Rule from a doctrinal perspective, three specific lessons that could be drawn from the application of Rule 2.1 from an institutional perspective are addressed. First, suggestions are made regarding the potential for more proactive docket-policing by judges and registrars. Then, the experience of Rule 2.1 regarding the potential of specialized decision-makers to facilitate access to justice is considered. Finally, some comments are made regarding the ethics of using Rule 2.1 given that it is likely to be used disproportionately against self-represented litigants.

## **A. How the Rule Should Be Interpreted Going Forward**

### **1. In Favour of a Restrictive Standard, Robustly Applied**

By its words, Rule 2.1 is meant to apply to litigation that is “on its face” frivolous, vexatious, and/or abusive. Courts have been rigorous in enforcing this requirement, even in cases where a

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<sup>179</sup> LeBel, *supra* note 93 at 53.

<sup>180</sup> Noted in the introduction of Freya Kristjanson & Sharon Naipul, “Active Adjudication or Entering the Arena: How Much is Too Much?” (2011) 24 Can J Admin L & Prac 201; L’Heureux-Dubé J contemplated written submissions satisfying procedural fairness in *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at para 33: it “cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved.”

small amount of legal argument or evidence could make the “certain to fail” nature of the litigation apparent. This standard is appropriate, partially because it accords with the Rule’s words, which are always where an analysis of a statute or regulation’s meaning begins,<sup>181</sup> and also because Rule 2.1 is meant to apply very summarily, and evidence and argument would defeat that purpose.

In this sense, Rule 2.1 should not be conflated with Rules 21 or 25.11. These rules have indispensable roles to play in the resolution of actions in certain cases, weeding out hopeless cases and clearing courts’ dockets for all members of the public to use.<sup>182</sup> Though strong cases can be made, such as those put forward by Stephen Pitel and Matthew Lerner, that such rules should be more broadly interpreted to permit the resolution of questions of law,<sup>183</sup> this should not bleed into Rule 2.1. The common law is based on the premise that adversarial argument is likely to lead to a better resolution of questions of law – a premise that modern psychology has shown to be well-founded.<sup>184</sup> While the virtues of summary procedures are manifold,<sup>185</sup> Rule 2.1 is the most summary of all, dispensing with evidence, discovery, and legal argument. Restricting its use to the “clearest of cases” is therefore appropriate from a policy perspective. If the law needs to be explained, a factum is necessary and Rule 2.1 is inappropriate. Therefore, judges should be reluctant to order notice if there is even a whiff of a cause of action. The cases where Rule 2.1 has been an obvious access to justice hindrance are instances where notice was ordered and then the judge declined to use the Rule after receiving the plaintiff’s submissions. Obviously, if a plaintiff

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<sup>181</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: Butterworths, 2014) at § 23.81; *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 35.

<sup>182</sup> *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 at paras 18-19.

<sup>183</sup> See, e.g., Pitel & Lerner, *supra* note 19; Gerard J Kennedy & Mary Angela Rowe, “*Tanudjaja v. Canada (Attorney General)*: Distinguishing Injusticiability and Deference on Motions to Strike” (2015) 44 Adv Q 391.

<sup>184</sup> *Supra* note 94.

<sup>185</sup> See, e.g., Pitel & Lerner, *supra* 19; Hryniak, *supra* note 6; MacKenzie, *supra* note 5.

explains, though submissions, that his or her action is not abusive, a judge should not dismiss it – that is the purpose of notice. But no plaintiff should be put in that situation unnecessarily.

Though Rule 2.1 contemplates submissions from responding parties, judges issuing notice should consider whether they are truly necessary. This is not to suggest that a court should never reach out to a responding party for representations if the goal is to help redirect the plaintiff to an appropriate, potentially non-legal, forum for assistance. For instance, the ability to reach out to responding counsel to discern whether “something horrible [i]s indeed happening” that would require intervention, albeit not in the civil courts, seems eminently reasonable.<sup>186</sup> Generally, however, a responding party will have little to add about whether a pleading is “on its face” abusive, making responding submissions a waste of resources.

In this vein, one decision where Rule 2.1 was used to dismiss a claim arguably seemed inappropriate. In *Beatty*,<sup>187</sup> the plaintiff sought to sue, among other parties, the Office of the Children’s Lawyer (“OCL”) for, among other things, many acts for which the OCL is *prima facie* immune under the CJA.<sup>188</sup> The claim bore many hallmarks of abusive litigation and was also an attempt to re-litigate some matters raised in the pleading.<sup>189</sup> The issue of immunity was the only issue that gave the judge pause in concluding that there was no valid cause of action buried within the claim as the OCL’s immunity is not absolute. He engaged in eleven paragraphs of legal analysis to determine that no applicable exceptions applied, concluding that aspects of the pleading that could suggest an exception applied appeared to have been inserted for colour.<sup>190</sup> With respect, this amount of legal analysis leads one to wonder if the claim was actually “on its face” frivolous,

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<sup>186</sup> *Kadiri, supra* note 68 at para 7.

<sup>187</sup> *Supra* note 74.

<sup>188</sup> CJA, *supra* note 9, s 142.

<sup>189</sup> *Beatty, supra* note 74 at para 28.

<sup>190</sup> *Ibid* at paras 36-46.

vexatious, or abusive; read generously, there appeared to be a (weak) cause of action lurking in the pleading and a pleadings motion may have been more appropriate.

Given that this is the only claim where the employment of Rule 2.1 appears inappropriate, and given that no substantive injustice seems to have occurred, this does not detract from the overall effectiveness of the Rule in enhancing access to justice. However, it does appear to be an instance where Rule 2.1 was arguably, albeit understandably, used to “shortcut” proper procedure where adversarial argument would have been helpful.

## 2. The “Attempt to Re-Litigate” Exception

An exception to the “on its face” requirement is appropriate where a pleading may contain a cause of action, but the proceeding is an obvious attempt to re-litigate issues that have already been finally determined. Traditionally, attempts to re-litigate issues had to be addressed by either a vexatious litigant proceeding under s 140 of the CJA,<sup>191</sup> or a motion under Rule 21 or 25.11.<sup>192</sup> As noted above in Part I.B, these are time-consuming and expensive. It is unjust to force a defendant, having already participated in litigation that determined an issue, to do so again. As such, it would appear appropriate to allow a responding party to direct a one sentence explanation letter to the court, merely pointing in the direction of the release or past decision. If there is any ambiguity about the binding nature of these precedents or release, as there sometimes will be,<sup>193</sup> the court should decline to use Rule 2.1. But if the pleading, when combined with the precedent or release, leads to the abusiveness of the new pleading being apparent “on its face”, Rule 2.1 is appropriate. After all, attempting to re-litigate issues is a hallmark of abusive litigation.<sup>194</sup>

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<sup>191</sup> *E.g., Pagourov, supra* note 40.

<sup>192</sup> *E.g., Power Tax Corp v Millar*, 2013 ONSC 135, 113 OR (3d) 502 (SCJ).

<sup>193</sup> *Supra* note 116.

<sup>194</sup> *Gao #2, supra* note 75 at para 15; *Behn, supra* note 27 at para 40, quoting *Canam, supra* note 28 at para 56.



### 3. Cause of Action Buried in an Abusive Pleading

When a pleading potentially contains a scintilla of a cause of action, but is otherwise obviously abusive,<sup>195</sup> it would appear unfair to force the defendant to respond to obviously inappropriate and/or irrelevant material. It is also not in a plaintiff's best interest to allow him or her to make irrelevant arguments that are destined to fail.<sup>196</sup> As such, judicial intervention may be warranted as at least parts of the proceeding are "on their face" abusive. However, the appropriate remedy in these circumstances would be to order that a new pleading be delivered.<sup>197</sup> This preserves any legitimate interest of the plaintiff, but makes it clear that he or she cannot proceed in an abusive fashion. The case law has already illustrated that this can be a valuable use of Rule 2.1.<sup>198</sup>

### 4. A Standard Form?

A primary cause of unsuccessful uses of Rule 2.1 is attempts by responding parties to explain why a proceeding is abusive, whether through: obviously inappropriate legal argument and attempts to put unsworn evidence before the court;<sup>199</sup> or more understandable, but still inappropriate, explanations of the allegedly vexatious party's past behaviour.<sup>200</sup> These concerns could potentially be addressed by a standard form that any request to use Rule 2.1 would have to follow. Such a form could integrate all potential nuances to the "on its face" requirement very simply, like this:

The defendant/respondent/responding party (circle one) asks the Court to consider using Rule 2.1 of the *Rules of Civil Procedure* to dismiss \_\_\_\_ (name of proceeding and document filed).

The proceeding is frivolous, vexatious, and, or abusive:

\_ in its entirety;

\_ in part at paragraphs \_\_\_\_\_.

<sup>195</sup> *Rallis*, *supra* note 85, was, as discussed above, an instance where the plaintiff made a vexatious rant in the context of claiming, without obvious implausibility, medical malpractice.

<sup>196</sup> *Shafirovitch*, *supra* note 92 at paras 3, 5.

<sup>197</sup> *Rallis*, *supra* note 85.

<sup>198</sup> *Rallis*, *ibid*; *Asghar v Alon*, *supra* note 72.

<sup>199</sup> *Ramlall v Jahir Ullah Pharmacy Inc #1333*, 2016 ONSC 2705, [2016] OJ No 2139 (SCJ) at para 3.

<sup>200</sup> *Raji #1*, *supra* note 7.

\_ The proceeding is abusive because the matters raised therein have been finally determined in a previous decision, a copy of which is attached.

\_ The proceeding is abusive because the matters raised therein are subject to a final release, a copy of which is attached.

No strong opinion is expressed on whether such a form would be desirable. The improper uses of the Rule are rare enough that asking parties to submit such a form may be needless complication to the simple procedure that is Rule 2.1. The civil justice system does not suffer from a lack of paperwork. Having said that, a standard form could also streamline all cases under the Rule, and prevent improper uses of the Rule early on in the process. As such, a pilot project in Toronto – which has many practice directions for uses of particular elements of procedural law<sup>201</sup> – may be an experiment worth considering.

### 5. Dispensing with Notice

Some internal angst seems to be apparent among Rule 2.1 judges about when it is appropriate to dispense with the notice requirement. The common law has always emphasized that *some* type of hearing before a decision is made affecting one’s legal interests is an essential part of fairness. Fortescue J famously wrote in *Dr. Bentley’s Case* in 1723, that “even God himself did not pass sentence upon Adam before he was called upon to make his defence [...] And the same question was put to Eve also.”<sup>202</sup> But submissions filed in response to notice ordered pursuant to Rule 2.1 can generally encompass the party’s opportunity to be heard.<sup>203</sup>

In thirteen cases, the notice requirement was dispensed with, usually because the proceeding was commenced in violation of a vexatious litigant order, had manifestly been brought in the

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<sup>201</sup> Ontario Superior Court of Justice, “Practice Directions and Policies: Toronto”, online: <<http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/>>.

<sup>202</sup> *R v Chancellor, Masters and Scholars of the University of Cambridge (Dr Bentley’s Case)* (1723) 1 Str 557 at 567.

<sup>203</sup> This is most obviously apparent in administrative law: LeBel, *supra* note 93.

wrong court, and/or was an obvious attempt to re-litigate. Ordering notice in cases such as these appears neither necessary nor appropriate. Most importantly, the purpose of notice – the opportunity to be heard by a judge – had already been fulfilled or could be fulfilled in another venue. Moreover, the wording of Rule 2.1 prescribes notice “unless the Court orders otherwise”. Given that the possibility of dispensing with notice is therefore contemplated, this minimizes the rule of law concerns that come with dispensing with it.<sup>204</sup> Finally, in many situations, it was in the moving party’s own best interest that they be redirected to a new procedure as soon as possible – particularly, the instances where the matter had been brought in the wrong court<sup>205</sup> or time was ticking on an appeal period.<sup>206</sup>

The one case where this was most difficult – and where Myers J appeared to have the greatest struggle – was *Shafirovitch*, where the plaintiff alleged that the military had implanted brainwashing devices in him, and hospital staff threw bugs on him so he could be interrogated. If true, these facts would amount to a cause of action. But it also seems appropriate to take judicial notice that these facts would not have occurred,<sup>207</sup> and the plaintiff was therefore behaving vexatiously deliberately or, more likely, was mentally ill. Myers J held that “realistically, there is nothing” the plaintiff could have said that would have led to his not dismissing the action.<sup>208</sup> He

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<sup>204</sup> Ignoring a statute or regulation’s language is antithetical to the rule of law, though how this principle is applied in marginal cases is of course contestable: see, e.g., Stéphane Beaulac, “Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or Weight” (August, 1998) 43 McGill LJ 287 at 322.

<sup>205</sup> The access to justice implications of Ontario having multiple appellate venues is an important topic that will be returned to in Chapter Three.

<sup>206</sup> *Lin v Rock*, *supra* note 2 at para 12.

<sup>207</sup> Judicial notice is available when something is “either (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons, or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy”: *R v Spence*, 2005 SCC 71, [2005] 3 SCR 458 at para 53, quoting *R v Find*, 2001 SCC 32, [2001] 1 SCR 863 at para 48. That Canadian hospitals do not throw bugs upon individuals so that they can be interrogated appears to fall within the first branch. Even if the allegation that the military implanting brainwashing devices in persons does not fall within this category (though I am inclined to the view that it does), it is difficult to fathom how the plaintiff would or could have proven such an allegation.

<sup>208</sup> *Shafirovitch*, *supra* note 92 at para 3.

then compassionately referred the plaintiff to the Public Guardian and Trustee.<sup>209</sup> This was understandable, especially as it may have appeared disingenuous to have allowed the plaintiff to have made submissions in these circumstances.<sup>210</sup> However, the “right to be heard” principle is so important in the common law, and the precedent of allowing judges to comment on the merits of a dispute without any submissions so potentially dangerous, that it would seem appropriate to mandate submissions in these circumstances. This would leave the “no submissions” cases confined to instances where the plaintiffs have either already had an opportunity to be heard, or are certain to have that opportunity in another venue. That *Shafirovitch* was the only case where notice was dispensed with that did not fall into these categories suggests that the costs of mandating notice in cases such as *Shafirovitch* are not great, while also ensuring that justice is seen to be done.

### **B. A More Active Role for the Court**

Rule 2.1’s wording suggests the court itself is to be the primary gatekeeper on its use. However, the Rule is almost always used as a result of a responding party’s request. To some extent, this could indicate understandable risk-averseness from both common law judges trained to be passive listeners, as well as registrars who are not meant to be decision-makers. The registrars are likely the primary reason a court seldom employs Rule 2.1 without a responding party’s request. After all, registrars see the originating documents when they are filed, whereas judges seldom do. This reticence has advantages – Rule 2.1 is an extremely powerful tool and there have been no “false positives” when registrars or judges commenced the Rule 2.1 process unprompted.

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<sup>209</sup> *Ibid* at para 5.

<sup>210</sup> Myers J’s concern in *Shafirovitch*, *ibid* at para 3.

While caution is the side on which the registrars should likely err, simple training to look for obviously vexatious actions could be helpful, also assisting registrars in their duties under Rule 2.1.01(7). As Myers J once told a Continuing Professional Development class, he tells registrars that “if you get a claim and it’s written in crayon, call me.”<sup>211</sup> This comment could be interpreted flippantly but his jurisprudence indicates that he is willing to give the benefit of the doubt to any pleading with even a semblance of a cause of action.

Two practical suggestions may be of assistance. First, registrars could have a list of persons against whom Rule 2.1 orders have been made. Such persons should be able to file pleadings (unless subject to a vexatious litigant order) but these pleadings could be sent to a judge to review. While it is possible that these persons could bring a legitimate proceeding, given that more than 40% of proper uses of Rule 2.1 are the result of “frequent fliers”, a simple review of their pleadings by a judge appears prudent. Given the minimal time investment in having a judge review a single originating document, such a review could have minimal costs but substantial savings to all parties.

Second, in order to ensure that such a list is as comprehensive as possible, judges should report their decisions to use Rule 2.1. There are several good reasons to believe that this is not always done. First, there were many instances where one, but not all, of an appeal, order of notice, and/or first disposition was reported. Second, the *Toronto Star* uncovered, after an investigation, that one individual has commenced vastly more proceedings than have been reported.<sup>212</sup> Third, Sachs J referred to another individual having commenced fifteen proceedings in the Divisional Court in a period of less than three years, most of which were not reported.<sup>213</sup>

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<sup>211</sup> Made at Ontario Bar Association Young Lawyers Division, Evening Reception with The Honourable Mr. Justice Fred Myers, March 22, 2016, reported in Gerard J Kennedy, “Justice for Some” *The Walrus* (November 2017) 47 at 53.

<sup>212</sup> Mathieu & McLean, *supra* note 175, *contra* the five cases reported in Appendix D.

<sup>213</sup> *Lin v ICBC*, *supra* note 130, *contra* the cases actually reported in the Divisional Court, in Appendix D.

Any screening mechanisms that the Superior Court currently employs appear to not be public knowledge, so these suggestions should be viewed as complementary, rather than an alternative to any current practices. Though principles of judicial independence give a court significant internal independence, the Court could also consider making any screening practices public. This would be in the interests of transparency to the bench and the bar, and accord with the open court principle. This theme of transparency will be returned to in this dissertation's Conclusion.

### **C. Specialized Decision-Makers**

Specialized decision-makers can become familiar with the substantive law and procedure related to a particular area of law. In addition to increasing efficiency and leading to a more consistent jurisprudence, this is also likely to minimize errors.<sup>214</sup> This has been particularly discussed in the family law context,<sup>215</sup> but has been considered in the civil context as well. For example, the Toronto Commercial List has been praised as a specialized group of Superior Court judges working in a particular context, and in doing so improving access to justice.<sup>216</sup>

Myers J, as well as, to a lesser extent, Beaudoin and Nordheimer JJ, have had disproportionate influence on the development of Rule 2.1. Myers J was designated as the Toronto judge responsible for Rule 2.1 shortly after his appointment to the bench.<sup>217</sup> Of the 162 Superior Court decisions, 96 were decided by Myers J, and 24 were decided by Beaudoin J. This represents nearly 75% of the Superior Court decisions. Nordheimer J decided 13 of the 21 Divisional Court decisions prior to his elevation to the Court of Appeal. This appears to have resulted in a streamlined approach to

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<sup>214</sup> Kennedy Jurisdiction, *supra* note 48 at 105-106.

<sup>215</sup> *E.g.*, Kennedy Jurisdiction, *ibid*; Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil & Family Justice: A Roadmap for Change" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) at 16; Canadian Forum for Civil Justice, online: <[http:// www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)>, cited in Kennedy Jurisdiction at 106.

<sup>216</sup> See, *e.g.*, Warren K Winkler, "The Vanishing Trial" (Autumn 2008) 27(2) *Advocates' Soc J* 3 at 4, cited in Kennedy Jurisdiction, *ibid* at 106.

<sup>217</sup> *Brown v Loblaws Companies Limited*, 2015 ONSC 7629, [2015] OJ No 6394 (SCJ) at para 4.

the use of Rule 2.1, leading to predictability, relatively few improper uses, and very few successful appeals. Though Myers J wrote vastly more reported decisions, the fact that Beaudoin and Nordheimer JJ also wrote a substantial minority of decisions mitigated the risk that the idiosyncratic views of a single judge would have disproportionate influence. Having a limited group of judges – particularly in jurisdictions such as Toronto and Ottawa – review cases such as these therefore appears a beneficial idea from the perspective of access to justice. Nor did any of Justices Myers, Beaudoin, or Nordheimer write either of the successfully appealed decisions.<sup>218</sup>

There are disadvantages to specialization. For instance, specialization can lead to a judge’s burn out due to lack of exposure to new issues. Specialization can also lead to a resistance to considering new ideas.<sup>219</sup> However, these risks must be weighed against the benefits of specialization. In any event, they can be mitigated by “rotating” the specialized judges, which occurs in the context of class actions in Toronto.<sup>220</sup> Ultimately, therefore, Rule 2.1 appears to be an instance where specialization has been a success. Not only should this be continued in this context, this could potentially be applied to other areas of civil litigation.

#### **D. Self-Represented Litigants**

Before giving an unequivocal endorsement to Rule 2.1, it is important to consider the ethical implications of the Rule. It has now become trite law that Rule 2.1 is “not for close cases”.<sup>221</sup> It is

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<sup>218</sup> *Frick, supra* note 118; *Khan, supra* note 47.

<sup>219</sup> See, e.g., Freeda Steel, “The Unified Family Court – Ten Years Later” (1996) 24 Man LJ 381 at 388.

<sup>220</sup> Traditionally, three judges serve in this respect, though that was reduced to two after Strathy J was elevated to the Court of Appeal: Drew Hasselback, “The billion-dollar judge: Class action lawsuits about more than frivolous claims” *Financial Post* (26 July 2015), online: <<http://business.financialpost.com/legal-post/the-billion-dollar-judge-class-action-lawsuits-are-about-more-than-frivolous-claims>>.). In addition to Strathy J, Perrell J (see, e.g., *Spina v Shoppers Drug Mart Inc*, 2012 ONSC 5563, [2012] OJ No 4659 (SCJ)), Conway J (see, e.g., *Clark (Litigation guardian of) v Ontario*, 2014 ONSC 1283, 2014 CarswellOnt 2725 (SCJ)), Belobaba J (see, e.g., *Goldsmith v National Bank of Canada*, 2015 ONSC 2746, 126 OR (3d) 191 (SCJ)), and Horkins J (see, e.g., *Sagharian (Litigation Guardian of) v Ontario (Minister of Education)*, 2012 ONSC 3478, 2012 CarswellOnt 8513 (SCJ)) have also served in this respect in the past decade.

<sup>221</sup> *Raji #1, supra* note 7 at para 9.

easy to imagine how Rule 2.1, given its extremely summary nature without in-face court time, can be used against disadvantaged, frequently self-represented, persons. As the National Self-Represented Litigant Project has noted, self-represented litigants frequently do not understand summary procedures and can feel ambushed when responding to them.<sup>222</sup> The above analysis indicates that the Rule is more likely to be successfully employed against self-represented litigants. This should create ethical pause before the Rule is employed. There is also good reason for believing that several individuals against whom Rule 2.1 is employed are mentally ill, presenting unique challenges to ensure their rights are respected.<sup>223</sup>

The Law Society of Ontario's *Rules of Professional Conduct*<sup>224</sup> only prescribe basic standards regarding professional obligations.<sup>225</sup> Nonetheless, while they are clearly not a sufficient basis upon which to form an ethical decision, they still need to be considered. The *LSO Rules* prescribe particular duties when a party in litigation is self-represented.<sup>226</sup> As one example, counsel have a duty not to conceal a binding authority even if not raised by other parties.<sup>227</sup> Though this duty applies to counsel in all cases, it is likely to be especially germane when a self-represented litigant is on the other side.<sup>228</sup> In summary procedures, it is particularly important that this rule not be

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<sup>222</sup> NRSLP Vexatiousness, *supra* note 30.

<sup>223</sup> See, e.g., *Shafirovitch*, *supra* note 92.

<sup>224</sup> Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: Law Society of Upper Canada, 2014 ["*LSO Rules*"].

<sup>225</sup> Adam Dodek & Alice Woolley, "Introduction" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) at 5; Gerard J Kennedy, "Searching Through Storytelling: Book Review of *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession*" (2018) 35:1 Windsor YB Access Just 177.

<sup>226</sup> *LSO Rules*, *supra* note 224, Rule 7.2-9 (Unrepresented persons) and the commentary to Rules 3.2-4 (Encouraging Compromise or Settlement) and 5.1-2 (Advocacy).

<sup>227</sup> The contours of this duty, and its appropriateness in all circumstances, are controversial: Stephen GA Pitel & Yu Seon Gadsden-Chung, "Reconsidering a Lawyer's Obligation to Raise Adverse Authority" (2016) 49:2 UBC L Rev 521.

<sup>228</sup> See the Law Society's "Dealing With Self-Represented Litigants", online: <<http://www.lsuc.on.ca/with.aspx?id=2147499412>>.



ignored,<sup>229</sup> as there is likely less opportunity for counsel and the judge to recognize the omission of an on-point authority. Firm admonishments and costs consequences in the face of improper uses of Rule 2.1, as have been seen to date,<sup>230</sup> appear warranted.

But the real bulwarks against abuse of Rule 2.1 are judges – the individuals assigned to assess whether any particular potential use of the Rule is appropriate. The above cases illustrate that judges are cognizant of their obligation to grant more indulgences to self-represented litigants, particularly on procedural matters.<sup>231</sup> However, Rule 2.1 does not provide for *any* “in court” time for a party to explain his or her case to a judge. This reduces the opportunities that a judge has to ensure that the rights of self-represented litigants are protected.<sup>232</sup> This could illustrate public dispute resolution systems adopting many of the features of private dispute resolution, including a lesser amount of procedural protections. While at times this is desirable, in the name of efficiency and proportionality, it also creates risks, particularly for vulnerable parties. This could in fact illustrate that privatization of civil justice results in some of the negative consequences Farrow describes arising even in the public justice system as courts feel obliged to “compete” with more efficient, private alternatives.<sup>233</sup>

Appellate courts have repeatedly held that the *Rules* must be interpreted flexibly to treat self-represented litigants fairly. For instance, in *Sanzone v Schechter*, the Ontario Court of Appeal held that a motions judge held a self-represented litigant to an unrealistic standard of what constituted

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<sup>229</sup> Pitel & Gadsden-Chung, *supra* note 227, suggest that this apply not only in cases of intentional misleading, but also when the omission occurred as a result of recklessness or carelessness.

<sup>230</sup> *Supra* note 110.

<sup>231</sup> *Dauids v Dauids* (1999), 125 OAC 375 (CA) at para 36.

<sup>232</sup> See the discussion in *Sanzone v Schechter*, 2016 ONCA 566, 402 DLR (4th) 135 [“*Sanzone*”]. There is similar concern that the use of the technology in the courtroom could disadvantage marginalized populations: see, e.g., Suzanne Bouclin, Jena McGill & Amy Salyzyn, “Mobile and Web-Based Legal Apps: Opportunities, Risks and Information Gaps” (April 28, 2017). Canadian Journal of Law and Technology, Fall 2017, Forthcoming; Ottawa Faculty of Law Working Paper No. 2017-17. Available at SSRN: <https://ssrn.com/abstract=2960207>.

<sup>233</sup> Farrow Book, *supra* note 120 at, e.g., 232-251.

an expert report while responding to the defendants' summary judgment motion.<sup>234</sup> In *Wouters v Wouters*, the same court held that it was inappropriate to strike a self-represented litigant's pleadings after, among other things, the motion judge failed to turn his mind to whether any of the – admittedly improperly prepared – materials before him could have been of assistance.<sup>235</sup> In *Pintea v Johns*, Karakatsanis J ruled on behalf of a unanimous Supreme Court of Canada that a motion judge gave insufficient consideration to whether it was proven beyond a reasonable doubt that a self-represented litigant had actual knowledge of two orders she was held in contempt for violating.<sup>236</sup> In *Bernard v Canada*, Rothstein J cautioned against overly technical interpretations of court rulings that would prevent a self-represented litigant from raising an argument.<sup>237</sup>

The NSRLP has suggested that Rules 20 and 21 should be applied with particular restraint against self-represented litigants, noting that self-represented litigants frequently feel “ambushed” by summary procedures, and that judicial education and further monitoring of the outcomes of summary procedures may be appropriate.<sup>238</sup> The NSRLP has also suggested that “vexatious” is a term disproportionately levelled against self-represented litigants.<sup>239</sup>

These concerns are real, and there would appear little downside to the NSRLP's encouragement of further judicial training to manage allegedly vexatious litigation.<sup>240</sup> So why the sanguineness that these concerns can be mitigated in the context of Rule 2.1? Largely because Rule 2.1 addresses cases that are so egregious that there is every reason – theoretical and empirical

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<sup>234</sup> *Sanzone*, *supra* note 232.

<sup>235</sup> 2018 ONCA 26, 6 RFL (8th) 305 [*Wouters*] at paras 36-38. The impropriety was obvious but technical, exemplified in the failure to present evidence under oath.

<sup>236</sup> 2017 SCC 23, [2017] 1 SCR 470 [*Pintea*].

<sup>237</sup> 2014 SCC 13, [2014] 1 SCR 227 (partially dissenting, though the majority did not address this issue).

<sup>238</sup> NRS�P Vexatiousness, *supra* note 30.

<sup>239</sup> Sandra Shushani, Lidia Imbrogno & Julie Macfarlane, “Introducing the Self-Represented Litigant Database” (Windsor, ON: The National Self-Represented Litigants Project, the University of Windsor, December 2017) [*NRS�P Database*] at 7-9.

<sup>240</sup> NRS�P Vexatiousness, *supra* note 30; see also Macfarlane Main Report, *supra* note 166 at 125.

– to believe that robustly enforced substantive and procedural doctrine will constrain the potential for abuse. Rule 2.1 is designed to address matters that are on their face destined to fail because they are manifestly abusive – a much higher standard than Rules 20 and 21. As Lorne Sossin and I have previously observed, even when procedural restraint is called for, “it should not permit frivolous and vexatious matters to tie up judicial resources.”<sup>241</sup> Procedurally, unlike the NSRLP’s concerns regarding Rules 20 and 21, the responding party is not permitted to bamboozle a self-represented litigant through lawyerly tactics because they are not allowed to make submissions at all. An extremely generous screening of each case is required, responding to the NSRLP’s concerns that vexatiousness and lack of merit will be conflated.<sup>242</sup> Adding further procedural protections would defeat the purpose of the Rule, which is to keep the responding party’s costs to an absolute minimum. It is important to remember that Karakatsanis J, the author of the unanimous *Pintea*, was also author of the unanimous *Hryniak*, calling for broader use of summary procedures. And as explained above, having read all 190 reported cases using the Rule from its first three years, none where its use was ultimately upheld seemed to have tenable causes of action. Many of them originate from the same querulant individuals. It appears to be genuine vexatiousness – and not mere inability to properly fill out court forms<sup>243</sup> – that leads to the use of Rule 2.1.

There are, moreover, numerous examples of judges offering procedural assistance to parties before them in Rule 2.1 cases – Di Luca J in *Van Shuytman v Orillia Soliders’ Memorial Hospital* is an eloquent example: “In reviewing this claim, I consider the fact that the Plaintiff is self-represented and of low income. I am not holding his statement of claim to the standard regularly

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<sup>241</sup> Gerard J Kennedy & Lorne Sossin, “Justiciability, Access to Justice & the Development of Constitutional Law in Canada” (2017) 45(4) FLR 707 at 713.

<sup>242</sup> NRSLP Database, *supra* note 239 at 9.

<sup>243</sup> As noted in *Wouters*, *supra* note 235, these are very different phenomena. See also Ashley Haines, “When Dealing with a Self-Represented Litigant, Judges May Accept Non-Compliant Documents Where Appropriate” *CanLII Connects* (19 March 2018), online: <<http://canliiconnects.org/en/commentaries/54989>>.

expected with material prepared by counsel.”<sup>244</sup> This is in line with the Court of Appeal’s instruction in *Wouters* that the *Rules* “are not so rigid or inflexible as to preclude the court from examining non-compliant documents submitted by self-represented litigants to ensure that any properly admissible portions are received”.<sup>245</sup> As long as judges continue to recognize that even a hint of a tenable cause of action is a reason to decline to use Rule 2.1, the risk of abuse of minimal. Other instances of judges assisting self-represented litigants have included suggesting where to obtain legal advice<sup>246</sup> to noting that the litigant has brought an appeal in the wrong court<sup>247</sup> to pointing to a resource on drafting pleadings.<sup>248</sup> While this may pose some concerns that judges are no longer strictly neutral,<sup>249</sup> it still appears the best way to achieve efficient access to justice, and respect the rights of self-represented litigants.<sup>250</sup> So long as judges continue to fulfill their duties in this regard, there is every reason to believe that concerns with denying vulnerable parties a hearing in the face of truly vexatious matters will be mitigated.

The need for judges to offer assistance to parties – and read pleadings extremely generously – is heightened when there is a concern that a party is suffering from mental illness. In this vein,

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<sup>244</sup> *Van Sluytman v Orillia Soldiers’ Memorial Hospital*, 2017 ONSC 692, [2017] OJ No 445 (SCJ) at para 12, aff’d *Van Sluytman*, *supra* note 97.

<sup>245</sup> *Wouters*, *supra* note 235 at para 38.

<sup>246</sup> *Lee v Future Bakery Ltd*, 2015 ONSC 3208, 2015 CarswellOnt 7464 (SCJ) at para 5.

<sup>247</sup> *Lin v Fluery*, *supra* note 89.

<sup>248</sup> *Rallis*, *supra* note 85 at para 5.

<sup>249</sup> A concern famously flagged by Lord Denning in *Jones v National Coal Board* (1957), [1957] 2 ALL ER 155 (CA); Freya Kristjanson (as she then was) and Sharon Naipul also explored this in *Kristjanson & Naipul*, *supra* note 180.

<sup>250</sup> *Kristjanson & Naipul*, *ibid* at 221-222, explore the tests imposed by appellate courts with respect to limits in this regard. The test for reasonable apprehension of bias remains the final bulwark against a judge who assumes the role of advocate: *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394 (per de Grandpré J, dissenting but widely cited since then for the test for reasonable apprehension of bias: see, e.g., *Stuart Budd & Sons Limited v IFS Vehicle Distributors ULC*, 2016 ONCA 60, 129 OR (3d) 37). The theoretical difficulties with the adversarial system of litigation as a mechanism to achieve access to justice – and whether such a system even exists – is a very interesting topic (see, e.g., Sasha Lallouz, “A Call for Ethical Accountability: The Necessity for Lawyer-Client Ethical Dialogue in a One-Sided Adversarial System” (2016) 37 WRS LI 45), albeit one beyond the scope of this chapter.

giving extensions of time<sup>251</sup> or asking clarifications about the nature of a party's allegations may be appropriate. Such correspondence would not technically be *ex parte*, as responding parties would be copied, but would presumably involve minimal expense for responding parties, thus according with the spirit of Rule 2.1.

Having said that, abusive claims remain abusive, regardless of the reasons for their genesis. If an individual is suffering from a mental illness, the response must be compassionate and may have to be societal. But the courts are unlikely to be the appropriate forum for such a response. As noted above, in one case Myers J referred the plaintiff to the Public Guardian and Trustee<sup>252</sup> – this is not something that judges should hesitate to do. Ultimately, this case recognizes that treating a mentally ill litigant with compassion can still be accompanied by the use of Rule 2.1. In many cases it seems essential to remove a person who needs help from a forum – the courts – incapable of providing that help.<sup>253</sup> It can in fact be a part of stopping cycles of self-injury.<sup>254</sup> Moreover, keeping these cases in the public courts can be emotionally draining on court staff, who must address these matters on a daily basis.<sup>255</sup>

Finally, it is also worth remembering that demanding procedural protections of a nature such that there is literally *no* potential of an unjust result would likely be so costly as to defeat the goal

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<sup>251</sup> Seen in, e.g., *Goralczyk v Beer Store*, 2016 ONSC 1699, [2016] OJ No 1196 (SCJ) at para 5.

<sup>252</sup> *Shafirovitch*, *supra* note 92 at para 5.

<sup>253</sup> The institutional difficulty of the courts to address and assess mental illness is noted (admittedly in another context) in Hugh Harradence, “Re-Applying the Standard of Fitness to Stand Trial” (2013) 59 CLQ 511 at 537; Richard D Schneider, Hy Bloom & Mark Herrema, *Mental Health Courts Decriminalizing the Mentally Ill* (Toronto: Irwin Law, 2007) at, *inter alia*, 145.

<sup>254</sup> See, e.g., Gary M Caplan & Hy Bloom, “Litigants Behaving Badly: Querulousness in Law and Medicine” (2015) 44:4 Adv Q 411; Paul E Mullen & Grant Lester, “Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour” (2006) 24 Behavioral Sciences and the Law 333.

<sup>255</sup> This point was made particularly well by Professor Rob Currie during a job talk at the Schulich School of Law in Halifax, Nova Scotia on November 27, 2018.

of summary procedures.<sup>256</sup> Lest there be any confusion, as has been emphasized throughout this chapter, not using Rule 2.1 is the side on which judges should err. This is both because the need to ensure just outcomes should not be compromised<sup>257</sup> and because justice must generally trump efficiency if they are in a zero-sum conflict.<sup>258</sup> Moreover, there are enough summary alternatives to Rule 2.1 that electing to *not* use Rule 2.1 in a marginal case is likely to have costs for a defendant that are small when compared to the interest of preserving not only justice, but its appearance. However, the desire to pursue a substantively fair outcome, without consideration of the costs, can be taken to an unhealthy extreme.<sup>259</sup>

## IN SUM

In 2017, one Ontario judge made headlines when he criticized – in mocking tone – parties for coming before him to deal with a matter he considered frivolous and manifestly a waste of the Superior Court’s resources.<sup>260</sup> But after a few days of mostly gleeful media praise,<sup>261</sup> Alice Woolley (prior to her appointment to the bench) wrote a thoughtful article in which she noted that

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<sup>256</sup> As Karakatsanis J noted in *Hryniak*, *supra* note 6 at para 29: “There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.”

<sup>257</sup> *Hryniak*, *ibid* at para 23.

<sup>258</sup> Farrow Book, *supra* note 120 at 271.

<sup>259</sup> As an example, the experience of expanded discovery rights is frequently cited as an example of a change to procedural law to minimize substantive injustices that has seemingly had minimal effects in doing so while also greatly increasing costs. Justice Thomas Cromwell noted as much in extrajudicial comments in 2013 while still serving on the Supreme Court: Beverley Spencer, “The Road to Justice Reform: An Interview with Supreme Court of Canada Justice Thomas Cromwell” *The National* (July-August 2013), online: <<http://nationalmagazine.ca/Articles/Recent4/The-road-to-justice-reform.aspx>>. This is also a common hypothesis in the United States: see, e.g., Judge (as he then was) Neil Gorsuch, “13th Annual Barbara K. Olson Memorial Lecture” (Address Delivered at the Federalist Society for Law and Public Policy’s 2013 National Lawyers Convention, The Mayflower Hotel, Washington, DC, 15 November 2013), online: <[https://www.youtube.com/watch?v=VI\\_c-5S4S6Y](https://www.youtube.com/watch?v=VI_c-5S4S6Y)> at ~6:15-10:30. See also *Hryniak*, *supra* note 6 at para 29.

<sup>260</sup> *Abdulaali v Salih*, 2017 ONSC 1609, 92 RFL (7th) 355 (SCJ).

<sup>261</sup> E.g., Christie Blatchford, “Getting to the root of Ontario’s family law mess” *National Post* (21 March 2017), online: <<http://nationalpost.com/opinion/christie-blatchford-getting-to-the-root-of-ontarios-family-law-mess>>.

the parties had a legitimate grievance, and regardless of how efficient the judge thought his solution was, it could never have been upheld by an appellate court as it was based on contradictory suppositions.<sup>262</sup> This instance therefore recognizes the dangers of judges using their powers, including their powers to summarily dismiss matters, inappropriately. And as damaging as vexatious litigation can be from the perspective of the court system, well-resourced defendants can at times claim “abusive” when litigation is anything but – demonstrating the danger that the term, like “civility”, could be used to attempt to silence those who seek to disrupt the *status quo*.<sup>263</sup> Occasionally, judges even fall into the trap of emphasizing efficiency over justice. This trap must be strenuously avoided, particularly when there is a self-represented litigant or a concern that a person suffering from mental illness is affected.

Simultaneously, litigation that is vexatious can cause significant problems. When a poorly resourced, potentially self-represented party comes before a court, judges should be inclined to grant the party more indulgences. However, the fact that a party is on the margins of society does not mean that he or she has a legitimate legal grievance. The disproportionate damage that vexatious litigation can do to the civil justice system, as well as societal perceptions of it,<sup>264</sup> is undeniable. Though such litigation is far from the norm, the above analysis explains how there are still dozens of reported examples of it in Ontario alone every year. Inflicting the costs of this upon innocent parties – even well-resourced innocent parties – is manifestly unjust. In light of these concerns, Rule 2.1 sought to balance the interests of the court system, plaintiffs, and defendants. And, despite minor hiccoughs, it appears to have succeeded.

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<sup>262</sup> “Judgmental Judges” *Slaw* (22 March 2017), online: <<http://www.slaw.ca/2017/03/22/judgmental-judges/>>.

<sup>263</sup> See, e.g., Constance Backhouse, “Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives” in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer* (Vancouver: UBC Press, 2016) at 128.

<sup>264</sup> Mathieu & McLean, *supra* note 175.

*Lin v Rock*<sup>265</sup> is an example of how judges should react in the face of genuinely vexatious litigation. The plaintiff, the source of eight different uses of Rule 2.1, sought to bring a “motion” to a judge of the Superior Court to make a “complaint” about a master’s decision after another Superior Court judge had upheld an appeal from that master’s decision. She also sought to receive a \$1.6 million dollar judgment. After advising her of where she could obtain legal advice, Myers J employed Rule 2.1, writing:

[11] Ms. Lin is entitled to her day in court. She is entitled to be heard by a judge or a master and to feel that she has been heard. As a litigant, whether represented by counsel or self-represented, she is entitled to be treated with respect. There is a difference however, between treating a person with respect and treating arguments and positions with respect. There is no submission that Ms. Lin can make to justify bringing a motion to a judge of this court to make a “complaint” about Justice Whitaker, Master Dash or their decisions. Neither can Ms. Lin seek judgment before her statement of claim is finalized and with no supporting evidence. There is a time and a place where a judge or a master will hear Ms. Lin’s evidence about the [merits of her claim]. The current motion however, cannot succeed. Pretending otherwise pending receipt of submissions would be disingenuous bordering on paternalistic.

[12] [...] If Ms. Lin wishes to make a written complaint of misconduct by Master Dash to the Chief Justice under section 86.2(1) of the *Courts of Justice Act* she can send a letter to the Chief Justice’s office to start the complaints process. If Ms. Lin wishes to appeal from the decision of Mr. Justice Whittaker, she will need legal advice to determine how to appeal from that type of order. [...] Ms. Lin should get legal advice very quickly because there are very short time limits that apply to appeals.

[13] [...] It is not treating someone respectfully to be disingenuous toward her. Ms. Lin’s position on this motion is frivolous. She cannot obtain the relief that she seeks because it is not available as a matter of law [...] Ms. Lin’s argument does not deserve respectful treatment. But she does. And it is not respectful, in my view, to call for submissions disingenuously while time is running on an appeal period or to have Ms. Lin attend court to make a “complaint” and then to subject her to yet another costs award.

[14] Ms. Lin’s motion [...] is dismissed without costs.

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<sup>265</sup> *Supra* note 2.



Ms. Lin may or may not have had a legitimate grievance. But allowing her to take up the Superior Court’s time and the defendant’s resources with a motion that inevitably would have failed is not in anyone’s interests, including hers. Rule 2.1 has allowed judges to address truly frivolous, vexatious, and/or abusive motions and actions in a way that is fair to the affected parties, recognizing that what constitutes a fair hearing varies according to the circumstances. Other jurisdictions should take note if they have not already done so.<sup>266</sup> There are risks created by the Rule – and potential ways to make its application more streamlined – but these are minimal and/or can be managed. Access to justice has been improved in narrow but very real circumstances. A simple amendment to the *Rules* – which are not merely regulatory but can also have valuable hortatory effects – has achieved this.<sup>267</sup> That is worth celebrating.

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<sup>266</sup> Some jurisdictions already have such rules, such as Prince Edward Island (Rule 2.1 of the *Prince Edward Island Rules of Civil Procedure*, based on the fact that PEI largely uses the same *Rules* as Ontario: see *Doyle v Roberts & PEI Mutual*, 2015 PEISC 2, 361 Nfld & PEIR 127, explaining the link with Ontario, and *Taha v Government of PEI*, 2018 PEICA 18, 2018 CarswellPEI 56, explaining the integration of Rule 2.1) and Alberta: Court of Queen’s Bench, Civil Practice Court: Note 7, online: <[https://albertacourts.ca/docs/default-source/qb/civil-practice-note-7---vexatious-application-proceeding-show-cause-procedure.pdf?sfvrsn=cb2fa480\\_4](https://albertacourts.ca/docs/default-source/qb/civil-practice-note-7---vexatious-application-proceeding-show-cause-procedure.pdf?sfvrsn=cb2fa480_4)>, effective September 4, 2018. Manitoba and Saskatchewan also allow a judge to waive the *Court of Queen’s Bench Rules* (potentially *sua sponte*) in response to vexatious actions: *Court of Queen’s Bench Rules*, Man Reg 553/88, Rule 2.04; *The Queen’s Bench Rules*, 2013, Rule 5-3. These are nonetheless distinguishable (e.g., Alberta’s procedure gives a different timeframe for response). The Court previously applied a “show cause” scheme in 2017 with respect to *habeas corpus* applications: see, e.g., *Latham v Her Majesty the Queen*, 2018 ABQB 69, 72 Alta LR (6th) 357, and *Latham v Alberta*, 2018 ABQB 141, 2018 CarswellAlta 318. Thanks to Donald Netolitzky, counsel for the Alberta Court of Queen’s Bench, for pointing this out in January 2019. He is the author of useful resources concerning responding to abusive litigation: see, e.g., Donald J Netolitzky, “The History of the Organized Pseudolegal Commercial Argument Phenomenon in Canada” 53:3 Alta L Rev 606; Donald J Netolitzky, “Lawyers and Court Representation of Organized Pseudolegal Commercial Argument [OPCA] Litigants in Canada” (2018) 51:2 UBC L Rev 419.

<sup>267</sup> Allan B Morrison, “The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System” (2012) 90 Or L Rev 993 at 1013.

## Chapter Three

### **Final vs Interlocutory Civil Appeals: How a Clear Distinction Became So Complicated – Its Purposes, Obfuscation, and a Simple Solution<sup>1</sup>**

“What should be a straightforward application of a simple principle has never been anything of the kind. Every previously untested order appears to raise the question anew, with unpredictable and inconsistent results – so much so that judges themselves have been driven to despair.”<sup>2</sup>

“[This is] an issue that has bedeviled the profession for decades.”<sup>3</sup>

Appellate courts sit at the pinnacle of the legal profession, providing final determinations on the meaning of statutes and the development of the common law.<sup>4</sup> Their decisions are analyzed in law schools for many years after their release.<sup>5</sup> The media frequently ask lawyers who lose a case whether they intend to appeal. As a Toronto law firm’s clever advertisement for its appellate practice group has advertised, “Who Wins Last, Wins”.<sup>6</sup> Or as Justice Robert Jackson famously wrote regarding apex courts, “we are not final because we are infallible, we are infallible because we are final.”<sup>7</sup>

But not every decision released by an appellate court is of lasting significance. Many appellate decisions address interlocutory issues unrelated to the merits of the dispute, concerning only the conduct of the litigation. These issues range from discovery rights to scheduling to the amendment

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<sup>1</sup> This chapter’s title is inspired by Darryl Robinson, “How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and Simple Solution” (2012) 13 *Melbourne J Int’l L* 1. Though international criminal law and Ontario civil appellate practice may seem very distinct, preferring simpler law (unless too simple) to more complicated law is not confined to particular jurisdictions or legal subfields.

<sup>2</sup> John Sopinka, Mark A Gelowitz & W David Rankin, *The Conduct of an Appeal*, 4th ed (Toronto: LexisNexis, 2018) [“*Conduct of an Appeal*”], § 1.17 [citation omitted].

<sup>3</sup> *Mancinelli v Royal Bank of Canada*, 2017 ONSC 1526, [2017] OJ No 1111 (Div Ct) [“*Mancinelli*”] at para 2.

<sup>4</sup> See the discussion in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [“*Housen*”] at, e.g., para 9.

<sup>5</sup> This is not without controversy: Janet Mosher, “Legal Education: Nemesis or Ally of Social Movements?” (1997) 35:3 *Osgoode Hall LJ* 613 at 624-29.

<sup>6</sup> “Appeals”, Lerner LLP, online: <<http://www.lerner.ca/appeals/>>.

<sup>7</sup> *Brown v Allen*, 344 US 443 (1953) at 540.

of pleadings. Interlocutory appeals have the potential to distort access to justice, by increasing expense and delay in reaching the merits in some cases; but they play an indispensable role in achieving justice in other cases. Moreover, the increased clarity in the law brought by appeals – even interlocutory ones – can help the pursuit of justice in numerous other cases.

It is important, therefore, to differentiate the way that interlocutory and final appeals are treated. However, it is first necessary to distinguish interlocutory appeals from final appeals; this has been the source of significant controversy itself, with Justice Russell Juriansz of the Ontario Court of Appeal succinctly describing the case law in this area as “unwieldy”.<sup>8</sup>

This chapter seeks to balance, theoretically and practically, the access to justice concerns that interlocutory appeals create with the access to justice concerns that such appeals address. Part I lays the doctrinal background necessary to analyze the distinction between interlocutory and final appeals. Part II explains the methodology for reviewing 119 Ontario Court of Appeal and 30 Divisional Court decisions considering the interlocutory/final distinction that were decided in Ontario between 2010 and 2017. Part III analyzes characteristics of these cases to highlight the consequences, in terms of delay and financial expense, of uncertainty in the law in this area. Finally, Part IV gives suggestions for improvement of the law surrounding the interlocutory/final distinction, with the aim of facilitating access to justice. The experience of British Columbia is drawn on in particular, reviewing 105 cases it has decided wrestling with this same issue – some before, and some after, legislative amendments that sought to clarify the law in this regard.

Analyzing the experiences of Ontario and British Columbia, and then mapping them on to the distinction’s purposes and history, leads to conclusions that are both alarming and encouraging. The Ontario Court of Appeal is considering this issue in dozens of cases each year. This seems an

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<sup>8</sup> *Parsons v Ontario*, 2015 ONCA 158, 125 OR (3d) 168 [“*Parsons*”] at para 209 (dissenting on this issue).

unnecessary waste of time and resources for both litigants and the courts. But there is hope to simplify the law in this area and improve access to justice. The distinction between interlocutory and final appeals remains important, with the former tending to cause delay, costs, and procedural complexity that may not be worth the benefits of the appeal. But a return to first principles and a consideration of other jurisdictions' experiences provide a path to a simpler rule, asking whether the appealed order finally determines the litigation. More provocatively, the place of the Divisional Court in Ontario in the appellate review of interlocutory appeals is questioned. While these paths forward will likely require legislative intervention, it would not only prevent needless interlocutory disputes, but also support the justice-oriented purposes that are served by appeals.

## **I) APPEALS' HISTORY, PURPOSES, AND RELATION TO ACCESS TO JUSTICE**

Before delving into how the interlocutory/final distinction is working in practice in Ontario, some doctrine and history is necessary to set the stage. This section begins by noting the purposes of appeals, as well as standards of review that further explain those purposes. The history of the interlocutory/final distinction in England and Wales is then reviewed before appellate jurisdiction in Ontario is explained. Lastly, the relationship between appeals and access to justice is considered.

### **A. Purposes of Appeals**

It has been frequently observed that appeals are creatures of statute and that, historically, the common law gave no "right" of appeal.<sup>9</sup> Even so, appeals are very old. The Court of Exchequer Chamber – the predecessor to the Court of Appeal of England and Wales for appeals of common law decisions – dates to the fourteenth century.<sup>10</sup> Appeals have evolved for several purposes. One is to ensure the law's consistent application.<sup>11</sup> A related purpose is to allow appellate courts to

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<sup>9</sup> See, e.g., *Conduct of an Appeal*, *supra* note 2 at § 1.1.

<sup>10</sup> John H Baker, *An Introduction to English Legal History* (London: Butterworths LexisNexis, 2002) at 137.

<sup>11</sup> *Housen*, *supra* note 4 at para 9.

make and refine the common law, with appellate courts having the responsibility to make law to an extent not shared by trial courts.<sup>12</sup> These purposes apply equally to civil and criminal cases.

But there is another reason for appeals: to ensure that the losing party at trial has the decision reviewed by a fresh set of eyes to ensure that an injustice has not occurred. This concern is heightened in criminal law, as an error at trial could have penal consequences. This is addressed in international human rights law, being codified in the *International Covenant on Civil and Political Rights*.<sup>13</sup> In the civil context, this concern, though less acute, is still significant, given the potential serious effects of a substantive injustice in the civil context.<sup>14</sup>

These purposes of appeals are important. But it is also important to observe that these purposes are narrow. Perhaps to prevent intermediary appellate courts misusing their power, the Supreme Court has restricted appellate courts' ability to interfere with trial judges' decisions. Given their role as law-making courts, appellate courts are primarily only entitled to review trial courts' decisions for errors of law, with trial judges' determinations of law being reviewed on a standard of correctness.<sup>15</sup> Findings of fact, on the other hand, are only to be disturbed if tainted by "palpable and overriding error."<sup>16</sup> Questions of mixed fact and law are reviewed on a spectrum of standards depending on the ease with which the question of law can be extracted.<sup>17</sup> In criminal law, the

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<sup>12</sup> *Ibid.*

<sup>13</sup> 999 UNTS 172, art 14(5): "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." See also Gerard J Kennedy, "Persisting Uncertainties in Appellate Jurisdiction at the Supreme Court" (2013) 100 CR (6th) 96 at 101.

<sup>14</sup> The far-reaching consequences of inability to access to civil justice are explained in, e.g., Trevor CW Farrow, "A New Wave of Access to Justice Reform in Canada" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) ["Farrow 2016"].

<sup>15</sup> *Housen*, *supra* note 4 at para 8.

<sup>16</sup> *Ibid* at para 10.

<sup>17</sup> *Ibid* at paras 26, 28; *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 ["*Hryniak*"] at para 81.

Crown is not entitled to appeal on questions of fact at all.<sup>18</sup> Throughout all of this, a principle of appellate restraint is strikingly apparent.<sup>19</sup>

This division of roles is rooted in concerns about both efficiency and expertise. Trial judges see evidence first-hand, and are thus in a privileged position vis-à-vis appellate courts to make findings of fact.<sup>20</sup> And as Iacobucci and Major JJ noted in *Housen v Nikolaisen*, appellate and trial courts have different purposes: “while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application.”<sup>21</sup> Moreover, principles of judicial economy and finality mandate not interfering with a trial ruling unless clearly warranted.<sup>22</sup>

These deferential standards are not without controversy – for example, Paul Pape and John Adair have argued that findings of fact should be reviewed on a reasonableness standard.<sup>23</sup> Calls for the Crown to have a right of appeal on findings of fact and/or inadequacy of counsel in criminal cases have also emerged in recent years.<sup>24</sup> Even so, Daniel Jutras has ably argued that appeals are not an intrinsic good or a logical corollary to decision-making but rather have particular, discrete purposes, such as delineating legal rules. He notes that there may be negative unintended consequences from expanding those purposes, such as needless litigation and lack of finality.<sup>25</sup>

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<sup>18</sup> *Criminal Code*, RSC 1985, c C-46, s 686(1)(a)(i), allows only the accused to appeal on evidentiary grounds.

<sup>19</sup> See, e.g., *Housen*, *supra* note 4; Daniel Jutras, “The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?” (2007) 32 Man LJ 61.

<sup>20</sup> *Housen*, *ibid* at para 18.

<sup>21</sup> *Ibid* at para 9.

<sup>22</sup> *Housen*, *ibid* at paras 4, 16; Jutras, *supra* note 19 at, in particular, 65.

<sup>23</sup> “Unreasonable Review: The Losing Party and the Palpable and Overriding Error Standard” (2008) 27:2 Advocates’ J 6.

<sup>24</sup> These became particularly loud after the high-profile acquittal of Gerald Stanley in the death of Colton Boushie: see, e.g., Naoimi Mettalic, “I am a Mi’kmaq Lawyer, and I Despair Over Colten Boushie” *The Chronicle Herald* (19 March 2018), online: <<http://thechronicleherald.ca/opinion/1554354-opinion-i-am-a-mi-kmaq-lawyer-and-i-despair-over-colten-boushie>>.

<sup>25</sup> Jutras, *supra* note 19 at, in particular, 65.

## B. Appellate Jurisdiction in Ontario

Ontario is unique among Canada's provinces in having two appellate courts. Understanding the reason is necessary for placing the subsequent analysis of interlocutory appeals in context. The superior courts of the provinces – in Ontario, the Superior Court of Justice – are Canada's courts of “inherent” jurisdiction.<sup>26</sup> As part of their constitutional authority to create additional courts to facilitate the administration of justice, provinces are permitted to create additional courts.<sup>27</sup> Ontario has created the Ontario Court of Justice (frequently known as the Provincial Court), the Small Claims Court, masters' chambers (both of which are technically part of the Superior Court), and a host of administrative tribunals to facilitate the administration of justice. The number of courts with judges decreased first in 1985 and again in 1990, when the High Court of Justice, the County Courts, District Courts, Court of General Sessions, Surrogate Court, and the District Court were merged into the Ontario Court of Justice (General Division), later renamed the Superior Court of Justice.<sup>28</sup> 1990 also saw the merging of various courts into the Ontario Court of Justice (Provincial Division),<sup>29</sup> later renamed the Ontario Court of Justice.<sup>30</sup>

Ontario's appellate courts are, like all Canadian appellate courts, creatures of statute.<sup>31</sup> But Ontario's two appellate courts – the Court of Appeal and Divisional Court – have different origins. The Court of Appeal's origins trace to the establishment of the Court of Error and Appeal for

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<sup>26</sup> See, e.g., *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at paras 27-33.

<sup>27</sup> Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell/Thomson Reuters, 2016) at 7-1-7-3.

<sup>28</sup> The Honourable Louise Charron, “An Interview with the Honourable Louis Charron” (2013) 43 *Ottawa L Rev* 305, fn 20; W Brent Cotter, “Ian Scott: Renaissance Man, Consummate Advocate, Attorney General Extraordinaire” in *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) at 214; *The Courts Improvement Act, 1996*, SO 1996, c 25 [“CIA 1996”], s 9(3).

<sup>29</sup> Cotter, *ibid* at 214; *Courts of Justice Amendment Act, 1989*, SO 1989, c 55, s 33.

<sup>30</sup> CIA 1996, *supra* note 28, s 9(5).

<sup>31</sup> Though the Supreme Court of Canada found itself to be constitutionally entrenched in *Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21, [2014] 1 SCR 433.

Canada in 1850.<sup>32</sup> The creation of an independent appellate court was considered preferable to the previous practice of having the Governor's Council act as an appeal court, which had occurred in Upper Canada since 1792.<sup>33</sup>

The Divisional Court's genesis is different. In 1964, the Ontario government appointed James C McRuer, recently retired Chief Justice of the High Court, to chair the Law Reform Commission of Ontario, as well as a public inquiry into civil rights in Ontario.<sup>34</sup> Among his many recommendations was creating a separate court to hear applications for judicial review.<sup>35</sup> In an era with an expanding administrative state, this suggestion was heeded despite being controversial,<sup>36</sup> leading to the establishment of the Divisional Court of the High Court of Justice.<sup>37</sup> The Divisional Court's decisions can generally be appealed to the Court of Appeal, with leave.<sup>38</sup>

Over time, the Divisional Court's jurisdiction expanded beyond judicial reviews to include appellate matters, in part due to suggestions that the Court of Appeal reform to emphasize its law-making functions.<sup>39</sup> In 1984, civil appeals with low dollar amounts were put in the Divisional Court's jurisdiction.<sup>40</sup> The Divisional Court, whose members are all Superior Court judges,<sup>41</sup> also has appellate jurisdiction under particular statutes, such as the *Class Proceedings Act*.<sup>42</sup>

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<sup>32</sup> Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal, 1792-2013* (Toronto: Osgoode Society for Canadian Legal History, 2014) at 18. The book is a detailed and thorough history of the Court.

<sup>33</sup> Moore, *ibid* at 6-18.

<sup>34</sup> Patrick Boyer, *A Passion for Justice: The Legacy of James Chalmers McRuer* (Toronto: Osgoode Society, 1994) at 297-298.

<sup>35</sup> *Royal Commission Inquiry into Civil Rights, JC McRuer, Commissioner, Report No 1* (vol 2) (Toronto: Queen's Printer 1968) at 667; Boyer, *ibid* at 324; Moore, *supra* note 32 at 132-133.

<sup>36</sup> For criticisms, see, e.g., John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18 UTLJ 351 at, in particular, 354. At the same time, the Exchequer Court was reorganized into what later became the Federal Court and Federal Court of Appeal, expanding its jurisdiction over judicial reviews of federal government action: Moore, *ibid* at 133.

<sup>37</sup> Moore, *ibid* at 133.

<sup>38</sup> *Courts of Justice Act*, RSO 1990, c C43 ["CJA"], s 6(1)(a).

<sup>39</sup> Moore, *supra* note 32 at 143-144.

<sup>40</sup> Moore, *ibid* at 159, currently in CJA, *supra* note 38, s 19(1)(a).

<sup>41</sup> CJA, *ibid*, s 18(3).

<sup>42</sup> *Class Proceedings Act, 1992*, SO 1992, c 6 ["CPA"], s 30.



Today, appellate jurisdiction in Ontario civil matters is split between the Superior Court, Divisional Court, and Court of Appeal. The Superior Court has jurisdiction over appeals from interlocutory orders of a master<sup>43</sup> and costs assessments of assessment officers.<sup>44</sup>

Apart from judicial reviews, the Divisional Court has jurisdiction over appeals of:

- final orders of Superior Court judges, where less than \$50,000 is at stake;<sup>45</sup>
- final orders of the Small Claims Court, unless less than \$1,000 is at stake;<sup>46</sup>
- final orders of masters;<sup>47</sup>
- interlocutory orders of Superior Court judges, with leave;<sup>48</sup> and
- where otherwise prescribed by particular statutes.<sup>49</sup>

The Court of Appeal has jurisdiction over most other civil appeals, notably:

- Divisional Court orders, unless based on a question of fact alone, with leave;<sup>50</sup> and
- final orders of the Superior Court, unless otherwise prescribed to the Divisional Court.<sup>51</sup>

This division is important, as the final section of this chapter will emphasize.

### **C. The History of the Interlocutory/Final Distinction**

#### **1. The English Experience**

Understanding the reason for distinguishing appeals of “interlocutory” and “final” orders (leading to “interlocutory appeal” referring to an appeal of an interlocutory order and “final appeal” referring to an appeal of a final order) requires considering the history of the issue in

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<sup>43</sup> CJA, *supra* note 38, s 17(a).

<sup>44</sup> CJA, *ibid*, s 17(b); *Conduct of an Appeal*, *supra* note 2, § 5.4.

<sup>45</sup> CJA, *ibid*, s 19(1)(a).

<sup>46</sup> *Ibid*, s 31.

<sup>47</sup> *Ibid*, s 19(1)(c).

<sup>48</sup> *Ibid*, s 19(1)(b).

<sup>49</sup> *Ibid*, s 6(1)(b), seen in, *e.g.*, CPA, *supra* note 42.

<sup>50</sup> CJA, *ibid*, s 6(1)(a).

<sup>51</sup> *Ibid*, s 6(1)(b).

England and Wales.<sup>52</sup> The distinction became important primarily because different procedural rules applied to appeals of the two different types of orders.<sup>53</sup> In *Salaman v Warner*,<sup>54</sup> the Court of Appeal for England and Wales explained the “application approach”, emphasizing that the fundamental question that a court should ask in determining whether an order under appeal is final or interlocutory is whether it finally disposed of the entire case.

Twelve years later, however, a different panel of the Court of Appeal cast doubt on *Salaman*. In *Bozson v Altrincham Urban District Council*, it introduced the “order approach”. Criticizing the reasoning in *Salaman*, it held that courts should ask “Does the judgment or order, as made, finally dispose of the rights of the parties?”<sup>55</sup> This was partially because many cases include orders that, if decided one way, would finally dispose of the litigation but, if decided the other, would not.<sup>56</sup> Examples would be orders determining jurisdiction or the applicability of a limitations period defence; it seemed to strike judges as unsatisfactory that appeal rights of an order that “finally” determines an issue would depend on which way the determination fell.<sup>57</sup> For example, an order determining that the court has jurisdiction over a matter technically does not resolve the dispute, but permanently affects a defendant’s interest, whereas an order determining that the court does not have jurisdiction does resolve the dispute as the plaintiff cannot pursue his or her claim.<sup>58</sup>

On the one hand, *Bozson* seems more principled than *Salaman*, reflecting what is actually at stake in an appeal. As such, *Bozson* was frequently defended by judges.<sup>59</sup> However, *Bozson* and

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<sup>52</sup> For a comprehensive overview, see *Conduct of an Appeal*, *supra* note 2, § 1.20-1.21.

<sup>53</sup> This notably concerned time frame: *Conduct of an Appeal*, *ibid*, § 1.22.

<sup>54</sup> [1891] 1 QB 734 [“*Salaman*”], explained in *Conduct of an Appeal*, *ibid*, § 1.22.

<sup>55</sup> [1903] 1 KB 547 [“*Bozson*”] at 548; *Conduct of an Appeal*, *ibid*, § 1.23-1.25.

<sup>56</sup> *Conduct of an Appeal*, *ibid*, § 1.63.

<sup>57</sup> This continues to this day: in Ontario, an order declining to set aside default judgment is final, while an order setting aside default judgment is interlocutory: *Conduct of an Appeal*, *ibid*, § 1.59-1.61; *Laurentian Plaza Corp v Martin* (1992), 7 OR (3d) 111 (CA); *Siddiqui v Thompson*, 2017 ONSC 1469, [2017] OJ No 1087 (Div Ct).

<sup>58</sup> *MJ Jones Inc v Kingsway General Insurance Co* (2003), 68 OR (3d) 131 (CA) [“*MJ Jones*”].

<sup>59</sup> See, e.g., *Haron bin Mohd Zaid v Central Securities (Holdings) Bhd* [1982] 2 ALL ER 481 at 486 (JCPC), cited in *Conduct of an Appeal*, *supra* note 2 at § 1.27.

its progeny led to more orders being considered final as almost all orders “finally” decide *a* right of the parties – even if it is a right concerning a procedural step.<sup>60</sup> It was also more difficult to apply than *Salaman*, leading Lord Denning to hold that *Bozson* “was right in logic, but [*Salaman*] was right in experience.”<sup>61</sup> In this situation, Lord Denning famously wrote that “This question of ‘final’ or ‘interlocutory’ is so uncertain, that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point.”<sup>62</sup> Buckley LJ remarked in 1910:

The rules [on how to decide whether an order is interlocutory or final] are so expressed and the decisions are so conflicting that [...] in my opinion it is essential that the proper authority should lay down plain rules as to what are interlocutory orders, for as matters now stand it is the fact that it is impossible for the suitor in many cases to know whether an order is interlocutory or final.<sup>63</sup>

In the 1980s, and after another request from an appellate judge<sup>64</sup>, the Civil Procedure Rule Committee in England and Wales expressed its preference for the more predictable application approach.<sup>65</sup> The *Access to Justice Act, 1999* codified this area of the law by adopting a slightly nuanced application approach, defining a final order as one that disposes of “the entire proceedings” and severely restricting appeals of other orders.<sup>66</sup> The current English approach increases certainty but may fairly be regarded as being unsophisticated, classifying matters as interlocutory that finally determine parties’ rights.<sup>67</sup> A return to this experience and the pros and cons of this trade-off will be found in Part IV.

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<sup>60</sup> See *Hendrickson v Kallio*, [1932] OR 675 at 678 [*“Hendrickson”*]; *Conduct of an Appeal*, *ibid*, § 1.59-1.60.

<sup>61</sup> *Salter Rex & Co v Ghosh*, [1971] 2 All ER 865 (CA) [*“Salter Rex”*] at 866, reported in *Conduct of an Appeal*, *ibid*, § 1.27.

<sup>62</sup> *Salter Rex*, *ibid* at 866; see also discussion in *Conduct of an Appeal*, *ibid*, § 1.29-1.31.

<sup>63</sup> *Re Page, Hill v Fladgate* [1910] 1 Ch 489 at 493-494, quoted in Eric TM Cheung, “Interlocutory or Final Orders: Pouring New Wine into Old Wineskins” (2006) 36(1) Hong Kong LJ 15 at 16.

<sup>64</sup> Cheung, *ibid* at 16, quoting *Steinway & Sons v Broadhurst-Clegg*, 1983 WL 215526 (Eng CA).

<sup>65</sup> *Conduct of an Appeal*, *supra* note 2, § 1.28.

<sup>66</sup> *Access to Justice Act 1999 (Destination of Appeals)*, Order 2000 SI 2000/1071, art 1(2)(c) [*“A2J 2000 Order”*]; *Conduct of an Appeal*, *ibid*, § 1.34; Cheung, *supra* note 63 at 17; *Tanfern Limited v Tanfern-MacDonald & Tanfern-Macdonald*, [2000] 2 All ER 801, [2000] EWCA Civ 3023 [*“Tanfern”*].

<sup>67</sup> *Conduct of an Appeal*, *ibid*, § 1.36.

## 2. The Development of the Distinction in Ontario

Canada began to go in its own direction from England shortly after *Salaman* and *Bozson*. In 1932, the Ontario Court of Appeal decided *Hendrickson v Kallio*,<sup>68</sup> still the leading case on the interlocutory/final distinction in Canada.<sup>69</sup> Middleton JA held:

The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties -- the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.<sup>70</sup>

This could fairly be described as close to the application approach.<sup>71</sup> But despite *Hendrickson* having repeatedly been affirmed as the leading on-point authority,<sup>72</sup> caveats have been continually added to it. Two decisions<sup>73</sup> of Morden ACJO held that determinations of the Superior Court's jurisdiction vis-à-vis arbitration and/or administrative tribunals were "final" orders given that "substantive rights" were finally determined.<sup>74</sup> Similarly, Sharpe JA has held dismissals of motions alleging that Ontario did not have jurisdiction and/or was *forum non conveniens* were "final" orders, rationalizing that they finally determine the forum for litigation.<sup>75</sup> The definition of "final" order has also been expanded<sup>76</sup> to include matters such as determinations of motions finding

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<sup>68</sup> *Hendrickson*, *supra* note 60.

<sup>69</sup> *Conduct of an Appeal*, *supra* note 2, § 1.37.

<sup>70</sup> *Hendrickson*, *supra* note 60 at 678.

<sup>71</sup> *Conduct of an Appeal*, *supra* note 2, § 1.39.

<sup>72</sup> *Parsons*, *supra* note 8, at paras 42 (LaForme JA, for the majority on this point) and 195 (Juriansz JA, dissenting on this point).

<sup>73</sup> *Buck Brothers v Frontenac Builders Ltd* (1994), 19 OR (3d) 97 (CA); *Leo Alarie & Sons Ltd v Ontario* (2000), 48 OR (3d) 204 (CA).

<sup>74</sup> *Conduct of an Appeal*, *supra* note 2, § 1.42-1.44.

<sup>75</sup> *MJ Jones*, *supra* note 58; *Conduct of an Appeal*, *ibid*, § 1.59.

<sup>76</sup> For a more comprehensive list, see *Conduct of an Appeal*, *ibid*, § 1.59-1.60.

contempt,<sup>77</sup> determining that a limitations period defence does not apply,<sup>78</sup> and setting aside service *ex juris*.<sup>79</sup> Summarizing this area, Mark Gelowitz and David Rankin write that when orders:

have a terminating effect on an issue or on the exposure of a party, they plainly “dispose of the rights of the parties” and are appropriately treated as final. Where such orders set the stage for a determination on the merits, they do not “dispose of the rights of the parties” and are appropriately treated as interlocutory.<sup>80</sup>

This seems as good as connecting thread as exists between the cases determining this issue. The rest of this chapter explores the consequences of how this works in practice.

#### **D. Appeals and Access to Justice**

As noted in detail in this dissertation’s Introduction,<sup>81</sup> access to justice can be defined broadly or narrowly depending on the circumstances. It can include normative analyses of what constitutes substantive justice,<sup>82</sup> broader analyses of social trends and projects that would lessen the need for formal dispute resolution,<sup>83</sup> and alternatives to traditional litigation such as mediation and arbitration.<sup>84</sup> In the context of civil litigation, it means, at the very least, that civil litigation should have the characteristics of timeliness, minimal financial expense, and simplicity.<sup>85</sup> While these

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<sup>77</sup> *Bush v Mereshensky* (2007), 229 OAC 200 (CA).

<sup>78</sup> *Charlebois v Les Entreprises Normand Ravary Ltee* (2006), 79 OR (3d) 504 (CA) [“*Charlebois*”].

<sup>79</sup> *MacKay v Queen Elizabeth Hospital* (1989), 68 OR (2d) 90 (Div Ct).

<sup>80</sup> *Conduct of an Appeal*, *supra* note 2, § 1.47.

<sup>81</sup> Introduction at 3-6, 9-12.

<sup>82</sup> *E.g.*, Trevor CW Farrow, “What Is Access to Justice” (2014) 51:3 Osgoode Hall LJ 957 [“Farrow 2014”] at 969; Patricia Hughes, “Law Commissions and Access to Justice: What Justice Should We Be Talking About?” (2008) 46:4 Osgoode Hall LJ 773.

<sup>83</sup> Kent Roach & Lorne Sossin, “Access to Justice and Beyond” (2010) 60 UTLJ 373 at 374.

<sup>84</sup> See, *e.g.*, Julie Macfarlane & Michaela Keet, “Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program” (2005) 42 Alta L Rev 677; Robert G Hann & Carl Baar, “Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months” (Toronto: Ministry of the Attorney General, 2001), online: <[https://archive.org/stream/mag\\_00041982/mag\\_00041982\\_djvu.txt](https://archive.org/stream/mag_00041982/mag_00041982_djvu.txt)>, described by Martin Teplitsky, QC, “Universal mandatory mediation: A critical analysis of the evaluations of the Ontario mandatory mediation program” (Winter 2001) 20 Advocates’ Soc J No 3, 10. See also Gary Smith, “Unwilling Actors: Why Voluntary Mediation Works, Why Voluntary Mandatory Mediation May Not” (1998) 36:4 Osgoode Hall LJ 847, expressing doubt about the wisdom and utility of mandatory mediation.

<sup>85</sup> See, *e.g.*, Farrow 2014, *supra* note 82 at 978-979.

characteristics are likely insufficient for a complete understanding of access to justice, they are nonetheless necessary.<sup>86</sup>

Appeals can be indispensable in achieving access to justice, by righting clear wrongs and correcting substantive injustices. Clarity in the law brought by appeals can also allow numerous other parties to order their affairs with certainty and predictability – thereby increasing access to justice.<sup>87</sup> While it is regrettable to have private parties bear the costs of achieving said clarity in the law, at times it seems appropriate – especially when a party is the government.<sup>88</sup>

But appeals come with significant costs in terms of time and financial expenses. This seems particularly the case with respect to interlocutory appeals, which are disconnected from the merits of a dispute and the request for justice therein. (Though there may be some cases where determining an interlocutory matter will make settlement far more likely.) However, there are still benefits to interlocutory appeals. If the interlocutory appeal is necessary to pre-emptively prevent a substantive injustice, misuse of judicial resources, or to clarify the law, then it is permitted. Ontario law has sought to recognize this, allowing a judge to grant leave to appeal an interlocutory order if: a) “there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) **and** that it is in the opinion of the judge hearing the motion ‘desirable that leave to appeal be granted’”<sup>89</sup>; or b) “there is reason to doubt the correctness of the order in question **and** that the proposed appeal involves matters of such importance that leave to appeal

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<sup>86</sup> See, e.g., Farrow 2016, *supra* note 14 at 166.

<sup>87</sup> Particularly important given information asymmetries between legal professionals and their clients: Michael J Trebilcock, “Regulating the Market for Legal Services” (2008) 45:5 *Alta L Rev* 215 at 218, 220; Roach & Sossin, *supra* note 83 at 392.

<sup>88</sup> See, e.g., Gerard J Kennedy & Lorne Sossin, “Justiciability, Access to Justice & the Development of Constitutional Law in Canada” (2017) 45(4) *FLR* 707.

<sup>89</sup> Molloy J in *Sahota v Sahota*, 2015 CarswellOnt 6046, [2015] OJ No 2090 (Div Ct) [“*Sahota*”], quoting/citing Rule 62.02(4)(a) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 [the “*Rules*”].

should be granted.”<sup>90</sup> The former criteria emphasize clarifying the law, while the latter look at proportionate access to justice.

Appeals in general, and interlocutory appeals in particular, can therefore facilitate or hinder access to justice. This has been recognized in other situations regarding appeals. For example, bifurcating appeals is discouraged, unless there appears good reason to believe that the appellate answer in the first appeal will resolve the dispute.<sup>91</sup> The distinction in treatment of interlocutory and final appeals in Ontario law is designed to address the double-edged nature of appeals vis-à-vis access to justice. As Perell and Morden note:

In general terms, the policy underlying the distinction between interlocutory and final orders is the proportionality principle. For judicial decisions that are of comparatively less importance to the parties and the public than other decisions (particularly those other decisions that are determinative of the outcome of the litigation), there should be no appeal at all, or the right of appeal should be curbed by a leave requirement.<sup>92</sup>

This principle of proportionality was given general application in Ontario in 2010 in light of the Osborne Report.<sup>93</sup>

The subsequent parts of this chapter seek to determine whether the balance has been struck appropriately. Against this background, it is important to consider the Supreme Court’s seminal 2014 decision *Hryniak v Mauldin*, calling for a “culture shift” in how litigation is conducted, to ensure the timely and inexpensive resolution of civil actions on their merits, the spirit of which has

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<sup>90</sup> *Sahota, ibid* at para 5, citing Rule 62.02(4)(b) of the *Rules, ibid*.

<sup>91</sup> *Bonello v Gores Landing Marina (1986) Limited*, 2017 ONCA 632, 39 CCLT (4th) 175 [“*Bonello*”] at para 15.

<sup>92</sup> Paul M Perell & John W Morden in *The Law of Civil Procedure in Ontario*, 2d ed (Markham: Lexis-Nexis Canada, 2014) at ¶ 12.40, cited in, e.g., *Skunk v Ketash*, 2016 ONCA 841, 135 OR (3d) 180 [“*Skunk*”] at para 31.

<sup>93</sup> *Rules, supra* note 89, Rule 1.04(1.1), amended as a result of O Reg 438/08; also described in Trevor Farrow, “Proportionality: A Cultural Revolution” (2012) 1 *Journal of Civil Litigation and Practice* 151 [“Farrow 2012”], and the discussion of Karakatsanis J for a unanimous Supreme Court in *Hryniak, supra* note 17 at paras 28-33. This came after Colter Osborne’s seminal report: Coulter Osborne, QC, *Civil Justice Reform Project: Findings and Recommendations* (Ontario Ministry of the Attorney General, November 2007), online: <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>> at c 12.

been held to apply outside the summary judgment context.<sup>94</sup> Chapter One’s discussion of jurisdiction motions, however, suggested that *Hryniak* had minimal impacts where it was not explicitly incorporated into binding precedent.<sup>95</sup>

## II) METHODOLOGY FOR REVIEWING ONTARIO DECISIONS

In June, July, and August of 2018, WestLaw Canada and QuickLaw Advance were searched, attempting to isolate all Ontario cases in the Divisional Court and Court of Appeal where there was dispute about whether an appeal was final or interlocutory between January 1, 2010 and December 31, 2017. “Interlocutory” was searched for within the same paragraph as “appeal”. This yielded 458 results in QuickLaw (June 27, 2018) and 488 in WestLaw (September 5, 2018, excluding four Supreme Court of Canada cases). These included many false positives as results included many cases where there was no question that the appeal was interlocutory, whether in the context of a final decision<sup>96</sup> or a motion for leave.<sup>97</sup> But the sample was still manageable.

As previously recognized,<sup>98</sup> there are limitations to using Westlaw and QuickLaw in this way. These databases do not report every case decided in Ontario. For example, in one case the Divisional Court addressed a leave motion after the Court of Appeal held that the appeal was interlocutory – but the Court of Appeal’s decision was unreported.<sup>99</sup> Despite limitations, however, quantitative analyses of case law frequently use Westlaw and QuickLaw.<sup>100</sup> It should also be

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<sup>94</sup> *Hryniak*, *ibid* at paras 23-29; Stephen GA Pitel & Matthew Lerner, “Resolving Questions of Law: A Modern Approach to Rule 21” (2014) 43 Adv Q 344 at 344-346.

<sup>95</sup> Gerard J Kennedy, “Jurisdiction Motions and Access to Justice: An Ontario Tale” (2018) 55:1 Osgoode Hall LJ 79 [“Kennedy Jurisdiction”].

<sup>96</sup> See, e.g., *Canada (Attorney General) v Giacomelli*, 2010 ONSC 985, 317 DLR (4th) 528 (Div Ct).

<sup>97</sup> See, e.g., *United States of America v Yemec*, 2010 ONSC 1409, 100 OR (3d) 394 (Div Ct), transferred to Court of Appeal after leave granted: *United States of America v Yemec*, 2010 ONCA 414, 100 OR (3d) 321.

<sup>98</sup> See, e.g., Kennedy Jurisdiction, *supra* note 95 at 90; Gerard J Kennedy, “Rule 2.1 of Ontario’s *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?” (2018) 35 Windsor YB Access to Just 243 [“Kennedy Rule 2.1”].

<sup>99</sup> *Colenbrander v Savaria Corp*, 2016 ONSC 8051, [2016] OJ No 6608 [“*Colenbrander*”].

<sup>100</sup> See, e.g., Craig E Jones & Micah B Rankin, “Justice as a Rounding Error? Evidence of Subconscious Bias in Second-Degree Murder Sentences in Canada” (2014) 52:1 Osgoode Hall LJ 109 at 121, fn 58.



recognized that normative values underlying legal rules cannot be assessed through quantitative analyses of case law.<sup>101</sup> However, understanding how rules work in practice can lead to appreciation of the practical consequences of prioritizing different normative values in interpreting the law.

The following variables were recorded:

- the number of disputes over the interlocutory/final appeal distinction, as this illustrates both how large a problem this is, and whether there have been any post-*Hryniak* changes;
- whether the remedy for an appeal being brought in the wrong court is:
  - quashing the appeal, thus necessitating seeking an extension of time;<sup>102</sup> and/or
  - the Court of Appeal reconstituting itself as the Divisional Court, usually to save the parties time and/or money when the matter is urgent,<sup>103</sup>
 and what factors seem to lead a court to deciding which of these remedies to use;
- what costs awards are associated with these disputes as this indicates many of the financial costs associated with the disputes (admittedly, costs awards typically represent only about half of costs actually incurred<sup>104</sup>);
- how many cases involved self-represented litigants, as there is special concern about self-represented litigants being able to access justice;<sup>105</sup>

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<sup>101</sup> See, e.g., Joshua B Fischman, “Reuniting ‘Ought’ and ‘Is’ in Empirical Legal Scholarship” (2013) 162(1) U Pa Law Rev 117.

<sup>102</sup> E.g., *Pinsky v Smiley*, 2015 ONCA 52, [2015] OJ No 443.

<sup>103</sup> E.g., *Pruner v Ottawa Hunt and Golf Club Ltd*, 2015 ONCA 609, 127 OR (3d) 337.

<sup>104</sup> *Infra* note 147.

<sup>105</sup> See, e.g., Julie Macfarlane, Katrina Trask & Erin Chesney, “The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?” (Windsor, ON: The National Self-Represented Litigants Project, The University of Windsor, November 2015) [“NSRLP Summary Procedures”]; Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report” (May 2013), online: <<https://scholar.uwindsor.ca/lawpub/85/>> [“Macfarlane Main Report”]; Kennedy Rule 2.1, *supra* note 98, summarizing this work.

- what delay is associated with this, as delay is another major consideration regarding access to justice; and
- how they are resolved, as this indicates how frequently unnecessary motions are brought.

The rationale for isolating these factors is to allow for analysis of both how clear the law is, and the practical consequences of it hypothesized (lack of) clarity. All these details are recorded in Appendices G (Court of Appeal decisions) and H (Divisional Court decisions).<sup>106</sup> Once these factors are assessed, it will be analyzed whether *Hryniak* itself was cited in any contested cases. Based on both explicit citations (though one would expect it to be cited regarding summary judgment, it is cited for its spirit more generally<sup>107</sup>) and quantitative trends, whether the spirit of *Hryniak* is being heeded outside the narrow summary judgment context will be assessed.

Court of Appeal and Divisional Court cases are separated in this analysis given that the issue usually comes up in different ways in the two courts. In the Court of Appeal, the Court is typically confronted with the question of whether it has jurisdiction to hear an appeal from an order that may be interlocutory. In the Divisional Court, the issue tends to be if leave is required, or whether an interlocutory order is not appealable, such as being a decision made under the *Construction Act*<sup>108</sup> or in the Small Claims Court.<sup>109</sup> The rarity with which a litigant brings a final appeal in the Divisional Court by mistake also led to a decision not to search for cases where a litigant mistakenly appealed a master's final order to the Superior Court – such cases are likely extremely rare, and searching for them would appear to be searching for the proverbial needle in a haystack.

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<sup>106</sup> Whether the issue was raised by the court itself or as a result of a responding party's motion was also kept track of. However, these results turned out to be uninteresting, due to this matter being unclear in many cases and uncertainty about how the results are in any way relevant to the proposed policy prescriptions.

<sup>107</sup> *Infra* note 114.

<sup>108</sup> Where interlocutory appeals are not permitted: RSO 1990, c C30 ["CLA"], s 71(3), as occurred in, *e.g.*, 570 *South Service Road Inc v Lawrence-Paine & Associates Ltd*, 2011 ONSC 3410, 3 CLR (4th) 1 (Div Ct) ["570 *South Service Road*"].

<sup>109</sup> *Ellins v McDonald*, 2012 ONSC 4831, [2012] OJ No 4556 (Div Ct) ["*Ellins*"].

One could quibble with confining this analysis to Ontario. Other common law provinces – notably, British Columbia<sup>110</sup> – have similarly struggled with the distinction between interlocutory and final appeals for decades. A more tailored review of British Columbia case law is returned to in Part IV.B.2. However, confining in this way seems an appropriate decision for multiple reasons, one of which is simply to have a more manageable sample size. More importantly, however, Ontario is unique among the provinces given the division of jurisdiction over interlocutory and final appeals between two courts<sup>111</sup> – as discussed below, this may be relevant to potential solutions in this area. British Columbia also has different practical procedural approaches to this issue, as will be discussed in Part IV.B.2, that make a direct comparison to Ontario inexact. Finally, Ontario underwent serious reforms to its civil procedure in the past decade.<sup>112</sup> While the rules surrounding interlocutory appeals *per se* were not amended, the principle of proportionality now applies to all of civil procedure,<sup>113</sup> and the spirit of the Supreme Court’s decision in *Hryniak* has been held to apply beyond the specific summary judgment context.<sup>114</sup> Confining the analysis to Ontario thus appears reasonable.

Not every case where there was a dispute over the interlocutory or final nature of an appeal could be neatly classified as falling into the goal of this study: to discern the state of the law regarding this distinction, and the access to justice consequences of its hypothesized lack of clarity. As such, the following types of cases were not included in this analysis:

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<sup>110</sup> See, e.g., Frederick M Irvine, “Annotation: *Radke v. S. (M.) (Litigation Guardian of)*” (2006) 27 CPC (6th) 8.

<sup>111</sup> *Conduct of an Appeal*, *supra* note 2, § 5.1.

<sup>112</sup> Described in, e.g., Janet Walker, “Summary Judgment Has Its Day in Court” (2012) 37 Queen’s LJ 697 at 700-701 and Brooke MacKenzie, “Effecting a Culture Shift: An Empirical Review of Ontario’s Summary Judgment Reforms” (2017) 54:4 Osgoode Hall LJ 1275 at 1280-1281.

<sup>113</sup> *Supra* note 93.

<sup>114</sup> See, e.g., Pitel & Lerner, *supra* note 94; *Gao v Ontario (Workplace Safety & Insurance Board)*, 2014 ONSC 6100, 37 CLR (4th) 1 (SCJ) at para 9 (holding that the spirit of *Hryniak* applies to the interpretation of Rule 2.1 of the *Rules*).

- disputes over appeal rights in the criminal or quasi-criminal context<sup>115</sup> (the differences in criminal and civil procedure are so great that comparing them seems of marginal utility);
- attempts to appeal or judicially review arguably interlocutory decisions of administrative tribunals (generally not allowed),<sup>116</sup> as this appears not relevant to civil practice, being a matter of administrative law;
- disputes over proceeding with interlocutory appeals pending the Court of Appeal deciding what to do in the same case (not shedding light on the uncertainty in the law);<sup>117</sup>
- when a party's position disputing a court's jurisdiction caused by this distinction was withdrawn prior to the hearing – it would be very difficult to quantify costs and delay caused by the withdrawn position in these cases;<sup>118</sup>
- leave to appeal an order being sought despite the judge not being sure it was necessary;<sup>119</sup>
- applications for judicial review of Small Claims Court interlocutory decisions (which are theoretically allowed to ensure the Small Claims Court did not act without jurisdiction);<sup>120</sup>
- where the Divisional Court satisfied itself that it could hear an interlocutory appeal due to an allegation of bias (not caused by the distinction between interlocutory and final orders *per se*);<sup>121</sup> and

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<sup>115</sup> *E.g., United States of America v Fafalios*, 2012 ONCA 365, 110 OR (3d) 641.

<sup>116</sup> See, *e.g., Aroda v Ontario (Human Rights Commission)*, 2010 ONSC 419, 259 OAC 384 (Div Ct); *Ackerman v Ontario (Provincial Police)*, 2010 ONSC 910, 259 OAC 163 (Div Ct); *Ibrahim v Ontario College of Pharmacists*, 2010 ONSC 5293, [2010] OJ No 4200 (Div Ct).

<sup>117</sup> See, *e.g., Manicinelli*, *supra* note 3, excused a party from filing materials pending determination from the Court of Appeal on whether an order was interlocutory or final.

<sup>118</sup> *Sluyt v Sluyt*, 2010 ONCA 150, 75 RFL (6th) 237.

<sup>119</sup> *Sun v Pomes*, 2012 ONSC 3031, [2012] OJ No 2270 (Div Ct).

<sup>120</sup> *Mazinani (cob Mazinani Law Offices) v Clark*, 2014 ONSC 7100, [2014] OJ No 5886 (Div Ct); *Harbinger Network Inc v Robert Webster Co*, 2016 ONSC 487, [2016] OJ No 363 (Div Ct).

<sup>121</sup> *1147335 Ontario Inc v Thyssen Krupp Elevator (Canada) Inc*, 2012 ONSC 4139, 295 OAC 71 (Div Ct).

- where confusion among lawyers about whether an order was final or interlocutory led to missing a deadline if the parties ultimately resolved the issue.<sup>122</sup>

Though all of these matters, in some way, shed light on consequences of the fact that there is a distinction between interlocutory and final appeals, they seem inapposite to assess the actual distinction, and the access to justice consequences of its hypothesized lack of clarity. However, disputes over whether orders made under the *Construction Act*<sup>123</sup> or the *Partition Act*<sup>124</sup> were final or interlocutory were included. Though these statutory regimes prescribe somewhat idiosyncratic appellate practice, the law concerning whether an order is interlocutory or final is the same,<sup>125</sup> and as such they highlight the costs of this distinction.

### III) CHARACTERISTICS OF ONTARIO CASE LAW

#### A. Number of Disputes

119 cases in the Court of Appeal, and 30 in the Divisional Court, had disputes over whether an order under appeal was interlocutory or final. This came up in a variety of ways, including motions brought by respondents to strike the appeal,<sup>126</sup> cases where the court raised the issue on its own initiative,<sup>127</sup> where the respondent raised it at the hearing of the appeal,<sup>128</sup> or as defences to motions to extend time in which to appeal.<sup>129</sup> The numbers per year can be expressed as follows:

<sup>122</sup> *Laczko v Alexander*, 2012 ONCA 803, [2012] OJ No 5423.

<sup>123</sup> *Ravenda Homes Ltd v Ontario 1372708 Ltd*, 2010 ONSC 6338, 5 CPC (7th) 440 (Div Ct) [“*Ravenda*”].

<sup>124</sup> *Nifco v Nifco*, 2017 ONSC 7475, 6 RFL (8th) 212 (Div Ct) [“*Nifco*”].

<sup>125</sup> *Nifco*, *ibid* at paras 4-6 (which makes this point implicitly); *Ravenda*, *supra* note 123 at para 6.

<sup>126</sup> *E.g.*, *Wong v Gong*, 2010 ONCA 25, [2010] OJ No 121 [“*Wong v Gong*”].

<sup>127</sup> *E.g.*, *Clarke (Litigation guardian of) v Richardson*, 2013 ONCA 731, [2013] OJ No 5896 [“*Clarke*”].

<sup>128</sup> *E.g.*, *Hanisch v McKean*, 2014 ONCA 698, 325 OAC 253.

<sup>129</sup> *E.g.*, *VandenBussche Irrigation & Equipment Ltd v Kejay Investments Inc*, 2016 ONCA 613, [2016] OJ No 4185.

**TABLE 3A: NUMBERS AND RESULTS OF DISPUTES OVER THE INTERLOCUTORY/FINAL DISTINCTION – ONTARIO**

<b>Year</b>	<b>CA: Total</b>	<b>CA: <i>Interlocutory</i></b>	<b>CA: <i>Final</i></b>	<b>CA: <i>Other</i></b>	<b>Div Ct: Total</b>	<b><i>Div Ct:</i> <i>Interlocutory</i></b>	<b><i>Div Ct:</i> <i>Final</i></b>	<b><i>Div Ct:</i> <i>Other</i></b>
2010	7	4	2	1	4	2	2	0
2011	9	6	3	0	2	2	0	0
2012	13	11	2	0	1	0	1	0
2013	7	7	0	0	3	0	3	0
2014	12	10	2	0	6	6	0	0
2015	22	15	7	0	5	3	1	1
2016	26	18	8	0	1	1	0	0
2017	23	19	4	0	8	3	3	2
<b>TOTAL</b>	<b>119</b>	<b>90</b>	<b>28</b>	<b>1</b>	<b>30</b>	<b>17</b>	<b>10</b>	<b>3</b>

It is unsurprising that the Court of Appeal has dealt with this issue more frequently than the Divisional Court, as it is where a party would more likely go under the mistaken belief that an appeal can be taken as of right. This happens less frequently in the Divisional Court, except when specific statutes such as the *Construction Act* make interlocutory appeals impermissible.<sup>130</sup>

To put the Court of Appeal's numbers of more than twenty cases per year in recent years in perspective, the Court usually reports around 1,000 decisions a year.<sup>131</sup> That 1-2% of them address disputes over the interlocutory/final distinction suggests misuse of resources of an important court.

<sup>130</sup> CLA, *supra* note 108, s 71(3)(b), litigated in, *e.g.*, *Ravenda*, *supra* note 123.

<sup>131</sup> *Infra* note 232.

## B. Results and Remedies

90 of 119 Court of Appeal decisions – 75.6% – held the appeal to be interlocutory, suggesting that respondents do not usually raise this issue frivolously, trying to uphold a result on a technicality. 28 of the 119 held the appeal to be final (23.5%), allowing the appeal to proceed.

Determining the remedy in the Court of Appeal is only relevant when the appeal is found to be interlocutory – otherwise, the appeal may proceed (though the costs caused by the issue being raised are doubtless irritating for the appellants). In 87 of 90 cases where the appeal was held to be interlocutory, the Court of Appeal simply quashed, dismissed, or would not entertain the appeal. An eighty-eighth case quashed the appeal but extended time to seek leave to appeal in the Divisional Court.<sup>132</sup> In only two cases did the Court of Appeal hear the appeal, once reconstituting itself as the Divisional Court due to urgency,<sup>133</sup> and once because it did not wish to bifurcate matters when much of the appeal was properly before the Court of Appeal and the issues it was addressing were intertwined with the issues that should have been before the Divisional Court.<sup>134</sup>

The results in the Divisional Court (17 orders held to be interlocutory, compared to 10 held to be final) are less important than the absolute numbers and the remedies, as at times holding the appealed order to be final allowed it to proceed,<sup>135</sup> yet in others it did not.<sup>136</sup> This is due to various statutes prescribing peculiar appellate routes to the Divisional Court,<sup>137</sup> making the cases more idiosyncratic. In twenty cases, the Court declined leave to appeal, or dismissed, quashed, or refused to hear the appeal. In six of the thirty cases, the Court decided it could hear the appeal. In two

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<sup>132</sup> *Ambrose v Zupardi*, 2013 ONCA 768, 368 DLR (4th) 749 at para 11.

<sup>133</sup> *Punit v Punit*, 2014 ONCA 252, 43 RFL (7th) 84 [“*Punit*”] at para 18.

<sup>134</sup> *Azzeh (Litigation guardian of) v Legendre*, 2017 ONCA 385, 135 OR (3d) 721, leave to appeal ref’d, [2017] SCCA No 289, 2018 CarswellOnt 2058 [“*Azzeh*”].

<sup>135</sup> *E.g.*, *Ellins*, *supra* note 109.

<sup>136</sup> *Petgrave (Litigation guardian of) v Maheru*, 2010 ONSC 1710, [2010] OJ No 1211 (Div Ct) [“*Petgrave*”].

<sup>137</sup> *E.g.*, the CPA, *supra* note 42, s 30; CLA, *supra* 108, ss 70-71.

others it declined to decide the issue, deciding the case on other grounds<sup>138</sup> or adjourning pending the Court of Appeal ruling in the same case.<sup>139</sup> The Court also reconstituted itself as the Superior Court once,<sup>140</sup> and gave sought directions once.<sup>141</sup>

In both the Divisional Court and Court of Appeal, there is an overwhelming tendency, upon realizing an appeal has been improperly commenced, to send the party back to square one. Rarely do the judges facilitate the progress of the action. This is not necessarily problematic – if the appeal was illicitly commenced, ending it can be entirely appropriate. At times, interpreting procedural law excessively strictly can be an access to justice obstacle,<sup>142</sup> but this may not be the case when addressing an appeal that does not concern the merits of a dispute. And in a few rare cases where judges felt access to justice demanded the appeal be helped along due to urgency, this occurred. (Admittedly, this does not mean that there were no other cases in which judges were similarly concerned about urgency but for whatever reason did not act to accommodate those concerns.)

To briefly address the four cases that did not decide the dispute over the interlocutory/final distinction: one involved an instance where the Court of Appeal thought, even if an order was final, it would be imprudent to entertain the appeal before trial;<sup>143</sup> in the second, another factor rendered the dispute irrelevant;<sup>144</sup> in the third, the Divisional Court adjourned the matter pending the Court of Appeal deciding whether the matter was interlocutory or final (appeals were brought in both courts out of caution);<sup>145</sup> and in the last, Nordheimer J (as he then was) felt the matter was appropriate to dismiss pursuant to Rule 2.1 of the *Rules* for being facially abusive, regardless of

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<sup>138</sup> *Polmat Group Inc v E Ring Corp*, 2015 ONSC 1233, 2015 CarswellOnt 2864 [“*Polmat*”].

<sup>139</sup> *Mancinelli*, *supra* note 3.

<sup>140</sup> *C&M Properties Inc v 1788333 Ontario Inc*, 2015 ONSC 706, [2015] OJ No 534.

<sup>141</sup> *Awad v Dover Investments Ltd*, 2015 ONSC 3955, [2015] OJ No 3204 [“*Awad*”].

<sup>142</sup> See, e.g., *Wouters v Wouters*, 2018 ONCA 26, 6 RFL (8th) 305 at para 36.

<sup>143</sup> *Harrop (Litigation guardian of) v Harrop*, 2010 ONCA 390, 85 CPC (6th) 1.

<sup>144</sup> *Polmat*, *supra* note 138.

<sup>145</sup> *Mancinelli*, *supra* note 3.



whether it was interlocutory or final.<sup>146</sup> These cases evidence how frequently this issue arises, but provide no insight on how courts determine whether an issue is interlocutory or final. Now that we have discussed how courts resolve this issue and how frequently it arises, we should consider the financial costs of these cases.

### C. Costs

When calculating the costs incurred by parties, it must be acknowledged that costs awards generally only permit recovery of approximately half of the costs actually incurred.<sup>147</sup> Many cases also have no reported costs, whether because the decision is silent,<sup>148</sup> the issue was reserved to the trial judge,<sup>149</sup> settlement was encouraged and no subsequent costs decision is reported,<sup>150</sup> no costs were sought,<sup>151</sup> or the court decided it was not an appropriate case for costs, potentially because the court had to raise the issue on its own initiative.<sup>152</sup> These cases accordingly cannot be used in determining the costs incurred by parties. Cases where the costs award was clearly animated by factors other than the interlocutory/final dispute were excluded, as they shed no light on the costs caused by the distinction *per se*.<sup>153</sup> The quantum of some of the orders was also adjusted, if the interlocutory/final dispute reflected only about a quarter<sup>154</sup> or half<sup>155</sup> of issues raised.

The average quantum of the 86 informative costs awards is \$6,307. In the 70 Court of Appeal cases, it is \$5,685. There was also a fairly small range in this sample of seventy cases – only two

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<sup>146</sup> *Loftus v Chamberlain*, 2017 ONSC 5751, [2017] OJ No 5175 (Div Ct).

<sup>147</sup> P Scott Horne, “The Privatization of Justice in Québec’s Draft Bill to Enact the New Code of Civil Procedure: A Critical Evaluation” (2013) 18 Appeal 55 at 61.

<sup>148</sup> *Royal Bank of Canada v Trang*, 2012 ONCA 902, 97 CBR (5th) 52.

<sup>149</sup> *570 South Service Road*, *supra* note 108 at para 16.

<sup>150</sup> *Fram Elgin Mills 90 Inc v Romandale Farms Ltd*, 2016 ONCA 404, 131 OR (3d) 455.

<sup>151</sup> *Chand v Quereshi*, 2016 ONCA 231, [2016] OJ No 1596.

<sup>152</sup> *Golden Oaks Enterprises Inc v Lalonde*, 2017 ONCA 515, 137 OR (3d) 750 [“Golden Oaks”].

<sup>153</sup> See, e.g., *Talbot v Bergeron*, 2016 ONCA 956, 2016 CarswellOnt 19874.

<sup>154</sup> *Shoukralla v Shoukralla*, 2016 ONCA 128, 41 CBR (6th) 6, where this was one of four major issues.

<sup>155</sup> *Westmount-Keele Ltd v Royal Host Hotels and Resorts Real Estate Investment Trust*, 2017 ONCA 673, [2017] OJ No 4686, where this was one of two major issues.

of the 70 decisions awarded more than \$10,000 in costs. The average costs award in the 16 Divisional Court cases is \$9,028. Despite the smaller sample size, the range was larger, with the median being only \$5,000. Remembering that actual costs incurred are about double the size of costs orders, it is fair to assume that the typical party incurs at least \$10,000 in costs as a result of a dispute over the interlocutory or final nature of an order, not including the costs of the matter before the motions judge. This is not an enormous amount of costs,<sup>156</sup> but given that a dispute over the interlocutory or final nature of an appealed order is definitionally unrelated to a case's merits, it is unfortunate that these costs are incurred.

#### **D. Delay**

In eleven cases where the Court of Appeal quashed an appeal, the losing party sought leave to appeal the matter in the Divisional Court. The average length of time between the quashing and determination of the leave motion (or the appeal, if leave was granted) in the ten cases where delay is calculable<sup>157</sup> is approximately 7.7 months.<sup>158</sup> This step would have been necessary even in the presence of clearer law. But from the perspective of a litigant's lived experience, it comes after an average delay of about six months between the decision under appeal and the Court of Appeal quashing the appeal.<sup>159</sup> This latter delay was for a step that in no way helped resolve the merits of a case and should not have been undertaken as a matter of procedure. This is an unfortunate occurrence given that the merits of the dispute are not addressed. This excludes a twelfth case,

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<sup>156</sup> For instance, Kennedy Jurisdiction, *supra* note 95 at 98 estimates that jurisdiction motions cost parties three to eight times this amount, depending on whether there is an appeal.

<sup>157</sup> *Colenbrander*, *supra* note 99 denies leave to appeal after the Court of Appeal quashed an appeal in an unreported decision. It accordingly could not be used in the calculations. The other cases are noted in their own column in Appendix G.

<sup>158</sup> It would be longer if one considers the appeal process in *Xela Enterprise Ltd v Castillo*, 2015 ONSC 866, 70 CPC (7th) 224 (Div Ct), aff'd 2016 ONCA 437, 131 OR (3d) 193, leave to appeal denied, [2016] SCCA No 366, 2017 CarswellOnt 2690.

<sup>159</sup> In these eleven cases, the delay between the decision under appeal and the Court of Appeal quashing the appeal was 183 days – essentially, half a year or 6 months.

where a determination that the motion to quash should be heard in conjunction with the substantive appeal led to a delay of three months.<sup>160</sup>

### E. Appeals

Two of thirty Divisional Court decisions led to unsuccessful motions for reconsideration.<sup>161</sup> Nine Court of Appeal decisions led to unsuccessful Supreme Court of Canada leave applications. Of these cases, however, four of the Court of Appeal decisions addressed the merits<sup>162</sup> (despite that only occurring in a quarter of cases<sup>163</sup>), non-interlocutory matters dominated a fifth,<sup>164</sup> and four involved self-represented litigants who may have been confused about the process or were excessively querulant<sup>165</sup> (though care should be taken not to unfairly stereotype self-represented litigants,<sup>166</sup> there is also evidence that they may be responsible for a disproportionate share of inappropriate litigation, even if through no fault of their own<sup>167</sup>). In other words, no party with counsel appealed only fact that his or her appeal was quashed for being interlocutory.

<sup>160</sup> *Lawrence v International Brotherhood of Electrical Workers (IBEW) Local 773*, 2017 ONCA 321, 138 OR (3d) 129, aff'd 2018 SCC 11, [2018] 1 SCR 267.

<sup>161</sup> *2128445 Ontario Inc v Sherk*, 2017 ONSC 5996, [2017] OJ No 5783 [“Sherk”]; *Belway v Petro-Canada Fuels Inc*, 2015 ONSC 675, [2015] OJ No 416, ref’g to reconsider 2014 ONSC 3344, [2014] OJ No 2621.

<sup>162</sup> *Azzeh*, *supra* note 134 (the Court addressed the interlocutory portions); and *R & G Draper Farms (Keswick) Ltd v Nature’s Finest Produce Ltd*, 2016 ONCA 481, 350 OAC 198, leave to appeal ref’d, [2016] SCCA No 399, 2016 CarswellOnt 16389, *Speciale Law Professional Corp v Schrader Canada Ltd*, 2015 ONCA 856, [2015] OJ No 6418, leave to appeal ref’d, [2016] SCCA No 56, 2016 CanLII 26756, and *Griffin v Dell Canada Inc*, 2010 ONCA 29, 98 OR (3d) 481, leave to appeal ref’d, [2010] SCCA No 75, 2010 CanLII 27725 (held to be final decisions).

<sup>163</sup> 30 of 119 decisions: 28 where the appeal was held to be final, and 2 others where the Court heard the appeal.

<sup>164</sup> *Fanshawe College of Applied Arts and Technology v AU Optronics Corp*, 2016 ONCA 621, 132 OR (3d) 81, leave to appeal ref’d, [2016] SCCA No 442, 2016 CarswellOnt 17004.

<sup>165</sup> *Olumide v Conservative Party of Canada*, 2016 ONCA 314, [2016] OJ No 2284, leave to appeal refused: [2016] SCCA No 425, 2017 CarswellOnt 6254; *Must v Shkuryna*, 2015 ONCA 665, [2015] OJ No 5087, leave to appeal ref’d, [2015] SCCA No 482, 2016 CarswellOnt 5396; *Ontario v Lipsitz*, 2011 ONCA 466, 281 OAC 67, leave to appeal ref’d, [2011] SCCA No 407, 2012 CarswellOnt 1520; *Lindhorst v Stone & Co*, 2011 ONCA 657, [2011] OJ No 4594, leave to appeal ref’d, [2011] SCCA No 564, 2012 CarswellOnt 4238.

<sup>166</sup> NRSPLP Summary Procedures, *supra* note 105; Yves-Marie Morrisette, “Abus de droit, querulence et parties non représentées” (2004) 49 McGill LJ 23.

<sup>167</sup> Kennedy Rule 2.1, *supra* note 98, suggesting that self-represented litigants bring a disproportionate number of frivolous, vexatious, and abusive actions; see also Donald J Netolitzky, “The History of the Organized Pseudolegal Commercial Argument Phenomenon in Canada” 53:3 Alta L Rev 606; Donald J Netolitzky, “Lawyers and Court Representation of Organized Pseudolegal Commercial Argument [OPCA] Litigants in Canada” (2018) 51:2 UBC L Rev 419.

Ultimately, this is a fairly low rate of appeals, with there being no cases where an appellate court overturned the result below. This could indicate that the law is clearer than suspected,<sup>168</sup> but two other explanations exist. First, disputes over the interlocutory or final nature of orders are always peripheral in litigation, and parties likely feel that it is not worthwhile pressing these matters – especially to the Supreme Court of Canada. Second, leave is almost always required to appeal a Divisional Court<sup>169</sup> or Court of Appeal decision,<sup>170</sup> disincentivizing such appeals.

#### **F. Self-Represented Litigants**

Of the 149 cases, self-represented litigants were present in 32 (21%), compared to 117 (79%) where all parties had counsel. In 8 of 30 cases in the Divisional Court, litigants were self-represented, compared to 22 cases (73%) where all parties had counsel. This is similar to there being 24 cases in the Court of Appeal (20%) where there were self-represented litigants, compared to 94 cases where all parties have counsel (79%). This is less than other contexts, given Julie Macfarlane’s observation of “some lower level civil courts reporting more than 70% of litigants as self-represented.”<sup>171</sup> This area of law therefore appears to confuse lawyers as well as laypeople.

At the same time, self-represented litigants’ positions lost 79% of the time in the Court of Appeal (the Divisional Court’s decisions’ idiosyncrasies make the results of what is a “loss” there less informative). This could be because self-represented litigants are being bamboozled unfairly, in line with Macfarlane’s fears.<sup>172</sup> But it is possible – hopefully likelier – that self-represented litigants are simply confused about the process,<sup>173</sup> which court an appeal should be brought in, and

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<sup>168</sup> Kennedy Jurisdiction, *supra* note 95 at 95, positing that lowering rates of appeals suggests greater clarity in the law.

<sup>169</sup> Divisional Court decisions are generally only appealable with leave: CJA, *supra* note 38, s 6(1)(a).

<sup>170</sup> *Conduct of an Appeal*, *supra* note 2 at § 7.5.

<sup>171</sup> Macfarlane Main Report, *supra* note 105 at 34.

<sup>172</sup> NSRLP Summary Procedures, *supra* note 105.

<sup>173</sup> *Ibid.*

whether leave is necessary. The uncertainty of the law would thus appear to affect self-represented litigants especially harshly.

### **G. Effects of *Hryniak***

One would have hoped that *Hryniak*, with its emphasis on the timely and inexpensive resolution of civil claims on their merits, would have contributed to a decrease in the number of disputes over this issue, given how far the issue is removed from the merits of a case. Reading the case law did lead to observations that the spirit of *Hryniak* has been cited in deciding whether to grant leave to appeal an interlocutory order,<sup>174</sup> as well as a reason not to bifurcate an appeal.<sup>175</sup> However, not a single case cited *Hryniak* in the context of adjudicating the final/interlocutory distinction.<sup>176</sup> While this could be interpreted as *Hryniak* being irrelevant to the interlocutory/final distinction, its spirit still seems as though it should permeate how parties act going forward,<sup>177</sup> and perhaps how the law surrounding this distinction should be amended.

Moreover, more cases are disputing this point in the aftermath of *Hryniak* being decided in early 2014 – exactly the opposite of what one would have hoped would be *Hryniak*'s effects. Whether this can truly be attributed to lawyers not heeding the call for a “culture shift” is debatable – it could be the result of the area of law becoming more unwieldy, as Juriansz JA suggested in *Parsons*.<sup>178</sup> But if *Hryniak* had helped ameliorate this area of law, one would have thought that parties would be bringing fewer interlocutory appeals, in line with *Hryniak*'s call for a culture shift, recognizing that interlocutory appeals are frequently a disproportionate step in achieving

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<sup>174</sup> *Gatti v Avramedis*, 2016 ONSC 606, 2016 CarswellOnt 892 (Div Ct) at para 11.

<sup>175</sup> *Bonello*, *supra* note 91 at para 16.

<sup>176</sup> Some of the cases concerned summary judgments and *Hryniak* was considered in the context of the merits of the appeal: *e.g.*, *Bonello*, *ibid.*

<sup>177</sup> See, *e.g.*, *Iannarella v Corbett*, 2015 ONCA 110, 124 OR (3d) 523 at para 53, concerning *Hryniak*'s relation to discovery; *Pitel & Lerner*, *supra* note 94, concerning *Hryniak*'s spirit and motions to strike.

<sup>178</sup> *Supra* note 8.

access to civil justice. (Though increased use of summary judgment could increase the number of interlocutory orders and thus interlocutory appeals, this would also hopefully lead to litigation being resolved earlier, giving less time for interlocutory orders to be made.)

## H. Conclusions on Ontario Case Law

The most important isolated statistic may be the sheer number of cases brought where the parties could not determine whether an appeal was interlocutory or final. That the Court of Appeal is spending 1-2% of its cases addressing a matter such as this – so far removed from its purpose – is troubling. Tomes have been written on legal issues that arise less frequently.<sup>179</sup> The result has been hundreds of litigants having their claims delayed by months and spending approximately \$10,000 in legal costs. At times, this could be the result of an obvious procedural mistake or a conscious illicit attempt to have an appeal as of right – there are cases where a straightforward application of precedent should have resolved the issue.<sup>180</sup> On other occasions, self-represented litigants could be confused about the process.<sup>181</sup> Overall, however, it seems the primary reason would be the already observed uncertainty in the state of the law regarding this distinction.<sup>182</sup> This is evident from the court acknowledging this to be case,<sup>183</sup> there being no clear precedent on

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<sup>179</sup> For example, the Court of Appeal hears only about a half-dozen jurisdiction motions a year (see Kennedy Jurisdiction, *supra* note 95) and a handful (if any) cases determining non-criminal procedure rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of *Canada Act 1982* (UK), 1982, c 11 [the “Charter”].

<sup>180</sup> See, e.g., *Wong v Gong*, *supra* note 126.

<sup>181</sup> See, e.g., *Minkofski v Dost Estate*, 2014 ONSC 1904, 321 OAC 38 (Div Ct), where the judge sought to clarify a self-represented litigant’s grounds of appeal.

<sup>182</sup> Whether there are dissents on any of the foregoing was also recorded, as this is one indicator of lack of clarity in the law. Only a single dissent emerged in any of the decisions – Juriansz JA’s dissent in *Parsons*, *supra* note 8, concluding that a decision to hold a post-settlement hearing out-of-province in a class proceeding was interlocutory, while the majority held it to be final. This could indicate that the law is not as uncertain as it may appear on first glance. But it could also reflect that intermediary appellate courts have fewer dissents than apex courts, and that dissenting on the question of whether an appeal is interlocutory or final is unlikely to be an issue that an intermediary appellate court judge would feel strongly enough about to write a dissent.

<sup>183</sup> See, e.g., *Mancinelli*, *supra* note 3 at para 2.

point,<sup>184</sup> and it being not uncommon for the court rather than the responding party to raise the issue.<sup>185</sup>

The state of the law surrounding the interlocutory/final distinction therefore exemplifies the truth in the fear that uncertain law will create needless litigation.<sup>186</sup> Other things being equal, clear rules are preferable to unclear ones. Of course, absolute predictability is not possible and some uncertainty may be necessary to ensure a party can have a remedy.<sup>187</sup> Whether this is the case vis-à-vis the interlocutory/final distinction will be returned to below. But regardless of the answer to this normative question, it is clear that the uncertainty in this area of procedural law has had negative consequences in terms of misusing courts' and litigants' time and financial resources.

#### IV) WAYS FORWARD

The purpose and history behind the difference in treatment between interlocutory and final appeals has been explained, as has the perception of unnecessary confusion in this area of the law. Recent case law shows that this is more than mere perception, and is posing an access to justice obstacle for litigants. The best way forward would be to clarify the law, to avoid procedural errors producing needless expense and delay. Of course, the law, whether procedural or substantive, will never be entirely clear<sup>188</sup> but the confusion in the interlocutory/final distinction appears unhelpful. This section tests potential solutions. First, consideration is given to whether it would be prudent

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<sup>184</sup> See, e.g., *Parsons*, *supra* note 8.

<sup>185</sup> It was hard to quantify this as there were many cases where the source of the issue coming before the court was unclear. However, in at least ten cases, the court raised the issue on its own initiative: *Simmonds v Armtec Infrastructure Inc*, 2012 ONCA 467, [2012] OJ No 2981, further reasons at 2012 ONCA 774, 299 OAC 20; *Clarke*, *supra* note 127; *Punit*, *supra* note 133; *Waldman v Thomson Reuters Canada Ltd*, 2015 ONCA 53, 330 OAC 142; *Parsons*, *ibid*; *Durbin v Brant*, 2017 ONCA 463, [2017] OJ No 2991; *Golden Oaks*, *supra* note 152; *Highland Shores Children's Aid Society v CSD*, 2017 ONCA 743, [2017] OJ No 4937; *Petgrave*, *supra* note 136; *Beamer v Beamer*, 2013 ONSC 7379, [2013] OJ No 5395 (Div Ct).

<sup>186</sup> Kennedy Jurisdiction, *supra* note 95 at 107.

<sup>187</sup> See, e.g., Michael Sobkin, "Residual Discretion: The Concept of Forum of Necessity Under the *Court Jurisdiction and Proceedings Transfer Act*" (2018) 55:1 Osgoode Hall LJ 203 at 205, arguing for a "forum of necessity" in jurisdictional disputes, despite recognizing that this will increase litigation.

<sup>188</sup> See, e.g., Cass R Sunstein, "Problems with Rules" (1995) 83 Cal L Rev 955.

to eliminate the distinction between interlocutory and final appeals, or the leave requirement for interlocutory appeals. Next, the possibility of legislative intervention is considered with particular reference to the experiences of England and Wales and especially British Columbia. Third, thought is given to how Ontario courts could interpret existing legislation pending reform. Fourth, it is explained why complete prohibition of interlocutory appeals is a solution that would likely be counterproductive. Fifth, the Divisional Court's place in the Ontario court system as an intermediary appellate court is questioned.

### **A. Elimination**

Disputes over the interlocutory/final distinction would disappear if the leave requirement for interlocutory appeals was eliminated or all civil appeals required leave.

#### **1. Eliminating the Leave Requirement**

Eliminating the leave requirement for interlocutory appeals would not solve the issue of a party bringing an appeal in the wrong court, but would eliminate the expense and delay caused by the leave motion itself. However, the leave requirement fulfils a valuable purpose: to encourage proportionality in appeals. The rationale for this is logical: interlocutory appeals do not address the merits of a dispute, but only a collateral matter, and as such the resources and time put into them are often not commensurate with their importance vis-à-vis the fundamental dispute between the parties.<sup>189</sup> Though some such appeals may be significant in terms of affecting a party's chance to achieve justice,<sup>190</sup> the instances of this are rare.

Moreover, as Jutras has noted, there is no natural "right" of appeal.<sup>191</sup> Policy choices mandate that appeals be restricted to matters that fulfill the purposes of appeals and are not disproportionate

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<sup>189</sup> Perell & Morden, *supra* note 92 at ¶ 12.40, cited in, *e.g.*, *Skunk*, *supra* note 92 at para 31.

<sup>190</sup> Determining the applicability of a limitation period is a good example: see, *e.g.*, *Charlebois*, *supra* note 78, compared to *Golden Oaks*, *supra* note 152; see also *Conduct of an Appeal*, *supra* note 2 at § 1.51-1.53, 1.59.

<sup>191</sup> Jutras, *supra* note 19 at, *e.g.*, 66.



to the expense incurred as a result of the appeal.<sup>192</sup> Interlocutory appeals are seldom necessary to fulfill the appellate role of making law – though if there are conflicting decisions on a legal point, that is a reason to grant leave to appeal.<sup>193</sup> As for checking for errors, it is of course possible for a trial judge to err in deciding an interlocutory matter. However, it is less likely to cause an injustice when it does not address the merits of the dispute. As such, it is reasonable to require a party to show that there is reason to doubt the correctness of the order under appeal *and* to show that the matter is of sufficient importance to justify the costs of an appeal. This also reflects the fact that public resources are finite, and that perfection in the procedural aspects of the case is not necessary to preserve justice or the appearance of justice.<sup>194</sup>

Ultimately, eliminating the leave requirement for interlocutory appeals would open the door to unnecessary delay, expense, and costs through fostering needless interlocutory appeals. Furthermore, given that interlocutory appeals are rarely necessary to secure access to justice, explicitly stating that they are to be exceptional has additional valuable hortatory value.

## 2. A Leave Requirement for All Appeals?

An alternative would be to mandate that *all* decisions require leave to be appealed. This would ensure that all appeals have some chance of success,<sup>195</sup> as well as ensuring respect for the proportionality principle: whether final damages or discovery is at stake, the judge considering granting leave would have to be persuaded that the interests of justice favour having an appeal. Concerns about denying parties an appeal when warranted and/or proportionate can also be

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<sup>192</sup> Jutras, *ibid*; Housen, *supra* note 4 at para 9; Perell & Morden, *supra* note 92 at ¶ 12.40.

<sup>193</sup> Rules, *supra* note 89, Rule 62.04(a).

<sup>194</sup> As Karakatsanis J noted in *Hryniak*, *supra* note 17 at para 29, “There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim.”

<sup>195</sup> Frequent in leave requirements, such as the *Securities Act*, RSO 1990, c S5, s 138.8(1), requiring “a reasonable possibility that the action will be resolved at trial in favour of the plaintiff” to commence a proceeding.

mitigated. First, the threshold to appeal would presumably be rather low – probably raising a “serious question” (akin to the test for an interlocutory injunction<sup>196</sup>). Second, an overarching criterion such as the “interests of justice” (seen, in, for example, granting a stay pending appeal<sup>197</sup>) or the “balance of convenience” (seen in, for example, the test for an interlocutory injunction<sup>198</sup>) favouring granting leave could incorporate concerns about the costs of granting leave to appeal.<sup>199</sup>

However, this may be an overreaction. The costs of the leave motion would include delay and financial expense for parties, albeit of a different sort than is seen now. Though the number of disputes over interlocutory appeals are surprisingly high, they are still a small minority of the work of the Court of Appeal and Divisional Court. Though a leave requirement could have the additional benefit of deterring frivolous appeals, costs awards are a potential<sup>200</sup> – albeit imperfect<sup>201</sup> – solution to that. The Court of Appeal appears to have little difficulty summarily dismissing appeals when appropriate to do so.<sup>202</sup> Asking it to hear leave motions of unambiguously final orders may be an imprudent use of resources.

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<sup>196</sup> *RJR -- MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [“RJR”] at 337, describing this threshold as “low”.

<sup>197</sup> *Pickering (City) v Slade* (2015), 39 MPLR (5th) 173 (Ont CA).

<sup>198</sup> *RJR*, *supra* note 196 at 342.

<sup>199</sup> *RJR*, *ibid* at 342, citing Beetz J in *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd*, [1987] 1 SCR 110 at 129: “determin[ing] which of the two parties will suffer the greater harm” from granting the relief. See, e.g., *New Solutions Extrusion Corp v Gauthier*, 2010 ONCA 348, [2010] OJ No 1988 at para 4.

<sup>200</sup> As noted above, *supra* note 147, costs awards are only about half of costs actually ordered. There also can be difficulty in enforcing costs orders: see, e.g., *Apollo Real Estate v Streambank Funding Inc*, 2018 ONSC 392, 2018 CarswellOnt 2965 (SCJ).

<sup>202</sup> Glancing at the Court’s judgments in any given week leads one to see that many cases are dismissed with “by the bench” judgments or endorsements of 26 or fewer paragraphs. For example, during the week of September 17, 2018 (a week chosen at random when this footnote was being drafted), 17 of 23 decisions fell into this category: 1) *R v Breton*, 2018 ONCA 753, 366 CCC (3d) 281; 2) *R v Romano*, 2018 ONCA 754, 2018 CarswellOnt 15147; 3) *R v Korof*, 2018 ONCA 757, 2018 CarswellOnt 15159; 4) *R v Sauve*, 2018 ONCA 755, [2018] OJ No 4717; 5) *Bisumbule c Conway*, 2018 ONCA 765, [2018] OJ No 4768; 6) *Chiocchio v Hamilton (City)*, 2018 ONCA 762, 143 OR (3d) 356; 7) *Filice v Complex Services Inc*, 2018 ONCA 763, 49 CCEL (4th) 228; 8) *White v Curtis*, 2018 ONCA 767, [2018] OJ No 4767; 9) *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761, 142 OR (3d) 481; 10) *Wiles v Sun Life Assurance Company of Canada*, 2018 ONCA 766, 82 CCLI (5th) 189; 11) *Davis (Re)*, 2018 ONCA 768, 2018 CarswellOnt 16315; 12) *R v Balouch*, 2018 ONCA 770, 2018 CarswellOnt 16309; 13) *R v Bhandol*, 2018 ONCA 769, 36 MVR (7th) 21; 14) *R v Fiddaoui*, 2018 ONCA 759, [2018] OJ No 4740; 15) *Simmonds v G&G Pool Services*, 2018 ONCA 772, 143 OR (3d) 239; 16) *R v Patterson*, 2018 ONCA 774, [2018] OJ No 4831; 17) *Taylor v Workplace Safety & Insurance Board*, 2018

Ultimately, despite the current problems caused by the distinction between interlocutory and final appeals, the rationale for the distinction remains sound. Doing away with this distinction could add to the problems with the current state of the law. Despite over a century of confusion on the topic, the distinction has sufficient merit to justify attempts to retain it.

## **B. Legislative Adoption of a Version of the Application Approach**

One may be less sanguine about the likelihood of reforming the interlocutory/final distinction were it not for the fact that England and Wales – the jurisdiction that was the source of this controversy – has already done so. Moreover, and closer to home, British Columbia has also amended its legislation regarding interlocutory appeals. Both these jurisdictions have sought to clearly define what appeals do (not) require leave (or “permission” to use the English term<sup>203</sup>) to be appealed. This section explains how both jurisdictions have done so, analyzing British Columbia’s experience in particular, before turning to the advantages of such legislative intervention, and ways to mitigate its acknowledged disadvantages.

### **1. England and Wales**

As noted above, the Civil Procedure Rule Committee for England and Wales proposed that the more predictable application approach be adopted in the 1980s. And in 1999, the *Access to Justice Act, 1999*, codified this area of law.<sup>204</sup> A “final decision” was defined as “a decision of a court that would *finally determine* (subject to any possible appeal or detailed assessment of costs) *the entire proceedings*.”<sup>205</sup> What used to be called “interlocutory orders” that did not finally

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ONCA 771, [2018] OJ No 4832, *contra*: 1) *Wood v CTS of Canada Co*, 2018 ONCA 758, 142 OR (3d) 641; 2) *R v CG*, 2018 ONCA 751, 142 OR (3d) 489; 3) *Carrick (Re)*, 2018 ONCA 752, 2018 CarswellOnt 15613; 4) *Smith v Safranyos*, 2018 ONCA 760, 143 OR (3d) 22; 5) *R v JL*, 2018 ONCA 756, 143 OR (3d) 170; 6) *Ghiassi v Singh*, 2018 ONCA 764, [2018] OJ No 4974.

<sup>203</sup> *Civil Procedure Rules* (UK) [“UK Civ Pro Rules”], Rule 52.3.

<sup>204</sup> A2J 2000 Order, *supra* note 66, art 1(2)(c); *Conduct of an Appeal*, *supra* note 2, § 1.34; Cheung, *supra* note 63 at 17.

<sup>205</sup> A2J 2000 Order, *ibid*, s 2(c) [emphasis added].

dispose of proceedings can be reviewed only if clearly “wrong or where it was unjust because of a serious procedural or other irregularity in the proceedings in the lower court.”<sup>206</sup> There remains criticism that this is too restrictive of appeal rights, allowing a court to avoid addressing a meritorious appeal through denying permission to appeal.<sup>207</sup> But the new approach seems more predictable and likely to preserve scarce appellate resources.<sup>208</sup> Though this experience is interesting, the difference in court levels between Ontario and England and Wales makes its experience less informative than those of other Canadian jurisdictions. Unlike Ontario, there are multiple trial courts in civil matters “below” the High Court of England and Wales; as such, appeal rights vary with the level of court appealed from as well as the nature of the order appealed. There are thus reasons that make appeal routes complicated beyond the interlocutory/final distinction.<sup>209</sup> Fortunately, there is another reference point closer to home.

## 2. British Columbia

### a. Background

Like Ontario, British Columbia struggled with this distinction for years.<sup>210</sup> The Court of Appeal regularly held that the order approach rather than the application approach be followed,<sup>211</sup> despite the reticence of some of its members.<sup>212</sup> Steps were then taken to rectify the situation.<sup>213</sup> In 2011, Finch CJBC issued a practice directive concerning delay caused by interlocutory appeals, and mandating that counsel discuss dates for such appeals prior to arguing motions for leave to

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<sup>206</sup> *Tanfern*, *supra* note 66, summarizing Part 52.21 of the UK *Civ Pro Rules*, *supra* note 203.

<sup>207</sup> Richard Nobles & David Schiff, “The Right to Appeal and Workable Systems of Justice” (2002) 65 *Modern L Rev* 676 at 687-689.

<sup>208</sup> Nobles & Schiff, *ibid*, at 688-689. There does not appear to be a more recent review of this.

<sup>209</sup> See, e.g., Nobles & Schiff, *ibid*.

<sup>210</sup> Irvine, *supra* note 110.

<sup>211</sup> *Hayes Forest Services Ltd v Weyerhaeuser Co*, 2008 BCCA 120, 78 BCLR (4th) 251, *aff’d* 2007 BCCA 497, 76 BCLR (4th) 39 [“*Hayes*”]; *Forest Glen Wood Products Ltd v British Columbia (Minister of Forests)*, 2008 BCCA 480, 58 BCLR (4th) 330 [“*Forest Glen Wood*”].

<sup>212</sup> See, e.g., *Kimpton v Victoria (City)*, 2007 BCCA 376, 243 BCAC 158 [“*Kimpton*”].

<sup>213</sup> See also *Conduct of an Appeal*, *supra* note 2 at § 1.75.

appeal.<sup>214</sup> This perhaps had valuable effects in terms of encouraging cooperation,<sup>215</sup> but the real change occurred through legislation. Effective May 31, 2012, the *Court of Appeal Act* was amended to replace the concept of “interlocutory appeals” with one of “limited appeal orders” requiring leave to appeal for<sup>216</sup> limited appeal orders in a number of situations: classically interlocutory matters such as scheduling, discovery, and evidentiary matters.<sup>217</sup> This reduces doubt about whether leave to appeal is required.<sup>218</sup>

### b. Methodology for reviewing British Columbia cases

To assess the effects of these amendments, a search was undertaken in WestLaw Canada and QuickLaw Advance in September 2018 for cases decided in the British Columbia Court of Appeal considering this distinction: between January 1, 2007 through May 30, 2012 using “interlocutory” and “appeal” within the same paragraph, and from May 31, 2012 through December 31, 2017, searching for: a) “limited appeal order”; or b) “interlocutory” within the same paragraph as “appeal”.<sup>219</sup> The types of cases excluded in Part II were excluded here as well,<sup>220</sup> and the same

<sup>214</sup> *Expediting Interlocutory Appeals* (Civil Practice Directive, 19 September 2011), online: <[http://www.courts.gov.bc.ca/court\\_of\\_appeal/practice\\_and\\_procedure/civil\\_practice\\_directives\\_/Civil-Expediting%20Interlocutory%20Appeals.htm](http://www.courts.gov.bc.ca/court_of_appeal/practice_and_procedure/civil_practice_directives_/Civil-Expediting%20Interlocutory%20Appeals.htm)>.

<sup>215</sup> It is difficult to measure the value of such symbolic steps, but there would appear to be little disadvantage to encouraging reflection on this issue. This is done, for instance, with respect to race-based challenges for cause in jury selection: see, e.g., *R v Parks* (1993), 15 OR (3d) 324 (CA).

<sup>216</sup> RSBC 1996, c 77, s 7, as am.

<sup>217</sup> *Court of Appeal Rules*, BC Reg 297/2001 [“BC CA Rules”].

<sup>218</sup> “Litigation and Dispute Resolution in Canada” (Blake, Cassels & Graydon, 2012) at 35.

<sup>219</sup> Similar to Part II, above, recognizing that the change became effective May 31, 2012.

<sup>220</sup> E.g., the following were excluded:

- where a panel varied a single judge denying leave to appeal: *CSWU, Local 1611 v SELI Canada Inc*, 2010 BCCA 371, 8 BCLR (5th) 241, var’g 2010 BCCA 276, 7 Admin LR (5th) 40;
- motions for leave themselves: e.g., *Meade v Armstrong (City)*, 2010 BCCA 87, 285 BCAC 20;
- where there was dispute over whether the matter should be considered criminal or civil (the majority finding it to be the former negating the need to consider the interlocutory/final decision): *British Columbia (Director of Civil Forfeiture) v Hells Angels Motorcycle Corp*, 2014 BCCA 330, 360 BCAC 170;
- the Court holding that it had no jurisdiction to hear an appeal from a recital: *Law v Cheng*, 2016 BCCA 120, 84 BCLR (5th) 238;
- the parties agreed the matter was interlocutory, even though the judge was not sure: *Quaite v Avorado Resort Ltd*, 2010 BCCA 242, [2010] GSTC 192;

limitations of this analysis as that one are recognized. Evidence of six unreported decisions in British Columbia was found,<sup>221</sup> compared to two in Ontario,<sup>222</sup> despite there being fewer British Columbia cases in the analysis. This suggests that unreported decisions addressing this issue are more common in British Columbia than Ontario.

The search in British Columbia was both narrower and broader than the search in Ontario. Regarding narrowness, there was no concentration on issues of costs, delay, and self-represented litigants because the structure of the courts in British Columbia, and lawyers' fees, make such factors obviously distinguishable from the Ontario experience due to reasons having nothing to do with the interlocutory/final distinction. Given that searching for the effects of change in the law was the purpose of the analysis, numbers, results, remedies, and appeals of civil<sup>223</sup> and family cases were recorded.<sup>224</sup> Family law cases were included in British Columbia but not Ontario

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- where the parties agreed an order was a limited appeal order, but one party argued leave was not necessary given other issues being raised as of right: *Hansra v Hansra*, 2017 BCCA 199, 97 BCLR (5th) 240;
  - where the judge satisfied himself that no leave was necessary even though no party contested the issue: *Gajie v Lam*, 2016 BCCA 225, 387 BCAC 171; *Ho Estate v Ho*, 2016 BCCA 253, [2016] BCJ No 1206; *KMM v DRM*, 2017 BCCA 348, 2 RFL (8th) 14;
  - decisions under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [the "BIA"], that require leave to be appealed but did not consider the interlocutory/final distinction *per se*: *Canadian Petcetera Ltd Partnership, Re*, 2009 BCCA 255, 273 BCAC 26 (interpreting s 193 of the BIA);
  - where the parties resolved the issue on the own, as this does not illustrate how much time the Court and parties spent on this issue, and it was by happenstance that this was mentioned (it is hard to know how common an occurrence this would be): *Westbank Holdings Ltd v Westgate Shopping Centre Ltd*, 2009 BCCA 370, 275 BCAC 21; and
  - a seemingly uncontroversial amendment of a self-represented litigant's notice of appeal to a notice of application for leave to appeal having realized leave was necessary: see, *e.g.*, a reference to an unreported decision in *1026238 BC Ltd v Pastula*, 2017 BCCA 118, 95 BCLR (5th) 230 at para 3.

<sup>221</sup> *M(AAA) v British Columbia (Director of Adoption)*, which was reversed in 2017 BCCA 27, 95 CPC (7th) 215 ["M(AAA)"]; *Cotter v Point Grey Golf and Country Club*, which was referred to in 2015 BCCA 331, 377 BCAC 1; *McGregor v Holyrod Manor*, which was referred to in 2015 BCCA 157, 370 BCAC 224; *Keremelevski v VWR Capital Corp*, which was affirmed in 2011 BCCA 469, [2011] BCJ No 2249, leave to appeal ref'd, [2012] SCCA No 187, 2012 CarswellBC 1881 ["Keremelevski"]; *Bea v Strata Plan LMS 2138*, which was affirmed in 2010 BCCA 463, 94 CPC (6th) 117 ["Bea"]; *Forest Glen Wood Products Ltd v British Columbia (Minister of Forests)*, which was affirmed in *Forest Glen Wood*, *supra* note 211.

<sup>222</sup> *Colenbrander*, the Court of Appeal decision in which an unreported decision was referenced, *supra* note 99, and *Sherk*, an unreported result in which was affirmed, *supra* note 161.

<sup>223</sup> Criminal cases were also not included in the analysis: *e.g.*, *R v Carlson*, 2010 BCCA 81, 282 BCAC 306.

<sup>224</sup> Family law and civil litigation certainly share much in common regarding the inability to achieve justice in courtrooms. But different statutory and social considerations render them distinguishable in many respects,

because they are not distinguished procedurally in British Columbia as they are in Ontario.<sup>225</sup> The search was also broader than for Ontario, as it commences with cases decided in 2007, in order to have a comparable number of years pre- and post-legislative change.

**c. Numbers, Results, and Remedies of British Columbia Cases**

All cases analyzed appear in Appendix I. They can be summarily described as follows:

**TABLE 3B: NUMBERS AND RESULTS OF DISPUTES OVER THE INTERLOCUTORY/FINAL DISTINCTION – BRITISH COLUMBIA**

Year	Total	Interlocutory (or “limited appeal”)	Final	Mixed Success	Did not decide	Held to be Unappealable
2007	15	8	6	0	0	1
2008	10	8	2	0	0	0
2009	11	6	5	0	0	0
2010	10	2	7	0	1	0
2011	10	2	7	1	0	0
2012	9	5	2	0	2	0
<i>2012 – Old Rule</i>	5	3	0	0	2	0
<i>2012 – New Rule</i>	4	2	2	0	0	0
2013	9	3	6	0	0	0
2014	7	3	3	0	1	0
2015	7	5	2	0	0	0
2016	11	7	4	0	0	0

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leading to reasonable justifications to distinguish the two fields, but that distinguishing should not lead to artificial separation: Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) at 71, fn 86; Mary-Jo Maur, Nicholas Bala & Alexandra Terrana, “Costs and the Changing Culture of Canadian Family Justice” (February 6, 2017) Queen’s University Legal Research Paper No 087, online: <<https://ssrn.com/abstract=2919492>>.

<sup>225</sup> *N(SHF) v N(AB)*, 2015 BCCA 314, 62 RFL (7th) 335.

<b>Year</b>	<b>Total</b>	<b>Interlocutory (or “limited appeal”)</b>	<b>Final</b>	<b>Mixed Success</b>	<b>Did not decide</b>	<b>Held to be Unappealable</b>
2017	6	2	4	0	0	0
<b><i>TOTAL – Pre-Change</i></b>	<b>61</b>	<b>29</b>	<b>27</b>	<b>1</b>	<b>3</b>	<b>1</b>
<b><i>TOTAL – Post- Change</i></b>	<b>44</b>	<b>22</b>	<b>21</b>	<b>0</b>	<b>1</b>	<b>0</b>
<b>TOTAL</b>	<b>105</b>	<b>51</b>	<b>48</b>	<b>1</b>	<b>4</b>	<b>1</b>

In the 5.41<sup>226</sup> years prior to the rule change, the average is 11.27 cases per year. In the 5.59 years since, the average is 7.88 cases per year. The change in the law has not eliminated all controversies, but has led to a reduction in the number of cases by 30%, suggesting that the attempted clarifications have had positive effects.<sup>227</sup> This conclusion is further supported by an absence of the expected spike in disputes immediately following codification to test the contours of the new rule.<sup>228</sup> There were five requests for reconsideration after the amendments,<sup>229</sup> one being successful.<sup>230</sup> This compares to six requests for reconsideration prior to the amendments, meaning there has been a very slight decrease.<sup>231</sup>

Many characteristics of the British Columbia case law remain the same before and after the changes in legislation. Both before and after these changes, only slightly more orders have been

<sup>226</sup> January 1 through May 30 being 151 days of a 366-day year.

<sup>227</sup> Akin to the effects in Ontario after codifying the law of jurisdiction and its effects on jurisdiction motions: Kennedy Jurisdiction, *supra* note 95.

<sup>228</sup> Kennedy Jurisdiction, *ibid* at 93; see also the dissenting reasons of Côté and Rowe JJ in *Office of the Children’s Lawyer v Balev*, 2018 SCC 16, [2018] 1 SCR 398 at para 111, where they predicted a change in law prescribed by the majority would “create[] a recipe for litigation.”

<sup>229</sup> *Bradshaw v Stenner*, 2013 BCCA 61, 334 BCAC 52; *Wright v Sun Life Assurance Co of Canada*, 2015 BCCA 528, 383 BCAC 26; *Michael Wilson & Partners, Ltd v Desirée Resources Inc*, 2017 BCCA 139, 2017 CarswellBC 945; *MacLachlan v Nadeau*, 2017 BCCA 326, 2 BCLR (6th) 223; *M(AAA)*, *supra* note 221.

<sup>230</sup> *M(AAA)*, *ibid*.

<sup>231</sup> *Forest Glen Wood*, *supra* note 211; *Hayes*, *supra* note 211; *Fontaine v Canada (Attorney General)*, 2008 BCCA 329, 82 BCLR (4th) 11; *Bea*, *supra* note 221; *Holland (Guardian ad litem of) v Marshall*, 2009 BCCA 582, 281 BCAC 69; *Keremelevski*, *supra* note 221.



held to be interlocutory than final: 29 interlocutory compared to 27 final prior to the amendments, and 22 limited appeal and 21 final after the amendments. The continuity in outcome could be a result of the fact that many orders that were once considered interlocutory were not defined as limited appeal orders, meaning that more orders do not require leave to be appealed.<sup>232</sup> Incidentally, the frequency in absolute numbers with which orders are held to be final vis-à-vis Ontario underscores that peculiarities of legislation make the two jurisdictions not directly comparable. Though smaller in terms of absolute numbers, having almost ten cases per year on this issue in the British Columbia Court of Appeal is also proportionately greater than in Ontario, which, despite having had an average of 15 cases per year in its Court of Appeal, decides roughly twice the number of total cases.<sup>233</sup> The proportionally greater number of cases in British Columbia could be because of the tendency (that will be returned to) in British Columbia to seek directions on whether leave to appeal is necessary – something that rarely occurs in Ontario.<sup>234</sup> But despite these caveats, it appears as though the legislative amendments have reduced and/or simplified litigation over the interlocutory/final distinction.

### 3. Advantages of Legislation

Ontario could benefit from following British Columbia and England and Wales in legislating that a version of the application approach be followed. First, this could simplify the law and reduce

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<sup>232</sup> See, e.g., *XY, LLC v International Newtech Development Inc*, 2013 BCCA 530, 347 BCAC 274 [“*XY, LLC*”] at para 19, concerning an order regarding cross-examination.

<sup>233</sup> In 2017, for instance, *R v Patel*, 2017 BCCA 459, 2017 CarswellBC 3725 was the British Columbia Court of Appeal decision with the “highest” number in its neutral citation, as reported on CanLII as of September 20, 2018. On the same date, *1162251 Ontario Limited v 833960 Ontario Limited (M-Plan Consulting)*, 2017 ONCA 1025, 2017 CarswellOnt 20493, was the Ontario Court of Appeal decision with the highest number in its neutral citation. In 2016, *Ressel v Ressel*, 2016 BCCA 517, 93 BCLR (5th) 239, was the 2016 British Columbia Court of Appeal decision with the highest number in its neutral citation, based on a search on the same date, while *R v Squire-Hill*, 2016 ONCA 995, 19 MVR (7th) 171 was the Ontario Court of Appeal decision with the highest number in its neutral citation.

<sup>234</sup> Despite exceptions: see, e.g., *Awad*, *supra* note 141.

litigation: other things being equal, clear rules are preferable to complicated ones.<sup>235</sup> The British Columbia approach aims to prevent the need to characterize each order as interlocutory or final, which often occurs as a matter of first impression.<sup>236</sup> British Columbia’s experience, though not conclusive, is promising. Though perfect clarity is neither possible nor desirable, greater clarity is beneficial to litigants.<sup>237</sup> The law in British Columbia might need improvement. In *Clifford v Lord*, for instance, Garson JA lamented that the BC *CA Rules* were too rigid, giving parties rights of appeal where they may not be warranted.<sup>238</sup> In *XY, LLC*,<sup>239</sup> Saunders JA noted that it was an “anomaly” that the particular order under consideration did not require leave to appeal. Rather than defining what orders require leave to be appealed, therefore, Ontario could follow the England and Wales definition of a final order as being one that finally disposes of the entire proceedings. As recommended by Coulter Osborne, these orders could be appealed as of right, with all other appeals requiring leave.<sup>240</sup> In this sense, Ontario would be building on successful reforms in British Columbia’s experience, and learning from the experience with these reforms.

Second, codifying the application approach accords with principles of statutory interpretation. This interpretation allows “final” to mean just that, defined by the *Oxford English Dictionary* as “coming at the end” and “[m]arking the last stage of the process; leaving *nothing* to be looked for”.<sup>241</sup> Similarly, *Black’s Law Dictionary* defines “final judgment” (it does not define “final”) as a “court’s last action that settles the rights of the parties and disposes of all issues in controversy,

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<sup>235</sup> Kennedy Jurisdiction, *supra* note 95 at 110.

<sup>236</sup> Paraphrasing Tanya J Monestier, “(Still) A ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2013) 36 *Fordham Int’l LJ* 397 at 413, discussing the excessively complicated law of jurisdiction in the aftermath of *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA) [*“Muscutt”*].

<sup>237</sup> See, e.g., Kennedy Jurisdiction, *supra* note 95, arguing benefits that have accrued – and could still accrue – in the context of clarifying the law of jurisdiction.

<sup>238</sup> 2013 BCCA 302, 46 BCLR (5th) 87 at para 29.

<sup>239</sup> *XY, LLC*, *supra* note 232 at para 19, concerning an order regarding cross-examination.

<sup>240</sup> Osborne, *supra* note 93 at c 12.

<sup>241</sup> *Oxford English Dictionary*, online: <<http://www.oed.com/view/Entry/70319?redirectedFrom=final#eid>>, *sub verbo*, “final” [emphasis added].

except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment".<sup>242</sup> The plain meaning of a word such as this should be highly relevant in statutory interpretation.<sup>243</sup> That the legislature did not give any other definition in the *Courts of Justice Act* suggests that the legislature had a plain meaning in mind.<sup>244</sup> This is another reason suggesting that, though closely following the approach of British Columbia and listing orders that require leave to appeal would be preferable to the *status quo*, it may be optimal to follow the English approach of defining a final order as one that disposes of the litigation. In other words, the definition could focus on the nature of a final order rather than an interlocutory order. This would prevent the Court of Appeal from declining to hear an interlocutory appeal that is not defined as a "limited appeal order" because it believes that doing so would be imprudent pending resolution of all issues in the court below.<sup>245</sup>

Third, codifying the application approach would be generally fair and accord with the purpose of the interlocutory/final distinction: to ensure proportionality in appeals.<sup>246</sup> It allows a party to have an appeal as of right only when an order has determined the outcome of the litigation. It is true that sometimes an order that would be considered interlocutory under the application approach does, in fact, affect the rights of the parties in some substantive way. Defining such orders as interlocutory restricts the ability to have an appeal as of right when a legal right is conclusively determined. This concern has been repeatedly emphasized in the case law, leading a five-judge panel of the British Columbia Court of Appeal to decline the request of the province's Attorney General that it reconsider its approach to this issue prior to the legislature amending the law in this

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<sup>242</sup> 7th ed, *sub verbo*, "final judgment".

<sup>243</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: Butterworths, 2014) at § 2.13.

<sup>244</sup> Context can of course change this: Sullivan, *ibid* at § 3.16.

<sup>245</sup> *Hollander v Nelson*, 2013 BCCA 83, 41 BCLR (5th) 173.

<sup>246</sup> Perell & Morden, *supra* note 92 at ¶ 12.40, cited in, e.g., *Skunk*, *supra* note 92 at para 31.

area.<sup>247</sup> These concerns are not without merit; in this sense, the application approach can seem unprincipled.

But any line short of “does the ruling finally dispose of the litigation” will appear arbitrary. Holding that a party cannot obtain discovery of a document “finally” determines the party’s ability to see that document but hardly seems to warrant an appeal as of right. Refusing leave to amend a pleading to clarify the document’s relevance seems only marginally less so. But if the amendment concerning the document’s relevance could also be determinative of a limitation period defence, this seems less clear. And if refusal to amend the pleading explicitly ends the ability to rely on a limitation period defence, then it truly seems to determine a party’s rights.<sup>248</sup> Such not-totally-hypothetical examples exist on a continuum.<sup>249</sup> Parsing this continuum seems unprincipled, and attempts to do so have led to the *status quo*, where the profession justifiably feels that it cannot predict proper appellate procedure.<sup>250</sup> A slippery slope exists as soon as one opens the possibility of treating orders that do not finally dispose of litigation as final orders. In such circumstances, it can be principled to prevent the slippage by not getting on the slope.<sup>251</sup> In any event, as will now be discussed, the problems associated with the admittedly imperfect application approach appear to be manageable.

#### **4. Imperfections with the Application Approach Being Manageable**

It is indeed true that this approach could be attacked for being unsophisticated and impeding substantive access to justice by denying a party an appeal as of right on a sufficiently important matter. These concerns are not totally misplaced. There may be some matters that would be

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<sup>247</sup> *Forest Glen Wood*, *supra* note 211.

<sup>248</sup> *Golden Oaks*, *supra* note 152.

<sup>249</sup> See *Conduct of an Appeal*, *supra* note 2 at § 1.59, 1.61.

<sup>250</sup> Nordheimer J (as he was then) in *Mancinelli*, *supra* note 3 at para 2.

<sup>251</sup> Eugene Volokh, “The Mechanisms of the Slippery Slope” (2003) 116(4) Harv L Rev 1026.

deemed interlocutory under this definition – such as a finding of jurisdiction or striking out portions of a claim<sup>252</sup> – that are so important, and the costs of the trial court coming to a wrong determination so large, that it would be proportionate to allow an appeal as of right.<sup>253</sup> A finding of liability when liability and damages have been bifurcated (as frequently happens in tort cases<sup>254</sup>) would likely fall into this category. These understandable concerns led to the present state of affairs.

Despite the validity of these concerns, they can nonetheless be mitigated. First, a list of orders where the legislature or Civil Rules Committee believes that there should be an appeal as of right can be explicitly listed in the legislation itself as exceptions to the application approach. Indeed, in England and Wales, findings from the first portion of bifurcated proceedings are treated as final orders for the purposes of appeals.<sup>255</sup> British Columbia, on the other hand, lists all orders that require leave to be appealed.<sup>256</sup> Drafting such clear exceptions to a general rule does not risk overcomplicating matters. A rule that says “If X, then Y; If not X, then Z” may be too simple.<sup>257</sup> A rule that says “Consider A, B, C, D, E, F, G, and H and then do what is fair and just” may be too amorphous.<sup>258</sup> But there are middle ways, such as “If X, then Y; If not X, then Z. Unless one of L, M, N, O, or P is present, then do Y even though X is not also present”. So long as the presence

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<sup>252</sup> E.g., *Kimpton*, *supra* note 212.

<sup>253</sup> *MJ Jones*, *supra* note 58.

<sup>254</sup> Contemplated in, e.g., *Whiten v Pilot Insurance*, 2002 SCC 18, [2002] 1 SCR 59 at para 122.

<sup>255</sup> A2J 2000 Order, *supra* note 66, art 1(3)(a).

<sup>256</sup> BC *CA Rules*, *supra* note 217, Rule 2.1.

<sup>257</sup> Though it is actually more complicated than Kelsen’s “If A, then B” formulation: HLA Hart, “Kelsen Visited” (1963) 10 *UCLA L Rev* 709 at 710; Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1949) at 45-46.

<sup>258</sup> Tanya Monestier and I have argued that this was the state of the law of jurisdiction in Canada when applying *Muscutt*, *supra* note 236; Kennedy Jurisdiction, *supra* note 95; Monestier, *supra* note 236. The problems of amorphous rules are also noted by Justice David Stratas in “The Canadian Law of Judicial Review: Some Doctrine and Cases,” March 26, 2018, online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2924049](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2924049)> and “The Decline of Legal Doctrine” (Keynote Address Delivered at the Canadian Constitution Foundation Law & Freedom Conference, Hart House, University of Toronto, 8 January 2016), online: <<https://www.youtube.com/watch?v=UxTqMw5v6rg>>.

of “L, M, N, O, and P” can be determined with reasonable predictability, this seems eminently reasonable and predictable. Turning this thought experiment to the interlocutory/final decision, things could look as follows: “If the action is finally determined as a result of the appealed order, then the order is final for the purposes of the appeal. If the action is not finally determined as a result of the appealed order, then the order is interlocutory for the purposes of the appeal. Though if there is a final determination on the court’s jurisdiction, the defendant’s liability, or the quantum of damages owed, then the appeal is as of right.” This is not an endorsement of this particular wording – that matter will be come to shortly – but rather a suggestion that wording such as this could be effective.

Second, nothing suggested regarding the application approach suggests that leave to appeal interlocutory orders should not be granted in appropriate cases, thereby facilitating access to justice. In fact, the criteria that currently exist for leave further both purposes of appeals. Rule 62.02(4)(a) prescribes that a court may grant leave to appeal when there is conflicting authority from another court,<sup>259</sup> recognizing appellate courts’ law-making role. Rule 62.02(4)(b) states that leave may be granted if there is good reason to doubt the correctness of the order below, and the issues are of such importance that the interlocutory appeal is warranted.<sup>260</sup> This reflects appellate courts’ role to ensure the universal application of settled law,<sup>261</sup> while also bringing in a proportionality requirement, implicitly recognizing that not all errors on interlocutory orders will warrant the expense entailed in correcting them. The mischief in the *status quo* has resulted not from the criteria for granting leave but the characterization to determine whether leave is necessary. The leave process admittedly consumes the time and resources of parties who genuinely

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<sup>259</sup> *Rules, supra* note 89.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Housen, supra* note 4 at para 9.

need an interlocutory appeal. But given that appeals in general, and interlocutory appeals in particular, are meant to be exceptional,<sup>262</sup> this appears a price worth paying to discourage inappropriate use of judicial resources, and ensure that only interlocutory matters that truly deserve an appeal receive them. Finally, it must be remembered that interlocutory orders can be a reason to have a lower court decision set aside on the grounds that the interlocutory order led an unfair trial.<sup>263</sup> While this creates a great deal of inefficiency – and seeking leave to appeal the interlocutory order is to be preferred – it does leave a (narrow) door open to a party where an interlocutory order led to a clear injustice.

### 5. Proposed Wording

In light of the foregoing, it is proposed that, for purposes of appeal rights under the *CJA*, “final order” be defined as:

an order that determines:

- a) every issue in the proceeding with the exception of costs;
- b) a party’s liability;
- c) the quantum of damages owed in the proceeding; or
- d) the jurisdiction or lack thereof of the court to hear the proceeding and/or that the court is or is not *forum non conveniens*

An “interlocutory order” could be defined as “any order that is not a final order”.

Though this is the first analysis of this issue in this way, it is not the first to have recommended legislative adoption of the application approach. Gelowitz and Rankin have suggested that the “benefits of certainty and clarity [should] triumph over analytic purity”.<sup>264</sup> Associate Chief Justice Osborne (after his retirement from the Court of Appeal) suggested that the distinction should be “jettison[ed]” – though what he actually seemed to be advocating was a strict adoption of the

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<sup>262</sup> Jutras, *supra* note 19.

<sup>263</sup> *Cridge v Ivancic*, 2010 BCCA 476, 10 BCLR (5th) 296; *Moon Development Corp v Pirooz*, 2014 BCCA 64, 352 BCAC 25.

<sup>264</sup> *Conduct of an Appeal*, *supra* note 2 at § 1.76.

application approach.<sup>265</sup> There is every reason to believe that the application approach would reduce unnecessary litigation and be generally quite fair to parties. In the rare cases where its lack of nuance seems to lead to an unjust result, an exception can appear in legislation (preventing judges creating such exceptions on an *ad hoc* basis, which has led to the *status quo*) or leave to appeal can be granted. In defending the order approach, Donald JA astutely observed, “no single formula can eliminate all controversies over what is a final order”.<sup>266</sup> Even so, abandoning the order approach in British Columbia seems to have been a positive development. This is not adoption of the common law but rather adoption of the application approach with few discrete exceptions. And unlike British Columbia – where legislative intervention appears to have been valuable but not as valuable as hoped – this proposed wording seeks to define a final order instead of an interlocutory order. While this restricts courts from accepting new exceptions on a case-by-case basis, this seems to not be a devastating result, as one can always seek leave to appeal and, in an exceptional circumstance, can seek legislative amendment to add an additional exception. Even if many cases would be decided the same way as under the *status quo*, attempts to make appeal routes clear in legislation rather than through precedents that one must consistently engross oneself in<sup>267</sup> has value. This appears a simple solution to a needlessly complicated problem.

### C. Interpretation in the Meantime

Adopting the application approach would significantly change how legislation has been interpreted, suggesting the legislature rather than the courts should correct that interpretation.<sup>268</sup>

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<sup>265</sup> Osborne, *supra* note 93 at c 12, quoted in *Shinder v Shinder*, 2017 ONCA 822, 140 OR (3d) 477 at para 7.

<sup>266</sup> *Forest Glen Wood*, *supra* note 211 at para 35.

<sup>267</sup> See the comment of Lord Denning in *Salter Rex*, *supra* note 61 at 866.

<sup>268</sup> Recommended by, *e.g.*, Osborne, *supra* note 93 at c 12. This preference for the legislature rather than the courts to overturn precedent in circumstances such as these is seen in, *e.g.*, Debra Parkes, “Precedent Unbound? Contemporary Approaches to Precedent in Canada” (2007) 32 Man LJ 135 at 147; *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (HL). The ability of legislatures to do this in the face of *stare decisis* is also noted in Lorne Neudorf, “Legislatures in the Judicial Domain?” (2014) 47:1 UBC L Rev



Parties may also have relied on these precedents in forming litigation strategies, such as in deciding whether to bring a motion based on a precedent concerning its appealability. Such reliance cautions against a court overturning itself.<sup>269</sup> If a court begins to amend its own precedents, there may also be confusion about a status of the group of interrelated precedents in an area of law.<sup>270</sup> It also creates the risk of the court being perceived as not interpreting legislation but making it. This could potentially create a perception, rightly or wrongly, that the court has exceeded its power with there being an associated risk that the populace will disrespect the court.<sup>271</sup> While one could argue that reinterpreting legislation to accord with the application approach is in line with reasonable developments of the common law, the aforementioned considerations warrant caution.

In the meantime, the Court of Appeal could decline to find any additional orders that do not fall within the application approach's ambit to be final orders: in other words, the number of "exceptions" to the application approach would be capped. Abella J recently proposed this in the context of exceptions to reasonableness review in administrative law.<sup>272</sup> Without endorsing that particular suggestion of Abella J (which some have suggested would cause additional problems<sup>273</sup> and/or be unprincipled<sup>274</sup>), the principle of constraining without overruling arguably erroneous

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313. This can be taken to an unhealthy extreme, as Parkes notes, as does Ian Bushnell in "Justice Ivan Rand and the Role of a Judge in the Nation's Highest Court" (2010) 61 UNB LJ/34 Man LJ 101 at 103.

<sup>269</sup> Richard Haigh, "A *Kindler*, Gentler Supreme Court? The Case of *Burns* and the Need for a Principled Approach to Overruling" (2001) 14 SCLR (2d) 139 at 149.

<sup>270</sup> *David Polowin Real Estate Ltd v The Dominion of Canada General Insurance Co* (2005), 199 OAC 266 (CA), leave to appeal denied, [2005] SCCA No 388, 2006 CarswellOnt 439 at para 119, cited in Parkes, *supra* note 268 at 136-137.

<sup>271</sup> As it stands, however, the *Charter*, *supra* note 179, which seemingly had the opportunity to have the judiciary exceed its constitutional role, is viewed favourably by the Canadian public: Benjamin Shingler, "Charter of rights, universal health care top Canadian unity poll" *Global News* (30 June 2014) <<https://globalnews.ca/news/1424367/charter-universal-health-care-top-canadian-unity-poll/>>.

<sup>272</sup> *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, [2016] 1 SCR 770 ["Wilson"].

<sup>273</sup> The concurring reasons of Cromwell J, and the dissenting reasons of Moldaver, Côté, and Brown JJ in *Wilson*, *ibid*; see also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016) 62 McGill LJ 527 at 564, expressing optimism at this idea, but concern that it may not achieve its goals.

<sup>274</sup> Lauren J Wihak, "Wither the correctness standard of review? *Dunsmuir*, six years later" (2014) 27 CJALP 173; Diana Ginn, "Some Initial Thoughts on *Wilson v. Atomic Energy of Canada Ltd* and *Edmonton (City) v.*

precedents that have been relied upon is well-founded.<sup>275</sup> So while *stare decisis* cautions against the Court of Appeal declaring that the application approach is now to be strictly followed, it is nonetheless suggested that heretofore promulgated exceptions to it should be the only orders that do not finally resolve a case viewed as final pending legislative intervention.

Finally, it should also be noted that – both before and after prospective legislative intervention – the Chief Justices of the Superior Court and Court of Appeal should not hesitate to use their powers to expedite the hearing of interlocutory appeals once leave has been granted. This would be a good way to mitigate the delay caused by interlocutory appeals. It would also not be unfair to other litigants as the litigants in the case where leave has been granted have already endured a wait pending being granted leave to appeal.

#### **D. Eliminating Interlocutory Appeals Altogether?**

Another solution to the quagmire caused by the interlocutory/final distinction would be to prohibit interlocutory appeals altogether. This is already done for decisions under the *Small Claims Court Rules*<sup>276</sup> and the *Construction Act*<sup>277</sup> given that procedures thereunder are meant to be extremely summary. This is also largely, if controversially, the case in the United States federal courts<sup>278</sup> and has the advantage of being an extremely simple rule. While it would not eliminate

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*Edmonton East (Capilano) Shopping Centres Ltd*” (2017) 68 UNB LJ 285; the reasons of Brown and Rowe JJ in *West Fraser Mills Ltd v British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 SCR 635.

<sup>275</sup> A high-profile example is Justice Anthony Kennedy of the United States Supreme Court and his ambivalent relationship with *Roe v Wade*, 410 US 113 (1973) [“*Roe*”]: Lewis F Powell, Jr, “Stare Decisis and Judicial Restraint” (1990) 47 Wash & Lee L Rev 281 at 284. Kennedy J nonetheless refused to overturn *Roe*, famously holding (with O’Connor and Souter JJ) that “Liberty finds no refuge in a jurisprudence of doubt”: *Planned Parenthood v Casey*, 505 US 833 (1992), opening line. See also Ilya Shapiro, “A Faint-Hearted Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy” (2009) 33(1) Harvard J L & Publ Pol 333 at 348-351. Kagan J argued that the same should be the case regarding *Auer v Robbins*, 519 US 542 (1997) in *Kisor v Wilkie*, 588 US \_\_\_\_ (2019).

<sup>276</sup> *Supra* note 109.

<sup>277</sup> *Supra* note 108.

<sup>278</sup> Michael E Solimine, “Revitalizing Interlocutory Appeals in the Federal Courts” (1989) 58 Geo Wash L Rev 1165.

disputes over what is an interlocutory or final appeal, it would prevent litigation that does not address a dispute's merits.

Ultimately, however, this too may be an overreaction. For instance, in the United States federal courts system, if a District Court concludes that it has jurisdiction, that determination cannot be appealed until after a full trial on the merits – which may take years and cost millions of dollars.<sup>279</sup> If the Court was wrong about this, access to justice has clearly been impeded. Declaring interlocutory appeals are to be exceptional – but still occasionally worthwhile – appears a more promising path forward.

#### **E. Wither the Divisional Court?**

The suggestions so far have focussed on changing the law surrounding the interlocutory/final distinction. But it would be a serious lacuna to not flag a potential institutional change: namely, is it prudent to have two separate courts for appeals of Superior Court civil decisions? While other common law provinces still struggle over the interlocutory/final distinction,<sup>280</sup> they have only one court that must wrestle with this matter. The Divisional Court's existence has not caused the uncertainty in the law regarding the interlocutory/final distinction, which clearly exists elsewhere. However, its existence exacerbates some of the distinction's collateral consequences, including:

- bringing appeals in both courts out of an abundance of caution and then needing to move to stay the proceeding in the Divisional Court<sup>281</sup> – something that would not be necessary if there was only one court, where a motion could be brought for “leave, if necessary”;

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<sup>279</sup> Kennedy Jurisdiction, *supra* note 95.

<sup>280</sup> One need also only look at *Conduct of an Appeal*, *supra* note 2 at § 1.41-1.74 to see this being apparent across common law Canada. Ontario may be a disproportionate source of this controversy, but hardly the only source. See also *infra* note 301.

<sup>281</sup> *E.g.*, Mancinelli, *supra* note 3 at para 2.

- bringing appeals in two courts when a party seeks to simultaneously appeal interlocutory and final decisions, especially given the disinclination of the Court of Appeal to reconstitute itself as the Divisional Court, even with consent;<sup>282</sup> and
- the Chief Justice of the Superior Court needing to grant permission for the Court of Appeal to reconstitute itself as the Divisional Court when it does wish to do so.<sup>283</sup>

A single court for appeals of Superior Court civil decisions would at least mitigate these collateral consequences of confusion over the interlocutory/final distinction. Indeed, British Columbia avoids many of these consequences. It is common in British Columbia for a party to seek directions on whether leave is necessary to appeal and, if so, seek leave to appeal simultaneously.<sup>284</sup> The British Columbia Court of Appeal is also willing to convert a notice of appeal into a notice of application for leave to appeal, even when refusing leave.<sup>285</sup> These efficient uses of judicial resources are more difficult given the presence of the Divisional Court in Ontario. As noted above, confusion about which court to bring an appeal in also appears to disproportionately impact self-represented litigants.

Analogous court mergers have been suggested in other contexts. Policymakers such as the late Ian Scott<sup>286</sup> and scholars such as Don Stuart<sup>287</sup> have suggested merging the criminal trial courts to,

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<sup>282</sup> See, e.g., *Cavanaugh v Grenville Christian College*, 2013 ONCA 139, 304 OAC 163 [*“Cavanaugh”*].

<sup>283</sup> *Punit*, *supra* note 133 at para 18.

<sup>284</sup> E.g., *Gemex Developments Corp v Coquitlam (City)*, 2011 BCCA 119, 81 MPLR (4th) 60.

<sup>285</sup> *Island Savings Credit Union v Brunner*, 2016 BCCA 308, 2016 CarswellBC 2187.

<sup>286</sup> David Stockwood, “In Conversation: Ian Scott” (1993) 12 Adv Soc J 4 at 9-10, cited in Wayne Renke, “A Single Trial Court for Alberta: Consultation Paper” (Edmonton, AB: Alberta Justice/Faculty of Law, University of Alberta, 2007), online: <[http://cfcj-fcjc.org/sites/default/files/docs/hosted/18550-single\\_trial\\_court\\_consult.pdf](http://cfcj-fcjc.org/sites/default/files/docs/hosted/18550-single_trial_court_consult.pdf)>; Don Stuart, “The *Charter* Is a Vital Living Tree and Not a Weed to Be Stunted: Justice Moldaver Has Overstated” (2006) 21 Nat’l J Const L 245 at 247.

<sup>287</sup> Stuart, *ibid* at 247, makes the similarities between the criminal and civil contexts easy to see:

The [...] serious problem of systemic delay may well be better addressed by returning to the vision of those such as former Attorney General Ian Scott and others who called for just one federal trial court to handle all criminal trials [...] A unified court would certainly address delays resulted from judge-shopping tactics and the sheer undue complexity of the current system. The *status quo* is currently propped up by claims of special expertise by judges of higher status which increasingly

among other things, pool talent and create simplicity. This has also been attempted in various provinces with the family courts.<sup>288</sup>

The Divisional Court has purposes other than hearing interlocutory appeals: as noted above, it hears appeals of many other matters, such as masters' decisions. Though other provinces – such as Alberta and British Columbia – simply prescribe an appeal of a master's order to the Court of Queen's Bench (in Alberta)<sup>289</sup> or the Supreme Court (in British Columbia).<sup>290</sup> The Divisional Court also hears appeals of civil matters with low dollar amounts at stake. While this arguably leaves the Court of Appeal addressing more important matters, this seems somewhat arbitrary. And it certainly does not further specialization, as the Court of Appeal is surely as suited to hear an appeal concerning \$49,999 as one concerning \$50,001. Nor does this distinction reflect different procedures followed in lower courts, as is the case for appeals of Small Claims Court decisions.

More notably, the Divisional Court also sits as a court of judicial review. The idea of having a specialized court for judicial review was the impetus behind the Court's creation, and there remains a point of view that it should return to that purpose.<sup>291</sup> This may be a sufficient reason to keep the Divisional Court. But its jurisdiction has expanded, and given that it generally sits in panels of three judges, it seems unclear that expertise in administrative law will be present among all three judges. Even if expertise in judicial review is desirable, this could be accomplished by having a "list" of judges who hear such applications on the Superior Court – though there are a

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ring hollow given the calibre and workload of current Provincial Court judges. The single unified court is already the reality in Nunavut. [Citations omitted]

<sup>288</sup> See, e.g., Freeda Steel, "The Unified Family Court – Ten Years Later" (1996) 24 Man LJ 381; Nicholas Bala, Rachel Birnbaum & Justice Donna Martinson, "One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict" (2010) 26 Can J Fam L 395 at 399.

<sup>289</sup> *Alberta Rules of Court*, Alta Reg 124/2010, Rules 6.14(1), noting that a master's order may be appealed to a judge, with "judge" being defined in the Appendix as a judge of the Court of Queen's Bench.

<sup>290</sup> Rule 23-6(8) of the *Supreme Court Civil Rules*, BC Reg 168/2009, explains that a master's order may be appealed to the "court", with the "court" being defined as the Supreme Court of British Columbia in Rule 1(1).

<sup>291</sup> Osborne, *supra* note 93 at c 12.

limited number of Superior Court judges who would hear an insolvency proceeding or a murder trial, there is no separate court for these matters. This could also be the case for administrative law. Moreover, all other provinces – and the Federal Court – have single judges hear applications for judicial review, which appears to be a more efficient use of judicial resources.

On the note of expertise, the Divisional Court also has a prescribed statutory role to develop expertise in class actions.<sup>292</sup> This could be another reason to keep the Divisional Court, though the aforementioned comments on administrative law and judicial review apply equally to class actions.

The Court of Appeal could also mitigate the consequences caused by the division of appellate functions if it were to transfer matters to the Divisional Court, or reconstitute itself as the Divisional Court, more regularly, perhaps taking parties' procedural errors into account in costs determinations.<sup>293</sup> But even here, this could be seen as usurping what is the Divisional Court's statutory authority, with the Court of Appeal typically only doing so in cases of true urgency.<sup>294</sup>

To be clear, a recommendation that the Divisional Court be abolished would require further study. Such a drastic step would be complicated. All criteria that would be relevant to such a decision, such as amending numerous statutes that mandate steps be taken in the Divisional Court, have not been considered. The abolition of the Divisional Court would also likely require additional judges on the Court of Appeal.<sup>295</sup> Though this analysis does not support the Divisional Court's existence facilitating access to justice vis-à-vis interlocutory appeals, it is clearly possible

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<sup>292</sup> *Cavanaugh*, *supra* note 282 at para 91, per Doherty JA.

<sup>293</sup> The Court of Appeal is willing to award costs even against successful parties if they make serious and costly procedural errors: see, e.g., *Knew Order Co Ltd v 2291955 Ontario Inc*, 2013 ONCA 559, 2013 CarswellOnt 12679, described by Mark Gelowitz, "Knew Order v. 2291955 Ontario: Costs Awarded Against Successful Appellants for Procedural Errors" *Conduct of an Appeal* blog (3 October 2013), online: <<https://www.osler.com/en/blogs/appeal/october-2013/knew-order-v-2291955-ontario-costs-awarded-again>>.

<sup>294</sup> *Cavanaugh*, *supra* note 282 at para 91, per Doherty JA.

<sup>295</sup> The proportion of Superior Court judges sitting on the number of Divisional Court cases that would move to the jurisdiction of the Court of Appeal could potentially be transferred to the Court of Appeal to respond to this issue.

to have a court with discrete yet diverse subject matter jurisdiction work functionally: the Federal Court, with its varied expertise in judicial review, national security law, intellectual property, taxation, and maritime law, exemplifies this. What is being recommended is that there be a serious discussion on this topic and that further research be done concerning it. Various courts were merged in 1990, despite opposition, with most observers viewing this as a positive development.<sup>296</sup> And at least when it comes to the problems caused by the interlocutory/final distinction in civil appeals, the existence of the Divisional Court appears to be unhelpful. So this is a matter that is worth considering in more depth, as Coulter Osborne urged more than a decade ago.<sup>297</sup>

## IN SUM

It is difficult to overstate how important appeals are from the perspective of access to justice – in narrow circumstances. In other circumstances, appeals are a significant access to justice obstacle, especially when they prevent appellate courts from focussing on their primary tasks of correcting injustices and delineating legal rules. Ontario law has attempted to balance the need for appeals with recognition of the need for finality through, among other things, treating interlocutory and final appeals differently. The motivations behind doing so are sound, and it would likely be an overreaction to eliminate their differential treatment. As is, however, the distinction has caused considerable mischief – and understandable judicial exasperation. The uncertainty surrounding this distinction has led to dozens of disputes over this matter in both the Divisional Court and the Court of Appeal every year in the 2010s. This tends to cost litigants months of time and thousands of dollars without addressing the merits of a dispute. The Supreme Court's call for civil justice reform in *Hryniak* appears to have had minimal impact on this.

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<sup>296</sup> Cotter, *supra* note 28 at 214-215.

<sup>297</sup> Osborne, *supra* note 93 at c 12.

Fortunately, however, there is hope – and other jurisdictions chart a path. British Columbia and England and Wales have sought to fix a similar problem in their case law through legislation. There is no question that the approaches of these jurisdictions create some risk of arbitrariness or lack of sophistication in terms of determining which orders can be appealed as of right. But there also remains discretion for appellate courts to intervene – by granting leave to appeal – if that is what substantive justice requires. Ontario should consider following suit, and grant appeals as of right only to orders that finally dispose of litigation, or are of such importance that the legislature or Civil Rules Committee has clearly prescribed that there should be an appeal as of right. In the meantime, it is humbly suggested that a simple rule is better than a complicated one, and courts should interpret Ontario’s procedural law to move in that direction.

Both substantive justice and a fair process are essential to achieving access to justice.<sup>298</sup> But a fair process must be proportionate to what is at stake<sup>299</sup> and reasonably predictable.<sup>300</sup> Unfortunately, the current status of the interlocutory/final appeal distinction in Ontario (and, it would appear, Canada in general<sup>301</sup>) is anything but proportionate or predictable. Fortunately, there are ways forward that lead one to hope that this situation could be remedied.

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<sup>298</sup> Farrow 2014, *supra* note 82 at 971.

<sup>299</sup> See, e.g., *Hryniak*, *supra* note 17 at para 29; Farrow 2012, *supra* note 93.

<sup>300</sup> Seen in as diverse areas of law as international trade law (see Ian A Laird, “Betrayal, Shock and Outrage - Recent Developments in NAFTA Article 1105” (2003) 3 *Asper Rev Int’l Bus & Trade L* 185 at 195), administrative justice (see Lorne Sossin, “Designing Administrative Justice” (2017) 34 *Windsor YB Access Just* 87 at 97), and environmental protection (see Jason MacLean & Chris Tollefson, “Climate-Proofing Judicial Review after Paris: Judicial Competence, Capacity, and Courage” (2018) 31 *J Env L & Prac* 245 at 247, citing Government of Canada, “Environmental and Regulatory Reviews: Discussion Paper” (June 2017), online: <<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/share-your-views/proposed-approach/discussion-paper.html>>).

<sup>301</sup> *Conduct of an Appeal*, *supra* note 2, § 1.44, citing case law from across the common law provinces, such as: *Van de Wiel v Blaikie*, 2005 NSCA 14, 230 NSR (2d) 186, per Cromwell JA (as he then was); *Curtis v Smith’s Home Centre Limited (Smith’s Home Hardware)*, 2009 NLCA 14, 286 Nfld & PEIR 113, per Wells JA; and *Proprietary Industries Inc v Workum*, 2005 ABQB 472, 49 Alta LR (4th) 397, per Kent J.



## Chapter Four

### The 2010 Amendments and *Hryniak v Mauldin*: The Perspective of the Lawyers Who Have Lived Them

Access to justice is generally cited as the most pressing concern facing Canada’s justice system, one that must be addressed through many different avenues.<sup>1</sup> One commonly proposed response is reforming procedural law. Accordingly, Ontario significantly amended its procedural law effective January 1, 2010, aiming to facilitate the timely and inexpensive resolution of civil actions on their merits.<sup>2</sup> In the 2014 decision *Hryniak v Mauldin*, the Supreme Court of Canada unanimously held that the 2010 Amendments should be interpreted generously to facilitate access to justice.<sup>3</sup> *Hryniak* and the 2010 Amendments were subject to significant praise at the time, recognizing the need for novel solutions to longstanding problems.<sup>4</sup> Empirical research since has suggested that there has been some progress in resolving certain types of claims more efficiently and with less cost.<sup>5</sup> But there have also been criticisms of these developments<sup>6</sup> and anecdotal evidence that they have negatively impacted vulnerable parties.<sup>7</sup>

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<sup>1</sup> *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at paras 1, 26; Trevor CW Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall LJ 957 [“Farrow 2014”] reviews the literature in this area at fn 1. The various approaches to addressing this issue are discussed in more detail below in Part I.A.

<sup>2</sup> O Reg 438/08 [the “2010 Amendments”], amending the *Rules of Civil Procedure*, RRO 1990, Reg 194 [the “Rules”].

<sup>3</sup> *Supra* note 1 [hereinafter “*Hryniak*”].

<sup>4</sup> See, e.g., Shantona Chaudhary, “*Hryniak v. Mauldin*: The Supreme Court issues a clarion call for civil justice reform” (Winter 2014) 33 Adv J No 3.

<sup>5</sup> See, e.g., Brooke MacKenzie, “Effecting a Culture Shift: An Empirical Review of Ontario’s Summary Judgment Reforms” (2017) 54:4 Osgoode Hall LJ 1275; Gerard J Kennedy, “Rule 2.1 of Ontario’s *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?” (2018) 35 Windsor YB Access Just 243 [“Kennedy Rule 2.1”].

<sup>6</sup> See, e.g., Jonathan Lissus, “*Hryniak*: Requiem for the vanishing trial, or brave new world?” (Summer 2014), 33 Adv J No 1, 6.

<sup>7</sup> See, e.g., Julie Macfarlane, Katrina Trask & Erin Chesney, “The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?” (Windsor, ON: The National Self-Represented Litigants Project, The University of Windsor, November 2015).

So what is the *status quo* in practice? This chapter seeks to answer this question by asking the lawyers who have actually lived the recent developments in Ontario procedural law about their experiences. Specifically, volunteer lawyers at Pro Bono Ontario’s Law Help Centres were surveyed, chosen given that they tend to have diverse experiences and clients from multiple socioeconomic groups in society. The results complement previous theoretical work and empirical analysis of case law with the lived experiences of litigants’ legal service providers.

Part I of this chapter provides background on the access to justice crisis in Ontario and how the 2010 Amendments and *Hryniak* sought to address it. Part II explains the background and methodology of the survey that the volunteer lawyers were invited to complete. Part III describes what the survey showed. Part IV critically summarizes these results and what lessons they provide regarding *Hryniak* and the 2010 Amendments specifically, and the potential of civil procedure reform as a means to facilitate access to justice more broadly.

The results were mixed. Most respondents viewed *Hryniak* and the 2010 Amendments as positive overall. But this was hardly a unanimous view. And most respondents viewed the effectiveness of *Hryniak* and the 2010 Amendments to be limited, as other factors have intervened or remained as access to justice obstacles. The responses did not lack all hope, but they ultimately suggested that the battle for access to civil justice must continue to be waged on multiple fronts.

## **I) BACKGROUND**

### **A. The Access to Justice Crisis in Ontario**

Access to civil justice has consistently been held to be an area where Canada’s justice system falls short, resulting in considerable scholarship<sup>8</sup> and reports<sup>9</sup> attempting to address this issue. The

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<sup>8</sup> Farrow 2014, *supra* note 1 significantly outlines the literature in this area at fn 1.

<sup>9</sup> See, e.g., Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil & Family Justice: A Roadmap for Change” (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) [“*Roadmap for Change*”]; Coulter Osborne, QC, *Civil Justice Reform Project*:

word “crisis” is frequently used to describe the *status quo*.<sup>10</sup> Practically every Canadian will encounter a legal dispute at least once in their lifetime<sup>11</sup> even though most cannot afford a lawyer for a matter of any complexity.<sup>12</sup> As individuals are unable to resolve legal issues, legal problems tend to multiply and the significant majority of these problems go unaddressed; this results in a host of social and health consequences.<sup>13</sup>

These broad phenomena – which have been documented elsewhere far more thoroughly than is possible here<sup>14</sup> – require multipronged responses. This in turn leads to multiple definitions of access to justice, varying in light of what is at stake. Some definitions are very broad, including philosophical analyses of “what is justice”,<sup>15</sup> including those arguing for the need for transformative social justice.<sup>16</sup> Even when discussing access to justice vis-à-vis traditional legal disputes, much access to justice literature concentrates on how to deliver legal services in a more accessible manner<sup>17</sup> as well as “alternative dispute resolution” (ADR) such as mediation, arbitration, and administrative procedures that lessen the need to resort to courts.<sup>18</sup>

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*Findings and Recommendations* (Ontario Ministry of the Attorney General, November 2007), online: <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>>.

<sup>10</sup> But see Andrew Pilliar, “what will you do about access to justice this year” *Legal Aid Ontario Blog* (4 February 2014), online: <<http://blog.legalaid.on.ca/2014/02/04/andrew-pilliar-what-will-you-do-about-access-to-justice-this-year/>>, who suggests “chronic problem” is a better term than crisis.

<sup>11</sup> *Roadmap for Change*, *supra* note 9; Farrow 2014, *supra* note 1 at 965-966.

<sup>12</sup> Farrow 2014, *ibid* at 964, citing Beverley McLachlin, “Foreword” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at ix.

<sup>13</sup> Farrow 2014, *ibid* at 963; Trevor CW Farrow, “A New Wave of Access to Justice Reform in Canada” in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) [“Farrow 2016”] at 166-167. See also Introduction at 9-10.

<sup>14</sup> See, e.g., Farrow 2014, *ibid*.

<sup>15</sup> E.g., Farrow 2014, *ibid* at 969; Patricia Hughes, “Law Commissions and Access to Justice: What Justice Should We Be Talking About?” (2008) 46:4 Osgoode Hall LJ 773.

<sup>16</sup> E.g., *ibid*; see also Sarah Buhler, “The View from Here: Access to Justice and Community Legal Clinics” (2012) 63 UNB LJ 427.

<sup>17</sup> E.g., Gillian K Hadfield, “The Cost of Law: Promoting Access to Justice Through the (un)Corporate Practice of Law” (2014) 38 Supplement Intl Rev L & Econ 43.

<sup>18</sup> See, e.g., Julie Macfarlane & Michaela Keet, “Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program” (2005) 42 Alta L Rev 677; Robert G Hann & Carl Baar, “Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months” (Toronto: Ministry of the Attorney General, 2001), online: <[https://archive.org/stream/mag\\_00041982/mag\\_00041982\\_djvu.txt](https://archive.org/stream/mag_00041982/mag_00041982_djvu.txt)>, described by Martin Teplitsky, QC,

These conceptions of access to justice are all important. But public civil litigation still matters, for a variety of reasons, including (but not limited to<sup>19</sup>) development of the common law and related democratic norms,<sup>20</sup> ensuring economically disadvantaged parties have a forum to adjudicate claims with basic procedural fairness,<sup>21</sup> and incentivizing mediation and arbitration to ensure their purported benefits are present.<sup>22</sup> If the public civil litigation system is inaccessible due to excessive delay and expense, these socially important goals remain unfulfilled. This can even jeopardize the rule of law as an undeveloped common law leaves parties unable to order their affairs<sup>23</sup> and one's legal fate may depend on his or her economic status, which has become a frequent prerequisite for a chance at fair adjudication, rather than the law.<sup>24</sup>

So in the context of civil litigation, access to justice includes, at the very least, ensuring that litigation is prompt, affordable, and comprehensible to litigants, so that they are not discouraged from pursuing it or dissatisfied if they do.<sup>25</sup> This accords with the principle of proportionality, discussed in the next subsection. While these characteristics are likely insufficient for a complete

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“Universal mandatory mediation: A critical analysis of the evaluations of the Ontario mandatory mediation program” (Winter 2001) 20 *Advocates’ Soc J* No 3, 10. See also Gary Smith, “Unwilling Actors: Why Voluntary Mediation Works, Why Voluntary Mandatory Mediation May Not” (1998) 36:4 *Osgoode Hall LJ* 847, expressing doubt about the wisdom and utility of mandatory mediation.

<sup>19</sup> See, e.g., Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) [“Farrow Book”] at, in particular, 219ff.

<sup>20</sup> *Ibid* at 251-258; *Hryniak*, *supra* note 1 at paras 1, 26.

<sup>21</sup> Farrow Book, *ibid* at 219-232.

<sup>22</sup> Joshua D H Karton, “Party Autonomy and Choice of Law: Is International Arbitration Leading the Way or Marching to the Beat of Its Own Drummer?” (2010) 60 *UNB LJ* 32.

<sup>23</sup> *Hryniak*, *supra* note 1 at paras 1, 26. The connection between allowing parties to order their affairs and the rule of law is noted in, e.g., Malcolm Lavoie & Dwight Newman, “Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence” (2015) Fraser Centre Institute for Aboriginal Policy Studies, online: <<https://www.fraserinstitute.org/sites/default/files/mining-and-aboriginal-rights-in-yukon-how-certainty-affects-investor-confidence.pdf>> at 16, drawing on Friedrich A Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) [16th impression, 1962].

<sup>24</sup> *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 39, [2014] 3 SCR 31 [“*Trial Lawyers*”]; Paul Vayda, “Chipping away at Cost Barriers: A Comment on the Supreme Court of Canada’s *Trial Lawyers* Decision” (2015) 36 *WRLSI* 207 at 211-212.

<sup>25</sup> See, e.g., Farrow 2014, *supra* note 1 at 978-979.

understanding of access to justice, they are still necessary.<sup>26</sup> Facilitating timeliness, minimal financial expense, and simplicity were the justifiable goals of the 2010 Amendments and *Hryniak*, which will now be discussed.

### **B. The 2010 Amendments and *Hryniak***

In 2007, Coulter Osborne, retired Associate Chief Justice of Ontario, presented a report to the Ontario government recommending numerous reforms to the justice system to help facilitate access to justice. Many of his recommendations were enacted as the basis of the 2010 Amendments.<sup>27</sup> Perhaps, the most notable of the 2010 Amendments concerned when a court may grant “summary judgment” – disposing of all or part of a case on a motion, with affidavit evidence, and without a full trial.<sup>28</sup> Also important was enshrining the principle of proportionality throughout civil procedure.<sup>29</sup> These amendments can be criticized, whether due to conceptual problems with the proportionality principle<sup>30</sup> or belief in the merits of the traditional trial.<sup>31</sup> However, this chapter largely seeks to learn the 2010 Amendments’ effects rather than try to justify them.

In *Hryniak*, the Supreme Court came down firmly on the side of viewing the proportionality principle, as well as the expanded ability to seek summary judgment, as positive. Karakatsanis J, authoring the Court’s unanimous judgment, held that excessive reliance on traditional litigation methods can hinder access to justice and she called for a “culture shift” in the conduct of litigation.<sup>32</sup>

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<sup>26</sup> See, e.g., Farrow 2016, *supra* note 13 at 166.

<sup>27</sup> See, e.g., MacKenzie SJ, *supra* note 5 at 1280-1281; Janet Walker, “Summary Judgment Has Its Day in Court” (2012) 37 Queen’s LJ 697 at 700-701 and 707-708.

<sup>28</sup> Rule 20 of the *Rules*, *supra* note 2, analyzed in *Hryniak*, *supra* note 1.

<sup>29</sup> The subject of *Hryniak*, *supra* note 1.

<sup>30</sup> Colleen M Hanycz, “More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform” (2008) 27 CJQ 98.

<sup>31</sup> Lisus, *supra* note 6.

<sup>32</sup> *Hryniak*, *supra* note 1 at paras 23-33.

Despite the focus on proportionality and summary judgment, the spirit of the 2010 Amendments and *Hryniak* have been held by appellate courts<sup>33</sup> and scholarly commentators<sup>34</sup> to apply more broadly. This is apparent, for instance, in Rule 2.1 of Ontario's *Rules*, which came into effect after *Hryniak* and allows a court to dismiss abusive actions through a very summary written procedure. As Chapter Two notes, Rule 2.1 was influenced by the spirit of *Hryniak*.<sup>35</sup>

## II) THE SURVEY<sup>36</sup>

### A. Background

Qualitative surveys remain relatively rare in legal scholarship,<sup>37</sup> perhaps due to Langdellian views that law is a science to be discovered through primary sources, and as such surveys have little to add.<sup>38</sup> And it is indeed true that obtaining a sample of judges or lawyers that would be representative in the eyes of a statistician was not realistic for this dissertation. But this is also an area where personal, small-scale ethnographical impressions matter a great deal.<sup>39</sup> Scholars such as Julie Macfarlane<sup>40</sup> and Trevor Farrow<sup>41</sup> have learned invaluable insights through interviewing

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<sup>33</sup> See, e.g., *Iannarella v Corbett*, 2015 ONCA 110, 124 OR (3d) 523 at para 53, concerning discovery; *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289, 580 AR 265 at para 5, concerning the intersection between discovery and claims of privilege.

<sup>34</sup> See, e.g., Stephen GA Pitel & Matthew Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014) 43 *Advocates' Quarterly* 344 at 344-346; Kennedy Rule 2.1, *supra* note 5 at 246; Gerard J Kennedy, "Jurisdiction Motions and Access to Justice: An Ontario Tale" (2018) 55:1 *Osgoode Hall LJ* 79 ["Kennedy Jurisdiction"] at 85; Barbara Billingsley, "*Hryniak v. Mauldin* Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials" (2017) 55:1 *Alta L Rev* 1.

<sup>35</sup> Described in depth in Kennedy Rule 2.1, *ibid*.

<sup>36</sup> The structure of this section of this chapter borrows heavily from Farrow 2014, *supra* note 1 at 965.

<sup>37</sup> Urszula Jaremba & Elaine Mak, "Interviewing Judges in the Transnational Context" (2014) 5:3 *Law and Method* 1 at 1.

<sup>38</sup> See, e.g., the discussions in David Sandomierski, "Canadian Contract Law Teaching and the Failure to Operationalize: Theory & Practice, Realism & Formalism, and Aspiration & Reality in Contemporary Legal Education" (2017), SJD Thesis, Faculty of Law, University of Toronto at 51-52.

<sup>39</sup> Farrow 2014, *supra* note 1 at 966.

<sup>40</sup> Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report" (May 2013), online: <<https://scholar.uwindsor.ca/lawpub/85/>> ["Macfarlane Main Report"].

<sup>41</sup> Anne Griffiths, "Using Ethnography as a Tool in Legal Research: An Anthropological Perspective" *Law Explorer* (20 May 2017), online: <<https://lawexplores.com/using-ethnography-as-a-tool-in-legal-research-an-anthropological-perspective-anne-griffiths/>>; Farrow 2014, *supra* note 1 at 966, citing Anne Griffiths "Using

those who interact with the justice system as litigants. Such scholarship builds upon a significant body of work, perhaps developed most prominently in Canada by Roderick Macdonald, attempting to place the person who experiences the law at the heart of legal analysis.<sup>42</sup> Moreover, the first three chapters of this dissertation, as well as Brooke MacKenzie's work,<sup>43</sup> have sought to look at the "raw numbers" of how Ontario procedural law has (not) changed in its application in the aftermath of *Hryniak*. There is only so much dispassionately reading case law can show – this chapter attempts to consider the lived experiences of those who experience the justice system.

Admittedly, this project surveyed legal service providers while it may be preferable to speak to litigants – those who experience the justice system on a day-to-day basis most acutely. However, the impressions of these providers are still important in access to justice analysis.<sup>44</sup> More importantly, finding a group of litigants who had experienced the civil justice system pre- and post-*Hryniak* and/or the 2010 Amendments seemed unrealistic.

## B. Methodology

From June through August of 2019, lawyers who volunteer at Pro Bono Ontario ("PBO") Law Help Centres were surveyed,<sup>45</sup> seeking to discern their opinions on *Hryniak* and the 2010 Amendments. The questions, many of which are repeated below and all of which appear in

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Ethnography as a Tool in Legal Research: An Anthropological Perspective", Chapter Six in Reza Banakar & Max Travers, eds, *Theory and Method in Socio-Legal Research* (Portland: Hart Publishing, 2005).

<sup>42</sup> See, e.g., Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005) at 19; Martha-Marie Kleinhans & Roderick A Macdonald, "What is a Critical Legal Pluralism?" (1997) 12 Can J L & Soc 25; Farrow 2016, *supra* note 13 at 170; Justice Thomas A Cromwell, Address (Remarks delivered at the PLEAC Conference, 26 October 2012) [unpublished] at 2 as reported in Mary Eberts, "'Lawyers Feed the Hungry:' Access to Justice, The Rule of Law, and the Private Practice of Law" (2013) 76 Sask L Rev 115 at 120, fn 32.

<sup>43</sup> MacKenzie SJ, *supra* note 5.

<sup>44</sup> Farrow 2014, *supra* note 1 at 965.

<sup>45</sup> Pursuant to York University Ethics Approval, Certificate # STU - 070, dated May 22, 2018, attached as Appendix N. Attached at Appendices O is a Renewal-Amendment Approval, dated May 22, 2019. Attached as Appendix P is an Amendment Approval, dated July 18, 2019. Attached as Appendix Q is the Informed Consent form participants completed.

Appendix J, mostly fall into three categories: a) specific questions on the effects of *Hryniak* and the 2010 Amendments; b) follow-up questions allowing the respondents to explain the answers;<sup>46</sup> and c) questions about the respondents' demographics.<sup>47</sup>

PBO is a registered charity that provides legal services to Ontarians who cannot afford a lawyer.<sup>48</sup> PBO has done this through a variety of projects, ranging from: providing assistance to the parents of sick children at Toronto's Hospital for Sick Children;<sup>49</sup> a call centre where individuals can to speak to a lawyer via telephone;<sup>50</sup> acting as duty counsel in Civil Practice Court, the Divisional Court, and Court of Appeal for Ontario;<sup>51</sup> and running "Law Help Centres" adjacent to the Superior Court in Toronto and Ottawa and the Small Claims Court in North York, where individuals can speak to a lawyer in person.<sup>52</sup> When the Law Help Centres were in jeopardy of closing in late 2018 due to a funding shortfall, a massive campaign emerged among the bar to "Save Law Help" and keep the centres open.<sup>53</sup> The Law Society of Ontario ("LSO") recognizes PBO's unique role in facilitating access to justice. For instance, LSO-licensed lawyers are asked

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<sup>46</sup> The importance of which is noted in Farrow 2014, *supra* note 1 at 967.

<sup>47</sup> Clearly essentially in critical race scholarship: Shanthi Elizabeth Sente & Sujith Xavier, "Re-Igniting Critical Race in Canadian Legal Spaces: Introduction to the Special Symposium Issue of Contemporary Accounts of Racialization in Canada" (2013) Windsor YB Access Just 1; Faisal Bhabha, "Towards a Pedagogy of Diversity in Legal Education" (2014) 52:1 Osgoode Hall LJ 59 at 87.

<sup>48</sup> Pro Bono Ontario, "About PBO", online: <<https://www.probonoontario.org/about/>>; Jacques Gallant, "Pro Bono Ontario help centres to remain open with funding from Ottawa, donations from lawyers" *The Toronto Star* (27 November 2018), online: <<https://www.thestar.com/news/gta/2018/11/27/pro-bono-ontario-help-centres-to-remain-open-with-funding-from-ottawa-donations-from-lawyers.html>>; Pro Bono Ontario, "Pro Bono Ontario Funding Background and History" (17 May 2019), online: <<https://probonoontario.org/voices-for-pro-bono/wp-content/uploads/2019/05/PBO-Funding-Background-and-History-May-17-2019.pdf>> ["Funding Backgrounder"].

<sup>49</sup> Lorne Sossin, "The Helping Profession: Can *Pro Bono* Lawyers Make Sick Children Well?" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) at 150 ["Sossin SickKids"]; Funding Backgrounder, *ibid* at 13.

<sup>50</sup> Pro Bono Ontario, "Hotline", online: <<https://www.probonoontario.org/hotline/>>; Funding Backgrounder, *ibid* at 10-11.

<sup>51</sup> Funding Backgrounder, *ibid* at 10.

<sup>52</sup> Gallant, *supra* note 48; Gabrielle Giroday, "Support builds in effort to stop closure of pro bono centres" *Canadian Lawyer* (12 November 2008), online: <<https://www.canadianlawyermag.com/news/general/support-builds-in-effort-to-stop-closure-of-pro-bono-centres/275633>>; Pro Bono Ontario, "Going to Court", online: <<https://www.probonoontario.org/lawsuits-and-disputes/>>; Funding Backgrounder, *ibid* at 9-10.

<sup>53</sup> Extensively reported in, e.g., Gallant, *ibid*; Giroday, *ibid*; Funding Backgrounder, *ibid* at 22-23.



on their annual report whether they volunteer for PBO.<sup>54</sup> In addition, lawyers may also provide *pro bono* services for PBO despite not paying the level of insurance or dues to the LSO that would normally be required to provide analogous services outside of the *pro bono* context.<sup>55</sup>

During their volunteer shifts, as well as through multiple emails sent to the lawyers who volunteer at PBO's Law Help Centres, lawyers were invited to respond to the questions asked in this survey. They were given the opportunity to: a) complete the survey on their own time and return through email; b) complete in person during or adjacent to a volunteer shift; or c) fill out the survey through PBO's website. PBO lawyers are almost all litigators, who are likely to be familiar with *Hryniak* and the 2010 Amendments. Many of them have a private practice in their "day jobs" while also working with economically disadvantaged persons through PBO. This diversity of experience is valuable for a survey such as this one. Of the approximately 670 lawyers on PBO's volunteer roster for its Law Help Centres, 90 responded to the survey – a take-up rate of approximately 13.4%. Each respondent was assigned a number, prefaced by "L" (for "lawyer") during the recording of the results. Individual substantive responses will be referenced by those numbers for the duration of this chapter. With one exception,<sup>56</sup> the responses were not amended, even to correct typographical errors.

All answers to the qualitative questions were copied into Word documents, and common themes were grouped. All substantive comments are reflected below. In the interests of brevity, many of these comments are paraphrased, but the number of respondents who made similar qualitative comments is noted in Part III.

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<sup>54</sup> Law Society of Ontario, "Blank Copy 2018 Annual Report", online: <[https://portal.lso.ca/wps/PA\\_AnnualReport/resources/pdf/en/mar\\_draftform.pdf](https://portal.lso.ca/wps/PA_AnnualReport/resources/pdf/en/mar_draftform.pdf)>, Question 8(c).

<sup>55</sup> Funding Backgrounder, *supra* note 48 at 6.

<sup>56</sup> L85's year of call to the bar was recorded as "1015". It seemed a safe assumption that it was obviously 2015.

Superior Court judges were also sought to be surveyed to add a different and important perspective. Trial judges deal with the *Rules* on a day-to-day basis. While there has been praise of *Hryniak* and the 2010 Amendments in the case law,<sup>57</sup> there is also concern that increased summary judgment adds to the work of trial judges to read the evidence rather than hear it in a trial. This is sometimes derisively called “trial in a box”.<sup>58</sup> However, the Office of the Chief Justice (prior to the appointment of Chief Justice Morawetz) declined to facilitate this request. While this is understandable given concerns about the judiciary speaking extrajudicially or otherwise performing extrajudicial activities,<sup>59</sup> it is nonetheless a point of view that could not be explored.

### C. Limitations of Methodology

Since the Law Help Centres are in Toronto and Ottawa, the respondents are disproportionately from those cities. This does limit the extent to which the lessons can be drawn from the lawyers’ impressions. And despite the respondents’ diversity of experience, it cannot necessarily be said to mirror that of the Ontario bar, especially given the geographic limitations. Nor do 90 lawyers constitute a particularly large sample. It would accordingly be ill-advised to change public policy/the law based only on the responses to this survey. However, that does not mean that the respondents’ impressions are uninteresting or cannot complement other work in this area.

### D. Hypotheses

Given the high-profile nature of *Hryniak* and the 2010 Amendments, it was expected that respondents would have opinions on them, with this hopefully leading to greater satisfaction with

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<sup>57</sup> *E.g.*, *Gao v Ontario (Workplace Safety and Insurance Board)*, 2014 ONSC 6100, 37 CLR (4th) 1 (SCJ) at paras 7, 9.

<sup>58</sup> See, *e.g.*, *Hamilton v Desert Lake Family Resort Inc*, 2017 ONSC 1382, 2017 CarswellOnt 2874 (SCJ) [“*Hamilton*”] at para 1, per Mew J.

<sup>59</sup> See, *e.g.*, the case of Justice Patrick Smith, being controversially found to have committed misconduct by having accepted an interim deanship of a law school: Colin Perkel, “Canada’s chief justice urges ‘major reforms’ to judge oversight” *City News* (31 March 2019), online: <<https://toronto.citynews.ca/2019/03/31/canadas-chief-justice-urges-major-reforms-to-judge-oversight/>>.

the civil justice system, with parties being less inclined to settle in suboptimal circumstances. But it was also expected that opinions would be mixed given the aforementioned praise/criticism of *Hryniak* and the 2010 Amendments. Given that the 2010 Amendments do not make any reference to litigants' demographics, it was expected that few respondents would view that litigants' experiences would vary in light of their demographic status. However, given the findings in Chapter Two that self-represented litigants can encounter special difficulty in dealing with summary procedures,<sup>60</sup> it was hypothesized that the presence of self-represented litigants would affect respondents' impressions. Moreover, given the need to invest finite resources in criminal litigation in the aftermath of *Jordan* to prevent stays of proceedings,<sup>61</sup> it was expected that this would hurt access to civil justice in the absence of more judges being appointed.

### III) FINDINGS

#### A. Demographics of Sample

Respondents were asked whether they wished to identify their gender, whether they identified as a racialized person, a member of the LGBT+ community, a person with a disability, or an Indigenous Canadian. Respondents were also asked to state when they were called to the bar. 36 of the respondents self-identified as female while 51 identified as male. No one identified as "Other" (despite the option to do so), although three preferred not to say. 14 respondents identified as racialized, 71 identified as non-racialized, and five preferred not to say. Two respondents identified as a person with a disability, and one identified as an Indigenous Canadian. None identified as members of the LGBT+ community. There were 45 respondents called prior to 2010 and 42 called in or after 2010, with three not answering. 2010 was chosen as a cut-off date for

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<sup>60</sup> Kennedy Rule 2.1, *supra* note 5 at 270-274

<sup>61</sup> Discussed in, *e.g.*, Palma Paciocco, "The Hours are Long: Unreasonable Delay after *Jordan*" (2017) 81 SCLR 233 ["Palma Paciocco"], analyzing *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 ["*Jordan*"].

recent calls as it was when the 2010 Amendments came into force. It is unsurprising that there were nearly as many lawyers called within the past ten years as before in light of the greater likelihood of junior lawyers to gain experience through *pro bono* work<sup>62</sup> and the well-known phenomenon of lawyers stopping the full-time practice of law after gaining some experience.<sup>63</sup> All quantifiable questions were analyzed to assess whether there were any notable differences in respondents' answers in light of their gender, racialization, or year of call. This will be returned to in Part III.I.

## **B. Effects of *Hryniak* and the 2010 Amendments**

### **1. Respondents regarded *Hryniak* as more impactful than 2010 Amendments**

The survey's first questions addressed the fundamental issues of this dissertation, with Question One asking whether "the Supreme Court's Decision in *Hryniak v Mauldin* [has] affected your approach to and/or experience in practice in recent years?" 48.9% (44 respondents) said that *Hryniak* had affected their practice experiences, while 28.9% (26 respondents) said that it had not. 20% (18 respondents) were not sure. The remaining 2.2% (2 respondents) indicated unawareness of *Hryniak*. Among those with an opinion, therefore, there was an approximate 5:3 ratio of believing that *Hryniak* *did* have an impact.

Question Three followed up with "Have the 2010 amendments to the Ontario *Rules of Civil Procedure* affected your approach to and/or experience in practice in recent years?" 33.3% (30 respondents) percent said that the 2010 Amendments had affected their practice experiences, while 48.9% (44 respondents) said that they had not. 16.7% (15 respondents) were not sure. A single

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<sup>62</sup> Francis Regan, "Legal Aid Without the State: Assessing the Rise of *Pro Bono* Schemes" (2000) 33:2 UBC L Rev 383 at, *inter alia*, 396; Mary Jane Mossman, Karen Schucher & Claudia Schmeing, "Comparing and Understanding Legal Aid Priorities: A Paper Prepared for Legal Aid Ontario" (2010) 29 WRLSI 149 at 195.

<sup>63</sup> A phenomenon that disproportionately impacts women: Fiona M Kay, Stacey Alarie & Jones Adjei, "Leaving Private Practice: How Organizational Context, Time Pressures, and Structural Inflexibilities Shape Departures from Private Law Practice" (2013) 20(2) Indiana J Global Leg Studies 22.

respondent (1.1%) indicated unawareness of the 2010 Amendments. In other words, there was an approximate 3:2 ratio asserting that the 2010 Amendments did *not* have an impact.

Why is there a difference in respondents' impressions of *Hryniak* vis-à-vis the 2010 Amendments given the overlap between them? Even though no respondents explicitly said so, a hypothesis worth exploring might be that a seminal case such as *Hryniak* becomes a particularly acute symbol. This will be returned to below in Part IV. But much of the difference in impressions of the effects of *Hryniak* and the 2010 Amendments is clearly attributable to respondents who were called to the bar for less than ten years not feeling qualified to comment on the state of things prior to 2010, with twenty-two respondents (24%) stating something to this effect.<sup>64</sup> Overall, there were 37 respondents who answered the first two questions differently, and 63.9% were called in or after 2010. Among those called to the bar in or after 2010, only 16.7% felt the 2010 Amendments had impacted their practice compared to 32.6% of all respondents and 48.9% of those called prior to 2010. Nowhere near a similar gap existed in light of year of call for opinion on the effects of *Hryniak* itself, where 53.3% of those called before 2010 said it affected their practice compared to 42.9% of those called afterwards.

Other respondents suggested they had limited ability to comment on the 2010 Amendments as they rarely came into contact with summary judgment (L84), or otherwise had a specific area of practice such as regulatory litigation (L80),<sup>65</sup> tax litigation (L03),<sup>66</sup> ADR (L79), or practising litigation only in conjunction with PBO (L05) that rendered *Hryniak* and/or the 2010 Amendments of limited applicability.

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<sup>64</sup> L08, L12, L14, L16, L22, L24, L25, L37, L45, L51, L52, L55, L57, L59, L60, L64, L70, L74, L78, L83, L84, L88.

<sup>65</sup> As noted in Lorne Sossin, "Chapter Seven: Access to Administrative Justice and Other Worries" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Publications, 2013) 1, different considerations and procedural rules apply in this context.

<sup>66</sup> Governed by the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a.

## 2. Respondents' Qualitative Experiences with *Hryniak* and 2010 Amendments

Questions Two and Four asked the lawyers to explain their responses to Questions One and Three. Overall, there was consensus that *Hryniak* makes parties more inclined to bring summary judgment motions and clarified the framework for doing so. Twenty-two respondents (24%) explicitly indicated that they or other lawyers are more likely to bring summary judgment motions,<sup>67</sup> including at an earlier time.<sup>68</sup> L86 even noted encountering “boomerang” summary judgment motions where summary judgment is awarded against the party originally seeking it. Other respondents praised “much needed clarity” in terms of the applicability of summary judgment. These exact words of L04 were similar to sentiment expressed by six other respondents who indicated how *Hryniak* now permeates discussions of summary judgment and how they frame their arguments concerning its appropriateness.<sup>69</sup>

However, not all respondents agreed. Indeed, eleven respondents indicated increased willingness to bring summary judgment motions in the immediate aftermath of *Hryniak*, but with that frequency decreasing in recent years due to impressions that Superior Court or Court of Appeal judges are less likely to grant it.<sup>70</sup> Four additional respondents indicated some increased willingness to bring summary judgment motions but also hesitation due to risks of being impractical in particular cases and/or derailing litigation if not successful.<sup>71</sup> This indicates the double-edged nature of summary judgment as a means to facilitate access to justice. L39’s lengthy response summarized many of these impressions:

The decision initially had me considering how best to set up my cases for possibly using summary judgment. [...] I was emboldened by the *Hryniak* decision initially until it

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<sup>67</sup> L08, L12, L13, L23, L31, L35, L37, L38, L39, L40, L51, L52, L53, L55, L58, L65, L66, L69, L77, L81, L86, L87.

<sup>68</sup> L13.

<sup>69</sup> L10, L46, L42, L36, L47, L50, L62.

<sup>70</sup> L08, L16, L19, L28, L32, L30, L48, L68, L75, L88, L39.

<sup>71</sup> L52, L58, L26, L39.

became clear that Courts were still reluctant to grant summary judgment in anything but the clearest possible cases. The risks (and costs) in proceeding outweighed the possible benefits in most cases. Similarly I felt that the amendments to the *Rules of Civil Procedure* would allow for a more robust taking control of actions by the courts. This has not been the case as courts are reluctant to use the powers given under the amendments where it might make scheduling mini trials or trails [*sic*] of issues difficult.

Impressions on case management were also divided. While L39 and L68 lamented its absence, L63 indicated frustration with the *extent* to which courts have taken control of particular matters. L72 was more sympathetic to courts, noting that even when parties have acted promptly, the court may not have the resources to facilitate effective movement.

A handful of respondents indicated objections to the premise that summary judgment is an effective means to facilitate access to justice. L54, for instance, believed that summary judgment could be as expensive as a short trial. L61 thought such motions “more complicated and time-consuming”, and L23 expressed the view that they included “an oppressive amount of paper”. L82 further opined that increased summary judgment and mediation mean that the “vanishing trial” is vanishing even more.<sup>72</sup>

Even among the vast majority of respondents who seemed to indicate greater – but not absolute – openness to summary judgment as an effective means to facilitate access to justice, there was emphasis that certain types of litigation are not amenable to summary judgment. While emphasizing being “mindful of proportionality” (also noted by L90), L07 indicated that “summary judgment [is] not worth it unless there’s a well funded litigant”. L09’s practice usually involves more than two parties in the litigation and recent Court of Appeal case law restricting “partial summary judgment” (*e.g.*, seeking to obtain summary judgment on behalf of a single defendant in a multi-defendant case) means summary judgment is now not an option in this particular type of

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<sup>72</sup> In line with Jonathan Lisus’s critique: Lisus, *supra* note 6.

practice. L88 also indicated that inability to pursue partial summary judgment limited *Hryniak*'s effectiveness.

The area of law and type of question before the court also affected respondents' impressions. L27 noted that the determination of a limitation period was a quintessential example of where summary judgment is appropriately sought post-*Hryniak*. Multiple employment litigators also cited increased use of summary judgment as being both appropriate and helpful.<sup>73</sup> L22 wrote:

Post-*Hryniak*, summary judgment has become the standard process for wrongful dismissal cases that go to litigation. This means pressuring employers more effectively, getting to mandatory mediation early, and, when necessary, getting a judgment within 6 months instead of 1-2 years.

Another employment lawyer (L21) also noted that discoveries have become more streamlined in the aftermath of the 2010 Amendments.

On the other side, however, two lawyers who practise personal injury/insurance litigation indicated distrust of summary judgment motions, and/or that increased attempts to use them have had significant costs and minimal benefits.<sup>74</sup>

Respondents' impressions on these first two questions were overwhelmingly – but not exclusively – confined to impressions regarding summary judgment. Among those who shared their experiences more broadly, for instance, L15 noted that, outside the summary judgment context, discovery rules have been interpreted in ways to expand availability of discovery in a way that has decreased the value of the rule change.<sup>75</sup> L26 and L31 similarly noted that the 2010 Amendments mandating “discovery plans” through Rule 29.1.03 has mostly been ignored, despite

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<sup>73</sup> In particular, L67 and L22.

<sup>74</sup> L31, L73.

<sup>75</sup> Attempts to restrict parties to seven hours of discovery have led to attempts to seek leave to exceed that, which these respondents seem to feel are granted not infrequently. This is defensible from a fairness perspective but still has the consequences of leading to more discovery. See the discussion in *Osprey Capital Partners v Gennium Pharma Inc et al*, 2010 ONSC 2338, 93 CPC (6th) 256, per Master Glustein (as he then was).



L21's view that discovery has become more streamlined. L35 felt that expanded use of the simplified *Rules* and the Small Claims Court's jurisdiction were effects of the 2010 Amendments that could facilitate access to justice. Lamenting that the 2010 Amendments have not been more applicable outside the summary judgment context, L83 wrote that "I have made efforts to use the 'culture shift' argument on a number of occasions outside of the summ[ary] judgment [context]. No judge has picked up on the argument."

### C. Speed

Turning to the access to justice variable of speed, Question 5 asked respondents whether "there [had] been a noticeable change in how quickly you have resolved civil cases in recent years". A majority – 52.2% (47 respondents) – said there had been no change. The next most common response – 31.1% (28 respondents) – was one of uncertainty. Of those who substantively responded, only 4.4% (4 respondents) felt matters were being resolved more quickly while 12.2% (11 respondents) felt things were taking longer.

The belief that there had been little change was reflected in responses to Question 6's request for an explanation to the answer to Question 5. L13 said there was "no discernible change" despite *Hryniak* and the 2010 Amendments while L10 added that the process "[s]till takes too long and [is] too expensive". Explaining why there has been no change, L68 wrote: "The delay in resolving cases is attributable to three things: (1) lack of urgency by counsel, (2) very few judges who are willing to actively and aggressively manage and push a case forward; and (3) long delays in getting court time for multi-day civil hearings."

Other impressions, however, were more complicated than simply believing that the *status quo* had remained. Several respondents indicated that some cases are being resolved more quickly post-*Hryniak* but others are not. These included:

- a belief that case management leads to quicker resolution but for cases that go to trial, the process takes even longer, so the average remains the same (L39);
- an impression that there are fewer settlements, but also more decisions resolved by way of summary judgment, which have “more or less” balanced out the delay of matters (L65);
- the employment of the proportionality principle can lead to cases being resolved more quickly (L90);
- feeling that the attitude of the particular judge towards dispositive motions matters enormously, with some cases being resolved quicker and others not (L36);
- being uncertain about effects on delay even in the context of rising costs (L16); and
- believing that “very strong and very weak cases can be resolved somewhat more quickly” but there has been no change for most (L48).

The belief that *Hryniak* and the 2010 Amendments have led to some, albeit limited, effects was also shared by L70, who viewed *Hryniak* as “somewhat helpful” and L77, who viewed the expanded ability to seek summary judgment as a way to reduce the length of litigation. Among those who believe litigation is taking longer, there was a view that it was attributable to an increase in motions (L79) rather than *Hryniak* or the 2010 Amendments *per se*. The notion that delay is increasing, even when some cases are decided more quickly, is complemented by Chapter One’s suggestion that there have been fewer unsuccessful jurisdiction motions in later years of the 2010s, but delay in resolution of the remaining jurisdiction motions has increased.<sup>76</sup>

The attitude of the respondents towards summary judgment – and the apparent uncertainty about whether it would be granted – also shone through some responses. L23 wrote that “A long

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<sup>76</sup> Kennedy Jurisdiction, *supra* note 34 at 99-100.

motion takes longer to schedule than a short trial. If summary judgment is appealed then there is a 2 year delay in the prosecution of the action.” L28 added that “Courts are blocking summary judgment. Any attempt to make such a motion often results in wasted time and effort” while L63 wrote “Everything takes at least as long as before but with more pointless interactions with the court.” This highlights Karakatsanis J’s acknowledgment in *Hryniak* that summary judgment motions themselves can be an unnecessary source of delay and expense.<sup>77</sup>

Others suggested parties with deep pockets can use that fact to illegitimately delay matters, exemplified in specific complaints regarding insurers (L31) or more general observations, such as the court having limited means to “set a bully straight” until the end of litigation (L07).

#### **D. Costs**

The questions on delay were followed by questions on financial expense: “Adjusting for inflation, has there been a noticeable change in the financial expense (in terms of legal fees and disbursements) required to resolve civil actions in recent years (since 2010)?” The results were as follows:

- 38.9% (35) answered expenses had increased;
- 2.2% (2) responded that they had decreased;
- 20.0% (18) said there had been no change; and
- 38.9% (35) said they were not sure.

Two respondents viewed *Hryniak* and the 2010 Amendments as leading to “slight improvements”,<sup>78</sup> such as: “increasing the threshold for simplified rules cases up to [\$100,000]

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<sup>77</sup> *Hryniak*, *supra* note 1 at para 74.

<sup>78</sup> These exact words of L56 were similar to the sentiment expressed by L77.

has made it more affordable to litigate low value matters” (L50). Ultimately, however, these were dwarfed in most respondents’ eyes by other factors, such as:

- cases being more complex (L56, L81);
- more pre-trial steps that are in theory designed to decrease costs but can be a source of increased expense in themselves (L39), such as non-summary judgment motions (L37) and mandatory mediation (L38);
- increased hourly rates for lawyers (L14) and the billable hour model itself (L15);
- costs of document production, identified by four respondents,<sup>79</sup> partially due to a proliferation of relevant documents due to increased electronic communications (though paradoxically, L30 said the ability to “outsource” document production can make litigation less expensive<sup>80</sup>);
- increased costs of running a law firm (L31), the costs of which get passed on to clients;<sup>81</sup> and
- increased costs of disbursements, such as court fees (identified by three respondents<sup>82</sup>) and, more notably, experts, which six different respondents identified as increasing the costs of litigation.<sup>83</sup> L82 also indicated increased costs of disbursements but did not specify which ones.

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<sup>79</sup> L16, L18, L25, L81.

<sup>80</sup> The outsourcing of document production, frequently offshore, has been ongoing for over a decade: see, e.g., Alexandra Hanson, “Legal Processing Outsourcing to India: So Hot Right Now!” (2009) 62 SMU L Rev 1889.

<sup>81</sup> John S Dzienkowski, “The Future of Big Law: Alternative Legal Service Providers to Corporate Clients” (2014) 82:6 Fordham L Rev 2995 at 3017; Edward Poll, “Under Water from Overhead? Here Are Ways to Keep Afloat” in *Law Practice Today* (March 2008), online: <<http://apps.americanbar.org/lpm/lpt/articles/mtt03081.shtml>>.

<sup>82</sup> L53, L36, L87.

<sup>83</sup> L27, L28, L31, L38, L53, L74.

The lack of improvement in most respondents' eyes – and the worsening of the *status quo* in the view of almost 40% – therefore appears attributable to many factors, unrelated to *Hryniak* and the 2010 Amendments. The occasional respondent (*e.g.*, L63) did feel that *Hryniak* and the 2010 Amendments were themselves the source of increased expense, claiming more money was being “spent on unnecessary steps.” But regardless of the reason for the (lack of) change, it would appear that most respondents would agree with L79's observation that “Litigation has become a forum for the wealthy. The exception being the Small Claims Court.”

## **E. Settlement and ADR**

### **1. Rates and Timing of Settlement**

Questions 9, 11, and 13 asked about settlement and ADR. Question 9 asked “has there been an increase or decrease in the rate of settlement in recent years (since 2010)?” Nearly 85% opined either that there had been no change (40% or 36 respondents) or they were not sure (44.4% or 40 respondents). Of the remainder, there was division as to whether there was an increase (8.9% or 8 respondents) or decrease (6.7% or 6 respondents) in rates of settlement. L90, explaining an increase in rates of settlement, wrote that proportionality now factors into settlement decisions. The overwhelming majority of results, however, suggest that the situation had not changed much, exemplified in L37's response that “I tell my clients that 99% of cases settle and that has not changed.” L19 suggested that “Everything is settling. The vast majority of young lawyers have virtually no chance of ever going to trial.”

This is not to suggest that respondents had no other impressions, with L27 writing that others in their office were more likely to go to trial post-*Hryniak*, while L09 explained a tendency to “act more for public authorities, which tend to take a more principled approach to settlement”.

On the issue of timing of settlement, respondents had opposite impressions. Believing that settlement takes place later, L31 (who clearly acts regularly against insurance companies) lamented that “insurers take things to the eve of trial” only to have settlement then and L73 (who also clearly litigates against insurance companies) opined that insurance companies suspect juries will not give plaintiffs large settlements and are now willing to go to trial more often. However, L39 wrote that while the rate of settlement has remained the same, this frequently occurs earlier due to mandatory mediation. L79 even wrote that the summary judgment rule has been used in arbitration with the consent of all parties, resulting in earlier resolution.

## **2. Satisfaction with Settlement**

Question 11 asked a related question about whether there has “been an increase or decrease in the quality of settlements and/or clients’ satisfaction from settlements in recent years (since 2010)?” The results were not very different. Again, over 85% were either unsure (39.3% or 36 respondents) or thought that there had been no change (48.3% or 43 respondents). One respondent did not answer. That leaves only eleven respondents opining on the question. These respondents were almost evenly divided on whether satisfaction had increased (6 respondents or 6.9%) or decreased (5 respondents or 5.7%).

Giving their impressions, L23 and L87 believed that satisfaction with settlement had decreased because settlement results from litigants’ inability to afford to continue. L74 suggested that changes to deductibles in insurance policies was the reason for the decreased satisfaction. Among those who thought satisfaction had increased was the belief from L77 that *Hryniak* and the 2010 Amendments had reduced costs. But another respondent (L15) observed that there is no satisfaction in litigation, even when settlement occurs. Expressing many respondents’ conflicting

emotions, L36 described that *Hryniak* could help to avoid some unprincipled settlements, but with settlement remaining by far the norm given the costs of not settling:

My clients are typically reluctant to settle. When they do, [...] I have really encouraged them to – and they aren't happy about it. They settle because court is too expensive and they cannot afford it. I do not know if that is different from years past. Maybe. I recently resolved a case (by getting judgment without a trial) and maybe I would have encouraged a settlement if a trial seemed more likely.

### 3. Use of ADR

Question 13 asked about ADR, which frequently leads to settlement, specifically: “Has there been an increase or decrease in the use of alternative dispute resolution in recent years (since 2010)?” Here, respondents had slightly stronger opinions. The majority were either uncertain (32.2% or 29 respondents) or felt there had been no change (38.9% or 35 respondents). 26.7% (24 respondents) felt the use of ADR had increased. Only two respondents (2.2%) felt the use of ADR had decreased.

This view that ADR remains either very common or is increasing even further appears to exist for a variety of reasons, including:

- clients not wanting to pay for trial (L38);
- legal fees and disbursements being lower with the view that ADR is less expensive (expressed by five respondents<sup>84</sup>) with multiple mediations being used in complex matters (L39);
- the view that litigation is uncertain (L16); and
- mandatory mediation is present in many locations in Ontario (as noted by five respondents<sup>85</sup> – this is not related to the 2010 Amendments *per se*).

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<sup>84</sup> L10, L16, L35, L39, L68.

<sup>85</sup> L15, L61, L21, L87, L28.

Three respondents<sup>86</sup> also emphasized that “sophisticated” clients were particularly likely to use or be interested in using ADR. L23 was nonetheless cognizant of the trade-offs entailed in this:

Sophisticated parties use ADR because it is speedier and increases control. Yet this comes at the expense of development of the jurisprudence. The parties who can afford to make full and thoughtful argument are opting for ADR. Self-reps generally can’t afford ADR, and they are not in a position to make an argument in front of a judge that will lead to valuable jurisprudence.

Some respondents were nonetheless skeptical of ADR, with L66 opining, “If lawyers cannot resolve the problem between themselves, [I’m] not sure how another lawyer can help keep it out of court.”

#### **F. Self-Represented Litigants**

Respondents were less ambivalent about the effects of self-represented litigants, as discerned through Question 15: “Do your answers to the foregoing questions change depending on whether a self-represented litigant is involved in a proceeding?”. One respondent did not answer. Of those who did, 31 (34.4%) answered that their approach to litigation and experience in recent years *did* change depending on whether a self-represented litigant was involved in the proceeding. But 30 (33.3%) said it did *not*. 29 (32.2%) were unsure. Five respondents said their lack of opinion was due to the fact that they did not frequently interact with self-represented litigants.<sup>87</sup>

Despite the division on whether the involvement of self-represented litigants affected their approach to litigation, those who felt that self-represented litigants did affect the litigation had strong opinions, and offered many views. A very interesting impression from nine respondents<sup>88</sup> suggested that self-represented litigants were less likely to settle and/or more likely to take more

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<sup>86</sup> L16, L23, L48.

<sup>87</sup> L18, L35, L56, L62, L73.

<sup>88</sup> L02, L19, L23, L32, L38, L39, L47, L57, L83.



“principled” stances. This may be a contributing factor to their greater presence in court.<sup>89</sup> Though one respondent (L83) put “principled” in scare quotes and added that this “results in a more drawn out litigation process to the detriment of the often innocent defendant.” Though understanding of the need to be flexible and generous with self-represented litigants, L83 cited an example of needing to win four motions against a self-represented litigant before a master was willing to award even nominal costs.

Twelve different respondents also felt that the presence of self-represented litigants increased challenges, costs, and/or time required to resolve an action due to a combination of the self-represented litigants’ need for more formalized processes and the difficulties that they had in understanding the process.<sup>90</sup> For instance, L23 and L66 wrote that ADR is very difficult if only one party has a lawyer while L32 wrote that “Claims by self-reps are almost always dealt with by trial or motion. Other mechanisms do not work.” L79, who has worked as a mediator and arbitrator, wrote: “A self rep has a more difficult time in putting their best case forward. [This p]uts the mediator and arbitrator in [a] difficult position.”

These problems that lawyers felt they encountered with self-represented litigants did not necessarily arise for lack of trying to prevent them. L44 wrote that “[o]ur firm approach is to offer to settle early and more often with self-reps”. L90 said that “While it is easier to deal with another lawyer, the same offers [on] the same basis are extended to self-reps.” L55 explained that, “When dealing with self-reps, I try to provide multiple opportunities to try to resolve the issue. I also use

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<sup>89</sup> The prevalence of self-represented litigants in court is noted by, *e.g.*, Trevor CW Farrow, *et al*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System, A White Paper for the Association of Canadian Court Administrators* (Toronto and Edmonton, 27 March 2012) at 14-16, online: <<http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf>>; Macfarlane Main Report, *supra* note 40.

<sup>90</sup> L10, L25, L47, L23, L32, L37, L40, L50, L53, L60, L68, L87.

motions only as a last resort unless the plaintiff's position is unwarranted. I also use Rule 2.1 letters to the Court [if] a self-represented claim is clearly vexatious."<sup>91</sup>

Despite a disproportionate amount of abusive litigation by a relatively small number of self-represented litigants,<sup>92</sup> there was an acknowledgment from respondents such as L07 that many self-represented litigants were in difficult situations with serious issues in disputes. L27 summarized many respondents' conflicting impressions:

Self-represented litigants result in delays, sometimes through no fault of their own. They get many additional opportunities to meet deadlines, file material, comply with orders etc. Many often move from self-represented to represented over and over again, which also creates significant delays. My practice is in civil litigation, so it is essentially unheard of for them to [have] legal aid assistance.

L64 offered a rare note of hope: that availability of simpler procedures post-2010 should help self-represented litigants. But even in the face of simpler procedures, civil courts can only do what they have the resources to do, resources that may have to be redirected if circumstances demand as much, as will now be discussed.

### **G. Effects of *Jordan***

The 2016 *Jordan*<sup>93</sup> decision imposed strict timelines on criminal trials, with there being presumptive stays of proceedings if these time limits are not observed.<sup>94</sup> Question 19 inquired about the effects of this on civil justice through asking, "Do you believe that the Supreme Court of Canada's 2016 decision in *R v Jordan* has had any effects on access to civil justice?" Exactly half of respondents (45, or 50%) felt that *Jordan* has hurt access to civil justice, while only 3.3% (3 respondents) felt that *Jordan* had helped access to civil justice. 31.1% (28 respondents) were uncertain while 7.8% (7 respondents) were unaware of the *Jordan* decision. 7.8% (7 respondents)

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<sup>91</sup> Rule 2.1 is discussed in Kennedy Rule 2.1, *supra* note 5.

<sup>92</sup> *Ibid* at 263.

<sup>93</sup> *Supra* note 61.

<sup>94</sup> Discussed in, *e.g.*, Palma Paciocco, *supra* note 61.

viewed *Jordan* as having had no effects on access to civil justice, with four respondents citing *Jordan* being a criminal case as the reason for this.<sup>95</sup>

The 15:1 ratio of believing *Jordan* has hurt as opposed to helped in civil justice is reflected in impressions, such as the following:

- Twenty-three respondents<sup>96</sup> – over a quarter of the total sample – had the impression that *Jordan* had exacerbated delay in civil matters as resources had been diverted to criminal matters with L48 succinctly describing this state of affairs as “Where there are not dedicated courts (*i.e.*, outside of Toronto<sup>[97]</sup>), prioritizing criminal cases has made it much more difficult to get access to courts for civil justice”;
- at least three respondents<sup>98</sup> were told by court staff or judges that motions or trials needed to be delayed to ensure compliance with *Jordan*, and/or that there were insufficient judges to manage the criminal list under *Jordan*, let alone the civil system; and
- through courts’ de-prioritizing civil matters, it is even harder for self-represented litigants to have their day in court (L08).

L73, writing in Summer 2019, gave a particularly poignant observation: “As of today the next available court date for a trial is in 2022. This is beyond what we have ever seen before.”

L39, who is a member of a committee with many judges, summarized many of these concerns:

the Bench is consumed with the *Jordan* case and assuring that criminal justice is provided in a timely fashion to the detriment of civil justice. Criminal justice has priority followed by family and child protection followed lastly by civil. Times to get lengthy civil trials has increased to the point where you can wait up to 3 to 4 years for your trial date once you are ready to set the matter down.

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<sup>95</sup> L54, L64, L77, L84.

<sup>96</sup> L01, L23, L48, L11, L18, L26, L38, L42, L50, L51, L55, L59, L63, L65, L68, L70, L74, L79, L81, L82, L87, L39, L73, L15, L19.

<sup>97</sup> Presumably this refers to the Toronto practice of “dedicating” judges to various areas of law such as class proceedings (see Kennedy Rule 2.1, *supra* note 5 at fn 196) and commercial litigation (see Warren K Winkler, “The Vanishing Trial” (Autumn 2008) 27(2) *Advocates’ Soc J* 3 at 4).

<sup>98</sup> L51, L53, L70.

Some criticism was levelled more directly at the Supreme Court. L15 expressed opposition “to any cap [...] The system is bloated and slow and has been for decades. Placing a cap/timing for trial in favour of rights of [the] accused may have the effect of rewarding delay in the system.”

L19 synthesizes frustration even more succinctly:

*R. v. Jordan* is terrible for civil justice. The Supreme Court should not have instituted a “legislative regime” that cannot be overturned by elected officials. When faced with allowing a murderer or fraudster to walk free, or to delay or force the settlement of a whiplash claim, the [motor vehicle accident] claimant loses out 100% of the time.

At the same time, there was equivocation from some respondents. L07, for instance, wants the spirit of *Jordan* to be applied in criminal and family law. L44 thought *Jordan* may have been a positive effect on “accelerating and keeping the system moving.” And L28 felt *Jordan* has had positive effects on *quasi*-criminal matters.

#### **H. Presence of a Culture Shift?**

Question 21 asked whether respondents believed “a ‘culture shift’ has been occurring this decade [the 2010s] in the conduct of civil litigation oriented towards promoting access to justice?” 28.9% (26 respondents) felt there had been while 46.7% (42 respondents) felt there had not. 24.4% (22 respondents) were unsure.

This could suggest that the majority of respondents felt that things have not changed, or not changed much, and that appears to be the case to some extent. But Question 22 sought impressions based on the above question, and also asked what a culture shift might look like. These impressions were valuable in illustrating the responses. Among those who thought there were signs of a culture shift, impressions included:

- a shift towards private arbitration (L59), and a recognition of the need to look for solutions to problems outside the courts (L35);
- lawyers and judges becoming more patient with self-represented litigants (L57);

- benefits from the enactment of the proportionality principle (L90);
- “Judges increasingly promot[ing] settlement through judicial mediation and blocking access to hearing time” (L22);
- “People seem[ing] to care more as the years go by” (L70); and
- PBO allowing parties who cannot afford lawyers to nonetheless have access to legal advice that allows them to appear more organized when in court (L38).

Others felt that there had been small movement, seen in increased acknowledgment and/or discussion about the importance of civil justice (*e.g.*, L60). Yet more thought that the judiciary is more cognizant about the problem than lawyers (L45, L53). L15 believed that the greater awareness around the need for access to justice has produced effects:

I have seen a shift in lawyers’ perceptions of access to justice and a need to give back by volunteering or supporting the shift in other ways (support of legal aid funding) that was not as accepted as a few decades ago. I recall when even volunteering at clinics outside of practice was frowned on (taking away from billable hours and insurance issues for giving such advice outside of firm control); now it is strongly supported by most firms. But that has more to do with volunteer programs and education than any change in the law or Rules of procedure [*sic*].

Many more impressions indicated the belief in little to no progress, however. L34 exemplifies this, answering Question 21 “Yes” (*i.e.*, there has been a culture shift) but then answered Question 22 with “NOWHERE NEAR ENOUGH” (capitalization in original). Other comments in this vein include:

- “There certainly should be a culture shift, but too many lawyers tend to delay cases either intentionally or out of an abundance of caution. There are simply not enough judges, and will never be enough judges, to control this behaviour” (L48);
- “In my view the Court has attempted to make access to justice for the public, however many factors have intervened” (L79);

- “The amount of grunt work in civil litigation is crazy and shoots up the cost to the client” with examples including lengthy paper productions, cuts to legal clinics, and practice directives changing from judicial district-to-judicial district across the province (L25);
- “The existence of access to justice would constitute a cultural shift. I don’t see that any meaningful progress has been made” (L46);
- “In my experience, lawyers have continued to approach litigation the same way” (L50), shared by L75, who wrote: “Legal aid does not extend to civil claims and therefore the same issues that existed 20 years ago when I started to practice still exist today [with] lots of self-represented litigants trying to navigate a complex court system”; and
- “I believe there have been many more references to a culture shift, but in practical terms, the profession is resistant to change. I have frequently been frustrated in attempts to resolve matters more efficiently by senior counsel or the bench as they are uncomfortable with creative approaches to dispute resolution” (L51).

Many respondents picked up on L51’s emphasis on “talk” or “lip service” about access to justice, which perhaps has a positive effect on consciousness-raising,<sup>99</sup> but lacks accompanying significant change:

- “More lip service for access to justice but the system is at least as complex and expensive for unrepresented parties as it was before” (L63);
- “Culture shift sounds nice but not sure cases are being resolved any faster” (L12);
- “[M]y peers and colleagues at law school and at work nearly universally profess to be concerned about access to justice [but] my overall impression is that while most

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<sup>99</sup> Seen in L60’s response. Consciousness-raising is not unimportant, as has been particularly noted in feminist scholarship: see, e.g., Janet E Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, NJ: Princeton University Press, 2006) at 43-44, 239.

recognize there is an access to justice problem, only a small fraction of the profession are actually doing anything about it (and I would not count myself among their ranks)” (L01);

- “[W]hile people talk a big game, I wouldn’t say I’ve seen a marked increase in people actually working towards access to justice. The culture shift has been limp [*sic*] service without tangible action” (L18);
- “For all the talk by LSO and the courts about A2J, [...] Unless the case is worth hundreds of thousands of dollars or more, it simply is becoming cost-prohibitive to litigate” (L87);
- “There is a lot more lip service. [...] It is too expensive for most clients to go to trial so they settle for less than they deserve or give up.” (L78);
- “Certainly people talk about access to justice all of the time, but recent provincial [government] policies and cuts seem to be moving in the opposite direction” (L84);
- “It’s all lip service. Nothing has really changed.” (L54); and
- “The discussion has simply become more vocal.” (L55).

Even among those who believe there has been change, there is a view that this is not always positive. For instance, L23 felt *Hryniak* and the 2010 Amendments have led to changes that are not necessarily positive: “I sense a desire by judges to dispose of litigation whenever possible. The civil justice system will provide an outcome, but not necessarily justice.”

The frustration seemed particularly acute among three personal injury lawyers (L31, L73, L74) who emphasized the particularly devastating consequences of being unemployed or underemployed while needing to seek treatment to recover from an injury for which one should be compensated.

Turning to what a culture shift *should* look like, respondents suggested:

- Being “[c]oncerned with fairness to self-represented plaintiffs and non-institutional plaintiffs re[garding] cost, time and expense of court processes and proceedings” (L49);
- “increased support for PBO within and without the Bar” (L14);
- “[PBO] should operate like legal aid with proper funding for civil cases limited to the income testing which is now done. They receive hundreds of calls daily and can respond to only a handful” (L77);
- “We’re all taught at law school that trials are bad and ADR is good. That’s a bad thing.” (L82);
- “Faster turnover of disputes [and] expeditious hearings to reduce fees” (L21);
- “We need to turn our minds to a more flexible system that can address the different types of litigation, not just one size fits all” (L04);
- a less adversarial system of litigation, especially in Toronto (L28); and
- “The system requires increased careful independent expert assessment in the early stages of any dispute – maybe the process would equate to ‘eliminating claim(s)’ with [...] parties involved in an informal, more affordable, lower risk environment” (L07).

Some specific suggestions were given, such as:

- “Access to justice would increase if we reduced court time allocated to procedural matters and enacted tighter procedural rules. No court time should be spared on costs, for example” (L36);
- “E-filing and service of documents should be prioritized. Active case management must be aggressive” (L68); and
- Courts operating for longer hours and increasing limits to access the Small Claims Court and Simplified Procedure (L19).



L54 cynically dismissed the project itself, proclaiming “It is and will always be about the money.” L37 felt that the problem was not solvable without government involvement: “Until the government funds or subsidizes civil litigation, there is no access to justice.” Putting both of these impressions together, L66 wrote that incentives are misaligned for change: “Lawyers benefit from delay. Courts are public institutions run by public servants without much incentive to make things efficient.”

L39 seemed to channel many different responses, recognizing that there is greater awareness of the problem, but being skeptical as to how much change has actually occurred, in light of legal uncertainty and competing pressures on lawyers:

I think the profession and the government pays lip service to access to justice but that access to justice itself is difficult if not impossible when the economic pressures of practice on lawyers[,] in particular sole practitioners and small firm lawyers, are such that promoting a culture shift is difficult. In addition the government is increasing the disbursement costs and the courts themselves appear to chastise lawyers for failing to be extremely well prepared and covering all possible angles while at the same time criticizing lawyers for their large legal bills to their clients. Appella[te] courts and trial courts decisions are such that certainty in law is difficult to discern. Where there is uncertainty, costs increase as those with deep pockets can exploit the uncertainty while those without deep pockets must “cave” or run a risk that they cannot afford to run. The deck is stacked against those who need access to justice most being those with few resources. [...] Steps should be taken to encourage access to justice through a robust legal aid funding and court fees; particularly for those having to defend against claims, should be lowered.

## **I. Demographic Variables**

### **1. Demographics of the Client**

The vast majority of respondents felt that litigants’ demographic characteristics (such as race or gender) did not affect the litigants’ experiences with *Hryniak* and the 2010 Amendments (55% or 49 respondents), or they were unsure (36% or 32 respondents). Among those who gave these responses, most did not give explanations but among those who did, impressions included “see[ing] no change based on the demographic status of the litigants in my practice” (L39) and

having “[n]ever thought about it that way” (L37). Two respondents – one racialized, one not – responded somewhat tersely to the question being asked with L54 writing “I deal with the merits of the case; not the race or gender of the client” and L55 similarly stating “I report to my clients on the merits of the claim, not demographic status.”

Only 9% of respondents (8 persons) viewed litigants’ demographics as having an impact on those litigants’ experiences interacting with *Hryniak* and the 2010 Amendments. However, it is worth observing that 50% of those who felt so were racialized lawyers themselves (though they were still a minority, albeit 28.6%, of the fourteen racialized lawyers in the sample).

Explaining their answers, some respondents emphasized economic (L07) or language (L36, L50, L57) barriers as being more important than the listed examples of race or gender *per se*. L79 similarly wrote: “*As long as they can clearly articulate their position* race or gender does not matter” [emphasis added by me]. Implicit in responses such as these appears to be a suggestion that racialization may be correlated with linguistic and/or economic challenges, and this is posing difficulty to litigants post-*Hryniak*.

However, other observations, though very much in the minority, were more profound and concerning. L19, for instance, wrote how the shortcomings of the civil justice system (including what they viewed as the limited effects of *Hryniak* and the 2010 Amendments) can perversely incentivize very low-income racialized individuals to remain in the court system while pushing out the lower-middle class:

In motor vehicle accident litigation, especially for minor accidents, most plaintiff’s [*sic*] come from racialized minorities. The economic aspects of running a weak whiplash claim, prevent most middle and high income earners from bothering to sue. But for someone who earns \$20,000 per year, a \$20,000 payout after 4 years of hassle makes economic sense. Most [motor vehicle accidents] are resolved through dispute resolution, so perhaps ADR could be seen to be of assistance to minorities in this situation.

L61 added, “There has been an increasing number of poor litigants, mostly from the immigrant population that is ignorant of their rights and are often taken advantage of.”

L31, whose practice clearly includes many actions against insurers and was also the sole respondent who self-identified as an Indigenous Canadian, wrote that “There is no question in my mind that insurers are racist. They offer less and litigate more against immigrants.” L74, who also clearly practised in the personal injury area, similarly wrote:

Generally juries are more favourable to English speaking Caucasians. This inherent bias in society then effects [*sic*] access to justice for racialized communities. Judge alone trials should become the standard or more common place in civil litigation even for the regular procedure. It’s great that now it is for simplified procedure.

L23’s concern about the intersection of marginalized populations and lack of access to civil justice was more profound, citing the lack of case law caused by a lack of access to the civil court system: “In a constitutional democracy judges protect minorities. Our society will not develop in a way that is favourable to minorities without the development of jurisprudence.” It is worth emphasizing that these impressions were not common – but they are still concerning.

## **2. Demographics of the Lawyers**

As noted above, only two respondents identified as persons with disabilities, only one identified as an Indigenous Canadian, and no one identified as a member of the LGBT+ community. It accordingly could not be observed whether there were notable differences in lawyers’ impressions of *Hryniak* and the 2010 Amendments based on these characteristics. However, whether respondents’ year of call affected their answers was a subject of analysis, as was whether there were any noticeable differences in responses in light of race and gender. Given that the entire sample surveyed cannot be considered representative of the population of Ontario litigators, and the subsets of years of call, gender, and race are even smaller, caution must be emphasized in looking at these numbers. But it would be derelict not to report them.

**a. Relevance of Year of Call**

By far the most striking difference between respondents called before and after (or in<sup>100</sup>) 2010 was the extent to which the more senior lawyers had stronger opinions on the changes (or lack thereof) in civil litigation in recent years. To every single question, a larger number of post-2010 calls indicated they were “unsure” about the answer. This is perhaps unsurprising given the comparative lack of pre-*Hryniak* experience of the more recently called lawyers. This “agnosticism gap” did range from question-to-question: *i.e.*, there is a 6.5:1 gap on the question of whether the 2010 Amendments have affected experience but only a 1.18:1 gap on whether there has been a culture shift. But it was substantial in many questions, such as the effects of *Hryniak* (2.58:1), views about the length (3.58:1) and expense (3.48:1) of litigation, changes to the prevalence of (1.65:1) and satisfaction with (2.25:1) with settlement, and the use of ADR (3.94:1). Nor are any of these attributable to particularly small sample sizes – all of these questions led to at least fifteen (and as many as forty) lawyers answering they were “unsure” about the answers.

The number of more recent calls being uncertain seems to have resulted in the more senior lawyers being likelier to have substantive views on the answers to the questions, including that:

- *Hryniak* and the 2010 Amendments have affected their experience/approach to practice (53.3% and 48.9% among the pre-2010 calls compared to 42.9% and 16.7% among the post-2010 calls);
- litigation had become longer and more expensive (24.4% and 53.3% among pre-2010 calls compared to 4.8% and 23.8% among post-2010 calls) – admittedly, the only respondents

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<sup>100</sup> Those called to the bar in 2010 will be referred to as “post-2010 calls” for ease of reference. Given that the 2010 Amendments became effective January 1, 2010, they did not experience practice prior to 2010 (though they may have had articling experience).

who felt litigation had become less expensive were also pre-2010 calls but they were only two individual respondents;

- settlement and ADR have become more prevalent (11.1% and 31.1% among pre-2010 calls compared to 7.1% and 21.4% among post-2010 calls); and
- *Jordan* has hurt access to civil justice (62.2% among pre-2010 calls compared to 40.5% among post-2010 calls).

To be fair, in some questions, the older calls were likelier to have opinions and therefore likelier to be split in their opinions: for example, being likelier to believe both that satisfaction from settlement had increased *and* decreased compared to the newer calls.

Some questions also yielded no serious differences based on year of call in the answers: for instance, the older and newer calls had very similar views on the relevance of a litigant's self-represented status. Newer calls were also slightly more likely to believe there had been a "culture shift" in the 2010s (33.3% answering yes compared to 40.5% answering no) than the older calls (24.4% compared to 53.3%). Overall, however, it is fair to say that the older calls believed that there had been more change. All differences in answers based on year of call can be found in Appendix K.

#### **b. Relevance of Gender**

As illustrated in Appendix L, there were not many notable differences in responses in light of a lawyer's gender. Among the more notable disparities were female lawyers being more likely to opine that settlement had increased (13.9% compared to 5.9%), in addition to satisfaction from settlement (13.9% compared to 2%). Male lawyers, by contrast, were more likely to believe that *Hryniak* had affected their experience in and/or approach to practice (54.9% compared to 38.9%). But there do not appear to be any consistently connected differences analogous to what could be

found among the lawyers' years of call. As such, more methodological research would be necessary to be certain that gender does or does not affect lawyers' impressions of changes to Ontario litigation in recent years.

### c. Relevance of Race

The sample size of 14 racialized lawyers, and no more than eight racialized individuals answering any question in the same manner, renders it particularly unsafe to draw conclusions about differences in responses based on race, even more so than for gender or year of call.<sup>101</sup> This is amplified in light of the results, the entirety of which are found in Appendix M, where variations (insofar as there are any) between respondents based on their race could be reduced significantly by adding just one more racialized lawyer to the sample. In any event, most answers to most questions did not reveal a notable gap between racialized and non-racialized lawyers.<sup>102</sup>

The one notable, possible exception to this was the increased likelihood of racialized lawyers to view litigants' experiences with *Hryniak* and the 2010 Amendments as having differed in light of the litigants' demographic status. 28.6% of racialized lawyers believed this to be the case compared to 5.8% of non-racialized lawyers. Moreover, 63.8% of the non-racialized lawyers asserted that the litigants' demographics did *not* affect their experience in the civil justice system in recent years compared to only 21.4% of racialized lawyers. The remaining gap can be attributed to 50% of racialized lawyers being unsure compared to only 30.4% of non-racialized lawyers.

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<sup>101</sup> David M Dietz, Christopher D Barr & Mine Cetinkaya-Rundel, *OpenIntro Statistics*, 3d ed (2015), online: <[https://www.openintro.org/stat/textbook.php?stat\\_book=os](https://www.openintro.org/stat/textbook.php?stat_book=os)> at 178, noting that a sample size of less than thirty is particularly vulnerable.

<sup>102</sup> For example, it is worth noting that racialized lawyers were more likely to view that the rate of settlement has increased (28.6% compared to 7%), though also more likely to view it as having decreased (14.3% compared to 5.6%), with the reason being non-racialized lawyers viewing it as more likely not to have changed (42.7% compared to 28.6%). Another gap that appears large also appears likely attributable to coincidence (no causal rationale jumps to mind, in any event): racialized and non-racialized lawyers essentially having inverted statistics on being unsure whether litigation's length is increasing (57.1% of racialized lawyers and 26.8% of non-racialized lawyers) or believing there is no change (28.6% of racialized lawyers and 59.2% of non-racialized lawyers).

Indeed, as many racialized lawyers (in absolute numbers) viewed demographics to be as relevant to litigants' experiences as did non-racialized lawyers despite there being five times as many non-racialized lawyers in the sample.

The difficulty of drawing conclusions relating to the impact of race based on these results (as is done for many other issues in Part IV) also arises because this project is ill-suited to delve into critical race scholarship in depth. However, this is an issue worthy of further study, with two considerations underscoring this. First, the survey asked respondents whether the effects of recent changes to procedural law differed in light of litigants' demographics status. This is a different and more narrow question than asking about the extent to which racialization affects interactions with the civil justice system more broadly, something also worthy of study.<sup>103</sup> Second, racialized lawyers responding in notably different ways even to the more narrow question suggests this area of study may contribute to recent discussions on the value of diversity in the bar.<sup>104</sup>

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<sup>103</sup> See, e.g., Sara Sternberg Greene, "Race, Class, and Access to Civil Justice" (2015) 101 Iowa L Rev 1263.

<sup>104</sup> This has most obviously been an issue recently in the debate over the "Statement of Principles" at the LSO: see, e.g.: Justin P'ng, "The Gatekeeper's Jurisdiction: The Law Society of Ontario and the Promotion of Diversity in the Legal Profession" (Spring 2019) 77 UT Fac L Rev 82; Omar Ha-Redeye, "My Friends Muddy the Waters: How a Statement of Principles Became a Public Fiasco" (December 15, 2017). Ethics Primer at King Law Chambers, 2017. Available at SSRN: <https://ssrn.com/abstract=3091758>; and Lorne Sossin, "Slouching towards Inclusion: The Law Society's Statement of Principles" *Dean Sossin's Blog* (24 October 2017), online: <<https://deansblog-osgoode-yorku-ca.ezproxy.library.yorku.ca/2017/10/slouching-towards-inclusion-the-law-societys-statement-of-principles/>>, *contra*: Léonid Sirota, "The Law Society of Upper Canada should stick to its statutory knitting", *CBA National* (7 November 2017), online: <<http://nationalmagazine.ca/en-ca/articles/law/ethics/2017/articles-november-2017-the-law-society-of-upper-c?lang=FR>>; Murray Klippenstein & Bruce Parly, "How Social Justice Ideologues Hijacked a Legal Regulator" *Quillette* (11 February 2019), online: <<https://quillette.com/2019/02/11/how-social-justice-ideologues-hijacked-a-legal-regulator/>>; and Arthur Cockfield, "Limiting Lawyer Liberty: How the Statement of Principles Coerces Speech" (March 15, 2018) (Queen's Law Research Paper Series no. 2018-100, 2018). Available at SSRN: <https://ssrn.com/abstract=3141561>. But the issue is broader: e.g., Challenges Faced by Racialized Licensees Working Group, *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions* (Toronto: Law Society of Upper Canada, 2016), online: <[https://www-lsuc-on-ca.ezproxy.library.yorku.ca/uploadedFiles/Equity\\_and\\_Diversity/Members/Challenges\\_for\\_Racialized\\_Licensees/Working-Together-for-Change-Strategies-to-Address-Issues-of-Systemic-Racism-in-the-Legal-Professions-Final-Report.pdf](https://www-lsuc-on-ca.ezproxy.library.yorku.ca/uploadedFiles/Equity_and_Diversity/Members/Challenges_for_Racialized_Licensees/Working-Together-for-Change-Strategies-to-Address-Issues-of-Systemic-Racism-in-the-Legal-Professions-Final-Report.pdf)> [perma.cc/DS8L-LZ2A].

#### **IV) SUMMARY AND LESSONS**

The previous section reported primarily on the survey's responses without annotations, this chapter's primary contribution to the literature. This final section nonetheless seeks to draw lessons in eight areas where the responses appear worthy of independent analysis and/or complement other work in the field. First, it is posited that the surveys' responses suggest that *Hryniak* and the 2010 Amendments have had some, albeit limited, effects, on resolving certain types of cases more quickly. Second, a superficial contradiction will be addressed given the prevalence of responses suggesting that there has been little-to-no-change. Third, it will be emphasized that a substantial minority of respondents view increased summary judgment and case management to be unfavourable as there are trade-offs that come even with the benefits. Fourth, the necessity of exploring whether there has been a drop in the use of summary judgment in very recent years will be discussed. Fifth, it will be proposed that the responses suggest that explicit prescriptions in particular areas of practice are likelier to facilitate access to justice than more general consciousness-raising. Sixth, the respondents' impressions on the effects of legal uncertainty will be analyzed. Seventh, the responses regarding self-represented litigants will be revisited and summarized from a policy perspective, leading to the eighth and final area: the role of legal aid, *pro bono* work, and government support to facilitate access to civil justice.

##### **A. Effects of *Hryniak* and the 2010 Amendments**

###### **1. Effects Present, if Narrow**

The responses to Questions One and Three suggest that a substantial number of litigators view *Hryniak* and, to a lesser extent, the 2010 Amendments, to have affected their experience in and/or approach to practice in recent years. This complements previous analysis, both by Brooke



MacKenzie<sup>105</sup> and in the earlier chapters of this dissertation, that the 2010 Amendments and *Hryniak* (or their spirit<sup>106</sup>) have led to resolving at least some cases more quickly and with less financial expense.

To be sure, it is not suggested that this has been universal. Many respondents suggested little-to-no effects of *Hryniak* and the 2010 Amendments, with the needle moving even less (or in the opposite way of intentions) on questions of costs, delay, and settlement. This will be returned to below. But even if a substantial minority of lawyers view their practice to have changed, that suggests that change has occurred in a substantial number of cases, and is noteworthy in itself.

## 2. Effects Depend on Area of Law and Legal Issue

The area of law and legal issue at stake certainly seem to affect the appropriateness of summary judgment in particular. Three employment lawyers noted that summary judgment is particularly common in their field post-*Hryniak*, and they view this as positive, being able to resolve litigation quicker and with less expense.<sup>107</sup> This has been observed in case law<sup>108</sup> and is not altogether surprising: employment litigation, particularly wrongful dismissals where just cause is not alleged, typically involves facts that are relevant to determining issues, such as appropriate pay in lieu of notice, but which are also discrete.<sup>109</sup> The ability to get a judgment more quickly can benefit both employees<sup>110</sup> and employers.<sup>111</sup> Determining a limitation period is another type of legal question that both respondents (*e.g.*, L27) and case law<sup>112</sup> have repeatedly held is appropriate

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<sup>105</sup> MacKenzie SJ, *supra* note 5.

<sup>106</sup> The discussion of Rule 2.1 in Kennedy Rule 2.1, *supra* note 5.

<sup>107</sup> L22, L67, and (to a lesser extent) L21.

<sup>108</sup> *Peticca v Oracle Canada ULC*, 2015 CarswellOnt 5450, [2015] OJ No 198 (SCJ) at paras 1-2, per Myers J.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> See, *e.g.*, *Betts v IBM Canada Ltd/IBM Canada Ltée*, 2016 ONSC 2496, 31 CCEL (4th) 60 (Div Ct), aff'g 2015 ONSC 5298, [2015] OJ No 4461 (SCJ) [*"Betts"*].

<sup>112</sup> See, *e.g.*, *Demide v Canada (Attorney General)*, 2015 ONSC 3000, 47 CLR (4th) 126 (SCJ) at para 134.

for summary judgment post-*Hryniak*. In this sense, the responses complemented what case law already shows: that these legal issues are being decided summarily saves resources for courts and litigants, in addition to contributing to valuable jurisprudence.<sup>113</sup> This is a good in itself.

This does not extend to other areas of law, however. Three different respondents emphasized personal injury/insurance litigation<sup>114</sup> as an area where the 2010 Amendments and *Hryniak* have had little if any effect and may in fact have been counterproductive. This too is unsurprising. Some insurance litigation – such as interpretation of insurance contracts<sup>115</sup> – may be appropriate for disposition by summary judgment. But much personal injury litigation contains a great deal of expert testimony and complicated assessments of damages<sup>116</sup> that seem particularly ill-suited for what has been critically called “trial by box”.<sup>117</sup>

### **B. One Step Forward, Two Steps Back?**

The conclusion that there have been some, albeit limited, effects of *Hryniak* and the 2010 Amendments may seem contradicted by the answers to Questions Five and Seven, which suggest that litigation is becoming neither less expensive (and, indeed, may be becoming more expensive) nor quicker (though there is more equivocation on that front). Similarly, respondents thought that there had been little change to the rates of settlement while the use of ADR is, if anything, increasing. Given that *Hryniak* and the 2010 Amendments sought to achieve different objectives, it may seem as though they have had no – or even contrary – effects.

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<sup>113</sup> *Betts*, *supra* note 111 has become a leading case on abandonment of employment: see, e.g., *Sutherland v Messengers International*, 2018 ONSC 2703, 46 CCEL (4th) 201 (Div Ct) at para 24, per Thorburn J (as she then was) and Howard Levitt, *The Law of Dismissal in Canada*, 3d ed (loose-leaf) (Toronto: Canada Law Book, 2003) at 12-14.7-12-14.8.

<sup>114</sup> L31, L73, L74.

<sup>115</sup> See, e.g., *Stantec Consulting Ltd v Altus Group Ltd*, 2014 ONSC 6111, 2014 CarswellOnt 14842 (SCJ), noting the appropriateness of summary judgment to resolve issues of contractual interpretation.

<sup>116</sup> See, e.g., *Griva v Griva*, 2016 ONSC 1820, 2016 CarswellOnt 4019 (SCJ).

<sup>117</sup> *Hamilton*, *supra* note 58.

This seeming contradiction between responses is explained by the follow-up questions, asking why lawyers felt this way. Their responses revealed that their reasons were usually not because they viewed *Hryniak* and the 2010 Amendments to have been ineffectual or counterproductive (though a few felt this way, as discussed in the next subsection). Rather, they had other reasons for feeling that, for instance, the costs of litigation had stayed the same or increased. There were numerous reasons for this, seven of which bear repeating as they complement hypotheses that have been raised elsewhere.

The most prominent among these was the increased use and prevalence of expert witnesses, which six different respondents<sup>118</sup> cited as a reason for litigation's increased costs. The proliferation of experts is sometimes defended as necessary to ensure that judges have knowledge to which they normally would not have access.<sup>119</sup> However, it has also led to the phenomenon of "trial by expert" where parties try to "out-expert" each other through finding an expert who will testify to whatever the party wants,<sup>120</sup> advantaging parties who can afford to hire more experts.<sup>121</sup> There are also infamous instances of attempting to call an "expert" who is actually opining on a legal issue.<sup>122</sup> That so many respondents (unprompted) cited this as a reason for increasing costs of litigation is an additional reason to be hesitant to accept increased expert testimony. The *Rules* are set to be amended effective January 1, 2020 to allow an expert to testify by way of affidavit in

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<sup>118</sup> L27, L28, L31, L38, L53, L74.

<sup>119</sup> This has been argued for particularly strongly in sexual assault cases: see, e.g., *R v Ennis-Taylor*, 2017 ONSC 5797, 2017 CarswellOnt 16533 (SCJ), not admitting the expert evidence due to concerns about prejudice to the accused and qualifications of a particular expert, but agreeing such evidence would be helpful to a jury.

<sup>120</sup> See, e.g., *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 SCR 182 at para 18, per Cromwell J; David M Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009) 35 Queen's LJ 565.

<sup>121</sup> The expense of extensive expert evidence was acknowledged by Binnie J in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38 at para 128 (dissenting).

<sup>122</sup> See, e.g., *Apotex Inc v Pharmascience Inc*, 2004 FC 1198, 36 CPR (4th) 218, per Blais J (as he then was), aff'd 2005 FCA 144, 332 NR 389.

cases of Simplified Procedure.<sup>123</sup> However, this was cited by neither any of the participants expressing concern about the costs of experts, nor those who praised the expanded ability to use Simplified Procedure (R35, R50) or advocated for its availability being increased even further (R19). Nor did any respondents make the link between Simplified Procedure and expert witnesses.

Second, four respondents cited costs of document production as the reason for the increased cost of litigation.<sup>124</sup> The cost of discovery as an access to justice impediment has been chronicled extensively<sup>125</sup> and it may be that increased electronic communications lead to even more documents being relevant for production.<sup>126</sup> While this can be defended as essential for fairness,<sup>127</sup> it may be worthwhile asking whether the extent of unfairness caused by more limited documentary discovery is worth the costs of extensive discovery. This is especially the case given that unfairness can be mitigated through the ability of a judge to draw an adverse inference against a party that fails to produce a relevant document.<sup>128</sup> While the 2010 Amendments attempted to enshrine the principle of proportionality in discovery, six respondents suggested that this had little impact<sup>129</sup>

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<sup>123</sup> *Rules*, *supra* note 2 at Rule 76.09.1 (coming into effect January 1, 2020).

<sup>124</sup> L16, L18, L25, L81.

<sup>125</sup> Justice Thomas Cromwell noted the counterproductivity of expanding discovery rights in extrajudicial comments in 2013 while still serving on the Supreme Court: Beverley Spencer, “The Road to Justice Reform: An Interview with Supreme Court of Canada Justice Thomas Cromwell” *The National* (July-August 2013), online: <<http://nationalmagazine.ca/Articles/Recent4/The-road-to-justice-reform.aspx>>. This is also a common hypothesis in the United States: see, *e.g.*, Judge (as he then was) Neil Gorsuch, “13th Annual Barbara K. Olson Memorial Lecture” (Address Delivered at the Federalist Society for Law and Public Policy’s 2013 National Lawyers Convention, The Mayflower Hotel, Washington, DC, 15 November 2013), online: <[https://www.youtube.com/watch?v=VI\\_c-5S4S6Y](https://www.youtube.com/watch?v=VI_c-5S4S6Y)> at 6:15-10:30. See also *Hryniak*, *supra* note 1 at para 29.

<sup>126</sup> This has become subject to the *Sedona* Canada Principles on e-discovery, as described in Ken Chasse, “The Admissibility of Electronic Business Records” (2010) 8 Can J L & Tech 105 at 130, 149, *etc.* These are incorporated in the *Rules*, *supra* note 2, Rule 29.1.03(4).

<sup>127</sup> This varies in light of the circumstances: EDD Tavender, QC, “Considerations of Fairness in the Context of International Commercial Arbitrations” (1996) 34 Alta L Rev 509 at 522, cited in *ENMAX Energy Corporation v TransAlta Generation Partnership*, 2019 CarswellAlta 1340, 2019 ABQB 486.

<sup>128</sup> See, *e.g.*, *Ontario (Attorney General) v \$11,633.21 in Currency (In Rem)*, 2009 CarswellOnt 9261 at para 4, per Matlow J.

<sup>129</sup> L16, L18, L25, L26, L31, L81.

and will be discussed further in Part IV.E. This is a problem that international commercial arbitration has also attempted to solve in recent years.<sup>130</sup>

Three respondents also brought up, in various ways, the billable hour model for providing legal services as reason for litigation's increasing costs. The billable hour model's incentivization of inefficiency has been noted for years.<sup>131</sup> The rise of alternative fee arrangements<sup>132</sup> may only be peripherally related to civil procedure reform (though it arguably could be better reflected in the law of costs<sup>133</sup>) and is clearly another area of importance in access to justice discussions.

Fourth, and related to lawyers' increased rates, law firm overhead was cited as a reason for increased legal fees (L31), in line with previous analysis.<sup>134</sup> It might be that this overhead/bureaucracy provides important value to clients that is difficult to quantify. But law firms should think carefully about whether increased overhead provides value to clients that is worth the cost.<sup>135</sup>

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<sup>130</sup> See, e.g., Michele Curatola & Federica De Luca, "Document Production in International Commercial Arbitration: A 'Trojan Horse' for Uncontrolled Costs" (2018) *Transnational Dispute Management* 4, url: <[www.transnational-dispute-management.com/article.asp?key=2576](http://www.transnational-dispute-management.com/article.asp?key=2576)>; Courtney Lofti, "Documentary Evidence and Document Production in International Arbitration" (2015) 4 *YB on Intl Arbitration* 99.

<sup>131</sup> Brooke MacKenzie, "Better value: Problems with the billable hour and the viability of value-based billing" (2013) 90 *Can Bar Rev* 677.

<sup>132</sup> Albert H Yoon, "The Post-Modern Lawyer: Technology and the Democratization of Legal Representation" (2014) 66 *UTLJ* 456 at 462; Catherine Ho, "Is This the Death of Hourly Rates at Law Firms?" *Washington Post* (13 April 2014), online: <[http://www.washingtonpost.com/business/capitalbusiness/is-this-the-death-of-hourly-rates-at-law-firms/2014/04/11/a5697018-be97-11e3-b195-dd0c1174052c\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/is-this-the-death-of-hourly-rates-at-law-firms/2014/04/11/a5697018-be97-11e3-b195-dd0c1174052c_story.html)> (noting that law firms were experimenting with alternative fee arrangements); *Spiteri Estate v Canada (Attorney General)*, 2014 ONSC 6167, 2014 CarswellOnt 14831 (Master) ["*Spiteri Estate*"] at para 25.

<sup>133</sup> See *Spiteri Estate*, *ibid*, navigating uncertain territory.

<sup>134</sup> Dzienkowski, *supra* note 81; Poll, *supra* note 81.

<sup>135</sup> The tendency of bureaucracies to expand even when they do not provide obvious value in service delivery is not confined to the legal profession. Similar criticism has been levelled at universities for increasing their tuition, largely to expand their administration: Paul F Campos, "The Real Reason College Tuition Costs So Much" *The New York Times* (4 April 2015), online: <<https://www.nytimes.com/2015/04/05/opinion/sunday/the-real-reason-college-tuition-costs-so-much.html>>. Similar thought could occur at the Law Society of Ontario, which has the highest fees in Canada (inevitably indirectly passed onto clients and, in the case of government lawyers, taxpayers), and has engaged in significant expenditures in recent years (see, e.g., Bruce Parry, "This lawyer was determined to stop the law society's forced 'statement of principles'" *Financial Post* (14 May 2019), online: <<https://business.financialpost.com/opinion/this-lawyer-was-determined-to-stop-the-law-societys-forced-statement-of-principles>>), the value of which can certainly be defended but also contested: see, e.g., *supra* note 104.

Fifth, three respondents (L53, L36, L87) brought up increased court fees as a reason litigation has become more expensive. These are frequently defended as a user tax that disincentivizes needless filings<sup>136</sup> and are recoverable at the end of litigation.<sup>137</sup> However, they also adversely impact economically disadvantaged litigants<sup>138</sup> and an application (causing time and expense) needs to be brought for a litigant to be absolved of the need to pay them.<sup>139</sup> The necessity and amount of filing fees can certainly be questioned, therefore, especially as the enactment of Rule 2.1 allows courts to very summarily address facially abusive matters.<sup>140</sup>

Sixth, dozens of respondents cited the *Jordan* case as having diverted resources from the civil court system,<sup>141</sup> with half of the respondents believing *Jordan* has negatively impacted access to civil justice. As a constitutional case, *Jordan* cannot be legislated away (as noted by L19) unless the notwithstanding clause is invoked. As such, it is understandable for courts to try to divert limited resources to the criminal system to avoid having criminal prosecutions stayed. However, it should be acknowledged that an unintended consequence of *Jordan* appears to be decreased access to civil justice. Though *Jordan* was certainly well-intentioned, one cannot help but wonder if it is too rigid<sup>142</sup> and/or if the Supreme Court would have come to the same decision (which the parties in *Jordan* did not ask for<sup>143</sup>) had they known of such collateral consequences. Of course, this may be rationalized<sup>144</sup> on the basis of the grave consequences of a criminal trial.<sup>145</sup>

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<sup>136</sup> See the dissenting reasons of Rothstein J in *Trial Lawyers*, *supra* note 24.

<sup>137</sup> See, e.g., *Henderson v Canada* (2008), 238 OAC 65 (Div Ct) at paras 28 and 30, per Molloy J.

<sup>138</sup> Discussed by the majority in *Trial Lawyers*, *supra* note 24, and Vayda, *supra* note 24.

<sup>139</sup> See, e.g., *Samuels v Canada (Attorney General)*, 2016 ONSC 6706, 2016 CarswellOnt 17204 (SCJ) at para 16.

<sup>140</sup> Kennedy Rule 2.1, *supra* note 5.

<sup>141</sup> L01, L23, L48, L11, L18, L26, L38, L42, L50, L51, L55, L59, L63, L65, L68, L70, L74, L79, L81, L82, L87, L39, L73, L15, L19.

<sup>142</sup> See the discussion in Palma Paciocco, *supra* note 61.

<sup>143</sup> *Ibid* at 241, citing Cromwell J's dissenting reasons in *Jordan*, *supra* note 61 at para 146.

<sup>144</sup> Palma Paciocco, *ibid* at 251-252, seems to suspect that this may be the case, despite difficulties.

<sup>145</sup> Meaning that numerous criminal trial rights are constitutionally guaranteed in Canada: *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of *Canada Act 1982 (UK)*, 1982, c 11 [the "Charter"], s 11.

Seventh, the lack of using technology was noted by those who cited paper productions and lack of e-filing as sources of unnecessary expense (L25, L68). This complements a significant body of work on the ability to use technology to facilitate access to justice.<sup>146</sup> This will be returned to in this dissertation's Conclusion.

Each of these seven can be – and has been – subject to important scholarship, which is only superficially addressed above. However, this chapter's survey nonetheless suggests that each of these is posing impediments to access to civil justice in Ontario. This underscores the need for a multipronged approach to achieving access to civil justice.

### C. Not All Effects Positive

Some respondents were not convinced that *Hryniak* and the 2010 Amendments could even be considered “one step forward” in facilitating access to civil justice. Some (*e.g.*, L54) believed that short trials could be less expensive than summary judgment motions. This aligns with a fear, acknowledged in *Hryniak* itself,<sup>147</sup> that summary judgment could itself be a source of unnecessary delay and expense. But that was not the only objection to *Hryniak* and the 2010 Amendments. L23 felt that something important is lost when trials become less common. A less paper-intensive way to litigate with more human interaction is preferred by many lawyers, even when it is more expensive.<sup>148</sup> This supports the view of some trial judges<sup>149</sup> and commentators<sup>150</sup> that trials are an

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<sup>146</sup> See, *e.g.*, Jane Bailey, Jacquelyn Burkell & Graham Reynolds, “Access to Justice for All: Towards an ‘Expansive Vision’ of Justice and Technology” (2013) 31 Windsor YB Access Just 181; Anthony J Casey & Anthony Niblett, “Artificial Intelligence, Big Data, and the Future of Law” (2016) 66 UTLJ 429; Christopher P Naudie & Gerard J Kennedy, “Ontario Court of Appeal Divided on Permissibility of Hearings Outside Ontario in Multi-Jurisdictional Class Actions” (August 2015) 4 CALR 33; Benjamin Alarie, Anthony Niblett & Albert H Yoon, “Law in the Future” (2016) 66 UTLJ 423; Ken Chasse, “Electronic Discovery in the Criminal Court System” (2010) 14 Can Crim L Rev 111; Ken Chasse, “‘Records Management Law’—A Necessary Major Field of the Practice of Law” (2015) 13 Can J L & Tech 57.

<sup>147</sup> *Hryniak*, *supra* note 1 at para 74.

<sup>148</sup> See, *e.g.*, Lisus, *supra* note 6.

<sup>149</sup> See, *e.g.*, Hamilton, *supra* note 58, noting the dangers of “trial in a box”.

<sup>150</sup> See, *e.g.*, Lisus, *supra* note 6; see also the comments of David Rankin in Gerard J Kennedy, “Justice for Some” *The Walrus* (November 2017) 47 [“Kennedy *Walrus*”] at 49-50.

intrinsic good. One could even fear that a departure from trials – with their greater procedural protections – decreases the likelihood of the court coming to the “correct” result in a particular case.<sup>151</sup> Trials clearly exist for a reason – being constitutionally guaranteed in criminal law<sup>152</sup> – and there is a fear among respondents such as L19 that young civil litigators are unlikely to ever go to trial. This aligns with Colleen Hanycz’s concern that the proportionality principle leads to “more access to less justice”<sup>153</sup> and is summarized by L23’s sensing “a desire by judges to dispose of litigation whenever possible. The civil justice system will provide an outcome, but not necessarily justice.” Implicit in this view is an assumption that greater procedure such as extensive discovery, greater use of experts, and more court time will lead to litigation coming to an “accurate” outcome. This has an intuitive appeal and there are likely circumstances where it is true – respondents to this survey suggest this is frequently the case when self-represented litigants are in the litigation. But evidence is lacking about the extent to which more extensive procedures lead to more accurate outcomes.

From the perspective of time and costs – incurred by parties and the courts – one should acknowledge that summary judgment is not a panacea. But this is not a new insight, and can be mitigated by recognizing that certain types of claims lend themselves to summary judgment more than others. Many other respondents viewed summary judgment as an effective costs-savings tool if used appropriately. It may be that the respondents who emphasized costs of inappropriately sought summary judgment have simply encountered those costs more often than typical.

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<sup>151</sup> See, e.g., Alan B Morrison, “The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System” (2011) 90 Or L Rev 993 at, e.g., 1024-1025.

<sup>152</sup> *Charter*, *supra* note 145, s 11(b).

<sup>153</sup> Hanycz, *supra* note 30.



It is difficult to compare the intangible sense of loss as trials become rarer, with the more objectively quantifiable savings of time and cost resulting from fewer trials.<sup>154</sup> But it should be acknowledged that this loss is likely to occur as more summary procedures are used. Most respondents seem to feel this trade-off is worth it – at least in many cases. However, a cautionary flag should be planted regarding unintended consequences<sup>155</sup> as we depart from an institution – the trial – that has been viewed as the paradigm of dispute resolution in the common law world for so long. This will be returned to in greater depth in this dissertation’s Conclusion. In the meantime, one should acknowledge that the benefits of *Hryniak* and the 2010 Amendments may come with costs that are not easily quantified.

#### **D. Initial Boom Followed by a Decline?**

Part IV.B set aside an issue that repeatedly came up as a reason for the limited effects of *Hryniak* and the 2010 Amendments: namely, that an initial boom in summary judgment motions in the immediate aftermath of *Hryniak* and the 2010 Amendments has been followed by a lull in recent years as the Superior Court and Court of Appeal have been more reluctant to grant summary judgment. Two respondents<sup>156</sup> attributed this to the Court of Appeal holding that pre-*Hryniak* rationales for restricting partial summary judgment apply with equal force post-*Hryniak*.<sup>157</sup> However, other respondents implied that this is not the only reason that lower courts have been more reluctant to grant summary judgment.<sup>158</sup>

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<sup>154</sup> Grégoire Webber has made an argument in a similar vein, that Parliament should be able to criminalize assisted suicide to preserve the sanctity of life, utilitarian concerns about mitigating suffering notwithstanding: “The Remaking of the Constitution of Canada” *UK Constitutional Law Association* blog (1 July 2015), online: <<https://ukconstitutionallaw.org/2015/07/01/gregoire-webber-the-remaking-of-the-constitution-of-canada/>>.

<sup>155</sup> A concern expressed by Edmund Burke that is essential to conservative thought: *e.g.*, Edmund Burke, *Reflections on the Revolution in France* (New York: Oxford University Press, 1999 [1790]) at 96-97. <sup>156</sup> L88, L09.

<sup>157</sup> *Butera v Chown, Cairns LLP*, 2017 ONCA 783, 137 OR (3d) 561.

<sup>158</sup> *E.g.*, L30, L39.

More research, akin to MacKenzie’s analysis of 2004-2015 summary judgment motions,<sup>159</sup> would be required to confirm the scope of this phenomenon. L19 suggested that it is particularly prevalent in Hamilton. But the impressions suggest a waning interest in summary judgment except in clear cases. This could be the result of the experience with summary judgment indicating that not all claims are suited for summary judgment. This would be a positive development with only cases likely to have summary judgment granted proceeding down that route. In this vein, not all respondents viewed courts’ reticence as negative – L16 explicitly noted that lower courts were “appropriately” skeptical of their powers. This is putting aside the above-noted view of a vocal minority that the move towards summary judgment is *per se* a negative development. But many other respondents (*e.g.*, L39, L19, L28) viewed courts as being inappropriately sheepish in recent years. It is hard to know which of these theories is correct. But it could indicate that more explicit guidance from appellate courts as to when summary judgment is appropriate is necessary, as will now be discussed.

### **E. Explicit Guidance More Effective than Broad Statements**

Many respondents discussed summary judgment as being at the core of the 2010 Amendments’ effectiveness, to the comparative exclusion of considerations of proportionality (though L90 was a notable exception in this regard) and changes to discovery rules (which two respondents suggested were ineffective<sup>160</sup>). Eight respondents<sup>161</sup> went out of their way to state that they view the broader discussion surrounding access to justice to be one of “talk”, “lip service”, or something to that effect. It is likely not coincidental that summary judgment reforms are represented in the seminal case of *Hryniak*. Its status as a Supreme Court of Canada decision can

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<sup>159</sup> MacKenzie SJ, *supra* note 5.

<sup>160</sup> L26, L31.

<sup>161</sup> L01, L12, L18, L51, L55, L63, L84, L87.

be viewed as a particularly visible symbol that is more effective than more general statements that a “culture shift” is necessary.

This builds on work in the previous chapters, suggesting that changes to procedural law have been most effective where legislation/regulations (Rule 2.1,<sup>162</sup> the new appellate jurisdiction legislation in British Columbia<sup>163</sup>) or directly applicable appellate jurisprudence (*Van Breda* on jurisdiction,<sup>164</sup> *Hryniak* on summary judgment<sup>165</sup>) have been promulgated. In this vein, Chapter One recommended consideration of legislative reform regarding jurisdiction motions<sup>166</sup> and Chapter Three did the same regarding interlocutory appeals.<sup>167</sup> This is not to suggest that the consciousness-raising has not been real – respondents certainly feel it has been. Nor is it unimportant.<sup>168</sup> However, in and of itself, it does not appear to have been particularly effective.

This may indicate that top-down changes are necessary.<sup>169</sup> The example of document production should illustrate. This is an area where four respondents continued to believe needless expense is incurred.<sup>170</sup> Even though the 2010 Amendments introduced the principle of proportionality in discovery and mandated discovery plans, some respondents viewed these changes as having been ignored.<sup>171</sup> Lawyers’ concern about being sued for malpractice if a stone is left unturned – no matter how expensive the unturning, or how unlikely it is to yield anything

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<sup>162</sup> Kennedy Rule 2.1, *supra* note 5.

<sup>163</sup> Chapter Three at 166, citing: *Court of Appeal Act*, RSBC 1996, c 77, s 7, as am; *Court of Appeal Rules*, BC Reg 297/2001.

<sup>164</sup> Kennedy Jurisdiction, *supra* note 34 and its analysis of *Club Resorts Ltd v Van Breda*, 2012 SCC 17, [2012] 1 SCR 572.

<sup>165</sup> MacKenzie SJ, *supra* note 5.

<sup>166</sup> Kennedy Jurisdiction, *supra* note 34 at 108.

<sup>167</sup> Chapter Three at 177-178.

<sup>168</sup> *Supra* note 98.

<sup>169</sup> Proposed by, e.g., Lucinda Vandervort in “Access to Justice and the Public Interest in the Administration of Justice” (2012) 63 UNB LJ 125.

<sup>170</sup> L16, L18, L25, L81.

<sup>171</sup> L26, L31.

consequential<sup>172</sup> – also leads to L48’s impression of “delay out of an abundance of caution”. Given these impressions, a more explicit rule regarding documentary discovery may be advisable. In the Small Claims Court, for instance, documents need only be disclosed if a party is relying on them,<sup>173</sup> and this is deemed to be acceptable from a fairness perspective, especially as a trier of fact may draw an adverse inference if a party refuses to produce a document deemed relevant.<sup>174</sup> This practice, which is frequently found in civilian legal traditions and arbitration,<sup>175</sup> is worthy of consideration, as will be discussed in more depth in the Conclusion.

Having said that, there may be an understandable and deep-seated reason for the comparative non-heeding of *Hryniak*’s call for a “culture shift” compared to areas where more tailored interventions occurred: the inherent conservatism of law.<sup>176</sup> “Conservative” in this sense does not refer to modern right-wing politics but rather an enduring preference for the *status quo*, and the view that change should come gradually, with time to learn and absorb its unintended consequences. This view is defensible: *Jordan* is an instance where a serious change was made suddenly and quickly and appears to have had unintended negative consequences. The story is the same with respect to the expansion of discovery rights.<sup>177</sup> As such, it may be more realistic to expect change to be gradual, even when the amount of progress seems less than one would hope.

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<sup>172</sup> L39 had the impression that judges paradoxically berate lawyers for not covering every conceivable angle in a case, while simultaneously expressing the view that bills are too high.

<sup>173</sup> *Rules of the Small Claims Court*, O Reg 258/98, Rule 18.02.

<sup>174</sup> *Supra* note 128.

<sup>175</sup> See, e.g., Rolf Trittman & Boris Kasolowsky, “Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions - The Development of a European Hybrid Standard of Arbitration Proceedings” (2008) 31:1 UNSW LJ 330; Practical Law Arbitration, “Document production in international arbitration” (London: Thomson Reuters, 2019), online: <[https://uk.practicallaw.thomsonreuters.com/4-382-1150?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-382-1150?transitionType=Default&contextData=(sc.Default)&firstPage=true)>.

<sup>176</sup> Something critical scholars have noted for at least eighty years: see, e.g., Moses J Aronson, “Mr Justice Stone and the Spirit of the Common Law” (1940) 25 Cornell L Rev 489 at 494.

<sup>177</sup> *Supra* note 125.

## F. Uncertainty in the Law

At least six respondents, in various ways, cited uncertainty in the law as a factor that increases legal costs, even in the aftermath of *Hryniak*. This emerges in various ways, including:

- wealthy parties exploiting that uncertainty to the detriment of poorer resources parties (L39);
- this uncertainty pushes parties out of the public court system (L16);
- a lack of case law leaving parties, particularly vulnerable minorities, unable to order their affairs (L23);
- the belief that the identity of a particular judge will matter enormously in determining whether he or she will be amenable to summary procedures (L36); and
- practice directives differing across the province, increasing work on lawyers who need to prepare in light of modified procedures, increasing costs to clients (L25).

The uncertainty in the law in some of these areas may be worthwhile. Differing practice directives from one judicial district to another enables pilot projects<sup>178</sup> and may also be necessary given the different resources in the different judicial districts.<sup>179</sup> Judges need to exercise judgment,<sup>180</sup> especially as the pursuit of a just outcome may require a level of discretion and lack of perfect predictability.<sup>181</sup> But respondents noted that these benefits come with negative

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<sup>178</sup> See, e.g., “Practice Advisory Concerning the Provincial Civil Case Management Pilot – One Judge Model” (effective 1 February 2019), online: <<http://www.ontariocourts.ca/scj/practice/civil-case-management-pilot>>.

<sup>179</sup> For example, Toronto and Ottawa have dozens of resident judges while Kenora has only one: Helen Burnett, “Kenora left without a full-time judge” *The Law Times* (23 April 2007), online: <<https://www.lawtimesnews.com/article/kenora-left-without-a-full-time-judge-8795/>>.

<sup>180</sup> As Jacob S Ziegel wrote in “Judicial Free Speech and Judicial Accountability: Striking the Right Balance” (1996) 45 UNB LJ 175 at 179, “Judges are individuals, not robots” (paraphrasing Sopinka J in John Sopinka, “Must the Judge be a Monk?” (Address to Canadian Bar Association, 3 March, 1989)).

<sup>181</sup> Julia Black, “Critical Reflections on Regulation”, CARR Discussion Papers (DP 4). Centre for Analysis of Risk and Regulation, London School of Economics and Political Science, London, UK, online: <<http://eprints.lse.ac.uk/35985/1/Disspaper4-1.pdf>>, cited in, *inter alia*, Dimity Kingsford Smith, “What Is Regulation – A Reply to Julia Black” (2002) 27 Australian J of Leg Philosophy 37 at 42; Michael Sobkin, “Residual Discretion: The Concept of Forum of Necessity Under the *Court Jurisdiction and Proceedings*

consequences, all of which have been theorized before, from an underdeveloped jurisprudence (L23) to the need for lawyers to use differing procedures (L25) to the inability to reach principled resolution as parties with deep pockets exploit legal uncertainty (L39). This will be explored in greater depth in this dissertation's Conclusion.

### **G. Self-Represented Litigants**

At least twelve respondents<sup>182</sup> noted that the presence of self-represented litigants results in a need for more formalized processes, more use of court time, and greater costs needing to be incurred by the non-self-represented parties.<sup>183</sup> It has long been recognized that lack of access to legal counsel, leading to self-represented litigants, has negative effects for the self-represented litigant,<sup>184</sup> but respondents' answers suggest that these negative consequences extend to the court,<sup>185</sup> mediators/arbitrators,<sup>186</sup> and other parties to litigation.<sup>187</sup>

A small minority of self-represented litigants who are truly behaving vexatiously can have their claims disposed of pursuant to Rule 2.1.<sup>188</sup> L55 acknowledged its utility in this regard. But the threshold to use Rule 2.1 is appropriately very high<sup>189</sup> and it rightly does not apply to the overwhelming majority of cases with self-represented parties. Indeed, respondents such as L07 and L27 acknowledged that many self-represented litigants have genuine legal issues with the delay and expense that they cause not being their fault.

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*Transfer Act*" (2018) 55:1 Osgoode Hall LJ 203 at 205, arguing for a "forum of necessity" in jurisdictional disputes, despite recognizing that this will increase litigation.

<sup>182</sup> L47, L23, L32, L10, L25, L37, L40, L50, L53, L60, L68, L87.

<sup>183</sup> Viewed to be the case by nine respondents: L02, L19, L23, L32, L38, L39, L47, L57, L83.

<sup>184</sup> Macfarlane Main Report, *supra* note 40.

<sup>185</sup> L27, L23.

<sup>186</sup> L79.

<sup>187</sup> L02, L19, L23, L32, L38, L39, L47, L57, L83.

<sup>188</sup> Kennedy Rule 2.1, *supra* note 5 at 263.

<sup>189</sup> Kennedy Rule 2.1, *ibid* at 251, citing *Scaduto v Law Society of Upper Canada*, 2015 ONCA 733, 343 OAC 87 at para 12, leave to appeal ref'd, [2015] SCCA No 488, 2016 CarswellOnt 21905 and *Raji v Borden Ladner Gervais LLP*, 2015 ONSC 801, [2015] OJ No 307 (SCJ).

There is no easy solution to this problem apart from attempting to deliver legal services more accessibly – another important element of access to justice conversations.<sup>190</sup> Though the lack of access to legal representation could also potentially be addressed by further government funding of the civil justice system: the subject of the next subsection.

## H. Government Funding

When discussing potential solutions to the access to justice crisis, at least seven lawyers<sup>191</sup> recommended some combination of additional government funding, legal aid in civil cases, and/or an expanded role for and more funding of PBO. This is in line with the view that civil litigation, though ostensibly addressing “private” disputes, actually performs an important public service. As noted in Part I, this includes vindicating legal wrongs and developing democratic norms. It can also prevent health and/or social problems that end up costing the public purse in other ways.<sup>192</sup> As such, not only would more government funding assist in facilitating access to justice, but it would also further valuable public purposes.<sup>193</sup>

At the present time, however, Ontario’s provincial government appears reluctant to invest more in this area.<sup>194</sup> And to be fair, the public value of civil litigation also exists on a spectrum, from cases of great constitutional importance<sup>195</sup> to developing an important new common law doctrine<sup>196</sup> to vindication of legal rights on an individual scale but where a wrongdoer needs to

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<sup>190</sup> See, e.g., Hadfield, *supra* note 17.

<sup>191</sup> L39, L37, L84, L77, L14, L75, L27.

<sup>192</sup> See, e.g., Farrow 2016, *supra* note 13 at 166-167; Sossin SickKids, *supra* note 49.

<sup>193</sup> An example is the Court Challenges Project to support certain constitutional challenges: Gerard J Kennedy & Lorne Sossin, “Justiciability, Access to Justice & the Development of Constitutional Law in Canada” (2017) 45(4) FLR 707 at 716.

<sup>194</sup> See Nicole Brockback, “Free civil legal service to close, despite study showing it saves Ontario \$5M a year” *CBC News* (7 November 2018), online: <[www.cbc.ca/news/canada/toronto/free-civil-legal-service-to-close-despite-study-showing-it-saves-ontario-5m-a-year-1.4894963](http://www.cbc.ca/news/canada/toronto/free-civil-legal-service-to-close-despite-study-showing-it-saves-ontario-5m-a-year-1.4894963)>.

<sup>195</sup> See, e.g., the discussion of the law of costs in *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at paras 133-146.

<sup>196</sup> Such as a general duty of good faith, found in *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494.

have an example made of it<sup>197</sup> to lawsuits brought as a matter of business practice<sup>198</sup> to petty disputes which should not be the concern of the justice system.<sup>199</sup> Gillian Hadfield and Thomas Cromwell have also convincingly questioned the extent to which inadequate government funding is a primary access to justice obstacle, without denying that it is one.<sup>200</sup> So as valuable as further funding and support from the government may be, it is not likely to be forthcoming as a total solution – and may not always be desirable or effective in any event. That does not mean that it should not be pushed for in appropriate cases.

## IN SUM

The 2010 Amendments and *Hryniak* have not solved the challenges of access to civil justice in Ontario.<sup>201</sup> Given that there was significant skepticism, accompanied by significant praise, of *Hryniak* and the 2010 Amendments, their ambiguous effects are not surprising. Some lawyers criticized *Hryniak* and the 2010 Amendments directly as counterproductive. More often, however, respondents cited a reluctance to change, misaligned incentives, and new additional sources of litigation expense as reasons for the continued barriers to access to civil justice. But there are still signs of hope, as one would have thought would have been the case in the aftermath of significant changes to procedural law: surveying lawyers suggests that some cases are being resolved more efficiently in recent years. There is also a genuine awareness of the need to facilitate access to

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<sup>197</sup> See, e.g., *Whiten v Pilot Insurance*, 2002 SCC 18, [2002] 1 SCR 59.

<sup>198</sup> The construction industry's litigiousness jumps to mind: see, e.g., R Bruce Reynolds, "The Impact of the Global Financial Crisis on the Construction Sector and the Construction Bar: Version 2.0" (2011) J Can Construction Law 1 at 23.

<sup>199</sup> See, e.g., *Morland-Jones v Taerk*, 2014 ONSC 3061, 2014 CarswellOnt 6612 (SCJ).

<sup>200</sup> The Honourable Thomas A Cromwell & Siena Antsis, "The Legal Services Gap: Access to Justice as a Regulatory Issue" (2016) 42 Queen's LJ 1 at 3-4; Hadfield, *supra* note 17 at 43.

<sup>201</sup> This should be unsurprising, as this problem dates to the time of Dickens and was notably described in Charles Dickens, *Bleak House* (London: Oxford University Press, 1971) [originally published in 1853]. As noted in the Introduction at 34, this has been noticed before: see, e.g., The Honourable J Roderick Barr, QC, "The Cost of Litigation: *Bleak House* in the 1990s" (March 1993) 12 Advocates' Soc J No 1, 12; William Kaplan, QC, "The Derivative Action: A Shareholder's 'Bleak House'" (2003) 36:3 UBC L Rev 443; Kennedy *Walrus*, *supra* note 150 at 48; Gorsuch, *supra* note 125 at ~ 3:49-4:14.



justice, to an extent that lawyers such as L15 view as not present earlier in their careers. These results were somewhat expected and are encouraging. But the other issues arising was also unexpected and are *discouraging*.

What is the upshot of such conclusions? The profession must recognize that access to justice is not a problem that admits of a single solution. After all, so many of the anecdotes that the lawyers shared in response to the survey questions revealed openness and attraction to many hypothesized solutions to the access to justice crisis. One hopes that this sharing of experiences will lead to action on all of these avenues.

## Conclusion: Towards Rules-Based Reforms?

This dissertation has explored the evolution of Ontario procedural law throughout the 2010s. The goal has been to answer a straightforward, if multi-faceted question: have the 2010 Amendments<sup>1</sup> to Ontario’s *Rules of Civil Procedure*,<sup>2</sup> and the Supreme Court of Canada’s decision in *Hryniak v Mauldin*,<sup>3</sup> achieved their goals of facilitating timely, inexpensive resolutions of civil actions on their merits? In response to a plethora of evidence that civil process contributes to rendering civil justice out of reach for many Ontarians,<sup>4</sup> the 2010 Amendments sought to ensure that parties could vindicate their legal rights in a public courtroom<sup>5</sup> and decrease the temporal and financial costs of doing so. Proposed benefits include disincentivizing suboptimal settlements (recognizing that settlement is still generally positive<sup>6</sup>) and facilitating development of the common law and associated democratic norms.<sup>7</sup>

Part I of this Conclusion explains why there have been access to justice successes in the aftermath of *Hryniak* and the 2010 Amendments – but why they are only limited. This is probably because civil procedure reform is only likely to be so effective in facilitating access to justice: it can prescribe predictable processes to facilitate the just resolution of actions on their merits, bearing in mind the principle of proportionality. But its limitations, like those of the proportionality principle, remain. A reconceptualization of proportionality, in light of critiques of the principle

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<sup>1</sup> O Reg 438/08 [hereafter, the “2010 Amendments”].

<sup>2</sup> RRO 1990, Reg 194 [the “Rules”].

<sup>3</sup> 2014 SCC 7, [2014] 1 SCR 87 [“*Hryniak*”].

<sup>4</sup> *Hryniak*, *ibid* at paras 1, 26; Trevor CW Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall LJ 957 [“Farrow 2014”] reviews the literature in this area at fn 1.

<sup>5</sup> See, e.g., Brooke MacKenzie, “Effecting a Culture Shift: An Empirical Review of Ontario’s Summary Judgment Reforms” (2017) 54:4 Osgoode Hall LJ 1275 [“MacKenzie SJ”] at 1280-1281; Janet Walker, “Summary Judgment Has Its Day in Court” (2012) 37 Queen’s LJ 697 [“Walker SJ”] at 700-701 and 707-708; Coulter Osborne, QC, *Civil Justice Reform Project: Findings and Recommendations* (Ontario Ministry of the Attorney General, November 2007), online: <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>>.

<sup>6</sup> *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37, [2013] 2 SCR 623 at para 11, per Abella J, citing Callaghan ACJHC (as he was then) in *Sparling v Southam Inc* (1988), 66 OR (2d) 225 (HC).

<sup>7</sup> *Hryniak*, *supra* note 3 at paras 1, 26.

and analysis of Ontario's trends, is proposed, before assessing the 2010 Amendments' effectiveness against this reconceptualization. The remaining sections of this Conclusion address matters that require further research and where this dissertation can play a role in that further research. Part II discusses another phenomenon that has arisen repeatedly throughout the earlier chapters: the Ontario Court of Appeal frequently acting as an impediment to implementing novel civil procedure initiatives designed to facilitate access to justice. Part III considers the intersection of this dissertation with the "rules-standards debate" in legal theory, another issue that all four chapters' results shed light upon in some way. Part IV considers how this dissertation's conclusions could inform access to justice initiatives adjacent to civil procedure reform, specifically through increased transparency in enacting procedural law, uses of technology in the civil litigation process, judicial specialization, and more active judging. Part V discusses how this dissertation could help inform access to justice conversations in family law and criminal law. In the end, I attempt to see optimism in the midst of what is understandably a pessimistic discussion about access to civil justice, and civil procedure's role therein.

#### **I) WHAT THE CHAPTERS SHOW: LIMITED, BUT REAL SUCCESS THROUGH CIVIL PROCEDURE REFORM**

This dissertation's Introduction<sup>8</sup> explained the appropriateness of assessing the effectiveness of the 2010 Amendments against a relatively narrow definition of access to justice, concentrating on the increased resolution of civil actions on their merits, with decreased delay and financial expense. This is largely in line with the principle of proportionality, enshrined in the Ontario *Rules* in 2010.<sup>9</sup> Many of the critiques of this definition of access of justice are compelling<sup>10</sup> but it was

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<sup>8</sup> Hereinafter, the "Introduction".

<sup>9</sup> 2010 Amendments, *supra* note 1; Hryniak, *supra* note 3 at paras 27-33; Trevor Farrow, "Proportionality: A Cultural Revolution" (2012) 1 J Civil Litigation & Practice 151 ["Farrow 2012"].

<sup>10</sup> See, e.g., Trevor CW Farrow, "A New Wave of Access to Justice Reform in Canada" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC

proceeded with for several reasons, three of which bear repeating. First, proportionality was added to the *Rules* in 2010 and endorsed by the Supreme Court in *Hryniak* – it is accordingly worthwhile assessing whether and how it is being realized in practice in addition to assessing its normative implications. Second, even if access to justice must consider issues beyond proportionality in procedure, proportionality in procedure is still *part* of a holistic conversation about access to justice, as will be discussed.<sup>11</sup> Third, most broader questions about access to justice would have been very difficult to assess through the dissertation’s methodology, defended in the Introduction.

This Conclusion nonetheless returns to proportionality – and critiques thereof – with the benefit of having conducted the research in Chapters One through Four. The aim is to come to a deeper understanding and conceptualization of the term. The findings from the first four chapters are then assessed against this definition before suggesting what this says about civil procedure reform’s potential to achieve access to justice, and where it is likely to come up short, in the context of broader conversations about access to justice. This will include a brief assessment of how this dissertation’s conclusions complement the experience of England and Wales.

## **A. Reconsidering Proportionality in the Access to Justice Conversation**

### **1. A Note on Terminology**

At the outset, it should be noted that proportionality has a long and rich history in civilian legal systems distinct from its history in the common law.<sup>12</sup> The terms “cost-effectiveness” or “value-for-money” may be better-suited terms than proportionality in terms of exemplifying the

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Press, 2016) [“Farrow 2016”] at 166-167; Justice Thomas A Cromwell, Address (Remarks delivered at the PLEAC Conference, 26 October 2012) [unpublished] at 2 as reported in Mary Eberts, “‘Lawyers Feed the Hungry:’ Access to Justice, The Rule of Law, and the Private Practice of Law” (2013) 76 Sask L Rev 115 at 120, fn 32; Andrew Pilliar, “Exploring a Law Firm Business Model to Improve Access to Justice” (2015) 32(1) Windsor YB Access Just 1 [“Pilliar 2015”].

<sup>11</sup> Farrow 2016, *ibid* at 166.

<sup>12</sup> Eric Engle, “The History of the General Principle of Proportionality: An Overview” (2012) 10 Dartmouth LJ 1.

values that proportionality seeks to enshrine in Ontario. However, both terms are somewhat wordy. “Efficiency” is less wordy but comes with problematic connotations, as will be discussed in more depth below.<sup>13</sup> Therefore, though its suboptimal nature as a term should be flagged, proportionality is the word used in *Hryniak* and the 2010 Amendments, and must be theorized.

## 2. Critiques of Proportionality

In *Hryniak*, Karakatsanis J enthusiastically encouraged the principle of proportionality to be adopted throughout Canadian civil litigation.<sup>14</sup> As described in the Introduction, this principle emphasizes that steps taken in litigation are to be proportionate to what is actually at stake in the litigation.<sup>15</sup> The Introduction accepted, somewhat implicitly, the validity of this principle with minimal critical analysis. However, it remains important to consider criticisms of the principle alongside the effects of its promulgation. These can be grouped into three categories.

First and foremost, the principle of proportionality appears to put a dollar value on justice, through suggesting that the less money is at stake in litigation, the less resources – financial and temporal – should be invested in it. This can seem vulgar and is likely to affect vulnerable parties in particular, who may have disputes with modest sums in absolute dollars, but are hugely consequential to them.<sup>16</sup> Such vulnerable, potentially self-represented parties may also have a claim that cannot easily be described by a non-lawyer due to the idiosyncratic language of law. Such self-represented parties require more in-court time with a judge to explain their cases.<sup>17</sup> The

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<sup>13</sup> Farrow 2012, *supra* note 9. See also Bryant, *infra* note 32.

<sup>14</sup> *Hryniak*, *supra* note 3 at paras 27-33.

<sup>15</sup> Farrow 2012, *supra* note 9 at 154.

<sup>16</sup> Illustrated for a general audience in Gerard J Kennedy, “Justice for Some” *The Walrus* (November 2017) 47 [“Kennedy *Walrus*”] at 47-48.

<sup>17</sup> Julie Macfarlane, Katrina Trask & Erin Chesney, “The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?” (Windsor, ON: The National Self-Represented Litigants Project, The University of Windsor, November 2015) [“NSRLP Self-Reps”]; see also John L Carroll, “Proportionality in Discovery: A Cautionary Tale” (2010) 32 *Campbell L Rev* 455 at 466.

public court system has a particularly important role to ensure that these claims are adjudicated after adequate procedural protections,<sup>18</sup> and the proportionality principle arguably downplays this. The flip side of this coin is that such an understanding of proportionality, emphasizing the dollar amounts at stake in litigation, can be a licence to pursue every tangential avenue if substantial sums are at stake.<sup>19</sup> The proportionality principle also arguably does not reflect the broader public importance that a case may have, as discussed in more depth in Part I.A.3.a.

Second, there is a danger that proportionality can lead to “more access to less justice” as Colleen Hanycz feared would be the case before the 2010 Amendments were enacted.<sup>20</sup> The reduction of procedural protections and in-court time certainly increases access to the courts in terms of numbers of cases being decided on their merits – the analysis of Rule 2.1 in Chapter Two suggests as much,<sup>21</sup> as does Brooke MacKenzie’s review of decisions regarding summary judgment motions.<sup>22</sup> But decreasing the resources put into each case also comes with a risk that the results will be a less satisfying McJustice,<sup>23</sup> instead of the more nourishing justice resulting from a full trial. In other words, there is a concern that by being able to decide more cases, courts will become less good at deciding each one.

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<sup>18</sup> Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) [“Farrow Book”] at 232-251.

<sup>19</sup> See, e.g., *Burlington Financial Resources Co v Canada*, 2017 TCC 144, [2017] 6 CTC 2001 [“Burlington”] at para 16, and the critique thereof in the Introduction at 17-18.

<sup>20</sup> Colleen M Hanycz, “More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform” (2008) 27 CQ 98.

<sup>21</sup> Gerard J Kennedy, “Rule 2.1 of Ontario’s *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?” (2018) 35 Windsor YB Access Just 243 [“Kennedy Rule 2.1”] at 272-274.

<sup>22</sup> MacKenzie SJ, *supra* note 5.

<sup>23</sup> Akin to a “McJob” or another McDonalds product that is not nourishing in the sense that it does not lead to a better job: *Oxford English Dictionary*, online: <<http://www.oed.com/view/Entry/245114?redirectedFrom=McJob#eid>>, *sub verbo*, “McJob”. The term “McJustice” has been used to describe a similar phenomenon in the criminal justice system: see, e.g., Joseph DiLuca, “Expedient McJustice or Principled Alternative Dispute Resolution?” (2005) 50 Crim LQ 14.

Third, and related to the foregoing, there are procedural fairness concerns with an emphasis on proportionality, particularly for vulnerable parties, as described in Chapter Two.<sup>24</sup> Civil procedure is obviously concerned with helping the court arrive at an “accurate” result in each case.<sup>25</sup> Excessive delay can be a problem in this regard as memories fade, evidence is lost, and parties grow old and die. But excessive speed can also be problematic as insufficient time and resources are devoted to investigation. For example, emphasizing speed can increase a substantive mistake’s likelihood through denying parties information in discovery.<sup>26</sup> This jeopardizes civil procedure’s purpose of providing a process that facilitates the legally “correct” result.<sup>27</sup> Just as, justice delayed can be justice denied, justice hurried can be justice buried. Attempting to balance thoroughness and promptness is present in a wide variety of litigation, from criminal<sup>28</sup> to civil<sup>29</sup> to administrative<sup>30</sup> to international.<sup>31</sup> In this vein, Michael Bryant, the former Ontario Attorney General and law professor who is now Executive Director of the Canadian Civil Liberties Association, has written that “‘efficient justice’ is to justice what ‘efficient music’ is to music.”<sup>32</sup>

While Bryant’s concerns are largely based on a concern that attempts to increase speed in the justice system will increase errors, this is not his – or others – only concern in this respect.

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<sup>24</sup> Kennedy Rule 2.1, *supra* note 21 at 270-274.

<sup>25</sup> *E.g.*, Robert G Bone, “Economics of Civil Procedure” in *The Oxford Handbook of Law & Economics – Volume III: Public Law and Legal Institutions*, 3d ed, Francesco Parisi, ed (Oxford: Oxford University Press, 2017) at 143.

<sup>26</sup> Carroll, *supra* note 17 at 466.

<sup>27</sup> Alan B Morrison, “The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System” (2011) 90 Or L Rev 993 at, *e.g.*, 1024-1025.

<sup>28</sup> Palma Paciocco, “The Hours are Long: Unreasonable Delay after *Jordan*” (2017) 81 SCLR 233.

<sup>29</sup> *Aguas v Rivard Estate*, 2011 ONCA 494, 107 OR (3d) 142 at para 50, per Juriansz JA (dissenting, but the sentiment remains uncontroversial), citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [“*Blencoe*”] at para 146.

<sup>30</sup> *Blencoe*, *ibid*, at para 146, per LeBel J (dissenting in part in the result).

<sup>31</sup> Alex Whiting, “In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered” (2009) 50 Harv Int’l LJ 323.

<sup>32</sup> “Legal ‘reforms’ punish people Supreme Court sought to protect” *The Toronto Star* (9 April 2018), online: <<https://www.thestar.com/opinion/contributors/2018/04/09/legal-reforms-punish-people-supreme-court-sought-to-protect.html>>.

Procedural protections – that indeed take time and resources – are also necessary for the *perception* of justice. These concerns are particularly acute in analyses of procedural law, given that a substantive body of procedural justice literature suggests that the *perception* of a fair process – allowing a party to present its case after gaining access to all relevant information – increases the parties’ and the public’s faith in the justice system.<sup>33</sup> Indeed, the process, especially a formal process where parties can present their views, can matter just as much if not more than the result in terms of perceiving the legitimacy of awards and institutions that grant them.<sup>34</sup> This leads to a primary goal of procedural law being facilitating fairness by giving parties a hearing.<sup>35</sup> The proportionality principle and summary procedures such as those advocated by *Hryniak* and the 2010 Amendments could be seen as moving away from this. Indeed, the failure to observe this principle led to what is viewed as a rare procedural injustice in the use of Rule 2.1, discussed in Chapter Two.<sup>36</sup>

Uniting all of these is a strange implication of *Hryniak* and the 2010 Amendments’ emphasis on proportionality: that access to justice can be increased through restricting (though not eliminating) access to the courts.<sup>37</sup> This seems counterintuitive and requires a defence.

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<sup>33</sup> This is well-synthesized in Jona Goldschmidt & Loreta Stalans, “Perceptions of the Fairness of Judicial Assistance to Self-Represented Litigants” (2012) 30 Windsor YB Access Just 139 at 157-159.

<sup>34</sup> *Ibid*; E Allan Lind & Tom R Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988) at 76-81; Edgar Allan Lind, *et al*, *The Perception of Justice: Tort Litigants’ Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* (Santa Monica, CA: Rand Corporation, 1989), online: <<https://www.rand.org/pubs/reports/R3708.html>> at 78-80; Julian V Roberts & Loretta J Stalans, *Public Opinion, Crime, and Criminal Justice* (Boulder, CO: Westview, 2000) at 149.

<sup>35</sup> In administrative law as well as civil litigation: Kennedy Rule 2.1, *supra* note 21 at 254-255, citing *Ontario Provincial Police Commissioner v Mosher*, 2015 ONCA 772, 340 OAC 311 at paras 60-63; The Hon Louis LeBel, “Notes for an Address: Reflections on Natural Justice and Procedural Fairness in Canadian Administrative Law” (February 2013) 26 Can J Admin L & Prac 51 at 53, based upon a presentation to the Continuing Legal Education Society of British Columbia Administrative Law Conference 2012 in Vancouver, British Columbia on October 26, 2012.

<sup>36</sup> Kennedy Rule 2.1, *supra* note 21 at 268, citing *Shafirovitch v Scarborough Hospital*, 2015 ONSC 7627, 85 CPC (7th) 149 (SCJ) [“*Shafirovitch*”].

<sup>37</sup> This theme runs throughout Chapter Two; thanks also due to Professor Joseph HH Weiler of NYU School of Law for suggesting this succinct summary – increasing access to justice by restricting access to the courts – during a mock job talk performed at NYU School of Law on October 29, 2018.



### 3. A Sophisticated Understanding – And Defence – of Proportionality

These concerns are real, but a nuanced understanding of proportionality can overcome them.

#### a. Financial Concerns

Regarding the financial concern, the amount of money at stake in litigation is likely to be relevant – but not determinative – to what is considered proportionate procedure.<sup>38</sup> For instance, Lorne Sossin and I have suggested that expensive and time-consuming procedures may be warranted, despite modest sums of money being in play, if resolving the question of law is likely to have significant effects on society at large.<sup>39</sup> This is most obviously the case when the government is a litigant and/or human rights are at stake.<sup>40</sup> Though it may extend to private law claims that have a significant public dimension such as environmental claims.<sup>41</sup> Large sums being at stake should also not be a licence to spend unlimited amounts of time and money on peripheral matters that will not lead to the prompt and fair resolution of a case.<sup>42</sup>

More difficult are cases where an expensive procedure appears necessary to fairly adjudicate an action with modest sums of money at stake. Sometimes, ensuring justice and its appearance indeed mandates that the expensive procedure be followed – with costs awards correcting (at least in part) the burden at the end. This is likeliest to be the case in Small Claims Court matters<sup>43</sup> or matters adjacent to the Small Claims Court’s jurisdiction.<sup>44</sup> Ensuring justice and its appearance in

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<sup>38</sup> Introduction at 17-18.

<sup>39</sup> Gerard J Kennedy & Lorne Sossin, “Justiciability, Access to Justice & the Development of Constitutional Law in Canada” (2017) 45(4) FLR 707.

<sup>40</sup> *Ibid.*

<sup>41</sup> See, e.g., *Yaguaje v Chevron Corporation*, 2018 ONCA 472, 141 OR (3d) 1 at paras 86-88.

<sup>42</sup> See the discussion of *Burlington*, *supra* note 19 in Introduction at 17-18.

<sup>43</sup> There is of course a tension between ensuring access to the Small Claims Court and having it maintain its simple character: see, e.g., Shelley McGill, “The Evolution of Small Claims Court: Rising Monetary Limits and Use of Legal Representation” (2015) 32 Windsor YB Access Just 173.

<sup>44</sup> The Ontario Superior Court will occasionally grant costs awards greater than the value of a judgment to ensure respect for a plaintiff’s decision to vindicate his or her legal rights instead of accepting an unprincipled settlement: see, e.g., *Van Winkle v Siodlowski* (2009), 99 OR (3d) 471 (SCJ).

these circumstances may simply be worth the cost, lest the law become disrespected. At other times, class proceedings may be the appropriate vehicle to address this concern, particularly in the consumer protection realm.<sup>45</sup>

Perhaps most difficult is where there is realistically no way to expect a party to pursue or the public to absorb the cost of a claim with a very modest sum at stake: say, \$3,000, where the matter concerns a single but complicated fraud. The principle of proportionality may indeed countenance against pursuing the action. Insisting on procedural protections to allow this claim to proceed may come with other negative consequences, as discussed in more depth below, opening the door to unrealistic expectations of what constitutes appropriate and/or necessary procedural justice.<sup>46</sup>

One could argue that the amount of money should be completely irrelevant to the assessment of appropriate procedure. This argument would proceed on the basis that the amount the state will have to spend to see a process through does not affect how much money is at play in society, but merely who has said money. As such, only justice, which cannot be quantified, is at play in the litigation. In any event, the amount of money at stake does not tell one how consequential that is to the affected parties. For instance, \$200 for a poor widow may be worth more to her than \$2,000,000 to Jeff Bezos: this type of observation has been noted since biblical times.<sup>47</sup> There is accordingly no particular reason to view the amount of money at stake as important in assessing

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<sup>45</sup> Kent Roach & Lorne Sossin, "Access to Justice and Beyond" (2010) 60 UTLJ 373 at, *e.g.*, 378, summarizing the work of Michael J Trebilock.

<sup>46</sup> The validity of the concerns about "slippery slopes" is discussed in Eugene Volokh, "The Mechanisms of the Slippery Slope" (2003) 116(4) Harv L Rev 1026.

<sup>47</sup> One thinks of the story in Luke 21:1-4 (NSRV):

[Jesus] looked up and saw rich people putting their gifts into the treasury; he also saw a poor widow put in two small copper coins. He said, "Truly I tell you, this poor widow has put in more than all of them; for all of them have contributed out of their abundance, but she out of her poverty has put in all she had to live on."

proportionality, though every litigation step could still be assessed for the extent to which it advances the likelihood of a just result.<sup>48</sup>

This indicates why the sums at stake should not be determinative. There is inherent good in the public vindication of a private wrong,<sup>49</sup> and any attempt to declare that the public court system shall only deal with cases involving more than \$1,000,000 would almost certainly be undesirable.<sup>50</sup> But arguing that it is irrelevant appears to overstate the matter. First, while it is not certain that a case concerning \$2,000,000 is more consequential to the parties than one involving \$200, it is likelier. Other things being equal, even Jeff Bezos cares more about \$2,000,000 than \$200, and even the poor widow cares more about the \$200 than she would about 2 cents. Total sums may be a crude measure for measuring importance to parties, as ancient and biblical wisdom tells us, but it seems to logically have a correlation. Second, the amount of money at stake in the litigation is readily assessable and thus pragmatically useful. Third, the downstream effects on society at large related to “who has the money” are greater if the actual sums in the litigation are larger. Fourth, insofar as society is concerned about allocation of resources, the amounts at stake are surely relevant. Just as the Canada Revenue Agency does not generally seek to collect amounts less than \$2,<sup>51</sup> there would be a similar reason to not expect the public to spend \$100,000 in assisting a party (however poor) to collect \$100. These examples illustrate that, other things being equal, cases with

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<sup>48</sup> Carroll, *supra* note 17 at 466.

<sup>49</sup> *E.g.*, Nathan B Oman, “The Honor of Private Law” (2011) 80 *Fordham L Rev* 31.

<sup>50</sup> Thanks to Professor Liam Murphy of NYU School of Law for pointing this out during a presentation in NYU Law’s “JSD Forum” on February 1, 2019.

<sup>51</sup> See, *e.g.*, Government of Canada, “How to make a payment”, online: <<https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/corporations/corporation-payments/make-a-payment.html>>; Government of Canada, “Line 484 - Refund”, online: <<https://www.canada.ca/en/revenue-agency/services/tax/individuals/topics/about-your-tax-return/tax-return/completing-a-tax-return/deductions-credits-expenses/line-484-refund.html>>.

the larger sums should take priority just as, other things equal, an act's consequences are relevant in criminal and tort law, even when the defendant's moral blameworthiness is the same.<sup>52</sup>

There are also practical consequences to declaring sums at stake being irrelevant. This would make it difficult to defend mandatorily proceeding in the Small Claims Court when less than \$25,000 is at stake,<sup>53</sup> or Simplified Procedure if less than \$100,000 is at stake.<sup>54</sup> It is also difficult to imagine the public accepting treating a case worth \$500,000 the same as one worth \$5,000. As will be discussed shortly, public perception cannot be determinative of what is appropriate procedure. But nor is it irrelevant, lest the reputation of the justice system be jeopardized.

**b. “More Access to Less Justice”?**

The concern that the proportionality principle leads to “more access to less justice” may be well-founded in certain circumstances. At times, the “more justice” of more extensive procedures is proportionate to the expense entailed in following them. Just as the phrase “value for money” does not necessarily mean “buy the cheapest option”, “proportionality” does not always mean “follow the cheapest procedure.”

But if additional resources are not expended on cases that *do not require them*, allowing more cases to be resolved on their merits, that is positive. MacKenzie suggests this is occurring<sup>55</sup> and this dissertation supports this. For example, it makes no sense to spend \$25,000 on a trial if the same result will be achieved by spending \$10,000 on a summary judgment motion. More difficult is where spending the additional \$15,000 increases a just result's likelihood – but only marginally so. This is discussed below.

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<sup>52</sup> This bleeds into the controversial if very present idea of “moral luck” but the importance of consequences shows little sign of disappearing: see, e.g., Bebhinn Donnelly, “Possibility, Impossibility and Extraordinariness in Attempts” (2010) 23 Can J L & Juris 47 at 64, fn 35.

<sup>53</sup> *Courts of Justice Act*, RSO 1990, c C43 [“CJA”], s 23(1).

<sup>54</sup> *Rules*, *supra* note 2 at 76.02(1).

<sup>55</sup> MacKenzie SJ, *supra* note 5.

Let us put this another way by returning to the health care analogy. A drug that will save the lives of ten individuals may be so costly that administering it to those ten individuals will prevent twenty thousand others from attending routine check-ups. The consequences for each of the twenty thousand may be less dire than for each of the ten. However, the cumulative consequences for the twenty thousand – from missed early warning signs of serious problems to the inability to obtain drugs that will keep high blood pressure in check to everything in between – may be greater than the inability to save the ten lives. There is something disquieting about such utilitarian calculations, which is why deontological considerations are also important in our justice system. But we do not live in a perfect world without the necessity of any such trade-offs. It is at least arguable that the access for the twenty thousand is greater than the optimal result for the ten. Something analogous is surely present in the civil justice system.<sup>56</sup> While increasing access may come at the expense of some justice, the earlier chapters of this dissertation suggest the trade-offs are less than feared, at least in certain circumstances. And if the access is greatly improved, it is suggested that the trade-off is worth it. To paraphrase Voltaire, perfect justice should not be an enemy of good justice.

### **c. Procedural Protections for Vulnerable Parties**

The concern about procedural protections for vulnerable parties is a real one. It is the public courts' possessing of these protections, frequently lacking from private dispute resolution, that is a primary concern about the privatization of dispute resolution.<sup>57</sup> But as suggested in Chapter Two, such protections can be compatible with summary procedures.<sup>58</sup> Nor is emphasizing proportionality incompatible with granting indulgences to vulnerable parties. Rather, it is part of a sophisticated conception of proportionality. Mitigating the likelihood of a substantively unjust

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<sup>56</sup> Louis Kaplow, "Information and the Aim for Adjudication: Truth or Consequences?" (2013) 67 *Stanford L Rev* 1303 ["Kaplow 2013"].

<sup>57</sup> Farrow Book, *supra* note 18 at 232-251.

<sup>58</sup> Kennedy Rule 2.1, *supra* note 21 at 272-274.

result should be given substantial value on the ledger in assessing whether a procedure is proportionate. But it cannot be given infinite value to the exclusion of everything else. Recall the following thought experiment from the Introduction:<sup>59</sup>

Suppose Procedure A leads to substantively fair and just results 100% of the time, but only 10% of members of the public can afford it. Now suppose Procedure B leads to substantively fair and just results 90% of the time, and 80% of members of the public can afford it. [...] Procedure B would be preferable, if we can justify the substantively unfair results to the 10%. While governmental aid or social support [...] may mitigate the necessity of such tradeoffs, comprehensive civil justice legal aid is unlikely to be a government priority,<sup>60</sup> and in certain cases may not even be desirable. This necessitates maximizing the utility of resources currently invested in the civil justice system, albeit in a principled manner.

This illustrates that having a system of procedure with literally no potential of an unjust result is unrealistic, something already recognized in other areas of law. For instance, the law of negligence holds defendants to a standard of reasonableness, not perfection. This is so even in the realm of medical malpractice which,<sup>61</sup> unlike much of procedural law, literally involves life-and-death. Mandating a standard of perfection in every case would prevent the treating of other patients.

#### **d. Ensuring the Perception of Fairness**

Procedural law's unique role in ensuring the *perception* of fairness may require less tolerance for "errors".<sup>62</sup> This concern has merit, but can be taken to an unhealthy extreme. Analogously, in criminal law, avoiding wrongful convictions is emphasized, at expense of wrongful acquittals. Blackstone's maxim, "better that ten guilty persons escape, than that one innocent suffer",<sup>63</sup>

<sup>59</sup> Introduction at 33, originating with Trevor Farrow, but synthesized here.

<sup>60</sup> See, e.g., Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007) 33 Queen's LJ 139 at 154-156.

<sup>61</sup> *Ganger (Guardian ad litem of) v St. Paul's Hospital* (1997), 40 BCLR (3d) 116 (CA) at para 159.

<sup>62</sup> Goldschmidt & Stalans, *supra* note 33 at 157, fn 102.

<sup>63</sup> William Blackstone, *Blackstone's Commentaries on the Laws of England*, vol 4, Wayne Morrison, ed (London: Cavendish Publishing Limited, 2001) at 358 [p 283 of this edition], cited and expounded upon in Craig E Jones & Micah B Rankin, "Justice as a Rounding Error? Evidence of Subconscious Bias in Second-Degree Murder Sentences in Canada" (2014) 52:1 Osgoode Hall LJ 109 at 137-138.

exemplifies this. Asymmetrical consequences between a wrongful conviction and a wrongful acquittal mandate this. But even with these stakes, the Crown need not establish a person's guilt to a scientific certainty.<sup>64</sup> Nor do we suggest that it is better that ten million guilty people be set free, rather than one innocent should suffer. That would paralyze the criminal justice system's ability to effectively function.<sup>65</sup>

Moreover, a party's perception of what is necessary procedure may be unreasonable. A party expecting that anything short of trumpets being played upon his or her entering the courtroom has an erroneous perception of what is appropriate procedure.<sup>66</sup> It would seem advisable to try to change the perception or, if that is not possible, politely decline to adhere it.<sup>67</sup> As a more realistic example, a party expecting a traditional trial can likely be persuaded that a summary judgment motion, which does include a hearing, is a procedurally fair mechanism to address his or her claim.<sup>68</sup> When truly vexatious parties abuse the court system, their perceptions of entitlement to Cadillac-style procedural justice may need to be respectfully disagreed with, after giving them the opportunity to be heard.<sup>69</sup> But if the perception is widespread, some accommodation may be necessary, lest the public turn away from the justice system.<sup>70</sup> This can be problematic when the

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<sup>64</sup> Well explained in Michael Plaxton, "Are Wrongful Convictions Wrong? The Reasonable Doubt Standard and the Role of Innocence in Criminal Procedure" (2002) 46 CLQ 407.

<sup>65</sup> Alluded to in Jones & Rankin, *supra* note 63 at 138, noting that the consequences of a "Type 1 error" (wrongful conviction) are sufficiently great to outweigh a "Type 2 error" (wrongful acquittal) by "several" times.

<sup>66</sup> Thanks to Professor Liam Murphy of NYU School of Law for pointing this out during a presentation in NYU Law's "JSD Forum" on February 1, 2019.

<sup>67</sup> This has obviously occurred with respect to changing the public's perception of impaired driving: see, *e.g.*, Marie Comiskey, "Justice Peter de Carteret Cory and His Charter Approach to Regulatory Offences" (2007) 65 UT Fac L Rev 77 at 92.

<sup>68</sup> See, *e.g.*, MacKenzie SJ, *supra* note 5; Shantona Chaudhary, "Hryniak v. Mauldin: The Supreme Court issues a clarion call for civil justice reform" (Winter 2014) 33 Adv J No 3.

<sup>69</sup> Emily Mathieu & Jesse McLean, "'Vexatious litigant' continues to have her days in court" *The Toronto Star* (26 November 2016), online: <<https://www.thestar.com/news/gta/2016/11/26/vexatious-litigant-continues-to-have-her-days-in-court.html>>, cited in Kennedy Rule 2.1, *supra* note 21 at 263, 269.

<sup>70</sup> Commonly discussed in the criminal justice system (see, *e.g.*, *R v NS*, 2012 SCC 72, [2012] 3 SCR 726 ["NS"] at para 95, per Abella J (dissenting)), but arising in the civil justice system as well: see, *e.g.*, Seana C McGuire & Roderick A Macdonald, "Tales of Wows and Woes From the Masters and the Muddled: Navigating Small Claims Court Narratives" (1998) 16 Windsor YB Access Just 48.

consequences are grave – say, a large portion of the population demanding capital punishment for jaywalking – but the stakes of civil procedure are unlikely to lead to such trade-offs.

**e. Concluding Thoughts on Proportionality**

All of this is to suggest that, though civil procedure must recognize the paramount importance of achieving substantive justice and the perception of fairness, we should not be wedded to lengthy and expensive procedures if other procedures fulfill these goals. Nor should the fairest procedure imaginable to reach the factually “true” outcome be mandated regardless of the costs.<sup>71</sup> As such, increasing financial and temporal expenses by 150% to increase the likelihood of a just result by 10% may simply not be worth it. Some may argue that this is merely putting a price tag on justice in a roundabout way. Criticism has been levelled against law and economics for attempting such counterintuitive quantifications.<sup>72</sup> But most public policy – which civil procedure undoubtedly is – inherently involves trade-offs. Even if they cannot be quantified with precision, suggesting that Factor A trumps everything else will likely have negative consequences.<sup>73</sup>

A sophisticated understanding of proportionality merely recognizes that all aspects of the justice system must be recognized as having costs, even if those costs are not easily quantifiable.<sup>74</sup> Fairness – in terms of facilitating a correct result and mandating a hearing – is among civil procedure’s purposes. But so are predictability and efficiency.<sup>75</sup> Turning to the subjects discussed in earlier chapters of this dissertation, an appeal as of right, full trial, summary judgment motion,

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<sup>71</sup> Kaplow 2013, *supra* note 56 at 1365-1366.

<sup>72</sup> For a review, see, *e.g.*, Claire A Hill, “Beyond Mistakes: The Next Wave of Behavioural Law and Economics” (2004) 29 *Queen’s LJ* 563.

<sup>73</sup> Noted in, *e.g.*, Gary Lawson, “Everything I Need to Know About Presidents I Learned from Dr. Suess” (2000) 24 *Harv J L & Pub Pol’y* 381 at 386.

<sup>74</sup> Kaplow 2013, *supra* note 56 at 1363.

<sup>75</sup> David Bamford, Trevor CW Farrow, Michael Karayanni, Erik S Knutsen, Shirley Shipman & Beth Thornburg, “Learning the ‘How’ of the Law: Teaching Procedure and Legal Education” (2013) 51:1 *Osgoode Hall LJ* 45 [“Bamford, *et al*”] at 56.



motion to strike, or request to use Rule 2.1 all have benefits. The more extensive of these procedures' benefits include increasing the likelihood of achieving a substantively just result, as well as the perception thereof. But they also come with costs to predictability and efficiency, in terms of time, money, preventing others from accessing the courts, and, on occasion, the perception that the court process is being abused by persons behaving vexatiously.<sup>76</sup> And the probability that they will increase the likelihood of (the perception of) a just result must be weighed against these costs. Though there may be a correlation between investment of resources into a claim and a just result (though Chapter Four notes that the extent to which this is true is uncertain<sup>77</sup>), investment of resources into a claim for its own sake appears unwise. What is important is that resources be invested wisely. As John Carroll, recognizing the benefits and dangers of proportionality, wrote about the principle in discovery, we should ask “is this [procedure] worth the cost given the information which it will produce?” and, as a result, the justice it will produce.<sup>78</sup> If proportionality is construed in this way, it incorporates both deontological (in terms of recognizing the paramount importance of substantive justice) and consequentialist (in terms of recognizing that the concern is one of many) concerns and appears a useful tool against which to assess the effectiveness of civil procedure reform.

### **B. Summary of Chapters in Terms of Achieving Proportionality**

Now it is time to evaluate this nuanced understanding of proportionality against findings from earlier chapters. The first three chapters investigated elements of Ontario's procedural law that were not directly amended in 2010, making the 2010 Amendments and the holding of *Hryniak* not directly applicable, but can facilitate or hinder the prompt resolution of actions on their merits

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<sup>76</sup> Noted in Chapter Two: Kennedy Rule 2.1, *supra* note 21 at 263, citing Mathieu & McLean, *supra* note 69.

<sup>77</sup> Chapter Four at 233.

<sup>78</sup> Carroll, *supra* note 17 at 466.

depending on how they are used, helping assessment of whether the spirit of the 2010 Amendments and *Hryniak* is being heeded more generally.

Chapter One analyzed how jurisdiction motions pose an access to justice obstacle, against the backdrop of recent, consistent criticisms of the law of jurisdiction.<sup>79</sup> Specifically, it looked at the intersection of jurisdiction motions not only with *Hryniak* and the 2010 Amendments, but also the Supreme Court of Canada’s attempt to clarify the law of jurisdiction in *Club Resorts v Van Breda*.<sup>80</sup> There have been notable and positive if modest improvements in the 2010s as the number of jurisdiction motions brought has decreased, while the rate of success has increased.<sup>81</sup> Isolating the reason for this is not possible to discern with scientific precision. While it is possible that the spirit of *Hryniak* has something to do with this, it appears likelier that the primary reason is *Van Breda*, which unapologetically sought to clarify the law of jurisdiction, even at the cost of causing expense and inconvenience to parties by denying them the opportunity to litigate in their preferred forum.<sup>82</sup>

Chapter Two looked at a new element of the *Rules*: Rule 2.1, allowing judges to dismiss actions after a written process, potentially *sua sponte*, if they appear facially vexatious or abusive.<sup>83</sup> There are dangers associated with the Rule, particularly with respect to the fair treatment of self-represented litigants, and three instances of arguably inappropriate use of the Rule are cited.<sup>84</sup> Nonetheless, the Rule generally seems an effective and procedurally fair mechanism to address a particular type of claim, saving responding parties, courts, and other litigants significant time and

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<sup>79</sup> Gerard J Kennedy, “Jurisdiction Motions and Access to Justice: An Ontario Tale” (2018) 55:1 Osgoode Hall LJ 79 [“Kennedy Jurisdiction”].

<sup>80</sup> 2012 SCC 17, [2012] 1 SCR 572 [hereinafter “*Van Breda*”].

<sup>81</sup> Kennedy Jurisdiction, *supra* note 79 at 91-93.

<sup>82</sup> *Ibid* at 83-84.

<sup>83</sup> Kennedy Rule 2.1, *supra* note 21.

<sup>84</sup> *Ibid* at: 268, citing *Shafirovitch*, *supra* note 36; 265-266, citing *Beatty v Office of the Children’s Lawyer*, 2016 ONSC 3816, [2016] OJ No 3024 (SCJ); and 260, citing *Khan v Krylov & Company LLP*, 2017 ONCA 625, 2017 CarswellOnt 16235 [“*Khan*”].

resources. Rule 2.1 was enacted in the immediate aftermath of *Hryniak*, with the principle of proportionality in mind. *Hryniak* is also cited in leading cases interpreting Rule 2.1.<sup>85</sup> But are the positive effects of Rule 2.1 caused by *Hryniak* and its call for a “culture shift” or because a new, specific rule of procedural law was enacted? Almost certainly, it is bit of both. It seems clear that the Rule would not have been enacted but for the spirit of the 2010 Amendments. But it seems equally clear that a specific new regulation was required to have these effects.

Chapter Three investigates the distinction between interlocutory and final appeals, which Nordheimer J (as he then was) succinctly described as “an issue that has bedevilled the [legal] profession for decades.”<sup>86</sup> Despite being definitionally unrelated to a case’s merits, the number of disputes over this issue has not decreased in the aftermath of *Hryniak*, which is not cited by a single case wrestling with this issue for its emphases on proportionality and the need for a culture shift in how civil litigation is conducted.<sup>87</sup> A different trend was apparent in British Columbia – this, however, followed legislative intervention attempting to address this specific issue.<sup>88</sup>

Chapter Four reported the results of a survey asking lawyers who had experienced the 2010 Amendments and *Hryniak* what they viewed the effects of those Amendments to be. There was a perception among many respondents that summary judgment was being pursued more often, which most, though not all, respondents viewed as positive.<sup>89</sup> There was also a view among many respondents that this led to certain types of cases being resolved more quickly and with less financial expense.<sup>90</sup> However, most respondents nonetheless believed that litigation was, in the

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<sup>85</sup> Kennedy Rule 2.1, *ibid*, at, *e.g.*, 248, citing, *e.g.*, *Raji v Borden Ladner Gervais LLP*, 2015 ONSC 801, [2015] OJ No 307 (SCJ) [“*Raji*”].

<sup>86</sup> *Mancinelli v Royal Bank of Canada*, 2017 ONSC 1526, [2017] OJ No 1111 (Div Ct) at para 2.

<sup>87</sup> Chapter Three at 158.

<sup>88</sup> *Ibid* at 165-170, citing *Court of Appeal Act*, RSBC 1996, c 77 [“*CoA Act*”], s 7, *as am.*

<sup>89</sup> Chapter Four at 225-227.

<sup>90</sup> *Ibid* at 226-227.

main, becoming neither quicker nor less expensive, with most respondents citing myriad reasons outside of *Hryniak* and the 2010 Amendments *per se* as the cause of this.<sup>91</sup>

Each of these show some positive effects in the conduct of civil litigation in Canada vis-à-vis minimizing unnecessary interlocutory disputes and resolving actions on their merits more quickly and with fewer costs. But these improvements have still been modest. Moreover, they tend to have been in response to discrete, tailored interventions by the courts (*Van Breda* seemingly being the likelier reason for the effects on jurisdiction motions than *Hryniak*), regulators (the enactment of Rule 2.1 providing a new tool to address a particular type of claim again seeming more important than *Hryniak per se*), or legislatures (the British Columbia's legislature amending the law surrounding interlocutory appeals). It would seem too harsh a conclusion to suggest that *Hryniak* has had no effect outside the summary judgment context – the surveys suggest some change has indeed occurred, and it is somewhat difficult to separate *Hryniak* from the enactment of Rule 2.1 in particular. But these effects of *Hryniak* outside summary judgment seem amorphous and less effective than the other more tailored, if less wide-reaching, interventions.

### **C. Where Civil Procedure Reform Can Facilitate Access to Justice – And Where it Likely Will Not**

It appears that there have been real effects of *Hryniak* and the 2010 Amendments. MacKenzie has also suggested this is the case with respect to summary judgment in particular<sup>92</sup> and Catherine Piché, though critical of the state of access to justice in Ontario, believes the recent reforms have been helpful.<sup>93</sup> Certain cases have been resolved on their merits more quickly – or inappropriate interlocutory wrangling has been avoided – and this has only very rarely come at the expense of

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<sup>91</sup> *Ibid* at 227-232.

<sup>92</sup> MacKenzie SJ, *supra* note 5.

<sup>93</sup> Catherine Piché, “Administering Justice and Serving the People: The Tension between the Objective of Judicial Efficiency and Informal Justice in Canadian Access to Justice Initiatives” (2017) 10(3) *Erasmus L Rev* 137 at 140.

procedural or substantive injustices.<sup>94</sup> In other words, the increased speed and lesser financial expense has *some* costs, but they have been minimal. This seems positive.

These changes appear real; however, they seem confined to discrete areas: in particular, where legislation/regulations (Rule 2.1, the new appellate jurisdiction legislation in British Columbia) or binding appellate jurisprudence (*Van Breda* on jurisdiction, *Hryniak* on summary judgment) have been promulgated. This may indicate that top-down changes are necessary.<sup>95</sup> This is a reason Chapter One recommended legislative reform regarding jurisdiction motions<sup>96</sup> and Chapter Three did the same regarding interlocutory appeals.<sup>97</sup> On the other hand, *Hryniak*'s call for a “culture shift” appears to have only been heeded minimally outside areas where more tailored interventions occurred. This could suggest that this term is too amorphous to be helpful outside of consciousness-raising – consciousness-raising that Chapter Four suggests has occurred.<sup>98</sup>

Despite limited positive effects of *Hryniak* and the 2010 Amendments, civil procedure reform appears only so effective in facilitating access to justice. In this context, it is worth revisiting the “Access to Justice Triangle” as introduced in the Introduction:<sup>99</sup>

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<sup>94</sup> Kennedy Jurisdiction, *supra* note 79 at 110; Kennedy Rule 2.1, *supra* note 21 at 274.

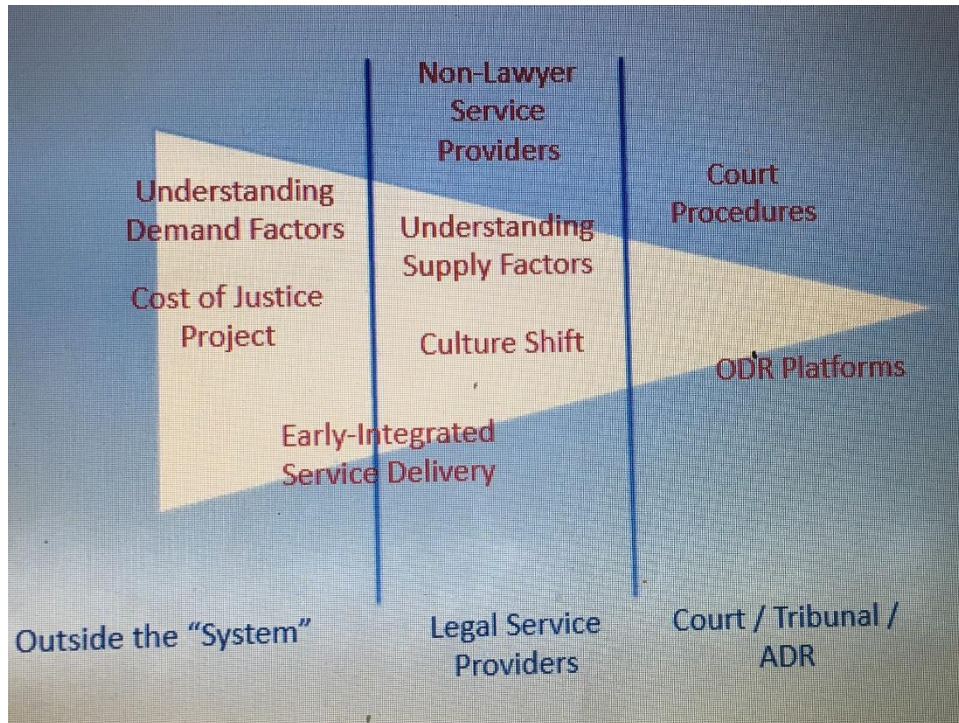
<sup>95</sup> Proposed by, *e.g.*, Lucinda Vandervort in “Access to Justice and the Public Interest in the Administration of Justice” (2012) 63 UNB LJ 125.

<sup>96</sup> Kennedy Jurisdiction, *supra* note 79 at 108.

<sup>97</sup> Chapter Three at 177-178.

<sup>98</sup> Chapter Four at 215, acknowledging that this is not unimportant: see, *e.g.*, Janet E Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, NJ: Princeton University Press, 2006) at 43-44, 239, noting that this has been particularly important in feminist legal scholarship.

<sup>99</sup> This version comes from Andrew Pilliar, “Connecting and Understanding: AJRN and the Market for Personal Legal Services”, presentation to University of Saskatchewan Access to Justice Working Group, Summer 2016, slide 12. Developed by the British Columbia Civil Justice Task Force and later used by organizations such as the Canadian Forum on Civil Justice and National Action Committee on Access to Justice on Civil and Family Matters: see footnotes 12-14 of Introduction.



The triangle seeks to illustrate how different interventions can resolve justiciable issues, with the triangle's narrowing reflecting a reduction of the number of people "in the system". This dissertation's research has mostly concentrated on the right-most third: how to resolve matters once the litigation process has begun. The importance of this was explained in the Introduction.<sup>100</sup>

However, it was hypothesized that civil procedure reform is unlikely to have effects on, or to the left of, the Triangle. This is not a novel observation<sup>101</sup> but buttresses the common-sense proposition that goals such as preventing justiciable issues from arising or demystifying legal knowledge cannot be assisted by civil procedure reform. Another factor nearer to the left of the A2J Triangle is delivering legal services in a more accessible way, as it is problematic for a legal service's cost to exceed its value.<sup>102</sup> This unfortunately occurs frequently, partially due to financial

<sup>100</sup> Introduction at 4-6.

<sup>101</sup> See, e.g., Radu Razvan Ghergus, "The Curious Case of Civil Procedure Reform in Canada, So Many Reforms Proposals With So Few Results" (LLM Thesis, University of Toronto, 2009) at, e.g., 58.

<sup>102</sup> See, e.g., Gillian K Hadfield, "The Cost of Law: Promoting Access to Justice Through the (un)Corporate Practice of Law" (2014) 38 Supplement Intl Rev L & Econ 43.

incentives for lawyers to practice in inefficient ways<sup>103</sup> and concern that they will be subject to malpractice claims if they are insufficiently thorough.<sup>104</sup> But *Hryniak* and the 2010 Amendments have had minimal discernible effects beyond where specific changes in procedural or substantive law occurred, leaving much more work to be done, as Chapter Four notes in particular.<sup>105</sup>

#### **D. Conclusions Complementary to England and Wales Experience**

While this is not a comparative dissertation (save for the brief comparison of Ontario and British Columbia law in Chapter Three), it nonetheless worth briefly considering how Ontario's experiences with summary procedures appear to complement what has been hypothesized and experienced elsewhere – notably, England and Wales. The Osborne Report, which was the genesis of the 2010 Amendments, has significant similarities with the “Woolf Report”, which had the purpose of reforming civil procedure in England and Wales. Written by former House of Lords jurist Harry Woolf, the Woolf Report had the purposes of, among other things, speeding up civil justice and making it more affordable.<sup>106</sup> Specifically, just as occurred in Ontario with the 2010 Amendments, expanded ability to seek summary judgment<sup>107</sup> was established in England and Wales, and the principle of proportionality was enshrined throughout civil procedure.<sup>108</sup>

Ontario shares much in common with England and Wales. Both are common law jurisdictions – indeed, the Ontario Superior Court of Justice's powers are based in the historic powers of the courts of England.<sup>109</sup> And both jurisdictions were rife with inefficiencies, delay, and procedure

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<sup>103</sup> Brooke MacKenzie, “Better value: Problems with the billable hour and the viability of value-based billing” (2013) 90 Can Bar Rev 677 [“MacKenzie 2013”].

<sup>104</sup> Deborah L Rhode, *Access to Justice* (New York: Oxford University Press, 2004) at 100-101.

<sup>105</sup> Chapter Four at 235-237.

<sup>106</sup> See, e.g., Suzanne Burn, “The Civil Justice Reforms in England and Wales” (1999) 17 Windsor YB Access Just 221 at 223; Neil Andrews, “English Civil Procedure: A Synopsis” (2008) *Ritsumeikan L Rev* 25 at 31; Oscar G Chase, et al, *Civil Litigation in Comparative Context*, 2d ed (St. Paul, MN: West Academic Publishing, 2017) [“Chase, et al”] at 19.

<sup>107</sup> Chase, et al, *ibid* at 387.

<sup>108</sup> *Ibid* at 19.

<sup>109</sup> CJA, *supra* note 53, s 11(2).

that was unnecessary to achieve a just result. Lord Woolf himself noted “disclosure” (the English equivalent to Ontario’s discovery) as a quintessentially cited example of a procedure causing disproportionate expense.<sup>110</sup> This is another parallel to Ontario.<sup>111</sup>

The reforms arising from the Woolf Report have been praised for prudently using public resources and disposing of cases in a speedier manner by, for example, expanding the ability to grant summary judgment, potentially *sua sponte*.<sup>112</sup> Neil Andrews has also noted that the involvement of judges earlier in litigation through potentially dispositive motions gives the judge the ability to comment upon (even if not decide) the merits of the case, allowing parties to achieve more informed settlement.<sup>113</sup> There has been criticism of the Woolf Report and subsequent reforms. But these have mostly been for failing to comprehensively consider all issues relevant to access to civil justice.<sup>114</sup> The enshrinement of proportionality and expanded summary judgment powers appear likely to stay. The consensus appears that these were positive developments unless taken to a counterproductive extreme of excessively jeopardizing the ability of the courts to come to accurate results in the vast majority of cases.<sup>115</sup>

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<sup>110</sup> Lord Harry Woolf, “Civil Justice in the United Kingdom” (1997) 45 *American Journal of Comparative Law* 709 at, *e.g.*, 711, 723, 726.

<sup>111</sup> See, *e.g.*, Justice Thomas Cromwell noting as much in extrajudicial comments in 2013 while still serving on the Supreme Court: Beverley Spencer, “The Road to Justice Reform: An Interview with Supreme Court of Canada Justice Thomas Cromwell” *The National* (July-August 2013), online: <<http://nationalmagazine.ca/Articles/Recent4/The-road-to-justice-reform.aspx>>. This is also a common hypothesis in the United States: see, *e.g.*, Judge (as he then was) Neil Gorsuch, “13th Annual Barbara K. Olson Memorial Lecture” (Address Delivered at the Federalist Society for Law and Public Policy’s 2013 National Lawyers Convention, The Mayflower Hotel, Washington, DC, 15 November 2013), online: <[https://www.youtube.com/watch?v=VI\\_c-5S4S6Y](https://www.youtube.com/watch?v=VI_c-5S4S6Y)> at ~6:15-10:30. See also *Hryniak*, *supra* note 3 at para 29.

<sup>112</sup> Chase, *et al*, *supra* note 106 at 387.

<sup>113</sup> *Ibid*; Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (Cambridge: Cambridge University Press, 2003) [“Andrews ECP”] at 505-07.

<sup>114</sup> See, *e.g.*, John Sorabji, *English Civil Justice after Woolf and Jackson* (Cambridge: Cambridge University Press, 2014) at 166ff.

<sup>115</sup> *Ibid* at, *e.g.*, 201-202; Chase, *et al*, *supra* note 106 at 387; Andrews ECP, *supra* note 113 at 3.22.



At the same time, there is also recognition that the reforms arising from Woolf Report, like the 2010 Amendments, failed to achieve a panacea. For example, the Woolf Report reforms can be criticized for increasing inequities in access to the courts, privileging those who were already able to access justice while the state has an arguable obligation to ensure access to justice for all who need recourse to it.<sup>116</sup> As suggested earlier, Ontario's trade-offs in terms of increasing access appear to have only minimally helped those with pre-existing disadvantages in accessing the courts.<sup>117</sup> This is in line with general critiques of proportionality.<sup>118</sup> But the 2010 Amendments and *Hryniak* do not appear to have generally exacerbated the difficulties encountered by those with disadvantages in accessing the courts.<sup>119</sup> Rather, as John Sorabji notes in the English context, civil procedure reform is likely only so capable of facilitating access to justice and addressing such systemic inequities.<sup>120</sup> Andrews has noted that despite success from the Woolf Report, the reforms did not solve the access to justice problems arising from lawyers charging high fees, meaning a further report had to be commissioned to address that issue.<sup>121</sup> How lawyers are paid<sup>122</sup> and regulated<sup>123</sup> are also hypothesized to be access to justice impediments in Ontario, through incentivizing excessive billing and unnecessarily capping the number of lawyers available to the public. Catherine Piché has construed Canada's access to justice problems as first and foremost

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<sup>116</sup> Sorabji, *ibid* at 166.

<sup>117</sup> NSRLP Self-Reps, *supra* note 17; Carroll, *supra* note 17 at 466.

<sup>118</sup> *E.g.*, Sorabji, *supra* note 114, Chapters 6 and 7; Hanycz, *supra* note 20.

<sup>119</sup> Kennedy Rule 2.1, *supra* note 21 at 270ff.

<sup>120</sup> Sorabji, *supra* note 114 at 202.

<sup>121</sup> Neil Andrews, "Accessible, Affordable, and Accurate Civil Justice--Challenges Facing the English System" (University of Cambridge Faculty of Law Research Paper No 35/2013, 2013) at 3-4.

<sup>122</sup> Pilliar 2015, *supra* note 10; MacKenzie 2013, *supra* note 103.

<sup>123</sup> See, *e.g.*, Dwight Newman, Michelle Biddulph & Amy Gibson, "Grappling with the Future of Law in the Context of Change" (2013) 76 Sask L Rev 51 at 65-67, summarizing work of Adam Dodek, among others; Lauren Moxley, "Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice" (2015) 9 Harv L & Pol'y Rev 553; Léonid Sirota, "Deregulate All the Lawyers" *Double Aspect* (9 May 2019), online: <<https://doubleaspect.blog/2019/05/08/deregulate-all-the-lawyers/>>.

problems with access to legal representation.<sup>124</sup> We should be unsurprised that civil procedure reform was limited in its ability to facilitate access to justice in Ontario when, as in England and Wales, there are many other barriers to access to justice.

### **E. The Broader Access to Justice Conversation**

This discussion has emphasized a relatively narrow understanding of the concept of access to justice – the increased, just resolution of civil actions on their merits with less delay and financial expense. As noted in the Introduction, there are good reasons to define access to justice much more broadly.<sup>125</sup> Much work done by those defining access to justice more broadly, such as analyzing how lawyers practice law<sup>126</sup> or reforming substantive law to emphasize transformative social justice,<sup>127</sup> should be viewed as complementary, rather than alternatives, to civil procedure reform. But a relatively narrow definition of access to justice was adopted for analyzing *Hryniak* and the 2010 Amendments given, among other reasons, the hypothesis that civil procedure reform is likely an ill-suited vehicle to achieve access to justice defined in this broader way.

Analysis has born out this hypothesis to a significant extent – though it should be caveated slightly. Civil procedure reform remains a questionable vehicle to, for example, achieve transformative social change, though civil procedure rules may need to be applied slightly more flexibly in the public law realm, when a case could have far-reaching effects.<sup>128</sup> It is also doubtful that the use of prescriptive, summary procedures is likely to, without more, affect how lawyers

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<sup>124</sup> *Supra* note 93 at 140.

<sup>125</sup> Introduction at, *inter alia*, 10.

<sup>126</sup> Michele M Leering, “Enhancing the Legal Profession’s Capacity for Innovation: The Promise of Reflective Practice and Action Research for Increasing Access to Justice” (2017) 34 Windsor YB Access Just 189 at 220.

<sup>127</sup> *E.g.*, Farrow 2014, *supra* note 4 at 969; Sarah Buhler, “The View from Here: Access to Justice and Community Legal Clinics” (2012) 63 UNB LJ 427; Patricia Hughes, “Law Commissions and Access to Justice: What Justice Should We Be Talking About?” (2008) 46:4 Osgoode Hall LJ 773.

<sup>128</sup> Kennedy & Sossin, *supra* note 39.

practice law. Specifically, this analysis suggests particular prescriptions are likelier to change how lawyers practise law than statements that a “culture shift” is required.

This Conclusion nonetheless should be caveated insofar as summary procedures are used against vulnerable, potentially self-represented parties. Such parties, who may disproportionately come from equity-seeking groups,<sup>129</sup> are likely to benefit from the in-court time that summary procedures seek to curtail.<sup>130</sup> Julie Macfarlane has amassed significant anecdotal evidence that summary procedures disproportionately disadvantage self-represented litigants,<sup>131</sup> and Chapters Two and Three’s analysis of the case law suggests that this concern is real.<sup>132</sup> Chapter Four concurs that self-represented litigants frequently require more formal processes.<sup>133</sup> Is this concern best addressed by transformative social justice addressing the economic and social status of these individuals or adopting different procedural rules depending on whether a self-represented litigant is a party to the litigation? The answer is likely both, and finding a dividing line between the two may seem artificial. The fundamental issues causing such individuals’ problems likely have solutions outside courts.<sup>134</sup> However, judges should be inclined to give self-represented litigants the benefit of the doubt, if doubt is present.<sup>135</sup> This includes flexibility in filling out court forms, and not expecting use of technical legal language.<sup>136</sup> This permissive attitude can be taken to an

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<sup>129</sup> See, e.g., Patricia Hughes, “Advancing Access to Justice through Generic Solutions: The Risk of Perpetuating Exclusion” (2013) 31 Windsor YB Access Just 1.

<sup>130</sup> NSRLP Self-Reps, *supra* note 17; Carroll, *supra* note 17 at 466.

<sup>131</sup> NSRLP Self-Reps, *ibid* at 17; Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report” (May 2013), online: <<https://scholar.uwindsor.ca/lawpub/85/>> [“Julie Macfarlane”].

<sup>132</sup> Kennedy Rule 2.1, *supra* note 21 at 263; Chapter Three at 157-158.

<sup>133</sup> Chapter Four at 210, 240.

<sup>134</sup> As the Supreme Court of Canada has stated regarding relationships with Canada’s Indigenous populations, “true reconciliation is rarely, if ever, achieved in courtrooms”: *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, [2017] 1 SCR 1069 at para 24. This is a reminder that court decisions can only achieve so much.

<sup>135</sup> See, e.g., *Wouters v Wouters*, 2018 ONCA 26, 6 RFL (8th) 305 [“Wouters”] at paras 36-38; *Sanzone v Schechter*, 2016 ONCA 566, 402 DLR (4th) 135 [“Sanzone”]; *Pintea v Johns*, 2017 SCC 23, [2017] 1 SCR 470.

<sup>136</sup> E.g., *Wouters*, *ibid*; *Sanzone*, *ibid*.

extreme that defeats the purpose of summary procedures.<sup>137</sup> And creating myriad exceptions to legal rules, including procedural rules, can be its own access to justice impediment, as noted in Chapters One and Three in particular. This will be re-explored in Part III of this Conclusion. However, an appropriate balance can be struck about the side on which to err, and Chapter Two suggests this largely has been struck with respect to Rule 2.1. So while this dissertation is mostly complementary to yet separate from conversations about transformative social justice, there is some overlap.

Much of this dissertation has assumed that the substantive law is just and worthy of resort to the courts to enforce. This premise is of course disputable, as the critical legal studies movement exemplifies.<sup>138</sup> Indeed, almost every reasonable person should disagree with this premise to some extent. Edmund Burke recognized that institutions such as substantive law will inevitably have to change, albeit preferably gradually.<sup>139</sup> A primary way to change the substantive law is bringing a lawsuit. Insofar as civil procedure reform makes this easier, this project of substantive legal reform is facilitated. Indeed, scholars<sup>140</sup> and judges<sup>141</sup> have defended the desire to increase resolution of claims on their merits to ensure development of the common law and related democratic norms.

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<sup>137</sup> Kennedy Rule 2.1, *supra* note 21 at 274, citing Karakatsanis J in *Hryniak*, *supra* note 3 at para 29:

There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

<sup>138</sup> See, e.g. Patricia J Williams, “The Pain of Word Bondage” in *The Alchemy of Pain and Rights* (Cambridge, MA: Harvard University Press, 1991), c 8; Constance Backhouse, “Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives” in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer* (Vancouver: UBC Press, 2016).

<sup>139</sup> Edmund Burke, *Reflections on the Revolution in France* (New York: Oxford University Press, 1999 [1790]) at 96-97.

<sup>140</sup> See, e.g., Farrow Book, *supra* note 18 at 219-232; Brooke MacKenzie, “Settling for less: How the *Rules of Civil Procedure* overlook the public perspective of justice” (2011) 39 Adv Q 222 (specifically commenting on the incentivization of settlement in the *Rules*, *supra* note 2 at Rule 49, but the sentiment is applicable more broadly).

<sup>141</sup> Karakatsanis J in *Hryniak*, *supra* note 3 at para 1.

## II) ONTARIO COURT OF APPEAL AN IMPEDIMENT?

The Ontario Court of Appeal is one of the highest-regarded courts in Canada, and justly so. But with the greatest respect to the Court of Appeal, this dissertation suggests that, when it comes to the use of summary procedures to achieve access to civil justice, it has consistently lagged behind both the Superior Court and the Supreme Court. This brief section begins with a discussion of the various ways in which the Court of Appeal has interpreted procedural law in ways that have hindered, rather than facilitated, access to justice in the specific realm of summary procedures. The Court's reluctance is likely driven by a well-motivated desire to fulfill its roles to lay down clear legal rules and ensure that substantive injustices do not occur. But it is nonetheless posited that the Court has erred in excessively preventing the creative use of summary procedures to facilitate access to justice. A more hands-off approach to reviewing trial judges' procedural decisions may be warranted. Suggestions on how that could be realized, without appellate judges abrogating their responsibilities, are given.

### A. Court of Appeal and Summary Procedures

#### 1. History

The Ontario Court of Appeal interpreted the introduction of summary judgment to the *Rules* in 1985 narrowly.<sup>142</sup> MacKenzie has observed that the Court of Appeal's narrow interpretation of the 2010 Amendments also resulted in a reduced effectiveness of the 2010 Amendments pending the Supreme Court of Canada's decision in *Hryniak*.<sup>143</sup> It required the Supreme Court of Canada's interpretation of Ontario procedural law to allow the 2010 Amendments to have their full effect in the summary judgment context. Building on the above conception of access to justice, and work

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<sup>142</sup> Walker SJ, *supra* note 5 at 697; *Irving Ungerman Ltd v Galanis* (1991), 4 OR (3d) 545 at 550–51.

<sup>143</sup> MacKenzie SJ, *supra* note 5.

by MacKenzie,<sup>144</sup> Pitel and Lerner,<sup>145</sup> and Choudhary,<sup>146</sup> this dissertation views the expanded use of summary procedures as an access to justice success, allowing the prompt resolution of civil claims on their merits, and also giving the judiciary the opportunity to develop the common law. Though not everyone shares this view,<sup>147</sup> it appears that, had the Court of Appeal's interpretation of courts' summary judgment powers been allowed to stand, the positive access to justice-related effects of the Supreme Court's *Hryniak* decision would not have been realized.

## 2. Summarizing Chapters One Through Four

Chapter One notes that the Supreme Court's decision in *Van Breda*<sup>148</sup> was an access to justice improvement compared to the Ontario Court of Appeal's decision in *Muscutt*<sup>149</sup> and even the Court of Appeal's own decision in *Van Breda*.<sup>150</sup> The number of jurisdiction motions, and especially the number of unsuccessful jurisdiction motions, has decreased in the aftermath of the Supreme Court's intervention. The result has been a notable saving of parties' time and money.<sup>151</sup>

Chapter Two similarly posits that the Court of Appeal has narrowly construed the applicability of principles of Rule 2.1 in the family law context. This could have negative impacts on the ability to use Rule 2.1 to achieve access to justice.<sup>152</sup> Family law is governed by different statutory authority and social considerations than civil litigation and the Court of Appeal's holding that Rule 2.1 is not directly applicable in the family law context is understandable. Having said that, superior

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<sup>144</sup> *Ibid.*

<sup>145</sup> Stephen GA Pitel & Matthew Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014) 43 Adv Q 344.

<sup>146</sup> Chaudhary, *supra* note 68.

<sup>147</sup> See, e.g., Jonathan Lisus, "*Hryniak*: Requiem for the vanishing trial, or brave new world?" (Summer 2014) 33 Adv J No 1, 6; see also the results reported in Chapter 5 at Part IV.C.

<sup>148</sup> *Supra* note 80.

<sup>149</sup> *Muscutt v Courcelles* (2002), 60 OR (3d) 20 (CA).

<sup>150</sup> *Charron Estate v Village Resorts Ltd*, 2010 ONCA 84, 98 OR (3d) 721.

<sup>151</sup> Kennedy Jurisdiction, *supra* note 79 at, e.g., 102.

<sup>152</sup> *Frick v Frick*, 2016 ONCA 799, 132 OR (3d) 321 ["*Frick*"].

courts have inherent authority to control their own processes.<sup>153</sup> Moreover, the *Family Law Rules* are not as flexible as the *Rules of Civil Procedure*, which leads to the ability to use the *Rules of Civil Procedure* by analogy when the *Family Law Rules* do not “cover a matter adequately”. Myers J’s analysis in *Purcaru* is convincing:

I see no benefit in highly technical efforts to scan and parse the various rules so as to neatly pigeon-hole particular cases into one or another. [...] There may be cases where Rule 1(8.2) of the *Family Law Rules* neatly addresses a problem on its own. There may also be cases where Rule 1(8.2) does “not cover a matter adequately” so that Rule 1(7) of the *Family Law Rules* will then allow access to Rule 2.1 of the *Rules of Civil Procedure* or other rules as necessary or appropriate in the circumstances. In each case the court is seeking to promote efficient and affordable litigation recognizing that the “process of adjudication must be fair and just. This cannot be compromised.” *Hryniak*, at para. 23.<sup>154</sup>

With greatest respect to the Court of Appeal, insofar as it concluded, in *Frick v Frick*,<sup>155</sup> that Rule 2.1 is not applicable, even by analogy, in the family law context, this may be too rigid. The procedure that the Court of Appeal has adopted to use Rule 2.1 in the Court of Appeal itself is also more complicated than those which the Superior Court or the Divisional Court<sup>156</sup> have adopted. Insofar as simplicity and access to justice are correlated, this is not a desirable development coming from the Court of Appeal.

Chapter Three suggests that the Court of Appeal has needlessly muddied the waters between what is considered a final or interlocutory order for purposes of appeal. Though this observation has originated elsewhere,<sup>157</sup> Chapter Three attempts to quantify what the actual costs of this have

<sup>153</sup> E.g., *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 [“*MacMillan Bloedel*”] at paras 18, 33.

<sup>154</sup> *Purcaru v Vacaru*, 2016 ONSC 1609, 76 RFL (7th) 333 (SCJ) [“*Purcaru*”] at para 15.

<sup>155</sup> *Supra* note 152.

<sup>156</sup> *Simpson v The Chartered Professional Accountants of Ontario*, 2016 ONCA 806, 5 CPC (8th) 280 at paras 45-46.

<sup>157</sup> See, e.g., John Sopinka, Mark A Gelowitz & W David Rankin, *The Conduct of an Appeal*, 4th ed (Toronto: LexisNexis, 2018) [“*Conduct of an Appeal*”], § 1.17ff.

been, and concludes that they have been steep. This has likely been motivated by a desire to ensure that substantive justice is done – but it has also seemingly resulted in needless procedural disputes.

Chapter Four reports that survey respondents believe that an initial increase in summary judgment post-*Hryniak* has fallen off after recent Court of Appeal decisions.<sup>158</sup> While some respondents viewed this as positive, more seemed to feel that the Court of Appeal was needlessly curtailing creative uses of procedure to resolve litigation on the merits.<sup>159</sup>

### 3. Partial Summary Judgment

The Court of Appeal also recently held that pre-*Hryniak* cases on partial summary judgment that render it extremely rare<sup>160</sup> are equally applicable post-*Hryniak*.<sup>161</sup> This is motivated by a concern to ensure that there is not needless bifurcation of issues. While there are doubtless cases where this would be problematic, this concern can also extend to summary judgment generally, which can also create needless delay and expense if sought inappropriately.<sup>162</sup> But in *Hryniak*, a unanimous Supreme Court held that these concerns should not dissuade parties from using summary judgment powers robustly when appropriate.<sup>163</sup> The strong presumption against partial summary judgment does not consider the benefits of partial summary judgment motions in terms of finally resolving issues,<sup>164</sup> that in turn may finally resolve the litigation, or at least finally remove parties from the litigation.<sup>165</sup> This makes trials quicker, if necessary at all.<sup>166</sup> It would also

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<sup>158</sup> Chapter Four at 234-235.

<sup>159</sup> *Ibid* at 235.

<sup>160</sup> See, e.g., *Corchis v KPMG Peat Marwick Thorne*, [2002] OJ No 1437, 2002 CarswellOnt 1064 (CA), applying *Gold Chance International Ltd v Daigle & Hancock*, 2001 CarswellOnt 899, [2001] OJ No 1032 (SCJ), cited in *Butera v Chown, Cairns LLP*, 2017 ONCA 783, 137 OR (3d) 561 [“*Butera*”] at para 26.

<sup>161</sup> *Butera*, *ibid*.

<sup>162</sup> *Hryniak*, *supra* note 3 at para 33.

<sup>163</sup> *Ibid*.

<sup>164</sup> *Butera*, *supra* note 160 at para 34 recognizes this, but at what cost to deterring bringing advantageous motions?

<sup>165</sup> This admittedly creates a risk of inconsistent results against parties: *Hryniak*, *supra* note 3 at para 60. But it entails significant financial costs to the party who must go through trial.

<sup>166</sup> A benefit of, in particular, resolution of a question of law: see, e.g., *Pitel & Lerner*, *supra* note 145. This logically should be the same, in the context of a particular case, for resolutions of questions of fact.



seem particularly appropriate when a plaintiff has sued a plethora of individuals, which is known to happen.<sup>167</sup> Respondents in Chapter Four lamented the unavailability of partial summary judgment in circumstances such as these.<sup>168</sup> Partial summary judgment can also further development of the common law, another purpose of *Hryniak*,<sup>169</sup> and make settlement more informed and fair. Admittedly, this rationale was also dispensed to expand discovery rights – which was not a positive experiment.<sup>170</sup> But unlike expanded discovery, partial summary judgment disposes of issues in litigation. Moreover, trial courts can control a partial summary judgment motion’s scope more easily than documentary discovery and limit its potential to cause mischief.

It is true that partial summary judgment does not finally dispose of litigation – as such, it is not directly analogous to summary judgment. But there are cases where partial summary judgment appears more analogous to tort cases where the parties choose to bifurcate issues of liability and damages.<sup>171</sup> Moreover, partial summary judgment can lead to development of the common law and its associated benefits.<sup>172</sup> With respect, the Court of Appeal did not consider these benefits of partial summary judgment. Moreover, asserting that the pre-2010 case law applies post-*Hryniak* appears, with respect, unsophisticated and not in accordance with the spirit of *Hryniak* and its call for a culture shift in the use of procedural law. Nor does it consider the proportionality principle, which was only enshrined in 2010<sup>173</sup> before the pre-2010 cases restricting partial summary judgment, and can suggest that partial summary judgment may – or may not – be appropriate.

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<sup>167</sup> See, e.g., *Goralczyk v Beer Store*, 2016 ONSC 2265, 2016 CarswellOnt 5181 (SCJ) at para 9.

<sup>168</sup> Chapter Four at 201, 234-235.

<sup>169</sup> Pitel & Lerner, *supra* note 145; *Hryniak*, *supra* note 3 at paras 1, 26.

<sup>170</sup> Contemplated in, e.g., *Whiten v Pilot Insurance*, 2002 SCC 18, [2002] 1 SCR 59 at para 122.

<sup>171</sup> See, e.g., *Baert v Graham*, 2009 SKCA 72, 337 Sask R 117, cited in Dwight Newman, “The Judgments of the Saskatchewan Court of Appeal, 2009” (2010) 73 Sask L Rev 173 at fn 135.

<sup>172</sup> Pitel & Lerner, *supra* note 145 make this point in the context of Rule 21 motions.

<sup>173</sup> 2010 Amendments, *supra* note 1; Farrow 2012, *supra* note 9.

Ultimately, there appears to be a tendency of the Court of Appeal to narrowly construe summary procedures designed to improve access to justice.<sup>174</sup> Doubtless well-motivated by the intention to ensure a trial judge fully appreciates all relevant facts and that justice is seen to be done, it is nonetheless doubtful that this is a sufficient argument against summary procedures.<sup>175</sup>

### **B. Sound Motivations**

Before suggesting how the Court of Appeal could improve, it should be acknowledged again that its reasons for interpreting these procedural rules narrowly likely come from motivations that can be justified. This dissertation discusses the need for appellate courts to lay down clear rules, and the Court of Appeal has done this regarding partial summary judgment, Rule 2.1 in the family law context, and summary judgment pre-*Hryniak*. The Court of Appeal appears particularly concerned to correct injustices – such as ensuring a plaintiff can avail itself of Ontario’s jurisdiction in Chapter One<sup>176</sup> or have an appeal as of right in Chapter Three.<sup>177</sup> Correcting injustices through ensuring consistent application of the law is indeed a purpose of appellate courts.<sup>178</sup> “Correcting errors” in this way is a particularly important role of first-level appeal courts. Once called the Court of Error and Appeal,<sup>179</sup> the Court of Appeal’s role can be distinguished from the Supreme Court of Canada, which is truly a law-making Court. Intermediary appellate courts are not law-making courts to the same extent.<sup>180</sup> However, it would not be reasonable to expect the Supreme Court of Canada to be regularly interpreting Ontario procedural law, given the

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<sup>174</sup> *E.g.*, MacKenzie SJ, *supra* note 5 at 1295.

<sup>175</sup> MacKenzie SJ, *ibid*; Chaudhary, *supra* note 68.

<sup>176</sup> Kennedy Jurisdiction, *supra* note 79 at 95.

<sup>177</sup> Chapter Three at 141-142.

<sup>178</sup> *Ibid* at 134.

<sup>179</sup> *Ibid* at 136-137; Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal, 1792-2013* (Toronto: Osgoode Society for Canadian Legal History, 2014) at 18.

<sup>180</sup> Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at, *e.g.*, 95.

Supreme Court's purpose being confined to issues of national public importance.<sup>181</sup> In light of this, it would be understandable if the Court of Appeal were only an access to justice obstacle in one of the ways mentioned above in Section A. Erring in so many different ways, however, appears to be excessive, even if understandably so.

### C. Two Suggestions for the Court of Appeal

The Court of Appeal should be lauded for seeking to prevent substantive injustices. But the Court – and appellate courts generally for that matter – should reflect on their role in reviewing trial judges' procedural determinations in at least two specific ways. First, consciousness-raising is likely appropriate. As Daniel Jutras has noted, appellate courts are not designed to address every conceivable injustice and attempting to do so can come with serious and negative consequences.<sup>182</sup> And interpreting procedural law in such a way that there is *no* chance of an injustice is likely to be so costly so as to defeat the purpose of summary procedures. Narrow interpretations of summary procedures from appellate courts may also deter lawyers from bringing potentially advantageous motions.

How should the Court of Appeal approach its review of procedural decisions of trial courts? That leads to the second suggestion: giving *de facto* deference on determinations of appropriate procedure. The Supreme Court has already mandated that this is to be the case with respect to summary judgment motions,<sup>183</sup> but it should probably exist more generally. This is not to suggest that “palpable and overriding error”-style review<sup>184</sup> for procedural determinations should come into existence. However, an analogy from administrative law may be appropriate. While the “standard of review” for procedural fairness is technically correctness for issues of procedural

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<sup>181</sup> *Supreme Court Act*, RSC 1985, c S-26, s 40(1) explains the requirement for leave to appeal.

<sup>182</sup> “The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?” (2007) 32 Man LJ 61.

<sup>183</sup> *Hryniak*, *supra* note 3.

<sup>184</sup> Described in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 10.

fairness, deference to a decision-maker is known to creep in.<sup>185</sup> This is only logical as a first-instance decision-maker is in a privileged position to determine what is a fair procedure vis-à-vis a reviewing court.<sup>186</sup> Some jurists have criticized this as being disguised reasonableness review,<sup>187</sup> but terminology aside, the principle of deference pervades. It may be that this is best conceived not as deference *de jure* so much as deference as respectful common sense,<sup>188</sup> in the way that an appellate court may be “deferential” to a trial judge with great experience in a particular area even when deference *de jure* is not owed.

Appellate courts should of course intervene if there has been a consequential procedural error. At times, this is essential to protect vulnerable parties.<sup>189</sup> As noted above in Part I, a fair process is essential for justice. Courts of Appeal should not condone clear departures from the *Rules* as that is not only unfair but undermines the rule of law.<sup>190</sup> Insofar as laying down clear legal rules can be preferable to standards, interventionist appellate courts can actually *improve* access to justice, giving numerous other parties the chance to order their affairs.<sup>191</sup>

However, just as rules are not always preferable to standards, interventionist appellate courts are not always preferable to deferential appellate courts. And when it comes to reviewing trial courts’ procedural decisions, it would appear preferable for appellate courts to not assess what

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<sup>185</sup> Rennie JA describes this conundrum in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, 2018 CarswellNat 1433 at para 44; The Honourable Simon Ruel, “What Is the Standard of Review to Be Applied to Issues of Procedural Fairness?” (2016) 29 Can J Admin L & Prac 259.

<sup>186</sup> *Maritime Broadcasting System Ltd v Canadian Media Guild*, 2014 FCA 59, 373 DLR (4th) 167 at paras 50-51.

<sup>187</sup> Stratas JA in *ibid*, cited in Ruel, *supra* note 185 at 277.

<sup>188</sup> Abella and Cromwell JJ suggested this would occasionally be appropriate in *Bernard v Canada (Attorney General)*, 2014 SCC 13, [2014] 1 SCR 227 at para 35. Justice Antonin Scalia noted in “Judicial Deference to Administrative Interpretations of Law” (1989, No 3) Duke LJ 511 at 514 that there may be instances where such *de facto* deference may be appropriate, but is important to distinguish this from deference *de jure*.

<sup>189</sup> See, *e.g.*, Kennedy Rule 2.1, *supra* note 21.

<sup>190</sup> Ignoring a statute or regulation’s language is antithetical to the rule of law, though how this principle is applied in marginal cases is of course contestable: see, *e.g.*, Stéphane Beaulac, “Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or Weight” (August, 1998) 43 McGill LJ 287 at 322.

<sup>191</sup> Douglas Baird & Robert Weisberg, “Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207” (1982) 68 Virginia L Rev 1217 at 1229.

procedure is called for as if it were assessing from a blank slate. To paraphrase Karakatsanis J in *Hryniak*, a court should ask itself the question of “whether the added expense and delay of fact finding [from its preferred procedure] is necessary to a fair process and just adjudication.”<sup>192</sup> But the question for an appellate court should not be “would we have viewed this procedure” to be necessary as per *Hryniak* but instead be “could a reasonable trial judge have viewed this as a fair procedure” as per *Hryniak*. This should not be confined to summary judgment but to all procedural law that has the opportunity to facilitate or hinder access to justice, such as the examples in this dissertation. Appellate courts should also recognize that trial courts may be the source of innovation in the use of the *Rules*, and should be reluctant to discourage an innovative spirit that, as noted above, has produced benefits in discrete circumstances.

### III) THE RULES-STANDARDS DEBATE

The earlier chapters of this dissertation analyzed three procedural rules that had been criticized for being unpredictable in how they were to be applied (in the case of jurisdiction motions<sup>193</sup> and interlocutory appeals<sup>194</sup>) or were novel (in the case of Rule 2.1), leading to uncertainty in application. In response, efforts were undertaken – in the case of jurisdiction motions<sup>195</sup> and Rule 2.1,<sup>196</sup> by the bench, and in the case of interlocutory appeals, by the British Columbia legislature<sup>197</sup> – to increase predictability through decreasing discretion. In Chapter Four, respondents mentioned (unprompted) how legal uncertainty can impact access to justice. This goes to the heart of the

<sup>192</sup> *Hryniak*, *supra* note 3 at para 4.

<sup>193</sup> See, e.g., Tanya J Monestier, “(Still) A ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2013) 36 *Fordham Int’l LJ* 397 at 413; Janet Walker, “Judicial Jurisdiction in Canada: The *CJPTA*—A Decade of Progress” (2018) 55:1 *Osgoode Hall LJ* 9 [“Walker Jurisdiction”] at 15-20.

<sup>194</sup> *Conduct of an Appeal*, *supra* note 157, § 1.17.

<sup>195</sup> *Van Breda*, *supra* note 80.

<sup>196</sup> *Raji*, *supra* note 85 at para 9, endorsed by the Ontario Court of Appeal in *Scaduto v Law Society of Upper Canada*, 2015 ONCA 733, 343 OAC 87 at para 12, leave to appeal ref’d, [2015] SCCA No 488, 2016 CarswellOnt 21905 [“*Scaduto*”].

<sup>197</sup> *CoA Act*, *supra* note 88, s 7, as am.

“rules-standards debate” in legal theory, asking whether justice is better served by laws that are open-ended and broad, with discretion for the decision-maker to facilitate substantive justice, or clear and narrow, allowing parties to order their affairs and without being subject to arbitrary decision-making. This debate affects practically all areas of law, including the availability of procedural mechanisms, as this dissertation evidences.

Part A of this section introduces and summarizes the “rules-standards debate”, “one of the oldest” in legal scholarship.<sup>198</sup> Part B suggests how findings from this dissertation’s first four chapters complement or belie many hypotheses in this area. Part C suggests that Ontario procedural law has erred excessively in prescribing standards instead of rules – at least in circumstances of determining the availability of a particular forum or procedure. It is suggested that attempts to make the availability of dispositive procedures more rules-based have been helpful, in terms of decreasing financial expense and interlocutory wrangling, with minimal costs from the perspective of achieving substantive justice. It is not argued that all discretionary standards should be done away with; rather, it is suggested that, in this discrete area, moving closer to the “rules” end of the rules-standards spectrum can, in the aggregate, increase access to justice. This requires further research and exploration. Nor it is suggested that this is the primary access to justice obstacle current facing our legal system, especially when compared to the need to simplify procedures that seek to minimize the likelihood that perfect justice will be an obstacle to good justice. But much like the foregoing discussion about the Court of Appeal, it would be neglectful not to raise this.

#### **A. The Debate**

The rules-standards debate will need to be simplified, likely excessively. The term “rules” can of course describe all legal norms but, in this narrow sense, refers to bright-line prescriptions

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<sup>198</sup> Baird & Weisberg, *supra* note 191 at 1220.

that purportedly clearly prescribe particular legal results once relevant facts are known.<sup>199</sup> Such rules typically encompass a normative value that the law-maker believes should be applied in all cases.<sup>200</sup> “Standards”, on the other hand, typically announce the law-maker’s policy goal and then give decision-makers significant discretion in how to achieve that in any individual case.<sup>201</sup> The term “standards” can also encompass terms such as “factors”, “deals”,<sup>202</sup> and “principles” (which seems the primary term in the United Kingdom, particularly by Julia Black, who has analyzed this in depth<sup>203</sup>). Some scholars seek to distinguish these other terms,<sup>204</sup> while others (notably Cass Sunstein) simply put all of them together into a category of “rulelessness”.<sup>205</sup> Strong cases can be made to distinguish these terms, though at other times they seem indistinguishable.<sup>206</sup> Ultimately, there seems little disadvantage in following Duncan Kennedy’s consideration of these non-rules as types of standards.<sup>207</sup> Not only is this the most common parlance in North America but, as will be noted shortly, drawing bright lines between any of these terms is somewhat artificial. As such, these terms will be used interchangeably unless circumstances call for more specificity, though the emphasis will certainly be on “standards”.

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<sup>199</sup> See, e.g., Lawrence Solum, “Legal Theory Lexicon: Rules, Standards, and Principles” *Legal Theory Blog* (6 September 2009), online: <<https://lsolum.typepad.com/legaltheory/2009/09/legal-theory-lexicon-rules-standards-and-principles.html>>.

<sup>200</sup> See, e.g., Baird & Weisberg, *supra* note 191 at 1228. The law-maker can be an appellate court or the legislature.  
<sup>201</sup> *Ibid* at 1227-1228.

<sup>202</sup> The latter term being preferred by Navroz K Dubash & Bronwen Morgan in “The Embedded Regulatory State: Between Rules and Deals – Conclusion” in Navroz K Dubash & Bronwen Morgan, eds, *The Rise of the Regulatory State of the South Infrastructure and Development in Emerging Economies* (Oxford: Oxford University Press, 2013).

<sup>203</sup> See, e.g., Julia Black, “The Rise, Fall and Fate of Principles Based Regulation” (November 21, 2010). LSE Legal Studies Working Paper No. 17/2010. Available at SSRN: <https://ssrn.com/abstract=1712862> [“Black 2010”] and Julia Black, *Rules and Regulators* (Oxford: Clarendon Press, 1997) at, e.g., 100-108.

<sup>204</sup> See, e.g., Solum, *supra* note 199.

<sup>205</sup> Cass R Sunstein, “Problems with Rules” (1995) 83(4) *Cal L Rev* 953 at 967.

<sup>206</sup> Sunstein, *ibid* at 967.

<sup>207</sup> Duncan Kennedy, “Form and Substance in Private Law Litigation” (1975) 89 *Harv L Rev* 1687 [“Duncan Kennedy”] at 1688.

Rules' proponents tend to argue that they promote certainty in the law.<sup>208</sup> Rules allow parties to better order their affairs because the application of the law to the facts in which they find themselves is more certain.<sup>209</sup> Rules can also reduce the cost of litigation, if it does become necessary, by restricting what can be deemed relevant.<sup>210</sup> In addition, rules encourage parties to order their dealings so that they comply with clear laws – this incentivizes parties becoming masters of their own destinies.<sup>211</sup> The precedential value of decisions interpreting or prescribing rules tends to be greater than decisions interpreting or promulgating a standard, which can be more readily distinguished.<sup>212</sup> Finally, standards impose costs of determining how to be applied in particular cases.<sup>213</sup> It is likely the privileged that can afford lawyers who can afford the cost of arguing for a favourable application in such circumstances.<sup>214</sup>

There are also more deontological reasons to have rules. Rules have hortatory value in that they treat all parties alike.<sup>215</sup> Though this can also be a problem in certain circumstances, as will be discussed shortly, *ex ante* rules “seem fairer” to many observers.<sup>216</sup> Rules' giving less discretion to depart from them when emotions are running high can also be a virtue as it is in such circumstances that fairness is especially jeopardized.<sup>217</sup> In this vein, Chapter Two proposed a rule

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<sup>208</sup> *Ibid* at 1229-1230; Sunstein, *supra* note 205 at 969, noting rules “save a great deal of time, effort, and expense.”

<sup>209</sup> Duncan Kennedy, *ibid* at 1688; Justice Antonin Scalia, “The Rule of Law as a Law of Rules” (1989) 56 U Chi L Rev 1175.

<sup>210</sup> Baird & Weisberg, *supra* note 191 at 1229; Carl E Schneider, “Discretion and Rules: A Lawyer’s View” in *The Uses of Discretion*, Keith Hawkins, ed (Oxford: Clarendon Press, 1992) 47 at 77.

<sup>211</sup> Baird & Weisberg, *ibid* at 1230; Lon Fuller, “Consideration and Form” (1941) 41 Colum L Rev 799 at 800-801; Duncan Kennedy, *supra* note 207 at 1698; Sunstein, *supra* note 205 at 974.

<sup>212</sup> Duncan Kennedy, *ibid* at 1690.

<sup>213</sup> Sunstein, *supra* note 205 at 972.

<sup>214</sup> *Ibid* at 977, 996.

<sup>215</sup> *Ibid* at 975.

<sup>216</sup> *Ibid* at 962; Schneider, *supra* note 210 at 74.

<sup>217</sup> Sunstein, *ibid* at 975. This principle is of course applicable in a wide variety of circumstances, and Senator Susan Collins argued it was a reason to confirm Judge Brett Kavanaugh to the United States Supreme Court: The Editorial Board, “Susan Collins Consents” *The Wall Street Journal* (5 October 2018), online: <<https://www.wsj.com/articles/susan-collins-consents-1538780948>>. Whether this was an appropriate application of this principle is of course debatable.



that no dismissal *sua sponte* occur without giving the plaintiff the opportunity to be heard.<sup>218</sup> Rules also tend to emerge over time, reflecting the wisdom of experience, and are less likely to lead into error with (potentially unforeseen) consequences than *ad hoc* decisions based on standards.<sup>219</sup> As an example, Chapter Three suggested that the ability to give appeals as of right to decisions that do not finally conclude litigation was well-motivated but has led to much unnecessary litigation.<sup>220</sup>

Standards' advocates often emphasize that they better reflect law's substantive objectives and are better at precisely applying the objectives of a law to all cases.<sup>221</sup> Rules, on the other hand, are inevitably both over- and under-inclusive vis-à-vis their purposes.<sup>222</sup> Mandating that claims under \$25,000 proceed in the Small Claims Court assumes the costs of Superior Court procedure are disproportionate to the issues at stake in such a claim.<sup>223</sup> But one could easily imagine a case raising issues of broader legal import such that the costs of proceeding in Superior Court are warranted. These risks of arbitrariness are heightened when the rule has been poorly crafted<sup>224</sup> or the circumstances in which the rule was crafted have significantly changed.<sup>225</sup> Rules can also encourage undesirable behaviour "right up to the line of the rule".<sup>226</sup> Someone who claims \$25,001 in damages due to an inflated claim for punitive damages has disingenuously circumvented the jurisdiction of the Small Claims Court. Simultaneously, rules can have difficulty distinguishing

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<sup>218</sup> Kennedy Rule 2.1, *supra* note 21 at 269.

<sup>219</sup> Sunstein, *supra* note 205 at 969. This is an Edmund Burke-style "conservative" argument: Burke, *supra* note 139 at 96-97.

<sup>220</sup> Chapter Three at 184.

<sup>221</sup> Duncan Kennedy, *supra* note 207 at 1688; Sunstein, *supra* note 205 at 992.

<sup>222</sup> Baird & Weisberg, *supra* note 191 at 1235.

<sup>223</sup> Inspired by Duncan Kennedy, *supra* note 207 at 1689, giving the example of granting individuals legal capacity at the age of 21. This rule assumes a level of maturity obtained by those who are 21, but not all those who are 21 will have this level of maturity; similarly, many individuals who are not 21 will have this level of maturity.

<sup>224</sup> Baird & Weisberg, *supra* note 191 at 1235.

<sup>225</sup> Oliver Wendell Holmes, Jr famously wrote, that "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past": "The Path of Law" (1897) 10 Harv L Rev 457 at 469; Sunstein, *supra* note 205 at 994.

<sup>226</sup> Pierre J Schlag, "Rules and Standards" (1985) 33 UCLA L Rev 379 at 385; Sunstein, *supra* note 205 at 995.

between flagrant and technical violations of the rule.<sup>227</sup> Mandating that substantial indemnity costs be awarded in the case of an unproven fraud allegation fails to distinguish between cases when fraud was pled in bad faith to smear a party, vis-à-vis cases where fraud was pled in the alternative to negligence, and the evidence shows “merely” recklessness.<sup>228</sup> Similarly, standards’ prescribing outcomes rather than methods can allow for “bottom-up” innovation, especially in complicated areas or where new issues consistently arise.<sup>229</sup> These risks can be mitigated if a rule is well-crafted, but crafting a rule well is a significant time investment.<sup>230</sup>

Proponents of standards also observe that, though rules arguably create a perception of justice in treating like cases alike, it is just as much a part of procedural fairness for individuals to be able to argue that a departure from a rule is justified in a particular case because they are *not* like cases that have gone before.<sup>231</sup> A case can be made that the availability of, for example, summary judgment should depend on a case-by-case assessment of the characteristics of the proceedings and the parties. Rules can impede this.

Furthermore, the alleged certainty of rules can be illusory.<sup>232</sup> Whether an order “finally” determines the litigation may turn on a technicality such as whether an indefinite stay of proceedings truly “terminated” the litigation.<sup>233</sup> Standards reflect the fact that any clearly promulgated rule will create difficulties and uncertainties about how it is to be applied in such

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<sup>227</sup> Schlag, *ibid* at 385.

<sup>228</sup> Fortunately, costs are “quintessentially discretionary”, allowing a court to take this into consideration: *Nolan v Kerry (Canada) Inc*, 2009 SCC 39, [2009] 2 SCR 678 at para 126.

<sup>229</sup> Such as financial regulation: Black 2010, *supra* note 203 at 11.

<sup>230</sup> Louis Kaplow, “Rules Versus Standards: An Economic Analysis” (1992) 42 Duke LJ 557 [“Kaplow 1992”].

<sup>231</sup> Sunstein, *supra* note 205 at 978, 995-996; Schneider, *supra* note 210 at 74, notes that “losing parties” in litigation are particularly likely to notice distinguishing characteristics between their cases and ones that have gone before.

<sup>232</sup> Sunstein, *ibid* at 1012.

<sup>233</sup> Seen in, *e.g.*, when a matter is stayed as opposed to dismissed for the jurisdiction being *forum non conveniens*: Stephen GA Pitel & Nicholas C Rafferty, *Conflict of Laws*, 2d ed (Toronto: Irwin Law, 2016) at 121. This is inspired by the famous example of determining whether a motorized tractor-lawn mower violates a prohibition on motorized vehicles in a park, which may depend on whether it was maintaining the park, vandalizing it, or simply driving through it.

marginal cases.<sup>234</sup> Given this inevitability, it would seem prudent to give discretion to executive actors and judges to implement the rule’s purpose in an individual case.

Though the distinction between rules and standards has been discussed for decades and remains the subject of study,<sup>235</sup> the fact is that they exist on a continuum. The line between a rule and a standard is blurry, and few rules are truly absolute.<sup>236</sup> A rule that courts may not exercise jurisdiction over matters that take place extraterritorially may be nuanced when the matters took place in an area where the state has *de facto* sovereignty.<sup>237</sup> In this vein, context can turn something that seems like a rule into a standard.<sup>238</sup> Similarly, a standard that may appear entirely open-ended can easily end up being quite constrained, as the law cannot allow for unlimited discretion.<sup>239</sup> Thus, the antithesis of “rigid rules” is not “flexible standards” but rather the non-existent “untrammelled discretion”.<sup>240</sup> The advantages and disadvantages of rules and standards have led Frederick Schauer to hypothesize that they eventually tend to converge.<sup>241</sup>

Many legal realists argue that this demonstrates that many rules are in fact covert standards<sup>242</sup> but it seems more accurate to conceptualize that laws instead operate on a continuum. Sunstein and Kennedy, among others, note that the distinction between rules and standards is useful,<sup>243</sup> and this dissertation suggests it has practical implications. Kennedy – hardly a legal formalist – has

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<sup>234</sup> Baird & Weisberg, *supra* note 191 at 1234.

<sup>235</sup> Though there is an argument that technology will eventually render this debate moot: Anthony J Casey & Anthony Niblett, “The Death of Rules and Standards” (2016) 92 Ind LJ 1401.

<sup>236</sup> Schlag, *supra* note 226 at 389-390; Sunstein, *supra* note 205 notes at 964, that these are frequently matters of “degree rather than kind”.

<sup>237</sup> *Boumediene v Bush*, 553 US 723 (2008) discusses this in the context of Guantanamo Bay.

<sup>238</sup> Sunstein, *supra* note 205 at 960 and 965, noting that “excessive speed” may end up being interpreted narrowly.

<sup>239</sup> Sunstein, *ibid* at 960-961. Perhaps seen most famously in Canada in *Roncarelli v Duplessis*, [1959] SCR 121, where a law giving the Attorney General the power to grant liquor licences with allegedly absolute discretion was held to not permit excluding an applicant because of his religion.

<sup>240</sup> Sunstein, *ibid* at 961.

<sup>241</sup> “The Convergence of Rules and Standards” (2003) NZ L Rev 303.

<sup>242</sup> Duncan Kennedy, *supra* note 207 at 1701.

<sup>243</sup> Sunstein, *supra* note 205 at 965.

written that, despite the legitimacy of noting that rules and standards do not exist in all-or-nothing opposition to each other, “there seems no basis for disputing that the notions of rule and standard, and the idea that the choice between them will have wide-ranging practical consequences, are useful in understanding and designing legal institutions.”<sup>244</sup> He also noted that policymakers could prefer rules or standards depending on the circumstances, and the nature of their objectives.<sup>245</sup> This certainly appears to be true with respect to the topics of this dissertation.

Ultimately, neither rules nor standards create a panacea, and there is reason to be skeptical of those arguing for excessive emphasis on one, to the exclusion of the other, in all circumstances.<sup>246</sup> However, many of the alleged virtues of rules and standards depend upon empirical assumptions. Such assumptions could be mistaken. This will now be investigated vis-à-vis attempts to clarify the availability of particular procedural mechanisms.

## **B. The Results from the First Four Chapters**

Chapter One analyzed jurisdiction motions in Ontario. The law of jurisdiction in common law Canada has been subject to a plethora of criticism for being too unpredictable.<sup>247</sup> The Supreme Court attempted, in *Club Resorts v Van Breda*,<sup>248</sup> to make the law more rules-based and less standards-based. The chapter suggests that the number of jurisdiction motions has decreased, and the number of unsuccessful jurisdiction motions has decreased even further.<sup>249</sup> It is posited that this is a positive, if limited, effect on minimizing unnecessary and/or unsuccessful interlocutory motions.<sup>250</sup> This has come at the expense of very few instances where a party was denied the

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<sup>244</sup> Duncan Kennedy, *supra* note 207 at 1701.

<sup>245</sup> *Ibid* at 1701.

<sup>246</sup> Sunstein, *supra* note 205 at 1016.

<sup>247</sup> Monestier, *supra* note 193; Walker Jurisdiction, *supra* note 193 at 15-20.

<sup>248</sup> *Van Breda*, *supra* note 80.

<sup>249</sup> Kennedy Jurisdiction, *supra* note 79 at 91-93.

<sup>250</sup> *Ibid*.

chance to litigate in Ontario when that arguably would have been the fairest result.<sup>251</sup> This would seem to make the case for rules over standards in terms of opening a forum's availability.

Chapter Two investigated a new part of Ontario's procedural law ("Rule 2.1"). Through analyzing every reported case that used Rule 2.1 in its first three years, it is suggested that a streamlined jurisprudence and clear standard for its applicability have been helpful.<sup>252</sup> The threshold for applying Rule 2.1 is somewhat standard-like in that judges always have the discretion not to apply it, but the high threshold to use it (no discernible cause of action, however generously read<sup>253</sup>) appears to have minimized improper attempts to invoke it. The result has been dozens of cases per year where a responding party was spared the expense and delay of needing to bring an expensive motion to dismiss an obviously meritless claim. This has come at the expense of no apparent substantive injustices – and very rare instances of procedural injustices. The majority of these procedural injustices turned out to be inconsequential.<sup>254</sup>

Chapter Three looked at the distinction between interlocutory and final appeals. This was once a distinction that could be readily discerned due to a clear rule asking whether the litigation had ended.<sup>255</sup> However, it has become more complicated over time as a more amorphous standard has replaced it, asking whether an issue has been finally determined.<sup>256</sup> England and Wales<sup>257</sup> and British Columbia<sup>258</sup> have both attempted to make the law in this area more predictable. The

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<sup>251</sup> See the discussion of *Arsenault v Nunavut*, 2015 ONSC 4302, [2015] OJ No 3494 (SCJ), aff'd 2016 ONCA 207, 30 CCEL (4th) 46 in Kennedy Jurisdiction, *ibid* at 110.

<sup>252</sup> Kennedy Rule 2.1, *supra* note 21.

<sup>253</sup> *Raji*, *supra* note 85 at para 9, adopted by the Court of Appeal for Ontario in *Scaduto*, *supra* note 196 at para 12.

<sup>254</sup> Kennedy Rule 2.1, *supra* note 21 at 266.

<sup>255</sup> Chapter Three at 139.

<sup>256</sup> *Ibid* at, *inter alia*, 140.

<sup>257</sup> *Ibid* at 140, citing *Access to Justice Act 1999 (Destination of Appeals)*, Order 2000 SI 2000/1071, art 1(2)(c); *Conduct of an Appeal*, *supra* note 157, § 1.34; Eric TM Cheung, "Interlocutory or Final Orders: Pouring New Wine into Old Wineskins" (2006) 36(1) Hong Kong LJ 15 at 17.

<sup>258</sup> Chapter Three at 165, citing, *inter alia*, *Conduct of an Appeal*, *ibid* at § 1.75.

chapter's analysis suggests that these attempts have been beneficial.<sup>259</sup> Building on the successes and shortcomings in these jurisdictions and Ontario, a path forward is proposed. This path forward also seeks to make the law in Ontario more rules-based.<sup>260</sup> This would restrict the number of orders with appeals as of right, but there would still be a possibility of appealing almost any order when the interests of justice require it through seeking leave.

In Chapter Four's survey, six respondents, unprompted, cited legal uncertainty as an access to justice obstacle, one that impacted economically disadvantaged parties particularly acutely.<sup>261</sup> At the same time, seven respondents praised *Hryniak* for providing "much-needed clarity" (the exact words of one respondent<sup>262</sup>) to the availability of summary procedures. This complements Brooke MacKenzie's work that *Hryniak* has led to more successful summary judgment motions.<sup>263</sup>

### **C. A Case for More Rules?**

As may be apparent from the previous section, it would appear that the use of rules can lead to many of their hypothesized benefits and, if done on certain conditions, can do so while mitigating rules' vices. Ultimately, being nearer to the "rigid rules" end of the "rigid rules-untrammelled discretion" continuum appears preferable when determining the availability of a particular procedural mechanism. In essence, these are instances where (slightly nuanced) rules are unlikely to be so crude so as to occasion injustice that cannot be reasonably mitigated.<sup>264</sup>

#### **1. Presence of the Virtues of Rules**

There are reasons for suspecting that rules would be particularly appropriate in this context. Indeed, rules – particularly rules with some but not a great deal of discretion, suggested as future

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<sup>259</sup> Chapter Three at 164-170.

<sup>260</sup> *Ibid* at 176.

<sup>261</sup> Chapter Four at 238.

<sup>262</sup> *Ibid* at 199.

<sup>263</sup> MacKenzie SJ, *supra* note 5.

<sup>264</sup> Sunstein, *supra* note 205 at 1022.

paths for the laws analyzed in Chapters One, Two, and Three – tend to be particularly appropriate when the law-maker (as distinct from the law-applier<sup>265</sup>) is specialized and knowledgeable of the precedents of judicial interpretation.<sup>266</sup> This leads to the rule being well formulated, and mitigates the consequences of a crude rule.<sup>267</sup> This appears to be the case with the Civil Rules Committee and the judges who interpret the *Rules*.

Sunstein also suggests that rules are particularly appropriate in the presence of factors such as those relevant to determining the availability of dispositive procedural mechanisms:

- a) the error rate in their use is relatively low: this appears to be the case for the rules investigated in Chapters One,<sup>268</sup> Two,<sup>269</sup> and, to a lesser extent, Three (and to the extent it is not true in Three, it is because the current law has been poorly formulated<sup>270</sup>);
- b) the negative consequences for rulelessness is high: which appears the case for the matters discussed in Chapters One<sup>271</sup> and Three,<sup>272</sup> especially post-intervention – Rule 2.1’s novelty makes the costs of rulelessness more difficult to calculate, though one can observe how the previous regime put parties in difficult situations;<sup>273</sup> and
- c) the number of cases is large:<sup>274</sup> manifestly the case in terms of the availability of procedural avenues, a question that affects practically every civil case.<sup>275</sup>

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<sup>265</sup> Whose expertise may favour a standard: this is one of the rationales for deference to administrative decision-makers: see, e.g., *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 54.

<sup>266</sup> Sunstein, *supra* note 205 at 1005-1006.

<sup>267</sup> Baird & Weisberg, *supra* note 191 at 1235.

<sup>268</sup> Kennedy Jurisdiction, *supra* note 79 at 101-102.

<sup>269</sup> Kennedy Rule 2.1, *supra* note 21 at 260, 266, 268.

<sup>270</sup> Chapter Three at, *inter alia*, 140-142.

<sup>271</sup> Kennedy Jurisdiction, *supra* note 79 at 101-102.

<sup>272</sup> Chapter Three, Part III.

<sup>273</sup> Kennedy Rule 2.1, *supra* note 21 at 248.

<sup>274</sup> Sunstein, *supra* note 205 at 1004 notes the importance of the principle.

<sup>275</sup> As a matter of fact, every case has procedural and substantive components. See also MacKenzie SJ, *supra* note 5, noting the number of cases where summary judgment alone is sought.

To this list should be added the costs – pecuniary and non-pecuniary – of departing from rules,<sup>276</sup> and the severity of the consequences of a discord between a rule’s purpose and application. These also both favour the use of rules in determining the availability of procedural mechanisms. The costs of determining whether it is appropriate to use a dispositive motion prevent the court from dealing with the merits of the case before it and numerous others.<sup>277</sup> Moreover, a rule prescribing the availability of a particular procedural vehicle seldom affects the ability of a litigant to obtain the remedy he or she is seeking (though it frequently affects the costs of doing so). A mismatch between a rule’s purpose and its application therefore has relatively manageable consequences.

## 2. Manageability of the Vices of Rules

Standards certainly mitigate the consequences of rules’ over-and-under-inclusiveness. But in terms of the availability of procedural mechanisms, there are reasons to believe these concerns are not as consequential. As noted, the consequences of over-and-under-inclusiveness are less severe: the ability to access a particular procedure is unlikely to be dispositive of a person’s ability to access a remedy. Determining the availability of a procedural vehicle in a particular case is also likely to cause significant expense without getting to the merits of a decision – rules, in this case, can mitigate the costs of figuring out what procedure to follow.<sup>278</sup> As noted, procedure *per se* does not affect what is at stake for litigants: there will almost always (rare exceptions may include a limitation period) be an opportunity for an individual to raise his or her claim or defence elsewhere. For example, the consequences of the definition of an interlocutory appeal as of right being under-inclusive is the need to apply for leave to appeal: hardly the end of the world. This distinguishes from areas where the substance of what is being regulated is constantly changing, where Julia

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<sup>276</sup> Sunstein notes this is appropriate too: *supra* note 205 at 1002, citing *Mathews v Eldridge* (1976), 424 US 319.

<sup>277</sup> Chase, *et al*, *supra* note 106 at 19-20.

<sup>278</sup> Sunstein, *supra* note 205 at 1015.



Black notes standards can be particularly useful.<sup>279</sup> This remaining discretion to have an interlocutory appeal through obtaining leave would not defeat the purpose of the rule, which is not to disallow interlocutory appeals but to make them exceptional.

### 3. A Cautionary Note

Despite suggesting that much of procedural law can move away from rulelessness, it is certainly possible to put on too much of a straightjacket. Rules can have an adverse impact on vulnerable parties who were unlikely to have had the necessary power to have had a say in creating a rule.<sup>280</sup> This concern is real but cuts both ways, as a wealthy person is likelier to be able to afford a lawyer who can argue a standard should be interpreted in his or her favour.<sup>281</sup>

Admittedly, standards' benefits may be more difficult to quantify than those of rules.<sup>282</sup> But that should not lead us to not ask hard questions about whether those benefits can be outweighed by their more readily apparent costs. Only one respondent in Chapter Four thought more flexibility in the law would help facilitate access to justice compared to six who felt the opposite.<sup>283</sup> In the three rules analyzed, perhaps only a few cases could have benefitted from a less determinate standard. The costs of indeterminate standards, on the other hand, are more certain and were mostly worth avoiding. Ultimately, clear rules to eliminate arguments over the availability of a procedure appear, at least to the extent seen to date, to have had minimal impacts on coming to substantive justice or the perception thereof, and noticeable facilitation of access to the courts and thus access to justice.

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<sup>279</sup> Black 2010, *supra* note 203 at 12.

<sup>280</sup> Duncan Kennedy, *supra* note 207 at 1751.

<sup>281</sup> Sunstein, *supra* note 205 at 977, 996.

<sup>282</sup> Kaplow notes that this may be the case in terms of the public's knowing that the legal system embodies truth: Kaplow 2013, *supra* note 56 at 1363.

<sup>283</sup> Chapter Four at 238.

#### 4. Practical Suggestions

What should such rules look like? They could start with suggestions such as those given in earlier chapters, especially Chapter Three, which proposes a clear definition of the types of orders that can be appealed as of right, with all other orders requiring leave to be appealed.<sup>284</sup> But Chapter One similarly suggested narrowing discretion for Ontario to assume jurisdiction over an action.<sup>285</sup> Such rules could also include another recent reform to Ontario civil procedure, which added an automatic rule for dismissal of an action for delay if it is not set down for trial within five years.<sup>286</sup> While this presumption can be amended upon order, this was also motivated by a desire to create a simpler rule.<sup>287</sup> Parties are now clearly incentivized to resolve actions within that time period, with this now being considered an acceptable maximum amount of time to resolve an action, with it being presumptively dismissed for delay if not resolved in that time period.<sup>288</sup> Rules could also be seen in the realm of professional conduct, where new rules could seek to enforce principles such as proportionality and civility that further access to justice.<sup>289</sup> These suggestions are tentative, but they accord with the theoretical hypotheses regarding the appropriateness of rules, and seem to complement what the data from the earlier chapters show.

To conclude this section, it must be remembered that the rules-standards debate is not a new one, and viewing it as a catchall solution to achieving access to justice would be a mistake. In 1975, Kennedy noted that many areas of American law had gone from one end of the continuum

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<sup>284</sup> Chapter Three at 176.

<sup>285</sup> Kennedy Jurisdiction, *supra* note 79 at, *e.g.*, 108-111.

<sup>286</sup> *Rules*, *supra* note 2, Rule 48.14, enacted by O Reg 170/14.

<sup>287</sup> See, *e.g.*, *Elkhouli v Senathirajah*, 2014 ONSC 6140, 2014 CarswellOnt 15027 (Master) [*“Elkhouli”*] at para 45.

<sup>288</sup> This has even been applied to be an acceptable time for an action to be resolved in deciding whether to restore matters dismissed under a previous (and more amorphous) rule: *Klaczkowski v Blackmont Capital Inc*, 2015 ONSC 1650, 2015 CarswellOnt 3620 (Div Ct) at paras 32-33; *Elkhouli*, *ibid* at para 48; *Belay v Ages*, 2015 ONSC 2377, 2015 CarswellOnt 5350 (Master).

<sup>289</sup> Observed by the dissenting judges in *Groia v Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 SCR 772 at para 230.

to the other and back again, trying to strike the appropriate balance.<sup>290</sup> But he also noted what works best in practice would vary according to what is at stake.<sup>291</sup> Kaplow has suggested, and Sunstein has endorsed, a context-specific inquiry into the likely errors and abuses on both sides.<sup>292</sup> So what is at stake in civil procedure? This includes, at the very least, the ability to efficiently guide a process through the courts with reasonable promptness and minimal financial costs.<sup>293</sup> This is in addition to the need for predictability and perceptions of fairness.<sup>294</sup> Guiding the case to the right result is also particularly important. The first three chapters of this dissertation all suggest that haggling over the availability of particular procedures is seldom helpful to fulfilling these purposes. Accordingly, when prescribing the availability of particular, potentially dispositive, litigation tactics, adopting legal tests closer to the “rules” rather than the “standards” end of the rules-standards spectrum tends to realize the virtues of rules, without many of their vices. Insofar as critics have argued that excessive reliance on standards leads to needless litigation,<sup>295</sup> this concern appears warranted. While this dissertation certainly does not argue for a rejection of all discretionary standards, much of Ontario procedural law appears to have prescribed standards to a fault. Rules can advance access to the courts – and access to justice.

#### IV) ACCESS TO JUSTICE OUTSIDE CIVIL PROCEDURE REFORM

This dissertation has expressed hope that civil procedure reform can achieve real – if narrow – effects in improving access to justice, largely through simplification of procedural law. It is also

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<sup>290</sup> Duncan Kennedy, *supra* note 207 at 1704.

<sup>291</sup> *Ibid.*

<sup>292</sup> Sunstein, *supra* note 205 at 1012, citing Kaplow 1992, *supra* note 230 at 559-60.

<sup>293</sup> *E.g.*, Farrow 2014, *supra* note 4 at 978-979; Roderick A Macdonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005) at 68-73; Hryniak, *supra* note 3 at paras 29-33; Farrow 2012, *supra* note 9.

<sup>294</sup> See also Bamford, *et al*, *supra* note 75.

<sup>295</sup> As Côté and Rowe JJ wrote in *Office of the Children’s Lawyer v Balev*, 2018 SCC 16, [2018] 1 SCR 398 at para 111, criticizing the majority for adopting a test they viewed as “an unprincipled and open-ended approach [...] that creates a recipe for litigation”.

clear that many types of disputes require legal assistance that no amount of tinkering with procedural law can resolve. Some cases should never have come to fruition, as systemic injustices resulted in the legal issue unnecessarily arising.<sup>296</sup> In other cases, the issue may be how lawyers are paid, whether through perverse incentives to bill as many hours as possible,<sup>297</sup> or delivering work where costs exceed value.<sup>298</sup> In still others, there may simply be *no* economical way to deliver legal services.<sup>299</sup> Responses to these situations could include the government taking on a role similar to that it takes on in criminal procedure, providing counsel.<sup>300</sup> Opinions on such matters are split, from suggesting that it is bad policy<sup>301</sup> to that it is constitutionally mandated.<sup>302</sup> Civil procedure *per se* would appear to have little to add here, apart from needing to be flexible enough (again, demonstrating how standards can be preferable to rules) to be fair to self-represented litigants.<sup>303</sup> This dissertation acknowledges the importance of these conversations.

There are four other areas, however, where civil procedure reform appears adjacent to potential institutional changes that can make a difference in facilitating access to justice, and where

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<sup>296</sup> Farrow 2014, *supra* note 4 at 980; Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil & Family Justice: A Roadmap for Change” (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) [“*Roadmap for Change*”] at 7-8.

<sup>297</sup> MacKenzie 2013, *supra* note 103.

<sup>298</sup> Hadfield, *supra* note 102.

<sup>299</sup> See, e.g., Iain Ramsay, “The Alternative Consumer Credit Market and Financial Sector: Regulatory Issues and Approaches” (2001) 35 CBLJ 326 at 401.

<sup>300</sup> See, e.g., Lorne Sossin, “The Public Interest, Professionalism, and Pro Bono Public” (2008) 46:1 Osgoode Hall LJ 131 at 141, discussing a Canadian Bar Association attempt to have such a right acknowledged in British Columbia. This is also discussed in Kennedy & Sossin, *supra* note 39 at 720.

<sup>301</sup> See, e.g., the dissenting judgment of Rothstein J in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 39, [2014] 3 SCR 31, noting the need for public policy trade-offs in this regard. For additional criticism of the majority, see, e.g.: Asher Honickman, “Looking for Rights in the All the Wrong Places: A Troubling Decision from the Supreme Court” *Advocates for the Rules of Law blog* (30 October 2014), online: <<http://www.ruleoflaw.ca/looking-for-rights-in-the-all-the-wrong-places-the-supreme-courts-troubling-decision-in-trial-lawyers-association/>>; Asher Honickman, “Day Three: Asher Honickman”, *Double Aspect* (29 December 2018), online: <<https://doubleaspect.blog/2018/12/27/day-three-asher-honickman/>> (part of *Double Aspect*’s “12 Days of Christmas”).

<sup>302</sup> Sossin, *supra* note 300 at 141 and Kennedy & Sossin, *supra* note 39 at 720, discussing a Canadian Bar Association attempt to have such a right acknowledged in British Columbia.

<sup>303</sup> See, e.g., NSRLP Self-Reps, *supra* note 17; Wouters, *supra* note 135.

this dissertation's conclusions can make contributions. First, the ability of technology to complement civil procedure in ensuring the prompt and inexpensive resolution of matters is considered. Second, the lack of transparency in how Ontario procedural law is made is raised. Third, the potential for judicial specialization in areas of law is analyzed. Fourth and finally, it is queried whether it would be prudent to have a single judge case manage all aspects of a particular case, and whether more active judging would generally be prudent.

### A. Courts and Technology

What is a “fair hearing” can vary according to the circumstances.<sup>304</sup> So why can a fair hearing not take place via technology without mandating individuals travel to a courtroom? This would eliminate the need for travel time, and reduce the need to expend resources on courtrooms, if some hearings need not have a literal courtroom, but can be electronically conducted from a judge's chamber.<sup>305</sup> Accepting electronic filings and allowing affidavits to be commissioned electronically – other matters adjacent to civil procedure if not civil procedure *per se* – are also “low-hanging fruit” in this respect.<sup>306</sup> Two respondents in Chapter Four viewed that failure to use technology in this way, including the inability to e-file documents, as an access to justice impediment.<sup>307</sup>

Lack of face-to-face time creates other problems, especially for self-represented litigants, who are likely to particularly benefit from the opportunity to explain their case to a judge, in person.<sup>308</sup>

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<sup>304</sup> This is recognized in administrative law, as famously noted in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

<sup>305</sup> Encouraged by the Supreme Court in multijurisdictional class actions in *Endean v British Columbia*, 2016 SCC 42, [2016] 2 SCR 162; Christopher P Naudie & Gerard J Kennedy, “Ontario Court of Appeal Divided on Permissibility of Hearings Outside Ontario in Multi-Jurisdictional Class Actions” (August 2015) 4 CALR 33.

<sup>306</sup> See Dane Bullerwell's tweet on December 4, 2018 at 7:04 pm EST: “When legal futurists talk about lawyers' use of AI, I'm struck by how different their world is from mine. I just spent two hours driving because a jail didn't have a commissioner for oaths who could commission an affidavit. Could we pick THAT low-hanging fruit first, please?”

<sup>307</sup> Chapter Four at 232.

<sup>308</sup> Suzanne Bouclin, Jena McGill & Amy Salyzyn, “Mobile and Web-Based Legal Apps: Opportunities, Risks and Information Gaps” (April 28, 2017). Canadian Journal of Law and Technology, Fall 2017, Forthcoming; Ottawa Faculty of Law Working Paper No. 2017-17. Available at SSRN: <https://ssrn.com/abstract=2960207>.

This thus need not be the norm for steps that may dismiss a party’s claim (unless they fall within the ambit of Rule 2.1). But if a party feels it will not be disadvantaged, by participating remotely for most procedural matters, it would seem inappropriate to obligate an in-person appearance. Even regarding dispositive matters, parties could consent to a hearing by way of technology if they do not feel the benefits of in-court time are worth the cost. The earlier discussion of the proper way to conceptualize proportionality is directly germane here. Recent practice directives at the Superior Court in Toronto have sought to incorporate these ideas – promising news.<sup>309</sup>

### **B. Increased Transparency in Making the *Rules***<sup>310</sup>

The lack of transparency in how Ontario makes its procedural law became particularly salient while researching the history of Rule 2.1 in the context of Chapter Two. Like all of Ontario’s *Rules*, Rule 2.1 was enacted pursuant to a decision of the Civil Rules Committee, a body created by the *Courts of Justice Act*.<sup>311</sup> While Rule 2.1’s purpose and rationale has been commented upon in reported decisions,<sup>312</sup> it would nonetheless have been helpful to understand what the drafters of the Rule envisioned when recommending its adoption. While the views of individual committee members are not determinative, just as the views of individual legislators are not determinative in interpreting legislation, their views are nonetheless informative – just as the views of individual legislators are informative regarding the meaning of legislation.<sup>313</sup>

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<sup>309</sup> “Practice Advisory Concerning Electronic Documents in Commercial List Proceedings” (effective 11 February 2019), online: <<http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/commercial/electronic-documents/>>.

<sup>310</sup> This section of this dissertation is inspired by Gerard J Kennedy, “Accountability and Transparency in Canadian Civil Justice”, *Accountability e Transparência da Justiça Civil - Uma Perspectiva Comparada* (São Paulo: Thomson Reuters, 2019) [“IAPL Paper”].

<sup>311</sup> CJA, *supra* note 53, s 66(3); Osborne, *supra* note 5, c 17.

<sup>312</sup> See, e.g., *Chalupnicek v Children’s Aid Society of Ottawa*, 2016 ONSC 2787, 2016 CarswellOnt 6466 (SCJ), *aff’d* 2017 ONSC 1278, 2017 CarswellOnt 272 (Div Ct) at para 3.

<sup>313</sup> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: Butterworths, 2014) at § 23.81, quoting *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 35, which in turn quotes *R v Morgentaler*, [1993] 3 SCR 463 at 484; Beaulac, *supra* note 190.

The rationale for the Rule, therefore, would likely be best understood through minutes of the Civil Rules Committee meetings that led to its enactment.<sup>314</sup> Such minutes exist, and are apparently detailed.<sup>315</sup> However, they are not publicly available. The Civil Rules Committee’s secretary declined a request to see them for discrete academic purposes. Despite requesting reconsideration, her decision is understandable given the policy that the minutes are for internal use only.

This predicament could have been potentially circumvented by requesting to see the minutes pursuant to the *Freedom of Information and Protection of Privacy Act*.<sup>316</sup> However, created under the CJA, the Civil Rules Committee is not part of the Ministry of the Attorney General<sup>317</sup> and it is unclear that an access to information request pursuant to FIPPA for the Civil Rules Committee’s minutes would be allowed. Unlike the Ministry of the Attorney General, the Civil Rules Committee is not mentioned on the list of government entities to which FIPPA applies on the Government of Ontario’s website.<sup>318</sup> The Civil Rules Committee could also plausibly be viewed as analogous to actors within and documents emanating from the judicial branch of government to which FIPPA does not apply: judges’ and masters’ notes;<sup>319</sup> judges’ performance evaluations;<sup>320</sup> the Ontario Judicial Council;<sup>321</sup> and proceedings relating to complaints against judges and

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<sup>314</sup> Given the inability to access the Civil Rules Committee minutes, one alternatively could have elected to interview members of the Civil Rules Committee, asking them questions such as:

- Could you explain why the Civil Rules Committee recommended the adoption of Rule 2.1?
- Where did opposition to Rule 2.1 come from?
- Is there anything in the implementation of Rule 2.1 that you did not foresee?

But getting an appropriate sample seemed difficult. And given the peripheral nature of this, it was ultimately decided not to proceed.

<sup>315</sup> Osborne, *supra* note 5 at c 17.

<sup>316</sup> RSO 1990, c F31 [“FIPPA”].

<sup>317</sup> See the Ministry of the Attorney General’s website:  
[https://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/civil\\_rules\\_committee.php](https://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/civil_rules_committee.php).

<sup>318</sup> As of December 11, 2017: <https://www.ontario.ca/page/directory-institutions>.

<sup>319</sup> FIPPA, *supra* note 316, s 65(3).

<sup>320</sup> *Ibid*, s 65(4).

<sup>321</sup> *Ibid*, s 65(5).

masters.<sup>322</sup> Admittedly, nothing determinative was found suggesting that FIPPA does not apply to the Civil Rules Committee. And given its specific statutory enactment, it could best be considered part of the executive, rather than judicial, branch of government. The Federal Court has recently held this to be the case for the Canadian Judicial Council, in its role disciplining judges.<sup>323</sup> However, using FIPPA to seek to see the Civil Rules Committee's minutes carried a considerable risk of being futile, and in any event was peripheral in discerning the purpose of Rule 2.1.

This secrecy exists despite Coulter Osborne (former Associate Chief Justice of Ontario) having recommended that there be consideration of making the Civil Rules Committee's minutes publicly available in his seminal report on access to justice after his retirement from the Court of Appeal.<sup>324</sup> Many of his recommendations were enacted, as discussed throughout this dissertation. Admittedly, Mr. Osborne was equivocal in this recommendation. In this vein, his views on the minutes can be distinguished from his unequivocal recommendations that the composition of the committee and the agendas for its meetings be made publicly available. While he thought making the minutes publicly available would increase transparency, he recognized a risk that members of the committee may be more reluctant to speak freely if they knew that they were being recorded and their statements could become public.<sup>325</sup>

Secrecy is often used to preserve unaccountable power<sup>326</sup> and, ultimately, the secrecy surrounding the Civil Rules Committee's meetings does not seem necessary to preserve judicial independence. The Federal Court recently held that this lack of necessity to preserve judicial independence should result in the Canadian Judicial Council's decisions not being immunized

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<sup>322</sup> *Ibid.*, s 65(5.1).

<sup>323</sup> *Girouard v Canada*, 2018 FC 865, 2018 CarswellNat 5089 [“*Girouard*”].

<sup>324</sup> Osborne, *supra* note 5 at c 17.

<sup>325</sup> *Ibid.*

<sup>326</sup> *E.g.*, Maureen Webb, “Essential Liberty or a Little Temporary Safety? The Review of the *Canadian Anti-terrorism Act*” (2006) 51 CLQ 53 at, *e.g.*, 85.



from judicial review.<sup>327</sup> Nor is this secrecy apparent in other common law jurisdictions. In the United States, for instance, the *Rules Enabling Act* prescribes a much more open procedure for the Supreme Court of the United States promulgating the *Federal Rules of Civil Procedure*.<sup>328</sup> Similarly, in New South Wales, the Uniform Rules Committee was designed to be a mechanism in which stakeholders may make public recommendations on procedural law, for the purpose of public accountability.<sup>329</sup> One hopes that the Civil Rules Committee will eventually consider how to respond to Mr. Osborne’s recommendations. Given that the Civil Rules Committee is a quasi-legislative body,<sup>330</sup> the secrecy surrounding its actions is particularly problematic.

### C. Judicial Specialization in Areas of Law

Chapter One hypothesized that it would be a worthwhile experiment to have a select group of judges work on jurisdiction motions to facilitate their resolution.<sup>331</sup> Chapter Two posited that having a limited group of judges develop Rule 2.1 jurisprudence has streamlined case law and increased access to justice.<sup>332</sup> Chapter Three suggested that having a group of Superior Court judges with specializations in administrative law hear judicial reviews may be preferable to the current *status quo* of the Divisional Court.<sup>333</sup>

While tentative about all of these possibilities, judicial specialization to facilitate access to justice is not a new suggestion. The virtues of specialization, particularly in family law<sup>334</sup> and

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<sup>327</sup> *Girouard*, *supra* note 323.

<sup>328</sup> ch 651, PubL 73–415, 48 Stat 1064, enacted June 19, 1934, 28 USC § 2072.

<sup>329</sup> Natalina Nheu & Hugh McDonald, *By the people, for the people? Community participation in law reform*, vol 6 (Sydney, NSW: Law and Justice Foundation of New South Wales, November 2010) at 79-80.

<sup>330</sup> Its power to make the *Rules*, *supra* note 2, so long as they do not conflict with provincial legislation, is explained in s 66(3) of the CJA, *supra* note 53.

<sup>331</sup> Kennedy Jurisdiction, *supra* note 79 at 105.

<sup>332</sup> Kennedy Rule 2.1, *supra* note 21 at 270.

<sup>333</sup> Chapter Three at 180-184.

<sup>334</sup> Freeda Steel, “The Unified Family Court – Ten Years Later” (1996) 24 Man LJ 381; Nicholas Bala, Rachel Birnbaum & Justice Donna Martinson, “One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict” (2010) 26 Can J Fam L 395 at 399, cited in Chapter Three at 182.

commercial litigation,<sup>335</sup> have been noted for years. It may be time to act on them. Dangers of specialization are present, to be sure, especially if judges become territorial and indicate lack of reception to new ideas when they are only one of a few judges working in an area. Though this is an issue that already exists in locations where there is only one judge covering a large area: for example, Kenora, Ontario has only a single Superior Court judge.<sup>336</sup> And the risk can be partially addressed by obliging judges to take turns specializing in areas, allowing most superior court judges (at least in urban centres where this is feasible) to have at least two specializations. Though not at the core of this dissertation, this concluding suggestion regarding specialization seems worthy of further consideration, especially given its prevalence in civilian legal traditions.<sup>337</sup>

#### **D. Case Management and More Active Judging**

Historically, the model common law judge – particularly at the trial level – was meant to be nothing more than a passive listener. But the aftermath of the 2010 Amendments suggests that this model may be outdated. More active judging and case management can facilitate access to justice – something shown not only by Ontario’s experience, but also trends elsewhere. Regarding Ontario’s experience, Chapter Two of this dissertation in particular analyzed Rule 2.1’s role in introducing new potential for more active judging through the availability of *sua sponte* dismissals. Rule 2.1 has led to increased resolution of actions on their merits, with few if any problems for procedural or substantive justice.<sup>338</sup> When the court has used the Rule on its own initiative, there has been *only* increased resolution of claims on their merits more quickly, without any unnecessary

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<sup>335</sup> Warren K Winkler, “The Vanishing Trial” (Autumn 2008) 27(2) *Advocates’ Soc J* 3 at 4, cited in Kennedy Jurisdiction, *supra* note 79 at 106.

<sup>336</sup> Helen Burnett, “Kenora left without a full-time judge” *The Law Times* (23 April 2007), online: <<https://www.lawtimesnews.com/article/kenora-left-without-a-full-time-judge-8795/>>.

<sup>337</sup> Chase, *et al*, *supra* note 106 at Chapter Three.

<sup>338</sup> Kennedy Rule 2.1, *supra* note 21.

delay. Concerns about coming to inaccurate results appear not to have been born out.<sup>339</sup> If anything, courts should be *more* proactive in using the Rule.<sup>340</sup> More generally, the ability of judges to prescribe procedure through summary judgment is viewed by commentators such as MacKenzie<sup>341</sup> – and many but not all respondents in Chapter Four<sup>342</sup> – as a facilitator of access to justice.

Many but not all respondents in Chapter Four also expressed the view that trial judges should, if anything, be *more* proactive in using their case management powers.<sup>343</sup> In this vein, the previous subsection’s suggestions regarding specialization in law and procedure can also extend to the facts of particular cases. This, like specialization in areas of law, may not be an issue related to civil procedure reform *per se*. Rather, it reflects the wisdom of having a single judge become familiar with all matters of a case as it goes through the system. In other words, a judge should hear all aspects of a case absent good reason, and retain the ability to decide when sufficient procedure has occurred so that a decision can be rendered. This is already present in Ontario in some areas – the United Family Court seeks to ensure that a single case has a single judge,<sup>344</sup> while the class actions list in Toronto also aims to have a single judge supervise all procedural elements of an action.<sup>345</sup>

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<sup>339</sup> *Ibid* at, *e.g.*, 266.

<sup>340</sup> *Ibid* at 259.

<sup>341</sup> MacKenzie SJ, *supra* note 5.

<sup>342</sup> Chapter Four at 225-226.

<sup>343</sup> *Ibid* at 235.

<sup>344</sup> Bala, Birnbaum & Martinson, *supra* note 334.

<sup>345</sup> Kennedy Rule 2.1, *supra* note 21 at fn 196:

Traditionally, three judges serve in this respect, though that was reduced to two after Strathy J was elevated to the Court of Appeal: Drew Hasselback, “The billion-dollar judge: Class action lawsuits about more than frivolous claims” *Financial Post* (26 July 2015), online: <<http://business.financialpost.com/legal-post/the-billion-dollar-judge-class-action-lawsuits-are-about-more-than-frivolous-claims>>. In addition to Strathy J, Perrell J (see, *e.g.*, *Spina v Shoppers Drug Mart Inc*, 2012 ONSC 5563, [2012] OJ No 4659 (SCJ)), Conway J (see, *e.g.*, *Clark (Litigation guardian of) v Ontario*, 2014 ONSC 1283, 2014 CarswellOnt 2725 (SCJ)), Belobaba J (see, *e.g.*, *Goldsmith v National Bank of Canada*, 2015 ONSC 2746, 126 OR (3d) 191 (SCJ)), and Horkins J (see, *e.g.*, *Sagharian (Litigation Guardian of) v Ontario (Minister of Education)*, 2012 ONSC 3478, 2012 CarswellOnt 8513 (SCJ)) have also served in this respect in the past decade.

Even outside the United Family Court, family law proceedings in Ontario are frequently case managed, with increased efficiency.<sup>346</sup> This ensures that the parties have a decision-maker intimately familiar with their case, which would seem to increase the likelihood of a just result. The Superior Court’s “Commercial List” in Toronto is another area where judges become familiar not only with the law but the facts.<sup>347</sup> This is in line with New York State establishing a “Commercial Part” of its courts in which some judges take only commercial cases with a certain value.<sup>348</sup>

The use of such practices in areas such as commercial litigation can be criticized for being the product of wealthy litigants convincing the courts to amend practice to turn to their wealthy clients’ interests, and then not act proportionally in any individual case.<sup>349</sup> In this sense, Toronto’s “Commercial List” can be criticized for being gold-plated justice while the types of cases that do not end up on the Commercial List languish. But this does not detract from the underlying soundness of the policy, or why this practice cannot be exported to other areas. Indeed, promising first steps in this regard have been taken in areas such as class actions and family law. This is also a more efficient use of resources, as a new judge does not need to become familiar with the facts of a case at each individual stage.<sup>350</sup> Karakatsanis J suggested that this was sound practice in *Hyrniak* in cases of unsuccessful summary judgment motions.<sup>351</sup>

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<sup>346</sup> See, e.g., the famous saga of Eleanor McCain and Jeffrey Melanson, as described in the decisions of Horkins J in *McCain v Melanson*, 2017 ONSC 916, 2017 CarswellOnt 1641 (SCJ) at paras 72-73 and *McCain v Melanson*, 2017 ONSC 4603 (SCJ) [“*McCain #2*”].

<sup>347</sup> Winkler, *supra* note 335.

<sup>348</sup> See, e.g., Denny Chin, “Summary Judgment in Employment Discrimination Cases: A Judge’s Perspective” (2012) 57 NY L Sch L Rev 671 at fn 19, citing Jed Rakoff, “Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise” (2012) 17 Fordham J Corp & Fin L 4 and Robert L Haig, “Can New York’s New Commercial Division Resolve Business Disputes as Well as Anyone?” (1996) 13 Touro L Rev 191.

<sup>349</sup> See, e.g., Paul Vayda, “Chipping away at Cost Barriers: A Comment on the Supreme Court of Canada’s *Trial Lawyers* Decision” (2015) 36 WRLSI 207 at 215-216, looking at the decision of DM Brown J (as he then was) in *Exposoft Solutions Inc (Re)*, 2013 ONSC 5798, 6 CBR (6th) 148 (SCJ).

<sup>350</sup> Noted by Horkins J in *McCain #2*, *supra* note 346.

<sup>351</sup> *Supra* note 3 at para 78, citing Osborne, *supra* note 5 at c 5.

Other jurisdictions – such as British Columbia – prescribe that a single judge is to hear all interlocutory and final matters in a single action.<sup>352</sup> This is common in many American states such as New York.<sup>353</sup> While perhaps not an aspect of civil procedure *per se*, this is an institutional matter adjacent to civil procedure. In early 2019, Ontario announced that it was launching a pilot project in this respect: promising news.<sup>354</sup> Much of English civil procedure has moved away from having the parties control the proceedings to having the courts do so.<sup>355</sup> Though parties still control the vast majority of procedure in Ontario, slightly moving away from this appears to have been a positive development, and Neil Andrews suggests the same is true in England and Wales.<sup>356</sup> Similarly, more active judging has been used in the American federal courts primarily through Rule 16.<sup>357</sup> Many states have enacted similar rules.<sup>358</sup>

This role of more active judging is apparent in civilian legal traditions. In many civil law jurisdictions, for instance, there is no process analogous to common law discovery with the court controlling the gathering of evidence.<sup>359</sup> This is not to suggest that the common law’s virtues of a dispassionate judge who listens to the best version of each case from both parties cannot also be a true help in the effort to facilitate access to justice.<sup>360</sup> Rather, it reflects that common law courts

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<sup>352</sup> Walker SJ, *supra* note 5 at 724-725, citing Supreme Court of British Columbia, *Practice Direction: Case Management* (20 November 1998), replaced by the Supreme Court of British Columbia, *Practice Direction: Case Planning and Judicial Management of Actions*, PD-4 (1 July 2010).

<sup>353</sup> Julius Lang, “What is a Community Court? How the Model is Being Adapted Across the United States” (Bureau of Justice Assistance, US Department of Justice, 2011) at, *e.g.*, 9-10.

<sup>354</sup> “Practice Advisory Concerning the Provincial Civil Case Management Pilot – One Judge Model” (effective 1 February 2019), online: <<http://www.ontariocourts.ca/scj/practice/civil-case-management-pilot>>.

<sup>355</sup> Chase, *et al*, *supra* note 106 at 22-24.

<sup>356</sup> Andrews ECP, *supra* note 113 at 2.02, 2.13ff.

<sup>357</sup> Described in, *e.g.*, Steven Baicker-McKee, “Reconceptualizing Managerial Judges” 2018 *Revisa Forumul Judecatorilor* 79 at 82; Paul W Grimm, “Introduction: Reflections on the Future of Discovery in Civil Cases” (2018) 71 *Vand L Rev* 1775 at, *e.g.*, 1777.

<sup>358</sup> Such as Massachusetts: see, *e.g.*, *Joint Standing Order 1-04: Civil case management*, 2004, applicable to Boston Municipal Court Department and the District Court Department.

<sup>359</sup> Oscar G Chase & Helen Hershkoff, eds, *Civil Litigation in Comparative Context* (St. Paul, MN: Thomson West, 2007) at 222-224.

<sup>360</sup> Kennedy Rule 2.1, *supra* note 21 at fn 83, citing Jonathan Haidt, “Moral Psychology and the Law: How Intuitions Drive Reasoning, Judgment, and the Search for Evidence” (2013) 64:4 *Ala L Rev* 867 at 873,

should not be scared to learn valuable lessons from civilian legal traditions.<sup>361</sup> Ultimately, these mostly positive effects of increasingly active judging could be seen to support the hypothesis that civilian and common law traditions, over time, tend to converge in their procedures.<sup>362</sup>

To be sure, the risks of more active judging are not zero. The notion that a common law judge should remain relatively passive is frequently defended as necessary to ensure that the judge does not lose his or her impartiality, or the perception thereof.<sup>363</sup> *Stuart Budd*, which framed Chapter One, is an example of where a judge understandably lost that perception.<sup>364</sup> There was a similar case cited in Chapter Two where a trial judge appeared overzealous in the use of Rule 2.1.<sup>365</sup> And several, though a minority of, respondents in Chapter Four viewed more active judging as leading to unnecessary and expensive interactions with the court.<sup>366</sup> These are real trade-offs. But with respect, they appear to be less problematic than the more plentiful benefits. And they also complement trends seen elsewhere.

## V) TRANSSYSTEMIC POLLINATION

This final section seeks to briefly suggest how this dissertation could contribute to access to justice conversations in family law and criminal law, which have important distinguishing characteristics but still many commonalities. This is not meant to be a comprehensive analysis of

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building on his work in Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012); Justice Peter Lauwers, “Reflections on *Charter* Values” (Keynote Address Delivered at the Runnymede Society Law & Freedom Conference, Hart House, University of Toronto, 12 January 2018) [online: <https://www.youtube.com/watch?v=H5WTRCO-u9U>] at ~18:00-18:20; The Honourable Justice Peter Lauwers, “What Could Go Wrong with *Charter* Values” (2019) 91 SCLR (2d) 1.

<sup>361</sup> A theme in Chase, *et al*, *supra* note 106.

<sup>362</sup> See, *e.g.*, Geoffrey C Hazard, Jr & Angelo Dondi, “Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits” (2006) 39 Cornell J IL 59 at 68.

<sup>363</sup> See, *e.g.*, Don Stuart & Ronald Joseph Delisle, *Learning Canadian Criminal Law: Student Edition*, 6th ed (Scarborough, ON: Carswell, 1997) at 63.

<sup>364</sup> *Stuart Budd & Sons Ltd v IFS Vehicle Distributors ULC*, 2016 ONCA 60, 129 OR (3d) 37, rev’g 2015 ONSC 519, 66 CPC (7th) 316 (SCJ).

<sup>365</sup> Kennedy Rule 2.1, *supra* note 21 at 260, citing *Khan*, *supra* note 84.

<sup>366</sup> Chapter Four at 204.

these issues, or even a comprehensive introduction. But it would seem remiss to exclude consideration of how this dissertation could assist discussions of access to justice in these contexts.

### A. Family Law

This dissertation has not generally sought to comment on family law procedures. Family and civil litigation have different purposes, and correspondingly different procedures. This is reflected in: Chapter One’s analysis of jurisdiction motions, which excluded family law given the different issues at stake;<sup>367</sup> Chapter Two’s discussion of Rule 2.1, which the Ontario Court of Appeal has held to only be applicable to family litigation in particular ways,<sup>368</sup> and Chapter Three’s discussion of interlocutory appeals, given the different appeal routes in family law in Ontario.<sup>369</sup> Much like the presumption of innocence in criminal law, the wide-reaching principle of “best interests of the child” permeates much of family law.<sup>370</sup> The urgency of many family law matters means that all procedural protections that would be ideal cannot always be granted.<sup>371</sup> At the same time, there are other family law matters with such great stakes that greater procedural protections are not only called for but also constitutionalized – such as the right to a state-funded lawyer in certain child protection proceedings.<sup>372</sup> In other words, family law procedural protections can – and should – be both broader and narrower than those in civil litigation depending on specific details of cases.

But what is at stake frequently varies. Custody of children – particularly at-risk children – is not all, or even most, of the purview of family law. Indeed, much of family law concerns division

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<sup>367</sup> Kennedy Jurisdiction, *supra* note 79 at 87, citing Martha Bailey, “Judicial Jurisdiction Rules for Family Law Matters” (2016) (Paper presented to the Symposium, *The CJPTA: A Decade of Progress*, Toronto, Ontario, 21 October 2016) [unpublished].

<sup>368</sup> Kennedy Rule 2.1, *supra* note 21 at 257, citing *Frick*, *supra* note 152 at para 21.

<sup>369</sup> Chapter Three at 168-169.

<sup>370</sup> See, e.g., Donna Bouchard, “The Three-Parent Decision: A Case Commentary on *A.A. v B.B.*” (2007) 70 Sask L Rev 459 at 475.

<sup>371</sup> E.g., Nicholas Bala, “The *Charter of Rights & Family Law* in Canada: A New Era” (2000) 18 CLFQ 373 at 409.

<sup>372</sup> *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46.

of property, albeit in the family context.<sup>373</sup> When it comes to matters such as these, or varying of support, or appellate practice, or not infrequent abusive steps taken by warring parties,<sup>374</sup> many principles from civil litigation seem apposite, particularly regarding the need to minimize financial costs and maximize speed and simplicity.

One example seems particularly apposite and has already been noted. Chapter Two noted how the Court of Appeal, in *Frick v Frick*,<sup>375</sup> cautioned against bringing Rule 2.1 into the family law context. There were and are sound statutory interpretation reasons for this, given the wording of the *Family Law Rules* vis-à-vis the *Rules of Civil Procedure*.<sup>376</sup> But it is important that this not be taken too far. Superior courts have inherent authority to control their own processes<sup>377</sup> and in this sense, the principles animating Rule 2.1 would appear applicable in the family law context. Myers J's analysis in *Purcaru* is convincing.<sup>378</sup>

With respect to the Court of Appeal, insofar as it concluded, in *Frick*, that Rule 2.1 is not applicable, even by analogy, in the family law context, this conclusion may be too rigid. *Frick* only addressed Rule 1(8.2) of the *Family Law Rules* – not Rule 1(7), which holds that:

If these rules do not cover a matter [...] the practice shall be decided by analogy to these rules, by reference to the *Courts of Justice Act* and the Act governing the case and, if the court considers it appropriate, by reference to the *Rules of Civil Procedure*.<sup>379</sup>

Given the overall success of Rule 2.1, one hopes that *Frick* will not prevent future cases from incorporating principles from Rule 2.1 case law into the family law context through Rule 1(7) of the *Family Law Rules* in appropriate – but likely rare – circumstances.

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<sup>373</sup> This is a hotly contested area of law: see, e.g., *Quebec v A*, 2013 SCC 5, [2013] 1 SCR 61.

<sup>374</sup> It must be remembered that this is not incompatible with a legitimate grievance: see, e.g., *Belway v Lalonde-Weber*, 2017 ABCA 108, 2017 CarswellAlta 575, per Martin JA (as she then was).

<sup>375</sup> *Frick*, *supra* note 152.

<sup>376</sup> *Ibid* at paras 19-20.

<sup>377</sup> E.g., *MacMillan Bloedel*, *supra* note 153 at paras 18, 33.

<sup>378</sup> *Purcaru*, *supra* note 154 at para 15.

<sup>379</sup> *Frick*, *supra* note 152 vis-à-vis *Family Law Rules*, O Reg 114/99, Rule 1(7).



While civil and family litigation cannot be conflated, the danger of conflation should not lead to artificial separation. This is not a novel observation – indeed, the National Action Committee on Access to Justice investigates both civil and family matters.<sup>380</sup> But whether discussing abusive litigation,<sup>381</sup> jurisdiction disputes,<sup>382</sup> or appellate practice,<sup>383</sup> this dissertation evidences underlying access to justice-related principles present in both the civil and family law contexts. Those who practise family law should seek to learn what civil practice says in these areas.

## **B. Criminal Law**

Unlike family law, discussions of access to justice in criminal law frequently take place in an entirely different conversation, with little overlap even in areas where issues are common to both.<sup>384</sup> This is despite the difficulty in obtaining speedy justice in both systems. The costs and especially the delay in criminal procedure have been repeatedly noted in recent years, whether in the media,<sup>385</sup> academic commentary,<sup>386</sup> or, most notably, judicial decisions.<sup>387</sup> These concerns animated the Supreme Court’s 2016 decision in *R v Jordan*, which imposed strict time limits.<sup>388</sup> *Jordan* may have been a blunt instrument subject to understandable criticism.<sup>389</sup> However, it was certainly prompted by legitimate concerns.<sup>390</sup>

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<sup>380</sup> *Roadmap for Change*, *supra* note 296.

<sup>381</sup> *Purcaru*, *supra* note 154.

<sup>382</sup> Kennedy Jurisdiction, *supra* note 79 at 87, citing Bailey, *supra* note 367.

<sup>383</sup> Chapter Three at 168-169, noting the overlap of this issue in civil and family litigation in British Columbia in particular.

<sup>384</sup> The imbalance between prioritizing criminal and civil litigation is noted in, *e.g.*, DA Rollie Thompson, “Legal Aid Without Conflict: Nova Scotia” (1998) 16 Windsor YB Access Just 306.

<sup>385</sup> Laura Kane, “From murder to sex assault: More than 200 cases tossed over court delays” *The Globe and Mail* (6 July 2017), online: <<https://www.theglobeandmail.com/news/national/more-than-200-cases-tossed-over-delays-since-top-courts-jordan-decision/article35572565/>>.

<sup>386</sup> Paciocco, *supra* note 28.

<sup>387</sup> *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 [*“Jordan”*].

<sup>388</sup> *Jordan*, *ibid.*

<sup>389</sup> See, *e.g.*, Keara Lundigran, “*R v Jordan*: A Ticking Time Bomb” (2018) 41 Man LJ 113.

<sup>390</sup> *Jordan*, *supra* note 387 at, *e.g.*, paras 40-42.

To some extent, keeping discussions of civil and criminal procedure separate is understandable – the stakes are higher in criminal law, where an individual’s liberty is at stake, as is his or her reputation as a non-criminal.<sup>391</sup> As such, the right to a criminal trial in a reasonable time is guaranteed in both the *Canadian Charter of Rights and Freedoms*<sup>392</sup> and the *International Covenant on Civil and Political Rights*.<sup>393</sup>

At the same time, the term “McJustice”, introduced above, originated in the criminal context and is a cautionary term noting the dangers in emphasizing the quantum of cases addressed rather than quality of outcomes.<sup>394</sup> This concern is prevalent in both criminal and civil litigation. As such, criminal and civil procedure can almost certainly learn from each other. Both systems suffer from an epidemic of delay and excessive cost, and some of that can likely be attributed to wasteful use of court time. While the desire to avoid substantive injustices must be weighed greater in the criminal law realm – and remember that it should be given paramount weight in the civil litigation realm as well – actors in the justice system should think carefully about whether particular steps actually further a just and timely result. Three suggestions from earlier in this dissertation could

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<sup>391</sup> There are asymmetrical consequences between a “wrongful acquittal” and a “wrongful conviction”. While the former is indeed an “error” in terms of achieving substantive justice, the consequences of the latter are much more severe – both for the wrongfully convicted person and society’s perception of the justice system. This is reflected in Blackstone’s formulation that “It is better that ten guilty persons escape than that one innocent suffer” (Plaxton, *supra* note 64). This maxim is so ancient and useful that it would seem wise to keep some version of it – when push comes to shove, even critical commentators will concede this (see, e.g., Laura I Applebaum, “A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice” (2014) 128 *Harv L Rev F* 91). After all, “Blackstone’s maxim” has even earlier origins, being seen in the Pentateuch (Genesis 18:32) and the work of Maimonides and Fortescue (Bruce A MacFarlane, QC, “Wrongful Convictions: Is It Proper for the Crown to Root Around, Looking for Miscarriages of Justice?” (2012) 36 *Man LJ* 1 at fn 80, citing Alexander Volokh, “Guilty Men” (1997) 146 *U Pa L Rev* 173 at 178, 182); Fyodor Dostoevsky, *The Karamozov Brothers*, Ignat Avsey, trans (Oxford: Oxford World's Classics, 2008) at 402ff, querying about the morality of sitting in judgment of another human as a criminal.

<sup>392</sup> Part I of the *Constitution Act 1982*, being Schedule B to *Canada Act 1982* (UK), 1982, c 11 [“*Charter*”], s 11(b).

<sup>393</sup> 999 UNTS 172, art 14(5): “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal.” Cited in Chapter Three at 134 and Gerard J Kennedy, “Persisting Uncertainties in Appellate Jurisdiction at the Supreme Court” (2013) 100 *CR* (6th) 96 at 101.

<sup>394</sup> See, e.g., DiLuca, *supra* note 23.

be of assistance in speeding up criminal procedure: 1) increased written testimony; 2) eliminating needless interlocutory steps; and 3) court mergers.

### 1. Increased Written Testimony

Bill C-75, the federal government's primary legislative response to *Jordan*, was subject to significant criticism, especially by the criminal defence bar.<sup>395</sup> Much of this is understandable, but much of it may also be unnecessary resistance to change. For instance, one of the criticisms of Bill C-75 is giving police officers a *prima facie* ability to testify by way of affidavit.<sup>396</sup> Singling out police officers as a unique category of witnesses in this respect is likely inappropriate, suggesting their evidence is inherently reliable – something there is good reason to doubt.<sup>397</sup>

Having said that, it is worth having a serious discussion about whether all evidence in a criminal trial needs to be adduced by live evidence – many matters likely do not require this. This dissertation suggests that proceeding in writing can speed up matters with minimal effects on the appearance of fairness.<sup>398</sup> Given that the appearance of fairness must be given even greater weight in the criminal law realm, dispensing with oral evidence should be done with even more reluctance. There still appears no reason in principle to prevent particular witnesses in criminal trials giving evidence without the need for in-court testimony. This appears to work well in civil litigation, where even trials can have certain witnesses testify in writing.<sup>399</sup> This is particularly promising

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<sup>395</sup> See, e.g., Kent W Roach, “The Peter Khill/Jon Styres Case: Jury Selection and Self-Defence” (2018) 66 CLQ 1 [“Roach Urgent”] at 2.

<sup>396</sup> See, e.g., Stephanie Heyens, “How Bill C-75 fundamentally abrogates due process” (8 May 2018), online: <<https://www.thelawyersdaily.ca/articles/6473/how-bill-c-75-fundamentally-abrogates-due-process>>.

<sup>397</sup> See, e.g., Kevin Cyr, “Rethinking Police Testimony — Notes, Lies, and Videotape” (2014) 60 CLQ 522.

<sup>398</sup> Kennedy Rule 2.1, *supra* note 21; Chapter Four at, e.g., 235. See also MacKenzie SJ, *supra* note 5.

<sup>399</sup> Experts must produce a written report before testifying in civil matters: *Rules*, *supra* note 2 at, e.g., Rules 52.03(7), 53.03(1).

when it comes to expert testimony<sup>400</sup> and witnesses testifying about relatively uncontestable matters or matters peripheral to the fundamental issues in a criminal case.<sup>401</sup>

## 2. Eliminating Interlocutory Steps: Preliminary Inquiries and Jury Challenges

Another criticism of Bill C-75 has been its proposed reduction of preliminary inquiries.<sup>402</sup> Somewhat analogous to pre-trial case conferences in civil litigation, these can result in testing of the Crown's case and weeding out weak cases – but do not necessarily do so. Experience from England and Wales suggests that alternative obligations such as Crown discovery can fulfill the roles of preliminary inquiries.<sup>403</sup> While a pilot project eliminating preliminary inquiries may have been prudent,<sup>404</sup> openness to reform within the established constitutional order should remain.

Bill C-75 also eliminated peremptory challenges for jurors.<sup>405</sup> Despite Bill C-75 being partially in response to the high profile acquittal of Gerald Stanley for murder and manslaughter of an Indigenous man by an all-white jury,<sup>406</sup> and despite the notorious underrepresentation of Indigenous Canadians on juries,<sup>407</sup> there are opinions that peremptory challenges actually increase juries' diversity.<sup>408</sup> In any event, changing criminal procedure in response to a high profile

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<sup>400</sup> *Ibid.*

<sup>401</sup> *NS, supra* note 70 at paras 43-44, notes that not all evidence is “created equal” in criminal law in terms of its probative value.

<sup>402</sup> See, e.g., Sarah E Leamon, “Limiting Preliminary Inquiries Will Make Things Worse For The Accused” *The Huffington Post* (14 September 2018), online: <[https://www.huffingtonpost.ca/sarah-e-leamon/bill-c-75-preliminary-inquiries\\_a\\_23525467/](https://www.huffingtonpost.ca/sarah-e-leamon/bill-c-75-preliminary-inquiries_a_23525467/)>.

<sup>403</sup> John Arnold Epp, “Abolishing Preliminary Inquiries in Canada” (1996) 38 CLQ 495.

<sup>404</sup> Often prudent when deciding to follow a new path: see the discussion of a “single judge” model, *supra* Part IV.D.

<sup>405</sup> Described in, e.g., Kent Roach, “A good first step towards diverse, impartial Canadian juries” *The Conversation* (2 April 2018), online: <<https://theconversation.com/a-good-first-step-towards-diverse-impartial-canadian-juries-94257>>.

<sup>406</sup> Acquitted of both second-degree murder and manslaughter in the death of Colton Boushie: see, e.g., Roach Urgent, *supra* note 395.

<sup>407</sup> See, e.g., *R v Kokopenace*, 2015 SCC 28, [2015] 2 SCR 398 [“*Kokopenace*”].

<sup>408</sup> See, e.g., John Paul Tasker, “Lawyers say post-Boushie justice reforms could actually make juries less diverse” *CBC News* (30 March 2018), online: <<https://www.cbc.ca/news/politics/liberal-justice-reforms-jury-selection-1.4600007>>.

acquittal is likely imprudent:<sup>409</sup> it is precisely when tensions are elevated that fairness can be most jeopardized.<sup>410</sup> In *R v King*, an Ontario Superior Court judge recently held that these changes to peremptory challenges violated the *Charter* rights of an accused Indigenous person.<sup>411</sup>

But despite these concerns about the circumstances in which the proposed elimination of preliminary inquiries arose, and without commentary on the recent *King* decision, a jury is meant to be a random sample of disinterested members of the community.<sup>412</sup> Peremptory challenges impede a jury being such a random sample.<sup>413</sup> Warring anecdotes do not resolve the question of whether peremptory challenges increase juries' diversity – experimentation and research is necessary. But one can also fairly question whether having lawyers engage in stereotyping is an appropriate way to increase juries' diversity.

More germane to this dissertation, however, peremptory challenges waste court time as an interlocutory step of dubious value. This led Frank Iacobucci, after his retirement from the Supreme Court of Canada, to recommend supervision of their use.<sup>414</sup> Juries and peremptory challenges are less common in civil litigation<sup>415</sup> and moving in that direction may help increase the timeliness of criminal justice.<sup>416</sup>

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<sup>409</sup> Don Stuart, “*Ghomeshi*: Dangers in Overreacting to this High Profile Acquittal” (2016) 27 CR (7th) 45.

<sup>410</sup> Sunstein, *supra* note 205 at 975.

<sup>410</sup> *Ibid* at 975. See also *supra* note 217.

<sup>411</sup> 2019 ONSC 6386, 2019 CarswellOnt 17827, reported on in Samantha Craggs, “New jury selection rules are unfair to Indigenous man, Hamilton judge rules” *CBC News* (4 November 2019), online: <<https://www.cbc.ca/news/canada/hamilton/dale-king-yosif-al-hasnawi-1.5346363>>.

<sup>412</sup> See, e.g., *Kokopenace*, *supra* note 407 at para 190 (per Cromwell J, dissenting, but the principle seems generally respected: see, e.g., Kent Roach, “The Urgent Need to Reform Jury Selection after the Gerald Stanley and Colten Boushie Case” (2018) 65 CLQ 271 at 277).

<sup>413</sup> Roach, *ibid* at 274-275.

<sup>414</sup> Frank Iacobucci, “First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci” (February 2013), online: <[https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First\\_Nations\\_Representation\\_Ontario\\_Juries.html](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html)>.

<sup>415</sup> Steven Penney, “Mass Torts, Mass Culture: Canadian Mass Tort Law and Hollywood Narrative Film” (2004) 30 Queen’s LJ 205 at 214.

<sup>416</sup> It nonetheless must be recognized that the right to a trial by jury is guaranteed in criminal law: *Charter*, *supra* note 392, s 11(f).

### 3. Court Mergers

Both systems could also consider court mergers. As noted in Chapter Three, folding the Divisional Court into the Superior Court and Court of Appeal could potentially facilitate access to justice. This is analogous to the proposed mergers of the criminal trial courts suggested not only by scholars such as Don Stuart but also policymakers such as the late Ian Scott.<sup>417</sup> The *status quo* in criminal procedure is sometimes defended on the basis of expertise of Superior Court judges. Stuart has cast doubt on this.<sup>418</sup> In any event, as discussed above, specialization could occur within a broader institution. And the types of inefficiencies noted in Chapter Three due to Ontario having multiple appellate courts also occur in the criminal trial courts due to divided jurisdiction.<sup>419</sup> An example would be the Provincial Court being unable to issue a type of warrant in a case where it is already familiar with the facts but only the Superior Court can issue the warrant.<sup>420</sup> This is also analogous to lost resources in the civil context when multiple judges needlessly address a single matter. As noted in Chapter Three, eliminating the Divisional Court is something that would have widespread ramifications and should not be done lightly. But it should be considered, just as eliminating the distinction between the provincial courts and superior courts has been considered in criminal law, and has already occurred in Nunavut.<sup>421</sup>

Even this, however, must be reviewed on a case-by-case basis: the Small Claims Court's unique tailoring of its procedures and institutional structure to self-represented litigants may well

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<sup>417</sup> David Stockwood, "In Conversation: Ian Scott" (1993) 12 Adv Soc J 4 at 9-10, cited in Wayne Renke, "A Single Trial Court for Alberta: Consultation Paper" (Edmonton, AB: Alberta Justice/Faculty of Law, University of Alberta, 2007), online: <[http://cfcj-fcjc.org/sites/default/files/docs/hosted/18550-single\\_trial\\_court\\_consult.pdf](http://cfcj-fcjc.org/sites/default/files/docs/hosted/18550-single_trial_court_consult.pdf)>; Don Stuart, "The *Charter* Is a Vital Living Tree and Not a Weed to Be Stunted: Justice Moldaver Has Overstated" (2006) 21 Nat'l J Const L 245 ["Stuart *Charter*"] at 247.

<sup>418</sup> Stuart *Charter*, *ibid* at 247.

<sup>419</sup> Chapter Three at 180.

<sup>420</sup> *E.g.*, Steven Penney, "National Security Surveillance in an Age of Terror: Statutory Powers and *Charter* Limits" (2010) 48:2 Osgoode Hall LJ 247 at 255, discussing surveillance under Part VI of *Criminal Code*, RSC 1985, c C-46.

<sup>421</sup> Stuart *Charter*, *supra* note 417 at 247.

benefit from its status as a separate court within the ambit of the Superior Court.<sup>422</sup> This illustrates that, just as rules are not necessarily always preferable to standards, as discussed above,<sup>423</sup> unified courts are not necessarily always preferable to specialized courts.

### TREATING A CHRONIC PROBLEM?

*Jarndyce and Jarndyce* drones on. This scarecrow of a suit has, over the course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in *Jarndyce and Jarndyce* without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when *Jarndyce and Jarndyce* should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out.<sup>424</sup>

Charles Dickens's *Bleak House* continues to haunt the legal profession, ringing far too close to home.<sup>425</sup> It is difficult to disagree with Andrew Pilliar's astute observation that access to justice is not so much of a "crisis" (as is often claimed) but rather a "chronic problem".<sup>426</sup> What is often forgotten is that within a generation of *Bleak House*'s publication, the courts of law and equity were merged in England and Ontario, with almost universal consensus that this was to the betterment of access to justice.<sup>427</sup> But in an instance of "one step forward, two steps back", different and/or new elements of civil procedure have emerged as different access to justice

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<sup>422</sup> The success of this endeavour is debatable: McGill, *supra* note 43 at 175.

<sup>423</sup> Conclusion, Part III.

<sup>424</sup> Charles Dickens, *Bleak House* (London: Oxford University Press, 1971) [originally published in 1853] at 4, cited in, e.g., *Jimenez v Romeo*, 2009 CarswellOnt 7677, [2009] OJ No 5248 (SCJ) at para 1.

<sup>425</sup> As noted in the Introduction at 34, this has been noticed before: see, e.g., The Honourable J Roderick Barr, QC, "The Cost of Litigation: *Bleak House* in the 1990s" (March 1993) 12 *Advocates' Soc J* No 1, 12; William Kaplan, QC, "The Derivative Action: A Shareholder's 'Bleak House'" (2003) 36:3 *UBC L Rev* 443; Kennedy *Walrus*, *supra* note 16 at 48; Gorsuch, *supra* note 111 at ~ 3:49-4:14.

<sup>426</sup> "what will you do about access to justice this year" *Legal Aid Ontario Blog* (4 February 2014), online: <<http://blog.legalaid.on.ca/2014/02/04/andrew-pilliar-what-will-you-do-about-access-to-justice-this-year/>>.

<sup>427</sup> Moore, *supra* note 179 at 46-48.

obstacles. All of these – ranging from excessive discovery to needless insistence on a full trial or disputing whether a particular order can be appealed – are motivated by valid normative concerns over fairness. But many have been taken to needless extremes. Rarely does substantive justice appear to require such significant procedural protections. And the cost in terms of time and money appears to outweigh the value of many steps such as these. This illustrates the Burkean concern of the need to be aware of unintended consequences of reforms to established institutions such as the court system.<sup>428</sup>

This dissertation began by noting how Beverley McLachlin lamented access to justice being the greatest crisis in Canada’s justice system today. And there are many metrics on which Canada’s civil justice system falls unacceptably short, negatively impacting millions of lives.<sup>429</sup> McLachlin CJC’s concerns are very legitimate.

Despite this, it is also clear that the recently retired Chief Justice was a great believer in institutions, and recognized that Canada has much to be proud of regarding its justice system.<sup>430</sup> In a celebrated quote in *Peter v Beblow*, she wrote, “[i]n the rush to substantive justice, the

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<sup>428</sup> Burke, *supra* note 139.

<sup>429</sup> Already described for a general audience in Kennedy *Walrus*, *supra* note 16, and international audience in IAPL Paper, *supra* note 310. See also *Hryniak*, *supra* note 3, fn 2; World Justice Project, *2011 World Justice Progress Report*, p 21, online: <[https://worldjusticeproject.org/sites/default/files/documents/WJP\\_Rule\\_of\\_Law\\_Index\\_2011\\_Report.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP_Rule_of_Law_Index_2011_Report.pdf)>; The World Justice Project, *The Rule of Law Index*, 2017-2018, online: <<http://data.worldjusticeproject.org/#/groups/CAN>>; Farrow 2014, *supra* note 4, fn 1; Trevor CW Farrow, *et al*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System, A White Paper for the Association of Canadian Court Administrators* (Toronto and Edmonton, 27 March 2012) at 14-16, online: <<http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf>>; Julie Macfarlane, *supra* note 131; Trevor CW Farrow, *et al*, *Everyday Legal Problems and the Cost of Justice in Canada: An Overview Report* (Canadian Forum on Civil Justice, 2016), online: <<http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>>.

<sup>430</sup> Beverley McLachlin, “Foreward” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at ix.



principles are sometimes forgotten.”<sup>431</sup> This could be interpreted as the Chief Justice not caring about substantive justice, but her career shows that such an interpretation would be utterly erroneous.<sup>432</sup> Rather, this quote recognizes that there can be no justice without first following procedure and precedent, and working within established institutions, all of which have substantive justice as their aims. Those procedures, precedents, and established institutions can certainly be flawed, but if that is the case, it is usually worth seeking to amend these institutions to reflect changing realities rather than jettisoning them.<sup>433</sup> So let us not be too pessimistic either. After all, over thirty-seven million people living together under the rule of law – however imperfectly – is an amazing accomplishment.<sup>434</sup>

The 2010 Amendments are an example of trying to amend an institution – specifically, Ontario procedural law – to ensure substantive justice can be delivered more quickly, and with fewer financial costs. The 2010 Amendments are only a discrete step to achieve access to justice. They have not created utopia – there is much more work to do, and what some of that work may be is discussed elsewhere in this Conclusion. But the 2010 Amendments have been a worthwhile if limited step on the journey to make our established procedures and institutions more accessible. Indeed, many individuals have had substantive justice delivered more quickly, efficiently, and with a fair – albeit abbreviated, in some cases – process. Much more work is to be done. But let us not forget the successes.

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<sup>431</sup> [1993] 1 SCR 980 at 988.

<sup>432</sup> David Sandomierski, “Selective Deference and the Judicial Role: Chief Justice McLachlin’s Legacy for Law and Legal Education” in *Controversies in the Common Law: Tracing the Contributions of Chief Justice McLachlin* (Toronto: University of Toronto Press, forthcoming).

<sup>433</sup> Burke, *supra* note 139 at 96.

<sup>434</sup> This is not the state of nature as noted by Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (New York: Viking, 2011); as noted in IAPL Paper, *supra* note 310, Canada also has much to be proud of regarding its civil justice system.

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**APPENDIX A – NUMBER OF CASES, RESULTS, AND APPEALS (EXCLUDING SUPREME COURT OF CANADA LEAVE APPLICATIONS) (JURISDICTION MOTIONS)**

2010

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>1.</b>	<i>Cannon v Funds for Canada Foundation</i> , 2010 ONSC 4517, [2010] OJ No 3486 (SCJ)	Partially Granted	<b>1.</b>	Affirmed: 2011 ONCA 185, [2011] OJ No 990	Partially Granted
<b>2.</b>	<i>Goldmart Farms Inc v Fasig-Tipton Co</i> , 2010 ONSC 1631, [2010] OJ No 1683 (Master)	Granted		-	Granted
<b>3.</b>	<i>Magnum Integrated Technologies Inc v Integrated Industrial Systems</i> , 2010 ONSC 3389, 84 CPR (4th) 211 (SCJ)	Granted		-	Granted
<b>4.</b>	<i>Tucows.com Co v Lojas Renner SA</i> , 2010 ONSC 5851, 334 DLR (4th) 564 (SCJ)	Granted	<b>2.</b>	Overtured: 2011 ONCA 548, 106 OR (3d) 561	Dismissed
<b>5.</b>	<i>Brisben v Lunev</i> , 2010 ONSC 1840, [2010] OJ No 3216 (SCJ)	Dismissed	<b>3.</b>	Affirmed: 2011 ONCA 15, [2011] OJ No 87	Dismissed
<b>6.</b>	<i>MCAP Leasing Limited Partnership v Genexa Medical Inc</i> , 2010 ONSC 6050, 100 CPC (6th) 201 (SCJ)	Dismissed		-	Dismissed
<b>7.</b>	<i>McKenna v Gammon Gold Inc</i> , 2010 ONSC 1591, 88 CPC (6th) 27 (SCJ)	Partially Granted		(other issues only: 2011 ONSC 3782, 87 CCLT (3d) 123 (Div Ct))	Partially Granted
<b>8.</b>	<i>Lazer-Tech v Dejerrey</i> , 2010 ONSC 1662, [2010] OJ No 1080 (SCJ)	Granted		-	Granted

	Case Name	Result (At Motion)	Appeal	Appeal Result	Final Result
9.	<i>Cardinali v Strait</i> , 2010 ONSC 2503, 97 CPC (6th) 290 (SCJ)	Dismissed		-	Dismissed
10.	<i>Di Stefano v Energy Automated Systems Inc</i> , 2010 ONSC 493, 68 BLR (4th) 209 (SCJ)	Granted		-	Granted
11.	<i>Kahlon v Cheecham</i> , 2010 ONSC 1957, [2010] OJ No 1584 (SCJ)	Granted		-	Granted
12.	<i>Wolfe v Wyeth</i> , 2010 ONSC 2368, 84 CPR (4th) 43 (SCJ)	Dismissed	4.	Affirmed: 2011 ONCA 347, 373 NSR (2d) 79	Dismissed
13.	<i>Canada Hot Tub Outlet v Canada Spas Depot Inc</i> , 2010 ONSC 2524, 96 CPC (6th) 359 (SCJ)	Granted		-	Granted
14.	<i>Zhejiang Ruyi Canada Inc v Transglobal Communications Group Inc</i> , 2010 ONSC 204, [2010] OJ No 150 (SCJ)	Granted		-	Granted
15.	<i>Collingwood Ethanol LP v Humblet Inc</i> , 2010 ONSC 2132, 91 CLR (3d) 112 (SCJ)	Dismissed		-	Dismissed
16.	<i>Litner (Litigation Guardian of) v Saunders</i> , 2010 ONSC 4862, [2010] OJ No 3901 (SCJ)	Granted		-	Granted
17.	<i>Dundee Precious Metals Inc v Marsland</i> , 2010 ONSC 6484, 104 OR (3d) 51 (SCJ)	Granted	5.	Overtured: 2011 ONCA 594, 108 OR (3d) 187	Dismissed
18.	<i>Luk v Pottery Barn</i> , 2010 ONSC 5540, [2010] OJ No 5239 (SCJ)	Granted		-	Granted
19.	<i>Van Kessel v Orsulak</i> , 2010 ONSC 6919, 9 CPC (7th) 434 (SCJ)	Granted		-	Granted



	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>20.</b>	<i>Dennis v Farrell</i> , 2010 ONSC 2401, 84 CCLI (4th) 64 (SCJ)	Dismissed		-	Dismissed
<b>21.</b>	<i>Wielgomas v Anglocom Inc</i> , 2010 ONSC 6289, 335 DLR (4th) 745 (SCJ)	Granted	<b>6.</b>	Affirmed (except on costs): 2011 ONCA 490, 335 DLR (4th) 741	Granted
<b>22.</b>	<i>Bunyan v Ens</i> , 2010 ONSC 216, 99 OR (3d) 304 (SCJ)	Dismissed		-	Dismissed
<b>23.</b>	<i>Branconnier v Maheux</i> , 2010 ONSC 1524, [2010] OJ No 994 (SCJ)	Dismissed		-	Dismissed
<b>24.</b>	<i>Salus Marine Wear Inc v Queen Charlotte Lodge Ltd</i> , 2010 ONSC 3063, [2010] OJ No 2329 (SCJ)	Dismissed		-	Dismissed
<b>25.</b>	<i>Roadtrek Motorhomes Ltd v Aralex Acoustics Ltd</i> , 2010 ONSC 2700, [2010] OJ No 2217 (SCJ)	Granted	<b>7.</b>	Overtaken: 2010 ONCA 878, [2010] OJ No 5570	Dismissed
<b>26.</b>	<i>Sun Life Assurance Co of Canada v Yellow Pages Group Inc</i> , 2010 ONSC 2780, [2010] OJ No 2608 (SCJ)	Dismissed		-	Dismissed
<b>27.</b>	<i>Galustian v SkyLink Group of Companies Inc</i> , 2010 ONSC 292, 85 CPC (6th) 132 (SCJ)	Granted	<b>8.</b>	Security for costs ordered for appeal: 2010 ONCA 645, 268 OAC 157 (no apparent appeal)	Granted
<b>28.</b>	<i>Expedition Helicopters Inc v Honeywell Inc</i> , 2010 ONSC 732, [2010] OJ No 462 (SCJ)	Dismissed	<b>9.</b>	Overtaken: 2010 ONCA 351, 262 OAC 195	Granted
<b>29.</b>	<i>Shinoff v BMO Nesbitt Burns Inc</i> , 2010 ONSC 926, [2010] OJ No 540 (SCJ)	Granted		-	Granted

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>30.</b>	<i>Jabbour v Eparchy of Our Lady of Lebanon of Los Angeles</i> , 2010 ONSC 2475, 2010 CarswellOnt 10731 (SCJ)	Dismissed	<b>10.</b>	Affirmed, 2011 ONCA 140, [2011] OJ No 796	Dismissed
<b>31.</b>	<i>Wideawake Entertainment Group Inc v Lavi</i> , 2010 ONSC 1659, [2010] OJ No 1701 (SCJ)	Dismissed		-	Dismissed
<b>32.</b>	<i>Stubbs v ATS Applied Tech Systems Inc</i> , 2010 ONSC 2838, 87 CCEL (3d) 165 (SCJ)	Dismissed	<b>11.</b>	Affirmed: 2010 ONCA 879, 272 OAC 386	Dismissed
<b>33.</b>	<i>Moisan v Antonio Sanita Land Development Ltd</i> , 2010 ONSC 3339, [2010] OJ No 3220 (SCJ)	Action Dismissed On Other Grounds		-	Action Dismissed On Other Grounds

2011

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>1.</b>	<i>Export Packers Co v SPI International Transportation</i> , 2011 ONSC 5907, [2011] OJ No 4343 (SCJ)	Granted	<b>1.</b>	Affirmed: 2012 ONCA 481, 294 OAC 319	Granted
<b>2.</b>	<i>Toronto (City) v Tseng</i> , 2011 ONSC 4594, 87 MPLR (4th) 220 (Master)	Dismissed		-	Dismissed
<b>3.</b>	<i>Galaxy Dragon Ltd v Topwater Exclusive Fund IV LLC</i> , 2011 ONSC 6818, [2011] OJ No 5255 (SCJ)	Granted	<b>2.</b>	Affirmed: 2012 ONCA 382, [2012] OJ No 2522	Granted
<b>4.</b>	<i>Kais v Abu Dhabi Education Council</i> , 2011 ONSC 75, [2011] OJ No 33 (Master)	Dismissed		-	Dismissed

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>5.</b>	<i>Bond v Brookfield Asset Managements Inc</i> , 2011 ONSC 2529, [2011] OJ No 1901 (SCJ)	Granted	<b>3.</b>	Affirmed: 2011 ONCA 730, 18 CPC (7th) 74	Granted
<b>6.</b>	<i>Obégi Chemicals LLC v Kilani</i> , 2011 ONSC 1636, [2011] OJ No 1351 (SCJ)	Dismissed		-	Dismissed
<b>7.</b>	<i>1673332 Ontario Ltd v Habonim Industrial Valves &amp; Actuators Ltd</i> , 2011 ONSC 4973, [2011] OJ No 3774 (SCJ)	Dismissed		-	Dismissed
<b>8.</b>	<i>Elfarnawani v International Olympic Committee</i> , 2011 ONSC 6784, 20 CPC (7th) 412 (SCJ)	Granted		-	Granted
<b>9.</b>	<i>1756670 Ontario Inc v Roxboro Excavation Inc</i> , 2011 ONSC 7289, [2011] OJ No 5911 (SCJ)	Granted		-	Granted
<b>10.</b>	<i>Comstock Canada Ltd v SPI Systems Ltd (cob SPI Controls)</i> , 2011 ONSC 2652, 100 CLR (3d) 289 (SCJ)	Dismissed		-	Dismissed
<b>11.</b>	<i>Jennings v Haas</i> , 2011 ONSC 2872, 335 DLR (4th) 225 (SCJ)	Granted		-	Granted
<b>12.</b>	<i>Moore v Vancouver Fraser Port Authority</i> , 2011 ONSC 3692, [2011] OJ No 2994 (SCJ)	Granted		-	Granted
<b>13.</b>	<i>Thompson v Our Lady of the Missions</i> , 2011 ONSC 382, [2011] OJ No 512 (SCJ)	Dismissed		-	Dismissed
<b>14.</b>	<i>Jafarzadehahmadsargoorabi v Sabet</i> , 2011 ONSC 5827, [2011] OJ No 5073 (SCJ)	Granted	<b>4.</b>	Affirmed: 2012 ONCA 391, [2012] OJ No 2573	Granted
<b>15.</b>	<i>Title v Canadian Asset Based Lending Enterprise (Cable) Inc</i> , 2011 ONSC 922, [2011] OJ No 611 (SCJ)	Dismissed	<b>5.</b>	Allowed on Other Grounds: 2011 ONCA	Dismissed

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
				715, 108 OR (3d) 71	
<b>16.</b>	<i>Consbec Inc v Walker</i> , 2011 ONSC 2944, [2011] OJ No 2146 (SCJ)	Granted		-	Granted
<b>17.</b>	<i>Furfari v Juncos</i> , 2011 ONSC 3624, 38 CPC (7th) 110 (SCJ)	Granted		-	Granted
<b>18.</b>	<i>Harster Greenhouses Inc v Visser International Trade &amp; Engineering BV</i> , 2011 ONSC 2608, 334 DLR (4th) 481 (SCJ)	Granted		-	Granted
<b>19.</b>	<i>Dempsey v Staples</i> , 2011 ONSC 1709, 12 MVR (6th) 30 (SCJ)	Dismissed		-	Dismissed
<b>20.</b>	<i>Abdula v Canadian Solar Inc</i> , 2011 ONSC 5105, 92 BLR (4th) 324 (SCJ)	Dismissed	<b>6.</b>	Affirmed: 2012 ONCA 211, 110 OR (3d) 256	Dismissed
<b>21.</b>	<i>Mehmood v Gray</i> , 2011 ONSC 1735, [2011] OJ No 1177 (SCJ)	Granted		-	Granted
<b>22.</b>	<i>Ironrod Investments Inc v Enquest Energy Services Corp</i> , 2011 ONSC 308, [2011] OJ No 544 (SCJ)	Granted		-	Granted
<b>23.</b>	<i>Merill Lynch Canada Inc v Mineralogy Canada Acquisition Corp Pty Ltd</i> , 2011 CarswellOnt 3755 (SCJ)	Dismissed		-	Dismissed

2012

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>1.</b>	<i>Ontario v Rothmans, Inc</i> , 2012 ONSC 22, 28 CPC (7th) 68 (SCJ)	Dismissed	<b>1.</b>	Affirmed: 2013 ONCA 353, 115 OR (3d) 561	Dismissed
<b>2.</b>	<i>Central Sun Mining Inc v Vector Engineering Inc</i> , 2012	Granted	<b>2.</b>	Reversed: 2013 ONCA	Dismissed

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
	ONSC 7331, 18 CLR (4th) 189 (SCJ)			601, 117 OR (3d) 313	
<b>3.</b>	<i>Young v Home Depot, USA, Inc</i> , 2012 ONSC 1971, [2012] OJ No 1350 (SCJ)	Dismissed		-	Dismissed
<b>4.</b>	<i>Gordon v Deiotte</i> , 2012 ONSC 1973, 109 OR (3d) 626 (SCJ)	Dismissed		-	Dismissed
<b>5.</b>	<i>Alexander v Alexander</i> , 2012 ONSC 2826, [2012] OJ No 2099 (Master)	Granted		-	Granted
<b>6.</b>	<i>Aldo Group Inc v Moneris Solutions Corp</i> , 2012 ONSC 2581, [2012] OJ No 1931 (SCJ)	Dismissed	<b>3.</b>	Affirmed: 2013 ONCA 725, 118 OR (3d) 81	Dismissed
<b>7.</b>	<i>McAlpine v McAlpine</i> , 2012 ONSC 297, 108 OR (3d) 672 (SCJ)	Granted		-	Granted
<b>8.</b>	<i>Misyura v Walton</i> , 2012 ONSC 5397, 112 OR (3d) 462 (SCJ)	Granted		-	Granted
<b>9.</b>	<i>2249659 Ontario Ltd v Siegen</i> , 2012 ONSC 3128, [2012] OJ No 3263 (SCJ)	Granted	<b>4.</b>	Reversed: 2013 ONCA 354, 115 OR (3d) 241	Dismissed
<b>10.</b>	<i>Mackie Research Capital Corp v Mackie</i> , 2012 ONSC 3890, 3 BLR (5th) 312 (SCJ)	Dismissed		-	Dismissed
<b>11.</b>	<i>Paraie v Cangemi</i> , 2012 ONSC 6341, 113 OR (3d) 231 (SCJ)	Granted		-	Granted
<b>12.</b>	<i>Cugalj v Wick</i> , 2012 ONSC 2407, 40 CPC (7th) 356 (SCJ)	Granted		-	Granted
<b>13.</b>	<i>United States of America v Yemec</i> , 2012 ONSC 4207, 41 CPC (7th) 362 (SCJ)	Granted		-	Granted

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>14.</b>	<i>Zhang v Hua Hai Li Steel Pipe Co</i> , 2012 ONSC 4379, [2012] OJ No 3704 (SCJ)	Dismissed	<b>5.</b>	Affirmed: 2013 ONCA 103, [2013] OJ No 677	Dismissed
<b>15.</b>	<i>Umutomi c Safari</i> , 2012 CSON 6962, [2012] OJ No 5822 (SCJ)	Dismissed		-	Dismissed
<b>16.</b>	<i>Bale-eze Industries Inc v Frazier Industrial Co</i> , 2012 ONSC 4892, [2012] OJ No 3996 (SCJ)	Granted		-	Granted
<b>17.</b>	<i>Cesario v Gondek</i> , 2012 ONSC 4563, 113 OR (3d) 466 (SCJ)	Dismissed		-	Dismissed
<b>18.</b>	<i>Nagra v Malhotra</i> , 2012 ONSC 4497, 111 OR (3d) 446 (SCJ)	Dismissed		-	Dismissed
<b>19.</b>	<i>Amtim Capital Inc v Appliance Recycling Centers of America</i> , 2012 ONSC 1214, [2012] OJ No 958 (SCJ)	Dismissed	<b>6.</b>	Affirmed: 2012 ONCA 664, 298 OAC 75	Dismissed
<b>20.</b>	<i>Nadi Inc v Montazemi-Safari</i> , 2012 ONSC 4723, [2012] OJ No 4005 (SCJ)	Dismissed		-	Dismissed
<b>21.</b>	<i>Colavecchia v Berkeley Hotel Ltd</i> , 2012 ONSC 4747, 112 OR (3d) 287 (SCJ)	Granted		-	Granted
<b>22.</b>	<i>Avanti Management and Consulting Ltd v Argex Mining Inc</i> , 2012 ONSC 4395, [2012] OJ No 3665 (SCJ)	Dismissed		-	Dismissed
<b>23.</b>	<i>Frank v Farlie, Turner &amp; Co, LLC</i> , 2012 ONSC 5519, 113 OR (3d) 25 (SCJ)	Granted		-	Granted

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>24.</b>	<i>Wilson v Riu</i> , 2012 ONSC 6840, 98 CCLT (3d) 337 (SCJ)	Granted		-	Granted
<b>25.</b>	<i>Mining Technologies International Inc v Krako Inc</i> , 2012 ONSC 2239, 2012 CarswellOnt 8034 (SCJ)	Dismissed	<b>7.</b>	Affirmed: 2012 ONCA 847, 99 CCLT (3d) 46	Dismissed
<b>26.</b>	<i>Wynn Las Vegas LLC v Teng</i> , 2012 ONSC 1927, [2012] OJ No 1467 (SCJ)	Dismissed		-	Dismissed

2013

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>1.</b>	<i>Tamminga v Tamminga</i> , [2013] OJ No 4515 (SCJ)	Granted	<b>1.</b>	Affirmed: 2014 ONCA 478, 120 OR (3d) 671	Granted
<b>2.</b>	<i>Kazi v Qatar Airlines</i> , 2013 ONSC 1370, [2013] OJ No 992 (Master)	Dismissed		-	Dismissed
<b>3.</b>	<i>Inukshuk Wireless Partnership v 4253311 Canada Inc</i> , 2013 ONSC 5631, 117 OR (3d) 206 (SCJ)	Dismissed		-	Dismissed
<b>4.</b>	<i>Ghana Gold Corp (Re)</i> , 2013 ONSC 3284, 3 CBR (6th) 220 (SCJ)	Dismissed		-	Dismissed
<b>5.</b>	<i>Royal Bank of Canada v DCM Erectors Inc</i> , 2013 ONSC 2864, [2013] OJ No 2233 (SCJ)	Dismissed		-	Dismissed
<b>6.</b>	<i>Greta Inc v De Lange</i> , 2013 ONSC 3086, [2013] OJ No 2412 (SCJ)	Dismissed	<b>2.</b>	Affirmed: 2014 ONCA 107, [2014] OJ No 625	Dismissed
<b>7.</b>	<i>Trillium Motor World Ltd v General Motors of Canada</i>	Dismissed	<b>3.</b>	Affirmed: 2014 ONCA 497, 120 OR (3d) 598,	Dismissed

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
	<i>Ltd</i> , 2013 ONSC 2289, 51 CPC (7th) 419 (SCJ)			2016 SCC 30, [2016] 1 SCR 851	
<b>8.</b>	<i>West Van Inc v Daisley</i> , 2013 ONSC 1988, [2013] OJ No 1649 (SCJ)	Granted	<b>4.</b>	Affirmed: 2014 ONCA 232, 119 OR (3d) 481	Granted
<b>9.</b>	<i>Brown v Spagnuolo</i> , 2013 ONSC 5178, [2013] OJ No 3853 (SCJ)	Granted		-	Granted
<b>10.</b>	<i>Lixo Investments Ltd v Gowling, Lafleur, Henderson</i> , 2013 ONSC 4862, [2013] OJ No 3534 (SCJ)	Granted	<b>5.</b>	Affirmed: 2014 ONCA 114, [2014] OJ No 667	Granted
<b>11.</b>	<i>Haufler (Litigation Guardian of) v Hotel Riu Palace</i> , 2013 ONSC 6044, 117 OR (3d) 275 (SCJ)	Granted		-	Granted
<b>12.</b>	<i>Mitchell v Jeckovich</i> , 2013 ONSC 7494, 28 CCLI (5th) 229 (SCJ)	Granted		-	Granted
<b>13.</b>	<i>Sullivan v Four Seasons Hotels Ltd</i> , 2013 ONSC 4622, 116 OR (3d) 365 (SCJ)	Granted		-	Granted
<b>14.</b>	<i>Kaynes v BP plc</i> , 2013 ONSC 5802, 117 OR (3d) 685 (SCJ)	Dismissed in Part	<b>6.</b>	Varied: 2014 ONCA 580, 122 OR (3d) 162	Granted
<b>15.</b>	<i>Leone v Scaffidi</i> , 2013 ONSC 1849, 87 ETR (3d) 93 (SCJ)	Dismissed		-	Dismissed
<b>16.</b>	<i>Patterson v EM Technologies, Inc</i> , 2013 ONSC 5849, [2013] OJ No 4249 (Master)	Dismissed		-	Dismissed
<b>17.</b>	<i>Bedford v Abushmaies</i> , 2013 ONSC 1352, [2013] OJ No 949 (SCJ)	Dismissed		-	Dismissed
<b>18.</b>	<i>Prince v ACE Aviation Holdings Inc</i> , 2013 ONSC 2906, 115 OR (3d) 721 (SCJ)	Partially granted	<b>7.</b>	Reversed (entirely granted due to cross-appeal): 2014 ONCA	Granted



	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
				285, 120 OR (3d) 140	
<b>19.</b>	<i>Thin v Philippe</i> , 2013 ONSC 7395, 96 ETR (3d) 114 (SCJ)	Granted		-	Granted
<b>20.</b>	<i>Jones v Raymond James Ltd</i> , 2013 ONSC 4640, [2013] OJ No 3199 (SCJ)	Dismissed		-	Dismissed
<b>21.</b>	<i>Kozicz v Preece</i> , 2013 ONSC 2823, [2013] OJ No 2226 (SCJ)	Granted		-	Granted
<b>22.</b>	<i>Petrook v Natuzzi Americas, Inc</i> , 2013 ONSC 4508, 10 CCEL (4th) 317 (SCJ)	Dismissed		-	Dismissed
<b>23.</b>	<i>Bouzari v Bahremani</i> , 2013 ONSC 6337, [2013] OJ No 5690 (SCJ)	Dismissed	<b>8.</b>	Reversed: 2015 ONCA 275, 126 OR (3d) 223	Granted
<b>24.</b>	<i>Century Indemnity Co v Viridian Inc</i> , 2013 ONSC 4412, [2013] OJ No 3265 (SCJ)	Dismissed		-	Dismissed
<b>25.</b>	<i>Bearsfield Developments Inc v McNabb</i> , 2013 ONSC 7063, [2013] OJ No 5141 (SCJ)	Dismissed		-	Dismissed

## 2014

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>1.</b>	<i>Harrowand SL v Dewind Turbines Ltd</i> , 2014 ONSC 2014, [2014] OJ No 2022 (Master)	Dismissed	<b>1.</b>	Reversed: 2014 CarswellOnt 19177 (Div Ct)	Allowed
<b>2.</b>	<i>Khan v Layden</i> , 2014 ONSC 6868, [2014] OJ No 5632 (SCJ)	Dismissed		-	Dismissed
<b>3.</b>	<i>Manson v Canetic Resources Ltd</i> , 2014 ONSC 261, [2014] OJ No 288 (SCJ)	Allowed		-	Allowed

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>4.</b>	<i>Leonard v GC Surplus</i> , [2014] OJ No 1906 (Small Claims Court)	Dismissed		-	Dismissed
<b>5.</b>	<i>Christmas v Fort McKay First Nation</i> , 2014 ONSC 373, 119 OR (3d) 21 (SCJ)	Allowed		-	Allowed
<b>6.</b>	<i>Szecsodi v MGM Resorts International</i> , 2014 ONSC 1323, [2014] OJ No 946 (Master)	Allowed		-	Allowed
<b>7.</b>	<i>Kavanagh v Magna Exteriors and Interiors Corp (cob Servicios Decoplas)</i> , 2014 ONSC 4540, [2014] OJ No 4949 (SCJ)	Allowed		-	Allowed
<b>8.</b>	<i>David S Laflamme Construction Inc v Canada (Attorney General)</i> , 2014 ONSC 1379, 31 CLR (4th) 285 (SCJ)	Action dismissed on other grounds	<b>2.</b>	Affirmed: 2014 ONCA 775, 34 CLR (4th) 187	Action dismissed on other grounds
<b>9.</b>	<i>Montel Inc v Kipawa Sales &amp; Services Inc</i> , 2014 ONSC 83, [2014] OJ No 219 (SCJ)	Dismissed		-	Dismissed
<b>10.</b>	<i>Victory v Sattar</i> , 2014 ONSC 641, [2014] OJ No 437 (SCJ)	Dismissed		-	Dismissed
<b>11.</b>	<i>Central Sun Mining Inc v Vector Engineering Inc</i> , 2014 ONSC 1849, [2014] OJ No 1981 (SCJ)	Dismissed		-	Dismissed
<b>12.</b>	<i>Kornhaber v Starwood Hotels and Restaurants Worldwide Inc</i> , 2014 ONSC 6182, [2014] OJ No 4986 (SCJ)	Allowed		-	Allowed
<b>13.</b>	<i>Solloway v Klondex Mines Ltd</i> , 2014 ONSC 391, [2014] OJ No 285 (SCJ)	Allowed	<b>3.</b>	Affirmed: 2014 ONCA 672, [2014] OJ No 4572	Allowed

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>14.</b>	<i>Endress + Hauser Canada Ltd v Aikman</i> , 2014 ONSC 3067, [2014] OJ No 2677 (SCJ)	Allowed		-	Allowed
<b>15.</b>	<i>Romanko v Nettina</i> , 2014 ONSC 5153, 44 CCLI (5th) 96 (SCJ)	Allowed		-	Allowed
<b>16.</b>	<i>Wu v Ng</i> , 2014 ONSC 7126, 6 ETR (4th) 104 (SCJ)	Dismissed		-	Dismissed
<b>17.</b>	<i>Ismail v Pafco Insurance</i> , 2014 ONSC 1290, [2014] OJ No 890 (SCJ)	Dismissed		-	Dismissed
<b>18.</b>	<i>Ibrahim v Robinson</i> , unreported (SCJ)	Dismissed		Affirmed: 2015 ONCA 21, 124 OR (3d) 106	Dismissed

2015

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>1.</b>	<i>Tyoga Investments Ltd v Service Alimentaire Desco Inc</i> , 2015 ONSC 3810, [2015] OJ No 3133 (SCJ)	Dismissed	<b>1.</b>	Affirmed: 2016 ONCA 15, [2016] OJ No 79	Dismissed
<b>2.</b>	<i>Hitlab Inc v Anderson</i> , 2015 ONSC 2535, [2015] OJ No 2083 (SCJ)	Granted		-	Granted
<b>3.</b>	<i>Legge v Young</i> , 2015 ONSC 775, 125 OR (3d) 67 (SCJ)	Granted		-	Granted
<b>4.</b>	<i>Orthoarm Inc v American Orthodontics Corp</i> , 2015 ONSC 1880, 125 OR (3d) 312 (SCJ)	Dismissed		-	Dismissed
<b>5.</b>	<i>Currie v Farr's Coach Lines Ltd</i> , 2015 ONSC 2352, [2015] OJ No 2075 (SCJ)	Granted		-	Granted
<b>6.</b>	<i>Goldhar v Haaretz.com</i> , 2015 ONSC 1128, 125 OR (3d) 619 (SCJ)	Dismissed	<b>2.</b>	Affirmed: 2016 ONCA	Granted (after

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
				515, 132 OR (3d) 331 Reversed: 2018 SCC 28, [2018] 2 SCR 3	chapter published)
<b>7.</b>	<i>Arsenault v Nunavut</i> , 2015 ONSC 4302, [2015] OJ No 3494 (SCJ)	Granted	<b>3.</b>	Affirmed: 2016 ONCA 207, 30 CCEL (4th) 46	Granted
<b>8.</b>	<i>Shah v LG Chem, Ltd</i> , 2015 ONSC 2628, 125 OR (3d) 773 (SCJ)	Granted		-	Granted
<b>9.</b>	<i>Airia Brands Inc v Air Canada</i> , 2015 ONSC 5332, 126 OR (3d) 756 (SCJ)	Granted		-	Granted
<b>10.</b>	<i>Machado v Catalyst Capital Group Inc</i> , 2015 ONSC 6313, 27 CCEL (4th) 116 (Master)	Dismissed	<b>4.</b>	Affirmed: 2016 ONSC 6719, 34 CCEL (4th) 274 (Div Ct)	Dismissed
<b>11.</b>	<i>Silveira v FY International Auditing &amp; Consulting Corp</i> , 2015 ONSC 338, 37 BLR (5th) 308 (Master)	Granted		-	Granted
<b>12.</b>	<i>QBD Cooling Systems Inc v Sollatek (UK) Ltd</i> , 2015 ONSC 947, [2015] OJ No 1578 (SCJ)	Dismissed		-	Dismissed
<b>13.</b>	<i>Canadian Imperial Bank of Commerce v Glasford</i> , 2015 ONSC 197, [2015] OJ No 87 (SCJ)	Granted	<b>5.</b>	Affirmed: 2015 ONCA 523, [2015] OJ No 3622	Granted
<b>14.</b>	<i>James Bay Resources Ltd v Mak Mera Nigeria Ltd</i> , 2015 ONSC 1538, 39 BLR (5th) 313 (SCJ)	Dismissed	<b>6.</b>	Affirmed: 2015 ONCA 781, 128 OR (3d) 198	Dismissed

	<b>Case Name</b>	<b>Result (At Motion)</b>	<b>Appeal</b>	<b>Appeal Result</b>	<b>Final Result</b>
<b>15.</b>	<i>Candoo Excavating Services Ltd v Ipex Inc</i> , 2015 ONSC 809, 42 CLR (4th) 153 (SCJ)	Dismissed		-	Dismissed
<b>16.</b>	<i>Forsythe v Westfall</i> , 2015 ONSC 758, 125 OR (3d) 135 (SCJ)	Granted	<b>7.</b>	Affirmed: 2015 ONCA 810, 128 OR (3d) 124	Granted
<b>17.</b>	<i>Algonquins of Barriere First Nations v Canada (Attorney General)</i> , 2015 ONSC 3505, [2015] OJ No 3031 (SCJ)	Granted		-	Granted
<b>18.</b>	<i>Carolina Foods Inc v 838116 Ontario Inc</i> , 2015 ONSC 1342, [2015] OJ No 953 (SCJ)	Granted		-	Granted
<b>19.</b>	<i>Cook v 1293037 Alberta Ltd (cob Traveller's Cloud 9)</i> , 2015 ONSC 7989, [2015] OJ No 6765 (SCJ)	Granted	<b>8.</b>	Affirmed: 2016 ONCA 836, [2016] OJ No 5698	Granted
<b>20.</b>	<i>Stuart Budd &amp; Sons Ltd v IFS Vehicle Distributors ULC</i> , 2015 ONSC 519, [2015] OJ No 979 (SCJ)	Dismissed	<b>9.</b>	Affirmed: 2016 ONCA 977, [2016] OJ No 6644*	Dismissed
<b>21.</b>	<i>CP Ships Ltd v Icecorp Logistics Inc</i> , 2015 ONSC 6243, [2015] OJ No 5319 (SCJ)	Granted		-	Granted
<b>22.</b>	<i>Mannarino v Brown Estate</i> , 2015 ONSC 3167, 50 CCLI (5th) 122 (SCJ)	Granted		-	Granted

\*Original motion overturned in 2016 ONCA 60, 129 OR (3d) 37, but re-dismissed in 2016 ONSC 2980, [2016] OJ No 2372, leading to the second appeal.

**APPENDIX B – COSTS (JURISDICTION MOTIONS)**

Costs Awards (Motions) in Order of Magnitude:

	<b>Costs Decision</b>	<b>Costs of Motion</b>	<b>Unique Characteristics</b>
1.	<i>Khan v Layden</i> , 2015 ONSC 146, [2015] OJ No 43 (SCJ)	\$1,921	
2.	<i>Paraie v Cangemi</i> , 2012 ONSC 6341, 113 OR (3d) 231 (SCJ)	\$2,000	
3.	<i>Mehmood v Gray</i> , 2011 ONSC 1735, [2011] OJ No 1177 (SCJ)	\$2,500	
4.	<i>Endress + Hauser Canada Ltd v Aikman</i> , 2014 ONSC 3067, [2014] OJ No 2677 (SCJ)	\$3,000	
5.	<i>Kahlon v Cheecham</i> , 2010 ONSC 1957, [2010] OJ No 1584 (SCJ)	\$3,000	
6.	<i>Silveira v FY International Auditing &amp; Consulting Corp.</i> , 2015 ONSC 338, 37 BLR (5th) 308 (Master)	\$3,304.51	
7.	<i>Cugalj v Wick</i> , 2012 ONSC 2407, 30 CPC (7th) 356 (SCJ)	\$3,500	
8.	<i>Stubbs v ATS Applied Tech Systems Inc</i> , 2010 CarswellOnt 10562 (SCJ)	\$3,500	
9.	<i>McAlpine v McAlpine</i> , 2012 ONSC 297, 108 OR (3d) 672 (SCJ)	\$3,604.71	
10.	<i>Moore v Vancouver Fraser Port Authority</i> , 2011 ONSC 3692, [2011] OJ No 2994 (SCJ)	\$4,000	
11.	<i>Comstock Canada Ltd v SPI Systems Ltd (cob SPI Controls)</i> , 2011 ONSC 2652, 100 CLR (3d) 289 (SCJ)	\$4,500	
12.	<i>Kazi v Qatar Airlines</i> , 2013 ONSC 1370, [2013] OJ No 992 (Master)	\$5,000	
13.	<i>Dempsey v Staples</i> , [2011] OJ No 5326 (SCJ)	\$5,000	
14.	<i>Lazer-Tech v Dejerrey</i> , 2010 ONSC 1662, [2010] OJ No 1080 (SCJ)	\$5,000	
15.	<i>Roadtrek Motorhomes Ltd v Aralex Acoustics Ltd</i> , 2010 ONCA 878, [2010] OJ No 5570, rev'g 2010 ONSC 2700, [2010] OJ No 2217 (SCJ)	\$5,000	
16.	<i>Litner (Litigation Guardian of) v Saunders</i> , 2010 ONSC 4862, [2010] OJ No 3901 (SCJ)	\$5,334	

	<b>Costs Decision</b>	<b>Costs of Motion</b>	<b>Unique Characteristics</b>
17.	<i>Goldmart Farms Inc v Fasig-Tipton Co</i> , 2010 ONSC 1631, [2010] OJ No 1683 (Master)	\$5,489	
18.	<i>Alexander v Alexander</i> , 2012 ONSC 2826, [2012] OJ No 2099 (Master)	\$6,000	
19.	<i>Zhang v Hua Hai Li Steel Pipe Co</i> , 2012 ONSC 5298, [2012] OJ No 4506 (SCJ)	\$6,000	
20.	<i>Di Stefano v Energy Automated Systems Inc</i> , 2010 ONSC 493, 68 BLR (4th) 209 (SCJ)	\$6,500	
21.	<i>Bearsfield Developments Inc v McNabb</i> , 2013 ONSC 7063, [2013] OJ No 5141 (SCJ)	\$7,000	
22.	<i>CP Ships Ltd v Icecorp Logistics Inc</i> , 2015 ONSC 6243, [2015] OJ No 5319 (SCJ)	\$7,500	
23.	<i>Wynn Las Vegas LLC v Teng</i> , 2012 ONSC 1927, [2012] OJ No 1467 (SCJ)	\$7,500	
24.	<i>Salus Marine Wear Inc v Queen Charlotte Lodge Ltd</i> , 2010 ONSC 5170, [2010] OJ No 4389 (SCJ)	\$7,500	
25.	<i>Montel Inc v Kipawa Sales &amp; Services Inc</i> , 2014 ONSC 83, [2014] OJ No 219 (SCJ)	\$8,600	
26.	<i>Hitlab Inc v Anderson</i> , 2015 ONSC 2535, [2015] OJ No 2083 (SCJ)	\$9,500	
27.	<i>Export Packers Co v SPI International Transportation</i> , 2011 ONSC 6906, [2011] OJ No 5227 (SCJ)	\$9,606.39	
28.	<i>Orthoarm Inc v American Orthodontics Corp</i> , 2015 ONSC 1880, 125 OR (3d) 312 (SCJ)	\$10,000	
29.	<i>Carolina Foods Inc v 838116 Ontario Inc</i> , 2015 ONSC 1342, [2015] OJ No 953 (SCJ)	\$10,000	
30.	<i>Wu v Ng</i> , 2015 ONSC 320, 6 ETR (4th) 117 (SCJ)	\$10,000	
31.	<i>Glasford v Canadian Imperial Bank of Commerce</i> , 2015 ONSC 1843, [2015] OJ No 1393 (SCJ)	\$10,298.20	
32.	<i>Wielgomas v Anglocom Inc</i> , 2011 ONCA 490, 335 DLR (4th) 741, var'g 2010 ONSC 6289, 335 DLR (4th) 745 (SCJ)	\$12,750	
33.	<i>Christmas v Fort McKay First Nation</i> , 2014 ONSC 373, 119 OR (3d) 21 (SCJ)	\$13,000	
34.	<i>Jafarzadehahmadsargoorabi v Sabet</i> , 2011 ONSC 7166, [2011] OJ No 6228 (SCJ)	\$13,136.65	

	<b>Costs Decision</b>	<b>Costs of Motion</b>	<b>Unique Characteristics</b>
35.	<i>Mitchell v Jeckovich</i> , 2014 ONSC 210, 28 CCLI (5th) 240 (SCJ)	\$13,935.78	
36.	<i>Legge v Young</i> , 2015 ONSC 775, 125 OR (3d) 67 (SCJ)	\$14,321.67	
37.	<i>Bale-eze Industries Inc v Frazier Industrial Co</i> , 2012 ONSC 5505, [2012] OJ No 4568 (SCJ)	\$14,595.34	
38.	<i>Amtim Capital Inc v Appliance Recycling Centers of America</i> , 2012 ONSC 1902, [2012] OJ No 1330 (SCJ)	\$15,000	
39.	<i>Colavecchia v Berkeley Hotel Ltd</i> , 2012 ONSC 5868, [2012] OJ No 4888 (SCJ)	\$15,000	
40.	<i>1673332 Ontario Ltd v Habonim Industrial Valves &amp; Actuators Ltd</i> , 2011 ONSC 4973, [2011] OJ No 3774 (SCJ)	\$15,000	
41.	<i>Tucows.com Co v Lojas Renner SA</i> , 2010 ONSC 5851, 334 DLR (4th) 564 (SCJ)	\$15,000	
42.	<i>Luk v Pottery Barn</i> , 2010 ONSC 5540, [2010] OJ No 5239 (SCJ)	\$15,000	
43.	<i>Consbec Inc v Walker</i> , 2011 ONSC 2944, [2011] OJ No 2146 (SCJ)	\$15,719.50	
44.	<i>Leone v Scaffidi</i> , 2013 ONSC 2847, 87 ETR (3d) 105 (SCJ)	\$18,000	
45.	<i>Petroom v Natuzzi Americas, Inc</i> , 2013 ONSC 5855, [2013] OJ No 4376 (SCJ)	\$19,177.07	Substantial Indemnity
46.	<i>Cook v 1293037 Alberta Ltd (cob Traveller's Cloud 9)</i> , 2015 ONSC 7989, [2015] OJ No 6765 (SCJ)	\$20,000	
47.	<i>Haufler (Litigation Guardian of) v Hotel Riu Palace</i> , 2014 ONSC 2686, [2014] OJ No 2659 (SCJ)	\$20,000	
48.	<i>James Bay Resources Ltd v Mak Mera Nigeria Ltd</i> , 2015 ONSC 2487, [2015] OJ No 1888 (SCJ)	\$21,000	
49.	<i>Brown v Spagnuolo</i> , 2013 ONSC 6665, [2013] OJ No 5028 (SCJ)	\$21,000	
50.	<i>Manson v Canetic Resources Ltd</i> , 2014 ONSC 1480, [2014] OJ No 1037 (SCJ)	\$23,896.92	Substantial Indemnity
51.	<i>Lixo Investments Ltd v Gowling, Lafleur, Henderson</i> , 2013 ONSC 6181, [2013] OJ No 4488 (SCJ)	\$24,000	



	<b>Costs Decision</b>	<b>Costs of Motion</b>	<b>Unique Characteristics</b>
52.	<i>Dundee Precious Metals Inc v Marsland</i> , 2011 ONCA 594, 108 OR (3d) 187, rev'g 2010 ONSC 6484, 104 OR (3d) 51 (SCJ)	\$25,000	
53.	<i>Greta Inc v De Lange</i> , 2013 ONSC 4931, [2013] OJ No 3598 (SCJ)	\$25,000	
54.	<i>Mackie Research Capital Corp v Mackie</i> , 2012 ONSC 3890, 3 BLR (5th) 312 (SCJ)	\$26,000	
55.	<i>Elfarnawani v International Olympic Committee</i> , 2011 ONSC 6784, 20 CPC (7th) 412 (SCJ)	\$28,823.73	
56.	<i>Victory v Sattar</i> , 2014 ONSC 1763, [2014] OJ No 1361 (SCJ)	\$30,000	
57.	<i>Harster Greenhouses Inc v Visser International Trade &amp; Engineering BV</i> , 2011 ONSC 3708, [2011] OJ No 2853 (SCJ)	\$30,000	
58.	<i>Nadi Inc v Montazemi-Safari</i> , 2012 ONSC 5492, [2012] OJ No 4570 (SCJ)	\$32,000	“Somewhat more” than partial indemnity costs
59.	<i>Sun Life Assurance Co of Canada v Yellow Pages Group Inc</i> , 2010 ONSC 2780, [2010] OJ No 2608 (SCJ)	\$33,000	
60.	<i>Bond v Brookfield Asset Managements Inc</i> , 2011 ONSC 3761, [2011] OJ No 2760 (SCJ)	\$35,000	Class Action
61.	<i>Title v Canadian Asset Based Lending Enterprise (Cable) Inc</i> , 2011 ONSC 1562, [2011] OJ No 1104 (SCJ)	\$35,000	
62.	<i>Kais v Abu Dhabi Education Council</i> , 2011 ONSC 100, [2011] OJ No 29 (Master)	\$39,566.90	
63.	<i>Solloway v Klondex Mines Ltd</i> , 2014 ONSC 1632, [2014] OJ No 1171 (SCJ)	\$42,000	
64.	<i>Bouzari v Bahremani</i> , 2015 ONCA 275, 126 OR (3d) 223, rev'g 2013 ONSC 6337, [2013] OJ No 5690 (SCJ)	\$50,000	
65.	<i>Stuart Budd &amp; Sons Ltd v IFS Vehicle Distributors ULC</i> , 2016 ONSC 3798, [2016] OJ No 3033 (SCJ), also including costs of 2015 ONSC 519, [2015] OJ No 979 (SCJ)	\$50,000	
66.	<i>Merill Lynch Canada Inc v Mineralogy Canada Acquisition Corp Pty Ltd</i> , 2011 ONSC 3032, [2011] OJ No 2317 (SCJ)	\$56,564.29	Substantial Indemnity

	<b>Costs Decision</b>	<b>Costs of Motion</b>	<b>Unique Characteristics</b>
67.	<i>Harrowand SL v Dewind Turbines Ltd</i> , 2014 CarswellOnt 19177 (Div Ct), rev'g 2014 ONSC 2014, [2014] OJ No 2022 (Master)	\$63,300	
68.	<i>Collingwood Ethanol LP v Humblet Inc</i> , 2010 ONSC 2132, 91 CLR (3d) 112 (SCJ)	\$64,000	
69.	<i>Cannon v Funds for Canada Foundation</i> , 2010 ONSC 5658, [2010] OJ No 4374 (SCJ)	\$66,105.76	Class Action
70.	<i>Ghana Gold Corp (Re)</i> , 2013 ONSC 5790, 3 CBR (6th) 220 (SCJ)	\$69,917.58	
71.	<i>Wilson v Riu</i> , 2013 ONSC 635, 98 CCLT (3d) 342 (SCJ), var'd 2013 ONSC 2586, 2 CCLT (4th) 169 (SCJ)	\$72,508.60	Judge made arithmetical error, requiring variation
72.	<i>Kaynes v BP plc</i> , 2014 ONCA 580, 122 OR (3d) 162 var'g 2013 ONSC 5802, 117 OR (3d) 685 (SCJ)	\$75,000	Class Action
73.	<i>McKenna v Gammon Gold Inc</i> , 2010 ONSC 3630, 88 CPC (6th) 83 (SCJ)	\$100,000	Class Action
74.	<i>Abdula v Canadian Solar Inc</i> , 2011 ONSC 7055, [2011] OJ No 5912 (SCJ)	\$250,000	
75.	<i>Ontario v Rothmans, Inc</i> , 2012 ONSC 1804, 28 CPC (7th) 103 (SCJ)	\$575,520	Tobacco

Costs Awards (Appeals) in Order of Magnitude:

	<b>Appellate (Costs) Decision</b>	<b>Costs of Appeal</b>	<b>Unique Characteristics</b>
1.	<i>Arsenault v Nunavut</i> , 2016 ONCA 207, 30 CCEL (4th) 46	\$5,000	
2.	<i>Stubbs v ATS Applied Tech Systems Inc</i> , 2010 ONCA 879, 272 OAC 386	\$5,000	
3.	<i>Wielgomas v Anglocom Inc</i> , 2011 ONCA 490, 335 DLR (4th) 741	\$5,000	
4.	<i>Roadtrek Motorhomes Ltd v Aralex Acoustics Ltd</i> , 2010 ONCA 878, [2010] OJ No 5570	\$5,000	
5.	<i>Jabbour v Eparchy of Our Lady of Lebanon of Los Angeles</i> , 2011 ONCA 140, [2011] OJ No 796	\$6,000	

	<b>Appellate (Costs) Decision</b>	<b>Costs of Appeal</b>	<b>Unique Characteristics</b>
6.	<i>Glasford v Canadian Imperial Bank of Commerce</i> , 2015 ONCA 523, [2015] OJ No 3622	\$7,500	
7.	<i>James Bay Resources Ltd v Mak Mera Nigeria Ltd</i> , 2015 ONCA 781, 128 OR (3d) 198	\$7,500	
8.	<i>Cook v 1293037 Alberta Ltd (cob Traveller's Cloud 9)</i> , 2016 ONCA 836, [2016] OJ No 5698	\$7,500	
9.	<i>Tamminga v Tamminga</i> , 2014 ONCA 478, 120 OR (3d) 671	\$7,500	
10.	<i>West Van Inc v Daisley</i> , 2014 ONCA 232, 119 OR (3d) 481	\$7,500	
11.	<i>Ibrahim v Robinson</i> , 2015 ONCA 21, 124 OR (3d) 106	\$7,500	
12.	<i>Galaxy Dragon Ltd v Topwater Exclusive Fund IV LLC</i> , 2012 ONCA 382, [2012] OJ No 2522	\$7,500	
13.	<i>Galustian v SkyLink Group of Companies Inc</i> , 2010 ONCA 645, 268 OAC 157	\$9,000	Security for Costs Ordered for Appeal
14.	<i>Tyoga Investments Ltd v Service Alimentaire Desco Inc</i> , 2016 ONCA 15, [2016] OJ No 79	\$10,000	
15.	<i>Solloway v Klondex Mines Ltd</i> , 2014 ONCA 672, [2014] OJ No 4572	\$10,000	
16.	<i>Machado v Catalyst Capital Group Inc</i> , 2016 ONSC 6719, 34 CCEL (4th) 274 (Div Ct)	\$10,000	
17.	<i>Jafarzadehahmadsargoorabi v Sabet</i> , 2012 ONCA 391, [2012] OJ No 2573	\$11,070	
18.	<i>Trillium Motor World Ltd v General Motors of Canada Ltd</i> , 2014 ONCA 497, 120 OR (3d) 598	\$12,000	
19.	<i>Stuart Budd &amp; Sons Ltd v IFS Vehicle Distributors ULC</i> , 2016 ONCA 977, [2016] OJ No 6644	\$13,000	
20.	<i>Amtim Capital Inc v Appliance Recycling Centers of America</i> , 2012 ONCA 664, 298 OAC 75	\$15,000	
21.	<i>Export Packers Co v SPI International Transportation</i> , 2012 ONCA 526, [2012] OJ No 3652	\$15,000	

	<b>Appellate (Costs) Decision</b>	<b>Costs of Appeal</b>	<b>Unique Characteristics</b>
22.	<i>Brisben v Lunev</i> , 2011 ONCA 15, [2011] OJ No 87	\$15,000	
23.	<i>Greta Inc v De Lange</i> , 2014 ONCA 107, [2014] OJ No 625	\$15,000	
24.	<i>Dundee Precious Metals Inc v Marsland</i> , 2011 ONCA 594, 108 OR (3d) 187	\$17,000	
25.	<i>Lixo Investments Ltd v Gowling, Lafleur, Henderson</i> , 2014 ONCA 114, [2014] OJ No 667	\$17,000	
26.	<i>Harrowand SL v Dewind Turbines Ltd</i> , 2014 CarswellOnt 19177 (Div Ct)	\$17,500	
27.	<i>David S Laflamme Construction Inc v Canada (Attorney General)</i> , 2014 ONCA 775, 34 CLR (4th) 187	\$17,500	
28.	<i>Mining Technologies International Inc v Krako Inc</i> , 2012 ONCA 847, 99 CCLT (3d) 46	\$20,000	There was also a motion for leave to appeal to the Divisional Court, but that appears to be related to either unrelated relief and/or was made erroneously in the wrong court: see 2012 ONSC 3555, [2012] OJ No 2877 (SCJ) and 2012 ONSC 4505, [2012] OJ No 3687 (SCJ)
29.	<i>Bond v Brookfield Asset Managements Inc</i> , 2011 ONCA 730, 18 CPC (7th) 74	\$20,000	Class Action
30.	<i>Tucows.com Co v Lojas Renner SA</i> , 2011 ONCA 548, 106 OR (3d) 561	\$24,000	
31.	<i>2249659 Ontario Ltd v Siegen</i> , 2013 ONCA 513, [2013] OJ No 3566	\$24,000	
32.	<i>Cannon v Funds for Canada Foundation</i> , 2011 ONCA 185, [2011] OJ No 990	\$25,000	Class Action
33.	<i>Wolfe v Wyeth</i> , 2011 ONCA 347, 282 OAC 64	\$25,000	
34.	<i>Expedition Helicopters Inc v Honeywell Inc</i> , 2010 ONCA 351, 262 OAC 195	\$25,000	

	<b>Appellate (Costs) Decision</b>	<b>Costs of Appeal</b>	<b>Unique Characteristics</b>
<b>35.</b>	<i>Title v Canadian Asset Based Lending Enterprise (Cable) Inc</i> , 2011 ONCA 715, 108 OR (3d) 71	\$25,000	
<b>36.</b>	<i>Central Sun Mining Inc v Vector Engineering Inc</i> , 2013 ONCA 601, 117 OR (3d) 313	\$25,000	
<b>37.</b>	<i>Goldhar v Haaretz.com</i> , 2016 ONCA 515, 132 OR (3d) 331	\$30,000	
<b>38.</b>	<i>Kaynes v BP plc</i> , 2014 ONCA 580, 122 OR (3d) 162	\$50,000	Class Action
<b>39.</b>	<i>Prince v ACE Aviation Holdings Inc</i> , 2014 ONCA 285, 120 OR (3d) 140	\$50,000	Class Action
<b>40.</b>	<i>Ontario v Rothmans, Inc</i> , 2013 ONCA 642, 118 OR (3d) 213	\$237,332.50	Tobacco Litigation

**APPENDIX C – DELAY (JURISDICTION MOTIONS)**

**Cases Without Appeals (Sorted By Length of Delay)**

	<b>Decision</b>	<b>Date Service of Statement of Claim</b>	<b>Date of Motion Resolution</b>	<b>Delay in Months</b>
1.	<i>Ghana Gold Corp (Re)</i> , 2013 ONSC 3284, 3 CBR (6th) 220 (SCJ)	May 8, 2013	June 7, 2013	1
2.	<i>Obégi Chemicals LLC v Kilani</i> , 2011 ONSC 1636, [2011] OJ No 1351 (SCJ)	December 23, 2010	March 24, 2011	3
3.	<i>Avanti Management and Consulting Ltd v Argex Mining Inc</i> , 2012 ONSC 4395, [2012] OJ No 3665 (SCJ)	April 4, 2012	July 27, 2012	4
4.	<i>Wu v Ng</i> , 2014 ONSC 7126, 6 ETR (4th) 104 (SCJ)	July 2014	December 9, 2014	5
5.	<i>Alexander v Alexander</i> , 2012 ONSC 2826, [2012] OJ No 2099 (Master)	Mid-December 2011	May 11, 2012	5
6.	<i>Century Indemnity Co v Viridian Inc</i> , 2013 ONSC 4412, [2013] OJ No 3265 (SCJ)	January 3, 2013	June 26, 2013	5
7.	<i>Royal Bank of Canada v DCM Erectors Inc</i> , 2013 ONSC 2864, [2013] OJ No 2233 (SCJ)	December 2012	May 16, 2013	5
8.	<i>Toronto (City) v Tseng</i> , 2011 ONSC 4594, 87 MPLR (4th) 220 (Master)	March 8, 2011	July 28, 2011	5
9.	<i>Inukshuk Wireless Partnership v 4253311 Canada Inc</i> , 2013 ONSC 5631, 117 OR (3d) 206 (SCJ)	March 7, 2013	September 6, 2013	6
10.	<i>Ironrod Investments Inc v Enquest Energy Services Corp</i> , 2011 ONSC 308, [2011] OJ No 544 (SCJ)	June 2010	January 25, 2011	7
11.	<i>Candoo Excavating Services Ltd v Ipex Inc</i> , 2015 ONSC 809, 42 CLR (4th) 153 (SCJ)	July 11, 2014	February 4, 2015	7
12.	<i>Carolina Foods Inc v 838116 Ontario Inc</i> , 2015 ONSC 1342, [2015] OJ No 953 (SCJ)	August 6, 2014	March 2, 2015	7

	<b>Decision</b>	<b>Date Service of Statement of Claim</b>	<b>Date of Motion Resolution</b>	<b>Delay in Months</b>
13.	<i>Orthoarm Inc v American Orthodontics Corp</i> , 2015 ONSC 1880, 125 OR (3d) 312 (SCJ)	September 5, 2014	March 30, 2015	7
14.	<i>Patterson v EM Technologies, Inc</i> , 2013 ONSC 5849, [2013] OJ No 4249 (Master)	Early 2013	September 17, 2013	7
15.	<i>McAlpine v McAlpine</i> , 2012 ONSC 297, 108 OR (3d) 672 (SCJ)	April 29, 2011	January 12, 2012	8
16.	<i>Shinoff v BMO Nesbitt Burns Inc</i> , 2010 ONSC 926, [2010] OJ No 540 (SCJ)	May 22, 2009	February 8, 2010	8
17.	<i>Kahlon v Cheecham</i> , 2010 ONSC 1957, [2010] OJ No 1584 (SCJ)	July 11, 2009	April 20, 2010	9
18.	<i>Bearsfield Developments Inc v McNabb</i> , 2013 ONSC 7063, [2013] OJ No 5141 (SCJ)	February 1, 2013	November 14, 2013	9
19.	<i>Endress + Hauser Canada Ltd v Aikman</i> , 2014 ONSC 3067, [2014] OJ No 2677 (SCJ)	August 1, 2013	June 5, 2014	10
20.	<i>Legge v Young</i> , 2015 ONSC 775, 125 OR (3d) 67 (SCJ)	May 2014	March 10, 2015	10
21.	<i>Nadi Inc v Montazemi-Safari</i> , 2012 ONSC 4723, [2012] OJ No 4005 (SCJ)	October 26, 2011	August 28, 2012	10
22.	<i>Manson v Canetic Resources Ltd</i> , 2014 ONSC 261, [2014] OJ No 288 (SCJ)	February 21, 2013	January 13, 2014	11
23.	<i>Van Kessel v Orsulak</i> , 2010 ONSC 6919, 9 CPC (7th) 434 (SCJ)	Mid-January 2010	December 24, 2010	11
24.	<i>Victory v Sattar</i> , 2014 ONSC 641, [2014] OJ No 437 (SCJ)	Late January 2013	January 29, 2014	12
25.	<i>Mehmood v Gray</i> , 2011 ONSC 1735, [2011] OJ No 1177 (SCJ)	March 2010	March 18, 2011	12
26.	<i>Patterson v EM Technologies, Inc</i> , 2013 ONSC 5849, [2013] OJ No 4249 (Master)	September 2012	September 17, 2013	12

	<b>Decision</b>	<b>Date Service of Statement of Claim</b>	<b>Date of Motion Resolution</b>	<b>Delay in Months</b>
27.	<i>Petrook v Natuzzi Americas, Inc</i> , 2013 ONSC 4508, 10 CCEL (4th) 317 (SCJ)	May 11, 2012	July 3, 2013	14
28.	<i>Umutomi c Safari</i> , 2012 CSON 6962, [2012] OJ No 5822 (SCJ)	September 19, 2011	December 6, 2012	15
29.	<i>Khan v Layden</i> , 2014 ONSC 6868, [2014] OJ No 5632 (SCJ)	July 2013	November 26, 2014	16
30.	<i>Shah v LG Chem, Ltd</i> , 2015 ONSC 2628, 125 OR (3d) 773 (SCJ)	December 24, 2013	April 23, 2015	16
31.	<i>Montel Inc v Kipawa Sales &amp; Services Inc</i> , 2014 ONSC 83, [2014] OJ No 219 (SCJ)	September 11, 2012	January 17, 2014	16
32.	<i>United States of America v Yemec</i> , 2012 ONSC 4207, 41 CPC (7th) 362 (SCJ)	Late March 2011	August 24, 2012	17
33.	<i>Furfari v Juncos</i> , 2011 ONSC 3624, 38 CPC (7th) 110 (SCJ)	Late December 2009-Early January 2010	June 13, 2011	17
34.	<i>QBD Cooling Systems Inc v Sollatek (UK) Ltd</i> , 2015 ONSC 947, [2015] OJ No 1578 (SCJ)	August 14, 2013	February 11, 2015	18
35.	<i>Currie v Farr's Coach Lines Ltd</i> , 2015 ONSC 2352, [2015] OJ No 2075 (SCJ)	October 2013	April 23, 2015	18
36.	<i>Kais v Abu Dhabi Education Council</i> , 2011 ONSC 75, [2011] OJ No 33 (Master)	March 25, 2009	January 5, 2011	21
37.	<i>Wilson v Riu</i> , 2012 ONSC 6840, 98 CCLT (3d) 337 (SCJ)	Early January 2011	November 29, 2012	22
38.	<i>Frank v Farlie, Turner &amp; Co, LLC</i> , 2012 ONSC 5519, 113 OR (3d) 25 (SCJ)	Late December 2010	October 2, 2012	22
39.	<i>Szecsodi v MGM Resorts International</i> , 2014 ONSC 1323, [2014] OJ No 946 (Master)	March 2012	March 3, 2014	24
40.	<i>Bedford v Abushmaies</i> , 2013 ONSC 1352, [2013] OJ No 949 (SCJ)	December 2010	March 6, 2013	27



	<b>Decision</b>	<b>Date Service of Statement of Claim</b>	<b>Date of Motion Resolution</b>	<b>Delay in Months</b>
41.	<i>1673332 Ontario Ltd v Habonim Industrial Valves &amp; Actuators Ltd</i> , 2011 ONSC 4973, [2011] OJ No 3774 (SCJ)	Early March 2009	August 22, 2011	29
42.	<i>Kavanagh v Magna Exteriors and Interiors Corp (cob Servicios Decoplas)</i> , 2014 ONSC 4540, [2014] OJ No 4949 (SCJ)	February 29, 2012	July 31, 2014	29
43.	<i>Dennis v Farrell</i> , 2010 ONSC 2401, 84 CCLI (4th) 64 (SCJ)	September 12, 2007	April 23, 2010	31
44.	<i>Bale-eze Industries Inc v Frazier Industrial Co</i> , 2012 ONSC 4892, [2012] OJ No 3996 (SCJ)	January/February 2009	August 28, 2012	42
45.	<i>Central Sun Mining Inc v Vector Engineering Inc</i> , 2014 ONSC 1849, [2014] OJ No 1981 (SCJ)	May 10, 2010	April 28, 2014	47
46.	<i>Mitchell v Jeckovich</i> , 2013 ONSC 7494, 28 CCLI (5th) 229 (SCJ)	Late 2009	December 5, 2013	48
47.	<i>Haufler (Litigation Guardian of) v Hotel Riu Palace</i> , 2013 ONSC 6044, 117 OR (3d) 275 (SCJ)	Late 2008	September 27, 2013	58
48.	<i>Airia Brands Inc v Air Canada</i> , 2015 ONSC 5332, 126 OR (3d) 756 (SCJ)	September 21, 2006	August 26, 2015	107

**Cases With Appeals (Sorted By Length of Delay)**

	<b>Decision</b>	<b>Date Service of Statement of Claim</b>	<b>Date of Motion Resolution</b>	<b>Delay in Months</b>
1.	<i>James Bay Resources Limited v Mak Mera Nigeria Limited</i> , 2015 ONSC 1538, 39 BLR (5th) 313 (SCJ), aff'd 2015 ONCA 781, 128 OR (3d) 198	September 10, 2014	November 11, 2015	14
2.	<i>Mining Technologies International Inc v Krako Inc</i> , 2012 ONSC 2239, 2012 CarswellOnt 8034 (SCJ), aff'd ONCA 847, 99 CCLT (3d) 46	Early-to-mid-2011	November 22, 2012	14
3.	<i>Galaxy Dragon Ltd v Topwater Exclusive Fund IV LLC</i> , 2011 ONSC 6818, [2011] OJ	January 27, 2011	May 30, 2012	16

	<b>Decision</b>	<b>Date Service of Statement of Claim</b>	<b>Date of Motion Resolution</b>	<b>Delay in Months</b>
	No 5255 (SCJ), aff'd 2012 ONCA 382, [2012] OJ No 2522			
4.	<i>Brisben v Lunev</i> , 2010 ONSC 1840, [2010] OJ No 3216 (SCJ), aff'd 2011 ONCA 15, [2011] OJ No 87	June 2009	January 7, 2011	19
5.	<i>Tyoga Investments Ltd v Service Alimentaire Desco Inc</i> , 2015 ONSC 3810, [2015] OJ No 3133 (SCJ), aff'd 2016 ONCA 15, [2016] OJ No 79	May 7, 2014	January 8, 2016	20
6.	<i>Wielgomas v Anglocom Inc</i> , 2010 ONSC 6289, 335 DLR (4th) 745 (SCJ), aff'd 2011 ONCA 490, 335 DLR (4th) 741	Summer 2009	June 29, 2011	23
7.	<i>Lixo Investments Ltd v Gowling, Lafleur, Henderson</i> , 2013 ONSC 4862, [2013] OJ No 3534 (SCJ), aff'd 2014 ONCA 114, [2014] No 667	January 2012	February 2, 2014	25
8.	<i>Arsenault v Nunavut</i> , 2015 ONSC 4302, [2015] OJ No 3494 (SCJ), aff'd 2016 ONCA 207, 30 CCEL (4th) 46	February 3, 2014	March 3, 2016	25
9.	<i>Jabbour v Eparchy of Our Lady of Lebanon of Los Angeles</i> , 2010 ONSC 2475, 2010 CarswellOnt 10731 (SCJ), aff'd 2011 ONCA 140, [2011] OJ No 796	November 8, 2008	February 23, 2011	27
10.	<i>2249659 Ontario Ltd v Siegen</i> , 2012 ONSC 3128, [2012] OJ No 3263 (SCJ), rev'd 2013 ONCA 354, 115 OR (3d) 241	January 11, 2011	May 31, 2013	29
11.	<i>Wolfe v Wyeth</i> , 2010 ONSC 2368, 84 CPR (4th) 43 (SCJ), aff'd 2011 ONCA 347, 373 NSR (2d) 79	December 3, 2007	May 5, 2011	41
12.	<i>Stuart Budd &amp; Sons Ltd v IFS Vehicle Distributors ULC</i> , 2015 ONSC 519, [2015] OJ No 979 (SCJ), rev'd 2016 ONCA 60, 129 OR (3d) 37; re-decided 2016 ONSC 2980, [2016] OJ No 2372 (SCJ), aff'd 2016 ONCA 977, [2016] OJ No 6644	March 22, 2013	December 23, 2016	45

**Cases With Supreme Court Leave Applications (Sorted By Length of Delay)**

## APPENDIX D – ALL CASES BY DATE (RULE 2.1)

	Case Name	Resolution Date	Court	Source	Notice Ordered?	Decision	Result	Appeal	Costs	Delay: Notice to Final Disposition	Judge(s) (noted if Master)	Claim Type	Self-Rep?
1	<i>Gao v Ontario (Workplace Safety and Insurance Board)</i>	07-Nov-14	SCJ	Responding Party	2014 ONSC 6100, 37 CLR (4th) 1	2014 ONSC 6497, 31 CPC (7th) 153	Granted After Notice	N/A	None	18 Days: October 20, 2014 to November 7, 2014	Myers	Motion in dismissed claim	Unclear
2	<i>Markowa v Adamson Cosmetic Facial Surgery Inc</i>	14-Nov-14	SCJ	Unclear	N/A	2014 ONSC 6664, [2014] OJ No 5430	Granted After Notice	N/A	Unclear	25 Days: October 20, 2014 to November 14, 2014	Myers	Attempt to re-litigate	Yes
3	<i>Ali v Ford</i>	14-Nov-14	SCJ	Unclear	N/A	2014 ONSC 6665, [2014] OJ No 5426	Granted After Notice	N/A	Unclear	25 Days: October 20, 2014 to November 14, 2014	Myers	OPCA	Yes
4	<i>Crawford v Carey</i>	05-Dec-14	SCJ	Unclear	N/A	2014 ONSC 7054, [2014] OJ No 5824	Dismissed After Notice	N/A	Unclear	28 Days: November 7, 2014 to December 5, 2014	Myers	Tortious acts of building owner and developer	Unclear
5	<i>Nolan v Law Society of Upper Canada</i>	11-Dec-14	SCJ	Unclear	N/A	2014 ONSC 7196, [2014] OJ No 5989	Granted After Notice	N/A	Unclear	52 Days: October 20, 2014 to December 11, 2014 (plaintiff could not be reached)	Myers	Forced resignation from Law Society in 1986	Unclear
6	<i>Brown v Lloyds of London Insurance Market</i>	05-Jan-15	SCJ	Unclear	N/A	N/A	Granted After Notice	Affirmed: 2015 ONCA 235, [2015] OJ No 1739	None	Unclear/About 120 Days: Unclear to December 2014 to April 9, 2015 (appeal)	Myers	Not discernible; no cause of action	Yes
7	<i>Hawkins v Schlosser</i>	28-Jan-15	SCJ	Unclear	N/A	2015 ONSC 646, [2015] OJ No 372	Granted After Notice	N/A	\$1,148.02: 2015 ONSC 1691, [2015] OJ No 1346	13 Days: January 15, 2015 to January 28, 2015	Ellies	Procedurally flawed family proceeding	Unclear
8	<i>Stefanizzi v Ontario (Landlord and Tenant Board)</i>	05-Feb-15	SCJ	Registrar	N/A	2015 ONSC 859, [2015] OJ No 562	Granted After Notice	N/A	Unclear	11 Days: January 25, 2015 to February 5, 2015	Kurke	Attempt to re-litigate	Unclear
9	<i>Williams v Law Society of Upper Canada</i>	09-Feb-15	SCJ	Responding Party	2015 ONSC 913, [2015] OJ No 619	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Myers	Mental distress due to poor Law Society regulation	Unclear

	Case Name	Resolution Date	Court	Source	Notice Ordered?	Decision	Result	Appeal	Costs	Delay: Notice to Final Disposition	Judge(s) (noted if Master)	Claim Type	Self-Rep?
10	<i>Park v Short</i>	26-Feb-15	SCJ	Responding Party	N/A	2015 ONSC 1292, [2015] OJ No 926	Granted Without Notice	N/A	Unclear	0 Days	Myers	Commenced in violation of vexatious litigant order	Yes
11	<i>Rousay v Rousay</i>	27-Feb-15	SCJ	Responding Party	N/A	2015 ONSC 1336, [2015] OJ No 930	Granted After Notice	N/A	Unclear	66 Days: December 23, 2014 to February 27, 2015	McEwen	Attempt to re-litigate; not discernible	Yes
12	<i>Raji v Borden Ladner and Gervais LLP</i>	02-Mar-15	SCJ	Responding Party	2015 ONSC 801, [2015] OJ No 307	2015 ONSC 2915, [2015] OJ No 976	Granted After Notice	N/A	Unclear	35 Days: January 26, 2015 to March 2, 2015	Myers	Attempt to re-litigate	Unclear
13	<i>Chowdhury v Bangladeshi-Canadian Community Services</i>	06-Mar-15	SCJ	Responding Party	2015 ONSC 1534, [2015] OJ No 1081	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Argument plaintiff's motion premature	Unclear
14	<i>Beatty v Ontario (Attorney General)</i>	06-Mar-15	SCJ	Unclear	N/A	2015 ONSC 1519, [2015] OJ No 1290	Granted After Notice	N/A	None	28 Days: February 6, 2015 to March 6, 2015	Gray	Attempt to force province to alter policies in absence of factual basis	Yes
15	<i>Lin v Greither</i>	09-Mar-15	SCJ	Unclear	N/A	2015 ONSC 1541, [2015] OJ No 1086	Granted After Notice	N/A	Unclear	19 days: February 18, 2015 to March 9, 2015	Myers	Wrongful dismissal in 2009 in Vancouver; complaints against court for judgments; complaints against police for failing to investigate crime	Yes
16	<i>Gledhill v Toronto (City) Police Services Board</i>	18-Mar-15	SCJ	Responding Party	2015 ONSC 1006, [2015] OJ No 733 (second notice)	2015 ONSC 1755, [2015] OJ No 1297	Granted After Notice	N/A	Unclear	33 Days: February 13, 2015 to March 18, 2015	Myers	Not discernible and attempt to re-litigate	Yes
17	<i>Clarke v Canada (Human Rights Commission)</i>	18-Mar-15	SCJ	Unclear	2015 ONSC 1789, [2015] OJ No 1341	2015 ONSC 2564, 2015 Carswell Ont 5611	Claim Withdrawn Against 1 Defendant on Consent	N/A	None	27 Days: February 19, 2015 to March 18, 2015	Myers	Medical malpractice claim against improper defendant	Yes
18	<i>Husain v Craig</i>	18-Mar-15	SCJ	Responding Party	2015 ONSC 1754, [2015] OJ No 1300	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Claim against criminal defence lawyer	Yes

	Case Name	Resolution Date	Court	Source	Notice Ordered?	Decision	Result	Appeal	Costs	Delay: Notice to Final Disposition	Judge(s) (noted if Master)	Claim Type	Self-Rep?
19	<i>Di Marco v Lattuca</i>	10-Apr-15	SCJ	Unclear	N/A	2015 ONSC 2341, [2015] OJ No 1845	Granted After Notice	N/A	Unclear	50 Days: February 19, 2015 to April 10, 2015	Myers	Attempt to re-litigate	Unclear
20	<i>Lin v Rock</i>	14-Apr-15	SCJ	Responding Party	N/A	2015 ONSC 2421, [2015] OJ No 1851	Granted Without Notice	N/A	None	N/A	Myers	Motion brought before wrong decision-maker	Yes
21	<i>Gledhill v Toronto (City) Police Services Board</i>	14-Apr-15	SCJ	Unclear	2015 ONSC 2068, 2015 CarswellOnt 5323	2015 ONSC 2418, [2015] OJ No 1847	Granted After Notice	N/A	Unclear	15 Days: March 30, 2015 to April 14, 2015	Myers	Attempt to re-litigate	Yes
22	<i>Covenoho v Ceridian Canada</i>	16-Apr-15	SCJ	Responding Party	2015 ONSC 2468, [2015] OJ No 1889	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Defendants attempt to raise merits in 6-page submissions	Yes
23	<i>Cao v Whirlpool Corp</i>	20-Apr-15	SCJ	Responding Party	2015 ONSC 1266, [2015] OJ No 884	2015 ONSC 2582, [2015] OJ No 1990	Granted After Notice	N/A	Unclear	54 Days: February 25, 2015 to April 20, 2015	Myers	Attempt to bring motion in dismissed action	Yes
24	<i>Tunney v 51 Toronto (City) Police</i>	24-Apr-15	SCJ	Unclear	[2015] OJ No 2148	2015 CarswellOnt 6140	Granted After Notice	N/A	Unclear	37 Days: March 18, 2015 to April 24, 2015	Myers	Purporting to sue on behalf of another without standing	Yes
25	<i>Nguyen v Economical Mutual Insurance Co</i>	24-Apr-15	SCJ	Responding Party	N/A	2015 ONSC 2646, 49 CCLI (5th) 144	Dismissed in Context of Other Motion	N/A	\$2,000 (to defendant given other success)	N/A	Dow	Insurance claim (procedural error by defendant)	Yes
26	<i>Salman v Patey</i>	27-Apr-15	SCJ	Responding Party	2015 ONSC 2727, 72 CPC (7th) 368	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Lawyer's negligence (alleged <i>res judicata</i> )	Yes
27	<i>Haidari v Sedeghi-Pour</i>	04-May-15	SCJ	Responding Party	2015 ONSC 2904, 73 CPC (7th) 191	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Car accident	No
28	<i>Scaduto v Law Society of Upper Canada</i>	05-May-15	SCJ	Responding Party	2015 ONSC 2563, [2015] OJ No 2005	N/A	Granted After Notice	Affirmed: 2015 ONCA 733, 343 OAC 87, leave to appeal ref'd, [2015] SCCA No 488, 2016 CarswellOnt 21905	Unclear	15 Days: April 20, 2015 to May 5, 2015 to November 2, 2015 to April 21, 2016	Myers	Allegations against Law Society for permitting a lecture	Yes

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29	<i>Guettler v Royal Bank of Canada</i>	05-May-15	SCJ	Unclear	N/A	2015 ONSC 2905, 72 CPC (7th) 295	Granted After Notice	N/A	Unclear	176 Days: November 10, 2014 to May 5, 2015	Di Tomaso	Wilful interference with right to peaceful life	Yes
30	<i>Pileci v Ontario (Attorney General)</i>	25-May-15	SCJ	Responding Party	2015 ONSC 3298, [2015] OJ No 2616	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Myers	Attempt to sue court staff for how another proceeding was handled	Yes
31	<i>Brown v Fred Victor Organization</i>	28-May-15	SCJ	Responding Party	2015 ONSC 2728, [2015] OJ No 2133	2015 ONSC 3421, [2015] OJ No 2681	Granted After Notice	N/A	Unclear	31 Days: April 27, 2015 to May 28, 2015	Myers	Not discernable; failure to respond to offers to settle	Yes
32	<i>Keedi v McDonald's Corp Canada</i>	01-Jun-15	SCJ	Unclear	N/A	2015 ONSC 3516, [2015] OJ No 3428	Granted After Notice	N/A	None	45 Days: April 17, 2015 to June 1, 2015	Beaudoin	Unintelligible	Yes
33	<i>Becky v Ontario (Attorney General)</i>	04-Jun-15	SCJ	Responding Party	N/A	[2015] OJ No 4061, 2015 CarswellOnt 12048	Granted After Notice	N/A	Unclear	37 Days: March 30, 2015 to May 6, 2015	Grace	Upset police entered apartment complex and sued the world	Yes
34	<i>Nemmour v Durdle</i>	12-Jun-15	SCJ	Responding Party	2015 ONSC 2561, [2015] OJ No 1999	2015 ONSC 3772, [2015] OJ No 3074	Granted After Notice	N/A	Unclear	53 days: April 20, 2015 to June 12, 2015	Myers	Allegations against city re shelter	Yes
35	<i>Godzicz v McPherson</i>	12-Jun-15	SCJ	Unclear	N/A	2015 ONSC 3776, [2015] OJ No 3071	Granted After Notice	N/A	Unclear	38 Days: May 5, 2015 to June 12, 2015	Myers	Excessively long and not discernable	Yes
36	<i>Craven v Chmura</i>	12-Jun-15	SCJ	Unclear	N/A (referred to in 2015 ONSC 4843, [2015] OJ No 4088)	N/A	Notice Not Ordered	N/A	Unclear	N/A	Broad	Motion within broader case	No
37	<i>Ibrahim v Toronto Transit Commission</i>	17-Jun-15	SCJ	Judge	N/A	2015 ONSC 3912, [2015] OJ No 3155	Granted After Notice	Affirmed: 2016 ONCA 234, [2016] OJ No 1631, leave to appeal ref'd, [2016] SCCA No 231, 2016 CarswellOnt 15338	Unclear	20 Days: May 28, 2015 to June 17, 2015 to March 31, 2016 to October 6, 2016	Myers	Not something civil action can redress	Yes
38	<i>Vasiliou v Hallett</i>	19-Jun-15	SCJ	Responding Party	2015 ONSC 3207, [2015] OJ No 2567	2015 ONSC 3997, [2015] OJ No 3227	Granted After Notice	N/A	Unclear	30 Days: May 20, 2015 to June 19, 2015	Myers	Litigation over will of mother	Yes

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39	<i>Lee v Future Bakery Ltd</i>	19-Jun-15	SCJ	Responding Party	2015 ONSC 3208, [2015] OJ No 2546	2015 ONSC 3996, [2015] OJ No 3217	Granted After Notice	N/A	Unclear	30 Days: May 20, 2015 to June 19, 2015	Myers	Non-comprehensible interlocutory step brought	Yes
40	<i>Posadas v Khan</i>	23-Jun-15	SCJ	Responding Party	2015 ONSC 4077, 75 CPC (7th) 118	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Badly phrased counterclaims	Yes (but lawyer)
41	<i>Asghar v Ontario</i>	23-Jun-15	SCJ	Responding Party	2015 ONSC 4071, [2015] OJ No 3326	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Myers	Asks province to provide job, fix romance issues, etc.	Yes
42	<i>Raji v Myers</i>	23-Jun-15	SCJ	Unclear	N/A	2015 ONSC 4066, 75 CPC (7th) 115	Granted After Notice	N/A	Unclear	N/A	Beaudoin	Sues Myers J	Yes
43	<i>Clancy v Ontario</i>	29-Jun-15	SCJ	Unclear	N/A	2015 ONSC 4194, [2015] OJ No 3422	Granted After Notice	N/A	Unclear	116 days: March 5, 2015 to June 29, 2015	Johnston	Attempt to re-litigate	Yes
44	<i>Hurontario Travel Centre v Ontario (Attorney General)</i>	30-Jun-15	SCJ	Responding Party	2015 ONSC 3296, [2015] OJ No 2613	2015 ONSC 4246, [2015] OJ No 3469	Granted After Notice	N/A	Unclear	36 Days: May 25, 2015 to June 30, 2015	Myers	Attempt to re-litigate	Yes
45	<i>Maden v Longstreet</i>	30-Jun-15	SCJ	Responding Party	2015 ONSC 3425, [2015] OJ No 2691	2015 ONSC 4247, [2015] OJ No 3473	Granted After Notice	N/A	None	34 Days: May 27, 2015 to June 30, 2015	Myers	Not discernable claim against lawyer	Yes
46	<i>Persaud v Boudry Road Apts Ltd</i>	02-Jul-15	SCJ	Responding Party	N/A	2015 ONSC 4275, [2015] OJ No 3586	Granted After Notice	N/A	Unclear	N/A	Daley	Unintelligible, attempt to re-litigate, no standing	Yes
47	<i>Allevio Healthcare Inc v Kirsh</i>	14-Jul-15	SCJ	Responding Party	2015 ONSC 4539, 77 CPC (7th) 211	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Defamation claim based on privileged communications – requires hearing	Unclear
48	<i>Asghar v Toronto (City)</i>	20-Jul-15	SCJ	Responding Party	2015 ONSC 4075, [2015] OJ No 3325	2015 ONSC 4650, 42 MPLR (5th) 138	Granted After Notice	N/A	Unclear	27 Days: June 23, 2015 to July 20, 2015	Myers	Sued city after lifeguard said he was swimming too slowly in fast lane	Yes
49	<i>Kadiri v Harikumar</i>	04-Aug-15	SCJ	Responding Party	2015 ONSC 3777, [2015] OJ No 3073	2015 ONSC 4894, [2015] OJ No 4103	Granted After Notice	N/A	Unclear (substantial indemnity)	53 Days: June 12, 2015 to August 4, 2015	Myers	Allegation that baby was stolen	Yes



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50	<i>Cheng v Lee</i>	14-Aug-15	SCJ	Responding Party	2015 ONSC 5148, 77 CPC (7th) 141	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Accusations of sabotaging business (\$25M counterclaim on \$30K claim)	Yes
51	<i>Tunney v Crew &amp; Tango</i>	15-Aug-14	SCJ	Responding Party	2015 ONSC 4537, [2015] OJ No 3875	2015 ONSC 5140, 2015 CarswellOnt 12347	Granted After Notice	N/A	Unclear	31 Days: July 14, 2015 to August 14, 2015	Myers	Plaintiff upset police arrested his tenant	Yes
52	<i>Ebriniss v D'Ovidio</i>	24-Aug-15	SCJ	Responding Party	2015 ONSC 4649, [2015] OJ No 3842	2015 ONSC 5295, [2015] OJ No 4446	Granted After Notice	N/A	Unclear	35 Days: July 20, 2015 to August 24, 2015	Myers	Baseless claim in occupier's liability – on its face cannot succeed (acknowledges self-reps need help)	Yes
53	<i>Gallion v Ontario Mortgage Corp</i>	25-Aug-15	SCJ	Responding Party	2015 ONSC 4770, [2015] OJ No 3966	2015 ONSC 5320, [2015] OJ No 4433	Granted After Notice	N/A	None	29 Days: July 27, 2015 to August 25, 2015	Myers	Eviction 35 years ago	Yes
54	<i>Asghar v Avepoint Toronto</i>	04-Sep-15	SCJ	Responding Party	2015 ONSC 5164, [2015] OJ No 4331	2015 ONSC 5544, [2015] OJ No 4611	Granted After Notice	N/A	None	21 Days: August 14, 2015 to September 4, 2015	Myers	Defendant offered and then renege on job interview	Yes
55	<i>Kyriakopoulos v Lafontaine</i>	30-Sep-15	SCJ	Responding Party	2015 ONSC 6067, [2015] OJ No 5029	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	"Wholly inappropriate use of Rule 2.1"	No
56	<i>Mesa v TD Direct Investment</i>	14-Oct-15	SCJ	Responding Party	2015 ONSC 5543, [2015] OJ No 4589	2015 ONSC 6337, [2015] OJ No 5292	Granted After Notice	N/A	Unclear	40 Days: September 4, 2015 to October 14, 2015	Myers	Alleged failure to pay over investment	Yes
57	<i>Fine v Botelho</i>	15-Oct-15	SCJ	Responding Party	N/A	2015 ONSC 6284, [2015] OJ No 5321	Dismissed in Context of Other Motion	N/A	Not Applicable (other issues)	N/A	Graham (Master)	Declined to use in context of broader motion	Yes
58	<i>Raji v Canada (RCMP)</i>	16-Oct-15	SCJ	Responding Party	2015 ONSC 5414, [2015] OJ No 4515	2015 ONSC 6392, [2015] OJ No 5486	Granted After Notice	N/A	Unclear	53 Days: August 24, 2015 to October 16, 2015	Beaudoin	Massive attempt to re-litigate alleged terrorist plot concerning plaintiff	Yes
59	<i>Raji v Downtown Legal Services</i>	16-Oct-15	SCJ	Responding Party	2015 ONSC 5770, [2015] OJ No 4812	2015 ONSC 6391, [2015] OJ No 5474	Granted After Notice	N/A	Unclear	29 Days: September 17, 2015 to October 16, 2015	Beaudoin	Collateral attack on provincial court decision	Yes
60	<i>Grigorov v Booth</i>	04-Nov-15	SCJ	Responding Party	2015 ONSC 6066, [2015] OJ No 5025	2015 ONSC 6804, [2015] OJ No 5745	Granted After Notice	N/A	Unclear	35 Days: September 30, 2015 to November 4, 2015	Myers	Lawyer's negligence	Yes

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61	<i>Minor v Leonard</i>	04-Nov-15	SCJ	Responding Party	2015 ONSC 6069, [2015] OJ No 5293	2015 ONSC 6801, [2015] OJ No 5744	Granted After Notice	N/A	Unclear ("with costs")	35 Days: September 30, 2015 to November 4, 2015	Myers	Damages based on absolutely privileged events from previous cases	Yes
62	<i>Obermuller v Kenfinch Co-Operative Housing Inc</i>	04-Nov-15	SCJ	Responding Party	2015 ONSC 6065, [2015] OJ No 5031	2015 ONSC 6800, [2015] OJ No 5743	Granted After Notice	Affirmed: 2016 ONCA 330, [2016] OJ No 2362	Unclear (trial); \$2,000 (appeal)	35 Days: September 30, 2015 to November 4, 2015 to May 3, 2016	Myers	Attempt to re-litigate Landlord-Tenant Board proceedings	Yes
63	<i>Charendoff v McLennan</i>	09-Nov-15	SCJ	Responding Party	2015 ONSC 6883, [2015] OJ No 6469	N/A	Notice Not Ordered	N/A	None	N/A	Myers	Questionable late attempt to add plaintiff's lawyer as third party	No
64	<i>Kavuru v Ontario (Public Guardian and Trustee)</i>	09-Nov-15	SCJ	Responding Party	2015 ONSC 6344, [2015] OJ No 5288	2015 ONSC 6877, 2015 CarswellOnt 18764 (partially granted); 2015 ONSC 7697, [2015] OJ No 6468 (fully granted)	Granted After Notice	Affirmed: 2016 ONCA 758, [2016] OJ No 5557	Unclear	27 Days: October 13, 2015 to November 9, 2015 (to December 9, 2015 to October 14, 2016)	Myers	Suit against Attorney General due to decision of Divisional Court and other claims against Public Guardian and Trustee	Yes
65	<i>Perkins-Aboagye v Becker</i>	26-Nov-15	SCJ	Responding Party	2015 ONSC 6812, [2015] OJ No 6472	2015 ONSC 7366, [2015] OJ No 6291	Granted After Notice	N/A	Unclear	23 Days: November 3, 2015 to November 26, 2015	Beaudoin	Attempt to re-litigate	Yes
66	<i>Hagey v Ontario (Racing Commission)</i>	27-Nov-15	SCJ	Unclear	N/A	2015 ONSC 7506, [2015] OJ No 6203	Granted After Notice	N/A	Unclear	Unclear	Nadeau	Claim for breach of procedural fairness by Racing Commission	Yes
67	<i>Nguyen v Economical Mutual Insurance Co</i>	01-Dec-15	SCJ	Unclear	2015 ONSC 6802, [2015] OJ No 5723	2015 ONSC 7449, [2015] OJ No 6251	Granted After Notice	N/A	None	27 Days: November 4, 2015 to December 1, 2015	Myers	Attempt to re-litigate	Yes
68	<i>Munroe v Salvation Army</i>	01-Dec-15	SCJ	Responding Party	2015 ONSC 7448, [2015] OJ No 6220	N/A	Lack of Notice Reconsidered: 2016 ONSC 5564, [2016] OJ No 4643	N/A	Unclear	N/A	Myers	Wrongful dismissal with outrageous facts	Yes
69	<i>Gebremariam v Toronto (City) Police Service</i>	01-Dec-15	SCJ	Responding Party	2015 ONSC 7447, [2015] OJ No 6243	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Police brutality	Unclear

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70	<i>Ghasempour v DSM Leasing Ltd</i>	07-Dec-15	SCJ	Responding Party	2015 ONSC 7628, [2015] OJ No 6422	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Equipment lease	Yes
71	<i>Shafirovitch v Scarborough Hospital</i>	07-Dec-15	SCJ	Responding Party	Dismissed without notice	2015 ONSC 7627, 85 CPC (7th) 149	Granted Without Notice	N/A	None	0 Days	Myers	Belief hospital threw bugs at him	Yes
72	<i>Brown v Loblaws Companies Ltd</i>	07-Dec-15	SCJ	Responding Party	2015 ONSC 6501, [2015] OJ No 5440	2015 ONSC 7629, [2015] OJ No 6394	Granted After Notice	N/A	None	47 Days: October 21, 2015 to December 7, 2015	Myers	Claims related to denied credit card application	Yes
73	<i>Asghar v Alon</i>	14-Dec-15	SCJ	Responding Party	2015 ONSC 3835, 74 CPC (7th) 311	2015 ONSC 7823, [2015] OJ No 6573	Dismissed After Notice	N/A	Unclear	182 Days: June 15, 2015 to December 14, 2015	Myers	Libel	Yes
74	<i>MacLeod v Bell Canada Enterprises</i>	22-Dec-15	SCJ	Responding Party	2015 ONSC 7116, [2015] OJ No 5958	2015 ONSC 8019, [2015] OJ No 6770	Granted After Notice	N/A	None	35 Days: November 17, 2015 to December 22, 2015	Myers	Simply gave a collection of bills	Yes
75	<i>MacLeod v Ontario</i>	22-Dec-15	SCJ	Responding Party	2015 ONSC 7240, [2015] OJ No 6047	2015 ONSC 8020, [2015] OJ No 6772	Granted After Notice	N/A	None	32 Days: November 20, 2015 to December 22, 2015	Myers	Incomprehensible; request for exemption from credit check	Yes
76	<i>MacLeod v Hanrahan Youth Services</i>	22-Dec-15	SCJ	Responding Party	2015 ONSC 8018, [2015] OJ No 6771	N/A	Notice Not Ordered	N/A	Unclear	0 Days	Myers	Request to dismiss defendant's motion (itself frivolous and vexatious)	Yes
77	<i>Reyes v Esbin</i>	11-Jan-16	SCJ	Responding Party	2015 ONSC 6885, [2015] OJ No 6469	2016 ONSC 254, [2016] OJ No 97	Partially Granted	N/A	Unclear (submissions called for)	63 Days: November 9, 2015 to January 11, 2016	Myers	Loss of valuable chattels after eviction	Yes
78	<i>Frick v Frick</i>	18-Feb-16	SCJ	Responding Party	N/A – Formal Motion Brought	2016 ONSC 359, 78 RFL (7th) 430	Dismissed After Appeal	Allowed in Part: 2016 ONCA 799, 132 OR (3d) 321	Unclear	70 Days: December 10, 2015 to February 18, 2016 to October 31, 2016	Ellies	Family law use	No
79	<i>Purcaru v Vacaru</i>	07-Mar-16	SCJ	Responding Party	2016 ONSC 1037, [2016] OJ No 726	2016 ONSC 1609, 76 RFL (7th) 333	Dismissed After Notice	N/A	Unclear	25 Days: February 10, 2016 to March 7, 2016	Myers	Family law dispute	Yes
80	<i>Dias v Ontario (Workplace Safety &amp; Insurance Board)</i>	10-Mar-16	SCJ	Responding Party	2016 ONSC 980, [2016] OJ No 671	2016 ONSC 1752, [2016] OJ No 2464	Granted After Notice	N/A	Unclear	30 Days: February 8, 2016 to March 10, 2016	Myers	Attempt to re-litigate WSIB	Yes

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81	<i>Lee v Future Bakery Ltd</i>	10-Mar-16	SCJ	Unclear	N/A	2016 ONSC 1764, [2016] OJ No 1266	Granted Without Notice	N/A	Unclear	0 Days	Myers	Attempt to re-litigate	Unclear
82	<i>Ochnik v Belusa</i>	10-Mar-16	SCJ	Unclear	N/A	2016 ONSC 1767, [2016] OJ No 1302	Granted – Notice Unclear	N/A	Unclear	N/A	Myers	Attempt to re-litigate but different party	Unclear
83	<i>Ochnik v Belusa</i>	10-Mar-16	SCJ	Unclear	N/A	2016 ONSC 1861, [2016] OJ No 1386	Granted – Notice Unclear	N/A	Unclear	N/A	Myers	Attempt to re-litigate but different party	Unclear
84	<i>Noddle v Attorney General (Ontario)</i>	14-Mar-16	SCJ	Responding Party	2016 ONSC 1826, [2016] OJ No 1317	N/A	Notice Not Ordered	N/A	None	N/A	Myers	Claim against government for medical malpractice and incarceration	Yes
85	<i>Rallis v Scarborough Hospital</i>	04-Apr-16	SCJ	Unclear	2016 ONSC 1763, [2016] OJ No 1264	2016 ONSC 2263, [2016] OJ No 1773	Ordered to Serve Amended Pleading	N/A	Unclear	25 Days: March 10, 2016 to April 4, 2016	Myers	Medical malpractice	Yes
86	<i>Goralczyk v Beer Store</i>	04-Apr-16	SCJ	Responding Party	2016 ONSC 993, [2016] OJ No 675	Mostly granted: 2016 ONSC 2265, [2016] OJ No 1763 and entirely granted: 2016 ONSC 4416, [2016] OJ No 3597	Granted After Notice	N/A	None (against some); Unclear (against others)	55 Days: February 8, 2016 to April 4, 2016 to July 5, 2016 (More time granted on March 9 and May 9: 2016 ONSC 1699, [2016] OJ No 1196)	Myers	Mostly incomprehensible claim including slip-and-fall	Yes
87	<i>Nguyen v Bail</i>	04-Apr-16	SCJ	Responding Party	2016 ONSC 1828, [2016] OJ No 1316	2016 ONSC 2259, [2016] OJ No 1769	Granted After Notice	N/A	None	21 Days: March 14, 2016 to April 4, 2016	Myers	Attempt to re-litigate	Yes
88	<i>Nguyen v Economical Mutual Insurance Co</i>	04-Apr-16	SCJ	Unclear	N/A	2016 ONSC 2260, 2016 CarswellOnt 5186	Granted After Notice	N/A	None	40 Days: February 23, 2016 to April 4, 2016	Myers	Attempt to re-litigate	Yes
89	<i>Lin v ICBC Vancouver Head Office</i>	04-Apr-16	SCJ	Unclear	N/A	2016 ONSC 2262, [2016] OJ No 1766	Granted After Notice	Affirmed: 2016 ONSC 3934, [2016] OJ No 3223 (Div Ct), 2016 ONCA 788, [2016] OJ 6071, leave to appeal ref'd,	Unclear	25 Days: March 10, 2016 to April 4, 2016 to October 2016 to April 13, 2017	Myers	Attempt to re-litigate – appeals dismissed under Rule 2.1	Yes

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								[2016] SCCA No 561, 2017 CarswellOnt 807 (SCC)					
90	<i>Nguyen v Bail</i>	07-Apr-16	SCJ	Unclear	N/A	2016 ONSC 2365, [2016] OJ No 1840	Granted Without Notice	N/A	Unclear	0 Days	Myers	Attempt to re-litigate	Yes
91	<i>Leandre v Windsor Regional Hospital</i>	20-Apr-16	SCJ	Responding Party	2016 ONSC 2657, [2016] OJ No 2300	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Faieta	Discrimination/ failure to honour insurance	Unclear
92	<i>Ramlall v Jahir Ullah Pharmacy Inc #1333</i>	22-Apr-16	SCJ	Responding Party	2016 ONSC 2705, [2016] OJ No 2139	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Failure to honour sale prices	Yes
93	<i>Chalupniczek v Children's Aid Society of Ottawa</i>	26-Apr-16	SCJ	Responding Party	2016 ONSC 2353, [2016] OJ No 1940	2016 ONSC 2787, [2016] OJ No 2122	Granted After Notice	Request for re-consideration denied: 2016 ONSC 4452, [2016] OJ No 3876 Affirmed: 2017 ONSC 1278, 2017 CarswellOnt 272 (Div Ct)	None (Trial); \$17,684.83 (Appeal - full indemnity)	19 Days: April 7, 2016 to April 26, 2016 to July 6, 2016 to February 23, 2017	MacLeod (Master)	Kidnapping of children	No
94	<i>Dias v Ontario (Liquor Control Board)</i>	12-May-16	SCJ	Responding Party	2016 ONSC 2364, [2016] OJ No 1827	2016 ONSC 3135, [2016] OJ No 2465	Granted After Notice	N/A	Unclear	35 Days: April 7, 2016 to May 12, 2016	Myers	Attempt to re-litigate	Yes
95	<i>Murray v Toronto (City)</i>	12-May-16	SCJ	Responding Party	2016 ONSC 2355, [2016] OJ 1839	2016 ONSC 3137, [2016] OJ No 2472	Granted After Notice	N/A	Unclear	35 Days: April 7, 2016 to May 12, 2016	Myers	Seeks public inquiry	Yes
96	<i>Leandre v Children's Aid Society of London</i>	18-May-16	SCJ	Responding Party	2016 ONSC 2472, [2016] OJ No 1902	2016 ONSC 3250, [2016] OJ No 2959	Granted After Notice	N/A	Unclear	35 Days: April 13, 2016 to May 18, 2016	Diamond	Attempt to re-litigate	Yes
97	<i>Thompson v WJ Holdings Ltd</i>	31-May-16	SCJ	Responding Party	2016 ONSC 2704, [2016] OJ No 2145	2016 ONSC 3591, [2016] OJ No 2942	Granted After Notice	N/A	Unclear	39 Days: April 22, 2016 to May 31, 2016	Myers	Attempt to re-litigate	Yes

	Case Name	Resolution Date	Court	Source	Notice Ordered?	Decision	Result	Appeal	Costs	Delay: Notice to Final Disposition	Judge(s) (noted if Master)	Claim Type	Self-Rep?
98	<i>SC v Children's Aid Society</i>	31-May-16	SCJ	Responding Party	2016 ONSC 3592, [2016] OJ No 2953	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Claim against CAS for bad treatment	Yes
99	<i>Chaloob v Canada (Attorney General)</i>	31-May-16	SCJ	Unclear	N/A	2016 ONSC 3569, [2016] OJ No 3002	Granted After Notice	N/A	Unclear	55 Days: April 6, 2016 to May 31, 2016	Beaudoin	Unclear	Unclear
100	<i>Ochnik v Belusa</i>	31-May-16	SCJ	Unclear	2016 ONSC 1860, [2016] OJ No 1385	2016 ONSC 3589, [2016] OJ No 2950	Granted After Notice	N/A	Unclear	77 Days: March 15, 2016 to May 31, 2016	Myers	Attempt to re-litigate	Yes
101	<i>Leandre v Collection Services of Windsor Ltd</i>	01-Jun-16	SCJ	Unclear	2016 ONSC 2733, [2016] OJ No 2125	2016 ONSC 2733, [2016] OJ No 2931	Granted After Notice	N/A	None	37 Days: April 25, 2016 to June 1, 2016	Diamond	Motion to seek immediate arrest of many individuals	Yes
102	<i>TFB v Office of the Children's Lawyer</i>	07-Jun-16	SCJ	Unclear	N/A	2016 ONSC 3816, [2016] OJ No 3024	Granted After Notice	N/A	Unclear	77 Days: March 22, 2016 to June 7, 2016	Trimble	Claims against children's lawyer not actionable	Yes
103	<i>Mitchell v Ontario (Ministry of Transportation)</i>	16-Jun-16	SCJ	Unclear	N/A	2016 ONSC 4016, [2016] OJ No 3643	Granted After Notice	N/A	Unclear	118 Days: February 18, 2016 to June 16, 2016	Daley	Obviously meritless appeal brought in wrong court	Unclear
104	<i>Marleau v Brockville (City)</i>	30-Jun-16	SCJ	Responding Party	N/A	2016 ONSC 4364, [2016] OJ No 3634	Granted After Notice	N/A	\$5500: 2016 ONSC 5901, [2016] OJ No 4961	Unclear	Trousdale	Statutory abuse of power, etc	Yes
105	<i>Jarvis v Morlog</i>	07-Jul-16	SCJ	Responding Party	2016 ONSC 1827, [2016] OJ No 1314	2016 ONSC 4476, [2016] OJ No 3662	Granted After Notice	N/A	\$2,256.39: 2016 ONSC 5061, 2016 CarswellOnt 12693 (substantial indemnity)	115 Days: March 14, 2016 to July 7, 2016	Myers	Freeman on the land submissions regarding criminal court summons	Yes
106	<i>Irmya v Mijovick</i>	15-Jul-16	SCJ	Responding Party	2016 ONSC 3608, [2016] OJ No 2935	2016 ONSC 4629, [2016] OJ No 3797	Granted After Notice	N/A	\$13,615.94, \$6706.65, \$9,865.19 (full indemnity, against three different parties): 2016 ONSC 5276, [2016] OJ No 4372	45 Days: May 31, 2016 to July 15, 2016	Myers	Condo dispute	Yes

	Case Name	Resolution Date	Court	Source	Notice Ordered?	Decision	Result	Appeal	Costs	Delay: Notice to Final Disposition	Judge(s) (noted if Master)	Claim Type	Self-Rep?
107	<i>Asghar v Toronto (City) Police Services Board</i>	27-Jul-16	SCJ	Responding Party	2016 ONSC 4844, [2016] OJ No 4028	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Faieta	Unclear	Unclear
108	<i>Park v Crossgate Legal Services</i>	28-Jul-16	SCJ	Registrar	N/A	2016 ONSC 4864, [2016] OJ No 4021	Granted Without Notice	N/A	Unclear	0 Days	Myers	Commenced in violation of vexatious litigant order	Unclear
109	<i>Noddle v Canada (Deputy Attorney General)</i>	28-Jul-16	SCJ	Responding Party	2016 ONSC 4866, [2016] OJ No 4038	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Faeita	Suit alleging defamation based on contents of past pleadings	Unclear
110	<i>Polanski v Scharfe</i>	29-Jul-16	SCJ	Responding Party	2016 ONSC 4892, [2016] OJ No 4039	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Strange claim based on dismissal from articling	Unclear
111	<i>D'Orazio v Ontario (Attorney General)</i>	29-Jul-16	SCJ	Responding Party	N/A	2016 ONSC 4893, [2016] OJ No 4031	Granted Without Notice	N/A	Unclear (partial)	0 Days	Myers	Acknowledged attempt to re-litigate	Yes
112	<i>Mester v Weh</i>	29-Jul-16	SCJ	Responding Party	December 17, 2015 (not reported – by registrar)	2016 ONSC 4887, [2016] OJ No 4274	Dismissed After Notice	N/A	None	253 Days: November 19, 2015 to July 29, 2016	Maddalena	Serious allegations but detailed	Unclear
113	<i>Musole v Buset &amp; Partners LLP</i>	02-Aug-16	SCJ	Responding Party	2016 ONSC 4429, [2016] OJ No 3886	2016 ONSC 5561, [2016] OJ No 4699	Granted After Notice	N/A	None	63 Days: July 5, 2016 to September 6, 2016	Beaudoin	Attempt to re-litigate	Yes
114	<i>Carby-Samuels v Carby-Samuels</i>	05-Aug-16	SCJ	Responding Party	2016 ONSC 4974, [2016] OJ No 4188	N/A	Notice Not Ordered	N/A	Unclear	N/A	Beaudoin	Muddled but discernible claim	Unclear
115	<i>Graff v Network North Reporting and Mediation</i>	15-Aug-16	SCJ	Responding Party	2016 ONSC 5158, [2016] OJ No 4301	N/A	Notice Not Ordered	N/A	Unclear	N/A	Myers	Claim against former medical experts	Unclear
116	<i>MacLeod (Litigation guardian of) v Hanrahan Youth Services</i>	19-Aug-16	SCJ	Unclear	2016 ONSC 5231, [2016] OJ No 4342	2016 ONSC 5845, [2016] OJ No 4814	Granted After Notice	N/A	Unclear	33 Days: August 17, 2016 to September 19, 2016	Myers	Attempt to litigate prerogative of family courts	Yes
117	<i>Lochner v Toronto (City) Police Service</i>	26-Aug-16	SCJ	Responding Party	2016 ONSC 5384, [2016] OJ No 4534	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Goldstein	Motion was 2.1ed after determination on other issues	Yes

	Case Name	Resolution Date	Court	Source	Notice Ordered?	Decision	Result	Appeal	Costs	Delay: Notice to Final Disposition	Judge(s) (noted if Master)	Claim Type	Self-Rep?
												appears to have rendered moot	
118	<i>Zhang v Oh</i>	31-Aug-16	SCJ	Responding Party	2016 ONSC 3734, [2016] OJ No 3021	2016 ONSC 5484, [2016] OJ No 4710	Granted After Notice	N/A	Unclear	86 Days: June 6, 2016 to August 31, 2016	Beaudoin	Suit of senator for being spy	Yes
119	<i>Reyes v Buhler</i>	06-Sep-16	SCJ	Unclear	N/A	2016 ONSC 5559, [2016] OJ No 4635	Granted Without Notice	N/A	Unclear (full indemnity)	N/A	Myers	Commenced in violation of vexatious litigant order	Unclear
120	<i>Reyes v Jocelyn</i>	06-Sep-16	SCJ	Unclear	N/A	2016 ONSC 5568, [2016] OJ No 4642	Granted Without Notice	N/A	Unclear (full indemnity)	N/A	Myers	Commenced in violation of vexatious litigant order	Unclear
121	<i>Reyes v Embry</i>	06-Sep-16	SCJ	Unclear	N/A	2016 ONSC 5558, [2016] OJ No 4636	Granted Without Notice	N/A	Unclear (full indemnity)	N/A	Myers	Commenced in violation of vexatious litigant order	Unclear
122	<i>Dias v Ontario (Workplace Safety &amp; Insurance Board)</i>	09-Sep-16	SCJ	Responding Party	2016 ONSC 5226, [2016] OJ No 4355	2016 ONSC 5636, [2016] OJ No 4662	Granted After Notice	N/A	Unclear	23 Days: August 17, 2016 to September 9, 2016	Braid	Attempt to re-litigate Toronto actions	Yes
123	<i>Sagos v Edelson</i>	23-Sep-16	SCJ	Responding Party	2016 ONSC 4482, [2016] OJ No 3894	2016 ONSC 5987, [2016] OJ No 4936	Granted After Notice	N/A	Unclear	78 Days: July 7, 2016 to September 23, 2016	Beaudoin	Statute-barred, likely jurisdiction-barred, unclear claim against lawyer	Yes
124	<i>Bisumbule v Conway</i>	30-Sep-16	SCJ	Responding Party	2016 ONSC 6138, [2016] OJ No 5209	N/A	Notice Not Ordered	N/A	Unclear	N/A	Beaudoin	Arguable <i>res judicata</i> /limitations period	Unclear
125	<i>Troncanada &amp; Associates v B2Gold Corp</i>	06-Oct-16	SCJ	Responding Party	2016 ONSC 6271, [2016] OJ No 5190	N/A	Notice Not Ordered	N/A	Unclear	N/A	Dow	Arguable attempt to re-litigate	Unclear
126	<i>MS v Elia Associates Professional Corp</i>	26-Oct-16	SCJ	Responding Party	2016 ONSC 5375, [2016] OJ No 4479	2016 ONSC 6714, [2016] OJ No 5628	Granted After Notice	N/A	Unclear	62 Days: August 25, 2016 to October 26, 2016	Beaudoin	Attempt to re-litigate	Yes
127	<i>Sagos v Bermuda (Attorney General)</i>	01-Nov-16	SCJ	Responding Party	2016 ONSC 5664, [2016] OJ No 4709	2016 ONSC 6806, 2016 CarswellOnt 17293	Granted After Notice	N/A	Unclear	50 Days: September 12, 2016 to November 1, 2016	Beaudoin	Attempt to sue Bermudan police in Ontario	Yes



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128	<i>Chapadeau v Addelman</i>	01-Nov-16	SCJ	Responding Party	2016 ONSC 6803, [2016] OJ No 5655	N/A	Notice Not Ordered	N/A	None	N/A	Beaudoin	“Arguable issues”	Unclear
129	<i>Bouragba v Conseil des Écoles Publiques de l’Est de l’Ontario</i>	01-Nov-16	SCJ	Responding Party	2016 ONSC 6810, [2016] OJ No 5652	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Beaudoin	Claims arising from suspension from school	Yes
130	<i>Zeleny v Canada</i>	18-Nov-16	SCJ	Responding Party	N/A	2016 ONSC 7226, [2016] OJ No 6101	Granted After Notice	N/A	None	N/A	Minnema	Sought half-billion dollars as per obviously fake bonds	Yes
131	<i>Clark v Sports Cafe Champions</i>	21-Nov-16	SCJ	Responding Party	2016 ONSC 7303, [2016] OJ No 5991	2016 ONSC 8046, [2016] OJ No 6605	Granted After Notice	N/A	None	28 Days: November 23, 2016 to December 21, 2016	Myers	Wrong forum, no standing	Yes
132	<i>Beseiso v Halton (Regional) Police</i>	17-Dec-16	SCJ	Unclear	N/A	2016 ONSC 7986, [2016] OJ No 6752	Granted After Notice	N/A	Unclear	23 Days: November 24, 2016 to December 17, 2016	Beaudoin	Unclear	Yes
133	<i>R v Samuels</i>	04-Jan-17	SCJ	Responding Party	2016 ONSC 7748, [2016] OJ No 6396	2017 ONSC 67, [2017] OJ No 20	Granted After Notice	N/A	Unclear	26 Days: December 9, 2016 to January 4, 2017	Myers	Attempt to stay criminal case through civil proceedings	Yes
134	<i>Noddle v Canada (Attorney General)</i>	10-Jan-17	SCJ	Responding Party	2017 ONSC 215, [2017] OJ No 154	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Beaudoin	Attempt to re-litigate	Unclear
135	<i>Mpamugo v Canada (Revenue Agency)</i>	17-Jan-17	SCJ	Responding Party	2016 ONSC 7569, [2017] 1 CTC 186	2017 ONSC 406, [2017] OJ No 200	Dismissed After Notice	N/A	Unclear	43 Days: December 5, 2016 to January 17, 2017	Myers	Attempt to re-litigate (submissions suggest potential change of circumstances)	Yes
136	<i>Van Shuytman v Department of Justice (Canada)</i>	23-Jan-17	SCJ	Responding Party	N/A (January 5, 2017 per appeal decision)	2017 ONSC 481, 2017 CarswellOnt 9603	Granted After Notice	Affirmed: 2018 ONCA 32, 2018 CarswellOnt 301, leave to appeal denied, [2018] SCCA No 206, 2018 CarswellOnt 18335	Unclear	18 Days: January 5, 2017 to January 23, 2017 (to January 16, 2018)	Wood	Statute-barred, many actions	Yes

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137	<i>Van Sluytman v Orillia Soldiers' Memorial Hospital</i>	27-Jan-17	SCJ	Judge	N/A	2017 ONSC 692, [2017] OJ No 445	Granted After Notice	Affirmed: 2018 ONCA 32, 2018 CarswellOnt 301, leave to appeal denied, [2018] SCCA No 206, 2018 CarswellOnt 18335	Unclear	24 Days: January 3, 2017 to January 27, 2017 to January 16, 2018	DiLuca	Statute-barred, many actions	Yes
138	<i>2222028 Ontario Inc v Adams</i>	27-Jan-17	SCJ	Responding Party	2017 ONSC 690, [2017] OJ No 565	N/A	Notice Not Ordered	N/A	Unclear	N/A	Matheson	Badly drafted claim alleging misappropriation of funds	Non-Lawyer Purports to Act
139	<i>Bresnark v Canada</i>	31-Jan-17	SCJ	Responding Party	2017 ONSC 767, [2017] OJ No 960	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Chiappetta	Unclear	Unclear
140	<i>Caliciuri v Matthias</i>	07-Feb-17	SCJ	Responding Party	N/A	2017 ONSC 748, [2017] OJ No 547	Dismissed in Context of Other Motion	N/A	Unclear	137 Days (formal motion in conjunction with Rule 21): September 23, 2016 to February 7, 2017	MacLeod	Alleged attempt to re-litigate	No
141	<i>Lin v Ontario (Ombudsman)</i>	10-Feb-17	SCJ	Unclear	N/A	2017 ONSC 966, [2017] OJ No 699	Granted After Notice	N/A	Unclear	79 Days: November 23, 2016 to February 10, 2017	Chiappetta	Many actions	Yes
142	<i>Milne v Livingston</i>	27-Feb-17	SCJ	Responding Party	2017 ONSC 1367, [2017] OJ No 1031	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Chiappetta	"On its face" abusive	Unclear
143	<i>Ellis v Wernick</i>	03-Mar-17	SCJ	Responding Party	N/A	2017 ONSC 1461, [2017] OJ No 1070	Granted After Notice	N/A	Unclear	N/A	Marrocco	Attempt to challenge Royal Proclamation of 1763	Yes
144	<i>Strang v Toronto (City)</i>	10-Mar-17	SCJ	Judge	2017 ONSC 997, [2017] OJ No 680	2017 ONSC 1622, [2017] OJ No 1295	Granted After Notice	N/A	Unclear	29 Days: February 9, 2017 to March 10, 2017	Myers	Hallmarks of vexatiousness	Yes
145	<i>Strang v Paragon Security</i>	10-Mar-17	SCJ	Judge	2017 ONSC 996, [2017] OJ No 684	2017 ONSC 1623, [2017] OJ No 1299	Granted After Notice	N/A	Unclear	29 Days: February 9, 2017 to March 10, 2017	Myers	Hallmarks of vexatiousness	Yes

	Case Name	Resolution Date	Court	Source	Notice Ordered?	Decision	Result	Appeal	Costs	Delay: Notice to Final Disposition	Judge(s) (noted if Master)	Claim Type	Self-Rep?
146	<i>Strang v Ontario Public Service Employees Union</i>	10-Mar-17	SCJ	Judge	2017 ONSC 995, [2017] OJ No 683	2017 ONSC 1625, [2017] OJ No 1298	Granted After Notice	N/A	Unclear	29 Days: February 9, 2017 to March 10, 2017	Myers	Hallmarks of vexatiousness	Yes
147	<i>Strang v Ontario</i>	10-Mar-17	SCJ	Judge	2017 ONSC 994, [2017] OJ No 682	2017 ONSC 1625, [2017] OJ No 1297	Granted After Notice	N/A	Unclear	29 Days: February 9, 2017 to March 10, 2017	Myers	Hallmarks of vexatiousness	Yes
148	<i>Strang v Ontario (Treasury Board)</i>	13-Mar-17	SCJ	Judge	2017 ONSC 993, [2017] OJ No 681	2017 ONSC 1638, [2017] OJ No 1296	Granted After Notice	N/A	Unclear	32 Days: February 9, 2017 to March 13, 2017	Myers	Hallmarks of vexatiousness	Yes
149	<i>Zhang v Zang</i>	17-Mar-17	SCJ	Responding Party	2017 ONSC 1183, [2017] OJ No 950	2017 ONSC 1772, [2017] OJ No 1858	Granted After Notice	N/A	Unclear	23 Days: February 22, 2017 to March 17, 2017	Beaudoin	Attempt to re-litigate allegations of spying	Yes
150	<i>DeMasi v Toronto (City)</i>	24-Mar-17	SCJ	Unclear	N/A	2017 ONSC 1916, [2017] OJ No 1541	Granted After Notice	N/A	None	162 Days: October 13, 2016 to March 24, 2017	Dunphy	Incomprehensible	Yes
151	<i>Fex v McCarthy Tetrault LLP</i>	27-Mar-17	SCJ	Responding Party	2017 ONSC 1280, [2017] OJ No 905	2017 ONSC 1907, [2017] OJ No 1548	Granted After Notice	N/A	Unclear	31 Days: February 24, 2017 to March 27, 2017	Sweeny	Attempt to re-litigate	Yes
152	<i>Dias v Ontario (Workplace Safety &amp; Insurance Appeal Tribunal)</i>	27-Mar-17	SCJ	Responding Party	2017 ONSC 1277, [2017] OJ No 902	2017 ONSC 1888, [2017] OJ No 1542	Granted After Notice	N/A	Unclear	31 Days: February 24, 2017 to March 27, 2017	Sweeny	Attempt to re-litigate	Yes
153	<i>Van Shuytman v Brewster</i>	28-Mar-17	SCJ	Responding Party	N/A	2017 ONSC 1957, [2017] OJ No 2287	Granted After Notice	Affirmed: 2018 ONCA 32, 2018 CarswellOnt 301, leave to appeal denied, [2018] SCCA No 206, 2018 CarswellOnt 18335	Unclear	61 Days: January 26, 2017 to March 28, 2017	DiLuca	Obviously statute-barred	Yes
154	<i>White v Graham</i>	10-Apr-17	SCJ	Responding Party	2017 ONSC 1268, [2017] OJ No 948	2017 ONSC 2236, [2017] OJ No 1856	Granted After Notice	N/A	Unclear	47 Days: February 22, 2017 to April 10, 2017	Beaudoin	Outrageous, delusional claims	Yes
155	<i>Reyes v KL</i>	12-Apr-17	SCJ	Responding Party	2017 ONSC 308, [2017] OJ No 192	2017 ONSC 2304, [2017] OJ No 2195	Granted After Notice	N/A	Unclear	90 Days: January 12, 2017 to April 12, 2017	Faieta	Scandalous and/or statute-barred employment allegations	Yes

	Case Name	Resolution Date	Court	Source	Notice Ordered?	Decision	Result	Appeal	Costs	Delay: Notice to Final Disposition	Judge(s) (noted if Master)	Claim Type	Self-Rep?
156	<i>Ramsarran v Assaly Asset Management Corp</i>	19-Apr-17	SCJ	Responding Party	2017 ONSC 2394, [2017] OJ No 1937	N/A	Notice Not Ordered	N/A	Unclear	N/A	Beaudoin	Trying to explain why abusive through argument	No
157	<i>Carby-Samuels v Carby-Samuels</i>	12-May-17	SCJ	Responding Party	2017 ONSC 2911, [2017] OJ No 2406	N/A	Notice Not Ordered	N/A	Unclear	N/A	Beaudoin	"Clearly inappropriate" attempt to short circuit defendant's summary judgment motion after failure to file notice of motion	Unclear
158	<i>Foster v Children's Aid Society</i>	15-May-17	SCJ	Responding Party	2017 ONSC 2086, [2017] OJ No 2692	2017 ONSC 2990, [2017] OJ No 2693	Granted After Notice	N/A	Unclear	42 Days: April 3, 2017 to May 15, 2017	Beaudoin	No material facts pleaded – simply demanded money	Yes
159	<i>Korolev v Canadian Union of Public Employees</i>	05-Jun-17	SCJ	Responding Party	2017 ONSC 2984, [2017] OJ No 2696	2017 ONSC 3474, [2017] OJ No 2949	Granted After Notice	N/A	None	21 Days: May 15, 2017 to June 5, 2017	Beaudoin	Statement of Claim containing one word: Dafamation ( <i>sic</i> )	Yes
160	<i>Gbremariam v Jenkins</i>	21-Jun-17	SCJ	Unclear	N/A	2017 ONSC 3845, [2017] OJ No 3197	Granted After Notice	N/A	Unclear	55 Days: April 27, 2017 to June 21, 2017	Glustein	Attempt to re-litigate, unknown claim	Yes
161	<i>Kashani v Algonquin College</i>	28-Jun-17	SCJ	Responding Party	2017 ONSC 3971, [2017] OJ No 3513	N/A	Notice Ordered; Unclear Result	N/A	Unclear	N/A	Beaudoin	Manifestly frivolous and/or in the wrong court	Yes
162	<i>Khan v Krylov &amp; Company LLP</i>	N/A	SCJ	Unclear	N/A	N/A	Dismissed After Appeal	Reversed: 2017 ONCA 625, 2017 CarswellOnt 16235	\$2,000 (trial); \$3,000 (appeal)	N/A	Daley	Not "clearest of cases"	Yes
163	<i>R. v Jayaraj</i>	03-Nov-14	Div Ct	Judge	N/A	2014 ONSC 6367, 69 CPC (7th) 287	Granted After Notice	N/A	None	14 Days: October 20, 2014 to November 3, 2014	Nordheimer	Seeking to quash appointments of judges	Unclear
164	<i>Beard Winter LLP v Shekhdar</i>	15-Mar-16	Div Ct	Unclear	N/A	2016 ONSC 1852, [2016] OJ No 1350	Granted After Notice	N/A	None	1 Day: Judge Asked Day Before	Marrocco	Improper attempt to "review and set aside" earlier decision	Yes

	Case Name	Resolution Date	Court	Source	Notice Ordered?	Decision	Result	Appeal	Costs	Delay: Notice to Final Disposition	Judge(s) (noted if Master)	Claim Type	Self-Rep?
165	<i>Lin v Zhang</i>	18-Apr-16	Div Ct	Unclear	N/A	2016 ONSC 2485, [2016] OJ No 1988	Granted After Notice	N/A	None	27 Days: March 22, 2016 to April 18, 2016	Sachs	Seeking damages in Divisional Court based on Landlord-Tenant proceeding	Yes
166	<i>Lin v Springboard</i>	22-Jul-16	Div Ct	Unclear	N/A	2016 ONSC 4705, [2016] OJ No 3917	Granted After Notice	Affirmed: 2016 ONCA 787, [2016] OJ No 6072, Leave to appeal refused: [2016] SCCA No 562, 2017 CarswellOnt 2700	Unclear	42 Days: June 10, 2016 to July 22, 2016 to October 26, 2016 to February 23, 2017	Sachs	Seeks relief that cannot be granted in judicial review	Yes
167	<i>Cerqueira Estate v Ontario</i>	18-Aug-16	Div Ct	Unclear	N/A	2016 ONSC 5112, [2016] OJ No 4353	Granted After Notice	N/A	None	77 Days: June 2, 2016 to August 18, 2016	Sachs	Attempt to re-litigate (dealt with by SJ in SCJ)	Yes
168	<i>Gates v Humane Society of Canada for the Protection of Animals and the Environment (cob The Humane Society of Canada)</i>	24-Aug-16	Div Ct	Unclear	N/A	2016 ONSC 5345, [2016] OJ No 4424	Granted After Notice	N/A	\$8,000: 2016 ONSC 6051, [2016] OJ No 4957	N/A	Horkins	Dismissal of appeal of Small Claims Court decision after many frivolous steps	No
169	<i>Adamson v Iracleous</i>	27-Sep-16	Div Ct	Unclear	N/A	2016 ONSC 6055, [2016] OJ No 4943	Granted After Notice	N/A	None	N/A	Nordheimer	Attempt to JR to "fix to do what is right"	Yes
170	<i>El Zayat v Hausler</i>	28-Sep-16	Div Ct	Unclear	N/A	2016 ONSC 6099, [2016] OJ No 4984	Granted After Notice	N/A	None	N/A	Nordheimer	"Motion" really attempt to have second appeal	Yes
171	<i>Adamson v Lo</i>	29-Sep-16	Div Ct	Unclear	N/A	2016 ONSC 6114, [2016] OJ No 5012	Granted After Notice	N/A	None	N/A	Nordheimer	Attempt to JR to "fix to do what is right"	Yes
172	<i>Graff v Capreit Limited Partnership</i>	03-Oct-16	Div Ct	Unclear	N/A	2016 ONSC 6173, [2016] OJ No 5073	Dismissed After Notice	N/A	Unclear	N/A	Nordheimer	Landlord dispute that had become moot	Yes
173	<i>Lin v Toronto (City) Police Services Board</i>	27-Oct-16	Div Ct	Unclear	N/A	2016 ONSC 6736, [2016] OJ No 5540	Granted After Notice	N/A	Unclear	37 Days: September 20, 2016 to October 27, 2016	Nordheimer	Unintelligible	Yes

	Case Name	Resolution Date	Court	Source	Notice Ordered?	Decision	Result	Appeal	Costs	Delay: Notice to Final Disposition	Judge(s) (noted if Master)	Claim Type	Self-Rep?
174	<i>Stefanizzi v Ontario (Landlord and Tenant Board)</i>	09-Nov-16	Div Ct	Responding Party	N/A	2016 ONSC 6932, [2016] OJ No 5779	Granted After Notice	N/A	Unclear	N/A	Gauthier	Divisional Court obviously not proper forum	Yes
175	<i>Hemchand v Toronto (City)</i>	16-Nov-16	Div Ct	Responding Party	N/A	Unreported (referred to in 2016 ONSC 7134, [2016] OJ No 5857)	Granted After Notice	N/A	None	N/A	Nordheimer	No jurisdiction for Divisional Court	Yes
176	<i>Coady v Law Society of Upper Canada</i>	02-Dec-16	Div Ct	Unclear	N/A	2016 ONSC 7543, [2016] OJ No 6194	Granted Without Notice	N/A	None	N/A	Nordheimer	Seeking relief that cannot be granted	Yes
177	<i>Son v Khan</i>	06-Dec-16	Div Ct	Unclear	N/A	2016 ONSC 7621, [2016] OJ No 6283	Granted After Notice	N/A	\$2,611.93	N/A	Price	Attempt to re-litigate	Yes
178	<i>Cerqueira (Estate Trustee of) v Ontario</i>	19-Dec-16	Div Ct	Unclear	N/A	2016 ONSC 7961, [2016] OJ No 6512	Granted After Notice	N/A	None	33 Days: November 16, 2016 to December 19, 2016	Nordheimer	Attempt to re-litigate	Yes
179	<i>Nithiananthan v Quash</i>	09-Jan-17	Div Ct	Registrar	N/A	2017 ONSC 155, [2017] OJ No 62	Granted After Notice	No appeal allowed: 2017 ONSC 1359, 2017 CarswellOnt 2764	None	20 Days: December 20, 2016 to January 9, 2017	Nordheimer	Seeking leave to appeal a decision declining leave to appeal. No right of appeal per Marrocco ACJ	Yes
180	<i>Volnyansky v Ontario (Attorney General)</i>	14-Mar-17	Div Ct	Responding Party	2017 ONSC 1692, [2017] OJ No 1330	N/A	Notice Not Ordered	N/A	Unclear	N/A	Daley	Arguable attempt to re-litigate	Yes
181	<i>Apollo Real Estate Ltd v Streambank Funding</i>	23-Mar-17	Div Ct	Judge	N/A	2017 ONSC 1877, [2017] OJ No 1463	Granted After Notice	N/A	None	N/A	Nordheimer	Denying frivolous motion for leave to appeal	Unclear
182	<i>Lin v Fluery</i>	09-Jun-17	Div Ct	Judge	N/A	2017 ONSC 3601, 2017 CarswellOnt 8926	Granted Without Notice	Affirmed: 2017 ONCA 695, 2017 CarswellOnt 13756	None	3 Days: Notice of Appeal filed June 6; appeal dismissed June 9	Nordheimer	Dismissal of appeal without jurisdiction	Yes
183	<i>Khan v 1806700 Ontario Inc</i>	15-Jun-17	Div Ct	Judge	N/A	2017 ONSC 3726, 2017 CarswellOnt 9122	Granted Without Notice	N/A	None	7 Days: June 8, 2017 to June 15, 2017	Nordheimer	Dismissal of attempt to appeal denial of leave to appeal	Yes

	Case Name	Resolution Date	Court	Source	Notice Ordered?	Decision	Result	Appeal	Costs	Delay: Notice to Final Disposition	Judge(s) (noted if Master)	Claim Type	Self-Rep?
184	<i>Okel v Misheal</i>	15-Oct-14	CA	Judge	N/A	2014 ONCA 699, [2014] OJ No 4842	Granted After Notice	N/A	None	0 Days	Juriansz, Rouleau, Pepall	Vexatious step by family law litigant	Yes
185	<i>Gallos v Toronto (City)</i>	20-Nov-14	CA	Judge	N/A	2014 ONCA 818, [2014] OJ No 5570	Granted After Notice	N/A	Unclear	0 Days	Feldman, Juriansz, MacFarland	Attempt to re-open appeal after Supreme Court denied leave to appeal	Yes
186	<i>Hoang v Mann Engineering Ltd</i>	02-Dec-15	CA	Responding Party	N/A	2015 ONCA 838, [2015] OJ No 6316	Granted After Notice	N/A	\$1,500	N/A	Strathy, LaForme, Huscroft	Second attempt to rehear appeal	No
187	<i>Simpson v The Chartered Accountants Institute of Ontario</i>	01-Nov-16	CA	Responding Party	N/A	2016 ONCA 806, [2016] OJ No 6382	Granted After Notice	N/A	None	Unclear	Laskin, Sharpe, Miller	Attempt to re-litigate	Yes
188	<i>Collins v Ontario</i>	19-Apr-17	CA	Responding Party	N/A	2017 ONCA 317, [2017] OJ No 1982	Partially Granted	N/A	Unclear	106 Days: January 3, 2017 to April 19, 2017	LaForme, Peppall, Pardu	Appellant refusing to perfect appeal	Yes
189	<i>Damallie v Ping</i>	17-Feb-17	CA	Responding Party	2016 ONCA 603, [2016] OJ No 4009	2017 ONCA 146, [2017] OJ No 1229	Granted After Notice	N/A	Unclear	205 Days: July 27, 2016 to February 17, 2017	Gillese, referred to MacFarlane, van Rensburg, Huscroft	Attempts to re-litigate	Yes
190	<i>Children's Aid Society of Toronto v VD</i>	19-Jun-17	CA	Judge	N/A	2017 ONCA 514, 2017 CarswellOnt 9499	Granted After Notice	N/A	None	47 Days: May 3, 2017 to June 19, 2017	Epstein, referred to Rouleau, Benotto, Hourigan	Attempt to bring frivolous motions and appeals not in interests of child	Yes

## APPENDIX E – COSTS ORDERS (RULE 2.1)

	<b>Case Name</b>	<b>First Instance Costs</b>	<b>Appeal Costs</b>
1.	<i>Hawkins v Schlosser</i> , 2015 ONSC 1691, [2015] OJ No 1346 (SCJ)	\$1,148.02	None
2.	<i>Nguyen v Economical Mutual Insurance Co</i> , 2015 ONSC 2646, 49 CCLI (5th) 144 (SCJ)	\$2,000	None
3.	<i>Obermuller v Kenfinch Co-Operative Housing Inc</i> , 2015 ONSC 6800, [2015] OJ No 5743 (SCJ), aff'd 2016 ONCA 330, [2016] OJ No 2362	Unclear	\$2,000
4.	<i>Chalupnicek v The Children's Aid Society of Ottawa</i> , 2017 ONSC 1278, 2017 CarswellOnt 272 (Div Ct)	None	\$17,684.83 (full indemnity)
5.	<i>Marleau v Brockville (City)</i> , 2016 ONSC 5901, [2016] OJ No 4961 (SCJ)	\$5,500	None
6.	<i>Jarvis v Morlog</i> , 2016 ONSC 5061, 2016 CarswellOnt 1269 (SCJ)	\$2,256.39 (substantial indemnity)	None
7.	<i>Irmya v Mijovick</i> , 2016 ONSC 5276, [2016] OJ No 4372 (SCJ)	\$30,187.78 (full indemnity, three defendants)	None
8.	<i>Khan v Krylov &amp; Company LLP</i> , 2017 ONCA 625, 2017 CarswellOnt 16235	\$2,000	\$3,000
9.	<i>Gates v Humane Society of Canada for the Protection of Animals and the Environment (cob The Humane Society of Canada)</i> , 2016 ONSC 6051, [2016] OJ No 4957 (Div Ct)	\$8,000	None
10.	<i>Son v Khan</i> , 2016 ONSC 7621, [2016] OJ No 6283 (Div Ct)	\$2,611.93	None
11.	<i>Hoang v Mann Engineering Ltd</i> , 2015 ONCA 838, [2015] OJ No 6316	\$1,500	None



**APPENDIX F – CALCULATION OF DELAY (RULE 2.1)**

<b>Disposition</b>	<b>Number of Cases</b>	<b>Superior Court</b>	<b>Divisional Court</b>	<b>Court of Appeal</b>
Granted	136	111	19	6
<i>After Notice</i>	<i>121</i>	<i>99</i>	<i>16</i>	<i>6</i>
Average Delay – Excluding Appeal (102)	45 Days (102)	45 Days (92)	31 Days (8)	126 Days (2)
Average Delay – Including First Appeal (13)	232 Days (13)	274 Days (10)	80 Days (3)	N/A (0)
Average Delay – Including Second Appeal and/or Supreme Court Leave Application (4)	338 Days (4)	411 Days (3)	120 Days (1)	N/A (0)
<i>Unclear About Notice</i>	<i>2</i>	<i>2</i>	<i>0</i>	<i>0</i>
	Delay Not Calculable			
<i>Without Notice</i>	<i>13</i>	<i>10</i>	<i>3</i>	<i>0</i>
Average Delay	0 Days			
Partially Granted	2	1	0	1
Average Delay (2)	84.5 Days	63 Days	N/A	106 Days
Notice Ordered of Dismissal Being Considered But Final Disposition Not Reported	13	13	0	0
	Delay Not Calculable			
New Pleading Ordered	1	1	0	0
Delay (1)	25 Days		N/A	
Resolved After Claim Withdrawn Against One Defendant on Consent	1	1	0	0
Delay (1)	28 Days		N/A	
Dismissed	37	35	2	0

<b>Disposition</b>		<b>Number of Cases</b>	<b>Superior Court</b>	<b>Divisional Court</b>	<b>Court of Appeal</b>
	<i>No Notice Ordered</i>	27	26	1	0
	Average Delay	0 Days			
	<i>After Notice</i>	4	3	1	0
	Average Delay (3)	108 Days	108 Days	Unreported	N/A
	<i>In Context of Broader Motion</i>	3	3	0	0
	Average Delay	Not Informative			
	<i>After Amended Pleading Served</i>	1	1	0	0
	Average Delay	180 Days		N/A	
	<i>After Appeal</i>	2	2	0	0
	Average Delay	326 Days (1)	326 Days (1)	N/A	
<b>Total</b>		<b>190</b>	<b>162</b>	<b>21</b>	<b>7</b>

## APPENDIX G – ONTARIO COURT OF APPEAL DECISIONS CONSIDERING DISPUTES OVER INTERLOCUTORY/FINAL DISTINCTION

	Case Name	Resolution Date	Decision	Result (how came before court)	Appeal	Subsequent	Costs	Delay: Quashing to Disposition	Self-Rep? (Result if Yes)	Remedy
1	<i>Wong v Gong</i>	2010-Jan-13	2010 ONCA 25, [2010] OJ No 121	Interlocutory (motion)	None/unreported	None/unreported	\$7,500	Not Applicable	N	Quash
2	<i>Griffin v Dell Canada Inc</i>	2010-Jan-20	2010 ONCA 29, 98 OR (3d) 481	Final (motion)	Leave to appeal denied: [2010] SCCA No 75, 2010 CanLII 27725	Not Applicable	Other Issues Only	Not Applicable	N	N/A
3	<i>Jones v Foresi</i>	2010-Feb-9	2010 ONCA 108, [2010] OJ No 546	Interlocutory (unclear)	None/unreported	None/unreported	\$3,500	Not Applicable	N	Quash
4	<i>Silver v IMAX Corp</i>	2010-May-18	[2010] OJ No 6242, 2010 CarswellOnt 11219	Interlocutory (motion)	None/unreported	Leave denied: 2011 ONSC 1035, 105 OR (3d) 212	\$5,000	8 Months, 27 Days: May 18, 2010 until February 14, 2011	N	Quash
5	<i>Harrop (Litigation guardian of) v Harrop</i>	2010-Jun-1	2010 ONCA 390, 85 CPC (6th) 1	Decided not to decide (unclear)	None/unreported	Not Applicable	\$4,500	Not Applicable	N	N/A
6	<i>1550188 Ontario Inc v Mutual Development Corp</i>	2010-Sept-24	2010 ONCA 618, [2010] OJ No 3999	Interlocutory (unclear)	None/unreported	None/unreported	\$700	Not Applicable	N	Quash
7	<i>Aecon Buildings, a Division of Aecon Construction Group Inc v Brampton (City)</i>	2010-Nov-15	2010 ONCA 773, [2010] OJ No 4860	Final (motion)	None/unreported	Not Applicable	\$10,000	Not Applicable	N	N/A
8	<i>Willmot v Benton</i>	2011-Feb-4	2011 ONCA 104, 11 CPC (7th) 219	Interlocutory (motion)	None/unreported	None/unreported	None	Not Applicable	Y (lost)	Quash
9	<i>Lukezic v Southward</i>	2011-Apr-13	2011 ONCA 295, CarswellOnt 16211	Interlocutory (unclear)	None/unreported	None/unreported	\$3,595.80	Not Applicable	N	Quash
10	<i>B &amp; M Handelman Investments Ltd v Curreri</i>	2011-May-20	2011 ONCA 395, 278 OAC 199	Final (raised on appeal)	None/unreported	Not Applicable	Other Issues Only	Not Applicable	N	N/A
11	<i>Ontario v Lipsitz</i>	2011-Jun-22	2011 ONCA 466, 281 OAC 67	Final (raised on appeal)	Leave to appeal denied: [2011] SCCA No 407, 2012 CarswellOnt 1520	Not Applicable	Other Issues Only	Not Applicable	N	N/A
12	<i>Lindhorst v Stone &amp; Co</i>	2011-Oct-19	2011 ONCA 657, [2011] OJ No 4594	Interlocutory (unclear)	Leave to appeal denied: [2011] SCCA No 564, 2012 CarswellOnt 4238	None/unreported	\$1,500	Not Applicable	Y (lost)	Quash
13	<i>White v Garrow</i>	2011-Dec-8	[2011] OJ No 6482	Interlocutory (motion)	None/unreported	None/unreported	\$750	Not Applicable	N	Quash
14	<i>Trainor v Canada (Customs and Revenue Agency)</i>	2011-Dec-8	2011 ONCA 794, 20 CPC (7th) 227	Interlocutory (unclear)	None/unreported	Appeal allowed after leave granted: 2012 ONSC 3450, [2012] OJ No 2665	\$10,000	6 Months, 4 Days Days: December 8, 2011 to June 12, 2012	N	Quash
15	<i>Almrei v Canada (Attorney General)</i>	2011-Dec-13	2011 ONCA 779, 345 DLR (4th) 475	Final (motion)	None/unreported	Issues morphed	\$5,000	Not Applicable	N	N/A
16	<i>3574423 Canada Inc v Invescor Restaurants Inc</i>	2011-Dec-16	2011 ONCA 800, [2011] OJ No 5779	Interlocutory (unclear)	None/unreported	None/unreported	\$5,000	Not Applicable	N	Quash
17	<i>Carleton Condominium Corp No 396 v Burdet</i>	2012-Mar-13	2012 ONCA 169, [2012] OJ No 1163	Interlocutory (motion)	None/unreported	None/unreported	\$7,500	Not Applicable	N	Quash
18	<i>Dewan v Burdet</i>	2012-Mar-13	2012 ONCA 169, [2012] OJ No 1163	Interlocutory (motion)	None/unreported	None/unreported	\$5,000	Not Applicable	N	Quash
19	<i>Carmen Alfano Family Trust (Trustee of) v Piersanti</i>	2012-Jun-25	2012 ONCA 442, [2012] OJ No 2847	Final (motion)	None/unreported	Not Applicable	\$3,500	Not Applicable	N	N/A

	Case Name	Resolution Date	Decision	Result (how came before court)	Appeal	Subsequent	Costs	Delay: Quashing to Disposition	Self-Rep? (Result if Yes)	Remedy
20	<i>Malamas v Crerar Property Corp</i>	2012-Jun-28	2012 ONCA 465, [2012] OJ No 2984	Interlocutory (motion)	None/unreported	None/unreported	\$3,000	Not Applicable	Y (lost)	Quash
21	<i>Simmonds v Armtec Infrastructure Inc</i>	2012-Jun-29	2012 ONCA 467, [2012] OJ No 2981, with further reasons: 2012 ONCA 774, 299 OAC 20	Interlocutory (own initiative)	None/unreported	Appeal dismissed: 2013 ONSC 331, 303 OAC 299	None	6 Months, 17 Days: June 29, 2012 to January 15, 2018	N	Quash
22	<i>NM Sutherland Developments Ltd v Platinum Plus Products Inc</i>	2012-Jul-20	2012 ONCA 509, [2012] OJ No 3374	Interlocutory (unclear)	None/unreported	None/unreported	\$2,500	Not Applicable	N	Quash
23	<i>Nazarinia Holdings Inc v 2049080 Ontario Inc (cob JW Car Care)</i>	2012-Sep-28	2012 ONCA 652, [2012] OJ No 4530	Interlocutory (motion)	None/unreported	None/unreported	\$7,500	Not Applicable	N	Quash
24	<i>Soden v Soden</i>	2012-Oct-5	2012 ONCA 678, [2012] OJ No 4668	Interlocutory (unclear)	None/unreported	None/unreported	\$3,000	Not Applicable	N	Quash
25	<i>Almrei v Canada (Attorney General)</i>	2012-Nov-15	2012 ONCA 779, 11 Imm LR (4th) 175	Interlocutory (reconsideration of earlier motion in light of developments)	None/unreported	None/unreported	\$5,000	Not Applicable	N	Quash
26	<i>Martin v Martin</i>	2012-Nov-22	2012 ONCA 814, [2012] OJ No 5499	Interlocutory (motion)	None/unreported	None/unreported	\$5,000	Not Applicable	N	Quash
27	<i>1250264 Ontario Inc v Pet Valu Canada Inc</i>	2012-Dec-20	2012 ONCA 901, [2012] OJ No 6754	Final (motion)	None/unreported	Not Applicable	\$2,000	Not Applicable	N	N/A
28	<i>Royal Bank of Canada v Trang</i>	2012-Dec-21	2012 ONCA 902, 97 CBR (5th) 52	Interlocutory (unclear)	None/unreported	None/unreported	Unclear	Not Applicable	N	Quash
29	<i>Child and Family Services for York Region v LH</i>	2012-Dec-28	2012 ONCA 912, [2012] OJ No 6756	Interlocutory (motion)	None/unreported	None/unreported	None	Not Applicable	Y (lost)	Quash
30	<i>Ashak v Ontario (Family Responsibility Office)</i>	2013-Jun-6	2013 ONCA 375, 115 OR (3d) 401	Interlocutory (unclear)	None/unreported	Leave denied: 2013 ONSC 39, 357 DLR (4th) 560	\$10,000	7 Months, 1 Day: June 6, 2013 to January 7, 2017	N	Quash
31	<i>Simmonds v Simmonds</i>	2013-Jul-16	2013 ONCA 479, 117 OR (3d) 479	Interlocutory (unclear)	None/unreported	None/unreported	\$3,500	Not Applicable	N	Quash
32	<i>D'Amato v Kovachis</i>	2013-Oct-8	2013 ONCA 603, [2013] OJ No 4508	Interlocutory (unclear)	None/unreported	None/unreported	None	Not Applicable	N	Quash
33	<i>Clarke (Litigation guardian of) v Richardson</i>	2013-Nov-21	2013 ONCA 731, [2013] OJ No 5896	Interlocutory (own initiative)	None/unreported	None/unreported	\$7,500	Not Applicable	N	Quash
34	<i>Dams v TD Home and Auto Insurance Co</i>	2013-Dec-3	2013 ONCA 730, [2013] OJ No 6338	Interlocutory (unclear)	None/unreported	None/unreported	\$9,950	Not Applicable	N	Quash
35	<i>Murphy v Wheeler</i>	2013-Dec-17	2013 ONCA 762, [2013] OJ No 5771	Interlocutory (unclear)	None/unreported	None/unreported	\$10,000	Not Applicable	Y (won)	Quash
36	<i>Ambrose v Zuppari</i>	2013-Dec-18	2013 ONCA 768, 368 DLR (4th) 749	Interlocutory (unclear)	None/unreported	None/unreported	\$1,000	Not Applicable	N	Quash and extend time
37	<i>Pelletier v U-Haul Co (Canada)</i>	2014-Feb-12	2014 ONCA 120, [2014] OJ No 690	Interlocutory (unclear)	None/unreported	None/unreported	\$5,000	Not Applicable	N	Quash
38	<i>Chahal v Chabrra</i>	2014-Mar-6	2014 ONCA 180, 317 OAC 243	Interlocutory (motion)	None/unreported	None/unreported	\$7,500	Not Applicable	N	Quash
39	<i>Punit v Punit</i>	2014-Apr-2	2014 ONCA 252, 43 RFL (7th) 84	Interlocutory (own initiative)	None/unreported	None/unreported	Other Issues Only	Not Applicable	N	Reconstitute as Div Ct
40	<i>Xela Enterprises Ltd v Castillo</i>	2014-Apr-7	2014 ONCA 275, [2014] OJ No 1666	Interlocutory (motion)	None/unreported	Appeal dismissed after leave granted: 2015 ONSC 866, 70 CPC (7th) 224, aff'd 2016 ONCA 437, 131 OR (3d) 193,	\$5,000	10 Months, 12 Days (plus): April 7, 2014 to February 19, 2015	N	Quash

	Case Name	Resolution Date	Decision	Result (how came before court)	Appeal	Subsequent	Costs	Delay: Quashing to Disposition	Self-Rep? (Result if Yes)	Remedy
						leave to appeal denied, [2016] SCCA No 366, 2017 CarswellOnt 2690				
41	<i>Bank of Nova Scotia v McLennan</i>	2014-Apr-25	2014 ONCA 331, [2014] OJ No 1977	Interlocutory (motion)	None/unreported	None/unreported	\$5,800 (full indemnity)	Not Applicable	N	Quash
42	<i>Susin v Susin</i>	2014-Jun-12	2014 ONCA 461, [2014] OJ No 2809	Interlocutory (motion)	None/unreported	None/unreported	\$3,500	Not Applicable	N	Quash
43	<i>Hopkins v Kay</i>	2014-Jul-2	2014 ONCA 514, [2014] OJ No 6670	Final (motion)	None/unreported	Not Applicable	\$5,000	Not Applicable	N	N/A
44	<i>Henderson v Henderson</i>	2014-Aug-1	2014 ONCA 571, 324 OAC 138	Interlocutory (defence to motion)	None/unreported	None/unreported	\$24,000	Not Applicable	N	Dismissed
45	<i>Hanisch v McKean</i>	2014-Oct-14	2014 ONCA 698, 325 OAC 253	Final (raised on appeal)	None/unreported	Not Applicable	Other Issues Only	Not Applicable	N	N/A
46	<i>Liu v Bagg Group</i>	2014-Oct-20	2014 ONCA 718, [2014] OJ No 4890	Interlocutory (unclear)	None/unreported	None/unreported	Other Issues Only	Not Applicable	Y (lost)	Dismissed
47	<i>Mader v South Easthope Mutual Insurance Co</i>	2014-Oct-21	2014 ONCA 714, 123 OR (3d) 120	Interlocutory (unclear)	None/unreported	None/unreported	Other Issues Only	Not Applicable	N	Dismissed
48	<i>Brown v Ontario</i>	2014-Nov-17	2014 ONCA 806, [2014] OJ No 5456	Interlocutory (motion)	None/unreported	None/unreported	\$2,000	Not Applicable	Y (lost)	Quash
49	<i>Raba v Toronto (City) Police Services Board</i>	2015-Jan-12	2015 ONCA 12, [2015] OJ No 119	Interlocutory (unclear)	None/unreported	None/unreported	\$2,000	Not Applicable	Y (lost)	Quash
50	<i>Pinsky v Smiley</i>	2015-Jan-27	2015 ONCA 52, [2015] OJ No 443	Interlocutory (motion)	None/unreported	None/unreported	\$2,500	Not Applicable	Y (lost)	Quash
51	<i>Waldman v Thomson Reuters Canada Ltd</i>	2015-Jan-28	2015 ONCA 53, 330 OAC 142	Interlocutory (own initiative)	None/unreported	Appeal allowed after leave granted: 2016 ONSC 2622, 131 OR (3d) 367	None	15 Months: January 28, 2015 to April 28, 2016	N	Quash
52	<i>Dynasty Furniture Manufacturing Ltd v Toronto-Dominion Bank</i>	2015-Mar-2	2015 ONCA 137, [2015] OJ No 945	Interlocutory (motion)	None/unreported	None/unreported	\$20,000	Not Applicable	N	Quash
53	<i>Bilich v Toronto (City) Police Services Board</i>	2015-Mar-6	2015 ONCA 149, [2015] OJ No 1077	Interlocutory (motion)	None/unreported	Leave denied: 2015 ONSC 5873, [2015] OJ No 4870	\$2,000	6 Months, 16 Days: March 6, 2015 to September 22, 2015	Y (lost)	Quash
54	<i>Parsons v Ontario</i>	2015-Mar-13	2015 ONCA 158, 125 OR (3d) 168	Final (own initiative, over dissent)	Other Issues Only	Not Applicable	Other Issues Only	Not Applicable	N	N/A
55	<i>Natario v Rodrigues</i>	2015-Apr-2	2015 ONCA 227, 71 CPC (7th) 285	Interlocutory (unclear)	None/unreported	None/unreported	\$4,145	Not Applicable	N	Quash
56	<i>Akagi v Synergy Group (2000) Inc</i>	2015-May-22	2015 ONCA 368, 125 OR (3d) 401	Final (seemingly raised on appeal)	None/unreported	Not Applicable	Other Issues Only	Not Applicable	N	N/A
57	<i>Cheung v Sheun</i>	2015-Jun-4	2015 ONCA 403, [2015] OJ No 2921	Interlocutory (motion)	None/unreported	None/unreported	\$18,000	Not Applicable	N	Quash
58	<i>Meisels v LAWPRO</i>	2015-Jun-8	2015 ONCA 406, 126 OR (3d) 448	Final (seemingly raised on appeal)	None/unreported	Not Applicable	\$10,000	Not Applicable	N	N/A
59	<i>Baradaran v Tarion Warranty Corp</i>	2015-Jun-29	2015 ONCA 490, [2015] OJ No 3419	Interlocutory (unclear)	None/unreported	Leave denied: 2015 ONSC 7333, [2015] OJ No 6101	\$7,294.30	4 Months, 26 Days: June 29, 2015 to November 24, 2015	Y (lost)	Quash
60	<i>1793670 Ontario Ltd v Chan</i>	2015-Jul-9	2015 ONCA 522, [2015] OJ No 2620	Interlocutory (motion)	None/unreported	None/unreported	\$7,000 (substantial indemnity)	Not Applicable	N	Quash

	<b>Case Name</b>	<b>Resolution Date</b>	<b>Decision</b>	<b>Result (how came before court)</b>	<b>Appeal</b>	<b>Subsequent</b>	<b>Costs</b>	<b>Delay: Quashing to Disposition</b>	<b>Self-Rep? (Result if Yes)</b>	<b>Remedy</b>
61	<i>Must v Shkuryna</i>	2015-Aug-4	[2015] OJ No 4077	Interlocutory (unclear)	None/unreported	None/unreported	Unclear	Not Applicable	Y (lost)	Quash
62	<i>Must v Shkuryna</i>	2015-Oct-1	2015 ONCA 665, [2015] OJ No 5087	Interlocutory (unclear)	Leave to appeal denied: [2015] SCCA No 482, 2016 CarswellOnt 5396	None/unreported	None	Not Applicable	Y (lost)	Quash
63	<i>Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v SNC-Lavalin Group Inc</i>	2015-Oct-28	2015 ONCA 718, 340 OAC 271	Final (motion)	None/unreported	Not Applicable	\$2,000	Not Applicable	N	N/A
64	<i>Mullin v Legace</i>	2015-Nov-6	2015 ONCA 757, 81 CPC (7th) 254	Final (raised as defence on appellant's motion for other relief)	None/unreported	Not Applicable	None	Not Applicable	N	Quash
65	<i>Catalyst Capital Group Inc v Moyses</i>	2015-Nov-17	2015 ONCA 784, 127 OR (3d) 625	Interlocutory (motion)	None/unreported	Leave denied: 2016 ONSC 554, [2016] OJ No 320	\$5,000	2 Months, 5 Days: November 17, 2015 to January 22, 2016	N	Quash
66	<i>Fanshawe College of Applied Arts and Technology v AU Optronics Corp</i>	2015-Nov-24	2015 ONCA 808, [2015] OJ No 6137	Interlocutory (motion)	None/unreported	None/unreported	\$2,500	Not Applicable	N	Quash
67	<i>Speciale Law Professional Corp v Schrader Canada Ltd</i>	2015-Dec-7	2015 ONCA 856, [2015] OJ No 6418	Final (unclear)	Leave to appeal denied: [2016] SCCA No 56, 2016 CarswellOnt 7592	Not Applicable	Other Issues Only	Not Applicable	N	N/A
68	<i>Walchuk Estate v Houghton</i>	2015-Dec-9	2015 ONCA 862, [2015] OJ No 6492	Final (motion)	None/unreported	Not Applicable	\$6,000	Not Applicable	N	N/A
69	<i>Ontario Psychological Assn v Mardonet</i>	2015-Dec-11	2015 ONCA 883, 128 OR (3d) 637	Interlocutory (motion)	None/unreported	None/unreported	\$2,500	Not Applicable	N	Quash
70	<i>RREF II BHB IV Portofino LLC v Portofino Corp</i>	2015-Dec-21	2015 ONCA 906, 33 CBR (6th) 9	Interlocutory (unclear)	None/unreported	None/unreported	\$5,000	Not Applicable	N	Quash
71	<i>Building Solutions International Inc v Benazzi</i>	2016-Feb-9	2016 ONCA 112, [2016] OJ No 696	Interlocutory (unclear)	None/unreported	None/unreported	\$8,500	Not Applicable	N	Dismissed
72	<i>Shoukralla v Shoukralla</i>	2016-Feb-11	2016 ONCA 128, 41 CBR (6th) 6	Interlocutory (unclear)	None/unreported	None/unreported	\$7,000 (one-quarter of issues)	Not Applicable	Y (decision not affecting self-rep's position)	Quashed
73	<i>Canadian Union of Postal Workers v QuebecorMedia Inc</i>	2016-Mar-14	2016 ONCA 206, 129 OR (3d) 711	Interlocutory (unclear)	None/unreported	None/unreported	Other Issues Dominate	Not Applicable	N	Unclear
74	<i>Chand v Quereshi</i>	2016-Mar-29	2016 ONCA 231, [2016] OJ No 1596	Interlocutory (unclear)	None/unreported	None/unreported	None	Not Applicable	Y (all sides self-repped)	Quash
75	<i>Olumide v Conservative Party of Canada</i>	2016-Apr-28	2016 ONCA 314, [2016] OJ No 2284	Interlocutory (unclear)	Leave to appeal denied: [2016] SCCA No 425, 2017 CarswellOnt 6254	None/unreported	\$750 (half of two motions)	Not Applicable	Y (lost)	Dismissed (motion to review)
76	<i>Balice v Serkeyn</i>	2016-May-17	2016 ONCA 372, 349 OAC 218	Final (raised on appeal)	None/unreported	Not Applicable	Other Issues Dominate	Not Applicable	N	N/A
77	<i>NAN Corporate Services (cob Nishnawbe Aski Nation) v Kocsis</i>	2016-May-19	2016 ONCA 382, [2016] OJ No 2612	Interlocutory (unclear)	None/unreported	None/unreported	None	Not Applicable	Y (lost)	Quash

	Case Name	Resolution Date	Decision	Result (how came before court)	Appeal	Subsequent	Costs	Delay: Quashing to Disposition	Self-Rep? (Result if Yes)	Remedy
78	<i>Fram Elgin Mills 90 Inc v Romandale Farms Ltd</i>	2016-May-26	2016 ONCA 404, 131 OR (3d) 455	Interlocutory (motion)	None/unreported	None/unreported	Unclear/settled	Not Applicable	N	Quash
79	<i>Treats International Franchise Corp v 2247383 Ontario Inc</i>	2016-Jun-2	2016 ONCA 429, [2016] OJ No 2889	Interlocutory (motion)	None/unreported	None/unreported	Silent	Not Applicable	N	Quash
80	<i>R &amp; G Draper Farms (Keswick) Ltd v Nature's Finest Produce Ltd</i>	2016-Jun-16	2016 ONCA 481, 350 OAC 198	Final (raised on appeal)	Leave to appeal denied: [2016] SCCA No 399, 2016 CarswellOnt 16389	Not Applicable	Other Issues Only	Not Applicable	N	N/A
81	<i>Chirico v Szalas</i>	2016-Jul-22	2016 ONCA 586, 132 OR (3d) 738	Final (unclear)	None/unreported	Not Applicable	Other Issues Only	Not Applicable	N	N/A
82	<i>VandenBussche Irrigation &amp; Equipment Ltd v Kejay Investments Inc</i>	2016-Aug-4	2016 ONCA 613, [2016] OJ No 4185	Interlocutory (raised on motion for extension of time)	None/unreported	None/unreported	Silent	Not Applicable	N	Dismissed (motion to extend time)
83	<i>Fanshawe College of Applied Arts and Technology v AU Optronics Corp</i>	2016-Aug-11	2016 ONCA 621, 132 OR (3d) 81	Interlocutory (raised on appeal)	Leave to appeal denied: [2016] SCCA No 442, 2016 CarswellOnt 17004	None/unreported	Other Issues Dominate	Not Applicable	N	Do Not Entertain
84	<i>Enerzone Inc v Ontario (Minister of Revenue)</i>	2016-Sep-30	2016 ONCA 717, [2016] OJ No 5070	Interlocutory (raised on appeal)	None/unreported	None/unreported	\$3,500	Not Applicable	N	Quash
85	<i>C-A Burdet Professional Corp v Gagnier</i>	2016-Oct-7	2016 ONCA 735, [2016] OJ No 5176	Final (raised on appeal)	None/unreported	Not Applicable	Other Issues Dominate	Not Applicable	Y (won)	N/A
86	<i>Quinto v Stadler</i>	2016-Oct-18	2016 ONCA 766, [2016] OJ No 5391	Interlocutory (motion)	None/unreported	None/unreported	\$1,500	Not Applicable	N	Quash
87	<i>Buccilli v Pillitteri</i>	2016-Oct-24	2016 ONCA 775, 410 DLR (4th) 480	Final (motion)	None/unreported	Not Applicable	\$5,000	Not Applicable	N	N/A
88	<i>Williams v Grand River Hospital</i>	2016-Oct-26	2016 ONCA 793, 134 OR (3d) 319	Interlocutory (motion)	None/unreported	None/unreported	\$7,500	Not Applicable	N	Quash
89	<i>John Deere Financial Inc v 1232291 Ontario Inc (cob Northern Haul Contracting)</i>	2016-Nov-8	2016 ONCA 838, [2016] OJ No 5739	Interlocutory (raised on appeal)	None/unreported	None/unreported	None	Not Applicable	N	Quash
90	<i>Skunk v Ketash</i>	2016-Nov-10	2016 ONCA 841, 135 OR (3d) 180	Interlocutory (raised on appeal)	None/unreported	None/unreported	None	Not Applicable	N	Quash
91	<i>1100997 Ontario Ltd v North Elgin Centre Inc</i>	2016-Nov-14	2016 ONCA 848, 409 DLR (4th) 382	Final (raised on appeal)	None/unreported	Not Applicable	Other Issues Dominate	Not Applicable	N	N/A
92	<i>Rana v Unifund Assurance Co</i>	2016-Nov-29	2016 ONCA 906, [2016] OJ No 6151	Interlocutory (motion)	None/unreported	None/unreported	Not Reported	Not Applicable	Y (lost)	Quash
93	<i>Fatahi-Ghandehari v Wilson</i>	2016-Dec-6	2016 ONCA 921, [2016] OJ No 6291	Interlocutory (raised on motion)	None/unreported	None/unreported	None	Not Applicable	N	Dismissal of request
94	<i>Wallace (Re)</i>	2016-Dec-16	2016 ONCA 958, 43 CBR (6th) 210	Final (motion)	None/unreported	Not Applicable	None	Not Applicable	N	N/A
95	<i>Talbot v Bergeron</i>	2016-Dec-19	2016 ONCA 956, 2016 CarswellOnt 19874	Final (raised on appeal)	None/unreported	Not Applicable	Other Issues Dominate	Not Applicable	N	N/A
96	<i>Colenbrander v Savaria Corp</i>	Unclear	Unreported (assuming 2016 given lateness of Div Ct decision in 2016)	Interlocutory (unclear)	None/unreported	2016 ONSC 8051, 2016 CarswellOnt 20383 (Div Ct)	Not Reported	Not Calculable	N	Quash
97	<i>PM v MA</i>	2017-Jan-4	2017 ONCA 6, [2016] OJ No 6746	Interlocutory (unclear)	None/unreported	None/unreported	Silent	Not Applicable	N	Quash

	Case Name	Resolution Date	Decision	Result (how came before court)	Appeal	Subsequent	Costs	Delay: Quashing to Disposition	Self-Rep? (Result if Yes)	Remedy
98	<i>Sennek v Carleton Condominium Corp No 116</i>	2017-Feb-21	2017 ONCA 154, [2017] OJ No 873	Interlocutory (reason to dismiss motion)	None/unreported	None/unreported	None	Not Applicable	Y (lost)	Quash
99	<i>Density Group Ltd v HK Hotels LLC</i>	2017-Mar-8	2017 ONCA 205, [2017] OJ No 2346	Interlocutory (motion)	None/unreported	None/unreported	\$5,000	Not Applicable	N	Quash
100	<i>Kent v Chin and Orr Lawyers</i>	2017-Mar-20	2017 ONCA 223, [2017] OJ No 1484	Interlocutory (motion)	None/unreported	None/unreported	\$1,500	Not Applicable	Y (lost)	Quash
101	<i>Huang v Pan</i>	2017-Mar-30	2017 ONCA 268, 16 CPC (8th) 59	Interlocutory (motion)	None/unreported	None/unreported	\$1,500	Not Applicable	N	Quash
102	<i>McClintock v Karam</i>	2017-Apr-3	2017 ONCA 277, [2017] OJ No 1636	Interlocutory (unclear)	None/unreported	None/unreported	\$10,000	Not Applicable	N	Quash
103	<i>Lawrence v International Brotherhood of Electrical Workers (IBEW) Local 773</i>	2017-Apr-20	2017 ONCA 321, 138 OR (3d) 129	Final (motion)	Affirmed (other issues): 2018 SCC 11, [2018] 2 SCR 3	Not Applicable	Other Issues Only	3 Months: January 20, 2017 to April 20, 2017 (to being heard with appeal)	N	N/A
104	<i>JK v Ontario</i>	2017-Apr-26	2017 ONCA 332, 9 CPC (8th) 22	Interlocutory (motion)	None/unreported	None/unreported	\$5,192.50	Not Applicable	N	Quash
105	<i>Azzeh (Litigation guardian of) v Legendre</i>	2017-May-12	2017 ONCA 385, 135 OR (3d) 721	Interlocutory (unclear)	Leave to appeal denied: [2017] SCCA No 289, 2018 CarswellOnt 2058	None/unreported	Other Issues Only	Not Applicable	N	Heard interlocutory portions
106	<i>Doskova v Dimitrov Estate</i>	2017-May-19	2017 ONCA 412, [2017] OJ No 2606	Interlocutory (unclear)	None/unreported	None/unreported	\$5,000	Not Applicable	N	Quash
107	<i>Cowan v General Filters Inc</i>	2017-Jun-2	2017 ONCA 456, [2017] OJ No 2859	Interlocutory (unclear)	None/unreported	None/unreported	\$7,500	Not Applicable	N	Quash
108	<i>Durbin v Brant</i>	2017-Jun-5	2017 ONCA 463, [2017] OJ No 2991	Interlocutory (own initiative)	None/unreported	None/unreported	None	Not Applicable	Y (lost)	Quash
109	<i>2441472 Ontario Inc v Collicutt Energy Services Corp</i>	2017-Jun-5	2017 ONCA 452, 48 CBR (6th) 173	Interlocutory (unclear)	None/unreported	None/unreported	\$5,000	Not Applicable	N	Quash
110	<i>Golden Oaks Enterprises Inc v Lalonde</i>	2017-Jun-20	2017 ONCA 515, 137 OR (3d) 750	Interlocutory (own initiative)	None/unreported	None/unreported	None	Not Applicable	N	Quash
111	<i>Paradigm Quest Inc v McInroy</i>	2017-Jun-22	2017 ONCA 547, [2017] OJ No 3413	Interlocutory (unclear)	None/unreported	None/unreported	None	Not Applicable	Y (won)	Quash
112	<i>Amyotrophic Lateral Sclerosis Society of Essex County v Windsor (City)</i>	2017-Jun-30	2017 ONCA 555, [2017] OJ No 3444	Interlocutory (motion)	None/unreported	Appeal allowed after leave granted: 2018 ONSC 2350, [2018] OJ No 1932	\$3,000	9 Months, 13 Days: June 30, 2017 to April 12, 2018	N	Quash
113	<i>Bonello v Gores Landing Marina</i>	2017-Aug-2	2017 ONCA 632, 39 CCLT (4th) 175	Final (raised on appeal)	None/unreported	Not Applicable	Other Issues Only	Not Applicable	N	N/A
114	<i>Westmount-Keele Ltd v Royal Host Hotels and Resorts Real Estate Investment Trust</i>	2017-Aug-28	2017 ONCA 673, [2017] OJ No 4686	Interlocutory (unclear)	None/unreported	None/unreported	\$10,000 (half of total award)	Not Applicable	N	Quash
115	<i>Highland Shores Children's Aid Society v CSD</i>	2017-Sep-25	2017 ONCA 743, [2017] OJ No 4937	Interlocutory (own initiative)	None/unreported	None/unreported	None	Not Applicable	N	Quash
116	<i>Deltro Group Ltd v Potentia Renewables Inc</i>	2017-Oct-6	2017 ONCA 784, 139 OR (3d) 239	Interlocutory (motion)	None/unreported	None/unreported	\$5,000	Not Applicable	N	Quash
117	<i>Airia Brands Inc v Air Canada</i>	2017-Oct-17	2017 ONCA 792, 417 DLR (4th) 467	Final (unclear)	None/unreported	Not Applicable	Other Issues Dominate	Not Applicable	N	N/A
118	<i>Zafar v Saiyid</i>	2017-Nov-28	2017 ONCA 919, [2017] OJ No 6206	Final (raised on appeal)	None/unreported	Not Applicable	Other Issues Dominate	Not Applicable	N	N/A



	<b>Case Name</b>	<b>Resolution Date</b>	<b>Decision</b>	<b>Result (how came before court)</b>	<b>Appeal</b>	<b>Subsequent</b>	<b>Costs</b>	<b>Delay: Quashing to Disposition</b>	<b>Self-Rep? (Result if Yes)</b>	<b>Remedy</b>
119	<i>Toronto-Dominion Bank v Froom</i>	2017-Dec-18	2017 ONCA 998, [2017] OJ No 6619	Interlocutory (unclear)	None/unreported	None/unreported	\$8,773.39: 2018 ONCA 15, [2018] OJ No 715	Not Applicable	Y (lost)	Quash

## APPENDIX H – ONTARIO DIVISIONAL COURT DECISIONS CONSIDERING DISPUTES OVER INTERLOCUTORY/FINAL DISTINCTION

	Case Name	Resolution Date	Decision	Result (how it came before Court)	Appeal	Costs	Delay: Decision to Resolution	Self-Rep?	Result
1	<i>Petgrave (Litigation guardian of) v Maheru</i>	2010-Mar-25	2010 ONSC 1710, [2010] OJ No 1211	Final (own initiative)	None/unreported	\$4,000	Not Applicable	N	Quash
2	<i>Beard Winter LLP v Shekhar</i>	2010-Sept-16	2010 ONSC 4947, [2010] OJ No 4354	Final (motion)	None/unreported	\$2,500	Not Applicable	Y	N/A
3	<i>Drosophilinks Consulting Inc v Canadian National Railway</i>	2010-Sept-22	2010 ONSC 5156, 2010 CarswellOnt 9246	Interlocutory (raised on leave motion)	None/unreported	\$5,000	3 Months, 1 Day: June 21, 2010 to September 22, 2010	N	Leave denied
4	<i>Ravenda Homes Ltd v Ontario 1372708 Ltd</i>	2010-Nov-17	2010 ONSC 6338, 5 CPC (7th) 440	Interlocutory (raised on appeal)	None/unreported	\$8,500	4 Months, 2 Days: July 15, 2010 to November 17, 2010	N	Appeal dismissed
5	<i>Varshavska v Varshavskiy</i>	2011-Apr-5	2011 ONSC 1396, [2011] OJ No 1613	Interlocutory (raised on appeal)	None/unreported	\$2,945	Not Calculable	Y	Appeal “not heard”
6	<i>570 South Service Road Inc v Lawrence-Paine &amp; Associates Ltd</i>	2011-Jun-3	2011 ONSC 3410, 3 CLR (4th) 1	Interlocutory (raised on appeal)	None/unreported	Reserved to trial judge	5 Months, 18 Days: December 16, 2010 to June 3, 2011	N	Quash
7	<i>Ellins v McDonald</i>	2012-Sep-25	2012 ONSC 4831, [2012] OJ No 4556	Final (raised on appeal)	None/unreported	None	Not Applicable	N	N/A
8	<i>Trifield Construction Co v HC Matcon Inc</i>	2013-Oct-30	2013 ONSC 6514, [2013] OJ No 4916	Interlocutory (motion)	None/unreported	\$22,000: 2013 ONSC 7164, [2013] OJ No 5270, leave to appeal denied: 2014 ONSC 3318, [2014] OJ No 6568	Not Calculable	N	Quash
9	<i>Kostyniuk &amp; Bruggeman Barristers v Burnell</i>	2013-Nov-15	2013 ONSC 6705, [2013] OJ No 5188	Interlocutory (raised on appeal)	None/unreported	\$5,000	10 Months, 24 Days: November 28, 2012 to October 22, 2013	N	Appeal dismissed
10	<i>Beamer v Beamer</i>	2013-Nov-28	2013 ONSC 7379, [2013] OJ No 5395	Interlocutory (own initiative)	None/unreported	\$5,000	Not Insightful: Too Many Other Issues	N	Appeal dismissed
11	<i>Minkofski v Dost Estate</i>	2014-Mar-28	2014 ONSC 1904, 321 OAC 38	Interlocutory (judge clarifying self-rep’s grounds of appeal)	None/unreported	Other issues only	Not Insightful: Too Many Other Issues	Y	Appeal dismissed
12	<i>Belway v Petro-Canada Fuels Inc</i>	2014-Jun-2	2014 ONSC 3344, [2014] OJ No 2621	Interlocutory (motion)	Affirmed: 2015 ONSC 675, [2015] OJ No 416	\$34,000	7 Months, 12 Days (15 Months, 3 Days, 8 Days): October 21, 2013 to June 2, 2014 (to January 29, 2015)	N	Quash
13	<i>Urbacon Building Groups Corp v Guelph (City)</i>	2014-Jun-24	2014 ONSC 3840, 327 OAC 6	Interlocutory (raised on motion for stay pending appeal)	None/unreported	Not Reported	Not Calculable	N	Appeal dismissed
14	<i>1309395 Ontario Ltd v Pronesti Investments Inc</i>	2014-Jul-31	2014 ONSC 4466, [2014] OJ No 5019	Interlocutory (unclear)	None/unreported	Other issues only	Not Insightful: Too Many Other Issues	Y	Motions for leave to appeal dismissed
15	<i>Tran v Kerbel</i>	2014-Sep-15	2014 ONSC 5233, [2014] OJ No 4285	Interlocutory (motion)	None/unreported	\$3,500	7 Months, 3 Days: January 7, 2014 to September 10 2014	Y	Quash
16	<i>Mazinani (cob Mazinani Law Offices) v Clark</i>	2014-Dec-10	2014 ONSC 7100, [2014] OJ No 5886	Interlocutory (unclear)	None/unreported	\$5,000	7 Months: May 8, 2014 to December 8, 2014	Y	Appeal dismissed
17	<i>C&amp;M Properties Inc v 1788333 Ontario Inc</i>	2015-Feb-4	2015 ONSC 706, [2015] OJ No 534	Interlocutory (unclear)	None/unreported	Other Issues Dominate	Not Applicable	N	Reconstitutes as SCJ

	Case Name	Resolution Date	Decision	Result (how it came before Court)	Appeal	Costs	Delay: Decision to Resolution	Self-Rep?	Result
18	<i>Polmat Group Inc v E Ring Corp</i>	2015-Feb-24	2015 ONSC 1233, 2015 CarswellOnt 2864	Did not decide (motion)	None/unreported	Other Issues Dominate	Not Applicable	N	Decided on other grounds
19	<i>Barbalata v Barbalata</i>	2015-Mar-4	2015 ONSC 2964, [2015] OJ No 3115	Interlocutory (unclear)	None/unreported	\$2,000	Not Applicable (matter proceeded regardless)	Y	Appeal dismissed
20	<i>Thaker v Affinia Canada ULC</i>	2015-Mar-19	2015 ONSC 1787, [2015] OJ No 1388	Interlocutory (motion)	None/unreported	\$7,000 (substantial indemnity)	Not Applicable (many interlocutory matters)	N	Quash
21	<i>Awad v Dover Investments Ltd</i>	2015-Jun-19	2015 ONSC 3955, [2015] OJ No 3204	Final (motion for directions)	None/unreported	None	Not Applicable	Y	Directions given
22	<i>Winsa v Henderson</i>	2016-Mar-22	2016 ONSC 1736, 81 RFL (7th) 74	Final (raised on appeal)	None/unreported	Other Issues Only	Not Applicable	N	N/A
23	<i>Mancinelli v Royal Bank of Canada</i>	2017-Mar-6	2017 ONSC 1526, 2017 CarswellOnt 3161	Did not decide (raised on appeal brought out of caution)	None/unreported	Not Reported	Not Calculable	N	Adjourned <i>sine die</i> pending CA decision
24	<i>Dircam Electric v Am-Stat Corp</i>	2017-Jun-2	2017 ONSC 3421, 72 CLR (4th) 256	Final (raised on appeal)	None/unreported	Other Issues Dominate	Not Applicable	N	N/A
25	<i>Amalgamated Transit Union, Local 113 v Toronto Transit Commission</i>	2017-Jun-30	2017 ONSC 4084, 279 LAC (4th) 221	Final (raised on appeal)	None/unreported	\$20,000: 2017 ONSC 4538, [2017] OJ No 3872	Not Insightful: Too Many Other Issues	N	Quash
26	<i>HMI Construction Inc v Index Energy Mills Road Corp</i>	2017-Jul-5	2017 ONSC 4075, [2017] OJ No 3491	Final (raised on appeal)	None/unreported	Other Issues Only	Not Applicable	N	N/A
27	<i>2128445 Ontario Inc v Sherk</i>	2017-May-31	Unreported	Interlocutory (motion)	Reconsideration denied: 2017 ONSC 5996, [2017] OJ No 5783	\$10,000 (from motion to reconsider)	Not Applicable	N	Quash
28	<i>Ontario Provincial Council of Carpenters Benefit Trust Funds (Trustee of) v RES Canada Construction (Ontario) LP</i>	2017-Aug-18	2017 ONSC 4877, [2017] OJ No 4318	Interlocutory (motion)	None/unreported	Unreported/settled	15 Months, 21 Days: April 27, 2016 to August 18, 2017	N	Quash
29	<i>Lofus v Chamberlain</i>	2017-Sep-27	2017 ONSC 5751, [2017] OJ No 5175	Did not decide (mentioned in passing)	None/unreported	None	Not Applicable	N	N/A
30	<i>Nifco v Nifco</i>	2017-Dec-14	2017 ONSC 7475, 6 RFL (8th) 212	Interlocutory (motion)	None/unreported	\$8,000	6 Months, 7 Days: June 6, 2017 to December 13, 2017	N	Quash

**APPENDIX I: BRITISH COLUMBIA COURT OF APPEAL DECISIONS ADDRESSING DISPUTES OVER THE INTERLOCUTORY/FINAL DISTINCTION**

N.B.: Times New Roman font indicates cases decided under rule in effect after amendment that came into effect May 31, 2012; cases in Arial font indicate those decided under previous rule.

	<b>Case Name</b>	<b>Date</b>	<b>Decision</b>	<b>Result</b>	<b>Appeal</b>	<b>Remedy</b>
1	<i>Purple Echo Productions Inc v KCTS Television</i>	23-Jan-07	2007 BCCA 132, 237 BCAC 118	Final	N/A	N/A
2	<i>Barker v Hayes</i>	29-Jan-07	2007 BCCA 51, 64 BCLR (4th) 90	Final	N/A	N/A
3	<i>British Columbia v Ismail</i>	31-Jan-07	2007 BCCA 55, 235 BCAC 299	Interlocutory	N/A	Leave refused
4	<i>McCulloch v Sherman</i>	5-Feb-07	2007 BCCA 66, 64 BCLR (4th) 249	Interlocutory	N/A	Directed to seek leave
5	<i>Randhawa v Legendary Developments Ltd</i>	27-Mar-07	2007 BCCA 184, 238 BCAC 308	Final	N/A	N/A
6	<i>Skogstad v Law Society (British Columbia)</i>	4-May-07	2007 BCCA 266, 69 BCLR (4th) 52	Interlocutory	N/A	Directed to seek leave
7	<i>Lesiczka v Sahota</i>	11-May-07	2007 BCCA 334, 70 BCLR (4th) 281	Interlocutory	N/A	Leave refused
8	<i>Kimpton v Victoria (City)</i>	12-Jun-07	2007 BCCA 376, 243 BCAC 158	Final	N/A	N/A
9	<i>Pearlman v Insurance Corp of British Columbia</i>	25-Jul-07	2007 BCCA 451, 55 CCLI (4th) 7	Final	Other issues only	N/A
10	<i>Robertson v Slater Vecchio (A Partnership)</i>	18-Sep-07	2007 BCCA 453, 70 BCLR (4th) 199	Interlocutory	N/A	Time extended to seek leave
11	<i>Gateway Casinos LP v BCGEU</i>	25-Sep-07	2007 BCCA 465, 72 BCLR (4th) 101	Interlocutory	N/A	Directed to seek leave
12	<i>Hayes Forest Services Ltd v Weyerhaeuser Co</i>	16-Oct-07	2007 BCCA 497, 76 BCLR (4th) 39	Final	Aff'd: 2008 BCCA 120, 78 BCLR (4th) 251	N/A
13	<i>Soleil Hotel &amp; Suites Ltd v Soleil Management Inc</i>	19-Oct-07	2007 BCCA 545, 73 BCLR (4th) 253	Interlocutory	N/A	Leave refused
14	<i>Birrell v Providence Health Care Society</i>	2-Nov-07	2007 BCCA 573, 72 BCLR (4th) 326	Interlocutory	N/A	Directed to seek leave
15	<i>Singh v Bains</i>	30-Nov-07	2007 BCCA 590, 248 BCAC 317	Not appealable	N/A	Directed to reappear before trial judge
16	<i>Forest Glen Wood Products Ltd v British Columbia (Minister of Forests)</i>	17-Jan-08	Unreported	Final	Aff'd: 2008 BCCA 480, 58 BCLR (4th) 330	N/A
17	<i>Fontaine v Canada (Attorney General)</i>	11-Feb-08	2008 BCCA 60, 77 BCLR (4th) 318	Final	Aff'd: 2008 BCCA 329, 82 BCLR (4th) 11	N/A
18	<i>Okanagan Land Development Corp v Stonecroft Management Ltd</i>	26-Mar-08	2008 BCCA 184, 2008 CarswellBC 831	Interlocutory	N/A	Directed to seek leave
19	<i>Kwon v Jung Developments Ltd</i>	31-Mar-08	2008 BCCA 183, 255 BCAC 86	Interlocutory	N/A	Leave granted
20	<i>Yaremy v Insurance Corp of British Columbia</i>	6-Jun-08	2008 BCCA 235, 83 BCLR (4th) 119	Interlocutory	N/A	Directed to seek leave
21	<i>Te Kiapilanoq v British Columbia</i>	11-Jun-08	2008 BCCA 244, 256 BCAC 304	Interlocutory	N/A	Directed to seek leave
22	<i>Soleil Hospitality Inc v Louie</i>	11-Jul-08	2008 BCCA 293, 257 BCAC 299	Interlocutory	N/A	Leave refused
23	<i>Te Kiapilanoq v British Columbia</i>	9-Oct-08	2008 BCCA 398, 259 BCAC 317	Interlocutory	N/A	Directed to seek leave
24	<i>Strata Plan VR 2000 v Grabarczyk-Nagy</i>	14-Oct-08	2008 BCCA 405, 261 BCAC 75	Interlocutory	N/A	Directed to seek leave
25	<i>Holland (Guardian ad litem of) v Marshall</i>	13-Nov-08	2008 BCCA 456, 261 BCAC 102	Interlocutory	N/A	Leave refused
26	<i>Strata Plan LMS 1751 v Scott Management Ltd</i>	19-Jan-09	2009 BCCA 15, 2009 CarswellBC 49	Final	N/A	N/A
27	<i>Amezcuca v Taylor</i>	6-Feb-09	2009 BCCA 42, 2009 CarswellBC 214	Final	N/A	N/A
28	<i>Cosgrove v L &amp; C Canada Coastal Aviation Inc</i>	20-Feb-09	2009 BCCA 81, 55 BLR (4th) 161	Interlocutory	N/A	Leave refused
29	<i>North Pender Island Trust Committee v Hunt</i>	7-Apr-09	2009 BCCA 164, 91 BCLR (4th) 71	Final	N/A	N/A
30	<i>IBEW, Local 213 v Hochstein</i>	22-Apr-09	2009 BCCA 171, 270 BCAC 33	Final	N/A	N/A
31	<i>Holland (Guardian ad litem of) v Marshall</i>	6-May-09	2009 BCCA 199, 273 BCAC 33	Interlocutory	Aff'd: 2009 BCCA 582, 281 BCAC 69	Leave refused
32	<i>Jamieson v Loureiro</i>	8-May-09	2009 BCCA 254, 275 BCAC 3	Final	N/A	N/A

33	<i>Canada v Leeado Enterprises Ltd</i>	10-Jun-09	2009 BCCA 330, 2009 CarswellBC 2019	Interlocutory	N/A	Directed to seek leave
34	<i>Gibson Estate, Re</i>	4-Aug-09	2009 BCCA 347, 2009 CarswellBC 1984	Final	N/A	N/A
35	<i>Transpacific Petroleum Corp v Dover Investments Ltd</i>	11-Sep-09	2009 BCCA 407, 2009 CarswellBC 2999	Interlocutory	Other issues only	Applications for extension of time dismissed
36	<i>Synex Pharmaceutical v Lee</i>	2-Nov-09	2009 BCCA 473, 277 BCAC 252	Interlocutory	N/A	Notice of appeal declared nullity
37	<i>Thompson v Canada (Attorney General)</i>	6-Jan-10	2010 BCCA 60, 2010 CarswellBC 575	Final	N/A	N/A
38	<i>Jensen v Jackman</i>	7-Jan-10	2010 BCCA 6, 293 BCAC 225	Final	N/A	N/A
39	<i>Holmes v United Furniture Warehouse Ltd Partnership</i>	24-Feb-10	2010 BCCA 110, 283 BCAC 276	Final	N/A	N/A
40	<i>Moulton Contracting Ltd v British Columbia</i>	12-Jul-10	2010 BCCA 350, 296 BCAC 103	Final	N/A	N/A
41	<i>Bank of Montreal v Peri Formwork Systems Inc</i>	20-Aug-10	2010 BCCA 444, 294 BCAC 53	Final	N/A	N/A
42	<i>Brenner v Brenner</i>	30-Aug-10	2010 BCCA 387, 9 BCLR (5th) 266	Interlocutory	N/A	Leave granted
43	<i>Bea v Strata Plan LMS 2138</i>	16-Sep-10	Unreported	Interlocutory	Aff'd: 2010 BCCA 463, 94 CPC (6th) 117	Directed to seek leave
44	<i>Dosanjh v Singh</i>	29-Sep-10	2010 BCCA 425, 2010 Carswell BC 2567	Did not decide	Other issues only	Leave granted
45	<i>Cridge v Ivancic</i>	28-Oct-10	2010 BCCA 476, 10 BCLR (5th) 296	Final	N/A	N/A
46	<i>Lefebvre v Durakovic Estate</i>	2-Dec-10	2010 BCCA 545, 297 BCAC 101	Final	N/A	N/A
47	<i>Beltz v West Vancouver (City)</i>	9-Feb-11	2011 BCCA 58, 2011 CarswellBC 197	Interlocutory	N/A	Leave refused
48	<i>Chouinard v O'Connor</i>	22-Feb-11	2011 BCCA 121, 302 BCAC 10	Final	N/A	N/A
49	<i>Gemex Developments Corp v Coquitlam (City)</i>	3-Mar-11	2011 BCCA 119, 81 MPLR (4th) 60	Interlocutory	N/A	Leave denied
50	<i>Tylon Steepe Homes Ltd v Pont</i>	30-Mar-11	2011 BCCA 162, 303 BCAC 139	Interlocutory	N/A	Quash
51	<i>Keremelevski v VWR Capital Corp</i>	4-May-11	Unreported	Interlocutory	Aff'd: 2011 BCCA 469, [2011] BCJ No 2249, leave to appeal ref'd, [2012] SCCA No 187, 2012 CarswellBC 1881	Directed to seek leave
52	<i>Pacifica Mortgage Investment Corp v Laus Holdings Ltd</i>	6-Jun-11	2011 BCCA 317, 2011 CarswellBC 1837	Interlocutory	N/A	Leave denied
53	<i>Laidar Holdings Ltd v Lindt &amp; Sprungli (Canada) Inc</i>	17-Jun-11	2011 BCCA 320, 2011 CarswellBC 1847	Final	N/A	N/A
54	<i>Ehatesaht First Nation v British Columbia (Agriculture &amp; Lands)</i>	28-Jun-11	2011 BCCA 325, 308 BCAC 93	Interlocutory	N/A	Leave denied
55	<i>Pope &amp; Talbot Ltd, Re</i>	8-Jul-11	2011 BCCA 326, 21 BCLR (5th) 270	Interlocutory	N/A	Leave granted
56	<i>Ahmed v Vancouver (City)</i>	29-Dec-11	2011 BCCA 538, 315 BCAC 75	Mixed	N/A	N/A; leave denied
57	<i>da Costa Duarte v British Columbia (Attorney General)</i>	12-Jan-12	2012 BCCA 6, 314 BCAC 306	Interlocutory	N/A	Leave denied
58	<i>Unlu v Air Canada</i>	1-May-12	2012 BCCA 179, 346 DLR (4th) 134	Interlocutory	N/A	Leave granted
59	<i>Morrison v Van Den Tellaart</i>	2-May-12	2012 BCCA 185, 321 BCAC 185	Did not decide	N/A	Quashed for being out of time
60	<i>Monych v Beacon Community Services Society</i>	25-May-12	2012 BCCA 231, 322 BCAC 162	Interlocutory	N/A	Leave denied
61	<i>Yao v Li</i>	20-Jun-12	2012 BCCA 315, 39 BCLR (5th) 241	Limited appeal	N/A	Leave denied
62	<i>Pearlman v Critchley</i>	16-Aug-12	2012 BCCA 344, 326 BCAC 234	Did not decide	N/A	Leave denied
63	<i>Royal Bank of Canada v Miller</i>	23-Oct-12	2012 BCCA 419, 329 BCAC 72	Final	N/A	N/A
64	<i>Bradshaw v Stenner</i>	28-Nov-12	2012 BCCA 481, 39 BCLR (5th) 241	Limited appeal	Aff'd: 2013 BCCA 61, 334 BCAC 52	Leave denied
65	<i>Bentley v British Columbia (Police Complaint Commissioner)</i>	21-Dec-12	2012 BCCA 514, 40 BCLR (5th) 266	Final	N/A	N/A
66	<i>Aleong v Aleong</i>	7-Mar-13	2013 BCCA 167, 335 BCAC 48	Limited appeal	N/A	Leave granted
67	<i>Wallman v John Doe</i>	14-Mar-13	2013 BCCA 110, 43 BCLR (5th) 103	Final	N/A	N/A

68	<i>LPT v MR</i>	27-Mar-13	2013 BCCA 140, 30 RFL (7th) 69	Limited appeal	N/A	Leave refused
69	<i>Tomic v Tough</i>	3-May-13	2013 BCCA 212, 337 BCAC 281	Final	N/A	N/A
70	<i>Aldergrove Credit Union v Hoessmann Estate</i>	3-May-13	2013 BCCA 213, 45 BCLR (5th) 249	Final	N/A	N/A
71	<i>Mission Creek Mortgage Ltd v Angleland Holdings Ltd</i>	22-May-13	2013 BCCA 347, 341 BCAC 199	Limited appeal	N/A	Appeal dismissed
72	<i>Clifford v Lord</i>	25-Jun-13	2013 BCCA 302, 46 BCLR (5th) 87	Final	N/A	N/A
73	<i>Morgan v Thompson</i>	11-Jul-13	2013 BCCA 329, 2013 CarswellBC 2115	Final	N/A	N/A
74	<i>Sociedade-De-Fomento Industrial Private Ltd v Pakistan Steel Mills Corp (Private) Ltd</i>	10-Oct-13	2013 BCCA 474, 51 BCLR (5th) 343	Final	N/A	N/A
75	<i>British Columbia (Director of Civil Forfeiture) v Lloydsmith</i>	21-Feb-14	2014 BCCA 72, 56 BCLR (5th) 309	Limited appeal	N/A	Appeal quashed
76	<i>McGregor v Holyrod Manor</i>	22-Jul-14	Unreported (Referred to in 2015 BCCA 157, 370 BCAC 224)	Final	N/A	N/A
77	<i>Leroux v Canada Revenue Agency</i>	14-Aug-14	2014 BCCA 355, 361 BCAC 60	Final	N/A	N/A
78	<i>Fitzgibbon v Fitzgibbon</i>	23-Oct-14	2014 BCCA 403, 65 BCLR (5th) 131	Did not decide	N/A	Appeal considered
79	<i>696591 BC Ltd v Madden</i>	10-Nov-14	2014 BCCA 517, 364 BCAC 9	Limited appeal	N/A	Leave refused
80	<i>Do Process LP v Infokey Software Inc</i>	3-Dec-14	2014 BCCA 470, 364 BCAC 78	Limited appeal	N/A	Leave granted
81	<i>Creyke v Creyke</i>	3-Dec-14	2014 BCCA 519, 2014 CarswellBC 4051	Final	N/A	N/A
82	<i>Regional District Fraser-Fort George v Norlander</i>	28-Jan-15	2015 BCCA 98, 368 BCAC 6	Final	N/A	N/A
83	<i>Cotter v Point Grey Golf and Country Club</i>	8-May-15	Unreported (referred to in 2015 BCCA 331, 377 BCAC 1)	Limited appeal	N/A	Directed to seek leave
84	<i>Kouznetsova v Kouznetsov</i>	13-May-15	2015 BCCA 230, 373 BCAC 30	Limited appeal	N/A	Appeal dismissed
85	<i>Harras v Lhotka</i>	3-Jul-15	2015 BCCA 329, 375 BCAC 15	Final	N/A	N/A
86	<i>N(SHF) v N(AB)</i>	8-Jul-15	2015 BCCA 314, 62 RFL (7th) 335	Limited appeal	N/A	Leave granted
87	<i>Wright v Sun Life Assurance Co of Canada</i>	8-Jul-15	2015 BCCA 312, 375 BCAC 19	Limited appeal	Aff'd: 2015 BCCA 528, 383 BCAC 26	Appeal quashed
88	<i>Freshwest Equities Trading Corp v Dosanjh</i>	25-Nov-15	2015 BCCA 482, 2015 CarswellBC 3386	Limited appeal	N/A	Dismissed motion for extension of time
89	<i>Leung v Yung</i>	21-Jan-16	2016 BCCA 64, 384 BCAC 1	Final	N/A	N/A
90	<i>Law Society of British Columbia v Boyer</i>	20-Apr-16	2016 BCCA 169, 2016 CarswellBC 1051	Final	N/A	N/A
91	<i>Century Services Inc v Leroy</i>	19-May-16	2016 BCCA 228, 2016 CarswellBC 3938	Limited appeal	N/A	Time extended for motion
92	<i>Michael Wilson &amp; Partners, Ltd v Desirée Resources Inc</i>	30-Jun-16	2016 BCCA 296, 389 BCAC 305	Limited appeal	Aff'd: 2017 BCCA 139, 2017 CarswellBC 945	Leave refused
93	<i>Island Savings Credit Union v Brunner</i>	7-Jul-16	2016 BCCA 308, 2016 CarswellBC 2187	Limited appeal	N/A	Leave refused (after conversion to notice of appeal)
94	<i>Smithies Holdings Inc v RCV Holdings Ltd</i>	12-Jul-16	2016 BCCA 311, 91 BCLR (5th) 19	Limited appeal	N/A	Notices of appeal struck
95	<i>MacLachan v Nadeau</i>	11-Oct-16	2016 BCCA 410, 2016 CarswellBC 3018	Limited appeal	Aff'd: 2017 BCCA 326, 2 BCLR (6th) 223	Leave refused
96	<i>Tri-City Capital Corp v 0942317 BC Ltd</i>	18-Oct-16	2016 BCCA 407, 3 CPC (8th) 277	Limited appeal	N/A	Appeal dismissed with permission to re-apply for leave
97	<i>Pixhug Media Inc v Steeves</i>	3-Nov-16	2016 BCCA 433, 92 BCLR (5th) 20	Final	N/A	N/A
98	<i>M(AAA) v British Columbia (Director of Adoption)</i>	25-Nov-16	Unreported	Final	Rev'd: 2017 BCCA 27, 95 CPC (7th) 215	N/A
99	<i>Fraser Valley Community College Inc v Private Career Training Institutions Agency</i>	6-Dec-16	2016 BCCA 488, 2016 CarswellBC 3407	Limited appeal	N/A	Appeal dismissed
100	<i>Denton v British Columbia (Workers' Compensation Appeal Tribunal)</i>	30-Mar-17	2017 BCCA 138, 97 BCLR (5th) 133	Final	N/A	N/A

101	<i>311165 BC Ltd v Derewenko</i>	4-May-17	2017 BCCA 182, 2017 CarswellBC 1903	Final	N/A	N/A
102	<i>Cambie Surgeries Corporation v British Columbia (Attorney General)</i>	31-Jul-17	2017 BCCA 287, 99 BCLR (5th) 338	Limited appeal	N/A	Leave denied
103	<i>Hu v Ting</i>	23-Aug-17	2017 BCCA 305, 1 BCLR (6th) 285	Final	N/A	N/A
104	<i>Smith v Smith</i>	7-Sep-17	2017 BCCA 319, [2017] BCJ No 1855	Final	N/A	N/A
105	<i>Price v Robson</i>	1-Dec-17	2017 BCCA 419, 14 CPC (8th) 20	Limited appeal	N/A	Appeal dismissed

**APPENDIX J – SURVEY QUESTIONS**

1. Has the Supreme Court's decision in *Hryniak v Mauldin* affected your approach to and/or experience in practice in recent years (since 2014)?
  - a) Yes
  - b) No
  - c) Not sure
  - d) What is *Hryniak v Mauldin*?
2. Explain your answer to Question 1.
3. Have the 2010 amendments to the Ontario *Rules of Civil Procedure* affected your approach to and/or experience in practice in recent years?
  - a) Yes
  - b) No
  - c) Not sure
  - d) What amendments?
4. Explain your answer to Question 3.
5. Has there been a noticeable change in how quickly you have resolved civil cases in recent years (since 2010)?
  - a) Yes – they are being resolved more quickly
  - b) Yes – they are taking longer to resolve
  - c) No change
  - d) Not sure
6. Explain your answer to Question 5.
7. Adjusting for inflation, has there been a noticeable change in the financial expense (in terms of legal fees and disbursements) required to resolve civil actions in recent years (since 2010)?
  - a) Yes – even adjusting for inflation, litigation is becoming more expensive
  - b) Yes – adjusting for inflation, litigation is becoming less expensive
  - c) No change
  - d) Not sure
8. Explain your answer to Question 7.
9. Has there been an increase or decrease in the rate of settlement in recent years (since 2010)?
  - a) Increase
  - b) Decrease
  - c) No change
  - d) Not sure
10. Explain your answer to Question 9.



11. Has there been an increase or decrease in the quality of settlements and/or clients' satisfaction from settlements in recent years (since 2010)?
  - a) Increase
  - b) Decrease
  - c) No change
  - d) Not sure
12. Explain your answer to Question 11.
13. Has there been an increase or decrease in the use of alternative dispute resolution in recent years (since 2010)?
  - a) Increase
  - b) Decrease
  - c) No change
  - d) Not sure
14. Explain your answer to Question 13.
15. Do your answers to the foregoing questions change depending on whether a self-represented litigant is involved in a proceeding?
  - a) Yes
  - b) No
  - c) Not sure
16. Explain your answer to Question 15
17. Do your answers to the foregoing questions change depending on the demographic status of the litigants involved (*e.g.*, their race and/or gender)?
  - a) Yes
  - b) No
  - c) Not sure
18. Explain your answer to Question 17
19. Do you believe that the Supreme Court of Canada's 2016 decision in *R v Jordan* has had any effects on access to civil justice?
  - a) Yes – *Jordan* has helped access to civil justice
  - b) Yes – *Jordan* has hurt access to civil justice
  - c) No – *Jordan* has had no effects on access to civil justice
  - d) Not sure
  - e) I do not know what *Jordan* is
20. Explain your answer to Question 19.
21. Do you believe a “culture shift” has been occurring this decade in the conduct of civil litigation oriented towards promoting access to justice?
  - a) Yes
  - b) No
  - c) Not sure

22. Explain your answer to Question 21. If you answered “Yes”, please explain what the culture shift looks like. If you answered “No”, please explain whether you believe there *should* be a culture shift and what it should look like.
23. Do you self-identify as:
- a) Male
  - b) Female
  - c) Other
  - d) Prefer Not to Answer
24. Are you a member of a racialized community?
- a) Yes
  - b) No
  - c) Prefer Not to Answer
25. Do you self-identify as a member of the LGBT+ community?
- a) Yes
  - b) No
  - c) Prefer Not to Answer
26. Do you identify as a person with a disability?
- a) Yes
  - b) No
  - c) Prefer Not to Answer
27. Do you identify as an Indigenous Canadian?
- a) Yes
  - b) No
  - c) Prefer Not to Answer
28. When were you called to the bar?

**APPENDIX K – RESPONDENTS’ ANSWERS BY YEAR OF CALL**

QUESTION	GROUP	ANSWERS			
1 ( <i>Hryniak’s</i> Effects)	<b>TOTAL</b>	<b>48.9% Yes</b>	<b>28.9% No</b>	<b>2.2% What is <i>Hryniak</i>?</b>	<b>20% Not Sure</b>
	Pre-2010	53.3% Yes	35.6% No	0 What is <i>Hryniak</i> ?	11.1% Not Sure
	Post-2010	42.9% Yes	23.8% No	4.8% What is <i>Hryniak</i> ?	28.6% Not Sure
3 (2010 Amendments’ Effects)	<b>TOTAL</b>	<b>33.3% Yes</b>	<b>48.9% No</b>	<b>1.1% What Amendments?</b>	<b>16.7% Not Sure</b>
	Pre-2010	48.9% Yes	46.7% No	0 What Amendments	4.4% Not Sure
	Post-2010	16.7% Yes	52.4% No	2.4% What Amendments?	28.6% Not Sure
5 (Length of Litigation)	<b>TOTAL</b>	<b>12.2% Longer</b>	<b>4.4% Quicker</b>	<b>52.2% No Change</b>	<b>31.1% Not Sure</b>
	Pre-2010	24.4% Longer	4.4% Quicker	57.8% No Change	13.3% Not Sure
	Post-2010	4.8% Longer	0 Quicker	47.6% No Change	47.6% Not Sure
7 (Cost of Litigation)	<b>TOTAL</b>	<b>38.9% More</b>	<b>2.2% Less</b>	<b>20% No Change</b>	<b>38.9% Not Sure</b>
	Pre-2010	53.3% More	4.4% Less	24.4% No Change	17.8% Not Sure
	Post-2010	23.8% More	0 Less	14.3% No Change	61.9% Not Sure
9 (Rate of Settlement)	<b>TOTAL</b>	<b>8.9% Increase</b>	<b>6.7% Decrease</b>	<b>40% No Change</b>	<b>44.4% Not Sure</b>
	Pre-2010	11.1% Increase	6.7% Decrease	48.9% No Change	33.3% Not Sure
	Post-2010	7.1% Increase	7.1% Decrease	31% No Change	54.8% Not Sure
11 (Satisfaction with Settlement)	<b>TOTAL</b>	<b>6.7% Increase</b>	<b>5.6% Decrease</b>	<b>48.3% No Change</b>	<b>39.3% Not Sure</b>
	Pre-2010	6.7% Increase	8.9% Decrease	60% No Change	24.4% Not Sure
	Post-2010	4.8% Increase	2.4% Decrease	38.1% No Change	54.8% Not Sure
13 (Use of ADR)	<b>TOTAL</b>	<b>26.7% Increase</b>	<b>2.2% Decrease</b>	<b>38.9% No Change</b>	<b>32.2% Not Sure</b>
	Pre-2010	31.1% Increase	4.4% Decrease	51.1% No Change	13.3% Not Sure

QUESTION	GROUP	ANSWERS				
	Post-2010	21.4% Increase	0 Decrease	26.2% No Change	52.4% Not Sure	
15 (Relevance of a Self-Rep)	<b>TOTAL</b>	<b>34.4% Yes</b>		<b>33.3% No</b>	<b>32.2% Not Sure</b>	
	Pre-2010	33.3% Yes		40% No	26.7% Not Sure	
	Post-2010	35.7% Yes		28.6% No	35.7% Not Sure	
17 (Relevance of Litigants' Demographics)	<b>TOTAL</b>	<b>9.1% Yes</b>		<b>55.7% No</b>	<b>35.2% Not Sure</b>	
	Pre-2010	13.3% Yes		68.9% No	17.8% Not Sure	
	Post-2010	5% Yes		45% No	50% Not Sure	
19 (Effects of <i>Jordan</i> )	<b>TOTAL</b>	<b>3.3% Helped</b>	<b>50% Hurt</b>	<b>7.8% No Effect</b>	<b>7.8% Unaware of <i>Jordan</i></b>	<b>31.1% Not Sure</b>
	Pre-2010	4.4% Helped	62.2% Hurt	8.9% No Effect	2.2% Unaware of <i>Jordan</i>	22.2% Not Sure
	Post-2010	2.4% Helped	40.5% Hurt	7.1% No Effect	9.5% Unaware of <i>Jordan</i>	40.5% Not Sure
21 (Presence of Culture Shift)	<b>TOTAL</b>	<b>28.9% Yes</b>		<b>46.7% No</b>	<b>24.4% Not Sure</b>	
	Pre-2010	24.4% Yes		53.3% No	22.2% Not Sure	
	Post-2010	33.3% Yes		40.5% No	26.2% Not Sure	

## APPENDIX L – RESPONDENTS’ ANSWERS BY GENDER

QUESTION	GROUP	ANSWERS			
1 ( <i>Hryniak</i> 's Effects)	<b>TOTAL</b>	<b>48.9% Yes</b>	<b>28.9% No</b>	<b>2.2% What is <i>Hryniak</i>?</b>	<b>20% Not Sure</b>
	Male	54.9% Yes	25.5% No	2% What is <i>Hryniak</i>	17.6% Not Sure
	Female	38.9% Yes	36.1% No	0	25% Not Sure
3 (2010 Amendments' Effects)	<b>TOTAL</b>	<b>33.3% Yes</b>	<b>48.9% No</b>	<b>1.1% What Amendments?</b>	<b>16.7% Not Sure</b>
	Male	33.3% Yes	51% No	2.4% What Amendments?	13.7% Not Sure
	Female	33.3% Yes	44.4% No	0	22.2% Not Sure
5 (Length of Litigation)	<b>TOTAL</b>	<b>12.2% Longer</b>	<b>4.4% Quicker</b>	<b>52.2% No Change</b>	<b>31.1% Not Sure</b>
	Male	15.7% Longer	2.0% Quicker	56.9% No Change	25.5% Not Sure
	Female	8.3% Longer	5.6% Quicker	47.2% No Change	38.9% Not Sure
7 (Cost of Litigation)	<b>TOTAL</b>	<b>38.9% More</b>	<b>2.2% Less</b>	<b>20% No Change</b>	<b>38.9% Not Sure</b>
	Male	45.1% More	3.9% Less	23.5% No Change	27.4% Not Sure
	Female	30.6% More	0 Less	16.7% No Change	52.7% Not Sure
9 (Rate of Settlement)	<b>TOTAL</b>	<b>8.9% Increase</b>	<b>6.7% Decrease</b>	<b>40% No Change</b>	<b>44.4% Not Sure</b>
	Male	5.9% Increase	5.9% Decrease	41.1% No Change	47.1% Not Sure
	Female	13.9% Increase	8.3% Decrease	38.9% No Change	38.9% Not Sure
11 (Satisfaction with Settlement)	<b>TOTAL</b>	<b>6.7% Increase</b>	<b>5.6% Decrease</b>	<b>48.3% No Change</b>	<b>39.3% Not Sure</b>
	Male	2% Increase	6% Decrease	52% No Change	40% Not Sure
	Female	13.9% Increase	5.6% Decrease	44.4% No Change	36.1% Not Sure
13 (Use of ADR)	<b>TOTAL</b>	<b>26.7% Increase</b>	<b>2.2% Decrease</b>	<b>38.9% No Change</b>	<b>32.2% Not Sure</b>
	Male	23.5% Increase	2% Decrease	39.2% No Change	33.3% Not Sure

QUESTION	GROUP	ANSWERS				
	Female	33.3% Increase	0 Decrease	38.9% No Change	27.8% Not Sure	
15 (Relevance of a Self-Rep)	<b>TOTAL</b>	<b>34.4% Yes</b>		<b>33.3% No</b>		<b>32.2% Not Sure</b>
	Male	33.3% Yes		39.2% No		27.5% Not Sure
	Female	36.1% Yes		25% No		38.9% Not Sure
17 (Relevance of Litigants' Demographics)	<b>TOTAL</b>	<b>9.1% Yes</b>		<b>55.7% No</b>		<b>35.2% Not Sure</b>
	Male	6.3% Yes		62.5% No		31.2% Not Sure
	Female	13.9% Yes		50% No		36.1% Not Sure
19 (Effects of <i>Jordan</i> )	<b>TOTAL</b>	<b>3.3% Helped</b>	<b>50% Hurt</b>	<b>7.8% No Effect</b>	<b>7.8% Unaware of <i>Jordan</i></b>	<b>31.1% Not Sure</b>
	Male	5.8% Helped	56.9% Hurt	9.8% No Effect	2.0% Unaware of <i>Jordan</i>	25.5% Not Sure
	Female	0 Helped	44.4% Hurt	2.8% No Effect	16.7% Unaware of <i>Jordan</i>	36.1% Not Sure
21 (Presence of Culture Shift)	<b>TOTAL</b>	<b>28.9% Yes</b>		<b>46.7% No</b>		<b>24.4% Not Sure</b>
	Male	27.4% Yes		45.1% No		27.4% Not Sure
	Female	33.3% Yes		44.4% No		22.2% Not Sure

## APPENDIX M – RESPONDENTS’ ANSWERS BY RACE

QUESTION	GROUP	ANSWERS			
1 ( <i>Hryniak</i> 's Effects)	<b>TOTAL</b>	<b>48.9% Yes</b>	<b>28.9% No</b>	<b>2.2% What is <i>Hryniak</i>?</b>	<b>20% Not Sure</b>
	Racialized	50% Yes	14.3% No	0 What is <i>Hryniak</i> ?	35.7% Not Sure
	Non-Racialized	46.5% Yes	33.8% No	1.4% What is <i>Hryniak</i> ?	18.3% Not Sure
3 (2010 Amendments' Effects)	<b>TOTAL</b>	<b>33.3% Yes</b>	<b>48.9% No</b>	<b>1.1% What Amendments?</b>	<b>16.7% Not Sure</b>
	Racialized	42.9% Yes	28.6% No	0	28.6% Not Sure
	Non-Racialized	31% Yes	52.1% No	1.4% What Amendments?	15.5% Not Sure
5 (Length of Litigation)	<b>TOTAL</b>	<b>12.2% Longer</b>	<b>4.4% Quicker</b>	<b>52.2% No Change</b>	<b>31.1% Not Sure</b>
	Racialized	14.3% Longer	0 Quicker	28.6% No Change	57.1% Not Sure
	Non-Racialized	12.7% Longer	1.4% Quicker	59.2% No Change	26.8% Not Sure
7 (Cost of Litigation)	<b>TOTAL</b>	<b>38.9% More</b>	<b>2.2% Less</b>	<b>20% No Change</b>	<b>38.9% Not Sure</b>
	Racialized	35.7% More	0 Less	14.3% No Change	50% Not Sure
	Non-Racialized	40.8% More	1.4% Less	22.5% No Change	35.2% Not Sure
9 (Rate of Settlement)	<b>TOTAL</b>	<b>8.9% Increase</b>	<b>6.7% Decrease</b>	<b>40% No Change</b>	<b>44.4% Not Sure</b>
	Racialized	14.3% Increase	14.3% Decrease	28.6% No Change	42.9% Not Sure
	Non-Racialized	7.0% Increase	5.6% Decrease	42.7% No Change	42.7% Not Sure
11 (Satisfaction with Settlement)	<b>TOTAL</b>	<b>6.7% Increase</b>	<b>5.6% Decrease</b>	<b>48.3% No Change</b>	<b>39.3% Not Sure</b>
	Racialized	0	15.4% Decrease	38.5% No Change	46.2% Not Sure
	Non-Racialized	5.6% Increase	4.2% Decrease	52.1% No Change	38% Not Sure
13 (Use of ADR)	<b>TOTAL</b>	<b>26.7% Increase</b>	<b>2.2% Decrease</b>	<b>38.9% No Change</b>	<b>32.2% Not Sure</b>
	Racialized	28.6% Increase	0 Decrease	21.4% No Change	50% Not Sure

QUESTION	GROUP	ANSWERS				
		28.2% Increase	2.8% Decrease	42.3% No Change	26.8% Not Sure	
15 (Relevance of a Self-Rep)	<b>TOTAL</b>	<b>34.4% Yes</b>		<b>33.3% No</b>	<b>32.2% Not Sure</b>	
	Racialized	35.7% Yes		7.1% No	57.1% Not Sure	
	Non-Racialized	35.2% Yes		36.6% No	28.2% Not Sure	
17 (Relevance of Litigants' Demographics)	<b>TOTAL</b>	<b>9.1% Yes</b>		<b>55.7% No</b>	<b>35.2% Not Sure</b>	
	Racialized	28.6% Yes		21.4% No	50% Not Sure	
	Non-Racialized	5.8% Yes		63.8% No	30.4% Not Sure	
19 (Effects of <i>Jordan</i> )	<b>TOTAL</b>	<b>3.3% Helped</b>	<b>50% Hurt</b>	<b>7.8% No Effect</b>	<b>7.8% Unaware of <i>Jordan</i></b>	<b>31.1% Not Sure</b>
	Racialized	14.3% Helped	42.9% Hurt	7.1% No Effect	7.1% Unaware of <i>Jordan</i>	28.6% Not Sure
	Non-Racialized	1.4% Helped	54.9% Hurt	5.6% No Effect	8.5% Unaware of <i>Jordan</i>	29.6% Not Sure
21 (Presence of Culture Shift)	<b>TOTAL</b>	<b>28.9% Yes</b>		<b>46.7% No</b>	<b>24.4% Not Sure</b>	
	Racialized	21.4% Yes		42.9% No	35.7% Not Sure	
	Non-Racialized	31.0% Yes		45.1% No	23.9% Not Sure	



**APPENDIX N – YORK UNIVERSITY ETHICS APPROVAL,  
CERTIFICATE # STU - 070, DATED MAY 22, 2018**



**OFFICE OF  
RESEARCH  
ETHICS (ORE)  
5<sup>th</sup> Floor, Kaneff  
Tower**

4700 Keele St.  
Toronto ON  
Canada M3J 1P3  
Tel 416 736 5914  
Fax 416 736-5512  
[www.research.yorku.ca](http://www.research.yorku.ca)

<b>Certificate #:</b>	<b>STU 2018 - 070</b>
<b>Approval Period:</b>	<b>06/12/18-06/12/19</b>

## ETHICS APPROVAL

**To:** Gerard Kennedy  
Graduate Student of Osgoode Hall Law School

**From:** Alison M. Collins-Mrakas, Sr. Manager and Policy Advisor, Research Ethics  
*(on behalf of Veronica Jamnik, Chair, Human Participants Review Committee)*

**Date:** Tuesday, June 12, 2018

**Title:** **Balancing Certainty and Substantive Justice in Achieving Access to Justice: A Civil Procedure Journey Through the 2010s**

**Risk Level:**  Minimal Risk  More than Minimal Risk

**Level of Review:**  Delegated Review  Full Committee Review

I am writing to inform you that this research project, "Balancing Certainty and Substantive Justice in Achieving Access to Justice: A Civil Procedure Journey Through the 2010s" has received ethics review and approval by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines.

Note that approval is granted for one year. Ongoing research – research that extends beyond one year – must be renewed prior to the expiry date.

Any changes to the approved protocol must be reviewed and approved through the amendment process by submission of an amendment application to the HPRC prior to its implementation.

Any adverse or unanticipated events in the research should be reported to the Office of Research ethics ([ore@yorku.ca](mailto:ore@yorku.ca)) as soon as possible.

For further information on researcher responsibilities as it pertains to this approved research ethics protocol, please refer to the attached document, "RESEARCH ETHICS: PROCEDURES to ENSURE ONGOING COMPLIANCE".

Should you have any questions, please feel free to contact me at:

Yours sincerely,

Alison M. Collins-Mrakas M.Sc., LL.M.  
Sr. Manager and Policy Advisor,  
Office of Research Ethics

## RESEARCH ETHICS: PROCEDURES to ENSURE ONGOING COMPLIANCE

Upon receipt of an ethics approval certificate, researchers are reminded that they are required to ensure that the following measures are undertaken so as to ensure on-going compliance with Senate and TCPS ethics guidelines:

1. **RENEWALS:** Research Ethics Approval certificates are subject to annual renewal. It is the responsibility of researchers to ensure the timely submission of renewals.
  - a. As a courtesy, researchers will be reminded by ORE, in advance of certificate expiry, that the certificate must be renewed. Please note, however, it is the expectation that researchers will submit a renewal application prior to the expiration of ethics certificate(s)
  - b. **Failure to renew an ethics approval certificate (or to notify ORE that no further research involving human participants will be undertaken) may result in suspension of research cost fund and access to research funds may be suspended/ withheld.**
2. **AMENDMENTS:** Amendments must be reviewed and approved **PRIOR** to undertaking/making the proposed amendments to an approved ethics protocol
3. **END OF PROJECT:** ORE must be notified when a project is complete;
4. **ADVERSE EVENTS:** Adverse events must be reported to ORE as soon as possible;
5. **POST APPROVAL MONITORING:**
  - a. More than minimal risk research may be subject to post approval monitoring as per TCPS guidelines;
  - b. A spot sample of minimal risk research may similarly be subject to Post Approval Monitoring as per TCPS guidelines

**FORMS:** As per the above, the following forms relating to on-going research ethics compliance are available on the Research website:

- a. Renewal
- b. Amendment
- c. End of Project
- d. Adverse Event

**APPENDIX O – YORK UNIVERSITY ETHICS RENEWAL-AMENDMENT  
APPROVAL, CERTIFICATE # STU - 070, DATED MAY 22, 2019**



OFFICE OF  
RESEARCH  
ETHICS (ORE)  
369 York Lanes  
4700 Keele St.  
Toronto ON  
Canada M3J 1P3  
Tel 416 736 5914  
Fax 416 736-5512  
www.research.yorku.ca

Certificate #:	STU 2018-070
Initial Approval:	06/12/18-06/12/19
Amendments:	Amendment approved: 05/22/19
Renewals:	05/22/19-05/22/20
Current Approval Period:	05/22/19-05/22/20

### ETHICS RENEWAL- AMENDMENT APPROVAL

**To:** Gerard Kennedy  
Graduate Student of Osgoode Hall Law School

**From:** Alison M. Collins-Mrakas, Sr. Manager and Policy Advisor, Research Ethics  
(on behalf of Veronica Jannik, Chair, Human Participants Review Committee)

**Date:** Wednesday May 22, 2019

**Title:** **Balancing Certainty and Substantive Justice in Achieving Access to Justice:  
A Civil Procedure Journey Through the 2010s**

**Risk Level:**  Minimal Risk  More than Minimal Risk

**Level of Review:**  Delegated Review  Full Committee Review

With respect to your research project entitled, "Balancing Certainty and Substantive Justice in Achieving Access to Justice: A Civil Procedure Journey Through the 2010s", the committee notes that, as there are no substantive changes to either the methodology employed or the risks to participants in and/or any other aspect of the research project, a renewal of approval re the above project is granted.

Any changes to the approved protocol must be reviewed and approved through the amendment process by submission of an amendment application to the HPRC prior to its implementation.

Ongoing research – research that extends beyond one year – must be renewed prior to the expiry date.

Any adverse or unanticipated events in the research should be reported to the Office of Research ethics ([ore@yorku.ca](mailto:ore@yorku.ca)) as soon as possible.

For further information on researcher responsibilities as it pertains to this approved research ethics protocol, please refer to the attached document, "RESEARCH ETHICS: PROCEDURES to ENSURE ONGOING COMPLIANCE".

Should you have any questions, please feel free to contact me at [redacted]

Yours sincerely,

Alison M. Collins-Mrakas M.Sc., LL.M  
Sr. Manager and Policy Advisor,  
Office of Research Ethics

## RESEARCH ETHICS: PROCEDURES to ENSURE ONGOING COMPLIANCE

Upon receipt of an ethics approval certificate, researchers are reminded that they are required to ensure that the following measures are undertaken so as to ensure on-going compliance with Senate and TCPS ethics guidelines:

1. **RENEWALS:** Research Ethics Approval certificates are subject to annual renewal. Failure to renew an ethics approval certificate or (to notify ORE that no further research involving human participants will be undertaken) will result in the closure of the protocol. No further research activities may be undertaken until such time as a new protocol has been reviewed and approved. Further, it may result in suspension of research cost fund and access to research funds may be suspended/withheld.
2. **AMENDMENTS:** Amendments must be reviewed and approved **PRIOR** to undertaking/making the proposed amendments to an approved ethics protocol;
3. **END OF PROJECT:** ORE must be notified when a project is complete;
4. **ADVERSE EVENTS:** Adverse events must be reported to ORE as soon as possible;
5. **POST APPROVAL MONITORING:**
  - a. More than minimal risk research may be subject to post approval monitoring as per TCPS guidelines;
  - b. A spot sample of minimal risk research may similarly be subject to Post Approval Monitoring as per TCPS guidelines.

**FORMS:** As per the above, the following forms relating to on-going research ethics compliance are available on the Research website:

- a. Renewal
- b. Amendment
- c. End of Project
- d. Adverse Event

**APPENDIX P – YORK UNIVERSITY ETHICS AMENDMENT APPROVAL,  
CERTIFICATE # STU - 070, DATED JULY 18, 2019**



OFFICE OF  
RESEARCH  
ETHICS (ORE)  
309 York Lane  
4700 Keele St.  
Toronto ON  
Canada M3J 1P3  
Tel 416 736 5914  
Fax 416 736-5512  
www.research.yorku.ca

Certificate #:	STU 2018-070
Initial Approval:	06/12/18-06/12/19
Amendments:	Amendment approved: 05/22/19 2 <sup>nd</sup> Amendment approved: 07/18/19
Renewals:	05/22/19-05/22/20
Current Approval Period:	05/22/19-05/22/20

## ETHICS AMENDMENT APPROVAL

**To:** Gerard Kennedy  
Graduate Student of Osgoode Hall Law School

**From:** Alison M. Collins-Mrakas, Sr. Manager and Policy Advisor, Research Ethics  
(on behalf of Veronica Jannik, Chair, Human Participants Review Committee)

**Date:** Thursday July 18, 2019

**Title:** **Balancing Certainty and Substantive Justice in Achieving Access to Justice:  
A Civil Procedure Journey Through the 2010s**

**Risk Level:**  Minimal Risk  More than Minimal Risk

**Level of Review:**  Delegated Review  Full Committee Review

With respect to your research project entitled, "Balancing Certainty and Substantive Justice in Achieving Access to Justice: A Civil Procedure Journey Through the 2010s", the committee notes that, as there are no substantive changes to either the methodology employed or the risks to participants in and/or any other aspect of the research project, a renewal of approval re the above project is granted.

Any changes to the approved protocol must be reviewed and approved through the amendment process by submission of an amendment application to the HPRC prior to its implementation.

Ongoing research – research that extends beyond one year – must be renewed prior to the expiry date.

Any adverse or unanticipated events in the research should be reported to the Office of Research ethics ([ore@yorku.ca](mailto:ore@yorku.ca)) as soon as possible.

For further information on researcher responsibilities as it pertains to this approved research ethics protocol, please refer to the attached document, "RESEARCH ETHICS: PROCEDURES to ENSURE ONGOING COMPLIANCE".

Should you have any questions, please feel free to contact me at [redacted]

Yours sincerely,

Alison M. Collins-Mrakas M.Sc., LL.M.  
Sr. Manager and Policy Advisor,  
Office of Research Ethics

### RESEARCH ETHICS: PROCEDURES to ENSURE ONGOING COMPLIANCE

Upon receipt of an ethics approval certificate, researchers are reminded that they are required to ensure that the following measures are undertaken so as to ensure on-going compliance with Senate and TCPS ethics guidelines:

1. **RENEWALS:** Research ethics Approval certificates are subject to annual renewal. Failure to renew an ethics approval certificate or (to notify ORE that no further research involving human participants will be undertaken) will result in the closure of the protocol. No further research activities may be undertaken until such time as a new protocol has been reviewed and approved. Further, it may result in suspension of research cost fund and access to research funds may be suspended/withheld.
2. **AMENDMENTS:** Amendments must be reviewed and approved PRIOR to undertaking/making the proposed amendments to an approved ethics protocol.
3. **END OF PROJECT:** ORE must be notified when a project is complete;
4. **ADVERSE EVENTS:** Adverse events must be reported to ORE as soon as possible;
5. **POST APPROVAL MONITORING:**
  - a. More than minimal risk research may be subject to post approval monitoring as per TCPS guidelines;
  - b. A spot sample of minimal risk research may similarly be subject to Post Approval Monitoring as per TCPS guidelines.

**FORMS:** As per the above, the following forms relating to on-going research ethics compliance are available on the Research website.

- a. Renewal
- b. Amendment
- c. End of Project
- d. Adverse Event

## APPENDIX Q – INFORMED CONSENT FORM

### Informed Consent Form – Instructions and Template

Informed consent documentation is required whenever there are human participants involved in research. The following sections are required in all informed consent documents, and this instructions sheet is intended to assist students in the preparation of informed consent documentation. The Office of the Dean, Graduate Studies has created a template which is attached to these instructions, and which students are encouraged to utilize. Wherever necessary, informed consent documents should be modified based on the research being conducted. Informed consent documentation should be developed in conjunction with the research ethics protocol (York University Graduate Student Human Participants Research Protocol).

**Study name:**

Include the study name.

**Researchers:**

Include the names of all researchers here (student(s) and faculty).

Include your level of study, graduate program and institution.

Include your contact details, including email address and/or office phone number. Do not use a personal phone number or home address.

**Purpose of the research:**

Include a statement about the purpose of the research. Include a statement indicating how the research will be conducted, presented and reported.

**What you will be asked to do in the research:**

Include a statement regarding the role and/or responsibilities of the research participants. Include a statement regarding the estimated time commitment for the participation. If inducements will be offered, indicate them here.

**Risks and discomforts:**

Include a statement regarding any real or perceived risks or potential discomfort that may result from participation in the research. If there is a possibility of harm or discomfort it must be described and the mitigation methods must be indicated.

**Benefits of the research and benefits to you:**

Include a statement regarding any benefits of the research as well as benefits to the research participants.

**Voluntary participation:**

Include the following required text: "Your participation in the research is completely voluntary and that participants may choose to stop participating at any time. Indicate that a participant's decision not to continue participating will not influence their relationship or the nature of their relationship with researchers or with staff of York University either now or in the future."

**Withdrawal from the study:**

Include the following required text: "You may stop participating in the study at any time, for any reason, if you so decide. Your decision to stop participating, or to refuse to answer particular questions, will not affect your relationship with the researchers, York University, or any other group associated with this project. In the event that you withdraw from the study, all associated data collected will be immediately destroyed wherever possible."

If you are offering inducements, the following text is also required: "If you decide to stop participating, you will still be eligible to receive the promised pay for agreeing to be in the project".

**Confidentiality:**

Indicate whether or not the interview documentation/recording of the participant will be associated with identifying information. Indicate how the data will be collected (e.g. handwritten notes, video/audio tapes, digital device, etc.). Indicate how the data will be stored, who will have access to it, and that it will be stored securely. Indicate how long the data will be stored and whether or not it will be destroyed after the study, and how it will be destroyed. If the data will not be destroyed, indicate where and how it will be archived.

Include the following required text: "Confidentiality will be provided to the fullest extent possible by law."

#### Questions about the research?

Indicate that if a research participant has questions about the research in general or their role in the study that they should contact the researcher or their supervisor. Provide the supervisor's name and telephone number and/or email address. Indicate that the graduate program office may also be contacted. Provide the contact information for the graduate program office.

Include the following required text: "This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, you may contact the Senior Manager and Policy Advisor for the Office of Research Ethics, 5<sup>th</sup> Floor, York Research Tower, York University, telephone 416-736-5914 or e-mail [ore@yorku.ca](mailto:ore@yorku.ca)"

#### Legal Rights and Signatures:

Include the following required text:

"I <<fill in the research participant's name here>>, consent to participate in <<insert study name here>> conducted by <<insert investigator name here>>. I have understood the nature of this project and wish to participate. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

**Signature** \_\_\_\_\_

Participant's name

**Date** \_\_\_\_\_

**Signature** \_\_\_\_\_

Principal Investigator's name

**Date** \_\_\_\_\_

#### Optional: Additional consent

If you require additional consent (e.g., for video/audio recording, to waive anonymity, to authorize the use of photographs, to use associated data, etc.) include check boxes or request additional signatures.



**Informed Consent Form**

**Study name**

"Balancing Certainty and Substantive Justice in Achieving Access to Justice: A Civil Procedure Journey Through the 2010s"

**Researchers**

Researcher name Gerard Kennedy

Doctoral Candidate

Graduate Program in Law

Email address

**Purpose of the research**

I am assessing whether the spirit of the 2010 amendments to Ontario's Rules of Civil Procedure (the "Amendments") and the Supreme Court of Canada's 2014 decision in *Hryniak v. Mauldin* ("Hryniak") have been effective in achieving a "culture shift" in the conduct of civil litigation to achieve access to justice outside the narrow context of summary judgment. Your answers will hopefully be published (anonymously) as a stand-alone article which will be part of my doctoral thesis.

**What you will be asked to do in the research**

Answer 28 questions on a computer survey, through Microsoft Word or on a hard copy.

**Risks and discomforts**

This will take about approximately 10-20 minutes of your time.

**Benefits of the research and benefits to you**

The research should assess the effectiveness of the Amendments and Hryniak, to help us understand what is, and is not, working in the realm of achieving access to justice through civil procedure reform. This should help achieve access to justice in the future. No other incentives are offered, however.

**Voluntary participation:** Your participation in the study is completely voluntary and you may choose to stop participating at any time. Your decision not to volunteer will not influence the relationship you may have with the researchers or study staff or the nature of your relationship with York University either now, or in the future.

**Withdrawal from the study:** You can stop participating in the study at any time, for any reason, if you so decide. Your decision to stop participating, or to refuse to answer particular questions, will not affect your relationship with the researchers, York University, or any other group associated with this project. In the event you withdraw from the study, all associated data collected will be immediately destroyed wherever possible.

You may also choose not to answer any questions.

**Confidentiality**

Your answers will be securely stored on a password-protected computer server, and/or kept in locked offices, and destroyed after Mr. Kennedy finishes his doctoral studies and in any event no later than August 1, 2022. The data will be anonymously reported and will be forwarded to Mr. Kennedy through an anonymous interlocutor if preferred. Given the demographic questions and the nature of email, anonymity

Confidentiality will be provided to the fullest extent possible by law.

**Questions about the research?**

If you have any questions about the ethics of this research project, please contact:

- a) me at Osgoode Hall Law School, 4700 Keele Street, Toronto, ON M3J 1P3
- b) Osgoode's Graduate Program at the same address,
- c) Manager, Office of Research Ethics, York University, 309 York Lanes,

This research has been reviewed and approved by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, you may contact the Senior Manager and Policy Advisor for the Office of Research Ethics, 5<sup>th</sup> Floor, York Research Tower, York University, teleph

**Legal rights and signatures:**

I, \_\_\_\_\_, consent to participate in

"Balancing Certainty and Substantive Justice in Achieving Access to Justice: A Civil Procedure Journey"

conducted by Gerard Kennedy. I have understood the nature of this project and wish to participate. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

Signature  
Participant

Date

Signature  
Principal Investigator

Date

**Optional: Additional consent:**

**APPENDIX R – TEXT OF RULE 20 OF THE RULES OF CIVIL PROCEDURE, RRO  
1990, REG 194**

**RULE 20 SUMMARY JUDGMENT**

*WHERE AVAILABLE*

*To Plaintiff*

**20.01** (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (1).

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just. R.R.O. 1990, Reg. 194, r. 20.01 (2).

*To Defendant*

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

*EVIDENCE ON MOTION*

**20.02** (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. O. Reg. 438/08, s. 12.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial. O. Reg. 438/08, s. 12.

*FACTUMS REQUIRED*

**20.03** (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 14.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 4.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 4.

(4) REVOKED: O. Reg. 394/09, s. 4.

### *DISPOSITION OF MOTION*

#### *General*

**20.04** (1) REVOKED: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

- (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
- (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

#### *Powers*

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

#### *Oral Evidence (Mini-Trial)*

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. O. Reg. 438/08, s. 13 (3).

#### *Only Genuine Issue Is Amount*

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount. R.R.O. 1990, Reg. 194, r. 20.04 (3); O. Reg. 438/08, s. 13 (4).

***Only Genuine Issue Is Question Of Law***

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge. R.R.O. 1990, Reg. 194, r. 20.04 (4); O. Reg. 438/08, s. 13 (4).

***Only Claim Is For An Accounting***

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts. R.R.O. 1990, Reg. 194, r. 20.04 (5).

***WHERE TRIAL IS NECESSARY******Powers of Court***

**20.05** (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously. O. Reg. 438/08, s. 14.

***Directions and Terms***

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

- (a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;
- (b) that any motions be brought within a specified time;
- (c) that a statement setting out what material facts are not in dispute be filed within a specified time;
- (d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;
- (e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;
- (f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;
- (g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

- (h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;
- (i) that any oral examination of a witness at trial be subject to a time limit;
- (j) that the evidence of a witness be given in whole or in part by affidavit;
- (k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,
  - (i) there is a reasonable prospect for agreement on some or all of the issues, or
  - (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;
- (l) that each of the parties deliver a concise summary of his or her opening statement;
- (m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;
- (n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;
- (o) for payment into court of all or part of the claim; and
- (p) for security for costs. O. Reg. 438/08, s. 14.

### ***Specified Facts***

(3) At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice. O. Reg. 438/08, s. 14.

### ***Order re Affidavit Evidence***

(4) In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration. O. Reg. 438/08, s. 14.

### ***Order re Experts, Costs***

(5) If an order is made under clause (2) (k), each party shall bear his or her own costs. O. Reg. 438/08, s. 14.

***Failure to Comply with Order***

(6) Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just. O. Reg. 438/08, s. 14.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default. O. Reg. 438/08, s. 14.

***COSTS SANCTIONS FOR IMPROPER USE OF RULE***

**20.06** The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

- (a) the party acted unreasonably by making or responding to the motion; or
- (b) the party acted in bad faith for the purpose of delay. O. Reg. 438/08, s. 14.

***EFFECT OF SUMMARY JUDGMENT***

**20.07** A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief. R.R.O. 1990, Reg. 194, r. 20.07.

***STAY OF EXECUTION***

**20.08** Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just. R.R.O. 1990, Reg. 194, r. 20.08.

***APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS***

**20.09** Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims. R.R.O. 1990, Reg. 194, r. 20.09.