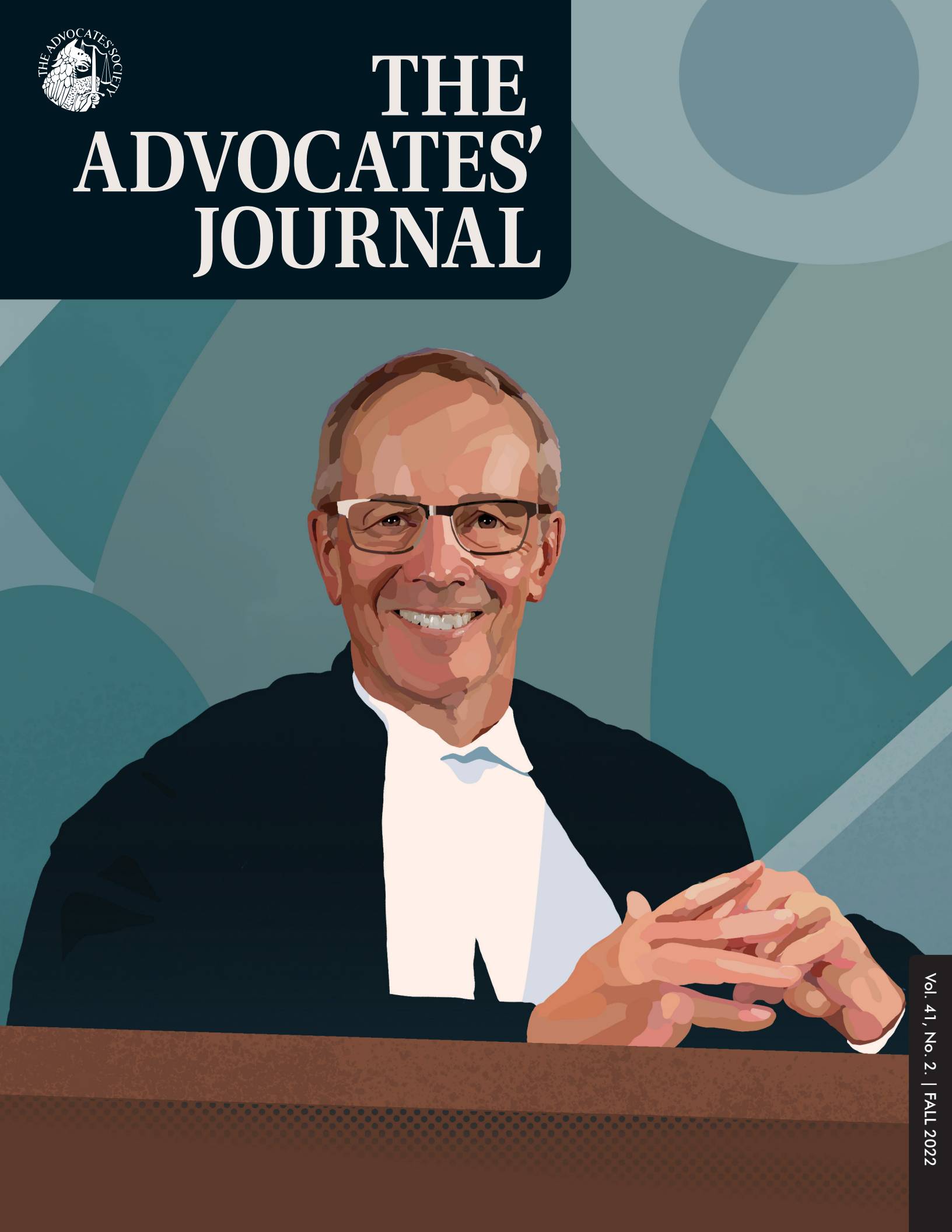
THE ADVOCATES' JOURNAL



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Farewell to the Chief

Linda Rothstein, LSM

"Society changes, law changes, institutions change. The law has to evolve and the constitution and our interpretation of the constitution has to evolve ..."
~ Chief Justice George Strathy

Chief Justice Strathy never drew attention to himself. The Chief's focus was always exclusively on the work – of the courts, and of the justice system as a whole and all those who serve it and depend on it. In June, when he announced that he would retire in August, almost a year early, advocates across the province reacted with sadness, wishing there was a way to appeal his decision.

Alas, no. As I write this in July, George Strathy will be sworn out as Chief Justice of Ontario on August 31, 2022. There will be no speeches and no public ceremony – let alone a grand retirement party. That's George.

George Strathy's auspicious talents were evident from the outset of his career. He was born into an extended family with links to the Toronto legal community, but he took no shortcuts. George was the gold medallist in his University of Toronto law school class of 1970. He was a rising star among a galaxy of stars at the pre-eminent litigation firm MacKinnon McTaggart. Always a student of the law, he became a master of diverse practice areas. Maritime law was his first love, but he also practised commercial litigation, administrative law, and constitutional litigation. He wrote two leading texts while managing a busy practice as both trial and appellate counsel. He eventually founded his own firm. When he was appointed to the Superior Court of Justice in December 2007, it was a no-brainer, as was his elevation to the Court of Appeal for Ontario just five years later. He became Chief Justice of Ontario in June 2014.

Unfailingly respectful, inside and outside the courtroom, incapable of condescension, the Chief is more introverted than extroverted but also friendly and easily amused. Ian Binnie describes him as having a flair for well-received practical jokes. Unfortunately, hubris often clings to great talent like an invisible tick to an oblivious forest walker, but there is no hubris in George Strathy. The opposite: Those who worked with him and for him describe him as having a personal style that elevates human decency and respect for others to an art form.

Rising at 4 a.m. most days and at the office by 6 a.m., he worked hard and purposively. In the dark days of the pandemic, as he managed the court's massive transition, he also met frequently with law associations and members of the bar to share a Zoom coffee, an anecdote, a conversation. He reminded them of Louis Pasteur's words, "Chance favours the prepared mind," which was the Chief's personal mantra.

The Chief Justice consciously used his position as the justice system's lead ambassador to speak out against inequality and systemic discrimination. Working closely with the Roundtable of Diversity Associations, he also actively engaged with equity-seeking communities and groups to advance the legal profession's commitment to equity, diversity, and inclusion. It was far from performative. As Shawn Richard, a former president of the Canadian Association of Black Lawyers, put it, "I never expected the Chief Justice of Ontario to spend so much time trying to really understand our experiences as people and as advocates."

In May, Chief Justice Strathy published a paper to discuss the importance of addressing mental health and the work of litigators. Deeply researched, candid, and poignant, "The Litigator and Mental Health" challenges all of us to acknowledge the damage caused by a prominent culture of shame, blame, and criticism that continues to surround those with mental illness. It's available to everyone, lawyer and layperson, on the Court of Appeal for Ontario website. Then, at the Law Society of Ontario's Mental Health Summit for Legal

Professionals, he described in public, for the first time, the very private and personal story of his mother's struggles with mental illness, explaining that he thought it important to demonstrate some of the courage of those in the profession who have spoken openly about their mental health struggles.

If there was a course on empathy competency we could all take, we would ask Chief Justice Strathy to help teach it.

For now, he will be golfing, tandem bicycling with his wife, Elyse, and spending lots of time with their five daughters and their partners and with their 10 grandchildren. You've earned a break, Chief. Our deepest appreciation for everything you've done.

*****

We are delighted to publish the 2022 winner of the David Stockwood Memorial Prize. Dayna Steinfeld's article examines the advocacy challenges for union lawyers defending allegations of sexual violence.

If you don't know the holding of *Handley Estate* by heart (and even if you do), the article in this issue on the duty to disclose settlement agreements is a must read. The second offering in our "Look Back" series describes the life of female litigators in the '80s and '90s, when the practice of law resembled a men's club on a good day and a men's locker room on a bad one. We also have a piece that untangles the interlocutory-final-order knot and one that interrogates the standard of appellate review with new insights. Our article on pro bono work will arm you with all the arguments you need to persuade your firm to support you in doing more of it. And finally, for those of you who agree that existing torts do not adequately remedy the kinds of harms that occur on the internet, we have a great article that explores a new arsenal of torts. I hope you will make time for all of these.

THE ADVOCATES' JOURNAL SUBMISSION GUIDELINES

- Content: We value articles about advocacy and advocates that are topical and crackle with currency.
- File format: We accept submissions only in Microsoft Word format.
- Length: Although we appreciate concision, there is no maximum or minimum length for *Journal* articles. The majority of our articles are between 1,500 and 3,500 words (excluding notes), but we will consider articles outside this range.
- Notes: We prefer articles without notes, but whether to include notes is at the author's discretion. (All direct quotations should be referenced, however, whether in the body of the article or in notes.) If you include notes with your submission, we prefer endnotes to footnotes. When reviewing notes after completing the final draft, double-check that cross-references ("*ibid.*," "*supra*") haven't changed because of late additions or deletions of text.
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Mixing it up on mixed questions: 20 years of *Housen*

Andrew Bernstein

The author would like to thank Asher Honickman and Professor Michael Plaxton for their generous comments on draft versions of this article. He can't say he accepted them all (probably an error on his part), but they all made him think harder about these issues.

Appellate advocates have an intimate relationship with the standard of review for mixed questions of fact and law. We have been living with it since *Housen v Nikolaisen*[1] was released more than 20 years ago. And if you have ever lived for 20 years in an intimate relationship, you know there's going to be some ups and downs. Making it difficult to win an appeal is not always a bad thing. No one wants an appellate court to be a forum to retry a case before a panel of three, five, or nine judges. But 2022 marks *Housen*'s 20th anniversary, and it is worth asking whether the appellate standard of review hinders any of the central functions of appellate courts. I will suggest that it does hinder one central function, which is ensuring consistency in the application of legal tests. As a result, I will suggest that it may be time to rethink how to deal with mixed questions of fact and law on appeal.

Housen and its justifications

The rule in *Housen* is really three rules. First, questions of law are reviewed for correctness. Second, questions of fact (including drawing inferences from the evidence) are reviewed for palpable and overriding error. Third, mixed questions of fact and law will also be reviewed for palpable and overriding error, unless they involve an "extricable error of law," in which case they will be reviewed for correctness. Between the two decades that we have been living with *Housen* and the collection of cases it was based on, these rules can seem inevitable and inviolate. But they are not. Rather, they represent deliberate choices about the function that trial and (especially) appellate courts serve in our legal system.

Questions of fact

Housen did not create the rule that factual findings are to be reviewed for "palpable and overriding error," but it did expand on both how and why it should be applied. In a previous decision – *Schwartz v Canada* – the Court explained that the deferential standard "is principally based on the assumption that the trier of fact is in a privileged position to assess the witnesses' testimony at trial."[2] *Housen* acknowledged that this

explanation alone could not justify assessing all factual findings exclusively for palpable and overriding error.[3] It therefore articulated numerous additional reasons for deference on findings of fact, including the "presumption of fitness" (i.e., trial judges are just as capable of hearing and deciding factual questions as appellate judges); limiting the number, length, and cost of appeals; and preserving the integrity of the trial process. Overall, the focus is on the appropriate and efficient use of judicial resources. In fact *Housen* cites Justice Laskin of the Court of Appeal for Ontario, explaining that the overarching reason for deference on questions of fact (whether inferences or direct findings) is "to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice."[4]

It is more than a little ironic that the frailties of appellate

courts reconsidering factual assertions is premised on an entirely unproven factual assertion: the idea that having appellate courts decide facts would not improve the quality of justice. But even assuming that the underlying factual assertion is true, we should recognize that the Court is engaging in a utilitarian analysis; even if allowing appellate courts to reconsider factual matters would *occasionally* improve the quality of justice, it is just not worth the judicial and party resources that would be required.

This is policy choice. It may well be a wise policy choice, but it is neither the only choice available nor the one that gets selected in every context. Appellate systems exist, even in Canada, where reviewing bodies have powers to disagree with the facts found at first instance.[5] But the Supreme Court makes it clear in *Housen* that, when it comes to appeals on factual issues, it does not believe the "candle" (potentially better justice) is worth the "wick" (i.e., the costs it would impose on courts).

Questions of law

Housen provided two justifications for why questions of law should be reviewed on a correctness standard. The first was described as "the principle of universality," which it defined as requiring "the same legal rules [be] applied in similar situations." Citing *Woods Manufacturing v The King*,[6] the Court reasoned, "Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined."

The "second and related" reason for the correctness standard for questions of law is the "recognized law-making role of appellate courts." This is really another appeal to universality, because "the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application." As a result, "appellate courts require a broad scope of review with respect to matters of law."[7]

This analysis has both strong similarities to and major differences with the Court's explanation for deference on findings of fact. The similarity is that it is a policy choice grounded in largely functional terms – that is, what "should" different actors do in the justice system? But the difference is that it is not grounded in a utilitarian calculus about the costs of better justice. Rather, the Court justifies its policy choice by reference to the value of certainty and consistency in the law, which it asserts is required to maintain public confidence in the legal system. While it is hard to disagree with this, it is worth asking whether it is any less true when dealing with mixed questions of fact and law.

Mixed questions

The concept of a question of mixed fact and law is frequently misunderstood. The Court in *Housen* spends considerable effort trying to explain what it is, concluding that "[q]uestions of mixed fact and law involve applying a legal standard to a set of facts," whereas "factual findings or inferences require making a conclusion of fact based on a set of facts."[8] It acknowledges that "[b]oth mixed fact and law and fact findings often involve drawing inferences" but then explains that "the difference lies in whether the inference drawn is *legal* or *factual* [emphasis added]."[9] While it is not entirely clear what a "legal inference" really means, I think the Court was saying that what gets called "mixed questions" generally turns on the *legal effect* of facts, rather than the facts themselves. But acknowledging this would have pointed out an inconvenient truth: this makes them much closer to questions of law than questions of fact.

The Court then goes on to explain that some errors involving questions of mixed fact and law constitute "extricable errors of law" (i.e., when the judge below gets the legal content of the tests wrong)[10] which rest "on an incorrect statement of the legal standard"[11] or "can be traced to an error in [the judge's] characterization of the legal standard."[12] These, it explains, should be subject to correctness review. But absent that type of error, mixed questions "involve drawing inferences from underlying facts" and are therefore "intertwined with the weight assigned to the evidence. As a result, the Court concludes that "the *numerous policy reasons* which support a deferential stance to the trial judge's inference of fact also, *to a certain extent*, support showing deference to the trial judge's inferences of mixed fact and law [emphasis added]."[13]

A close examination of the rationale shows that it might not be especially persuasive. In particular, if mixed questions are really about "legal inferences" and legal inferences are about the legal effect of facts, this raises an important question: are appellate courts showing too much deference? And what do we do about this?

Mixed feelings about mixed questions

Neither deference on questions of fact nor correctness for questions of law are especially controversial. While there may be room to quibble about whether the "palpable and overriding error" standard allows appellate courts to ignore very low-quality evidence or permits illogical inferences to stand, the principles themselves are (at a minimum) principled, and the rules are more or less straightforward to apply.

This is much less true for mixed questions of fact and law. First, whether true questions of mixed fact and law are particularly common is not a totally straightforward proposition. As the Court itself acknowledges, most "mixed questions" are just a group of questions, usually combined into one with the deft use of a legal term of art, such as "negligence" or "fairness." The Court even quotes from a 1955 article that explains:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way [square brackets in original]."[14]

To think about this in more concrete terms, consider sports and games.[15] Every sport has a question of mixed fact and law: *Who is the "winner"?* Why is this a mixed question of fact and law? Because to discern the winner, you need to know two things: first, you need to know what, as a matter of fact, happened. Second, you need to know exactly what the rules of the game say about the effect of what happened. In soccer it's easy: *How many times did Team A kick the ball into Team B's net, and vice-versa?* You add them up and the team that kicked the ball into the net the most times[16] is the winner. In basketball, things get a little more complicated: putting the ball in the net might be worth one or two or three points, and so you can't keep score without understanding the rules regarding the value of each basket. But even that can be broken down into a process of discerning the facts (Was the shot that produced the basket a free throw or was it a field goal? If it was

a field goal, was it from behind the three-point line?), applying the rules to each one and then declaring the high-scoring team to be the winner. Golf has very different rules: the person with the lowest score is the winner.[17] But in every sport or game, like each case, figuring out who is the "winner" requires two things: discerning what happened – that is, the facts – and then discerning what the rules say about the *effect* of those facts.

Many "mixed questions" are therefore better understood as compound questions. When we encounter those, a court that reviews the "mixed question" on a deferential standard is doing the parties a real disservice. Instead, to the extent possible, these questions should be untangled into questions of fact (Was the shooter's toe on the three-point line? Was there a snail in the ginger beer?) and questions of law (If the shooter's foot is on the three-point line but not in front of it, how many points is the basket worth? Is it appropriate to impose liability on a soda manufacturer for foreseeable harm to the ultimate consumer of the soda?). The factual questions will be assessed for palpable and overriding error. The legal questions – sometimes referred to as "extricable errors of law" – will be assessed for correctness.

But there are admittedly other questions that cannot be broken down quite so intuitively. As the Supreme Court identified in *Housen*, the quintessential "mixed question consists of" applying the legal standard to a particular set of facts: Did someone fail to take "reasonable care?" Is a trademark "confusingly similar" to another? Is an individual a "directing mind" of a company? Is a particular defamatory expression "fair comment"? And in light of recent case law,[18] this even extends to the question, "What do the words of a contract mean?"

Much has been written about some of the difficulties in distinguishing between questions of law and mixed questions of fact and law, but the general concept is the difference between *identifying* a legal standard (What are the criteria for determining whether someone is a "directing mind"?) and *applying* it to a particular set of facts (Is this particular individual a "directing mind"?). *Housen* acknowledges these difficulties but cites a prior decision (*Southam v Canada*) that relies on the functional concept of *usefulness as a precedent* for drawing this line: is the way that the court answers the question useful in future cases? Or are the matrices of fact in issue "so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value?"[19]

If the line between questions of law (reviewed for correctness) and mixed questions (reviewed with deference) is answered by asking whether the application of the legal test has any precedential value, then it is worth asking whether this line maps well on to the justifications for deference or intervention provided in *Housen*. And there's the rub – I'm not sure it does, for two separate reasons. First, there is no reason to think that the utilitarian calculus is the same for *applying facts to the law* as it is for pure questions of fact. And second, having consistent rules is of marginal utility if they are not consistently applied.

Does the utilitarian calculus hold?

The facts have been found, and the legal test is relatively well-understood. What is left is the difficult process of slotting factual blocks into the legal slots and seeing if there is a match. But as anyone who has owned a Melissa & Doug Shape Sorting Cube can tell you, human laws are a lot more flexible

than the laws of physics. Applying facts to law a ways requires value judgments. Have the steps taken by an employer provided "reasonable accommodation" under a *Human Rights Code*? Is a well-defined omission "material" under a *Securities Act*? Did a plaintiff "reasonably rely" on a statement for the purposes of assessing negligent misrepresentation? One author refers to these questions as "evaluative determinations" because they require the "decision-maker to exercise judgment and evaluate a person's conduct or a set of circumstances."[20] To some extent, "mixed questions" is sort of a misnomer, because even after all the facts have been comprehensively found, the decision-maker must still conduct this evaluation. They may therefore more usefully be described as "application questions."

But when we acknowledge that "application" questions require the decision-maker to evaluate the legal effect of known facts – that is, apply their *judgment* – the argument that intensive appellate review provides too little marginal justice for too much marginal cost is much less persuasive. If we treat the facts as found, the marginal cost of reapplying them should not be excessive. And while we cannot say for sure that justice will be improved, the fundamental premise of appellate review is that three judges (or five, seven, or nine) are more likely to come to the "right" outcome. As Justice Peter Lauwers recently pointed out in the pages of this journal, all decision-makers suffer from cognitive biases and experience noise that gets in the way of the application of sound judgment.[21] It is implicit in the composition of multi-member appellate panels that we hope that they might be able to counteract one another's biases and experience of noise to improve the quality of decision-making.

While the justifications for deference are less applicable to mixed questions, the justifications for correctness – the need for consistency to promote confidence in the justice system – is considerably more apt to these circumstances. If articulating a legal test requires consistency, then surely applying it does, too. Legal tests do not apply themselves and the variance among different trial judges can be significant. Two parents might agree that there is to be "no candy after dinner." But parent #1 applies that rule literally: ice cream is allowed, but the sorbitol-sweetened hard candies that bubbie[22] brings over are not. Parent #2 is more purposive: ice cream and cookies are prohibited along with Sour Patch Kids and Kit Kat bars, but grandparental sorbitol is permitted (unless someone has orthodontics). These parents *recite* a single rule, but any observer recognizes they are not applying one. We don't want a system that leaves the kids wondering what's going to happen, and even less want a system where the final outcome depends on which parent or judge happens to be in charge that day.

Is it time for a rethink?

Housen, at the 20-year mark of our relationship, we have certainly grown accustomed to each other, but I don't think our relationship is as good as it could be. Here is what I propose for the next 20 years. First, let's minimize the discussion of "mixed questions" of fact and law. Instead, let's try to define as clearly as possible what questions the "court below" answered and how it answered them. Many questions can be divided into "fact-finding," "law-identifying," and "application." Once we hit the application stage, let's ask a logical question: Is this really about finding facts, or is it really about legal rules? In the latter case, let's ask our appellate courts to do what they are set up for: enforce consistency and regularity in the law – not just what is recited, but what is actually applied.

While this sounds like heresy to Canadian appellate lawyers who have grown up in the *Housen* era, this quote from the Supreme Court of the United States might be eye-opening: "We have explained that a reviewing court should break [a question of mixed law and fact] into its separate factual and legal parts, reviewing each according to the appropriate legal standard. But when a question can be reduced no further, we have added that the standard of review for a mixed question all depends – on whether answering it entails primarily legal or factual work."[23]

This no doubt complicates things, as it requires determining whether a mixed question is primarily factual or legal work, but also has the benefit of hewing just a little closer to the reasons for these rules in the first place.

Notes

1. *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 [*Housen*].
2. *Schwartz v Canada*, [1996] 1 SCR 254 at para 32.
3. Imagine a person is sued for the imaginary tort of eating the last cookie. If the evidence shows the defendant was found near the cookie jar with cookie crumbs on their shirt and chocolate on their face, a trier of fact might draw the inference that the defendant ate the cookie. Whereas if the plaintiff testifies, "I saw the accused eat the cookie" and the defendant testifies, "I did not eat the cookie," a trier of fact can decide whom to believe without drawing inferences.
4. *Housen*, *supra* note 1 at para 12.
5. I am thinking in particular of appeals from the Trademark Opposition Board to the Federal Court of Canada, which are done *de novo*.
6. [1951] SCR 504 at p 515.
7. *Housen*, *supra* note 1 at para 9.
8. *Ibid* at para 26.
9. *Ibid*.
10. *Ibid* at para 34.
11. *Ibid* at para 31.
12. *Ibid* at para 33.
13. *Ibid* at para 32.
14. *Housen*, *ibid* note 1, citing Goodhard, "Appeals on Questions of Fact" (1955), 71 LQR 402 at 405 (square brackets in original).
15. If you are not a sports fan, or generally dislike sports analogies, you can look at Justice Breyer's recent decision in *Unicolors Inc. v H&M Hennes & Mauritz L.P.*, 595 US ___ (2022) at p 4 for an example about someone who sees a red flash in the woods and erroneously concludes it is a cardinal when it is in fact a scarlet tanager, either because he did not see the black wings (an error of fact) or because he just did not know anything about birds (what he refers to as a "labelling error" as an analogy for the error of law).
16. The "most times" is often one or two, which is generally why I'm not a soccer fan.
17. Anyone I have ever played golf with is going to be surprised that I know this. But this provides an important lesson: factual incompetence is not the same as legal ignorance, even if the effect is the same in the end.
18. *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53.
19. *Southam v Canada (Director of Investigations and Research)*, [1997] 1 SCR 748 at para 37.
20. Warner, "All Mixed Up About Mixed Questions," 7-1 Journal of Appellate Practice and Process, 101 at 120.
21. Justice Peter Lauwers, "Cutting the Noise (and the Cognitive Bias) in Legal Thinking" (Spring 2022) 40:4 (Spring 2021) Adv J, 37–40.
22. "Bubbie" is a commonly used Yiddish term for "grandma." Neither of my children's grandmothers – Bubbie Barb Bernstein or Bubbie Hannah Rosen – brings over sorbitol hard candies to my kids. However, my late Bubbie Ruthie (Bernstein) had a huge bowl of them at her house and encouraged us to fill our pockets.
23. *Google v Oracle America Inc.*, 593 US (2021) at p 19.

The duty to disclose settlement/ litigation agreements

Hilary Book and William McLennan

Chief Justice Strathy has been encouraging litigators to challenge the "gladiator mindset" of advocates as warriors who never experience a moment's fear or doubt. If they're being honest, most litigators (us included) will admit they've endured many moments of panic and sleep-challenged nights worrying about their cases.

The good news is that in civil litigation, most mistakes are fixable, and many decisions/omissions that at first appear calamitous aren't mistakes at all. One exception that we all know about is the missed limitation period. We create tickler systems and other processes to ensure we don't let a limitation period expire, because once that magical date has passed, the potential claim is barred and cannot be brought.

Unfortunately, a missed limitation period isn't the only unfixable mistake that may be causing litigators to lose sleep these days. Three decisions released by the Court of Appeal for Ontario this year highlight another error, one which is much less well-known by the bar but equally serious: the failure to disclose immediately a settlement or litigation agreement that alters the adversarial landscape of the litigation. The court's recent decisions affirm that this failure will result in a stay of the plaintiff's claim as an abuse of process, even if the non-settling defendants suffered no prejudice.

As of this writing, leave to appeal to the Supreme Court of Canada has been sought in one of those cases. However, unless and until that Court intervenes, given the potential consequences to the client if a mistake is made, litigators need to be as careful and conservative with the obligation to disclose settlement agreements as they are with limitation periods.

The duty to disclose

The duty to disclose a settlement or litigation agreement may arise where not all parties to a proceeding are parties to the agreement.

Two common examples of partial settlement agreements are *Mary Carter* agreements and *Pierringer* agreements. In a *Mary Carter* agreement, the settling defendants guarantee the plaintiff a minimum recovery and the plaintiff agrees to limit the settling defendants' risk. In a *Pierringer* agreement, the settling defendants agree to pay a fixed amount, and the plaintiff agrees to release the settling defendants and limit the amount claimed against the non-settling defendants to their several liability in order to obtain dismissal of the crossclaims against the settling defendants.

The origins of the obligation to disclose a *Mary Carter* agreement date back at least to *Pettey v Avis Car Inc.*, 1993 CanLII 8669 (Ont. Gen. Div.), when the plaintiff settled with some of the defendants on the second day of trial. The court held that it was "obvious" that the agreement had to be disclosed to the parties and the court as soon as it was made, as it might impact the non-settling parties' strategy and future steps. Disclosure of the agreement was a matter of procedural fairness. The court also found it obvious that *all* the terms of the agreement, excepting the dollar amounts, had to be disclosed. The court did not have to consider the consequences of non-disclosure in that case because disclosure had been made immediately.

In some ways, *Pettey* was an easy case. It involved a settlement

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agreement that significantly changed the parties' positions, entered into mid-trial, while the parties and the court were actively involved in the litigation.

Subsequent jurisprudence has made clear that the obligation to disclose is not limited to agreements made mid-trial or to *Mary Carter* or *Pierringer* agreements. Notably, *Aecon v Stephenson Engineering*, 2010 ONCA 898, and *Handley Estate v DTE Industries Limited*, 2018 ONCA 324, considered the obligation to disclose in somewhat different circumstances than *Pettey*, and found that courts must grant stays where immediate disclosure is not made, in order to be able to control their own process.

In *Aecon*, plaintiff and defendant entered into an agreement where the defendant agreed to advance claims against a third party on behalf of the plaintiff, and the plaintiff agreed to cap its claim against the defendant to any amounts recovered from the third party. Even though the agreement was disclosed before the third party had delivered its pleading, and there was *no prejudice* to the third party, the court stayed the third-party claim because the agreement had not been disclosed immediately after it was made.

Handley was another case in which the plaintiff financially supported, and later stepped into the shoes of, one of the defendants but the agreement to do so was not immediately disclosed. The court reiterated that the obligation of immediate disclosure is not limited to *Mary Carter* or *Pierringer* agreements. Rather, it extends to any agreement that changes the adversarial position of the parties set out in their pleadings to a co-operative one. The court reversed the motion judge's refusal to grant a stay and refused to consider whether the parties had been prejudiced by the non-disclosure, holding: "Where such a sophisticated party [an insurer] fails to comply with its clear disclosure obligation, judicial time should not be spent on inquiring into what, if any, prejudice was caused by a breach of the party's clear obligation." [para 46]

The Ontario Superior Court had occasion to consider at least a half-dozen cases seeking stays based on *Handley* in 2021, three of which (so far) have been appealed to and decided by the Court of Appeal. The Court of Appeal's recent decisions make clear that there is no room for a court to refuse to grant a stay when a plaintiff fails to immediately disclose an agreement that significantly changes the adversarial nature of the litigation. [para 46]

The trio of appellate decisions

The first decision, released early this year, is *Tallman v K.S.P. Holdings Inc.*, 2022 ONCA 66. In June 2018, Tallman entered a settlement agreement with Secure, one of the co-defendants, under which Secure agreed to provide affidavit evidence that would support Tallman's summary judgment motion and, if the motion failed, continuing support throughout the litigation. Tallman sought consent from the co-defendant K.S.P. to discontinue its action against Secure. In the circumstances, K.S.P.'s counsel suspected a settlement had been reached and inquired. Three weeks after the settlement agreement was reached, Tallman disclosed it.

In upholding the motion judge's stay of Tallman's claim based on *Handley*, the Court of Appeal held:

- Even though there were no cross-claims between K.S.P. and Secure, Secure's realignment with Tallman was a "dramatic change" from K.S.P.'s perspective and did change the litigation landscape.
- The discontinuance of the action against Secure was not sufficient to meet the disclosure obligation. The obligation is to disclose forthrightly and immediately, not to make "functional disclosure" or leave opposing counsel guessing about the nature of the settlement.
- It did not matter that Tallman's counsel had not acted in bad faith, that the delay was brief, or that K.S.P. suffered no prejudice. Staying the claim was the only remedy to redress the abuse of process.

In the second decision, *Waxman v Waxman*, 2022 ONCA 311, the plaintiffs' settlement agreement with certain defendants required the settling defendants to provide affidavits and submit to private cross-examinations by the plaintiffs. The agreement permitted the plaintiffs to withdraw unilaterally from the settlements if they were unsatisfied with the settling defendants' disclosure. The non-settling defendants were only told of the settlement three years after the agreement was reached and did not receive the actual settlement agreements for another year.

The plaintiffs argued that their disclosure obligation did not arise until the settling defendants had provided their evidence because the settlement was conditional until that time. The motion judge, affirmed by the Court of Appeal, disagreed. The court held that the key question was whether the agreement, *at the time it was entered into*, altered the adversarial position of the parties to one of co-operation. This agreement did, and a stay was necessary to enable the court to control its process and deter future breaches of this "well-established" rule.

The final decision is *Poirier v Logan*, 2022 ONCA 350. In that case, the defendants had crossclaimed against each other but were co-operating in their defence strategy and had entered into a stand-still agreement. The plaintiff and one of the defendants subsequently entered into a settlement agreement by which the defendant agreed to provide a sworn statement of assets and an affidavit that implicated the other defendants in wrongdoing. Counsel for the settling parties had discussions about disclosing the settlement agreement, but didn't do so for six months, during which time the litigation continued. The Court of Appeal once again upheld the stay of the plaintiff's claim as an abuse of process.

The Court of Appeal rejected the plaintiff's argument that a stay should be granted only if the settlement agreement results in a party taking a different position from what was set out in the pleadings or turns the litigation into a sham (as in when one party steps into the shoes of another). The court emphasized that disclosure is required where the agreement "changes entirely the landscape of the litigation in a way that significantly alters the adversarial relationship among the parties" and went on to hold that:

> the usual principles that apply in granting a stay, an otherwise discretionary remedy that is to be used only in the clearest of cases, do not apply. Essentially, any breach of the obligation to disclose falls among the clearest of cases that require a stay. [para 41]

Practice implications, or how to avoid losing sleep

The Court of Appeal for Ontario's recent decisions may not be the final word on this matter. Other Canadian jurisdictions take a different approach. For example, in *Northwest Waste Solutions Inc. v Super*

Save Disposal Inc., 2017 BCCA 312, the British Columbia Court of Appeal distinguished *Aecon* and refused to impose a stay where the failure to disclose had been corrected before trial and the non-settling defendant had not suffered irreparable harm. The appellant in *Tallman* has sought leave to appeal to the Supreme Court, and if leave is granted, it will be interesting to see whether that Court endorses the bright-line rule taken by the Ontario courts or allows for greater flexibility.

For now, it is clear that in Ontario, at least, once a court has found an agreement ought to have been disclosed and wasn't, there is no discretion – a stay must be granted. The Court of Appeal has rejected arguments seeking to avoid the stay based on, among other things, the lack of a crossclaim between the defendants, the presence of a confidentiality clause in the settlement agreement, the conditional nature of the settlement agreement, the brevity of the delay, and the lack of any prejudice to the non-settling defendants.

The real fight on these motions now is whether the agreement has significantly changed the adversarial nature of the litigation. The agreement need not be a *Mary Carter* or *Pierringer* agreement in order to do so. How can counsel be certain whether an agreement must be disclosed? The best approach, as when dealing with limitation periods, is a conservative approach. We can do no better than to repeat the comments of the motion judge in *Poirier*, Justice Perell:

> As a practice point, however, there is little reason not to disclose a settlement agreement immediately. Even if the agreement is of the type that does not have to be immediately disclosed, then – better to be safe than sorry. As the immediate case demonstrates, the risks of intentionally or unintentionally keeping the settlement agreement a secret are far too risky.

Addendum

Following the submission of this article, the Court of Appeal for Ontario released another decision on this topic, turning its trilogy into a quartet. Unlike in the other three decisions, in *CHU de Québec–Université Laval v Tree of Knowledge International Corp.*, 2022 ONCA 467, the plaintiff's claim was not stayed. The settling plaintiff had disclosed the fact of the agreement the day after it was signed but only revealed the specific terms of the co-operation piecemeal. The court found that the duty to disclose had been fulfilled because the plaintiff had intended to put the agreement before the court and had revealed the aspects of the settlement that altered the litigation landscape: that a Pierringer agreement had been entered into, that the respondent had settled with two defendants, that the plaintiff would continue its lawsuit against the non-settling defendants, and that one of the settling defendants had assigned its rights against certain non-settling defendants to the plaintiff. No doubt there is still more to come from the courts on this issue. Stay tuned.

Notes

1. See *Crestwood Preparatory College Inc. v Smith*, 2021 ONSC 8036 at paras 60–75.
2. *Poirier v Logan*, 2021 ONSC 1633, aff'd 2022 ONCA 350 at para 61.

Look back: A sister in law on the slow route to change

Kirby Chown, LSM

I began my legal career in 1981 when I was pregnant with twins. In my mind I was joining an honourable profession with wonderful opportunities to use my skills and brains to make change. The fact I was joining a male-dominated profession didn't cross my mind.

In the 1970s I had taught high school for five years. Teaching was a traditional choice for women of my generation after they left university. But I was in for a shock when I entered the work world and quickly noticed that teaching was a gender-stratified profession, with men holding the leadership roles as department heads, vice-principals, and principals. What was wrong with this picture? I was a university student in the 1960s and had felt the full force of the first wave of feminism. Teaching in the 1970s, with the placid paternalism from those in power, seemed like a still life from another era.

That picture inspired me to persuade other women teachers to join in agitating for change in the teaching profession. I recall speaking at other high schools about this kind of change. I met with some lukewarm support from male leaders, but I was also asked – yes, on more than one occasion – whether women were unsuitable for leadership because they had menstrual periods.

In my five years as a teacher, I did not see a lot of change, and so I decided a new career was the better choice. I left teaching for law, naively expecting the legal profession to be more enlightened. I couldn't have been more wrong. It was equally behind the times.

As an articling student and then as a litigation lawyer for the next 27 years at a major Toronto firm, I saw a world I thought I had left behind – the 1950s, relived. Most lawyers were white males. Most male lawyers (young and old) had stay-at-home spouses. Male lawyers were firmly entrenched as partners and leaders, and virtually all the rock star litigators were men. Men were practice-group heads and client leads. In court, you saw mainly male judges and male lead counsel.

At my firm, I was a bit player on a vast team of men. The signs of difference were everywhere. One example: as a junior litigator, I was shocked to find that the courthouses I visited outside of Toronto had no changing rooms for women litigators. We were directed to public washrooms. In Toronto, Osgoode Hall's small, utilitarian change room for women was drab and, from what I understand, second rate compared with the men's palatial facilities.

In courtrooms, in those early days, male judges frowned on women litigators wearing pants instead of skirts. One time, as I argued a motion wearing sober black trousers under my robe, the senior judge continued to say he couldn't hear me. So I spoke louder, not understanding the subtext until a male lawyer tugged on my robe and told me the judge could not hear me because I wasn't wearing a skirt.

None of this made sense, and the gender issue soon became front and centre for me. Why were women, often the best and brightest at law school, at the bottom of the ladder once they started to practise? I couldn't resist the opportunity to see if we could make a change for women in the profession. I had a secret weapon – self-confidence. I was older than the average first-year lawyer; I had been successful in another profession; I had prior experience raising these issues; and I had little fear about speaking out, even when it seemed a bit risky.

Leaving aside the male domination of leadership positions, what did I notice? Male lawyers inviting only male associates to business development events or social events. Male partners assigning cases to male lawyers only. The serious lack of women leading client teams. The complete lack of understanding of how pregnant women lawyers should be treated – financially and otherwise – when on maternity leave. The golf course and squash court were where male lawyers entertained male clients, and sports tickets were the currency of a firm's business development. When I asked women clients what they would like their lawyers to offer them, some mentioned that sports tickets would not be their first choice – many preferred attending theatre, movies, book events, or other similar experiences. One client told me she would love her lawyers just to give her the sports tickets so she could take her family to a game rather than going with a lawyer from the firm.

I was surprised by the conservative nature of law at the time. (It actually hasn't changed all that much.) I articled at the firm and then did six months of bar admission. When I returned as a first-year associate – now pregnant with twins – I was told that a senior male partner saw this development as a "breach of trust" since I had not been pregnant when asked back. When I challenged a senior male litigator to include women in his annual cottage weekend – allegedly held to bring in his dock but really to bond with male colleagues – he reconsidered and changed his invitation list to include women litigators. Sadly, none of his women colleagues were prepared to attend. Having created the fuss, I felt I had no choice but to show up. It was a bizarre but fun weekend that gave me a glimpse into the 1980s

world of male lawyers at leisure. The dinner menu choices were my first clue: bold red wine and bloody steaks, with vegetables an afterthought. Around the roaring fire at night, nobody talked about family or work/life balance. Instead, we played Monopoly, but not the game I knew. This game was all about cut-throat competition, with side deals between players, private mortgage arrangements, and loans at high interest rates. At a very late hour, I retired to the main bedroom, which had been forced upon me as "proper for the only woman here." Elsewhere, the guys rolled out sleeping bags.

I got used to hearing the cliché that women could not be good wives and mothers *and* good lawyers. Parenting was a full-time job best carried out by women, so the men said. Some women accepted this trope and often made a decision to leave law to give their full attention to a newborn – something I came to call "the Madonnafication of motherhood." Change was clearly needed.

I started to try things in my own firm and soon was invited to speak to women and men across the province – at firms big and small – on issues affecting women lawyers. I found the experience exhausting but exhilarating.

From my experience trying to make changes in the teaching profession, I knew that power was the key to being heard. Junior women were often charged with leading gender-related issues, but they rarely made progress. So when I was offered a role on one of my firm's less powerful committees, I took it as a start to gaining some power. That was just the beginning. I gradually was invited to join other committees and eventually was selected as the firm's professional development partner. This role allowed me to continue to focus on women's issues and take steps that would make change happen. Later, with colleagues, I set up a women's committee and initiated a newsletter to profile the gains and wins of women in the firm and to highlight the challenges we still faced.

I quickly learned that getting the male lawyers behind the issues was crucial to our success. They held the reins of power in the firm and with clients. Although, in my view, supporting the retention and advancement of women lawyers was the right thing to do, what moved more male lawyers to action were appeals to their competitive nature so we could come out ahead of other firms. They also noticed that action on this front resonated with clients who saw some of these issues in their own organizations and were more inclined to stick with a firm that shared their views; so it was good for business development, too. I reoriented my pitch to take these factors into account when dealing with my male colleagues. As I said to our CEO, "In this race around the advancement of women lawyers in law firms, we want to be first, not last." And indeed we were among the first firms to focus on this issue. This work was exciting but also lonely and, on occasion, I received hostile reactions to what some lawyers saw as preferential treatment for women.

About 20 years ago, our firm underwent a major reorganization as a national firm. Our new CEO, a male business law partner in the Toronto office, proposed I let my name stand for the new role of Ontario regional managing partner. He knew about my work on women's issues generally and my involvement in partner allocations, professional development, and other committees. Indeed, he had been a member of my PD committee when I was the professional development partner.

(Getting men on board, especially those who were skeptical of my initiatives, was a big part of my strategy.) Suggesting a woman for a managing partner role was a bold choice at the time, but it was based on a solid appraisal of my legal and managerial work. It also reflected my years of talking about the firm becoming a leader on women's issues and our CEO's wish to demonstrate such a change in proposing women for new leadership roles. Confirmed in this role by my partners, I became the managing partner of the Ontario region in 2002 and continued in that role until the end of 2008.

As the managing partner, I had a high-profile opportunity to be heard and, in many instances, the ability to carry others along with me. Among other early initiatives, I focused on maternity leaves and how to make them work better for both women and the firm. As a result, we started to do things differently. The firm created Maternity Leave Buddies to help women go on leave with support on exit and re-entry. It paid for parent lawyers (both men and women) to get coaching from an experienced couples' therapist on how to parent while carrying a lawyer's load. Non-lawyer spouses were invited to participate in the coaching.

The firm reached out to clients in direct and indirect ways to capitalize on our women's initiatives. We created women-only business development events that revolved around activities of interest to our women clients. Early on, I was invited to our Calgary office to help with issues raised by the women lawyers there. My proposal to have the office's women lawyers run a women clients' business development event at the Calgary Stampede was met with blank stares by the male partners. "We don't have any women clients," they said. But of course they did. With a great deal of effort, we put together a list of women in top roles at Calgary corporate clients and sent out invitations. The response was enthusiastic. These women didn't usually get invited to their law firm's business development events. As well, most of the functions that law firms hosted reflected the Stampede's masculine personality. Our all-women event was novel and enthusiastically embraced by the guests. Given the excellent feedback, the male partners rushed to add women clients to the next year's guest list.

Law firms are not easy places for women. Making change for women was not easy. But I pressed on and, gradually, things began to shift. Women lawyers knew they were on the bottom rung, but some didn't want to rock the boat. At this point, many men still failed to mentor potential women stars or to promote women for group heads or client leads. Many men resented the firm's focus on advancing women lawyers.

In my career at the firm, women role models and mentors at a senior level were few, a problem that persists. To advance my own career and to support the gains of women lawyers in our firm and our profession, I realized I needed to reach out to the men in our firm. I want to single out Niels Ortved, a pre-eminent barrister who had been the managing partner of the firm's Toronto office and who encouraged me to seek out leadership opportunities and mentored and supported me when I was given new roles. Niels helped advance my litigation career through opportunities to junior him, such as at the Royal Commission Inquiry into the deaths at the Hospital for Sick Children. I learned much from observing Niels in court, in his practice, and in his interactions with clients. I benefited greatly from his mentoring and feel lucky to have worked with him.

Over time, the advancement of women in the profession gained traction. Notably, the Law Society of Ontario initiated the Justicia Project to focus on the issues. The work continues today with many firms, and many men and women, pushing it forward. But progress is slow and change incremental at best. It is easy to feel discouraged, but I encourage both women and men lawyers to keep on pushing for continued progress for women in the profession.

Although basic issues facing women lawyers are now more broadly recognized by both women and men, implementing change remains a challenge. As well, hurdles remain around more complex issues involving compensation, leadership, hours expectations, and work and family. Other areas that need change have been identified, and work on equity, diversity, and inclusion in law firms is in its early stages.

On a positive note, I salute the many strong women lawyers who today appear in courtrooms and conference rooms, lead cases and deals, and mentor younger lawyers. I also salute the rising numbers of women judges at all levels of our courts. I could provide names but that list, happily, would be extremely long.

I retired from my law practice at the end of 2008. I was never one of the pack of lawyers who grumbled about the profession. I loved my work, but the early steps I pushed our firm to take in advancing women in the profession is the part of my career of which I am most proud.

Change continues. I am proud to have played a tiny role in making that happen. And those twins? They turned out to be boys. They are now 40 years old, and neither one is a lawyer.

The common law's response to harms in the internet age: A new arsenal of torts

Nadia Effendi, Mani Kakkar, and Emily Baron

Society's reliance on the internet, social media, and online platforms has made people more vulnerable to privacy breaches and attacks on their reputations and well-being. The extent to which personal information is collected and stored online and the ease with which it can be disseminated have significantly increased the risk and scope of harm and undermined the effectiveness of available legal remedies. As the Office of the Privacy Commissioner of Canada noted, we live in an age where technology has an impact on "every aspect of modern life."[1]

In the face of fast-paced technological developments, the law's ability to regulate digital spaces has been seriously challenged. For one thing, existing torts do not adequately remedy the kinds of harms that occur in modern society. Such harms are further compounded because the person behind an online post can be difficult to track and identify, and content can be instantaneously spread across multiple jurisdictions. Although legislative changes have addressed some of the burgeoning problems created by our growing reliance on technology, gaps remain for the common law to fill.

Understanding the new lexicon of nominate torts

Starting with the landmark decision of *Jones v Tsige* [*Jones*] in 2012,[2] courts across the country have responded to the gaps in the law and established new torts to address the harms expounded by the speed and reach of online communication and digital technologies. Practitioners should keep these torts in mind. The torts of intrusion upon seclusion, distribution of private facts, false light, and internet harassment, as outlined in the table on the following page, are not limited to a particular industry or a single practice area.

One may criticize the development of these new torts as "palm tree justice," but this is not the first time there has been significant doctrinal change in tort law. The famous case of *Donoghue v Stevenson* is such an example, where a snail in one woman's ginger beer led to the establishment of the neighbour principle, which has fundamentally shaped the modern-day tort of negligence.[3] Lord Macmillan is reported as having said, "Only recently, the House of Lords was much concerned with the question of a snail in a ginger-beer bottle, and the result of that case has been to rock the foundations of the common law of England to their very base."[4] What began as a foundational shift in the law of negligence has become an integral and robust doctrine over the last 90 years.

We may be standing at a similar crossroads today. The internet has fundamentally changed the nature and degree of the harms that one person can inflict on another, and the common law is responding. As these torts develop and are applied to new situations, they have the potential to become robust,

Novel tort	Test	Remedies	Case name & facts
Intrusion upon seclusion	1. The defendant's conduct was intentional or reckless; 2. The defendant invaded, without lawful justification, the plaintiff's private affairs or concerns; and 3. A reasonable person would regard the invasion as highly offensive, causing distress, humiliation, or anguish.	Damages	*Jones v Tsige*, 2012 ONCA 32 A bank employee repeatedly accessed the personal banking information of a co-worker who was in a relationship with her ex-husband.
Distribution of private facts	1. The defendant publicized an aspect of the plaintiff's private life; 2. The plaintiff did not consent to the publication; 3. The matter publicized or its publication would be highly offensive to a reasonable person; and 4. The publication was not of legitimate concern to the public.	Permanent injunction and damages	*Jane Doe 72511 v Morgan*, 2018 ONSC 6607 The defendant ex-boyfriend posted an intimate video of the plaintiff on the internet without her consent.
False light	1. An individual gave publicity to a matter concerning another before the public in a false light; 2. The false light in which the other was placed would be highly offensive to a reasonable person; and 3. The individual had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.	Damages	*Yenovkian v Gulian*, 2019 ONSC 7279 The plaintiff's ex-husband made egregious internet posts about the plaintiff and her family that included personal identifying information, including allegations that the plaintiff had kidnapped and abused their children and that she had defrauded the government and forged documents.
Internet harassment	1. The defendant maliciously or recklessly engaged in communications or conduct so outrageous in character and duration and extreme in degree so as to go beyond all possible bounds of decency and tolerance; 2. These actions were done with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff; and 3. The plaintiff suffered such harm.	Permanent injunction findings of fact concerning the impugned statements, and giving plaintiffs title in defamatory and harassing postings to aid in their removal	*Caplan v Atas*, 2021 ONSC 670 An insolvent individual who was undeterred by financial consequences maintained "systematic campaigns" of online harassment against approximately 150 individuals over the course of several decades.

integral legal doctrines that provide meaningful remedies for harms exacerbated by the internet.

Developing the contours of these new torts

As courts apply the four recently established torts to cases involving less egregious facts than the ones that led to their initial recognition, the contours of these torts become clearer. For example, courts have applied the tort of distribution of private facts in two recent cases which make it clear that personal information about a person's mental health, marital relationship, and domestic abuse are private facts captured by the tort. In *Racki v Racki* [*Racki*], the Nova Scotia Supreme Court concluded that details of the plaintiff's addiction to sleeping pills and suicide attempts described in a self-published book written by the defendant (the plaintiff's former spouse) constituted disclosure of information to which a reasonable expectation of privacy was attached.[5] In *Cope v Gesualdi* [*Cope*], the court found a recording between the plaintiff and a police officer regarding domestic abuse and marital discord which was posted on the plaintiff's employer's website by the defendant constituted a distribution of private facts.[6]

In addition to developing the contours of these torts, courts are also beginning to balance the plaintiff's privacy interest and the societal interest in protecting victims against the defendant's interests, such as freedom of expression. Practitioners should keep in mind this balancing exercise when arguing these torts. The tension between privacy interests and freedom of expression is particularly pertinent, given how the "internet has cast [the balance between freedom of speech and limits on that freedom] into disarray."[7] Again, the recent cases applying the tort of distribution of private facts provide helpful insight to practitioners.

In *Racki*, the court stated that the "right to privacy is not absolute. It has to be weighed against competing rights including freedom of expression."[8] Specifically, the court noted that the defendant "has the right to publish a book to encourage entrepreneurship and overcome hardship. But the issue in considering the book as a whole is whether the publication of the private facts of Ms. Racki's addiction and suicide attempts is in the public interest."[9] Ultimately, the court concluded the defendant could have advanced the purpose of his book without disclosing details of his former wife's private information and that doing so was not in the public interest.

In *Cope*, the court found that the defendant's right to freedom of expression was undisputed; however, it also emphasized that the right does carry "restricting duties and responsibilities for the protection of the reputation of others and in respect of the prevention of the disclosure of information received in confidence."[10] The court went on to cite the fundamental importance given to "violations of privacy that cause a loss of control over fundamental personal information about oneself," as depicted by Justice Kasirer in *Sherman Estate v Donovan* [*Sherman Estate*].[11] Ultimately, the court concluded that the privacy violation outweighed the defendant's freedom of expression.

The courts have provided some guidance on when an individual's privacy interests outweigh a defendant's freedom of expression. As the tort develops to include private facts at the fringes, balancing these interests will become more difficult. What constitutes private facts may change depending on the plaintiff's position – certainly, what constitutes a private fact for Ms. Racki and Ms. Cope may not be the same as for a public figure. Moreover, what liability, if any, social media platforms have in the distribution of private facts is open to adjudication, as are the competing interests that are at play in this context.

No remedy, no problem: Establishing a new tort to address egregious harms

Given the judiciary's willingness to establish new torts in the context of harms exacerbated by the internet and digital technology, practitioners should think creatively about their cases, especially those where the novel nature of online information-sharing platforms (with their scale and anonymity) deprives their client of meaningful recourse.

Practitioners should consider three factors that appear to be common to the torts discussed in this article: the egregious nature of the harm; existing remedies (if any) and why they are inadequate; and academic literature and foreign jurisdictions that may provide persuasive authority. These considerations align with the Supreme Court of Canada's guidance in *Nevsun Resources Ltd. v Araya* [*Nevsun*].[12] The majority decision in that case made it clear that a court should not recognize a new nominate tort that does not reflect and address a wrong visited by one person upon another; where there are adequate alternative remedies; and where the change wrought upon the legal system would be indeterminate or substantial.[13] The cases that establish the new torts discussed here meet the first two requirements in *Nevsun* with relative ease, as they usually involve egregious harms and inadequate remedies.

The third prong in *Nevsun* orients judges to be mindful of the need for the law to remain "stable, predictable and accessible."[14] There is a tension between stability and predictability and the recognition of a new tort, and the usual response to this tension is to limit judges to incremental changes in the law. Although this response may be preferable, it may not always be possible in an area of law that has historically been and needs to be responsive to fundamental changes in society. Where incremental change is not enough to achieve a remedy for certain harms, then stability and predictability may come from developing the law with careful consideration of the academic literature and/or case law of foreign jurisdictions where that law has been applied.

Consider the recent case of *Caplan v Atas* [*Caplan*] as an illustration of all three of the above-described factors.[15] In this case, the defendant, who was insolvent and undeterred by financial consequences, maintained "systematic campaigns" of harassment against approximately 150 individuals, unchecked over the course of decades. Describing the egregious facts of the case, the court highlighted how the internet constitutes a dangerous medium for the dissemination of harassing content:

> Cyber-stalking is the perfect pastime for Atas. She can disseminate vile messages globally, across multiple unpoliced platforms, forcing her victims to litigate in multiple jurisdictions to amass evidence to implicate her, driving up their costs and delaying the process of justice.[16]

This case stands in contrast with the earlier Court of Appeal for Ontario case of *Merrifield v Canada* [*Merrifield*], which declined to establish the tort of harassment.[17] In *Merrifield*, which concerned an action

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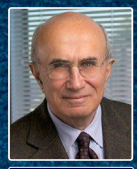
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for alleged harassment and bullying in the employment context, the court held that the facts did not occasion creation of a novel remedy given the availability of other legal remedies. In addition, and unlike in *Merrifield*, the tort of intentional infliction of mental suffering could not be made out because it required proof that the conduct resulted in visible and provable illnesses. Justice Corbett noted that plaintiffs should not have to establish visible and provable illnesses (or suffer from them) before being able to bring an end to harassing behaviour.

Justice Corbett established the tort of internet harassment in this case, in part because of the egregious facts and lack of adequate remedies available, but also because of foreign authority cited by the plaintiffs. Justice Corbett noted that the lack of foreign authority cited was an important reason that the court in *Merrifield* declined to establish the tort of internet harassment.[18] Furthermore, he relied on the American case law cited in adopting the stringent test for the tort of internet harassment in Ontario.[19] As *Caplan* showcases, when practitioners are seeking to establish a new tort, it is necessary to display how existing remedies are inadequate and helpful to provide relevant foreign jurisprudence or academic literature.[20]

Tailored remedies

The recent decision in *Caplan* illustrates the immense benefits that can arise from establishing a new tort: tailored remedies that are able to do more than throw money at the problem. Sometimes damages are insufficient and certainly, in the case of many of these harms, one of the plaintiff's key goals will be the removal of information from the internet. When arguing that a new tort should apply, the potential for new and better-suited remedies should be front and centre. Again, *Caplan* serves as an excellent example. In that case, the court crafted a remedy which provided the plaintiffs with tools to have the defamatory and harassing communications removed. Specifically, the court imposed a permanent injunction against the defendant, which broadly prohibited her from posting about the plaintiffs, their families, related persons, and business associates, and gave the plaintiffs title in her defamatory and harassing postings so that they may have them removed.[21] The court also made findings of fact regarding the falsity of the impugned communications and publications that would help with removal. These kinds of remedies provide victims of internet harassment with meaningful tools to stop the harassment. Such remedies could be equally helpful in the context of some of the other torts discussed, such as the distribution of private facts or false light.

Taking it too far: New torts should not pave over existing law

Although courts have shown a willingness to establish new torts where egregious facts "cry out for a remedy," practitioners should keep in mind that these new torts are not meant to pave over existing law.[22] For example, in the recent Ontario decision of *Del Giudice v Thompson* [*Del Giudice*], the potential floodgates of *Jones* applying to custodians of information who are attacked by third-party hackers were closed.[23] In closing them, the courts are ensuring that intrusion upon seclusion is used to "fill gaps in the law of privacy not pave them over."[24] In *Del Giudice*, the Ontario Superior Court of Justice remarked that intrusion upon seclusion is not meant to apply to misconduct that is already regulated by other torts, actions for breach of contract, and statutory provisions.[25]

This decision followed *Owsianik v Equifax Canada Co.*, a class proceeding that was initiated after a data breach of an international credit-monitoring company affected millions of individuals in North America.[26] At the certification hearing, the judge allowed the claim to proceed, noting that it was open to the court to decide whether a defendant who "recklessly permits a hacker attack" may be liable for intrusion upon seclusion. On appeal, the Ontario Divisional Court concluded that this tort did not apply to cases involving a breach by a third party. Specifically, the court noted that extending this tort to a defendant who does not intrude, but merely fails to prevent an intrusion, would "be more than an incremental change in the common law … the intrusion need not be intentional; it can be reckless. But it still has to be an intrusion."[27] Applying intrusion upon seclusion in such a scenario would amount to providing a remedy absent the necessary degree of fault. Without direct intrusion by the defendant, the court held that the appropriate claim would be in negligence.

Be mindful of the public record

Practitioners need to be mindful of the public records created through the litigation process, particularly in cases where private or personal information is at the heart of the dispute. Practitioners should consider seeking appropriate protection for their clients where available, such as sealing orders or anonymizing the identities of the parties.

In the context of distribution of private facts cases, many of the victims whose intimate images or videos were shared online were not identified by name in the proceedings or the judgment. This practice may help strike an appropriate balance between the open court principle and the privacy interests of the parties, given the SCC's recent emphasis on the importance of the open court principle in *Sherman Estate v Donovan* [*Sherman*].[28]

Although the SCC emphasized the importance of the open court principle in *Sherman*, it also recognized that protecting an individual's dignity or privacy expectation in information that forms part of the person's "biographical core" may provide sufficient basis for a sealing order preventing disclosure of personal information. While it is unsettled what information is included in the 'biographical core,' sealing orders remain a possibility. *Sherman* emphasized that courts must apply the *Sierra Club* test when determining whether a sealing order is appropriate in a civil matter:

- Court openness must pose a serious risk to an important public interest.
- The order must be necessary to prevent the serious risk, as other measures will not suffice.
- The benefits of the order must outweigh its negative effects.[29]

Even if anonymization or a sealing order is not possible, at the very least, practitioners need to make their clients aware of the privacy risks of litigation. Court documents containing sensitive information are easily accessible online despite whatever injunctive remedies the court may impose to constrain its dissemination.[30] *Racki* provides a good example of this problem. As discussed above, although the court provided the remedy of ordering the plaintiff's private information to be removed from the defendant's book, this information – in addition to the court's assessment of the veracity of the information – lives on in court documents, which will be discussed, cited, and

readily available to anyone with sufficient interest to access free, public websites such as CanLII.

Conclusion

Given how fundamentally the internet has changed our lives, it is difficult to think that the law could remain unchanged and somehow still be able to remedy the harms exacerbated by online communication and digital technologies. Over the past decade, courts have demonstrated a willingness to establish new torts in situations that "cry out for a remedy" that is unavailable within the existing legal framework.

Practitioners play an important role in this process by taking the critical first step in arguing that a new tort is necessary or should be adopted in cases where their clients lack meaningful legal recourse for serious harms. Practitioners making these arguments and judges adopting them may not be engaging in "palm tree justice." Rather, the common law may be at a crossroads similar to ones it has faced in the past during times of fundamental change.

Notes

1. IPC, "A Guide for Individuals: Protecting Your Privacy"; online: < https://www.priv.gc.ca/en/about-the-opc/publications/guide_ind/>.
2. 2012 ONCA 32.
3. [1932] SC 562 (HL).
4. "Manufacturers' Liability: Recent Developments of *Donoghue v Stevenson* (1936) 14 Can B Rev 283.
5. *Racki v Racki*, 2021 NSSC 46 [*Racki*].
6. *Cope v Gesualdi*, 2021 CanLII 58972 (ON SCSM) [*Cope*].
7. *Caplan v Atas*, 2021 ONSC 670 at para 5 [*Caplan*].
8. *Racki*, *supra* note 5 at para 38.
9. *Ibid*.
10. *Cope*, *supra* note 6 at para 15.
11. *Sherman Estate v Donovan*, 2021 SCC 25 at para 71.
12. *Nevsun Resources Ltd. v Araya*, 2020 SCC 5.
13. *Ibid* at para 242.
14. *Ibid*.
15. *Caplan*, *supra* note 7.
16. *Ibid* at para 2.
17. *Merrifield v Canada*, 2019 ONCA 205.
18. *Caplan*, *supra* note 7 at para 164.
19. *Ibid* at para 171.
20. Professor Prosser's seminal works on privacy torts formed the basis for a number of other decisions establishing new torts, including *Jones*.
21. *Caplan*, *supra* note 7 at paras 220, 228.
22. *Jones*, *supra* note 2 at para 69; *Caplan* at para 174.
23. See *Del Giudice v Thompson*, 2021 ONSC 5379 [*Del Giudice*].
24. *Ibid* at paras 135, 142.
25. *Del Giudice*, *supra* note 23 at para 5.
26. 2021 ONSC 4112.
27. *Ibid* at paras 54–55. The court has also since applied this decision in *Obodo v Trans Union of Canada, Inc.*, 2021 ONSC 7297, in holding that intrusion upon seclusion is not applicable where information has been breached by a hacker.
28. 2021 SCC 25.
29. *Ibid*; *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.
30. See Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context" (2011) 56:2 *McGill Law Journal* 289; *AB v Bragg Communications Inc.*, 2012 SCC 46.

The un-appealing (and unending) appellate debate:

Final vs. interlocutory orders

Ronald D. Davis and Bree Pierce

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For over five centuries, unending debates over what is and is not an interlocutory order have vexed courts and litigants alike. This is especially true of appeals in Ontario. The law of interlocutory versus final order appeals is confusing at best, and a "stain on our civil justice system"[1] at worst. It is the cause of wasted time, prolonged delays, and needless costs. It is a dichotomy unique to Ontario.

The concept of "interlocutory" is not new to Anglo-Canadian common law. As long ago as 1590, more than a decade before Shakespeare had written *Hamlet* or *Macbeth*, the English jurist Henry Swinburne defined it in his *Briefe Treatise of Testaments and Last Wills*:[2]

> Of Iudiciall sentences there bee two sortes, the one interlocutory, the other *definitiue*. An interlocutory sentence, is a decree giuen by the iudge, betwixte the beginning and ending of the cause, touching some incident or emergent question.

In this article, we compare Ontario's interlocutory versus final appeal framework with those in other Canadian provinces and suggest how Ontario's "stain" might be removed.[3]

The appeal process in Ontario

Ontario prescribes different appeal routes to different courts for different kinds of orders. *Final* orders go to the Court of Appeal for Ontario, as of right.[4] *Interlocutory* orders from Superior Court judges go to the Divisional Court with leave.[5] Leave is hard to obtain. It is granted only in two circumstances, each of which has two requirements:

> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted; or
>
> (b) there appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the panel's opinion, leave to appeal should be granted.[6]

The divergent appeal paths impose the consequential question "When is an order final and when is it interlocutory?"

> In theory, the answer is straightforward and not much different from Swinburne's 1590 description: a *final* order is one which disposes of all or part of the litigation,[7] while an *interlocutory* order is one that does not finally dispose of the action.[8] But that is in theory.

And as the great 20th-century pundit Yogi Berra is said by some to have observed, "In theory there is no difference between theory and practice. In practice there is."

So it is with Ontario's appeal process: theoretically straightforward, but in practice convoluted. Two major issues arise as a direct result of Ontario's dichotomous system:

> 1. *Classification.* Whether an order is interlocutory or final is not always clear. An order may have traits that fall into either category, making it difficult to determine the court to which an appeal should lie.
>
> 2. *Hybrid orders.* Complications arise when an order is mixed, comprising both interlocutory and final terms, falling within the jurisdictions of both the Divisional Court and the Court of Appeal.

Both circumstances give rise to confusion and the risk of multiplicity of proceedings, delay, and increased costs.

Issue 1 – Classification of an order

The general principles

In many cases, the interlocutory or final nature of a court order will be obvious. There are no definitions of the terms in any statute or rule. In some instances, case law settles the issue. For example, a line of decisions has established that orders granting or setting aside a certificate of pending litigation are interlocutory.[9]

There are other instances, however, when the nature of an order is not clear, and a court must determine how it is to be classified. Some guidance comes from the Court of Appeal for Ontario's 1932 decision in *Hendrickson v Kallio*, in which Middleton JA observed:

> 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.[10]

More thorough and recent guidance comes from Benotto JA for the court in *P1 v XYZ School*:[11]

> For nearly 90 years, this court has approached the issue of final/interlocutory orders by beginning with this distinction laid out in *Hendrickson v. Kallio* […]
>
> Since then, this court has, on many occasions, addressed Hendrickson. In the recent decision of *Paulpillai Estate v. Yusuf*, 2020 ONCA 655, at para 16, Jamal JA (as he then was) summarized the law as follows:
>
> > The main principles that determine whether an order is interlocutory or final are well known:
> >
> > 1. An appeal lies from the court's order, not from the reasons given for making the order.
> >
> > 2. An interlocutory order "does not determine the real matter in dispute between the parties – the very subject matter of the litigation – or any substantive right. Even though the order determines the question raised by the motion, it is interlocutory if these substantive matters remain undecided."
> >
> > 3. In determining whether an order is final or interlocutory, "one must examine the terms of the order, the motion judge's reasons for the order, the nature of the proceedings giving rise to the order, and other contextual factors that may inform the nature of the order."
> >
> > 4. The question of access to appellate review "must be decided on the basis of the legal nature of the order and not on a case by case basis depending on the application of the order to the facts of a particular case." In other words, the characterization of the order depends upon its legal nature, not its practical effect. [Citations omitted.]

Hendrickson and *P1 v XYZ* do offer some guidance. But they do not offer finality or certainty. To this day, there is debate in the Court of Appeal over the process judges should undertake when classifying orders, as recent decisions illustrate. The cases are legion. We will discuss only three from the past 15 years that exemplify the problem.

Capital Gains Income Streams Corp. v Merrill Lynch Canada Inc.

The appeal in *Capital Gains Income Streams Corp. v Merrill Lynch Canada Inc.*[12] arose from a motion for judgment based on the terms of a settlement. The parties disagreed on whether a settlement had been reached. The motion judge, Justice Cumming, found that a trial was needed to determine the question. His Honour dismissed the motion.

Both parties argued that the appeal was rightly in the Court of Appeal because Justice Cumming's dismissal order was final. The majority disagreed.[13] Justice Doherty concluded (for himself and Justice Juriansz) that, since Justice Cumming had not determined whether there had been an accepted offer to settle, only that he could not decide the question, the matter was not over.[14] It would continue to trial. The dismissal order was thus interlocutory. Justice Cumming's inability to decide was "not a finding that no agreement exist[ed] and [could not] foreclose a full factual inquiry into that issue."[15]

Justice Laskin dissented. He found the order to be final, for two reasons: (1) the motion judge's conclusion, in at least part of his reasons, that there was no settlement made his decision final, and (2) the motion judge had mistaken one of the party's arguments, and if that mistake was corrected, the finding would have been that there was no settlement – a final determination.[16] Justice Laskin left

no doubt about his disapproval of Ontario's interlocutory versus final dichotomy:

> The distinction between final and interlocutory orders bedevils this court. Far too much ink has been spilled over the pages of the Ontario Reports, grappling with this distinction. Even when the parties themselves do not raise the issue, the court itself often feels compelled to do so – as it did in this case – because the court's jurisdiction to hear an appeal turns on the distinction: final orders are appealable as of right to this court; […] interlocutory orders are not.
>
> And yet, despite the very large number of decisions on whether a particular order is final or interlocutory, our court's jurisprudence on the distinction has been anything but a model of consistency. […] The litigation bar – even the experienced members of that bar – cannot always fathom whether an order is final or not.[17]

Parsons v Ontario

Parsons v Ontario[18] was a national class action that had been settled. Class counsel brought a motion for directions as to whether the Ontario judge could sit outside the province, with judges from British Columbia and Quebec, on motions about the late filing of claims to the settlement fund. The motion judge ruled that he could.[19] One party appealed. The majority in the Court of Appeal found the order to be final, giving the court jurisdiction to hear the appeal.

As in *Capital Gains*, the court was divided. Justice LaForme (Justice Lauwers concurring on this point) adopted a modified approach to the *Hendrickson* criteria for classifying the order, since there had been a settlement in the class proceeding.[20] Justice LaForme held the motion for directions to be akin to an application for a declaration, and the resulting order as having "disposed of the motion on the merits by granting declaratory relief in a form that was consistent with the moving party's position."[21] The order was thus final.

Justice Juriansz disagreed. He found the order to be interlocutory.[22] In his view, Justice LaForme's departure from *Hendrickson* in favour of the modified test was "misplaced,"[23] According to Justice Juriansz, the "real matter in dispute" (per *Hendrickson*) was whether the court should extend the filing deadline for settlement fund claims. The motion for directions was not akin to a free-standing application.It was an interlocutory motion regarding the extensions. The motion judge's decision left the merits of that matter to be determined. It decided only where the court could sit to hear the matter.[24]

1476335 Ontario Inc. v Frezza

1476335 Ontario Inc. v Frezza[25] is an October 2021 decision of Brown JA, sitting as a single motion judge. The plaintiffs had brought an action in the Superior Court of Justice and moved at the outset for a certificate of pending litigation (CPL). Their motion was dismissed.[26] Following a common practice, the plaintiffs (now the moving parties/appellants) filed both a motion in the Divisional Court for leave to appeal the dismissal and a notice of appeal in the Court of Appeal.[27] They also brought motions in the Court of Appeal to determine whether the dismissal order was final, and for the CPL that they had

been denied in the court below.

Justice Brown found that he had to adjourn both motions to a panel of the court.[28] However, Justice Brown offered strong opinions about the state of the interlocutory versus final dichotomy in Ontario:

> […] one of the great on-going failures of the Ontario civil justice system is the confusion entrenched in the *Courts of Justice Act*, R.S.O. 1990, c. C.43 concerning appeal routes from orders made by judges of the Superior Court of Justice: Does the appeal lie with leave to the Divisional Court or as of right to this court? Such confusion inflicts unnecessary legal costs on parties, delays the resolution of appeals on their merits and, as this case illustrates, sows uncertainty about how a party can attempt to protect its rights pending an appeal.
>
> There is absolutely no excuse for such confusion to continue. Simple "bright line" appeal route solutions are available. I would hope that at some point in the near future the Ontario Legislature will awake and address this far-too-long-outstanding stain on our civil justice system. In my respectful view, the Legislature needs to enact legislation that creates an unambiguous "bright line" explaining when an appeal lies to the Divisional Court andwhen it lies to the Court of Appeal for Ontario. The current final/interlocutory dividing line is an expensive, time-wasting anachronism. Implementing a "bright line" solution is not a hard task: all it needs is a bit of creativity, political will, and concern for the health of our ailing civil justice system.[29]

Soon after, a three-judge panel heard the motion regarding the court's jurisdiction. Justice Feldman, for the court, noted that the Divisional Court had agreed to hold the leave motion in a beyance pending the Court of Appeal's decision.[30] The court had no trouble finding that the dismissal of the CPL motion was an interlocutory order, citing numerous authorities in support. The matter was thus within the jurisdiction of the Divisional Court.[31] Justice Feldman highlighted the importance of being able to distinguish between final and interlocutory orders:

> As is apparent from the strict requirements for leave to be granted to appeal interlocutory orders, appeals from such orders are intended to be very limited. On the other hand, appeals from final orders are as of right. As a result, the issue of whether an order is final or interlocutory determines not only which court has jurisdiction, but also the extent to which an appeal will lie from the order.[32]

In sum: Confusion reigns

The three decisions just discussed, and many others, invite a ponderous question: If it takes three appeal justices to determine the nature of an order – justices who cannot always agree, as we saw in *Capital Gains* and *Parsons* – what hope is there for mere lawyers, let alone self-represented parties? Getting the answer right (if possible) is fraught with the risk of failure, wasted time, and thrown-away costs.

And yet, all the confusion and adverse outcomes could easily be avoided. In other provinces, appellate courts have jurisdiction to hear appeals from any order, interlocutory or final. Granting the Court of Appeal for Ontario the same jurisdiction would resolve the issue. We will return to this point later.

Issue 2 – Hybrid orders

A Byzantine procedure

Some orders are both interlocutory and final – that is, hybrid (or interrelated) orders. Ontario's *Courts of Justice Act* (*CJA*) allows the Court of Appeal to hear appeals from hybrid orders, but only in a Byzantine (if not Kafkaesque) way.

Subsection 6(2) of the *CJA* states:

> The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal.[33]

This should clear the path for hybrid appeals. It does not. The court's jurisdiction under subsection 6(2) of the *CJA* arises only if the Divisional Court grants leave. To get to the Court of Appeal, the appellant must still first pass through the Divisional Court.[34]

Uncertainties in the procedure: Lax v Lax

This convoluted, two-step procedure is not airtight. The Court of Appeal in *Lax v Lax*[35] held that, where the interlocutory and final aspects are so interrelated that leave inevitably would have been granted, the Court of Appeal has jurisdiction without the appellant obtaining it first from the Divisional Court. This accords with subsection 6(2) of the *CJA*, which grants the Court of Appeal "jurisdiction to hear and determine an appeal that lies to the Divisional Court […] if an appeal in the same proceeding lies to and is taken to the Court of Appeal."

This principle has been followed in several decisions.[36]

The obvious question

The case law raises an obvious question: If the Court of Appeal in *Lax* and other decisions could take jurisdiction over hybrid orders, why not in all cases?

The streamlined appeal process in *Lax* and later cases offers increased resource efficiencies for the courts and litigants alike. It also meets the directive in subsection 64(1) of Ontario's *Legislation Act*[37]:

> An Act *shall* be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects [Emphasis added.]

Unfortunately, Ontario has not yet reached that stage. The nebulous divide between when the Court of Appeal does and does not find orders sufficiently interrelated to take jurisdiction, per *Lax*, remains in place. Cautious appellants will and must still apply for leave from the Divisional Court concurrently.

Obtaining leave in interlocutory appeals: No easy task

Another complicating factor in Ontario's tortuous interlocutory/final patchwork is the difficulty in obtaining leave to appeal an interlocutory order in the Divisional Court. As noted, there are two two-part bases on which the Divisional Court may grant leave: (1) a conflicting decision, and leave is desirable in the panel's opinion; or (2) good reason to doubt the correctness of the order in question, and the matter is of such importance that leave should be granted in the panel's opinion.[38]

The bar is high objectively and subjectively under both branches of both tests for leave. Objectively, just what is a "conflicting decision," a "matter of such importance," or "good reason"? Subjectively, the two branches of the test are highly discretionary. Justice A's opinion may not match Justice B's.

That makes a leave application the luck of the draw – that is, the justice whom you draw.

The case law only adds to the leave applicant's challenges. "Matters of importance" must be important to the public, and not merely the parties.[39] However, it is "extremely rare that a single interlocutory order of a single trial judge, which is likely not binding on any other court and often involves only procedural matters, will raise much of an issue of interest beyond the parties to the case."[40] It also doesn't help that some interlocutory orders, such as interlocutory injunctions, are discretionary.[41] That makes it difficult for the Divisional Court to find an error that would justify granting leave.

The result of all this is that leave is rarely granted in Ontario's Divisional Court, even when it might be just to do so. And if the order is not hybrid or interrelated, allowing the Court of Appeal to claim jurisdiction, litigants are left with no other appeal mechanism.

Appeals in other provinces

A look at procedures outside Ontario adds perspective to the problem. Appendix A is a table of concordance setting out the differing provisions for leave to appeal from interlocutory and final orders in the 10 provinces.

Two provinces do not require leave for an appeal of an interlocutory order. In Alberta,[42] interlocutory appeals go straight to the Court of Appeal. In Prince Edward Island, interlocutory orders from a prothonotary are appealed to the Supreme Court, while interlocutory appeals from the Supreme Court go to the Court of Appeal.[43]

Until January 1, 2022, Manitoba did not require leave. As of that date, an amendment to *The Court of Appeal Act*[44] replaced the former rule with a statutory provision that mandates leave (with exceptions).[45]

In the remaining provinces, leave is also required, but the process is much more streamlined.

In this section, we will consider the procedures in British Columbia, Saskatchewan, and New Brunswick. None of these provinces bifurcate appeals as Ontario does. Their appeal courts enjoy the jurisdiction to hear both final and interlocutory appeals. In addition, there is no legislated test for leave.

British Columbia

In British Columbia, an interlocutory order falls under the category of a "limited appeal order," since there is no automatic right of appeal. The Court of Appeal has the jurisdiction to hear final order appeals and decide if it will grant leave to hear an interlocutory order appeal.[46] Unlike Ontario's *Rules*, the BC *Court of Appeal Rules* clearly enumerate the types of orders considered to be limited appeal orders requiring leave (mostly procedural and family law matters).[47]

Under section 7 of the BC *Court of Appeal Act*, an appeal from an interlocutory order can only be heard if leave has been granted first.[48] There is no specified test for leave under either the *Court of Appeal Act* or the *Court of Appeal Rules*. This increases appellants' prospects of obtaining leave. The court's own case law has developed a broad test for leave, summarized as "whether granting leave to appeal is in the interests of justice."[49]

Saskatchewan

Leave is required to appeal interlocutory orders in Saskatchewan.[50] There are, however, exceptions: where the case involves (1) the liberty of an individual; (2) the custody of a minor; (3) the granting or refusal of an injunction; or (4) the appointment of a receiver.[51] No leave is needed for final order appeals.[52]

Like British Columbia, Saskatchewan has no specified statutory or regulatory test for leave. It is left to the court's discretion.[53]

New Brunswick

The Court of Appeal of New Brunswick has original jurisdiction over appeals respecting all judgments, orders, or decisions from any judge of any court.[54] Appeals of interlocutory orders require leave from a judge of the Court of Appeal.[55]

As in British Columbia and Saskatchewan, New Brunswick has no specified statutory or regulatory test for leave. It is left to the court's discretion.

Bringing order to the disorder around orders: The *Hryniak* culture shift

Ontario law in this area needs to take a lesson from other provinces. It is badly in need of reform. Solution: the Court of Appeal for Ontario ought to be granted jurisdiction to hear all appeals, whether interlocutory or final.

There are options: the Alberta/Prince Edward Island approach of requiring no leave ever, or the British Columbia/Saskatchewan/New Brunswick approach of a streamlined and less constricted leave procedure. Unless Ontario adopts one or the other of these approaches, needless delay and wasted expense over the nebulous criteria for leave will persist. Streamlining the procedures would also meet the remedial imperative that Ontario's *Legislation Act* prescribes.

The language may be pointed, but Justice David Brown in *1476335 Ontario Inc. v Frezza* (above) expressed perfectly what many, including us, believe:

> There is absolutely no excuse for such confusion to continue. Simple "bright line" appeal route solutions are available.

The only plausible reason that the wasteful and frustrating procedures governing appeals from interlocutory and final orders continue is inertia. Justices, lawyers, and litigants alike have long been calling for change, but successive governments have not responded.

This is not a mere technical issue. It is a social policy issue. How many meritorious appeals have been lost or abandoned because of the over-restrictive interlocutory final gateway? How many wrong or, worse, bad judgments have been left to stand? How many litigants have been denied the probative scrutiny of the appellate eye – one of the common law's most estimable attributes – because of this procedural anomaly? Too many, no doubt.

There are surely good reasons to control the inflow of interlocutory appeals. The Court of Appeal for Ontario is a busy court, with an already burdensome workload. But the control is set at too high a restrictive value. It needs to be adjusted for a better balance between the cases that make it past the gate, and the ones that don't.

In *Hryniak v Mauldin*,[56] Justice Karakatsanis famously invoked a "culture shift" in our courts:

> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system.

One way in which this culture shift can begin, and more timely and affordable access to the civil justice system can be achieved, would be to end the decidedly unappealing disorder that now reigns over final and interlocutory orders in Ontario.

Appendix A

Table of concordance **Provisions for leave to appeal from interlocutory and final orders in the Canadian provinces (territories omitted)**	
The following legislation is included in this table of concordance:	
Alberta:	*Alberta Rules of Court*, Alta Reg 124/2010
British Columbia:	*Court of Appeal Act*, RSBC 1996, c 77 (***CAA***); *Court of Appeal Rules*, BC Reg 297/2001 **(CAR)**
Manitoba:	*The Court of Appeal Act*, CCSM c C240
New Brunswick:	*Judicature Act*, RSNB 1973, c J-2 (***JA***); *Rules of Court*, NB Reg 82-73 (***ROC***)
Newfoundland:	*Rules of the Supreme Court*, 1986, S.N. 1986, c 42, Sched D
Nova Scotia:	*Nova Scotia Civil Procedure Rules*, N.S. Civ. Pro. Rules 2009
Ontario:	*Courts of Justice Act*, RSO 1990, c C43 (***CJA***); *Rules of Civil Procedure*, RRO 1990, Reg 194 (***RCP***)
PEI:	*Rules of Civil Procedure* (***RCP***); *Judicature Act*, RSPEI 1988, c J-2.1 (***JA***)
Quebec:	*Code of Civil Procedure*, CQLR c C-25.01
Saskatchewan:	*The Court of Appeal Act*, SS 2000, c C-42.1

	ON	**AB**	**BC**	**MB**	**NB**	**NL**	**NS**	**PEI**	**QC**	**SK**
Differing treatment of orders	**Yes:** *CJA,* 6, 19	**No:** 9.15	**Yes:** *CAA,* 6, 7	**Yes:** 25.1, 25.2	**Yes:** *JA,* 8(3), 8(3.1)	**Yes:** 58.03-58.04	**Yes:** 90.05	**Yes at SC:** *RCP,* 62.01(1) **No at COA**: *JA,* 5(1)	**Yes:** 30-31	**Yes:** 7-8
Appeal as of right	**Final:** *CJA,* 6(1)(b)	**Both:** 14.4(1)	**Final:** *CAA,* 6	**Final:** 25.1	**Anything not requiring leave:** *JA,* 8(3)	**Anything not requiring leave:** 58.03-58.04	**Anything not requiring leave:** 90.05	**Both:** *RCP,* 62.01 *JA* 5(1, 3)	**Final:** 30	**Anything not requiring leave:** 7(2-3)
Appeal with leave	**Inter:** *CJA,* 19(1)(b)	**-**	**Inter:** *CAA,* 7	**Inter:** 25.2(1)	**Inter:** *JA,* 8(3.1) *ROC,* 62.03	**Inter:** 58.03(a)	**Inter:** 90.05(c)	**-**	**Inter:** 31	**Inter:** 8(1)
Test for leave	*RCP* 62.02(4)	-	-	-	-	-	-	-	-	-
Court with jurisdiction	**COA/DIV:** *CJA,* 6, 19	**COA:** 14.4(1)	**COA:** *CAA,* 6(1)(a), 7(2)	**COA:** 25	**COA:** 8(2)	**SC:** 1.03(c1), 58.02(1)	**COA:** 90.02(2)	**SC:** *RCP,* 62.01 **COA:** *JA,* 5	**COA:** 29	**COA:** 7(2)

Notes

1. *1476335 Ontario Inc v Frezza*, 2021 ONCA 732 at para 16 [Frezza], per Brown JA.
2. Full title: *A treatise of testaments and last wills: compiled out of the laws ecclesiastical, civil, and canon, as also out of the common law, customs and statutes of this realm. The whole digested into seven parts / by Henry Swinbure*.
3. For a thorough analysis of the issue, see Gerard J Kennedy, "Civil Appeals in Ontario: How the Interlocutory / Final Distinction Became So Complicated and the Case for a Simple Solution?" (2020) 45:2 Queen's LJ 243.
4. *Courts of Justice* Act, RSO 1990, c C43, as amended, s 6(1)(b). We do not address appeals from the interlocutory orders of associate justices (formerly known as masters).
5. RSO 1990, c C43, s 19(1)(b).
6. *Rules of Civil Procedure*, RRO 1990, Reg 194, s 62.02(4).
7. *Ball v Donais* (1993), 13 OR (3d) 322 (CA).
8. *Kot v Kot*, 2018 SKQB 338 at para 21.
9. See *Archer v Archer* (1975), 11 OR (2d) 432 (CA); *Amphenol Canada Corp. v Sundaram*, 2019 ONCA 932, 56 CPC (8th) 307; *561895 Ontario Ltd. v Metropolitan Trust Co. of Canada* (1997), 14 CPC (4th) 195 (ONCA), leave to appeal to SCC refused, 26191 (November 20, 1997).
10. *Hendrickson v Kallio*, [1932] OR 675 (CA).
11. *P1 v XYZ School*, 2021 ONCA 901 at paras 11–12; *Singh v Heft*, 2022 ONCA 135 at paras 9–11.
12. 2007 ONCA 497.
13. *Ibid* at paras 3–4.
14. *Ibid* at para 23.
15. *Ibid* at paras 31–32.
16. *Ibid* at para 45.
17. *Ibid* at paras 36–37.
18. 2015 ONCA 158, reversed on other grounds, 2016 SCC 42 [Parsons].
19. *Ibid* at paras 44–45.
20. *Ibid* at para 44. See also Justice Paciocco's discussion of the "modified approach" in *Fontaine v Canada (Attorney General)*, 2021 ONCA 313 at para 55.
21. *Parsons, supra* note 18 at para 51.
22. *Ibid* at para 187.
23. *Ibid* at para 199.
24. *Ibid* at para 204.
25. *Frezza, supra* note 1.
26. *Ibid* at paras 1–2.
27. *Ibid* at para 4.
28. *Ibid* at para 9.
29. *Frezza, supra* note 1 at paras 15–16.
30. *1476335 Ontario Inc v Frezza*, 2021 ONCA 822 at para 5.
31. *Ibid* at para 9 .
32. *Ibid* at para 8.
33. RSO 1990, c C43, as amended, s 6(2).
34. See *Cole v Hamilton (City)*, 60 OR (3d) 284, para. 15 (CA); *Edgeworth v Shapira*, 2020 ONCA 374 at para 5.
35. *Lax v Lax* (2004), 70 OR (3d) 520 at para 9; *Martin v 11037315 Canada Inc.*, 2021 ONCA 256 at para. 13 *[Martin]*.
36. *Martin, ibid; Azzeh v Legendre*, 2017 ONCA 385, leave to appeal refused, [2017] SCCA No. 289; *Abbasbayli v Fiera Foods Company*, 2021 ONCA 95 at para. 17; *2099082 Ontario Limited v Varcon Construction Corporation*, 2020 ONCA 202 at para 17; 97 CLR (4th) 26 at para 17; and *Cooper v The Laundry Lounge, Inc.*, 2020 ONCA 166 at para 2.
37. 2006, SO 2006, c 21, Sch F.
38. RRO 1990, Reg 194, s 62.02(4).
39. *Norris v Norris*, 2017 ONSC 3515 (Div Ct)at para 18; *WorldCare International, Inc. v Health Care Services*, 2018 ONSC 713 (Div Ct) at para 19.
40. Geoff R Hall, "Applications for Leave to Appeal: The Paramount Importance of Public Importance" (1999) 22 Adv Q 87 at 98.
41. *Barbra Schlifer Commemorative Clinic v Canada*, 2012 ONSC 5577 at para 8.
42. *Alberta Rules of Court*, Alta Reg 124/2010 at ss 9.15, 14.4.
43. *Rules of Civil Procedure*, s 62.01(1)(a); Judicature Act, RSPEI 1988, c J-2.1, s 5(1), (3).
44. CCSM c C240, s 25.2.
45. See *Meeking v Cash Store Inc.* et al., 2014 MBCA 69 at paras 18–19 for the former procedure.
46. *Court of Appeal Act*, RSBC 1996, c 77.
47. *Court of Appeal Rules*, BC Reg 297/2001, s 2.1.
48. RSBC 1996, c 77, s 7.
49. *Jiang v Peoples Trust Company*, 2022 BCCA 40 at paras 32–33.
50. *The Court of Appeal Act*, SS 2000, c C-42.1, s 8(1).
51. *Ibid*, s 8(2)(a).
52. *Ibid*.
53. See *Patel v Saskatchewan Health Authority*, 2021 SKCA 115 at paras 196–204.
54. *Judicature Act*, RSNB 1973, c J-2, s 8(2).
55. *Ibid*, s 8(3.1); Rules of Court, NB Reg 82-73, s 62.03.
56. *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at para 2.

The business benefits of pro bono: Not just for the public good

Mary Paterson, Gordon Currie, and Jesse-Ross Cohen

Full disclosure: the authors are unabashed advocates of pro bono work. The authors wish to recognize the efforts of Andrea Korajlija, student-at-law, and Mary Angela Rowe for her thoughtful comments.

Robust pro bono programs can be good for business. That's right. Giving away legal services for free to advance a worthy cause can improve your bottom line.[1] Pro bono work can help you attract, train, and retain talent. It can also help you attract and retain clients, who are increasingly inclined to engage law firms and business partners who have a demonstrated commitment to the broader communities in which they work. Both results drive profit.

In this article, we explore why pro bono work provides an excellent return on investment, both tangible and intangible. Some of the rationales apply to all firms, big or small, and in-house counsel. Some apply only to big firms. *Across the board*, the business case for dedicating time to pro bono work – from talent advancement to client retention to network-building – is compelling, and increasingly so. And contrary to popular belief, the costs of doing pro bono work "are almost always exaggerated."[2]

After setting out the business rationale for doing pro bono work, we explore how firms and corporations can build effective pro bono programs. Then we peer into the future, which, based on US, UK, and Australian experience, will require lawyers to set aspirational pro bono targets and make public disclosure of their pro bono commitments. Building a robust pro bono program in preparation for this future is the smart move for any business-minded lawyer.

Defining "pro bono"

What is pro bono? Most definitions of pro bono have three features in common:

- *Legal services*. A lawyer (or supervised law student or clerk) is providing *legal* services; pro bono does not include business development, sitting on a board, or coaching little league.[3]
- *No expectation of a fee*. The lawyer provides the legal services without expecting a fee in return.
- *Access to justice*. The legal services are provided to people of limited means who would not otherwise be able to obtain legal advice or to non-profit organizations, charities, or advocacy groups.

It is the second feature – the lack of fee – that seems inconsistent with a healthy bottom line. It's not. Pro bono is a smart business strategy for law firms, individual lawyers, and in-house legal groups.[4] Many of the most successful organizations and top in-house counsel in Canada are pro bono leaders.[5]

The business case for organizations to invest in pro bono work

From the perspective of law firms and corporations, a strong pro bono culture has immediate and practical benefits. These benefits relate primarily to the core profit drivers in the business of law: talented people to do the work, and clients hiring us to solve their problems.

One obvious benefit of a robust pro bono program – particularly during the talent war currently raging in our businesses – is

recruiting, training, and retaining top talent.

- ***Recruiting and diverse recruiting.*** Many people go to law school with public-spirited motivations: they see law school as "a pathway to a career in public service, being helpful to others, and advocating for social change."[6] When they graduate, the cost of law school forces many to prioritize jobs that will help them to repay their loans.[7] A business that is committed to pro bono work can offer the best of both worlds.[8] Some authors suggest that a business with a strong pro bono culture attracts more diverse talent, although we did not locate any quantitative data.[9]
- ***Training.*** Law school teaches students to issue spot and argue "both sides.[10] These are important aptitudes, but no client is happy receiving advice framed "on the one hand … but on the other hand …" Advising clients is a skill. Real experience is necessary to learn how to make a recommendation to a client, how to communicate that recommendation clearly and credibly, and how to identify the risks flowing from that recommendation. Pro bono work can provide that real-world experience. Junior lawyers typically have more autonomy on pro bono files, particularly in firms where the cases tend to be larger or in corporations with large in-house legal teams. Pro bono work therefore delivers valuable training while also helping the community.
- ***Retention.*** Recruitment and training alone are not enough. Retaining top talent in a competitive legal marketplace requires teamwork and strong morale. According to the chief justice of Ontario, a key driver of low morale among associates is a lack of control over their work.[11] Pro bono can be a salve, as it tends to (as noted above) provide junior lawyers an autonomous platform to ply their trade. Robust pro bono programs also allow lawyers to "bring their whole selves to work";[12] lawyers can use their legal skills to pursue their social justice passions in a way that is recognized and valued by their firm, without making a career out of it.

The other obvious benefit to a strong pro bono program, in addition to building your organization's legal team, is that it can also help build and maintain your client base. This is the case for several reasons:

- ***Environmental, social, and governance*** (ESG). Clients are increasingly asking their law firms to demonstrate a commitment to pro bono work as part of their ESG and diversity inquiries.[13] Outside of law, leading businesses[14] and business analysts recognize the "linkage from ESG to value creation" and the power of ESG to drive business-to-business sales.[15] As these trends continue, law firms and corporations that have proactively woven pro bono work into their culture will have an advantage.[16]
- ***Networking.*** As discussed further below, the pro bono bar is a great place to network because it exposes lawyers to a wide range of top practitioners and community leaders. Firms and organizations that do pro bono work participate in, and benefit from, these networks.
- ***Opportunity to highlight firm capabilities and build reputation.*** Pro bono work provides opportunities for impact, outreach, and profile-building. For example, some firms take on cases that engage issues of national importance before the Supreme Court of Canada.[17] Even cases without such a high-profile dimension can help build a firm's reputation within the legal community itself. Changing how every single traffic violation in Ontario is prosecuted (for example) can spark more interest and conversation than a plethora of near-identical deals.

Clients also care about outcomes. They are not pleased when you explain that their trial date is years in the future; they want to get back to focusing on their business or life. A particularly keen client may ask what your firm is doing to reduce the backlog in the court system,[18] a backlog that affects both plaintiffs and defendants.[19] The simplest way to reduce this backlog is to reduce the number of unnecessary appearances chewing up resources in the system, many of which stem from self-represented litigants who do not understand their rights or the rules. Pro bono is one solution.

A final reason to do pro bono work is that, in some cases, with proper engagement letters, firms can recover costs on pro bono matters even when they take on the mandate without an expectation of a fee.[20] Recovery of costs is permitted by the courts, and even encouraged from the perspective of access to justice.[21] In some cases, even if you do not expect a fee, you may receive one.

Given these business benefits, it is perhaps unsurprising that legal scholars and economists have shown that typically the most profitable firms and corporations do the most pro bono work.[22]

The business case for lawyers to invest in pro bono work

From the perspective of individual lawyers (whether in-house, part of a firm, or sole practitioner), the rationale for doing pro bono work overlaps with, but is distinct from, the rationale for firms and corporations at large.

As we note above, pro bono work teaches lawyers to get on their feet and make decisions. This type of clinical and experiential learning experience is now a staple at Canadian law schools, for good reason.[23] In addition, pro bono lawyers build their reputations with the courts as strong advocates committed to the rule of law.

Doing pro bono work is also a ticket to an exclusive club[24] – which includes law firm partners, general counsel, and senior members of some of Canada's largest financial institutions.[25] Participating in pro bono work exposes lawyers to a wide network of top practitioners and community leaders.[26]

Doing pro bono work is also rewarding and often fun.

The self-regulation rationale for investing in pro bono work

A robust commitment to pro bono work is part of maintaining our self-regulated status. The legislation enabling lawyers to provide legal services is grounded in a bargain: we get a self-regulated monopoly, and society gets access to legal services.[27] This bargain is made express in the *Law Society Act*, R.S.O. 1990, c. L.8:[28]

> 4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
>
> 1. The Society has *a duty* to act so as *to facilitate access to justice* for the people of Ontario. [Emphasis added.]

Although less explicit, the legislation enabling lawyers in British Columbia, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, and Prince Edward Island

each refers to protecting the "public interest."[29] As explained by the Supreme Court of Canada, the "privilege of self-government is granted to professional organizations only in exchange for, and to assist in, protecting the public interest with respect to the services concerned."[30] The public interest cannot be protected unless legal services are, as a practical matter, accessible to most individuals; as the term "access to justice" implies.

If we lawyers do not live up to our end of the bargain by ensuring access to justice, our self-regulated monopoly is at risk.[31] As Justice Major of the Supreme Court of Canada (to take one example) wrote:

> Unless lawyers act quickly to ensure that these requirements [of access to legal services] are met, their position as members of a self-regulated profession with a virtual monopoly is in serious danger of becoming something else. […] If the profession does not act to solve these problems – specifically the cost of legal services – solutions to the detriment of the profession will be imposed.[32]

Although an outright end to self-regulation may not be imminent, it is important to recognize (as the learned justice did) that self-regulation is not a "yes or no" proposition; it can be eroded. Since Justice Major delivered his warning, several regulatory measures have been proposed and adopted in response to the access to justice "crisis"[33] that could affect lawyers' monopoly on the provision of legal services and impact the business of law.[34]

In addition to formal measures, commentators in the United States have observed a "*de-facto* deregulation" of the legal profession occurring in real time, with judges and non-lawyer advocates working together "behind the scenes" to help self-represented litigants.[35]

These formal and informal measures, and the measures that follow, could fundamentally change the business of law. To preserve self-regulation, lawyers must demonstrate that we will respond to the access to justice crisis. This response requires a broad and meaningful commitment to pro bono work. A strong pro bono culture that improves access to justice is part and parcel of maintaining our self-regulated status.

Building a strong pro bono culture

The first step in building a strong pro bono culture – whether in-house, part of a firm, or sole practitioner – is to develop a pro bono policy. Commit to doing pro bono each year, decide what kind of pro bono you will permit, and value that pro bono by giving the lawyers who do that work billable hour credit.

The second step is simple: do pro bono work. This is *The Advocates' Journal*, so we focus on barrister work, but there are many opportunities for solicitors to do pro bono work[36] and lots of support.[37] Explain the business case for pro bono to your corporate colleagues as well.

What pro bono work can you do?

Would you like to spend a morning providing summary legal advice to people who just need a little bit of help understanding their rights? No problem: you can take a shift (sometimes from the comfort of your home or office), supported by enterprise-quality software and experienced staff.[38] Whether you are a barrister or a solicitor, if you are called to the bar, you are capable of providing summary legal advice on a pro bono basis.[39] It is fun, easy, and convenient, and every law society in Canada has either relaxed its conflict and engagement rules or published guidance to facilitate this type of pro bono work.[40]

Would you like some appellate-level advocacy experience? A few provinces have formal programs, and more are likely to develop as we emerge from the pandemic and in-person services become more prevalent.[41]

Would you like to develop a new part of your practice, such as tribunal or judicial review work? There are many opportunities for pro bono advocacy work in these spaces. For example, formal programs providing training and resources to lawyers so that they can help refugees is a burgeoning area as of the date of this article.[42]

Would you like a platform for your students to get real experience managing files and delivering actionable advice? Pro Bono Students Canada is a leader in that space, dedicating more than 120,000 hours per year. You can also speak with your provincial pro bono organization (such as Pro Bono Ontario or Access Pro Bono in British Columbia) about programs for your articling students.

Is pro bono working?

In very important ways, the answer is *yes*

Readers of this Journal are familiar with the access to justice crisis.[43] Sincere efforts are being made,[44] but the demand for pro bono services continues to outpace the supply.[45]

Fortunately, while every lawyer has a role to play in addressing the access to justice crisis, the burden is not on us as individuals to understand and solve the underlying causes and structural impediments at play. Leading scholars are considering these issues (and we thank them for doing so).[46] Our job is to attack the problem directly, as the most profitable firms and corporations do.

Such direct efforts work. Take the following testimonial from a pro bono client, by way of example:

> My issue related to a poorly worded employment contract. The professional carefully explained to me what it said, and proposed the addition of 1 line that fixed the document. My employer later agreed to hire me under the modified document. I am happily working there now!

It took the lawyer half an hour to deliver that advice – long enough to open and close the "file," gain experience delivering actionable advice, and reduce court backlog by avoiding an employment dispute.[47] A single day working on pro bono can lead to several such outcomes.[48]

The business case for pro bono in the future

Often, we look to the legal markets outside Canada to see the trends that will emerge in our legal market a few years later. What is happening outside Canada?

We see leading firms and corporations increasingly adopting ESG requirements and reaping the financial benefits of doing so.

We see increased transparency and reporting on how many hours lawyers are dedicating through pro bono work.[49] For example, several US states require lawyers and/or firms to report their pro bono commitments.[50] In some states, the courts have created programs to publicly recognize lawyers who report meaningful pro bono work.[51]

We see organizations pushing lawyers, whether in-house or in firms, to sign pledges committing to do more pro bono work.[52]

We see national and international coalitions of law firms and

lawyers committed to pro bono work,[53] which also serve as referral networks for paying work.

These trends are coming to Canada. Going a step further, Chief Justice Wagner predicts that legal regulators will eventually *require* lawyers to do some pro bono work; and the chief justice thinks it would be "very good" if pro bono was part of all of our practices.[54]

The business-minded lawyer will proactively create a strong pro bono culture to capitalize on these trends. It's the right thing to do.

Notes

1. The bottom line matters; we are long past the time of junior barristers' gowns having pockets sewn in the back into which their honorariums are deposited: Peter Hay, *The Book of Legal Anecdotes* (New York: Facts on File, 1989), 255.
2. Reena N Glazer, *Revisiting the Business Case For Law Firm Pro Bono*, South Texas Law Review, 51:563, 2010 at 572, online, citing Jack Londen, *The Economics of Pro Bono Work*, 15 Challenge Signatories Update 1–4 (1997).
3. These are worthwhile pursuits, but different from pro bono. See The Australian Pro Bono Centre, "Definition of Pro Bono" (undated), online.
4. To be clear, these are not new ideas. The authors recognize the work of, among others, the late Esther F Lardent: *Making the Business Case for Pro Bono*, Pro Bono Institute (2000), online.
5. Glazer, *supra* note 2. See also Jennifer Brown, "Ontario In-House Lawyers Recognized for Pro Bono Work," *Canadian Lawyer Magazine*, 2017, online.
6. Association of American Law Schools, *Highlights from Before the JD: Undergraduate Views on Law School* (undated) at 3, online.
7. Practice Panther, "The Impact of Law Student Loan Debt," *National Law Review* (3 September 2021), 11:246, online.
8. This resonates especially with younger generations. For example, Deloitte found that almost two-thirds of "Gen Y" would prefer to work for a company that provides opportunities for them to apply their skills to benefit non-profit organization: Deloitte, *Deloitte Volunteer IMPACT Survey, 2007 Executive Summary*, online. Similarly, nearly half (46%) of "Gen Zs" and "millennials" in senior positions have rejected a job and/or assignment based on their personal ethics: *Deloitte, Striving for Balance, Advocating for Change – The Deloitte Global 2022 Gen Z & Millennial Survey*, online.
9. Carl G Cooper and Carleton O Strouss, *Synergy at the Intersection of Diversity and Pro Bono*, Pro Bono Institute (2005), online.
10. Stephanie LaRose, "A Step Toward Aligning Legal Education with Practice" (November 2018) Michigan Bar Journal, online.
11. Chief Justice George R Strathy, "The Litigator and Mental Health" (2022), 8, online.
12. See, in a non-legal context: Mike Robbins, "How to Bring Your Whole Self to Work," The Greater Good Science Center at the University of California, Berkeley (2022), online.
13. See Scott L Cummings, Fabio de Sa e Silva, and Louise G Trubek, *Global Pro Bono: Causes, Context, and Contestation* (Cambridge: Cambridge University Press, 2022), ch 3: "Pro Bono Legal Work in Canada" 121, online. See also notes 14 and 15, *infra*.
14. According to one survey conducted by Morgan Stanley, for example, a significant majority of the top institutional investors globally (i.e., most of whom hold over $1 billion in assets) apply ESG principles to their investing. Approximately 78% of respondents agreed that sustainable investing is a risk mitigation strategy. *Morgan Stanley, Morgan Stanley Sustainable Signals: Asset Owners See Sustainability as Core to Future of Investing*, 2020, online.
15. Witold Henisz et al., "Five Ways That ESG Creates Value," McKinsey Quarterly, 2019, online. See also, relatedly, Matthew Rudman, *Opinion: ESG Becomes Key to Unlocking the B2B Sales Process*, 2022, FleishmanHillard, online. A similar dynamic applies with consumers: Afdhel Aziz, "Global Study Reveals Consumers Are Four to Six Times More Likely to Purchase, Protect And Champion Purpose-Driven Companies," 2020, Forbes, online.
16. For example, firms that count pro bono work as billable hours.
17. For example, the firm that represented The Advocates' Society in the recent decision of the Supreme Court of Canada in *Anderson v Alberta*, 2022 SCC 6.
18. This backlog is likely to get worse, as a result of COVID-related measures among other factors before it gets better. For example, the courthouse in London, Ontario, reported clearing only five of 65 family matters from its trial list in March 2022.
19. Litigants can typically expect over a year of delay in getting their matter to trial, usually longer. See Kevin LaRoche et al., "The Length of Civil Trials and Time to Judgment in Canada: A Case for Time-Limited Trials" (2021) Canadian Bar Review 286, 2021 CanLIIDocs 2254 at 297, online.
20. These funds can be retained by the firm or donated to create a "double impact."
21. See *1465778 Ontario Inc. v 1122077 Ontario Ltd.*, 2006, 216 OAC 339 (CA) at paras 2, 34, 36, 44–48; *Hinse v Canada (Attorney General)*, 2015 SCC 35 at para 178.
22. Glazer, *supra* note 2, online. Glazer cites various studies including Jack Londen, *supra* note 2. See also note 14, *supra*.
23. Gemma Smythe, Samantha Hale, and Neil Gold, "Clinical and Experiential Learning in Canadian Law Schools: Current Perspectives," The Canadian Bar Review, 95:1 (2017), online.
24. Anecdotally, lawyers who do pro bono are more likely to refer matters to other lawyers who do pro bono.
25. Pro Bono Ontario, "Staff & Board Members" (undated), online. See also, for example, the US "In House Pro Bono Group," which is made up of legal and compliance professionals from over 75 different organizations, including Goldman Sachs, Citibank, PwC, Bloomberg, Bank of America, GSK, and Hewlett Packard.
26. Lauren Hunt Brogdon, "Networking Through Pro Bono" (undated), *American Bar Association*, online.
27. Lorne Sossin, "The Public Interest, Professionalism and Pro Bono Publico" (2008) 46 Osgoode Hall LJ, 131–58; Richard Devlin, "Bend or Break: Enhancing the Responsibilities of Law Societies to Promote Access to Justice" (2015) 38:1 Man LJ, 119–58. Devlin puts it simply: "Lawyers have a social contract with society because they've got a monopoly over legal services": Cristin Schmitz, "Chief Justice's Remarks Spark Debate over Mandatory Pro Bono for Lawyers," The Lawyer's Daily (2019), online. The language of a "social contract" has also been adopted by, *inter alia*, Justice Frank Marrocco: Anita Balakrishnan, "Self-Regulation: The End of an Era? Lawyer Discipline and the Role of Law Societies," Canadian Lawyer Mag (November 2019), online.
28. *Law Society Act*, RSO 1990, c L.8 at ss 4.1 and 4.2. In the same vein, the Model Code of Professional Conduct of the Federation of Law Societies of Canada encourages lawyers, "as a matter of access to justice," to do pro bono work: Federation of Law Societies of Canada, *Model Code of Professional Conduct* at section 2.1-2, commentary #1(b) and section 4.1-1, commentary #2, online.
29. *Legal Profession Act*, 1990, L-10.1 at ss 3.1 and 3.2 (SK); *Legal Profession Act*, SBC 1998, c 9 at s 3 (BC); *Legal Profession Act*, CCSM, c L107 at ss 3(1) and 3(2) (MB); *Law Society Act*, 1996, SNB 1996 at s 5 (NB); *Legal Profession Act*, RSPEI 1988, c L-6.1 at s 4 (PEI); Legal Profession Act, SNS 2004, c 28 at s 4 (NS).
30. *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at paras 35–36, quoting DAA Stager in Lawyers in Canada (Toronto: University of Toronto Press,1990), 31.
31. See note 27, *supra*. See also: Justice JC Major, "Lawyers' Obligation to Provide Legal Services" (1995) 33 Alta L Rev 719, online; Schmitz, *supra* note 27, online, citing Adam Dodek "Leadership best comes from the profession rather than from the regulator."
32. Major, JC, *ibid*.
33. Discussed further below.

34. For example: (a) moving disputes out of the courts and into specialized tribunals: Lorne Sossin and Kent Roach, "Access to Justice and Beyond" (2010) 60 U Toronto LJ 373; (b) expanding paralegal services: in Ontario, for example, paralegal services were expanded through legislation explicitly called the *Access to Justice Act:* 2006, SO 2006, c 21. Years later, leading academics continue to call for a yet-further expansion to the scope of services that paralegals can provide: Lorne Sossin and Kent Roach, "Access to Justice and Beyond"; Trevor Farrow, *Access to Civil and Family Justice: A Roadmap for Change*, 2013, Action Committee on Access to Justice in Civil and Family Matters; Richard Devlin, "Bend or Break: Enhancing the Responsibilities of Law Societies to Promote Access to Justice" (2015) 38:1 Man LJ 119–58; (c) outsourcing the delivery of legal services to domestic or offshore lawyers and other service providers: Alice Woolley and Trevor Farrow, "Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges" (2016) 3:3 Texas A&M L Rev 549, online; and (d) adding all lawyers to the Sunshine Regulations: Richard Devlin, "Bend or Break." See also, for example: The Honourable Justice Thomas A Cromwell and Siena Anstis (law clerk to Justice Cromwell), "The Legal Services Gap: Access to Justice as a Regulatory Issue" (2016) 42:1 Queen's LJ 1–26.
35. Steinberg, Carpenter, Shanahan, and Mark, "Judges and the Deregulation of the Lawyer's Monopoly," 89 Fordham L Rev 1315 (2021), online.
36. See, for example, Pro Bono Ontario "Corporate/Non-Profits" (undated), online; see also Manitoba's Legal Help Centre, which has a Consumer Protection Clinic that helps people with issues including small claims, estates, employment, debt collection, and auto insurance.
37. See, for example, Pro Bono Ontario, "Don't Think Corporate Lawyers Can Do Pro Bono? Think Again" (22 July 2021), online. See also note 53, *infra*, referencing the efforts of corporate lawyers in New York.
38. For example, Pro Bono Ontario's Free Legal Advice Hotline; Alberta's Civil Claims Duty Counsel Project and Queen's Bench Court Assistance, which was relaunched virtually in December 2020 in response to the pandemic; Manitoba's Community Legal Education Association, which has a Law Phone-In & Lawyer Referral Program; and in British Columbia, the Access Pro Bono Summary Advice Program, which provides services by telephone, online, and in-person. Provinces that do not have a tailor-made virtual option for pro bono work have in-person clinics; for example the 14 free legal clinics run across Saskatchewan by Pro Bono Law Saskatchewan.
39. See, for example, Pro Bono Ontario, "Going to Court" (undated), online; Access Pro Bono, "Volunteer as a Lawyer" (undated), online. Other types of mandates run the gamut from judicial review applications to interventions before the Supreme Court of Canada. See, for example, the Ontario Bar Association's Access Pro Bono Roster Program; and Manitoba's Public Interest Law Centre, which assists clients with public interest cases that will affect groups of Manitobans, such as environmental or human rights.
40. Richard Devlin, *supra* note 27 at paras 9, 27. See also for example:
    - Law Society of Ontario, *Complete Rules of Professional Conduct (undated)*, online, rr 3.4-16.2–3.4-16.6;
    - The Law Society of British Columbia, *Code of Professional Conduct for British Columbia (the BC Code) – annotated (undated)*, online, rr 3.4-11.1–3.4.11.4;
    - Law Society of Alberta, *Code of Conduct* (20 February 2020), online, r 3.4-15;
    - Law Society of Saskatchewan, *Code of Professional Conduct* (10 February 2012), online, rr 3.4-2A–3.4-2D;
    - The Law Society of Manitoba, *Code of Professional Conduct* (17 June 2010), online, rr 3.4-2A–3.4-2D;
    - Law Society of New Brunswick, *Code of Professional Conduct* (1 January 2020), online, rr 3.4-2A–3.4-2D; Nova Scotia Barristers' Society, *Code of Professional Conduct* (23 September 2011), online, rr 3.4-2A–3.4-2D;
    - Law Society of Prince Edward Island, *Code of Professional Conduct* (6 October 2020), online, rr 3.4-2A–3.4-2D.
    - The Law Society of Newfoundland and Labrador has published on its website, *The Nuts & Bolts of Unbundling: A NSRLP Resource for Lawyers Considering Offering Unbundled Legal Services*, online.
    - The Bar of Montreal has published on its website, *A Lawyer's Guide to Limited Scope Representation*, online.
41. For example, through the Nova Scotia Court of Appeal Judicial Mediation Program; or Pro Bono Ontario's Supreme Court Leave to Appeal Assistance Project.
42. For example, judicial review applications on behalf of refugees: Refugee Sponsorship Training Program website (www.rstp.ca), "All About Refusals – Judicial Review" (undated), online. At the Halifax Refugee Clinic, lawyers help clients before the Immigration and Refugee Board.
43. Twelve years after CJC McLachlin convened the Action Committee on A2J, Professor Farrow describes the A2J movement as only just starting the transition from "1.0" to "2.0"; Trevor CW Farrow and Lesley A Jacobs, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020).
44. At the macro level, these efforts often have unintended results. For example, the expansion of paralegal services at the landlord-tenant board in Ontario has provided more assistance to landlords than tenants: Farrow and Jacobs, *ibid* at ch 8.
45. Aidan Macnab, "Why Is Pro Bono Work Important?" *Canadian Lawyer* (30 July 2021), online.
46. For example: Farrow and Jacobs *supra* note 43.
47. Not to mention, change the course of that client's life for the better and improve the efficiency of the local economy.
48. Although not the focus of this article, it should be noted that such outcomes typically have a knock-on effect. Where legal problems are left unresolved, "the potential cost – economic, health, social, et cetera – to the individual, as well as to the state, is significant": Trevor Farrow, "What Is Access to Justice?" Osgoode Hall LJ, 51:3, Article 10, online.
49. We also see increasing mandates for ESG reporting generally; for example, the American Securities and Exchange Commission proposing rule changes that would require registrants to include certain climate-related disclosures in their registration statements and periodic reports: SEC Press Release dated March 21, 2022, online.
50. Including Florida, Hawaii, Illinois, Indiana, Maryland, Minnesota, Mississippi, Nevada, New Mexico, and New York. In New York, for example, lawyers must file a statement biennially describing their pro bono services and contributions: 22 NYCRR &118.1(e)(14), online.
51. For example, lawyers meeting the Tennessee Supreme Court's minimum goal of 50 pro bono hours annually are named "Attorneys for Justice" by the court, and have their names published in the Tennessee *Attorneys for Justice Honor Roll*. In Illinois, the Fifth Judicial Circuit recognizes lawyers who provide pro bono work in an *Annual Celebration*. This is also seen internationally, for example in Hong Kong where the Government of the Hong Kong Special Administrative Region has enacted a Recognition Scheme for Provision of Pro Bono Legal Services.
52. For example: the Pro Bono Pledge of the Illinois Fifth Judicial Circuit, online; Ireland's Pro Bono Pledge, online; the Pro Bono Pledge of the Tax Section of the American Bar Association, online; the pro bono pledges of various law schools, including the University of Michigan (online), the University of Chicago Law School (online), the Washington College of Law at American University (online).
53. For example, a coalition of law firms in New York assisting small businesses in accessing (mostly COVID-related) government support (online); The European Pro Bono Alliance, which is made up of several national and subnational groups (online); and the International Lawyers Project, which has a volunteer database of over 2,000 senior lawyers and delivered over $2.5M (Cad) in pro bono hours in 2019 (online).
54. Cristin Schmitz, "Chief Justice Wagner Improves Public Communication, Brings New Ideas, Change to Top Court, CJC and NJI" [exclusive interview], The Lawyer's Daily (2019), online.

Finding a balance:

Navigating the advocacy challenge for union-side labour lawyers in cases involving allegations of member-on-member sexual violence

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Litigation files involving sexual assault allegations raise a multitude of legal and ethical issues for lawyers. These issues are often discussed in the context of criminal proceedings but, for labour lawyers, workplace sexual assault cases present challenging considerations. For union-side labour lawyers, a grievance that arises from a sexual assault allegation in the workplace may require cross-examination of a union member called as a key employer witness. For example, in a member-on-member case where an employee is disciplined as a result of a workplace sexual assault allegation, the union's lawyer will likely be faced with having to cross-examine the union member who has alleged that they were sexually assaulted[1] by the grievor. From an advocacy perspective, carrying out this prospect can raise difficult questions of strategy for union-side counsel. This article suggests that the union-side advocate can be guided by legal principles of the law of consent to fulfil their role as an advocate for their client while balancing broader ethical obligations and being sensitive to the union's duties owed to all its members.

Background

Unions owe a duty of fair representation to their members, which requires that a union, in its determinations of whether to advance grievances, "weigh the competing interests of the employees it represents and make a considered judgment[,] the procedure and results of which must neither be arbitrary, discriminatory nor in bad faith."[2] This weighing can prove particularly challenging when there are competing union-member interests in one case, such as the interests of the complainant in having a workplace free of violence and discrimination, and the interests of the member disciplined for an alleged workplace sexual assault in being disciplined only where there is just cause and only to the extent appropriate in the circumstances. As noted by Susan M. Hart in the similar context of member-on-member sexual harassment:

> A grievance alleging sexual harassment by a supervisor or manager more easily fits the conventional model of arbitration. In contrast, many unions face a "classic dilemma …" in co-worker sexual harassment cases where an alleged harasser files a grievance appealing employer discipline … The duty of fair representation reinforces this tension because protecting the interests of both members potentially undermines bargaining unit solidarity …[3]

Many unions have developed internal policies to help guide their representation decisions in member-on-member harassment and violence cases in the context of their duty of fair representation.[4] Once a decision to provide representation to the disciplined member has been made,[5] however, the competing interests of the members do not evaporate, even if the union has ensured that the complainant also has representation in advancing a complaint or grievance over the assault or has otherwise met its duty of fair representation to the complainant.

As the then-president of the Canadian Union of Public Employees once commented, "the situation gets even more complicated when you throw in internal workplace politics, friendships and loyalties that can have other workers taking different sides …"[6] Beyond these concerns is the fact that unions are inherently political organizations.

Union solidarity, including support for members as part of the political collective generally, and the aim of advancing equity-seeking principles[7] are often significant animating features of how unions approach litigation and litigation strategy. At the same time, a discipline grievance demands zealous advocacy by the union's lawyer, recognizing the importance of work in the life of the grievor[8] and the goal of the union to ensure the employer meets their obligations under the collective agreement. And beyond the concerns of the parties in a particular grievance, there is the fact that, in many grievances, the union will have an obligation to provide ongoing representation to both the grievor and the complainant after the arbitration has concluded.

When unions are instructing union-side counsel acting in a workplace sexual assault discipline matter, these difficult and potentially conflicting interests may present a challenge for counsel in developing litigation strategy and particularly in the preparation and conduct of cross-examination of the union-member complainant. There are suggestions that counsel does not always strike the right balance. One 2012 study of labour arbitration cases involving the discipline of male union members for sexual harassment of a female co-worker found that union-side counsel often employed approaches in litigation that invoked victim blaming and undermined the credibility of witnesses through gendered arguments:

> [I]n many of the discipline cases, unions appeared to be aggressively protecting the rights of the male perpetrator, moving beyond what was required to meet their legal duty of fair representation to pursue gendered arguments, reflecting stereotypical and out-dated images of women, as recognized by a number of the arbitrators. In a minority of cases, arbitral reasoning did not sufficiently take into account institutionalized inequality and gendered power relations at work either, and so gendered arguments were built into award reasonings and decisions. …
>
> The findings of this research indicated that legal counsel, increasingly hired by the parties in arbitrations … felt professionally obliged to win the union case at any cost in what has become a highly adversarial, legalistic context …

In several cases, the humiliating and degrading process of being cross-examined in response to strongly gendered arguments in order to assess the credibility of women versus their harassers led to the re-victimization of women.[9]

Given the political goals of unions, including promotion of women's equality in the workplace, the approach described above falls short of striking the right balance. Indeed, Elaine Craig has argued that such an approach compounds "the systemic effects of race-, class-, ableism-, sex- and gender-based discrimination on people who make allegations of sexual violation."[10] The question then is how counsel should conduct these cases. As discussed below, legal principles of consent provide a guide on the limits to be placed on cross-examination in a manner that will still allow union-side lawyers to advocate fully for the union on behalf of the grievor.

Legal principles of consent in the arbitral context

The law of consent has in recent years developed to eliminate persistent gender-based myths and stereotypes about sexual assault and sexual assault complainants. As such, being guided by the relevant legal principles will allow counsel to discharge their duty to zealously represent the union's position in a discipline grievance in a manner that balances the conflicting interests of a union-member complainant. Moreover, although developed largely in the criminal law realm, informed by law reform amendments to the *Criminal Code*, the legal principles of consent have broader applicability when cases involving sexual assault arise in non-criminal forums. Arbitrators have recognized that principles from criminal sexual assault cases can inform the proper interpretation of sexual assault issues in a labour proceeding.[11] Indeed, the Court of Appeal of Alberta has expressly held that the Supreme Court of Canada's cautions about the bounds of the law of consent "apply equally to arbitrators adjudicating sexual assault grievances."[12]

As Craig has argued, the boundaries of the law of consent shape the limits on the strategies and arguments advanced by counsel on behalf of their clients:

> Professional codes of conduct in Canada require of lawyers that every question posed be discharged by fair and honourable means and without illegality in a manner that respects the tribunal and promotes a fair trial. Fair, honourable, and without illegality must mean within the bounds of law. Within the bounds of law in this context must mean consistent with law reforms that have categorically precluded the admission of some types of evidence, certain lines of cross-examination, and certain arguments if introduced in an effort to invoke a stereotype that has been legally rejected.[13]

Craig's work, which provides an outline of the ethical limits for defence counsel in criminal trials, can also be applied to provide guidance for union-side counsel in labour arbitrations involving allegations of member-on-member sexual violence. Just as an informed understanding of the law of consent shapes the ethical obligations of defence counsel, these legal principles can provide union-counsel with a means of achieving the balance between the interests of the union on behalf of the grievor and those of the union-member complainant.

The foundational principle is that the existence of consent is legally established based on the complainant's subjective state of mind at the time of the sexual touching.[14] The only concern is the complainant's perspective, and the question is if there was free and voluntary consent.[15] The complainant's ostensible participation in the sexual act will

not equate to consent where the complainant has submitted owing to force, fear, threats, fraud, duress, or the exercise of authority.[16] The complainant's silence,[17] non-resistance, and non-objection cannot, at law, be equated to the complainant's consent.[18] As the Supreme Court has succinctly explained, "Today, not only does no mean no, but only yes means yes. Nothing less than positive affirmation is required."[19] This principle is equally applicable when litigating a sexual violence case before a labour arbitrator. Arbitrator McNamee explained the legal requirements for a grievor attempting to avail themselves of consent as a defence to discipline:

> Although it may not have always been so, society has surely now progressed to the point that every man should understand, at the very least, that he should not put his hands on a woman without her explicit consent. In touching cases, at least, it is not enough merely to say, "she did not tell me to stop" in order to set up a defense. A grievor must be able to point to words or conduct which provide permission to touch. Nothing of that sort was alleged here.[20]

Stemming from this foundational principle are a number of other legal rules that confirm the importance of subjective consent *at the time* of the sexual touching. First, there is no doctrine of implied consent in the area of sexual assault: "[t]he complainant either consented or did not. There is no third option."[21] It is not open at law to argue that consent was implied by the circumstances or the relationship between the accused and the complainant.[22] There is further no basis in law for any argument that a complainant's manner of dress can signify consent; the assumption that "if a woman is not modestly dressed, she is deemed to consent" has been squarely rejected.[23]

Second, the notion of advance consent has been firmly discarded. Even if a complainant has consented in advance of the sexual touching, that consent must be ongoing, active, and continuous throughout the sexual act to remain valid consent. The complainant can revoke consent at any time, and any change in circumstances that render the complainant unable to actively consent at the time – such as unconsciousness – will result in non-consent to continued sexual touching.[24]

Third, and relatedly, the consent of the complainant must be specifically directed to each and every sexual act.[25] This means that a proper cross-examination must recognize that consent to an earlier sexual act cannot be equated to consent to ongoing or later sexual acts. Again, consent must be ongoing, active, and continuous. To suggest that a particular consensual activity equates to consent to all sexual acts that followed would be to ignore this fundamental principle of consent.

Beyond the legal rules that establish the meaning of consent, the law has evolved to explicitly reject a number of myths and stereotypes about sexual violence and those who experience it. Craig summarizes what she describes as "three social assumptions about sexual violence that have been legally rejected as baseless and irrelevant":

> (1) the assumption that once a woman's chastity has been lost she is more likely to have sex with anyone and less likely to tell the truth; (2) the assumption that women who were actually raped will tell someone immediately and, correlatively, that women who do not report an attack promptly are lying; and (3) the assumption that women who genuinely do not want to engage in sex will physically resist or attempt escape.[26]

As Craig explains, the first assumption has been rejected in the criminal law through the enactment of section 276 of the *Criminal Code*. That section expressly bars the use of evidence of a complainant's prior sexual history proffered for the purpose of supporting an inference that, by reason of the sexual nature of the prior activity, the complainant is more likely to have consented to the sexual activity in question or is less worthy of belief. These are generally referred to as the "twin myths." Craig describes section 276 as parliamentary rejection of the narrative that

> women who are "loose" are untrustworthy" and of the assumption that "women with previous sexual experience are more likely to consent than are women who are "chaste" – *i.e.* the absurd proposition that once a woman has had sex with one man, she becomes less discriminating in her sexual choices.[27]

Although codified in our criminal law through section 276 of the *Criminal Code*, the rejection of the twin myths is premised on the recognition at common law that a complainant's prior sexual history is seldom relevant: "The rules in question are common law rules … evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent."[28] As the Court of Appeal for Ontario has accepted, in civil cases evidence of prior sexual history can run afoul of common law rules excluding evidence of collateral facts and similar facts.[29] While such evidentiary rules do not strictly apply in labour arbitrations, the basic issue of relevance means that these myths equally have no place in criminal law or a labour arbitration. The Supreme Court has clearly instructed that these myths are "simply not relevant" to the question of consent.[30] The twin myths are irrelevant because they are not true – and their use undermines the truth-seeking function of any adjudicative process.

With respect to Craig's second assumption, it is now a well-established legal principle that a complainant's delay in disclosing a sexual assault cannot give rise to an adverse inference as to the complainant's credibility. The Supreme Court's caution that there is "no inviolable rule on how people who are the victims of a trauma like a sexual assault will behave"[31] has been accepted by appellate courts across the country to be applicable in the adjudication of grievances.[32]

In *Calgary (City)*, Arbitrator Casey explained that

> individuals undergoing a traumatic event will react to those events in a variety of ways. There is no "correct" way for the individual to react and the law is clear that adjudicative decision-makers must be cautious about coming to credibility conclusions solely on alleged "common sense" conclusions about how a person was likely to react.[33]

Arbitrator Casey went on to draw the following conclusion, consistent with Craig's third category of assumptions rejected at law:

> Some individuals experiencing traumatic events will simply freeze. In AB's case her reaction was to attempt to deflect and distract and to use humour to try to [defuse] a very stressful situation. Her reaction does not provide any reliable information on assessing whether the touching was unwanted.[34]

Together, the clear legal rules on consent and rejection of myths and stereotypes about complainants establish the boundaries for relevance in any given case. This is no less true in a labour arbitration. Good advocacy, grounded in ethical

practice, demands that cross-examination explores relevant issues and evidence; and having an informed understanding of the legal principles detailed in this article will enable union-side lawyers to avoid descending into reliance on improper and stereotypical reasoning. When preparing for and conducting a cross-examination, union-side lawyers will be well served by continually asking themselves what the purpose of the evidence is and what inferences are sought to be drawn from it. The answers to these questions will help identify where the underlying aim of the strategy crosses into the territory of discarded doctrines of consent or discredited myths and stereotypes. Lawyers can then re-evaluate a situation and refocus their attention on proper areas through which to explore inconsistencies in evidence or witness credibility.

In this way, the union-side lawyer can actively work to shape their approach to the arbitration in a way that achieves a balance between the representation of the grievor's interests and the conflicting interests of the union-member complainant.

Conclusion

Grievances involving member-on-member sexual assault allegations raise particular and unique challenges for union-side counsel. While a lawyer retained to represent the union on behalf of the grievor has duties to advocate zealously, these duties find conflict with the union-member complainant's interests and the union's broader mandates for seeking equality and workplace safety. When overly focused on advancing the interests of the grievor, union-side counsel risks falling into aggressive cross-examination that can bring improper gendered myths and stereotypes into the case.

Achieving a balance among the conflicting interests in such cases, while meeting the lawyer's ethical duties to their client, is not an easy task. By informing themselves of the relevant legal principles applicable to the law of consent – developed largely in the criminal context but accepted and applied by arbitrators in labour arbitrations – union-side counsel can identify and pursue a litigation strategy that promotes rather than upsets that balance. This is what good advocacy demands.

Notes

1. For ease of reference, the term "complainant" is used throughout this article.
2. *Bukvich v Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304*, [1982] OLRB Rep 35 at para 24.
3. Susan M Hart, "Labour Arbitration of Co-worker Sexual Harassment Cases in Canada" (2012) 29:3 *Canadian Journal of Administrative Sciences* 268 at 269.
4. See, e.g., Canadian Union of Public Employees, "Stop Harassment: A Guide for CUPE Locals"; online: <cupe.ca/stop-harassment-guide-cupe-locals-1>.
5. It is beyond the scope of this article to address how the duty of fair representation can be met in these circumstances, but the Supreme Court of Canada has recognized that "the union may pursue one set of interests to the detriment of another as long as its decision to do so is not actuated by any of the improper motives and as long as it turns its mind to all the relevant considerations": *Gendron v Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 SCR 1298 at 1328–29.
6. J Darcy, "Sexual Harassment – Unions at Work" in Linda Fay Geller-Schwartz, *From Awareness to Action* (Ottawa: Queen's Printer, 1993) at 132, quoted in Lori L Park, "Fair Representation and Conflict of Interest: Sexual Harassment Complaints Between Co-workers" (1997) 6 *Dalhousie Journal of Legal Studies* 121 at 146.
7. Including specific calls and collective action to end gender-based violence and prohibit violence and harassment at work. See, e.g., Canadian Labour Congress, "Canada's Unions Call for Long-Term Solutions to End Gender-Based Violence" (December 4, 2020); online: <canadianlabour.ca/canadas-unions-call-for-long-term-solutions-to-end-gender-based-violence>; and Marie Clarke Walker, "Prohibiting Violence and Harassment in the World of Work" (June 10, 2019); online: <canadianlabour.ca/prohibiting-violence-and-harassment-in-the-world-of-work>.
8. *Reference Re Public Service Employee Relations Act (Alta)*, [1987) 1 SCR 313 at para 91.
9. Hart, *supra* note 3 at 277.
10. Elaine Craig, "The Ethical Obligations of Defense Counsel in Sexual Assault Cases" (2014) 51:2 *Osgoode Hall Law Journal* 427 at 466.
11. *Calgary (City) v ATU, Local* 583 (2019), 310 LAC (4th) 329 [*Calgary (City)*] at para 81; *Kingston General Hospital v OPSEU, Local 444*, 2012 CarswellOnt 10808 at para 98.
12. *Calgary (City) v Canadian Union of Public Employees Local 37*, 2019 ABCA 388 (*CUPE Local 37*) at para 42.
13. Craig, *supra* note 10 at 456
14. *R v J.A.*, 2011 SCC 28 [*J.A.*] at para 23.
15. *R v Ewanchuk*, [1999] 1 SCR 330 [*Ewanchuk*] at para 38.
16. *Ibid* at para 36.
17. *R v M. (M.L.)*, [1994] 2 SCR 3.
18. *Ibid* at para 37.
19. *R v Goldfinch*, 2019 SCC 38 [*Goldfinch*] at para 44.
20. *London Health Sciences Centre and ONA* (2015), 261 LAC (4th) 150 at para 102.
21. *Ewanchuk, supra* note 15 at para 31.
22. *J.A., supra* note 14 at para 47.
23. *Ewanchuk, supra* note 15 at para 103; *R v Lacombe*, 2019 ONCA 938 at para 39.
24. *J.A., supra* note 14 at paras 65, 66.
25. *R v Barton*, 2019 SCC 33 at para 99.
26. *Craig, supra* note 10 at 430.
27. *Ibid* at 432.
28. *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at 630.
29. *R v A.R.B.* (1998), 113 OAC 286 (Ont CA).
30. *Goldfinch, supra* note 19 at para 74.
31. *R v D.D.*, 2000 SCC 43 at para 65.
32. *Jane Doe v Canada (Attorney General)*, 2018 FCA 183 at para 41; *CUPE Local 37*, *supra* note 12 at para 42.
33. *Calgary (City)*, *supra* note 11 at para 81.
34. *Ibid* at para 82.

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