Civil Appeals in Ontario: How the Interlocutory/Final Distinction Became So Complicated and the Case for a Simple Solution?†

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In this article, the author argues that while the impacts of interlocutory appeals can be just as significant as final appeals to concerned parties, access to justice is more likely to be impeded when appeals are heard on interlocutory issues. This issue is compounded due to a lack of clarity over whether an appeal is interlocutory or final. To clarify this uncertain area of law, the author analyzes 119 decisions of the Court of Appeal for Ontario and 30 decisions of the Divisional Court in which a dispute arose regarding the interlocutory/final distinction.

The author discovers that, in the majority of these cases, the court held that the appeal was interlocutory and the appeal was quashed. For all parties, the result was unnecessary cost and delay. The author argues that while these costs and delays were lower than expected, the sheer number of cases where the finality of the appeal was at issue suggests that uncertainty in the law creates needless litigation and indicates that change is needed.

The author makes several suggestions for reform. First, the leave requirement for appeals could be eliminated. Second, the leave requirement could be applied evenly to all appeals. Drawing on the models adopted in England and Wales and in British Columbia, where a clear definition of a "final" appeal was created, the author suggests that Ontario should also create an explicit guideline for whether an appeal is interlocutory or final. The British Columbia model is drawn on through the analysis of

† This article's title is inspired by an article by Darryl Robinson. See Darryl Robinson, "How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution" (2012) 13:1 Melbourne J Intl L 1. Though international criminal law and Ontario civil appellate practice may seem very distinct, preferring simpler law (unless too simple) to more complicated law is not confined to particular jurisdictions or legal sub-fields.

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105 British Columbia decisions highlighting the impact of the legislative change in 2012 when the new model was adopted. Third, the author suggests eliminating the Divisional Court altogether and instead having a single court of appeal that hears all appeals in a given case, regardless of whether they are interlocutory or final in nature.

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Introduction

[This is] an issue that has bedeviled the profession for decades.[1]

Appellate courts sit at the pinnacle of the legal profession, providing final determinations on the meaning of statutes and the development of the common law.[2] Their decisions are analyzed in law schools for many years after

1. *Mancinelli v Royal Bank of Canada*, 2017 ONSC 1526 at para 2 (Div Ct) [*Mancinelli*].
2. See *Housen v Nikolaisen*, 2002 SCC 33 at para 9.

their rulings. The media frequently ask lawyers who lose a case whether they intend to appeal. There are good reasons for these perceptions. As a Toronto law firm's clever advertisement for its appellate practice group advertised, "Who Wins Last, Wins".[3] Or as Jackson J famously wrote regarding apex courts, "[w]e are not final because we are infallible, we are infallible only because we are final."[4]

But not everything appellate courts do accords with their iconic reputation. Many appellate decisions address interlocutory matters unrelated to the merits of a dispute, but rather related to a collateral issue concerning the conduct of the litigation. These issues range from discovery rights to scheduling matters to amendments of pleadings. On the one hand, interlocutory appeals have the clear potential to distort access to justice by causing unnecessary expense and delay, two prime impediments to access to justice. On the other hand, appeals, including interlocutory appeals, play an indispensable role in achieving justice in particular cases, and in righting clear wrongs. Moreover, legal clarity brought by appeals—even interlocutory ones—can help the pursuit of justice in numerous other cases through clarifying the law.

Distinguishing how interlocutory and final appeals are to be treated therefore appears not only defensible but also eminently sensible. However, determining whether an appeal even is interlocutory or final has been the source of significant controversy, with one Court of Appeal for Ontario judge succinctly describing the case law in this area as "unwieldy".[5]

This article seeks to balance, theoretically and practically, the access to justice concerns that interlocutory appeals cause with the access to justice concerns that such appeals fix. Part I lays the doctrinal background necessary to analyze the distinction between interlocutory and final appeals. Part II analyzes characteristics of 149 Ontario cases to highlight the consequences, in terms of delay and financial expense, of uncertainty in the law in this area. Finally, in Part III, suggestions are given for improvement of the law surrounding the interlocutory/final distinction, with the aim of facilitating access to justice. This part draws on the experience of British Columbia in particular, reviewing 105 cases its courts have decided while wrestling with this same issue—61 decided before, and 44 after, legislative amendments that sought to clarify the law in this regard.

Analyzing the experiences of Ontario and British Columbia, and then mapping them onto the distinction's purposes and history, leads to conclusions

3. "Appeals in Toronto & London" (last visited 9 February 2020), online: *Lerners Lawyers* <www.lerners.ca/appeals/>.

4. *Brown v Allen*, 344 US 443 at 540 (1953).

5. *Parsons v Ontario*, 2015 ONCA 158 at para 209, Juriansz JA, dissenting.

that are alarming yet hopeful. The Court of Appeal for Ontario is analyzing this issue in dozens of cases each year. This seems an unnecessary waste of time and resources for both litigants and the courts. But there is hope to simplify the law in this area and improve access to justice. A return to first principles and a consideration of other jurisdictions' experiences provide a path to a simpler rule, asking whether the appealed order finally determines the litigation. More provocatively, the place of the Divisional Court, a branch of the Superior Court of Justice, in Ontario appellate practice is questioned. While this will likely require legislative intervention, this will not only prevent needless interlocutory disputes, but also facilitate appeals serving their purposes.

I. Appeals' History, Purposes, and Relation to Access to Justice

Before delving into how the interlocutory/final distinction is working in practice in Ontario—and possibilities for reform—some doctrine and history is necessary to set the stage. This section begins by noting the purposes of appeals, as well as standards of review that further explain the purposes of appeals. The history of the interlocutory/final distinction in England and Wales is then reviewed before explaining appellate jurisdiction in Ontario. Finally, the relationship between appeals and access to justice is considered.

A. Purposes of Appeals

It has been frequently observed that appeals are creatures of statute and that, historically, the common law gave no "right" of appeal.[6] Even so, appeals are very old. The Court of Exchequer Chamber—the predecessor to the Court of Appeal (England and Wales) for appeals of common law decisions—dates to the fourteenth century.[7] Appeals have evolved for several purposes. One is to ensure the law's consistent application.[8] A related purpose is to allow appellate courts to make and refine the common law, with appellate courts having the responsibility to make law to an extent not shared by trial courts.[9] These purposes apply equally to civil and criminal cases.

6. See e.g. John Sopinka, Mark A Gelowitz & W David Rankin, *Sopinka and Gelowitz on the Conduct of an Appeal*, 4th ed (Toronto: LexisNexis Canada, 2018) at § 1.1.

7. See JH Baker, *An Introduction to English Legal History*, 4th ed (London, UK: Butterworths LexisNexis, 2002) at 137–43.

8. See *Housen v Nikolaisen*, *supra* note 2 at para 9.

9. See *ibid.*

But there is another reason for appeals: to ensure that the losing party at trial has the decision reviewed by a fresh set of eyes to ensure that an injustice has not occurred. This concern is amplified in criminal law, as an error at trial could have devastating consequences. This is addressed in international human rights law, as codified in the *International Covenant on Civil and Political Rights*.[10] In the civil context, this concern may be less acute, but it still is present, given the potentially serious effects of a substantive injustice in the civil context.[11]

These purposes of appeals are important. But they are also narrow. Perhaps to prevent intermediary appellate courts misusing their power, the Supreme Court of Canada has restricted appellate courts' ability to interfere with trial judges' decisions. Given their role as law-making courts, appellate courts are primarily only entitled to review trial courts' decisions for errors of law, with trial judges' determinations of law being reviewed on a standard of correctness.[12] Findings of fact, however, are only to be disturbed if tainted by "palpable and overriding error".[13] Questions of mixed fact and law are reviewed on a spectrum of standards depending on the ease with which the question of law can be extracted.[14] In criminal law, the Crown is not entitled to appeal on questions of fact at all.[15] Throughout this, a principle of appellate restraint is strikingly apparent.[16]

This division of roles is rooted in concerns about both efficiency and expertise. Trial judges see evidence first-hand, and are thus in a privileged position to make findings of fact.[17] And as Iacobucci and Major JJ jointly noted in *Housen v Nikolaisen*, appellate and trial courts have different purposes: "[W]hile

10. See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 14(5) (entered into force 23 March 1976, accession by Canada 19 May 1976). Article 14(5) guarantees that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law" (*ibid*). See also Gerard J Kennedy, "Persisting Uncertainties in Appellate Jurisdiction at the Supreme Court" (2013) 100 CR (6th) 97 at 101.

11. For an explanation of the far-reaching consequences of the inability to access civil justice, see e.g. Trevor CW Farrow, "A New Wave of Access to Justice Reform in Canada" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) 164 [Farrow, "A New Wave"].

12. See *Housen v Nikolaisen*, *supra* note 2 at para 8.

13. *Ibid* at para 10.

14. See *ibid* at paras 26, 28; *Hryniak v Mauldin*, 2014 SCC 7 at para 81.

15. See *Criminal Code*, RSC 1985, c C-46, s 676. See also *ibid*, s 686(1)(a)(i) (allowing only the accused to appeal on evidentiary grounds).

16. See Daniel Jutras, "The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?" (2006) 32:1 Man LJ 61.

17. See *Housen v Nikolaisen*, *supra* note 2 at para 18.

the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application".[18] Moreover, the principles of judicial economy and finality mandate not interfering with a trial ruling unless clearly warranted.[19]

These deferential standards are not without controversy—for example, Paul Pape and John Adair have argued that findings of fact should be reviewed on a reasonableness standard.[20] Calls for the Crown to have a right of appeal on findings of fact and/or inadequacy of counsel in criminal cases have also emerged in recent years.[21] Even so, Daniel Jutras has ably argued that appeals are not an intrinsic good or a logical corollary to decision making but rather have particular, discrete purposes such as delineating legal rules. He notes that there may be negative unintended consequences from expanding those purposes, such as needless litigation and inability to view a matter as "over".[22]

B. Appellate Jurisdiction in Ontario

Ontario is unique among Canada's provinces in having two appellate courts. Understanding why is necessary to place the subsequent analysis of interlocutory appeals in context. The superior courts of the provinces—in Ontario, the Superior Court of Justice—are Canada's courts of "inherent" jurisdiction.[23] Ontario's appellate courts are, like all Canadian appellate courts, creatures of statute.[24] But Ontario's two appellate courts—the Court of Appeal and the Divisional Court—have different origins. The Court of Appeal's origins

18. *Ibid* at para 9.

19. See *ibid* at paras 4, 16. See also Jutras, *supra* note 16 at 65.

20. See Paul J Pape & John J Adair, "Unreasonable Review: The Losing Party and the Palpable and Overriding Error Standard" (2008) 27:2 Advocates' Society J 6 at 8–9.

21. These became particularly loud after the high-profile acquittal of Gerald Stanley in the death of Colten Boushie. See e.g. Naiomi Metallic, "I am a Mi'kmaq Lawyer, and I Despair Over Colten Boushie", *The Conversation* (18 March 2018), online: <theconversation.com/i-am-a-mikmaq-lawyer-and-i-despair-over-colten-boushie-93229>.

22. See Jutras, *supra* note 16 at 65.

23. See e.g. *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at paras 27–33, 130 DLR (4th) 385.

24. However, the Supreme Court of Canada has found itself to be constitutionally entrenched. See *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21.

trace to the establishment of the Province of Canada's Court of Error and Appeal in 1850.[25] The creation of an independent appellate court was considered preferable to the previous practice of having the Governor's Council act as an appeal court, which had occurred in Upper Canada since 1792.[26]

The Divisional Court's genesis is markedly different. In 1964, the Robarts government appointed James C McRuer, who stepped down from his position as Chief Justice of the Ontario High Court, to chair the Law Reform Commission of Ontario and a public inquiry into civil rights in Ontario.[27] Among McRuer's many recommendations was to create a separate court to hear applications for judicial review.[28] In an era with an expanding administrative state, this suggestion was heeded despite being controversial,[29] leading to the establishment of the Divisional Court of the High Court of Justice.[30] The Divisional Court's rulings can be appealed to the Court of Appeal, with leave.[31]

Over time, the Divisional Court's jurisdiction expanded beyond judicial reviews to include appellate matters, in part due to suggestions that the Court of Appeal reform to emphasize its law-making functions.[32] In 1984, civil appeals with low dollar amounts were put in the Divisional Court's jurisdiction.[33] The Divisional Court, whose members are all Superior Court judges,[34] also has appellate jurisdiction under particular statutes, such as the *Class Proceedings Act*.[35]

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25. See Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal, 1792–2013* (Toronto: University of Toronto Press for The Osgoode Society for Canadian Legal History, 2014) at 18 (the book is a detailed and thorough history of the Court of Appeal for Ontario).

26. See *ibid* at 6–18.

27. See Patrick Boyer, *A Passion for Justice: The Legacy of James Chalmers McRuer* (Toronto: Osgoode Society for Canadian Legal History, 1994) at 297–98.

28. See Ontario, *Royal Commission Inquiry into Civil Rights: Report Number One*, vol 2 (Toronto: Frank Fogg, Queen's Printer, 1968) (Honourable James Chalmers McRuer) at 667. See also Boyer, *supra* note 27 at 324; Moore, *supra* note 25 at 132–33.

29. For criticisms, see e.g. John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18:3 UTLJ 351 at 354. At the same time, the Exchequer Court of Canada was reorganized into what later became the Federal Court and Federal Court of Appeal, expanding its jurisdiction over judicial review of federal government action. See Moore, *supra* note 25 at 133.

30. See Moore, *supra* note 25 at 133.

31. See *ibid*; *Courts of Justice Act*, RSO 1990, c C.43, s 6(1)(a).

32. See Moore, *supra* note 25 at 143–44.

33. See *ibid* at 159. See also *Courts of Justice Act*, *supra* note 31, s 19(1)(a).

34. See *Courts of Justice Act*, *supra* note 31, s 18(3).

35. *Class Proceedings Act, 1992*, SO 1992, c 6, s 30 [*Class Proceedings Act*].

Today, appellate jurisdiction over Ontario civil matters is split between the Superior Court, Divisional Court, and Court of Appeal. The Superior Court has jurisdiction over appeals from interlocutory orders of a master and of certificates of assessments of costs.[36] Apart from judicial reviews, the Divisional Court has jurisdiction over appeals of:

i. final orders of Superior Court judges, where less than $50,000 is at stake;[37]
ii. final orders of the Small Claims Court, a branch of the Superior Court of Justice, unless less than $3,500 is at stake;[38]
iii. final orders of masters;[39]
iv. interlocutory orders of Superior Court judges, with leave; [40] and
v. where otherwise prescribed by particular statutes.[41]

The Court of Appeal has jurisdiction over most other civil appeals, notably:

i. Divisional Court orders, unless based on a question of fact alone, with leave;[42] and
ii. final orders of the Superior Court, unless otherwise prescribed to the Divisional Court.[43]

This division is important, as the final section of this paper will emphasize.

C. The History of the Interlocutory/Final Distinction

(i) The English Experience

Understanding why Ontario—and other provinces—distinguish between appeals of interlocutory and "final" orders (leading to "interlocutory appeal" referring to an appeal of an interlocutory order and to "final appeal" referring

36. See *Courts of Justice Act*, *supra* note 31, s 17; Sopinka, Gelowitz & Rankin, *supra* note 6 at § 5.4.

37. See *Courts of Justice Act*, *supra* note 31, s 19(1)(a).

38. See *ibid*, s 31; O Reg 626/00, s 2.

39. See *Courts of Justice Act*, *supra* note 31, s 19(1)(c).

40. See *ibid*, s 19(1)(b).

41. See *ibid*, s 6(1)(b). For an example of where other statutes have enshrined appeals to the Divisional Court, see e.g. *Class Proceedings Act*, *supra* note 35, s 30.

42. See *Courts of Justice Act*, *supra* note 31, s 6(1)(a).

43. See *ibid*, s 6(1)(b).

to an appeal of a final order) requires considering the history of the issue in England and Wales.[44] The distinction became important primarily because different procedural rules applied to appeals of the two different types of orders, particularly concerning the time frame in which an appeal was permissible.[45] In *Salaman v Warner*, the Court of Appeal (England and Wales) explained the "application approach", emphasizing that the fundamental question that a court should ask in determining whether an order to be appealed from is final or interlocutory is whether it finally disposed of the entire case.[46]

Twelve years later, however, a different panel of the Court of Appeal cast doubt on *Salaman*. In *Bozson v Altrincham (Urban District Council)*, the Court criticized the reasoning in *Salaman*, and held that courts should ask whether "the judgment or order, as made, finally dispose[s] of the rights of the parties?"[47] This was partially because many cases include orders that, if decided one way, would finally dispose of the litigation but, if decided the other, would not.[48] Examples would be orders determining jurisdiction or the applicability of a limitations period defence; it seemed to strike judges as unfair that appeal rights of an order that "finally" determines an issue would depend on which way the determination fell. This continues to this day.[49] For example, a determination that the court has jurisdiction over a matter technically does not resolve the dispute, but permanently affects a defendant's interest, whereas an order determining that the court does *not* have jurisdiction does resolve the dispute as the plaintiff cannot pursue his or her claim.[50]

On the one hand, *Bozson* seems more principled than *Salaman*, reflecting what is actually at stake in an appeal. As such, *Bozson* was frequently defended

44. For a comprehensive overview of the historical English approach, see Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.20–1.35.

45. See *ibid* at § 1.22.

46. [1891] 1 QB 734, 60 LJQB 624 (CA (Eng)). For an explanation of *Salaman v Warner*, see Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.22.

47. [1903] 1 KB 547 at 548, 72 LJKB 271 (CA (Eng)). For an explanation of *Bozson*, see Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.23–1.25.

48. See Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.63.

49. For example, in Ontario, an order declining to set aside default judgment is final, while an order setting aside default judgment is interlocutory. See *Laurentian Plaza Corp v Martin* (1992), 7 OR (3d) 111 at 113–14, 89 DLR (4th) 50 (CA); *Siddiqui v Thompson*, 2017 ONSC 1469 at paras 27–31; Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.59–1.61.

50. See *MJ Jones Inc v Kingsway General Insurance Co* (2003), 68 OR (3d) 131 at para 10, 233 DLR (4th) 285 (CA) [*MJ Jones*].

by judges.[51] On the other hand, *Bozson* and its progeny led to more orders being considered final as almost all orders finally decide a right of the parties—even if it is a right concerning a procedural step.[52] It was also more difficult to apply than *Salaman*, leading Lord Denning MR to hold that *Bozson* "was right in logic but [*Salaman*] was right in experience".[53] In light of this conflicting case law, Lord Denning MR famously wrote: "This question of 'final' or 'interlocutory' is so uncertain, that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point."[54] Lord Justice Buckley remarked in 1910:

> The rules [on how to decide whether an order is interlocutory or final] are so expressed and the decisions are so conflicting that . . . in my opinion it is essential that the proper authority should lay down plain rules as to what are interlocutory orders, for as matters now stand it is . . . impossible for the suitor in many cases to know whether an order is interlocutory or final.[55]

In the 1980s, and after another request from an appellate judge,[56] the Civil Rules Committee in England and Wales expressed its preference for the more predictable application approach.[57] The *Access to Justice Act* codified this area of the law by adopting a slightly nuanced application approach, defining a final order as one that disposes of "the entire proceedings" and

51. See e.g. *bin Mohd Zaid v Central Securities (Holdings) Bhd*, [1982] 2 All ER 481 at 486, [1983] 1 AC 16 (PC); Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.27.

52. See *Hendrickson v Kallio*, [1932] OR 675 at 678, [1932] 4 DLR 580 (CA); Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.59–1.60.

53. *Salter Rex & Co v Ghosh*, [1971] 2 All ER 865 at 866, [1971] 2 QB 597 (CA) [*Salter Rex*]. See Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.27.

54. *Salter Rex*, *supra* note 53 at 866. See also Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.17, 1.29–1.31.

55. *Re Page; Hill v Fladgate*, [1910] 1 Ch 489 at 493–94, 79 LJ Ch 482 (CA). See also Eric TM Cheung, "Interlocutory or Final Orders: Pouring New Wine into Old Wineskins" (2006) 36:1 Hong Kong LJ 15 at 16.

56. See Cheung, *supra* note 55 at 16–17, citing *Steinway & Sons v Broadhurst-Clegg* (21 February 1983), Transcript No 80 of 1983 (CA (Civ Div)) [unreported].

57. For a brief overview tracing calls for reform and legislative responses in England and Wales, see Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.33–1.36. See also *Civil Procedure Rules 1998* (UK), SI 1998/3132 [*Rules* (UK)].

severely restricting appeals of other orders.[58] The current English approach increases certainty but may fairly be regarded as being unsophisticated, classifying matters as interlocutory that finally determine parties' rights.[59] A return to this experience and the pros and cons of this trade-off will be found in Part III.

(ii) The Development of the Distinction in Ontario

Canada began to go in its own direction from England shortly after *Salaman* and *Bozson*. In 1932, the Court of Appeal for Ontario decided *Hendrickson v Kallio*,[60] which is still the leading case on the interlocutory/final distinction in Canada.[61] Justice Middleton held that an interlocutory order

> 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.[62]

This approach appears close to the application approach.[63] But despite *Hendrickson* having repeatedly been affirmed as the leading authority,[64] caveats have been continually added to it. Two decisions of Morden JA held that determinations of the Superior Court of Justice's jurisdiction vis-à-vis other forums were final orders given that "substantive rights" were finally determined.[65]

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58. *Access to Justice Act 1999 (Destination of Appeals) Order 2000* (UK), SI 2000/1071, s 1(2)(c) [*Access to Justice Act Order 2000*], as repealed by *Access to Justice Act 1999 (Destination of Appeals) Order 2016* (UK), SI 2016/917, s 7 [*Access to Justice Act Order 2016*]; Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.34; Cheung, *supra* note 55 at 17; *Tanfern Ltd v Cameron-MacDonald*, [2000] 1 WLR 1311, [2000] 2 All ER 801 (CA (Eng)) [*Tanfern*].

59. See Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.36.

60. See *supra* note 52.

61. See Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.37.

62. *Hendrickson v Kallio*, *supra* note 52 at 678.

63. See Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.39.

64. See e.g. *Parsons v Ontario*, *supra* note 5 at paras 42, 196.

65. See *Buck Bros Ltd v Frontenac Builders Ltd* (1994), 19 OR (3d) 97 at 103–04, 117 DLR (4th) 373 (CA); *Leo Alarie & Sons Ltd v Ontario (Minister of Natural Resources)* (2000), 48 OR (3d) 204 at paras 4–5, 185 DLR (4th) 211 (CA). See also Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.42–1.44.

Similarly, Sharpe JA has held dismissals of motions alleging that Ontario did not have jurisdiction and/or was *forum non conveniens* were final orders, as they finally determined the forum for litigation.[66] The definition of final order has also been expanded[67] to include matters such as determinations of motions finding contempt,[68] holdings that a limitations period defence does not apply,[69] and orders setting aside service *ex juris*.[70] Summarizing this area, John Sopinka, Mark Gelowitz, and David Rankin write that when

> orders have a terminating effect on an issue or on the exposure of a party, they plainly "dispose of the rights of the parties" and are appropriately treated as final. Where such orders set the stage for a determination on the merits, they do not "dispose of the rights of the parties" and are . . . treated as interlocutory.[71]

This seems as good of a connecting thread as exists between the cases determining this issue. The rest of this article explores the consequences of how this works in practice.

D. Appeals and Access to Justice

Access to justice can be defined broadly or narrowly depending on the circumstances. It can include normative analyses of what constitutes substantive justice,[72] broader analyses of social trends and projects that would lessen the need for formal dispute resolution,[73] and alternatives to traditional litigation

66. See *MJ Jones*, *supra* note 50; Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.59.

67. For a more comprehensive list of what types of orders have been classified as final, see Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.59–1.60.

68. See e.g. *Bush v Mereshensky*, 2007 ONCA 679 at para 10.

69. See e.g. *Charlebois v Les Enterprises Normand Ravary Ltée* (2006), 79 OR (3d) 504 at para 14, 266 DLR (4th) 732 (CA) [*Charlebois*].

70. See e.g. *MacKay v Queen Elizabeth Hospital* (1989), 68 OR (2d) 90 at 91, 32 OAC 253 (H Ct J).

71. Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.66.

72. See e.g. Trevor CW Farrow, "What Is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 969 [Farrow, "Access to Justice"]. He extensively reviews the literature in this area (*ibid* at 960, n 1).

73. See e.g. Kent Roach & Lorne Sossin, "Access to Justice and Beyond" (2010) 60:2 UTLJ 373.

such as mediation and arbitration.[74] In the context of civil litigation, it means, at the very least, that civil litigation should have the characteristics of timeliness, minimal financial expense, and simplicity.[75] While these characteristics are likely insufficient for a complete understanding of access to justice, they are nonetheless necessary.[76]

Appeals can be indispensable in achieving access to justice, righting clear wrongs, and correcting substantive injustices. Clarity in the law brought by appeals also allows numerous other parties to order their affairs with certainty and predictability—thereby increasing access to justice.[77] But appeals come with significant costs in terms of time and financial expense. This is particularly the case with respect to interlocutory appeals, which are disconnected from the merits of a dispute and the request for justice therein. However, interlocutory appeals still have benefits. If the interlocutory appeal is necessary to pre-emptively prevent a substantive injustice or the misuse of judicial resources, or to clarify the law, then it is permitted. Ontario law has sought to recognize this, allowing a judge to grant leave to appeal an interlocutory order if: (a) "there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) *and* that it is in the opinion of the judge hearing the motion 'desirable that leave to appeal be granted'";[78] or (b) "there is reason to doubt the correctness of the order in question *and* that the proposed appeal involves matters of such importance that leave to appeal should be granted".[79] The former criteria emphasize clarifying the law, and the latter look at proportionate access to justice.

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74. See e.g. Julie Macfarlane & Michaela Keet, "Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program" (2005) 42:3 Alta L Rev 677; Civil Rules Committee: Evaluation Committee for the Mandatory Mediation Pilot Project, "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -- The First 23 Months", by Robert G Hann & Carl Baar with Lee Axon, Susan Binnie & Fred Zemans (Toronto: Queen's Printer, 2001); Martin Teplitsky, "Universal Mandatory Mediation: A Critical Analysis of the Evaluations of the Ontario Mandatory Mediation Program" (2001) 20:3 Advocates' Society J 10 (discussing the flaws in the conclusions of the Hann and Barr report).

75. See e.g. Farrow, "Access to Justice", *supra* note 72 at 978.

76. See e.g. Farrow, "A New Wave", *supra* note 11 at 166, 171–173.

77. See Roach & Sossin, *supra* note 73 at 392, n 68, citing Michael J Trebilcock, "The Regulation of the Market for Legal Services" (Paper presented at the Law Society of Alberta 100th Anniversary Conference: Canadian Lawyers in the 21st Century, Edmonton, 25 October 2007) at 28.

78. *Sahota v Sahota*, 2015 CanLII 20903 at para 4, [2015] OJ No 2090 (QL) (Ont Div Ct) [emphasis in original], citing ON, *Rules of Civil Procedure*, RRO 1990, Reg 194, r 62.02(4)(a) [*Rules* (Ont)].

79. *Sahota v Sahota*, *supra* note 78 at para 5 [emphasis in original], citing *Rules* (Ont), *supra* note 78, r 62.02(4)(b).

Appeals in general, and interlocutory appeals in particular, can thus facilitate or hinder access to justice. Appellate practice recognizes this in other situations: for example, bifurcating appeals is discouraged.[80] The distinction in treatment of interlocutory and final appeals seeks to address the double-edged nature of appeals vis-à-vis access to justice. As Paul Perell and John Morden note:

> In general terms, the policy underlying the distinction between interlocutory and final orders is the proportionality principle. For judicial decisions that are of comparatively less importance to the parties and the public than other decisions (particularly those other decisions that are determinative of the outcome of the litigation), there should be no appeal at all, or the right of appeal should be curbed by a leave requirement.[81]

This principle of proportionality was also enshrined throughout Ontario civil procedure in 2010.[82]

The subsequent parts of this article seek to determine whether the balance has been struck appropriately. Against this background, it is important to consider the Supreme Court of Canada's seminal decision earlier this decade in *Hryniak v Mauldin*, calling for a "culture shift" in how litigation is conducted to ensure the timely and inexpensive resolution of civil actions on their merits.[83]

II. Characteristics of Ontario Case Law

A. Methodology

In Summer 2018, WestlawNext Canada and Lexis Advance Quicklaw were searched, attempting to isolate all Ontario cases in the Divisional Court and Court of Appeal where there was dispute about whether an appeal was final or interlocutory between January 1, 2010 and December 31, 2017. Court of Appeal and Divisional Court cases are separated in this analysis as the issue

80. See *Bonello v Gores Landing Marina (1986) Limited*, 2017 ONCA 632 at para 15.

81. Paul M Perell & John W Morden, *The Law of Civil Procedure in Ontario*, 2nd ed (Markham, Ont: LexisNexis Canada, 2014) at ¶ 12.41 [footnotes omitted]. See also *Skunk v Ketash*, 2016 ONCA 841 at para 31, citing Perell & Morden, *supra* note 81.

82. See *Rules* (Ont), *supra* note 78, r 1.04(1.1), as amended by O Reg 438/08, s 2. See also Trevor CW Farrow, "Proportionality: A Cultural Revolution" (2012) 1:3 J Civ Litigation & Practice 151 [Farrow, "Proportionality"]; *Hryniak v Mauldin*, *supra* note 14 at paras 30–31.

83. See *supra* note 14 at paras 23–33.

usually arises in different ways in the two courts. In the Court of Appeal, the Court typically must ask whether it has jurisdiction to hear an appeal from an order that may be interlocutory. In the Divisional Court, the issue tends to be if leave is required, or whether an appeal is not allowed, as from an interlocutory order made under previous iterations of the *Construction Act*[84] or in the Small Claims Court.[85] The rationale for isolating these factors is to illustrate the state of the law, to enable analysis of how clear the law is, and to outline the practical consequences of its hypothesized (lack of) clarity.

B. Number of Disputes

119 cases in the Court of Appeal, and 30 in the Divisional Court, had disputes over whether an order under appeal was interlocutory or final. The numbers per year can be expressed as follows:

Table A: Numbers and Results of Disputes Over the Interlocutory/Final Distinction—Ontario

Year	CA: Total	CA: Interlocutory	CA: Final	CA: Other	Div Ct: Total	Div Ct: Interlocutory	Div Ct: Final	Div Ct: Other
2010	7	*4*	*2*	*1*	4	*2*	*2*	*0*
2011	9	*6*	*3*	*0*	2	*2*	*0*	*0*
2012	13	*11*	*2*	*0*	1	*0*	*1*	*0*
2013	7	*7*	*0*	*0*	3	*0*	*3*	*0*
2014	12	*10*	*2*	*0*	6	*6*	*0*	*0*
2015	22	*15*	*7*	*0*	5	*3*	*1*	*1*
2016	26	*18*	*8*	*0*	1	*1*	*0*	*0*
2017	23	*19*	*4*	*0*	8	*3*	*3*	*2*
Total	**119**	**90**	**28**	**1**	**30**	**17**	**10**	**3**

84. RSO 1990, c C.30, s 71(3) (where interlocutory appeals were not permitted prior to recent amendments). For an example of when this occurred, see *570 South Service Road Inc v Lawrence-Paine & Associates Limited*, 2011 ONSC 3410 at para 16 (Div Ct) [*570 South Service Road*].

85. See e.g. *Ellins et al v McDonald et al*, 2012 ONSC 4831 at para 8 (Div Ct) (finding that the Divisional Court did have jurisdiction to review an interlocutory order of the Small Claims Court) [*Ellins*].

It is unsurprising that the Court of Appeal has dealt with this issue more frequently than the Divisional Court, as it is where a party would likely go under the mistaken belief that an appeal can be taken as of right. This happens less frequently in the Divisional Court, except when specific statutes such as former versions of the *Construction Act*[86] rendered interlocutory appeals impermissible.

To put the Court of Appeal's numbers of more than twenty cases per year in recent years in perspective, the Court usually reports around a thousand decisions a year.[87] In other words, one to two per cent of the decisions address disputes over the interlocutory/final distinction.

C. Results and Remedies

90 of 119 Court of Appeal decisions (75.6%) held the appeal to be interlocutory, suggesting that respondents do not usually raise this issue frivolously, such as by trying to uphold a result without a hearing on the merits. 28 of 119 decisions (23.5%) held the appeal to be final, allowing the appeal to proceed.

Determining the remedy in the Court of Appeal is only relevant when the appeal is found to be interlocutory—otherwise, the appeal may proceed (though the costs caused by the issue being raised are doubtless irritating for the appellants). In 87 of 90 cases where the appeal was held to be interlocutory, the Court of Appeal simply quashed, dismissed, or would not entertain the appeal. The 88th case quashed the appeal but extended time to seek leave to appeal in the Divisional Court.[88] In only 2 cases did the Court of Appeal hear the appeal, once reconstituting itself as the Divisional Court due to urgency,[89] and once because it did not wish to bifurcate matters when much of the appeal was properly before the Court of Appeal and the issues it was addressing were intertwined with the issues that should have been before the Divisional Court.[90]

The Divisional Court results (17 orders held to be interlocutory, compared to 10 held to be final) are less important than the numbers and remedies, as at times

86. See *supra* note 84, s 71(3)(b), as it appeared on 30 June 2018. For an example of this section of the Act being litigated, see *Ravenda Homes Ltd v 1372708 Ontario Inc*, 2010 ONSC 6338 (Div Ct).

87. In 2017, *Muthulingam (Re)* was the Court of Appeal for Ontario decision with the highest number in its neutral citation. See 2017 ONCA 1026. In 2016, *JPB v CB* was the Court of Appeal for Ontario decision with the highest number in its neutral citation that year. See 2016 ONCA 996.

88. See *Ambrose v Zuppardi*, 2013 ONCA 768 at para 11.

89. See *Punit v Punit*, 2014 ONCA 252 at para 18.

90. See *Azzeh v Legendre*, 2017 ONCA 385 at paras 22–26, leave to appeal to SCC refused, 37692 (8 February 2018).

the Court's holding that the appealed order was final allowed it to proceed,[91] yet in others it did not.[92] This is because various statutes prescribe peculiar appellate routes to the Divisional Court, making the cases more idiosyncratic.[93] In 20 cases, the Court dismissed, quashed, or refused to hear the appeal, or declined leave to appeal. In 6 cases, the Court decided it could hear the appeal. In 2 others, it did not decide the issue, resolving the case on other grounds[94] or adjourning pending another ruling in the same case.[95] The Court also reconstituted as the Superior Court of Justice once,[96] and gave the sought-after directions once.[97]

In both the Divisional Court and the Court of Appeal, there is an overwhelming tendency, upon realizing an appeal has been improperly commenced, to send the party back to square one. Rarely do the judges facilitate the progress of the action. This is not necessarily problematic—if the appeal was illicitly commenced, ending it can be entirely appropriate. At times, interpreting procedural law excessively strictly can be an access to justice obstacle,[98] but this may not be the case when addressing an appeal that does not concern the merits of a dispute. And in a few rare cases where judges felt access to justice demanded the appeal be helped along due to urgency, this occurred. Admittedly, this does not mean that there were no other cases in which judges were similarly concerned about urgency but for whatever reason did not act to accommodate those concerns.

D. Costs

When calculating costs incurred by parties, it should be recognized that cost awards only usually constitute approximately half of the costs actually incurred.[99] Many cases also have no reported costs, whether because the decision was

91. See e.g. *Ellins*, *supra* note 85 at para 8.

92. See e.g. *Petgrave v Maheru*, 2010 ONSC 1710 at para 4 (Div Ct).

93. See e.g. *Class Proceedings Act*, *supra* note 35, s 30; *Construction Act*, *supra* note 84, ss 70–71.

94. See *Polmat Group Inc v E Ring Corp*, 2015 ONSC 1233 (Div Ct).

95. See *Mancinelli*, *supra* note 1 at paras 5–6.

96. See *C&M Properties Inc v 1788333 Ontario Inc*, 2015 ONSC 706 (Div Ct).

97. See *Awad v Dover Investments Limited*, 2015 ONSC 3955 (Div Ct) [*Awad*].

98. See e.g. *Wouters v Wouters*, 2018 ONCA 26 at para 38.

99. See P Scott Horne, "The Privatization of Justice in Québec's *Draft Bill to Enact the New Code of Civil Procedure*: A Critical Evaluation" (2013) 18 Appeal 55 at 61, citing *Riddell v Conservative Party of Canada*, 2007 CanLII 24093 at para 38, [2007] OJ No 2577 (QL) (Ont Sup Ct).

silent,[100] the issue was reserved to the trial judge,[101] settlement was encouraged and no subsequent costs decision was reported,[102] no costs were sought,[103] or the court decided it was not an appropriate case for costs,[104] potentially because the court had to raise the issue on its own initiative. These cases accordingly cannot be used in determining the costs incurred by parties. Cases where the costs award was clearly animated by factors other than the interlocutory/final dispute were excluded, as they shed no light on the costs caused by the distinction per se.[105] The quantum of some of the orders were also adjusted downward, if the interlocutory/final reflected only about a quarter[106] or half[107] of issues raised.

The average quantum of the 86 informative costs awards was $6,307. In the 70 Court of Appeal cases, it was $5,685. There was also a fairly small range in this sample of 70 cases—only 2 of the 70 decisions awarded more than $10,000 in costs. The average costs award in the Divisional Court cases was $9,028. Despite the smaller sample size, the range was larger, with the median being only $5,000. Remembering that actual costs incurred are about double the size of costs orders, it is fair to assume that the typical party incurs at least $10,000 in costs as a result of a dispute over the interlocutory or final nature of an order. This is not an enormous amount of costs,[108] but given that a dispute over the interlocutory or final nature of an appealed order is definitionally unrelated to a case's merits, it is unfortunate that these costs are incurred at all.

E. Delay

In 11 cases where the Court of Appeal quashed an appeal, the losing party sought leave to appeal the matter in the Divisional Court. The average length of time between the quashing and determination of the leave motion (or the

100. See e.g. *Royal Bank of Canada v Trang*, 2012 ONCA 902.

101. See e.g. *570 South Service Road*, *supra* note 84 at para 16.

102. See e.g. *Fram Elgin Mills 90 Inc v Romandale Farms Limited*, 2016 ONCA 404.

103. See e.g. *Chand v Qureshi*, 2016 ONCA 231 at para 2.

104. See e.g. *Salewski v Lalonde*, 2017 ONCA 515 at para 52.

105. See e.g. *Talbot c Bergeron*, 2016 ONCA 956.

106. See e.g. *Shoukralla v Shoukralla*, 2016 ONCA 128 (where this was one of four major issues).

107. See e.g. *Westmount-Keele Limited v Royal Host Hotels and Resorts Real Estate Investment Trust*, 2017 ONCA 673 (where this was one of two major issues).

108. See e.g. Gerard J Kennedy, "Jurisdiction Motions and Access to Justice: An Ontario Tale" (2018) 55:1 Osgoode Hall LJ 79 at 98 [Kennedy, "Jurisdiction Motions"] (estimating that jurisdiction motions cost parties three to eight times this amount, depending on whether there is an appeal).

appeal, if leave was granted) in the 10 cases where delay is calculable[109] was 7.98 months.[110] This step would have been necessary even in the presence of clearer law. But from the perspective of a litigant's lived experience, it comes after an average delay in these 11 cases between the decision under appeal and the Court of Appeal quashing the appeal of 183 days—essentially, half a year or 6 months. This latter delay was for a step that in no way helped resolve the merits of a case and should not have been undertaken as a matter of procedure. This is an unfortunate occurrence given that the merits of the dispute are not addressed. This excludes a 12th case, where a determination that the motion to quash should be heard in conjunction with the substantive appeal led to a delay of 3 months.[111]

F. Appeals

2 of 30 Divisional Court decisions led to unsuccessful motions for reconsideration.[112] 9 Court of Appeal decisions led to unsuccessful Supreme Court of Canada leave applications. Of these cases, however, 5 of the Court of Appeal decisions addressed the merits[113] (despite the Court of Appeal addressing the merits in only a quarter of all Court of Appeal cases analyzed[114]), non-interlocutory matters dominated 1,[115] and 3 involved self-represented litigants who may have been confused about the process or were excessively

109. *Colenbrander v Savaria Corp* denied leave to appeal after the Court of Appeal quashed an appeal in an unreported decision; it accordingly could not be used in calculations. See 2016 ONSC 8051 (Div Ct).

110. Calculated with 1 day being 2/61 of a month.

111. See *Lawrence v International Brotherhood of Electrical Workers (IBEW) Local 773*, 2017 ONCA 321, aff'd 2018 SCC 11.

112. See *2128445 Ontario Inc v Sherk*, 2017 ONSC 5996 (Div Ct) [*Sherk*]; *Belway v Petro Canada Fuels Inc*, 2015 ONSC 675 (Div Ct).

113. See *Azzeh v Legendre*, *supra* note 90 (the Court addressed the interlocutory portions); *R & G Draper Farms (Keswick) Ltd v Nature's Finest Produce Ltd*, 2016 ONCA 481, leave to appeal to SCC refused, 37189 (2 February 2017) (held to be a final decision); *Speciale Law Professional Corporation v Schrader Canada Limited*, 2015 ONCA 856, leave to appeal to SCC refused, 36851 (12 May 2016) (held to be a final decision); *Griffin v Dell Canada Inc*, 2010 ONCA 29, leave to appeal to SCC refused, 33588 (20 May 2010) (held to be a final decision).

114. This occurred in 30 of 119 decisions: 28 where the appeal was held to be final, and 2 where the Court heard the appeal.

115. See *Fanshawe College of Applied Arts and Technology v AU Optronics Corporation*, 2016 ONCA 621, leave to appeal to SCC discontinued, 37244 (20 June 2017).

querulant[116] (though care should be taken not to unfairly stereotype self-represented litigants,[117] there is also evidence that they may be responsible for a disproportionate share of inappropriate litigation, even if through no fault of their own[118]). In other words, no party with counsel appealed only the fact that his or her appeal was quashed for being interlocutory.

Ultimately, this is a fairly low rate of appeals, with there being no cases where an appellate court overturned the result below. This could indicate that the law is less unclear than suspected,[119] but two other explanations exist. First, disputes over the interlocutory or final nature of orders are always peripheral in litigation, and parties likely feel that it is not worthwhile pressing these matters—especially to the Supreme Court of Canada. Second, leave is almost always required to appeal a Divisional Court[120] or Court of Appeal decision,[121] disincentivizing such appeals.

G. Conclusions on Ontario Case Law

The most important isolated statistic may be the sheer number of cases brought where the parties could not determine whether an appeal was interlocutory or final. That the Court of Appeal is spending one to two per cent of its cases addressing a matter such as this—so far removed from its purpose—is

116. See *Olumide v Conservative Party of Canada*, 2016 ONCA 314, leave to appeal to SCC refused, 37246 (27 April 2017); *Must v Shkuryna*, 2015 ONCA 665, leave to appeal to SCC refused, 36734 (7 April 2016); *Lindhorst v Stone & Co Limited*, 2011 ONCA 657, leave to appeal to SCC refused, 34597 (12 April 2012).

117. See Julie Macfarlane, Katrina Trask & Erin Chesney, "The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?" (2015) The National Self-Represented Litigants Project No 11-2015, online (pdf): *University of Windsor* <scholar.uwindsor.ca/cgi/viewcontent.cgi?article=1084&context=lawpub>; Yves-Marie Morissette, "Abus de droit, quérulence et parties non représentées" (2004) 49:1 McGill LJ 23.

118. See Gerard J Kennedy, "Rule 2.1 of Ontario's Rules of Civil Procedure: Responding to Vexatious Litigation While Advancing Access to Justice?" (2018) 35 Windsor YB Access Just 243 (suggesting that self-represented litigants bring a disproportionate number of frivolous, vexatious, and abusive actions).

119. See Kennedy, "Jurisdiction Motions", *supra* note 108 at 95 (suggesting lowering rates of appeals implies greater legal clarity).

120. Divisional Court decisions are generally only appealable with leave. See *Courts of Justice Act*, *supra* note 31, s 6(1)(a).

121. See Sopinka, Gelowitz & Rankin, *supra* note 6 at § 7.5.

troubling. Tomes have been written on legal issues that arise far less frequently.[122] The result has been hundreds of litigants having their claims delayed by months and spending approximately $10,000 in legal costs. At times, this could be the result of an obvious procedural mistake or a conscious illicit attempt to have an appeal as of right—there are cases where a straightforward application of precedent should have resolved the issue.[123] On other occasions, self-represented litigants could be confused about the process.[124] Overall, however, it seems the primary reason would be the uncertainty in the state of the law regarding this distinction. This is evident from the court acknowledging this to be the case,[125] there being no clear precedent on point,[126] and the fact that it is not uncommon for the court rather than the responding party to raise this issue.[127]

The state of the law surrounding the interlocutory/final distinction therefore exemplifies the truth in the fear that uncertain law will create needless litigation.[128] Other things being equal, clear rules are better than unclear ones. Of course, absolute predictability is not possible and some uncertainty may be necessary to ensure a party can have a remedy.[129] Whether this is the case vis-à-vis the interlocutory/final distinction will be returned to below. But regardless of the answer to that normative question, it is clear that the uncertainty in this area of procedural law has had negative consequences in terms of misusing courts' and litigants' time and financial resources.

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122. For example, the Court of Appeal hears only about a half-dozen jurisdiction motions a year. See Kennedy, "Jurisdiction Motions", *supra* note 108. It also only hears a handful (if any) cases determining non-criminal procedure rights under the *Canadian Charter of Rights and Freedoms*. See Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

123. See e.g. *Wong v Gong*, 2010 ONCA 25.

124. See e.g. *Minkofski v Dost Estate*, 2014 ONSC 1904 (Div Ct) (where the judge sought to clarify a self-represented litigant's grounds of appeal).

125. See e.g. *Mancinelli*, *supra* note 1 at para 2.

126. See e.g. *Parsons v Ontario*, *supra* note 5.

127. The courts raised the issue on their own initiative in at least ten cases. See e.g. *Locking v Armtec Infrastructure Inc*, 2012 ONCA 774 at para 4; *Hunter v Richardson*, 2013 ONCA 731 at para 1; *Punit v Punit*, *supra* note 89; *Waldman v Thomson Reuters Canada Limited*, 2015 ONCA 53 at para 2; *Parsons v Ontario*, *supra* note 5 at para 38; *Durbin v Brant*, 2017 ONCA 463 at para 2; *Salewski v Lalonde*, *supra* note 104 at para 2; *Highland Shores Children's Aid Society v CSD*, 2017 ONCA 743 at para 3; *Petgrave*, *supra* note 92 at para 6; *Beamer v Beamer*, 2013 ONSC 7379 (Div Ct).

128. See Kennedy, "Jurisdiction Motions", *supra* note 108 at 107.

129. See e.g. Michael Sobkin, "Residual Discretion: The Concept of Forum of Necessity Under the *Court Jurisdiction and Proceedings Transfer Act*" (2018) 55:1 Osgoode Hall LJ 203 (arguing for a "forum of necessity" in jurisdictional disputes, despite recognizing that this will increase litigation at 205).

III. Ways Forward

The purpose and history behind the difference in treatment between interlocutory and final appeals has thus far been explained, while also describing the perception that this discrete area of law has become needlessly convoluted. Recent case law shows that this is more than mere perception, and is posing a serious access to justice obstacle for litigants. The best way forward would likely be clarifying the law, so that parties are less likely to make errors of procedure that cause needless expense and delay. How to achieve such clarification is the subject of the rest of this article.

Of course, attempting to make law absolutely clear, whether procedural or substantive, is impossible. And even if it were possible, it would almost certainly be undesirable.[130] The interlocutory/final distinction seems to have erred severely in this direction, however. As such, this section tests potential solutions to the status quo. First, consideration is given to whether it would be prudent to eliminate the distinction between interlocutory and final appeals, and/or the leave requirement. Second, and most substantively, legislative intervention to bring clarity is considered as a preferable solution. In doing so, the experiences of England and Wales and especially British Columbia are considered. Third, thought is given to how Ontario courts should interpret governing statutes pending legislative intervention. Fourth and finally, the Divisional Court's place in the Ontario court system as an intermediary appellate court is questioned.

A. Elimination

Disputes over the interlocutory/final distinction would disappear if procedural law would treat both types of appeal the same, whether through eliminating the leave requirement for the former, or subjecting all civil appeals to a leave requirement.

(i) Eliminating the Leave Requirement

Eliminating the leave requirement for interlocutory appeals would eliminate the expense and delay caused by the leave motion itself. At the same time, the leave requirement fulfils a valuable purpose: to encourage proportionality in appeals. The rationale for this is logical: interlocutory appeals do not address the merits of a dispute, but only a collateral matter, and as such the resources and time put into them are often not commensurate with their importance

130. See e.g. Cass R Sunstein, "Problems with Rules" (1995) 83:4 Cal L Rev 953 at 1014.

vis-à-vis the fundamental dispute between the parties.[131] Though some such appeals may be over very important matters—practically determining a party's chance to achieve justice[132]—those appear to be a small minority.

Moreover, as Jutras has noted, there is no natural right of appeal.[133] Policy choices mandate that appeals be restricted to matters that fulfill the purposes of appeals and are not disproportionate to the expense incurred as a result of the appeal.[134] Interlocutory appeals are seldom necessary to fulfill the appellate role of making law—though if there are conflicting decisions on a legal point, that is a reason to grant leave to appeal.[135] As for checking for errors, it is of course possible for a trial judge to err in deciding an interlocutory matter. However, its likelihood of causing an injustice is diminished when it does not address the merits of the dispute. As such, it is eminently reasonable to expect a party to show both that there is prima facie reason to doubt the correctness of the order under appeal *and* that the matter is of sufficient importance to justify the costs of an appeal. This also reflects the fact that public resources are finite, and the most optimally fair procedure imaginable is not necessary to preserve either justice or its appearance.[136]

Ultimately, eliminating the leave requirement for interlocutory appeals would open the door to unnecessary delay, expense, and costs as there would be less disincentive to bring a needless interlocutory appeal. And given that interlocutory appeals are rarely necessary to achieve access to justice, explicitly stating that they are to be exceptional has additional valuable hortatory value.

131. See Perell & Morden, *supra* note 81 at ¶ 12.41. See also *Skunk v Ketash*, *supra* note 81 at para 31.

132. Determining the applicability of a limitation period is a good example. See e.g. *Charlebois*, *supra* note 69. *Cf Salewski v Lalonde*, *supra* note 104. See also Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.51–1.53, 1.59.

133. See Jutras, *supra* note 16 at 66.

134. See *ibid*; *Housen v Nikolaisen*, *supra* note 2 at para 9; Perell & Morden, *supra* note 81 at ¶¶ 12.41–12.42.

135. See *Rules* (Ont), *supra* note 78, r 62.02(4)(a).

136. As Karakatsanis J noted in *Hryniak v Mauldin*, "[t]here is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim." See *supra* note 14 at para 29.

(ii) A Leave Requirement for All Appeals?

An alternative would be to mandate that *all* decisions require leave to be appealed. This would ensure that all appeals have some chance of success,[137] as well as ensuring respect for the proportionality principle: whether final damages or discovery is at stake, the judge considering granting leave would have to be persuaded that the interests of justice favour having an appeal. Concerns about denying parties an appeal when warranted and/or proportionate can also be mitigated. First, the threshold to appeal would presumably be rather low—probably raising a "serious question" (akin to the test for an interlocutory injunction[138]). Second, an overarching criterion such as the "interests of justice" (seen in, for example, granting a stay pending appeal[139]) or the "balance of convenience" (seen in, for example, the test for an interlocutory injunction[140]) favouring granting leave could incorporate concerns about the costs of granting leave to appeal.[141]

However, this may be an overreaction. The costs of the leave motion would include delay and financial expense for parties, albeit of a different sort than is seen now. Though the number of disputes over interlocutory appeals is surprisingly high, they are still a small minority of the work of the Court of Appeal and Divisional Court. Though a leave requirement could have the additional benefit of deterring frivolous appeals, costs awards are a potential—albeit imperfect[142]—solution to that.[143] The Court of Appeal appears to have little difficulty summarily dismissing appeals when appropriate to do so.[144]

137. Frequently leave requirements require "a reasonable possibility that the action will be resolved at trial in favour of the plaintiff" to commence a proceeding. See e.g. *Securities Act*, RSO 1990, c S5, s 138.8(1)(b).

138. See *RJR — MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR MacDonald* cited to SCR] (describing this threshold as "low" at 337).

139. See e.g. *Pickering (City) v Slade* (2015), 39 MPLR (5th) 173, 2015 CarswellOnt 10461 (Ont CA).

140. See e.g. *RJR MacDonald*, *supra* note 138 at 342.

141. See *ibid* at 342, citing *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, 38 DLR (4th) 231 [cited to SCR] ("determin[ing] . . . which of the two parties will suffer the greater harm" from granting the relief at 129).

142. Costs awards are usually about half of costs incurred. See Horne, *supra* note 99 at 61. Enforcing costs orders can also be difficult. See e.g. *Apollo Real Estate v Streambank Funding Inc*, 2018 ONSC 392.

143. See e.g. *New Solutions Extrusion Corporation v Gauthier*, 2010 ONCA 348 at para 4.

144. For example, during the week of September 17, 2018 (chosen at random as the week when drafting this footnote), 17 of 23 were disposed with "by the bench" judgments and/or endorsements of 26 or fewer paragraphs.

Asking it to hear leave motions of unambiguously final orders may be an imprudent use of resources.

Ultimately, despite the current problems caused by the distinction between interlocutory and final appeals, the rationale for the distinction remains sound. Doing away with this distinction would create other problems that may be worse than the status quo, despite the lamentable nature of that status quo. Despite over a century of confusion on this topic in England and Wales and then Ontario, the distinction has enough merit that attempting to salvage it appears prudent.

B. Legislative Adoption of (Something Close to) the Application Approach

One may be less sanguine about the likelihood of reforming the interlocutory/final distinction were it not for the fact that England and Wales—the jurisdiction that was the source of this controversy—has already done so. Moreover, and closer to home, British Columbia has also amended its legislation regarding interlocutory appeals. Both these jurisdictions have sought to clearly define what appeals do (not) require leave (or "permission" to use the English term[145]) to be appealed. This section explains how both jurisdictions have done so, analyzing British Columbia's experience in particular, before turning to the advantages of such legislative intervention, and ways to mitigate its acknowledged disadvantages.

(i) England and Wales

As noted above, the Civil Procedure Rule Committee in England and Wales proposed that the more predictable application approach be adopted in the 1980s. And, in 1999, the *Access to Justice Act, 1999* codified this area of law.[146] A "final decision" was defined in line with the application approach as "a decision of a court that would *finally determine* (subject to any possible appeal or detailed assessment of costs) *the entire proceedings*".[147] What used to be called interlocutory orders that did not finally dispose of proceedings can only be reviewed if clearly "wrong or where it was unjust because of a serious procedural or other irregularity in the proceedings in the lower court".[148] There remains criticism that this is too restrictive of appeal rights, allowing a court to

145. *Rules* (UK), *supra* note 57, r 52.3.

146. See *Access to Justice Act Order 2000*, *supra* note 58, art 1(2)(c); Cheung, *supra* note 55 at 17.

147. *Access to Justice Act Order 2000*, *supra* note 58, art 1(2)(c) [emphasis added].

148. *Tanfern*, *supra* note 58. The case summarized rule 52.21 of the Rules. See *Rules* (UK), *supra* note 57, r 52.21.

avoid addressing a meritorious appeal through denying permission to appeal.[149] But there is also optimism that the new approach is more predictable and will allow appellate courts to concentrate on what is most important.[150] Though this experience is interesting, the difference in court levels between Ontario and England and Wales makes its experience less informative than those of other Canadian jurisdictions. Unlike Ontario, there are multiple trial courts "below" the High Court of Justice in civil matters in England and Wales; appeal rights therefore depend on both which court a case began in as well as the nature of the order sought to be appealed. As such, there are other reasons that make routes of appeal complicated beyond the interlocutory/final distinction.[151] Indeed, in 2016, England and Wales again amended its laws in this area largely based on the large number of courts "below" the High Court.[152] Fortunately, there is another, more analogous Canadian jurisdiction that has sought to address this issue.

(ii) British Columbia

a. Background

Like Ontario, British Columbia struggled with this distinction for years.[153] The Court of Appeal for British Columbia regularly held that the order approach rather than the application approach be followed,[154] despite the reticence of some of its members.[155] Steps were then taken to rectify the situation.[156] In 2011, Finch CJ issued a practice directive that delay caused by interlocutory appeals was a serious concern to be addressed, and mandated that counsel discuss dates for such appeals prior to arguing motions for leave to

149. See Richard Nobles & David Schiff, "The Right to Appeal and Workable Systems of Justice" (2002) 65:5 Modern L Rev 676 at 687–89.

150. See *ibid* at 688–89. There does not appear to be a more recent review of this.

151. See e.g. *ibid*.

152. See *Access to Justice Act Order 2016*, *supra* note 58.

153. See Frederick M Irvine, Annotation on *Radke v MS et al*, 2006 BCCA 12, (2006) 27 CPC (6th) 8.

154. See e.g. *Hayes Forest Services Limited v Weyerhaeuser Company Limited*, 2008 BCCA 120, aff'g 2007 BCCA 497 [*Hayes*]; *Forest Glen Wood Products Ltd v British Columbia (Minister of Forests)*, 2008 BCCA 480 [*Forest Glen Wood*].

155. See e.g. *Kimpton v Victoria (City of)*, 2007 BCCA 376 [*Kimpton*].

156. See Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.75.

appeal.[157] This perhaps had valuable effects in encouraging co-operation,[158] but the real change occurred due to legislation. Effective May 31, 2012, the *Court of Appeal Act* was amended to replace the concept of interlocutory appeals with one of "limited appeal orders" requiring leave to appeal.[159] The *Court of Appeal Rules* then lists said limited appeal orders: classically interlocutory matters such as scheduling, discovery, and evidentiary matters.[160] This aims to eliminate all doubt about whether leave to appeal is required.[161]

To discern these amendments' effects, a search of Westlaw and Quicklaw was undertaken in September 2018 for Court of Appeal for British Columbia decisions considering this distinction, from January 1, 2007 through December 31, 2017. Evidence of 6 unreported British Columbia decisions (for instance, where a three-judge panel of the Court of Appeal overturned a decision of a single judge) was found,[162] compared to 2 in Ontario,[163] despite there being fewer British Columbia cases in the analysis. This suggests unreported decisions addressing this issue are more common in British Columbia than Ontario.

Given that determining effects of change in the law was the purpose of the analysis, numbers, results, remedies, and appeals of civil and family cases

157. See British Columbia, Court of Appeal, "Expediting Interlocutory Appeals" (Civil Practice Directive, 19 September 2011), online (pdf): *The Courts of British Columbia* <www.bccourts.ca/court_of_appeal/practice_and_procedure/civil_practice_directives_/PDF/(Civil)%20Expediting%20Interlocutory%20Appeals.pdf>.

158. It is difficult to measure the value of such symbolic steps, but there would appear to be little disadvantage to encouraging reflection on this issue. This is done, for instance, with respect to race-based challenges for cause in jury selection. See e.g. *R v Parks* (1993), 15 OR (3d) 324, 24 CR (4th) 81 (CA).

159. RSBC 1996, c 77, s 7(1).

160. BC, *Court of Appeal Rules*, Reg 297/2001 [*CA Rules* (BC)].

161. See Blake, Cassels & Graydon LLP, "Litigation and Dispute Resolution in Canada" (2012) at 35.

162. See *AAAM v Director of Adoption* (25 November 2016), Vancouver (BCCA) [unreported], rev'd 2017 BCCA 27 [*AAAM*]; *Cotter v Point Grey Golf and Country Club* (8 May 2015), Vancouver (BCCA) [unreported] (referred to in 2015 BCCA 331); *McGregor v Holyrood Manor* (16 October 2014), Vancouver (BCCA) [unreported] (referred to in 2015 BCCA 157); *Keremelevski v VWR Capital Corporation* (4 May 2011), Vancouver (BCCA) [unreported], aff'd 2011 BCCA 469, leave to appeal refused, 34813 (28 June 2012) [*Keremelevski*]; *Bea v The Owners, Strata Plan LMS 2138* (16 September 2010), Vancouver (BCCA) [unreported], aff'd 2010 BCCA 463 [*Bea*]; *Forest Glen Wood Products Ltd v British Columbia (Minister of Forests)* (17 January 2008), Vancouver (BCCA) [unreported], aff'd *Forest Glen Wood*, *supra* note 154.

163. See *Colenbrander v Savaria Corp*, *supra* note 109 (referencing an unreported decision); *Sherk*, *supra* note 112 (affirming an unreported decision).

were recorded.[164] Family law cases were included in British Columbia but not Ontario given that British Columbia procedural law, unlike Ontario procedural law, treats family law appeals the same as civil appeals from Supreme Court of British Columbia judges; as such, British Columbia's family law experience is informative of the consequences of the appeals between interlocutory and final orders, which is not the case in Ontario.[165] The search in British Columbia went back as far as 2007, in order to have a comparable number of years pre- and post-legislative change.

b. Numbers, Results, and Remedies of British Columbia Cases

The analyzed cases can be summarily described as follows:

Table B: Numbers and Results of Disputes over the Interlocutory/Final Distinction—British Columbia

Year	Total	Interlocutory (or limited appeal)	Final	Mixed Success	Did not decide	Held to be Unappealable
2007	15	8	6	0	0	1
2008	10	8	2	0	0	0
2009	11	6	5	0	0	0
2010	10	2	7	0	1	0
2011	10	2	7	1	0	0
2012	9	5	2	0	2	0
2012—Old Rule	*5*	*3*	*0*	*0*	*2*	*0*
2012—New Rule	*4*	*2*	*2*	*0*	*0*	*0*
2013	9	3	6	0	0	0
2014	7	3	3	0	1	0
2015	7	5	2	0	0	0
2016	11	7	4	0	0	0

164. Criminal cases were also excluded. See e.g. *R v Carlson*, 2010 BCCA 81.

165. See *Court of Appeal Act*, *supra* note 159, s 7. See e.g. *SHFN v ABN*, 2015 BCCA 314.

2017	6	2	4	0	0	0
Total—Pre-Change	***61***	***29***	***27***	***1***	***3***	***1***
Total—Post-Change	***44***	***22***	***21***	***0***	***1***	***0***
Total	**105**	**51**	**48**	**1**	**4**	**1**

In the 5.41 years[166] prior to the rule change, the average number of cases per year was 11.27. In the 5.59 years since, the average was 7.88 cases per year. This has not eliminated all controversies, though it is a drop of over 30 per cent, suggesting that the attempted clarifications have had positive effects.[167] The conclusion that the developments are positive is buttressed given that one would expect a spike in disputes immediately after codification to test the contours of the new rule.[168] There were 5 requests for reconsideration after the amendments,[169] with 1 being successful.[170] This compares to 6 requests for reconsideration prior to the amendments, a very slight decrease.[171]

Of course, not all has changed. Both before and after the changes in legislation, barely more orders have been held to be interlocutory than final: 29 interlocutory compared to 27 final prior to the amendments, and 22 limited appeal and 21 final after the amendments. There has been little change in percentages of orders held to be final. This could be because many orders that classically were considered interlocutory were not defined as limited appeal

166. This accounts for the time between January 1, 2012 and May 30, 2012 (being 151 days of a 366-day year).

167. This is akin to the effects in Ontario after codifying the law of jurisdiction and its effects on jurisdiction motions. See Kennedy, "Jurisdiction Motions", *supra* note 108.

168. See *ibid* at 93. See also *Office of the Children's Lawyer v Balev*, 2018 SCC 16, Côté and Rowe JJ, dissenting (where they predicted a change in law prescribed by the majority would "[create] a recipe for litigation" at para 111).

169. See *Bradshaw v Stenner*, 2013 BCCA 61; *Wright v Sun Life Assurance Company of Canada*, 2015 BCCA 528; *Michael Wilson & Partners, Ltd v Desirée Resources Inc*, 2017 BCCA 139; *MacLachlan v Nadeau*, 2017 BCCA 326; *AAAM*, *supra* note 162.

170. See *AAAM*, *supra* note 162.

171. See *Forest Glen Wood*, *supra* note 154; *Hayes*, *supra* note 154; *Fontaine v Canada (Attorney General)*, 2008 BCCA 329; *Bea*, *supra* note 162; *Holland v Marshall*, 2009 BCCA 582; *Keremelevski*, *supra* note 162.

orders.[172] Incidentally, the frequency with which orders are held to be final vis-à-vis Ontario underscores that peculiarities of legislation make the two jurisdictions not directly comparable. Though smaller in terms of absolute numbers, having almost 10 cases per year on this issue in the Court of Appeal for British Columbia is also proportionately greater than in Ontario, which, despite having had an average of 15 cases per year in its Court of Appeal, decides roughly twice the number of total cases.[173] This could be because of the tendency in British Columbia to seek directions on whether leave to appeal is necessary—something that rarely occurs in Ontario.[174] But despite these caveats, it appears as though the legislative amendments have reduced litigation over the interlocutory/final distinction.

(iii) Advantages of Legislation

Several advantages would come to Ontario by following British Columbia and England and Wales in legislating that the application approach be followed. First, it would make the law simpler and likely reduce litigation. Other things being equal, clear rules are preferable to complicated ones.[175] Clear prescriptions, akin to those in British Columbia, aim to prevent characterizing each order an appellate court encounters as interlocutory or final, frequently acting as though this was the first time the court had ever encountered such an order.[176] British Columbia's experience, though not overwhelmingly conclusive, is promising. Though creating absolute certainty in the law is neither possible

172. See e.g. *XY, LLC v Wang*, 2013 BCCA 530 at para 19 (concerning an order regarding cross-examination).

173. In 2017, *R v Patel* was the Court of Appeal for British Columbia decision with the "highest" number in its neutral citation, as reported on CanLII. See 2017 BCCA 459. *Muthulingam (Re)* was the Court of Appeal for Ontario decision with the highest number (1026) in its neutral citation. See *supra* note 87. In 2016, *Zhang v McIntosh* was the Court of Appeal for British Columbia decision with the highest number in its neutral citation, based on a search on the same date. See 2016 BCCA 518. Comparatively, *JPB v CB* was the Court of Appeal for Ontario decision with the highest number (996) in its neutral citation that year. See *supra* note 87.

174. There are exceptions in Ontario. See e.g. *Awad*, *supra* note 97.

175. See Kennedy, "Jurisdiction Motions", *supra* note 108 at 110.

176. See Tanya J Monestier, "(Still) A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013) 36:2 Fordham Intl LJ 396 at 413. The article discusses the law of jurisdiction in the aftermath of *Muscutt v Courcelles*. See (2002), 60 OR (3d) 20, 213 DLR (4th) 577 (CA).

nor even desirable, improvements can still result from clarity in the law, to the benefit of litigants.[177]

British Columbia's experience could also likely be improved upon. In *Clifford v Lord*, for instance, Garson JA lamented that Rule 2.1 of the British Columbia *Court of Appeal Rules* was too rigid, giving parties rights of appeal where they may not be warranted.[178] In *XY, LLC v Wang*, Saunders JA noted that it was an "anomaly" that a particular order did not require leave to appeal.[179] Rather than defining what orders require leave to be appealed, therefore, Ontario could follow the England and Wales definition of a final order as being one that finally disposes of the entire proceedings. As recommended by Coulter Osborne, these orders could be appealed as of right, with all other appeals requiring leave.[180] In this sense, Ontario would be building on British Columbia's fairly successful experience, and also learning from where British Columbia may have fallen short.

Second, codifying the application approach accords with principles of statutory interpretation. This interpretation allows final to mean just that, as defined by the *Oxford English Dictionary*: "[c]oming at the end" and "[m]arking the last stage of the process; leaving *nothing* to be looked for."[181] Similarly, *Black's Law Dictionary* defines "final judgment" (it does not define final) as a "court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney's fees) and enforcement of the judgment".[182] The plain meaning of a word such as this should be highly relevant in statutory interpretation.[183] That the Legislative Assembly of Ontario did not give any other definition in the *Courts of Justice Act* (*CJA*) suggests that the legislature had a plain meaning in mind.[184] This is another reason suggesting that, though closely following the approach of British

177. See e.g. Kennedy, "Jurisdiction Motions", *supra* note 108 (arguing benefits that have accrued—and could still accrue—in the context of clarifying the law of jurisdiction).

178. 2013 BCCA 302 at para 29. See also *CA Rules* (BC), *supra* note 160, r 2.1.

179. *Supra* note 172 at para 19 (concerning an order regarding cross-examination).

180. See Ontario, Ministry of the Attorney General, *Civil Justice Reform Project: Summary of Findings & Recommendations*, by Honourable Coulter A Osborne (Toronto: Ministry of the Attorney General, 2007) at 105 [*Civil Justice Reform Project*].

181. *Oxford English Dictionary* sub verbo "final", online <www.oed.com/view/Entry/70319?redirectedFrom=final#eid> [emphasis added].

182. Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (WL, 2019) sub verbo, "final judgment".

183. See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: Butterworths, 2014) at § 2.13.

184. Context can of course change this. See *ibid* at § 3.16.

Columbia and listing orders that require leave to appeal would be preferable to the status quo, it may be optimal to follow the approach of England and Wales of defining a final order as one that disposes of the litigation. In other words, the definition could be of what is a final order rather than what is an interlocutory order. This would prevent what occasionally occurs in British Columbia, where the Court of Appeal declines to hear an interlocutory appeal that is not defined as a limited order appeal because it believes that doing so would be imprudent pending resolution of all issues in the court below.[185]

Third, codifying the application approach would be generally fair and accord with the purpose of the interlocutory/final distinction: to ensure proportionality in appeals.[186] It allows a party to have an appeal as of right only when an order has determined the outcome of the litigation.

It is true that sometimes an order that would be considered interlocutory under the application approach does, in fact, affect the rights of the parties in some substantive way. Defining such orders as interlocutory restricts the ability to have an appeal as of right when a legal right is conclusively determined. This concern has been repeatedly emphasized in the case law, leading a five-judge panel of the Court of Appeal for British Columbia to decline the request of the province's Attorney General that it reconsider its approach to this issue.[187] These concerns are not without merit; in this sense, the application approach can seem unprincipled.

But any line short of "does the ruling finally dispose of the litigation?" will appear arbitrary. Holding that a party cannot obtain discovery of a document finally determines what the party can learn pre-trial but hardly seems to warrant an appeal as of right. Refusing leave to amend a pleading to clarify the document's relevance seems only marginally less so. But if the amendment concerning the document's relevance could also be determinative of a limitation period defence, this seems less clear. And if refusal to amend the pleading explicitly ends the ability to rely on a limitation period defence, then it truly seems to determine a party's rights.[188] Such not-totally-hypothetical examples exist on a continuum.[189] Parsing this continuum seems unprincipled, and attempts to do so have led to the status quo, where the profession justifiably feels that it cannot predict appellate procedure.[190] A slippery slope exists once the possibility of treating orders that do not finally dispose of litigation as final

185. See e.g. *Hollander v Nelson*, 2013 BCCA 83.

186. See Perell & Morden, *supra* note 81 at ¶¶ 12.41–12.42. See e.g. *Skunk v Ketash*, *supra* note 81 at para 31.

187. See *Forest Glen Wood*, *supra* note 154.

188. See *Salewski v Lalonde*, *supra* note 104.

189. See Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.59, 1.61.

190. See *Mancinelli*, *supra* note 1 at para 2.

orders is opened. It can be principled to prevent this slippage by not getting on the slope.[191] In any event, as will now be discussed, the problems associated with the admittedly imperfect application approach appear to be manageable.

(iv) Problems Controllable

It is indeed true that this approach could be attacked as unsophisticated and impeding substantive access to justice by denying a party an appeal on a sufficiently important matter. These concerns are not totally misplaced. There may be some matters that would be deemed interlocutory under this definition—such as a finding of jurisdiction or striking out portions of a claim[192]—that are so important, and the costs of the trial court coming to a wrong determination so large, that it may appear proportionate to allow an appeal as of right.[193] A finding of liability when liability and damages have been bifurcated (as frequently happens in tort cases[194]) would also likely fall into this category. These understandable concerns led to the present state of affairs.

Despite the validity of these concerns, they can nonetheless be mitigated. First, a list of orders where the legislature or Civil Procedure Rule Committee believes that there should be an appeal as of right can be explicitly listed in the legislation itself as exceptions to the application approach. Indeed, in England and Wales, findings from the first portion of bifurcated proceedings are treated as final orders for the purposes of appeals.[195] British Columbia, on the other hand, lists all orders that require leave to be appealed.[196] Drafting such clear exceptions to a general rule does not risk overcomplicating matters. A rule that says "If X, then Y; If not X, then Z" may be too simple.[197] A rule that says "Consider A, B, C, D, E, F, G, and H and then do what is fair and just" may be too amorphous.[198]

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191. See Eugene Volokh, "The Mechanisms of the Slippery Slope" (2003) 116:4 Harv L Rev 1026.

192. See e.g. *Kimpton*, *supra* note 155.

193. See *MJ Jones*, *supra* note 50.

194. See e.g. *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 122.

195. See *Access to Justice Act Order 2000*, *supra* note 58, art 1(3)(a).

196. See *CA Rules* (BC), *supra* note 160, r 2.1.

197. However, it is actually more complicated than this. For Kelsen's "If A, then B" formulation, see HLA Hart, "Kelsen Visited" (1963) 10:4 UCLA L Rev 709 at 710, citing Hans Kelsen, *General Theory of Law and State*, 3rd ed, translated by Anders Wedberg (Cambridge, MA: Harvard University Press, 1949) at 45–46.

198. Tanya Monestier has argued that this was the state of the law of jurisdiction in Canada when applying *Muscutt v Courcelles*. See Monestier, *supra* note 176 at 402–03. The problems of amorphous rules are also noted by Justice David Stratas. See David Stratas, "The Canadian Law

But there are middle ways, such as "If X, then Y; If not X, then Z. Unless one of L, M, N, O, or P is present, then do Y even though X is not also present". So long as the presence of "L, M, N, O, and P" can be determined with reasonable predictability, this seems eminently reasonable and predictable. Turning this thought experiment to the interlocutory/final decision, things could look as follows: "If the action is finally determined as a result of the appealed order, then the order is final for the purposes of the appeal. If the action is not finally determined as a result of the appealed order, then the order is interlocutory for the purposes of the appeal. But if there is a final determination on the court's jurisdiction, the defendant's liability, or the quantum of damages owed, then the appeal is as of right". This is not an endorsement of this particular wording—that matter will be addressed shortly—but rather a suggestion that wording such as this could be effective.

Second, nothing suggested regarding the application approach suggests that leave to appeal interlocutory orders should not be granted in appropriate cases, thereby facilitating access to justice. In fact, the criteria that currently exist for leave further both purposes of appeals. Rule 62.02(4)(a) prescribes that a court may grant leave to appeal when there is conflicting authority from another court,[199] recognizing appellate courts' law-making role. Rule 62.02(4)(b) states that leave may be granted if there is good reason to doubt the correctness of the order below, and the issues are of such importance that the interlocutory appeal is warranted.[200] This reflects the appellate courts' role to ensure universal application of settled law,[201] while also incorporating proportionality concerns, implicitly recognizing that not all errors on interlocutory orders will warrant the expense entailed in correcting them. The mischief has resulted not from the criteria for granting leave but the characterization to determine whether leave is necessary. The leave process admittedly consumes the time and resources of parties who genuinely need an interlocutory appeal. But given that appeals in general, and interlocutory appeals in particular, are meant to be exceptional,[202] this appears to be a price worth paying to discourage inappropriate use of judicial resources, and to ensure that only interlocutory matters that truly deserve

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of Judicial Review: Some Doctrine and Cases" (last revised 13 January 2020) Working Paper at 2–3, online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2924049>; The Hon Justice David Stratas, "Reflections on the Decline of Legal Doctrine" (Keynote Address delivered at the Canadian Constitution Foundation Law & Freedom Conference, Hart House, University of Toronto, 8 January 2016), online (video): <www.youtube.com/watch?v=UxTqMw5v6rg>.

199. See *Rules* (Ont), *supra* note 78, r 62.02(4)(a).

200. See *ibid*, r 62.02(4)(b).

201. See *Housen v Nikolaisen*, *supra* note 2 at para 9.

202. See Jutras, *supra* note 16 at 65.

an appeal receive them. Finally, it must be remembered that interlocutory orders can be a reason to have a final order set aside on the grounds that the interlocutory order led to an unfair trial.[203] While this creates a great deal of inefficiency—and seeking leave to appeal the interlocutory order is to be preferred—it does leave a (narrow) door open to a party where an interlocutory order led to a clear injustice.

(v) Proposed Wording

In light of the foregoing, it is proposed that, for purposes of appeal rights under the *CJA*, "final order" be defined as:

> an order that determines:
> (a) every issue in the proceeding with the exception of costs;
> (b) a party's liability;
> (c) the quantum of damages owed in the proceeding; or
> (d) the jurisdiction or lack thereof of the court to hear the proceeding and/or that the court is or is not *forum non conveniens*.

An "interlocutory order" could be defined as: "any order that is not a final order".

Though this is the first analysis of this issue in this way, it is not the first to have recommended legislative adoption of the application approach. Sopinka, Gelowitz, and Rankin have suggested that the "benefits of certainty and clarity [should] triumph over analytic purity".[204] Associate Chief Justice Osborne (after his retirement from the Court of Appeal for Ontario) suggested that the distinction should be "jettison[ed]"—though what he actually seemed to be advocating was a strict adoption of the application approach.[205] There is every reason to believe that the application approach would reduce unnecessary litigation and be generally quite fair to parties. In the rare cases where its lack of nuance seems to lead to an unjust result, an exception can appear in legislation (preventing judges creating such exceptions on an ad hoc basis, which has led to the status quo) or leave to appeal can be granted. In defending the order approach, Donald JA astutely observed that "no single formula can eliminate all controversies over what is a final order".[206] Even so, abandoning the order approach in British Columbia seems to have been a positive development. This

203. See e.g. *Cridge v Ivancic*, 2010 BCCA 476.

204. Sopinka, Gelowitz & Rankin, *supra* note 6 at § 1.76.

205. *Civil Justice Reform Project*, *supra* note 180 at 105. See also *Shinder v Shinder*, 2017 ONCA 822 at para 7.

206. *Forest Glen Wood*, *supra* note 154 at para 35.

is not adoption of the common law but rather adoption of the application approach with few discrete exceptions. And unlike British Columbia—where legislative intervention appears to have been valuable but not as valuable as hoped—this proposed wording seeks to define a final order instead of an interlocutory order. While this restricts courts from accepting new exceptions on a case-by-case basis, this seems to not be a devastating result, as one can always seek leave to appeal and, in an exceptional circumstance, can seek legislative amendment to add an additional exception. Even if many cases would be decided the same way as under the status quo, attempts to make appeal routes clear in legislation, rather than through precedents that one must consistently engross oneself in, have value.[207] This appears a simple solution to a needlessly complicated problem.

C. Interpretation in the Meantime

Adopting the application approach would significantly change how legislation has been interpreted, suggesting the legislature rather than the courts should correct that interpretation.[208] Parties may also have relied on these precedents in forming litigation strategies, such as in deciding whether to bring a motion based on a precedent concerning its appealability. Such reliance cautions against a court overturning itself.[209] If a court begins to amend its own precedents, there may also be confusion about a status of the group of interrelated precedents in an area of law.[210] It also creates the risk of the court being perceived as not interpreting legislation but making it. This could potentially create a perception, rightly or wrongly, that the court has exceeded its power with there being an associated risk that the populace will disrespect

207. See the comment of Lord Denning MR in *Salter Rex*. See *supra* note 53 at 866.

208. See e.g. *Civil Justice Reform Project*, *supra* note 180 at 105. This preference for the legislature rather than the courts to overturn precedent in circumstances such as these is seen in scholarship and case law. See e.g. Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2007) 32 Man LJ 135 at 142, citing *Practice Statement (Judicial Precedent)*, [1966] 1 WLR 1234, [1966] 3 All ER 77 (HL (Eng)). The ability of legislatures to do this in the face of *stare decisis* has also been noted by Lorne Neudorf. See Lorne Neudorf, "Declaratory Legislation: Legislatures in the Judicial Domain?" (2014) 47:1 UBC L Rev 313 at 322–25. This can be taken to an unhealthy extreme, as both Debra Parkes and Ian Bushnell have noted. See Parkes, *supra* note 208; Ian Bushnell, "Justice Ivan Rand and the Role of a Judge in the Nation's Highest Court" (2010) 34:1/2 Man LJ 101 at 103.

209. See Richard Haigh, "A *Kindler*, Gentler Supreme Court? The Case of *Burns* and the Need for a Principled Approach to Overruling" (2001) 14:1 SCLR (2d) 139 at 149.

210. See *David Polowin Real Estate Ltd v Dominion of Canada General Insurance Co* (2005), 76 OR (3d) 161 at para 119, 255 DLR (4th) 633 (CA), leave to appeal to SCC refused, 31095 (26 January 2006); Parkes, *supra* note 208 at 136.

the court.[211] While one could argue that reinterpreting legislation to accord with the application approach is in line with reasonable developments of the common law, the aforementioned considerations warrant caution.

In the meantime, the Court of Appeal for Ontario could decline to find any additional orders that do not fall within the application approach's ambit to be final orders: in other words, the number of "exceptions" to the application approach would be capped. Justice Abella recently proposed this in the context of exceptions to reasonableness review in administrative law.[212] Without endorsing that particular suggestion of Abella J (which some have suggested would cause additional problems[213] and/or be unprincipled[214], leading to it not being followed in the recent Supreme Court of Canada decision, *Canada (Minister of Citizenship and Immigration) v Vavilov*[215]), constraining without overruling arguably erroneous precedents that have been relied upon can be prudent.[216] So while *stare decisis* cautions against the Court of Appeal declaring that the application approach is now to be strictly followed, it is nonetheless suggested that heretofore promulgated exceptions to it should be the *only* orders that do not finally resolve a case viewed as final pending legislative intervention.

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211. As it stands, however, the *Charter*, which seemingly had the opportunity to have the judiciary exceed its constitutional role, is viewed favourably by the Canadian public. See Benjamin Shingler, "Charter of Rights, Universal Health Care Top Canadian Unity Poll", *Global News* (last modified 30 June 2014), online: <globalnews.ca/news/1424367/charter-universal-health-care-top-canadian-unity-poll/>.

212. See *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at paras 33, 35, 39, 69 [*Atomic Energy*].

213. For the concurring reasons of Cromwell J, and the dissenting reasons of Côté and Brown JJ, see *Atomic Energy*, *supra* note 212. See also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016) 62:2 McGill LJ 527 at 564 (voicing concern that this may not achieve its goals).

214. See Lauren J Wihak, "Wither the Correctness Standard of Review? *Dunsmuir*, Six Years Later" (2014) 27:2 Can J Admin L & Prac 173; Diana Ginn, "Some Initial Thoughts on *Wilson v. Atomic Energy of Canada Ltd* and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*" (2017) 68 UNBLJ 285; *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 (see in particular the separate dissenting reasons of Brown J and of Rowe J).

215. 2019 SCC 65.

216. A high-profile example is Kennedy J of the Supreme Court of the United States and his ambivalent relationship with *Roe v Wade*. See 410 US 113 (1973); Lewis F Powell Jr, "Stare Decisis and Judicial Restraint" (1990) 47:2 Wash & Lee L Rev 281 at 284. Justice Kennedy narrowed but refused to overturn *Roe v Wade*. See *Planned Parenthood of Southeastern Pennsylvania v Governor (Pennsylvania)*, 505 US 833 (1992); Ilya Shapiro, "A Faint-Hearted

D. Wither the Divisional Court?

My suggestions so far have focused on changing the law surrounding the interlocutory/final distinction. But it would be a serious lacuna to not flag a potential institutional change: namely, is it prudent for Ontario to have two separate courts for appeals of Superior Court of Justice civil decisions? While other common law provinces still struggle over the interlocutory/final distinction,[217] they have only one court that must wrestle with this matter. The Divisional Court's existence has not caused the uncertainty in the law regarding the interlocutory/final distinction, which clearly exists elsewhere. However, its existence exacerbates some of the distinction's collateral consequences, including:

i. bringing appeals in both courts out of an abundance of caution and then needing to move to stay the proceeding in the Divisional Court[218]—something that would not be necessary if there was only one court, where a motion could be brought for "leave, if necessary";
ii. bringing appeals in two courts when a party seeks to simultaneously appeal interlocutory and final decisions, especially given the disinclination of the Court of Appeal to reconstitute itself as the Divisional Court, even with consent;[219] and
iii. the Chief Justice of the Superior Court needing to grant permission for the Court of Appeal to reconstitute itself as the Divisional Court when it does wish to do so.[220]

A single court for appeals of Superior Court civil decisions would at least mitigate these collateral consequences of confusion over the interlocutory/final distinction. Indeed, British Columbia avoids many of these consequences. It is common in British Columbia for a party to seek directions on whether leave is necessary to appeal and, if so, seek leave to appeal simultaneously.[221] The Court

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Libertarian at Best: The Sweet Mystery of Justice Anthony Kennedy" (2010) 33:1 Harv JL & Pub Pol'y 333 at 348–51. Justice Kagan argued in *Kisor v Wilkie* that *Auer v Robbins* should not be overturned, despite potentially legitimate criticism of it. See *Auer v Robbins*, 519 US 452 (1997); *Kisor v Wilkie*, 139 S Ct 2400 (2019).

217. See Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.41–1.74 (demonstrating that this struggle is apparent across common law Canada). Ontario may be a disproportionate source of this controversy, but it is hardly the only source.

218. See e.g. *Mancinelli*, *supra* note 1 at para 2.

219. See e.g. *Cavanaugh v Grenville Christian College*, 2013 ONCA 139 [*Cavanaugh*].

220. See *Punit v Punit*, *supra* note 89 at para 18.

221. See e.g. *Gemex Developments Corp v Coquitlam (City)*, 2011 BCCA 119 at para 1.

of Appeal for British Columbia is also willing to convert a notice of appeal into a notice of application for leave to appeal, even when refusing leave.[222] These efficient uses of judicial resources are more difficult given the presence of the Divisional Court in Ontario. As noted above, confusion about which court in which to bring an appeal also appears to disproportionately impact self-represented litigants.

Analogous court mergers have been suggested in other contexts. Policy-makers such as the late Ian Scott[223] and scholars such as Don Stuart[224] have suggested merging the criminal trial courts to, among other things, pool talent and create simplicity. This has also been attempted in various provinces with the family courts.[225]

The Divisional Court has more purposes than addressing interlocutory appeals: as noted above, it hears appeals of many other matters, such as masters' decisions. However, other provinces—such as Alberta and British Columbia—simply prescribe an appeal of a master's order to the Court of Queen's Bench (in

222. See *Island Savings Credit Union v Brunner*, 2016 BCCA 308 at para 3.

223. See David Stockwood, "In Conversation: Ian Scott" (1993) 12:1 Advocates' Society J 4; Alberta, Ministry of Justice and Solicitor General, *A Single Trial Court for Alberta* (Consultation Paper), by Wayne Renke (Edmonton: Ministry of Justice and Solicitor General, 4 July 2003), online (pdf): <open.alberta.ca/dataset/9a3f39cf-40dd-45d7-b60d-23b35cdb13af/resource/5d2c2df0-2369-41d5-9541-2ccbbc4e62b2/download/2003-single-trial-court-alberta-consultation-paper.pdf>; Don Stuart, "The *Charter* Is a Vital Living Tree and Not a Weed To Be Stunted: Justice Moldaver Has Overstated" (2006) 21 NJCL 245 at 247.

224. See Stuart, *supra* note 223 at 247. Stuart makes the similarities between the criminal and civil contexts easy to see:

> The . . . serious problem of systemic delay may well be better addressed by returning to the vision of those such as former Attorney General Ian Scott and others who called for just one federal trial court to handle all criminal trials . . .. A unified court would certainly address delays resulted from judge-shopping tactics and the sheer undue complexity of the current system. The status quo is currently propped up by claims of special expertise by judges of higher status which increasingly ring hollow given the calibre and workload of current Provincial Court judges. The single unified court is already the reality in Nunavut.

Ibid [footnotes omitted].

225. See e.g. Freda Steel, "The Unified Family Court — Ten Years Later" (1996) 24:2 Man LJ 381; Nicholas Bala, Rachel Birnbaum & Justice Donna Martinson, "One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict" (2010) 26:2 Can J Fam L 395 at 399.

Alberta)[226] or the Supreme Court (in British Columbia).[227] The Divisional Court also hears appeals of civil matters with low dollar amounts at stake. While this arguably leaves the Court of Appeal for Ontario dealing with more important matters, this seems somewhat arbitrary. And it certainly does not further purposes such as specialization, as the Court of Appeal is surely just as suited to hear an appeal with $49,999 at stake as one with $50,001 at stake, nor does this distinction reflect different procedures followed in the court below, as is the case vis-à-vis appeals of Small Claims Court decisions.

More notably, the Divisional Court also sits as a court of judicial review. The idea of having a specialized court for judicial review was the impetus behind the Court's creation, and there remains a point of view that it should return to that purpose.[228] This may be a sufficient reason to keep the Divisional Court. But its jurisdiction has expanded, and given that it generally sits in panels of three judges, it seems unclear that expertise in administrative law will be present among all three judges. Even if expertise in judicial review is desirable, this could be accomplished by having a "list" of judges who hear such applications in the Superior Court—though there are a limited number of Superior Court judges who would hear an insolvency proceeding or a murder trial, there is no separate court for these matters. This could also be the case for administrative law. Moreover, all other provinces—and the Federal Court—have single judges hear applications for judicial review, which appears to be a more efficient use of judicial resources.

On the note of expertise, the Divisional Court also has a prescribed statutory role to develop expertise in class actions.[229] This could be another reason to keep the Divisional Court, though the aforementioned comments on administrative law and judicial review apply equally to class actions.

The Court of Appeal could also mitigate the consequences caused by the division of appellate functions if it were to transfer matters to the Divisional Court, or reconstitute itself as the Divisional Court, more regularly, perhaps taking parties' procedural errors into account in costs determinations.[230] But

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226. See AB, *Rules of Court*, AR 124/2010, s 6.14(1) (noting that a master's order may be appealed to a judge, with "judge" being defined in the Appendix as a judge of the Court of Queen's Bench).

227. See BC, *Supreme Court Civil Rules*, BC Reg 168/2009, r 23–6(8.1). Rule 23–6(8.1) explains that a master's order may be appealed by "filing a notice of appeal in Form 121" to the Supreme Court of British Columbia (*ibid*, r 23–6(8.1)).

228. See *Civil Justice Reform Project*, *supra* note 180 at 103–04.

229. See *Cavanaugh*, *supra* note 219 at para 91.

230. For more on when the Court of Appeal is willing to award costs even against successful parties if they make serious and costly procedural errors, see e.g. *Knew Order Co Ltd v 2291955 Ontario Inc*, 2013 ONCA 559; Mark Gelowitz, "Knew Order v. 2291955 Ontario: Costs

even here, this could be seen as usurping what is the Divisional Court's statutory authority,[231] with the Court of Appeal typically only doing so in cases of true urgency.

To be clear, a recommendation that the Divisional Court be abolished would require further study. Such a drastic step would be complicated. All criteria that would be relevant to such a decision, such as amending numerous statutes that mandate steps be taken in the Divisional Court, have not been considered. The abolition of the Divisional Court would also likely require additional judges on the Court of Appeal.[232] Though this analysis does not support the Divisional Court's existence facilitating access to justice vis-à-vis interlocutory appeals, it is clearly possible to have a court with discrete yet diverse subject matter jurisdiction work functionally: the Federal Court, with its varied expertise in judicial review, national security law, intellectual property, taxation, and maritime law, exemplifies this. What *is* being recommended is that there be a serious discussion on this topic and that further research be done concerning it. Various courts were merged in 1990, despite opposition, with most observers viewing this as a positive development.[233] And at least when it comes to the problems caused by the interlocutory/final distinction in civil appeals, the existence of the Divisional Court appears to be unhelpful. So, this is a matter that is worth considering in more depth, as Osborne urged more than a decade ago.[234]

Conclusion

It is difficult to overstate how important appeals are from the perspective of access to justice—in narrow circumstances. In other circumstances, appeals are a significant access to justice obstacle, especially when they prevent appellate courts from focusing on their primary tasks of correcting injustices and delineating legal rules. Ontario's law has attempted to balance the need for appeals with recognition of the need for finality through, among other things,

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Awarded Against Successful Appellants for Procedural Errors" (3 October 2013), online (blog): *Osler* <www.osler.com/en/blogs/appeal/october-2013/knew-order-v-2291955-ontario-costs-awarded-again>.

231. See *Cavanaugh*, *supra* note 219 at para 91.

232. The proportion of Superior Court judges sitting on the number of Divisional Court cases that would move to the jurisdiction of the Court of Appeal could potentially be transferred to the Court of Appeal to respond to this issue.

233. See W Brent Cotter, "Ian Scott: Renaissance Man, Consummate Advocate, Attorney General Extraordinaire" in Dodek & Woolley, *supra* note 11, 202 at 214–15.

234. See *Civil Justice Reform Project*, *supra* note 180 at 103–04.

treating interlocutory and final appeals differently. The motivations behind doing so are sound, and it would likely be an overreaction to eliminate their differential treatment. As is, however, the distinction has caused considerable mischief—and understandable judicial exasperation. The uncertainty surrounding this distinction has led to dozens of disputes over this matter in both the Divisional Court and the Court of Appeal every year this past decade. This tends to cost litigants months of time and thousands of dollars without addressing the merits of a dispute. The Supreme Court of Canada's call for civil justice reform in *Hryniak* appears to have had minimal impact on this.

Fortunately, however, there is hope—and other jurisdictions have charted a path. British Columbia and England and Wales have sought to fix a similar problem in their case law through legislation. There is no question that the approaches of these jurisdictions create some risk of arbitrariness or lack of sophistication in terms of determining which orders can be appealed as of right. But there also remains discretion for appellate courts to intervene—by granting leave to appeal—if that is what substantive justice requires. Ontario should consider following suit, and grant appeals as of right only to orders that finally dispose of litigation, or are of such importance that the legislature or Civil Procedure Rule Committee has clearly prescribed that there should be an appeal as of right. In the meantime, it is humbly suggested that a simple rule is better than a complicated one, and courts should interpret Ontario's procedural law to move in that direction.

Both substantive justice *and* a fair process are essential to achieving access to justice.[235] But a fair process must be proportionate to what is at stake[236] and reasonably predictable.[237] Unfortunately, the current status of the interlocutory/final appeal distinction in Ontario (and, it would appear, Canada in general[238])

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235. See Farrow, "Access to Justice", *supra* note 72 at 971–72.

236. See e.g. *Hryniak v Mauldin*, *supra* note 14 at para 29; Farrow, "Proportionality", *supra* note 82.

237. This has been seen in diverse areas of law. For an example in international trade law, see Ian A Laird, "Betrayal, Shock and Outrage - Recent Developments in NAFTA Article 1105" (2003) 3 Asper Rev Intl Bus & Trade L 185 at 195. For an example in administrative justice, see Lorne Sossin, "Designing Administrative Justice" (2017) 34:1 Windsor YB Access Just 87 at 97. For an example in environmental protection, see Jason MacLean & Chris Tollefson, "Climate-Proofing Judicial Review After Paris: Judicial Competence, Capacity, and Courage" (2018) 31:2 J Envtl L & Prac 245 at 247, citing Government of Canada, *Environmental and Regulatory Reviews* (Discussion Paper) (June 2017) at 7, online: *Government of Canada* <www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf>.

238. See Sopinka, Gelowitz & Rankin, *supra* note 6 at §§ 1.37–1.65 (citing case law from across the common law provinces).

is anything but proportionate or predictable. Fortunately, there are ways forward that lead one to hope that this situation could be remedied.