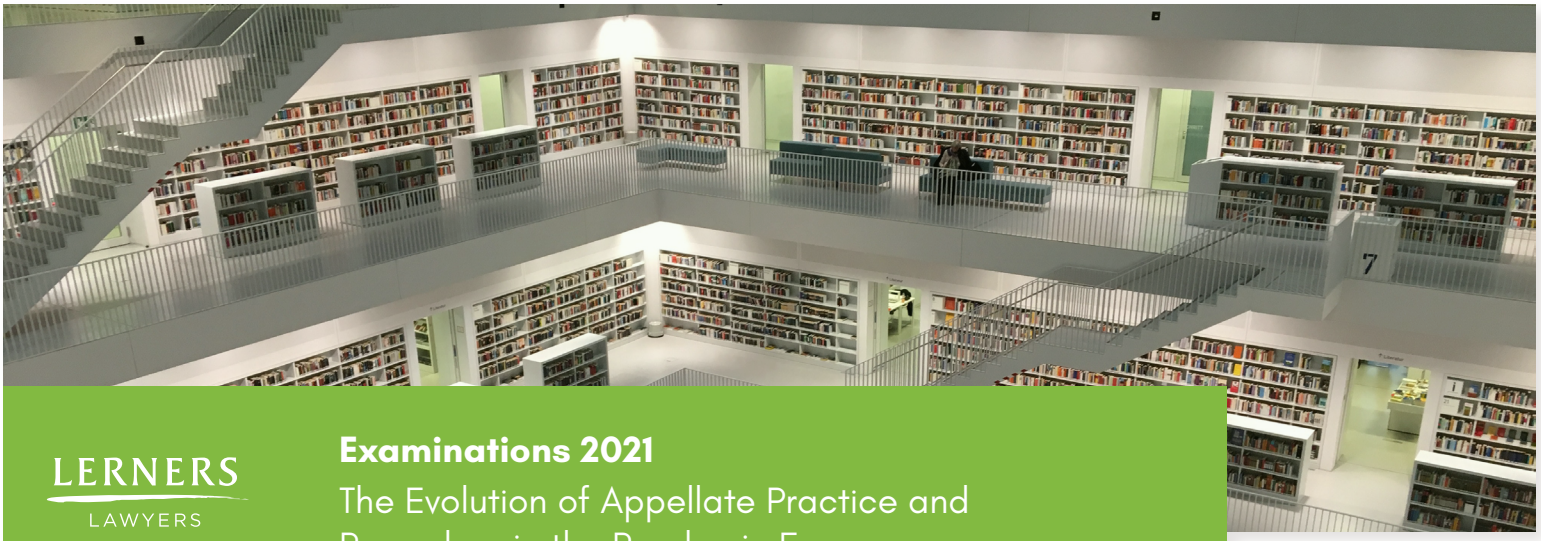

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Examinations 2021

The Evolution of Appellate Practice and Procedure in the Pandemic Era

The COVID-19 pandemic hit hard and its impacts on the justice system were felt fast in courtrooms across Canada. As public health directives and provincial closure orders disseminated through March and April 2020, courts closed and quickly moved to pivot the delivery of judicial services (from a civil litigation perspective) without the need for in person attendance at brick and mortar locations. 2020 also witnessed a flurry of decisions at the Court of Appeal for Ontario providing important guidance on matters of trial practice and procedure. Finally, the Court of Appeal for Ontario released a number of significant decisions in the past year concerning appellate practice and its own powers as an appellate court.

In an effort to reflect on key decisions and legal developments of the past year, and contemplate what lies in store from an appellate law perspective, the Lerners Appellate Advocacy Group presents the second edition of Examinations, our annual review and forecast on the state of appellate law. While there were many highly anticipated appellate decisions that were released in 2020 (*Uber v. Heller*, *Waksdale*, *Nevsun Resources v. Araya*, to name a few), this has been well covered ground by many a lawyer, ourselves included.

And so, this year, our approach was one rooted in the biggest development of all, the pandemic, and its wide-ranging effect on appellate advocacy and procedure - an unmasking, if you will. In the pages that follow, we've considered the current and future impact of COVID-19 on appellate decisions, process and practice, as well as some helpful guidance for conducting virtual appeals efficiently and effectively.

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Part I - COVID Impacts the Appellate Courtroom

The pandemic's impact on appellate courtrooms is reflected in important decisions of the Court of Appeal for Ontario throughout the year: from the court's ability to direct that appeals be "heard" in writing despite objection; to granting extensions of time to perfect appeals; to the final versus interlocutory orders quandary; and to the stay of trial court decisions striking civil juries due to the pandemic.

***Carleton Condominium Corporation No. 476 v. Wong*, 2020 ONCA 244 & *4352238 Canada Inc. v. SNC-Lavalin Group Inc.*, 2020 ONCA 303**

The Court of Appeal for Ontario administratively adjourned all appeals and motions scheduled to be heard in person after March 17, 2020 and quickly found itself in a backlog of hundreds of hearings to reschedule. To process the backlog, the court invited parties to agree to have their adjourned matters determined in writing or attend before a case management judge to argue why an oral hearing was necessary.

In one of the first pandemic case management decisions, in *Carleton Condominium Corporation No. 476* Paciocco J.A. ordered an appeal that was scheduled to be heard April 9, 2020 to be heard in writing, with the opportunity for the panel to ask questions by teleconference, at the panel's discretion. The appellant sought an adjournment, while the respondent requested that the appeal proceed in writing. Justice Paciocco noted that the appeal could be fairly adjudicated in writing and "The written materials reflect that they were professionally prepared. The appellant's materials present the issues with clarity and the appellant's position is well developed. The respondent's materials are responsive." He also considered that the issues on appeal—statutory interpretation, sufficiency of notice, alleged misapprehension of evidence, limitation period—were all "by their nature, capable of being addressed in writing." He found that the delay of the appeal would be prejudicial and that a preference for in-person oral argument, while understandable, was not in the interests of justice. He ruled: "It is in the interests of justice to have the appeal proceed in writing based on the materials filed. The parties will have an opportunity to respond, by teleconference, to any questions the panel may have, on the date set for the appeal, April 9, 2020."

"He ruled: "It is in the interests of justice to have the appeal proceed in writing based on the materials filed."

In a subsequent case management decision, Roberts J.A. went further. In *4352238 Canada Inc. v. SNC-Lavalin Group Inc.*, the appellant argued that the Court of Appeal did not have jurisdiction to order an appeal be heard in writing over the objection of one of the parties to the appeal. Justice Roberts rejected this argument observing the Court of Appeal's broad jurisdiction to manage its own process and "make any procedural order to prevent an abuse of process or to ensure the just and efficient administration of justice".[1]

1 *4352238 Canada Inc. v. SNC-Lavalin Group Inc.*, 2020 ONCA 303, at para. 4.

The Court of Appeal's "implicit powers include those that are reasonably necessary to accomplish the court's mandate and perform its intended functions" even absent "express statutory or common law authority".[2] Justice Roberts also pointed to the absence of any absolute right to an oral hearing in either the *Rules of Civil Procedure* or *Courts of Justice Act* compared with the governing principle in rule 1.04(1) that the *Rules* "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."[3] She concluded "it is well within this Court's jurisdiction to order that a civil appeal be heard in writing when the due administration of justice requires it."

***Jonas v. Elliott*, 2020 ONCA 542**

The pandemic also had practical implications for parties, one of which played out in the chambers decision in *Jonas v. Elliott* which granted an extension of time to the appellants to perfect their appeal due to the pandemic. Applying the standard test for granting such an extension, Pepall J.A. held the appellants had "clearly formed an intention to appeal within the relevant time period; they provided a reasonable explanation for the delay; and its length was justified. There is no prejudice to the respondents other than an absence of finality, and the merits of the appeal are arguable."[4] She concluded "Under the circumstances and given the challenges presented by the COVID-19 pandemic, the justice of this case calls for the granting of the requested time extension."[5]

***Ontario (Attorney General) v. Nanji*, 2020 ONCA 591**

During the pandemic, there was a temporary moratorium on evictions of residents from their homes. Chief Justice Morawetz made an order on March 19, 2020 that suspended evictions pursuant to eviction orders issued by the Landlord and Tenant Board or writs of possession during the suspension of regular court operations. On July 6, 2020, Chief Justice Morawetz ordered that the moratorium on evictions would end on July 31, 2020.

The Advocacy Centre for Tenants Ontario brought a motion for an interim stay of Chief Justice Morawetz's July 2020 order pending hearing of an application to set aside the order. Their motion was dismissed and the Advocacy Centre for Tenants Ontario appealed to the Court of Appeal.

The Court of Appeal quashed the appeal on the basis that it lacked jurisdiction because the order appealed from was interlocutory, rather than final. The court relied on earlier jurisprudence confirming that an order granting a stay is final, but an order refusing one is interlocutory. It noted that the motion to set aside Chief Justice Morawetz's order was outstanding and the merits of the order remained to be determined.

***Belton v. Spencer*, 2020 ONCA 623 & *Louis v. Poitras*, 2020 ONCA 815**

Another issue that arose during the pandemic was the scheduling of jury trials. Many regions of the province have not been able to schedule civil jury trials during the pandemic, and there have been a number of cases where one party moved to strike the jury notice. Some of these cases, like *Belton v. Spencer* and *Louis v. Poitras*, ended up in the Court of Appeal, where the Court of Appeal applied

2 *4352238 Canada Inc. v. SNC-Lavalin Group Inc.*, 2020 ONCA 303, at para. 4.
3 *4352238 Canada Inc. v. SNC-Lavalin Group Inc.*, 2020 ONCA 303, at para. 5.
4 *Jonas v. Elliott*, 2020 ONCA 542, at para. 7.
5 *Jonas v. Elliott*, 2020 ONCA 542, at para. 8.

the three-part test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (serious question to be tried, irreparable harm, and balance of convenience) to determine whether to grant a stay.

In *Belton v. Spencer*, the motion judge struck the parties' jury notices. As a result, the personal injury trial was scheduled to proceed on October 5, 2020 before a judge alone. The defendant sought a stay of the motion judge's order before Justice Brown at the Court of Appeal shortly before the trial was scheduled to commence.

"Justice Brown noted that the substantive right to a civil jury trial is a qualified right and subject to the power of the court to order that the action proceed without a jury."

Justice Brown dismissed the motion for a stay, thereby allowing the trial to proceed before a judge alone.

Justice Brown noted that the substantive right to a civil jury trial is a qualified right and subject to the power of the court to order that the action proceed without a jury. As the Court of Appeal recognized in *Girao v. Cunningham*, it is not an absolute right and must sometimes yield to practicality. A motion judge's decision to strike a jury notice is a discretionary one and accordingly, the scope of appellate review is limited. Justice Brown did not find anything on the face of the motion judge's balancing exercise that appeared arbitrary or capricious. In addition, Justice Brown noted that the weight of authority is that an order striking out a civil jury notice is interlocutory in nature, meaning that an appeal would lie to the Divisional Court, rather than the Court of Appeal.

Justice Brown was not persuaded that the defendant had demonstrated irreparable harm and noted that the possibility that the trial would proceed and the defendant would later succeed on the appeal of the striking of the jury notice, resulting in hundreds of thousands of dollars of lost legal costs, was remote.

With respect to the balance of convenience, Justice Brown noted that the events in question occurred a decade earlier and given the delays to civil jury trials as a result of the pandemic, any additional delay would be unconscionable.

"[A civil jury trial] is not an absolute right and must sometimes yield to practicality."

Louis v. Poitras is another decision from Justice Brown. Unlike the defendant in *Belton v. Spencer*, the defendants in *Louis v. Poitras* proceeded to the Divisional Court first.

The plaintiffs brought a tort action and accident benefits action as a result of a car accident. The two actions were ordered to be tried together in a 10-week jury trial commencing April 20, 2020. In July 2020, the plaintiffs moved for an order striking the jury notices in both actions. The motion judge granted the order and ordered the trial to proceed in three-week pieces before a judge alone (since judge alone trials of three weeks or less were available for scheduling).

The defendants were granted leave to appeal to the Divisional Court and their appeal was allowed. The Divisional Court concluded that the motion judge exercised his discretion to strike out the jury notices in an arbitrary fashion. However, it stated that the appeal was granted without prejudice to the motion to strike being renewed.

The plaintiffs sought leave to appeal to the Court of Appeal and brought a motion to stay the Divisional Court's order. The plaintiffs also brought a second motion in the Superior Court seeking to strike out the jury notices.

Justice Brown granted the stay of the Divisional Court's order. The Divisional Court said the motion judge struck the jury notices without any reliance on evidence that explained the anticipated length of the delay, or its impact on the administration of justice. However, Justice Brown noted that the motion judge specifically referred to information about the availability of jury trials in Ottawa and the specific circumstances of the parties, including that the plaintiffs had waited seven years for trial, all parties were ready for trial, the trial was scheduled for April 2020, any delay would require costly updated expert reports, and it was not known when a new jury trial might be heard.

Since leave to appeal to the Court of Appeal was required, Justice Brown also gave consideration to the principles that determine whether leave should be granted. He commented that the plaintiffs raised questions of public importance and existential questions about the future viability of Ontario's civil justice system.

Justice Brown accepted that there was irreparable harm, because if a stay was not granted, there was a very high risk that the plaintiffs would lose their currently scheduled judge-alone trial date and if so, they would suffer non-compensable loss caused by further delay because the *Insurance Act* limits the damages for income loss before the trial. Justice Brown also concluded that the delay caused by a postponement of the trial was itself irreparable harm.

Like the defendant in *Belton v. Spencer*, Justice Brown noted that the defendants in *Louis v. Poitras* had not explained, in specific functional terms, what litigation disadvantage they might suffer if their rights were adjudicated by an impartial and independent judge instead of a jury. Accordingly, Justice Brown granted the stay.

Addendum: On January 25, 2021, the Court of Appeal released its decision on the appeal of the Divisional Court's decision in *Louis v. Poitras*. Justice Hourigan wrote the reasons on behalf of the panel of Justices Watt, Lauwers and Hourigan. The court granted leave to appeal, allowed the appeal, and restored the order of the motion judge.

The court emphasized that motion and trial judges must have the discretion to respond to local conditions to ensure the timely delivery of justice and intermediate courts of appeal should not lightly second-guess these discretionary decisions. According to the Court of Appeal, the Divisional Court engaged in second-guessing under the guise of a finding regarding the evidentiary record. Its approach was at odds with the currently reality faced by courts. The Court of Appeal added that implicit in the Divisional Court's reasoning was the idea that delay is to be expected and tolerated, which is precisely the type of complacency that has led to systemic delay in the civil justice system and was criticized by the Supreme Court in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. The Court of Appeal held that the motion judge was entirely justified in striking the jury notices.

Part II - Appellate Direction on Trial Practice

Though not expressly "pandemic-related", the Court of Appeal has offered direction related to efficiency and economy in litigation which may prove germane as the judicial system continues to cope with the fallout and delays attributable to COVID-19.

***Girao v. Cunningham*, 2020 ONCA 260 & *Bruno v. Dacosta*, 2020 ONCA 602**

In two 2020 decisions, Lauwers J.A. provided a detailed review of the governing principles applicable to the fair and proper preparation of document briefs and their role in the trial record. While *Girao v. Cunningham* was decided in the context of issues arising with respect to the duties of a court and counsel in dealing with self-represented litigants, the governing principles apply generally. As a starting point:

> The goal of a trial judge in supervising the assembly of a trial record is completeness and accuracy, so that the panel of this court sitting on the appeal can discern without difficulty exactly what was before [the trial judge] at any moment in the course of the trial.[6]

From that starting point, Lauwers J.A. summarized the following principles:

- Any document introduced by any party that does not become a numbered exhibit should become a lettered exhibit. The important distinction between numbered exhibits and lettered exhibits is that, subject to the trial judge's discretion, lettered exhibits do not go in with the jury during its deliberations, but numbered exhibits do;[7]
- Best practice in jury trials is to make expert reports lettered exhibits in order to preserve the integrity of the trial record for the purpose of an appeal;[8]
- When a document brief is tendered at trial, the record should reflect clearly the use the parties may make of it;[9]
- Absent an agreement by the parties on the permitted use of a document brief, the trial judge should make an early ruling about its use;[10]
- Counsel should clarify the extent to which the authenticity of each document in the proffered document brief is accepted. If counsel has not done so, it is the trial judge's responsibility to get the requisite clarity when the documents are made exhibits, especially concerning a document's hearsay content;[11]

6 *Girao* at para. 22, citing *1162740 Ontario Limited v. Pingue*, 2017 ONCA 52 at para. 14.
7 *Girao* at para. 23, citing *Pingue* at para. 17.
8 *Girao* at para. 24, citing *Pingue* at para. 21.
9 *Girao* at para. 25, citing *Blake v. Dominion of Canada General Insurance Company*, 2015 ONCA 165, at para. 54.
10 *Girao* at para. 25, citing *Blake* at para. 54.
11 *Girao* at para. 26, citing *Pingue* at para. 40.

- Counsel typically agree on a list of documents and one party attends to the brief's preparation, but such agreement is not always a certainty;[12]
- The discipline of judicial oversight applies even more forcefully where one party is self-represented and the opposing lawyer prepares the brief, and in a jury trial where the brief goes into the jury room.[13]

Justice Lauwers concluded this discussion relating to trial practice by providing a useful summary of questions counsel and the court should consider regarding document briefs:

> In my view, counsel and the court should have addressed the following questions, which arise in every case, in considering how the documents in the joint book of documents are to be treated for trial purposes:
>
> 1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?
> 2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?
> 3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?
> 4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?
> 5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?
> 6. Does any party object to a document in the document book, if it has not been prepared jointly?
>
> It would be preferable if a written agreement between counsel addressing these matters were attached to the book of documents in all civil cases. In addition, it would be preferable if the trial judge and counsel went through the agreement line by line on the record to ensure that there are no misunderstandings.[14]

12 *Girao* at para. 26, citing *Iannarella v. Corbett*, 2015 ONCA 110 at paras. 127-128.
13 *Girao* at para. 27.
14 *Girao* at paras. 33-34.

Subsequently, in *Bruno v. Dacosta*, Lauwers J.A. reiterated this direction and took the "opportunity for further reflection on trial practice."[15] Commenting on the suggested agreement between counsel to be included in the document brief referenced in *Girao*, Lauwers J.A. noted: "As a matter of ordinary trial practice, the parties' agreement should be entered with the joint book of documents at the earliest opportunity."[16] Justice Lauwers also noted that it would be "good trial practice to include any written arguments in the trial record as lettered exhibits to which the appeal court can have access if necessary."[17]

He also emphasized that "any agreement between counsel as to the admissibility of documents is not automatically binding on the trial judge, who remains at all times the gatekeeper of the evidence."[18] Specifically, certain issues relating to the admissibility of certain forms of double hearsay in business records introduced pursuant to s. 35 of the *Evidence Act* will require "argument and an evidentiary ruling", notwithstanding an agreement of the parties.[19] Further, concerning the *Evidence Act*, Lauwers J.A. commented that it is "unacceptable trial practice" to include broad, sweeping references in s. 35 *Evidence Act* notices, such as "All other business and medical records listed in the parties' affidavits of documents and produced subsequently in this proceeding in response to undertaking or production requests".[20] Justice Lauwers strongly condemned, as "legal heresy" the "deplorable tendency in civil cases of admitting evidence subject only to the weight to be afforded by the trial judge: 'Seduced by this trend towards [evidentiary] flexibility, some judges in various jurisdictions have been tempted to rule all relevant evidence as admissible, subject to their later assessment of weight'".[21]

***Malik v. Attia*, 2020 ONCA 787**

In a case arising out of a real estate transaction dispute, the Court of Appeal in *Malik v. Attia* provided further guidance on when partial summary judgment will be appropriate. Building on the jurisprudence of the Court of Appeal and Supreme Court of Canada about the purposes and function of summary judgment motions as a procedural tool in civil litigation, Brown J.A. directed that "before embarking on hearing a motion for partial summary judgment a motion judge must determine whether, in the circumstances, partial summary judgment will achieve the objectives of proportionate, timely, and affordable justice or, instead, cause delay and increase expense".[22] In making this determination:

> a motion judge should make three simple requests of counsel or the parties:
>
> (i) Demonstrate that dividing the determination of this case into several parts will prove cheaper for the parties;
>
> (ii) Show how partial summary judgment will get the parties' case in and out of the court system more quickly;

15 *Bruno v. Dacosta*, 2020 ONCA 602 at para. 54.
16 *Bruno* at para. 63.
17 *Bruno* at para. 66.
18 *Bruno* at para. 55.
19 *Bruno* at para. 61.
20 *Bruno* at para. 63.
21 *Bruno* at para. 65.
22 *Malik v. Attia*, 2020 ONCA 787, at para. 61.

> (iii) Establish how partial summary judgment will not result in inconsistent findings by the multiple judges who will touch the divided case.[23]

Justice Brown also observed the significant constraints on judicial time for civil matters across the province and strongly urged that "triage processes must be put in place so that judges end up determining a case once and for all on the merits, instead of slicing determinations into a series of partial summary judgments."[24]

***Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 ONCA 788**

In this case, the proper interpretation of r. 6.1.01 of the *Rules of Civil Procedure*, which delineates a judge's power to bifurcate a proceeding, was at issue.

The rule reads as follows:

> *6.1.01 With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.*

The policy rationale for the rule is that it permits judges to act as the gate-keepers of bifurcation requests, thereby giving effect to the principle, set out in Section 138 of the *Courts of Justice Act*, that "as far as possible, multiplicity of legal proceedings shall be avoided". There are potential costs and benefits to bifurcation. In cases with damages, it may make sense to deal with liability first and damages second, as a ruling against liability makes the issue of damages moot. Determination of one issue may make the parties more inclined to settle other issues, resulting in savings of time, money and judicial resources. On the other hand, Feldman J.A., writing for a unanimous Court of Appeal, recognized that there are legitimate reasons why a party may not consent to bifurcation, such as the cost of preparing twice for a trial in the context of a contingency fee arrangement, and the potential for an appeal of the liability finding with the cost and delay associated with it.

A majority of the Divisional Court held that the effect of r. 6.1.01 is to allow the court to order bifurcation of a jury trial only when the parties consent, but that, where the trial is by judge alone, the court retains its inherent jurisdiction to bifurcate without the consent of the parties. The majority of the Divisional Court interpreted "may" as permissive language that did not preclude the court from also making a bifurcation order without the consent of the parties.

Feldman J.A. found that the problem with the majority's interpretation of the rule was that nothing in the wording of the Divisional Court's rule suggests a distinction between jury and non-jury proceedings. Furthermore, the purpose and effect of the word "may" in the rule is to give courts the discretion to make an order bifurcating a hearing, but does not require it to do so, even where the parties consent. The majority's interpretation of the Rule required the Divisional Court to read in a distinction based on whether the order is being made in the context of a jury or a non-jury trial, without any basis in the wording for doing so.

The golden rule of statutory interpretation is the oft-quoted excerpt from Driedger's *Construction of Statutes*:

23 *Malik*, at para. 62.
24 *Malik*, at para. 68.

> *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

To give effect to this approach, Feldman J.A. not only reviewed the history of the enactment of the rule and the relevant jurisprudence concerning bifurcation, but also engaged in a practical analysis: how would a self-represented litigant read the rule? Feldman J.A. surmised that a self-represented litigant would be surprised to learn that the court can make an order that is directly contrary to the wording of the rule, and she ruled that the court cannot make such an order.

Part III - Appellate Direction on Appellate Procedure

Appellate (and trial) lawyers considering, advancing, or responding to arguments on appeal would be well-advised to familiarize themselves with the court's direction and jurisprudence on the fact-finding powers of appeal courts, appropriate factum length, sufficiency of reasons, and raising new issues or reframing arguments on appeal.

***Pucci v. The Wawanesa Mutual Insurance Company*, 2020 ONCA 265** & ***Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447**

Two 2020 decisions from the Court of Appeal provide guidance on appellate fact-finding in Ontario and when the court will make a fresh assessment of the evidence to exercise its fact finding powers on appeal.

Pucci v. The Wawanesa Mutual Insurance Company considered an appeal from a trial concerning the cause of the plaintiff's catastrophic impairment following a motor vehicle accident, and the extent of the plaintiff's benefits entitlement under the *Statutory Accident Benefits Schedule* for household and attendant care expenses. Justice Doherty ultimately held that the trial judge erred in holding that these expenses had been incurred, but noted that the trial judge's errors did "not necessarily compel the quashing of paras. 3 and 4 of the judgment [awarding housekeeping and attendant care benefits]." Rather, pursuant to s. 134(4)(a) of the *CJA*, the Court of Appeal could draw inferences of fact from the evidence, as long as those inferences were not inconsistent with any finding made by the trial judge that had not been set aside by the Court of Appeal.[25]

Notwithstanding this statutory authority to draw inferences of fact, Doherty J.A. noted that "[a]ppellate courts do not routinely exercise fact-finding powers."[26] This is especially the case where "credibility assessments are required, or if the evidentiary basis required for the drawing of the necessary inferences is inadequately developed in the trial record".[27] He did note, though:

> Appellate fact-finding can, however, promote finality and efficiency in the civil justice process. In civil proceedings, appellate courts should avoid ordering a new trial if, in light of the nature of the factual issues, and the state of the trial record,

25 *Pucci*, at para. 60.

26 *Pucci*, at para. 61.

27 *Pucci,* at para. 61, citing *Cook v. Joyce*, 2017 ONCA 49, at para. 82; *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, at para. 166.

> the appellate court can confidently make the necessary factual findings without working any unfairness to either party...[28]

Justice Doherty considered whether the Court of Appeal could, on the basis of the trial record, make necessary findings in support of the conclusion that the insurer acted unreasonably by relying on its expert's report on the causation issue. Justice Doherty reviewed the applicable legal principles and the argument on point, but concluded:

> My difficulty in making a finding of fact as to the reasonableness of Wawanesa's refusal to pay the benefits lies in the paucity of evidence permitting informed inferences about the steps, if any, Wawanesa took to critically review Dr. Ozersky's report, and the steps, if any, counsel for Ms. Pucci took to bring the inadequacies in Dr. Ozersky's report to the attention of Wawanesa. [Emphasis added.][29]

In light of this "paucity of evidence" and the fact that the "question attracted little attention in the development of the evidence at trial", any attempt to make such a finding on appeal or "to draw the necessary inferences from this record would quickly slip into speculation."[30] As the trial record did not speak with "sufficient clarity and force to justify [the Court of Appeal's] exercising of its fact finding function" a new trial was mandated and ordered.[31]

In *Carmichael v. GlaxoSmithKline Inc.*, Jamal J.A. reaffirmed the principles set out in *Pucci* and applied them in the context of an appeal from an unsuccessful summary judgment motion asking for dismissal of the action pursuant to the *Limitations Act, 2002*.[32] In that context, Jamal J.A. reviewed the countervailing factors described in *Pucci* concerning appellate fact-finding,[33] as well as the culture shift called for in *Hryniak* to "create an environment promoting timely and affordable access to the civil justice system".[34] In reaching the conclusion that the Court of Appeal could make a fresh assessment of the evidence and substitute its own decision, he gave five reasons:

> **1.** The appeal does not raise questions of credibility, but rather depends crucially on the court's appreciation of the expert evidence...;
>
> **2.** The record is complete for the purpose of deciding whether to grant summary judgment. The record includes affidavits, transcripts of cross-examinations and examinations for discovery, medical reports, and other information that was before the Board;
>
> **3.** The parties do not materially dispute the facts; they dispute the legal significance of the facts, arising from a documentary record. This court is therefore as well placed as the motion judge to decide the issues;

28 *Pucci,* at para. 62, citing *Cook* at paras. 78-80. See also *Masden Estate v. Saylor*, [2007] 1 S.C.R. 838 at para. 24.

29 *Pucci* at para. 72.

30 *Pucci* at para. 74.

31 *Pucci* at para. 75.

32 *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

33 *Carmichael* at paras. 129-130 & 133.

34 *Carmichael* at paras. 131-132.

4. Neither party asked this court to remand the matter to the Superior Court for redetermination if it set aside the motion judge's order; and

5. The tragic events of this case occurred almost 16 years ago and have now been before the courts for almost a decade. This gives particular poignancy to *Hryniak*'s admonition, that the "[p]rompt judicial resolution of legal disputes allows individuals to get on with their lives"...[35]

The decisions in *Pucci* and *Carmichael* reinforce the importance of developing a complete record, which speaks with sufficient clarity and force on every relevant issue about which you need the court—trial or appeal—to make factual findings in order for your case to succeed.

"...the importance of developing a complete record, which speaks with sufficient clarity and force on every relevant issue about which you need the court—trial or appeal—to make factual findings in order for your case to succeed."

***OZ Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2020 ONCA 532**

In an era of ever-increasing reliance on virtual advocacy—by necessity during the COVID pandemic, and for economy and efficiency moving forward—the premium placed on effective written advocacy must not be underestimated. A Court of Appeal chambers decision in *OZ Merchandising Inc.* dismissing a motion for leave to file a 125-page factum on appeal provides a timely and cautionary tale against treating that court's 30-page limit for facta too lightly or liberally.

In a fittingly concise decision offering a survey of relevant commentary on factum length from appellate courts across the country, Roberts J.A. provides useful guidance on when such an extension might be appropriate. Some key points include:

1. the standard 30-page limit is a maximum, not a suggestion or starting point, set with complex cases in mind – simpler cases can (i.e. should) be dealt with in less;

2. the *Rules of Civil Procedure* stipulate facta should be concise, and jurisprudence directs counsel to be focused on the critical issues;

3. leave is required to submit a factum longer than 30 pages, and will be granted exceptionally and only in special circumstances;

4. there is a "requirement of conciseness" and a "duty of efficiency to the court" in order to "keep appeals manageable, efficient and cost-effective for the litigants and the court";

35 *Carmichael* at para. 135.

5. an extension should be granted only if it is "required in the interests of procedural fairness and justice" to give the other side notice of the issues on appeal and adequately assist the court; and

6. the importance or complexity or number of issues on appeal, the duration of underlying proceedings or length of trial below are only factors to be considered, not automatic justifications for granting an extension of the page limit.

***Bruno v. Dacosta*, 2020 ONCA 602**

This case was already discussed above in the context of document briefs, but it is also notable for Lauwers J.A.'s discussion of sufficient reasons.

Referring to the Supreme Court's exploration of the "functional purposes" of quality reasons in *Baker v. Canada (Minister of Citizenship and Immigration)*,[36] Lauwer's J.A. emphasized that "reasons … allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed".

In practice, the task facing appellate courts in cases where the sufficiency of the trial judge's reasons are at issue is to decide how hard to work to salvage inadequately explained trial reasons. If the decision itself is deficient, but the record is clear enough that the appellate court can explain the decision in its own words, the court should simply do so, and there is no need for a new trial. However, where the reasons are so deficient that the appellate court does not consider itself able to do explain the decision, a new trial may be ordered. Ultimately, the appellate court cannot substitute its own analysis for that of the trial judge

According to Lauwers J.A., the Court of Appeal will decline to mine the record in order to save a decision where the trial decision turned on instances of conflicting evidence, evaluations of credibility and reliability, and exercises of discretion that are properly within the purview of a trial judge. Each of these were examined.

With regard to weighing conflicting evidence, the more findings of fact made by the trial judge, the better. When a fact which must be established in order to determine the legal outcome is not determined, the resulting ambiguity should not be resolved by an appellate court.

When evaluating the credibility and reliability of the evidence, a trial judge must "sufficiently articulate how credibility and reliability concerns are resolved" and a failure to do so may be a reversible error.[37]

While exercises of discretion that are properly within the purview of a trial judge can be determined – by definition – in accordance with the trial judge's discretion, appellate courts cannot guess how the discretion was exercised.

In this case – which concerned the alleged failure of Niagara Detention Centre employees to take reasonable steps to protect the plaintiff as a vulnerable inmate, Ontario's liability, if any, could

36 [1999] 2 S.C.R. 817, at para. 39,

37 *R. v. A.M.*, 2014 ONCA 769, 123 O.R. (3d) 536, at para. 18, citing *R. v. Vuradin*, 2013 SCC 38, [2013] 2 SCR 639, at para. 11, and *Dinardo*, at para. 26

only derive from actionable negligence of specific correctional officers under subsections 5(1)(a) and 5(2) of the *Proceedings Against the Crown Act*. The correct legal test for liability therefore required the trial judge to have found individual, and not merely institutional, negligence.

The trial judge, throughout his reasons, consistently made institution-level references to the conduct of the "NDC", "the Ministry", "NDC staff", and "the COs.", which suggested a failure on his part to fully understand and properly apply the correct legal test for liability. The respondents argued that the trial judge could not have misunderstood the requirement of individual liability, because the action itself named numerous individuals specifically as negligent employees.

Lauwers J.A. noted that the trial judge's language created an ambiguity: the trial judge may have misunderstood the legal test, or he may have simply used loose language, while understanding the correct test. Ultimately, this left the Court of Appeal with "genuine uncertainty" about whether the trial judge fully understood and properly applied the correct legal test for liability and the court ordered a new trial.

***Becker v. Toronto (City)*, 2020 ONCA 607**

In *Becker v. Toronto (City)* the City of Toronto defended a personal injury action under the *Occupiers Liability Act*, R.S.O. 1990, c. O.2, at trial on the basis that it had installed a type of safety glass required by the 1990 Ontario *Building Code*, O. Reg. 413/90, which was in force at the time of the accident. The trial judge found that the City had not done so and breached its duty of care. On appeal, the City argued that the trial judge erred by not considering whether the City met its duty by undertaking reasonable efforts to have the appropriate glass installed regardless of what glass was actually installed.

In accordance with the general rule that appellants may not raise a point on appeal that was not pleaded, or was not argued in the trial court, Zarnett J.A. roundly rejected this argument. He characterized the City's position on appeal to be "that it should be entitled to the benefit of any defence the evidence and law could support, regardless of the theory it expressly articulated to the trial judge, and regardless of the way its submissions framed the questions the trial judge was to decide."[38] Justice Zarnett explained:

> Strong authority contradicts the City's argument that a position is advanced, and remains on the table, so long as it was pleaded and not formally abandoned, without regard to how the case was put at trial. Although the authorities arise in the context of attempts to raise a new issue on appeal, in my view they apply even more forcefully to an attempt to argue that a trial judge failed to consider an issue that was not raised before her.[39]

Even if the alternative defence had been pleaded, it was not articulated or pursued at trial, and unfairness would have resulted to the plaintiff/respondent for the trial judge to have decided the case on that theory,[40] regardless of whether the City had expressly abandoned that position or theory.[41]

38 *Becker* at para. 34.

39 *Becker* at para. 36.

40 *Becker* at paras. 35-38, citing *Union Building Corporation of Canada v. Markham Woodmills Development Inc.*, 2018 ONCA 401 at paras. 13, 15 and *Shaver Hospital for Chest Diseases v. Slesar* (1979), 27 O.R. (3d) 383 (C.A.).

41 *Becker* at para. 41, citing *Cotic v. Gray*, [1983] 2 S.C.R. 2.

Becker is consistent with and builds on appellate jurisprudence which considers it unfair to allow an appellant to spring a new argument on the other side on appeal in circumstances where the respondent(s) may have led evidence at trial if they knew the matter was in issue.[42] Justice Zarnett went further, holding that even if there is some evidence in the record that might supported a claim or defence, "it would be unfair to permit the [appellant] to resurrect an argument virtually abandoned at trial on which relevant evidence was not fully adduced".[43]

Justice Zarnett reiterated the Court of Appeal's earlier caution to would-be-appellants: "you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another question, and have fought it, and have been beaten upon it."[44] The lesson is clear: strategic choices at trial whether to advance alternative arguments or not should be made carefully, for there is no second kick at the can on appeal.

Part IV - Reflections from the Virtual Appellate Courtroom

Lessons Learned and Practice Points for Effective Virtual Advocacy

However long pandemic-driven public health measures requiring physical distancing remain in place, it is clear, that we must be prepared to deliver our submissions and oral argument in new, innovative, and modern methods. With that in mind, here are some thoughts for setting yourself up for success at your first (or fifth, or fiftieth) e-hearing, whether at an appellate court, a trial or motion, or a tribunal hearing.

Writing Winning Arguments

As always, but perhaps more than ever, the importance of persuasive written advocacy cannot be overstated. We've all heard from judges and adjudicators how critical the written materials we put before them are. We've also heard how irksome it can be to our judiciary when they do not have the assistance of well-crafted, clear, concise facta. So much so that the recently retired Honourable Justice John I. Laskin dedicated 13 pages in the Spring 2020 issue of *The Advocates' Journal* and a chunk of his retirement to remind us about "Persuasive Sentences".

This isn't the forum for rehashing what makes for persuasive written advocacy, only to emphasize its importance in this transitional time. As judges, adjudicators, and lawyers continue to get used

to the ins-and-outs of oral advocacy in virtual hearings we should be loath to underestimate the value of effective and efficient written arguments to position the issues going into the virtual hearing and guide our decision-makers as they return to deliberate and write their reasons post-hearing.

42 *K.M. v. H.M.*, [1992] S.C.J. No. 85, 142 N.R. 321 at 367; *R. v. Brown*, [1993] 2 S.C.R. 918 at 923; *Kaiman Estate v. Graham Estate* (2009), 245 O.A.C. 130 (C.A.) at paras. 23-24.

43 *Becker* at para. 37.

44 *Becker* at para. 39, quoting *Pedwell v. Pelham (Town)* (2003), 174 O.A.C. 147 (C.A.) at para. 50.

Exceptional Electronic Documents

Hand-in-hand with the significance of writing persuasive facta, preparing and filing exceptional electronic documents is key to effective virtual advocacy. As both bench and bar have transitioned to an almost exclusively virtual delivery of justice, the paramountcy of easy to navigate, user-friendly electronic documents has taken centre stage. Most courts now not only accept, but require, electronic service and filing and court-specific practice directions on electronic document preparation and filing abound.

A few lessons learned that can be implemented to improve the workability of electronic filings:

- Ensuring all e-documents filed are in PDF OCR searchable format with navigable tables of contents/indexes;
- Hyperlinking case references in facta to cases available on CanLii and/or cross-linking to an electronic book of authorities;
- Cross-linking references in facta to the motion record, appeal book, transcripts, or respondent's compendium;
- Annotating electronic books of authorities to include a navigable table of contents with links directly to the paragraph references you intend to take the court or tribunal;
- Submitting electronic documents together by a single email in a zip file, a secure file sharing service, or compiled on a USB;
- To the extent possible, coordinating and cooperating with opposing counsel to permit cross-referencing between plaintiff/defendant, appellant/respondent, moving party/responding party materials.

These are just some examples of readily applicable technologies that will make everything easier for all stakeholders in the justice system – lawyers, judges, witnesses alike. While these tools were not new, they hardly seemed to be in wide use beyond a few specific forums pre-pandemic. It is now clear that there will not be an immediate reversion to the paper-based norm when social distancing measures are no longer mandatory. Familiarity and efficiency with electronic documents is no longer optional.

Setting up for Success

Once the written arguments are drafted and the electronic documents are filed, its time for the e-hearing. Whether by telephone or videoconference, through CourtCall, Skype, Zoom, Webex, or any other platform, the key to success in virtual advocacy – as with all advocacy – is preparation.

Just as every advocate will have their own process and ritual to prepare for an in-person hearing, the manner in which one prepares for a virtual hearing will be necessarily individualized. Find what works for you, whatever makes you comfortable and confident, and focus on the substance of the argument, not the form. Still, a few thoughts worth considering as you do prepare:

- Check your phone / Internet / browser capabilities. Make sure you're actually able to connect to the e-hearing service. To the extent possible, test the platform before the e-hearing. Familiarize yourself with the functionality and tools at your disposal within the various systems. A VPN or similar is preferable to Wi-Fi, as the Supreme Court of Canada requires a hard-wired connection for its virtual hearings.

- Make sure your phone and computer are fully charged and plugged into a power source. Seems simple, but we've all been there, asking strangers for a charger or desperately looking for an outlet before our phone or computer dies during an important call or drafting session.

- Take time to set up your microphone and camera so others in the e-hearing will hear what you need them to hear, and see what you want them to see. Test your microphone and computer audio. If you're preparing for a video e-hearing, make sure the camera is framed on your face, not your forehead or stomach, or tilted down at your desk or up to the roof.

- Try getting on your feet. As we are able, we advocate primarily on our feet. We stand at a podium or lectern to make our submissions in court, so why not try to set up the same for your e-hearing. Purchase a reading stand, or make-shift a podium that you can stand comfortably at and work from during the hearing and making your submissions.

- If working remotely with co-counsel, set up an email or SMS chat to communicate confidentially back and forth as the hearing is going on.

"Find what works for you, whatever makes you comfortable and confident, and focus on the substance of the argument, not the form."

- In some ways, a virtual hearing can be more efficient than an in-person one. Having an assistant share the screen with the panel and other counsel, putting up highlighted evidence extracts and case law as counsel arguing them refer to them is more efficient and less time consuming than referring to hard copy at an in-person hearing.

- Close the door! We all love our pets and kids, and the past few weeks have generated many adorable stories about dogs joining virtual meetings, cats taking over the keyboard, and kids adding their commentary to calls and dictations. But take the e-hearing seriously. Shut the door and lock it. Ask your family to go for a walk. Keep the pets outside. Do what you need to do, but stay focused.

Following these steps and complete your own preparation and pre-hearing rituals, you will be set up for success at the e-hearing. And remember, mute your microphone when you're not speaking – whether during a telephone conference or videoconference – to avoid disrupting the hearing with vociferous typing, cute kids in the background, or comments under your breath that the microphone wasn't supposed to pick up!

Be Patient with the Process

A final piece of advice: be patient with the process. As with all new systems, they take time to learn and familiarize oneself with. This will be true for all of us on both sides of the phone/screen. The connection may "lag" – as the kids say – and audio quality may cut in and out. Loading the right documents on everyone's screen may take some trial and error (though we've been working with paper briefs for hundreds of years and every hearing I've been at still requires trial and error to ensure that the court and counsel (and, if applicable, witnesses) are holding the same brief, open to the same tab, looking at the right page or paragraph). Advocates may not be as quick to notice when the adjudicator has a question, or opposing counsel has an objection. Judges may speak over lawyers and vice versa as everyone settles into the nuances of this new technology.

Closing Submission

Tips from the Trenches

As appellate advocacy went virtual, our expert counsel answered the call applying their specialized experience and expertise in appellate practice and procedure to the new age of e-advocacy. We asked a few members of Lerners' Appellate Advocacy Group to share some reflections on takeaways, tips, and lessons learned on the conduct of virtual appeal hearings, whether by video conference, telephone, or in writing.

"If your matter is at the Court of Appeal, and you want your clerk to be the one to share the screen, permission to have the clerk 'in the room' (and not sent to the observation room) is required. Only counsel listed on the Counsel sheet is allowed to be 'in the room'."

– Jo Grande, Law Clerk

"It is time very well spent in advance of an appeal (or any hearing) to bookmark the pdf of your record, compendium or authorities brief to your (or your principal's) argument. It turns out that sharing your screen to those pinpoints makes turning up your cites faster than navigating judges through a hardcopy brief."

– Jason Squire, Partner

"Virtual oral advocacy allows you to truly see if a judge is listening. Not just writing, but listening. Look up from your notes, and pay attention to those facial expressions and visual cues. And remember, that they can see you that closely too."

– Cynthia Kuehl, Partner

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About Lerners' Appellate Advocacy Group

At Lerners, we know that the Canadian appellate landscape is ever-changing. We are passionate about the unique nature of appeals and our lawyers have the battle-tested specialized knowledge and experience with the appeal process and appellate courts that delivers results.

We represent a broad range of clients and have argued a wide variety of appeals in insurance law, family law, tort law, class actions, commercial law and municipal law as well as questions of constitutionality. We regularly appear before the Court of Appeal for Ontario and the Supreme Court of Canada and have been involved in some of the leading appeals in Canadian jurisprudence.

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