Wither the Divisional Court? Looking at the Past, Analyzing the Present, and Querying the Future of Ontario's Intermediary Appellate Court

Gerard J. Kennedy

THIS ARTICLE CRITICALLY analyzes the role of the Divisional Court in Ontario's justice system, and ultimately proposes that the Divisional Court be eliminated, or at least have its jurisdiction significantly constrained. The analysis begins through looking at the Divisional Court's history, from its founding as a specialist court for judicial review to its gradually expanding jurisdiction. The article then turns to the present by: looking at the types of cases that are prescribed to the Divisional Court's jurisdiction; comprehensively analyzing every Divisional Court decision from 2018 and 2019; looking at cases where it was disputed whether a matter was properly before the Divisional Court; and critically analyzing the *status quo*. In light of this analysis of the Divisional Court's past and present, the article then proceeds to critically analyze the future of the Court. The author argues that the Divisional Court be abolished, with matters currently in its jurisdiction subsumed into the jurisdiction of either the Superior Court or Court of Appeal, in light of six rules:

1) All judicial reviews and statutory appeals of administrative decisions proceed before single judges of the Superior Court, unless a statute clearly provides otherwise;
2) All orders of masters, whether interlocutory or final, may be appealed to a single Superior Court judge, with leave;

CET ARTICLE PRÉSENTE une analyse critique du rôle de la Cour divisionnaire au sein du système de justice de l'Ontario et propose finalement que la Cour divisionnaire soit éliminée, ou du moins que sa compétence soit considérablement limitée. L'analyse commence par un examen de l'histoire de la Cour divisionnaire, depuis sa fondation en tant que tribunal spécialisé dans le contrôle judiciaire jusqu'à l'élargissement progressif de sa compétence. L'article se tourne ensuite vers le présent en examinant le type d'affaires qui relèvent de la compétence de la Cour divisionnaire, en analysant de manière exhaustive chaque décision rendue par la Cour divisionnaire de 2018 et 2019, en examinant les cas où il a été contesté, à savoir si une question présentée devait être réellement soumise à la Cour divisionnaire, en analysant de manière critique le *statu quo*. À la lumière de cette analyse du passé et du présent de la Cour divisionnaire, l'article procède ensuite à une analyse critique de l'avenir de la Cour. L'auteur ou l'auteure soutient que la Cour divisionnaire devrait être abolie et que les affaires relevant actuellement de sa compétence devraient être confiées à la Cour supérieure ou à la Cour d'appel, selon six règles :

1) Tous les contrôles judiciaires et tous les appels conférés par la loi concernant des décisions administratives se déroulent devant des juges uniques de la Cour supérieure,

3) All appeals of orders of Superior Court judges proceed to the Court of Appeal, with leave in the case of interlocutory orders, or as of right in the case of final orders;
4) There be no distinctions as to appellate routes based on the monetary values of judgments under appeal;
5) Decisions of the Small Claims Court can be appealed to single judges of the Superior Court; and
6) The foregoing can be amended by the legislature specifically prescribing that a matter proceed in another manner.

To the extent that complete abolition is not pragmatic, this article argues that the Divisional Court's jurisdiction be confined to narrower and more predictable circumstances, and offers suggestions regarding how this could be achieved in light of the Divisional Court's purpose, history, and present docket. This will facilitate access to justice by resulting in better use of judicial resources, give Ontario a comparable procedure to other provinces, and reduce interlocutory wrangling that delays cases from being resolved on their merits.

à moins qu›une loi ne prévoie clairement le contraire ;
2) Toutes les ordonnances des protonotaires, qu'elles soient interlocutoires ou finales, peuvent faire l'objet d'un appel devant un seul juge ou une seule juge de la Cour supérieure, avec autorisation ;
3) Tous les appels d'ordonnances des juges de la Cour supérieure sont portés devant la Cour d'appel, avec autorisation dans le cas des ordonnances interlocutoires, ou de plein droit dans le cas des ordonnances finales ;
4) Qu'il n'y ait pas de distinctions quant aux voies d'appel basées sur la valeur monétaire des jugements en appel ;
5) Les décisions de la Cour des petites créances peuvent être portées en appel devant des juges uniques de la Cour supérieure ; et
6) Les dispositions qui précèdent peuvent être modifiées par une loi qui prescrirait expressément qu'une affaire doive être traitée d'une autre manière.

Dans la mesure où l'abolition complète de la Cour divisionnaire n'est pas pragmatique, le présent article fait valoir que la compétence de la Cour divisionnaire devrait être limitée à des circonstances plus précises et plus prévisibles, et il offre des suggestions sur comment y parvenir en tenant compte de l'objectif, de l'histoire et du rôle actuel de la Cour divisionnaire. Cela facilitera l'accès à la justice en permettant une meilleure utilisation des ressources judiciaires, permettra à l'Ontario d'avoir un processus comparable à celui en place dans d'autres provinces et réduira les querelles interlocutoires qui retardent le règlement des affaires sur le fond.

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Canada's court system is simple, is it not? The superior courts of the provinces are courts of "inherent" jurisdiction. The provincial courts of appeal review their decisions. There is significant symmetry across Canada on this front.

However, Ontario is an outlier. Since 1971, Ontario has had an intermediary appellate court—the Divisional Court—which sits hierarchically between the Superior Court of Justice and the Court of Appeal for Ontario.[1] The Divisional Court was established in large part to be a specialist court in judicial review, adopted in an era of an expanding administrative state. While other courts from that era have disappeared, resulting in a well-received simplification of the court system, the Divisional Court has remained. Moreover, the Divisional Court's jurisdiction has expanded to include a host of matters not originally contemplated by the Court's establishment. This has resulted in dozens of cases each year (see Part II.C) where the dispute is whether a case should properly be before the Superior Court, Divisional Court, or Court of Appeal. The Divisional Court also frequently sits in panels of three judges for matters that other

* Assistant Professor, Faculty of Law, University of Manitoba. The author thanks the two anonymous peer reviewers and the staff of the *Ottawa Law Review* for their assistance and suggestions during the editing process. Ryan Alford, Asher Honickman, Pam Hrick, Jeremy Opolsky, and Erin Pleet went out of their way to provide me with sources or detailed comments during the drafting stage and this paper is very much improved as a result. Finally, and most importantly, Dan Patriarca Jr provided invaluable research and editing assistance, generously supported by the Legal Research Institute of the University of Manitoba.

1 See Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal, 1792–2013* (Toronto: University of Toronto Press, 2014) at 133 [Moore, "Ontario"].

provinces would have considered by a single judge. In the face of these facts, as well as the trend towards simplifying and merging courts, it is time to reconsider the role of the Divisional Court. This article attempts that reconsideration, largely through the lens of access to justice. It is suggested that the Divisional Court be abolished, and its jurisdiction be divided between the Superior Court and Court of Appeal in accordance with the following six rules:

1. All judicial reviews and statutory appeals of administrative decisions proceed before single judges of the Superior Court;
2. All appeals of orders of associate judges, whether interlocutory or final, proceed before single judges of the Superior Court, with leave;
3. All appeals of orders of Superior Court judges proceed to the Court of Appeal with leave in the case of interlocutory orders or as of right in the case of final orders;
4. There be no distinctions as to appellate routes based on the monetary values of Superior Court judgments under appeal;
5. Final decisions of the Small Claims Court can be appealed to a single judge of the Superior Court; and
6. The foregoing can be amended by a specific legislative or regulatory provision to the contrary.

All of this would accord with and advance the principle of access to justice.

Part I of this article analyzes the past of the Divisional Court, from its founding as a specialist court for judicial review to its gradually expanding jurisdiction. The principle of access to justice is then introduced, and the potential of the Divisional Court to advance the principle is acknowledged. Part II turns to the present by looking at the types of cases that are prescribed to the Divisional Court's jurisdiction, comprehensively analyzing every Divisional Court decision from 2018 and 2019, looking at cases where it was disputed whether a matter was properly before the Divisional Court, and critically analyzing the status quo through the lens of access to justice. With that access to justice lens, Part III discusses what the future of the Divisional Court should be in light of the analysis in Parts I and II. It argues that the Divisional Court be abolished, with matters currently in its jurisdiction subsumed into the jurisdiction of either the Superior Court or Court of Appeal, as suggested above. To the extent that complete abolition is not pragmatic, this article argues that the Divisional Court's jurisdiction be confined to narrower and more predictable circumstances, and offers suggestions regarding how this could be achieved in light of the Divisional

Court's purpose, history, and present docket. This would give Ontario a comparable procedure to other provinces, and reduce interlocutory wrangling that delays cases from being resolved on their merits. In an era of court reform and procedural reform in the aftermath of the COVID-19 pandemic,[2] this is an additional reform that could facilitate access to justice.

I. THE PAST

A. Establishing the Divisional Court

Pursuant to section 96 of the *Constitution Act, 1867*,[3] Canada's Superior Courts are courts of "inherent" jurisdiction, generally possessing jurisdiction similar to that of the High Court of England and Wales unless jurisdiction over a given matter has been removed by statute.[4] In Ontario, the Superior Court of Justice is the current incarnation of the superior court. Appellate courts, however, do not have inherent jurisdiction—rather, they are creatures of statute.[5] The Court of Appeal for Ontario is the successor court to the Court of Error and Appeal for Canada, which was created in 1850.[6] Prior to this, the Governor's Council acted as an appeal court in Upper Canada since 1792. Having an independent appellate court was considered preferable to this unpredictable practice.[7]

It was more than a century after the Court of Appeal's establishment that the Divisional Court was established. In 1964, the Ontario government appointed James C. McRuer, recently retired Chief Justice of the High Court (a previous incarnation of the Superior Court), to chair the Law Reform Commission of Ontario as well as a public inquiry into civil rights in Ontario.[8] Among his many recommendations was creating a sep-

2 See generally Suzanne E Chiodo, "Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?" (2020) 57:3 Osgoode Hall LJ 801.

3 (UK), 30 & 31 Vict, c 3, s 96, reprinted in RSC 1985, Appendix II, No 5.

4 See e.g. *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725 at paras 27–33, 130 DLR (4th) 385; Gerard J Kennedy, "Civil Appeals in Ontario: How the Interlocutory/Final Distinction Became So Complicated and the Case for a Simple Solution?" (2020) 45:2 Queen's LJ 243 at 249 [Kennedy, "Appeals"].

5 See John Sopinka, Mark A Gelowitz & W David Rankin, *Sopinka and Gelowirz on the Conduct of an Appeal*, 4th ed (Toronto: LexisNexis Canada, 2018), § 1.1; Kennedy, "Appeals", *supra* note 4 at 249.

6 Moore, "Ontario", *supra* note 1 at 4, 18.

7 *Ibid* at 6–18.

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

arate court to hear applications for judicial review.[9] Prior to this time, the procedure to bring an application for judicial review was complicated and depended on the particular remedies being sought, which could result in multiple judicial review applications arising from the same underlying administrative action.[10] Simplicity and clarity were, therefore, necessary to ensure better access to judicial review.

McRuer's recommendations regarding judicial review, including his advocacy for a specialist court, were controversial. John Willis of the University of Toronto's Faculty of Law feared that McRuer's recommendations would entrench judicial review over civil servants' decisions[11] and criticized McRuer's report as being "ideological."[12] This reflects what Ryan Alford noted as Willis' faith in the administrative state — a faith that Alford describes as enduring even when the administrative state's actions conflict with the rule of law.[13] The rule of law, of course, is the constitutional principle that guarantees the right to judicial review of administrative action, even in the face of privative clauses that purport to restrict that right.[14] Despite Willis' criticisms, the Ontario government followed McRuer's recommendations and established the Divisional Court of the High Court of Justice.[15] The Divisional Court's decisions can generally be appealed to the Court of Appeal, with leave.[16]

McRuer's recommendations were not only understandable but sensible, particularly in an era of an expanding administrative state.[17] The Divisional Court was established in tandem with other moves to codify the process of judicial review of administrative action. For instance, it

9 *Ibid* at 324; Ontario, Royal Comission Inquiry into Civil Rights, *Report No 1*, vol 2 (Toronto: Queen's Printer, 1968) (Hon James Chalmers McRuer) at 667 [Royal Commission, "McRuer Report Vol 2"]; Moore, "Ontario", *supra* note 1 at 132–33.

10 See Ontario, Royal Commission Inquiry into Civil Rights, *Report No 1*, vol 1 (Toronto: Queen's Printer, 1968) (Hon James Chalmers McRuer) at 317–18.

11 See John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18:4 UTLJ 351 at 354.

12 *Ibid* at 351–52, 359.

13 See Ryan Alford, *Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law* (Montreal & Kingston: McGill-Queen's University Press, 2020) at 177–82. See also Ryan Alford, "The Origins of Hostility to the Rule of Law in Canadian Academia: A History of Administrativism and Anti-Historicity" (2019) 92 SCLR (2d) 47.

14 See *Crevier v Quebec (AG)*, [1981] 2 SCR 220, 127 DLR (3d) 1 [*Crevier* cited to SCR]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 24 [*Vavilov*].

15 Moore, "Ontario", *supra* note 1 at 133.

16 See *Courts of Justice Act*, RSO 1990, c C.43 s 6(1)(a) [*CJA*].

17 See e.g. Graeme A Barry, "Spectrum of Possibilities: The Role of the Provincial Superior Courts in the Canadian Administrative State" (2005) 31:1 Man LJ 149 at 150.

would not appear coincidental that the Divisional Court was established at approximately the same time that the Exchequer Court was reorganized into the Federal Court, Trial Division, and the Federal Court, Appeal Division.[18] These two courts were later renamed the Federal Court and Federal Court of Appeal[19] and have, among other things, jurisdiction to hear judicial reviews of federal government action.[20]

The name of the Divisional Court was inspired by the Divisional Court of the High Court of England and Wales: indeed, McRuer viewed it as the model for the Ontario Divisional Court, which was originally named the "Appellate Division of the High Court of Justice for Ontario."[21] The Divisional Court of the High Court of England and Wales is so named because it is comprised of, and sits in, "divisions" of multiple judges.[22] One of these—renamed the "Administrative Court" in 2000—has jurisdiction over judicial review similar to that of the Ontario Divisional Court.[23] McRuer viewed multiple judges as desirable on judicial reviews given the similarities between judicial reviews and appeals.[24] Willis argued that this overstated such similarities, noting that there is a significant difference between appellate judges reviewing trial judges' decisions and judges reviewing civil servants' decisions.[25]

Many of the rationales behind McRuer's recommendations are just as, if not more, germane in the present as they were more than a half-century ago. This is largely because of his emphasis on specialist judging, particularly in the area of administrative law. Specialist judging can increase efficiency in the decision-making process.[26] This efficiency means that parties can spend less time and money on litigation, which increases access to justice for them.[27] It also allows the courts to hear more cases, meaning

18 Moore, "Ontario", *supra* note 1 at 133.

19 See *Federal Courts Act*, RSC 1985, c F-7, ss 3–4.

20 *Ibid*, ss 18–18.1.

21 Royal Commission, "McRuer Report Vol 2", *supra* note 9 at 665.

22 The Honourable Serjeant Stephen, *Mr. Serjeant Stephen's New Commentaries on the Laws of England*, vol 3 (London: Butterworth & Co, 1903) at 376.

23 See Sarah Marie Nason, *Judicial Review in England and Wales: Constructive Interpretation of the Role of the Administrative Court* (PhD Dissertation, University College London, 2014) [unpublished] at 181.

24 Royal Commission, "McRuer Report Vol 2", *supra* note 9 at 654, 660.

25 Willis, *supra* note 11 at 359–60.

26 See e.g. Gerard J Kennedy, "Jurisdiction Motions and Access to Justice: An Ontario Tale" (2018) 55:1 Osgoode Hall LJ 79 at 105 [Kennedy, "Jurisdiction"].

27 This emphasis on less financial costs and less time spent in the system may be insufficient for an understanding of access to justice, but it is part of it: See Trevor CW Farrow, "A

that other members of the public can access the courts.[28] In addition to this, specialist judging tends to reduce errors by increasing the likelihood that the first-instance judge understands the legal subject matter.[29] This furthers the principle of finality, as parties are more likely to accept the judge's opinion, leading to fewer appeals and even fewer successful appeals.

To be sure, specialist judging in administrative law was never the only rationale behind the establishment of the Divisional Court. McRuer was also concerned about the large number of cases that were heard by the Court of Appeal, and he believed that it would be a better use of judicial resources to divert certain matters to the Divisional Court.[30] In this sense, though creation of a specialist court in judicial review was a primary rationale animating McRuer's recommendation to establish the Divisional Court, it must be acknowledged that it was not the only rationale.

B. The Expansion of the Divisional Court's Jurisdiction

Originally, the Divisional Court also had jurisdiction over matters prescribed by specific statutes, as well as appellate jurisdiction over interlocutory decisions of High Court judges (for which leave is required[31]) and final decisions of masters, now known as associate judges.[32] Over time, the Divisional Court's jurisdiction continued to expand to include additional appellate matters, in part due to suggestions that the Court of Appeal was overworked and should concentrate on the most important cases.[33] For

New Wave of Access to Justice Reform in Canada" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) at 166 [Farrow, "New Wave"]; Gerard Joseph Kennedy, *Hryniak, the 2010 Amendments, and the First Stages of a Culture Shift?: The Evolution of Ontario Civil Procedure in the 2010s* (PhD Dissertation, York University, 2020) [unpublished] at 11 [Kennedy, "Culture Shift"].

28 See *Canada v Olumide*, 2017 FCA 42 at para 19 [*Olumide*].

29 Kennedy, "Jurisdiction", *supra* note 26 at 105–106.

30 Royal Commission, "McRuer Report Vol 2", *supra* note 9 at 664–65.

31 *CJA*, *supra* note 16, s 19(1)(b).

32 See Margaret A Banks, "The Evolution of Ontario Courts: 1788–1981" in David H Flaherty, ed, *Essays in the History of Canadian Law*, vol 2 (Toronto: University of Toronto Press, 2012) at 535. The title "master" was replaced by "associate judge" upon Bill 245, the *Accelerating Access to Justice Act, 2021*, SO 2021, c 4, being proclaimed into force. However, the word "master" will be used in this article to refer to the past actions of those in this position, reflecting the contemporaneous title. References to the present and future will be to "associate judge."

33 Moore, "Ontario", *supra* note 1 at 143–44.

example, in 1984, civil appeals with low dollar amounts were put in the Divisional Court's jurisdiction.[34]

The Divisional Court, whose members are all Superior Court judges,[35] also has appellate jurisdiction over executive powers prescribed by dozens of statutes, such as the *Ambulance Act*,[36] the *Beef Cattle Marketing Act*,[37] and the *Law Society Act*.[38] The use of the language "appeal" is important when the "appeal" is an appeal of an administrative actor's decision for two reasons. First, this language modifies the more general language of the *Judicial Review Procedure Act* (*JRPA*)[39] and *Statutory Powers and Procedure Act* (*SPPA*),[40] which otherwise govern actions for judicial review. Second, pursuant to the Supreme Court of Canada's *Canada* (*Minister of Citizenship and Immigration*) *v Vavilov* decision, these statutory appeals result in the administrator's decisions being reviewed on a correctness, rather than a reasonableness, standard on questions of law.[41] Explicit prescriptions that "judicial review" is available in the Divisional Court exist in other statutes, such as the *Marriage Act*[42] and the *Construction Act*.[43] Such statutory language prescribes in more detail what the *JRPA* and *SPPA* would otherwise permit.

Other matters in the Divisional Court's jurisdiction include appellate jurisdiction over certain Superior Court decisions made pursuant to thirty different statutes, including: the *Business Corporations Act* (*OBCA*);[44] the *Estates Act*;[45] and the *Municipal Conflict of Interest Act*.[46] This is in addition to other idiosyncratic references to the Divisional Court in statutes:

34 *Ibid* at 159, citing *CJA*, *supra* note 16, s 19(1)(a).
35 CJA, *supra* note 16, s 18(3).
36 RSO 1990, c A.19, s 16(1).
37 RSO 1990, c B.5, s 16(1).
38 RSO 1990, c L.8, s 49.38.
39 RSO 1990, c J.1 [*JRPA*].
40 RSO 1990, c S.22, s 6(1) [*SPPA*].
41 *Supra* note 14 at paras 36–47.
42 RSO 1990, c M.3, s 8(4).
43 RSO 1990, c C.30, s 13.18(1).
44 RSO 1990, c B.16.
45 RSO 1990, c E.21, s 10(1).
46 RSO 1990, c M.50, s 11(1). See also *Magder v Ford*, 2013 ONSC 263.

- a privative clause insulating a tribunal's decisions from "appeal";[47]
- contemplating steps that statutory decision-makers must take to assist the Divisional Court in prospective future litigation;[48]
- allowing for stated cases to the Divisional Court,[49] a general power that also exists under the *SPPA*;[50]
- prescribing that a licensee must make Divisional Court decisions concerning the licensee public;[51] and
- modifying the effects of bringing proceedings in the Divisional Court from what would otherwise be prescribed by the *JRPA* or *SPPA*.[52]

Other statutes prescribed rights of appeal to the Divisional Court in the past but they have either been removed or been redirected to the Court of Appeal or the Superior Court. The most notable recent example is the *Class Proceedings Act, 1992* (*CPA*),[53] where jurisdiction that previously belonged to the Divisional Court is now within the purview of the Court of Appeal. Other statutes, usually concerning the administrative state, previously prescribed jurisdiction to the Divisional Court but these have been repealed.[54]

Ultimately, with over one hundred statutes in force prescribing jurisdiction to the Divisional Court, it is a trite observation that there has been quite the evolution of the Divisional Court's jurisdiction from its original role as a specialist court in judicial review.

C. Subsequent Mergers of Courts

Pursuant to their constitutional power to create additional courts to facilitate the administration of justice, provinces are permitted to create courts beyond the superior courts and, subject to narrow constitutional

47 See *Alcohol, Cannabis and Gaming Regulation and Public Protection Act, 1996*, SO 1996, c 26, s 14.1(8).

48 See *Drainage Act*, RSO 1990, c D.17, s 114; *Municipal Arbitrations Act*, RSO 1990, c M.48, s 4. Such matters can still be judicially reviewed: *Crevier* cited to SCR, *supra* note 14.

49 See *Assessment Act*, RSO 1990, c A.31, s 43(1); *Coroners Act*, RSO 1990, c C.37, s 51; *Education Act*, RSO 1990, c E.2, s 10; *Human Rights Code*, RSO 1990, c H.19, s 45.6(1); *Ontario Energy Board Act, 1998*, SO 1998, c 15, Schedule B, s 32(1); *Public Inquiries Act, 2009*, SO 2009, c 33, Schedule 6, s 30(1); *Ombudsman Act*, RSO 1990, c O.6, s 14(5).

50 *SPPA*, *supra* note 40, s 13(1).

51 See *Retirement Homes Act, 2010*, SO 2010, c 11, s 55(1).

52 See *Independent Health Facilities Act*, RSO 1990, c I.3, s 7(12); *Ontario Works Act, 1997*, SO 1997, c 25, Schedule A, s 31(4).

53 SO 1992, c 6, s 30 [*CPA*].

54 See e.g. *Ontario Energy Board Act*, RSO 1990, c O.13, s 32; *Family Benefits Act*, RSO 1990, c F.2, s 15; *Commercial Concentration Tax Act*, RSO 1990, c C.16, s 12.

constraints, prescribe the exercise of the jurisdiction of the superior courts.[55] As noted by Laskin CJ in *Di Iorio v Warden of the Montreal Jail*:

> A province may establish Courts or tribunals to administer matters falling within its legislative power, provided that the limitations as to the character and stature of the courts or tribunals arising under s. 96 are observed [...]. A province may establish Courts and endow them with a jurisdictional capacity to administer even federal legislation, subject to the power of the Parliament of Canada to repose exclusive jurisdiction in such matters in a Court of its own creation under s. 101 [...]. Where a province establishes such a Court, the substantive law administered therein, being in relation to matters falling within exclusive federal competence, would have to come from federal enactments; [...]. The Parliament of Canada could and has, in some cases, fortified this exercise of federal jurisdiction by provincial courts by designating them to be the judicial enforcement agencies. The commonest illustration of this is, of course, in the federal provisions for enforcement of the criminal law.[56]

Ontario has created the Small Claims Court, associate judges' chambers (both of which are technically part of the Superior Court), the Ontario Court of Justice (frequently known as the Provincial Court), and a host of administrative tribunals to facilitate the administration of justice. The number of courts with judges first decreased in 1985 when the District Courts, Country Courts, and Court of General Sessions were merged into the District Court of Ontario. Effective 1990, the District Court of Ontario, High Court of Justice, and the Surrogate Court were merged into the Ontario Court of Justice (General Division), which, in 1999, had its name changed to the Superior Court of Justice.[57] The year 1990 also saw the merging of various courts into the Ontario Court of Justice (Provincial Division),[58] which, in 1999, was renamed the Ontario Court of Justice.[59] Despite this lauded simplification of the court system—largely the work

55 See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2016) at 7-1 to 7-3; *Constitution Act, 1867*, *supra* note 3.

56 [1978] 1 SCR 152 at 160–61, 73 DLR (3d) 491 [citations omitted].

57 See The Honourable Louise Charron, "An Interview with the Honourable Louis Charron" (2012) 43:2 Ottawa L Rev 305, n 20; W Brent Cotter, "Ian Scott: Renaissance Man, Consummate Advocate, Attorney General Extraordinaire" in Adam Dodek & Alice Wolley, eds, *In Search of the Ethical Lawyer: Stories From the Canadian Legal Profession* (Vancouver: UBC Press, 2016) at 214; *Courts Improvement Act, 1996*, SO c 25, s 9(3) [*CIA*].

58 Cotter, *supra* note 57 at 214; *Courts of Justice Amendment Act, 1989*, SO 1989, c 55 (No 1), s 33.

59 *CIA*, *supra* note 57, s 9(5), amending *CJA*, *supra* note 16, s 34.

of Attorney General Ian Scott[60]—the Divisional Court has nonetheless remained as a separate institution.

D. Access to Justice

"Access to justice" is a ubiquitous phrase, the meaning of which can frequently be extremely contested. This concept is traditionally defined as seeking to increase *access* to the justice system by attempting to ensure that the system can resolve more cases at lower costs.[61] A definition of procedural law that encourages more cases be resolved fairly with less cost and delay advances access to justice. At the same time, many "access to justice" considerations involve broader matters, such as the accessible delivery of legal services,[62] the proper regulation of the legal system,[63] and alternatives to the legal system, such as mediation and arbitration,[64] all of which facilitate "access" to the justice system in their own way. Certain "access to justice" scholarship has truly picked up on the *justice* side of the

60 Cotter, *supra* note 57.

61 Joshua Sealy-Harrington made this particularly astute observation in "Webinar: A Conversation about Access to Justice and Systemic Racism" (29 October 2020) online (video): *YouTube* <www.youtube.com/watch?v=zwxPKoOaf1Q> at 00:05:59-00:06:05. See also Colleen M Hanycz, "More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform" (2008) 27:1 CJQ 98. This is discussed in depth in Noel Semple, *Better Access to Better Justice: The Potential of Procedural Reform* (25 August 2021) [unpublished, archived at Social Science Research Network <ssrn.com/abstract=3914920>].

62 See e.g. Gillian K Hadfield, "The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law" (2014) 38 Intl Rev L & Econ 43.

63 Summarizing work of Adam Dodek, among others: See e.g. Dwight Newman, Michelle Biddulph & Amy Gibson, "Grappling with the Future of Law in the Context of Ongoing Change" (2013) 76:1 Sask L Rev 51 at 65–67; Lauren Moxley, "Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice" (2015) 9:2 Harv L & Policy Rev 553; Léonid Sirota, "Deregulate All the Lawyers" (8 May 2019), online: *Double Aspect* <doubleaspect.blog/2019/05/08/deregulate-all-the-lawyers/>.

64 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; Ontario, Ministry of the Attorney General, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months* by Robert G Hann & Carl Baar (12 March 2001), described by Martin Teplitsky, QC, "Universal Mandatory Mediation: A Critical Analysis of the Evaluations of the Ontario Mandatory Mediation Program" (2001) 20:3 Advocates' Soc J 10. See also Gary Smith, "Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not" (1998) 36:4 Osgoode Hall LJ 847, expressing doubt about the wisdom and utility of mandatory mediation.

equation, arguing that little is gained by ensuring access to a system with a normatively indefensible view of justice.[65]

However, no matter how one defines access to justice, it certainly *includes* the ability to resolve cases promptly and with minimal financial cost. As Farrow has noted "[t]here is no doubt that, if a matter needs to go to court, and if a client needs to pay for a lawyer in order to get advice on that matter, access to the system will have been improved if the system and the people providing those services are available more efficiently and cost effectively, allowing more people access to those services."[66] As such, even if concentrating on minimizing cost and financial expense is not the entirety of the concept of access to justice, they remain indispensable parts of it. Insofar as the Divisional Court's small size allows it to be nimble, and it develops procedures that result in prompt, fair, and accurate resolution of cases, it could very much facilitate access to justice in this vein. Whether it is actually doing so will be at the core of the remainder of this article's analysis.

II. THE PRESENT

A. Jurisdiction in 2021

As noted, the Divisional Court presently has jurisdiction over judicial review of Ontario government action. The Divisional Court has jurisdiction over matters in the following six categories:

1. Judicial reviews;[67]
2. Appeals of final orders of Superior Court judges, where less than $50,000 is at stake;[68]
3. Appeals of final orders of the Small Claims Court for amounts greater than $3,500;[69]

65 Sealy-Harrington, *supra* note 61; Semple, *supra* note 61; Trevor CW Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 969 [Farrow, "What is Access"]; Sarah Buhler, "The View From Here: Access to Justice and Community Legal Clinics" (2012) 63 UNBLJ 436; Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46:4 Osgoode Hall LJ 773.

66 Farrow "New Wave", *supra* note 27 at 166.

67 *JRPA*, *supra* note 39, s 6(1).

68 *CJA*, *supra* note 16, s 19(1)(a).

69 *Ibid*, s 31; *Small Claims Court Jurisdiction and Appeal Limit*, O Reg 626/00, s 2(1). Decisions concerning less than the monetary limits are still judicially reviewable, to protect the rule of law, but the Divisional Court will only exercise this judicial review power exceptionally: see e.g. *Stamm Investments Limited v Ryan*, 2016 ONSC 6293 at para 15.

4. Appeals of final orders of associate judges;[70]
5. Appeals of interlocutory orders of Superior Court judges, with leave;[71] and
6. Where otherwise prescribed by particular statutes.[72]

There are presently over 100 statutes that require particular litigation steps to be taken in the Divisional Court, with examples noted above. Most of these concern explicit prescriptions of appellate or judicial review jurisdiction, which appear in tension with access to justice that values simpler law when other things are equal.[73]

B. Numbers of Decisions

In June through August of 2020, QuickLaw, Westlaw, and CanLII were comprehensively searched, attempting to isolate each decision of the Divisional Court. This does not necessarily capture every Divisional Court decision nor does it capture matters that settled or were diverted prior to a reported decision being rendered. Even so, quantitative analyses of case law frequently use these databases given their relative comprehensiveness.[74] The study did not include 2020 as the COVID-19 pandemic created a very unusual year and it would be dubious to assess general trends based on that year.

This search revealed 407 Divisional Court decisions in 2018, and 372 Divisional Court decisions in 2019. Of these 779 decisions:

- 58 percent (452) were administrative law decisions—either judicial reviews or statutory appeals of administrative decisions;
- 15 percent (117) were appeals of Small Claims Court decisions;
- 4.9 percent (38) were appeals of Superior Court decisions of low monetary value;
- 4.4 percent (34) were appeals of interlocutory orders or attempts to seek leave for such appeals;
- 3.1 percent (24) were appeals of masters' decisions;

70 *CJA*, *supra* note 16, s 19(1)(c).

71 *Ibid*, s 19(1)(b).

72 *Ibid*, s 6(1)(b), citing *CPA*, *supra* note 53, ss 30(6)–(11).

73 See e.g. Farrow, "What is Access", *supra* note 65 at 978–79.

74 See e.g. Craig E Jones & Micah B Rankin, "Justice as a Rounding Error? Evidence of Subconscious Bias in Second-Degree Murder Sentences in Canada" (2014) 52:1 Osgoode Hall LJ 109 at 121; Kennedy, "Jurisdiction", *supra* note 26 at 258; Kennedy, "Appeals", *supra* note 4 at 257.

- 1.5 percent (12) were decisions under the *CPA* and are no longer in the Court's jurisdiction;
- 12.3 percent (95) were prescribed under other particular statutes, including 5.3 percent (41) in family law or child protection contexts; and
- 0.9 percent (seven) were short endorsements where it was impossible to determine how the matter came to be within the Divisional Court's jurisdiction.

Costs decisions were classified in accordance with the foregoing categories that brought the matter within the Divisional Court's jurisdiction as they were such matters that explain the substance of the Divisional Court's docket.

In 2018 and 2019, 260 and 256 decisions were decided by three-judge panels respectively compared to 150 decisions in 2018 and 116 in 2019 that were decided by single judges, many of which were motions concerning matters such as seeking extensions of time[75] and seeking leave to appeal (motions which are "heard" in writing).[76] These motions would need to be treated as Superior Court or Court of Appeal motions if the Divisional Court were to be eliminated or its jurisdiction reduced.

C. Numbers of Disputes Over Jurisdiction

In conjunction with the aforementioned analysis, WestLaw, QuickLaw, and CanLII were also searched in July and August 2020 to determine whether there were disputes in any Superior Court or Court of Appeal cases on whether the proceeding should have been in the Divisional Court.

The analysis revealed 21 cases in 2018 and 24 in 2019 of a dispute in the Superior Court or Court of Appeal over whether the matter actually belonged in the Divisional Court. This analysis set aside disputes about the manner in which the proceeding was brought before a court, such as whether leave was required or whether it should have been commenced as a judicial review or a statutory appeal. While these are "jurisdictional" problems, they are not caused by the existence of the Divisional Court *per se*.[77] Of 45 cases, 41 took place in the Court of Appeal, which is not a

75 See e.g. *The Catalyst Capital Group Inc v Moyse*, 2016 ONSC 554.

76 See e.g. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 62.02(2) [*ON Rules*].

77 For instances where the matter was argued not to be within the ambit of statutory appeals to the Divisional Court: *Capreit 2 Limited Partnership v Reid*, 2018 ONSC 7588; *Bouchard v CICB*, 2018 ONSC 4034; *2276761 Ontario Inc v Overall*, 2018 ONSC 3264. For disputes

small number of cases. Especially with the Court of Appeal issuing only about 1,000 reported decisions per year,[78] spending two percent of them (over 20 a year) on jurisdictional disputes seems like an unfortunate waste of resources. This waste of resources negatively impacts access to justice for the parties of the proceeding, who need to be transferred to another forum, and other parties, who cannot access the courts occupied by jurisdictional disputes that do not advance a case's merits. The Court of Appeal is clearly aware of this issue arising somewhat frequently: in at least one 2020 case, the Senior Legal Officer advised the parties in advance that the Court of Appeal may not have jurisdiction, but the parties could not agree on a transfer order.[79]

Of the 41 cases before the Court of Appeal, 20 concerned disputes over whether an appeal was of an interlocutory or final order. This issue, and the confusion, delay, and cost caused by it, have been discussed before, with most commentators suggesting that the definition of "final order" be narrowed.[80] Even so, although this problem would exist independent of the Divisional Court's existence, I have previously noted that the

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over whether a monetary threshold for an appeal of a decision was triggered: *Behre v Bathurst Optical*, 2018 ONSC 6849; *Riddell v Carefree Moving Inc*, 2018 ONSC 1972; *Lahrkamp v Metropolitan Toronto Condominium Corporation No 932*, 2018 ONSC 1771. In instances where leave to appeal was required but there was not a dispute over which court the matter should proceed: *Sax v Aurora*, 2018 ONSC 1834. In instances that looked at whether a matter was judicially reviewable at all (distinct from whether a matter is a judicial review rather than a free-standing constitutional challenge, as that affects which court a matter should be in): *Association of Professors of the University of Ottawa v University of Ottawa*, 2018 ONSC 1191; *McLeod v Brantford (City of)*, 2018 ONSC 943; *Sangar v Ontario (Private Career Colleges Superintendent)*, 2018 ONSC 673; *Beaucage v Métis Nation of Ontario*, 2019 ONSC 633. For disputes on whether a decision is appealable at all: *Heinrichs v 374427 Ontario Ltd*, 2018 ONSC 78. For disputes on whether an "appeal" should have been brought as an extension of time for leave to appeal: *CLASSIC Pos Inc v Hinic*, 2018 ONSC 5791. In instances where only a collateral issue required leave to appeal, but most matters in the proceeding did not: *AACR Inc v Lixo Investments Limited*, 2018 ONSC 2774. For dispute over whether an application for judicial review was premature: *Cheng v Ontario Securities Commission*, 2018 ONSC 2502. For instances of procedural missteps in the Court of Appeal being a reason not to grant indulgences to a party: *Singh v Toronto Police Services Board*, 2018 ONSC 5510.

78 Kennedy, "Appeals", *supra* note 4 at 259.

79 See *2503257 Ontario Ltd v 2505304 Ontario Inc (Good Guys Gas Bar)*, 2020 ONCA 149 [*Good Guys Gas Bar*].

80 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, 20 November 2007) at 105; Kennedy, "Appeals", *supra* note 4 at 274.

Divisional Court's existence hinders, rather than facilitates, resolution of the problem and exacerbates its negative consequences:

> While other common law provinces still struggle over the interlocutory/final distinction, 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—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; 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.[81]

Again, this does not further access to justice.

Other Court of Appeal decisions where jurisdiction was disputed, addressed a variety of matters:

- nine cases where particular statutes arguably prescribed a matter to the Divisional Court's jurisdiction;[82]
- six cases where the monetary amount was arguably within the Divisional Court's jurisdiction, one of which was also a dispute over the interlocutory or final nature of the order appealed from;[83]

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81 Kennedy, "Appeals", *supra* note 4 at 281.

82 *Good Guys Gas Bar*, *supra* note 79; *Priest v Reilly*, 2018 ONCA 389; *Williams v Young*, 2018 ONCA 611 [*Williams*]; *Wall v Shaw*, 2018 ONCA 929 [*Wall*]; *Gefen v Gaertner*, 2019 ONCA 233 [*Gefen*]; *Sub-Prime Mortgage Corporation v 1219076 Ontario Limited*, 2019 ONCA 581 [*Sub-Prime*]; *Broutzas v Rouge Valley Health System*, 2019 ONCA 751; *Wright v Strauss*, 2019 ONCA 844 [*Wright*]; *Rumanek & Company Ltd v Abuomar*, 2019 ONCA 908.

83 See *Laurentian Bank of Canada v Bernier*, 2018 ONCA 23 [*Laurentian Bank*]; *Van WynGaarden v Thumper Massager Inc*, 2018 ONCA 194 [*Van WynGaarden*]; *Chavdarova v The Staffing Exchange Inc*, 2018 ONCA 744; *Paderewski Society Home (Niagara) v Skorski*, 2019 ONCA 510; *Covenoho v First Data*, 2019 ONCA 909; *Brunning v Fontaine*, 2019 ONCA 98.

- four cases where a party sought to appeal a single Divisional Court judge's decision to the Court of Appeal, instead of the proper procedure of having it reviewed by a panel of the Divisional Court;[84]
- two cases where it was held that what was being sought was a form of judicial review;[85] and
- a single instance of seeking interim relief in the Court of Appeal pending resolution of a Divisional Court proceeding, which the Court held was improper as the relief should have been sought in the Divisional Court.[86]

As is the case for the interlocutory or final distinction,[87] many of these could be attributed to simple lawyer error. At the same time, lawyer error can be understandable given the general appeal routes to the Court of Appeal. In an additional two cases, the parties acknowledged that the matter was improperly before the Court of Appeal. However, in one case, the parties could not agree on which judicial centre of the Divisional Court (Toronto or Ottawa) it should be transferred to[88] while, in the other, they sought to be heard in the Court of Appeal because of an unrelated proceeding raising similar legal issues.[89]

What did the Court of Appeal do when it realized proceedings were improperly before it? In six cases, the court transferred the matter to the Divisional Court, saving the parties this step.[90] In four, the Court of Appeal reconstituted itself as the Divisional Court with permission of the Chief Justice of the Superior Court, and was able to dispose of the proceeding.[91] In a single additional case, the Court of Appeal elected to hear an appeal on all issues, when some but not all issues were properly before it.[92] In one, the result is unclear[93] and in another, the Court sought

84 See *Jadhav v Jadhav*, 2019 ONCA 660; *Aljawhiri v Pharmacy Examining Board of Canada*, 2019 ONCA 798; *Grey v TD Insurance Meloche Monnex*, 2019 ONCA 795; *Bernard Property Maintenance v Taylor*, 2019 ONCA 830 [*Bernard*].

85 See *Tomec v Economical Mutual Insurance Company*, 2019 ONCA 839; *Chang v Liu*, 2019 ONSC 6711 [*Chang*].

86 See *Alliance to Protect Prince Edward County v Ontario (Environment and Climate Change)*, 2018 ONCA 576.

87 Kennedy, "Appeals", *supra* note 4 at 264.

88 *Chang*, *supra* note 85.

89 *Wright*, *supra* note 82.

90 *Van WynGaarden*, *supra* note 83; *Williams*, *supra* note 82; *Wright*, *supra* note 82; *Chang*, *supra* note 85; *Cheung v Samra*, 2018 ONCA 923; *Good Guys Gas Bar*, *supra* note 79.

91 *Laurentian Bank*, *supra* note 83; *Wall*, *supra* note 82; *Bernard*, *supra* note 84.

92 *Sub-Prime*, *supra* note 82.

93 See *DAC Group (Holdings) Limited v Fuego Digital Media Inc*, 2018 ONCA 43.

additional submissions.[94] In the remaining 29—the significant majority of the 41—the Court quashed or dismissed the matter before it, which left the party needing to seek an extension of time in the proper court. The extension of time, of course, may not be granted. This indicates the courts' willingness, in accordance with access to justice, to help a matter progress despite procedural mistakes in certain instances but also their inclination to insist upon proper procedure, which is understandable from a rule of law perspective.

Four decisions in the Superior Court were also jurisdictional disputes caused by the Divisional Court's existence. Though not as great of a problem as in the Court of Appeal, these were unfortunate. They included a dispute about whether a matter should be considered a judicial review or a free-standing constitutional application,[95] whether an administrative process removed the Superior Court's jurisdiction to grant declaratory relief,[96] and whether the relief sought could only be granted in a judicial review.[97]

In addition to the cases before the Superior Court and Court of Appeal, 22 jurisdictional disputes took place in the Divisional Court itself—17 in 2018, and five in 2019. In one of these, a process server's mistake caused the issue.[98] In another, the concern was that the matter should have been before a three-judge panel as opposed to a single judge.[99] It should be emphasized that these were disputes as to the *proper forum* compared to the Court of Appeal or Superior Court. They do not include "jurisdictional disputes," such as whether a statutory appeal from an administrative decision-maker fell within the ambit of the statutory appeal clause. Such disputes would occur even if judicial reviews were prescribed to the Superior Court. Though each of these 22 cases are idiosyncratic, there would have been no jurisdictional issue but for the existence of the intermediate appellate court.

D. A Critical Take on the *Status Quo*

The Divisional Court was established in large part as a specialist court in judicial review. As noted above, there are numerous advantages to judicial

94 *Gefen*, *supra* note 82.
95 See *Alford v The Law Society of Upper Canada*, 2018 ONSC 4269 [*Alford*].
96 See *Unite Here Local 75 v Sunnybrook Health Sciences Centre*, 2018 ONSC 1444.
97 See *Blanchard v Georgina (Town of)*, 2018 ONSC 2238.
98 See *The Bank of Nova Scotia v Compas Inc*, 2018 ONSC 6522.
99 See *Canada Bread Company v Ontario Labour Relations Board*, 2018 ONSC 4561.

specialization. Most obviously, such specialization reduces judicial errors, which assists the courts in their paramount endeavour of disposing of each case accurately,[100] essential to a just legal system. Moreover, as judges become familiar with the law and procedure in discrete areas of law, they can dispose of each case more quickly and proportionately,[101] reducing temporal delay, which can be a major access to justice impediment.

However, it should also be observed that judicial reviews are not the overwhelming majority of cases within the Divisional Court's docket. As such, we should critically inquire whether it truly is a "specialist court." There is little evidence that the judges serving on the Divisional Court have particular scholary or practice expertise in administrative law. In any event, specialization can still occur *within* a generalist court. For instance, the Commercial List of the Ontario Superior Court is frequently cited as the gold standard of efficient, cost-effective, and specialized judging, with judges bringing genuine expertise in commercial litigation. But it does not require a separate institution.[102]

Furthermore, analysis of the Divisional Court's operations reveals some negative collateral consequences of the Divisional Court's jurisdiction. Most notably, these include disputes about whether a matter is or should be properly before the Divisional Court. While some disputes about jurisdiction are inevitable, having a separate institution dissuades, for instance, the Court of Appeal from simply transferring a matter to the Divisional Court as that understandably appears to step on the Divisional Court's prerogative. In British Columbia, where there are still disputes over the interlocutory or final order distinction for appeals, parties can—and frequently do—seek directions on whether leave to appeal is necessary in conjunction with seeking leave to appeal, should that be necessary.[103] The Divisional Court's existence dissuades this and also impedes the Court of Appeal from converting a Notice of Appeal into a Notice of Motion for

100 See e.g. Robert G Bone, "Economics of Civil Procedure" in Franceso Parisi, ed, *The Oxford Handbook of Law and Economics*, vol 3 (Oxford: Oxford University Press, 2017) at 143; Kennedy, "Culture Shift", *supra* note 27 at 247.

101 For a discussion of proportionality, see Trevor CW Farrow, "Proportionality: A Cultural Revolution" (2012) 1:3 J Civ Litigation & Practice 151.

102 See e.g. Kennedy, "Jurisdiction", *supra* note 26; Carol Liao, "A Canadian Model of Corporate Governance" (2014) 37:2 Dal LJ 559 at 589.

103 See e.g. *Gemex Developments Corp v Coquitlam (City of)*, 2011 BCCA 119 [*Gemex*].

Leave to Appeal.[104] All of this leads to cost, delay, and duplication, consequently impeding access to justice.

In addition, the Divisional Court's continued existence appears to conflict with what has otherwise been a trend across Canada: merging courts to have a single superior court sitting hierarchically above a provincial court and below a court of appeal. This advances access to justice by reducing overhead costs and creating a simpler procedure for litigants.

Finally, the Divisional Court sits in panels of three for many matters—most notably, judicial reviews—where other provinces and the Federal Court have a single judge address such matters. While diverse perspectives can doubtlessly be helpful, and the McRuer Report concluded that this feature of appellate practice should apply to judicial reviews, this also appears to be an inefficient use of judicial resources. More than 250 Divisional Court panels in both 2018 and 2019 arguably had two more judges sitting than necessary. Had those judges been able to address other matters, that would have facilitated the courts deciding more matters on their merits.

Ultimately, all of these factors, taken together—inefficient use of judicial resources, unnecessary disputes over jurisdiction, and complicated procedure—mean that the Divisional Court's existence, at least in its present form, comes with significant barriers to resolving matters on their merits promptly and efficiently. These barriers are, in other words, barriers to access to justice. The next section looks at how these can potentially be addressed through reform.

III. THE FUTURE

It is respectfully suggested that the foregoing section demonstrates that the Divisional Court is not fulfilling—or is at least not optimally fulfilling—its intended role as a specialist court in judicial review. Its occasionally confusing jurisdictional boundaries can also lead to disputes that impede the courts from quickly resolving matters on their merits and with minimal financial cost. While prompt and inexpensive resolution of claims may be an insufficient understanding of what constitutes access to justice, such prompt and inexpensive judging is nonetheless part of how

104 A common practice in British Columbia, where the title of the form is Notice of Application for Leave to Appeal: see e.g. *Island Savings Credit Union v Brunner*, 2016 BCCA 308 [*Island Savings*].

to conceptualize access to justice.[105] What should be done about this? That is the subject of this section, which seeks to weigh the advantages and disadvantages: (a) of maintaining the *status quo*, which is argued to be a suboptimal solution; (b) of abolishing the Divisional Court and re-allocating its powers to the Superior Court or Court of Appeal, a preferred solution; and (c) of reforming its jurisdiction as a potential compromise, perhaps on the way to abolition.

A. The Case for the *Status Quo*

While the Divisional Court's existence currently causes access to justice problems, it cannot be denied that it also comes with some benefits, largely falling into three categories: (a) specialization; (b) benefits of panels of judges; and (c) confining the Court of Appeal's docket to matters of sufficient importance. The benefits of specialized judging are manifold and can result in more efficient decision-making that decreases the likelihood of error.[106] Moreover, it is possible to have an institution that has discrete or diverse subject matter jurisdiction but still operates in a way that facilitates access to justice. An obvious example is the Federal Court. With jurisdiction over taxation, intellectual property, administrative law, immigration law, and maritime matters, it operates in a way that many observers view as preferable to the provincial superior courts in terms of resolving actions on their merits quickly and with minimal financial expense.[107] The Divisional Court could, in principle, have diverse but discrete subject matter jurisdiction and operate fairly, quickly, and with minimal financial expense.

Panels of judges can also be helpful, particularly when a decision is not being made for the first time. As almost all decisions in the Divisional Court's jurisdiction are appeals or judicial reviews, seldom is it acting as a first-instance decision-maker. Having a panel of judges would require some sort of consensus that the decision being reviewed should be overturned. Given the importance of finality in law, it is desirable to have institutional designs, such as multi-panelled appellate decision-making, to disrupt decisions only if necessary. Moreover, one of the distinct roles of

105 Farrow, "New Wave", *supra* note 27 at 166; Kennedy, "Culture Shift", *supra* note 27.

106 Kennedy, "Jurisdiction", *supra* note 26 at 105.

107 Kennedy, "Appeals", *supra* note 4 at 284; The Honourable David Stratas, "A Judiciary Cleaved: Superior Courts, Statutory Courts and the Illogic of Difference" (2017) 68:1 UNBLJ 54.

appellate courts is to refine and develop law.[108] It is logical, therefore, that this is traditionally done in panels of multiple judges, which ensures consensus, enables the panel members to catch their colleagues' errors, and prevents idiosyncratic views of single judges from having a disproportionate impact on the content of law that affects the public at large.[109]

It must also be recognized that the Court of Appeal is largely a court of error correction and law-making. Many of the judicial reviews and statutory appeals that the Divisional Court addresses do not appear to be "law-making" in any traditional sense, but are rather first-instance applications of well-established administrative law principles (save for particular instances where the Court needs to make a determination of law that will affect future practice before an administrative tribunal).[110] Many other matters presently within the Divisional Court's jurisdiction, such as appeals of associate judges' decisions, also seem to not warrant the Court of Appeal's expertise if only because, from an institutional design perspective, Court of Appeal judges are "two steps removed" from associate judges, who sit below Superior Court judges in Ontario's judicial hierarchy.

A final cautionary note against reform should be stated. It is possible, at least in principle, to have an unsatisfactory *status quo*, but only where proposed solutions to fixing that *status quo* create more, probably unintended, problems than they solve. Alternatively, the costs of fixing those problems may simply be too high.[111] As such, though this article ultimately does argue for reform, the next sections will seek to acknowledge the best cases against the proposed reforms.

B. The Case for Abolition

There are several strong rationales for eliminating the Divisional Court and folding its jurisdiction into those of the Court of Appeal and the Superior Court. These can largely be described as arguments for: (a) simpler procedure and symmetry with other Canadian jurisdictions; (b)

108 See e.g. *Housen* v *Nikolaisen*, 2002 SCC 33 at para 9 [*Housen*]; Christopher Moore, *The British Columbia Court of Appeal: The First Hundred Years, 1910-2010* (Vancouver: UBC Press for The Osgoode Society for Canadian Legal History, 2010) at 3.

109 See e.g. Pauline T Kim, "Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects" (2009) 157:5 U Pa L Rev 1319 at 1320–22.

110 See e.g. *Vavilov*, *supra* note 14 at paras 71–72 (implicitly responding to the dissent in *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29).

111 See e.g. Edmund Burke, *Reflections on the Revolution in France* (New York: Oxford University Press, 1993) at 96–97.

better use of judicial resources; and (c) fewer interlocutory disputes that do not address a case's merits. These, which clearly have some overlap, need to be considered alongside the benefits of the *status quo* and the costs of change.

1. The Core Reasons for Abolition

As noted above, no other province or territory in Canada has an intermediary appellate court, nor does a court sit hierarchically between the Federal Court and the Federal Court of Appeal. Other things being equal, asymmetry between provincial procedural codes is undesirable, as it causes confusion and complication, which can impede access to justice. Though differences between provincial procedures can be a source of innovation or reflect uniquely local concerns, legal asymmetry can cause undesirable confusion and "forum-shopping." This is a reason that, to its credit,[112] the Ontario government recently amended the *CPA* to provide the Court of Appeal, rather than the Divisional Court, with appellate jurisdiction over many Superior Court decisions made in the class proceedings context.[113] If the Divisional Court enhanced access to justice and reduced the number of legal errors, provincial asymmetry would not be a sufficient reason to abolish or even reform it. But when it is not fulfilling those functions, achieving provincial symmetry is a reason for reform.

The Divisional Court's existence also causes an inefficient use of resources, both in terms of the costs of maintaining a separate institution and mandating that three judges decide matters when a single judge would frequently suffice. Panels of three judges certainly come with advantages, as discussed above. But they also come with the obvious cost of tying up two judges' time, which could be spent addressing other cases that warrant adjudication or management. Given that hundreds of Divisional Court decisions are issued every year by a panel, the opportunity costs of two of those judges not addressing other cases on their merits must be considered. The inability to access prompt adjudication is, after all, a major access to justice impediment presently plaguing courts across

112 See Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: Law Commission of Ontario, July 2019) at 92–94.

113 *CPA*, *supra* note 53, s 30(1). To be sure, these were matters that were particularly likely to result in parties seeking leave for a second appeal given the amounts at stake. Eliminating this possibility, barring exceptional cases where the Supreme Court of Canada grants leave to appeal, preserves judicial resources. The emergence of national class actions has also likely contributed to increased preference for provincial symmetry: see *Parsons v Ontario*, 2015 ONCA 158 [*Parsons*].

Canada.[114] Turning to the institutional costs, a separate court requires separate judicial officers and certain procedures.[115] This was a reason, among others, to merge various courts in 1985 and 1990.[116] Another reason for those mergers, however, was a desire to decrease jurisdictional disputes, a matter that will now be addressed.

Further to Part II of this article, abolishing the Divisional Court would also reduce interlocutory jurisdictional disputes that do not address a case's merits. For many of these disputes, the existence of the Divisional Court causes confusion about whether a matter should be brought before the Court of Appeal as opposed to the Divisional Court, or the Superior Court as opposed to the Divisional Court. While some of these may transform into disputes about whether a matter should be in the Superior Court or Court of Appeal, many—such as a dispute over whether something is a judicial review or a free-standing constitutional application[117]— clearly would not. Moreover, even when the Divisional Court's existence does not cause the interlocutory dispute *per se*—such as whether an order is final or interlocutory and thus requires leave to be appealed—having two separate courts exacerbates collateral consequences. One court cannot or will not give orders to move the matter along in the face of procedural error, lest it usurp the powers of the other court.[118]

By contrast, in British Columbia, which also has many disputes over whether an order requires leave to be appealed, it is common for a party to seek directions on whether leave to appeal is necessary and, if so, to seek leave simultaneously.[119] The British Columbia Court of Appeal is also willing to convert a notice of appeal into a notice of application for leave to appeal, even when refusing leave.[120] These efficient uses of judicial resources (returning to the theme of efficiency from the previous paragraph) are more difficult given the presence of the Divisional Court in Ontario. As has been noted before, confusion about which court to bring an appeal

114 See e.g. Farrow, "New Wave", *supra* note 27 at 166.

115 See e.g. Chief Justice Heather J Smith, "Consolidated Practice Direction for Divisional Court Proceedings" (last modified 17 May 2019), online: *Ontario Superior Court of Justice* <www.ontariocourts.ca/scj/practice/practice-directions/divisional-court/>.

116 Charron, *supra* note 57, n 20; Cotter, *supra* note 57 at 214; *CIA*, *supra* note 57, 9(3), amending *CJA*, *supra* note 16, 11(1).

117 See e.g. *Alford*, *supra* note 95.

118 See e.g. *Cavanaugh v Grenville Christian College*, 2013 ONCA 139 at para 91, Doherty JA [*Cavanaugh*].

119 See e.g. *Gemex*, *supra* note 103.

120 See e.g. *Island Savings*, *supra* note 104.

appears to disproportionately impact self-represented litigants, a vulnerable group.[121] If there were only one appellate court in Ontario, many of these procedural problems could be avoided. Indeed, the McRuer Report proposed the creation of a single court for judicial review to simplify the process for judicial review. More than half a century later, however, changes to the surrounding court system have resulted in the Divisional Court's existence having the opposite consequence of McRuer's goal in this regard. Access to justice is not only not being furthered, but is hindered.

2. Concerns With Change

Now it is time to consider whether the advantages that would come with abolishing the Divisional Court would cause disadvantages such that reform is not worth it. First, let us consider the Divisional Court's purpose of specialization, particularly in judicial review. In his famous report on civil justice reform in Ontario, Coulter Osborne suggested that the Divisional Court should return to being a specialized court in judicial review.[122] Nothing in this article should be taken as suggesting judicial specialization is less than desirable and can itself facilitate access to justice. But there are two reasons to believe that the Divisional Court, at least in its current form, is not fulfilling that purpose, nor is it necessary to do so. First, specialization can—and frequently does—take place within a broader institution. Most Superior Court judges would not sit on a first-degree murder trial, an insolvency matter, or a class proceeding.[123] But specialization in such areas does not require a separate institution. Indeed, the separate institution comes with its own disadvantages, as noted above. In this vein, scholars such as Don Stuart—hardly an opponent of judicial specialization in criminal law—have suggested merging the criminal trial courts to, among other things, maximize the talent pool and simplify procedure.[124] To be sure, sometimes the separate institution is helpful. This

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121 Kennedy, "Appeals", *supra* note 4 at 262–64.

122 Osborne, *supra* note 80 at 106.

123 The specialization in class proceedings is discussed in Gerard J Kennedy, "Rule 2.1 of Ontario's *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?" (2018) 35:1 Windsor YB Access Just 243 at 270, n 196.

124 He makes the similarities between the criminal and civil contexts easy to see in 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:

> The general and 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

has also been attempted in various provinces with the family courts.[125] But there is an additional reason to believe that the Divisional Court, at least in its current form, is not actually a specialist court in judicial review or even administrative law: its jurisdiction has expanded to the point that, as noted above, more than 40 percent of its docket is not administrative law. 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. Ultimately, therefore, even though specialization in administrative law is a worthy goal, it could be achieved through a "list" of judges who hear such applications on the Superior Court—just as is the case for commercial matters.[126] Moreover, matters other than judicial review within the Divisional Court's jurisdiction are so wide-ranging that it seems a stretch to say that the Court is "specialized" in them. In fact, one of the areas, other than administrative law, where specialization could have most plausibly been present—class proceedings[127]—was recently removed from the Divisional Court's jurisdiction.[128] Ultimately, therefore, though specialization in judicial review is a laudable goal for Ontario courts, the Divisional Court does not seem to be achieving it, nor is its existence necessary to do so.

Another reason to preserve the Divisional Court is to preserve panels of judges on certain matters. The advantages of this were noted above, and they are real. Having said that, one can also fairly wonder whether these advantages are worth their costs. All other nine provinces, as well as the Federal Court, have a single judge decide applications for judicial review. Moreover, masters' decisions are reviewed by single judges of the

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> 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. [Citations omitted]

125 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.

126 Kennedy, "Jurisdiction", *supra* note 26 at 103; Liao, *supra* note 102 at 589.

127 *Cavanaugh*, *supra* note 118 at para 91.

128 *CPA*, *supra* note 53, s 30(1); *Parsons*, *supra* note 113.

superior courts in British Columbia,[129] Alberta,[130] and Manitoba.[131] There is no evidence that these jurisdictions having single judges review masters' decisions or administrative decisions causes unsatisfactory outcomes, particularly given the possibility of further review in a court of appeal. As such, subject to what is noted below, it is respectfully suggested that the advantages of three-judge panels may be a luxury that Ontario cannot afford as it restricts the ability to use judicial resources efficiently, thus hindering access to justice.

Another reason for establishing the Divisional Court was to confine the Court of Appeal's docket to the most important matters, especially given its law-making functions when compared to the Superior Court.[132] This concern is not without merit. However, as will be discussed in more detail in the next subsection, abolishing the Divisional Court could result in relatively few additional cases in the Court of Appeal's jurisdiction. There would also be fewer jurisdictional disputes that are presently occupying the Court of Appeal's time in dozens of cases per year.

It must also be acknowledged that eliminating the Divisional Court would require the amendment of approximately 138 statutes (based on an April 2021 search) that contemplate that particular steps be taken in the Court. There is no doubt that this is a legislative inconvenience and perhaps a reason not to abolish the Court. However, having reviewed all of these statutes, the next section will prescribe a framework to govern how the Divisional Court's jurisdiction should be divided between the Court of Appeal and the Superior Court to minimize this inconvenience. It must be remembered that former Attorney General Ian Scott oversaw the merging of courts' jurisdiction in a way that was significantly praised, and had minimal implementation problems alongside significant benefits for creating simplicity.[133]

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129 See BC, *Supreme Court Civil Rules*, BC Reg 168/2009, r 23 [*BC Rules*] (a master's order may be appealed to the "court," with the "court" being defined as the Supreme Court of British Columbia in Rule 1(1)).

130 See AB, *Rules of Court*, Alta Reg 124/2010, r 6.14(1) [*AB Rules*] (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).

131 See MB, *Court of Queen's Bench Rules*, Man Reg 553/88, r 62.01(1) [*MB Rules*] (a master's order may be appealed to a judge of the Court of Queen's Bench).

132 *Housen*, *supra* note 108 at para 9; Royal Commission, "McRuer Report Vol 2", *supra* note 9 at 659–61.

133 Cotter, *supra* note 57 at 214.

Finally, it would appear that abolishing the Divisional Court would likely require additional judges on the Court of Appeal as some matters presently in the Divisional Court's jurisdiction would be brought into the Court of Appeal's jurisdiction. This is a genuine concern that could be raised as a counterargument to the proposal to abolish the Divisional Court. After all, the Court of Appeal is hardly an underworked court.[134] Having said that, there are reasons to believe that, while public policy coordination would be necessary in this regard, it is nonetheless achievable. First, as the next section will discuss, the vast majority of matters presently in the Divisional Court's jurisdiction would be transferred to the Superior Court's jurisdiction. Given that the Divisional Court judges are Superior Court judges, they will simply be able to continue their work as Superior Court judges. Indeed, a reduction in three judge panels will mean that *more* Superior Court judges are available to address particular matters and facilitate access to justice. As the next section will demonstrate, it is estimated that the docket of the Court of Appeal would expand by less than ten percent. This is equivalent to the caseload of fewer than three non-supernumerary Court of Appeal judges, but, as the next section will illustrate, it will probably not even expand by that much. This is even prior to reducing the Court of Appeal's case load by reducing jurisdictional disputes. One would hope that the federal and provincial governments could coordinate to add an additional one to three judges to the Court of Appeal, especially given that the Court of Appeal could already use more judges. But if the government is truly worried about "pinching pennies," it could transfer one to three judicial positions from the Superior Court to the Court of Appeal. Though eliminating judicial positions from the Superior Court may, at times, be in tension with judicial independence,[135] this would appear to be a *sui generis* situation where the elimination is motivated to genuinely preserve access to justice (another constitutional principle) rather than interfering with the judicial role.[136] As such, judicial independence would not appear to be

134 With the exception of Quebec, the Court of Appeal for Ontario has the fewest judges per decisions decided of all provincial courts of appeal in Canada, based on an April 2021 comparison of the numbers of non-supernumerary judges on the courts compared to the numbers of cases decided based on the "highest" numbers in the courts' neutral citations.

135 Already found to be the case when the position of supernumerary judges has been eliminated: See e.g. Lisa J Mrozinski, "Monetary Remedies for Administrative Law Errors" (2009) 22:2 Can J Admin L & Prac 133 at 170, citing *Mackin v New Brunswick* (*Minister of Finance*), 2002 SCC 13.

136 See e.g. *Trial Lawyers Association of British Columbia v British Columbia* (*AG*), 2014 SCC 59 at para 39.

impaired if one to three positions presently allocated to the Superior Court were moved to the Court of Appeal.

3. An Endeavour Worth Attempting

Abolishing the Divisional Court would cause logistical challenges. That cannot be denied. And there are *some* benefits to access to justice that come from the Court's existence that could not be replicated with proposals to fold its jurisdiction into those of the Court of Appeal and Superior Court. It is ultimately suggested, however, that the logistical challenges can be overcome with sufficient ingenuity and political will. Moreover, the Divisional Court's benefits, though real, appear to be relatively small compared to its drawbacks. As such, it is suggested that the Divisional Court be wound down in accordance with the following six rules:

1. All judicial reviews and statutory appeals of administrative decisions proceed before single judges of the Superior Court, unless a statute clearly provides otherwise;
2. All orders of associate judges, whether interlocutory or final, may be appealed to a single Superior Court judge, with leave;
3. All appeals of orders of Superior Court judges proceed to the Court of Appeal, with leave in the case of interlocutory orders, or as of right in the case of final orders;
4. There be no distinctions as to appellate routes based on the monetary values of judgments under appeal;
5. Decisions of the Small Claims Court can be appealed to single judges of the Superior Court; and
6. The foregoing can be amended by the legislature specifically prescribing that a matter proceed in another manner.

The rationales for these will now be discussed in more depth, but the overarching access to justice-related themes of judicial efficiency, simplicity, and provincial symmetry permeate all six. They can also be expressed in the following chart, comparing the status quo to proposed solutions:

Type of Case	Present Jurisdiction	Proposed New Jurisdiction	Percentage of Divisional Court's Docket (2018–2019 average)
Administrative Law	Divisional Court panels	Superior Court single judge	58 percent
Appeals of associate judges' orders	Divisional Court (final orders) Superior Court, with leave (interlocutory orders)	Superior Court single judge, with leave	3.1 percent
Appeals of Superior Court judges' orders (unless a final order for less than $50,000)	Court of Appeal (final orders) Divisional Court, with leave (interlocutory orders)	Court of Appeal, as of right (final orders) Court of Appeal, with leave (interlocutory orders)	4.4 percent
Appeals of final Superior Court judges' orders for less than $50,000	Divisional Court panel	Court of Appeal panel	4.9 percent
Appeals of Small Claims Court decisions	Divisional Court single court	Superior Court single judge	15 percent
Other matters under particular statutes	Divisional Court	Case-by-case assessment	12.3 percent

First, all judicial reviews and statutory administrative appeals *prima facie* should proceed before single judges of the Superior Court. This would have the advantages of consistency with other provinces and the Federal Court, a more efficient use of resources, and eliminating disputes about whether a matter *is* a judicial review and needs to be commenced before a different court.[137]

Of course, this would come with the disadvantages of not having a specialist court in judicial review. But, as noted above, it does not appear that the Divisional Court is that court and, in any event, specialization can develop within the Superior Court. This would also lack the advantages of three-judge panels deciding whether to uphold or overturn an administrative decision. Again, however, though this goal is laudable, it is in tension with provincial symmetry and judicial efficiency, and it is suggested that

137 See e.g. *Alford*, *supra* note 95.

it can be sacrificed without a great loss to the perception of justice. It is estimated that 225 (55.3 percent) of Divisional Court decisions in 2018, and 227 (61.0 percent) of Divisional Court decisions in 2019, or 58 percent of decisions between the two years, fall into this category and would move to the Superior Court's jurisdiction.

Second, it is proposed that all orders of associate judges' decisions, whether interlocutory or final, proceed before single judges of the Superior Court, with leave. Regarding all associate judges' decisions proceeding to Superior Court judges, this has the advantages of:

- consistency with the procedure in British Columbia, Alberta, and Manitoba, where decisions of masters proceed to single judges of the superior courts;[138]
- contributing to the reduced institutional costs of the Divisional Court, and having fewer judges occupied with appeals of associate judges' decisions; and
- eliminating the need to transfer an appeal, or seek further time to appeal, where it is disputed whether the associate judge's decision was interlocutory or final, which currently affects whether the appeal should be commenced in the Superior Court or Court of Appeal.[139]

Regarding the leave requirement, mandating that all associate judges' decisions require leave is undesirable for four reasons. First, associate judges' decisions are almost invariably procedural determinations[140] and having appeals as of right thus risks delaying matters over disputes that do not address the merits of a decision. Second, if a matter is of sufficient importance to the public (such as in the case of unsettled law)[141] or the parties (where there is a real risk of an injustice),[142] leave to appeal can still be granted: these are the two animating principles that currently allow for leave to appeal an interlocutory order.[143] Third, mandating that all associate judges' decisions obtain leave to be appealed furthers the principle of

138 See *BC Rules*, *supra* note 129, r 23; *AB Rules*, *supra* note 130, r 6.14(1); *MB Rules*, *supra* note 131, r 62.01(1).

139 See e.g. *Cavanaugh*, *supra* note 118 at para 91.

140 There are exceptions, however, such as when an associate judge can grant summary judgment, although admittedly with lesser powers: See e.g. *ON Rules*, *supra* note 76, r 20.04(2), cited in *R&V Construction Management Inc v Baradaran*, 2020 ONSC 3111.

141 See *Sahota v Sahota*, 2015 ONCA 2640 at para 4, Molloy J [*Sahota*], citing *ON Rules*, *supra* note 76, rule 62.02(4)(a).

142 *Sahota*, *supra* note 141 at para 5, citing *ON Rules, supra* note 76, rule 62.02(4)(b).

143 Kennedy, "Appeals", *supra* note 4 at 249.

finality. Fourth, requiring that all associate judges' decisions require leave to be appealed eliminates disputes over whether a matter is interlocutory or final—a source of great controversy at present.[144] It is estimated that 13 (3.2 percent) of Divisional Court decisions in 2018, and 11 (three percent) of Divisional Court decisions in 2019, or 3.1 percent of all cases between the two years, would fall into this category and would move to the Superior Court's jurisdiction.

Third, it is proposed that all orders of Superior Court decisions proceed in the Court of Appeal, with leave in the case of interlocutory orders, and as of right in the case of final orders. This too has advantages:

- creating symmetry with other provinces;
- contributing to the reduced institutional costs of the Divisional Court (recognizing that judges on the Court of Appeal would be required to grant leave, and panels will hear appeals, as is presently the case in the Divisional Court); and
- if it is disputed whether a matter should have been commenced by notice of appeal or notice of motion for leave to appeal, the Court of Appeal can make the change to move the matter along, which is not common practice in Ontario.[145]

This could be said to result in interlocutory matters coming within the Court of Appeal's jurisdiction despite being matters with which the Court of Appeal should not generally be concerned. There may be legitimacy to this concern but this is the *status quo* in the other nine provinces. And the leave process, which would still control the court's docket on interlocutory matters, can proceed in writing before single judges,[146] creating efficiency and limiting the numbers of interlocutory appeals to instances where law needs to be made or the appeal is necessary to prevent an injustice. In any event, the Court of Appeal is primarily a court of error correction, rather than law-making,[147] so "confining its docket" may not be as important as is the case for the Supreme Court of Canada.[148] It is estimated that 18 (4.4

144 *Ibid*; *Parsons*, *supra* note 113 at para 209, Juriansz JA, dissenting (dissenting on this issue in the case, but the point regarding unwieldiness seems undeniable).

145 *Cavanaugh*, *supra* note 118 at para 91.

146 *ON Rules*, *supra* note 76, at r 12.06(1.1), 61.03.1(1), 62.02(2).

147 See Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 45, 50–51, 95–96.

148 *Ibid* at 51, 95–96; Gerard J Kennedy, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (loose-leaf) (Toronto: Thomson Reuters, 2020) at 4-4 to 4-8, citing *Supreme Court Act*, RSC 1985, c S-26, ss 36–43, 58–59.

percent) of Divisional Court decisions in 2018, and 16 (4.3 percent) of Divisional Court decisions in 2019, or 4.4 percent of decisions between the two years, fall into this category and would move to the Court of Appeal's jurisdiction.

Fourth, there should be no distinctions regarding appellate routes based on the monetary values of judgments under appeal. In other words, final orders of decisions where less than $50,000 is at stake would proceed to the Court of Appeal. This would create symmetry with other provinces, eliminate an arbitrary distinction regarding importance based on the $50,000 cut-off,[149] and reduce disputes over whether the monetary threshold was met.[150] It is estimated that 24 (5.9 percent) of Divisional Court decisions in 2018, and 14 (3.8 percent) of Divisional Court decisions in 2019, or 4.9 percent of decisions between the two years, fall into this category of appeals of judgments where less than $50,000 is at stake and would move to the Superior Court's jurisdiction. This too could be said to result in a case of insufficient importance being in the Court of Appeal's jurisdiction. But the $50,000 cut-off is, at best, a crude reflection of the case's importance to the parties, and has no connection to the importance of the legal issues at stake in the appeal. The $50,000 threshold also currently creates incongruity by regularly having co-equal judges hear appeals from decisions of their peers. Nor does this distinction necessarily reflect different procedures followed in the Superior Court, though it admittedly has some imperfect overlap with matters brought under Simplified Procedure.[151] This is unlike appeals of Small Claims Court decisions, which are made following a different procedure, in turn resulting in different appeal rights being more justifiable. This leads to the next consideration.

Fifth, final decisions of the Small Claims Court (assuming they meet the monetary threshold to be appealed)[152] should be appealed to single judges of the Superior Court. It is difficult to see what disadvantages would come from this amendment. Rather, it would be a different label attached to the present *status quo* of a Superior Court judge (sitting as a Divisional Court judge) hearing an appeal from a Small Claims Court judge. It would also contribute to the decreased need to have a separate institution – the Divisional Court – address these matters. It is estimated that 71 (17.4 percent) of Divisional Court decisions in 2018, and 46 (12.4

149 *CJA*, *supra* note 16, s 19(1.2)(a).

150 See *Todd Family Holdings v Robins Appleby LLP*, 2019 ONSC 3783.

151 *ON Rules*, *supra* note 76, r 76.02 (where the current limit is $200,000 rather than $50,000).

152 *CJA*, *supra* note 16, s 31.

percent) of Divisional Court decisions in 2019, or an average of 15 percent, fall into this category and would move to the Superior Court's jurisdiction.

Sixth, and finally, it must be recognized that the legislature could choose to amend the foregoing general rules to prescribe that particular matters proceed in another court. There is no issue, in principle, with the legislature amending a general rule through a specific provision. For instance, the *Criminal Code* presently prescribes appeals of Review Board determinations not to provincial superior courts but to courts of appeal.[153] Some provinces also prescribe that appeals of professional discipline matters proceed directly to the court of appeal—this is the case, for instance, with Law Society disciplinary decisions in Manitoba[154] and Saskatchewan.[155] This reflects the legislature's institutional design choice that particular matters proceed in particular courts. Within constitutional constraints, this must be respected given the principle of legislative supremacy.[156] It is estimated that 46 (11.3 percent) of Divisional Court decisions in 2018, and 50 (13.4 percent) of Divisional Court decisions in 2019, for a total of 12.3 percent of decisions between the two years, are within the Divisional Court's jurisdiction due to unique statutory procedures that do not fall neatly within one of the above categories. This sets aside decisions under the *CPA*, which have already been removed from the Divisional Court's jurisdiction. Of these, over 40 percent are family law or child protection matters. The remainder are disproportionately decided under the *OBCA*.[157] The legislature would need to decide whether these should proceed to the Court of Appeal or Superior Court, a matter complicated by the jurisdiction of the Ontario Court of Justice and the Unified Family Court over many family law and child protection matters. But given that the Superior Court would find itself with more available judges due to a lack of three-judge Divisional Court panels, the Superior Court should be where most are diverted, assuming a Superior Court judge was not the original decision-maker. An exception may be *OBCA* proceedings, both because the original decision-maker is usually a Superior Court judge, and because proceedings brought under the *Canada Business Corporations Act* include a right to appeal to the Court of Appeal.[158] It seems arbitrary and undesirable

153 *Criminal Code*, RSC 1985, c C-46, s 672.72(1).

154 *The Legal Profession Act*, CCSM, c L107, s 76.

155 *The Legal Profession Act, 1990*, SS 1990-91, c L-10.1, s 56(1).

156 See e.g. *Vavilov*, *supra* note 14 at para 33.

157 *OBCA*, *supra* note 44.

158 RSC 1985, c C-44, s 249(1).

to have different appeal routes for similar issues based on whether a company is incorporated under federal or provincial law.

Animating all six of these categories is a desire for simplicity and a better use of judicial resources, furthering access to justice. Nor is there any reason to believe that these proposals would jeopardize the fairness of judicial proceedings.

This proposal seeks to consider how the Divisional Court could be eliminated. Assuming administrative law matters, appeals of associate judges' decisions, and appeals of Small Claims Court decisions are all transferred to the Superior Court's jurisdiction, it is ultimately estimated that over 75 percent of Divisional Court decisions would be diverted to the Superior Court. By comparison, matters that are proposed to be diverted to the Court of Appeal—appeals of interlocutory orders of Superior Court judges, and appeals of low monetary value—comprise an average of 36 cases a year, or less than ten percent of the Divisional Court's docket. The remainder fall into the uncertain, most amorphous category, where the legislature would need to make a conscious decision as to where to allocate the matter. Even if these decisions were allocated to the Court of Appeal—a questionable assumption—this would add an additional 48 cases per year (on top of the clear 36 cases per year), for a total of 84 cases per year in the Court of Appeal. This is an increase of less than ten percent, which is why no more than three judges (from the current 22, excluding nine supernumerary judges) would need to be added to its complement.

If complete abolition of the Divisional Court seems unrealistic, however, the next section seeks to discuss how the Court's jurisdiction could potentially be reformed.

C. The Case for Reform

Removing the Divisional Court overnight would not be unprecedented—courts were removed in 1985 and 1990 relatively smoothly.[159] Even so, the disadvantages, theoretical and logistical, of eliminating the Divisional Court, may warrant caution in the manner that it is "wound down." Most notably, of the six categories of matters in the Divisional Court's jurisdiction as described above, the final one—where specific statutes prescribe steps be taken in the Divisional Court—is the most complicated

159 See e.g. Roy McMurtry, *Memoirs and Reflections* (Toronto: University of Toronto Press, 2013) at 443; Cotter, *supra* note 57 at 214.

to reform. Each such statute will need to be reviewed carefully to determine the role of the Superior Court *vis-à-vis* the Court of Appeal. The Divisional Court could potentially remain in existence until each statute is amended—a process that may understandably proceed slowly.[160]

As for the other five categories, it is suggested that, subject to the Court of Appeal's capacity to deal with a caseload that would be slightly increased (albeit not to the extent of the Superior Court's), all of these could be implemented relatively straightforwardly, mostly through amendments to the *Courts of Justice Act*[161] and *SPPA*.[162] But if the government wishes to move gradually, changes could be implemented individually.

More specifically, the first (judicial review jurisdiction), second (appeals from associate judges' orders), and fifth (appeals of Small Claims Court decisions) categories of changes could be implemented tomorrow without affecting the Court of Appeal's case load at all, and while achieving many benefits regarding efficient use of judicial resources, clearer jurisdictional lines, and symmetry with other provinces. As such, these three changes could be implemented in a first tranche. The third (interlocutory orders) and fourth (appeals of decisions where less than $50,000 is at stake) categories would be assisted through increased capacity at the Court of Appeal, and the provincial government could wait to address the capacity issue—presumably in conjunction with the federal government agreeing to increase the number of judges on the Court of Appeal—before turning to these matters. The provincial government could also seek to clarify the law regarding what it is a final order as opposed to an interlocutory order, to reduce the access to justice issues that uncertainty in that area of the law has caused.[163] The sixth and final category (jurisdiction under particular statutes) can be addressed as the government addresses those statutes. This is not necessarily an argument that reform towards abolition should proceed in a piecemeal fashion, but rather that there is a principled basis for proceeding in tranches if a government is disinclined to move too far, too quickly.

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160 See e.g. Burke, *supra* note 111 at 96–97.

161 *CJA*, *supra* note 16. Notably by removing s 19 and re-allocating the Divisional Court's powers to s 6 (for the Court of Appeal) and s 17 (for the Superior Court), and changing the reference in s 30 (concerning appeals of Small Claims Court decisions) from the Divisional Court to the Superior Court of Justice.

162 By replacing s 6 with the following: "[a]n application for judicial review shall be made to the Superior Court of Justice."

163 Osborne, *supra* note 80 at 105; Kennedy, "Appeals", *supra* note 4 at 249.

IV. CONCLUSION

Establishing the Divisional Court in the early 1970s was, in many ways, an inspired innovation, recognizing that courts needed to evolve to recognize an expanding administrative state. But administrative law has evolved,[164] as has our understanding of how to facilitate specialized judging and efficient use of judicial resources.[165] One need not condemn the McRuer Report[166] to recognize that, more than half a century later, the situation in which it was written has changed substantially, thus casting doubt upon many of its recommendations. In fact, the jurisdictional battles have turned the purpose of the Divisional Court—to facilitate better access to applicants—on its head.

This article has asked that there be a critical reevaluation of the role, if any, that the Divisional Court should play in the future of Ontario's legal system, through the lens of access to justice. Any change so vast is likely to encounter opposition, and no doubt a serious discussion of this may raise additional considerations unaddressed by this article. Even so, this is itself valuable, because a conversation about the role of the Divisional Court is long overdue. It is my fervent hope that this article is the beginning, rather than the end, of reconsidering the Divisional Court's role in Ontario's justice system.

164 See e.g. *Vavilov*, *supra* note 14 at para 24.

165 See e.g. Farrow, "New Wave", *supra* note 27 at 166; Kennedy, "Culture Shift", *supra* note 27 at 11; *Olumide*, *supra* note 28 at para 19; Kennedy, "Jurisdiction", *supra* note 29 at 105–106.

166 Willis, *supra* note 11. See also Alford, *supra* note 13 (critiques of Willis).