The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?

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I want to begin by stating unequivocally that, although I like it a lot, the title of this essay is not attributable to me. Everything that follows is indisputably mine. As for the title, it was suggested to me by the organizers of the Isaac Pitblado Lectures, and I gratefully agreed to use it. This title already says quite a bit about its author's perspective. It refers to the "narrowing scope of appellate review," which immediately suggests that appellate review used to be broader. It asks whether the "pendulum" has swung too far, which optimistically hints that it might swing back. After all, that is what a pendulum does.

For my part, I am not sure whether the scope of appellate review will or can revert back to more generous proportions. These days, it sure looks like the pendulum has lost momentum. In order to determine whether the scope of review pendulum has come to a stop in the right place, I propose to examine, first, why we have appeals at all, and how their scope can be determined (A). Having reached the provisional conclusion that just about any standard of appellate review can reasonably be defended, I will turn to a consideration of the standard enunciated by the Supreme Court of Canada in *Housen v. Nikolaisen*,[1] and examine some of its substantive, conceptual and procedural aspects (B). I will conclude, perhaps not surprisingly, that my provisional conclusion – that just about any standard of appellate review can reasonably be defended – is equally valid with respect to *Housen*.

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[1] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 [*Housen*].

I. APPEALS[2]: WHY AND HOW?

A. Appeals are not a Logical Corollary of the Exercise of Judgment

In my household, there are no appeals. When we had our first child, my wife and I decided that we would never overturn our respective decisions regarding requests and permissions sought by each child. Whoever had made the first decision would always be upheld by the other, regardless of the quality of the decision. For better or worse, we have held on to this system until now. My two daughters are now teenagers. They are rarely completely happy with our parental decisions, but whatever happens, they never attempt to get a second one. They often try to avoid outcomes with which they disagree. Furthermore, I have come to suspect that they make strategic decisions about which parent should be asked first for particular types of permissions, demonstrating that forum-shopping may be the unintended consequence of restrictions on appeals. But my daughters never appeal our decisions.

Whatever the child-rearing virtues of this system, one thing can be said: it is simple, and highly predictable. It saves us quite a bit of parental energy. But it comes at a price. What we gain in certainty may be offset by our children's frustration. In addition, every once in a while one of us is faced with the unpleasant task of upholding an aberrant decision made by the other parent. We were conscious of these risks from the outset, but nonetheless decided to go ahead with a single decision-maker, and no appeals. It seems to be working.

I very much doubt that a similar position could be made to work on a larger scale within our system of civil justice. Nonetheless, flawed as they may be, these parenting principles reveal that there is nothing inherent in the notion of decision-making which requires that every decision be reviewable by a second decision-maker. From the perspective of institutional design, the possibility of appeals – that is, the possibility of having a second person decide on the same issue after an original decision has been made – and the scope of appeals are matters of choice. Appeals may be desirable, or even politically necessary, but they are not a logical corollary of the exercise of judgment. We have appeal mechanisms for a reason, or a set of reasons, and there may well be rational grounds not to have them, or to restrict their scope.

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[2] I limit my remarks to civil appeals, at the exclusion of criminal or administrative appeals. Furthermore, I use here the label "appeals" to refer indiscriminately to all forms of recourse against an original decision, brought by a person who is adversely affected by it. Those recourses may range from full-fledged appeals where the evidence is considered *de novo*, all the way to limited reviews which are confined to examining the conformity of the original decision with the law. The distinction between these two types of appellate procedures is brilliantly described by Professor Jolowicz in his 1986 Southey Memorial Lectures: J.A. Jolowicz, "Appeals and Review in Comparative Law: Similarities, Differences and Purposes" (1986) 15 Melbourne U. L. Rev. 618.

B. The Availability and Scope of Appeals is the Product of Compromise

If we could somehow redesign our judicial institutions from the ground up, we would promptly be faced with a number of choices. At one extreme, we might choose to subject every judicial decision to the full review of a second decision-maker. There is not much hard evidence of what might come from such an appellate setup. Most people simply assume that unrestrained appeals would not be an optimal choice for a number of reasons, many of which were highlighted by the Supreme Court of Canada in *Housen*. Some of those reasons are pragmatic, such as the fear that the cost and number of appeals would become unmanageable, and would outweigh any possible gains derived from routine reconsideration. But the rejection of unrestrained appeals could also rest on substantive conceptions about the proper allocation of responsibilities between separate layers of dispute resolution. It is assumed, in this respect, that unrestrained appeals would undermine the credibility and authority of the first decision-maker, whose decisions would just be meaningless rehearsals for litigation before higher courts. And so it is generally concluded, without much discussion, that unrestrained appeals are a bad idea.

At the other extreme, in this hypothetical initial design of civil justice, we might be tempted to avoid appeals altogether, and to rely solely on wise, competent and efficient trial judges. Again, there is no hard evidence of what outcomes this might produce, but most people assume that this would not be an optimal choice either. Appeals serve many purposes, both public and private. For a start, the presence of appeal courts is a public signal that we care about high standards in trial decision-making. While it is difficult to verify empirically whether the threat of reversal actually provides a necessary incentive for trial judges to uphold those standards, it can nonetheless be argued that public confidence in our institutions of justice rests on the faith of citizens that capricious and arbitrary decisions will be overturned. In that sense, the existence of appellate courts may be crucial to the vitality of the rule of law.[3] Furthermore, appellate courts serve the additional public purpose of providing some uniformity, clarity and direction to

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[3] Defending appeals as of right in the United States, Dean Paul Carrington argued that:

> We send the wrong message to a litigant when we tell him that he is dependent on the reactions of a single judge whose decisions will be reviewed by higher authority only as an act of grace. The idea of law is that the individual judge is accountable for the principled exercise of power. Discrectionary accountability may look to the skeptic very much like no accountability at all.

See Paul D. Carrington, "The Function of Civil Appeal: A Late-Century View' (1986-87) 38 S. Cal. L. Rev. 411 at 431.

jurisprudence within a given political community.[4] More indirectly, perhaps, the availability of appeals also provides psychic or cathartic benefits to the losing party by affording an opportunity to vent the frustration that comes with failure at trial. It also depersonalizes the trial judge's responsibility, by integrating the judge into a broader institutional framework.[5]

Finally, in setting up our institutions, we might also care about outcomes: one good reason to have appeals is the assumption that, in law as in any human endeavour, mistakes are inevitable. We might choose not to tolerate errors, or at least to provide a mechanism to correct the most obvious and serious among them.[6] That may be the least convincing reason to have appeals, if it rests on the premise that appellate judges are better equipped than trial judges to say what the right (or better) answer is in every case.[7] But the argument is stronger if it rests on the premise that, all judicial skills being equal, a different type of process might yield a better answer in some cases at least.[8]

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4 Any appellate court also contributes to the integration of a given political community, including a province or a federation, to the extent that its corrective interventions are viewed as favours emanating from higher echelons of the State. See M. Shapiro, "Appeal" (1980) 14 Law & Soc'y Rev. 629.

5 P.D. Carrington, *supra* note 3 at 431.

6 The higher the stakes, the more catastrophic the outcome, the stronger the political justification for error correction. Furthermore, there is inevitably a correlation between the nature and scope of the first level of decision-making and the scope of review that should be made available. One might imagine an institutional design in which trial level decisions are made expeditiously and summarily, which would justify a searching and readily available review mechanism. Conversely, the more elaborate the trial procedure, the less justification there is for extensive review. There are policy choices to be made in this respect, which involve complex considerations of cost and access to justice. On these questions see A.S. Abel, "Appeals Against Administrative Decisions: In Search of a Basic Policy" (1978) Canadian Public Administration 28 and M. Barendrecht, K. Bolt and M. de Hoon, "Appeal Procedures: Evaluation and Reform" (2006) Tilberg Law and Economics Center Discussion Paper DP 2006-031.

7 Jolowicz, *supra* note 2 at 629, cites the conclusions of the 1953 Evershed Committee in the United Kingdom (*Final Report of the Committee on Supreme Court Practice and Procedure*, 1953 Cmnd 8878, para. 473) which justifies as follows the idea that a litigant should be afforded an appellate recourse:

> [T]he legal system of every civilized country recognizes that Judges are fallible and provides machinery for appeal in some form or other...It would be palpably wrong to leave the defeated litigant entirely without remedy in all cases, even in those where the judgment against him is demonstrably wrong, or to deny him altogether the chance of appealing from a decision which leaves him smarting under a sense of injustice.

8 Appellate review is not the same as getting a second opinion from a physician. Appellate judges often have more time and more resources to deliberate. The appellate process is an occasion for recalibration of the dispute, and appeal courts effectively ask and answer different

So far, I have stated the obvious. We need appeals, not because they are a logical corollary to decision-making, and not because every litigant has a fundamental right to two or more levels of judicial decision-making, but because they serve important purposes. To allow appeals is a matter of choice. On the other hand, appeals are not, and cannot be, an automatic incident of every trial decision. Full-fledged appeals must remain the exception. In short, appeals are not an intrinsic good. The design of interdependent trial and appellate courts necessarily involves a compromise between competing pragmatic and substantive aspirations: to correct mistakes, but also to achieve finality at a reasonable cost; to give justice to every litigant, but also to give each court a meaningful and distinctive role in relation to the parties' interests and the larger public interest.

C. The Ways and Means of Institutional Design: Standards of Review and Other Obstacles

Those competing aspirations are pursued in a number of ways in the design of appeals in Canada. First of all, while appeals are available in a number of circumstances, they are qualitatively different from the trial phase. As a rule, appellate courts do not hear witnesses. Subject to limited exceptions, they do not entertain new evidence or new legal arguments. The appeal normally proceeds on the basis of the record and litigation as constituted at trial. Second, some judicial decisions are simply not subject to appeals.[9] In my own province, for instance, decisions to authorize the initiation of a class action cannot be appealed.[10] The same is true of decisions made by the Small Claims division of the Cour du Québec.[11] Third, a large number of trial decisions cannot be appealed without first obtaining leave. Through that filtering process, the vast majority of interlocutory decisions are shielded from appellate review, as are decisions where the subject matter of the dispute falls below a certain financial threshold. In each of these re-

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questions. For this reason, appeal courts may be better able to perform some tasks, and less able to perform others. In this respect, the standard assumption that appeal courts are not well equipped to evaluate factual findings might well be challenged. Under some circumstances, the possibility of gaining access to the entire evidence (when a full transcript is available) and to move back and forth through it may enable a court of appeal to avoid mistakes that a trial judge might make in the sequential, non reflexive appreciation of evidence as it is presented at trial.

[9] Arbitration decisions are also frequently shielded from appeals. But arbitration decisions do not normally constitute precedents. Furthermore, some commentators have suggested that, unlike judges, arbitrators have to compete for each new case, which diminishes the need for appeals as an incentive to avoid errors. See Barendrecht, Bolt and de Hoon, *supra* note 6.

[10] Article 1010 of the *Code of Civil Procedure*, R.S.Q. c. C-25.

[11] Article 984 of the *Code of Civil Procedure*, R.S.Q. c. C-25.

spects, the availability and scope of appeals is a matter of institutional design, and involves a compromise between competing objectives.[12]

Standards of appellate review perform an analogous function to that played by those jurisdictional thresholds and procedural obstacles on appeal. Through the standard of review, the proper coordination of trial and appellate levels is achieved by limiting the grounds on which a trial decision can be overturned. In this sense, the standard of appellate review is just one additional vehicle to give effect to this compromise between competing aspirations and policies. Just as we can exclude appeals in some cases, or subject them to permission in others, we can set the standard of review at any level we deem appropriate, so as to discourage appeals that we consider to be unwarranted.

It is in this context that we must evaluate the allegedly restrictive standard of appellate review set by the *Housen* jurisprudence of the Supreme Court of Canada. The scope of appeals – and the corresponding standard of review – is not a matter of principle. It does not turn on some essential nature of appeals, or on some fundamental right to error correction for disappointed litigants. Rather, evaluating *Housen* turns on whether the standard of appellate review set by the court represents the best and most effective compromise between competing policy considerations, and results in an appropriate allocation of responsibilities between trial courts and appeal courts. It is time to turn to this more difficult question.

II. REVIEWING THE STANDARD OF REVIEW

A. *Housen* and Alternative Conceptions of Appellate Review

Let us first situate *Housen* within alternative conceptions of appellate review. In a recurring motif that can be seen in every Western jurisdiction, two paradigms emerge: one favouring intervention, and another favouring deference.

On the one hand, the interventionist conception of appellate review places emphasis on the rights and private interests of litigants, on the ability of appellate judges to draw their own factual and legal conclusions from the evidence, and on their duty to correct the mistakes of trial judges. Under this conception, the standard of review allows appeal courts to readily correct errors on any issue other than those that are tied to the trial judge's situational advantage.[13]

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[12] The number and scope of appeals can also be constrained in other ways, such as through court fees, or restrictions on the form and length of submissions presented to the court of appeal.

[13] Nowadays, appeals on this mode take the form of a re-examination of the evidence as presented at trial. There are some historical precedents for appeals that proceed *de novo* and in-

On the other hand, the minimalist or deferential conception of appellate review places primary responsibility for dispute resolution in the hands of trial judges, allows for the possibility of errors that will remain uncorrected in the interest of finality, and limits intervention to those circumstances in which public confidence in the high standards of adjudication at trial is engaged. Under this conception, appeal judges should only intervene in the presence of capricious judgments or egregious errors on any issue other than pure questions of law.[14]

Behind these alternative conceptions lies a minimal consensus on the scope of intervention on pure questions of law, as well as on questions of fact that the trial judge is better placed to address.

First, under all conceptions of appellate review, no deference is owed to the trial judge on questions of law.[15] Provided the claim is otherwise subject to review, any legal question that was wrongly decided by the trial judge can be corrected on appeal. Indeed, whatever weight is given to the idea that appeals must remain exceptional, and that trial judges must be afforded a measure of deference in order to sustain the authority of trial proceedings, the competing imperative of public confidence in judicial institutions requires that legal norms be stated clearly and applied uniformly within a given jurisdiction. To the extent

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volve a full re-hearing of the evidence. See M. Shapiro, *supra* note 4 at 645-649. With the power to reconsider the evidence afresh comes, quite naturally, the power to render final judgment on every aspect of the dispute, and under this pure conception of rehearings, appellate judges do not remand the case for decision by a lower court. See J.A. Jolowicz, *supra* note 2 at 619-620.

[14] This deferential position is also expressed in the more radical notion of *cassation* which is common in Continental Europe: In its purest form (which is no longer to be found) *cassation* was generally limited to questions of law alone, and the appellate court's jurisdiction was limited to remanding the case to the lower court for a decision according to the legal principles that it stated. According to Martin Shapiro, *supra* note 4 at 674:

> [...T]he Romanist appellate tradition was violently disrupted by the institution of cassation. This disruption occurred because of the hostility of the French Revolution to the judicial activism of the parlements, the highest appellate courts of the ancien regime. The French wished to destroy the political power wielded by the top of the appeals hierarchy but realized the need for uniformity of statutory interpretation, which could not be achieved by regional courts of appeal acting independently. So they created a court that would ensure uniformity without being able to give final judgments.

[15] Different considerations in judicial review of administrative action may justify a deferential standard even with respect to questions of law. See T. Cromwell, "Appellate Review: Policy and Pragmatism", in this volume.

that we choose to have appeal courts, the core of their competence should be to state the law, and to rectify the trial judge's errors of law.[16]

Second, there is also a wide consensus that on all questions over which the trial judge has a situational advantage, deference is warranted.[17] Even those who advocate wide powers of error correction for appellate courts recognize that these powers should not be exercised in relation to the trial judge's factual findings, where those findings rest on the manner in which the evidence was introduced for consideration. This is true, obviously, of all matters relating to the assessment of the credibility of witnesses. On the other hand, it is a matter of debate whether the trial judge's situational advantage and expertise extends also to the weighing of the evidence as a whole (some of which may not be presented to the appellate judge), to the interpretation of documentary evidence, or to factual inferences that the trial judge draws from primary facts in evidence.

Despite the consensus on these opposite points of the spectrum - on one side, pure questions of law and on the other side, questions of fact over which the trial judge has a situational advantage - the competing conceptions of appellate review part ways on issues that lie between the two extremes. The most contentious issue, perhaps, is the scope of review on mixed questions of fact and law, where a legal rule is applied by the judge to a set of facts in order to come to a legal characterization. Under the interventionist conception, appellate judges are in the same position as the trial judge to answer what is in effect an abstract question - to perform a mental operation, as it were. Once the facts are ascertained (by the trial judge), their legal effect can be determined by anyone who has appropriate legal training. For this reason, the interventionists conclude that the standard of review for mixed questions of law and fact should not be deferential. Conversely, under the deferential conception, there is no reason to intervene unless the trial judge was mistaken on the law applicable to those facts. While it is true that on these questions the trial judge enjoys no advantage, this is not the only basis upon which the scope of review is determined. Rather, for minimalists, appellate courts must also exercise restraint, and uphold decisions that they might have made differently, in order to sustain the authority of original decision-makers generally.

On that score, the decision of the Supreme Court of Canada in *Housen* falls squarely within the deferential conception of appellate review, and takes Canadian appellate jurisdictions closer to the paradigm of "appeal on the record," "review," or "cassation" and away from the interventionist paradigm of "rehearing"

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[16] Over the course of the 20th century, the rationale for this position evolved from the need for an overview of the process and its conformity with the rule of law, to a conception of appeal courts as lawgiving, rule-directed institutions. See P.D. Carrington, *supra* note 3 at 417 and H.L. Dalton, Taking the Right To Appeal (More or Less Seriously) (1985-1986) 95 Yale L.J. 63.

[17] But as I indicated, *supra* note 8, even this piece of received wisdom could be debated.

or "trial de novo." In *Housen*, the majority settled on the following standard of review: (i) for findings of fact and inferences of fact, the standard is palpable and overriding error; (ii) for pure questions of law, the standard of review is simple error - the trial judge's legal propositions must be correct; and (iii) for questions of mixed fact and law, the standard is palpable and overriding error. In the latter case, if the trial judge made an error of law that is extricable or severable from his or her factual conclusions, the error can be treated as a question of law and is not subject to deference.

It is fair to say that *Housen* effected a significant change to the appellate standard of review in Canada, or at the very least settled a controversial issue. In an article published last year, Madam Justice Kathryn Feldman of the Ontario Court of Appeal concluded that before the Supreme Court's decision in *Housen*, there was "ongoing debate about what to do with anything in between the two extremes [of pure questions of law and questions of fact tied to credibility of witnesses or weighing of the evidence].[18] In the decades preceding *Housen*, there was a developing consensus that deference was not limited to questions of credibility or weighing of evidence, and that it had to extend to inferences of fact and other mental processes for which the trial judge was in a privileged position. *Housen* crystallized this position. On the other hand, the Supreme Court's own jurisprudence prior to *Housen* was consistent with a non-deferential standard in relation to questions of mixed fact and law.[19] The restrictive standard established by the court on the latter question is certainly the most controversial aspect of the decision.

B. A Critical Appraisal of the *Housen* Standard

Much has been said about *Housen* in recent years, although not that much has been written on it.[20] Criticism of the standard of appellate review set by the majority in that case is mostly oral and informal. Whatever the private views of trial judges, appellate judges or litigants, there is now, it is fair to say, a *Housen* jurisprudence. By my (computer-assisted) count, in the four years since the decision was handed down, *Housen* v. *Nikolaisen* has been cited or discussed in close to a

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[18] K.N. Feldman, "Tipping the balance in the Court of Appeal" (2005) 23 Advocates' Soc. J. 9 at paras. 6-13.

[19] See for example *St-Jean v. Mercier*, [2002] 1 S.C.R. 491. Mr. Justice Bastarache provides a convincing account of this shift in his minority reasons in *Housen*, *supra* note 1 at paras. 110-113.

[20] But see Paul M. Perell, "The Standard of Appellate Review and the Ironies of *Housen v. Nikolaisen*" (2004) 28 Advocates' Q. 40 at 40-53; and K.N. Feldman, *supra* note 18. I have also in my possession a most illuminating but unpublished manuscript of Mr. Justice Yves-Marie Morissette, "Le point (provisoire) sur les règles d'intervention en appel."

thousand decisions of Canadian appellate courts.[21] In my own province, judicial invocation of *Housen* is a vibrant cottage industry, with over thirty citations by the Court of Appeal of Québec in 2006 alone. By way of comparison, the Manitoba Court of Appeal appears less enthusiastic, with only five citations of *Housen* over the past year, and a total of fourteen since this decision established the standard of review in 2002.[22]

Is there anything wrong with this jurisprudence?

To even begin to answer this question, we need to separate clearly three different types of concerns: (a) A first line of appraisal is substantive: this is the claim that *Housen* goes too far, and that the deference it imposes is ill advised; (b) A second line of criticism is conceptual: whatever the merits of the principles enunciated in *Housen*, they cannot be made to work because the notions and categories on which they rest are too vague and indeterminate; (c) Finally, there is a third, procedural and pragmatic concern: assuming the rationale of *Housen* is valid, and can be translated into concepts that produce predictable outcomes, should the standard of review be addressed differently, or at an earlier stage in the appellate process? Are there wasted resources in the substantial effort that is required to ascertain whether the standard is met?

Let us examine each of those concerns in turn.

1. Is Housen misguided?

It is unclear how one would go about deciding whether *Housen* goes too far in restricting the scope of appellate intervention. It is not enough to say that appellate judges should not be forced to uphold decisions with which they may disagree, as they are required to do under *Housen* - that is also the case under alternative standards, when the court of appeal does not find any palpable and overriding error of fact in the trial decision. Whatever the standard of review, not all errors are rectified by way of appeal, despite the very natural desire of appellate judges to remedy what they see as injustice when they are presented with an oc-

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[21] The search was performed in October 2006 on the Canadian Legal Information Institute database (www.canlii.org), with a cross-check on the QuickLaw database. In proportional terms, the highest contributor of citations to *Housen* is the Court of Appeal of Alberta, with over 150 references over the past four years.

[22] *Knock v. Dumontier*, 2006 MBCA 99; *Rivergate Properties Inc. v. West St.Paul (Rural Municipality)*, 2006 MBCA 76; *Gendis Inc. v. Canada (Attorney General)*, 2006 MBCA 58; *Slawik v. Manitoba (Workers' Compensation Board)*, 2006 MBCA 55; *Marinou v. Ziesmann*, 2006 MBCA 30; *Hill v. Kelbrei*, 2005 MBCA 81; *Kerkowich v. Wawanesa Mutual Insurance Co.*, 2005 MBCA 33; *Pohl v. Doane Raymond Pannell*, 2004 MBCA 183; *Northwood v. Bristol Aerospace Ltd.*, 2004 MBCA 162, *Jury v. Matthews Automet Inc.*, 2004 MBCA 133; *Steingarten v. Burke*, 2004 MBCA 9; *Macatula v. Tessier*, 2003 MBCA 31; *Communications, Energy & Paperworkers' Union of Canada v. MTS Mobility Inc.* 2003 MBCA 21; *Reimer Farm Supplies Ltd. v. AXA Pacific Insurance Co.*, 2002 MBCA 145.

casion to do so.[23] Still, explaining to ordinary litigants that the Court of Appeal must on occasion uphold a "mistaken" decision is not an easy thing to do.

Furthermore, it is not convincing to criticize *Housen* because it rests, at least in part, on public policies that are external to the interests of the parties. It is true that those rationales emphasize pragmatic concerns such as costs, delay, finality, and making room for the law-making functions of appellate courts, at the expense of the private interests of parties in seeing the dispute "rightly" decided. But in a way, as I argued above, those pragmatic concerns have always been with us, and have always been tied to the institutional design of appeals – it is those concerns that explain why some decisions cannot be appealed at all, and why some decisions can only be appealed with leave. Public interest concerns are not problematic as such – what needs to be assessed is the balance between those public purposes and the private interests of litigants.

Taking another tack, some may see in *Housen* the "perverse" influence of administrative law. The idea that appeals should be limited to the most egregious mistakes is obviously reminiscent of restrictive standards of judicial review of administrative action. But that does not mean that one is imported from the other. Deferential conceptions of appellate review existed well before the emergence of the infamous "pragmatic and functional approach." Those deferential conceptions have deep roots in history, such as in France where the traditionally limited scope of *cassation* was meant to constrain the powers of disreputable appellate courts.[24] Within the common law tradition, deference was historically justified by the status and function of the jury, and it must be recalled that the scope of appeals was severely limited until the latter part of the nineteenth century.[25] Modern justifications for deference are likely to be influenced by costs, delays and similar institutional considerations. But whatever the rationale, there is no reason to think that any particular standard of review is dictated by the nature of the decision to be reviewed. In particular, there is nothing unique about

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[23] J.A. Jolowicz describes it as the "humanitarian but misplaced desire to do justice to the parties in the cases that come before them." See J.A. Jolowicz, *supra* note 2 at 634.

[24] *Supra* note 14.

[25] According to Professor Jolowicz, while English procedure uses a single term ("appeals"),

> [t]his does not mean that procedures which would be classified elsewhere as cassation rather than appeal did not and do not exist in the common law. On the contrary, until the major reforms of the nineteenth century, an appeal properly so called existed in England only in the courts of Equity; in the courts of 'common law' the only forms of recourse available had far more in common with the cassation than with the appeal of other countries.

See J.A. Jolowicz, "Appeal, cassation, amparo and all that: what and why?" in J.A. Jolowicz, *On Civil Procedure* (Cambridge/ New York: Cambridge University Press, 2000) at 299.

decisions of administrative tribunals which dictates a deferential standard of review, and nothing unique about judicial decisions which dictates an interventionist standard of review. The logic and conceptual foundation of appeals and judicial review of administrative action are no doubt fundamentally different. Nevertheless, in both cases, the standard of review reflects a choice about how the process can best serve the interest of the parties in vindicating their rights and the interest of the community in an effective and authoritative resolution of disputes at the original and appellate levels. Balancing these competing interests might well yield the same standard of review, albeit for different reasons.[26]

In short, in substantive terms, the most that can be said is that the standard of review is a matter of choice - indeed, a matter of debate. Reasonable people may reasonably disagree on where it should be set to achieve the optimal institutional design.

In this respect, if it is the case that circumstances vary from jurisdiction to jurisdiction within Canada, there might well be an argument for greater diversity. Indeed, one of the difficulties with the jurisprudential standard set by *Housen* is that it is meant to apply in the same manner across the country and in relation to all appeals. At the very least, using the same standard of review for intermediate courts of appeal and for the Supreme Court of Canada may not be optimal, in light of their distinct roles.[27] The existence of recourse to intermediate appellate courts serves the private interests of litigants (if only in the form of catharsis) in a manner that is unsuited for appeals to the Supreme Court of Canada. But one might go further in recognizing diversity: different provincial courts of appeal may face different challenges, some may be less overwhelmed with delays and backlogs than others, and some may be able to cope more easily with the pressure of litigants than others might be. If the optimal balance is a matter of policy and circumstances, it need not be struck uniformly across Canada.

It follows that, to the extent that administration of justice is within the competence of the provinces, each community could seek to determine the scope of appellate review in its own distinctive way. Now that the Supreme Court has set a jurisprudential standard for all appellate courts, this diversity can only be ob-

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[26] In light of the role attributed to administrative tribunals and the difference in expertise between administrative decision-makers and judges, there may well be a stronger case for deference in judicial review of administrative action. But it is mistaken to assume that a deferential standard is only appropriate for this type of judicial review. For a careful assessment of the competing values in determining the scope of administrative appeals, see T. Cromwell, *supra* note 15.

[27] Carrington argues that when intermediate courts of appeal emulate the third level of appeal in its "lawmaking" role, there is a risk that appellate courts may be receding as effective authority, turning into remote institutions 'having limited apparent interest in, and limited capacity to control, the specific actions taken in trial courts.' See P.D. Carrington, *supra* note 3 at 425.

tained through provincial, statutory definitions of an alternative standard. The Supreme Court's decision in *H.L. v. A.G. Canada* is consistent with this possibility, although the language chosen to express such a statutory departure from *Housen* would have to be very specific indeed.[28]

2. Is the rule stated in Housen indeterminate?

Arguably, the problem with *Housen* is less that it unduly restricts appellate intervention, than that it might fail to produce predictable outcomes.

In principle, an appellate standard of review must be sufficiently simple and predictable to enable litigants to assess their chances of success on appeal, and to determine whether it is worthwhile to bring their claim before a higher court. Any standard of review that fails to do this might well produce more unnecessary appellate litigation than it avoids.

In this respect, *Housen* is no worse than alternative options.[29] *Housen* provides for two, and only two, standards of review: palpable and overriding error, and simple error (correctness). It rests on an intuitively appealing division of the three basic questions that are addressed in a trial: What is the law that governs these situations? (pure questions of law); What happened? (pure questions of fact); and What is the outcome of the application of law to these facts? (mixed questions of fact and law).

Despite its simplicity, this model is subject to pressure from two different angles.

The first point of pressure comes from the concept of mixed questions of fact and law. As I indicated above, the majority in *Housen* held that appellate courts should only intervene on those issues where the trial judge has made a palpable and overriding error. On the other hand, if the legal characterization (the application of law to the facts) involves an extricable error of law, then the standard of review is simple error. In short, the trial judge must get the law right. On everything else, appellate courts should be reluctant to interfere with the trial judge's conclusions, including conclusions that involve the application of the law to the facts.

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[28] See *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401. In that case, a majority of the Supreme Court of Canada found that the text of the *Court of Appeal Act* 2000, S.S. 2000, c. C-42,1, could not be read as an indication of the intention of the legislature of Saskatchewan to set a scope for appeals that would differ from the one set in *Housen*.

[29] For an illustration of the complexities that can be introduced through multiple sub-categories of issues matched with different degrees of intervention, see the analysis of Mr. Justice Bastarache in *H.L. v. Canada (Attorney General)*, *supra* note 28 at paras. 252-256, which lists no less than three different standards of appellate intervention in relation to three distinct types of questions of fact.

But the frontier between stating what the law is and merely applying the law to the facts is not so easily drawn.[30] Because much is at stake in sorting out those two types of questions, it is bound to become a contentious issue. And so it is in many cases. Indeed, within the common law tradition, legal rules are not naturally stated in abstract terms and divorced from any factual context. Leaving aside narrow questions of statutory interpretation, pure (or extricable) questions of law are likely to be quite rare.[31] On the other hand, questions such as whether a contract was formed, or whether some behaviour amounted to negligence, or whether the circumstances gave rise to a fiduciary duty, all involve the resolution of a particular dispute, as well as a normative statement with the potential to govern similar disputes in the future. In this context, just about any conclusion other than a conclusion about what happened (a pure question of fact) can be turned into a question of law, and subjected to a less deferential standard of review.

The second point of pressure is found in the characterization of errors of fact that give rise to correction on appeal. Here the difficulty is not the outcome of vague or flexible categories – purely factual issues are easily identified, and readily distinguished from mixed questions of fact and law, and from pure questions of law. Rather, the difficulty is produced by semantic disputes about the standard of review itself and its implementation. The phrase "palpable and overriding error" looks simple enough: the error of the fact finder must be obvious and readily seen (it must be palpable), and it must not be indifferent, in the sense that it must have played a key role in the decision (it must be overriding). Neither of those words, "palpable" and "overriding," naturally evokes the gravity or magnitude of the error. And yet, surely the seriousness of the trial judge's factual error is relevant in assessing whether the court of appeal should intervene. The more unreasonable the factual conclusions or weighing of the evidence, the greater the

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[30] For an interesting exploration of the complexities of this exercise in US law, see E. Tsen Lee, "Principled Decision Making and the Proper Role of Federal Appellate Courts: The 'Mixed Questions Conflict" (1991) S. Cal. L. Rev. 235.

[31] In my view, the best guidance in this respect is still to be found in the criterion stated in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997]1 S.C.R. 748 at para. 37:

> ...the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any precedential value.[...] In short, as the level of generality of the challenged position approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed fact and law.

In the same vein, Mr. Justice Morissette, in the unpublished manuscript referred to *supra* at note 20, suggests most pointedly that the issue of what is an extricable question of law can only be ascertained *ex post*. In other words, it is the normative potential of the answer, and not the formulation of the question, which determines whether it is subject to deference or not.

public interest in having an appellate court rectify them, and the more likely it is that these conclusions will be described as the product of a palpable and overriding error. While everything could be made simple (but perhaps more unpredictable) by paring down this standard to the idea of reasonableness, much energy is spent giving shape to what is "palpable and overriding" in relation to each sub-set of questions subject to this standard (credibility assessments, overall weighing of the evidence and justification of conclusions, inferences of fact, etc.).[32]

On either front (What is an extricable question of law? How palpable and overriding is the error of the fact finder?) the concepts are open-ended and subject to strategic use. For litigants, it is unclear whether the standard of review represents a real constraint, or simply a constraint in the formulation of questions for appeal. One can only hope that it actually discourages unnecessary appeals, but there is no way to tell, and good reason to be sceptical.[33] For their part, trial judges can try to shield their decisions from appellate review by intertwining legal issues with factual determinations, and by providing detailed explanations for their evidentiary conclusions.[34] And, despite all this, appellate judges can generally manoeuvre within the space left by those concepts so as to intervene when they think they should, and not to intervene when they think they should not. In the end, I remain convinced that none of this strategic use can be avoided or circumscribed by greater specificity of the concepts, more words, or more finely tuned categories.

Nonetheless, more consistency in the use of these words and concepts, at least in the Supreme Court itself, would perhaps heighten the predictability of outcomes prescribed by *Housen*. And yet, on both issues, the court has wavered.

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[32] See for example the very extensive and helpful judgment of the Ontario Court of Appeal in *Waxman v. Waxman*, (2004) 186 O.A.C. 201 at paras 289-309.

[33] Incentives to appeal are tied to the likelihood of success and the magnitude of the expected outcome if the trial decision is reversed, which suggests that a consideration of the standard of review by the litigants should have an impact on their decision to appeal. On the other hand, there are many other, sometimes perverse, incentives, and the use of appeals for dilatory or abusive purposes should not be underestimated.

[34] Indeed trial judges are encouraged, in *Waxman v. Waxman*, *supra* note 32 at paras. 307-308, to provide in their reasons detailed insight into their fact-finding process:

> Reasons for judgment can be so cryptic or incomplete as to provide little or no insight into the fact-finding process. Where reasons for judgment are so deficient that they effectively deny meaningful appellate review on a "palpable and overriding" standard, the inadequacy of reasons may in and of itself justify appellate intervention. [...] While inadequate reasons may short-circuit effective appellate review of fact-finding and thereby justify appellate intervention, detailed reasons for judgment, which fully explain findings of fact, make the case for a rigorous application of the "palpable and overriding" standard of review.

While *Housen* itself suggested that the legal characterization of behaviour as negligent or not was a question of mixed fact and law (and subject to deference on appeal), the Supreme Court's decision in *Prud'homme v. Prud'homme*[35] seems to treat it as a pure question of law, in a context in which the precedential value of the conclusion is dubious. And while *Housen* itself stated that the standard of palpable and overriding error meant something different from "unreasonable conclusion," the Supreme Court's decision in *H.L. v. A.G. Canada*[36] now states that the two standards are effectively identical. It is not always easy to keep track of the latest restatement of the rule.

3. Is the rule in Housen optimal in procedural terms?

Let us turn briefly to the procedural issue.

In this respect, one can begin from the premise that the standard of review is meant to ensure that appellate resources are used most effectively, and in the manner most conducive to sustaining the integrity and autonomy of the trial process. If it is the case that extensive resources must be spent in each appeal to determine whether the standard is met, and whether the court of appeal should rectify the original decision, then we may not have accomplished much in setting up a deferential standard. In particular, if it is the case that reaching a conclusion on whether a palpable and overriding error has occurred, or reaching a conclusion on whether a pure (or extricable) error of law was committed by the trial judge, can only take place after the appellate court has seen the full submissions of the litigants, there may be perverse incentives in the deferential standard.

As I intimated earlier, a strict standard of review is just one among many avenues which may be imagined in achieving the optimal management of appellate resources and their interplay with trial courts. Obviously, there are other practices that can enable a court of appeal to focus on the important cases, provide guidance on the law, and correct non-trivial errors that truly call for its attention. All or most appeals can be subject to the court's permission.[37] The court of appeal can offer mediation at an early stage so as to discourage dilatory or ill-founded appeals.[38] The court can entertain early motions for summary dismissal of the appeals that present no reasonable chance of success. It can require early

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[35] *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663.

[36] *Supra* note 28.

[37] It appears that reform of civil procedure in the United Kingdom has taken this direction, and that very few appeals can proceed without leave. For a description of this shift in perspective, see Adrian S. Zuckerman, *Civil Procedure* (London: LexisNexis UK, 2003) at 720-722.

[38] Such a process of mediation at the appeal stage exists in the Province of Quebec. See art. 508.1 - 508.4 *Code of Civil Procedure of Quebec*, R.S.Q. c. C-25.

presentation of skeleton arguments. Finally, the court of appeal can choose to reject without reasons, or with very terse reasons, those appeals that should not have been brought before it. Each of these avenues can be pursued on its own, or combined with a deferential standard of review.

I am not certain that the question whether the standard of review is met can indeed be turned into a preliminary issue (to be addressed on an application for leave to appeal, or in arguments on a motion to summarily dismiss the appeal), but I remain perturbed by the fact that the ordinary resources of a court of appeal must be set in motion only to come to the conclusion, after a full airing of the issues, that the court's intervention is not warranted after all. Admittedly, a court of appeal should not come to the conclusion that it agrees (or disagrees) with the trial judge without the benefit of the parties' representations. But it does not seem preposterous to imagine that a court of appeal could, on limited submissions, determine whether a question of law arises from the dispute, and failing that, whether the error of the trial judge is sufficiently obvious and serious to qualify as "palpable and overriding" error.[39] In my view, more thought should go into those procedural dimensions if the principles of *Housen* are to become truly effective.

III. CONCLUSION

In sum, while we have come to think of them as essential components of the architecture of civil justice, appeals are not a necessary corollary of decision-making. We choose to allow appeals in an effort to serve both private and public purposes. Those purposes need to be reconciled. *Housen* offers a defensible, workable compromise that is no less indeterminate than the alternatives.

[39] The key concern should be to identify a screening process that can effectively reduce the cost and energy required to sort out which cases deserve the appellate court's attention. If the screening requires as much effort as the appeal itself, there may be no gains for the court or for the parties on appeal.