Chief Justice Chartier's Civil Procedure Legacy: Attuned to Access to Justice

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ABSTRACT

This article investigates Chief Justice Chartier's legacy on civil procedure. Though not the area of law he is most known for, analyzing nineteen notable cases to which he contributed reveals engagement with the principles of civil procedure such as predictability, efficiency, and fairness—and a particular sensitivity to access to justice, largely through seeking to ensure the resolution of civil actions on their merits—in this area of law where chief justices often lead by example.

Keywords: civil procedure; courts; judges; access to justice; Chief Justice Chartier

INTRODUCTION

Across Canada, the chief justices of the provinces have been known to take a lead on "access to justice". This is often, but by no means exclusively, done through emphasizing how to apply and potentially reform civil procedure, something that Chief Justices Robert

Bauman,[1] Catherine Fraser,[2] Warren Winkler,[3] and George Strathy[4] have all emphasized.

On first blush, Chief Justice Richard Chartier might not seem to naturally fall into this pattern. During his "[t]en years and one month"[5] in practice, he was a corporate lawyer, not a civil litigator. He then proceeded to spend over a dozen years on the Provincial Court, dealing with criminal and family cases.[6] So upon elevation to the Court of Appeal in 2006, he had only the most passing of experiences with civil procedure despite a very distinguished legal career spanning nearly a quarter-century. Nonetheless, this article demonstrates that he has understood the purposes of procedural law and made an important contribution to it.

This article analyzes nineteen of Chartier CJ's most notable civil procedure decisions. Part II gives a brief introduction to methodology and terminology to place the rest of the article in context. Part III then looks at

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1 See, *e.g.*, *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2022 BCCA 163, 62 BCLR (6th) 42 at, *e.g.*, paras 97-100; Robert Bauman, "2022 Access to Justice Week BC is Underway" *Access to Justice BC* (9 February 2022), online: <url=https://accesstojusticebc.ca/2022/02/2022-access-to-justice-week-bc-is-underway/>.

2 See, *e.g.*, *Boyd v JBS Foods Canada Inc*, 2015 ABCA 120, [2015] AJ No 337; *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289, 2 Alta LR (6th) 146 at paras 30-32; CBC News, "Q&A: Former chief justice of Alberta Catherine Fraser on a challenging career and retirement" *CBC News* (13 August 2022), online: <url=https://www.cbc.ca/news/canada/edmonton/q-a-former-chief-justice-of-alberta-catherine-fraser-on-a-challenging-career-and-retirement-1.6547185>.

3 *E.g.*, *Parsons v The Canadian Red Cross Society*, 2013 ONSC 3053, 363 DLR (4th) 352, aff'd, 2016 SCC 42, [2016] 2 SCR 162, having been rev'd, 2015 ONCA 158, 125 OR (3d) 168 at, *e.g.*, paras 43, 53-54, 57; Warren K Winkler, "The Vanishing Trial" (Autumn 2008) 27(2) Advocates' Soc J 3.

4 *E.g.*, The Honourable George R Strathy, Chief Justice of Ontario, "Ontario has one of the Best Justice Systems in the World … and we can make it Even Better" (31 August 2022) Ontario Courts, online: <url=https://www.ontariocourts.ca/coa/about-the-court/publications-speeches/cjo-strathy-speech-justice-system/>; *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829, [2016] OJ No 3039 at para 13.

5 The Honourable Chief Justice Richard J Chartier, Chief Justice of Manitoba, "An Interview with the Chief Justice of Manitoba" (2013) 37:1 Manitoba LJ 43 at 52.

6 *Ibid* at 53.

many of Chartier CJ's decisions that ensured actions are resolved promptly on their merits, particularly through using summary procedures. Part IV then considers his decisions that concerned delay in civil litigation, and the need to balance timeliness with resolution of claims on their merits. Part V investigates Chartier CJ's attitude toward resolving issues on appeal, which in turn bleeds into Part VI's consideration of principles of finality and the purposes of appeals. A brief conclusion posits that Chartier CJ is an excellent example of how a judge without significant experience in a particular area of law can contribute positively to it by grounding himself in that area of law's principles and purposes that facilitate access to justice.

I. TERMINOLOGY AND METHODOLOGY

In August through November 2022, extensive CanLII and Lexis+ searches were undertaken to investigate Manitoba Court of Appeal decisions concerning civil procedure where Chartier CJ (or Chartier JA) sat on the panel. While there are limitations to this methodology, it was by far the simplest way to sort through reported case law. Quantitative analysis of case law frequently uses these databases[7] and their limitations—mostly regarding uncaptured decisions—are less important for this project, which concerns high-profile decisions in any event. Cases were triaged mostly through looking at citation count. However, based on experience with developments in Manitoba procedural law, other decisions that seem interesting and important have been included, even in the absence of significant citations. Cases were also excluded where the overwhelming procedural determination was that of jurisdiction, considering that to be more of an issue of conflicts of law, if contested to another forum,[8] or administrative law, in the event of a jurisdictional dispute with an administrative body.[9] A case where Rule 14 of the *Queen's Bench Rules* (as

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7 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, fn 58; 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, Faculty of Graduate Studies, York University, January 2020.

8 *Ward v Canada (Attorney General)*, 2007 MBCA 123, 220 ManR (2d) 224.

9 *Giesbrecht v McNeilly*, 2008 MBCA 22, 225 ManR (2d) 223.

they then were)[10] was considered, but primarily only insofar as it incorporated fiduciary law, was similarly excluded from the analysis given that it shed little light on an approach to civil procedure *per se*.[11]

Because this analysis includes instances where Chartier CJ sat on appeal panels when he was "Chartier JA", this article will hereinafter refer to him as "Chartier JA" in all instances prior to his elevation as Chief Justice. In the interest of conciseness, "as he then was" will not be added every time. Similarly, all decisions of the Court of Queen's Bench of Manitoba will be referred to as the Queen's Bench without adding "as it then was" on each occasion.

II. CONDEMNING DELAY WHILE ENSURING PROMPT RESOLUTION ON MERITS

Delay is an endemic problem in civil litigation. The phrase "justice delayed is justice denied" is a maxim connected to the rule of law that has existed for centuries.[12] Accordingly, insofar as procedure can be used to prevent delay—without jeopardizing fair process or resolution on the merits—it should be so used. This was at the core of the Supreme Court's 2014 decision in *Hryniak v Mauldin*, which called for the broader use of summary judgment powers to resolve more cases on their merits quickly and with less financial expense.[13] Several of Chartier CJ's decisions indicate that he is alive to this concern.

For instance, in *Beavis v PricewaterhouseCoopers Inc*,[14] Chartier JA was on a panel that recognized the importance of finality, even when one could have nitpicked with the trial judge's reasons granting summary judgment due to a limitations period. In the circumstances, the court noted that a single affidavit could resolve the factual issues necessary. Though the chamber judge's expression of the test for summary judgment left something to be desired, the conclusion that a trial was not necessary warranted upholding, even prior to *Hryniak*.

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10 Now the *Court of King's Bench Rules*, Man Reg 553/88 ["*KB Rules*"].

11 *Filkow Estate v D'Arcy & Deacon LLP*, 2019 MBCA 61, [2019] 9 WWR 271.

12 See, *e.g.*, *R v St-Cloud*, 2015 SCC 27, [2015] 2 SCR 328 at para 79.

13 2014 SCC 7, [2014] 1 SCR 87 ["*Hryniak*"].

14 2010 MBCA 69, 258 ManR (2d) 15.

In a similar vein, in another pre-*Hryniak* case, *Bodnarchuk v RBC Life Insurance Co*,[15] Chartier JA agreed with Scott CJ that a plaintiff's claim alleging that his business had been reduced in value due to the defendant's wrongdoing should be dismissed. There was no "hard evidence"[16] to support his assertion and he had an obligation to put his best foot forward on a summary judgment motion. A more general claim for damages was allowed to proceed to trial despite the evidence being "demonstrably not strong" but where the chambers judge was owed deference.[17]

Furthermore, in *Feierstein and Fishman Medical Corp v Costas Ataliotis*, Chartier JA was on a panel that held that a trial judge was well within her discretion to resolve a corporate law dispute on the basis of affidavit evidence, where there were few contested facts.[18] And most recently, in *Vale Canada Ltd v Schwartz*, he authored a decision emphasizing that granting summary judgment is discretionary, and a Queen's Bench judge did not commit an error in granting it in a tort case.[19]

The use of summary procedures extends beyond summary judgment to resolving questions of law on pleadings motions.[20] This was apparent in *Chrysler Canada Inc v Eastwood Chrysler Dodge Ltd*.[21] Here, Chartier JA overturned the Queen's Bench, but in a way that furthered finality, legal certainty, and a better use of judicial resources. Specifically, he held that it was clear on the pleadings that a claim alleging liability for chargebacks on an audit agreement was not tenable because the plaintiff was not a party to the agreement, nor were there any allegations that could lead to an alternative avenue of liability.[22] He further held that another counterclaim should be stayed pending an arbitration decision, recognizing that this result was mandated by legislation and arbitration should generally be

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15 2011 MBCA 18, 262 ManR (2d) 225.

16 *Ibid* at para 39.

17 *Ibid* at para 38.

18 2007 MBCA 132, 225 ManR (2d) 2.

19 2022 MBCA 18, 467 DLR (4th) 469.

20 See, *e.g.*, *Atlantic Lottery Corp v Babstock*, 2020 SCC 19, 447 DLR (4th) 543 ["*Atlantic Lottery*"]; Gerard J Kennedy, "*Nevsun*, *Atlantic Lottery*, and the Implications of 2020 Supreme Court of Canada Motion to Strike Decisions on Access to Justice and the Rule of Law" (2021) 72 UNB LJ 82 ["Kennedy Motions to Strike"].

21 2010 MBCA 75, 262 ManR (2d) 1.

22 *Ibid* at para 27.

preferred as a faster alternative to litigation in the courts.[23] As a result of this, the action was resolved on its merits—albeit legal rather than factual—promptly.

However, there are limits to resolving questions of law on pleadings motions. In *Driskell v Dangerfield*,[24] Chartier JA agreed with Scott CJ in declining to strike a pleading alleging that the police were negligent in failing to make post-conviction disclosure of exculpatory materials to the plaintiff. Emphasizing that the circumstances of the case were unique, with the plaintiff having wrongly spent more than a decade in prison, he declined to strike the pleading, while noting that "[t]here are other procedures that are potentially available at a later stage" to resolve the action.[25] One wonders whether this would have been decided the same way in the aftermath of *Atlantic Lottery Corp v Babstock*,[26] which more explicitly called for greater resolution of novel causes of actions on motions to strike.[27]

III. SKEPTICISM OF "PROCESS-BASED" DISMISSALS

Summary judgment and motions to strike can be contrasted with "process-based" attempts to resolve actions.[28] As important as procedure is to facilitating the prompt, efficient, and predictable resolution of claims, it is also important to remember that procedure is not a good in itself but must serve the just resolution of claims on their merits. This in turn results in considering whether granting exceptions from procedural rules will cause prejudice to other parties.

These considerations were apparent in the pleadings case of *Britton v Manitoba*,[29] which addressed whether adding a claim for punitive damages

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23 *Ibid* at para 32.

24 2008 MBCA 60, 228 ManR (2d) 116.

25 *Ibid* at para 36.

26 *Atlantic Lottery*, *supra* note 20.

27 See, *e.g.*, Kennedy Motions to Strike, *supra* note 20.

28 See, *e.g.*, Janet Walker, ed, *The Civil Litigation Process: Cases and Materials*, 9th ed (Toronto: Emond Montgomery, 2022), Chapter Eight. "Merits-based" pre-trial resolution, such as summary judgment and determinations of a legal question, can be contrasted from "process-based" resolutions due to a party failing to comply with procedural rules (*e.g.*, default, dismissal for delay, striking of pleadings for non-compliance).

29 2011 MBCA 77, 270 ManR (2d) 43.

was a "new cause of action" that could raise issues with respect to a limitations defence. Chartier JA agreed with Hamilton JA's opinion that it was not, recognizing that the purposes of limitations periods, and restrictions on pleadings amendments, are centred on preventing prejudice, which is manifestly not the case once a defendant knows that an action has been commenced arising from particular facts. Attempting to block an amendment alleging a different type of damages based on the same facts would not assist a defendant in terms of preserving evidence. Nor would it bait-and-switch the defendant regarding whether it was free from obligations arising from particular events when those events were already the subject of a lawsuit. Rather, it would be an example of a "technicality" defeating a potentially meritorious claim.[30]

Similarly, in *Dubois v Manitoba Lotteries Corp (cob Club Regent)*,[31] Chartier JA agreed with MacInnes JA's decision that an action should not be dismissed for delay. Though agreeing that the Queen's Bench erred in not considering whether the defendant was prejudiced by delay, the Court emphasized that the action should not be dismissed for delay in the absence of such prejudice. Even on appeal, it was clear that the defendant could not point to any such prejudice despite the delay being excessive. Prior to the 2018 amendments of the rules on delay,[32] this result further accorded with the language of the *Queen's Bench Rules*, as they then were.[33]

After those amendments, however, Chartier CJ delivered the sensible decision of the Court in *Tataskweyak Cree Nation v Intact Insurance Co*,[34] agreeing with the motion judge that a consolidation motion constituted a "significant advance" in an action for the purposes of resisting a defendant's motion for delay (with the defendant being *prima facie* entitled to move for dismissal for delay if three or more years have passed without a significant advance in the action[35]). Reading Chartier CJ's reasons, it was clear that he

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30 Contrast with the purposes of limitations periods as described in *M(K) v M(H)*, [1992] 3 SCR 6 at 29-31.

31 2009 MBCA 108, 251 ManR (2d) 5.

32 Discussed in, *e.g.*, Gerard J Kennedy, "*Hryniak* Comes to Manitoba: The Evolution of Manitoba Civil Procedure in the 2010s" (2021) 44:2 Man LJ 36 ["Kennedy Manitoba"] at 59-62.

33 *KB Rules*, *supra* note 10, Rule 24, with amendments thereto being discussed in Kennedy Manitoba, *ibid*.

34 2021 MBCA 91, 73 CPC (8th) 30.

35 *KB Rules*, *supra* note 10, Rule 24.02.

was unimpressed with the defendant's argument, viewing this as a case that clearly deserved to be decided on its merits.

Similarly, *Boryskiewich v Stuart*[36] was a motion for an extension of time for a family law appeal where Chartier CJ granted the motion. The appellant mother had an intention to appeal a family law decision but, because she was unrepresented, did not realize that the clock had started to tick on the timeline as she thought other matters needed to be completed before she could appeal. Though mistaken, this was an understandable mistake. As her appeal had plausible merit, Chartier CJ considered it inappropriate to deprive her of her right to appeal. This is a good example of giving an indulgence to a self-represented litigant, reflecting civil procedure's overarching goal of reaching determinations on the merits,[37] while also recognizing that some triage for merit was appropriate. It is notable that this was not a litigant who had been overly indulged, nor was she causing disproportionate expense for the responding father.[38] Moreover, the father

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[36] 2014 MBCA 77, [2014] MJ No 235.

[37] *KB Rules*, *supra* note 10, Rule 1.04(1), under the heading "General principle": "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

[38] Judges have a duty to assist self-represented litigants while still being, and being perceived as being, impartial: see, *e.g.*, *Pintea v Johns*, 2017 SCC 23, [2017] 1 SCR 470. This can be difficult in practice, and Julie Macfarlane has strongly suggested that courts have not been sufficiently accommodating of self-represented litigants: see, *e.g.*, Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report" (May 2013), online: <https://scholar.uwindsor.ca/lawpub/85/>; Julie Macfarlane, Katrina Trask & Erin Chesney, "The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?" (Windsor, ON: The National Self-Represented Litigants Project, The University of Windsor, November 2015). However, her work can be methodologically challenged, and Donald Netolizky has done so while emphasizing the challenges posed by particular self-represented litigants: see, *e.g.*, Donald J Netolitzky, "The History of the Organized Pseudolegal Commercial Argument Phenomenon in Canada" 53(3) Alta L Rev 606; Donald J Netolitzky, "Lawyers and Court Representation of Organized Pseudolegal Commercial Argument [OPCA] Litigants in Canada" (2018) 51:2 UBC L Rev 419. For potential "middle ways", see, *e.g.*, Gerard J Kennedy, "Rule 2.1 of Ontario's *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?" (2018) 35 Windsor YB Access Just 243 *contra* Gerard J Kennedy, "The Alberta Court of Appeal's Vexatious Litigant Order Trilogy: Preserving Access to the Courts, Respecting Statutory Language, and Hopefully Not to a Fault" (2021) 58:3 Alta L Rev 739. Much of the problem in this area arises from "vexatious" litigants. "Vexatious" litigants are disproportionately self-represented, but the vast majority of self-represented litigants are

was attempting to use process to prevent resolution on the merits—contrasted from procedural mechanisms designed to resolve matters quickly on their merits.

Of course, there are times where delay is so long that it cannot be excused, or where the legislature has clearly barred an action due to a limitation period. Such limitation periods are justifiable to encourage preservation of evidence, ensure defendants know when they are free from ancient obligations, and prevent plaintiffs from sleeping on their rights and using potential litigation illegitimately.[39] In *McIntyre v Frohlich*,[40] Chartier JA agreed with Hamilton JA's decision refusing leave to add a new defendant in the face of an expired limitation period. In this case, the defendant had a right to assume it was free from ancient obligations. The emphasis that the information on discovery should have been enough to allow the plaintiff to connect the dots to the prospective new defendant—and it was inappropriate to allow the plaintiff to wait until an expert report had been delivered to claim that it had "discovered" the cause of action—in many ways foreshadowed the Supreme Court's decision in *Grant Thornton LLP v New Brunswick*.[41] Similarly, in *Wilde v Taché (Rural Municipality)*,[42] Chartier CJ agreed with Spivak JA in holding that there was no basis to intervene with a Queen's Bench decision that refused to grant an extension from a limitation period (under now-repealed legislation[43]) given that the plaintiffs commenced litigation only after an inspection of their home despite having observed cracking in it for about a decade prior to obtaining the inspection.

IV. RESOLVING MATTERS ON APPEAL

The desire to resolve matters quickly on their merits poses a difficult conundrum for appellate courts when they are confronted with errors in the court below and are torn between the competing virtues of prompt

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not "vexatious".

39 *Supra* note 30.

40 2013 MBCA 20, 288 ManR (2d) 291.

41 2021 SCC 31, 461 DLR (4th) 613.

42 2022 MBCA 31, [2022] MJ No 92.

43 After the enactment and coming into force of *The Limitations Act*, SM 2021, c 44, which replaced *The Limitations of Actions Act*, CCSM c L150.

resolution and full consideration, the latter of which can only be given by a trial court. By and large, Chartier CJ has indicated a desire to resolve matters quickly if possible. This was apparent in *Johnson Waste Management v BFI Canada Inc*, a case where a trial judge had mischaracterized a cause of action and failed to address a defence.[44] But Chartier JA concurred with Freedman JA's holding that sufficient factual determinations had been made in the Queen's Bench to enable the appellate court to resolve the issue. This encouraged efficient use of judicial resources, in line with Rothstein J's decision in *Madsen Estate v Saylor*,[45] and ensured finality. Again, Chartier CJ applied procedural rules to advance the resolution of actions on their merits.

At the same time, Chartier CJ also contributed to panels recognizing that not everything can be resolved on appeal. For instance, in *232 Kennedy Street Ltd v King Insurance Brokers (2002) Ltd*,[46] he agreed with Hamilton JA's decision that the Queen's Bench was wrong to deny a plaintiff costs merely because it was self-represented. The Court nonetheless remitted the costs decision to the Queen's Bench as trial judges are in a uniquely privileged situation to assess and set costs.[47] Remitting to the Queen's Bench also opened up the possibility of settlement, which is to be encouraged, particularly with respect to costs orders.[48]

V. FINALITY AND GUIDANCE TO LOWER COURTS

Appeals are not a necessary corollary of good decision-making.[49] Rather, they have discrete purposes, particularly to: guide lower courts regarding the state of the law; ensure consistent application of the law; and delineate and refine legal rules.[50] Finality, on the other hand, encourages respect for first-

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44 2010 MBCA 101, 258 ManR (2d) 268.

45 2007 SCC 18, [2007] 1 SCR 838.

46 2009 MBCA 22, 236 ManR (2d) 147 at para 24.

47 Sometimes referred to as "quintessentially discretionary": *Nolan v Kerry (Canada) Inc*, 2009 SCC 39, [2009] 2 SCR 678 at para 126.

48 See, *e.g.*, *Krates Keswick Inc. v. Brian Miller*, 2016 ONSC 6467, [2016] OJ No 5573 at para 35.

49 See, *e.g.*, Daniel Jutras, "The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?" (2007) 32 Man LJ 61 at, in particular, 65.

50 *Ibid*; *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 ["*Housen*"] at, *e.g*, para 9.

instance decisions and allows parties to order their affairs. Chartier CJ's appellate jurisprudence has recognized these considerations.

A desire to guide lower courts, while still recognizing the need for finality, was apparent in *Rolling River School Division v Rolling River Teachers' Assn of the Manitoba Teachers' Society*.[51] Chartier JA granted leave to appeal a Queen's Bench decision that set aside an arbitration decision holding that a teacher had been terminated without cause. In deciding whether to grant leave, he purposively compared the leave-to-appeal provisions to the Queen's Bench to the leave-to-appeal provisions to the Court of Appeal, noting that the latter warrant a higher threshold given interests of finality and the general consideration that appeals are not a necessary corollary of decision-making. Accordingly, leave to appeal to the Court of Appeal should only be granted on pure questions of law (or jurisdiction, to use the language of the time[52]), when there is arguable merit (recognizing that meritless appeals are not in anyone's interest[53]), and where the issue is of sufficient importance to a party to warrant an appeal to the province's highest court. This set of considerations accords with the purposes of granting leave in other contexts.[54] He noted that these criteria would rarely be met, and were not for three of four issues raised.[55] But he nonetheless granted leave with

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51 2009 MBCA 38, 236 ManR (2d) 249 ["*Rolling River*"].

52 This was overturned in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 ["*Vavilov*"], subject to controversy as noted by, *e.g.*, Léonid Sirota, "Not Good Enough" *Double Aspect* (20 December 2019), online: <url=https://doubleaspect.blog/2019/12/20/not-good-enough/>.

53 Why the Court of Appeal for Ontario refused to grant an extension of time to appeal a decision in the absence of a "any scintilla suggesting that the appeal has merit", despite a non-prejudicial one-day mistake, in *1250264 Ontario Inc v Pet Valu Canada Inc*, 2015 ONCA 5, [2015] OJ No 1197 at para 7, per Pardu JA, discussed by Mark A Gelowitz in "1250264 Ontario Inc. v. Pet Valu Canada Inc.: Absence of 'any scintilla' of merit means late notice of appeal cannot be filed" *Conduct of an Appeal Blog, Osler Hoskin & Harcourt LLP* (21 January 2015), online: <url=https://www.osler.com/en/blogs/appeal/january-2015/1250264-ontario-inc-v-pet-valu-canada-inc-abse>.

54 See, *e.g.*, Molloy J in *Sahota v Sahota*, 2015 CarswellOnt 6046, [2015] OJ No 2090 (Div Ct) at paras 3-5 ["*Sahota*"], quoting/citing Rule 62.02(4)(a) of the *Rules of Civil Procedure*, RRO 1990, Reg 194, in the context of discussing the criteria for granting leave to appeal interlocutory orders. See also 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, in particular, 256.

55 *Rolling River*, *supra* note 51 at para 13.

respect to the administrative actor purportedly losing "jurisdiction"—a conclusion that was profoundly important in the case, and was also an issue of considerable uncertainty in the pre-*Vavilov* world of administrative law.[56] Indeed, that the appeal was allowed on the merits[57] seems to vindicate the granting of leave to appeal on this point.

This encouragement of finality was also apparent in *Lukács v United Airlines Inc*,[58] a somewhat bizarre case where leave to appeal a Small Claims Court decision was sought. Such appeals are only allowed on questions of law alone, which Chartier JA acknowledged were identified, as the applicant posited that the judge below misinterpreted international treaties related to air travel. However, he held that, while the provisions' meaning had not been conclusively determined by Manitoba appellate courts, they had been considered throughout Canada and the United States and all decisions reached conclusions contrary to the applicant's position.[59] There was accordingly neither legal uncertainty nor a reasonable chance of success that would justify granting leave to appeal. Another proposed ground of appeal was likely a question of mixed fact and law but, even if it was not, was similarly bereft of plausible success.[60]

Finality and access to justice were also apparent in *Meeking v Cash Store*.[61] Chartier CJ concurred with Cameron JA, who upheld the enforcement of an Ontario class proceeding settlement in Manitoba, observing that notice was given to putative class members who had the opportunity to opt-out. Given that the Ontario court had jurisdiction over class members outside Ontario, there was nothing wrong with enforcing the settlement in Manitoba. This furthered class actions' goal of access to justice.[62] However, insofar as a defendant was not part of the Ontario

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56 *Ibid* at para 23; See the discussion in *Vavilov*, *supra* note 52 at paras 65-68.

57 2010 MBCA 32, 251 ManR (2d) 231 at para 35.

58 2009 MBCA 111, 245 ManR (2d) 292 at para 4. This is an unusual case because it was heard by a Queen's Bench judge at first instance rather than a Small Claims Officer. At the time, there was an automatic right of appeal from hearing officers to the Queen's Bench, though in this case the appeal had to proceed before the Court of Appeal given that a Queen's Bench judge heard at first instance.

59 *Ibid* at para 11.

60 *Ibid* at para 15.

61 2013 MBCA 81, 299 ManR (2d) 109.

62 See, *e.g.*, *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, [2001] 2 SCR 534 at para 28, explored in, *e.g.*, Mathew P Good, "Access to Justice, Judicial Economy,

proceedings, it was unfair to enforce the judgment against it due to basic principles of fairness. Binding a party to the results of a proceeding in which it did not participate is generally anathema to procedural fairness.[63]

The need to emphasize finality and the limited role of appellate courts should, of course, not lead to countenancing obvious procedural injustices. And in this vein, in *Interlake Reserves Tribal Council Inc v Manitoba (Minister of Conservation and Climate)*,[64] Chartier CJ was part of a *per curam* panel that set aside interlocutory injunctions enjoining development. Though recognizing the discretionary nature of such injunctions, the Court held the trial judge had manifestly failed to consider the totality of the circumstances when applying the "balance of convenience" from *RJR MacDonald*.[65]

To be sure, at times legal principles and values do come into tension, if not conflict. This was the case in *Soldier v Canada*, where Chartier JA concurred with Steel JA's reasons that upheld a refusal to certify a class proceeding.[66] Steel JA noted that the trial judge erred by concluding that the plaintiffs clearly lacked standing to bring a claim for violations of Aboriginal rights.[67] In many ways, this foreshadowed future Supreme Court decisions in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*[68] and *British Columbia (Attorney General) v Council of Canadians with Disabilities*,[69] which "reopened law's gate" regarding standing.[70] Nonetheless, given the need for class proceedings to be a "preferable procedure" and the trial judge's finding of fact that a class proceeding was not preferable in this case, the Court of Appeal had no basis to overturn the decision. Given the need to respect the cumulative

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and Behaviour Modification: Exploring the Goals of Canadian Class Actions" (2009) 47:1 Alta L Rev 185.

63 This is recognized in principles of *res judicata*: see, *e.g.*, G Spencer Bower & AK Turner, *The Doctrine of Res Judicata*, 2d ed (London: Butterworths, 1969), cited in Walker, *supra* note 28 at 269.

64 2021 MBCA 17, 458 DLR (4th) 16.

65 *Ibid* at para 19, citing *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

66 2009 MBCA 12, 236 ManR (2d) 107.

67 *Ibid* at, in particular, para 59.

68 2012 SCC 45, [2012] 2 SCR 524.

69 2022 SCC 27, 62 BCLR (6th) 213 ["*CCD*"].

70 To use the language of Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44:2 UBC L Rev 255.

certification requirements in *The Class Proceedings Act*[71] and binding Supreme Court precedent regarding the limited role for appellate review on findings of fact,[72] the Court of Appeal could not interfere with the Queen's Bench decision, and thus privileged the virtue of finality.

VI. CONCLUSION: ACCESS TO JUSTICE-INFUSED APPROACH TO PROCEDURE

Access to justice has varying meanings, as noted by scholars such as Trevor Farrow[73] and Roderick Macdonald,[74] and, indeed, the Supreme Court of Canada itself.[75] Some of these definitions are very broad, incorporating philosophical views about substantive justice,[76] preventing legal problems from arising in the first place,[77] and/or analyzing how lawyers practise law.[78] But irrespective of how broadly or narrowly one defines access to justice, it certainly ***includes*** litigation being quicker and entailing less financial expense. Using procedure to facilitate the prompt and inexpensive resolution of civil actions on their merits is thus, other things being equal, a boon for access to justice.[79]

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71 CCSM, c C130, s 4.

72 *Housen*, *supra* note 50 at paras 10-18.

73 See, *e.g.*, Trevor CW Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 ["Farrow 2014"] at 969; Trevor CW Farrow, "A New Wave of Access to Justice Reform in Canada" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) ["Farrow 2016"].

74 Roderick Macdonald "Access to Justice in 2003: Scope, Scale and Ambitions" in J Bass, WA Bogart and FH Zemans, eds, *Access to Justice for a New Century - The Way Forward.* (Toronto: Law Society of Upper Canada, 2005) 19 at 20.

75 *CCD*, *supra* note 69 at para 35.

76 Farrow 2014, *supra* note 73 at 969; Sarah Buhler, "The View from Here: Access to Justice and Community Legal Clinics" (2012) 63 UNB LJ 427; Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46:4 Osgoode Hall LJ 773.

77 See, *e.g.*, Rick Craig, "Public legal education and information (PLEI) in a Changing Legal Services Spectrum" (Spring 2009) 12 News & Views on Civil Justice Reform 9 at 10.

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

79 Farrow 2016, *supra* note 73 at 166; Kennedy Motions to Strike, *supra* note 20 at 86-87.

Do Chartier CJ's decisions indicate such an access to justice-centred approach to civil procedure? By and large, the answer seems to be "yes". The survey of his jurisprudence in this article indicates a willingness to use summary procedures and appellate powers to resolve actions on their merits. At the same time, we also see indication that he does not view the use of procedure to resolve actions on "technicalities" to be a good.

Ultimately, and recognizing that no one will ever agree with any judge's entire body of decisions, Chartier CJ's approach to civil procedure and appellate practice indicates that he values: predictability, guiding lower courts; efficiency, in not taking longer than necessary to resolve actions on their merits; and fairness, ensuring procedure facilitates rather than hinders resolution of actions on their merits, barring exceptional circumstances. These purposes of civil procedure[80] indicate Chartier CJ's cognizance of why this area of law exists.

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80 David Bamford, Trevor CW Farrow, Michael Karayanni, Erik S Knutsen, Shirley Shipman & Beth Thornburg, "Learning the 'How' of the Law: Teaching Procedure and Legal Education" (2013) 51:1 Osgoode Hall LJ 45 at 56.