

LAW AND CONTEMPORARY PROBLEMS

Volume 47

Summer 1984

Number 3

FINALITY AND CIVIL APPEALS—A CANADIAN PERSPECTIVE

GARRY D. WATSON*

I

INTRODUCTION: AN OVERVIEW OF THE CANADIAN COURT SYSTEM

An appreciation of the basic court structure in Canada is a necessary starting point for any discussion of finality and appeals in Canada. There are important differences between the court structures in Canada and the United States. Like the United States, Canada is "blessed" with a dual court system—federal courts and provincial courts. However, the Canadian federal courts¹ are far less important than in the United States. Major constitutional limitations exist as to the jurisdiction which Parliament can grant to the federal courts,² and hence their jurisdiction is narrow and specialized. Essentially it is limited to judicial review of decisions of federal administrative agencies; cases concerning taxation, patents and trademarks, and admiralty; and actions against the federal government. Seen in a national perspective, the caseload of the federal courts is both small, relative to that of the provincial courts, and involves few important issues.

Each province has its own court system. Typically this consists of specialized lower trial courts of limited jurisdiction (small claims courts, criminal courts, family courts and the like), a superior trial court of general jurisdiction, and an

Copyright © 1984 by Law and Contemporary Problems

* Professor of Law, Osgoode Hall Law School, York University, Toronto.

1. There is in fact only one federal court (apart from the Supreme Court of Canada) that is of any significance—the Federal Court of Canada. But this court is really two courts: the Trial Division of the Federal Court of Canada and the Federal Court of Appeal. Federal Court Act, 1970 CAN. REV. STAT. ch. 10 (2d Supp. 1972). Though resident in Ottawa, judges of both these courts travel and sit across the country.

2. In a series of recent cases the Supreme Court of Canada has severely curtailed the jurisdiction of the Federal Court on constitutional grounds, and has refused to recognize any "ancillary" or "pendent" jurisdiction for the court. See Evans, *Federal Jurisdiction—a Lamentable Situation*, 59 CAN. B. REV. 124 (1981); Hogg, *Federal Court Jurisdiction*, 55 CAN. B. REV. 550 (1977); Laskin & Sharpe, *Constricting Federal Court Jurisdiction*, 30 U. TORONTO L.J. 283 (1980).

appellate court. A unique feature of Canadian federalism, and one which greatly surprises Americans, is that the power to appoint the judges of these provincial superior and appellate courts lies, not with the provinces, but exclusively with the *federal* government.³ Finally, at the pinnacle of each provincial court system stands the Supreme Court of Canada. Unlike its American counterpart, this court is a general court of appeal on matters of provincial and federal law from every province (and the federal courts).

It is convenient at this stage to deal briefly with the appellate jurisdiction of the Supreme Court of Canada. The treatment can be brief because, notwithstanding that it is a national court of appeal, its jurisdiction does not present pressing problems related to finality. Prior to 1975, in civil cases a party could appeal to the Supreme Court of Canada from a final judgment of any provincial court of appeal if the amount or value of the matter in controversy was more than \$10,000.⁴ The resulting uncontrolled civil caseload, coupled with a substantial volume of criminal appeals, led to the Court being swamped. In 1975 the statute governing appeals to the Supreme Court was amended. Now appeals to the Court in civil cases are by leave only.⁵ Typically leave will not be granted where the case is of interest only to the immediate parties. To obtain leave it is usually necessary to show that the case raises a question of law of general importance nationally or some issue of public importance such as a constitutional issue, the interpretation of a federal statute, or a conflict between federal and provincial statutes. Where leave to appeal is sought from the Supreme Court it is *not* a precondition that the challenged judgment be a final one: the statutory leave provision permits the Court to grant leave from a "final or other judgment."⁶

In summary, the Canadian system of federalism is one in which federal courts are less important, but one in which all of the major courts in the country (even those that are provincial courts) are staffed by federally appointed judges. The forum for the trial of most important civil cases is the provincial superior trial courts, from which appeals go to the provincial courts of appeal. Appeals are possible beyond this level to the Supreme Court of Canada, a national court of appeal, but only with leave. The principles applied in granting leave to appeal to the Supreme Court are such that the court no longer acts to correct mere judicial error or to resolve errors of law of only local interest. Consequently, for the vast majority of cases the court of last resort will be the provincial court of appeal. (There is an interesting and somewhat unexpected parallel here to the federal

3. Constitution Act, 1967, § 96 (originally the British North America Act, 1867, 30 & 31 Vict., ch. 3, § 96). *See generally* P. HOGG, CONSTITUTIONAL LAW OF CANADA 115-39 (1977).

4. Supreme Court Act, CAN. REV. STAT. ch. S-19, § 36 (1970).

5. *See* ch. 18, 1974-76 Can. Stat. (particularly §§ 3 & 5). Leave may be obtained either from the Supreme Court itself, or from the provincial court of appeal or, in the case of the Federal Court, the Federal Court of Appeal. However, the usual practice is to go directly to the Supreme Court to seek leave. Generally speaking it has been harder to obtain leave from the provincial or federal courts than from the Supreme Court of Canada.

6. Supreme Court Act, CAN. REV. STAT. ch. S-19 *as amended* by ch. 18, 1974-76 Can. Stat. § 5. Where leave is sought from a provincial court of appeal the judgment must be a final one. *Id.* § 38. However, final judgment is defined as: "any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding." *Id.* § 2(1).

court system in the United States. In that system nationally important trial courts are manned by federal judges, with appeals to the courts of appeals being subject to finality requirements. Review beyond this point by the United States Supreme Court is generally discretionary and rarely granted.)⁷

The balance of this article will focus on the appellate process within the provinces and will look at just one province—Ontario. Apart from the author's familiarity with this province there is further justification for this focus. It is Ontario's dominant role in the Canadian legal culture. With one-third of the country's population, Ontario has almost as many people as all the other eight common law provinces combined. The civil-law province of Quebec has a population slightly less than that of Ontario.

To simplify the analysis further, only appeals from decisions arrived at in the High Court of Ontario, which is the superior trial court of general jurisdiction in the province, will be discussed.⁸ No reference will be made to appeals from the several lower trial courts (i.e., county courts, family courts, and small claims courts). Given the population of Ontario and the preeminent role of Toronto as a financial center, the High Court of Ontario (with its fifty judges) is the most important and the busiest trial court in the country. As we shall see, some appeals from High Court decisions are dealt with internally by that court, while others go on to the two appellate courts within the province: the divisional court and the court of appeal. Beyond the court of appeal, as we have already seen, an appeal may be taken to the Supreme Court of Canada, but only with leave.

II

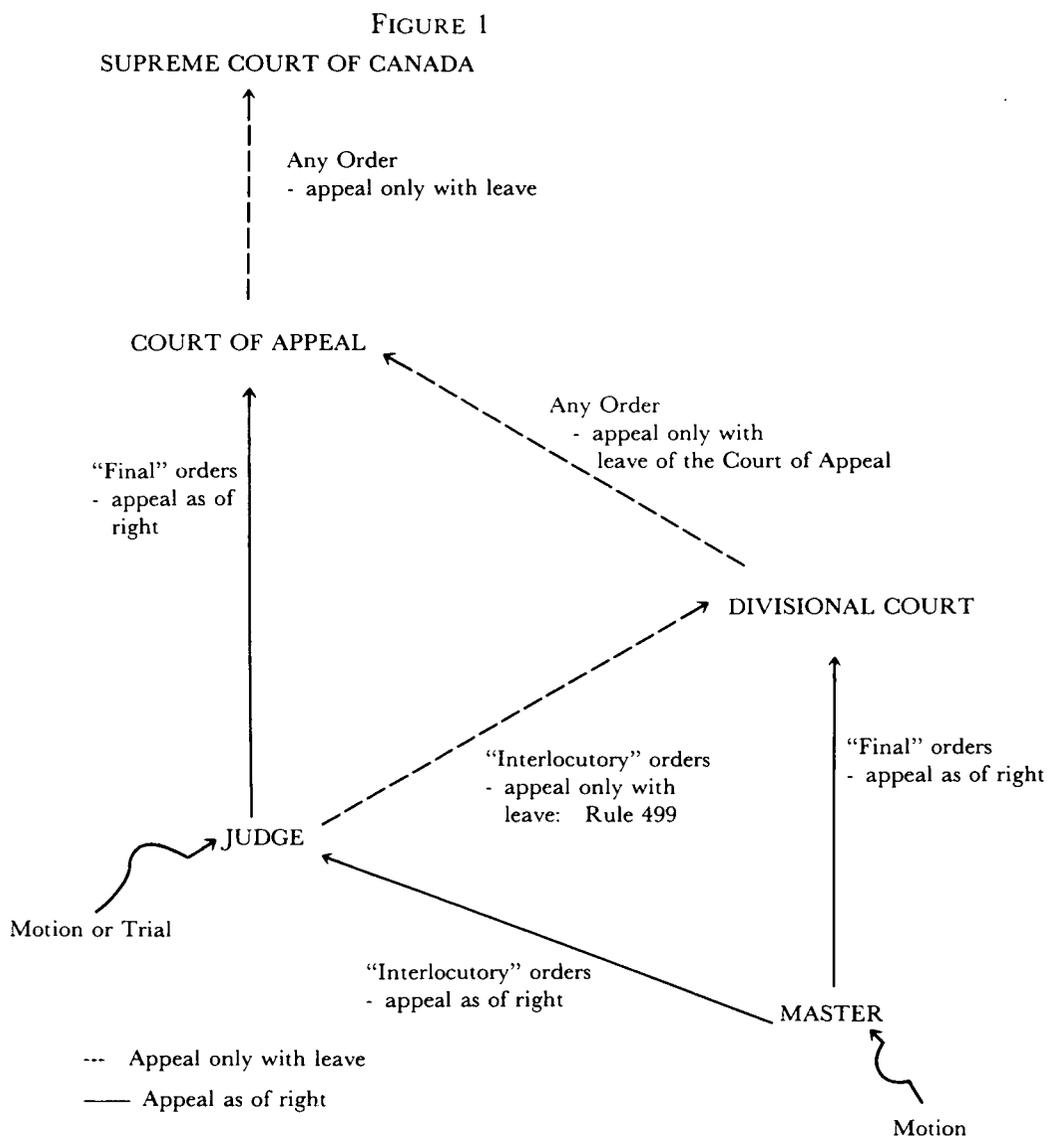
FINALITY AND CIVIL APPEALS IN ONTARIO

A. The Distribution of Business in the High Court of Ontario and the Appellate Structure

Within the High Court of Ontario judicial business is distributed between judges and "masters." The office of master has a long history in Ontario, predating confederation (1867) and originally inherited from England. There are currently more than twenty masters, performing much the same role as their modern English counterparts. While their status is less than that of a judge, they are generally viewed as experienced procedural decisionmakers. Trials are conducted exclu-

7. See 28 U.S.C. § 1254 (1982).

8. The high court is the trial division of "the Supreme Court of Ontario," a court which in fact is composed of three courts: the high court and the two appellate courts (the divisional court and the court of appeal). The Supreme Court of Ontario is a court established by the province, but all of the judges are appointed by the federal government. See *supra* note 3 and accompanying text. The jurisdiction and role of the divisional court and the court of appeal are further elaborated below. The court of appeal consists of fifteen judges. The divisional court is staffed by high court judges usually sitting in panels of three. All judges of the high court reside in Toronto, but since the court sits at some forty centers they go out "on circuit" throughout the province. In Ontario there is another level of trial courts with resident (and federally appointed) judges. These are the county and district courts with jurisdiction in cases involving amounts up to \$15,000, or beyond on consent. Outside Toronto these county court judges, sitting as "Local Judges of the high court," perform much the same role as do masters (see *infra* note 9 and accompanying text) in the hearing of interlocutory motions. See generally *Judicature Act*, ONT. REV. STAT. ch. 223 (1980). *County Courts Act*, ONT. REV. STAT. ch. 100 (1980).



sively by judges. However, the majority of pretrial motions are heard by masters, and only a few particularly important motions (motions to dismiss for failure to state a claim and motions for interim injunctions, for example) are within the exclusive jurisdiction of judges.⁹

9. The distribution of motion jurisdiction between judges and masters is influenced by several policies. The basic policy is to maximize the jurisdiction of masters, in order to make judges available for trial work. Some matters (whether to strike out a jury notice on the ground that the case is too complex to be heard by a jury, for example) are reserved for judges, however, on the basis that they have a special competence to deal with them or because, as noted above, the motions are considered to be of exceptional importance. A further consideration is that the jurisdiction of masters is limited constitutionally. Since they are provincially appointed court officers, not federally appointed superior court judges, they may not be given "judicial functions." See generally *Display Servs., Ltd. v. Victoria Medical Bldg., Ltd.*, 21 D.L.R.2d 97 (1960); P. HOGG, *supra* note 3, at 129-34. The extent of this limitation on their powers is unclear. It is clear that they

What are the rights of appeal from decisions of a judge at trial or from decisions of a judge or master made on pretrial motion? The short answer is that there is always an absolute right of appeal from the decision of a master, but where the decision is that of a judge such a right exists only if it is a final order or judgment. If the judge's order is merely interlocutory, an appeal may be taken only if leave is obtained. A diagram will be helpful in depicting the rights of appeal (Figure 1). As the diagram indicates, the Ontario situation regarding rights of appeal is complicated by the use of two appellate courts.¹⁰ Finality plays an important role in the appellate process, because both the nature of the right of appeal and the court to which appeal lies turn on whether the challenged order is "final" or "interlocutory."

It is important, however, to stress that Ontario has adopted a moderate or intermediate position regarding the role of finality in appeals. Any decision rendered by a master is subject to appeal as of right, whether it is final or interlocutory. (And in this context it must be remembered that most pretrial motions are heard by masters.) Moreover, even an interlocutory order made by a judge is subject to appeal, if leave is obtained.¹¹

Rule 499 of the Ontario Rules of Practice, specifically regulates the granting of leave to appeal from an interlocutory order of a high court judge (whether made by him in the first instance or on appeal from a master). Leave must be obtained from a judge of the high court other than the judge from whose decision the appeal was taken. Rule 499 provides further that

(3) Leave to appeal shall not be granted unless, (a) there are conflicting decisions by a judge or court upon the matter involved in the proposed appeal and it is in the opinion of the judge desirable that an appeal be allowed, or (b) there appears to the judge hearing the application to be good reason to doubt the correctness of the decision or order in question and the appeal involves matters of such importance that in the opinion of the judge leave to appeal should be given.

(4) The judge granting leave shall briefly state his reasons in writing.¹²

The policies underlying the two branches of Rule 499(3) are reasonably apparent. Part (a) is directed towards permitting the law to be settled by an appeal where there is a conflict in the case law. Part (b) is geared towards permitting review of incorrect decisions, provided the matter in issue is of some importance. The case

may not be given power to decide contested cases on their merits (that is, to hear and decide cases at trial). Whether they can constitutionally be given the power to grant interim injunctions (which they have not been given) or to grant summary judgment (which they have been given and have exercised for years) is unclear.

10. Prior to 1971, the situation was much simpler because then all appeals from final orders went to the court of appeal. In 1971 the divisional court was created for two purposes; first (which need not concern us), to exercise jurisdiction in judicial review of administrative agencies, and second, to relieve the workload of the court of appeal. For the statutory basis for the diagram, see the Judicature Act, ONT. REV. STAT. ch. 223, §§ 17, 28 (1980), and Rules 499, 514, and 515 of the Ontario Rules of Practice. Had appeals from local judges of the high court, *see supra* note 8, been included in the diagram, it would further complicate the diagram and the discussion. Nothing is lost by excluding this material.

11. Judicature Act, ONT. REV. STAT. ch. 223 (1980).

12. ONT. R. PRAC. 499.

law adds little to these straightforward provisions. It makes the obvious points that only one part of the rule need be satisfied, not both, and that each part contains two conditions, each of which must be satisfied.¹³ It has been held that the "conflicting decisions" referred to in part (a) must be a conflict between Ontario judges and not between them and foreign courts.¹⁴ It has also been held, however, that a divergence of opinion in different jurisdictions may support leave under part (b) as being indicative of there being "good reason to doubt the correctness of the decision in question."¹⁵ The decision by a judge of the high court granting or refusing leave to appeal is not reviewable and successive applications for leave to appeal are not permitted.¹⁶

B. What Decisions are "Final" for the Purposes of Appeal?

While the finality of an order or judgment does not solely determine whether an appeal lies in Ontario, it plays an important role in the appellate process. Finality is most important where the decision is that of a judge of the high court. If such a decision is characterized as final then there is an appeal as of right to the court of appeal. If it is held to be merely interlocutory, then, before any appeal may be taken, leave of another judge must be obtained under Rule 499. Most of the case law on finality has arisen from motions to quash in the court of appeal on the ground that the decision under appeal is not final and the appellant has failed to obtain leave.¹⁷ The characterization is less important, though still relevant, on appeals from a master; here, it will not affect the party's absolute right to appeal, but it will determine whether the appeal should properly be taken to a high court judge or to the multi-judge divisional court.

The courts have developed, and now apply, a more or less workable test of finality. The test is not, however, the result of any explicit functional analysis of the underlying problem, either by the courts or by academic writers.¹⁸ In formulating a test for determining finality the courts have not attempted to articulate the policies underlying the requirement of finality in the Ontario statutory context, or to use such an analysis explicitly as a means to shape a finality test that is responsive to the underlying policy objectives.

What type of finality rule does such a policy-oriented analysis suggest in the Ontario context? The authors of a leading Canadian casebook on civil procedure have observed two basic policies underlying the finality requirement: an unlimited right to appeal from interlocutory orders gives parties the opportunity to use the expense and delay involved in appeals to protract litigation and harass opponents; and it leads to further overloading of appellate courts.¹⁹ In addition, as

13. See *Gage v. Reid*, 39 Ont. L. R. 52, 53-55 (1917).

14. *Id.* at 54; *Asturiana De Zinc v. Canadian Electrolytic Zinc, Ltd.*, 55 Can. Pat. Rep. 2d 131 (1979).

15. *International Formed Tubes, Ltd. v. Ohio Crank Shaft Co.*, [1965] 1 Ont. 621, 622 (H.C.).

16. *Chesapeake & O. Ry. v. Ball*, 1953 Ont. 877 (C.A.).

17. In addition, today he would be in the wrong court. Formerly, when leave was obtained to appeal from an order made by a judge of the high court, the appeal was to the court of appeal. Since 1971 such an appeal with leave is to the divisional court. See *supra* note 10.

18. The account of the finality rule in the leading textbook is devoid of any functional analysis. See W. WILLISTON AND R. ROLLS, *THE LAW OF CIVIL PROCEDURE* 1031-44 (1970).

19. G. WATSON, S. BORINS & N. WILLIAMS, *CANADIAN CIVIL PROCEDURE*, ch. 6, at 36 (2d ed. 1977).

mentioned earlier, within the Ontario context account needs to be taken of the fact that a decision of nonfinality *does not* deprive a party completely of a right to appeal. An appeal is still available in such cases, if leave is obtained. The criteria in Rule 499 permit leave to be granted where either of the two major purposes of appellate review—the correction of judicial error and the resolution of conflict in the decisional law—are served. Given this policy framework, one might expect the Ontario courts to have developed a narrow finality test. Such a test, one that characterizes few decisions as final, would tend to further the policies of preventing delay and harassment in litigation and reducing the workload of the appellate court. Appeals would still be possible, through the leave mechanism, from orders thus characterized as interlocutory, where a rule of law needed to be settled or dubious decisions had been arrived at on significant issues.

Nevertheless, the type of narrow test formulated by the Supreme Court of the United States (a final decision must generally be “one which ends litigation . . . and leaves nothing for the court to do but execute the judgment”²⁰) has never found favor in Ontario. Ontario courts have not viewed the “determination of litigation” as the necessary criterion, although arguably this could have been both appropriate and acceptable given the statutory framework for appeals in Ontario. Instead the courts have focused on whether the order in question “finally determines the rights of the parties.” This test emerged from the leading case of *Henrickson v. Kallio*,²¹ in which the court of appeal said:

The interlocutory order from which there is no appeal [as of right] is an order which does not determine the real matter in dispute between the parties—the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.²²

The court formulated the test in the following terms:

It seems to me that the real test for determining this question ought to be this. Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion, an interlocutory order.²³

In other words, to be final an order must deal with the merits as opposed to mere procedural rights, no matter how important the procedural rights may be. The test focuses on whether the order under appeal finally disposes of the rights of the parties, in the sense of substantive rights to relief (in the case of a plaintiff) or the right to further contest the claims made (in the case of a defendant). If it does so, the order is final. If it does not, and the parties can return to court to continue their battle, it is interlocutory. Over a wide area the test has a predictable application. Obviously the judgment rendered at trial, disposing of the action, is final. So too are orders which, though made on pretrial motions, terminate the litigation,

20. *Catlin v. United States*, 324 U.S. 229, 233 (1945), cited in 9 J. MOORE, B. WARD & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 110.08[1] (2d ed. 1982). As Moore makes clear, this general test is subject to both case law and statutory exceptions.

21. 1932 Ont. 675 (C.A.).

22. *Id.* at 678 (an action for accounting had been referred to a special referee for trial and an order dismissing an appeal from his report was held final because it determined the merits of the action.)

23. *Id.* at 680 (quoting *Bozson v. Altrincham Urban Dist. Council*, [1903] 1 K.B. 547, 548-49 (C.A.)).

such as orders granting summary judgment,²⁴ dismissing an action for failure to state a claim on which relief could be granted,²⁵ refusing to set aside a default judgment,²⁶ or striking out a defense.²⁷ Also, applying the test makes it equally clear that orders refusing to grant summary judgment,²⁸ or refusing to dismiss for failure to state a claim,²⁹ or setting aside a default judgment³⁰ are interlocutory, because they do not determine the substantive rights of the parties but leave them to be resolved by subsequent adjudication. In addition, one could list many other orders that are clearly interlocutory because they do not finally determine any rights, for example, orders as to discovery rights between the parties, or orders striking out jury notices or granting a change of venue.³¹

Recently the court of appeal prevented a "breakaway" redefinition of the finality test in disapproving a lower court formulation that would have characterized orders as final if they resolved a "substantial issue" between the parties.³² The court of appeal pointed out that "procedural matters may well raise substantial issues without raising substantive rights."³³ The *Hendrickson* test, which the court reaffirmed, is not concerned with whether an order resolved a substantial or important issue, but with the impact of the order in question on the litigation: whether it finally determines the substantive right of the plaintiff to relief or of the defendant to contest the claim. Also, in other contexts, the court of appeal has made it clear that the *Hendrickson* test is concerned with the legal effect of the order, and not its likely impact in fact. Hence, the court has declined to hold that orders refusing or granting an interim injunction are final simply because as a practical matter they may determine the real *lis* between the parties.³⁴ Similarly, orders appointing receivers are interlocutory, notwithstanding the gravity of the remedy.³⁵

24. *Industrial Int'l Leasing, Ltd. v. Macaroni Machine, Ltd.*, 13 Ont. 2d 555 (H.C. 1976).

25. *Ainsworth v. Bickersteth*, 1947 Ont. 525 (C.A.).

26. *Bennington Dev., Ltd. v. Cohen*, [1966] 2 Ont. 837 (H.C.); *Broadhead v. Rutman*, [1966] 2 Ont. 834 (C.A.); *Yepremian v. Fitzsimmons*, 3 *Carswell's Practice Cases* [C.P.C.] 345 (Ont. H.C. 1977) (order refusing to set aside default judgment, "without prejudice to a further application by the defendant on other grounds," still held to be final).

27. *Four Seasons Travel v. Laker Airways*, 6 Ont. 2d 453 (Div'l Ct. 1974).

28. *Harrington v. Harrington*, 23 Ont. W. N. 633 (Div'l Ct. 1923).

29. *See Ainsworth v. Bickersteth*, 1947 Ont. 525 (C.A.).

30. *Shoolbred v. Reliable Trans., Ltd.*, 1959 Ont. W.N. 356 (C.A.); *Roblin v. Drake*, 1938 Ont. 711 (C.A.).

31. *See* 3 G. HOLMESTED AND G. GALE, *ONTARIO JUDICATURE ACT AND RULES OF PRACTICE* Rule 499, §§ 15-31 (1982); W. WILLISTON & R. ROLLS, *supra* note 18, at 1033-37.

32. *Pearl & Russell, Ltd. v. Vanbots Constr., Ltd.*, 15 Ont. 2d 265 (C.A. 1977) (disapproving the language used—though not, it is submitted, the result arrived at—in *Denton v. Jones*, 13 Ont. 2d 419, (C.A. 1976), in which an order refusing to grant the addition of a claim for trespass in a dental malpractice action originally pleaded in negligence was held to be final).

33. *Pearl & Russell, Ltd. v. Vanbots Constr., Ltd.*, 15 Ont. 2d 265, 267 (C.A. 1977).

34. *Pitts v. Hawthorne*, 13 C.P.C. 178 (Ont. Div'l Ct. 1979) (order granting interim injunction held to be interlocutory); *Ontario Medical Ass'n v. Miller*, 2 C.P.C. 125 (Ont. C.A. 1976); *Chesapeake & O. Ry. v. Ball*, 1953 Ont. 877 (C.A.) (orders refusing interim injunctions held to be interlocutory).

35. *Wardlaw v. Whittaker* [1970] 1 Ont. 86 (C.A.); *McCart v. McCart*, 1946 Ont. 729 (C.A.).

It should be noted that in Ontario, unlike in England, *see* Supreme Court Act, 1981, ch. 24, § 18(1)(h)(iii), and the United States, *see* 28 U.S.C. § 1292(a) (1982), there is no special statutory provision making orders relating to injunctions or receivers in effect final for the purposes of appeal. In Ontario there is a similar, limited statutory provision making orders resulting from applications for interim injunctions in labor dis-

It would be wrong, however, to create the impression that Ontario has adopted a clear, single test for determining finality that is applied easily and consistently across the board. In a number of areas there is confusion and uncertainty³⁶ and there are decisions which are difficult to reconcile.³⁷

The balance of this survey of the Ontario law on finality will look briefly at the two major areas which have caused the court difficulty: orders that do not dispose of litigation but which deprive a party of the right to proceed on certain claims or against certain parties, and orders involving strangers to the litigation. In conclusion, the experience in the United Kingdom will briefly be discussed.

C. Orders Regarding Multiple Claims and Parties

The problem, well familiar to Americans,³⁸ of the applicability of finality requirements to claims involving multiple claims and multiple parties, seems now to have been settled in Ontario through a particular application of the *Hendrickson* test.³⁹ The issue here is whether an order that, without disposing of the litigation, deprives a party of the right to proceed with a particular claim or to join a particular defendant in the litigation, is final or interlocutory? Initially, in a very early case predating the emergence of the *Hendrickson* test, the court applied a *res judicata* analysis in holding that an order denying a defendant the right to bring third

putes final, in effect, with an immediate right of appeal to the court of appeal. Judicature Act, ONT. REV. STAT. ch. 223, § 20(9) (1980).

36. The courts have often commented on the confusion among the authorities, and one court of appeal judge has even said recently that, "this question of final and interlocutory is so uncertain that the only thing for practitioners to do is to look up practice books and see what has been decided on the point." *Delaney Boatlines v. City of Barrie*, 2 C.P.C. 103, 104-05 (Ont. C.A. 1976) (quoting *Salter Rex & Co. v. Ghosh* [1971] 2 Q.B. 597, 601). This overstates the problem. On the one hand there is uncertainty and confusion, but on the other hand the courts have evolved (though they sometimes seem not to recognize it) a workable test. The confusion in the authorities is attributable to several factors, each of them familiar to any common law lawyer. First, growing pains were experienced in formulating the test and applying it consistently, leaving a number of inconsistent cases which remain undisturbed. Second, too often courts have failed to consider relevant authorities in arriving at their decisions. (Both of these factors are reasons why "looking at the books" to see what has been decided may be unhelpful or dangerous.) Third, insufficient attention is being paid to underlying policy. It can be argued that the courts have not given appropriate recognition to the fact that in Ontario there *are* avenues of appeal from interlocutory orders, and this should have led them in some areas to be slower to hold orders to be final.

37. The present court of appeal has itself contributed to the confusion. For example in *Top Banana, Ltd. v. Foodcorp, Ltd.*, 32 Ont. 2d 289 (C.A. 1981) the court held that an order made on an "originating" motion (a type of law suit, in and of itself), rather than on an "interlocutory" motion, was for that reason a final order, without reference to its own decision in *Pearl & Russell, Ltd. v. Vanbots Constr., Ltd.*, 15 Ont. 2d 265 (C.A. 1977), in which it held an order made on an originating motion to be interlocutory. *See also infra* text accompanying note 60.

For a further example of confusion, see *Bank of Nova Scotia v. Schussler*, 28 Ont. 2d 161 (H.C. 1980) (holding an order granting leave to discontinue to be interlocutory because the plaintiff had not yet filed a notice of discontinuance, without reference to *Ainsworth v. Bickersteth*, 1947 Ont. 525 (C.A.), which held that an order striking out a claim was final notwithstanding that it was issued with leave to amend, or *Yepremian v. Fitzsimmons*, 3 C.P.C. 345 (Ont. H.C. 1977)).

38. *See* 9 J. MOORE, B. WARD & J. LUCAS, *supra* note 20, ¶ 110.09. Under Rule 54(b) of the Federal Rules of Civil Procedure, in actions involving multiple claims or multiple parties a district court may, in its discretion, permit an appeal from an order that finally determines one or more, but fewer than all claims, or that finally determines a claim with respect to one or more but fewer than all the parties. The foundation of this rule is that in the United States such orders are interlocutory, not final.

39. *See supra* text accompanying notes 21-31.

party proceedings was merely interlocutory.⁴⁰ It was not final, the court reasoned, because the order had no *res judicata* affect and the defendant was free to assert his claim in another action.⁴¹ Subsequently, the courts have ignored or rejected such a *res judicata* analysis, and have instead looked at the issue in terms of whether the order finally determines the right of a party to claim relief in *this* litigation.⁴² If so, the order is final. Consequently the courts now appear⁴³ to be consistently holding that orders striking out claims, counterclaims and defenses,⁴⁴ or refusing to add claims,⁴⁵ additional defendants⁴⁶ or third or subsequent parties,⁴⁷ are final. By contrast, orders adding parties are interlocutory since they do not finally determine rights, but leave them to be determined in the ongoing litigation.⁴⁸ In so resolving these issues the Ontario courts, unlike their United States counterparts, have not concerned themselves with the problem of piecemeal adjudication or appeals.⁴⁹ Moreover, the results achieved are different. While in

40. *Self v. City of Toronto*, 12 Ont. W.R. 705, 706 (C.A. 1908).

41. *Id.* at 706.

42. In *Stabile v. 414582 Ontario Ltd.*, 34 Ont. 2d 52, 55 (H.C. 1981) (The argument that to be final an order must render the issues in dispute between the parties *res judicata* was specifically rejected). Cf. 9 J. MOORE, B. WARD & J. LUCAS, *supra* note 20, ¶ 110.08[1] (citing United States authority to the same effect).

43. Whether these questions are clearly settled depends upon the proper interpretation of two court of appeal decisions and how the court will subsequently apply them. If in *Pearl & Russell, Ltd. v. Vanbots Constr., Ltd.*, 15 Ont. 2d 265 (C.A. 1977), the court was disapproving the result, as well as the reasoning, in *Denton v. Jones*, 13 Ont. 2d 419, 1 C.P.C. 65 (H.C. 1976), see *supra* note 32 and *infra* note 45, then confusion results. The resulting confusion is even greater if the court's decision in *Smerchanski v. Lewis*, 30 Ont. 2d 370, 18 C.P.C. 29 (C.A. 1980) is to be read as meaning that an order adding a stranger is final. See *infra* text accompanying notes 60 and 48.

44. *Delaney Boat Lines v. City of Barrie*, 2 C.P.C. 103 (Ont. C.A. 1976) (order striking out a counterclaim, without prejudice to a separate action, held final because the right of the defendant to recover in this action disappeared as a result of the order). See also the following non-multiple-claim cases: *Four Seasons Travel v. Laker Airways, Ltd.*, 6 Ont. 2d 453 (Div'l Ct. 1974) (order striking out defense); *Ainsworth v. Bickersteth*, 1947 Ont. 525 (order striking out statement of claim).

45. *Denton v. Jones*, 13 Ont. 2d 419, 1 C.P.C. 65 (H.C. 1976) (order refusing leave to add a claim for trespass in a dental malpractice action originally pleaded in negligence). The reasoning in *Denton*—that the order was final and appealable because it raised a "substantial issue"—has since been overruled. *Pearl & Russell, Ltd. v. Vanbots Constr., Ltd.*, 15 Ont. 2d 165 (C.A. 1973). It is submitted, however, that the actual decision is sound.

46. *Frederick v. Aviation & Gen. Ins. Co.*, [1966] 2 Ont. 356, 361-62 (C.A.) (order denying D1 the right to join D2 as a necessary party held to be final because it finally determined D1's rights against D2 in the litigation). *Bryson v. Kerr*, 2 C.P.C. 46 (Ont. Div'l Ct. 1976) (order refusing to add a party defendant on the ground that claim was statutory, held final following *Frederick*). Two earlier decisions holding orders refusing to add persons as parties defendants to be interlocutory orders, though not referred to in *Frederick*, would no longer appear to be good law. *Chillingworth v. Cook*, [1949] 2 D.L.R. 140 (C.A.), 1949 Ont. W.N. 124, *Boston Law Book Co. v. Canada Law Book Co.*, 43 Ont. L.R. 233 (C.A. 1918). See Annot., 1 C.P.C. 63 (1976).

47. *Genier v. Commercial Credit Corp.*, 11 Ont. 2d 493 (H.C. 1976) (order striking out a third party notice); *Khalil v. United Inv. Servs., Ltd.*, 11 Ont. 2d 707 (Div'l Ct. 1975) (order refusing leave to issue third and fourth party notices held final because it denied the parties the right to assert these additional claims in the litigation) (citing *Frederick v. Aviation & Gen. Ins. Co.*, [1966] 2 Ont. 356); *Binkley v. Matera*, [1973] 1 Ont. 386 (C.A.) (order refusing to extend time for service of third party claim).

48. *Meadow Woode Corp. v. Eurasia Realty Inv., Ltd.*, 1 C.P.C. 62 (Ont. Div'l Ct. 1976). An earlier contrary decision by the court of appeal, *Zerker v. Jeffers*, 1950 Ont. W.N. 597, 600 (C.A.) (order permitting joinder held to be final by analogy to *Guaranty Trust Co. v. Fleming*, 1946 Ont. 31 (C.A.), in that it was a decision between a party and a stranger), was not followed in *Meadow Woode* and would appear no longer to be a reliable precedent. See Annot., 1 C.P.C. 63 (1976) (suggesting that *Zerker* is no longer reliable authority).

49. The Ontario Courts have not, in fact, drawn any distinction between multiple claim or party cases

Ontario orders striking out claims or refusing joinder are final, such orders are interlocutory in multiple claim or party situations in the United States, albeit appealable with leave of the trial court.⁵⁰

D. Orders Regarding Strangers

In their handling of cases where the order appealed from involves a nonparty (a stranger to the litigation) the courts have abandoned the *Hendrickson* test, or at least have applied it in a different way. The result is that orders, which would be interlocutory if made between the parties, may be final if they affect persons who are not parties to the action. Most of these cases have involved orders concerning discovery against nonparties. Orders pertaining to discovery *as between parties* (e.g., as to who may be deposed, questions as to the scope of the examination or as to the producibility of documents) are, under the *Hendrickson* test, clearly interlocutory.⁵¹

This is not so where discovery is sought against a nonparty. In the leading case of *Guaranty Trust Co. v. Fleming*,⁵² the defendant sought to examine for discovery (depose) a person who was technically a nonparty,⁵³ the former president of the bankrupt corporation on whose behalf the action was brought. The master and the high court judge on appeal both upheld the defendant's right to examine the nonparty. On a further appeal by the nonparty, the court of appeal held that the order made below was final. The court conceded that as between the parties the order was clearly interlocutory, for it determined none of the real issues in the litigation as between them. But the stranger, the court reasoned, was unconcerned with those issues and he raised an entirely different issue, one personal to him; that the defendant had no right to bring him, a stranger to the action, before an examiner and make him answer questions. As against him the order was final.⁵⁴

Guaranty Trust may well be a classic example of a hard case making bad law. The court of appeal made it quite clear that it viewed the underlying decision as wrong, and ultimately so decided.⁵⁵ But the high court judge, from whom leave to appeal the decision had been sought as an interlocutory order, had refused leave. The court of appeal was apparently not prepared to accept the result that it must deny review of a decision that was, in its opinion, clearly wrong. It can be argued that the *Guaranty Trust* case is evidence of the Ontario Court of Appeal's failure to see the finality issue, and its own role, in the overall context of the statutory appellate scheme. The nonparty would not have been without appellate relief even if the order against the nonparty had been characterized as interlocutory. As this very case demonstrates he had an absolute right to appeal from a master to a high court judge, and he could then appeal beyond the high court, if he could obtain

and nonmultiple claim or party cases. See cases cited *supra* notes 44-48. *Contra* 9 J. MOORE, B. WARD & J. LUCAS, *supra* note 20, ¶ 110.09.

50. See *supra* note 38.

51. Surprisingly there appears to be no Ontario case to this effect, though it is undoubtedly the law.

52. 1946 Ont. 817 (C.A.).

53. Under Ontario practice at present, nonparties are generally not subject to being examined for discovery (deposed), although this will change when new rules come into effect in January 1985. See ONT. R. CIV. P. 31.10. Production of documents, however, can be ordered from strangers to the litigation.

54. *Guaranty Trust*, 1946 Ont. at 822-23.

55. *Id.* at 824.

leave of a high court judge (which in this case was refused).⁵⁶ A consequence of any system that limits rights of appeal is that there may occur decisions which, in the opinion of the appellate court, are wrong but which it cannot review.⁵⁷ This is the price we pay for the advantages, such as the avoidance of the delay and expense involved in appeals, that flow from restrictions on reviewability. If such appellate schemes are to operate effectively, it is important to develop reasonably clear and workable rules as to reviewability. If courts manipulate and bend the criteria for determining reviewability in order to reach individual bad cases, we pay another price: widespread confusion and litigation over the issue of finality itself. In terms of the policies surrounding the finality issue, there was no compelling reason for treating the particular order in *Guaranty Trust* as anything other than interlocutory. Important decisions are often arrived at in litigation, which, notwithstanding their importance, are merely interlocutory. Some such orders will affect parties and some will affect strangers. Typically they will have their most serious impact on the parties. The mere fact that an order affects a nonparty is no reason, per se, for holding the order to be final.

The exception has caused confusion,⁵⁸ but has been recognized or applied in a variety of cases involving discovery against nonparties.⁵⁹ One of them, the recent case of *Smerchanski v. Lewis*,⁶⁰ is extraordinary. In that case the court of appeal held that an order, made in midtrial, quashing a subpoena duces tecum directed to a nonparty, was a final order and immediately appealable by the *plaintiff*.⁶¹ In a number of respects the *Smerchanski* decision is unsatisfactory. At a minimum the decision was simply unnecessary. There are strong policy arguments against any rule which allows for an immediate appeal from rulings or orders made in midtrial. When the person adversely affected by the order is a nonparty, and hence cannot appeal from the final judgment in the action, other considerations come into play, particularly where a claim of privilege is denied and the stranger is ordered to produce.⁶² That, however, was not the situation in *Smerchanski*. With respect to the appellant-plaintiff, who was a party to the action, the ruling was no

56. *Id.* at 817.

57. It is hoped that these can be kept to a minimum, through a mechanism like the leave provision that exists in Ontario, for example. See *supra* text accompanying note 15 (discussion of Rule 499(3)(b)).

58. *Zerker v. Jeffers*, 1950 Ont. W.N. 597 (C.A.) (arguing, following *Guaranty Trust*, that an order adding a person as a defendant was final because it was made against a stranger). In a later case, however, this decision was not followed. The court concluded that such an order was interlocutory against the new defendant because he could still defend on the merits. *Meadow Woode Corp. v. Eurasia Realty Inv., Ltd.*, 1 C.P.C. 62 (Ont. Div'l Ct. 1976). But see *Smerchanski v. Lewis*, 30 Ont. 2d 370, 18 C.P.C. 29 (Ont. C.A. 1980).

59. *Raponi v. Cramer*, 32 Ont. 2d 278 (H.C. 1981) (order refusing to order a third party to produce medical reports held final); see *Herman Deputy Att'y-Gen.*, 26 Ont. 2d 520 (C.A. 1979); *Kampus v. Bridgeford*, 25 C.P.C. 169, 173 (Ont. C.A. 1982). *Kampus* concerned an order directing a medical insurer to produce claim cards. The court acknowledged that an order against a stranger to the action is usually treated as final, but concluded that in this case the medical insurer was "in the nature of a party to the action." *Id.*; see also *Frischke v. Royal Bank*, 17 Ont. 2d 389, 396-97 (C.A. 1977) (in-trial order that a stranger divulge information held to be final on appeal by the stranger who was subsequently added as a party).

60. 30 Ont. 2d 370, 18 C.P.C. 29 (C.A. 1980).

61. *Id.* at 378, 18 C.P.C. at 38.

62. This is better dealt with by a rule such as that in *Alexander v. United States*, 201 U.S. 117 (1966), treating the order for production as interlocutory, but viewing a subsequent contempt order, should the

different from any other ruling at trial as to the admissibility of evidence, a ruling which could be reviewed on an appeal from the final judgment, with the same benefits and drawbacks as any post-judgment review of evidentiary rulings. The court should have addressed itself to the question it has asked in other contexts: did the decision finally determine the appellant's rights? The answer is that it did not. Applied literally, *Smerchanski* would make all orders involving nonparties final orders. The decision has already led lower courts to the conclusion that an order *refusing* pretrial production of documents from a stranger is final.⁶³

E. Scope of Review of Interlocutory Orders on Appeal from Final Judgment

One further aspect of finality on appeals in Ontario calls for comment. When seized with an appeal from the final judgment in a case, what is the scope of appellate review with regard to issues decided earlier in the litigation and disposed of by interlocutory order? The court of appeal has taken a position on this issue that appears to be considerably narrower than that adopted by the U.S. federal courts.⁶⁴ It has held, in effect, "once interlocutory, always interlocutory," and that on an appeal from the final judgment the correctness of an interlocutory order may not be reviewed, unless leave to appeal and the necessary extension of time for appeal have been obtained.⁶⁵ This means that a direct appeal from an interlocutory order, albeit for which leave must be obtained, is the exclusive appellate remedy. It is not open to a party to raise the issue of the correctness of an interlocutory order as a ground for appeal on the review of the ultimate decision in the case.⁶⁶

III

FINALITY AND CIVIL APPEALS IN ENGLAND: A COMPARATIVE PERSPECTIVE

Since the purpose of this article is to give a comparative perspective, it may be of interest to add a brief postscript on the situation in England. This subject is not totally unrelated to the Ontario experience, since in procedural and other matters English authorities are often considered persuasive in Canada. Fortunately, how-

stranger put himself in contempt of the initial order as final. See 9 J. MOORE, B. WARD & J. LUCAS, *supra* note 20, ¶ 110.13[2].

63. *Raponi v. Cramer*, 32 Ont. 2d 278 (1981). See also *Robertson v. Robertson*, 31 Ont. 2d 728 (H.C. 1981) (pretrial order requiring a stranger to disclose information is final).

64. For a discussion of the U.S. position regarding the review of interlocutory rulings on appeal from a final judgment, see 9 J. MOORE, B. WARD & J. LUCAS, *supra* note 20, ¶¶ 110.18, 110.25.

65. *Schiowitz v. I.O.S., Ltd.*, [1972] 3 Ont. 262, 265 (C.A.). In *Schiowitz*, an initial objection to long-arm service had been raised by a defendant and rejected by the court. Subsequently, judgment was granted against the defendant on the merits. On appeal the court declined to hear argument relating to the propriety of the service in the absence of the defendant having obtained leave to appeal the interlocutory order relating to this issue). In *McCart v. McCart*, 1946 Ont. 729 (C.A.), the order under appeal was a dismissal of an application to vary the amount of payment of maintenance with a further order appointing a receiver to collect same. The maintenance order was final and reviewable, but appointment of the receiver was interlocutory and only reviewable with leave.

66. It is unclear what policy interest was served by the decisions cited *supra* note 65, since in both cases the decisions arrived at would require bifurcation of appeals to different courts.

ever, in the area of finality the Ontario courts have declined to follow the lead of the English case law.

In England, judicial business in the high court is distributed between judges and masters in much the same way as in Ontario.⁶⁷ There is an absolute right of appeal from any decision of a master to a judge of the high court.⁶⁸ From a decision of a high court judge an appeal generally lies to the court of appeal, but there are a number of exceptions and qualifications.⁶⁹ For our purpose the restrictions on appeals from interlocutory orders are the most important. The Supreme Court Act, 1981, provides that no appeal lies to the court of appeal:

(h) without the leave of the court or tribunal in question or of the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by the High Court or any other court or tribunal, except in the following cases, namely—

(i) where the liberty of the subject or the custody, education or welfare of a minor is concerned;

(ii) where an applicant for access to a minor is refused all access to the minor;

(iii) where an injunction or the appointment of a receiver is granted or refused;

(iv) in the case of a decision determining the claim of any creditor, or the liability of any contributory or of any director or other officer, under the law relating to companies;

(v) in the case of a decree nisi in a matrimonial cause, or a judgment or order in an admiralty action determining liability;

(vi) in such other cases as may be prescribed.

(2) For the purposes of subsection (1)(h)—

(a) an order refusing unconditional leave to defend an action shall not be treated as an interlocutory order; and

(b) "education" includes training and religious instruction.⁷⁰

The statute provides further:

Where leave to appeal is sought from the Court of Appeal it may be determined by a single judge of the Court, and no appeal lies from his decision.⁷¹

The statutory scheme for civil appeals in England is straightforward. The same cannot be said, however, of the way in which the courts have handled the question of what orders are final. Over a long period of time two conflicting tests ran through the case law. One of these tests is the same as Ontario's *Hendrickson* test.⁷² In determining finality the court must look at the order under appeal and ask whether that order finally disposes of the rights of the parties. If it does, the order is final; if it does not, then it is an interlocutory order.⁷³ The second, competing, test requires the court to look not at the order actually made but at the nature of the application that gave rise to the order. An order will be held to be interlocutory unless the application to the court was of such a character that

67. See 1 THE SUPREME COURT PRACTICE 1982, at 573 (Order 32, rule 11); cf. *supra* text accompanying note 9. In England the jurisdiction of masters is even broader than in Ontario.

68. *Id.* at 907 (Order 58, rule 1).

69. Supreme Court Act, 1981, ch. 54, §§ 16, 18. A further appeal to the House of Lords is generally available, but only with leave of the Court of Appeal or the House of Lords. See Administration of Justice Act, 1969, ch. 58, § 13(a)(2).

70. Supreme Court Act, 1981, ch. 54, §§ 18(1)(h), 18(2).

71. *Id.* § 54(6).

72. See *supra* text accompanying notes 21-31.

73. See *Isaacs & Son v. Salbstein*, [1916] 2 K.B. 139, 147 (C.A.); *Bozson v. Altrincham*, [1903] 1 K.B. 547 (C.A.). The reason this test is the same as the *Hendrickson* test is that in adopting the test, the Ontario Court of Appeal was following the *Bozson* case. See *supra* note 23.

whatever order had been made, it would have finally disposed of the rights of the parties.⁷⁴ The test is so narrow that it is difficult to see what type of motion, other than the formal motion for judgment at the end of the trial, could lead to a final order. Applying this test has led English courts to the (bizarre) conclusion that orders, made on pretrial motion but which finally terminate the plaintiff's action and put him out of court—e.g., orders dismissing an action as frivolous and vexatious, or as disclosing no cause of action,⁷⁵ or for want of prosecution⁷⁶—are merely interlocutory. This second test was rejected by the Ontario Court of Appeal as early as 1947,⁷⁷ and the editors of the leading English practice text, understandably, state that the first test (the equivalent of the *Hendrickson* test) is the preferable approach.⁷⁸ In its most recent statement on the matter, however, the English Court of Appeal, speaking through Lord Denning, reaffirmed the second test as the one to be followed and applied.⁷⁹

In the recently enacted Supreme Court Act, Parliament took two steps to deal with the problems created by the court's handling of the finality issue. First, the cumbersome worded section 18(2)(a) (reproduced above) amounts to a legislative statement by the Parliament of England that an order granting summary judgment is a final order. Second, possibly because of dissatisfaction with the courts' efforts in determining the question of finality, the Act delegates this function to the Rules Committee.⁸⁰

IV

CONCLUSION

In both Ontario and England, unlike in the federal courts of the United States, the approach is to provide a speedy and relatively uncomplicated, "second-look" appeal from most pretrial procedural orders, through the mechanism of an unrestricted right of appeal to a high court judge from interlocutory orders made by a master. Where a party seeks to appeal beyond the high court judge, finality becomes important but not critical, since in Ontario and England interlocutory orders may be further appealed if leave to appeal is obtained. The existence of this general leave mechanism permits appellate courts in both of these jurisdictions to review interlocutory orders where there is good reason to do so, without having to

74. *Salaman v. Warner*, [1891] 1 Q.B. 734 (C.A.).

75. *Id.*; *Hunt v. Allied Bakeries, Ltd.*, [1956] 1 W.L.R. 1326 (C.A.).

76. *Arnot v. Amber Chemical, Ltd.*, *The Times* (London), May 20, 1953, at 3, col. 2 (C.A. May 19, 1953).

77. *Ainsworth v. Bickersteth*, 1947 Ont. 525 (C.A.).

78. 1 *THE SUPREME COURT PRACTICE* 1982, *supra* note 67, at 929. (Order 59, rule 4). The editors have maintained their position, notwithstanding the decision referred to in the next note.

79. *Salter Rex & Co. v. Ghosh*, [1971] 2 Q.B. 597 (C.A.). This case was the original source of the dictum, *see supra* note 36, that the question of what are "final" and "interlocutory" orders is so uncertain that the only thing to do is to "look up practice books." *Id.* at 601. One suspects that if one did this in England, one would find (a) no cases employing the second test holding any order final, and (b) that in all cases where an order was held final the first test was applied.

80. Supreme Court Act, 1981, ch. 54, § 60(1). This subsection states:

60.—(1) Rules of court may provide for orders or judgments of any prescribed description to be treated for any prescribed purpose connected with appeals to the Court of Appeal as final or as interlocutory.

resort to strained interpretations of, or exceptions to, the concept of final orders. Consequently, the case law they have developed surrounding finality is, on the whole, much more straightforward than that created by the U.S. federal courts.