THE WALKING WOUNDED: FAILURE OF SELF-REPRESENTED LITIGANTS IN 2017 SUPREME COURT OF CANADA LEAVE TO APPEAL APPLICATIONS

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Self-Represented Litigants (SRLs) are persons who appear in court and tribunal proceedings without a lawyer. They are rarely successful at the Supreme Court of Canada. Despite SRLs being the subject of considerable attention as a facet of the "access to justice crisis," this article reports the first statistical quantitative investigation of a Canadian SRL population. This article examines all of the SRL leave to appeal applications at the Supreme Court of Canada in 2017, categorizing them by party type, legal issue, and level of sophistication. No procedural obstacles were identified to SRL participation at the Supreme Court. Instead, the failure of SRLs in Supreme Court proceedings results from the substance of their filings.

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I. INTRODUCTION

Self-Represented Litigants (SRLs) are persons who appear in courts and tribunals without a lawyer. Most public dialogue about Canadian SRLs shares a common narrative:

1. SRL numbers are increasing;
2. SRLs are a family law phenomenon;
3. SRLs do not self-represent out of choice, but because they cannot afford a lawyer;
4. SRLs find the alien and complex character of Canadian law and legal procedure difficult;
5. litigation that involves SRLs is lengthier and more complex, and that stresses already over-taxed Canadian courts; and
6. almost all SRLs are good faith, fair dealing actors, but only a very few are "bad apples" who misuse courts and their resources.

SRLs are part of an "access to justice crisis," though the scope and character of this "crisis" is amorphous. Justice Stratas of the Federal Court of Appeal has recently observed the "access to justice" concept is itself ill-defined, an "abstract principle," and "a vague concept that takes on different meanings depending on the context."[1] The "access to justice crisis" allegedly denies SRLs their court-mediated rights.[2]

Yet, despite all this interest in "access to justice," the "crisis," and an apparently universal emphasis on the allegedly unsatisfied needs of Canadian SRLs, the Canadian SRL population is only weakly characterized and documented. Who Canadian SRLs are, and what they do, is essentially unknown. What supposedly is known largely comes from small population surveys and interviews.[3] These sources are of questionable reliability, and the degree to which this information accurately describes SRLs, or specific SRL subgroups, is unclear. Worse, non-Canadian investigations based on court records contradict much of the Canadian SRL narrative.[4]

Bad data often leads to bad policy. Our limited understanding of who SRLs are, and what they do, may handicap and misdirect Canada's developing response to SRLs who appear before courts and tribunals.

This article is part of a model study (the Project) that demonstrates a methodology to describe a Canadian SRL population and its activities in a statistically reliable manner. The Project's objective is to investigate and characterize SRL candidate appellants who sought to access the Supreme Court of Canada in 2017.

Meaningful investigation of Canadian SRLs almost certainly needs to target individual subgroups. There is no reason to presume, and much basis to reject, that the experiences and

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1 *Bernard v Canada (Professional Institute of the Public Service)*, 2020 FCA 211 at paras 25–26.

2 See e.g. The Right Honourable Beverley McLachlin, "The Challenges We Face" (2007) 40:2 UBC L Rev 819 at 822–23; Beverley McLachlin, "The Legal Profession in the 21st Century" (14 August 2015), online: <www.scc-csc.ca/judges-juges/spe-dis/bm-2015-08-14-eng.aspx>.

3 Reviewed in Part I.A.1.

4 Reviewed in Part I.A.2.

challenges to both SRLs and the court apparatuses would be the same when, for example, an SRL appears in a traffic court to dispute a speeding ticket, as when a parent is embroiled in a decade-long process to manage shared custody of a child with special needs. There is a diversity in knowledge, experience, and capacity that is an inherent aspect of human nature. Yet SRLs are usually described as a monolith.

Focusing on SRL activities before the Supreme Court has both advantages and drawbacks. First, the Supreme Court provides a national sample. That Court potentially draws litigants from all Canadian jurisdictions and courts. Second, Supreme Court SRLs are not limited to any particular litigation subjects, though their dispute activity will naturally be shaped by lower court proceeding events.

A third advantage to studying SRLs active at the Supreme Court is that these appeals follow a specific litigation sequence with discrete and well-defined steps. The materials used and procedures followed by each SRL should be largely the same. That permits "side by side" comparison of individuals who possess common characteristics. The Supreme Court appeal process typically takes under two years, which permits a complete contemporary profile of an SRL population and its litigation. Lower court proceedings provide supplementary information to evaluate these persons and their activities.

The Project's focus largely limits the potential relevance and implications of what is learned about SRL activity and conduct to SRLs who interact with the Supreme Court. SRLs in Canada's highest court are not likely representative of the Canadian SRL population as a whole, and particularly SRLs engaged in trial-level proceedings. These SRLs have already traversed at least two layers of trial and appeal proceedings. That is a filtering process. Supreme Court SRLs may have accumulated some degree of experience. Their perspectives and objectives are also plausibly different, given this population has persisted after at least some degree of litigation failure. Characteristics and conduct of Supreme Court SRLs may nevertheless be *relevant* to SRLs in other litigation contexts.

The first Project paper, "Limitations,"[5] examined what happens when SRLs take their disputes to Canada's highest court. The answer is simple: they fail. SRLs file at least a quarter of new candidate Supreme Court appeals. That amounts to between 100–200 applications per year. Despite that, in the past two decades, only six SRLs have argued their appeals before the Supreme Court.[6] Those appeals were largely unsuccessful. Very few SRL leave to appeal applications succeed.[7] The exception to this dismal record is that the Supreme Court very often grants limitations period time extensions to SRLs, though that "generous approach" applies equally to late leave to appeal applications by represented candidate appellants.[8]

That leads to the next question, and the focus of this part of the Project: why do SRLs meet with so little success when they engage the Supreme Court? Are SRLs blocked or

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5 Donald J Netolitzky, "Enforcement of Leave to Appeal Limitations Periods at the Supreme Court of Canada" (2021) 101 SCLR (2d) 165 [Netolitzky, "Limitations"].

6 *Ibid* at 167–68.

7 *Ibid* at 170–71.

8 *Ibid* at 181–82.

frustrated by Supreme Court procedure and process? Are SRL applications broadly defective, or abusive? Does the Supreme Court simply ignore SRLs?

This article investigates SRL failure by a detailed review of all 125 Supreme Court leave to appeal applications (the "Study Group Applications") filed by SRLs in 2017, including:

1. the pre-Supreme Court background of these matters;
2. characteristics of Study Group Application documents;
3. the parties and litigation subjects encountered in Study Group Applications; and
4. how the effectiveness and sophistication of Study Group Applications as legal documents relates to other characteristics.

This data generates a snapshot of SRL candidate appellant activity in 2017. This article then continues to investigate why SRLs are almost never successful when they engage Canada's final court.

Two background topics ground this investigation:

1. what we know about Canadian SRLs; and
2. gatekeeping of SRL activities in common law high courts.

A. THE CANADIAN SRL PHENOMENON

A consensus narrative has grown about who Canadian SRLs are, why they self-represent in court, what happens to them there, and why. However, things become murky once one scratches below that surface.

1. DESCRIPTIONS OF THE CANADIAN SRL PHENOMENON

Most information about Canadian SRLs comes from surveys of lawyers, judges, court workers, and litigants. Their opinions align on some points, including a high incidence of SRLs in family litigation,[9] and that many SRLs are unrepresented because of the cost of legal

[9] Rachel Birnbaum & Nicholas Bala, "Views of Ontario Lawyers on Family Litigants Without Representation" (2012) 63 UNBLJ 99 at 104 [Birnbaum & Bala, "Views"]; Rachel Birnbaum, Nicholas Bala & Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants" (2012) 91:1 Can Bar Rev 67 at 74–75 [Birnbaum, Bala & Bertrand, "Rise"]; Lorne D Bertrand et al, "Self-Represented Litigants in Family Law Disputes: Views of Alberta Lawyers" 2012 CanLII Docs 74 at 4–5 [Bertrand et al, "Lawyers"]; John-Paul E Boyd & Lorne D Bertrand, "Self-Represented Litigants in Family Law Disputes: Contrasting the Views of Alberta Family Law Lawyers and Judges of the Alberta Court of Queen's Bench" 2014 CanLII Docs 125 at 5–6; John-Paul E Boyd, Lorne D Bertrand & Joanne J Paetsch, "Self-Represented Litigants in Family Law Disputes: Views of the Judges of the Alberta Court of Queen's Bench" 2014 CanLII Docs 127 at 6–7 [Boyd, Bertrand & Paetsch, "Judges"]; Trevor CW Farrow et al, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System* (Toronto and Edmonton: Association of Canadian Court Administrators, 2012) at 15–16, online: *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/docs/2013/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf>; Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants" (May 2013) at 25–26, 32–33, online: <representing yourselfcanada.com/wp-content/uploads/2015/07/nsrlp-srl-research-study-final-report.pdf> [Macfarlane, "Report"].

services.[10] A less common explanation for persons appearing without lawyers is that SRLs are confident they can manage their litigation.[11] Survey respondents broadly agree that SRL matters involve additional cost and take more time to resolve,[12] and that SRLs find legal proceedings difficult and underestimate the challenges posed by court proceedings.[13] Lawyers and judges report represented litigants obtain better outcomes than SRLs, but at an increased expense.[14]

Three authors report direct surveys of SRL populations: Birnbaum et al reported 275 family dispute litigants, 60% of whom were SRLs; Langan reported 35 SRL family dispute litigants; Macfarlane reported 259 SRLs, 60% involved in family disputes.[15] Unexpectedly, Macfarlane's family dispute SRL population were predominately divorce rather than common law partnership disputes, for example in Alberta 85% to 15%, respectively.[16]

These different SRL studies report strikingly different age profiles. The Birnbaum et al SRL population were predominately under 30.[17] Macfarlane's study SRLs were predominately over 40 (77%), with only 3% under the age of 30.[18] Langan's study population exhibit a normal distribution profile centered on ages 31–40.[19]

Birnbaum et al and Langan describe SRLs as a low-income population. Some 85% of Langan's survey SRL respondents had an annual income under $30,000, and half received social assistance.[20] Similarly, a little under 60% of Birnbaum et al's SRL population reported an income under $30,000.[21] However, 60% of Macfarlane's respondents report an income of over $30,000, and 6% over $100,000.[22] Birnbaum et al states that many SRL litigants have limited "education and literacy skills," yet 77% of Macfarlane's population self-report they are professionals, or college or university educated.[23]

One point where lawyers, judges, and SRLs differ is how they evaluate each other's conduct. Lawyers and their clients report judges treat SRLs fairly, or provide SRLs an unfair

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10 Birnbaum & Bala, "Views," *ibid* at 104–106; Birnbaum, Bala & Bertrand, "Rise," *ibid* at 76–77, 92–95; Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30:2 Queens LJ 825 at 832, 861; Bertrand et al, "Lawyers," *ibid* at 4; Boyd & Bertrand, *ibid* at 6; Boyd, Bertrand & Paetsch, "Judges," *ibid* at 7; Macfarlane, "Report," *ibid* at 39–43.

11 Birnbaum & Bala, "Views," *ibid* at 105; Bertrand et at, "Lawyers," *ibid* at 4–5; Boyd & Bertrand, *ibid*.

12 Birnbaum & Bala, "Views," *ibid* at 108–109; Birnbaum, Bala & Bertrand, "Rise," *supra* note 9 at 79; Langan, *supra* note 10 at 833.

13 Birnbaum, Bala & Bertrand, "Rise," *ibid*; Langan, *ibid* at 833, 836; Boyd, Bertrand & Paetsch, "Judges," *supra* note 9 at 12–14; Farrow, *supra* note 9 at 18–19, 58–59, 65–68; Macfarlane, "Report," *supra* note 9 at 50–55.

14 Birnbaum & Bala, "Views," *supra* note 9 at 111–13; Birnbaum, Bala & Bertrand, "Rise," *ibid* at 87–88, but 89 contradicts; Bertrand et al, "Lawyers," *supra* note 9 at 8–12; Boyd, Bertrand & Paetsch, "Judges," *ibid* at 9–10.

15 Birnbaum, Bala & Bertrand, "Rise," *ibid* at 74; Langan, *supra* note 10 at 860; Macfarlane, "Report," *supra* note 9 at 8.

16 Macfarlane, "Report," *ibid* at 25.

17 Birnbaum, Bala & Bertrand, "Rise," *supra* note 9 at 78.

18 Macfarlane, "Report," *supra* note 9 at 27.

19 Langan, *supra* note 10 at 860.

20 *Ibid* at 831, 861.

21 Birnbaum, Bala & Bertrand, "Rise," *supra* note 9 at 77–78.

22 Macfarlane, "Report," *supra* note 9 at 28.

23 Birnbaum, Bala & Bertrand, "Rise," *supra* note 9 at 86; Macfarlane, "Report," *ibid* at 30–31.

advantage.[24] Surveyed judges overwhelmingly report that the treatment SRLs receive from the judiciary is very fair, or fair, but express less confidence in the conduct of lawyers who appear opposite SRLs in court.[25] Most represented and SRL litigants in Birnbaum et al's study population indicate judges treat SRLs "Very Well" or SRLs receive "Good Treatment."[26] The Macfarlane SRL population states the opposite. They report very negative experiences with judges and opposing lawyers, and denounce Canadian judges as escaping discipline justified by their improper conduct.[27] Macfarlane's SRLs found court processes and litigation traumatic.[28]

The demographic profiles of the three Canadian SRL survey populations are quite different. That observation suggests these investigators' sampling captured different groups. So do their investigation methodologies. Macfarlane's sample were volunteers that self-identified as SRLs, and who responded to posters and a website that invited comments.[29] Birnbaum et al conducted field interviews of family law litigants after their court appearances.[30]

To be fair, none of the three SRL survey studies purports to be randomized or quantitative, though Macfarlane calls her sample "effectively randomized as a result of the myriad points of entry" or "highly representative."[31] Birnbaum et al acknowledge issues with their survey methodologies and a need for empirical data.[32]

The available surveys leave many gaps. No criminal, ticket, or licence offence SRL populations were investigated. Instead, study populations are either explicitly limited to[33] or predominately composed of SRLs with family litigation subject disputes.[34] SRL appellate activity was not explored.[35]

Problematic SRL conduct is barely addressed. Judges report SRLs have a higher incidence of personality and anxiety disorders, and mental health issues.[36] Court workers frequently identified mental health issues (70%) and abusive conduct (60%) as challenges when assisting SRLs.[37] Macfarlane eliminated eight individuals from her study as "demonstrating enough emotional instability to indicate that they possibly suffered from a mental illness of some kind," but otherwise appears to presume her SRL survey population were good faith,

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24 Birnbaum, Bala & Bertrand, "Rise," *ibid* at 81–82; Birnbaum & Bala, "Views," *supra* note 9 at 109–11; Bertrand et al, "Lawyers," *supra* note 9 at 9–12.

25 Boyd, Bertrand & Paetsch, "Judges," *supra* note 9 at 10–11.

26 Birnbaum, Bala & Bertrand, "Rise," *supra* note 9 at 81–83.

27 Macfarlane, "Report," *supra* note 9 at 13–14, 91–92, 95–104.

28 *Ibid* at 108–10.

29 *Ibid* at 20. At some point post-publication, Macfarlane revised this document and replaced "highly representative" with "effectively randomized as a result of myriad points of entry." The revised version of the "Report" is found online: <representingyourselfcanada.com/wp-content/uploads/2016/09/srl reportfinal.pdf>.

30 Birnbaum, Bala & Bertrand, "Rise," *supra* note 9 at 73–74.

31 Macfarlane, "Report," *supra* note 9 at 19–20.

32 Birnbaum, Bala & Bertrand, "Rise," *supra* note 9 at 75–76, 94–95.

33 See e.g. Birnbaum & Bala, "Views," *supra* note 9; Birnbaum, Bala & Bertrand, "Rise," *ibid*; Langan, *supra* note 10.

34 See Macfarlane, "Report," *supra* note 9.

35 Farrow, *supra* note 9 at 57 reports 16% of surveyed court workers were from appellate courts but that subpopulation is not reported separately.

36 Boyd, Bertrand & Paetsch, "Judges," *supra* note 9 at 8.

37 Farrow, *supra* note 9 at 18, 63.

fair-dealing actors.[38] Interestingly, part of Macfarlane's Alberta study population were abusive pseudolaw litigants, a fact Macfarlane does not appear to have appreciated.[39]

2. EMPIRICAL DATA RAISES QUESTIONS

Little empirical data exists that describes SRLs and their activities. What is available raises concerns as to whether the Canadian survey investigations are reliable, and more broadly, about what might be described as SRL and SRL litigation stereotypes.

Whether SRL litigation is increasing has been challenged by John Greacen's 2002 review of several US studies.[40] Greacen reports extreme differences in SRL participation by subject matter. For example, over half of California family law subject actions involve SRLs. While that proportion was increasing, SRL involvement in tort and commercial matters was negligible (2–3%) and static.[41] Litigation that involves SRLs is stereotypically described as slow and lengthy. Unexpectedly, Greacen documents family and small claims court appearances where an SRL was involved took less court time, 30% and 49%, respectively.[42] Washington State SRL family matters were much less likely to go to trial, and resolved earlier than if lawyers were involved.[43]

In a 2014 follow-up study, Greacen proposed litigants selectively self-represent or engage lawyers in a calculated manner proportionate to the seriousness of the litigation subject matter. SRLs were most common in small claims matters (91.1%), less frequent in family subject litigation (35.3%), and were uncommon in large civil (11.5%) and motor vehicle injury (6.1%) actions.[44]

An Australian 2012 survey by Richardson et al of Commonwealth SRL research stresses the problem of treating SRLs as a homogenous population, and concludes SRL activities are highly contextual.[45] A further complication is this population often captures persons who were previously represented, who may be receiving information from non-lawyer or lawyer advisors, or who may even be lawyers acting on their own behalf.[46] Similar to Greacen, Richardson et al report large variations in SRL incidence between courts, tribunals, and in

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38 Macfarlane, "Report," *supra* note 9 at 32.

39 Paraclete Edward Jay Robin, "Getting assaulted obstructed nuisanced and intimidated on law courts day 420" (25 April 2012) at 00h:14m, online (video): <www.youtube.com/watch?v=EER4olAYgq8> . The individual in this video, Edward Jay Robin Belanger, is the leader or "guru" of "CERI," a fake church that purports pseudolaw immunizes its members from being subject to Canadian law: see *Meads v Meads*, 2012 ABQB 571 at paras 134–39, 183–88 [*Meads*]. The author is familiar with CERI as an aspect of his professional duties. At this point, CERI's Edmonton-area membership was probably 10–20 individuals. CERI is a particularly aggressive branch of Canadian pseudolaw, and its member have repeatedly sued Canadian judges to enforce their purported claims: e.g. *Potvin v Rooke*, 2019 FCA 285; *Rooke v Williams*, 2020 FC 1070.

40 John M Greacen, "An Administrator's Perspective: The Impact of Self-Represented Litigants on Trial Courts – Testing Our Stereotypes Against Real Data" (2002) 41:3 Judges' J 32 [Greacen, "Impact"].

41 *Ibid* at 33.

42 *Ibid* at 34, see also John M Greacen, "Self-Represented Litigants, the Courts, and the Legal Profession: Myths and Realities" (2014) 52:4 Fam Ct Rev 662 at 667–68 [Greacen, "Myths"].

43 Greacen, "Impact," *supra* note 40 at 34–35.

44 Greacen, "Myths," *supra* note 42 at 664.

45 Elizabeth Richardson, Tania Sourdin & Nerida Wallace, "Self-Represented Litigants: Literature Review" (Melbourne: Australian Centre for Court and Justice System Innovation, 2012), online (pdf): <papers.ssrn.com/sol3/papers.cfm?abstract_id=2713503> [Richardson, Sourdin & Wallace, "Literature"].

46 *Ibid* at 10–11.

different litigation subject domains. The highest frequency was in divorce filings (70%), but also the High Court of Australia (67%), while in the State of Victoria County and Supreme Courts SRLs are only 3% and 4.5% of the litigant population.[47]

A subsequent 2018 report repeats the conclusion that only limited data supports the widespread and plausibly exaggerated perception of an increasing incidence of SRLs in Australian courts and tribunals.[48] Inadequate data limits any conclusion on whether SRLs require more institutional resources, on their degree of success, and whether SRLs cause delay.[49] Richardson et al recommend better and more consistent data collection.

Moorhead and Sefton in 2005 surveyed UK Court records for 1,098 civil and 1,334 family trial proceedings that involved SRLs.[50] Like Greacen, Moorhead and Sefton found a complex profile where the frequency and gender of unrepresented litigants varied widely depending on the dispute subject. Litigants retained counsel for "substantial or complex" disputes.[51] Court data did not substantiate an "explosion in unrepresented litigants."[52] Defendants in certain litigation domains were more often self-represented. However, defendant "non-representation" was often simply "non-participation."[53] The trajectory of matters involving SRLs showed only "minor" differences in both family subject and civil litigation;[54] however, SRLs filed fewer documents, made fewer applications, more often did not attend court or contest litigation, and only rarely conducted appeals.[55]

Several studies challenge the stereotype that SRLs are unable to meaningfully operate in court and interact with the judiciary. Greacen describes a 2007 experiment where court proceedings that involved SRLs were videotaped and then those recordings were replayed for the SRLs to evaluate their understanding of what had transpired.[56] SRLs demonstrated a high level of comprehension. Experiment participant judges and SRLs both rated each other's conduct in a positive manner. The judges in this investigation indicated SRL proceedings required no additional time. Other recent US field studies showed that lawyers provided no benefit in employment insurance claims and where tenants resist eviction.[57]

An interesting theme emerges from non-Canadian attempts to describe SRLs. Investigators suspect that common lawyer, judge, and court worker stereotypes of the typical SRL are distorted by a smaller, highly problematic SRL subpopulation. Greacen suggests

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47 *Ibid* at 24–28.

48 Liz Richardson, Genevieve Grant & Janina Boughey, *The Impacts of Self-Represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice* (The Australasian Institute of Judicial Administration, 2018) at ii, 29–36, online: <aija.org.au/wp-content/uploads/2018/11/10803_SRL_Enviro-Scan-Report_WEB3.pdf> [Richardson, Grant & Boughey, "Impacts"].

49 *Ibid* at ii–iv, 36–51.

50 UK, Department for Constitutional Affairs, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, by Richard Moorhead & Mark Sefton, DCA Research Series 2/05 (London: DCA, 2005) at 7, online: <orca.cf.ac.uk/2956/1/1221.pdf>.

51 *Ibid* at 250.

52 *Ibid* at 60–61, 251–52.

53 *Ibid* at 247–48.

54 *Ibid* at 111–12.

55 *Ibid* at 125–27.

56 Greacen, "Myths," *supra* note 42 at 666–67.

57 Reviewed in Jeanne Charn, "Celebrating the 'Null' Finding: Evidence-Based Strategies for Improving Access to Legal Services" (2013) 122:8 Yale LJ 2206.

SRL stereotypes may be based on worst case scenarios.[58] Richardson et al identify a small population of problematic SRLs: "[P]ersistent litigants or querulous litigants."[59] Moorhead and Sefton, too, report a "striking, though possibly superficial" lawyer and court worker focus on "obsessive" and "vexatious litigants," while judges reported this problem SRL population is comparatively small.[60] UK judges, however, stress these individuals had a disproportionate and disruptive effect.

3. WHO ARE CANADA'S SRLS?

What does all this tell us about Canadian SRLs? Comparatively little. Survey-based research is inherently limited by reporter knowledge, belief, and honesty. There is good reason to conclude that SRLs are a heterogenous population. Their conduct and characteristics are plausibly different in different litigation contexts. Common wisdom concerning SRLs may be an oversimplification. Court staff, lawyers, and judges may very well focus on their worst-case experiences, and under-weigh mundane encounters and SRL matters that resolve on a document-only or settlement basis.

Is any of the usual SRL narrative accurate? Probably, in at least some situations. Greacen, Richardson et al, and Moorhead and Sefton's context-sensitive approach reveals a spectrum of litigation and dispute-related activities that both match and contradict expectations. Are these non-Canadian investigations even relevant? Any answer to that question is really only a guess.

Perhaps the ancient elephant and blind men parable is the best explanation. Individual studies may accurately capture an aspect of the SRL phenomenon, or describe a subpopulation of a larger community. Lawyers and judges in one court plausibly encounter SRLs who are quite different from those in other contexts. SRLs may successfully navigate simple criminal ticket and small debt proceedings, but flounder in more complex litigation. Each SRL brings a unique set of personal strengths and weaknesses to court. To imagine that SRL experiences and outcomes would be uniform defies the diversity of humanity and the variety of legal processes and proceedings.

If correct, then the unfocused survey-based, highly subjective approach employed to date to investigate Canadian SRLs has limited value. Caution should be taken to avoid overbroad conclusions when a study investigates a specific or limited SRL type. The Moorhead and Sefton study provides a superior model. First, collect a statistically valid, objective, and complete profile distilled from reliable documentary sources. With that foundation laid, subjective observations and experiences can be collected, tested, and located within a known and described framework.

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58 Greacen, "Impact," *supra* note 40 at 35.
59 Richardson, Grant & Boughey, "Impacts," *supra* note 48 at iv.
60 Moorhead & Sefton, *supra* note 50 at 79–82, 88–91.

B. HIGH COURT GATEKEEPING PROCESSES EXCLUDE SRLS

Netolitzky's "Limitations" concluded that Supreme Court gatekeeping processes almost always exclude SRL candidate appeals at the gatekeeping leave step.[61] The same pattern exists in the two other jurisdictions where high court SRL activity has been investigated: the US and Australia.

1. CANADA

"Limitations" reviews how since 2000, SRLs have met with only very limited success at the Supreme Court:

- incomplete data indicates SRLs file around a fifth to a third of new candidate Supreme Court appeals, over 100 applications per year;
- SRL leave to appeal applications are rarely granted, at a rate of less than one application per year; and
- six SRLs had full appeals; one appeal was granted where the SRL participated in a meaningful way.[62]

One 2017 SRL leave to appeal application was granted.[63] That appellant was, however, represented by counsel in the subsequent full appeal proceeding.[64] The appeal was dismissed.

About 10% of Supreme Court leave to appeal applications are granted each year,[65] so SRLs are disproportionately unsuccessful at this step. No data explains why these outcomes are so different. No reasons are provided when a leave application is rejected,[66] which is a Supreme Court policy "to preserve our total discretion on the choice of the business that the Court hears."[67]

Several Supreme Court justices have described how the leave to appeal process operates.[68] The Supreme Court may take jurisdiction where a question is of "public importance" due to "the importance of any issue of law or any issue of mixed law and fact," or where otherwise warranted.[69] Justice Sopinka identified a number of "hot buttons" that attract Supreme Court interest:

1. constitutional challenges to legislation, common law, or government practices;
2. when Canadian courts of appeal are in conflict;
3. novel points of law;

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61 Netolitzky, "Limitations," *supra* note 5 at 170–71.
62 *Ibid*.
63 *Mazraani v Industrial Alliance Insurance and Financial Services Inc*, 2017 FCA 80, leave to appeal to SCC granted, 37642 (2 November 2017).
64 *Mazraani v Industrial Alliance Insurance and Financial Services Inc*, 2018 SCC 50 [*Mazraani*].
65 See online: <www.scc-csc.ca/case-dossier/stat/sum-som-2020-eng.aspx>.
66 *R v Hinse*, [1995] 4 SCR 597 at 609 [*Hinse*].
67 Clément Gascon, "Avoir le dernier mot? Mythe ou réalité?" (2017) 58:3 C de D 581 at 586, citing *Hinse*, *ibid* at 609.
68 Gascon, *ibid*; Madam Justice Bertha Wilson, "Leave to Appeal to the Supreme Court of Canada" (1983) 4:1 Adv Q 1.
69 *Supreme Court Act*, RSC 1985, c S-26, s 40(1) [*SCA*].

4. interpretation of federal statutes, or multiple provincial statutes; and
5. Indigenous rights.[70]

More recently, former Supreme Court Justice Gascon disclosed additional factors:

1. the quantum of money at stake "is rarely decisive";
2. the underlying file should be complete and a "good record";
3. anticipated or existing legislative responses are a basis to refuse leave; and
4. the Supreme Court denying leave does not mean its justices agree a lower court decision was correct.[71]

Justice Gascon explained incoming leave applications are first read and summarized by staff lawyers, then independently reviewed by three Supreme Court justices, and sometimes circulated to all court justices.[72] If the full court discusses a leave application, leave is granted if four Supreme Court justices "express their interest to hear the case."[73]

2. THE SUPREME COURT OF THE UNITED STATES

A candidate appellant must submit "a petition for a writ of certiorari" to access the Supreme Court of the United States (SCOTUS).[74] Kevin H Smith in two papers published in 1999 and 2001 examined SCOTUS "*pro se*" (SRL) certiorari applications.[75] Smith reports only a small fraction, about 2%, of all SCOTUS certiorari applications are granted.[76] Successful SRL certiorari applications are very rare.[77] For example, in 1980–1983, only two SRL certiorari applications were successful.[78] Smith investigated random samples of SCOTUS civil certiorari applications that raised an "equal protection issue."[79] The samples had an SRL population of 22.6% and 23.8%.[80] In both studies, no SRL certiorari applications were granted. Smith's 1999 investigation examined whether lack of success correlated with the subject of the SRL appeals.

Rule 10(a) sets the criteria for the SCOTUS to take on a candidate appeal. Certiorari is only granted for "compelling reasons," including where US appeal courts are in conflict, and where a lower court "has decided an important question of federal law" that has not been

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70 Sanda Rodgers, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" (2010) 50 SCLR (2d) 1 at para 13; Eugene Meehan et al, *Supreme Court of Canada Manual: Practice and Advocacy* (Toronto: Thomson Reuters, 2016) at 3:15; D Lynne Watt et al, *Supreme Court of Canada Practice 2019* (Toronto: Thomson Reuters, 2019) at 12–16.

71 Gascon, *supra* note 67 at 585. See also Wilson, *supra* note 68 at 3.

72 Gascon, *ibid* at 586.

73 *Ibid*.

74 Procedures reviewed in Lawrence S Wrightsman, *The Psychology of the Supreme Court* (Oxford: Oxford University Press, 2006) at 59–66. See also Kevin H Smith, "Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Certiorari" (1999) 63:2 Alb L Rev 381 at 395–400 [Smith, "Justice"].

75 Smith, "Justice," *ibid*; Kevin H Smith, "Certiorari and the Supreme Court Agenda: An Empirical Analysis" (2001) 54:4 Okla L Rev 727 [Smith, "Certiorari"].

76 Smith, "Certiorari," *ibid* at 729.

77 Smith, "Justice," *supra* note 74 at 383–84.

78 *Ibid* at 384, n 11, citing Arthur D Hellman, "Case Selection in the Burger Court: A Preliminary Inquiry" (1985) 60 Notre Dame L Rev 947 at 964–65.

79 Smith, "Justice," *ibid* at 386.

80 *Ibid* at 383, n 7; Smith, "Certiorari," *supra* note 75 at 755, n 120.

settled by the SCOTUS.[81] Smith investigated whether SRL certiorari applications mention or meet these criteria. He concluded that SRL applications are less likely to identify conflicting authorities, unsettled law, and dissenting lower court opinions.[82] SRL certiorari applications more often flow from an oral rather than written lower appeal court decision, and in SCOTUS proceedings SRL applications triggered fewer written responses.[83] Smith concluded "frivolous case attributes" were about three-fold higher than for certiorari applications where a lawyer was involved.[84]

Smith therefore rejected that the SCOTUS discriminates against unrepresented persons, an outcome that Smith calls "bias against the poor and powerless."[85] Instead, Smith identified substantive defects in SRL SCOTUS certiorari applications that, in Smith's opinion, confirmed that the Court's pattern of denying access to SRLs was an efficient and appropriate allocation of court resources.

An interesting aspect of Smith's investigation of SCOTUS SRL litigation activity is he plausibly under-reports the true extent to which SRL applications both represent a significant fraction of SCOTUS SRL litigation and SRLs' lack of success. Smith only investigated SCOTUS certiorari applications where the appellant had paid a filing fee. That excluded "*in forma pauperis*" petitions. In Smith's study period, "paid" petitions were successful at a rate about 10-fold higher than "unpaid" petitions.[86] Smith excluded the *in forma pauperis* appellate subpopulation since its low success rate would make statistical analysis difficult.[87]

Around two-thirds of SCOTUS certiorari petitions are *in forma pauperis*, and most are filed by incarcerated indigent prisoners.[88] A substantial portion of these applicants are unrepresented.[89] These observations imply Smith's study underrepresents overall SRL failure at the SCOTUS.

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81 Supreme Court of the United States, "Rules of the Supreme Court of the United States," rule 10, online: <www.supremecourt.gov/ctrules/2019RulesoftheCourt.pdf>.

82 Smith, "Justice," *supra* note 74 at 405–14.

83 *Ibid* at 416–19. SCOTUS certiorari procedures permit written materials in response to leave applications, including by the Solicitor General. David C Thompson & Melanie F Wachtell, "An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General" (2009) 16:2 Geo Mason L Rev 237 at 244 report a significant positive correlation between reply submissions and the SCOTUS granting certiorari and hearing an appeal.

84 Smith, "Justice," *ibid* at 420–21.

85 *Ibid* at 422–24.

86 *Ibid* at 383, n 6. Data presented in Jared S Sunshine, "The Putative Problem of Pestersome Paupers: A Critique of the Supreme Court's Increasing Exercise of Its Power to Bar the Courthouse Doors Against In Forma Pauperis Petitioners" (2018) 46:1 Hastings Const LQ 57 at 131, indicates a higher, approximately 50-fold difference in certiorari petition success.

87 Smith, "Justice," *ibid* at 381, n 2. Smith also excluded "criminal cases" due to their low proportion in his initial study population.

88 Wrightsman, *supra* note 74 at 60; Wendy L Watson, "The U.S. Supreme Court's *In Forma Pauperis* Docket: A Descriptive Analysis" (2006) 27:1 Just Sys J 47.

89 Watson, *ibid* at 52. Watson's certiorari applications pool is dated (1976–1985) and may not be representative of recent SCOTUS litigation. Sunshine, *supra* note 86 at 131 documents a dramatic increase in *in forma pauperis* candidate SCOTUS appellants post-2000.

3. THE HIGH COURT OF AUSTRALIA

The High Court of Australia (HCA) also engages in appeal gatekeeping by a "special leave to appeal" process.[90] The criteria identified by former Chief Justice Mason broadly parallel those applied by the Supreme Court and the SCOTUS. The HCA intervenes where the question is of "public importance," where lower authorities diverge, issues are justiciable, and, generally, as a "law making" function.[91]

The HCA differs from the previous two common law appellate high courts as until 2005 all HCA leave applications received an oral hearing before two judges.[92] The rising volume of special leave applications, particularly from SRLs, first led to fixed duration hearings,[93] and then a mandatory document-based process. SRL leave applications were limited to a maximum of ten pages.[94] In 2016, the HCA further narrowed access to special leave to appeal hearings. Post-2016, an oral hearing is only conducted for any appellant, represented or not, where a two or three judge panel concludes that procedure is warranted.[95]

SRLs are a major component of the HCA's appellant population.[96] Wickham reports that in 2005, the majority of special leave applications (57%, N=720) were from SRLs.[97] A recent detailed investigation by Stewart and Stuhmcke of all special leave applications filed between 2013–2015 reported 46% (N=783) were SRLs.[98] None were granted leave. SRL appellants were most often engaged in civil rather than criminal subject appeals (211 vs 107), but HCA appeals include a large third SRL population with immigration law issues (N=140).[99] In total, 85% of all HCA immigration law special leave applications were by SRLs. Stewart and Stuhmcke observe that the subject matter of immigration law appeals is unlikely to trigger appellate review.[100]

Stewart and Stuhmcke expressed concern over SRLs' failure to access the HCA, and noted that only one 2013–2015 SRL special leave application even resulted in an oral leave hearing.[101] Their study also investigated litigants who received legal aid support. Legal aid candidate appellants had substantial success at obtaining leave, 27.5% (N=40).[102] However, the authors' suggestion that restricted access to legal aid challenges the HCA's ability to deal fairly and efficiently with SRL appeals is undermined by the fact that their study's SRL population was predominately composed of civil and immigration matters (76.6%, N=458), while the study's legal aid population were virtually all criminal appeals (92.5%, N=40).[103]

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90 The Honourable Sir Anthony Mason, "The High Court as Gatekeeper" (2000) 24:3 Melbourne UL Rev 784 at 785–86.
91 *Ibid*.
92 Ben Wickham, "The Procedural and Substantive Aspects of Applications for Special Leave to Appeal in the High Court of Australia" (2007) 28:1 Adel L Rev 153 at 154.
93 Mason, *supra* note 90 at 786–87.
94 Wickham, *supra* note 92 at 154.
95 Pam Stewart & Anita Stuhmcke, "Litigants and Legal Representatives: A Study of Special Leave Applications in the High Court of Australia" (2019) 41:1 Sydney L Rev 35 at 40–41.
96 Richardson, Sourdin & Wallace, "Literature," *supra* note 45 at 24.
97 Wickham, *supra* note 92 at 153.
98 Stewart & Stuhmcke, *supra* note 95 at 46.
99 *Ibid* at 47.
100 *Ibid* at 50–51.
101 *Ibid* at 49.
102 *Ibid* at 52.
103 *Ibid* at 50–51, 70.

4. PATTERNS OF SRL ACTIVITY AT HIGH COURTS.

Access to the Supreme Court, SCOTUS, and HCA is similar: an appellant usually must first seek leave. At present, each of these high courts principally evaluates leave applications via document-based processes. The criteria on which leave is granted are also similar. High courts have broad discretion, but focus on legal questions of general application and where subordinate courts are in conflict. These courts reject their function is to correct errors.[104] Their purpose is to make law.

SRLs are uniformly unsuccessful at the leave stage in all three courts. Smith concluded the SCOTUS rejects SRL certiorari applications because they are frivolous, or fail to meet the criteria that trigger appellate attention. Stewart and Stuhmcke did not investigate why HCA SRL applicants are unsuccessful, so their suggestion that ineffective presentation or argument might be remedied by legal aid is, at best, a hypothesis.

The proportion of SRL leave applications (20–30%) at the Supreme Court seems lower than at the SCOTUS (likely around two-thirds) and HCA (around half). Data collected by Smith and Stewart and Stuhmcke suggests a possible explanation. The SCOTUS receives a very large volume of prisoner SRL applications. Similarly, immigration subject appeals, almost all by SRLs, made up a large proportion (21.5%, n=168) of HCA 2013–2015 special leave applications. Graphs published in the HCA 2015–2016 Annual Report show a strong correlation between the fraction of SRL and immigration matter special leave applications.[105] That observation suggests the HCA's incoming case load is disproportionately one specific type of special leave application: SRL immigration matters. HCA immigration subject applications peaked in 2007–2008, *as almost two-thirds of all HCA leave applications*.[106]

No source that reviews Supreme Court leave applications by subject reports a similar super active subject area.[107]

II. METHODOLOGY

For consistency and ease of reference, leave applications are identified by the last name or organization name of the first appellant and the Supreme Court docket number. Where the appellant(s) are only identified by initials, those initials form the name. For example, "Olumide 37660" refers to the *Ade Olumide v Canadian Judicial Council* leave application assigned Supreme Court docket 37660.

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104 Gascon, *supra* note 67 at 585; Wilson, *supra* note 68 at 3; Smith, "Justice," *supra* note 74 at 387–95; Smith, "Certiorari," *supra* note 75 at 738–43; Wickham, *supra* note 92 at 155–56. Mason, *supra* note 90 at 786 qualifies this and indicates the HCA will engage in error correction in criminal matters to address "a miscarriage of justice," see also Stewart & Stuhmcke, *ibid* at 38–40.

105 High Court of Australia, "Annual Report" at 21, online: <www.hcourt.gov.au/assets/corporate/annual-reports/HCA_Annual_Report_2015-16.pdf>.

106 *Ibid*.

107 See e.g. Matthew Estabrooks et al, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada: The 2016-2017 Term" (2018) 82 SCLR (2d) 101 [Estabrooks et al, "2016-2017"]; Supreme Court of Canada, "02 Applications for Leave Submitted," online: <www.scc-csc.ca/case-dossier/stat/cat2-eng.aspx>.

If a single Supreme Court docket record included multiple Supreme Court leave applications, the individual applications are distinguished by a decimal suffix to the docket number. For example, "Bernard 36834.3" identifies the third leave application in *Elizabeth Bernard v. Canada Revenue Agency*, docket 36834, filed on 29 September 2016.

A. IDENTIFYING LEAVE APPLICATIONS FILED IN 2017 BY SRLS

Candidate 2017 SRL Supreme Court leave to appeal applications were identified via the "Supreme Court of Canada Bulletins of Proceedings" (Bulletins) published weekly by the Supreme Court.[108] Each Bulletin identifies "[a]pplications for leave to appeal filed," which are newly completed leave applications.

Each Bulletin published in 2017 and corresponding online Supreme Court docket records were reviewed.[109] "Applications for leave to appeal filed" with the same name for the appellant and representative were candidate SRL leave applications. Self-representation was confirmed via online Supreme Court docket records.

There were 129 candidate SRL leave applications identified. Electronic copies of "Applicant's Memorandum of Argument"[110] Parts I-V were ordered from the Supreme Court Records branch for each candidate application for leave to appeal.[111]

Four applications were eliminated from the study because these were either filed by a lawyer representing themselves,[112] or the application was prepared and submitted by lawyers.[113] These applications were excluded because this study is intended to investigate how SRLs who are not legally trained professionals operate in and interact with the Supreme Court.

In eight instances, Supreme Court Records was unable to complete the leave application document request. This result flows from two different scenarios.

Four Study Group Applications were subject to a publication ban.[114] Supreme Court Records was not permitted to release the requested leave to appeal documents. These Study Group Applications were included in this study because related lower court decisions were identified and available along with Supreme Court docket records. The Study Group Applications include few family law dispute candidate appeals. Two publication ban matters were divorces.[115] Eliminating the publication ban group could distort the role and character of family subject litigation in Supreme Court SRL appeals.

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108 See online: <decisions.scc-csc.ca/scc-csc/bulletins/en/nav_date.do>.

109 Identified via the Supreme Court Case Information search engine, online: <scc-csc.ca/case-dossier/info/search-recherche-eng.aspx>.

110 The Supreme Court has prepared a "fill in the blank" form version of this document for SRLs, online: <scc-csc.ca/unrep-nonrep/forms-formulaires/application-demande-eng.pdf>.

111 See Supreme Court of Canada, "Request for Court Records," online: <www.scc-csc.ca/case-dossier/rec-doc/request-demande-eng.aspx>.

112 Olfman 35875; Roberts 37653; Lee 37735.

113 Krivicic 37726.

114 Pierre 37639; AH 37661; IJ 37669; VC 37690.

115 AH 37661; VC 37690.

The other four unsuccessful document requests were instances where Supreme Court Records reported no leave application memoranda of argument were on file.[116] In each of these "no application" scenarios, the Supreme Court docket record shows that *something* was reviewed by the Supreme Court, which resulted in a leave application decision. "All materials on application for leave" were submitted to a panel of three Supreme Court justices, who then dismissed or would dismiss each "application for leave to appeal."

For Agostino 37464 and Hammami 37652, the Supreme Court docket indicates only incomplete paperwork was received by the Supreme Court Registry.[117] Docket records imply the Gonzalez 37517.2 documents received by the Supreme Court Registry were not an appeal application, but instead a "writ of Habeas Corpus Ad Subjiciendum" from the appellant.[118] The Supreme Court Registry accepts and files highly irregular documents as leave to appeal applications,[119] despite that section 25 of the *Rules of the Supreme Court of Canada*[120] sets out a mandatory five-part leave application and memorandum of argument scheme, and a 20-page memorandum of argument maximum length.[121]

Supreme Court Records being unable to satisfy the document requests, and the fact Supreme Court justices evaluated some kind of filed materials, implies that whatever these four appellants provided to the Court was so incomplete or non-compliant that, in effect, no *Supreme Court Rules* section 25 application was received.

The Project is generally intended to both examine the ability (and lack thereof) of SRLs to operate at the Supreme Court, and the effect of SRL litigation on the Supreme Court. Given those objectives, the four "no application" Supreme Court matters were included in the study, as they triggered a full Supreme Court leave application review and decision. Otherwise, these filings were classified as generally unsuitable for a meaningful response.[122]

B. THE STUDY GROUP APPLICATIONS AND APPELLANTS

The 125 Supreme Court leave to appeal applications filed in 2017 by SRL litigants form the "Study Group Applications." Initial review of the Study Group Applications identified 123 named leave to appeal applicants: 116 natural persons and seven corporations.[123]

Placid 37558 at first appeared to be an application by a corporation: "Placid Inc." However, review of this highly irregular handwritten application revealed that the applicant

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116 Humby 37394; Agostino 37464; Hammami 37652; Gonzalez 37517.2.

117 See Supreme Court of Canada, "Docket: 37464" (4 May 2018), online: <scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37464>; Supreme Court of Canada, "Docket: 37652" (4 May 2018), online: <scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37652>.

118 See Supreme Court of Canada, "Docket: 37517" (4 May 2018), online: <scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37517>.

119 See Part II.B.

120 SOR/2002-156, s 25 [*Supreme Court Rules*].

121 *Ibid*, s 8 permits Supreme Court judges and the Registrar to each waive compliance with the *Supreme Court Rules*, but also to refuse irregular documents.

122 See Part II.D. The four "no application" matters were assigned a "Sophistication Score" of 1.

123 The number and identity of SRL appellants was determined by the leave to appeal application rather than the Supreme Court docket where those two sources diverge. For example, the Supreme Court docket for Dove 37487 only identifies one appellant, Wally Dove, but the application included three other individuals: Jason Dove, Glenn Bursey, and Michael Bursey, "human beings."

was instead Justin Thyssen Placid, who self-identified as "President of Placid Inc." Placid was involuntarily institutionalized and treated for mental health issues.[124] Placid had, for no obvious reason, titled the leave application as being from a corporation. To the degree to which Placid 37558 might be characterized, its allegations are some kind of medical malpractice proceeding. The corporate veneer in the leave application's language was disregarded.

The corporate co-appellant in Hagan 37747 was excluded from this study because the Supreme Court dismissed an application by Hagan to represent that business. The other five corporations were represented by a natural person co-appellant, or an officer of that corporation, pursuant to *Supreme Court Rules* sections 15(2)–(3).[125]

These remaining 122 individuals are the "Study Group Appellants."

C. STUDY GROUP APPLICATION INVESTIGATION STRATEGY

This study does not attempt to measure the relative merit or potential merit of the grounds for appeal advanced in Study Group Applications. Instead, the data collected are either simple variables, or Study Group Applications were scored using structured five-category indices.[126] This investigation strategy was adopted for three reasons.

First, attempts to evaluate the relative merit of candidate Supreme Court appeals is an inherently, highly subjective exercise. Legal professionals and academics often have very different opinions on what the law is, or should be. This diversity of viewpoints also exists within the judiciary. Comparison of Supreme Court majority and dissenting opinions makes it plain Supreme Court justices often disagree on important legal questions, and social and policy conclusions.

Second, the Study Group Applications are very diverse. Attempts to assign relative merit would not just be subjective, but also potentially involve a range of factors.

For example, some disputes that underpin Study Group Applications were trivial. A student sued a university about a ten-year-old "D" grade in undergraduate English.[127] A landlord sought leave to appeal over a dispute about property line cedar hedge trimming.[128] The trial damages and costs were around $6,000. The Supreme Court was asked "to determine the distance from a cedar tree hedge trunk or roots that is acceptable to plant a garden or install a fence, so as not to disrupt or affect the roots."[129]

Other candidate Supreme Court appeals arguably involve less important subjects, but nevertheless, the emotional basis for why a person would pursue those matters is understandable. Binnersley 37440 involved SPCA seizure of a man's pet dog. Interpersonal

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124 See Supreme Court of Canada, "Summary: 37558" (2 May 2016), online: <scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=37558>.
125 *Supra* note 120.
126 See Part II.D.
127 Amrane 37599.
128 Malhotra 37651.
129 *Ibid* at 31.

conflicts are the underlying emotional foundation for certain disputes. Childs 37808 was an intense conflict between children of an elderly parent over payments to the children for care of that parent. Lubecki 36721 is the latest stage in a 13-year long dispute between a brother and sister over their mother's will.

Sometimes a broader agenda is in play. John "The Engineer" Turmel filed a candidate appeal to challenge Elections Canada's policy to reimburse the costs of mandatory election accounting reports. Turmel is famous (or infamous) as the world's least successful political candidate, having lost 99 Canadian municipal, provincial, and federal election bids.[130] Most of the 16 unsuccessful Supreme Court leave to appeal applications filed by Turmel since 1980 involve election-related issues, but Turmel has also appealed to the Supreme Court his lawsuit against the CBC and the "Dragon's Den" program when Turmel's scheme to replace money with poker chips was ridiculed by that program's "Dragons."[131]

Green 37407 is the fifth of eight Supreme Court leave to appeal applications filed by Martin Green. All relate to Green being expelled from a University of Winnipeg teaching practicum. Green in 2018 uploaded a YouTube video of himself performing an accordion song that describes his "extended pissing match" with the University.[132] The final stanza: "They spent half a million bucks on lawyers' fees, won't they ever get tired of fighting me?"[133]

Certain Study Group matters elicit deep sympathy from the courts. Robert Thomson, a civilian Department of National Defence employee paralyzed and frostbitten in a military aircraft crash, did not receive the same legislated benefits as military personnel who were injured in the same incident.[134] The Federal Court of Appeal denied Thomson's *Charter* section 15 argument,[135] but observed this differential treatment was probably "simply an oversight," and hoped that Thomson's pleas would "be favourably received by the Governor in Council."[136]

A small Montreal startup high-end cigar manufacturer was raided, shut down, had its assets seized, and was ultimately driven into bankruptcy. The trigger was a missing $50 licence fee.[137] The trial court complained it was difficult to understand why the RCMP and other government actors had not advised the startup's owner, "an honest businessman launching a legitimate business," of the missing licence, and instead waited for the business man "to hang himself" by commencing operations.[138] The Federal Court subsequently concluded the response of state actors to this "honest citizen trying to comply … by

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130 Jonathon Gatehouse, "The Biggest Loser: John Turmel is Making His 99th Try for Office this Fall" (9 September 2019), online: *CBC News* <www.cbc.ca/news/politics/election-record-biggest-loser-1.5264087>.

131 Turmel 34482.

132 Martin Green, "Marty vs the U of Winnipeg" (18 October 2018), online (video): <www.youtube.com/watch?v=U7KHEr8TciI>.

133 *Ibid* at 00h:02m:12s.

134 Thomson 37351.

135 *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

136 *Thomson v Canada (Attorney General)*, 2016 FCA 253 at para 44.

137 Orsini 37364.

138 *R c Orsini*, 1999 CanLII 10169 at paras 19–20 (QCCQ).

operating his business with complete openness … was, to say the least, a questionable, if not reprehensible, way to proceed."[139]

Other Study Group Appellants are instead condemned. When Carolyn Hagan[140] attempted to resist collection of nearly $1 million in "loans" extracted from a woman with serious health conditions, including a brain tumour, the Court denounced Hagan's "orchestrated fraud" against a "very naïve" and "excessively vulnerable" target.[141] Hagan's credibility was "totally nil" and her documents were "the most complete rubbish."[142]

Some candidate appeals are excellent examples of legal drafting and argument. Lyson 37520 expertly challenged the standard of review for a tribunal interpreting legislation. The tribunal in question was the Alberta Land Surveyor's Association, and Lyson argued that the body lacked any expertise to interpret the technical surveying-oriented language used in the Alberta *Surveys Act*.[143]

Mental health factors are sometimes in play. Maria Ranieri "with the most unmistakable immortal red lit diamond eyes" challenged her criminal prosecution.[144] She is the "Roman Empress" and is outside Canadian law "by virtue of her sole exclusive birthright, the sole owner of the 'Triple Crowns' which represent the sole authority exclusive ownership and control of planet Earth in it's entirety."[145] Ranieri's other Study Group Application rejects her being diagnosed as a schizophrenic, and instead complains of a conspiracy between the RCMP and hockey player Paul Coffey, the latter who "displayed serious romantic interest in the applicant."[146]

These examples only hint at the diversity of appeal subjects and grounds found in the Study Group Applications. The relative merit of the legal and factual arguments advanced in these candidate appeals is not readily weighed and reduced to a simple, reliable, objective index.

Finally, these are candidate Supreme Court appeals, so the usual rules by which an investigator might evaluate potential litigation merit do not apply. If this study investigated trial proceedings, then litigation could be safely classified as a forlorn hope where a claim was clearly contrary to binding jurisprudence from a higher court. That principle does not apply to the Supreme Court. Instead, the Supreme Court is the forum where a litigant may potentially seek and receive the impossible. That Court has the jurisdiction to rework the law as it sees fit.[147] Attempts by the investigator to evaluate an unusual or novel argument or rule are too uncertain.

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139 *CC Havanos Corp (Re)*, 2002 FCT 941 at para 72.
140 Hagan 37747.
141 *Van Nostrand c Hagan*, 2015 QCCS 2509.
142 *Ibid* at paras 61, 65.
143 RSA 2000, c S-26.
144 Ranieri 37796 at 34.
145 Ranieri 37830 at 24.
146 Ranieri 37796 at 53.
147 See e.g. *Canada (Attorney General) v Bedford*, 2013 SCC 72; *Carter v Canada (Attorney General)*, 2015 SCC 5. The standard of review upon judicial review is another example of the Supreme Court modifying and evolving law, e.g. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

Given these factors, the decision was made that this study would focus on simple defined characteristics of Study Group Applications, and how effectively Study Group Appellants identified issues, indicated relevant supporting authorities, and presented and communicated their applications. Whether or not the grounds of appeal merited Supreme Court intervention is better left to the Court itself, and that Court has been explicit: nothing should be read from when the Supreme Court denies leave.[148]

D. INVESTIGATION OF THE STUDY GROUP APPLICATIONS

Data to characterize the Study Group Applications was collected from three primary sources:

1. the Supreme Court online docket records for that application;
2. the leave application and five-part memorandum of argument; and
3. other reported court and tribunal decisions that relate to the application and applicant(s).

Variables recorded during review of the Study Group Applications included:

1. information to describe the application (e.g. leave application docket number, party names, whether the Supreme Court has classified the appeal as criminal or civil);
2. information concerning lower court proceedings, where available;
3. characteristics of the Supreme Court leave to appeal application, including format, language, and document length;
4. key dates in the leave to appeal process;
5. whether certain events occurred during the leave to appeal review process, such as a fee waiver[149] from the Supreme Court Registrar, or an unfavourable cost award;
6. the subject of the appeal;
7. whether the Study Group Application raised one or more categories of rights:
   a) a *Charter* right, and the *Charter* section(s) indicated, if any,
   b) rights or special status that result from being an SRL and appearing in court without a lawyer,
   c) being the target of racism or racial discrimination, but not expressed as a *Charter* right,
   d) being the target of non-racial discrimination, but not expressed as a *Charter* right,
   e) "human rights,"
   f) "privacy" rights, and
   g) rights resulting from Indigenous origin or affiliation, but not expressed as a *Charter* right;
8. allegations of bias, misconduct, and criminality by justice system participants, such as judges, law enforcement, and lawyers;
9. whether the leave application exhibited problematic litigation characteristics; and

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148 *Hinse*, *supra* note 66 at 609; Gascon, *supra* note 67 at 586.
149 *Supreme Court Rules*, *supra* note 120, s 82(2).

10. whether the candidate appeal exhibited any "hot button" characteristics that favour Supreme Court intervention.

If a Study Group leave to appeal application was identified as problematic, then the factor(s) that satisfied that characteristic were individually recorded.

Each Study Group Application was scored using two indices. First, Study Group Applications were assigned a five point "Sophistication Score" or "SS" to evaluate to what degree the leave application identified relevant information and issues, legal authorities, and adhered to the leave to appeal memorandum of argument five-part structure:

SS=1 An incoherent or incomplete document. Relevant facts, issues, or complaints are either unclear or bald allegations, so that the application would fail the *kisikawpimootewin v. Canada* minimum pleadings requirements for a non-abusive application.[150] By definition, an application that falls into this category is an abuse of court processes.

SS=2 Application facts are adequately pled, but issues are one of the following:
a) only broad questions not linked to the application's facts;
b) not identified, but may be implied from the facts and argument; or
c) incomplete and unclear.

SS=3 Application facts and issues are clear and adequately pled. The facts and issues relate to each other. The responding parties and court have a basis for a meaningful response. Authorities (legislation, case law, other legal authorities) are absent, unrelated to the facts and issues, or inaccurate.

SS=4 The five-part leave to appeal application format is strictly followed. Application facts and issues are adequately pled so as to provide a basis for a meaningful response. Some authorities (legislation, case law, other legal authorities) are identified, those authorities are accurate and relevant, and the application provides some indication of how those authorities relate to the proposed appeal's issue(s).

SS=5 A professional and complete product. The five-part leave to appeal application format is strictly followed. Application facts and issues are stated with precision. Relevant authorities (legislation, case law, other legal authorities) are identified, accurate, and explicitly linked to the issues. The application specifically indicates how its issues are of potentially broad legal relevance or otherwise merit Supreme Court response.

SS therefore measures two characteristics: the SRL's ability to (1) identify relevant information, legal issues, and authorities; and (2) communicate that information to the Supreme Court.

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150 2004 FC 1426 [*kisikawpimootewin*].

Second, each application was assigned a "Disruption Score," or "DS,"[151] that evaluates the degree to which the law in Canada would be affected if the Study Group appeal was granted:

DS=1 A successful appeal affects only the litigants or a small and specialized group.

DS=2 A successful appeal affects an important legal principle in a particular legal subject, such as who is subject to income tax.

DS=3 A successful appeal has broad implications to a particular legal subject, for example ruling that income tax is unconstitutional.

DS=4 A successful appeal disrupts entire government or institutional operations, or fundamentally re-orders rights and freedoms. For example, criminal legislation and prohibitions only operate where a person consents to be subject to criminal law jurisdiction.

DS=5 The conventional constitutional order is revised or superseded. For example, the *Magna Carta* has supraconstitutional effect, or God's Law is supreme.

Study Group Applications were generally approached and interpreted as a freestanding document, and evaluated on the basis of the application's own content. For example, when assigning SS, the intended meaning and objective(s) of the leave to appeal application were assessed using the memorandum of argument, rather than imputing information from other sources. That approach focused this investigation on the Study Group Appellants' ability to explain their proposed appeal, relevant facts, and the proposed appeal's issue(s).

In most instances, Study Group Application data and characteristics were readily identified and scored. There were certain exceptions.

A number of conditions satisfy the problematic leave to appeal application criterion:

1. The leave application received a SS=1 score that meant that leave application is a hopeless and abusive appeal that failed to provide a meaningful basis on which the Court and responding parties could reply.[152]
2. The leave application was part of the "no application" category.
3. The Supreme Court ruled it had no jurisdiction to hear the proposed appeal, and on that basis dismissed the leave to appeal application, or indicated it would have dismissed the leave to appeal application for that reason.
4. The leave to appeal application involved Organized Pseudolegal Commercial Arguments (OPCA) concepts and strategies.[153]

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151 The DS concept and scoring system is adapted from Donald J Netolitzky & Richard Warman, "Enjoy the Silence: Pseudolaw at the Supreme Court of Canada" (2020) 57:3 Alta L Rev 715.

152 *kisikawpimootewin*, *supra* note 150; *Unrau v National Dental Examining Board*, 2019 ABQB 283 at paras 626–31 [*Unrau #2*].

153 See *Meads*, *supra* note 39.

5. The leave to appeal application exhibited one or more of the generally accepted indicia of abusive litigation identified in Canadian jurisprudence.[154] The problematic application criterion was not intended to evaluate the validity or strength of arguments advanced by the Study Group Applications, so indicia that relate to the merit of the leave to appeal application, or lackthereof, did not satisfy the problematic leave to appeal application criterion, other than where the leave to appeal application was an attempt to re-litigate an issue or a collateral attack.

Where no leave to appeal application was available (the "publication ban" and "no application" categories), application-specific information was recorded as unknown, except that a SS=1 was assigned to the four "no application" Study Group Applications.

Sometimes the litigation and proposed appeal subjects were difficult to identify, but for different reasons. Some leave to appeal applications described litigation falling into multiple broad categories (for example, both tort and contract), or that crossed conventional legal category boundaries (for example, mixing civil and criminal law components). Other applications were simply incoherent or unrelated to known legal concepts, so the application's subject and intent were unclear or could not be described. Other times a leave application's focus was unrelated to lower court proceedings and decisions.

Lower court decisions and docket records were therefore sometimes the primary source to determine the general nature of the legal dispute from which the proposed appeal had emerged.

Another complicating factor was how Study Group Applications involved the *Charter*. Many leave to appeal applications mentioned the *Charter*, *Charter* rights, or alleged that *Charter* rights had been breached. However, only very few leave to appeal applications particularized the facts and issues of these *Charter*-related claims, offending the minimum pleadings requirement set by the Supreme Court in *MacKay v. Manitoba*.[155] Complicating matters further, Study Group Applications often did not identify any particular part or section of the *Charter* that was involved in the proposed appeal, or only provided incomplete information. For example, Martinez 37644 indicated *Charter* section 11 was involved, but does not identify which of that section's nine specific legal rights were implicated.

Rather than attempt to interpret the Study Group Appellants' intent, *Charter* references were recorded exactly as indicated in the Study Group Applications.

E. STATISTICAL CONVENTIONS AND LINKAGE

This study uses certain statistical conventions to express data. "N" indicates the number of a total population. "n" indicates the number of individuals or examples in a larger population who possess a characteristic. For example, "77%, n=17" indicates that in a total

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154 *Unrau #2*, *supra* note 152; *Re Lang Michener and Fabian* (1987), 37 DLR (4th) 685 (Ont HCJ), but see *Jonsson v Lymer*, 2020 ABCA 167.

155 [1989] 2 SCR 357 [*MacKay*].

population of 22 (N), 77% of the population, 17 individuals (n), share a common characteristic.

Mean or average indicate the arithmetic mean: the sum of numerical values in a data set divided by N. Median indicates the numerical value in a data set that separates the upper half and lower half of the data set's numerical values, and so is the "midpoint" value in a sequence of values.

The statistical relationship between certain binary Study Group Appellant characteristics was evaluated with the chi-squared (x^2) test using a 0.05 significance (p) level. The chi-squared test calculates the probability (p) that the different frequencies that two or more populations exhibit characteristics is the result of random chance.

The 0.05 significance threshold means the probability that random chance could account for observed population characteristic differences is 5%, or 1 in 20. If p is greater than 0.05 then the chi-squared test concludes that random chance is a possible basis for the observed differences. For example, if p were 0.0035, then the probability that observed population characteristic differences were the result of random chance is 0.35%. p of 0.0035 falls below the 0.05 significance threshold, and represents a statistically significant difference between the populations.

F. LANIGAN 37717.1: EXAMPLE OF STUDY GROUP APPLICATION DATA ACQUISITION PROCESSES

Lanigan 37717.1 illustrates the methodology used to characterize Study Group Applications. Two new leave to appeal applications were reported between E. Jo-Anne Lanigan and the Prince Edward Island Teachers' Federation in the 22 September 2017 Bulletin. Both were assigned docket 37717. Review of the Supreme Court record showed these two applications were before the Supreme Court at the same time and considered together. The Supreme Court Registry received Lanigan 37717.1 on 24 May 2017, and Lanigan 33717.2 on 10 August 2017.

Lanigan 37717.1 was filed outside the 60-day *SCA*, section 58(1)(a) limitations period.[156] The candidate appellant filed an *SCA*, section 59(1) motion to extend the time to serve and file Lanigan 37717.1 on 21 September 2017.[157]

File materials were submitted to Justices Abella, Gascon, and Brown on 15 January 2018. The Court on 8 February 2018 granted the motion for late filing of Lanigan 37717.1, but dismissed both applications, with costs. The costs quantum awarded is not indicated in the docket record.

Lanigan 37717.1 was ordered and received from the Supreme Court Registry. The memorandum of argument is a 20-page typed document that strictly follows the Supreme Court's five-part document schema. Lanigan provided a succinct but detailed chronology of

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156 *Supra* note 69.
157 *Ibid*.

events, tracing from the original dispute through to the Prince Edward Island Court of Appeal decision under appeal.[158]

Lanigan was a school principal who was demoted by her school board. Her union did not grieve that demotion, despite Lanigan providing a letter of rebuttal. The union claimed it only learned about Lanigan's demotion after a 20-day limitations period expired. When Lanigan sued the school board, that lawsuit was dismissed as she had no standing. Lanigan then sued her union and was successful, receiving $277,244 in damages. However, the Prince Edward Island Court of Appeal rejected the unfavourable findings of fact made by the trial judge and overturned that award. Lanigan's factual narrative pinpoints supporting materials.

Lanigan 37717.1 identifies two issues, but really raises three separate points:

1. the appeal court should have accepted the trial findings of fact;
2. the collective agreement allowed the union to authorize Lanigan to personally sue the school board, and that was relevant to the union's liability; and
3. a more general policy issue that when a teacher's union represents both teachers and their superior administrators, it creates a conflict of interest.

Most of Lanigan's argument focuses on the first point, and correctly identifies the palpable and overriding error threshold for appellate intervention on findings of fact.[159] The authority that Lanigan cites for this rule is a criminal appeal, but nevertheless relevant.[160] Lanigan also identifies and accurately reviews jurisprudence on how workers who belong to unions have restricted individual litigation rights as a consequence of the collective bargaining process.[161] The conflict of interest issue is not especially developed and cites no authorities, nor does this issue link into the remedy sought.

Lanigan 37717.1 does not implicate the *Charter* or make any other rights-based claims. The application does not allege misconduct by justice system participants.

Lanigan 37717.1 is a well drafted and presented leave to appeal application. It clearly establishes the factual and legal issues involved, accurately cites relevant authorities, and follows the memorandum of argument five-part scheme. Its chief weaknesses are the underdeveloped conflict of interest argument, and Lanigan's bald claims that her action should be granted leave "given the great public importance and seriousness of the issues raised."[162] In fact, Lanigan does not propose any change to Canadian law, other than perhaps a possible new test for the scope of worker types who may be grouped in a union, but that issue is essentially undeveloped. Given these observations, Lanigan 37717.1 was assigned a Sophistication Score of 4, and a Disruption Score of 1. This application has no problematic litigation characteristics.

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158 Lanigan 37717.1 at paras 1–31.
159 *Ibid* at paras 27, 29, 42–43.
160 *Ibid* at para 87, citing *R v Hogg*, 2013 PECA 11, dissent adopted *in toto*, *R v Hogg*, 2014 SCC 18.
161 Lanigan 37717.1 at paras 63–72.
162 *Ibid* at para 96.

Lanigan herself is the subject of six reported lower court decisions, all of which were accurately summarized in Lanigan 37717.1. Lanigan was represented by a lawyer until her second appearance at the Prince Edward Island Court of Appeal.

III. RESULTS AND OBSERVATIONS

A. SRLS AND THE SUPREME COURT LEAVE TO APPEAL PROCESS IN 2017

Data collected permits a quantitative review of how SRL appellants engaged with the Supreme Court leave to appeal process in 2017.

There were 125 leave to appeal dockets opened in 2017 by 122 SRLs. Most Study Group Appellants paid the $75 filing fee.[163] A few appellants sought and received fee waivers from the Supreme Court Registrar (16.8%, N=125).[164] All fee waiver requests were granted.

The leave to appeal process has four main steps:

1. initial communication between the Study Group Appellant and the Supreme Court Registry;
2. the Registrar opens a docket file or reports a leave to appeal application is complete;
3. the candidate appeal is assigned to a panel of three Supreme Court justices after receipt of correspondence and submissions from the responding parties; and
4. the Court issues a decision on whether to grant leave.

The average periods between these four steps were: steps 1–2: 56.6 days; steps 2–3: 87.1 days; steps 3–4: 40.1 days (N=125). On average, the entire process took about six months (183.8 days, N=125).

Figure 1 illustrates the time required for Study Group Applications to complete the leave to appeal process steps.

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163 *Supreme Court Rules*, *supra* note 120, Schedule A.
164 *Ibid*, s 82(2).

FIGURE 1:
TIME TO COMPLETE LEAVE TO APPEAL APPLICATION PROCESS STEPS FOR STUDY GROUP APPLICATIONS

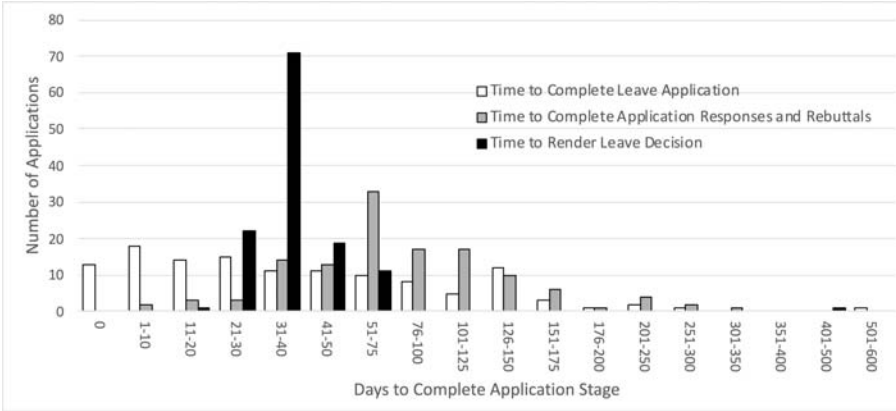

Figure 1: Distribution of the time required for Study Group Applications to advance through the Supreme Court leave to appeal process (N=125). "Time to Complete Leave Application" indicates the number of days between when a Study Group Appellant first contacted the Supreme Court Registry and the Registry docket reports an open file or a completed application. "Time to Complete Responses and Rebuttals" indicates the number of days between when the Registry opened a file or reported a completed application and the Registry submitted the leave to appeal file materials to a three-justice panel. "Time to Render Leave Decision" indicates the number of days between when the file was referred and the Supreme Court issued a leave to appeal decision. Note that the "Days to Complete Application Stage" axis intervals are not consistent.

Netolitzky's "Limitations" determined that in 2017, 33.6% (n=46) of SRL appellants submitted *SCA* section 59(1)[165] motions to extend the Study Group Applications' 60-day service and filing limitations period.[166] 82.6% (n=38) of those applications were successful.[167]

One Study Group Application, Mazraani 37642, was granted leave to appeal. The other 124 Study Group Applications were dismissed.

There were 73.4% (N=94)[168] unsuccessful Study Group Appellants ordered to pay costs. Where the Supreme Court docket record indicates a cost award quantum the average amount was $1,150.41 (N=24). Elevated solicitor/client costs of $14,249.90 were ordered in Belway 37708.

The Supreme Court possesses a residual authority to reconsider leave to appeal decisions in "exceptional" cases.[169] The Supreme Court Registrar shall, per *Supreme Court Rules* section 73(3)(b), reject any reconsideration application where an unsuccessful leave to appeal applicant does not: 1) establish "exceedingly rare circumstances … that warrant consideration," or 2) provide an explanation of why the issue was not previously raised.[170] Reconsideration processes were initiated in 18.4% (n=23) of the unsuccessful Study Group Applications. The Registrar did not accept any leave reconsideration application for filing,

165 *Supra* note 69.
166 *Ibid*, s 58(1)(a).
167 Netolitzky, "Limitations," *supra* note 5 at 178.
168 31 Study Group Applications' docket records provided no information on whether costs were ordered.
169 *Hinse*, *supra* note 66 at 609–10, codified in *Supreme Court Rules*, *supra* note 120, ss 73–74.
170 *Supreme Court Rules*, *ibid*.

presumably because the supporting affidavits failed to satisfy the *Supreme Court Rule* section 73(3)(b) criteria.

If a Supreme Court justice concludes that a litigant "is conducting a proceeding in a vexatious matter," or that filing additional documents would be "vexatious or … for an improper purpose," then *Supreme Court Rules* sections 66–67 (*Supreme Court Rule* 67) permits a justice may order a proceeding stayed or that the Registrar shall not accept further documents from a litigant.[171]

Supreme Court Rule 67 was applied in 12 Study Group Applications in essentially identical circumstances. In each instance, a Study Group Appellant was denied leave, but the Study Group Appellant continued to send materials to the Supreme Court Registry. A *Supreme Court Rule* 67 order was issued that directed the Registrar discard any further documents received in relation to these dockets.

B. STUDY GROUP LEAVE TO APPEAL APPLICATIONS

One Project objective is to investigate and characterize candidate SRL appeals received by the Supreme Court in 2017.

Incomplete information profiles were obtained in certain instances, particularly for "publication ban" and "no application" Study Group Appeals. In the analysis that follows, the Study Application population size usually indicates whether or not the "publication ban" and "no application" populations were a part of a sample population:

N=125 data involves all Study Group Applications,

N=121 data involves all Study Group Applications, except for the "publication ban" category, or

N=117 data involves all non-"publication ban" and "no application" Study Group Applications.

1. PRE-SUPREME COURT ACTIVITY

The Supreme Court docket record, reported lower court and tribunal decisions, and non-Supreme Court docket records provided substantial information on the pre-Supreme Court history of the Study Group Applications.

Study Group Applications challenged court decisions from the Federal Court and each of the Canadian provinces, except for Newfoundland and Labrador. No candidate appeals were identified from decisions of the three Canadian territorial Courts of Appeal or the federal Courts Martial.

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[171] *Ibid.*

Figure 2 illustrates the frequency at which Study Group Applications challenged litigation from subordinate court jurisdictions.

FIGURE 2:
PRE-SUPREME COURT OF CANADA
JURISDICTION FOR STUDY GROUP APPLICATIONS

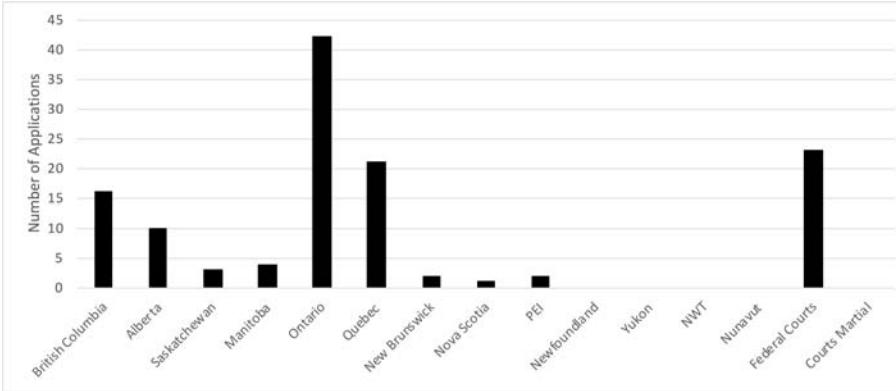

Figure 2: Distribution of Study Group Applications that challenged decisions of Canada's subordinate appeal courts by source jurisdiction (N=125). "PEI" indicates Prince Edward Island. "Newfoundland" indicates Newfoundland and Labrador. "NWT" indicates North West Territories.

The number of Study Group Applications per province is generally proportional to the populations of those jurisdictions.

Study Group Applications usually challenge a unanimous appeal court ruling. A dissent occurred in only one (0.95%, N=105) pre-Supreme Court court of appeal decision. No reported decision or docket records were available for 20 Study Group Applications to evaluate whether the lower appeal court decision was unanimous or divided; however, those 20 decisions were very likely unanimous, since a split outcome in an appeal court would be a strong reason to prepare a written judgment to explain why the appeal panel did not agree.

Reported lower court decisions typically indicate whether or not the Study Group Appellant had a lawyer or was self-represented in that proceeding. In four instances, a Study Group Application had an unusual pre-Supreme Court representation pattern which combined SRL activity and some other form of representation or assistance by an amicus[172] or a rogue unauthorized representative.[173]

Figure 3 summarizes the patterns of lawyer vs SRL representation in pre-Supreme Court proceedings.

172 Gonzalez 37517; Ranieri 37796.
173 d'Abadie 37507; d'Abadie 37508.

FIGURE 3:
LAWYER VERSUS SLR REPRESENTATION FOR STUDY GROUP APPLICATION TRIAL AND PRE-SUPREME COURT OF CANADA APPEAL PROCEEDINGS

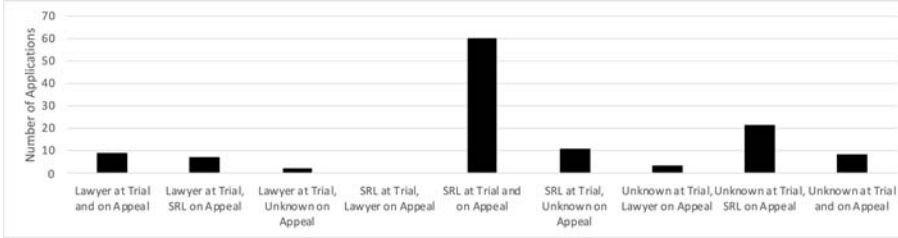

Figure 3: Frequency of SRL and lawyer representation in Study Group Application trial and appeal proceedings (N=121). Figure 3 excludes Gonzalez 37517, Ranieri 37796, d'Abadie 37507, and d'Abadie 37508 because of the unusual representation patterns in those four matters.

The substantial proportion of proceedings where representation status could not be determined means this information should be viewed with caution. The most common identified representation pattern was the Study Group Appellant self-represented throughout all documented pre-Supreme Court proceedings.

2. DOCUMENTARY CHARACTERISTICS OF THE STUDY GROUP APPLICATIONS

The proportion of English and French language Study Group Applications (82.9%, 17.1% respectively, N=117) generally corresponds to the proportion of persons in Canada who speak those languages.[174] A large majority of Study Group Applications were typed (85.5%, n=100). 6.8% (n=8) were either entirely handwritten documents or Supreme Court leave to appeal template forms filled out with handwriting. 7.7% (n=9) combined typed and handwritten content.

At present, *Supreme Court Rules* section 21[175] requires that all print and electronic documents filed with the Supreme Court follow specific document preparation guidelines.[176] The guidelines in force during 2017 are not known.

The large majority (91.7%, N=117) of Study Group Applications were generally compliant with the section 25 requirements for a valid leave to appeal application, including that the application include a five-part, up to twenty-page memorandum of argument.[177]

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174 Statistics Canada, "Data tables, 2016 Census," online: <www12.statcan.gc.ca/census-recensement/2016/dp-pd/dt-td/Index-eng.cfm>.

175 *Supra* note 120.

176 The present guidelines took effect on 27 January 2021: Supreme Court of Canada, "Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic)," online: <www.scc-csc.ca/parties/gl-ld2021-01-27-eng.aspx>. Earlier versions of these guidelines were not located.

177 *Supra* note 120.

However, several non-compliant leave to appeal applications demonstrate the Supreme Court Registry accepts irregular candidate Supreme Court SRL filings. For example:

- Pierce 37530 is an entirely handwritten 353-page document that does not follow the five-part memorandum of argument scheme. Instead, this document is best described as a letter to the lawyers who represented Pierce in his lower court proceedings, complaining about their failures to properly represent him at trial and on appeal.
- Placid 37558 is nine pages long, and combined typed content and handwriting in the Supreme Court template form. The Placid 37558 application is difficult to interpret because it includes very little information, but instead points to an external document, "compiled instruments in writing which argue and speak for themselves pages 1 to 300."
- Oh 37649 is an unusual, non-compliant Study Group Application. This document is an incomplete Supreme Court template application form (memorandum of argument parts 2–5 are missing), with minimal handwritten information. However, eight pages of Oh 37649 are two duplicate copies of tables filled in with handwritten name, address, and telephone information, and signatures. Oh 37649 appears to be a complaint about alleged municipal election irregularities, so the tabulated information may be the identity of purported voters.

The four "no application" Study Group Applications discussed in Part II.A suggest that other, even more irregular filings were accepted by the Supreme Court Registry, and then reviewed by a judicial panel.

Five Study Group Appellants sought permission to file an over-length leave to appeal application.[178] In four instances that motion was granted; no decision on that question is indicated in the Tilahun 37448 docket record.

The average length of the remaining Study Group leave to appeal application memoranda of argument, parts 1–5 was 13.9 pages (N=112). The *Supreme Court Rules* section 25 maximum is 20 pages. Figure 4 illustrates the range of page lengths for these 112 Study Group memoranda of argument, parts 1–5.

[178] Tilahun 37448; Hiamey 37519; Pierce 37530; Février 37583; Dunkers 37618.

FIGURE 4:
LENGTH OF STUDY GROUP APPLICATIONS' MEMORANDA OF ARGUMENT PARTS 1–5

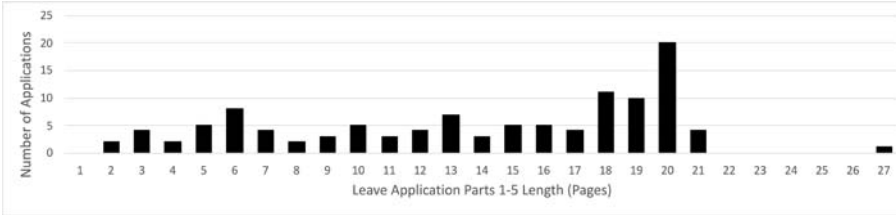

Figure 4: Document length in pages of certain Study Group Applications' memoranda of argument, parts 1–5 (N=112). This figure excludes Study Group Applications in the "no application" and "publication ban" groups, and five Study Group Applications where the Study Group Appellant sought permission to file an over-length leave to appeal application.

The five applications in Figure 4 where parts 1–5 of the memoranda of argument were over 20 pages did not receive permission for their extra length. These applications nevertheless were submitted to a Supreme Court panel for review.

3. STUDY GROUP APPLICATION PARTIES AND ISSUES

The Supreme Court Registry classifies leave to appeal applications as either civil or criminal matters. The Study Group Applications were predominately civil: 92.8% (N=125). The Supreme Court Registry appears to define "civil" vs "criminal" categories by whether a candidate appeal emerged from a criminal prosecution. This sometimes led to unusual results. For example, Hok 37624 was defined as a "civil" subject appeal, though the underlying issue was whether or not Alberta Provincial Court judges were correct to refuse to receive *Criminal Code* sections 507 and 507.1 private informations submitted by an SRL.[179] Post-sentence challenges to criminal sentences by detained prisoners were also classified as "civil" matters, including habeas corpus applications,[180] challenges to decisions of the Parole Board of Canada,[181] and unorthodox OPCA "get out of jail free" strategies.[182]

Most Study Group Applications had only one appellant (median=1, mean=1.14, N=125) and respondent (median=1, mean=3.48, N=125). Figure 5 illustrates the frequency at which Study Group Applications name different numbers of appellants and respondents.

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179 RSC 1985, c C-46.
180 See e.g. Thompson 37484.
181 See e.g. Fabrikant 37388.
182 See e.g. d'Abadie 37507; d'Abadie 37508.

FIGURE 5:
NUMBER OF LITIGANTS IN STUDY GROUP APPLICATIONS

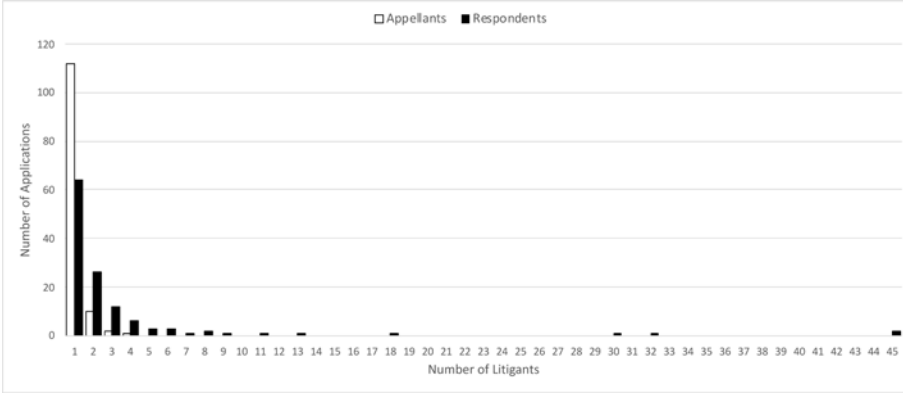

Figure 5: Frequency at which Study Group Applications named one or more appellants and respondents (N=125).

Study Group Application respondents were placed into four general categories:

1. government (nation, province, territory, municipality);
2. government entity (a government-operated or authorized entity or body, such as an administrative tribunal, a police service, or a professional association);
3. non-government entity (for example, corporations, unions, churches); and
4. named individuals.

Most Study Group Applications (66.4%, N=125) named only one respondent type. Appeals that involve multiple respondent categories were less common (two types - 24%; three types - 4.8%, all types - 3.2%).

Figure 6 illustrates the frequency at which the four respondent types appeared in Study Group Applications, either in association or alone.

FIGURE 6:
FREQUENCY OF RESPONDENT TYPES IN STUDY GROUP APPLICATIONS

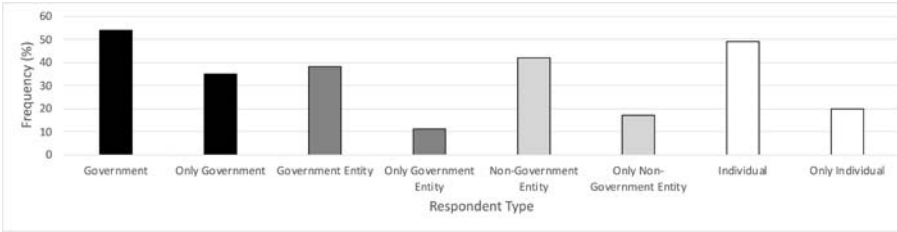

Figure 6: Frequency that Study Group Applications name respondents in four respondent type categories (N=125). The "Only" categories indicates the number of Study Group Applications where all respondents belong to only that one named category.

No strong pattern emerged as to whether the respondent category types appear as co-respondents. The least common combination was government and non-government entity (n=8), while the most common was non-government entity and individual (n=17).

Most Study Group Applications (73%, N=122) were the result of a litigation process or step initiated by the Study Group Appellant. Only 34.4% (N=122) of Study Group Applications were "defensive" and responded to steps taken by other parties. 7.4% (N=122) of Study Group Applications had both characteristics.

Study Group Applications and lower court and tribunal decisions were reviewed to identify the subject of the dispute underlying the candidate appeals. As previously described, the nature of the underlying dispute was sometimes difficult to identify. Some appeals have multiple and different subject aspects, for example combining criminal and civil legal issues. The litigation subject could not be determined for 12 Study Group Applications.

Table 1 summarizes the litigation subjects identified in the Study Group Leave Applications and their frequency.

TABLE 1:
LITIGATION SUBJECT OF STUDY GROUP APPLICATIONS

Civil Subject Appeals			Criminal Prosecution Subject Appeals		
Subject	**Number**		**Subject**	**Number**	
Tort	28		Criminal Prosecution	8	
Contract	8		Assault		1
Family Law	8		Embezzlement		1
Care of Elderly Parent		1	Harassment		1
Child Support		1	Motor Vehicle Offence		2
Divorce / Separation		2	Sexual Assault		2
Grandparents' Rights		1	Tax Evasion		1
Reopening Inter-Partner Agreement		2			
Spousal Support		1			
OPCA Pseudolaw Litigation	8				
Pseudolaw Claims		5			
Pseudolaw "Get out of Jail Free"		3			
Union / Labour	7				
Employment	6				
Taxation and Tax Administration	6				
Bankruptcy / Foreclosure	5				
Police Misconduct / Discipline	5				

Civil Subject Appeals		Criminal Prosecution Subject Appeals	
Subject	**Number**	**Subject**	**Number**
Professional Regulation and Discipline	5		
Psychiatric Evaluation / NCR Status	5		
Social Support and Benefits	5		
Habeas Corpus	3		
Wills and Estates	3		
Condo Issues	2		
Complaint vs University	2		
Court Procedure	2		
Elections Issues	2		
Land Ownership and Use	2		
Landlord / Tenant	2		
Indigenous Rights	1		
Commercial / Corporate	1		
Civil Contempt	1		
Immigration	1		
Intellectual Property	1		
Parole	1		
Privacy	1		
Private *Criminal Code* Informations	1		
Cannot Classify	12	Cannot Classify	0

Table 1: Kinds and frequency of civil and criminal litigation subjects identified in the Study Group Applications (N=125). The "Family Law," "OPCA Pseudolaw Litigation," and "Criminal Prosecution" types are further divided into more specific issues and the alleged criminal offences. In certain instances a single application resulted in multiple entries on Table 1. For example, d'Abadie 37507 and d'Abadie 37508 were both "Habeas Corpus" proceedings, but also attempts to employ OPCA "Get out of Jail Free" strategies.

Table 1 shows Study Group Application candidate appeals emerge from a diverse range of litigation. However, stepping back from the specific types of law and processes revealed over half of the civil subject Study Group Applications fall within four larger themes:

1. the Study Group Appellant's job or employment (22.0%, n=24);
2. the Study Group Appellant in a conflict with close relatives (14.7%, n=16);
3. the Study Group Appellant's personal business (11.0%, n=12); and
4. the Study Group Appellant seeking financial support and social benefits (9.2%, n=10).

Figure 7 illustrates the Disruption Score (DS) ratings for Study Group Applications.

FIGURE 7:
DISRUPTION SCORES (DS) FREQUENCY IN STUDY GROUP APPLICATIONS

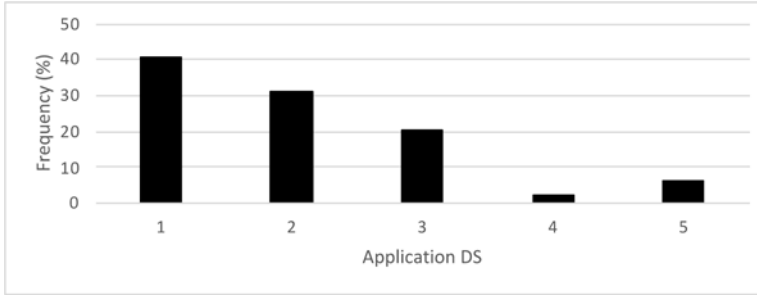

Figure 7: Frequency at which different Disruption Score (DS) ratings were assigned to Study Group Applications (N=94).

Where a Study Group appeal was intended to cause a change to Canadian law, that change typically had a limited scope. Very few Study Group Applications attempted to trigger radical changes to Canadian law and authority (DS=4–5, n=8). All but one of the DS=4–5 applications involved OPCA strategies and concepts. OPCA litigation often attempts to impose radical change on the conventional Canadian legal and social order.[183]

Certain claims and allegations appear with high frequency in the Study Group Applications:

1. allegations of bias, misconduct, and illegal conduct by judges, tribunals, law enforcement personnel, or lawyers = 61.5% (N=117);
2. claims that the *Charter*, or one or more *Charter* rights had been breached or were implicated in the proposed appeal = 64.1% (N=117); and
3. other claims that rights had been breached:
   a) "human rights" = 29.9% (N=117),
   b) discrimination on the basis of grounds other than race = 16.2% (N=117), and
   c) special status or rights that result from being an SRL = 14.5% (N=117).

The misconduct and rights-based claims are evaluated in greater detail in Part III.B.4, below.

Table 2 identifies *Charter* provisions referenced in the Study Group Applications and their frequency.

[183] Netolitzky & Warman, *supra* note 151 at 737 reports an average DS of 3.74 for 86 issues raised in OPCA Supreme Court leave applications.

TABLE 2:
***CHARTER* RIGHTS IDENTIFIED IN STUDY GROUP APPLICATIONS**

***Charter* Section**	**Right Implicated**	**Frequency**
1	Rights may be justifiably limited	2
2	"Fundamental freedoms"	3
2(b)	Freedom of thought, belief, and expression	2
2(d)	Freedom of association	3
2(e)	(no such *Charter* section)	1
3	Right to vote and be a member of Parliament	3
6(2)	Right to move and work in any province	1
6(3)	Limits are permitted to *Charter*, section 6(2)	1
7	Right to life, liberty, and security of the person	31
8	Prohibition against unreasonable search and seizure	5
9	Prohibition against arbitrary detention and imprisonment	5
11	"Proceedings in criminal and penal matters"	1
11(b)	Right to be tried in a reasonable time	2
11(c)	Prohibition against being compelled to be a witness against oneself	1
11(d)	Presumption of innocence	7
11(g)	Prohibition against retroactive criminal penalties	2
12	Prohibition against cruel and unusual punishment	9
13	Prohibition against self-criminalization	1
14	Right to an interpreter	3
15	"Equality Rights"	26
15(1)	Prohibition against discrimination	8
24	"Enforcement"	5
24(1)	*Charter* breaches lead to an appropriate and just remedy	14
24(2)	Evidence obtained via a *Charter* breach may be excluded	1
25(a)	Indigenous rights recognized by the Royal Proclamation of 7 October 1763	1
26	*Charter* rights to not exclude other rights and freedoms	5
28	Male and female persons have equal rights and freedoms	1
32	"Application of the *Charter*"	3
32(1)	*Charter* applies to federal, provincial, and territorial governments and legislatures	1
33	Notwithstanding clause	2
35(1)	Existing Indigenous rights are affirmed	1
52	Canadian Constitution is supreme law of Canada	6

***Charter* Section**	**Right Implicated**	**Frequency**
52(1)	Canadian Constitution is supreme law of Canada	4
675(1)	(no such *Charter* section)	1
None	*Charter* right allegedly breached, but no section is identified	20

Table 2: Incidence of *Charter* rights and claims in Study Group Applications (N=75). Certain leave to appeal applications included more than one *Charter* right or claim reference. Where a *Charter* section was identified, that section's identification is reproduced exactly as stated in the Study Group Application.

Study Group Applications often implicated multiple *Charter* provisions. For example, Hordo 37650 identifies *Charter* sections 2, 7, 8, 13, 15, 24, 28, 32, and 52 as relevant.

Over a quarter of Study Group Applications (26.7%, N=75) that invoke the *Charter* provided no detail beyond an open-ended statement that the Study Group Appellant's *Charter* rights were breached or implicated.

Study Group Applications only rarely provided adequate particulars for the Court and responding parties to evaluate the alleged *Charter* breach, if indeed that was what the appellant was attempting to indicate. This lack of information fails the requirement set by the Supreme Court in *MacKay* that *Charter* issues must be pled from a factual or alleged factual foundation.[184] Overall, the factual foundation requirement for a *Charter* breach issue was only satisfied for nine Study Group Application *Charter* issue claims.[185] The overwhelming majority of *Charter*-related Study Group Application references instead were "bald allegations."[186]

Many Study Group Applications implicate the *Charter* where the *Charter* would not appear to be relevant. 46.5% (N=75) of the applications that implicate the *Charter* name only non-governmental entities and individuals as respondents, despite the rule that the *Charter* only applies to government actors.[187] Hordo 37650 is an example of this pattern. The respondents are the State Farm insurance company and two named individuals.

Most Study Group Applications (61.2%, N=121) exhibited one or more problematic litigation indicia. Table 3 indicates the frequency at which individual indicia were found in all leave to appeal applications, and in applications that had one or more indicium.

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184 *Supra* note 155.

185 *Charter*, *supra* note 135. For section 7 claims, see d'Abadie 37507, d'Abadie 37508, Mullins 37426, Hok 37446. For section 8 claims, see d'Abadie 37507, d'Abadie 37508. For section 11(g) claims, see Gagne 37720. And for section 15(1) claims, see Holley 37562, Wissotzky 37559.

186 *GH v Alcock*, 2013 ABCA 24 at para 58.

187 *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573.

TABLE 3:
FREQUENCY OF PROBLEMATIC LITIGATION INDICIA IN STUDY GROUP APPLICATIONS

Problematic Litigation Indicium	Number	Frequency in Problematic Applications	Frequency in All Applications
Ungrounded allegations of conspiracy, misconduct, and illegal conduct by law enforcement, lawyers, courts, or judges	32	43.2%	26.4%
Application fails to provide a basis for a meaningful response (*Rule in kisikawpimootewin*)	27	36.5%	22.3%
Disproportionate or impossible remedies	23	31.1%	19.0%
Collateral attack, or attempt to re-litigate a decided issue	11	14.9%	9.1%
Supreme Court of Canada has no jurisdiction	10	13.5%	8.3%
Litigation has a political objective and does not seek to enforce justiciable rights	8	10.8%	6.6%
OPCA litigation	8	10.8%	6.6%
No leave application filed	4	5.4%	3.3%
Busybody litigation	2	2.7%	1.7%

Table 3: Incidence and frequency at which certain problematic litigation indicia are present in Study Group Applications (N=121) and Study Group Applications that exhibit one or more problematic litigation indicia (N=74).

4. APPLICATION SOPHISTICATION SCORE

The Study Group Applications are diverse documents. One way to classify these applications is by how effectively these documents communicate the Study Group Appellants' arguments and intent.

One end of the spectrum is leave to appeal documents that provide little to no basis for the Supreme Court to understand what the SRL appellant says has happened and what the appellant seeks. The opposite extreme are professional or near professional documents that lead the Supreme Court through the "who, what, where, when and why" of the facts and issues, identify and explain relevant authorities, and clearly indicate the remedy or remedies sought.

This range of document content and utility was captured using the five-point Sophistication Scale. This value measures the degree to which Study Group Applications:

1. provide the Supreme Court with:
   a) a factual narrative to explain the overall dispute and the issue(s) involved in this proposed appeal;
   b) a description of the legal issues involved, and the errors of the subordinate decision-makers that should be corrected; and
   c) the relevant law and legislation that is involved in the proposed appeal; and
2. adhere to the five-part memorandum of argument scheme.

Strategically, this measures how a Study Group Application succeeds by: (1) communicating the intended nature of the proposed appeal to the Court; and (2) explaining why the Court should grant leave and intervene.

Sophistication Scores were assigned to all Study Group Applications based on review of their text and content, except:

1. the "no application" group, which received a SS=1; and
2. the "publication ban" group, which were not assigned a SS.

When evaluating the Study Group Applications by SS the population size is usually 121 (N=121).

A full description of the Sophistication Score characteristics is provided above at Part II.D, however, in brief:

SS=1 applications are so incomplete or incoherent that the facts and issues are unclear;
SS=2 applications provide a factual narrative, but do not identify issues;
SS=3 applications provide both relevant facts and issues;
SS=4 applications in addition provide some relevant and accurate legal citations and authorities; and
SS=5 applications are professional or near professional products that fully explain the basis for the appeal, identify relevant law, and why the Supreme Court should grant leave to the candidate appeal.

The average Study Group Application score was 2.58 (N=121). Figure 8 illustrates the frequency of individual Sophistication Scores.

FIGURE 8:
SOPHISTICATION SCORES FOR STUDY GROUP APPLICATIONS

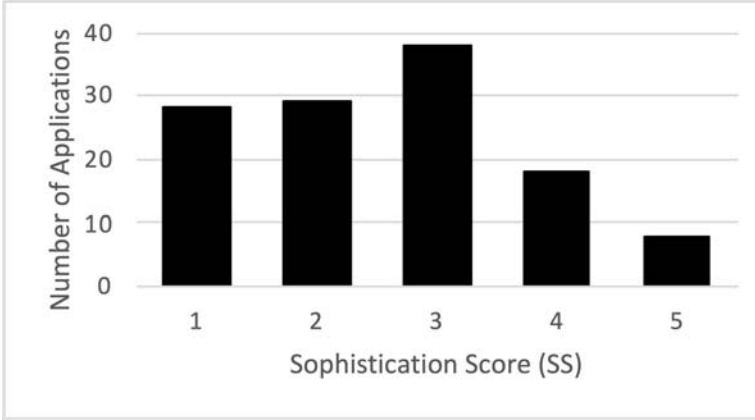

Figure 8: Incidence of different Sophistication Score (SS) ratings assigned to Study Group Applications (N=121).

Nearly half (47.1%, n=57) of the Study Group Applications failed to plead the relevant facts and issues (SS=1–2). Most (52.9%, n=64) Study Group Applications did provide a basis for a meaningful Court and respondent response (SS=3–5). Additional accurate reference to relevant legal authorities, legislation, and cases (SS=4–5) was comparatively uncommon (21.5%, n=26).

Sophistication Score is not significantly linked to either civil vs criminal candidate appeal subject matter ($x^2(4, N=125)=3.71$, $p=0.446$), or Study Group Appellant gender ($x^2(4, N=108)=3.21$, $p=0.523$).

Over twice as many Study Group Applications followed from a Study Group Appellant initiating (73%), rather than responding (34.4%), to a litigation process or step. Figure 9 shows that this difference is less for high SS applications.

FIGURE 9:
STUDY GROUP APPLICATION POLARITY FREQUENCY
BY SOPHISTICATION FREQUENCY

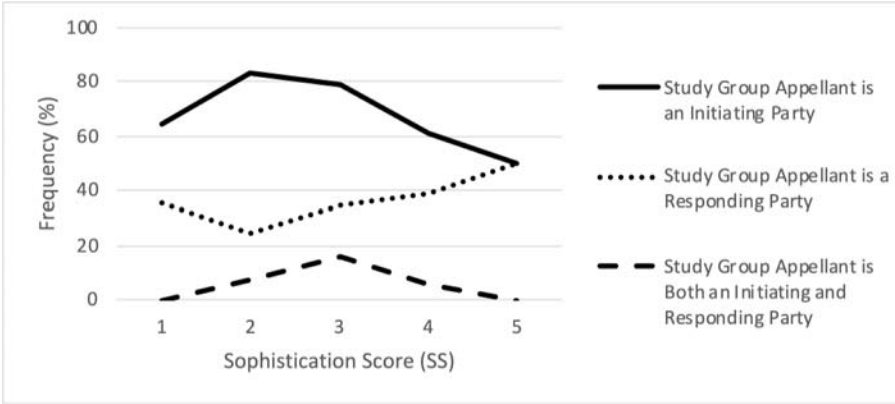

Figure 9: Frequency at which Study Group Appellants initiated or responded to the legal process that led to a Study Group Application, distributed by Sophistication Score (SS) ratings (N=119). Applications where reciprocal legal processes led to a Study Group Application are included in all three categories.

The Study Group Applications' diverse and complex litigation subject profile (Table 1) meant linking specific topics to SS was not feasible. The general dispute themes were not statistically associated to SS for applications where factual disputes could be evaluated (SS=2–5):

- jobs - $x^2(4, N=93)=5.48$, $p=0.140$;
- conflict with close relatives - $x^2(4, N=93)=2.61$, $p=0.456$;
- personal business - $x^2(4, N=93)=0.138$, $p=0.987$; and
- social support and benefits - $x^2(4, N=93)=0.0349$, $p=0.998$.

In contrast, Figure 10 illustrates a strong association between Study Group Application SS and the degree to which applications seek to change Canadian law.

FIGURE 10:
STUDY GROUP APPLICATION DS BY SOPHISTICATION SCORE

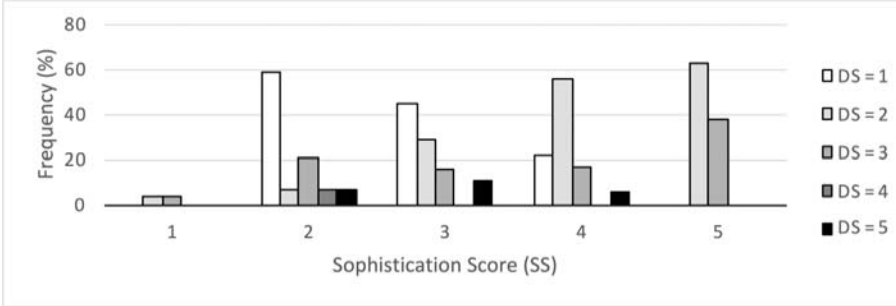

Figure 10: Degree to which Study Group Applications seek to alter Canadian law, measured by Disruption Score (DS) ratings, distributed by Sophistication Score (SS) ratings (N=95). Increasing DS score indicates greater intended alteration of Canadian law, see Part II(D). 26 applications with SS=1 had no discernible legal issues to rate that would affect existing Canadian law.

The number of Study Group Applications that sought changes that affect the candidate appellant or a small group (DS=1), or to broadly overturn Canadian legal concepts and order (DS=4–5), decrease as SS increases. High SS leave applications largely fall into the DS=2–3 "sweet spot," and propose a change in law that is neither too specialized to attract Supreme Court intervention, nor that would upend Canadian law.

Most Study Group Applications (61.2%, N=121) exhibit problematic litigation characteristics. 73.4% of unsuccessful Study Group Applications led to a cost award against the Study Group Appellant, where that information was available (N=94). *Supreme Court Rule* 67 was used to prohibit further document receipt for 12 Study Group Applications. Figure 11 illustrates how these characteristics relate to application SS.

FIGURE 11:
STUDY GROUP APPLICATION NEGATIVE LITIGATION CHARACTERISTICS AND OUTCOMES BY SOPHISTICATION SCORES

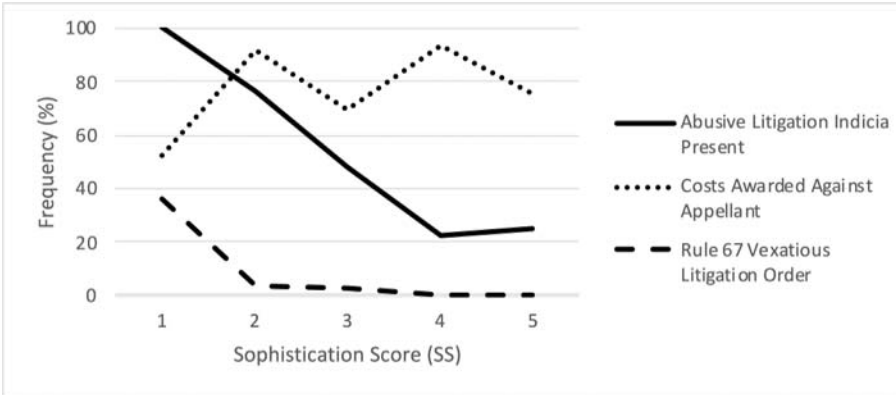

Figure 11: Frequency of negative litigation characteristics and outcomes, distributed by Sophistication Score (SS) rating. "Problematic Litigation Indicia Present" indicates that review of a Study Group Application and associated docket record identified one or more characteristics that are a basis to classify the leave application as abusive (N=121). "Costs Awarded Against Appellant" indicates the Study Group Appellant was ordered to pay costs in relation to this Study Group Application (N=94). "Rule 67 Vexatious Litigation Order" indicates a *Supreme Court Rule* 67 order was made in relation to this application (N=121).

Problematic litigation indicia show a strong and statistically significant ($x^2(4, N=121)=10.6$, $p=0.0308$) negative correlation to SS. Similarly, most *Supreme Court Rule* 67 orders were imposed in low SS application proceedings ($x^2(4, N=121)=26.1$, $p=0.0000303$). SS=1 applications were markedly less likely to be the subject of an unfavourable cost award than higher sophistication (SS=2–5) Study Group Applications. This association was statistically significant: $x^2(4, N=96)=12.8$, $p=0.0125$.

Many Study Group Applications included complaints of bias, misconduct, and criminality against judges, tribunal decision makers, law enforcement, and lawyers.

Judicial bias was the most common allegation (35.9%, n=42), but nearly a third (29.1%, n=34) of Study Group Applications went further and claimed one or more lower court judges had acted in an illegal or criminal manner. Bias was alleged against a non-court tribunal in 20.5% (n=24) of Study Group Applications. Figure 12 illustrates the frequency of these allegations in relation to application Sophistication Score.

FIGURE 12:
ALLEGATIONS OF DECISION-MAKER MISCONDUCT IN STUDY GROUP APPLICATIONS BY SOPHISTICATION SCORES

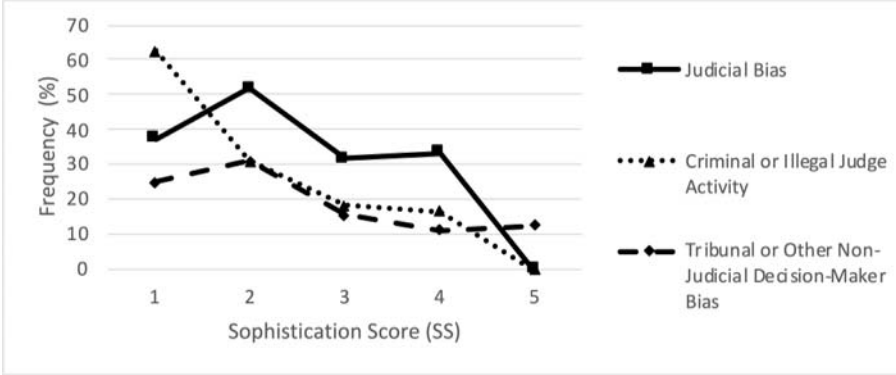

Figure 12: Frequency at which Study Group Applications included allegations of decision-maker misconduct distributed by Study Group (SS) rating (N=117).

While all three decision-maker misconduct categories generally decrease as Sophistication Score increased, only allegations of criminal or illegal judge activity ($x^2(4, N=117)=26.1$, $p=0.0000303$) showed a statistically significant association (judicial bias: $x^2(4, N=117)=8.02$, $p=0.0907$; tribunal bias: $x^2(4, N=117)=4.08$, $p=0.396$).

Complaints about other justice system participants were less common and not associated with SS:

- police and law enforcement bias and misconduct = 21.4% (n=25), $x^2(4, N=117)=4.52$, $p=0.340$;
- opposing lawyer misconduct = 23.9% (n=28), $x^2(4, N=117)=6.42$, $p=0.170$; and
- own lawyer misconduct = 8.5% (n=10), $x^2(4, N=117)=2.60$, $p=0.626$.

Complaints against justice system participants were very common in Study Group Applications. Figure 13 illustrates the frequency at which Study Group Applications of different SS included at least one such complaint, or an allegation of bias, illegality, or criminality against one or more judges.

FIGURE 13:
BIAS, ILLEGALITY, AND MISCONDUCT COMPLAINTS IN STUDY GROUP APPLICATIONS BY SOPHISTICATION SCORES

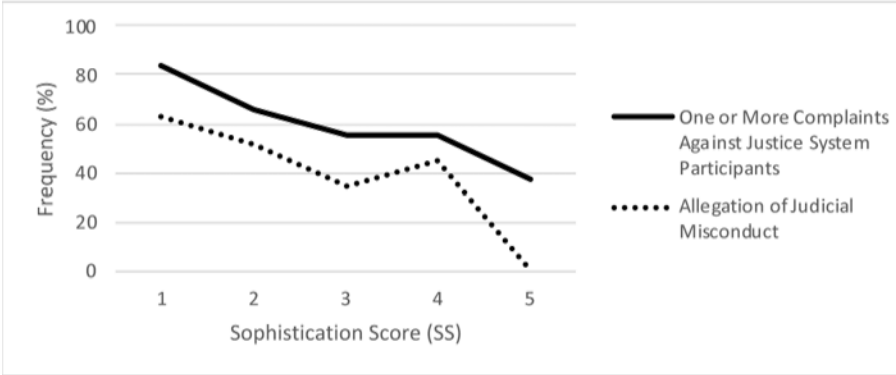

Figure 13: Frequency at which Study Group Applications included complaints of justice system participant misconduct and judge misconduct, distributed by Sophistication Score (SS) rating (N=117). "One or More Complaints Against Justice System Participants" indicates a Study Group Application included one or more complaints of misconduct or bias against a judge, tribunal or other non-court decision-maker, law enforcement, or lawyers. "Allegation of Judicial Misconduct" indicates a Study Group Application included one or more complaints of bias, or illegal or criminal conduct by a judge.

The second commonplace complaint encountered in Study Group Applications was that the Study Group Appellant's rights were implicated or breached. None of the seven rights types exhibit a significant association with SS:

- *Charter* - n=75, $x^2(4, N=117)=6.51$, $p=0.164$;
- human rights - n=35, $x^2(4, N=117)=5.25$, $p=0.263$;
- non-*Charter* non-racial discrimination - n=19, $x^2(4, N=117)=6.49$, $p=0.166$;
- SRL rights - n=17, $x^2(4, N=117)=5.16$, $p=0.271$;
- privacy rights - n=7, $x^2(4, N=117)=1.95$, $p=0.744$);
- non-*Charter* racial discrimination - n=4, $x^2(4, N=117)=6.05$, $p=0.195$; and
- Indigenous rights - n=4, $x^2(4, N=117)=6.45$, $p=0.168$.

However, Figure 14 shows the three most common rights-based complaints decrease as application sophistication increased.

FIGURE 14:
RIGHTS-BASED CLAIMS IN STUDY GROUP APPLICATIONS BY SOPHISTICATION SCORE

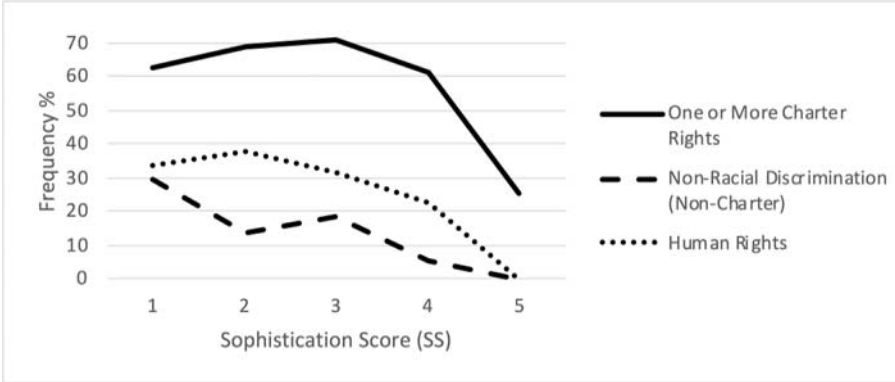

Figure 14: Frequency at which Study Group Applications include allegations of a breach of rights or that certain rights types are implicated, distributed by Sophistication Score (SS) rating (N=117). Non-racial discrimination claims were placed in the "One or More Charter Rights" category if the Study Group Application framed those rights in a *Charter* context, for example, that discrimination breached *Charter* section 15.

Most (64.1%, n=68) Study Group Applications include *Charter*-based claims or allegations. However, only 9.9% (n=12) of those applications provided alleged facts and information to particularize the *Charter* issue and provide a basis for a meaningful court response. Figure 15 shows a strong correlation between high Sophistication Scores (SS=4–5) and the frequency at which *Charter* issues were advanced in a substantive manner.

FIGURE 15:
FREQUENCY OF *CHARTER* CLAIM TYPES IN STUDY GROUP APPLICATIONS BY SOPHISTICATION SCORE

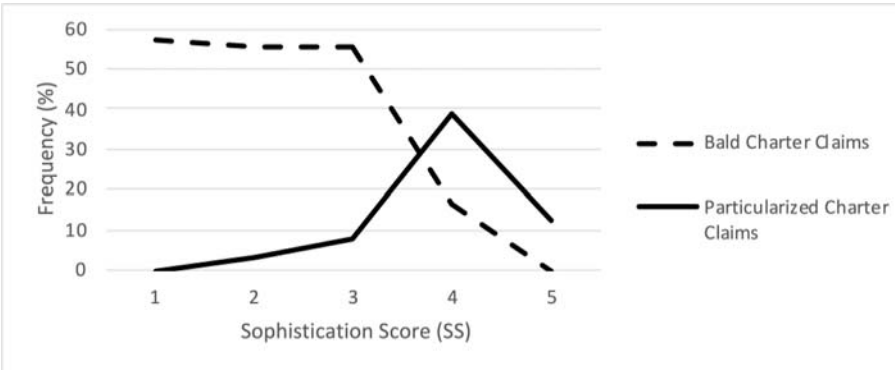

Figure 15: Frequency at which Study Group Applications include allegations of a breach of *Charter* rights, or implicate *Charter* rights, and also provide adequate particulars for that *Charter* right, distributed by Sophistication Score (SS) rating (N=117). "Bald Charter Claims" Study Group Applications fail to provide adequate detail to meet the requirement for a valid *Charter* application, per *MacKay*.[188] "Particularized Charter Claims" Study Group Applications meet the *MacKay* criteria for a valid *Charter* claim.

[188] *Supra* note 155.

Supreme Court justices link the Court's potential interest in a candidate appeal to certain issues and factors. In addition to the presence of *Charter* and Indigenous rights issues that have been addressed above, a leave application will more likely result in a full appeal if there is inconsistent or conflicting lower appeal court jurisprudence, or if the proposed appeal issue(s) affects legislation in multiple jurisdictions. However, the Supreme Court is not likely to grant leave to a candidate appeal where that appeal relates to issues of fact, or applications of fact to an established legal test, since the Supreme Court is a "law-making court," rather than an "appeal court."

Where the substance of a Study Group Application could be evaluated with confidence (SS=2–5), 43.2% (N=95) of those leave applications only alleged fact-finding or fact application errors. Claims that lower court jurisprudence was inconsistent (8.3%, N=117) and that legislation in multiple jurisdictions was implicated (5.8%, N=117) were both uncommon. Figure 16 illustrates how factors that favour Supreme Court intervention strongly cluster in higher SS applications.

FIGURE 16:
RIGHTS-BASED CLAIMS IN STUDY GROUP APPLICATIONS BY SOPHISTICATION SCORE

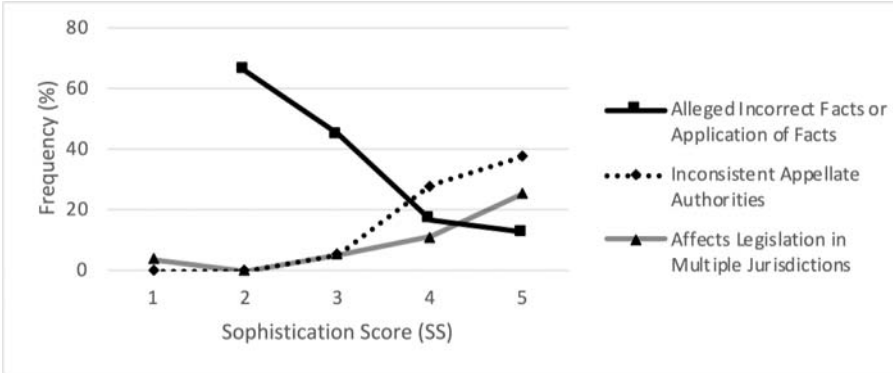

Figure 16: Frequency at which characteristics relevant to whether the Supreme Court grants leave occur in Study Group Applications, distributed by Sophistication Score (SS) rating. "Alleged Incorrect Facts or Application of Facts" indicates that a Study Group Application does not identify a proposed change to law, but instead that the Study Group Application restricts its issues to findings of fact or the application of accepted legal tests to disputed facts (N=95). No data is presented for SS=1 Study Group applications since these applications did not provide a basis to classify whether the proposed appeal was restricted to fact-related issues. "Inconsistent Appellate Authorities" indicates a Study Group Application identified appeal court decisions that allegedly came to different conclusions on a legal rule or principle, or where a lower court panel split on a legal rule or principle (N=117). "Affects Legislation in Multiple Jurisdictions" indicates a Study Group Application claimed that the issues raised in the proposed appeal affect legislation in multiple jurisdictions (N=117).

5. MAZRAANI 37642

Only one Study Group Application was granted leave: Mazraani 37642. A single application is not an adequate sample for statistical purposes. Nevertheless, a closer review of this application, its content and allegations, and pre-Supreme Court litigation is warranted. Mazraani 37642 is a rare exception to the rule.

Mazraani 37642 began in the Tax Court of Canada when Kassem Mazraani, an SRL, appealed the Canada Revenue Agency denying Mazraani's employment insurance claim. Mazraani's employer intervened in the Tax Court appeal, arguing Mazraani was an independent contractor. The Tax Court analysis is largely a review of conflicting witness evidence on that question. Mazraani was entirely successful at the Tax Court, however, the Federal Court of Appeal proceeding that followed focused on a different issue: whether language rights were respected during the trial.[189]

Justice Boivin concluded that the language rights of Mazraani and several witnesses were breached when Mazraani, who did not understand French, was not provided an interpreter, and because Justice Archambault "coaxed" opposing counsel and some witnesses to speak English.[190] The trial judge also provided language translation during the proceeding. Mazraani at trial had agreed to this arrangement, but the Federal Court of Appeal took a strict approach, and concluded that once the language issue emerged, Justice Archambault had no alternative except to stop the proceeding and get Mazraani an interpreter.[191] This appeal decision mentions both Mazraani's and opposing witnesses' language rights, but focuses on the former.

Mazraani filed his leave to appeal application 58 days after the Federal Court of Appeal decision. The leave component of the Supreme Court docket is unremarkable, aside from that an SRL had successfully passed through the Supreme Court's gatekeeping process.

Mazraani 37642 is a 20-page typewritten document. In many ways, Mazraani 37642 is a typical SS=3 SRL application. It does not strictly follow the Supreme Court memorandum of argument five-part scheme. Mazraani clearly has some difficulty in expressing himself in English; he acknowledges that is not his first language.[192] Mazraani 37642 outlines the prior litigation, cites to the record, and identifies two issues: (1) the Federal Court of Appeal ignored the unfavourable factual findings made at trial; and (2) the trial court decision appeal was based on a manufactured "dangler" issue. In effect, Mazraani's language rights had been used as a "sword" to obtain a new trial, rather than as a "shield" to protect Mazraani's right to a fair trial. Mazraani 37642's pleadings are clearly a basis for a meaningful response.

Mazraani did not cite any relevant authorities, but did carefully pinpoint evidence to the trial transcript and passages from the trial and appeal decisions. Mazraani did not allege judicial bias, but did criticize opposing counsel for allegedly unethical conduct.[193] Mazraani mentions the *Charter* on a number of occasions,[194] and reproduces *Charter* section 24, but does not develop a *Charter*-based argument.[195]

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189 *Industrielle Alliance, Assurance et services financiers inc v Mazraani*, 2017 FCA 80 at paras 27–28 [*Mazraani #2*].
190 *Ibid* at para 22.
191 *Ibid* at para 26.
192 Mazraani 37642 at 272.
193 *Ibid* at 284.
194 *Ibid* at 269, 286–88.
195 *Ibid* at 288; *Charter*, *supra* note 135.

Beyond that, Mazraani is angry:

> 60. The Federal Court of Appeal was not balanced and didn't take by all the reasons, the decision was arbitrary and just to quash the judgement.
>
> 61. This decision is a slow kill to me. I worked hard for 5 years sometimes day and night (despite I am not a lawyer) and I was able to present 70 very strong and solid direct and circumstantial evidences and proved to the Tax Court all those facts even the [opposing counsel] confirmed those Evidences. The Federal Court killed all my effort at no time.
>
> 62. This is the most fanatic judgement that leads to hate rage and instability.
>
> 63. The mother doesn't kill one of her children to satisfy the temperamental of her spoiled son.
>
> …
>
> 65. The Federal Court of Appeal killed those evidences and quashed my rights by creating a different ISSUE (I completely refuse) that led to unfair Judgement.[196]

Mazraani 37642 effectively employs the trial transcript to challenge the Federal Court of Appeal's conclusion that opposing party witnesses also had their language rights infringed. For example, Mazraani identifies how a bilingual witness was repeatedly instructed by opposing counsel to speak in French.[197] Mazraani notes opposing counsel agreed to how language would be dealt with at trial,[198] and never raised language as an issue during that proceeding.[199]

The Supreme Court's decision, issued 16 November 2018, concluded that the trial court approach to language rights breached *Charter* section 19(1) and the *Official Languages Act*[200] rights of Mazraani, opposing counsel, and opposing party witnesses.[201] A new trial was ordered. The Supreme Court categorically rejected a flexible approach to the use of official languages in court, but rather that in court proceedings witness and counsel language preferences must be accommodated.[202] Failure to do so usually requires a re-hearing of the matter.[203]

Mazraani 37642 is far from a model Supreme Court leave to appeal application. Mazraani 37642 does not follow the Supreme Court's mandatory memorandum of argument scheme. Its issues are discernible, but the application does not frame the in-court language choice questions in the context of either *Charter* section 19(1) or legislation. Similarly, Mazraani's primary focus that his own language rights were employed in a tactical sense to "unwind" his success at trial, does not dig into the substance of that allegation. Nevertheless, both issues are apparent, and the Supreme Court did respond to each.

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196 Mazraani 37642, *ibid* at 281.
197 *Ibid* at 279–80.
198 *Ibid* at 274–75.
199 *Ibid* at 276–77.
200 RSC 1985, c 31 (4th Supp).
201 *Mazraani v Industrial Alliance Insurance and Financial Services Inc*, 2018 SCC 50 at paras 56–65.
202 *Ibid* at para 20.
203 *Ibid* at para 48.

Mazraani 37642 illustrates that lawyer-like detail to identify and describe legal issues and law is not a prerequisite to a successful SRL leave to appeal application. The language used by this Study Group Appellant is strong and emotional. That, however, did not block a substantive review of this application and the Supreme Court identifying an issue of national importance.

Mazraani's success during the gatekeeping process does provide at least one example that demonstrates the Supreme Court conducts a substantive review of SRL leave to appeal applications, including those applications that possess significant defects, and that are not professional documents.

IV. DISCUSSION AND ANALYSIS

The preceding results demonstrate that a detailed profile of an SRL population's litigation activities may be developed using a document- and data-based methodology. This data will now be used to:

1. develop a "snapshot" of SRL leave to appeal activities at the Supreme Court in 2017; and
2. investigate why SRLs so rarely meet with success when they attempt to access the Supreme Court.

A preliminary point should be addressed first, because sometimes graphs and statistics mask other important facts.

A. PRELIMINARY OBSERVATION: SRL SUPREME COURT CANDIDATE APPEALS ARE DIVERSE

This investigation has uncovered a collection of litigation and litigants who have very different (and often opposite) characteristics. Their path to the Supreme Court involved a diverse and varied range of legal (and non-legal) disputes (Table 1). Their documents exhibit a dramatic range of organization, language, content, and sophistication. Many of these traits are not linked.

Succinctly, there are neither stereotypical Supreme Court SRL applications nor appellants. These populations are complex. That said, certain characteristics and patterns are more or less common. What should be kept in mind while teasing out those broader conclusions is exceptions exist to most rules or patterns.

B. SRLs AT THE SUPREME COURT IN 2017: A SNAPSHOT OF APPELLATE ACTIVITY

The Supreme Court,[204] the Supreme Court Registrar,[205] and the Supreme Court Law Review[206] publish annual reviews and reports that include statistics that document Supreme Court activity. These sources do not report on SRLs as a separate population. That fact, and the uncertain manner in which categories and classes are defined, means these data sources were referenced with caution.

The Study Group Applications made up a substantial portion of new Supreme Court matters in 2017.[207] In total the Study Group Appellants submitted 24.7% (N=507) of the leave applications filed in that year. Whether this rate is typical is uncertain since no source has regularly published SRL activity information since 2010. However, the Supreme Court reports an SRL rate of 33% for 2016–2017.[208]

One Study Group Appellant was granted leave in 2017, a success rate of 0.8% (N=125). The Supreme Court granted leave to 10% (n=50) of all applications filed in that year.[209] Combined, the successful leave to appeal application rate for represented Supreme Court appellants was 13.1% (N=382). This difference is statistically significant ($x^2(1, N=507)=15.3, p=0.00009$) and supports Chief Justice Wagner's report that a successful SRL leave to appeal application is an exceptional event.[210]

The geographic origin of non-Federal Courts and Courts Martial Study Group Applications generally corresponds to Canada's population distribution (Figure 3). Other reports on overall Supreme Court activity in 2017 identify the same pattern.[211] Supreme Court SRL activity appears unrelated to source provincial jurisdiction.

The frequency at which Study Group Applications emerge from Federal Court disputes (18.4%, n=23) was significantly higher than that observed for represented litigants (11.5% (n=44)): $x^2(1, N=507)=3.89, p=0.0486$.[212]

The Study Group Applications' dispute subject matter is too complex to dissect in detail, though a few general observations are possible. Most of these SRLs were engaged in civil

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204 See e.g. Supreme Court of Canada, "Statistics 2007–2017," online: <www.scc-csc.ca/case-dossier/stat/pdf/doc-eng.pdf> ["Statistics 2007–2017"].

205 See e.g. Office of the Registrar of the Supreme Court of Canada, "2017–2018 Departmental Results Report" at 10, online: <www.scc-csc.ca/about-apropos/rep-rap/dpr-rmr/2017-2018/report-rapport-eng.pdf>.

206 Estabrooks et al, "2016–2017," *supra* note 107.

207 What fraction of the overall 2017 Supreme Court appellants the Study Group Appellants represent could not be calculated since this investigation did not conduct a "head count" of represented 2017 Supreme Court appellants.

208 Netolitzky, "Limitations," *supra* note 5 at 166.

209 Supreme Court of Canada, "2018 Year in Review" at 12, online: <www.scc-csc.ca/review-revue/2018/yr-ra2018-eng.pdf> ["2018 Year"].

210 The Right Honourable Richard Wagner, "Access to Justice: A Social Imperative" (Remarks delivered at the 7th Annual Pro Bono Conference, Vancouver, 4 October 2018), online: <www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx>.

211 "Statistics 2007–2017," *supra* note 204 at 7–8; Estabrooks et al, "2016–2017," *supra* note 107 at 118–19; Matthew Estabrooks et al, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada: The 2017–2018 Term" (2019) 89:2 SCLR 71 at 84–86.

212 "Statistics 2007–2017," *ibid*.

subject litigation (Table 1) and initiated the legal dispute that ultimately led to the candidate appeal (Figure 9). Contrary to the SRL narrative, family dispute SRL litigation is rare at the Supreme Court.

All 2017 Study Group Applications completed the leave to appeal process. The Supreme Court Registry is not the Court's gatekeeper. All 21 fee waiver applications sought by Study Group Appellants in 2017 were granted. Highly irregular Supreme Court leave to appeal filings were accepted.[213] In four instances, a Supreme Court appeal docket was opened, and while something was submitted to the Supreme Court justices, nothing that matched the description of an "application" was on the file.[214] The Supreme Court Registry accepted applications that exceeded the 20-page memorandum of argument limit,[215] even where no motion for an over-lengthy leave to appeal memorandum of argument was received. All motions for an over-lengthy memorandum of argument were, apparently, granted.

The Supreme Court says it takes a "generous approach" to limitations periods,[216] which is clearly supported by the high success rate in 2017 (82.6%, N=46) for SRL time to serve and file limitations period extensions motions.[217] Those time period extensions are important for SRL appellants. Less than 20% of 2017 SRL criminal subject leave to appeal applications were filed within the 60-day limitations period; all SRL criminal subject limitations period extension motions were granted.[218]

There were 46 Study Group Applications that sought a *SCA* section 59(1) limitations period time extension. All these motions were evaluated when leave to appeal was determined. The Supreme Court ruled on both leave and time extensions together.[219]

Combined, these observations strongly suggest that the Supreme Court Registry takes a "file everything, filter later" approach to candidate SRL appeals. If so, the three-justice leave to appeal panels are the principle gatekeepers for Supreme Court SRL leave to appeal applications.

The Supreme Court's 2017 statistics report indicates on average 3.8 months elapsed "between the filing of a complete application for leave to appeal and the Court's decision on whether leave should be granted or denied."[220] This interval is similar to the 4.24 month average for a Study Group Application to complete those steps. Figure 1 illustrates that the time required for a candidate Supreme Court appellant to complete a leave to appeal application may be substantial. That said, nearly half (48%, n=60) of Study Group Applications were complete or had a docket assigned within one month of when the Study Group Appellant first contacted the Supreme Court Registry.

Supreme Court justice panels usually came to a decision on whether to grant leave to a Study Group Application within two months after application materials were submitted for

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213 See e.g. Pierce 37530; Placid 37558; Oh 37649.
214 See Part II.A.
215 Tilahun 37448; Hiamey 37519; Pierce 37530; Février 37583; Dunkers 37618; Figure 4.
216 *R v Roberge*, 2005 SCC 48 at para 6.
217 Netolitzky, "Limitations," *supra* note 5 at 178.
218 *Ibid*.
219 *Ibid* at 174, 184–85.
220 "Statistics 2007–2017," *supra* note 204 at 3.

review (Figure 1). The outlier, Sayhoun 37581, was rendered 458 days after the panel received the appeal materials. However, in that case the appellant had died.

No other source examines cost awards by the Supreme Court. Costs were usually awarded against unsuccessful Study Group Appellants, however, elevated costs were very unusual.[221] Cost awards were markedly less common for SS=1 Study Group Applications (Figure 11). This outcome is counterintuitive if no costs indicates a case had potential merit or involved novel issues.[222] SS=1 applications had serious and fatal pleadings deficiencies. Many are essentially indecipherable. One possible explanation for the low incidence of unfavourable SS=1 cost awards is the Court is sympathetic to Study Group Appellants whose applications demonstrated they were out of their depth, or who were affected by a mental health condition.

The Supreme Court only rarely applied its *Supreme Court Rule* 67 authority to terminate SRL candidate appeals. When it did so, that only occurred after the Study Group Appellant had already exhausted his or her legitimate steps at the Supreme Court, but still persisted with unmeritorious and abusive communications. *Supreme Court Rule* 67 was not applied as an application management tool, but instead to close down files.

C. WHY ARE SRL SUPREME COURT LEAVE APPLICATIONS DISMISSED AT VERY HIGH FREQUENCY?

The Project appears to be the first detailed survey of SRL activity at the Supreme Court, and provides an opportunity to investigate why SRLs so rarely have their proposed appeals heard in full. The failure of SRLs at the Supreme Court stands in stark contrast with the low but relatively consistent 10% rate at which candidate Supreme Court appeals filed by represented litigants are granted leave.[223] Academic commentary suggests several alternative, and sometimes opposing, explanations.

1. PROCESS FAILURE

The SRL narrative reports SRLs find Canadian court processes difficult. Since court procedures are foreign and complex, SRL appellant failure at the Supreme Court might be explained if that Court's procedures are an obstacle.

No observations support this hypothesis. In 2017, all Study Group Applications completed the leave to appeal process. No structural or institutional barriers to SRL access were identified. Instead, the Supreme Court leave to appeal process is an open one, given:

1. the Supreme Court Registry's procedures;
2. all fee waivers were granted;
3. acceptance of non-compliant and irregular SRL application materials;

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221 Only in Belway 37708. Netolitzky & Warman, *supra* note 151 at 737 also only identified one elevated Supreme Court leave to appeal cost award.

222 *Hubley v Hubley Estate*, 2012 PECA 17 at paras 24–27.

223 "2018 Year," *supra* note 209 at 12.

4. generous limitations period time extensions; and
5. abusive litigation management procedures were only deployed after a Supreme Court justice panel already evaluated the substance of the leave application.

All Study Group Applications were the subject of a full leave to appeal review process by a panel of three Supreme Court justices (and perhaps the entire Court). That review was the only gatekeeping process applied to the Study Group Applications.

One unanswered question is how many incoming appeals do not complete the application process. Sometimes the Supreme Court Registry returns SRL Supreme Court appeal materials,[224] or requests additional materials prior to opening a file.[225] The Supreme Court docket records do report instances where:

1. a candidate Supreme Court appeal was terminated after an unsuccessful *SCA* section 59(1) motion to extend the time to serve and file limitations period, but where no leave to appeal application was actually filed;[226]
2. a Supreme Court leave to appeal application was dismissed as abandoned;[227]
3. *Supreme Court Rule* 67 was employed to terminate a candidate Supreme Court appeal proceeding without submitting the leave to appeal application for review to determine whether leave should be granted or refused;[228] or
4. a candidate Supreme Court appeal was discontinued.[229]

No 2017 SRL leave to appeal applications ended in these ways.

No evidence is available to directly evaluate how often in 2017 an SRL contacted the Supreme Court Registry with the intent of making a Supreme Court appeal, but no docket was ultimately ever opened. That said, sometimes annual "Performance Reports" prepared by the Supreme Court Registrar have discussed mechanisms, tools, and resources the Supreme Court Registry uses to assist SRLs. The 2008–2009 Performance Report indicates all SRLs who contact the Registry are provided an information and instruction guide that includes sample fill-in-the-blank court forms.[230] In 2008, the Registry distributed 101 of these "information kits."[231] In that year, SRLs filed 128 completed leave to appeal applications.[232] These figures do not eliminate the possibility that an unknown number of SRLs started, or intended to start, a leave application that never resulted in a Supreme Court docket. Nevertheless, the fact the number of information kits distributed in 2008 does not greatly exceed the number of SRL applications received that year suggests most SRLs who intended to initiate a Supreme Court proceeding were successful in doing so. The 2008–2009 Performance Report is the last time information kit distribution volume is mentioned.

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224 See e.g. Lin 37377.
225 See e.g. Pierce 37530.
226 See e.g. Lindsay 27223; Fabrikant 28391; Ayangma 29168; Nagel 34032.
227 See e.g. Parker 31245.
228 See e.g. Aletkina 36521.
229 See e.g. Fortier 36729.
230 *Supreme Court of Canada Performance Report 2008–2009*, at 16, online: *Treasury Board of Canada Secretariat* <www.tbs-sct.gc.ca/dpr-rmr/2008-2009/inst/jsc/jsc-eng.pdf>.
231 *Ibid*.
232 *Ibid* at 17.

Together, these observations indicate the Supreme Court leave to appeal process is not a procedural obstacle for SRLs, and that most SRLs who intend to initiate Supreme Court appeals are likely able to do so.

2. SUBSTANTIVE OR ADJUDICATIVE FAILURE

That means the observed pattern of SRL failure has something to do with the leave to appeal applications, or how those applications are evaluated by the Supreme Court. Academic commentary suggests two alternatives: the adjudicators are unfair or biased, or the leave to appeal applications have serious or fatal defects.

While some legal academics allege Canadian judges are unfair to SRLs, SRL litigation in other high courts may explain the low observed Supreme Court SRL success rate.[233] SRLs are almost never successful in accessing the SCOTUS and HCA. Smith's comparison of SRL and non-SRL SCOTUS certiorari applications concluded SRL appeals were more often frivolous, and that SRL appeals were much less likely to involve a law-making issue, such as where appeal courts have come to different conclusions on a legal rule, or the pre-SCOTUS court panel included a dissent.[234] Stewart and Stuhmcke's investigation is much less definitive, though they too observe that the large volume of SRL immigration subject candidate appeals at the HCA are unlikely to have subjects that would warrant HCA intervention.[235]

Whether the Supreme Court operates in an analogous SRL environment is unclear. The Supreme Court has no large subpopulation of SRL appellants corresponding to the specific SRL appeal types encountered by the SCOTUS (incarcerated prisoners) and HCA (immigration appeals) (Table 1).

Certain candidate SRL appeal characteristics explain why Supreme Court SRLs are almost never granted leave to appeal. Study Group Applications exhibited sometimes overlapping attributes that are a basis for the Supreme Court to deny leave:

1. many SRL leave to appeal applications fail to meet minimum pleadings requirements;
2. many SRL leave to appeal applications advance allegations or claims that are outside the Supreme Court's role as a "law-making" court;
3. many SRL leave applications advance allegations or claims that are hopeless;
4. some SRL leave applications are abusive litigation;
5. few SRL leave applications exhibit the special factors or belong to categories that favour Supreme Court intervention; and
6. truly sophisticated SRL leave to appeal applications are rare, but even those exceptional applications may be problematic.

Many Study Group Applications possess more than one of these characteristics, further reducing the likelihood that the Supreme Court would grant leave to appeal. No evidence

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233 See e.g. Macfarlane, "Report," *supra* note 9 at 111.
234 Smith, "Justice," *supra* note 74 at 405–21.
235 Stewart & Stuhmcke, *supra* note 95 at 50–51.

supports an inference of some form of anti-SRL bias. The six identified defect categories warrant a closer review.

a. Inadequate Pleadings

Court filings that initiate a proceeding and set out its scope, the "pleadings," are a critical requirement for a valid action, application, or appeal. Pleadings identify the issues to which the opposing party must respond, and alert a party to the case it must meet.[236] Adequate pleadings are especially critical when a party seeks *Charter* relief. A factual foundation, or alleged factual foundation, is an absolute requirement in that context.[237]

Filings are abusive if those pleading fail to adequately particularize facts and issues so that responding parties and the court are unable to make a meaningful response.[238] This defect is a basis to immediately terminate litigation as a hopeless proceeding.[239]

Many Study Group Applications fail this criterion. Nearly a quarter (23.1%, N=121) of the leave to appeal applications filed by SRLs in 2017 simply do not provide any basis for a court response (SS=1). Some of these applications are incomplete or highly irregular.[240] Some are submitted by persons diagnosed as having mental health issues that subsequently resulted in court intervention.[241] Other SS=1 applications are largely identical boilerplate pleadings and composed of bald, unsubstantiated allegations.[242]

Another quarter of the Study Group Applications (24.0%, N=121) do not identify legal issues or errors, but only provide a factual narrative that describes what Study Group Appellants say went wrong (SS=2). Together, that means almost half the Study Group Applications fail to meet the basic informational pleadings requirements necessary for a Supreme Court response.

This issue also applies to a large portion (64.1%, N=117) of Study Group Applications that made some kind of *Charter* claim. Many Study Group Applications only invoke the *Charter*, or simply do not identify what particular subsection is in play (Table 2). Further, only rarely do Study Group Applications provide the necessary relevant facts to apply *Charter* tests used by Canadian courts (Figure 15).

This pattern of inadequate pleadings is a first basis why many SRL Supreme Court leave to appeal applications have no realistic prospect for success.

b. Allegations of Fact

Based on Sophistication Scores, a little over half (52.9%, N=121) of the Study Group Applications provided any basis for a court response (SS=3–5). However, many Study Group

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236 *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 87.
237 *MacKay*, *supra* note 155.
238 *Unrau #2*, *supra* note 152 at paras 626–31; *kisikawpimootewin*, *supra* note 150.
239 *Ibid*.
240 See e.g. Pierce 37530; Placid 37558; Oh 37649.
241 See e.g. Gonzalez 37517.2; Placid 37558; Ranieri 37796; Ranieri 37830.
242 See e.g. Olumide 37600; Olumide 37602; Olumide 37603; Olumide 37604; Olumide 37605; Olumide 37760.

Applications exhibit a second critical defect: the proposed appeal subjects do not correspond to the Supreme Court's true function.

The Supreme Court is not a court of appeal, but a court of law. In 1975, the *SCA* was amended to create a general leave requirement for access to that Court. At that point, Chief Justice Laskin described the Supreme Court's function "is to oversee the development of the law in the courts of Canada" via "law-making."[243] The Supreme Court's law-making function means it does not grant leave if a candidate appeal seeks that the Supreme Court rule whether a lower court decision was correct or not.[244] The Supreme Court's focus on law-making is not anything new. As early as 1904, the Court refused to hear an appeal because that appeal related to questions of fact, rather than a "matter of public interest or some important question of law or the construction of Imperial or Dominion statutes or a conflict of provincial and Dominion authority or questions of law applicable to the whole Dominion."[245]

The Court's law-making function means the Supreme Court would, for example, not grant leave where a candidate appeal seeks review of a finding of fact, the credibility of a witness, the weight placed on conflicting evidence, and applications of facts to otherwise undisputed common law and legislative tests. While these issues are a potential foundation for an appeal, that *type* of appeal is outside the Supreme Court's function. The Supreme Court stresses this fact in information provided to potential SRL appellants.[246]

43.1% (N=95) of the Study Group Applications where an issue was identified or could be inferred did not involve any law-making. These candidate SRL appeals only sought leave to challenge findings of fact, the weight placed on evidence, or the applications of facts.

For example, Kraljevic 37406 appeals a criminal conviction. A dispute between neighbours led to a stabbing. The offender, Branka Kraljevic, acknowledged she had stabbed a neighbour, but argued she acted in self-defence. Kraljevic 37406 has only one issue: which of the two conflicting witness narratives was credible. Kraljevic did not propose that the legal test to evaluate conflicting witness testimony is problematic, but instead only that the trial judge came to the wrong result. This SS=3 application's pleadings permit a meaningful Supreme Court response, but the remedy sought by Kraljevic was to correct the lower courts, not make law. The Supreme Court should not, and did not, grant leave.

32.8% (N=64) of the Study Group Applications which provide adequate pleadings only engage the Supreme Court as a "court of facts," and not a "court of law." These Study Group candidate appeals are not within the operational jurisdiction of the Supreme Court and are a second subset where a successful leave to appeal application is highly unlikely.

The combination of these first two often identified defects eliminates 62.4% (N=125) of the Study Group Applications. These nearly two-thirds of all 2017 candidate SRL appeals had no prospect of success.

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243 Bora Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada" (1975) 53:3 Can Bar Rev 469 at 475, 478.

244 Gascon, *supra* note 67 at 585; Wilson, *supra* note 68 at 3.

245 *Lake Erie and Detroit River Railway Co v Marsh* (1904), 35 SCR 197 at 200.

246 Supreme Court of Canada, "Important information about seeking leave to appeal to the Supreme Court of Canada" at point 5, online: <www.scc-csc.ca/unrep-nonrep/app-dem/important-eng.aspx>.

c. Hopeless Applications

Some Study Group Applications adequately plead the candidate appeal but have no reasonable prospect of receiving leave because their subject matter is hopeless. This study generally does not weigh Study Group Application merit, however, some identified attributes meant a Study Group Application had no reasonable possibility of success. For example, the Supreme Court found it had no jurisdiction to hear ten (6.6%, N=125) of the Study Group Applications (Table 3).

Others applications face a difficult onus. No less than 43.6% (n=51) of the Study Group Applications alleged that either court judges or tribunal decision-makers were biased against the Study Group Appellant. Establishing a basis for any such claim is very difficult. Court and tribunal decision-makers are shielded by a "strong presumption of impartiality"[247] that may only be displaced by "convincing evidence."[248] The fact a judge decided against a litigant does not establish an apprehension of bias.[249] All Study Group Applications that alleged bias provided no helpful foundation for those claims, and either made bald unsubstantiated allegations, or alleged bias because of the SRL's lack of success. These bias-driven claims were therefore highly unlikely to succeed. 34.4% (N=64) of SS=3–5 Study Group Applications include unfounded claims of decision-maker bias.

Other Study Group Applications sought disproportionate or impossible remedies (19%, n=23), or attempted to re-litigate settled issues (9.1%, n=11) (Table 3). These leave to appeal applications were therefore also unlikely to succeed.

d. Abusive Leave to Appeal Applications

Beyond that, certain Study Group Applications are abusive litigation that misused the Court. For example, eight Study Group Applications were grounded on OPCA concepts that are universally rejected by courts inside and outside Canada as having no legal merit. OPCA proceedings are instead better described as a kind of revolutionary political activity, where OPCA affiliates scheme to use court processes as a lever to radically rework Canadian society.[250]

e. Characteristics that Favour Supreme Court Intervention are Uncommon

A fifth reason that the Study Group Applications were unlikely to receive leave is that very few applications include any of the "hot button" characteristics that Sopinka J said attract Supreme Court attention.

At first glance the high incidence (64.1%, N=117) of *Charter* constitutional arguments might seem to suggest otherwise. Closer review shows:

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247 *R v S(RD)*, [1997] 3 SCR 484 at 503 [*S(RD)*]. See also *Yukon Francophone School Board, Education Area No. 23 v Yukon (Attorney General)*, 2015 SCC 25 at para 25.

248 *S(RD)*, *ibid*.

249 *Alberta Health Services v Wang*, 2018 ABCA 104 at para 8.

250 Netolitzky & Warman, *supra* note 151 at 718–20.

1. over a quarter (26.7%, N=75) of the applications that mention the *Charter* do nothing more than invoke the *Charter*, without specifying any particular section or *Charter* right,
2. nearly half (46.5%, N=75) of the Study Group Applications that mention the *Charter* do so in litigation that does not involve government actors, so the *Charter* has no application, and
3. the large majority of purported *Charter*-related issues are not adequately particularized (Figures 14–15).

Study Group Applications therefore rarely involve *viable Charter* appeal issues.

One of the Supreme Court's key functions is to clarify the law when the different Canadian courts of appeal disagree. Only ten Study Group Applications (8.5%, N=117) claimed to identify any such unresolved conflict in Canadian law.

Smith observes that a lower court dissent is a conflicting appeal authority scenario.[251] Of the 105 Study Group Applications where a lower court decision was reported, only one, MacRae 37378, involved a split panel and a dissent. The panel disagreed on whether placing information in internal police documents was publication for the purposes of defamation.[252] The majority and dissent decisions do not disagree on the criteria for publication or qualified privilege, but rather the application of specific facts to those tests. The MacRae 37378 dissent is unlikely to lead to a full appeal hearing. The dissent does not represent a disagreement over law.

Only three Study Group Applications mention Indigenous rights.[253] All were abusive OPCA-based candidate appeals.

In total, only 5.8% (N=117) of Study Group Applications claimed to identify instances where the candidate appeal interprets language in multiple federal or provincial statutes.

The "hot button" factors that Supreme Court justices identify as being particularly relevant to exercise of its law-making authority were rarely present in Study Group Applications. Smith came to the same conclusion in his investigation of SCOTUS SRL certiorari applications.[254] This pattern also helps explain why SRLs are so rarely successful at accessing high law-making courts.

f. Even Exceptional Supreme Court Leave to Appeal Applications are Sometimes Abusive

Eight Study Group Applications received an SS=5 score.[255] These documents are an impressive illustration that, despite many obstacles, laypersons may operate at a very high level in Canadian court processes. These applications rarely alleged that justice system

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251 Smith, "Justice," *supra* note 74 at 405–14.
252 *MacRae v Feeney*, 2016 ABCA 343 at paras 16, 29–31.
253 Dove 37487; Miracle 37631; Bloom 37391.
254 See Part I.B.2.
255 Bernard 36834.3; Bernard 37575; Lysons 37520; Collins 37638; Hillman 37663; Oomman 37719; Gagné 37720; Riddell 37858.

participants had engaged in misconduct (Figures 12–13), did not usually advance rights-based claims (Figure 14), but when these applications did advance the *Charter*, the *Charter* claims were particularized and detailed (Figure 15). SS=5 applications rarely based the appeal on a question or application of fact, and sometimes identified leave to appeal "hot buttons" (Figure 16).

Setting aside the potential merit of these cases, these SS=5 applications were the Study Group Applications that had the best chance of success. Nevertheless, two of these eight applications, each filed by Elizabeth Bernard, are clearly abusive litigation. Bernard 37575 involved a judicial review of two labour board decisions that denied two government workers a total of 8.25 hours of paid leave. Bernard identified defects in the decision-maker's geographic residence location and that the decision was made out of time. Both issues appear to be valid complaints, grounded in legislation. However, this otherwise very well drafted and argued leave to appeal application had a fatal defect — Bernard had absolutely nothing to do with the two decisions she had challenged,[256] and instead intruded into otherwise completed disputes on a purely "busybody" basis.[257] Busybody litigation is abusive litigation for an improper purpose.[258]

Bernard 36834.3 is equally flawed, but in a different way. That action was a collateral attack on Bernard's earlier Supreme Court decision.[259] Bernard 36834.3 ignores that, and provides no explanation for why the candidate appeal is not an attempt to re-litigate a settled issue.

g. Conclusion: SRL Supreme Court Leave to Appeal Applications are Dismissed at Very High Frequency Because of SRL Applications' Subject Matter and Content

Many Study Group Applications possess characteristics that mean the Supreme Court would almost certainly deny leave. Only 17.3% (N=121) of the Study Group Applications did not have some defect that was likely fatal to the application. Of these 21 candidate appeals, slightly over half (52.4%, n=11) included a "hot button" issue.

Combined, under one in ten (9.1%, n=11) Study Group Applications had much prospect of being granted leave, *before evaluation of the actual merits of those applications and their alleged issues.* In 2017, one SRL application was granted leave. Framed in that manner, in 2017 SRLs and represented litigant candidate appellants proceeded to a full appeal hearing at the same rate.

SRL leave to appeal applications have a dramatically lower rate of success than those submitted by represented candidate appellants. Document defects, the candidate appeal subjects, and factors applied by the Supreme Court to evaluate candidate appeals explain that difference. Most SRL leave to appeal applications simply do not meet the criteria on which the Supreme Court exercises its law-making function.

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256 *Close and Stevens v Treasury Board (Department of Citizenship and Immigration)*, 2016 PSLREB 18.
257 *Unrau #2*, *supra* note 152 at para 664.
258 *Ibid.*
259 *Bernard v Canada (Revenue Agency)*, 2017 FCA 40 at para 17.

V. CONCLUSION

This article provides an explanation for why SRL leave to appeal applications are almost never granted leave by the Supreme Court. No procedural obstacles were identified in the leave to appeal process. No evidence supports broad-based anti-SRL judicial bias. Close review of Mazraani 37642 instead suggests the opposite.

The problem rests within the applications themselves. These documents often fail to communicate facts, issues, and law. When an SRL does manage to form a coherent inquiry, many applications fall outside the Supreme Court's function, jurisdiction, or are otherwise problematic. Combined, these defects explain the low observed success rate. These SRL applications were walking wounded. Yes, they all completed the leave process, but their defects are fatal, and were fatal from the start.

There remains, however, a further enquiry. Who are these SRLs who tilt at windmills? They, themselves, are the subject of the final Project article.[260]

[260] Donald J. Netolitzky, "The Grim Parade: Supreme Court of Canada Self-Represented Appellants in 2017" [forthcoming in (2021) 59:1 Alta L Rev].