

SEVERANCE: JUSTICE FOR MORE

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Increased use of severance could ease the crisis of civil justice. Hearing the liability and damages portions of trials separately and sequentially would make most civil trials faster and cheaper. Severance also affects jury trials, witnesses' credibility, a court's accuracy, privacy, and extra-legal negotiation. Furthermore, severing more trials would cause stronger parties to win more often as studies show that severance reduces underdog bias. Moreover, there are theoretical implications of severance such as its relationship to concentrated proceedings and the law of evidence and the increasing administrative character of law. Overall, severance offers Canadians a new concept of justice that emphasizes access to justice.

Une utilisation accrue de la procédure de « disjonction » dans le cadre de procès pourrait alléger la crise de la justice civile. Une audition séparée et séquentielle des composantes responsabilité et dommages-intérêts d'un procès civil aurait pour effet d'accélérer la procédure et de réduire la facture. Une telle « disjonction » aurait également des répercussions sur les procès avec jury, la crédibilité des témoins, l'exactitude des conclusions tirées par les juges, la vie privée et les négociations extrajudiciaires. De plus, la « disjonction » d'un grand nombre de procès ferait en sorte que les parties en position de force auraient plus souvent gain de cause, puisqu'elle réduirait les partis pris en faveur des plus faibles. La procédure de « disjonction » revêt de surcroît des implications théoriques, telles sa relation avec le procès unique et le droit de la preuve, ainsi que le caractère de plus en plus administratif du droit. Globalement, la « disjonction » offre aux Canadiens un nouveau concept de justice qui place davantage l'accent sur l'accès à la justice.

1. Introduction

A) The Crisis of Civil Justice

Civil justice systems across Canada and around the world are in crisis. Proceedings are long and expensive. Delays are constant. Savings and psyches are worn down through interminable motions, negotiation, discovery, and the trial itself.¹ Opinion polls across the Western world show,

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¹ Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary*

with few exceptions, that the public has a low regard for the civil justice system.²

In Canada, the crisis is obvious. In Quebec, trial length has increased noticeably over the last few decades. Cases are taking an average of eighteen to twenty percent longer.³ The percentage of self-represented litigants is high and rising.⁴ Starting in the mid-1990s, a decreasing number of civil cases have entered the system as would-be litigants choose extra-legal dispute resolution mechanisms.⁵ In Ontario, the government has recently recommended major overhauls of the civil justice system to reduce congestion.⁶ Fewer and fewer Canadians have access to justice.

What should be done about the crisis? Before determining how the Canadian civil justice system should change, it is helpful to look first at the *status quo*. Trials are long and expensive. Only the wealthiest have the resources to pursue a claim. The effect of this *status quo* is to discourage litigation.⁷ As a result, many issues are dealt with outside of any formal or informal dispute resolution mechanism through private negotiation and agreement.⁸

A major consequence of the *status quo* is to encourage alternative dispute resolution (ADR). For the average Canadian, ADR is increasingly replacing litigation as the primary formal dispute resolution mechanism. ADR is a good complement to the civil justice system but it is not an adequate replacement. Despite all ADR's benefits, it is not necessarily faster or cheaper than civil justice.⁹ Moreover, some research suggests that

Forms of Decision-Making (Cambridge, UK: Cambridge University Press, 2005) at 70-71.

² Hector Fix-Fierro, *Courts, Justice and Efficiency: A Socio-Legal Study of Economic Rationality in Adjudication* (Portland, OR: Hart Publishing, 2003) at 3-4.

³ Me. Christiane Coulombe, "Portrait statistique de l'activité judiciaire en matières civiles à la Cour supérieure et à la Cour du Québec" in André Riendeau, ed., *Dire le droit: pour qui et à quel prix?* (Montreal: Wilson & Lafleur, 2005) 81 at 85.

⁴ *Ibid.* at 97.

⁵ *Ibid.* at 99.

⁶ Hon. Coulter A. Osborne, Q.C., "Civil Juries" in *Civil Justice Reform Project*, 2007, online at: Ontario Ministry of the Attorney General (http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/090_civil.as).

⁷ Herbert M. Kritzer, "Access to Justice for the Middle Class" in Julia Bass, William A. Bogart and Frederick H. Zemans, eds., *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 257 at 263.

⁸ Marc Galanter, "La justice ne se trouve pas seulement dans les décisions des tribunaux" in Mauro Cappelletti, ed., *Accès à la justice et État-providence* (Paris: Economica, 1984) at 153-54.

⁹ Fix-Fierro, *supra* note 2 at 91. For opinions on the merits of ADR see e.g. Owen

the public perceives ADR as a second-class kind of dispute resolution.¹⁰ The current civil justice system is too slow and expensive. The goals of reform should be to improve the system in terms of efficiency but without compromising fairness.

Countries around the world have reached similar conclusions. One of the main responses has been procedural reform. In 1976, Germany decided to concentrate more proceedings into single hearings and to replace many oral hearings with written proceedings.¹¹ The United Kingdom (UK) has been extremely active in civil justice procedural reform.¹² The result has been a radical shift of procedural philosophy from doing justice on the merits of the case at hand to a new philosophy of distributive justice.¹³

This paper will not undertake an in-depth review of other legal systems; nor will it propose a comprehensive solution. Rather it will focus on a civil justice procedural mechanism that is available in Canada but is underused: severance.¹⁴

Part 2 of this paper will discuss the internal logic of severance. It will look at the different ways the mechanism can be used and the different problems resulting from these different uses. Part 3 discusses severance's practical implications with respect to speed, costs, jury trials, credibility, accuracy, privacy, negotiation, and bias. Part 4 looks at the theoretical implications of severance: the end of Canada's tradition of concentrated proceedings and the possible effect of this change on the law of evidence; the increasingly administrative nature of law; and the changing idea of civil justice. Finally, Part 5 concludes with a reflection on why it is necessary to make the law common again.

Fiss, "Comment: Against Settlement" (1984) 03 Yale L.J. 1073 [Fiss]; Richard Abel, "Big Lies and Small Steps: A Critique of Deborah Rhode's *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*" (1988) 11 Geo. J. Legal Ethics 1019.

¹⁰ Christoph Renning, "Subjective Procedural Justice and Civil Procedure" in Klaus F. Rohl and Stefan Machura, eds., *Procedural Justice* (Dartmouth: Ashgate, 1997) 207 at 227.

¹¹ Fix-Fierro, *supra* note 2 at 194-95.

¹² Lord Woolf, *Access to Justice Final Report*, 1996 [Woolf Report].

¹³ Adrian A.S. Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure" in Adrian A.S. Zuckerman, ed., *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford: Oxford University Press, 1999) 3 at 16-17; Woolf Report, *ibid.* at 4.

¹⁴ I will be using the term "severance" throughout this paper to refer to the procedural mechanism being discussed. This is the name that is used in common law Canada. The same mechanism is typically called "scission" or "splitting" in Quebec and "bifurcation" in the US.

B) Severance: A Solution to the Crisis of Civil Justice

A brief explanatory note is in order before continuing. A severance proceeding is a pre-trial motion which asks a court to split a single trial into two or more stages. In some jurisdictions, severance can be imposed by the court on its own motion. For example, imagine a personal injury case in which the plaintiff decides to sue several years after the harmful incident and alleges physical and psychological damage. Currently, all the issues in the case would be heard at one comprehensive trial – limitations, liability, and damages.¹⁵ In a severed trial, each of the determinative issues would be heard separately and sequentially. First, there would be a hearing solely on the issue of limitations; if the defendant proved that the limitation period should exclude the claim, the entire trial would end without any hearing on liability or damages. If the plaintiff proved that the limitation period did not apply, then a second hearing would be held on liability. If the plaintiff proved liability then another hearing would be held on damages. A settlement between the parties could end the trial at any point.

This procedural mechanism is available in common law Canada, in Quebec, and in the US. In Ontario, severance is available pursuant to the court's inherent powers to control its procedure.¹⁶ Other Canadian common law jurisdictions have similar rules.¹⁷ In Quebec, severance has been available in its current form since 2003. That year, the *Code of Civil Procedure* (CCP) was amended to include an updated version of article 273.1, expanding judicial severance powers.¹⁸ In the US, severance has been available in the Federal Court system since Rule 42(b) was added

¹⁵ This example is illustrative only. The issue of limitations rarely arises at a full trial. However, it is included in this example to show how severance can streamline a trial by separating determinative issues from each other.

¹⁶ *Kovach (Litigation Guardian of) v. Kovach*, 2008 91 O.R. (3d) 553 at para. 20, [2008] O.J. No.1725 (Ont. Sup. Ct.) (QL) [*Kovach*].

¹⁷ The authority that allows severance in the rest of Canada (in alphabetical order): *Alberta Rules of Court*, Rule 221; *British Columbia Rules of Court*, Rule 39(29); *Manitoba Queen's Bench Rules*, Rule 1.04; *Federal Court Rules*, Rule 107; *New Brunswick Rules of Court*, Rule 47.03; *Newfoundland and Labrador Rules of the Supreme Court*, Rule 38.01(d),(f); *Northwest Territories Rules of the Court of the Northwest Territories* Rule 303; *Nova Scotia Judicature Act*, R.S.N.S. 1989, c.240, s.34; *Nunavut Rules of Court*, Rule 303; *Prince Edward Island Rules of Civil Procedure*, Rule 21.01; *Saskatchewan, 101055205 Saskatchewan v. Wolff*, 2008 SKQB 301, 328 Sask. R. 42, at para. 10 ("In Saskatchewan, authority to sever the issues at trial is founded on the Court of Queen's Bench inherent jurisdiction."); *Yukon Rules of Court*, Rule 18A (see *Vaughn v. Starke*, 2004 YKSC 29, [2004] Y.J. No. 50 (QL) (Y.S.C.)).

¹⁸ Art. 273.1, para.1 C.C.P.: "The court may, on an application, split an action in any matter at any stage of the proceeding."

to the *Federal Rules of Civil Procedure* in 1938.¹⁹ Yet, in all these jurisdictions, severance is viewed by most judges as exceptional.²⁰

I will argue that legislation should be introduced which imposes severance as a general rule, with the possibility of an unsevered trial if a party can prove that the case is exceptional enough to merit such a derogation. The primary effect of regular severance would be to separate hearings on the issues of liability and damages. Absent such a legislative rule, Canadian judges should use their existing powers to sever most trials to ease the crisis of civil justice.

2. *The Internal Logic of Severance*

A) *Separating Liability from Damages*

Severance is usually requested or imposed after the close of pleadings in the pre-trial phase of a lawsuit. Severance can take many forms, though it is most often used to separate the issue of liability from the issue of damages. It can be used, however, to separate any determinative issue from the others. In *Peter v. Medtronics*, for example, the Court agreed to sever the quantification of the amount of the waiver of a tort claim from the rest of the trial.²¹ This paper will focus on using severance to hear the issue of liability before the issue of damages, the mode of severance most used and studied.

In common law Canada this mode of severance was imposed, for example, in *Lord v. Royal Columbia Hospital*, where the trial judge found four of the five weeks of trial would be spent hearing the issue of damages.²² To save time, the judge ordered an initial hearing solely on liability.

In 1996, Quebec introduced this kind of severance when the CCP was amended to include article 273.1.²³ It has been successfully applied in

¹⁹ *Federal Rules of Civil Procedure* (US), Rule 42(b); see also James D. Bayard, "Eliminating the Barriers to Bifurcation in Louisiana Personal Injury Trials: Article 1562(A) of the Louisiana Code of Civil Procedure's Consent Requirement" (2006) 52 *Loyola L. Rev.* 345 at 358. Most states have adopted similar rules.

²⁰ See e.g. *B. Cata Construction v. Trapani*, [2005] J.Q. No. 15342 (C.Q. civ.) (QL) [*B. Cata*]; *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills*, (1986), 55 O.R. (2d) 56, 9 C.P.C. (2d) 260 (C.A.) [*Elcano* cited to O.R.]; Bayard, *ibid.* at 360.

²¹ [2009] O.J. No. 4364 (QL) (Ont. Sup. Ct.) [*Peter*].

²² (1980), 27 B.C.L.R. 123, 19 C.P.C. 233 at para. 9 (C.A.) [*Lord*].

²³ As noted above at note 18, art 273.1 C.C.P. has subsequently been changed to allow all modes of severance.

several Quebec cases, especially where the proof of liability is quite straightforward but the proof of damages is extensive and complex. For example, in *Fukuhara v. Stanstead College* the judge ordered severance, emphasizing that while a few witnesses were required for liability, more than twenty(!) experts in a variety of fields would be testifying on the issue of damages.²⁴

B) *Exceptional Status*

The use of severance is impeded by its exceptional status. In the US, severance is not explicitly exceptional but is widely treated as such.²⁵ One author speculates that this exceptional status flows from a 1966 amendment to Rule 42(b) of the *Federal Rules of Civil Procedure*, which was neutral in terms of language, but whose footnote sternly stated that routine severance should be avoided.²⁶ Still, a few jurisdictions and judges routinely apply severance.²⁷

Severance is also treated as exceptional in Ontario. The leading case on the issue is *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills*.²⁸ The Court held that because it is the basic right of a litigant to have all issues resolved at one trial, severance must be regarded as a “narrowly circumscribed power” to be used only “in the clearest of cases.”²⁹ Similar reasoning has been applied in other Canadian common law jurisdictions.³⁰ This line of reasoning has been doggedly followed in Ontario since *Elcano*, with only a single recent case suggesting that the increased emphasis on case management might weigh in favour of increased use of severance.³¹

Severance also remains exceptional in Quebec. When severance was first introduced in 1996, CCP article 273.1 stated it could only be used in exceptional circumstances. This legislative requirement was strongly

²⁴ [2003] J.Q. No.7872 (QL) (S.C.Q.) [*Fukuhara*].

²⁵ Steven S. Gensler, “Bifurcation Unbounded” (2000) 75 *Washington L. Rev.* 705 at 707.

²⁶ *Ibid.* at 710.

²⁷ Severance is the rule not the exception in both New York and Pennsylvania; see Bayard, *supra* note 19 at 359-60. Judge Tobin of Florida is one example of a judge who routinely severs his trials; see David L. Tobin, “To B ... Or Not to B ...: B Means Bifurcation” (2000) 74:10 *Fla. B.J.* 14.

²⁸ *Supra* note 20.

²⁹ *Ibid.* at 59.

³⁰ See e.g. *Boone (Guardian ad litem of) v. King*, 2004 NLSCD 154, 240 Nfld. & P.E.I.R. 211.

³¹ *Aghsani v. Briglio* (2006), 148 A.C.W.S. (3d) 565 at para. 30 (Ont. Sup. Ct.) [*Aghsani*].

upheld by judges.³² In 2003, a government report said the advantages of severance were great enough that it should no longer be exceptional.³³ The revised CCP article 273.1 explicitly deleted the word “exceptional.”³⁴ Doctrinal writers have embraced this change.³⁵ A few judges have embraced non-exceptionality too³⁶ but many others continue to reserve severance for exceptional cases.³⁷

The exceptional status of severance reveals two things. First, judges are relatively resistant to procedural change. This judicial conservatism supports my proposal that regular severance should be the *status quo*. Second, severance is not appropriate for every case. Sometimes the issue of liability and the issue of damages are too tightly intertwined. Many judges have rightly flagged this concern.³⁸ Similarly, the issue of damages might be straightforward enough that little or no time-saving will occur if severance is applied; hence the insistence of judges that the damages issue must be “complex” to be severed.³⁹ Another kind of case where severance may be inappropriate is a case of particular public interest, since severing might prevent all the issues from being fully and fairly heard.⁴⁰ Refusing to sever issues in such cases would be consistent with current practices that allow for special procedural rules for especially sensitive areas of the law.⁴¹ All of these kinds of cases could proceed unsevered under my proposed rule as exceptions to the general rule of severance.

³² See e.g. *Biron v. Bielinski*, [2003] J.Q. no.14134 (QL) (C.S.Q.).

³³ Comité de révision de la procédure civile, *Une nouvelle culture judiciaire* (Quebec: Bibliothèque nationale du Québec, 2001) at 133.

³⁴ *Supra* note 18 for newest version of CCP article 273.1.

³⁵ See e.g. Henri Kélada, *Les Incidents*, 2d ed. (Cowansville, QC: Yvon Blais, 2003) at 244.

³⁶ See e.g. *Pagé v. Mercure*, [2003] J.Q. No.13422 at para. 5 (QL) (C.S.Q.); *Desrochers v. EDC-Exploration et développement Canada*, 2007 QCCS 1704, [2007] J.Q. no. 3189 (QL) at para. 26 [*Desrochers*].

³⁷ *B.Cata*, *supra* note 20 at para. 6. Such response is surprising given the great respect Quebec judges usually show for the words of the legislature. In fact, when art. 273.1 C.C.P. contained the word “exceptional”, much weight was placed on the word; see e.g. *Société d'énergie Foster Wheeler liée c. Société intermunicipale de gestion et d'élimination des déchets (SIGED)*, [1998] R.J.Q. 1254 at para. 52 (C.S.Q.).

³⁸ See e.g. *Stone Consolidated Inc. c. Dalkotech de l'Estrie Ltée*, [1997] J.Q. no. 5625 (QL) at para. 10 (C.S.Q.); *Bourne v. Saunby*, (1993) 23 C.P.C. (3d) 333 (Ont. Ct. J. (Gen. Div.)) [*Bourne*]; *Kossow v. R.*, 2006 TCC 151, [2006] 3 C.T.C. 2227, 2006 D.T.C. 2672 at para. 13 (T.C.C.).

³⁹ See e.g. *Proctor & Gamble Co. et al. v. Kimberley - Clark of Canada Ltd.* (1989), 21 C.P.R. (3d) 414 (F.C.T.D.) affirmed on appeal (1989) 23 C.P.R. (3d) 287; *Kovach*, *supra* note 18; *Fukuhara*, *supra* note 24 at para. 16.

⁴⁰ Woolf Report, *supra* note 12 at 23, 123.

⁴¹ Such special treatment is identified as necessary by Mirjan R. Damaska,

C) Imposition

Another aspect of severance is how it is imposed. Imposition raises the issues of public perception and procedural justice. Currently, four models of imposition exist. One requires that both parties consent to severance.⁴² Under another, one party requests severance and then the judge decides whether or not to impose it.⁴³ A third allows a judge to impose severance at his own discretion without any party request.⁴⁴ A fourth model applies severance as the rule, but allows judges to authorize a full trial as an exception to that rule.⁴⁵ Each of these models results in a different rate of severance imposition, with the first model resulting in the lowest number of severed trials and the fourth model resulting in the highest number of severed trials.

Three reasons support the regular imposition of severance according to the fourth model. First, as discussed above, judges can be resistant to procedural reforms. For example, in the US the 1990 *Civil Justice Reform Act* greatly expanded judicial discretionary case management powers in the hopes that judges would use those powers to reduce the amount of pre-trial litigation and to encourage settlement. The changes failed to reduce the length of trials because many judges refused to exercise their new powers.⁴⁶ Similarly, the new procedural rules brought into the UK by the Woolf Report were initially strictly followed but are now increasingly ignored.⁴⁷ Quebec

Evidence Law Adrift (New Haven: Yale University Press, 1997) at 106 [Damaska, *Adrift*]; by Woolf Report, *ibid.* at 23, 123; and in Germany by Astrid Stradler and Wolfgang Hau, "The Law of Civil Procedure" in Mathias Reimann and Joachim Zekoll, eds., *Introduction to German Law*, 2d ed. (The Hague: Kluwer Law International, 2005) at 366.

⁴² This model is used in Louisiana and in the Canadian Federal Court at times, but has been criticized; see Bayard, *supra* note 19. For the Canadian example, see *Brouwer Turf Equipment Ltd. v. A and M Sod Supply Ltd.*, [1977] 1 F.C. 51 at 54.

⁴³ This model is used in Quebec; see *supra* note 18.

⁴⁴ This model can be followed in Ontario, although usually a party requests severance (see *Elcano*, *supra* note 20), and in the US Federal Courts (see *supra* note 19 on Rule 42(b)). Other Canadian common law jurisdictions also allow severance on the court's own motion; see *supra* note 16.

⁴⁵ This approach is taken in New York and Pennsylvania; Bayard, *supra* note 19 at 359-60.

⁴⁶ Dolores Grossemy, "Virage client de la justice et evaluation de sa qualité" in Andre Riendeau, ed., *Dire le droit: pour qui et à quel prix?* (Montreal, QC: Wilson & Lafleur, 2005) 141 at 147-49.

⁴⁷ Paul Michalik, "Justice in Crisis: England and Wales" in Adrian A.S. Zuckerman, ed., *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford: Oxford University Press, 1999) 117 at 157; Richard Verkijk, "Mandatory Mediation: Informal Injustice?" in Alan Uzela and C.H. van Rhee, eds., *Public and Private Justice: Dispute Resolution in Modern Societies* (Oxford: Intersentia Antwerpen, 2007) at 198.

and Ontario judges' frequent invocations of the exceptional status of severance are further examples of the same trend. Because many judges seem to resist procedural reform, such reform works best when judges have no choice but to follow legislative rules. The fourth model provides the least leeway for procedural backsliding and thus is the most attractive option for jurisdictions interested in reform.

Second, the time saved in each severed trial will only have the much needed system-wide effect if most trials are severed.

Third, public perception of the entire civil justice system will be most enhanced if severance is applied as uniformly as possible. Procedural justice scholars have noted that litigants use their judgments of the fairness of court procedure as a substitute for making a vastly more complicated judgment about whether the outcome of a proceeding is fair.⁴⁸ Thus, if the procedure is seen as fair, then the likelihood that a party (winning or losing) will view the entire system as fair is greatly increased. If more parties view the entire system as fair, then the entire public's perception of the system will improve.

Many parties evaluate procedural fairness with reference to two factors: judicial neutrality and whether a party feels he was given a fair opportunity to tell his version of the story – having one's "day in court."⁴⁹ Severance as the rule would strongly support the perception that judges are neutral and consistent. Judges would not be seen as playing favourites when imposing severance if severance were required by legislation. In addition, although severance undoubtedly reduces the ability of parties to fully tell their versions of a story, this perceived negative is attenuated by the fact that the legislation would ensure almost all parties are treated equally. Moreover, any net negative perception by particular parties is more than outweighed by the other benefits of severance, to which I now turn.

3. Severance's Practical Implications

A) Introduction

Regular severance will have concrete effects in terms of speed (including the related issue of appeals), costs (including the related issue of discovery), the character of jury trials, credibility, accuracy, privacy,

⁴⁸ Klaus F. Rohl, "Procedural Justice: Introduction and Overview" in Rohl and Machura, *supra* note 10, 1 at 7.

⁴⁹ David Wasserman, "The Procedural Turn: Social Heuristics and Neutral Values" in Rohl and Machura, *ibid.* 37 at 37-38 (discusses neutrality); Renning, *supra* note 10 at 222-23 (discusses consistency); Neil Vidmar, "Procedural Justice and Alternative Dispute Resolution" in Rohl and Machura, *ibid.* 121 at 128 (discusses the desire to tell one's story).

negotiations, and bias. Each of these issues will be discussed in turn. The overall conclusion I draw is that the practical implications of severance are more positive than negative.

A methodological point first. Many of the studies cited in this section, and in the rest of the paper, are from the US. There, due to the Seventh Amendment, the vast majority of civil trials are heard by juries.⁵⁰ This fact complicates the application of American data to Canada, where civil juries are less common. I think that this data is still highly relevant for two reasons. First, there are still many jury trials in some Canadian jurisdictions.⁵¹ Second, even in the majority of cases where there is no jury, the effects of severance will be similar. I am not impugning the professionalism or the impartiality of Canadian judges. Like jurors, however, judges are human beings and thus they are similarly (though less) disposed to be swayed by the forces that sway jurors.

B) Speed

One of the major reasons to impose severance regularly is that it will speed up trials. In a case where liability is severed from damages, if the plaintiff cannot prove liability, the trial is over. The possibility of time savings is obvious. For example, in *Lord*, the trial judge determined that the issue of liability would take one week and that of damages would take four weeks.⁵² This benefit of severance has been identified across North America.⁵³

One qualification to the speed argument is that, if a plaintiff wins the first stage of a severed trial, the proceedings may take longer overall.⁵⁴ Empirical studies, however, suggest this problem will rarely materialize.⁵⁵ The time savings can be realized even if the plaintiff wins the first hearing because the defendant will then have a very strong incentive to settle.⁵⁶ This incentive to settle is further strengthened by some studies which say once the plaintiff has proven liability in a severed case, the jury is likely to

⁵⁰ US Const. amend. VII.

⁵¹ For instance, in Ontario a recent Ministry of the Attorney General report said that 23% of the 6,839 civil matters cases in 2005-06 were heard by juries; see Osborne, *supra* note 6 at 53.

⁵² *Lord*, *supra* note 25 at para. 9.

⁵³ See Comité de révision de la procédure civile, *supra* note 33 at 132-33 (Quebec); Kovach, *supra* note 16 (Ontario); *Kroger v. Upshall*, 2006 NSSC 327, 249 N.S.R. (2d) 12 at para. 28 [*Kroger*] (Nova Scotia). In the US an example is found in *Hydrite Chem Co. v. Calumet Co.*, 47 F. 3d 887, 891 (7th Cir. 1995); see Bayard, *supra* note 19 at 348.

⁵⁴ See e.g. *1018202 Ontario Ltd. v. Hamilton Township Farmers' Mutual Fire Insurance Co.* (2007), 154 A.C.W.S. (3d) 820 at para. 3 (Ont. Sup. Ct.).

⁵⁵ See Gensler, *supra* note 25; Bayard, *supra* note 20; Tobin, *supra* note 27.

⁵⁶ Gensler, *ibid.* at 706.

make a large damages award.⁵⁷ This effect is especially apparent if the jury believes the defendant frivolously contested the issue of liability.⁵⁸

Judges are likely less disposed than jurors to punish a party for contesting liability. Judicial training makes it less likely that a judge will fall prey to hindsight bias, that is, to believing that a defendant who loses the liability hearing knew her position was frivolous. As a result, in the context of judge-only trials, one would expect a somewhat lower rate of settlement after a plaintiff wins on liability because the defendant would be somewhat less concerned about facing a large damages award. Yet, with either a judge or a jury the rate of settlement would still be very high since there is little reason for parties to spend additional resources on a damages hearing when a reasonable settlement can be had.⁵⁹

The empirical studies about the speed benefits of severance are encouraging. One American study found that severance makes the average civil matters trial take twenty percent less time.⁶⁰ Another study from the same jurisdiction found that, although a full hearing of a severed trial was longer than a regular unsevered trial (7.09 days versus 6.235 days), significant time savings occurred because many severed trials were never heard in full – and since the average liability portion of a severed trial last 3.82 days.⁶¹ Essentially, the high rate of settlement after the first hearing means that severance will almost certainly result in a net time savings.⁶² Time saving also results from the fact that severed trials are shorter and therefor can usually be scheduled much sooner than longer trials.⁶³

Some issues arise that could erode the potential time savings. In theory, if severance is not properly applied, it could lead to longer trials. As noted above, the issues at play in a case are sometimes too closely

⁵⁷ *Ibid.* at 747.

⁵⁸ Dan Cytryn, “Bifurcation in Personal Injury Cases: Should Judges Be Allowed To Use the ‘B’ Word?” (2001-2002) 26 *Nova L. Rev.* 249 at 262.

⁵⁹ Of course, it is possible that after a liability win a plaintiff will make unreasonable settlement demands. However, the effect of a distortion is likely to be minimal since many plaintiffs are in greater need of money than defendants and thus still would have an incentive to ask for a reasonable settlement.

⁶⁰ Bayard, *supra* note 19 at 351.

⁶¹ Gensler, *supra* note 25 at 773.

⁶² A more recent, less systematic study by a Florida judge of his caseload supports this point. He found that after three and a half years, only 1 of 42 of the trials he severed was heard in full; see Tobin, *supra* note 27. This finding suggests that the time savings from regular severance might well exceed 20%.

⁶³ Kroger, *supra* note 53 at paras. 29-30.

intertwined to be sensibly divided.⁶⁴ For example in *Mikolayczyk (Litigation Guardian of) v. Reid*,⁶⁵ the judge found the issues of causation and damages were too tightly intertwined. Liability was to be determined through accident reconstruction by experts. Their analysis was to focus on the injuries and how they were caused. Thus, the discussion of the causation aspect of liability and of damages would be quite similar.⁶⁶ Severing such a trial could lead to a lot of repetitive expert testimony.

To determine whether issues are sufficiently separate, it is also necessary to assess the extent of witness overlap. If a witness is expected to testify about different issues, then those issues may be more difficult to sever. In *Rajkhowa v. Watson* the Chambers judge found that the issues of liability and damages were not interwoven:

The actions and words which will be the focus of the liability claim have little to do with the damage claim. The unusual part of the damage claim is the alleged effect of those words and actions on the plaintiff's state of mental health and his ability to work. These two things have two almost completely separate sets of witnesses.⁶⁷

Witness overlap is not always, however, a reliable indicator of interwoven issues. In *Weatherford Canada Partnership v. Addie*, the judge accepted that, while some witnesses would be testifying about both liability and damages, the evidence those witnesses would be giving would be different for each issue.⁶⁸ Thus, superficial witness overlap will not always indicate the kind of evidentiary overlap that demands a full trial.

Time savings would also be reduced if severance resulted in multiple appeals. Two issues can arise from appeals. First, the decision to sever the trial could itself be appealed. In Quebec, CCP article 273.2 allows the appeal of any issue in a severed trial only once a final judgment has been rendered.⁶⁹ This restriction should be applied elsewhere to minimize unnecessary appeals. Second, the trial judge's decision on the issue of liability could be appealed multiple times, followed by a similar chain of appeals on damages. For instance, in *Addie*, two competitors in the oil equipment industry sued one other.⁷⁰ The judge noted that an appeal of his

⁶⁴ However, as noted above in Part 2, severance should only be applied when it will likely save time so this problem can mostly be avoided.

⁶⁵ [1995] 6 W.W.R. 357, 129 Sask. R. 218 at para. 10 (Sask. Q.B.) [*Mikolayczyk*].

⁶⁶ *Ibid.*

⁶⁷ 2000 NSCA 50, 216 N.S.R. (2d) 1 at para. 14 (N.S.C.A.) [*Rajkhowa*].

⁶⁸ 2009 ABQB 538, [2010] Alta L.R. (5th) 98 at para. 23 (Alta. Q.B.) [*Addie*].

⁶⁹ Art. 273.2 C.C.P.

⁷⁰ *Addie*, *supra* note 68.

decision on liability was highly likely given the stakes.⁷¹ Where multiple appeals are likely to occur whatever the court's decision, severance may waste time.

Still, there are two reasons to think the threat of appeal should not derail severance in most cases. First, even if a case is destined to be appealed, the appeal itself can still be heard sooner and decided sooner if the liability issue to be heard is shorter than a full trial. Second, courts should be wary of parties' claims that they will definitely appeal if they lose. Such statements are common in our adversarial system. Even in the face of such claims, severance may often be appropriate given the high rate of settlement after a determination of liability.

Overall, despite the concerns with severance, the regular use of this procedural tool would save the civil justice system time. The number of cases in which issues are truly too interwoven for severance to be appropriate is relatively small. Appeals can undermine the benefits of severance, but will not necessarily overwhelm the enticing prospect of settlement. Moreover, the majority of cases will not have any overlapping issues or aggressive appeal threats. Thus, these concerns do not detract significantly from severance's potential time savings.

C) Cost

The issue of cost is closely related to the issue of time, although the two are not entirely congruent. Faster civil proceedings will likely yield cheaper civil proceedings, but not necessarily so. For example, if parties know the first hearing is likely to be determinative, they will be more likely to put additional time and effort into that hearing.

Discovery is a major point for cost savings. A severed trial may involve a severed discovery process; whereby the parties conduct discovery on the issues that will be heard first and then go to trial – avoiding discovery on potentially superfluous issues. By severing discovery, courts can relieve parties of the substantial costs of examination on discovery and expert witness reports that may be irrelevant to the court's final determination. Severed discovery has been allowed across Canada, but is not the norm.⁷² The costs of discovery can be substantial. For example, *Peter* is a national class action against the maker of implanted defibrillators for damage flowing from battery defects in those

⁷¹ *Ibid.* at para. 45.

⁷² See e.g. *Unwin et al. v. Crothers et al.* (2005), 76 O.R. (3d) 453 (Sup. Ct.) [*Unwin*]; *101055204 Saskatchewan Ltd. (c.o.b. DT Consulting) v. Wolff*, 2008 SKQB 301, 328 Sask. R. 42 (Sask. Q.B.).

devices.⁷³ The defendant estimated that the cost of discovery for the issue of the quantification of the amount of the waiver of tort claim would be between \$750,000 and \$1.5 million.⁷⁴ Since the costs of discovery on this issue were significant and the relevance of the issue was uncertain, the court ordered severed discovery.⁷⁵

Severing discovery can have its downside. In *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Limited Partnership*, the trial judge warned that severing discovery may have implications for trial fairness.⁷⁶ Discovery into damages can affect a party's understanding of liability. We can imagine a case in which the defendant examination for discovery of the plaintiff's accident reconstruction expert reveals a new way of arguing causation the defendant might not have otherwise found. Cases can develop in unforeseen ways. Judges should tread carefully in ordering severed discovery lest trial fairness be undermined. That said, cases where severed discovery is inappropriate may well be cases where the issues are so interwoven that severance would not be appropriate anyway.

Despite these concerns, cheaper civil proceedings are very likely to result from severance. Less money will be spent on pre-trial motions and preparation for trial because the trial will be dealing with fewer issues.⁷⁷ Less money will be spent on discovery because fewer issues will be discussed at the first hearing. Finally, less money will be spent on expensive expert reports on damages because such reports may end up being superfluous. The expense of experts is a concern raised repeatedly in the jurisprudence and the literature.⁷⁸ Severance will create significant costs savings by reducing or eliminating all these expenditures.

Severance, then, will reduce the amount of money most parties spend on most civil trials. The result will be a considerable increase in access to justice. As noted above, one of the main criticisms of the civil justice system is that it is too expensive. Only the rich (and the subsidized poor) can afford to use the system.⁷⁹ If the cost of a civil suit fell, more people would likely use the civil justice system.⁸⁰

⁷³ *Peter*, *supra* note 21.

⁷⁴ *Ibid.* at paras. 12, 21.

⁷⁵ *Ibid.* at para. 38.

⁷⁶ 2006 BCSC 1716, 153 A.C.W.S. (3d) 562 at para. 60 (B.C.S.C.).

⁷⁷ *Tobin*, *supra* note 27.

⁷⁸ Kélada, *supra* note 35 at 245; *Fukuhara*, *supra* note 24 at para. 18; *Lord*, *supra* note 22 at paras. 9, 17.

⁷⁹ *Kritzer*, *supra* note 8 at 263.

⁸⁰ *Ibid.* (generally).

Severance is likely to make the civil justice system faster and cheaper. These two factors have a great impact on access to justice. However, speed and cheapness are not the only results that severance would produce. Severance would also make the civil justice system work differently. These other impacts are discussed for the rest of the article.

D) Jury Trials

One major roadblock to severance of liability from damages is jury trials. In *Rajkhowa v. Watson*, the plaintiff chose not to waive his legislative right to have the issues of fact in his defamation case heard by a jury.⁸¹ If the trial (and the related discovery) is severed and the jury finds liability in such a case, then several issues arise. First of all, there will be a long delay before the damages hearing during which the parties will conduct discovery. The question is what should be done with the jury during this period. The Court in *Rajkhowa* found there was no authority to support recalling the jury.⁸² For this reason, severance was not allowed.

Even if there were a legal basis for recalling a jury, a number of logistical problems arise. First, it would be difficult to reassemble a jury months or years later to hear the issue of damages. The alternatives to reconstituting the jury are not entirely appealing. A new jury could be empanelled to hear the issue of damages, but inconsistent findings could occur. The judge in *Robinson v. Terra Nova Shoes* observed that a key reason for a single trial is “to make sure that there is no inconsistency of ... finding[s].”⁸³ A new jury (or a new judge, as the case may be) will make new determinations about what occurred that may conflict with the findings of the original jury. That inconsistency could undermine the integrity of the trial process. Any attempt to make a jury follow the findings of the previous jury through the imposition of a form of *res judicata* is likely to fail, since such an attempt faces the dual hurdles of precedent⁸⁴ and jury comprehension of complex judicial directions.

Perhaps the concern that different juries will make inconsistent findings is overstated. Americans do not appear to be bothered by the issue of inconsistency. Justice Tobin, for instance, simply writes, without elaborating, that severance functions by way of one jury determining liability and another determining damages.⁸⁵ Still, Canadian courts have

⁸¹ *Rajkhowa*, *supra* note 66 at para. 2.

⁸² *Ibid.* at paras. 35-37.

⁸³ 2005 ABQB 187, 138 A.C.W.S. (3d) 46 at para. 6 (Alta. Q.B.).

⁸⁴ *Swamy v. Schell*, 2000 ABQB 437, 86 (2001) Alta L.R. (3d) 112 at para. 24 (Alta. Q.B.) [Swamy].

⁸⁵ Tobin, *supra* note 27.

generally found that the existence of a jury requires an unsevered trial.⁸⁶ Given the skepticism of Canadian courts towards severance and given the issues that arise from severing a jury trial, it may be difficult to win severance of a jury trial.

Severing jury trials may be advisable, however, if the issue of damages is especially complex. In Ontario, section 108(3) of the *Courts of Justice Act* allows a court to assess an issue of fact or of damages (or both) without a jury.⁸⁷ If the issue of damages is especially complex and involves many experts discussing a very technical issue, then severance would allow a judge to hear the complex issue herself, avoiding the prospect of a confused jury. Thus, while severance may be inappropriate for jury trials, there are circumstances in which it may be desirable.

E) Credibility

Another issue raised by severance is the possibility that two different triers of fact may determine the credibility of witnesses. Judges have tried to lessen this problem by asserting that, as far as possible, the same judge should hear both parts of a trial.⁸⁸ But the same judge will not always be available in a timely manner.

The issue of credibility has often been successfully raised by parties trying to avoid severance. In *Rajkhowa*, a defamation case, the court found that the appellant was a key witness and thus his credibility was a significant issue for the determination of both liability and damages. The court went on to say, "It is neither just nor convenient to require the appellant to establish his credibility before two separate juries."⁸⁹ Other cases have reached the same holding.⁹⁰ The concern is that one trier of fact will find a key witness credible and the other will not.

Credibility is not determined in a set manner. Still, many judges think the credibility of a witness is determined on the basis of all the evidence

⁸⁶ See e.g. *Kotai v. Queen of the North (The)*, 2008 BCSC 1398, [2008] B.C.J. No. 1973 (QL) at para. 89 (S.C.); *Carreiro (Litigation guardian of) v. Flynn*, [2004] O.J. No. 3117, 132 A.C.W.S. (3d) 667 at para. 23 (Sup. Ct.); *Rajkhowa*, *supra* note 66 at para. 50.

⁸⁷ Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, s.108(3).

⁸⁸ *Hamel v. Pitch-Walters Holdings Ltd.*, 2004 MBQB 231, 188 Man.R. (2d) 266 at para. 17 (Man. Q.B.).

⁸⁹ *Rajkhowa*, *supra* note 66 at para. 38.

⁹⁰ See *Kirby v. Raman*, 2009 NLTD 22, 285 Nfld. & P.E.I.R. 263 at para. 41 (N.L.S.C.T.D.)(*Kirby*); *Bakker v. Van Santen*, 2003 ABQB 706, 26 (2004) Alta L.R. (4th) 107 at para. 51 (Alta. Q.B.)(*Bakker*).

given by that witness in a holistic fashion.⁹¹ Thus, for example, believable testimony about the issue of damages can increase the credibility of unbelievable testimony given about liability.⁹² The obvious concern is that, in a severed trial, a witness will only be testifying about liability and thus the trier of fact's determination of his or her credibility may be skewed if the witness is more credible with respect to damages than liability.

Yet the issue of credibility is not always a reason to avoid severance. In *Hynes v. Westfair Foods* the plaintiff slipped on a puddle of spilled vegetable oil at the defendant's store.⁹³ While the judge did not order severance, she found the importance of that plaintiff's credibility was not a barrier to severance. The plaintiff's credibility was central to the issue of liability but marginal to the issue of damages.⁹⁴ In such circumstances, severance may proceed without major credibility concerns.

Assessing the appropriateness of severance challenges our prevailing ideas about credibility. It may be standard practice for a judge to use a witness' testimony on the issue of damages to assist in his determination of that witness' credibility on the issue of liability,⁹⁵ but there is no good explanation for why this practice makes sense. How credibility is or should be determined is beyond the scope of this paper. Credibility is one of the most important issues in any trial, but it remains one of the least studied aspects of evidence law. A richer notion of how credibility is and should be assessed might refine our ideas about the appropriateness of severance.

F) Accuracy

Severance increases accuracy by simplifying civil proceedings. Fewer issues lead to less complexity and less information for the trier of fact to process. The result will almost certainly be more accurate findings of fact.⁹⁶ Yet severance may sometimes result in less accurate trials. If a trial is severed but nonetheless proceeds to the damages hearing, then the time delay may mean witnesses forget crucial information or become unable to testify.⁹⁷ This concern is diminished by two things. First, much more often

⁹¹ *Dmytriw (Next Friend of) v. Odim*, 2008 MBQB 12, 226 Man. R. (2d) 284 at para. 22 (Man. Q.B.); *Mikolayczyk*, *supra* note 65 at para. 14.

⁹² *Swamy*, *supra* note 84 at para. 26.

⁹³ 2008 BCSC 637, 167 A.C.W.S. (3d) 283 at para. 3 (B.C.S.C.).

⁹⁴ *Ibid.* at para. 36.

⁹⁵ *Swamy*, *supra* note 84 at para. 26.

⁹⁶ Gensler, *supra* note 25 at 751; *Chestnutt v. Dollery Rudman Design Associates Inc.* [1996] 120 F.T.R. 54 at para.15 (F.C.T.D.).

⁹⁷ *Kirby*, *supra* note 90 at para. 8; *Bakker*, *supra* note 90 at para. 72 (counsel argument).

than not, there will be no second hearing. Second, any witnesses whose evidence may decrease in quality over time can be subject to an examination-for-discovery for the later severed issue. The transcript from this discovery could be used in lieu of *viva voce* evidence if necessary.

G) Privacy

Another benefit of severance, especially when accompanied by severed discovery, is that it will increase the privacy enjoyed by parties. Because it allows for a single determinative issue to be dealt with prior to, and separate from, other issues, and because settlement will likely result from the first hearing, severance dramatically decreases the “premature or unnecessary disclosure of confidential information.”⁹⁸ This advantage is especially important in Quebec where privacy rights have a quasi-constitutional status.⁹⁹

H) Negotiations

Severance will also affect the extra-legal negotiations that surround any civil trial. Parties, after all, are “bargaining in the shadow of the law.”¹⁰⁰ Currently, since civil proceedings are long and expensive, wealthier parties have a significant bargaining advantage because they can afford to go to trial more than poorer parties. After severance, shorter and cheaper trials will reduce that advantage. In fact, if a poor plaintiff wins on liability, the bargaining advantage may reverse.¹⁰¹

Moreover, settlement will likely increase because the parties have sunk less time and money into severed proceedings.¹⁰² A party will be more inclined to accept a \$50,000 settlement if he or she has spent only \$15,000 to prepare for a severed trial instead of \$45,000 to prepare for a full trial.

Readers might wonder how I can trumpet more settlement as an advantage of regular severance while earlier decrying the increasing amount of ADR. The answer is simple: the increased settlement rate in the proposed regime would flow from a more accessible civil justice system, whereas settlement under the *status quo* often results from the inaccessibility of civil justice.

⁹⁸ *Upjohn Co. v. Apotex Inc.* [1993] 71 F.T.R. 290 at para. 26 (F.C.T.D.).

⁹⁹ *Charter of Human Rights and Freedoms*, R.S.Q., c.C-12, s.5 [Quebec Charter].

¹⁰⁰ Hein Kotz, “Civil Justice Systems in Europe and the United States” 13:3 *Duke J. Comp. & Int’l L.* 61 at 76.

¹⁰¹ Gensler, *supra* note 25 at 747, 776.

¹⁰² Tobin, *supra* note 27.

1) Bias

The final practical effect of severance is a change in bias. A matrix of facts surrounds every issue in a case and affects how that issue is seen by the trier of fact.¹⁰³ Emotions and logic co-exist in the evaluation of evidence and law. For instance, if a poor senior ends up being seriously injured by a rich corporation, the trier of fact may be inclined to find that the corporation is liable, even if that finding is not supported by the facts.

This example should not be taken as an unsupported attack on the impartiality of juries or judges. In *Whiten v. Pilot Insurance Co.* the Supreme Court of Canada voiced the same concern: damages claims might affect the fairness of the liability hearing.¹⁰⁴ Or, as Justice Binnie pithily stated, the question “what’s a \$345,000 insurance claim to a \$231 million company?” should not cross the trier of fact’s mind.¹⁰⁵ Sympathy for the plaintiff can bias the trier of fact in favour of the plaintiff.¹⁰⁶

1) Studies Find Bias

The Supreme Court’s concerns are validated by several American empirical studies. Most commentators agree that the plaintiffs win fewer severed cases because severance eliminates or significantly reduces the amount of sympathy plaintiffs can evoke from the jury.¹⁰⁷ Steven Gensler reviewed the data and found that juries were significantly less likely to find liability in severed trials.¹⁰⁸ Dan Cytryn saw that plaintiffs were almost three times more likely to win an unsevered personal injury case than a severed one.¹⁰⁹ James D. Bayard similarly found that plaintiffs win more when liability and damages are decided together.¹¹⁰ Justice Tobin stated that severance prevents plaintiffs from gaining sympathy from the jury on the issue of damages.¹¹¹

These studies have been rightly criticized for focusing on personal injury cases, where the effect of sympathy is probably the greatest, and

¹⁰³ *B.C.I.T. v. British Columbia (Attorney General)* (1986) 4 B.C.L.R. (2d) 8, 12 C.P.C. (2d) 75 at 10 (C.A.) [*B.C.I.T.*].

¹⁰⁴ 2002 SCC 18, [2002] 1 S.C.R. 595 at 655 [*Whiten*].

¹⁰⁵ *Ibid.* at 654-55.

¹⁰⁶ In this section and for the rest of the paper I refer to plaintiff bias. Underdog bias may be a more accurate term since it is the underdog party who benefits from trier of fact sympathy, whether or not the underdog also happens to be the plaintiff.

¹⁰⁷ *Ibid.* at 741.

¹⁰⁸ Gensler, *supra* note 25 at 741-44.

¹⁰⁹ Cytryn, *supra* note 58 at 264-65.

¹¹⁰ Bayard, *supra* note 19 at 353.

¹¹¹ Tobin, *supra* note 27.

ignoring other types of cases which make up the majority of any court's docket.¹¹² This criticism cannot be lightly ignored, but nor should it be given undue weight. Even outside personal injury cases, there is often a clear underdog party who is likely to attract the trier of fact's sympathy – the new entrepreneur who mistakenly signed an unfair lease agreement, for instance.

Sympathy plays a significant role in the determination of liability, especially for jurors. One author has suggested that jurors have an anti-plaintiff bias in some cases.¹¹³ Another said that when jurors do not understand the legal issues at hand, they use emotional judgments of the case as substitutes for fully grasping the more complex issues.¹¹⁴ No study on juror behaviour suggests that sympathy does not sway jurors one way or another.

For many people a \$345,000 claim does not really mean a whole lot to a \$231 million company. Judicial professionalism undoubtedly dampens such populist sentiments but cannot entirely douse them. Surely by now legal realism has dispelled the classic image of the judge who mechanically applies the law. Whether a claim is heard by a judge or a jury, then, severance will result in a significant change in bias that will be more favorable to defendants.

2) *Impartiality Versus Equity*

The decrease in bias that results from severance pits two important legal principles against each other. On one hand, it enhances the impartiality of courts by significantly reducing the sympathy that undermines impartiality. The right to be heard by an impartial tribunal is constitutionally enshrined in section 96 of the *Constitution Act, 1867*.¹¹⁵ The same right is enshrined in section 23 of the *Quebec Charter of Human Rights and Freedoms*.¹¹⁶ Similarly, the Seventh Amendment of the US Constitution enshrines the right to an impartial trial.¹¹⁷ Some scholars have argued that the right to impartiality alone should be strong enough to compel cases to be heard in a severed manner.¹¹⁸

¹¹² Gensler, *supra* note 25 at 745.

¹¹³ Cytryn, *supra* note 58 at 259.

¹¹⁴ Gensler, *supra* note 25 at 756.

¹¹⁵ *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c.3.

¹¹⁶ *Quebec Charter*, *supra* note 102, s.23.

¹¹⁷ See *supra* note 50.

¹¹⁸ Bayard, *supra* note 19 at 356.

On the other hand, reducing the role of sympathy in civil proceedings undermines equity. Traditionally, equity allowed courts to soften and modify the law by departing from legal rules when such departure would produce a more just result.¹¹⁹ Equity is also a relevant legal concept in Quebec. Doctrinal scholars such as Pierre-Gabriel Jobin have consistently argued that rulings such as *Viger*¹²⁰ and various changes to the *Civil Code of Quebec* have firmly implanted the idea of equity in Quebec civil law.¹²¹ In the US, some scholars argue that civil juries serve a broader social purpose than simply applying the law; they ignore or modify legally defined standards of liability to reach a result that they regard as fair and equitable.¹²² Equity is thus relevant to the issue of severance because it is the spirit of equity which emboldens a sympathetic judge or jury to find liability.

The concern that severance will diminish the power of judges or juries to alter the law where they see fit is echoed throughout the literature. One judge said severance might “deprive plaintiffs of their right to place before the jury the circumstances and atmosphere of the entire cause of action ... replacing it with a sterile or laboratory trial atmosphere.”¹²³ In more Canadian language, the concern is that severance might detract too much from the “context” of the trial. To counteract this effect some judges have suggested that the damages can be mentioned in a liability trial “to put matters in context.”¹²⁴

Context matters to triers of fact. The mentioning of injuries is especially important because without any mention, jurors or judges often wonder why the plaintiff is suing at all.¹²⁵ This bewilderment may result in an anti-plaintiff bias where it appears the injury is not substantial.¹²⁶ Moreover, some studies have found that if jurors do not hear about injuries,

¹¹⁹ A.W.B. Simpson, *An Invitation to Law* (Oxford: Blackswell, 1988).

¹²⁰ *Cie Immobilière Viger v. L. Giguère*, [1977] 2 S.C.R. 67.

¹²¹ Pierre-Gabriel Jobin, “Equity in the Law of Contracts” in Pierre-Claude Lafond, ed., *Mélange Claude Masse. En quête de justice et d'équité* (Cowansville, QC: Yvon Blais, 2003) 469; see also Pierre-Gabriel Jobin with the collaboration of Nathalie Vézina, *Baudouin et Jobin: Les Obligations*, 6th ed. (Cowansville, Quebec: Editions Y. Blais, 2005); Preliminary Provision, art.1434 C.C.Q.

¹²² Gensler, *supra* note 25 at 748, 770.

¹²³ *In re Beverley Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982); this reasoning was affirmed six years later in *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988).

¹²⁴ *Kovach*, *supra* note 16 at para. 31. Justice Tobin of Florida agrees that sometimes it might be appropriate for the court to say to the jury that the plaintiff has injuries, or even “significant injuries;” see *supra* note 27.

¹²⁵ Cytryn, *supra* note 58 at 255.

¹²⁶ *Ibid.* at 259.

they may fail to take their role seriously.¹²⁷ This failure could be potentially devastating to the aim of using severance to increase public faith in the civil justice system insofar as one of the main reasons why people prefer trials to other forms of dispute resolution is that they feel their concerns are taken seriously at a trial.¹²⁸

The bias effect of severance is the most powerful example of how severance makes the civil justice system work differently. The question is whether this difference is good or bad; and if it is bad, whether it is outweighed by the benefits of severance. As Gensler points out, jurists who support severance see the correct role of the trier of fact as a fact-finder bound to follow the law.¹²⁹ Jurists who oppose severance believe that triers of fact serve a broader social purpose and should be allowed to depart from the law.¹³⁰ Given these different views, the bias effect of severance is not clearly an advantage or a disadvantage.

J) Conclusion

This part has discussed the various practical implications of severance. The evidence suggests that severance will make the Canadian civil justice system work faster and more cheaply. It will also make the decisions of the system more accurate. It will protect the privacy of parties and encourage negotiation at all stages of the proceedings. More controversially, it has effects on jury trials and on the trier of fact's determination of credibility. Finally, severance will decrease the pro-plaintiff bias that exists in civil trials.

Many of the changes that severance will deliver are positive. We want the civil justice system to be both faster and cheaper. It must be remembered, however, that one of the goals of reform is increased access to justice. While severance undoubtedly increases access by making civil proceedings faster and cheaper, it is less certain whether it will allow the civil justice system to continue to provide the kind of justice that Canadians want. Severance does not necessarily provide less justice, but rather a different kind of justice. It is this different kind of justice that this paper will explore next during its consideration of severance's theoretical implications.

¹²⁷ Gensler, *supra* note 25 at 766-67.

¹²⁸ Rohl, *supra* note 48 at 15.

¹²⁹ Gensler, *supra* note 25 at 748.

¹³⁰ *Ibid.* Bayard, for example, argues severance is a barrier against the prejudicial effects of jury sympathy; see *supra* note 19 at 346, 356.

4. Theoretical Implications of Severance

The discussion of theoretical implications of severance will focus on three main issues: concentrated proceedings and the law of evidence; the increasingly administrative nature of law; and the changed idea of “justice” that severance implies. The purpose of this part is to give the reader a sense of the larger normative effects that the implementation of regular severance would have and to evaluate those effects.

A) Concentrated Proceedings and the Law of Evidence

Concentrated proceedings are one of the most distinctive features of the common law. Traditionally, Anglo-American countries had a single, climactic trial concentrated into one continuous block of time. Continental countries, conversely, had many separate piecemeal hearings in which different parts of a case were slowly and methodically considered.¹³¹ More recently the gap between civil and common law jurisdictions has narrowed, but significant differences still remain.¹³²

Concentrated proceedings have long been the rule across Canada. In common law Canada this tradition is articulated as the “substantive right to have all issues dealt with in a single trial.”¹³³ In Quebec this same principle is described as the “uniqueness of the proceeding.”¹³⁴ The idea of concentrated proceedings is bolstered by a recent Supreme Court ruling which held that “litigation by installment” should be avoided.¹³⁵

Concentrated proceedings originally arose because civil trials were heard by juries. It made sense for a trial to take place in one uninterrupted block of time when a jury heard the case because piecemeal trials with multiple hearings would have disrupted the lives of jurors far too much. Once juries began to disappear from many Canadian civil trials in the early and mid-twentieth century, a major rationale for concentrated proceedings disappeared along with them.¹³⁶ Mirjan Damaska, a leading scholar, has argued that the diminished use of concentrated proceedings has undermined the rationale for many of the common law rules of

¹³¹ Damaska, *Adrift*, *supra* note 41 at 59.

¹³² *Ibid.* at 108.

¹³³ *Kovach*, *supra* note 18 at para. 26.

¹³⁴ *Assoc. des employés de l'hydraulique c. Ménasco Canada ltée*, [1998] R.J.Q. 1542 at para. 12 (C.S.Q.).

¹³⁵ *Garland v. Consumers' Gas*, 2004 SCC 25, [2004] 1 S.C.R. 629 at 664.

¹³⁶ *Stradler and Hau*, *supra* note 41 at 370.

evidence.¹³⁷ Thus, seemingly small procedural changes can result in wide-ranging substantive changes.

I would argue that, although the practical demands of the civil jury were the original rationale for concentrated proceedings, other convincing rationales have subsequently appeared. Concentrated proceedings result in a different kind of evidence evaluation. Piecemeal trials in the continental tradition encourage decisions based on the unhurried reflection of the bureaucratic judge. Evidence can be reviewed again and again as a judge slowly winds her way to a final decision. Conversely, concentrated proceedings encourage decisions based on fresh impressions – a witness' obvious shock at a leading question on cross-examination for example.¹³⁸ One may dispute the relative merits of these two kinds of evidence evaluation, but their difference cannot be denied.

The implementation of regular severance would push Canada more towards a piecemeal form of civil procedure. Even so, important differences would remain between the modified Canadian approach and the continental tradition. Continental judges are allowed to hold multiple hearings on many determinative issues before issuing a judgment.¹³⁹ In contrast, a Canadian judge would be forced to make a determinative decision after each part of a severed trial. She would still hear all evidence on the issue under consideration for the first time at trial. As a result, the traditional fresh evaluation of evidence would be maintained, albeit applied to a smaller number of issues. Thus, even if we are committed to a concentrated process, a key feature of that approach would not be altered by regular severance.

A brief postscript is in order. While common law jurisdictions are considering moving away from concentrated proceedings, several civil law jurisdictions are moving towards greater use of concentrated proceedings. For instance, in 1976, Germany reformed its civil procedure by requiring more concentrated proceedings with the goal of improving the speed of the civil justice system.¹⁴⁰ Other civilian countries have increased their use of concentrated jury trials for criminal matters.¹⁴¹ Recently, this movement

¹³⁷ Damaska, *Adrift*, *supra* note 41 at 60.

¹³⁸ Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986) at 51 [Damaska, *Faces*].

¹³⁹ *Ibid.*

¹⁴⁰ Fix-Fierro, *supra* note 2 at 194-95.

¹⁴¹ Carlo Guarnieri and Patrizia Pederzoli, C.A Thomas (English Editor), *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002) at 121 (Spain is given as an example).

has expanded across the Continent, with legislatures pushing for this change in the name of efficiency.¹⁴²

A full evaluation of these shifts is beyond the scope of this paper. Still, a brief review of the literature reveals that these new “concentrated” proceedings resemble what Canadian civil proceedings would look like if the proposed severance reform was implemented. They are mostly preliminary hearings which deal with one or two relatively simple issues.¹⁴³ Moreover, as in a severed trial, the initial hearing tends to displace the main proceedings.¹⁴⁴ Differences remain, but the convergence is notable.

B) Increasing the Administrative Character of the Law

Another theoretical effect of regular severance is that it would increase the administrative character of the law. Traditionally, the main goal of common law courts has been to do justice on the merits between the parties.¹⁴⁵ No extraneous consideration except what was fair and consistent with the law were to enter a trier of fact’s analysis of how to hear and decide a case.

Evidence of the continuing appeal of this traditional ideal can be seen in judges’ reactions to recent reforms attempting to improve the efficiency of the civil justice system. In the UK, judges have begun to relax the procedural strictness demanded by the Woolf Report.¹⁴⁶ In the US, judges complained that the case management powers in the *Civil Justice Reform Act* emphasized the issues of costs and delays above the issue of justice.¹⁴⁷ In Ontario, a judge held that the prospect of saving time and money that severance offered was “secondary” to the “paramount” issue of whether ordering severance would seriously prejudice the claims of one party.¹⁴⁸

Of course, a few judges who have embraced the increasingly administrative orientation that severance entails.¹⁴⁹

¹⁴² Damaska, *Faces*, *supra* note 138 at 52, 211.

¹⁴³ *Ibid.* at 52

¹⁴⁴ Fix-Fierro, *supra* note 2 at 203-04.

¹⁴⁵ Zuckerman, *supra* note 15 at 16.

¹⁴⁶ Michalik, *supra* note 47 at 157; Verkijk, *supra* note 47 at 198.

¹⁴⁷ Grossemy, *supra* note 46 at 150.

¹⁴⁸ *Woodglen & Co. v. Owens* (1995) 6 W.D.C.P. (2d) 228 at paras. 21-22 (Ont. Sup. Ct.) [*Woodglen*]. This sentiment was similarly endorsed in the criteria listed in *Bourne*, *supra* note 39 at para. 30.

¹⁴⁹ See e.g. *Desrochers*, *supra* note 36 at para. 27; *Aghsani*, *supra* note 31 at para. 30.

That said, Canadian courts have moved in an increasingly administrative direction, albeit reluctantly.¹⁵⁰ This change can be seen in formal calls for judges to exercise “case management” powers. In Quebec, after the reforms of 2003, case management was articulated as one of the leading principles of civil procedure.¹⁵¹ In Ontario, case management has been cited as an important factor to be considered when deciding if a case should be severed.¹⁵² In the US, similar powers were given to judges under the 1990 *Civil Justice Reform Act*.¹⁵³ In the UK, Lord Woolf requested more case management powers for judges.¹⁵⁴

The result, critics have charged, is that civil justice is treated like a bureaucratic commodity; what matters is not justice, but speed, efficiency, and cost-effectiveness.¹⁵⁵ Cases are supposed to be “moved along” at an appropriate rate.¹⁵⁶ The traditional majesty of the courts has been debased by the need for speed.

These highly rhetorical complaints are partially accurate. Public dispute resolution has become more administrative and more concerned with efficiency. Judicial review has replaced precedent as the primary mechanism binding the dispute resolution system together.¹⁵⁷ The continued crisis of civil justice demonstrates, however, the mostly inaccurate nature of these complaints. Judges may say they feel pressured to put efficiency above justice, but relatively few of them appear to use their new powers to act on such pressure.¹⁵⁸ One scholar says even Lord Woolf has found it difficult to shift his focus away from the merits of the

¹⁵⁰ Just as Damaska predicted in *Faces*, *supra* note 138 at 89. This movement was in response to the increasing power of the administrative state.

¹⁵¹ Art. 4.1, para. 2 C.C.P. 4.1: “The court sees to the orderly progress of the proceeding and intervenes to ensure proper management of the case.” This emphasis on management can also be seen in the jurisprudence; see e.g. *Desrochers*, *supra* note 36 at para. 27.

¹⁵² *Aghsani*, *supra* note 31 at para. 30; *Unwin*, *supra* note 72 at para. 82.

¹⁵³ *Grossemy*, *supra* note 46 at 144, 147.

¹⁵⁴ *Roberts and Palmer*, *supra* note 1 at 73

¹⁵⁵ *Fix-Fierro*, *supra* note 2 at 152.

¹⁵⁶ *Fiss*, *supra* note 9 at 1086 (discussing judges’ preference for settlement because it means that a case has been “moved along”).

¹⁵⁷ For instance it is judicial review and not legal precedent that scholars are concerned will undermine increased use of ADR; see *Fix-Fierro*, *supra* note 2 at 136. However, it must be noted that the Supreme Court clawed back at least some of the power of administrative tribunals recently by relaxing the standard of judicial review; see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

¹⁵⁸ *Grossemy*, *supra* note 46 at 150 and *Woodglen*, *supra* note 149 at paras. 21-22 give examples of judges refusing to bow to pressure for a more administrative treatment of cases.

case, even where such a decision is demanded by the new procedural rules he himself advocated.¹⁵⁹ Old habits of ignoring systemic problems in favour of deciding individual cases on their own merits die hard.

Regularly imposing severance would be another step toward the increasing the administrative efficacy of Canadian law. Since one of severance's main goals is to facilitate the faster processing of cases, it is partially guilty of the charge that it treats justice like a commodity.¹⁶⁰ Certainly it is less majestic for judges to restrict civil proceedings, rather than letting parties tell their stories entirely unencumbered.

Increasing the administrative dimension of the law is a theoretical disadvantage of severance, but a necessary one. In reality, justice is already treated like a commodity. Numerous reports affirming the need to increase efficiency to improve access to justice betray this fact.¹⁶¹ Justice is a commodity, and right now it is being unfairly denied to many Canadians. Procedural mechanisms like severance, which more fairly share judicial resources, are the best solution to this problem.

C) Justice Redefined

The final theoretical effect of implementing regular severance is that it would change the kind of justice the civil justice system offered to Canadians. As I have said above, severance would make the system work faster and cheaper, but also differently. Hector Fix-Fierro has observed that in the legal system, "justice is the prevalent value," so any attempts to make the justice system more efficient must speak the language of justice.¹⁶² A justice argument is essential because it is this kind of argument that is most likely to convince judges to either begin using the severance powers already available to them or to accept a legislative imposition of regular severance. Severance offers a different kind of justice, but it is a kind of justice that should be embraced.

Severing most cases makes the average case shorter. Shorter cases are less expensive. Lower costs mean more Canadians will use the civil justice system.¹⁶³ Therefore, severance increases access to justice. But severance will also change the kind of justice to which Canadians have access. As discussed in Part 3, this different kind of justice can be seen most clearly

¹⁵⁹ Michalik, *supra* note 48 at 157.

¹⁶⁰ Fix-Fierro, *supra* note 2 at 152.

¹⁶¹ See e.g. Osborne, *supra* note 6.

¹⁶² Fix-Fierro, *supra* note 2 at 74.

¹⁶³ Zuckerman, *supra* note 15 at 49 (Germany shows that an efficient civil justice system can stimulate litigation).

in the fact that severance will decrease the percentage of cases that plaintiffs win by decreasing the amount of sympathy that plaintiffs garner from the trier of fact. This change reduces the amount of economic social justice a civil trial may be able to provide to any one plaintiff. At bottom, severance offers more distributive justice and less corrective justice.¹⁶⁴ Instead of courts emphasizing the need to do justice between the parties in an individual case, severance entails a broader focus on the need to fairly distribute scarce judicial resources across the civil justice system as a whole.¹⁶⁵

In the past century, the law has increasingly operated as an economic social justice mechanism. This trend is most visible in the US, where it has been suggested that large damage awards are used as a substitute for an insufficient welfare state.¹⁶⁶ Severance counteracts this trend by reducing the ability of triers of fact to bend the law to suit their sense of economic equity.

Jurists on the right will obviously applaud this change. For most of them, it has always been clear that the law should be applied equally to all, undiluted by extraneous considerations such as economic redistribution. Severance's reduction of bias results in an increase of formalism that most conservatives will welcome.¹⁶⁷

The issue is more complicated for jurists on the left. On one hand, litigation has been used repeatedly to achieve some measure of economic social justice. The proliferation of class action lawsuits by consumers is just one example of how the law has empowered less wealthy actors. On the other hand, lawsuits are clearly a poor substitute for political changes aimed at achieving comprehensive economic social justice. Not every needy individual or group has been wronged by a wealthy legal or natural person. Even relatively liberal scholars like Harry Arthurs have argued that

¹⁶⁴ In this way severance is similar to most efficiency-oriented civil justice reforms such as those advanced in the Woolf Report, *supra* note 14.

¹⁶⁵ The exact same shift in emphasis was identified in the Woolf Report by Zuckerman, *supra* note 15 at 16-18.

¹⁶⁶ Damaska, *Adrift*, *supra* note 41 at 140.

¹⁶⁷ This statement is obviously a caricature, but it is also broadly true. For some reason conservative jurists identify the nineteenth century as the golden age to which the law should return. During that time the idea of formalism was relatively strong and the idea of equity was relatively weak. However, in earlier centuries equity was predominant and formalism was weak. Basically, the common law has several different pasts each of which emphasized different values. Why many conservatives privilege the nineteenth century is not clear.

more litigation does not produce more justice.¹⁶⁸ Arthurs writes that only political and social mobilization in favour of wide systemic change will produce the kind of society favoured by progressives.¹⁶⁹

Legal equity as expressed through jury sympathy was a better vehicle for economic social justice in the past when there was no social safety net. Perhaps it made sense in 1745 for a baron to pay a peasant £10 – despite the fact that the baron was not at fault for the peasant’s injuries – when such a decision was the only way the peasant would be able to support himself after an accident. Today, however, the government can simply implement a workers’ compensation scheme or a government disability benefit that will provide injured Canadians with financial support after an accident. A lawsuit is a poor substitute for a social program.

Some people might retort that social justice should be taken where it can be found; and if you can find it in court, then so be it. This response is short-sighted. The anti-defendant bias that results from a trier of fact sympathizing with a plaintiff’s description of their injuries may assist several plaintiffs in winning their lawsuits. That same bias, however, prevents thousands more potential plaintiffs from even entering the civil justice system. The damages portion of a typical civil trial can double or even quintuple the length of a proceeding.¹⁷⁰ Longer proceedings mean more preparation by the lawyers, more pre-trial motions, more discovery, more expert evidence. The cost of all these services is extremely high and has pushed most middle and low-income citizens out of the civil justice system altogether. The benefit that a few litigants gain from biased triers of fact is heavily outweighed by the disadvantages that thousands of potential litigants face by having the doors of the civil justice system locked to them by exorbitant costs. Economic social justice for a few people means no justice at all for many others.

The current trend of using the civil justice system as a means of economic redistribution for the few must change. Justice on the merits is an expense few people can afford. Instead of providing the maximum

¹⁶⁸ Harry Arthurs, “More Litigation, More Justice? The Limits of Litigation as a Social Justice Strategy” in Bass, Bogart and Zemans, *supra* note 8, 249 at 252.

¹⁶⁹ *Ibid.* at 253-54. Theoretically, of course, economic social justice could be pursued both legally and politically. However, there are only so many dedicated progressives and the “the legalization of politics” following the enactment of the Canadian *Charter* seems to have focused much of their energies on litigation as opposed to activism.

¹⁷⁰ Gensler, *supra* note 25 at 773 cites a study that says the damages portion of a typical trial takes 46% of the total proceeding time. In *Lord*, *supra* note 22 at para. 9, the trial judge estimated that the damages part of the hearing would take 4 of 5 total weeks of trial.

amount of public justice to a few very rich, very poor, or very lucky individuals and no public justice to the vast majority of potential litigants,¹⁷¹ it makes more sense to provide the more modest kind of public justice that severance offers to a far greater number of people.

Severance provides a more stripped-down procedure that is less attuned to current Canadian ideas of equity and justice. However, far from providing less justice, it provides more of a different kind of justice - distributive justice. It enables scarce public legal resources to be shared more evenly among users of the civil justice system.¹⁷² I have argued that the type of justice severance provides is better than the type of justice provided by the procedural *status quo* in Canada. More access to the civil justice system will significantly improve the public's view of the system and thereby ease the crisis of civil justice.

5. Conclusion

Civil justice reform has been pursued vigorously across the world in recent years. The UK has simplified procedure and given judges vastly more power to actively manage the scope of cases.¹⁷³ Civil law countries such as Germany and France have experimented with more concentrated proceedings and have tried to increase the rate of settlement that occurs between parties in their countries.¹⁷⁴ Canadian jurisdictions have been pursuing civil justice reform, albeit on a narrower scale. That said, Canada is ripe for more radical reform as well. In Quebec, article 4.2 of the newly revised *Code of Civil Procedure* states that “proportionality” – and the distributive justice that word implies¹⁷⁵ – is now a key principle of civil procedure.¹⁷⁶ In Ontario, courts have the inherent power to control procedure “in the interests of justice,”¹⁷⁷ and some judges have indicated that they are open to modifying civil procedure to improve the overall

¹⁷¹ Lucky individuals can afford the robust justice offered by the current Canadian justice system if they are fortunate enough to be selected as a test case by litigation-oriented interest groups.

¹⁷² Zuckerman, *supra* note 15 at 17, notes how the Woolf Report recommended this new philosophy of distributive justice in the UK.

¹⁷³ See e.g. Astrid Stradler, “The Multiple Roles of Judges and Attorneys in Modern Civil Litigation” (2003) 27 *Hastings Int'l & Comp. L. Rev.* 55 at 75 (saying that after the Woolf reforms UK judges have more power than German judges).

¹⁷⁴ Fix-Fierro, *supra* note 2 at 194-95, Damaska *Faces*, *supra* note 138 at 211.

¹⁷⁵ The Woolf Report, which emphasizes the need for a new distributive justice focus for the civil justice system, emphasizes the importance of proportionality; see *supra* note 14 at 4, 24.

¹⁷⁶ Art. 4.2 C.C.P. This same principle was evoked by Lord Woolf to support his report's radical civil justice reform recommendations; see Woolf Report, *ibid.* at 4, 24, 274.

¹⁷⁷ *Elcano*, *supra* note 20 at 59.

administration of justice.¹⁷⁸ Thus, meaningful civil justice reform is possible even without legislative action.

I have argued that severance should be one of the main civil justice reforms pursued. By making it a general rule, avoidable in exceptional circumstances, the civil justice system can realize significant gains. Trials would be faster, cheaper, and more accurate if determinative issues were tried in sequence. The privacy of the parties would be more protected because less disclosure would be necessary in the average trial. Settlement would be encouraged throughout the entire process, but against the backdrop of an accessible justice system. All of these gains are fully consistent with the goals of reform laid out in Part 1: higher speed, lower costs, and increased access.

There would be some more controversial effects as well. Jury trials may become less frequent or more logistically complicated. The credibility of witnesses might be evaluated differently. The courts would take on an increasingly administrative character. Most importantly, severance would decrease the pro-plaintiff bias that currently exists when plaintiffs gain sympathy from triers of fact by describing the extent of the damages they have suffered. The reduction of this bias would change the kind of justice that the civil justice system delivers by decreasing the weight of equitable ideas.

Regular severance should be implemented despite these upshots. The practical gains of speed and cost are real and substantial. The type of justice delivered by the system would change, but it would remain a worthwhile type of justice. Far more litigants would have access to public courts and public justice. While severance would not deliver public justice for all, it would deliver justice for more. If, on the other hand, the *status quo* remains unchanged, then the civil justice system will continue to deny average Canadians access, and would thereby force more and more people into various kinds of ADR.

While ADR is not inherently worse than the civil courts, it is undoubtedly more private. This shift is described by Teubner and Willke as the change from state law to reflexive law.¹⁷⁹ State law is characterized by public officials selected by the public enforcing public values.¹⁸⁰ It is accountable to the public and incorporates a healthy concern for the public interest that is lacking in ADR. *A priori*, the public nature of the civil courts

¹⁷⁸ *Aghsani, supra* note 31 at para. 30; *Desrochers, supra* note 36 at para. 27.

¹⁷⁹ Cited in Rohl, *supra* note 48 at 21.

¹⁸⁰ Fiss, *supra* note 9 at 1085.

is not itself a reason to prefer them to ADR. It must be remembered, however, that one of the goals of civil justice reform articulated in this paper is to increase public confidence in the civil justice system. The law remains a source of common identity in Canada today. To perpetuate the crisis of civil justice by refusing reforms such as severance is to acquiesce to the continued erosion of an important part of Canadians' common identity. In order to restore public faith in the civil justice, the law must be made common again. Severance is the one of the best tools available to achieve this goal. It should be embraced by Canadian jurists, whether as a reflection of a new ideal of justice or as a concession to necessity.¹⁸¹

¹⁸¹ Here I am paraphrasing from Damaska in *Faces*, *supra* note 138 at 62.