NEVSUN, *ATLANTIC LOTTERY*, AND THE IMPLICATIONS OF THE 2020 SUPREME COURT OF CANADA MOTION TO STRIKE DECISIONS ON ACCESS TO JUSTICE AND THE RULE OF LAW

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Syntax matters. The subtle but important difference between these two sentences affects how procedural law can be used to advance access to justice and the rule of law. Two recent Supreme Court of Canada decisions—where the important holdings on the substantive law will also resonate for years—demonstrate this. *Nevsun Resources Ltd v Araya*[1] and *Atlantic Lottery Corp Inc v Babstock*[2] may seem, at first blush, to have little in common apart from being 2020 Supreme Court of Canada decisions. After all, one concerns the ability of Canadian courts to provide redress for gross violations of international human rights law. The other addresses important issues regarding the law of restitution that have long been in doubt. However, they are united by the ability of common law courts to determine novel questions of law on preliminary motions to strike—that is, resolving a case on the basis that the pleadings are deficient, particularly because the facts alleged, even if true, would not entitle the party to the relief that it seeks as a matter of law. On this front, the decisions appear to be part of a trend of courts using summary procedural mechanisms to facilitate access to justice and develop the common law. It is possible that the decisions' implications on procedural law will have wider-ranging implications than their more constrained, if very important, impacts on substantive law.

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[*] Assistant Professor, Faculty of Law, University of Manitoba. The author would like to thank Dan Jr Patriarca and Madison Laval for research assistance on this paper, and the Legal Research Institute and Government of Canada's Canada Research Continuity Emergency Fund, which partially supported their work. Editing Press, from which I generously received the Laura Bassi Scholarship, also provided invaluable editing assistance. Finally, gratitude is owed to two anonymous peer reviewers and the staff of the *University of New Brunswick Law Journal* for their suggestions during the editing process. This article is in part based on a previous blog post (Gerard J Kennedy, "Moving to Strike" *Advocates for the Rule of Law* (24 November 2020), <www.ruleoflaw.ca/moving-to-strike/>), podcast interview (Runnymede Radio, October 30 2020), and CPD session ("Moving to Strike: Access to Justice, Ethical Principles & Recent Cases", Runnymede Society, 27 January 2021) about these issues.

[1] 2020 SCC 5, 32 BCLR (6th) 1 [*Nevsun*].

[2] 2020 SCC 19, 447 DLR (4th) 543 [*Atlantic Lottery*].

This article analyzes whether *Nevsun* and *Atlantic Lottery* have—either explicitly or by necessary implication—changed the law regarding using motions to strike to determine questions of law in Canada. Part I looks at the history of motions to strike prior to 2020 and places this against the backdrop of the principles of the rule of law and access to justice, including the spirit of the seminal Supreme Court civil procedure decision, *Hryniak v Mauldin*.[3] Part II analyzes the decisions in *Nevsun* and *Atlantic Lottery* in depth, seeking to separate the analyses regarding the appropriateness of using the motions to strike from the also notable aspects of the decisions on substantive law. Finally, Part III looks at the immediate aftermath of the decisions: doctrinally based on their procedural holdings; empirically in how they have been interpreted since being decided; and normatively in light of principles and goals of civil procedure. Throughout all of this analysis, it is posited that *Nevsun* and especially *Atlantic Lottery* have subtly expanded the invitation to courts to decide novel questions of law on motions to strike. The test to resolve such a question could be rephrased, with a judge asking "would the evidence regarding what the plaintiff and/or defendant did, as alleged in the pleadings, assist in my resolving the ***legal issue?***". This accords with broader trends to use procedural tools to promptly resolve actions on their merits while developing the common law. The result should not only be more access to justice in terms of prompt resolution of cases and better use of judicial resources. Rather, it should also preserve the rule of law through greater resolution of contentious legal issues.

I) BACKGROUND

A. A Terminological Note

Motions to strike pleadings—or motions to determine questions of law—are powerful but discrete tools in civil procedure. Codifications, such as in Rule 21 of Ontario's *Rules of Civil Procedure*[4] and Manitoba's *Court of Queen's Bench Rules*,[5] or Rule 9-5 of British Columbia's *Supreme Court Rules*,[6] reflect the historic power of common law courts to address abuses of process, with an action that discloses no cause of action being an abuse of process.[7] As the next subsection will illustrate, a "motion to strike" can have many purposes, only one of which is to determine a question of law. A plaintiff can also bring a motion to have a question of law determined in its favour.[8]

[3] 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*].

[4] RRO 1990, Reg 194 [Ontario *Rules*].

[5] MR 553/88.

[6] BC Reg 168/2009.

[7] Stephen Pitel & Matthew Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014) 43 Adv Q 344 at 348.

[8] Details vary by province: see e.g. Rule 21.01(a) of Ontario *Rules*, *supra* note 4; *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 9-4; *Alberta Rules of Court*, Alta Reg 124/2010, Rule 7.1; Janet Walker, ed, *The Civil Litigation Process: Cases and Materials*, 8th ed (Toronto: Emond Montgomery, 2015) at 666.

When it does so, the plaintiff is obviously not seeking to "strike" its own claim. As such, the terms "motion to strike" and "motion to determine a legal question" have significant—but not perfect—overlap. Nonetheless, motions to strike will be the term mostly used for the rest of this article, given that: it is very common in practice; *Nevsun* and *Atlantic Lottery* both concerned motions to strike and it was the terminology used in the decisions; and it is a simpler term than "motion to determine a legal question". Most importantly, as analyzed in this article, both a "motion to strike" and "motion to determine a question of law" concern the ability of courts to resolve legal questions on pleadings. It is this ability to resolve legal questions on pleadings that this article will primarily analyze, irrespective of the terminological name attached to a motion.

B. Motions to Strike: The Approach Prior to *Hryniak*

As noted, determining a question of law is not the only reason an action will be "struck" at an early stage. Uncontroversial reasons to strike pleadings or portions thereof include:

- a lack of particularity, preventing the other party from being able to plead an informed response, such as failing to explain why punitive damages are warranted;[9]
- being abusive, scandalous, or irrelevant, such as attacking a party's character needlessly;[10]
- claiming absurdities;[11] and/or
- attempting to re-litigate a matter already determined.[12]

None of these are controversial.

What has been more controversial—and what the rest of this article will primarily address—is when a pleading is alleged not to disclose a cause of action. In other words, a claim can be "struck" on the grounds that, even if everything a plaintiff says is true, the plaintiff would still lose for failing to meet the required elements of a recognized/established cause of action. For example, in *1317424 Ontario Inc v Chrysler Canada Inc*, the Ontario Court of Appeal struck a nuisance claim where the plaintiff alleged that its ability to enjoy its property was impaired by a previous owner's failure to remediate the land.[13] The Court noted that it is an essential element of nuisance that whatever causes interference with the land emanate ***from outside the***

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[9] See e.g. *Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595 [*Whiten*].

[10] See e.g. *National Energy Corp v Eco Energy Home Services Inc*, 2014 ONSC 3778, 2014 CarswellOnt 8425 (Master).

[11] See e.g. *Taylor v Design Plaster Mouldings Ltd*, 2010 ONSC 237, 79 CCEL (3d) 131 (SCJ) at para 7.

[12] See e.g. *Latham v Canada*, 2020 FC 239, 2020 CarswellNat 1116.

[13] 2015 ONCA 104, 330 OAC 105 [*Chrysler*].

plaintiff's land. As such, even if everything the party said was true, the nuisance claim would still fail.

At the same time, caution is necessary regarding the use of motions to strike in areas where the law is contested. As McLachlin CJ noted in *R v Imperial Tobacco*, "[t]he law is not static and unchanging".[14] As such, in *Hunt v Carey*, the Supreme Court of Canada held that a pleading should only be struck if it is "plain and obvious" that no cause of action is disclosed.[15] This firmly errs on the side of permitting tenuous or novel claims to advance to trial or a summary judgment motion if they are potentially meritorious. Since no evidence is admissible on a motion to strike, a judge must assume that everything the plaintiff says is true (unless it is absurd or incapable of proof) and then, on the plaintiff's version of the facts, still be able to come to the conclusion that the plaintiff will inevitably lose because its pleading discloses no viable cause of action.

But as other commentary[16] has noted, a review of the case law reveals two different approaches to motions to strike being applied under the label of the same test. This tension has been explored in depth by Stephen Pitel and Matthew Lerner.[17] Many decisions have given a strict interpretation to the "plain and obvious" test. Indeed, in *Hunt v Carey* itself, it was held that an action should not be struck for failing to disclose a cause of action unless it amounts to an abuse of process. This accords with the rule's history.[18] Another way of describing this standard is that a claim should be struck only if it is "certain to fail".[19] In this vein, many celebrated new causes of action originally survived motions to strike, such as in *Jane Doe v Board of Commissioners of Police for the Municipality of Metropolitan Toronto*,[20] holding that the police breached a duty of care by failing to warn women in a neighbourhood about a serial rapist.

However, in 2011, McLachlin CJ wrote in *R v Imperial Tobacco* that "another way of putting the [plain and obvious] test is that the claim has no reasonable prospect of success."[21] As we will be coming to in discussing *Atlantic Lottery*, this formulation, followed elsewhere,[22] continues to be commonplace.

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[14] *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*] at para 21.

[15] *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 [*Hunt*] at 980.

[16] See Gerard J Kennedy & Mary Angela Rowe, "*Tanudjaja v Canada (Attorney General)*: Distinguishing Injusticibility and Deference on Motions to Strike" (2015) 44 Adv Q 391.

[17] *Supra* note 7.

[18] *Hunt*, *supra* note 15 at 968.

[19] *Ibid* at 980 and 989.

[20] (1990), 74 OR (2d) (Div Ct), aff'g (1989) 58 DLR (4th) 396 (HC).

[21] *Imperial Tobacco*, *supra* note 14 at para 17. In this case, the Court went on to strike several novel claims on both legal and policy grounds.

[22] See e.g. *Chrysler*, *supra* note 13 at para 7.

Are the "certain to fail" or "plain and obvious" standards truly synonymous with a "reasonable prospect of success" standard? This seems doubtful. Holding that a claim may be struck if there is no ***reasonable*** prospect of success permits a motions judge to make determinations about the outcome of an action based on its merits, while *Hunt* explicitly cautioned against this.[23] This shift may reflect a different understanding of the purpose of motions to strike. In *Imperial Tobacco*, McLachlin CJ wrote that motions to strike are for "weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial."[24] This explicit invocation of the concern of the justice system more broadly rather than just in a particular case is reflective of broader trends and admonitions regarding the use of procedural law to facilitate access to justice—a topic that will now be addressed.

C. Motions to Strike, Access to Justice, and the Rule of Law

1. Access to Justice

"Access to justice" is a ubiquitous term often revealed to have multiple meanings. Traditionally, the emphasis has been on the "access" part of this phrase, assuming that, if ***access*** to the justice system is facilitated, justice will be served.[25] This is frequently conceived of as making procedure more accessible and affordable. Some conceptions of access to justice are much broader, however, bringing in questions of substantive justice.[26] Other work in this field has concentrated on how to deliver legal services more effectively[27] and how to prevent legal problems from ever arising.[28] The merits of these broader definitions are clear, even if there are likely limits to what the civil justice system, given its history and purpose, can realistically accomplish.[29]

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[23] See Kennedy & Rowe, *supra* note 16 at 399.

[24] *Imperial Tobacco*, *supra* note 14 at para 19.

[25] Joshua Sealy-Harrington made this particularly astute observation in University of Alberta Faculty of Law, "Webinar: A Conversation about Access to Justice and Systemic Racism" (27 October 2020, online (video): *Youtube* <www.youtube.com/watch?v=zwxPK0Oaf1Q>. See also Colleen M Hanycz, "More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform" (2008) 27 CJQ 98.

[26] See e.g. Trevor CW Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 969; Sarah Buhler, "The View from Here: Access to Justice and Community Legal Clinics" (2012) 63 UNBLJ 436; Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46:4 Osgoode Hall LJ 773.

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

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

[29] See Gerard Joseph Kennedy, *Hryniak, the 2010 Amendments, and the First Stages of a Culture Shift?: The Evolution of Ontario Civil Procedure in the 2010s* (PhD Dissertation, Faculty of Graduate Studies, York University, January 2020) [unpublished] at 11 [Kennedy Dissertation], citing, *inter alia*, Thomas Stuart Harrison, *Between Principle and Practicality: A Dynamic Realist Examination of Independence in*

But irrespective of the breadth of the definition of access to justice, it is indisputable that access to justice ***includes*** the ability of courts to resolve cases quickly and with minimal financial expense. As such, attempts to amend—or change the interpretation of—aspects of procedural law that achieve these goals are worthwhile. Even if they do not "solve" Canada's access to justice crisis, resolving cases with less procedure—assuming the resolution is fair—is a good in itself.

The Supreme Court of Canada famously called for broader interpretations of summary judgment powers in *Hryniak v Mauldin*. But *Hryniak*'s spirit applies beyond the summary judgment context, being recognized in the discovery context,[30] vexatious litigant orders,[31] and dismissals of manifestly abusive proceedings,[32] to say nothing of Karakatsanis J's call in *Hryniak* itself for a "culture shift" in the conduct of litigation.[33]

There are particularly good reasons to believe that motions to determine questions of law—including and perhaps especially novel questions of law—through motions to strike should be employed more liberally given the spirit of *Hryniak* and the need to facilitate access to justice more generally.

First, and most obviously, if a motion to strike results in the resolution of the claim, a defendant is saved significant procedural costs in extricating itself from a claim that should not have been brought against it. It does not accord with justice to have the defendant proceed to a trial, or even a summary judgment motion, if there is no cause of action at all. This accords with the proportionality principle, which recognizes that procedure is to be proportionate to what is at stake in litigation.[34] We should always ask what extent of procedure is necessary to achieve a just outcome. Trials and even summary judgment motions can be disproportionately expensive. And incentivizing an unprincipled settlement to avoid the time and expense of one of these procedures hardly accords with a normatively defensible understanding of justice.[35]

Second, by disposing of claims that have no realistic chance of success at an early stage of the proceeding, the court system is unclogged for many other parties to use. The need to ensure such general access has been repeatedly recognized in recent

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the Canadian Justice System (PhD Thesis, Faculty of Law, Queen's University, 2016) at 55; Gerard J Kennedy, "Justice for Some" *The Walrus* (November 2017) 47 at 48.

[30] See e.g. *The Trustees of the Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v SNC-Lavalin Group Inc*, 2014 ONSC 660, 2014 CarswellOnt 1103 (SCJ) at paras 86–87.

[31] See e.g. *Unrau v National Dental Examining Board*, 2019 ABQB 283, 94 Alta LR (6th) 1 at para 941.

[32] See e.g. *Raji v Borden Ladner Gervais LLP*, 2015 ONSC 801, [2015] OJ No 307 (SCJ) at para 8 [*Raji*].

[33] *Hryniak*, *supra* note 3 at paras 2, 23–33.

[34] See e.g. Trevor Farrow, "Proportionality: A Cultural Revolution" (2012) 1 J Civ Litigation & Practice 151.

[35] See e.g. Owen M Fiss, "Against Settlement" 93:6 Yale LJ 1073 at, in particular, 1075.

years in case law disposing of claims with no merit[36] or issuing vexatious litigant orders against those who abuse the court system.[37] Both of these reasons accord with *Hryniak*'s call to move away from the paradigm of the trial as the only way to have procedural justice. In this vein, in *Canada v Olumide*, Stratas JA noted "[t]he Federal Courts have finite resources that cannot be squandered."[38] There are additional benefits of motions to strike that could be described as boons for access to justice but they are perhaps more aptly described as benefits for the rule of law, as will now be explored.

2. The Rule of Law

Motions to strike uphold the rule of law for several reasons. One is by facilitating access to the courts. The Supreme Court discussed the connection between access to the courts and the rule of law in its 2014 *Trial Lawyers Association of British Columbia v British Columbia* decision, where it was held that the inability to access the courts jeopardizes the rule of law.[39] That case concerned the inability to access courts due to hearing fees. More generally, however, it illustrates the constitutional nature of the right to access the courts. If parties cannot access the courts because other claims that have no merit are utilizing scarce judicial resources, that is a deeply problematic state of affairs. As Stratas JA noted in *Olumide*:

> This isn't just a zero-sum game where a single vexatious litigant injures a single innocent litigant. A single vexatious litigant gobbles up scarce judicial and registry resources, injuring tens or more innocent litigants. The injury shows itself in many ways: to name a few, a reduced ability on the part of the registry to assist well-intentioned but needy self-represented litigants, a reduced ability of the court to manage proceedings needing management, and delays for all litigants in getting hearings, directions, orders, judgments and reasons.[40]

This was, admittedly, addressing vexatious litigant orders, and parties seeking a good faith advance in the law should not be conflated with vexatious litigants. Even so, the practical consequences of doomed litigation remaining in the court system remain the same. In other words, if parties cannot access the justice system, the ability to be governed under law, a key element of the rule of law, becomes illusory.

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[36] See e.g. *Raji*, *supra* note 32.

[37] See e.g. *Canada (Attorney General) v Fabrikant*, 2019 FCA 198, 2019 CarswellNat 3114.

[38] 2017 FCA 42, [2017] GSTC 17 at para 19 [*Olumide*].

[39] *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31.

[40] *Supra* note 38 at para 20.

Perhaps even more importantly, one of the requirements of the rule of law is that there ***be*** law and that it be reasonably clear.[41] If the court can develop and/or clarify the law on a motion to strike, this assists litigants and the entire legal profession, beyond the facts of the case in which there is a motion to strike. In answering questions of law on motions to strike, courts also develop the common law. As discussed below, *Atlantic Lottery* and to a lesser extent *Nevsun* did this, by clarifying what can(not) be the basis of a cause of action, and whether the act of state doctrine is part of Canadian law. This does not occur when cases disappear into the ether and/or are settled,[42] perhaps in an unprincipled way, in the face of legal uncertainty. This ability to develop the law through motions to strike can benefit both plaintiffs and defendants. Further, the ability to encourage ***principled*** settlement by resolving questions of law is also a reason to employ a motion to strike.

Pitel and Lerner explored these considerations shortly after *Hryniak* was decided, as they noted that, if a court will not recognize a new cause of action on the facts alleged in the pleadings—the most favourable facts possible—then the pleading is doomed to fail.[43] If the party seeking the determination of the legal issue is content to rely on an adverse party's alleged facts, it is difficult to see what additional value receiving the facts from a *viva voce* witness—or even affidavit evidence—will add, given that the court must assume the facts in the pleading to be accurate in any event. As I suggest below regarding *Nevsun*, if a corporation is institutionally incapable of violating international law (in the same way that it is institutionally incapable of violating constitutional law), knowing what the corporation did to the plaintiff cannot assist in determining whether the corporation violated international law: it cannot.

D. Post-*Hryniak*/Pre-*Nevsun* Changes?

Given these considerations, one might have thought that *Hryniak*, though strictly speaking a case concerning the appropriateness of summary judgment, would be invoked in decisions on motions to strike. Pitel and Lerner explicitly argued for this. And, indeed, several lower court decisions followed suit. A search of case law between 2014 and 2020, conducted in January and February of 2021, revealed at least fourteen decisions viewing *Hryniak*'s spirit as having implicitly changed the law on motions to

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[41] See e.g. Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 210–29, discussed in Hamish Stewart, "The Role of Reasonableness in Self-Defence" (2003) 16 Can JL & Juris 317 at 333–334. See also Friedrich A Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) [16th impression, 1962], discussed in, e.g. Malcolm Lavoie & Dwight Newman, "Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence" (2015) at 16, online: *Fraser Institute's Centre for Aboriginal Policy Studies* <www.fraserinstitute.org/sites/default/files/mining-and-aboriginal-rights-in-yukon-how-certainty-affects-investor-confidence.pdf>.

[42] See *Hryniak*, *supra* note 3 at paras 1, 26 (noting the dangers of a common law that is stunted in its development); Fiss, *supra* note 35.

[43] Pitel & Lerner, *supra* note 7.

strike.[44] This is in addition to two cases where parties submitted this to be the case and the court did not decide the issue[45] and one case where *Hryniak* was held to be relevant in deciding whether to ***schedule*** a motion to strike.[46] Two cases did hold *Hryniak* did not change the test to use a motion to strike in their provinces (Saskatchewan and New Brunswick[47]) and another cited *Hryniak* in declining to use a motion to strike as not advancing access to justice.[48] Fourteen is not an extraordinary number of cases, considering that a February 22, 2021 QuickLaw search revealed over 4,900 cases decided between *Hryniak* and *Nevsun* containing the word "motion" in the same sentence as "strike" or "struck". Even so, one can witness that the spirit of *Hryniak* in calling for prompter resolution of civil actions on their merits was being applied in admittedly narrow circumstances beyond the summary judgment context.

One other case is worth considering. *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)* upheld Quebec Superior Court and Court of Appeal decisions that dismissed a motion to strike brought by mining companies and the Attorney General of Newfoundland and Labrador.[49] The suit was based on environmental damage and breaches of Aboriginal rights under section 35 of the *Constitution Act, 1982*.[50] The companies and the Attorney General of Newfoundland and Labrador alleged that the Quebec Superior Court had no jurisdiction over the claim. Many legal issues were raised in the claim, and the appropriateness of using the motion to strike *per se* was a minor one. Wagner CJ and Abella and Karakatsanis JJ (for the majority, with Gascon and Martin JJ concurring)

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[44] See *Rudichuk v Genesis Land Development Corp*, 2020 ABCA 42, 98 Alta L Rev (6th) 339; *Falgui v Solomon College Ltd*, 2019 ABQB 404, [2019] AJ No 724; *Turp v Canada (Minister of Foreign Affairs)*, 2018 FC 12, [2018] FCJ No 203; *Al-Ghamdi v Alberta*, 2017 ABQB 684, [2017] AJ No 1218; *Nool v Carido*, 2016 ONCJ 639, [2016] OJ No 5505; *Resolute Forest Products Inc v 2471256 Canada Inc*, 2016 ONSC 5398, 133 OR (3d) 167 (Div Ct); *Sturgeon Lake Indian Band v Canada (Attorney General)*, 2016 ABQB 384, [2016] AJ No 713; *Janssen Inc v Celltrion Healthcare Co*, 2016 FC 651, [2016] FCJ No 683; *Shebib v Canada*, 2016 FC 539, [2016] FCJ No 498; *Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35, 481 NR 159; *HOOPP Realty Inc v Guarantee Co of North America*, 2015 ABCA 336, 607 AR 377; *Rodd v Alberta Health Services*, 2015 ABQB 320, [2015] AJ No 568; *Nash v Snow*, 2014 ABQB 355, 590 AR 198; *O'Connor Associates Environmental Inc v MEC OP LLC,* 2014 ABCA 140, 95 Alta L Rev (5th) 264.

[45] See *Northwest Organics Limited Partnership v Maguire*, 2015 BCSC 1918, [2015] BCJ No 2288; *Teva Canada Ltd v Pfizer Canada Inc*, 2015 FC 306, [2015] FCJ No 1431.

[46] See *Strohmaier v British Columbia (Attorney General)*, 2014 BCSC 2078, 69 CPC (7th) 353.

[47] See *Slim Contracting Inc v Saskcon Repair Services Ltd*, 2015 SKQB 258, 50 CLR (4th) 79; *Gillis v Bathurst (City)*, 2019 NBQB 6, [2019] NBJ No 5.

[48] See *Khan (Litigation guardian of) v Lee*, 2014 ONCA 889, 123 OR (3d) 709 (CA).

[49] 2020 SCC 4, 443 DLR (4th) 1 [*Uashaunnuat*]. For a discussion of this case, see also "The Supreme Court of Canada has opened the door to multi-jurisdictional aboriginal rights and title claims: *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani Utenam)**" (undated) online (blog): *Woodward & Company Lawyers LLP* <www.woodwardandcompany.com/the-supreme-court-of-canada-has-opened-the-door-to-multi-jurisdictional-aboriginal-rights-and-title-claims-newfoundland-and-labrador-attorney-general-v-uashaunnuat-innu-of-uashat-and-of-mani-uten/>.

[50] Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

held that "access to justice requires that jurisdictional rules be interpreted flexibly so as not to prevent Aboriginal peoples from asserting their constitutional rights", and cited *Hryniak* in support of this proposition.[51] But in dissent, Brown and Rowe JJ (Moldaver and Côté JJ agreeing) would have granted the motions in part. They specifically cited *Hryniak* for, among other things, a call for "proportional procedures".[52] The views of these four judges that would become apparent in *Nevsun* were being foreshadowed, as will now be discussed.

II. THE 2020 SUPREME COURT OF CANADA DECISIONS

As noted at the outset, motions to strike have proven most controversial where parties are seeking to fundamentally change the law. Courts have repeatedly held that novelty alone is not a reason to strike a claim.[53] Indeed, the statement "novelty is not a reason to strike a claim" is uncontroversial. Otherwise, new causes of action could never emerge. But does the similar but subtly different "novelty is a reason not to strike a claim" also hold? Some previous court decisions permitted novel claims to proceed despite acknowledged conceptual difficulties[54]—and observers have even implied in the past that courts should be extremely cautious about resolving novel questions of law barring frivolity.[55] But does this accord with the spirit of *Hryniak*, which called for a culture shift including in the use of civil procedure to expeditiously resolve civil actions, bearing in mind the need to preserve access to justice and the rule of law? That is where *Nevsun* and *Atlantic Lottery* enter the picture.

A. *Nevsun*

Nevsun is sure to live in casebooks and textbooks for its determinations on questions of international law.[56] The plaintiffs were allegedly conscripted into the Eritrean

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[51] *Uashaunnuat*, *supra* note 49 at para 50.

[52] *Ibid* at para 286, citing *Hryniak*, *supra* note 3 at para 2.

[53] See e.g. *Hunt*, *supra* note 15 at 980, cited in the dissenting reasons of Feldman JA in *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, 123 OR (3d) 161 [*Tanudjaja*].

[54] See e.g. the decision of Feldman JA in *Tanudjaja*, *ibid* at paras 49, 83–84.

[55] See e.g. Gerard J Kennedy & Lorne Sossin, "Justiciability, Access to Justice & the Development of Constitutional Law in Canada" (2017) 45:4 FLR 707 at 713 (I was more open to uses of motions to strike in that piece than Sossin (see e.g. n 84) but this present article may indicate some evolution in my thinking). I have argued in the past, and continue to consider, *Charter* claims to be "inherently justiciable": see e.g. Joanne Cave, "Retreating to Justiciability: Drawing a Fine Line between 'Legal' and 'Moral' Rights Questions" (2020) 10:2 W J Legal Stud 1 at 11 (aptly summarizing my views in Kennedy & Rowe, *supra* note 16 at 392). Having said that, a claim can be justiciable but clearly without legal merit.

[56] For a discussion of the case on the merits in more depth, see discussion between David Quayat, Hilary Young, Robert Danay, and Oliver Pulleyblank on the *Stereo Decisis* podcast, "*Nevsun Resources Ltd.* and the new Customary International Law Torts (with David Quayat)" (3 April 2020) [*Stereo Decisis*]. For a greater defence of the decision, see Malcolm Rogge, "*Nevsun* Puts Canada's Corporate Decision Makers in the 'Human Rights Zone'" (19 March 2020), online (blog): *Business & Human Rights Resource Centre*

military, where they allegedly suffered grave violations of their human rights, including by being forced to work at a mine owned by Nevsun Resources Ltd, a Canadian company ("the company"). The plaintiffs later sued the company in British Columbia for several causes of action, including domestic torts, such as conversion, battery, unlawful confinement, and negligence. They also sued the company for breaches of international human rights law. The company brought a motion to strike for several reasons, two of which reached the Supreme Court.

1. The Act of State Doctrine: Using the Motion to Strike – Against the Party Seeking It

The first basis on which the company submitted that the claim should be struck related to what is known as the "act of state doctrine". Essentially, the company submitted that the plaintiffs were actually seeking to have the Canadian court determine the legality of Eritrea's actions. It further submitted that Canadian courts should be forbidden from doing so pursuant to the act of state doctrine. By a 7–2 margin, the Supreme Court rejected this argument, holding the act of state doctrine is not part of Canadian law. In other words, a motion to strike was used to conclusively decide a question of law—in favour of the party who did not bring the motion. In dissent, Côté J disagreed on the merits, but agreed that this could be resolved on a motion to strike—she simply would have struck the claims in their entirety.

Abella J wrote for seven judges on this point. She held that the act of state doctrine simply is not a part of Canadian law. The doctrine exists in England and Wales and Australia, and may have been received into British Columbia law in the 1850s.[57] However, Canadian law has addressed the concerns raised by the act of state doctrine in other ways. The first is the doctrine of state immunity which is codified in Canada through the *State Immunity Act*.[58] This is why Eritrea could not be sued in Canada. But the plaintiffs in *Nevsun* did not sue Eritrea—they sued the company. Second, traditional conflicts of laws principles remove cases from the Canadian courts that they have no business adjudicating. But the British Columbia Supreme Court had presumptive jurisdiction due to the company's nationality, nor could the company prove that Eritrea was a clearly more appropriate forum.[59] Third, a general principle of judicial restraint leaves Canadian courts reluctant to enter into the fray when international relations are in play, with courts refraining in particular from issuing judgments that purport to bind foreign states.[60] But Canadian courts continue to have

Blog <www.business-humanrights.org/en/latest-news/nevsun-puts-canadas-corporate-decision-makers-in-the-human-rights-zone/>.

[57] *Nevsun*, *supra* note 1 at paras 56–57.

[58] RSC 1985, c S-18, as discussed in *Nevsun*, *ibid* at, e.g. para 23.

[59] *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856, 408 DLR (4th) 383, aff'd 2017 BCCA 401, 4 BCLR (6th) 91.

[60] *Nevsun*, *supra* note 1 at paras 47, 57.

the ability—and, indeed, the duty—to decide questions that incidentally consider the legality of foreign states' actions when necessary to adjudicate claims that Canadian courts are properly adjudicating. State immunity, conflicts of laws, and judicial restraint, taken together, address the mischief that the act of state doctrine addresses concerning one state reviewing how another exercises its sovereignty.[61]

Abella J's opinion on this issue in *Nevsun* should be commended for several reasons. The first is respecting legislative supremacy. The federal *State Immunity Act* and the British Columbia *Court Jurisdiction and Proceedings Transfer Act*,[62] taken together, could fairly be interpreted to occupy the areas of law with which the act of state doctrine is concerned. This is reflected in the *expressio unius est exclusio alterius* maxim of statutory interpretation—"legislative exclusion can be implied when an express reference is expected but absent."[63] Nöel JA (as he then was) explained this principle in *Canadian Private Copying Collective v Canadian Storage Media Alliance*:

> if a statute specifies one exception (or more) to a general rule [such as Canadian courts' inability to adjudicate on matters abroad not applying to a Canadian defendant that is not a state actor], other exceptions [such as the act of state doctrine barring actions where courts would need to indirectly adjudicate on the matter] are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended.[64]

Applying this principle to *Nevsun*, it would be inappropriate to read more exceptions to Canadian courts' jurisdiction through the common law.

Moreover, whether the act of state doctrine is part of Canadian law is a question of law that can be determined without knowing the facts of what occurred at the mine. Now, all litigants and lawyers can order their affairs more predictably knowing that this is not part of Canadian law. In other words, even in the event of settlement (which occurred)[65] and/or the lack of a reported decision on the merits (which will never be forthcoming), all other litigants in Canada know that the act of state doctrine is not part of Canadian law.

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[61] One state reviewing how another exercises its sovereignty is problematic as a matter of international law due to the doctrine of sovereign immunity: see e.g. John H Currie, Craig Forcese, Joanna Harrington and Valerie Oosterveld, *International Law: Doctrine, Practice and Theory*, 2d ed (Toronto: Irwin Law, 2014) [Currie, *et al*] at 539–541, citing *The Schooner Exhange v M'Faddon*, 11 US (7 Crach) 116.

[62] SBC 2003, c 28.

[63] See *University Health Network v Ontario (Minister of Finance)* (2001), 151 OAC 286 (CA) at para 31.

[64] 2004 FCA 424, [2005] 2 FCR 654 at para 96.

[65] See James Yap (plaintiff's counsel), "The parties to several lawsuits related to Nevsun Resources Ltd's involvement in the Bisha Mine in Eritrea have settled the lawsuits. Terms are confidential. The settlement brings a mutually satisfactory conclusion to over 5 years of litigation related to the Bisha Mine." (15 October 2020 at 14:11), online: *Twitter* <twitter.com/realjamesyap/status/1316788734726221826?s=20>; James Yap, "Just Security" (3 December 2020), online: <www.justsecurity.org/author/jamesyap/>.

Côté J dissented on this issue, with the concurrence of Moldaver J In her view, when the legality of a foreign state's actions is central to the litigation, it would unacceptably intrude upon the executive's role to conduct foreign relations for the court to resolve the issue. As such, she would have declared the issue injusticiable. Her concerns were not totally without merit given the general prohibition on domestic courts making determinations on how other states exercise their sovereignty.[66] But justiciability frequently is most important in cases where there are no legal standards to adjudicate the legality of a party's actions.[67] But the torts the company were alleged to have committed clearly had legal standards that could be used to resolve them. Moreover, Côté J accepted that courts can adjudicate the actions of foreign states when they arise incidentally in litigation. So how central do they have to be before we strike them? This is not terribly clear. As such, Abella J's opinion has an additional advantage when compared to Côté J's: it is easier to apply.[68]

It should be noted that, reading Abella J's reasons, one is left to wonder whether she views the "mischief" purportedly addressed by the act of state doctrine as problematic compared to how it and related doctrines can impede redress of rights violations. She began her judgment in a manner that left no doubt about its conclusion:

> This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.[69]

She then noted criticisms of the act of state doctrine in England and Australia[70] but did not respond to Côté J's dissent on this issue. This accords with her partially dissenting reasons in *Kazemi v Islamic Republic of Iran*,[71] where she very narrowly interpreted the *State Immunity Act*.

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[66] See also the interview with Quayat on *Stereo Decisis*, *supra* note 56.

[67] See e.g. Ryan Patrick Alford, "Two Cheers for a Cabinet Manual (And a Note of Caution)" (2017) 11 JPPL 41 at 59 (noting courts' reluctance to answer legal questions when no legal standards are at play). See also the decision of Rowe J in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 38 (noting the incompetence of courts to determine whether a procedure prescribed in the Gospel of Matthew was followed).

[68] Frequently defended as a reason to justify "rules" instead of standards: see e.g. Douglas Baird & Robert Weisberg, "Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207" (1982) 68 Va L Rev 1217 at 1229–1230; Cass R Sunstein, "Problems with Rules" (1995) 83:4 Cal L Rev 953 at 969.

[69] *Nevsun*, *supra* note 1 at para 1.

[70] *Ibid* at para 28.

[71] 2014 SCC 62, [2014] 3 SCR 176.

Even so, for the reasons noted above, her decision on the act of state doctrine should generally be commended, perhaps with a caveat that in ***exceptional circumstances***, a claim could be injusticiable if it is untethered from any legal principles. But that will be rare. Nor does anything in Abella J's opinion suggest that the law of justiciability is sent into abeyance merely when international human rights law is alleged to be at stake. The law of justiciability can apply in circumstances when appropriate just as the *State Immunity Act* and conflicts of laws can do the same. None of this requires the need to resort to the act of state doctrine. As a result of answering this question on a motion to strike (although against the party bringing the motion), this issue is now resolved.

2. The International Human Rights Law Causes of Action

By a 5–4 margin, the Court also declined to strike the claims based on proposed new torts for violations of international human rights law. Abella J, writing for the majority, held that it was not "plain and obvious" that these claims would fail and it would be a question for the trial judge whether the torts exist and what form they should take. Brown and Rowe JJ wrote for the dissent on this point, addressing in significant detail why it was appropriate to strike these particular claims on a preliminary motion. And they explicitly answered the question at the beginning of this article, emphasizing that novelty should not be a bar to resolving a legal issue on a motion to strike.

Abella J held that the claims based on international human rights law were based on customary international law, which in turn is part of Canadian common law.[72] She suggested that it may be appropriate for Canadian domestic law to evolve to provide remedies for breaches of international law, even when committed extraterritorially, and even when "committed" by corporations. Relying on normative work by Harold Koh,[73] she held that it would make no sense for a corporation to have criminal but not civil liability at international law.[74] Despite suggesting that the new torts may be appropriate, she held that it would be a question for the trial judge to determine whether a corporation would be bound by the international law norms at issue.[75] She further held that the trial judge would need to decide the form of the proposed new torts, and/or whether they were even necessary.[76] However, she concluded that it would be inappropriate to decide these questions on a motion to strike and it was not "plain and obvious" that they would fail.[77]

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[72] *Nevsun*, *supra* note 1 at para 90.

[73] Harold Hongju Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 JIEL 263.

[74] *Nevsun*, *supra* note 1 at para 112.

[75] *Ibid* at para 113.

[76] *Ibid* at para 127.

[77] *Ibid* at para 113.

Brown and Rowe JJ's opinion on this point (which Moldaver and Côté JJ joined) was lengthy, methodical, and detailed. They analyzed Abella J's theory of the case, and agreed that aspects of her analysis were unobjectionable, such as that there are international prohibitions against the use of forced labour, and cruel, inhuman, and degrading treatment, and that these prohibitions have the status of *jus cogens* at international law,[78] which means that no derogation from them is permitted.[79] But in their view, the claims based on international human rights law were nonetheless doomed to fail for several reasons, any of which would have been sufficient to strike the claim. Notably, these included:

- corporations are not bound by international human rights law as a matter of customary international law;[80]
- many of the claims were addressed by existing torts;[81]
- recognizing the new torts would offend the separation of powers, by overstepping the courts' role vis-à-vis both the legislature in developing new causes of action, and the executive vis-à-vis foreign relations;[82] and
- the relevant international law is not automatically adopted as part of Canadian law.[83]

More importantly for this article, however, Brown and Rowe JJ explicitly noted why it was appropriate to decide these issues on a motion to strike. These matters, which were sufficient to defeat the plaintiffs' claim, were questions of pure law. They may be novel but, citing Pitel and Lerner, they noted that if a court will not recognize a new cause of action on the facts in the pleadings—the most favourable facts possible—the claim is doomed to fail.[84] Evidence, whether submitted by affidavits or *viva voce*, is unhelpful.

Brown and Rowe JJ gave extensive reasons for explaining why the law was clearly against the plaintiffs' position on the international human rights law claims and why the evidence about what happened at the mine would merely add noise. Their analysis regarding the company not being bound by the relevant international law illustrates this in a particularly compelling manner. The company was either bound by the relevant international law or it was not. Given that no treaty imposes international human rights law obligations on the company, it could only be bound as a matter of customary international law in the presence of sufficient state practice and *opinio*

[78] *Ibid* at paras 185–186.

[79] See e.g. Currie, *et al*, *supra* note 61 at 153; *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 53.

[80] *Nevsun*, *supra* note 1 at paras 198–202, 210.

[81] *Ibid* at paras 148, 245–246.

[82] *Ibid* at, in particular, paras 148, 158–159, 256–260.

[83] *Ibid* at paras 148, 192–213.

[84] *Ibid* at para 145, citing Pitel & Lerner, *supra* note 7 at 351.

juris.[85] By not striking the claims, Abella J was essentially holding that evidence pertaining to what happened at the mine was necessary to demonstrate the (absence of) state practice and *opinio juris*. But what happened at the mine has no bearing on whether there is state practice and *opinio juris* that imposes international human rights law obligations on the company. Nor is it clear how a complicated and lengthy trial concerning what happened at the mine would assist in answering these legal questions.

International criminal law—the existence of which Abella J and the scholars she cited relied upon to suggest that civil liability should be imposed on corporations—has also evolved in a *sui generis* context pursuant to treaties such as the *Rome Statute*,[86] establishing the International Criminal Court, and the *Charter of the United Nations*,[87] indirectly establishing the *ad hoc* tribunals, the International Criminal Tribunals for Rwanda and the Former Yugoslavia. It may be normatively unsatisfying that international law imposes criminal but not civil liability on non-state actors such as individuals and corporations—but if that is what the relevant treaties, state practice, and *opinio juris* hold, that is a consequence of how international law is made.[88] And the plaintiffs' evidence regarding what happened at the mine, though obviously essential to proving whether Eritrea violated international law, is not relevant to how international law is made.

This is not to suggest that Brown and Rowe JJ's analysis on all points is beyond critique. In particular, one can query whether domestic torts such as battery, even if coextensive with the international law violations, were adequate remedies for the wrongs the plaintiffs endured.[89] The relationship between Canadian law and domestic law also arose again in a sharply divided decision in November 2020's decision in *Quebec (Attorney General) v 9147-0732 Québec inc*.[90] It is also possible that a principled framework will emerge reconciling the uniquely public wrongdoing encompassed in violations of international law, and corporations' potential role therein, with the fact that international law fundamentally is concerned with prescribing ***state*** behaviour—indeed, Hassan Ahmad has recently proposed such a framework.[91]

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[85] *Nevsun*, *ibid* at paras 163–164.

[86] *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 (registration date 1 July 2002).

[87] 26 June 1945, Can TS 1945 No 7.

[88] See e.g. *Nevsun*, *supra* note 1 at paras 202, 212, citing, *inter alia*, Roger O'Keefe, *International Criminal Law* (Oxford: Oxford University Press, 2015) at 47–48.

[89] See e.g. E Samuel Frakas, "*Araya v Nevsun* and the Case for Adopting International Human Rights Prohibitions into Domestic Tort Law" (2018) 76:1 UT Fac L Rev 130 at 133.

[90] 2020 SCC 32, 451 DLR (4th) 367.

[91] See Hassan M Ahmad, "Transnational Torts Against Corporations: A Functional Theory for the Application of Customary International Law Post-*Nevsun*" (2021) 54:2 UBC L Rev 299.

Brown and Rowe JJ did acknowledge that there are times when a court should decline to answer a question of pure law on a motion to strike even if it theoretically could. An example would be if facts are alleged that appear very unlikely but not implausible. Answering the legal question in such circumstances "risks distorting the law for an ultimately fruitless purpose".[92] It would make more sense to prove that the facts are not present. They also cited questions arising under the *Canadian Charter of Rights and Freedoms*[93] as instances where a court should decline to answer questions of law on a motion to strike.[94]

But *Nevsun* did not concern either the *Charter* or unlikely-but-not-implausible facts. Though the facts of the case were complicated, the facts related to certain discrete legal points were accepted by all. A trial could have taken years. That did not actually come to pass as the parties settled the case. To some extent, that is to be commended. But if it is an unprincipled settlement to avoid legal fees, it is suboptimal. More importantly, even putting aside the benefits of uncluttering the courts, the fact is that the existence of the torts for violations of international human rights law remains unsettled. Having such unsettled legal questions—which, fortunately, is no longer the case regarding the act of state doctrine—is itself a problem for access to justice. *Atlantic Lottery* demonstrated the costs of unsettled legal questions more clearly, leading to greater consensus on the Court.

B. *Atlantic Lottery*

Atlantic Lottery's underlying facts could not have been more different than those in *Nevsun*. *Atlantic Lottery* was also hotly anticipated for its substantive as well as its procedural determinations. While those substantive determinations have been subject to analysis elsewhere,[95] a brief summary of the case is necessary to place the procedural determinations in context.

The case was a proposed class proceeding filed in the Supreme Court of Newfoundland and Labrador. The defendant approved the operation of Video Lottery Terminals ("VLTs") in Newfoundland and Labrador, and the class alleged that these were inherently dangerous and deceptive.[96] Three primary causes of action were asserted:

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[92] *Nevsun*, *supra* note 1 at para 145.

[93] Ss 1–34 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*].

[94] *Nevsun*, *supra* note 1 at para 145. It is not altogether clear why *Charter* questions are unique in this regard.

[95] See e.g. Suzanne Chiodo, "Not Waiving, but Drowning: Supreme Court of Canada Kills Waiver of Tort as an Independent Cause of Action" (24 July 2020), online: *Western Law* <law.uwo.ca/about_us/blog/not_waiving_but_drowning__supreme_court_of_canada_kills_waiver_of_tort_as_an_independent_cause_of_action.html >.

[96] *Atlantic Lottery*, *supra* note 2 at paras 1–2.

- waiver of tort;
- breach of contract; and
- unjust enrichment.

For none of these causes of action did the class seek damages for losses incurred by the class members. Rather, they sought disgorgement of sums received by the defendant. And they primarily emphasized waiver of tort.[97]

This is a very old private law concept,[98] albeit somewhat of a misnomer, whereby a plaintiff "waives" his or her tort remedies in order to receive disgorgement remedies even if there is no contract (sometimes an "implied" or "quasi-contract" is found[99]). Insofar as disgorgement can be an appropriate remedy from time-to-time, this is uncontroversial. Historically, however, it still required the existence of a tort (or other cause of action) for tort remedies to be waived. Can it be a standalone cause of action? From a policy perspective, one could make a case that it should be, especially when defendants are profiting from breaching a standard of care. After all, for many torts, notably negligence, actual loss is part of the cause of action. If the plaintiff has not lost anything or cannot prove that they have, the plaintiff is not entitled to even nominal damages even when the defendant has breached the standard of care and even when the defendant has profited from breaching the standard of care. So in light of the aim of behaviour modification, which is a valid goal of the private law,[100] perhaps waiver of tort should be recognized as a standalone cause of action. In this case, the class essentially alleged the existence of a duty of care to warn about the dangerousness of VLTs, and the standard of care was breached. The class sought disgorgement remedies on that basis alone pursuant to "waiver of tort", irrespective of proof of causation of class members' losses.

Brown J, writing for a unanimous Supreme Court, rejected this argument. There were several reasons, notably the private law's primary purpose of compensation, and what he feared would be an undesirable consequence of recognizing a cause of action that did not require damages. This could incentivize prospective plaintiffs to pursue lawsuits as quickly as possible and receive "windfall"

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[97] *Ibid* at para 3.

[98] For comprehensive histories, see John D McCamus, "Waiver of Tort: Is There a Limiting Principle?" (2014) 55:3 CBLJ 333; Greg Weber, "Waiver of Tort: Disgorgement *Ex Nihilio*" (2014) 40:1 Queen's LJ 389.

[99] *Atlantic Lottery*, *supra* note 2 at para 29; McCamus, *supra* note 98; Weber, *supra* note 98 at 393.

[100] See e.g. H Michael Rosenberg, "Waiving Goodbye: The Rise and Imminent Fall of Waiver of Tort in Class Proceedings" (2010) 6:1 Can Class Action Rev 37 at 37. Behaviour modification is particularly emphasized in the class actions context: see e.g. *Hollick v Toronto (City)*, 2001 SCC 68 at para 27; Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003); Paul-Erik Veel, Craig Jones & Suzanne Chiodo, "2. Paul-Erik Veel and Craig Jones on Class Actions Theory" *Certified: Canada's Class Action Podcast* (23 September 2020).

judgments.[101] In other words, if a person were to use a VLT but end “in the black”, he could nonetheless obtain all the defendant’s profits if he were to be the first plaintiff obtaining a judgment that a duty was owed and breached.

From a procedural perspective, what was more interesting is that Brown J emphasized why this was such an appropriate claim to resolve on a motion to strike. He cited four reasons. First, the law of restitution had significantly changed since a previous decision, *Pro-Sys Consultants Ltd v Microsoft Corporation*,[102] that had declined to decide the tenability of waiver of tort as a standalone cause of action.[103]

Second, citing *Hryniak*, Brown J held that courts must look to procedural mechanisms to prevent claims that are doomed to fail from surviving too long in the civil justice system. He agreed that novel claims may occasionally be recognized, but a claim should not survive an application to strike simply because it is novel. In the vein of his decision in *Nevsun*, and answering the question posed at the outset of this article, he held that:

> It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present “no legal justification for a protracted and expensive trial.”[104]

Indeed, he cited an Ontario Superior Court decision that also declined to decide the issue, despite having a 138-day trial. Lax J, a highly respected jurist, mused out loud that there should be another vehicle to resolve the issue, because she considered the 138-day trial to be unhelpful in this regard. She noted that the parties “‘did not rely on any evidence … to support or oppose extending the waiver of tort doctrine to a negligence case’, nor did the plaintiffs ‘lead any policy evidence to explain why waiver of tort should be available’.”[105]

Third, Brown J noted the undesirability of leaving the status of waiver of tort as a standalone cause of action in a state of legal uncertainty. No Canadian court had recognized waiver of tort as a standalone cause of action. But several had held that it was not plain and obvious that it was not a standalone cause of action. Such perpetual uncertainty is undesirable and is a pragmatic reason to decide a question of law on a motion to strike,[106] even if it does not neatly fall into the test to use such a motion for such a purpose. Otherwise, the defendant may pay a nuisance settlement and such

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[101] *Atlantic Lottery*, *supra* note 2 at paras 34–35.

[102] 2013 SCC 57 [*Microsoft*].

[103] *Atlantic Lottery*, *supra* note 2 at paras 16–17 [emphasis in original].

[104] *Ibid* at para 19, citing *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38 at para 19.

[105] *Atlantic Lottery*, *ibid* at para 20, citing *Andersen v St. Jude Medical, Inc*, 2012 ONSC 3660 at para 585, 2012 CarswellOnt 8061 (SCJ).

[106] *Atlantic Lottery*, *ibid* at para 21.

"nuisance settlements" could continue in perpetuity without the question ever being resolved.[107]

Fourth, unlike *Microsoft*, the tenability of waiver of tort as a cause of action was central to *Atlantic Lottery*.[108]

Brown J went on to also strike the unjust enrichment and breach of contract claims. Regarding unjust enrichment, he held that, on the plaintiff's own theory of the case, there was a juristic reason for the enrichment and as such the claim could not succeed.[109] Turning to breach of contract, he interestingly agreed that there might be a claim for breach of contract. But it would yield expectation-based damages or nominal damages, while the class sought disgorgement damages and/or punitive damages, which were clearly not available on the pleadings. He thus held that there was no ***reasonable*** cause of action, even though there was technically a cause of action, implying expanded availability of the motion to strike.[110]

Karakatsanis J dissented on the breach of contract claim. She observed—accurately—that loss is not an essential element of a breach of contract claim, and held that evidence was required before determining the inappropriateness of disgorgement or punitive damages.[111] Brown J held that those remedies being appropriate would be inconsistent with the theory of the case in the pleadings, as the plaintiffs did not make the types of allegations that would entitle the class to non-compensatory compensation.[112]

III. THE IMPLICATIONS

A. The Doctrine Analyzed

In *Nevsun*, Abella J repeatedly emphasized the more traditional language of the necessity of it being "plain and obvious" that an action will fail before a motion to strike can be used to dismiss a novel claim. Specifically, fusing *Hunt* and *Imperial Tobacco*, she held that a claim should only be struck if it is "'plain and obvious' [language from *Hunt*] that the claim has no reasonable prospect of success [language

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[107] For problems of this nature (which can admittedly be overstated), see e.g. Randy J Kozel & David Rosenberg, "Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment" (2004) 90:7 Va L Rev 1849. The problems of settlement generally are most famously noted in Fiss, *supra* note 35.

[108] *Atlantic Lottery*, *supra* note 2 at para 22.

[109] *Ibid* at para 71.

[110] *Ibid* at paras 49ff.

[111] *Ibid* at, in particular, para 125.

[112] *Ibid* at para 67.

from *Imperial Tobacco*]".[113] Four months later, however, she found herself signing onto a majority with the four dissenting judges from *Nevsun*. Does this signal an evolution in the law? On one point, the answer appears to be an unambiguous "yes"—as there is an evolution or, at least, an important clarification. Another point is more ambiguous, but there appears to be a subtle development nonetheless.

To begin with where there was an unambiguous clarification, Brown J held—and Karakatsanis J did not appear to disagree with him on this point—that novelty is not a reason not to strike a claim.[114] Picking up on his partial dissent from a few months earlier, Brown J emphasized that a claim should not be allowed to survive a motion to strike merely because it is novel. He emphasized the importance of motions to strike to facilitate access to justice, both in protecting court resources and ensuring parties do not spend longer than necessary defending a claim.[115] Moreover, such motions permit development of the law, allowing a court to exercise its law-making functions, which can become more difficult when parties leave the litigation process in the face of excessive procedure.[116] So parties should take note that whenever a party argues its pleading should not be struck merely because it is novel, this is quite clearly not the law. To be sure, there was no case law explicitly holding that novel claims should survive merely because of novelty. But there is now no doubt that novel questions of law can be resolved on motions to strike, at least when the facts in the pleadings are presumed to be true when answering the legal questions. Much like the substantive non-tenability of waiver of tort as a standalone cause of action, *Atlantic Lottery* has also clarified an aspect of procedural law. And it removed any doubt about the legal status of Brown and Rowe JJ's pithy holding from *Nevsun*: "Any confusion over whether a novel question of law can be answered on a motion to strike should be put to bed: it can."[117]

Did *Atlantic Lottery* provide more clarity in terms of the threshold to be met before a motion to strike is granted? Here, the answer is murkier, given that Brown J emphasized four reasons that it was particularly appropriate to decide the questions of law raised in *Atlantic Lottery* on a motion to strike:

1) the law of restitution had changed since *Microsoft* and it was easier to answer the legal question;
2) *Hryniak* had encouraged courts to look to procedural mechanisms to resolve cases quickly on their merits to promote access to justice and the efficient use of court resources;
3) the legal uncertainty regarding waiver of tort's being a standalone cause of action was clearly causing undesirable practical problems; and

[113] *Nevsun*, *supra* note 1 at para 64.

[114] *Atlantic Lottery*, *supra* note 2 at para 19.

[115] *Ibid* at para 18.

[116] *Ibid* at para 21.

[117] *Nevsun*, *supra* note 1 at para 145.

4) unlike in *Microsoft*, the tenability of waiver of tort as a standalone cause of action was central to *Atlantic Lottery*.[118]

These four reasons, taken together, may mean that *Nevsun* and *Atlantic Lottery* are distinguishable and the former's reticence to use motions to strike is compatible with the latter's bullishness. The first consideration will seldom be relevant in all future cases. But the second—the effects of *Hryniak*—will be, while concerns about perpetuating legal uncertainty and a legal question being central to a case will often be present in future cases. In this vein, another distinguishing feature between *Atlantic Lottery* and *Nevsun* is that the uncertainty regarding the tenability of waiver of tort as a cause of action had caused greater mischief than the tenability of claims for violations of international human rights law.

Putting these pieces together, what should one conclude? First and foremost, as mentioned above, a cause of action should not survive a motion to strike ***merely*** because it is novel. To the extent that responding parties submit the opposite, there is now clear Supreme Court of Canada precedent to the contrary. Essentially, novelty is a neutral criterion in deciding whether to answer a question of law on a motion to strike: it is neither necessary nor sufficient.

Second, *Hunt*, as reformulated in *Imperial Tobacco*, remains the law of the land. In this vein, parties must point out how it is "plain and obvious" that a claim will fail or that it has "no reasonable prospect of success". But a claim can be "plain and obvious" in being destined to fail, or clearly have no reasonable prospect of success, due to a discrete legal issue. To use a baseball analogy, a runner can "barely" be out—but still "plainly" be out. And the principles from *Hryniak*, incorporated into *Atlantic Lottery*, hold that waiting for evidence is unnecessary once legal clarity is present. Nor, as McLachlin CJ noted in *Imperial Tobacco*, should parties hope that future developments will make their causes of action tenable.[119] Her decision was channeled by Brown J as he held how parties must plead facts and a theory of the case that would entitle them to their sought remedies. As he noted in striking the breach of contract claim in *Atlantic Lottery*, it is insufficient to plead a "reasonable" cause of action by pleading the elements of the cause of action with sought remedies theoretically—but not in light of the facts pled—leading to entitlement to those remedies.[120]

In light of the foregoing, a judge could ask herself a more specific question in deciding whether to resolve a novel question of law on a motion to strike: "would the evidence regarding what the plaintiff and/or defendant did, as alleged in the pleadings, assist in resolving the ***legal issue***"? If the answer is no, it can and should be resolved on a motion to strike. And a court should ***not*** decline to answer the question of law merely because it is difficult. If it is truly an independent question of law—such

[118] *Atlantic Lottery*, *supra* note 2 at paras 17–22.

[119] *Imperial Tobacco*, *supra* note 14 at paras 23–25.

[120] *Atlantic Lottery*, *supra* note 2 at paras 49–61.

as whether a corporation can violate customary international law or whether waiver of tort is a cause of action—the facts of what the parties did are not helpful and, if anything, may be noise in answering the legal questions (something that will be returned to in Part III.C). This overarching consideration in all cases appears to accord with both *Nevsun* and *Atlantic Lottery*.

That still leaves the question of what should be made of the other three factors that Brown J cited in *Atlantic Lottery*: developments regarding the surrounding law; general legal uncertainty caused by the unanswered question of law; and the centrality of the legal issue to the case. In principle, these do not appear to be relevant, in and of themselves, to the motion to strike test as developed over the years, and as synthesized above. Having said that, they—especially the concern of legal uncertainty caused by the unanswered question—buttress the value of resolving questions of law on a motion to strike assuming the previously discussed criteria are met. Parties should not be afraid to cite these three considerations as a ***particular*** reason to answer a question of law on a motion to strike in their case. Although these factors are neither necessary nor sufficient reasons to use the motion to strike, in a "close call" where a judge is uncertain about whether the threshold to use a motion to strike is met, the presence of factors of this nature could be the make-weight in deciding to answer the question. Again, this is not necessarily an absolute prerequisite. For instance, if a legal issue can be fairly resolved on a motion to strike, it can be fairly resolved whether it is central or peripheral. Though the centrality certainly does make the access to justice benefits of resolving the issue greater. As such, from a pragmatic perspective, parties should be reticent to bring motions to strike to resolve peripheral legal issues. While the court may be ***competent*** to answer a legal question that is peripheral to a case on a motion to strike, access to justice—which is a paramount consideration in these cases—is not generally served by piecemeal litigation. This is due to both the expense incurred by the parties and occupying a judge's time with a motion that does not dispose of proceedings.[121] Though that consideration should really fall onto lawyers, in light of their ethical duty to act in light of the principle of access to justice,[122] in bringing, or not bringing, motions to strike, rather than the court in determining whether the legal question can be answered on such a motion.

B. Subsequent case law

Analyzing the doctrine from first principles, however, only tells us so much. How have lower courts used *Atlantic Lottery* and *Nevsun* in the immediate aftermath of their being decided? Does it indicate any liberalization in the ability to use motions to strike to determine questions of unsettled law? In January and February 2021, these cases were extensively noted up to determine this issue.

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[121] See e.g. *Butera v Chown, Cairns LLP*, 2017 ONCA 783, 137 OR (3d) 561 at paras 31–32 [*Butera*] (raising these issues in the context of partial summary judgment).

[122] See e.g. *Law Society Act*, RSO 1990, c L.8, s 4.2, discussed in, e.g. Trevor CW Farrow, "Ethical Lawyering in a Global Community" (2013) 37 Man LJ 61 at 72.

As of February 23, 2021, ten cases had cited *Nevsun*'s majority opinion regarding the appropriateness of motions to strike. Four of these, however, did so in nonetheless striking pleadings,[123] and an additional two struck portions thereof.[124] Two decisions have cited the majority opinion in declining to strike claims, one of which noted the difficulties in applying the test for motions to strike,[125] and another picked up Abella J's view that a claim should only be struck if it fails on ***any*** theory.[126] Two decisions also cited the dissenting reasons, one of which noted that claims should be read generously, bearing in mind the possibility of drafting deficiencies.[127] The other picked up the invitation from Brown and Rowe JJ to answer a novel question of law, alleging breaches of the *Charter* for alleged government (in)action on climate change.[128] Ten decisions is not that many, but indicate that, within a year, this decision had been noticed—and not primarily as a call for restraint in use of motions to strike. And *Nevsun* appeared to be a lesser advance in procedural law compared to *Atlantic Lottery*.

Atlantic Lottery, on the other hand, despite having come out five months later, has already been cited more frequently on the propriety of using motions to strike. Thirteen cases have done so, ten of which did so in granting the motion to strike (or, in two cases, its Quebec equivalent), and many did so bearing in mind the access to justice and rule of law considerations that would warrant a liberalization in the ability to use such motions for these purposes:

- two cases noting that the use of a motion to strike should be interpreted in light of the "culture shift" required to effect prompt resolution of claims on their merits;[129]

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[123] See *Mee Hoi Bros Company Ltd v Borving Investments (Canada) Ltd*, 2020 BCSC 1999, 2020 CarswellBC 3259; *Kindylides v Does*, 2020 BCCA 330, 43 BCLR (6th) 149; *Goy v District of Sechelt*, 2020 BCSC 1242, 7 MPLR (6th) 252 [*Goy*]; *Husteel Co Ltd v Canada (Attorney General)*, 2020 FC 430, 2020 CarswellNat 2260.

[124] See *Walter v Insurance Corp of British Columbia*, 2020 BCSC 758, 2020 CarswellBC 1259; *Compliance Coal Corporation v British Columbia (Environmental Assessment Office)*, 2020 BCSC 621, 13 LCR (2d) 215.

[125] See *Lipinski v Speranza*, 2020 ABQB 445, 2020 CarswellAlta 1430.

[126] See *Ladner Reach Properties Ltd v Cameron*, 2020 BCCA 198, 37 BCLR (6th) 219.

[127] See *Beaumont v More Than The Roof Housing Society*, 2020 BCSC 453, 2020 CarswellBC 744.

[128] See *La Rose v Canada*, 2020 FC 1008, 2020 CarswellNat 4510 [*La Rose*].

[129] See *Kett v Mitsubishi Materials Corporation*, 2020 BCSC 1879, 2020 CarswellBC 3078; *Wakeling v Desjardins General Insurance Group Inc*, 2020 ONSC 6809, 2020 CarswellOnt 16986 (SCJ).

- two uses striking claims in Quebec, which has a civilian legal system in civil litigation,[130] in addition to a third that viewed *Atlantic Lottery* as relevant while still dismissing the request to dismiss;[131]
- four cases noting the appropriateness of using motions to strike to resolve novel questions of law;[132]
- two other cases granting motions to strike;[133] and
- two cases citing the case but declining to employ the motion to strike.[134]

A fourteenth case did not address a motion to strike, but did note that *Atlantic Lottery* encouraged the use of summary procedures more generally.[135]

Ultimately, though *Atlantic Lottery* and *Nevsun* remain fairly recent decisions, they are already being cited and, generally speaking, for encouraging rather than restricting the use of motions to strike. Recall that only fourteen cases were found citing *Hryniak* calling for a "culture shift" permeating civil procedure to encourage more uses of motions to strike to resolve actions on their merits. But more cases, in a shorter time period, have done so following *Atlantic Lottery* and *Nevsun*. The "culture shift" to encourage disposition of cases of their merits has been invoked in this regard, as has the need to promote certainty in the law. This illustrates that the specific encouragement in this regard from *Nevsun* and especially *Atlantic Lottery* has yielded more than the more general encouragement for a "culture shift" in *Hryniak*.[136] Nor does this seem to be treading into areas where knowledge of the facts is necessary for a fair disposition regarding whether a cause of action is made out. Indeed, several cases have cited the decisions on the need for it being "plain and obvious" that the pleadings should be struck—before holding the standard had been met. Is this desirable? That is the subject of the next section.

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[130] See *Autorité des marchés financiers c Cuggia*, 2021 QCCS 65, [2021] JQ no 135; *Pollués de Montréal-Trudeau (LPDMT) c Aéroports de Montréal (ADM)*, 2020 QCCS 2432, [2020] JQ no 5032.

[131] See *Dormani c Dallaire*, 2020 QCCS 2038, [2020] JQ no 8291.

[132] See *Donaldson v Swoop Inc*, 2020 FC 1089, 2020 CarswellNat 5155; *La Rose*, *supra* note 128; *Goy*, *supra* note 123; *Misdzi Yikh v Canada*, 2020 FC 1059, 2020 CarswellNat 6275.

[133] See *Vale Canada Ltd v Priestly Demolition Inc*, 2020 ONSC 6763, 2020 CarswellOnt 16985 (SCJ); *Enercare Home and Commercial Services Limited Partnership v Grand Hvac Leasing Ltd*, 2020 ONSC 6946, 2020 CarswellOnt 17003 (SCJ).

[134] See *Wakeling v Desjardins General Insurance Group Inc*, 2020 ONSC 6809, 2020 CarswellOnt 16986 (SCJ); *Pharmascience Inc v Novartis Pharmaceuticals Canada Inc, Novartis Pharm AG and Novartis AG*, 2020 ONSC 6534, 2020 CarswellOnt 15819 (SCJ).

[135] See *Link v Link*, 2020 NSSC 293, 2020 CarswellNS 814.

[136] The limited ability of the call for a "culture shift" to, without more, achieve that aim was noted in Kennedy Dissertation, *supra* note 29 at 234–237.

C. Problems with Motions to Strike

By and large, the above analysis demonstrates how motions to strike can advance access to justice and the rule of law. But such motions, to be sure, come with disadvantages. This section addresses many of the common critiques of motions to strike. But it is nonetheless suggested that concerns that can accompany such motions' increased use can be mitigated in order to realize their benefits.

1. Potential for Abuse and Delay

There is no question that, if brought inappropriately, motions to strike can delay the resolution of actions—if there are appeals, sometimes by years. This is a real problem, and warrants both triaging from scheduling judges (frequently becoming more common[137]) that the motion is appropriate, as well as ethical restraint on lawyers bringing the claims.[138] But the fact that a procedural mechanism can be abused does not mean that it is illegitimate—the Supreme Court recognized this in *Hryniak* regarding summary judgment.[139]

In this vein, the fourth criterion that Brown J considered in *Atlantic Lottery* that warranted use of the motion to strike—the centrality of the legal issue to the case—is worth exploring in more depth. A "partial motion to strike" can delay an action, just as a "partial summary judgment" motion can.[140] It also occupies a judge's time on a matter that does not resolve a claim.[141] So lawyers should query whether bringing a "partial motion to strike" is actually an effort to see to the claim's prompt resolution or whether it is an aspect of delay.

Even so, this should not be an absolute rule because even a partial motion to strike can be beneficial for two reasons. First, the pragmatic effect of a partial motion to strike may be to lead to a more principled settlement, as is the case for partial summary judgment.[142] Lawyers in Ontario have lamented the restriction on the use of partial summary judgment as causing an inability to streamline litigation leading to a

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[137] See e.g. Ontario Superior Court of Justice, "Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region", online: <www.ontariocourts.ca/scj/practice/practice-directions/toronto/t/>, Section B.3.b, noting:

Applications and motions before a Judge that require more than two hours for all parties to argue are considered long applications and long motions. These applications and motions are booked first by contacting the Civil Practice Unit for a date in Civil Practice Court. The Civil Practice Court will confirm the date for hearing the motion, and make any necessary procedural orders that are required.

[138] For a discussion about ethical restraint in this regard, see Kennedy & Sossin, *supra* note 55.

[139] *Hryniak*, *supra* note 3 at, e.g. para 32.

[140] See e.g. *Butera*, *supra* note 121.

[141] *Ibid* at para 32.

[142] See e.g. Kennedy Dissertation, *supra* note 29 at 272–273.

principled resolution, at least for certain parties.[143] One suspects this could—at least in certain cases—be the same for partial motions to strike. One can imagine an instance where a single defendant (among many) has been sued on a basis of vicarious liability not known to law. It is arguably unfair to force that defendant to remain in litigation because the plaintiff's claim against another defendant has merit. Second, the delay in resolving the action caused by answering the legal question must be considered alongside the benefits that can come to the profession as a whole in answering a legal question that should be answered. In this sense, the final two considerations Brown J cited in *Atlantic Lottery* as reasons to use a motion to strike—importance of certainty in the law and centrality of a legal issue to a case—can be in tension. Though neither are strictly relevant to whether a court is *per se* ***competent*** to answer the legal question on the motion to strike, the presence of persisting legal uncertainty may be a pragmatic consideration to permit scheduling a partial motion to strike when it would normally be inappropriate.

2. Asymmetry Between Plaintiff and Defendant

Another disadvantage regarding increased use of motions to strike is that they create an asymmetry between plaintiffs and defendants. This asymmetry is both theoretical and practical. From a theoretical perspective, while a plaintiff can seek the answer to a question of law, even if a court answers in the plaintiff's favour, there may still need to be a summary judgment motion or a trial to resolve whether the facts underlying a tenable claim are present. The plaintiff thus has less to gain and more to lose from a motion to strike.

From a practical perspective, moreover, courts may be more reluctant to answer a novel question of law on a preliminary motion if brought by the plaintiff, given that the plaintiff is likely the party seeking a change in the law such as through a new cause of action. A judge may understandably conclude that, even if the facts alleged by the plaintiff are true, it would be inappropriate to change the law in the plaintiff's favour. But if the judge is inclined to change the law as the plaintiff requests, the judge may still wish to receive the defendant's evidence in case changing the law would be impractical. This certainly results in the *status quo* being favoured. Though the slowly evolving nature of the common law can be one of its greatest strengths,[144] it can be to the likely detriment of plaintiffs.

This asymmetry may result in plaintiffs feeling that they are systematically disadvantaged. But it can also be overstated. As noted, the plaintiff ***can*** avail itself of a motion to strike, both to hold that a defence is untenable and, more rarely, to have an answer that its novel cause of action will be determined in its favour should it be

[143] See Gerard J Kennedy, "The 2010 Amendments and *Hryniak v Mauldin*: The Perspective of the Lawyers Who Have Lived Them" (2020) 37 Windsor YB Access Just 21 at 32–33, 53 [Kennedy Perspective].

[144] "Conservative" in the Burkean sense of the term: See generally Edmund Burke, *Reflections on the Revolution in France* (New York: Oxford University Press, 1999 [1790]) at 96–97.

able to prove its facts. As such, the motion to strike can lead to more principled settlement. This is a major benefit of motions to determine legal questions, although one that courts did not traditionally give considerable weight to in the pre-*Hryniak* era.[145]

To the extent that some asymmetry persists nonetheless, particularly in a court being reluctant to answer a novel question of law in the plaintiff's favour in a way that it may not be as reluctant to do for the defendant, this may be inevitable in litigation. It is the plaintiff who bears the burden of proof in civil litigation. It is not unreasonable to expect somewhat of an "uphill battle". The consequences of leaving questions of law unanswered when they could be answered on motions to strike can be cluttering the court system for both the parties to the case and other parties, in addition to perpetuating legal uncertainty. The plaintiff's view that it is being treated unfairly needs to be seriously considered, but is perhaps best considered in the next subsection.

3. A Lack of Evidence—And a Lack of Empathy?

This section addresses one of the greatest benefits and greatest limitations of the motion to strike—the inability to present evidence. This can be a great benefit because evidence, even if tendered by affidavit, can be time-consuming and expensive to accumulate, present, and be subjected to cross-examination. If it is possible to fairly adjudicate a matter on pleadings, it is unfair to the parties—and everyone else who cannot access the courts—to force the presentation of evidence. As Dean Lorne Sossin (as he was then) has previously suggested, "if the issue is whether tort law recognises a right to damages for 'nervous shock,' it would be unnecessary and arguably unfair to put the parties to the task of establishing a factual basis for nervous shock if this category of tortious harm is not recognised in the first place."[146] A lack of evidence is, of course, frequently a limitation, however, as sometimes evidence is necessary to resolve a dispute. The availability of the motion to strike should not be so liberalized so as to resolve cases where evidence is necessary, assuming the facts alleged in the pleadings are not implausible. Resolution on the basis of legal argument should be permitted, even when that legal argument is complicated. An example is Brown J's holding that the theory advanced in *Atlantic Lottery* could not reasonably yield disgorgement remedies for breach of contract. At the same time, if there is a need to learn what the defendant and plaintiff did, it is important that the standard to use the motion to strike not be "watered down". In other words, the importance of evidence is not to be understated. Among other things, evidence is essential to show whether the circumstances are present to make out a new claim. But this can and should be distinguished from whether a cause of action exists at all.

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[145] See e.g. *PDC 3 Limited v Bregman + Hamann Architects* (2001), 52 OR (3d) 533 (CA) at paras 9–11, discussed in Pitel & Lerner, *supra* note 7 at 348.

[146] Kennedy & Sossin, *supra* note 55 at 712–713.

This leads to other limitations caused by the lack of evidence: a) courts answering hypothetical questions; b) parties not feeling that they have been heard on the merits; and c) a lack of empathy caused by the lack of evidence. Reluctance on the part of courts to answer hypothetical questions is understandable. This is why motions to determine a legal question are frequently ruled inappropriate, especially if parties are trying to get an "advance ruling" based on contingencies.[147] But nor is this rule absolute—courts in Canada, unlike the United States, frequently answer reference questions, some of which are based on hypotheticals.[148] When the facts proposed on a motion to strike or a motion to determine a legal question seem implausible, it may make sense to heed Brown and Rowe JJ's caution from *Nevsun* and not risk "distorting the law for an ultimately fruitless purpose."[149] But an absolute objection to answering hypothetical questions fails to realize the overarching benefits of answering legal questions on motions to strike (and, for that matter, references), to both the parties and the public.

There is also a concern, building on the previous subsection regarding asymmetry between plaintiffs and defendants, that a party whose claim is dismissed on a motion to strike will feel as though it did not have a fair hearing. There is something to this concern. Tom Tyler's research notes the importance of "feeling heard" to losing parties' abilities to accept the result of a case.[150] But motions to strike do address the merits of a claim—they address the ***legal merits*** rather than the ***factual merits*** of a claim,[151] usually after live oral argument before a judge. So if judges writing decisions emphasize how they accept the allegations in a party's pleadings as true, but why that still results in a claim or defence being untenable, this hopefully goes some way to addressing the perception of being heard, even when a party loses.

Of course, this may not satisfy every litigant. Certain litigants may find giving evidence in court to be important from a cathartic perspective, and to increase empathy

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[147] See e.g. *Portuguese Canadian Credit Union Ltd v CUMIS General Insurance Co*, 2010 ONSC 6107, 104 OR (3d) 16 (SCJ).

[148] See e.g. Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019).

[149] *Nevsun*, *supra* note 1 at para 145.

[150] See e.g. Edgar Allan Lind & Tom R Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988) at 76–81. See also Edgar Allan Lind, *et al*, *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* (Santa Monica, CA: Rand Corporation, 1989) at 78–80, online: <www.rand.org/pubs/reports/R3708.html>. See also Julian V Roberts & Loretta J Stalans, *Public Opinion, Crime, and Criminal Justice* (Boulder, CO: Westview, 2000) at 149; Jona Goldschmidt & Loreta Stalans, "Lawyers' Perceptions of the Fairness of Judicial Assistance to Self-Represented Litigants" (2012) 30:1 Windsor YB Access Just 139 at 157–159.

[151] See e.g. Chapter Nine in Walker, *supra* note 8, and the distinction between "Disposition Without Trial: Merits Related", including Motions to Strike and Dismiss, Summary Judgment and Summary Trial, Motion to Determine a Legal Question, and Special Case, and "Disposition Without Trial: Process-Based", including Default Proceedings, Dismissal for Delay, Dismissal for Non-Compliance with Rules and Orders, and Discontinuance.

from the decision-maker.[152] To be sure, something is lost by accepting the facts from the pleadings rather than through live or even affidavit evidence, if only a human element.[153] But there are still two responses to this.

First, we should ask about the costs of adding this element. The benefits of in-person evidence are also lost through summary judgment but the benefits of prompter resolution have simply been accepted as worthwhile given the otherwise illusory trial.[154] There is controversy about whether these trade-offs are warranted.[155] But the assistance of in-person evidence in making accurate factual findings is also doubtful: for instance, it is particularly questionable whether judges and juries are gifted at determining "who is telling the truth" on the basis of seeing demeanour.[156]

Second, from a psychological perspective, the benefits of empathy (in terms of sharing the pain of another, rather than merely understanding their experience[157]) have been queried. Paul Bloom, for instance, has suggested that excessive reliance on empathy privileges acute issues at the expense of more wide-ranging but distant ones.[158] However, consideration of wide-ranging distant effects is exactly what judges ***should*** be considering when deciding whether to change the law—hence the maxim, "hard cases make bad law". In this sense, seeing the plaintiff in person rather than merely understanding what she alleged occurred to her may not be helpful—and may even be distracting—in making a determination about whether to change the law. To be sure, not all psychologists agree with Bloom's critiques of empathy.[159] But this uncertainty should at least prompt pause before a judge declines to use a motion to strike on the grounds that it is necessary to hear evidence.

Finally, it is also worth noting that the purpose of striking pleadings is not to summarily dismiss a claim without allowing for appropriate participation on the part of all litigants. Rather, there is a motion and submissions on the legal issues.[160] This

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[152] See e.g. Nourit Zimerman, "On the Individual Participation within Mass Litigation: The Case of the Fairness Hearing" (2019) 52(4) Akron L Rev 1105 at 1117, 1136, 1146.

[153] The loss of this "human element" was noted by lawyers in the summary judgment context in Kennedy Perspective, *supra* note 143 at 52.

[154] This is noted in *Hryniak*, *supra* note 3 at para 24.

[155] See e.g. Hanycz, *supra* note 25 (critiquing proportionality).

[156] See e.g. *R v NS*, 2012 SCC 72, [2012] 3 SCR 726 at paras 99–101 (the dissenting reasons of Abella J summarizes the limitations of this).

[157] See e.g. Paul Bloom, *Against Empathy: The Case for Rational Compassion* (New York: HarperCollins, 2016) at 3–4, 37, 50–51.

[158] *Ibid* at e.g. 9.

[159] See e.g. Jamil Zaki, "The War for Kindness: Building Empathy in a Fractured World" (New York: Broadway Books, 2019).

[160] Unlike dismissals of claims that are abusive on their face: see e.g. Gerard J Kennedy, "Rule 2.1 of Ontario's *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?" (2018) 35 Windsor YB Access to Just 243.

participation could also promote empathy and a feeling of being heard, even if testimony and/or affidavits of the parties' stories are not presented before the court.

D. A Final Benefit: Clearer Pleadings

A final, practical benefit of a robust use of motions to strike to determine questions of law should be acknowledged: this encourages clearer pleadings. As Brown and Rowe JJ noted in *Nevsun*, if a claim is permitted to proceed because its legal basis is unclear and courts will tolerate rather than interrogate imprecision, vague pleadings are encouraged.[161] If the vagueness rises to the level of a factual lack of particularity that does not permit a responding party to plead in response, particulars may be ordered.[162] That should logically extend to legal precision as well. In this way, if a novel claim does survive a motion to strike as the pleading is precise or becomes more precise as a result of a motion, litigation a whole will be more streamlined in terms of discovery and, ultimately, a trial or summary judgment motion.

CONCLUSION

After 2020, it appears as though the Supreme Court may be liberalizing the ability to use motions to strike to resolve questions of law. This should not be surprising given the trends in civil litigation towards greater use of summary procedures. To be sure, the extent to which the principles in *Atlantic Lottery* are applicable more broadly is uncertain. But they appear to be. This appearance is already evident in subsequent case law. It is also part of a trend to resolve more cases on their merits more quickly and develop the common law while doing so. It will be unsurprising to witness more motions to strike in the future resolving novel questions of law through assessing the legal tenability of a claim on the facts as presented in the pleadings. And so long as courts are only determining questions of law on motions to strike, rather than opining on the tenability of factual pleadings, this advances both access to justice and the rule of law.

Above, I suggested that it would be consistent with *Hunt*, *Imperial Tobacco*, *Hryniak*, *Nevsun*, and *Atlantic Lottery* for a court to ask the following question in deciding whether to answer questions of law on a motion to strike: "would the evidence regarding what the plaintiff and/or defendant did, as alleged in the pleadings, assist in my resolving the ***legal issue***"? While this seems an accurate and principled synthesis of these cases, I will end with another baseball analogy on how this should work in practice.

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[161] *Nevsun*, *supra* note 1 at para 261.

[162] See e.g. *Whiten*, *supra* note 9 at paras 87–90; *Copland v Commodor Business Machines Ltd* (1985), 52 OR (2d) 586 (Master).

Video replay evidence mandates "clear and convincing" evidence that a call on a field was wrong to overturn the call.[163] At times, the umpire barely got the call wrong—but still clearly got it wrong. Courts should not be reluctant to hold that a cause of action is clearly doomed if it is clear that the law does not support the cause of action, even when it is close. Declining to do so is an abrogation of the court's (like the replay reviewer's) responsibility to determine what the law is, in addition to causing problems for access to justice. At other times during replay, however, one ends up highly suspicious that the call on the field is very wrong—but one cannot be certain, possibly due to the angle of the players and umpire, possibly due to dirt flying in the air. Here, there are missing facts necessary to resolve the legal issue, and the game must go on. But the fact that this second possibility is occasionally present does not mean that the first one is never present either—even when it shows that the umpire's mistake was reasonable. Courts should recognize that "plain and obvious" and "close" are not incompatible. Access to justice and the rule of law can follow.

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[163] "What is a Replay Review?" (undated), online: *Major League Baseball* <m.mlb.com/glossary/rules/replay-review>.