

# ARTICLE

## CAN JUDGES CONDUCT INDEPENDENT LEGAL RESEARCH? THE U.S. VS. COMMON LAW APPROACHES

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## I. INTRODUCTION

Can judges conduct their own legal research? This question may seem absurd as common sense would say yes given the fact that judges are there to apply the correct law. In civil law systems, inquisitorial judges often rely on judicial assistants to conduct their own legal research.<sup>1</sup> In the adversarial common law system, if one researches “case not cited by the parties” or other similar keywords in legal databases, there will often be hundreds of precedents shown, implying this may not be an issue.

However, the actual position in common law jurisdictions is surprisingly not that simple. This topic has seldom been explored with not much literature, which explains why this Article is predominantly based on case law. This Article will evaluate the positions in four groups, namely (1) the United States, (2) England and Wales and Hong Kong, (3) Australia and Canada, and (4) Singapore.

In brief, the U.S. maintains an open position in the sense that there is no formal, universally applicable restriction; England and Wales and Hong Kong have in place a uniform, broad rule; Australia and Canada do not have a single rule like English law but have comparable guidance; and Singapore is just like Australia and Canada, but it illustrates how not having a single rule can lead to piecemeal guidance.

The rules are most complicated under English law to the extent of requiring analytical clarifications, whilst others are simpler. Although the U.S. position is the simplest, the flipside is that the absence of clearly set guidance leads to inconsistencies. The same happens in Singapore.

In this Article, the term “uncanvassed authority” means a case cited by the judge themselves without giving the parties an opportunity to respond. This is a term used by the English Court of Appeal.<sup>2</sup>

## II. THE U.S.

The position in the U.S. is different from other common law groups and is seemingly the most straightforward one. The U.S.

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1. Anne Sanders, *Judicial Assistants in Europe – A Comparative Analysis*, 11 INT’L J. CT. ADMIN. 2, 9 (2020); Consultative Council of European Judges (CCJE), *CCJE Opinion No. 22 (2019) The Role of Judicial Assistants* (Nov. 7, 2019), <https://rm.coe.int/opinion-22-ccje-en/168098eeeb>.

2. *Clark v. Clark Constr. Initiatives Ltd.* [2008] EWCA (Civ) 1446 [11].

does not practice a “purely adversarial system.”<sup>3</sup> Similar to the civil law traditions, there are law clerks providing legal research assistance to judges in the U.S.<sup>4</sup> The judges are free to cite cases that are not raised by the parties’ counsels.<sup>5</sup> This happens for example “when the court feels that the litigants have not raised the proper legal issues or identified the correct principle of law.”<sup>6</sup> In

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3. Layne S. Keele, *When the Mountain Goes to Mohammad: The Internet and Judicial Decision-Making*, 45 N. M. L. REV. 125, 154–55 (2014); see *De Fontbrune v. Wofsy*, 838 F.3d 992, 999 (2016) (“Judicial research into domestic law provides an appropriate analog. Although our common law system relies heavily on advocacy by the parties, judges are free to undertake independent *legal* research beyond the parties’ submissions”). See also *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (“The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them...Of course not all legal arguments bearing upon the issue in question will always be identified by counsel, and we are not precluded from supplementing the contentions of counsel through our own deliberation and research.”).

4. Nina Holvast, *The power of the judicial assistant/law clerk: Looking behind the scenes at courts in the United States, England and Wales, and the Netherlands*, 7 INT’L J. CT. ADMIN. 10, 14 (2016).

5. Delmer Karlen, *Civil Appeals: English and American Approaches Compared*, 21 WM. & MARY L. REV. 121, 136–37 (1979). See also *State of Utah v. Rasabout*, 2015 UT 72, fn. 35 (“On issues that are squarely presented, moreover, we regularly do take it upon ourselves to conduct independent legal research. No party would be surprised to read an opinion citing authority not presented in the briefs, or analysis taking a somewhat different angle than the parties. Our legal research is supposed to be *sua sponte*, and not at all limited to the legal material cited to us by the parties.”); Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270–72 (1944) (“In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion.”) (this observation was endorsed in *De Fontbrune*, 838 F.3d, at 999); Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L. J. 1263, 1296 (2007) (“well-established ability of judges to do independent legal research”); Debra Cassens Weiss, *May judges search the internet for facts? ABA ethics opinion sees problems*, ABA J. (Dec. 8, 2017), [http://www.abajournal.com/news/article/may\\_judges\\_search\\_the\\_internet\\_for\\_facts\\_aba\\_ethics\\_opinion\\_sees\\_ethics\\_pro](http://www.abajournal.com/news/article/may_judges_search_the_internet_for_facts_aba_ethics_opinion_sees_ethics_pro) (“Judges can conduct legal research online for cases not cited by the parties.”).

6. Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1276 (2002). The U.S. courts believe the independent judicial research is a beneficial practice. See *Hampton v. Wyant*, 296 F.3d 560, 565 (2002) (“Any time a judge does independent research there is a risk of error, but judges with some initiative probably err at lower rates than judges who naively believe that the briefs cover everything worth considering.”); *Camacho v. Trimble Irrevocable Trust*, 313 Wis. 2d 272, 277–78 (Wis. Ct. App. 2008) (“A competent judge is not so naïve to believe that briefs will always summarize the relevant facts and the applicable law in an accurate fashion. A competent judge uses the briefs as a starting line and not the finish line for his or her own independent research. Not only does a good judge confirm that the authorities cited actually support the legal propositions in the briefs, a good judge also makes sure that the authorities continue to represent a correct statement of the law.”); *G and G Prods. LLC v. Rusic*, 902 F.3d 940, 949 (9th Cir. 2018) (“The party may get saved by the court’s own research efforts” where the parties’ assistance are inadequate.). Yet, the courts have also warned counsels against shifting the research burden to them. See *Commonwealth v. Miller*, 455 Pa. Super. 534, fn. 4 (1997) (“While we realize that our Court is *free, and even obligated*, to conduct its own independent legal research, this in no way invites the litigants

other words, the U.S. differs from the other jurisdictions because it has an open position in the sense that there is no formal, universally-applicable restriction. However, in Section VI, the comparison with other jurisdictions reveals that the U.S.' open position can lead to inconsistencies in practice.

### III. ENGLAND AND WALES AND HONG KONG

These two jurisdictions are grouped together because Hong Kong adopts the same principle as England and Wales. Their legal position is the most complicated amongst the others but is also the only group with a structured legal guidance.

#### A. *The impression of no restriction*

Before going straight to the actual legal position, it is interesting to note that there are numerous precedents in Hong Kong where judges relied on their own legal research.<sup>7</sup> The English judges also occasionally cite cases not supplied by the lawyers.<sup>8</sup> They easily give rise to the impression that judges can freely do so.

Judicial assistants have played a role in judicial legal research. English courts have relied on legal research provided by judicial assistants when the parties appeared as litigants in person (i.e., with no counsels).<sup>9</sup> Even when no litigant in person is involved, the court has sought help from judicial assistants when the counsels' legal contributions are considered inadequate.<sup>10</sup>

The Hong Kong Court of Final Appeal has lauded the contribution from judicial assistants. In *Securities and Futures Commission v. Yiu Hoi Ying Charles*, the court quoted a foreign authority which reinforced their conclusion.<sup>11</sup> That case was discovered by a

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to act in dereliction of their duties to the Court.”) (emphasis added); *Davis v. State of Florida*, 309 So. 3d 318, 321 (Fla. Dist. Ct. App. 2021) (“as a part of the appellate review process, judges, staff attorneys, and law clerks engage in independent legal research—not to act as ‘stand-by counsel’ on behalf of one party or the other—but to assure that the submissions and representations of the parties’ lawyers are accurate; that relevant statutes, cases, and rules have not been overlooked; and that the resolution of legal issues and the disposition of each case is warranted”).

7. *Mohammad Amjad v. John M Pickavant & Co.* [2013] 1 H.K.C. 145, paras. 59, 78, 82; *Cheung Yin Heung v. Hang Lung Real Estate Agency Ltd.* [2010] 3 H.K.L.R.D. 67, paras. 51, 90.

8. *See, e.g., Rahmatullah v. The Ministry of Defence* [2014] EWHC 3846; *R v. MacKreth (Deceased)* [2009] EWCA (Crim) 1849.

9. *Pelling v. Families Need Fathers Ltd.* [2001] EWCA (Civ) 1280 [6].

10. *Ferguson v. British Gas Trading Ltd.* [2009] EWCA (Civ) 46 [30].

11. *Securities and Futures Comm’n v. Yiu Hoi Ying Charles* [2018] 6 H.K.C. 428, para. 52.

judicial assistant after the conclusion of the oral arguments. This kind of assistance happens once in a while.<sup>12</sup>

*B. The actual position under the Stanley Cole rule*

However, the English Court of Appeal in *Stanley Cole (Wainfleet) Ltd. v. Sheridan* has actually laid down a ground rule that relying on own legal research will amount to a ground of appeal for breaching natural justice (i.e. due process) if two requirements are satisfied, namely (1) the authorities are “central to the decision and not peripheral to it,”<sup>13</sup> and (2) substantial prejudice has arisen from not giving the counsels an opportunity to respond.<sup>14</sup>

This principle was reiterated again by the English Court of Appeal in *Clark v. Clark Construction Initiatives Ltd.*, explaining that the rationale is to uphold the “universal obligation of judicial tribunals” to ensure transparent legal dispositions.<sup>15</sup> The “right to a fair hearing requires notice of all material matters of fact and law to be given to the parties.”<sup>16</sup>

In light of this rule, a practical guide has been distilled as follows:

Best practice, or even good practice, would have been for the Judge to have made an order, drawing the parties’ attention to the authority and providing them with the opportunity to provide written submissions, if they wished, within a short period of time, on the authority. Provision could also have been made for the parties to request a hearing if either considered it necessary and the Judge agreed. Taking that step would have been unlikely to have extended the proceedings excessively or in a manner disproportionate to the issues.<sup>17</sup>

Hong Kong courts have endorsed *Stanley Cole*.<sup>18</sup> It was most recently applied by the Hong Kong Court of Appeal in a 2022

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12. HKSAR v. Nguyen Anh Nga [2017] 2 H.K.C. 454, para. 39.

13. *Stanley Cole (Wainfleet) Ltd v. Sheridan* [2003] EWCA (Civ) 1046 [31]. The *Stanley Cole* rule was partly based on the 2001 case of *Albion Hotel (Freshwater) Ltd. v. Silva* [2001] UKEAT 375\_00\_1511 [35].

14. *Stanley Cole* [2003] EWCA (Civ) at [33], [34].

15. *Clark v. Clark Constr. Initiatives Ltd.* [2008] EWCA (Civ) 1446 [5].

16. *Albion Hotel* [2001] UKEAT at [34].

17. *London Borough of Hammersmith and Fulham v. Keable (Unfair Dismissal)* [2021] UKEAT 2019-000733 [93].

18. *Kwong Ka Yin Phyllis v. The Solicitors Disciplinary Tribunal* [2006] H.K.C.F.I. 806, para. 47.

case.<sup>19</sup> But the Hong Kong court has also applied a similar rule without quoting *Stanley Cole*.<sup>20</sup>

### C. Clarifying the complex rule

The *Stanley Cole* rule functions in a rather complicated manner. The “best practice” guidance mentioned above indicates that it neither completely bans nor imposes any mandatory pre-conditions on judicial reliance of unprompted legal research.<sup>21</sup> Instead, if a judge does not follow the best practice and the two requirements of the *Stanley Cole* rule are established, it will become a ground of appeal.

However, in practice, some risk-adverse judges do not equally perceive the rule as mere “best practice,” but as a mandatory routine:

This is more than mere good practice. Failure to do so may amount to a breach of natural justice and of the right to a fair hearing. The failure of the Tribunal to invite submissions from the parties on the three authorities was doubtless inadvertent.<sup>22</sup>

The two requirements of the *Stanley Cole* rule may seem vague and uninformative. There was no elaboration or guidance on them because the English Court in *Stanley Cole* did not wish to set a “rigid rule as to where the boundaries of procedural irregularity lie.”<sup>23</sup> To better understand the rule, there are three technicalities to be clarified.

First, in the U.K., the rule was mostly applied in employment tribunal cases. However, the Court in *Stanley Cole* has emphasized that this guidance is applicable to all contexts — i.e., including both courts and tribunals.<sup>24</sup> The same holds true in Hong Kong, where the *Stanley Cole* rule has been applied on appeal against the decision of the Court of First Instance.<sup>25</sup>

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19. Trinity Concept Ltd. (in liquidation) v. Wong Kung Sang [2022] H.K.C.A. 1180, para. 8.

20. Ho Chor Ming v. Hong Kong Chiu Chow Po Hing Buddhism Ass’n Ltd. [2019] 2 H.K.L.R.D. 1181, paras. 53–55.

21. See *London Borough of Wainfleet v. Stanley Cole (Wainfleet) Ltd v. Sheridan* [2003] EWCA (Civ) 1046 [29]. In Hong Kong, the same view has been adopted. See *Kwong Ka Yin Phyllis* [2006] H.K.C.F.I. at para. 47.

22. *Albion Hotel (Freshwater) Ltd v. Silva* [2001] UKEAT 375\_00\_1511 [35].

23. *Stanley Cole* [2003] EWCA (Civ) at [33].

24. *Id.* at [29].

25. Trinity Concept Ltd. (in liquidation) v. Wong Kung Sang [2022] H.K.C.A. 1180, paras. 1, 8.

Second, evaluating existing precedents helps understand *Stanley Cole*'s first requirement on when an uncanvassed authority will be considered central to a judicial disposition. On first sight, this requirement might seem perplexing because, logically, a judge would not have cited it in the first place if it is not relevant or important. However, such exceptional situations do exist, where the case was cited for (1) mere factual comparison, (2) mere clarification, or (3) mere confirmation of the correct law. In *London Borough of Hammersmith v. Keable*, the tribunal compared but distinguished the uncanvassed authority, which means the case was *not treated as binding* and central.<sup>26</sup> In *Cadent Gas Ltd. v. Singh*, the tribunal merely cited the authority to explain why something was not in issue and was not disputed by the parties, so it was just a mere clarification of a principle.<sup>27</sup> In *Fowler v. London Borough of Waltham Forest*, the tribunal simply cited a case to confirm the law (how the statute functions), and to ensure the law was applied correctly.<sup>28</sup>

Third, just because an uncanvassed authority is cited, it does not automatically mean there is prejudice under the second requirement. There is no prejudice when the authority simply denotes a trite general rule, such as a broad legal statement which says all circumstances have to be taken into account.<sup>29</sup> Usually those rules are “well-established and incontrovertible,” and an example would be the obvious rule that a trustee has a duty to account for the trust property.<sup>30</sup>

However, adding to the complexity, the courts have applied two different thresholds for the extent of prejudice. On one hand (based on *Stanley Cole* and subsequent English and Hong Kong cases), there is no prejudice where the outcome would remain the same had the parties been given the opportunity to comment.<sup>31</sup> In

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26. *London Borough* [2021] UKEAT [94]-[95].

27. *Cadent Gas Ltd. v. Singh* (Automatically Unfair Dismissal) [2019] UKEAT 0024\_19\_0810, [63]. *See also* 2 *Travel Group Plc. (in liquidation) v. Cardiff City Transp. Servs. Ltd.* [2012] CAT 19, fn. 3. Although the Tribunal did not cite the *Stanley Cole* rule, essentially the same standard was applied. The Tribunal dismissed the need to invite further submissions upon reliance on uncanvassed authorities, because those “cases reflect points that were fully debated before the Tribunal, and do not give rise to new points or matters which, in fairness to the parties, they ought to be called upon to address.”

28. *Fowler v. London Borough of Waltham Forest* [2007] UKEAT 0116\_06\_0902, [77], [95].

29. *Clark v. Clark Constr. Initiatives Ltd.* [2008] EWCA (Civ) 1446, [10].

30. *Trinity Concept Ltd. (in liquidation) v. Wong Kung Sang* [2022] H.K.C.A. 1180, para. 8.2.

31. *Stanley Cole (Wainfleet) Ltd. v. Sheridan* [2003] EWCA (Civ) 1046 at [38] (“whether it would have made any difference to the outcome if [the Claimant] had been

this sense, the focus is on the substantive reasoning, and not the procedural flaw. If the judge's reasoning and decision is sound and impeccable, there is no appealable prejudice.<sup>32</sup>

On the other hand (based on the pre-*Stanley Cole* case of *Albion Hotel v. Silva*), the court has applied a lower threshold that focuses more on the procedural flaw than the outcome. Prejudice is found as long as the uncanvassed authority has raised a new (i.e., unaddressed by the parties) issue or argument that is material to the outcome.<sup>33</sup>

The choice of applicable threshold perhaps depends on whether the uncanvassed authority raises a question of law that can be examined by the appellate court, or a mixed question of fact and law (i.e., a question of fact with legal implications), of which the factual aspect is reserved for the fact-finding trial court to ascertain. In *Albion Hotel*, the parties were not given the opportunity to make submissions as to whether the act in concern constituted a mere request (which has no legal implication) or an assertion of right (which has legal implication).<sup>34</sup> This is a question of "fact and law."<sup>35</sup>

#### D. How to reconcile the no-restriction impression with the *Stanley Cole* rule?

Judges can rely on his/her own legal research without complying with the rule, but risking its breach.<sup>36</sup> In other words, even if a judge does not give the parties' an opportunity to respond to the

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armed with this authority. That is a question for this court to answer. It is not a matter we must refer back to the original tribunal."); *Banerjee v. Royal Bank of Canada* [2020] UKEAT 0189\_19\_3010, [47]; *London Borough of Hammersmith and Fulham v. Keable* (Unfair Dismissal) [2021] UKEAT 2019-000733 [96]; *Fowler* [2007] UKEAT at 95; *Kwong Ka Yin Phyllis v. Solicitors Disciplinary Tribunal* [2006] H.K.C. 806, paras. 57, 59.

32. *Banerjee* [2020] UKEAT at [43], [47] (On the facts, the claimant's counsel was not given the opportunity to argue against the finding of "common mistake." However, the appellate court agreed with the tribunal's finding of such, and therefore the outcome would not have changed); *London Borough* [2021] UKEAT at [94] (the uncanvassed case was not treated as binding, but for mere comparison); *Ho Chor Ming v. Hong Kong Chiu Chow Po Hing Buddhism Ass'n Ltd.* [2019] 2 H.K.L.R.D. 1181, paras. 54–55 (the appellant was given the opportunity to raise on appeal what they could not have raised in trial, but the appellate court was not persuaded, so the trial court's reliance of 16 uncanvassed authorities did not constitute a successful appeal ground).

33. *Albion Hotel (Freshwater) Ltd. v. Silva* [2001] UKEAT 375\_00\_1511 [34]. *Albion Hotel* was later discussed by the *Stanley Cole* court.

34. *Id.* at [24]–[26], [34].

35. *Id.* at [34].

36. *Stanley Cole* [2003] EWCA (Civ) at [29]. See also *Beijing Ton Ren Tang (UK) Ltd. v. Wang* [2009] EAT 0024\_09\_1410, [13] (where the tribunal diligently self-reminded the relevance of *Stanley Cole* on the need to consult counsels before citing an uncanvassed authority and decided not to consult).

uncanvassed case, it does not necessarily mean there will be a successful appeal unless the two requirements of the *Stanley Cole* rule are established.

In relation to the impression, there is no way to ascertain whether the courts have followed the best practice by inviting post-hearing submissions; or simply no appeal was petitioned.

At the same time, it is possible that some lawyers and judges may not be aware of the *Stanley Cole* rule. This is discernible from past successful appeal based on this ground.<sup>37</sup>

#### IV. AUSTRALIA AND CANADA

The positions in Australia and Canada are less complicated than the above group, because they have not imposed a structured, broad rule like *Stanley Cole*.

In Canada, the starting point is that judges can conduct legal research on their own, because it “is the duty of the court to apply the law as it exists.”<sup>38</sup> “However, when judges consider authorities not cited by the parties, the issue of whether counsel should be invited to make further submissions arises.”<sup>39</sup>

The failure to consult counsels constitutes an error if the uncanvassed case raises a “new issue” or “new argument;”<sup>40</sup> or where it introduces a new principle of law or path of legal analysis.<sup>41</sup> The ground will not be made out if the case was merely cited to support the analysis of issues that have already been thoroughly discussed by the parties.<sup>42</sup> The legal rationale for this is based on the *audi*

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37. See, e.g., *Albion Hotel* [2001] UKEAT at [34].

38. *McCunn Estate v. Canadian Imperial Bank of Com.*, [2001] O.J. No. 486, para. 43 (Can. Ont. C.A.) (Q.L.). See also *Blake v. Blake*, [2021] O.N.S.C. 7189, para. 52; *Heron Bay Invs. Ltd. v. Canada*, [2010] F.C.A. 203, para. 22; *Greater Toronto Airports Auth. v. Public Serv. All. Canada Local 004*, [2011] O.N.S.C. 487, para. 72 (“arbitrators, like judges, could research questions of law and consider cases not cited by the parties”).

39. *Blake* [2021] O.N.S.C. at para. 52. See also *Greater Toronto Airports* [2011] O.N.S.C. at para. 73 (“It might have been preferable had the arbitrator asked the parties for submissions on [the uncanvassed authority], given its importance.”).

40. *A & K Enns Trucking Ltd. v. Elkew*, [2017] F.C. 917, para. 13; *Canadian Linen and Unif. Serv. Co. v. Saskatchewan Joint Bd, Retail, Wholesale and Dep’t Store Union*, [2005] S.K.Q.B. 264, para. 21 (successful appeal as the uncanvassed case raised issues not discussed by the parties). See also *Greater Toronto Airports*, [2011] O.N.S.C. at para. 73 (holding that there was no denial of natural justice, because the [party] was reasonably informed of all the remedial issues in dispute, and its counsel could have found [the uncanvassed authority] with reasonable diligence”).

41. *Heron Bay Invs. Ltd.*, [2010] F.C.A. at para. 24.

42. *A & K Enns Trucking Ltd.*, [2017] F.C. at para. 13; *McCunn Estate*, [2001] O.J. No. 486 at para. 42; *Casavant v. British Columbia (Labour Relations Board)*, [2019] B.C.S.C. 1422, para. 83 (“I agree that it is not a breach of procedural fairness for a statutory decision maker to rely on an authority, not cited by the parties, in addressing an issue that

*alteram partem* rule (i.e. giving the parties adequate notice and the opportunity to be heard).<sup>43</sup> Notably, the legal basis for this was consistently either the legal maxim or the principle of “natural justice,” which indicates the absence of a single guiding case like the English *Stanley Cole* rule. The consistent legal basis also forms a contrast with Singapore’s piecemeal guidance with varying legal basis.

In Australia, a similar position has been adopted. The starting point is that the “court is generally under no obligation to invite further submissions or consider further submissions in relation to a case referred to in the court’s reasons for judgment and not cited by any of the parties.”<sup>44</sup>

However, a comparable exception also applies, and the guidance has been laid down as:

“[I]f a Judge or judicial officer, after reserving judgement, reaches a conclusion on the issues for . . . determination, upon entirely new points which were not the subject of argument. . . the desirable course. . . is to restore the case to the list for further argument.”<sup>45</sup>

First, the Federal Court of Australia has emphasized that the guidance only applies when a “new point” is raised.<sup>46</sup> There is no error in relying on further authorities for a point already argued.<sup>47</sup> This focus resembles the Canadian approach.

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*was raised before them.”*) (emphasis added); *MSI Methylation Scis., Inc. v. Quark Ventures Inc.*, [2019] B.C.S.C. 440, para. 52 (“it is not an error or a breach of natural justice for an arbitrator (or a judge) to rely on case authorities not cited by counsel: see, for example, *ICBC v. Patko*, 2008 B.C.C.A. 65, para. 37. Although it is improper for a judge to decide a case on issues that were not argued, a judge is entitled to seek assistance on the issues argued beyond the authorities counsel provides”). Comparable legal standard has been applied by tribunals: *See Lortie v. Mun. Prop. Assessment Corp., Region 01*, 2022 (Assessment Review Board File number: RD 19-033AA), para. 109 (“There is no suggestion that a party was unaware of the issues in dispute. It is incumbent on a party, when preparing and presenting its case, to cite the applicable law. . . Therefore, a party is given the right to be heard, notwithstanding that the Board has considered a decision that was not cited by the parties in their submissions made at the hearing.”).

43. *A & K Enns Trucking Ltd.*, 2017 F.C. at para. 12. The Canadian courts usually broadly refer to “natural justice.” *See* note 40.

44. *APN Funds Mgmt. Ltd. v. Australian Prop. Inv. Strategic Pty Ltd (No 2)* [2012] VSC 365, para. 4.

45. *Lydia Stephenson v. Human Rights and Equal Opportunity Comm’n* [1995] FCA 1757, para. 77. It can be observed that judges in practice adhere to this. *See Jones v. Penuto* [2020] WASC 416, para. 36 (“[A case] was not cited by either party and I invited the parties to make submissions on the relevance of the decision to the disposition of these applications”).

46. *Lydia Stephenson* [1995] FCA at para. 77.

47. *Id.* at para. 77.

Second, the Supreme Court of Victoria has made observations very similar to the English case of *London Borough of Hammersmith and Fulham v. Keable* mentioned above.<sup>48</sup> The Supreme Court held that where the facts of the uncanvassed authority have been distinguished and are therefore not treated as binding, the guidance does not apply.<sup>49</sup>

The Federal Court justified the narrow ground of appeal from the perspective of practicality:

“Systems would become unworkable if a matter had to be referred back to parties for further submission if, on each occasion that a court, or other body applying legal principles, considered that an authority, not cited by the parties, was relevant to the issues argued before it.”<sup>50</sup>

## V. SINGAPORE

Singapore is grouped on its own because its legal position is comparable to Australia and Canada in the sense that it has not laid down a broad, uniform rule like the *Stanley Cole* one. At the same time, it differs from the U.S. because Singapore has provided some piecemeal guidance. However, that makes the Singaporean position more confusing than Australia and Canada.

In Singapore, the courts frequently refer to their own research for additional legal insights.<sup>51</sup> In particular, Singaporean judges often refer to uncanvassed authorities and then dismiss them—apparently as a way to show that their reasoning is comprehensive

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48. See *London Borough of Hammersmith and Fulham v. Keable (Unfair Dismissal)* [2021] UKEAT 2019-000733.

49. *APN Funds Management* [2012] VSC at [4]–[5]. As a side note, New Zealand has also adopted an analogous approach. See *Black v Lagoon Lodges Props Ltd* [2014] NZHC 3336, fn. 23 (“Unfortunately this authority was not cited by the parties. I did not however consider it was necessary to invite further submission as the authority is noted in the leading text, Burrows, Finn and Todd, above n 22, at 572. Moreover, it simply provides an analogy and is not cited on the basis that it is authoritatively on point.”).

50. *Lydia Stephenson* [1995] FCA at para. 75.

51. See, e.g., *PT Sandipala Arthaputra v. STMicrollectronics Asia Pacific Pte Ltd.* [2015] SGHC 245 [95]; *Tan Chor Chuan v. Tan Yeow Hiang Kenneth* [2005] SGHC 177 [91]; *CBB v. Law Society of Singapore* [2019] SGHC 293 [61] (“I am fortified in my conclusion by a case not cited by the parties”); *Dong Wei v. Shell Eastern Trading Pte Ltd.* [2021] SGHC 123 [50] (“Two contrasting British cases, not cited by the parties, help illustrate the issue.”); *Neo Hui Ling v. Ang Ah Sew* [2012] SGHC 65 [14], [49], [50]; *TDA v. TCZ* [2016] SGHC 63 [19] (“Although not cited by the parties, r 590 of the FJR is also pertinent.”); *Golden Hill Capital Pte Ltd. v. Yihua Lifestyle Technology Co., Ltd.* [2021] SGCA 85 [33] (“The UK authorities, though not cited by either party, offer valuable guidance on the proper interpretation.”).

and has considered other potential arguments.<sup>52</sup> Some Singaporean judges apparently find it necessary to refer the independently-researched authorities to counsels. This can be observed in a number of cases, such as *Kong Swee Eng v. Rolles Rudolf Jurgen August*, where the judge said:

“The recent decision in *St George Bank* was derived from my own research. As it appeared to me to be a case on point, I invited written submissions from both parties, after the close of submissions, to address me on its relevance to the dispute before me.”<sup>53</sup>

In the absence of a guiding rule like *Stanley Cole*, the applicable principle in Singapore is based on the natural justice maxim *audi alteram partem*, just like Canada. The starting point is that the Singaporean courts enjoy a certain degree of freedom of independent legal inquiry, as stated by the Court of Appeal (the highest court in Singapore) in *Pacific Recreation Pte Ltd. v. S Y Technology Inc.*:

“The natural justice principle of *audi alteram partem*...appl[ies] to any court or tribunal. The important point to note is that *we are not suggesting that a court is hogtied by the issues canvassed before it*...The emphasis of this aspect of natural justice is on the opportunities given to parties to address the *determinative* issue(s) in a matter. Reasonable inferences, findings of fact or *lines of argument* adopted by the court, even though not specifically addressed by the parties, are entirely acceptable.” (emphasis added)<sup>54</sup>

The High Court case of *Hon Industries Pte Ltd. v. Wan Sheng Hao Construction Pte Ltd.* addressed exactly the issue of whether there is a need to give counsel an opportunity to respond to uncanvassed authorities.<sup>55</sup> The plaintiff argued that there was a breach of natural justice. The appellate court conceded that the reliance on uncanvassed authorities “caused surprise” to the parties.<sup>56</sup>

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52. Public Prosecutor v. BPK [2018] SGHC 34 [101], [287]; Cheung Teck Cheong Richard v. LVND Investments Pte Ltd. [2021] SGCA 77 [122], [129]; Singsung Pte Ltd. v. LG 26 Electronics Pte Ltd. [2016] SGCA 33 [141], [144]; Asia Development Pte Ltd. v. The Attorney-General [2020] SGCA 22 [11]–[12]; Dynasty Line Ltd. (in liquidation) v. Sukanto Sia [2014] SGCA 21 [51].

53. Kong Swee Eng v. Rolles Rudolf Jurgen August [2010] SGHC 300 [70]. See also Aldabe Fermin v. Standard Chartered Bank [2010] SGHC 119 [102]–[103] (“Both parties did not adequately address this issue during oral closing submissions. My own research led me to the decision in *Marley v Forward Trust Group* (1986) I.C.R.891...I then invited the parties to address me on the relevance of the decision in *Marley*.”).

54. Pacific Recreation Pte Ltd. v. S Y Technology Inc. [2008] SGCA 1 [32].

55. Hon Industries Pte Ltd. v. Wan Sheng Hao Construction Pte Ltd. [2011] SGHC 247 [42].

56. *Id.* at [46].

However, that was not enough to set aside the decision, because those authorities “served merely as examples and illustrations and could not have affected the outcome of the case.”<sup>57</sup>

At this point, the application of *audi alteram partem* is understandable, and there are similarities with the English *Stanley Cole* rule in terms of focusing on whether the outcome will be affected. Nevertheless, it does not mean the test can be distilled as whether there will be a change of outcome. The Singaporean High Court in *Hon Industries Pte Ltd. v. Wan Sheng Hao Construction Pte Ltd.* went further and made the actual test quite confusing:

It was true that the parties were not invited to address the specific adjudication determinations cited by the Adjudicator, but it could not be denied that they had ample opportunity to address the *issues* in question...It cannot be said that a reasonable litigant in the shoes of the plaintiff could not have foreseen the possibility of *reasoning of the type revealed in the award* merely because the particular examples and references provided by the Adjudicator were not previously known to it.<sup>58</sup> (original emphasis)

The above quoted passage generates two additional factors, namely (1) whether the parties had ample opportunity to address the issues overall, and (2) whether a reasonable litigant could have foreseen the line of reasoning. These two unhelpful factors create confusion. The first factor focuses on the *procedural* aspect. By contrast, the “change of outcome” test focuses on the *substantive* aspect. The confusion is that it is uncertain which one of them prevails. What if the *substantive* outcome could not have been changed, but there is a serious *procedural* flaw? By comparison, the English *Stanley Cole* rule is much clearer as its prejudice requirement clearly weighs the *substance* over procedure.

In relation to the second factor, it is awkward and circular to draw reference to a reasonable person. Legally, there is the widely-endorsed principle that everyone is presumed to know the law.<sup>59</sup>

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57. *Id.* at [46].

58. *Id.* at [47].

59. *Chee Soon Juan v. Public Prosecutor* [2012] SGHC 109 [53] (“everyone is presumed to know the law.”); *UAM v. UAN* [2017] SGHCF 10 [53] (“When a party has legal advice, he will be more easily presumed to know the law”). *See also* similar trite legal maxims like *ignorantia juris non excusat* and *nemo censetur ignorare legem*. For other jurisdictions, *see Pankhania v. Hackney* [2002] EWHC 2441 (Ch) [50] (English High Court); *R. v. Matt* [1968] 1 CCC 258 (Alberta Supreme Court) (“After all, our law is based on the proposition that—‘Everyone is presumed to know the law’”); *Power v. Power*, (1975) 5 OR (2d) 537 (Ontario High Court of Justice) (“it is necessary to state that everyone is presumed to know the law”); *Canada Trust Company (McDiarmid Estate) v. Alberta (Infrastructure)*,

In that sense, the uncanvassed authority—as part of the applicable law—must always be within the knowledge of a reasonable person, so he/she must have always foreseen its potential relevance. This factor is therefore not very helpful.

To further complicate the issue, the courts have not adopted a consistent test, sometimes using the change-of-outcome test, sometimes using others. This is apparently because there is not a single, uniform rule like the English *Stanley Cole* one. For example, it was held that there is no need to refer to the parties when (1) the cases from independent research “stand for uncontroversial propositions” and (2) “they have not had a decisive impact on the outcome of this appeal.”<sup>60</sup> In other words, the test is whether the outcome will be changed, rather than the procedural test in *Hon Industries Pte Ltd.* or the broad principle of *audi alteram partem*.

In one more case, the court approached the same issue from yet another perspective, which focuses on whether the reliance on uncanvassed authorities has revealed bias towards one of the parties.<sup>61</sup> This kind of controversy could have been avoided had there been a procedural guideline or a best practice for judges.<sup>62</sup>

In sum, a structured rule like the English *Stanley Cole* is important and helpful. As Australia and Canada also do not have a broad, uniform rule, it is foreseeable that their laws can easily develop into piecemeal guidance that is confusing and potentially inconsistent. How about the U.S., which has an open position?

## VI. INSIGHTS FOR THE U.S.?

Drawing from the foreign experience, the question for the U.S. is whether there should be a clear, authoritative guidance like the English *Stanley Cole* rule. A clear guidance in this regard has two

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2020 ABQB 580, para. 100 (Court of Queen’s Bench of Alberta) (“There is a long-standing legal presumption that everyone is presumed to know the law, including the common law”); *Potestio v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1648, para. 22 (Supreme Court of British Columbia) (“Everyone is presumed to know the law.”); *McMaster v Qube Ports Pty Ltd* [2015] FCA 1385, para. 238 (Federal Court of Australia) (“People are presumed to know the law. That is a requirement for an ordered society.”); *Coleman v Power* [2004] HCA 39, para. 140 (High Court of Australia) (“Fictional though it may be, everyone is presumed to know the law.”). Once in a while, however, there is debate over this fictional presumption, though it would be difficult to deny its prevalence. *See, e.g.*, *Ostrowski v Palmer* [2004] HCA 30, para. 1 (“This does not mean that people are presumed to know the law. Such a presumption would be absurd.”).

60. *URU v. URV* [2018] SGHCF 22 [21].

61. *The Law Society of Singapore v. Manjit Singh s/o Kirpal Singh* [2015] SGHC 95 [36].

62. *Id.* (the appellate court recognized that the tribunal “could have formally addressed a note to both parties referring to the two authorities and asking them to make submissions thereon”).

limbs, namely (1) whether judges can do their own research, and (2) whether judges are obliged to give counsels an opportunity to respond upon reliance of uncanvassed authorities.

The first limb is crystal clear (see section II for the settled U.S. position), and therefore is not an issue. Judge Easterbrook has authoritatively stated that there is “*no federal entitlement* to have a case decided strictly on the basis of precedent cited to the tribunal.”<sup>63</sup>

The second limb is the most controversial. Whilst the U.S. position is the simplest in the sense that it does not have any formal requirement to give counsels a chance to respond, the flipside is that the situation becomes unregulated, and the excessive flexibility accorded to individual judges can lead to inconsistent outcomes.<sup>64</sup>

It is important to understand why there is no formal requirement—especially when other common law jurisdictions have raised important considerations like fair hearing and trite maxims like *audi alteram partem*. Whilst there is always the argument that relying on uncanvassed authorities goes against due process, this view has not received much support in the U.S.<sup>65</sup> Rather, the more prevalent view in favor of applying uncanvassed authorities is that, the parties are considered to have *waived* their right to respond in relation to arguments that have not been raised in their briefs.<sup>66</sup> According to Miller, the scope of waiver is very wide, and the U.S. courts will find waivers from briefs without “sufficient de-

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63. Hampton v. Wyant, 296 F.3d 560, 565 (2002). See also Alvary v. United States, 302 F.2d 790, 794 (1962) (“it is proper, and *all too frequently necessary*, for a judge to do independent research on questions of law”) (emphasis added).

64. Miller, *supra* note 6, at 1256 (noting that the U.S. courts “make one of these six choices every day,” namely “(1) they can ignore the issue; (2) they can spot the issue in their opinion, but treat it as not properly raised or waived; (3) they can spot the issue and remand it for resolution in the first instance in the trial court; (4) they can ask the parties for supplemental briefs before deciding the issue; (5) they can decide the issue without briefs; (6) they can spot the issue in the opinion, and write dicta.” The problem is, in Miller’s view, “the Supreme Court and other appellate courts have failed to follow any consistent practice about *sua sponte* holdings.”).

65. Miller, *supra* note 6, at 1291, 1260. The doctrine of waiver cannot be readily seen in other jurisdictions mentioned. Rather, in the Singaporean case of Culindo Livestock (1994) Pte Ltd. v. Ananda UK (China) Ltd. [2014] SGHC 178 [48], the court chose to adhere to the briefs despite the court has discovered a potentially relevant legal provision. (“In this respect, s 14(3) of the SGA was not cited by either party. I will, therefore, proceed on the basis that Culindo was merely referring to the *general* purpose of the goods under s 14(2B)(a) as one factor to be taken into account for the purpose of determining whether the goods were of satisfactory quality, as opposed to a *particular* purpose under s 14(3) of the SGA.”).

66. Miller, *supra* note 6, at 1266.

tail,” arguments “in footnotes, of just one page or less, without citation of authority,” etc.<sup>67</sup> Nevertheless, the judicial reliance of waiver is arguably justifiable, because, bearing in mind the practical restraints in time and resources and the civil/criminal justice need to ensure swift resolution, litigation lawyers must have already chosen their best line of arguments or case theory. Issues and precedents omitted are therefore rightly treated as impliedly waived.

Besides, there are alternative ways to uphold due process, even though the parties are not given the opportunity to respond. The U.S. courts have held that “the law provides many ways to challenge a court’s reliance on cases discovered during research. For example, a party can file a motion for reconsideration or initiate an appeal.”<sup>68</sup>

In other words, some U.S. courts have already taken the normative stance that there are no overriding due process issues and expectations. However, the problem is, some courts think the otherwise and choose to side with due process considerations. For instance, it was noted that some courts have, in practice, adopted procedural routine comparable to the English *Stanley Cole* rule:

“[A]ppellate courts on a regular basis ask for supplemental briefing on matters beyond what has been presented in the parties’ briefs...sometimes on matters the defense may have overlooked. *See State v. Causey*, 503 So. 2d 321, 323 (Fla. 1987) (applying *Anders* to “allow both the appellant and the state to submit briefs on issues that the court has found in its independent review to be arguable on the merits”). These supplemental briefs are an accepted and useful part of a judicial process whose purpose is to produce thorough review and just results.”<sup>69</sup>

The adherence to this routine must have been a *merely voluntary* preference, because other courts could have easily relied on the doctrine of waiver (or require the parties to pursue alternative

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67. Miller, *supra* note 6, at 1268.

68. *Camacho v. Trimble Irrevocable Trust*, 756 N.W.2d 596, 599–600 (Wis. App. 2008) (citations omitted). For the context of Wisconsin, *see* Wis. Stat. § 805.17(3) (“Upon its own motion or the motion of a party made not later than 20 days after entry of judgment, the court may amend its findings or conclusions or make additional findings or conclusions and may amend the judgment accordingly.”). *See also* *Hampton v. Wyant*, 296 F.3d 560, 565 (2002) (commenting that mechanism for rehearing and appeal “afforded ample opportunities to point out any errors in the appellate court’s independent research.”); Miller, *supra* note 6, at 1296 (noting that some “courts believe there is no due process violation as long as there has been an opportunity for reconsideration”).

69. *Davis v. State of Florida*, 309 So. 3d 318, 321 (Fla. Dist. Ct. App. 2021).

due process route like appeal) to avoid this routine whenever cases or issues have been omitted.

The above shows already two camps of judicial thoughts: one which prefer waivers; another which sides with due process. However, there is a further middle camp which will pick the latter depending on the circumstances. In particular, some U.S. judges agree that when a “new issue” is raised, parties have to be given an opportunity to respond—a criterion that all of the other common law jurisdictions discussed above have adopted. For example, in *Miwel, Inc. v. Kanzler*, the trial court relied on a legal ground not raised by the parties (meaning they had no opportunity to respond). The appellate court reversed the trial court’s decision and remarked that “[t]here is a difference, however, between conducting independent research and injecting new issues into the proceedings.”<sup>70</sup>

The 2019 *Miwel* case actually marks out another shortcoming of the U.S.’ absence of guidance. Under the English *Stanley Cole* rule (see section III(C)), not giving an opportunity to respond is not immediately a ground for appeal, because there must still be prejudice in the sense that the *substantive* outcome would have been changed. The mere existence of a *procedural* omission itself is not enough. By contrast, in *Miwel*, the U.S. court reversed the decision upon the mere *procedural* omission without paying any attention to whether there will be *substantive* change. Has the U.S. court adopted a purely *procedural* test, or simply failed to take into account the *substantive* aspect? Without a clear test like the *Stanley Cole* rule, there is no certainty and leaves room for inconsistent judicial approaches.

Given the complicatedness of this section, it is helpful to summarize the two shortcomings in terms of uncertainty caused by the absence of a uniform guidance, namely (1) the courts themselves are split into different schools of thoughts: some prefer waivers and alternative routes to due process like appeal; whilst others support giving counsels an opportunity to respond. Also, (2) in relation to the latter, the *Miwel* case illustrates that there is no clear guidance on the specifics—which only the English *Stanley Cole* rule has such—on when counsel will be given an opportunity, thereby giving rise to further inconsistency and uncertainty.

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70. *Miwel, Inc. v. Kanzler*, 141 N.E.3d 1181, 1185 (Ill. App. 2d Dist. 2019).

## VII. CONCLUSION

This Article has clarified the positions (which are especially complicated under English and Hong Kong laws) with the intention to help court officers avoid procedural flaws. All of the jurisdictions above do not prohibit unbidden legal research done by judges and judicial assistants. This judicial practice has many undeniable benefits, such as preventing the oversight of relevant cases.

The comparison between the U.S. and the other approaches reveals that they put different emphasis on due process in terms of giving counsels an opportunity to respond to the uncanvassed authorities. On the one hand, non-U.S. jurisdictions take the stance that there are mandatory circumstances that warrant the seeking of lawyers' response. This is necessary to ensure fair procedure and there is plenty of legal support for this rule such as the *audi alteram partem* principle. But at the same time, it means that diligent, self-initiated legal research conducted by judges and judicial clerks can unfortunately become a ground of appeal simply because the proper procedure has not been followed.

On the other hand, the U.S. maintains an open position, making the legal situation much simpler upon comparison. Notably, the U.S. has their own unique considerations such as the relevance of implied waiver of the opportunity to respond and the alternative ways to uphold due process other than seeking a response. At the same time, however, some U.S. courts hold a similar view towards due process like the other jurisdictions, indicating that there is not a uniform view and guidance. This could lead to inconsistency as a result. Whilst the English *Stanley Cole* rule can seem convoluted and requires analytical examination, it is broad enough to capture varying circumstances. Having a single rule better ensures consistency on when it is problematic not to give counsels' an opportunity to respond.