CONVICTION APPEALS TO THE COURT OF APPEAL OF ALBERTA: A STATISTICAL ANALYSIS, 1985 - 1992

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Although the Provincial Courts of Appeal perform the same role within the Canadian judicial system, they do not share a similarity in caseload. Alberta's Court of Appeal is unique in the sense that although Alberta is the fourth largest province, it handles more conviction appeals as an absolute number than any other province. Through an analysis of various statistical surveys, McCormick explores this phenomenon. His work centres around conviction from 1985 to 1992 and it reveals trends that have developed during that time.

Bien que les Cours d'appel provinciales aient le même rôle au sein de l'appareil judiciaire canadien, leur volume de travail n'est cependant pas semblable. Le cas de l'Alberta est unique à cet égard. Bien qu'il s'agisse de la quatrième province canadienne en importance, on y trouve un plus grand nombre de condamnations portées en appel que partout ailleurs au pays. McCormick a procédé à l'analyse de ce phénomène en s'appuyant sur l'analyse de plusieurs enquêtes statistiques. Ses travaux reposent sur les années 1985-1992 et révèlent les tendances à l'oeuvre durant cette époque.

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I. INTRODUCTION

The Alberta Court of Appeal occupies the same important but somewhat anomalous position as the other provincial courts of appeal it sits at the apex of the provincial court system, but is itself subject to the supervisory appellate overview of the Supreme Court of Canada.[1] However, with the restricted caseload of the Supreme Court of Canada

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1. Not surprisingly, the review of prior decisions of the provincial courts of appeal continues to provide the bulk of the Supreme Court caseload in recent years, some 85% of the total, with the bulk being made up of appeals from the Federal Court, rehearings of various sorts, and *per saltum* appeals from provincial superior trial courts. See McCormick, "The Supervisory Role of the Supreme Court of Canada"; *Supreme Court Law Review*, forthcoming.

and its increasing focus in recent years on public law cases,[2] the provincial appeal courts are playing an increasingly pivotal role, and their behaviour and performance merits closer attention.

The purpose of this paper is to provide a statistical analysis of conviction appeals to the Alberta Court of Appeal from January 1, 1985 to June 30, 1992. These dates are more opportunistic than logical quite simply, the Registrar's Office in Edmonton does not retain as archival material the summary lists on which this study is based. However, they coincide very closely with the Chief Justiceship of Mr. Justice J.H. Laycraft; Justice Laycraft was appointed Chief Justice of the province on February 20, 1985 and Justice Fraser was appointed to succeed him on March 12, 1992. This conveniently sets the tone for the examination to follow: neither critical nor rigorously comparative, but simply a close statistical snapshot of the recent performance of one of the more active[3] and respected[4] of the provincial courts of appeal.

The analysis of appeal court decisions is more often carried out in terms of the discursive[5] analysis of legal doctrine as it emerges and is elaborated in specific decisions; decisions consist of words and ideas, which at one and the same time determine the "winner" of the specific case and contribute to a body of law that will guide the process of determining "winners" in future cases. There is an unavoidable degree of simplification in reducing this to flat statistical categories both the one-paragraph dismissal of a defendant's wishful thinking and a careful and reasoned rejection of a Crown argument on the *Charter* implications for breathalyser cases, are coded as "appeal dismissed." This abstraction (even trivialization) of intellectual content means that findings based on general statistical patterns must be treated with some caution. To defend the statistical approach, the suggestion is not that the reduction should or could replace discursive analysis, but simply that it provides information about the context of specific decisions in the form of long-term patterns. By the very nature of things, some cases must be more unusual than others, some outcomes more predictable and ordinary. The purpose of this study is to provide some of the background against which these assessments can be made; to describe the forest as a means of better understanding the provenance of a specific tree.

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2 See, for example, P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto and New York: Carswell/Methuen, 1987), c. 2 "Changing the Court's Business: The Evolution of the Court's Docket, 1960-85".

3 The Alberta Court of Appeal has the third, and in recent years possibly the second, highest caseload of all the Canadian courts of appeal. See P. McCormick "Canadian Provincial Courts of Appeal: A Comparison of Procedures" (Paper presented at 1992 Canadian Appellate Court Seminar, May 1992) [unpublished].

4 On subsequent appeal to the Supreme Court of Canada, the Alberta Court of Appeal is reversed less often than most other provincial appeal courts. See P. McCormick, "Alberta's Court of Next to Last Resort: Appeals from the Alberta Court of Appeal to the Supreme Court of Canada, 1970-1990" (1991) 29 Alta L. Rev. 861.

5 In the sense of its core meaning: "passing from premises to conclusions; ratiocinative [as opposed to intuitive]" rather than its more figurative meaning of "rambling, digressive." *Shorter Oxford English Dictionary*.

The data on which the analysis is based were generated from the monthly case-lists maintained by the Office of the Registrar of the Court of Appeal in Edmonton and Calgary;[6] focusing on three or five-judge panel decisions and, therefore, excluding chambers proceedings. These records are not maintained in identical format in both centres even today, and there have been changes to both the format and the completeness of the records over time. The data base is, therefore, less than perfect, and the total number of cases from which statistics have been generated may differ slightly from one part of the paper to another.

II. THE ALBERTA COURT OF APPEAL IN A COMPARATIVE CONTEXT

The Alberta Court of Appeal is one of ten provincial superior appeal courts,[7] nine of which operate within the British common law tradition and all of which oversee the application of a uniform national criminal code. One would expect from this a certain similarity in the caseload of the various appeal courts, modified perhaps to accommodate differing provincial population size and possibly different sizes of the provincial courts of appeal. This expectation is in fact far wide of the mark, as indicated by *Table 1*.

The comparative numbers in *Table 1* lack any clear pattern neither regional nor population considerations seem consistently to explain the variations. There is some logic to the numbers for civil appeals: if we set aside Quebec as a special case because of its civil code system, then a province always has more civil appeals than any smaller province. However, the attempt to translate this into a consistent ratio (civil appeals per hundred thousand of population) fails. The numbers for criminal appeals lack even this initial logic; there is no clear pattern for the number of criminal appeals, the ratio of criminal to civil appeals, and the ratio of criminal appeals to population. For example, Alberta has significantly fewer civil appeals than B.C., but three times as many criminal appeals.[8] Among the provincial courts of appeal, Alberta has the highest ratio of criminal to civil appeals, followed by Newfoundland and Ontario. Quebec has the lowest, a practical face to the formal difference implied by that province's civil code regime.

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6. I wish to indicate my appreciation for the friendly cooperation of the Office of the Registrar of the Court of Appeal in both Edmonton and Calgary who gave me access to the records and facilities to record the results and to Chief Justice Laycraft and Chief Justice Fraser, whose permission and approval made the access possible.

7. However, it is only in recent decades that this has been the case. Newfoundland only acquired its separate appellate court in 1974 and Prince Edward Island in 1987. See P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill/Ryerson, 1987) c. 12.

8. To some extent, this is a difference in procedure and in the way that cases are counted: for example, the B.C.C.A. does, and the Alberta C.A. does not, use "leave to appeal" as a screening mechanism, a formal separate stage that keeps some matter from full panel consideration. The point is not that the Alberta Court of Appeal is padding its numbers; rather, it has chosen as a matter of policy to leave the door open to a larger number of appeals and to accommodate the greater caseload this creates.

Table 1: Criminal and Civil Annual Appellate Caseload
Canadian Provincial Courts of Appeal[9]

Province	Civil Appeals	Criminal Appeals	Percentage Criminal
Alberta	275	746	73.1%
Newfoundland	35	65	65.0%
Ontario[10]	492	837	63.0%
Saskatchewan	194	304	61.0%
Manitoba	184	243	56.9%
Nova Scotia	165	195	54.2%
P.E.I.	34	31	47.7%
British Columbia	405	286	41.3%
New Brunswick	106	58	35.4%
Quebec	830	321	27.9%
TOTAL:	2720	3086	53.2%

It is of course important to distinguish between conviction appeals and sentence appeals; the latter, usually less complex and demanding, can make up a significant proportion of the criminal caseload and misleadingly swell their numbers relative to civil caseload. It is a mistake to assume that the conviction/sentence/civil ratio in caseload in any sense parallels the normal weekly judicial workload. Sentence appeals are typically so straightforward that they can be "batch-processed" in large numbers; conviction appeals vary but are generally more routine and repetitive than civil appeals;[11] while the "civil" rubric is itself a residual category including an enormous diversity of cases, many of which call for significantly more reading and preparation. Moreover, the ratio of sentence appeals to conviction appeals within the criminal appeal category is itself far from

9. All data for calendar 1989; from McCormick "Provincial Appeal Procedures" op.cit., revised to include figures from *British Columbia Court of Appeal Annual Report 1990.*

10. Omits inmate appeals, a category which in practice includes a considerable overlap with the criminal appeals category.

11. See J.T. Wold, "Going Through the Motions: Monotony of Appellate Court Decisionmaking" (1978-79) 62 *Judicature* 58; and J.T. Wold & G.A. Caldeira, "Perceptions of 'Routine' Decisionmaking in Five California Courts of Appeal" (1980) 13 *Polity* 334.

constant. For example, in Ontario the ratio is almost five to one[12] while in Manitoba, in recent years, the numbers have been almost even.[13]

Alberta falls between these two extremes. Over the seven year period, conviction appeals have been almost exactly half as frequent as sentence appeals, and criminal conviction appeals make up almost one-quarter of the Alberta appellate caseload. This suggests rather a surprising conclusion: although Alberta is the fourth largest province, its court of appeal may well handle more conviction appeals as an *absolute* number, let alone as a percentage of total caseload than any other province, and this "fourth to first" jump suggests the dangers of generalizing findings about appeal court procedures.

Hard numbers of this sort are not available for a series of years for all the provincial courts of appeal. The Alberta figures suggest a gradual decline from a high just over 1350 cases in 1985-86 to stabilize around 1000 cases per year over the last three years. Fragmentary and anecdotal information from the other courts of appeal suggest that some (but not all) have experienced similar or greater declines in recent years, implying that the "remarkable growth in the volume of appeals" described by P.H. Russell in 1987 as "a general North American phenomenon over the last twenty-five years"[14] has come to an end.

III. SOURCES OF APPELLATE CASELOAD

By definition, the caseload of the Alberta Court of Appeal consists of appeals reviews of judicial decisions arising from trials in the lower courts, primarily the Court of Queen's Bench (since 1979 the only provincial superior trial court in the province) but also from the Provincial Court where an indictable offence has been tried there upon election by the defendant.[15] As well, some of the cases appealed from the Court of Queen's Bench are themselves summary conviction appeals from the Provincial Court.[16] *Table 2* provides the seven-year breakdown of the appellate caseload in these terms, with the success rate of appeals from each.

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12. Based on figures and comments in C. Baar, I. Greene, M. Thomas and P. McCormick, "The Ontario Court of Appeal and Expeditious Justice" (1992) 30 *Osgoode Hall Law Journal* 261.
13. "Caseload and Output of the Manitoba Court of Appeal 1991" *Manitoba Law Journal* (forthcoming)
14. P.H. Russell, *The Judiciary in Canada: the Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 294.
15. *Criminal Code*, R.S.C., c. C-46, ss. 601-695 [hereinafter *Criminal Code*].
16. *Criminal Code*, s.771

Table 2: Sources and Success Rates of Appeals to the Alberta Court of Appeal, 1985-1992

Source of Appeal	Number	Percentage of Total	Success Rate
Provincial Court	577	28.9%	41.4%
Queen's Bench			
second appeal[17]	285	14.3%	31.2%
judge & jury	8	8.4%	37.5%
judge alone	1128	56.5%	32.8%
Total Queen's Bench	1421	71.3%	32.5%
TOTAL:	1998		35.2%

The figures in *Table 2* suggest several general observations: The *first* is that the number of appeals is small relative to the total criminal caseload of trial courts. Although the news reports from any particularly high profile trial seem to suggest that appeal is almost automatic, so much so that the failure to appeal seems tantamount to an admission of guilt, this is in fact completely misleading. Appeals are statistically extremely rare and the appellate caseload is a small fraction of the trial caseload. This simply underlines the fact that appeal is an exceptional, not a routine, dimension of the court system. As Justice Kerans has written, "it is no part of our tradition that the just resolution of a dispute necessarily includes a review of the trial decision."[18] This being so, appeal is not automatic, not simply a second chance for the losers at trial but, rather, a recourse to be available only when there is some real apprehension that the outcome may not have been appropriate (which is not necessarily the same as suggesting that the judge may have made a mistake).[19] Most trial decisions are not subjected to appellate review.

The *second* observation is the fact that most appeals do not succeed: the "normal" outcome of an appeal is the upholding of the trial judge's decision, and this is twice as likely as a successful appeal. At a personal interview several years ago, an appeal judge suggested a "rule of three" governing the appellate caseload: one third of all cases should never have been appealed and were a waste of time; one third were dismissed; and one third were allowed. This rule of thumb is consistent with the reversal rate of conviction

17. That is: second appeal of summary conviction case from Provincial Court already appealed to Queen's Bench.

18. Justice Kerans, "A Review of Standards of Review" (Paper presented at 1992 Canadian Appellate Court Seminar, May 1992) [unpublished].

19. By way of contrast, in the continental judicial tradition, review is much more automatic and routine; see M.R. Damaska, *The Faces of Justice and State Authority* (New Haven and London: Yale University Press, 1986) at 47-56, who comments on the "relatively weak character of judicial review" in the Anglo-American systems.

appeals in Alberta, and indeed with the behaviour of appeal courts more generally.[20] Over the seven and a half years, reversal rates have been declining slowly but steadily from just over 35% in the 1980s to just under 35% in the 1990s.

These comments can be made even more strongly by including those appeals that were started but not pursued to a final judicial determination on the merits. Over the seven and a half years, the Edmonton Registrar's Office recorded a total of 1165 appeals that were either allowed or dismissed by a panel decision. Over the same period, 146 appeals were "abandoned," 21 were "abandoned in court," 37 were "deemed abandoned" and 43 were "dismissed for want of prosecution."[21] Of the 1412 conviction appeals that were initiated in Edmonton, 17.5% (or just over one in six) were not pursued to completion. It seems reasonable to assume that these are comprised disproportionately of cases whose chances of success were small, and had they been pursued to conclusion, the reversal rate might well be even lower than the 35.1% indicated above. Less than 30% of all initiated conviction appeals are pursued to a successful conclusion.

The *third* observation is that there is a relatively high proportion of appeals direct from the Provincial Court, amounting to almost three-tenths of the total caseload. To the layperson, this at first glance is surprising; in a strict and formal hierarchy, one cannot by definition move from the "low" court to the "high" court without going through the "middle" court. This just demonstrates, however, that the Canadian court system is something less than a strict and formal hierarchy,[22] and highlights both the importance and the frequency of the defendant's right to elect the mode and forum for trial for many indictable offenses.[23] It also underlines Peter Russell's comments that Canadian provincial court judges "exercise a vast criminal jurisdiction which appears to be unmatched by the lower criminal courts of any other liberal democracy."[24] From a slightly different angle, more than two fifths of the caseload of the Court of Appeal consists of cases that originated in Provincial Court, arising either in the form of a direct appeal from that Court, or as a second appeal on summary conviction from the Court of Queen's Bench. The normal expectation of major cases in provincial superior court, minor cases in provincial court, is clearly too simple to catch the reality. At the same time, it should be noted that there has been a modest but persisting decline in the proportion of

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20 "Research shows that state supreme courts affirm more than 60% of the lower court decisions that they review." C. Emmert, "An Integrated Case-Related Model of Judicial Decision-making" (1992) 54 *Journal of Politics* 548; see also B. Cartwright et al., "Courting Reversal: The Supervisory Role of State Supreme Courts" (1978) 87 *Yale Law Journal* 1191.

21 Although the consequences are much the same, I take it that the designations "abandoned" or "abandoned in court" indicate explicit decisions by the appellant, "dismissed for want of prosecution" is clearly a judicial decision (albeit a *pro forma* one) made by a panel of judges, and "deemed abandoned" appears to be an administrative determination.

22 To make the point explicitly: on indictable offenses, the Provincial Court and the provincial superior trial court do not comprise a judiciary hierarchy but are courts of coordinate and partially overlapping jurisdiction, both subject to review by the Court of Appeal.

23 Not, of course, murder trials, which (along with piracy and inciting to mutiny) are expressly reserved to the provincial superior courts by s. 427 of the *Criminal Code*. However, appeals involving, for example, assault are from provincial court as often as from Queen's Bench.

24 *Supra* note 14 at 205.

provincial court appeals (from 32% in 1985 to 27% in 1990 and 1991) in the appellate caseload. I do not wish to make too much of this point: the Court of Appeal spends more time reviewing the decisions of Queen's Bench justices than it does looking at Provincial Court decisions, and given the caseload volumes of the two trial benches, it is unquestionably true that there are proportionately more appeals from Queen's Bench than from Provincial Court.

The *fourth* observation is the striking rarity of appeals from jury trials. The Alberta Court of Appeal is often called upon to second-guess or over-rule judges, but rarely to second-guess a jury's decision.[25] Jury trials are not a major component of the Canadian judicial process (although they are more frequent than they were twenty years ago), so it is possible that the 140:1 ratio of judge alone to jury trials among the Queen's Bench appeals simply replicates the relative rarity of this phenomenon. Also, it is possible that there is less leverage for an appeal because of the fact that juries (unlike judges) do not have to give formal reasons for their decisions. It does not appear that appeals from jury trials are any more or any less likely to succeed.

The *fifth* observation is the significant and consistent (repeated for each year and for all types of offenses) difference in the success rates for appeals from Provincial Court and Court of Queen's Bench, with the success rate for an appeal from the provincial bench being almost 10% higher than that for appeals from provincial superior trial court. It is tempting, but possibly premature, to read this as a crude indicator of merit and, therefore, as confirming the notion of a hierarchy of ability that corresponds to the hierarchy of courts. At the same time, there are also grounds for suggesting that it is fairer to see this as a reflection of the different circumstances under which provincial judges work, with higher caseloads, shorter trial time, less opportunity for reading and research, and less time set aside for focused decision writing.

Table 3: Number of appeals and frequency of reversal, by bench
Alberta Conviction Appeals, 1985 to 1992

Number of Appeals	No. of Judges		Reversal Frequency	No. of Judges[26]	
	QB	ProvCt		QB	ProvCt
40+	1	-	60%+	2	23
30-39	10	-	50-59%	5	14
20-29	24	-	40-49%	6	8

[25] It is also possible that the records in the Registrar's Office do not reliably include the comment "and jury" after the judge's name, and that this is a matter of under-reporting rather than a low rate of appeals.

[26] Omits all judges with only one appeal.

Number of Appeals	No. of Judges		Reversal Frequency	No. of Judges[26]	
	QB	ProvCt		QB	ProvCt
10-19	27	13	30-39%	29	20
5- 9	6	37	20-29%	18	13
1- 4	7	62	10-19%	8	4
			0-9%	1	13

The 1,998 appeals came from the trial decisions of 187 different judges, 75 on the Court of Queen's Bench and 112 on the Provincial Court. This means that there are very few judges in the province whose performance has not been subject to review by the Court of Appeal through the mechanism of a conviction appeal although there are some (about a dozen, mostly provincial judges) who have escaped such scrutiny. Other judges are appealed much more often; a single justice of the Queen's Bench was appealed 58 times, one provincial judge eighteen times. There are one dozen Queen's Bench judges who together account for 35% of the appeals from their bench, and one dozen provincial judges whose decisions make up 30% of the appeals from their bench, over the seven and a half year period. To be sure, part of this variation is caused by the length of the time span considered in that the retirement and appointment of judges means that some served for only part of the period; however, a considerable difference remains. The obvious conclusion, however, is clearly false: that is, it is demonstrably *not* the case that a specific subset of Alberta judges are appealed often because they are reversed often. The twelve most frequently appealed Queen's Bench judges, and the twelve Queen's Bench justices with the highest reversal rate, are twenty-one different individuals. Similarly the twelve most frequently appealed provincial judges, and the twelve provincial judges with the highest reversal rate, are twenty-three different individuals. Whatever drives the frequency of appeals from the decisions of a specific judge, it is something other than an objectively accurate perception of the frequency of error.

IV. COMPOSITION OF APPELLATE CASELOAD

Given the diversity of the appellate caseload, a single overall success rate is not very useful. *Table 4* refines this general information by dividing the caseload data among half a dozen major categories of offenses, indicating numeric totals and success rates for the major sub-categories where the grouping is obvious. Where a conviction appeal involved multiple offenses (they generally did not), the more serious category has been used, and there has been no attempt to account for or report multiple offenses.

It is hardly to be expected that this breakdown of caseload in any way mirrors that of the trial courts generally. On purely logical grounds, it is undoubtedly the case that the appellate caseload is skewed heavily toward the more serious and significant components of the trial caseload. For one thing, the normal outcome of a guilty determination in a criminal trial in Canada is a fine rather than imprisonment, while the appellate caseload

is composed overwhelmingly of criminal convictions that drew a jail sentence. Similarly, the six-to-one preponderance of indictable offense appeals over summary conviction appeals reflects both the additional appellate stage and the lower stakes at issue.

Table 4: Elements of Caseload and Success Rates
Alberta Court of Appeal, 1985 to 1992

Type of Offense	appeals	as % of caseload	success rate
crimes against the person			
assault	192	9.7%	29.2%
robbery	166	8.3%	30.1%
sex assault	166	8.3%	38.0%
murder	123	6.2%	26.8%
other	37	1.9%	13.5%
TOTAL:	684	34.4%	30.2%
crimes against property			
break & enter	143	7.2%	33.6%
theft	137	6.9%	51.8%
stolen property	78	3.9%	37.2%
fraud/false pretences	75	3.8%	32.0%
other	53	2.7%	35.8%
TOTAL:	486	24.4%	39.1%
motor vehicle offenses			
driving over .08	159	8.0%	36.5%
breath sample	77	3.9%	23.4%
impaired driving	70	3.5%	27.1%
dangerous operation	43	2.2%	44.2%
other	30	1.5%	53.3%
TOTAL:	379	19.1%	34.3%
wrongful acts			
weapons offenses	52	2.6%	21.1%
other	141	7.1%	54.6%
TOTAL:	193	9.7%	45.6%
drug-related offenses	142	7.1%	38.0%
miscellaneous	105	5.3%	25.7%
TOTAL:	1989		35.1%

Young offender appeals account for barely 3% of all appeals and are significantly more likely to succeed than adult appeals (45.5% compared to 34.4%). Similarly, appeals involving female defendants are relatively unusual (less than one appeal in thirty) and are also more likely to succeed than appeals by male defendants (43.7% against 34.4%). These two effects appear to be cumulative of the ten appeals by female young offenders, six were successful. These differences seem quite pronounced and consistent, but the numbers are so small as to make them of limited usefulness. The overwhelming majority of the cases in the conviction appellate caseload involve male adult offenders in their 20s and 30s.

V. CORRELATES OF APPELLATE REVERSAL

The most dependable predictor of appellate success is simple: which party is appealing the trial decision? Crown appeals are more likely to succeed than defense appeals by a striking margin of almost two to one 55.2% to 31.3%. It would of course be both superficial and unfair to see this simply as a pro-Crown predilection on the part of appeal judges; a better explanation is both obvious and logically simple but nonetheless significant in its impact.

Marc Galanter has argued that there is a critical difference in the way that our judicial system generally (and therefore by logical extension appellate courts specifically) serve two general categories of litigant "one-shotters" (meaning those who make very few appearances in court, largely involuntary) and "repeat performers" (meaning those actors for whom court decisions are a routine and regular component of official activities).[27] Although these categories are of broader application, they clearly catch criminal defendants on the one hand and the crown prosecutor's office on the other. For defendants, the decision to appeal grows from a combination of advice by counsel, financial means, and the negative impact of the particular sentence: if the impact is sufficiently devastating, then even a remote chance of success logically justifies an appeal. By contrast, the Crown can both organize its appeals on the basis of a coherent and long-term strategy and decide on a broader and more rational basis where to locate the cut-off point of cost versus probable outcome. The advantages of bureaucratic organization also suggest that it can do so on the basis of more complete and systematized information as well. Further, the fact that Crown appeals are restricted to questions of law[28] differentiates their appeals from the broader range of defendant appeals, some of which amount to little more than wishful thinking that the appeal court will retry the case.

This in turn suggests that the information in *Table 4*, relating varying success rates to different components of the appellate caseload, could be fundamentally misleading. Given the massive differential between the success rates for Crown and for defendant appeals, the reversal rates for different types of offense are only strictly comparable if the ratio of defendant to Crown appeals remains fairly constant, and there is no logical or structural reason to think that it does. We can assume that defendant appeals are a product of trial

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27 See M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 95.

28 *Criminal Code*, s. 605.

sentencing practices, specific individual situations making the gamble of an appeal more attractive, and specific features of individual trials that raise some prospect of reversal on procedural grounds these are factors that should be reasonably constant over time. But Crown appeals are also the product of a bureaucratic decision anticipating a line of decisions that differs from that of the trial bench (and will therefore ripple out to influence the pattern of future trials), and of a willingness to invest the legal resources to bring about that change. In other words, the ratio itself is an important statement of the extent to which appeals within a particular area of law, and therefore the patterns of results that emerge, are "defendant pulled" or "Crown pushed."

Similarly, a certain level of success can be taken as the "normal" product of error correction and judicial uniformity (that is: endorsing a specific trial judge's innovation from several plausible but mutually exclusive alternatives) and only a higher-than-normal reversal rate suggests deliberate appellate redirection of trial behaviour. Putting the matter in its crudest terms: given that many defendants plead guilty and that most trials end in determinations of guilt, it could be said that the major function of trial courts is to process criminal charges by registering the convictions of accused persons. From this same perspective, the general function of appeal courts is (through sheer weight of numbers) to turn the balance very slightly back in favour of the accused. That is, Crown appeals are about twice as likely to succeed, while defendant appeals are seven times as numerous. This crude ratio of appeal frequency and success rates is, if you will, the norm or "carrier signal," and variations from it are the basis for the extraction of specific meaning. *Table 5* presents the data on this basis.

Table 5: Frequency and Success Rate of Crown Appeals, by Type of Offense; Alberta Court of Appeal 1985-1992

Type of Offense	% of appeals by Crown	Crown appeal Success rate	Defendant Appeal Success Rate
motor vehicle	23.2%	62.5%	25.8%
drug-related offenses	23.9%	55.9%	32.4%
crimes against the person	12.6%	41.9%	28.5%
crimes against property	9.3%	44.4%	38.6%
wrongful acts	29.0%	67.9%	38.0%
miscellaneous	12.4%	69.2%	18.9%
TOTAL:	16.2%	55.2%	31.3%

In these terms, the pattern is rather different from that suggested in *Table 4*. It is not after all the case that appeals on drug-related offenses have a better than average chance

of being reversed; instead, the success rates for both Crown and defendant appeals are almost exactly the overall average, and the apparent difference in reversal rate is driven by a higher than average proportion of Crown appeals ("Crown push") which does not seem to be meeting with any unusual degree of success. The net result is relative stability. Further, the appearance from *Table 4* that motor vehicle offenses have a reversal rate below average is even more illusory; in fact, an unusually high ratio of Crown appeals is meeting with a considerable degree of success, while defendant appeals are *less* likely than average to succeed.[29] On the other hand, appeals on crimes against property show the reverse category a very low proportion of Crown appeals which nonetheless succeed less often than average, while defendant appeals succeed more often than average.

VI. THE USE OF *AD HOC* JUDGES

Information is available on the panels for 1,998 of the conviction appeal decisions. 1362 (or about two-thirds) of these included only Appeal Court judges (including seven five-judge panels), 625 were composed of two appeal judges and one provincial superior trial judge sitting *ad hoc*, and 11 were composed of one appeal judge and two *ad hoc* judges. Over the total period, there were *ad hoc* judges on 31.8% of the conviction appeals, and appearances by *ad hoc* judges accounted for 10.8% of all panel assignments.

This is one of the distinctive features of the Alberta Court of Appeal. In British Columbia and Ontario, trial judges never sit as *ad hoc* members of the Court of Appeal.[30] In Saskatchewan, Manitoba and the Atlantic provinces it occurs only in unusual circumstances, when for one reason or another[31] it is not possible to form a panel of appeal court judges. For example, in Manitoba, the total number of *ad hoc* appearances over a recent calendar year fluctuates between three and six.[32] For a number of years, the Quebec Court of Appeal relied on the services of a single full-time *ad hoc* judge[33] from the provincial superior trial court, but opted for an increase in the number of full-time appeal judges rather than expanding the practice. In Canadian Provincial Courts of Appeal, the general rule is the near exclusive use of full-time appeal judges (supplemented as required by supernumerary judges when they are available).[34]

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29. As the anonymous reviewer pointed out: the low rate of success in defendant appeals is probably the result of *Charter*-related breathalyser appeals which skew the total because defence arguments are often very weak. The unusually high success rate of Crown appeals, however, remains significant.

30. In British Columbia, the relevant provincial legislation does not permit the use of provincial superior trial judges on an *ad hoc* basis. In Ontario, the legislation does permit it when needed, but in recent decades a series of Chief Justices have been so reluctant to consider the practice that the permission amounts to a dead letter.

31. Usually a small court in which one or more members must recuse themselves from consideration of a specific appeal; more rarely illness or non-judicial assignments or temporary surges in caseload.

32. See McCormick, "Caseload and Output of the Manitoba Court of Appeal 1991" *Manitoba Law Journal* (forthcoming)

33. This apparent oxymoron is the term used in Quebec and, perhaps, the least misleading way of labelling an unusual situation.

34. Differences in the statutory regimes of the different Courts of Appeal drive part of this difference. In Alberta, all trial judges are formally *ad hoc* members of the appeal court as well, although a fairly small subset of the trial bench is called upon to provide the bulk of such service.

In Alberta, however, the use of members of the trial bench as *ad hoc* judges is a regular practice.[35] (Alberta is also more willing than other provinces to follow the reverse logic of using appeal judges as *ad hoc* provincial superior trial judges, although this is much more rare.[36]) The advantages of the practice are two-fold: first, it provides a considerable degree of flexibility in the deployment of judicial resources to cope with fluctuations in the caseload of trial and appeal courts; and second, it allows, even forces, judges on both benches to be more aware of the perspectives and the imperatives of their respective roles. The disadvantage would be the increased difficulty of co-ordinating the activities of a functionally larger appeal bench with an even greater number of panels, and the possibility that the *ad hoc* judges would be somewhat more reluctant to be too critical of their own trial bench colleagues a concern that logically should apply as well to appeals from a trial decided by an appeal judge sitting *ad hoc*.

Forty-six different Queen's Bench judges, which is clearly more than half of those who served on the trial bench over the seven and a half year period, made appearances in conviction appeals as *ad hoc* judges of the Court of Appeal. Sixteen of these made less than half a dozen appearances each, so that the bulk of the *ad hoc* work is done by about 30 judges of the Court of Queen's Bench, three of whom (Mr. Justice Gallant, Madam Justice McFadyen and Mr. Justice Matheson) made more than fifty appearances, and three others (Mr. Justice Agrios, Mr. Justice Egbert and Mr. Justice Feehan) more than thirty. These six judges alone account for more than 40% of the *ad hoc* panel appearances for conviction appeals.

The number of *ad hoc* appearances is clearly large enough to provide the opportunity to assess their impact in that there is a sufficient run of cases to see if there is a difference in the voting behaviour of *ad hoc* judges as opposed to appeal judges, or if there is a systematic long-term difference in outcome depending on the composition of the panels. The relative infrequency of dissents[37] (the product either of high caseload or of informal internal norms that discourage overt disagreement) makes the first approach unpromising, but Atkins and Green[38] have argued that over a sufficient run of cases, the pattern of outcomes may hint at the different voting tendencies obscured by a bias toward formal unanimity in decision-making. Dividing panels on the double criteria of the presence or absence of *ad hoc* judges, and the level of court from which the appeal derived, generates the patterns displayed in *Table 6*.

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35. Even more so for sentence appeals, which will be dealt with in another paper.

36. In practice, for obvious reasons, this is usually limited to appeal court judges who were elevated from the trial bench, although formally all appeal court judges are *ad hoc* members of the trial bench as well.

37. The monthly caselists indicate dissents in only 66 of the 2000+ panel decisions, a dissent rate just over 3%. Almost half of this is accounted for by a single judge Mr. Justice Harradence usually supporting an unsuccessful appeal against the Crown. Interestingly, the *ad hoc* judges account for roughly one-tenth of the dissents, closely parallel to their one-tenth of all panel appearances. These rates seem low enough to suggest informal norms depressing the overt expression of disagreement.

38. B.M. Atkins and J.J. Green, "Consensus on United States Courts of Appeals: Illusion or Reality?" (1976) 20 *American Journal of Political Science* 735.

The pattern is reasonably clear. It is not just that the presence of an *ad hoc* judge on the panel reduces the chance of a successful appeal (although this is a correct statement: an appeal is only five-sixths as likely to succeed if a Queen's Bench judge is sitting), but that the differential impact is entirely directed to appeals from the Queen's Bench itself. If three appeal court judges are sitting, an appeal from Provincial Court is slightly (5%) more likely to succeed than an appeal from Queen's Bench. If the panel includes an *ad hoc* judge, the success rate for provincial court appeals is almost unchanged, but the likelihood of a successful Queen's bench appeal falls so far as to triple the spread to 15%.

Table 6: Success Rate of Conviction Appeals
by Presence or Absence of *Ad Hoc* Judges, 1985-1992

Appeal from	no *ad hoc* judges	*ad hoc* judge on panel	All Appeals
Provincial Court	41.1% n=367	42.4% n=205	41.6%
Queen's Bench	35.7% n=995	25.1% n=438	32.5%
All Appeals:	37.2%	30.7%	35.1%

To some extent, these differences in outcome may well be the product of structural factors. The allocation of the lists between panels is probably less than random, such that panels with *ad hoc* judges receive sets of appeals that are skewed toward the more routine and less challenging in which the decisions will resolve the immediate case but have few wider implications; while the appeals whose jurisprudential impact is more likely to significant within and beyond the province are directed to full-time appeal judges only. This would seem a sensible and reasonable policy. The patterns may also be affected by the fact that only full-time appeal judges sit on the less frequent summer panels whose caseload is presumably comprised largely of unusual cases requiring expeditious handling. To this extent, the numbers in *Table 6* must be taken with a grain of salt, although the differences still appear noteworthy.

VII. CASEFLOW IN THE ALBERTA COURT OF APPEAL

As indicated above, there is a persisting indication that the long-term increase in appellate caseload has peaked in Alberta (and possibly in several other provinces as well); however, this slight downturn comes after a period of decades in which caseload rose steadily. The challenge that appeal courts have faced in recent years is to balance caseload and judicial capacity, so as to process appeals expeditiously while still giving each case the measured and careful consideration necessary for just resolution. Matching the readiness of appellants against the availability of appeal panels against the backdrop of rising caseload generates problems of caseflow, case management and, as the negative result, backlog cases that must wait for resolution until the resources are available to deal with them.

All comparative indications are that Alberta has dealt reasonably well with the caseflow challenge. There is a significant backlog problem in Ontario and Quebec; measured against the other high-volume appeal courts [see *Table 1*] Alberta does not by general report have a problem perhaps partly because the policy of the large-scale utilization of trial judges as *ad hoc* appeal judges expands judicial resources so as better to absorb a larger workload.

The data permit some discussion of the caseflow patterns in the Alberta Court of Appeal. Information was available on the date of trial decision for about 99% of the cases, and this permits comparison in terms of elapsed time between trial decision and appeal decision. In many ways this is not the most subtle or useful measure of court performance: to be totally fair, the appeal court rating clock should only start ticking when both parties to the appeal have filed the relevant documentation and are prepared to proceed,[39] but this information was simply not available for a large enough range of courses. Elapsed time from trial to appeal has the advantage of building from the "consumer" side of the process, but it is used here with full acknowledgment of the fact that the Court of Appeal is by no means responsible for all, and possibly not even for most, of the passage of time.

The discussion of caseflow that follows is based entirely on the length of time elapsing from trial judgment to appeal panel hearing. This is usually, but not always, the day that the appeal decision is delivered in 1989, the only year for which I have complete lists, only one decision in six was reserved, but where these two dates differ the reference is to the appellate hearing. A very small number of conviction appeals involve a second day of court time, but the number is so small that there is no significant distortion in simply counting time to the first day of court hearing. Figures are provided for both the average case and the median case (that is: that case so situated that the number of cases handled more quickly and the number handled less quickly are identical).

Table 7: Average and Median Times from Trial to Appeal
Conviction Appeals in the Alberta Court of Appeal, 1985-92

Year	Average	Median
1984-85[40]	276.4 days	202 days
1985-86	249.7 days	215 days
1986-87	260.5 days	219 days
1987-88	289.2 days	233 days
1988-89	279.7 days	262 days

39. From other sources, it seems clear that two significant components of the time lag are the production of appeal books and the processing of applications for legal aid.

40. Information available only for the latter half of 1984-85.

Year	Average	Median
1989-90	308.8 days	271 days
1990-91	296.0 days	268 days
1991-92	316.9 days	275 days

Between 1985 and 1992, the average appeal was heard (and usually decided) about nine and a half months (282 days) after the trial decisions were handed down. The median figure is slightly lower, at eight months (245 days), which compares with Ontario's median figure of 328 days for conviction appeals over a comparable time period.[41] There has been a gradual and general upward movement over the years; both the average and the median figures for 1991-2 are almost 30% higher than those for 1985-86, the first full year for which data is available. The percentage of cases cleared within three months of trial is similarly down from 10.8% in 1984-5 to 4.7% in 1990-1 and 1991-2; and the percentage of cases cleared within six months of trial is similarly down from 40% in 1985-6 to below 15% of 1991-2. The percentage of cases taking one year or more has risen more modestly, from 20% in 1984-85 and 1985-86 to 25% in 1991-92. It is at first glance curious that rising average time correlates with decreasing caseflow, but the relationship might well be logical even tautological rather than causal in that the only way the Court could handle its larger number of cases in the mid- and late 1980s was by rushing them through more quickly. It does not necessarily follow that the numbers for the mid-80s constitute a "normal" time or a fair basis for evaluation; it might just as plausibly represent the haste that makes waste. A further factor might be the routinization of *Charter* arguments in appeals as the novelty of the *Charter* fades, more and more lawyers include *Charter* arguments in their appeals, thereby expanding the grounds on which they are presenting argument and the issues that the appeal court might resolve but this hypothesis cannot be tested directly because the registrar's records do not identify cases involving the *Charter*.

Table 8: Average and Median Times from Trial to Appeal
by Type of Offense; Conviction Appeals 1985-1992

Type of Offense	Average	Median
drug related offenses	363 days	285 days
crimes against the person	307 days	265 days
wrongful acts	285 days	278 days
miscellaneous appeals	267 days	210 days
crimes against property	257 days	237 days

41. See Baar, Greene, Thomas & McCormick "Expeditious Justice," *op.cit.*

Type of Offense	Average	Median
motor vehicle offenses	243 days	213 days
ALL OFFENSES:	283 days	245 days

There seems to be more substance to comparisons derived from the different clearing rates for the various types of offences, as shown in *Table 8*. Motor vehicle cases are cleared most quickly, drug-related offenses the least quickly, and the difference between the two amounts to several months for both average and median figures. 37% of all motor vehicle appeals, and 36% of property appeals, were cleared within six months or less of the trial decision. Only 14% of drug appeals were resolved this quickly. The unusually large spread between the average and median times for drug-related offenses suggests a small number of cases that took an unusually long time to resolve, but the fact that the median is still several weeks higher than for any other type of offense indicates that this is not the only factor.

An explanation might be sought in bail practices, and in the logical dynamics of an appellant who is granted interim release and might presumably be in less hurry to resolve the issue. Clearly, bail is more frequent in appeals involving drug-related offenses than for other types of offenses; one drug-related appeal in three, but only one appellant in five for crimes against the person or against property, and only one appellant in twelve for motor vehicle cases, is freed on bail. However, appeals involving appellants who are granted bail do not drag on longer than appeals involving parties who remain in custody. The average for all appeals is 283 days, the average for appeals where bail is involved only 299 days. Nor do success rates differ significantly: 35.1% for all appeals, and 37.3% for appellants granted interim release. The impact of the granting of bail is surprisingly neutral, and an explanation for the dragging pace of drug-related appeals must be sought elsewhere.

Table 9: Clearing Rates and Reversal Rates, by Percentile
Crown and Defendant Appeals; Conviction Appeals 1985-1992

Percentile	Crown Days	Crown Success Rate	Defendant Days	Defendant Success Rate
10%	101	45.5%	102	31.0%
25%	161	49.0%	170	32.4%
50%	232	63.0%	249	32.1%
75%	245	56.8%	354	31.4%
90%	294	55.1%	481	30.4%
100%	1861	50.0%	1532	28.7%

Note: Clearing time counted in days from trial decision to appeal decision.

There is also no real difference in clearance rate between Crown appeals and defendant appeals; the average for the former is 283.8 days, for the latter 282.5 days. This is surprising, because it contrasts so strikingly with Ontario's experience.[42] In that province, there is a considerable difference between Crown and defendant appeals, with the former moving rapidly and the latter dragging. In Ontario, there is a 105 day gap between Crown and defendant appeals at the 50th percentile. In Alberta, the gap is only 17 days. (In both provinces there is a similar pattern of a dramatically ballooning of the gap for the last deciles of slow-paced appeals.) At least at first glance, it would appear that the Alberta Court's practices of trying to "force the pace" and manage the conviction appeal lists is generally successful, and the parallel pacing of Crown and defendant appeals is the outcome. It is curious that in Alberta, unlike Ontario, this results in a much higher success rate for Crown appeals.

VIII. CONCLUSION

The purpose of this paper has been to provide a statistical summary of conviction appeals in the Alberta Court of Appeal between January 1 1985 and June 30 1992. The diversity of *Table 1*, and the varying dynamics of the appeal process they suggest, cast some doubt on the extent to which these findings can be generalized. Some of the general patterns of Alberta Court of Appeal processes such as a gradual increase in the average and median clearing times for conviction appeals, and a "one-in-three" success rate, and a strong preponderance of defendant over Crown appeals, and a significant number of appeals direct from Provincial Court might well be true of all or most of the provinces. Others, such as the much higher success rate for Crown appeals,[43] and the varying ratios of defendant and Crown appeals and the patterns suggested by the success rates for different types of offence, might be more reflective of unique temporal and locational factors. The curious fact that Alberta, the fourth largest province, may well lead the country for the absolute number of conviction appeals makes the focus of this research paper at one and the same time *more* intriguingly important and *less* easily generalizable.

The *sui generis* nature of the data-base on which this paper was based requires the tone of exposition rather than of criticism or comparison: these simply are the patterns that the thousands of individual appeals, each the product of judicial deliberations and reasoned arguments, adds up to. The point is not to suggest that these patterns should be different in some specific way, but simply that information about what the patterns are is both interesting and of use in understanding the broader context created by those individual decisions over time.

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42. *Ibid.*

43. There does not seem to be a difference in the success rates for Crown and defendant appeals in Ontario; see *ibid.*