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Does a Judge's Party of Appointment or Gender Matter to Case outcomes?: An Empirical Study of the Court of Appeal for Ontario

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Abstract
A recent study by Cass Sunstein identified ideological differences in the votes cast by judges on the United States Courts of Appeals in certain types of cases. He found that these patterns varied depending on the ideology of an appellate judge's co-panelists. In this study, we undertake a similar examination of the busiest appellate court in Canada, the Court of Appeal for Ontario. This study collects data on the votes cast by individual judges in every reported decision between 1990 and 2003. Each case was cod6d by type, for example "criminal law," "constitutional law," or "private law." In addition, the votes cast by individual judges in each category were tracked based on variables such as the type of litigant, the political party that appointed the judge, and the judge's gender. This study reveals that at least in certain categories of cases, both party of appointment and gender are statistically significant in explaining case outcomes. Between these two variables, gender actually appears to be the stronger determinant of outcome in certain types of cases. While these findings are cause for concern, this study also points toward a simple solution. Diversity in the composition of appeal panels both from the standpoint of gender and party of appointment dampened the statistical influence of either variable. In other words, in the case of gender, a single judge on a panel who is of the opposite sex from the others, or in the case of political party, a single judge appointed by a different political party, is sufficient to eliminate the potential distorting influence of either variable. This finding suggests a need to reform how appeal panels are currently assembled in order to ensure political and gender diversity and minimize concerns about the potential for bias.

Keywords
Judges; judicial process; Bias (Law)

DOES A JUDGE'S PARTY OF APPOINTMENT OR GENDER MATTER TO CASE OUTCOMES?: AN EMPIRICAL STUDY OF THE COURT OF APPEAL FOR ONTARIO©

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A recent study by Cass Sunstein identified ideological differences in the votes cast by judges on the United States Courts of Appeals in certain types of cases. He found that these patterns varied depending on the ideology of an appellate judge's co-panelists. In this study, we undertake a similar examination of the busiest appellate court in Canada, the Court of Appeal for Ontario. This study collects data on the votes cast by individual judges in every reported decision between 1990 and 2003. Each case was codéd by type, for example "criminal law," "constitutional law," or "private law." In addition, the votes cast by individual judges in each category were tracked based on variables such as the type of litigant, the political party that appointed the judge, and the judge's gender.

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Dernièrement, une étude de Cass Sunstein a mis le doigt sur les différences idéologiques des votes exprimées par les juges des cours d'appel américaines dans certains genres de cas. Cass Sunstein a constaté que les tendances variaient selon l'idéologie des co-. magistrats du juge de cour d'appel. Dans cette étude, nous entreprenons un examen analogue de la cour d'appel la plus sollicitée du Canada, à savoir, la Cour d'appel de l'Ontario. L'étude recueille des données sur les votes de chaque juge dans chaque décision rapportée entre 1990 et 2003. Chaque affaire avait été codée selon son genre, par exemple: «droit penal,» «droit constitutionnel» ou «droit privé.» En outre, les votes de chaque juge dans chaque catégorie étaient enregistrés en fonction de certaines variables: genre de plaideur, parti politique qui a nommé le juge, sexe du magistrat.

Cette étude révèle que dans certaines catégories de cas au moins, le sexe du magistrat et le parti politique ayant nommé ce magistrat étaient

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significatifs du point de vue statistique pour expliquer l'issue dans certains types de cas. Entre ces deux variables, le sexe du magistrat semble effectivement être le déterminant le plus fort de l'issue de certaines espèces de cas. Tandis que ces constatations sont des motifs de préoccupation, cette étude montre également la voie d'une solution simple. La diversité dans la composition des chambres des magistrats des Cours d'appel, à la fois du point de vue du sexe et du parti responsable des nominations, amenuisait l'influence statistique tant d'une variable que de l'autre. En d'autres termes, dans le cas du sexe, un seul juge dans une chambre, qui est du sexe opposé de celui des autres,ou dans le cas du parti politique, un seul juge nommé par un parti politique différent, suffit à supprimer la possibilité d'une influence déformante d'une variable comme de l'autre. Cette constatation porte à suggérer un besoin de réformer la façon dont les chambres d'appel sont actuellement constituées, afin d'assurer une diversité politique et sexuelle, et ainsi minimiser le souci d'une possibilité d'un parti pris.

> The judicial oath of office imposes on the judge a lofty duty of impartiality. But impartiality is not easy of attainment. For a judge does not shed the attributes of common humanity when he assumes the ermine. The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognized by their possessor. Few minds are as neutral as a sheet of plate glass, and indeed a mind of that quality may actually fail in judicial efficiency, for the warmer tints of imagination and sympathy are needed to temper the cold light of reason if human justice is to be done.[1]
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> — Lord MacMillan

I. INTRODUCTION

At least formally, our legal system is prefaced on the notion that the personal characteristics of individual judges—for example, a judge's political views or gender—are not relevant to how cases are decided. This assumption is fundamental. The legitimacy of our legal system depends very much on the idea of impartial justice—the notion that *who* the judge is should not affect *what* is decided.[2] Nevertheless, lawyers who regularly litigate cases before our courts would undoubtedly question the correctness of this assumption. Most telling are the first questions that they invariably ask one another about the cases they are litigating, either at trial or on appeal: "who is your judge?" or "who is on your panel?" Are such questions indicative of some empirically verifiable truth about judges, or are they simply an artifact of litigation bias?[3] This study attempts to answer that question.

In this study, we empirically evaluate whether subjective characteristics such as the party that appointed a judge or a judge's

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[1] Rt. Hon. Lord MacMillan G.C.V.O., LL.D., *Law & Other Things*, (Cambridge: Cambridge University Press, 1938) at 217.

[2] See *e.g. Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at 287-88, wherein the Court refers to impartiality as a "well-settled, foundational principle" (at 287) and indicates that it is the "key to our judicial process, and must be presumed" (at 288). See also *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at 532-34.

[3] A lawyer could blame a loss, or many losses, rather unjustifiably, on the fact that a particular judge was presiding; this might allow the lawyer to avoid the discomfort of taking the blame for either mishandling the case and/or overestimating its strength. More generally, optimism bias on the part of those involved in litigation is a well-documented phenomenon. See George Loewenstein *et al.*, "Self-Serving Assessments of Fairness and Pretrial Bargaining" (1993) 22 J. Legal Stud. 135; Richard Birke & Craig R. Fox, "Psychological Principles in Negotiating Civil Settlements" (1999) 4 Harv. Negot. L. Rev. 1 at 12-19; Robert H. Mnookin, "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict" (1993) 8 Ohio St. J. on Disp. Resol. 235 at 243-46; and Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge: Harvard University Press, 2004) at 405.

gender matter to case outcomes on appeal. This study is modelled on the work of Cass Sunstein, David Schkade, and Lisa Michelle Ellman in the United States.[4] We employ the same methodology to analyze the voting behaviour of the judges of the Court of Appeal for Ontario, Canada's busiest provincial appellate court. This study involves an analysis of every reported decision issued by that court between 1990 and 2003, amounting to over 4,000 cases involving 12,000 distinct observations of individual judges' votes.[5] Our analysis reveals a number of noteworthy findings.

First, there is an extraordinarily high rate of unanimity in the court's judgments: 95%. It is just as interesting that this rate varies substantially in different categories of cases. For example, in narcotics cases it increases to 99%, whereas in sexual assault cases it decreases to 93%. We offer potential explanations for these variations by examining variables, such as differences in voting patterns between male and female judges in sexual assault cases.

Second, our analysis reveals that in certain categories of cases, there is a statistically significant variation in the voting of judges depending on the party of their appointment. The degree of this variation fluctuates from one case category to another, while in many categories there is virtually no difference at all. However, in certain types of cases, such as criminal cases where *Charter*[6] remedies were sought, the differences are dramatic, with appointees of Conservative[7] government favouring more conservative outcomes and appointees of Liberal government preferring more liberal outcomes, although in a more nuanced fashion. The influence of political ideology is dampened

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[4] Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation" (2004) 90 Va. L. Rev. 301.

[5] We used the *Ontario Appeal Cases* (O.A.C.), published by Maritime Law Book, as our source. We appreciate that this reporter does not contain many of the court's decisions that take the form of "endorsements." Historically, "endorsements" were simply the written entry of the court on the back of an Appeal Book. As a result, such "decisions" were very brief, not very accessible, and accordingly given little weight as precedents. In recent years, especially with the advent of Quicklaw's online database of decisions, most endorsements are now available in an electronic format. This study does not extend to endorsements. This is because many endorsements, especially from the early period of this study, are so brief that they provide insufficient detail to be included.

[6] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[7] References to the "Conservative" party/government in this study refer to the Progressive Conservative party/government.

in panels made up of appointees of Conservative and Liberal governments, and it is accentuated in panels made up of appointees of a single party. This finding calls into question the assumption that our judiciary is apolitical in its decision-making, and it points to a need to be more conscious about how appeal court panels are assembled.

Third, and equally notable, is the variation we found in the way male and female judges vote. Although in many categories there is no discernible difference in their voting patterns, in some categories, gender appears to matter greatly. For example, in criminal cases involving sexual or domestic violence, as well as in family law cases involving disputes about custody or support, there is a statistically significant tendency on the part of female judges to favour the interests of complainants and mothers. The converse of male judges voting in favour of the interests of accused persons and fathers is also true. Again, these effects are dampened on panels that include judges of both genders. These findings signal a need for greater gender diversity on appellate court panels, especially in cases where polarization of the genders is more likely.

It is well worth knowing how individual judges fit into this general dynamic. The parliamentary committee that recently reviewed the appointments of Justice Abella and Justice Charron to the Supreme Court of Canada might have been interested in knowing whether either of these judges stood out in their judging, in a statistically measurable way. In a more transparent appointments process, the responsible committee could use this sort of data to query why a nominee has distinguished herself in a certain way. For example, did Justice Abella lead the other judges when gender issues were involved because she is perceived as an expert in this area and her colleagues therefore found her views persuasive in these cases? Or, alternatively, was she simply more "activist" on gender issues (as some claimed at the time of her nomination),[8] which, with the culture of consensus—remembering the

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[8] See Robert Matas, "New Judges Expected To Maintain Continuity" *The Globe and Mail* (25 August 2004) A7. It may be that when it comes to equality issues at least, Justice Abella might very well be prepared to admit and even defend her perceived activism. Long before she was a nominee for the Supreme Court of Canada, she quite frankly acknowledged that "[e]very decisionmaker who walks into a courtroom to hear a case is armed not only with the relevant legal texts, but with a set of values, experiences and assumptions that are thoroughly embedded." See Rosalie S. Abella, "The Dynamic Nature of Equality" in Shelia L. Martin & Kathleen E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 3 at 8-9.

95% unanimity rate—resulted in her colleagues deferring to her judgment for the sake of collegiality? Our data cannot answer these sorts of normative questions; they do, however, provide a strong empirical justification for beginning to ask them. All of the foregoing suggests a need for further research in this area and for greater transparency in the judicial appointments process in Canada, so that there will at least be a public forum for seeking answers to these important questions.

II. THE CURRENT STUDY IN CONTEXT

Empirical studies of the judicial process began in the United States with the groundbreaking work of Glendon Schubert, a political scientist.[9] By modifying a technique first developed by social psychologists, Schubert applied a methodology known as "cumulative scaling" to the voting behaviour of judges of the U.S. Supreme Court. By "scaling"[10] the votes of individual judges in selected categories of cases, Schubert was able to reveal the attitudinal commitments of individual judges in such cases. The object of his studies was to show the extent to which the public acts of judges are influenced by their personal beliefs.[11] This work ultimately opened up an entire sub-discipline within political science that continues to this day.[12]

Canadian scholars quickly followed. In the late 1960s, Sidney Peck applied scalogram analysis[13] to the decisions of the Supreme Court of Canada. He used this methodology to reveal the strength of the policy commitments of individual judges in a variety of different case categories, including taxation, negligence, criminal law, labour relations,

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[9] See Glendon A. Schubert, "The Study of Judicial Decision-Making as an Aspect of Political Behaviour" (1958) 52 Am. Pol. Sci. Rev. 1007; Glendon A. Schubert, *Quantitative Analysis of Judicial Behaviour* (Glencoe: The Free Press, 1959); and Glendon Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices 1946-1963* (Evanston: Northwestern University Press, 1965) [Schubert, *The Judicial Mind*].

[10] This method consists of plotting the voting of individual judges on a graph and placing the judge's voting against a measurable scale so that patterns in the judge's voting can be observed.

[11] Schubert, *The Judicial Mind*, *supra* note 9 at 15.

[12] For an excellent review of the evolution of this area of research in the United States, see Thaddeus Hwong, "A Review of Quantitative Studies of Decision Making in the Supreme Court of Canada" (2003) 30 Man. L.J. 353 at 354-59.

[13] Another term used to describe "scaling." See *supra* note 10 and accompanying text.

federalism, and civil liberties.[14] Not surprisingly, Peck found that many of the judges voted consistently in favour of their personal policy preferences, for example, routinely preferring the interests of the Crown in criminal cases, or management in labour disputes. Within the legal academy, however, there was much doubt regarding the utility of this kind of empirical research.[15]

A short while ago, the dominant view among legal scholars was that the law reports alone provided a representative account of what was taking place in the courts.[16] Although this assumption had long been viewed with much skepticism within legal academic circles,[17] it was not until the groundbreaking work of George Priest and Benjamin Klein[18] that empirical legal research conclusively proved its utility to legal scholars. By examining actual court records, Priest and Klein identified a number of recurring variables that created a selection bias in those cases that went to trial—variables that were unlikely to be present in cases that settled. This meant that the legal disputes that worked their way up to appeal did not provide a representative sampling of all cases. It was with this conclusion that empiricism began its ascent within contemporary legal scholarship.

Although the decisions of appellate courts are no longer considered representative of all cases in the legal system, they are nonetheless of critical importance for several reasons. First, the provincial appellate courts are usually a litigant's only hope for relief from trial errors, as less than 1.5% of the cases decided by provincial

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[14] See Sidney Raymond Peck, "A Behavioural Approach to the Judicial Process: Scalogram Analysis" (1967) 5(1) Osgoode Hall L.J. 1; S. R. Peck, "The Supreme Court of Canada, 1958-1966: A Search for Policy through Scalogram Analysis" (1967) 45 Can. Bar. Rev. 666; and Sidney R. Peck, "A Scalogram Analysis of the Supreme Court of Canada, 1958-1967" in Glendon Schubert & David J. Danelski, eds., *Comparative Judicial Behavior: Cross-Cultural Studies of Political Decision-Making in the East and West* (New York: Oxford University Press, 1969) 293.

[15] See *e.g.* Philip Slayton, "A Critical Comment on Scalogram Analysis of Supreme Court of Canada Cases" (1971) 21 U.T.L.J. 393, criticizing the utility of this sort of research. But see Philip Slayton, "Quantitative Methods and Supreme Court Cases" (1972) 10 Osgoode Hall L.J. 429, wherein the author retreats somewhat from his initial skepticism.

[16] See *e.g.* Richard A. Posner, "A Theory of Negligence" (1972) 1 J. Legal Stud. 29.

[17] See *e.g.* Jerome Frank, *Law and the Modern Mind* (New York: Bretano's, 1930) at 109-19. Frank argued that judges decide cases by arriving at tentative conclusions and then reasoning backwards. For Frank, these tentatively formulated conclusions were influenced by a variety of "stimuli," one of which includes the "idiosyncratic biases" of the individual judges.

[18] George L. Priest & Benjamin Klein, "The Selection of Disputes for Litigation" (1984) 13 J. Legal Stud. 1.

appellate courts proceed to the Supreme Court of Canada.[19] Second, these courts play a central role in shaping the doctrines that control how cases are dealt with in the trial courts. It is therefore not surprising that empirical investigations into appellate court decisions are on the rise.

There have been a number of studies in the United States which have employed quantitative methods to examine various aspects of decision-making by appellate courts.[20] The recent study by Sunstein, Schkade and Ellman examines the possible influence of ideology on the voting patterns of judges on the U.S. Federal Courts of Appeals.[21] That study used party of appointment as a proxy for ideology. For an eight-year period, it examined the votes of Democrat and Republican appointees in certain categories of reported cases that seem most likely to reveal ideological divisions, such as abortion and capital punishment.

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[19] See generally Ian Greene *et al.*, *Final Appeal: Decision-Making In Canadian Courts of Appeal* (Toronto: Lorimer, 1998).

[20] See Sheldon Goldman, "Voting Behaviour on the United States Courts of Appeals, 1961-1964" (1966) 60 Am. Pol. Sci. Rev. 374; Bradley C. Canon & Dean Jaros, "External Variables, Institutional Structure & Dissent on State Supreme Courts" (1970) 3 Polity 175; Sheldon Goldman, "Voting Behaviour on the United States Courts of Appeals Revisited" (1975) 69 Am. Pol. Sci. Rev. 491; J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth and District of Columbia Circuits* (Princeton: Princeton University Press, 1981); Sheldon Goldman & Charles M. Lamb, eds., *Judicial Conflict and Consensus: Behavioral Studies of American Appellate Courts* (Lexington: University of Kentucky Press, 1986); Stephen L. Wasby, "Communication in the Ninth Circuit: A Concern for Collegiality" (1987) 11 University of Puget Sound L. Rev. 73 [now the Seattle U.L. Rev.]; Donald R. Songer & Reginald S. Sheehan, "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals" (1992) 36 Am. J. Pol. Sci. 235; Gary Zuk, Gerard S. Gryski, & Deborah J. Barrow, "Partisan Transformation of the Federal Judiciary, 1869-1992" (1993) 21 Am. Pol. Q. 439; Deborah J. Barrow, Gary Zuk & Gerard S. Gryski, *The Federal Judiciary and Institutional Change* (Ann Arbor: University of Michigan Press, 1996); Harold J. Spaeth & Jeffrey A. Segal, *Majority Rule Or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (Cambridge: Cambridge University Press, 1999); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, "Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions" (2004) 65 Ohio St. L.J. 491; David S. Law, "Strategic Judicial Lawmaking: Ideology, Publication and Asylum Law in the Ninth Circuit" (2005) 73 U. Cin. L. Rev. 817; Theodore W. Ruger *et al.*, "The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking" (2004) 104 Columbia L. Rev. 1150; Sean Farhang & Gregory Wawro, "Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making" (2004) 20 J.L. Econ. & Org. 299; Richard L. Revesz, "Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts" (2000) 29 J. Legal Stud. 685; Jennifer L. Peresie, "Note: Female Judges Matter: Gender and Collegial Decisonmaking in the Federal Appellate Courts" (2005) 114 Yale L.J. 1759; Susan B. Haire, Donald R. Songer & Stefanie A. Lindquist, "Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective" (2003) 37 Law & Soc'y Rev. 143; and Sunstein, Schkade & Ellman, *supra* note 4.

[21] Sunstein, Schkade & Ellman, *ibid.*

The study found that in a number of areas the ideology of the judges matters greatly. For example, overall, panels composed entirely of Democrat appointees favoured a liberal outcome 61% of the time, whereas panels composed exclusively of Republican appointees preferred a liberal outcome only 34% of the time. In addition, there were noteworthy results from involving mixed-party panels. In short, when a panel consisted of both Democrat and Republican appointees, the effect of ideology on outcome was significantly dampened.

A study by Theodore Ruger *et al.*[22] focused on decision-making by the U.S. Supreme Court. By examining only a handful of characteristics in cases decided between 1994 and 2002, the authors were able to formulate a model that enabled them to predict the outcome in 75% of the cases decided by the U.S. Supreme Court in 2003. In contrast, a panel of legal experts was able to forecast the outcome correctly in only 59.1% of the cases.

An even more recent study focused on the influence of ideology in the "unreported" decisions of the Ninth Circuit Court of Appeals.[23] Apparently, over 80% of the Federal Courts of Appeals decisions are unreported judgments that, depending upon the circuit, are either considered to have little or no value as a precedent.[24] The study found that for certain judges, voting and publication were strategically intertwined; some judges were willing to acquiesce in decisions that run contrary to their ideological preferences in unreported cases, but were prepared to dissent if the majority insisted on publication.

Finally, another recent American study probed the potential influence of minority judges on panel behaviour in the federal appellate courts.[25] It found that the presence of a female or non-white judge is an important predictor of panel decisions in discrimination cases. In seeking an explanation for this finding, the authors argued that "this phenomenon is driven by the institutional norm of unanimity on federal appellate panels, which fosters deliberation and compromise that allows

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[22] Ruger *et al.*, *supra* note 20.

[23] See Law, *supra* note 20.

[24] The same is true in some Canadian appellate courts. For example, the Court of Appeal for Ontario disposes of a great many cases through "unpublished" endorsements that, because of their brevity, are often seen as having little precedential value.

[25] See Farhang & Wawro, *supra* note 20. The authors define minority as female and "non-white" judges, a comparatively small minority relative to white men on the federal bench.

numerical minorities on panels to influence case outcomes."[26] A similar theory about the panels of the Court of Appeal for Ontario may also explain many of our findings.

To date, most of the empirical research on Canadian appellate courts has been focused on the various aspects of Supreme Court decision-making: the rate at which the Court grants and refuses leave applications;[27] trends in the sources the Court tends to cite in its opinions;[28] the voting patterns of individual judges, alone and when sitting together;[29] the potential influence of some of the judges'

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[26] *Ibid.* at 300.

[27] See S.I. Bushnell, "Leave to Appeal Applications: The 1984-85 Term" (1986) 8 Sup. Ct. L. Rev. 382; S.I. Bushnell, "Leave to Appeal Applications: The 1985-86 Term" (1987) 9 Sup. Ct. L. Rev. 467; S.I. Bushnell, "Leave to Appeal Applications: The 1986-87 Term" (1988) 10 Sup. Ct. L. Rev. 361; S.I. Bushnell, "Leave to Appeal Applications: The 1987-88 Term" (1989) 11 Sup. Ct. L. Rev. 383; Brian A. Crane & Henry S. Brown, "Leave to Appeal Applications: The 1988-89 Term" (1990) 1 Sup. Ct. L. Rev. (2d) 483; Henry S. Brown & Brian A. Crane, "Leave to Appeal Applications: The 1989-90 Term" (1991) 2 Sup. Ct. L. Rev. (2d) 473; Henry S. Brown, Brian A. Crane & Patricia Brethour, "Leave to Appeal Applications: The 1990-91 Term" (1992) 3 Sup. Ct. L. Rev. (2d) 381; Henry S. Brown, Brian A. Crane & Gordon Thomson, "Leave to Appeal Applications: The 1991-92 Term" (1993) 4 Sup. Ct. L. Rev. (2d) 27; Henry S. Brown, Brian A. Crane & Michel Jolicoeur, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada: The 1992-93 Term" (1994) 5 Sup. Ct. L. Rev. (2d) 1; Brian A. Crane, Henry S. Brown & Lorraine Allard, "Leave to Appeal Applications: The 1993-94 Term" (1995) 6 Sup. Ct. L. Rev. (2d) 545; Henry S. Brown, Brian A. Crane & Kathleen Lemieux, "Leave to Appeal Applications: The 1994-95 Term" (1996) 7 Sup. Ct. L. Rev. (2d) 421; Henry S. Brown, Brian A. Crane & Caroline Jill Date, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada 1996-1997" (1998) 9 Sup. Ct. L. Rev. (2d) 431; Henry S. Brown, Brian A. Crane & Mary Rose Ebos, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada 1997-1998" (1999) 10 Sup. Ct. L. Rev. 513; Henry S. Brown, Brian A. Crane & Nicole D. Winsor, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada 2000-2001" (2001) 15 Sup. Ct. L. Rev. (2d) 381; and Brian A. Crane, Henry S. Brown & Ryan E. Flewelling, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada" (2003) 22 Sup. Ct. L. Rev. (2d) 387.

[28] See Vaughan Black & Nicholas Richter, "Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990" (1993) 16 Dal. L.J. 377; Peter McCormick, "The Supreme Court Cites the Supreme Court: Follow-Up Citations on the Supreme Court of Canada, 1989-1993" (1995) 33 Osgoode Hall L.J. 453; Peter J. McCormick, "Judicial Citation, the Supreme Court of Canada, and the Lower Courts: The Case of Alberta" (1996) 34 Alta. Law Rev. 870; Peter McCormick & Tammy Praskach, "Judicial Citation, the Supreme Court of Canada, and the Lower Courts: A Statistical Overview and the Influence of Manitoba" (1996) 24 Man. L. J. 335; Peter McCormick, "Do Judges Read Books Too?: Academic Citations by the Supreme Court of Canada 1991-96" (1998) 9 Sup. Ct. L. Rev. 463; and Peter McCormick, "Second Thoughts: Supreme Court Citation of Dissents and Separate Concurrences, 1949-1999," (2002) 81 Can. Bar. Rev. 369.

[29] See Andrew D. Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal" (1991) 24 Can. J. Pol. Sci. 289; Peter McCormick, "Follow the Leader: Judicial Power and Judicial Leadership on the Laskin Court, 1973-1984" (1998) 24 Queen's

background variables on their judging;[30] how the judgments of the various provincial appellate courts fare when reviewed by the Supreme Court;[31] the Court's treatment of particular legal issues;[32] and, finally, the extent to which the Court has been "activist" in some of its decisions.[33]

By comparison, scholarship focusing on the provincial appellate courts is a relatively recent development. Peter McCormick—a political scientist—pioneered this new and valuable area of empirical judicial research. McCormick's early work focused primarily on the Alberta and Manitoba appellate courts. With respect to Alberta, he considered the

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L.J. 237; Peter McCormick, "Birds of a Feather: Alliances and Influences on the Lamer Court 1990-1997" (1998) 36 Osgoode Hall L.J. 339; Peter J. McCormick, "The Most Dangerous Justice: Measuring Judicial Power in the Lamer Court 1991-97" (1999) 22 Dal. L.J. 93; C. L. Ostberg, Matthew E. Wetstein & Craig R. Ducat, "Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991-1995" (2002) 55 Pol. Res. Q. 235; Lori Hausegger & Stacia Haynie, "Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division" (2003) 37 Law & Soc'y Rev. 635; Peter McCormick, "'With Respect ...' - Levels of Disagreement on the Lamer Court 1990-2000" (2003) 48 McGill L.J. 89; C. L. Ostberg, Matthew E. Wetstein & Craig R. Ducat, "Acclimation Effects on the Supreme Court of Canada: A Cross-Cultural Examination of Judicial Folklore" (2003) 84 Soc. Sci. Q. 704; C. L. Ostberg, Matthew E. Wetstein & Craig R. Ducat, "Leaders, Followers, and Outsiders: Task and Social Leadership on the Canadian Supreme Court in the Early 'Nineties'" (2004) 36 Polity 505; Matthew E. Wetstein & C. L. Ostberg, "Strategic Leadership and Political Change on the Canadian Supreme Court: Analyzing the Transition to Chief Justice" (2005) 38 Can. J. of Pol. Sci. 653.

[30] See Peter McCormick, "Judicial Career Patterns and the Delivery of Reasons for Judgment in the Supreme Court of Canada, 1949-1993" (1994) 5 Sup. Ct. L. Rev. 499; C. Neal Tate & Panu Sittiwong, "Decision making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations" (1989) 51:4 J. Pol. 900.

[31] See Peter McCormick, "The Supervisory Role of the Supreme Court of Canada: Analysis of Appeals from Provincial Courts of Appeal, 1949-1990" (1992) 3 Sup. Ct. L. Rev. (2d) 1. See also Barbara Billingsley & Bruce P. Elman, "The Supreme Court of Canada and the Alberta Court of Appeal: Do the Top Courts Have a Fundamental Philosophical Difference of Opinion on Public Law Issues?" (2001) 39 Alta. L. Rev. 703, compiling data on the Court's treatment of public law judgments originating from the Alberta Court of Appeal.

[32] See Gerard E. Mitchell, *The Supreme Court on Excluding Evidence Under the Charter* (Charlottetown: P.E.I. Law Foundation, 1992); F.L. Morton, Peter H. Russell & Michael J. Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1; and C.L. Ostberg & Matthew Wetstein, "Dimensions of Attitudes Underlying Search and Seizure Decisions of the Supreme Court of Canada" (1998) 31:4 Can. J. Pol. Sci. 767.

[33] See Sujit Choudhry & Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v. NAPE*" (2003) 48 McGill L.J. 525. For a critique, see Christopher P. Manfredi & James B. Kelly, "Misrepresenting the Supreme Court's Record? A Comment on Sujit Choudhry and Claire E. Hunter, 'Measuring Judicial Activism on the Supreme Court of Canada'" (2004) 49 McGill L.J. 741.

treatment of sentence appeals in light of a number of variables (offence, origin of case, panel composition, extent of any modification to sentence).[34] Similarly, McCormick also looked at how the court dealt with criminal conviction appeals.[35] This last study provided statistics on the origins of the cases appealed, the overall success rate, and the success rate of the accused as the appellant and the Crown as the appellant. Statistics as to the processing speed of appeals were also reported, as well as appeal success rates for five general categories of offences. These results were not linked back to the composition of the presiding panel, although a distinction was made between regular panels and those containing ad hoc judges. More recently, Barbara Billingsley and Bruce Elman[36] examined all of the Alberta Court of Appeal's public law decisions since the *Charter* was enacted that were subsequently overturned by the Supreme Court. They concluded that some fundamental philosophical differences divide the two courts in many of these cases.

McCormick's studies of the Manitoba Court of Appeal are also quite extensive. In one, he analyzed all of the Manitoba Court of Appeal cases that were reviewed by the Supreme Court between 1906 and 1990.[37] This study attempted to identify recurring patterns and variables among these cases. In addition, McCormick looked at the court's caseload and output over a four-year period.[38] With respect to output, these studies reported on a number of relevant features of the court's decisions: first, the success rates of appellants before the court generally and, also, in specific categories of cases including sentence, criminal, family, private law, public law, financial, and references; and second, the voting patterns of specific judges generally—that is, the statistical rate at

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[34] Peter McCormick, "Sentence Appeals to the Alberta Court of Appeal, 1985-1992: A Statistical Analysis of the Laycraft Court" (1993) 31 Alta. L. Rev. 624.

[35] Peter McCormick, "Conviction Appeals to the Alberta Court of Appeal: A Statistical Analysis, 1985-1992" (1993) 31 Alta. L. Rev. 301.

[36] Billingsley & Elman, *supra* note 31.

[37] Peter McCormick & Suzanne Maisey, "A Tale of Two Courts II: Appeals from the Manitoba Court of Appeals to the Supreme Court of Canada, 1906-1990" (1992) 21 Man. L.J. 1.

[38] See Peter McCormick, "Caseload and Output of the Manitoban Court of Appeal: An Analysis of Twelve Months of Reported Cases" (1990) 19 Man. L.J. 31; Peter McCormick, "Caseload and Output of the Manitoba Court of Appeal, 1989" (1991) 19 Man. L.J. 334; Peter McCormick, "Caseload and Output of the Manitoba Court of Appeal, 1990" (1992) 21 Man. L.J. 24; and Peter McCormick, "Caseload and Output of the Manitoba Court of Appeal, 1991" (1993) 22 Man. L.J. 263 [McCormick, "Manitoba Court of Appeal, 1991"].

which each judge voted to dismiss or allow appeals. More specifically, these studies considered how each judge voted in criminal appeals—the statistical rate at which each judge favoured the Crown, as opposed to the accused, in criminal appeals. (Cases within the criminal category were not broken down further based on offence type or the fact that a *Charter* claim may have been involved.) These studies also reported on a number of other aspects related to decision-making at the Manitoba Court of Appeal, including the rate at which individual judges dissented from the majority, apparent alliances between certain judges based on frequency of pairings in non-unanimous decisions, the source of precedents cited by the court in its judgments, and the rate at which precedents from various courts were cited in specific categories of cases. Finally, the most recent study of the Manitoba Court of Appeal also included an analysis of an additional variable: success rates based on the type of litigant (*i.e.* Crown, "Big" Business, Federal or Provincial Government, Business, Municipal Government, Individuals, Other Litigants).[39] This study revealed that in cases decided between 1989-1991 "Big" Business succeeded before the court 65.7% of the time, whereas individuals only succeeded 38.5% of the time.[40]

There are analogous studies of the Saskatchewan Court of Appeal by Dwight Newman,[41] which examined the output of the Saskatchewan Court of Appeal from both quantitative and qualitative standpoints. Newman's studies included statistics on the types of cases decided, the number of decisions rendered by each judge and the form of those decisions (*i.e.* written or oral), as well as the voting record of each judge generally, and more specifically in both civil and criminal cases. The voting record of the judges was then broken down further, depending upon whether the Crown or the accused was appealing and whether the appeal was against a conviction or a sentence. Beyond these general categories, however, none of these studies tracked the voting of individual judges with respect to more discrete legal issues within each category.

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[39] McCormick, "Manitoba Court of Appeal, 1991," *ibid.*

[40] *Ibid.*

[41] See Dwight G. Newman, "A Study of the Judgments of the Saskatchewan Court of Appeal, 2000" (2002) 65 Sask. L. Rev. 107; Dwight G. Newman, "A Study of the Judgments of the Saskatchewan Court of Appeal, 2001" (2003) 66 Sask. L. Rev. 21; and Dwight G. Newman, "A Study of the Judgments of the Saskatchewan Court of Appeal, 2002" (2004) 67 Sask. L. Rev. 13.

McCormick and others also studied the processing of appeals by the Court of Appeal for Ontario.[42] This group collaborated again in 1998, publishing the first comprehensive study on appellate courts in Canada.[43] That study employed both qualitative and quantitative methods; 80% of the judges sitting on Canadian appellate courts were interviewed, and a representative sample of 6,000 cases from these courts were analyzed. The empirical analysis of the cases yielded statistical insights into various aspects of decision-making by appellate courts across the country, including the stage of the process at which criminal appeals are resolved (before or after hearing); the rate at which judgments are reserved on criminal and civil cases; the attributes of the decisions (details about length and citations); the rate of dissenting opinions and large panels presiding over appeals, historically; the speed at which appeals are processed and heard; the length of hearings; the amount of time that elapses between hearing and judgment; and the rate at which substantive criminal appeals are allowed and dismissed.

Our study builds on the existing scholarship by employing a combination of quantitative and qualitative methods. Like some earlier Canadian studies, we observe the voting patterns of the court generally and also of each judge individually. This data set includes every reported decision of the Court of Appeal for Ontario between 1990 and 2003. In addition, unlike past studies, our data tracks judges by both party of appointment and gender. Just as importantly, the data that were collected distinguishes between different areas of law and, in certain areas where we thought it might prove relevant, creates subcategories within those areas. Beyond tracking the judges and the subject matter of the cases, this study also tracks case outcomes based on the type of litigant. It is only through this sort of multivariate analysis that real insight can be gained into whether or not extraneous factors, such as gender or party of appointment, matter to case outcomes. In short, we undertake in Canada the kind of empirical research into appellate court decision-making that has existed for some time in the United States, and which has been on the rise there in recent years.[44]

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[42] See Carl Baar *et al.*, "The Ontario Court of Appeal and Speedy Justice" (1992) 30 Osgoode Hall L.J. 261.

[43] See Ian Greene *et al.*, *supra* note 19.

[44] See *supra* note 12.

III. THE METHODOLOGY OF THIS STUDY

Each case decided by the Court of Appeal for Ontario between 1990 and 2003 was initially indexed by reference to eight broad categories: Criminal Law, Public Law, Commercial Law, Family Law, Employment Law, Labour Law, Private Law, and Other. Within each category further distinctions were drawn, and identifiers were used and tracked to distinguish between various classes of litigants depending on the context. Our initial subcategories and party identifiers were as follows:

CRIMINAL LAW		
Subcategories	**Definitions**	**Parties**
Offences Against the Person	Homicide, assault, robbery, etc.	Crown; Accused
Offences Against Property Rights	Theft, fraud, etc.	Crown; Accused
Public Morals	Prostitution, gaming, etc.	Crown; Accused
Narcotics	Importing, trafficking, possession, etc.	Crown; Accused
Sexual Assault	All offences of sexual violence, sexual assault, aggravated sexual assault, sexual exploitation, etc.	Crown; Accused
Domestic Violence	Crimes of violence where accused and complainant are in domestic relationship	Crown; Accused
Criminal—Other	Crimes that do not fall into the above categories	Crown; Accused
Criminal—Regulatory	Offences other than those that are characterized as criminal or narcotics offences	Crown; Defendant
Charter—Case-specific Remedy	*Charter* applications where accused seeks exclusion of evidence or stay of proceedings	Crown; Accused
Charter—Invalidation	*Charter* application where accused seeks declaration of invalidity	Crown; Accused
Charter—Combined	Case-specific remedy sought, along with declaration of invalidity	Crown; Accused

PUBLIC LAW		
Subcategories	**Definitions**	**Parties**
Non-criminal *Charter*	*Charter* claims other than those advanced in criminal proceedings	Individual; Corporation; Crown; Other State Actor
Constitutional Division of Powers	Constitutional litigation focused on the *vires* of legislation	Individual; Corporation; Provincial Government; Federal Government; Other State Actor
Human Rights	Rights claims as between private actors, usually under human rights legislation	Individual; Corporation; Crown; Human Rights Commission

Administrative Law	All litigation touching on administrative law matters	Individual; Corporation; Crown; Administrative Body
Aboriginal—Constitutional	Litigation that raises issues under sections 25 and/or 35 of the *Constitution Act, 1982*	Individual; Band; Provincial Government; Federal Government; Other State Act
Aboriginal—Other	All other forms of litigation that primarily raise issues affecting Aboriginal Peoples, but not involving sections 25 and/or 35 of the *Constitution Act, 1982*[45]	Individual; Band; Provincial Government; Federal Government; Other State Actor
Environmental	All litigation raising environmental issues, including prosecutions for violations of environmental protection legislation, etc.	Individual; Corporation; Crown

COMMERCIAL LAW		
Subcategories	**Definitions**	**Parties**
Contracts	Litigation regarding contractual claims	Individual; Corporation; Crown; Other State Actor
Corporate Law—Oppression Remedy	Corporate litigation in which minority shareholders pursue an oppression claim against majority shareholders	Minority Shareholder(s); Majority Shareholder(s)
Corporate Law—All Others	Corporate litigation involving all other claims	Individual; Corporation
Insurance Law	All litigation relating to insurance law claims	Individual; Corporation

FAMILY LAW		
Subcategories	**Definitions**	**Parties**
Child Custody	Family litigation involving disputes over child custody and/or access issues	Husband/Father; Wife/Mother
Child Support	Family litigation involving disputes over questions of child support	Husband/Father; Wife/Mother
Spousal Support	Family litigation involving disputes over questions of spousal support	Husband/Father; Wife/Mother
Other	Other family law litigation not captured by the above subcategories	Husband/Father; Wife/Mother

EMPLOYMENT & LABOUR LAW		
Subcategories	**Definitions**	**Parties**
Wrongful Dismissal	Litigation in which an employee seeks damages against an employer for wrongful dismissal	Employee; Employer
Labour	Labour disputes between groups of employees and their employer	Union; Employee; Management

[45] Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

PRIVATE LAW		
Subcategories	**Definitions**	**Parties**
Professional Responsibility	All litigation relating to lawyers. (*i.e.* fraud, negligence claims, judicial review of professional discipline, etc.)	Lawyer; Client; Law Society
Negligence	Torts claims in which negligence is alleged	Individual; Corporation; Crown
Torts	All other tort claims	Individual; Corporation; Crown

Although we initially used the above subcategories to collect our data, some subcategories contained too few observations for statistical analysis. As a result, we collapsed the above subcategories, creating more general classifications, which were then subjected to further statistical analysis. These broad categories and the component subcategories are as follows:

Broad Categories	**Original Subcategory Components**
Aboriginal	Aboriginal—*Charter*; Aboriginal—Other
Administrative Law	Administrative Law; Taxation
Constitutional Law	Non-criminal *Charter*; Constitutional Division of Powers; Human Rights
Private Law	Contracts; Corporate Law—Oppression Remedy; Corporate Law—All Other; Insurance Law; Negligence; Torts
Criminal *Charter*	*Charter*—Case-specific Remedy; *Charter*—Invalidation; *Charter*—Combined
Criminal Non-*Charter*	Domestic Violence; Narcotics; Sexual Assault; Offences Against the Person; Property Offences; Public Morals; Criminal—Other
Criminal Gender	Domestic Violence; Sexual Assault
Public Law	Criminal—Regulatory; Environmental
Family Law	Child Custody; Child Support; Spousal Support; Family—Other
Labour	Labour; Wrongful Dismissal
Human Rights	Non-criminal *Charter*; Human Rights
Professional Responsibility	Professional Responsibility

Finally, we classified the judges of the appellate panels by their gender and by the party that formed the government which appointed them to the Court of Appeal for Ontario. The decision to track party of appointment, as opposed to other background variables that might serve to reveal political allegiances, was deliberate. It is true that the judicial appointments process in Canada is not as overtly partisan as it is in the United States. It is not at all difficult to name judges who are widely

perceived as being "liberal" who were appointed by a Conservative government, or judges considered "conservative" who were appointed by a Liberal government. As a result, we contemplated tracking judges based on perceptions of whether they are "conservative" or "liberal" in their judging. This would empirically measure whether such perceptions are rooted in fact or should be attributed to some other factor. The difficulty in this approach lay in deciding how to categorize the judges. We initially considered surveying members of the legal academy and profession, but ultimately decided against this, as our preliminary inquiries revealed that although this method might work for some known judges, there were too many judges of the Court of Appeal for Ontario for whom our respondents would have no preconceptions. In contrast, party of appointment is a fixed variable that is applicable to each and every judge. In addition, if the appointments process is in fact apolitical, one would expect no discernible differences in the voting patterns of judges who were appointed by governments headed by different parties. As a result, we decided that party of appointment is a worthwhile variable to track in this study.

The judges in our sample are listed in Table 1. The party of appointment refers to the party that was in power when each judge was appointed to the Court of Appeal for Ontario.[46]

Table 1: The Judges in the Sample by Name, Party of Appointment to the Court of Appeal, and Gender

Judge	Party of Appointment	Gender
Rosalie Abella	Conservative	Female
Louise Arbour	Liberal	Female
Robert B. Armstrong	Liberal	Male
Allan McNiece Austin	Conservative	Male
Stephen Borins	Liberal	Male
John W. Brooke	Conservative	Male
James J. Carthy	Conservative	Male
Marvin Catzman	Conservative	Male
Louise Charron	Conservative	Female
Eleanore A. Cronk	Conservative	Female
David H. Doherty	Conservative	Male
Charles L. Dubin	Liberal	Male
Kathryn N. Feldman	Liberal	Female

[46] If a judge was initially appointed to the Superior Court by the Conservatives but was subsequently elevated to the Court of Appeal by the Liberals, we classified the judge as "Liberal."

George D. Finlayson	Conservative	Male
Patrick T. Galligan	Conservative	Male
Eileen E. Gillese	Liberal	Female
Stephen T. Goudge	Liberal	Male
Samuel Grange	Liberal	Male
Peter D. Griffiths	Conservative	Male
Lloyde Houlden	Liberal	Male
Horace Krever	Conservative	Male
Jean-Marc Labrosse	Conservative	Male
Maurice Norbert Lacourcière	Conservative	Male
John I. Laskin	Liberal	Male
James C. MacPherson	Liberal	Male
Hilda McKinlay	Liberal	Female
R. Roy McMurtry	Liberal	Male
Michael J. Moldaver	Liberal	Male
John Wilson Morden	Conservative	Male
Dennis R. O'Connor	Liberal	Male
Coulter Osborne	Conservative	Male
Sydney L. Robins	Conservative	Male
Marc Rosenberg	Liberal	Male
Robert J. Sharpe	Liberal	Male
Walter Tarnopolsky	Liberal	Male
Karen M. Weiler	Conservative	Female

IV. CASE OUTPUT: SOME GENERAL OBSERVATIONS

Between 1990 and 2003, the Court of Appeal for Ontario released a total of 4,906 reported decisions,[47] most of which were decided by panels of three judges.[48] The number of reported judgments in each year is set out in Table 2.

Table 2: Number of Cases by Year

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total
Number of Cases	181	203	225	201	259	262	305	343	412	561	506	506	490	452	4906

[47] See Part I for a discussion of the incidence of so-called "unreported" judgments, typically disposed of by means of an "endorsement."

[48] Sometimes panels of five judges sit together; when one of the five panellists becomes unavailable, four judges render the decision.

The number of cases in each of our initial subcategories (hereafter referred to as the "narrow categories") is set out in Table 3a. The breakdown of cases based on the broad categories that we ultimately settled on for the purpose of our statistical analysis is set out in Table 3b.

Table 3a: Number of Cases by Narrow Category

Case Type by Narrow Category	Number of Cases	Percent
Aboriginal—*Charter*	2	0.04
Aboriginal—Other	20	0.41
Administrative Law	123	2.51
Charter—Invalidation	2	0.04
Constitutional	54	1.10
Contracts	387	7.89
Corporate Law—Oppression	18	0.37
Corporate Law—All Other	67	1.37
Criminal—*Charter* Case-specific Remedies	250	5.10
Criminal—*Charter* Issues Combined	7	0.14
Criminal—*Charter* Invalidation	42	0.86
Criminal—Domestic Violence	50	1.02
Criminal—Narcotics	247	5.03
Criminal—Offences Against the Person	772	15.74
Criminal—Other	299	6.09
Criminal—Offences Against Property Rights	211	4.30
Criminal—Public Morals	55	1.12
Criminal—Regulatory	56	1.14
Criminal—Sexual Assault	533	10.86
Environmental	21	0.43
Family—Child Custody	38	0.77
Family—Child Support	48	0.98
Family—Other	90	1.83
Family—Spousal Support	61	1.24
Human Rights	18	0.37
Insurance	222	4.53
Labour	73	1.49
Negligence	290	5.91
Non-criminal *Charter*	87	1.77
Other	446	9.09
Professional Responsibility	42	0.86
Taxation	38	0.77

Torts	133	2.71
Wrongful Dismissal	104	2.12

Table 3b: Number of Cases by Broad Category

Case Type by Broad Category	Number of Cases	Percent
Aboriginal	22	0.45
Administrative Law	161	3.28
Constitutional Law	54	1.10
Criminal—Non-*Charter*	1584	32.3
Criminal—*Charter*	299	6.10
Criminal—Gender	583	11.89
Family	237	4.83
Human Rights	105	2.14
Labour	177	3.61
Other	446	9.09
Professional Responsibility	42	0.86
Private	1117	22.78
Public	77	1.57

Some narrow categories, such as criminal offences against the person and sexual assaults, each accounted for over 10% of the total number of cases during this time period. Additionally, contract cases, criminal cases involving narcotics, criminal cases where a *Charter* remedy was sought (which were often narcotics cases), negligence cases, and insurance cases each accounted for over 5% of the total number of cases during this period. In terms of the broader categories, criminal cases made up over 38% of the court's reported judgments, of which 11% involved sexual assaults and domestic violence, while private law disputes made up 23% of the court's reported cases.

Table 4 reports the disposition of cases below, while Table 5 reports the outcomes of the cases on appeal. About 18% of appeals concern a criminal sentence or the quantum of damages. Appeals from criminal convictions represent roughly 31% of cases, but only slightly under 4% of appeals result from the Crown appealing an acquittal. In private law disputes both winners and losers appealed with an equal frequency of 21%. On appeal, 57% of the cases were affirmed, while 42% of the decisions appealed from were overturned. Table 6a reports the disposition of appeals of selected narrow categories in which there were 100 observations or more, while Table 6b does the same based on

the broad categories. The affirmation rate was consistently high in each category, and it is especially high for private law disputes.

Table 4: Disposition of Cases at Trial

Decision	Number of Cases	Percent
Magnitude[49]	896	18.26
Acquittal	177	3.61
Allowed	1121	22.85
Conviction	1544	31.47
Dismissal	1075	21.91
Plea	3	0.06
Stay	90	1.83

Table 5: Disposition of Cases on Appeal

Decision	Number of Cases	Percent
Affirm	2818	57.44
Overturn	2083	42.46
Stay	5	0.1

Table 6a: Percentage of Affirmation in Narrow Categories with 100 or More Observations.

Case Type by Narrow Categories with 100+ Observations	Percent Affirmed
Administrative Law	55
Contracts	63
Criminal—*Charter* Case-Specific Remedies	58
Criminal—Narcotics	53
Criminal—Offences Person Against the Person	60
Criminal—Other	51
Criminal—Offences Against Property Rights	54
Criminal—Public Morals	55
Criminal—Sexual Assault	51
Insurance	59
Negligence	60
Other	58
Torts	69
Wrongful Dismissal	60

[49] Magnitude refers to sentences applied in criminal cases and damages awarded in civil cases.

Table 6b: Percentage of Affirmation in Broad Categories

Case Type by Broad Categories	Percent Affirmed
Aboriginal	50
Administrative Law	55
Constitutional Law	67
Criminal—Non-*Charter*	56
Criminal—*Charter*	60
Criminal—Gender	51
Family	57
Human Rights	66
Labour	57
Other	58
Professional Responsibility	67
Private	62
Public	38

Dissenting judgments were quite rare. As Table 7a reveals, there were dissents in only about 6% of the court's reported judgments—quite a powerful statistic. Table 7b presents the unanimity rate by year, and it reveals an increasing trend towards unanimous judgments. Perhaps this reflects the retirement of earlier Conservative appointees and therefore an increased level of political homogeneity among the remaining judges—recall that the Liberals won the federal election in 1993, and therefore, that more and more Liberal appointees joined the court after 1994. Nonetheless, even at its lowest rate of 87%, the Court of Appeal for Ontario tends to have an institutional orientation toward consensus.[50]

Our findings also reveal that very little variation in unanimity rates as between different categories of cases. In other words, the judges tended to reach consensus in their decision-making regardless of the nature of the case. (Table 7c reports the unanimity rate for the narrow categories with 100 observations or more, while Table 7d does the same for the broad categories.) Nevertheless, there are some noteworthy variations. For example, the level of unanimity is at its highest in

[50] The collegiality that develops between judges working closely together on an appellate court may very well serve to explain this extraordinarily high rate of unanimous decision-making. See generally Harry T. Edwards, "The Effects of Collegiality on Judicial Decision Making" (2003) 151 U. Pa. L. Rev. 1639.

narcotics cases (97%), but drops off significantly in sexual assault cases (93%). This may reflect the comparatively contentious nature of cases in the latter category.

Table 7a: Unanimity Rate

Nature of Decision	Number of Cases	Percent
Dissent	278	5.67
Unanimous	4628	94.33

Table 7b: Unanimity Rate by Year

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Unanimity Rate	92	85	92	92	90	91	92	97	94	96	96	95	97	98

Table 7c: Unanimity Rate by Narrow Categories with 100 or More Observations

Case Type—Narrow Categories with 100 or More Observations	Percent Unanimous
Administrative Law	94
Contracts	95
Criminal—*Charter* Case-Specific Remedies	96
Criminal—Narcotics	97
Criminal—Offences Person Against the Person	94
Criminal—Other	95
Criminal—Offences Against Property Rights	94
Criminal—Public Morals	95
Criminal—Sexual Violence	93
Insurance	95
Negligence	94
Other	94
Torts	94
Wrongful Dismissal	97

Table 7d: Unanimity Rate by Broad Categories

Case Type—Broad Categories	Percent Unanimous
Aboriginal	100
Administrative Law	95
Constitutional Law	87
Criminal—Non-*Charter*	95
Criminal—*Charter*	94
Criminal—Gender	92
Family	96
Human Rights	96
Labour	96

Other	94
Professional Responsibility	100
Private	95
Public	88

Decisions which are issued by "The Court" (known as *Per Curium* in the United States) are also quite pervasive. These judgments comprise approximately one third of the cases, as shown in Table 8a. Curiously, in 64% of the time, the result was to affirm, rather than to overturn, the decisions from below. The use of the decisions issued by "The Court" by broad category is presented in Table 8b.

Table 8a: Decisions Issued by "The Court"

Decision Issued by "The Court"	Frequency	Percent
No	3072	62.62
Yes	1834	37.38

Table 8b: Percentage of Decisions Issued by "The Court"

Case Type	Percent
Aboriginal	55
Administrative Law	28
Constitutional Law	31
Criminal—Non-*Charter*	43
Criminal—*Charter*	29
Criminal—Gender	42
Family	38
Human Rights	31
Labour	28
Other	32
Professional Responsibility	50
Private	35
Public	19

Finally, our study also reveals a fair amount of diversity in the appeal panels assembled by the court. The composition of panels in terms of the two characteristics, gender and party of appointment, is reflected in Tables 9a and 9b, respectively. Roughly 59% of the panels included judges of both genders, while 41% of the panels were all male; only 0.51% of the panels in this period were constituted entirely by female judges. In terms of who appointed the judges, 73% of the panels

were mixed; that is, they were made up of judges appointed by both a Conservative government and a Liberal government. While 18% of the panels comprised only Conservative appointees, 9% of the panels were made up only of Liberal appointees. Given that the Liberals took office in 1993, a period preceded by nine years of government by the Progressive Conservatives, the court between 1990 and 2003 was rich with judges appointed by both parties. In terms of actual votes cast, Table 9c shows that 23% of the votes were cast by female judges, while Table 9d shows that Conservative appointees cast 59% of the votes, and Liberal appointees cast 41% of the votes.

Table 9a: Gender Composition of Panels

Gender of Panel	Number	Percent
Female	25	0.51
Mixed	2893	58.97
Male	1988	40.52

Table 9b: Party of Appointment Composition of Panels

Politics of Panel	Number	Percent
Conservative	905	18.45
Mixed	3578	72.93
Liberal	423	8.62

Table 9c: Votes by Judges' Gender

Gender	Number of Votes	Percent
Female	3239	22.8
Male	10966	77.2

Table 9d: Votes by Judges' Party of Appointment

Party of Appointment	Number of Votes	Percent
Conservative	8376	58.97
Liberal	5829	41.03

V. BEYOND CASE COUNTING: TRENDS IN PANEL VOTING BEHAVIOUR

In order to make more penetrating observations regarding the court's decision-making, the next step in our data analysis examined the rate at which the court affirmed or overturned cases in each of our categories, relative to the outcome of the court below. For example, while we report the rate of affirmation in each of our broad categories in Table

5b, above, we do not distinguish those rates based on the decisions from below. In the Criminal Non-*Charter* category, for instance, a case could be on appeal from either a conviction or an acquittal; whether the court affirms convictions or overturns acquittals may be seen as a measure of how "pro-accused" or "pro-Crown" the court may be. Of course, this may also reflect the actual merits of the cases in the different categories. Nevertheless, significant variations in these rates as between the different subcategories of the cases would be curious. Accordingly, we conducted a multivariate analysis of affirmation rates linked to case outcomes below for each of our subcategories. Using the logistic regression model (also known as the Logit procedure),[51] we tested whether the court affirmed the decision below as a function of case category and the disposition below. The equation is as follows:

$$P(y_i) = \sum \beta_i X_i + \varepsilon_i$$

y_i=1, Affirm case category interacted with Decision below

y_i=0, Overturn

The variable on the left represents the panel's decision, either to affirm or to overturn. The right side is a set of interactive dummies[52] representing the case category interacted with the decisions from below. The purpose of this procedure is to determine which categories have a statistically significant pattern of affirming or overturning decisions of the court below. The Logit procedure looks at a set of variables, such as whether the appellant was convicted of a narcotics offence, and measures the impact of this category on the odds that the judge will affirm or reverse the conviction.

Where a sufficient number of observations existed, we also broke down the decision from below based on what we termed "Magnitude," relative to which party was appealing, whether it was the defendant appealing the damages ordered against it (MagDef) or the plaintiff appealing the adequacy of the damage award (MagPl). Similarly, for criminal sentence appeals, we broke Magnitude into MagCrn and MagDef depending on whether the Crown or the accused

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[51] For a detailed introduction to the Logit procedure, see William H. Greene, *Econometric Analysis*, 3d ed. (Toronto: Prentice Hall, 1997) at 912-25.

[52] This is a technical term which means that the variable takes on a value of 0 if the category is absent and 1 if the category is present. No intercept was used.

was appealing against the sentence. In the family law categories, we reclassified the decision from below into Male and Female depending on the gender of the appellant: Male meant that the husband or father (or other male party) was appealing an adverse decision, and Female meant that a mother or wife was appealing. We eliminated those observations for which there was incomplete data. We also eliminated five observations where the court had stayed the decision below. This left us with 4,805 observations.

A. *Are There Noteworthy Differences in Affirmation Rates Within and Between Categories?*

Our study reveals a number of areas in which there are statistically significant patterns of affirming or reversing lower court decisions. We classified those categories for which the p-value[53] is less than 0.1 (10%) as statistically significant. Where a category is insignificant, there are two possible explanations. The first is that there is no genuinely discernible pattern in the court's decision-making within that category. The second is that there are not enough observations to discern from a statistical standpoint whether there is in fact an existing or emerging pattern.

1. Statistically Significant Findings

We now turn to the statistically significant findings.

i. ADMINISTRATIVE LAW

In the narrow categories, not including taxation cases, our data reveal that individuals who appealed an adverse ruling were unsuccessful in their appeals at a statistically significant rate of 64%.

ii. CRIMINAL LAW

Statistically noteworthy patterns are also apparent in criminal cases, especially those involving *Charter* claims. While dismissals of constitutional challenges to a statute were affirmed on appeal almost

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[53] P-value is the level of confidence we can have in the outcome of the court being random. We chose 10% as our cut-off for which results we interpreted as being statistically significant.

90% of time, acquittals obtained via case-specific *Charter* remedy (*i.e.* the exclusion of unconstitutionally obtained evidence or a stay of proceedings) were reversed on appeal 91% of the time.[54] Where a case-specific *Charter* remedy was refused and a conviction resulted, the appellate court affirmed the conviction 71% of the time. In narcotics cases, acquittals appealed by the Crown were reversed 87.5% of the time, while convictions appealed by the accused were affirmed 59% of the time. It is not surprising that the *Charter*—Case-specific Remedies cases and the narcotics cases seem to receive comparable treatment. Many of the *Charter*—Case-specific Remedies cases are also narcotics cases. These are cases in which, at trial, the accused unsuccessfully challenged the police search that led to the discovery of the drugs that were ultimately used to secure a conviction.

Interesting trends also continue in non-narcotics criminal cases. Appeals of convictions and sentences in criminal cases involving offences against the person were affirmed 62% of the time. The Crown's appeals of cases involving property offences were successful 87.5% of the time, while the accused's appeal of these cases were successful only 42% of the time. The Crown was also successful in appealing acquittals in 88% of cases involving regulatory offences. Sentence appeals by the Crown in sexual assault cases were successful 78% of the time. In contrast, sentence appeals by those convicted of sexual assault cases were dismissed 76% of the time.

It is not surprising that in criminal matters the Crown has such a high success rate on appeal. Our study reveals that the Crown appeals at a far lower rate than individual accused persons, which suggests that there is a great deal of pre-screening within the Crown's office before an appeal is launched. In short, the Crown seems to exercise its right of appeal sparingly, restricting itself to those cases where success on appeal seems likely. As a result, the Crown tends to be successful in criminal appeals at a considerably higher rate than individuals appealing their convictions or sentences.

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[54] The rate is 18.5%, but this is the rate of affirmation, which means that the rate of reversal is 91.5%. It should be noted that in Ontario, appeals by the Crown, which is what these cases involve, are comparatively rare. In short, the Crown appears to be far more selective when it comes to deciding whether or not to appeal.

iii. FAMILY LAW

Family law cases also reveal some noteworthy results. For example, males who appealed trial judgments relating to child custody, the quantum of spousal support, or other related matters were unsuccessful in 70%, 63%, and 61% of the cases, respectively.

iv. CORPORATE LAW

Corporate law produced a rather interesting and entirely unexpected result. The court, at the extraordinarily high rate of 89%, affirmed oppression actions that were dismissed at trial. In other words, minority shareholders who failed to make out a claim at trial enjoyed a less than one in ten chance of success on appeal! This is a fact that lawyers who act for minority shareholders may wish to bring to a client's attention before initiating what will most likely be, according to these data, an unsuccessful (and no doubt costly) appeal.

v. PRIVATE LAW

Deference appears to be the watchword for most private law disputes that come before the court. Contracts, insurance, negligence, and torts cases were affirmed 60% of the time, regardless of the result below. That is, the affirmation rate did not vary based on who won or lost at trial. Thus, there seems to be a clear tendency to defer to the judgments of the trial courts in private law matters. This is significant because few litigants would bear the cost of appealing a civil judgment, unless they could be optimistic about their chances for success.[55] Those contemplating an appeal from a civil judgment should probably keep this statistical reality in mind before deciding to run the added risk of a further cost award should they be unsuccessful on appeal.

2. Aggregated Categories

As was noted above, in some areas, the absence of statistically significant observations may be an artifact of too few observations in that category or, alternatively, a reflection of the fact that there really is no discernible trend in these areas. One way to remedy the small data

[55] Priest & Klein, *supra* note 18 at 5.

problem is to aggregate the categories. Using the broader category definitions and reapplying the Logit produced some noteworthy results.

i. ADMINISTRATIVE LAW

In the broad category of administrative law, corporations appealing adverse decisions were likely to be unsuccessful 64% of the time. Although individuals were also likely to be unsuccessful on appeal, the statistically significant difference in the success rate between individuals and corporations disappeared. Aggregating tax and other administrative decisions seemed to indicate that corporations are less successful, but it also blurred the trend, noted in more discrete categories, that individuals were not as successful. Recall that when using the narrow categorization, individuals were generally unsuccessful in appealing adverse administrative decisions, but this broader analysis of the data reveals that individuals are successful at appealing taxation decisions, albeit in a statistically insignificant manner. Hence, combining these observations removes any trend associated with individuals, but strengthens it for corporations, since corporations were unsuccessful in both administrative and tax appeals.

ii. CRIMINAL LAW

In non-*Charter* criminal law cases, convictions were affirmed 61% of the time, acquittals were overturned 71% of the time, sentence appeals by defendants were affirmed 57% of the time, and stays ordered in the court below were overturned 76% of the time. In cases where a *Charter* claim was advanced in the court below, the results on appeals from convictions, acquittals, and stays remained essentially the same. For example, where a *Charter* claim was rejected at trial, the result was affirmed on appeal 76% of the time. Crimes that had a gender component, such as sexual assault and domestic violence, resulted in successful sentence appeals by the Crown 75% of the time; meanwhile, sentence appeals by offenders were unsuccessful 74% of the time, and appeals by the Crown against a stay of proceedings were successful 82% of the time. Again, these results, at a minimum, confirm the selection bias, noted above, with respect to Crown appeals in criminal matters.

iii. FAMILY LAW

Family law stood out yet again. Males who appealed an adverse decision in family law disputes were unsuccessful 62% of the time.

iv. PRIVATE LAW

In private law cases, regardless of whether or not liability was found, the court affirmed the result at the rate of 62%. In addition, appeals by plaintiffs with respect to the quantum of damages were dismissed 67% of the time.

To this point, we have reported the averages for the court as a whole. The next part addresses our main line of inquiry: whether or not party of appointment or gender played any role in the outcomes of these cases.

B. *Does Party of Appointment Matter?*

To isolate the political element, we reapplied the Logit procedure, this time including the party of appointment of the panel as an independent or explanatory variable. Recall that the dependant variable (the variable that is to be explained) is the panel's decision to affirm or overturn. The explanatory variables are the case's category, the decision below, and the panel's party of appointment. Panels were classified as Conservative, Liberal, or Mixed.

There were a number of noteworthy results, in the broad categories, which suggest that, at least in some cases, party of appointment does indeed matter.[56] Most surprising, however, is that in some instances, party of appointment mattered in ways that were unexpected and even counterintuitive.

Beginning with constitutional cases where a party challenged the constitutionality of a statute and the case was dismissed at trial, Mixed panels affirmed the dismissal 95% of the time, in a statistically significant way in comparison to single-party panels. Conservative panels affirmed 71% of the time, but these results were not statistically significant; Liberal panels also affirmed such dismissals but the results

[56] All results henceforth will be with respect to the broad categories, unless otherwise noted.

were similarly not significant.[57] In cases where the trial court dismissed a *Charter* challenge, an appellant facing a Conservative panel would have no *a priori* indication as to the direction of the ruling, whereas in facing a Mixed panel, the appellant would know that there is only a 5% chance of successfully appealing the trial court's decision.

In cases of the Criminal—Non-*Charter* category where the accused appealed the length of the sentence, Mixed panels affirmed the sentence 57% of the time. In cases where the Crown appealed an acquittal, there was a noticeable difference depending on the composition of the panel. Conservative panels overturned acquittals 76% of the time, whereas Mixed panels overturned acquittals 70% of the time. Convictions were affirmed by Conservative panels and Mixed panels at a rate of 62% and 61% respectively.[58]

A panel's composition matters greatly in criminal cases involving *Charter* claims seeking to either exclude evidence or invalidate a legislation. In these cases, where the *Charter* argument was unsuccessful at trial and the accused was convicted, the panels generally affirmed the conviction. Conservative panels affirmed at a rate of 65%, Mixed panels at a rate of 70%, and Liberal panels at a rate of 87%. This is quite a stark and surprising result, as one might expect Conservative-appointed judges to be less likely to accede to *Charter* arguments than their Liberal counterparts. That said, in such cases, Conservative judges may have exhibited a libertarian inclination that is not shared as strongly by their Liberal counterparts. Curiously, the affirmation rate for Mixed panels was approximately the average of the affirmation rates of the single-party panels. This indicates that the presence of just one judge appointed by another political party was sufficient to dampen the trend that would otherwise be apparent if the panel was entirely made up of judges appointed by the same party. This finding is consistent with the dampening trend observed by Sunstein, Schkade, and Ellman in their study of the United States Courts of Appeals.

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[57] This has more to do with the number of observations for Conservative panels and Liberal panels hearing appeals from dismissals of constitutional challenges to statutes. There were only seven Conservative panels hearing such cases, and only one Liberal panel, but twenty-one Mixed panels (of which twenty affirmed the dismissal and only one reversed).

[58] Liberal panels overturned acquittals 71% of the time, but there were only seven observations, making this statistically insignificant.

Affirmation rates appeared to be statistically significant only in cases presided over by Mixed panels. This could be a function of an insufficient number of observations involving such panels. It is also possible that the data actually reflect Mixed panels' greater tendency toward maintaining the status quo and deferring to the lower court decisions; Conservative and Liberal judges may be more inclined to defer to courts below for the sake of maintaining institutional cohesiveness. In contrast, for politically homogenous panels, the need for consensus to maintain good relations may not have been as pressing.

Cases where gender differences would likely be most pronounced revealed little variation based on the political composition of the panels. In criminal cases where there is typically a gender component (sexual assault and domestic violence), Mixed panels dismissed sentence appeals by accused persons 74% of the time, while allowing sentence appeals by the Crowns in such cases 77% of the time. Also, in family law cases where the male party appealed, the lower court decisions were affirmed 64% of the time by Mixed panels.

The trend toward deference in private law disputes that was noted above in Part V(A)(2) persisted despite the political composition of the panels. All three types of panels affirmed judgments rendered below in a statistically significant manner: Conservative panels affirmed 65% of the time, Liberal panels affirmed 63% of the time, and Mixed panels affirmed 64% of the time.

Human rights cases also presented some unexpected results. Where a claimant was unsuccessful at trial, Conservative panels affirmed the decision 80% of the time, Mixed panels affirmed 70% of the time, and Liberal panels affirmed 85% of the time. These results are quite surprising and, again, somewhat counterintuitive, given that Mixed panels affirmed at a significantly lower rate than both the Conservative panels and the Liberal panels. These results point toward the possibility that a lack of political cohesiveness caused Mixed panels to employ a different deliberative approach than those composed of all Liberal or all Conservative appointees. In other words, it may well be that a panel comprising only judges appointed by one political party tends to have default norms for certain types of cases, whereas a mixed panel may result in a more deliberative process.

When we reapplied the Logit procedure using the narrow categories, there were a few noteworthy results. Overall, the same trends observed with the broad categories continued to hold. However, in

contract cases where a claimant was successful at trial, Conservative panels affirmed the trial judgment 72% of the time, Mixed panels 66% of the time, and Liberal panels 71% of the time. Again, Mixed panels seemed to rule differently than homogeneous panels, exhibiting a greater likelihood to overturn lower court decisions than homogeneous panels.

The only other noteworthy variation with the narrow categories was in the tort law category. In those cases, where a claimant was successful at trial, Conservative panels affirmed the judgment 75% of the time, while Mixed panels affirmed 65% of the time.[59] This variation is somewhat puzzling in a category in which one would expect differences in political beliefs of the judges to matter very little, if at all. Again, this may be symptomatic of a difference in the dynamic that develops between judges, depending on how ideologically homogenous the panel happens to be. It is quite possible, for example, that a Liberal appointee may take a more conservative approach to a case when joined in the panel by Conservative appointees, in order to serve some unspoken and even subconscious desire to maintain collegial relations.

C. *Does Gender Matter?*

We reapplied the Logit procedure using a variable to indicate the gender composition of the panels. The panels were classified as Male, Female,[60] or Mixed. Once again, there were a number of noteworthy results—some expected and others rather surprising. In the end, these results seem to suggest that, at least in some types of cases, the gender composition of an appeal panel matters greatly.

Beginning with constitutional law, in cases where a statute was challenged on constitutional grounds and the trial court dismissed the claim, Mixed panels affirmed at a higher rate than Male panels—93% of the time, as compared to 86% of the time. In other words, the presence of a single female judge seemed to increase, albeit slightly, the likelihood of the court deferring to a trial judgment dismissing a constitutional challenge to a legislation.

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[59] There was no statistically significant trend observed with respect to Liberal panels.

[60] Given that only 0.51% of panels consisted entirely of female judges, there were insufficient data to draw any statistically reliable conclusions about the voting behaviour of such panels.

In contrast, in some categories the gender composition of the appeal panel did not seem to matter at all. For example, in sentence appeals by an offender, or in Crown appeals against an acquittal at trial, the results were entirely consistent in Male and Mixed panels. There was only slight variation in some other categories. For example, in non-*Charter* criminal cases where the accused was appealing, Mixed panels affirmed 59% of the time, while Male panels affirmed 63% of the time. Similarly, Mixed panels affirmed convictions 70% of the time in cases where a *Charter* claim was rejected at trial, while Male panels affirmed 71% of the time in such cases. Sentence appeals in cases where gender difference might seem likely, such as sexual violence and domestic violence cases, actually revealed Mixed and Male panels affirming the decisions from below at virtually the same rate.

There are other categories, however, where gender composition seemed to matter greatly. In cases where a *Charter* challenge was successfully asserted at trial, Male panels affirmed the result 70% of the time, while Mixed panels did so 82% of the time. This is a significant difference, as it means that an individual acquitted at trial via a successful *Charter* application had a 10% greater chance of having that acquittal affirmed on appeal when a female judge was on the panel.

In family law cases, where the male party appealed an adverse ruling, Mixed panels dismissed the appeal 60% of the time, while Male panels dismissed the appeal 64% of the time. Although a difference of four percentage points is small, the result suggests that some male judges may be more sympathetic to female litigants in family matters than their female counterparts. This provides some empirical grounding for concern about the possibility of male-on-male gender bias in these sorts of cases.[61] In other words, some male judges may consciously, or more likely subconsciously, be influenced by stereotypes regarding the roles of women and men in family relationships, a risk that strongly suggests a need for mixed-gender panels in family law appeals.

We reapplied the Logit procedure using our initial set of narrow categories. This revealed some noteworthy differences in voting patterns based on gender. To be frank, in some instances, these variations came in categories of cases where gender differences were entirely

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[61] For a study suggesting this at the law enforcement stage, see Grant A. Brown, "Gender as a Factor in the Response of the Law-Enforcement System to Violence Against Partners" (2004) 8 Sexuality & Culture 3.

unexpected. In this regard, the category that stands out the most concerns criminal cases where the accused was acquitted through a *Charter* remedy. In these cases, Mixed panels sided with the Crown and overturned the acquittal 73% of the time, while Male panels did so at a much higher rate of 92%. It is difficult to conceive of a rationalization for this sort of drastic variation; for some reason, Male panels were much more likely to overturn in this category of constitutional cases than they were if a female judge was present.

In sexual assault cases where an accused appealed the sentence, Mixed panels affirmed the sentence at a rate of 78%, while Male panels affirmed at a slightly lower rate of 73%. This difference suggests either a slight bias of female judges against men convicted of these offences or, alternatively, a slight bias of male judges in favour of the convicted male.

D. *Which Matters More?*

Clearly, both the party of appointment and the gender of the judges appear to influence the voting behaviour of the panel, at least in certain categories of cases. The next obvious step is to ask which factor is more powerful. To answer this, we reapplied the Logit procedure with the party of appointment and gender composition of the panel as explanatory variables. It should be noted that with the addition of explanatory variables, the ability of the model to identify which variables are significant was diminished in some categories where there were too few observations. Despite these limitations, our finding dos reveal some notable trends.

Beginning with criminal cases, panels that were mixed both in gender and party of appointment were highly likely to affirm dismissals of constitutional challenges to legislation. On sentence appeals, these panels were also more likely to affirm the penalty imposed by the sentencing judge. In cases where the Crown appealed an acquittal, the mixed panels (both in political appointments and gender) overturned acquittals 68% of the time, while Male panels overturned 71% of the time. In appeals against conviction, Conservative panels affirmed the conviction at the rate of 62%, regardless of the gender of the judges. Yet, gender seemed to matter for panels that were politically mixed when hearing conviction appeals. For example, politically mixed panels of all male judges affirmed convictions 65% of the time, while the presence of just one female judge in a politically mixed panel reduced that rate to 59%. The observations in these results show that male

Liberal judges had a slightly higher rate of affirming convictions, followed by Conservative judges, and then by female Liberal judges.

In cases where an accused was unsuccessful in advancing a *Charter* claim at trial, mixed-gender, mixed-party of appointment panels affirmed the conviction 68% of the time, all-male mixed-party of appointment panels of all male judges affirmed the conviction 73% of the time, mixed-gender Liberal panels affirmed 89% of the time, while all-male Liberal panels affirmed 86% of the time. Strangely, these results suggest that in conviction appeals turning on a *Charter* claim, the presence of a female Conservative judge on the panel maximized an appellant's chances for success. In contrast, Liberal panels, regardless of their gender composition, were less receptive to *Charter* claims. These results suggest that Conservative appointees in general, and female Conservative appointees in particular, are more civil libertarian in their judicial outlook than their Liberal counterparts, and that therefore they are more receptive to constitutional arguments.

In cases where a *Charter* claim was successful at trial and the charge(s) were dismissed, all-male mixed-party of appointment panels affirmed the decision 73% of the time, whereas the presence of a female judge on a mixed-party of appointment panel raised the rate of affirmation to 80%. In cases where the remedy granted at trial was a stay of proceedings, mixed-gender panels affirmed the result 26% of the time, whereas all-male panels did so only 12% of the time. These results suggest that female judges are more receptive to *Charter* claims in criminal cases than their male counterparts.

Family law cases also revealed some noteworthy results. In cases where the male party appealed, mixed panels (both in party of appointment and in gender) affirmed the lower court decision 60% of the time, while all-male mixed-party of appointment panels affirmed 70% of the time. Again, this provides a surprising indication of male-on-male bias in family law cases, at least for panels that are politically mixed. Of course, this result may have been fuelled by a greater likelihood of stereotypical thinking by male judges about women and family life. In family law cases men fared best before all-male Conservative panels: these panels affirmed adverse ruling against male litigants only 37% of the time—however, there were too few observations for this result to be considered statistically significant.

In the human rights category, mixed-gender Conservative panels affirmed dismissals at trial 86% of the time, while mixed gender, mixed-

party of appointment panels did so 72% of the time. This suggests that party of appointment matters in this area while gender does not.

We reapplied the Logit, once again, using the narrow categories, continuing to measure for the combined influence of a panel's political and gender composition. Again, in certain categories there were some noteworthy results.

Beginning with private law cases, all-male Conservative panels affirmed lower court decisions in contract cases 75% of the time, while mixed-gender Conservative panels did so 70% of the time. In insurance cases dismissed at trial, mixed-gender, mixed-party of appointment panels affirmed the dismissal 64% of the time, while all-male mixed-party of appointment panels did so 79% of the time. Male judges were more deferential to the trial outcome in insurance cases dismissed at trial, which suggests a greater tendency on the part of male judges to favour insurance companies. In negligence cases dismissed at trial, mixed-gender Conservative panels affirmed the dismissal 85% of the time, while mixed-gender, mixed-party of appointment panels did so 64% of the time. In summary, in negligence cases, party of appointment mattered more than gender; by contrast, in insurance cases, gender seemed to matter more.

Turning to criminal law, there was one noteworthy variation. In cases where an accused was convicted of an offence against the person and appealed, all-male mixed-party of appointment panels allowed the appeal 30% of the time, while mixed-gender panels did so 40% of the time. In other words, an accused convicted of a crime of violence had a slightly better chance of success on appeal when a female judge was on the panel hearing the appeal.

Collectively, these results seem to suggest that, as between the two variables, gender may matter more than party of appointment, although there are exceptions in some categories where party of appointment was statistically more important. Most interestingly, there appears to be greater cohesiveness in the decisions of judges of the same gender than in those from the same party of appointment. This is an important finding. Nearly twenty years ago, it was an open question whether the increasing proportion of female judges on our courts would matter to how cases are decided. At the time, Justice Bertha Wilson was

strongly of the view that the presence of female judges would indeed make a difference.[62] She explained:

> [W]hether you agree or not will probably depend on your perception of the degree to which the existing law reflects the judicial neutrality or impartiality ... If the existing law can be viewed as the product of judicial neutrality or impartiality, even although the judiciary has been very substantially male, then you may conclude that the advent of increased numbers of women judges should make no difference, assuming, that is, that these women judges will bring to bear the same neutrality and impartiality. However, if you conclude that the existing law, in some areas at least, cannot be viewed as the product of judicial neutrality, then your answer may be very different.[63]

Our results empirically validate Justice Wilson's theory that female judges would bring a different perspective to the judiciary than their male counterparts, and that this would serve to influence how cases are decided, at least in certain areas of the law.

VI. TRENDS IN THE VOTING BEHAVIOUR OF INDIVIDUAL JUDGES

The results above draw no distinction between unanimous decisions and decisions including dissenting opinion(s). In this part, we observe the voting behaviour of individual judges as a function both of party of appointment and gender. Although decisions including a dissent represented a very small proportion of the court's total case output, isolating the voting of each judge in every category while also tracking gender and party of appointment substantially increased the number of available observations. This analysis reveals that judges of either gender, appointed by either political party government, seem to exhibit very similar patterns in their voting, with rarely more than a few percentage points distinguishing them. In certain categories, however, there are some noteworthy differences.

A. *Party of Appointment and Gender*

Beginning with criminal law, in cases where the Crown appealed an acquittal, Conservative appointees allowed the appeal 77% of the time, while Liberal appointees did so 71% of the time. In

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[62] See Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507.

[63] *Ibid.* at 511.

cases where an acquittal was obtained via a successful *Charter* claim (*i.e.* exclusion of evidence), Conservative appointees voted to reverse the decision 82% of the time, while Liberal appointees did so 74% of the time. In other words, although there were statistical differences in how judges of different parties of appointment voted (with Conservative appointees being slightly more likely than Liberal appointees to overturn acquittals in both categories), there were also strong similarities. Specifically, both Conservative appointees and Liberal appointees tended to be more deferential toward acquittals that resulted from a trial on the merits than they were toward acquittals that stemmed from a successful *Charter* application.

Similarly, where charges were stayed because of a *Charter* challenge, Conservative appointees overturned acquittals at a rate of 83% (affirming the stay only 17% of the time), while Liberal appointees overturned at a rate of 74% (affirming the stay 26% of the time). In contrast, where the Crown appealed an acquittal in cases involving charges of sexual assault or domestic violence, Liberal appointees were more likely to overturn acquittals (76%) than their Conservative counterparts (65%). In short, the influence of party of appointment varied depending on the subject matter and the appellant (the Crown or the accused). With allegations that typically involve female victims and male perpetrators, Liberal-appointed judges were more likely than their Conservative counterparts to vote against the accused persons on Crown appeals. In contrast, in *Charter* criminal cases, the influence of party of appointment reversed, with Conservative appointees being more likely to overturn acquittals on Crown appeals than their Liberal counterparts.[64]

There are other noteworthy results to suggest that party of appointment does matter, at least in certain categories of cases and with certain types of litigants. For example, in family law cases appealed by a male party, Conservative appointees allowed the appeal 43% of the time, while Liberal appointees did so 33% of the time. This indicates that in family law cases, while a female party has an advantage before judges appointed by either party, a male party's chances of success are greater (by 10%) when before Conservative appointees rather than Liberal appointees.

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[64] The data reported here refer to findings based on the narrower *Charter* case categories. See Table 3a above.

Similarly, in human rights cases dismissed below (usually involving an individual or company seeking judicial review against the decision of the human rights tribunal), Conservative appointees affirmed the decision 76% of the time while Liberals appointees did so 70% of the time. In labour law cases where the employee appealed, Conservative appointees affirmed the decision from below 71% of the time, while Liberal appointees did so only 67% of the time.

The voting patterns of male and female judges were, for the most part, quite similar. That said, there were also some clear exceptions. For example, in criminal cases where a successful *Charter* challenge led to an acquittal, male judges voted to overturn 86% of the time while female judges did so only 71% of the time. This is a considerable but somewhat inexplicable difference. Although there are certain categories of cases where one would expect a judge's gender to matter, Crown appeals of acquittals following a successful *Charter* claim would not normally spring to mind.

Much more expectedly, the voting patterns of male and female judges diverged most significantly in cases involving sexual or domestic violence. In such cases, when the Crown appealed the sentence, male judges voted to allow the appeal 67% of the time, while their female counterparts did so 91% of the time. However, when the accused person appealed the sentence, both male and female judges dismissed the appeal and affirmed the sentence at the same rate of 70%. Nevertheless, the differences between the genders surfaced again in this category in cases where the Crown appealed acquittals entered at trial: male judges voted to overturn the acquittal 64% of the time, while female judges did so 85% of the time. Again, the individual voting patterns revealed a much wider disparity than that which was apparent in panel behaviours considered in light of gender composition. There is no other category in this study in which either gender or party of appointment mattered more. Of all the differences revealed by this study, none is more pronounced than the difference between male and female judges in cases involving sexual or domestic violence.

B. *Which Matters More?*

We next reapplied the Logit with both gender and party of appointment as explanatory variables to see which of the two characteristics influenced the judges' decision making more. Again, a number of noteworthy trends emerged.

Beginning with constitutional law, in cases where the constitutional challenge to legislation was dismissed at trial, female Conservative appointees voted to affirm the decision 92% of the time, while male Conservative appointees did so 83% of the time. Male Liberal appointees voted to affirm such cases 96% of the time, which indicated that they are either comparatively more skeptical of constitutional challenges to legislation or more deferential to trial judgments.

Differences in voting patterns were again apparent in criminal law cases. In some categories of cases, such as those involving sentence appeals by accused persons, female Conservative appointees, male Conservative appointees, and male Liberal appointees were all likely to affirm at closely related rates (61%, 57%, and 56% respectively). In contrast, in cases where the Crown appealed an acquittal, female Conservative appointees (77%), male Conservative appointees (71%), female Liberal appointees (70%), and male Liberal appointees (68%) exhibited somewhat more noticeable differences in the rates at which they voted to overturn acquittals. Female Conservative appointees were the most responsive to Crown appeals, with the differences between the other three categories of judges being less marked. When it came to criminal convictions, female Conservative appointees (61%), male Conservative appointees (62%), and male Liberal appointees (60%) all voted to affirm convictions at virtually the same rate. In contrast, female Liberal appointees were the least likely to affirm in these cases, doing so only 54% of the time.

In criminal cases involving a *Charter* challenge that culminated in the dismissal of the charge(s), female Conservative appointees affirmed the decision 92% of the time, and male Conservative appointees did so 72% of the time. Male Liberal appointees affirmed such cases 84% of the time, suggesting that, at least in this category, gender and party of appointment can both be important variables. In cases where a successful *Charter* challenge led to a stay of proceedings, female Conservative appointees overturned the stay 71% of the time and their male counterparts did so 87.5% of the time; meanwhile, female Liberal appointees did so 92% of the time and male Liberal appointees did so 69% of the time. Here, party of appointment and gender clearly mattered, although in rather surprising ways. For example, it seems that in cases of stay of proceedings resulting from *Charter* challenges, male Conservative appointees and female Liberal appointees shared similar perspectives, and the same was surprisingly true of female Conservative appointees and male Liberal appointees.

Once again, noteworthy differences were apparent in criminal cases that typically involved male perpetrators and female victims. In cases where the Crown appealed the sentence in cases of sexual or domestic violence, female Conservative appointees voted to allow the appeal 87.5% of the time while male Conservative appointees did so 66% of the time—male Liberal appointees allowed such appeals 72% of the time, putting them squarely between female Conservative appointees and male Conservative appointees. Convicted persons who appealed the sentence imposed for crimes of sexual or domestic violence were unsuccessful at about the same rate, regardless of the judge's gender: Conservative appointees affirmed 70% of the time while Liberal appointees did so slightly more often, 74% of the time.

Differences were also apparent in certain types of private law cases. In private law cases where a plaintiff appealed the amount of damages, female Conservative appointees affirmed 76% of the time while male Conservative appointees did so 63% of the time. Male Liberal appointees affirmed 69% of the time, again placing them squarely between their male and female Conservative counterparts. Female Conservative appointees affirmed private lawsuits that were successful in the lower court 68% of the time, and male Conservative appointees did so 62% of the time. Female Liberal appointees and male Liberal appointees did so 59% and 65% of the time, respectively. Again, this is an odd breakdown with inexplicable parallels in the voting of male Conservative appointees and female Liberal appointees, and in female Conservative appointees and male Liberal appointees. This same strange trend is again evident in private law cases that were dismissed below, with female Conservative appointees affirming at a rate of 66%, male Conservative appointees at a rate of 59%, female Liberal appointees at 61%, and male Liberal appointees at 64%.

In short, although our analysis reveals that party of appointment mattered, the gender of the judges mattered more.

C. *Is there a Dampening Effect?*

The study by Sunstein, Schkade, and Ellman found that, at least in certain categories of cases, there was a pronounced difference in the voting of judges based on party of appointment: Democratic or Republican. This effect was dampened, however, where panels were composed of judges appointed by both political parties. In other words, where a panel is made up of two Democratic appointees and one

Republican appointee (or two Republican appointees and one Democratic appointee), the judge in the political minority tended to vote with the other two judges. But the mixed-panel decision tended to be less ideologically extreme than it would have been if the panel were composed entirely of judges appointed by a single party. As part of our study, we decided to test whether such a dampening effect exists at the Court of Appeal for Ontario.

We reapplied the Logit procedure using the party of appointment of the judges and the party of appointment of the co-panellists as explanatory variables. To complete this analysis, we compared the individual judge's votes in light of his or her party of appointment, with his or her votes conditional on the co-panellists and the party or parties of appointment of the co-panellists. Recall from above that in criminal appeals, Conservative panels overturned acquittals 76% of the time, while mixed-party of appointment panels did so 70% of the time. Our further analysis revealed that a Conservative appointee sitting with Conservative-appointee co-panellists voted to overturn 81% of the time, but when sitting on a mixed panel (*i.e.* one with at least one Liberal appointee), only voted to overturn 64% of the time. Similarly, a Liberal appointee sitting with two other Liberal appointees voted to overturn acquittals 64% of the time, while a Liberal appointee sitting with Conservative and Liberal co-panellists overturned 69% of the time.

In cases where a *Charter* challenge was dismissed at trial and in which the accused was convicted, Conservative panels affirmed the decision 65% of the time, mixed-party of appointment panels affirmed 70% of the time, and Liberal panels affirmed 87% of the time. In contrast, a Conservative appointee sitting with two Conservative-appointee colleagues voted to affirm 63% of the time, while a Conservative appointee sitting with one Liberal appointee present on the panel voted to affirm 68% of the time, and a Conservative appointee sitting with two Liberal appointees voted to affirm 76% of the time. A Liberal appointee sitting on a panel of judges made up of all Liberal appointees affirmed 80% of the time, but only 67% of the time when a Conservative appointee was present on the panel. In this category, Conservative appointees tended to dampen the voting behaviour of Liberal appointees—while the presence of a Liberal appointee did have a dampening effect on Conservative appointees, it was comparatively less pronounced.

In short, these differences very strongly suggest that, at least in some categories of cases, there was a dampening effect at work at the

Court of Appeal for Ontario. Its impact varied with the composition of the panels, and it was most pronounced in the behaviour of Liberal appointees, whose voting was dampened significantly by the presence of a Conservative appointee on the panel. There was also a dampening effect on Conservative appointees voting when sitting with a Liberal appointee, but to a substantially lesser degree. Again, this did not hold in all categories of cases. For example, in cases where accused persons were appealing a conviction, diversity in the party of appointment among the judges did not have a discernible effect.

In terms of gender, we reapplied the Logit procedure with the gender of the judge and the genders of the co-panellists as explanatory variables. Gender again seemed to matter, with a noticeable dampening effect on its influence with mixed-gender panels. Some of the outcomes observed are extremely curious and in conflict with our expectations of when gender might matter.

Beginning with criminal cases in which an accused successfully asserted a *Charter* claim in obtaining an acquittal, mixed-gender panels affirmed the decision 81% of the time while all-male panels did so 70% of the time. A female judge sitting with another female judge affirmed the dismissal 82% of the time, while male judges sitting on all-male panels did so 72% of the time. Male judges on a panel with a single female judge, however, voted to affirm 86% of the time, thereby increasing their rate of affirming lower court decisions above the rate of their female colleagues.

Cases where one might suspect gender differences to be most pronounced are cases involving charges of sexual or domestic violence. Where the charges were stayed at trial in these cases, male judges sitting with all male colleagues voted to overturn the decision 82% of the time, while female judges sitting with female co-panellists voted to overturn the decision at only a slightly higher rate of 86% of the time.[65] The number dropped down to 79% when two male judges sat with a single female judge,[66] a rate lower than when there were two female judges on a panel.

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[65] The panel data on this category was not statistically significant enough to make any meaningful comparison.

[66] Of course, the comparatively high rate for overturning stays among all panels regardless of their gender composition is likely a by product of the exceptionally high standard that the

Unusual patterns also arose in human rights cases dismissed below. Male judges with all male co-panellists voted to affirm the dismissal 67% of the time, and female judges with at least one female co-panellist did so 71% of the time, but male judges with just one female co-panellist voted to affirm 73% of the time.

The influence of gender diversity was also apparent in labour law cases and in private law disputes. In labour law cases appealed by an employee, male judges voted to affirm 73% of the time, and a female judge sitting with another female judge voted to affirm 66% of the time, while male judges sitting with one female co-panellist voted to affirm 67% of the time. Similarly, in private law cases dismissed below, male judges in an all-male panel voted to affirm 55% of the time, while female judges sitting with another female judge did so 65% of the time, and male judges sitting with at least one female co-panellist voted to affirm 67% of the time.

These results suggest that there may be a dampening effect that accompanies gender diversity on appeal panels. The influence of gender diversity, in some categories, was unexpected, as was the way in which gender sometimes seemed to matter. Most curiously, as the last few examples illustrate, on certain issues, the voting of male judges seems to be influenced considerably by the presence of a single female colleague.

VII. CONCLUSION

Our study shows a remarkable amount of cohesiveness in the decision-making of judges on the Court of Appeal for Ontario. In most circumstances, neither the party of appointment nor the gender of a judge had any bearing on case outcomes. That said, as it is made apparent above, there were indeed certain categories of cases where either or both variables seemed to matter greatly, from a statistical standpoint. This is a cause for concern.

Our future research will focus on, among other things, the impact of the judges' background on their voting records. While this present study examined judges only by their gender and party of appointment, another study could examine individual judges and their voting records. Justices Abella and Charron, when they were appointed

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Supreme Court of Canada has set down for staying criminal proceedings. See *R. v. Regan*, [2002] 1 S.C.R. 297.

to the Ontario Court of Appeal, both voted on certain issues in discernible patterns. For example, in sentence appeals by the Crown in cases involving sexual or domestic violence (using the broad categories), Justice Charron voted over 95% of the time to allow the appeal (presumably in favour of a harsher sentence), while the justices other than Justice Charron voted to allow the appeal at an average rate of 69%. Similarly, when males appealed in family law cases, Justice Charron voted to uphold the lower court decision 88% of the time, while the other justices did so at an average rate of 56%. When there was an appeal on a human rights case that was dismissed below, Justice Charron voted 90% of the time to affirm the dismissal, while the other justices voted to affirm the dismissal 70% of the time. When Justice Abella was faced with an administrative law appeal by a corporation, she voted to affirm the decision from below 75% of the time, while her colleagues did so 60% of the time. These results are preliminary, and our future research will examine the question of the individual judges and the potential influence of their backgrounds on their decision-making.

To date, at least formally, the party of appointment and gender of judges on appeal panels were considered irrelevant. This study demonstrates that this should no longer be the case. As we all know, judges are human. Despite our best hopes, judges, like all people, bring their life experiences, including their political perspective and their gender, with them when they come to work. These are not variables that judges can, nor arguably should, check at the door. At the same time, both litigants and the public expect impartial justice. To the extent that it is possible, judges, on an individual level, and our institutions, on a systemic level, should strive for objective decision-making. Although this study empirically confirms that there is good reason for concern, it also points toward a relatively simple solution.

Put simply, diversity in the political and gender mix of appellate court panels is essential. With respect to the political composition of the bench, history has shown that natural cycles in our democratic processes make it very unlikely that one political party will hold power long enough to stack the courts.[67] That said, despite a fair mixture of judges appointed by both the Conservatives and the Liberals, it will often

[67] Admittedly, in the federal context, there have been some rather long periods of the Liberals holding power. Our experience over the last twenty-five years, however, suggests that changes in the governing party are growing more frequent than they may have been in generations past.

happen that three judges appointed by the same party sit together on an appeal panel. This study reveals that when dealing with certain legal issues—where political ideology would seem to matter—such panels behave differently than they would if one judge appointed by another political party had also been on the bench. The same is true with respect to gender. Again, at least with respect to certain issues where gender polarization seems most likely, panels composed of all male judges behave differently than panels that have a single female member.

Our research suggests the need to develop a panel selection process that deliberately ensures political and gender diversity while also respecting the wisdom of randomness in assembling the panels. At present, the Registrar determines the composition of panels at the Court of Appeal for Ontario. Developing a process that ensures political and gender diversity on appeal court panels would be an easy task and would go a considerable distance toward eliminating reasonable perceptions of bias that this study would now seem to have empirically validated.

Empirical legal research in Canada is in its relative infancy. Arguably, the most important lesson that emerges from this study is that long-standing assumptions that currently undergird our legal system are in need of empirical evaluation. Especially today, when Canada's legal system is routinely marked with profound changes, often precipitated by *Charter* litigation, we can no longer afford to rest future developments on unsubstantiated assumptions. It is the job of researchers to infuse legal and policy debates in Canada with the empirical knowledge that is required if our institutions are to evolve and mature.[68] Gaining that knowledge and effecting change is essential if we are to have a legal system of which all Canadians can be proud.

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[68] See generally Daved Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007) who makes this very same point.