

**Where Does the Supreme Court Caseload Come From?
Appeals from the Atlantic Courts of Appeal, 2000-2005
Peter McCormick**

The Supreme Court of Canada hands down about one hundred decisions per year¹ and these are the cases that are closely watched and studied by court watchers to identify the voting blocks and to pin down the doctrinal trends. But this, of course, is just the top of the judicial pyramid, which raises the question: where does the Supreme Court caseload come from? What cases wind up in front of the Court, and how do they compare with the mix of cases that one finds lower in the pyramid? Obviously, one hardly expects to find a representative cross-section of the trial court caseload to show up in the Supreme Court, but it would be useful to know what kinds of cases are screened out and what kinds tend to come through.

The question, of course, has two half-answers, and I will examine both of them. The first part of the answer has to do with the provincial and federal courts of appeal, because it is appeals from the decisions of these courts that make up almost all of the Supreme Court caseload.² It is the dissatisfied losers from the provincial courts of appeal, knocking on the Supreme Court's door, that provide the raw material from which the docket is constructed. The decision to appeal is very important but essentially mysterious, not always guided by as much judgment and calculation as one might expect. At every level, even the Supreme Court itself, appeal courts have a surprising number of "we will not need to hear from you, Mr. Smith" cases.³ The primary thrust of this paper will be to compare the set of cases where there is an attempt at further appeal with the broader universe of the entire court of appeal caseload, to identify those attributes of the provenance, the handling and the outcome of an appeal court decision which tend to correlate with a further appeal.

¹Actually, it was regularly more than 100 in the 1990s, and is regularly less than 100 in the new century – a declining docket is a phenomenon that is shared by both the SCC and the USSC.

²The other three sources are: reference cases from the federal government; reconsiderations of Supreme Court decisions; and *per saltum* appeals from provincial superior trial courts, but all together these account for only one or two cases per year.

³The point, of course, is that the appellant has to make a *prima facie* case for an appeal, and once this hurdle is cleared the respondent has the opportunity to rebut those arguments; when the Court begins a decision by saying "we will not need to hear from you" it means the appellant has failed to clear this minimal threshold, and the respondent has won without saying a word.

The second part of the answer has to do with the Supreme Court itself. The bulk of the Supreme Court caseload is made up of cases where the Court itself has granted leave to appeal. Most applications for leave are rejected – in recent years, the success rate varies between 11% and 15%. There are also appeals by right; these made up almost a third of the Lamer Court caseload, and although the 1999 amendments to the Criminal Code briefly trimmed this to less than one case in six, the number seems to be rebounding. As it happens, however, the provinces that will be considered in this paper supplied almost no appeals by right to the Supreme Court, so that phenomenon will not be considered to any extent.⁴ This creates a third set of cases that invites comparison with the first two described above – namely those cases that the Supreme Court has agreed (or, in the case of the five appeals by right, has been obliged) to consider. Because this number is small enough to invite case-by-case consideration, I will further identify the even smaller sub-set of cases in which the Supreme Court did something other than simply approve and agree with the appeal court's outcome and reasons.⁵

This is part of a larger project – I have already analyzed and written about appeals from the Manitoba Court of Appeal, and data collection is currently under way for the other three Western provinces. The sheer numbers make it unlikely that I will ever follow through on Ontario and Quebec. As the (revised) title promises, however, this paper will consider only appeals from the four Atlantic provinces. The time period is the obvious one: I will be considering those cases decided by the four provincial courts of appeal since the turn of the century, which also corresponds with the beginning of the McLachlin Court.⁶

The Data Base

The major part of the data set was generated from the provincial court of appeal decisions reported on the CANLII website (supplemented, for Nova Scotia, with the overlapping but not identical set of cases reported directly on the Nova Scotia courts web-site). As I learned from my Manitoba project, the CANLII case collection is not as complete as that of (say) Quicklaw, but the overwhelming advantage of CANLII for my purposes is that it is free. After several phone calls to a very patient Manitoba Registrar, I am confident that CANLII is picking up 95% or more of the decisions handed down by that Court of Appeal, and much of the remaining 5% is relatively minor stuff like denials of leave to appeal or ancillary questions about the assignment of costs. I think I have been able to generate a reasonably, but not absolutely, complete date-set for the provincial courts of appeal for the years that are reported. This takes me to a slightly more serious problem: CANLII only promises complete reports for New Brunswick since May

⁴Four courts generated five appeals by right in six years.

⁵This is, of course, not as simple as considering whether the case was allowed or dismissed; the Supreme Court can uphold the outcome, but make significant alterations to the reasons, and for my purposes this will also be considered as a type of intervention.

⁶Some would argue that 2000 is the last year of the 20th century, not the first year of the 21st, in which case I will use the McLachlin Chief Justiceship as my justification.

2001, and for Newfoundland and Labrador since January 2001; before that date, the information is more fragmentary. I therefore only have about 90% to 95% of the full “24 court-years” on which I had wanted to base this study.

The supplementary part of the data set was drawn from the Supreme Court of Canada web-site, which allows one to query the last 100 cases generated from a province. Cross-referencing this back against the Supreme Court bulletins (also accessible from the Supreme Court web-site) allows leaves by right and applications for leave from a province to be matched back against the specific decisions in the provincial court of appeal data base. From these two pieces of information, it is possible to follow the case through its consideration for leave to a final outcome.

The match is not perfect. Some applications for leave to appeal to the Supreme Court are from refused applications for leave to appeal to the Court of Appeal; these do not always leave reported reasons in the Court of Appeal, and may not appear on the Court of Appeal list. (As the Manitoba registrar pointed out for a couple of cases, there really was not anything to report.) Some appeals from the provincial courts come with publication bans at the provincial level, and are simply listed but without any of the details that I wished to enter in the data-base. And some are simply missing – the Supreme Court shows an application for leave, but searching the provincial appeal decisions for that name turns up nothing, and sometimes no missing decision numbers for the month in question.

Appealing beyond the provincial Court of Appeal

Table 1 provides the simple numbers which are the basis for the rest of this article. Over the six year period, I could identify just under two thousand decisions handed down and reported by the four provincial courts of appeal. These in turn generated 161 attempts at further appeal – five appeals by right, and 156 applications for leave. Straight up, it would seem that about one provincial appeal case in twelve is appealed – a higher number than I might have expected, although it is hard to know what to compare it to.⁷

Table 1: Appeals from the Atlantic Courts of Appeal to the SCC, 2000 - 2005

Court	Panels Heard/Applied/Granted	Chambers Heard/Applied/Granted	Total Heard/Applied/Granted
Nova Scotia	696 / 72 / 7	152 / 4 / 0	848 / 76 / 7
New Brunswick	579 / 46 / 7	217 / 2 / 0	796 / 48 / 7

⁷It would appear, for example, that about one provincial superior court trial in five is appealed to the provincial court of appeal – which would suggest that one in twelve is actually a fairly low number.

Nfld & Lab.	229 / 26 / 7	34 / 0 / 0	263 / 26 / 7
P.E.I.	120 / 11 / 2	18 / 0 / 0	138 / 11 / 2
Total	1624 / 155 / 23	421 / 6 / 0	2045 / 161 / 23

As Table 1 shows, it is actually not quite this simple, because 20% of these reported appeal court decisions were actually single-judge chambers decisions. My initial tendency would have been to ignore these completely, but for two considerations. The first is that a handful of them actually generated applications for further leave (although none were successful). The second is that the modern court system is evolving in a way that is to a certain extent taking it away from full trials and full appeals – modern trial judges have taken on a case management and settlement responsibility that is reducing the number of actual trials, not just as a percentage of total filings but in absolute numbers.⁸ Although I will put the matter aside for the purposes of this paper, and focus only on panel appeal decisions, I do so with more hesitation than I might have a few years ago.

Refocused to omit single-judge chambers decisions, we can say that the four provinces reported just over 1600 multi-judge panel appeal decisions in six years, 155 of which were appealed further (150 applications for leave, 5 appeals by right), 23 of which were accepted for review on the merits by the Supreme Court. One case in every ten generates an attempt to appeals, and one appeal in every seven is granted leave; so one provincial appeal decision in every seventy is actually reviewed by the Supreme Court of Canada.

Identifying the appealed cases

I want to compare the 155 appealed decisions to the 1525 reported panel decisions of the Atlantic courts of appeal in order to isolate the differences between the two – that is to say, the correlates of the decision to appeal further. I will explore a number of different variables.

⁸See, for example, the collection of articles in Vol. 1 No.3 of the *Journal of Empirical Legal Studies*, an issue which was entirely organized around the theme of “The Vanishing Trial.”

The first set of variables will have to do with what I will call the provenance of the case – that is to say, the way it looks as it begins oral argument. I will identify the type of law, the type of litigants involved in the case, and the presence or absence of the Chief Justice as relevant to this set of considerations.⁹ Initially I had thought that the size of the provincial appeal court panel would also be a variable worth looking at. Thirty years ago, most provincial appeal courts used three judges as the default panel, but assigned larger panels for more significant cases – five-judge panels several times a year, seven-judge panels on occasion, and at least once (a 1960s case in Quebec) a nine-judge panel. But in fact that practice has vanished – more than 99% of all provincial appeal court panels are dealt with by the minimum and standard three judge panels. Between them, Nova Scotia, New Brunswick and Newfoundland and Labrador generated only four five-judge panels in six years, one of which was appealed (successfully) to the Supreme Court.¹⁰

A second set of variables will have to do with the way that the panel handles the decision. Some decisions are delivered orally “from the bench” immediately after the hearing; others are reserved for varying lengths of time, sometimes more than a year. I will also consider whether the panel was divided, and whether the appeal was allowed or dismissed.

A final set of variables will bear on the reasons for judgment. I will consider how long the decision was (a proxy for its importance), and what sort of citations to authority the decision included (a proxy for its complexity).

Provenance variables: The types of law

We normally divide the caseload of the provincial court of appeal into two categories: criminal and civil. For my purposes, this is too blunt a division, and “civil” is too much of a residual grab-bag. I will therefore divide the caseload into four segments. The civil caseload will be divided into public law (involving government actors other than the Crown in criminal cases, and therefore including regulations and taxation and the like), and private law (pitting natural persons or corporate entities against each other). Charter cases (mostly criminal, but sometimes public and rarely private) will form their own category, and my “criminal” category will include only non-Charter criminal cases. Table 2 breaks down the Atlantic provinces caseload in terms of these four factors, and then identifies the numbers of cases appealed, the number of leave applications granted, and the number of successful appeals.

Table 2: Appeals from the Atlantic Courts of Appeal to the SCC
By Type of Case, 2000 - 2005

⁹Excluding, of course, Prince Edward Island, with only three members of the Court of Appeal including the Chief Justice.

¹⁰The four cases were: *Cabot Insurance v Moore* 2003 NLCA 19; *Thorson v N.S. W.C.B.* 2003 NSCA 14; *Brunelle v N.S. W.C.B.* 2003 NSCA 15; and *R. v Gallant* 2001 NBCA 9. *Cabot Insurance* was the only one that was appealed.

Type of case	Panel cases	Appeals	Granted	Allowed
Charter	100	21	11	6
public	334	42	4	2
criminal	428	36	4	2
private	762	56	4	4
Total:	1624	155	23	14

The caseload of a provincial court of appeal is largely made up of private law cases – almost one half of the total. Charter cases (defined fairly generously) make up barely 6% of the caseload, with public and criminal law numbers falling in between. But the most numerous private law cases are the least likely to generate a further appeal (only one time in fourteen) while Charter cases are the most likely (one time in five), and this disparity is compounded in the frequency with which the appeals are granted – on time in 14 for private appeals, and one time in two for Charter cases. Fifteen years ago, Dale Gibson worried that the Supreme Court’s new preoccupation with constitutional and Charter issues would effectively make the provincial courts of appeal the final word for private law issues within their own jurisdiction; the numbers certainly suggest that this is coming to pass.¹¹

There is a further point to be made about the private law cases, this being the fact that all four of the cases granted leave to appeal resulted in success for the appellant. This is not at all the normal pattern – the criteria for granting leave to appeal is not “we think there is a big enough error that we will probably reverse” but rather “this raises an important enough question of law that we should speak to it, even if only to affirm.” Normally, the success rate on successful applications for leave is below 50%. But the “four for four” of the private law appeals hints at the possibility that the Supreme Court may in fact be using a “we will probably reverse” standard for this relatively small corner of the caseload. I would feel more confident about the assertion were this number larger.

Overall, the success rate on appeals is a little high; over the life of the McLachlin Court, the all-province average has been just under 46%. But six years is not very long, and 23 cases is not much to build a firm judgment on, so this may be only a small part of a longer cycle.

Provenance variables: Litigant types

¹¹Dale Gibson, “The Crumbling Pyramid: Constitutional Appeal Rights in Canada” *University of New Brunswick Law Journal* Vol. 38 (1989)

One obvious feature of the appellate caseload is that it involves a variety of types of litigant, and not all are so positioned as to give the same consideration to the possibility of taking an appeal further. The most obvious (and most frequent) litigant type is a natural person, accounting for more than one half of all litigants (if we classify the two parties to an appeal and then combine the counts for appellants and respondents). In Galanter’s terms, these tend to be “one-shotters” – actors whose involvement with the judicial process is discontinuous from their normal life and largely mysterious, and who have limited resources to deploy for the purpose.¹² The third most frequent litigator is the Crown (in criminal cases, acting under provincial or federal authority), which accounts for about one-sixth of all litigants – which is obviously just the flip side of saying that criminal cases (this time including Charter cases) account for about one third of the total caseload. The Crown is also an excellent example of what Galanter has called the “repeat players” – actors whose involvement with the judicial process is continuous and ongoing, who deploy considerable resources, and who can make strategic choices based upon the knowledge of expert professionals. The second most frequent litigator is corporations, accounting for one-fifth of the total, and the fourth is governments (municipal, federal, provincial and other¹³) which make up one-eighth of the total. Unions seldom show up on the appellate docket (twenty-two appearances in total, making up less than 1% of the total), and a residual “other” category is comparably infrequent, at less than 2% of the total.

The total number of appearances is one element in how many times a litigant type is likely to appeal further; also important, of course, is the fact that you can only appeal if you lose, and some litigant types are more likely than others to be unsuccessful.¹⁴ Natural persons are the most frequent litigant type, but they are also the most likely to be unsuccessful, with almost three defeats for every two victories (even though many cases take the form of “natural person vs. natural person”). The Crown, on the other hand, is involved in far fewer cases, but prevails more than two-thirds of the time, and therefore has fewer opportunities to appeal further than would at first appear from their numbers in the total litigant count.

Table 3: Appeals from the Atlantic Courts of Appeal to the SCC
By Litigant Type, 2000 - 2005

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¹²Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change.” *Law and Society Review*, Vol. 9 (1974) 95.

¹³There were three extradition cases involving the United States government.

¹⁴This is not absolutely true, because there are still very limited opportunities for the “winner” to obtain higher court review, and there are a small number of cases involving cross appeals such that success can be divided, but the generalization is sound enough for present purposes. However, as I will discuss below, one of the cases appealed to the SCC (*Elias*) is in fact an appeal from a case which the Crown “won” (to the extent that the accused’s appeal was dismissed).

Litigant types	Appearances	Lost	Appealed	Granted
person	1741	990 (56.9%)	88 (8.9%)	16
corporation	603	299 (49.6%)	31 (10.4%)	2
Crown	493	151 (30.6%)	10 (6.6%)	2
provincial govt	270	117 (43.3%)	15 (12.8%)	2
municipal govt	85	39 (45.9%)	9 (23.1%)	0
union	22	12 (54.5%)	2 (16.7%)	1
federal govt	19	7 (36.8%)	0 (-)	0
other	11	5 (45.5%)	1 (20%)	0

Individual litigants make up by far the largest number of litigants and also the largest number of “losers,” losing 56.9% of the time. They are very close to the average in the frequency of their applications for leave to appeal – hardly surprising considering what a disparate group they are, and the fact that they include large numbers of family law cases (which almost never appeal further) and of sentence appeals (which the Supreme Court normally will not hear). The Crown is both the least likely litigant type to lose (less than one time in three), and the least likely litigant type to appeal (less than one time in sixteen). This is particularly interesting because the Crown, unlike the other litigant types identified in the table, is less a statistical amalgam than an organized institution with decision making capacities organized around coherent strategies and bureaucratic procedures.¹⁵ The very low number of appeals – just over one a year – suggests that the threshold is consciously and deliberately placed very high. On the other hand, the Crown’s applications for leave to appeal are not granted particularly often (unlike the situation in Manitoba) suggests that the criteria on which this selection is made does not match particularly well with the criteria applied by the Supreme Court in granting leave.

The litigant type most likely to go further is municipal governments, which do reasonably well in appeal court decisions but still appeal almost one quarter of their losses – but not once in the six years did the Supreme Court take one of these appeals.

Provenance variables: the presence of the Chief Justice

It has been suggested that in some jurisdictions the panel assignments of the Chief Justice

¹⁵There is, of course, a distinction to be made between criminal cases carried by provincial authorities and those carried by federal authorities; I have made no attempt to distinguish between these two sets, there being no way for me to make this determination from the standard case report, but I am assuming that the large majority of provincial court of appeal cases are represented by the former and only a small number involve federal officials.

are an indicator that particular attention is being attached to a case.¹⁶ The logic is that the office of Chief Justice carries a prestige factor with it, and that prestige is assigned disproportionately to cases that have some special significance or importance. The logic, of course, is not that the Chief Justice’s presence causes the appeal in any direct sense, but that both the Chief Justice’s presence and the subsequent appeal flow from something intrinsically important about the case that has been identified from this very early point. This factor is explored in Table 4.

I should explain that my format here is different from that of the other tables; I am not looking at three different sets of cases that can be summed to an overall total, but rather starting with the whole universe of panel decisions and them zooming in twice for closer looks. The first “zoom” focuses on all the panels from all the non-P.E.I. decisions that included the Chief Justice as one member of the panel; and the second “zoom” looks at the subset of those panels for which the Chief Justice was the person who delivered the decision of the court.

Table 4: Appeals from the Atlantic Courts of Appeal to the SCC
By Presence & Participation of Chief Justice, 2000 - 2005

Panels	Number	Appealed	Granted
All	1624	155 (9.5%)	23 (14.8%)
Panel Included CJ	443	45 (10.2%)	10 (22.2%)
CJ writing decision	163	10 (6.1%)	6 (60%)

At first glance, the table flatly disproves the hypothesis: the presence of the Chief Justice on the panel does not significantly increase the likelihood of the case being taken to appeal, disproving the notion that the Chief Justice takes a disproportionate number of the more difficult assignments. There is a slight appearance of increase when the Chief Justice sits on the panel, but hardly worth noticing – reduce the 45 appeals to 42, and this appearance would disappear. But any impact of the Chief Justice should logically be enhanced when the Chief Justice not only sits on the panel but also writes the decision; in fact, the frequency jumps the other direction, and appeals are much *less* likely (not more) when the Chief Justice writes. Overall, therefore, it can hardly be suggested that the presence of the Chief makes appeals more likely, and modest grounds for taking the hypothesis in the opposite direction.

There is, however, a second-order effect that is well worth noting. The presence of the Chief Justice does not appear to correlate with how often the losing party chooses to appeal, but it does correlate with the Supreme Court’s readiness to grant the application. Overall, this

¹⁶See e.g. Burton M. Atkin’s “Alternative Models of Appeal Mobilization in Judicial Hierarchies” 37 *American Journal of Political Science* (1993)

success rate is 14.8%, but it is half again as high if the Chief Justice serves on a panel and a startling four times as likely if the Chief Justice wrote the decision him- or her-self. The supposedly higher profile might not be having an effect on the litigants, but it does seem to be having an effect on the Supreme Court.

Decision process elements: length of time for reserved decisions

After oral argument, the appeal court panel decides whether to deliver its decision and its reasons orally only the same day, or whether to reserve the decision to develop reasons (almost always written). About 25% of the time, it chooses the former, delivering reasons on the spot – for obvious reasons, these are usually very short reasons, and they seldom include any references to judicial or academic authorities.

If a case is reserved, most cases are returned with written reasons within two months. We can use this figure to create four different types of cases, allocated in terms of how long the panel takes to work through its reasons. The largest group are those decided orally on the same day, comprising about 25% of the total. The second largest group are the ones that are reserved for two months or less, and these amount to just under one half of the total. The next group includes cases that are reserved for two to six months, making up about one fifth of the total; and the final group are those who are reserved for more than six months (27 for more than a year), and these account for less than 10% of the total.

Table 5: Appeals from the Atlantic Courts of Appeal to the SCC
By Time Decisions are Reserved, 2000 - 2005

Reserved	Number	Appealed	Granted
Oral decisions	439	12 (2.7%)	0
less than 2 months	706	52 (7.4%)	4
2-6 months	349	60 (17.2%)	12
more than 6 months	142	29 (20.4%)	8

It seems reasonable to expect some correlation between the length of time a decision is reserved and the likelihood that it will be taken to further appeal; the major reasons for the delay would be the importance and/or the complexity of the case, both of which would take more time to resolve and both of which would suggest a greater likelihood that the losing party will have some aspects or elements that they want to be considered by a higher court. The numbers certainly confirm this hypothesis; oral decisions are hardly ever taken to appeal and cases reserved for less than two months are less likely than the average case to be appealed, but cases reserved for longer are twice as likely to be taken further and this figure jumps again for cases reserved for six months or more. The success rate for the granting of leave parallels these figures: no oral decision was accepted by the Supreme Court for oral argument, and the

percentage of successful applications rises through the categories.

Decision Process Elements: Divided Panels

Perhaps the most dramatic thing that an appeal court panel can do with an appeal is to fail to arrive at a unanimous set of outcome-plus-reasons. Unanimity is the normal outcome – in almost 95% of all the cases handled over the five year period – but it still happened about twenty times a year that a panel in one of the four provinces would differ on the resolution of a case. Dissents (disagreeing with the outcome) were more common, but there were also a reasonable number of separate concurrences (agreeing with the outcome but not agreeing, or not agreeing completely, with the reasons). Indeed there were five occasions when the panel failed to generate a set of reasons agreed to by a majority of the panel, resulting in a decision, a dissent and a separate concurrence on a single three-judge panel.

There is an obvious reason to expect that disagreement on the panel would correlate with a greater likelihood of subsequent appeal. For one thing, such disagreement is indicating a legal issue that involves some complexity and uncertainty, such that the three professionals cannot – either simultaneously and immediately, or after a reasoned exchange of views – arrive at a completely consensual understanding of what the law is and how it applies to the facts at hand. For another, the presence of disagreement on the panel is an indication to the loser that there is still some life in his argument, some chance that a divided court might go the other way at a higher level. (For still another, dissents on a matter of law in the court of appeal are, in criminal matters, entitled to access to the Supreme Court as an appeal by right; but in fact appeals by right have largely disappeared from the Supreme Court docket, well down from the 1990s when they made up about a third of the caseload, and there were only five appeals by right from the Atlantic provinces in five years.)

Table 6: Appeals from Atlantic Courts of Appeal to the SCC
By Extent to Which Panels are Divided, 2000 - 2005

Type of decision	Number	Appealed	Granted
Unanimous	1512	121 (8.0%)	11
Sep. concurrence	40	9 (22.5%)	2
Dissent	67	22 (32.8%)	7
Both dissent & separate concurrence	5	3 (60.0%)	3

The numbers strongly support the hypothesis that there would be a connection between disagreement on the panel and subsequent appeal. Compared with a unanimous panel, a divided panel is about four times as likely to generate an application for leave. Understandably, this effect is stronger for dissents, but it is also the product of separate concurrences as well,

confirming as I have argued elsewhere that separate concurrence is a species of judicial disagreement that can on some occasions indicate divisions as serious as dissent.¹⁷ (This was not the case in Manitoba, where separate concurrences had no effect on appeal rates.) Fragmented panels where all the members write are even more likely to generate appeals.

This effect is compounded by the rate at which the Supreme Court grants leave. Disagreement not only makes appeal more likely, but it also makes an oral argument in front of the Supreme Court of Canada more likely, and again the effect is stronger for dissents than for concurrences, and stronger for fragmented panels than for divided panels. Overall, a divided court is four times as likely to be appealed, and four times as likely to be granted leave, as the decision of a unanimous panel.

Decision Process Elements: Outcome

The most obvious basis for distinguishing categories of decisions by provincial courts of appeal is the outcome: almost two thirds of appeals fail. (As a provincial court of appeal judge told me years ago: “one third of the time we allow the appeal, one third of the time we dismiss the appeal, and one third of the time we wonder who these people are and why they are wasting our time.”) As shown in Table 7, this does not have much impact on the frequency of subsequent appeal; in one eleventh of the cases where the appeal court upholds the trial judge, and in one ninth of the cases where the appeal court allows the appeal, there is a further appeal.

Table 7: Appeals from the Atlantic Courts of Appeal to the SCC
By Outcome of Appeal Court Decision, 2000 - 2005

Result	Number	Appealed	Granted
Allowed	579	64 (11.1%)	16
Dismissed	1030	94 (9.1%)	11

¹⁷Peter McCormick, “Blocs, Swarms and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada” *Osgoode Hall Law Journal*, Vol. 42 (2004)

I admit that this seems to me the intuitively likely direction for the difference to run, and I am surprised that the difference is not greater. At a simple psychological level, it seems to me that it is more appeal-producing to have a trial victory taken away on appeal, then to have a trial defeat confirmed on appeal. At the very least, the difference in the outcomes shows that at least one judge has found the merit in your case. And pragmatically, in terms of assessing one's odds, it makes more sense as well – in earlier research, I found that the Supreme Court was twice as likely to allow an appeal if it represented an appeal court reversal of a trial court victory.¹⁸ If litigants and lawyers were aware of this, even intuitively one would expect it to increase the frequency of appeal when the appeal court intervenes in any way in a trial court outcome, and the surprise is only that the effect is so small.

¹⁸Peter McCormick, "The Supervisory Role of the Supreme Court of Canada" *Supreme Court Law Review*, (Second series) Vol.3 (1992)

Curiously, however, this intuitively obvious (and empirically supported) connection is not normally the case. In Manitoba, an appeal that was dismissed by the Court of Appeal was more than half again as likely to be appealed as one that was allowed. Other research findings point the same direction. In his study of the way that the U.S. Department of Justice and Solicitor General decide which cases to appeal, Zorn (like me) hypothesized that reversal at the appeal level would increase the likelihood of further appeal because it suggested that such a case was more “winnable” than confirmation at the appeal level. His findings, however, showed the causality working in the opposite direction, although he fails to acknowledge this in his analysis, let alone to suggest what aspect of the appeal decision it might illuminate.¹⁹ Flemming’s parallel study of the Canadian Department of Justice point the same way (although the finding is not statistically significant), but he does not attempt to explain the finding or to assess its implications either.²⁰ Curiously, therefore, these “obvious” results from the Atlantic Courts of Appeal stand out from the other research on comparable courts.

The outcome of the decision at the appeal court level does, however, seem to have an impact on the Supreme Court’s decision to grant leave to appeal – this is twice as likely when the court of appeal has allowed the appeal. This works in the same direction as my finding a decade ago, and suggests that the combined impact of outcome on success in the Supreme Court is even greater than I suggested at that time.

¹⁹Christopher J.W. Zorn, “U.S. Government Litigation Strategies in the Federal Appellate Courts” *Political Research Quarterly*, Vol. 55 (2002) 145 at 158, esp. Table 2.

²⁰Roy Flemming, “Why Does the Federal Government Appeal to the Supreme Court of Canada in Charter of Rights Cases?: A Strategic Explanation” *Law and Society Review*, forthcoming. Actually, Flemming does attempt to explain it by the fact that the federal Department of Justice loses most of its cases in the provincial and federal courts of appeal – a startling (and, I should have thought, unlikely) claim in itself but even if correct, it hardly explains a reluctance to appeal.

Reasons elements: the word-count

Some of the reasons that the Atlantic courts of appeal provide for their decisions are very sparse, especially the oral reasons that resolve more than 25% of the caseload. There were, for example, twenty-nine decisions of only twelve words or less, and eight of those were six words or less. At the other extreme, there were thirteen decisions that were more than 20,000 words long (about twice as long as this article), one of which was, at 90,000 words, longer than any decision ever delivered by the Supreme Court of Canada.²¹

Word counts are significant, because they serve as a proxy for an important judicial resource – namely, time and effort. Small differences prove nothing (a decision of 5000 words is probably not significantly different from one of 5500 words), but the larger and more persisting disparities are worth noting. If a judge can explain the outcome to the parties (or at least their lawyers) in fifty words or less, it is a clear indication that there was not a legal issue of much significance involved in the case; conversely, if a judge invests the time and effort to write a ten-thousand word decision that canvases judicial opinions in other provinces and countries and that draws on the recent periodical literature, then this is an expenditure of time and energy that can only be justified by a legal issue of some real importance. It is true that the old judicial saying is “I wrote a long decision because I did not have time to write a short one” but the point is that caseload demands are high enough and constant enough that all judges work under the same constraints; and even if in a perfect world of greater leisure all decisions would be shorter, it would still be the case that the longer ones reached further and with more thoroughness than the shorter ones.

Table 8: Length of Decisions of the Atlantic Courts of Appeal, 2000 - 2005

Court of Appeal	Median Length	Average Length
New Brunswick	950	2420
Nova Scotia	2038	3720

²¹The traditional way of registering decision length was the page count; but in an age when decisions are generally accessed on-line, page numbers become irrelevant (no matter how long the decision, it takes only one “page” on the internet); and since wordprocessing programs can count words in a blink, that is the more objective and intermeasurable way to compare lengths.

Prince Edward Island	2147	2950
Newfoundland & Labrador	4439	6020

There are some persisting differences between the four provinces. New Brunswick rights by far the shortest decisions; the median length of a decision (a better measure when no decision can be less than half a dozen words but the length is unbounded at the upper end) is below a thousand words, and the average length is just under 2500. Newfoundland and Labrador have by far the longest with a median length of 4400 and an average length of 6000 words. (Manitoba was closer to New Brunswick, with a median length of 1200 and an average length of 2000 words.)

Table 9: Appeals from the Atlantic Courts of Appeal to the SCC
By Length of Decision, 2000 - 2005

Word-length	Number	Appealed	Granted
less than 100 words [very short]	151	4 (2.6%)	0
101 - 1000 words [short]	445	18 (4.0%)	0
1001 to 10,000 words [medium]	902	86 (9.5%)	14
over 10,000 words [long]	126	47 (37.3%)	11

Not surprisingly, longer decisions are more likely to be appealed – if there are more issues to draw the writing attention of appeal court judges, then there are more issues to which the losing side can take exception. Only one in forty of the very short decisions, but more than one in three of the long decisions, was taken to appeal, and the short and medium length decisions fit predictably in between.

Again, the success rates for the granting of appeals simply mirror this pattern. Not one of the short or very short decisions was accepted for review by the Supreme Court; but one in six of the medium decisions, and one in four of the long decisions, was granted leave. The review processes of the Supreme Court once again are picking up on the much the same markers that drive appeal rates in the first place, and these are already identified (perhaps even signaled) by the way that the court of appeal has treated the cases.

Reason process elements: Citation practices

[to be included in presented version of this paper; not completed at this time]

Summary of findings

To summarize the discussion above:

First: About one panel decision in ten is appealed beyond the provincial court of appeal, and one such appeal in seven is granted leave to appeal by the Supreme Court, meaning the overall about one provincial court of appeal decision in every seventy is subject to review on the merits.

Second: The relatively small number of Charter cases are much more likely to be appealed, and to be granted leave to appeal, than the private law cases that make up most of the provincial appeal court caseload; to a more modest extent, public law cases are more likely to be appealed, and more likely to be granted leave to appeal, than criminal law cases.

Third: Natural persons are the most frequent litigant type, and they also lose the highest proportion of decisions in the court of appeal; but they are not more likely to appeal to the Supreme Court than the average litigant.

Fourth: The Crown is the most successful litigant type in the provincial courts of appeal, and it is also by a significant margin the least likely to appeal further (although its appeals are no more likely to be heard by the Supreme Court); conversely, municipal governments, although moderately successful in the provincial courts of appeal are the *most* likely to appeal further but the *least* likely to be granted leave.

Fifth: Panels including the Chief Justice are not significantly likely to be appealed (and decisions delivered by the Chief Justice are less likely to be appealed) than the average; but if they are appealed, they are significantly more likely to be accepted for review by the Supreme Court.

Sixth: The longer a case is reserved for decision (or reserved for reasons if the outcome is announced immediately), the more likely it is to be appealed, and the more likely the appeal is to be heard by the Supreme Court.

Seventh: Divided panels are more likely to be appealed, and more likely to be granted leave, than unanimous panels; this effect is strong for dissents, and only slightly less strong for separate concurrences.

Eighth: Decisions in which the court of appeal allows an appeal are slightly more likely to be appealed, and significantly more likely to be granted leave to appeal, than decisions in which the court of appeal dismisses the appeal.

Ninth: Longer decisions are more likely to be appealed, and more likely to be granted leave to appeal, than short decisions.

None of this, of course, is particularly surprising – although the absence of a “Chief Justice” effect is worth noting, as is the fact that these are the first findings regarding intermediate courts of appeal that do not suggest that dismissals are more likely than successful appeals to generate further appeal. Given a more complete data-base, and more time and

opportunity to probe the details of the cases in which the Supreme Court does respond to lower court decisions, this will contribute to a better understanding of the interaction between the courts of appeal and the Supreme Court, and the way that the supervisory role of the Supreme Court is being applied in this new century.