

# Appealing Outcomes: A Study for the Overturn Rate of Canada's Appellate Courts

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# Appealing Outcomes: A Study for the Overturn Rate of Canada's Appellate Courts

## **Abstract**

This commentary discusses the rate at which Canada's appellate courts are overturned by the Supreme Court of Canada. By deconstructing the overturn rate, the authors identify and compare various factors that affect the rate at which appeals are pursued, considered, and allowed. The data reveal that decisions from the British Columbia, Quebec, and Newfoundland & Labrador courts of appeal are overturned more often than those from their counterparts. Conversely, the Ontario and Saskatchewan courts of appeal exhibit overturn rates below the national average. The analysis suggests that the underlying drivers giving rise to the unusually high or low overturn rates, however, differ from province to province, and this provides possible avenues for further investigation.

## **Keywords**

Appellate courts; Appellate courts--Statistics; Canada. Supreme Court; Canada

## Commentary

# Appealing Outcomes: A Study of the Overturn Rate of Canada's Appellate Courts

MICHAEL H. LUBETSKY\* & JOSHUA A. KRANE\*\*

This commentary discusses the rate at which Canada's appellate courts are overturned by the Supreme Court of Canada. By deconstructing the overturn rate, the authors identify and compare various factors that affect the rate at which appeals are pursued, considered, and allowed. The data reveal that decisions from the British Columbia, Quebec, and Newfoundland & Labrador courts of appeal are overturned more often than those from their counterparts. Conversely, the Ontario and Saskatchewan courts of appeal exhibit overturn rates below the national average. The analysis suggests that the underlying drivers giving rise to the unusually high or low overturn rates, however, differ from province to province, and this provides possible avenues for further investigation.

Ce commentaire examine la proportion des arrêts rendus par les cours d'appel du Canada qui sont infirmés par la Cour suprême du Canada. En disséquant la proportion des arrêts infirmés, les auteurs identifient et comparent divers facteurs qui affectent la proportion des appels qui sont interjetés, examinés et permis. Les données révèlent que les arrêts rendus par les cours d'appel de Colombie-Britannique, du Québec et de Terre-Neuve Labrador sont infirmés plus souvent que ceux de leurs homologues. Inversement, on constate que la proportion des jugements infirmés par les cours d'appel de l'Ontario et de la Saskatchewan est inférieure à la moyenne nationale. Toutefois, l'analyse suggère que les mobiles latents, qui engendrent une proportion inhabituellement élevée ou faible d'arrêts infirmés, fluctuent d'une province à l'autre, ce qui fournit des pistes possibles où l'on peut pousser l'enquête.

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THE SUPREME COURT LAW REVIEW publishes an annual report on leave to appeal applications to the Supreme Court of Canada (SCC),<sup>1</sup> and the Osgoode Hall Law Journal has previously compiled and analyzed data on the outcomes of cases heard by the Court.<sup>2</sup> No study to date, however, has attempted to combine the SCC data with the workload statistics of the various appellate courts to determine how often, overall, each court finds itself reversed. This study aims to fill this gap in research by compiling a comprehensive and integrated database of the caseloads, leave to appeal applications, and overturn rates of the SCC, the Federal Court of Appeal (FCA), and the ten provincial courts of appeal.<sup>3</sup> Analysis

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1. For the 2007-2008 edition of the report, see Henry S. Brown & Joshua A. Krane, "Annual Report on Applications for Leave to Appeal to the Supreme Court of Canada: The 2007-2008 Term" (2008) 43 S.C.L.R. (2d) 343.
  2. Peter H. Russell, "The Supreme Court in the 1980s: A Commentary on the S.C.R. Statistics" (1992) 30 Osgoode Hall L.J. 771. See also F.L. Morton, Peter H. Russell & Michael J. Withy, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1.
  3. The authors use the following abbreviations for the courts of appeal: Federal Court of Appeal (FCA), British Columbia Court of Appeal (BCCA), Alberta Court of Appeal (Alta. CA), Saskatchewan Court of Appeal (Sask. CA), Manitoba Court of Appeal (Man. CA), Ontario Court of Appeal (Ont. CA), Quebec Court of Appeal (QCA), New Brunswick Court of Appeal (NBCA), Nova Scotia Court of Appeal (NSCA), Prince Edward Island Court of Appeal (PEICA), and Newfoundland & Labrador Court of Appeal (NLCA). The study does not include

of this data, primarily through decomposition into indicative ratios, leads to a number of striking conclusions.

In summary, the data reveal that the decisions from three appellate courts—British Columbia, Quebec, and Newfoundland & Labrador—are overturned more often than those from their counterparts. Conversely, two appellate courts—Ontario and Saskatchewan—exhibit overturn rates below the national average. The underlying drivers giving rise to high or low overturn rates, however, differ from province to province, and this provides possible avenues for further investigation.

Part I introduces the comprehensive overturn rate and its various components; Part II outlines the study's research methodology; Part III discusses the results; and Part IV identifies future lines of research that are suggested by these findings.

## I. THE MEASURE: THE COMPREHENSIVE OVERTURN RATE

This commentary proposes the “comprehensive overturn rate” (COR) to measure how often and how seriously a particular appellate court finds itself “in error.” The COR is defined as the number of SCC reversals divided by the appellate court's total dispositions over a particular time period. The ratio is then scaled by 1000 in order to produce a more workable measure of reversals per thousand cases:

$$\text{Comprehensive Overturn Rate (COR)/1000 Cases} = \frac{\text{Number of SCC Reversals}}{\text{Total Appeal Dispositions}} \times 1000$$

As shown in Table 1A, below, between 2000 and 2007, the COR of the eleven Canadian appellate courts collectively averaged 6.5 reversals per thousand cases. A graphic summary of the ten provincial courts of appeal appears in Figure 1A, and a complete table with all the results appears in the appendix: Five courts exhibit a statistically significant<sup>4</sup> difference between their overturn rate

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the Court Martial Court of Appeal or the courts of appeal from the three territories because the SCC has considered less than a dozen appeals from these courts altogether since 1998.

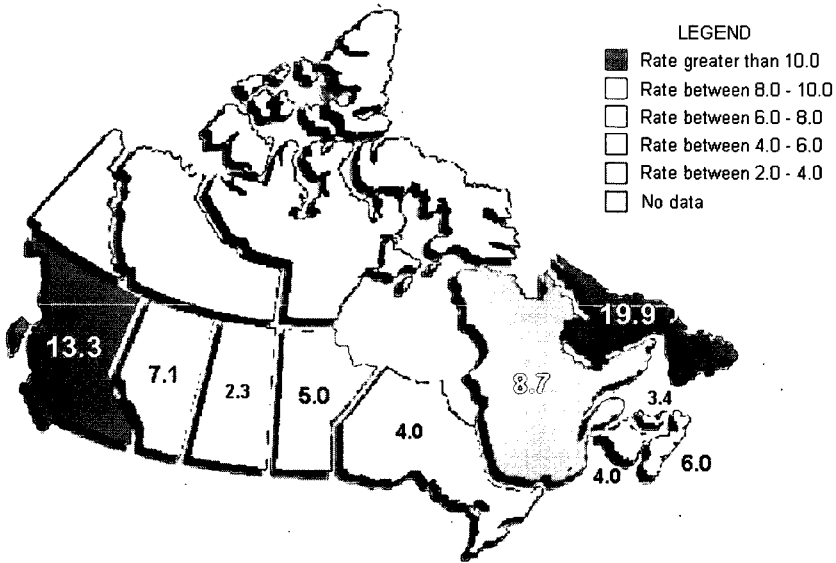
4. “Statistically significant” means unlikely to have resulted from random chance. The significance

**TABLE 1A: COMPREHENSIVE OVERTURN RATE (2000-2007)  
APPEALS ALLOWED PER 1000 CASES**

Years (2000-2007)	FCA	Ont. CA	QCA	BCCA	Other CAs	National Average
COR	6.5	4.0*	8.7*	13.3*	5.5	6.5

Note: \*Statistically significant to 0.02 (98% confidence).

**FIGURE 1A: COMPREHENSIVE OVERTURN RATE BY PROVINCE**



of a result depends on both the number of cases examined and the degree of deviation from the norm. When looking at the results of this study, it is important not only to consider how much a court's ratios differ from the national average, but also whether the difference is significant. A fairly large difference from the national average may not be statistically significant from a court which considers fewer cases. On the other hand, a fairly small difference may be significant from a larger court which considers more cases. Generally, this study only draws conclusions from results significant at the 98% confidence level.

and the national average, with the Ont. CA and Sask. CA experiencing significantly lower CORs, and the QCA, BCCA, and NLCA experiencing significantly higher CORs.

Numerous factors can affect the COR for a particular appellate court, including the court's total caseload, the propensity of the litigants to appeal, the willingness of the SCC to grant leave, and the proportion of cases that the SCC eventually overturns. To help identify some of these factors, the COR is broken down into three constituent ratios:

- Appeals Pursued Rate (PR), which is defined as the total appeals pursued from a particular appellate court to the SCC (*i.e.*, appeals as of right and applications for leave) divided by the appellate court's total dispositions or caseload;
- Appeals Considered Rate (CR), which is defined as the total appeals considered by the SCC originating from a particular appellate court (*i.e.*, appeals as of right and the number of leaves to appeal granted) divided by the total appeals pursued; and
- Appeals Allowed Rate (AR), which is defined as the number of reversals by the SCC divided by the total appeals considered by the SCC.

These three ratios conveniently multiply together to equal the COR:

$$\text{COR} = \frac{\text{Appeals Pursued}}{\text{Total Appeal Dispositions}} \times \frac{\text{Appeals Considered}}{\text{Appeals Pursued}} \times \frac{\text{S.C.C. Reversals}}{\text{Appeals Considered}} \times 1000$$

Table 1B breaks down the COR into its three constituent components. Higher rates of PR, CR, and AR will increase the COR for a particular jurisdiction.

The three constituent variables have different intuitive meanings. The Appeals Pursued Rate, or PR, estimates the extent to which litigants accept an appellate court's decision as resolving their dispute. Although decisions to appeal often involve factors beyond a court's control—particularly the importance of the case to the parties and their financial resources—an appellate court that produces comprehensible and well-reasoned decisions should, *ceteris paribus*, exhibit a lower PR. A higher rate suggests that the appellate court's opinion is generally less convincing to losing parties and their counsel.

The Appeals Considered Rate, or CR, estimates the degree to which the issues raised in the appealed decision reach the requisite level of public importance to mandate SCC review. Two sub-factors drive this component: the number of cases that proceed as of right, which the law presumes sufficiently important to

TABLE 1B: COMPREHENSIVE OVERTURN RATE (2000–2007)  
 APPEALS ALLOWED PER 1000 CASES

Years (2000–2007)	FCA	Ont. CA	QCA	BCCA	Other CAs	National Average
COR	6.5	4.0*	8.7*	13.3*	5.5	6.5
Appeals Pursued Rate (PR)	11%*	8%*	14%*	15%*	7%*	10%
Appeals Considered Rate (CR)	10%*	12%	12%	20%*	15%	13%
Appeals Allowed Rate (AR)	55%	42%	53%**	45%	50%	49%

Notes: \*Statistically significant to 0.02 (98% confidence); \*\* Statistically significant to 0.02 over 1988–2007 period.

automatically merit consideration,<sup>5</sup> and the number of cases granted leave by the SCC,<sup>6</sup> following a preliminary assessment of whether the case raises issues of “national importance.”<sup>7</sup> A higher CR indicates that the decisions appealed from an an appellate court deal more often with important questions, whereas a lower

5. Most appeals as of right occur pursuant to the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 691-95. These provisions, *inter alia*, provide for appeals when an appellate court sets aside an acquittal or issues a decision on a criminal matter that contains a dissenting opinion. Appeals by right can also occur pursuant to the *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 35.1, 36. These provisions include reference questions referred to the SCC by the lieutenant governor in council. Of the 635 cases considered by the SCC between 2000 and 2007, 112 cases, or 17.6% proceeded as of right.
6. In 1990, amendments to s. 43(1)(a) of the *Supreme Court Act*, *ibid.*, removed the automatic oral hearing on leave to appeal applications. The SCC may grant leave on the basis of written submissions alone. See *An Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, S.C. 1990, c. 8, s. 38.
7. *Supreme Court Act*, *ibid.*, s. 40(1). Pursuant to the *Supreme Court Act*, ss. 37, 37.1, a court of appeal can itself refer cases, by leave, to the SCC. According to Crane and Brown, this power has been invoked on only three occasions since 2000 and only five times since 1982. Brian A. Crane & Henry S. Brown, *Supreme Court of Canada Practice 2008* (Toronto: Carswell, 2008) at 68-74.



CR suggests that the court's purported errors involve less weighty issues and are therefore less compelling. Separating CR into "by leave" and "as of right" sub-components can also reveal significant interprovincial differences.

The Appeals Allowed Rate, or AR, measures how often the SCC agrees with an appellate court's decisions after reviewing the law in detail and (usually) holding a hearing. An appellate court whose important and controversial decisions generally align with the law should boast a lower AR, while one which tends to "err" more often (at least in the eyes of the SCC) should obtain a higher rate.

In summary, the decomposition roughly breaks the COR down into three key questions: (a) how often does the court of appeal produce unconvincing decisions that fail to satisfy the litigants that the matter is resolved (PR), (b) how important are the issues raised in these controversial decisions (CR), and (c) how often does the court of appeal actually get these difficult decisions "right" (AR)?

The authors recognize that the three COR constituent ratios do not purely measure the underlying driving factors. For example, the willingness of a litigant to pursue an appeal (measured by PR) will depend to some extent on the likelihood of the SCC granting leave (measured by CR) and the likelihood of success (measured by AR). However, correlation analyses confirm that the three ratios are largely independent and, thus, can indicate meaningful differences between the various courts.<sup>8</sup> Further research may explore in more detail the interaction between the ratios and the extent to which they overlap.

## II. RESEARCH METHODOLOGY

Originally, this report sought to cover the period from 1988 to 2007, but only the BCCA, QCA, and Sask. CA provided ready access to the necessary statistics for the entire period. The NBCA's figures trace back to 1992,<sup>9</sup> the Alta. CA's and NLCA's to 1994, the PEICA's to 1997, the Man. CA's to 1998, the Ont.

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8. The correlation ( $\rho$ ) between the PR and CR (0.37), PR and AR (0.05), and CR and AR (-0.15) for the eleven appellate courts does not reach the threshold normally required to suggest a meaningful relationship ( $|\rho| > 0.4$ ). Moreover, an ordinary linear regression between the PR and CR does not produce a slope significantly different from zero, even at the 75% confidence level ( $p = 27\%$ ).
  9. The registrar of the NBCA, however, could not guarantee the reliability of the court's data before 1995.

CA's to 1999, the FCA's to 2000, and the NSCA's to 2002. Given these data limitations, the report will focus on the period from 2000–2007, with the 2000 and 2001 figures from Nova Scotia estimated by counting cases reported on the Canadian Legal Information Institute (CanLII) database.

Eight of the ten provincial courts of appeal broke down their dispositions into civil and criminal disputes; counting cases reported on CanLII provided estimates of the criminal-civil splits of the remaining two courts (the NLCA and PEICA). Because the FCA did not break down its cases by category, this survey treats all FCA cases as civil, even though many have criminal dimensions.<sup>10</sup>

The SCC registrar provided detailed records that tabulated styles of cause, dates of hearing and disposition, the nature of the actions (*i.e.*, criminal or civil), how the cases came before the Court (*i.e.*, by leave or as of right),<sup>11</sup> and the final outcomes. Outcomes were categorized as “allowed,” which included decisions quashed, remanded, ordered reheard, or as “dismissed,” which included cases adjourned or discontinued.<sup>12</sup> This study excludes five SCC reference cases decided at first instance,<sup>13</sup> but it does include other reference cases decided by an appellate court at first instance and then appealed to the SCC. The SCC also provided information on the number of leave to appeal applications filed and disposed of by the Court.

Several caveats apply to the data included in this study. The authors have relied upon the statistical information provided by the various registrars and have not attempted to audit the data. Each court may also have a slightly different

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10. For example, taxation inquiries and deportation hearings, though technically administrative in nature, often deal with the same issues that arise in criminal cases. See *e.g.* *Del Zotto v. Canada*, [1999] 1 S.C.R. 3; *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350.
  11. The SCC did not note whether the case arose by right or by leave in only one decision. See *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 252. This study will consider the case as heard by leave, given the case information and the reasoning provided by the Court.
  12. The SCC classified almost all of its 2022 cases as “allowed” or “dismissed.” Of the remaining cases, eight decisions were quashed, five appeals were adjourned, five appeals were remanded or had a re-hearing ordered, and one appeal was discontinued.
  13. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698; *Reference re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858; *Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715; and *Reference re Milgaard (Can.)*, [1992] 1 S.C.R. 875.

methodology of collection; for example, a registrar may count joined cases as one disposition, or two. Furthermore, the study considers aggregate annual numbers of cases and does not track individual files, which may take several years to work their way through the judicial system. The aggregate multi-year counts are, therefore, more meaningful than those from individual years.

It also bears noting that the manner in which cases ascend to the various appellate courts also varies by province and can affect court workload and likelihood of appeal. For example, the Ont. CA grants leave as of right to civil appeals where the value of the property in dispute exceeds \$50,000,<sup>14</sup> whereas the Sask. CA hears civil appeals from all Queen's Bench decisions.<sup>15</sup>

### III. DISCUSSION OF RESULTS

#### A. THE HIGH-COR COURTS: NEWFOUNDLAND & LABRADOR, BRITISH COLUMBIA, AND QUEBEC

##### 1. NEWFOUNDLAND & LABRADOR

The country's highest overall COR comes from the NLCA. However, separation of the COR into its civil and criminal components, as seen in Table 2, reveals that criminal jurisprudence accounts for virtually all of the court's difference from the national average.

The table also reveals that CR constitutes the major driving force beyond the NLCA's high criminal COR, while a deeper look shows that the high CR results primarily from a large number of criminal cases in which dissenting opinions have given rise to appeals as of right. The abundance of such cases—in comparison to other provinces—suggests the existence of strong ideological cleavages among the judges of the NLCA with regard to criminal matters.<sup>16</sup>

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14. *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 6(1).

15. *Court of Appeal Act, 2000*, S.S. 2000, c. C-42.1, s. 7(2)(a).

16. An examination of the thirty-six criminal cases appealed from the NLCA between 1988 and 2007 suggests some stark attitudinal differences among its judges, with some usually favouring the Crown (such as Chief Justice C.K. Wells) and others favouring the accused (particularly Justice J.J. O'Neill). Since the NLCA has only six judges, a judge with particularly strong views on criminal matters may have occasion to hear criminal appeals more often than his or her counterparts on larger appellate courts.

**TABLE 2: NLCA COMPREHENSIVE OVERTURN RATE (2000–2007) COMPARED WITH NATIONAL AVERAGE**

NLCA (2000–2007)	Criminal Cases	National Average	Civil Cases	National Average
COR	43.8*	5.9	8.7	6.8
Appeals Pursued Rate (PR)	14%*	7%	13%	12%
Appeal Considered Rate (CR)	57%*	21%	11%	11%
Appeals Allowed Rate (AR)	54%	42%	60%	53%

Note: \*Statistically significant to 0.01 (99% confidence).

## 2. BRITISH COLUMBIA

The BCCA features the second highest COR in Canada, and, as Table 3 illustrates, the court's COR significantly exceeds the national average for both its civil and criminal cases.

The decomposition and significance analysis also reveals that the BCCA's above-average COR stems primarily from its PR and CR, while a closer examination shows that the BCCA's CR stems primarily from an unusually high percentage of successful leave applications.<sup>17</sup>

Although the BCCA's overall AR mirrors the national average (as seen in Table 1B), Table 3 reveals some striking differences between criminal and civil cases. The criminal AR falls significantly below the national average, while the civil AR exceeds it—albeit not by enough of a margin to draw conclusions. Further research may attempt to better understand the source and persistence of these results.

Although the BCCA data lend themselves to different interpretations, they are consistent with the image of an avant-garde court providing the country's

17. Between 2000 and 2007, 16% of all leave applications from the BCCA were successful in comparison to a national average of 11% over the same time period. This figure is significant at the 98% confidence level.

**TABLE 3: BCCA COMPREHENSIVE OVERTURN RATE (2000–2007) COMPARED WITH NATIONAL AVERAGE**

BCCA (2000–2007)	Criminal Cases	National Average	Civil Cases	National Average
COR	9.5*	5.9	16.3*	6.8
Appeals Pursued Rate (PR)	13%*	7%	17%*	12%
Appeal Considered Rate (CR)	26%*	21%	16%*	11%
Appeals Allowed Rate (AR)	29%*	42%	60%	53%

Notes: \*Statistically significant to 0.02 (98% confidence).

more cutting edge jurisprudence. The high PR and CR seem to suggest that the court tends to stake out controversial positions on issues of national importance, which often find favour with the SCC—particularly in criminal matters. Further research may explore the degree to which the BCCA's caseload, which may include a larger variety of cutting edge or novel issues as compared with other courts, drives its often controversial decision making.

### 3. QUEBEC

The QCA's COR also exceeds the national average, although not to the same extent as in Newfoundland & Labrador and British Columbia. The decomposition and significance analysis reveals that the QCA's COR is driven primarily by its AR in criminal matters.<sup>18</sup>

A closer look at all criminal appeals to the SCC since 1988, as summarized in Table 5, reveals that Crown appeals constitute a greater proportion of the criminal appeals from the QCA (40% versus a national average of 27%). Since Crown appeals generally enjoy a much higher success rate than accused appeals

18. The QCA's above-average criminal AR is only statistically significant at the 90% confidence level for the period in question. However, between 1988 and 2007, the QCA criminal AR was 47%, compared to a national average of 39%, and this finding is statistically significant at the 98% confidence level.

**TABLE 4: QCA COMPREHENSIVE OVERTURN RATE (2000–2007) COMPARED WITH NATIONAL AVERAGE**

QCA (2000–2007)	Criminal Cases	National Average	Civil Cases	National Average
COR	8.8*	5.9	8.7	6.8
Appeals Pursued Rate (PR)	9%*	7%	16%*	12%
Appeal Considered Rate (CR)	17%	21%	10%	11%
Appeals Allowed Rate (AR)	57%*	42%	51%	53%

Note: \*Statistically significant to 0.02 (98% confidence).

**TABLE 5: DISTRIBUTION OF CRIMINAL APPEALS TO THE SUPREME COURT OF CANADA (1988–2007)**

Distribution of Criminal Appeals	Crown Appellant: Allowed	Crown Appellant: Dismissed	Accused Appellant: Allowed	Accused Appellant: Dismissed	Total Crown Appeals	Total Accused Appeals
Ont. CA	15%	10%	19%	55%	25%	74%
QCA	24%	16%	24%	37%	40%	61%
BCCA	12%	14%	25%	50%	26%	75%
Other CAs	14%	10%	28%	48%	24%	76%
Canada Total	15%	12%	24%	49%	27%	73%

Note: Due to rounding, the percentages may not add up to 100%

(57% versus 33% overall),<sup>19</sup> the higher percentage of Crown appeals is the primary contributing factor to the QCA’s higher criminal AR. At first glance, this could suggest a relatively pro-accused orientation of the QCA in comparison with the rest of the country.

19. The Crown appeal success rate (57%) is derived by dividing the total Canadian percentage of Crown appeals allowed (15%) by the sum of the total Canadian percentages of Crown appeals allowed and dismissed (15% + 12%). The accused appeal success rate is derived by a similar formula.

It is worth noting that the QCA's PR for both criminal and civil appeals also exceeds the national average by a small but statistically significant degree. This could suggest a particularly litigious clientele or may be the by-product of a clash of judicial cultures, insofar as out-of-province litigants may fail to appreciate the differences in approach that underlie the QCA's "civilian" decision making.<sup>20</sup> Further research could serve to explore these issues in more detail.

## B. THE LOW-COR COURTS: ONTARIO AND SASKATCHEWAN

### 1. ONTARIO

The Ont. CA stands out from the other courts on virtually all metrics. It not only outperforms its peers in terms of accessibility and productivity (as discussed below), but also features the second-lowest COR in the country, with lower rates of PR, CR, and AR. These findings remain consistent between the court's civil and criminal cases. The data suggest that the Ont. CA produces uncontroversial decisions consistent with settled law, which effectively end the disputes before it.

### 2. SASKATCHEWAN

The Sask. CA is the only court to achieve a COR less than Ontario, and the decomposition reveals that the court's low COR stems almost entirely from its PR, which itself was driven downward by the court's extremely large caseload per capita (see Part IV.A, below). A look at the province's rules of civil procedure suggests that the Sask. CA deals with smaller, routine cases that may not be subject to appeal in other jurisdictions.<sup>21</sup> Assuming that the litigants in these cases would typically not consider an appeal to the SCC, the Sask. CA's low COR arises mostly from its increased accessibility rather than from any identifiable elements inherent in its decision making.

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20. The archetypical civilian judgment in Quebec proceeds in the following manner: (a) recitation of the facts, (b) identification of the relevant propositions of enacted law, (c) extracts from prominent legal scholarship on those propositions, (d) illustrations from the jurisprudence, if necessary, and (e) application of the law to the facts. Prior decisions are not binding in Quebec and play a secondary role to the doctrine.
  21. For example, small claims cases can be appealed to the Sask. CA on questions of law with leave. *Small Claims Act, 1997*, S.S. 1997, c. S-50.11, s. 45.

## IV. AVENUES FOR FUTURE RESEARCH

The total workload of an appellate court constitutes a key driving factor in its COR. The appendix includes a complete table of the caseloads of Canada's appellate courts, both per capita (cases per year per million people) and per judge (cases per year per judge). A summary of the data appears in Table 6, below. Although tangential to the main inquiry of this study, accessibility and productivity, as well as the criminal-civil distribution of workload, merit observation and suggest potentially fruitful avenues of future research.

It bears note that the national average caseload fell by 28% between 2000 and 2007, and the total number of cases granted leave by the SCC over the same period also saw a similar decline.<sup>22</sup> Further research might explore the causes of this decline in more detail.

### A. ACCESSIBILITY AND PRODUCTIVITY OF APPELLATE COURTS

The appellate courts vary significantly in terms of accessibility, with those from larger provinces providing considerably fewer decisions per capita than those from smaller provinces. Among the larger provinces, the Ont. CA offers the greatest accessibility at 159 cases per year per million people, surpassing the output of the QCA (154) and, particularly, that of the BCCA (131). Among the smaller provinces, the Sask. CA processes almost 400 cases per year per million people—well over double the rate of the other provincial appellate courts. In contrast, the NLCA offers the lowest accessibility in the country (124), processing considerably fewer cases than other smaller provinces.

Case output per judge also varies considerably between the appellate courts, with those from larger provinces exhibiting much more productivity. The Ont. CA leads by a high margin with 74 cases per year per judge, followed distantly by the FCA (51) and the QCA (46). The judges from the BCCA lag far behind (27), attaining levels of output comparable to the smaller provinces.

It bears noting that higher levels of accessibility and productivity do not necessarily imply better appellate jurisprudence. Unusually high levels (*i.e.*, those shown by Ontario and Saskatchewan) could suggest that an appellate court is devoting

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22. Brown & Krane, *supra* note 1 at 374.



TABLE 6: APPELLATE WORKLOAD (2000–2007)

Year	FCA	Ont. CA	QCA	BCCA	Other CAs	Canada Total
2000	948	2339	1472	647	1813	7219
2001	827	2323	1397	614	1771	6932
2002	866	1946	1369	555	1552	6288
2003	814	1864	1211	585	1437	5911
2004	690	1821	1040	519	1557	5627
2005	660	1750	949	471	1553	5383
2006	677	1730	806	416	1370	4999
2007	688	1679	1028	490	1284	5169
<b>Aggregate Caseload</b>	<b>6170</b>	<b>15452</b>	<b>9272</b>	<b>4297</b>	<b>12337</b>	<b>47528</b>
<b>Decline: 2000–01 to 2006–07</b>	<b>-23%</b>	<b>-27%</b>	<b>-36%</b>	<b>-28%</b>	<b>-26%</b>	<b>-28%</b>
<b>Accessibility (caseload per year per million people)</b>	n/a	159	154	131	204	n/a
<b>Productivity (cases per year per judge)</b>	51	74	46	27	29	41

resources to relatively small and routine cases, which could be more efficiently reviewed elsewhere. Unusually low levels (*i.e.*, those shown by British Columbia and Newfoundland & Labrador) could suggest inefficient use of judicial resources. Further research might explore the optimal levels of appellate accessibility and productivity, and benchmark Canada's appellate courts accordingly.

## B. CRIMINAL-CIVIL DISTRIBUTION OF WORKLOAD

As seen in Table 7, Canada's appellate courts also differ significantly in terms of the proportion of their workload devoted to civil and criminal cases. In Quebec and the Atlantic provinces, criminal cases make up approximately one-third of the total caseload, while in Ontario and the Prairie provinces, the figure amounts to about one-half. British Columbia lies between these two extremes. Lower crime rates in Quebec and the Atlantic provinces, compared to the Prairie provinces

TABLE 7: PROPORTION OF CRIMINAL CASES (2000–2007)

Year	Ontario	Quebec	British Columbia	Prairie Provinces	Atlantic Provinces
2000	55%	32%	47%	45%	30%
2001	57%	33%	50%	47%	28%
2002	48%	33%	41%	47%	28%
2003	51%	34%	45%	45%	29%
2004	50%	33%	47%	49%	29%
2005	51%	38%	39%	45%	29%
2006	50%	36%	41%	47%	34%
2007	52%	39%	41%	49%	34%
Criminal Cases as % of Total Workload	52%	34%	44%	47%	30%

and British Columbia, may explain part of this difference.<sup>23</sup> As for Ontario, which boasts the lowest crime rate in Canada, the high criminal workload of the Ont. CA may result from the presence of the Divisional Court, which serves as the province's front-line appellate court in a variety of non-criminal matters.

## V. CONCLUSION

This commentary has aimed to develop a practical methodology to compare the activity of Canada's appellate courts and their contribution to Canada's top-level jurisprudence, as well as assemble a long-awaited data set that can serve as a basis for further research. It bears mention that the purpose of this study has not been to criticize the courts of appeal, but rather to identify regional differences in the outcomes of the appellate process. Hopefully, this will provide a framework for further lines of inquiry that will serve not only to improve our understanding of how federalism impacts appellate jurisprudence, but also how to improve access to justice for all Canadians.

23. Statistics Canada, "Crimes by Offences, by Province and Territory" (2007), online: <<http://www40.statcan.gc.ca/l01/cst01/legal04c-eng.htm>>.

## APPENDIX

**TABLE 1 (COMPLETE): COMPREHENSIVE OVERTURN RATE (2000-2007)  
APPEALS ALLOWED PER 1000 CASES**

Years (2000-2007)	COR	PR	CR	AR
FCA	6.5	11%*	10%*	55%
BCCA	13.3*	15%*	20%*	45%
Alta. CA	7.1	9%*	16%	51%
Sask. CA	2.3*	4%*	12%	44%
Man. CA	5.0	10%	15%	35%
Ont. CA	4.0*	8%*	12%	42%
QCA	8.7*	14%*	12%	53%
NBCA	4.0	4%*	19%	47%
NSCA	6.0	8%*	10%	77%*
PEICA	3.4	7%	10%	50%
NLCA	19.9*	14%*	26%*	56%
All Provinces	6.5	10%	14%	48%
Canada Total	6.5	10%	13%	49%

Note: \*Statistically significant to 0.02 (98% confidence)

**TABLE 6 (COMPLETE): APPELLATE WORKLOAD (1988-2007)  
ALL JURISDICTIONS**

Years (2000-2007)	FCA	BCCA	Alta. CA	Sask. CA	Man. CA	Ont. CA
1988		710		506		
1989		691		498		
1990		799		441		
1991		717		443		
1992		625		410		
1993		653		331		
1994		827	998	431		
1995		764	891	630		
1996		803	705	602		
1997		777	708	542		
1998		793	618	586	218	
1999		698	610	529	203	2562
2000	948	647	569	487	248	2339
2001	827	614	525	507	242	2323
2002	866	555	377	370	175	1946
2003	814	585	463	309	148	1864
2004	690	519	427	412	165	1821
2005	660	471	488	362	125	1750
2006	677	416	412	341	134	1730
2007	688	490	393	298	164	1679
<b>Aggregate Caseload</b>	6171	4297	3654	3086	1041	15452
<b>Decline: 2000-01 to 2006-07</b>	-23%	-28%	-26%	-36%	-39%	-27%
<b>Accessibility (caseload/ year/million people)</b>	n/a	131	139	152	152	159
<b>Productivity (caseload/ year/judge)</b>	51	27	33	25	25	74

**TABLE 6 (COMPLETE): APPELLATE WORKLOAD (1988-2007)  
ALL JURISDICTIONS**

Years (2000-2007)	QCA	NBCA	NSCA	PEICA	NLCA	All Prov- inces	Canada Total
1988	1151						
1989	1059						
1990	1076						
1991	1276						
1992	1081	224					
1993	973	163					
1994	1272	160			86		
1995	1327	312			87		
1996	1558	301			91		
1997	1334	277		37	85		
1998	1476	230		20	98		
1999	1734	291		27	84		
2000	1472	268	145	30	66	6271	7219
2001	1397	223	183	35	56	6105	6932
2002	1369	216	304	50	60	5422	6288
2003	1211	154	267	43	53	5097	5911
2004	1040	239	211	30	73	4937	5627
2005	949	256	211	42	69	4723	5383
2006	806	199	180	37	67	4322	4999
2007	1028	186	159	25	59	4481	5169
<b>Aggregate Caseload</b>	9272	1741	1660	292	503	41358	47528
<b>Decline: 2000-01 to 2006-07</b>	-36%	-22%	3%	-5%	3%	-29%	-28%
<b>Accessibility (caseload/ year/ million people)</b>	154	298	227	269	124	165	n/a
<b>Productivity (caseload/ year/judge)</b>	46	24	30	9	10	40	41

