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The Ontario Court of Appeal and Speedy Justice

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The Ontario Court of Appeal and Speedy Justice

Abstract

The authors use a data sample collected from the Ontario Court of Appeal minute books between 1983 and 1987 to analyze how appeals move through the province's highest court. Criminal and, chiefly, sentence appeals dominate the Court's agenda. Hearing times—the duration of argument and rendering of judgment—are shorter than commonly believed, most often lasting less than twenty minutes. Elapsed times—the period between end of trial and beginning of hearing—are, on average, 77 per cent longer for civil than criminal appeals, 52 per cent longer for defendant than crown appeals, and 23 per cent longer for fall than spring appeals. Elapsed times are also compared with data on United States appeal courts, and the use of appellate case-flow management is considered.

Keywords

Ontario. Court of Appeal; Appellate procedure—Statistics; Ontario

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THE ONTARIO COURT OF APPEAL AND SPEEDY JUSTICE[©]

BY CARL BAAR, IAN GREENE, MARTIN THOMAS,
AND PETER MCCORMICK*

The authors use a data sample collected from the Ontario Court of Appeal minute books between 1983 and 1987 to analyze how appeals move through the province's highest court. Criminal and, chiefly, sentence appeals dominate the Court's agenda. Hearing times—the duration of argument and rendering of judgment—are shorter than commonly believed, most often lasting less than twenty minutes. Elapsed times—the period between end of trial and beginning of hearing—are, on average, 77 per cent longer for civil than criminal appeals, 52 per cent longer for defendant than crown appeals, and 23 per cent longer for fall than spring appeals. Elapsed times are also compared with data on United States appeal courts, and the use of appellate case-flow management is considered.

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I. INTRODUCTION

Although most provincial appeal court offices collect data for their internal use about the cases they process, there is no published research describing patterns of case processing and disposition in provincial appeal courts in Canada.¹ The purpose of this article is to improve our understanding of the appellate process in Ontario, with particular attention to delays in that process.

The article will focus on two aspects of the appeal process. The first aspect is the *hearing time*, which is the time from the beginning of argument to the rendering of the judgment, including only those recesses during which the judges are deliberating. Hearing time is the key element of disposition time, which is the time from the beginning of the hearing to the rendering of the judgment including all recesses. The second aspect is the *elapsed time*, or the time from the trial to the day the appeal is heard. The research findings we will report show that hearings in the Court of Appeal for Ontario² are much more abbreviated than the

¹ For an analysis of case dispositions in the Supreme Court of Canada, see P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 349-64.

² While the Court's proper name is the Court of Appeal for Ontario, the common shorter form of Ontario Court of Appeal is used in the title and throughout the paper. See *Courts of Justice Act, infra*, note 6, s. 2(1).

popular conception of unhurried, deliberative appeal courts. Furthermore, the way in which cases flow through the Court may not be as neutral a process as we expect or desire.

The Ontario Court of Appeal is both the highest court in the province and the court responsible for hearing original appeals. Ontario, like all other Canadian provinces, but unlike three-fourths of the state court systems in the United States, has no intermediate appellate court. Although an intermediate appeal court was recommended by the Zuber Report in 1987,³ the Attorney General rejected this recommendation in his 1989 court reform package.⁴

The Ontario Court of Appeal's role as the appeal court of first instance is subject to important limitations. Like all other provincial courts of last resort, the first instance criminal appeal caseload of the Court consists entirely of indictable offenses. In summary conviction matters, the first appeal lies with a single superior court trial judge, but there may be a subsequent appeal to the Court of Appeal by leave.⁵ The Court can also grant leave to appeal in provincial offenses cases which have already been through an earlier appeal. Unlike any other provincial court of last resort, however, the Ontario Court of Appeal's jurisdiction over original civil appeals has been limited. The 1984 *Courts of Justice Act* hived off civil appeals that involve amounts under \$25,000 and gave those appeals to the Divisional Court,⁶ which is composed of judges of Ontario's superior trial court—the Ontario Court of Justice (General Division)⁷—and sits in three-judge panels. A second appeal (by leave) may go to the Court of Appeal itself.

³ Ontario, *Report of the Ontario Courts Inquiry* by the Honourable T.G. Zuber (Toronto: Queen's Printer, 1987) at 119-21. For appellate courts in general, see *ibid.* at 113-24.

⁴ Former Ontario Attorney General Ian Scott tabled his government's court reorganization proposals in the Ontario Legislature on 1 May 1989. Phase One of the statutory changes may be found in *Courts of Justice Act*, *infra*, note 6, Part II.

⁵ District Court judges heard summary conviction appeals before Ontario merged its Supreme and District Courts in 1990.

⁶ *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 19(1)(a)(i).

⁷ Until the court reforms of 1990, the superior trial court in Ontario was known as the High Court of Justice.

II. METHOD

The data were obtained from the Court of Appeal's "minute books," all of which were made available to us. These handwritten volumes constitute the formal record of court proceedings. Clerks write the entries in the courtroom on loose leaf sheets which are subsequently transferred to the minute books. The records include the name of the case, the names of the judges presiding, a brief description of the nature of the case, a summary of the disposition, and a record of whether the decision was announced orally,⁸ tape-recorded for transcription, or rendered as a written judgment. Cross-references enabled us to find the date of the relevant trial for each appeal.

The appeals studied in this research were drawn from a sample of appeals disposed of by judgments preceded by argument in the Ontario Court of Appeal rather than from appeals simply filed in that Court.⁹ It is likely that a substantial proportion of the cases that originally come into the Court—including over 40 per cent of the criminal appeals and over half the civil appeals—never proceed to argument, let alone judgment. This conclusion is based on Ontario government figures reported in Tables 1 and 2.¹⁰ The proportion of appeals filed but disposed of prior to argument appears to be higher than that in British Columbia and Nova Scotia,¹¹ but lower than that in the Ontario Divisional Court.¹² Regardless of how the Ontario Court of Appeal compares with other appellate courts, the key point is that our analysis of the characteristics of cases argued before that Court focuses

⁸ Some of the decisions classed as "oral" are accompanied by endorsements which are written at the back of the appeal book. Some of these endorsements may be several pages long.

⁹ Throughout this paper, when we refer to the "filing" of an appeal, we mean the filing of the notice of appeal.

¹⁰ See below, section III at 268 and 269.

¹¹ British Columbia figures are from Annual Report of the British Columbia Court of Appeal (1986) [unpublished]; Nova Scotia estimates are based on data gathered in 1986 by JoLynn Durocher, then a graduate student at Brock University.

¹² See Ontario, Ministry of the Attorney General, *Ontario Court Statistics Annual Report, Fiscal Year 1987/88* (Toronto: Computer and Telecommunications Services Branch, Ministry of the Attorney General, 1988) at 6 (Table I.3) [hereinafter *Annual Report 1987/88*]. Note that this table, while showing that 42.5 per cent of dispositions were argued, combines dispositions of both appeals and judicial review applications.

only on that portion of the Court's caseload that has reached the oral argument stage, and not those cases left aside at an earlier stage.

Because of limited financial resources, a cluster sampling technique was used; all of the data for the months of April and October were collected. These two months were identified by officials in the Court of Appeal office as being representative of the months when the Court is in full operation. For criminal cases, data were collected for the 1983-1987 period, although the 1984 minute book data were incomplete because of a change in the Court office staff that year. With regard to the civil cases, data were collected for 1985 to 1987 inclusive. Only those cases which were disposed of during the months examined were included in the sample. The number of criminal cases studied during each of the sample months is shown in Table A-1 in the Appendix;¹³ Table A-2 shows complementary information for civil cases.¹⁴

In the discussion below of elapsed time, the most frequently used time period will be the number of days from the end of the trial in the court below to the beginning of argument in the Court of Appeal. Data for this time period were available for 503 of the 548 criminal cases and 220 of the 261 civil cases.

Some judges and officials of the Court might feel that it would be more appropriate to focus on the period from the point at which the appeal is perfected to judgment.¹⁵ This view is based on the premise that earlier delay—for example, beginning with the judgment of the trial court or beginning with the filing of the appeal itself—is “lawyer delay,” and is beyond the control of the Court itself. The Court of Appeal may properly feel that it should not be blamed for delays that it sees as “beyond its control.”¹⁶ However, the delays faced by litigants are of one piece. How those delays break down into segments attributable to court or counsel may be useful for analysis, but those segments are part of the same delay problem for most litigants. In fact, the distinction between

¹³ See below at 290.

¹⁴ *Ibid.*

¹⁵ The term “perfected” means that counsel for the appellant has submitted all documents required by the Court for the appeal to proceed, including and especially the appeal book, the factum and the transcript of the trial. See *infra*, note 32.

¹⁶ However, for our discussion of the validity of this perspective, see, *Toward Appellate Case-flow Management?*, below at 279.

“court delay” and “lawyer delay” may obscure effective approaches to reducing the elapsed time in appeals.

In some instances, we will report the elapsed time from trial to filing, and from filing to the beginning of argument, to help interpret findings about overall elapsed times. More detailed time breakdowns were not available since the minute books had no entries indicating, for example, when appeals had been perfected.

There is also a limitation in the data pertaining to the end of the appeal process. By using as our end point the beginning of oral argument, we fail to capture any additional time that elapses when cases take more than one day to argue, or are reserved for some period of time before judgment and/or the filing of reasons for decision. Thus, for example, we have data on the elapsed time from end of trial to beginning of argument in 503 criminal cases. However, data on the elapsed time from end of trial to end of argument are available in only 455 cases, and from end of trial to judgment in 439 cases.

We have concluded that using the largest group of cases would produce the clearest overall picture because it appears that an overwhelming majority of cases is disposed of on the very same day that argument begins. In only 9 (2 per cent) of the 455 criminal appeals for which data are available has argument ended on a day other than when it began. Of the 439 judgments, 382 (87 per cent) were given orally (375 of those on the same day argument ended), 26 (6 per cent) were taped (the majority on the day argument ended), and only 31 (7 per cent) were written, 8 of those submitted within two days of the end of argument.

III. OVERVIEW OF FACTORS AFFECTING THE PACE OF LITIGATION

Before proceeding with the analysis of hearing time and elapsed time, it is useful to present some descriptive data which help to characterize cases and case processing in the Ontario Court of Appeal. First, there are very few non-unanimous decisions. In the criminal cases, our sample showed only 7 dissents (1.3 per cent) out of 548 cases. In our civil sample, no dissents were observed, although in 10 cases the minute book did not clearly indicate whether all judges had assented. Even if all these cases are considered as having dissents, the proportion of civil cases with dissents would be only 3.8 per cent, and the proportion of all

cases with dissents would be 2.1 per cent. In 1987, 3.3 per cent of reported cases from Ontario included dissenting opinions, meaning that decisions with dissents are more likely to be reported. Ontario has one of the lowest dissent rates for reported cases outside of the maritime provinces. For example, in Quebec and Manitoba the dissent rate is about 14 per cent.¹⁷ In commenting on this phenomenon, one Ontario Court of Appeal judge told us that his court had a conscious policy of discouraging dissents and separate concurring opinions so that the law could be made as clear as possible to practitioners.

The minute books showed that only 1.6 per cent of the cases in the sample from 1983 to 1987 involved *Charter*¹⁸ arguments; for 1987, the proportion was 3.2 per cent. This figure almost certainly errs on the low side because some court clerks did not always record in the minute books all the instances in which *Charter* arguments were raised. The proportion of reported cases involving *Charter* arguments is substantially higher: 37 out of 122 in 1987, or 30 per cent.

Eighty-five per cent of the criminal appeals were defendant rather than Crown appeals, 83 per cent were sentence appeals, and 93 per cent involved adults rather than young offenders. In the non-sentence criminal appeals, 46 per cent involved property offenses (theft, fraud, break and enter), 31 per cent were offenses against persons (assault, robbery, manslaughter), and 15 per cent were wrongful acts (traffic violations, tax evasion, trafficking). Seventy-seven per cent of the non-sentence appeals, and 67 per cent of the sentence appeals, were dismissed.

¹⁷ The data for reported cases was collected by Peter McCormick with the assistance of a Social Sciences and Humanities Research Council grant. See P. McCormick, "Canadian Provincial Courts of Appeal: A Comparison of Procedures" (delivered at the Canadian Judicial Centre Appellate Court Seminar, Victoria B.C., May 1991) [unpublished] [hereinafter "Canadian Provincial Courts"]. This paper is available at the National Judicial Institute, University of Ottawa. For further analysis of the circumstances under which dissents are issued, see P. McCormick, "Caseload and Output of the Manitoba Court of Appeal 1989" (1990) 19 Man. L.J. 334 at 334-47 and "Caseload and Output of the Manitoba Court of Appeal 1990" (1991, forthcoming) 20 Man. L.J.

¹⁸ *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 [hereinafter *Charter*].

TABLE 1

Disposition of Criminal Appeals in Ontario Court of Appeal
by Type of Disposition, 1985-1988

<i>Type of Disposition</i>	<i>1985/86</i>	<i>1986/87</i>	<i>1987/88</i>	<i>Total</i>
Argued	853 (53%)	955 (56%)	933 (60%)	2,741 (56%)
Abandoned	709 (44%)	726 (43%)	611 (39%)	2,046 (42%)
Refused Leave to Appeal	33 (2%)	19 (1%)	22 (1%)	74 (2%)
TOTAL	1,595 (100%)	1,700 (100%)	1,566 (100%)	4,861 (100%)

Source: Ontario, Ministry of the Attorney General, *Court Statistics Annual Report, Fiscal Year 1987/88*, Table I.1 at 2.

Among the civil appeals, 44 per cent of the appeals were brought by individuals, 34 per cent by corporations, and 17 per cent by the Crown. Of the individuals, 64 per cent were male (and 60 per cent of the individual respondents were male). Thirty-six per cent of the respondents were individuals, 33 per cent were corporations, and 19 per cent were governments. Twenty-six per cent of the civil cases involved business law (contract, business property, bankruptcy), 16 per cent family law, 9 per cent torts, and 3 per cent labour law.¹⁹ Seventy-seven per cent of the civil appeals were dismissed.

The judgments in 86 per cent of the criminal cases were rendered orally (with no difference between the sentence and non-sentence appeals), compared with 72 per cent of the civil appeals.²⁰ Six per cent of the criminal cases and 17 per cent of the civil cases were reserved and later resulted in written judgments. The rest, 8 per cent of criminal and 11 per cent civil cases, were dictated by the judges onto tape and later transcribed.

¹⁹ The other 46 per cent could not be classified in these categories or the minute book did not record the case type.

²⁰ The oral decisions include some cases disposed of by way of written endorsement on the back of the appeal book.

TABLE 2

Disposition of Civil Appeals in Ontario Court of Appeal
by Type of Disposition, 1985-1988

Type of Disposition	1985/86	1986/87	1987/88	Total
Argued	463 (47%)	452 (58%)	194 (35%)	1,109 (48%)
Abandoned or Deemed Abandoned	466 (47%)	257 (33%)	315 (56%)	1,038 (45%)
Settled	40 (4%)	37 (5%)	20 (4%)	97 (4%)
Other	18 (2%)	34 (4%)	32 (6%)	84 (4%)
TOTAL	987 (100%)	780 (100%)	561^a (100%)	2,328 (100%)

Source: Ontario, Ministry of the Attorney General, *Court Statistics Annual Report, Fiscal Year 1987/88*, Table I.2 at 4.

^aThe Ministry Table shows 620 for this figure, but gives no indication of the categories in which the additional 59 cases would fall.

Tables 1 and 2 (which are based on Ministry of the Attorney General's data), together with Tables A-1 and A-2 in the Appendix,²¹ suggest that the number of criminal cases argued in the Court of Appeal has remained relatively stable during the period under study, increasing slightly between 1983 and 1988, while the number of civil dispositions has declined since 1985, presumably reflecting the 1984 expansion in Divisional Court jurisdiction to include civil appeals involving less than \$25,000.²² Criminal cases in our sample outnumbered civil cases in the

²¹ See below at 290.

²² The number of criminal appeals remained stable until 1988-1989, but increased substantially to 2,282 in 1989-1990. On the other hand, the number of civil appeals remained constant at 520 in 1988-1989 and 550 in 1989-1990. With regard to cases pending, however, on the civil side, there was a substantial increase from 1,108 in 1987-1988 to 1,708 in 1989-1990, while criminal cases pending remained fairly constant at 2,678 in 1987-1988 and 2,829 in 1989-1990. See *Annual Report 1987/88*, *supra*, note 12 at 2 (Table I.1) and 4 (Table I.2); Ontario, Ministry of the Attorney General, *Ontario Court Statistics Annual Report, Fiscal Year 1988/89* (Toronto: Computer and Telecom-

1985-1987 period by 373 to 261. By 1987, the gap between criminal and civil cases had widened, with criminal cases outnumbering civil cases 125 to 55. Official Ministry statistics show that criminal cases argued outnumbered civil cases argued by a much wider margin: over the three year period, the difference was 2,741 to 1,109, and in the 1987-1988 fiscal year, it was a lopsided 933 to 194.²³ Since the Ministry's fiscal year statistics are slightly more recent than our calendar year figures, they suggest that the increasing proportion of criminal appeals in Ontario's highest Court is not a one-time aberration, but given the current division of jurisdiction between the Court of Appeal and the Divisional Court, a longer term trend. The shift was observable, though not as sharp as in 1988-1989, with 956 criminal appeals argued compared with 244 civil appeals. In 1989-1990, the margin grew wider again from 1153 to 210.²⁴

IV. HEARING TIME: THE TWINKLING OF AN EYE

Figure 1 shows the mean (arithmetic average) and modal (most common) hearing times for criminal and civil cases, including the mean and modal time taken up by counsel for appellants and respondents in argument, and by judges in their deliberations.²⁵ Hearing time is the amount of time between the beginning of an appeal court hearing and the rendering of the judgment, including only those recesses during which the judges are deliberating.

The mean hearing time for criminal cases is an hour of court time, while civil appeals last about ninety minutes. However, these averages are misleading because they include a few appeals that lasted several days or even weeks. The modal (most common) disposition time

munications Services Branch, Ministry of the Attorney General, 1989) at 2 (Table I.1) and 4 (Table I.2) [hereinafter *Annual Report 1988/89*]; and Ontario, Ministry of the Attorney General, *Ontario Court Statistics Annual Report, Fiscal Year 1989/90* (Toronto: Computer and Telecommunications Services Branch, Ministry of the Attorney General, 1990) at 2 (Table I.1) and 4 (Table I.2) [hereinafter *Annual Report 1989/90*].

²³ *Annual Report 1987/88*, *ibid.*

²⁴ *Annual Report 1989/90*, *supra*, note 22 at 2 (Table I.1) and 4 (Table I.2).

²⁵ In some cases, the averages for the component parts do not sum to the average for the total disposition time because of the nature of the calculations. In these cases, the component parts are graphically proportional to each other and fitted into the total disposition time with actual figures indicated. See Figure 1, below at 272.

provides a better indicator of the length of a typical appeal hearing—twenty minutes whether criminal or civil.²⁶

As expected, lawyers for the appellants take up the greatest proportion of the Court's time, partly because, when the appellant's case is deemed to be weak, the judges do not call upon the lawyer for the respondent to speak. Thus, the modal court time for lawyers for the respondent is zero. Even when cases in which the respondents are not called upon are omitted, appellants tend to take up much more court time. For example, 76 per cent of the counsel for the appellants spoke for ten minutes or more, compared to only 46 per cent of counsel for respondents.

For most cases, the panel needs very little time to reach a decision. The modal "judge time" for criminal cases is five minutes, and for civil cases, only two minutes. Even the mean judge time is not that much greater: twelve minutes for criminal cases and fourteen minutes for civil cases. In three-fourths of all cases, the judges deliberated for less than fifteen minutes. Note that the judge time measurement includes the time taken by the judges to exit and re-enter the courtroom, so that actual conferral time is even less than the judge time shown in Figure 1.

These data seem to indicate that there is a substantial number of "routine" appeals in which the issues are not complex. For such cases, the respondent is often not even called on to speak, and the judges need only a few minutes to confer with each other before announcing their decision. Even though initial civil appeals in cases under \$25,000 go to a different court, civil appeals in the Court of Appeal reflect the same pattern as criminal appeals—the dominance of quickly resolved routine cases.

²⁶ Non-sentence appeals tend to take up more court time than sentence appeals. Forty-eight per cent of the non-sentence appeals take more than an hour of court time, compared to 31 per cent of the sentence appeals. There is no difference between the time taken by adult cases and young offender cases.

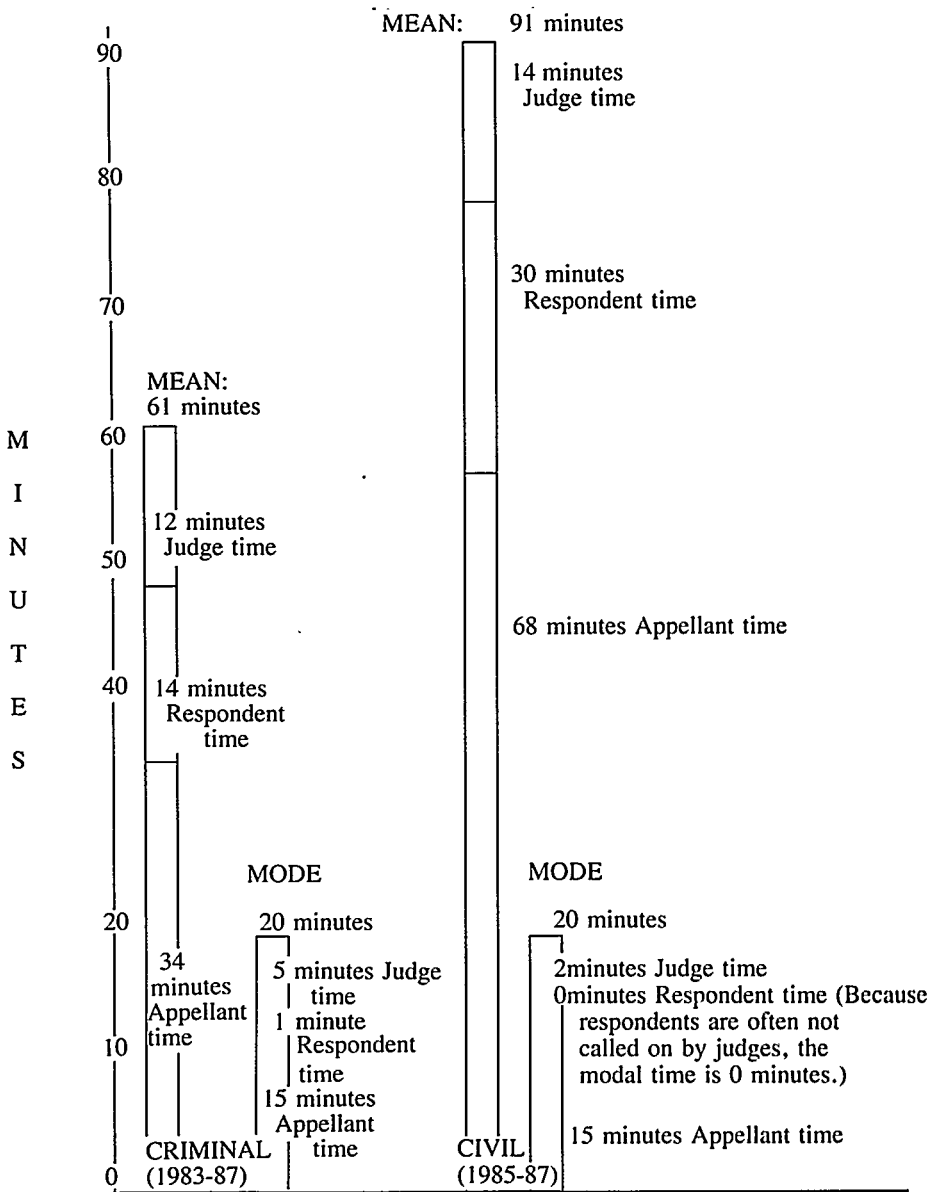


Fig. 1: Mean and Modal Hearing Times in Ontario Court of Appeal

V. ELAPSED TIME: THE PACE OF APPELLATE JUSTICE IN ONTARIO

How long does a typical case take to move from trial through the Ontario Court of Appeal? A quick answer would be "about a year." But that answer would not reveal the actual pace of appellate justice. Our data show clearly that civil cases take substantially longer than criminal cases to go through the appellate process. Variations over time must be noted: delays have grown during the period of our study. Other factors which may contribute to delay include dissents, type of case, impact of *Charter of Rights* arguments, appellant's identity, and method by which judges render their decisions.

A. *Different Elapsed Times in Civil and Crown Appeals*

The median time from end of trial to beginning of argument²⁷ in the Ontario Court of Appeal is 287 days for criminal cases and 508 for civil cases, or 77 per cent longer. Even if one separates the criminal appeals into sentence appeals and appeals on matters other than sentence, on the assumption that sentence appeals are likely to be reached and disposed of more quickly, civil cases take a considerably longer time. The median time for sentence appeals is 283 days and for non-sentence appeals 328 days.

To ensure that the absence of elapsed time data for civil cases for 1983 and 1984 did not affect the results (since criminal cases showed less delay in those years), it would be appropriate to compare civil and criminal elapsed times during the 1985-1987 period. As Table 3 shows, the differences are still striking. Less than 30 per cent of the civil appeals reach argument within a year, while 60 per cent of the criminal matters do so.

One explanation for the difference in elapsed time between criminal and civil cases may be the policy of the Ontario Court of Appeal to give priority to the scheduling of criminal appeals, and especially to

²⁷ The median is the point at which 50 per cent of the cases take a longer time and 50 per cent take a shorter time. It is a better indicator of the typical elapsed time than the mean or arithmetic average, which is misleadingly high due to the small number of cases delayed for three years or more.

criminal appeals in which the appellant has been denied bail.²⁸ This explanation needs to be confirmed by comparison of civil and criminal elapsed times in the early stages of the appeal process. It may be that differences in the way counsel develop civil and criminal appeals may account for a greater proportion of the difference than the availability of dates for oral argument.

TABLE 3

**Elapsed Time from End of Trial to Beginning of Argument
by Major Time Intervals, 1985-1987**

<i>Time Interval</i>	<i>Civil Cases</i>	<i>Criminal Cases</i>
Under Six Months	23 (11%)	85 (24%)
Six Months to One Year	41 (19%)	124 (36%)
One Year to Two Years	130 (59%)	110 (32%)
More than Two Years	26 (12%)	29 (8%)
TOTAL	220 (100%)	348 (100%)

B. Elapsed Time When Crown or Defendant Appeals

Another sharp difference exists within the sample of criminal cases. Appeals by the Crown take significantly less time than appeals by the defence. The median time from end of trial to beginning of argument in 69 Crown appeals was 201 days. The corresponding median time in 421 defence appeals was 306 days. This difference between Crown and defendant held for both sentence appeals and non-sentence appeals.

²⁸ Interview with an Ontario Appeal Court judge, 1990.

What accounts for this difference? The Court would surely not give priority to Crown rather than defence appeals in scheduling cases for argument. Thus, there must be other causes of delay that lead to half of the defence appeals coming up for argument after ten months while a majority of Crown appeals are heard within seven months. We could hypothesize that delays in obtaining legal aid might slow defence appeals, since additional time might be required for legal aid officials to review an application to fund an appeal. If so, we would expect that the median time from the end of trial to the filing of an appeal would be longer for the defence than the Crown.

However, the difference is far too small to account for all of the difference in elapsed times. The median time for filing a Crown appeal is 39 days (based on 68 cases), compared with 63 days for the defence (based on 409 cases). Interestingly, the variability in time taken to file defence appeals is greater than for those initiated by the Crown. Ten per cent of defence appeals are filed within 8 days (compared with 23 days for the Crown); 25 per cent of defence appeals are filed within 27 days of trial (compared with 28 days for the Crown). In contrast, 75 per cent of Crown appeals are filed within 79 days, while 75 per cent of defence appeals are not filed until 135 days after trial. In turn, 90 per cent of Crown appeals are filed in 181 days, compared with 253 days for the defence side.

Perhaps the explanation for the differences between Crown and defence practices for filing appeals is broader than legal aid screening procedure. The differences may reflect the greater diversity of work styles, time management, and tactical strategies that impinge on private counsel and not on Crown counsel. This explanation emerges from examination of the differences between Crown-initiated and defence-initiated appeals, not only for the normal appeals, but also for faster and slower appeals. Table 4 shows this comparison, based on the same percentage break points used in the previous paragraph.

These figures show not only a 105 day gap between Crown and defendant at the medians for each group, but also that the gap widens, as cases extend through time, to 136 and 153 days at the 75th and 90th percentile. The widening gap suggests the value of exploring why the pattern of elapsed times of appeals brought on by the Crown is so different from the pattern for cases brought on by the defence. Do some legal issues go unnoticed by defence counsel until long after

conviction?²⁹ Are the personal circumstances of defendants more diverse, so that appeals arise and move in distinctive ways? Or is there diversity in the legal community such that different individuals or different firms are better equipped to move more quickly in pursuing appeals—or, conversely, are able to organize their work to avoid having to postpone problem cases for an inordinate period of time?

TABLE 4

**Elapsed Time for Criminal Cases from End of Trial to Beginning of Argument
by Crown or Defendant Appeal, 1983-1987**

<i>Percentile of Cases</i>	<i>Crown Appeals (Days)</i>	<i>Defendant Appeals (Days)</i>	<i>Diff- erence (Days)</i>	<i>All Appeals (Days)</i>
90%	526	679	- 153	676
75	331	467	- 136	453
50	201	306	- 105	287
25	152	182	- 30	175
10	85	118	- 33	111
(N=	69	421		503)

The fact that civil appeals engender even more delay suggests that the factors that differentiate criminal cases from one another may also differentiate criminal cases from civil cases. In civil matters, legal issues arise in a number of different fields of law. Lawyers are drawn from a variety of firms; no single government ministry is a party in every case. Given the greater likelihood that civil appeals will be disposed of in a manner other than by judicial decision, perhaps some of the additional time elapses during negotiation or further discussion of outstanding issues.

²⁹ Defence counsel are required to file their appeal books and factums 30 days after they have received notice that the transcripts from the trial are ready, but in fact it is not difficult for counsel to obtain permission to file these documents for up to a year after the transcripts are ready. The transcripts themselves, however, often take months to be prepared, and once they are received by counsel, a careful scrutiny of them may identify new legal issues which necessitate additional preparation time.

C. "Spring Forward, Fall Back"

Our effort to explain differences in elapsed times has focused on characteristics of the parties and their lawyers' behaviour. To what extent can differences in elapsed time be placed at the feet of the Court and attributed directly to how it operates? This question is more difficult. Elapsed time may increase over time and lead members of a court to ask for more resources, implicitly attributing delay to the absence of those resources. But this explanation is often hard to test. Those who feel the Court of Appeal has too few judges, for example, do not focus on changes in the number of appeals. In fact, the number of pending appeals has increased much faster than the number of appeals added, and the number of cases disposed of following argument in court has decreased while the number of judgeships has remained stable.

Instead, the case for more judicial resources is linked to an increase in the diversity and complexity of legal issues dealt with in the existing cases. The advent of the *Charter* provides the most dramatic example to proponents of this viewpoint, even though cases involving *Charter* issues were in fact rare in our sample, as noted above. Two Appeal Court judges who commented on an earlier draft of this article noted that *Charter* cases were more likely to lead to written decisions, and the time commitment needed to research and write *Charter* decisions imposes a heavy burden on some judges. There is a need for further data focused on *Charter* cases to test their argument.

Another test of whether the operation of the Court, rather than the operation of the bar, affects elapsed time compares cases argued in April with cases argued in October. Coming after the July-August period, traditionally termed the "long vacation," when (prior to the recent changes) regular oral argument was not scheduled, the October cases will presumably show longer elapsed times unless the cases have taken so long that differences attributable to an annual cycle will have little impact. Table 5 shows how well the evidence supports this expectation.

It takes 55 days longer to reach the median appeal hearing, in terms of elapsed time, in October than in April. A similar gap is observable for the more expeditious cases; the fastest 10 per cent requires 61 more days, and the fastest quarter requires 56 more. In all three categories, the increase closely approximates the length of the summer vacation. Yet no such gap is observable for the slowest quarter

or slowest 10 per cent of the cases; presumably, those cases are sufficiently far behind that a 60 day break has no impact on their elapsed times.

TABLE 5

Elapsed Time for Criminal Cases from End of Trial to Beginning of Argument
by Month, 1983-1987

<i>Percentile of Cases</i>	<i>April Appeals (days)</i>	<i>October Appeals (days)</i>	<i>Difference (days)</i>
90%	679	674	5
75	459	442	17
50	243	298	-55
25	142	198	-56
10	80	141	-61
N=	209	294	

What lesson can be drawn from the evidence that October cases, in certain circumstances, take longer than April cases? The key point is that official court operations may offer the best explanation. Slow cases were unaffected by practices and procedures such as the traditional long vacation, while litigants and counsel who sought priority, were prepared sooner, and pressed for earlier dates for argument were the ones penalized.

Since 1989, the Ontario Court of Appeal has had panels sitting in the July-August period. While there is only one panel per week (a single criminal panel and a single civil panel sit on alternate weeks), it will be interesting to test whether this change has reduced the differences in elapsed time between the faster April and October cases.

D. *Toward Appellate Case-flow Management?*

This analysis of the impact of the July-August break in the court year is but a small part of the larger issue of what responsibility the Court itself has for the reduction of delay. The above discussion implies that court procedures have little impact on slower cases. In fact, case-flow management and delay reduction programs established over the past decade in many courts in the United States, and now implemented in three Ontario trial centres, emphasize the monitoring of all cases in order to ensure that they are tracked by the court, even if elapsed times could be attributed to counsel rather than the court. When one side delays a trial or an appeal and the other side does not object, this is too often not a private matter between two private individuals, but the use of the public court process for private advantage rather than for the fair resolution of a dispute. Legitimate and distinctive problems often retard the resolution of individual cases before the court, but cases are far more frequently delayed as the result of inadequately prepared counsel and poorly organized court scheduling processes—twin factors that reinforce each other in court after court.³⁰

A re-examination of Tables 4 and 5 helps to illustrate this problem.³¹ Earlier, we looked at these tables in order to contrast one set of elapsed times with another. However, these tables also have something in common. All five columns of data show a highly skewed elapsed time. If we look at all 503 criminal cases, we observe that while half the cases reach argument in under 10 months, 10 per cent of the cases take well over another year to reach argument. It is not merely a handful of cases that extend beyond that last point in time; some 50 criminal cases in our sample—10 per cent—took over 22 months after trial to come before the Court of Appeal.

The fact that a large number of cases extend far beyond the time that is normally required for the average case suggests that the Ontario

³⁰ This conclusion is reinforced by interviews with a sample of Ontario judges, lawyers, crown attorneys, and court administrators. See I. Greene, "The Zuber Report and Court Management" (1988) 8 Windsor Y.B. Access Just. 150. For general background on case-flow management, see M. Solomon & D. Somerlot, *Case-flow Management in the Trial Court: Now and for the Future* (Chicago: American Bar Association, 1987). For current information on Ontario trial courts, see J.M. Wilson, "Case Management in Ontario: When There's a Will There's a Way" (1990) 9 Advocates' Soc. J. 3.

³¹ See above, Table 4 at 276 and Table 5 at 278.

Court of Appeal may be taking a *laissez-faire* approach toward its pending cases. Once all the paperwork has been completed for a case by the appellant, the Deputy Registrar schedules the appeal hearing.³² If the parties request that a case be expedited, it may be scheduled for hearing sooner, but the cases in which neither party has come forward to request a date are ignored unless the preliminary paperwork has not been completed a year after the date of filing of the notice of appeal. These cases are then brought forward, a procedure known as “purging the list.”³³ The Ontario Court of Appeal is in good company operating on a *laissez-faire* basis. Courts throughout the common law world and beyond use a similar approach. The court is there to serve the parties when the parties wish to proceed; it is assumed that when neither party comes forward, either to seek a date or to press for an order if the other side rebuffs efforts to move the case, all is well.

The consequences of this approach for appellate justice in Ontario are only beginning to be understood. In criminal cases, the *laissez-faire* approach has meant in practice that Crown appeals are heard months earlier than appeals by defendants, and large numbers of appeals are not heard until they have been in the Court for more than twice as long as the average case. With regard to civil appeals, there are differences in the rates of progress of appeals depending on whether they are initiated by corporations, governments, or individuals. Appeals initiated by governments tend to be disposed of relatively quickly; a third of them were disposed of in the fastest quartile of cases. Appeals brought on by individuals tend to cluster around the median elapsed

³² In civil cases, an appeal is put on the ready list once the appellant has perfected the case, meaning that the appellant has filed with the Court the appeal book, factum, transcripts, and a “certificate of perfection” indicating that the appeal is ready to proceed. The Deputy Registrar sets the appeal date after checking with counsel involved in the case to ensure that they are all available on the same day. For criminal cases, an appeal is considered perfected when the appellant has filed the appeal book, factum, and transcript, and the Court of Appeal office has received the lower court file; no certificate of perfection is required. Once a criminal case is perfected, the case goes on the bottom of the ready list, and the Deputy Registrar sets hearing dates as cases come to the top of the list. Counsel are usually not involved in setting the hearing date, as criminal counsel tend to be more flexible in being able to appear at a hearing than the counsel in civil cases. Criminal counsel who appear frequently in the Court of Appeal sometimes request a change in the date set by the Deputy Registrar so that they can argue more than one appeal on the same day, and these requests are accommodated if possible. (Based on information from court officials.)

³³ In Nova Scotia, the list is purged every two to three months, and in Alberta, after six months. In Quebec, the list is purged after 18 months. See “Canadian Provincial Courts,” *supra*, note 17.

time, while those brought on by corporations tend to end up in either the slowest or the fastest quartile of cases.

Because appeals do proceed at such varying rates, the appeal judges should be aware of these differences and consider how to deal with them. For example, a variety of techniques and practices are available to ensure that particular appeals are not inordinately delayed; standards can be established by court rule, and administratively enforced, so that judge time need not be taken away from adjudication. Procedures designed jointly by bench, bar, and court officials can expedite many types of appeals, smooth out the bumps on the road to judgment, and minimize the traffic jams that too often characterize “stop and start” litigation.

This type of joint planning has already been used to explore ways of expediting the adjudication of sentence appeals. A practice direction, issued by Chief Justice Howland on 21 September 1989, has altered scheduling and formalized time limits for arguments. It has also established the requirement of a standard form factum focusing on specific characteristics of the case and the defendant likely to be considered most relevant by the panel of judges. The research reported in the present article reinforces the need for joint efforts of this kind to expedite the flow of all types of appeals.

VI. THE SENTENCING FUNCTION

Given the large number of sentence appeals and the routine nature of most sentence appeal hearings, it is important to examine this portion of the Court of Appeal’s work in the aggregate.

Not surprisingly, the overwhelming majority of sentence appeals are taken by the defendant rather than the Crown. Of the 444 sampled appeal cases for which data were available, 384, or 86 per cent, were taken by the defendant, and only 60 by the Crown. The proportion of appeals by the defendant on sentence is marginally higher than the proportion of appeals by the defendant on non-sentence matters. In the non-sentence appeals, the defendant brought on 73 of 88 appeals, or 83

per cent. Sentences were varied in 34 per cent of defence appeals, and 32 per cent of Crown appeals.³⁴

TABLE 6
Variations in Sentences Resulting From Appeal
by Length, 1983-1987

<i>Length of Variation</i>	<i>Decrease</i>	<i>Increase</i>
Less than 90 days	7 (6%)	2 (10%)
From 90-179 days	20 (18%)	1 (5%)
From 180-364 days	34 (31%)	8 (38%)
From 365-729 days	33 (30%)	3 (14%)
730 days and over	17 (15%)	7 (33%)
TOTAL	111 (100%)	21 (100%)

The overwhelming majority—84 per cent—of sentence variations result in decreased penalties. However, this does not mean that the appeal court judges have a predisposition to decrease sentences, all other factors being equal. When only the sentence appeal cases which result in variances are considered, the sentence variances are in the direction requested by the Crown 93 per cent of the time; the corresponding figure for defendant appeals is about the same—94 per cent. Thus, the appeal court judges seem to be even-handed in their treatment of sentence appeals.

It has been suggested to us by judges and court officials in Ontario, Alberta, and Quebec that appeal court judges in Ontario and

³⁴ By way of comparison, research by Peter McCormick has shown that between 1 July 1986 and 1 July 1991, the Alberta Court of Appeal allowed 50.2 per cent of 2,540 sentence appeals it heard; over the same period, the Alberta Court allowed 32.4 per cent of its substantive criminal appeals.

Alberta have a reputation for "tinkering" with sentences more than their counterparts in other provinces.³⁵ As a result, they say, there are more sentence appeals in Ontario and Alberta because lawyers realize that they have a reasonable chance to succeed on an appeal. Data on criminal appeals across Canada lend some support to this hypothesis. Criminal cases make up a far greater proportion of the total caseload in Ontario and Alberta than in the other provinces. In 1987, criminal cases made up 82 per cent of the total appeal caseload in Ontario and 70 per cent in Alberta. The average for the other eight provinces was 46 per cent.³⁶

This analysis suggests a way to ameliorate the current caseload crisis faced by the Ontario Court of Appeal. If the judges adopted the approach of appeal judges in eight other provinces and varied sentences only in cases of clear injustice, the number of sentence appeals might drop. Thus, some judicial resources could possibly be freed to deal with the other criminal and civil cases which involve substantive issues of law.

On the other hand, Ontario's treatment of sentence appeals may result in a fairer system of justice. The literature on sentencing, in both the United States and Canada, has demonstrated that trial judges tend to vary widely in the sentences handed out for the same type of offence even when the background characteristics of offenders are held constant.³⁷ From this perspective, it may be that in eight provinces the fairness and consistency of the sentences of persons convicted of crimes are receiving inadequate consideration and that Ontario's example is laudable. Moreover, according to one Ontario Court of Appeal judge we interviewed, some of the appeal judges feel strongly that, if defendants have a decent chance of succeeding in a sentence appeal, this will encourage them to improve their behaviour between the filing of the

³⁵ This information was obtained through random sample interviews conducted with judges, lawyers, and court officials in Alberta and Ontario, and through telephone interviews with some court officials in Quebec. Also see P. McCormick and I. Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: Lorimer, 1990) at 154.

³⁶ P. McCormick, "Caseload and Output of the Manitoba Court of Appeal: An Analysis of Twelve Months of Reported Cases" (1990) 19 Man. L.J. 31 at 35 (Table II).

³⁷ See, for example, J. Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971).

appeal and the hearing.³⁸ Again, a more comprehensive study of appeal court decision making across the country is called for in order to resolve this important issue.

VII. EVALUATING THE ELAPSED TIME OF ONTARIO APPEALS

We have presented figures on the amount of time that civil and criminal appeals take to move through the Ontario Court of Appeal. Depending upon the reader's perspective, he or she may react to these figures with satisfaction or alarm. One way to evaluate how well or how badly the Ontario Court of Appeal is doing in expeditiously dealing with its pending cases is to compare its performance with other appellate courts.

Unfortunately however, inquiries into other provinces and statistical reports from other provincial courts of appeal yield no data on the pace of appeals, making comparison impossible. More systematic data are available from appellate courts in the United States, but those data only allow broad comparisons. The case mix in American appellate courts is much different. Sentence appeals are virtually unknown. Three-fourths of the states have intermediate appellate courts, so that the functions of the Ontario Court of Appeal are divided between a state court of last resort and a court (or set of courts in the most populous states) that hears initial appeals.

With these caveats in mind, Table 7 reports median time from lower court judgment to appeal court mandate (following the decision) in the ten American state appellate courts for which data are available. The data are based on samples of between 288 and 660 cases decided in 1975-1976.

³⁸ An Alberta Court of Appeal judge with whom we conducted an interview suggested that the longer the delay before the sentence appeal hearing, the more the appeal court might feel obliged to reduce the sentence of an offender who has behaved acceptably between the time of the offence and the time of the sentence appeal hearing.

TABLE 7

**Median Elapsed Times from Lower Court Judgment to Appeal Court Mandate,
1975-1976**

<i>Court</i>	<i>Type^a</i>	<i>Median (Days)</i>
Oregon Court of Appeals	ICA	210
Florida Court of Appeal First District	ICA	302
Nebraska Supreme Court	Sole	303
Montana Supreme Court	Sole	355
New Jersey Superior Court, Appellate Division	ICA	384
Colorado Court of Appeals	ICA	413
Ohio Court of Appeals, Eighth District	ICA	481
Virginia Supreme Court	Sole	483
Indiana Court of Appeals	ICA	609
Illinois Appellate Court, First District	ICA	648

Source: J.A. Martin and E.A. Prescott, *Appellate Court Delay: Structural Responses to the Problems of Volume and Delay* (Williamsburg, Va.: National Center for State Courts, 1981) at xiv and at 86.

^a "Sole" means that the state has no intermediate court of appeal; "ICA" means the court is the initial court of appeal rather than the court of last resort.

How does the Ontario Court of Appeal compare with these American counterparts? As we reported earlier, the median time from end of trial to beginning of argument in the Ontario Court of Appeal is 287 days for criminal cases and 508 days for civil cases. The average elapsed time, adjusting for the different proportions of criminal and civil cases, is 359 days. Even adding some amount of time to the Ontario figures to account for the additional elapsed time from beginning of argument to judgment, the Ontario Court of Appeal is comparable to its opposite numbers in the United States. Even its relatively weak performance on civil appeals places it well ahead of appeal courts in two of the ten states (though those states, Indiana and Illinois, were

notorious for their patronage dominated court staffs and highly partisan systems for electing judges). A combination of civil and criminal elapsed times would place the Ontario Court no lower than seventh, and perhaps as high as fourth.

But this comparison should provide no basis for satisfaction. The predominance of sentence appeals and the small minority of written judgments in the Ontario Court of Appeal should have given that Court a comparative advantage over its American counterparts.³⁹ Furthermore, American courts of last resort generally sit *en banc* rather than in panels, limiting their flexibility to handle increases in volume. On the other hand, the Ontario Court serves a province with a larger population than any American state served by a single appeal court. The Ontario Appeal Court's ability to keep pace, in comparative terms, is to its credit. Whether it can continue to do so may depend, at least in the short term, on its ability to further refine and improve its internal operations.

VIII. CONCLUSION

Our research has shown that once the trial ends, appeal cases tend to make their way to the hearing stage in a relatively leisurely fashion, although there is a tremendous diversity of patterns which cries out for further research. When the hearing does take place, however, it is generally very brief.

Typical hearings last about twenty minutes, including two to five minutes of conferral time among a panel of three judges. Only 2 per cent of the appeal hearings last more than one day. The argument is dominated by counsel for the appellant, who characteristically addresses the Court for about fifteen minutes. If the appellant's argument is unpersuasive, counsel for the respondent is not called upon to speak at all; if called upon, the respondent's remarks may take only one or two minutes. In forty-nine out of fifty cases, the panels decision is unani-

³⁹ When reserved judgments in civil and criminal cases in Ontario are combined, 8 per cent of the cases are reserved for a written decision. This is lower than in any other province (reserved judgments vary from 10-15 per cent in Manitoba, 15-20 per cent in Saskatchewan, 20 per cent in Alberta and British Columbia to upwards of 30 per cent in the Atlantic provinces and 60 per cent in Quebec). Although there are no comparable data for U.S. appeal courts, the general impression among scholars is that in most courts, at least 20 per cent of the cases are reserved. See "Canadian Provincial Courts," *supra*, note 17.

mous. Seven-eighths of the criminal decisions and three-fourths of the civil decisions are delivered orally, and 98 per cent of the oral decisions are delivered on the day of the trial. These data indicate that the great majority of appeals are routine and non-controversial in nature.

We will attempt to paint a picture of the pace of litigation for a “typical” appeal case in Ontario. It takes about a year to get such a case to the hearing stage if it is a criminal case (and 75 per cent of the appeals are criminal cases) or about eighteen months for a civil case. Sentence appeals are the most common single kind of appeal heard by the Court. Eight out of ten criminal appeals are sentence appeals, and 86 per cent of these sentence appeals are brought on by the defence. About a third of the sentences are varied by the Court. Next to sentence appeals, the most common type of criminal case concerns property related offenses, and the most common kind of civil case pertains to business law. For both the non-sentence criminal appeals and the civil appeals, the appellant has between a one-in-seven and one-in-eight chance of winning.

Our analysis suggests that while the Court may be making every effort to accommodate those appeals which counsel want brought on quickly, it is doing little to advance those cases which counsel themselves are in no particular hurry to complete. Although in some cases such delays may neither threaten the standards of justice nor harm individual litigants, in other cases this *laissez-faire* approach of the judges may well have unacceptable results. Because so many appeals are routine and some counsel appear to be in no hurry to proceed for some of them, it is possible that the Court is being used more for the strategic advantage of litigants or counsel than for the fair resolution of disputes, and that this is happening more frequently than we would like to think.

One possible explanation for the dominance of sentence appeals on the Court’s agenda is that the appeal judges in Ontario are willing to “tinker” with sentences in contrast to appeal judges in every other province except Alberta. A change in the Ontario Court’s approach to sentencing might help resolve its current caseload crisis. On the other hand, it may be that the other provincial appeals courts are undervaluing the importance of greater uniformity and fairness in sentencing. This issue can only be settled after additional research has been conducted.

The major structural issue confronting appellate justice in Ontario is whether an intermediate court of appeal should be created. The Zuber Report recommended that the current Court of Appeal be

divided into a new "Supreme Court of Ontario" whose seven justices would be the final arbiters of the law within the province, and a new "Ontario Court of Appeal" whose twenty-five justices would handle the civil appeals now heard by the Divisional Court and the criminal and remaining civil appeals now heard initially by the existing Court of Appeal. This is essentially the same proposal that has the support of current Court of Appeal judges and was endorsed by the Joint Committee on Court Reform of the Canadian Bar Association of Ontario.⁴⁰

Despite this substantial support, the proposal has not been enacted even as Ontario has taken major steps to alter its trial court structure. The provincial government has refused to support it, perhaps sharing the concern of other governments that once Ontario has created an intermediate court of appeal, the other large provinces will be under pressure to follow suit, adding a new step and increased costs to the judicial process.

Our findings on sentence appeals suggest that a change in the Court's approach to those appeals (that is a refusal to make small adjustments to custodial sentences) might substantially reduce the Court's caseload. Yet it would be inappropriate for a provincial government to tell a court to alter the way its discretion is exercised. A change in approach that can be attributed to caseload pressure, rather than to a redefinition of what fairness and justice require in individual cases, would lack the legitimacy needed for public acceptance. Furthermore, even if the Court of Appeal modifies its sentence appeals practices, and its criminal caseload decreases, a substantial proportion of civil appeals will continue to go to Divisional Court panels. Thus, a continuing stalemate between the Court of Appeal judges and the provincial government on creation of an intermediate court of appeal is likely to maintain the dominance of criminal appeals in the existing Court of Appeal.

This policy stalemate may reflect a difference in perspectives that is unlikely to be altered by further research on the appellate process or the function of sentence appeals. On the other hand, perhaps further

⁴⁰ The Court of Appeal judges endorsed an intermediate court of appeal in their submission to Mr. Justice Zuber's Ontario Courts Inquiry. See C. Schmitz, "Ontario Appeal Court Justices Urge Creating New Appellate-Level Court" *The Lawyers Weekly* (12 December 1986) 1 at 23. For the bar report, see Joint Committee on Court Reform, *Report of the Sub-Committee on Appeal Court Reform* (Toronto: Canadian Bar Association (Ontario), October 1989).

research could spell out the costs of the current appellate structure, as well as suggest means to ameliorate the impact of caseload pressure on delays in both criminal and civil appeals.

APPENDIX

TABLE A-1

Criminal Cases Sampled by Month and Year

<i>Year</i>	<i>April</i>	<i>October</i>	<i>Total</i>
1983	40	76	116
1984	29	30	59
1985	55	61	116
1986	62	70	132
1987	56	69	125
TOTAL	242	306	548

NOTE: The lower number of criminal cases in 1984 does not reflect the court's actual workload. The quality and completeness of the court clerks' records in that year did not allow the collection of relevant data from the minute books.

TABLE A-2

Civil Cases Sampled by Month and Year

<i>Year</i>	<i>April</i>	<i>October</i>	<i>Total</i>
1985	53	38	91
1986	61	54	115
1987	28	27	55
TOTAL	142	119	261