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Abstract — Given the visibility and obvious importance of judicial power in the age of the Charter, it is important to develop the conceptual vocabulary for describing and assessing this power. One such concept that has been applied to the study of appeal courts in the United States and Great Britain is “party capability”, a theory which suggests that different types of litigant will enjoy different levels of success as both appellant and respondent. Using a data base derived from the reported decisions of the provincial courts of appeal for the second and seventh year of each decade since the 1920s, this article applies party capability theory to the performance of the highest courts of the ten provinces; comparisons are attempted across regions and across time periods, as well as with the findings of similar studies of American and British courts.

In any single case, the answer to the question that provides the title of this article is clear: that party wins which persuades the appeal panel that it has the stronger, better argued case. Since the focus of legal analysis and discussion is usually on

* I wish to indicate my gratitude to the Social Sciences and Humanities Research Council who funded the data collection project on which this analysis is based.
the single case, this mode of explanation is both normal and adequate for explaining the outcome. For most of the legal readership, what is important is the extent to which a specific decision relates to the established background of legal doctrine (on the law of contract, or the Charter limitations clause, or whatever) and how it contributes to or alters that doctrine.

However, at another level, it is possible to discuss the wall itself rather than the individual bricks that have been carefully and painstakingly put in position. One can identify the broad patterns that emerge from an extended series of cases, each single one of which is defensible and justifiable in its own right. On this level, the question “who wins and who loses” can be answered in terms of specific categories of litigant, different clusters of identifiable social and economic interests. Neither the case-focused nor the overall answer is complete in itself; both must be combined to generate a more complete understanding, and it is the purpose of this article to examine the other side of the coin.

The patterns are important because they remind us of the extent to which the court system as a whole is embedded in a broader social and political context. The courts are called upon to yield fair and impartial resolutions to specific disputes against the background of established legal norms; however, those norms themselves emerge from the give-and-take of the political competition for influence, and some groups do better than others in this competition. By the same token, the resources that advantage groups in the political process from which the rules emerge again advantage them in the judicial process that resolves disputes over the meaning or the application of those rules. The broad patterns of judicial winners point to the same groups that already dominate other decision-making forums, but this fact is neither an indictment of the courts nor a repudiation of the impartiality of those who preside over them; it is common sense, not subversion, that some groups can better afford the expert representation and careful research that builds strong cases. However, it is a corrective—and in these post-Charter days perhaps an increasingly necessary and important one—to unrealistic expectations that would situate courts and judges above the fray, the source of some perfect and transcendant justice.

The focus on the ten provincial courts of appeal is appropriate because of the growing importance of these courts in the light of the “litigation explosion” below them, and the Charter-constricted Supreme Court case load above them. It is increasingly the case, as commentators such as Dale Gibson have already pointed out with something less than enthusiasm, that in many areas of law (such as private law) the provincial appeal courts have effectively become the final

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1. Or possibly on the “case congregation” including a related series of cases that will be caught by the same line of precedents. See, e.g., M. Galanter, “Case Congregations and Their Careers” (1990) 24 Law and Society Review 371.
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court. But this simply brings to our attention the extent to which the provincial courts of appeal have always played a significant (if often unnoticed) role. It has always been the case that most of their decisions are not in fact appealed to the Supreme Court—indeed, most of them could not be appealed because their volume so overwhelms Supreme Court capacity. Although in some ways less powerful than their state supreme court counterparts in the United States (whose decisions can only be appealed higher if they raise issues of constitutional law), they are now and always have been much more than a casual way station on the way to the Supreme Court of Canada. The patterns that emerge from their decisions over time, and the shadows they cast over the trial courts below them, are an important component of the Canadian judicial system.

Winners, Losers and the Courts of Appeal

The conceptual framework that directs this enquiry derives from a body of American research literature that labels itself “party capability theory.” Twenty years ago, Marc Galanter argued that we could better understand the operations of trial courts by categorizing litigants as “repeat players” (actors for whom recourse to the courts is a regular and routine strategy) or “one-shotters”, and by realizing that repeat player status carried with it considerable advantages that explained their much higher rates of success. Repeat players typically possess the resources that can purchase expert legal advice and pay for extensive legal research, and allow them better to absorb the costs of delay. As well, because they are pursuing a string of decisions of which any specific case is only one element, they can “over-invest” relative to the expected returns for any single decision, or develop and implement a coherent long-term litigation strategy, or settle out of court to avoid a potentially harmful precedent, or “win while losing” if unfavourable rules or principles are construed narrowly rather than broadly. By contrast, “one-shotters” are typically obliged to treat their immediate dispute as an isolated whole, to seek a settlement on the basis of pure accounting

3. The term is taken from B. M. Atkins, “Party Capability Theory as an Explanation for Intervention Behaviour in the English Court of Appeal” (1991) 35 American Journal of Political Science 881. An anonymous assessor rightly objected to the logical error of taking as a label for the phenomenon what is really only one possible explanation for it; my use of the term is intended to locate this piece in relation to other contemporary research, not to beg the question of what might cause the phenomenon.

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principles (total desired amount times the probability of success, discounted against the time factors of possible delay), and precedential value is of little importance since it will benefit others—strangers. None of these elements suggest that repeat players are acting unfairly, or that the court system betrays its impartiality when it rewards their advantages with litigational success, any more than it is "unfair" for the taller basketball players to collect more rebounds; it is simply the case that some attributes that are shared unequally by litigant groups contribute significantly to success.

The categories Galanter suggested were fairly broad—that government would do better than other actors, and business would do better than individuals—and his attention was focused on trial courts. However, the same principles can usefully be applied to appeal courts, and the general categories can be refined—not government in general, but specific governments (federal/provincial, or municipal governments) or government acting in a specific capacity (as the Crown in a criminal case); not business in general, but “big” business as opposed to ordinary business interests.5 The basic logic, however, remains the same: court decisions are valued outputs that are sought by a variety of groups to protect or to advance their interests, and some groups are more successful than others in this quest. This may be because they are better litigants,6 or because they enjoy significant resource differentials,7 or because they enjoy higher status,8 or because there is a “normative tilt” in the law that favors them,9 or because their role is defined by ideological values that judges are willing to assign a high priority.10 This paper will not attempt to penetrate the reasons for the differentials in success rates, simply to identify the general patterns of these advantages.

In general terms, party capability theory leads to the expectation that governments will do better than other parties in cases decided by appeal courts,


7. Songer & Sheehan, supra note 5.


9. Wheeler et al., supra note 5.

and more specifically that the senior levels of government will do better than their municipal counterparts while the Crown will do better yet, by virtue of acting against isolated individuals against the clearly defined legal background to maximize returns to experience and organization. "Big" business, so defined as to isolate a small subset of unusually powerful and active major interests, will be much more successful than "small" business, and individuals will be the least successful. In a sense this is all obvious, but it means the rejection of a rational actor hypothesis, which would hold that, at the appellate level, all litigants have comparable chances of success because they proceed on the basis of competent legal advice. As well, it suggests that if these significant differences can be found between general classes of litigants, then more pervasive differences might render at least subtly unequal almost every appellate confrontation, every litigant match-up.

The Data Base

The data base on which this analysis is based consists of all reported decisions of provincial courts of appeal for two years (the second and seventh) in each decade from 1920 to 1990; for the Atlantic provinces, appeals from the provincial superior trial court sitting en banc are included for those years before the province gained a full-time specialized appeal court. The total includes more than 700 cases for each decade, and almost 9000 cases in total. This data base is in some sense comparable to that compiled by Wheeler et al. in their study of the published decisions of state supreme courts in the United States, although the time period considered here is somewhat shorter (the 70 years between 1920 and 1990, rather than the 100 years between 1870 and 1970), the numbers are based on two years from each decade rather than one, and every single province is included as opposed to selected states.

The restriction to reported decisions does seem to create something of a problem. Clearly, not all decisions are reported, although the dearth of accurate

11. Different considerations, of course, apply at the original trial level.
12. The reports that were checked for these decisions were: Alberta Reports, Alberta Law Reports, Atlantic Provinces Reports, British Columbia Law Reports, Canadian Bankruptcy Reports, Canadian Cases in the Law of Insurance, Canadian Cases in the Law of Torts, Canadian Criminal Cases, Canadian Rights Reporter, Criminal Reports, Dominion Law Reports, Manitoba Reports, Maritime Provinces Reports, Ontario Appeal Cases, Ontario Law Reports, Ontario Reports, Ontario Weekly Notes, Ontario Weekly Reporter, Recueils de jurisprudence du Québec, Reports on Family Law, Saskatchewan Reports, and Western Weekly Reports.
14. Wheeler et al., supra note 5.
statistics makes it impossible to have anything more than impressionistic estimates of the ratio between reported decisions and actual decisions. Nor is this ratio necessarily constant over time; because even an economic cataclysm like the Great Depression is less likely to reduce the case load than to change the proportions of different types of appeals within that case load, the 30% reduction in reported cases between the 1920s and the 1930s is suspect. By the same token, the recent explosion in the number of reported decisions is partly a function of larger appellate case loads, but it is also the result of the proliferation of law reports since the late 1960s—such as the resurrection of the provincial law reports in the three Prairie Provinces, and the development of specialized reports in such fields as family law, motor vehicle law, human rights, and aboriginal law. In recent years, about one-sixth of all appeal decisions are reported; the ratio may be somewhat lower earlier in the century.

Clearly, reported decisions are not a statistically random sample of all decisions; it would be an insult to the law reporting services to suggest that they might be. It does, however, seem reasonable to suggest that the over- and under-representation of various types of cases, and of various types of litigant, has been driven by fairly constant considerations—that is, that the relationship of actual to reported cases in 1920, and the same relationship in the 1980s, is fairly similar. This still permits the development of generalizations and the discussion of trends based on the tip of the iceberg, with some reasonable assurance that they apply more or less rigorously to the larger and invisible slab beneath the surface.

As well, to the extent that one can take seriously the immoderate claims of the reporting services (“all the cases worth reporting”), restricting consideration to reported cases rather than total cases is a desirable virtue rather than a necessary vice. In all provinces to some extent, and much more so in some than in others, the appellate case load includes large numbers of appeals with little jurisprudential substance, whose resolution creates no ripples in the precedential pool. In Alberta and Ontario, for example, a significant portion of the total annual case load is made up of hundreds of sentence appeals, typically resolved in batches of 20 or 30 per day, and often without any written reasons; strictly speaking, there is nothing to report. In other provinces (such as Manitoba), court rules require at least brief written reasons for every decision, but the unreported decisions are typically very brief (usually about one type-written page) without any citations to authority. There is a large gap between the number of significant cases and the total number of cases in the provincial appellate case load, and it is certainly credible to suggest that reported decisions include much—even most—of this smaller set.

15. As an Alberta appeal judge said of the recession that followed the Western resource boom: “During the boom, they fought over the profits; now, they fight over the liabilities.”
Finally, it might be suggested that those decisions not picked up by the reporting services do in fact become the less significant cases: that is, given that unreported decisions are hardly ever cited,\textsuperscript{16} it is reported decisions that can have an impact on subsequent trial decisions within the province, and possibly on the subsequent decisions of trial and appeal decisions elsewhere. Unreported decisions are written on the sand, of little importance to any save the immediate parties and affecting little save the immediate case. To the extent that powerful litigants aim not only at the particular outcome but at the precedential chain to which it contributes, the question of whether or not a decision is reported can be almost as important as whether or not their side prevailed.

For all these reasons, the restriction to reported cases (as opposed to the total universe of all cases) must be borne in mind as a limitation, but it is not necessarily a serious one, and in some respects it may not be problematic at all.\textsuperscript{17}

One distortion that is created by the use of reported appeal decisions is that the overall success rate of reported appeals is about 49%, varying from the 46.9% for Québec to the 50.4% of the Atlantic Provinces. This is clearly a totally unrealistic figure; no provincial court of appeal has an actual reversal rate that is nearly this high; in an interview, a member of the Alberta Court of Appeal once suggested to me a “rule of three”—one third of appeals are allowed, one third dismissed, and one third “you wonder why they're wasting your time”—which seems a more reasonable estimate.\textsuperscript{18} The over-reporting of successful

\begin{itemize}
\item \textsuperscript{16} From the citation study which generated the data base on which this paper is based: citations to unreported decisions constitute less than 1% of all citations to judicial authorities.
\item \textsuperscript{17} The author has complete data on reported and unreported cases for only a single province—Manitoba—and only for a recent two-year span—1990 and 1991.
\item \textsuperscript{18} The information that is available suggests that reversal rates in the provincial courts of appeal are in the 35-40% range. See, \textit{e.g.}, \textit{British Columbia Court of Appeal Annual Report 1990} at 26 and 28; P. McCormick, “Caseload and Output of the
\end{itemize}
appeals relative to unsuccessful appeals is both logically plausible and consistent with the publication practices of comparable jurisdictions. While the comparative dimension can plausibly be seen as surviving this distortion (that is, it is still reasonable to take the figures as suggesting that the Crown is more successful, and individuals less successful, than other categories of litigant), allowance must be made for the fact that the overall floor of appellate success is exaggerated.

Categories and Coding

The 8901 cases were coded by categorizing both the appellant and the respondent in terms of eight specific categories, as follow:

1. The Crown in a criminal case (without attempting to disentangle which level of government directed the prosecution).
2. The federal and provincial governments, including departments and agencies of government, or government officials acting in that capacity; the two levels of government were combined into a single category because the federal government presence in provincial appellate case loads is too small to justify separate coding or to generate meaningful results.
3. Municipal governments, or school and hospital boards.
4. “Big” business. Wheeler et al. identified litigants such as railroads, banks, major manufacturing companies and insurance companies as possessing both substantial resources and recurrent litigation experience differentiating them from the broader category of businesses; Songer and


See, e.g., B. M. Atkins, “Communication of Appellate Decisions: A Multivariate Model for Understanding the Selection of Cases for Publication” (1990) 24 Law and Society Review 1171; and B. M. Atkins, “Data Collection in Comparative Judicial Research: A Note on the Effects of Case Publication Upon Theory Building and Hypothesis Testing” (1992) 45 Western Political Quarterly 783. Both articles are directed not to the selective publication practices of some U.S. courts (which enjoy direct control over which decisions are published) but to the English Court of Appeal (which has no such control), and they are therefore directly relevant to the Canadian situation.

Until recently, an appeal against a decision of, say, the Department of Motor Vehicles would sometimes name either the minister or the specific official involved; the legal description of the case, however, makes its official and governmental nature very clear.

Wheeler et al., supra note 5 at 413.
Sheehan\textsuperscript{22} (writing of a shorter and more recent period) added airlines and major oil companies as well. For the purposes of this project, the category has been further expanded to include Ontario Hydro, Hydro-Québec, Bell Telephone, and the Irving interests in the Maritimes. Crown corporations create a special coding problem, but the large proprietary Crowns are (by legal definition and by deliberate intention) more like businesses in their day-to-day activities than they are like government departments or agencies, and it seems artificial to put the CNR and Air Canada in one category, the CPR and Canadian Airlines in another. “Big business” so defined accounts for about one-quarter of all business litigation for appellants and respondents alike.

5. Other business organizations.
6. Trade unions and comparable employee’s organizations.
7. Private individuals (that is: natural persons).
8. A residual (“other”) category for actors such as organized interest groups (e.g. the Lord’s Day Alliance), or colleges and universities, or the governments of other countries or of U.S. states.

In all cases, uncertainties were resolved by “coding down”—if it was not clear that a business was a major corporation, it was coded as other business; if it was not clear whether the person was acting in his own or a corporate business capacity, then it was coded as “individual”. The methodological purpose was to make the purportedly advantaged categories under-inclusive, and the allegedly disadvantaged categories over-inclusive, so as to identify patterns that would be more than an artefact of coding accidents. Of course, grouping litigants into broad categories of this sort already suggests a degree of oversimplification, because there might well be significant differences in relevant resources within the big business, business and individual categories, and quite possibly some degree of overlap between them. In general, however, it is legitimate to assume that major corporations are advantaged relative to other interests, and that incorporated businesses are advantaged relative to private individuals.

Success and failure has been coded in the most straightforward way, recording simply whether or not the appellant party was successful in its attempt to persuade the appeal court to alter the lower court decision in some material way. Clearly, this oversimplifies to such a point as to miss much of the drama and the substance of successful litigation, because not all victories are of a kind\textsuperscript{23} Sometimes an appellate decision will simply affirm existing doctrine,

\textsuperscript{22} Songer & Sheehan, \textit{supra} note 5 at 239.
\textsuperscript{23} For example, Galanter has argued that the appropriate unit for analysis for many purposes is not the individual case but the “congregation” of cases raising similar
turning back an appeal court suggestion of a possible innovation or refinement in favour of the *status quo*;\textsuperscript{24} other times, it can expand or modify legal doctrine in ways which subtly but significantly alter the context within which future controversies will take place. A flat "dismiss/allow" coding cannot catch this deeper dimension. It is also true that sometimes, for certain types of groups in certain kinds of controversy, "losing" the specific dispute in court can mean "winning" a more pervasive advantage in other decision-making forums.\textsuperscript{25} In the most general terms, however, appellants pay their lawyers to persuade higher courts to intervene in the unpalatable decisions of lower courts, while respondents pay their lawyers to protect what has been gained in the lower court; and over time, the large ground-shifting victories will normally stand in some stable proportion to the smaller and more marginal victories. As well, appeals "allowed in part" are treated not as a third category but as a sub-category of successful appeals, on the grounds that they represent some degree of success by the appellant in persuading the appeal panel to alter the trial judge's disposition of the case.

### Who Wins and Who Loses: Analysis of Results

Table 1 summarizes the success of the various categories of litigant in reported decisions of the Canadian provincial courts of appeal for selected years since 1920. The first column indicates the number of cases in which the appellant fell within each of the categories identified above, and the frequency with which the Supreme Court responded to their arguments by altering the lower court decision. The second column shows the other half of the story, indicating the number of cases in which the respondent fell within each category, and the frequency with which the Supreme Court overrode their arguments supporting the lower-court decision. The third column indicates the combined success rate for litigants in each category, expressing as a percentage of total appearances their successful appeals plus their successful defences against appeal; because the ratio of appellant appearances to respondent appearances is quite different for the various litigant categories, this third column is not simply the average of the first two.

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\textsuperscript{24} Not, to be sure, a small matter for a group significantly favoured by some aspect of the legal *status quo*.

\textsuperscript{25} See, \textit{e.g.}, R. A. L. Gambitta, "Litigation, Judicial Deference and Policy Change" (1981) \textit{3} Law and Policy Quarterly at 142: "In this article, I argue that lawsuits which lose in court can stimulate positive policy change, and that the final court ruling is not necessarily the most significant or influential event in the litigation process with respect to policy reform."
Table 1
Success Rates by Litigant Category
Reported Provincial Appeal Court Decisions, 1920-1990

<table>
<thead>
<tr>
<th>Litigant Category</th>
<th>Reversal Rate as Appellant</th>
<th>Reversal Rate as Respondent</th>
<th>Combined Success Rate</th>
<th>Net Advantage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crown</td>
<td>74.6% n= 696</td>
<td>43.8% n=1729</td>
<td>61.4%</td>
<td>+ 30.7%</td>
</tr>
<tr>
<td>Big Business</td>
<td>55.9% n= 392</td>
<td>34.8% n= 405</td>
<td>60.6%</td>
<td>+ 21.1%</td>
</tr>
<tr>
<td>Fed./Prov. Govts</td>
<td>51.5% n= 237</td>
<td>38.4% n= 450</td>
<td>58.1%</td>
<td>+ 13.0%</td>
</tr>
<tr>
<td>Municipal Govts</td>
<td>52.2% n= 345</td>
<td>45.9% n= 477</td>
<td>53.3%</td>
<td>+ 6.3%</td>
</tr>
<tr>
<td>Other Businesses</td>
<td>45.2% n= 1536</td>
<td>50.0% n= 1391</td>
<td>47.5%</td>
<td>- 4.8%</td>
</tr>
<tr>
<td>Individuals</td>
<td>46.4% n= 5579</td>
<td>53.6% n= 4324</td>
<td>46.4%</td>
<td>- 7.2%</td>
</tr>
<tr>
<td>Unions</td>
<td>39.3% n= 89</td>
<td>48.9% n= 90</td>
<td>45.3%</td>
<td>- 9.6%</td>
</tr>
<tr>
<td>Other*</td>
<td>29.6% n= 27</td>
<td>37.1% n= 35</td>
<td>58.4%</td>
<td>- 7.5%</td>
</tr>
</tbody>
</table>

* This is a residual category, included for statistical neatness and without any suggestion that these success rates bear comparison with those of any other group.

In general terms, the results confirm the party capability thesis. The general category of government was the most successful as both appellant and respondent; appeals by government succeeded more than 50% of the time, and each of the four categories enjoyed a combined success rate well above 50%. The rank ordering within the government category (Crown, federal/provincial, municipal) was also as expected. Business as a whole was slightly less...
successful, with a combined success rate just over 50%. However, the spread between “big business” and “other business” is surprisingly large, so much so as to rank big business litigants above the federal/provincial government category and second only to the Crown. Unions and individuals bring up the rear, with combined success rates well below 50%. The rational actor hypothesis, that all parties compete more or less equally at the appellate level because they receive comparable legal advice and base their litigation decisions on careful assessments of their prospects, does not seem to be supported by the significant long-term differences in the success rates of different classes of litigant.

Although the comments must be qualified in light of the rather small number of cases, the apparent weakness of trade unions is particularly striking. Many unions are large organizations with considerable resources and access to first-rate legal advice; their operations are such that recurrent interaction with judicial and quasi-judicial bodies is unavoidable. One would expect them to reap some of the benefits of size and repeat-player status, relative at least to ordinary business operations if not in direct conflicts with big-business opponents and with major government regulatory activity; and certainly there is no reason to expect that their lawyers lack experience or ability. In fact, unions are relatively effective when they appear as respondent, successfully defending the trial court decision more than half of the time. However, they seldom manage to persuade the appeal court when they appear as appellant, and their combined success rate is even lower than that of individual litigants. Wheeler et al. have suggested that one factor contributing to differential outcomes may well be a “normative tilt of the law” favouring one type of interest over another, and the weakness of trade unions before the courts—not just in Canada, but in the Anglo-American court systems generally—might well be a case in point. By contrast, the large spread between big business and other business cannot be explained in terms of any such normative tilt, but suggests a straightforward vindication of the party capability or litigant resource thesis—large organizations for whom litigative activity at the appellate level is a routine activity can both develop the expertise and deploy the resources to maximize their performance.

But the relative success of categories of litigant must be assessed in the context of several complicating factors. The first is the general tendency of appeal courts to affirm rather than to reverse the lower court; although, as already indicated, this tendency is understated by selective reporting practices, it is still a factor. The appellant’s battle, as it were, is fought uphill; to extend the sports analogy, there is a significant home-team advantage. In general, the fact

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26. Wheeler et al., supra note 5 at 408.
27. See, e.g., H. J. Glasbeek, “Contempt for Workers” (1990) 28 Osgoode Hall L.J. at 8: “In the past, courts have sided with capital when it clashed with labour. This well-established fact is central to the argument of those who oppose the Charter as an instrument to achieve a better society.”
that the overall success rate of appeals is less than 50% means that a class of litigants could be generally successful (compared with other groups) even if their own appeals fail more often than they succeed.

The second is that litigants can appear before the court as either appellants or respondents, and the ratio of such appearances is not the same for all groups. Governments, for example, seldom appeal but are often appealed against; individuals appear as appellants far more often than as respondents. On purely logical grounds, one would expect that this ratio is itself a guide to the relative position in society of various groups: strong and advantaged groups, because they already enjoy substantial resources and benefits, are more often called upon to defend themselves, while weak and disadvantaged groups are more often in a position where they must approach a higher court to vindicate or establish their position. The different proportions of litigant types among appellants and respondents makes it possible for a category of litigants to prevail in more than half of its total appearances before the court while still being in some sense a net loser, and the greater the tendency of an appeal court to affirm, the more pronounced this latter tendency can be.

The fourth column of Table 1 refines the analysis by calculating the “net advantage” for each category, calculated by taking the success rate when that party appears as the appellant and subtracting from it their opponents' success rate when they appear as respondent. This index has a triple advantage. Firstly, unlike the combined success rate, it is independent of the relative frequency with which each type of litigant appears as appellant or respondent. Secondly, it tends to reduce the extent to which intra-category litigation pulls the combined success rate toward 50%, thereby understating relative advantage. Thirdly, “it is also independent of the relative propensity of different courts to affirm” and is therefore a better measure to use for comparisons between different countries or different benches or different time periods. It is interesting that this measure does not in any way change the rank ordering of various categories of litigant suggested by the combined success rate, although it does refine the impression of the relative degrees of advantage implied, especially in terms of the gap that opens up between big business litigants and federal and provincial governments.

The explicit implication of this analysis is that the net advantage rankings in Table 1 carry some predictive capacity for every litigation match-up, that the relative prospects of success can be assessed ahead of time by comparing the net

28. A different logic, of course, would apply to trial courts, which Galanter suggests are typically used by powerful groups to enforce their rights and advantages. See Galanter, “Why the Haves Come Out Ahead”, supra note 4.

29. The concept and method of calculation are both taken from Wheeler et al., supra note 5 at 407.

30. That is, by definition, individual litigants won one half of the cases in which both appellant and respondent were individuals.

31. Songer & Sheehan, supra note 5 at 241.
advantage "scores" of the appellant and respondent, the result suggesting the extent to which the prospects of appellate reversal vary from the 35-40% norm for provincial appeal courts generally. In terms of the first and most basic question any litigant asks of his lawyer ("What are my chances?"), party capability analysis provides an essential element of the context within which that question must be answered.

Inter-Regional and Time-Based Comparisons

<table>
<thead>
<tr>
<th>Litigant Category</th>
<th>Québec</th>
<th>Ontario</th>
<th>West</th>
<th>Atlantic</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crown</td>
<td>+16.6%</td>
<td>+21.9%</td>
<td>+31.6%</td>
<td>+38.3%</td>
<td>+30.7%</td>
</tr>
<tr>
<td>Big Business</td>
<td>+27.0%</td>
<td>+3.2%</td>
<td>+30.4%</td>
<td>+9.8%</td>
<td>+21.1%</td>
</tr>
<tr>
<td>Fed./Prov. Govt</td>
<td>+4.5%</td>
<td>+21.9%</td>
<td>+9.4%</td>
<td>+24.9%</td>
<td>+13.0%</td>
</tr>
<tr>
<td>Municipal Govt</td>
<td>+7.6%</td>
<td>+9.7%</td>
<td>+2.3%</td>
<td>+7.4%</td>
<td>+6.3%</td>
</tr>
<tr>
<td>Other Business</td>
<td>-8.3%</td>
<td>-3.5%</td>
<td>-5.9%</td>
<td>-0.4%</td>
<td>-4.8%</td>
</tr>
<tr>
<td>Individuals</td>
<td>-2.1%</td>
<td>4.4%</td>
<td>-8.2%</td>
<td>-13.9%</td>
<td>-7.2%</td>
</tr>
<tr>
<td>Unions</td>
<td>28.6%</td>
<td>23.8%</td>
<td>-5.7%</td>
<td>-7.4%</td>
<td>-9.6%</td>
</tr>
<tr>
<td>Total Number</td>
<td>1542</td>
<td>1999</td>
<td>3573</td>
<td>1787</td>
<td>8901</td>
</tr>
</tbody>
</table>

The nature of the data base means that regional breakdowns can easily be calculated. Table 2 presents the net advantage of each of the seven litigant groups for each of the four obvious regional divisions in Canada. The bottom row indicates the total number of cases on which the regional calculations are based. These totals are less distorting and more representative than might appear at first glance; in recent years, it is in fact the case that if we exclude sentence

32. Omitting the "other" category, on the grounds that the very low numbers and its residual nature prevent meaningful comparisons.
appeals, Ontario accounts for roughly one-quarter of the total appellate case load, and the four Western Provinces combine for more than half again the combined case load. Although it is true that Québec appellate decisions are under-represented in national and specialized reports—presumably because of the language factor (many Québec appeals being rendered in French only) and because the uniqueness of Québec’s Civil Code reduces the precedential usefulness of most non-criminal decisions from that province—the statistics here are drawn from the French-language provincial reports as well, and do not reflect this under-representation.

The information in Table 2 is valuable because it demonstrates that the patterns for each of the four regions are essentially variations on the basic theme suggested by the overall figures, implying that these patterns identify something real and important within the way that appeal courts operate rather than a fortuitous outcome of four widely different sets of figures. For each region, as for the overall figures, government (and especially the Crown) are on balance the most successful litigants, while big business significantly outperforms other business, and unions and individuals come out as net losers. It is of course necessary to use caution in attaching significance to differences between the net advantages for specific groups in specific regions, because the numbers on which the figures in some cells are based is rather small; however, some of these differences, such as the low profile of big business in Ontario, are rather intriguing, and the relatively greater success of municipal governments in the two central provinces is both interesting and credible.

Table 3 breaks the same data down by decade. Again, the figures for each decade are clearly a variation of the basic theme suggested by the overall figures, although some anomalies draw attention—such as the poor showing of the Crown in the 1940s, or the sudden weakness of business litigants in the 1950s, or the slump in municipal government performance in the 1970s. These are more plausibly seen as the artefact of the selective reporting practices, or the product of small numbers of relevant cases, rather than as a serious indication of a sudden, dramatic and temporary change in the collective behaviour of appellate judges.

In general, however, it is the continuities in Table 3 that are the most striking. Through the seven decades, governments and big business remain strong, while the relative position of individual litigants erodes steadily and

Success Rates by Litigant Category and Decade
Reported Provincial Appeal Court Decisions, 1920-1990

<table>
<thead>
<tr>
<th>Litigant Category</th>
<th>1920s</th>
<th>1930s</th>
<th>1940s</th>
<th>1950s</th>
<th>1960s</th>
<th>1970s</th>
<th>1980s</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crown</td>
<td>+19.2%</td>
<td>+19.6%</td>
<td>+ 0.6%</td>
<td>+32.3%</td>
<td>+20.8%</td>
<td>+34.1%</td>
<td>+33.0%</td>
</tr>
<tr>
<td>Big Business</td>
<td>+11.2%</td>
<td>+27.4%</td>
<td>+20.4%</td>
<td>+25.0%</td>
<td>+21.2%</td>
<td>+29.3%</td>
<td>+20.9%</td>
</tr>
<tr>
<td>Fed./Prov. Govt</td>
<td>+19.2%</td>
<td>+ 6.7%</td>
<td>+21.7%</td>
<td>+23.6%</td>
<td>+10.4%</td>
<td>+13.4%</td>
<td>+ 9.9%</td>
</tr>
<tr>
<td>Municipal Govt</td>
<td>+ 0.6%</td>
<td>- 1.4%</td>
<td>+22.4%</td>
<td>+11.8%</td>
<td>+11.4%</td>
<td>-10.6%</td>
<td>+19.0%</td>
</tr>
<tr>
<td>Other Business</td>
<td>- 5.7%</td>
<td>+ 0.4%</td>
<td>+ 2.7%</td>
<td>-16.5%</td>
<td>- 0.8%</td>
<td>- 4.4%</td>
<td>- 6.2%</td>
</tr>
<tr>
<td>Individuals</td>
<td>- 0.6%</td>
<td>- 4.8%</td>
<td>- 4.6%</td>
<td>- 3.8%</td>
<td>- 5.4%</td>
<td>-10.9%</td>
<td>-15.3%</td>
</tr>
<tr>
<td>Unions</td>
<td>-33%*</td>
<td>-50%*</td>
<td>-67%*</td>
<td>-71%*</td>
<td>-31.2%</td>
<td>- 7.9%</td>
<td>+ 8.3%</td>
</tr>
<tr>
<td>Number</td>
<td>1414</td>
<td>945</td>
<td>724</td>
<td>891</td>
<td>837</td>
<td>1518</td>
<td>2572</td>
</tr>
</tbody>
</table>

Note: * = analysis based on less than 15 cases

unions climb from massive disadvantage to something just above a “break-even” point. To the extent that the purpose of party capability analysis is to demonstrate persisting and significant differences in the patterns of appellate success for specific litigant groups, the two tables combine to suggest enduring and pervasive features of appellate decision-making in Canada. The fact that the analysis catches an intuitively plausible development over time (in the gradually improving performance of trade unions) makes the persistence of the general patterns of advantage that much more striking.

Comparisons with Other Countries

One of the useful aspects of party capability theory in general, and the “net advantage” methodology in particular, is the extent to which it facilitates comparison between the output of different appellate courts in different countries. These findings about litigant success patterns in the provincial courts of appeal mesh reasonably well with similar analyses of appellate processes in other Anglo-American democracies. For example, Wheeler et al. looked at the performance of state supreme courts over an extended period; Songer and Sheehan investigated U.S. courts of appeal decisions for the single calendar year
1986. Their findings (summarized in Table 4) roughly parallel the patterns described in this paper.

### Table 4
Party Capability Analysis: U.S. Courts

<table>
<thead>
<tr>
<th>Type of litigant</th>
<th>State Supreme Courts</th>
<th>U.S. Courts of Appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Government</td>
<td>n.a.</td>
<td>+45.1%</td>
</tr>
<tr>
<td>Government (State &amp; City)</td>
<td>+11.8%</td>
<td>+29.9%</td>
</tr>
<tr>
<td>&quot;Big&quot; Business</td>
<td>+ 6.4%37</td>
<td>+ 5.9%38</td>
</tr>
<tr>
<td>Business Organizations</td>
<td>+ 3.1%</td>
<td>+ 1.6%</td>
</tr>
<tr>
<td>Individuals</td>
<td>- 1.5%</td>
<td>- 18.2%</td>
</tr>
<tr>
<td>Government (small towns)</td>
<td>- 1.6%</td>
<td>n.a.</td>
</tr>
<tr>
<td>Business Proprietors</td>
<td>- 5.4%</td>
<td>n.a.</td>
</tr>
</tbody>
</table>

In the United States, just as in Canada, government litigants show the strongest performance on appeals, this advantage being the most pronounced for the national government, less so for state and city governments, and much less so for the governments of smaller centres. Business organizations tended to fare rather less well, although big business concerns (where they could be identified and their appellate performance isolated) do somewhat better than their smaller counterparts, although in the United States (unlike Canada) they do significantly less well than state governments. Individual litigants tend to be less successful, their status as residual net "loser" somewhat disguised by the disproportionately large share of appellants and respondents they constitute. Neither U.S. project provided data on the relative success of trade unions as parties to appeal cases.

There is a striking difference in the magnitude of these advantages. Wheeler et al. found only modest (although significant and persistent) advantages and disadvantages; the maximum advantage or disadvantage is just over 17%. By contrast, Songer and Sheehan found massive differentials—the spread between

34. From Wheeler et al., supra note 5 at 418.
35. From Songer & Sheehan, supra note 5 at 243.
36. Treated by both as a sub-category of the "business organization" category, rather than as a separate category. This means that the following line ("business organizations") includes big businesses, and overstates the advantage of other (i.e. "non-big") business organizations as a separate group.
37. See Wheeler et al., supra note 5 at 422.
38. See Songer & Sheehan, supra note 5 at 244.
the most- and least-advantaged class of litigant is 66.3%. They suggested that the most likely reason for the difference is that state supreme courts typically do, and U.S. courts of appeals do not, have significant control over their own docket. As a result, "frivolous appeals by individuals inflate the winning percentages of governments and businesses" while "repeat players with substantial resources are less likely to bring appeals to any court if they have little realistic chance of winning." The leave process of most state supreme courts allows them to screen out such cases, and devote their decision-making to substantial questions of significant import. The long-term success rate of appeals to state supreme courts was under 40%; the similar figure for appeals to the U.S. courts of appeal in 1986 was only 16%.

Comparing these two sets of data to the figures derived from the provincial courts of appeal is appropriate, because within the single hierarchy of the Canadian judicial system, a provincial court of appeal in a sense combines the functions of both the U.S. courts of appeal and the state supreme courts—that is, it is at one and the same time an articulator of federal law under the appellate supervision of the Supreme Court, and the highest court in the judicial structure of the province. Typically, the provincial courts of appeal exercise little control over their own docket, but the screening of the reporting services could be expected to offset the insubstantial, even frivolous, appeals that would otherwise pad the advantage of superior litigants unrealistically. One difference that should be noted as carrying particular significance is the much greater degree of net advantage for big business interests in Canada, as opposed to the modest edge they appear to enjoy in the United States.

Employing blunter litigant categories, and measuring direct inter-category competition rather than overall figures, Burton Atkins has examined the English Court of Appeal, and discovered parallel patterns: government litigants are significantly advantaged (+25% to +30%) relative to both business and individual litigants, and business litigants are comparably advantaged (+15%) relative to individuals. (Atkins provided no breakdown between the various levels of government or between different types of business, nor did he isolate data for trade unions.) The persistence of patterns across the pond as well as across the border further strengthens the suggestion that we are identifying structural features of courts in general (or at least Anglo-American appeal courts) rather than some passing or incidental feature unique to a specific bloc of data derived from a specific component of Canadian judicial experience.

39. Songer & Sheehan, supra note 5 at 256.
40. Wheeler et al., supra note 5 at 407, fn. 7.
41. Songer & Sheehan, supra note 5 at 240.
42. Even where leave application is required, the process is not always used as a gatekeeping mechanism; see P. McCormick, "Conviction Appeals", supra note 18 at 303.
43. Atkins, supra note 3.
Conclusion

The purpose of this investigation and analysis is simply to contribute to a better understanding of the activities of appeal courts, a clearer picture of the "normal" pattern of outcomes over a period of time and their implications for various categories of litigant groups. It is hardly surprising to suggest that large well-organized groups who frequently find it necessary or useful to make reference to appeal courts tend to do somewhat better than groups or individuals less endowed with resources and making only sporadic interventions. In general, we recognize Smith v. Chartered Bank as something of a mismatch, and expect more fireworks from A.-G. Manitoba v. C.P.R.; this is simply common sense, although the magnitude and persistence of these differences might be mildly surprising, and their quantification from actual results (with the more rigorous rank ordering this makes possible) represents an advance.

This is not to suggest that judges are doing something wrong, or that they should find some way to tilt the balance or level the playing field, any more than the basketball referee is obliged to find some way to help the smaller team get a larger share of rebounds. The case that is stronger by established legal criteria should indeed prevail, but we must realize that different categories of litigant differ in their ability to put together the stronger case; although this does not mean that they will always lose, it suggests that they will more often than not lose the borderline cases that could go either way. Since these are precisely the cases that tend to draw the expense and effort of appellate review, their number can accumulate significantly over time and their cumulative impact on the law is important. The courts are "key institutions for the legitimate settlement of a wide spectrum of conflicts between individuals and groups that have important implications for the distribution of material and symbolic goods." They are therefore necessarily and inevitably part of the political system broadly considered, whatever the Supreme Court might have suggested (for different purposes and in a more limited context) in Dolphin Delivery.

The point is not that judges should behave differently, but that we should think differently about what it is that judges are doing and what we can reasonably expect from them. The criteria for success in a legal case are somewhat different from those of the other decision-making forums in Canadian society, and from time to time a group or an individual will achieve in court the success that was not possible elsewhere. By the same token, however, in a purely pragmatic sense, the court-relevant prerequisites for success do not draw on completely different resources, do not operate in their own self-contained world, which suggests that the same categories of interests and actors will tend to

44. Songer & Sheehan, supra note 5 at 235.
prevail both inside the courts and outside the courts—not all the time, but much of the time; not in every single case, but in the patterns of decision-making that emerge from examining a large run of cases. Judges may stand somewhat above and apart from the overtly political process of making and applying rules; judicial independence and adjudicative impartiality are real and important dimensions of the process, not an empty or cynical facade. However, the insulation of the courts is partial rather than total, and structural considerations still leave them embedded in the differentials of resources and advantages that pervade modern society.

This is important to remember in light of the court system’s post-Charter increase in power (or, perhaps more accurate, our post-Charter increased awareness of the court system’s persisting power). Judges, however competent, however professional, however well-intentioned, cannot be the Solomonic dispensers of some perfect transcendent justice, and we should not expect them to be. Although their interventions may blunt the impact of some differentials of power and resources, they cannot catch them all. The constitutional formalities, strict procedures and careful formal neutrality of the court system are important both for themselves and for their consequences, but this must not blind us to the extent to which the court system remains embedded in a broader socio-economic and socio-political system. It is quite appropriate and highly desirable that this broader context not be permitted to intrude explicitly within the appellate process, that it not determine the outcome of any specific case; but at the same time, the privilege-reinforcing tendencies of an extended run of decisions cannot be excluded from a full understanding of the political implications and social consequences of the judicial system.