ALTHOUGH PROVINCIAL COURTS OF APPEAL decide the bulk of appeals in Canada, relatively little is known about judicial decision-making on these courts. The high rates of unanimity on these courts makes quantitative study of their decision-making more challenging and raises questions about how their decisions may differ from those of the Supreme Court of Canada. In this study we investigate decision-making behind the scenes through surveys and interviews with appellate court judges across Canada. What influences are at work in their decisions? We find that, while appellate court judges describe their decision-making as constrained by norms (e.g., judges should arrive at conclusions based on an application of existing legal principles) and institutional structures (e.g., the large number of relatively straightforward cases heard by these courts), judges also acknowledge that to some degree, and in some contexts, individual backgrounds, characteristics, and worldviews will shape individual cases and the development of law. We explore the patterns in these findings in an effort to better understand these important courts.

BIEN QUE LES COURS D’APPEL PROVINCIALES décident la majeure partie des appels au Canada, nous ne savons pas grand-chose sur la prise de décision judiciaire par ces tribunaux. Le taux élevé d’unanimité adoptée au sein de ces cours rend l’étude quantitative de leur processus décisionnel plus difficile et soulève des questions en ce qui concerne la manière dont leurs décisions diffèrent de celles de la Cour suprême du Canada. Dans cette étude, nous examinons les coulisses de la prise de décision grâce à des enquêtes et des entrevues avec des juges de cours d’appel de partout au Canada. Quelles sont les influences qui façonnent leurs décisions? Nous constatons que, même si les juges de cours d’appel reconnaissent que le processus décisionnel est limité par des normes (les juges doivent arriver à une conclusion en se basant sur une application de principes juridiques existants) et des structures institutionnelles (comme le nombre important de causes relativement simples entendues par ces tribunaux), les juges reconnaissent tout de même que dans une certaine mesure et dans certains contextes, les origines, les caractéristiques et les visions du monde de chacun et chacune influencent individuellement les causes et le développement du droit. Nous explorons les tendances dans ces résultats dans le but de mieux comprendre ces tribunaux importants.
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Judges on Judging in Canadian Appellate Courts: The Role of Legal and Extra-Legal Factors on Decision-Making

Lori Hausegger and Troy Riddell

I. INTRODUCTION

In its 2017 Sahaluk v Alberta (Transportation Safety Board) decision, the Alberta Court of Appeal struck down an Alberta law that allowed the province to immediately suspend the license of a driver when charges were laid for driving while impaired. The majority argued that the right to be presumed innocent in section 11 of the Canadian Charter of Rights and Freedoms (the Charter) was violated as was the right to security of the person in section 7, given the importance of driving. The case was unusual for a few reasons. First, there was a law being challenged under the Charter—these types of cases make up a very small portion of provincial appellate court decisions. Second, there was a concurring opinion in the decision (albeit a very short one). Third, there was a dissent. Madam

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1 Sahaluk v Alberta (Transportation Safety Board), 2017 ABCA 153 [Sahaluk].
2 Ibid at paras 152–54.
Justice Paperny argued that neither section 7 nor 11 of the *Charter* were engaged, as driving was a privilege and not a right.³

The dissent is particularly noteworthy since the vast majority of provincial appellate decisions are unanimous. In fact, the trend in the last two decades is for Canadian provincial courts of appeal to be unanimous around 95% of the time.⁴ What explains this high rate of unanimity—and, perhaps more importantly—the cases where unanimity falters and judges dissent? A few quantitative studies of provincial courts of appeal have found that case outcomes are influenced by differences between the justices, such as gender.⁵ However, other studies have found more muddled results for the influence of extra-legal differences such as gender or ideology.⁶ The *Sahaluk* case includes a dissent by a woman justice. But is their gender one of the factors influencing their vote? The high rate of unanimity in Canadian courts of appeal—and the resulting lack of variation—has complicated our previous attempts to answer these types of questions quantitatively and increased our interest in the unanimity itself. It has been over 20 years since provincial appellate judges in Canada have been asked about their decision-making.⁷ Faced with this time-lapse in interviews, and the challenges posed to studying these courts, this project set out to learn more about judicial decision-making from the appellate court judges themselves.

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³ *Ibid* at para 159. We oversimplify our case description here as our interest is actually in the existence of separate opinions, not in the reasoning itself.

⁴ McCormick, for example, notes that between September 2000 and June 2004, the Manitoba Court of Appeal only featured a dissent in 34 of 540 panel decisions, which was in line with dissent rates in the other provinces. That was a change from a decade earlier where the rate in Manitoba was twice as high (which, according to McCormick, meant that Manitoba—along with Quebec—featured some of the highest rates of dissent in the country). Our own data suggests that provinces like Saskatchewan and Nova Scotia had dissent rates closer to two percent between 2005 and 2015. See Peter McCormick, “The Manitoba Court of Appeal, 2000-2004: Caseload, Output, and Citations” (2005) 31:1 Man LJ 1.


Since the Supreme Court of Canada (SCC) decides very few cases per year, provincial courts of appeal are the final courts of appeal for the vast majority of cases that come through the system each year. As such, there is a need to better understand judicial decision-making in these courts. The survey and interviews discussed and analyzed in this paper replicate some of the key questions asked by Greene et al. However, we also take a different approach to further explore various dimensions of judicial decision-making on provincial courts of appeal. For example, we ask: what causes the high rate of unanimity that makes quantitative analysis of decisions more challenging? Does unanimity reflect the workload and the types of cases coming before these courts or does it reflect compromise and negotiation (or elements of both)? In our survey and interviews we also explored the impact of extra-legal factors such as gender. Do women judges decide differently than men (particularly in certain types of cases such as those involving sexual assault), and are panels influenced by the presence of women on the bench? More broadly we asked how individual experience, backgrounds, and worldviews of judges filter into decision-making.

We argue that our results resemble what Tamanaha has dubbed “balanced realism.” Canadian appellate court judges describe their decision-making as constrained by norms (such as judges should arrive at conclusions based on an application of existing legal principles) and institutional structures (for example, these intermediate appellate courts review a large number of cases in which the outcome is relatively straightforward). However, judges also acknowledge that to some degree, and in some contexts, individual backgrounds, characteristics, and worldviews will shape individual cases and the development of law. As might be expected, there is a wide range of opinions as to the degree and contexts in which these factors will matter. In other words, the judges differ in how the realism is balanced.

This points to another central conclusion of this research: there is a diversity of viewpoints amongst appellate court judges as to how they should judge and how they do judge. In turn, this means that some of the aggregate responses are paradoxical. Most respondents, for instance, believe that gender does not matter to case outcomes, yet most respondents also argued that having more women on the courts will change the overall shape of the law. The diversity of viewpoints also means that some aspects of the courts

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8 Ibid.

remain somewhat elusive. The extremely high rates of unanimity from the courts, for example, remain difficult to explain. While judges point to the nature of the cases as a factor, judges also note that there is often some discretion in the application of the law in a number of cases. Why then are most of those cases decided unanimously? Some judges suggest that greater collegiality means that there are fewer dissents, while other judges argue that greater collegiality means that judges may feel more liberated to dissent without fear that it will cause tensions on the court.

Overall, we try to offer analysis and make inferences based on patterns in the data while not submerging the range of opinions and even, at times, their contradictory nature. We believe this study illustrates something very starkly: the influences on judicial decision-making are messier than suggested by a lot of quantitative studies and even by many judges themselves. This is likely particularly true for appellate courts which are subject to a wide variety of constraints and pressures.

II. STUDIES OF JUDICIAL DECISION-MAKING ON APPELLATE COURTS

Scholarship on decision-making in Canadian courts of appeal is limited. As noted above, most studies of judicial decision-making in Canada have focused on the SCC. The SCC typically has a dissent rate well over 30%—this level of disagreement amongst the judges, combined with the new policy-making role of the Court under the Charter, have encouraged the proliferation of quantitative studies on its decision-making. Indeed, several studies have explored why SCC justices dissent. Scholars have increasingly examined the influence of extra-legal factors on SCC justices’ decision-making. For example, studies such as those conducted by Songer et al reveal that there are statistically significant ideological differences between SCC justices, although those differences are more muted than in the United States (US) Supreme Court. Likewise, a number of studies have found gender-based differences in decision-making on the SCC. Based on his interviews with SCC judges and clerks, Macfarlane argues

that individual worldviews can and do play a role in SCC decision-making, but outcomes are also influenced by institutional norms, processes, and strategic considerations. Examples of these factors include the influence of the law, leadership styles of Chief Justices, and concerns about how the Court would be perceived.\(^\text{12}\)

Although there have been excellent historical treatments of provincial courts of appeal, analysis of their jurisprudence, and some statistical information about their work, there have been very few studies that have tried to systematically examine the nature of decision-making in these courts.\(^\text{13}\)

**Unanimity Rates on Provincial Courts of Appeal**

In one of the rare studies of Canadian provincial courts of appeal, Greene *et al* interviewed close to 100 appellate judges between 1991 and 1995.\(^\text{14}\)

Their study addresses a number of topics including several directly relevant to our work here, such as the high rates of unanimity on provincial courts of appeal. Greene *et al* argue that part of the explanation lies in the shrinking size of appellate panels.\(^\text{15}\) For example, in 1962, close to 20 percent of panels in provincial courts of appeal were larger than three and the dissent rate was also close to 20 percent. Since the late 1960s, however, three-judge panels have predominated. Still, Greene *et al* note that the declining rates of dissent has been “steadier and less precipitous” than the decline in larger panel sizes, which suggests there may be other contributing factors to unanimity. One possibility put forward by the authors was that the growing importance of judicial leadership encouraged judges to speak with one voice, which is easier to do with three-judge panels.\(^\text{16}\)

In addition to panel sizes, US scholars have found other institutional features are related to rates of dissent, including how opinions are assigned, workload, docket structure, and the presence or absence of an intermediate appellate court.\(^\text{17}\) The effect of these variables is somewhat difficult to estimate in the Canadian setting because of differences in judicial process between Canada and the US. The courts we are interested in, provincial courts of appeal, hear appeals from a wide variety of places, including provincial and superior trial courts and administrative tribunals.


\(^{13}\) But see Greene *et al*, *supra* note 7; Stribopoulos & Yahya, *supra* note 5, among others.

\(^{14}\) Greene *et al*, *supra* note 7.

\(^{15}\) *Ibid* at 133–35.

\(^{16}\) *Ibid* at 133–34.

As discussed below, in many instances, provincial courts of appeal are required to hear an appeal, but in other instances they have discretion as to whether to grant leave to appeal.

In the aggregate, however, because of institutional processes (relatively more direct appeals by right are heard than other types of cases) and possibly institutional norms (e.g. granting leave to appeal even in “routine” cases) it appears that provincial courts of appeal tend more towards hearing cases that make the manifestation of dissent less likely.

Nevertheless, the relatively high volume of cases that provincial courts of appeal hear and the very low rates of dissent make it probable that there are times where dissents are being suppressed or avoided rather than not being considered at all. According to Farhang and Wawro,\(^\text{18}\) possible explanations for the dearth of dissents in the US federal courts of appeal can be divided into two broad categories: suppressed dissents or modified content. The latter category suggests that the judges deliberate, bargain, accommodate, or logroll to come to a consensus before releasing their decisions. The former category suggests that judges withhold their dissent owing to such possible factors as workload, organizational loyalty, or a coercive consensus norm. Both approaches assume that the expression of the judges’ preferences, even if they are shaped by forces such as ideology, gender, or professional background, will be curbed to some degree in the decision-making process.

A 2018 book on decision-making by Justice Sharpe of the Ontario Court of Appeal suggests that both factors might be at play, though his reflections tend to be more supportive of the modified content explanation. Justice Sharpe writes about the benefits of collegial decision-making and notes that he would not dissent on peripheral points of the law.\(^\text{19}\) However, he specifies that the “spirit of collegiality” should not “discourage” potential dissents and he offers a number of reasons why dissent can be valuable and not undermine collegiality (particularly if respectfully articulated).\(^\text{20}\) Nevertheless, he explains that differences of opinion are thoroughly discussed by the panel in an effort to “resolve” them.\(^\text{21}\) The result of these


\(^{20}\) Ibid at 51–52.

\(^{21}\) Ibid at 50.
discussions is often a narrowing of the decisions to reflect a minimalist approach to resolving the dispute.22

A. Individual Characteristics, Institutional Constraints, and Role Perceptions

Greene et al broached the question of whether the individual characteristics of appellate court judges mattered to decision-making. They noted, for example, former SCC Justice Bertha Wilson’s assertion that woman judges will make a difference to judicial decision-making,23 but no interview questions appear to have been asked on the matter. As for ideological predispositions, only a third of their respondents said that their colleagues could be divided into ideological groups.24

Quantitative studies of provincial courts of appeal testing for correlates of judges’ characteristics and decision-making are rare; though some studies, particularly those focusing on the Ontario Court of Appeal, have found a relationship between gender and decisions, and between party affiliation and decisions, in particular types of cases (for example, gender in family law cases).25 However, our continued research—particularly our quantitative studies focusing on smaller provincial appellate courts—has had more mixed results.

The US literature on federal courts of appeal decision-making is more developed than in Canada. The results are not uniform, but studies tend to find some relationship between party affiliation of the judge and decisions as well as the gender of the judge (or the gender composition of the panel) and outcomes—but only in particular kinds of cases.26 As suggested

22 Ibid.
23 Greene et al, supra note 7 at 25.
24 Ibid at 77.
25 Songer et al, supra note 11; Hausegger, Riddell & Hennigar, supra note 5; Stribopoulos & Yahya, supra note 5.
above, US researchers note that institutional factors can serve to restrain the influence of judicial characteristics on decision-making and contribute to the high levels of unanimity in these courts.

Some scholarship goes further, arguing that the notion that appellate court judges are “constrained” in trying to achieve their preferred outcome fails to acknowledge the possibility that individual, collegial, and institutional influences lead judges to see the application of legal principles as their role rather than a constraint per se. Certain quantitative studies appear to find an independent and important role for the law. Judges themselves point to the importance of legal considerations in their deliberations. David Klein, based on his interviews with circuit court judges in the US, concludes that, although judges frankly admitted to caring about the outcomes of cases, “legal goals, too, have a real effect on judges’ decisions” despite the limited oversight that the US Supreme Court can directly exert over the federal courts of appeal. Expertise and prestige are valued because of the importance attached to making sound legal decisions. Similarly, Tamanaha, while rejecting a mechanistic view of judging, argues that for many judges—and particularly those below the Supreme Court—the law is central to their decision-making, rather than simply a constraint. Drawing on observations and comments from judges, Tamanaha notes that they acknowledge that their backgrounds and worldviews may shape how they perceive the law, especially in a subset of cases where the law and its application are not clear. However, these judges argue such hard cases appear less frequently than at the Supreme Court.

In their surveys of Canadian appellate court judges, Greene et al found that on average judges believed they were lawmakers in only about 15 percent of cases. On a scale of whether they considered themselves lawmakers (one) or law interpreters (five), the average overall response was 3.8. Consistent with this finding, Justice Sharpe writes that some lawmaking is an inevitable and important element of judging, but that it

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27 See e.g. Cross’s study of the US federal courts of appeal: Cross, supra note 26.
29 Ibid at 138–39.
30 Tamanaha, supra note 9 at 719–20.
31 Ibid at 724.
32 Greene et al, supra note 7 at 187. The average for Supreme Court judges only was 3.1, which suggests that the intermediate appellate court judges considered themselves to be even closer to the law interpreter end of the scale; however, the average for only the intermediate appellate judges was not provided.
should be done in an incremental fashion that respects a coherent set of underlying legal principles.\textsuperscript{33}

In applying and developing the law, Justice Sharpe believes that it is unavoidable that judges’ personal views and experiences play a role. Indeed, he maintains that it would be undesirable if judges simply saw themselves as “cyphers”—not only would this inhibit the pursuit of compassionate justice, but it would prevent judges from undertaking the continual self-reflection needed to confront their own biases.\textsuperscript{34} While viewing this human dimension of judging as necessary and helpful, Justice Sharpe notes that judges should not consider themselves “knights errant” trying to achieve justice or legislators creating policy—instead their decisions must be based upon legal principles.\textsuperscript{35}

Justice Sharpe’s reflections are very helpful but only reflect one judge’s view, and the valuable data from the study of Greene \textit{et al} are over two decades old and do not respond to all the questions in which we are interested. Thus, we believe there is need for more study. In the next section we outline the survey and interviews we undertook in an effort to hear from the justices and learn more about their decision-making and the influences working on them behind the scenes.

\section*{III. Survey Overview}

To accomplish our goal of better understanding judicial decision-making, we created a survey to send to judges on provincial courts of appeal across Canada. In creating the survey, we drew upon some previous studies that have featured surveys or interviews with appellate judges below the SCC level, particularly Greene \textit{et al}.\textsuperscript{36} We also discussed possible survey questions with two former judges who had retired relatively recently from provincial courts of appeal.

Our survey begins with questions about process. We ask questions about case selection, panel and case assignments, when judges discuss cases (before or after oral argument), how they discuss them (in formal meetings or informally), who assigns the opinion writing, and when is it assigned.

\begin{footnotes}
\item[\textsuperscript{33}] Sharpe, \textit{supra} note 19 at 77.
\item[\textsuperscript{34}] \textit{Ibid} at 258.
\item[\textsuperscript{35}] \textit{Ibid} at 92.
\item[\textsuperscript{36}] Greene \textit{et al}, \textit{supra} note 7.
\end{footnotes}
Part of the remainder of the survey asks a series of questions that probe how judges perceive their role (including vis-à-vis other courts and the larger system of governance). The role-related questions involve such matters as where judges see themselves on a spectrum from “correcting error” to “shaping the law” and from “law interpreter” to “law maker”; the degree to which they feel free to review facts from lower courts; and an open-ended question about the effects of the *Charter* on the role of courts.

Of more direct interest for the focus of this paper are questions addressing influences on decision-making, including a specific question about the factors that influence unanimity (e.g., nature of the cases, conventions of collegiality, and desire for clarity in the law). Using a five-point scale, another question asks about the importance of several factors on the outcome vote, including “sense of a just outcome,” “deference to the original tribunal,” “desire for unanimity,” and “avoiding reversal by the SCC.” Another outcome-related question offers options that are more associated with the process of decision-making, probing the respondent’s beliefs about how important the following factors are to the decision: “parties’ legal briefs,” “oral argument,” “draft opinion,” and “discussion with colleagues.”

The final set of decision-making questions probes the respondent’s attitudes towards the influence of extra-legal factors in decision-making. Here we ask whether women judges decide cases differently and whether, as more women are added to the court, they might influence the process of deliberations and outcomes in general. We also asked about the influence of professional backgrounds on decision-making and about differences between judges who were elevated to the court and those who were appointed directly from practice.

To assess how judges perceive the influence that the law and their own policy preferences play in decision-making, we took a number of quotes from judges and scholars about this question and asked judges to assess on a scale of 0–100 how much each quote reflected the experiences on their court. Some of the quotes (see the Policy Preferences section below for a full list of the quotes) emphasized policy preferences more, while others highlighted the constraining role of law. For example:

a) “The ordinary business of judges is to apply the law as they understand it, to reach results with which they do not necessarily agree;”

b) “Justice A thinks that ideology does not divide [the court]... sharply.... He admits, however, that on hard cases the justices usually split along consistent lines that relate to their basic ideas about justice;”
c) “Notwithstanding the ample room for discretion and judgment, judges are ‘subject to very significant restraints,’ and can try to become aware of and attempt to counter the influence of their biases.”

In the summer of 2016, we contacted the Chief Justices of all ten provincial appellate courts to tell them about our proposed survey and to ask if we could send the survey to members of their courts. We are grateful that all agreed to allow us to distribute the survey via email in the fall of 2016 and winter of 2017. Both current judges and supernumerary judges were included in the distribution for a total of 146 possible respondents. The number of judges who responded to the survey was 43, for a response rate of 29.5 percent. Three courts had a response rate over 50 percent and two courts had rates closer to 15 percent. The remaining five provinces were remarkably consistent in the low 30 percent range.

A. Interviews

The survey concluded with a question asking respondents if they were willing to be interviewed. We wrote a follow-up email, requesting interviews with willing participants. We were able to interview 19 judges representing eight of the Canadian courts of appeal. The interviewees represent a mix of gender, age, ideology, and professional background. Our interviews were typically 45 to 60 minutes long and were conducted primarily by telephone (with one face-to-face interview) during the summer and fall of 2017. We had six questions we asked all participants. The interview began with us asking the judges about the importance of certain goals of appellate decision-making that have been identified in the literature: producing just decisions, producing legally correct decisions, producing coherent law, and producing prompt decisions. To probe more deeply the possible reasons for the high rates of unanimity on provincial courts of appeal, we flipped a survey question asking about factors generating unanimity and asked these judges “what would help generate a dissent?” We also spent time talking to judges about the amount and type of consultation and negotiation that occur during opinion writing. We also asked judges to comment about a variety of potential influences on their decision-making (e.g. gender).

37 For this paper we did not need a precise measure of ideology. However, from newspaper accounts and our conversations with the judges, we believe we have a diversity of ideologies included in the sample.
IV. RESULTS

A. Unanimity

As we discussed above, one of the factors that makes quantitative studies of appellate courts difficult is the extremely high rate of unanimity in their decision-making. This leads to a small number of cases in which to explore differences (and creates concerns about what we are missing “behind the scenes” that helps produce the unanimous decisions). To help us better understand the possible reasons for the high rates of unanimity in these courts, we directly asked the judges we surveyed about what factors help explain this phenomenon. Judges were asked to rate the importance of each factor on a scale of one: “Not at all Important,” to five: “Extremely Important.” Figure 1 reveals that respondents thought that their familiarity with colleagues or any expectations of collegiality (norms of collegiality) were not that important in explaining unanimity. Neither was the possibility of bargaining amongst the panel. Instead, the nature of the cases that came before the courts, and a desire for clarity in the law, were the most important factors in explaining unanimity.

**FIGURE 1 — IMPORTANCE FOR GENERATING UNANIMITY**

Mean Score on Question
(5 = Extremely Important; 1 = Not at all Important)

Why Not Dissent? Workloads and the Nature of the Cases

The results above suggest that dissents (and concurrences) are suppressed to some degree, particularly by workload factors and the nature of many cases that come before the courts. As for the nature of the cases, one judge noted that “more appeals are error-correcting” while another judge
explained that does not necessarily mean that there are many errors: “Most of our work involves error correction, notionally, but we dismiss most of the appeals we hear, because trial judges usually get things right, including the law.” In *R v Rouse*, for instance, the Nova Scotia Court of Appeal upheld the trial judge who found the accused was guilty of violating subsection 286.1(1) of the *Criminal Code*, which makes it an offence to offer consideration for obtaining sexual services. The trial judge found that, although the accused and the victim were in a friendship and then a relationship, it was clear that on more than one occasion the accused offered drugs in exchange for sexual services contrary to the law. The panel, featuring one woman and two males, was “satisfied the trial judge’s interpretation of the law and its application to the facts as she found them was correct.”

Like *Rouse*, the bulk of appeals come to the provincial appellate courts by way of “right”—a large majority of our respondents, across courts of appeal, estimated these made up over 75 percent of their cases. The 2019 report of the British Columbia Court of Appeal, the most comprehensive report for the appellate courts that is accessible to the public (indeed one of the only reports), indicates that 5266 of the 6341 civil appeals filed between 2010 and 2019 were by right (83 percent). Without being vetted by a judge or panel of judges, it is likely that a large number of appeals by right may be decided relatively easily.

Cases coming to the courts by right can also lead to high volumes of cases for the courts to decide which amplifies considerations of the nature of case with workload issues. As one judge stated:

> Where the workload is high, it can be an unjustified indulgence to divert time from other pressing, difficult, and serious work to dissent on a matter that, while of importance to the immediate parties, will not be of importance to anyone else. There is little value to a dissent that, by its nature, will not benefit either of the parties, and does not contribute to the development of the law.

One of our interviewees noted that he might be tempted to write more concurrences if not for the workload. Of course, workload varies between

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38 2020 NSCA 8 [*Rouse*].  
39 *Criminal Code*, RSC 1985, c C-46, s 286.1(1).  
40 *Rouse*, supra note 38 at para 35.  
Canadian courts of appeal. Lubetsky and Krane, for example, found that from approximately the mid-1990s to 2007, annual caseload ranged per judge, from around ten (in PEI and Newfoundland and Labrador) up to the mid-70s (in the Ontario Court of Appeal). Thus, workload is likely more of a contributing factor in some courts compared to others.

**Why Not Dissent? Other Possible Factors**

Some judges noted the lack of utility in dissenting in cases where a larger legal principle is not involved, such as in a case involving a criminal sentence in which there might be some disagreement about the actual sentence, but not the legal framework. Judges also drew attention to their preference for minimalism. They suggested their desire to decide on the narrowest grounds possible and to not overwrite helped suppress dissent, since agreement was more likely on narrow decisions.

Our interview respondents, however, also drew attention to the small number of judges involved in courts of appeal decisions and the give-and-take that can occur in such a group. They noted that it was relatively common for judges to ask their colleagues to make changes to draft opinions—ranging from more editorial to more substantive changes. Respondents were adamant that there were never promises of vote swapping between cases or parts of cases. They also did not characterize these exchanges as “bargaining,” which perhaps explains why this option on the survey was ranked as the least important factor explaining unanimity (see Figure 1 above). Nevertheless, from our interviews it is clear that in a small but important subset of cases, changes are made to the draft opinion to achieve unanimity—changes that impact the legal reasons offered to justify the outcome. It therefore appears that the “modified content” explanation offered by Farhang and Wawro in their study of US courts of appeal is also at work in explaining high rates of consensus on provincial appellate courts. For instance, one interviewee indicated that there were approximately ten percent of cases that could result in a dissent. In those cases, there were multiple rounds of discussion and attempts at

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42 Lubetsky and Krane’s figures end at 2007, but their start dates vary for different courts from the early-1990s to 2000. See Michael H Lubetsky & Joshua A Krane, “Appealing Outcomes: A Study of the Overturn Rate of Canada’s Appellate Courts” (2009) 47:1 Osgoode Hall LJ 131 at 148–49. The most recent figures from BC indicate that the Court of Appeal in 2019 produced 273 written reserve judgments (164 civil and 109 criminal) and provided oral reasons in a further 138 appeals (88 civil and 50 criminal). Just over 1,400 motions were brought before individual judges in Chambers. *Ibid* at 3.

43 Farhang & Wawro, *supra* note 18 at 307–08.
“persuasion.” The majority of these cases ended with this judge agreeing to join a final decision in which the legal principles were often narrowed. In his 2018 book, Justice Sharpe of the Ontario Court of Appeal echoes these statements suggesting that in certain instances, if initial requests for changes did not result in agreement, a “draft dissent or concurrence will often persuade the colleague....”44

Of course, this raises the question of why judges expend these efforts to try to forge consensus. Some of the judges we interviewed argued that building a consensus can help provide greater clarity in the law. Yet, other judges, including some of those who generally believe that more consensus helps achieve clarity, believe that in some circumstances a dissent is important and that too much emphasis on consensus can dilute the clarity of legal principles. The role of collegiality was also described in contrasting ways by different judges. Some judges pointed out that collegiality helped to explain efforts to arrive at consensus. One judge noted that their court was much more collegial than it had been in the past, which they felt helped explain that court’s increasing rates of unanimity. Other judges argued, however, that because the judges on their court respected one another, dissents were not seen as a problem—the collegial nature of the court seemed to liberate judges to feel free to dissent in those relatively rare cases where they disagreed on fundamental principles. Regardless of these different viewpoints, the judges we spoke to could agree that cases needed to be important, and a judge needed to feel passionately about it for a dissent to be worth the extra time it takes to write.

B. Role Perceptions and Objectives

In addition to asking specific questions probing the high rates of unanimity and conditions under which a dissent might occur, we also tried to ascertain whether unanimity rates might be linked to broader questions about what judges’ objectives were in deciding cases or how judges perceived their role. One of our survey questions, for instance, asked about the importance of various factors in “influencing your vote on the outcome.” In addition to “desire for unanimity,” judges were asked to rank these other factors on a scale from “not at all important,” to “extremely important”: applying established doctrine, sense of a just outcome, deference to original tribunal, societal values, and avoiding reversal by the SCC. Table 1 reports the results:

44 Sharpe, supra note 19 at 50.
Clearly, achieving unanimity is not considered an important goal in and of itself. Nor does unanimity seem to result from judges prioritizing established legal doctrine. Justices show concern for objectives such as the justness of the outcome or societal values—considerations that one would expect to have the potential to lead to more disagreements amongst the judges. Similarly, unanimity does not appear to simply be a by-product of how provincial court of appeal judges see their role. When survey respondents were asked on a scale of one to five if they saw their role as “error correction” (one) or “shaping/clarifying the law” (five), the mean of the responses was 2.6. Similarly, when asked if judges saw themselves as a “law interpreter” (one) or a “law maker” (five) the mean of the responses was 2.5. These middling responses suggest that overall, as a group, judges do not see their role as just a straightforward correcting of errors by applying established legal principles—a role that presumably would lead to fewer possibilities for disagreement.

When analyzing the quantitative scores, the open-ended text responses to survey questions, and our interviews, we begin to see some patterns that not only illuminate high rates of unanimity, but judicial decision-making on provincial courts of appeal more generally. Judges towards the “error correction” and “law interpreter” end of the scale on the survey tended to mention the nature of the cases as a key explanation for outcomes. They noted that the SCC has narrowed the conditions under which appellate courts could interfere with trial outcomes—“standards of review” were considered to be the “shackles that bind.” During the interviews, where we started by asking judges about the possible tensions between applying established doctrine and achieving just outcomes, a majority of judges indicated that for the most part, established legal principles should

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**TABLE 1 — IMPORTANCE OF FACTORS ON DECISION OUTCOME**

<table>
<thead>
<tr>
<th>Applying Established Legal Doctrine</th>
<th>Sense of a Just Outcome</th>
<th>Deference to Original Tribunal</th>
<th>Societal Values</th>
<th>Desire for Unanimity</th>
<th>Avoiding Reversal by the Supreme Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.0</td>
<td>3.9</td>
<td>3.4</td>
<td>3.0</td>
<td>2.4</td>
<td>1.3</td>
</tr>
</tbody>
</table>

*5=Very important; 1=Not at all Important*

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45 As we note below at page 23, some judges indicated that their answers might differ on the survey and interview questions depending on the area of law. Here we try to provide a general overview of their sentiments.
produce just outcomes even if one has to “dig back deeper into the legal principles to see the result.”

In this vein, a number of judges contrasted their role on an intermediate appellate court with the SCC. We were frequently reminded during our interviews that the SCC hears far fewer cases and that the nature of their decision-making is much more broadly focused on clarifying and perhaps creating rules. Often these observations were made with frustrated asides about the SCC: the SCC declares that the court of appeal erred in law when the SCC just changed the law; the SCC does not always follow its rule about being deferential to original decision-makers; the SCC takes “poetic license” with cases; and even, the SCC “is doctrinally undisciplined... [with] no regard for precedent and has ceased to be a real court except in criminal cases where they are bound by the Criminal Code— unlike the courts of appeal which are bound by precedent.” Despite frustration with the SCC and not being motivated by fear of reversal by the SCC (see Table 1), these judges see their role primarily as applying precedent to correct possible errors in law within the parameters of deference owed to lower courts.46

A minority of our survey respondents and interviewees pushed back against the notion that most court of appeal cases were relatively easy cases of error correction, whereby a clear precedent could be applied to resolve the case in a just manner. We heard a few stories, as did Greene et al, of instances in which appellate courts deliberately deviated from SCC precedents with the hope of modifying the law to achieve more just outcomes. A couple of judges also noted that courts of appeal had latitude in shaping the law because the SCC decided so few cases and the SCC’s decisions were often quite general in nature, which left much room for appellate courts to fill in important details. One interviewee noted that there is always “some flexibility in the joints” to achieve a just outcome. Even the judge who characterized the courts of appeal as “roadkill on the way the SCC” still thought the courts of appeal could help form the law by doing the right thing, “while explaining the right reasons in order to give the SCC guidance.” One survey respondent went the furthest and wrote: “Law is policy. Because of the inherent ambiguity of language, in every case involving the interpretation of the language of either a statute

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46 The appellate judges made clear this commitment was not out of concern for whether they will be reversed by the Supreme Court. This also comports with Klein’s overall conclusions that US courts of appeal judges are not motivated by fear of reversal from the US Supreme Court. See Klein, supra note 28, ch 6.
or a precedent, judges have a choice available as to the meaning to be attributed to the language.”

Although this judge’s view of the indeterminacy of cases coming before provincial appellate courts was not widely shared, it is also notable (given the averages on the survey results and the comments in the survey and interviews) that respondents certainly did not consider all cases to be easy, and themselves to be exclusively law interpreters who corrected errors. Despite the “routine” cases of right discussed above, provincial courts of appeal also grapple with questions that on their face appear to leave more room for discretion in the application or development of the law. Some recent examples from Ontario include questions about whether to create torts of privacy or workplace harassment; whether police legally or illegally entered a backyard in a racialized community; and whether the detention of Mr. Le was arbitrary or not.47 Does this leave room for extra-legal influences to play a role even in unanimous decisions of the courts of appeal? We address this question in the next section of the paper.

C. Extra-Legal Influences

After asking judges about some general influences on case outcomes, we wanted to probe further into how they saw judges’ backgrounds, characteristics, and worldviews relating to their decisions.

1. Path to the Bench

In both the survey and our follow-up interviews, we asked respondents open-ended questions about whether a judge’s professional background (such as civil litigator versus Crown or defence counsel) played a role in their decisions. The responses were mixed. Survey respondents overwhelmingly focused on the example we provided in the question: differences between former Crown attorneys and former defence counsel in criminal cases. Several judges said the professional background of a judge does not affect their rulings. However, other judges stated that, particularly in criminal cases, they did indeed see an “institutional bias” from judges

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47 See Jones v Tsige, 2012 ONCA 32; Merrifield v Canada (Attorney General), 2019 ONCA 205; R v Le, 2018 ONCA 56.
who were former Crown attorneys and defense counsel. Crown attorneys were typically suggested to be “more hardline,” although one judge stated that in their experience, “former prosecutors tend to be less sympathetic to state agency than might otherwise be anticipated.” Indeed, in our interviews with judges, more than one suggested that former defense attorneys were actually more sympathetic to the Crown and more skeptical of defendants, with one suggesting that former defense attorneys “can spot bullshit better than anyone.”

In interviews, a few judges looked beyond the Crown-defense example, with one suggesting they would instead make a distinction between former litigators, legal academics, and mergers and acquisitions attorneys. A judge who had been a commercial litigator suggested it did impact their perspective. They felt they had more appreciation for the “societal costs of being cavalier about business.” They also argued that those with a criminal law background had a “greater sense of how awful prison is and may be less anxious to throw people in prison for a long time.” However, in both the survey and our interviews, there was not strong support for judges voting differently based on their previous experience as a lawyer. One judge we interviewed suggested that professional background matters when you first arrive on the bench but becomes less important the longer you sit as a judge.

Indeed, in interviews a common theme was not that judges of particular professional backgrounds voted significantly differently from others, but rather that judges would defer to their colleagues who were specialists in the case area—be it criminal law or family law or some other area of specialization. One justice argued “you don’t leave your expertise at the door,” and suggested that judges had the ability to influence their colleagues by having a better background in that area of law. The majority of judges agreed that different experience could help decision-making.

Interestingly, the vast majority of judges agreed on one experience they felt was vital to being a judge on a court of appeal: sitting as a trial court judge before being elevated to the court of appeal. Judges suggested this experience made them more sympathetic to the difficulties of being a trial judge and less hasty to support appeals challenging trial court actions such as jury instructions. They spoke of their insight into the processes of a trial, arguing it left them better able to distinguish when mistakes were impactful on outcomes. Judges who had not sat on lower courts were often skeptical that it hampered their decision-making, but they too remarked that the other judges thought it did.
2. Gender

We also asked judges in our survey about the influence of gender on judging. Our first question was as follows:

Legal scholars and social scientists have suggested that female judges tend to vote differently than their male colleagues in particular types of cases. Thinking about your experience on your current court, would you agree or disagree that this describes female judges on your court?

As Figure 2 indicates, the response options were: (1) “strongly disagree,” (2) “disagree,” (3) “neither agree nor disagree,” (4) “agree,” or (5) “strongly agree.” The mean response to this question was 2.37, with 62.8 percent of respondents either “strongly disagreeing” (23.3 percent) or “disagreeing” (39.5 percent). Only two percent strongly agreed with the statement.48

Some judges took the time to explain their answer. Responses ranged from “this is nonsense,” to “some female judges approach sexual assault cases differently,” to “more women are needed on the courts...if for no other reason than to ensure that justice is seen to be done.”

Perhaps surprisingly, the results for our next question on gender (see Figure 3) generated much more agreement. Here, we asked whether respondents agreed or disagreed with the statement:

Legal scholars and social scientists have suggested that as more female judges join the court, they will have an indirect influence on the law by approaching deliberations differently and by influencing the perspectives of their colleagues.

48 Missing from Figure 2: the 16 percent who neither agreed nor disagreed.
The mean response (using the same scale as the previous question) was 3.4 with 65.1 percent of respondents picking either “agree” (58.1 percent) or “strongly agree” (7.0 percent) with that proposition. In responses to the open-ended question that followed (“[D]o you have any comments about gender and judging?”), there were echoes of the findings of judicial studies that panel effects can occur when women or minorities join their peers on a case. Panel effects exist when male or white judges vote differently when sitting on a more diverse panel. A few judges in our study suggested this was indeed the case, stating that the “principle advantage of equalizing the genders in the courts is that the panels then have the benefit of a better and more complete life experience against which to evaluate the benefits of movement in the law....”

**FIGURE 3: WOMEN JUDGES HAVE AN INDIRECT INFLUENCE**

The differences between these two survey questions and the interesting responses they generated led us to ask a question directly on gender in our interviews. Our question drew attention to the fact that the majority of survey respondents had not agreed with the statement that women vote differently than men. It then asked if the judge would answer differently if we had mentioned particular types of cases like sexual harassment or sexual assault. We also asked whether they thought a woman’s experience and perspective were different.

Although there was not a significant difference between how men and women respondents answered the two questions in the survey, we did see a distinction between how women and men answered this question in interviews. Only a small number of women agreed to be interviewed, but

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49 Missing from Figure 3: The 12 percent who neither agreed nor disagreed.
those that did said yes—they thought gender mattered, while the men split more evenly. Some men argued that gender does not have an effect on how a case is decided. A few of these judges suggested that although they did not see a difference between the genders, courts might need to be sensitive to perception. One male judge told us that he “likes to have a woman on sexual assault cases and maybe family law cases.” The suggestion here was that while a woman will not decide a case differently from a man, the appearance of a woman on the panel hearing these particular cases had some value. A woman judge told a similar story about a case heard by her Court involving domestic violence and sexual assault. After hearing the case she volunteered to write the decision to which the men on her panel replied “yes please. It will be better received from a woman.”

A few men suggested gender might matter in a particular issue area (sexual assault was mentioned by one and child custody issues by another). Some other respondents focused on what they felt was a different, more collaborative approach and a different communication style used by women, although some respondents noted that there was no difference in styles that could be attributed to gender. The rest of the judges—both men and women—focused on the different perspective and experience women brought to the bench. One woman judge said “one part of my brain wants to say gender does not matter—we are all equal. But real worldview—yes it makes a difference.” Life experiences matter: several judges said they have an impact.

This is why, one woman argued, diversity is important. This woman told us a story to illustrate her point. A male judicial colleague sitting on a trial court told her about a date rape case he had heard. The victim in the case testified that after being assaulted, she had gathered up her stuff and ran out of the apartment. The accused said his accuser had consented to sex and left after the encounter—she had merely forgotten her bra. The trial judge was lamenting about the difficulty of the “he said-she said” nature of these cases. The woman we were interviewing had a different reaction to this story and told her male colleague that “no woman would forget her bra…unless she was frightened and fleeing from a sexual assault.” This was a great example, she argued, of a perspective that women judges could uniquely bring to a case.

The importance of diversity was mentioned by some of the men we interviewed as well. One in particular argued “diversity is important for different life experiences. We are bringing our minds to the problems of
the day. Judges necessarily filter what they hear in the courtroom through the lens of their own experience. So, a range of experience is crucial.”

The responses of the judges to our questions suggest that many do not believe that women judges vote significantly differently from men judges. However, they do see the impact of different experience and perspective. As one judge summed up, “sometimes people with different backgrounds can shed light.”

3. Policy Preferences

Lastly, we tried to ask judges about the role of ideology or worldviews in judging. Not only is this a potentially sensitive subject, but we know from the literature that gauging any potential influence of ideology is complex. Some judges suggest policy preferences have a strong and independent influence, while others claim it varies depending on the case. Still, others argue it may influence how judges read the law, rather than influence the outcome directly. To capture these possible complexities and to avoid raising the ire of our survey respondents, we decided to take select quotations from scholars and judges that provided different perspectives on this issue. We then asked respondents to “indicate the degree to which they believe each statement accurately reflects their experiences on their court where ‘zero’ represents ‘not at all’ and ‘100’ represents ‘completely’.”

The results are shown in Table 2:

<table>
<thead>
<tr>
<th>Statement</th>
<th>Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>“The ordinary business of judges is to apply the law as they understand it to reach results with which they do not necessarily agree.” (quoted from Klein at 16)</td>
<td>51.92</td>
</tr>
<tr>
<td>“Justice A thinks that ideology does not divide [the court]... sharply.... He admits, however, that on hard cases the justices usually split along consistent lines that relate to their basic ideas about justice.” (quoted from Songer et al at 65)</td>
<td>50.86</td>
</tr>
</tbody>
</table>

The quotations found in this table were derived from Tamanaha, supra note 9, Songer et al, supra note 11, Klein, supra note 28, and James L Gibson, “From Simplicity to Complexity: The Development of Theory in The Study of Judicial Behavior” (1983) 5:1 Political Behavior 7 at 9.
“Decisions are a function of what they prefer to do [policy preferences], tempered by what they think they ought to do [judicial role obligations], but constrained by what they think is feasible to do [institutional constraints].” (quoted from Gibson at 9)

Judge E similarly estimated that about 5–15% of appellate cases are very hard, with equally strong competing legal arguments. Disposition of this small number of cases, then, requires judges to exercise a measure of discretion, drawing to some degree on their own social and moral beliefs.” (quoted from Tamanaha at 742)

“I would be naive to suggest that all judges reason alike...how could they given their backgrounds, experiences, perceptions, and former involvements, all of which are part of the intellectual capital they bring to the bench.” (quoted from Tamanaha at 741)

“Justices’ comments...reveal that they often react strategically to their colleagues. That is, they clearly negotiate and bargain over the content of the court’s opinion and their ultimate positions reflect their calculations about their colleagues’ reactions and probable reactions.” (quoted from Songer et al at 62)

“[N]otwithstanding the ample room for discretion and judgment, judges are ‘subject to very significant restraints,’ and can try to become aware of and attempt to counter the influence of their biases.” (quoted from Tamanaha at 741)

The results from this question suggest that judges were inclined to take what Tamanaha has called a “balanced realism” perspective on decision-making. In keeping with their responses to questions about unanimity, judges tended to reject the notion that strategic bargaining amongst themselves was important in decision-making. However, they also had only tepid support for the proposition that the business of judges is simply to “apply the law.” The quote that resonated the most with respondents acknowledged that judges would reason differently due to their backgrounds and experiences. The statement the judges agreed with at the next highest level acknowledged judges do have discretion, but suggested that there are also significant restraints, and that judges may become aware of and attempt to counter their biases. This viewpoint was expressed in this open-ended text response in the survey:

To a great degree, one’s worldview or policy preferences are constrained once you become a judge. The law and judicial practice requires the suppression of those more personal considerations and, in my experience, most, if not all, judges—regardless of their background—successfully

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52 Tamanaha, supra note 9 at 739, 741.
do this. The weight of the bench will always temper a judge’s personal worldview.

The third most supported quote (that there are a small percentage of “hard” cases that require the use of judicial discretion) could be seen along these lines as well. There is only a small percentage of hard cases wherein personal beliefs play a role “to some degree”; presumably, the nature of the other cases with clear lines of precedent provides a constraint on judging. One of the open-ended text responses is clearly in line with this perspective:

No doubt we have unconscious biases and must strive to be self-aware and overcome them. But as an appellate judge on an intermediate court I think we strive to reach principled and reasoned decisions that are consistent with and build on a body of law recognizing that there are open cases in which the answer is not clear. In those circumstances, judges will be influenced by judicial philosophy and other influences, no doubt.

Nevertheless, there was also a quote from a judge illustrating a much more realist approach (“law is policy”). And one judge emphasized a more formal legal model by arguing that the nature of the work of intermediate appellate courts is “straight up error-correcting,” which means there is “not a lot of room for ‘policy’ or ‘personal philosophy’” to play a role in outcomes. This judge contrasted the work of intermediate appellate courts with the SCC, which, as noted above, was remarked upon (particularly in our interviews) by other judges as well. This point was also emphasized by one of the retired judges with whom we spoke while crafting the survey.

A couple of other survey respondents argued that they thought there was significant variation amongst judges as to their approaches and to what degree preferences played a role in decisions. For example, one judge wrote: “It is hard to generalize on these questions. For some of my colleagues I would answer 100 percent on some questions, and for others I would answer zero. As for myself, sometimes even I don’t know what I’m doing.” This respondent and a few others indicated that you might see more room for policy preferences in the more open-ended realm of public law or Charter cases in particular. One of these judges, though, was skeptical that judges making decisions in these cases would recognize the influence of their own preferences:

In most areas of law, this is simply not an issue. It is mostly in the more open-ended world of public law that there is much room for a judge’s
worldview. But in these cases, judges often do not understand themselves to have a worldview in competition with other worldviews, and think that their worldview is uniquely embodied in the law.

Many of the interviews we conducted after our survey echoed the “balanced realism” perspective. One judge stated: “I won’t try to hide behind the silly statement that we just apply the law, but we are very constrained. There is only room at the margins.” Another judge argued that “even when there are differences of opinion, that rarely affects outcomes because the law usually tempers those opinions.” One interviewee suggested that, while they could identify a modest ideological divide along a left-right spectrum on the court, it did not amount to much.

Interestingly, this judge argued that a more important divide than left-right was one’s overall approach to judging—whether a judge was more inclined towards principled reasoning or was more pragmatic and results-oriented (which the interviewee considered to be in the minority). Another judge had a similar comment about differences in the process by which judges would arrive at a decision. This judge indicated that there is often a tension between doctrine and justice, and some judges look to the law first, while others figure out an outcome and then look to see if anything in the law blocks that outcome. That there can be different ways of approaching a case was echoed by a third judge who referenced the famous Lon Fuller article, “The Case of the Speluncean Explorers,” wherein the hypothetical judges adopted different perspectives on legal reasoning—from natural law to positivism to pragmatism—to decide the appeal of the cave explorers who were convicted for cannibalizing one of their own to survive after being trapped by a landslide. The more positivist-oriented judges affirm the conviction as the spelunkers broke the law, whereas other judges argue that the convictions should be set aside based upon conditions in the state of nature or common sense and public opinion.

Yet, another judge encouraged us to consider differences in views about more general principles of what an appellate decision should do. For example, should judges create “bright lines” to be followed or enunciate a more contextual approach? And two interviewees, including one woman judge, argued that any differences in approaches to cases, such as in the area of sexual assault, were more likely to be due to generational differences than political philosophy (or gender). The interviews

53 Lon L Fuller, “The Case of the Speluncean Explorers: In the Supreme Court of Newgarth 4300” (1943) 62:4 Harv L Rev 616.
therefore reflected the survey responses but also encouraged us to look at different types of worldviews, beyond the political, in trying to explain decision-making.

V. DISCUSSION AND CONCLUSION

Asking provincial court of appeal judges about their own perceptions of decision-making provides some important insights to help us better explain and understand outcomes from these courts where most cases in Canada are finally determined. On the one hand, some of those insights seem to be contradictory or in tension with each other. For example, individual judges gave conflicting views on the role of law and preferences (including the one judge who claimed that often they did not even know what was influencing what they were doing); and respondents indicated that gender does not matter to outcomes, but that more women judges would make a difference on courts. Perhaps one judge summed it up best when they wrote, “this is a complicated subject. I suspect that every judge is influenced by different factors that are a product of their upbringing, education, mentors, clients and judicial colleagues.” This parallels David Klein’s summary of his interviews with US courts of appeal judges and the importance of asking such questions:

[S]cholars have less often investigated variation in the types of goals motivating judges or the kinds of influences acting on them…. One of the clearest lessons of the interviews is that not all judges place the same value on the same goals, nor are they all equally susceptible to the same influences.\textsuperscript{54}

On the other hand, it might be possible to see, perhaps dimly, through this noise an overall picture of the work of provincial appellate judges. At the court of appeal level, the nature of many cases coming before these courts, combined with a high workload (particularly in certain jurisdictions) and a commitment to apply the law (even if it blocks their preferred outcome), leads to high rates of unanimity and a dampening of the effects of individual characteristics. This conclusion would support researchers who argue for a more nuanced view of judging: suggesting that institutional norms and structures play an important role in judicial decision-making, while acknowledging that individual judges have different perceptions of

\textsuperscript{54} Klein, supra note 28 at 106.
their roles and the nature of law and bring different impactful experiences to the bench.

Future work on this project will build on some of the insights and questions raised by the survey and interviews. Part of this future research will investigate the nature of cases inspiring dissents. For example, do cases that have a dissent feature complex public law issues like those featured in many Charter cases or the recent carbon tax decisions that featured dissenting opinions in the Alberta, Saskatchewan, and Ontario courts of appeal? Are dissents more typical in five-person panels as evidenced in the carbon tax decisions? An initial scan of some of our completed databases discloses that answers are not as straightforward as one might expect. In a number of ways that would not be surprising, given the complexity and tensions that our survey responses and interviews have revealed about the nature of intermediate appellate court judging.

Our next step will use quantitative modelling to explore whether there are statistical relationships between outcomes, the nature of cases, and the personal characteristics of judges. This will allow us to triangulate results to further our understanding of these important but understudied actors in the Canadian judicial system.