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ESSAY

COMPARING "APPELS" AND ORANGES: EVALUATING THE LINK BETWEEN APPEAL PROCESSES AND JUDICIARY STRUCTURES IN CANADA AND FRANCE

Mike Madden*

I. INTRODUCTION

In this essay, I will attempt to explain why criminal appeal processes in France and Canada are so fundamentally different. At first glance, this is a simple question, with an obvious answer. Sometimes, however, obvious answers to simple questions can lead the academically minded among us onto long

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journeys of inquiry, in our efforts to uncover, beyond the obvious, why things exist or are done in a certain way.

By way of example, consider that “[a]ppeals . . . are not a logical corollary of the exercise of judgment.”¹ Indeed, as Dean Jurtas has pointed out,

there is nothing inherent in the notion of decision-making which requires that every decision be reviewable by a second decision-maker. From the perspective of institutional design, the possibility of appeals—that is, the possibility of having a second person decide on the same issue after an original decision has been made—and the scope of appeals are matters of choice.²

In other words, the simple question “Why do appeals exist at all, or in given form?” can be answered with the obvious statement “For different reasons that we have, institutionally, settled upon.” One cannot argue with this conclusion; it is undoubtedly true. But from a scholarly perspective, it is also somewhat unsatisfying: It leaves us wondering, again and again, why? Why has a particular form of appellate law developed in a given jurisdiction? What logic underlies the choices that have been made in adopting a certain mechanism for appeals?

This type of probing intellectual inquiry is perhaps most common among comparative law scholars, who, by the nature of their work, must often confront and account for differences in laws across jurisdictions. Thus, when a comparative law scholar asks why Canada and France have such markedly different criminal appeal processes, that scholar will not likely accept the obvious response that the laws enabling appeals in each jurisdiction provide for different forms of appeal. The truth of that obvious assertion does not ensure its sufficiency as a response to the question that was originally asked.

My goal in this essay, therefore, is to probe beyond the superficial in order to ascertain why criminal appeals in Canada and France exist in such distinctly different forms. The first part of the ensuing discussion will briefly review some of the theory explaining, generally, why appeals exist within legal systems. In Part III, the law dealing with criminal appeals in Canada and

1. Daniel Jurtas, *The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?* 32 Man. L. J. 61, 62 (2008).

2. *Id.*

France will be summarized. Next, in Part IV, the Canadian and French criminal judiciaries will be described. Finally, in Part V, I will attempt to demonstrate that a link exists between the design of the appellate processes and the design of the institutions of the judiciary in both Canada and France. Ultimately, I will argue that criminal appeals in Canada and France are different because the two jurisdictions train, educate, and view the abilities of judges in very different ways, and because each appeal system is therefore built around distinct assumptions about the capacities of judges to perform their functions at trial and on appeal.

II. THE THEORETICAL BASIS FOR APPEALS

As I have already suggested, the decision to permit criminal appeals in one form or another is, at least in Canada and France, a matter of legislative choice. It is important to understand, however, that there may be valid reasons to restrict or withhold a right to appeal, as much as there may be reasons to grant such a right. For instance, one could argue that, in order to “promote the autonomy and integrity of proceedings”³ at the trial level, there should not be recourse to an appellate court for a decision on the same matter. After all, if parties to a proceeding know that any trial decision is subject to appeal, then there is a danger that they will treat the trial as a sort of dress rehearsal for the appeal that may inevitably follow, which would tend to undermine the authority of the trial court.⁴

Alternately, one could argue that, in a society with limited resources devoted to justice functions by government, it would be irresponsible or inefficient to commit a portion of those

3. *Housen v Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at ¶ 17 (discussing how this concept of maintaining the autonomy and integrity of trial proceedings militates in favour of a deferential standard of appellate review).

4. See e.g. *id.* (“The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine and weaken public confidence in the trial process.”). This discussion in *Housen* suggests that the concept of maintaining the autonomy and integrity of trial proceedings militates in favour of a more deferential standard of appellate review, but I think that this concept could equally be cited as a reason for denying or restricting a right to appeal in the first place.

resources toward appeals of matters that have already been adjudicated before a competent trial authority.⁵ Rather than constituting appeal courts to re-evaluate trial decisions, perhaps society would be better served by constituting more trial courts, so that participants in criminal justice systems could be dealt with more expeditiously.

Notwithstanding the persuasiveness of the above arguments, there are probably more compelling reasons why appeals, at least in criminal matters, should be permitted. To begin with, human beings, including trial judges, are fallible: “[H]umans do not always work to capacity. Being human, they err.”⁶ One of the purposes of appeals and reviews, therefore, is to detect and correct errors that might have been made by the court of first instance. As Justice Arbour of the Supreme Court of Canada pointed out in *Moreau-Bérubé v. New Brunswick (Judicial Council)*,⁷ the appeal process “is designed to correct errors in the original decision and set the course for the proper development of legal principles.”⁸ This obvious error-correction role of appellate courts is a necessary one if the integrity of our justice system is to be maintained, as it would be difficult to defend a system that permits legal errors to be upheld. In any event, if we accept that trial judges can make mistakes, then it is easy for us also to accept that appellate authorities must, from time to time, be permitted to intervene to correct these mistakes.

Appellate courts arguably also have a duty to standardize the application of laws within their jurisdictions, so that like cases can generally be decided alike. As the SCC explained in *Housen*, “the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application.”⁹ This

5. The suggestion that a “scarcity of resources” should militate in favour of a deferential standard of appellate review has been raised in the scholarly literature, see e.g. Roger Kerans & Kim Willey, *Standards of Review Employed by Appellate Courts* 18 (2d ed., Juriliber 2006), just as the Supreme Court of Canada (SCC) has suggested that a deferential standard of appellate review should assist in “limiting the number, length, and cost of appeals,” *Housen*, 2 S.C.R. 235 at ¶ 16 (focusing on deference to fact finding by the trial court). Again, however, the same arguments could just as easily be marshalled in order to restrict or (in extreme cases) deny a right of appeal.

6. Kerans & Willey, *supra* n. 5, at 5.

7. [2002] 1 S.C.R. 249, 2002 SCC 11, ¶58.

8. *Id.* at ¶ 58.

9. *Housen*, 2002 SCC 33, ¶ 9.

standardizing role, or “call for universality” that extends to appellate authorities, “has both a time and a place component.”¹⁰ That is to say, the law should be standardized such that the same result obtains both today and in the future (the temporal component), just as it obtains equally in a major metropolitan centre as much as in a small countryside community (the spatial component). In this respect, appellate courts serve as centralized coordinating authorities that prescribe overarching rules of law for application by each court within their respective jurisdictions. Thus, appeals are necessary in order for higher courts to give guidance, and to ensure that their guidance is being properly incorporated into the decisions of trial courts.

Finally, a theoretical basis for appeals exists once it is recognized that higher courts can have a law-making, or developmental role to fulfill. The developmental role of appellate courts is conceptually difficult to understand, because, at first glance, this role appears to operate at cross-purposes with the courts’ standardizing role: How can the law be applied consistently by an appellate court if that body is also responsible for leading the law through periodic phases of evolution? Nonetheless, this law-making role has been acknowledged by the SCC in numerous decisions, through references to a duty of appellate courts to “refine legal rules,”¹¹ or to “set the course for the proper development of legal principles.”¹² It is perhaps easiest to reconcile the competing roles of appellate courts by viewing law not as a static body of rules, but as a process subject to continuous modification. This process, as Kerans and Willey have explained, requires appellate judges to engage in creative interpretations of past statements of the law, so that these statements can take on meanings that are consistent with a society’s changing expectations of the law.¹³ Again, as appellate courts have a duty to standardize laws, then the higher courts should also be vested with the duty (if such a duty is to exist) of leading changes in the law when it becomes apparent, through review of a trial decision, that such changes are necessary.

10. Kerans & Willey, *supra* n. 5, at 7.

11. *Housen*, 2002 SCC 33, ¶ 9.

12. *Bérubé*, 2002 SCC 11, ¶ 58.

13. Kerans & Willey, *supra* n. 5, at 8–12.

Not all of the above justifications for permitting appeals will be relevant to the same degree in every jurisdiction and every legal tradition.¹⁴ For instance, the developmental role of appellate courts would likely not be recognized within civilian legal systems (such as the French system), where the law is said to be comprehensively codified in statutes, as much as within common law systems (such as the Canadian system), where the law may exist as much in precedent and tradition as in legislation. However, at least one of the above justifications could be relied upon in almost any jurisdiction as providing a theoretical basis for appeals.

In reality, a right of appeal by an individual who has been convicted of a criminal offence exists in most democratic legal traditions, and elsewhere throughout the world. The universality of this right of appeal is both reflected in, and reinforced by, Article 14(5) of the International Covenant on Civil and Political Rights: “[E]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”¹⁵ In recognition of the fact that appeals are widely permitted within criminal justice systems, then, it is perhaps more productive to assess whether appeals are permitted according to different conditions in various jurisdictions, and, if so, why?

III. THE LAW OF CRIMINAL APPEALS IN CANADA AND FRANCE

In the sub-sections of this paper that follow, I will describe the essential characteristics of Canadian and French criminal appeal systems, including who can appeal, on what grounds, to what court, composed of what judges, on what type of evidence, and in accordance with what standard of review. An

14. I note, at this point, that much of the above discussion regarding the justifications in favour of and against having appeals within a legal system has been informed by my earlier work on standards of appellate and judicial review in Canada. See Mike Madden, *Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review*, 36 *Advoc. Q.* 269 (2010) [hereinafter “Hydra: Probably Correct”]; Mike Madden, *Conquering the Common Law Hydra: A Consolidated Guide to Standards of Appellate and Judicial Review* (August 2009) (unpublished ms. commissioned by and produced for N.S. Ct. of App.).

15. Intl. Covenant on Civ. & Political Rights [ICCPR], 999 U.N.T.S. 171, 6 I.L.M. 368 (19 Dec.1966) (entered into force Mar. 23, 1976).

understanding of this information is important not only so that the two systems can be juxtaposed for analysis, but also because it will provide the basis for my ultimate argument that the Canadian and French appeal systems are designed around different assumptions about the judiciaries in each jurisdiction.

A. Criminal Appeals in Canada

In order to understand the criminal appeal process in Canada, one must first learn something of the country's court structure. The names of different levels of criminal courts in Canada vary from province to province, but each province has a Court of Appeal that serves as its highest court. Additionally, each has a superior court of criminal jurisdiction, which could be called, for instance, the Supreme Court of the province, the Court of Queen's Bench, or the Superior Court of Justice, depending on its location. Finally, each province has a provincial court for criminal matters, which could be called simply Provincial Court or Court of Justice; these provincial courts also typically serve as summary conviction courts.

In Canada, criminal offences can be tried either as summary conviction offences, or indictable offences, and this classification largely determines the court before which an accused will appear for trial.¹⁶ Summary conviction offences are tried by "summary conviction courts," as defined at section 785 of the Code,¹⁷ in accordance with section 798 of the Code. Indictable offences can typically be tried by either a superior court of criminal jurisdiction¹⁸ (with or without a jury)¹⁹ or by a provincial court judge sitting alone, at the election of the accused.²⁰ Some of the most serious indictable offences can only

16. The system of classifying offences, and of determining the mode of a trial and the court before which a trial in the first instance will take place, is not simple or intuitive under the Canadian law. To understand the discussion of appeals in this essay, however, one needs only the sort of basic familiarity with criminal procedure relating to trials in the first instance that is provided in this paragraph.

17. Criminal Code, R.S.C., 1985, c. C-46 [hereinafter "Code"]. It should be noted that the Code encapsulates elements of both substantive criminal law and criminal procedure.

18. *Id.* at § 468.

19. *Id.* at § 536(2).

20. *Id.*

be tried by a superior court of criminal jurisdiction.²¹ However, other less serious indictable offences fall within the absolute jurisdiction of provincial courts, and do not give rise to an election as to mode of trial for the accused.²²

1. Appeals from Summary Conviction Decisions

A defendant has a right, under s. 813(a) of the Code, to appeal a summary conviction, an associated sentence, or certain decisions relating to mental fitness, while the Crown has a more limited right, under section 813(b), to appeal a sentence, a stay of proceedings, or certain decisions relating to mental fitness of the defendant. Although it is not expressly written in the Code, a defendant's right of appeal on a conviction entails (as the permissible "grounds" of appeal) a right to seek review of findings of fact (including inferences of fact)²³ and/or law made by the trial court.²⁴

Both the Crown and the Defendant can appeal to an "appeal court,"²⁵ which is in each province the superior court of criminal jurisdiction for that province. In other words, a single justice of the Supreme Court of a province, sitting as a Summary Conviction Appeal Court (SCAC), will hear an appeal from a summary conviction offence.

The powers of a SCAC are set forth at section 822(1) of the Code, which provides that a SCAC has essentially the same powers as a Court of Appeal for a province hearing an appeal from an indictable offence decision.²⁶ It is interesting to note

21. *Id.* at § 469.

22. *Id.* at § 553.

23. In *Housen*, 2002 SCC 33 at ¶ 25, the SCC noted that, for appellate review purposes, there is no longer any meaningful distinction between findings of fact and inferences of fact.

24. As I have argued elsewhere, it is no longer helpful to consider an additional ground of appeal on questions of mixed fact and law:

If, on the one hand, a supposed question of mixed fact and law contains an "extricable" error in principle, then the question is actually two separate questions: one of law (the extricable issue), and one of fact (the underlying facts that surround the legal issue). If, on the other hand, a supposed question of mixed fact and law does not contain any extricable errors in principle, then it is really just a complex question of fact.

Madden, *Hydra: Probably Correct*, *supra* n. 14, at 284.

25. Code §§ 812, 813.

26. I will discuss these powers in more detail below. See pp. 177–79, *infra*.

that section 822 also permits a SCAC to determine an appeal by holding a trial *de novo*, when, “because of the condition of the record of the trial in the summary conviction court or for any other reason,” the SCAC determines that “the interests of justice would be better served by hearing and determining the appeal by holding a trial *de novo*.”²⁷ Thus, rather than determining an appeal on the basis of the record of a trial, a SCAC could begin “a new trial on the entire case—that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first instance.”²⁸ In spite of the Code’s broad provision enabling trials *de novo*, however, Canadian courts have clearly established that trials *de novo* should be the exception, rather than the rule, for disposing of summary conviction appeals:

A brief history of s. 822(4) is in order. Before 1976, the year in which the subsection was passed, appeals in summary conviction matters went automatically by way of trial *de novo* unless the court ordered another mode of appeal. This change in legislation was obviously the result of a change in policy, namely to make appeals by trial *de novo* the exception rather than the rule. [. . .] I agree with this inference and therefore read the subsection, particularly the words which grant a trial *de novo* “for any other reason”, restrictively. The case law interpreting s. 822(4) says that the appellant must establish either that there is something about the condition of the record which prevents an appeal based on that record, or that there was a denial of natural justice in the summary conviction court.²⁹

Thus, instead of conducting an appeal *de novo*, a SCAC will typically determine an appeal on the record, which shall consist of “the conviction, order or order of dismissal and all other material in [the summary conviction court’s] possession in connection with the proceedings,”³⁰ and which may also include a transcript of any evidence given at the trial, furnished to the SCAC by the appellant.³¹

27. Code § 822(4).

28. *Black’s Law Dictionary* 1645 (Bryan A. Garner ed., 9th ed., West 2009) (defining trial *de novo*).

29. *R. v. Leung*, 54 Alta. L.R. (3d) 1, [1998] 2 W.W.R. 178, ¶¶ 33–34.

30. Code § 821(1).

31. *Id.* at § 821(3).

The standard of review to be applied by a SCAC has been established at common law, and it is generally said that “[a]bsent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence.”³² Similarly, the SCC has stated that, on sentence appeals, “absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.”³³ In other words, as I have argued elsewhere,³⁴ the standard of review on questions of law is correctness (or a lack of errors),³⁵ and on questions of fact is reasonableness (or an assessment that the findings of fact cannot be unreasonable).³⁶

Beyond a SCAC, a defendant or the Crown can appeal to the Court of Appeal of the province on a question of law alone, with leave of the Court of Appeal.³⁷ Such an appeal would typically be heard by a panel of three justices of the Court of Appeal, but nothing would preclude a Chief Justice from assigning five judges to a given appeal. The powers of a provincial Court of Appeal when hearing an appeal from a decision of a SCAC are the same as a Court of Appeal’s powers when hearing an appeal from a trial court decision relating to an indictable offence.³⁸ Similarly, the appeal from a decision of a SCAC would be determined on the basis of the record, just as an appeal from a trial court’s decision relating to an indictable offence would be determined.³⁹ The standards of review

32. *R. v. Nickerson*, 178 N.S.R. 2d 189 (C.A.), [1999] N.S.J. No. 210, at ¶ 18.

33. *R. v. M. (C.A.)*, 46 C.R. (4th) 269, [1996] 1 SCR 500, ¶ 90. This proposition was recently affirmed in *R. v. M. (L.)*, 293 D.L.R. (4th) 1, [2008] 2 SCR 163, ¶ 14.

34. See Madden, *Hydra: Probably Correct*, *supra* n. 14, at 282–86, 288.

35. A standard of correctness implies that no deference will be shown to a lower court; if the lower court decision is not correct in the eyes of an appellate court, then the appellate court will simply replace the original incorrect decision with its own view of what the original decision should have been.

36. A standard of reasonableness implies that deference will be shown to a lower court. The lower court need not have reached exactly the same conclusion as the appellate court in order for the former’s decision to be upheld, so long as the trial decision falls within the possible range of reasonable outcomes.

37. Code § 839(1).

38. *Id.* at § 839(2). I discuss these powers below. See pp. 177–79, *infra*.

39. *Id.*

applicable at the provincial Court of Appeal would remain correctness on questions of law, and reasonableness on questions of fact⁴⁰ (although other equivalent phrasings, such as “palpable and overriding error” are often used to describe the standard of review on questions of fact).

Finally, in certain circumstances, a party can appeal a decision of a provincial Court of Appeal relating to a summary conviction offence to the SCC, but only with leave of the provincial Court of Appeal,⁴¹ or of the SCC itself.⁴² Leave to appeal could be granted by a provincial Court of Appeal on any question “that ought to be submitted to the Supreme Court for decision,”⁴³ which could (theoretically) include both questions of law and questions of fact, although the latter is unlikely to be deemed worthy of submission to the SCC. Leave to appeal could be granted by the SCC itself, even if leave has been denied by a provincial Court of Appeal, on any question that is

by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.⁴⁴

An appeal to the SCC would typically be heard by a panel of seven judges, although it is not uncommon for the Court to sit with nine judges for the hearing of a particularly significant appeal. The standards of review applicable at the SCC would be identical to those applicable at the provincial Court of Appeal.⁴⁵ No judicial appeal exists beyond an appeal to the SCC in Canada.

2. Appeals Relating to Indictable Offences

Both an accused and the Crown have a right to appeal from trial decisions relating to indictable offences, but leave to appeal

40. See generally Madden, *Hydra: Probably Correct*, *supra* n. 14.

41. Supreme Court Act, R.S.C. 1985, c. S-26, § 37 [hereinafter “Supreme Court Act”].

42. *Id.* at § 40(1).

43. *Id.* at § 37.

44. *Id.* at § 40(1).

45. See generally Madden, *Hydra: Probably Correct*, *supra* n. 14.

may be required, depending on the ground of appeal.⁴⁶ Appeals are directed to the “court of appeal,”⁴⁷ which is defined to mean the relevant provincial Court of Appeal.⁴⁸ A panel of three judges would typically hear an appeal, but nothing precludes a Chief Justice from assigning five judges to a panel for a given appeal.

An initial appeal to a provincial Court of Appeal is determined on the basis of the record from trial of the indictable offence. Specifically, the trial court (or, in practice, the appellant) will furnish to the Court of Appeal a copy of the evidence taken at the trial, any charge to the jury and any objections that were made to a charge to the jury, the reasons for judgment, if any, and the addresses of the prosecutor and the counsel for the accused, if a ground for the appeal is based on either of the addresses.⁴⁹ Although a provincial Court of Appeal has the power to consider evidence other than that which is found within the trial record, such as by ordering a witness to be examined on appeal,⁵⁰ or by receiving the evidence of an appellant during an appeal,⁵¹ it should be noted that these are extraordinary measures that are only invoked when a Court of Appeal “considers it in the interests of justice” to receive such evidence,⁵² whereas the trial record is furnished to the Court of Appeal in every appeal.

The powers of a Court of Appeal, as set forth in section 686 of the Code, are broad and perhaps surprising to some: The Court can affirm the original decision, order a new trial, vary a sentence, substitute an acquittal for a verdict of guilty, or (under limited circumstances) substitute a verdict of guilty for an acquittal—a power that would likely not be thought of as legitimate in the United States. The standard of review that a provincial Court of Appeal would apply in relation to indictable offence appeals, as for appeals against SCAC decisions, would

46. Code §§ 675, 676.

47. *Id.*

48. *Id.* at § 2. In Prince Edward Island, however, the provincial Court of Appeal is actually called the Appeal Division of the Supreme Court. *Id.*

49. Code § 682(2).

50. *Id.* at § 683(1)(b).

51. *Id.* at § 683(1)(d).

52. *Id.* at § 683(1).

be correctness on questions of law, and reasonableness (or some equivalent expression) on questions of fact.

A further appeal to the SCC by either a defendant or the Crown on a question of law alone exists as a matter of right, under the Code, where a judge of the provincial Court of Appeal dissents on a question of law.⁵³ Each party may also appeal to the SCC on a question of law, even in the absence of a dissenting judgment in the provincial Court of Appeal, if leave to appeal is granted by the SCC.⁵⁴ Outside of the context of the Code, it is also possible that either the Crown or an accused may be granted leave to appeal to the SCC (perhaps even on a question of fact) under the authority of the Supreme Court Act.⁵⁵ The law in this respect is identical to that addressing appeals to the SCC on summary conviction offence decisions.⁵⁶ The standard of review applied by the SCC would also be correctness on questions of law, and reasonableness on questions of fact.

3. Summarizing the Criminal Appeal Process in Canada

As the above discussion has demonstrated, the law relating to criminal appeals in Canada is complex, in that its content is scattered throughout the Code, the Supreme Court Act, and the common law. However, certain elements of appellate procedure are consistent throughout the various steps within Canada's criminal appeal structure. For instance, regardless of the nature of the initial offence, successive appeals will be heard by increasingly larger appellate panels, and in all appeals other than an appeal to a SCAC, the appellate court will consist of more judges than the trial court. Additionally, in any appeal, the standard of review on questions of law is correctness, and the standard of review on questions of fact is reasonableness; in other words, a trial judge is always entitled to deference on questions of fact, and in criminal matters, a trial judge is never entitled to deference on questions of law. Finally, in all criminal appeals, the determination of a given appeal will normally (and

53. *Id.* at §§ 691(1)(a), 693(1)(a).

54. *Id.* at §§ 691(1)(b), 693(1)(b), respectively.

55. Supreme Court Act § 40(1).

56. *See* nn. 41–44, *supra*, and associated text.

almost always) be made on the basis of the record at trial and in any lower courts. These features of the Canadian criminal appeal process are all noteworthy, because they differ in significant respects from appellate procedure in French law, to which I will now turn.

B. Criminal Appeals in France

Before my discussion of criminal appeals in France, some background on the different types of crimes tried with the involvement of professional judges, and the courts in which they are tried: The “tribunal de police” (police court) tries “les contraventions” (petty crimes),⁵⁷ and is presided over by a single judge.⁵⁸ The “tribunal correctionnel” (correctional court) tries “les délits” (misdemeanours),⁵⁹ and is presided over by three judges: a president and two other judges.⁶⁰ Finally, the “cour d’assises” (assize court) tries “les crimes” (felonies),⁶¹ and is presided over by three professional judges (one president⁶² and two assessors⁶³), in addition to a jury made up of nine lay members.⁶⁴ The assize court reaches decisions on the basis of votes cast by each judicial and lay member, and no special weight is assigned to the votes of the professional judges.⁶⁵ The assize court renders decisions on both findings (guilt or acquittal) and sentences.⁶⁶

57. Code de procédure pénal, art. 521 [hereinafter “CPP”].

58. CPP, art. 523; see also John Bell, *Judiciaries within Europe: A Comparative Review* 46 (Cambridge U. Press 2006). Interestingly, Bell also notes that ninety-eight percent of cases in police court lead to convictions. *Id.*

59. CPP, art. 381.

60. CPP, art. 398; Bell, *supra* n. 58, at 46 (observing that the conviction rate in correctional court is approximately ninety-five percent).

61. CPP, art. 181, 231.

62. CPP, art. 244.

63. CPP, art. 248.

64. CPP, art. 296.; Bell, *supra* n. 58, at 46 (observing that, in 2001, the conviction rate at the assize court was 95.7 percent).

65. CPP, art. 356–58. Any decision that is unfavourable to the accused must be reached by a majority of eight (out of twelve) votes. CCP, art. 359.

66. CCP, art. 362; see also Bron McKillop, *Review of Convictions after Jury Trials: The New French Jury Court of Appeal*, 28 Sydney L. Rev. 343, 344 (2006) (“In its present form [the assize court] is comprised of three judges (a President and two assessors) and nine jurors who, since 1941, sit and deliberate together both on culpability and punishment.”).

1. Appeals from Decisions of the Police Court

Appeals against decisions of the police court are made to the “cour d’appel” (appeal court).⁶⁷ These appeals are investigated and tried in the same manner as appeals from judgments made in misdemeanour matters (which I will discuss in more detail, below). In the case of appeals from decisions of the police court, however, the appeal court is presided over by only the president of the correctional appeal court, sitting as a single judge.⁶⁸ A right of appeal exists for the state, the defendant, and the person liable under the civil law.⁶⁹ The standard of review and broad grounds of review are identical to those applicable to appeals from decisions made in misdemeanour matters.⁷⁰

2. Appeals from Decisions of the Correctional Court

Appeals against misdemeanour decisions of the correctional court are also made to the appeal court;⁷¹ however, on such appeals, the court is presided over by three professional judges: one president, and two other judges.⁷² The appeal proceeds as a trial de novo.⁷³ The rules applicable at the trial (correctional) court are largely applicable again at the appeal court;⁷⁴ the defendant is examined by the appeal court;⁷⁵ and, any witnesses summoned by the defendant are heard by the appeal court,⁷⁶ although “witnesses are not normally called, either at the first instance hearing or on the appeal,”⁷⁷ since the

67. CPP, art. 547.

68. *Id.*

69. CPP, art. 546. It should be noted that French criminal trials allow for the concurrent hearing of civil claims that arise out of a criminal act, such that there might be a civil claimant (“the civil party”) who is a party to the criminal trial, just as there might be a person who is liable under the civil law at the trial.

70. See § III(B)(2), *infra*.

71. CPP, art. 496.

72. CPP, art. 510.

73. See McKillop, *supra* n. 66, at 346 (“The appeal is by way of a rehearing, the facts particularly being re-examined.”).

74. CPP, art. 512.

75. CPP, art. 513.

76. *Id.*

77. McKillop, *supra* n. 66, at 346.

“dossier” or case file is the critical source of evidence both at trial and on appeal. Some of the rules of evidence that are applicable at the correctional court (and that are therefore also applicable at the appeal court) include the right of a judge to receive any mode of evidence according to his innermost conviction,⁷⁸ and a right of a judge to inspect any premises (or “perform a viewing” as one might say in Canadian legal parlance) in order to discover the truth of a matter.⁷⁹ In other words, the appeal is determined on any evidence, whether taken at trial or not, that the appeal court deems relevant. The appeal court is vested with powers to uphold or reverse a trial judgment, either in whole or in part.⁸⁰ Thus, the appeal court, in appeals relating to both petty crime and misdemeanour matters, can confirm, quash, or vary a lower court’s decision.

It becomes apparent that the appeal court is a “*juge en fait et en droit*” (competent to rule on both the facts and the merits) that has as its mission the “*examen des faits*” (finding of facts) and “*application de la loi*” (application of the law),⁸¹ and that the standard of review at the appeal court, whether on an appeal from a decision of the police court or of the correctional court, is correctness on both questions of law and fact.⁸² Like appeal courts in Canada, the French appeal court can substitute its own view for that of the trial court regarding the correct interpretation of any point of law. However, the appeal court is also free to hear new evidence or re-hear evidence that was received at trial, just as it is free to weigh all of the evidence in whatever manner it pleases, regardless of how a trial court characterized and weighed the evidence. There is thus no

78. CPP, art. 427.

79. CPP, art. 456.

80. CPP, art. 515.

81. République Française, Ministère de la Justice et des libertés, Publications, *L'organisation de la Justice*, <http://www.justice.gouv.fr/publications-10047/outils-pedagogiques-12161/presentation-de-lorganisation-de-la-justice-21695.html>, at slides 30–32 (Feb. 1, 2012) [hereinafter “Ministry of Justice Video”]. To reach a version of this video with narration in English, click the Union Jack next to the globe in the top right corner of the main page, then click the photo icon next to “The Justice system in France” in the menu at the right margin of the “Multilinguisme” page.

82. Bell, *supra* n. 58, at 46 (noting that “appeal lies on law and fact,” but that, “[b]ecause there is a file on the case containing all the elements of the evidence produced by the lower civil and criminal courts, it is easy to conduct such an appeal on fact as well as law”).

deference to a trial court, even on questions of fact, at the French criminal appeal court.

3. Appeals from Decisions of the Assize Court

Appeals from decisions of the assize court are brought before another assize court.⁸³ The new assize court, when hearing a matter on appeal, is again composed of three professional judges (one president⁸⁴ and two assessors⁸⁵), but it is augmented by an additional twelve jurors,⁸⁶ as opposed to the nine jurors who normally augment the court during a trial at first instance,⁸⁷ in all but two very limited circumstances.⁸⁸ Thus, an appeal of a decision by the assize court will usually result in simply another jury trial of the same matter, by a differently constituted assize court.

A right of appeal is afforded to the state, the defendant, the person who is liable under the civil law, or the civil party.⁸⁹ The assize court, on appeal, will re-examine a case in accordance with the rules applicable to trials in the first instance before the assize court,⁹⁰ which means that the appellate assize court can hear witness testimony and fresh evidence as a matter of routine, just as the court of first instance could hear such evidence.⁹¹ Indeed, to clarify the role of the relatively new assize court hearing appeals, the French Ministry of Justice initially published an information circular that

made clear that the *cour d'assises d'appel*, a "juridicial innovation", is not a traditional French appeal court concerned to "confirm, amend or overturn" a first instance decision but a court which must "entirely re-examine" a

83. CPP, art 380-1.

84. CPP, art. 244.

85. CPP, art. 248.

86. CPP, art. 296.

87. *Id.*

88. CPP, art. 380-1. In certain cases in which an appeal is brought solely in respect of a misdemeanour that was related to a felony, the appeal is heard at the assize court by only the three professional judges. *Id.*

89. CPP, art. 380-2.

90. *Id.*

91. See e.g. CPP, art. 329.

case as far as practicable without reference to an earlier first instance hearing.⁹²

The above rules for the hearing of appeals by a second assize court again indicate that the standard of review applicable on appeals of felony matters is correctness for questions of both law and fact: The original assize court is shown no deference in its findings, and the second assize court is free to substitute its own view of the case for that of the assize trial court.

4. Appeals to the Court of Cassation

Judgments made by courts of final instance in felony, misdemeanour, or petty crime matters can be appealed, by way of application, to the criminal chamber of the French Court of Cassation.⁹³ The composition of a panel that hears an application to the criminal chamber of the Court of Cassation varies according to the circumstances:

A case is heard by three judges when an appeal is inadmissible or not based on arguable grounds, which results in its being declared “not admitted” (*non admis*), or also when it seems necessary to settle the case. Otherwise, the case must be heard by a bench consisting of at least five voting members. When so decided by its president, the chamber may also sit as a full bench, for instance because the decision required in a case could result in a reversal of case law or because it has to rule on a sensitive issue.⁹⁴

The grounds for cassation, or quashing of a lower court’s decision, are outlined at Articles 591–99 of the CPP, and essentially consist only of errors in law made by a lower court,⁹⁵ such as when a court imposes a sentence other than one that is authorized by law in relation to a felony offence.⁹⁶

92. McKillop, *supra* n. 66, at 349.

93. CPP, art. 567.

94. See Cour de Cassation, Documents Translated into English, *The Organisation of the Court of Cassation*, http://www.courdecassation.fr/IMG/File/About%20the%20court_mars09.pdf. (The pages in these translated documents are not numbered; scroll down to the section headed “The Organisation of the Court of Cassation.”)

95. See McKillop, *supra* n. 66, at 344 (pointing out that the Court of Cassation’s “jurisdiction is confined to ‘violations of the law’ in the lower courts and if a ‘violation’ is found to exist the sanction is annulment of the decision”).

96. CPP, art. 596.

An application to the Court of Cassation proceeds on the basis of the record,⁹⁷ and “les rapports,” rather than as a trial de novo: “[L]es rapports sont faits à l’audience. Les avocats des parties sont entendus dans leurs observations après le rapport, s’il y a lieu. Le ministère public présente ses réquisitions.”⁹⁸ The report that is referred to here is apparently presented to the panel hearing the application for cassation by a reporting judge of the criminal chamber, essentially as a summary of the case.⁹⁹ Once this report has been provided, and after the lawyers have made representations to the Court, a decision can be reached without any need for further or fresh evidence.

When the Court of Cassation ultimately decides to annul a judgment of a lower court, it does not substitute its decision for the decision originally given by the lower court, but, rather, remits the matter to a different court of the same level as the original court for a new trial.¹⁰⁰ However, given that there is no limitation placed upon the Court of Cassation in its authority to determine the law applicable in criminal matters, and given that it is the country’s ultimate legal authority, responsible for the “application correcte de la loi” that “ne rejuge pas les faits,”¹⁰¹ one can conclude that the standard of review applicable on appeals to the Court of Cassation is correctness on questions of law, with no review being performed on questions of fact.

5. Summarizing the Criminal Appeal Process in France

Some patterns are easily identifiable in French criminal appeal processes. First, where appeals are permitted on questions of fact (to the appeal court for petty offence and misdemeanour appeals, or to an assize court hearing an appeal

97. See McKillop, *supra* n. 66, at 345 (“The *Cour de cassation* is confined in considering questions of law to the brief written summary of the proceedings in the *cour d’assises* made by the recording clerk (*greffier*) and to the record of the investigation, the latter of which comprises the essentials of the *dossier*.”).

98. CPP, art. 602 (indicating in the quoted passage that a report is presented to the court, which then hears the comments of the parties’ lawyers and the argument of the prosecutor).

99. CPP, art. 603.

100. CPP, arts. 609–10.

101. Ministry of Justice Video, *supra* n. 81, at slide 34 (indicating that the Court of Cassation’s mission includes applying the law correctly and that it does not engage in factfinding).

on a felony matter), the standard of review applicable to such questions is correctness—an appellate court in France that is permitted to review factual matters will never owe deference to a trial court. Second, an initial appeal in France is always taken to a court composed of the same number of professional judges as were found in the trial court (one judge for petty offence trials and appeals, three judges for misdemeanour trials and appeals, and three professional judges at the assize court for trials and appeals of felony offences). Third, an initial appeal in France is always a trial *de novo*, whether as a new jury trial (at the assize court hearing an appeal), or as an appeal to the appeal court where the case can essentially be re-opened and re-tried in accordance with the applicable rules of evidence.

These features of the French appeal process differ significantly from the Canadian process, if for no other reason than because the enabling laws in each jurisdiction are different. The examination of the ways in which judges are educated, appointed, trained, and promoted in each country that follows, however, makes it possible to argue that criminal appeals in France and Canada are different (at least in part) because these two jurisdictions conceive of criminal judiciaries in fundamentally distinct ways.

IV. CRIMINAL JUDICIARIES IN CANADA AND FRANCE

A. Canadian Criminal Judges

Federally appointed criminal judges in Canada—that is to say, judges of superior courts and Courts of Appeal within the provinces, and judges of the SCC—are eligible for appointment to the bench once they have accumulated ten years standing at the bar of any province.¹⁰² Judges of provincial (inferior) criminal courts must typically have five years standing at the bar

102. Judges Act, R.S.C. 1985, ch. J-1, § 3; Supreme Court Act, *supra* n. 41, at § 5. This implies that they must also have an undergraduate law degree, because that is a prerequisite for bar admission in all Canadian jurisdictions. See e.g. Federation of Law Societies of Canada, National Committee on Accreditation, *NCA Resources, FAQ 26*, <http://www.flsc.ca/en/nca/nca-resources/faqs> (2012) (noting that in Canada “only three year LL.B./J.D. graduates qualify for admission to the Bar”) (accessed Mar. 23, 2012; copy on file with Journal of Appellate Practice and Process).

of a province in order to be eligible for appointment.¹⁰³ In practice, however, new judges have significantly more than the minimum number of years standing as lawyers when they are selected for judicial positions; the three most recent appointees to the Court of Queen's Bench of Alberta, for instance, had an average of over twenty-seven years since they were first called to a provincial or territorial bar prior to joining the judiciary.¹⁰⁴ Similarly, the advisory committee in Nova Scotia that makes recommendations to the Lieutenant-Governor of the province for the appointment of Provincial Court judges "will not recommend a Candidate with less than fifteen years standing at a Bar in a Canadian jurisdiction for appointment except where the Committee feels that there are exceptional circumstances to warrant that recommendation."¹⁰⁵

The appointment of judges in Canada is a political process. Provincially appointed candidates must typically be recommended by a Minister (often the Attorney General), and must be appointed by the Lieutenant Governor of the Province (or the Governor in Council).¹⁰⁶ Federal appointments, in contrast,

are made by the Governor General acting on the advice of the federal Cabinet. A recommendation for appointment is made to Cabinet by the Minister of Justice with respect to the appointment of puisne judges, and by the Prime Minister with respect to the appointment of Chief Justices and Associate Chief Justices.¹⁰⁷

However, there is typically an independent assessment mechanism to assist political figures in appointing the most highly qualified judges. For instance, at the federal level, the Office of the Commissioner for Federal Judicial Affairs

103. See e.g. Provincial Court Act, R.S.N.S. 1989, ch. 238, § 5 [hereinafter "Provincial Court Act"].

104. Department of Justice Canada, *Alberta Judicial Appointments Announced*, http://www.justice.gc.ca/eng/news-nouv/ja-nj/2011/doc_32593.html.

105. Courts of Nova Scotia, Executive Council, *Provincial Judicial Appointments: Guidelines to Ensure Appointments Based on Merit* at 2, http://www.courts.ns.ca/conduct/prov_judges_appoint_guide_09_03_17.pdf.

106. See e.g. Provincial Court Act, at §§ 3(1)–(2A).

107. Office of the Commissioner for Federal Judicial Affairs Canada, *Process for an Application for Appointment* 8, <http://www.fja.gc.ca/appointments-nominations/process-regime-eng.html> (Oct. 16, 2009) [hereinafter "FJA Appointments Process"].

has an appointments secretariat which administers 17 advisory committees responsible for evaluating candidates for federal judicial appointments. The Minister of Justice has given FJA the mandate to administer the Supreme Court of Canada Appointments Selection Panel process, established to evaluate candidates for appointment to the Supreme Court of Canada.¹⁰⁸

Some of the factors that federal judicial advisory committees will explore and consider when assessing a candidate's suitability include "reputation among professional peers and in the general community," "awareness of racial and gender issues," "humility," and "courtesy."¹⁰⁹ As all of the above information tends to suggest, the appointment of criminal court judges in Canada is accomplished through a process that engages significant government resources and the individual attention of senior political figures, whether within a province or at the federal level.

Criminal judges in Canada are appointed to permanent positions, and hold office during "good behavior."¹¹⁰ This means that judicial appointments are only ever terminated when a judge reaches compulsory retirement age (typically age 75,¹¹¹ although sometimes age 70 for provincially appointed judges, depending on the province¹¹²), or when a judge is removed from office for cause by a Lieutenant-Governor of a province or by the Governor General of Canada.¹¹³ Because judicial appointments are permanent, there are no individually negotiated promotions or salary increments for any particular judicial position,¹¹⁴ and,

108. Office of the Commissioner for Federal Judicial Affairs Canada, *Our Role*, <http://www.fja.gc.ca/fja-cmf/role-eng.html> (July 22, 2008).

109. Office of the Commissioner for Federal Judicial Affairs Canada, *Assessment Criteria, Candidates for Federal Judicial Appointment*, <http://www.fja.gc.ca/appointments-nominations/assessment-evaluation-eng.html> (Nov. 14, 2007).

110. See e.g. Supreme Court Act § 9(1); Provincial Court Act § 6(1).

111. See e.g. Supreme Court Act § 9(2).

112. See e.g. Provincial Court Act § 6(2).

113. See e.g. Supreme Court Act § 9(1).

114. See e.g. Office of the Commissioner for Federal Judicial Affairs Canada, *Federal Judicial Appointments—Considerations Which Apply to an Application for Appointment, Remuneration, Salaries as of April 12, 2011*, <http://www.fja.gc.ca/appointments-nominations/considerations-eng.html> (May 18, 2011) (indicating that the base salary (excluding any cost of living allowances) for all federally appointed *puisse* judges of Appeal, Superior, Supreme, and Queen's Bench courts within each province, regardless of a judge's years of experience, was then \$281,100.00) [hereinafter "FJA Salaries"].

therefore, no routine performance assessments or appraisals for judges. In other words, in order for a judge to move upward from a position in a lower court to a higher court, or upward from a *puisne* position to a Chief Justice or Associate Chief Justice position within his or her current court, a judge must be freshly appointed into the new position just as if appointed into the position from outside of the judiciary.¹¹⁵

It is also worth noting that there is no salary difference between a *puisne* judge of a superior trial court and a Court of Appeal in any province, just as there is no difference between the salaries of the Chief Justices of these two levels of courts.¹¹⁶ Within the federal scheme of judicial compensation, then, a judge of a provincial Court of Appeal is an equal, at least in terms of salary, to a judge of a provincial Supreme Court.

In summary, one could describe the Canadian criminal judiciary as group of individuals who each have significant experience in the practice of law prior to their appointments as judges, and who are employed within a very static judicial regime that is not characterized by merit-based reappointment processes, salary increases, or promotions. Furthermore, very little distinction is made between the initial appointment processes, minimum qualifications, and compensation schemes of trial and first-level appeal court judges within the federally appointed criminal judiciary.

B. French Criminal Judges

Judicial careers in France, as in most civil law countries, are in many ways comparable to careers within other government departments: "Civil law judiciaries of continental

115. Some of the appointment application processes may be modified with respect to candidates who are already members of a judiciary instead of practicing lawyers or law professors. For instance,

[p]rovincial or territorial court judges who wish to be candidates must also notify the Commissioner of their interest in a federal judicial appointment by completing a Personal History Form for judges. These candidates are not assessed by the advisory committees, but their files are submitted to the appropriate committee for comments which are then provided to the Minister of Justice, including the results of any confidential consultations undertaken by the committee.

FJA Appointments Process, *supra* n. 107.

116. FJA Salaries, *supra* n. 114.

Europe do not differ fundamentally from the state bureaucracy, and reflect the old division of law from politics.”¹¹⁷ In France, this reality is seen in the fact that “the management of the ordinary judiciary and the courts is primarily the function of the Ministry of Justice,”¹¹⁸ a department of the government of France.

The similarity between judicial and other public sector careers within continental Europe begins at the point of entry into government employment:

Traditionally, recruitment into the judiciary has been based on criteria and procedures very similar to those governing entrance into the civil service. In most civil law countries, the largest proportion of judges are still recruited directly from university through some form of public examination (normally run by the Ministry of Justice), and with no requirement of previous professional experience.¹¹⁹

This selection process is still used in France, where training of the judiciary “is also centralized and takes place at the national school, the Ecole Nationale de la Magistrature (ENM), entrance to which is by extremely competitive examination.”¹²⁰ Although there are “some thirteen different entry routes”¹²¹ into the French judiciary, the primary entry route is through a *concours*, or written examination competition.¹²² One prominent *concours* has been described as largely “designed for those leaving university,”¹²³ and the “typical portrait of an entrant” to this *concours* has been described as a woman “twenty-five years old, with a Master’s degree in law, coming from the Paris area and prepared for entry at the Institut des études judiciaires of the University of Paris 2.”¹²⁴ Thus, a typical entrant to the judiciary in France will not have any previous experience in the practice of law.

117. Carlo Guarnieri, *Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government*, 24 Leg. Stud. 169, 170 (2004).

118. Bell, *supra* n. 58, at 50.

119. Guarnieri, *supra* n.117, at 170.

120. Jacqueline Hodgson, *Hierarchy, Bureaucracy and Ideology in French Criminal Justice: Some Empirical Observations*, 29 J. L. & Society 227, 235 (2002).

121. Bell, *supra* n. 58 at 52.

122. *Id.*

123. *Id.*

124. *Id.*

After being selected for entrance into the judiciary, candidates in France undergo a two-year training period at the ENM, consisting of courses and some practical placements with various organizations involved in the administration of justice.¹²⁵ Again, however, judicial selection and training processes in European civilian legal systems tend to have a theoretical, rather than an experiential, focus:

Legal education is typically multi-purpose, providing a general knowledge of all relevant branches of the law at the expense of any form of specialisation. As a consequence, selection incorporates little or no emphasis on the practical side of the work of the judiciary, and is made on the basis of written and oral exams that test the candidates' theoretical knowledge of the law.¹²⁶

The relative youth and inexperience of newly selected French judges that follows from this selection and training process contrasts sharply with the Canadian standard of, realistically, appointing to the bench only applicants who have already practiced law for some twenty years.

With respect to promotions and career advancement, members of the criminal judiciary in France are subject to the control of both the political branch of the Government of France, and other judges. For instance, the highest grades of judges (including all judges of the cassation court, and first presidents of appeal courts) are appointed by the president of the Republic, but they are selected from among only those candidates proposed by the *Conseil Supérieur de la Magistrature* (CSM);¹²⁷ all lower grades of criminal judges are proposed by the Minister of Justice, but these candidates are subsequently scrutinized by the CSM for suitability, and the

125. *Id.* at 54.

126. Guarnieri, *supra* n. 117, at 170.

127. The CSM includes mostly elected members of the judiciary, and is responsible for aspects of appointment and discipline within the judiciary. *See e.g.* Conseil Supérieur de la Magistrature, *Missions et Attributions*, <http://www.conseil-superieur-magistrature.fr/missions-et-attributions> (indicating that the Conseil Supérieur de la Magistrature shall have the power to propose candidates for seats on the highest courts); Conseil Supérieur de la Magistrature, *Historique*, <http://www.conseil-superieur-magistrature.fr/historique> (tracing the CSM's history from 1883 through 2008) (both accessed Mar. 23, 2012; copies on file with Journal of Appellate Practice and Process); *see also* Bell, *supra* n. 58, at 51 (pointing out that "in its present structure, the CSM is strongly representative of the judges and offers a limited judicial self-government, confined to appointments").

recommendations of the CSM to the Minister are binding on the Minister.¹²⁸ As the appointment process suggests, there is a mix of judicial and political involvement, of varying proportions, in the selection of French judges for different positions.

When it comes to promotions (and incremental salary increases) within a judicial grade, however, control rests predominantly with more senior judges.¹²⁹ As “continental European judiciaries operate within a pyramid-like organisational structure,” an individual judge’s

[s]alary, prestige, and personal influence depend on [his or her] position on the hierarchical ladder and can be improved only through promotions. These are granted on a competitive basis and according to two criteria, seniority and merit, the latter being determined through assessments by senior judges.¹³⁰

This civil-service-based model of judicial evaluation and career progression is adhered to in France as in many other European countries. In France, there are two “grades” of judges—*deuxième grade* (the entry level), and *première grade* (to which one can be promoted on the basis of merit). Within each of these ranks, there are also multiple seniority levels.¹³¹ In addition, senior French judges have management roles within their courts that require them to act “as hierarchical superiors (e.g. in monitoring performance and promotions and as persons responsible for ensuring cases are properly distributed among judges),”¹³² essentially controlling the progression of junior judges through the seniority and rank tiers. Thus, unlike in Canada, where judges are never formally assessed after they have been appointed to the bench, judges in France are bureaucratically assessed in the performance of their duties on an ongoing basis.

128. See e.g. Conseil Supérieur de la Magistrature, *Missions et Attributions*, *supra* n. 127.

129. See e.g. Guarnieri, *supra* n. 117, at 174 (noting that “[h]ierarchical superiors play a fundamentally important role in determining judicial status in most continental countries”).

130. *Id.*

131. *Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature*, Art. 2 (Feb. 15, 2012). (The statute’s official text is available at République Française, *Legifrance*, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000339259>.)

132. Bell, *supra* n. 58, at 51.

In summary, then, one could describe members of the French criminal judiciary in the following terms: Judges start out as young law school graduates who have no previous experience in the practice of law; they attend common basic training at a single, national school for judges (the ENM); and, they are assessed in the performance of their duties by other judges, while being selected for successive appointments within the magistratural hierarchy on the basis of input from both political and other judicial figures. The contrast between Canadian and French judicial institutions on these points, as can now be seen, is unmistakable.

V. RELATING CHARACTERISTICS OF THE JUDICIARY TO APPEAL PROCESSES IN CANADA AND FRANCE

As I suggested at the outset of this paper, I think that a link exists between the way in which judges are appointed, trained, promoted, and generally perceived within a legal system, and the way in which that system's criminal appeal process operates. However, any effort to understand this link must begin with some consideration of the assumptions that are (either explicitly or implicitly) held by stakeholders within legal systems about the capabilities of judges to perform their various duties.

A. Assumptions Arising from the Treatment of Questions of Law

I will begin my analysis in this section by studying the treatment that questions of law receive in criminal matters in Canada and France. For instance, what statement might be made about the abilities that judges have to determine law, both at trial and on appeal, within Canada's criminal justice system? First, we know that the standard of review on questions of law at every criminal appellate court is correctness, which signifies that appellate courts are free to intervene in decisions of—or owe no deference to—trial courts on questions of law. We also know that, with the exception of first-level appeals to SCACs relating to the most minor type of criminal offences, initial and subsequent appeals are determined by increasingly larger panels of judges (i.e., one trial judge's decision is appealed to three or five Court of Appeal judges, and their decision is appealed to

seven or nine SCC judges). These considerations, taken together, tend to suggest that Canada's legal system assumes that appellate courts are better able to determine law than trial courts.

At first glance, this seems to be a strange proposition, given that appeal court judges are often appointed from within the same FJA process as trial judges, with the same sorts of education and practical legal backgrounds as trial judges, without (necessarily) any greater judicial experience than trial judges, and often with the same salary as trial judges. Clearly, then, Canada's criminal appeal laws do not suggest that an individual appellate judge is inherently more capable of determining the law than an individual criminal trial judge.

There are, therefore, two likely bases upon which Canada's apparent assumption of increased judicial competence to state the law on appeal might rest:

- first, that successive Canadian appellate panels, by virtue of their increasing size, are actually more capable of getting the right answer to a question of law (a strength-in-numbers assumption), or
- second, that appellate panels, by virtue of their law-standardizing function,¹³³ and regardless of whether they are capable of objectively determining the right answer to legal questions, must have the ability to intervene in and correct interpretations of law in lower courts, if only for the sake of uniformity in the application of criminal laws.

It seems that one of these rationales must underlie the reality reflected in Canada's criminal appellate laws, or else there would be no sense in allowing liberal appellate intervention in trial court decisions on questions of law: Either more judges make better law, or better law is just a secondary goal that is of lesser importance than standardized law within our legal system. These are interesting assumptions about judges that may help to explain why Canadian law allows for appeals in a given way.

133. See text accompanying nn. 9 & 10, *supra*.

In France, questions of law are treated by appellate courts in essentially the same manner as by Canadian appellate courts: The standard of review by all French criminal appellate courts on questions of law is correctness. Again, this standard tends to suggest that, within French legal culture, appellate courts are assumed to be better judges of the law than trial courts. The basis for this assumption, however, is likely very different in France than in Canada.

Appeals in France are determined by courts that are essentially the same in judicial composition as the trial courts from which the appeals arise. (Trial and appeal courts are each presided over by one judge for petty offences, three judges for misdemeanours, and three professional judges with jury augmentation for felonies.) Consequently, a strength-in-numbers argument would not carry much weight in the French context: French appellate courts are simply deemed superior judges of law, even though they are not superior in judicial numbers. Although one could attempt to argue, as in Canada, that a law-standardizing function at French appellate courts explains the interventionist standard of review applicable on questions of law, and although this would be a reasonably compelling argument, the logic is less persuasive in France's civil law system (where deductive reasoning prevails) than in a common law system (where adherence to precedent prevails). Standardization, while important, is not as much a paramount jurisprudential consideration in France as it is in Canada.

Thus, the most convincing explanation for the French standard of review is simply that the French legal system assumes that French appellate courts are inherently better judges of law than French trial courts: In a system where judges progress through seniority levels and ranks in order to move up the "ladder" or hierarchy of judicial roles, and in a system where judges are routinely assessed in the performance of their duties (which would only be necessary if there was a spectrum of competence within the judicial world), there must also exist an assumption, unlike any assumption in Canada, that judges are capable of learning more law, or of better understanding the complexities of law, as they progress through their careers toward positions on an appeal court bench.

The only place where the above explanation is insufficient is at the assize court, where trials and appeals involve only three (presumably equally qualified) professional judges. Recall, however, that a jury consists of twelve members on appeal, and only nine members at a first-instance trial, so in this context perhaps there is an element of the “strength in numbers” rationale operating even within the French criminal appeal system. Ultimately, however, it would seem that the design of a Canadian appellate system is heavily predicated on assumptions about “strength in numbers” and perhaps on a recognition that standardized law is sometimes more important than objectively “correct” law (if there can be such a thing), while the French system is likely designed more on the basis of an assumption about judicial potential to improve in judging law over time.

B. Assumptions Arising from the Treatment of Findings of Fact

Keeping in mind, however, that French and Canadian appeal processes are different not so much in the ways in which they treat questions of law, but in the ways in which they treat questions of fact, I will now attempt to uncover what assumptions reside within each legal system about the abilities of judges to find facts at trial and on appeal.

In Canada, we know that the standard of appellate review on questions of fact is reasonableness, or some variant of the concept—appeal courts are not to intervene in the findings of fact or the inferences of fact made by a trial court unless there is a palpable and overriding error that makes these factual conclusions unreasonable. This standard of review applies even though appeal courts are almost invariably composed of more judges than trial courts, and even though appeal courts have a law-standardizing role that trial courts do not share. We also know that Canadian appellate courts are not, by default, presented with the opportunity to review evidence in order to make factual determinations, since appellate courts generally proceed on the basis of the record when determining appeals. When this information is considered as a whole, it tends to suggest that the following assumptions underlie Canadian criminal appellate laws: first, that no one (appeal) judge is better than any other (trial) judge at finding facts; second, that no

group of (appeal) judges is better than any single (trial) judge at finding facts; and, third, that no group of (appeal) judges is better than a jury at finding facts.

What logic grounds the above assumptions about judicial competencies in Canada? As in France, the assumptions that we hold about judicial abilities are likely attributable to the appointment, training, education, and employment processes for judges. For instance, Canadian judges are largely deemed to be equals amongst themselves, in terms of selection criteria (the same ten years at a provincial bar qualifies one for federal appointment to a criminal trial court and to the SCC), pay (Supreme Court and Court of Appeal judges within a province are paid equally), lack of promotion opportunity, and lack of assessments. As a result of these factors, there is simply no officially sanctioned way to distinguish between a “better” and a “worse” judge in the Canadian judicial system, so all judges must, inherently, be equally capable of finding facts in criminal matters.

It is somewhat surprising, however, that a group of (appellate) judges can be deemed better at stating the law than a single (trial) judge, but the same group of judges is not deemed to be more capable of finding facts than a single judge. This situation is partially explained by the fact that Canadian appellate courts have a strong law-standardizing role, but no comparable fact-standardizing role; indeed, one of the supposed strengths of the common law system is its flexibility to deal with individual cases on the basis of unique facts, so it would be wholly undesirable for appellate courts to intervene in a trial judge’s factual findings in order to prescribe a uniform template for the treatment of certain types of facts in future cases. The situation is probably also explained, however, by the Canada’s common law history of reliance upon and deference toward juries—the ultimate arbiters of reasonableness on questions of fact—in criminal trials. In other words, Canadian appellate courts might today be deferential to trial judges on questions of fact simply out of a historical habit of deference toward the original criminal fact-finders: the jury members. Perhaps, however, the state of criminal appellate law can best be explained by Canadian conceptions of the very nature of facts in a criminal trial: Facts, in the Canadian consciousness, are

subjective and malleable. The chance of improving on a factual finding is not necessarily increased, therefore, by having evidence considered by more judges, or higher-level judges.

In France, questions of fact are treated in essentially the same manner as questions of law on appeal: No deference is owed to a trial court, and an appeal proceeds as a trial *de novo*, even though initial appellate courts are made up of the same number of judges as the associated trial courts. Again, this reality tends to suggest that the French assume their appellate courts are more capable of finding facts than their trial courts.¹³⁴

As with questions of law, the most persuasive explanation for the French standard of review on questions of fact is that appellate courts in France are seen as being inherently better judges of fact than trial courts. This conception of judicial competence is likely tied to a belief, unlike any belief held in Canada, that facts can be objectively determined, and that there are distinctly better and worse findings of fact rather than just reasonable and unreasonable ones. Furthermore, the assumption that French appellate courts are more qualified to find facts than trial courts again probably flows from the core qualities of the French criminal judiciary: It is hierarchical and bureaucratic, and it consists of first-level judges who are, in relative terms, extremely inexperienced in law. Such an institution of judges must therefore be constructed around a belief that, with experience and seniority, each member will improve as both a trier of fact and as a judge of law, which, in turn, supports the idea of liberal appellate intervention (by more experienced judges) at successively higher courts.

134. It is interesting to note, however, that appellate procedures at the Court of Cassation conform to a different, more deferential paradigm for assessing facts—a paradigm that closely resembles Anglo-American thinking about criminal appellate law. It is difficult to reconcile the Court of Cassation's role as strictly a *juge de droit* (that will not routinely re-examine factual findings made by in lower courts) with the otherwise coherent body of French appellate law that provides appeal courts with wide latitude to intervene in and alter the factual findings of trial courts. Perhaps, as the unique role of the Court of Cassation suggests, even the strongly civil and Napoleonic French legal system is beginning to adopt certain elements of Anglo-American common law procedure.

VI. CONCLUSION

This paper began with a simple question: Why are criminal appeals in Canada and France so different? The *prima facie* answer—that the appeal systems are different because their enabling laws are different—is incomplete and intellectually unsatisfying. The real challenge, therefore, lies in finding out why French and Canadian criminal appeal laws diverge.

As the preceding discussion has demonstrated, one of the major reasons why criminal appeals are handled so differently in the Canadian and French systems is because these two jurisdictions educate, train, appoint, and employ their judges in vastly different ways. On the one hand, Canadian judges at all levels share a common minimum of education and experience before they are appointed to the bench, and they comprise a relatively static profession once they are sitting judges, in that they are never given raises, promotions, or assessments. Regardless of the courts over which they preside, Canadian criminal judges as individuals are, theoretically, equally capable of determining both law and fact, and it is only the roles of the different courts, or the numbers of judges that decide a given case within each court, that permit higher-level courts some degree of superiority as judges of law.

French judges, on the other hand, typically begin their careers with no prior legal experience. As a result, there is a marked distinction between junior and senior judges, with the latter having significantly greater expertise in both finding fact and stating law. Furthermore, even when two French judges have an equal and significant amount of experience on the bench, the French system assumes that official distinctions (in the form of assessments) can be made between these judges in terms of their individual competencies to perform as judges. Consequently, French criminal appeals are designed to allow the more competent appellate judges to intervene liberally on any questions of law or fact addressed by the trial courts.

It is important to understand how, in France and Canada, and arguably in any jurisdiction, links such as those described above will tend to exist between criminal appeal processes and the core characteristics of the criminal judiciary in the given jurisdiction. Only once these links are identified and understood

can scholars go on to ask more complicated policy questions, such as whether a particular appeal system makes sense, because the “good sense” of an appeal system cannot fairly be evaluated without considering relative judicial qualifications, as between trial and appeal courts, to determine questions of law and fact. Alternately, we might want to know whether it would be desirable to adopt element X of the appellate process from foreign jurisdiction Y, but it would first be important to know how jurisdiction Y’s judiciary is different from our own before we adopt an element of appellate procedure that might not correspond properly with our own judiciary’s capabilities. Thus, in any comparative, or even wholly internal, analysis of appellate law reform, or law reform dealing with the judiciary, the interaction between judges and appeals must be recognized—even if this means (as it has throughout the preceding discussion) searching beyond the obvious answer to the simple question in order to satisfactorily address the heart of the inquiry.

