

Robson JA: The Manitoba Court of Appeal in the Robson Era

MELANIE R. BUECKERT *

ABSTRACT

Hugh Amos Robson served as a judge of the Manitoba Court of Appeal for over 13 years. During that time, the Court faced increasing difficulties arising from the senility of some of its members. In particular, Justices Trueman and Robson rarely agreed, though there was a high level of dissension amongst the entire Court during this period (1930-1944). This article examines the senility controversy surrounding the Manitoba Court of Appeal, how it played out in the relationship between Justices Trueman and Robson and how it may have affected the overall level of disunity amongst the Court at the time.

The Honourable Chief Justice Hugh Amos Robson (“Justice Robson”) held a variety of judicial positions during his illustrious legal career. He was first appointed as a judge of the Court of King’s Bench in 1909. He resigned in 1911 to serve as chair of the public utilities commission of Manitoba. However, on December 31, 1929, he was appointed to the Manitoba Court of Appeal, where he spent the bulk of his judicial career, until his appointment as Chief Justice of the Court of King’s Bench on March 18, 1944.¹ This article reviews Justice Robson’s time at the Court of Appeal, focusing on three overlapping and potentially interrelated issues:

* Melanie R. Bueckert, LL.B., LL.M. is Legal Research Counsel with the Manitoba Court of Appeal. Please note that none of the opinions expressed herein are those of her employer.

¹ Gordon Goldsborough, “Memorable Manitobans: Hugh Amos Robson (1871-1945)” (last modified 21 January 2019), online: Manitoba Historical Society, <www.mhs.mb.ca/docs/people/robson_ha.shtml> [Robson].

1. The Manitoba Court of Appeal senility controversy;
2. Justice Robson’s feud with the Honourable Mr. Justice Trueman (“Justice Trueman”); and
3. The degree of disunity on the Manitoba Court of Appeal during Justice Robson’s tenure.

Before delving into these three issues, we must set the scene by meeting Justice Robson’s colleagues at the Court of Appeal.

THE CAST OF CHARACTERS

One of the remarkable things about Justice Robson’s time at the Court of Appeal was how little the composition of the Court changed during that period.² When the Honourable Chief Justice Perdue retired on December 30, 1929, the Honourable Mr. Justice James Emile Pierre Prendergast was appointed as Chief Justice of Manitoba (“Chief Justice Prendergast”).³ Justice Robson was appointed to fill the void left by Mr. Justice Prendergast’s appointment as Chief Justice. The other members of the Court at that time were the Honourable Mr. Justice Fullerton (“Justice Fullerton”), Mr. Justice Dennistoun (“Justice Dennistoun”) and Mr. Justice Trueman.⁴ Mr. Justice Fullerton was appointed Chairman of the Board of Railway Commissioners of

² At that time, the Manitoba Court of Appeal consisted of one Chief Justice and four puisne judges: *The Court of Appeal Act*, RSM 1913, c 43, s 3(1). Currently, the Manitoba Court of Appeal consists of the Chief Justice and seven puisne judges: *The Court of Appeal Act*, RSM 1987, c C240, s 2(1). The total number of judges was increased from seven to eight in June 2008: *The Court of Appeal Amendment Act*, SM 2008, c 35, s 2. This does not include supernumerary judges. For comparison purposes, in January 2000, the Manitoba Court of Appeal consisted of the Honourable Chief Justice Richard Scott and Huband, Philp, Twaddle, Lyon, Helper, Kroft & MA Monnin, JJA; in 2014, the Manitoba Court of Appeal consisted of the Honourable Chief Justice Richard Chartier and MA Monnin, Steel, Hamilton, MacInnes, Beard, MM Monnin, Cameron, Burnett & Mainella, JJA. The only constant is the Honourable Mr. Justice Michel Monnin, who continues to serve as a supernumerary judge on the Court of Appeal. He was appointed to the Court of Appeal in August 1995 (Gordon Goldsborough, “Memorable Manitobans: Judges of Manitoba” (last modified 2 July 2019), online: <www.mhs.mb.ca/docs/people/manitobajudges.shtml>).

³ He was officially sworn-in on January 10, 1930: see *Re Macdonald*, [1930] 2 DLR 177, [1930] 1 WWR 242 (Man CA).

⁴ See (1928–30) 38 Man R iii.

Canada on August 13, 1931. The Honourable Mr. Justice Richards (“Justice Richards”) was appointed to fill the resultant vacancy on March 11, 1932.⁵

Chief Justice Prendergast resigned on March 18, 1944, so the Honourable Chief Justice McPherson was elevated from his position as Chief Justice of the Court of King’s Bench to Chief Justice of Manitoba. On the same date, Justice Robson was appointed Chief Justice of the Court of King’s Bench in his stead and the Honourable Mr. Justice Bergman was appointed to replace Justice Robson on the Court of Appeal.⁶

CHIEF JUSTICE PRENDERGAST

Chief Justice Prendergast has been described as “among the least accomplished lawyers to sit on a Manitoba bench.”⁷ Others labelled him as “the laziest man in public life”, who “did not like work any more than a schoolboy.”⁸ Brawn writes:

When he retired Prendergast had been on the bench for forty-seven years and he was the only Canadian judge to have received patents for six judicial appointments. He was also one of the few judges, if not the only one, to move from a county court to become the chief justice of a province. More than most who sat on Manitoba’s Court of Queen’s Bench, however, Prendergast is remembered with very mixed feelings. Many contemporaries had little good to say about him, before or after his appointment.

In terms of his political involvement before his appointment to the bench, Chief Justice Prendergast was elected to the provincial legislature as a Liberal-Conservative in 1885. After falling out with the government over the funding of Catholic schools, he was later elected as an independent. He also served as the mayor of St. Boniface.⁹

⁵ See (1930–31) 39 Man R iii and (1931–32) 40 Man R iii. Interestingly, Justice Fullerton had replaced Justice Richards’ father on the Court of Appeal when he was appointed in 1917: Dale Gibson & Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Hignell Printing Limited, 1972) at 266 [Substantial Justice].

⁶ See (1944–45) 52 Man R iii. According to Westlaw, Justice Robson’s last Court of Appeal decision was in *Winnipeg v T. Eaton Co*, [1944] 3 DLR 154, a case about municipal tax assessments and the calculation of rental value. Justices Trueman and Robson wrote separate reasons dismissing the appeal, while Justice Dennistoun dissented.

⁷ Dale Brawn, *The Court of Queen’s Bench of Manitoba 1870-1950: A Biographical History* (Toronto: University of Toronto Press, 2006) at 226.

⁸ *Ibid*, quoting Manitoba Premier Rodmond Roblin; see also *ibid* at 232.

⁹ *Ibid* at 226.

JUSTICE FULLERTON

Justice Fullerton and Justice Robson only served together for a short time on the Manitoba Court of Appeal before Justice Fullerton's appointment to the Board of Railway Commissioners for Canada. In terms of his political involvement, before he moved to Manitoba, Justice Fullerton served as Mayor of Sydney, Nova Scotia. He also ran unsuccessfully as a Conservative candidate in the 1910 Manitoba provincial election.¹⁰

JUSTICE DENNISTOUN

When Mr. Justice Perdue was appointed Chief Justice of Manitoba, Justice Dennistoun was appointed to fill the resultant vacancy. According to the Gibsons, he:

[...] brought a great breadth of experience to the position. In addition to being one of the province's leading barristers, he had served as the Law Society's solicitor for several years, and had drafted the first Workmen's Compensation Act. He was acting as Deputy Judge Advocate for Canadian military forces at the time of his appointment.¹¹

JUSTICE TRUEMAN

Justice Trueman has been described as "a restless man with intellectual leanings and progressive views."¹² He earned a favourable reputation for his conduct of the defence during the Winnipeg general strike trials, but his "virtues were offset by a notoriously bad temper [...] and a tendency to erratic conduct."¹³ Other sources describe him as having a "hair-trigger temper."¹⁴ Justice Trueman retired from the Court of Appeal in 1947 "with his deteriorating mental state quite evident."¹⁵

¹⁰ Gordon Goldsborough, "Memorable Manitobans: Charles Percy Fullerton (1870-1938)" (last modified 5 September 2018), online: Manitoba Historical Society, <www.mhs.mb.ca/docs/people/fullerton_cp.shtml> [Fullerton].

¹¹ *Substantial Justice*, *supra* note 5 at 224.

¹² *Ibid* at 239.

¹³ *Ibid*.

¹⁴ Gordon Goldsborough, "Memorable Manitobans: Walter Harley Trueman (1870-1951)" (last modified 9 June 2018), online: Manitoba Historical Society, <www.mhs.mb.ca/docs/people/trueman_wh.shtml> [Trueman].

¹⁵ *Ibid*; see also Gibson & Gibson, *supra* note 5 at 292.

In terms of his politics, prior to his appointment to the Court of Appeal in 1923, Justice Trueman ran unsuccessfully as a Liberal candidate in the 1922 provincial election.¹⁶

JUSTICE ROBSON

As this issue of the Law Journal is dedicated to Justice Robson, I will not spend a great deal of time describing him here. It has been said that “[t]here is little doubt that the judge with the largest legacy on and off the Manitoba bench was Hugh Amos Robson.”¹⁷ He was “regarded by his contemporaries as an excellent lawyer and a good judge, and as a person was universally liked and respected.”¹⁸

In terms of his politics, prior to his appointment to the Court of Appeal, Justice Robson served as the leader of the provincial Liberal party.¹⁹ He was opposed to any kind of cooperation with the Progressives, who held the most seats in the Manitoba legislature at the time.²⁰ The Premier of Manitoba met with the Prime Minister of Canada and told him that “the only way to prevent the Conservatives from taking control of the legislature was to replace Robson.” Within days, Justice Robson’s appointment to the Court of Appeal was announced.²¹

Justice Robson is well-known as the founder of the Manitoba Law School.²² However, as Brawn records, “[e]ven after he became a member of the Court of Appeal, Robson’s passion for legal education did not wane. Beginning in 1939 he collected an assortment of appeal books, *facta*, written arguments, and transcripts of evidence that he lodged in the school’s library as an aid to students.”²³

¹⁶ Trueman, *supra* note 14; see also Gordon Goldsborough, “Events in Manitoba History: Manitoba Provincial Election (1922)” (last modified 8 December 2018), online: Manitoba Historical Society, <www.mhs.mb.ca/docs/events/provincialelection1922.shtml>.

¹⁷ Brawn, *supra* note 7 at 232.

¹⁸ *Ibid* at 246.

¹⁹ *Ibid* at 244.

²⁰ *Ibid*.

²¹ *Ibid* at 245.

²² *Ibid* at 232.

²³ *Ibid* at 239.

JUSTICE RICHARDS

Justice Richards was a labour relations conciliator, and later served as chairman of the Wartime Labour Relations Board for Manitoba. In this latter role, “Richards did much to ensure that labour disputes did not hamper the nation’s wartime production. *Time Magazine* referred to him in 1944 as ‘Canada’s outstanding strike doctor.’”²⁴

THE SENILITY CONTROVERSY

The greatest scandal plaguing the Manitoba Court of Appeal during Justice Robson’s time related to the alleged senility of some of its elderly judges. As the Gibsons record:

This lack of change [in the courts’ composition] became a subject of controversy, particularly with respect to the Court of Appeal, some of whose members were seriously incapacitated by old age. There were increasing complaints from barristers about the Court’s arbitrariness. Every one of the six cases appealed to the Supreme Court of Canada from the Court of [p. 282] Appeal in 1942 and 1943, was reversed. The dissatisfaction came to a head when, during one of those appeals, H. A. Bergman was forced to tell the Supreme Court that the Court of Appeal had not permitted him to speak on behalf of his client, because they had made up their minds beforehand that the case had no merit.

Three senior lawyers, E. K. Williams, Isaac Pitblado and R. D. Guy, Sr., went to Chief Justice Prendergast and persuaded him to submit his resignation, but for some reason the Minister of Justice procrastinated in accepting the resignation. A memorandum was dispatched to him explaining the situation, and the *Free Press*, which acquired a copy of the memorandum, published an editorial in February 1944, disclosing the facts that it contained, and describing the condition of the Court as a ‘public scandal.’²⁵

1. The Winnipeg Free Press Article

As noted in the above-quoted Gibsons’ account, the scandal came to a head on February 15, 1944 with the publication in the *Winnipeg Free Press* of an anonymous front-page article entitled, “Rebuild the Appeal Court.” The article observed that in 1942-43, seven Manitoba cases were heard by the Supreme

²⁴ Gibson & Gibson, *supra* note 5 at 271. See also Gordon Goldsborough, “Memorable Manitobans: Stephen Elswood Richards (1878-1950)” (last modified 20 July 2019), online: Manitoba Historical Society, <www.mhs.mb.ca/docs/people/richards_se.shtml> [Richards].

²⁵ *Ibid* at 281-82.

Court of Canada; the Manitoba Court of Appeal was overruled in six of them. It stated that “[i]n some instances the Appeal Court has decided cases without hearing the parties concerned. In others it has decided cases after hearing the litigants in form only.”

As a case in point, the article referred to the Supreme Court of Canada hearing in *Attorney-General for Manitoba v Minister of Finance for Canada*, [1943] SCR 370. In that case, counsel for the appellant wrote in his factum, “[w]hen the appeal came before the Court of Appeal, the Court declined to hear any argument and intimated that it had already decided that the appeal should be dismissed.”²⁶ In addition, “the Appeal Court indignantly rejected arguments which it assumed that the appellant would have put forward if the Court had not refused to hear him. ... The actual arguments which the appellant intended to introduce did not emerge, of course, as the Appeal Court would not hear them.”

Apparently, Mr. Justice Rinfret of the Supreme Court “appeared incredulous when told that the Appeal Court had refused to hear argument.” Mr. Bergman then explained that “under the practice in the Appeal Court it is optional with counsel whether they file points for argument or not; that where both sides file points for argument the Court frequently announces, when the case is called, that it has considered the points for argument and reached a decision, and then proceeds to give judgment without any oral argument.”

The news article alleged that “the Appeal Court broke the elementary rule that litigants should be heard before a decision is made.” It further stated that “the Appeal Court has shown disregard for evidence and law in its decisions. Sometimes no reasons for its judgments are given, even when the judgment under appeal is reversed.”²⁷ Furthermore, “[i]t is well known that the Court at times shows reluctance to give sustained consideration to matters before it, to work out reasoned conclusions or to formulate the grounds for its decisions.” The article alleged that the Court of King’s Bench therefore “has little guidance

²⁶ Interestingly, the lawyer was H.A. Bergman, K.C., who was appointed to replace Justice Robson on the Court of Appeal in the following year.

²⁷ Westlaw contains 663 Manitoba Court of Appeal cases between January 1, 1930 and March 18, 1944. In 52 of those cases, the Court of Appeal did not issue written reasons. However, the year with the most decisions issued without reasons (seven) was 1938. In 1934, there were only two such cases; in 1944, there were three. Of course, these types of cases may not be included in online databases or otherwise published. Interestingly, in *Hunter v Trans-Canada Finance Corp*, [1930] 3 DLR 275 (Man CA), the appeal was allowed on March 3, 1930; however, according to the headnote, “at the request of interested parties, reasons for judgment were handed down on March 21, 1930.”

from the superior Court and is frequently confused by its decisions. A similar difficulty confronts the Bar.”

The article went on to say that “some members of the Bar decline to take briefs to the Appeal Court and those who appear there do so with reluctance.” Continuing on, it said:

One of the principal causes of these extraordinary conditions is quite obvious to all who have watched the Appeal Court at work. The men who occupy the bench do not have the collective energy to deal adequately with the litigation before them. Two of the judges, by reason of age and infirmity, are unable to discharge their duties fully.

One of those older judges is reported to have offered his resignation some time ago, but this offer, for some unknown reason, has not been accepted yet by the Department of Justice. [...] The Government is not doing its duty if it permits the highest court of Manitoba to remain without the confidence of the Bar and the public – in a condition which approaches a public scandal.²⁸

The article concluded by saying that new judges “should be chosen and appointed immediately before more damage is done to our system of justice.”²⁹

At the time that the article was published, the members of the Manitoba Court of Appeal were Chief Justice Prendergast (age 85), Justice Dennistoun (79), Justice Trueman (73), Justice Robson (72) and Justice Richards (65).³⁰ At

²⁸ Prominent Winnipeg lawyer William Parker Fillmore, QC later wrote that “one Judge in the Court of Appeal was mentally incapable; another was nearly blind, and another hard of hearing.” See W P Fillmore, “The Lighter Side of the Law” (1973) 39 *Man Bar N* 114 and 118.

²⁹ Interestingly, nothing was said about the article in the *Manitoba Bar News* around that time. Coincidentally, on February 15, 1944 (the same date that the Court of Appeal article was published), the Manitoba Bar Association Council approved an “ambitious public relations program” that would involve “an organized series of advertisements to be published weekly in the two Winnipeg daily newspapers”: “A Public Relations Program” (1944) 16:1 *Man Bar N* 7. To cover the cost of this program, an additional public relations assessment of \$5 was charged to every member of the Bar Association, in addition to the \$2 annual dues ((1944) 16:2 *Man Bar N* 20). According to the minutes of the February 15, 1944 MBA Council meeting, “Mr. Bergman, speaking for himself, and not as president of the Law [p. 29] Society commended the Committee for its initiative in planning the Public Relations Campaign and indicated by his remarks his approval of it.”: “Manitoba Bar Association” (1944) 16:2 *Man Bar N* 28–29. The cost to place an advertisement in both Winnipeg newspapers every Saturday for one year was \$2,300 ((1944) 16:2 *Man Bar N* 29).

³⁰ Chief Justice Prendergast retired on March 18, 1944 and died on April 18, 1945 (Gordon Goldsborough, “Memorable Manitobans: James Emile Pierre Prendergast (1858-1945)” (8 December 2018), online: <www.mhs.mb.ca/docs/people/prendergast_jep.shtml>); Justice

that time, *The British North America Act, 1867* provided that “[t]he Judges of the Superior Courts shall hold Office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.” The mandatory retirement age of 75³¹ was only added in 1961.³² Legal historians have since observed that in his last years on the bench, Chief Justice Prendergast was “obviously incapable of performing his obligations as a judge.”³³ Justice Trueman’s “increasing senility” has also been noted.³⁴

2. Appeals to the Supreme Court of Canada

During Justice Robson’s time at the Manitoba Court of Appeal, the process for appealing to the Supreme Court of Canada was different than it is today. At that time, appeals to the Supreme Court were permitted on most final judgments.³⁵ According to CanLII and Westlaw, there were 42 appeals from the Manitoba Court of Appeal to the Supreme Court of Canada between 1930 and 1945.³⁶ In 14 (one-third) of those cases, the Manitoba Court of Appeal

Dennistoun retired in October 1946 and died on October 10, 1956 (Gordon Goldsborough, “Memorable Manitobans: Robert Maxwell Dennistoun (1864-1952)” (last modified 3 February 2019), online:

<www.mhs.mb.ca/docs/people/dennistoun_rm.shtml>); Justice Trueman retired on January 1, 1947 (Gibson & Gibson, *supra* note 5 at 292) and died on February 24, 1951 (Trueman, *supra* note 14); Justice Robson served as Chief Justice of the Court of King’s Bench until his death on July 9, 1945 (Robson, *supra* note 1); Justice Richards died on October 17, 1950 (Richards, *supra* note 24). As Peter McCormick & Suzanne Maisey wrote in “A Tale of Two Courts II: Appeals from the Manitoba Court of Appeals to the Supreme Court of Canada, 1906-1990” (1992) 21 Man LJ 1 at para 26, “the average age of the Manitoba Court before the 1944 replacements was over 75, the highest it has ever been, and even the youngest member of the Court was above what non-judges now think of as retirement age.”

³¹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 99(2), reprinted in RSC 1985, Appendix II, No 5.

³² See *Constitution Act, 1960* (UK), 9 Eliz II, c 2, which came into force on March 1, 1961.

³³ Brawn, *supra* note 7 at 232.

³⁴ *Ibid* at 246.

³⁵ *Supreme Court Act*, RSC 1927, c 35, s 36. If the amount at issue did not exceed \$2,000, special leave was required (see s 39).

³⁶ Unfortunately, at present, the current online databases do not contain comprehensive information regarding applications for special leave that were denied. Included in this total are *Kapusta v Polish Fraternal Aid Society* (1939), 46 Man R 161 at 164 (SCC), where the application for leave to appeal was refused, and *Robertson v Murphy*, [1939] SCR 273 (application for leave to appeal dismissed).

was overruled.³⁷ During this period, there were also four appeals to the Judicial Committee of the Privy Council involving Manitoba cases.³⁸ In all of those cases, the decision of the Manitoba Court of Appeal was affirmed.³⁹ According to McCormick & Maisey, “[t]he court reached its best comparative level under Prendergast, being reversed [by the Supreme Court] almost 30% less often than the other courts of appeal for a period around 1940.”⁴⁰ McCormick & Maisey observed that:

On the one hand, it is quite true that in his last few years as Chief Justice, Prendergast C.J.M. led the Manitoba Court of Appeal to a rate of reversal at the hands of Canada’s highest court much higher than that enjoyed by his predecessors or by the en banc appeals that preceded the creation of the Court (and higher as well than the Court had enjoyed in the first years of his Chief Justiceship), and it was quite understandable that the members of the relevant legal public should have become concerned about the reputation of the Court. On the other hand, none of his successors – and especially not his immediate successors – have been able to produce a lower reversal rate over any extended period of time.⁴¹

³⁷ *Montgomery v Rural Municipality of Assiniboia*, [1930] SCR 494 (cross-appeal allowed); *Roberts v The King*, [1931] SCR 417; *R v Gudmondson* (1933), 60 CCC 332 (SCC) (new trial ordered); *Veniot v Black*, [1934] 1 DLR 803 (SCC); *Winnipeg Electronic Co v Winnipeg*, [1934] SCR 173; *Maguire v Northland Drug Co Ltd*, [1935] SCR 412; *Canadian Pacific Ry Co v Anderson*, [1936] SCR 200 (appeal allowed in part); *Barickman Hutterian Mutual Corp. v Nault*, [1939] SCR 223; *In Re West Estate*, [1942] SCR 120; *Dawes v Gaye*, [1942] SCR 369; *Forsythe v R*, [1943] SCR 98; *Gach v R*, [1943] SCR 250; *Manitoba (Provincial Treasurer) v Canada (Minister of Finance)*, [1943] SCR 370; *Morice v Davidson*, [1943] SCR 94 (judgment var’d on appeal; aff’d in part); *More v Sweezey*, [1944] SCR 111.

³⁸ Namely, *Young v Canadian Northern Railway*, [1931] 1 DLR 645, [1931] AC 83 (wrongful dismissal); *Winnipeg Electric Co v Geel*, [1932] 4 DLR 51, [1932] AC 690 (motor vehicle negligence); *Pronek v Winnipeg, Selkirk & Lake Winnipeg Railway*, [1933] 1 DLR 1, [1933] AC 61 (negligence); and *Forbes v Manitoba (Attorney General)*, [1937] 1 All ER 249, [1937] 1 DLR 289 (constitutional law – taxation).

³⁹ In *Pronek*, *ibid*, the Supreme Court of Canada was overruled and the trial judgment was affirmed (which had been affirmed by the Manitoba Court of Appeal). In *Geel* and *Forbes*, *ibid*, the Supreme Court of Canada and the Manitoba Court of Appeal reached the same result. In *Young*, *ibid*, special leave to appeal to the Judicial Committee of the Privy Council was granted by the Manitoba Court of Appeal. According to Westlaw, *Young* was the first Manitoba Court of Appeal decision issued with Justice Robson on the panel. Like the Judicial Committee, Justice Robson dismissed the appeal.

⁴⁰ McCormick & Maisey, *supra* note 30 at para 39.

⁴¹ *Ibid* at para 19.

For comparison purposes, Quicklaw's SCCA database contains 232 Manitoba Court of Appeal cases between 2000-2015.⁴² Eleven of those cases were appeals as of right.⁴³ In four of those eleven cases, the appeal was allowed.⁴⁴ In 23 cases, leave to appeal was granted.⁴⁵ In 10 of those 23 cases, the appeal was allowed.⁴⁶ Overall, the Court of Appeal was only overturned 5.67% of the time. However, in those cases where leave was granted, the rate was much higher – 43.48%; it was slightly lower in appeals as of right (36.37%).

Response to the Article

The Gibsons write that:

The editorial provoked great consternation among lawyers. Some thought it improper to give such publicity to the infirmities of judges who had rendered distinguished service in the past. Some accused Bergman, whose name was prominently mentioned in the article, of campaigning to acquire the Chief Justiceship for himself, while others felt that the article must be a plot by some other judicial aspirant to embarrass Bergman.⁴⁷

Justice Dennistoun apparently took the occasion of Chief Justice McPherson's swearing-in ceremony to fire back at the *Free Press*. His remarks were reported in the *Winnipeg Tribune* on April 3, 1944:

This gathering of Judges and Lawyers is made possible by the resignation of Chief Justice Prendergast, which he sent to the Minister of Justice in August last, eight

⁴² Two applications for leave to appeal were discontinued (namely, *Totalline Transport Inc v Heller Financial Canada Holdings Co*, [2009] SCCA no 20 (QL) and *R v Kematch*, [2010] SCCA no 189 (QL)) and, after leave to appeal was granted, the appeal in *Meeking v Cash Store Inc*, [2013] SCCA no 443 (QL) [*Meeking*] was discontinued. For additional information regarding appeals between 2000-2004, see Peter McCormick, "Try, Try Again: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada 2000-2004" (2006) 32:1 *Man LJ* 79.

⁴³ Pursuant to the *Criminal Code*, RSC 1985, c C-46, s 691(1).

⁴⁴ See *R v ALR*, [2000] SCCA no 39 (QL) (by consent); *R v McKay*, 2007 SCC 16; *R v CLY*, 2008 SCC 2; and *R v Koczab*, 2014 SCC 9.

⁴⁵ Including *Meeking*, *supra* note 42.

⁴⁶ See *R v Buhay*, 2003 SCC 30; *R v Mann*, 2004 SCC 52; *R v Orbanski & Elias*, 2005 SCC 37; *R v Sinclair*, 2011 SCC 40; *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14; *R v Mabior*, 2012 SCC 47; *Telecommunications Employees Association of Manitoba Inc v Manitoba Telecom Services Inc*, 2014 SCC 11; *R v Steele*, 2014 SCC 61; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

⁴⁷ Gibson & Gibson, *supra* note 5 at 282.

months ago.

He felt it his duty to fill the office and earn his salary until his resignation was accepted.

Suddenly, without warning, from a clear sky, there came a devastating, shattering bombshell from *The Free Press*. This attack was as sudden, as unexpected, as treacherous, as the attack made by the Japanese on Pearl Harbor while the ambassadors were discussing peace at Washington.

It can be compared only to a raid on a hospital flying the Red Cross or a Mercy Ship with all lights burning and no means of defense available.

Judicial etiquette prevents Judges from engaging in controversy in the public press, and I would keep silence now but for the fact that this is a gathering of our own profession, where we can speak freely on matters concerning ourselves.

The article referred to, while [continued on 11] naming Chief Justice Prendergast, designated the Court of Appeal and its administration of justice as a 'Public Scandal.' This is a false and libellous statement. It would not matter so much if it were confined to our own city and province, where it can be, and is, being refuted by many good citizens, but unfortunately it has been re-published and commented on by newspapers from coast to coast.

... Some one in the absence of Mr. G. V. Ferguson, the editor, seized the opportunity and delivered this uncensored and unpatriotic diatribe.

It is an ill bird that fouls its own nest. ...

I think that we as Lawyers and Judges are entitled to know the name of the person who is responsible for the information upon which this article was founded, particularly if he is a member of our own profession.

After our dear old Chief Justice had sent in his resignation and closed the door on his official life, the *Free Press* came from behind and kicked him downstairs.

The article refers to myself indirectly as 'aged and infirm.' I think it will be conceded that in any event my language shows remarkable strength and vigor. ...

I have taken none of my brother Judges into my confidence, and these remarks are made upon my sole responsibility.

There [h]as been a conspiracy of silence and I feel it is my duty to break it.⁴⁸

Presumably, the publication of the *Free Press* article played a role in the resignation of Chief Justice Prendergast just over one month later. Ultimately, "[t]he need for some modification of the principle of life tenure for judges had become distressingly apparent."⁴⁹

⁴⁸ "Judge Denounces 'Treacherous' Editorial", *The Winnipeg Tribune* (3 April 1944) 1 & 11.

⁴⁹ *Ibid.*

3. *Robson versus Trueman*

There are abiding rumours regarding a feud between Justice Robson and Justice Trueman. Indeed, it has been said that the appointment of Justice Robson as Chief Justice of the Court of King’s Bench was:

...necessitated [p. 246] after the antipathy that had grown between Robson and fellow justice W.H. Trueman began affecting the functioning of the Court of Appeal. Robson’s strong negative feelings for Trueman, and Trueman’s increasing senility, caused Robson to take positions opposite to those of Trueman, regardless of their merit. Members of the provincial bar were aware of the feud and of the effect it was beginning of have on all concerned. In a 1944 letter to a Liberal Member of Parliament written a week after the transfer, newly appointed Court of Appeal justice H.A. Bergman noted that ‘Robson is very happy over his transfer. The Court of Appeal atmosphere and his feud with Trueman were beginning to get him down.’⁵⁰

However, it does not appear that a review of Justice Robson’s decisions has ever been undertaken to ascertain whether these allegations are true.⁵¹ This article attempts to rectify that omission.

According to Westlaw, there are 579 Manitoba Court of Appeal cases with Justices Trueman and Robson as members of the panel between 1930 and 1944.⁵² They may be broken down as follows:⁵³

Year	Agreed	Trueman dissents	Robson dissents	Wrote separately	% Agreement
1930	38	2	8	3	74.5
1931	40	5	5	4	74.1
1932	16	0	10	3	55.2
1933	28	8	8	6	70
1934	32	8	14	12	48.5
1935	27	7	12	2	58.7

⁵⁰ Brawn, *supra* note 7 at 245-46.

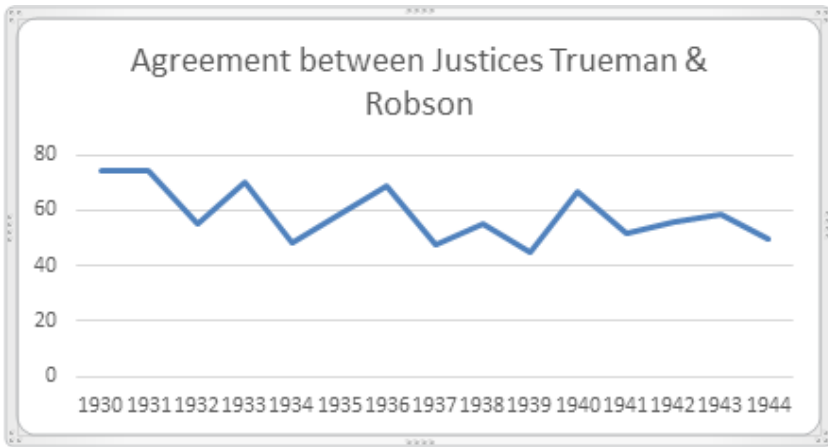
⁵¹ Unfortunately, as others have noted, Justice Robson’s diary went missing after his death: Brawn, *supra* note 7 at 246.

⁵² This includes cases where appeals were dismissed without written reasons.

⁵³ Where Justices Trueman and Robson wrote separate dissents in the same case, they are recorded as individual dissents, rather than an instance of writing separately. Where either concurred in a set of reasons written by a different judge and the other wrote separately, that is recorded as writing separately, even if they ultimately reached the same result. Where Justices Trueman and Robson agreed in the result generally (though others may also have written, reaching that result), that is listed as an instance of agreement (including consent judgments).

Year	Agreed	Trueman dissents	Robson dissents	Wrote separately	% Agreement
1936	36	3	7	6	69.2
1937	23	9	6	10	47.9
1938	21	5	7	5	55.3
1939	14	7	4	6	45.2
1940	12	4	1	1	66.7
1941	16	5	3	7	51.6
1942	15	4	4	4	55.6
1943	14	3	2	5	58.3
1944	5	1	1	3	50

The extent of the ability of Justices Trueman and Robson to agree may be visualized as follows:



While they got off to a relatively good start, agreeing about three-quarters of the time (including 40 out of 54 judgments in 1931), it is clear that the extent of their disagreement grew over the years.⁵⁴ By 1944, they only agreed in 50% of their cases. Indeed, in 1934, 1937 and 1939, they agreed less than 50% of

⁵⁴ Nevertheless, there are examples of Justice Trueman explicitly agreeing with Justice Robson from time to time: see e.g. *Re Gilroy Estate*, [1938] 2 DLR 662 (Man CA); *Kmetiuk v Lac Du Bonnet (Rural Municipality)*, [1938] 2 DLR 510 (Man CA). Justice Robson also agreed with Justice Trueman occasionally: see e.g. *Re McEwen*, [1941] 2 DLR 54 (Man CA); *Allen v Frith*, [1941] 1 DLR 53 (Man CA); *R v McCann*, [1936] 4 DLR 788 (Man CA); *Sykes v One Big Union*, [1934] 2 DLR 753 (Man CA).

the time. In 1934, Justice Robson dissented in 14 cases involving Justice Trueman; in 1937, Justice Trueman dissented in 9 of their cases together. In 1934, Justices Trueman and Robson wrote separately in 12 cases (in addition to Justice Robson's 14 dissents). Remarkably, Justice Trueman did not author a single dissent in 1932.⁵⁵ Justice Robson only dissented once in 1940 and 1944, though that may be due in part to the limited number of cases heard by the Court in those years.⁵⁶

There were also some interesting cases that did not feature Justices Trueman and Robson as part of the same panel. For instance, in *Kozlowski v Workers' Benevolent Society of Canada*, [1933] 4 DLR 652 (Man CA), Justice Trueman refused to stay proceedings. However, Justice Robson (writing for the majority of a panel of the Court) subsequently ordered a stay.⁵⁷ In *Winnipeg Electric Co v Winnipeg* (1933), 41 Man R 1 (CA), Justice Trueman granted leave to appeal. However, the Court of Appeal dismissed the appeal. Ultimately, however, the Manitoba Court of Appeal decision was overturned by the Supreme Court of Canada.⁵⁸

There were also a few instances where a Court of Appeal judge sat as an *ad hoc* trial judge and had his decision overturned by his colleagues on appeal.⁵⁹ For instance, in *Reith v Safeway Stores Ltd*, [1936] 1 WWR 481 (Man CA), Justice Trueman sat as a trial judge, then the Court of Appeal allowed the appeal.⁶⁰ In *Christakos v Thomas*, [1941] 3 DLR 759 (Man CA), Justice Robson sat as a trial judge, then the appeal was allowed without written reasons. The panel in that case was Chief Justice Prendergast and Justices Dennistoun and Trueman.

⁵⁵ Justice Robson suffered a heart attack on October 20, 1932 ((1932) 2 Fort LJ 120); however, according to Westlaw, he still participated in 39 of the 45 cases heard by the Court that year.

⁵⁶ And due to Justice Robson's appointment as Chief Justice of the Court of King's Bench in March 1944.

⁵⁷ But see *Re Penner*, [1940] 4 DLR 800 (Man CA), where the Court of Appeal (including Trueman JA) dismissed an appeal from Justice Robson's chambers decision (without written reasons). The only other decision of Justice Robson in Chambers that is available through Westlaw is *Re Helik*, [1939] 3 DLR 56, another *habeas corpus* application.

⁵⁸ [1934] SCR 173.

⁵⁹ There were also cases where such decisions were upheld on appeal: see e.g. *Ryz v Nash-Simington Co*, [1934] 2 DLR 804 (Man CA) (appeal from a decision of Trueman JA) and *Meanwell v Meanwell*, [1941] 2 DLR 655 (Man CA) (appeal from a decision of Dennistoun JA).

⁶⁰ In that case Donovan J sat as an *ad hoc* Court of Appeal judge and wrote the unanimous decision on behalf of Justices Robson and Richards.

In order to put these matters into perspective, however, it is necessary to consider the extent of disunity within the Court of Appeal more generally during this period.

4. Discord at the Court of Appeal

A review of the Manitoba Court of Appeal's judgments from 1930 to 1944 reveals a great deal of disunity amongst the Court.⁶¹ Judges were clearly not afraid to dissent.⁶² In addition, it is clear that the Court at that time tended more towards the English *seriatim* practice of judges writing their own – sometimes duplicative – reasons.⁶³

Year	Unanimous judgments ⁶⁴ with Trueman & Robson	Total Number of MBCA Cases with Trueman & Robson on the panel	%	Unanimous judgments without Trueman & Robson together	Total Number of MBCA Cases without both Trueman & Robson	%
1930	31	50	62	10	19	52.6
1931	35	54	64.8	7	7	100
1932	11	29	37.9	9	16	56.3
1933	25	51	49	6	12	50
1934	26	64	40.6	3	3	100
1935	20	48	41.7	1	2	50
1936	29	53	54.7	1	1	100

⁶¹ These findings are based on the Manitoba Court of Appeal cases available through Westlaw.

⁶² Nearly 250 dissenting judgments were recorded during this period, when the Court decided just over 650 cases. For instance, in *Reference Re Ferguson Estate*, [1944] 1 DLR 448 (Man CA), Justice Dennistoun lamented (in para 1) the “very badly drawn will” at the heart of the case; on the other hand, Justice Robson in his dissent wrote (in para 24): “I do not think that upon a careful perusal of this will lack of care or skill in its preparation is evident.”

⁶³ Peter McCormick & Marc Zanoni, “The First ‘By the Court’ Decisions: The Emergence of a Practice of the Supreme Court of Canada” (2014) 38:1 Man LJ 159 at 168. It is notable that there are no Manitoba Court of Appeal cases on Westlaw during this period where the judgment was written co-operatively by two or more judges together (not including *per curiam* decisions), though this is undoubtedly a more modern practice.

⁶⁴ In this chart, “unanimous judgments” include those without written reasons and consent orders.

Year	Unanimous judgments ⁶⁴ with Trueman & Robson	Total Number of MBCA Cases with Trueman & Robson on the panel	%	Unanimous judgments without Trueman & Robson together	Total Number of MBCA Cases without both Trueman & Robson	%
1937	16	47	34	0	1	0
1938	20	39	51.3	0	0	0
1939	8	31	25.8	1	2	50
1940	8	19	42.1	2	4	50
1941	12	32	37.5	2	3	66.7
1942	11	28	39.3	5	7	71.4
1943	12	25	48	1	1	100
1944	3	8	37.5	0	0	0
		AVERAGE	44.4%		AVERAGE	56.5%

This data indicates that the Court of Appeal was much more likely to be unanimous when Justices Trueman and Robson were not on the panel together. There were only four years when the majority of the cases involving Justices Trueman and Robson were unanimous (1930, 1931, 1936 and 1938). The highest degree of unanimity was evident in 1931, when nearly 65% of the cases they heard together resulted in unanimous decisions. They were least likely to be unanimous in 1939, when just over one-quarter of their cases together resulted in unanimous decisions.

Conversely, when Justices Trueman and Robson were not on the panel together, the Manitoba Court of Appeal was much more likely to render a unanimous decision. In fact, in 1931, 1934, 1936 and 1943, all of the decisions that did not feature Justices Trueman and Robson on the bench together were unanimous. Nearly every year, the cases that did not have Justices Trueman and Robson sharing the bench were more often than not unanimous. In 1938 and 1944, there were no cases during Justice Robson’s tenure that Justices Trueman and Robson did not hear together. If those years are removed from the calculation, the percentage jumps from 56.5% to 65.2%. The other notable exception is 1937, where the Court of Appeal heard one case that did not feature Justices Trueman and Robson on the panel together: *Kerr v Wiens*, [1937] 2 DLR 743 (Man CA). Justice Dennistoun wrote the decision in that case and Justices Trueman and Richards “agree[d] in the result.” In fact, the

DLR report of the case indicates that “[t]he judgment of the Court was delivered by Dennistoun, J.A.” If 1938 and 1944 are removed from the calculation and the one judgment in 1937 is instead treated as unanimous, the average jumps even more markedly – up to 72.9%.

Thus, it can be seen that, on average, if Justices Trueman and Robson were on the panel together, the Court was less than 50% likely to be unanimous. However, if Justices Trueman and Robson did not share the bench, the Court was on average almost 75% likely to be unanimous. The following chart illustrates how many fewer dissents there were on panels that did not involve both Justices Trueman and Robson:

Year	Dissenting judgments with Trueman & Robson on the panel	Dissenting judgments without Trueman & Robson together
1930	9	2
1931	10	0
1932	10	2
1933	19	4
1934	21	0
1935	22	0
1936	15	0
1937	14	0
1938	12	0
1939	13	0
1940	7	0
1941	9	0
1942	9	2
1943	8	0
1944	3	0

To get a better sense of the forces at work at the Court during this time, we may further refine the data to determine who was mostly likely to write a unanimous judgment and, conversely, who was most likely to dissent.⁶⁵

AUTHORSHIP OF UNANIMOUS JUDGMENTS

⁶⁵ According to Westlaw, there were 248 dissents and 246 unanimous decisions recorded during this period.

Year	Prendergast	Fullerton	Dennistoun	Trueman	Robson	Richards
1930	7	8	8	8	8	
1931	11	2	11	5	9	
1932	3		4	4	2	3
1933	6		7	3	8	5
1934	5		10	6	3	1
1935	3		6	4	4	2
1936 ⁶⁶	4		1	3	7	7
1937	4		3	1	1	2
1938	1		8	1	1	0
1939	2		1	1	0	1
1940	1		1	2	1	0
1941	1		2	4	1	0
1942	1		4	2	1	1
1943	0		7	1	1	0
1944	0		0	0	0	0
TOTAL	49	10	73	45	47	22

Thus, it would appear that Justice Dennistoun was most frequently able to obtain consensus.⁶⁷ On the other hand, Justice Robson emerges as the Court’s great dissenter, with Justice Trueman a fairly close second:

DISSENTING JUDGMENTS⁶⁸

Year	Prendergast	Fullerton	Dennistoun	Trueman	Robson	Richards
1930	2	1	1	3	8	
1931	0	0	1	5	5	
1932	0		1	0	12	0
1933	2		7	9	8	4
1934	2		3	8	15	6
1935	1		3	7	13	4

⁶⁶ As noted above, Donovan J (*ad hoc*) wrote for the Court in *Reith v Safeway Stores Ltd*, [1936] 1 WWR 481 (Man CA).

⁶⁷ It is notable that most unanimous judgments of the Manitoba Court of Appeal during this period, whomever their author, tended to be significantly shorter than more fragmented decisions. It appears that when they agreed, the judges felt that less needed to be said than when they disagreed.

⁶⁸ Where one judge simply agreed with another judge’s dissent, that is recorded as a dissenting judgment for each individual. Partial dissents are also included.

1936	2		1	5	7	4
1937	3		2	9	6	0
1938	1		2	5	7	2
1939	0		3	8	4	0
1940	1		0	4	1	1
1941	2		1	5	4	0
1942	0		3	6	5	1
1943	1		2	4	2	0
1944	0		1	1	1	0
TOTAL	17	1	31	79	98	22

Justice Robson dissented twice as often as he wrote for the Court. In contrast, Justice Richards was just as likely to write a unanimous decision as he was to dissent, writing 22 of each during this period.⁶⁹

According to Westlaw, Justice Robson's first dissent was delivered on March 3, 1930, in *Northern Engineering & Development Co v Philip*, [1930] 3 DLR 387 (Man CA).⁷⁰ The case arose from proceedings before the Municipal and Public Utility Board, which no doubt would have been near and dear to Justice Robson's heart – as he served as the province's first Public Utilities Commissioner and had written texts on municipal law.⁷¹ The issue was whether the Board erred in its handling of costs in the matter. The majority deferred to the Board, while Justice Robson held that the Board proceeded on a wrong principle and would have sent the matter back for reconsideration.

Justice Robson's final dissent was in *Kuchma v Tache (Rural Municipality)*, [1944] 2 DLR 41 (Man CA).⁷² Interestingly, that was another municipal law matter – the closing of a road allowance under *The Municipal Act*. Again, Justice

⁶⁹ For comparison purposes, according to internal statistics maintained by the Manitoba Court of Appeal, there have been 18 dissents since January 2010. During that period, the year with the most dissents was 2018, with six (in 2007, there were five). No dissenting judgments were issued in 2008, 2015, 2016 or 2017. See also Richard J Scott & Michael E Rice, "The Changing Environment in the Manitoba Court of Appeal" (2006) Pitblado Lectures I-14.

⁷⁰ Justice Trueman wrote for the majority (Chief Justice Prendergast and Justice Dennistoun concurring); Justice Fullerton concurred in Justice Robson's dissent.

⁷¹ Brawn, *supra* note 7 at 232; see also Robson, *supra* note 1.

⁷² Justices Dennistoun, Trueman, Robson and Richards each penned separate judgments. Chief Justice Prendergast concurred with Justice Dennistoun.

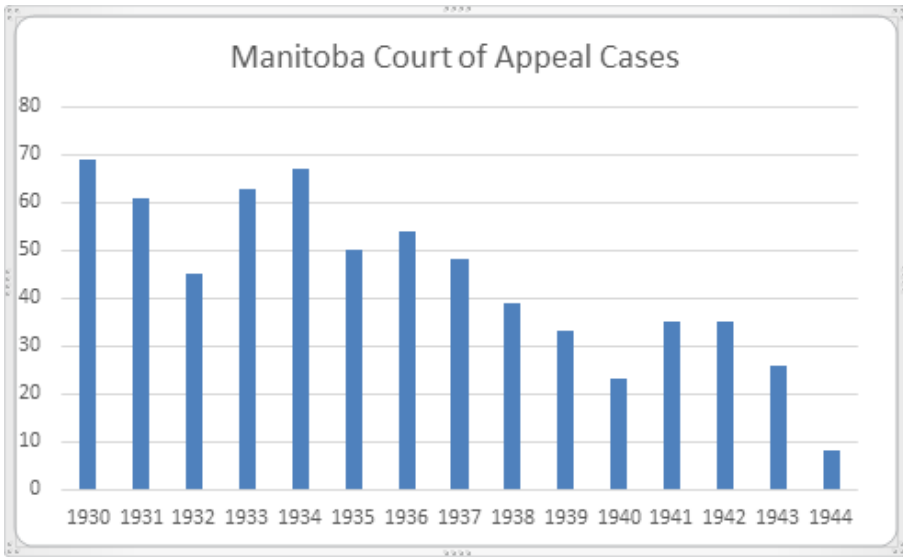
Robson felt that an error had been committed, while the rest of the Court refused to interfere with the decision that had been made.

Justice Robson's first unanimous Court of Appeal judgment was also delivered on March 3, 1930, in *R v Seilke*, [1930] 3 DLR 630 (Man CA). The case involved an appeal from a conviction for being intoxicated in a public place. The appeal was dismissed.

Justice Robson's last unanimous Court of Appeal decision was *R v Nowicki*, [1944] 2 DLR 517 (Man CA). The accused was charged for failing to submit to a medical examination related to compulsory military service. However, no evidence was led to show that the man was covered by the regulation (*i.e.*, confirming his age). In para 17, Justice Robson wrote, "[w]hile it is plain that this law is one which in the war emergency is indispensable and imperative, nevertheless, when the functions of the Courts are invoked in cases under that law, these functions must, it seems to me, be exercised in judicial proceedings in accordance with the fundamental principles of the law." He held that the magistrate was correct in dismissing the charge.

5. *Workload*

Of course, it must be noted that the workload at the Court of Appeal was undoubtedly affected by World War II:⁷³



6. *Panels of Four*

One peculiarity that stands out from this review of the Court's decisions is their propensity to sit as panels of four.⁷⁴ Of their 656 judgments available through Westlaw for this period, 192 featured panels of four judges. Only 60 involved the current standard of a panel of three judges. Ad hoc judges were rarely employed.⁷⁵ The Court of Appeal Act during this time clearly indicated that

⁷³ Though the limited number of cases from 1944 is a result of Justice Robson's appointment as Chief Justice of the Court of King's Bench in March 1944. For comparison purposes, Westlaw contains 2,116 Manitoba Court of Appeal cases from January 1, 2000 to March 18, 2014 (compared to the 656 recorded during Justice Robson's tenure).

⁷⁴ Apparently this was "an early, and regrettable, phenomenon in the history of the court": Scott & Rice, *supra* note 69 at I-2.

⁷⁵ According to Westlaw, there were only seven Manitoba Court of Appeal panels featuring

three judges constituted a quorum;⁷⁶ it also provided that the decision of the judges – or a majority of them – would be deemed to be the decision of the Court.⁷⁷ Given the judges’ proclivity for disagreement, this unsurprisingly led to several evenly divided panels.⁷⁸ In those cases, the appeals were automatically dismissed.⁷⁹ There was also the interesting case of *Lane v Lane*, [1938] 4 DLR 40 (Man CA), which was argued twice: “first before a Court of four Judges and, after consideration, counsel were requested to reargue before the full Court.”

Apparently “the size of the Court of Appeal had been increased to five judges in 1912. Due to the Depression, however, a vacancy had not been filed and, to save administrative costs, the [government] was apparently contemplating not filling the vacancy and ultimately reducing the Court of Appeal to three judges.”⁸⁰ The problem of evenly divided panels was the subject

ad hoc judges during this period: *Campbell v Belt*, [1934] 1 DLR 694; *Reith v Safeway Stores Ltd*, [1936] 1 WWR 481; *R v Anderson*, [1938] 3 DLR 317; *Baker Estate v Soeurs de la charité de l’Hôpital général de St. Boniface*, [1938] 3 DLR 802 (“The action was brought under *The Fatal Accidents Act*, S.M. 1935, ch. 18, by the administrator of the estate of George Hamilton Baker, deceased, for damages for alleged negligence in administering medical treatment, the treatment consisting of the application to the person of the deceased of electricity from the machine known as a 17-metre short wave radio therm.”); *Kriewetski v Winnipeg (City)*, [1938] 4 DLR 577; *R v Harrop*, [1940] 4 DLR 80; and *Hink v McInnes*, [1941] 2 WWR 369.

⁷⁶ *The Court of Appeal Act*, RSM 1913, c 43, s 14; *The Court of Appeal Act*, SM 1933, c 6, s 15; *The Court of Appeal Act*, RSM 1940, c 40, s 15; *The Court of Appeal Act*, RSM 1954, c 48, s 15.

⁷⁷ *The Court of Appeal Act*, RSM 1913, c 43, s 14; *The Court of Appeal Act*, SM 1933, c 6, s 16; *The Court of Appeal Act*, RSM 1940, c 40, s 16; *The Court of Appeal Act*, RSM 1954, c 48, s 16.

⁷⁸ See *Wood v Canadian Indemnity Co*, [1933] 3 DLR 778; *Stockton v Webb*, [1934] 4 DLR 746; *R v Hatskin*, [1936] 3 DLR 437; and *Webb v Moore’s Taxi Co*, [1942] 4 DLR 154. It has been suggested that “[w]here there has been an affirmation by an appellate court on an equal division, this is not a binding decision on the court below in a future case” (CED 4th (online), *Courts* (West), “Authority of Judicial Decisions: Rule of Stare Decisis: General” (XVI.1) at §1081, citing *Pattison v Behr*, [1920] 1 WWR 417 (Sask KB)). See generally JT Irvine, “The Case of the Evenly Divided Court” (2001) 64 Sask L Rev 219 and Peter J McCormick, “‘Was It Something I Said?’ Losing the Majority on the Modern Supreme Court of Canada, 1984-2011” (2012) 50 Osgoode Hall LJ 93 at 98, n 13 (which refers to the “inconclusive embarrassment of an equal division”).

⁷⁹ There does not appear to have been a statutory provision or rule to address such scenarios (such as the *Court of Appeal Act*, 2000, SS 2000, c C-42.1, s 16(2)).

⁸⁰ Scott & Rice, *supra*, note 69 at I-2.

of scathing 1931 address by H.A. Bergman, K.C., then President of the Manitoba Bar Association.⁸¹

ADDITIONAL OBSERVATIONS

This review of the Manitoba Court of Appeal's cases from 1930 to 1944 reveals how much the Court and the law has changed since then.⁸² There is not one reference in cases from that period to the "standard of review"; instead, the decisions include lengthy transcript extracts and detailed discussions of witnesses' testimony. The notion that the Court would allow an appeal – particularly in a family law matter – without issuing written reasons is also hard to fathom.⁸³ The nature of the work was quite different, too; the Court dealt with numerous motor vehicle accident cases,⁸⁴ as well as a great many wills and estate matters.⁸⁵

⁸¹ (1931) 4:4 Man Bar N 1. See also BV Richardson et al, "Hands Off the Court of Appeal" (1932) 4:6 Man Bar N 1.

⁸² For example, in *Re Campbell*, [1933] 3 DLR 448 (Man CA), Justice Dennistoun wrote: "The mother laid an information in the police court charging the father with assault, but, before hearing, better counsels prevailed and it was recognized that such a proceeding, if successful, would jeopardize the father's position as a public servant."

⁸³ See e.g. *Wilson v Wilson*, [1943] 2 WWR 267 (Man CA); *Carey v Carey*, [1943] 2 DLR 778 (Man CA); *Boivin v Boivin*, [1937] 1 DLR 804 (Man CA); *Scott v Scott*, [1937] 1 DLR 796 (Man CA) ("An appeal by respondent from a judgment...granting an order nisi upon a divorce petition, was allowed by the Court of Appeal with costs, without written reasons. The Court did so on the facts and did not find it necessary to consider the law.").

⁸⁴ Such as *Ksionek v Wallace*, [1937] 3 DLR 651 (Man CA) (fatal car accident involving a 5-year-old boy) and *Nelson v Dennis*, [1930] 3 DLR 215 (Man CA).

⁸⁵ There was also the interesting case of *R v Giesbrecht*, [1944] 2 DLR 522 (Man CA), involving a stateless person during wartime. Some of the cases involved very small sums of money, such as *R v Freedman*, [1936] 1 DLR 763 (Man CA) (\$5 cash and \$3 of cordwood) and *R v Lexier*, [1933] 59 CCC 343 (Man CA) (\$5). See also *Grindey v Piggly Wiggly Canadian, Ltd*, [1933] 4 DLR 491 (selling 9 lbs of sugar instead of 10 lbs).

The most common criminal cases arose from liquor and gambling.⁸⁶ Often the Court was answering questions posed by police magistrates about whether the decisions they had rendered were correct.⁸⁷ Of course, the penalties available were different, as well – hard labour and even capital punishment. The styles of cause were presented a bit differently than they are now. Due to the lack of turnover amongst the judges and the Court’s apparent preference for panels with as many judges as possible, the judges were stuck with the same panel members for most appeals. In their reasons, the judges frequently cited English authorities, and even some American cases. They also regularly referred to trial judges by name.⁸⁸

CONCLUSION

Justice Robson’s time at the Court of Appeal must have been interesting. With no mandatory retirement age, his colleagues grew older and, some of them, more senile. As illustrated above, Justice Robson was not afraid to make use of his power to dissent and, indeed, dissented more than any other judge on the Court at the time. Given the Court’s preference to sit the largest possible panels, and the lack of turnover amongst the judges, Justices Trueman and

⁸⁶ See e.g. *R v Lebanksy*, [1941] 2 DLR 380 (Man CA) (“This was a prosecution for keeping a common betting house. It is related to the operation of a miniature rifle gallery in a confectionery store.”); *R v McCann*, [1936] 4 DLR 788 (Man CA) (betting at the Woodbine Hotel); *R v Edwards* (1936), 66 CCC 117 (Man CA); *R v Magid*, [1936] 1 DLR 638 (Man CA) (slot machines); *R v Denaburg*, [1935] 4 DLR 399 (Man CA) (keeping a common gaming house). My personal favourite is *R v Freedman*, [1931] 55 CCC 288 (Man CA), wherein Chief Justice Prendergast wrote: “It was demonstrated that each time that a five-cent coin is dropped in a slot at the top of the machine an interior mechanism is set in motion whereby there is produced through an opening at the bottom a small roll of candy such as is generally sold for five cents in all stores, and three disks which can be seen through a glass covering in front are at the same time made to revolve and, when come to a stop, display printed legends or sentences of fortune-telling such as ‘You will soon be called in Court’ or the no less comforting prognostication ‘Your mother-in-law will come to live with you.’”

⁸⁷ In *R v Hatskin*, [1936] 3 DLR 437 (Man CA), a minimum wage case, Justice Robson wrote:

[22] Besides being for the greater part groundless, the 22 objections set out on six typewritten pages are stated with unnecessary prolixity. Magistrates should keep the verbiage of such references to the Court within reasonable bounds [...]

[39] I do not think the proceedings of the Board are to be subjected to the microscope caution with which a timid investor would scrutinize a bond mortgage.

⁸⁸ Which is not the usual practice nowadays.

Robson were forced to work together on most Court of Appeal cases during this era, which no doubt increased the overall disunity amongst the Court.