

Caseload and output of the Manitoban court of appeal: an analysis of twelve months of reported cases

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Une vue statistique d'ensemble de la Cour d'Appel du Manitoba est présentée dans le contexte de ses décisions qui ont été rapportées pendant l'année 1987. Des comparaisons ont été faites avec d'autres cours canadiennes et également avec les données des cours suprêmes des états Américains.

A statistical overview is presented of the Manitoban Court of Appeal in the context of its reported decisions during calendar year 1987, comparisons being drawn between other Canadian courts and with data from U.S. state Supreme Courts.

WITH PROVINCIAL COURTS ON THE BOTTOM, one or more section 96 trial courts above, then the variously named provincial courts of appeal, and finally the Supreme Court of Canada at the apex, the pyramidal structure of Canada's court system is so familiar as to require neither comment nor elaboration. What does require comment, however, is an obvious corollary of the fact that, at each higher level of the pyramid, the diameter gets smaller, and the corresponding reduction in the number of disputes that can be accommodated. But, if the flow of cases into the bottom of the pyramid is rising – and the combined effect of rising population, increasing social complexity, growing governmental regulation and the impact of the *Charter* make it unrealistic to assume anything else – while the caseload capacity of the highest level is constant, then the judicial significance of the next-to-the-highest level must accommodate itself to the demands this implies.

In more concrete and specific terms, the caseload capacity of the Supreme Court of Canada now seems to have stabilized at around 100 cases year, or about one quarter of those who make application,¹ and only the most heroic efforts of the Supreme Court justices can briefly push it around 600.² This means that, some 98 per cent of the time, the

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1 S.I. Bushnell, "Leave to Appeal Applications: The 1985-86 Term" (1987) 9 Sup. Ct. L. Rev. 467 at 468 and 470.

2 *Ibid.* at 469.

provincial appeal court decision is in fact the final decision, and more than 90 per cent of the time it is accepted as such by the parties without even an application for review. Further, the low number logically suggests that the Supreme Court would maximize its effective impact upon Canadian law by keying certain areas of law (most obviously and notably the *Charter*) for frequent review, the other side of the coin being the fact that some other areas of law will be assigned a low priority and reviewed only sporadically. A regional journal for lawyers has identified and deplored some of the implications, complaining that "the Supreme Court of Canada is no longer functioning in the manner that it should, as a national universal Court of Appeal" with the result that "important commercial appeals will have to be content with their Provincial Court of Appeal as the court of last resort."³

Provincial courts of appeal already are, and probably have been for some time and certainly will be in the future, much more than a notional way-station for cases en route to the Supreme Court of Canada. It therefore is increasingly important to examine and assess what happens here. At one level, such assessment is conducted through the medium of the discursive analysis of legal doctrine as it emerges in concrete decisions, and this is the standard fare of the law journals. At another level, however, the overall patterns can be examined through statistical analysis; taking a step back, as it were, to look at the forest rather than the trees, to examine the general patterns and trends against which can be characterized as typical or atypical those specific details of an individual decision, such as the length of substantive argument, number and type of judicial citations, and presence or absence of dissents or separate concurrences. Before we can identify the unusual, we must be able to describe the usual.

What is attempted here is a simple statistical overview of the Manitoban Court of Appeal in the context of its reported decisions during calendar year 1987. The purpose is not to identify hawks or doves, to find which judges, for example, are pro- or anti-labour, or to construct indices of liberalism or whatever; rather, the aim is to develop a general statistical description of the Manitoban Court of Appeal in the late 1980s. Throughout, comparisons will be made with data from U.S. State Supreme Courts; although the U.S. court structure and decisional style are quite different, the American figures provide an objective background against which the Manitoban experience can be discussed.

3 "Entre Nous" (1986) 44 Advocate 11 at 22.

I. THE COURT

THE MANITOBAN COURT OF APPEAL in 1987 consisted of seven judges. Three of them (Monnin C.J.M., Hall and Philp J.J.A.) were elevated to the bench from the Section 96 trial bench, this low proportion distinguishing the Manitoban Court from, for example, the Albertan Court of Appeal, on which a majority of the judges were so elevated. The "average" Manitoban appeal judge in 1987 had 9.3 years of appellate experience. Almost half of the Manitoban court in 1987 had served on the appeal bench for five years or less, and an equal number for ten years or more, creating an interesting balance between experienced senior judges and recently appointed junior judges. Whether there are significant differences in statistical terms between the decisions of these two groups will be addressed later.

TABLE 1:
Judges of the Court of Appeal of Manitoba, 1987

Name	Appointed	Elevated From s. 96 Trial Court
Monnin	1962	yes ⁴
Hall	1971	yes ⁵
O'Sullivan	1977	no
Huband	1980	no
Philp	1983	yes? ⁶
Twaddle	1985	no
Lyon	1986	no

In some provinces, judges of the Section 96 trial court sit from time to time as *ad hoc* judges of the Court of Appeal.⁷ On the basis of the reported cases, this practice would seem to be extremely unusual in Manitoba: only one reported case includes a single *ad hoc* judge as a member of the panel, and he did not deliver the decision of the court.⁸ Even sentence appeals are always decided by a three-judge panel of full-

4 Appointed to the Queen's Bench in 1957 and to Chief Justice of the Court of Appeal in 1983.

5 Appointed to Queen's Bench in 1965.

6 Appointed to County Court in 1973.

7 But see, Sinclair J., "Structural Reform: The Creation of Provincial Supreme Courts: A View From Alberta" [1988] 31 Crim. L.Q. 43 *passim*.

8 *Chapman Estates v. O'Hara*, (1987), (1988), 49 Man. R. (2d) 101 (C.A.).

time appellate judges, unlike the practice in Alberta where sentence appeals panels routinely include two *ad hoc* judges.⁹

II. THE DECISIONS

THE MANITOBAN COURT OF APPEAL in the late 1980s hands down about 400 decisions a year.¹⁰ Like other provincial courts of appeal, the Manitoban court does not have the Supreme Court's luxury of deciding what to decide,¹¹ but must give all comers their right to appeal, however casually exercised. Application for leave to appeal to a provincial court of appeal is normally required only for appeals in a limited category of cases, such as the decision of some provincial tribunals, or appeals from conviction for a provincial offence, or Crown appeals from sentence.¹² None are a large component of appeal court workload. The Supreme Court of Canada since the 1974 reforms is close to the "total discretion" side of the docket control continuum, but the Manitoban Court of Appeal must be considered very close to the "no discretion" extreme. As a consequence, many appeal decisions are routine, but even routine decisions consume court time and demand judicial attention. Now, as compared with a few decades ago, a court of appeal is a busy place. On the basis of figures from the registrars of the provincial courts of appeal, summarized in Table II, it would seem that the Manitoban Court of Appeal is close to the national average for workload per judge, well above that of the Atlantic provinces, but below the heavy caseload provinces of Ontario, Quebec, and Alberta.

9 *Supra*, note 7.

10 Numbers by telephone from Office of the Registrar of the Court of Appeal in Winnipeg (January, 1989).

11 There is a critical difference between appeal courts that control their own dockets and those that must take all comers; Bushnell discusses Supreme Court of Canada control of its own docket in "Leave to Appeal Applications to the Supreme Court of Canada" (1982) 3 Sup. Ct. L. Rev. 383 and (1987) 9 Sup. Ct. L. Rev. 467.

12 For a more complete statement of provincial appellate jurisdiction, see W. K. Zimmer, "The Appeal Process," in J. E. Pink and D. Perrier, ed., *From Crime to Punishment* (Toronto: Carswell, 1988).

TABLE 2:
Caseload and Civil/Criminal Breakdown for Canadian Provincial Courts
of Appeal¹³

Province	Judges ¹⁴	Civil cases	Criminal cases	Total cases	Civil as %	Cases per J.A.
B.C.	11	399	265	664	60.1	60.4
Alberta	10	360	840	1,200	30.0	120.0
Saskatchewan	7	224	297	521	43.0	74.4
Manitoba	6	161	245	406	39.7	67.7
Ontario	15	265	1,211	1,476	18.0	98.4
Quebec	16	955	316	1,271	75.1	79.4
New Brunswick	6	103	58	161	64.0	26.8
P.E.I.	3	45	24	69	65.2	23.0
Nova Scotia	7	101	146	247	40.9	35.3
Newfoundland	4	38	40	78	48.7	19.5
Total	85	2,651	3,442	6,093	43.5	71.7

Table II shows the number of cases decided by multi-judge panels (almost always three-judge panels) for each province's court of appeal in a twelve-month period;¹⁵ that is, it does not include chambers decisions by a single judge. Because some cases are more important and more complex than others, numbers are of course only part of the story, and not necessarily the most important part; and the numbers themselves should be taken with a grain of salt, especially for the high-volume provinces, because the criminal figures may well include a high proportion of relatively routine sentence appeals.¹⁶ The numbers

13 All figures are for the 1987 calendar year, except those for New Brunswick, which cover the 1988 fiscal year, and for Prince Edward Island and Newfoundland, which reflect the 1988 calendar year.

14 Nonsupernumerary appeal judges of 1985 (Russell, *supra*, note 3 at 291).

15 It should be noted that the twelve-month period is not identical for all ten provinces. For Newfoundland and Prince Edward Island, the information was available only for the 1988 calendar year, and for New Brunswick the figures that were provided were for the fiscal year 1987-1988; for all other provinces, the numbers are for the 1987 calendar year. This is as close as it was possible to come to strictly comparable figures, and the time periods are close enough that they can be taken as strongly indicative.

16 A study of the Ontario Appeal Court caseload for selected months over the past five years indicated that over eighty per cent of the Ontario appellate criminal caseload was made up of sentence appeals: C. Baar *et al.* "In the Twinkling of an Eye: The Ontario Court of Appeal and Speedy Justice," (Paper presented at the General Meeting of the Canadian Law and Society Association and Learned Societies, 1989).

do have some value, however, as a crude indicator of how many files each year flow over the desk of the typical appeal judge in each province.

The numbers give good reason to think that the caseload of the provincial courts of appeal collectively are rising; Peter Russell's book indicates the provincial appellate courts as deciding between "four and five thousand" cases per year¹⁷ earlier in the 1980s, and the number has now risen to just over six thousand.

406 decisions were handed down by the Manitoban court of Appeal between 1 January and 31 December, 1987;¹⁸ of these, 104 panel decisions (and nine chambers hearings on applications) were subsequently reported in one or more of the standard law reports.¹⁹ Because the reports make no real distinction between decisions reserved for full written judgments and "memoranda of judgment",²⁰ no attempts will be made to separate these two categories in the discussion that follows.

Obviously, not every decision is reported, and 104 reported cases from a universe of 406 indicates a reporting rate of about one quarter. The question that arises is: on what grounds can one treat reported cases, as opposed to all decisions both reported and unreported, as a meaningful sample for analysis? The question can be answered on two levels. First, reported cases are selected by the reporting services, because they are, by virtue of the legal issues raised or the arguments developed, more important and more useful to the profession than the cases that are not reported. Secondly, the mere fact of reporting gives these cases special importance. Reported cases are more widely and conveniently available as raw material for lawyers, as a guide to trial judges, and as a contribution to legal interpretation for the benefit of appeal judges in other provinces.²¹ Unreported cases are of course of

17 P. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) 295.

18 The criterion for selection was the date the decision was delivered, not the date it was reported.

19 Sources consulted were: (1987) 42 Man. R. (2d) to (1988) 50 Man. R. (2d); (1987) 1 W.W.R. to (1988) 3 W.W.R.; (1987) 30 D.L.R. (4th) to (1988) 47 D.L.R. (4th); (1987) 42 R.P.R. to (1988) 47 R.P.R.; (1987) 4 R.F.L. (3d) to (1988) 15 R.F.L. (3d); (1987) 54 C.R. (3d) to (1988) 63 C.R. (3d); (1987) 29 C.C.C. (3d) to (1988) 39 C.C.C. (3d); (1986-7) 43 M.V.R. to (1988) 4 M.V.R. (2d); (1987) 22 C.R.R. to (1988) 31 C.R.R.; (1987) 38 L.C.R. to (1988) 44 L.C.R. In fact, there were only eight cases in the other law reports that were not in the *Manitoba Reports*, and only a single case that was not in either the *Manitoba Reports* or the *Western Weekly Reports*.

20 Lightly-edited *verbatim* transcripts of decisions delivered from the bench.

21 A reviewer pointed out that unreported decisions are in fact available and intricately indexed in the Great Library of the Law Society of Manitoba, but agreed that they "do not figure greatly or at all" in the work especially of senior members

great importance to the immediate parties, but with only the rarest exceptions, they have little impact on the development of the law.

III. DISCUSSION AND ANALYSIS

ONLY TWO REPORTED CASES WERE HEARD by a panel of five judges,²² and none by the full court of seven judges. 102 reported appeal cases were heard by three-judge panels, confirming Russell's observation that three-judge panels have become the norm for provincial courts of appeal.²³ This is consistent with the idea that appellate caseloads are high and rising, and that panels are the efficient way to deal with this:²⁴ a five- or seven-judge panel would take about twice the "judge-hours" that a three-judge panel would take to hear and decide any given case, the more so if we assume, as seems intuitively obvious, that the larger panel requires more time for deliberation among its members to reach a decision; therefore, in times of heavy caseload, large panels clearly represent an inefficient use of judicial resources. Presumably, the use of larger panels in Manitoba parallels that of other provinces. Five-judge panels are used for the most important cases, specifically including cases when a lawyer applies to the court intending to argue that a previous decision of the court should be overruled. On the basis of reported cases, it would seem that departures from three-judge panels are now very unusual in Manitoba, as they are in other provinces as well.

The composition of the panels was varied. The 102 reported decisions using three-judge panels were made by 34 different combinations of judges. The danger in breaking a collegial court into panels is that persisting groupings of judges may develop growing differences in decision-making style or legal interpretation, and this is one reason why many American state supreme courts have resisted the practice.²⁵ In Manitoba, however, the danger seems remote from the actual performance of the Court of Appeal, because the panels in reported cases do not contain persisting groupings of judges.

of the profession, who are presumably over-represented before the Court of Appeal. In 1987 reported cases, appeal judges cited fewer than half a dozen unreported cases.

22 *Re Sections 193 and 195.1(1)(c) of the Criminal Code* (1987), (1988) 49 Man. R. (2d) 1 (C.A.), and *John Deere Ltd v. Firdale Farms* (1987), (1988) 50 Man. R. (2d) 45 (C.A.).

23 *Supra*, note 17 at 295.

24 R. L. Stern, "Remedies for Appellate Overloads: The Ultimate Solution," (1988) 72 *Judicature* 103.

25 *Ibid.*

TABLE 3:
Reported Decisions of the Manitoban Court of Appeal, 1987

	Civil	Criminal	Total
Allowed	29	8	37
Dismissed	43	23	66
Total	72	31	103 ²⁶

As shown in Table III, the reported decisions included 31 criminal cases and 72 civil cases, while 37 appeals were allowed and 66 were dismissed. The success rate overall was 36 per cent (26 per cent for criminal and 41 per cent for civil cases); it makes no significant difference to these rates whether or not sentence appeals are included. This success rate is virtually identical to that of U.S. State Supreme Courts, where 35.5 per cent of appeals result in the reversal of the lower court decision.²⁷ As might be expected, reported decisions are not statistically typical of the total population. Civil cases are somewhat over-represented, making up 70 per cent of reported as against 60 per cent of actual cases. No information was available on the overall success rate or on the success rate of either criminal or civil appeals separately considered, although it seems reasonable to suppose that appellate decisions reversing trial decisions are inherently more reportable than decisions affirming them, and therefore that the reported cases may somewhat overrepresent success.

The Manitoban appellate caseload also differs from those of U.S. State Supreme Courts, where criminal cases average only 18.2 per cent of total cases,²⁸ well below Manitoba's 39.7 per cent. There is a rather surprising lack of uniformity among the Canadian appeal courts, with the figures again summarized in Table II. Only Quebec has a civil/criminal ratio like that of the U.S. state supreme courts. British Columbia, New Brunswick, and Prince Edward Island.E.I. also decide significantly more civil cases than criminal, while Alberta joins Ontario with an appellate caseload that predominantly is criminal. Manitoba falls very near the

26 Total does not include one reference case.

27 R. A. Kagan *et al.*, "The Evolution of State Supreme Courts," (1977) 76 Mich. L. Rev. 961 at 994. A comparable figure of 31.12 per cent is suggested as a 50-state average by B. M. Atkins & H. R. Glick, "Environmental and Structural Variables as Determinants of Issues in State Courts of Last Resort," (1976) 20 Am. J. Pol. Science 97 at 100-1.

28 Kagan *et al.*, "The Business of State Supreme Courts, 1870-1970" (1977) 30 Stan. L. Rev. 121 at 148.

appellate court average, with about three criminal appeals for very two civil appeals. Because a good number of these may well be sentence appeals, and because such appeals are often routine, these numbers may well overstate the prominence of criminal law within the Manitoban appellate workload, as distinct from caseload.

Of the 104 reported decisions, 54 (51.9 per cent) were unanimous; three were dissents in 25 cases (24.0 per cent), and concurrences in 35 (33.6 per cent).²⁹ Ten cases had both dissents and concurrences, five had more than one separate concurrence, and one had more than a single dissent; in all, there were 26 dissents and 42 concurrences. Separate opinions were slightly more likely for appeals that were allowed (12 dissents and 12 concurrences in 37 cases) than for appeals that were dismissed (14 dissents and 26 concurrences for 66 cases);³⁰ and more likely for criminal cases (12 dissents and 17 concurrences in 32 cases) than for civil cases (14 dissents and 25 concurrences in 71 cases). A single judge (Monnin C.J.M.) accounted for almost one half of the dissents, a second (O'Sullivan J.A.) for five, and two others (Hall and Huband J.J.A.) for three each. Every member of the court delivered at least one dissent. Only one member of the court (O'Sullivan J.A.) delivered as many as ten concurrences; three others made half a dozen or so.

Compared with the Canadian and U.S. Supreme Courts, the proportion of dissents and concurrences seems high. This is even more the case when it is taken into account that the statistical likelihood of dissent is greater where the number of judges is larger, meaning that three-judge panels in themselves are reason for a lower rate of dissent, even apart from such factors as potential dissenters encouraging each other or the "psychological pressures" of dissent within a small panel.³¹ Scholars³² suggest the personality, leadership and example of the chief justice as critical factors influencing whether a court will tend towards the individualism of separate judgments or the solidarity of consensual behaviour, which makes it significant that Manitoba's

29 The term "concurrence" as used here implies the explicit addition of discursive argument or citations to a decision of the court with which the judge is in agreement as to the outcome. It does not include that simple statement without additional comment indicating that a judge "concur" without the judge delivering the decision of the court.

30 The remaining four concurrences were for the single reference case that cannot be coded as either "dismissed" or "allowed."

31 B. M. Atkins and J. J. Green, "Consensus on the United States Courts of Appeals: Illusion or Reality?" ((1976) 20 Am. J. Pol. Science 735) for an intriguing argument suggesting that dissent rates on small-panel courts may seriously underestimate the degree of dissensus existing within that court.

32 I.G. Walker *et al.* "On the Mysterious Demise of Consensual Norms in the United States Supreme Court," (1988) 50 J. Pol. 378.

Monnin C.J.M. delivered twelve dissents and six concurring opinions in the 47 recorded decisions in which he took part.

TABLE 4:
Per Cent of Dissent and Concurrence in Western Courts of Appeal, 1987

	Manitoba	Sask.	Alberta	B.C.	West
Unanimous	51.9	85.3	88.8	76.9	78.5
Concurrence	24.0	5.4	1.7	13.7	9.2
Both concurrence & dissent	9.6	2.5	0.6	1.7	2.9
Dissent	14.4	6.9	9.0	7.7	9.4
Agreement Index	0.71	0.93	0.93	0.88	0.88

Both dissent and concurrence rates are at least twice as high for the Manitoban Court of Appeal as they are for the other three western Courts of Appeal, and unanimous decisions are much less frequent. If we think of a scale on which perfect agreement (all decisions are unanimous) scores 100, and perfect disagreement (every three-judge panel yields a decision, a concurrence and a dissent) scores 0,³³ then the Manitoban appeal court earns a score of 71, with the other three western Courts of Appeal scoring around 90. This is not by any means to imply that unanimity and perfect agreement are always desirable, or to suggest that dissents and concurrences cannot represent useful contributions to the law. The point is to measure the level of agreement, not to evaluate it. However one might choose to assess its merits or consequences, the fact is that the level of nonconsensual behaviour in the decisions of the Manitoban Court of Appeal is high compared to that of other courts of appeal in the same part of the country.³⁴

33 Since dissent is clearly a denial of agreement, the debatable point is how to count separate concurrences. One could suggest either that concurrence includes agreement as to outcome and that only dissents register disagreement (P.L. Dubois & P.F. Dubois, "Measuring Dissent Behaviour on State Courts" (1930) 13 *Polity* 147 at 152), or that a concurrence as to outcome could mask deep disagreement on the meaning and significance of relevant law (Stephens, "The Function of Concurring and Dissenting Opinions in Courts of Last Resort" (1952) 5 *U.Fla.L. Rev.* 394 at 396). This index takes the middle course, coding a separate concurrence as indicating half as much disagreement as a dissent.

34 It seems reasonable to assume, even in the absence of hard data, that cases involving dissents and separate concurrences tend to be over-reported, on the grounds that they signal the presence of important legal questions identified by disagreements within a court. These numbers therefore almost certainly overstate the degree of disagreement on all four of the western provincial appeal courts.

TABLE 5:
Appearances and Decisions in Reported Cases Manitoban
Appeal Judges, 1987

Judge	Recorded Case Appearances	Decision of Court	Dissents	Concurrences
Hall	35	11	3	6
Huband	56	20	3	5
Lyon	38	5	1	2
Monnin	47	15	12	6
O'Sullivan	48	14	5	10
Philp	42	14	1	5
Twaddle	49	24	1	8
<i>Ad hoc</i> judges	1	0	0	0
<i>Per coram</i>	1	—	—	—
Total:	316	104	26	42

Table 5 indicates the number of times that a judge appeared in the panel of a reported decision and also the number of times that the judge delivered the decision of the court or any judgment (including dissents and concurrences). This Table is not in any simple way a measure of either workload or merit. However, because recorded Court of Appeal decisions are a source of binding precedent for Manitoban trial courts and of persuasive precedent for the trial courts and appeal courts of other provinces, it does have some significance as a measure of probable impact. Over the twelve months, almost half of the recorded decisions of the Manitoban Court of Appeal were delivered by two judges (Huband and Twaddle J.J.A.). If a Manitoban appellate decision from this period is cited by another court, it is even odds that the words quoted will be the words of one of these judges.

The average reported decision of the Manitoban Court of Appeal is just over three pages long, and the median is just under three pages. One-fifth of all decisions are one page or less in length, and a further fifth are two pages or less. Again, this is similar to the experience of American State Supreme Courts, where "many" decisions are less than a page in length. Only one Manitoban Court of Appeal decision in thirty is over 10 pages long, and none exceeded 20 pages. The average reported case contains between two and three citations to authority. More than 40 per cent of all decisions have no citations to prior court cases, and almost 60 per cent have references to one or fewer; that is, the median number of judicial citations is 1. Only one case in twenty uses more than 10 citations, as compared with U.S. state Supreme

Courts where 54.1 per cent of all decisions cite 8 or more prior court cases.³⁵

Manitoban Court of Appeal decisions are shorter and use fewer citations with fewer citations per page than American appellate courts, where the average decision is over 6 pages long, with 14 citations. Table 4 provides parallel information on Manitoban appeal decisions for several categories of decision. Decisions allowing an appeal are 20 per cent longer and use 30 per cent more citations than decisions dismissing the appeal. This is what one would expect; a decision reversing the trial decision requires greater explanation (length) and greater justification (citations) in order to explain the error to lower courts and to indicate how it can be avoided in future. Dismissed appeals, on the other hand, require some statement of legal doctrine, but can be shorter because they call for less elaboration for the guidance of lower courts.

TABLE 6:
Average Length of Decisions and Average Number of Citations, by Category,
of the Manitoban Court of Appeal, 1987

Total Cases	Average Length	Average # of Cites	Cites per Page	Average age of cite	
All ³⁶	181	2.7	2.2	0.82	
Appeals ³⁷					
Allowed	37	3.5	2.8	0.81	
Dismissed	66	2.9	2.1	0.75	
Applications	9	1.2	0.6	0.47	
Dissents	26	2.5	1.8	0.72	
Concurrences	42	1.9	2.1	1.12	
Charter cases	11	3.6	2.2	0.82	
Type of law					
Criminal ³⁸	19	3.1	3.8	1.21	16.4
Private	29	3.3	2.8	0.85	30.4
Financial	12	2.8	1.7	0.58	30.4
Public	19	3.0	2.0	0.65	27.6

continued...

35 Kagan, *supra*, note 27 at 992.

36 Includes 26 dissents and 42 concurrences.

37 Adds up to only 103, because the single reference case could not be coded as "allowed" or "dismissed."

38 Cases involving young offenders are counted as family, not criminal.

Total Cases	Average Length	Average # of Cites	Cites per Page	Average age of cite	
Family ³⁹	18	3.5	1.6	0.46	7.4
Routine	6	1.7	0.5	0.29	5.7
Reference	1	8.5	13.0	1.53	5.6
Judges ⁴⁰					
Established	104	1.9	1.23	0.64	
Recent	67	3.3	3.04	0.93	

In addition to the "civil/criminal" distinction used by the Court of Appeal in its own statistics, Table 6 also breaks the cases into further categories according to the type of law that is involved. These categories are as follows. The first is "criminal law," including criminal prosecutions against individuals and against corporations, but excluding those criminal cases involving young offenders. The second is "private law," including civil suits of various kinds between natural and corporate persons, but excluding "financial" cases. The third is "financial law," breaking away from the second category a separate block of cases involving estates, bankruptcies, trusts, mortgages, and insurance cases. The fourth is "public law," including non-criminal cases to which a government official or agency acting in that capacity is a party; cases involving unions (2 instances) are also included. The fifth is "family law," including matrimonial cases (divorce, property settlements, maintenance, and custody) as well as criminal cases involving young offenders (7 examples). The sixth category is "sentencing" cases, broken out from other criminal cases because of their routine nature; and the last category is reference cases (with only a single example).

Because the overall reporting rate is rather low, it would not necessarily be correct to think of this as an accurate indicator of the workload breakdown of the Manitoban Court of appeal, although it is by definition the breakdown of significant workload if we equate significance with impact.⁴¹ It is striking how small are the differences in average length between the various types of cases, although criminal decisions use significantly more citations than average and family law cases significantly less. The average age of judicial citations is also indi-

39 *Ibid.*

40 Calculations exclude applications, but include Includes 26 dissents and 42 concurrences. Moreover, the total is 171, not 172, because of the single *per coram* decision.

41 That is, even if the cases were not necessarily or invariably the most important before they were reported, they became so by the act of being reported and thereby being made widely available to other judges and lawyers.

cated, and it is hardly unexpected that family law cases tend to use the most recent citations and private and financial law cases the oldest.

Concurring decisions average just under two pages in length, with slightly more than two citations per case. Some are very short, suggesting not so much the result of serious doctrinal or jurisprudential disagreements with the majority argument, along the lines of "right answer, wrong reasons," but rather something more like a footnote, adding a single legal point to the decision. About a third of them, however, are longer than many majority decisions with as many or more citations, and these suggest a more deep-seated level of disagreement despite achieving the same final outcome. Dissenting opinions tend to be slightly longer, around two-and-a-half pages with just under two citations each. This contrasts with the U.S. experience, in that state supreme court dissents are on average only half as long as majority decisions and stylistically "looser and more flamboyant" rather than tightly argued.

Merryman suggests that there are two different ways that an appeal court can use *per curiam*, or anonymous unanimous, decisions. The first is to serve the "equivalent functions" of a majority opinion; that is, to "state the final result of a long process of trial and appeal, instruct the lower court, the parties, their lawyers, and, through eventual publication, a more general audience, about the law, and establish a precedent...[; to] deal with applicable authorities and show how this decision relates to prior cases, statutes and doctrines." Such a *per curiam* decision stresses the court's unity by making the decision more than a single judge's opinion. Some of the early *Charter* cases by, for example, the Ontario Court of Appeal were *per curiam* decisions, and commentators have taken it as significant that the Supreme Court of Canada is able to achieve neither unanimity nor anonymity in its more recent decisions.⁴² Alternatively, *per curiam* decisions may be used "to dispose of relatively simple or noncontroversial questions; there is little conflict within the court, hence little patience with extended argument and little necessity to explain and document at length." Some judges have suggested to me in private conversation a third use of the *per curiam* device, implying such mutual accommodation in the conference room as to make single authorship inappropriate. The Manitoban Court of Appeal delivered only a single reported *per curiam* judgment in 1987,⁴³ and it was clearly an example of the second type, just over a page in length with no citations.

42 R. M. Elliot, "The Supreme Court and Section 1: The Erosion of the Common Front" (1987) 12 *Queen's L.J.* 277.

43 *Fedorowicz v. Manitoba* (1987), (1988), 49 *Man. R.* (2d) 88 (C.A.).

There do seem to be some differences between the style of recently appointed judges and that of established judges, using five years as the arbitrary point of division. Recent judges tend to deliver decisions that are 75 per cent longer, use two-and-a-half times as many citations and show half again the citation density of established judges. Recent judges are almost three times as likely to use positive law citations (that is, judicial notice of provincial or federal statutes and regulations) or academic citations (references to legal texts or journal articles) in addition to judicial citations. This might or might not be significant. It could be a question of socialization, of a transition period while lawyers adjust to a new legal role. It might be the case that new judges tend to use more citations, gradually developing a sparser and more economic style. Equally, it might simply be a question of different judicial personalities, in which case the decision-writing style of the recently appointed judges will persist and eventually become dominant. In this context, it seems relevant that recent judges are only half as likely to deliver separate (dissenting or concurring) opinions; in only 11.6 per cent of their appearances on a panel did recent judges deliver concurrences and in 2.3 per cent dissents, compared with 14.5 per cent and 12.3 per cent respectively for established judges. Individual style, and the interaction patterns that arise within a specified set of very strong personalities, cannot be overlooked in a court of just over half a dozen members.

Ten of the 104 reported panel decisions, and one of the nine applications,⁴⁴ raised *Charter* questions, including a single reference case concerning the *Criminal Code*.⁴⁵ The success rate of *Charter* appeals was very low; only one *Charter* appeal was allowed, and the *Charter* application failed as well.⁴⁶ *Charter* cases tend to be 20 per cent longer with twice as many citations as other cases. This is hardly unexpected, in that *Charter* cases often raise new or controversial questions and therefore require more explanation and justification, providing clear guidance to the trial courts. There were separate concurring opinions in all but two of the reported *Charter* cases, and multiple concurrences in two of them, but it is perhaps surprising that only a single reported *Charter*

44 *Klachefsky v. Brown* [1988] 1 W.W.R. 755, concerning an (unsuccessful) application for intervenor status in a *Charter* case.

45 *Re Sections 193 and 195.1(1)(c) of the Criminal Code*, *supra*, note 22.

46 Care should be taken in designating "winners" and "losers" in a field as complex and dynamic as *Charter* litigation. Gambitta argues that "litigation is an instrument often used to stimulate policy reform and social change. On occasion, lawsuits can achieve desired results even if they are unsuccessful in court" (Gambitta, "Litigation, Judicial Deference and Policy Change" (1981) 3 L. & Policy Q. 141).

case provoked a dissent,⁴⁷ and that not a single *Charter* decision was delivered *per curiam*.

IV. THE CITATIONS

HOW MANY CITATIONS ARE MADE by Manitoban appeal judges is one question; far more important is *what* they cite. Table 7 is a first step towards an answer, showing both the number of citations (and the percentage they represent of all citations), and the number of judgments (and the percentage of all judgments) containing one or more citations from that authority. These citation patterns are, of course, an attribute as much of the Manitoban bar as of the Court of Appeal Bench itself, especially in decisions made from the bench; but equally important in cases that are reserved, where the appeal bench is heavily dependent upon the case citations in the briefs presented to them. However, it is difficult not to assume that there is still an important judicial element involved. Presumably, judges select from the lawyers' arguments those authorities they find most convincing, while lawyers surely develop a feeling as to what citations of specific courts or of individual judges are most likely to carry weight and to be well received.

TABLE 7:
Number of Citations, and Number of Judgments Using Citations,
in Manitoban Court of Appeal Decisions, 1987

Authority	Number of Cites	As %	Judgments ⁴⁸	As %
FEDERAL COURTS				
Supreme Court of Canada	101	25.4	53	29.3
Federal Court of Canada	3	0.8	3	1.7
Total Federal:	104	26.2	56	30.9
PROVINCIAL COURTS OF APPEAL⁴⁹				
Manitoba	67	16.9	47	26.0
Ontario	26	6.5	18	9.9
Alberta	11	2.8	11	6.1

continued...

47 *Manitoba A. G. v. Groupe Quebecor* (1987) 47 Man. R. (2d) 187 (C.A.).

48 Includes 26 dissents and 42 separate concurrences.

49 "Court of Appeal" is used as generic term, although some provinces now use (for example, Nova Scotia), or previously used (for example, Alberta), the designation "Supreme Court, Appellate Division."

Authority	Number of Cites	As %	Judgments	As %
Saskatchewan	9	2.3	9	5.0
British Columbia	11	2.8	8	4.4
Nova Scotia	4	1.0	4	2.2
Quebec	2	0.5	2	1.1
New Brunswick	1	0.3	1	0.6
Total Appeal:	131	33.0	62	34.6
CANADIAN TRIAL COURTS				
Manitoba	18	4.5	14	7.7
Ontario	18	4.5	11	6.1
Others	32	8.1	20	11.0
Total Trial:	68	17.1	35	19.3
COMMONWEALTH COURTS				
Privy Council	13	3.3	10	5.5
Other English Courts	66	16.6	37	20.4
Others	0	0	0	0
Total Commonwealth:	79	19.9	40	22.1
UNITED STATES COURTS				
	12	3.0	8	4.4
TOTAL:		397 citations in 181 judgments		

Judicial citations in decisions of the Manitoban Court of Appeal are drawn from a range of sources, with the Supreme Court being referred to most often (just over 25 per cent of all citations) and the Manitoban Court of Appeal itself second (16.9 per cent). All other provincial courts of appeal combined are cited almost as often as the Manitoban Court itself, with the Ontario court leading the citation list and the three other western appeal courts also figuring prominently. Citations to British courts make up one-fifth of the cites (falling to one-sixth if we exclude Privy Council citations⁵⁰, and Canadian provincial trial courts account for one citation in six. This diversity contrasts strikingly with American state supreme courts, which refer to their own national Supreme Court less often and to their previous decisions almost three times as often, as does the Manitoban Court of Appeal.⁵¹

50 Privy Council citations before the patriation of final appellate authority to the Supreme Court in 1949 are separated because they constitute binding precedent for Canadian appeal courts – that is, decisions of a superior court to which the court's decisions could be appealed – while other United Kingdom authorities are examples of persuasive precedent.

51 This, of course, is hardly surprising, given the role of the Canadian Supreme Court as a court of general appeal on all matters of law, provincial as well as federal, and the fact that the Canadian criminal law largely is within federal jurisdiction.

As might be expected, different types of law tend to draw citations from different sets of authorities, as shown in Table 8. On the argument that, just as reported decisions are the Manitoban Court of Appeal's contribution to the great conversation of the Canadian common law, so their citation practices show what part of that conversation they are listening to, it seems useful to differentiate the citation patterns of various types of legal cases.

TABLE 8:
Authorities Cited, by Type of Case by the Manitoban Court of Appeal, 1987

	Cases	Cites ⁵²	% SCC ⁵³	% Man. C.A.	% U.K. ⁵⁴	% Other C.A.	Prov. Trial	% All Other
Criminal ⁵⁵	18	100	36.0	14.0	10.0	22.0	12.0	6.0
Private	26	103	22.3	15.5	32.0	15.5	10.7	3.9
Finance	15	58	12.1	12.1	17.2	19.0	32.8	6.9
Public	18	54	37.0	14.8	20.4	7.4	20.4	0
Family ⁵⁶	20	48	31.2	29.2	4.2	10.4	20.8	4.2
Routine	6	3	66.7	33.3	0	0	0	0
Reference	1	26	42.3	7.7	0	23.1	19.2	7.7
Charter	11	104	28.8	28.3	7.7	19.2	18.3	7.7
All Judgments								
	104	256	31.2	16.4	15.6	16.8	17.2	2.7
Dissent	26	47	29.8	2.8	29.8	8.5	12.8	6.4
Concurrence	42	89	22.5	15.7	13.5	19.1	20.2	9.0
All Opinions								
	181	397	28.7	16.9	16.6	16.1	17.1	4.5
Judges								
Recent	67	204	30.9	15.8	13.7	18.1	15.7	5.9
Established	104	192	26.9	18.2	14.5	18.7	18.7	3.1

As evidenced by the use of judicial citations, the Supreme Court of Canada's influence is most pronounced in criminal and family law (and in the single constitutional reference case), and least for private and financial cases. The Manitoban Court of Appeal cites itself most frequently in cases involving family law and public law, and least often in decisions involving criminal and private law. Other courts of appeal have their greatest impact on criminal law decisions, and their least ef-

52 Includes judicial citations in dissents and concurrences.

53 Includes decisions of Judicial Committee of Privy Council.

54 Excludes decisions of Judicial Committee of Privy Council.

55 Criminal cases involving young offenders are excluded from "criminal" and included in "family,"

56 *Ibid.*

fect for family and public law cases. United Kingdom citations (excluding Privy Council citations) are most frequent for private law, least frequent for family, public and criminal law cases. Finally, decisions of provincial trial courts tend to be cited most in financial and public law cases, and least in criminal cases. *Charter* cases use citations from a range of sources, primarily the Supreme Court, other courts of appeal, and prior decisions of the Manitoban Court of Appeal itself. None of these patterns are particularly surprising or counter-intuitive, although not all of them are obvious, and collectively they suggest that the Manitoban Court of Appeal draws its cues from a variety of sources. The very low citation rate for Supreme Court of Canada citations in private and financial law cases may be taken as supporting the *Advocate's* comment⁵⁷ about the role of the Supreme Court vis-à-vis major commercial cases, not just in the sense that such cases can no longer be appealed that high, but also in the sense that Supreme Court precedents play such a limited part.

A "popular" image of the common law, or at least one often encountered among undergraduates, is of discursive argument studded with citations to cases that took place before the Crimean War, and this image contributes to a certain scepticism about the utility of citations as serious explorations or explanations of contemporary law. Certainly there are a number of citations to well-aged authorities in Manitoban Court of Appeal decisions (23 of them date from before the most recent turn of the century, and the oldest to a case dating back to 1584,⁵⁸ but these account for only 5.8 per cent of all citations, and therefore can hardly be taken as typical. The median date for all citations is 1978, and only for United States and United Kingdom authorities does the median shift back significantly earlier.

It is surprising that trial court citations, for which the median citation date is 1977, tend to be somewhat older than appellate citations, whose median citation date is 1982. One would have expected the reverse. Presumably decisions are considered to be worth citing because they settle legal problems or aptly encapsulate legal doctrine; trial courts, the front line of judicial confrontation with new problems, contribute to this process. But almost by definition a trial decision that breaks new ground or deals innovatively with complex questions is likely to be appealed to a higher court, at which point an appellate panel would approve or improve or reject the trial court's proposed solutions, and then the greater weight and finality of the appellate judgment would make it the relevant citation. On this view, trial court

57 *Supra*, note 3.

58 *Heydon's Case* (1584) 76 E.R. 637, cited by Philp J.A. in his concurrence in *John Deere Ltd*, *supra*, note 22.

citations would tend to be recent ones, drawn from cases that have not yet been the subject of appellate reconsideration, and would suffer attrition as appellate decisions are registered. This seems obvious, but it does not capture the way that the Manitoban Court of Appeal cites trial court decisions. The median trial court citation is half a decade older than that of any Canadian appeal court. Many trial cites are accompanied by the phrase "as he then was," suggesting that the critical factor may have been the elevation and subsequent reputation of the specific judge, which would also explain the relative age of the citations.

V. SUMMARY OF FINDINGS

ON THE BASIS OF AN EXAMINATION OF 104 reported panel decisions and nine reported chambers applications from 1 January to 31 December 1987, one can make a number of generalizations about the general decision making practices of the Manitoban Court of Appeal. A short list of summary findings would be as follows:

1. The case load of the Manitoban Court of Appeal is about 400 cases per year, and about 25 per cent of Manitoban appellate decisions are reported in one or more of the standard law reports. Civil cases are slightly over-represented.
2. The overwhelming majority of Manitoban appellate cases are decided by a three-judge panel, and membership of the panels is constantly rotated; the use of trial judges sitting as *ad hoc* members of the Court of Appeal is extremely rare.
3. About three-fifths of the appellate case load is criminal cases (including sentence appeals), and the success rate of all reported appeals is 36 per cent, slightly higher for civil cases.
4. Compared with other provincial courts of appeal, the Manitoban Court of Appeal is close to the national average for caseload for each full-time judge and for the ratio of criminal cases to civil cases within that caseload.
5. About 85 per cent of all decisions are delivered from the bench; only one case in six is reserved for written judgment.

6. The average decision is just over 3 pages in length, and contains between two and three citations to authority; only about 3-5 per cent of all cases exceed 10 standard pages in length or contain 10 or more citations.

7. Just over one half of all reported decisions are unanimous.

8. The concurrency rate is 33.6 per cent, and concurrences tend to be shorter but as heavily cited as decisions of the court, making substantial rather than brief additional comments about the outcome.

9. The dissent rate is 24 per cent, substantially higher than that of other Western courts of appeal, and dissents tend to be almost as long and almost as heavily cited as majority decisions.

10. *Per curiam* decisions are extremely infrequent, there being only one reported case. On this very limited foundation, such decisions seem to be used for short and relatively routine cases.

11. Almost one half of the judges of the Manitoban Court of Appeal were appointed within the last five years, and there are suggestive but not conclusive indications that the decision-making style of recently appointed judges differs from the more senior judges in length, in citation practice, and in the frequency of dissents and separate concurrences.

12. *Charter* issues arise in about 10 per cent of reported appeal decisions, and *Charter* decisions differ from the general sample in having a much lower success rate. They tend to be longer and to have a much higher citation density than other decisions, and to be accompanied by many concurrences but very few dissents.

13. The Supreme Court of Canada is the most frequently cited judicial authority (one citation in every four), especially in criminal and family law cases; the Manitoban Court of Appeal itself is the second source of citations (one in six), especially in public and family law cases.

14. Other provincial Courts of Appeal receive one sixth of all judicial citations, and their influence seems most pronounced in criminal law cases.

15. The median date for citations to judicial authority by the Manitoban Court of Appeal in 1987 was 1978, meaning that more than half of the judicial citations were less than a decade old. More than 30 per cent of the citations were as or more recent than 1984.