A Tale of Two Courts: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada, 1970-1990[1]

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IN MAY, 1990, THE SUPREME COURT OF CANADA delivered its decision on the case of *R. v Lavallee*, reversing the decision of the Manitoba Court of Appeal.[2] Observers of the Court pointed out how this case broke new judicial ground, marking the first time that a Canadian appeal court had accepted the "battered woman syndrome" as a defence to a crime. However, as well as the important questions about the *content* of the case, there are also many questions about its *context*, about the background that it shares with the whole universe of Supreme Court decisions, and these must be known as well in order to assess the uniqueness and the impact of this particular decision.

For example, how frequently are decisions of the Manitoba Court of Appeal subjected to final appellate scrutiny by the Supreme Court? How often are other Courts of Appeal? How common is it for the Supreme Court to reverse provincial appeal courts in general, and the Manitoba Court of Appeal in particular? Is this frequency higher or lower for a criminal case? Is reversal less likely when the provincial appeal decision was unanimous, and more likely when it drew a dissent from one member of the panel (as was the case for *R. v Lavallee*)? Are some judges more likely, and others less likely, to be appealed? To be reversed? Are particular Supreme Court judges, or groups of judges, unusually ready, or unusually reluctant, to vote to reverse? Are Supreme Court judges elevated from Courts of Appeal more understanding and sympathetic, or more critical and demanding, than their colleagues appointed "from the street"? Is reversal more

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[2] For a discussion of the legal background to this case, see Lee Stuesser, "The 'defence' of 'battered woman syndrome' in Canada" (1990), 19 *Manitoba Law Journal* 195.

common now that the Supreme Court has shrunk its caseload to focus on more important cases; or is it less common now that the provincial Courts of Appeal are becoming larger and better organized and enjoy better services? To use the obvious metaphor: it may well be true that *R. v Lavallee* is an unusually important tree, but what does the forest look like?

This paper will examine on a statistical basis the record of the Manitoba Court of Appeal on those cases taken to the Supreme Court since the beginning of the 1970 term.[3] Although the record on appeal is one measure of judicial performance, any figures should be taken with a grain of salt. For one thing, judges (as individuals, or as members of panels) strive to reach the best decision under law for the specific case; looking "over their shoulder" at possible appellate review is and should be only a small part of this process. For a second, only a small part of the caseload is ever subjected to appellate review (for the Manitoba Court of Appeal, about 2%), and these cases represent neither a random nor a representative sample. For a third, the legal issues that engage judicial attention at the appellate level are seldom such that a reversed court or a dissenting judge can be said to be "wrong" in the way that it is "wrong" to say "two plus two equals five." A pattern of Supreme Court reversals of the decisions of a particular court of appeal does not mean that the performance of the court of appeal is unsatisfactory on some absolute scale; it could just as easily be suggested that it is the performance of the Supreme Court that is problematic. The Supreme Court is not supreme because it is necessarily right, but rather it is supreme because it has the final say.

These qualifiers notwithstanding, one measure of the performance of a provincial Court of Appeal, useful but by no means exhaustive, is the fate of its decisions subsequently appealed to the Supreme Court of Canada. Whether the success rate of these appeals is seen as an objective standard of correctness, or as a measure of the status of the court in the eyes of the highest judicial authority, or simply as an indication of the extent to which the standards and priorities of that provincial Court of Appeal are "in sync" with those of the Supreme Court, the bench and the bar of the province attach strong and

[3] The date is an arbitrary one, convenient because it gives a span of two full decades, and because it covers the complete period from the beginning of the Fauteux Court in 1970 to the end of the Dickson Court in 1990.

practical significance to the record on appeal; Gibson[4] reports that one of the factors leading to the resignation under pressure of Prendergast C.J.M. in 1944 was the blow to the Court's credibility when "every one of the six cases appealed to the Supreme Court of Canada from the Court of Appeal in 1942 and 1943, was reversed."

As well as being directly upheld or reversed on appeal, the decisions of a provincial Court of Appeal may be subject to Supreme Court review by favourable or unfavourable citation in the course of deciding a different case. Indeed, the Supreme Court can *overrule* a Manitoba Court of Appeal decision in the course of delivering a judgment on an appeal from (say) the Ontario Court of Appeal. It is customary for the decision of an appeal court to indicate the line of prior judicial decisions being followed, as well as any prior decisions that are being distinguished or "not followed." An indication from the Supreme Court that a provincial precedent is not to be followed has the same practical impact as reversal on direct appeal (except, of course, for the immediate parties, who may derive small satisfaction from such vindication). Such collateral reversal is not considered in this paper.

I. Appeals to the Supreme Court from Provincial Courts of Appeal

A. Success rates

To set the general parameters: between October 1970 and December 1989, the Supreme Court of Canada handed down decisions on 1660 appeals[5] from provincial appeal court decisions, these constituting 84.8% of the Supreme Court's reported caseload over the period.[6] The Supreme Court allowed the appeal[7] 737 times.[8] This represents a

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[4] Dale and Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba, 1670-1970* (Winnipeg: Peguis Publishers, 1972), p.281.

[5] Figures based on all cases reported in *Supreme Court Reports*.

[6] Appeals from various federal courts account for 13.0% of the Court's workload; *per saltum* appeals from the provincial superior courts 0.7%; rehearings 0.6%; appeals from federal boards 0.6%; and reference cases 0.3%.

[7] Appeals "allowed in part" are counted as "allowed".

[8] This figure clearly understates the Supreme Court's supervisory and corrective role, because it is possible for the Court to uphold the provincial appeal court decisions but articulate significantly different reasons. For example: in *A-G Quebec v. Protestant School Boards* [(1984), 10 D.L.R., (4th) 321] the Supreme Court upheld the decision of

success rate of 44.4% or, to look at it from the other side, a 55.6% approval rate for provincial appellate decisions.

Table 1
Success Rate of Appeals From Provincial Courts of Appeal
Supreme Court of Canada; September 1970 to December 1989

Provincial C.A. Appealed from	Total appeals	Success Rate 1970-1989	Success Rate 1970s	Success Rate 1980s
British Columbia	237	37.6%	39.8%	34.6%
Alberta	167	40.7%	47.7%	32.9%
Saskatchewan	84	54.8%	62.0%	44.1%
MANITOBA	115	50.4%	51.9%	49.2%
Ontario	459	38.3%	41.5%	34.2%
Quebec	436	49.3%	48.3%	50.8%
New Brunswick	59	61.0%	61.1%	60.9%
Nova Scotia	70	52.9%	54.8%	50.0%
Prince Edward I.	8	25.0%	0.0%	66.7%
Newfoundland	25	40.0%	36.4%	42.9%
ALL C.A.'s	1660	44.4%	46.5%	41.7%

Note: * includes "allowed in part" as "allowed"

This reversal rate seems somewhat higher than might have been anticipated. Many U.S. state supreme courts, for example, reverse

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the Quebec C.A. but passed over in silence that Court's detailed argument about the critical distinction between limiting and denying a right; and in *Black v. Law Society of Alberta* [(1989), 58 D.L.R. (4th) 317] the Supreme Court upheld the Alberta Court of Appeal but shifted the focus of the case from Section 2 (freedom of association) to Section 6 (mobility rights). There has been no attempt in this analysis to code for this more subtle type of supervision.

trial courts about one third of the time,[9] although there seems to be a slightly higher success rate for Canadian provincial appeal courts.[10] It is somewhat disconcerting to discover that the decision of the highest court in the province, upon reconsideration by a higher court that is itself composed almost exclusively of former provincial appeal court judges, is reversed almost as often as it is sustained. If the court system is viewed as a manufacturer of judicial decisions, these figures suggest either a substandard production process or an unreasonably perfectionist quality control system. Such reflections, however, miss the importance of a screening process that allows the court to control its own docket, and understates the role of the highest court in an effective judicial hierarchy. The U.S. Supreme Court, by way of comparison, alters the lower court decision half again as often: between 1953 and 1979, a stunning 66.6%.[11]

Reversal does not, of course, reduce simply to "reversal for error," let alone reversal for simple error - few Supreme Court decisions take the form of a sharp admonition to a Court of Appeal for having "goofed." The balance within a judicial decision between law-interpretation and law-making shifts toward the latter as one moves up the appellate hierarchy, and reversal may often indicate only disagreement as to the optimal modifications of legal doctrine called for by changing circumstances, or an alternative choice among several defensible positions in the interests of national uniformity. Still and all, it can hardly be suggested that judges like to be reversed on appeal; their intention surely is to render the best decision under the law, which is at the same time one that will hold up on subsequent appeal. The various courts of appeal achieve this to widely different degrees.

The reversal rate for appeals from the Manitoba C.A. is higher than the average for all provinces, but only slightly higher. If only one-tenth of the successful appeals had been dismissed, then the Manitoba

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[9] See e.g. Kagan *et al*, "The Evolution of State Supreme Courts," (1978) 76 *Michigan Law Review*, at 994; and Burton M. Atkins & Henry R. Glick, "Environments and Structural Variables as Determinants of Issues in State Courts of Last Resort" (1976), 20 *American Journal of Political Science*, at 100-101.

[10] Generalization based on recent numbers from the Registrars of the Provincial Courts of Appeal for those provinces (B.C., Alberta, Ontario and Quebec) for which the information was readily available.

[11] Burton Atkins, "Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States," (1990), 24 *Law and Society Review*, at 87-88.

success rate would have parallelled exactly that of the provincial courts of appeal considered as a whole. Indeed the clustering toward the centre is an important feature of the numbers; only the low success rates for appeals from British Columbia, Ontario, Newfoundland, and Alberta, and the high success rates for appeals from New Brunswick and Saskatchewan, stand out from the norm as requiring explanation. Manitoba is not one of those provinces whose appeal courts are reversed two times out of five (like British Columbia, Ontario, Newfoundland, and Alberta), nor one of the provinces whose appeal courts are reversed substantially more than half the time (like Saskatchewan, New Brunswick, and P.E.I.), but falls with Quebec into an intermediate group between these two extremes.

The overall reversal rate has been trending slightly downward, as also shown in Table 1. The success rate for appeals from provincial courts of appeal in the 1970s was 46.5%; in the 1980s, it was only 41.7%. Saskatchewan, Alberta, British Columbia and Ontario have led the improvement, while Quebec and Newfoundland (and Prince Edward Island, although the numbers are too small to be significant) are reversed significantly more often in the 1980s than in the 1970s. Manitoba is one of the provinces (New Brunswick is the other) for whom the reversal rates remain the same for both decades.

This decline is counter-intuitive. It might have been expected that the dramatic reduction in the annual caseload of the Supreme Court from 130 per year in the 1970s to 80 per year in the 1980s - the result of the expansion of the Court's discretionary jurisdiction - would push reversal rates up by screening out routine (and therefore routinely dismissed) appeals by right. This has not been the case.

B. Frequency of Appeals

What does distinguish Manitoba strikingly but rather curiously, especially for the last third of the period considered, is the **frequency** of appeals. Manitoba has less than one-twentieth of the Canadian population, yet for each term since the proclamation of the *Charter* she has accounted for one-twelfth to one-tenth of all Supreme Court appeals from provincial Courts of Appeal. Picking the 1986 census as providing a convenient mid-point, one can compare the number of appeals to the Supreme Court with the provincial population; over the eight years, the provinces have generated 22.2 appeals per million people, or very close to three appeals per million per year.

Table 2
Number of Appeals and Provincial Population
Provincial C.A. Appeals to Supreme Court of Canada
September 1982 to December 1989

Province	Provincial Population*	Total Appeals	Appeals/ million
MANITOBA	1063.0	48	45.2
British Columbia	2883.4	90	31.2
New Brunswick	709.4	19	26.8
Nova Scotia	873.2	23	26.3
Saskatchewan	1009.6	26	25.8
Alberta	2365.8	59	24.9
Prince Edward Island	126.2	3	23.8
Quebec	6532.5	132	20.2
Newfoundland	568.3	11	19.4
Ontario	9101.7	148	16.3
ALL PROVINCES:	25233.1	559	22.2

Note: *population = population in thousands, 1986 census

As shown in Table 2, Manitoba stands out with an exceptionally high frequency of appeal, double the all-province figure and half again that of any other single province. What is curious is that there is no apparent correlation between the frequency of appeals (Table 2) and the success rate for those appeals (Table 1), as one would expect if the numbers were related to the perceived performance. Quebec has one of the lowest figures for appeals per million, but one of the highest reversal rates; British Columbia has a very high number of appeals per million, but one of the lowest success rates for appeals. Only Ontario's figures clearly support a performance-related hypothesis, suggesting a court that is seldom appealed because it is seldom reversed.

The large number of appeals coming to the Supreme Court from Manitoba might reflect an unusually high proportion of difficult or controversial cases arising within that province. There is no *a priori*

reason to suggest that Manitoba's caseload might claim such a distinction, but neither is there preemptive reason to reject the possibility out of hand; problem cases and the first appellate resolution of new legal dilemmas must arise somewhere, and Winnipeg is as likely as anywhere else. However, if this were the case, then we would expect these cases to be contentious in the Court of Appeal, and to remain so in the Supreme Court - that is, they would tend to be characterized by a lower than usual degree of judicial consensus within the panel. This does not appear to be the case. Only 12.5% of Supreme Court decisions on Manitoba appeals since 1982, as against 18.2% of decisions on appeals from all other provinces, drew dissents from one or more Supreme Court judges; only 16.7% of Manitoba appeals, as against 20.2% of all other provincial appeals, were non-unanimous. Although 31 of the 48 Manitoba cases (64.6%) were non-unanimous at the appeal court level, only eight of them were similarly treated by the Supreme Court, despite the fact that the larger panel size of the higher Court makes dissents both mathematically and behaviourally more likely.[12]

Because the Supreme Court now has considerable discretionary control over its own docket by means of its leave jurisdiction, there are two obvious ways this high proportion of Manitoba appeals could be generated: *first*, an unusual number of dissatisfied litigants might pursue the question to the Supreme Court by means of the application for leave; or *second*, the Supreme Court might grant such applications (whatever their relative frequency) at a higher than average rate. Intriguingly, neither appears to be the case. Bushnell's figures[13] do not support the hypothesis of disproportionate numbers of leave applicants from Manitoba for any of those years for which he provides statistics, the number of applications per 100,000 population being only modestly above the average. The success rate for these applications is similarly unexceptional, modestly **below** average.

If the disproportionate presence of Manitoba appeals on the Supreme Court docket does not arise from the Supreme Court's discretionary leave jurisdiction, then it must be driven by appeals by right rather than appeals by leave. One of the circumstances that

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[12] See e.g. Burton M. Atkins & Justin J. Green, "Consensus on the United States Courts of Appeal: Illusion or Reality?" (1976), 20 *American Journal of Political Science*, at 375.

[13] S.I. Bushnell, "Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance," (1982), 3 *Supreme Court Law Review* at 479; updated annual comments appear as well in (1986), 8 *S.C.L.R.* at 383, (1987), 9 *S.C.L.R.* at 467, and (1988), 10 *S.C.L.R.* at 361.

creates an appeal by right is a dissent on a question of law in a criminal case on the provincial court of appeal,[14] and this may well be the critical factor because the Manitoba Court of Appeal delivers an unusually high number of dissents.[15] If this is the reason, then Manitoba's high rate of dissensual behaviour has the secondary consequence of subjecting the Court to an unusual degree of scrutiny by the highest court in the land, although the comparable dissent rate of the Quebec Court of Appeal[16] has no similar effect. This increased level of supervision does not, however, push up the rate of reversal; quite the reverse. The success rate for appeals from a Manitoba decision with a dissent is 44.7% (and since 1982 an even lower 28.6%), compared with 57.8% (since 1982, 64.7%) for appeals from a unanimous panel.

C. Supreme Court Panel Sizes

Many of the Manitoba appeals (but an unusually high 54% of Manitoba appeals since 1982) were decided by the minimum Supreme Court panel of five judges, this group including six of the most recent ten cases. This is unexceptional, as 42.9% of all appeals from provincial courts of appeal (but only 37% of such appeals since 1982) were resolved by the minimum panel. The average size of a panel for a Manitoba appeal was 6.6 (since 1982, 6.1), identical to the all-province average. Presumably smaller panels are used for the less contentious or critical cases, and larger panels for those that the Supreme Court deems more important. If so, the pattern seems consistent with the idea that Manitoba's high dissent rate allows cases to rise to the Supreme Court as appeals by right that otherwise would not have survived the discretionary leave process, these cases being assigned in disproportionate numbers to the smallest possible panel. Clearly, however, the situation is more complex than this, because the average size of the Supreme Court panel on a recent Manitoba appeal which included a dissent is not significantly smaller (actually, fractionally larger: 6.54 as against 6.45) than the average size of a panel for an appeal that did not involve a dissent.

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[14] See Section 41 of *The Supreme Court Act* SC 1974-75-76, c.18, s.5; and s.618 of the *Criminal Code* SC 1974-75-76, c.105, s.18. Note that by this same section of the *Code* there is also an appeal by right where a Court of Appeal overturns an acquittal.

[15] See McCormick, "Caseload and Output of the Manitoban Court of Appeal," (1990) 19(1) *Manitoba Law Journal*, at 40-41 and especially Tables 4 & 5.

[16] Comment based on research in progress.

There does seem to be a modest correlation between outcome and Supreme Court panel size for the Manitoba cases, with 48.9% of the minimum panels allowing the appeal (compared with 46.1% for all provincial appeal courts) and 50.7% of the larger panels (compared with 40.5%). If there is indeed a strong correlation between panel size and the perceived significance of the legal issues in the case, the implications are intriguing, because the Manitoba Court of Appeal is reversed more often than average on major appeals, but not on the minor appeals. Equally intriguing, this particular relationship has turned around with the last decade; since 1982, the Manitoba Court is reversed more often than average on lesser appeals, but no more often than average on major appeals. If this pattern continues, then this would be a better indication than a slight reduction of overall reversal rates that the performance of the Manitoba Court of Appeal had, in the eyes of the Supreme Court of Canada, taken some significant turn for the better. Of course, the numbers involved are rather small, and it would perhaps be misleading to attach too much weight to them.

D. Charter Appeals

The enactment of the Canadian Charter of Rights and Freedoms[17] has dramatically transformed the workload and the importance of Canadian courts and especially of appeal courts, but it has dominated neither appeals from provincial courts of appeal in general nor Manitoba appeals in particular.[18] There have been ninety-eight Charter appeals from provincial Courts of Appeal as of December, 1989. Seven of these were from the Manitoba Court of Appeal - delivered, as it happens, by seven different judges.

In general, Charter appeals are less often successful than other appeals. For all provinces other than Manitoba, the Charter success rate of 29.7% is one third less than the post-1982 non-Charter success rate of 43.3%. For Manitoba, however, there is no such effect; the

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[17] *The Canadian Charter of Rights and Freedoms* was enacted as Schedule B to the *Canada Act 1982* (U.K.) c.11, which came into force on April 17, 1982.

[18] There is some room for disagreement as to what does and what does not count as a Charter case. With their permission, I have used the lists recently and meticulously drawn up by F.L. Morton, Peter H. Russell and M.J. Withey for their paper on "The Supreme Court's First One Hundred Charter Decisions: A Statistical Analysis" which was presented at the 1990 annual meeting of the Canadian Political Science Association. Our figures vary slightly because what they count as a single Supreme Court decision sometimes resolves appeals from more than one provincial C.A.

Charter success rate of 42.9% remains close to the non-Charter success rate of 46.3%.

These rates vary significantly from one provincial court of appeal to another. British Columbia can be considered something of a lead court; it is almost never reversed in Charter cases, and its decisions therefore provide a useful early warning of the subsequent direction of Supreme Court decisions. At the other extreme, the Quebec Court of Appeal is frequently reversed, and therefore provides a much poorer indication. Manitoba ranks, for Charter as for non-Charter appeals, near (and slightly below) the middle; the success rate of appeals from its decisions is neither unusually high nor unusually low. The numbers involved are, of course, small; should the Manitoba Court of Appeal be upheld on its next few Charter appeals, it would be close to or slightly above the all-province trend.

E. Criminal, Public and Private Law Appeals

All appeals are not of a kind, there being an obvious distinction between criminal appeals, private law appeals, and public law appeals.[19] This distinction divides total appeals roughly 40-40-20 (public non-criminal cases being the smallest segment), although within the last decade the balance is swinging and the number of private law appeals heard by the Supreme Court is sharply declining.[20]

The Supreme Court allows criminal appeals 35.2% of the time, public law appeals 49.2% of the time, and private law appeals 50.1% of the time. This suggests that the long-term decline in Supreme Court reversal rates is partly illusory, as much an artefact of the shifting proportions of the types of appeal as a trend of real substance - that is, since reversal rates for criminal appeals have always been lower than for other appeals, the rise in the proportion of criminal appeals from 28% in the 1970s to just under 47% since 1982 (and the concomitant slide of private law appeals from 49% of caseload in the 1970s to 28% in the 1980s) would of itself reduce overall reversal rates. That success rates within specific broad areas of law have

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[19] By "public law" I mean non-criminal cases between government agencies or departments and natural persons or commercial corporations. This is, of course, a stipulative definition - in some usage, the term "public law" includes criminal law as well, but the further subdivision is more useful for present purposes.

[20] See e.g. Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto, New York and London: Carswell/Methuen, 1987), Ch.2.

remained roughly constant[21] over two of the most dramatic decades in Supreme Court history is itself a finding of some significance.

For the provincial courts of appeal considered together, criminal appeals are only two thirds as likely to succeed as non-criminal appeals, but this ratio is very uneven from one province to another, as shown in Table 3. If being upheld or reversed on appeal is some crude indicator of judicial ability, then it is clear that excellence in the various types of law does not come in a single composite package.

Table 3
Success Rates, Criminal and Non-criminal Appeals
Provincial C.A. Appeals to Supreme Court of Canada
September 1982 to December 1989

Province	criminal number	criminal allowed	public number	public allowed	private number	private allowed
B.C.	111	37.2%	53	34.0%	71	40.8%
Alberta	78	33.3%	30	46.7%	59	47.5%
Sask.	29	31.0%	20	65.0%	35	68.6%
Manitoba	56	30.4%	26	61.5%	33	75.8%
Ontario	186	23.7%	85	51.8%	188	46.8%
Quebec	93	58.4%	136	49.3%	207	49.8%
N.B.	20	50.0%	21	71.4%	18	61.1%
N.S.	20	65.0%	16	37.5%	34	52.9%
P.E.I.	2	50.0%	2	0.0%	4	25.0%
Nfld.	9	66.7%	10	30.0%	6	16.7%
ALL CA's	606	35.1%	399	49.1%	655	50.1%

For few provinces is the difference more striking than for Manitoba. Criminal cases from the Manitoba Court of Appeal are **less** likely to succeed than similar appeals from any other provincial C.A. except Ontario; but private law appeals from that court are **more** likely to succeed than those from any other court of appeal. A non-criminal

[21] The success rate from criminal appeals declined from 35.4% in the 1970s to 35.0% in the 1980s; for public law appeals, from 50.5% to 47.8%; for private law appeals, from 51.0% to 48.0%.

Manitoba appeal is two and a half times as likely to succeed as a Manitoba criminal appeal, and a comparable pattern can be observed for both Saskatchewan and Ontario. At the other extreme, a Newfoundland non-criminal appeal is less than half as likely to succeed as a Newfoundland criminal appeal, another disparity of baffling dimensions; the fact that it shares with Nova Scotia a criminal reversal rate almost double the national average may suggest a systemic weakness in the administration of criminal justice in the region. The Manitoba pattern is also consistent (even increasing) over time; of the first ten non-criminal appeals since 1982, seven were successful and of the most recent[22] ten, nine were successful.

One assumes that differences so striking must be noticed by the legal profession, at least subliminally. For example, a Manitoba Court of Appeal citation in a criminal case must be taken as having some considerable weight, because of the demonstrable and striking extent to which that Court and the Supreme Court of Canada find themselves in harmony. If the Manitoba Court of Appeal has spoken on some question of criminal law that has not yet reached the Supreme Court, there are strong empirical grounds for thinking the Manitoba opinion is unlikely to be repudiated and therefore furnishes a useful, even a powerful, precedent. Conversely, on non-criminal appeals, there is a statistical basis for attaching low precedential weight to a Manitoba appeal decision, given the frequency with which that court finds itself out of step with subsequent Supreme Court doctrine.

It is harder to find objective grounds for this striking disparity. The Manitoba Court of Appeal is very similar to the other provincial Courts of Appeal in the proportion of its members who have prior trial bench experience, the number running around half. It differs only in the rather short length of this trial bench experience for some of its members, which is on average considerably less than that of many other provinces. This does not seem to constitute even suggestive evidence of unusual competence in criminal trial matters, or of untypical weakness in non-criminal matters.

II. The Manitoba Appeal Bench and Appeals to the Supreme Court

Because *per coram* decisions are unusual in Manitoba, each decision of the Manitoba Court of Appeal was delivered by a specific judge. This means that each member of the Court has an objective and

[22] That is, recent as of December 1989.

public personal "track record" on appeals to the Supreme Court of Canada, although for only a few of them are the numbers very large. This information is presented in Table 4.

Table 4
Results of Appeals by Name of Judge Delivering Decision
Manitoba C.A. Appeals to Supreme Court of Canada
September 1970 to December 1989

Name of judge	Total Appeals	Allowed	Dismissed
Hall	22	11 [3/4/4]	11 [8/1/2]
Matas	18	12 [3/2/7]	6 [5/0/1]
Monnin	17	6 [2/2/2]	11 [5/4/2]
Freedman	16	6 [2/1/3]	10 [7/3/0]
O'Sullivan	11	7 [2/3/2]	4 [4/0/0]
Huband	7	4 [2/0/2]	3 [2/0/1]
Twaddle	6	2 [1/0/1]	4 [3/1/0]
Guy	7	2 [0/2/1]	4 [2/0/2]
Philp	4	2 [2/0/0]	2 [2/0/0]
Dickson	5	4 [0/2/2]	1 [0/1/0]
Smith	1	1 [0/0/1]	-
not known	1	0	1 [1/0/0]
TOTAL	115	58 [17/16/25]	57 [39/10/8]

Note: [ ] = criminal/public/private

The numbers may overstate the extent to which the Supreme Court endorses the decisions of a particular judge, because of the fact that a decision may dismiss the appeal (uphold the decision of the lower court) but so alter the grounds on which the same outcome has been reached that the lower court has been implicitly repudiated; the figures in Table 4 do not reflect this more subtle type of rejection.

The strength in criminal law and weakness in private law appears to be an attribute of the Manitoba Court of Appeal as a whole rather

than of a particular judge or judges. The non-criminal Manitoba appeals upheld by the Supreme Court were delivered by a range of different judges, not by a small identifiable sub-group of unusual competence or reputation; similarly, the criminal decisions upheld on appeal are scattered across the entire bench. Not a single member of the court had more reversals than decisions upheld on criminal cases appealed; only a single member (Monnin) had more decisions upheld than reversed on public and private law appeals combined. Although both Freedman C.J.M. and Dickson J. enjoyed solid national reputations as outstanding jurists,[23] the statistics here do not highlight them.

It does not seem to be the case that specific individual judges have their decisions accepted for reconsideration by the Supreme Court of Canada unusually often or unusually seldom. Nor do a dozen or so cases seem an adequate basis to characterize individual judicial performance, however tempting it might be in such extreme examples as Monnin C.J.M. or Matas J.A. However, during the twenty-year period there have been three different Chief Justices of Manitoba, and the periodization this implies is a workable basis for comparison.

Of the 115 appeals from the Manitoba Court of Appeal to the Supreme Court of Canada between September 1970 and December 1989, ten were appeals of decisions made before Mr. Justice Samuel Freedman became Chief Justice of the province, seventy were appeals of decisions made while he led the Court, and thirty-five were appeals of decisions made since his retirement and the appointment of Mr. Justice Alfred Monnin as Chief Justice. The cutoff points beginning and ending the 20 years are arbitrary, and therefore the comparison is asymmetrical - there is only a final trickle of appeals from the Court of Smith C.J.M., the complete set of appeals from the Freedman Court, and only those appeals from the Monnin Court decided by the Supreme Court of Canada before December 31, 1989. The length of time from appeal court to Supreme Court is extremely variable; the last of the pre-Freedman appeals was decided by the Supreme Court on December 21 1973, six months after the first of the appeals from the Freedman Court, and the last Freedman appeal was decided on

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[23] For Mr. Justice Freedman, see e.g. Cameron Harvey, *Chief Justice Samuel Freedman: A Great Canadian Judge*, (Winnipeg: Law Society of Manitoba, 1983), passim; for Mr. Justice Dickson, see e.g. James G. Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985), who describe Dickson as "the best criminal-law mind on the Ottawa bench," and a judge whose "contribution to criminal jurisprudence has been nothing short of outstanding." [p.243]

May 1 1986, almost eighteen months after the first Supreme Court decision on an appeal from the Monnin court.

Table 5
Appeals from Manitoba Court of Appeal to Supreme Court of Canada
By Chief Justice and Type of Appeal, Sept 1970 to Dec 1989

	Smith Court	Freedman Court	Monnin Court	Total
Criminal appeals	2	30	24	56
Criminal appeals allowed	0.0%	33.3%	29.2%	30.4%
Public law appeals	4	19	3	26
Public appeals allowed	25.0%	68.4%	66.7%	61.5%
Private law appeals	4	21	8	33
Private appeals allowed	25.0%	81.0%	87.5%	75.0%
TOTAL APPEALS	10	70	35	115
TOTAL ALLOWED	20.0%	57.5%	45.7%	50.5%

The ten cases from the Smith Court are obviously too small a sample to permit conclusions or generalizations, but the very low reversal rate is striking, the more so given the unusually low proportion of seldom reversed criminal appeals, and the high proportion of the private law appeals on which the Supreme Court has been so ready to reverse. The two members of the Court that led this performance were Mr. Justice Guy (four decisions) and Mr. Justice Monnin (three decisions).

Appeals from the Freedman court succeeded 57.5% of the time; appeals from the Monnin court succeeded 45.7% of the time. This apparent difference, however, is almost entirely illusory - created by the much larger proportion within the Monnin court's appeals of criminal appeals, a category of law in which the Manitoba Court of Appeal seems always to have been stronger. On the basis of their track record within the Supreme Court of Canada, it would seem that compared with the Freedman Court, the Monnin Court is slightly

stronger in criminal law, imperceptibly stronger in public law, and even weaker in private law.

It is, however, misleading to focus on the modest differences between two sets of figures that are so similar. The reversal rates for the Freedman and Monnin courts are clearly minor variations on a basic theme, that theme being comparative strength in criminal law appeals and marked weakness in public and private law appeals. This element of continuity is just to be expected. Given the length of tenure of the average appeal court judge and the principled independence that is valued within the judicial profession, the characterization of "Freedman Court" and "Monnin Court" rests on a simple double substitution - that is, one person being elevated to the vacant Chief's chair and a single new justice being appointed to bring the Court back up to strength. On an appeal bench that is more than double the size of the typical panel, the impact of a new chief justice on the court's output cannot be more than marginal and incremental, and labelling the Court with the name of the Chief Justice is more a convenient periodization than an imputation of dominant leadership.

One place to search for an explanation might be in the general judicial temperament of the Manitoba Court of Appeal and the Supreme Court of Canada - that is, in terms of "liberalism" and "conservatism." It has been suggested[24] that we can rank the judicial decisions of an individual judge or a set of judges on a liberal-conservative spectrum, treating as liberal a decision for the individual in a criminal case, for the individual in a private law case pitting individual against corporation, and against the government in a public law dispute.[25] Because a court has no control over which of its decisions are appealed, it would be a mistake to read these absolute numbers as permitting a comparison between (say) the Freedman Court and the Monnin Court; however, because the appeals provide us with a set of cases that have been dealt with by both the Court of Appeal and the Supreme Court, they permit us to consider the relative (not absolute) positions of those two courts on a notional scale.

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[24] By, for example, Neil Tate and Panu Sittiwong, "Decision Making in the Canadian Supreme Court: Extending the Personal Attribute Model across Nations" in (1989), 51 *Journal of Politics*, at 900.

[25] This implies that not all cases are such as to generate a "liberal" or "conservative" outcome so defined - for example, a private lawsuit between two individuals or between two corporations, and a public law case pitting one government board or agency against another.

The six cases appealed from the Smith Court that can be classified in these terms all demonstrated the conservative result; the Supreme Court's decisions on appeal altered one in favour of the liberal outcome. Of the 50 classifiable appeals from the Freedman court, 74% demonstrated the conservative result; the Supreme Court on appeal reduced this to 62%. Of the 32 classifiable appeals from the Monnin court, 69% demonstrated the conservative result; the Supreme Court on appeal altered this to 72%. Apart from suggesting a possible mismatch in judicial philosophy between the Freedman Court and a more liberal Supreme Court of Canada, these figures are inconclusive.

III. JUDGES OF THE S.C.C. AND MANITOBA APPEALS

FIVE OF THE SUPREME COURT DECISIONS on Manitoba appeals were *per coram* (that is, anonymous and unanimous) decisions, and the 108 other decisions were delivered by nineteen different judges. Data on panel appearances[26] and delivered opinions are presented in Table 6. Laskin and Dickson clearly dominate, together delivering more than one-third of the decisions. Martland delivered eleven decisions for the Court and McIntyre nine, both of them mostly dismissals. No other judge delivered more than half a dozen decisions. What stands out is the extremely low profile of the French Canadian judges (that is, the nine Quebec judges excluding Abbot, plus Le Dain and Laforest). In a total of 269 panel appearances, these eleven judges delivered only 20 decisions, half of them by Lamer and Pigeon.

[26] Cases for which a justice is listed on the panel but did not participate in the decision are excluded from these figures.

Table 6 Frequency of Votes to Reverse Manitoba Court of Appeal
(Criminal, Public and Private Law Appeals)
Supreme Court of Canada Decisions, Sept 1970 to Dec 1989

Judge	Panel Appearances	Decisions	Criminal %neg	Public %neg	Private %neg
Dickson	74	20	41.9%	54.5%	75.0%
Martland	61	11	30.8%	52.9%	66.7%
Beetz	58	4	33.3%	66.7%	68.8%
Ritchie	57	4	30.4%	58.0%	82.4%
Laskin	53	22	55.0%	70.6%	56.2%
McIntyre	51	9	37.5%	57.1%	66.7%
Estey	50	6	34.5%	63.6%	50.0%
Lamer	39	6	35.7%	66.7%	50.0%
Pigeon	39	5	15.4%	42.9%	83.3%
Wilson	38	6	31.8%	80.0%*	81.8%
Spence	36	3	63.6%	66.7%	61.5%
Chouinard	33	2	40.0%	71.4%	50.0%*
Judson	33	2	22.2%	55.6%	66.7%
LaForest	31	0	31.6%	66.7%*	77.8%
LHeureuxDubé	23	1	18.8%	50.0%*	100%*
Le Dain	16	0	20.0%	100%*	50.0%*
de Grandpré	15	3	28.6%	50.0%*	66.7%
Sopinka	9	2	40.0%	50.0%*	100%*
Cory	8	1	40.0%	0%*	100%*
Abbot	7	0		33.3%*	0%*
Fauteux	6	0	0%	20.0%*	
Hall	5	2		33.3%*	50%*
Pratte	5	0	33.3%	0%*	100%*
Gonthier	5	0	66.7%	100%*	100%*
McLachlin	2	1	100%		100%*
ALL SCC:	754	115	35.4%	58.0%	69.8%

Note: five SCC decisions were *per coram*

To consider things from a different angle: the 115 Supreme Court decisions resulting in fifty-eight reversals can be considered as a string of votes by individual Supreme Court justices for or against the decision of the Manitoba Court of Appeal. This viewpoint is slightly distorting, because it is a critical feature of appellate decision making that it issues from a collaborative and interactive process involving all members of the panel, not from the recording of a discrete series of decisions arrived at privately and independently; with this reservation, however, the numbers can still be useful. Table 6 also indicates (for criminal appeals, public law appeals and private law appeals) the percentage of "negative" votes - a vote to reverse the Manitoba appeal decision, either by joining the decision of the Court or delivering a separate concurrence for an allowed appeal, or by dissenting from a dismissed appeal - by each Supreme Court judge.

In general, the voting patterns of all Supreme Court judges on Manitoba appeals are broadly similar, at least for those judges with a dozen or more active panel appearances. There do not appear to be identifiable clusters of unusually friendly and unusually unfriendly judges; the luck of the draw in the framing of panels carries little in the way of differential consequences. Only L'Heureux-Dubé and Le Dain voted with the Manitoba decision more than 60% of the time; only Laskin and Spence voted against it more than 60% of the time. The sharply different success rates for criminal, public and private law appeals is similarly a feature of the Supreme Court as a whole, not of specific individuals or groups within it. Of the judges with twelve or more panel appearances, only Laskin and Spence voted against the Manitoba Court of Appeal more than half the time on criminal cases; Le Dain, L'Heureux-Dubé and Pigeon voted with the Manitoba decision at least 80% of the time, and these five are the only departures of greater than 10% from the overall average. Not all of these judges have half a dozen or more appearances in public law appeals, but those that do line up in a similar fashion: Pigeon is the judge most likely to support the Manitoba appeal decision, while Laskin and Spence lead the voting against it. In private law appeals, the pattern is quite different. Laskin and Estey are the judges most likely to vote to uphold the Manitoba decision, Pigeon, Wilson and Ritchie to vote against it.

Table 7
Votes to Reverse Manitoba C.A., By Specific Attributes
Supreme Court Decisions, 1970 to 1990

	Criminal appear.	criminal %neg	public appear	public %neg	private appear.	private %neg
Diefenbaker appointee	58	29.3%	46	54.3%	52	71.2%
Mulroney appointee	49	32.7%	9	55.6%	20	90.0%
Trudeau appointee	224	37.1%	77	64.9%	98	66.3%
Other PM appointee	45	37.8%	44	50.0%	32	65.6%
Liberal appointee	249	36.9%	114	58.8%	124	66.9%
Conservative appointee	127	32.3%	62	56.5%	78	74.4%
Maritime	42	31.0%	20	60.0%	26	80.8%
Quebec	121	31.4%	59	52.5%	50	72.0%
Ontario	111	38.7%	59	66.1%	73	64.4%
West	102	39/2%	38	52.6%	53	69.8%
CA-yes	268	37.3%	89	64.0%	113	69.0%
CA-no	108	30.6%	87	51.7%	89	70.8%
Total:	376	35.4%	176	58.0%	202	69.8%

Table 7 provides some crude objective measures of the type of Supreme Court judges most and least likely to support the Manitoba Court of Appeal decision. The strength of the Manitoba court on criminal appeals rests primarily on the votes of Conservative appointees without provincial appeal court experience from Quebec and the Maritimes - to personalize it: Ritchie/Pigeon. Conversely, the weakest support for Manitoba criminal appeals comes from Ontario

and Western judges appointed from provincial courts of appeal by Liberal governments - epitomized by Laskin/Dickson. Support for the Manitoba court on public law appeals is in many ways a weaker echo of that for criminal appeals, with Western judges replacing Maritimes judges - if you will, Pigeon/Martland. The voting patterns for private law appeals, while weak in support for the Manitoba decisions across the board, is a complete reversal of the criminal/public patterns, with the weakest opposition coming from Ontario Liberal appointees with appellate experience - for a crystallized image: Laskin/Estey.

On the basis of the figures in Table 7, there is no reason to think that the Manitoba Court of Appeal faces less hospitable times in the future. The new bloc of Mulroney appointments to the Supreme Court are only slightly less likely to vote to uphold the Manitoba Court of Appeal in criminal cases than the Diefenbaker appointments who left the Court in the 1970s, but significantly more likely to do so than the Trudeau appointments who dominated the Court through the 1980s; and the same holds true of public law appeals as well. With regard to private law appeals, the new members of the Supreme Court are more likely than any previous set of judges (and previous judges were not at all reluctant) to vote against the Manitoba Court of Appeal - but private law appeals are a small and dwindling component of the Supreme Court caseload, numerically less significant than they ever have been in the past. *R. v. Lavallee*, a Supreme Court decision reversing the Manitoba Court of Appeal on a question of criminal law, is historically a statistical anomaly, and may well remain so for the future.

IV. EXCURSUS ON CASELOAD AND FREQUENCY OF APPEAL

THE RATIO OF APPEAL COURT CASELOAD to Supreme Court reconsideration has become very high in recent years. Provincial appellate caseloads are increasing; Russell reported in the early 1980s that provincial courts of appeal delivered some 4000 decisions per year, having jumped 100% in the previous decade and a half,[27] and by 1987 the number had risen again to 6000+.[28] Concomitantly, the number of full-time appeal court judges has more than doubled during

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[27] Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government*, (Toronto: McGraw-Hill-Ryerson, 1987), pp. 294-5.

[28] See McCormick, "Caseload and Output of the Manitoban Court of Appeal," (1990), 19(1) *Man. L.J.* 31 at 35.

the 1970s and 1980s. At the same time, Supreme Court caseload has fallen from 130 cases per year before the Charter to 85 per year since. It is therefore an increasingly unusual event for a provincial appeal decision to be reviewed, let alone reversed, by the Supreme Court of Canada.

To give some idea of *how* unusual, we can put these numbers in statistical perspective; because of the dramatic changes in discretionary jurisdiction and average annual caseload that the Supreme Court has undergone in recent years, this will be calculated on the basis of the last seven years rather than the last twenty. Between September 1982, and December 1989, the Supreme Court considered a total of 559 appeals from the provincial courts of appeal. Taking 1985 as a convenient mid-point, there were 86 non-supernumerary provincial appeal judges.[29] This works out to 6.5 Supreme Court decisions per appeal court judge, or 0.9 decisions per judge per year of which 41.3% (0.36 per judge per year) are successful, or one every 34 months. But the average provincial Court of Appeal judge participates in 210+ panel decisions each year and delivers 70+ decisions,[30] which means that he or she will deliver 200 cases between Supreme Court reversals. Table 8 presents the parallel information for each provincial Court of Appeal.

The numbers graphically illustrate the relatively low profile of Supreme Court appeals in the ongoing work of the provincial courts of appeal. The standard pyramidal diagrams of the Canadian judicial hierarchy are slightly misleading in their elegance; to catch the proportions involved, and the statistical rarity of appeals, the pyramid should be shown as very broad and very squat, the caseload at each ascending level falling dramatically.

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[29] These figures are of course not accurate for 1990, as the expansion of the Court of Appeal continues in several provinces.

[30] See figures in McCormick, *supra*, note 28 at 35.

Table 8
Appeals to Supreme Court and Appellate Caseload
Provincial C.A. Appeals to Supreme Court of Canada
September 1982 to December 1989

Provincial C.A.	Appeals to SCC	No. of JA's	Appeals /JA/yr	Cases decided between:	
				appeals	reversals
Ontario	148	16	1.2	80	262
Quebec	132	16	1.1	72	131
B.C.	90	11	1.1	55	161
MANITOBA	48	6	1.1	64	139
Alberta	59	10	0.8	153	500
Saskatchewan	26	7	0.5	150	325
Nova Scotia	23	7	0.4	81	169
New Brunswick	19	6	0.4	63	100
Newfoundland	11	4	0.4	53	117
P.E.I.	3	3	0.1	172	259
All Provinces	**559**	**86**	**0.9**	**83**	**200**

Note: *nonsupernumerary judges 1985 as per Russell
Note: ** caseload figures 1987

Of course, there are two different ways to read these numbers. The first would be to suggest that Supreme Court review is an unusual component of an appeal judge's life, like a pot-hole in a generally well-maintained road, reversal constituting a somewhat larger pot-hole. The Supreme Court may in fact not loom very large in an appeal judge's life. Conversely, and rather more likely, the very rarity of review may make it more, not less important, with substantive reversal constituting a personal and reputational set-back which the judge might well have to wait a year or more to retrieve when next appealed to the highest judicial authority.

Whichever way we choose to read the numbers, one thing is clear: they are unlikely to get smaller over the next years and decades. Provincial appellate caseload fluctuates but is probably still on the rise, The Supreme Court itself is caught in something of a vicious and escalating cycle which can be expressed in the following terms: as the

ratio between its caseload and that of the provincial C.A.s falls, each appeal considered by the Supreme Court carries behind it, as it were, an increasing number of similar cases and related legal issues that the Court cannot consider separately, which means that the Supreme Court decisions must be broad, thorough and complete rather than narrow, focused and case-specific. But this simply means that each such decision must consume more of the research and conference time of the Supreme Court, putting further pressure on (and possible reducing) its effective caseload, and therefore driving the ratio even lower.

V. Summary of Findings

THE DISCUSSION OF THE STATISTICAL ANALYSIS of appeals from the Manitoba Court of Appeal to the Supreme Court of Canada can be summarized in the following general terms:

1. The success rate on appeals from the Manitoba Court of Appeal to the Supreme Court of Canada between September 1970 and December 1989 is 50%, somewhat above the all-province average of 43.9%. This puts Manitoba in a central block of three provinces for whom success rates on appeal are neither inordinately high nor unusually low. There has been a general downward trend in reversal rates over the last two decades (possibly an artefact of changing proportions of caseload), but the Manitoba Court does not seem to have contributed to, or benefitted from, this trend.

2. Although there has been a long-term decline in the success rate of appeals to the Supreme Court of Canada (possibly a product of a change in the proportions of the types of law brought to the SCC rather than a substantive change in behaviour), appeals from the Manitoba Court of Appeal do not show any parallel improvement, and the success rate of appeals from the Monnin Court is only marginally lower than that of appeals from the Freedman Court.

3. Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada have in recent years been roughly twice as frequent as one would expect on a *per capita* basis. This unusually high frequency does not seem to be driven by the Supreme Court's discretionary leave jurisdiction (in terms either of an unusual number of applications for leave, or an unusually high rate of

approval for such applications) but rather by appeals by right, possibly contributed to by the high rate of dissent on the Manitoba court. There do not appear to be identifiable individuals or groups of judges on the Court who are appealed or reversed unusually often.

4. The Manitoba Court of Appeal (even more so than other courts of appeal) is reversed more frequently by the minimum Supreme Court panel size of five judges than it is by larger panels; this suggests that the Manitoba Court has a somewhat stronger record on major and contentious appeals than it does on more routine ones.

5. More so than any other Court of Appeal, the Manitoba Court is reversed more frequently in non-criminal (private and public) than in criminal appeals. Indeed, the Manitoba Court of Appeal has one of the strongest records of any provincial C.A. on criminal appeals, but one of the weakest records on both public law and private appeals. It appears (with some reservations because of the small numbers of cases involved) that this strong performance on criminal appeals was led by Freedman C.J.M. and Monnin C.J.M.

6. The success rate on Manitoba Charter appeals is roughly the same as that for all appeals, unlike most other provincial Courts of Appeal for which it is much lower. Given that most Charter appeals have been on criminal matters, it is surprising that Manitoba's strong performance on criminal appeals generally does not carry over to the sub-category of Criminal charter appeals.

7. There does not appear to be a block of judges on the Supreme Court of Canada who are either unusually friendly or unusually unfriendly to the Manitoba Court of Appeal, although Manitoba tends to fare better at the hands of Quebec and Maritime judges appointed by the Conservatives without provincial appellate experience. The weakness of the Manitoba court in private law matters is likely to be of decreasing statistical significance in the future as private law cases provide a small and dwindling proportion of the Supreme Court caseload.

8. Of the twenty-five Supreme Court judges who have sat on appeals from the Manitoba Court of Appeal, four (Laskin, Dickson, Martland and McIntyre) account for over one third of all panel appear-

ances and over half of all delivered (authored) decisions of the Court. The number of decisions delivered by French-Canadian members of the Court is much lower than their share of panel appearances would lead one to expect.

9. Approximately one Manitoba Court of Appeal decision in every sixty-four is appealed to the Supreme Court of Canada; to put the same point somewhat differently, the average Manitoba appeal judge can expect to deliver approximately 64 decisions before being appealed, and 139 decisions before being reversed, by the Supreme Court. Both these numbers are lower (by one-fifth and one-third respectively) than the average for provincial Courts of Appeal as a whole; and both numbers appear to be rising over time.