Caseload and Output of the Manitoba Court of Appeal 1989[1]

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THE CANADIAN PROVINCIAL COURTS OF APPEAL occupy a position of unique significance and power within the Canadian judicial system. They are the counterparts at one and the same time of the U.S. state supreme courts, and the U.S. federal courts of appeal, powerful articulators of both federal and provincial law. Although fully subordinate to the Supreme Court of Canada, in terms of both binding precedent and direct appeal, the sheer volume of provincial appellate caseload inhibits the scope of supervision - of 6000+ provincial appeal decisions each year, only sixty or seventy can be reviewed by the Supreme Court.[2] In the late 1980s, the reporting services were picking up more provincial appeal court decisions than at any time since the 1920s, and provincial courts of appeal now cite each other's decisions more often than in the past.[3]

For all these reasons, provincial courts of appeal must be thought of as much more than a way-station between the trial court and the Supreme Court; their growing role in the Canadian judicial system highlights their importance, even while recent events in Nova Scotia warn against complacency about their adequacy for the task. More than in the past, and increasingly in the future, these courts deserve to be the focus of study and analysis. What this paper attempts is to lay out the statistical background of one year's decisions, both

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[1] This project was funded by the Legal Research Institute at the University of Manitoba, and I wish to thank those who collected the data for me: Judi Hoffman (now a law student at the University of Victoria), Alex Kotkas (now a law student at the University of Alberta), and Jonathan Penner and Karen Beattie (law students at the University of Manitoba). This paper is an update and expansion, based on more complete data, of "Caseload and Output of the Manitoba Court of Appeal, 1988," (1990) 19 Man. L.J. 31.

[2] The Supreme Court of Canada handles between 80 and 100 cases per year in recent years; and on actual count, 85% of the Supreme Court's caseload since 1970 is made up of appeals from decisions of provincial appeal courts.

[3] Both comments based on research in progress.

reported and unreported, of one provincial court of appeal - specifically, the Manitoba Court of Appeal in calendar 1989. The analysis of judicial decisions is usually intensive, logical and case specific; the analysis presented here is general, statistical and panoramic. There is no suggestion, implicit or explicit, that analysis of context can or should replace analysis of content; the overall figures provide only the broad setting within which the doctrinal contributions of specific decisions take place. However, the specific can only be properly understood against the background of the general.

I. THE COURT

THE MANITOBA COURT OF APPEAL in the late 1980s consisted of seven full-time judges, putting it in the middle ranks of the provincial appeal courts - smaller than Ontario, Quebec, B.C. and Alberta, but larger than P.E.I., Newfoundland and New Brunswick. Saskatchewan and Nova Scotia also have seven-judge appeal courts. The critical point is that it is large enough to work in smaller panels (almost all cases are heard by a panel of three) rather than as a single permanent group jointly deciding all cases; this characteristic, common to all provincial courts of appeal save P.E.I., makes them less like the American state supreme courts and more like the U.S. federal courts of appeal.

There was one change in personnel during the year (leaving the Court with six judges for three months) when Mr. Justice Hall - second senior member of the Court - was replaced by Madame Justice Helper. This is the fifth appeal appointment in the 1980s (four replacements, one new appointment when the Court expanded from six to seven); such a rate of turnover is what one would expect for a seven-judge court, given that the average Court of Appeal judge appointed in this century serves less than twelve years (excluding, of course, incumbents). Unlike some other provinces (such as Alberta), Manitoba makes very little use of *ad hoc* judges brought up from the superior trial bench to serve temporarily as appeal judges, augmenting the resources of judicial hours for (typically) routine cases; there were only three occasions on which this was done in Manitoba during calendar 1989.

Table 1
Judges of the Court of Appeal of Manitoba, 1989

Name	Appointed to Court of Appeal	Appointed to s.96 Sup. Trial Ct.
Monnin	1962[4]	1957[5]
Hall	1971[6]	1965
O'Sullivan	1977	no
Huband	1980	no
Philp	1983	1973
Twaddle	1985	no
Lyon	1986	no
Helper	1989[7]	1983[8]

Madame Justice Helper was appointed on June 30 1989, taking her first panel assignments in September. Her appointment keeps the balance between trial judge elevations and appointments "from the street" at three and four respectively. With Monnin C.J.M. she joins the very short list of individuals who have served on both the provincial court and the provincial superior trial court before appointment to the appellate bench. She might also be thought of as filling a "Jewish seat" on the Court, vacant for only two years in the past thirty. As the first woman appeal judge in the history of the province, she makes Manitoba the sixth province (and last of the "established" appeal courts) to have a woman serve on the province's highest court; now only the more recently created appellate courts of the Atlantic provinces have not done so.

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[4] Appointed Chief Justice of Court of Appeal in 1983.

[5] Previously served on Provincial Court.

[6] Retired from the Court, April 1989.

[7] Appointed June 30, 1989.

[8] Previously served on Provincial (Family) Court, part-time 1978, full-time 1980.

With the replacement of Mr. Justice Hall, the average appeal bench experience of the Manitoba Court of Appeal falls from 10.4 to 8.8 years, but this is still rather high for Canadian provincial courts of appeal. The comparable figures as of January 1, 1989, were 6.8 years for British Columbia, 6.2 years for Alberta and 5.7 years for Saskatchewan.[9] At the same time, however, with the retirement of Monnin in 1990, O'Sullivan becomes the only Manitoba Court of Appeal judge appointed before the 1980s, and the average age of the Court on January 1, 1990 was only 59 - an unusual blend of experience and relative youth.

II. The Decisions

The Manitoba Court of Appeal delivered 382 panel decisions in calendar 1989, down marginally from the 403 of 1987.[10] This confirms its status as one of the middle-ranking appeal courts for caseload - it is not one of the heavy (1000+ cases per year) caseload courts like Ontario and Alberta and Quebec, or one of the light (250 cases per year or less) caseload courts like those of the Atlantic provinces, but falls with Saskatchewan and British Columbia in an intermediate range of about 400-650 cases per year.

Peter Russell has commented that three-judge panels are now the norm for the Canadian Courts of Appeal, and larger panels are now extremely unusual.[11] This is confirmed by the record of the Manitoba court in 1989; of the 382 panels, 379 were composed of three judges. There was only one larger panel, of seven judges.[12] Rather oddly, it was convened for a single sentence appeal which was, in the event, dismissed with the briefest of reasons; the logical expectation that

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[9] If we consider provincial superior trial bench service as well, B.C. has the most experienced judges with an average of 13.6 years of experience, Manitoba is a close second with 13.4, Alberta trails with 10.6, and Saskatchewan is a surprisingly low 6.4.

[10] These numbers are not strictly comparable, the 1987 figure coming from a telephone call to the Office of the Registrar of the Court of Appeal, and the 1989 figure being a "hard count" of all the decisions for which there is any recorded result or decision on file. It is interesting that the total caseload for the Alberta Court of Appeal is also down slightly from 1987, by about 10%, which suggests that 1987 may have represented a temporary peak in appeal court caseloads, rather than a mid-stage of continuing growth.

[11] Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 295.

[12] *R. v Peters*, (12 April, 1989) unreported decision, file #502/88 (Man. C.A.).

larger panels are used for the cases raising critical questions of law was clearly not met on this particular occasion. Two decisions were handed down by a panel of two judges;[13] from the timing, these may very well have been three-judge panels reduced to two by the retirement of Mr. Justice Hall.

The danger of three-judge panels in a seven-judge court is the possibility of persisting divisions between the panels on questions of legal doctrine, and the standard way of reducing this risk is the rotation of judges between panels.[14] The composition of panels on the Manitoba Court is fully consistent with the principle of rotation, every judge sitting in a panel with every other judge at least two dozen times (prorating the numbers for Hall and Helper JJA. who served for less than the full twelve months). Among full-year judges, some pairings occur more often than one would expect from a totally random process (specifically Huband-O'Sullivan and Lyon-Twaddle), and one occurred much less often (Monnin-Lyon), although these variations may be the product of nothing more than the fact that some panels batch-process half a dozen sentence appeals in a day, while others deliver only a single decision.

The normal practice on Canadian provincial appeal court panels is for the senior member to be the presiding judge - seniority being defined in terms of initial Section 96 appointment (trial or appeal), with the Chief Justice automatically senior to anyone else regardless of appointment dates, and with supernumerary judges (on those Courts that have them - Manitoba does not) excluded.[15] The presiding judge typically leads the discussion of the case in court room and at conference, and therefore has a greater obligation to be prepared. In the Manitoba Court of Appeal, this clearly carries over to the delivery of the decision of the Court as well. Of the 382 multi-judge panel decisions, 267 (69.9%) were delivered by the senior judge on the panel; if we exclude the 23 occasions when the senior judge dissented,

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[13] *R. v Bernardo*, (7 September, 1989) unreported case, file #102/89 (Man. C.A.). This has been coded as two separate decisions because the substantive appeal was dismissed by O'Sullivan J.A., while the sentence appeal was allowed by Huband J.A. - the only such divided result recorded.

[14] See, for example, J. Woodford Howard, *Courts of Appeals in the Federal Judicial System*, (Princeton: Princeton University Press, 1981), esp. ch. 7.

[15] Anecdotal information suggests that this practice may no longer be as rigid as it was, and that in some provinces such as Alberta the responsibilities of presiding judge are themselves subject to some kind of informal rotation.

the percentage rises to 74.4%. This tendency was most pronounced for Philp (89.7%), least evident for O'Sullivan (61.3%). Lacking comparable data on the other provinces, one cannot say whether Manitoba is typical in this regard, but the figures suggest a *de facto* apprenticeship for new appeal judges that delays any major direct impact on the law of the province. Other factors - such as the numbers of judicial citations by junior judges, or the fact that two-thirds of the Charter decisions were made by junior judges - suggest this may apply primarily to the routine cases that make up much of the caseload.

The largest single bloc of cases was sentence appeals, of which the Court heard and decided 119 (31% of total caseload); substantive criminal appeals accounted for another 97 cases (25%). The 60/40 split of criminal appeals over non-criminal appeals in 1987 appears to have shifted slightly to a 55/45 split, although it would be premature to identify this as a trend. Private law appeals (torts and contracts) totalled 79 (21%), and financial law appeals (estates, insurance, bankruptcies, liens) contributed another 28 (7%). The remainder of the caseload included 36 family law appeals (9%), 26 public law[16] appeals (6%) and a single reference case.

Of these 382 decisions, 123 (or 32%) were reported by one or more of the legal reporting services; this is up from the 104 (26%) of 1987. For obvious reasons, the apparent caseload breakdown from reported decisions distorts the real picture - only one sentence appeal, and barely one-quarter of the substantive criminal appeals, were reported, while the reporting rate of each of the non-criminal categories was above 40 per cent (and for public law, above 70 per cent). In reality, the Manitoba Court of Appeal has a stable caseload in which criminal cases slightly outnumber non-criminal cases; from the reported cases, it would appear that the Court has only a small criminal caseload and handles far more private and public law cases. Of course, many criminal appeals are routine and this may well be an accurate description of the Court's significant caseload; if length in pages and/or citations to authority are a rough indicator of legal significance, this certainly appears to be true, as only 10 of the 259 unreported decisions used any citations to judicial authority at all. As would be expected, reported cases over-represent successful appeals (a reported 44 per cent rather than the real 34 per cent), but the almost total

[16] Defined for present purposes as non-criminal cases between government and citizens or commercial corporations. In some usages, public law includes criminal law, but it will be used in this paper exclusively in the narrower sense.

exclusion from the reports of sentence appeals, the most frequently successful category of appeal, reduces the extent of this distortion.

Overall, the ratio of unsuccessful appeals to successful appeals is almost two to one. This is remarkably close to the long-term figures for the U.S. state supreme courts, which allow 35.5% of all appeals.[17] It is sometimes suggested that reversal rates can carry clues about the nature of the evolution of legal doctrine at any given time, with high reversal rates signalling controversy and change within the law - whether in the form of appeal court initiatives proclaimed for the leadership of the trial courts, or trial court initiatives being turned back by a reluctant appeal court. The Manitoba figures seem to carry no message of this sort. The highest reversal rate of trial court decisions is in the area of sentence appeals (42.9%), typically the area of law in which the ratio of legal doctrine to idiosyncratic detail is the lowest; the lowest reversal rate is for substantive criminal appeals (25.8%). Family law and public law might be expected to be at the cutting edge of jurisprudential controversy, but are unexceptional in their success rates (27.8% and 35.7% respectively).

[17] See R. A. Kagan *et al*, "The Evolution of State Supreme Courts" (1977), 76 *Michigan Law Review* 961; a comparable figure of 31% is suggested by B.M. Atkins and H.R. Glick, "Environmental and Structural Variables as Determinants of Issues in State Courts of Last Resort" (1976), 20 *American Journal of Political Science*, 97.

Table 2
Success and Reporting Rates by Type of Appeal
Manitoba Court of Appeal Decisions 1989

Type of appeal	Number of cases	Success Rate	Reporting rate
criminal	97 [28]	25.8% [42.9%]	28.9%
sentence	119 [1]	42.9% [0%]	0.8%
public	28 [21]	35.7% [42.9%]	75.0%
family	36 [16]	27.8% [43.8%]	44.4%
private	77 [46]	38.5% [52.2%]	59.0%
financial	24 [10]	29.2% [40.0%]	41.7%
reference	1 [1]	-	100%
TOTAL:	382 [123]	34.8% [45.9%]	31.9%

Note: bracketed numbers refer to reported cases only.

To state the obvious: appeals succeed because a majority (on the typical three-judge panel, at least two) of the judges on the panel voted in its favour. The year's record of appeals can therefore be disaggregated into the behaviour of the individual judges,[18] and because the analysis is based upon all decisions, not just those that were reported, it is a fair reflection of the year's performance. This information is shown in Figure I. Overall, Manitoba appeal judges voted to reverse the trial decision and allow the appeal 35.0% of the time. For individual judges, however, this figure varies from a low of 26.2% (Helper) to a high of 42.5% (O'Sullivan); the range seems broad enough to bear some analysis, although every single judge votes to uphold more often than they vote to reverse.

[18] It should go without saying that nothing trivializing or slighting is intended by this breakdown in terms of readiness to reverse or readiness to support the Crown. Appeal Court judges are individuals who have professional training, extensive experience, and firm convictions about the law; these convictions will reveal themselves in consistent patterns of decision making, and an awareness of these patterns is part of a full understanding of appellate judicial behaviour.

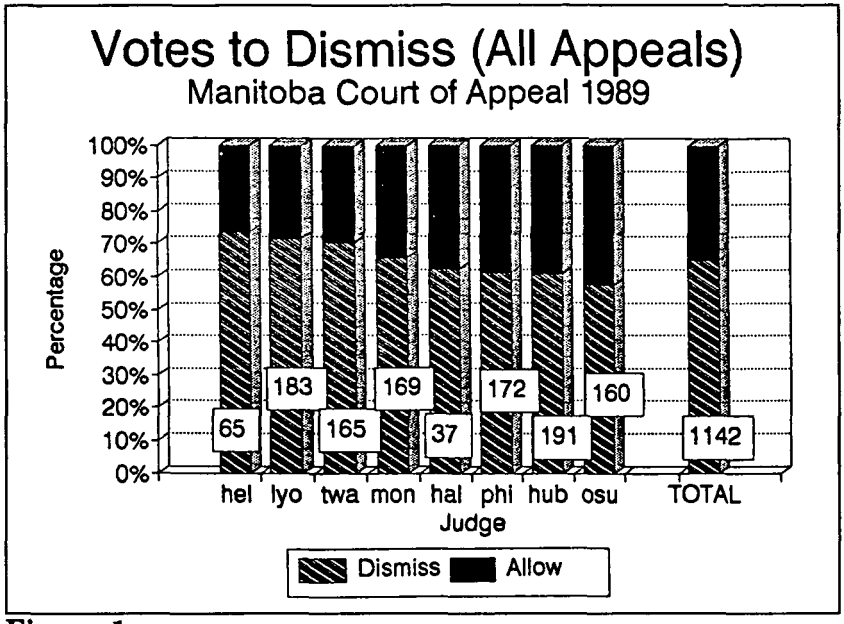

Figure 1

The following is the data for Figure 1:

Judge	Dismiss	Allow	Total	Dismiss%
Helper	48	17	65	73.8%
Lyon	131	52	183	71.6%
Twaddle	116	49	165	70.3%
Monnin	111	58	169	65.7%
Hall	23	14	37	62.2%
Philp	105	67	172	61.0%
Huband	116	75	191	60.7%
O'Sullivan	92	68	160	57.5%
TOTAL	742	400	1142	65.0%

Note: excludes three ad hoc judges, and excludes reference case that could not be coded allowed/dismissed; figures consistent with Table 5.

The presence or absence of trial experience is one possible explanation. It might be thought that former trial judges elevated to the appeal bench would differ from those judges appointed to the appeal bench "from the street" - although one could argue with equal cogency that former trial judges would be more sympathetic to the problems confronted by their former colleagues, or tougher because more prone to substitute their own judgment for that of the judge presiding over the trial. In the event, neither argument applies: there is no detectable difference between the four former trial judges (Monnin CJM, Hall, Philp and Helper), who voted to reverse 35.2% of the time, and the four judges without trial experience (O'Sullivan, Huband, Twaddle and Lyon), who voted to reverse 34.9% of the time.

It is possible to identify a bloc of O'Sullivan, Huband, Philp and Hall, who vote to reverse about 40 per cent of the time, and another bloc of Helper, Lyon and Twaddle who vote to reverse less than 30 per cent of the time, with Monnin C.J.M. falling in between; it is not clear what characteristics the judges within each of these blocs share that might explain this.

Table 3
Success rates by appellant for Criminal and sentence appeals
Manitoba Court of Appeal decisions, Calendar 1989

Appeal by:	Substantive Number	Substantive successful	Sentence Number	Sentence successful
Crown	7	71%	44	59%
defendant	90	22%	75	33%
TOTAL	97	26%	119	43%

Less than one-tenth of substantive Criminal appeals and over one-third of sentence appeals are initiated by the Crown, and they are successful much more often than appeals by the defendant against the Crown; these figures are shown in Table 2. This is, of course, to be expected; because the result of any specific criminal case looms much larger for the defendant than it does for the criminal justice system, the threshold point - in terms either of future precedential value, or scope of anticipated changes upon a successful appeal - at which an appeal becomes worth the time and effort is much lower for defendants than it is for the Crown. The appearance of a hill that is steeper

for defendants than for prosecutors is reduced if one looks at the numbers from a different angle - more than 60 per cent of all successful criminal appeals, and 80 per cent of the successful appeals in substantive criminal cases, are victories of defendants over the Crown.

Focusing on criminal appeals alone (lumping together for these purposes both substantive and sentence appeals) makes it possible to measure another aspect of overall appellate performance, and to distinguish between what we may loosely term as "hawks" and "doves". Specifically: every criminal appeal can be scored as a **win** or a **loss** for the Crown, and all the judges can be ranked for how often they vote with or against the Crown. This information is presented graphically in Figure 2.

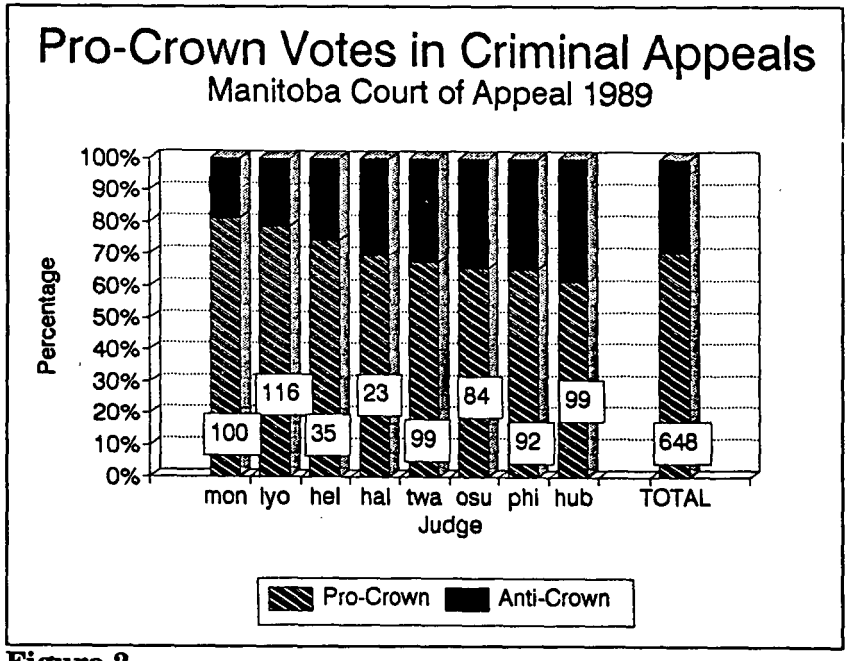

Figure 2

The following is the data for Figure 2:

Judge	Pro-Crown	Anti-Crown	Total	ProCrown%
Monnin	81	19	100	81.0%
Lyon	91	25	116	78.4%
Helper	26	9	35	74.3%
Hall	16	7	23	69.6%
Twaddle	67	32	99	67.7%
O'Sullivan	55	29	84	65.5%
Philp	60	32	92	65.2%
Huband	61	38	99	61.6%
TOTAL	457	191	648	70.5%

Overall, the judges of the Manitoba Court of Appeal vote for the Crown and against the defendant about 70 per cent of the time. Huband, O'Sullivan and Philp are the least pro-Crown, with a favourable rating of 60 to 65 per cent; Monnin C.J.M. and Lyon are the most pro-Crown, with a favourable rating of 75 to 80 per cent.

III. Dissents and Concurrences

ONE CHARACTERISTIC OF REPORTED DECISIONS of the Manitoba Court in 1987 (as discussed in my earlier article) was the frequency of non-unanimous decisions; both dissents and separate concurrences were far more frequent for the Manitoba appeal court than for its counterparts in the other Western provinces. Table 4 compares the 1987 figures with 1989 reported decisions, and with 1989 total decisions, demonstrating the continuing validity of the general characterization of the Manitoba court as exhibiting an unusual degree of dissensual behaviour.

There has been a dramatic decrease in separate concurrences that cannot be attributed simply to reporting practices;[19] this is consistent with a continuing shift (noted in interviews with appeal court judges in other provinces) from earlier Canadian provincial appeal court practices approaching *seriatim* decisions ("everyone on the panel having a go at it" as one Alberta judge described it) to the clarity of a single statement of the law ("Justice X for the Court") except where explicit dissent precludes this. There has been no corresponding decrease in the Manitoba court's dissent behaviour, which has dropped only from one case in four (1987 reported cases) to one in five (1989 reported cases), still unusually high for a provincial court of appeal.[20]

Table 4
Frequency of Separate Concurrences and Dissents
Manitoba Appeal Court Decisions, 1987 and 1989

	1987 reported	1989 reported	1989 all
Unanimous	51.9%	62.6%	84.0%
Concurrence	24.0%	8.9%	3.4%
Concurrence & Dissent	9.6%	1.6%	1.6%
Dissent	14.4%	18.7%	11.0%
Cases:	104	123	382

Typically, separate opinions on the Manitoba Court of Appeal (whether concurring or dissenting) are extremely short, a brief statement rather than an extended reasoned defence of a position. The concurrences of Huband in *DeCorby*[21] and O'Sullivan in *R. v Ostrow-*

[19] That is, separate concurrences in 1987 reported cases exceed in number not just concurrences in 1989 reported cases, but concurrences in all 1989 cases.

[20] Only Quebec among the provincial courts of appeal exhibits a dissent rate in reported cases approaching that of Manitoba. Dissent rates for the other provinces are significantly lower, and in some provinces -- notably Nova Scotia and Ontario -- approach zero.

[21] *DeCorby v. DeCorby Estate* (1989), 57 *Man. R.* (2d) 97.

ski,[22] and the dissents of Huband in *R. v MacFarlane*[23] and Monnin CJM in *Macdonald Estate*[24] are the unusual counter-examples, the only separate opinions that exceed five pages in length. The average concurrence or dissent is 250 words or less in length, with few - more often no - citations to authority.

As might be expected, some judges are more likely to dissent than others, and these patterns are indicated in Table 5. The four most senior judges are more than twice as likely to dissent as the four most junior judges; this could be seen either as a simple difference in personalities (in which case dissent behaviour will decline in the future as the senior judges are replaced) or as a product of experience and the confidence that goes with it (in which case the dissent behaviour of the now-junior judges will increase as their years of service on the Court go up).

[22] *R. v Ostrowski and Correia* (1989), 57 *Man. R.* (2d) 255.

[23] *R. v MacFarlane* (1989), 55 *Man. R.* (2d) 105.

[24] *Macdonald Estate v. Martin & Rossmere Holdings*, [1989] 3 W.W.R. 653.

Table 5
Appearances, Decisions and Separate Opinions
Manitoba Court of Appeal Judges, 1989

Judge	Appearances	Decisions	Dissent	Concurrence
Hall	37 (10)	18 (4)	0 (0)	0 (0)
Helper	65 (23)	9 (7)	1 (1)	1 (0)
Huband	191 (70)	75 (29)	10 (3)	5 (5)
Lyon	183 (54)	17 (8)	7 (3)	2 (1)
Monnin CJM	170 (56)	123 (23)	14 (6)	0 (0)
O'Sullivan	161 (56)	49 (13)	9 (7)	6 (4)
Philp	172 (51)	50 (18)	3 (2)	2 (2)
Twaddle	166 (48)	41 (21)	3 (2)	6 (4)
ad hoc	3 (1)	0 (0)	1 (1)	0 (0)
TOTAL	1148 (369)	382 (123)	48 (25)	22 (16)

Note: bracketed numbers refer to reported decisions only.

Almost 90 per cent of the dissent behaviour is accounted for by one-half of the Court (Monnin CJM; Huband, O'Sullivan and Lyon JJA.), and 50 per cent by a single pair of judges (Monnin CJM and Huband JA). The point can be made even more precisely than this; the comments about Monnin and Huband are not so much two parallel remarks about two different individuals as a single comment about the dynamics of a specific pair of judges. Monnin and Huband sat together on fewer than 15% of the Court's 1989 decisions, but accounted for 40% of the Court's total dissents in the process. Table 6 carries out the parallel investigation for every two-judge pairing showing what percentage of the time there is a dissent if a specific pair of judges is included in the panel. (That is: it does not measure specific disagreement between the two judges, but only how likely their presence is to be accompanied by a dissent on the part of any of the judges on the panel.)

Table 6
Likelihood of Dissent for Two-judge Pairings
All Manitoba Court of Appeal Decisions, 1989

	HAL	OSU	HUB	PHI	TWA	LYO	HEL
MON	.00*	.16	.31	.14	.10	.20	.00*
HAL	--	.10*	.06*	.11*	.08*	.14*	--
OSU		--	.22	.13	.19	.12	.04
HUB			--	.16	.14	.14	.05
PHI				--	.12	.12	.09
TWA					--	.07	.15
LYO						--	.13

Note: * = fewer than 20 examples

The most distinctive single judge is Madame Justice Helper, whose presence on a panel seems significantly to reduce the probability of a dissent. There are two quite different possible explanations: the first would be the "freshman" effect, which suggests that newly appointed judges tend to be more accommodating and low-profile (because of transitional difficulties of a newcomer fitting into an established set of group dynamics; or because of the need to acquire a more encyclopedic knowledge of the law than that required of a superior trial court judge); the second would be an accommodative and persuasive personal style that heads off dissent by discovering mutually acceptable middle ground. Similar calculations over the next few years, demonstrating whether this restraint continues or diminishes, would indicate which of these is in fact the case.

The overall frequency of dissent is about .125. This being the case, we can identify those pairings of judges whose presence on a panel most frequently generates a dissenting opinion; the names that emerge are Monnin, Huband, O'Sullivan and Lyon. The cases in which dissents were registered (shown in Table 7) suggest that there is more to this than a clash of personalities (although, as a general principle, the role of personalities on a small group with low turnover should never be underestimated); instead, the dissents fall into a clear and consistent pattern. Monnin and Lyon are more likely to dissent when

a criminal appeal decision goes against the Crown, and (in general) when an appeal is allowed. Huband and O'Sullivan are more likely to dissent when a criminal appeal decision goes against the defendant, or (more generally) when an appeal is dismissed; O'Sullivan's dissents also include all but one of the Charter dissents in 1989. These twin polarities - "hawks" versus "doves," and a readiness to reverse trial decisions - identify these two pairs of judges as the polar extremes of the 1989 Manitoba Court of Appeal and dissent behaviour as the way in which their disagreement manifests itself.

Table 7
Type of Case Eliciting Dissent
Manitoba Court of Appeal Judges 1989

Judge	Public & Family	Private & Finan.	Criminal CrW/CrL	TOTAL
Helper	1			1
Huband	1	2	7/0	10
Lyon	1		0/6	7
Monnin CJM	1	5	1/7	14
O'Sullivan	1	2	6/0	9
Philp	1	2		3
Twaddle	1	1	1/0	3
ad hoc	1			1
TOTAL	8	12	15/13	48

Note: "CrW" = Crown win; "CrL" = Crown loss

Given the retirement of Monnin C.J.M. in 1990, it might be expected both that dissent behaviour will decrease in the future and that the "dove" faction would prevail more frequently. This conclusion may be premature, again on the basis of Table 6. The dissent frequency numbers for Mr. Justice Twaddle (low when Lyon J.A. is on the panel, high when O'Sullivan J.A. shares an assignment) suggest a distinct possibility that the Monnin/Lyon bloc may simply be

replaced by a Lyon/Twaddle bloc, although Figure 2 hints that the Crown/defendant choice may become a less salient dimension of the dissenting blocs.

IV. THE CITATIONS

THE ACCEPTED MODE OF REASONED JUSTIFICATION for a judicial decision is the citation to authority; the important question, therefore, is what counts as an appropriate source of authority for Manitoba appeal judges. Academic citations (books and academic articles) are rare, accounting for only one citation in twenty; only in financial law decisions (where they make up one fifth of total citations) are they used in unusually large numbers. Positive citations (constitution, statutes and regulations) make up one quarter of all citations, and loom particularly large in decisions on applications and in the single reference case. However, over two-thirds of all citations to authority are citations to **judicial** authority - to the past decisions of common law judges in Canada, the United Kingdom and the United States. Even if the age of the common law has yielded pride of place to the age of statute, it lives on in the citation practices of the common law judges, shown in Table 8. (These figures are, of course, an attribute as much of the bar as of the bench, and the logical conundrum - do judges cite authorities because lawyers use them in argument, or do lawyers use them in argument because judges like to cite them? - is unanswerable. On the other hand, a recent study of U.S. appellate decisions[25] found that only one half of the citations by judges were drawn from the arguments of counsel, so this problem should not be exaggerated.)

[25] Thomas B. Marvell, *Appellate Courts & Lawyers: Gathering Information in the Adversary System* (Westport, Conn. & London: Greenwood Press, 1978).

Table 8
Citations to Judicial Authority
Manitoba Court of Appeal Decisions

Authority	Number of cites	As % of total	No. of judgmnts	As % of total
FEDERAL COURTS:				
Supreme Court	114	24.8%	56	12.0%
Federal Court	3	0.7%	3	0.6%
Total Federal:	**117**	**25.5**	**56**	**12.0**
PROVINCIAL COURTS OF APPEAL:				
Manitoba	80	17.4%	46	9.9%
Ontario	41	8.9%	28	6.0%
Alberta	18	3.9%	15	3.2%
Saskatchewan	12	2.6%	10	2.1%
British Columbia	12	2.6%	10	2.1%
Nova Scotia	6	1.3%	4	0.9%
Quebec	3	0.7%	3	0.6%
New Brunswick	2	0.4%	2	0.4%
Prince Edward Island	2	0.4%	2	0.4%
Newfoundland	1	0.2%	1	0.2%
Total Appeal:	**177**	**38.6**	**79**	**13.9**
CANADIAN TRIAL COURTS:				
Manitoba	15	3.3%	11	2.4%
Ontario	17	3.7%	13	2.8%
Others	29	6.3%	12	2.6%
Total Trial:	**61**	**13.3**	**24**	**4.2**
COMMONWEALTH COURTS:				
Privy Council	7	1.5%	7	1.5%
Other English Courts	83	18.1%	38	8.2%
Other Commonwealth	2	0.4%	2	0.4%
Total Commonwealth:	**92**	**20.0**	**43**	**7.6**
U.S. COURTS	12	2.6%	5	1.1%
TOTAL CITATIONS	459 citations in 567 judgments			

Notes: includes 382 decisions for the court, 15 applications, 48 dissents and 22 separate concurrences.

These figures parallel very closely the pattern for 1987 (as indicated in my earlier paper); because the 259 unreported 1989 decisions included only 18 judicial citations, comparability is not seriously

affected by the fact that the 1987 study dealt with reported decisions only. The largest body of citations are from the Supreme Court of Canada, still providing one citation to authority in every four. Self-citations - that is, references to previous decisions of the Manitoba Court of Appeal itself - stand at 17.4% (just over one in six). This is again very close to the 1987 figures, and distinctly different from the other established Courts of Appeal who cite themselves 5 to 10 per cent more often. The other provincial courts of appeal draw 21.2% of all citations - mostly from Ontario (8.9%) or from the other three Western provinces (10.2%). United Kingdom citations account for almost one-fifth of all judicial citations, consistent with 1987 and an unusually high number (rivalled only by British Columbia) among the provincial courts of appeal. Citations of Canadian trial courts remain significant at 13.3% - none of the other courts of appeal supply as many precedents as the extra-provincial trial courts combined - but down somewhat from 1987. Finally, citations of U.S. authority remain very low, mostly in family and private law.

Disaggregating the overall figures into the specific types of law reveals the patterns of Table 9. Many of these are hardly unexpected. Citations for single-judge chambers applications are almost exclusively self-citations, fitting the decision in a clear manner into the record of past decisions of the Court. The pattern for sentence appeals might be expected to be similar, clustering around one or more of its own benchmark sentencing decisions, but in fact splits between citations of other courts of appeal and of trial courts. Supreme Court references are most frequent for criminal law and public law appeals and for Charter cases, and very low for private law and financial law - this is consistent with the general conclusion that caseload pressures have forced the Supreme Court to narrow the focus of its attention, and all but abandon the field of private and commercial law to the provincial courts of appeal. United Kingdom citations are most frequent for private and financial law appeals, which may also explain why citations in these cases tend to be to older decisions (average age of 25.1 and 40.2 years respectively, against an overall figure of twenty years). Self-citations are relatively frequent for public and family law, and references to other provincial courts of appeal are most significant for criminal appeals, the major staple of the appellate workload. Only in family law do Canadian trial citations figure prominently. This is not surprising - given the dramatic recent changes to the content and social context of Canadian family law, an unusual proportion of relevant citations might well be found lower than usual on the

appellate hierarchy - although the average age of family law citations (19.8 years) is higher than might have been expected.

Table 9
Authorities Cited, By Type of Case & Decision
All Manitoba Court of Appeal Decisions, 1989

	n	SCC[26]	Man CA	UK[27]	Oth CA	Cdn Tr	Oth
applications	12	16.7	66.7	8.3	8.3	-	-
criminal	149	34.9	11.4	10.7	34.2	6.7	2.0
sentence	7	-	-	-	71.4	28.6	-
public	52	36.5	23.1	7.7	15.4	13.5	3.8
family	54	18.5	22.2	7.4	16.7	27.8	7.4
private	172	21.5	16.9	30.2	12.2	14.5	4.7
financial	12	-	16.7	50.0	16.7	16.7	-
reference	1	100%	-	-	-	-	-
All Decisions	386	26.2	17.9	17.9	21.0	14.2	2.8
Dissents	44	29.5	13.6	9.1	27.3	9.1	11.4
Concurrences	29	24.1	17.2	34.5	13.8	6.9	3.4
All Opinions	459	26.3	17.4	18.1	21.2	13.3	3.3
Charter	106	31.4	12.4	15.2	24.8	13.3	2.9
Judges:							
senior 4	162	22.2	8.6	22.8	22.8	17.3	6.2
junior 4	297	28.6	22.2	15.5	20.2	11.1	2.4

[26] Includes 7 Privy Council citations.

[27] Excludes 7 Privy Council citations.

The differences between the "senior four" and the "junior four" among the eight judges who served on the Court of Appeal during 1989 are interesting and suggestive. The recently appointed judges tend to cite prior decisions of their own court more often, and decisions of the Supreme Court of Canada somewhat more often, than do their senior colleagues; and concomitantly they tend to cite United Kingdom decisions and Canadian trial court decisions less often. These differences can all be described in terms of the junior judges pulling the Manitoba citation patterns closer to the all-province norm; if these judges also continue their relative reticence to deliver dissents, the distinctness of the current Manitoba pattern will be further eroded. As well, the recently appointed judges tend to cite more recent decisions (average citation age 17.6 years) than their senior colleagues (average citation age 24.6 years).

V. Summary of Findings

On the basis of a statistical analysis of the 382 panel decisions of the 1989 Manitoba Court of Appeal, one can make the following generalizations:

1. The numbers give some grounds for thinking that the steady growth in appellate caseloads that has characterized the last two decades may have peaked, at least temporarily, in Manitoba (and possibly in the other provinces as well).
2. Almost all the decisions of the Manitoba Court of Appeal are made by three judge panels, larger panels having become extremely rare.
3. Most of the decisions of the Manitoba Court of Appeal are brief and (presumably) routine, only 9% requiring as many as five pages, and another 11% as many as two pages, in a standard law report.
4. The large majority of the decisions of the Court are made by the senior judge of the panel, which is to say by the senior judges of the Court; this is more so of the routine cases than of (say) Charter cases, which are if anything more likely to be made by junior judges.
5. Overall success rates are around one in three; the highest success rates are for sentence appeals and the lowest for substantive criminal appeals, the two together making up a majority of the Court's caseload.
6. The dissent behaviour of the Manitoba Court remains high in comparison with the other Western provincial courts of appeal. There seems some statistical basis for describing this as primarily

organized around a principled disagreement between two pairs of judges (Monnin C.J.M. and Lyon against Huband and O'Sullivan), with the critical polarities generated by support for the Crown and a readiness to reverse the trial judge.

7. The citation patterns of the judges of the Manitoba Court of Appeal remain distinctive both in the high frequency of United Kingdom citations and the low frequency of citations of the Court's own previous decisions. There are some reasons to think that the more junior judges on the Court exhibit consistently different citation behaviour that is closer to that of the other provincial Courts of Appeal.