

## **A Tale of Two Courts II: Appeals from the Manitoba Court of Appeals to the Supreme Court of Canada, 1906–1990**

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THE PURPOSE OF THIS paper is to consider the history of the Manitoba Court of Appeal, primarily in the context of subsequent appeals from that Court to the Supreme Court of Canada. This paper examines the attributes of the Manitoba Court of Appeal that correlate with the patterns that emerge out of the appeal loss to the Supreme Court of Canada. The period under consideration reaches from the establishment of the Manitoba Court at the beginning of the 1906/1907 term to the end of the 1989/90 term, which roughly corresponds with the retirement of Chief Justice Alfred Monnin early in 1990. By fortunate coincidence, this same time period is very closely coincident with the span from the beginning of the Supreme Court Chief Justiceship of Sir Charles Fitzpatrick (June 4, 1906) to the retirement of Chief Justice Brian Dickson — a nice artistic touch by virtue of the fact that Justice Dickson himself served on the Manitoba Court of Appeal for five years. The nine provincial and eleven federal chief justiceships will provide the basic periodicization for the analysis.

This paper will focus on the most obvious dimension of the interaction between a specific court and a higher court — namely, the rate and the patterns of higher court interventions into lower court decisions brought before it on appeal. The term “intervention” is used in the sense suggested by Burton Atkins:<sup>1</sup> a higher court decision that significantly alters the resolution imposed by the lower court. It therefore includes both appeals allowed and appeals allowed in part. Because of coding problems, however, it does not include those situations in which the Supreme Court maintains the appeal court outcome while significantly altering the legal reasons given for that outcome.

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<sup>1</sup> B.M. Atkins, “Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States” (1990) 24 *Law & Soc. Rev.* 71.

The focus on the Manitoba Court's record on subsequent appeal is of course somewhat limited and artificial. Appeal court decisions are (usually and appropriately) directed at something other than simply trying to guess what the Supreme Court might do, and the process of appeal court review is by no means limited to the correction of error, to the identification of blameworthy slip-ups on the part of lower court judges who should have known better. The fact that provincial appeal court decisions are themselves panel reviews of trial court decisions clearly suggests that such factors should not be the cause of most Supreme Court interventions. Rather, the purpose of a "General Court of Appeal" is directed more to the making of new law (in the sense either of altering the accepted rule within existing doctrine, or establishing new doctrine to deal with new problems or issues), or to the creating of uniformity between divergent lower court practices in areas involving significant discretion.<sup>2</sup> The fact that the judges of the Supreme Court themselves have not always been of uniform high quality — the first third of the period here under consideration is described in Snell and Vaughan's history of the Supreme Court in two chapters entitled "The Court in Decline" and "An Instrument of Politics"<sup>3</sup> — makes the mere fact of reversal somewhat problematic as a measure of quality. However, given that a Chief Justice of Manitoba was forced to retire because of a string of reversals in the Supreme Court and the resulting loss of prestige of the Manitoba court,<sup>4</sup> an investigation of a court's record on appeal is something more than a casual or arbitrary focus.

## I. THE MANITOBA COURT OF APPEAL

THE MANITOBA COURT OF Appeal was established in 1906, making Manitoba the third province in Canada (after Ontario and Quebec)

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<sup>2</sup> Using discretion in the way suggested by Barak: "Discretion is the power given to a person with authority to choose between two or more alternatives, when each of the alternatives is lawful." See A. Barak, *Judicial Discretion* (New Haven & London: Yale University Press, 1987) at 7.

<sup>3</sup> See J.G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985).

<sup>4</sup> The reference, of course, is to Mr. Justice Prendergast's retirement in 1944; see D. Gibson & L. Gibson, *Substantial Justice: Law and Lawyers in Manitoba, 1670-1970* (Winnipeg: Peguis, 1972).

with a full-time specialized Court of Appeal.<sup>5</sup> According to Gibson & Gibson,<sup>6</sup> the major reason for the establishment of a Court of Appeal was a caseload crisis better accommodated by a specialized two-tiered system than by a single provincial superior court hearing appeals *en banc*. Such an explanation is clearly only half the story — it gives no suggestion, for example, of why the evolution of specialized appeal courts in the Atlantic provinces took another six decades, even though the population sizes were comparable and the provincial court system even more established — but it does suggest a pedigree somewhat more distinguished than that of British Columbia where (if I am not reading too much between the lines of Williams' account)<sup>7</sup> one reason for creating a Court of Appeal was to separate two superior court judges whose personality clashes were adversely affecting the court's functioning.<sup>8</sup>

The Manitoba Court of Appeal was initially established as a four-judge bench, expanded to five judges in 1912, six in 1977, and seven in 1985. Thirty-six judges have served on the Court between July 23, 1906 and June 30, 1990. The average judge appointed to the Manitoba Court of Appeal was 57 years old<sup>9</sup> and (excluding those judges still sitting) served in that capacity for just under 13 years. The record for longevity is held by Mr. Justice Dennistoun (28 years, 120 days), closely followed by Mr. Justice Monnin (28 years, 28 days); the shortest serving judge was Mr. Justice Metcalfe, who served for only six months. The basic parameters of these two elements — age and length of service — are indicated because they will be considered as possible correlates of Appeal Court performance on subsequent appeal.

There has been a preponderance of judges elevated from the trial bench (21) over those with no previous judicial appointment (15);

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<sup>5</sup> Technically, there is some basis for arguing that it was second, not third, because the Quebec King's/Queen's Bench retained a vestigial original trial jurisdiction, and was not a fully specialized Court of Appeal until 1974 — see P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 291. However, the *Quebec Reports* have used the designation "Cour d'Appel" since early in this century, and it would be misleading to press the technicality.

<sup>6</sup> *Supra*, note 4 at 198.

<sup>7</sup> D.R. Williams, *Duff: A Life in the Law* (Vancouver: University of British Columbia Press, 1984).

<sup>8</sup> For a fascinating, if less than uplifting, account of the origins and the details of this feud, see H.B. Robertson, "When Judges Disagree ..." (1957) 15 *The Advocate* 182.

<sup>9</sup> Mr. Justice Monnin, appointed just before his 42nd birthday, appears to have been the youngest ever appointed; Mr. Justice Dysart, at 72, the oldest.

judges have had an average of 9 years of trial bench experience upon elevation. A recalculation in terms of "judge years" yields a comparable balance of 259/168 for elevations over new appointments; nonetheless, fully one-half of the time (44 years out of 86, including 1912–1921, 1922–1948, and 1986 to present) a majority of the Court has been composed of judges for whom the appellate bench marked their first judicial appointment. The factor of prior trial experience, and/or length of total judicial service, will also be used as a basis for evaluation and comparison.

I have no direct information on the caseload of the Manitoba Court over the period. Information on reported decisions of the Manitoba Court of Appeal hover in the low forties and high thirties for much of the period from the 1920s to the late 1970s before rising sharply,<sup>10</sup> but this is clearly more a function of the resurrection of the *Manitoba Reports* than an accurate reflection of a massive surge in actual caseload. Within the confines of the very limited data available, the most reasonable conclusion is that of Peter Russell: there is plausible and convincing fragmentary evidence suggesting that appeal court caseloads have risen dramatically in the last thirty years,<sup>11</sup> and some more recent indications that this caseload increase has levelled off in the 1990s.<sup>12</sup> This meshes with the fairly obvious assumption that the rise in the size of the Manitoba (and other) Courts of Appeal has been driven at least in part by the quantity of work that those courts were obliged to deal with; that earlier courts were smaller because they had less work to do. Even making some allowance for the fluctuating Supreme Court caseload over the period, this suggests that for much of this period cases appealed to the Supreme Court may have formed a higher percentage of the total Manitoba caseload than they do today, even though the absolute number of such appeals is higher today than in the pre-war period.

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<sup>10</sup> Comments based on research in progress, specifically a project funded by SSHRC to investigate citation and decisional patterns of provincial appeal court decisions at five year intervals since World War I.

<sup>11</sup> *Supra*, note 5 at c. 12 and especially at 294.

<sup>12</sup> See, e.g., P. McCormick, "Canadian Provincial Courts of Appeal: A Comparison of Procedures," paper presented at the 1991 Canadian Judicial Appellate Court Seminar; Victoria, B.C., May 1991 especially at 8.

## II. THE DATA BASE

THE DISCUSSION AND COMMENTS that follow are based upon an analysis of all reported decisions of the Supreme Court of Canada since 1905. Specifically, every decision reported in the *Supreme Court Reports* has been coded for a variety of attributes, and that information has been supplemented where possible by additional information concerning the provincial appeal court decision that was itself the basis for the appeal. For present purposes, analysis was limited to the 80.4% of reported Supreme Court decisions that related to appeals from the provincial appeal courts, omitting the smaller but far from negligible categories of appeals from federal courts and boards (15.8%), appeals *per saltum* from provincial superior trial courts (1.6%), and a miscellaneous category of reference cases, Supreme Court reconsiderations of their own decisions, and procedural motions and applications (2.3%).

There is an immediate problem in the fact that the reporting practices for Supreme Court decisions have not remained constant over the period. It is only since 1970 that the *Supreme Court Reports* routinely include almost all of the Court's decisions; before this date, as Peter Russell indicates, the reporting was rather more selective.<sup>13</sup> Comparing the numbers in the data base with the numbers that Snell and Vaughan report for the entire Supreme Court caseload for selected years between 1910 and 1950,<sup>14</sup> it would appear that about 70% of Supreme Court decisions were reported, although this overall figure disguises fluctuations between a low of 40% and a high of 90%. This is, to say the least, disconcerting — we could be missing as many as one-third of the Supreme Court's decisions on Manitoba appeals, and any attempt to generalize from the known 70% to the partially unknown 100% appears suspect from the start.

For several reasons, however, the problem is probably less drastic and debilitating than appears at first glance, and the analysis of reported cases remains useful. *First*, given the normal practices of a common law system, unreported cases virtually vanish from the system, usually having little or no lasting significance or implication for anyone other than the immediate parties. Both the reputation and the influence of the Manitoba Court of Appeal, to the extent that it is directly reflected in Supreme Court judgements or implicit in their

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<sup>13</sup> "The Political Role of the Supreme Court of Canada in its First Century" (1975) 53 *Can. Bar Rev.* 576.

<sup>14</sup> *Supra*, note 3 at 163.

treatment of Manitoba decisions or derivative from the Manitoba Court's record on appeal, would rest far more on the visible and permanent record than on the smaller invisible fragment not recorded.

*Second*, the selection of cases for reporting was not random, but was instead based upon an assessment of their importance on criteria that retain some continuity and consistency over time. Even if the judgment that guided these choices can sometimes be faulted,<sup>15</sup> it does suggest that the pool of unreported decisions is likely to be heavily skewed in favour of the routine and repetitive. Before the revisions to the Supreme Court's discretionary jurisdiction in 1975, most of the Supreme Court caseload comprised appeals by right rather than appeals by leave — that is to say, they were cases that earned the right to Supreme Court consideration by the size of the dollar amount at issue or the seriousness of the criminal penalty involved, rather than by some judicial assessment of the nature and significance of the legal issues involved. The jurisprudential content, the doctrinal and precedential importance, of many of them could be expected to be small.

*Third*, there have been recent studies of comparable systems involving the selective publication of court decisions where the choice is made by someone other than the judges themselves. These studies suggest identifiable and predictable continuities to the patterns that emerge from the publication of decisions, continuities that survive the double test of common sense and statistical verification. Burton Atkin's exploration of the English Court of Appeal<sup>16</sup> suggests two relevant variables: a case is more likely to be reported if it involves a reversal rather than an affirmation of the decision appealed from; and a case is more likely to be reported if it comes from a higher rather than a lower forum.

The implications are twofold: *first*, the Supreme Court cutting room floor is more likely to be littered with appeals from provincial superior trial courts or federal boards than with appeals from provincial appeal courts; and second, reported decisions are likely somewhat to overstate reversal rates on a consistent basis. This is very reassuring; although an accurate picture is better, a reasonably invariant and consistent distortion is almost as good. With some caution regarding the major

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<sup>15</sup> And has in fact been subject to criticism for much of the period under consideration; see *ibid.*

<sup>16</sup> B.M. Atkins, "Communication of Appellate Decisions: A Multivariate Model for Understanding the Selection of Cases for Publication" (1990) 24 *Law & Society Rev.* 1171 especially at 1183.

change in reporting practices after 1970, it should still be possible to make meaningful comparisons between different courts within and between provinces.

### III. APPEALS TO THE SUPREME COURT OF CANADA

BETWEEN JUNE 4, 1906 and June 30, 1990, there were 5,138 appeals from provincial courts of appeal (or provincial superior courts sitting *en banc*) to the Supreme Court of Canada. 2,118 of them, or 41.2%, were successful in whole or in part. Over this same period, there were 311 appeals from the Manitoba Court of Appeal, of which 43.9% were successful; the ratio between the success rate for Manitoba appeals and the success rate for all appeals was 1.07:1. Table 1 shows these same figures for each of the eleven Supreme Court Chief Justiceships.

By way of comparison with the regionalization factors suggested in the earlier and more limited analyses of this data-base,<sup>17</sup> there are several significant confirmations in this longer term perspective. One is the continuing low profile of the Quebec judges; with roughly one-third of the Supreme Court "judge years" over the period,<sup>18</sup> Quebec members of the Supreme Court accounted for only 25.9% of the panel appearances and 16.0% of the decisions.<sup>19</sup> By way of contrast, Western judges were slightly over-represented for panel appearances (26.3%) relative to total judge-years (22.7%), and significantly over-represented for decisions (32.7%). Another is the fact that Quebec Supreme Court judges were less likely to vote to reverse appeal court decisions (38.8% of the time) than Ontario (44.3%) or Western (44.4%) judges, although these differences are even larger for the post-World War II period. Such persisting tendencies hint at intriguing dimensions of Supreme Court decision making practices.

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<sup>17</sup> See P. McCormick, "A Tale of Two Courts: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada 1970-1990" (1990) 19 Man. L.J. 357; and P. McCormick, "The Supervisory Role of the Supreme Court of Canada: Appeals from the Provincial Courts of Appeal 1949-1990" Sup. Ct L. Rev. (2d) [forthcoming].

<sup>18</sup> That is, making allowance for the fact that between 1927 and 1949, there were seven members of the Supreme Court of Canada, one from the Maritimes and two each from Ontario, Quebec and the West.

<sup>19</sup> Excluding *per coram* decisions, and a small number of reported decisions for which it was impossible to determine which judge was delivering the decision of the Court.

**Table 1:**  
**Success Rates of Appeals to the Supreme Court of Canada.**  
**Manitoba and All Appeal Courts Compared, 1906-1990.**

CJSCC	Date Appointed	All CA success %	Man CA success %	Man CA/ All CA
FITZPATRICK	Jun 04/06	31.8%	23.1%	72.7
DAVIES	Oct 23/18	39.6%	28.6%	72.2
ANGLIN	Sep 16/24	41.7%	37.0%	88.8
DUFF	Mar 17/33	41.4%	44.0%	106.2
RINFRET	Jan 08/44	46.4%	52.2%	112.5
KERWIN	Jul 01/54	39.5%	42.9%	108.6
TASCHEREAU	Apr 22/63	44.8%	59.1%	131.9
CARTWRIGHT	Sep 06/67	37.9%	45.5%	120.9
FAUTEUX	Mar 23/70	44.8%	37.5%	83.7
LASKIN	Dec 27/73	46.1%	58.3%	126.5
DICKSON	Apr 19/84	40.1%	45.8%	114.2

Of course, such a simplistic table with single figures for the reversal rates of Chief Justiceships lasting as long as twelve years begs a lot of questions. As well, the period has seen dramatic changes on the Supreme Court of Canada — the growth of the Court to seven members in 1927 and nine in 1949, the abolition of appeals to the Judicial Committee in criminal cases in 1935<sup>20</sup> and in all cases in 1949, the expansion of discretionary leave jurisdiction in 1974/75, and the entrenchment of the *Canadian Charter of Rights and Freedoms*<sup>21</sup> in 1981. Even the caseload has changed, in both size and composition — from the heavy focus on private law appeals in the early decades of the century to the recent emphasis on public and criminal law appeals. At the same time, the Courts of Appeal have expanded dra-

<sup>20</sup> The critical decision was *British Coal Corporation v. R.*, [1935] AC 500, which overruled *Nadan v. R.*, [1926] AC 482 and upheld the section of the *Criminal Code* barring appeals beyond the Supreme Court of Canada.

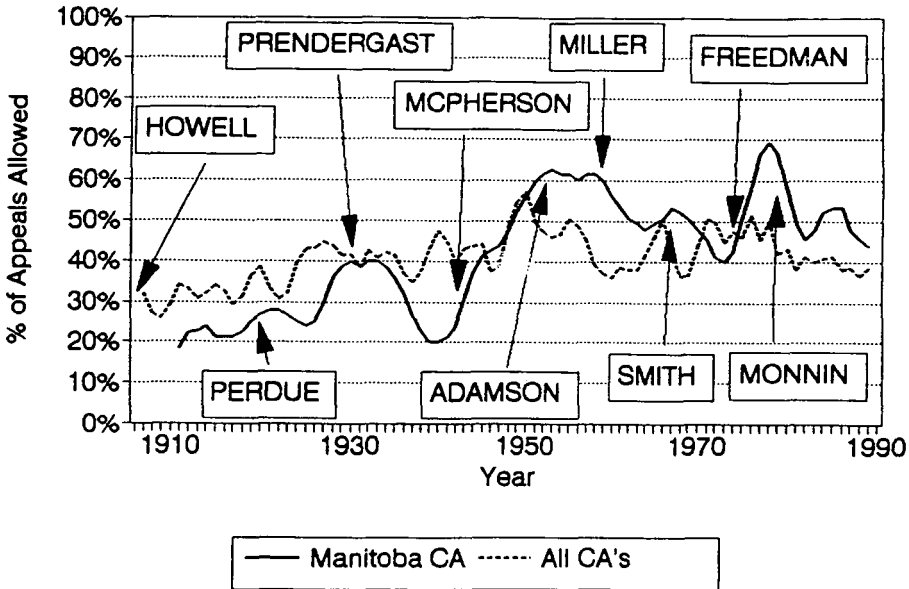
<sup>21</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.



matically in size while reducing the normal size of an appellate panel (from five for most of the period to three in the last decade or so). Given all these changes, overall reversal rates have a misleading firmness to them and should be taken with a grain of salt. Again, for the reasons indicated above, it is probably the case that the reporting practices of the *Supreme Court Reports* before 1970 slightly exaggerate the reversal rate, and therefore the data in Table 1 almost certainly understates rather than overstates the contrast between the early Court and the recent Court.

Figure 1

## Reversal Rates in SCC 1906-90 Manitoba CA compared with All CA's



Perhaps we can fine-tune the general characterizations. It seems useful to think of the reputation of a Court of Appeal as being linked, not to a single appeal, but to the string of appeals that preceded it, with the outcomes of older appeals gradually forgotten as newer ones enjoy more vivid recollection. To translate this common sense observation into a methodology that a computer can render as specific numbers, we can express an appeal court's image at any given time in

terms of the success rate of the most recent, for example, twenty-five appeals from its own decisions. Figure 1 traces the ebb and flow of the Manitoba Court of Appeal's public record in these terms. The same figure permits a comparative dimension, in that the success rate of all appeal courts generally is not a constant number but itself ebbs and flows; the national "norm" or standard against which to evaluate any specific Court of Appeal can be calculated by a similar process including appeals from the decisions of all provincial appeal courts (the larger numbers in this case permitting a "tail" of fifty cases rather than twenty-five).

In very general terms — and trying to look past the constant and significant short-term fluctuations within this long-term trend — the success rate of appeals to the Supreme Court of Canada started the period low and rose fairly steadily to peak just after World War II, holding more or less steady thereafter. In similar terms, the success rate of appeals from the Manitoba Court of Appeal started low and rose fairly steadily to peak in the late 1960s, before rising to an all time high in the late 1970s, recovering slightly thereafter. There is a basic similarity between these two patterns, a sense in which the Manitoba story is a slightly exaggerated version of the same basic trend — compared with the overall figures, the Manitoba rate started lower, rose more rapidly, and peaked much later.

Obviously, given the unusual historical drama of a Chief Justice forced from office, the focal date must be the closing years of the Prendergast term as Chief Justice of Manitoba — the early 1940s, corresponding to the end of Duff's term as Chief Justice of Canada. The pattern that emerges is extremely ironic. On the one hand, it is quite true that in his last few years as Chief Justice, Prendergast C.J.M. led the Manitoba Court of Appeal to a rate of reversal at the hands of Canada's highest court much higher than that enjoyed by his predecessors or by the *en banc* appeals that preceded the creation of the Court (and higher as well than the Court had enjoyed in the first years of his Chief Justiceship), and it was quite understandable that the members of the relevant legal public should have become concerned about the reputation of the Court. On the other hand, none of his successors — and especially not his immediate successors — have been able to produce a lower reversal rate over any extended period of time. This is far from proving that Prendergast was the victim of a bum rap, but it certainly suggests that there is more going on here.

#### IV. STRUCTURAL FACTORS AND REVERSAL RATES

ONE PLACE TO LOOK for an explanation of these patterns is in the structural factors relating to the cases that rise on appeal — that is, the objective characteristics of the case under appeal that can be demonstrated to make reversal statistically more likely. This seems a strange assertion for a judicial system that focuses on the individual case on its own merits, and it certainly is not intended to deny that any court would allow its decisions to be driven by their contribution to some *ex post facto* statistical pattern rather than the facts and the legal arguments presented to them. The suggestion implicit in this approach is one of correlation rather than causation — not that appeal panels tend to allow appeals in certain types of cases *because* they have these characteristics, but simply that any examination of the record over an extended period of time reveals that they do in fact allow these appeals more often. This is an example of the use of cue theory, itself a development from general communications theories, as a way of examining complex and technical decision-making practices from an outside and statistical perspective.<sup>22</sup>

One such objective characteristic that seems to serve as a cue identifying an appeal with a greater chance of success is a dissent on a matter of law on the provincial Court of Appeal. Such a dissent indicates — and a unanimous decision denies — the existence of a degree of judicial doubt about the optimal resolution of the legal issues, and it seems logical to assume that the signalled existence of such doubt increases the possibility that the Supreme Court itself will disagree with the appeal court majority. It is clearly the case that dissents on the provincial appeal court make subsequent appeal more likely — there was a dissent on more than 35% of the decisions appealed to the Supreme Court, and no provincial court has dissent rates this high<sup>23</sup> — and this is presumably a reflection of appellants' greater anticipation of success. The numbers certainly confirm these expectations: appeals for which there was an appeal court dissent are

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<sup>22</sup> For a discussion of cue theory and its applicability to the study of appellate courts, see *supra*, note 16 at 1166 ff.

<sup>23</sup> For a comparison of inter-provincial dissent rates, see P. McCormick, "Caseload and Output of the Manitoba Court of Appeal 1989" (1990) 19 Man. L.R. 334; and P. McCormick (with W.D. Griffiths), "Comparative Review of Administration in the Provincial Appellate Courses" presented at 1991 Canadian Appellate Court Seminar, Victoria B.C.; May 12, 1991.

half again as likely (47.7%) to succeed as appeals from unanimous decisions (32.7%).<sup>24</sup>

The Manitoba Court of Appeal has been characterized for some time by a rate of dissent higher than that of many other courts. This is fully borne out in those decisions appealed to the Supreme Court and subsequently reported. For all appeal courts, breaking the figures down by Supreme Court Chief Justiceships, the frequency of dissents in appealed decisions was in the low 40% range, falling to below 35% after Kerwin;<sup>25</sup> but for the Manitoba Court of Appeal, the corresponding frequency of dissent was very low for the Fitzpatrick court but jumped above 50% thereafter, declining into the low 40% range only during the Cartwright court and rising again afterward. Overall, 47% of all appeals from Manitoba, compared with 35% from all provinces combined, involved a dissent on the appeal panel. However, the explanatory power of this variable is undermined by the fact that, unlike appeals overall, Manitoba appeals do not appear to be significantly influenced by the presence or absence of dissent; the differential is only 46% to 42%, rather than the 48% to 33% for all appeals. The overall success rate of Manitoba appeals is slightly above average, not because so many of the Manitoba appeals were non-unanimous, but because so many unanimous appeal decisions were reversed.

A *second* relevant factor is whether or not the Court of Appeal itself allowed or dismissed the appeal that brought the case before it. At first glance, this seems a strange point to raise; especially if the provincial court of appeal reached a unanimous decision, it seems completely beside the point whether that decision upheld or reversed the initial trial judge. However, it has been suggested in the literature<sup>26</sup> that there is a "rut in the road" strongly promoting continuity and solidarity within the judiciary. At its mildest: the ideal outcome is a trial judgment affirmed at subsequent levels of appeal, because this pattern most strongly suggests a single objectively correct answer accessible to all trained professionals and therefore minimizes the

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<sup>24</sup> This discussion builds on an argument that I have made elsewhere in "The Supervisory Role of the Supreme Court of Canada," *supra*, note 17; the figures in this article show a larger difference because they are based on an 85-year rather than a 40-year time period.

<sup>25</sup> Clearly, one factor that has contributed to the decline in dissent rates is the falling size of the average provincial appeal panel, usually five and sometimes seven before World War II, and almost invariably three more recently.

<sup>26</sup> See, e.g., *supra*, note 1.

appearance of a diversity of opinion among judges which subjects any specific decision to the "luck of the draw." On this argument, if the Court of Appeal has ruffled the surface of the water by reversing the trial judge, the Supreme Court is that much less reluctant to reverse the court of appeal itself. Again, lawyers seem aware of this; although appeals to provincial courts of appeal generally appear to succeed 35-40% of the time, these cases account for roughly one-half of the further appeals to the Supreme Court. And again the expectations seem to be justified: over the 85 year period, appeals succeeded 35.4% of the time if the provincial appeal court upheld the trial decision, 48.6% of the time if it reversed the trial decision.

But this factor as well does nothing to explain the record of the Manitoba court, which has an allowed/dismissed breakdown that is very close to the all-province figures. 48.6% of all appeals, and 50.8% of the appeals from the Manitoba Court of Appeal, were of decisions that had in some way altered the trial judge's disposition of the case. Again, however, the impact of the structural factor is less for Manitoba appeals than for appeals generally: when the Manitoba Court of Appeal reversed the trial judge, it was itself reversed 43.4% of the time (slightly less often than other courts), but when it upheld the trial judge it was reversed 44.0% (significantly more often than other courts).

Examination of the structural factors, therefore, does not explain the Manitoba pattern; it only heightens the mystery. The Manitoba record on appeal is slightly below that of other courts precisely because the Court is reversed more frequently than usual on precisely the unanimous affirmations of trial decisions that make up the bulk of the output of all provincial appeal courts.

## V. JUDGES: AGE AND EXPERIENCE

A SECOND POSSIBLE BASIS for an explanation lies with the immediate characteristics of the judges themselves, more specifically with such factors as age and experience. Gibson and Gibson<sup>27</sup> allude (with all the delicacy that normally surrounds retrospective accounts of courts and judges) to the increasing age of the Manitoba Court before the anti-Prendergast coup, and to concern within the legal public about the resulting effect on the capacity of some of the judges. Certainly there is some reason on the face of it to think of this factor as providing at least an element of the answer; the average age of the

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<sup>27</sup> *Supra*, note 4.

Manitoba Court before the 1944 replacements was over 75, the highest it has ever been, and even the youngest member of the Court was above what non-judges now think of as retirement age. Our own time may have overdone the cult of youth, may have become too prone to celebrate energy over experience, but even without this modern prejudice these numbers seem high enough to draw some second looks.

To generalize from the implied hypothesis: at least beyond a certain age, the performance of judges as measured by their rate of reversal on subsequent appeal, begins noticeably to decline. The older the judge, the more frequent the reversals; and consequently (the whole being the sum of the parts), the older the average age of the court, the more its collective performance suffers. To check this hypothesis, appeals from the Manitoba Court were coded for the age of the judge who delivered the decision,<sup>28</sup> and the results are shown in Table 2.

**Table 2: Success Rates, Appeals from Manitoba C.A.  
By Age of Deciding Judge**

Age of Appeal Judge	Number of Appeals	Success Rate of Appeals
80 or over	5	60.0%
70 to 79	62	40.3%
60 to 69	118	40.7%
50 to 59	104	49.0%
40 to 49	9	55.6%

The pattern seems to refute the "older judges, more reversals" thesis quite decisively. The general pattern is rather different: as the age of the deciding judge goes up, the reversal rate goes down (although the rate of this decline diminishes) at least until the 80-year point; and the increased reversal rate for the 80-year old judges is shaky ground for a counter-argument because the very small number of cases involved makes generalization dubious. Certainly there is no reason over the long run to suggest that panels of seventy-year old judges are

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<sup>28</sup> Calculated on the day the appeal decision was handed down, not the day the Supreme Court decision was made.

less satisfactory than panels of sixty-year old judges, and some reason to think that they are reversed less often than panels of fifty- or forty-year old judges.

To pursue the point one step further: the 62 decisions by judges between 70 and 80 years of age were made by 13 different judges, who during their complete tenure on the bench combined for a total of 151 decisions subsequently appealed to the Supreme Court. The overall success rate of those appeals was 40.4%, suggesting both that this group included a swath of the better judges of the Manitoba Court and that their performance did not decline during their eighth decade. On the other hand, the three judges who delivered appealed decisions while in their 80s combined during their total career for an overall appeal success rate of 53.8% on 26 appeals — suggesting more that they were among the less distinguished judges than that their performance declined with age.

We cannot therefore make the general point that the decisions of older judges tend to be reversed more frequently — that is, to the extent that reversal patterns over a sufficient number of cases can be treated as some indicator of judicial quality, that older judges are poorer judges. Certainly the appointment patterns that emerge at this critical point in the history of the Court do not point to any serious finding that judicial age was a major dimension of the problem. Between 1944 and 1947, Prendergast (85), Robson (73) and Dennistoun (82) and Trueman (77) were replaced by Bergman (63), McPherson (65) Coyne (68) and Dysart (72), the latter four having an average age on appointment ten years above the long-term average. This hardly represents a youth movement.

But perhaps the problem is not with age but with another factor that is so closely associated that it is difficult to disentangle — namely, experience; the length of service on the bench. Perhaps we are not looking at a judge who has been on the planet too long, but simply one who has been on the bench too long; that is, perhaps the problem is a kind of judicial burnout, aggravated by the fact that judges before the age of pensions had little incentive to retire and every incentive to continue serving.

**Table 3: Success Rates, Appeals from Manitoba C.A.  
By Length of Experience of Deciding Judge**

Judge's Experience	Appeal Experience		Total Experience	
	Cases Appealed N	Success%	Cases Appealed N	Success%
super senior	—		16	50.0%
very senior	22	40.9%	58	46.6%
senior	27	40.7%	25	56.0%
established	134	44.0%	140	42.1%
recent	110	47.3%	54	42.6%

To test this we can divide judges at the time they rendered the decision into categories both in terms of their appellate experience and in terms of the total judicial experience (appellate, plus trial experience for those judges who were elevated from the trial bench.)<sup>29</sup> The categories that will be employed for this purpose are “recent” judges (5 years or less), “established” judges (5 years to 15 years on the bench), “senior” judges (15 to 20 years) and “very senior” judges (more than 20 years). For total appellate experience, an additional and more senior category isolates decisions by judges with more than 25 years experience. The results are shown in Table 3.

These patterns seem completely schizophrenic. Looking at appellate court experience alone, more experience clearly contributes strongly and consistently to lower reversal rates on subsequent appeals. Looking at total judicial experience, the situation is more confused but there is some suggestion that more experience contributes significantly to higher reversal rates. There is a simple, albeit rather surprising, explanation for this apparent incoherence: however counter-intuitive it may seem, it is not the case that elevated judges are, measured in terms of reversals on subsequent appeals,<sup>30</sup> better

<sup>29</sup> For those judges whose appellate appointment represented their first judicial appointment, the two figures are of course the same.

<sup>30</sup> As the careful wording suggests, I do not wish to suggest that record on reversal is necessarily the best, or even a particularly reliable, indication of judicial ability, merely to suggest that it is one element that might enter into such a judgment.



than or even as good as judges appointed (as the rather quaint phrase has it) “off the street.” Decisions made by elevated judges were reversed 47.4% of the time; decisions by first-time judges were reversed only 41.0% of the time.<sup>31</sup> It does not seem to be the case that the journey from private practice to the appeal bench is longer or more difficult than the journey from the trial bench to the appeal bench; at least on the basis of the Manitoba figures, there is a case for the reverse. The pattern of improvement connected to appellate experience is similar for both sets of judges.

In terms of providing a systematic explanation for the patterns of reversal rates that have characterized different periods of the Manitoba Court’s history, theories organized around the personal characteristics of the judges are no more helpful than theories building on structural qualities of the cases appealed. Perhaps in the end we can do no more than fall back upon chronological accounts revolving around the personal qualities and interactions of specific sets of judges — always a plausible recourse when we are dealing with a Court whose members number in single figures.

## **VI. APPEALS FROM THE MANITOBA COURT OF APPEAL: A STATISTICAL CHRONOLOGY**

AS A LOGICAL STARTING point: each appealed decision of the Manitoba Court of Appeal was delivered by a specific and identifiable judge of the Manitoba appeal bench.<sup>32</sup> In this sense, the whole is quite literally the sum of its parts, and the record of the Manitoba Court of Appeal is the collective record of thirty-six individual judges. Table 4 therefore identifies all the judges of the Manitoba Court of Appeal with six or more reported appeals<sup>33</sup> to the Supreme Court of Canada, and the reversal rate that their decisions suffered at the hands of the higher court.

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<sup>31</sup> There are no overall figures supporting the idea that either group is particularly likely to be appealed; the ratio between elevated and first-time judges remains roughly 3:2 for total numbers of judges, total judge-years, and total appeals.

<sup>32</sup> Excluding the case for which there was no written decision, the decision written by an *ad hoc* judge from the trial bench, and the dozen decisions for which the information was not available.

<sup>33</sup> Although the number six is arbitrary, the principle is self-evident: if the number of reported appeals drops to lower and lower numbers, reversal rates lose any plausibility as an indicator of performance.

**Table 4: Reversal Rates for Individual Judges Appeals from Manitoba CA to SCC, 1906-1990**

Name of Judge	On Court	Appeals	Allowed	Reversal Rate
Fullerton	1917-31	11	2	18.2%
Perdue*	1906-29	21	5	23.8%
Howell*	1906-18	25	6	24.0%
Richards	1906-17	9	3	33.3%
Freedman*	1960-83	20	7	40.0%
Twaddle	1985-	7	3	42.9%
Dennistoun	1918-46	16	7	43.0%
Trueman	1923-47	11	5	45.5%
Hall	1971-89	23	11	47.8%
Monnin*	1962-90	24	12	50.0%
Huband	1979-	8	4	50.0%
Guy	1961-78	19	10	52.6%
Adamson*	1948-61	14	8	57.1%
Prendergast*	1922-44	8	5	62.5%
O'Sullivan	1977-	14	9	64.3%
Miller*	1959-67	6	4	66.7%
Matas	1973-86	18	12	66.7%

Note: includes only judges with six or more decisions appealed

\* = served as CJ for all or part of term on Court of Appeal

The table should not, of course, be treated as a "league table" in any simple sense. *First*, reversal rate on subsequent appeal is at best only one indicator of judicial ability, not an infallible one, and this would be so even if the reporting rate for Supreme Court decisions were 100% rather than 70% for much of the period considered. *Second*, the number of cases that generate the figure for the reversal rate vary

quite significantly, from barely half a dozen for Miller, Twaddle and Prendergast to about two dozen for Howell, Monnin and Hall; the smaller the number of cases involved, the less reliable the resulting figure. *Third*, the overall success rate for appeals to the Supreme Court of Canada has fluctuated quite dramatically over the decades, raising an insoluble “chicken and egg” problem — do some of the early judges have such lower reversal rates because they were lucky enough to work at a time when the Supreme Court seldom reversed; or did the Supreme Court seldom reverse because the judges who worked at that time were of unusually high quality? This is all the more central to any assessment because the four judges whose record on appeal is at or below 33.3% include three of the four judges initially appointed to the Court in 1906.

One variable that makes surprisingly little dent in the message of Table 4 is the appeal rate per judge. A notional rate of “one appeal per judge per year, give or take 25%” would catch every one of the judges listed except for Howell and Hall, who have unusually more appeals, and Dennistoun and Trueman, who have unusually few.<sup>34</sup> To a certain degree, this is just what one would expect — especially on a small court, the workload must be shared fairly evenly, and all judges would normally write roughly comparable shares of the major (and therefore appealable) cases. It is perhaps mildly surprising that the Chief Justices do not loom somewhat larger. One might have expected their cases to enjoy a higher profile, not necessarily because they write an unusually large share of the major decisions, but simply because the status of the office would make an appeal from the decision of a Chief Justice inherently more reportable. This does not seem to have been the case; the Chief Justices account for 24% of the reported appeals from a bench whose size has averaged five over the 84-year period, hardly a significant degree of over-representation. Nor have Chief Justices differed in any major way from their respective benches; decisions of Chief Justices have been reversed 41.1% of the time, decisions of all other judges 45.6% of the time.

But these comments, and the muted comparisons implicit in Table 4, suffer from one inherent flaw: the assumption of a “level playing field” that allows the reversal rate of Justice Richards (appointed to the Court in 1906) to be compared with that of Justice Huband

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<sup>34</sup> It is, however, worthy of note that there are six appeal court judges, including one Chief Justice, who accumulated ten or more years on the bench without having six or more reported appeals to the Supreme Court of Canada, these six being Cameron, Robson, Richards *filis*, McPherson, Coyne and Schultz.

(appointed in 1979). The same assumption underlies the indictment against the Prendergast Court — the simple fact of six straight reversals is taken to speak for itself. In reality, of course, it can do so only if we assume a known and constant background where a run of six cases should call for some “normal” number of reversals, say two or three.<sup>35</sup> But the spiky peaks and valleys of Figure 1, and the long-term upward drift that they embellish, show clearly that this is not the case; that the “normal” run of reversals in any given number of appeals is not constant but rather demonstrates both long-term increase and short-term fluctuations.

Figure 2 is an attempt to provide a more stable and objective background to such sequential comparisons. It builds on the logic of Figure 1 — the notion that the reputation of appeal courts collectively, and any specific court of appeal in particular, is a function of their performance over some previous run of cases, arbitrarily set as the most recent 50 decisions for all appeals and the most recent 25 decisions for the individual court of appeal. The relative strength of the Manitoba Court of Appeal is therefore the difference between these two figures — the all-appeal rate subtracted from the Manitoba rate — with a *positive* result meaning that the Manitoba rate has recently been reversed more often than other courts of appeal, and a *negative* result indicating that it has recently been reversed less often.

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<sup>35</sup> Or, in the United States Supreme Court, a number closer to four; see *supra*, note 1.

Figure 2

## Reversal Rates in SCC 1906-90

### Manitoba CA compared with All CA's

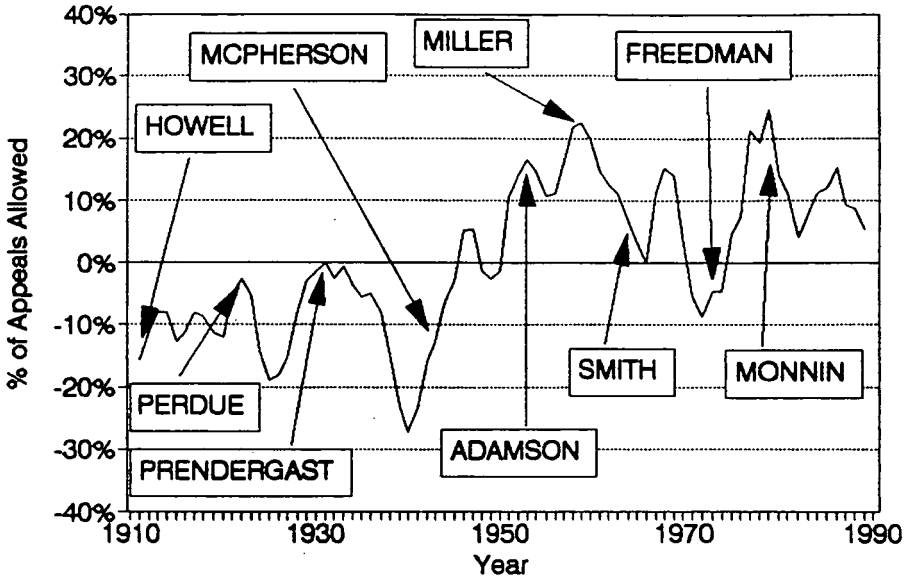


Figure 2 also relates these long-term patterns to the sequence of provincial Chief Justiceships, the arrow indicating the date when the new Chief Justice took office. In several cases, the resulting periodicization is arbitrary rather than defensible — when nothing has taken place but a simple “double shuffle” (a previous puisne becomes Chief, and a new puisne is appointed to fill the vacancy) it does not seem reasonable to expect a major change in court performance. There are, however, four junctures (besides the creation and initial staffing of the Howell Court) at which the convenient division into periods survives more rigorous scrutiny: the Perdue Court culminated five appointments in six years; the McPherson Court, besides resulting from the forced retirement of Prendergast, occurs within the context of five appointments in four years; the Adamson Court begins three new appointments in four years; and the Miller Court is identified by four appointments in four years. This compares with an overall replacement rate of 32 judges in 84 years, below one every two years; at each

of these points, therefore, it seems reasonable to identify a "new" court capable of establishing a new track record and a fresh reputation.

The resulting pattern is elegant in its simplicity and striking in its implications. The Manitoba Court of Appeal has existed for just over 80 years, a period which is logically divided into two roughly equally intervals — the first, in which the Manitoba court was reversed on appeal significantly less often than other comparable courts, and the second in which it was reversed more often. The transition from the first to the second stage took place during the McPherson Chief Justiceship. Under three Chief Justices (Prendergast, Miller and Monnin) the performance of the Manitoba Court of Appeal improved markedly relative to the other provinces; under three Chief Justices (McPherson, Adamson, and Freedman) it deteriorated in terms of the same comparison. The court reached its best comparative level under Prendergast, being reversed almost 30% less often than the other courts of appeal for a period around 1940; at its worst, around 1960 at the end of Adamson's Chief Justiceship, it was being reversed more than 20% more often than the other courts.

## VII. CONCLUSION

THIS PAPER HAS TRACED the long-term record of the Manitoba Court of Appeal in terms of its reversals on subsequent appeal to the Supreme Court of Canada, both in absolute terms and in comparison with other provincial courts of appeal. The attempt to resolve some of the emerging patterns by reference to structural characteristics of the decisions appealed (whether they were themselves reversals of trial court decisions, and whether they were the occasion of a dissent on the appeal court panel) was not successful; instead, to the extent that these factors do correlate with overall reversal rates, but not with Manitoba reversal rates, this examination revealed some doubts about the extent to which the Manitoba findings can be generalized. Attempted explanations couched in terms of the personal characteristics of the judges (specifically, age and length of appellate and judicial experience) carried greater explanatory power in the sense that older judges and more experienced judges are reversed less often, and that judges first appointed to the appellate bench consistently and significantly outperform judges elevated from the trial bench; however, these factors do not connect to the ebb and flow of Manitoba reversal rates either. The paper concluded with a revised chronology that placed the performance of the Manitoba Court in a statistical and comparative context that leaves many questions unanswered, and that meshes

curiously with the public reputations of some of the members and leaders of the Court.

It should go without saying that this statistical discussion is intended to supplement rather than to replace the traditional and fully appropriate focus of the judicial system on the individual case in its unique detail, fitted into the broader background through the citation of judicial authorities. Given that the authorities are cited for their contributions to legal doctrine, without regard to what sort of party prevailed in the case or whether an appeal was won or lost, overall statistical generalizations are completely beside the point. It is, however, throwing the baby out with the bathwater to discard them as irrelevant, because they enhance the context within which an answer can be attempted to that most basic of litigants' questions, "What are my chances?"