Caseload and Output of the Manitoba Court of Appeal, 1990[1]

Peter McCormick[*]

IN THE COURSE OF an interview, a trial court judge once commented to me that his law was as good as the Supreme Court's — right up until the moment he was appealed. Given the much greater precedential value of the Supreme Court's law, this is not strictly true of any trial judge, but it is much closer to being true of the ten provincial courts of appeal. These Courts are only one level away from the very pinnacle of the judicial hierarchy, and in recent years barely one per cent of their decisions are in fact ever reviewed by the Supreme Court. The series of annual articles of which this is the third[2] are intended as a contribution to the study of these courts of appeal in general and the Manitoba Court of Appeal in particular, by providing the statistical background against which the doctrinal content of any specific decision takes place.

The study of the provincial courts of appeal is particularly valuable in the context of the Supreme Court of Canada's restricted caseload and tight focus on public law matters. By default, extensive responsibilities with regard to law-making functions and legal uniformity issues on a wide range of other legal matters fall to the provincial courts of appeal. Such considerations make it all the more important that there be some awareness of the context in which these Courts operate and the general parameters of their decisional tendencies. The provincial courts of appeal are no longer (if they ever were) simply way stations along the road linking initial trial court decisions with final Supreme Court of Canada determinations, but instead are increasingly important and increasingly deserving of study in their own right.

[1] This project was funded by the Manitoba Legal Research Institute, and I wish to thank the research assistants who collected the data: Lisa Lambert (now a graduate student at the University of Western Ontario) and Jonathan Penner (law student at the University of Manitoba).

[*] Professor, Department of Political Science, University of Lethbridge.

[2] See P. McCormick, "Caseload and Output of the Manitoba Court of Appeal 1988" (1990) 19 Man. L.J. 31; and P. McCormick, "Caseload and Output of the Manitoba Court of Appeal 1989" (1990) 19 Man. L.J. 334.

I. THE COURT

THE MANITOBA COURT OF Appeal ranks in size near the middle of the Canadian provincial courts of appeal, with seven full-time appeal judges and no supernumeraries. Quebec is the largest with 19,[3] Ontario next with 16;[4] B.C. and Alberta have 13[5] and 10[6] respectively. The Appeal Courts of Saskatchewan and Nova Scotia were both the same size as Manitoba's;[7] New Brunswick and Newfoundland have six-judge courts (the latter with two supernumeraries) and P.E.I. has three.[8] During 1990, only one appeal court (Quebec) increased in size by a single full-time judge, and the numbers for supernumeraries were similarly stable. The protracted growth in the size of the provincial courts of appeal, and therefore the increasing complexity of their panel and decision-making practices, that was so obvious through the 1980s seems to have come to an end, a statement qualified only by a recent increase in the number of supernumerary judges.

There was one change in the personnel of the Manitoba Court of Appeal during 1990. Chief Justice Monnin retired from the Court in April and was replaced (after a delay of several months) by the new Chief Justice, Richard Scott, who was elevated from the position of Associate Chief Justice of the Manitoba Court of Queens Bench. The appointment of a Chief Justice from outside the court, rather than by elevation of one of the sitting members of the Court, is somewhat unusual but by no means unprecedented; possibly one quarter of the appointments of provincial Chief Justices in this century have taken this form.[9]

---

[3] Plus four supernumeraries.

[4] Plus five supernumeraries.

[5] Plus nine supernumeraries.

[6] Plus three supernumeraries, and one vacancy (since filled) created by the appointment of Mr. Justice Stevenson to the Supreme Court of Canada.

[7] Nova Scotia had one supernumerary judge; and Saskatchewan was increased in size to nine judges in the fall of 1991.

[8] The data from which these figures were drawn was collected by Mr. Justice Griffiths of the Ontario Court of Appeal for the 1991 Canadian Judicial Appellate Court Seminar.

[9] The third variant, appointing a member of the Court of Appeal to serve as Chief Justice of the Section 96 trial court and subsequently to Chief Justice of the Appeal Court, is more characteristic of Ontario and British Columbia.

Table 1: Judges of the Court of Appeal of Manitoba, 1990

Name	Appointed to Court of Appeal	Appointed to Sup. Trial Ct.
Monnin C.J.[10]	1962[11]	1957[12]
Scott C.J.[13]	1990	1985[14]
O'Sullivan	1977	no
Huband	1980	no
Philp	1983	1973
Twaddle	1985	no
Lyon	1986	no
Helper	1989[15]	1983[16]

Justice Scott's appointment maintained the balance between the three judges with trial bench experience (the Chief Justice, Philp, and Helper) and the four without, and means that a majority of the Court has been appointed since the Mulroney government took office in 1984. Average appellate experience has fallen to 5.7 years; average total judicial experience to 9.4 years; both figures are comparable to the other Western courts of appeal. To put the same point somewhat differently: it is not the case that the retirement of two very senior and long-serving members (Hall in 1989, Monnin in 1990) has made the Manitoba Court unusually inexperienced, but rather that their replacement has dropped the Court to something closer to the all-province average.

---

[10] Retired April, 1990.

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

[12] Previously served on Provincial Court.

[13] Appointed September, 1990.

[14] Associate Chief Justice, Manitoba Court of Queen's Bench.

[15] Appointed June 30, 1989.

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

II. Caseload and Success Rates

THERE WAS A MODEST across-the-board decline in the caseload of the Manitoba Court of Appeal in 1990. The number of panel decisions delivered by the Court fell by almost one fifth (18.8%), from 382 in calendar 1989 to 310 in calendar 1990.[17] Criminal cases (including sentence appeals) dropped from 216 to 180, civil cases from 166 to 130. This means that the rough balance between criminal and civil caseload has been maintained, with criminal appeals continuing to constitute a slight majority of the Court's work. By giving equal weight to a sentence appeal and a constitutional reference, numbers are of course only a crude indication of workload; and over time even similar numbers may not have the same impact on the actual workload. At the 1991 Canadian Judicial Appellate Court Seminar, for example, appeal judges from several provinces commented that the average hearing time (and presumably the average complexity) for civil appeals was tending to increase significantly.

Manitoba is not unique in this regard; Saskatchewan's appellate caseload suffered a much greater decline (although the size of that Court was increased from seven to nine full-time judges in the fall of 1991). Other provinces were affected only marginally; the caseload in British Columbia, Alberta, Ontario and Quebec does not seem to have fallen significantly. As a generalization, it would seem that the steady rise of appellate caseloads through the 1980s has now levelled off, becoming a significant decline in only a few provinces. The generalization that economic recession affects the content rather than the size of the caseload (fighting over the liability for the debts rather than a share of the profits, as one judge told me a few years ago) still holds

---

[17] This rather bland summary glosses over the very real problems involved in the apparently simple act of counting, as there are several problems built into the counting process and the total count varies depending on how they are answered. I have chosen to treat denials of leave to appeal as panel decisions because in Manitoba as in several (but not all) other provinces, these are handled by a full panel rather than by a chambers judge, and because the substantive decision when leave is granted will normally be given at the same time. When a single decision of the Court resolves a batch of related appeals — *e.g. R.* v. *Bauder* on May 7 dismissed in a single paragraph 19 appeals from sentence by 17 different individuals, each with its own appeal number — this is treated as one panel decision rather than as several different decisions. Appeals abandoned, or appeals resulting in adjournments (to a total of 16) have not been counted; and reserved decisions not cleared before December 31, 1990, could not be included. The figures presented in this paper therefore tend to "undercount" rather than "overcount" Appeal Court caseload; different figures would result from different choices in resolving the problems.

generally true of the provincial courts of appeal collectively even if recent experiences on the Prairies suggest some need for a reconsideration.

In theory, the slight reduction in caseload could have provided an opportunity to return to the larger panels that have become so unusual in Manitoba (as in the other provinces) under the appellate workload pressures of recent years. Maintaining the same number of judicial person-hours while slightly reducing the number of cases to which they have to be applied makes it possible to consider the technically less efficient (but clearly more collegial) practice of five- or seven-judge panels for a wider range of significant cases, rather than the three-judge panels that have become the all-but-invariate norm for provincial courts of appeal. There was only the smallest evidence of such a trend; of the 310 panel decisions in 1990, four were decided by a panel of five judges.[18] By way of comparison, only one of the 389 panels in 1989 was larger than three. Perhaps if caseload continues to decline (something that can by no means be assumed), larger panels might again become more common.

The use of *ad hoc* judges from the Section 96 trial court continues to be unusual; this happened three times in 1989 and ten times in 1990. Most of these occurred during the May through August period, after Monnin's retirement but before Scott took up duties, and therefore may reflect the practical problems in panel-formation caused by this smaller size. On one occasion only[19] (compared with zero last year), the *ad hoc* judge delivered the unanimous decision of the Court.

The overall success rate for appeals is virtually unchanged: 35.9% in 1990 compared with 34.8% in 1989. The patterns for the components of caseload are rather more complicated: success rates are down for sentence appeals and public law appeals;[20] up for substantive criminal appeals, family law appeals, and private law appeals; virtually unchanged for financial law appeals. This overall continuity is hardly surprising, given that a comparable mix of appeals is being heard by substantially the same Court — the new member, Chief

---

[18] *Neroda* v. *Westfair Foods* (1990), 63 Man. R. (2d) 311; *R.* v. *Butler* (1990), [1991] 1 W.W.R. 97, 1 C.R. (4th) 309 [hereinafter *Butler*]; *Honolulu Federal Savings & Loan* v. *Robinson* (1990), 76 D.L.R. (4th) 103; and *Reference Re Public Schools Act* (1990), 64 Man R. (2d) 1 [hereinafter *Public Schools Reference*]. There was a fifth five judge panel — *R.* v. *Flett*, 22 March 1990 — that adjourned without a decision.

[19] Kennedy J., *R.* v. *Proctor* (24 July 1990), [unreported].

[20] Defined as non-criminal appeals to which a government agency or department is a party.

Justice Scott, sat in only 29 cases and accounted for less than 5% of all the Court's panel appearances.

Table 2: Caseload and Success Rate Compared Manitoba Court of Appeal, 1989 and 1990

type of appeal	1990	1989
sentence	103 (30.1%)	119 (42.9%)
criminal	77 (36.4%)	97 (25.8%)
family	32 (43.8%)	36 (27.8%)
private law	67 (44.8%)	77 (38.5%)
public law	16 (25.0%)	28 (35.7%)
financial	14 (28.6%)	24 (29.2%)
reference	1 (n.a.)	1 (n.a.)
total	310 (35.9%)	382 (34.8%)

The replacement of the Chief Justice after a delay of several months divides the year into three different segments: the first four months under Monnin C.J., the last four months under Scott C.J., and the period in between. The success rate for appeals in the closing months of the Monnin court was 40.9%, falling to 32.2% when he left the court and continuing unchanged (at 32.6%) after Scott assumed the centre chair. This is rather slender basis for generalization and prediction, but it does hint at a "new" appeal court rather less prepared to reverse trial judge determinations.

III. Judicial Voting Behaviour

To state the obvious, the decision of an appeal court panel is the result of the votes of the majority of the judges who made up that panel. This is made all the more evident in the more dissensual courts where the minority vote highlights itself in the form of a dissent. But it is possible to push the obvious a step further, and to generate overall tables and rank orderings by accumulating each judge's position on every panel as votes for or against the trial judge's decision, or (in criminal appeals) as votes for or against the Crown. Because the

figures that appear in these papers are not simply a partial random sample, but include every vote on every panel decision reached by the Court over the year, they can be taken as a fair and reliable indicator of judicial voting tendencies.[21]

To be sure, there is an element of abstraction and distortion in this process. It is the hallmark of appellate decision making that it takes place in a collegial context — the three judges sit together on the bench to hear legal arguments, and typically confer together at least briefly outside the courtroom before reaching and announcing their decision. Unlike (for example) a situation in which a set of decision-makers receives the arguments in isolation and registers a vote for a preferred outcome completely independently, appellate decision-making is an interactive process that provides an opportunity for a degree of give and take, for an exchange of views resulting in an outcome that is not necessarily the detailed initial position of any of the members. With this disclaimer, however, there is some value in the collection and description of aggregate voting patterns for the judges of the Manitoba Court of Appeal.

It goes without saying that the figures are more significant for their relative than for their absolute values: that is, it is more useful to say that Judge A votes more often and more readily than Judge B to reverse the trial judge's decision, than it is to say that Judge A does so on any specific percentage of his or her opportunities. The relevance of this caveat is obscured by the strong continuity between the voting patterns of 1989 and 1990, but it remains logically important. This degree of continuity suggests that there is some value, and even some predictive capacity, built into the presentation of these aggregate figures.

---

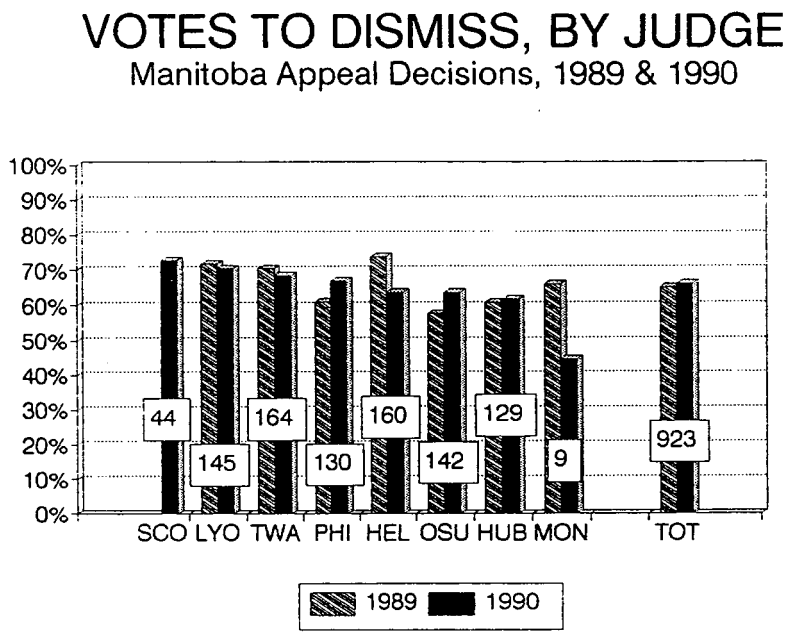
[21] B.M. Atkins & J.J. Green, "Consensus on U.S. Courts of Appeal: Illusion or Reality?" (1976) 20 Am. J. Pol. Sci. 735 argue that on some courts that use small panels such figures can be misleading if there are informal conventions and expectations that discourage the expression of disagreement in the form of public dissent, and they have evolved a procedure for the analysis of panel decision making that will penetrate the illusion of consensus. Such concerns carry less cogency for a Court that registers dissents as frequently as the Manitoba Court of Appeal than they would for a parallel investigation of (say) the Ontario Court of Appeal.

Table 3: Votes to Dismiss, by Judge
Manitoba Appeal Decisions 1990

Judge	Dismiss	Allow	Total	Dismiss % 1990	Dismiss % 1989
Scott CJ	32	12	44	72.7%	n.a.
Lyon	102	43	145	70.3%	71.6%
Twaddle	112	51	163	68.7%	70.3%
Philp	87	43	130	66.9%	61.0%
Helper	102	58	160	63.4%	73.8%
O'Sullivan	89	52	141	63.1%	57.7%
Huband	79	50	129	61.7%	60.7%
Monnin	4	5	9	44.4%	65.7%
TOTAL	607	314	921	65.9%	65.0%

Note: excludes ten appearances by *ad hoc* judges & one reference case.

Figure 1



To a very large extent, the two sets of figures run parallel, and the rank ordering of the judges, from most reluctant to reverse down the table to least reluctant, remains very much the same from one year to the next.[22] The most anomalous performance is Madame Justice Helper, and the difference can be partly explained by a possible "freshman effect" that makes a new judge initially (but only temporarily) reluctant to reverse.[23]

There are some significant structured and consistent differences in the voting patterns of the eight judges. The "junior four" on the Court

---

[22] Bearing in mind that the number of appearances by Monnin is too few to generate a figure that is strictly comparable with either his 1989 performance or with the other judges in 1990.

[23] For a discussion of the "freshman effect" see for example J.M. Scheb & L.W. Ailshie, "Justice Sandra Day O'Connor and the Freshman Effect" (1985) 69 Judicature at 9; T.F. Rubin & A.P. Melone, "Justice Antonin Scalia: a first year freshman effect?" (1988) 72 Judicature at 98; and A.P. Melone, "Revisiting the freshman effect hypothesis: the first two terms of Justice Anthony Kennedy" (1990) 74 Judicature at 6.

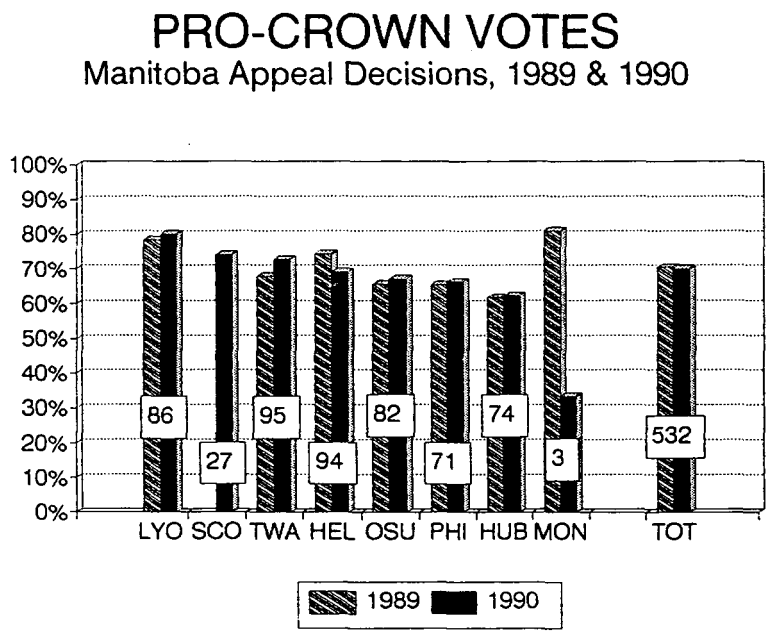
are somewhat less ready to reverse the trial judge than are the "senior four"; the respective figures are 32.0% and 36.7%. However, there is no perceptible difference in readiness to reverse between judges elevated from the trial bench and their colleagues appointed "off the street"; the figures are 33.9% and 34.4% respectively.

The number of criminal appeals — both substantive appeals and sentence appeals — was down slightly in 1990, and the success rate for those appeals showed some change, significantly higher for substantive appeals but lower for sentence appeals. However, two significant generalizations about the criminal appellate caseload can be made in identical terms of the 1989 data and the 1990 data. First, the Crown initiates about one-tenth of the substantive criminal caseload, and one-third or less of the sentence appeals. Second, the success rate for appeals by the Crown is at least double the success rate for substantive appeals against the Crown. Combining substantive and sentence appeals, the success rate for the accused was almost unchanged (72.5% in 1990, compared with 72.3% in 1989) and the success rate for the Crown only minimally reduced (55.3% in 1990 compared with 60.8% in 1989). The Crown's overall "batting average" is almost unchanged, falling only from 70.5% to 69.9%. The continuity of these ratios suggests that they reflect continuing and persistent features of the appellate caseload and the judicial resolution of it. The breakdown in Table 4 shows how deep the continuity goes.

Table 4: Pro-Crown Votes in Criminal Appeals
Manitoba Court of Appeal Decisions 1990

Judge	Pro-Crown	Anti-Crown	Total	Pro-Crown % 1990	Pro-Crown % 1989
Lyon	69	17	86	80.2%	78.4%
Scott CJ	20	7	27	74.1%	n.a.
Twaddle	69	26	95	72.6%	67.7%
Helper	65	29	94	69.1%	74.3%
O'Sullivan	55	27	82	67.1%	74.3%
Philp	47	24	71	66.2%	65.2%
Huband	46	28	74	62.2%	65.5%
Monnin CJ	1	2	3	33.3%	81.0%
TOTAL	372	160	532	69.9%	70.5%

Figure 2



The high degree of continuity between the 1989 and 1990 columns is striking.[24] Mr. Justice Lyon remains the most pro-Crown of the continuing judges on the Court, recently joined by Scott C.J.; Huband, O'Sullivan and Philp are the least pro-Crown.[25] In the middle of the table, Twaddle and Helper have traded places while remaining close to the all-Court average. Appeal judges with trial bench experience are not significantly more likely to support the Crown than their colleagues without such experience (68.2% against 70.9%), but the "junior four" on the Court are much more strongly pro-Crown than their senior colleagues (73.8% compared to 64.8%).

---

[24] The 1990 figures for Monnin are, of course, too small to constitute a serious comparison, being based on only three cases; they are included for statistical completeness rather than for comparative purposes.

[25] This polarization is also reflected in the analysis of voting patterns in non-unanimous decisions, discussed below.

IV. Decisions, Dissents and Concurrences

During 1990, the average judge on the Manitoba Court of Appeal sat on panels that decided about 140 cases. This is down slightly from the 180 or so cases that would have been heard by the average judge in 1989. However, the delivery of decisions is by no means equally distributed among the panel members, and indeed the asymmetry in this regard is quite striking. On average, a purely random assignment would suggest that each judge should deliver one decision for roughly every three panel appearances.[26] But some judges (such as Monnin CJM, Huband JA, and Scott CJM) deliver decisions in half or more of their panel appearances, others (such as Helper and O'Sullivan) in about one fifth of their appearances, and still others (such as Lyon) in less than 10% of appearances.

In 1989, the factor that was driving the differentials in the frequency of delivered decisions was clearly seniority.[27] Excluding those cases where the senior judge dissented from the majority decision, fully 74.4% of all decisions were delivered by the senior and presiding judge of the panel. The comparable figure in 1990 was only 63.9%. This somewhat reduces the appearance of a *de facto* apprenticeship, of practices that delay the opportunity for recently appointed members to make a significant contribution to the Court's development of the law. In 1989, the delivery of decisions was dominated by two judges: Monnin CJM with almost one third of all decisions of the Court, and Huband with about one quarter. A year later, the departure of Monnin has created a void that is being filled primarily by the quartet of Huband, O'Sullivan, Twaddle and Philp, who together account for more than two thirds of the decisions; the much lower profile of Helper and Lyon is striking.

---

[26] Slightly less because of the (infrequent) larger panels and the (similarly infrequent) *per coram* decisions.

[27] I have treated the Chief Justice as senior member of the Court regardless of length of service, and ranked other judges in seniority by date of appointment to the appeal bench; this reflects the order in which the members of the panel are listed in both reported and unreported decisions.

Table 5: Appearances, Decisions, and Separate Opinions Manitoba Court of Appeal Judges, 1990

Judge	Appearances	Decisions	Dissents	Concurrence
Helper	161	24	4	3
Huband	128	66	1	1
Lyon	145	12	6	3
Monnin CJM	10	6	2	0
O'Sullivan	142	62	6	5
Philp	131	52	1	1
Scott CJM	44	28	0	0
Twaddle	164	57	4	9
ad hoc	10	1	0	0
Total	935[28]	310[29]	24	22

The Manitoba Court of Appeal is distinguished by an unusually high proportion of dissents; among the nine other provincial courts of appeal, only Quebec has a comparable frequency of dissent, and in many provinces (most notably Ontario and Nova Scotia) dissents are extremely unusual.[30] Chief Justice Monnin, who retired in April 1990, has in recent years led the Manitoba Court in dissents. It might be thought, therefore, that his departure would reduce the frequency of dissent in two respects — directly, by taking away the dissents that he himself contributed; and indirectly, by taking away the leadership by example exhibited by a frequently dissenting Chief Justice — and thereby bring the Manitoba Court closer to all-province norms. There is some indication that this is indeed taking place. Not only did the new Chief Justice not deliver a single dissent himself, but there were dissents in only 7.8% of the panel decisions, compared with 12.7% of

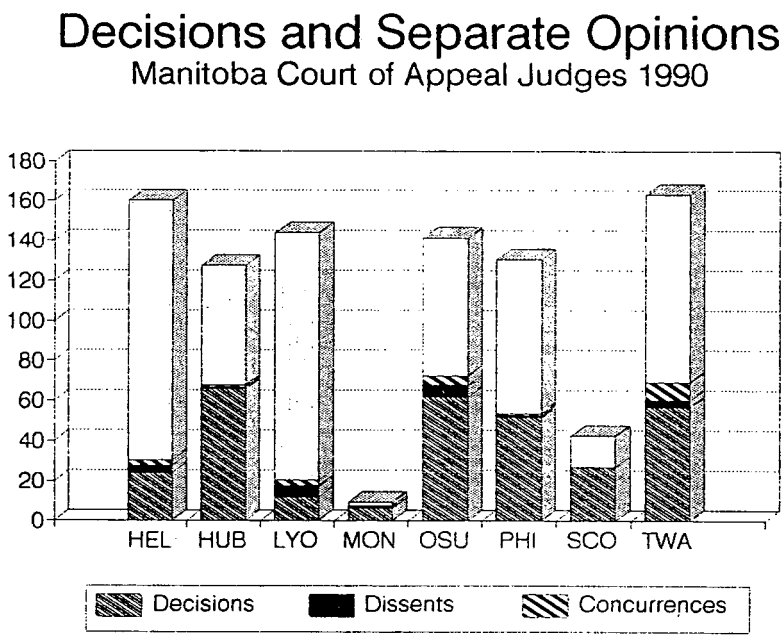
[28] Excludes one panel appearance by Mr. Justice Hall, who retired in April 1989.

[29] Two decisions were rendered *per coram*.

[30] These comments are based upon dissent rates in reported decisions of the various courts of appeal, and should therefore be treated with some caution. For example, the Chief Justice of Nova Scotia has reported informally that the actual dissent rate on his court is rather higher than would be suggested by reported cases.

all cases in 1989. Separate concurring opinions, on the other hand, showed no comparable decrease, rising slightly from 5.8% of all cases in 1989 to 7.0% in 1990; so overall the plurality of decisions is only slightly reduced.

Figure 3



It is a frequent suggestion in the U.S. literature on State Supreme Courts that dissent in particular and the plurality of opinions in general is inversely related to caseload: the heavier the caseload, the less frequent such practices become. On this argument, separate opinions are written by judges who have the time to express in writing how their views differ from those of the panel majority, and the greater the pressure of caseload on the judge's available time, the more strongly he or she will have to feel about the difference in opinion before crossing the notional threshold at which this disagreement takes written form. To put it crudely: to reduce the frequency of dissents and separate concurrences, simply increase the caseload to the point where the judges are struggling just to keep up with the normal flow of business. But this suggests that the 1990's modest

decline in caseload should have provided the opportunity for even more frequent dissents than has been the case in the recent past. It may be the case that the effect of reduced caseload (increasing dissents) has partly cancelled out the effect of a new and more consensual Chief Justice (decreasing dissents).

In general, dissents were less likely for criminal (6.7%) than for civil appeals (10.2%), and four times as likely for successful appeals (15.3%) as for results that confirmed the trial judge's decision (3.5%). The most frequent dissenters were Lyon and O'Sullivan (with six apiece); the least frequent were Huband and Philp (with one each) and Scott (with none). The small number of dissents in 1990 makes generalization both tentative and suspect; but all of Lyon's dissents involved successful appeals against the Crown, and O'Sullivan's included two of the three dissents on *Canadian Charter of Rights and Freedoms*[31] questions. As before, separate opinions tend typically to be short and lightly supported by citations to authority. Only two dissents — Twaddle in *Butler* and Lyon in *R.* v. *Reimer*[32] — and only two separate concurring opinions — Helper in *Butler* and O'Sullivan in the *Public Schools Reference* — exceeded ten pages of a standard law report in length, or used more than ten judicial citations.

V. VOTING BEHAVIOUR: ALLIANCES AND FAULT LINES

IT IS OFTEN SUGGESTED that the tendencies toward voting blocks on any Court are best revealed by an analysis of non-unanimous decisions. Overall voting patterns can be misleading; they can overstate agreement, because the caseload of any appeal court necessarily includes a significant proportion of routine cases of little merit or significance. (As a rule of thumb: several appeal court judges in different provinces have told me that about one third of the appeals that are brought before them are an absolute waste of time, and another third could be easily resolved.) The presence of a dissent clearly flags the case as one involving an issue important enough for a judge to disagree on in writing, and also identifies the panel as containing at least two of the different predilections or points of view that exist among potentially identifiable groups within the Court. This, of course, over-excludes decisions — to say that routine cases are always unanimous in no way suggests that all unanimous cases are

---

[31] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[32] (1991), 68 Man. R. (2d) 129.

routine — but it does so to focus on that small subset of decisions that most clearly displays the major divisions within the Court.

The fact that the Manitoba Court of Appeal never sits as a panel including every single judge, but all-but-invariably uses three-judge panels to consider appeals, creates two problems for such an analysis. The first is the question of what we might call "ghost dissents" — that is, the situation where a judge or judges would have dissented had they been on that particular panel, their absence meaning that a specific point of view was not recorded. This is not a problem for the study of, say, the U.S. State Supreme Courts, which rarely employ panels; it is not a large problem for studying the Supreme Court of Canada, where the average panel during the more recent Chief Justiceships includes seven of the nine judges,[33] but it is a problem on a provincial court of appeal, where the panel assignments of even the most conscientious and industrious judge include less than half of the entire caseload.

The second problem is that the readiness of any given pair of judges to agree or disagree with each other can only reveal itself on those panels on which they both happen to serve. But on a seven judge court there are 21 different pairs of judges that can be generated, only three of which appear on any specific three-judge panel. The double reduction from the basic data set, (analyzing the propensity to agree or disagree of any pair of judges, in cases that fall within both the one-seventh of all cases where that pair sat together and the one-tenth of cases where there is a dissent), results in some rather small numbers and therefore a rather weak base for generalization. For this reason, the calculations which provide the basis for this section are based upon both the 1989 and 1990 data combined to form a single data base which includes the seventy-one dissent-generating cases from the 24-month period.

Within these limitations, however, the voting behaviour of Manitoba appeal court judges on the 10% or so of cases generating dissents provides useful clues about the dynamics of the court. For example, it is useful to know that Mr. Justice Lyon is one of the judges who dissents more frequently, and even more useful to know that most of the time that he does so, the decision from which he dissents is a successful appeal against the Crown. However, it is more useful yet to know that fully one half of his dissents over the past two years come from the panel assignments that he shares with Mr. Justice

---

[33] See P. McCormick, "The Supervisory Role of the Supreme Court of Canada" Sup. Ct L.R. (2d) [forthcoming].

O'Sullivan and Mr. Justice Huband. This information is presented in Table 6, identifying each pairing of judges in terms of a fraction showing the number of times they agreed out of the number of times they appeared together. The table has been simplified by excluding the single dissent delivered by an *ad hoc* judge, and by leaving out Justice Hall and Chief Justice Scott, both of whom served on only one dissent-generating panel.

Table 6: Frequency of Agreement for Pairings of Judges on the Manitoba Court of Appeal Non-unanimous Decisions, Calendar 1989 and 1990

	MON	OSU	HUB	TWA	PHI	LYO	HEL
MON	–	2/14	2/19	3/11	2/8	6/9	0/0
OSU		–	18/24	5/13	0/8	2/14	0/6
HUB			–	5/11	6/12	3/19	1/5
TWA				–	4/6	4/8	2/8
PHI					–	4/6	3/4
LYO						–	0/2
HEL							–

The table suggests two major pairings of judges in the Court's non-unanimous decisions. The first is O'Sullivan/Huband, who have appeared together in fully one-third of the Court's dissent-generating cases, and who agree with each other more than three quarters of the time (usually anti-Crown and pro-reversal). The second, much less frequent or solid, and broken now by the retirement of C.J. Monnin, was the Monnin/Lyon grouping (usually pro-Crown and anti-reversal). The numbers also hint that Philp and Twaddle might be thought of as something of a "shadow group," tending to join with Lyon against O'Sullivan and/or Huband, but this does not happen often enough or consistently enough to constitute a firm pairing. Finally, Madame Justice Helper seems to be steering very much an independent course, disagreeing with O'Sullivan and Huband every bit as often as Lyon but without any statistically clear core to the type of case generating the dissent and without consistently joining with Lyon (or anybody else) in the non-unanimous panels on which she appears. The point, of course, is not to reduce the behaviour of any judge to caricature, but

simply to take them at their word in their reasoned arguments and to identify the persisting differences and patterns that emerge in those principled positions.

VI. Citations to Authority

THE WEAPON OF CHOICE in the argumentative arsenals of lawyers and judges is the citation to judicial authority, which raises the question of where judges of the Manitoba Court of Appeal prefer to find their ammunition. The Anglo-American common law countries are prolific producers of judicial decisions, and the choice is wide; it seems clear from the citation patterns of the various provincial courts of appeal (to say nothing of the citation patterns of the individual judges on each court) that there are real and enduring differences in these choices. Table 7 presents the data on the frequency of citation of the major categories of judicial authorities in calendar 1990.

Table 7: Citations to Judicial Authority
Manitoba Court of Appeal Decisions

Authority	Citations	% of total	Judgments	% of total
FEDERAL COURTS				
Supreme Court	113	20.0%	40	10.8%
Federal Court	0	0.0%	0	0.0%
Total Federal:	**113**	**20.0%**	**40**	**10.8%**
PROV. APPEAL CTS				
Manitoba	109	19.7%	60	16.2%
Ontario	46	8.2%	27	7.3%
British Columbia	27	4.8%	20	5.4%
Alberta	26	4.6%	20	5.4%
Nova Scotia	18	3.2%	11	3.0%
Saskatchewan	13	2.3%	10	2.7%
Quebec	5	0.9%	5	1.3%
New Brunswick	3	0.5%	3	0.8%
P.E.I.	2	0.4%	2	0.5%
Total Appeal:	**249**	**44.6%**	**81**	**21.8%**
CANADIAN TRIAL CTS				
Manitoba	25	4.4%	16	4.3%
Ontario	25	4.4%	17	4.6%
Others	35	6.2%	12	3.2%
Total Cdn trial:	**85**	**15.5%**	**34**	**9.2%**
COMMONWEALTH CTS				
Privy Council	4	0.7%	3	0.8%
Other English	98	17.3%	30	8.1%
Commonwealth	6	1.1%	3	0.8%
Total:	**108**	**19.1%**	**32**	**8.6%**
UNITED STATES CTS	6	1.1%	4	1.1%
EUROPEAN COURT	1	0.2%	1	0.3%
TOTAL CITATIONS	562		371	

Note: includes 310 decisions for the court, 15 applications, 24 dissents and 22 separate concurrences.

Although the number of cases decided by the Manitoba Court of Appeal fell slightly in 1990, the total number of citations to judicial authority in that reduced caseload showed an absolute increase of more than 20%, from 459 to 564. The average decision in 1990 was somewhat longer and significantly more explicitly connected to authority than the average decision in 1989. It can, of course, only be conjecture whether this altered behaviour is attributable to the mix of cases presented to the Court, or a result of the modestly greater prep-

aration time per case that is the logical corollary of the reduced caseload, or some combination of both these factors.

The figures in Table 7 parallel very closely the patterns for both 1987 and 1989 (as described in the earlier papers), making it even more plausible to suggest that the differences between the citation patterns of the Manitoba Court of Appeal and those of other provincial courts of appeal stem from persisting and fundamental characteristics rather than from transient or gratuitous circumstances. The largest single block of citations to authority comprises those from the Supreme Court of Canada, still providing one citation in every five (down from one in four in the earlier years). Self-citations — that is, references to previous decisions of the Manitoba Court of Appeal itself — have risen slightly to 19.7% (just under one in five). This is again very close to the figures for 1987 and 1989 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 24.9% of all citations — mostly from Ontario (8.2%) or from the other three Western provinces (11.7%). United Kingdom citations once again account for almost one-fifth of all judicial citations, and once again an unusually high number (rivalled only by British Columbia) among the provincial courts of appeal. Citations of Canadian trial courts remain significant at 15.5% — none of the other courts of appeal supply as many precedents as the extra-provincial trial courts combined. Finally, citations of U.S. authority remain extremely rare, almost to the point of insignificance — a characteristic that the Manitoba Court of Appeal shares with every other province except Ontario.

Curiously, the average age of a judicial citation is some ten years (or 30%) higher in 1990 than it was for 1989, a change that is pervasive throughout a wide range of the cases (there were a dozen decisions with an average citation age over 50 years) rather than being attributable to a handful of unusually venerable authorities. The age factor should not, of course, be over-stressed; fully one-third of the judicial citations (187 out of 564, or 33.2%) were to decisions rendered within the last five years, since the beginning of 1986.

Table 8: Authorities Cited, by Type of Case & Decision
All Manitoba Court of Appeal Decisions, 1990

	SCC	Man CA	UK	Oth CA	Cdn Tr	Oth
applications	14.3%	42.9%	–	35.7%	7.1%	–
criminal	39.1%	11.7%	10.1%	29.6%	6.7%	2.8%
sentence	1.5%	34.3%	6.0%	53.7%	4.5%	–
public	34.8%	21.7%	8.7%	21.7%	13.0%	–
family	3.7%	22.4%	32.7%	11.2%	29.9%	–
private	15.4%	18.7%	26.4%	15.4%	22.0%	2.2%
financial	5.8%	23.1%	28.8%	11.5%	21.2%	9.6%
reference	51.7%	3.4%	–	31.0%	10.3%	3.4%
All Opinions	26.3%	17.4%	18.1%	21.2%	13.3%	3.3%
Judges:						
senior 4	26.2%	17.3%	19.9%	19.4%	13.1%	4.2%
junior 4	17.7%	20.4%	16.3%	28.0%	16.3%	1.4%

The patterns of Table 8, breaking down the overall figures into the specific types of law, are hardly unexpected. Citations for single-judge chambers applications are almost always self-citations, fitting the decision in a clear manner into the record of past decisions of the Court, or uniformity citations, fitting it in with the practices of other provinces. The pattern for sentence appeals continues to emphasize references to the decisions of other provincial courts of appeal, although self-citations — presumably references to one or more of its own benchmark sentencing decisions — are proportionately more frequent than in previous years. Supreme Court references are concentrated in reference cases and criminal law and public law appeals, and are seldom used in private law and financial law — again consistent with the argument that caseload pressures have forced the Supreme Court to virtually abandon 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), although they are surprisingly common in family law appeals as well.

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. It is difficult, however, to attribute this to the recent emergence of new doctrine or practical solutions lower than usual on the appellate hierarchy, because again this year the average age of family law citations is (at 43.1 years) much higher than might have been anticipated.

There are some differences between the "senior four" and the "junior four" among the eight judges who served on the Court of Appeal during 1990, but they are not entirely consistent with the differences that could be discerned in 1989, and therefore do not appear conclusive. The recently appointed judges tend to cite prior decisions of their own court somewhat more often, and decisions of the other courts of appeal much more often, than do their senior colleagues; and they tend to cite United Kingdom decisions and Supreme Court decisions less often; of these comments, only those dealing with self-citation and UK citations are consistent with 1989, although it is still true that both of these differences can be described in terms of the junior judges pulling the Manitoba citation patterns closer to the all-province norm. It is no longer the case, however, that the more junior judges are rather more reluctant to issue dissents; if anything, the reverse is true, as the "senior four" dissented in 3% of their panel appearances, the "junior four" in 4%. There is therefore no statistical evidence to suggest that the characterization of Manitoba as an unusually dissensual court is a transient phenomenon.

VII. Summary of Findings

On the basis of a statistical analysis of the 310 panel decisions of the 1990 Manitoba Court of Appeal, one can make the following generalizations:

1. The somewhat reduced caseload demonstrates that the steady growth in appellate caseloads that has characterized the last two decades has clearly peaked in Manitoba (and in some of the other provinces as well).

2. Almost all decisions of the Manitoba Court of Appeal are made by three judge panels, larger panels having become extremely rare — barely 1% of all panels — although there is some modest sign that the use of larger panels may have been increasing in 1990.

3. Most decisions of the Manitoba Court of Appeal are brief and (presumably) routine, only 10% requiring as many as five pages, and another 15% as many as two pages, in a standard law report; however, both the average length and the average number of citations per decision increased in 1990.

4. A substantial majority — almost two-thirds — of the panel decisions of the Court are made by the presiding judge of the panel, which is to say by the senior judges of the Court.

5. Overall success rates have remained constant at about one in three, and the percentage of Crown wins in criminal cases is similarly stable at just over two in three. These overall figures slightly overstate the stability of the success rates for the various types of appeal; substantive criminal and family law appeals succeeded more often, and sentence and financial appeals less often, in 1990 than in 1989.

6. The dissent behaviour of the Manitoba Court remains high in comparison with the other Western provincial courts of appeal, although less high than it has been in the recent past. There continues to be some statistical basis for describing this as 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, although this pattern will undergo change with the retirement of Monnin CJM.

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 limited reasons to think that the more junior judges on the Court exhibit consistently different citation behaviour that is somewhat closer to that of the other provincial Courts of Appeal.