# Caseload and Output of the Manitoba Court of Appeal 1991[1]

*Peter McCormick*[*]

## I. INTRODUCTION

THE MANITOBA COURT OF Appeal, established in 1906, is the apex of the Manitoba court system, exercising (through its hundreds of appeal decisions each year) an ongoing supervisory authority over the provincial superior and "purely provincial" trial courts beneath it. At the same time, it is itself subject to the supervisory authority of the Supreme Court of Canada,[2] through the handful of its decisions which are appealed to that higher authority each year.

As a general proposition, the provincial courts of appeal have been too easily lost in the obscurity of this intermediate position, and unacceptably so in light of their ongoing and growing importance within the Canadian judicial system. This article is one of a series examining the Manitoba Court of Appeal,[3] and should be seen in the context of similar reviews of the Saskatchewan Court of Appeal,[4] the Ontario Court of Appeal,[5] and the Alberta Court of Appeal.[6] For

[1] I wish to acknowledge the support of the Manitoba Legal Research Institute for funding the data collection on which this article was based.

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

[2] See P. McCormick, "The Supervisory Role of the Supreme Court of Canada" (1993), 3 Supreme Court L.R. (2nd) 1.

[3] See P. McCormick, "Caseload and Output of the Manitoba Court of Appeal: An Analysis of Twelve Months of Reported Cases" (1990) 19 Man. L.J. 31; P. McCormick, "Caseload and Output of the Manitoba Court of Appeal 1989" (1991) 20 Man. L.J. 334; and P. McCormick, "Caseload and Output of the Manitoba Court of Appeal 1990" (1992) 21 Man. L.J. 24 [hereinafter "Caseload 1990"].

[4] See, for example, P. McCormick, "The Saskatchewan Court of Appeal 1987: An Analysis of 12 Months of Reported Cases" (1989) 53 Sask. L.J. 340.

[5] See, for example, C. Baar *et al.*, "The Ontario Court of Appeal and Expeditious Justice" (1990) 30 Osgoode Hall L.J. 261.

Manitobans, the processes and performance of the Manitoba Court are important in their own right; more broadly, they help to cast light upon the operations of the provincial courts of appeal in general.

## II. 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. In 1991, Quebec had the largest with 18 full-time judges, Ontario was next with 16; while B.C. and Alberta had 13 and 10 respectively. The Saskatchewan Court of Appeal was (for most of the year) the same size as Manitoba's;[7] New Brunswick and Nova Scotia courts had six judges each, Newfoundland five, and P.E.I. had three.[8] During 1990, only one appeal court (Quebec) increased in size by a single full-time judge, and during 1991 only one court (Saskatchewan) expanded; while two (Nova Scotia and Newfoundland) shrank by one full-time judge. The protracted growth in the size of the provincial courts of appeal, and the increased 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 an increase in the number of supernumerary judges.

There were no changes in the personnel of the Manitoba Court of Appeal during 1991 — the first time in several years that this has been the case. The judges had an average of 6.7 years of appellate experience (two with more than ten years, and two with less than five), and an average of 9.7 years of combined judicial experience. Both figures were comparable with the other Western courts of appeal, although the Manitoba court was unusual in having had a majority of its members appointed "off the street" rather than elevated from the trial bench.

---

[6] See, for example, P. McCormick "Conviction Appeals to the Alberta Court of Appeal: A Statistical Analysis 1985–1992" (1993) 31 Alta. L.R. 301.

[7] The Saskatchewan Court of Appeal was expanded to nine judges in the fall of 1991. However, my understanding is that new appointments will not be made to the Saskatchewan court until their number falls below seven.

[8] The data from which these figures were drawn was collected by Mr. Justice Griffiths of the Ontario Court of Appeal for the 1992 Canadian Judicial Appellate Court Seminar. All numbers exclude supernumerary judges, of which (at year end) there were nine in British Columbia, eight in Ontario, three in Alberta and Newfoundland, and one in Nova Scotia and Quebec.

**Table 1**: Judges of the Court of Appeal of Manitoba, 1991

| Name | Appointed to Court of Appeal | Appointed to Sup.Trial Ct. |
|---|---|---|
| Scott C.J.[9] | 1990 | 1985[10] |
| O'Sullivan J.A. | 1977 | no |
| Huband J.A. | 1980 | no |
| Philp J.A. | 1983 | 1973 |
| Twaddle J.A. | 1985 | no |
| Lyon J.A. | 1986 | no |
| Helper J.A. | 1989[11] | 1983[12] |

## III. Caseload and Success Rates

THERE WAS A VERY modest decline in the caseload of the Manitoba Court of Appeal from 1990 to 1991. The number of panel decisions delivered by the Court fell by about 5 per cent, from 310 in 1990 to 292 in 1991.[13] There were more sentence appeals, but fewer appeals from conviction. On balance, these two trends cancelled each other out, and criminal appeals again constituted just under 60 per cent of the total caseload, a figure that cannot be generalized to other courts. These numbers, of course, are only a crude indication of judicial workload, since they give equal weight to a sentence appeal and a

[9] Appointed September, 1990.

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

[11] Appointed 30 June, 1989.

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

[13] As I have noted before: this rather bland summary glosses over some very real problems involved in the apparently simple act of counting. I 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. Appeals abandoned, or appeals resulting in adjournments have not been counted; reserved decisions not cleared before December 31 could not be included; and chambers decisions by single judges of the court are also omitted. The figures presented in this paper therefore tend to "under-count" rather than "over-count" Appeal Court caseload; different figures would result from different choices in resolving these and similar problems.

constitutional reference. On the assumption that sentence appeals tend to be routine and largely devoid of broader legal issues, we might more accurately infer a decline of about 20 per cent in the more substantive cases brought before the Court.

Certainly the caseload figures had not rebounded to the higher levels of the 1980s, and they support the tentative conclusion that appellate caseload in the 1990s is stabilizing at a significantly lower level. Manitoba is not unique in this regard (Saskatchewan's appellate caseload has suffered a greater decline), although the impact in provinces such as British Columbia, Alberta and Ontario seems to have been more modest and gradual. As a generalization the steady rise of appellate caseloads through the 1980s seems to have levelled off, with a significant decline occurring in only a few provinces.

The slight reduction in caseload by 1991 could have provided an opportunity to return to the larger panels that had become so unusual in Manitoba (as in the other provinces) in recent years. With the same number of judges handling fewer cases, it should have been possible to use the less efficient, but 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 norm for provincial courts of appeal. But there was no evidence of such a trend: of the 293 panel decisions in 1991, only four were decided by a panel of five judges, compared with four in 1990 and one in 1989.[14]

The use of *ad hoc* judges from the s. 96 trial court continued to be unusual; this happened three times in 1989, ten times in 1990 and five times (involving four different trial judges) in 1991. (Manitoba differs from provinces such as British Columbia and Ontario, which never use trial judges on an *ad hoc* basis, and from Alberta, which uses such judges regularly, especially on sentence appeals.[15]) On no occasion did the *ad hoc* judge deliver the decision of the Court or a dissent, and only one issued a separate concurring decision.[16]

---

[14] *R.* v. *Werhun* (1991), 70 Man. R. (2d) 63; *Cross* v. *Wood* (1991), 70 Man. R. (2d) 43; *Reference Re Corporations Act* (1991), 73 Man. R. (2d) 81; and *R.* v. *Laramee* (1991), 73 Man. R. (2d) 238.

[15] For a discussion of this practice and its impact, see P. McCormick "Conviction Appeals" *supra* note 6.

[16] *Reference re Corporation Act* (1991), 73 Man. R. (2d) 81, Jewers J..

**Table 2**: Caseload and Success Rate Compared
Manitoba Court of Appeal; 1989, 1990 & 1991

| Type of appeal | 1991 | 1990 | 1989 |
|---|---|---|---|
| Sentence | 132 (40.2%) | 103 (30.1%) | 119 (42.9%) |
| Criminal | 42 (42.9%) | 77 (36.4%) | 97 (25.8%) |
| Private law | 58 (29.3%) | 67 (44.8%) | 77 (38.5) |
| Family | 25 (28.0%) | 32 (43.8%) | 36 (27.8%) |
| Public law | 24 (37.5%) | 16 (25.0%) | 28 (35.7%) |
| Financial | 11 (27.3%) | 14 (28.6%) | 24 (29.2%) |
| Reference | 1 (n.a.) | 1 (n.a.) | 1 (n.a.) |
| Total | 293 (36.6%) | 310 (35.9%) | 382 (34.8%) |

The overall success rate for appeals was virtually unchanged: 36.6 per cent in 1991 compared with 35.9 per cent in 1990 and 34.8 per cent in 1989. (Last year, I indicated that there was some hint of Justice Scott's accession indicating a "'new' appeal court rather less prepared to reverse trial judge determinations" based on the fact that "[t]he success rate for appeals in the closing months of the Monnin C.J.M. court was 40.9 per cent, falling to 32.2 per cent when he left the court and continuing unchanged (at 32.6 per cent) after Scott assumed the centre chair."[17] This trend has not continued, and the generalization cannot be supported.) The patterns for the components of caseload are rather more complicated: success rates are up for criminal appeals (both conviction and sentence) and public law appeals,[18] down for substantive family law and private law appeals; virtually unchanged for financial law appeals.

## IV. Judicial Voting Behaviour

Obviously, the decision of an appeal court panel is determined by the votes of the majority of the judges who made up that panel. To push this logic a small step further, it is possible to generate overall tables accumulating each judge's position on every panel as votes for

[17] "Caseload 1990," *supra* note 3 at 29.

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

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.[19]

There is, of course, an element of distortion in this aggregative process. It is the hallmark of appellate decision-making that it takes place in a collegial context — the 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. They do not receive the arguments in isolation and independently register a vote for a preferred outcome. Appellate decision-making is an interactive process that provides an opportunity for an exchange of views contributing to an outcome that is not necessarily the initial personal reaction. 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.

The figures are, of course, more significant for their relative than for their absolute values — that is, it is more useful to say that Judge A votes more often than Judge B to reverse the trial judge's decision, than it is to say that Judge A does so on a specific percentage of his or her opportunities. As Tables 3 and 4 show, there is a considerable degree of continuity in the voting patterns of the individual judges, confirming the utility (at least a modest predictive capacity) of the data.

Table 3 ranks the judges, based on 1991 figures, from most reluctant reverse down to least reluctant. To a very large extent, the ranking remained the same from 1989 to 1991. Perhaps, the most anomalous performance was that of Madame Justice Helper, and the difference can be partly explained by a possible "freshman effect" that makes a

---

[19] B. Atkins and 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.

new judge initially (but only temporarily) reluctant to reverse,[20] followed by a "sophomore effect" that (at least temporarily) increases the predilection to allow appeals. The performance of Scott C.J.M. exhibits a comparable pattern. Lyon, Huband and Philp JJ.A showed a quite remarkable consistency from one year to the next, although Twaddle J.A. voted to allow an appeal about a dozen more times than the "scores" for 1989 and 1990 might have led one to expect.

**Table 3**: Votes to Dismiss, by Judge
Manitoba Appeal Decisions 1991[21]

| Judge | Panel Appearances | Votes to Dismiss | Dismiss % 1991 | Dismiss % 1990 | Dismiss % 1989 |
|---|---|---|---|---|---|
| Lyon J.A. | 125 | 88 | 70.4% | 70.3% | 71.6% |
| Helper J.A. | 122 | 85 | 69.7% | 63.4% | 73.8% |
| O'Sullivan J.A | 111 | 70 | 63.1% | 63.1% | 57.7% |
| Philp J.A. | 119 | 73 | 61.3% | 66.9% | 61.0% |
| Huband J.A. | 139 | 85 | 61.2% | 61.7% | 60.7% |
| Twaddle J.A. | 115 | 68 | 59.1% | 68.7% | 70.3% |
| Scott C.J.M. | 144 | 84 | 58.3% | 72.7% | n.a. |
| TOTAL: | 875 | 553 | 63.2% | 65.9% | 65.0% |

There seemed in 1989 and 1990 to be some significant structured and consistent differences in the voting patterns of the eight judges; these had largely disappeared by 1991. In these earlier years, it seemed that the junior members of the Court were somewhat less ready than the senior members to reverse the trial judge; in 1991, the four most recent appointments to the Court included the two who voted the most often to reverse, and the two who did so the least often. Nor did the appeal judges with trial experience (Philp, Helper JJ.A., and Scott C.J.M.) show any similarity in their readiness to support or reverse the trial judge.

---

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

[21] This table excludes five appearances by *ad hoc* judges and one reference case.

The number of sentence appeals was up, and the number of conviction appeals down, in 1991, but the success rate for both types of appeals was higher — for conviction appeals, this marked the second year in a row in which caseload dropped while success rate rose. As in previous years, the Crown initiated fewer appeals than defendants (less than one sixth of the conviction appeals and less than one third of the sentence appeals), but its success rate on appeal was almost twice as high — 60 per cent to 36 per cent. The Crown's overall "batting average" (that is, its combined success as appellant on its appeals, and as respondent on defendant appeals) fell to 64.4 per cent in 1991, from 69.9 per cent in 1990 and 70.5 per cent in 1989. This trend may reflect continuing and persistent features of the appellate caseload and the judicial resolution of it. The breakdown in Table 4 shows how deep the trend went.

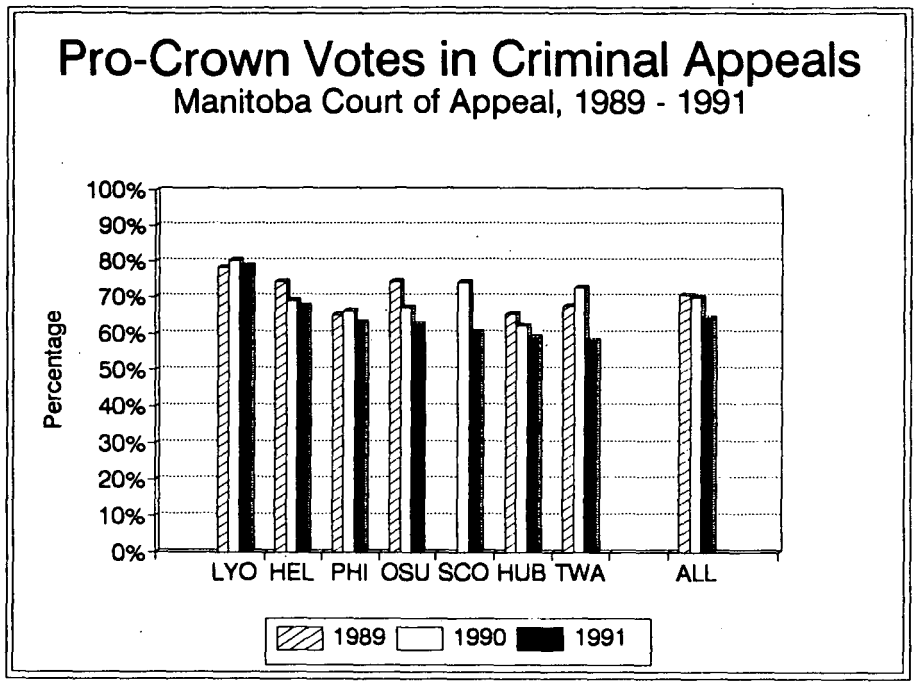
**Table 4**: Pro-Crown Votes in Criminal Appeals
Manitoba Court of Appeal Decisions 1981–1991

| Judge | Total Crim. | Pro-Crown | Pro-Crown % 1991 | Pro-Crown % 1990 | Pro-Crown % 1989 |
|---|---|---|---|---|---|
| Lyon J.A. | 71 | 56 | 78.9% | 80.2% | 78.4% |
| Helper J.A. | 71 | 48 | 67.6% | 69.1% | 74.3% |
| Philp J.A. | 68 | 43 | 63.2% | 66.2% | 65.2% |
| O'Sullivan J.A. | 75 | 47 | 62.7% | 67.1% | 74.3% |
| Scott C.J.M. | 96 | 58 | 60.4% | 74.1% | n.a. |
| Huband J.A. | 78 | 46 | 59.0% | 62.2% | 65.5% |
| Twaddle J.A. | 67 | 39 | 58.2% | 72.6% | 67.7% |
| Total: | 523 | 337 | 64.4% | 69.9% | 70.5% |

There has been a modest but consistent across-the-board erosion in the support given to the Crown in criminal appeals — not a single member of the Court cast a higher proportion of pro-Crown votes in 1991 than in 1990, and only Lyon J.A. voted pro-Crown more often in 1991 than in 1989. The most pronounced changes were on the part of Twaddle J.A. and Scott C.J.M., whose pro-Crown votes fell by almost 15 per cent from 1990 to 1991. It is of course true that the vote totals for each year reflect a response to a specific set of cases and that the ratio of Crown appeals to defendant appeals, and of sentence appeals

to conviction appeals, has been continuously changing (both in favour of the first-named category). The modest changes in voting tendencies have to be seen in the light of this rather complex set of factors.

**Figure 1**




## V. Decisions, Dissents and Concurrences

During 1991, the average judge on the Manitoba Court of Appeal sat on panels that decided about 125 cases. This was down slightly from the 140 or so cases that were heard by the average judge in 1990, which in turn was down from the 180 cases of 1989. However, the delivery of decisions was by no means equally distributed among the panel members, and the asymmetry in this regard is quite striking. On average, a purely random assignment would suggest that each judge should have delivered one decision for roughly every three panel appearances.[22] But some judges (such as Scott C.J.M.) delivered decisions in more than half of their panel appearances,

[22] Slightly less because of the infrequent larger panels and the similarly infrequent *per curiam* decisions.

others (such as Huband and O'Sullivan JJ.A.) in about one third of their appearances, and still others (such as Lyon and Helper JJ.A.) in less than one-fifth. In 1989, the delivery of decisions was dominated by two judges: Monnin C.J.M. with almost one third of all decisions of the Court, and Huband J.A. with about one quarter. A year later, the departure of Monnin C.J.M. created a void that was filled primarily by the trio of Huband, O'Sullivan and Philp JJ.A., who together accounted for more than two thirds of the decisions. In 1991, Scott C.J.M. dominated with about one third of all decisions, flanked by Huband and O'Sullivan JJ.A. with about one sixth each. The much lower profile of Helper and Lyon JJ.A. was striking.

**Table 5**: Appearances, Decisions, and Separate Opinions
Manitoba Court of Appeal Judges, 1991

| Judge | Appearances | Decisions | Dissents | Concurrence |
|---|---|---|---|---|
| Scott C.J.M. | 144 | 104 | 1 | 0 |
| Huband J.A. | 140 | 57 | 3 | 0 |
| Lyon J.A. | 125 | 9 | 12 | 1 |
| Helper J.A. | 123 | 18 | 4 | 2 |
| Philp J.A. | 119 | 32 | 2 | 3 |
| Twaddle J.A. | 116 | 30[23] | 1 | 6 |
| O'Sullivan J.A. | 112 | 42[23] | 7 | 1 |
| *ad hoc* | 5 | 0 | 0 | 1 |
| Total | 884 | 292[24] | 30 | 14 |

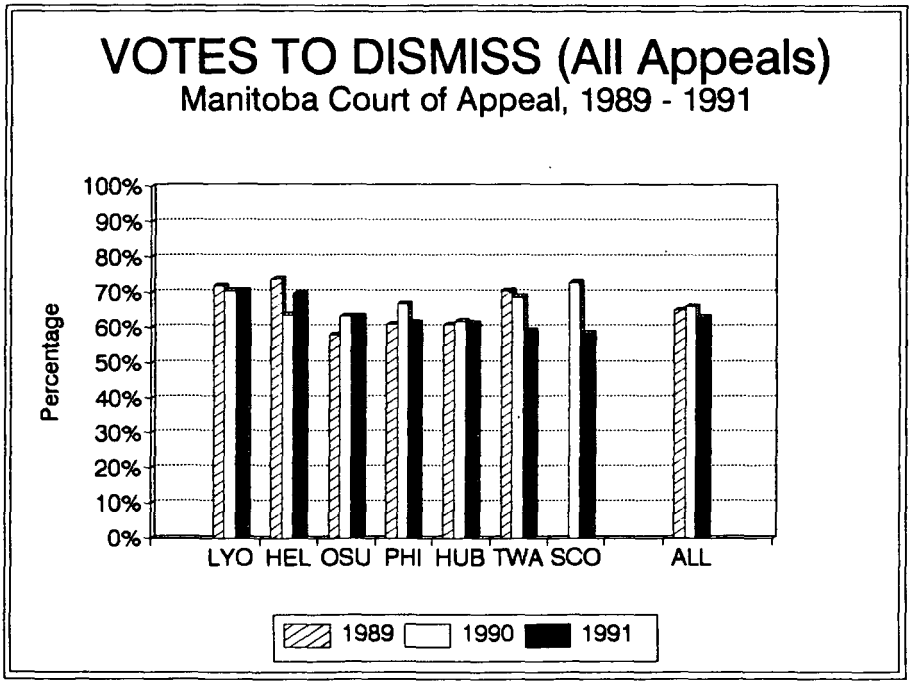
As the simple listing of the names suggests, the factor that drove the differences in the frequency of delivered decisions was clearly seniority. Excluding the six decisions from which the senior judge dissented, the senior member of the panel delivered the judgment of the court in 172 of the 287 panel decisions in 1991 (59.9 per cent of the time); this compares with 63.9 per cent in 1990, and 74.4 per cent in 1989. By contrast, the "junior" judge on the panel delivered the

[23] One decision, *R.* v. *Schneider* (6 March 1991), Doc. 72/91 (Man. C.A.), was jointly rendered by Twaddle and O'Sullivan JJ.A..

[24] Two decisions were rendered *per curiam*. They were *Cross* v. *Wood* (1991), 70 Man. R. (2d) 43, and *R.* v. *J.T.J.* (1991), 73 Man. R. (2d) 103.

decision only 38 times (13.0 per cent).[25] As might be expected, however, judgments delivered by senior members were more common in routine decisions (such as sentence appeals) than in the more substantive appeals that came before the court. Excluding the 132 sentence appeals (77 per cent of which were delivered by the senior judge), only 45 per cent of all appeals were delivered by the senior member of the panel, implying that the allocation of responsibility for writing decisions was rather more egalitarian than the crude figures would suggest. This significantly refutes the appearance of a *de facto* apprenticeship delaying the opportunity for recently appointed members to make a significant contribution to the Court's development of the law.

**Figure 2**




[25] Treating the Chief Justice as senior member of the Court regardless of length of service, and ranking other judges in seniority by date of appointment to the appeal bench; this is accurate for Manitoba, although some other courts base seniority on the date of first appointment to the provincial superior bench (trial or appeal).

As has been indicated in the earlier articles in this series, the Manitoba Court of Appeal has been characterized 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.[26] Before April 1990, then-Chief Justice Monnin typically led the Court in dissents, and there was some indication that his replacement by Chief Justice Scott partway through 1990 would make a significant difference in the plurality of opinions; dissents were registered in 12.6 per cent of the decisions in 1989, but only 7.7 per cent in 1990. Logically, the Monnin/Scott shift should have had a double impact: first, replacing the frequently-dissenting Monnin C.J.M. with the seldom-dissenting Scott C.J.M.; and second, taking away the leadership by example exhibited by a frequently dissenting Chief Justice. However, this trend did not continue, and the dissent rate in 1991 rebounded to 10.2 per cent, although separate concurring decisions were sharply down.

Mr. Justice Lyon dissented most frequently in 1991 (12 times in 125 appearances), typically from a successful appeal by a defendant in a criminal case. The second most frequent dissenter was O'Sullivan J.A., with seven. However, every single member of the Court including Chief Justice Scott dissented on at least one occasion. As in previous years, Mr. Justice Twaddle was the most likely to write a separate concurring judgment.

## VI. 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, and, in last year's article,[27] I discussed this on the basis of two years' caseload. The argument is that presence of a dissent carries a double message: first, it clearly flags the case as one involving an issue important enough for a judge to disagree in writing; and second, it identifies the panel as containing at least two different points of view on the optimal judicial resolution of the issue. Table 6 shows the

---

[26] 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 Justices of Nova Scotia and New Brunswick have informally mentioned to me that the actual dissent rate on their courts is rather higher than would be suggested by reported cases.

[27] See "Caseload 1990," *supra* note 3 at 38.

frequency of agreement, among the appeal court judges, are based on figures from 1989, 1990 and 1991 combined to form a single database which includes the 101 dissent-generating cases from the 36-month period. The table identifies 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, who 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, 1990 & 1991

| | O'Sullivan | Huband | Twaddle | Philp | Lyon | Helper |
|---|---|---|---|---|---|---|
| Monnin | 2/14 | 2/19 | 3/11 | 2/ 8 | 6/ 9 | 0/ 0 |
| Scott | 2/ 6 | 1/ 5 | 2/ 2 | 2/ 3 | 2/ 7 | 5/ 5 |
| O'Sullivan | - | 21/29 | 6/16 | 1/11 | 2/20 | 0/10 |
| Huband | | - | 7/14 | 9/16 | 6/28 | 3/13 |
| Twaddle | | | - | 6/ 8 | 4/14 | 2/ 9 |
| Philp | | | | - | 5/12 | 3/ 6 |
| Lyon | | | | | - | 0/ 4 |

Because the Manitoba Court of Appeal uses three-judge panels (and very rarely five-judge panels), this means that disagreement between two judges can only be registered for those cases in which they happen to sit together, and the figures in Table 6 may therefore be misleading, especially for the cells that involve rather small numbers. Within these limitations, however, the voting behaviour of Manitoba appeal court judges on the 10 per cent or so of cases generating dissents provides interesting clues about the dynamics of the court. For example, it is useful to know that Lyon J.A. dissents more frequently, and that most of his dissents are against successful appeals against the Crown. However, it is more useful yet to know that most of his dissents over the years came from the panel assignments shared with O'Sullivan J.A. and/or Huband J.A..

The table suggests several significant pairings of judges in the Court's non-unanimous decisions, both confirming and slightly modifying the patterns that could be identified in 1990. The first is O'Sullivan/Huband JJ.A., who appeared together in fully one-third of

the Court's dissent-generating cases, and who agree with each other almost three quarters of the time (often anti-Crown and pro-reversal). The second pairing, much less frequent and broken now by the retirement of Monnin C.J.M., was the Monnin C.J.M./Lyon J.A. grouping (usually pro-Crown and anti-reversal). The numbers also hint that Philp and Twaddle JJ.A. tend more often than not to be in agreement on those non-unanimous panels on which they appear together. Finally, Scott and Helper JJ.A. seem to find themselves frequently in agreement, and may be emerging as a new bloc balancing (and generally opposing) both Lyon and O'Sullivan/Huband JJ.A..

## VII. CITATIONS TO AUTHORITY

TO JUSTIFY THEIR DECISIONS, judges relate their findings to the decisions of other judges and other courts; that is, they explain themselves by making citations to judicial authority. This raises the question of which courts and judges they tend to use to justify different types of decisions, and Table 7 presents the relevant data for 1991.

The figures in Table 7 parallel the patterns for both 1990 and 1989 (as described in the earlier articles[28]), 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. At the same time, some interesting new features are emerging.

The largest single block of citations to authority was from the Supreme Court of Canada, providing more than one in every four citations (slightly increased from one in five in 1990). Self-citations — that is, references to previous decisions of the Manitoba Court of Appeal itself — rose slightly to 21.2 per cent (just over one in five). This was again very close to the figures for 1989 and 1990, and distinctly different from the other established Courts of Appeal[29], who cite themselves five to ten per cent more often. The other provincial courts of appeal drew 19.3 per cent of all citations — mostly from the other three western provinces (12.0 per cent) and from Ontario (5.5 per cent). The frequency of United Kingdom citations fell

---

[28] *Supra* note 3.

[29] That is excluding the P.E.I. Court of Appeal, which has existed for less than a decade and therefore has very few earlier decisions to cite.

significantly, from almost one-fifth of all judicial citations to barely half that proportion, eroding Manitoba's long-standing distinction as a frequent user of British citations rivalled only by British Columbia. Citations of Canadian trial courts remained significant at 16.4 per cent — none of the other courts of appeal supply as many precedents as the extra-provincial trial courts combined. Finally, citations of U.S. authority remained extremely rare, almost to the point of insignificance, a characteristic that the Manitoba Court of Appeal shares with every other province except Ontario.

**Table 7**: Citations to Judicial Authority
Manitoba Court of Appeal Decisions 1991[30]

| Authority | Citations | % of total | Judgments | % of total |
|---|---|---|---|---|
| FEDERAL COURTS: | | | | |
| Supreme Court | 121 | 26.5% | 54 | 15.0% |
| Federal Court | 18 | 3.9% | 9 | 2.5% |
| Total Federal: | **139** | **30.4%** | **56** | **15.6%** |
| PROV. APPEAL COURTS | | | | |
| Manitoba | 97 | 21.2% | 55 | 15.3% |
| Alberta | 28 | 6.1% | 20 | 5.6% |
| Ontario | 25 | 5.5% | 21 | 5.8% |
| British Columbia | 17 | 3.7% | 13 | 3.6% |
| Saskatchewan | 10 | 2.2% | 8 | 2.2% |
| Nova Scotia | 3 | 0.7% | 3 | 0.8% |
| New Brunswick | 3 | 0.7% | 2 | 0.6% |
| Quebec | 2 | 0.4% | 2 | 0.6% |
| Total Appeal: | **185** | **40.5%** | **80** | **21.8%** |
| CANADIAN TRIAL COURTS | | | | |
| Manitoba | 27 | 5.9% | 22 | 6.1% |
| Ontario | 18 | 3.9% | 14 | 3.9% |
| Others | 30 | 6.6% | 13 | 3.6% |
| Total Canadian trial: | **75** | **16.4%** | **36** | **10.0%** |
| COMMONWEALTH COURTS | | | | |
| Privy Council | 8 | 1.8% | 1 | 0.3% |
| Other English | 43 | 9.4% | 22 | 6.1% |
| Total: | **51** | **11.2%** | **22** | **6.1%** |
| UNITED STATES COURTS | **2** | **0.4%** | **2** | **0.6%** |
| PROVINCIAL TRIBUNALS | **5** | **1.1%** | **1** | **0.3%** |
| TOTAL CITATIONS | **457** | | **360** | |

[30] This table includes 293 decisions for the court, 23 applications, 30 dissents and 14 separate concurrences.

The average age of a judicial citation in 1991 was 20.3 years, some ten years older than it was for 1990. It would be tempting to attribute this largely to the decline in British citations, except that 1990 was itself an aberration, and the 1989 average (when U.K. citations remained high) was also around 20 years. Although the fact may be obvious to the lawyers and judges who spend a great deal of time reading judicial decisions, it is still worth pointing out the error of the average lay-person's impression that the doctrine of judicial precedent involves citing venerable authorities that are typically many decades old. In fact, fully one third of all citations involve decisions rendered within the last five years, and a majority cite decisions that are less than a decade old.

**Table 8**: Authorities Cited, by Type of Case and Decision
All Manitoba Court of Appeal decisions, 1991

| | S.C.C.[31] | Manitoba C.A. | U.K.[32] | Other C.A. | Canadian Trial | Other |
|---|---|---|---|---|---|---|
| Applications | 4.8% | 61.9% | - | 33.3% | - | - |
| Criminal | 48.5% | 15.5% | 15.5% | 15.5% | 1.9% | 2.9% |
| Sentence | 2.0% | 38.8% | 2.0% | 49.0% | 8.2% | - |
| Public | 34.9% | 6.4% | 15.6% | 8.3% | 16.5% | - |
| Family | 10.0% | 20.0% | 10.0% | 20.0% | 30.0% | 10.0% |
| Private | 21.3% | 34.0% | 10.6% | 9.6% | 24.5% | - |
| Financial | 9.3% | 13.0% | 9.3% | 20.4% | 46.3% | 1.9% |
| Reference | 76.5% | 5.9% | 5.9% | 11.8% | 8.2% | - |
| All Opinions | 28.2% | 21.2% | 19.3% | 9.4% | 16.4% | 5.4% |
| Judges: | | | | | | |
| App'ted pre '85 | 19.4% | 27.1% | 10.9% | 15.5% | 21.7% | 5.4% |
| App'ted post '85 | 30.2% | 19.5% | 9.1% | 21.1% | 14.8% | 5.4% |

Obviously, different types of cases will tend to draw different types of citations, and Table 8 breaks down the data of Table 7 in terms of

[31] Includes eight citations to the Judicial Committee of the Privy Council before 1949.

[32] Excludes eight references to the Judicial Committee of the Privy Council before 1949.

seven different categories of panel decisions. Information of the citation patterns of chambers decisions (labelled "applications") is also provided. Again, the patterns in 1991 are both obvious and generally similar to those of previous years. The Supreme Court citations were predominant in criminal law and public law cases and in reference cases, while the Manitoba Court cited itself most frequently in applications and in sentence appeals (but less often than before in financial and family matters, and more often in private law appeals). U.K. references, formerly numerous in family, private law and financial appeals, but have declined sharply in all three areas. Other Courts of Appeal were consulted and referred to in chambers decisions, and in sentence and family law appeals. Trial court references were most frequent in family law and private law cases.

It is rather striking that differences remained between the "senior" and the "junior" judges on the bench, the latter citing the Supreme Court and other provincial appeal courts more often, and the Manitoba Court and Canadian trial courts less often, than their colleagues. However, this difference did nothing to explain the decline in U.K. citations, as both groups used such references with comparable frequency. Nor did anything remain of the difference suggested last year in the frequency with which the two groups issued dissents. This rate was very similar (at 3.5 and 3.2 dissents per hundred appearances respectively) for both the senior judges and the junior judges, with Lyon's willingness to dissent being nicely balanced by Scott's evident reluctance.

## VII. Winning and Losing in Manitoba: Party Capability Theory

The performance of the Manitoba Court of Appeal can also be used to test the general hypothesis of "party capability theory": that is, the notion that even at the higher levels of a scrupulously fair judicial system, certain types of litigants tend systematically to succeed more often than other types of litigants.

The origins of party capability theory lie in Marc Galanter's classic articles.[33] Galanter explored trial litigation to suggest why governments are generally more successful in litigation than businesses, and

[33] M. Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Social Change" (1974) 9 Law & Soc. Rev.; and M. Galanter, "Afterword: Explaining Litigation" (1975) 9 Law & Soc. Rev. 347.

why business organizations are usually more successful than individuals. He suggested that there was a critical distinction between "repeat players" and "one-shotters." The former (typically institutions or corporations) deploy superior material resources, which permit them to hire the best legal representation and to pay the costs of extensive legal research and preparation, while being better able to absorb the costs of delay. Their repeat player status also implies the benefits of greater litigation experience, a capacity for selecting the best cases for appeal (and for settling out of court to avoid cases with little prospect of success), and the ability to develop and implement a comprehensive litigation strategy. Working with a longer time horizon, they can even to some extent "win while losing" — for example, if a "losing" decision embodies rules of evidence or procedure or interpretation that will favour their cause in the long run, or if it states very narrowly a principle that would have been more dangerous or expensive stated generously and expansively. By way of contrast, for "one-shotters" (typically individuals, often from less advantaged segments of society) every case is all-or-nothing, a self-contained grievance which stands or falls in isolation, and the precedent it establishes is little more than blazing a trail for strangers.

But the general thesis — that material resources and "repeat player" status confer long-term advantages on certain types of litigants — applies to appeal courts at least as much as trial courts, and the dichotomous approach ("repeat player" versus "one-shotter") can be refined to identify a broader range of litigant types. This methodology has been applied to the U.S. Federal Courts of Appeals,[34] to U.S. State Supreme Courts,[35] to the English Court of Appeal,[36] and to the Supreme Court of Canada.[37] The categories Galanter suggested and the hypotheses he generated were broad and general — that government would do better than other actors, and business would do better than individuals. However, the general categories can be refined — not government in general, but specific governments (federal government, or provincial governments, or

---

[34] D. Songer and R. Sheehan, "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals" (1992) 36 Am. J. Pol. Sci. 235.

[35] S. Wheeler *et al.*, "Do the 'Haves' Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970" (1987) 21 Law & Soc. Rev. 43.

[36] B. Atkins, "Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal" (1991) 35 Am. J. Pol. Sci. 735.

[37] P. McCormick, "Party Capability Theory and Appellate Success in the Supreme Court of Canada" (1993) 26 Can. J. Pol. Sc. 523.

municipal governments) or government acting in a specific capacity (as the Crown in a criminal case); not business in general, but "big" business as opposed to ordinary business interests. The basic logic, however, remains the same: court decisions are valued outputs that are sought by a variety of groups to protect or to advance their interests, and some groups are more successful than others in this quest.

In general terms, party capability theory leads to the expectation that governments will do better than other parties in cases decided by appeal courts. More specifically, senior levels of government will do better than their municipal counterparts, while the Crown will do better yet, by virtue of acting against isolated individuals against the clearly defined legal background that maximizes returns to experienced organization. "Big" business, a small subset of unusually powerful and active major interests, will be much more successful than "small" business, and individuals will be the least successful. In a sense this is all obvious, but it means the rejection of a rational actor hypothesis, which would hold that at the appellate level all litigants have comparable chances of success because they proceed on the basis of competent legal advice.

**Table 9**: Appearances and Successes, by Litigant Category
Manitoba Court of Appeal Decisions 1989–1991

| Litigant Type | Appearances | Success | Success% |
|---|---|---|---|
| Crown | 563 | 381 | 67.7% |
| "Big" Business | 70 | 46 | 65.7% |
| Fed/Prov. Gov't | 75 | 48 | 64.0% |
| Business | 241 | 117 | 48.5% |
| Municipal Gov't | 18 | 8 | 44.4% |
| Individuals | 1010 | 389 | 38.5% |
| Other litigants | 21 | 11 | 52.4% |

Table 9 breaks down the overall results into seven categories of litigant. "Government" cases have been divided into three different groups. The first is the Crown acting in criminal cases; the second is federal and provincial governments (including departments, boards and agencies), the two being combined because the federal government was involved as a litigant in less than a dozen cases over the three-

year span; and the third is municipal governments (including school boards). "Business" cases have been divided into two groups: "big" business (including insurance companies and banks) and other business. The sixth category is individuals ("natural persons" as opposed to "corporate persons"); and the seventh is a residual category comprising those litigants (such as universities, trade unions and governments of other countries) who were neither enough alike any other category to be assimilated to it, nor numerous enough to justify a separate category.

The relative success of categories of litigants has to be assessed in the context of two complicating factors. The first is the general tendency of appeal courts to affirm rather than to reverse the lower court; in the case of the Manitoba Court of Appeal over the last three years, the odds in favour of the respondent have been roughly two to one. The appellant's battle, as it were, is fought uphill; to extend the sports analogy, there is a significant home team advantage. The second factor is that litigants can appear before the Court as either appellants or respondents, and the ratio of such appearances is not the same for all groups. Governments, for example, seldom appeal but are often appealed against, while individuals appear as appellants far more often than as respondents.

**Table 10**: "Net Advantage" by Litigant Type
Manitoba Court of Appeal Decisions, 1989–1991

| Litigant Type | Success as Appellant | Loss as Defendant | Net Advantage |
|---|---|---|---|
| "Big" business | 75.0% | 23.1% | 51.9% |
| Crown | 60.5% | 30.4% | 30.1% |
| Fed/Prov Gov't | 55.2% | 30.4% | 24.8% |
| Business | 36.7% | 38.1% | -1.4%[38] |
| Municipal Gov't | 40.0% | 53.9% | -13.9% |
| Individuals | 30.9% | 45.4% | -4.5%[39] |
| Other Litigants | 16.7% | 33.3% | -16.6% |

[38] Net advantage is -1.6%, if data base is adjusted to exclude all cases where both litigants were businesses.

[39] Net advantage is -25.6%, if data base is adjusted to exclude all cases where both litigants were individuals.

Table 10 shows the success rate of the various categories of litigant as appellant, and their loss rate as respondent. The third column indicates the difference between these two rates. According to Wheeler *et al.*,[40] this measure is independent of the appellant/respondent ratio of a litigant's court appearances, and also of any specific court's overall tendency to reverse trial dispositions, enhancing the comparability of results.

The results generally confirm the hypotheses generated by the party capability thesis: governments tend to prevail against other litigants, and businesses are generally successful against individuals. However, there are some modest surprises revealed by the further sub-division of the categories. The high rate of success for the Crown is unsurprising, and replicates a similar advantage at the higher appellate level of the Supreme Court. Municipal governments fare less well in the Manitoba Court than elsewhere, and the gap between "big" business and other litigant categories is considerably larger than (although in the same direction as) similar analysis of Supreme Court decisions.[41]

To put these findings in context, it is hardly surprising to learn that large well-organized institutions or corporations who frequently find it necessary or useful to make reference to appeal courts tend to do somewhat better than groups or individuals less endowed with resources and making only sporadic appearances. This is simply common sense, although the magnitude and persistence of these differences might be mildly surprising, and the rank ordering permitted by quantification represents a significant advance.

This is of course not to suggest that judges are doing something wrong, or that they should find some way to tilt the balance or level the playing field, any more than the basketball referee is obliged to find some way to help the smaller team get a larger share of rebounds. The case that is stronger by established legal criteria should indeed prevail, but we must realize that different categories of litigant differ in their ability to put together the stronger case. Although this does not mean that they will always lose, it suggests that they will, more often than not, lose the borderline cases that could go either way. Judges may stand somewhat above and apart from the overtly political process of making and applying rules; judicial independence and adjudicative impartiality are real and important dimensions of the process, not an empty or cynical facade. However, the insulation of the

---

[40] *Supra* note 35.

[41] See *supra* note 37.

courts is partial rather than total, and structural considerations still leave them embedded in the differentials of resources and advantages that pervade modern society. The general transferability of party capability conclusions from one country to another suggests that these observations are true of appellate courts generally.

## VIII. SUMMARY OF FINDINGS

ON THE BASIS OF a statistical analysis of the 293 panel decisions of the 1991 Manitoba Court of Appeal, one can make the following generalizations:

1. The mild reduction in caseload for the second consecutive year confirms that the steady growth in appellate caseloads that characterized the last two decades has clearly peaked in Manitoba (and in some 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 one per cent of all panels — and there is no indication that the use of larger panels may increase.

3. Most decisions of the Manitoba Court of Appeal are brief and (presumably) routine, only ten per cent requiring two to five pages, and another 15 per cent requiring two pages or less, in a standard law report.

4. A substantial majority — over two-thirds — of the panel decisions of the Court are made by the presiding judge of the panel (i.e., the senior judges of the Court), although many of these were routine decisions of the Court such a sentence appeals.

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 about two in three. These overall figures slightly overstate the stability of the success rates for the various types of appeal; criminal and public law appeals succeeded more often, and other appeals less often, in 1991 than in 1990.

6. The dissent behaviour of the Manitoba Court remains high in comparison with the other western provincial courts of appeal,

and there is no indication that the accession of a new Chief Justice has had any lasting effect on the dissent rate. There continues to be some statistical basis for describing this as organized around a principled disagreement between two sets of judges (Huband and O'Sullivan JJ.A. versus Lyon J.A.), with the critical polarities generated by support for the Crown and a readiness to reverse the trial judge.

7. The citation patterns of the judges of the Manitoba Court of Appeal remain distinctive, although less so in 1991 than in previous years. United Kingdom citations are less common, and citations of the Supreme Court and of the Court's own previous decisions more common, than had previously been the case.

8. The Manitoba Court of Appeal resembles the Supreme Court of Canada, and the appeal courts of other comparable jurisdictions, in that certain categories of litigants such as governments and business organizations tend on aggregate to do better on appeal.