

## Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices

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AN APPELLATE COURT DECISION does not simply declare a winner; it also presents a persuasive explanation that is intended to convince both the parties and a broader legal public that the outcome was appropriate. A significant characteristic of these explanations is the citation of the decisions of other courts and other judges. A series of articles in this *Journal* has examined *inter alia* the citation practices of the Manitoba Court of Appeal over a number of years, the logic of that analysis resting on two separate assumptions. The first was that there is a continuity in the citation practices of the Court, rather than a purely gratuitous aggregate of citations that responded to a string of contingent situations. This assumption seems to have been vindicated quite convincingly by the continuity in citation patterns that has persisted over the 1987–1991 five-year span and is summarized in Table 1.

The second assumption, equally important but heretofore unproven, was that the citation patterns of a particular Court reflect enduring characteristics of that Court (and/or the individual judges who comprise it) rather than a uniform set of responses that is more or less replicated from one province to the next. This article will seek to validate this second, and possibly more controversial, assumption.

Judicial authority is clearly and transparently important, but this simply raises the question of what counts as authority. The universe of available precedent is extremely broad — judicial citations from the courts of the ten provinces (trial and appeal) and from the federal courts back to Confederation, as well as the courts of a dozen other common law countries reaching back for centuries; statutes and regulations from many jurisdictions; academic and general books and articles from a range of Canadian, American and British sources. But

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the search patterns are not random. Some authorities are cited more often than others, and this becomes one of the distinguishing features of the Canadian judicial system as a whole, and of identifiable elements within that system.

**Table 1: Citations to Judicial Authority, by Type of Authority  
Manitoba Court of Appeal Decisions, 1987-1991.**

| Year              | SCC   | Own CA | Other CA | U.K.  | CdnTr | U.S. | Other |
|-------------------|-------|--------|----------|-------|-------|------|-------|
| 1987 <sup>1</sup> | 25.4% | 16.9%  | 16.1%    | 19.9% | 16.1% | 2.0% | 2.5%  |
| 1989 <sup>2</sup> | 24.8% | 17.4%  | 21.2%    | 19.6% | 13.3% | 2.6% | 1.1%  |
| 1990 <sup>3</sup> | 20.0% | 19.7%  | 24.9%    | 18.0% | 15.5% | 1.1% | 1.3%  |
| 1991 <sup>4</sup> | 26.5% | 21.2%  | 19.3%    | 11.2% | 16.4% | 0.4% | 5.0%  |

Where do judges find the cues that they read into their specific individual decisions? Which courts lead, and which courts follow, as new issues are explored and new problems are resolved?

This paper undertakes an exploration of Canadian citation practices empirically and statistically, by examining the citations to authority in all the reported decisions of all ten Canadian provincial courts of appeal in a single calendar year (1987). Such an approach follows neither of the routes with which lawyers are most comfortable, falling uneasily somewhere in between. On the one hand, citation and precedent can be discussed abstractly in terms of the idea of “binding” precedent: judges are bound by, and must follow, the decisions of those courts to which their own decisions can be appealed; and they acknowledge these heavy ruts in the judicial road by citing those higher court decisions. Although there is some question as to whether

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<sup>1</sup> 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.

<sup>2</sup> P. McCormick, “Caseload and Output of the Manitoba Court of Appeal 1989” (1990) 19 Man. L.J. 334.

<sup>3</sup> P. McCormick, “Caseload and Output of the Manitoba Court of Appeal 1990” (1992) 21 Man. L.J. 24.

<sup>4</sup> P. McCormick, “Caseload and Output of the Manitoba Court of Appeal 1991” (1993) 22 Man. L.J. 261.

courts are bound by previous decisions of their own court,<sup>5</sup> this is another block of decisions that would, on any orthodox approach, be expected to bulk fairly large in citation practices.

On the other hand, citations are dealt with in the focused context of a specific judicial decision, in which case the criteria for the appropriateness and weight of a judicial citation are "internal"—the parallelism of the issues raised, the rigor of the analysis, the clarity and persuasiveness of the resolution achieved. When the unit of analysis is the individual case, this is both inevitable and appropriate, although this species of story-telling is inherently subject to its own type of distortion. As Scheingold observes, "In the retelling, the progress of precedent in a particular line of cases tends to take on a misleading gloss of certainty."<sup>6</sup>

In this paper, however, the concern is not the individual case but the overall picture, not in terms of *a priori* theory but in terms of actual practice, and the consideration of citations will be "external"—what sources are cited, and how often, by specific courts. This analysis will be used to characterize the judicial system as a whole (in terms of the pluralism or centralism of most favoured sources) and also to identify significant differences between the individual provincial courts of appeal.

The various levels of analysis should, of course, be thought of as complementary rather than competitive. Any pluralism in the citation of authorities exists against the irrefutable background of the hierarchy of Canadian courts; and it is because judges select citations for their "internal" characteristics that this paper can consider which authorities specific sets of judges tend to turn to for such guidance and leadership — that is, given that citations are selected for their excellence, where is it that the judges of the different courts tend to find this excellence? Reported decisions are any court's contributions to the ongoing conversation of the common law and its citations to authority indicate to what part of that conversation it is listening.

It may not be credible to suggest that there is always a single

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<sup>5</sup> See, for example, the discussion in G. Gall, *The Canadian Legal System*, 2d ed. (Toronto: Carswell, 1983) at 226-36.

<sup>6</sup> S. A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven: Yale University Press, 1974) at 109.

correct answer,<sup>7</sup> but it remains an important feature of the judicial decision (and an important limitation on the judicial power that might otherwise be so threatening) that the authority of judges requires justification in terms of existing and past practice. "Judges, generally speaking, have derivative rather than primary authority. Even though they have great power, they are not supposed to act free and unfettered." Rather, they are "bound by the law."<sup>8</sup> The need to work within the framework of authoritative citations limits the discretion of judges, and an examination of the citations that judges acknowledge as setting those limits indicate where judges find their cues and what values they seek to promote. "Citation patterns ... reflect conceptions of role .... These patterns may be clues, too, to the role of courts in society."<sup>9</sup>

Nor does it matter whether we think of judicial citations patterns as an attribute of the bench or of the bar — that is, do judges tend to cite certain sets of authorities because they are the ones used by the lawyers who appear before them, or do lawyers tend to use these arguments because they know (empirically or, more plausibly, intuitively) that judges are more likely to be persuaded by them.<sup>10</sup> Undoubtedly, this causal arrow runs in both directions. However, because senior judges are invariably drawn from the bar of the province within which they preside, and because this paper will look at each provincial court of appeal as a single unit rather than attempting to break it down into the citation preferences of individual judges or specific subsets of judges, this particular conundrum can simply be bypassed.

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<sup>7</sup> Mr. Justice Roger Kerans of the Alberta Court of Appeal likes to refer to this as the "flat rock theory" of precedent: "[R]eading cases is like turning over rocks, and if you just turn over enough rocks you will eventually find the exact piece of law you need." From R. Kerans, "Standards of Review" (Paper presented to the National Judicial Institute's 1993 Canadian Appellate Court Seminar; Montreal, Quebec; April 1993) [unpublished].

<sup>8</sup> L. M. Friedman *et al.*, "State Supreme Courts: A Century of Style and Citation" (1981) 33 *Stan. L. Rev.* 773 at 793.

<sup>9</sup> *Ibid.* at 794.

<sup>10</sup> The dimensions of this chicken-and-egg problem should, however, not be overstated. A U.S. study found that less than half of the legal authorities cited in a sample of U.S. appeal decisions were taken from the arguments of counsel, accounting for only one-sixth of all citations by counsel; and that in over one fifth of the cases none of the authorities emphasized in the judgment were from the arguments of counsel. See T. B. Marvell, *Appellate Courts and Lawyers: Information Gathering Information in the Adversary System* (Westport, Conn.: Greenwood Press, 1978) at 29ff.

## II. THE CONTEXT OF PROVINCIAL APPEAL COURT DECISIONS

NINETEEN EIGHTY SEVEN IS the first year that all ten provinces had a full-time court of appeal, above and distinct from the s. 96 trial courts. The 1987 creation and staffing of the Prince Edward Island Supreme Court (Appeal Division) marked the culmination of the process begun in 1867 whereby each province<sup>11</sup> acquired a specialized and functionally separate court staffed by judges whose full-time responsibility was the hearing of appeals from lower trial courts rather than the exercise of original jurisdiction.<sup>12</sup> Despite some persisting diversity in terminology — the Ontario Court of Error and Appeal, the Quebec Court of King's/Queen's Bench, the designation of an Appeal Division within the provincial Supreme Court — the term "court of appeal" now used in nine provinces<sup>13</sup> and two territories can legitimately be employed as a generic label.

Provincial courts of appeal in the late 1980s and early 1990s collectively deliver 6,000 or more decisions per year, which compares with the 100 or less of the Supreme Court of Canada. Of these 6,000, some 1,400 (just over 20 per cent) are reported by the provincial, regional or national reporting services.<sup>14</sup> Caseload and reporting rates both vary to a truly remarkable extent from one province to the next, as shown in Table 2.

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<sup>11</sup> Ontario and Quebec have had specialized superior courts of appeal virtually since Confederation, although the Quebec Banc du Roi/Banc de la Reine (renamed the Court of Appeal in 1974) retained an increasingly vestigial trial jurisdiction. Manitoba and B.C. gained their courts of appeal in the first decade of this century, Alberta and Saskatchewan in the 1920s, New Brunswick and Nova Scotia in 1966, and Newfoundland in 1974.

<sup>12</sup> This generalization goes a shade too far by ignoring the original jurisdiction gradually bestowed upon every court of appeal in the form of reference cases or advisory opinions. See J.P. McEvoy, "Separation of Powers and the Reference Power: Is There a Right to Refuse?" (1988) 10 Supreme Court L. R. 429.

<sup>13</sup> The Nova Scotia Supreme Court (Appeal Division) was renamed the Nova Scotia Court of Appeal on 31 January 1993.

<sup>14</sup> The law reports that were covered in this research project included all the provincial law reports, *Western Weekly Reports*, *Dominion Law Reports*, *Canadian Criminal Cases*, *Criminal Reports*, *Reports on Family Law*, *Motor Vehicle Reports*, *Canadian Bankruptcy Reports*, and a number of the other more specialized reports.

**Table 2: Caseload and Reporting Rates**  
Canadian Provincial Courts of Appeal 1987.

| Province          | Total Cases 1987 | Reported Cases | Reporting Rate |
|-------------------|------------------|----------------|----------------|
| British Columbia  | 664              | 237            | 35.7%          |
| Alberta           | 1,200            | 174            | 14.5%          |
| Saskatchewan      | 521              | 202            | 38.8%          |
| Manitoba          | 406              | 104            | 25.6%          |
| Ontario           | 1,476            | 177            | 12.0%          |
| Quebec            | 1,271            | 137            | 10.8%          |
| New Brunswick     | 161              | 102            | 63.4%          |
| Prince Edward Is. | 69               | 19             | 27.5%          |
| Nova Scotia       | 247              | 188            | 76.1%          |

This is one clear difference between the Canadian provincial courts of appeal and their American counterparts, the state supreme courts — in the United States, either all decisions are reported, or the publication/non-publication decision is made by the judges themselves and is the subject of both analysis and controversy, but in Canada the selection of cases for reporting is left to the editors of a reporting service. The variation in reporting rates in Table 2 — from Quebec's 11 per cent to Newfoundland's 80 per cent — is so great as to be almost absurd. However, these figures — both the diversity of reporting rates, and the low rates for the larger provinces — should be taken with a grain of salt. Because much of the caseload of a provincial appeal court consists of first appeals by right from the provincial superior trial courts, many are routine and raise few important legal questions. As a result, they tend to be resolved (typically, dismissed) with little or nothing in the way of written reasons. In the large volume courts, only a minority of decisions are reserved for formal written reasons,<sup>15</sup> and another equally small minority<sup>16</sup> receive subsequent brief written comment in the form of a bench memo (Alberta) or an endorsement (Ontario). The remainder,

<sup>15</sup> In Alberta in 1989, for example, of 1,150 Court of Appeal decisions, only 193 were reserved.

<sup>16</sup> In Alberta 1989, there were 175 bench memos.

a majority of the total caseload, leave no record behind them save the result.

Alberta and Ontario are two of the provinces with the highest caseload and the lowest reporting rates. They are also the two provinces with an unusually high proportion (40 per cent or more of total cases) of sentence appeals, typically appeals in which the ratio of unique idiosyncratic detail to general legal principle is so high that there is little to report. In the lower volume courts, it may be the case that every appeal decision is accompanied by some written reasons and more cases, therefore, result in a decision in reportable form.<sup>17</sup> But most of these are extremely short and again only a minority are the subject of discursive explanation and extended argument that citable decisions would be expected to contain. In other words, the reported appeal court decisions represent much more than the tip of the iceberg of legally important decisions, and may well constitute most of the iceberg.

The general physical parameters of the "average" reported court of appeal (and of each province) are shown in Table 3, although because of the very high reporting rates for the Atlantic provinces and the very low rates for Ontario and Quebec these "averages" must be taken with a grain of salt. On average, an appeal decision takes up just under four and a half pages<sup>18</sup> of a standard law report (Ontario and British Columbia appeal decisions are notably longer), and includes just over five citations to authorities of various kinds (with Ontario and Quebec leading the way). Of these citations, 69 per cent are to previous judicial decisions, a proportion that is strongly consistent from coast to coast, with only Nova Scotia and New Brunswick falling below 65 per cent. "Positive" citations — that is, specific judicial reference to statutes or regulations — account for about 23 per cent of the total (significantly higher for Nova Scotia and Newfoundland), and "academic" citations — that is, judicial reference to books or journal articles — for barely 8 per cent (Ontario and Quebec being unusual in this regard).

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<sup>17</sup> This is the case, for example, in Manitoba.

<sup>18</sup> These numbers refer to the decision of the court only; dissents and separate concurring opinions, which are more frequent in some provinces than in others, would alter these figures somewhat.

**Table 3: Characteristics of Reported Appeal Decisions  
Calendar 1987**

| Province | Reported Appeal Decisions | Average Length in Pages | Average Judicial Citations | Average Positive Citations | Average Academic Citations |
|----------|---------------------------|-------------------------|----------------------------|----------------------------|----------------------------|
| B.C.     | 237                       | 5.86                    | 3.74                       | 1.57                       | 0.14                       |
| Alberta  | 174                       | 3.36                    | 2.86                       | 1.11                       | 0.48                       |
| Sask.    | 202                       | 3.94                    | 3.68                       | 1.30                       | 0.39                       |
| Manitoba | 104                       | 3.16                    | 2.46                       | 0.84                       | 0.25                       |
| Ontario  | 177                       | 6.40                    | 6.06                       | 1.62                       | 0.95                       |
| Quebec   | 137                       | 4.63                    | 4.77                       | 1.53                       | 0.84                       |
| N.B.     | 102                       | 3.04                    | 2.02                       | 0.85                       | 0.46                       |
| N.S.     | 188                       | 3.33                    | 2.40                       | 1.17                       | 0.21                       |
| P.E.I.   | 19                        | 2.42                    | 3.84                       | 1.16                       | 0.32                       |
| Nfld.    | 62                        | 3.49                    | 2.84                       | 1.19                       | 0.18                       |
| TOTAL:   | 1,402                     | 4.32                    | 3.58                       | 1.29                       | 0.43                       |

Two things should be noted about this balance between the types of citations. The first is the non-distinctiveness of the figures for the province of Quebec. According to Goutal,<sup>19</sup> judicial decisions in a civil code regime typically rely heavily on the written code itself and on academic commentaries, seldom and only exceptionally making reference to prior judicial decisions; professors rather than judges are the major enunciators and clarifiers of the law. Because Quebec is Canada's only civil code province, one would expect some visible trace of this difference. In fact, the citation patterns of Quebec's Court of Appeal in 1987 are little different from those of the other provinces, and show no greater tendency to cite academic authorities than (say) neighbouring common law Ontario. The pattern is similar for both criminal and civil cases. This strongly supports Peter Russell's argument that "the judicial institutions of Quebec, despite any residue

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<sup>19</sup> See J.L. Goutal, "Characteristics of Judicial Style in France, Britain and the U.S.A." (1976) 24 Am. J. Comp. L. 43.

of French civil law and procedure that survives, bear the essential features of English common law courts."<sup>20</sup>

The second is the preponderance of judicial citations. Although "the age of common law" is usually held to have been at least partially supplanted by "the age of statute," most of the authorities that appeal court judges in the 1980s cite to explain their decisions are other judges. References to statutes are less common (mostly federal statutes in criminal cases, provincial statutes in private law cases, and a mixture of the two in public law cases); and references to academic authorities even rarer, especially outside the central provinces. This being the case, the rest of this discussion will focus on the basic stuff of appellate judicial authorities, namely judicial citations.

### III. JUDICIAL CITATIONS BY PROVINCIAL COURTS OF APPEAL

WHICH PROVINCIAL APPEAL COURTS tend to cite which judicial authorities, and how often? In the 1,402 reported decisions in 1987, provincial appeal court judges made 6,213 references to judicial authorities. A preliminary breakdown of these authorities is indicated in Table 4.

#### A. The Supreme Court of Canada

The largest single supplier of judicial precedent was the Supreme Court of Canada itself, with just over one quarter of all citations (26.6 per cent). The range is from a high of 35.4 per cent (Newfoundland) to a low of 19.5 per cent (Prince Edward Island); British Columbia is also strikingly low at 21.8 per cent.

This is higher than the corresponding U.S. state supreme court figure of about 19 per cent,<sup>21</sup> although neither the existence nor the direction of the difference is surprising. Criminal law in Canada, but not in the U.S., is a matter of federal jurisdiction with a strong natural role for the national court of appeal; and in Canada, but not in the U.S., all areas of law (provincial as well as federal) are subject to appeal beyond the highest provincial court. Both these features

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<sup>20</sup> P. H. Russell, *The Judiciary in Canada: The Third Branch of Government*, (Toronto: McGraw-Hill Ryerson Ltd, 1987) at 36.

<sup>21</sup> J.H. Merryman, "Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960 and 1970" (1977) 50 S. Cal. L. Rev. 381 at 419. Friedman *et al.*, *supra* note 8, suggest a somewhat lower figure of 13 per cent.

suggest a higher profile and a larger role for the Supreme Court of Canada in the judicial decisions of the provincial courts of appeal.

**Table 4:** Citations to Judicial Authority, by Type of Authority Reported Provincial Court of Appeal Decisions 1987

| Province | S.C.C. | Own CA | U.K.  | Other CA | CdnTr | Other | Total |
|----------|--------|--------|-------|----------|-------|-------|-------|
| B.C.     | 21.8%  | 25.3%  | 19.8% | 13.6%    | 15.2% | 4.4%  | 237   |
| Alberta  | 26.5%  | 24.3%  | 14.4% | 20.5%    | 11.4% | 2.9%  | 174   |
| Sask.    | 28.9%  | 23.2%  | 13.1% | 17.9%    | 12.6% | 4.4%  | 202   |
| Manitoba | 25.4%  | 16.9%  | 19.9% | 16.1%    | 17.1% | 4.5%  | 104   |
| Ontario  | 24.2%  | 27.4%  | 11.1% | 11.4%    | 12.8% | 13.0% | 177   |
| Quebec   | 31.1%  | 37.2%  | 3.6%  | 7.9%     | 14.0% | 6.2%  | 137   |
| N.B.     | 29.4%  | 17.1%  | 14.1% | 18.6%    | 17.1% | 3.7%  | 102   |
| N.S.     | 27.5%  | 30.9%  | 8.6%  | 18.9%    | 10.9% | 3.3%  | 188   |
| P.E.I.   | 19.5%  | 14.6%  | 7.3%  | 31.7%    | 26.8% | 0.0%  | 19    |
| Nfld.    | 35.4%  | 10.8%  | 11.9% | 25.0%    | 11.9% | 5.0%  | 62    |
| TOTAL    | 26.6%  | 25.6%  | 12.9% | 15.4%    | 13.6% | 5.9%  | 1402  |

It is, perhaps, surprising that the differences between American and Canadian Supreme Court citation rates are not even larger. The contrast between Canada’s unitary court system and the federalized system of the U.S., and the constitutional dissimilarities referred to above, would lead one to expect more dramatic differences. Twenty-six per cent is larger than 19 per cent, but not overwhelmingly so; the Canadian Supreme Court may loom somewhat larger for the provincial courts of appeal than does the U.S. Supreme Court for the American state supreme courts, but not all that much larger.

**B. Self-Citations**

The second most commonly cited authority is the provincial court of appeal itself, with 25.6 per cent of all citations. (Given the small size of some appeal courts, this was probably often a self-citation in the purest form, and is sometimes explicitly identified as such — “as I said in a previous decision ...”). Indeed for four provinces, self-citations are more frequent than Supreme Court citations — these are Ontario, Quebec, Nova Scotia (the “lead court” of the Atlantic provinces) and

British Columbia (the "lead court" of the Western provinces). The range is from a high of 37.2 per cent in Quebec to a low of 10.8 per cent in Newfoundland.

The high figure for Quebec is not surprising, given the uniqueness of the civil law system in that province and the correspondingly reduced salience for such precedents from the other jurisdictions. There does seem to be some correlation between the age of court of appeal and the frequency of its self-citation — that is, the more established courts tend to cite themselves more often, and the recently established courts less often. This seems quite sensible, both in terms of accumulated jurisprudence and institutional self-confidence, although the numbers for both Nova Scotia and Manitoba cut against this generalization.

U.S. state supreme courts also cite themselves frequently; indeed "the cases most often cited by State Supreme Courts are their own prior decisions."<sup>22</sup> However, they do so at a much higher rate than the Canadian provincial courts of appeal. About two thirds of all state supreme court citations are to their own decisions or to the decisions of their own intermediate appeal courts.<sup>23</sup> The big difference between Canadian provincial practices and those of the American state courts is therefore not that federal courts are cited so often, but that the provincial courts' own decisions are cited so seldom. The shrunken area of self-citation (compared to American patterns) is not offset by a corresponding increase in citations of the Supreme Court. Instead, what differentiates Canadian provincial appeal judges from U.S. state supreme court judges is less a centralized fixation on the Supreme Court than a pluralistic openness to a variety of judicial authorities.

### C. Other Provincial Courts of Appeal

The third major source of citations to authority is the other provincial (and territorial) courts of appeal; taken collectively, these accounted for almost one citation in six (15.4 per cent) ranging from a high of 31.7 per cent (P.E.I.) to a low of 7.9 per cent (Quebec). Again, this differentiates Canadian from American practice; Canadian provincial courts of appeal are twice as likely to cite other provincial appellate

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<sup>22</sup> Friedman *et al.*, *supra* note 8 at 796; the identical observation is made by Merryman, *supra* note 21 at 394: "The authority most frequently cited by the [California Supreme] court ... was itself."

<sup>23</sup> Merryman, *supra* note 21 at 394; see also Friedman *et al.*, *supra* note 8 at 797.

courts as a U.S. state supreme court is to cite other state supreme courts.<sup>24</sup>

As one would expect, not all provincial appeal courts are equally likely to be cited, and again as one would expect, the Ontario Court of Appeal clearly leads the way with more than 40 per cent of all such citations. The B.C. Court of Appeal is a distant second with 18.2 per cent, and Alberta an even more distant third with less than 10 per cent. A partial breakdown (combining into a single category Atlantic and Western appeal courts respectively) is shown in Table 5.

**Table 5:** Citations of Judicial Authority, Other Provincial Courts of Appeal Only Reported Decisions of Provincial Courts of Appeal 1987

| Province | Atlantic  | Ontario   | Quebec   | West      | All |
|----------|-----------|-----------|----------|-----------|-----|
| B.C.     | 21 (12%)  | 85 (50%)  | 4 (2%)   | 49 (29%)  | 169 |
| Alberta  | 14 (10%)  | 70 (49%)  | 6 (5%)   | 51 (36%)  | 143 |
| Sask.    | 19 (11%)  | 73 (43%)  | 2 (1%)   | 74 (44%)  | 168 |
| Manitoba | 5 (8%)    | 26 (41%)  | 2 (3%)   | 31 (48%)  | 64  |
| Ontario  | 20 (15%)  | -         | 13 (10%) | 102 (76%) | 135 |
| Quebec   | 8 (13%)   | 34 (54%)  | -        | 21 (33%)  | 63  |
| N.B.     | 12 (24%)  | 16 (32%)  | 2 (4%)   | 20 (40%)  | 50  |
| N.S.     | 6 (7%)    | 51 (55%)  | 1 (1%)   | 34 (37%)  | 92  |
| P.E.I.   | 7 (27%)   | 8 (31%)   | 0        | 11 (42%)  | 26  |
| Nfld.    | 12 (18%)  | 27 (42%)  | 1 (2%)   | 25 (38%)  | 65  |
| TOTAL    | 124 (13%) | 390 (40%) | 33 (3%)  | 418 (43%) | 975 |

Caldeira<sup>25</sup> suggests a number of characteristics relevant to the patterns of judicial reference across state boundaries, two of which — population size and geographical proximity — seem useful in explaining this pattern. Population size would help to explain the apparent leading role of the Ontario Court of Appeal; and geographical proximity, the clustering of citations within the western and Atlantic courts of appeal.

<sup>24</sup> Merryman, *supra* note 21 at 400.

<sup>25</sup> G.A. Caldeira, "The Transmission of Legal Precedent: A Study of State Supreme Courts" (1985) 79 *Am. Pol. Sci. Rev.* 178.

The argument from size is as follows: a larger population means a larger trial caseload, therefore more appeal cases, and therefore a larger number of legally significant appeals. This in turn suggests that an appeal court in a large province is likely already to have dealt with, and to have developed the doctrine to accommodate consistently, cases of a type arising for the first time in a smaller province. Further, a larger population means more lawyers and more trial judges, therefore a better opportunity to recruit a higher proportion of outstanding appeal judges. Finally, it may be the case that the more specialized law reports pick up Ontario cases more readily and quickly than others, giving them a logical advantage for frequency of citation. The same factors do not operate for Quebec because of language, and because that province has a different legal system (civil code rather than common law) for the non-criminal cases that make up most of the reported decisions.

The geographical proximity argument suggests that physical closeness makes it more likely that judges will know each other personally or by reputation, and will be more familiar with styles or with areas of expertise that particular judges have developed. It may also mean that provincial law reports are available more quickly and more regularly. In addition, neighbouring provinces are more likely to share similar problems and similar attitudes towards their resolution. This is mildly in evidence within the Atlantic and Western provinces, accounting for roughly 25 per cent of all interprovincial citations.

What the figures do show is the lead role of the Ontario court, which is cited by every other province much more often than it cites in return. Also illustrated graphically is the isolation of the Quebec Court of Appeal, which hardly ever cites any Canadian provincial appeal court except that of Ontario, and is rarely cited by any Canadian provincial appeal court except (again) Ontario.

#### **D. Canadian Trial Courts**

Canadian trial courts account for about one seventh (13.6 per cent) of total citations, highest in P.E.I. (26.8 per cent), New Brunswick and Manitoba (17.1 per cent), and lowest in Nova Scotia (10.9 per cent) and Alberta (11.4 per cent). These numbers are rather higher than might have been anticipated. It seems natural to think of a court looking for guidance and leadership "up" or "across" the judicial hierarchy rather than "down." Some American studies of appellate court citations practices exclude citations to trial courts on the

question-begging grounds that they are not “really” precedent.<sup>26</sup> It seems better sense to take the judges’ actions at face value: if appellate courts cite trial decisions as explanatory authority carrying persuasive weight, then these decisions are in fact part of the body of judicial precedent, not to be excluded by *a priori* definitions.

Trial citations are almost always to the provincial superior (that is, s. 96) trial courts. References to Provincial Court decisions are extremely rare, but not quite a zero category. Ontario trial courts are cited more frequently than those of any other province, but own-province trial citations are also common, especially in Quebec where most trial citations are of this type.

The frequency of citations of trial decisions suggests the need for some caution in describing the division of labour between trial courts and appeal courts. Sometimes (but not all the time) appeal courts formulate new legal doctrine or judicial policy within the field created by party-initiated appeals from trial decisions; other times, they should rather be seen as sifting through the variety of trial decisions to select those that are most sound, and by that selection endorsing those trial decisions.

One would expect that trial court citations would tend to be of recent cases, representing a first judicial confrontation with new legal problems or social expectations that has not yet been incorporated into appellate jurisprudence; over time, these trial citations would, logically, tend to be replaced by the appeal decisions that incorporated or modified them. However, for those provinces for which the further calculations were made, the average and median ages for a Canadian trial court citation is higher, not lower, than that for an appellate citation. In other words, the “obvious” expectation seems not to catch the way the Canadian provincial courts of appeal actually cite trial court decisions.<sup>27</sup>

### **E. United Kingdom**

More than one citation in eight (12.9 per cent) is from a British court, more than any single authority except the Supreme Court or the specific court of appeal itself. Some of these citations are to the

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<sup>26</sup> See, for example, W.M. Landes and R.A. Posner, “Legal Precedent: A Theoretical and Empirical Analysis” (1976) 19 J. of Law & Ec. 249 especially at 251.

<sup>27</sup> On an impressionistic rather than a statistical basis: it seems to be the case that many of the trial court citations are accompanied by the phrase “as he then was,” suggesting that often it is the subsequent elevation of the judge in question to a Court of Appeal or the Supreme Court that helps to render the decision citable.

venerable cases of the English legal tradition, dating back as early as the sixteenth century, and some (about one tenth) are from the period before 1949 when the Judicial Committee of the Privy Council was Canada's final court of appeal. Others are more recent, suggesting an ongoing rather than a largely historic interest in British ideas and the British legal style. The highest figures are those for Manitoba (19.9 per cent) and British Columbia (19.8 per cent); the lowest (not surprisingly) are for Quebec (3.6 per cent). Generally, the most frequent references to British courts are made by the appeal judges of the four Western provinces.

Again (and not surprisingly), this clearly differentiates the Canadian style from that of the U.S. state supreme courts, where citations to English authorities have virtually vanished in recent decades.<sup>28</sup> The persistence of such a high level of English citations is perhaps mildly surprising, in that most of today's provincial appeal judges took their legal training and were admitted to the bar after the abolition of appeals to the Judicial Committee of the Privy Council patriated final judicial authority within Canada. The pattern of English citations may change as the new generation of lawyers comes to the fore, or as *Charter*<sup>29</sup> litigation moves the focus of attention to American Bill of Rights jurisprudence.

#### **F. Other Judicial Authorities**

Some 6 per cent of all judicial citations do not fall into any of the above general categories, and were grouped into a residual "other" category in Table 3. There are a handful of citations to the European courts (but none to the French courts), and a small number of references (35, mostly by the Quebec Court of Appeal) to the decisions of federal and provincial boards and tribunals. All the other Commonwealth countries combined account for 45 references, almost all from Ontario and B.C.; the Australian courts (Australian High Court and New South Wales) draw most of these citations. There were only 53 citations of federal court decisions, including the present Federal Court of Canada (both Trial and Appeal Divisions) and the Exchequer Court that it replaced; the largest number of these references were made by the Quebec and Saskatchewan Courts of Appeal.

Noteworthy more for their low frequency than for anything else are citations of United States authorities. Barely 3 per cent of all citations

<sup>28</sup> Merryman, *supra* note 21 at 400; Friedman *et al.*, *supra* note 8 at 798-99.

<sup>29</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.

to authority are to U.S. courts, hardly a major presence. This is all the more surprising because *Charter* issues arise in about 15 per cent of all cases, which would make U.S. authorities attractive and instructive — not necessarily to be followed closely but certainly providing a survey of relevant issues and a warning of possible pitfalls. As well, American law is similar to Canadian law in a number of specialized areas such as petroleum law and insurance law, creating an unfulfilled expectation that U.S. authorities would routinely be canvassed in such areas. Bushnell<sup>30</sup> indicates that the Supreme Court of Canada does tend to refer to U.S. authorities fairly frequently in specific areas of law. Given these considerations, the rate of citation of U.S. jurisprudence is surprisingly sparse.

Equally striking is the fact that a single court — the Ontario Court of Appeal — accounts for fully one half of all the U.S. citations made by all the provincial courts of appeal, these making up over 10 per cent of all citations for that court. (Only two other courts — those of Saskatchewan and British Columbia — approach the 3 per cent figure; for the other seven provincial courts of appeal, U.S. citations are negligible and U.S. authorities are almost as infrequent as, say, Australian.) Combining this fact with the apparent “lead court” role of the Ontario Court of Appeal suggests an interesting dynamic — American influences on the development of Canadian law are not directly upon the various courts of appeal, but indirectly through the mediate authority of the Ontario Court of Appeal (and, of course, the Supreme Court of Canada, which also cites U.S. authorities reasonably regularly).

#### IV. PRECEDENT TODAY AND TOMORROW

IF I HAD BEEN writing fifty years ago (and perhaps as recently as twenty years ago), the emphasis within this discussion would have been rather different. It would have been necessary to stress “binding” authority more and “persuasive” authority less. Rather paradoxically, although the citation of precedent appears to be a method of decision-making that attempts to conquer time by linking today’s decisions to yesterday, it is in fact itself the prisoner of time as it adjusts to changing social expectations on the way that past and present and future bear on today’s decisions.

More specifically, the modern world and the technology that increasingly characterizes it are having an impact on the practice of

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<sup>30</sup> See S.I. Bushnell, “The Use of American Cases” (1986) 35 U.N.B.L.J. 157.

judicial citation as on every other aspect of society, and therefore there is a time-bound character to the way we think about precedent. For example, even while the number of judges and the number of cases that they decide has been steadily rising, computer technology is making more and more of these decisions widely and immediately available. This has a double effect on the use of judicial citations; either one would be significant on its own, but the “one-two” punch of the combination is even more so.

The first effect is a product of the *volume* of available precedents which can be accessed by computer data-base techniques. The modern practice of judicial citation has its roots in a time when the number of reported decisions was modest and manageable; judges and lawyers could identify from a finite body of reported cases the smaller set of cases that made useful contributions to knowledge, and then use the citations as a kind of professional shorthand to build their own decisions around those valued insights. But this process depends upon a sort of equilibrium point, a delicate balance in the volume of cases that need to be processed and assimilated. “A system of precedent is unnecessary when there are very few cases that are accessible; it will be unworkable when there are too many cases.”<sup>31</sup> If the universe of citable precedents is a manageable size, then judicial citations are a way of meshing the immediate decision against a stable and coherent background. If that universe becomes too large, then we are in danger of the confusion that can be created by what Neil Postman describes as “precedent overload.”<sup>32</sup> The use of judicial citations becomes a “mix and match” game limited only by the imagination of the lawyer and the power of the computer that is searching the data-base. As Grant Gilmore bluntly warned three decades ago, “when the number of printed cases becomes like the number of grains of sands on the beach, a precedent-based case-law system does not work and cannot be made to work.”<sup>33</sup> This simply replicates the irony that surrounds the first uses of any new technology; although it is used in ways which seem at first glance to allow old things to be done in a much better way, in fact it subtly undermines the meaning of the old things themselves.

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<sup>31</sup> M.E. Katsh, *The Electronic Media and the Transformation of Law* (New York: Oxford University Press, 1989) at 44.

<sup>32</sup> N. Postman, *Technopoly: The Surrender of Culture to Technology* (New York: Alfred A. Knopf, 1992) at 121.

<sup>33</sup> G. Gilmore, “Legal Realism: Its Cause and Cure” (1961) 70 Yale L.J. 1037 at 1041.

The second effect is a result of the *speed* with which new precedents become available. The impact of this factor is rather more subtle but nonetheless important. As Katsh suggests:

The authority of case law is promoted by a process that does not rapidly modify reported decisions. 'Landmark' decisions not only settle a particular point of law, but add to the general authority of judicial decisions because they seem to settle a problem with some finality.<sup>34</sup>

Under the old technology of printed reports, it took time for other judges to respond to and adjust the modified doctrines laid down in landmark decisions. Under the new technology, the feed-back loop is measured in days instead of months.

Our society is sufficiently "hooked" on newness that it will be difficult for many to see this as constituting a problem. The point is not that newness is bad, but simply that it fundamentally alters the meaning of precedent and the way that it is used. Merryman's study of citation practices in the United States<sup>35</sup> suggested a cycle whereby new precedents displaced old ones at a fairly steady rate, balancing the stability of legal doctrines with the capacity for adaptation to changing circumstances. As the speed with which new cases are reported goes up, however, this cycle becomes much shorter. The fact that newer cases are available increases the pressure to use them, and "older" citations date very quickly.

Such a trend is a natural response to pressure to be less behind the times and to make use of the increased accessibility to cases. It will also lead to a perception of the judicial process as a system in which questions are not settled finally but are continually raised for reconsideration.<sup>36</sup>

Many lay-people probably think of the judicial citation process as having quaintly antiquarian overtones, of lengthy and often rather dreary judicial dissertations studded with references to judicial cases that were already old when inventors began to muse about steam power and ships made of iron. This conception is very wide of the mark; not only are many appeal court decisions short, and clearly and tightly written (albeit a little too dry and abstract to aspire to best-seller status), but most of the citations to judicial authority are to

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<sup>34</sup> Katsh, *supra* note 30 at 46.

<sup>35</sup> Merryman, *supra* note 21.

<sup>36</sup> Katsh, *supra* note 30 at 46.

recent decisions. For example, in recent years, more than one third of the citations of the Manitoba Court of Appeal have been to decisions delivered within the last five years, more than one half to cases that are less than ten years old.<sup>37</sup> More to the point, the average age of the judicial citations in Canadian appeal decisions has been declining fairly steadily, from 34.3 years in 1927 to 19.8 years in 1987.<sup>38</sup>

Given the technological possibilities and the public expectations of modern society, this could hardly be otherwise, but a focus on the frequent re-examination of recent decisions is logically antithetical to the very idea of precedent. As Frederick Schauer pointedly argues, precedent does not mean following the good ideas of past decisions because the decision-maker believes they are good ideas; it means following past decisions simply because of their historical pedigree.

Only if a rule makes relevant the results of a previous decision regardless of a decision-maker's current belief about the correctness of that decision do we have the kind of argument from precedent routinely made in law and elsewhere.<sup>39</sup>

The cult of newness precludes even understanding this assumption, let alone being persuaded by it.

In this context, I think it is highly significant that two of the first "big" decisions applying the *Charter* — *Big M Drug Mart*<sup>40</sup> and *Therens*<sup>41</sup> — both explicitly rejected ten-year-old Bill of Rights precedents (*Robertson and Rosetanni v. R.*<sup>42</sup> and *Chromiak v. R.*<sup>43</sup> respectively) to initiate a bold new style of interpretation. Leaving to one side any discussion of the merits of either set of decisions, this is surely a symptom of a new approach to precedent that sharply depreciates that particular currency. By way of contrast, the Supreme Court of Canada and the Judicial Committee of the Privy Council spent decades trying to reason their way around the roadblock of

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<sup>37</sup> McCormick, *supra* note 3.

<sup>38</sup> Median figures (that value for which there are an equal number of higher and lower values) would be better than average figures (total values divided by number of examples), because a handful of unusually old citations can misleadingly inflate the average figure; however, only average figures are available.

<sup>39</sup> F. Schauer, "Precedent" (1987) 39 *Stan. L. Rev.* 571 at 576.

<sup>40</sup> *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

<sup>41</sup> *R. v. Therens*, [1985] 1 S.C.R. 613.

<sup>42</sup> [1963] S.C.R. 651.

<sup>43</sup> [1980] 1 S.C.R. 471.

*Russell v. R.*<sup>44</sup> rather than casually discarding it as aberration or error.

## V. CONCLUSION

THE EMPIRICAL INVESTIGATION CLEARLY appears to validate the assumption that there is a difference in the citation styles of the various courts of appeal. In general, Canadian provincial courts of appeal are (in comparison with U.S. state supreme courts) more pluralistic in their use of judicial authority — that is, they draw their citations from a broader and more balanced range of courts — although distinctive styles emerge for a number of courts. Quebec and Nova Scotia are more introspective, more focused on the prior decisions of their own court and/or the trial courts of the province. P.E.I., Newfoundland and Alberta are the most ready to take advantage of the insights and ideas of the other provincial courts of appeal, and Ontario is the most open to the influence of American jurisprudence. British Columbia and Manitoba are the most willing to draw on British experience (both recent and remote), while P.E.I. and Manitoba make the heaviest use of trial court precedents. None of this is to deny the importance or the strength of judicial hierarchy, although New Brunswick, Quebec and Saskatchewan are the three provinces who lean most heavily on Supreme Court decisions as a source of precedent. These differences in style provide the backdrop against which the reasoned explanations of individual decisions are crafted.

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<sup>44</sup> (1882), 7 App. Cas. 829 (P.C.).

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