

Judicial Citation, the Supreme Court of Canada, and the Lower Courts: A Statistical Overview and the Influence of Manitoba

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I. INTRODUCTION

THE PURPOSE OF THIS PAPER is to provide a statistical overview of the judicial citation practices of the Supreme Court of Canada over a fifty-year period, using this information as the background to a more focussed consideration of one time period (the Dickson and Lamer Courts) and one type of citation (to decisions of provincial trial and appeal courts in general, and Manitoba courts in particular).

Already, this simple statement requires explanation. It is normal in the discourse of jurisprudence to consider judicial citations in terms of the way that they build toward the reasoned conclusion of a single specific case,¹ or perhaps more rarely in terms of the way that a single specific case of critical importance is cited in an evolving way over a period of time.² What is proposed here is a somewhat more remote level of analysis, that will similarly accumulate information about cited cases, but will do so less in terms of their *content* and more in terms of their *provenance* — what courts? What specific judges? What time periods?

The rationale for this collection and presentation of data is the fact that the citing judge has some discretion — greater, of course, for some cases than for others but, we would argue, almost never no discretion at all — in the sources which are

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¹ Such as the “case comments” or the “recent jurisprudence” sections in journals such as the *Canadian Bar Review* or the *Alberta Law Review*.

² As one arbitrary example for a much longer list: A. Lokan, “The Rise and Fall of Doctrine Under Section 1 of the *Charter*” (1992) 24 *Ottawa L. Rev.* 163.

cited to support critical points in the reasoned argument, or to establish them with greater certainty, or to locate them in relation to other established legal principles. For any single case, the range of practical choice may in fact be very small and information about judicial sources of influence may be of limited utility, but over a sufficiently broad range of cases these general patterns will point the way toward the answers to a number of very important questions. As one example: where is judicial merit situated, in the form of those specific judges on specific courts who contribute disproportionately to the law that is cited by the judges who serve on Canada's highest court? For another: how has the concept of judicial role, in the sense of the mix of courts to which the Supreme Court collectively finds it appropriate to refer, evolved over time? For a third, are there identifiable blocs within the Supreme Court at any give time, in terms of the way in which their performance suggests answer to the first two? As soon as the citations do not "explain themselves" by the simple fact of their existence, they open the way to an enquiry which will cast light upon other aspects (some more conscious and some more obvious than others) of the decision making process.

We take it that the concept of a judicial decision, especially at the appellate level, is more complex than it appears at first glance. Obviously, the first purpose of any judicial decision, trial or appeal, is to resolve a dispute about a justiciable issue by relating the specific facts and the general principles involved to a broader background of law and then providing a reasoned explanation that (typically) declares a "winner" and shows why this legal background made their victory appropriate. Part of the difference between a trial decision and an appeal decision is the shift from arguments about facts to arguments about general legal principles, although this is more a matter of emphasis than a night-and-day distinction; Justice Roger Kerans of the Alberta Court of Appeal, for example, has suggested that he personally finds no use in the distinction between "questions of fact" and "questions of law."³

But the very style of the judicial decision becomes problematic in these terms; put crudely, the deciding judge or panel seems to be saying that there never really was any uncertainty about the legal issue around which the case revolves, because here is the set of legal principles unambiguously laid down in previous law that leads to the inevitable and fully appropriate victory of one of the parties. We agree with Scheingold when he suggests that the way this particular tale is told gives it "a misleading gloss of certainty"⁴ that subtly distorts the real process. This appearance of certainty is functional, to be sure, in that it downplays the discretion (and hence

³ Justice R.P. Kerans, "Standards of Review" (Paper presented at the Canadian Appellate Court Seminar, April 1993) [unpublished].

⁴ S.A. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change* (New Haven: Yale University Press, 1974) at 109.

the opportunity for arbitrariness) of the judge by displacing the choice between competing principles and values from the current court to the broader background of law, but it is still misleading to the extent that asserting the clarity of law denies the very condition of initial uncertainty that made the case intelligible. "After all, when the law is clear enough that people on opposite sides of a case can agree on what it commands, people usually don't spend the many thousands of dollars that contesting a case in an appellate court requires."⁵ Taken at face value, the style of judicial decision seems to imply that about one half of the litigants who come before it are pursuing hopeless cases, either saddled with uninformed counsel or perversely determined to litigate contrary to good advice. Of course no legal professional — and especially not the losing counsel — takes the rhetorical overkill at face value; it is only the non-legal by-stander who can be misled.

What is really happening is something subtly but importantly different: the Court is concerned less with yesterday's certainty than with today's — and, even more so, with tomorrow's. It is not suggesting that "counsel should have known better" and somehow erred in finding uncertainty and contentiousness in the legal issue now (allegedly) put to rest with such (apparent) finality. Rather, it is suggesting that henceforth parties similarly related to this and similar issues will operate under no comparable uncertainty. The point is less "this is how this issue always was handled" than "this is how the issue should be handled," less a flat recital of past fact than a creation of present fact — that is, it constitutes an attempt to persuade the relevant legal public about the best resolution of an issue, and validates itself by its own success. (In the process, one should add, it replicates the misleading veneer of the judicial decision in the way that citation practices ruthlessly discard those attempts at persuasion that failed to draw support, while encrusting in ever-thicker praise and approval those attempts that have actually succeeded in establishing the certainty of consensus — making "obvious" a developmental process that in fact might well have surprised some of the earlier individuals now taken as contributors, and presenting as inevitable a line of development which was at some earlier point only one of several defensible alternatives.)

The more effectively a court renders its outcome inevitable and its explanation obvious, the less visible this creative process. But if the crux of the judicial process is in some sense an exercise in persuasion, then it is important to ask about the favoured tools in the judicial persuasive arsenal, and to this the answer is very obvious: judicial citations. Judges explain what they have done in the immediate case largely by relating it to what their own or some other Court has done in some previous case. And this simply takes us back to a more confident reiteration of the opening statement: The purpose of this paper is to provide a general statistical

⁵ L.H. Carter, *Reason in Law*, 4th ed. (New York: Harper Collins, 1994) at 10.

overview of the judicial citation practices of the Supreme Court of Canada over a fifty-year period, using this approach to shed light upon some developing aspects of Supreme Court decision-making.

II. THE THEORY

TO BEGIN WITH THE OBVIOUS: "Presumably a citation means something to the person citing, and presumably he anticipates that it will have some meaning to a reader."⁶ That is, judges use a specific citation for a reason: because of the congruency of factual situation or legal context; because of the rigour of the doctrinal analysis or the succinctness of its conclusions; because of the status of a specific judge or a specific court; and, in general terms, because of the extent to which it will persuade the relevant audience (which includes but is by no means limited to the immediate parties) of the appropriateness of the outcome. Although there are of course important differences (such as the hierarchy of citability implied by the appellate process itself, and the rigour of the doctrine of *stare decisis*), this is not in principle different from the way that academic articles such as this one organize themselves around references to the relevant literature. Such citations — academic citations in this case, citations to judicial authority for judges — serve a triple purpose.

Firstly, citations are used to demonstrate a basic knowledge of the relevant subject matter. If we were to write a piece on Canadian federalism, political scientists would expect that our bibliography would include the standard articles by people like Alan Cairns and Don Smiley. Similarly, if a judge were to deliver a judgment in a case involving the division of property after the break-up of a marriage, judges would expect it to include a reference to the obvious cases like *Pelech v. Pelech*,⁷ just as a case on the standards of appellate review would normally make reference to cases like *Lensen v. Lensen*⁸ or (for administrative tribunals) to *CUPE v. New Brunswick*.⁹ As Shapiro suggests,¹⁰ this constant reiteration serves a double purpose: it enhances certainty by making certain sequences or blocks of citation the clearly beaten path of legal doctrine, and it also highlights innovation by making it easy to identify when the standard sequence is broken or altered.

⁶ J.H. Merryman, "The Authority of Authority" (1954) 6 *Stanf. L. Rev.* 613.

⁷ [1987] 1 S.C.R. 801.

⁸ [1987] 2 S.C.R. 672.

⁹ *CUPE Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

¹⁰ M. Shapiro, "Towards a Theory of *Stare Decisis*" (1972) 1 *J. of L.S.* 125.

Secondly, citations are used to locate the immediate analysis in the context of established principles and standards. In an academic article, one locates oneself by indicating basic agreement or disagreement, or by suggesting that certain arguments or statements go too far or not far enough. Similarly, judges distinguish past decisions to show how far (but no further) a legal principle should be extended, or they clarify ambiguities or insufficiencies from prior decisions, or they try to resolve apparent (or real) disagreements or divergences within the existing case law. Terrell¹¹ has rather fancifully suggested that we can think of each judicial decision as possessing a specific location on a multi-dimensional grid; the way that the immediate “point” links to an indicated string of prior decisions suggests not just location but also direction, a vector along which the law is developing on a specific point over a period of time. One purpose of citation (academic or judicial) is to send this line in a desired direction.

Thirdly, citations are used to add weight and credibility to the arguments being advanced, making them more persuasive and therefore more acceptable to the relevant public. This paper has made an argument about the utility of understanding courts by studying their judicial citation patterns; presumably the credibility of this suggestion is enhanced by the fact that it has been made by scholars like Merryman¹² and Caldeira¹³ and Johnson¹⁴ in professional journals as distinguished as the *Stanford Law Review*, the *California Law Review*, and the *American Political Science Review*. Similarly, a judge enhances the persuasiveness of his logic to the legally relevant public by building it around the comments of respected courts and/or particularly distinguished judges (Dickson C.J. of the Supreme Court of Canada, Lord Denning of the English Court of Appeal, Learned Hand of the US Federal Court, etc.). We wish to suggest that there are — to paraphrase White’s comment about Justice Holmes¹⁵ — some judges whose opinions carry with them greater authority because of their authorship as well as their content; we will be returning to this factor (which may be operationalized through explicitly naming a cited judge) later.

¹¹ T.P. Terrell, “Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles” (1984) 72 *Calif. L. Rev.* 288.

¹² Merryman, *supra* note 6 at 16; and “Toward a Theory of Citations” (1977) 50 *South. Calif. L. Rev.* 381.

¹³ G.A. Caldeira, “The Transmission of Legal Precedent” (1985) 79 *American Pol. Sci. Rev.* 1978.

¹⁴ C.A. Johnson, “Citation to Authority in Supreme Court Opinions” (1985) 7 *Law and Policy* 509; and “Follow-up Citations on the U.S. Supreme Court” (1986) 39 *Western Pol. Q.* 538.

¹⁵ G. E. White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford: Oxford University Press, 1993) at 305.

III. THE DATA BASE

THE DATA BASE FOR THIS ANALYSIS was generated by entering every citation to judicial authority made in the decisions, dissents and separate concurrences in every case in the *Supreme Court Reports* from 1944 to 1993,¹⁶ then looking up each of those citations to identify the cited judge and court.¹⁷ The second part of this process is not yet complete, and therefore some of the cases that will appear in residual "other" categories simply means "not located at this time" — this is particularly true of references to unreported (as distinct from "not yet reported") decisions, as well as to citations of obscure sources. No attempt has been made to collect parallel information from unreported Supreme Court decisions;¹⁸ since 1970, almost all Supreme Court decisions are reported, but before that time the selection process was sometimes criticised as unreliable and erratic,¹⁹ a consideration which slightly qualifies findings for the first half of the period.

The periodicization that will be employed roughly corresponds to the Chief Justiceships, but for convenience these will be rounded off to complete calendar years, and as well the shorter Chief Justiceships (Taschereau plus Cartwright plus Fauteux are folded into a single period, and Dickson plus Lamer into a second) will be combined in such a way as to divide the period between 1 January 1944 and 31 December 1993 into five ten-year periods. There is a slight distortion here (for example, although Kerwin was Chief Justice for just over eight and a half years, from 1 July 1954 to 2 February 1963, his name will be given to the entire period from 1 January 1954 to 31 December 1963) but the fit is surprisingly good. Chief Justice Rinfret fills the first decade, Chief Justice Kerwin (almost) fills the second, Taschereau and Cartwright and Fauteux the third, Laskin the fourth, and Dickson and Lamer the fifth.

¹⁶ Excluding, of course, references to the case immediately under appeal, which would be a function less of the Supreme Court's mode of explaining its decision than of the appeal-generating characteristics of the various provinces. On the inter-provincial variations in appeal frequency, see P. McCormick, "The Supervisory Role of the Supreme Court of Canada" (1993) 3 *Supreme Court L.R.* (2d) 1.

¹⁷ We wish to indicate our appreciation for the support of the Social Sciences and Humanities Research Council, which funded this project, and for the student research assistants who were involved in the data collection and processing: Charlene Jahnert, Clayton Giles, Stephen Smith, Scott McCormick, Lisa McCormick and David Barva.

¹⁸ There are also several hundred pre-1970 cases omitted from the *Supreme Court Reports* but included in the *Dominion Law Reports*; citations from these cases have not yet been integrated into the data base.

¹⁹ See, e.g., P. Russell, "The Political Role of the Supreme Court in Its First Century" (1975) 53 *Can. Bar Rev.* 576.

To be sure, a simple count oversimplifies the process of citation by assuming what is clearly not the case — that a citation is a citation and all deserve to be counted equally. On the contrary; some cases are briefly indicated in passing, as single examples of a general point or as one of a string of cases illustrating a trend, while others are considered at length. Some cases are cited approvingly, others criticised or rejected or distinguished — although in practice the citation ratio is heavily in favour of the former. This misleading facade of equality will be penetrated later in the paper for the specific category of citations of Manitoba courts, but for the early parts of the discussion this counter-factual assumption remains a limitation that qualifies our findings.

IV. THE FINDINGS

IN GENERAL, JUDGES CITE OTHER JUDGES to explain their decisions for the double purpose of fitting their own ruling into the broader context of law and rendering the outcome more acceptable to the concerned legal public, but this is still too general to be particularly informative. It seems to us that the study of the citation of judicial authorities might usefully be organized around a consideration of the basic values served by the process of judicial citation and by the linkages between specific sets of courts that the practice creates. We would suggest five basic values, and therefore five different types of inter-court relationships implied. This discussion will be linked to the figures in Table 1, identifying the major sources of judicial citations by the Supreme Court of Canada, although the fit between our categories and those sets of sources is not perfect.

TABLE 1
SOURCE OF JUDICIAL CITATIONS BY THE S.C.C.
(REPORTED DECISIONS 1944–1993)

SOURCE	NUMBER	PERCENT
Judicial Committee of the Privy Council	2,901	7.20%
Supreme Court of Canada	15,293	37.95%
Other English Courts	8,499	21.09%
Other Canadian Courts	11,064	27.46%
United States Courts	1,726	4.28%
Other Countries	814	2.02%
TOTAL:	40,297	100.00%

A. Hierarchy

The first principle recognized through the practice of judicial citation is *hierarchy*. The appellate process generates an objective hierarchy of courts, and it is an important principle of the judicial decision making of any court that it shape its own decisions around an acceptance of the prior decisions of “higher” courts, these being defined as any court to which the immediate case could theoretically be appealed. Such appeals are statistically infrequent — only about 1 percent of the decisions of any Court are actually appealed to the Court or Courts above it, and sometimes the figure is much lower — but the possibility of such appeal and the hierarchical deference that it generates are an important dimension of the judicial process.

For the first seventy-five years of its existence, the Supreme Court of Canada was subject to appeal to the Judicial Committee of the Privy Council in London, the highest court of appeal for Canada as for other political entities that had not shed their connection to the British empire. In 1949, with an amendment to the *Supreme Court Act*, Canada’s connection to the Judicial Committee ended, although that “court” continued (and continues) to exist. Only about 250 Supreme Court decisions were ever actually carried to London on appeal, along with a further 400 or so *per saltum* appeals that went directly from the highest provincial court to the Judicial Committee,²⁰ and these long constituted binding precedent for the Supreme Court of Canada in the same way that its own decisions bound lower (that is to say, all other) Canadian courts. Only in 1978 in *Re Agricultural Products Marketing Act*,²¹ did the Supreme Court under Chief Justice Laskin explicitly refuse to follow a Privy Council precedent.

Of the total of 40,000 citations to judicial authority made by the Supreme Court of Canada in reported decisions over a fifty-year period, less than three thousand — about one in every fourteen — were to decisions of the Judicial Committee.

B. Consistency

The second value promoted by judicial citations is *consistency*. Viewed functionally, one of the purposes of judicial decisions is to promote predictability — to create a regime in which most people most of the time know how their situation will be resolved should a legal dispute arise. This is promoted by a situation in which past decisions of the immediate court are not ignored or denied or casually reversed, but rather are turned into a general background into which the immediate decision is integrated. Reinterpreting or finetuning or expanding upon the explanations

²⁰ J.G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 180.

²¹ [1978] 2 S.C.R. 1198.

contained in the court's own past decisions is an important part of what the process of appellate decision making is about.

The extent to which an appellate court is bound by its own past decisions is very much a debatable point. As Gerald Gall has pointed out,²² the practices of the ten provincial courts of appeal on this point show such diversity as to defy generalised description. Before 1949, the Supreme Court of Canada held that it was very much bound to follow its own prior decisions (the critical case is *Stuart v. Bank of Montreal*²³), but more recently "the Court has gradually come to accept that, while it should normally adhere to its prior decisions, it was not absolutely bound to do so; and the Court has explicitly refused to follow a prior decision in several cases."²⁴ It was a hallmark of the early Charter decisions in particular (such as *R. v. Big M Drug Mart*²⁵ which ignored *Robertson & Rosetanni v. R.*,²⁶ and *R. v. Therens*²⁷ which overturned *Chromiak v. R.*²⁸) that the Supreme Court began by declaring that pre-Charter decisions even on essentially identical points were not necessarily binding in the new judicial world of the Charter.

Among the provincial courts of appeal, citations to their own prior decisions make up one of the largest elements of citations to judicial authority, just fractionally behind the largest category which is citations to the Supreme Court itself.²⁹ Just over one decision in four falls into this category, the proportion being the highest (one-third or more) in Quebec and Nova Scotia and the lowest (at or below one-sixth) in Manitoba, P.E.I., and Newfoundland. This strongly supports the notion that establishing consistency with its own prior decisions is an important element of appeal court decisions.

References to its own prior decisions similarly loom large within the practices of the Supreme Court of Canada, constituting the largest single bloc among its citations to judicial authority. More than 15,000 citations — well over a third of the total — fall into this category. There are useful clues to the evolution of the way that judicial influence is transmitted and operationalized in the Supreme Court

²² G. Gall, *The Canadian Legal System*, 2d ed. (Toronto: Carswell, 1983) at 226–236.

²³ (1909) 41 S.C.R. 516.

²⁴ P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1985) at 183.

²⁵ [1985] 1 S.C.R. 295.

²⁶ [1963] S.C.R. 651.

²⁷ [1985] 1 S.C.R. 613.

²⁸ [1980] 1 S.C.R. 471.

²⁹ P. McCormick, "Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices" (1993) 22 Man. L.J. 286.

in such questions as which specific Supreme Court cases are cited most often,³⁰ and also which individual Supreme Court judges are cited (and named) most often;³¹ for present purposes, what is significant is the large but not overwhelming proportion of total citations that they constitute.

C. Deference

A fourth value promoted through judicial citation is *deference*, referring in this case to the practice of citing English decisions other than those of the Judicial Committee. Of course, this suggested dichotomy between Judicial Committee and other English decisions is something of an oversimplification. The Judicial Committee was until 1949 clearly in the position of being a hierarchical superior to the Supreme Court of Canada, given that appeals lay directly from the latter to the former; no other English court could hear an appeal from a decision by a Canadian court. However, the position of the House of Lords remains anomalous. It was from the ranks of the Law Lords that the panel of the Judicial Committee was struck (supplemented from time to time with judges drawn from the highest courts of the Empire/Commonwealth, including the Supreme Court of Canada.) And the Judicial Committee itself described the House of Lords as the final authority on questions of English law,³² which (given Canada's adoption of the English common law) made the Lords an authority for Canadian courts as well. However, we have to draw the line somewhere, and we choose to leave the Judicial Committee alone on the hierarchy side, while (reluctantly) relegating the House of Lords to the deference side.

References to English cases other than those of the Judicial Committee account for more than 8000 cases over the fifty year period — more than one-fifth of the total — which is far more than the numbers for the decisions of the Judicial Committee itself, but less frequent than either citations of prior decisions of the Supreme Court or (perhaps surprisingly) citations to lower Canadian courts. A similar study³³ of the citation practices of the provincial courts of appeal reveals that these courts cited British sources about as often (19.32 percent of total citations) as does the Supreme Court, although they cited Judicial Committee decisions

³⁰ P. McCormick "What Supreme Court Cases Does the Supreme Court Cite? Follow-up Citations on the Supreme Court of Canada 1989–1993" (1996) 7 *Supreme Court L.R.* 451.

³¹ P. McCormick "The Supreme Court Cites the Supreme Court: Follow-Up Citation on the Supreme Court of Canada 1989–1993" (1995) 33 *Osgoode Hall L.J.* 453.

³² The critical case is *Robins v. National Trust Co.*, [1927] A.C. 515; see the discussion in Hogg, *supra* note 24 at 183.

³³ Comments based on research in progress. Some of the findings of this project have been reported in McCormick, "Judicial Authority and the Provincial Courts of Appeal," *supra* note 29.

significantly less often (3.69 percent of the total). The extent to which this a characteristic of the Canadian judiciary, rather than of the common law itself, is shown by comparison with the practices of U.S. courts, where citations to English authority are extremely rare.³⁴

D. Coordination

A fourth function of judicial citation is *coordination*, using this term to pick up on what Ross Flowers has called “coordinate citation”³⁵ — that is, references to the decisions of courts that are neither above nor below the citing court in any judicial hierarchy, but which occupy a similar position within their own judicial hierarchy. Strictly speaking, Flowers’ reference is to courts that occupy a similar position in the sense of both being subject to appeal to a single higher source. In this restricted sense, the only citations that would qualify would be pre-1949 references to the courts of other countries that were similarly subject to appeal to the Judicial Committee — that is, the highest courts of other countries within the Empire/Commonwealth such as Australia or New Zealand. In this narrow sense, the Supreme Court has done little in the way of coordinate citation; in fifty years of reported decisions we could find only 95 such cases, 71 from Australia and 24 from New Zealand.

However, it may be defensible to use the term in a more expanded sense. Now that the Supreme Court of Canada is supreme in fact as well as in name, subject to no further legal appeal, parallel authorities would be those similarly located at the top of a pyramid of judicial review — the Supreme Court of the United States, or the Australian High Court, or (more recently and a little more dubiously) the European Court of Justice³⁶ or the European Court of Human Rights. Only the first named is measurably common — although the United States category in Table 1 includes references to federal and state courts as well as the 823 citations of the United States Supreme Court itself, and therefore even these fairly low figures overstate the extent of genuine coordinate citation. Citations of the Australian High Court are even less common — 178 cases in total — and European citations begin only very recently and remain extremely rare. As one way to make the point: right up until the most recent decade, the Supreme Court of Canada has been more

³⁴ Merryman, “Toward a Theory of Citations,” *supra* note 12 at 400; L.M. Friedman *et al.*, “State Supreme Courts: A Century of Style and Citation” (1981) 33 *Stanf. L. Rev.* 798 at 798–89.

³⁵ R. Flowers, “Stare Decisis in Courts of Coordinate Jurisdiction” (1984–85) 5 *Advocates’ Q.* 464.

³⁶ On the recent emergence of the European Court of Justice as a court of last review, see J.H.H. Weiler, “A Quiet Revolution: The European Court of Justice and Its Interlocutors” (1994) 26 *Comparative Political Studies* 510; and A.-M. Burley & W. Mattli, “Europe Before the Court: A Political Theory of Legal Integration” (1993) 47 *International Organization* 41.

likely to cite the Judicial Committee of the Privy Council than it is to cite the United States Supreme Court, and this remains the case even if citations of the Australian High Court are thrown into the balance as well. Given that the United States and Australia constitute the two federal common law systems in the world most similar to the Canadian, this fact is striking.

By contrast, the practice of coordinate citation on the part of the provincial courts of appeal is well-established and longstanding. Not only is the number reasonably large — about one citation in every six in recent decades — but the patterns of interprovincial citation are sufficiently persistent and striking that they can be more closely analysed.³⁷ As against its provincial counterparts, the Supreme Court draws from a precedential pool that is less diversified, more concentrated on a relatively small number of sources, including primarily its own prior citations. However, it should be noted that with the possible and somewhat sporadic exception of the Ontario Court of Appeal, the provincial appeal courts do not make much use of American case law either.

E. Leadership

The fifth value served by the practice is that of judicial *leadership*, which we suggest is exemplified by Supreme Court citations of lower courts (which by definition, given that the Supreme Court of Canada is a “general court of appeal” means all other Canadian courts). In such citations, the Court is arguably less concerned to fit its own decision in with the practices of these courts than to accomplish the reverse — to show the lower courts what they need to do to satisfy the Supreme Court. To some extent this is done directly by upholding or reversing or altering the immediate case under appeal — and the question of which provincial courts are reversed how often is itself of some interest³⁸ — but this study has explicitly excluded the immediate case under appeal from the citation data base.

The immediate case aside, the Supreme Court may explicitly refer to the decisions of that and other provincial or federal courts in the process of explaining its decision. In the process of commenting on these cases, it may endorse or reject or modify the statements of law and doctrine enunciated by these lower courts. Indeed, an important part of the function of a general court of appeal lies in its capacity to take advantage of its one-further-step removal from the immediacy of the trial situation, as well as the diversity of context and fact situations that may have emerged in a broad range of trial courts and been considered by several appeal courts, to present a running synthesis of Canadian legal doctrine on new or matur-

³⁷ P. McCormick “The Emergence and Evolution of Coordinate Precedential Citation in Canada: Interprovincial Citations of Judicial Authority 1920–1992” (1994) 32 Osgoode Hall L.J. 271.

³⁸ See e.g. McCormick, “The Supervisory Role of the Supreme Court of Canada,” *supra* note 16.

ing legal issues. What these practices look like, as well as some indication of their relative frequency, will be considered later in the specific context of citations of decisions of Manitoba courts.

With 11,064 citations, just over one-quarter of the total, references to the decisions of the lower courts ranks second in Supreme Court citation patterns only to the prior decisions of the Supreme Court itself.

But the relative emphasis on each of these five values has been far from constant over time, as is shown in Table 2 which considers the relative proportions of each of the major sources for each decade since 1944. As Friedman points out, these shifts in emphasis and priority tell a story of great significance, because "Citation patterns ... reflect conceptions of role These patterns may be clues, too, to the role of courts in society."³⁹ Where the Supreme Court gets its law from may not in the final analysis be as important as what the law is, but in practice the two will tend to be related.

TABLE 2
PROPORTION OF SUPREME COURT CITATIONS BY CHIEF JUSTICESHIP
(REPORTED DECISIONS OF THE SUPREME COURT OF CANADA, 1944-1993)

CJSCC	JCPC	SCC	OTH UK	OTH CDN	U.S.	OTHER
Rinfret Ct 1944-1953	15.36%	22.12%	41.79%	18.10%	1.29%	1.32%
Kerwin Ct 1954-1963	15.45%	28.10%	31.39%	21.62%	1.49%	2.04%
T/C/F Ct ⁴⁰ 1964-1973	7.55%	37.83%	25.14%	25.11%	2.98%	1.39%
Laskin Ct 1974-1983	7.54%	37.64%	19.40%	30.59%	3.26%	1.57%
Dickson & Lamer Ct 1984-1993	2.13%	46.06%	11.36%	30.91%	6.87%	2.67%

There are several mutually reinforcing stories that are told by these changing figures. The first is the gradual turning away from British sources which runs

³⁹ Friedman *et al.*, *supra* note 34 at 794.

⁴⁰ The Chief Justiceships of Taschereau, Cartwright and Fauteux are combined to create a single ten-year period comparable to the time periods for the other Chief Justices.

consistently through each of the five decades, starting from the very beginning.⁴¹ In the 1940s, British courts other than the Judicial Committee were supplying four of every ten citations to judicial authority made by the Supreme Court of Canada, and adding in the Judicial Committee cites pushes the figure closer to six of every ten. By the 1980s, this figure had plummeted to one in every nine (about one in seven if Judicial Committee references are included.) The English courts remain a significant source of precedent for Supreme Court decisions, but they are no longer dominant. To this extent, the “captive court” of which (then Professor) Bora Laskin complained so long ago,⁴² writing critically of a time when the Supreme Court so completely subordinated itself to the English authorities, has come to an end, and the hopes of those who saw the termination of appeals beyond the Supreme Court as a new and important starting point have been fulfilled.

The second and parallel story is the even more dramatic falling off in citations to the Judicial Committee of the Privy Council, although intriguingly this effect is delayed by a full decade — compared to the Rinfret Court, the Kerwin Court was much less likely to cite English authorities but fully as likely to cite the Judicial Committee itself. Only with the decade of Taschereau/Cartwright/Fauteux does the frequency of Judicial Committee citation begin to fall, but when it does the decline is dramatic, and by the most recent (Dickson/Lamer) decade such references — even including citations of Judicial Committee decisions since 1949 — are negligible. The Supreme Court’s 1976 declaration under Laskin that it was no longer bound by Judicial Committee decisions is one hallmark of the Supreme Court’s new-found independence; we would argue that this statistically evident drop-off in Judicial Committee citations is a second and reinforcing development.

The third story is the flip side of the first two, namely the rise in the frequency with which the Supreme Court treats its own prior decisions as the judicially most important background to the immediate decision. This figure has risen steadily through the half-century, and self-citations for the Dickson/Lamer decade now loom twice as large in the citation patterns as they did for the Rinfret decade. Again, the Taschereau/Cartwright/Fauteux decade after 1964 is the critical one in the transition, marking the first period for which Supreme Court self-citations are more numerous than English citations (even including Judicial Committee references). Such citations are not yet an absolute majority of the Supreme Court’s citations, but simple extrapolation suggests that they may well be very soon.

⁴¹ Nor are the patterns in any sense the artefact of this collection into ten year blocks; a graph showing the major sources of citations for each separate year of the period has been omitted for reasons of space, but it shows exactly the same persistent trend without any significant single year departures.

⁴² B. Laskin, “The Supreme Court of Canada: A Final Court of and for Canadians” (1951) 29 Can. Bar Rev. 1038.

The fourth story is the relatively low level of US citations throughout the period, although there is a sharp jump for the most recent decade. This coincides with the impact of the Canadian Charter of Rights and Freedoms, although it would be incorrect to suggest that the major context of these US citations is in reference to the development of Charter jurisprudence; as Bushnell points out,⁴³ US citations have in fact tended to be concentrated in specific areas of law such as insurance law. The impact of this recent surge is quite striking; of the fifty-year totals, fully two-thirds of all citations to US court decisions have taken place within the last decade, including three-quarters of the citations of US Supreme Court decisions. At the same time, however, this rise in influence should not be overstated; US citations are still only about half as frequent as English citations, even in the decade characterized by the lowest ever influence of English cases. The US courts remain a marginal source of direct (and admitted) judicial inspiration for the Supreme Court of Canada, although less marginal than at any previous period.

The fifth story is the persistence of a reasonably high proportion of citations to "lower" Canadian courts, rising from just below one fifth of all citations to just below one-third, and in recent decades this has become the second largest source of Supreme Court citations after the Supreme Court itself. Although we have chosen to characterize this component of citation as exhibiting judicial leadership, we think it would be misleading to think of this as entirely a one-way street. Certainly very strong judges have served on the various courts of appeal, and given the accidents of timing and regional representation that surround the appointment process, it is on the face of it unlikely that the nine judges on the Supreme Court have always been the nine best judges in the country. Justice Learned Hand of the Federal Circuit Court is sometimes referred to as the finest judge never to serve on the United States Supreme Court,⁴⁴ a clear implication being that he has made a larger contribution to the law than some of the lesser lights who cleared this last hurdle;⁴⁵ Ontario's Justice Martin of the Court of Appeal may well be the leading example of his Canadian counterparts. For this reason, the remainder of this paper will seek to penetrate the practices that surround Supreme Court citations of lower court decisions in general and Manitoba court decisions in particular.

⁴³ S.I. Bushnell, "The Use of American Cases" (1986) 35 U.N.B.L.J. 157.

⁴⁴ See G. Gunther, *Learned Hand: The Man and the Judge* (New York: Alfred A. Knopf, 1994).

⁴⁵ See for example D.P. Currie "The Most Insignificant Justice: A Preliminary Enquiry" (1983) 50 U. Chicago L. Rev. 466; and F.H. Easterbrook, "The Most Insignificant Justice: Further Evidence" (1983) 50 U. Chicago L. Rev. 481.

IV. SUPREME COURT CITATIONS TO LOWER COURT DECISIONS

DURING THE DECADE beginning in 1984, the Supreme Court of Canada made 4191 citations of provincial court decisions, this comprising just over 30 percent of all judicial citations. (For present purposes this omits the 259 citations of the federal trial and appeal courts, and also the 139 citations of a variety of federal and provincial boards — labour arbitration, labour relations, workers compensation and immigration appeal boards). Of these, only a small fraction (about 2 percent) were to the decisions of the “purely provincial” courts at the bottom of the Canadian judicial hierarchy; roughly two-thirds were to the provincial courts of appeal, and one-third to the section 96 trial courts. Table 3 breaks this data down by province and by court level. The territorial row is included by reason of logical completeness; the territorial appeal courts are of course comprised of judges drawn largely (until recently, entirely) from the provincial appeal courts of the western provinces — the British Columbia Court of Appeal the Yukon, and the Courts of Appeal of Alberta and Saskatchewan for the North West Territories — and strictly speaking their highest trial court cannot be a section 96 court because the territories are not provinces.

TABLE 3
 FREQUENCY OF CITATION OF LOWER COURTS BY PROVINCE AND LEVEL
 (SUPREME COURT DECISIONS 1984–1993)

PROVINCE	COURT OF APPEAL ⁴⁶	OTHER S. 96 COURTS ⁴⁷	PROVINCIAL COURTS
British Columbia	404	229	12
Alberta	202	120	4
Saskatchewan	130	61	11
Manitoba	162	78	6
Ontario	1023	483	27
Quebec	527	247	38
P.E.I.	14	22	0
New Brunswick	94	25	4
Nova Scotia	124	65	2
Newfoundland	24	14	5
Territories	22	12	0
TOTAL:	2,726	1356	109

The general ratio of two appeal court cites for every trial cite seems to hold true for all the provinces except two. Prince Edward Island is the only province to have received more trial court cites than appeal court (or trial court *en banc*) cites; this is probably a function both of the small number of citations involved, and of the recent creation of the full-time specialized appeal court in 1987.⁴⁸ New Brunswick, on the other hand, has the highest such ratio at 4:1.

Overall, there seems to be something close to a 4:3:2:1 ratio that applies to appeal and trial citations as well as to the overall totals: in every ten citations of provincial court decisions, there are about four references to Ontario Courts, three

⁴⁶ Includes s.96 trial court sitting *en banc*, for those years in which a province did not yet have a full-time specialized court of appeal; there were sixteen such cases cited.

⁴⁷ Includes decisions by the Ontario Divisional Court and by the Quebec Cour Supérieur en revision, both representing s.96 panel courts "lower" than the Court of Appeal, but "higher" than the regular s.96 trial court.

⁴⁸ See P. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 291.

to Western courts, two to Quebec courts, and one to the courts of the four Atlantic provinces. This roughly replicates the patterns that emerged from the study of interprovincial citations.⁴⁹ As was suggested in that study, this is probably the consequence (for Quebec) of the double isolation of civil code and French language, and (for the Atlantic provinces) of both the relatively recent creation of the specialized appeal courts and their comparatively low caseload.

Sometimes, but not all the time or even most of the time, the citing judge will specifically name the cited judge. For citations of lower Canadian courts, this is the case 32.3 percent of the time. By way of comparison, citations of earlier Supreme Court decisions include such an explicit identification just under one half of the time, and the patterns of specific naming are sufficiently consistent and logical to bear further examination.⁵⁰ References to the provincial courts of appeal include specific names 35 percent of the time, to the section 96 trial courts 30 percent of the time, and to the provincial courts less than 25 percent of the time, a business-like scale that neatly reflects the judicial hierarchy (and all the more so when it is combined with the 50 percent for references to the Supreme Court itself). Among the appeal courts, the Manitoba Court of Appeal is the one most likely to be named as well as cited (41.0 percent of the time), about twice the figure for the New Brunswick Court of Appeal (22.3 percent).

Since the choice of whether or not to name the judge in a cited decision is presumably a logical one on the part of the citing judge, and since it results in a specific name being supplied only about one third of the time, it seems reasonable to assume that the emphasis has a purpose and this purpose links to the judge being named. Again to use White's phrase: presumably there are some judges whose decisions are more highly regarded because they are their's. More bluntly, it may well be the case that the practice of naming identifies the most highly regarded — the most meritorious⁵¹ — of the lower court judges, the more so as citations are almost never accompanied by negative comment. To the extent that this argument is persuasive, the most outstanding judge identified is Mr. Justice Martin of the Ontario Court of Appeal, who was named 111 times. It is a measure of his predominance that there was a three way tie for runner-up (Dubin C.J. Ontario; Morden J.A. Ontario; Anderson J.A. British Columbia) with nineteen named citations each; indeed, Martin was named as often as the next seven judges combined. In all, eleven judges were cited and named more than a dozen times; in addition to the four already indicated, they included Laidlaw, Brooke, Schroeder, Laskin J.J.A. and

⁴⁹ McCormick, *supra* note 37.

⁵⁰ P. McCormick, "The Supreme Court Cites the Supreme Court," *supra* note 31.

⁵¹ With one obvious caveat, that being that the frequency of naming must logically be the product of a combination of merit and length of service, rather than of merit *simpliciter*.

Mackinnon A.C.J. of the Ontario Court of Appeal, Monnin C.J. from the Manitoba Court of Appeal, and Kerans J.A. from Alberta. Apart from the emphasis on Ontario, the most obvious thing about the list is that only two of the eleven were Chief Justices.

If one side of the equation is “who is cited?” the other is “who does the citing?” One possibility, all the more plausible because most (if recent practice is hardening into convention, seven of the nine) judges of the Supreme Court of Canada are normally elevated from the provincial courts of appeal, is that they carry with them both a familiarity with their own court’s (and more generally their own province’s) jurisprudence and a readiness to incorporate this into their reasons for judgment on the Supreme Court. If this were the case, then one would expect something of a “homer” effect — within their citations of lower court decisions, Supreme Court judges would be more likely to emphasize their home province. In order to highlight systemic tendencies over purely individual styles, Table 4 presents this data in terms of a double consolidation: first, the cited cases are accumulated not on a purely provincial basis but rather on the basis of the four regions (Atlantic, Quebec, Ontario, West) which by law or by convention constrain appointments to the Supreme Court; and secondly, the totals for the Supreme Court judges who are doing the citing are similarly aggregated by region.

TABLE 4
CITATIONS OF LOWER COURT CASES
(REPORTED SUPREME COURT DECISIONS, 1984–1993)

JURISDICTION	WESTERN COURTS	ONTARIO COURTS	QUEBEC COURTS	ATLANTIC COURTS
Western Judges	35.2%	45.4%	5.7%	13.7%
Ontario Judges	32.9%	48.6%	5.2%	13.3%
Quebec Judges	18.7%	26.9%	48.5%	6.0%
Atlantic Judges	36.1%	46.1%	9.4%	8.4%
All Judges	28.4%	39.7%	21.7%	10.2%

Table 4 indicates that there is in fact no generalizable “homer” effect. Judges from Ontario, from the West, and from the Atlantic provinces are virtually indistinguishable in the way they draw their citations from the various provincial courts — all cite Ontario courts most often (just under half the time), Western courts about one third of the time, and Atlantic courts about one-tenth of the time. At first glance, it seems striking that “Atlantic judges” are less likely than Western or Ontario judges to cite Atlantic courts and more likely to cite Quebec courts,

although it is important to remember that we are talking here about a single individual who has filled the Atlantic seat on the court for almost all of the decade.

The important exception, however, in this as in so many things, is Quebec. Supreme Court judges from Quebec are almost ten times as likely as their colleagues from English Canada to draw references from Quebec decisions, and as a consequence they are only half as likely to draw references from courts in each of the other three regions — although the Ontario/West/Atlantic ratios in the references they do use is very similar to that of all other judges. This Quebec-centred pattern is doubly understandable in terms both the language question and the personal background and experience of the Quebec judges; the Civil Code question is probably not particularly relevant, as so few civil law cases have been reaching the Supreme Court in the last decade.⁵²

The Supreme Court judges who most frequently cite Manitoba decisions (that is, for whom Manitoba citations are the largest percentage of all of their citations to provincial court decisions) are Mr. Justice Iacobucci (11.1 percent), Madame Justice Wilson (10.8 percent), Chief Justice Dickson (9.2 percent) and Mr. Justice Sopinka (8.2 percent), compared to an all-court average of 6.3 percent.⁵³ These four judges together account for 150 of the 246 Manitoba citations, just over 60 percent. Given his elevation from the Manitoba Court of Appeal, Chief Justice Dickson's appearance on this list is hardly surprising, but the other three individuals admit of no such easy explanation. Indeed, what is most striking is their diversity — Wilson was elevated from the Ontario Court of Appeal, Iacobucci previously served on the Federal Court of Appeal, and Sopinka had no judicial experience prior to his appointment to the Supreme Court.

The 246 citations identified 196 different Manitoba decisions, only one of which — the decision of Monnin C.J.M. in *R. v. Belton*⁵⁴ — was cited as often as four times. Ten other decisions (three by Freedman C.J.M., two each by Dickson and Huband J.J.A., and one each by Dysart J.A., O'Sullivan J.A. and Hansen of the Court of Queen's Bench) were cited three times, and another 27 were cited twice. More than half (twenty of thirty-eight) of these more frequently cited decisions were criminal cases.

⁵² J.L. Baudoin, "Chronique de Droit Civil Quebecois: Session 1985-1986" (1987) 9 Supreme Court L.R. at 319; see also Baudoin "Chronique de Droit Civil Quebecois: Session 1986-1987" in (1988) 10 Supreme Court L.R. at 175. Both articles limit themselves to discussing a single case. More recently, Claude Masse's "Chronique de Droit Civil Quebecois: Session 1988-89" (1989) 1 Supreme Court L.R. (2d) 325, with six cases to discuss, begins by commenting on the unusual proliferation of cases and issues.

⁵³ The figure for "by the Court" decisions is even higher, at 14.0 percent.

⁵⁴ [1983] 3 C.C.C. (3d) 427.

About two-thirds of all the citations to Manitoba decisions were made to decisions of the Manitoba Court of Appeal, the earliest from the nineteenth century but most of them from the last decade. These involved 26 different appeal court judges, seventeen of whom were specifically named. Only eight were cited as often as half a dozen times, and only five were cited a dozen times or more. These higher frequencies are specifically identified in Table 5. The 78 citations of Section 96 trial court decisions (bringing together in this single category both the Court of King's/Queen's Bench and the County Court) were to the decisions of 41 different individuals, 16 of whom were named. Only two of these judges (Hamilton J. and Kroft J.) were cited half a dozen times or more.

TABLE 5
FREQUENCY OF MANITOBA COURT OF APPEAL CITATION
(SUPREME COURT DECISIONS 1984-1993)

APPEAL COURT JUDGE	TIMES CITED	TIMES NAMED
Monnin C.J.	23	15
Huband	19	7
Hall	18	7
O'Sullivan	18	6
Freedman C.J.	15	7
Twaddle	9	5
Matas	9	4
Dickson	7	5

It remains to discuss the ways in which these citations were used by the Supreme Court, and we think that we can identify four general categories in terms of which this can be discussed.

The first and most straightforward type of citation is the "string citation," which involves a Supreme Court justice making a general point of law, or briefly describing a general trend in the interpretation of a rule or standard, and the simply listing a string of lower court decisions which illustrate the point. As one example, consider the following passage from the Supreme Court decision in *Blanchard v. Control Data Canada*:⁵⁵

⁵⁵ [1984] 2 S.C.R. 476 at 491.

Indeed, a trial judge should exercise his discretion in favour of allowing rebuttal evidence when the issue raised by the defense arose *ex improviso*, could not have been foreseen by the Crown, and that [sic] the Crown is not in effect attempting to split the case. (See for example *R. v. Parkin (No.2)* (1922) 37 C.C.C. 35; *R. v. Therien & Sanservino* (1943) 80 C.C.C. 37; *R. v. Corrado* (1977) 35 C.C.C. (2d) 85; *R. v. Campbell* (1978) 1 C.R. (3d) 309 and *R. v. Kerr* (1983) 18 Man. R. (2d) 230.)

A similar example is provided by Madame Justice McLachlin, in *R. v. Osolin*.⁵⁶

The dangers of the judge abandoning the traditional role of neutral adjudicator have often been confirmed. The general rule has emerged that while judges may ask questions of clarification and amplification, they need not, indeed should not, take the case out of the hands of competent counsel and into their own hands: *Boran v. Wenger* [1942] O.W.N. 185 (C.A.); *R. v. Ignat* (1965) 53 W.W.R. 248 (Man. C.A.); *Majcenic v. Natale* [1968] 1 O.R. 189 (C.A.); and *Jones v. National Coal Board*, [1957] 2 All E.R. 155 (C.A.). Indeed, trial judges have been criticized and verdicts overturned precisely because judges have entered the arena and subjected the accused to their own cross-examination: *Brouillard v. The Queen* [1985] 1 S.C.R. 39; *R. v. Turlon* (1989) 49 C.C.C. (3d) 186 (Ont. C.A.); *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.).

A comparable phenomenon is what we call a “string of one”: that is, a citation which consists of a statement of a legal principle followed by a parenthetical “see for example” reference to a single lower court decision, with no expansion as to the particulars of the case or the specific reasoning of the judge or judges who made the decision. We think this is clearly analogous, and will treat both types as a single category of citation.

This is an extremely cryptic style of citation, which does not so much analyse specific decisions to build on their logic as turn them into self-defining discrete referents, making the decision penetrable only by a professional and inscrutable to any wider public. Jean-Louis Goutal labels this form of reasoning pattern a “statistical syllogism” and he suggests that it is typical of American judicial opinions in a way that can easily be distinguished from the more discursive British practice. As he describes it: “The judge will cite the rule he finds governing, and state his conclusion in the same telegram-style sentence, followed by citation ... of an avalanche of cases. Generally, one will look in vain for explanations.”⁵⁷ Goutal’s examples, drawn from the decisions of the U.S. Supreme Court and several prominent state supreme courts, are exactly parallel to the McLachlin selection above.

On our count, about two-fifths of Supreme Court citations of Manitoba court decisions fall into this string citation category — 78 are pure string citations, and 27 are what we have called “string of one” citations. Clearly, this involves rather little in the way of influence, and the longer the list of examples backing up any

⁵⁶ [1993] 4 S.C.R. 595 at 644.

⁵⁷ J.-L. Goutal, “Characteristics of Judicial Style in France, Britain and the U.S.A.” (1976) 24 *American Journal of Comparative Law* 43 at 53.

specific point, the less weight we can attach to any one of them. This is the low end of the citation scale, but at the same time it is important not to discount it too casually. The vast majority of lower court decisions are never cited by the Supreme Court. For a case to merit passing mention by the Court even to the limited extent of illustrating a general trend of some importance already separates it from the general population, the more so because such a cryptic mention makes it considerably more likely that the legal public (particularly but not only in that province) will take a closer look at the specific details and the reasoning of that case.

The second type of citation is the “expanded discussion” citation, which involves an attempt by the cited judge to penetrate and to summarize the logic of the cited case, indicating which aspect is of particular importance. Sometimes this will take the form of an “expanded string” — that is, a statement of a general point of law or a trend in lower court decisions, this being supported by reference to a string of lower court decisions, but each one of these decisions in turn is briefly described and differentiated from the others in the string, building toward a restatement of the trend by the citing judge. At other times, it is a single case which is discussed, sometimes even quoted directly, in order to establish a clear pedigree for the particular idea which is being extracted from it.

Gonthier’s use of a Manitoba Court of Appeal decision in *R. v. Milne*⁵⁸ is a good example of expanded string citation, as follows:

In the case of *R. v. Johnson*, [1978] 6 W.W.R. 97 (Man. C.A.), the majority also focuses on the accused’s knowledge of the mistake, rather than the type of mistake. In that case, funds were mistakenly deposited by a bank into the accused’s account, and the accused, knowing that he was not entitled to them withdrew and spent the funds. Monnin J.A. found that the spending constituted conversion, and the knowledge of the mistake was sufficient to make this theft (at p. 99): “Under the plain ordinary interpretation that would be made by any citizen and under the plain legal interpretation of s.283 of the Criminal Code, which defines theft, even if the accused’s conduct in taking something which he very well knew was not his may not by itself have amounted to theft, his conduct in then fraudulently and without colour of right converting that money to his own use certainly constituted theft. The accused was not entitled to this sum of money and he very well knew it: ‘I almost flipped out.’ In my view that is all that is required to make this conversion of the money a theft for which the accused ought to have been found guilty.”

Very similar is L’Heureux-Dube’s use of another Manitoba decision in *R. v. Tapaquon*,⁵⁹ similarly concerned with drawing a useful idea from a lower court without any overtones of criticism or rejection:

Is anything different if the prosecutor prefers an indictment under s.574(1)(b). Once again, an accused can bring a motion to quash, and once again, the judge goes to the record. The only

⁵⁸ [1992] 1 SCR 697 at 707.

⁵⁹ [1993] 4 SCR 535 at 564.

question is whether the charge itself is founded on the facts. If it is not, the charge will be quashed. This is not a question of asking whether the prosecutor incorrectly 'over-ruled' the justice, or whether the prosecutor should have deferred to the opinion of the justice. In this respect, I agree with the comments of Helper J.A. in *R. v. Hampton* (1990), 69 Man. R. (2d) 293 at p. 302: "The specific charges upon which the justice commits the accused do not affect the prosecutor's discretion under s. 574 to prefer the same, additional or substituted charges against the accused ... The condition precedent to the exercise of the prosecutor's authority in s. 574 is the committal on a specific transaction. The exercise of that administrative discretion by the prosecutor does not result in a collateral attack upon the decision of the magistrate whose only power is to commit for trial or to discharge the accused from the court process."

Such a use of precedent and judicial citation seems much more similar to what Goutal has described as the general features of the English style of judicial craftsmanship — "flexible assertions, discussion of cases, inductive reasoning, [and] specific example ..."⁶⁰ The focus is very much on reasoned explanation and persuasion, on discussing and linking ideas in a way which is accessible to a more general audience. However, as Goutal points out, it does tend to involve much longer written decisions than the more staccato American style, the style of citation accounting for a significant part of the difference.

These expanded citations also account for just over two-fifths of all Supreme Court references to Manitoba court decisions — that is, they are slightly more numerous than the more staccato string citations, with 55 expanded string citations and 58 citations that are expanded single examples. This balance suggests that the Canadian style of judicial reasoning is something of a blend of the English and the American styles.

The third type of citation involves the resolution of lower court disagreement, whether it takes the form of "picking a winner" or of framing a synthesis. The precondition for this type of citation is a clear difference on a point of law between the appeal or trial courts of different provinces, and the lack of a clear national standard to guide trial court decision-making. Obviously, such a split is particularly problematic when it involves a question of national law (such as the interpretation of the *Criminal Code*) but it is not necessarily limited to this context.

Such was the case in *R. v. Jewitt*,⁶¹ where Dickson dealt with the question of whether or not there exists in common law a discretionary power to stay proceedings in a criminal case for abuse of process. Dickson acknowledged that the confusion might "in some measure, stem from several decisions of this Court,"⁶² particu-

⁶⁰ Goutal, *supra* note 57 at 55.

⁶¹ [1985] 2 S.C.R. 128.

⁶² *Ibid.* at 132.

larly *Rourke v. The Queen*,⁶³ which was seen by some as putting a complete end to the doctrine of abuse of process. Some courts, including the Ontario Court of Appeal, interpreted the decision in *Rourke* restrictively and still applied the doctrine in exceptional circumstances. Others, including the Manitoba Court of Appeal⁶⁴ simply declared the abuse of process doctrine was not available in criminal proceedings under any circumstances. Saying that it was “desirable and timely to terminate the uncertainty” which surrounded this issue, Dickson examined the double trail of cases, the first headed by Manitoba decisions such as *Catagas, R. v. Belton*,⁶⁵ and *Re Balderstone and The Queen*,⁶⁶ the other headed by Ontario cases such as *R. v. Young*,⁶⁷ opting to endorse the latter.

A second and particularly clear example is found in Madame Justice Wilson’s major change of direction in family law in the famous trilogy of *Pelech, Caron* and *Richardson*. Dealing with the question of when a settlement should be varied, Wilson J. identifies four possible stances the courts could choose to follow. The first, which she says is most clearly demonstrated by the Ontario Court of Appeal, is that an antecedent agreement greatly restricts the power of the court under s. 11. This is directly contrasted by the second method, demonstrated by the Manitoba Court of Appeal, which sees fairness as something to be reassessed in light of new circumstances, these circumstances (rather than the mere existence of a previous agreement) being the key element. A third possibility is a compromise — namely that the circumstances must be devastating to warrant a change — and the last option is that specific categories of events justify judicial intervention, rather than the measurement of magnitude.⁶⁸

In discussing the second approach, Wilson J. concentrates on three main Manitoba cases; *Newman v. Newman*,⁶⁹ *Katz v. Katz*,⁷⁰ and *Ross v. Ross*,⁷¹ which in her eyes put the Manitoba method on the far end of the scale, and she concludes by rejecting their approach:⁷²

⁶³ [1978] 1 S.C.R. 1021.

⁶⁴ E.g., *R. v. Catagas*, [1978] 2 C.R. (3d) 328.

⁶⁵ (1982) 31 C.R. (3d) 223.

⁶⁶ (1983) 8 C.C.C. (3d) 582.

⁶⁷ (1984) 40 C.R. (3d) 289.

⁶⁸ [1987] 1 S.C.R. 832 at 832–33.

⁶⁹ (1980) 4 Man. R. (2d) 50.

⁷⁰ (1983) 33 R.F.L. (2d) 412.

⁷¹ (1984) 39 R.F.L. (2d) 51.

⁷² [1987] 1 S.C.R. 849.

I would, with all due respect, reject the Manitoba Court of Appeal's broad and unrestricted interpretation of the court's jurisdiction in maintenance matters. It seems to me that it goes against the main stream of recent authority, both legislative and judicial, which emphasizes mediation, conciliation and negotiation as the appropriate means of settling the affairs of the spouses when the marriage relationship dissolves.

At first glance, this particular example seems to undercut our argument, because in the end Wilson for the Court repudiated the Manitoba approach rather than endorsing it. However, we must not be seduced by the overkill rhetoric of the judicial decision-writing style in its attempt to pretend a pre-existing finality that is in fact created by the decision itself. Put more neutrally: in their attempt to deal with changing popular expectations in the light of a slightly ambiguous section of the statute, the provincial appeal courts have divided in the way they handle some critical matters following the break-up of a marriage. The courts that emerge as clearly and consistently enunciating an argument on how to resolve these issues, drawing a following among courts in their own and other provinces, are Manitoba and Ontario. Although both positions have considerable merit, on balance Wilson prefers the approach of Ontario. To present this as "brilliant Ontario, mistaken Manitoba" is to miss the tone, as well as the whole point of an appellate decision in the face of such divided authorities; it is at least as apposite to think of the Manitoba court as earning something along the lines of an honourable mention. Even while rejecting the Manitoba approach, Wilson indicates sympathy with the arguments of Matas; and it might also be noted that La Forest, separately concurring in *Pelech* but dissenting in *Richardson*, remained unconvinced both by the four-way typology and by the rejection of Manitoba's approach, identifying instead a continuum and quoting both Matas and Hall with approval.

On our count, a total of sixteen of the Supreme Court citations to Manitoba decisions were of this type, or about one and a half per year. As the two examples demonstrate, the Supreme Court tends to follow the Ontario Court of Appeal over the Manitoba Court when the two wind up heading opposite "camps" in the trend of interpretation, but this in no way undercuts the fact that the Manitoba Court is, in some areas of law, recurrently treated as a leading example among the provincial courts of appeal.

The fourth type of citation we would like to call "leading case" citations, although we appreciate that this term is not quite apposite. What we describe is a situation in which the Supreme Court identifies either a virtual absence of lower court decisions that bear upon the issue in hand, or else a confusion of lower court cases that create no definite trend or principle, and then points to a specific lower

court case that optimally resolves the issue.⁷³ We recognize that the term “leading case” usually carries a somewhat stronger meaning than this, and apologize for the possible confusion caused by our slightly eccentric redefinition, but alternative labels (such as “light in darkness citations”), although somewhat closer to our meaning, seemed inappropriately frivolous.

One of the clearest examples of the phenomenon that we have in mind is the way that an early Manitoba decision is treated by the Supreme Court in *R. v. Jobidon*.⁷⁴ As Gonthier J. describes the situation;

We have seen that the statutory definition of assault has always contained a general requirement that the Crown prove absence of consent, and has made reference to *some* circumstances in which consent would be considered involuntary. But this Court has not previously confronted the precise issue on appeal Provincial appellate courts on the other hand have dealt with numerous cases of purportedly consensual beatings giving rise to charges of assault (and sometimes manslaughter) though the overwhelming bulk of these have surfaced in recent times. Prior to the 1970s, only one reported decision addressed the issue: *R. v. Buchanan* (1898), 1 C.C.C. 442 (Man. C.A.), decided a few years after the offence was incorporated in the *Code* of 1892.

This principle was based on English cases — specifically *R. v. Coney*⁷⁵ which concluded that consent to fist fights where bodily harm was intended was ineffectual. It was indirectly affirmed by a few pre-1970 cases, but not as precisely as it had been by the *Buchanan* case. When similar situations began to arise in the 1970s, however, the Manitoba case was not even mentioned and the cases followed rather a different path, tending to accept the proposition that consent was consent even if the result was severe injury or death resulting from fist fights. Gonthier concludes by reaffirming the principle from *Buchanan*, as follows;⁷⁶

Although there is certainly no crystal-clear position in the modern Canadian common law, still, when one takes into account the combined English and Canadian jurisprudence, when one keeps sight of the common law’s centuries-old persistence to limit the legal effectiveness of consent to a fist fight, and when one understands that s. 265 has always incorporated that persistence, the scale tips rather heavily against the validity of a person’s consent in the infliction of bodily injury in a fight. ... The thrust of the English common law is particularly important in this regard because it has been consistent for many decades, indeed, centuries. It became an integral part of the Canadian common

⁷³ A weaker form, which we do not include in the count of this type of citation, is the situation in which a lower court decision is cited as the first example of an approach to resolving a legal issue; an example of this type of citation is *R. v. Tupper* (1976), 32 C.C.C. 529, cited by Wilson in *Fleming v. The Queen*, [1986] 1 S.C.R. 415, as the first case to use a new approach to the issue of restoring seized goods.

⁷⁴ [1991] 2 S.C.R. 714.

⁷⁵ (1882) 8 Q.B.D. 534.

⁷⁶ *Ibid.* at 761–62.

law and has remained so to this day. ... In light of the many considerations, I am of the view that the Canadian position is not as opaque or bifurcated as one might think.

(Of course, one must admit that the opposite phenomenon is also possible, in that a court may be singled out as marching to its own drummer in a manner of which the Supreme Court is not willing to approve. An example is the case of *Isbister v. Isbister*,⁷⁷ in which Monnin for the Manitoba Court of Appeal dealt with the question of the extent to which pension payments should be treated as income or as assets in divorce settlements. Referring to this decision ten years later, Wilson for the Supreme Court concluded that Manitoba was “out of step with the current trends” in this case.⁷⁸ Such an oblique over-ruling is infrequent, and we have not included this type of citation in our “leading case” category.)

On our count, there are seven examples of this type of citation over the ten year period considered — about once every year and a half. Obviously, this is an extremely pure form of judicial influence, and clearly demonstrates a lower court contribution to the interpretation of the law explicated by the Supreme Court of Canada.

Finally, four decisions of Manitoba courts were cited only to be distinguished. Some studies of judicial citation⁷⁹ consider “distinguished” to be a negative category of citation, closer to “over-ruled” than to “followed” or even “considered.” We disagree; to distinguish a case is by no means to reject its reasoning or impugn its persuasive weight, simply to contain its meaning within a specific range with the immediate issue falling outside that range. However, for a case to be distinguished implies that it has been examined and then set aside, which means that it cannot count as an solid example of substantive judicial influence.

V. CONCLUSION

AS IS THE CASE WITH OTHER COURTS in the Anglo-American world, the Supreme Court’s weapon of choice in the persuasive arsenal is citations to judicial authority. These citations are drawn from a range of sources, although the heavy reliance on British authorities is increasingly a thing of the past, having been replaced by a tendency for the Supreme Court to cite its own prior decisions. Citations from the

⁷⁷ [1981] 22 R.F.L. (2d) 234.

⁷⁸ *Clarke v. Clarke*, [1990] 2 S.C.R. 795.

⁷⁹ See for example L.K. Rees-Potter, *Patterns of Authority: An Analysis of Canadian Court Case Citation Patterns* (Canadian Law Information Council: Working Paper No.10, 1982) at 26: “For the purpose of discussion, the terms followed and applied are called ‘positive’ treatment, while distinguished, not followed and reversed are considered ‘negative’ treatment of a case.”

courts of other countries — even other federal countries such as the United States and Australia — are relatively rare.

About one-quarter (in recent years it is closer to one-third) of all citations are to the decisions of the lower Canadian courts, the bulk of these coming from the various provincial appeal courts. Other studies⁸⁰ have described the relationship of the provincial courts to the Supreme Court of Canada primarily in terms of appeal frequency and reversal rates, a strong court being one that is reversed infrequently, and on this approach Ontario easily tops the list while Quebec trails surprisingly. This study suggests an alternative relationship in terms of citation frequency, which has the consequence of restoring the Quebec Court to a position of greater prominence.

The Manitoba courts are neither unusually visibly nor unusually invisible in the citation practices of the Supreme Court of Canada — Manitoba ranks fifth in citation frequency, behind Alberta but ahead of Saskatchewan. This is roughly what the province's share of the national population and of the total of appeal court judges would suggest to be appropriate. The citation tables are dominated by the longer-serving judges of the recent courts of appeal, a tendency sufficiently obvious as to explain itself. There are two major areas of law which seem to predominate in the Manitoba citations — the appeal court review of trial judge discretion in criminal law, and the emergence of new doctrines in family law — but it is not clear that this distinguishes the Manitoba citations from those of other provinces.

Some of these citations of Canada's lower court cases constitute an indirect way of over-ruling a lower court decision that may not have been appealed, specifically identifying an error or an inappropriate way of resolving a particular issue, but these are a very small minority. Others involve the Supreme Court identifying two or more general lines of interpretation emerging in the practices of the lower courts, and then choosing (or creating) a single national doctrine to replace this diversity. More typically, however, these lower court citations are treated the same way as self-citations or invocations of the English authorities — that is, they are taken as confirmations of legal doctrine or as sources of legal ideas deserving consideration in their own right. Some lower court judges think of the judicial pyramid less as a strict hierarchy in which error flows upward to be corrected and truth flows down to be followed, than as a conversation (albeit something less than a conversation

⁸⁰ See, for example, McCormick, "The Supervisory Role of the Supreme Court of Canada," *supra* note 16; P. McCormick, "A Tale of Two Courts: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada, 1970-1990" (1990) 19 Man. L.J. 357; P. McCormick & S. Maisey "A Tale of Two Courts II: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada, 1906-1991" (1992) 21 Man. L.J. 1; and P. McCormick "Alberta's Court of Next-to-Last Resort" (1991) 29 Alta. L. Rev. 861.

of equals) between higher courts and lower courts.⁸¹ The way in which the Supreme Court treats many of these citations of lower court decisions strongly suggests that this conversational mode is an appropriate description.

This study of Supreme Court citation patterns suggests a reliance on a diversity of sources, and an approach to lower court cases which is as likely to be collegial as admonitory. This being the case, the diffusion of specific ideas from the courts of one province to the courts of other provinces and possibly to the Supreme Court itself presents itself as an area that might usefully be explored, although this is beyond the scope of the present study.

⁸¹ See for example P. McCormick & I. Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: James Lorimer & Co., 1990), especially the quotations at 221 and the following discussion.