

Try, Try Again: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada 2000-2004

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For many of the cases on its docket, the Manitoba Court of Appeal is the final stop on the judicial journey; for some, it is simply the next-to-the-last station on the way to the Supreme Court of Canada. In this article, I wish to explore the frequency, the provenance, the characteristics, the correlations and (hopefully) the predictors of this differentiation. I want to develop a comparative typology of the types of cases that are most likely to try to go farther.

My major interest is a curiosity about the mysterious decision to appeal and its place within the judicial process. However, of equal importance is the question of how such decisions lead us to think about the relationship between the two courts - more precisely, what they tell us about the supervisory role of the Supreme Court within the Canadian judicial hierarchy. My approach will also shed some light on how we should conceptualize the curious dual role of the provincial courts of appeal - *usually* the highest courts of appeal for all legal matters arising within their borders, but *sometimes* intermediate courts of appeal within the wider Canadian system.

My methodology is simple. I will begin from a database that includes every panel decision handed down by the Manitoba Court of Appeal between 1 January 2000 and 31 December 2004 - the first five years of the new century.¹ I will identify the subset of cases in which there was some attempt to carry the matter further, either as an appeal by right to the Supreme Court of Canada, or through an application (successful or not) for leave to appeal. Then I will compare these two populations on a number of criteria. Finally, I will look more closely at every one of the cases that was heard and decided by the Supreme Court, and attempt an overall description of this interaction.

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¹ Purists would insist that 2000 was the last year of the old century, not the first year of the new one; technically, they are correct, but I will go with the more popular labelling.

I. THE DECISION TO APPEAL

The decision to appeal is one of the mysteries of the judicial process.

From one point of view: the simple fact that one can appeal a judicial decision is curious. We have evolved a set of rigorous practices for the resolution of specific disputes, often time-consuming and always presided over by trained professionals. Functionally and psychologically, one of the major purposes of the process is to reconcile the loser to his loss, always the hardest test of any decision-making system, but one on which the Anglo-American judicial process generally scores well. This is best accomplished by a formalized drama that works toward a solid and final outcome, which makes it curious that the loser can always “push the reset button” and have another go. Historically, the emphasis always was on the trial rather than the appeal, and the modern notion of a full hierarchy of differentiated courts, with every judicial decision subject to at least one appeal by right, is a relatively recent development, no more than a century or so old.

From another point of view: it is surprising that appeals are so rare. Follow any newsworthy trial on television, and the lawyers for the losing side will inevitably say very solemnly to the reporters that they are disappointed in the outcome and will be deciding very soon whether or not to appeal, but the fact is that they almost never appeal. In the province of British Columbia, for example (picking this province simply because the court websites provide more detailed information than the other provinces), the trial courts handle about a quarter of a million cases per year – about one hundred and sixty thousand by the provincial court and seventy thousand by the provincial superior trial court. But the annual caseload of the B.C. Court of Appeal is only seven hundred – about one third of one per cent of the trial caseload. Even if we make some allowance for provincial court appeals going to the Supreme Court of Canada (SCC), it seems unlikely that this would take us over one per cent.

As anyone in the judicial system will tell you, the cases that are appealed are surprisingly random. Trial judges are often dissatisfied in two different ways: difficult cases where they do their best in complex circumstances but would not mind a second opinion are left unreviewed, while solid decisions on more straightforward matters are appealed. Appeal courts are sometimes left wondering as well; as one Alberta appeal court judge once told me of his caseload, “one third of the time we allow the appeal, one third of the time we dismiss the appeal, and one third of the time we wonder what on earth these people are doing in front of us.” It is surprising to see how often appeal court decisions will describe the appeal as “having no merit” and the same message is sent every time the court tells the respondent’s lawyer “we will not need to hear from you.” Clearly, some people knock on the wrong door or in the wrong way, and others do not knock when perhaps they should.

The same considerations apply to the decision to appeal beyond a provincial court of appeal. At this point, the case will have been reviewed by two (or more

rarely by three) different levels of court, but there is still a loser who may not be satisfied with the outcome and who may be willing to consider the time and expense of one more appeal. Collectively, the provincial and federal courts of appeal decide about 4 000 cases per year, and in recent years the docket of the Supreme Court has declined to about 80, which suggests that we are in roughly the same ball park as the provincial court system – about two per cent of all provincial appeal court decisions, compared with one per cent or less of all trial court decisions, are subjected to full appellate review.

But of course this is not the whole story, because there is an additional factor. The general rule of thumb is that any trial decision is subject to one appeal by right, but any further appeal is by leave of the court to which the appeal is made. This consideration catches a modest proportion of the provincial court of appeal caseload but almost the entirety of the Supreme Court caseload. The Supreme Court receives about six hundred applications for leave to appeal every year and grants, on average, about one in eight. And this in turn means that a much higher proportion of provincial appeal court decisions than appeared at first glance have generated an unhappy loser who is seeking further review – not one in fifty, as the previous paragraph suggested, but one in six.

And this brings me to the basic purpose of this article, which is to take a closer look at the set of cases that have knocked on the door of the Supreme Court during the first five years of the century. What do these cases look like? What features, if any, do they have in common? How do they compare to the full set of Manitoba Court of Appeal decisions? Is there anything about them, or about some significant number of them, that would have allowed us to predict that they would make this further attempt at appeal – anything about their initial appearance, or the way the Court of Appeal handled them, or the form the reasons took, that is unusual or distinctive?

II. THE DATABASE

The database includes every decision of the Manitoba Court of Appeal between 1 January 2000 and 31 December 2004 that was reported on either CanLII or Quicklaw.² In order to avoid overcounting, I omitted situations such as parties returning for clarification of costs. When the hearing and decision were announced one day with the reasons to follow, I counted this only once. Ultimately, this gave me 795 reported panel decisions with reasons (7 of them from

² CanLII refers to the Canadian Legal Information Institute, a not-for-profit organization that makes primary sources of Canadian legal information available on the Internet. Canadian Legal Information Institute, “About CanLII,” online: CanLII <<http://www.canlii.org/>>. Quicklaw is a commercial online legal research tool. LexisNexis Canada, “Research Solutions,” online: LexisNexis Canada <http://www.lexisnexis.ca/about/research_solutions.php>.

five-judge panels) and 142 reported single-judge (chambers) decisions, the latter have been omitted from the calculations that follow. According to the registrar of the Manitoba Court of Appeal (MBCA), a small number of panel decisions are made without reasons, not even the dozen or so words that make up a fair proportion of the oral decisions. Therefore, my total slightly understates the caseload of the Court, but not in such a way as to miss anything substantive.

The list of appeals by right and applications for leave to appeal was generated from the Supreme Court website, looking up each case separately and double-checking in the relevant Supreme Court Bulletin³ to make sure that I had linked it to the correct Manitoba Court of Appeal decision (since some individuals can generate multiple appeals, and most cases acquire a rather large number of identifying numbers as they work their way through the system, not all of which are given at any specific point). This resulted in some complexities that make the counting a little complicated. One case, *R. v. Morrison*, was an appeal from a Manitoba Court of Appeal decision without recorded reasons (written or oral).⁴ It was originally an appeal from conviction and sentence, but the conviction appeal was deemed abandoned and the sentence appeal was dismissed without reasons. Another case (*Fletcher v. Manitoba Public Insurance Corp.*) was from a chambers (single judge) Appeal Court decision.⁵ And two appeals (*R. v. Lamirande* and *R. v. Lamirande (Appeal by Guimond)*) were from a single Manitoba Court of Appeal decision when the co-accused filed separate applications for leave.⁶

Of the decisions delivered by the Manitoba Court of Appeal over the five years, 3 were taken to the Supreme Court as appeals by right and 85 by application for leave to appeal (my database ultimately includes only 86 cases, because there is no appeal court data on *Morrison*, and *Lamirande* and *Guimond* both stem from a single Manitoba case). This means that almost exactly one in nine Manitoba Court of Appeal decisions during this period involved an attempt at a further appeal – a much higher rate than any trial court but lower than the all-province average suggested above. Eight of the applications for leave were granted, somewhat less than the all-province average (although 4 applications for

³ Supreme Court of Canada judgments are available online through a collaborative website of the Supreme Court of Canada and the University of Montreal Faculty of Law. “Judgments of the Supreme Court of Canada,” online: Supreme Court of Canada and LexUM Laboratory in University of Montreal’s Law Faculty <<http://scc.lexum.umontreal.ca/en/index.html>>.

⁴ (11 May 2004), Man.C.A. No. AR 03-30-05693 leave to appeal to S.C.C. refused 30461 (November 18, 2004), 337 N.R. 395 [*Morrison*].

⁵ *Fletcher v. Manitoba Public Insurance Corp.*, 2003 MBCA. 62, [2003] M.J. No. 145 leave to appeal to S.C.C. refused 29804 (June 9, 2003).

⁶ *R. v. Lamirande*, 164 MBCA 41, [2002] M.J. No. 133 leave to appeal to S.C.C. refused 29205 (May 2, 2002) [*Lamirande*]; and *R. v. Guimond*, 164 MBCA 41, [2002] M.J. No 133 leave to appeal to S.C.C. refused 29222 (May 27, 2002) [*Guimond*].

leave are still pending at time of writing). Of the 11 appeals from Manitoba (3 by right, 8 by leave) two were allowed, 5 were dismissed (including all 3 of the appeals by right), 2 are awaiting oral argument, and 2 have had oral argument and are awaiting decision and reasons. Only one (*R. v. Estabrook*) was deemed abandoned before it went to a three-judge Supreme Court panel.⁷ This is a little surprising, because it had been my impression from an earlier study of appeals by right that there was a larger slippage between the number of appeals accepted (especially the “by right” appeals) and the number of cases actually decided by the Supreme Court.⁸

III. COMPARISON OF THE APPEALED CASES

I want to compare the 86 appealed decisions to the 795 reported panel decisions of the Manitoba Court of Appeal in order to isolate the differences between the two – that is to say, the correlates of the decision to appeal further. I will explore nine different variables.

Four variables will have to do with what I will call the provenance of the case – that is to say, the way it looks as it begins oral argument: I will identify the type of law, the type of litigants, the size of the panel, and the presence or absence of the Chief Justice as relevant to this set of considerations. Three variables will have to do with the way that the panel handles the decision: I will consider how long the panel reserved its decision, whether it was divided, and whether the appeal was allowed or dismissed. Finally three variables will bear on the reasons for judgment: I will consider who wrote the decision, the length of the decision (a proxy for importance), and what sort of citations to authority the decision included (a proxy for complexity).

A. Provenance elements

1. The type of law

The Manitoba Court of Appeal hears appeals on a wide variety of legal issues, and it is only to be expected that there will be differentials in the likelihood of an appeal going further. For present purposes, the caseload can be divided into four fairly straightforward categories. The first is *Canadian Charter of Rights and Free-*

⁷ *R. v. Estabrook*, [2001] M.J. No. 170.

⁸ Peter McCormick, “Compulsory Audience: Appeals by Right and the Lamer Court 1990-1999” (Paper presented to Canadian Political Science Association’s Annual General Meeting (Congress of Social Sciences and Humanities) June 2002).

doms law or "Charter" law,⁹ exercising some discretion here so as not to include cases where there may have been a hint of a *Charter* issue in the lower court but it is not the subject of any analysis or discussion in the Court of Appeal, where the decision is resolved on different grounds. The second is criminal law, which is sufficiently straightforward to define itself (with the obvious proviso that many *Charter* cases are carved out of the criminal law category). The third is private law, involving litigation between natural and corporate persons. And the last is public law, which involves government actors in a non-criminal context.¹⁰

TABLE 1
COMPARISON OF DECISIONS BY TYPE OF LAW

Type of law	MBCA decisions of this type	Decisions appealed to SCC	Decisions heard by SCC
<i>Charter</i> (includes criminal)	31	15 (48.4%)	6
Public	97	20 (20.6%)	0
Criminal (non- <i>Charter</i>)	297	22 (7.4%)	5
Private	370	29 (7.8%)	0
Total	795	86	11

The differences are pronounced, but not all that surprising. *Charter* cases make up by far the smallest part of the caseload (it is perhaps surprising to see just how small), but they are by far the most likely to be taken to the Supreme Court.¹¹ Public law cases are less than half as likely to be appealed, although this

⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

¹⁰ For a number of years after 1982, almost all of the *Charter* cases were also criminal cases, as this aspect of the *Charter* dominated the caseload and jurisprudence for a considerable time. The assumption is, however, no longer valid: fully half of the *Charter* decisions of the "McLachlin" Court (i.e. under Chief Justice Beverly McLachlin), for example, involved cases which did not arise in a criminal context.

¹¹ *Charter* cases are also the most likely to succeed. Fully six of the eight cases that were granted leave to appeal were *Charter* cases, including all three of the cases in which the Manitoba

still means that they are three times as likely as (non-*Charter*) criminal or private cases, with the further implication that private law cases are very unlikely to be granted leave – none were in the five-year period. Fifteen years ago, Dale Gibson worried that the Supreme Court's new preoccupation with constitutional and *Charter* issues would effectively make the provincial courts of appeal the final word for private law issues within their own jurisdictions; the numbers certainly suggest that this is coming to pass.¹²

2. The litigant type

One obvious feature of the appellate caseload is that it involves a variety of types of litigant, and it is unlikely in the extreme that all are so positioned as to give the same consideration to the possibility of taking an appeal further. The most obvious (and most frequent) litigant type is a natural person, accounting for about one half of all litigants (if we classify the two parties to an appeal and then combine the counts for appellants and respondents). In Galanter's terms, these tend to be "one-shotters" – actors whose involvement with the judicial process is discontinuous from their normal life and largely mysterious, and who have limited resources to deploy for the purpose.¹³ The second most frequent litigator is the Crown (in criminal cases, acting under provincial or federal authority), which accounts for almost exactly 20 per cent of all litigants – which is obviously just the flip side of saying that criminal cases account for about 40 per cent of the total caseload. The Crown is also an excellent example of what Galanter has called the "repeat players" – actors whose involvement with the judicial process is continuous and ongoing, who deploy considerable resources, and who can make strategic choices based upon the knowledge of expert professionals.¹⁴ The third most frequent litigator is corporations, accounting for roughly 17 per cent of the total, and the fourth is governments (municipal, federal, provincial and other¹⁵) which make up just over 8 per cent. Unions seldom show up on the appellate docket (11 appearances in total, making up less than 1 per cent of the total), and a residual "other" category¹⁶ is comparably infrequent, at less than 2 per cent. The reason for not including unions in the "other" category – the obvious thing

Court of Appeal was reversed and a seventh case deals with another constitutional law issue in the form of Métis rights.

¹² Dale Gibson, "The Crumbling Pyramid: Constitutional Appeal Rights in Canada" (1989) 38 U.N.B.L.J. 1.

¹³ Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 Law & Soc'y Rev. 95 at 98.

¹⁴ *Ibid.*

¹⁵ There were three extradition cases involving the United States government.

¹⁶ Litigants in the 'other' category numbered 29 in total, the most frequent types being First Nations communities (7), hospitals (5), universities (3) and churches (3).

to do given the small numbers - will become clear later in this section.

The total number of appearances is one element in how many times a litigant type is likely to appeal further; also important is the fact that you can only appeal if you lose, and some litigant types are more likely than others to be unsuccessful.¹⁷ Natural persons are the most frequent litigant type, and they are also the most likely to be unsuccessful, with three defeats for every two victories (even though one case in six takes the form of “natural person vs. natural person”). Governments, on the other hand, are involved only one-sixth as often, but prevail three-quarters of the time, and therefore have even fewer opportunities to appeal further than would at first appear from their numbers in the total litigant count.

Table 2 presents information for each of the six categories of litigant, relating how often defeat in the Court of Appeal gave them the option of an appeal, and how often they actually filed an application for leave, this last being expressed as both an absolute number and as a percentage of the opportunities.¹⁸ The parenthetical number provides a further refinement by indicating how often the application for leave was successful. Unions lead the table (which is the reason they were not assimilated to the residual “other” category) - they are the only litigants other than natural persons who lose more often than they win in the Court of Appeal (six to five), and when they lose they usually file an application for leave (which is never successful). Governments do not lose very often, but when they do they are slightly more likely than average to apply for leave. Natural persons and corporations anchor the center of the table for their application for leave frequency - hardly surprising given their sheer volume¹⁹ - although natural persons were modestly successful over the period and corporations not successful at all, in being granted leave.

¹⁷ This is not absolutely true, because there are still very limited opportunities for the “winner” to obtain higher court review, and there are a small number of cases involving cross appeals such that success can be divided, but the generalization is sound enough for present purposes. However, as I will discuss below, one of the cases appealed to the SCC is in fact an appeal from a case which the Crown “won” (to the extent that the accused’s appeal was dismissed) (*R. v. Elias*, 2003 MBCA 72, [2003] M.J. No. 192, *aff’d R. v. Orbanski; R. v. Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3 [*Elias*]).

¹⁸ For present purpose, the handful of appeals by right are included as if they were appeals by leave. Since there were only three of them, they do not significantly distort the patterns.

¹⁹ That is to say, there are so many cases involving individuals and corporations that any appeal frequency they generated would pretty well become the average.

TABLE 2

FREQUENCY OF APPEALS BY LOSER'S LITIGANT CATEGORY

Litigant category	Losses in MBCA	Applications for leave ²⁰ [successful]	Application frequency
Unions	6	4	66.7%
Governments	36	5	13.9%
Natural persons	472	55 [7]	11.7%
Corporations	128	13	10.2%
Other	12	1	8.3%
Crown	141	8 [4]	5.7%
Total	795	86	10.8%

At the other end of the table, the Crown loses fewer appeal cases than it wins (losing about 40 per cent of the time), but the volume is high enough that there is still a fairly high number of opportunities to appeal – one case in every seven on the Manitoba Court of Appeal docket ends in a defeat for the Crown. But the Crown very seldom appeals, and the high volume of cases means that this can be stated with assurance, and not qualified as a possible anomaly based on a short run of unusual cases. The Crown is less than half as likely as the overall average to attempt to appeal a defeat, doing so only one time in twenty. This is particularly interesting because the Crown, unlike the other litigant types identified in the table, is less a statistical amalgam than an organized institution with decision making capacities organized around coherent strategies and bureaucratic procedures.²¹ The very low number of appeals – just over one a year – suggests that the threshold is consciously and deliberately placed very high. The fact that almost half of the Crown's applications for leave to appeal are granted suggests that the

²⁰ Includes the three appeals by right.

²¹ There is, of course, a distinction to be made between criminal cases carried by provincial authorities and those carried by federal authorities. I have made no attempt to distinguish between these two sets, there being no way for me to make this determination from the standard case report, but I am assuming that the large majority of provincial Court of Appeal cases are represented by the former and only a small number involve federal officials.

criteria on which this selection is made match well with the criteria applied by the Supreme Court in granting leave. On the other hand, in terms of the ultimate outcome, the Crown has been markedly less successful, with two failures²² and one case still awaiting decision.²³ Justice Fish's sardonic comments in *R. v. Woods* do not seem to speak very highly of the Crown's decision to appeal this case, commenting on the "valiant but vain" attempt to "overcome the factual, semantic and constitutional barriers to its proposed interpretation" of the relevant phrase.²⁴

If one side of the equation is which litigant types are the most prepared to apply for leave to appeal, the other side is which litigant types are the most likely to be appealed against. In part, this will make a difference because different sets of litigants imply different sorts of things being argued for; in part, it will make a difference because some types of litigants are more daunting to challenge than others (although every case before a provincial court of appeal has, of course, already been appealed once). This information is assembled in Table 3, again identifying both the absolute number and the relative frequency of applications for leave, this time in terms of the "winner" whose victory is being appealed.

²² *R. v. L.A.P.*, 2000 MBCA 109, [2000] M.J. 483, aff'd *R. v. Pakoo*, 2001 SCC 28, [2001] S.C.R. 757 [L.A.P.]; and *R. v. Woods*, 2004 MBCA 46, [2003] M.J. No. 145, aff'd 2005 SCC 42, [2005] S.C.J. No. 42 [*Woods*].

²³ A fourth case (*R. v. B.W.P.*) has been combined with a case from B.C. and has not yet proceeded to oral argument, having been delayed by a consideration of applications for leave to intervene. Editor's note: *R. v. B.W.P.* was subsequently affirmed by the Supreme Court of Canada. *R. v. B.W.P.*, 2004 MBCA 110, [2004] M.J. 267, aff'd *R. v. B.W.P.*; *R. v. B.V.N.*, 2006 SCC 27, [2006] S.C.J. No. 27 [*B.W.P.*].

²⁴ *Woods*, *supra* note 23 at para. 1.

TABLE 3

FREQUENCY OF APPEALS BY WINNER'S LITIGANT CATEGORY

Litigant category	Victories in MBCA	Applications for leave ²⁵ [successful]	Application frequency
Natural persons	345	23 [5]	6.7%
Corporations	144	11	7.6%
Other	17	2	11.8%
Crown	184	28 [5]	15.2%
Unions	5	1	20.0%
Governments	100	21 [1]	21.0%
Total	795	86	10.8%

Natural persons and corporations - who together make up about 60 per cent of all litigants - are considerably less likely than average to be appealed against when they win (even though these types of litigants are no more likely than average to appeal themselves when they lose). This is at first glance mildly surprising. Simply in terms of something as obvious as party capability theory, one would think that these litigants are less likely to be able to withstand protracted litigation, or to deploy the resources and the persistence that make appellate success more likely, and that this would be something of an invitation to their opponents. Presumably this is sometimes because the stakes are often small. But presumably a part of what we are seeing for individuals is also the flip-side of the Crown's tendency not to appeal when it loses in the Court of Appeal. On the other hand, the Crown and governments are appealed against more often than average, with the further consideration that the Crown is the type of litigant against whom appeals are most likely to be granted leave to appeal.

Because the "natural person" category is so large, it deserves a more focused look. Table 4 addresses the appeal frequency of cases involving natural persons. Individuals are much more likely to appeal a losing case when their involvement is with the federal or provincial government, a generalization which is of course centered on the high volume of criminal cases but applies to other types of cases as well, although it does not extend to municipal governments (and this excep-

²⁵ Includes the three appeals by right.

tion is the reason for using different litigant categories in this table). Conversely, when natural persons are the winners in the Court of Appeal, governments are not very likely at all to pursue an appeal, a phenomenon that is again centered in the apparent strong reluctance of the Crown to take an appeal, but which again applies to the broader category of cases involving governments (this time including municipal governments). This in turn qualifies the earlier observation that governments are twice as likely as average to file an appeal from a losing decision in the Court of Appeal - we should now add "except when they have lost to a natural person litigant."

TABLE 4

FREQUENCY OF APPEALS FOR CASES INVOLVING NATURAL PERSONS

Litigant Type	Person loses Cases/Appeals	Person wins Cases/Appeals against	Combined Cases/Appeals
Federal government	7/3 (42.9 %)	0	7/3 (42.9%)
Provincial government	43/9 (20.9 %)	14/1 (7.1 %)	57/10 (17.5%)
Other	16/3 (18.8 %)	4/1 (25.0 %)	20/4 (20.0%)
Crown	184/28 (15.2 %)	138/7(5.1 %)	322/35 (10.9%)
Natural persons	158/9 (5.7 %)	160/10 (6.3 %)	318/19 (6.0%)
Corporations	55/2 (3.6 %)	24/1 (4.2 %)	79/3 (3.8%)
Municipal government	9/0 (0.0 %)	5/2 (40.0 %)	14/2 (14.3%)
Total	472/54 (11.4 %)	345/22 (6.4 %)	817/76 (9.3%)

To anticipate a point that will be expanded upon in the penultimate section of this paper, focusing on cases involving natural persons is all the more appropriate because every single successful application for leave (as well as the three appeals by right) are drawn from this set of cases; in one, the other party was the provincial government and in all the others it was the Crown. This reinforces the conclusion from the previous section: the part of the Supreme Court docket to which the Manitoba Court of Appeal contributes is centered by criminal cases and *Charter* cases (the two categories overlapping to a considerable extent). Other cases - and other types of litigant - are unusual.

3. *The size of the panel*

In Manitoba as in other provinces, the three-judge panel is the norm and larger panels have become extremely unusual. Thirty years ago, one would sometimes find seven-judge panels in the law reports, and on at least one occasion the Quebec Court of Appeal sat a nine-judge panel. Today, however, three-judge panels account for about 99 per cent of all the panel decisions by provincial courts of appeal. This being the case, it is obvious to the point of triteness to suggest that the assignment of a case to an unusual over-size panel is an indication that it has some significance or raises some matter that is out of the ordinary. Judicial person-hours are a scarce resource on any court, and going from three judges to five almost doubles the “cost” of a decision, besides disrupting the normal panel rotations. In the practice of most provinces, one of these situations is when the court of appeal is being asked to overrule an earlier decision.

In five years, there were only seven five-judge panels set by the Manitoba Court of Appeal, and no examples at all of anything larger. The numbers being so small, I will list them to give some flavour to this small but important part of the caseload. The list is:

- (i) *R. v. Gillespie*,²⁶
- (ii) *Glenko Enterprises Ltd. v. Keller*,²⁷
- (iii) *B. (T.L.) v. C. (R.E.)*,²⁸
- (iv) *M.M. v. Roman Catholic Church of Canada*,²⁹
- (v) *Moar v Roman Catholic Church of Canada*,³⁰
- (vi) *Manitoba (Provincial Municipal Assessor) v. Seagrams*,³¹ and
- (vii) *Simplot Chemical Co. Ltd. v. Manitoba (Municipal) Assessor*.³²

²⁶ *R. v. Gillespie*, 2000 MBCA 1, [2000] M.J. No. 218, 156 Man. R. (2d) 162 (C.A), [2001] 8 W.W.R. 603.

²⁷ *Glenko Enterprises Ltd. v. Keller*, 2000 MBCA 7, [2000] M.J. No. 444, 150 Man.R. (2d) 1; [2001] 1 W.W.R. 229.

²⁸ *T.L.B. v. R.E.C.*, 2000 MBCA 83, [2000] M.J. No. 434 150 Man.R. (2d) 34 (C.A) leave to appeal to S.C.C. refused 28316 (Dec. 28, 2000), 156 Man.R. (2d) 318.

²⁹ *M.M. v. Roman Catholic Church of Canada*, 2001 MBCA 148, [2001] M.J. No. 401, 160 Man.R. (2d) 265 leave to appeal to S.C.C. refused 28925 (Jan. 9, 2002).

³⁰ *Moar v Roman Catholic Church of Canada*, 2001 MBCA 148, [2001] M.J. No. 401, 205 D.L.R. (4th) 253 leave to appeal to S.C.C. refused 28925 (Jan. 9, 2002).

³¹ *Manitoba (Provincial Municipal Assessor) v. Seagrams*, 2003 MBCA 128, [2003] M.J. No. 393, 180 Man.R. (2d) 69 (C.A.)

³² *Simplot Chemical Co. Ltd. v. Manitoba (Municipal) Assessor*, 2003 MBCA 129, [2003] M.J. No. 391, 180 Man. R. (2d) 56 (C.A).

One of these cases involved courthouse security, something which recent events in the United States have made more topical. One involved contract and funds in trust issues, two grew out of the residential schools issue, one involved government liability for sexual abuse perpetrated by a provincial employee, and two involved property assessments for taxation. Only three of the decisions were unanimous; one generated three different sets of reasons without a clear majority behind any single set of reasons. Only two (the third and fifth) were the subject of applications for leave to appeal; leave was granted in both, but both appeals were dismissed.

In terms of the correlation between panel size and subsequent appeal, there does seem to be some connection: two of the seven large panels, but only about one case in every nine of the normal panels, generated an application for appeal. However, considering how unusual these cases are, and what a "bright line" indicator one might have expected it to be, the connection is not particularly strong. Cases assigned to larger panels are mildly but not preemptively more likely to be appealed further.

4. The presence of the Chief Justice

It has been suggested that in some jurisdictions the assignment of the Chief Justice to a panel is an indicator that particular attention is being attached to a case.³³ The logic is that the office of Chief Justice carries a prestige factor with it, and that prestige is assigned disproportionately to cases that have some special significance or importance. There are two factors in Manitoba that would suggest from the start that this approach will not work in this province - one is that the Chief Justice serves on a full set of panels, not some smaller set skewed toward more important cases; the second is that the Chief Justice delivers a significant number of the single sentence oral decisions that are the Court's way of dealing with routine cases. However, it is still worth running the figures for statistical confirmation of this impression. The logic, of course, is not that the C.J.'s presence causes the appeal, but that both the C.J.'s presence and the subsequent appeal flow from something intrinsically important about the case that has been identified from this very early point.

The fact that there are 11 names on the list for a seven-judge court simply reflects the fact that the five-year period has caught two personnel replacements on the Court - Lyon and Helper leaving the Court, and Hamilton and Freedman joining. Two of the judges (Philp and Kroft) enjoyed supernumerary status for the entire period. The ordering of the judges in Table 5 is driven by the right-hand column, which measures appearances on subsequently appealed panels as a proportion of total panel appearances.

³³ Burton M. Atkin, "Alternative Models of Appeal Mobilization in Judicial Hierarchies" (1993) 37 *American Journal of Political Science* 780.

TABLE 5

FREQUENCY OF APPEALS BY PANEL MEMBERSHIP

Judge	Total panel appearances	Appearances on cases subsequently appealed to SCC	Percentage
Kroft	245	38	15.5%
Hamilton	118	18	15.3%
Philp	222	30	13.5%
Twaddle	274	34	12.4%
Huband	317	35	11.0%
Monnin	320	34	10.6%
Steel	280	26	9.3%
Helper	152	14	9.2%
Freedman	120	11	9.2%
Scott C.J.	276	24	8.7%
Lyon	64	2	3.1%

The figures could not have refuted the hypothesis more clearly - far from the presence of the Chief Justice on a panel signalling a greater likelihood of a subsequent appeal, his numbers are the lowest on the table (except for Lyon, who did not sit on a panel after April 2002). Overall, the spread from top to bottom on the table is small, so much so that we cannot identify any judge or set of judges whose presence serves as either a correlate or a predictor of further appeal.

B. Decision process elements

1. The length of time for reserved decisions

After oral argument, the appeal court panel decides whether to deliver its decision and its reasons orally on the same day, or whether to reserve the decision to develop reasons (almost always written). About 40 per cent of the time, it chooses the former, delivering reasons on the spot - obviously, these are usually very

short reasons, and they seldom include any references to judicial or academic authorities.

If a case is reserved, the median length of time between oral argument and the delivery of reasons is 52 days.³⁴ We can use this figure to categorized the cases into four different types, allocated in terms of how long the panel takes to work through its reasons. The largest group consists of those cases decided orally on the same day, comprising about 40 per cent of the total. The second largest group consists of the cases reserved for two months or less, which amount to 32 per cent of the total. The next group includes cases reserved for two to six months, making up 23 per cent of the total; and the final group are those reserved for more than six months (none was over a year, but four were over nine months), accounting for only 4 per cent of the total.

TABLE 6

FREQUENCY OF APPEAL BASED ON TIME TAKEN FOR DECISION

Length of time taken to issue decision	Total number of cases	Cases subsequently appealed to SCC
Oral decision (same day)	327 (41.1%)	14 (4.3 %)
2 months or less	256 (32.2%)	23 (9.0 %)
2 to 6 months	180 (22.6%)	39 (21.7 %)
More than 6 months	32 (.04%)	10 (31.3 %)
Total	795	86

It seems reasonable to expect some correlation between the length of time a decision is reserved and the likelihood that it will be taken to further appeal. The major reasons for the delay would be the importance and/or the complexity of the case, both of which would take more time to resolve and both of which would suggest a greater likelihood that the losing party will have some aspects or elements that it wants to be considered by a higher court.³⁵ The numbers cer-

³⁴ If we look at all the cases, including the ones decided orally on the same day as the hearing, the median length of time drops to 16 days, but the higher figure seems more useful.

³⁵ Of course, there can be other more prosaic reasons why some cases are reserved for longer than others; I note that a single judge (it would be impolitic to give the name) accounts for nine of the twelve longest delays between oral argument and written reasons.

tainly confirm this hypothesis. Oral decisions are hardly ever taken to appeal and cases reserved for less than the median time are less likely than the average case to be appealed. On the other hand, cases reserved for more than the median time are twice as likely to be taken further and this figure jumps again for cases reserved for six months or more. However, the point should not be pushed too far. An oral decision was the basis for one of the seven cases heard and decided by the Supreme Court.³⁶ Conversely, only one of the four reserved for more than nine months was taken further.

2. The Divided Panel

Perhaps the most dramatic thing that an appeal court panel can do with an appeal is to fail to arrive at a unanimous set of outcome-plus-reasons. Unanimity is the normal outcome – in almost 95 per cent of all the cases handled over the five-year period – but it still happened about once a month that a panel would differ on the resolution of a case. Dissents (disagreeing with the outcome) were more common, but there were also a reasonable number of separate concurrences (agreeing with the outcome but not agreeing, or not agreeing completely, with the reasons). Indeed there were three occasions when the panel failed to generate a set of reasons agreed to by a majority of the panel; this happened twice on a three-judge panel (all three judges wrote),³⁷ and once on a five-judge panel that split two-two-one.³⁸

TABLE 7

FREQUENCY OF APPEALS BY PANEL DEGREE OF UNANIMITY

Degree of Unanimity	Total Cases	Cases appealed
Unanimous	740	70 (9.5%)
Dissenting reasons	34	12 (35.3%)
Concurring reasons	20	2 (10.0%)
Both dissenting and concurring reasons	1	1 (100%)

³⁶ *Siemens v. Manitoba (Attorney General)*, 2000 MBCA 152, [2000] M.J. No. 588, 153 Man. R. (2d) 106 (C.A), aff'd 2003 SCC 3, [2003] 1 S.C.R. 6 [*Siemens v. Manitoba*].

³⁷ *R. v. J.S.S.*, 2001 MBCA 144, [2001] M.J. No. 396, 187 Man.R. (2d) 196 (C.A) leave to appeal to S.C.C. refused 28788 (Jan. 14, 2002) and *Lamont-Daneault v. Daneault*, 2003 MBCA 111, [2003] M.J. No. 318, 177 Man. R. (2d) 235.

³⁸ *Supra* note 28.

There is an obvious reason to expect that disagreement on the panel would correlate with a greater likelihood of subsequent appeal. For one thing, such disagreement indicates a legal issue that involves some complexity and uncertainty, such that the three professionals cannot – either immediately or after a reasoned exchange of views – arrive at a consensual understanding of what the law is and how it applies to the facts at hand. For another, the presence of disagreement on the panel is an indication to the loser that there is still some life in his argument, i.e., some chance that a divided court might go the other way at a higher level. For still another, dissents on matters of law in the court of appeal are, in criminal matters, entitled to access to the Supreme Court as an appeal by right. On this last point, however, in fact appeals by right have largely disappeared from the Supreme Court docket, well down from the 1990s when they made up about a third of the caseload. There were only three appeals by right from Manitoba in the five years under consideration here.

The numbers strongly support the hypothesis that there is a connection between disagreement on the panel and subsequent appeal. Compared with a unanimous panel, a panel with a dissent is about four times as likely to generate an application for leave.³⁹ But the same is not true of separate concurrences, which have no impact on subsequent appeal rates. Although I have argued elsewhere that separate concurrence is a species of judicial disagreement that can on some occasions indicate divisions as serious as dissent (and more serious than some dissents), that argument clearly cannot be applied to the Manitoba Court of Appeal, at least not during this five-year period.⁴⁰ Losers apparently take considerable encouragement from dissents, but none at all from separate concurrences.

3. *The Outcome*

The overall success rate of appeals to the Manitoba Court of Appeal is just under 40 per cent, a figure which is generally consistent with the other provinces. But if we isolate the cases in which there was an application for appeal to the Supreme Court, the corresponding figure is much lower, at just over 25 per cent.

I admit that I find this rather surprising. I thought that the most discouraging result in the provincial Court of Appeal would have been to have an appeal dismissed, suggesting that both the trial judge and the appeal panel have identified the same party as deserving to lose. Conversely, the most provocative result from the Court of Appeal would have been to have an appeal allowed, such that

³⁹ Recalculating the proportions to include the single case with both a concurrence and a dissent, the true rate for dissenting panels is 13 out of 35, or 37 per cent, which is 3.9 times as high as the appeal rate from unanimous panels.

⁴⁰ Peter McCormick, "Blocs, Swarms and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada" (2004) 42 *Osgoode Hall L.J.* 99.

the loser in the court of appeal is having a trial court victory taken away from him. Intuitively, it makes more sense to be appealing to restore the trial decision than it does to be making one more attempt to get a first sympathetic hearing. And pragmatically, in terms of assessing one's odds, it makes more sense as well – in earlier research, I found that the Supreme Court was twice as likely to allow an appeal if it represented an appeal court reversal of a trial court victory.⁴¹ My assumption had always been that the attempts to go beyond the court of appeal would be disproportionately drawn from those cases in which the appeal court had intervened in the trial court decision, which is to say that I thought the success rate in this subset of cases would be substantially higher – at least half again as high – as the overall success rate, not the reverse. But reality cuts in just the opposite direction; when an appeal is allowed, the losing party tries to go further once in every fourteen cases, but when an appeal is dismissed, the losing party does so one in every eight cases. This is quite a pronounced difference.

Perhaps we should refine the measure to include the level of agreement on the appeal court panel. The most provocative outcome would then be not just having a trial court victory taken away by the court of appeal, but to have that done by a divided panel, with one judge still saying that you deserved to win. And the most discouraging outcome would then be not just having an appeal court panel agree with the trial judge that you deserved to lose, but having the appeal court panel do so unanimously. This creates four different possibilities, and I have lined them up in Table 8 in what I had expected to be the increasing likelihood of a further appeal.

TABLE 8

FREQUENCY OF APPEAL BY OUTCOME OF DECISION

Outcome of case at MBCA	Total caseload	Number of cases appealed to SCC
Dismissed unanimously	453	52 (11.5%)
Dismissed divided	30	10 (33.3%)
Allowed unanimously	283	18 (6.4%)
Allowed divided	26	5 (19.2%)

⁴¹ Peter McCormick, "The Supervisory Role of the Supreme Court of Canada" (1992) 3 Sup. Ct. L. Rev. 1.1.

Clearly the strongest factor is the presence of a divided panel, which triples the likelihood of a further appeal whatever the appeal court outcome. But a case is at least half again as likely to be appealed when the Court of Appeal upholds the trial court decision, as when it intervenes to alter the trial court outcome.⁴² Since the database has picked up on all the decisions of the Court of Appeal for five full calendar years, it hardly seems likely that this is some temporary anomaly. It is more likely by far that I have identified something significant and persisting about the decision to appeal, although it still seems counterintuitive for the causality to be running in this direction. This is even more so in light of the earlier research I have already alluded to – the Supreme Court is twice as likely to allow an appeal when the court of appeal has altered a trial court decision, but it is three times as likely to do so when the appeal court panel divided in the process.⁴³

Other research findings point in the same direction. In his study of the way that the U.S. Department of Justice and Solicitor General decides which cases to appeal, Zorn (like me) hypothesized that reversal at the appeal level would increase the likelihood of further appeal because it suggested that such a case was more “winnable” than confirmation at the appeal level. His findings, however, are that the causality is actually working in the opposite direction, although he fails to acknowledge this in his analysis, let alone to suggest what aspect of the appeal decision it might illuminate.⁴⁴ Flemming’s parallel study of the Canadian Department of Justice points the same way (although the finding is not statistically significant), but he does not attempt to explain the finding or to assess its implications either.⁴⁵

⁴² In this table, I included separate concurrences as an example of divided panels, on the argument that the reasons are the most important part of appeal court decisions, and a judge’s action in taking the unusual step of writing minority reasons has to be taken seriously. As the section above demonstrates, the disparities would be even greater had I limited the numbers to dissents alone.

⁴³ *Supra* note 42.

⁴⁴ Christopher J.W. Zorn, “U.S. Government Litigation Strategies in the Federal Appellate Courts” (2002) 55 *Political Research Quarterly* 145 at 158, esp. Table 2.

⁴⁵ Roy Flemming, “Why Does the Federal Government Appeal to the Supreme Court of Canada in Charter of Rights Cases?: A Strategic Explanation” (2007) 41 *Law & Soc’y Rev.*, forthcoming. Actually, Flemming does attempt to explain it by the fact that the federal Department of Justice loses most of its cases in the provincial and federal courts of appeal – a startling (and, I should have thought, unlikely) claim in itself but even if correct, it hardly explains a reluctance to appeal.

C. The reasons for judgment

1. Who Writes

It seems reasonable to think that some judges are more likely to be appealed than others. This might reflect differences in abilities or in expertise (although one would think that the panel would tend to have the stronger or more qualified member write the more challenging decisions, which would reduce this factor.) In previous research, I have found a suggestion that, at the trial level, the question is less of competence than of a style in the courtroom. Specifically, I found that although I could easily identify the handful of judges on both the Provincial Court and the Court of Queen's Bench who generated more than their share of appeals to the Alberta Court of Appeal, there was no correlation between appeal frequency and the success rate of the appeals.⁴⁶ In other words, it wasn't that the judges more often appealed from were objectively worse than their colleagues, such that the lawyers appearing before them were more ready to appeal. It must have been something about the way they handled the trial that left the losers more often dissatisfied than usual even though on the record there was nothing to provoke appeal court intervention. But this factor seems much less relevant to the more cerebral interaction between legal professionals working off the record that is the appeal process; realistically, therefore, although the hypothesis is worth testing, I did not really expect to find very dramatic results.

TABLE 9

FREQUENCY OF APPEAL BY AUTHOR

Judge who authored decision	Total number of decisions	Decisions appealed to SCC
<i>Per curiam</i>	13	5 (38.5%)
Other	7	2 (28.6%)
Hamilton	25	4 (16.0%)
Philp	80	12 (15.0 %)
Twaddle	77	11 (14.3%)

⁴⁶ Peter McCormick, "Conviction Appeals to the Alberta Court of Appeal: A Statistical Analysis" (1993) 31 Alta. L. Rev. 301 and "Sentence Appeals in the Alberta Court of Appeal, 1985-1992: A Statistical Analysis of the Laycraft Court" (1993) 31 Alta. L. Rev. 624.

Helper	57	8 (14.0%)
Freedman	31	4 (12.9%)
Monnin	69	8 (11.6%)
Kroft	36	4 (11.1%)
Scott	149	12 (8.1%)
Huband	175	13 (7.4%)
Steel	64	3 (4.7%)
Lyon	9	0 (0.0%)

Two rows in Table 9 require explanation. *Per curiam* (“by the Court”) decisions are the anonymous (and presumably jointly authored) reasons that Anglo-American courts deliver from time to time. The Manitoba Court of Appeal does not use this device very often – on average, only two or three times a year (which is about the same frequency as the Supreme Court of Canada). One normally thinks of these decisions as unanimous as well as anonymous, and they usually are, but technically the hallmark of the *per curiam* decision is its anonymity and it is possible (although unusual) to have a dissent. The “other” row refers to the occasional practice of a jointly authored decision for the Court, usually involving two of the judges on the panel but on one occasion including all three.⁴⁷ What is striking about these two categories is that they lead the table; both are much more likely than the ordinary single-authored decisions to be the subject of an application for leave to appeal.

I took a closer look at the 13 *per curiam* decisions to see if there is some very focused use of them which logically links to subsequent appeals, but nothing stands out. They are spread out over the five years, somewhat clustered in 2001 and 2004 but spread out through the year even then. They cover the full range of the types of law, and they were argued by different lawyers. They involved nine different judges, and eight differently constituted panels. Some of the decisions were from the bench, others were reserved for weeks; some of the decisions are very short, but some are over ten thousand words long. In other words, their only clearly distinguishing feature is that they are more likely to be appealed,

⁴⁷ *R. v Drury & Hazard*, 2000 MBCA 100, [2000] M.J. No. 457, 150 Man.R. (2d) 64 leave to appeal to S.C.C. refused 28306 (December 4, 2000).

which may mean that this is simply coincidence. Similarly, the co-authored reasons link six different pairs and one trio of judges in a wide variety of cases.

This temporary and probably spurious correlation aside, the table does not suggest that there is any real connection between who writes a decision and whether it is taken further. There is a spread through the table, but the differences are modest. Hamilton and Steel provide the bookends, but on rather modest “n’s” – that is to say, the table appears to suggest that the more times a particular judge delivers decisions for the Court, the more the rate of subsequent appeal tends to move toward the center of the table.

2. Length of reasons

Some of the reasons that the Manitoba Court of Appeal provides for its decisions are very sparse, especially the oral reasons that resolve more than 40 per cent of the caseload. There were, for example, two decisions of only 6 words each and another half dozen that were 12 words long. At the other extreme, there were 13 decisions that were more than 10 000 words long, one of which was more than 20 000 words.⁴⁸

Word counts are significant because they serve as a proxy for important judicial resources – namely, time and effort. Small differences prove nothing (a decision of 5000 words is probably not significantly different from one of 5500 words), but the larger and more persisting disparities are worth noting. If a judge can explain the outcome to the parties (or at least their lawyers) in 50 words or less, it is a clear indication that there was not a legal issue of much significance involved in the case. Conversely, if a judge invests the time and effort to write a 10 000 word decision that canvasses judicial opinions in other provinces and countries and that draws on the recent periodical literature, this is an expenditure of time and energy that can only be justified by a legal issue of some real importance. It is true that the old judicial saying is “I wrote a long decision because I did not have time to write a short one,” but the point is that caseload demands are high enough and constant enough that all judges work under the same constraints. Even if in a perfect world of greater leisure all decisions would be shorter, the longer ones would still reach further and with more thoroughness than the shorter ones.

⁴⁸ The traditional way of registering decision length was the page count, but in an age when decisions are generally accessed online, page numbers become irrelevant (no matter how long the decision, it takes only one “page” on the Internet); and since word processing programs can count words in a blink, that is the more objective and intermeasurable way to compare lengths.

TABLE 10
FREQUENCY OF APPEALS BY LENGTH OF REASONS

Length of reasons	Number of decisions	Decisions appealed to SCC
Less than 400 words	301	14 (4.7%)
400 to 4 000 words	371	41 (11.1%)
Over 4 000 words	123	31 (25.2%)

The cut-off points are somewhat arbitrary, but moving them slightly higher or lower would not change the pattern. Shorter decisions are rarely appealed – the cut-off point of four hundred words is about the contents of a single page of this article (and some decisions are considerably shorter, at a single paragraph or even a single sentence), and less than one in every fifty is taken further. Mid-size decisions (one to ten pages) are appealed at the one-in-nine rate that is the organizing point of this discussion. But longer decisions – over ten pages – are appealed more than twice as often.

One can push the argument even further. Over the five years there were 13 decisions in which the reasons for judgment exceeded 10 000 words in length (about the length of this article); 9 of them (or 69.2 per cent) generated applications for leave. And, one final poetic note: the longest Manitoba Court of Appeal decision of the five years, the only one to top 20 000 words, was the single case that generated two appeals when the two accused (Lamirande and Guimond) filed separate applications for leave to appeal.⁴⁹ Length of reasons is a significant correlate of the decision to appeal, presumably because both relate to the importance of the underlying issue or issues.

3. Citations to authority

A substantial minority of the decisions of the Manitoba Court of Appeal make no reference at all to authority; sometimes because they are so brief, and sometimes because they are so tightly linked to factual findings or statutory application, the reasons are straight text with no footnotes. About 45 per cent of the Court's decisions take this form.

⁴⁹ *Supra* note 7.

The other 55 per cent include one or more references to prior judicial decisions, but we can push this a step further. Two hundred and sixty three cases make some reference to prior decisions of the Manitoba Court of Appeal itself and 306 cases make some reference to Supreme Court decisions. It seems reasonable to treat these two as the first logical sources to go to in most areas of law (and of course these cases overlap because the references are purely to these two courts). But in 263 cases, the Court of Appeal goes further, citing decisions from other Canadian courts – usually provincial courts of appeal, but sometimes the Federal Court of Appeal or trial courts. It seems reasonable to treat this as suggesting the exploration of legal issues of greater complexity or contentiousness, just as the 106 cases that cite foreign decisions (usually English or American) are casting the net even wider. Finally, it is increasingly the case that modern Canadian appeal courts make some use of the periodical and academic literature as well, and the 127 cases that cite these sources can be taken as evidence of further research in support of the resolution of the immediate cases. If word length alone suggests importance, I would suggest that the use of citations to authority, and especially to a wider range of authorities, is a proxy for the complexity of the issues involved in the case, and therefore a plausible correlate of the decision to appeal further.

TABLE 11

FREQUENCY OF APPEALS BY CITATION TO AUTHORITY

Type of citation to authority	Number of decisions	Decisions appealed to SCC
No citations	372	18 (4.8%)
Judicial citations	419	68 (16.2%)
-Manitoba cases	263	43 (16.3%)
-Supreme Court cases	306	58 (19.0%)
-other Canadian cases	263	55 (20.9%)
-foreign cases	106	26 (24.5%)
Academic citations	127	31 (24.4%)

The numbers support the hypothesis. Only one in twenty of the decisions whose reasons do not cite authority are the subject of a request to appeal to the Supreme Court of Canada. This more than triples when there is any citation to

authority at all, and as the search for judicial authority works past the Manitoba Court of Appeal and the Supreme Court to other Canadian courts, to foreign cases, and to academic works, the frequency of further appeal continues to climb.

IV. CLEARING THE THRESHOLD: SUCCESSFUL APPLICATIONS FOR LEAVE

To this point, I have discussed the cases in which there is an attempt to appeal beyond a decision by the Manitoba Court of Appeal, and I have been comparing that set of cases with the total universe of Manitoba Court of Appeal decisions over a five-year period starting in January 2000. But most applications for leave fail, and in recent years the failure rate has been going up; now, the chances of being granted leave to appeal by the Supreme Court are below one in eight, as is shown in Table 12.⁵⁰ For applications from Manitoba, the success rate was slightly lower, at just under one in ten (8 out of 85).

TABLE 12

COMPARISON OF SCC APPLICATIONS FOR LEAVE SOUGHT AND GRANTED: 2000-2003

Calendar Year	Applications for leave to appeal	Applications granted
2000	634	84 (13.2%)
2001	658	79 (12.0%)
2002	486	53 (10.9%)
2003	598	75 (12.5%)
Total	2376	291 (12.2%)

It has to be remembered, though, what the purpose of the leave process is. The point is not to allow a panel of the Supreme Court of Canada to sift through the applications in order to find those cases which it thinks are most likely to include a judicial error, in the sense of being the most likely to be re-

⁵⁰ Data is from the statistics provided on the SCC website; numbers for 2004 are not yet available, as a large number of the applications are still indicated as "pending."

versed. We know this is not the case because the success rate for appeals heard by the Supreme Court was exactly the same in the years before the modern leave process was instituted in 1975 (when the caseload was 85 per cent appeals by right and 15 per cent appeals by leave) as it was in the years after (when the caseload was 85 per cent appeals by leave and 15 per cent appeals by right), and this figure simply could not have remained unchanged if the panels were pre-selecting cases on the basis of the likelihood of reversal. Rather, cases are accepted for hearing because of the “public importance” of the issues (or, more circularly, because they are of a nature or significance to warrant decision by the Supreme Court – disagreement between two or more courts of appeal might be the most obvious example). The message from this lower rate of successful applications is therefore not the mildly positive idea that the Supreme Court thinks that the Manitoba Court of Appeal is slightly less likely than the average court of appeal to stand in need of correction, but rather the mildly negative idea that a case from Manitoba is slightly less likely to provide the opportunity for considering an issue of public importance than cases from an “average” province.⁵¹

TABLE 13

NUMBER OF MBCA CASES HEARD BY SCC BY TYPE OF LAW

Type of law	Number of decisions by MBCA	Decisions appealed to SCC	Appeals heard by SCC	Successful appeals
<i>Charter</i>	31	15	6	3 ⁵²
Public	97	20	0	-
Criminal	297	22	5	0
Private	370	29	0	-

The basic theme of Table 13 is obvious – it is the increasing importance of

⁵¹ The slightest shift in timing would probably have changed these numbers – during the first nine months of 2000, the Supreme Court handed down no fewer than eight decisions on appeals from the Manitoba Court of Appeal, but all had been decided by the Manitoba Court before my turn-of-the-century cut-off date.

⁵² One case (*R. v. B.W.P.*) was pending at the time of writing. See Editor’s note, *supra* note 24.

criminal law and (even more so) of *Charter* cases as we move through the “funnel” from the total universe of Court of Appeal cases to the final column of successful appeals to the Supreme Court. Public law and private law cases gradually disappear; they make up the large majority of all appeal court decisions and a narrow majority of applications for leave, but none of them cleared the hurdle for a hearing on the merits before the Supreme Court.

But this statement about cases from Manitoba cannot be generalized; the total caseload of the Supreme Court over the first five years of the new century consisted of 18 per cent *Charter* cases, 31 per cent criminal cases, 26 per cent public law cases, and 25 per cent private law cases. Almost all the private law cases (more than 80 per cent) are drawn from Quebec, Ontario and British Columbia; most of the public law cases come from the Federal Court of Appeal, Quebec and B.C. And although *Charter* cases were the most likely to succeed (53 per cent, compared with 45 per cent for criminal law cases, 43 per cent for public, and 41 per cent for private), the differences are much less stark and dramatic than the Manitoba subset would seem to imply. There is a further distinction to be drawn: in the first five or ten years of the *Charter*, almost all of the *Charter* caseload was drawn from criminal cases – that is to say, from cases in which individuals (or more rarely, corporations) confronted the Crown in the context of a prohibition and a penal consequence. That is still the case for Manitoba: only one of the successful applications for leave (*Siemens v. Manitoba*) involved a *Charter* case that was not also a criminal case.⁵³ But for the Supreme Court caseload over the five years, fully half of the *Charter* cases (36 out of 72) occurred outside the criminal context – among the more significant examples being such cases as *Sauvé v. Canada (Chief Electoral Officer)*, *Figueroa v. Canada (Attorney General)*, *Gosselin v. Quebec (Attorney General)*, *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *Dunmore v. Ontario (Attorney General)*, *Syndicat Northcrest v. Amselem*, *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, and *Trociuk v. British Columbia (Attorney General)*.⁵⁴ In this respect as well, the Manitoba case set is not typical.

Because the number is sufficiently small, it is possible to do a survey of all the Manitoba Court of Appeal decisions considered by the Supreme Court of Can-

⁵³ *Supra* note 37.

⁵⁴ *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519; *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835.

ada during the period.

A. Non-Charter Cases

1. *Right of Appeal Cases (Cases #1, #2 and #3)*

Three surprisingly similar cases reached the Supreme Court as appeals by right.⁵⁵ All three involved questions about the reasonableness of a trial judge's verdict, and in all three cases the doubt about reasonability grew out of the less-than-completely-satisfactory testimony of the alleged victim (two under-age persons, one 79-year-old woman). In two of the cases, the majority of the three-judge panel of the Manitoba Court of Appeal considered the matter at some length (several thousand words) and reviewed the relevant precedents before deciding that the trial judge had behaved reasonably. In the third case, the Court of Appeal decided at the end of the process that the witness was not sufficiently credible and reversed the trial court decision. In all three, a single judge (Twaddle twice, Kroft once) disagreed, writing somewhat shorter reasons to explain his dissent, and the presence of this dissent gave the losing side a right of appeal – twice this was a second appeal by the convicted accused, and once it was an appeal by the Crown seeking to restore the trial judge's verdict. All three were heard by the Supreme Court within less than a year (two by the minimum five-judge panel, one by a nine-judge panel). All were dismissed on the same day without being reserved for written reasons, all three sets of oral reasons were short (the three combined would not take up half a page), and only one (*R. v. V.C.A.S.*) was not unanimous, although the dissenter presented no reasons. Even the terminology was roughly parallel – “not persuaded the trial judge was mistaken” and “did not see any reason to differ” from the Court of Appeal, and “no reasons were presented” for the Court to interfere with the lower courts' decisions. It seems reasonable to think that all three would have been denied leave to appeal, had that hurdle blocked their way – the reasonableness of this assumption flowing not from the fact that they were dismissed, but from the fact that the decisions were given in purely formulaic language that adds nothing to the jurisprudence. On the other hand, it is curious that although two of the cases were assigned to the absolute minimum size of panel (which is true of only one-eighth of all decisions of the McLachlin Court, and therefore worth noticing), one (*R. v. V.C.A.S.*) was assigned to the full panel of nine. At some point in the process, someone must have thought that there was something in *R. v. V.C.A.S.* that might be significant, although in the event this failed to materialize.

⁵⁵ The three were: *R. v. L.A.P.* *supra* note 23; *R. v. V.C.A.S.*, 2001 MBCA 85, [2001] M.J. No. 249, *aff'd* 2002 SCC 36, [2002] 2 S.C.R. 414 [V.C.A.S.]; and *R. v. Willis*, 2002 MBCA 138, [2002] M.J. No. 413, *aff'd* 2003 SCC 12, [2003] 1 S.C.R. 127 [Willis].

2. *The Non-Charter "By Leave" Cases (Cases #4 and #5)*

The only straightforward non-Charter "by leave" criminal case that was accepted by the Supreme Court from the Manitoba Court of Appeal over the five years was *R. v Woods*⁵⁶. The critical element in this case was the meaning of the legislative term "forthwith" in the context of a demand for a breath sample from a man who was suspected of driving under the influence of alcohol. The complicating circumstance was the fact that the man had initially refused to provide a sample but upon reflection indicated two hours later that he wished to accede to the request. The trial judge accepted the sample and convicted; the summary judgment appeals judge allowed the appeal, excluded the evidence, and acquitted. A unanimous Court of Appeal panel upheld the summary judgment appeals judge and wrote four thousand words of reasons to explain its decision; the core of it was that "two hours later" is not "forthwith," and the behavior of the police in gaining this sample did not fit within the framework contemplated by the legislation. In the Supreme Court, Fish J. for a unanimous seven-judge panel, dismissed the Crown appeal and agreed with the Court of Appeal that the "forthwith" requirement connotes prompt demand and immediate response. In a thirty-eight hundred word judgment, he rejected the "semantic stretch" that would allow it to include a second-thought consent more than an hour after the accused had been arrested for failure to comply with the request, and much more so than the Court of Appeal criticized the Crown for its "valiant" attempt to "overcome the factual, semantic and constitutional barriers to its proposed interpretation of the phrase."⁵⁷ My reason for providing the word count is to show how parallel in scope was the treatment of the issue by the two courts.

*R. v. Blais*⁵⁸ arose in slightly more complex circumstances. The case began at trial as involving hunting out of season, with the defendant presenting two defences: 1) that he was exercising an aboriginal right under s.35(1) of the *Constitution Act, 1982*,⁵⁹ and 2), that the right to hunt on unoccupied Crown land had been extended to Métis under the *Natural Resources Transfer Agreement (NRTA)* of 1930.⁶⁰ By the time the case reached the Manitoba Court of Appeal and the Supreme Court, the issue had been narrowed to the question of the meaning of the *NRTA*. In a unanimous eleven thousand word decision, the Manitoba Court of Appeal said that the term "Indian" has to be understood in the context of its times, and in the 1930s the term was not understood (by others and by the Métis themselves) to include the Métis. As well, the logical structure of the *NRTA* -

⁵⁶ *Woods*, *supra* note 23.

⁵⁷ *Supra* note 25.

⁵⁸ *R v. Blais*, 2001 MBCA 55, [2001] M.J. No. 168, aff'd 2003 SCC 44, [2003] 2 S.C.R. 236 [*Blais*].

⁵⁹ *The Constitution Act, 1982*, being Schedule B to *Canada Act 1982* (U.K.), 1982, c. 11.

⁶⁰ *Constitution Act, 1930*, 20-21 Geo V. c 26 (U.K.)

which linked the expanded right to hunt for food to “reservations” – implies that the term has to be understood in a narrow sense. The question of whether this Métis community could establish a claim to an aboriginal right under s. 35(1) was “not before the Court,” but it was suggested that historical continuity problems meant that the recent decision of the Ontario Court of Appeal in *R. v. Powley* did not necessarily direct the result.⁶¹ In the Supreme Court, a nine-judge panel delivered a unanimous *per coram* decision of fifty-five hundred words to dismiss the appeal. The term “Indians” in the Manitoba *NRTA* did not include the Métis, this conclusion being based on the usage of the time and by the fact that the inclusion of the Métis is not consistent with the purpose of that section of the *NRTA*. There was therefore “no reason to disturb the lower courts’ findings”⁶² and since the question of s. 35(1) had not been argued before the Court, it declined to comment. It is unusual in a double sense for the Supreme Court reasons to be so much shorter than the Court of Appeal reasons – firstly, because it is unusual for the Manitoba Court of Appeal to write such extended reasons (the average being just over two thousand words); and secondly, because it is unusual for the Supreme Court to write so briefly (the average is just under ten thousand words).

B. Charter Cases

Up to this point, the Manitoba Court of Appeal is looking very strong – there does not appear to be any daylight between its position on a string of cases, and the final position taken up by the Supreme Court (often unanimously). With respect to the six *Charter* cases, however, the story is rather different – the Manitoba Court of Appeal has been reversed three times (*R. v. Buhay*,⁶³ *R. v. Mann*⁶⁴ and *R. v. Elias*⁶⁵), upheld twice (*R. v. Orbanski*⁶⁶ and *Siemens v. Manitoba*⁶⁷), and one case is still awaiting oral argument (*R. v. B.W.P.*)⁶⁸. At first glance, this does not look like a very impressive performance, since the Court has been reversed

⁶¹ *R. v. Powley*, 53 O.R. (3d) 35, 196 D.L.R. (4th) 221, *aff'd*, 2003 SCC 43, [2003] 2 S.C.R. 207.

⁶² *Supra* note 59 at para. 42.

⁶³ *R. v. Buhay*, 2001 MBCA 70, [2001] M.J. No. 215, *rev'd* 2003 SCC 30, [2003] 1 S.C.R. 631 [*Buhay*].

⁶⁴ *R. v. Mann*, 2002 MBCA 121, [2002] M.J. No. 380, *rev'd* [2004] 2004 SCC 52, [2004] 3 S.C.R. 59 [*Mann*].

⁶⁵ *R. v. Elias*, *supra* note 18.

⁶⁶ *R. v. Orbanski*, 2003 MBCA 43, 2003 M.J. No. 99 *aff'd R. v. Orbanski*; *R. v. Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3 [*Orbanski*].

⁶⁷ *Supra* note 37.

⁶⁸ *Supra* note 24.

more often than it has been upheld – bluntly, a failing grade. But the point is that most *Charter* appeals to the Supreme Court are successful, and during the first five years of the century there were only two appeal courts – British Columbia and the Federal Court of Appeal – that were affirmed more often than they were reversed. Indeed, if its decision in *R. v. B.W.P.* is upheld, Manitoba will move into a tie for third place.⁶⁹

1. The Criminal Charter Cases (Cases #6, #7, #8, #9 and #10)

Buhay (Case #6) was a *Charter* case dealing with search and seizure. Private security guards at a bus depot, responding to smells emanating from a rental locker, opened the locker and found a duffel bag containing marijuana. They notified police, who seized the marijuana and then kept the locker under surveillance, arresting the individual who opened it the next day. Did the absence of a judicial warrant mean that *Buhay's Charter* rights had been violated, given the expectation of some degree of privacy and security that attached to the rental of a locker? A unanimous Manitoba Court of Appeal agreed with the trial judge, who found that the private security guards were not agents of the state, so there was no state action involved in the opening of the locker, and no problem when the security guards handed the material to the police. There was no need for the police to get a warrant before coming to get the evidence from the security guards, because the police themselves neither searched nor seized. More significantly, they treated this as such an obvious conclusion that it did not need extended explanation or a thorough review of the case-law – it was decided in less than a thousand words (about two pages) and without a single citation to the decision of any court. In the Supreme Court, Arbour J. for a unanimous nine-judge panel allowed the appeal. The accused had a reasonable expectation of privacy in the use of the rental locker. The actions of the security guards did not in themselves violate the *Charter*, but when the police were notified, they should have obtained a warrant before seizing the evidence and putting the locker under surveillance; the intervention of the security guards does not relieve the police from the requirement of prior judicial authorization. She reached this conclusion after an extensive review of the prior decisions of the Supreme Court itself and a number of provincial courts of appeal, including two references to American case-law. The reasons extended to ten thousand words, not an unusually long decision for the Supreme Court, but a much more significant deployment of resources than had been the case for the Manitoba Court of Appeal.

Mann (Case #7) raised the question of a “frisk search” (or “pat search”). Investigating a reported break and enter, the police found a man who resembled the description of the suspect. When they stopped him, he agreed to comply

⁶⁹ See Editor's note, *supra* note 24.

with a frisk search, which turned up a soft lump in a jacket pocket that turned out to be a pouch containing marijuana. The trial judge excluded the evidence because he found a violation of the *Charter* right protecting people from arbitrary search and seizure; the police had no reason to remove and look into a soft pouch. But a unanimous Court of Appeal, in a four thousand word decision, identified a common law power to detain and frisk search; what the police had done was not a violation of the *Charter*, and had not been carried out in an unreasonable way. In the Supreme Court, Iacobucci J. for five judges of a seven-judge panel allowed the appeal in a nine thousand word decision. He found that a pat-down search for weapons was legitimate in the circumstances described, but this did not extend to looking through pockets at “soft” objects which could not plausibly have been regarded as possible weapons. The minority conceded a *Charter* violation but did not think that exclusion of the evidence was an appropriate remedy.

Two cases – *Orbanski* and *Elias* (Cases #8 and #9) – are so closely parallel that it would be redundant to describe them separately; indeed, the Supreme Court of Canada joined both cases for a single decision. Both cases involved drivers who were stopped by police – one when he was observed driving erratically, the other at a random check stop. In both cases, police testified that they could smell alcohol and asked the drivers if they had been drinking. Both were asked to undergo further tests – sobriety tests for *Orbanski*, and an approved screening device for *Elias* – after which they were charged with impaired driving and driving over .08. In both cases, the trial judge excluded the evidence because the police did an inadequate job of informing the drivers of their rights, and because the questioning before the application of a test to confirm police suspicions was improper. The Manitoba Court of Appeal agreed in both cases that there had been a *Charter* violation, but did not agree that exclusion of the evidence was a reasonable remedy (because the exclusion of the evidence was more likely to bring the administration of justice into disrepute than its admission). To highlight the continuity between the two cases, they were handled by the same panel (Philp, Kroft and Freedman) and the reasons were delivered by the same member of the panel (Philp). In both cases, the analysis was extensive – twelve thousand words in *Orbanski* and nine thousand words in *Elias* – although in the latter case, Kroft wrote separate concurring reasons backing away from the earlier case to find there was no *Charter* violation, but (obviously) agreeing with the outcome that the evidence be admitted and the case be sent back for retrial. *Orbanski* appealed his conviction; in *Elias*, the Crown, the nominal “winner” in the immediate case, sought leave to appeal, seeking a ruling from the Supreme Court not just that the evidence should be admitted but that there had been no *Charter* violation in the first place.

The Supreme Court obliged; Charron J. for seven judges on the nine-judge panel allowed that the police procedures constituted a *prima facie* violation of the

right to counsel, but found that the violation was reasonable, given the context of the police/motorist interaction in relation to the serious problem of the “menace” of drinking and driving. There was, therefore, no *Charter* violation, and hence no reason to consider the question of a remedy. Two judges (LeBel J. and Fish J.) disagreed, and preferred the reasoning of the Manitoba Court of Appeal. Given the slightly complicated circumstances of the combined appeal, this meant that they were dissenting in *Elias* but separately concurring in *Orbanski*, in both cases favoring the finding of a *Charter* violation that was not a reasonable limit but which nonetheless did not warrant exclusion of the evidence. And one last curious consequence: a closer look at this pair of cases suggests that the earlier count is actually too generous to the Manitoba Court of Appeal, because the upholding of the *Orbanski* decision represents an interference (subtle but significant) in the doctrinal position of the Manitoba Court, one that is just as significant as (because absolutely identical to) the correction implied by the reversal in *Elias*.

B.W.P. (Case #10) is a sentence appeal, concerning the new sentencing provisions for young offenders under the *Youth Criminal Justice Act* (YCJA),⁷⁰ and more specifically the question of whether the Act permits (or even requires) deterrence as a sentencing principle to guide the discretion of the sentencing judge. In this case, the Crown was appealing the Court of Appeal’s ten thousand word decision that deterrence is not a sentencing principle within the new legislative regime; there was also a cross-appeal by the defendant challenging the “serious violent offender” designation in the Act as violating the *Charter* by constituting retroactive criminal legislation. At time of writing, the case has still not gone to oral argument, having been held up by the consideration of applications for intervenor status; it has been joined with another case, *R. v. B.V.N.*,⁷¹ which similarly involves sentencing under the YCJA (although it does not involve a *Charter* challenge).⁷² This grouping of cases to allow the Supreme Court to give its first definitive statement on a recent legislative change is reminiscent of the quintet of cases through which the Supreme Court pronounced on the new conditional sentencing provisions of the Criminal Code in 2000⁷³ – and, intriguingly, that quintet as well was centered on an appeal from Manitoba, namely *R. v. Proulx*.⁷⁴

⁷⁰ *Youth Criminal Justice Act*, S.C. 2002, c. 1

⁷¹ *R. v. B.V.N.*, 2004 BCCA 266, [2004] B.C.J. No. 974.

⁷² See Editor’s note, *supra* note 24.

⁷³ The quintet was: *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. L.F.W.*, 2000 SCC 6, [2000] 1 S.C.R. 132; *R. v. R.N.S.*, 2000 SCC 7, [2000] 1 S.C.R. 149; *R. v. R.A.R.* 2000 SCC 8, [2000] 1 S.C.R. 163; and *R. v. Bunn*, 2000 SCC 9, [2000] 1 S.C.R. 183.

⁷⁴ It is also worth noting that this duo, like the earlier quintet, represent departures from the Supreme Court’s normal rule of not hearing sentence appeals.

2. The Non-criminal Charter Case

Siemens v. Manitoba (Case #11) involved provincial legislation that enabled municipalities to hold binding plebiscites on the question of permitting video lottery terminals (VLT's) within their jurisdiction. One town (Winkler) had previously held a non-binding plebiscite on the matter, and the legislation specifically incorporated the outcome of that vote, with the result that VLT's were banned from the community until and unless a new plebiscite reversed the earlier decision. This new law was challenged as being *ultra vires* the provincial government and also as violating *Charter* rights – voting rights because people in Winkler had been denied an initial binding plebiscite, and equality rights because the community was singled out for differential treatment. The challenges were dismissed by the motions judge, and on appeal the Manitoba Court of Appeal unanimously and very briefly upheld the motions judge on all issues without expanded argument. The decision ran to only 274 words, not much more than a good-sized paragraph, half of which simply quoted the motion judge's decision. In the Supreme Court, Major J. for a unanimous nine-judge panel dismissed the appeal in 7 800 words. The *Gaming Control Local Option (VLT) Act* (or “VLT Act”)⁷⁵ was *intra vires* in its entirety; it was not a colourable attempt to legislate on criminal matters, and the local option feature did not improperly abdicate the provincial legislature's law making responsibilities. There was no *Charter* violation of the right to vote because the *Charter* guarantee relates to elections to the legislature and the House of Commons, not to referendums; and there was no violation of equality rights because the town that was singled out is not historically disadvantaged, and because there was no discrimination in any substantive sense.

What I find striking here is that although the outcome is unchanged, the two courts treated the matter in an entirely different way, the Court of Appeal dismissing it formulaically and the Supreme Court writing a small legal essay laying out the issues and deploying the case-law. Appeal courts do not just resolve disputes – they also give reasoned explanations to guide the future behavior of lower courts and other actors, and to make their own future behavior more predictable. When they write extremely brief decisions, they are essentially saying that there is nothing particularly significant in the case to talk about; when they write longer decisions, they are identifying the major issues and contributing to the jurisprudence. What clearly happened here is that the Supreme Court did, and the Manitoba Court of Appeal did not, think that the *Siemens* case raised issues requiring elaboration and explanation, and in some ways the mismatch here is just as striking as a reversal.

In general, the division between “*Charter*” and “other” cases is absolutely critical. On other issues (or at least on non-*Charter* criminal matters, since no other cases cleared the application for leave hurdle), the Supreme Court and the Mani-

⁷⁵ *Gaming Control Local Option (VLT) Act*, C.C.S.M. c. G7.

toba Court of Appeal are at one. Sometimes the Supreme Court dismisses formulaically, which I think translates not just as “no reason to interfere” but also as “we have nothing to add” (*Willis*, V.C.A.S., L.A.P.). Sometimes it simply echoes the Manitoba Court of Appeal, which has the effect of turning provincial binding precedent into national binding precedent (*Woods*, *Blais*). It could also use the Manitoba decision as a stepping stone to a more detailed treatment of a broader issue, as clearly happened with *Proulx* and may be about to happen again with *B.W.P.*

But on *Charter* cases it is a totally different matter. As I have tried to illustrate on a case-by-case basis, none of the *Charter* appeals suggest anything near the close fit in approaches and outcomes demonstrated by the non-*Charter* appeals. The Manitoba Court of Appeal is usually reversed (*Buhay*, *Mann*, *Elias*), and even when it is upheld, it is done in such a way as substantially to change the grounds (*Orbanski*) or to suggest that the Manitoba Court failed to identify substantive issues deserving discussion (*Siemans*). This sounds like I am saying something about the Manitoba Court of Appeal, but of course I am not – I am saying something about the case selection process, and the way that it has impacted the visible interaction between the Manitoba Court of Appeal and the Supreme Court of Canada over a specific period of time. What is striking is that the difference in the inter-court discourse relating to these two types of cases is so complete – not “usually,” but “always;” not “some cases” but “all cases.”

V. SUMMARY OF FINDINGS

On the basis of the empirical data, the following generalizations can be supported with regard to the type of cases that are more likely or less likely than average to be the subject of an appeal by right or an application for leave to appeal beyond the Manitoba Court of Appeal:

First: *Charter* and public law decisions are frequently appealed; non-*Charter* criminal cases and private law cases are rarely appealed.

Second: Governments (less so municipal governments) and trade unions are the most likely litigant categories to appeal; the Crown is the least likely.

Third: Governments (including municipal governments) and the Crown are the most likely litigant categories to be appealed against.

Fourth: Larger panels are somewhat more likely to be appealed, although they are now so unusual that the numbers do not really provide an adequate basis for comparison.

Fifth: There is no judge or set of judges whose presence on a panel is more likely to result in a further appeal, not even the Chief Justice whose presence might have been thought to signal an important case; if anything, the presence of the C.J. makes further appeal less likely.

Sixth: Cases that are reserved for longer than average are more likely to be

appealed; the frequency jumps with cases reserved for two months or more, and again for cases reserved for six months or more.

Seventh: The presence of a dissent makes subsequent appeal more likely (even though appeals by right have become vanishingly infrequent); the presence of a separate concurrence does not.

Eighth: Successful appeals to the provincial Court of Appeal are less likely than unsuccessful appeals to be appealed further.

Ninth: *Per curiam* decisions (of which the Manitoba Court of Appeal delivers two or three a year) are considerably more likely than single-authored decisions to be appealed; the same is also true of the smaller number of jointly authored decisions.

Tenth: Short decisions (under four hundred words) are unlikely to be appealed; long decisions (over four thousand words) are considerably more likely to be appealed, and very long decisions (over ten thousand words) are usually appealed, suggesting that length does serve as a reasonable proxy for importance.

Eleventh: Cases decided without any citations to authority are very seldom appealed; as the authority decided goes beyond the most obvious (the Manitoba Court of Appeal itself and the Supreme Court of Canada) to the less obvious (other Canadian courts, foreign courts, and academic authority) the likelihood of appeal increases, suggesting that citation type and frequency does serve as a reasonable proxy for complexity.

Twelfth: Criminal cases and *Charter* cases (the two categories overlapping to a very large extent) are the most likely – indeed, in recent years, the only – types of cases to be granted leave to appeal.

Thirteenth: The criminal cases heard by the Supreme Court suggest a very close fit with the style and content of the Manitoba Court of Appeal; the *Charter* cases strongly suggest a much more significant degree of divergence between the two.

Some of these conclusions (such as the fact that a dissent makes appeal more likely) are obvious; others (such as the fact that there is more likely to be a further appeal when the Court of Appeal dismisses an appeal than when it allows the appeal) are counter-intuitive; others (such as the heightened profile of *Charter* cases) might have been anticipated and here are confirmed. They represent only a first look at the phenomenon of the decision to appeal to the Supreme Court of Canada; this is part of a larger project (more provinces, more years) that will support the creation of a more sophisticated model that is not constrained by the particularities of a single province or the small “n’s” involved. At the very least, this discussion demonstrates that the supervisory role of the Supreme Court is more extensive than might have appeared from the fact that it considered only eleven appeals from Manitoba in five years; a more accurate statement is that the Supreme Court was invited to take a look at more than 80 Manitoba decisions over that period, a sample that makes up more than ten per cent of the Court’s entire caseload, and this is a more continuous interactional dynamic than we

might have assumed.

The divergence between (non-*Charter*) criminal and *Charter* appeals is very striking - so much so as to suggest that the interaction of the two levels of court, and the degree and type of supervision implied, is completely different for *Charter* cases than it is for other cases. The fact that *Charter* appeals to the Supreme Court are significantly more likely to result in reversals of the appeal court decision suggests that this conclusion may well be generalizable. To be sure, this conclusion rests on less than a dozen cases over a rather short five-year period; the analysis would have to be extended to more provinces and a broader time period before this could be asserted with any confidence.