

Measuring Judicial Performance, Power, and Precedent: Some Reflections on the Empirical Studies of Peter McCormick on the Occasion of His Retirement*

A L V I N E S A U * *

I. INTRODUCTION

One of the projects that I initiated as head of the Legal Research Institute (LRI) at the University of Manitoba in the late 1980s was an attempt to stimulate research, primarily, but not exclusively within the law faculty, by publishing through the *Manitoba Law Journal* an annual survey of jurisprudential developments in Manitoba in various doctrinal areas of the law.¹ It was precisely at this fortuitous point that Peter McCormick, Political Science Professor at the University of Lethbridge, submitted his first statistical analysis of the Manitoba Court of Appeal, which fit perfectly with our agenda.²

* This is a slightly edited version of a presentation at a symposium at the University of Lethbridge on March 13, 2015, celebrating Peter McCormick's illustrious forty year career as a Political Science scholar at that University. Other speakers included Ian Greene (York); Troy Riddell (Guelph); Peter Russell (Toronto); Rainer Knopff (Calgary); and, of course, Peter McCormick (Lethbridge).

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¹ The larger goal of the Manitoba Legal Research Institute to have an annual issue devoted to Manitoba legal developments has not been successful, appearing only sporadically, although the legislative side of Manitoba developments has been covered by an annual *Under the Golden Boy*, volume 2 issue of the *Manitoba Law Journal* under the guidance of Professor Bryan Schwartz.

² Finally published as Peter McCormick, "Case-Load and Output of the Manitoban Court of Appeal: An Analysis of Twelve Months of Reported Cases" (1990) 19 Man

Apparently the main reason that I have been invited to this symposium is that I continued to solicit these McCormick studies on the Manitoba Court of Appeal for purposes of the annual survey issues, and McCormick produced at least ten articles in the *Manitoba Law Journal* over the years. More importantly, if memory serves me properly, I suggested to McCormick that he should study the appeals from the Manitoba Court of Appeal to the Supreme Court of Canada, as another measure of the performance of the Manitoba court. He readily accepted this assignment, and with LRI funding, he developed a database of Supreme Court decisions to advance the work. Of course, with this beginning, and with experimenting with the Manitoba Court of Appeal in terms of statistical and theoretical methodologies, McCormick went on to become the leading scholar in the statistical analysis of the Supreme Court of Canada, publishing dozens of articles in a wide variety of law journals across Canada, as well as several books.

I am delighted to have had a small part to play in the scholarly trajectory of a great Canadian scholar. I want to comment briefly on three topics: first, McCormick's Manitoba work; second, McCormick's scholarship on the Supreme Court of Canada; and finally, McCormick's most recent book.³

II. MCCORMICK ON PROVINCIAL COURTS OF APPEAL (ESPECIALLY MANITOBA)

I want to make a few brief remarks as to the empirical work of McCormick related specifically to the *Manitoba Law Journal* articles. These articles may be placed into two broad categories: first, the statistical studies on the Manitoba Court of Appeal's own decisions; and second, the study of Manitoba appeals taken to the Supreme Court of Canada.

LJ 31. A companion piece on the equivalent Saskatchewan court was published as Peter McCormick, "Case-Load and Output of the Saskatchewan Court of Appeal: An Analysis of 12 Months of Reported Cases" (1989) 53 Sask L Rev 341.

³ Peter McCormick, *The End of the Charter Revolution: Looking Back from the New Normal* (Toronto: University of Toronto Press, 2014).

A. Manitoba Court of Appeal Decisions

Law students often run the law journal, even if the material is presented to them in bulk by a faculty member for a particular issue.⁴ This being the case, I was rather displeased when the first Manitoba Law Annual had been changed to the “Annual Survey of Manitoban Law,” and McCormick’s article was called “Caseload and Output of the Manitoban Court of Appeal: An Analysis of 12 Months of Reported Cases.”⁵ With respect, we do not call the court the Manitoban Court of Appeal, however grammatically correct that may be in theory.⁶

But moving to the substance of the article, I immediately found the first study of the Manitoba Court of Appeal for the 1987 year very insightful, particularly because McCormick could bring comparative statistics to the project, having looked at the Saskatchewan Court of Appeal for the same year, as well as other Canadian provincial courts of appeal. The article gave us the number of decisions of the court; the proportionate areas of law that the appeals fell into; the success rates for appeals in different areas; the number of times the judgment of the court was not unanimous, but rather included a dissenting judgment or a separate concurring judgment or both; and which judges were more likely to write those dissents and concurrences; the comparative numbers of times that a particular judge would write the decisions of the court; the page lengths; and the overall citation patterns in terms of which precedents the court took into account in their opinions for the year. It was all interesting to me.

This kind of statistical analysis helps to shed light on the court, but also within the context of comparative statistics, McCormick noted, among other things, that both dissent and separate concurrence rates in the Manitoba Court of Appeal in 1987 were at least twice as high as they were for the other three western Courts of Appeal.⁷

⁴ The author was himself an editor-in-chief of the Alberta Law Review while a student, and now regrets many circumstances of ineptitude that he demonstrated in the position.

⁵ *Supra* note 2.

⁶ It also did not help that an important graph at pgs. 42-43 was “garbled” in the printing of the article.

⁷ *Supra* note 2 at 40.

This was a good start, but within a very short space of time, McCormick's statistical work on the Manitoba Court of Appeal became more sophisticated and arguably more controversial as it raised the dragon of attitudinal decision-making theory without explicitly adopting such a meta-theory of jurisprudence.⁸ In the second law annual, McCormick studied the Manitoba Court of Appeal for the year 1989, and while covering the same ground as the previous study, he now provided a detailed analysis of the voting patterns of the judges.⁹

Having read the article, particularly in the context of high levels of disagreement on the court, it would be apparent in criminal appeals, to take just one example, that upon facing Chief Justice Monnin, and Justices Helper, and Lyon as the three judges assigned to the panel, a Crown lawyer, whether appealing or responding to an appeal, might be happy indeed, while the defense lawyer's heart might sink; while on the other hand, if facing a panel of Justices O'Sullivan, Philp, and Huband, it would be the defense lawyer who would be smiling and the sinking heart would

⁸ One recent example of attempting to empirically measure attitudinal decision making is CL Ostberg & Matthew Wetstein, *Attitudinal Decision making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007). It seems obvious, especially when the law is left open to judicial choice, that the personal policy preferences of the judges would play some role, though Ostberg and Wetstein actually find little empirical evidence to prove this in many areas of the court's jurisprudence. Empirical demonstration seems rather weak, partly based on the limited ability to identify what the policy preferences of the judges are in the first place, so as to measure judicial votes against these preferences. The use by Ostberg and Wetstein of a variety of newspaper accounts revealing the possible attitudes of a judge upon appointment seems to me to be a rather haphazard way of identifying personal policy preferences. I would think a careful analysis of past academic writing, if available, would more likely reveal attitudes, as would a candid interview with those who know and have worked with the candidate in question. If attitudes are hard to identify, the coding of decisional outcomes along a spectrum of conservative to liberal can also be rather haphazard. What I found interesting in the book was not the measure of attitudes, but rather the measure of power and performance, as the authors identify the leaders, the followers, and the outsiders in regard to various areas of the court's jurisprudence. Peter McCormick offers a brief review of this book in (2007) 37:4 *The American Review of Canadian Studies* 544. A stronger study of the degree to which political attitudes (and gender, and regional, and religious factors, etc.) play a role, is Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: U of T Press, 2008).

⁹ Peter McCormick, "Caseload and Output of the Manitoba Court of Appeal: 1989" (1990) 19 Man LJ 334.

belong to the Crown.¹⁰ The attitudinal propensity of the judges on a pro-Crown and anti-Crown scale do not, of course, explain the outcome of a vast number of cases that are unanimous, but nevertheless, there does appear in significant numbers of difficult or close call cases the possibility that personal ideology has something to do with the result, and that the “luck of the draw” has entered the realm of the “rule of law.”

Given the fact that having a dissent in the Court of Appeal still gives you the right in some criminal cases to appeal to the Supreme Court of Canada, and may also help to a degree to get leave to appeal from the Supreme Court in other cases, the identification by McCormick as to which pair of judges on a panel were the most or least likely to disagree with each other if they sat on a panel together, might be very relevant information.

McCormick continued to produce studies of the Manitoba Court of Appeal for the 1990 year,¹¹ and for the 1991 year.¹² Now he could compare various years and also aggregate voting behavior over several years to present an even sharper picture of the alliances and fault lines between the justices, and also test to see if the voting patterns were consistent or if there was significant change from year to year. It also appeared to me that McCormick was not just replicating the previous methodology, but was always adding to it. For example, for the 1991 study McCormick started doing a party capability analysis of success rates by different groups of litigants in the Manitoba Court of Appeal.

Within this category of studying the decisions of the Manitoba Court of Appeal, McCormick also did a comparative analysis of citation practices at the Manitoba Court of Appeal compared to other Courts of Appeal in Canada.¹³ The Manitoba Court of Appeal stood out to some degree as citing its own past precedents less, citing English authorities more, citing

¹⁰ My understanding is that panel assignments are generated by a computer program. See Melanie R Bueckert, “Legal Research in Canada’s Provincial Appellate Courts” (2011) 35 *Man LJ* 181.

¹¹ Peter McCormick, “Caseload and Output of the Manitoba Court of Appeal, 1990” (1992) 21 *Man LJ* 24.

¹² Peter McCormick, “Caseload and Output of the Manitoba Court of Appeal, 1991” (1993) 22 *Man LJ* 263.

¹³ Peter McCormick, “Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices” (1993) 22 *Man LJ* 286.

trial level decisions more, and citing academic articles less, compared to other provincial courts of appeal.

As the Manitoba Law Annual project lost momentum, there was a long lull in which no new McCormick studies were commissioned. Fortunately, long after I left the LRI, a student editor at the *Manitoba Law Journal* asked McCormick to return to the Manitoba Court of Appeal statistical work, which resulted in a study of the decisions from 2000 to 2004.¹⁴ The Manitoba Court of Appeal at this stage was quite different from the one McCormick had studied a decade earlier, and it is telling that McCormick did not return to his previous vote counting in regard to alliances and fault lines when there was a panel disagreement, probably because the court at this stage demonstrated a much higher degree of consensus compared to the court a decade previously.

B. Appeals from Manitoba to the Supreme Court of Canada

Let's turn to the second group of McCormick articles dealing with Manitoba, which focused on an examination of the Supreme Court of Canada with special reference to appeals from Manitoba or citations to Manitoba courts. In his first article on this topic, McCormick compared the success rates of appeals to the Supreme Court of Canada from various provincial Courts of Appeal over the then most recent twenty year period, noting that the success rate varied sometimes significantly from province to province.¹⁵ This sort of study raises questions about the possible measures of judicial performance. If the Manitoba court is overturned by the Supreme Court of Canada more frequently than other courts, what does this say about the performance of the Manitoba court? McCormick established that the success rate of having a Manitoba Court of Appeal decision overturned by the Supreme Court was higher than average during this twenty-year period, although not as high as the New Brunswick Court of Appeal.

However, what stood out in McCormick's study was not so much the higher rate of reversals, but the *frequency* of appeals from the Manitoba Court of Appeal which had the highest number of appeals per capita,

¹⁴ Peter McCormick, "The Manitoba Court of Appeal, 2000-2004: Caseload, Output and Citations" (2005) 31 Man LJ 1.

¹⁵ Peter McCormick, "A Tale of Two Courts: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada, 1970-1990" (1990) 19 Man LJ 357.

compared to other Canadian appeal courts. Could this be a measure of performance? Was it an indication of higher litigant dissatisfaction with the decisions of the court? Was it a function of the comparative frequency of dissents in Manitoba leading to appeals as of right in some cases, and perhaps a better chance of getting a leave to appeal from the Supreme Court in other cases? McCormick also examined the various types of cases that were appealed and compared success rates across different provinces, noting the high success rate at the Supreme Court level of appeals in the private law area from Manitoba. He then provided a table of judges from the Manitoba Court of Appeal who wrote the most judgments that were appealed to the Supreme Court and tabulated the frequency with which their judgments were upheld or overturned.¹⁶ Additionally he provided statistics as to which judges at the Supreme Court were more likely to overturn or affirm Manitoba cases.

A follow up article extended this study of appeals from Manitoba through a much longer time period all the way back to 1906, when the Manitoba Court of Appeal was established.¹⁷ While the aggregate of success rates from Manitoba did not differ markedly from other provinces over the long run, there were periodic variances of significance and again McCormick provided an interesting table of Manitoba judges who wrote the judgments most frequently appealed and upheld or reversed.

Again the issue of measuring performance, both of a court as an institution and of particular judges on the court, was raised by McCormick in his examination of the appeals from a particular court to a higher court. These "Tale of Two Courts" articles proved to be somewhat controversial. It seems to me that the bulk of work done by McCormick could be classified as descriptive, rather than driven by some critical theory of the judicial process. McCormick provides the data, and provides various possible explanations, but he is cautious about imposing conclusions on it. However, shortly after the second article was published I received a long letter from a respected law professor from the University of Alberta.¹⁸ He

¹⁶ *Ibid* at 370.

¹⁷ Peter McCormick & Suzanne Maisey, "A Tale of Two Courts II: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada, 1906-1990" (1992) 21 *Man LJ* 1. Prior to 1906 appeals were heard by the Court of Queen's Bench *en banc*.

¹⁸ Letter from Professor {I have chosen not to mention his name} from University of Alberta to Alvin Esau (Dec. 29, 1992).

acknowledged that McCormick had denied a simple link between competence or performance and reversal rates at the Supreme Court, but he objected to the underlying assumption of the article which he claimed did precisely that, namely linking reversal rates with the performance of various judges of the Manitoba Court of Appeal.

Certainly my former professor from Alberta was right to question any simple assumption that in his words, “Supreme Court judges are necessarily more able than lower court judges...to give better answers to legal issues,” or that “there is objective ‘rightness’ in the law, and the SCC knows what it is”, or that “what the SCC says is right because it is the court at the top of the court hierarchy,” or that “the business of the appeal court is to please the SCC.”¹⁹

But what struck me about the objection to implied performance evaluation is how sensitive we are about the topic. We have a vast literature on judicial appointment, judicial independence, judicial education, and judicial discipline, but little on judicial *evaluation*.²⁰ I recall that way back in the late 1970s when I first arrived in Manitoba, some local newspaper interviewed a bunch of lawyers in an anonymous fashion and then published a rating of provincial court judges on various scales of competence, bias, demeanor and so forth. Imagine that! It must have been quite a shock for some of the judges to read about their poor ratings in the morning newspaper.²¹

Admitting all the same problems that exist with ratings of professors on some internet site (as if popularity necessarily equates with educating), and also admitting some tension between evaluation and judicial independence, nevertheless the courts belong to the people. It is our taxes that pay these hefty salaries and most of the other costs of adjudication. Beyond a formal discipline process, why not a formal evaluation process for purposes of professional development? Back in the early half century of the Queen’s Bench in Manitoba when political patronage was the main factor of appointment, at least 12 of the first 33 judges of the Manitoba Queen’s Bench, according to historical analysis, appeared to be

¹⁹ *Ibid.*

²⁰ Troy Riddell, Lori Hausegger, & Mathew Hennigar, “Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy” (2012) 50 Osgoode Hall LJ 403.

²¹ I have lost my copy of the article, and I also recall that a somewhat more muted version of another judicial rating article appeared in a lawyer’s magazine at the time.

incompetent, incapacitated, or obviously lacked impartiality, or suffered from all three disabilities at once.²² I am certainly not suggesting that any of the appeal judges are in such a category based simply on frequency of having their judgments overturned, but rather that we have some basic reticence in Canada about even talking about performance of judges as if we have a duty to protect judges from possible criticism.

If we concede that some of the push-back to McCormick is simply based on a historic reticence to enter the field of judicial evaluation, we must still deal with the problem of identifying factors that might go into any measure of performance. McCormick at one stage gave various factors in relation to the Supreme Court of Canada's *Secession Reference* case, and the United States Supreme Court's decision in *Bush v. Gore*, and then utilizing the factors, gave our court a B grade and the U. S. court a D grade.²³ In a popular book on the Supreme Court, Philip Slayton noted that "[m]ost of the judgments seemed like essays written by diligent B students"²⁴ in law school.

About a decade after his first article on this topic of appeals from the Manitoba Court of Appeal to the Supreme Court of Canada, McCormick revisited the topic by looking at the appeals from Manitoba in more recent years.²⁵ Returning to the controversy over measuring performance, if anything, at this stage Manitoba litigants were slightly less likely to get the Supreme Court to review the Manitoba Court of Appeal compared to other provinces, hinting that the previous "performance" of the court was a thing of the past. Again, McCormick provided a table of the judges of the Manitoba Court most often appealed and the success rate at the Supreme Court of having their judgments overturned. While the spread between the most frequently appealed Justice and the least is perhaps modest, I can imagine again the objections of my Law Professor from Alberta as to the possible performance implications of this table.

²² See for example, my review of Dale Brawn, *The Court of Queen's Bench of Manitoba 1870-1950: A Biographical History* in (2007-2008) 39 *Ottawa L Rev* 149.

²³ *Reference re Succession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*]; and *Bush v Gore*, 521 US 98 (2000), cited in Peter McCormick, "The Political Jurisprudence of Hot Potatoes" (2002) 13 *NJCL* 271.

²⁴ Philip Slayton, *Mighty Judgment: How the Supreme Court of Canada Runs Your Life* (Toronto: Penguin, 2011) at xxvi.

²⁵ Peter McCormick "Try, Try Again: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada, 2000-2004" (2007) 32 *Man LJ* 79.

Another possible measure of judicial power, if not performance, is the frequency with which the decisions of a court, or a particular judge of that court, are cited negatively or positively by the higher court, or by other courts in other provinces. Another McCormick study involved an examination of Supreme Court citations of judicial decisions from the Manitoba Court of Appeal or other courts in Manitoba.²⁶ Again raising the dragon of possible measures of performance and influence on legal developments, we might argue that disproportionately favorable references to decisions of a certain court of appeal or to a particular Justice by the Supreme Court would be an interesting bit of positive data to look at. It would appear from the McCormick study that for its population, Manitoba decisions do not stand out disproportionately as either cited more nor less by the Supreme Court compared to the other Western provincial courts of appeal. Nonetheless, McCormick again provides a table of the most frequently cited judges from the Manitoba Court of Appeal in the 1984 to 1993 period.²⁷ When you put that table together with the overall list of the most cited Court of Appeal judges, the top Manitoba cited Justice (Chief Justice Monnin) only ranks at 18th place.²⁸

C. Other Provincial Courts of Appeal

While McCormick was producing these empirical studies of the Manitoba Court of Appeal, he also published some studies that focused on the Alberta Court of Appeal,²⁹ as well as important work that looked at

²⁶ Peter McCormick & Tammy Praskach, "Judicial Citation, the Supreme Court of Canada, and the Lower Courts: A Statistical Overview and the Influence of Manitoba" (1996) 24 Man LJ 335.

²⁷ *Ibid* at 355.

²⁸ See Peter McCormick, "Judicial Citation, the Supreme Court of Canada, and the Lower Courts: The Case of Alberta, 1984-1994" (1996) 34 Alta L Rev 870, where we find the list of the most cited Judges by the Supreme Court. It should be noted that any future study must be careful with the name Monnin. Chief Justice Monnin retired in 1990 but his son Michel Monnin was appointed to the Manitoba Court of Appeal in 1995, and another son, Marc Monnin was appointed to the same Court in 2011.

²⁹ Peter McCormick, "Alberta's Court of Next-to-Last Resort: Appeals of the Alberta Court of Appeal to the Supreme Court of Canada, 1970-1990" (1991) 29:4 Alta L Rev 861; Peter McCormick, "Conviction Appeals to the Court of Appeal of Alberta: 1985-1992" (1993) 31 Alta L Rev 301; Peter McCormick & Twyla Job, "Do Women Judges Make a Difference? An Analysis of Appeal Court Data" (1993) 8:1 CJLS 135; Peter McCormick, "Judicial Citation, The Supreme Court of Canada and Lower

the provincial appeal courts in Canada generally,³⁰ especially with reference to the interaction between those courts and the Supreme Court of Canada³¹, and the changing patterns of citations to authority within provincial appeal courts.³² Aside from the differences in numbers of appeals and success rates from different provinces, it is noteworthy that the success rate on appeal is higher when you have a dissent in the court of appeal, and also when the court of appeal itself has allowed the appeal from the trial judge, as opposed to affirming the trial judge; and when you combine dissents and reversals of the trial court you have the highest predictive success rate at the Supreme Court of Canada.³³

D. Some Thoughts on the Impact of McCormick's Empirical Work in Manitoba

Now before commenting on McCormick's work on the Supreme Court of Canada, I want to make a few concluding comments on the provincial court of appeal studies. What impact did these publications have, if any? In a recent book, David Muttart describes the "brilliant studies" of McCormick (and he lists other luminaries like Peter Russell, as well) as "being candles in a sea of darkness," but because they lack a meta-theory (which Muttart claims to provide) they do not amount to an "effulgent chandelier" as his own work does.³⁴ Well, I think cautious candles in the darkness are sometimes safer than chandeliers that might crash down on our heads.

Courts: The Case of Alberta" (1996) 34 Alta L Rev 870.

³⁰ Peter McCormick, "Who Wins and Who Loses in the Provincial Courts of Appeal? A Statistical Analysis, 1920-1990" (1994) 9 CJLS 21. The Court of Appeal work is also summarized in parts of the co-authored book: Ian Green et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998); and in: Peter McCormick, *Canada's Courts* (Toronto: Lorimer, 1994).

³¹ Peter McCormick, "The Supervisory Role of the Supreme Court of Canada: Analysis of Appeals from Provincial Courts of Appeal, 1949-1990" (1992) 3 SCLR (2d) 1. ["Supervisory"]

³² Peter McCormick, "The Evolution of Coordinate Precedential Authority in Canada: Interprovincial Citation of Judicial Authority, 1922-92" (1994) 32:2 Osgoode Hall LJ 271.

³³ See "Supervisory", *supra* note 31.

³⁴ David Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007) at 189.

I have already noted that McCormick's "Manitoba" work raised issues about attitudinal decision making and also possibly measuring judicial performance, but I want to comment briefly on the more prosaic use of McCormick in the area of legal education, the legal profession, and the judiciary itself.

1. *Legal Education*

First, as to legal education there was once a full first year course called "The Legal System" (now titled "Legal Systems") at my law school which might be termed a "perspectives" course alongside the "doctrinal" big five of Contracts, Torts, Property, Criminal, and Constitutional, and alongside the "skills" course called "Legal Methods."³⁵ The Legal Systems course could accommodate quite a range of different topics within its tent, but at its core it included such topics as the Canadian court system and the doctrine of precedent, statutory interpretation, and judicial decision-making. There were lectures and readings on trial courts, appeal courts, and the Supreme Court of Canada. There were topics like the appointment of judges, the independence of the judiciary and the removal and discipline of judges. (It is here that I mention that Peter McCormick has contributed to these topics, as well.)³⁶ There were also various units on jurisprudential schools and fact finding, administrative tribunals, and juries. Eventually in the struggle for more hours for doctrinal work, and given the perceived "softness" of Legal Systems, the course hours were cut

³⁵ For an overview of the curriculum currently under increased threat to be overruled by contemporary notions, see Phil Osborne & Alvin Esau, "Curriculum Reform at Robson Hall" (1990) 19 Man LJ 605.

³⁶ See for example, Peter McCormick, "Twelve Paradoxes of Judicial Discipline" (1997-1998) 9:4 Const Forum Const 105; Peter McCormick, "Could We, Should We, Reform the Senate and the Supreme Court?" (2000) 21 Policy Options 7; Peter McCormick, *Judicial Independence and Judicial Governance in the Provincial Courts* (Toronto: Canadian Association of Provincial Court Judges, 2004); Peter McCormick, "Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada" (2005) 7:1 J App Pr & Pro 1; Peter McCormick, "The Serendipitous Solution to the Problem of Supreme Court Appointments" (2006) 44:3 Osgoode Hall LJ 539; Peter McCormick, "Choosing the Chief: Duality, Seniority and Beyond" (2013) 47:1 J Can Stud 5; Peter McCormick, "Reforming the Supreme Court: The One-Court Problem and Two-Court Solution" in Nadia Verrelli, ed., *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montreal: McGill-Queen's University Press, 2013) at 191.

in half, and currently it appears to be primarily an education in aboriginal and other “equality” issues.

My point here is that for several decades when I taught Legal Systems, McCormick’s empirical work was very useful to me and I incorporated it into the classroom. At a time in which empirical work was rare, I would refer to McCormick’s work in lectures, and would reproduce various statistical analysis and charts from his articles in my lecture outlines, as we discussed the Supreme Court or the Manitoba Court of Appeal or judicial decision making generally.

2. The Legal Profession

Secondly, as to the use of McCormick’s work by the legal profession, one of the obvious difficulties is the time lag between any study and the publication date. Within the context of law teaching, the “best before date” is less important because we are concerned about judicial process in a broad sense and also in terms of historical trends. But for the current advocate, the empirical study of voting blocs or dissenting or separate concurrence tendencies often comes too late, especially when there is a high turnover of judges on the court. While an understanding of appellate decision-making is obviously important for the advocate, the empirical work on particular judges will often be out of date with the current configuration.

3. The Courts

Thirdly, let’s turn to the court itself. I have no inside connection to the judiciary in Manitoba, but I would think it is entirely plausible that McCormick’s work was read by the judiciary that he studied. I think judges must have the same degree of ego as academics have as they periodically check to see if anyone has cited them. Thus I would think a judge would be interested in the statistics on their voting behavior, their record on appeal, their purported degrees of agreement and disagreement with others on the court, and particularly the ranked lists that include their name. It would have been nice to have been a fly on the wall in the various chambers of the members of the Court of Appeal, listening to the conversations when McCormick’s early work was published. Was it incredulous, dismissive, defensive, or appreciative? I do not know.

But just maybe we could speculate that McCormick’s earliest work on the Manitoba Court of Appeal *might* itself have impacted on the very court he was studying. While I was teaching the Legal Systems course in the

1980s, one of the assignments for the course required the students to spend at least a half day of visitation in each of four tribunals: an administrative tribunal (the license suspension appeal board); a proceeding in the Provincial Court; a Queen's Bench trial; and finally oral argument at the Court of Appeal. The students then would have to write a paper for me which included some critical reflections on what they had witnessed as observers in these four proceedings. Now without mentioning any names of particular judges, I must say that the stories that these students would tell about their experience in the Court of Appeal at the time were quite disheartening. By far, the majority of first year students were shocked at the extreme hostility directed at the lawyers by the judges, and sometimes hostility between judges on a panel. Frequently, one would read in these student papers references like, "and then Justice X would swing his chair around and for the rest of the hearing would have his back to the lawyer arguing the case." Given that there were no court transcripts of Court of Appeal hearings and the press was absent in virtually every case, the judges could say pretty much anything with impunity.

Based on the student observation papers given to me year after year, I would think the court during much of the 1980s was not just a disagreeing one, as the McCormick studies showed, but also a disagreeable one. The presence or absence of demeanor and decorum does not equate to the presence or absence of judicial brilliance, but the relationships between judges and lawyers may well have had an effect on the reputation and workings of the court. Certainly the court that McCormick studied in the 2000-2004 period was a very different court compared to the one he examined in the late 1980s, and I wonder whether his own work, say on the inordinate degree of disagreement, might itself have had an effect on the court, both on the bases of existing judges reading the articles or of prospective new judges who came to the court after looking at McCormick's studies of the court.³⁷

³⁷ I regret that when I cleaned out my office, I threw out several tote boxes of these student papers on court visitation spreading over several decades and did not put them in some kind of archive instead. The problem, of course, was that students who wrote the papers wrote them for me, and not for a wider audience. Even removing the names of the students from the papers might not erase the problem of archiving them. Furthermore, the naming of specific judges and lawyers and parties (though the activity did take place in open court) led me to believe that they could only be archived with some of these details removed, which would have involved some

III. MCCORMICK ON THE SUPREME COURT OF CANADA

McCormick's empirical work directly related to Manitoba has of course been overshadowed by his voluminous work on the Supreme Court of Canada, to which I now turn. There is much to say, but I want to divide my remarks around the two themes of power as a measure of performance, and the constraints of precedent.

A. Power: Judicial Judgment Writing, Voting Patterns, Alliances, Fault Lines, Leadership

In addition to McCormick's books on the Supreme Court,³⁸ he has published more than a dozen articles in various law journals containing analysis of the degrees and kind of leadership by chief justices;³⁹ rates and patterns of judgment delivery;⁴⁰ dissents and separate concurrences;⁴¹ and

considerable work on my part. This said, I still wish I had preserved this valuable treasure trove of two decades of court observations in Manitoba. The court visitation assignment was greatly improved at some stage by my colleague, Ann McGillvray, who instituted, with the cooperation of the judiciary, a Judge Shadowing Project which brought the students inside the judges' chambers instead of having them only in the courtroom as observers. However, as I understand it, the Judge Shadowing Project brings students and judges together in the Provincial Court and the Queen's Bench, but not at the Court of Appeal level where students continue to observe a hearing as they did under "my" old system. For many years, the Court Shadowing Project has been led by my colleague, DeLloyd Guth. See his article: "Judicial Shadowing at the University of Manitoba & Canada's First-Year Law Curriculum" (2014) 37:1 Man LJ 473.

³⁸ Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: Lorimer, 2000); Peter McCormick, *The End of the Charter Revolution: Looking Back from the New Normal* (Toronto: University of Toronto Press, 2015). Chapter 6 of his latest book, in particular, contains some of the empirical work on the Supreme Court that is contained with more detail in various law journal articles.

³⁹ Peter McCormick, "Assessing Leadership on the Supreme Court of Canada: Towards a Typology of Chief Justice Performance" (1993) 4 SCLR (2d) 409; Peter McCormick, "Follow the Leader: Judicial Power and Judicial Leadership on the Laskin Court, 1973-1984" (1998) 24 Queen's LJ 237.

⁴⁰ Peter McCormick, "Judicial Career Patterns and the Delivery of Reasons for Judgment in the Supreme Court of Canada" (1994) 5 SCLR (2d) 499; Peter McCormick, "Sharing the Spotlight: Co-authored Reasons on the Modern Supreme Court of Canada" (2011) 34:1 Dal LJ 165; Peter McCormick, "Who Writes? Gender and

the identification of leadership, voting alliances and disagreement rates between judges during various periods of time.⁴² This work raises crucial questions about differences in terms of judicial performance and power as between judges at the Supreme Court of Canada. There is also at least one article on party capability that has the memorable line that “we do not insult the referee by suggesting that the taller basketball team will usually win.”⁴³ Aggregating these studies together provides a rich treasure trove of information on the history of our highest court and food for fodder for the larger debates about the nature of judicial decision-making.

I want to comment here on only one recent article because it is one of my favorites.⁴⁴ Building on an earlier article which pointed out the development of a common format of labeled sections for Supreme Court judgments,⁴⁵ McCormick points out that sometimes when you read judgments you come across a dissent or a separate concurrence which appears to have the same full format as a majority judgment. It is this dissent or concurrence which has the introduction to the case, a detailed recital of the facts, the judicial history of proceedings in the courts below, the list of issues to be determined, and so forth. The majority judgment of the court does not have this full format and refers to the dissenting or separate concurrence for these items. It is the *majority* judgment that begins, “I have read the reasons for decision of Justice X, and....” Now

Judgment Assignment on the Supreme Court of Canada” (2014) 51:2 Osgoode Hall LJ 595.

⁴¹ Peter McCormick, “The Choral Court: Separate Concurrence and the McLachlin Court, 2000-2004” (2005-2006) 37:1 Ottawa L Rev 1; Peter McCormick, “Standing Apart: Separate Concurrence and the Modern Supreme Court of Canada, 1984-2006” (2008) 53 McGill LJ 137.

⁴² Peter McCormick, “Birds of a Feather: Alliances and Influences on the Lamer Court 1990-1997” (1998) 36:2 Osgoode Hall LJ 339; Peter McCormick, “The Most Dangerous Justice: Measuring Judicial Power on the Lamer Court 1991-1997” (1999) 22 Dal LJ 93; Peter McCormick, “Levels of Disagreement on the Lamer Court, 1990-2000” (2003) 48 McGill LJ 89; Peter McCormick, “Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada” (2004) 42 Osgoode Hall LJ 99.

⁴³ Peter McCormick, “Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949-1992” (1993) 26 Can J Poli Sci 523 at 524.

⁴⁴ Peter McCormick, “‘Was It Something I Said?’: Losing the Majority on the Modern Supreme Court of Canada, 1984-2011” (2012) 50:1 Osgoode Hall LJ 93.

⁴⁵ Peter McCormick, “Structures of Judgment: How the Modern Supreme Court of Canada Organizes its Reasons” (2009) 32 Dal LJ 35.

McCormick asserts, quite correctly in my view, that this indicates that after the oral hearing and after the preliminary vote in conference as to the disposition of the appeal, one or more judges were assigned to write the majority opinion and then subsequently after the circulation of judgments among the justices and the negotiations over getting consensus on the disposition of various issues, one or more judges changed their minds from their initial positions and joined with the initial dissenting or separately concurring group and the minority judgment became the majority one. This might be called “swing voting” where initial dissenting judgments can become majorities, or initial separate concurrences can become majorities, or enough votes are taken from the initial majority so that the case becomes a plurality judgment, with no majority reasons for the disposition of the appeal.

In the post-1984 period, McCormick counted 166 cases that had the full format in the minority judgments, and another 89 cases where the full format appeared in both minority and majority judgments, but without reference to each other. These might be called “contest” judgments likely evidencing some last minute swing. Even if we take only the first number out of these 255 cases, the number of times that we have these swings is far greater than we might have supposed. Counting them together, McCormick asserts that in non-unanimous cases, between 25% and 30% of them involve this swing-vote phenomena.⁴⁶

Of course, once McCormick identifies the swing cases, he is able to give us a list of the judges who most frequently wrote the initial minority judgment and were able to persuade other judges to swing their way to form the majority.⁴⁷ The current Chief Justice (McLachlin) is solidly at the top of the list, followed by Justice La Forest, a distant second; but then McCormick gives us an even more interesting list of those who wrote opinions which started out as majority judgments of the court but ended up as minority reasons.⁴⁸ Here again the Chief Justice tops the list, followed closely by Justice L’Heureux-Dubé. So putting the two tables together, McCormick gives us a kind of score card as to which judges had more swings in their favor as opposed to defections, and here Justice Binnie is up by 10 points while Justice L’Heureux-Dubé is down by 15.

⁴⁶ *Supra* note 44 at 111.

⁴⁷ *Ibid* at 113.

⁴⁸ *Ibid*.

However, then McCormick has to factor in the length of service of various judges, and the number of panel appearances, and the number of authored opinions to even the field as it were to give us a final “swing efficiency.” Here it appears that Chief Justice Dickson is on top, followed by Justice Cory, and very solidly by a wide margin at the bottom is Justice L’Heureux-Dubé, followed by Justice Wilson.

Given the great secrecy surrounding the decision-making process at the Supreme Court, I think this detective work by McCormick is very useful.⁴⁹ I like the article not because I equate the scores with judicial merit, but rather that the scores clearly show that while all nine judges on the court have an equal vote, they do not necessarily have equal power or influence on a collegial court in the sense of persuading colleagues to join in their legal analysis; and it is also telling that of the seven female judges during the period of this study, only one of them (Justice Charron) had a positive “swing efficiency.” It seems that the gender factor may be significant in terms of the power of influence, or lack thereof, over other judges.

These findings lend support to the institutional theory of judicial decision-making and cast at least some splashes of water onto the fire of the attitudinal camp. As McCormick says, “persuasion clearly matters as well as predisposition.”⁵⁰ Justices do not just vote their ideological preferences and then rationalize the outcome to appear as if the result is

⁴⁹ Perhaps the next step is to have some computer program that analyzes writing styles, and then we could perhaps identify which parts of the judgment were written by clerks as opposed to the judge, or which of two judges in co-authored opinions wrote what, and so forth. For an attempt, see Kelly Bodwin, Jeffrey S Rosenthal & Albert H Yoon, “Opinion Writing and Authorship on the Supreme Court of Canada” (2013) 63 UTLJ 159. This article seems flawed to me because while it quite plausibly shows on the bases of writing style that clerks have a role in opinion-writing, it never looks at which parts of the standard format might be implicated by a different style. If justices assign to the clerk the writing of the procedural history of the case in the courts below, what is the big deal? If justices assign some part of the actual reasoning as to resolving a key issue, that is an entirely different matter. By simply scoring the whole judgment for variability in style, the study fails to reveal what might be important. This does not detract from the value of the study in potentially finding out who had the primary hand in writing a *per curiam* judgment or jointly authored reasons, and so forth. For example, Slayton suggests that Justice Gonthier, and not Chief Justice Lamer, wrote the bulk of the *Succession Reference*. See Philip Slayton, *supra* note 24 at 85.

⁵⁰ *Supra* note 44 at 126.

governed by the logic of the law, but rather they can be persuaded by their colleagues in some cases that the gravitational pull of pre-existing law, or the plausible consequences of a policy choice, are compelling enough to set aside their predispositions. As Emmett Macfarlane has recently argued, the institutional approach does not deny that the judges' backgrounds, personal values, and ideological predilections play a significant role in judicial decision-making, but all of this may be constrained by the institutional roles and processes and conventions that are involved in appellate decision-making.⁵¹

B. Precedent and Citations to Authorities and the *Charter*

A second group of McCormick studies on the Supreme Court of Canada deal with citation analysis over various time periods. By my count, there are at least eight of these publications.⁵² At first blush, some of these citation studies may seem rather tedious. In a different context, and before justifying himself, McCormick once wrote, "It may seem that I have laboured mightily and brought forth very little."⁵³ (It struck me that this might be the epitaph to many of our scholarly careers).

Some of this citation analysis work fits within the general theme of identifying various levels of power and influence that particular judges have compared to other judges. Just as the studies of voting behavior and

⁵¹ Emmett Macfarlane, *Governing From The Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013).

⁵² Peter McCormick, "The Supreme Court of Canada Cites the Supreme Court of Canada, 1989-1993" (1995) 33:3 *Osgoode Hall LJ* 453-486; Peter McCormick, "Judges, Journals and Exegesis: Judicial Leadership and Academic Scholarship" (1996) 45 *UNBLJ* 139 [This article is more about judges writing academic articles, as opposed to judges citing them]; Peter McCormick, "Which Supreme Court Decisions does the Supreme Court Cite?: An Analysis of Follow-up Citations on the Supreme Court of Canada, 1989-1993" (1996) 7 *SCLR* (2d) 451; Peter McCormick, "The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview" (1997) 8 *SCLR* (2d) 527; Peter McCormick, "Do Judges Read Books, Too? Academic Citations by the Lamer Court 1991-1996" (1998) 9 *SCLR* (2d) 463; Peter McCormick, "The Judges and the Journals: Citation of Periodical Literature by the Supreme Court of Canada, 1985-2004" (2004) 83 *Can Bar Rev* 632; Peter McCormick, "American Citations and the McLachlin Court: An Empirical Study" (2009) 47:1 *Osgoode Hall LJ* 83; Peter McCormick, "Waiting for Globalization: An Empirical Study of the McLachlin Court's Foreign Judicial Citations" (2009-10) 41 *Ottawa L Rev* 209.

⁵³ *Supra* note 45 at 49.

judgment writing and swing behavior illustrated various measures of judicial influence, we could come to that issue in a different way through the influence of the justices' opinions in later cases, even long after they have left the court. Perhaps a Justice who was frequently in the minority bloc on the court turns out in a subsequent period to have a greater influence on the future direction of the jurisprudence. So we want to know which justices of the court wrote the judgments that are most frequently cited in later cases.

Some of this citation analysis also looks at the possible influence on the court by academic writers. This is also interesting, although the court is increasingly parsimonious about making such citations. There is a big difference between what the court reads and is possibly influenced by, and what the court deigns to cite. Perhaps the more interesting analysis today would be citations to academic work within party and intervener materials submitted to the court.

But the point that I want to highlight deals with how the court deals with precedential authority. The point is not the changing *source* of precedential authority as Canadian courts turn away from historical reliance on English precedent towards a focus on their own past cases, but rather to the *methodology* of how precedential authority is treated. If precedent is the skeleton that keeps the legal system standing as a matter of the rule of law instead of the luck of the draw, it would appear to me that the Canadian legal system is in danger of wobbling along or even falling down, blown in ever more unpredictable directions by the winds of whatever ideological predilections happen to exist at any given time. That the Supreme Court can now overrule its own past precedent under compelling circumstances is one thing. The more important source of instability and unpredictability is the use of past dissents and separate concurrences without close analysis of whether the cited argument lacks majority assent or is consistent with it.⁵⁴

⁵⁴ An overview of precedent is provided by my colleague: Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2007) 32:1 Man LJ 135.

IV. MCCORMICK'S *CHARTER* BOOK

This theme of precedent brings me to the topic of McCormick's latest book. The bulk of *The End of the Charter Revolution: Looking Back from the New Normal*⁵⁵ is not statistical analysis, but rather a helpful overview of the history of *Charter* interpretation in the Supreme Court during various eras, including lawyerly summaries of what the leading cases established in regard to rights definitions, limitations, and remedies. However, I want to comment ever so briefly on the main thesis, namely that the seminal work of *Charter* interpretation took place in the heydays of the Dickson and Lamer eras, and that more recently the McLachlin era has been a period of consolidation, routine, and retreat in terms of blockbuster *Charter* advances by the court.

Like throwing a big brick into the jurisprudential pail, we have had several decades of splashy turbulence, but now things have settled down and the water in the pail or pond is much less turbulent. Certainly, the statistical analysis in Chapter 6 serves to support McCormick's thesis. The numbers of *Charter* cases in terms of percentage of caseload are down; disagreement rates are down; length of judgments are down; swing judgments are down; citations to older judgments are up; citations to dissents and separate concurrences are down; foreign citations are down; and academic citations are down. All of these might be indicators that the storm era of the *Charter* is being replaced by a more settled routine.

I appreciate McCormick's view that as the Supreme Court fleshed out the *Charter* with various precedents laying out basic boundaries of rights and basic tests for their limitations, we have reduced uncertainty, and now the pull of precedent, rather than the personal policy preferences of judges, lies at the core of *Charter* judicial decision making. I wish this was true, but I believe the tests and boundaries are so subjective and subject to manipulation in any case that their constraint is a sham. The various hurdles that have to be jumped over to pass a *Charter* test are moved up or down in height by the judges in any given case depending on the circumstances. Not only are the heights of the judicially-created hurdles subjectively manipulated up or down, the legislation or the competing

⁵⁵ Peter J McCormick, *The End of the Charter Revolution: Looking Back from the New Normal* (Toronto: U of T Press, 2015).

right that has to jump over the hurdles is subjectively characterized in ways that are manipulated. The legislation is presented as an elephant unlikely to jump over much, or it is characterized as a gazelle, easily sailing over all. But that is a thesis that I will not defend here.

Rather, I want to suggest that an alternative thesis might be inspired by the title of a book on demographics, called *Boom, Bust and Echo*.⁵⁶ The contents of the book are irrelevant to my comment, but it is the title that is suggestive. The thesis is that if McCormick is right about a period that might be labelled a bust, we are now increasingly into new turbulence with an activist echo, both in terms of numbers of cases and expansion of rights. Circumstances, such as our current concern for security from terrorism, will throw up a whole raft of new laws that the Supreme Court will ultimately be dealing with. But my main reason for believing in an echo is that many of the original blockbuster cases, in which rights claimants lost, are now up for re-examination by the courts.

My somewhat critical approach may have resulted in the fact that I read McCormick's book at the same time that the Supreme Court declared that the prohibition on physician-assisted death in some circumstances violated the *Charter*. Here was a case that was unanimous, short, and cited only one academic article, and yet could hardly be viewed as anything less than a blockbuster. But I think in terms of the echo thesis that the most important aspect to the case is how it illustrates the trend to reconsider past precedent, even at the lower court level. The doctrine of constraining precedent is being destabilized even further.

If we look at this recent case of *Carter v Canada*⁵⁷ where the Supreme Court declared that the blanket prohibition on physician-assisted suicide violated the *Charter*, we might well conclude that the Court has plainly overruled the outcome that the majority came to in the *Rodriguez v BC*⁵⁸ case in 1993. We know that the Supreme Court can depart from its own past precedents, but it has always been a fundamental principle of our legal system that lower courts are bound by higher court precedent. A lower court cannot overrule the Supreme Court. If this is so, how does a

⁵⁶ David K Foot with Daniel Stoffman, *Boom, Bust & Echo: How to Profit from the Coming Demographic Shift* (Toronto: MacFarlane, 1996).

⁵⁷ *Carter v Canada*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*].

⁵⁸ *Rodriguez v BC*, [1993] 3 SCR 519 [*Rodriguez*].

case like *Carter* make its way up the judicial ladder to the Supreme Court in the first place, if we presume that lower courts were bound by *Rodriguez*?

We'll first look at the decision of the trial judge in *Carter*.⁵⁹ We might paraphrase the argument something like this: We are bound by *Rodriguez*, but that decision did not cover all the possible legal issues that might arise under the *Charter*. For example, s. 7 involves a trinity of interests, namely life, liberty and security of the person, and the majority decision in *Rodriguez* supposedly did not deal with the life interest issue, but rather decided the case on the liberty and security heads of the trinity.

So the Supreme Court of Canada said a prayer, as it were, and invoked the Father and the Son, but failed to invoke the Holy Spirit. So now, even if there is no evidence that invoking the Holy Spirit would have made a shred of difference to the original prayer, we conclude that we can embark on a new s. 7 analysis under the head of the life interest, free of the binding precedent because it does not cover the path we are going to take.

Notice that s. 7 also potentially limits the trinity of rights by a trinity (or more) of factors that might constitute fundamental justice for the limitation of the rights. Now we make the same arguments in regard to the principles of fundamental justice. The trinity test here involves the three hurdles of arbitrariness, over breadth, and gross disproportionality. And by now you get the idea. The Supreme Court in *Rodriguez* only dealt with arbitrariness, because the other two tests had not even been created yet. Ergo, we can now test the prohibition on assisted suicide by applying new tests that the previous precedent did not utilize and thereby come to the opposite conclusion from what the earlier Supreme Court of Canada precedent came to.

At the trial level, the most promising path of all was the assertion that the majority in *Rodriguez* did not undertake a s. 15 equality rights analysis, and therefore the lower court could now travel down that highway unburdened by the previous case. Again, however, one might wonder if this conclusion makes sense, given the fact that some of the dissenters in *Rodriguez* did go down this highway and the majority presumably read the dissents and rejected that path. But now roads not travelled become open roads for future reconsideration of judgments.

⁵⁹ *Carter v Canada*, 2012 BCSC 886 [*Carter BCSC*].

But the biggest uncertainty of all in terms of how lower courts can navigate around binding precedent relates to factual determinations. While the adjudicative facts as to *Rodriguez* and *Carter* were virtually the same, the social and legislative facts had changed over the last twenty years, most notably because there were now a greater number of jurisdictions that allowed physician-assisted deaths and lots of studies on the effectiveness of safeguards, or the abuse of them, within these jurisdictions. So, fundamental changes to the factual and social landscape could now ground the analysis as the court embarked on the various paths previously not taken. The combination of new legal issues and a new factual matrix meant that the lower court was correct in distinguishing the binding precedent, which is a long-standing practice in our legal system. The current case before the court is said to be different than the precedent case, even if the basic adjudicative facts are the same.

However, the larger issue that is lurking in the shadow is whether a lower court can embark down the *same* legal issue paths as the binding precedent, but now use the new factual landscape to in effect not follow a binding precedent utilizing a theory of “anticipatory overruling.” Here, the court would be anticipating that the Supreme Court of Canada itself would decide differently today given the changed landscape of social facts, so now the lower courts treat the binding precedent as no longer binding. An even more radical destabilizing theory would be that the *Charter* is the supreme law and it even trumps any past Supreme Court of Canada decisions on it, allowing lower courts to ignore precedents now considered wrongfully decided, and outside the shade of the constitution as a current living tree.⁶⁰

When the *Carter* case was decided by the B.C. Court of Appeal, it is noteworthy that the majority *rejected* this attempt by the trial court to set aside *Rodriguez* as distinguishable from the current case.⁶¹ When applying the binding precedent “the focus...should be on *what* was decided, not how it was decided or how the result was described.”⁶² The majority of the court treated *Rodriguez* as authoritatively deciding the issues raised in

⁶⁰ This is the implication taken from Joseph J Arvay, Sheila M Tucker & Alison M Latimer, “*Stare Decisis* and Constitutional Supremacy: Will Our *Charter* Past Become An Obstacle to Our *Charter* Future?” (2012) 58 SCLR (2d) 61.

⁶¹ *Carter v Canada*, 2013 BCCA 435 [*Carter BCCA*].

⁶² *Ibid*, Newbury and Saunders JJ.A at para 321 [emphasis added].

Carter and the idea of anticipatory overruling was rejected as the court quoting from *Air Canada Pilots' Association v. Kelly*, where Justice Pelletier observed:

...the evolution of social policy over time may justify the Supreme Court revisiting a particular issue but it cannot justify a lower court's failure to follow the Supreme Court's jurisprudence.

This is not to say that lower courts do not have a role to play in the evolution of the jurisprudence once the Supreme Court has spoken. Where a challenge to the existing jurisprudence is raised, the role of the lower courts is to allow the parties to gather and present the evidence and to make the necessary findings of fact and of credibility, so as to establish the evidentiary record upon which the Supreme Court can decide whether to reconsider its earlier decision.⁶³

But notice that when *Carter* got to the Supreme Court of Canada, the unanimous *per curiam* decision disagreed with the B.C. Court of Appeal's view of vertical precedent and affirmed how the trial court had properly identified new legal issues allegedly not covered in *Rodriguez*, as well as finding that new social facts had changed the landscape. The Supreme Court of Canada cryptically stated:

Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate."⁶⁴

The court cited its own recent decision in *R v Bedford*⁶⁵ for this proposition.

Before we turn to *Bedford*, notice that the court does not say that both of these circumstances have to exist together, although they allegedly both did in *Carter*. That is, can you have no new legal issues, but nevertheless argue the second situation that circumstances have fundamentally shifted the parameters of the debate and so now you can revisit the very issues that the Supreme Court of Canada covered earlier? It seems possible that rather than one *and* two, we have here one *or* two. I would argue that the traditional doctrine of vertically binding precedent has been destabilized, which may be seen as another step in the delegalization of law.

⁶³ *Air Canada Pilots' Association v Kelly*, 2012 FCA 2009 cited in *ibid* at paras 47-48, quoting from the ONCA case of *R v Bedford*, 2012 ONCA 186 [*Bedford ONCA*] at para 76.

⁶⁴ *Supra* note 57 at para 44.

⁶⁵ *R v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].

Let's look at *Bedford* as another example. The trial court judge in the case was faced with an application to strike down three *Criminal Code* offences, namely the prohibition on keeping or being in a bawdy-house (s.210); living on the avails of prostitution (s.212(1)(j)); and communication for the purpose of prostitution (s.213(1)(c)). For the purposes of our discussion of precedent, all we need mention here is that the trial court judge was faced with the binding precedent from the Supreme Court of Canada, "*The Prostitution Reference*" decided in 1990.⁶⁶ There was no problem dealing with the constitutionality of the bawdy house offence since that was not dealt with in the previous *Reference* case, but what about the other two offences that had been upheld as *Charter* compliant in the *Reference* case?

Well, again, we see the argument in regard to s. 7 that the trinity of interests are independent and the principles of fundamental justice now include hurdles that the legislation must pass through that did not exist when the *Reference* case was decided. So far we are again just taking new paths that the Supreme Court did not determine previously.

But now we have a problem, because the applicants in regard to the communicating offence also want the court to strike this provision down as violating the s. 2(b) freedom of expression right, and they do not want it saved under s.1. But this is precisely a path that the binding *Reference* case had already taken. The Supreme Court had determined that the provision was saved under s. 1. However, in *Bedford*, the trial judge asserted that the evidentiary landscape had changed and so she embarked down this previously trodden path, reaching the opposite conclusion on the basis of new evidence. This is to say that the trial judge appeared to accept a form of anticipatory overruling, as she noted the very factors that the Supreme Court itself has sometimes given for overruling its own precedent for the justification now for the lower court to not follow the previous decisions of the Supremes. The social, political, and economic assumptions that underlay the *Reference* s. 1 analysis were presumably no longer valid.

As to the issue of precedent, the Ontario Court of Appeal in *Bedford*⁶⁷ agreed that new paths not taken by the *Reference* case were open for

⁶⁶ *Reference re ss 193 & 195.1(1)(c) of Criminal Code (Canada)*, [1990] 1 SCR 1123 [*The Prostitution Reference*].

⁶⁷ *Bedford v Canada*, 2012 ONCA 186 [*Bedford ONCA*].

analysis, but they *disagreed* with the “anticipatory overruling” move in regard to not following the Supreme Court in their freedom of expression and s. 1 analysis, which was binding on the lower courts, even if they thought the Supreme Court was wrong, or that it might change its mind if hearing the case today. The factors that the Supreme Court uses to overrule its own precedent cannot be used as arguments for lower courts to refuse to be bound by what the Supreme Court has previously decided. As the Ontario Court of Appeal stated:

In our view, the need for a robust application of *stare decisis* is particularly important in the context of *Charter* litigation. Given the nature of the s. 1 test, especially in controversial matters, the evidence and legislative facts will continue to evolve, as will values, attitudes and perspectives. But this evolution alone is not sufficient to trigger reconsideration in the lower courts.

If it were otherwise, every time a litigant came upon new evidence or a fresh perspective from which to view the problem, the lower courts would be forced to reconsider the case despite authoritative holdings from the Supreme Court on the very points at issue.... Such an approach to constitutional interpretation yields not a vibrant living tree but a garden of annuals to be regularly uprooted and replaced.⁶⁸

But notice that when the *Bedford* case was unanimously decided by the Supreme Court of Canada⁶⁹ and the three criminal code offences were struck down as unconstitutional, Chief Justice McLachlin for the Court, disagreed with the Ontario Court of Appeal’s restrictive and narrower view of the role of the lower courts not to revisit paths already taken and determined. The lower courts can revisit the constitutionality of provisions by looking at new legal issues *or* “if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.”⁷⁰ So in both *Bedford* and *Carter*, the Supreme Court of Canada has taken a much more flexible approach to the vertical conventions of precedent than taken by the Ontario and B.C. Courts of Appeal.

Curiously, while giving this generous blessing on opening up the doors for lower court reconsideration of her own court’s precedent, Chief Justice McLachlin then concluded that in this particular case, the trial court should not have revisited the freedom of expression issue because there was not the kind of fundamental shift in the parameters of the

⁶⁸ *Ibid* at paras 83-84.

⁶⁹ *Canada v Bedford*, 2013 SCC 72, [2013] SCJ No 72.

⁷⁰ *Ibid* at para 42.

debate that would allow this reconsideration here. Indeed the Supreme Court felt that it was unnecessary to revisit the *Reference* case, since all three provisions could be struck down as violating s. 7.

My point here is to simply illustrate the fact that the so-called *Charter* Revolution is not over if there is going to be new litigation down the line every time the court upholds some provision as *Charter* compliant. To take another example, there seems to be little doubt that the Trinity Western University attempt to open a law school and have the school accredited by the various Law Societies in Canada will end up in the Supreme Court of Canada, despite the fact that the same issue in regard to that universities' teacher education certification was decided previously.⁷¹

V. CONCLUSION

While Peter McCormick is formally retiring from his administrative and teaching duties, we can expect from him many more stimulating studies on the judiciary in Canada. He has made, and will continue to make, a substantial contribution to our understanding of the courts in Canada. It is a pleasure and honor to have been asked to participate in this symposium.

⁷¹ *Trinity Western University v College of Teachers (British Columbia)*, 2001 SCC 31, [2001] 1 SCR 772 [*Trinity Western University*].