"I CAN HEAR THE SNICKER OF THE HEARSE HORSE" – A LAST HISTORICAL LOOK AT THE LAW OF THE PROVINCE

Edward Veitch*, Tyler Botten** & Clare Henderson***

INTRODUCTION

This brief essay seeks to paint a picture of citation practices of counsel and courts in New Brunswick through three periods in the province's history: the early years of law reporting in the 19th century; the numerically corresponding years in the 20th century; and two years from the beginning of the 21st century.

At the outset, we had certain expectations as to what our research might indicate. We expected to find a reliance on American jurisprudence in the earlier periods due to the geographical proximity of New Brunswick and the New England states. The Canadian courts were newly founded, and in the absence of an extant legal system, it seemed likely that there would be a visible reliance on the already developed system in existence to the south. However, we anticipated that there would be little reference to the law of the United States today because of the present attitude in Canadian courts, which tends to resist American influence over Canadian law. We therefore began with the overall assumption that reliance on English common law and equity would decline as reference to Canadian sources increased, and as counsel and judges developed a local system of law.

The research involved counting the number of cases as well as secondary sources that were cited before the courts of New Brunswick, as recorded in the case law reporters of New Brunswick Reports and the Atlantic Provinces Reports. The periods chosen were 1825-1830, 1925-1930 and 2003-2005. The verification of the

---

* Professor of Law, University of New Brunswick (1979 – 2007). The title of this 'retirement' essay is drawn from Carl Sandburg's poem, "The Lawyers Know Too Much":

> Why is there always a secret singing
> When a lawyer cashes in?
> Why does the hearse horse snicker
> Hauling a lawyer away?

This short work of serendipity makes no pretence to legal historical gravity. Rather the research herein will be of value if it encourages further exploration by legal historians. Some of the possible avenues have already been identified by the Journal's thoughtful reviewers. For example, what has been the relative influence of digests and abridgements as compared with that of law reports; what precedents did counsel consult as compared with those employed by the judicial officers; who had access to what volume of jurisprudence and where was it available; and, do the numbers of citations vary with the nature of the subject matter of the dispute? We hope that these inquiries will be pursued by the appropriately curious.

** B.Sc. (University of Alberta), LL.B. (2008, University of New Brunswick)

*** B.A. (University of Prince Edward Island), LL.B. (2008, University of New Brunswick)

origins of the secondary sources was carried out using the resources of the G.V. La Forest, the Bodleian and the Osgoode Hall law libraries.

We appreciate that the mere counting of citations as a measuring device has its shortcomings which have been identified by others[1], but it cannot be denied that the resulting broad-brushed portrait is of interest – simply because the data has not been collected before. The raw information can be given in short compass: in the initial period there are 78 reported decisions (72 civil and 6 criminal) in which 188 authorities were cited and 72 secondary sources considered. Of the total, all but one (which was from the United States) were English. In the second period there were 172 reported judgments (146 civil and 26 criminal) in which 1837 precedents were cited: 963 English, 817 Canadian and 41 American, along with penny numbers from Australia, Ireland and South Africa. Of the 140 secondary sources cited, 123 were English, 13 Canadian and 4 from the United States. In the last period, there are 790 reported decisions (537 civil and 253 criminal). Of the 4,770 case citations: 4,578 are Canadian, 144 English, 37 American, 6 Australian, 3 from the European Court of Justice and 1 from each of Ireland, Scotland and New Zealand. The 388 secondary sources cited comprised 341 Canadian, 31 English, 13 American, 2 Australian and 1 from the Netherlands.

We hoped that this exercise would give us an idea of just what counsel and judges were employing to resolve legal disputes – which cases did they rely on, what other materials did they reach for and whose jurisprudence underpinned the decision in each matter? In the earliest period, we wanted to know how law operated when the legal profession was thin on the ground[2] and law reports were hard to come by.[3] In the second period, we wished to see if the work habits of advocates and judges had resulted in modifications of the received common law to meet local conditions. And for the most recent period, we wanted to know if current practices revealed a wholly independent, local legal system some two centuries and more after the establishment of the jurisdiction. When we compare the citation practices over the three periods we see that at the beginning it was usual to consider just two authorities, whereas in the later periods this had increased to around eight authorities. Such averages do not tell us what percentage of cases had no citations, the time period of the authorities relied on and, of course, we can never know which cases were read but discarded.

---

1 G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late Victorian Empire" (1985) 3 LHR at 219, 260. Mere counting cannot expose the legal culture or style of a particular period; equally, such cannot explain why certain sources of law are chosen or why a particular jurisdiction is favoured.

2 Professor David Bell (University of New Brunswick) gives the number of 51 as the complement of lawyers and judges in New Brunswick in the years 1785 and 1820 - DeLloyd J. Guth & W. Wesley Pue, eds., *Canada's Legal Inheritances* (Winnipeg: Canadian Legal History Project, 2001) at 128.

3 D & L. Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670 -1970* (Winnipeg: Peguis Publishing, 1972), at 192-96.

1. 1825-1830

(A) *The Context*

A legal system reliant on precedent can only operate effectively with a series of reliable law reports, but in all jurisdictions the development of such essential tools was a fraught exercise. From the earliest reporting years of the province, there are judgments in linen in boxes in the provincial archives and a few reports of cases in the Royal Gazette.[4] We can derive some idea of what was available to the lawyers and judges of the day from such as the notes on Ward Chipman in the Anti-Slavery case of 1800.[5] He referred to work by Blackstone, Bracton, Burke, Coke, Molloy, Montesquieu, Morse, Smith and English reporters from Holt to Salkeld. Also John Simpson's catalogue of the Law Society of New Brunswick's Library of 1834 includes Bayley on Bills, Chitty on Bills, Eden on Injunctions, Foster on Crown Law, Impey on Practice, Kent on the Law of America, Peake on Evidence, Roscoe on Evidence, Saunders on Pleadings, Tidd on Practice, and Woodfall on Tenant Law editions; some of which are still on our shelves today. The range of English private reports in Fredericton ran from Barnewell & Cresswell all the way through to Yelverton, with all of the other great names now collected in the 176 volumes of the English Reports.[6] A formal local reporting system did not arrive until 1836[7] and the reports of cases from 1825 to 1835 were not compiled until 1849. Those for 1848-1866 appeared occasionally through to 1879[8] but regularity of reporting can only be claimed from 1867[9] onwards, nevertheless, there were still complaints of tardiness in 1875.[10]

Sporadic and delayed reporting was not just a local phenomenon. Lawyers in Saskatchewan expressed regret that court records of the early years of their jurisdiction were not extant[11] and their counterparts in Manitoba complained that the lack of regular law reports inconvenienced the profession through to the end of the 19th century.[12] In truth, things were not much better at the home of the Common Law. Moran, in his Heralds of the Law, records that in 1863 "all was not well with

---

4 Court transcript of the Anti-Slavery case (*R. v. Jones*), Fredericton, New Brunswick 1800 (82pp).

5 John Simpson, *General Rules of the Supreme Court of the Province of New Brunswick* (Fredericton: Printer to the King's most Excellent Majesty, 1834). We are grateful for the advice of Professor Bell as to this volume and to the transcript in the prior note.

6 J. Sadler, *Law Reporting & Legal Publishing in Canada: A History*, ed. by Martha Foote (Kingston: CALL, 1997) at 106.

7 J Nedelsky & D. Long, *Law Reporting in the Maritime Provinces: History and Development* (Ottawa: CLIC, 1981) at 1.

8 *Ibid.* at 4.

9 *Ibid.* at 5.

10 *Ibid.* at 6.

11 Louis Knafla, ed., *Law & Justice in a New Land: Essays in Western Canadian Legal History* (Calgary: Carswell, 1985) at 54.

12 *Supra* note 3 at 150.

law reporting"[13] due both to delays and to imperfections in the recording of judgments. In 1885, twenty years after the incorporation of the Council of Law reporting in England and Wales, and the initial publication of the Law Reports, Nathaniel Lindley (as he then was) wrote that the performance of the official reports remained far from perfection.[14] As late as 1949, the debate over the quality and regularity of law reporting continued in the Law Quarterly Review with A. L. Goodhart, K.C., arguing for a weekly reporting series all the while being mindful of Lord Lindley's stricture that "Collections of rubbish must be carefully avoided."[15] This echoed the worry expressed by Holt C.J. two centuries earlier – "Scrambling reports will make us appear to posterity as a parcel of blockheads."[16]

(B) ***The Data***

Number of Cases Cited in Non-Criminal Cases
1825-1830

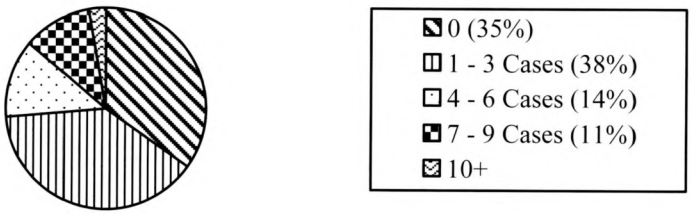


Fig 1 Represents a total of 72 cases

Number of Cases Cited in Criminal Cases
1825-1830

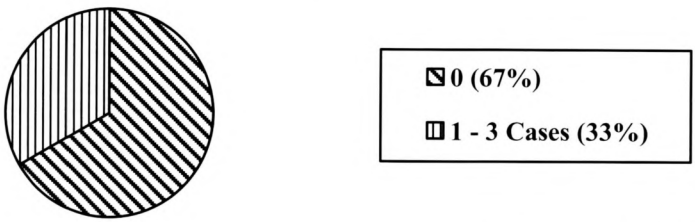


Fig. 2 Represents a total of 6 cases

---

[13] C.G. Moran, *The Heralds of the Law* (London: Stevens and Sons, 1948) at 19.

[14] Nathaniel Lindley, "History of the Law Reports" (1885) 1 L.Q.R. 137 at 142.

[15] A.L. Goodhart, "Reporting the Law Note" (1939) 55 L.Q.R. 29.

[16] J. Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: UNC Press, 2004) at 30. 1825 marks the beginning of the official reports available to us and the period chosen for examination provides a greater volume of material than the prior forty years. The number of 78 is quite high when compared with the 14 reported cases in the Newfoundland reports for the same period.

(C) *The Analysis*

A review of the New Brunswick Reports from 1825-1830 reveals the extent of the detail offered in the annotations of John C. Allen (later Chief Justice of the Province) who compiled the judgments in print. The extent of his notes stands in stark contrast to the brevity of the original judgments themselves. Although Allen relied only on the manuscripts of Justice Ward Chipman (as he then was), there is a consistent pattern of low references to authority throughout. While 78 reported cases is a small number from which to draw firm conclusions about the workload of the court at that time, the sample does provide insight into the citation practices of the period. Our data demonstrates that the primary jurisprudential influence on the courts in this formative period was overwhelmingly English.[17] This finding is interesting given the large number of Loyalists who settled in New Brunswick at the time of the province's founding. Nevertheless, the materials available to the court came from England and were, in fact, quite diverse. The authorities referenced in Chipman's decisions reveal that he had access to a variety of nominate reporters and also secondary works – that is, a more substantial library than simply a set of Blackstone's Commentaries[18] or editions of Leading Cases.[19]

Of the numbers themselves, what stands out is the absence of citations in approximately one-third of the cases with another third referencing only three precedents at most.[20] This is somewhat surprising in light of the wealth of historical English jurisprudence available. There is evidence of a preference for modern authorities with two-thirds of the cases cited dating from after the founding of the province. With regard to secondary authorities, Archbold's Practice of the Court of Queen's Bench[21] is the most often leaned upon. But overall there is little consistency in the citation practice of these sources – varying from multiple references to none at all.

2. 1925-1930

(A) *The Context*

Lord Lindley writing in 1885,[22] asked some trenchant questions which resonate with us today – why are such important matters as the recording of court judgments left in

---

[17] The exceptions being two references to cases of the New Brunswick Supreme Court and one reference to an Abridgement of American Law.

[18] Sir William Blackstone, *Commentaries on the laws of England: a facsimile of the first edition of 1765-1769* (Chicago: University of Chicago Press, 1979).

[19] See e.g. J.W. Smith (1809-1845), *Smith's Leading Cases: A selection of leading cases on various branches of the law with notes*, 13th ed. by A.T. Denning (London: Sweet & Maxwell, 1929).

[20] See Fig. 1 and 2.

[21] J.F. Archbold (1785-1870), *Archbold's Practice of the Court of Queen's Bench: in personal actions and ejectment*, 7th ed. by Thomas Chitty (London: H. Sweet etc., 1840). First edition (1819) has title: *The practice of the Court of King's bench in personal actions and ejectment.*

[22] *Supra*, note 3 at 142.

private hands? Government publishes legislation, then why not law reports or does the profession fear the tendency of all governments to patronage?[23] Or worse, would such lead to a monopoly and to "the continuance of an old evil"?[24] He went on to state that which he believed the profession did not want – the publication of cases which were valueless as precedents, or of judgments solely for the complexity of their facts. What the bar and bench desired were cases which established legal principle or which illustrated their fresh application. He was explicit as to the essence of a reportable decision – one which introduced a new principle or rule; one which modified a principle or rule; one which settled a contentious question; or one which was peculiarly instructive. In other words, not every hop, skip and burp of the judiciary which is the apparent practice of today.

Just before the turn of the 20th century, Showell Rogers[25] wrote in a later issue of the Law Quarterly Review[26] that while treatises give a general or bird's eye view of law, it is in the law reports that one learns how principles are applied in specific instances. But he worried about the proliferation of reports and the problems of traversing an ever-increasing forest. He pointed out that all of the Year Books (covering 1307 to 1535, some 228 years) occupied 25 volumes, whereas the Law Reports from 1865 to 1896, just 31 years, filled up 265 volumes. He attributed the increase in the number of cases reported to the growth of the railways and the expansion of corporate law. Similarly, Sir Frederick Pollock[27] was not impressed by the expansion of law reporting and suggested that the plethora encouraged lawyers to concentrate on compilations which were "the province of the index-hunter or the digest-sucker."[28] Manisty J.[29] was no happier with multiple citations – "Common sense is a better guide in such matters than authority."[30] Equally, Lord Esher[31]

---

[23] *Judicature Act*, R.S.N.B. 1973 c. J-2 ss. 63-66 recognizes the authority of the Lt-Gov. to appoint suitable persons to report true and authentic opinions of the courts of the province.

[24] *Supra*, note 12 at 143. The "evil" being the multiplicity of private reporting series.

[25] Dr William Showell Rogers of Birmingham University was a trenchant critic and legal humourist. See: S. Rogers, "Ballade of Judicial Notice" (1893) 9 LQR 285. His too early death was noted by Sir Frederick Pollock in his celebrated essay – "The Genius of the Common Law" (1912) 12 Columbia L.R. 480 at 487.

[26] S. Rogers, "On the Study of Law Reports" (1897) 13 L.Q.R. 250.

[27] Sir Frederick Pollock (1845-1937), Professor of Jurisprudence at the University of Oxford, author of texts on contract and tort, Editor of the Law Quarterly Review (1885-1919) and Editor in Chief of the Law Reports (1885-1935).

[28] *Supra*, note 26 at 255.

[29] Sir Henry Manisty, a distinguished member of the court of Queen's Bench whose contribution was recognised by the hanging of his portrait in Grays-Inn in 1876. His judgments still command respect, see *Regina v. Dica*, [2004] EWCA Crim 1103 (C.A. (Crim. Div.)).

[30] *Henderson v. Preston* (1888), 21 Q.B.D. 362 at 365 (C.A.) [*Henderson*].

[31] See "English Judges of To-Day" (1892) 5 Harv.L.Rev. 405 at 406:

> In the absence of Coleridge, Lord Esher presides over the Court of Appeals (sic), with a salary pf 6,000 pounds. He was formerly Mr. Justice Brett, and is a conservative in politics; he has little patience for theory or innovation, but is

deplored the excess of authority – "Every case upon the subject that industry could find and ingenuity could torture was brought before the Court."[32] Showell Rogers offered an opinion on the value of dissents – he thought them of limited utility, as they did not represent the law, although he conceded they might offer inspiration for future argument. Most importantly, he observed that the law reports are successive records of the developments of the law and of the people subject to it. They provide a microcosm of the life of the jurisdiction as every popular craze, every new invention and fashion – scientific, literary or artistic – finds its way before the judiciary.[33]

(B) ***The Data***

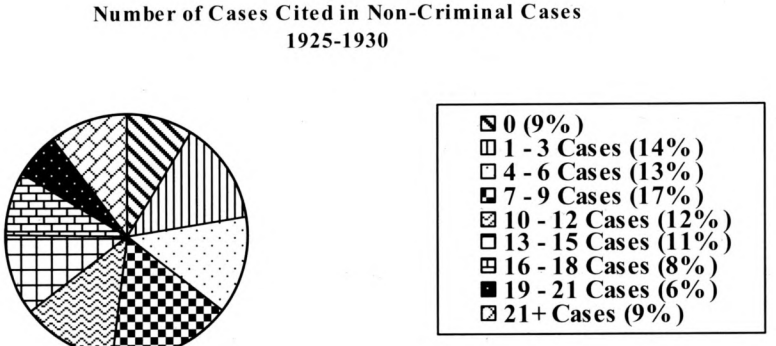


Fig 3 Represents a total of 146 cases

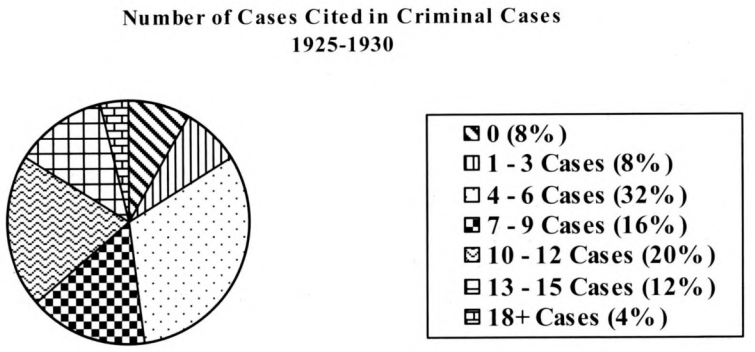


Fig 4 Represents total of 26 cases

---

opposed to fine distinctions, basing his decisions on common sense; he was a great oarsman at college, and has a large knowledge of nautical and mercantile affairs. He was made Lord Esher in 1880, and Master of the Rolls in 1883.

[32] *Turner v. Mersey Docks and Harbour Board. (The "Zeta")*, [1892] P. 285 (C.A.) at 297.

[33] *Supra* note 23 at 264.

(C) *The Analysis*

The manner of the presentation of the judgments in the New Brunswick Reports for this period differs from that of the other two periods under review. The data collected told us the numbers of cases cited per case, but once tabulated and graphed it took on an interesting dimension. The number of precedents cited per case between 1925-1930 was significantly higher than in the other periods: 52% of criminal cases and 64% of civil cases cited at least seven precedents.[34] In 35% of the civil cases there were at least thirteen precedents utilized. These numbers suggest that lawyers in this period were able to gather larger numbers of authorities, time consuming though it must have been, using a paper-based system and without the modern linkages to computerized data-bases.

According to G. Blaine Baker[35], Canadian legal resources were not readily available even after the First World War because of the lack of sales of Canadian materials within Canada[36] as well as the paucity of law libraries outside of Toronto. Our figures must be read in light of that observation.

Given the limited number of Canadian authorities available during this period, it is therefore unexpected that 96% of the cases cited are Canadian. Indeed, the overall numbers show that Canadian references compare favourably with the English precedents. As the Judicial Committee of the Privy Council was still the final court of appeal for Canada, one might expect a continued reliance on English jurisprudence but that influence was already diminishing. The *Criminal Code of Canada* of 1893[37] was under judicial development in this period and the *Code* itself was seen as a break with the legal traditions of the United Kingdom, which may explain the observable trend.[38]

3. 2003-2005

(A) *The Context*

In this last period, no one can miss noticing that the annual volumes of the reports in law libraries are growing more obese by the year. The Incorporated Council of Law Reporting for England & Wales acknowledges that the average weekly part of the Weekly Law Reports in the mid-1970's was 65 pages, however, that has now grown to 150 pages.[39] And while the editors have kept their annual number of cases

---

[34] Fig. 3 and 4

[35] *Supra* note 1, at 222.

[36] *Ibid.* at 232.

[37] Proclaimed 1st July, 1893.

[38] D.H. Brown ed., *The Birth of a Criminal Code* (Toronto: U of T Press, 1995).

[39] Robert Williams, "Why are Judgments Getting Longer" *The Daily Law Notes, The Weekly Student Newsletter* (Summer 2005) 20, online: Incorporated Council of law Reporting <http:// www.lawreports.co.uk>.

reported at 350, that number took up 3236 pages in 1976, but required 6337 pages in 2004. If we look closer to home, the picture looks a little different. In 1976, the New Brunswick Report's total page number was 1608 (202 cases) but by 2004 that had apparently ballooned to 6091 pages (384 cases).[40] However, it must be recognized that New Brunswick, as Canada's only provincial bilingual jurisdiction, is required in the post-*Charter* years to publish the law reports in both official languages. The bilingual Supreme Court of Canada Reports has expanded similarly – in 1976 the page count was 1705 (106 cases) but by 2004 it was 2420 pages (85 cases).

In all three examples above, the growth in page numbers tracks the increase in the average length of the judgments. Those in the Weekly Law Reports grew from nine pages in 1976 to eighteen in 2004. In the New Brunswick Report the increase over the same period has been from eight to sixteen pages. Similarly, the judgments in the final court have gone from an average of sixteen to thirty pages. What might account for this proliferation of words? A reading of many first instance judgments suggests that the trial judge was determined to cover all points raised by counsel, even if they were not central to the ultimate decision. It suggests some sort of "let no stone remain unturned" approach or maybe even a desire not to be chastised on appeal for not considering every "hail Mary" argument. Equally, with regard to appellate tribunals, one has to wonder if the subtlety of concurring judgments or of differing dissents added illumination. It has been suggested elsewhere[41] that the computer literacy of the judiciary and their phalanx of clerks has brought into the reasons for a decision whole chunks of counsels' arguments along with quotations from cases, texts and documentary evidence. The ability to scan and copy with an understandable reluctance to edit may provide an explanation. In the United Kingdom of the 19th century, it was thought that industrialization expanded both the law and the law reports, while it is believed that the adoption of the *Human Right Act* in 1998, which mandated inquiries into notions of fairness and fundamental justice, led to longer judgments. Similarly then for us, the patriation of the *Constitution* in 1982 with its *Charter of Rights and Freedoms* and its own principles of fundamental justice, together with the explosion of administrative law jurisprudence – from fairness to correctness to reasonableness – may help to explain our experience. Most recently, the Report of the Chief Justice's Advisory Committee on length and delays in criminal trials in Ontario's Superior Court of Justice is tangentially relevant. The authors of this Report state that the causes of longer proceedings include: the impact of the *Charter* (which they think has become, for lawyers, "a growth industry in Canada").[42] But they also believe that changes in: the law of evidence (such as the expanded scope of the principled exception to the hearsay rule); the increased use of

---

[40] One can only wish that the local reporting series would heed the admonition printed in the opening pages of the Weekly Law Reports - "If a case merely reiterates established principles and breaks no new ground it will not merit inclusion. We do not intend to report all cases indiscriminately: we prefer to exercise strong editorial control."

[41] *Supra* note 33.

[42] Ontario, Chief Justice's Advisory Committee on Criminal Trials, *New Approaches to Criminal Trials, The Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice* (May, 2006) at para. 27.

expert witnesses; the introduction of videotaped statements; and the ineffectiveness of pre-trial conferences have all contributed to the expansion of the whole decision-making process. But as the Editor of the Weekly Law Reports has said – "...tempting though it is to think that confiscating judges' computers and issuing them with parchment and quill pens would result in shorter judgments, there are other factors as well which are not so easily dealt with."[43]

Today, access to the Internet and electronic media impacts both the speed and variety of law reporting so that there is an excess rather than a drought of precedent. Thus, there needs to be restraint at all levels and particularly in the reporting of decisions which do no more than apply well known principles to a particular fact pattern.

If New Brunswick counsel preparing for litigation heads for the La Forest Law Library to undertake some research, then (excluding foreign and other provincial and territorial reporting series) they have access to the ADLRs, the BCLRs, the BLRs, the CCELs, the CCLIs, the CCERs, the DELRs, the CFLCs, the CIPRs, the CLLCs, the CNLCs, the CPRs, the CMARs, the Crs, the FCs, the MPLRs, the NBRs and the NCBRs. From these serried ranks they can glean what Kay J. in the 19th century occasionally deemed – "the arguments of despair."[44] As a consequence of the availability of all of that Canadian jurisprudence, it is hardly surprising that there is emphasis on the decisions of the Supreme Court of Canada, that reliance on English case law continues to decline and that American precedents are now noticeable by their rarity. As research from Manitoba confirms, where English cases are cited they tend to be of much older vintage, with all of the recent authorities cited being Canadian.[45]

(B) ***The Data***

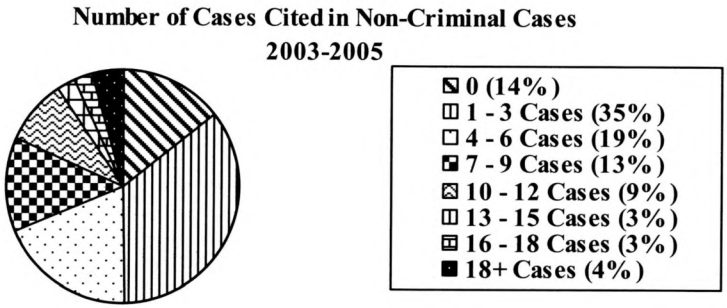


Fig 5 Represents a total of 537 cases

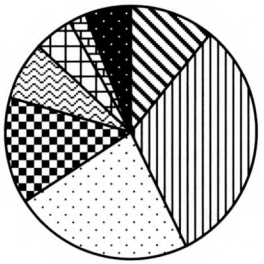
---

[43] *Supra* note 33.

[44] *Petty v. Daniel* (1886) 34 Ch.D. 172 at 176 and *Finck v. London And South-Western Railway Company* (1890) 44 Ch.D. 330 at 341.

[45] P. McCormick, "The Manitoba Court of Appeal, 2000-2004: Caseload, Output and Citations" (2005) 31 Man.L.J. 1 at 18-19.

Number of Cases Cited in Criminal Cases
2003-2005



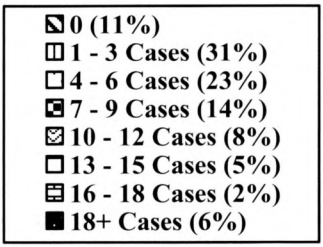


Fig 6 Represents a total of 253 cases

(C) *The Analysis*

The most surprising finding from the data in this period is the relatively low number of citations per reported case. Given the ease with which legal databases give access to both Canadian and foreign materials, it is interesting that in nearly half of the civil cases there are references made to fewer than four precedents.

The majority of precedents cited in both criminal and civil cases are Canadian. In both categories, there is a clear preference for very recent law. Of the cases cited in civil matters, the overwhelming majority (90%) are from the last three decades. In criminal cases, the corresponding number is 96%. In both civil and criminal cases, approximately 31% of the precedents cited were drawn from the years 2000 and later. This tendency to rely principally on the latest cases may indicate that the most modern precedents are deemed most persuasive.[46] The similarity of practice in civil and criminal cases is noteworthy when one considers that the latter operates within the structure of a code while the former is predominantly precedent based.

CONCLUSIONS & OBSERVATIONS

(A) *Older Citations*

In reviewing the precedents cited in both the 1925-1930 and 2003-2005 periods, older cases appear to be consistently employed to demonstrate the evolution of the law, but there is no indication that they are considered in anything more than an illustrative manner. The most common usage of these older cases appears to be to illustrate the origins of judicial modes of reasoning.[47] Therefore, where such older citations

---

[46] A. Diamond, "Codification of the Law of Contract" (1968) 31 M.L.R. 361 at 365 - discovered a similar reliance on recent caselaw in England - "The truth is that there are many practitioners that rarely open a law report more than two years old."

[47] See for example: *R. v. Ed* (1926) 53 NBR 387 (S.C. (A.D.)); *R. v. Bernard* (2002) 262 N.B.R. (2d) 1 (C.A.); 261 NBR (2d) 199; *R. v. J.B.C. Securities Ltd.* (2003) 54 N.B.R. 145 (C.A); *Crowther v. Shea* (2005) 283 N.B.R. (2d) 109 (QB); and *Parlee v. College of Psychologists (New Brunswick)* (2004) 270 N.B.R. (2d) 375 (C.A.)

appear in a judgment, they are immediately followed by authorities from the Supreme Court of Canada or from New Brunswick in which the same principle has been applied.

(B) *Citation Extremes*

Judgments devoid of citations seem at odds with the common law tradition of precedent, and to find such judgments in large quantities is notable. A close examination of these reported decisions reveals that there is no single area of law where the complete absence of authority is more common; this characteristic may be found in judgments arising from tort actions, bankruptcy matters, trust issues or property disputes.[48] The data shows that there is little difference between the percentages of criminal judgments and civil judgments which are bereft of citations.[49]

At the other extreme, it is trite to say that cases with high numbers of case citations are not noticeable for their complexity. Equally, it is difficult to tell what impact all of the citation has had on the ultimate outcome.[50] The civil case with the highest number of citations from the latest period supports these observations.[51] On the other hand, on occasion a high number of precedents does serve to underscore the complexity of a criminal case. For example, see *R. v Bernard*[52] which had the highest number of precedents cited for a criminal case.

---

[48] See *Peat v. Walsh* [1927] 54 NBR 36 (S.C. (A.D.)) at 38 - "It is the duty of traffic on a side street to give way to that on a main road. 21 Hals. 414, note 4 and cases cited *MacAndrew v. Tillard*, [1909] A.C. 78; *Roberts & Gibb, 'Collision on Land'*, p. 62, 79, persons have a right to assume that cars using streets will be driven moderately and prudently. *Ramsey v Toronto Ry. Co.* 30 O.L.R. 127; *Doyle v. C.N.R.* [1919] 46 D.L.R. 135. It was the duty of Walsh to use common sense when approaching a main thoroughfare such as Douglas Avenue. *Toronto Rly. v Gosnell* (1895) 24 S.C.R. 582; *Toronto Rly v King*, [1908] A.C. 260; *Hanley v. Hayes*, [1925] 3 D.L.R. 782; *Skidmore v B.C. Elec. Co.* (1922) 68 D.L.R. 32; *Noble v. Stewart* (1923) 51 N.B.R. 94."

[49] Fig. 1 through 6.

[50] Bernard J. Hibbits, "Her Majesty's Yankees: American Authority in the Supreme Court of Victorian Nova Scotia, 1837-1901" in P. Girard, J. Phillips & B. Cahill eds., *The Supreme Court of Nova Scotia, 1754-2004* (Toronto: U of T. Press, 2004) 321 at 322; See *Lebel c. Doiron* (2005) 289 N.B.R. (2d) 209 (B.R.) - the capacity of a near relative to pledge credit; *Cherubini Metal Works Ltd v. New Brunswick Power Corp.* (2005) 283 N.B.R. (2d) 56 (C.A.)- the applicability of the Public Purchasing Act to construction contracts; *Curtis (Litigation Guardian of) v. League Savings & Mortgage* [2004] 277 N.B.R. (2d) 99 (Q.B.) - the restoration of trust funds wrongfully distributed; *McLoon v. Lowell* [1828] 1 N.B.R. 67 (S.C.) - fraudulent misrepresentation of a promissory note; *Putnam v. DeVeber* (1825) 1 N.B.R. 455 (S.C.)- evidentiary issues involving probate; *Huestis v. Huestis* (1928) 54 N.B.R. 1 (S.C. (Ch.D.) - joint tenancies and partition of land; *Noble v. Phillips* (1929) 1 M.P.R. 241 (S.C.(A.D.) - civil procedure and jury findings; and *Holmwood & Holmwood (Nfld) Ltd v. Young* [1930] 1 M.P.R. 445 (S.C.(A.D.) - civil procedure and jury findings.

[51] *Vincent v. Abu-Bakare*, [2003] 259 N.B.R. (2d) 66 (C.A).

[52] *R. v Bernard* [2003] 262 N.B.R. (2d) 1 (C.A.), the court faced the difficult issue as to whether or not the trial judge was in error in determining the existence of aboriginal title. There are 69 citations.

(C) *Secondary Sources*

One difficulty in researching the secondary sources cited during each of the three periods was the lack of clarity in the citations to those sources, particularly in the earliest period. The referenced sources were cited using abbreviations that have since become outdated and were often difficult to discern. This made the process of identifying and dating the sources tedious albeit essential.

It is true that of all three periods, the secondary sources are cited relatively infrequently in criminal matters where there is more reliance on such traditional authorities as annotated criminal codes. In the most recent period under review, only 102 of 542 criminal cases contained cites to secondary materials. In light of the increase in Canadian treatise writing from the 1980's through to today, it is surprising that practice does not reflect a similar increase in their use.[53] We are in no way able to speculate on the possible attitudes of counsel and judges to academic literature.

With regard to the relation of secondary sources to precedents – in 2003-2005 there are 104 cases that contained no citations,[54] and of that number, only six cases cited to secondary authority.[55] Therefore, we cannot suggest that an absence of case-law results from the conclusiveness of some text.

Lastly, it is the hope of the authors that this short jaunt through some of the history of the citation tendencies and reporting law of the Province of New Brunswick will prompt the curiosity of others to carry forward some more detailed study.

---

[53] E. Veitch & R. MacDonald, "Law Teachers and their Jurisdiction" (1978) 56 C.B.R. 2 710; H. Arthurs, "Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada" (The Arthurs' Report) (Ottawa: Minister of Supply and Services, 1983).

[54] Fig. 5 and 6.

[55] *Greene v. Greene Estate* (2005) 289 N.B.R. (2d) 282 (Q.B); *Sampson v. Melanson's Waste Management Inc.* (2005) 277 N.B.R. (2d) 76 (Q.B.); *Cansugar Inc., Re* (2003) 270 N.B.R. (2d) 71 (Q.B.); *Bernard v. New Brunswick* (2004) 270 N.B.R. (2d) 83 (Q.B.); *Estate of Joseph Patrick Roy* (2005) 284 N.B.R. (2d) 200 (Q.B.); and *R. v. Beaulieu Estate* (2003) 258 N.B.R. (2d) 67 (Q.B.).