

Essays

Consensus and Unanimity at the Supreme Court of Canada

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I. INTRODUCTION

Empirical studies of judicial decision-making tend to focus on explaining why individual judges often come to different conclusions. The dominant understanding of decision-making on the U.S. Supreme Court is the ideologically based policy preferences of the justices,¹ with related studies showing that American justices often make strategic choices to ensure the Court's decisions reflect their preferred outcome.² Recent studies investigating whether similar "attitudinal" behaviour occurs at the Supreme Court of Canada generally confirm the existence of ideological voting, but in a weaker form than in the American Court.³ These results

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¹ See Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002) [hereinafter "Segal & Spaeth"]; Cass R. Sunstein, *et al.*, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Washington, D.C.: Brookings Institution Press, 2006) [hereinafter "Sunstein *et al.*"].

² See Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998) [hereinafter "Epstein & Knight"]; Forrest Maltzman, James F. Spriggs II & Paul J. Wahlbeck, *Crafting Law on the Supreme Court* (New York: Cambridge University Press, 2000) [hereinafter "Maltzman *et al.*"].

³ See C.L. Ostberg & Matthew Wetstein, "Dimensions of Attitudes Underlying Search and Seizure Decisions of the Supreme Court of Canada" (1998) 31 Can. J. Pol. Sci. [hereinafter "Ostberg & Wetstein, 'Dimensions of Attitudes'"]; Matthew E. Wetstein & C.L. Ostberg, "Search and Seizure Cases in the Supreme Court of Canada: Extending an American Model of Judicial Decision Making across Countries" (1999) 80(4) Social Science Quarterly [hereinafter "Wetstein & Ostberg, 'Search and Seizure'"]; C.L. Ostberg, Matthew E. Wetstein & Craig R. Ducat, "Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991-1995" (2002) 55(1) Political Research Quarterly [hereinafter "Ostberg *et al.*"]; C.L. Ostberg & Matthew E. Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007) [hereinafter "Ost-

are not surprising. In contrast to the U.S. Supreme Court, which from 1975 to 2005 had a unanimity rate of only 28.4 per cent,⁴ the Canadian Court obtains unanimity in over 63 per cent of cases.⁵ Explaining this consensus is important not only to further our understanding of how the Court works but also because unanimous decisions are said to bring clarity and authority to its judgments. Clear and authoritative decisions are especially significant for their legal and policy effects, particularly given that many scholars view the Court's rulings as part of a "dialogue" with the elected branches of government.⁶

Several different factors may account for the relatively high degree of consensus at the Canadian Court. The first is a less overtly partisan (and therefore a seemingly less politicized) appointments process,⁷ something that conceivably produces a more moderate and less ideologically divided Court. The second is a more collectivist and deferential political and legal culture, including a strong respect for the tradition of Parliamentary sovereignty, which some scholars argue might inhibit ideological conflict.⁸ Finally, studies examining the final courts of appeal in other countries demonstrate that strong norms of behaviour govern the collegial and collaborative nature of those institutions and help to determine the relative level of consensus they achieve.⁹

berg & Wetstein"]; Donald R. Songer, *The Transformation of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2008) [hereinafter "Songer"].

⁴ See Richard A. Posner, *How Judges Think* (Cambridge: Harvard University Press, 2008) at 50 [hereinafter "Posner"].

⁵ See Peter McCormick, "Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada" (2004) 42 *Osgoode Hall L.J.* 107 [hereinafter "McCormick, 'Blocs, Swarms, and Outliers'"].

⁶ Peter Hogg & Allison Bushell, "The *Charter* Dialogue Between Courts and Legislatures: (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35(1) *Osgoode Hall L.J.* [hereinafter "Hogg & Bushell"]; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) [hereinafter "Roach"].

⁷ See Jacob Ziegel, "A New Era in the Selection of Supreme Court Judges?" (2006) 44 *Osgoode Hall L.J.* [hereinafter "Ziegel"].

⁸ See Ostberg & Wetstein, *supra*, note 3, at 26-28.

⁹ See Stacia L. Haynie, "Leadership and Consensus on the U.S. Supreme Court" (1992) 54 *The Journal of Politics* 1158 [hereinafter "Haynie"]; Gregory A. Caldeira & Christopher J. W. Zorn, "Of Time and Consensual Norms in the Supreme Court" (1998) 42 *Am. J. Pol. Sci.* 874 [hereinafter "Caldeira & Zorn"]; David M. O'Brien, "Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions" [hereinafter "O'Brien"] in Cornell W. Clayton & Howard Gillman, eds., *Supreme Court Decision-Making: New Institutional Approaches* (Chicago: The University of Chicago Press, 1999); Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, "The Norm of Consensus on the U.S. Supreme Court" (2001) 45 *Am. J. Pol. Sci.* 362 [hereinafter "Epstein *et al.*"]; Paresh Kumar Narayan & Russell Smyth, "The Consensual Norm on the High Court of Australia: 1904-2001" (2005) 26 *Int. Pol. Sci. Rev.* 147 [hereinafter "Narayan & Smyth"].

While acknowledging that all of these factors likely do influence the level of consensus on the Court, this article explores and sheds new light on the final factor described above: the collegial norms and processes to which the justices adhere. These norms are a product of what L'Heureux-Dubé J. has described as the "internal dynamics" of the institution, and they influence both the style and number of opinions in the Court's judgments.¹⁰

Studies of consensual norms on the U.S. Supreme Court confirm the effect internal dynamics have on levels of consensus, particularly as they apply to judicial leadership. Chief Justice Marshall is credited with establishing a convention in the early 1800s that the justices normally speak with one voice by working together to produce a single, authoritative judgment. This consensual norm became so strong it would often suppress individual justices' private disagreements over the outcome of a case.¹¹ It was not until the 1930s and 1940s under Hughes and Stone that this convention began to break down via a sharp rise in the number of dissents and separate concurrences published by the Court, something attributed largely to the leadership styles of the respective Chief Justices.¹²

By contrast, the High Court of Australia has traditionally had low levels of consensus, reflected by its long-held tradition of *seriatim* decision-making (where each judge writes an individual opinion). As Narayan and Smyth explain, low levels of consensus do not indicate the absence of consensual norms. Their study confirms that factors like the approach of a Chief Justice or personality differences among justices can have short-term effects on consensus, but that consensual norms dictated by the *seriatim* style of decision-making and a dearth of processes de-

¹⁰ Claire L'Heureux-Dubé, "The Length and Plurality of Supreme Court of Canada Decisions" (1990) 28(3) *Alta. L. Rev.* 586 [hereinafter "L'Heureux-Dubé"].

¹¹ Epstein *et al.*, *supra*, note 9. See also Robert Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court" (2001) 85 *Minn. L. Rev.* 1267 [hereinafter "Post"]. Post describes the suppression of dissent evidence by judicial papers of the Taft Court as not representing a "norm of consensus" so much as a "norm of acquiescence" because the justices preserve their differences (at 1344).

¹² See Haynie, *supra*, note 9; Caldeira & Zorn, *supra*, note 9. By contrast, O'Brien, *supra*, note 9, contends that while judicial leadership is an important factor, the abrupt rise in individual expression on the Court was a result of the "forces of American Legal Realism and liberal legalism brought to the Court by the New Deal justices" (at 111). Post, *supra*, note 11, concurs, suggesting one explanation for the collapse of the "acquiescent" behaviour might be the emergence of the view of the law as flexible and having a legitimate role in accomplishing political purposes (in other words, the move away from a formalist conception of the law and towards a realist one). Having moved away from a jurisprudential view "in which the Court depended upon its capacity to maintain a domain of fixed and certain rules", judicial willingness to suppress disagreement waned (at 1382).

signed to produce higher levels of consensus override these effects in the long run.¹³

The evolution of consensual norms on the Canadian Court has taken a different path than either the American or Australian examples. For the first few decades following the Court's creation in 1875, *seriatim* decisions were standard practice and most of the time there was little to no communication between justices prior to the delivery of decisions.¹⁴ Chief Justice Anglin pushed hard in the 1920s to abandon the practice and have the justices coalesce (where possible) around a single opinion. According to L'Heureux-Dubé J., the new approach became convention and from the 1930s onward, *seriatim* opinion writing was virtually abandoned.¹⁵ Chief Justice Cartwright facilitated further unity on the Court in the late 1960s by instituting a regular schedule of conferencing by all of the judges following the oral hearing of appeals.

These larger, historical changes in Court procedure are significant. Yet it is important to note that patterns of disagreement can change over relatively short periods of time and are influenced by a number of factors relating to the internal dynamics of the institution. For much of its history, the internal operation of the Canadian Court has been obscured from public and academic scrutiny. Only in the "Charter¹⁶ era" have the institution's basic procedures come to light, often through interviews of its members¹⁷ or through speeches and writings of the justices themselves.¹⁸ Despite this, evidence of the type of judicial deliberation, bargaining or strategic behaviour that marks activity on the U.S. Court is less apparent in the Canadian context, primarily because scholars of the Supreme Court of Canada generally lack access to internal documents and to the private papers of retired justices.¹⁹

¹³ See Narayan & Smyth, *supra*, note 9.

¹⁴ 38(3) Can. L.J. 63 (February 1, 1902); L'Heureux-Dubé, *supra*, note 10.

¹⁵ L'Heureux-Dubé, *id.* According to McCormick, the last *seriatim* decision delivered by the Court was in 1965. See McCormick, "Blocs, Swarms, and Outliers", *supra*, note 5, at 115.

¹⁶ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

¹⁷ See Ian Greene *et al.*, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer & Company, 1998) [hereinafter "Greene *et al.*"]; Songer, *supra*, note 3.

¹⁸ See Bertha Wilson, "Decision-Making in the Supreme Court" (1986) 36 U.T.L.J. [hereinafter "Wilson"]; John Sopinka, "The Supreme Court of Canada" in Brian A. Crane & Henry S. Brown, eds., *Supreme Court of Canada Practice* (Toronto: Thomson Canada Limited, 2008) [hereinafter "Sopinka"]; L'Heureux-Dubé, *supra*, note 10.

¹⁹ For much of its history, the Canadian Court did little to preserve its records. The internal documents belonging to more recently retired justices have been donated to the National Archives, but are kept from public scrutiny for 25 years after initial donation.

The analysis that follows makes it clear that the Chief Justice has a considerable impact on the consensual norms adhered to on the Court, but that interpersonal relations and the individual approaches adopted by each of the Court's nine members matter as well. Perhaps most significantly, the internal dynamics of the Court operate in a manner that indicates the degree of unanimity achieved by the justices ought to be viewed as a natural by-product of the institution's norms and processes, rather than as an overt goal of the justices. The justices rarely seek unanimous outcomes for their own sake. While the Court's processes and norms often produce strong consensus, marked by a relatively high degree of unanimity, consensus and unanimity should be viewed as interrelated but conceptually distinct. Not all unanimous judgments represent strong consensus among the justices.

This article draws on 28 research interviews with the Court's current and retired justices, former law clerks, and other staff members.²⁰ Part II describes the rules and norms that have implications for consensus-building at the various stages of the Court's decision-making process. Part III of this article explores cases where unanimity was an explicit goal of the justices and concludes that in those rare instances, the extent of the consensus achieved by the justices is actually quite thin. When the justices "force" unanimity in particular instances, the result is to significantly narrow the scope of the opinion or to introduce ambiguity that fosters disagreement in later cases.

II. RULES AND NORMS GOVERNING THE DECISION-MAKING PROCESS

In a wide-ranging lecture on the Court's decision-making processes delivered in 1985, Wilson J. emphasized the collegial nature of a court. She noted that:

if there is, indeed, an obligation on a collegial court to strive for a consensus, or at least submerge individuality in the interests of a few sets of reasons, then the dynamics of the Court's process would seem to be extremely important.²¹

²⁰ Interviews were conducted from July 2007 to August 2008 on a not-for-attribution basis. For writing purposes, all interviewees are referred to as "she" or "her" regardless of gender.

²¹ Wilson, *supra*, note 18, at 235-36.

Her alarm that “very little has been said or written” about this aspect of judicial decision making on multi-member courts of appeal remains equally troubling today.

The tension Wilson J. identifies between the judge as an individual member of the Court and the Court as an institution raises two important questions: To what extent should justices make decisions autonomously? How important is consensus or, more specifically, unanimity? The justices have a variety of views on these questions. Some justices see unanimity as an ideal, as it is said to add clarity to the law, provide clear direction for lower courts, and potentially gives the decision more legitimacy in the eyes of the public. These justices view strong dissents as inevitable on occasion, but they contend that keeping the number of separately written reasons to a minimum is a good principle, both for the development of the law and to avoid confusion on the part of other political actors and the legal community. Indeed, upon becoming Chief Justice one of McLachlin C.J.C.’s key goals was to increase consensus on the Court.²²

Gauging levels of consensus is not necessarily a straightforward task. The Court’s statistics categorize as unanimous those cases which do not produce a dissenting opinion.²³ Because concurring opinions are not considered, “unanimous” judgments may have more than one set of written reasons. Songer adopts this understanding as well, finding that from 1970 to 2003, unanimous judgments represent nearly three-quarters (74.4 per cent) of all cases.²⁴ This measure of unanimity is problematic, particularly if the future legal and policy effect of a given case matters more than the simple dichotomous outcome of the appeal itself. The justices’ reasoning is what ought to be given the most weight in identifying rates of unanimity, especially in the broader context of examining consensus. Since the rationale for a judgment can result in wider or narrower implications for the policy issues at stake in a case, written reasons are arguably a more precise representation of what the consensus is about. A preferable measure of unanimity thus includes a consideration of concurring opinions.

²² Cristin Schmitz, “Communication, Consensus Among McLachlin’s Targets” (November 19, 1999), 19(27) *The Lawyers Weekly* [hereinafter “Schmitz, ‘Communication, Consensus’”].

²³ Supreme Court of Canada, *Statistics 1998-2008* (Ottawa: Supreme Court of Canada, 2009).

²⁴ Songer, *supra*, note 3, at 213.

McCormick draws on this latter understanding of unanimity and finds for the period of 1970 to 2002 a unanimity rate of 63.7 per cent.²⁵ Unanimity rates are only one measure of how successful McLachlin C.J.C. has been in increasing consensus on the Court, but they provide some indication. Following the last few years of the Laskin Court, which saw unanimity rates of well over 80 per cent, the Court entered the age of the Charter, where given the more complex and divisive issues involved, the justices not surprisingly had more difficulty reaching consensus. Unanimity rates under Dickson C.J.C. (1984-1990) were 64.7 per cent,²⁶ falling to 58.4 per cent under Lamer C.J.C. (1990-2000).²⁷ The Court's unanimity rate under McLachlin C.J.C. from 2000 through to July 12, 2009 is 62.8 per cent.²⁸

At first glance, it might seem that McLachlin C.J.C. has only been marginally successful at achieving her goal of increasing consensus over the previous decade. This can be placed into further perspective, however, by considering that McLachlin C.J.C. is much more likely to assign full panels of nine justices than her predecessors. Chief Justice Dickson assigned panels of nine in under 10 per cent of cases, Lamer C.J.C. in 30 per cent and McLachlin C.J.C. in nearly 52 per cent.²⁹ Larger panel sizes decrease the opportunity for unanimous judgments because it is harder to achieve unanimity when there are more justices involved in a decision.³⁰ The increase in unanimous judgments under McLachlin C.J.C. is thus more impressive than the simple statistics indicate.

Perhaps even more significantly, McLachlin C.J.C. has been especially good at reducing the number of extra written reasons produced when the Court does split. In other words, the Chief Justice works with her colleagues to consolidate disagreement as much as possible. Where justices wrote separate concurrences in 31.1 per cent and 33.9 per cent of cases under Dickson C.J.C. and Lamer C.J.C. respectively, they have done so in only 12.9 per cent of cases under McLachlin C.J.C. during the

²⁵ McCormick, "Blocs, Swarms, and Outliers", *supra*, note 5, at 107.

²⁶ *Id.*, at 123.

²⁷ *Id.*, at 127.

²⁸ Correspondence with McCormick (July 13, 2009), drawing on his Supreme Court database from the start of the McLachlin Court to *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009] S.C.J. No. 31, 2009 SCC 31 (S.C.C.).

²⁹ Songer, *supra*, note 3, at 116.

³⁰ *Id.*, at 214.

first five years of her time heading the Court.³¹ Comments about the McLachlin Court by Bastarache J. confirm this effort:

[T]here are a lot more things that are being reconsidered. There is more place for discussion and dialogue in the sense that we strive more to discover each other's reasons and opinions, and try to determine ways in which we can reduce the number of dissents, or reduce the number of published reasons in a case. I don't mean to say that there wasn't discussion before. There was always a conference and a meaningful discussion. But I think we've tried different approaches to reduce the number of written reasons and try to produce decisions that are more useful to the courts of appeal.³²

Regardless of whether McLachlin C.J.C. has been successful, not all justices think striving for consensus should be an overarching goal of the Court. One justice views attempts by the chief to push for it as interference, noting that because justices are totally independent, compromise cannot be forced. Another justice says, "I think that Chief Justices would like to think that they could have a court marching to the same tune, but it just doesn't happen." This justice notes that with all Chief Justices, the degree of unanimity achieved on the Court varies year-to-year.

A third justice, however, suggests that the chief is capable of at least some influence in this regard:

There is such a thing as collegiality and people influencing each other. For some people influence is a nasty word, but in reality you're subject to all sorts of influences. The answer is that you should remain impartial and independently minded, and be able to properly integrate or refuse to integrate these influences. And the Chief Justice can have influence. She may be persuasive in her arguments. She may bring certain elements, aspects home for better understanding, or find ways of reconciling divergent views because, of course, these really difficult issues are usually issues on which reasonable people can reasonably differ.

Where there is disagreement, the extent of division on a panel makes a difference with respect to the ability of the majority to persuade those in the minority:

³¹ See Peter McCormick, "The Choral Court: Separate Concurrence and the McLachlin Court, 2000-2004" (2005) 37(1) *Ottawa L. Rev.* at 10 [hereinafter "McCormick, 'The Choral Court'"].

³² Cristin Schmitz, "The Bastarache Interview: 'Overall, this is not a Frustrating Job'" (February 2, 2001), 20(36) *The Lawyers Weekly* [hereinafter "Schmitz, 'The Bastarache Interview'"].

I don't remember seeing a case where there's been four judges dissenting where the majority was able to persuade all four that their dissent was not well founded. If it's eight people see it one way, and one dissenter, I think the one might spend some time reflecting on whether or not all eight others could be wrong and he could be right.

A fourth justice argues that "in an ideal world a Supreme Court would speak with one voice". This justice explains the role of the Chief Justice in this regard:

One of the functions of the chief is in fact to try to bring people together, [and] make sure that if there are disagreements those are what I would call "real," "true" disagreements, but not matters of what I would call pure drafting or style of judgments. I think the Chief Justice normally will, if there are disagreements, try to probe the depth of the disagreements and see if there are ways to bring people together.

A fifth justice states that "there is no doubt that the whole environment of decision-making is influenced at an important level on the Court by the Chief Justice". Nevertheless, "the other eight judges have to play an important role in what might be called 'creating the collegial environment' at the Court ... it's a collegium, it's not individuals." This final justice feels McLachlin C.J.C. has been successful at improving consensus, but does not want to give the impression that her predecessor, Lamer C.J.C., was somehow unconcerned with collegiality. "The preferential outcome for a collegial court, especially a Supreme Court, is a unanimous judgment," because it provides the most clarity and guidance for lower courts, lawyers, and most importantly the public who are affected by the decision. Any success McLachlin C.J.C. has had, this justice notes, depends on the attitude and approach of the other eight justices.

The Chief Justice, like her eight colleagues, has no authority to ensure a particular level of consensus on the Court. Instead, she must rely on the art of persuasion. Nevertheless, the fact that most of the justices view consensus-building as a particular role of the Chief Justice indicates her importance as a driving force for the development and maintenance of consensual norms on the Court. Further, because the chief can introduce or change specific procedures at various stages of the decision-making process, it is worthwhile exploring how the internal dynamics of the Court have evolved over its recent history.

1. The Conference

The conference is usually the only time that the full panel of justices will discuss a case together at the same time. Following oral hearing of each case, the justices meet to indicate where each of them stands on the case and to state their primary rationale. The justices express their views in reverse order of seniority — a convention designed to ensure that junior justices are not unduly influenced by or deferential to their more experienced colleagues, something Wilson J. notes there is little risk of because judges on the Court are “fiercely independent”.³³ By contrast, the U.S. Court’s justices speak in order of seniority.

While the tone, duration and comprehensiveness of the conference deliberation varies from case to case, it appears to ebb and flow in a manner dictated by the style of the Chief Justice. Where some justices would prefer more opportunity for in depth, free-flowing group discussions of the cases, in reality conferences can be as short as five minutes long. Under Laskin C.J.C. they were quite brief. In the early years of the Charter under Dickson C.J.C. longer discussions would take place because he believed the new issues the Court was facing required more collaborative attention. According to McCormick and Greene, “because of the tendency of the judges on the Dickson court to debate issues with each other directly, comments were sometimes not made according to the usual junior-senior order, but ricocheted around the room in a more random and variable manner.”³⁴ Chief Justice Dickson’s “collegial” approach has been compared to Laskin C.J.C.’s “more austere and professorial style”. Whereas Laskin C.J.C. was reportedly “inclined to try to influence the result”, Dickson C.J.C. “was less interested in imposing his own views than in achieving broad consensus; he was looking for clear and practical solutions that would attract the widest possible support from his colleagues and the community at large.”³⁵ The drawback to this approach, according to La Forest J., was that “the discussions were sometimes like faculty meetings — need I say more”.³⁶

On the contemporary Court the majority of conferences are 20 minutes in duration or less, though they can exceed that when consensus

³³ Wilson, *supra*, note 18, at 236.

³⁴ See Peter McCormick & Ian Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: James Lorimer & Company, 1990), at 203 [hereinafter “McCormick & Greene”].

³⁵ See Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge’s Journey* (Toronto: Os-
goode Society for Canadian Legal History, 2003), at 301-303 [hereinafter “Sharpe & Roach”].

³⁶ *Id.*, at 301-303.

does not develop or the case is particularly complex or controversial. One justice explains that the conference is not meant to be a drafting process: discussion is usually meant to formulate where each justice stands, the outcome of the case and the main reasons or basis for it. Where a consensus is reached quickly, it would be inefficient to prolong the conversation. “There is an effort that when the first people speak, you try to build on what they say. You don’t repeat what they say, you simply say ‘I agree with that point or that point.’” The discussion will take longer if some judges are uncertain or if there is disagreement on “how far to go in our reasoning”.

Despite this, conferences on the current McLachlin Court tend to be more comprehensive than they were under her predecessor, Lamer C.J.C., Bastarache J. noted not long after McLachlin C.J.C. became chief that she “rejuvenated” the process, seeking from the outset of a case to reduce the number of written reasons.³⁷ This goal tends to require more thorough conference meetings, something that occurred with less frequency on the Lamer Court, where in particular areas of law, such as Charter cases involving due process issues, deep divisions were evident.³⁸

Once the justices have aired their views as to the disposition of the case, the remaining task is usually to assign an opinion writer. Justices will typically volunteer to write because they specialize in the particular area of law or because the case interests them. According to the justices, case assignment tends to be a collegial process. Nonetheless, they acknowledge that on occasion one of them will push strongly to write the majority reasons, particularly if the case is one of high visibility or constitutional importance. Competition between the justices in the period immediately following the Charter was especially strong, “with judges jostling to write majority judgments and make legal history”.³⁹ Ostberg and Wetstein’s analysis suggests justices will defer to colleagues with expertise in a particular area of law, as this is a strong factor in determining authorship of reasons.⁴⁰ Songer’s research suggests that under some Chief Justices, seniority played an important role in assigning prominent

³⁷ Schmitz, “The Bastarache Interview”, *supra*, note 32.

³⁸ See Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company Ltd., 2000), at 134-35 [hereinafter “McCormick, *Supreme at Last*”].

³⁹ See Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001), at 152 [hereinafter “Anderson”].

⁴⁰ Ostberg & Wetstein, *supra*, note 3, at 211.

cases, although this too has been less the case under McLachlin C.J.C.⁴¹ According to the justices I interviewed, on the McLachlin Court in particular, workload considerations and legal specialization tend to dominate assigning priorities.

The generally collegial and rule-based approach to writing assignments does not mean there is no room for strategically minded behaviour. For example, at conference following hearings for the “labour trilogy”,⁴² all of the justices except for Dickson C.J.C. and Wilson J. spoke strongly against protecting the right to strike under the Charter. According to Sharpe and Roach, Dickson C.J.C. refrained from expressing his view, thereby “preserving his prerogative as Chief Justice and leading exponent of the Charter to write first reasons, a task he could not have assumed had he taken a strong position at odds with the majority of the Court”.⁴³ Such behaviour is reminiscent of the political machinations revealed in Woodward and Armstrong’s account of the U.S. Supreme Court, where Burger C.J. would not vote — or would even switch his vote — at conference to retain decision assignment power.⁴⁴ Where the controversial practice appears to have been representative of a pattern of behaviour on Burger’s part, the same cannot be said of Dickson C.J.C.

2. Circulation of Drafts: The Process of Deliberation and Negotiation

Once a judge has completed a draft of reasons,⁴⁵ it is circulated among her colleagues for comment. If a justice finds the draft satisfactory, she signs on to the reasons as written. Normally justices will send out comments on the draft, either asking for clarification about certain points, or proposing a different way to frame or word particular sections

⁴¹ Songer, *supra*, note 3, at 128-29. See also Peter McCormick, “Judicial Career Patterns and the Delivery of Reasons for Judgment in the Supreme Court of Canada, 1949-1993” (1994) 5 S.C.L.R. 499, finding that a transitional effect exists, such that junior members write significantly fewer decisions in their first five or so years on the Court.

⁴² *Reference re Public Service Employee Relations Act (Alta.)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.); *PSAC v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.); *R.W.D.S.U. v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 (S.C.C.).

⁴³ Sharpe & Roach, *supra*, note 35, at 358.

⁴⁴ Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Avon Books, 1979), at 71 and 201.

⁴⁵ Many of the justices, though not all, will have their clerks write the first draft of reasons. This is generally done with careful instructions to the clerk about the logic of the opinion. All interviewees, judges and clerks alike, stress that the final draft of an opinion always represents the carefully considered views of the justices themselves.

of the judgment.⁴⁶ Often these comments are intended as suggestions for improvement and a justice's support is not contingent on the changes being adopted by the author. Frequently, however, a judge will make her support conditional on the author making particular modifications.

The level of collaboration is often much more comprehensive. One justice notes:

I know that there are judgments that are under my name that could really reflect other members of the court's names. And I could point to judgments that are not under my name that could have reflected my name. And there are judgments under one judge's name that could basically be a judgment of "The Court".

An opinion's author will routinely accommodate changes if they do not involve significant points or fundamentally alter the rationale or structure of a decision. In this context, adopting such changes — particularly when the majority of judges agree with them — is a basic collegial norm on the contemporary Court. One justice explains:

In this Court a first draft is only that, a first draft. It usually attracts comments, objections and discussion. This process of exchange, review, modifying reasons, removing things, adding some, I think is a fairly regular process.

Some of the justices describe their thinking when deciding to write a concurring or dissenting opinion. One justice states:

law is a very rigorous intellectual enterprise, but it isn't mathematical. It's not science. It's not *scientific*. It is argument and persuasion and deciding cases according to principle, precedent, policy, and when you put those things together you're going to get different views of an outcome in a particular case and a reason that supports that outcome.

This justice continues:

I would ask myself the basic question: can I go along with the majority on this particular case? I didn't say "I must go with the majority on this case" but "can I?" If I can't, then I have to think about dissenting if I'm in strong disagreement, or concurring if I agree with the result but not the reasoning. Those are the legitimate reasons for taking a different

⁴⁶ Some of the justices will update their clerks on the proceedings at conference, not giving them specifics or a verbatim report, but an explanation of what the main positions were. These clerks will thus have an idea of what to look for when the draft is finally circulated, and the clerks themselves will sometimes produce a comment memorandum on the draft for their justice. Other justices do not involve their clerks at all in commenting on colleagues' drafts.

view. But my first question was always “can there be a consensus opinion on this?”

Another justice notes that, particularly with dissents, separate reasons should only be written on matters of substance. “You won’t just write for the pleasure of writing.” That said, this justice points out that dissents and concurring opinions can be important for the future of the law, even on an aspect that is not a central issue in the given case.

The give-and-take that characterizes the Court’s deliberative process does include some strategic behaviour on the part of some justices. Former Chief Justice Lamer has made what is likely the most explicit public explanation of strategic behaviour to garner votes. He argues that if a justice does not get colleagues to sign on to her reasons, “the rest of it is literature. And so I horse-trade. I don’t compromise on principle, though. I would never do that. But if I can’t get something through as it is, I’ll get half of it through, and see to the rest of it the next time around.”⁴⁷ He describes not being able to move his colleagues to support a particular approach in the 1987 case *Vaillancourt*,⁴⁸ which involved a Charter challenge of a provision of the *Criminal Code*⁴⁹ that allowed the charge of murder for a death caused in the commission of an armed robbery. Justice Lamer (as he then was), writing for the majority, struck down the section of the Code as unconstitutional, but he could not get his colleagues to agree on a “subjective test” of foreseeability, instead relying in this case on a minimum standard of objective foresight (that is, a reasonable expectation that death could occur in the eyes of a “reasonable person” as opposed to in the eyes of the accused). Three years later, however, he was able to swing the Court to favour his approach:

[I]n *Vaillancourt*, the felony murder, I wasn’t getting a majority for the subjective test. Well I got at least the objective test, and said we need not decide in the case whether it has to be subjective. ... But you’ll notice that in *Martineau*⁵⁰ I went up the further step with different judges. The court had changed.⁵¹

Of the seven judges deciding *Martineau*, only three — Dickson C.J.C., Wilson J. and Lamer J. (as he then was) — were involved in the *Vaillan-*

⁴⁷ Bob Babinski, “Backstage at the Supreme Court” (1993) 17(3) Canadian Lawyer, at 11 [hereinafter “Babinski”].

⁴⁸ *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

⁴⁹ R.S.C. 1985, c. C-46.

⁵⁰ *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

⁵¹ Babinski, *supra*, note 47.

court decision. This description epitomizes the strategic considerations some scholars view as central to judicial behaviour.

Without access to the private papers of the justices, it is impossible to document definitively how common such strategic behaviour is at the Canadian Court. However, to characterize the overall process as strategic is problematic for two reasons. First, norms of collegiality and collaboration infuse the process to the point that, as noted above, reasons are sometimes attributed to a particular justice in name only. In instances where a judge works hard with her colleagues to produce the “best” possible reasons, where changes are made not to secure votes but to improve the quality of the decisions, then such choices are not strategic in the instrumentalist sense portrayed in the scholarly literature.

Second, because half, if not more, of the initial votes at the conference stage are unanimous, there are invariably many occasions where strategic behaviour on the part of the justice assigned to write the reasons is simply unnecessary. This is especially true of instances where the justices are not only unanimous on the outcome of the case, but the reasoning for the outcome from the outset, something which is fairly common at the Court.

Finally, although changes in reasoning, whether involving the scope or logic of a judgment, might reflect strategic choices by the justices, in a substantial percentage of cases a judge will change her mind on the vote as well. According to Sopinka J., the oral hearings are determinative in approximately 10 to 15 per cent of cases, meaning that judges will come to the hearing with a certain impression (or completely undecided) having read the written submissions, but will change their minds or have their views significantly altered by the strength of the arguments at hearing.⁵² The justices I interviewed state that while they are less likely to change their mind after the oral hearing, a certain degree of “vote fluidity” exists at the latter stages of the decision-making process.

Each member at some point arrives at conference unable to make a firm decision on the merits of an appeal. In such instances, undecided members typically need to see the first draft of reasons before deciding how to vote. While cases where a justice votes one way at conference and switches to the other side during the writing stage are less common, they do occur.⁵³ One justice notes it is not uncommon to change one’s

⁵² John Sopinka, “Advocacy in the Top Court” (1995) 4(4) *The National* 42.

⁵³ That judges will change their minds in this manner is independently verified in interviews with the law clerks.

mind on whether or not to dissent. A judge who thought he or she would dissent can end up joining the majority on the strength of their arguments, and vice versa. Although rare, it is not unheard of for a justice assigned to write the reasons to have a change of heart. In one very rare instance, confirmed by two justices, the entire Court changed sides after the justice who was assigned what everyone thought to be unanimous reasons to dismiss an appeal could not get to the originally desired result and ended up writing reasons that upheld the appeal. Explanations of judicial behaviour premised solely on ideologically based policy preferences cannot account for this type of vote fluidity.

3. Collegiality and Interpersonal Relations

Deliberation over drafts of judgments does not take place solely through written memoranda. The justices will also discuss cases on an informal, face-to-face basis.⁵⁴ Disagreement about the appropriateness of particular forms of interaction in the process has occasionally caused frosty relations on the Court. “Insider” accounts suggest outright lobbying between the justices.⁵⁵ In her biography, Wilson J. describes being left out of informal deliberations:

the concept of lobbying your colleagues to support you became an important part of the process. So people would spend quite long periods in each other’s rooms, arguing about changes and amendments and so on and so forth. You might not know anything about this, of course, and that person wouldn’t come and speak to you, because they were going to speak to the person that they thought, well, this is the judgment I am going to be supporting. So there never was any kind of opportunity to explain why you didn’t think that was a sound addition, or a sound subtraction. The first thing you knew was the group had now formed.⁵⁶

⁵⁴ There appears to be strong disagreement in previous studies of the Court about the extent to which deliberation takes place via written memoranda or in-person meetings. Greene *et al.* contend in their 1998 study that face-to-face discussions are “rare”. Greene *et al.*, *supra*, note 17, at 121. In their biography of Chief Justice Dickson, however, Sharpe and Roach suggest that “post-conference discussion between judges appear, for the most part, to have been oral and informal”. Sharpe & Roach, *supra*, note 35, at xi.

⁵⁵ Anderson, *supra*, note 39, at 162-63; Lorne Sossin, “The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada” (1996) 30(2) U.B.C. L. Rev. 295, at note 48.

⁵⁶ Anderson, *id.*

In the same book, L'Heureux-Dubé J. recalls numerous occasions when she, Wilson J. and, later, McLachlin J. (as she then was), were left out of some deliberations.⁵⁷

Interviews confirm that some members of the Court are significantly more likely to engage their colleagues in informal deliberations about drafts of reasons than others. In part, this depends on personality. Some justices are more gregarious than others, and feel more comfortable “walking the halls” and having discussions in each other’s offices. On occasion, however, this process suffers from political manoeuvring, or at least the perception that such strategic machinations are occurring. One former clerk recalls an instance in which Wilson J. distributed dissenting reasons and a couple of her colleagues came to her to say that while they agreed with her, they had already promised the judge writing the initial draft that they would sign on to his reasons. It is important to underline that this type of incident may be exceptional, but the broader incidence of lobbying threatens to undermine consensus. Indeed, one of the troubling aspects for Wilson J. was that “once a particular group knew it had ‘won,’ there was little incentive for it to consider any diverging or opposing opinions”.⁵⁸

Former Chief Justice Lamer disputed Wilson J.’s contention, arguing that “there was no little clique, no little gang. Like-minded people tend to congregate”.⁵⁹ In an interview with *The Globe and Mail*, Lamer C.J.C. states that “there was no point in going to Bertha’s office and saying: ‘Bertha, if you were to change this or that, I could go along with it.’ Because she was stubborn as a mule.”⁶⁰

All of the justices I interviewed confirm that informal discussions among their colleagues regularly take place, but they differ on the extent to which they prevent others from fully participating and on whether they are as problematic as Wilson J. and L'Heureux-Dubé J. describe. One justice expressly denies that there is any attempt to “lobby” or change minds:

⁵⁷ *Id.*, at 164.

⁵⁸ *Id.*

⁵⁹ Cristin Schmitz, “Former Chief Justice Lamer Reflects on his Brightest, Darkest Moments as Canada’s Top Jurist” (March 29, 2002), 21(44) *The Lawyers Weekly* [hereinafter “Schmitz, ‘Former Chief Justice Lamer’”].

⁶⁰ Kirk Makin, “Lobbying Hurt Court, Book says Backroom Deals Among Top-Court Judges Threatened Charter, Wilson Felt” *The Globe and Mail* (March 11, 2002) at A9 [hereinafter “Makin, ‘Lobbying Hurt Court’”].

The majority would write the first opinion, probably in the hope that they would write an opinion that the dissenters would find answers their dissent. But there was never any arm-twisting ... you were from the beginning and all through the process completely independent [without] any pressure from anybody.

Another justice points out that personality does make a difference: “Some are more outgoing, more extroverted by personality, easier to approach or deal with ... You can’t take human nature away from the judges. They’ve got their own personalities.” This justice continues: “Everybody’s very polite about this, but some [colleagues] you know from past history are just reluctant to change anything. Sometimes you don’t bother trying, you just simply write your concurrence or your dissent.”

A third justice states: “I think the principle is that if something is important enough to warrant changes, normally other colleagues should be added to the discussion. But it’s not that formal. There is still a lot of face-to-face interaction.”

A fourth justice explains: “We do some walking around the halls, but you can’t do it in an unprincipled way. By that I mean you’ve got to be transparent eventually about it.” This justice acknowledges, however, that there is on occasion the potential for harm to the Court’s collegial relations:

There’s a danger when you have informal discussions that somebody will not be involved. That’s something that one has to be sensitive to. And sometimes that will happen. But it doesn’t detract, in my view, from having both formal and informal contact. And if you know that that’s going to happen, then you can be more sensitive to it. But I never felt that — maybe others did — but I didn’t feel that there was a sort of deliberate cabal or factionalizing. Sometimes it came together that five judges were all seeing a problem in a particular way, and four were not.

In other instances, “you may have a question that you’re not sure about. You don’t want to waste everybody’s time exploring something by sending a formal memorandum around when it’s something that you want to raise and have a discussion with a colleague about.”

Justice Wilson viewed the “lobbying” process as too dependent on personalities and as reflecting ideological considerations.⁶¹ Further, the lobbying described in her biography suggests informal discussions were about far more substantive issues than changes in wording to a particular paragraph or minor changes that might amount to a waste of everyone’s

⁶¹ Anderson, *supra*, note 39, at 164-65.

time. Part of the problem, in Wilson J.'s view, was that it manifested as a "boy's club", where some of the justices would often lunch together or play squash, but Wilson J. and later L'Heureux-Dubé J., were never invited. The problem was that these activities can carry over to discussions of decisions and that, in Wilson J.'s words, "those who weren't part of that didn't have the benefit of that private intimate discussion and exchange of views".⁶²

Justice Wilson felt that the Court required a clear protocol on decision-making, such as ensuring justices did not sign onto opinions until all dissenting or concurring drafts had been circulated.⁶³ Her understanding was that once a justice notifies her colleagues that she proposes to dissent, the process of concurring to the original reasons stops, as it is "bad form" to concur with the first set of reasons until the dissenting reasons are circulated.⁶⁴ Such a protocol never materialized because the justices do not agree on the best approach.

The debate over lobbying and when a judge should sign on to a set of reasons stems from competing conceptions of the Court as a collaborative decision-making collegium or as nine individual decision-makers. A host of factors can influence the degree to which justices are motivated to engage in such lobbying. There is little doubt that, as noted above, like-minded justices will deliberate and collaborate more often with each other. Over the Court's history, "voting blocs" of justices have been identified. In the 1970s, Laskin C.J.C., with Spence J. and Dickson J. (as he then was), came to be known as the "L-S-D Connection" for their frequent joint dissents.⁶⁵ Through much of the 1990s, a bloc consisting of Lamer C.J.C., Sopinka J., Cory J., Iacobucci J. and Major J., also known as the "gang of five", was instrumental in consistent rulings strengthening legal rights under the Charter for the criminally accused. The Court often sharply divided on these issues, with other justices, McLachlin J. (as she then was) and L'Heureux-Dubé J. especially, frequently in dissent.⁶⁶

It is clear that, depending on the issue, certain justices are inclined to speak to those colleagues they believe are predisposed to agree with them. Several former law clerks confirm that their respective justice would have obvious choices among their colleagues regarding who to

⁶² *Id.*, at 415, note 12.

⁶³ *Id.*, at 165.

⁶⁴ Wilson, *supra*, note 18, at 237.

⁶⁵ McCormick, *Supreme at Last*, *supra*, note 38, at 92.

⁶⁶ *Id.*, at 134-35 and 155-56. See also Kirk Makin, "It 'Fundamentally Changed the Justice System'" *The Globe and Mail* (April 10, 2007) at A7.

approach, and who not to, about a particular case.⁶⁷ One clerk explains, “my judge tended to take the opinions of certain judges with more seriousness than some of the other judges. I think that’s normal in any institution ... that the closer your opinions lie to somebody the more likely you are to consider their input and take them seriously.” Just as significantly, “when he was considering whether to concur on judgment x, it mattered to him if it was coming from judge x or judge y, judge x being someone he had a lot of respect for, judge y less so.” Chief Justice Lamer’s comments that “there was no point in going to Bertha [Wilson’s] office”⁶⁸ provide further confirmation of this point.

This, of course, depends largely on the issues at stake, although personality conflicts could at times infect and deepen the patterns of division on the Court. Recent studies make clear that the Charter itself has been a major source of jurisprudential division on the Court; Charter cases are twice as likely to generate disagreement as non-Charter cases.⁶⁹ Even during the Charter era the collegiality on the Court has ebbed and flowed. Despite the consensus-driven approach Dickson C.J.C. strived for in the first couple of years of the Charter, sharp divisions quickly became evident. Between the tensions involved in dealing with a large backlog of cases and strong disagreement among the justices over how expansively to interpret the Charter, the Court of the mid-to-late 1980s has been described as an unhappy place. As L’Heureux-Dubé J. explains:

[T]here is a little joke that says marriage is like a tower which is under siege: ‘Everybody that’s in wants to get out, and everybody that’s out wants to get in.’ When I arrived here [in 1987], the Supreme Court was exactly that ... There will always be divisions between nine people of different backgrounds, nine people of different visions ... Sometimes it will become more personal, more bitter.⁷⁰

Levels of disagreement on the Court peaked in the middle of the 1990s, also the middle of Lamer C.J.C.’s tenure as Chief Justice. Under McLachlin C.J.C., as noted earlier, consensus has increased, particularly as it pertains to reducing the number of separate reasons. McCormick

⁶⁷ It is important to note, however, that approximately one-half of the former law clerks interviewed for this study claim to have had little to no knowledge about the informal discussions between justices as it pertained to who would speak to whom and what was said.

⁶⁸ Makin, “Lobbying Hurt Court”, *supra*, note 60.

⁶⁹ McCormick, “Blocs, Swarms, and Outliers”, *supra*, note 5, at 134. See also Daved Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007).

⁷⁰ Cristin Schmitz, “Our One-On-One with Justice Claire L’Heureux-Dubé” (May 17, 2002), 22(3) *The Lawyers Weekly*.

speculates on why patterns of disagreement seem to coincide with the tenure of different Chief Justices: “Perhaps it is a question of a forceful personality in the centre chair to whom the others defer; perhaps it is a successful attempt to persuade the members of the Court to a certain style or tone of disagreement; or perhaps it is leadership by example.”⁷¹ With regard to the latter, McCormick notes that McLachlin C.J.C. and Dickson C.J.C. wrote or signed onto minority opinions with less frequency after they became chief, suggesting a “moderating effect” on the behaviour of their colleagues, while Lamer C.J.C.’s behaviour did not change. Ostberg and Wetstein also suggest that McLachlin C.J.C. “is more interested in consolidating the Court by letting others shoulder the majority opinion workload, and in casting few dissenting votes and writing few dissenting opinions as chief”.⁷²

By the mid-1990s, the major backlog problems of the 1980s had largely been alleviated, but divisions and a certain degree of interpersonal tensions remained significant. Upon retiring in 1997, La Forest J. described the Court as having a “closed style” under Lamer, reflecting some of the concerns Wilson J. had about the Court’s collegiality a decade earlier. Several justices, without commenting negatively on Lamer C.J.C.’s approach to collegiality, agree that under McLachlin C.J.C., the level of deliberation and congeniality has increased.

The implication of this discussion is clear: the influence certain justices have on each other is a combination of good personal relations and past records of agreement. Similar ideologies matter, of course, but mutual respect plays a role as well. Collegiality (in terms of how the justices work together), and the interpersonal relationships on the Court (in terms of how well the various personalities mesh) are connected and mutually reinforcing.⁷³

It should not be surprising that jurisprudential divisions and personality conflicts might, on occasion, come together in a manner that impacts the Court’s decisions and working environment. Despite the fact that identifiable voting blocs develop from time-to-time, these divisions are far from permanently entrenched on the Canadian Court in the way they seem to be on its American counterpart. The justices acknowledge these tensions, but maintain that for the most part, the Court has been a very collegial place, even during the more tumultuous periods of its

⁷¹ McCormick, “Blocs, Swarms, and Outliers”, *supra*, note 5, at 135.

⁷² Ostberg & Wetstein, *supra*, note 3, at 212.

⁷³ See Anderson, *supra*, note 39, on the distinction between “collegiality” and “congeniality”, at 153.

modern history. Comments throughout the interview process that the McLachlin Court is a *particularly* happy and collegial place are important, not only for what they say about the current environment but because they reflect how consensus can improve or deteriorate over time.

4. Reconferencing

On occasion the Court, usually at the behest of the Chief Justice, will reconvene for a second conference about a particular case. One justice notes that there is a general acceptance among members of the Court if one of their colleagues wants to reconvene. The practice was relatively common in the mid-to-late 1980s, when the Court was first developing approaches to the Charter's various provisions. Chief Justice Dickson's biographers confirm this, noting that at the time, "ongoing, seminar-type discussion of broad legal issues was virtually unheard of, but ... the judges were conscious that their early Charter pronouncements would set the tone for the future, and they wanted to sound as clear, confident, and unanimous as possible."⁷⁴ While reconvening was quite rare under Lamer C.J.C., it has increased again under McLachlin C.J.C.

Reconferencing usually occurs in particularly difficult or divisive cases. For example, many conferences were convened with respect to the *Reference re Secession of Quebec*.⁷⁵ More generally, one justice describes why a second conference might be called: "Sometimes, for example, there would be two main streams of reasoning after the circulation of drafts. Or quite often a reason would be complicated so you'd have three sets of reasons, and there would be consideration of whether you can combine two sets of reasons in some way." Often the second conference will help smooth over divisions or help to get the justices to reach some type of consensus. Nonetheless, they are not always successful. Another justice notes that "you can never be sure how helpful the [second] conference will be until after the fact".

Chief Justice McLachlin has publicly stated that reconferencing also helps to prevent unnecessary friction or invective between majority and minority factions. She notes that they are intended "to make sure that anything which could develop into a more major issue gets defused at an

⁷⁴ Sharpe & Roach, *supra*, note 35, at 312.

⁷⁵ [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) [hereinafter "*Quebec Secession Reference*"].

early level ... Occasionally you just have a chat on something that you think might blow up, even if it's just a [single] case".⁷⁶

The practice of reconvening, from the perspective of a clerk on the McLachlin Court, can help reduce confusion as well:

You'd sometimes see a flurry of memos and comments going around, and then there'd be a pause, and then [the justices] would actually have a discussion following from that [in the conference room]. And then you'd hear the results of that discussion. ... Once the judges can get together and talk again about what their points of disagreement [were] they'd realize they weren't that far apart.

III. UNANIMITY AS A GOAL AND ITS EFFECTS

Despite the norms the justices adhere to and the procedural efforts they make to reach consensus, only in rare instances do they make unanimity an explicit goal. Usually this occurs in the context of particularly important cases, where the justices view having the Court speak with one voice as paramount. Examining the impact of unanimity as a goal and its effect on decisions is important because it is an open question whether unanimity actually produces better results.

Drawing on a couple of cases identified as such in interviews, I find that when unanimity is an overt goal it can have the effect of both narrowing and broadening the Court's written reasons. On the one hand, decisions become narrow because the compromise required among the justices necessitates focusing only on those issues to which all of the justices on a panel can agree. Issues about which agreement cannot be reached are deemed tangential to the main problem at hand and are left out of the decision. Former Chief Justice Dickson has stated that "it might be necessary to pass up the benefits to be had from discussion about fine points of difference between various colleagues" in order to achieve unanimity around an issue that requires a "clear and firm statement of principle from the Court".⁷⁷ One recent study confirms that narrow opinions, measured by the number of separate legal issues raised by a case, were more likely to be unanimous.⁷⁸

⁷⁶ Kirk Makin, "Judicial Activism Debate on Decline, Top Judge says", *The Globe and Mail* (January 8, 2005) at A1.

⁷⁷ Brian Dickson, "A Life in the Law: The Process of Judging" (2000) 63 Sask. L. Rev. 373, at 385 (from address delivered in 1992).

⁷⁸ Donald R. Songer & Jill Siripurapu, "The Unanimous Cases of the Supreme Court of Canada as a Test of the Attitudinal Model" (2009) 42(1) Can. J. Pol. Sci. 87.

On the other hand, decisions become broader or ambiguous when the justices agree on particular concepts but leave them underspecified to avoid conflict. Justice Wilson felt the informal negotiations between justices were too often justified on the basis that they produced clear majorities instead of split decisions, even if the result was increased ambiguity in the reasons: “calculated ambiguity, as one colleague described it, was anathema for her; far better to have a range of judgments offering options, including a dissent and a diverging concurrence if necessary, as long as each judgment was written with crystal clarity.”⁷⁹ Justice Bastarache has argued that consensus can occasionally “muddy the legal waters”. He states:

We have had a few experiences that I think were meant to be helpful, but didn’t produce very good results because I guess too much compromise [by the judges], or too much wording to try and meet the minimum requirements of everybody on what should be said, produces [decisions] that are difficult to read and too long and not helpful with regard to the use that can be made of them, in the courts of appeal especially. So, thinking about it now I think there are some cases where we might have been better to produce a few sets of reasons instead of one.⁸⁰

Perhaps the most important decision the Court has rendered is its opinion in the *Quebec Secession Reference*. The justices put considerable effort into producing a unanimous judgment, and signed it with no lead author, choosing instead to write as “The Court”. Following the narrow victory of the federalist side in the 1995 referendum on Quebec sovereignty, the federal government tossed the Court a political hand grenade, asking it to rule on whether the provincial government of Quebec could effect secession unilaterally. The stakes for the Court’s legitimacy, across Canada but also specifically within Quebec, were clear. Throughout much of Quebec, a decision limited to a declaration that the province had no constitutional right to secede unilaterally would only confirm suspicions that the Court was firmly in the hands of federalist Ottawa. Indeed, separatists initially claimed that the Court would prove to be politicized if it chose to even render a decision.⁸¹ Rather than limiting the decision in this manner, however, the Court balanced its reasons by ruling that in

⁷⁹ Anderson, *supra*, note 39, at 164.

⁸⁰ Schmitz, “The Bastarache Interview”, *supra*, note 32.

⁸¹ Sujit Choudhry & Robert Howse, “Constitutional Theory and The *Quebec Secession Reference*” (2000) 13(2) Can. J. L. & Juris. 166 [hereinafter “Choudhry & Howse”].

the event of a “clear majority” on a “clear question” in favour of sovereignty, the rest of Canada has a duty to negotiate.

The Court has generally received high praise for the political acumen the justices demonstrated in fashioning a decision from which both federalists and sovereigntists could claim some victory. Commentators have described the decision as “masterful”⁸² and “ingenious”.⁸³ Lacking legal precedent or explicit guidance in the Constitution’s text, the Court’s decision refers to four “basic constitutional principles” — federalism, democracy, rule of law and constitutionalism, and the protection of minority rights — and from those principles developed an opinion that “reads more like an essay than a legal decision”.⁸⁴

Yet the decision is also remarkable for what it left unanswered. The Court leaves “for the political actors to determine what constitutes ‘a clear majority on a clear question’”.⁸⁵ The justices provide no guidance on a host of other issues: what amending formula should be used to achieve secession; the rights of Aboriginals or other minorities; and the content of negotiations between Quebec and the rest of Canada. Peter Leslie writes that:

[the] *Secession* case actually resolved almost nothing, in the sense of removing any critical questions from the realm of political controversy. Even the “obligation to negotiate,” highlighted by so many commentators (certainly by the *indépendentistes*), left in place almost all the existing ambiguities and uncertainties surrounding the process that could lead to secession.⁸⁶

The explanation for this is almost universally ascribed to the Court’s concern for protecting its institutional legitimacy.⁸⁷ Put simply, the Court left these questions to the “political” sphere so as to preserve its role as guardian of the Constitution in the eyes of all Canadians. In the judgment, the Court notes that:

the role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have

⁸² Robert A. Young, *The Struggle for Quebec* (Montreal: McGill-Queen’s University Press, 1999), at 146 [hereinafter “Young”].

⁸³ Peter H. Russell, Rainer Knopff, *et al.*, *The Court and the Constitution: Leading Cases* (Toronto: Emond Montgomery Publications, 2008), at 543 [hereinafter “Russell *et al.*”].

⁸⁴ *Id.*, at 542.

⁸⁵ *Quebec Secession Reference*, *supra*, note 75, at para. 153.

⁸⁶ Peter Leslie, “Canada: The Supreme Court Sets Rules for the Secession of Quebec” (1999) 29(2) *Publius* at 149-50.

⁸⁷ Young, *supra*, note 82, at 147; Russell *et al.*, *supra*, note 83, at 543; Choudhry & Howse, *supra*, note 81, at 166.

interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations.⁸⁸

There is little reason to disagree with the consensus view that part of the reason for the Court's restraint was to avoid breaking the balance the justices fought so hard to achieve. The justices had given something for both federalists and sovereigntists to cling to following the ruling (and claim "victory" with). Had it spelled out the requirements for a potential negotiated secession or the meaning of "clear majority" or "clear question", the Court would have risked disaffecting one side and raising the spectre of attacks on its legitimacy.

Seemingly ignored in extant analyses of the case is a consideration of the written judgment as a product of a collegial process where, in this instance, unanimity was an important goal of the justices. Under this condition, the tendency is for justices to coalesce around the major issues of agreement. Where disagreement arises over specific issues, if the desire for unanimity is strong enough, the effect of a collegial decision-making process is to leave those issues out.

A second case in which the goal of unanimity effectively narrowed the Court's final decision was in *Tremblay v. Daigle*.⁸⁹ The appellant, Chantal Daigle, sought to overturn an injunction obtained in a Quebec Superior Court by her former boyfriend that prevented her from terminating her 18-week pregnancy. A memorandum circulated by Dickson C.J.C. indicated his intention to write reasons declaring that a foetus had no legal status under section 7 of the Charter. Justice La Forest responded by saying he would write separate reasons dealing only with the *Quebec Charter of Human Rights and Freedoms*,⁹⁰ as it was unnecessary, in his opinion, to deal with the issue under the Canadian Charter. According to Sharpe and Roach, "this prompted Dickson to pull back. He did not want a divided opinion. Although it seems possible that he might have attracted a majority of the Court on his more broadly based draft, he preferred an immediate and unanimous decision on narrower grounds."⁹¹

⁸⁸ *Quebec Secession Reference*, *supra*, note 75, at para. 100.

⁸⁹ [1989] S.C.J. No. 79, [1989] 2 S.C.R. 530 (S.C.C.).

⁹⁰ R.S.Q., c. C-12.

⁹¹ Sharpe & Roach, *supra*, note 35, at 394-95.

It is important not to understate the significance of Dickson C.J.C.'s preference for unanimity in this case. It was not surprising that the justices sought unanimity in a case such as the *Quebec Secession Reference*. For one thing, the notion that federalist judges in a case involving Quebec secession would have ideological differences (at least those premised on simple liberal versus conservative considerations) is highly questionable. But in a case dealing with abortion rights, most observers would not expect an institutionally derived preference for unanimity to override the philosophical predilections of any of the justices involved. Here, Dickson C.J.C.'s desire for a quick and unanimous judgment suggests he held consensual norms powerful enough to pre-empt his own policy preference.

Other instances in which the justices aim to achieve unanimity result in broader judgments that hinge on vague concepts or ambiguous wording. One prominent 1999 case, *Law*,⁹² established a new approach to the Charter's equality provisions. In so doing, a finding that a law impaired the "human dignity" of the claimant became a crucial component of the Court's approach to section 15. This concept proved to be so vague that its application in later cases created sharp disagreement among the justices. Ten years prior to *Law*, in the Court's first equality case the justices agreed to an approach that promoted a substantive understanding of equality as opposed to a more restrictive, formal understanding of it as identical treatment under the law.⁹³ A finding of discrimination, however, would be limited to the grounds enumerated in section 15(1) of the Charter, as well as any "analogous" grounds.⁹⁴

The justices soon split into three camps on identifying discrimination. The division is most clearly identified in two 1995 cases: *Egan*⁹⁵ involved a gay man's challenge to the Old Age Security spousal allowance provisions, in which the Act defined "spouse" as a person of the

⁹² *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter "*Law*"].

⁹³ *Law Society of British Columbia v. Andrews*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.). The justices were unanimous on the approach, but divided over the outcome of the particular case.

⁹⁴ The grounds enumerated in s. 15(1) are race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. Over the years, the Court has identified several analogous grounds: marital status (*Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.) [hereinafter "*Miron*"]); sexual orientation (*Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.) [hereinafter "*Egan*"]); citizenship/non-citizenship (*Andrews, id.*); and off-reserve residence for Aboriginals (*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.)).

⁹⁵ *Egan, id.*

opposite sex; and *Miron*⁹⁶ involved a challenge to a provision of Ontario legislation that gave accident benefits to married spouses but did not give the same benefits to common-law spouses. As Hogg explains:

four of the nine justices wanted to import into the section 15 analysis (through the definition of discrimination) the requirement that the legislative classification not only be based on a listed or analogous ground, but also be “irrelevant” to “the functional values of the legislation”.⁹⁷

Thus in the *Miron* and *Egan*, the four justices ruled that the legislative schemes were saved because they were designed to protect the institution of marriage. Another four justices disagreed, choosing to stick with the original approach from *Andrews*, where “a disadvantage imposed on the basis of an analogous ground (marital status in *Miron*, sexual orientation in *Egan*) was enough to constitute discrimination”.⁹⁸ Justice L’Heureux-Dubé rejected both approaches in favour of investigating claims of discrimination on a “more discretionary, case-by-case basis”.⁹⁹ This division persisted, even in subsequent cases where the justices reached unanimous decisions on the outcome. For example, in the 1998 case *Vriend v. Alberta*, Cory J. notes that “[i]n this case, as in *Eaton*, *Benner* and *Eldridge*, any differences that may exist in the approach to s. 15(1) would not affect the result, and it is therefore not necessary to address those differences.”¹⁰⁰

In *Law*, the justices decided to develop a unanimous approach that resolved these divisions. The new interpretation of section 15 incorporated a novel element to discrimination beyond a distinction based on an enumerated or analogous ground: the impairment of “human dignity”. Justice Iacobucci, writing for the Court, defines human dignity as follows:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to

⁹⁶ *Miron*, *supra*, note 94.

⁹⁷ Peter W. Hogg, “What is Equality? The Winding Course of Judicial Interpretation” (2005) 29 S.C.L.R. (2d) 53-54 [hereinafter “Hogg”].

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at 74 (S.C.C.). Citing *Eaton v. Brant County Board of Education*, [1997] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.); *Benner v. Canada (Secretary of State)*, [1997] S.C.J. No. 26, [1997] 1 S.C.R. 358 (S.C.C.); and *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624 (S.C.C.).

individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?¹⁰¹

Justice Iacobucci writes further that the “equality guarantee in s. 15(1) of the *Charter* must be understood and applied in light of the above understanding of its purpose. The overriding concern with protecting and promoting human dignity in the sense just described infuses all elements of the discrimination analysis.”¹⁰² Although not setting up a strict legal “test” *per se*, Iacobucci J. outlines four “contextual factors” to help guide analysis: whether there is pre-existing disadvantage experienced by the individual or group at issue; whether there is a correspondence between the distinction made in the impugned law and the claimant’s characteristics or circumstances; the ameliorative purpose or effects of the law with respect to other, potentially more disadvantaged, groups; and the nature of the particular interest affected by the impugned law.¹⁰³

Although the justices aimed to reconcile diverging equality approaches into a single framework, the decision has been criticized for its complexity, for being confusing, and for increasing burdens on *Charter* claimants to prove violations of human dignity.¹⁰⁴ Indeed, the justices quickly fell into the pattern of disagreement that marked equality jurisprudence prior to *Law*. One good example is the 2002 case *Lavoie*, which concerned the constitutionality of the Public Service Commission’s hiring preference for citizens and had four sets of written reasons.¹⁰⁵ As

¹⁰¹ *Law*, *supra*, note 92, at para. 53.

¹⁰² *Id.*, at para. 54.

¹⁰³ *Id.*, at para. 88.

¹⁰⁴ Debra M. McAllister, “Section 15 – The Unpredictability of the *Law* Test” (2003) 15 *Nat’l J. Const. L.* 35; Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 3d ed. (Toronto: Irwin Law, 2005), at 293 [hereinafter “Sharpe & Roach, *The Charter of Rights*”]; Cristin Schmitz, “Mixed Reviews for 20th Anniversary of Section 15” (April 29, 2005), 24(48) *The Lawyers Weekly*; Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada Inc., 2006).

¹⁰⁵ *Lavoie v. Canada*, [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769 (S.C.C.).

Sonia Lawrence writes, “[a]ll of the reasons purport to apply the *Law* test, which confirms the criticism that the test is too vague and open-ended and cannot be the basis for consistent decision-making.”¹⁰⁶ Similar disagreement over the application of the human dignity standard appears in a number of other important equality cases decided after *Law*.¹⁰⁷

The justices sought and achieved unanimity in *Law*, but the vague nature of the central element of the new approach — human dignity — and the subsequent disagreement among the justices over its meaning reveals that the level of consensus achieved was quite thin. Moreover, since most equality cases failed under the *Law* regime,¹⁰⁸ it is clear that judicial readiness to push for unanimity in certain circumstances can have important repercussions not only for statements of the law, but for the outcomes of subsequent cases.

Criticism of the Court’s post-*Law* equality jurisprudence has been so significant that the Court addressed it in 2008, when the justices unanimously¹⁰⁹ backtracked on the human dignity standard and re-enunciated the original approach to equality found in *Andrews*.¹¹⁰ Chief Justice McLachlin and Abella J. write, “as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.”¹¹¹ It remains to be seen whether the divisions that have plagued the Court with regard to the proper approach to section 15 are solved by this restated position.

While measures of unanimity provide an indication about the level of consensus on multi-member courts of appeal, a unanimous outcome does not always reflect deep consensus. In some cases, the consensus is quite narrow, but the justices prefer clarity for both the law and to preserve institutional legitimacy, particularly in the most important cases. More significantly, unanimous cases can sometimes lead to disagreement if

¹⁰⁶ Sonia Lawrence, “Section 15(1) at the Supreme Court 2001-2002: Caution and Conflict in Defining ‘The Most Difficult Right’” (2002) 16 S.C.L.R. (2d) 110.

¹⁰⁷ *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.); *Nova Scotia (Attorney General) v. Walsh*, [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325 (S.C.C.); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.). Cited by Hogg, *supra*, note 97.

¹⁰⁸ Sharpe & Roach, *The Charter of Rights*, *supra*, note 104, at 292-93.

¹⁰⁹ Justice Bastarache wrote a concurring opinion relating specifically to s. 25, but signalled agreement with the restatement of the application of s. 15 found in the majority reasons.

¹¹⁰ *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.).

¹¹¹ *Id.*, at para. 22.

unanimity is achieved at the cost of ambiguous provisions, as demonstrated by the Court's Charter jurisprudence involving equality.

IV. CONCLUSION

The Supreme Court of Canada is characterized by a relatively high level of consensus. Although many factors likely contribute to an institutional culture that produces this consensus, one of the most important is the norms and conventions that the justices adhere to in their work. These norms and the broader collegial nature of the institution are shaped by the institution's internal processes and the individual behaviours and approaches of the nine justices serving on the Court at any given time. The preceding analysis illustrates that judicial leadership is important in the cultivation and maintenance of these norms, as it is in the high courts of other countries.¹¹²

The Chief Justice can engender shifts in the level of consensus achieved by the Court in several ways. While she is not in a position to dictate agreement because the independence of each of the Court's nine justices is considered essentially sacrosanct, the Chief Justice can influence her colleagues by example and force of personality. As noted above, Dickson C.J.C. and McLachlin C.J.C. both reduced their writing of dissents and separate opinions after becoming chief, and both sought to encourage the other members of the Court to come together where possible. The Chief Justice can also take advantage of her leadership role at particular stages of the decision-making process, such as the post-hearing conference, to persuade her bench mates to consolidate disagreement. Chief Justice McLachlin implemented other tools, like reconvening additional conferences to reduce disputes and potentially garner further agreement in certain cases.

More broadly, the individual approaches the justices adopt towards collaboration, such as whether to deliberate primarily through formal memoranda or through informal face-to-face discussions, has at times influenced the general atmosphere of cooperation at the Court. Congenial relations may foster collegial ones, as recent history suggests that collaboration often depends on personality and past records of agreement between justices. Divisions within a group may become entrenched if relationships grow sour or if justices come to identify certain members as

¹¹² See Haynie, *supra*, note 9; Caldeira & Zorn, *supra*, note 9; Epstein *et al.*, *supra*, note 9; Narayan & Smyth, *supra*, note 9.

those they will not bother engaging. Nevertheless, in the context of the Court's recent history, to the extent that pronounced divisions have emerged on the Canadian Court they have been relatively ephemeral.

The consensual norms are strong enough that the various stages of the decision-making process designed to foster collaboration have either been maintained or strengthened over time. Certain indicators are especially illustrative, such as the fact that official authorship of opinions is often immaterial given the level of cooperation involved. Further, the propensity among most of the justices to change their minds in a significant percentage of cases (a phenomenon that ideological explanations of judicial behaviour struggle to explain), suggests not only the open-mindedness expected of the judicial role, but a spirit of engagement in a collegial setting.

The degree of consensus characterizing the Court should not be overstated, however. The Court fails to reach unanimous outcomes in over a third of its decisions. Moreover, as noted above, there remains ample room for strategic behaviour by justices in the deliberation process. Perhaps most significantly, unanimity — often considered the primary indicator of consensus — does not always signify substantive or deep agreement among the justices. This may apply especially to those cases deemed important enough that unanimity becomes an explicit goal of the justices.

Nonetheless, that the Court obtains unanimous outcomes in the majority of cases, and does so as a natural by-product of the processes by which it operates, illustrates the strength of the consensual norms at work. This article has aimed not only to demonstrate that fact but also to uncover how those norms operate. In so doing, it hopefully improves our understanding of the Court and provides comparative insight into the nature of consensus on final courts of appeal.