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# *Standing Apart: Separate Concurrence and the Modern Supreme Court of Canada, 1984–2006*

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Separate concurrences, like dissents, are a common feature of many common law court decisions. At first glance though, it is difficult to understand their purpose, as they have no effect on the outcome of a case and leave in doubt legal questions that would otherwise be perceived as resolved. In addition, valuable amounts of time and effort are in some instances invested in their preparation.

Seeking rationales for separate concurrences, the author provides an empirical analysis of their use by the Supreme Court of Canada under Chief Justices Dickson, Lamer, and McLachlin. From the resulting data, the author generates a typology of separate concurrences and contends that most express significant doctrinal disagreements with the reasoning of the majority rather than minor quibbles. Despite those that are merely intended to “bridge” reasons found in other opinions or confirm a judge’s break from a previous dissent, many concurrences argue in favour of more sweeping statements of law while others advocate for narrower legal grounds. A significant proportion of concurrences are even more disapproving of the majority opinion, either asserting the incorrectness of the majority’s reasons or disagreeing with the majority’s very approach. Most striking are separate concurrences written in the form of complete decisions, which the author suggests are intended to sway other judges of the Court who have initially committed to signing other opinions.

This typology indicates that writing separate concurrences is a common and often rational strategy. The author also suggests that their use frequently reflects broader understandings of the judicial function in evolving contexts. This is exemplified by the declining use of separate concurrences at the Supreme Court of Canada as *Charter* matters have become more settled.

Les décisions conjointes, tout comme les décisions dissidentes, sont fréquentes dans le système de common law. À première vue, il est difficile de comprendre leur raison d’être, n’ayant aucun effet sur le résultat d’une affaire et semant le doute sur des questions de droit considérées comme résolues. De plus, leur préparation requiert souvent un investissement de temps considérable.

Cherchant à comprendre leur fonction, l’auteur analyse de façon empirique l’utilisation de décisions conjointes au sein de la Cour suprême du Canada durant les années de service des Juges en chef Dickson, Lamer et McLachlin. Utilisant les résultats obtenus, l’auteur développe une typologie et suggère que la plupart des décisions conjointes reflètent d’importants différends doctrinaux entre les juges et non pas des désaccords mineurs. Un grand nombre de décisions conjointes proposent des déclarations plus générales sur le droit alors que d’autres promeuvent des motifs plus restreints. Une grande proportion de ces décisions exprime des désaccords encore plus grands, rejetant les motifs de la majorité ou allant même jusqu’à questionner l’approche de la majorité. Les plus surprenantes de ces décisions conjointes sont celles écrites comme des décisions complètes; selon l’auteur, celles-ci ont été rédigées dans cette forme pour tenter de persuader les juges qui ont initialement décidé de se rallier à une opinion différente.

La typologie indique que la rédaction de ces décisions conjointes est une stratégie commune et souvent rationnelle de la part des juges. L’auteur argumente aussi que leur utilisation reflète des perspectives générales sur la fonction des tribunaux judiciaires dans des contextes juridiques qui évoluent. Par exemple, le déclin du nombre de décisions conjointes ces dernières années est possiblement le résultat de l’existence d’une jurisprudence plus établie ayant trait à la *Charte canadienne des droits et libertés*.

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\* Professor, Department of Political Science, University of Lethbridge. I would like to acknowledge the assistance of Ben Thibault, who was an active and aggressive collaborator both for the collection and coding of data for the Lamer Court, and for the development of my database’s coding categories.

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<b>Introduction</b>	139
<b>I. The Frequency of Separate Concurrence</b>	142
<b>II. Special Concurrences: What Kind of Law?</b>	143
<b>III. The Length of Separate Concurrences</b>	145
<b>IV. Toward a Typology of Separate Concurrences</b>	146
A. <i>Bridging</i>	149
B. <i>"Let me add ... "</i>	149
C. <i>Narrower Grounds</i>	152
D. <i>"Except for ... "</i>	155
E. <i>Different Route</i>	156
F. <i>Ditto</i>	157
G. <i>Seriatim Style</i>	159
H. <i>Other</i>	162
<b>Conclusion</b>	163

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## Introduction

At first glance, writing a separate concurrence is the most curious of available choices for a judge of a panel appellate court. To be part of the majority (even more so, the lead writer for the majority) is clearly to be preferred, as it carries with it the capacity both to declare the winner in the immediate case and to declare the law in a way that will direct decisions in future cases. Since it is widely understood that the named judge<sup>1</sup> is the lead rather than the sole author, to be part of this winning coalition also implies an opportunity to persuade or bargain with other judges about the details of reasons, which by all accounts usually involves a considerable degree of give and take.<sup>2</sup>

To write (or sign) a dissent is clearly less preferable, but on its face still makes perfectly good sense. If one thinks that the majority has got the outcome wrong—has allowed an appeal that it should have dismissed or vice versa—then it is a widely accepted part of the judicial role in common law countries<sup>3</sup> to speak up, to say that the majority is wrong and to explain where and how they went wrong.<sup>4</sup> To dissent all the

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<sup>1</sup> Or judges, given recent co-authorship practices on the Supreme Court of Canada. There have been 86 coauthored decisions since 1984. Perhaps the most famous example is the decision in *Irwin Toy Ltd. v. Quebec* (one of the first statements about the nature and scope of freedom of expression under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]), authored jointly by Dickson, Lamer and Wilson JJ. ([1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577). For a recent significant example, see *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia* (repudiating a 20-year old precedent to include collective bargaining within the *Charter* right to freedom of association), authored jointly by McLachlin and LeBel JJ. (2007 SCC 27, [2007] S.C.R. 391, 283 D.L.R. (4th) 40).

<sup>2</sup> All descriptions of the Supreme Court of Canada's decision-making process emphasize a practice of drafting and circulating that typically draws serious rather than perfunctory response, and that goes through more than one iteration. See e.g. Bertha Wilson, "Decision-Making in the Supreme Court" (1986) 36 U.T.L.J. 227; Ian Green *et al.*, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer & Company, 1998); Donald Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press) [forthcoming]. For the Supreme Court of the United States, for which judicial papers become widely available to the public after a period of 20 years, norms of interaction clearly include explicit negotiation as well as collegial persuasion. See e.g. Forrest Maltzmann, James F. Spriggs & Paul J. Wahlback, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge: Cambridge University Press, 2000).

<sup>3</sup> This assertion is not universally shared though. Some commentators, such as William D. Popkin, would reject this flat and static statement, pointing out that the practice varies from one country to another, from one court to another even within the same country, and from one time to another (*Evolution of the Judicial Opinion: Institutional and Individual Styles* (New York: New York University Press, 2007)).

<sup>4</sup> Of course, it is never quite that simple: it is unlikely that judges are, and arguably undesirable that they should be, completely candid all the time about every aspect of every question. See e.g. Scott Altman, "Beyond Candor" (1990) 89 Mich. L. Rev. 296; Scott C. Idleman, "A Prudential Theory of Judicial Candor" (1995) 73 Tex. L. Rev. 1307.

time would raise questions, but never to dissent at all over an extended period of time would be equally remarkable.<sup>5</sup>

To write a separate concurrence—to agree with the outcome but disagree (or at least not agree completely) with the majority reasons for that outcome—seems the much less obvious choice. It does not change the outcome; indeed, it does not even suggest that the outcome should be changed. A judge who writes a concurring opinion gives up on (and thereby admits the failure of) the attempt to persuade or negotiate with the majority to accept at least part of his diverging ideas. It undermines the impact of the decision itself and the lessons it provides for other courts in the future by reducing the size of the majority and concomitantly leaving in doubt questions that would otherwise be understood to have been resolved. And in the process it absorbs the time and energy—sometimes to quite a considerable extent—of the separately concurring judge or judges.

Nonetheless, judges of the Supreme Court of Canada continue to write separate concurrences. By 25 October 2007, the McLachlin Court, which began in January 2000, had already written eighty-seven separate concurrences—about eleven every year—and these have totalled just over 300,000 words. To be sure, this is only about half as often as the judges wrote dissents (175 over the same time period), and dissents tended to be twice as long as concurrences. But this practice still represents a considerable investment of time and energy, limited resources on any national high court. And since every member of the Court has taken part in one or more concurrences,<sup>6</sup> we must be observing something that is rooted in the practices of the Court and not simply an attribute of a subset of judges—explanations based on personality cannot carry all the weight in accounting for such a pervasive phenomenon.

This paper will examine the practice of separate concurrence in the modern Supreme Court of Canada, which I will take as including the Chief Justiceships of Dickson, Lamer, and McLachlin.<sup>7</sup> My intention is to develop a typology of separate concurrences, in the hope that such a classification and frequency count will suggest

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<sup>5</sup> See e.g. Paul H. Edelman & Jim Chen, “‘Duel’ Diligence: Second Thoughts about the Supremes as the Sultans of Swing” (1996) 70 S. Cal. L. Rev. 219 at 221 (writing disparagingly of a “Justice Milquetoast” who never fails to follow the majority, and wondering if his participation in judicial decisions amounts to anything).

<sup>6</sup> Rothstein J., the most recent appointee, was the coauthor of a separate concurrence in *R. v. Bryan*, 2007 SCC 12, [2007] S.C.R. 527, 276 D.L.R. (4th) 513.

<sup>7</sup> This selection is not altogether arbitrary, because by the end of the Laskin Court, the Court was exhibiting the most unified decision-delivery practices in its history, with more unanimous decisions, fewer dissents and separate concurrences, fewer cases with multiple minority decisions, and a total absence of plurality decisions. The amount of disagreement rose until the mid-1990s; it fell after this point, but is still higher than during the Laskin Court. The years selected are also very convenient. For one thing, a complete set of Court decisions starting in 1985 is available online (*Judgments of the Supreme Court of Canada*, online: LexUM <<http://scc.lexum.umontreal.ca/en/index.html>> [LexUM]). For another, it limits my inquiry to the post-*Charter* period.

something about the purpose and function of separate concurrence in common law appellate courts. An earlier product of this project, looking only at the concurrence behaviour of the McLachlin Court, has already been published.<sup>8</sup> The present endeavour is a refined study that takes the analysis further and applies it to a more extended time period.

It might be thought that concurrences do not need to be investigated very closely because they ultimately do not matter. I admit that I once belonged to this school of thought myself, blithely assuming that dissents were “big disagreements” deserving further exploration, while separate concurrences were “little disagreements” that could be treated more casually. Curiously, the Supreme Court of Canada itself seems to have adopted this same evaluation. The statistics that the Court collects on its own performance keep track of “unanimous/split” decisions, where “unanimous” refers only to unanimity of *outcome*,<sup>9</sup> suggesting that only dissents are indications of disagreements worth noting.

However, with respect, this practice is simply wrong, as illustrated by the trilogy of cases led by *R. v. Van der Peet*.<sup>10</sup> In these cases, Chief Justice Lamer for the majority set out a new test for establishing a claim to an aboriginal right, using this test twice to dismiss the claim<sup>11</sup> and once to allow it.<sup>12</sup> Justices L’Heureux-Dubé and McLachlin vigorously disagreed with the new test, each writing a lengthy dissent in the first two cases<sup>13</sup> and a comparably lengthy concurrence in the third.<sup>14</sup> Despite the different designations used to describe their separate opinions, the depth of the disagreement expressed, and its future doctrinal implications, are identical in all three of these cases.<sup>15</sup>

At least some of the time—indeed, as I will suggest, most of the time—separate concurrences express differences of opinion that are just as significant (and sometimes more so) as those expressed in dissents. If we wish to study what judges

<sup>8</sup> Peter McCormick, “The Choral Court: Separate Concurrence and the McLachlin Court, 2000–2004” (2005) 3 Ottawa L. Rev. 1.

<sup>9</sup> Supreme Court of Canada, *Bulletin of Proceedings: Statistics, 1997–2007*, special ed. at 8, online: Supreme Court of Canada <[www.scc-csc.gc.ca/information/statistics/download/ecourt.pdf](http://www.scc-csc.gc.ca/information/statistics/download/ecourt.pdf)>.

<sup>10</sup> [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.]; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528 [*Smokehouse* cited to S.C.R.]; *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [*Gladstone* cited to S.C.R.].

<sup>11</sup> *Smokehouse*, *ibid.*; *Gladstone*, *ibid.*

<sup>12</sup> *Van der Peet*, *supra* note 10.

<sup>13</sup> *Ibid.* at paras. 95–223, L’Heureux-Dubé J.; *ibid.* at paras. 224–322, McLachlin J.; *Smokehouse*, *supra* note 10 at paras. 30–82, L’Heureux-Dubé J.; *ibid.* at paras. 83–99, McLachlin J.

<sup>14</sup> *Gladstone*, *supra* note 10 at paras. 126–54, L’Heureux-Dubé J.; *ibid.* at paras. 155–175, McLachlin J.

<sup>15</sup> One could make the same point about the companion cases *Pecore v. Pecore* (2007 SCC 17, [2007] 1 S.C.R. 795, 279 D.L.R. (4th) 513) and *Madsen Estate v. Saylor* (2007 SCC 18, [2007] 1 S.C.R. 838, 279 D.L.R. (4th) 547), Abella J. separately concurring in the former and dissenting in the latter.

do, we cannot overlook the fact that one of the things they do reasonably often is write separate concurrences. My purpose in generating a typology of this type of disagreement is to support the argument that a concurrence is worthy of examination, as it is more often used to indicate significant doctrinal disagreement with, rather than preference for minor adjustments to, the majority opinion.

The database I have used to obtain the numbers presented in this paper was initially created in the mid-1990s to cover Supreme Court of Canada decisions since 1949.<sup>16</sup> Since then, the information has been kept up to date on a personal and voluntary basis and the data points have been expanded. Information inputted into the database now includes the style of cause, the application and hearing and decision dates, the result, the type of law involved, whether the decisions are unanimous or include dissents or concurrences, which judges served on the panel and what reasons they wrote or signed, which court the case is being appealed from, whether the action was successful in that court and whether the decision's set of reasons were unanimous, and a word count for every set of reasons. The full data-point expansion applies only to the last three Chief Justiceships, and is under way for the Laskin Court. For more recent years, the LeXUM online database is the source that has been used to find cases, although, as the website long acknowledged, there are some gaps for cases in the late 1980s.<sup>17</sup> I have therefore also used the CanLII online database,<sup>18</sup> which has a better (but still not complete) coverage. The source which was used in the initial data compilation in the 1990s was the print version of the Supreme Court Reports. It is only since 1970 that the Supreme Court Reports have attempted to report every decision; data collection for years before that date included all major law reports (e.g., Dominion Law Reports, Canadian Criminal Cases, Criminal Reports, Canadian Cases on the Law of Torts, Motor Vehicle Reports) but there may still be some omissions. The database has supported the publication of 18 articles as well as one book.<sup>19</sup>

## I. The Frequency of Separate Concurrence

How frequent is the practice of writing a separate concurrence? From the beginning of Dickson's Chief Justiceship to the end of December 2006, there were 432 cases with 610 separate concurrences bearing 906 judicial signatures. For present purposes, I will concern myself with the middle figure—the existence of a separate concurring opinion—not with the question of how often there were multiple separate concurrences in a single case, and only slightly with the collegiality of separate

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<sup>16</sup> The project was initially funded by the Manitoba Legal Research Institute (my thanks to Alvin Esau) and the Alberta Law Foundation (my thanks to Owen Snider).

<sup>17</sup> *Supra* note 8.

<sup>18</sup> Online: CanLII <<http://www.canlii.ca>>.

<sup>19</sup> Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Co., 2000).

concurrences—the extent to which separate concurrences are more than the action of a solitary judge.

To put these figures in the broader decisional context, there were about 2,200 decisions handed down by the Court over this same period, which means that about one case in five involved a separate concurrence (or, to put it differently, decisions outnumbered separate concurrences by about three and a half to one). However, this description slightly misstates the pattern because it ignores the clear ebb and flow that marked this practice. If one were to chart the frequency of separate concurrences (on any of the three measures suggested in the above paragraph), the graph would start low (twenty-four signatures on sixteen separate concurrences in twelve different cases in the 1984–85 Court term), rise steadily and peak in the 1994–95 term (which had 111 signatures on 75 separate concurrences in 43 different cases), then begin to slide back down at almost exactly the same rate as the steady rise (ending with eleven signatures in seven separate concurrences in six different cases in the 2005–06 term). The two average terms (forty-three signatures on twenty-seven concurrences in nineteen cases) are 1991–92 and 1998–99, nicely framing the peak year as well as marking something close to the beginning and end of Lamer’s Chief Justiceship. However, the fact that the peak comes in the middle and not at the end of the Lamer Court suggests that whatever causal factors may have driven this pattern, they are nothing as simple as a change of chief justices.

## II. Special Concurrences: What Kind of Law?

It would hardly be expected that all types of law would be equally likely to draw separate concurrences; presumably we are drawing on those aspects and issues that are still to some extent unsettled, and it is this uncertainty that leads even judges who agree on the outcome to disagree on the best way to explain why it is appropriate. For present purposes, the caseload has been divided into four blocks. The first—obvious since the beginning of the Dickson Court—consists of cases involving the *Canadian Charter of Rights and Freedoms*.<sup>20</sup> Although there is not a perfectly clean line dividing *Charter* cases from other cases, and researchers sometimes generate slightly different lists,<sup>21</sup> this group is generally easy to identify. I have also allowed myself to be guided by the headnotes in the Supreme Court Reports (which are drawn up by the

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<sup>20</sup> *Supra* note 1.

<sup>21</sup> This is a hard point to document now that there are so many *Charter* cases that it is no longer possible (as the first generation of *Charter* articles did) to include an appendix listing all the cases that were included as *Charter* decisions. I will therefore illustrate the problem with a not-so-simple question: what was the Court’s first *Charter* decision? Most accounts would accord this honour to *Skapinker v. Law Society of Upper Canada* ([1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161); but LexUM (*supra* note 7) includes as a *Charter* decision the other contender, *R. v. Westendorp* ([1983] 1 S.C.R. 43, 144 D.L.R. (3d) 259 [cited to S.C.R.]), despite the fact that Laskin C.J.C. found in a single paragraph that the *Charter* issue does not even arise unless the bylaw in question survives a division-of-powers test (*ibid.* at 46-47), which it did not. My point is that both answers are defensible.

judges themselves, not by staff lawyers or law clerks). The second block is public law, which involves noncriminal cases to which the government (provincial, federal or municipal) is a party. The third block is criminal law, where the Crown is a party to the case. This block also includes appeals arising from provincial offences, although in practice these instances make up a very small part of the Court's caseload. The last block is private law, which generally involves individuals and corporations in actions dealing with such matters as liability and contract. To be sure, the categories are not quite exclusive of one another (because every *Charter* case has some other element—usually criminal, sometimes public). However, they seem preferable to the blunt “civil/criminal” distinction of the Supreme Court Reports themselves, which create an enormous and unwieldy residual “civil” category.

<b>Table 1: Separate Concurrences and Total Number of Decisions by Type of Law Supreme Court of Canada, 1984–2006</b>			
Type of law	Number of Concurrences	Percentage of Concurrences	Number of Decisions
<i>Charter</i>	260	42.6%	334
Public	134	22.0%	495
Criminal	127	20.8%	494
Private	89	14.6%	393
Total:	610	100%	1716

The separate-concurrence proportions do not parallel those of the overall caseload—there are almost three times as many *Charter* cases involving concurrences as one would expect from their share of the total caseload, and only about half as many criminal cases. The criminal-law case figures admit of an easy answer: about one-half of the criminal-law caseload was made up of appeals by right,<sup>22</sup> which are disproportionately likely to be dismissed unanimously by the legal minimum panel

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<sup>22</sup> When the Court's leave jurisdiction was expanded in 1975 (*An Act to Amend the Supreme Court Act*, S.C. 1974-75-76, c. 18), the proportion of appeals by right promptly dropped to about 15 per cent of the caseload, but their numbers moved steadily upward to the point where they accounted for more than 30 per cent of the caseload during the Lamer Court. During the first seven years of the McLachlin Court, they were down again to 17.4 per cent, or a little higher if the Court's own coding category of mixed issues of right and leave is recognized. See e.g. *R. v. Rémillard*, 2004 SCC 41, [2004] 2 S.C.R. 246, [2005] J.E. 311 (as an example of this category).



with the briefest of reasons<sup>23</sup> or, less often, allowed unanimously by the minimum panel with comparably brief reasons).<sup>24</sup> These summary cases aside, the pool of “real” criminal cases with substantive issues that are comparable to the rest of the leave-generated caseload was therefore only about half as large as one would deduce from the raw numbers. And this in turn takes us to a mildly surprising conclusion: the hotly contentious *Charter* issues aside, private-law, public-law, and (substantive) criminal-law appeals all seemed to draw separate concurrences with roughly comparable frequency. Separate concurrences, in other words, are routine, and thus not triggered only by extraordinary circumstances.

### III. The Length of Separate Concurrences

The judges of the Court invest a considerable amount of time and effort in writing separate concurrences. Under Lamer’s Chief Justiceship, the Court wrote fully half as many words in minority reasons as it did in decisions of the Court; looking more closely at these minority reasons, the Court wrote fully half as many words in its separate concurrences as it did in its dissents.<sup>25</sup> Assuming that word length is a useful proxy for the investment of the scarce resource of judicial time, this suggests that judges on the Lamer Court spent on average one-ninth of their working time on separate concurrences. Under McLachlin’s Chief Justiceship, the Court wrote just over a quarter as many words in minority reasons as it did in decisions, and just under a quarter as many words in separate concurrences as dissents; judges spent on average one-twentieth of their working time on separate concurrences. This in turn suggests that separate concurrence is a practice of declining significance in the operation of the Court, the implications of which I shall discuss in the Conclusion.

The average number of words in reasons for judgment moved up from just over 5,000 for the Dickson Court to just over 6,500 for the McLachlin Court; the average dissent was very close to the same length, and increased similarly; the average separate concurrence was just under half as long, also tracking upward. The median separate concurrence was about 700 words long—between two and three pages of text. About one-fifth of all separate concurrences were less than one hundred words long, not enough for anything more than an enthusiastic paragraph. At the other extreme, fully one hundred separate concurrences were more than 5,000 words long, forty of them more than 10,000 words and half a dozen more than 20,000 words. The

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<sup>23</sup> The standard formula was “The appeal is dismissed for the reasons given in the Court below,” a bare dozen words. See e.g. *R. v. Huang*, [1990] 2 S.C.R. 1105, 11 W.C.B. (2d) 216; *United States of America v. Whitley*, [1996] 1 S.C.R. 467, 132 D.L.R. (4th) 575; *R. v. Howell*, [1996] 3 S.C.R. 604, 110 C.C.C. (3d) 192.

<sup>24</sup> The standard formula was “The appeal is allowed for the reasons given in the dissent in the Court below.” See e.g. *R. v. Grover*, [1991] 3 S.C.R. 387, 67 C.C.C. (3d) 576; *R. v. Fleurant*, [1995] 4 S.C.R. 47, 28 W.C.B. (2d) 513; *United States of America v. Jamieson*, [1996] 1 S.C.R. 465, 197 N.R. 1.

<sup>25</sup> The numbers really are that neat: 66.8 per cent of all its words were written in decisions, 22.3 per cent in dissents, and 10.9 per cent in concurrences.

differences in length correlate only mildly with type of law. The average concurrence was 2,500 words long; concurrences in *Charter* and private-law cases were on average about 20 per cent longer, and in criminal law cases about 25 per cent shorter. But there is far more mileage to be made by working word length into the typology of concurrences that I will be presenting below. There are very distinct types of concurrence, and each type implies a certain scope of argument that directs it toward a standard word length, something that does not correlate very strongly with the type of law involved.

#### **IV. Toward a Typology of Separate Concurrences**

There is no single style, length, tone, or content to separate concurrences; they are quite a diverse collection of arguments and ideas. Nor do they cluster in particular areas of law (except for a tendency to be somewhat more frequent in *Charter* cases than in non-*Charter* cases). It might be, however, that there are substantially different types of separate concurrence, each of which has distinctive characteristics and a core logic. This Part will attempt to generate a typology of separate concurrence on the Supreme Court of Canada by identifying these types.

I suggest that there exist seven different types of separate concurrences (with an inevitable but very small residual group). In order to generate these categories, and to assign specific minority opinions to one category or another, I have relied on my own judgment, based on a close reading of the minority reasons and an analysis of their relation to the decision of the Court. However, as I worked through this process, I was intrigued to discover that judges of the Court have a distinctive language that coincides with the categories I have identified. To a surprising extent, these judges seem to have developed a set of stock phrases used in the opening paragraph of the concurrence (occasionally but rarely the second paragraph) that serve to identify the nature and extent of the disagreement that will direct their separate concurrence; rather than imposing my categories on the words of the judges, I had a real feeling that I was discovering a typology of which they were already aware. This is the phenomenon that I shall refer to as “self-labelling”—the judges themselves have provided the unambiguous language that enables their reasons to be assigned to an appropriate category. The categories I have identified are listed, along with their frequency and their average word count, in the table below:

<b>Table 2: Types of Separate Concurring Opinions, Supreme Court of Canada, 1984–2006</b>		
Type	Number	Average Length (words)
Bridging	51	244
“Let me add ... ”	106	1447
Narrower Grounds	79	658
“Except for ... ”	141	2403
Different Route	126	4057
Ditto	77	144
<i>Seriatim</i> Style	15	6872
Other	14	367

It is intriguing that the judges of the Court have invented language for separate concurrences that clearly indicates from the very start the nature and extent of their disagreement. I believe that the most useful frame for understanding minority opinions is to speak of concerned publics and signals. By concerned publics I refer to organizations, groups and individuals within civil society who wish to push legal doctrine on certain issues in a specific direction. Applications for intervener status, resulting in the filing of briefs to press these arguments, are an obvious example of such activities; publishing academic articles or establishing journals as vehicles for a steady flow of certain kinds of articles are others. But since the evolution of law is usually incremental rather than total, and since the judges of the Court are discrete individuals who do not respond identically to the arguments and interpretations that are suggested to them, minority opinions become the vehicle for sending signals to these publics—what is important is not just that a judge is claiming one of his colleagues made a mistake about the law (which could be done in a personal note, or over coffee), but that the judge is stating this publicly in an official pronouncement of the Court. Part of the motive in writing separately may be intellectual (“This is wrong, and I want the record to show that I know it is wrong”), but part of it may also be tactical, with the opinion serving as a signal to those concerned elements in civil society (“I agree with you, I’m doing what I can, give me more to work with”). A standard language for different types of disagreement serves this signalling function well.<sup>26</sup>

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<sup>26</sup> I take the notion of concerned publics from Charles R. Epp’s argument that courts do not develop doctrine on their own, but rather in collaboration with a network of supporting institutions and groups

There is one procedural complication that needs to be resolved: it concerns what might be called “concurrency swing” decisions, where a judge who was initially writing the majority reasons loses signatures to a judge who was initially writing a concurrence. From an external perspective, what matters is that there is a set of reasons written by a judge who agrees with the outcome but not with the reasons given by a majority of the Court, even if at the time of writing them the judge in question thought they would constitute the decision of the Court and thus followed the appropriate format—for mere observers, that is a separate concurrence. However, from an internal perspective, which is what I will adopt, it *does* matter that this judge thought she was writing a judgment, while another colleague was writing what started out as concurring reasons but became the judgment when the votes shifted. It is in this second set of reasons that we need to look for the acknowledgment, the terms of respect, and the self-labelling that characterize judicial disagreement in Canada, and that permits us to categorize them appropriately. For the same reason, it is also this second set of reasons that gives us a better idea of the conventions on word length (a proxy for both thoroughness of analysis and allocation of time) that accompany the various types of disagreement.

To expand this argument, the Court has over the last twenty years developed a standard format for delivering decisions (which it follows in over 90 per cent of reserved decisions) that includes the facts of the case, the actions of lower courts, the issues, an analysis, and a conclusion. Concomitantly, it has developed a minority-reason style that includes an acknowledgment (“I have read the reasons”), respect terms (“but with respect—deference”), and a self-location (“I cannot agree with regard to [specific issue]”). But on a number of occasions, the set of reasons designated by the Supreme Court Reports as the “judgment of the court” began with the acknowledgment—respect—location language of minority reasons; and the (concurring or dissenting) minority reasons contained the labelled elements of the standard majority reasons. My argument is that these occasions clearly identify a “judgment swing” as deliberations after conference moved enough votes to allow the initial minority reasons to become a judgment and vice versa; this has happened sixty times for separate concurrences (and ninety times for dissents) since 1984. When this happens, I think it is more appropriate to seize on the initial expectations (when the minority judge thought she was writing minority reasons) rather than the final outcome (when this became the judgment of the Court because signatures moved).

The ordering of the items in the table (except of course for the residual “other” category) reflects an increasing level of disagreement, a point that I will demonstrate by describing typical examples of each type and discussing their implications. To anticipate my conclusion, the frequency of the various types is heavily skewed toward those types reflecting significant disagreement: although some separate concurrences

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*(The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998)). I take the notion of signalling from Tonja Jacobi (“The Judicial Signaling Game: How Judges Shape Their Dockets” (2007) [forthcoming in *Sup. Ct. Econ. Rev.*]).

represent rather modest levels of disagreement within the panel, concurrences typically organize around much more substantive and deep-seated disagreements. The typical concurrence is not motivated by a small matter.

### A. Bridging

Concurrences in this category are never the second set of reasons for a judicial decision, but arise when a decision of the Court is in place and a set of minority reasons has been written (separate concurrences are more likely, but one-fifth of the time it is a dissent). A judge may in such circumstances write a separate opinion to agree with some of the reasons of the majority and some of the reasons of the minority, while of course accepting the outcome proposed by the majority. As an example, consider Chief Justice Lamer's reasons in *R. v. Osolin*:<sup>27</sup> "I agree with my colleague that the trial judge erred in refusing to permit cross-examination on the medical records. ... With respect to the defence of mistaken belief, I am in agreement with my colleague, Justice Sopinka"<sup>28</sup> (who wrote his own, more substantial, concurrence). Similarly, in *R. v. Marquard*,<sup>29</sup> Justice Gonthier wrote that he agreed with Justice McLachlin's reasons for the majority, "subject however to the comments of Justice L'Heureux-Dubé pertaining to s. 16 of the *Canada Evidence Act*, ... which I adopt."<sup>30</sup> These reasons tend to be short (about a single page of argument) for the obvious reason that they do not need to make the full argument themselves, but simply refer the reader to the relevant section or sections of the majority and minority opinions.

If a single judge is to be associated with this style of disagreement, it is Justice Gonthier: alone, he accounted for more than one-quarter of the fifty-one examples of this category of disagreement, and conversely, this category of disagreement accounted for roughly half of his own separate concurrences (Justices Cory, La Forest and Lamer were in an approximate three-way tie for second place, each with about half as many bridging opinions as Justice Gonthier). Bridging concurrences are also the most solitary type of disagreement: 88 per cent of bridging concurrences, in comparison with 66 per cent of all concurrences, were signed by a single judge.

### B. "Let me add ..."

A more substantive type of separate concurrence expresses agreement with the majority disposition and its supporting reasons, usually without any significant qualification, but then goes on to add to those majority reasons. There were 106 examples of this type. Sometimes the stated purpose is to clarify the majority reasons, or to emphasize some element within them. For example, in *Mitchell v. Peguis Indian*

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<sup>27</sup> [1993] 4 S.C.R. 595, 109 D.L.R. (4th) 478 [cited to S.C.R.].

<sup>28</sup> *Ibid.* at 607-08.

<sup>29</sup> [1993] 4 S.C.R. 223, 108 D.L.R. (4th) 47 [cited to S.C.R.].

<sup>30</sup> *Ibid.* at 253. L'Heureux-Dubé J. dissented in this case.

*Band*,<sup>31</sup> Justice Wilson wrote, “I agree with my colleague that the *Garnishment Act* does not apply on the facts of this case. But it seems to me important to explain why this is so.”<sup>32</sup> And more recently, in *Blank v. Canada*,<sup>33</sup> Justice Bastarache wrote, “I have read the reasons of Fish J. and concur in the result. I think it is necessary to provide a more definitive and comprehensive interpretation of s. 23 of the *Access to Information Act* ...”<sup>34</sup> Nothing in the language suggests any serious substantive disagreement; rather, what is intended is an expansion or a closer reading of one particular aspect of the majority reasons.

Of course, there is always something more to this type of concurrence than an initial analysis may reveal. The reasons might read as if the justices were saying, “This just occurred to me while you were reading your decision,” but that is never actually the case. Judicial decisions are collegial and negotiated products, released only after they have been crafted and polished.<sup>35</sup> The reasons pronounced in public and recorded in the Supreme Court Reports are the product of a considerable and often extended interaction, as drafts are circulated, comments received and responded to, and compromises worked out between different points of view within the majority. The final product only appears in public when the judges have determined that it is indeed the final product and not some evolution toward a broader consensus. We can feel confident that every one of the expansions or clarifications expressed within this category were conveyed to the writing judge, indicating general agreement, but suggesting that the majority reasons might be amended to address these points more specifically. And, because they appear in a separate concurrence, it is clear that the writing judge (and the other judges in the majority), upon reflection, expressly and deliberately rejected such suggestions. The disagreement between the separately concurring judge and the judges in the majority is strong enough that the majority is willing to reject the suggestion at the cost of losing one or more signatures, and strong enough that the disagreeing judge is willing to break from the majority to write separately. However, this type of disagreement is still a relatively innocuous one that does not significantly compromise any core doctrine.

More commonly, this type of separate concurrence not only clarifies the majority reasons, but explicitly takes the logic behind these reasons one step further. To qualify for inclusion in this set of concurrences, the general tone must always be one of

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<sup>31</sup> [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193 [cited to S.C.R.].

<sup>32</sup> *Ibid.* at 116.

<sup>33</sup> 2006 SCC 39, [2006] 2 S.C.R. 319, 270 D.L.R. (4th) 257.

<sup>34</sup> *Ibid.* at para. 66. Actually, this wording is subtly subversive, and the message may be more negative than I have suggested. A judicial decision consists of an outcome and supporting reasons, both of which are important; to write “I have read the reasons and support the outcome” carries with it a subtle hint of “but I don’t support the reasons.” My contention, however, is that the justices have verbal formulae that they routinely use to express varying levels of disagreement, and therefore I do not think it necessary to try to read between the lines.

<sup>35</sup> See *supra* note 2.

addition, never of subtraction. In *Peel (Regional Municipality) v. Canada*,<sup>36</sup> for example, Chief Justice Lamer agreed with the disposition and the analysis of the majority, but went on to say that he agreed with the outcome “for these additional reasons.”<sup>37</sup> Similarly, in *Bhinder v. Canadian National Railway Co.*,<sup>38</sup> Justices Wilson and Beetz agreed with the outcome “[f]or these [reasons] and the reasons given by ... McIntyre J.” for the majority.<sup>39</sup> In *R. v. Melnychuk*,<sup>40</sup> Justice Iacobucci agreed with the majority, “but would go further.”<sup>41</sup> And in *Chaoulli v. Quebec (A.G.)*,<sup>42</sup> the concurring judges agreed with Justice Deschamps that the Quebec ban on private health-care insurance violated the Quebec *Charter of Human Rights and Freedoms*,<sup>43</sup> but unlike Justice Deschamps, also wanted to take the logical step of considering whether it violated the Canadian *Charter* as well.

Again, these comments are carefully contemplated additions rather than spontaneous outbursts: the further steps have obviously been presented to (and rejected by) the majority, yet the minority still wishes to break from what would otherwise be a stronger majority (or even unanimous) decision to make the observations public. It sends a message to the public that an element of the Court wishes to push certain ideas further in order to develop the Court’s precedence on a particular issue, and hence that there is some value in considering litigation that would bring similar issues back in front of the Court in the hope that opinions would move in this direction. In doctrinal terms, it still constitutes a relatively modest and unsubversive disagreement, which is why I have placed it fairly low on the continuum.

However, it would be a mistake to write such concurrences off altogether. In *Mitchell v. M.N.R.*,<sup>44</sup> for example, Justice Binns blandly introduced his separate concurrence with the words “There are, however, some additional considerations.”<sup>45</sup> But those additional considerations required more than 12,000 words to be discussed, longer than the average Court decision. Also, in *Toronto (City of) v. C.U.P.E., Local 79*,<sup>46</sup> Justice LeBel agreed with Justice Arbour’s disposition, but saw a need for “further discussion” of “the administrative law aspects”<sup>47</sup> of the question, and spent 11,500 words elaborating. The basic message of this type of disagreement is that a minority of the Court wishes to go further in a particular direction than the majority.

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<sup>36</sup> [1992] 3 S.C.R. 762, 98 D.L.R. (4th) 140 [cited to S.C.R.].

<sup>37</sup> *Ibid.* at 773.

<sup>38</sup> [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481 [cited to S.C.R.].

<sup>39</sup> *Ibid.* at 580.

<sup>40</sup> [1997] 1 S.C.R. 602, 146 D.L.R. (4th) 686 [cited to S.C.R.].

<sup>41</sup> *Ibid.* at para. 6.

<sup>42</sup> 2005 SCC 35, [2005] 1 S.C.R. 791, 254 D.L.R. (4th) 577.

<sup>43</sup> R.S.Q. c. C-12.

<sup>44</sup> 2001 SCC 33, [2001] 1 S.C.R. 911, 199 D.L.R. (4th) 385.

<sup>45</sup> *Ibid.* at para. 66.

<sup>46</sup> 2003 SCC 63, [2003] 3 S.C.R. 77, 68 O.R. (3d) 799, 232 D.L.R. (4th) 385.

<sup>47</sup> *Ibid.* at para. 61.

### C. Narrower Grounds

If “let me add” suggests a judge who wants to push the Court to go further, the narrower-grounds category of separate concurrence comes from a judge who thinks the majority may already have gone too far. There are three slightly different forms that this category can take. One is the “not at this time” argument. As a good example of the tone of this argument, consider Chief Justice McLachlin’s reasons in *B. v. Ontario (Human Rights Commission)*:<sup>48</sup> “We do not disagree in the result, ... [but] we would reserve for another day the more general question ... ”<sup>49</sup> (note the double negative). Similarly, Justice La Forest in *R. v. Felawka*<sup>50</sup> agreed with the majority but preferred “not to take a definitive position regarding the interaction” of certain sections of the *Criminal Code* at this time.<sup>51</sup>

Slightly different, but still conveying the same general meaning, is the “narrower grounds” wording. Of all types of disagreement, this is intriguingly the one most likely to reveal a certain testiness in the language, although the general tone of the Court, even in disagreement, is so formal and polite that one must look quite closely to find instances of it. For example, in *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*,<sup>52</sup> Justice La Forest rather pointedly asserted, “As I see it, this case raises a very narrow point and I prefer to confine myself to that point,”<sup>53</sup> a statement that comes across as an unusually curt dismissal of his colleagues’ finding of a less narrow point that deserved close consideration. Citing Justice LaForest again, his concurrence in *R. v. Papalia*<sup>54</sup> is a delightfully pithy “I have had the benefit of reading the judgment of Justice McIntyre and would dismiss the appeal solely for the reason set forth in the last paragraph of his judgment.”<sup>55</sup>

Slightly different again is the third variant, which suggests that it is not necessary to consider some aspects or elements of the majority decision. Justice McIntyre, in *Hunter Engineering v. Syncrude Canada*,<sup>56</sup> agreed with the disposition but found it “unnecessary to deal with the further concept of fundamental breach in this case.”<sup>57</sup> In *R. v. Park*,<sup>58</sup> Justice Sopinka noted the comments of a colleague on “honest but mistaken belief in consent” but claimed that it was “unnecessary and undesirable” to deal with this in the immediate case.<sup>59</sup> And in *Sport Maska v. Zitrer*,<sup>60</sup> Justice Beetz

<sup>48</sup> 2002 SCC 66, [2002] 3 S.C.R. 403, 219 D.L.R. (4th) 701.

<sup>49</sup> *Ibid.* at para. 1.

<sup>50</sup> [1993] 4 S.C.R. 199, 85 C.C.C. (3d) 248 [cited to S.C.R.].

<sup>51</sup> *Ibid.* at 209.

<sup>52</sup> [1995] 1 S.C.R. 157, 127 D.L.R. (4th) 385 [cited to S.C.R.].

<sup>53</sup> *Ibid.* at para. 88.

<sup>54</sup> [1988] 2 S.C.R. 137, 43 C.C.C. (3d) 129 [cited to S.C.R.].

<sup>55</sup> *Ibid.* at 197.

<sup>56</sup> [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321 [cited to S.C.R.].

<sup>57</sup> *Ibid.* at 481.

<sup>58</sup> [1995] 2 S.C.R. 836, 99 C.C.C. (3d) 1 [cited to S.C.R.].

<sup>59</sup> *Ibid.* at 873.

<sup>60</sup> [1988] 1 S.C.R. 564, 83 N.R. 322 [cited to S.C.R.].



concurring in the result but added, “I do not consider it necessary to rule on the possible similarity between common law and Quebec law in this respect.”<sup>61</sup> More bluntly, Justice LeBel in *Entreprises Sibeca v. Frelighsburg (Municipality of)*<sup>62</sup> wrote, “I do not believe that it is necessary to state an opinion regarding the application of those principles to the facts of this appeal ... ,”<sup>63</sup> which seems to be a rather pointed comment.

The general content of this style of disagreement is straightforward and consistent: an expression of general agreement with the outcome, but a bluntly expressed reluctance to sign on to some major element of those reasons. Initially, they were coded as three different types of disagreement, but this seems to go too far. Instead, think of a single type of disagreement, taking the pure form “We prefer to decide on narrower grounds because it is not necessary at this time to resolve the broader issues,” with different elements being emphasized in different exemplars. The cross-section of “not at this time,” “narrower grounds,” and “not necessary” demarcates this set very nicely.

There have been seventy-nine examples of this type of disagreement. “Narrower grounds” concurrences tend to be short—only a handful are over 1,000 words long and the average, at just over 500 words, is barely a page and a half of text. These concurrences also tend to be individual efforts—66 per cent of all concurrences, but 75 per cent of narrower-grounds concurrences, are signed by a single judge.

This type of disagreement is significant because it offers a glimpse of the Court as a strategizing institution that does not simply answer whatever questions are dropped before it, but plans collegially and collectively over the longer term to develop legal doctrine. The most obvious arena for judicial discretion in the service of strategic calculation is the process of granting or denying leave to appeal (which does not even involve giving reasons); most of the time, the Court has the power to decide whether a specific legal issue should be addressed immediately, or whether the Court should deny leave and wait for the matter to come up when the lower-court debate is more developed, or when Canadian public opinion is more prepared for a resolution.

But the other, less visible face of strategic judicial discretion is the panel’s decision about how broadly or narrowly it wishes to respond to the question before it. In the American literature, the term for this latter dimension of discretion is “issue fluidity”, which deals with the capacity of the Court to decide for itself how broadly or how narrowly to treat the issue before it.<sup>64</sup> The battles that have been fought out on

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<sup>61</sup> *Ibid.* at 570.

<sup>62</sup> 2004 SCC 61, [2004] 3 S.C.R. 304 at para. 41, 243 D.L.R. (4th) 513.

<sup>63</sup> *Ibid.* at para. 41.

<sup>64</sup> See e.g. Kevin T. McGuire & Barbara Palmer, “Issue Fluidity on the U.S. Supreme Court” (1995) 89 *American Political Science Review* 691; Kevin T. McGuire & Barbara Palmer, “Issues, Agendas, and Decision Making on the Supreme Court” (1996) 90 *American Political Science Review* 853; Lee Epstein, Jeffrey A. Segal & Timothy Johnson, “The Claim of Issue Creation on the U.S. Supreme

the pages of the American Political Science Review and the Political Research Quarterly revolve around the codification of hundreds of decisions of the Supreme Court of the United States, comparing the issues identified by the appellants' application with the issues actually addressed by the court. But in narrower-grounds concurrences, we actually have the Canadian judges saying, out loud and in public, that the members of the panel specifically consider and sometimes disagree on the appropriate timing for the consideration of the broader issues that always and inevitably lurk beneath specific cases.

Narrower-grounds disagreements serve as a measure of increasing reluctance within the Court to pursue a particular doctrinal development. Think of a string of cases that are filling out the implications of a particular legal issue. At a certain point in time, the "solid" Court majority shreds as some judges evince reluctance to extend the core principle beyond a certain point; "narrower grounds" is the signal to the concerned publics that the boundaries of doctrinal extension have been reached and further litigation on the question may not be fruitful. The set of decisions on "constructive murder", hinging on the nature of foreseeability, does not quite make my point, but it comes close. This "set" includes six different decisions delivered on 13 September 1990, all dealing with the (now unconstitutional) crime of "constructive murder", which addresses situations in which a person dies as a result of a felony.<sup>65</sup> These cases work through an intriguing variety of factual circumstances to display a range of subissues working off the basic concept. The five-judge majority on the seven-judge panel held firm through all six cases. However, Justice L'Heureux-Dubé separately concurred in three of the decisions,<sup>66</sup> and dissented in the other three. Justice Sopinka separately concurred with all six, but in different terms. The "right to counsel" set, consisting of six decisions handed down on 29 September 1994, is even more useful.<sup>67</sup> In these cases, a seven-judge majority in *R. v. Matheson* eroded to a four-judge plurality in *R. v. Prosper*, and a number of judges (Justices LaForest, McLachlin, L'Heureux-Dubé, Gonthier and Major) moved from the majority to separate concurrences to dissents as the factual context shifted.

But, given the lack of any overt indication of a desire to roll back a legal doctrine, this style of concurrence is still a comparatively mild form of disagreement. There is an air of ambiguity to it: the judge who signs such a concurrent opinion is merely communicating an unwillingness, at this time, to commit to a position on the broader

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Court" (1996) 90 American Political Science Review 845; Barbara Palmer, "Issue Fluidity and Agenda Setting on the Warren Court" (1999) 52 Political Research Quarterly 39.

<sup>65</sup> *R. v. Martineau*, [1990] 2 S.C.R. 633, 109 A.R. 321; *R. v. Rodney*, [1990] 2 S.C.R. 687, 112 N.R. 167; *R. v. Arkell*, [1990] 2 S.C.R. 695, [1990] 6 W.W.R. 180 [Arkell]; *R. v. Luxton*, [1990] 2 S.C.R. 711, 111 A.R. 161 [Luxton]; *R. v. Logan*, [1990] 2 S.C.R. 731, 73 D.L.R. (4th) 40 [Logan]; *R. v. J.(J.T.)*, [1990] 2 S.C.R. 755, [1990] 6 W.W.R. 152;

<sup>66</sup> *Arkell*, *ibid.*; *Luxton*, *ibid.*; *Logan*, *ibid.*

<sup>67</sup> *R. v. Bartle*, [1994] 3 S.C.R. 173, 118 D.L.R. (4th) 83; *R. v. Prosper*, [1994] 3 S.C.R. 236; *R. v. Pozniak*, [1994] 3 S.C.R. 310, 118 D.L.R. (4th) 154; *R. v. Matheson*, [1994] 3 S.C.R. 328, 118 D.L.R. (4th) 323; *R. v. Harper*, [1994] 3 S.C.R. 343, 118 D.L.R. (4th) 312; *R. v. Cobham*, [1994] 3 S.C.R. 360, 118 D.L.R. (4th) 301.

question, and is not necessarily suggesting that that she will reject a majority position at an appropriate time in the future.

#### D. “Except for ... ”

A more serious form of disagreement occurs when the writer of a separate concurrence specifically rejects elements of the majority reasons because they are not only unnecessary to reach the outcome (or are being raised prematurely), but also simply incorrect. A pure example of the wording used in such concurrences (and the one that provides this section’s title) is found in *Quebec (A.G.) v. Greater Hull School Board*<sup>68</sup> in the reasons of Justice LeDain, who agreed with the writer of the majority reasons, “except for his conclusion concerning the validity of the requirement of referendum ...”<sup>69</sup> Another example is *R. v. Creighton*,<sup>70</sup> in which Justice McLachlin bluntly started off with “I respectfully disagree with the Chief Justice on two points.”<sup>71</sup> And in *R. v. Demers*,<sup>72</sup> Justice LeBel stated, “I agree with my colleagues’ conclusion regarding the breach of s. 7 of the *Charter*, but I disagree with respect to the division of powers issue ...”<sup>73</sup> The general form of the concurrence is straightforward: concurring judges “agree” with the disposition, but “disagree” or “cannot agree” with one or more specifically identified points in the majority reasons supporting that disposition. Alternative wording indicates general agreement but then qualifies that agreement or expresses significant reservations about specifically indicated aspects of the majority reasons, as Justice Lamer did in *R. v. Bulmer*<sup>74</sup> and *R. v. Thatcher*.<sup>75</sup>

This type of concurrence expresses serious and major disagreement, comparable in many ways to the significance and impact of a dissent. The minority is not just adding a gloss to the majority reasons or differing on tactics or timing, but flatly stating that the majority is wrong in the way that it has resolved some of the legal issues involved. Indeed, in one case in this category, *R. v. Potvin*,<sup>76</sup> Justice McLachlin described herself as “respectfully dissent[ing]”<sup>77</sup> from the majority even though she agreed with the outcome. There were 141 such separate concurrences, including 40 per cent of the concurrence swing decisions. And they tended to be longer than any of

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<sup>68</sup> [1984] 2 S.C.R. 575, 15 D.L.R. (4th) 651 [cited to S.C.R.].

<sup>69</sup> *Ibid.* at 598.

<sup>70</sup> [1993] 3 S.C.R. 3, 105 D.L.R. (4th) 632 [cited to S.C.R.].

<sup>71</sup> *Ibid.* at 40.

<sup>72</sup> 2004 SCC 46, [2004] 2 S.C.R. 489, 240 D.L.R. (4th) 629.

<sup>73</sup> *Ibid.* at para. 68.

<sup>74</sup> [1987] 1 S.C.R. 782 at 796, 4 W.W.R. 577, Lamer J. (“I wish to add, however, the following qualifications to certain statements made in his reasons”).

<sup>75</sup> [1987] 1 S.C.R. 652 at 703, 4 W.W.R. 193, Lamer J. (“I should, however, qualify my concurrence in those of his reasons addressing the ground he refers to as ‘*Jury Unanimity as to the Material Facts*’”).

<sup>76</sup> [1993] 2 S.C.R. 880 at 886, 105 D.L.R. (4th) 214 [cited to S.C.R.].

<sup>77</sup> *Ibid.* at 886.

the other forms of disagreement that have been mentioned so far, averaging 2,550 words; the longest, at 11,000 words, was Justice LeBel's concurrence in *Figuroa v. Canada (A.G.)*,<sup>78</sup> where he agreed with much of the majority opinion but expressed "reservations about the methodology" for identifying a *Charter* violation.<sup>79</sup> "Except for" is the modal type of separate concurrence, the largest single category, and it accounts for roughly one-quarter of the total.

### **E. Different Route**

Another type of concurrence that expresses even deeper disagreement with the majority begins with a deceptively simple self-description. To use an example from the very beginning of the time period, in *Re B.C. Motor Vehicle Act*<sup>80</sup> (from which I take the section title), Justice Wilson agreed with the result reached by Justice Lamer but added, "I reach that result ... by a somewhat different route."<sup>81</sup> Alternate phrases that clearly locate themselves in the same zone were "on a different basis,"<sup>82</sup> "for somewhat different reasons,"<sup>83</sup> for "different considerations,"<sup>84</sup> by a "different approach,"<sup>85</sup> "by a somewhat different analysis and characterization,"<sup>86</sup> or "in a somewhat different manner."<sup>87</sup> Though this variation brings to light the fact that the judges of the Court do not have a laminated, official style sheet pinned to their bulletin boards, it still suggests that they deliberately and consistently use similar language to highlight the nature and extent of their differences.

I suggest that this concurrence is the most serious form of disagreement. If "narrower grounds" suggests that the majority answered questions that it did not need to ask, and if "except for" suggests it got part of the answer to a question wrong, then "different grounds" suggests that the majority got the question itself wrong. The language here is often very forthright about this opinion. In *Norberg v. Wynrib*,<sup>88</sup> Justice McLachlin somewhat testily wrote, "I do not find that the doctrines of tort or contract capture the essential nature of the wrong done to the plaintiff."<sup>89</sup> In *Reference*

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<sup>78</sup> 2003 SCC 37, [2003] 1 S.C.R. 912, 67 O.R. (3d) 440.

<sup>79</sup> *Ibid.* at para. 95.

<sup>80</sup> [1985] 2 S.C.R. 486 at 522, 24 D.L.R. (4th) 536 [cited to S.C.R.].

<sup>81</sup> *Ibid.* at para. 92.

<sup>82</sup> *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399 at para. 27, 271 D.L.R. (4th) 385, LeBel J.

<sup>83</sup> *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1331, 74 D.L.R. (4th) 449.

<sup>84</sup> *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at 607, 77 D.L.R. (4th) 94.

<sup>85</sup> *R. v. Chaulk*, [1990] 3 S.C.R. 1303 at 1366-67, 119 N.R. 161.

<sup>86</sup> *Canadian National Railway v. Norsk Pacific Steamship*, [1992] 1 S.C.R. 1021 at 1166, 91 D.L.R. (4th) 289, Stevenson J.

<sup>87</sup> *R. v. Bain*, [1992] 1 S.C.R. 91 at 101, 87 D.L.R. (4th) 449, Cory J.

<sup>88</sup> [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449 [cited to S.C.R.].

<sup>89</sup> *Ibid.* at 268-69.

*Re Young Offenders Act (P.E.I.)*,<sup>90</sup> Justice La Forest wrote, “I do not believe that the test enunciated in *Re Residential Tenancies Act*, 1979, [1981] 1 S.C.R. 714, is fully applicable to the case at the bar.”<sup>91</sup> In *Multani v. Commission Scolaire Marguerite-Bourgeoys*,<sup>92</sup> Justice Deschamps objected to the majority’s choice of treating the case as a *Charter* issue, and firmly stated that it should have been handled purely as an administrative-law issue.<sup>93</sup> Justice L’Heureux-Dubé similarly argued for an administrative-law approach in her massive separate concurrence in *2747-3174 Quebec Inc. v. Quebec (Régie des permis d’alcool)*.<sup>94</sup> Under slightly different circumstances, these are the kinds of disagreements that lead to major dissents. In *Trinity Western University v. College of Teachers*<sup>95</sup> for example, the majority chose to resolve the issue in terms of municipal and administrative law, while Justice L’Heureux-Dubé wrote a vigorous dissent arguing that this was the appropriate time and case to clarify the Court’s position on the scope of freedom of religion under the *Charter*.<sup>96</sup>

I would make three further observations about the “different route” style of disagreement. First, the concurrences in this category were twice as long as the average separate concurrence, at just over 4,000 words. This was not quite as long as the average dissent, but it is sufficient to make an argument of some scope and depth. Second, 27 per cent of all concurrences in *Charter* cases, but only 18 per cent of concurrences in non-*Charter* cases, were “on different grounds.” Third, almost 40 per cent of the concurrence swing decisions fell within this category. This is the second most common type of concurrence, accounting for just over one-fifth of the total.

## F. Ditto

About one-seventh of separate concurrences are very short comments directing attention to the reasons presented in another Court decision. In *Kourtesis v. M.N.R.*,<sup>97</sup> for example, Justice Sopinka wrote, “Although I was part of the minority in *Knox*

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<sup>90</sup> [1991] 1 S.C.R. 252, 77 D.L.R. (4th) 492 [cited to S.C.R.].

<sup>91</sup> *Ibid.* at 281.

<sup>92</sup> 2006 SCC 6, [2006] 1 S.C.R. 256, 264 D.L.R. (4th) 577.

<sup>93</sup> *Ibid.*

<sup>94</sup> [1996] 3 S.C.R. 919, 140 D.L.R. (4th) 577.

<sup>95</sup> 2001 SCC 31, [2001] 1 S.C.R. 772, 199 D.L.R. (4th) 1.

<sup>96</sup> I am peering over a very high cliff in legal theory by raising this question. If we are persuaded by the formalist model, then of course all judicial decisions are determinate; there is a single objectively correct answer reached by mechanical processes, and it makes no difference in what order the questions come or when the Court decides to decide a matter. But formalism is no longer persuasive, and once we admit any degree of judicial discretion, we are committed to a certain amount of path dependency: it does matter in what order the questions come, and this contingency can direct the course of the law. For an introduction to this (very extensive) argument, see Oona A. Hathaway, “Path Dependency in the Law: The Course and Pattern of Legal Change in a Common Law System” (2001) 86 Iowa L. Rev. 601.

<sup>97</sup> [1993] 2 S.C.R. 53 at 93, 102 D.L.R. (4th) 456 [*Kourtesis* cited to S.C.R.].

*Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, I feel bound by the majority decision in that case and, accordingly, join Justice La Forest J.'s reasons in the present case."<sup>98</sup> This particular example is a nice demonstration of the doctrine of precedent. *Knox Contracting Ltd. v. Canada*<sup>99</sup> raised an issue that had not yet been definitively resolved, and the Court was divided on the best way to resolve it; three years later, when the issue resurfaced in connection with *Kourteassis*, the former minority declared that the matter had been definitively resolved and distanced itself from its earlier disagreement with the majority.<sup>100</sup> To be sure, it is mildly curious that the former minority found it necessary to tell us so. One would expect that this surrendering of earlier views in the light of previous majority decisions is a fairly frequent occurrence that usually goes unremarked—clearly, not every nonunanimous decision that is subsequently cited as authority calls for such an explicit act of self-abnegation. Nor is there anything in the tone or content of the earlier decision referred to that seems to call for particular comment. Generally speaking, disagreement on the Supreme Court of Canada is expressed in terms that are mild, temperate, and polite; indeed, there does not seem to be anything pointedly critical or offensive in the rather bland wording of the minority reasons in *Knox*.<sup>101</sup> Apart from wondering why anything was said at all, however, the content seems unproblematic. Eleven concurrences took this form.

The reason that I have put this category higher on the disagreement continuum is the subsequent evolution of the use of the "ditto" citation. The most explicit renunciations of former minority reasons in the name of precedent are found in the first decade (1984–94), and there have been no explicit renunciations since 1994. More recently, the terminology of the ditto concurrence has hardened so as to make it considerably more ambiguous. These concurrences now tend to be extremely terse (typically around fifty words) and uncommunicative, beginning with the phrase "subject to my comments [in another specific case]," and concluding simply with "I concur in the disposition of the appeal." Tracking down the reference, and going to the earlier case for a closer look, one invariably finds a dissent that is being referred to. The effect on the critical observer is to see a reinforcement of, not a retreat from, the earlier disagreement.

At first glance, the effects of both types of ditto concurrence seem to be very similar: an earlier dissent is indicated, but in the immediate case the judge concurs. What is missing in this modern expression, however, is any declaration of distance,

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<sup>98</sup> *Ibid.* at 93.

<sup>99</sup> [1990] 2 S.C.R. 338, 106 N.B.R. (2d) 408 [*Knox* cited to S.C.R.].

<sup>100</sup> *Supra* note 98.

<sup>101</sup> In his dissent, Justice Sopinka begins very neutrally with "I have had the advantage of reading the reasons for judgment herein of my colleague, Cory J., but I am unable to agree with either his reasons or his disposition of this appeal" (*supra* note 100 at 356). And the most critical comments in the pages that follow are "While I agree with the statement of Cory J. ... it does not follow ..." (*ibid.* at 360), and then a concluding "I am concerned that, contrary to the views expressed by my colleague, the appellants and others in the same position will find themselves without a remedy" (*ibid.* at 365).

any indication that the issue has been decisively settled. Justice L’Heureux-Dubé’s acknowledgment of authority in the 1993 *Kourtessis* decision indicated no desire to raise the issue again;<sup>102</sup> the more modern terminology (used by a broad cross-section of current judges) suggests a more reluctant acquiescence, which keeps the issue, at least theoretically, alive. To my ears, the message seems to be “subject to the reservations expressed in an earlier case, reservations I still have.” And this in turn leads me to suggest that this subtle shift in wording hints at a softening in the modern doctrine of *stare decisis*, such that previous decisions of the Court—even recent ones—have a less privileged status in directing the deliberations and declarations of the Court than they might have had a few decades ago. The message is less “I was wrong” than “I am still waiting for my chance.”

For obvious reasons, these concurrences tend to be individual efforts—66 per cent of all concurrences, but 73 per cent of all ditto concurrences, are signed by a single judge. Curiously though, there were three occasions on which reasons that started off as ditto concurrences swung enough votes to become the judgment of the Court,<sup>103</sup> creating something that seems almost a caricature of a Court decision—with a terse judgment of the Court immediately followed by an extended separate concurrence. In *W.(V.) v. S.(D.)*,<sup>104</sup> the most extreme example, the judgment of the Court (so identified in the Supreme Court Reports) is a single twenty-five-word sentence by Justice McLachlin, signed by three other judges; but Justice L’Heureux-Dubé’s separate concurrence is over 15,000 words long.

### G. Seriatim Style

The normal appearance of a decision of the Supreme Court of Canada is a judgment of the Court, containing the facts of the case, the actions of the lower courts, the relevant legislation, the issues, the analysis, and the disposition.<sup>105</sup> This may be accompanied by one or more sets of minority reasons (dissents or separate concurrences), but typically these reasons are derivative rather than free-standing—they refer specifically to the judgment of the Court, they position themselves in relation to the reasons in that judgment, they self-label the focus and extent of their disagreement, and they omit the more routine elements such as reporting the facts or

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<sup>102</sup> *Supra* note 103 at 93.

<sup>103</sup> And another three occasions when it came within a single vote of being the majority, these being *R. v. Wilson*, [1990] 1 S.C.R. 1291, 5 W.W.R. 188; *R. v. Forster*, [1992] 1 S.C.R. 339, 88 D.L.R. (4th) 169; *R. v. Pearson*, [1998] 3 S.C.R. 620, 233 N.R. 367.

<sup>104</sup> [1996] 2 S.C.R. 108, 134 D.L.R. (4th) 481.

<sup>105</sup> The evolution of such formats is interesting in itself. The Court of Appeal for England and Wales just marches in with straight text, unbroken by headings, while the Supreme Court of the United States divides its opinions into roman-numbered and lettered “parts” in a unique and sometimes very confusing way. See B. Rudolph Delson, “Typography in the U.S. Reports and Supreme Court Voting Protocols” (2001) 76 N.Y.U.L. Rev. 1203. The closest analogue to the Canadian style that I have come across is that of the United States Court of Appeals for the Ninth Circuit; other circuits have different practices.

the actions of the lower courts. The Canadian Supreme Court Reports explicitly reinforce this normal appearance: almost (but not quite) invariably, one set of reasons is identified as the “judgment” of the Court,<sup>106</sup> with a list of the judges signing on to it and an identification of the lead author or authors; the other sets of reasons are labelled as “reasons” of a given judge or group of judges.

Sixty-three cases depart from this pattern, though for a very simple reason: the separate concurrence looks like a judgment of the Court because the majority decision looks like a concurrence. At some point well into the collegial decision-making process, a judge who was writing a separate concurrence persuaded enough of her colleagues to sign her reasons rather than the initially designated judge’s reasons, such that the concurrence and the decision changed places. Since it usually does not make sense for everyone to start again by redrafting the decision in the more conventional way, the new judgment of the Court typically accepts what is now the concurrence’s statement of the facts, actions of the lower courts, and legislative summary, and it may adopt some (even many) of the reasons as well. In other words, the departure from the normal appearance is easily explained and largely illusory (although it does generate some enormously long separate concurrences).

This explanation simply makes the other exceptions all the more surprising. There is a style of minority opinion, usually as long as or longer than the majority reasons, that is written as if the majority reasons simply were not there. A full decision format (facts, actions of the lower courts, relevant legislation, issues, analysis and disposition) is provided even though the first four elements simply parallel and duplicate the material in the majority reasons. But at no time is the majority opinion referred to or confronted on any specific point. The two sets of reasons display a complete indifference to one another—this is a dual monologue, not a conversation. I call this type of concurrence “*seriatim* style” because it recalls the concurrence format of the Court from decades ago, a format that is still widely followed by the High Court of Australia<sup>107</sup>; all or most of the judges on the panel write their own reasons, often running parallel and even citing the same authorities.

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<sup>106</sup> “[A]lmost” because the exercise can fail in both directions. Sometimes, as in *Committee for the Commonwealth of Canada v. Canada*, there are so many concurring reasons playing off each other in such complex ways that no set of reasons is identified as the judgment ([1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385). And sometimes, as in *Comité paritaire de l’industrie de la chemise v. Potash*, there will be two different sets of reasons, both free-standing, both signed by a majority of the judges, and both identified in the Supreme Court Reports as a “judgment” ([1994] 2 S.C.R. 406, 115 D.L.R. (4th) 702 [*Comité paritaire*]). In this case, Sopinka and McLachlin JJ. signed on to the reasons of La Forest J. as well as those of L’Heureux-Dubé J. However, both scenarios together comprise less than 1 per cent of the full caseload.

<sup>107</sup> See Matthew Groves and Russell Smyth, “A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court, 1903–2001” (2004) 32 *Federal Law Review* 255. See also Matthew Lynch, “Report from Australia” (24 April 2007), online: The Court <<http://www.thecourt.ca/2007/04/24/report-from-australia/>>. For a discussion of the (declining) practice of *seriatim* judgments on the Supreme Court of Canada, see Claire L’Heureux-Dubé, “The Length and Plurality of Supreme Court of Canada Decisions” (1990) 28 *Alta. L. Rev.* 581.



The reasons are then totalled as votes to direct the outcome. No indication is made of any exchange between the writers, or any attempt to engage points on which they differ. The Court has long since abandoned this style—their last true *seriatim* decision was in 1964<sup>108</sup>—and I do not wish to suggest that they are returning to it; my use of the label is intended only to catch the notion of multiple decisions that are written as if each of them were intended to constitute a judgment of the Court.<sup>109</sup>

Fifteen cases effectively had two sets of reasons written like judgments of the Court, one with enough signatures to constitute the decision of the Court.<sup>110</sup> These cases do not seem to have any centre of gravity: they are scattered across the three Chief Justiceships (four for Dickson, seven for Lamer, four for McLachlin) and across the four areas of law indicated above. The closest to a clustering is the fact that four such cases occurred in the two calendar years of 1990 and 1991, but even this correlation is weakened if one refers to Court terms instead of calendar years. The *seriatim* style is normally not an individual effort; almost two-thirds of all concurrences, but less than two-fifths of *seriatim* concurrences, are signed by a single judge.

What could explain this phenomenon? Should we be thinking in terms of a failure of communication at the post-hearing conference, such that two different judges think they have been assigned the judgment? That understanding is simply not credible, the more so because there are another sixty-six examples of this practice that involve dissents. It seems more likely that the conference revealed two strongly held views with a number of judges expressing either uncertainty between the two, or choosing between them with some obvious hesitation. None of the accounts of what happens at conference—not Justice Wilson’s 1986 article about decision making at the Court,<sup>111</sup> Ian Greene’s account drawn from interviews with seven of the sitting judges of the Court,<sup>112</sup> nor Donald R. Songer’s more recent description<sup>113</sup>—suggest that it is acceptable for a judge to abstain while waiting to be persuaded. Therefore,

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<sup>108</sup> *Hossack Estate v. Hertz Drive Yourself Stations of Ontario Ltd.*, [1966] S.C.R. 28, 54 D.L.R. (2d) 148.

<sup>109</sup> At first glance, this seems to be a massively wasteful duplication of effort; but I think the practice of writing in full *seriatim* mode can be understood in terms of the formalist approach to decision making, which assumes that there is a single correct answer to any legal question that can be rigorously and objectively derived from purely legal materials. If this is the case, then having each judge run their own separate analysis is the judicial equivalent of seeking a second opinion in a medical diagnosis, only with the additional opinions being generated simultaneously rather than sequentially. The “perfect” result would be to have all the judges on the panel not only reach the same outcome, but do so by drawing on the same set of authorities in strikingly parallel ways. It is only if the panel of judges is seen as negotiating within a zone of discretion that multiple and repetitive reasons are counterproductive.

<sup>110</sup> Sixteen if we include *Comité paritaire*, which has two free-standing sets of reasons both signed by a majority of the panel (*supra* note 106).

<sup>111</sup> *Supra* note 2.

<sup>112</sup> *Supra* note 2.

<sup>113</sup> *Supra* note 2.

perhaps the first of my scenarios is too fanciful to survive. But the second is enough to explain why both the nominal judgment writer and a strong challenger, sensing real uncertainty among some potential swing votes, would invest time and effort in writing a set of reasons in full judgment format.

It is difficult to tell how many of these challenges succeeded. It could be that none did, that the original bloc of judges held firm and that the challenger wound up simply writing an unusual separate concurrence with extraneous material included; but I find this unlikely, the more so because the sixty-three swing concurrences mentioned above show that judges do change their minds after conference. Or it could be that every single challenge succeeded, and on all fifteen occasions the original majority writer wound up in minority; but I find this equally unlikely.

This is a significant category of disagreement because it shows that delivering reasons for the Court is a contested territory even at the time of writing these reasons. Combined with the number of swing concurrences, it also suggests a reason why judges are willing to invest time and effort in writing separate reasons: they do so because they have a not-insignificant chance of prevailing, of persuading enough of their colleagues that their reasons should become the judgment of the Court.

#### **H. Other**

In any categorization, there are always some leftover cases. In this case, I am relieved that this category is needed for barely 2 per cent of the total concurrences. For almost all of these concurrences, I am unable to detect any reason for separate reasons having been written at all—the writer seems to do nothing more than echo some or all of the major elements of the majority reasons. On two occasions,<sup>114</sup> a judge wrote to indicate agreement with the ideas of another judge who was writing a separate concurrence; again, a signature on those reasons would have made the same point.

Only once, in *R. v. Burlingham*,<sup>115</sup> was a separate concurrence written simply to take stronger exception to the ideas in a dissent than that expressed in the majority reasons. In *Burlingham*, the only example from the twenty-five concurrences to have a clear substantive content, Justice L'Heureux-Dubé wrote an individual dissent severely criticizing the majority for reverting to a formalist approach to decision making (“reminiscent of ... *R. v. Wray*, [1971] S.C.R. 272”),<sup>116</sup> rather than the contextual approach that has characterized the style of the modern Court. This assertion provoked every judge in the majority except one to sign separate reasons

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<sup>114</sup> *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, 59 D.L.R. (4th) 161; *R. v. Tutton*, [1989] 1 S.C.R. 1392, 35 O.A.C. 1.

<sup>115</sup> [1995] 2 S.C.R. 206, 124 D.L.R. (4th) 7 [cited to S.C.R.].

<sup>116</sup> *Ibid.* at para. 107.

vigorously and categorically refuting this accusation.<sup>117</sup> The case is significant for acknowledging and reinforcing the shift from formalist to contextual decision making, and also demonstrates the frequent marginality of Justice L’Heureux-Dubé.

Clearly, these separate concurrences do not amount to very much. If all concurrences looked like these, there would be no reason to study them; only *Burlingham* is even mildly interesting.

## Conclusion

I have tried to show that separate concurrences are a regular and ongoing aspect of the work of the Supreme Court of Canada, whose judges invest a considerable amount of time and effort in preparing them. I have also sought to show that separate concurrences are a normal and routine part of the output of the Court, such that all judges participate to a greater or lesser degree, and such that all the major components of the Court’s caseload provide the opportunity for this type of disagreement. I have tried to show that writing separate concurrences is a rational strategy, given that about one-tenth of separate concurrences can sway the signatures of enough members of the panel to become the judgment of the Court (and another tenth of separate concurrences come within a single signature of accomplishing this). And I have tried to show that there are just over a half-dozen distinctive types of separate concurrences of escalating importance, these types being routinely “self-labelled” by the judges of the Court in a consistent and transparent manner. What remains is to put judicial disagreement in general, and the separate-concurrence mode of disagreement in particular, in a broader frame.

Mitchel Lasser has suggested that courts in the modern world are pulled between two equally important yet mutually exclusive expectations.<sup>118</sup> On the one hand, courts are expected to follow the rules that have been laid down, to be the mouthpiece of the law rather than a source of the law, and to impartially apply rules, standards, and demands that are not of their own making. The formalist view—that there is a correct solution to all legal issues that can be derived by legal professionals through formal techniques to generate an objective and replicable result—is no longer fully convincing, even to the judges themselves. But the desire lives on and is reflected in the wording of many judicial decisions. On the other hand, courts are expected to pay attention to the policy consequences of their decisions, to consider the significance of social conditions that change faster than the laws themselves, and to take special circumstances into appropriate consideration even when these events cut in a different

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<sup>117</sup> *Ibid.* at 287-97, Sopinka J. The curious implication is that sometimes judges will sign on to more than one set of reasons; in fact, this has occurred less than a dozen times in twenty years, usually involving only a single judge, so I see no reason to break it out for separate discussion.

<sup>118</sup> Mitchel de S.-O.-L’E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004) at 63.

direction than the text of the rules. Modern courts balance these conflicting demands in a variety of ways.

Lasser's work explores this idea by examining three appellate courts that exemplify distinct systems: the Supreme Court of the United States, the French *Cour de cassation*, and the European Court of Justice. Lasser argues that the American solution (which is also in large part the Canadian solution) is to have judges take responsibility for their decisions through extensive, authored reasons for their decisions, and to have these reasons include a dynamic consideration of both sets of demands and a finding that strikes an appropriate balance between these forces in the immediate case.<sup>119</sup> I will take the argument a step further: the written expression of disagreement, in the form of both dissent and separate concurrence, is a further part of this process of assuring the concerned public that there has been serious consideration of a wide range of materials, ideas, and approaches. The reasons why the winner must win are often accompanied, in the official text, by suggestions that there was much to be said for the loser's concerns as well. Thus, the formal certainty of the statement of legal doctrine by the majority is subtly shadowed by minority statements of alternative tracks and options, and the archival embodiment of these subordinated concerns in the same document as the winner's vindication keeps these ideas in play.<sup>120</sup>

Because the two aforementioned expectations are in unavoidable tension, they constantly conflict with one another; the appearance of following the rules laid down, of observing binding precedent, of staying within judicial tests created in earlier decisions, suggests rigidity, uniformity, and inflexibility. But the often-heated give and take of judicial disagreement and the deployment of "on the other hand" arguments backed by judicial and academic citations constantly threaten this stability with the potential for judicial discretion and creativity, risking the appearance of a court that is "simply making it up as it goes along."<sup>121</sup> Both extremes are constantly in play, as both, if isolated from one another, are intolerable. While neither can take over the judicial function, neither can be conclusively defeated without serious consequences.

But, as noted above, it would seem that I am plotting the cartography of a rapidly shrinking landscape. The numbers—six hundred concurrences in twenty-three years—suggest vigorous ongoing activity, but in fact this is overwhelmed by the ebb and flow that saw a steady rise in the use of separate concurrence to a dramatically high peak in 1995–1996, followed by steady decline. The Supreme Court of Canada,

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<sup>119</sup> *Ibid.* at 302-03.

<sup>120</sup> About one-tenth of all Court citations to its own prior decisions are to minority opinions. See Peter McCormick, "Second Thoughts: Supreme Court Citation of Dissents & Separate Concurrences, 1949–[1999]" (2002) 81 Can. Bar Rev. 369 at 375.

<sup>121</sup> Paul Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974) at 207.

which once delivered twelve separate concurrences on a single day,<sup>122</sup> and eighteen separate concurrences on two consecutive days,<sup>123</sup> has over the last three calendar years averaged only eight concurrences every year. Part of this is explained by a caseload that has fallen from a high of 136 cases in one calendar year<sup>124</sup> to its current level of less than sixty every calendar year<sup>125</sup> (a phenomenon curiously paralleled by the Supreme Court of the United States),<sup>126</sup> but even on a relative rather than absolute basis, separate concurrence is declining. Taking word count as a reasonable surrogate measure, the Supreme Court of Canada under Chief Justice Lamer devoted more than one-ninth of its efforts to writing concurrences; under Chief Justice McLachlin the figure is just over one-twentieth. In what context should we place this decline?

M.T. Henderson suggests that we should not think of the expression of judicial disagreement as something that is idiosyncratic, accidental, personality driven,<sup>127</sup> or even explainable purely in terms of internal variables.<sup>128</sup> Instead, he sees this activity as representing a strategy on the part of courts to respond to threats or opportunities in the external environment in order to better position these institutions for survival and influence. His first North American example (U.S. Chief Justice John Marshall's displacement of *seriatim* practices in favour of unanimous and often anonymous expressions of doctrine) is presented as a strategy for building an institutional space for the Supreme Court of the United States in a new democratic society, where clarity and consistency in articulating a generally settled, if still developing, vision were critical.<sup>129</sup> His second North American example, the fragmentation of the same court's

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<sup>122</sup> This occurred on 25 January 1991. See *R. v. Ratti*, [1991] 1 S.C.R. 68, 44 O.A.C. 161; *R. v. Romeo*, [1991] 1 S.C.R. 86, 110 N.B.R. (2d) 57; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385; *R. v. Landry*, [1991] 1 S.C.R. 99, 119 N.R. 293.

<sup>123</sup> This occurred on 29–30 September 1994. See *R. v. Bartle*, [1994] 3 S.C.R. 173, 118 D.L.R. (4th) 83; *R. v. Cobham*, [1994] 3 S.C.R. 360, 118 D.L.R. (4th) 301; *R. v. Matheson*, [1994] 3 S.C.R. 328, 118 D.L.R. (4th) 323; *R. v. Harper*, [1994] 3 S.C.R. 343, 118 D.L.R. (4th) 312; *R. v. Prosper*, [1994] 3 S.C.R. 236, 118 D.L.R. (4th) 154; *R. v. Pozwak*, [1994] 3 S.C.R. 310, 118 D.L.R. (4th) 205; *R. v. Swolinski*, [1994] 3 S.C.R. 481, 119 D.L.R. (4th) 309; *R. v. Bordon*, [1994] 3 S.C.R. 145, 119 D.L.R. (4th) 74; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161; *R. v. Daviault*, [1994] 3 S.C.R. 63, 118 D.L.R. (4th) 469.

<sup>124</sup> This occurred in 1993.

<sup>125</sup> Based on neutral citation, 59 cases were decided in 2006 while 55 were decided in 2007.

<sup>126</sup> See e.g. David M. O'Brien, "A Diminished Plenary Docket" *Judicature* 89:3 (November-December 2005) 134.

<sup>127</sup> See e.g. Philip Cooper, *Battles on the Bench: Conflict Inside the Supreme Court* (Lexington, Ky.: University of Kentucky Press, 1995) (describing disagreement on the Supreme Court of the United States in terms of personality clashes between pairs of justices).

<sup>128</sup> "From *Seriatim* to Consensus and Back Again: A Theory of Dissent" (2007) [unpublished], online: Social Science Research Network, <<http://ssrn.com/abstract=1019074>>. See also John V. Orth, *How Many Judges Does it Take to Make a Supreme Court? And Other Essays on Law and the Constitution* (Lawrence, Kan.: University Press of Kansas, 2006) at 42, 35, 38 (emphasizing Marshall's institution-building accomplishments, and the important role played by single-opinion decisions).

<sup>129</sup> Henderson, *ibid.* at 8ff.

decision writing after the mid-1930s, is explained in terms of the juxtaposition of the new legal realism—unconvinced by a formalism that sought to validate itself by its own unanimity—with the new and controversial challenges faced by the Court before and after World War II.<sup>130</sup> He argues that divided decisions demonstrate a court that is both open to a variety of arguments (and that therefore mollifies the losing side) and willing to change its mind over time (which keeps the losing side in the game).<sup>131</sup> Both enhance long-term legitimacy in this new landscape.

Perhaps we should make a parallel case for the Supreme Court of Canada. During the first twenty years of the *Charter*, as the Court sought to flesh out a new constitutional document and as Canadian politicians and citizens received a crash course in judicial policy involvement, the Court (like the Supreme Court of the United States during the New Deal and the rights revolution) needed to present a variety of faces, an openness to new ideas, and a willingness at times to reconsider its initial positions. This need was served by an extensive number of multiple-opinion decisions, and in particular by a separate-concurrence rate that grew to exceed that of dissents. Separate concurrences are particularly useful in this context because they resist a simple winner–loser dichotomy and suggest a variety of directions in which the prevailing point of view could be nudged in future. But the declining caseload of the Supreme Court of Canada in this century, as well as its declining rates of disagreement in general and separate concurrence in particular, suggests that this dynamic period of flux and change has come to an end. Although the *Charter* is not yet completely explored ground, it is nonetheless true that most of the major questions have been answered; as a result, fewer “big” questions are coming before the Court, and fewer policy-divergent responses need to be generated to prepare the field within which these can be managed. To be sure, this is a big conclusion to hang on two decades of caseload numbers; the point is to suggest that we need to look beyond specific personalities or the impact of a chief justice, or even the inner workings of the Court, to broader notions of the judicial function in evolving contexts.

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<sup>130</sup> *Ibid.* at 28ff.

<sup>131</sup> *Ibid.* at 32ff.