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Peter J. McCormick*

Sharing the Spotlight: Co-authored
Reasons on the Modern Supreme
Court of Canada

When the Supreme Court of Canada delivers its reasons for judgment, the normal expectation (the rare "By the Court" decision aside) is that the judgment of the Court—unanimous or majority or even plurality—will be designated as having been delivered by one specific judge. ("The reasons of A, B, C and D were delivered by B.") But in recent decades, the practice has developed for two or more judges to share this formal designation; co-authorships currently account for one judgment (and, for that matter, one set of minority reasons) in every ten. This article explores this practice, unusual among comparable national high courts: when it started, which judges and which combinations of judges have been the most frequent participants, and what sorts of cases (type of law, size of panel, length of reasons) have tended to be involved; and it concludes by considering why this matters, and what it tells us about the evolving Court.

Lorsque la Cour suprême du Canada exprime les motifs d'un arrêt, on s'attend normalement (sauf dans les rares arrêts rédigés au nom de la Cour) à lire que l'opinion—unanime, majoritaire ou même divisée—a été rédigée par l'un des juges. (« Motifs de jugement : Le juge A (avec l'accord des juges B, C et D.) ») Mais au cours des dernières décennies, il est devenu fréquent que deux juges rédigent les arrêts; actuellement, un arrêt sur dix est rédigé par plus d'un juge, tout comme d'ailleurs les motifs de la minorité. Cet article examine cette pratique, laquelle est inhabituelle dans les hauts tribunaux comparables : quels juges et quels groupes de juges ont le plus souvent eu recours à ce moyen lorsque la pratique a été instaurée et dans quels types d'affaires (domaine de droit, nombre de juges qui siégeaient, longueur du texte des motifs). En conclusion, l'article demande pourquoi cette façon de faire est importante et ce qu'elle nous apprend sur l'évolution de la Cour.

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Introduction

Consider the fairly recent (2003) Supreme Court decision in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.¹

This case will be familiar to everyone who has been following the Supreme Court's *Charter*² jurisprudence. It involves a decision by a trial judge, dissatisfied with a provincial government's actions regarding minority language education facilities, who concluded by requiring the government to report to him regularly concerning the steps they were taking to deal with the problem. Reversed on this remedy by the provincial Court of Appeal, the decision was further appealed to the Supreme Court of Canada which, in a narrow 5-4 judgment, re-established the trial court decision and remedy. This is an important decision in that it endorses a novel remedy to a Charter violation, and interesting again for both the major split on the Court and the vehemence with which both groups pressed their views.

But my interest is in another aspect of the decision. The decision was a 5-4 split, but if you look at the reasons for the majority, they are introduced as follows: "The judgment of McLachlin C.J., and Gonthier, Iacobucci, Bastarache and Arbour JJ. was delivered by Iacobucci and Arbour JJ." Similarly, if you look at the reasons of the four judge dissenting group, they are similarly introduced: "The reasons of Major, Binnie, LeBel and Deschamps JJ. were delivered by Lebel and Deschamps JJ. (dissenting)." Normal practice on our own and most comparable common law high courts would have led us to expect a single judge being indicated as the lead author of the reasons (which is not to deny, of course, that the reasons are circulated and suggestions for changes and refinements are received and often honoured within the reason-signing bloc). Given a single author, we might ask "why that judge rather than one of the others?" and pursue this question down a number of possible tracks (seniority; ideological congruency with the senior justice in the bloc; expertise) within the general frame 'they take turns.' But: why two and not some other number? And why those two and not any of the others? It would be novel in the extreme to suggest a pattern of 'pairs of judges taking turns' or even of a pair being assigned to write by (presumably) the Chief Justice at judicial conference. These questions (why two? and why these two?) seem on the face of it rather harder to answer.

1. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 [*Doucet-Boudreau*].

2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

Is this an extreme and unusual example? Far from it. Consider *Chaoulli v Quebec*,³ the extraordinary 2005 decision that struck down Quebec's ban on private health care insurance. Three judges on a seven-judge panel found that the ban violated the *Charter*; three judges found that it did not; and a seventh judge, finding that the ban violated the Quebec *Charter*,⁴ was silent on the Canadian *Charter* issue. But the reasons of the three judges who found a Canadian *Charter* violation were written by two judges, with the third simply signing on in the type of concurrence we normally take for granted; the reasons of the three judges who dissented were likewise written by two of the judges, again with the third simply signing on.

My argument will be that co-authorship of this sort is a fairly recent development on the modern Supreme Court of Canada, that we can identify a 'who' and a 'when' for its beginning, that it has been increasing to a level and in a way that makes it a more routine part of the current Court than of any prior Court, and that there are implications to the emergence of this practice that we need to consider in terms of the role of individual judges within the Court. But first I want to head off possible objections to tasking your time with the question at all.

Let me anticipate scepticism. Say "co-authorships," and many will reply: first of all, it cannot be all that new because the Dickson Court⁵ gave us *Irwin Toy Ltd v Quebec (Attorney General)*⁶ and *Sparrow*,⁷ still two of the prime examples from whatever co-authorship short list one might wish to develop; that was 25 years ago, so whatever it is, it is not particularly new. Second, because other more recent examples do not leap to mind, it cannot be all that frequent. And third, even if there is somewhat more history and substance to it than that, the prime example is surely the Cory-and-Iacobucci partnership through the 1990s, which was not that frequent (only a dozen instances), and in any event, involves two judges who left the Court years ago. This aside, one might say, nothing really seems to stand out, so this is at most just a low-grade thing that perhaps (Cory and Iacobucci aside) reflects nothing more than idiosyncratic circumstances. Table 1 below is my response to all three objections.

3. *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*].

4. *Charter of Human Rights and Freedoms*, RSQ, c C-12.

5. Former Chief Justice Dickson was Chief Justice of the Supreme Court of Canada from 18 April 1984 until his retirement on 30 June 1990.

6. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*].

7. *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].

Court	Judgments	Minority Reasons	All Reasons	Cases with Co-Authored Reasons
Dickson Court	4 (0.7%)	2 (0.5%)	6 (0.6%)	6 (1.1%)
Lamer Court	26 (4.0%)	20 (3.2%)	46 (3.6%)	45 (6.9%)
McLachlin Court	68 (9.8%)	31 (8.3%)	99 (9.3%)	91 (13.1%)
Total Period	98 (5.2%)	53 (3.8%)	151 (4.6%)	142 (7.5%)

Table 1: Co-authored Reasons (as % of all such reasons)

How rare is the practice? For the Dickson Court, it was vanishingly rare; the two obvious examples I gave above are half of the six-year total for judgments, and one-third of all the co-authored sets of reasons of all kinds. For the Lamer Court,⁸ it was about six times as frequent but (Cory and Iacobucci JJ. notwithstanding) still a relatively minor phenomenon. But the McLachlin Court⁹ now deploys co-authored judgments in a solid one-tenth of all its cases, and co-authored reasons in fully one eleventh of all sets of reasons of all kinds. Perhaps a better measure is the percentage of reserved decisions that include at least one set of co-authored reasons, judgment or minority; this has tracked upward from one per cent for the Dickson Court, through seven per cent for the Lamer Court, to 13 per cent (more than one in eight) for the McLachlin Court. This is a clear upward trajectory, all the more so when we penetrate the almost-a-decade block of the Lamer Court to find a solid ‘before and after’ split, as I will do in a later section. Second, the Cory/Iacobucci JJ. partnership does not loom particularly large within the practice because the most active use of co-authorships has occurred under McLachlin C.J., when Cory J. had already left the Court, and it still continues (and continues to grow) in recent years after Justice Iacobucci’s departure. Indeed, as it turns out, there is another pairing on the Court in this last decade that rivals the Cory/Iacobucci JJ. partnership for the absolute number of its co-authorships. Finally, the count of co-authored reasons has now reached quite impressive levels—over the last 25 years, there have been 150 of them, two thirds of them judgments. And my examples already make the point that they are not confined to the more routine cases: *Irwin Toy* and *Sparrow* from the 1980s,

8. Former Chief Justice Lamer was Chief Justice of the Supreme Court from 1 July 1990 until his retirement on 6 January 2000.

9. Chief Justice McLachlin was appointed Chief Justice of the Supreme Court on 7 January 2000 and is still Chief Justice at time of writing.

and *Doucet-Boudreau* and *Chaoulli* from the more recent decade, make the point that these cases include some of the Court's most important and high profile decisions.

It would be too much to suggest that co-authorship is taking over as the dominant form; the numbers are too modest for this. But the practice is sufficiently frequent, and sufficiently persistent over a long enough time period, to suggest that we cannot simply ignore it, and that we need to take a closer look at the who and the what and the when and the why; this is what I shall do in this paper.

I. *How?*

As the table above suggests, I will explore the co-authorship question in the context of a database that includes all decisions of the Supreme Court of Canada between 18 April 1984 (Dickson J.'s appointment as Chief Justice) and 31 December 2010—a span of just under 27 years including two complete Chief Justiceships and the first eleven years of a third. The cases were accessed on the LEXUM website,¹⁰ and coded for a range of elements and variables.

For present purposes, the data set has been reduced from the total that this description would imply. First, I include only panel decisions on appeals or direct references to the Court; this might seem self-evident, but from time to time the Court includes, and incorporates into the new (post 2000) neutral numbering system, products of the Court that are not panel decisions. For example, they can sometimes include motions decided by a single judge,¹¹ or decisions by a three-judge panel for various applications.¹² Second, I include only those panel decisions where judgment was reserved for written reasons, excluding the hundreds of oral decisions given from the bench on the same day as oral arguments; these were particularly numerous during the Lamer C.J. decade.

Within this data-set, I have singled out co-authored sets of reasons—that is to say, not only co-authored judgments for the Court, but also co-authored minority reasons. Within the text of the reasons, these take the form of “The judgment (or the reasons) of (several members of the panel, or of The Court) were delivered by (more than one justice).” The overwhelming majority of these co-authorships involve two judges, but

10. <http://scc.lexum.umontreal.ca/en/index.html>.

11. *R v Reddick*, [1991] 1 SCR 1105; *Norberg v Wynrib*, [1992] 2 SCR 224; *M(K) v M(H)*, [1992] 3 SCR 3; *Quebec v Montreal*, [1999] 1 SCR 381; *Public School Boards' Association of Alberta v Alberta* 2000 SCC 2, [2000] 1 SCR 44; *Alliance for Marriage and Family v AA*, 2007 SCC 40, [2007] 3 SCR 124.

12. *R v Roberge*, 2005 SCC 48, [2005] 2 SCR 469; *R v Hay*, 2010 SCC 54; *R v White*, 2010 SCC 59, [2010] 3 SCR 374.

there are a smaller number of cases where three judges were involved (as in *Irwin Toy*), and a single dissent that was co-authored jointly by all four of the dissenting judges; this slightly complicates the counting that is involved in some tables below, but not to such an extent as to compromise any calculations.

II. *What?*

Common law courts, including common law appeal courts (and especially including common law national high courts) do not simply declare outcomes; they also give reasons that explain why that outcome is the most appropriate one.¹³ Indeed, the reasons (which provide guidance for lower courts and send signals to potential litigants) are arguably considerably more important than the outcome (which usually matters only to the immediate parties); reasons, not outcomes, are the court's primary product. Courts are, in the familiar language of the Federalist Papers, the weakest of the three branches of government. They lack a police force to enforce their rulings, or even a bureaucracy to follow up on whether their orders have been obeyed, relying instead on the parties coming back to court if the consequences have not been satisfactory. 'Giving reasons' is the most important thing that courts do, which is why it is a mistake to focus too narrowly on who wins, or how the judges voted.

However, practices vary considerably from one country to another. Elsewhere I have explored the emergence of a unique format for decisions of the Supreme Court of Canada, accompanied by the emergence of a unique protocol for minority reasons;¹⁴ in that paper, I briefly canvassed the diversity of decision-delivery formats in the common law world. The same observations apply to the specific element of how authorship of those reasons is presented. The British House of Lords (that was), and United Kingdom Supreme Court that has replaced it, tend toward *seriatim*¹⁵ or at least plural judgments, with several and sometimes all the members of the panel writing full sets of reasons with very little cross-referencing or self-location and with a considerable tolerance for repetition and overlap. The

13. See Martin Shapiro, "The Giving Reasons Requirement" (1992) *U Chicago Legal F* 179; and Frederick Schauer, "Giving Reasons" (1995) 48 *Stan L Rev*, 633. Looking wider than common law courts, see Mathilde Cohen, "Reason Giving in Court Practice: Decision-makers at the Crossroads" (2008) 14 *Colum J Eur L* 77; and Vlad Perju "Reason and Authority in the European Court of Justice" (2009) 49 *Va J Int'l L* 307.

14. Peter McCormick, "Structures of Judgment: How the Supreme Court of Canada Organizes Its Reasons" (2009) 32 *Dal LJ* 35.

15. That is to say: everyone writes their own separate and free-standing reasons, with their "votes" being tabulated to generate an outcome and to mark some of those reasons as dissents, but with the specific reasoning directing that outcome being developed retrospectively by judges in subsequent decisions.

Australian High Court oscillates between *seriatim* decisions, especially for constitutional cases,¹⁶ and decisions that are ostensibly equally co-authored by all the members of the majority (or of the entire panel in the case of unanimity), with no identification of a lead author. The US Supreme Court follows a practice of single authorship so persistently that one can observe and analyze the practices of opinion assignment within the majority block¹⁷ and to some extent within the minority block as well¹⁸ (although US Supreme Court practices are unusual for the fact that decisions are divided into “parts” and the various members of the panel can sign onto, or differ from, each of those parts so as to create complex, even byzantine patterns¹⁹).

In general terms, during the 20th century the Supreme Court of Canada evolved from frequent *seriatim* decisions, to frequently divided panels, to increasingly unified decisions with a lead author;²⁰ by the closing years of the Laskin Court, the Court was delivering a higher proportion of unanimous decisions than ever before in its history. But the period that L’Heureux-Dubé J. is describing consistently involves sets of reasons that are attributed to a single judge, usually with one or more other judges signing on to the reasons, or limiting themselves to curt single sentence concurrences; what is changing over the period is the number of such sets of reasons that typically accompany a single decision of the Court and (concomitantly) the number of signatures that are typically attached to one of those sets of reasons. What has emerged since the end of the Laskin Court, and especially since the closing years of the Lamer Court, is a practice of co-authored reasons; that is of two (only rarely more) judges jointly sharing the designation of lead author. This is a new development

16. See Matthew Groves & Russell Smyth, “A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001” (2004) 32 Federal L Rev 255. See also Matthew Lynch, “Report from Australia” *The Court* (24 April 2007), online: The Court <<http://www.thecourt.ca/2007/04/24/report-from-Australia>>, who observes that “the High Court of Australia has always stated its decisions *in seriatim*.”

17. See e.g. Forrest Maltzman & Paul J Wahlbeck, “A Conditional Model of Opinion Assignment on the Supreme Court” (2004) 57 Political Research Q 551; Jeffrey Lax & Charles Cameron, “Bargaining and Opinion Assignment on the U.S. Supreme Court” (2007) 23 JL, Economics & Organization 276; and Paul J Wahlbeck, “Strategy and Constraints in Supreme Court Opinion Assignments” (2006) 154 U Pa L Rev 1729.

18. See Beverly Blair Cook, “Justice Brennan and the institutionalization of dissent assignment” (1995) 79 *Judicature* 17; reprinted in Elliot E Slotnick (ed) *Judicial Politics: Readings from Judicature* (American Judicature Society, 1999) at 363.

19. B Rudolph Delson, “Typography in the U.S. Reports and Supreme Court Voting Protocols” (2001) 76:4 NYUL Rev 1293.

20. 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 Alb L Rev 551. The last pure *seriatim* decision by the Supreme Court of Canada was *Hossack v Hertz Drive Yourself Stations of Ontario Ltd*, [1966] SCR 28.

for the Supreme Court of Canada; it has no counterpart in the high courts of England or the United States; and it is only remotely similar to the practices of the High Court of Australia. This is both new and distinctive; in the following sections I will describe its general characteristics.

III. *When?*

Table 1 above suggests a practice that was rare on the Dickson Court and considerably more frequent on the McLachlin Court, with the Lamer Court falling somewhere in between. What remains to be seen is whether this is really a step-wise increase (three separate Courts performing consistently at three different levels), a steady gradual rise, or a discontinuous development somewhere within the middle segment. Figure 1 provides the answer.

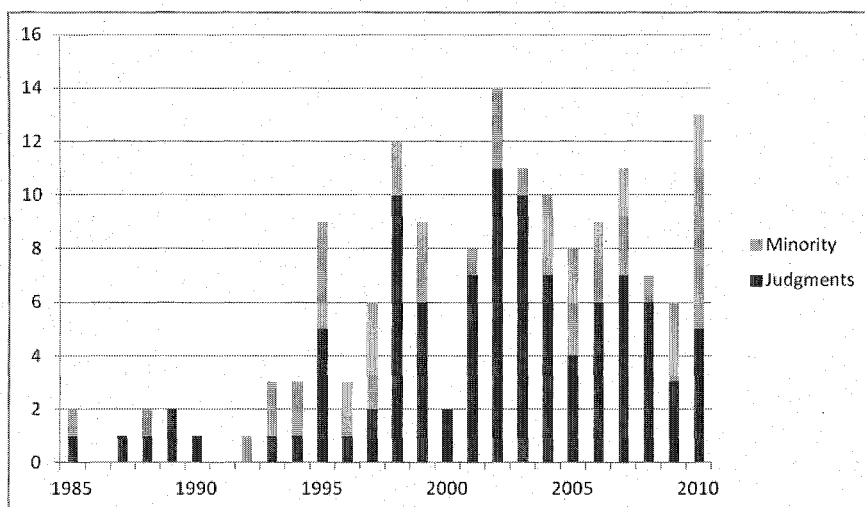


Figure 1: Frequency of Co-authorship (absolute count)

Figure 1 suggests not gradual growth but rather a sharp jump. After a decade where the number of co-authored reasons fluctuates between zero and three, evenly divided between decisions and minorities, it jumps to nine in 1995, as many as the five previous years combined. It briefly drops in the following year to the more 'normal' level of three, but then rises in 1997, and rises again to a new high in 1998. The following dozen years continue at this new high level (save for the curiosity of calendar 2000). The average level for 1998 through 2010 is fractionally *above* the 'spike' in 1995, which suggests that this represents the pivotal year when co-authorship arrived as a significant element in the Court's decision-delivery performance.

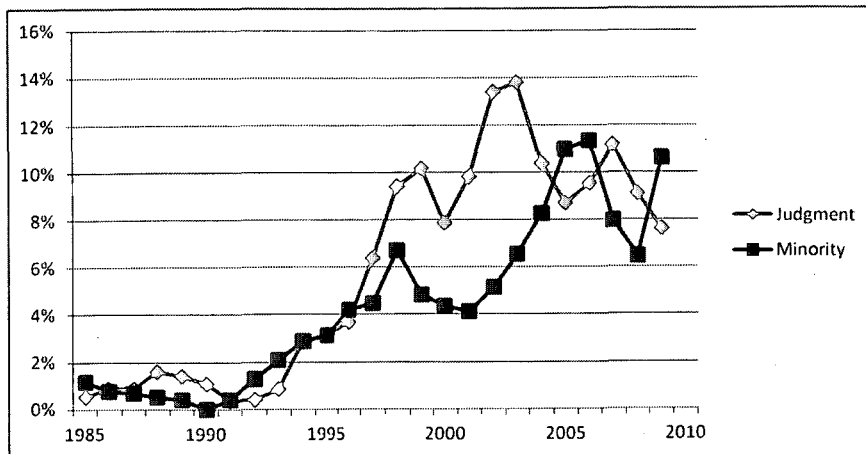


Figure 2: Frequency of Co-authorship (as %)

The absolute number is not, of course, the whole story, because the total caseload of the Court has been fluctuating over the quarter century. A good part of this fluctuation is the product of the oral from-the-bench decisions, which made up more than 20 per cent of the Lamer Court caseload but only half that share for the McLachlin Court, yet there has still been a downward drift of the caseload in the past dozen years. The possibility that the numbers in Figure 1 might be in some part an artefact of these fluctuations is belied by this single basic observation—the absolute count of co-authorships has been going *up* while the annual number of reserved judgments has been going *down*. Figure 2 explores this question more directly. The two lines indicate the number of shared reasons (judgment and minority) as a percentage of all such reasons; so as to soften the spikes and curves and allow a general trend-line to emerge, these represent three-year running totals. The upward trend in the relative frequency of both co-authored judgments and co-authored minority reasons is strongly confirmed, as is the general picture of an upward shift to a new and higher plateau somewhere around 1995. For most of this period, the frequency for co-authored decisions runs well above that of co-authored minority reasons; only recently have they converged.

The lines in recent years are fluctuating enough to make forward projection rather difficult. It would appear that co-authorship of reasons may have peaked at the beginning of the McLachlin Court, and is perhaps trending lower; but the co-authorship of minority reasons, which sagged at that same time, has shown a precisely off-setting increase. I have omitted the possible third line from the graph, for co-authored reasons of all kinds as a percentage of the total; the running three-year averages for this figure

have been higher for every year since 2002 than they were for every year before 2002. The appearance of a slight dip in calendar 2009 is offset by higher numbers in 2010, the highest single year percentage figure ever (and the second highest absolute number ever). It is less likely that the patterns in Figures 1 and 2 show a passing and self-correcting trend than that they represent a new ‘plateau’ of co-authorship performance. Co-authorship is not a passing fad; it has instead become a settled part of the Court’s decision-delivery repertoire.

IV. *Who?*

Given that co-authorships have at least recently become quite significant, the obvious question is: are some judges contributing disproportionately to this development and, if so, which ones? I will consider each of the three Chief Justiceships in turn.

1. *The Dickson Court*

The number of co-authored reasons on the Dickson Court was small enough that they can simply be listed, along with the participating judges in each case. There were four co-authored judgments, two with two authors and two with three; there was also a two-authored dissent, and a two-authored concurrence. To describe this as ‘one per year’ is not simply to give an average (six co-authorships in six years), but very nearly to describe the actual frequency; they are very close to being spaced out such that there is a single example in each calendar year, the more so given that *John v R.* was handed down in December.

Case	Citation	Type	Co-Authors
<i>Germain v R.</i>	[1985] 2 SCR 241	concurrence	Dickson & Lamer JJ.
<i>John v R.</i>	[1985] 2 SCR 476	judgment	Estey & Lamer JJ.
<i>Labrosse v R.</i>	[1987] 1 SCR 310	judgment	McIntyre, Lamer & La Forest JJ.
<i>R. v Green</i>	[1988] 1 SCR 228	dissent	Estey & Lamer JJ.
<i>Irwin Toy</i>	[1989] 1 SCR 927	judgment	Dickson, Lamer & Wilson JJ.
<i>R. v Sparrow</i>	[1990] 1 SCR 1075	judgment	Dickson & La Forest JJ.

Table 2: Co-authored Reasons, Dickson Court

The name that stands out from the string of co-author pairs and triplets is Lamer J., who is involved in all but one of the six co-authorships; Dickson C.J. is second, with three. In all, six judges share the fourteen slots—this out of the total count of fourteen judges who served on the Court for at least part of the six years. One feature that might help explain these co-

authorships is the fact that for four of the cases (all but *Sparrow* and *John*), the co-authoring judges represent all the judges in the group (that is to say: “the reasons of justices A and B were delivered by JUSTICES A AND B”); there were no other judges signing on to the reasons. That said it was far from common for a pair or trio of judges joining on a set of reasons to do so through co-authorship; the norm was very much for one to write and the other(s) to sign.

2. *The Lamer Court*

There were considerably more co-authored reasons by the judges of the Lamer Court, such that it is useful to organize the record of their participation into tabular form, which is done in Table 3. This indicates all the co-authored reasons (judgments, dissents and separate concurrences) in which each judge participated. The rank ordering is driven by the number of co-authored reasons per year of service on the Lamer Court, although strictly speaking this is less useful a number than it might have been because co-authorship is so much more part of the second half of the decade than it is of the first.

Judge	Reasons Co-Authored	Years Served	Co-Authored per year	Co-Authored With
Bastarache	7	2.3	3.1	5
Iacobucci	27	9.0	3.0	6
Cory	18	8.9	2.0	7
Sopinka	10	7.4	1.3	5
McLachlin	11	9.5	1.1	8
Major	8	7.2	1.1	4
Lamer C.J.	8	9.5	0.8	7
Binnie	1	2.0	0.5	1
LaForest	3	7.2	0.4	3
L’Heureux-Dubé	2	9.5	0.2	2

Table 3: Participation in Co-Authorship by Judge, Lamer Court

The two judges who stand out in Table 3 are Iacobucci and Cory JJ. Together, they account for fully one-half of the co-authorship activities of the Lamer Court (and Iacobucci J. himself accounts for a third).²¹ Bastarache J. leads the table because his seven sets of co-authored reasons

21. On the other hand: even together, they are only one half of the total, so it is over-reaching to say that they invented the practice, or that co-authorship is little more than the story of their unusual partnership.

in two and a quarter years put him marginally ahead of Iacobucci J.; it is of course worth noting that Justice Bastarache's two plus years were all after the critical shift of the 1995 calendar year, where there was considerably more co-authorship going on to be part of, but Binnie J. served for almost as long with only a single co-authorship to show for it, which suggests that Justice Bastarache's high ranking on the table is still carrying some information.

If the list of judges in Table 3 appears somewhat short, this is because I have omitted the four judges who served on the Lamer Court but never co-authored a single set of reasons. In the case of Wilson J., this is understandable; she served for less than six months before retiring. Stevenson J. served for just under two years, still a relative short period; and Arbour J. was appointed less than three months before Lamer C.J. retired. But the most striking of the non-participants in co-authorship is Gonthier J., who served the full nine and a half years of the Lamer decade without co-authoring a single set of reasons with anybody. Table 3 suggests three judges (Iacobucci, Cory and Bastarache JJ.) who were frequent co-authors, four (Sopinka, McLachlin, Major and Lamer JJ.) who were occasional co-authors, and the other half of the Court who did so seldom or never.

	LAM	WIL	LAF	L'H	SOP	COR	GON	MCL	STE	IAC	MAJ	BAS	BIN	ARB
LAM	-				2	1		1		2	2	1	1	
WIL		-								X	X	X	X	X
LAF			-		1	1		1				X	X	X
L'H				-				1				1		
SOP	2		1		-	1		1		5			X	X
COR	1		1		1	-		3		12	1	1		X
GON							-							
MCL	1		1	1	1	3		-		1	3	3		
STE									-		X	X	X	X
IAC	2	X			5	12		1		-	4	3		
MAJ	2	X				1		3	X	4	-			
BAS	1	X	X	1		1		3	X	3		-		
BIN	1	X	X		X				X				-	
ARB		X	X		X	X			X					-

Table 4: Co-authorship Pairings, Lamer Court²²

22. Totals may differ from Table 3 because of the small number of triple-authored reasons which throws off the count.

But Table 3 (which judges participated in how many co-authorships) is only half of the story; the other half is who they co-authored with, and this is shown in Table 4. Iacobucci J. clearly dominates the table: the three highest counts for co-authorships (12, 5, and 4) all link him with one of his colleagues, Cory and Sopinka and Major JJ. respectively. The Cory-and-Iacobucci partnership is clearly the highlight of the interactions indicated on Table 4, the more so because it includes no fewer than six decisions of the Court (*Vriend*²³ and *M. v. H.*²⁴ are perhaps the most instantly recognizable).

If Iacobucci J. is in some sense ‘first’ in Tables 3 and 4, being the most frequent and most effective user of the co-authorship style, then at first glance Cory J. would seem to be second, but I think there is a better way of looking at it. Cory J.’s prominence on the tables is only the reflection of Iacobucci J.; take all of Justice Iacobucci’s numbers off the table, and the person who stands out is not Cory J. but rather McLachlin J., who not only has the third highest absolute count but has also co-authored with more of her colleagues (eight) than any other member of the Court.

The logic I am suggesting here is similar to that followed by Edelman and Chen in their well known studies of the “most dangerous” justice on the US Supreme Court,²⁵ which for them is a matter of flexibility, in the sense of an openness to the maximum number of alliances. Their measure of power is to set aside the question of how many times a particular set of judges may have prevailed, and ask instead how many prevailing-at-least-*once* combinations a particular judge has taken part in—this indicates the judge’s capacity to form diverse alliances, a capacity that can be “cashed in” to deliver unexpected majorities. On the parallel logic, McLachlin J. has indicated that she is more able than anyone else on the Court to form joint delivery partnerships with the full range of her colleagues; besides the ‘never co-author’ trio of Wilson, Stevenson and Gonthier JJ., the only person outside her net is the ‘almost never co-author’ Binnie J. To adopt Edelman and Chen’s deliberately provocative language, this arguably makes McLachlin J. the “most dangerous justice” on the Lamer Court.

23. *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*].

24. *M v H*, [1999] 2 SCR 3. These two co-authorships are unusual because they consist of a first section attributed to Cory J and a second section attributed to Iacobucci J; no other set of co-authored reasons takes this form.

25. Paul Edelman & Jim Chen, “The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics” (1996) 70 S Cal L Rev 63; Paul Edelman & Jim Chen, “The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices” (2001) 86 Minn L Rev 131; Paul Edelman & Jim Chen, “The Most Dangerous Justice Rides Into the Sunset” (2007) 24 Const Commentary 199.

3. *The McLachlin Court*

Table 5 is the counterpart of Table 3, showing for each judge how often they took part in co-authored reasons and then running this against the length of their service on the McLachlin Court. The 'co-authorships per year' column, and therefore the sorting in order of this measure, is much more meaningful for the McLachlin Court, since co-authorships and the opportunity to take part in them have been consistently high through the whole decade.

There are two obvious differences between Table 5 and earlier Table 3. The first is that the numbers in Table 5 are much bigger, with twice as many judges into double figures and two (compared with zero) taking part in thirty or more jointly authored reasons. The second is that there are no zeroes; that is to say, unlike the situation for the Lamer Court, where four judges (including one who served the whole decade) never co-authored a single set of reasons, not one of the fifteen judges who has served on the McLachlin Court has similarly declined to participate in a single co-authorship. Even the shortest serving members (L'Heureux-Dubé J. with two and a half years at the beginning, Cromwell J. with just over two years at the end) have co-authored; and even Gonthier J. has five such partnerships in three and a half years, up from zero in the previous decade, although this still places him toward the bottom of the table. Only three Lamer Court judges averaged two co-authorships per year; seven McLachlin Court judges do so. Co-authorships are clearly more frequent and more pervasive.

Judge	Reasons Co-Authored	Years Served	Co-Authored per year	Co-Authored With
Iacobucci	22	4.5	4.9	4
McLachlin C.J.	31	11.0	2.8	11
LeBel	30	11.0	2.7	8
Bastarache	21	8.5	2.5	9
Fish	18	7.4	2.4	6
Major	14	6.0	2.3	5
Arbour	10	4.5	2.2	2
L'Heureux-Dubé	4	2.5	1.6	4
Abella	10	6.3	1.6	5
Deschamps	13	8.4	1.5	7
Rothstein	7	4.8	1.4	6
Gonthier	5	3.6	1.4	4
Charron	7	6.3	1.1	3
Binnie	7	11.0	0.6	4
Cromwell	1	2.0	0.5	1

Table 5: Participation in Co-authorship by Judge, McLachlin Court

Iacobucci J. continues to stand out among the judges for his willingness to co-author; although he served less than half of the McLachlin decade, he still places third among the judges for the absolute frequency of his co-authorships, and is well out in first place on a 'per year' basis—somewhat surprisingly, perhaps, given that his 'partner of preference' Cory left the Court in 1999. McLachlin C.J. and Bastarache J. are also fairly high on the table, as is LeBel J. (who replaced Lamer in 2000) and Fish J. (appointed in 2003). All of the judges whose service carries over from the Lamer Court are co-authoring more frequently under McLachlin C.J.—even Gonthier J., who never did so under Lamer C.J.—with the notable exception of Binnie J. who continues to rank very close to the bottom of the table. Even Cromwell J., the most recent appointee, has already co-authored once (with, as it happens, Rothstein J., the second most recent appointee). On the one hand, it is therefore clear that co-authorship has become pervasive on the Court but, on the other hand, there is a clear spread in the extent to which various members of the Court take part in it.

	MCL	L'H	GON	IAC	MAJ	BAS	BIN	ARB	LEB	DES	FIS	ABE	CHA	ROT	CRO	
MCL	-	1	1		6	2	1		3	1	5	3	6	2		
L'H	1	-	2			1			1	X	X	X	X	X	X	
GON	1	2	-			1	2				X	X	X	X	X	
IAC				-	5	7	2	9				X	X	X	X	
MAJ	6			5	-	1				1	1			X	X	
BAS	2	1	1	7	1	-		1	6		1	1			X	
BIN	1		2	2			-		3							
ARB				9		1		-				X	X	X	X	
LEB	3	1				6	3		-	5	10	1		1		
DES	1	X			1				5	-	1	3	1	1		
FIS	5	X	X		1	1			10	1	-					
ABE	3	X	X	X		1		X	1	3		-		1		
CHA	6	X	X	X				X		1			-	1		
ROT	2	X	X	X	X			X	1	1		1	1	-	1	
CRO		X	X	X	X	X		X							1	-

Table 6: Co-Authorship Pairings, McLachlin Court

The frequency of specific pairings is indicated in Table 6 (the counterpart to Table 4). Justice Iacobucci's numbers continue to be impressive; his nine co-authorships with Arbour J.,²⁶ and seven with Bastarache J., are among the highest numbers on the table. However, the most numerous single pairing is that between Fish and LeBel JJ., with ten co-authorships including five decisions of the Court.²⁷ And McLachlin C.J. once again displays the 'flexible power' of having not only co-authored more times than anyone else on the Court, but also having done so with a wider variety of co-authorship partners.

V. *Who not?*

The previous section has dealt with which pairs of judges have ever co-authored reasons, and how often they have done so; but there is another side to the story. In Table 4, there are theoretically 91 different pairs of judges, but 15 of these are indicated with an X because they represent pairs of judges whose service on the Court did not overlap. This leaves 76 possible pairs of judges, but only 24 of these cells have any numbers in them; the other 52 are blank (which is why I did not obscure this point

26. Although five of these are accounted for by the case of *R v Johnson*, 2003 SCC 46, [2003] 2 SCR 357 [Johnson], and the four (very) much shorter companion case decisions that accompany it.

27. The most significant probably being *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 SCR 326.

by putting “0’s” in those cells). Although there was a certain degree of co-authorship on the Lamer Court, only 31.6 per cent (less than a third) of the possible pairings were actualized in practice. Similarly, on the McLachlin Court there are theoretically 105 possible pairs of judges, but 22 of these are indicated with an X because these are pairs of judges whose service did not overlap. This leaves 83 possible pairs of judges, but only 39 of them were active; only 47.0 per cent (less than half) of the possible pairings were actualized. On both Courts, there were more pairs of judges who never co-authored than who did so.

Some of these pairings involve judges whose service on the Court in question was very short: Wilson, Stevenson, Arbour JJ. (on the Lamer Court), L’Heureux-Dubé J., and Cromwell J. (on the McLachlin Court). These arguably did not have time to experience the full range of interactions that would have given full scope for co-authorships. Some represent those judges—most notably, Gonthier J. on the Lamer Court—who served for an extended period but never co-authored with anybody.

But there are other non-active pairings that are interesting. Abella and Charron JJ. were both appointed on the same day, midway through the McLachlin Chief Justiceship, after serving together on the Ontario Court of Appeal for nine years; and yet they have never co-authored anything, whether as majority or minority. (Cory and Gonthier JJ. were likewise appointed on the same day, toward the end of the Dickson Court, but never co-authored.) Bastarache and Binnie JJ. are the pair of judges whose appointments in the late 1990s ended the ‘natural court’ that centered the Lamer decade; both have co-authored a number of sets of reasons (Bastarache J. considerably more often than Binnie J.), but they have never co-authored together.

But, saving the best for last: clearly the two most active co-authoring judges on the Supreme Court in the last twenty years are Iacobucci J. and McLachlin C.J.; whatever advantages accrue to, or whatever challenges are best met by, co-authorships, they have been the most deeply engaged. Iacobucci J. has been involved in 49 co-authored reasons, McLachlin C.J. in 42. Put differently: these two judges between them have participated in well over one half of all the co-authorships that have happened in the last quarter century. Yet over all these opportunities, and all these years, they have only once co-authored anything: the judgment in *R. v. Mills*.²⁸

None of my readers will need any reminding that *Mills* was a rather extraordinary case; what I want to stress is how splendidly it is located within the evolution of the notion of ‘dialogue theory’ as a way of

28. *R v Mills*, [1999] 3 SCR 668 [*Mills*].

understanding the relationship between Court and Parliament—that is to say, that Parliament is not always limited to doing what the Court says, but can sometimes talk back.²⁹ The classic Canadian judicial statement on dialogue theory as the correct understanding of the role of the Court and its relationship to the legislature is found in *Vriend*,³⁰ and these reasons were written by Iacobucci J.³¹ In *Mills*, about a year later, a majority of the Court upheld as constitutional an amendment to the *Criminal Code*³² that embodied the ideas of the minority rather than the majority in *O'Connor*.³³ It would be hard to find a purer example of Parliament ‘talking back’ rather than simply acquiescing, which arguably represents the high point of dialogue theory. This was the one and only set of reasons ever co-authored by McLachlin C.J. and Iacobucci J. Three years later, the Court effectively shut the door on dialogue theory in *Sauve 2*,³⁴ with the majority reasons being delivered by McLachlin C.J. I find it intriguing that the investigation of co-authorship leads to McLachlin C.J. and Iacobucci J., and that the sole example of a McLachlin-Iacobucci co-authorship leads to this important mid-point of an evolving notion about constitutional interpretation.³⁵

VI. *Where?*

By “where?” I mean “in what kinds of cases were co-authored reasons most likely to be found?”. My concern throughout is to counter the suggestion that although co-authorships were taking place to some extent, they were limited to the periphery—to simpler, more routine cases without strong precedential value. For these purposes, I will refrain from dividing the co-authorship experience among the three Chief Justiceships; I will instead pick up on the strong intimation from Figures 1 and 2 that we can identify a specific time period (calendar 1995) when the practice

29. For the genesis of dialogue theory in the context of Canadian constitutional interpretation, see Peter Hogg & Allison Bushel, “The Charter Dialogue Between Courts and Legislatures (or, Perhaps the Charter Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75, expanded in their “Reply to ‘Six Degrees of Separation’” (1999) 37 Osgoode Hall LJ 529.

30. *Vriend*, *supra* note 23 at 563.

31. More correctly: recall that *Vriend* is one of only two co-authored decisions (both by Cory and Iacobucci JJ) that take the form of a first section attributed to Cory J and a second section attributed to Iacobucci J; this being the case, we can despite the co-authorship say that the endorsement of dialogue theory is specifically Iacobucci J’s.

32. *Criminal Code*, RSC 1985, c C-46.

33. *R v O’Connor*, [1995] 4 SCR 411.

34. *Sauve v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519. (Usually referred to as “*Sauve 2*” because there was an earlier “*Sauve 1*” raising similar issues but less conclusively, that being *Sauve v Canada (Attorney General)*, [1993] 2 SCR 438).

35. For a more expanded argument on the place of *Sauve 2* in the dialogue debate, see Christopher Manfredi, “The Day the Dialogue Died: A Comment on *Sauve v. Canada*” (2007) 45 Osgoode Hall LJ 105.

stopped being purely sporadic and occasional and instead became more frequent and regular. Calendar 1995 saw three times as many co-authored sets of reasons as any previous year in the modern Supreme Court period, although it fell just short of breaking into double digits.³⁶

1. *Type of case*

The first independent variable that seems worth considering is the type of law that was involved in the case. The standard division—still used in the Supreme Court of Canada’s own statistics—is between criminal cases and civil cases, the two between them exhausting the entire caseload; I find this unworkably blunt. My own preference is to divide the caseload into three distinct and easily identifiable categories: criminal law (engaging the Crown); public law (involving a government department or official in a non-criminal context); and private law (involving private citizens or corporate entities). From this exhaustive tripartite set, I then carve out a fourth category, namely *Charter* cases (usually criminal cases, but with a steadily increasing element of public law cases).

Type of Case	Co-Authored Reasons	No Co-Authored Reasons	Total	Co-Author%
Charter	47	171	218	21.6%
Public	33	248	281	11.7%
Criminal	26	246	272	9.6%
Private	23	242	265	8.7%
Total	129	907	1036	12.5%

Table 7: Frequency of Co-authorship, by Type of Case

Table 7 shows the frequency of co-authored reasons (that is to say, either co-authored judgments or co-authored minority reasons) for each of these four categories, arranged in descending order. *Charter* cases easily lead, with double the frequency of non-*Charter* cases; the other three are separated by such small margins that it seems best to declare it something of a tie. Over the last fifteen years, then, one fifth of all *Charter* cases, and one-tenth of non-*Charter* cases, have included co-authored reasons by either the deciding majority or the differing minority. Given that the high profile *Charter* cases continue to provide such an important dimension of the contemporary Court’s jurisprudence, this strongly suggests that the co-

36. Those figures also provide some temptation for treating calendar 1998 as the critical date, with 1995 as a unique departure from the previous lower levels of co-authorship. However, not picking 1995 would leave out cases like *Egan v Canada*, [1995] 2 SCR 513 and *Thibaudeau v Canada*, [1995] 2 SCR 627, which under the earlier date stand as marking the pivotal change, and this is attractive.

authorship phenomenon is not connected with the less important elements of the Court's caseload.

2. *Type of decision*

Another way of identifying significant cases is to consider whether or not the Court has divided on the matter. I fully recognize that the Court makes a serious attempt to generate a united court and solid reasons on its most important cases, but the point is that these major cases (controversial, or with real public or public policy impact, or breaking new ground, or requiring some change or retreat from prior decisions) require the extra effort because they are inherently more likely to be divisive. Certainly the other end of the notional spectrum is less controversial—the more straightforward cases that do not raise major issues or controversies are more likely to be unanimous.

Type of decision	Co-Authored Reasons	No Co-Authored Reasons	Total	Co-Author%
Unanimous	38	509	547	6.9%
Majority	72	364	436	16.5%
Plurality	19	34	53	35.8%
Total	129	907	1036	12.5%

Table 8: Frequency of Co-authorship, by Type of Decision

Table 8 shows the frequency of co-authorship for the three different types of Supreme Court decision: unanimous decisions, majority decisions (which for me includes cases with separate concurrences as well as those with dissents), and plurality decisions (in which there is no single set of 'outcome plus reasons' that draws the direct support of a majority of judges on the panel). The sharp jump between 'unanimous' and 'majority' opinions is of course largely illusory: by definition, a unanimous decision only has one set of reasons that can be co-authored or not; but a majority decision has (at least) two. Given that comparable proportions of judgments and minority reasons are co-authored, this must mean that majority decisions should be twice as likely (actually, a little more than twice as likely, since some will involve more than two sets of reasons) to include co-authored reasons, and they are. But the much higher proportions for plurality reasons do not succumb to such an easy explanation. Assuming (as seems only reasonable) that the more difficult cases are the ones that generate more division on the Court, this suggests that the more difficult cases are more likely to draw co-authored reasons. This again argues against the suggestion that the co-authorship phenomenon is primarily the product of the more routine parts of the caseload.

3. Panel size

Another measure of importance is the size of the panel to which the case is assigned. Under Supreme Court practices, a case can be assigned to a panel of at least five judges; for obvious reasons, the practice is to restrict this to panels with odd numbers of judges. The modern Supreme Court (Laskin C.J. and after) has increasingly leaned toward the use of larger rather than smaller panels, which is facilitated by the somewhat smaller caseloads of recent years; but the logic has always been that the more important cases are directed toward the full court of nine judges, and the less important cases (such as most appeals by right) are directed to five judge panels.³⁷ The size of the panel is therefore a good indication of the relative importance that the case had in the expectations of the Chief Justice, and although this is not a perfect indicator (some nine-judge panels conclude with oral from-the-bench decisions; some five-judge panels hand down decisions that are among the Court's most frequently cited), it is a reasonable first approximation.

Panel Size	Co-Authored Reasons	No Co-Authored Reasons	Total	Co-Author%
Nine judges	81	445	526	15.4%
Seven judges	44	389	433	10.2%
Five judges	4	73	77	5.2%
Total	129	907	1036	12.5%

Table 9: Frequency of Co-authorship, by Size of Panel

Table 9 indicates the frequency of co-authorship by the size of the panel, and the pattern is obvious. Seven-judge panels are twice as likely, and nine judge panels three times as likely, as five judge panels to employ co-authorship. To be sure, this almost suspicious step-wise pattern is qualified by the obvious fact that the larger panels present more pairs of judges to share a co-authorship. One might suggest that some solo authored reasons on smaller panels would have been co-authored had a preferred colleague been present. Nevertheless, the pattern definitely does not support any suggestion that co-authored reasons tend to be found in the more routine cases, and offers some support for the contrary.

4. Length of judgment

A final surrogate for the judicial importance of a Supreme Court decision is, I would suggest, the length of the judgment; in general, longer decisions

37. See Ian Greene et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal*, (Toronto: James Lorimer & Co, 1998), c 6 especially 114ff.

represent a greater investment of time and effort, and it makes no sense to suggest that the Court would not be steering this investment toward those cases, and those aspects of its jurisprudence, that it regards as the most important. I do not deny the occasional short decision that nonetheless carries considerable weight, or its obverse in the wordy decision that casts no apparent shadow over future cases; but these, I would suggest, are the unusual ones, and in general it is sensible and defensible to suggest that other things being equal, longer decisions are more likely than shorter ones to be significant.

The average length of a Supreme Court of Canada judgment on a reserved decision since 1995 is just over 7,500 words (7,770 words for the Lamer Court, 7,450 words for the McLachlin Court); and I specify ‘words in the judgment’ and not ‘total words in all reasons’ because of the upward skewing the latter gives to non-unanimous decisions. This being the case, I define a ‘medium’ length decision as being between 5,000 and 10,000 words in length, with ‘short’ and ‘long’ lying in the obvious directions. However, I also identify the extreme ends of the word-count tail, by having a ‘very short’ category for majority judgments less than 1,000 words in length and a ‘very long’ category for judgments over 15,000 words.

Length of judgment	Co-Authored Reasons	No Co-Authored Reasons	Total	Co-Author%
Very short	5	51	56	8.9%
Short	25	247	272	9.2%
Medium	44	389	433	10.2%
Long	30	159	189	15.9%
Very long	25	61	86	29.1%
Total	129	907	1036	12.5%

Table 10: Frequency of Co-authorship, by Length of Judgment

The patterns connecting length of the decision with frequency of co-authorship are shown in Table 10. There is not much difference for the three smaller categories, bunched right around ten per cent, but for the long and especially for the very long judgments the frequency of co-authorships goes up sharply. This again runs counter to any suggestion that co-authorship is in general an attribute of the less significant cases, with the more traditional solo authorship for the cases that really carry some weight; if anything, the implication is the reverse.

Generalizing a little casually, then: co-authored reasons tend to be found in the very long divided full-Court *Charter* decisions, a set that includes many of the most important decisions of the Court. There is no

empirically-supported reason to think of co-authorship as confined to the less important cases.

VII. *Why?*

If most of the potential pairs of judges never co-author, even if they serve on the Court together for many years, then this must be telling us something significant about those judges who do co-author, especially those who do so unusually often. So the obvious question is: what is it telling us? What are the reasons for two (or more) judges to co-author, to share the attribution of a set of reasons? I would suggest that there are two quite different possibilities (and unfortunately there is evidence to support both of them); the first I would call the 'similarity' thesis and the second the 'difference' thesis.

By the 'similarity thesis' I mean the suggestion that judges co-author because they are close allies, because they share a significant number of legal values and priorities, and because they frequently find themselves promoting the same sets of ideas in an attempt to persuade their colleagues and shape the law. The exemplar par excellence of the similarity thesis is Cory and Iacobucci JJ. In a previous paper on the Lamer Court,³⁸ I had occasion to consider the extent to which different pairs of judges agreed (joined in writing or signing the same sets of reasons) on all those cases when they served on the same panel and that panel divided on the outcome and reasons for a specific case. The highest level of two-judge agreement by a good margin was that between Cory and Iacobucci JJ.; and just as important, these were the two whose cohesiveness anchored the 'group of five' that tended to dominate during the extended 'natural Court' period that centered the Lamer decade (the other three being Lamer C.J., Major and Sopinka JJ.). No two judges were more likely to sign on together than Cory and Iacobucci JJ.; it seems no great leap to carry that thought one step further and say, no two judges were more likely to write together, formally and publicly sharing the writing of the reasons supporting the outcomes on which they so often agreed, than Cory and Iacobucci JJ. This same consideration goes some distance to resolving the problem I will revisit below, which is the problem of working out who is really responsible for that particular set of reasons and its subsequent impact on the law. The more alike the two judges are on a range of values and priorities, the less we need to make a sharp analytical distinction between them.

38. Peter McCormick, "Birds of a Feather: Alliances and Influences on the Lamer Court, 1990-97" (1998) 36 Osgoode Hall LJ 339.

This impression is reinforced by other elements of Table 4. The most frequent co-authorship pairing is Cory plus Iacobucci JJ.; the second is Iacobucci plus Sopinka JJ.; and the third is Iacobucci plus Major JJ. But all of these pairings are within the dominant five-judge group that I noted above; all of them represent co-authorships within the set of judges who voted together the most often and by doing so directed much of the important jurisprudence of the Court. On this approach, then, voting together shows the alliances on the Court, and writing together is a purer, more distilled form, of these same alliances. Indeed, about 60 per cent of the co-authorships operate within the five-judge group I have indicated (with 20 per cent joining members of the five-judge group with the four-judge outsiders; and 20 per cent involving Bastarache and Binnie JJ. who joined the Court after the departure of Sopinka and La Forest JJ. Overall, then, it would seem (at least for the Lamer Court) that like joins with like; co-authorship is a reflection of similarity.

The 'difference thesis' is precisely the reverse: we should think of co-authored decisions as representing some sort of difficult or reluctant blending of two alternative views, with both authors insisting on the inclusion of their name to indicate that they have not completely surrendered their own viewpoint to the other. This is consistent with the scenario presented to me by a former member of the Court, who answered my question about the recent rise in co-authored decisions by saying that the current Chief Justice was not comfortable with the large number of separate concurrences on the Lamer Court, and that when there seemed to be a possibility of one or more judges from the majority side of a divided panel writing their own separate reasons, she strongly encouraged them to see if they couldn't sit down together and work something out.³⁹ This is, as I say, the suggestion of an insider; and it does have some first-look support in the fact that the rise of co-authorships has been accompanied by a decline in the frequency of separate concurrences (although this last may be rebounding in recent terms).

As to what this looks like in practice: consider LeBel and Fish JJ., the co-authoring pair who nose out Iacobucci and Arbour JJ. for the highest number of co-authored reasons during the McLachlin Court, as shown in Table 6. Unlike the Cory and Iacobucci JJ. pairing, which had the highest two-judge agreement rate on the Lamer Court, the LeBel and Fish JJ. pairing is a good notch below the all-court average rate for two-judge agreement on the McLachlin Court (taking 'agreement' as meaning

39. Private conversation with Justice Michel Bastarache; during the IRPP Senate Reform workshop in Ottawa in October 2009.

‘signed on to the same set of reasons’ rather than just ‘voted for the same outcome’). We cannot suggest for them, as we could for Cory and Iacobucci JJ., that co-authorship represents a particular strong expression of deeply shared views on a number of important issues. Instead, there is now something of a sense of a real difference that is accommodated through real compromise, and almost by definition a compromise is the middle ground that neither side can support passionately because it does not closely approximate their ideal position.

I cannot repeat the ‘within the majority bloc’ calculations for the McLachlin Court that I performed above for the Lamer Court because there do not appear to be any persisting blocs on the McLachlin Court—instead of a solid core that usually prevails when the Court divides, there is a fluctuating series of majority coalitions, none of which occur more than a handful of times.⁴⁰ What I am left with is simply the figures for the two-judge pairings, and when these are compared with co-authorship frequencies, the results are rather inconclusive. The largest numbers of co-authorships on the McLachlin Court are between judges with only moderate (average) agreement rates, and about one eighth of all co-authorships are between judges with low (more than ten per cent below average) agreement rates; but, that said, there are also a number of reasonably frequent co-authorship pairs (Iacobucci/Arbour JJ., Iacobucci/Major JJ., McLachlin C.J./Charron J.) with high agreement rates.

40. Peter McCormick, “Voting Blocks, Divided Decisions, and the McLachlin Court 2000-2009” (paper delivered at the CPSA annual meeting, Congress of the Humanities & Social Sciences, Montreal, Quebec, June 2010).

	MCL	L'H	GON	IAC	MAJ	BAS	BIN	ARB	LEB	DES	FIS	ABE	CHA	ROT
MCL	-	.483	.682	.645	.658	.559	.668	.614	.469	.492	.535	.518	.594	.614
L'H		-	.603	.281	.290	.509	.250	.315	.271	X	X	X	X	X
GON			-	.547	.494	.614	.484	.447	.513	.480	X	X	X	X
IAC				-	.782	.520	.683	.691	.552	.359	.667	X	X	X
MAJ					-	.560	.733	.608	.395	.460	.538	.783	.818	X
BAS						-	.461	.367	.399	.473	.291	.471	.585	.644
BIN							-	.582	.434	.473	.636	.479	.569	.520
ARB								-	.441	.316	.600	X	X	X
LEB									-	.463	.465	.510	.493	.452
DES										-	.321	.421	.576	.698
FIS											-	.436	.496	.400
ABE												-	.576	.471
CHA													-	.710
ROT														-

Table 11: Agreement Rates on Divided Panels, McLachlin Court

Table 11 shows what fraction of the time each pair of judges agreed (signed on to the same set of reasons) when they served together on a non-unanimous panel; Cromwell J. has been omitted given that he joined the Court in 2008. The range is quite striking—Major J. agreed with both Abella and Charron JJ. three quarters of the time, but L’Heureux-Dubé J. agreed with Binnie J. only one quarter of the time—and the clustering of the numbers is fairly low, in that almost one half of the pairings agreed less than half the time that the panel divided. The table shows (by bolding) those pairs of judges who co-authored reasons frequently, which I have defined for this purpose as five or more times; and also (by italicizing) those pairs of judges who never co-authored. This is summarized in Table 12, below.

	Frequent	Occasional	Never	Total
70% or more	1	1	3	5
60% - 69.9%	2	7	6	15
50% - 59.9%	3	7	9	19
40% - 49.9%	2	10	12	24
Less than 40%	1	4	7	12
Total	9	29	37	75

Table 12: Agreement Rates & Co-Authorship Frequency

Table 12 makes more systematically the point I have made in more general terms above: there is no real correlation between the frequency with which any pair of judges agreed when the panel divided, and the likelihood that they will (or will not) have co-authored a set of reasons. Three of the five highest (70 per cent plus) agreement rates result in no co-authored reasons at all; one of the twelve lowest (below 40 per cent) agreement rates generated frequent co-authorships. LeBel and Deschamps JJ. co-authored ten times, but they sign on together substantially less than half the time they served on the same panel; conversely, Major and Binnie JJ. have one of the highest agreement rates on the Court (and this based on a considerable period of service and a good number of joint appearances), but they never co-authored.

That is to say: it would seem that both hypotheses are true simultaneously, the one (the similarity thesis) centered on the activity of Iacobucci J. and more typical of the Lamer Court, and the other (the difference thesis) more typical of the McLachlin Court and exemplified by LeBel and Fish JJ. Curiously, this notion of a single phenomenon with two completely contrary explanations does have a counterpart: specifically, in the practice of the “By the Court” (unanimous, unattributed to any judge or judges) decision. This practice emerged under the Dickson and Lamer Courts, and was suggested by some⁴¹ to indicate a special style of judicial decision that gave added weight and emphasis to major constitutional decisions. But a closer look at the “By the Court” phenomenon generates much less clear-cut decisions. It is quite true that the Supreme Court has used the “By the Court” device for some of its most significant constitutional decisions (such as the *Quebec Secession Reference*), but it is also true that many “By the Court” decisions (55 of the 112 since 1984) are less than five hundred words in length, not much more than a single printed page, and only nineteen are longer than the average set of majority reasons. “By the Court” reasons, then, sometimes indicate unusually important decisions, but sometimes they indicate casually routine decisions. Similarly, co-authorships sometimes indicate persisting doctrinal linkages between pairs of judges, and sometimes they indicate the unusual cooperation of judges who usually differ. Such discontinuous phenomena are confusing, hard to understand and challenging to describe, but they seem to exist.

41. See, e.g., Andre Bzdera, “A Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review” (1993) 26 Can J of Pol Sci. The same point is made by Donald Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008).

VIII. *So what?*

Why should all this matter? Why should anybody be concerned with this recent and persisting practice? I think we should be concerned because providing reasons is the most significant thing that national high courts do, from which it follows that any significant persisting structural change in the way that decisions are arrived at and constructed and delivered is important to the institution and the way that it performs its (evolving) functions.

As the Supreme Court itself has said, the giving of reasons has to do with accountability. “Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render.”⁴² Lasser has identified the provision of extended, discursive, specifically authored reasons as a critical element of common law (as distinct from civilian) judicial processes—it is a basic principle that in such systems judges do not vanish behind a flat, anonymous and apparently unanimous judgment, but instead step forward to write their reasons and sign their names.⁴³ Except for the unusual practice of the “By the Court” decision (never a major element of decision delivery on our Supreme Court, and less so today), these reasons have typically been attributed to single judges, with other judges who disagreed or did not quite agree writing their own reasons to say why. Although the other judges ‘behind’ the writers, in either the majority or minority bloc, undoubtedly had some say (perhaps even some negotiated say) in the precise wording,⁴⁴ the spotlight was distinctly on the lead author. By extension, when we talk about a judge’s record on the bench, or when we assess what that judge contributed to the evolution of the law in general or with respect to specific legal issues, we do so by identifying and studying and quoting from the decisions and the reasons for which that judge assumed the primary responsibility. Co-authorship blurs this attribution—less so perhaps under the ‘similarity thesis’ than under the ‘difference thesis,’ but it still blurs it. In the future, if we study the contributions of LeBel or Fish JJ., we will have to carry a parallel analysis of ‘LeBel and Fish’ and what this ‘not quite one or the other’ shadow justice can teach us. This may be a manageable problem when only ten per cent of the judgments, and ten per cent of the minority reasons, present the face of co-authorship; if the number continues to increase, we will need to address it more directly.

42. *R v Sheppard*, 2002 SCC 26 at para 15, [2002] 1 SCR 869, Binnie J.

43. Mitchel de s.-O.-l’E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press, 2009).

44. For an American discussion of this phenomenon, see Forrest Maltzmann et al, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge University Press, 2000).

To make the point by way of a colourful metaphor: let us think of the reasoned contributions of all the individuals who ever serve on a particular Court as being assigned their own primary colour as we locate them in some circular (or three-dimensional global) arrangement, these discs of colour having a variety of shadings of secondary colours along specific edges to reflect the influence of their various colleagues. (To be sure, there are not enough primary colours for this to work literally, but let us pretend there are.) Co-authorship, especially regular co-authorship extending to a number of significant judgments, implies an overlap of the discs, creating not just a shaded edge but a zone of not inconsiderable proportion in which we no longer have a primary colour, only a secondary colour. This is not necessarily a bad thing; my point is that it is a different thing.

Henderson suggests that changes to the way the Court organizes and presents itself in the delivery of reasons do not ‘just happen’ but rather reflect a changing social, legal and political context within which the Court is trying to perform an evolving function⁴⁵—the decision delivery form ‘makes sense’ (and the new one ‘makes more sense’ than the old one) once we decode this story. Similarly, a note in the most recent Harvard Law Review, speaking of the emergence of the practice of explicitly ‘respectful’ dissents, observes that “there exists a demonstrable nexus between institutional *practice*...and institutional *purpose*.”⁴⁶ Perhaps what we are seeing is a step away from, if you will, a ‘star system’ in which specific judges ‘stand for’ specific trends or issues in the law, each taking a turn in the spotlight on the appropriate occasions.⁴⁷ Co-authorship, on the other hand, points toward a more collegial product in which judges collaborate more extensively and formally, something that is perhaps reinforced by the current Court’s tendency for shifting alliances rather than solid blocs. But Henderson’s warning is well taken—we should never think of such things as if they ‘just happened’ for no particular reason, or as simply reducible to individual personalities and idiosyncrasies, as if the presentation of its reasons is not something upon which the Court seriously reflects as a critical element of its product.

It is intriguing that the rise of co-authorship has recently been explored in other contexts; for example, Ginsburg and Miles have pointed out that

45. M Todd Henderson, “From *Seriatim* to Consensus and Back Again: A Theory of Dissent” (2007) 1 Sup Ct Rev 283.

46. Note, “From Consensus to Collegiality: The Origins of the ‘Respectful’ Consent” (2011) 124 Harv L Rev 1305.

47. I admit that I have tended toward this sort of description myself, thinking of Sopinka J as the ‘fair answer and defence guy,’ or Lamer CJ as championing the right to be represented, or L’Heureux-Dubé J as relentlessly promoting anti-discrimination as the true core and focus of s 15 equality rights.

research in the field of empirical legal theory is increasingly manifested in co-authored rather than single-authored publications.⁴⁸ None of the four motives they suggest for increasing co-authorships (specialist complementarity; compensation; enhanced quality and credibility; and diversification) seem directly applicable here, although on the negative side, their “diminution of credit” idea is somewhat similar to the point I am making. For present purposes, it is significant that they assume that the explanation has to be sought in the changing nature of the academic legal profession itself, including the “increasingly technical demands in scholarship” and the “increasingly sophisticated methodologies” of empirical and interdisciplinary work.

Conclusion

John Orth once wrote an article⁴⁹ (and then reused the title for the book that collected several articles⁵⁰) entitled “How Many Judges Does it Take to Make a Supreme Court?” (referring to the US Supreme Court) and then proceeded to explain why the obvious answer “nine” is not completely satisfactory. Similarly, I am asking “how many judges does it take to write a Supreme Court decision?” and pointing out the fact that the obvious answer “one” does not cover as much ground as one might have thought. But where his concerns are largely historic, mine are more contemporary.

My topic might appear slightly esoteric: like the young child at Christmas, I want to play with the pretty wrapping while the adults focus on what was inside. But the decision/delivery duality is not really as easily divided as the product/packaging duality. “The medium is the message” may pitch it a bit strong, but it reminds us that the message and the medium *are* a meaning-communication package that cannot be disaggregated without changing it. *How* the Court is telling us something is not unconnected from *what* it is telling us, and changes in how it tells us things have their own dynamic and their own significance. What I have done is to draw attention to a recent phenomenon on the Court—the co-authorship of reasons, both judgments and minority reasons—and shown that it is at least a persisting and possibly a growing part of the way that the Court delivers its reasons. But although I have shown that it exists,

48. Tom Ginsburg & Thomas J Miles, “Empiricism and the Rising Incidence of Coauthorship in Law” U of Chicago Law & Economics, Olin Working Paper No 545 (15 February 2011), online: Social Science Research Network <papers.ssrn.com/so13/papers.cfm?abstract_id=1762323>. Note that the paper itself is coauthored.

49. John V Orth, “How Many Judges Does It Take to Make a Supreme Court?” (2002) 19 Const Commentary 681.

50. John V Orth, *How Many Judges Does It Take to Make a Supreme Court? And Other Essays on Law and the Constitution* (Lawrence: University Press of Kansas, 2006).

and that it applies to a set of cases that is skewed toward the Court's more important decisions, I am left with two completely contradictory, even mutually exclusive, explanations of why it is happening and what it means. This being the case, it is clear that more research needs to be done on this question, with this paper hopefully serving as a useful prolegomenon.