

# The Supreme Court Law Review : Osgoode's Annual Constitutional Cases Conference Volume 4 (2008)

## Voicing an Opinion: Authorship, Collaboration and the Judgments of Justice Bertha Wilson Marie-Claire Belleau, Rebecca Johnson, Christina Vinters\*

### I. INTRODUCTION

Justice Bertha Wilson's Betcherman Lecture, "Will Women Judges Really Make a Difference?"<sup>1</sup> remains one of the most highly cited articles by a judge. Certainly, the question she posed in the title is at the heart of any number of empirical projects considering the role that identity plays in judicial decision-making. It was thus with interest that we returned to the text of her speech years after each of us first read it. Given the controversy that had swirled around the text so many years ago, we found ourselves reflecting on the surprising moderation of the piece. With the passage of time, the speech now seemed to us a quite modest meditation on the role of the judge, the nature of "impartiality", and the obligation to judge fairly and objectively. The most provocative dimension of the article might well be the title. And it is the title that we begin with: "Will women judges make a difference?"

But though we, like her, take up the terms "women judges", "make" and "difference", we wish to spin them in slightly different directions. For in asking about difference, our interest is not so much in questions of judicial identity: who a judge *is*, or the ways in which elements of identity (whether gender, race, class, religion or political affiliation) might influence the substance of a judge's opinions. Rather, using Canada's first woman Supreme Court justice as our point of departure, we consider the nature of judicial work — the business of "making" the law through the production of written judicial opinions. While "difference" is a big preoccupation for us, our interest in this piece is less in the question of whether or not *men and women* judge differently, than in the *fact* of difference between judges: "differences of opinion" between judges that find textual expression in the form of published dissenting opinions.

In Part II, we take a brief empirical turn, and spend some time counting cases, seeking to sketch a portrait of Justice Wilsons' judicial work, attending to types of opinions (unanimous, majority, dissenting, partially dissenting, concurring), and methods of participation (signing and authoring). We contextualize this portrait by

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<sup>1</sup> Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507.

considering Justice Wilson’s work alongside that of colleagues with whom she sat. There are two strands in this data. The first, very visible in Part I, focuses attention on particular judges, raising questions about difference, voice and identity. In Part III, influenced by the insights of institutional ethnography, we reflect on a second strand in the data, one which suggests room for more attention to the complex collaborative and institutional dimensions to the production of law. If the empirical snapshot can encourage attention to the role of difference in the work of Canada’s first woman Supreme Court judge, it should also encourage attention to the place of difference more generally in the making of law. Attention to the judgments of Justice Bertha Wilson can enable a robust discussion about the production of opinions, as well as nuance in our thinking about the implications of collaboration, authorship and voice.

## II. COUNTING TEXTS

### 1. Justice Bertha Wilson

From the time of her appointment in 1982 to her retirement in 1991, Justice Bertha Wilson participated in 551 cases that generated written reasons. Each written opinion addresses two matters: result and reason. The first of these — *result* — is something that can generally be expressed in binary form. Someone wins or loses; there is or is not a contract; damages are or are not proved; a child is left with or removed from the parent. But it is not enough for a judge to pronounce the “yes or no” of result. The judge must also give *reasons*. The reasons tell us *how* the judge’s thinking process proceeded from the facts to the outcome.

The reasons tell us *why* certain outcomes are desirable, justifiable or inevitable:<sup>2</sup> why evidence must be thrown out in a given case; how children are or are not legal subjects; and why some injuries can happen without obligations on the part of others to help.

In situations where an appellate court produces a unanimous opinion, reason and result move together. That unanimous opinion may bear the authorial imprint of one of the judge’s names, or it may be issued under the *nom de plume* of “The Court”. But where differences emerge between judges — differences that make unanimity impossible — the case will result in the production of multiple texts: a majority opinion (a text supported by more than half the judges hearing the case), and one or more dissenting or concurring opinions. A terminological note is in order here, as the identification of a text as dissenting or concurring depends on the distinction between result and reason. Where the minority judges disagree with the result reached by the majority, the opinion is a dissenting one. Where, however,

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<sup>2</sup> As the unanimous court recently said in *R. v. Walker*, [2008] S.C.J. No. 34, 2008 SCC 34, at para. 19 (S.C.C.), citing *R. v. Sheppard*, [2002] S.C.J. No. 30, [2002] 1 S.C.R. 869, at paras. 15, 24 (S.C.C.): “Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. [...] Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.”

the minority judges agree with the *result* but disagree with the *majority reasons*, the opinion is a concurring one. In English, the word “concur” means “to agree”, but in law, the concurrence is a form of disagreement. This is perhaps more evident for francophone than anglophone readers since in French, the terms dissent and concurrence are rendered as *dissidences sur les résultats* and *dissidences sur les motifs*. This linguistic marking better exposes the distinction between reason and result, and puts emphasis on the dissenting nature of both types of opinion. The central point for the empirically minded is that, for the purposes of statistical analysis, the distinction between a dissent and a concurrence can be problematic: it straddles the categories of majority and dissent. If one is concerned primarily with the result in a case, a concurrence can be counted with the majority. But if one’s concern is with the reasons given, then a concurrence can instead be counted as a dissent.

There is one further wrinkle. Though a concurrence generally captures agreement on result and disagreement on reasons, there are situations in which there is no majority position on reasons. In such situations — plurality judgments — the concurrence is less a form of disagreement with the majority than an articulation of one of several possible stances in a context where a stable centre has not yet formed. While such an opinion is also labelled a “concurrence”, there are some good reasons for separately exploring concurrences produced in the context of plurality judgments, from those articulated against the background of a majority position.

In Table 1 below, we have captured all 553 opinions<sup>3</sup> in which Justice Bertha Wilson was implicated, separated both by type of opinion (unanimous, majority, concurring, dissenting,) and by Justice Wilsons’ status as either “author” or “signatory” of each of these opinions.

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<sup>3</sup> Though she participated in 551 opinion-generating cases, she is implicated in 553 opinions, because she signed two opinions in two cases: *R. v. A.*, [1990] S.C.J. No. 43, [1990] 1 S.C.R. 995 (S.C.C.) (she signed Cory J.’s majority opinion and a concurrence by Sopinka J.); and *N.B.C. v. Retail Clerks’ Union*, [1984] S.C.J. No. 15, [1984] 1 S.C.R. 269 (S.C.C.) (where she signed the per curiam reasons of Chouinard J., and a concurrence by Beetz J.). In each of these two cases she signed a majority and a concurring opinion, affirming results, but showing herself open to two sets of reasons.

TABLE 1

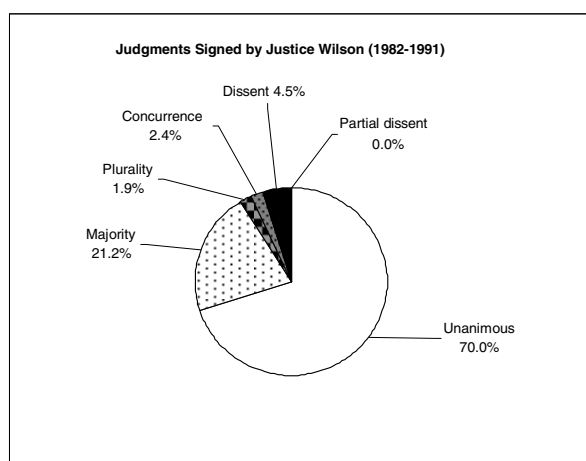
<b>Justice Wilson at the Supreme Court of Canada</b> (March 4, 1982 to January 4, 1991)		
<b>Wilson's Involvement</b>	<b>Number</b>	<b>Percentage</b>
Wrote for unanimous court	41	7.4%
Signed with unanimous court	213	38.5%
Judgment delivered by "The Court"	48	8.7%
<b>subtotal</b>	<b>302</b>	<b>54.6%</b>
Wrote majority opinion	22	4.0%
Signed majority opinion	79	14.3%
<b>subtotal</b>	<b>101</b>	<b>18.3%</b>
Wrote concurrence in plurality judgment	30	5.4%
Signed concurrence in plurality judgment	7	1.3%
Wrote a concurring opinion	35	6.3%
Signed a concurring opinion	9	1.6%
<b>subtotal</b>	<b>81</b>	<b>14.6%</b>
Wrote a dissenting opinion	41	7.4%
Signed a dissenting opinion	17	3.1%
Wrote a partial dissent	10	1.8%
Signed a partial dissent	0	0.0%
Took no part in judgment	1	0.2%
<b>subtotal</b>	<b>69</b>	<b>12.5%</b>
<b>TOTAL</b>	<b>553</b>	<b>100%</b>

One of the first things to note is the predominance of agreement. Justice Wilson heard 551 cases, and was a signatory to 302 unanimous opinions (41 that she wrote, 213 which were authored by other judges, and 48 under the name of “The Court”). She was part of a unanimous Court nearly 55 per cent of the time. If the majority and unanimous opinions are added together, one can further say that Justice Wilson shared the views of her colleagues over 70 per cent of the time.

When it comes to difference, the chart shows us that Justice Wilson, where she diverged from the majority, was slightly more likely to differ over the *reasons*, than over the *results*: she was more likely to be part of a concurrence than part of a dissent. For those with an empirical bent, there is an element of choice in how to think about those concurrences in the context of her work. If one’s interest is primarily in results, one might bundle the concurrences with the majority opinions, rather than with the dissenting ones.

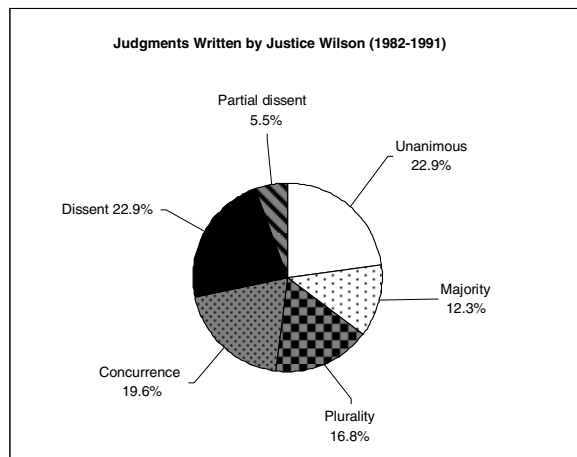
One might take the opinions above, and consider separately those she signed from those she authored. Justice Wilson is the author of 179 opinions. This means that in nearly one-third of the cases in which she participated, there is an opinion bearing her name as author. Peter McCormick reminds us that it is worth distinguishing the minority opinions a judge writes from those the judge signs: the propensities for these two modes of support do not tend to echo one another.<sup>4</sup> Justice Wilson’s production seems to follow this pattern. Of the texts she authored, for example, there are an equal number of unanimous and dissenting opinions (41 of each). But if one considers the texts she signed, the 213 unanimous opinions overwhelm the 17 dissents. Below, Figures 1 and 2 provide a portrait of the different modes of support in the “signed” judgments (373 opinions), and the “authored” judgments (179 opinions).

FIGURE 1



<sup>4</sup> Peter McCormick, “With Respect — Levels of Disagreement on the Lamer Court 1990- 2000” (2003) 48 McGill L.J. 89, at 98. According to McCormick, joining a separate opinion happens only three-fifths on average as often as writing one. With Justice Wilson, the numbers are even lower, and she signs the dissent of another only two-fifths as often as authoring one.

FIGURE 2



Placed side by side, these two figures show starkly different patterns of judgment in Justice Wilson's signed and authored opinions. Certainly, one can see that unanimity is the dominant theme in the signed judgments. She was a signatory to 373 opinions, and in less than 10 per cent of those did she express views which diverged from the majority position. Between the unanimous and majority opinions, one can see that Justice Wilson was often in agreement with her colleagues. Indeed, where she agreed, she was likely to sign on wholeheartedly.

The picture is quite different when one considers the 179 opinions that bear her name as author. Here, on the contrary, is a portrait of divergence. Together, the unanimous and majority decisions account for only 35 per cent of her authored opinions. The rest are variations on the theme of difference. And if a little less than one third of that difference emerges as "dissent" (divergence over result), a little more than one third takes the form of "concurrence" (divergence over reasons, whether expressed against a stable centre, or in the context of a plurality judgment). One could certainly conclude, at least in the case of Bertha Wilson, that her opinions make visible the centrality of difference in her written judgments.

## 2. The Supreme Court of Canada

Difference is inevitably a comparative concept, so it is interesting to consider not only the differences between her written and signed opinions, but differences that might be visible where her practices of judgment are set alongside the practices of those judges with whom she sat. What might this wider lens of inquiry make visible? In Table 2 below we provide some (loose) comparative data on the 15 judges who, at various times, sat on the bench with Bertha Wilson. In columns 2 and 3 are the total number of unanimous and divided cases in which that judge participated. Because we are highlighting the question of "difference", the columns that follow refer only to those non-unanimous cases: cases where a judicial difference of opinion produced two or more written texts. Column 4 thus provides us a sense of the frequency of that judge's authorial participation in the context of

those divided judgments: how often the judge wrote one of the multiple texts (whether majority, concurrence, dissent, or partial dissent). The following columns indicate “position” independent of authorial role. Columns 5 and 6 capture the proportion of times that the judge (whether authoring or signing) was aligned with a dissent or with a concurrence. The last column bundles together all divergent texts (dissents, concurrences, partial dissents) to provide an indicator of the general propensity to differ from the majority in some fashion. The judges are listed on this table in accordance with the final column: from most to least likely to diverge from the majority.

TABLE 2

1	2	3	4	5	6	7
Justice Date of Appointment	Unanimous Cases	Divided Cases	Took Part in Writing (%)	Took Part in Dissent (%)	Took Part in Concurring (%)	Diverged from Majority (%)
<b>L’Heureux- Dubé</b> ♀ 15/04/1987	340	531	42.7	28.1	31.5	63.3
<b>Wilson</b> ♀ 04/03/1982	<b>302</b>	<b>250</b>	<b>55.2</b>	<b>23.2</b>	<b>32.4</b>	<b>59.6</b>
<b>McLachlin</b> ♀ 30/03/1989	472	555	43.8	19.6	23.6	46.1
<b>La Forest</b> 16/01/1985	306	467	38.8	12.0	30.4	45.2
<b>Lamer</b> 28/03/1980	397	502	44.5	13.4	29.1	45.0
<b>Sopinka</b> 24/05/1988	207	382	46.1	17.3	25.7	44.8
<b>McIntyre</b> 01/01/1979	407	183	37.2	16.4	23.5	43.7
<b>Stevenson</b> 17/09/1990	27	70	25.7	14.3	28.8	42.9
<b>Beetz</b> 01/01/1974	490	134	22.4	11.1	29.1	41.6
<b>Dickson</b> 26/03/1973	486	229	39.3	12.2	27.9	40.5
<b>Estey</b> 29/09/1977	384	107	42.1	17.8	17.8	37.4
<b>Gonthier</b> 01/02/1989	404	506	17.2	12.5	21.3	35.2
<b>Chouinard</b> 24/09/1979	289	86	16.3	12.8	20.9	34.9
<b>Cory</b> 01/02/1989	267	397	35.5	9.8	19.4	31.0
<b>Le Dain</b> 29/05/1984	97	70	30.0	5.7	24.3	30.0
<b>Average</b>	<b>325</b>	<b>298</b>	<b>35.8</b>	<b>15.0</b>	<b>25.7</b>	<b>42.8</b>

There are limits to the conclusions one can draw from this table. Comparisons here can only be loose ones, since the judges on this table were appointed at different times, and can thus be understood as occupying different, if overlapping, streams of time; Chief Justice McLachlin is still a sitting judge, of course, and so the numbers for her are still a work in progress. Further, the aggregated numbers for each judge do not distinguish Charter<sup>5</sup> from non-Charter cases. One might well expect an increase in divided cases with the adoption of the Charter, as judges grappled with contingent and controversial social issues using new legal instruments. Table 2 places together judges who participated primarily in cases heard before the *Constitution Act*, 1982, with judges who worked exclusively during the post-repatriation era. As the Table shows, one-half of the judges sat on courts where less than one-half the total cases produced disagreement, while the other half produced judgments in the reverse situation. And of course, though all the judges here overlapped with Justice Wilson, not all of them overlapped with each other. Nonetheless, the numbers do provide snapshots for each judge, a snapshot making visible patterns linked to judicial difference.

Returning to Justice Wilson, we see that she is second in the list of judges “most likely to disagree”. The top position is held by Justice Claire L’Heureux-Dubé, often referred to as “The Great Dissenter”. Justice Wilson, however, is not far behind, taking second place. And indeed, if one looks at the column which captures the rate of concurring opinions, Justice Wilson holds first place. There is, of course, another aspect of Table 2 that is unavoidably visible: the three judges most likely to disagree with the majority position in divided cases are also the first three (and at the time, the only three) women on the Supreme Court. Their position at the top of the Table makes it nearly impossible not to re-invoke the question posed in the title of the Betcherman Lecture. And one could be forgiven for ironically responding with the observation that, whether or not women judges will make a difference, it appears that they will certainly differ.<sup>6</sup>

Focusing again on Justice Wilson, there is a further observation to be made. Table 2 shows that Justice Wilson “took part in writing” in over 55 per cent of the divided cases in which she participated. This is not only 20 points above the average participation rate of 35 per cent, but is also nearly 10 points ahead of her closest competitor, Justice John Sopinka (with a rate of 46 per cent). Justice Wilson is visibly in the lead in terms of participation in writing. And of course, as we noted earlier, when Justice Wilson was the author of an opinion, that opinion frequently expressed a divergent view: she authored 65 concurrences, 51 dissents and 22 majorities. In short, in the context of practices of authorship in divided cases, she was much less likely to be writing for the majority, than to be writing in disagreement. The sheer magnitude of the numbers is worthy of note. Between

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<sup>5</sup> *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.

<sup>6</sup> For an extended meditation on this point, see Marie-Claire Belleau & Rebecca Johnson, “Les femmes juges feront-elles véritablement une différence? Réflexions sur les décisions des femmes juges à la Cour suprême du Canada” (2005) C.J.W.L. 27.



the three of them, Justices Wilson, L’Heureux-Dubé and McLachlin are responsible for a significant proportion of the divergent opinions produced by the Court as a whole.

But what are we to make of this corpus of divergent opinions — descriptions of “law-that-might- have-been”?<sup>7</sup> What is the place of these outsider opinions, of these expressions from the margins? At the outset, one might reply that dissent should not be understood as marginal. Certainly, the tradition of dissent is strongly defended by many proponents for reasons that are well canvassed in the literature. Dissent is said to safeguard the integrity of the judicial institution;<sup>8</sup> sustain a robust ongoing legal dialogue across multiple constituencies; fill a “prophetic” function, providing a source of guidance for the resolution of similar issues in the future, sowing the seeds of innovation which sometimes “take root in the spirit of the law”.<sup>9</sup> Some dissents are so celebrated that they become “canonical”,<sup>10</sup> some dissenters are claimed by some communities as truth-tellers, prophetically breaking new paths or speaking truth to power.

And yet, this validation of dissent as structurally necessary in our legal order, coexists alongside an equally dominant tradition which treats dissent and dissenters as somewhat tangential to the “main event” which is what a majority opinion produces: binding precedential law. So, putting aside particular “canonical” dissents (like Justice Wilson’s concurrence in *R. v. Morgentaler*,<sup>11</sup> Justice L’Heureux-Dubé’s dissent in *R. v. Seaboyer*,<sup>12</sup> or Justice McLachlin’s (as she then was) dissent in *Norberg v. Wynrib*,<sup>13</sup> there is a default tendency to identify dissent as somewhat of an outsider practice, and thus to see the women’s heightened propensity to dissent as evidence that they were “isolated at one edge of the

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<sup>7</sup>These dissents are articulated in what Amsterdam and Bruner might identify as “noetic space”. Noetic space is the term they use to describe the distinctive imaginative space maintained in every culture. It is the space linked to “a distinctively human mental capacity that compels us to project our imaginations beyond the ordinary, the expectable, the legitimate — and to involve others in our imaginings”. Anthony G. Amsterdam & Jerome Bruner, *Minding the Law: How Courts Rely on Storytelling, and How Their Stories Change the Ways We Understand the Law — and Ourselves* (Cambridge: Harvard University Press, 2000), at 235. For an extended discussion of dissent and noetic space, see Marie-Claire Belleau & Rebecca Johnson, “I Beg to Differ: Questions about Law, Language and Dissent” in Logan Atkinson & Diana Majury, eds., *Law, Mystery & the Humanities: Collected Essays* (Toronto: University of Toronto Press, forthcoming) [hereinafter “I Beg to Differ”].

<sup>8</sup> Some interesting observations on the darker (gendered) side of “collegiality”, see the comments of Bertha Wilson in Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2001), at 152-55, and 415 (see notes 11 and 12) [hereinafter “*Judging Bertha Wilson*”].

<sup>9</sup> Claire L’Heureux-Dubé, “The Dissenting Opinion: Voice of the Future?” (2000) 38 Osgoode Hall L.J. 495-517, at para. 47.

<sup>10</sup> Anita S. Krishnakumar, “On the Evolution of the Canonical Dissent” (2000) 52 Rutgers L. Rev. 781.

<sup>11</sup> [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

<sup>12</sup> [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.).

<sup>13</sup> [1992] S.C.J. No. 60, [1992] 2 S.C.R. 226 (S.C.C.).

Court”, “left outside the dominant decision-making coalitions”, or as “very much on the fringes looking on rather than at the centre helping to steer”.<sup>14</sup>

And yet, there is something in this understanding of the women judges’ heightened dissent as a marginal or marginalizing practice that strikes us as incomplete. Certainly, it does not fully accord with our experiences as readers of those dissenting opinions.<sup>15</sup> Nor does it accord with our experiences as law clerks at the Court, observing the processes through which written judicial opinions (majority and dissenting alike) came into existence. The production of dissenting opinions seemed as important a part of the Court’s work as was the production of majority opinions. Further, understanding dissent as marginal is simply inconsistent with the empirical data presented in Table 2 above. The numbers in Table 2, far from portraying differences of opinion as marginal, document the prevalence of divided decisions on the Court.

Note that fully one-half of the judges on the Court participated in many *more* divided than unanimous cases. Justice Wilson, arriving at the Court at the same time as the repatriated Constitution, was placed at a moment in the Court’s history where this increase in divided cases was happening.

And while we are intrigued by the status of the first three women as the top dissenters, it is also interesting to consider the judges who come out at the other end of the scale: Justices Le Dain, Cory and Chouinard. Putting aside the question of whether it matters that the three judges least likely to dissent were all men, it is worth acknowledging just what that “non-dissenter” status means. It means that Justice Le Dain, who in the divided cases was least likely to disagree with the majority, nonetheless diverged from the majority opinion (albeit more commonly on *reasons* than on *results*) 30 per cent of the time. Thirty per cent seems sufficiently high a number to throw into question the characterization of disagreement as marginal. Even in its mapping of differences between judges, Table 2 makes it abundantly clear that the difference is central to the work of judging. There is no judge who has not been a participant in judicial conflict, no judge who has not been the author of a divergent judicial text. *Every* judge has had the occasion of diverging from the majority, of occupying the role of dissenter, whether on reasons, results or both.

That being said, the empirical snapshot above does seem to show difference operating at a higher level in the work of Justice Wilson. And further, those differences were often of a particular kind. While she often disagreed with the majority *result*, she was more frequently in disagreement with their *reasons*, seeing something that was missing, something that needed to be added, something that

<sup>14</sup> Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company Ltd., 2000), at 138 and 155.

<sup>15</sup> Marie-Claire Belleau & Rebecca Johnson, “La dissidence judiciaire : réflexions préliminaires sur les émotions, la raison et les passions du droit/Judicial Dissent: Early Reflections on Emotion, Reason and Passion in Law” in Marie-Claire Belleau & Francois Lacasse, eds., *Claire L’Heureux-Dubé à la Cour suprême du Canada, 1987-2002* (Québec: Wilson & Lafleur, 2004), at 699.

required comment, another direction to be taken, a different principle to be applied. Legal scholars have paid relatively little theoretical attention to the concurrence as a form of judicial dissent, but one can readily see that concurrences play an extremely important part in the work of Justice Wilson.

The statistics also make it apparent that attention needs to be paid to the concept of “authorship”. Table 2 makes visible the heightened rate at which Justice Wilson participated in writing opinions in divided cases. It was not simply that she sometimes saw things differently from the majority; she more frequently expressed those differences in the context of a written opinion bearing her name. Much of Justice Wilson’s energies on the Court were channelled, it seems, into “voicing” an opinion — that is, articulating her own view of the law in her own voice. But our choice of words here of course brings us back to the Betcherman Lecture, with Justice Wilson’s reference to Carol Gilligan’s work, *In a Different Voice*.<sup>16</sup> While it is clear that Justice Wilson frequently authored opinions, it is less clear what conclusions can be drawn on the basis of that authorship. What is the relationship between one’s views and one’s voice? Is “voice” just a matter of style, or does it express something about the identity or character of the speaker? In what ways might judicial opinions (dissenting or otherwise) provide us with evidence of a different voice? Would we find difference in the words chosen, or topics dealt with? Is the difference to be found simply in the fact that those words were expressed by the first woman on the Supreme Court?

We are reminded here of Foucault’s classic essay “What is an Author?”, where he poses his theme using a line from Beckett: “‘What does it matter who is speaking,’ someone said, ‘what does it matter who is speaking.’”<sup>17</sup> But that is exactly the question made visible in the empirical data. How might we theorize or understand these various differences in the opinions that judges voice? Do those differences matter at all? What are the complications we encounter when trying to think through questions of judicial authorship? In the next section, we offer some reflections emerging from our experiences with counting texts, and trying to understand the place of difference in the making of judicial opinions. More specifically, we pay some attention to the relational dimensions of judicial writing, with its combination of sounds, stemming both from collaboration and unique voices.

### III. REFLECTIONS ON COUNTING TEXTS

In what follows, we temporarily step back from the content of specific texts (whether dissenting, majority or unanimous), as well as from those texts’ putative authors. Instead of attempting to explain the prevalence of dissenting texts through

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<sup>16</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Cambridge, Mass.: Harvard University Press, 1982).

<sup>17</sup> Michel Foucault, “What is an Author?” in Paul Rabinow, ed., *The Foucault Reader* (New York: Pantheon Books, 1984) 101-120, at 101.

reference to their authors (i.e., women dissent more because they see the world differently), we invite the reader to reflect with us on the fact of these texts. Here, our thinking has been influenced by Dorothy Smith's institutional ethnographical approach. This approach presses us to take a different approach to familiar sociological objects (here, for example, dissenting judicial texts). Rather than beginning with the objects themselves (for example, specific dissenting opinions), it tries to get at the forms of social knowledge that are implicated in the production of those objects, the social relations which organize the world of experience. The focus is on the ways activities are organized and "how they are articulated to the social relations of the larger social and economic process".<sup>18</sup> In the context of this project, we are thus challenged to reflect on the work processes which organize and coordinate the production of judicial texts. What might such an approach suggest about difference, authorship and the making of judicial opinions?

## 1. Texts

At the outset, it is worth stating a point that might seem obvious: legal relations, part of the larger relations of ruling, are essentially text-mediated.<sup>19</sup> Law, as we practice it in Canada, is close to unthinkable in the absence of the judicial and legislative texts which assert, direct, lead, coordinate, regulate and organize. The work of the Supreme Court is the production of texts. These texts (judicial opinions) are central to the reproduction of law's order; the stability and authority of law is in large measure a product of the replicability of its texts. Conceding the degrees of freedom possible in interpretation, it is also the case that interpreters in various locations are required to grapple with "the same" texts. The textual mediation of law's forms of organization is, Dorothy Smith might argue, "fundamental to its characteristic abstracted, extra-local forms and its curious capacity to reproduce its order in the same way in an indefinite variety of actual local contexts".<sup>20</sup>

This is a point that is obvious, and yet of great significance. As Dorothy Smith reminds us, in our text-mediated societies, texts are far more than simple "ideas". They enter into the construction of social and physical environments by coordinating activity: they are "key devices in hooking people's activities in particular local settings and at particular times into the transcending organization of the ruling relations".<sup>21</sup> Legal texts are key documents in the construction and maintenance of justice. The texts are not just statements of law, or assertions

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<sup>18</sup> Dorothy E. Smith, *The Everyday World as Problematic: A Feminist Sociology* (Boston: Northeastern University Press, 1987), at 152 [hereinafter "The Everyday World as Problematic"].

<sup>19</sup> Dorothy E. Smith, "Texts and the Ontology of Organizations and Institutions" (2001) 7 *Studies in Cultures, Organizations and Societies* 159 [hereinafter "Texts and the Ontology of Organizations"]. She explores here the centrality of texts to the ontology of organizations, arguing that texts are essential to the objectification of organizations, and how they exist and persist as such. She invites us to consider how texts enter into practices to coordinate activities.

<sup>20</sup> Dorothy E. Smith, *Texts, Facts, and Femininity: Exploring the Relations of Ruling* (London, New York: Routledge, 1990), at 2 [hereinafter "Texts, Facts, and Femininity"].

<sup>21</sup> "Texts and the Ontology of Organizations", supra, note 19, at 164.

about what the world is, but are “active”, operating often as speech acts.<sup>22</sup> These “speech acts/texts” are brought to bear on the lives and bodies of the litigants before them, but also have real impacts even on those who do not know of the text’s existence. We tend, of course, to think of this active power of the text primarily in the context of opinions voiced by the majority, as if those are the only decisions which have the force to make their speech acts real.<sup>23</sup> And yet, though dissenting opinions may not operate in quite the same way as majority opinions, they are texts produced by the Supreme Court. That is, the active production of divergent judicial texts is part of the work of the Court.

This point could seem banal because, in Canada, we tend to take the presence of dissenting texts for granted. But it is worth remembering that judicial disagreement does not inevitably produce dissenting texts. In French appellate courts, by way of comparison, published opinions are anonymous and appear as if unanimous. There are no dissenting opinions.<sup>24</sup> This does not mean that judges in French appellate courts cannot or do not disagree. They can and do, but disagreements between judges as they attempt to reach a decision are protected by *le secret du délibéré*. That disagreement is not made visible in the judicial opinion, which is produced under the *nom de plume* of “The Court.” The resulting text may well reflect the unanimous opinion of the judges, but it may also reflect the opinion of only a majority. Differences and disagreements may exist between the judges, but they do not emerge in the form of a published dissenting text.

Our own Court produces just such texts, and they are texts marked by judicial power. These texts give voice to words of dissent, words uttered by a judge *acting in the capacity of judge*. Those words remain enrobed with the authority of judicial office.<sup>25</sup> This makes a dissenting opinion significantly different from other attempts to persuade or convince. The words of a dissenting opinion are a direct *challenge*, and the majority may be required to enter into dialogue. The dissent has the ability to force the majority to respond, to answer, to explain, to shift or to accommodate. And even where a majority does not respond directly, the very fact of the dissent often means that the majority reasons have been written differently than they would have been in the absence of a dissent. While, strictly speaking, only the majority opinion has the ability to make its view real in the world, the voice of dissent (even if itself not the law) may have played a part in constituting the shape of the majority against which it is issued. In the process of constructing the judgment, the first draft of the majority opinion often is transformed to meet arguments raised in minority reasons, or to muster support from other judges. Because of contact with minority

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<sup>22</sup> See Carlos L. Bernal, “A Speech Act Analysis of Judicial Decisions” (2007) 1(2) *European Journal of Legal Studies*, online at: <http://www.ejls.eu/index.php?mode=htmlarticle&filename=./issues/2007-12/BernalUK.htm>.

<sup>23</sup> Robert M. Cover, “Violence and the Word” (1986) 95 *Yale L.J.* 1601.

<sup>24</sup> On the place of dissent in the French system, see Wanda Mastor, *Les opinions séparées des juges constitutionnels* (Paris/Aix-en-Provence: Economica/Presses Universitaires d’Aix- Marseille, 2005).

<sup>25</sup> For an exploration of the texts of dissent, see, “I Beg to Differ”, *supra*, note 7.

opinions in the process of judgment writing, the officially published majority opinion is often very different from its first draft. This is also true for early drafts of minority opinions. In the context of a divided Court, majority and minority views emerge in conjunction with each other. Majority and diverging reasons are part of the same event. And though they are voiced in the names of particular judges, there is a very real sense in which they can also be understood as part of a more deeply collaborative venture.

The term “collaborative” here is not shorthand for “collegial”, nor does it assume happy inclusive working relations. Collaborations can be integrative and inclusive, involve exclusion and excision, result in unanimous agreement, or generate a series of fractured texts. So, for example, some scholars, considering dissenting texts written in the style of majority opinions, speculate that those the texts are failed majority opinions; and that they provide us with a window into conflicts and struggles between the judges of the Court.<sup>26</sup> This is one possibility. But it may be the case that such an opinion was known to be a dissenting one from the beginning, and that the judge, supported by his or her colleagues, actively chose to write it in that style, targeting a future audience, wanting the full argument to be comprehensible on its own terms. Certainly, the lure of the detective story solved is always there in our efforts to figure out what went on behind the scenes, how the various judges feel about each other, and how the texts came to be the texts that they are. However, in the end, as Smith might remind us, it is the text (and not the stories behind the text) that continues to act in the world, and thus it is the text that remains our focus.

There are many ways to use legal texts to think about the relations between judges that might have shaped the resulting opinions.<sup>27</sup> But our point is a slightly different one: whether texts are produced in hostile or hospitable conditions, those conditions are nonetheless collaborative. No dissenting opinion can come into existence without a majority opinion that cannot adjust itself to accommodate it. The majority judges may have as much responsibility for the shape of a dissenting opinion as does the judge in whose name the dissent is published. In this sense, though our empirical snapshot directed our attention to Justice Wilson’s heightened propensity to author dissenting and concurring reasons, it is interesting to consider the ways that these heightened statistics might tell us as much about the majority judges’ inability to accommodate Justice Wilson’s views, as they tell us about Justice Wilson herself.

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<sup>26</sup> Indeed, some argue that there is a category of dissents that read as if they were failed majorities. For a discussion of typologies of dissent, see Bonnie Androkovich-Ferries, *Judicial Disagreement Behaviour on the Supreme Court of Canada* (M.A., University of Lethbridge, 2004) [unpublished].

<sup>27</sup> We attempt one approach at reading opinions for traces of judicial emotion in Marie- Claire Belleau & Rebecca Johnson, “Faces of Judicial Anger: Answering the Call” in Myriam Jézéquel & Nicholas Kasirer, eds., *Les sept péchés capitaux et le droit privé* (Montréal: Éditions Thémis, 2007), at 13.

## 2. Collaboration

The suggestion that we think of practices of dissent through the lens of collaboration takes us back to Dorothy Smith, and institutional ethnography. The approach she proposes is one that sees texts as active, and which takes seriously the work involved in constituting those texts.

The questions she asks us are, How does it happen as it does? and, How do these texts come to be constituted?

The simple account of collaboration imagines nine judges sitting in the conference room, discussing a case. Each judge has read the materials, and has deeply considered the evidence, facts and argument. Each judge, while honouring the demands of impartiality, hears the case through the lens of his or her own history of individual life experiences (military service, disability, trial lawyers, member of bar, children, single, childless, deaths, law school and associations), experiences that combine to produce particular attitudes and ideologies. All this provides the context that enables the judge to come to a decision — to “vote” on the issue. One might imagine, in this situation, the judges voting, tallying results and assigning various judges to draft the texts that capture the views of the various voting blocks. Such an approach largely focuses our attention on the characters of the nine judges, seeking to see in them evidence of the results they arrive at.<sup>28</sup> It presumes that “voting” is the main dimension of judicial work, and tends to underemphasize the “constructing” portion of the collaborative venture. Indeed, in the common story, whether the Court produces a single unanimous decision, or a linked set of majority and dissenting opinions, there is a tendency to speak of the resulting judicial texts as primarily the work of the authors in whose name those opinions are published. There is relatively little discussion of the collaborative dimensions producing those texts. Such an approach seriously underemphasizes the vast amount of input that comes together in the production of the finalized texts. It tends to underemphasize the ways that (particularly in the context of judgments authored by “The Court”) the judges must work together to construct a text that, in its representation of the opinions of all, cannot be said to be the product of any single judge.

In looking to “the work”, Smith suggests we take a more generous approach, one which attempts to understand and weave together as many participants as possible. In short, she asks us to consider the “concerted sequences or courses of social action implicating more than one individual whose participants are not necessarily present or known to one another.”<sup>29</sup> Certainly, there are descriptions of the work of judges that do provide much more expansive accounts of the

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<sup>28</sup> For a comprehensive analysis of individual voting patterns, see C.L. Osterberg & Matthew E. Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: U.B.C. Press, 2007).

<sup>29</sup> *The Everyday World as Problematic*, *supra*, note 18, at 155.

processes and players involved, accounts which emphasize the involvement of far more than nine people in the production of Supreme Court opinions.<sup>30</sup>

One might account for the pre-screening (leave to appeal) processes that determine which cases will and will not be heard. Once a case is through the filter, the Registrar's office and Supreme Court Rules govern the materials that can and must be submitted, the documents that will come before the Court, the number of pages and the organization of those materials. What these materials might be is variable depending on the work performed by a variety of players at lower levels in the adjudication process. In some cases, clients are self-represented; in others, there are lawyers. Even here, there is a great diversity of resources standing behind the counsel of record. There are often teams of lawyers involved, along with articling students and staff, all in the production of the record that the Court will have before it. Intervenors also play an important part, placing new arguments in front of the Court. These interventions can play a big part in the construction of the eventual opinion, as it is not at all uncommon for large portions of a factum to appear directly in a court opinion.

Once the material arrives at the Court, there are additional processes around that material's diffusion and absorption. There are staff lawyers at the Court who produce summaries of materials, facts and issues. There are three law clerks in each chamber, available to do extra reading and research, and produce pre-hearing bench memos for the judges on various aspects of the cases. There is the hearing itself, and the conversations that occur during it with the various advocates before the Court. New questions and arguments made during the hearing can shape and influence the case before the Court. Judges also note the limitations placed on them in terms of the questions posed, the issues presented, the strategies of the argumentation, the arguments presented by intervenors, *etc.* As Lamer J. put it, the Court is "a prisoner" of the case presented to them.<sup>31</sup>

There is the post-hearing work, often beginning with a post-hearing conference. Different Chief Justices may schedule those conferences in ways that place longer or shorter periods of time before the first discussions. There are conversations between judges to discuss issues, sometimes documented in memos, sometimes occurring in hallways; there are draft judgments and memos between judges; memos from and to clerks; conversations between clerks and their judges; conversations between clerks across chambers. The question of how much of this happens in memo and how much happens informally is also variable, and different sources give different accounts. The central point for us here is simply to note that these processes involve a number of parties, the parties and processes are themselves socially related, and those relations are part of the work processes through which particular judicial texts are formed.

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<sup>30</sup> See, e.g., Ian Greene *et al.*, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998). In particular, see chapter 6 on the Supreme Court of Canada.

<sup>31</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3, at para. 82 (S.C.C.).



Also crucial is that the judges hearing one case are also considering their responses in terms of other cases recently heard, other cases scheduled for hearings and other cases in the public arena. As the judges are making decisions in particular cases, other cases and precedents are in the background, playing a part in how cases are written, even where those other precedents do not necessarily feature expressly in the texts. Existing case law is of course playing a part in structuring the resulting texts. The law itself (as understood in different ways by different judges) is one of the players influencing the production of the judicial texts.

One of the challenges is in linking these practices of collaboration to our understanding of judicial “authorship”. At the end of the day, all judicial opinions are inscribed under the name of an author. Generally that means under the name of a particular judge, though the author may also be in the name of “The Court”. But the practices of collaboration noted above sit in tension with our traditional ways of attributing authorship. There is a way in which we all know that decisions implicate all judges who sign on to them. However, we attribute primary responsibility for that decision to the judge in whose name it is inscribed, speaking as though the text captures the voice and view of a particular judge. The judges who sign opinions, on the other hand, are rarely characterized in the media as having responsibility for the production of those opinions. There is less glory (and culpability) in practices of signing than in practices of authoring. Where judges are “mere” signatories, they are less likely to be held publically “responsible” for their participation.<sup>32</sup> It is as if only two or three judges are active: they construct draft opinions and offer them to the judicial market, where the remaining judges exercise their market power by choosing to invest their judicial votes/dollars in one product rather than another.

For us, in thinking about the authorship of judicial opinions, we have found the analogy to cinematic texts to be a useful one. For while it is common to speak of a film as being *by* Hitchcock, Jarmusch or Spielberg, those films are textual objects whose shape is deeply determined by many players in addition to the director under whose name the final product is inscribed. Indeed, the film as text requires the collaborative participation of many players. The editing or lighting or casting or sound choices are fundamental to the filmic text that is produced. *Star Wars*, for example, would not be the same film without the John Williams score: one has only to hum the first few notes of Darth Vader’s theme to bring the villain to life. The point is not that the “real” author of the film is John Williams and not George Lucas. From our point of view, to even articulate the question thus (to focus on

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<sup>32</sup> To give just one example, consider the concurring reasons of Claire L’Heureux-Dubé J. in *R. v. Ewanchuk*, [1999] S.C.J. No. 10, [1999] 1 S.C.R. 330 (S.C.C.). She was pilloried by some in the press for her reasons, but Gonthier and McLachlin JJ., who agreed with her reasons, were not subject to the same level of vituperation. On the violence of the personalized attacks, see Hester Lessard, “Backlash and the Feminist Judge: The Work of Justice Claire L’Heureux-Dubé” in Elizabeth Sheehy, ed., *Adding Feminism to Law: The Contributions of Justice Claire L’Heureux-Dubé* (Toronto: Irwin Law Inc., 2004), at 133.

who is the “real” author) is partly to miss the point: a filmic text is a collaborative venture, inscribed generally under the name of a director.

There is, we believe, an analogy to opinions of the Supreme Court. They too are texts that must be produced, and the process of producing them is a deeply collaborative one. The process is not as simple as judges “signing on” as if they are buying goods at a grocery store, selecting the reasons that most fit their mood or style. Judges are more deeply involved in the construction of the reasons than that, and authorship is a more complicated concept. There are many inputs to the final product. In noting the participation of the parties, lawyers, articling students, staff members, lower courts, academics and law clerks in this process, our point is not to make a claim about “the real author” behind the text. It is rather to acknowledge that the processes of producing Court opinions are collaborative in a non-trivial way.

Written opinions are, in our system, generally produced under the name of a particular judge, but that judge’s name can in some ways be best understood as a cipher or a stamp: it does link us imaginatively with the voice of a particular person, but it also stands as name/function which acknowledges the existence of a particular collectively authored text. Perhaps an example can serve to make clear the insight about the complexity of the collaboration in the production of the text, insights that might lead us to think differently about the depth of collaborative participation by Justice Wilson in the work of producing unanimous decisions — and not only those bearing her name as author. Let us consider one of the judgments in which Justice Wilson participated in an unnamed fashion: the unanimous decision of “The Court” in *Tremblay v. Daigle*.<sup>33</sup>

### 3. Tremblay v. Daigle: A Study in Collaboration

In 1989, a pregnant Chantal Daigle left her boyfriend Jean-Guy Tremblay. She refused his offer of marriage, reporting him for having physically assaulted her. In return, he obtained an interlocutory injunction from the Quebec Superior Court, preventing her from having an abortion. He had argued that, under section 1 of the Quebec *Charter of Human Rights and Freedoms*,<sup>34</sup> the foetus was a human being that had a right to life. As Daigle was approaching the 20th week of her pregnancy, the Supreme Court authorized an expedited hearing, pulling judges back from summer vacations and engagements abroad to hear arguments about the rights of the foetus. Halfway through the hearing, counsel for Daigle was advised (and thus required to advise the Court) that, even in the face of the injunction and the hearing before the Court, his client had disguised herself to cross the border to the U.S., where she had obtained an abortion. After an hour-long recess, and the completion of the hearing, Chief Justice Dickson announced that the Court would unanimously grant the appeal, with reasons to follow. Three months later, the nine judges, under the name of “The Court”, held unanimously that such an injunction

<sup>33</sup> [1989] S.C.J. No. 79, [1989] 2 S.C.R. 530 (S.C.C.).

<sup>34</sup> R.S.Q. 1977, c. C-12.

could not stand. Neither the Quebec Charter nor the *Civil Code*<sup>35</sup> conveyed legal personhood upon the foetus. There was no legal basis to the argument that the father's interest in the foetus he helped to create gave him the right to veto a woman's decisions in respect of the foetus she was carrying.

Generally, this is as much background as we would have on a case: it is a matter of public record. However, this is one case where we have more background into the conditions of production of the text. The biographies of Justices Brian Dickson and Bertha Wilson contain stories which would have once circulated more narrowly.<sup>36</sup> Sharpe and Roach in particular provide some rich background to the case, having had exclusive access to 200 boxes of Chief Justice Dickson's personal papers, including his working files from the Court.<sup>37</sup> That is, they had his annotated copies of the documents, pre-hearing bench memos prepared by law clerks, judgment memos, memoranda on the draft reasons of other judges, conference memoranda prepared by Chief Justice Dickson shortly after the oral argument (containing the tentative views of his colleagues after their first discussions), and memoranda to and from other members of the Court commenting on draft reasons. And so, nearly 20 years after the case, biographical and historical work does enable us to see behind the name of "The Court" in which the decision was penned, and to see further into the work processes behind the ultimate text, a text that would require a decision from the judges on both "result" and "reasons". We think a few of these are worthy of emphasis here.

First, the Dickson biography shows us that the decision to allow the appeal was not necessarily as self-evident as the unanimous judicial opinion suggests. Sharpe and Roach tell us that several members of the Court felt that Daigle had abused the court process, and should have been subject to an action for contempt of court.<sup>38</sup> Chief Justice Dickson, we are told, "was furious and he wanted to end the case on the spot".<sup>39</sup> At this point, however, Justice Beverley McLachlin (as she then was) commented that the Court should put itself in the position of Chantal Daigle, a desperate young woman who did not want to carry the child of the man who had abused her. This comment seems to have had a big impact on Justice Dickson, and to have played a part in leading him to change his mind. The story is interesting in a number of ways. It shows us that unanimous decisions do not necessarily reflect easy agreement, but may have to be struggled for. It also makes visible the complexity of ways that judges participate in the decision-making, and the kinds of interventions (invisible to the rest of us) that contribute to a collective

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<sup>35</sup> R.S.Q. 1977, c. C-25.

<sup>36</sup> Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003), at 389-96 [hereinafter "A Judge's Journey"]; Judging Bertha Wilson, *supra*, note 8, at 295-97.

<sup>37</sup> In the preface to *Brian Dickson: A Judge's Journey, id.*, Sharpe and Roach provide a detailed discussion of the materials that were available to them.

<sup>38</sup> See *Judging Bertha Wilson, supra*, note 8, at 297 (note 46); and *A Judge's Journey, id.*, at 393-94.

<sup>39</sup> *A Judge's Journey, id.*, at 393.

decision. It is a reminder of the importance of having a variety of divergent groups represented on the Court, in order to facilitate better decision-making.<sup>40</sup>

Another significant element is that the judgment was delivered as unanimous and anonymous. It was authored not by one of the nine embodied judges, but rather by “The Court”. By publishing the opinion in this fashion, the judges of the Court emphasized the unanimity of their position. They also attempted to construct a text that did not speak in the “voice” of any particular judge. This not only makes it difficult for people to “re-politicize” the case through speculation about the judge in whose name the case is issued, it also serves to more visibly make the text speak in a voice beyond the individual judge, to speak instead the voice of “the Court”, the voice of “the law”.

There certainly is a politics to the attribution of authorship to “the Court” as a whole. But the use of such a device also makes visible the collaborative nature of the venture: the nine judges have had to agree that the judgment will appear in the name of no one, though somehow a material text must be constructed in which the opinion of the Court will be voiced.

The Dickson biography gives us some insight into how that anonymous and unanimous text was materially produced. We know that the first draft came from Justice Dickson’s chambers. We also know that Justices La Forest and Gonthier had concerns with parts of that text: Justice La Forest indicated that he would be writing separate reasons. For the reasons to be published unanimously, they would have to be changed. Discussion, debate, compromise and modification ensued. Though the judges had unanimously agreed on the result at the hearing, it would take months before they produced a text in a singular voice. Agreement on reasons did not imply agreement on results. If Justice Dickson’s chambers were sending out drafts, the work of constructing a draft that could be agreed upon was very much a collective enterprise, requiring active work by many judges.

The background texts around this case make it clear that the Court was very conscious of its place in the “intertextual hierarchy”.<sup>41</sup> The judges knew that they were not only dealing with a private law issue between Tremblay and Daigle, but were also being asked to weigh in on questions about “standing” (the rights of ordinary citizens to challenge laws that did not affect them personally), human dignity, fetal rights and abortion. Even though the final text is silent in this regard, the Court, in hearing *Tremblay v. Daigle*,<sup>42</sup> were still standing in the shadow cast by their 1988 decision in *R. v. Morgentaler*.<sup>43</sup> They would still be operating against

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<sup>40</sup> There are of course current empirical projects studying group decision-making, many of which focus on the importance of having divergent views in a group to ensure better decision-making. For example, Cass R. Sunstein, *Why Societies Need Dissent* (Cambridge, Mass.: Harvard University Press, 2003).

<sup>41</sup> The phrase is Julia Kristeva’s. Dorothy Smith uses it to identify texts which govern the rules for the production of other texts. See *Texts, Facts, and Femininity*, *supra*, note 20.

<sup>42</sup> *Supra*, note 33.

<sup>43</sup> [1988] S.C.J. No. 1, [1988] 1 S.C.R. 80 (S.C.C.).

the reverberations of Justice Wilson's important concurrence, in which she had said that most men could only respond imaginatively at best to the dilemmas confronting the pregnant woman. Even though the opinions make no reference to that case, it is clearly a participant in the unanimous reasons of the Court in this case. It is worth considering then the *lack* of a concurrence from Justice Wilson. The decision *not* to say something more about women and choice in the interests of producing a unanimous opinion may be seen as another indicator of collaborative practice. Of the final text, we know that Justice Wilson said she "worked very hard on that to get the judgment by the Court" and that she "was happy with the way that one worked out in the end".<sup>44</sup>

In this rare glimpse behind the screen, we can see the extent to which the production of law is a collaborative process, and indeed, more deeply collaborative than we tend to acknowledge. While one could look behind the voice of "The Court", and claim that it is really the voice of "Dickson", such a conclusion would miss the mark. Even if the text was written in Chief Justice Dickson's hand (or typed on his keyboard), there is much in the opinion that simply cannot be said to "be Dickson". Given the compromises necessary, we *know* that there are things there that are *not* a reflection of his personal opinion. The pieces of the story shared here make visible the active participation of at least five judges in the constructing of the text. Access to the personal papers of the other judges would undoubtedly show us even more. In short, the judicial opinion produced, even if the words chosen can be said to be articulated in the style of one judge, is a product of a number of interventions. It is much more than the sum total of nine votes. It is both more and less than the opinion of the nine judges standing in support of the text from behind the pen name of "The Court".

#### IV. CONCLUSION: RETURNING TO THE CONTRIBUTIONS OF JUSTICE WILSON

We return then to the beginning and the question that Justice Wilson asked in the Betcherman Lecture: Will women judges make a difference? Our empirical project, and the process of counting opinions, has raised more questions for us than it answered. The empirical data affirms that "difference" is indeed visible in the work of Justice Wilson: she wrote the highest proportion of concurring opinions, was second in dissents only to Justice L'Heureux-Dubé, and had by far the highest rate of authored opinions in divided cases. But what are we to make of these numbers, of these "differences"? What difference does difference make? Or rather, what role might these differences play in the making of law?

The heightened patterns of dissent and concurrence in the work of Justice Wilson (or indeed in the first three women judges) do not lead us to conclude that women judges judge "differently". Nor did those studying the early Charter cases. They concluded that the women judges were as likely to disagree with each other as with their male colleagues. The fact of gender does not enable us to predict how a

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<sup>44</sup> *Judging Bertha Wilson, supra*, note 8, at 299, note 47.

judge will vote. Neither do we conclude from the heightened rate of dissent that Justice Wilson (or women judges more generally) disagreed with greater ease. The numbers alone tell us little about the felt experience of dissent, or about the cost to a judge of articulating a minority view. Furthermore, if it is the case that all judges engage in practices of dissent, it is not the case that dissenting comes to all judges with equal ease. Differences in both human personality and legal theory play a role here. The point at which a judge determines that compromise is impossible and dissent is necessary will vary with that judge's personality, with how that judge understands the balance between law's contradictory demands for stability and responsiveness, and with the judge's understanding of what is at stake in the particular case.

The French legal system's rejection of judicial dissent provides a useful reminder: some theories of law place a very high premium on judicial unanimity. And while our own system authorizes dissent, theoretical orientations vary: some judges incline in the direction of seeing dissent as generally valuable; others see dissent as a necessary evil, to be deployed only where compromise is simply not possible. Furthermore, a dissent may be produced as much because of a majority's inability to find a compromise position as because of a dissenter's propensity to disagree. The fact of dissent cannot lead us to draw firm conclusions about the personality or theoretical understandings of Justice Wilson or any other particular dissenting judge.

Differences visible in the statistics encourage attention to authorship, but at the same time, the collaborative process of decision-making challenges traditional assumptions about the nature of authorship. There are some good reasons, for example, to distinguish Justice Wilson in her "judge-function" from Justice Wilson in her "author-function". The authorship of a judicial opinion (whether majority or dissenting) is not the same as the authorship of an article, a novel or a speech. And yet, a Supreme Court opinion is akin in many ways to a cinematic text. Both are produced under the name of an identifiable author/director, one who plays an important part in the generation of the text. And both texts, in spite of being signed under the name of a particular person, are produced under conditions of deep collaboration. It is important to remain conscious of this collaborative dimension when attributing responsibility to judicial "authors". The making of opinions, even solo dissents, involves many participants and inputs, and the attaching of a single judicial name provides a kind of shorthand for the authorial attribution of a collectively generated product.

Justice Wilson's own divergent forms of participation in the written and signed judgments suggest the importance of paying attention to authorship, but it remains important that authorship not be fetishized. For while we use authorial names in speaking of particular opinions, it is useful to understand those judgments as products of larger collaborative ventures. While the opinion bears the signature of a judge, it is too quick a leap to say that "the judicial opinion" is equal to "the judge's opinion".

Other judges are involved as more than simple signatories to another's work.

There are additional questions about difference. Justice Wilson was involved in a great many concurring opinions. Should we treat these as similar to or distinct from her dissenting opinions? What difference does it make when judges disagree over reasons rather than results? What is the difference between a concurrence and a dissent, and what might we learn from greater attention to the concurrence as a particular kind of legal opinion? Justice Wilson's opposing forms of participation in the signed and authored opinions (primarily with the majority in the signed opinions, diverging from the majority in the authored opinions) encourage greater attention to the different ways that judges participate in the process of constructing judgments, ways that may not always be visible in the final texts themselves. Justice Wilson may have disagreed at a heightened rate, but she also actively participated in many unanimous and majority decisions, and collaborated even in those decisions that do not bear her name. Her dissents and concurrences are important texts in their own right, opening space for imagining law otherwise. They also are important players in the process of constructing law, as the clash of difference alters the shape of each opinion produced.

The empirical snapshot and the reflections about institutional ethnography combine to focus our attention on the complexities in the production of law, of the many possible ways of thinking about the voicing of judicial opinions. Certainly, we are left reflecting on how voice matters. Years after reading the text of the Betcherman Lecture, we listened to the audio-recording of it posted on the Internet.<sup>45</sup> Here, the substance of the text echoed in the measured pace and musical lilt of Wilson's Scottish-accented voice. There was something magical in the moment of listening. Would the substance of the lecture have been any different if issued in a male voice? Or if it had been spoken in a voice not carrying the traces of an immigrant's voyage and experiences? Or in the voice of Canada's 100th rather than first female Supreme Court Justice? Does authorship matter? Does voice matter? What difference does difference make? What difference did Justice Wilson make? She posed for us questions for which she did not have answers, questions that remain as provocative and pressing today as they were when she first shouldered the burden of so many expectations. One thing is certain: Justice Wilson, whether signing or authoring opinions, whether aligned with the majority concurrence or dissent, lent her voice to the making of the law in Canada, law that would not have been the same without her.

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<sup>45</sup> To hear the lecture, see online at: <<http://www.thecourt.ca/2007/05/31/bertha-wilson-%E2%80%9Cwill-women-judges-really-make-a-difference%E2%80%9D-hear-justice-wilsons-speech/>>.