Dalhousie Law Journal

Volume 22 | Issue 1 Article 3

4-1-1999

The Most Dangerous Justice: Measuring Judicial Power in the Lamer Court, 1991-97

Peter McCormick
University of Lethbridge

Peter J. McCormick*

The Most Dangerous Justice: Measuring Judicial Power on the Lamer Court 1991-97

The Supreme Court is an important national institution, but it is also nine individuals with differing conceptions of the law, the constitution and the judicial role. When the Court divides, which it does about half the time, some judges tend more often than others to write or to sign the reasons that constitute the decision of the Court. This article explores the notion of "judicial power" by looking at the way that judges have written opinions and signed on to the opinions of others for the first seven years of this decade, looking for the "most powerful" (melodramatically: the "most dangerous") justice. It concludes by speculating about the implications of Justice La Forest's retirement and Justice Sopinka's death.

La Cour suprême du Canada est non seulement une importante institution nationale, mais c'est aussi neuf individus qui ont chacun leur propre conception du droit, de la constitution et du rôle judiciaire. Lorsque la Cour est divisée, comme c'est souvent le cas, certains juges ont tendance à écrire ou à signer plus fréquemment que leurs collègues, les motifs qui constituent la décision de la Cour. Cet article traite de la notion du "pouvoir judiciaire" en examinant la façon dont les juges ont rédigé leurs motifs et ont appuyé les positions des autres au cours des premiers sept ans de cette décennie, dans le but d'identifier le juge le plus "puissant" (mélodramatiquement : le plus "dangereux"). L'article conclut en spéculant au sujet des implications de la retraite du juge La Forest et de la mort du juge Sopinka.

* Professor and Chair of Political Science, University of Lethbridge, Alberta. I wish to acknowledge the financial assistance of the Manitoba Legal Research Institute and the Alberta Law Foundation, which jointly funded the project which assembled this data base; and to thank Prof. Alvin Esau of the MLRI, and Mr. Owen Snider of the ALF, for their support and encouragement.

Introduction

The melodramatic title of this article is, of course, a play on James Madison's comment in the *Federalist Papers* about the Supreme Court constituting the "least dangerous" of the three branches of government.[1] The logic of the ranking is obvious: The legislature is dangerous because of its capacity to tax and to regulate and to create crimes and offences—hence H.L. Mencken's famous comment about no one's life, liberty or property being safe while the legislature is in session. The executive is dangerous because of its police and its soldiers and its bureaucrats, who can command and prohibit and expropriate and investigate. The judiciary has only the power of words, gossamer reins that float in the air unless someone *chooses* to be led, *chooses* to treat them as compelling, *chooses* to be bound and limited and directed. But the fact that so many political actors so often make this choice means that the least dangerous branch can still be dangerous; from which it follows that it is worth finding out which of the judges on the highest court is the most powerful, and hence the most dangerous member of the least dangerous branch.

The title also has the advantage of invoking similar attempts in the U.S. literature to assess the relative power of the various members of their Supreme Court.[2] Later in this paper, I will use variants of their methodologies to draw some conclusions from the voting and writing

---

1. Immortalized by A.M. Bickel's classic text, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed. (New Haven: Yale University Press, 1986).

2. See, e.g., P.H. Edelman & J. Chen, "The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics" (1996) 70 S. Cal. L. Rev. 63 [hereinafter "Most Dangerous Justice"]; L.A. Baker, "Interdisciplinary Due Diligence: The Case for Common Sense in the Search for the Swing Justice" (1996) 70 S. Cal. L. Rev. 187; P.H. Edelman & J. Chen, "'Duel' Diligence: Second Thoughts About the Supremes as the Sultans of Swing" (1996) 70 S. Cal. L. Rev. 219 [hereinafter "Sultans of Swing"].

patterns of the Lamer Court. (The American literature has also been enlivened at the other end of the spectrum, namely the search for the "most insignificant justice,"[3] an inquiry which similarly involves speculating about the indicia of judicial power.) The basic point is that not all judges are equal, not all judges enjoy (or are able to create) the same scholarship or the same capacity for leadership or the same opportunity to exploit divisions between wings of the Court, and not all judges cast the same number of pivotal votes or write the same number of great landmark decisions. There are "core" members and "marginal" members of every appeal court that sits in large panels, something that is known, at least informally, by most court-watchers.[4]

What makes these reflections particularly relevant in a Canadian context are the recent changes in the composition of the Supreme Court of Canada, which during calendar year 1997 lost two of its longstanding members and, as a result, acquired two new members. The first change was occasioned by the retirement of Justice Gerard V. La Forest in the summer of 1997. Justice La Forest was a senior member of the Court in the early stages of its new (largely *Charter*-driven) prominence, an eminent legal scholar whose works on water law and extradition continue to be widely cited,[5] and the writer of some of the Court's most striking and controversial decisions. The most recent example, and a fitting swan song, is *Eldridge* v. *British Columbia (Attorney-General)*[6] on hospital services for the deaf. The death of Justice Sopinka in the fall of 1997 is also of great potential significance. Also a relatively senior member of the Court, he authored a string of important decisions many of which dealt with the rights of the accused—the most noteworthy (some might say "most notorious") probably being *R.* v. *Stinchcombe*.[7] Obviously, their departure will make a difference to the Supreme Court—to the way that

3. See for example: D.P. Currie, "The Most Insignificant Justice: A Preliminary Inquiry" (1983) 50 U. Chi. L. Rev. 466; F.H. Easterbrook, "The Most Insignificant Justice: Further Evidence" (1983) 50 U. Chi. L. Rev. 481.

4. See, e.g., the piece entitled "Curiously cautious [U.S.S.C. Justice Sandra Day] O'Connor" *The Economist* 345:8037 (4 October 1997) 38 which suggests that "Justice O'Connor has staked out the centre on many of the great questions before the Court" which means that "in closely contested cases, conservatives and liberals compete for her vote, since it is often the deciding one."

5. See, e.g., V. Black & N. Richter, "Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada 1985-1990" (1993) 16 Dal. L. J. 377; and P. McCormick "Do Judges Read Books, Too?: Academic Citations by the Lamer Court 1991-6" (1998) 9 Supreme Court L.R. (2d) 463.

6. [1997] 3 S.C.R. 624, La Forest J. for a unanimous court.

7. [1991] 3 S.C.R. 326.

it operates, the way that it divides on controversial legal issues, to who delivers what sort of decisions in different areas of law.

But how big a difference, and what kind of a difference? Is La Forest or Sopinka a Canadian version of Lewis F. Powell, Jr., the U.S. Supreme Court's quintessential "swing voter" whose cautious preferences frequently dictated the overarching direction of the Court?[8] Or a Canadian William J. Brennan Jr., in the sense of being a wily strategist who fashioned enduring voting coalitions despite major ideological cleavages?[9] Or a Canadian Thurgood Marshall, stubbornly and passionately championing a cause (capital punishment, affirmative action, whatever) so relentlessly as gradually to draw the entire Court in his direction?[10] Or a Canadian Rehnquist or Scalia, doggedly committed to an ideological position, his relative influence waxing and waning as the vagaries of the appointment process reinforce or deplete the ranks of his allies? Or a Canadian Burger, transparently tactical in his voting so as to use to the maximum the power his seniority gives him to write the words of the majority opinion, or on the basis of crafty calculation to assign the writing to someone else?[11]

This article is a preliminary attempt to generate meaningful answers on such issues. The analysis will proceed down a double track: first, I will try from several different angles to explore the notion of judicial power—that is, to wonder about what we might mean when we suggest that one judge exercises more (or less) power within the Court than another, and

---

8. See, e.g., J.C. Jeffries, *Justice Lewis F. Powell Jr.* (Macmillan, 1994) who introduces Powell (at xi) as having been "the most powerful man in America" because of his "position at the ideological centre of a divided Court."

9. See, e.g., B. Woodward & S. Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon & Schuster, 1979), whose work contributed greatly to—some would say "invented"—the reputation of Brennan as the great strategist. See also S.H. Freidelbaum, "Justice William J. Brennan Jr.: Policy Making in the Judicial Thicket" in S.C. Halpern & C.M. Lamb, eds., *The Burger Court: Political and Judicial Profiles* (Champaign: University of Illinois Press, 1991) at 122, who refers to Brennan's "remarkable record of consensus building."

10. See, e.g., M.V. Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court 1961-1991* (New York: Oxford University Press, 1997); W.J. Daniels, "Justice Thurgood Marshall: The Race for Equal Justice" in Halpern & Lamb, eds., *The Burger Court, supra* note 9. M. Mello, *Against the Death Penalty: The Relentless Dissents of Justices Brennan and Marshall* (Boston: Northeastern University Press, 1996).

11. See, e.g., "Sultans of Swing," *supra* note 2 at 221, where they talk about a "fictional Justice Milquetoast" who "decides that he will always vote in the majority" whatever that majority is deciding, and then add "[a]ny resemblance to a former Chief Justice of the United States is strictly coincidental and certainly unintentional." In a similar vein, see B. Schwartz, *Decision: How the [United States] Supreme Court Decides Cases* (New York: Oxford University Press, 1996) at 45ff [hereinafter *Decision*].

what empirical data might inform or test such conjectures.[12] I will use each of these approaches in turn to identify the "most dangerous" (in only slightly less loaded terms, the "most powerful") member of the Supreme Court of Canada. And second (unless that individual turns out to be La Forest or Sopinka, in which case the two paths will have converged) I will use the same methodology to characterize the participation of these two judges in the general direction of recent Supreme Court decision-making and thereby to assess the potential significance of their departure. More bluntly: what does judicial power look like, and how much of it did La Forest and Sopinka have?

This discussion is built on a data base which includes all the reported[13] panel[14] decisions of the Supreme Court of Canada during the Chief Justiceship of Antonio Lamer. More specifically, the time period to be considered is bounded on the one side by Lamer's ascension to the Chief Justiceship in 1990, and on the other by the retirement of Mr. Justice La Forest in 1997. Because there is a time lag—normally of several months—between the oral hearing and the handing down of the decision, it is the date of the oral hearing that will be taken as determinative.[15] It seems reasonable to take Lamer's appointment as the beginning of a distinctive period in the life of the Court, not only because of the convention by which intervals in the life of the institution are identified by the name of the Chief Justice, but also because a string of appointments left him as a very senior member of a very junior court. By the same token,

---

12. I concede that the issue of "judicial power" is a large one, and by talking about which judges on a panel appeal court exercise more power I have taken the easy end. The biggest part of the issue is how much power the judiciary collectively exercises via-à-vis other powerful institutions in our society (such as legislatures and political executives), a question which is more pressing after the entrenchment of the *Charter* than before. Almost as big is the issue of how much power the Supreme Court exercises within the judiciary as a whole, and it seems to me that we simply beg the question by falling back on such terms as "binding precedent."

13. At one time, not all Supreme Court of Canada decisions were reported in the Supreme Court Reports, some (but not all) of those omissions being reported in the Dominion Law Reports. Since 1970, however, the coverage in the Supreme Court Reports is all but total; it may still be the case that some Supreme Court decisions are not reported, but the fact of their not being reported robs them of the impact on the course of the law that I will argue is an important dimension of judicial influence.

14. Omitting the handful of single-judge responses to motions (such as *Richter & Partners* v. *Ernst & Young*, [1997] 2 S.C.R. 5; and *Esmail* v. *Petro-Canada*, [1997] 2 S.C.R. 3) that appear from time to time in the pages of the Supreme Court Reports.

15. More precisely: the statistics were collected and the analyses run on November 1, 1997. There may well be some other decisions "in the pipe-line" at the moment of writing—I note that in 1996, decisions in three of the cases argued in June of that year were handed down in early November—but they will be too few in number to affect these calculations.

it seems reasonable to think that the departure of La Forest, second in seniority only to the Chief Justice, might potentially trigger a significant realignment on the Court; and this possibility is obviously increased by the subsequent death of Sopinka.

The choice of this time period is also attractive, quite fortuitously, for the stability that the membership of the Supreme Court of Canada has enjoyed during the seven years. This stands in surprising contrast to the Laskin and Dickson Courts, both of which averaged almost one new appointment every year—a turnover rate without parallel in the history of the institution. For a time it seemed that rapid turnover and a "revolving door" Court were the constant hallmarks of the "modern" (post-Laskin, post-*Charter*) Supreme Court, but the stability of the 1990s has put the lie to this over-hasty generalization. Only the appointment of Iacobucci in early 1991, and Stevenson's replacement with Major in 1992, mark the shortfall from a perfectly stable complement of nine judges sitting and interacting for the full seven-year run—what American students of the judiciary call a "natural court."

There were 770 reported panel decisions of the Supreme Court for which the oral arguments were heard during the period indicated. In each of these, the participation of each judge on the panel was coded as delivering or as joining the unanimous decision of the Court, or the majority decision of the Court, or the plurality decision of the Court, or a separate concurring decision, or a dissent.[16] This coding is, by and large, absolutely straightforward—much more so than for the United States Supreme Court, whose opinions sometimes exhibit a byzantine complexity that borders on self-caricature, to such an extent that it becomes a "Herculean task" to try to determine "whether an actual majority exists behind any proposition."[17] Even on the Supreme Court of Canada, it is sometimes difficult in plurality decisions to determine which of the fragments can best be taken as the closest approximation of the decision

16. *Per coram* (unanimous anonymous) decisions pose a special problem; under the coding protocol adopted, all members of the Court are coded as joining and none of them as writing the decision.

17. See S.D. Gerber & K. Park, "The Quixotic Search for Consensus on the U.S. Supreme Court" (1997) 91 Am. Pol. S. Rev. 390 at 391.

18. As a "pure" example of this problem, albeit not one within the time period considered, the "majority" in *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 fragmented into three sets of reasons for judgment; I take it that Dickson's reasons are best treated as the plurality decision, Beetz's as a concurrence. More recently, *RJR MacDonald Inc.* v. *Canada (A.G.)*, [1995] 3 S.C.R. 199 poses a comparable problem, with the four dissenting judges signing on to a single set of reasons, but each of the five "majority" judges writing their own separate reasons.

of the Court;[18] and sometimes the majority that forms behind part of the Court's reasons differs from that supporting another part;[19] and sometimes a judge will deliver a brief decision dismissing an appeal while recording her own dissent;[20] and sometimes a decision or a concurrence or a dissent will be jointly authored by two judges, rather than written by one judge and signed onto by one or more other judges.[21] In these situations, which altogether were not sufficiently frequent to compromise the data base, the coding problems were resolved on the basis of common sense supportable by a closer reading of the individual texts.

I. *Judicial Power: Voting and Writing*

My starting point is simple—I want to think about what judicial power would look like, and then to identify the empirical data that would allow an objective assessment of the members of the Supreme Court in these terms. What are the indicia in terms of which we might feel justified in thinking of one judge as being more important—more powerful—than another? If some of these indicators build on each other, if they amount to looking at different sides or different dimensions of the same broader entity, then how can they be used to construct indices of judicial power and tentatively to rank the members of the Court? Alternatively, if some of these ways of thinking about judicial power seem to trade off against each other, to represent alternative strategies pursued for specific reasons by different sets of judges, then which judges are the most typical or the most adroit practitioners of each?

We start with the basics: the core function of a court of appellate jurisdiction like the Supreme Court of Canada is (obviously) to decide appeals—that is, to affirm the lower court decision that has been brought to it by the losing party, or to accept the arguments of the appellant to reverse the decision, or to alter its terms, or to send it back for a new trial. The most transparent face of judicial power, then—and certainly the one most obvious to appellants—is the fact that the members of an appellate panel vote on the outcome of an appeal, and those votes combine to generate a result—crudely, a "winner" and a "loser." Other things being equal, an individual judge is more "powerful" to the extent that she votes with the majority of the Court, especially on those not infrequent occasions when the Court is divided. As a first statement: the most

---

19. For example: *R.* v. *G.(S.G.)*, [1997] 2 S.C.R. 716.
20. For example: *R.* v. *Osvath*, [1997] 1 S.C.R. 7.
21. For example: *R.* v. *Curragh Inc.*, [1997] 1 S.C.R. 537, which features both a co-authored decision by La Forest and Cory, and a co-authored dissent by McLachlin and Major.

powerful judges are those whose views prevail the most often, which means (to make the same point from the obverse) those judges who dissent the least often.

But this crude first approximation is a little too crude—a better focus for assessing judicial power is not the *vote* but the *reasons for judgment*. A critical feature of judicial decision making (especially at the appellate level) is the fact that results are accompanied by discursive explanation—by written reasons for judgment providing the principles, definitions, analysis, clarification and sometimes the extrapolations from existing precedent that justify the immediate outcome.[22] For everyone except the immediate parties (and sometimes even for them) the outcome is less important than the reasons, because it is the reasons that cast their shadows forward, both to direct the deliberations of the lower courts and to constrain the future decisions of the deciding court. Terrell suggests that we should think of a specific judicial decision as having not only a notional locus on a multi-dimensional grid, but also a direction (in the way that it builds on previous decisions) and a "spin" (in the way that it invites certain extensions of its generalized principles and discourages others).[23] Because the tone and the detail can make a real difference, it often matters a great deal which judge writes the reasons for judgment even within a unanimous court; in the U.S. there is a considerable literature on the logic of opinion assignment and the tactics whereby individual judges can maximize their leverage.[24]

As a better starting point, then: it is when they deliver the reasons for judgment for the Court that judges have the clearest and most direct influence on the evolution of legal doctrine and the course of the law—that is to say, the most power. The reasons contained in the majority's reasons for judgment are the clear signpost for the lower courts, and for the members of the bar who will argue future appeals before the Supreme Court itself. To be sure, the specific wording of those reasons will respond to the concerns of the other judges on the panel, who do not simply vote

---

22. For a discussion of the significance of this requirement, see M. Shapiro, "The Giving Reasons Requirement" (1992) U. Chi. Legal Forum 179; and F. Schauer, "Giving Reasons" (1995) 47 Stan. L. Rev. 633.

23. T.P. Terrell, "Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles" (1984) 72 Cal. L. Rev. 288.

24. To consider only a few examples: S. Brenner & H.J. Spaeth, "Majority Opinion Assignment and the Maintenance of the Original Coalition on the Warren Court" (1988) 32 Am. J. Pol. Sci. 72; F. Maltzman & P.J. Wahlbeck, "May It Please the Chief?: Opinion Assignments in the Rehnquist Court" (1996) 40 Am. J. Pol. Sci. 421; D.W. Rohde, "Policy Goals, Strategic Choice and Majority Opinion Assignments in the US Supreme Court" (1972) 16 Midwest J. Pol. Sci. 652; E.E. Slotnick, "Who Speaks for the Court? Majority Opinion Assignments from Taft to Burger" (1979) 23 Am. J. Pol. Sci. 60.

and disappear—the process is more extended and collegial.[25] After oral argument, the case is discussed at conference and the responsibility of writing tentatively assigned, but the draft judgment is then circulated for critical comment and reply, and it can come up again at conference for further discussion.[26] Along the way, votes may change (although they usually do not) and the writing may be reassigned to someone else (although it normally is not). The writing judge may have to omit arguments that she would have preferred to include, to shade the wording (sometimes by reducing rather than increasing clarity), to include caveats or qualifications that she would not personally have chosen. As O'Brien observes in the American context, "[i]n order to accommodate the views of others, the author of an opinion for the Court must negotiate language and bargain over substance."[27]

I will explore this second dimension of power later in this paper, and I certainly do not deny its importance, but for the moment my point is the simpler and more obvious one: the leading signature on the published reasons for judgment is far more than a formal flourish, because it acknowledges the judge who had the most to say about the precise wording of the decision as finally delivered. And therefore (other things being equal) the most powerful judge is arguably the one who most often writes the decisions of the Court, especially on those critical cases that divide the Court.

Second best, but by no means insignificant, are those occasions when a judge signs on to a decision of the Court, whether unanimous or majority. Power in this form involves (sometimes) determining which of several positions becomes the majority decision, (always) determining how decisively large that majority is within the panel, and (to some extent) influencing the wording of the majority decision. Although all judges can read and comment on the draft of the reasons for judgment, it is the judges within the prevailing coalition who enjoy the greatest leverage in fine-tuning the majority decision to more closely approximate their own preferences. This leverage comes from the fact that they can at any time decide to withhold their signatures from the final draft, and to

---

25. For a discussion of the decision-making processes of the Supreme Court of Canada, see Bertha Wilson, "Decision-Making in the Supreme Court" (1986) 36 U.T.L.J. 227.

26. The circulation of written opinions, and revision in the light of critical comment, is an important and obvious feature of appeal court decision making. Its importance is demonstrated by the observation that in the early years of the U.S. Supreme Court, when written opinions were not circulated after conference, "justices complained . . . that the opinion read from the bench and the final printed version differed from that agreed to in conference." see D.M. O'Brien, *Storm Centre: The Supreme Court in American Politics*, 3d ed. (New York: Norton, 1993) at 151 [hereinafter *Storm Centre*].

27. *Ibid.* at 323.

write a separate opinion.[28] At the very least, every reduction in the number of judges signing on to a majority judgment reduces the clarity of its impact on the lower courts and suggests unresolved dimensions of the central issue that will be targeted in future litigation, the more so if it turns a majority decision into a plurality decision.[29] At the most, in a divided Court a single judge changing sides because critical points are inappropriately addressed may change the majority to the minority and vice versa.

The third best choice, in terms of exercising power, would be writing (or joining) a separate concurring opinion—that is, agreeing with the *outcome* of the case but disagreeing with the *reasons*, at least to the extent of suggesting that those reasons are incomplete, imperfect or misleading. In such a position, a judge is still contributing her vote to the desired outcome, which is the crudest but by no means an insignificant measure of judicial power. On occasion—for example, when there is a plurality vote, meaning that no single outcome-plus-reasons can draw the signatures of a majority of the panel—it may be the separate concurrence itself that determines which of a pair of balanced blocs of votes becomes the decision of the court and which becomes a dissent.[30] However, except in the most exceptional circumstances, a separate concurrence (even if it draws the signature of one or more other judges) cannot have the same impact on the evolution of judicial doctrine as the majority (or plurality) decision; and any impact that it enjoys comes at the expense of what would otherwise be a more clear-cut and decisive set of reasons from the majority.[31] Ultimately, a separate concurrence signals that the judge could not persuade a majority of her colleagues to sign on to her reasons,

---

28. For example: to keep his unanimous court in *Brown* v. *Bd. of Education*, Warren had to agree to use the word "desegregation" rather than "integration" and to include the now infamous phrase "with all deliberate speed." See *Storm Centre*, *supra* note 26 at 361.

29. For example: writing of the possibility that Brennan might reduce the majority by writing separately, Schwartz reports that Warren "did not want an opinion as important as *Miranda* to be diluted by any concurrence, even though it was intended to stress its author's support for the opinion of the Court." *Decision*, *supra* note 11 at 109.

30. Far from a hypothetical situation. See, e.g., *R* v. *Bain*, [1992] 1 S.C.R. 91; *CN* v. *Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Ontario Hydro* v. *Ontario (L.R.B.)*, [1993] 3 S.C.R. 327; *R.* v. *Finta*, [1994] 1 S.C.R. 701; *Canada Inc.* v. *Quebec (A.G.)*, [1994] 2 S.C.R. 339; and *Hickman Motors Ltd.* v. *Canada*, [1997] 2 S.C.R. 336.

31. The proposition that (other things being equal) unanimous decisions have the greatest impact on lower courts and other actors is widely accepted in the judicial impact literature: see, e.g., T. Becker & M. Feeley, eds., *The Impact of Supreme Court Decisions: Empirical Studies*, 2d ed. (London: Oxford University Press, 1973); and B.C. Canon, "Courts and Policy: Compliance, Implementation and Impact" in J. Gates & C.A. Johnson, eds., *The American Courts: A Critical Assessment* (Washington: CQ Press, 1991) 435. However, I note that this has been questioned in some of the more recent research; see J.F. Spriggs, "Explaining Federal Bureaucratic Compliance with Supreme Court Opinions" (1997) 50 Pol. Res. Q. 567 at 580.

even while she remained unpersuaded herself that she should put aside her objections and sign with the majority.

The least attractive alternative, and the bottom of the scale of judicial power, is to write (or to join) a dissent—rejecting not only the reasons, but also the outcome, supported by the majority. To be sure, every Supreme Court justice dissents some of the time, and some of those dissents can themselves become the seeds of future majority decisions.[32] If enough judges dissent (or, better yet, sign on to the same dissent), they highlight an issue that litigants might usefully revisit. However, the action of dissenting clearly signals that in the immediate case the judge is "off side" from the majority, unable to persuade enough of her colleagues which way the case should go let alone what sequence of legal reasoning supports it.

I would submit that most dissents have little impact on the course of the law; there are spectacular exceptions (many of them over Laskin's signature), but they are far from typical. When lower courts or the Supreme Court itself cite earlier cases to explain immediate outcomes, it is overwhelmingly (about 90% of the time) *decisions* that they cite rather than dissents or separate concurrences—and this frequency falls still lower if we exclude those occasions when a judge cites her own prior dissent or concurrence.[33] A judge who *never* dissents may well be (as Edelman and Chen suggest) something of a "judicial Milquetoast" more likely to compete for Currie's or Easterbrook's "most insignificant" list than for a position in the judicial pantheon; but nonetheless a judge who *often* dissents, especially if she usually dissents alone, is unlikely to leave many discernible footprints on the jurisprudential beach.

This "hierarchy of impact," from the heights of writing judgments for a unanimous court to the depths of solitary dissent, provides the logical basis for an empirical investigation of judicial power. To begin, Table 1 indicates for each judge on the Court how frequently they signed on to the decision of the Court (plurality, majority or unanimous) and how often they delivered that decision, both expressed as a percentage of total panel appearances. Note that this excludes not only dissents but also separate concurrences, the two occurring at almost identical rates. The right-hand column of Table 1 recalculates this information for the 332 decisions that were delivered by "divided" (that is to say, non-unanimous) courts. Justices Wilson and Stevenson are both included in Table 1, but will be

---

32. See, e.g., D.E. Lively, *Foreshadows of the Law: Supreme Court Dissents and Constitutional Development* (Westport, Conn.: Praeger, 1992).

33. See, e.g., P.J. McCormick, "The Supreme Court Cites the Supreme Court: Follow-up Citation on the Supreme Court of Canada, 1989-1993" (1995) 33 Osgoode Hall L.J. 453.

omitted from all subsequent tables because their total numbers of appearances are obviously too low to permit fair comparison with the rest of the Court. However, their numbers will continue to be included in the all-court figures.

Table 1: Frequency of vote with majority & delivered decision, by judge
Reported Supreme Court Decisions 1990-1997

Judges	Total	All appearances With maj	Del	Divided courts With maj	Del
Lamer	470	84.5%	34.5%	68.7%	27.9%
Wilson	22	63.6%	22.8%	50.0%	13.4%
La Forest	602	83.2%	14.1%	65.3%	12.5%
L'Heureux-Dubé	588	70.6%	8.2%	40.8%	7.9%
Sopinka	667	84.4%	20.8%	66.0%	17.7%
Cory	648	89.8%	14.2%	77.9%	20.1%
Gonthier	650	86.3%	8.2%	69.7%	6.1%
McLachlin	640	76.3%	8.9%	47.2%	12.5%
Stevenson	92	82.6%	10.9%	55.6%	5.6%
Iacobucci	612	90.2%	12.3%	77.4%	11.7%
Major	422	85.1%	7.1%	68.3%	7.5%
All judges		83.3%	13.9%	64.1%	13.7%

The most obvious feature of the all-appearance column is the frequency of agreement on the Court. On average, a judge of the Supreme Court of Canada writes or signs on to the decision of the Court six times in every seven appearances. The range is rather narrow, from the low figure for Justice L'Heureux-Dubé (who signs on to the majority's outcome-plus-reasons about 70% of the time) to the high figure for Justice Iacobucci (who does so more than 90% of the time). But these figures simply reflect the fact that most of the Court's decisions are unanimous: just over 57% during these the first seven years of the Lamer Court. The right-hand column, which "zooms in" on the 43% of the Court's decisions which are non-unanimous, is therefore a better indication of the relative (as opposed to absolute) frequency with which the individual judges join with or separate themselves from the rest of the Court. On this crude but not insignificant measure (since achieving desired outcomes and giving or endorsing the authoritative reasons for them is no small dimension of power), two very simple conclusions can be stated. First, the more junior members of the Court (McLachlin aside) tend to join the decision of the Court more often (that is, to dissent or to concur separately less often) than the more senior members. And second, the senior members of the Court (L'Heureux-Dubé excepted) tend to write more majority decisions than the junior members. No major surprises here.

Table 2: Participation Score & Index, by judge
Reported Supreme Court Decisions 1990-1997

Judge	Delivered decision[34]	All cases		Divided cases	
		Score	Index	Score	Index
Lamer	41.2%	2.31	1.56	1.57	1.40
La Forest	20.2%	1.47	1.01	1.14	1.01
L'Heureux-Dubé	19.5%	1.12	0.76	0.77	0.68
Sopinka	26.5%	1.75	1.20	1.25	1.11
Cory	25.0%	1.18	1.06	1.42	1.26
Gonthier	9.0%	1.18	0.85	0.95	0.85
McLachlin	26.3%	1.18	0.82	0.96	0.86
Iacobucci	14.9%	1.18	0.98	1.16	1.03
Major	11.3%	1.18	0.81	0.96	0.85
All Judges	20.5%	1.46	1.00	1.12	1.00

This fairly straightforward counting can be used to generate some more useful indicators of judicial power. For one thing, the extreme right-hand row of the table (in what percentage of divided panel appearances did the judge deliver the decisions of the Court) is actually a combination of two different variables: first, how often does the judge find herself on the "winning" side when the Court divides; and second, how often when the judge finds herself among the winners does she become the one to deliver the reasons. This latter figure (shown in Table 2) does carry some suggestion of relative judicial power, the more so when it departs from what we might otherwise expect—that is to say, from a fairly steady gradation reflecting simple seniority. On this indicator, La Forest and L'Heureux-Dubé fare unexpectedly poorly (given their seniority) while McLachlin performs strikingly well (although this is offset by the frequency with which she finds herself outside the deciding coalition). Seniority, it would appear, is not as good a power predictor as might have been anticipated.

Pushing further, we can turn the number count in the data base into a "Power Score" based on the hierarchy of judicial power already suggested. Since the most common degree of power is that wielded by a judge who votes for an outcome and joins the set of reasons explaining it, I will treat this as the "normal" condition and give it a score of "1.0". A separate concurrence (written or joined) also indicates the attainment of a desired outcome, but no direct participation in the reasons; it therefore earns a score of "0.5". A dissent (written or joined) fails on both measures, and therefore receives a score of "0".

---

34. As a percentage of those times each judge joined the majority of a divided court.

Writing the decision of the Court should receive a higher score than simply signing on to that decision (even assuming a collegial court in which the writer sincerely attempts to accommodate the concerns of coalition partners who are not constrained by any formal or informal norms from forcefully articulating those concerns). The problem is determining *how much* additional weighting to give it. I would suggest that the writer can be thought of as having an influence equal to that of all her coalition partners combined. Sometimes it will be much more than this (if the rest of the panel is quiescent or yields to the writer's persuasion or particular expertise), and sometimes it will be much less than this (if other members of the deciding coalition continually respond to circulated drafts by firmly suggesting substantial changes), but I would still suggest this as a crude but plausible rule of thumb for quantifying the unquantifiable. Ultimately, it implies a measure of *how often* each judge can get *how many* of her colleagues to sign on to her reasons for judgment.

For all decisions of the Court, the average size of the majority is 5.86, so for the all-decision calculations, delivering the decision will carry a score of 4.86 (that is, 5.86 for the total size of the deciding coalition, less 1 for the person doing the writing). For divided decisions of the Court, the average size of the majority is 4.88, so for those calculations delivering the decision will carry a score of 3.88. But the "score" for all judges combined is 1.46 for total appearances, 1.12 for divided court appearances; to make the comparisons more clearly, this "Power Score" is turned to a "Power Index" by showing it as a ratio to the all-judge score.

On all the measures in Table 2, Lamer clearly stands out as the leader of the Court. This is hardly surprising—at least since the Cartwright Court, this pattern of dominance by the Chief Justice has clearly characterized the Supreme Court of Canada,[35] and Table 2 is simply a way of emphasizing some of the dimensions along which this leadership is displayed. However, the other members of the Court who score well above average are Sopinka (especially for total appearances) and Cory (especially for divided court appearances). La Forest does not in any way stand out; his numbers are very close to the overall average, and almost indistinguishable from those of the much more junior Iacobucci. Sopinka's scores are slightly higher. Indeed, seniority correlates very poorly with the "power index," especially when the focus is on divided decisions. For those cases, the second most "powerful" judge is the fifth most senior, and the least "powerful" judge is the third most senior—and this despite the

35. P.J. McCormick, "Assessing Leadership on the Supreme Court of Canada: Towards a Typology of Chief Justice Performance" (1993) 4 Supreme Court L.R. (2d) 409.

fact that I have heavily weighted the score for delivering the decisions of the Court, a part of the process in which seniority is demonstrably a significant factor.[36]

Table 3: Assessment of relative power (first approximation)
Judges of the Lamer Court 1990-1997

Judge	Voted with Majority		Delivered Decision		Delivered when with majority	"Power Index"	
	All	Divided	All	Divided	Divided	All	Divided
Lamer	6th	4th	1st	1st	1st	1st	1st
La Forest	7th	7th	3rd	4th	5th	4th	5th
L'Heureux-Dubé	9th	8th	7th	7th	6th	9th	9th
Sopinka	5th	6th	2nd	3rd	2nd	2nd	3rd
Cory	2nd	1st	4th	2nd	4th	3rd	2nd
Gonthier	3rd	3rd	8th	9th	9th	6th	8th
McLachlin	8th	9th	6th	5th	3rd	7th	7th
Iacobucci	1st	2nd	5th	6th	7th	5th	4th
Major	4th	5th	9th	8th	8th	8th	6th

Table 3 pulls together from this discussion the seven crude measures[37] of judicial power that have been derived from the hierarchy of judicial power suggested at the outset, turning each into a first-through-ninth ranking of the nine[38] members of the Court. Since the actual delivery of decisions for the Court looms so large among the indicators, we might think of this as a concept of power organized around *outcome-directing and decision-writing leadership*, and treat it as the first of several dimensions of judicial power to be examined. On these measures, if there is a "most dangerous" justice to be found on the table, it is clearly Lamer—Sopinka and Cory are in the race but well back. And what of La Forest? Fairly consistently across the seven columns, he appears to rank in the middle third of the Court, well off the pace set by Cory and Sopinka and especially Lamer. To the extent that these measures can be taken as indicative, La Forest is not particularly powerful and therefore not particularly dangerous, and his departure is news, but not major news.

36. P.J. McCormick, "Judicial Career Patterns and the Delivery of Reasons for Judgment in the Supreme Court of Canada, 1949-1993" (1994) 5 Supreme Court L.R. (2d) 499.
37. With the added methodological complication that the fourth column is really based on the simple product of the figures that generated the third and fifth columns.
38. That is: excluding Wilson and Stevenson, on the ground that their much more limited numbers prevent fair comparison.

II. *Judicial Power: The Structure of Supreme Court Coalitions*

But this is only part of the story—and potentially a misleading part, because aggregated figures can tell a distorted story. More specifically: taken at their crudest, the figures from Table 1 strongly suggest that the most typical five-judge majority of a divided Supreme Court of Canada comprises Lamer, Cory, Gonthier, Iacobucci and Major, the only five of the court's members who find themselves signing on to the court's decisions in more than two thirds of the divided decisions for which they sit—and table 2 suggests that Lamer would probably write the decision. In fact, there has never been a single 5-4 or 5-2 decision by the Supreme Court of Canada which brought these five together as the deciding bloc (and there were only four 6-3 decisions which included all five of them). This suggests that the aggregate figures are only a first step. In this section, I will try to give a better account of a complex picture by unravelling the structure of winning coalitions within the Supreme Court; and this will lead (by way of Edelman and Chen's "most dangerous justice" methodology) to a second and complementary dimension of judicial power. If the first dimension looks at and compares the judges as individuals, this second dimension reflects the fact that their power can only be effective to the extent that the judges combine into more or less stable coalitions. Judicial power on a panel court has to do with groups as well as individuals.

This approach means focusing on the non-unanimous decisions of the Court. When the Court fragments between two or more preferred ways of resolving a particular case (that is, two or more sets of outcome-plus-reasons), it is possible to see which judges tend to agree with each other more readily and more often, presumably because of shared sets of legal values and priorities. This has a double advantage: first, by excluding the unanimous cases it focuses on those cases which provoked division on the Court, exaggerating the absolute levels of disagreement so as better to highlight the relative levels of disagreement. Second, it excludes the rather substantial number of decisions which contain only formulaic single paragraphs—the usual phrase is "for the reasons given in the Court below." This narrowing of the data base avoids the problem (implicit in any simple counting procedure) of diluting the subset of important cases with the admixture of large numbers of routine cases.

For my purposes, I should note, the successful coalition does not include those judges who write or join a separate concurrence—that is to say, those who agree on the outcome but present an alternative set of reasons. The same logic is used by the Harvard Law Review's annual survey of the Supreme Court, which similarly refuses to "treat two Justices as having agreed if they did not join the same opinion, even if they

agreed in the result of the case and wrote separate opinions revealing very little philosophical disagreement."[39] There is some suggestion in the American literature that we should push the argument a step further, and include in a single category not only those who dissent on the outcome but also those who agree with the outcome but dissent on the reasons—that is to say, those who wrote separate concurrences.[40]

Of the successful coalitions, the most transparently important and powerful are those which include five judges. This is the smallest number that must always prevail, even on a nine-judge panel, and therefore the smallest group capable of establishing a line of precedent in a particular area of the law that cannot be eroded or modified without their cooperation.[41] There will be more than one such coalition, of course, because there is no reason to think that there is only a single dimension along which to rank the judges, and different issues will suggest different continua—not just coalitions of different sizes, but coalitions including allies on one issue who were opponents on another and vice versa. But not all theoretically possible combinations will be actually existing combinations, and it is those coalitions that make the transition from theoretical possibility to concrete reality that I am looking for, especially those which do so the most often.

Over the seven years, sixty-eight cases were decided by five judge coalitions (including in this list 5-2 decisions as will as the minimum 5-4). At first glance this number seems rather small; it works out to just under ten five-judge majorities per year, where the comparable figure for the U.S. Supreme Court is between sixteen and twenty.[42] One obvious explanation is the fact that the U.S. Supreme Court uses nine-judge panels almost exclusively, while the Supreme Court of Canada uses a more flexible mix of nine- and seven- and five-judge panels. By definition, a five-judge panel cannot yield a divided decision with a five-judge winning coalition, and many seven-judge panels will also fall short of the five-member coalition threshold when they split 4-3. Another explanation may be that the Supreme Court of Canada simply divides less often, partly

---

39. "The Supreme Court, 1995 Term Leading Cases" (1996) 110 Harv. L. Rev. 135 at 369.
40. K.M. Stack, "The Practice of Dissent in the [United States] Supreme Court" (1996) 105 Yale L.J. 2235. See also A. Scalia, "The Dissenting Opinion" (1994) J. Supreme Court Hist. 33.
41. Although I will argue below, departing from Edelman and Chen on this question, that it is a mistake to assume that this means that we can or should consider *only* five judge coalitions, especially in light of Supreme Court of Canada practices with regard to panel sizes.
42. "Most Dangerous Justice," *supra* note 2 at 70-1.

because its case-screening process[43] lets through a significant number of cases that are routine, and hence disposed of briefly and unanimously.

Mathematically, there are 126 possible five-judge coalitions (factorial nine divided by factorial five and factorial four); thirty-five of these actually occurred at least once over the seven years, excluding those that included either Wilson or Stevenson. But a combination that occurs only once in seven years is not much of a coalition, so rather than produce an eye-numbing list spilling beyond an entire page I will limit my concern to those combinations that occurred at least three times in seven years—that is to say, roughly once every other year. There were six such combinations:

Lamer, Sopinka, Cory, Iacobucci, Major [12]
La Forest, L'Heureux-Dubé, Cory, Gonthier, Iacobucci [5]

La Forest, L'Heureux-Dubé, Cory, Gonthier, McLachlin [4]
L'Heureux-Dubé, Sopinka, Cory, Gonthier, Iacobucci [4]
Lamer, Sopinka, Cory, McLachlin, Iacobucci [3]
Sopinka, Cory, Gonthier, Iacobucci, Major [3]

What leaps off the page in this listing is the pre-eminence of the grouping of Lamer, Sopinka, Cory, Iacobucci and Major. When the court divides, no five-judge grouping prevails even half so often as this particular combination; and on almost as many occasions (ten as against twelve), a five-judge divided-court majority can be formed from four of these judges plus a single outsider (Gonthier on seven occasions, McLachlin on three). These numbers are not enormous, given that 68 decisions of divided courts were rendered by five-judge coalitions, but the significant thing is that no other competing coalition was remotely as successful.

There were another 30 decisions of divided courts[44] that were decided by six-judge coalitions, and although these were decided by fifteen different combinations of judges (of the logically possible 84), only three occurred as often as three times over the seven-year span. These three were:

Lamer, Sopinka, Cory, McLachlin, Iacobucci, Major [5]
Lamer, Sopinka, Cory, Gonthier, Iacobucci, Major [5]
Lamer, La Forest, Sopinka, Cory, Iacobucci, Major [3]

---

43. There still remain some cases (such as appeals from decisions in criminal matters involving a dissent on a matter of law in the provincial court of appeal) that must be heard as a matter of right by the Supreme Court of Canada, regardless of whether or not they think the case raises a question of national importance.

44. Omitting for present purposes those that divided as lopsidedly as 6-1.

It is striking that all three of these combinations include the five-judge coalition identified above, reinforcing the impression that this group constitutes the solid core of the Lamer Court.

If the Court always sat in nine-judge panels, then this would be the end of the story—any point of view unable to recruit and sustain a set of at least five judges could not prevail in the long run, and even in the short run its successes would be few. True, sometimes a four-judge grouping can prevail should the other five split themselves between two mutually exclusive alternatives[45]—plurality judgments will carry the day and set the legal doctrine if no majority judgment can be formed. However, such outcomes are both provocative and vulnerable—provocative because they mean that a minority of judges is setting the tone of the Court on important issues,[46] and vulnerable because the subsequent coalescence of a majority can quickly reverse its apparent accomplishments. In a Supreme Court guided by a strong preference for full panels, five is the magic number (six is better, although logically a luxury), and this is the logic that drives the analysis in Edelman and Chen.[47]

But the Supreme Court of Canada is not such a Court. Full nine-judge panels were used for only 31% of reported panel decisions over the seven year period, more frequently than five-judge panels (27%) but less so than seven judge panels (42%). The Court attempts to practice a logical triage, treating panels of seven as the norm with larger panels for the most critical cases and five judge panels for the ones that are expected to be of lesser importance. However, this triage is necessarily imperfect—dozens of nine-judge panels hand down the formulaic dismissals that consume only a page or two in the Supreme Court Reports, while some highly visible and important decisions (such as *Thomson Newspapers* v. *Canada)*[48] have been delivered by five-judge panels.

This practice of varying panel sizes, which so sharply differentiates the Supreme Court of Canada from its American counterpart, strongly suggests that we should broaden the search for viable and potentially decisive coalitions. When seven-judge panels are so common, four-judge coalitions are not necessarily locked in perpetual frustration (barring the fortuitous occasion of a plurality judgment), but can still enjoy their share

---

45. Just as a political party that never gains much more or much less than 40% of the vote can regularly win elections and form a government, so long as the remaining 60% cooperates by dividing itself fairly evenly between two or more alternatives. This is, of course, how the Liberals swept Ontario in the 1997 federal general election.

46. See, e.g., J.F. Davis & W.L. Reynolds, "Juridical Cripples: Plurality Opinions in the [United States] Supreme Court" (1974) Duke L.J. 59.

47. "The Most Dangerous Justice," *supra* note 2; "Sultans of Swing," *supra* note 2.

48. [1990] 1 S.C.R. 425.

of successes. And when five-judge panels hear one-quarter of all the cases, three-judge coalitions can also form for effective results. This means that voting patterns on smaller panels are equally useful as a hunting ground for effective and enduring coalitions.

There were 82 cases in which four-judge coalitions of judges delivered the majority or plurality decision of the Court. Logically, there are 126 different ways (factorial nine divided by factorial four and factorial five) in which four-judge groups can be built from a nine-judge court; forty-seven of them occurred in practice (omitting groups that included Wilson or Stevenson), but only six of them as often as three times over the seven-year period. These six were:

La Forest, L'Heureux-Dubé, Gonthier, McLachlin [5]
La Forest, L'Heureux-Dubé, Cory, Iacobucci [3]
La Forest, Sopinka, Iacobucci, Major [3]
Lamer, Sopinka, Cory, Iacobucci [3]
Lamer, Sopinka, Cory, Major [3]
Sopinka, Cory, Iacobucci, Major [3]

It is striking that the most frequently successful of the four-judge coalitions includes precisely those four members of the Court who are excluded by the five-judge "core" identified above, and that another three of these four-judge blocs are simple subsets of the same five-judge core. This is further evidence that this particular cleavage may indeed be the single most important part of the way the Court divides for its most critical decision making.

On a further sixty occasions, the decision of the Court was delivered by a three-judge combination; of the 84 logically possible combinations, 29 actually occurred and six occurred three or more times over the seven years. They were:

La Forest, L'Heureux-Dubé, Gonthier [9]
L'Heureux-Dubé, Cory, McLachlin [4]
Lamer, Cory, Gonthier [4]
Lamer, Sopinka, Major [3]
La Forest, Gonthier, McLachlin [3]
L'Heureux-Dubé, Cory, Iacobucci [3]

By far the most frequent of the three-judge combinations—indeed, the second most common coalition of any size to deliver decisions for a divided court—is drawn from the four-judge group of outsiders, and another such combination appears second from bottom on the list.

To try to draw some discursive general conclusions from these lists: the list of successful five-judge coalitions on the nine-judge Court is clearly led by the Lamer-Sopinka-Cory-Iacobucci-Major group, which I will call the "core group"; no other coalition of whatever size has

delivered as many divided court decisions. This same group also explains the thirteen decisions of the only three six-judge combinations to have occurred as often as three times; four-judge combinations drawn from these five combine for a further twelve decisions; and three-judge sub-combinations for another ten. In all, the core group in its various combinations and recombinations explains a total of 47 of the 240[49] divided court decisions, more than any other comparable group. Lamer is clearly the leading spokesperson, having delivered $17^1/_2$ of their decisions, compared with $9^1/_2$ for Sopinka and 9 for Cory.[50]

The second identifiable group is the one formed by La Forest, L'Heureux-Dubé, Gonthier and McLachlin, whom I will label "the outsiders." This group accounts for a total of eighteen decision-delivering combinations of divided courts—five as a four-judge group and thirteen others as "contained" three-judge groups. This is quite a surprising total considering that an alternative credible four-judge group (say, Lamer, Sopinka, Iacobucci, Major) accounts for only seven; and this larger number reinforces their appearance as a coherent group. The leading spokesman for "the outsiders" is clearly La Forest, writing $10^1/_2$ of their eighteen decisions compared to only five for L'Heureux-Dubé.[51] Between them, the "core" and the "outsiders" as distinct and mutually exclusive groupings account for only 65 of the 240 divided court decisions, reflecting the extent to which the Court is driven by shifting coalitions rather than by permanently polarized factions. But if this observation warns us away from thinking that the division between the Lamer group and the La Forest group is the only major dynamic on the Court, it is still the case that no other 5/4 division can account for anywhere near as many, and therefore that this cleavage is the most important one that emerges from a consideration of enduring coalition patterns.

There is something even more remarkable about the "outsiders" and that is the fact that they also form part of a five-judge group that closely rivals "the core" for their degree of success on divided courts. The outsiders alone account for 18 decisions—but the outsiders plus Cory account for a total of 39, almost as many as "the core" itself. This wider grouping, that we might call "the alternative core," explains the results of

---

49. This number differs from the 332 divided court decisions mentioned in the discussion of table 1 because it excludes all 6-1, 7-2 and 8-1 decisions, as well as the nine cases in which the "winning" side was so fragmented as not to have even three judges combine for a decision of the court.

50. The two half-decisions refer to the jointly authored majority decision by Lamer and Sopinka in *A.(L.L.)* v. *B.(A.)*, [1995] 4 S.C.R. 536.

51. The half-decision is the one co-authored by La Forest and McLachlin in *B.G. Checo* v. *B.C. Hydro*, [1993] 1 S.C.R. 12.

four five-judge majorities, eleven four-judge majorities, and twenty-four three-judge majorities. No other defection from "the core" carries such as immediate practical impact—where the outsiders plus Cory alone means an additional 21 majorities, the outsiders plus Iacobucci alone (the logical next choice) means only an additional seven majorities. Cory's pivotal position in the Court is strongly hinted at by the fact that he is the only judge to appear in all six of the six most successful five-judge combinations. However, even if Cory's adhesion so dramatically increases their success rate as to turn "the outsiders" into "the alternative core," La Forest still remains the intellectual leader of this broader grouping as well, writing $19^1/_2$ of their 39 decisions.

This investigation of the coalition structure of the divided court suggests a more subtle modification of the preliminary results. If the first set of indicators looked at outcome-directing and decision-delivering leadership as an element of judicial power, this second approach looks at the forming of stable coalitions as an additional element. And this involves a dimension of paradox: if the first approach emphasizes "leadership as power," this second implies that for many—even most—of the members of the most stable coalitions, power is found in "followership." On this second coalitional look at power, Lamer again stands out: he is the clear leader of the largest consistent coalition—the "core"—to emerge when the Court divides on critical issues, and he demonstrates this leadership by writing some 40% of their decisions. La Forest is the clear leader of a second group, this leadership remaining whether we limit it to "the outsiders" or expand it to "the alternative core." However, the person whose role is the most distinctive is Cory. He occupies an important swing position, his participation accounting for fully 85% of the core's majorities and also for 54% of the alternative core's majorities. The dynamics linking these three individual actors are an important part of the Supreme Court drama in those cases that bring out the divisions within the Court. Because La Forest is one of the three his departure is an important event that will change the Court; but on this analysis, the title of the "most dangerous justice" clearly and unambiguously belongs to Cory.

III. *Judicial Power: The "Deep Structure" of Supreme Court Coalitions*

This analysis started by considering some measures of effective judicial power that considered the writing and voting activity of each judge more or less in isolation. The limitations of this approach acknowledged, the attempt was then made to examine the most frequently successful

coalitions with the clear implication that the members of the most successful coalitions exercise the most effective power. One possibility, assuming a rigidly polarized court, was that there would be a stable coalition of "winners" and a slightly smaller stable coalition of "losers," the former presumably having (and more or less equally sharing) almost all the power and the others having (and again more or less equally sharing) almost no power. In fact, the reality was a little more complex: there were two groups of equal size, each prevailing with about the same frequency, and with a single member of the Court constituting the overlap between them. Again, crudely, it looks as if I am suggesting that each of these two groups has roughly equal power, that each of the members within each group has roughly equal power, and therefore that Cory, the only person to be a member of both groups on a stable basis, has twice as much power as anyone else.

Edelman and Chen argue that this is much too casual a view, and that not even the individual figures from the first section are enough to offset its inappropriate influence-levelling implications. They start their analysis from the same sort of calculation that appears above—that is, identifying the five-judge coalitions that prevail in a divided court. But they deny that every member of the coalition has an equal share of the coalition's voting power, and they also deny that the greatest share necessarily belongs to the member of the coalition who is doing most of the writing (although they do consider this aspect as something of a potential "tie-breaker" between comparably "dangerous" justices). Instead, they argue that the most powerful member of each coalition is the member who is the most likely to defect—"[t]he most dangerous Justices are those who are most able—and willing—to switch their votes on incremental but decisive legal propositions."[52] And the way to identify this factor is not by vanishing into the abstractions of game-theoretic analyses, where every five judge combination is equally likely, but by examining the actual voting behaviour of the judges when push comes to shove at these critical 5/4 interfaces. A judge demonstrates her ability and willingness to switch by actually having switched—by being part of more actual five-judge coalitions than her colleagues, and especially more than her colleagues in the immediate five-judge coalition she is attempting to influence. Edelman and Chen explicitly note that the strategy of maximizing power through "flexible voting" is an alternative to the more visible power of opinion leadership.[53] Since the writing and assigning of opinions is generally

52. "The Most Dangerous Justice," *supra* note 2 at 96.
53. *Ibid.* at 98.

linked to seniority, it follows that the higher scores for flexible voting tend to go to the more junior members of the Court—in 1994 and 1995, they identify Ginsburg and Kennedy rather than more obvious judicial heavyweights like Rehnquist and O'Connor and Scalia.

Let me make it clear what I have in mind when I talk about "flexible" voting. I am not of course suggesting that a judge would threaten to vote, or actually vote, against an appeal she thought should succeed simply in order to be "flexible" or to gain some concession or to increase her leverage. For one thing: on my analysis, as well as that of Edelman and Chen, separate concurrences are "outside" the winning coalition rather than part of it, so the "vote switching" involved may simply be a preference between two different sets of reasons for the same outcome. Or a judge may be choosing between one side that will allow an appeal while stating the central legal principle in a way she finds objectionable, while the other side will dismiss the appeal but may be capable of being persuaded to do so on much narrower terms, leaving the further clarification of the basic principle for the future.[54] Especially at the appellate level, there is much more to most cases than a simple "yes" or "no," and there is therefore much more that judges have to take into consideration, and much more that they can argue and disagree and negotiate about, than the simple act of voting for or against an appeal. If we accept that the reasons are more important than the outcome—and I think this proposition should border on the self-evident—then it is perfectly legitimate for a justice sometimes to prefer working within the majority to get the best possible wording rather than sitting with her arms righteously folded in separate concurrence or even in dissent. As Wahlbeck, Spriggs and Maltzman demonstrate for the United States Supreme Court, gaining the necessary signatures for a majority decision is a process of negotiation, compromise and accommodation.[55]

---

54. For an extended discussion of the desirability of this second choice, see C.R. Sunstein, "Leaving Things Undecided" (1996) 110 Harvard L. Rev. 4.

55. P.J. Wahlbeck, J.F. Spriggs II, & F. Maltzman, "Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court" (1998) 42 Am. J. Pol. Sci. 294.

It is also an important element of Edelman and Chen's analysis that it makes no difference how often each five-judge coalition actually occurs. If coalition A occurs ten times and coalition B only three times,[56] both have proved themselves to be examples of viable coalitions. There has been a practical demonstration that there are some issues on which these five judges will join ranks, and they confirm this for us by doing it again. Of course, it will tend to be the case that a small sub-set of the actual coalitions will appear and have its way more often than the others, and this is the most important thing for most court watchers. For Edelman and Chen, however, the important thing is to develop an empirically based assessment of which judge within the more frequently dominant group is the most able and therefore the most likely to defect, and for this it is the number of demonstrably effective coalitions that is more important than the relative frequency of specific coalitions. To venture into metaphor: they want only to demonstrate that a particular road exists, not caring whether the road is paved or whether it is carrying much traffic.

As in the previous section, it makes the most sense to begin by restricting the discussion to five-judge coalitions in decided cases—the smallest possible combination that can prevail against all comers—which gives us the six different coalitions previously listed. We then simply count the number of times that each individual judge appears on this six-coalition list, and this is the number that appears in Table 4. (Again, it does not matter to Edelman and Chen's methodology that some coalitions occur more often than others. Taking this into account just sends us back to the "with majority" count from the first stage of the analysis.) But this number in turn can be converted to an index by comparing it to the behaviour of the notional average justice. There are thirty "slots" in the six five-judge coalitions, so the average judge should be in one-ninth of them—awkwardly not a whole number, this comes to 3 $^1/_3$. The actual coalition frequency of each justice can then be compared to (divided by) this average, and then multiplied by 100 to generate a score. The results are shown in Table 4.

---

56. Edleman & Chen, of course, would not say "only three times" they would say "only once." But their paper is analyzing voting power for single terms, not for the seven-year sweep of this article, and I will therefore retain my "at least three" cut-off to keep the numbers manageable. They also argue, however, that the reason for taking even single examples so seriously is the fact that no single year provides a full and balanced range of all the issues and principles that could come before the Court; over a period of seven years, it seems more defensible to argue that a five-judge combination that does not even occur every second year is too ephemeral to count.

Table 4: Coalition Frequency and "Power Voting" Score in five-judge coalitions; Reported Decisions 1990-1997

Judge	Number of Coalitions	Score
Lamer	2	60
La Forest	2	60
L'heureux-Dubé	3	90
Sopinka	4	120
Cory	6	180
Gonthier	4	120
McLachlin	2	60
Iacobucci	5	150
Major	2	60

The scores for each judge are highly suggestive, especially when read in conjunction with the broad coalition patterns suggested in the previous section. Lamer and La Forest are the senior members and the principal spokespersons (decision deliverers) for the "core" group and the "alternative core" respectively, but the price they pay for this prominence is a relative inflexibility in terms of coalition shifting: each of them appears in only two of the six prominent five-judge coalitions. The table suggests that each has a most dependable coalition partner as well—Major for Lamer, McLachlin for La Forest—who similarly appear in only two of the six most frequently successful five-judge coalitions; L'Heureux-Dubé is only one notch more flexible than McLachlin. Cory's appearance in all six of the five-judge groupings gives him a score of 180, almost twice the score of the notional average judge, closely followed by Iacobucci (five of the six combinations) with 150; Sopinka and Gonthier, with four coalition appearances each, have scores slightly above the average.

Nonetheless, for the reasons already argued above, the exclusive consideration of five-judge majorities is less justified in the Canadian context than it is in the American. Most panels have fewer than the full set of nine judges, and one in every four has only five; this means that three- and four-judge coalitions are effective not just on those rare occasions when a fragmented court fails to deliver a majority judgment, but on a far more regular basis. A complete look at the coalitional "deep structure" of the Lamer court should therefore include all the successful and frequent coalitions listed in the previous section—not just the six five-judge combinations, but also the six four-judge combinations, the

six three-judge combinations and (for good measure) the three six-judge combinations. Again, the logic is to count the number of times that each individual judge appears on this extended list, and these totals are shown in Table 5. Again, these numbers are expressed as a score—there are 90 slots on the 21 different combinations, which means that the notional average judge should appear on ten of them. For direct comparability with Table 4, each judge's score is simply the number of coalitions multiplied by ten (the actual number of coalitions, divided by the "average judge" number of ten, times 100).

Table 5: Coalition Frequency and "Power Voting" Score in three-, four-, five- & six-judge coalitions; Reported Decisions 1990-1997

Judge	Number of Coalitions	Score
Lamer	9	90
La Forest	8	80
L'heureux-Dubé	8	80
Sopinka	12	120
Cory	16	160
Gonthier	8	80
McLachlin	6	60
Iacobucci	13	130
Major	9	90

Somewhat surprisingly, the pattern from this large set of fragmentary coalitions differs very little from that in Table 4, the single major difference being the lower score for Gonthier. It is still the case that La Forest, McLachlin and L'Heureux-Dubé (and now Gonthier) demonstrate low flexibility scores, which is another way of saying that none of them takes part in decision-delivering majorities very often. On the other flank of the Court, the relative inflexibility of Lamer and Major shows that they run some risk of being isolated by the relative flexibility of Sopinka and Iacobucci and especially Cory. At the same time, however, Cory's "powerful voting" (to use Edelman and Chen's term) no longer appears *sui generis*, as it did in the previous section; instead, it is something comparable to, but slightly stronger than, that of Iacobucci and Sopinka.

However, since "powerful voting" simply *is* the essence of Edelman and Chen's notion of the "most dangerous justice," this still leaves Cory

with the strongest claim to the title—although to an extent that was not clear from the analysis in the second section, Iacobucci and Sopinka are in the running and not far behind. And the significance of La Forest's departure is less in his own "dangerousness" score (which is very modest) than in the way it destabilizes the coalitions on the Court. This is important because the "power" that flows from "powerful voting" is less an individual attribute than a product of interactions, one judge's flexibility becoming a strategic lever only if it plays off the relative stability of her colleagues. It becomes harder to bank a shot off the wall if the wall itself is moving.

Conclusion

The general purpose of this article was to suggest a variety of methodological approaches that together would shed some light on the relative degrees of power enjoyed by each of the members on the current Supreme Court of Canada, this being provocatively labelled the search for the "most dangerous justice." The specific purpose was to use these power measures to develop an empirically grounded feeling for the significance of the retirement of Justice La Forest and the death of Justice Sopinka, and their subsequent replacement by Justices Bastarache and Binnie.

On the basis of the first crude set of measures—relating in different ways to the question of the relative frequency with which each justice joins or writes the majority decision—it was suggested that Justice La Forest ranks in the middle third of the Court with Justice Sopinka just above him. Admittedly, none of these measures is particularly subtle, and arguments could be adduced against any one of them as an adequate measure of judicial power, but the consistency of the patterns across all seven rankings was striking and at least indicative. On these measures, the top (and therefore most powerful and "most dangerous") third of the Court comprises Lamer (by a solid margin), Cory and Sopinka, a ranking which is at some variance with their respective seniority. On these measures, to be blunt, the departure of La Forest is small news rather than big news; and the subsequent death of Sopinka is potentially more significant.

A second approach sought to tease out the pivotal coalition structure of the Supreme Court, by limiting the consideration to divided courts, and emphasizing decisions by the more evenly divided courts—that is to say, not only were unanimous decisions excluded, but also those in which the Court divided 8-1, 7-2, and 6-1. On this basis, it was suggested that the "core" of the Lamer court is a group comprising Lamer, Sopinka, Cory,

Iacobucci and Major; Lamer writes the bulk of the decisions for majorities drawn from this group. A second group, emerging in its own right and not simply as the excluded members from this five-judge core, comprised La Forest, L'Heureux-Dubé, Gonthier and McLachlin, with La Forest writing most of their decisions. What was equally intriguing was the role of Cory—if his "day job" involved being part of the Lamer-led core, he also seemed to moonlight very successfully with the La Forest-led outsiders, creating an "alternative core" that rivalled the Lamer group for its degree of success in divided decisions, although La Forest still did the bulk of the writing. On this approach, La Forest can be seen as the principal spokesperson for one side of the essential dialogue that is being carried on whenever the Court divides, and this makes him (with Lamer and Cory) one of the three key players in the dynamic development of the Court's jurisprudence. Cory may be the "most dangerous" justice, but La Forest's departure from the Court is still very big news indeed, and Sopinka's subsequent departure threatens to undermine the stable block off which Cory's "flexible voting" played.

On the third approach, the frequency with which individual judges appear on the various successful coalitions, not just the single most successful coalition, can be used to rank them in terms of "flexibility" or "powerful voting." On the one hand, there are the "loyalists" (Lamer and Major on the one side, La Forest and McLachlin and L'Heureux-Dubé on the other) who appear in only a small number of coalitions with a fairly specific set of allies, and on the other there are the "opportunists" (Cory, Iacobucci and Sopinka) who appear in many coalitions embracing a wide variety of partnerships. Gonthier appears to be an "opportunist" if consideration is limited to five-judge coalitions, but a "loyalist" if attention is broadened to include the full "deep structure" of successful combinations of all sizes. But this opportunism is just another word for the "powerful voting" which Edelman and Chen suggest as the operationalization of the concept of the most dangerous justice, which means that Cory again wins the title (honorable mention to Iacobucci and Sopinka) with La Forest completely out of the running.

These are three rather different pictures, each suggesting subtle revisions to the other two. On the first account, Lamer, Cory and Sopinka are the three most powerful members of the Court, by virtue of being those whose participation on a panel is the most likely to result in the writing of, or at least in participation in, the majority decision. On the second account, Lamer is the leader of the "core" group on the Court, La Forest is the leader of the "alternate core," and Cory is a critically important member of both groups, the pivotal swing voter who most often determines which will have its way—these are the three individuals whose interaction

is the central story of the divided court, and we can argue whether Lamer or Cory is "really" the most powerful. On the third account, the flexible voting power of Cory, Iacobucci and Sopinka makes them the pivotal members of the Court, the ones who are the most demonstrably willing and able to move from one potential coalition to the other as various issues are addressed by the Court.

The question is not "which of these three stories is true?" All three of them are true, in the same way that the elephant not only appeared to be but was different things to each of the blind men (without ceasing in the process to be an elephant). The power of writing majority decisions is not the same thing as the power of stable coalition formation and both are different from the power of flexible voting; to some extent these even seem to trade off against each other. Rather, the question is how all three of these different views help us to understand how the "late Lamer" Court may be different from the "early Lamer" Court.

Crudely, we could diagram the voting patterns of the Lamer court between 1990 and 1997 as follows:

Lam Maj Sop Iac **Cory** Gon LaF McL L'H

The left-right spectrum is to be taken as purely notional (from "core" to "outsider") without any ideological implications; and the relative positions indicate both the pivotal central role of Cory as well as some feeling for the frequency with which "neighbouring" judges can enter alliances in either direction. Of course, any single diagram oversimplifies—there are many axes along which the voting and alliance predilections of the judges can be calculated and plotted, and not just the relative positioning but the notional distances between adjacent judges might well vary from one axis to another. However, the oversimplification notwithstanding, the diagram provides a logical basis for thinking about the implications of La Forest's retirement and Sopinka's death.

It is useful to compare this suggested structure with the findings from another study that has considered voting patterns on the Court. Morton, Russell and Riddell, for a time period (1982 to 1992) partially overlapping the one considered here and for a narrower set of decisions (*Charter* cases), came up with a general description of the Lamer Court as characterized by "a consolidation of the dominance of the Court's grey middle" rather than the American experience of an ideologically polarized Court.[57] However, they also identify two "wings" of the Court, the first in the person of Lamer (for whom the numbers suggest that he "has been

57. F.L. Morton, P.H. Russell & T. Riddell, "The *Canadian Charter of Rights and Freedoms*: A Descriptive Analysis of the First Decade 1982-1992" (1996) 5 N.J.C.L. 1 at 39.

less interested in or less able to continue the consensus-maker role" than Dickson)[58] and the second in the form of the female justices who have been "the most independent in terms of their willingness to dissent" although differences between them remain significant.[59] In these general terms, their picture is similar to my own, although I note that the levels of bilateral agreement in their Table 12[60] point to clusterings for *Charter* cases somewhat different from those I have identified for all divided decisions.

The suggested "logical structure of the Court" clearly points us to one sense in which the departure of La Forest can have a significant impact on the Court even when it does not involve a member of the block that has tended to form the majority on the court. His departure has an impact because it destabilizes the nature of, and the balance between, the major coalitions within the Court. Over the last seven years, a major dimension of the Court's performance on divisive issues has been a balance between the two camps whose principal spokespersons are Lamer and La Forest. The departure of La Forest destroys this balance, and the behaviour of his successor will determine what sort of a balance takes its place, even while the departure of Sopinka takes away a reliable and very articulate member of the more frequently dominant Lamer group. Who is going to be the other half of the argument, and how large and how strong and how united will their "core" group be, and how will the focus of that argument—the key issues over which the argument is most convincingly articulated and pursued—shift with this new spokesperson?

One possibility is that one of the new judges will become a new "outsider" while the other joins the core—in terms of the notional diagram above, joins McLachlin and L'Heureux-Dubé on the "right-hand" side (which just means the non-Lamer side) of the Court, and the other will join Lamer & Co. on the "left-hand" side. This will retain both the existing balance and will leave the same person acting as the pivot of the Court, although the "outsiders" will have to acquire a new principal voice. (On the numbers from the last seven years, L'Heureux-Dubé would appear to be the most likely candidate, but the new leading role does not automatically go to the understudy.) This scenario would represent the smallest degree of change, although there would be some significance to the fact that one team had replaced a "veteran" with a

58. *Ibid.* at 40.
59. *Ibid.*
60. *Ibid.* at 36.

"rookie," and the new principal voice will have her own priorities, her own central issues, her own preferred direction and style.

A second possibility is that both of the new judges will become more solidly loyal members of the "core" than Cory. In terms of the notional diagram, they will join Major well over to the "left hand" side (which just means the Lamer side) of the Court. This is a logical implication of the "freshman effect" which often sees new members of the Court keep a low profile and go with the majority while they find their feet. In such a circumstance, the pivot of the Court will move to the "right" away from Lamer, and someone else will play the role that Cory played for seven years. In the process, the mid-point—that is to say, the issues over top of which the most coalition shifting takes place—will also change.

A third possibility is that one or both of the new judges will enter the competition for the pivot position. This is not an illogical or unlikely scenario: as Edelman and Chen suggest, lack of seniority is such a limiting factor for recent appointees that "powerful voting"—that is to say, a flexible approach to dynamic coalition building—is often the best strategy if they wish to play a significant role.[61] Crudely put, the more likely a judge is to defect to other possible coalitions in any single divided court decision, the higher the price they can demand for not defecting, and that price can be measured in terms of a strong say in the precise wording of the reasons for judgment, if not the writing assignment itself. If you cannot write, then be the person the writer cannot afford to ignore. And if there is an inverse relationship between seniority and the power to be gained by "flexible" voting, then it makes sense not to assume that the same individual will necessarily hold the pivot position throughout his or her career, but will move away from it once they are sitting closer to the centre chair than to the door.[62]

This third possibility is harder to conceptualize in terms of the notional diagram. If someone is "bumped" from a central position, where do they "go"? However, it is also the most destabilizing of the scenarios. If the centre three spots are to be occupied by someone as high or even higher on the coalition flexibility ("power voting") scale than either Cory or

---

61. "The Most Dangerous Justice," *supra* note 2 at 9ff.

62. The "centre chair" is, of course, the Chief Justice, who is by definition the most senior member of the Court. It is no longer Canadian practice that he necessarily be the longest serving member of the Court although, as it happens, Lamer is the most senior in this sense as well. "The door" is an American reference which may or may not be echoed in Canada, reflecting the practice of excluding clerks and secretaries from the judicial conference, so the most junior justice sits closest to the door to answer it should there be a knock.

Iacobucci during the early years of this decade, then a completely different set of voting patterns—a new "core" and a new set of "outsiders"—may well emerge. It will probably be less stable than the one to which we have grown accustomed, and it will probably be a different set of issues that provides the ground over which the new coalitions organize and re-organize themselves.

The departure of La Forest and Sopinka may yet prove to be the most important development of Lamer's chief justiceship. La Forest may not be the "most dangerous" justice, nor yet the most "powerful" judge on any approach or calculation, but he has nonetheless been one of the Court's most significant players as the principal spokesman for the "outsiders." Sopinka may not be the "most dangerous" justice either, but he was a solid member of the dominant core and a Court leader in his own right on an important range of issues. The departure of either of them makes a real difference to the way that the Supreme Court operates, the way it divides on critical issues, even the kind of law it makes. The departure of both of them strongly suggests that we may have crossed a real watershed, and that it may soon be appropriate to speak of a "late Lamer court" that will be significantly different from the "early Lamer court" of the last seven years—and even more so (given his central and pivotal position) with the departure of Cory in the summer of 1999.