Structures of Judgment: How the Modern Supreme Court of Canada Organizes its Reasons

Peter McCormick
University of Lethbridge

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj

Part of the Courts Commons

Recommended Citation
In recent decades, the Supreme Court of Canada has developed a distinctive and unusual way of organizing its reasons for judgment; concomitantly, it has developed a comparably distinctive style for its minority reasons as well. This article describes this new decision format and the elements into which it is typically divided, and compares it with the practices of appeal courts in other common law countries. It concludes first by theorizing about the purpose and the functions of decision formats and format changes, and then by defending the current Canadian style.

Au cours des dernières décennies, la Cour suprême du Canada a élaboré une façon distinctive et inhabituelle de présenter ses motifs de jugement; elle a aussi, simultanément, élaboré un style distinctif pour exprimer les motifs de la minorité. L’auteur décrit le nouveau format des décisions et les différentes divisions de chacune; il les compare ensuite avec les pratiques qui ont cours dans les tribunaux d’appel d’autres pays de common law. En conclusion, il émet d’abord une hypothèse quant à l’objectif et aux fonctions du format des décisions et des modifications aux formats; il défend ensuite le style adopté au Canada.
Introduction
I. Does format matter?
II. The data-base
III. Caseload and format
IV. The "full format" of Supreme Court decisions
V. The SCC format in a comparative context
VI. Minority reasons
VII. Fine-tuning formats
Conclusion

Introduction
What does a decision of the Supreme Court of Canada look like? This seems a rather innocuous question, and to those who follow the current Supreme Court on a regular basis, it seems to have a very obvious answer. I will demonstrate that both the question and the answer involve more complicated considerations than would appear at first glance. The "obvious" answer, as it turns out, is a recent contrivance, making its current ubiquity all the more intriguing: continuity may sometimes be its own justification, but change (especially pervasive and persisting change) requires an explanation.

The question is not innocuous because the making and the justifying of decisions is the entire work of the Supreme Court, its decisions the only mechanism through which the Court exerts influence. This is the fascinating paradox of judicial power, never more pointed than today. On the one hand, as none can doubt in the age of the Charter, Canadian courts in general and the Supreme Court in particular have considerable power, a much greater impact on the flow of political events and the evolution of public opinion and the development of public policy than their predecessors could ever have dreamt (or, in most cases, would ever have wanted). On the other hand, the judiciary is—as the stock phrase has it—the "weakest branch," lacking its own bureaucracy or police force to enforce its decrees or even to see if those decrees are obeyed. Even the judicial hierarchy is a less reliable tool than one might think, because lower court judges are principled professionals who also need to be persuaded, locating themselves along a continuum between reticence (not to say resistance)
and enthusiasm as they respond to those decisions. Ultimately, the Court has all the power that people think it is appropriate for the Court to have at any given time, no less but no more; and it is through its written decisions that the Court seeks to maintain or augment that power.

And the answer is not obvious because the Court has clearly changed the format of its decisions in recent decades—the *Supreme Court Reports* through the 60s, 70s, 80s and 90s reveal an evolution in the way that the Court explains itself, a change in form with substantive implications. The current format seems transparent and routine today, but it was only clearly established under Lamer; thirty years ago, a distinctly different presentation style was similarly transparent, equally routine to its contemporaries. The very fact that one can speak of a standard format is an important consideration in its own right, refuting the fully plausible response that there is no standard format, that the appearance of a Supreme Court decision depends on the judge and the type of case and possibly a number of other variables as well.

My purpose is to describe the modern decision-delivery format of the Supreme Court of Canada—to identify its major elements and their sequence, and the functions that each element performs within the broader framework. Equally important, the emergence of a new standard format for the judgment of the Court has been accompanied by the emergence of a comparably standard appearance for minority reasons as well. To an extent that was not true a few decades ago, the two sets of reasons—majority and minority—now mesh in a new way as an institutional product that tells a new story about what the Court does and how it sees its role. I shall conclude by suggesting why the way the Court explains itself makes a difference, and appraising the Supreme Court’s new format in terms of how it contributes to the Court’s functions in this new century; in the process, I will compare the modern Supreme Court format with that of other comparable common law courts.

I. Does format matter?

One immediate objection might be that the format has nothing to do with the real product of the Supreme Court, which is doctrine. Not the wrapping, but the content, of Supreme Court decisions is what really matters, and it would matter just as much if it were scrawled in point form on the backs of envelopes. As all parents know, toddlers on Christmas day are likely to play with the empty boxes or the wrapping paper, but it does not take

---

many years for them to learn that what really matters is what is inside. Arguably, we Court-watchers should do likewise.

But even this homey metaphor can be unfolded to support my point, because the wrapping is an important part of the package. Putting something under the tree, wrapped in Christmas paper to make it part of the season, wrapped in the first place to create a pleasant mystery and to keep a secret, and sitting for some time to prolong the suspense: this is quite different from casually handing something over in the bag from the store, and saying “I thought you’d like this.” Both are nice, to be sure, but they are not the same thing.

Similarly with the courts—the packaging is part of the message, and not an unimportant part. Leave any set of practices in place long enough—decades, even centuries—and the original purposes may be taken for granted, overlooked, even forgotten. But when the packaging is changed, and in particular when it is changed suddenly and systematically, this must have been done to serve a conscious deliberate purpose—if there were no purpose, no reason at all, then continuity would be the more plausible choice. I will demonstrate the abruptness and extent of the change shortly; let me first defend the idea that the way that the Court organizes, presents and packages its decisions is coherent and purposeful, relating to the role of the Court and its relationship to other actors.

For example: consider the *seriatim* decision, the practice whereby every member of a multi-judge appeal panel delivers a full free-standing set of reasons, each writing as if nobody else were doing so, their “votes” for and against the appeal being totalled to generate an outcome. To this day, the English House of Lords usually delivers multiple sets of reasons, many of them largely parallel; the United States Supreme Court famously did so until John Marshall taught them the advantages of greater solidarity; our Court delivered many *seriatim* judgments until the 1920s and 1930s; and the High Court of Australia still delivers many *seriatim* decisions today (especially in constitutional decisions). To many, such a process

---


appears pointless, wasteful, and doubly inefficient. It is inefficient first, because all the judges are busily drafting reasons that will, much of the time, simply duplicate each other redundantly at what can be very great length, covering the same ground and citing the same authorities to reach the same conclusion, profligately squandering that most relentlessly finite of appellate resources, judicial person-hours. It is inefficient second, because one has to read all the reasons (or at least all those supporting what becomes the outcome) in order to be sure that they simply duplicate each other, and to be able to distinguish common ideas—which become precedent by their commonality—from stand-apart solo suggestions—which must be obiter.

The context which explains this now-curious practice is formalism, the idea that for every judicial question there is a single correct answer, for every statute or document a single objective meaning, which yields itself to trained experts applying mechanical procedures under fixed and clearly established rules. With law as with mathematics, formalism suggests, all professionals tackle any given problem in the same way, generate the same answer by the same process, and explain both process and answer in parallel terms; we can, the formalist says, demonstrate the truth of this proposition by having five (or seven or nine) of these professionals listen to the problem and then retire each to generate their own answer. The fact that they produce highly similar products vindicates their professionalism; more importantly, it validates the objectivity and the correctness of their separate and independent answers. We can think of it as the judicial equivalent of the medical second opinion, save that there are more than two opinions and they are simultaneous rather than sequential. The seriatim judgment is not only defensible; in the context of formalism, it is the logical and transparently convincing way for a panel appeal court to fulfill its role. The shared understanding of the nature of the law and the role of the court directs and constrains the form—the "packaging" and the presentation—of judicial doctrine.

For a second example: consider the decisions of a civilian appeal court such as the Court of Cassation of France (also called the Supreme Court of Appeal, which on its own website refers to itself as the Supreme

5. My discussion of formalism is based on Frederick Schaver, “Formalism” (1987-1988) 97 Yale L.J. 509; using this to explain the seriatim style is my own idea.
6. As John Orth intriguingly points out, even my assumption of an odd-sized panel is anachronistic in this description, since it anticipates serious disagreement and works in advance to avoid any prospect of the unfortunate confusion of a tie vote. In the world of the seriatim judgment, the expectation is that the members of the panel will all agree, that disagreement will be rare (albeit unfortunate when it occurs), and that close votes simply will not happen. See Orth, supra note 2, esp. ch.1.
Court of France). To someone familiar with common law Supreme Court judgments, these are curious documents. They are rarely more than a paragraph long, and often a short paragraph at that; they follow a rigid formula with a string of "whereas" clauses, some flatly stating facts and others identifying the appropriate section(s) of the relevant code, culminating in a "therefore" that is the outcome and the remedy. They lack the discursive argumentation we would expect to find to justify the rejection of alternative outcomes or argumentative tracks, to explain to the losers why they lost. Small wonder that a generation of comparative legal scholars grew up wondering if these were really parallel equivalents to common law decisions, or if there was something covert going on behind the panel’s brief, formulaic and invariably unanimous decisions.

But this, too, flows from the civilian understanding of the role of the judge and the nature of the system. First, the codes are understood to be simple and straightforward, comprehensive and easily understood, unfolding their meaning in an objective and transparent fashion—hence the mechanical flatness of the brief "whereas" clauses stating the law. Second, it is neither expected nor desired that the judge should do anything more than apply that flat objective meaning to the immediate facts; imagination and creativity (even the act of interpretation) would involve a discretionary judicial law-creating power that is completely repugnant to the civilian system. Third, since judicial decisions are not supposed to have any precedential value in the same or lower courts, there is no need for expansive explanation. Again, the shared conception of the function of the court directs the form of the decision.

We from the common law tradition might ask why there is no consideration of alternative theories of the case (that is to say, alternative explanatory frames which might so organize the facts as to direct different outcomes and consequences), no consideration of the way that the allegedly flat statements in the codes might be interpreted or worked off each other to subtly alter their meaning, no discussion of the contextual circumstances or the policy consequences of the different "spins" that might result from either of these or their combination, no careful fitting of the immediate case and decision into the broader and inevitably evolving framework of the law and of the judicial understanding of that law. But in fact this goes on all the time. The French process includes another official (a juge debout whose work supplements that of the juges assis) whose job it is to develop the documents on which the panel of judges bases their cryptic formal decision, and those documents contain explanatory alternatives, interpretive options and policy consequences galore. And the brief formal decision is often accompanied simultaneously by, and printed in
Structures of Judgment: How the Modern Supreme Court of Canada Organizes its Reasons

juxtaposition to, a scholarly commentary by a high-ranking law professor which locates the immediate decision in the framework of other decisions and commentaries, and subjects it to harsh criticism should it fail to fit. In the common law world, we find all these elements in a single rhetorical package, attributed to a specific judge and signed by enough colleagues to constitute a majority judgment of the panel; but in the civilian system, these are separate functions performed by different actors, and only some are widely available.  

My basic point, then, is that the way that a panel appeal court presents its decisions is not random or arbitrary epiphenomenon, but rather it reflects an understanding by the members of the court of their role, of the way they interact with other actors within the legal and judicial system. Once the basic elements of that role and those interactive relationships are understood, then the format of the decisions makes sense; indeed, it can become utterly self-evident, such that one cannot imagine from within the system how it could look otherwise. My present purpose is to perform a similar analysis of the decision format of the Supreme Court of Canada.

II. The data-base
This discussion is based upon a consideration of the cases decided by the Lamer Court and the McLachlin Court, including every written decision handed down by the Supreme Court between 1 July 1990 and 31 December 2007. The initial intention had been to include the Dickson Court as well, but this foundered on the fact that the Dickson Court is clearly the transitional period, and it is only the two most recent chief justiceships whose decision-delivery practices are so similar as to justify treating them as a single set of decisions. The starting date of 1 July 1990 is therefore not a matter of arbitrary choice but rather one that is dictated by the material: what is described is a decision delivery style that has clearly dominated the Court's written judgments since 1990, but that equally clearly did not do so before that date.

Specifying "written judgments" explains why the numbers are somewhat smaller than might have been expected. The Lamer Court handed down almost one thousand decisions over the not-quite-a-decade; but about a third of these were oral from-the-bench decisions, delivered on the same day arguments were heard. Similarly, the McLachlin Court as of December 2007 had handed down 592 decisions, but about one-

---

sixth of these were oral from-the-bench decisions. As might be expected, these were skewed toward appeals by right, skewed toward smaller panels, skewed toward dismissed appeals, and skewed heavily toward very short rather than extended reasons. Omitting these provides a better focus on the critical question: when the Supreme Court has a decision that it wishes to explain at some length to some broader public, how does it organize that explanation? Oral decisions, by contrast, can often be justified in a single paragraph—sometimes in a single formulaic sentence that can be as short as a dozen words. (“The appeal is dismissed for the reasons given in the court below.”)

Narrowing the count to reserved decisions reduces the total number of cases to 1166, of which 90.1% (89.6% for the Lamer Court, 90.8% for the McLachlin Court) correspond to the “full format” described below. By way of comparison, only a handful of the decisions of the Dickson Court (and a striking 0% of the decisions of the Laskin court) follow the same format. These numbers in themselves justify both the description of a new standard format for Supreme Court decisions, and the suggestion that this format has emerged recently in response to some specific consideration.

III. Caseload and format

Look at a set of Supreme Court reasons from its first decades, in the 1870s or 1880s, and it is easily described: it is a single block of text. By “single block” I do not suggest that it is not divided into paragraphs, or that the flow of text is not interrupted by appropriately attributed direct quotations (from statutes, from the lower courts, or from other judicial decisions); indeed, my impression is that the proportion of quoted material is higher for the early years than it has been since. But my point is that the text is never divided into sections with headings that would permit a reader to know when to skim and when to read closely.

Look at a set of Supreme Court reasons a century later, in the 1970s, and they look much the same—still a single block of text, broken into paragraphs and interrupted by quotations. The number of multiple sets of reasons (especially the number of cases that approach seriatim form with all or most of the members of the panel writing at comparable length without any reference to each other) has fallen, and the reasons for judgment have become somewhat longer, but the growth is actually rather modest—only about two dozen reasons for judgment of the Laskin Court

8. The shrinking fraction is interesting in its own right. For a more extended consideration of this phenomenon, see Peter McCormick, “Compulsory Audience: Appeals by Right and the Lamer Court 1990-99” (Paper presented to the CPSA Annual General Meeting (Congress of Social Sciences & Humanities, Toronto, June 2002)) [unpublished].
Structures of Judgment: How the Modern Supreme Court of Canada Organizes its Reasons

exceeded 10,000 words in length, and a number of the early sets of reasons by the Supreme Court approach this figure.

But look at a Supreme Court decision from any time after July, 1990, and the chances are very high (90% of all reserved judgments) that it will have a very definite and predictable form, one that I am calling “full format.” The first “pure” examples of this style occurred some time earlier, at the very end of the Dickson Court. Lamer’s reasons in R. v. Ross, [1989] 1 S.C.R. 3 almost qualify, although the single-sentence disposition is not broken off into a separate labelled section, so perhaps a stronger candidate is Gonthier for his reasons in Elsom v. Elsom, [1989] 1 S.C.R. 1367, his first substantive judgment for the Court. The ground broken, a string of other examples of the model follows, authored by Gonthier, Dickson,9 Lamer, Wilson and McLachlin. By 1990, these have ceased to be the exception and have become the standard rule; now it is a departure from this format, not the following of it, that has become unusual.

<table>
<thead>
<tr>
<th></th>
<th>Lamer Court</th>
<th>McLachlin Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full format</td>
<td>585 (89.6%)</td>
<td>464 (90.8%)</td>
<td>1049 (90.1%)</td>
</tr>
<tr>
<td>Other format</td>
<td>17 (2.6%)</td>
<td>7 (1.4%)</td>
<td>24 (2.1%)</td>
</tr>
<tr>
<td>Unformatted</td>
<td>51 (7.8%)</td>
<td>40 (7.8%)</td>
<td>91 (7.8%)</td>
</tr>
<tr>
<td>Total:</td>
<td>653</td>
<td>511</td>
<td>1164</td>
</tr>
</tbody>
</table>

The 90% figures in the table validate my assertion of a standard format, but it is still worth asking about the other 10%. Most of them (a remarkably consistent 7.8% for both the Lamer and McLachlin Courts) are the unformatted decisions reminiscent of the earlier period, and the major reason for the lack of format is obvious—they are very short. The average unformatted decision is 1400 words long, about three pages of text. One feels that there is sometimes more going on than appears on the surface—for example, when a case is granted leave, assigned to a full nine-judge panel, and judgment is reserved for over a year, it is curious to have it decided unanimously with reasons less than 500 words long.10 But if the reasons are going to be so short, the lack of segmentation into formally labelled parts is hardly surprising.

A significantly smaller number (2% overall, slightly more for the Lamer Court but slightly less for McLachlin) are divided into labelled

9. Although Dickson has a long series of decisions over the previous several years which differ from my “full format” only because rather than having an “Analysis” section divided into sub-sections with content-specific ad hoc labels, Dickson makes each of these a separate section.
segments, but those do not follow anything resembling the full format model that I am about to describe. The labels used in these cases are *ad hoc* and content-specific—that is to say, they look more like the transitional formats of the Dickson Court than the vast bulk of the decisions handed down since. I had expected that many of these would be reference cases, which do not always lend themselves to the standard format (although this is less true of reference case appeals from provincial courts of appeal), but these account for only four of the twenty-four. A pair of judges (McLachlin and Deschamps) account for more than a third of all the examples, but the others were authored or co-authored by ten different judges; only eight judges have never written one. Public law cases are over-represented with ten examples, Charter cases under-represented with two. There is no on-the-surface explanation of why these cases were handled differently; for my purposes, the point is that their numbers are very small.

IV. *The “full format” of Supreme Court decisions*

After Lamer assumed the chief justiceship, the new “full format” dominated. The new practice involved a number of separate segments headed by generic labels, as shown in the table. The “frequency” column demonstrates that this was something short of an automatic “cookie cutter” approach; my point is not that every decision used every one of these labels (although a rather impressive three hundred did), but that every decision was organized around labels drawn from this set. There was a certain degree of variation, but not to the extent of eclipsing the general practice; sometimes the facts were folded back into the introduction, or alternately sometimes the fact section was expanded to include the judicial history. More recently, the statutes/constitution section has increasingly been relegated to an appendix (especially if it is at all lengthy), although I think it would be premature to drop this as a normal segment of the typical decision.

---

11. Iacobucci, Stevenson, Wilson, Arbour, LeBel, Abella, Charron and Rothstein.
The table showing the most common elements and their average length is deceptively straightforward. For one thing, the labels for the standard sections are obvious, even banal—expressed in generic terms, what other aspects or elements would one expect to find? But part of my point is that the use of generic labels is the novelty. The Supreme Court began with undifferentiated blocks of text, a flow of words (broken into paragraphs and interrupted by quotations) that was not divided into sections even on those occasions, increasingly frequent into the 1970s, when the decisions began to stretch to and past ten thousand words. Then, briefly during the 1970s, the text was sometimes broken into sections that were numbered but not labelled, a curious step that seems to accomplish very little. Then the text was broken into segments that carried content-specific labels, often in the form of questions that the segment proceeded to answer. The “end” of the process (at least so far) is the division into segments with generic labels, generic precisely for the purpose of fitting a wide variety of types of cases.

It has always been the case that Supreme Court decisions usually give us some elements of the factual background, often tell us about the actions of the lower courts, and almost always give us an analysis which provides substantive reasons for the outcome, finally concluding with the disposition or outcome—but it has not always been the case that the Court divided its decisions into segments that carried these explicit labels, or that such a large proportion of the cases routinely included so many of the elements.

The “proportions” column indicates how many “full format” sets of reasons include a segment with the indicated title or some minor variant thereon. Since the format is used for a wide diversity of cases, variously resolved in as little as a thousand or as many as 30,000 words, this is only to be expected. What I am picking up on is the presence or absence of the labelled segment, and I do not mean to imply that the material is completely absent from the reasons; for example, if the “Background” section concludes with a paragraph or two on the decisions of the trial and appeal courts, my count would notice the absence of the labelled section rather than the presence of the information. And because not all segments are always present, the average lengths of course cannot be totalled to give an average decision length without being prorated against the frequency of their appearance.

Almost every case decided by the modern Supreme Court begins with an “Introduction,” usually labelled as such but sometimes simply an unlabelled paragraph or two before the first labelled and numbered section. These average about 250 words in length, or about 3% of the length of the average set of reasons, although they have been showing a tendency to get longer; the average introduction for the McLachlin Court is about double the size (360 words, or 4.0% of the total) that it was for the Lamer Court (170 words, or 1.8% of the total). Only six times for the Lamer Court, but 21 times for the McLachlin Court, have they exceeded 1,000 words.

The second section (although sometimes the first numbered section, a nicety I will ignore) is usually labelled “The Facts” (or “The Background” or “The Factual Background”). These tend to be somewhat longer, averaging just under one thousand words, or less than 10% of the total length of the average reasons for judgment. If the comments on the actions of the lower courts are particularly brief, they may be folded in as the last paragraph or two of this section. Not surprisingly, given the unusual circumstances of such cases, the “outlier” on this score is a reference case (Reference re Education Act, [1993] 2 S.C.R. 511) which actually has two consecutive sections both labelled “Background” and totalling over 8,000 words, almost one-third of the total; but this is very much sui generis, and no other case remotely approaches it.

There is usually a third section labelled “Judicial History” (or “Actions Below”) which describes what has happened in the lower courts (and/or, when relevant, in the board or tribunal which may have preceded the first judicial involvement). These, too, average about 1000 words (10% of the average total length), although they tended to be slightly longer for the Lamer Court (1130 words) than they have been for the McLachlin Court.
Structures of Judgment: How the Modern Supreme Court of Canada Organizes its Reasons

(900 words). The wording tends to be very flat and neutral; even if later sections of the decision depart from or criticize the analysis of the lower courts, there is usually no indication of it here. The outlier here is *R. v Pires*, 2005 SCC 66, in which the analysis is effectively folded back into the judicial history section by being juxtaposed, segment by segment, to what happened in the British Columbia Court of Appeal, but this again is one of a kind.

In the full format, the next two sections are the “Relevant Statutes” (and/or “Relevant Constitutional Provisions”), which are generally direct quotations from the legal text, and the “Issues” (or “Questions”), which are usually but not invariably questions explicitly set by the Court (usually the chief justice) before oral argument. The statutory/constitutional material averages about 550 words and the issues section averages about 250 words, the numbers staying constant for the two Courts. That said, these two are the most optional of the sections in the full format; only about half of all the formatted reasons use either of them. In recent decisions, there has been a tendency sometimes to relegate the statutory material to an appendix rather than to include it in the body of the decision text, especially if the quoted material is rather extensive, but it would be going too far to describe this as replacing the labelled segment completely.

Unsurprisingly, by far the largest part of the reasons deals directly with the doctrinal issues, presenting the legal arguments that justify the conclusion, and this section is usually labelled “Analysis” (or, less frequently, “Discussion”). This was the last section of the standard format to evolve; dozens of Dickson Court decisions use most of the standard format, but then use content-specific labels for a string of numbered sections that now would be sub-sections of a single Analysis section. These average almost 7,000 words in length; put differently, they account for fully 70% of all the words that are written in these reasons. Most of them are divided into smaller sub-segments with non-generic headings; and in some of the very long decisions, the sub-sections are themselves further sub-divided into what can become very complex structures that invite, but (at least within the time period considered) never receive, a table of contents.14

The final section gives the outcome, (or “Conclusion” or “Disposition” or “Remedy”), usually in terms of what happens to the appeal itself (is it

---

14. Although more recently, the Supreme Court has in fact taken just such a step: the decision of Rothstein J. (for a unanimous Court) in *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 represents the first time that a set of reasons has employed a table of contents laying out the structure of the reasons and the paragraph number with which each section begins.
allowed or dismissed), but sometimes in terms of what has happened to the initial judicial decision, especially if awards or remedies have been altered; it also sometimes speaks to costs. It averages just over 100 words; indeed, I have the impression that sometimes the judges are engaged in a private competition to see how low they can reduce the count for this section, there being several dozen examples of laconic utterances with word counts in the single digits. Very rarely, there will be two of these three labels heading separate segments. The outlier here is *R. v. Swain*, with an extensive 8000-word conclusion following the 10,000-word analysis, but this is highly unusual.

About one full-format decision in every seven includes all or most of the labelled segments I have indicated, but inserts one or more additional labelled sections as well. On average, when these additional segments exist, they average about 1000 words in total (or about three pages of text). Most of the labels are very content-specific rather than generic. For example: “The Publication Ban”; “The Statutory Interpretation of Section 70(6)”; “The Wiretap Issue”; “The Interveners”; “The Garafoli Leave Requirement”; and so on. But there are two important exceptions to this general observation, two distinct sets of “other” labelled sections that are recurrent rather than unique and specifically tailored. The first is generated by the presence of two or more separate sections from the disposition/conclusion/outcome/remedy set; this happened on twenty occasions. The second is the heading “Application [of the analysis] to the immediate case,” variations of which account for twenty examples; this more commonly occurs as the last sub-section of the larger “Analysis” section, but sometimes it is floated out on its own.

These section labels constitute the format around which the Supreme Court of Canada has organized the delivery of its reasons in reserved decisions since 1990. It is not quite an obligatory framework, as it if were handed out on laminated sheets to all new appointees–this is demonstrated both by the fact that 10% of all reserved decisions do not follow the format at all, and by the fact that fully two-thirds of all reasons omit or combine one or more of the “standard” labelled sections, or insert additional sections on a largely case-specific basis. Still, there is a definite centre of gravity to decision delivery that was not there for previous chief justiceships, and this suggests a conscious shared decision to work toward an institutional product.

V. The SCC format in a comparative context

It may seem that I have laboured mightily and brought forth very little. The material covered in the standard format is obvious and unsurprising, and the labels themselves border on the banal. After all, one might well ask, if a Court were going to organize its reasons in terms of a standard set of labelled segments, what else could they conceivably look like? But this challenge fails; it misses the point in four different and important ways.

First, it assumes that there is some logical or functional or historical imperative for a court to adopt a standard format for its judgments that will be followed by all judges for all sorts of cases. But this is simply not true. There is no compelling reason why such splendid individualists as appeal court judges, experienced professionals with solid credentials and constitutionally guaranteed judicial independence, should casually and routinely surrender their own unique and principled conceptions of an appropriate appearance for their reasons for judgment; nor is there any compelling reason on the face of it why all types of law (Charter, constitutional, public, criminal, private) in all types of cases (major and minor) should be assumed to call for the same format even when formats of some type are indicated. The variety of types of cases, exacerbated by the variety of judicial experiences and stylistic preferences, would suggest instead a variety of formats. Forget for the moment the question of what the format looks like; the first surprise is that there is a normal or standard format at all, followed in 90% of all reserved decisions.

Second, it assumes that if there is a standard format involving the division of a judgment into segments, those segments must be labelled. But this too is a conceptual leap that is supported by no compelling logic and massively unsupported by experience. Historically, when the unbroken flow of text in Supreme Court of Canada decisions was first interrupted for segmentation, this simply took the form of flat numbers (typically, Roman numerals), devoid of any label to render more transparent the internal logic of the segmentation. As suggested by examples from other countries (to be discussed below), these numbered segments can be further sub-divided into smaller segments that are similarly identified only by letters of the alphabet, similarly lacking any labels of any sort. The decision to segment is one thing, the decision to label another.

Third, it assumes that if there are to be labels attached to segments, these labels must be generic rather than \textit{ad hoc} and content specific. Again historically, when the Dickson Court began to experiment with formats, it initially worked with \textit{ad hoc} content-specific labels, often in the form of questions that the segment was directed to answering, alternatively in terms of indicating specific sections of the legislation or specific cases in the
precedential string that called for focused attention. The practice of appeal
courts in other countries similarly illustrates the sporadic attractiveness of
this logical alternative, and a certain (small) percentage of Supreme Court
of Canada decisions continue to respond to this impulse as well. The use
of generic and repetitive labels cannot simply be assumed; it represents a
further non-obvious non-determined choice among several alternatives.

*Fourth,* it assumes that the generic labels in the Supreme Court of
Canada’s current standard format constitute the only available set of such
labels—but despite the obvious, even bordering-on-the-banal, appearance
of the labels, this is demonstrably false. As I will explain below, there is
another set of appeal courts in the world that has also adopted a “generic
labels” format that is frequently used, but this set of labels is both smaller
than the SCC set (excluding a number of the frequent elements) and
larger than that set (including one element that has not earned itself an
independently labelled segment in Canada).

Thus far, I have been primarily concerned with comparing the SCC’s
current practices with its previous (pre-1984 and pre-1970) practices; I
now propose to support the above points by broadening the comparative
background to include a variety of modern common-law courts in
comparable countries.

*Three Commonwealth courts*

None of the three Commonwealth courts that I will consider have adopted
a standard format that is at all comparable to the Canadian style, or (for
that matter) a standard format at all.

*The United Kingdom House of Lords* (now the Supreme Court of the
United Kingdom) is still characterized by a tendency toward multiple
judgments, with more than one judge from the panels of usually five
(sometimes seven) judges providing reasons. There is often a single
longer set of reasons that can be thought of as a lead or central judgment,
but it is usually accompanied by one or more sets of additional reasons,
sometimes dissenting but often concurring, and these are invariably
unformatted. There is no standard format. The most common style
involves an unformatted flow of text, unbroken by sections or labels of any
kind; the next most common involves a more-or-less standard start (facts,
proceedings) followed by *ad hoc* content-specific labels. A small number
of decisions are organized around reasons which identify a string of issues
raised in the appeal, dealing with each one in turn. In general, decisions
tend to be considerably shorter than those from Canada or the U.S.

*The Judicial Committee of the Privy Council* is no longer (since
1949) the final court of appeal for Canada, but it continues in existence
and acquired significant new jurisdiction with the devolution of authority
to Scotland and Wales. Its decisions usually take the form of a single
set of reasons attributed to a specific author, although (unlike the practice
when the Judicial Committee still heard appeals from Canada) minority
opinions are now not unheard of. The normal format, even for longer sets
of reasons, is an unformatted flow of text, with the occasional decision
using \textit{ad hoc} content specific labels. Even more occasional (only a handful
of examples) is a format involving three generic labels (The Facts; The
Litigation; Conclusion), a style that is similar to that of the U.S. Circuit
Courts of Appeal that will be discussed below.

The decision delivery practices of the \textit{High Court of Australia} are
unusual in two respects. First, they tend to give \textit{seriatim} decisions,
especially but not only in constitutional and public law cases—\textit{seriatim}
meaning that each judge writes a full set of free-standing reasons as if
their is the only opinion being rendered by the Court. The \textit{seriatim} style
still lingers for the House of Lords (although it is no longer the dominant
approach on that body), and it was followed on the USSC in the eighteenth
and on the SCC in the nineteenth centuries, but it has all but vanished
for both courts; it survives in Australia for a significant number of cases,
although it is by no means predominant overall. The second unusual
feature is that where a block of judges combine to deliver a majority (or
unanimous) judgment for the court, they often do not designate a lead
judge who will be the nominal author, but instead deliver a joint judgment
that is co-authored—putatively equally—by all the judges on the panel.\textsuperscript{16}

The text itself, however, usually follows the British practice in that
it is an unformatted flow of text, even when the reasons themselves are
extensive. A minority of cases (but not so small a minority as to make
it particularly unusual) use \textit{ad hoc} content-specific labels to break the
text, but without any standard format. Further complicating things is the
fact that when the panel fragments, there is no set of majority reasons—
a “judgment of the Court” in Canadian terminology, an “opinion of the
Court” in American terminology—that is specifically designated on its face
as carrying particularly authority, and there may be several sets of solo

\textsuperscript{16} It is almost certainly the case that actual practice falls somewhere between the two extremes
of single author and evenly-shared responsibility: in Canada there is a lead author (more rarely but
increasingly, lead authors) but the principle of circulating drafts and then accommodating critical
suggestions means that the final reasons are really something of a joint product; and in Australia it
seems unlikely that there is not a single judge who takes the responsibility of writing an initial draft
that will then absorb suggestions from all the rest. On the one hand, the Australian practice means
that we do not know who the lead author was; on the other hand, the Canadian practice obscures the
contributions of those other than the lead author.
reasons of comparable length each with its own idiosyncratic set of *ad hoc* labels.

**American Courts**

The United States Supreme Court is clearly the premier court in the world for the modern model of judicial power, exercising the power of judicial review in the context of considerable (but not unlimited) judicial independence. It has never been the Canadian practice to follow, or even to attach particular importance to, American practices and models, one indication being the fact that English judicial citations continue even in this new century to outnumber all American citations, let alone citations to the USSC. It is therefore not particularly likely that the SCC would simply emulate the USSC in its decision-delivery format, although it is somewhat less unlikely in the last quarter century than it would have been earlier.

The USSC has developed a distinctive and increasingly uniform format for its reasons, fully described by Delson, on whose account I rely.\(^\text{17}\) The earliest examples of this format date back to the 1920s, and since the 1940s it has become the standard format for all the opinions of the Court save the shortest; the fact that it gradually rather than abruptly became the full format suggests that this was a gradual conversion by example rather than a focused decision by the full court or something more or less imposed by a chief justice. Unlike the Canadian practice, the same format is also frequently used for dissents and concurrences.

Opinions of the United States Supreme Court are divided into Parts with roman numerals but no descriptive labels (either generic or *ad hoc*), and these Parts are further divided into sub-parts identified by letters of the alphabet, again without labels. On occasion, these sub-parts may be divided even further under Arabic numbers or lower case Roman numerals, again without labels. Other members of the panel may indicate agreement or disagreement with the opinion in full or with specific parts and sub-parts, and this is outlined in the last paragraph of the official syllabus that precedes every USSC decision.\(^\text{18}\) As a fairly typical sample (this one from *Republic of Philippines v. Pimentel*, No. 06-1204): "Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Thomas, Ginsburg, Breyer, and Alito, JJ., joined, in which Souter, J., joined as to all but Parts IV-B and V, and in which Stevens, J., joined as to Part II.


Stevens, J., and Souter, J., filed opinions concurring in part and dissenting in part."

It is often the case that the “I” section could just as easily be headed “Facts and Lower Courts” combining those two segments from the SCC format; “II” is often the analysis of the arguments of the parties; and “III” is often a short conclusion, but it would be a mistake to translate the “part” system exclusively in these terms. For one thing, there are exceptions; for example, in Riley v. Kennedy (No. 07-77, decided May 27 2008), Part I is a legislative history and the facts of the immediate case are not found until Part II. But the larger problem is that there are not always three and only three Roman numeral-headed sections. In the recent decision in Boulware v. United States (No. 06-1598, decided on March 3, 2008), Part I is a short and focussed discussion of the relevant legislation (relating to the income tax and penalties for evasion), and it is Part II that deals with the facts and the details lower court decisions. Part III (which one would initially be tempted to label “Analysis”) starts off with a Section A that looks at a number of relevant precedents and the basic principles they establish, a Section B that focuses on a major precedent (Miller) that is treated as being rather dubious, and then a Section C that continues the critique of Miller. And Part IV is not a conclusion, but rather more analysis—a consideration of the government arguments in the case—with Part V providing a single paragraph conclusion (“vacate and remand”). Similarly, in Snyder v. Virginia (Number 06-10119, decided March 19 2008), Section I again gives the case background, but the analysis is divided between Part II and Part III; the single-sentence conclusion is not given a Part label, but is separated from the rest of the text by three centred asterisks.

Major cases can have even more parts—Hamdan v. Rumsfeld, (No. 05-185 June 29 2006) for example, had seven—but shorter ones can have as few as two. My general point is that individual judges decide for themselves when they have moved on to a new issue that deserves its own segment; there is no implicit “‘I’ means such and such, ‘II’ means something else” understanding that directs the segmentation. Similarly, when minority opinions divide themselves into Parts, these have no connection to the divisions of the majority opinion; Part II of a dissent does not match up with Part II of the majority reasons. The United States Supreme Court has a standard format, but it is very much a unique development that can be opaque and puzzling to outsiders.

*The US Circuit Courts of Appeal*

There are thirteen Circuit Courts of Appeal in the United States, eleven numbered circuits each with appellate jurisdiction over the federal district
courts in two or more states, plus the District of Columbia Circuit and a special Federal Circuit. Strictly speaking, they are not comparable to the other courts that I have been discussing, since they are intermediate courts of appeal rather than national high courts, and therefore this last comparison should be taken with the appropriate grain of salt. Partly in the interests of brevity, but even more because the variations between the circuits are relatively modest, I will be dealing with all the circuit courts as a single block, rather than working through the circuits one at a time. My comments relate only to published decisions, not unpublished decisions (or, to use the somewhat different terminology used by some circuits, precedential decisions and not non-precedential decisions) for those circuits where this distinction is indicated up front.

There is no single standard format for circuit appeal court decisions, neither for the thirteen circuits taken as a group nor for any of the circuits considered separately. Instead, the recent decisions of these courts take four different forms, with the proportions varying somewhat from one circuit to another. The first form is the most obvious one, consisting of unformatted flow-of-text reasons. These are of course more common for the shorter decisions, but they are not restricted to this type alone. The Seventh Circuit,\textsuperscript{19} for example, contains some of the most highly regarded appeal court judges in the country (Posner and Easterbrook), and they often use the unformatted style even for very extensive reasons. A second type of reasons (generally the least common) uses a numbered format that imitates that of the United States Supreme Court. Given that this is the high court in the judicial pyramid within which the circuit courts of appeals are the intermediate appeal courts, some degree of emulation is only to be expected, but it is perhaps surprising that it accounts for such a small share of the total; the proportion seems to be highest in the D.C. Circuit\textsuperscript{20} and the Fourth Circuit.\textsuperscript{21} The third type of reasons (and generally the second least common) uses \textit{ad hoc} labelled segments, where the title signals the content of the ensuing section, sometimes in the form of a question.

But there is a fourth type of sets of reasons, used by every one of the circuits and generally the second most common, that is particularly relevant to the topic that I am exploring. These reasons are divided into three numbered sections after a short introductory paragraph; the first section is labelled THE FACTS (more rarely THE BACKGROUND) (the

\textsuperscript{19} Including Indiana, Illinois, and Wisconsin, with sixteen judges.
\textsuperscript{20} With jurisdiction over the District of Columbia, and with fifteen judges.
\textsuperscript{21} Including Maryland, North Carolina, South Carolina, Virginia and West Virginia, with nineteen judges.
all-caps are used in every circuit except the First(22); the second is labelled DISCUSSION; and the third is labelled CONCLUSION. Only in the Ninth Circuit,23 and only about half the time, there is a fourth section labelled STANDARDS OF REVIEW before the Discussion section.

Conclusions re comparison
The brief survey of Commonwealth and American courts makes my general points. First, it is usually not the case that there is a standard decision format generally followed by all judges of the court for all cases—this is true only of the Supreme Court of Canada and the United States Supreme Court. Second, it is not necessarily the case that even modern courts always or even usually divide decisions into segments, at least for the longer sets of reasons; again, this is only true of the Supreme Court of Canada and the United States Supreme Court. Third, it is far from common practice for western appeal courts to use standard generic labels for segments when they occur; this is true only for the Supreme Court of Canada and (on a more occasional basis) the U.S. circuit courts of appeal. Fourth, although the U.S. circuit courts of appeal are the only other courts regularly to use generic labels, they do not use the same set of generic labels as the Supreme Court of Canada, but a consistently and distinctly different set.

VI. Minority reasons
But the judgment of the Court is not the whole story; more than half of all reserved decisions of the Court involve one or more sets of minority reasons, either dissents (disagreeing with the outcome) or separate concurrences (differing in whole or in part with the reasons that the majority has presented for that outcome).24 Particularly intriguing is the fact that at the same time that the Supreme Court was inventing a style and format for the judgments of the Court, it also developed a style—also rather different from that of previous chief justiceships—for the presentation of these minority reasons. If the first development is interesting in itself, the second makes it even more so, and reinforces my comments about the format for judicial reasons constituting a distinctive institutional product.

22. Including Maine, New Hampshire, Rhode Island and Puerto Rico, with ten judges.
23. The largest of all the circuits, comprising California, Arizona, Nevada, Montana, Idaho, Oregon, Washington state, Alaska and Hawaii, with twenty-eight judges.
24. From the Supreme Court's own statistics, it might look like my "more than half" overstates the case; but the Supreme Court's actually counted category is "cases unanimous as to outcome" which excludes cases where the differences dividing the judges are expressed in separate concurrences rather than dissents. For a discussion of the practices and conventions surrounding the Canadian Supreme Court's use of concurring reasons, see Peter McCormick, "Standing Apart: Separate Concurrence and the Modern Supreme Court of Canada, 1984-2006" (2008) 53 McGill L.J. 137.
There are six essential features to this new minority writing style. These are:

First: Minority reasons are written in the full consciousness of being minority reasons. They are typically not “stand alone” reasons that can be read on their own, but the self-conscious reasons of a single judge or of a minority of the panel, appended to the majority reasons in an explicit and self-conscious way. In contrast, in *seriatim* style all the reasons look much the same, and the minority judges do not realize they are dissenting (or at least do not display any overt sign of such a realization) in the way that they structure and present their reasons.

Second: Minority reasons concede the logical primacy and priority of the majority reasons. The language actually suggests temporal priority, (“I have read the reasons of Justice X”) but since most disagreement presumably emerges at the conference immediately after oral argument when the majority reasons are assigned to a particular judge, this should not be taken literally. The clear implication is that we too should read the reasons of Justice X first, before looking at the message of these minority reasons. This acknowledgment is the first distinctive element of modern minority reasons, and it has a further advantage: since the *Supreme Court Reports* long retained the old practice of listing the reasons in the order of the seniority of the writing judge (rather than the more functional sequencing of judgment, concurrences, and dissents), it is the verbal formula that alerts us to the fact that reading the first set of reasons does not necessarily mean that we are reading the judgment of the Court, even if the format initially gives this impression. Only in 2005 did the Court alter this practice to present the majority reasons first.

Third: Minority reasons express “respect” or “deference” or “regret” for their differences from the majority reasons. Again, this is presumably more a matter of formality than candour—Supreme Court justices are proud and confident professionals, and we can be sure that what they really regret is the fact that their colleagues were unwilling to sign on with them—but these formalities are an important part of the presentation process. And it does show something that the polite language can almost make us overlook—there is something inherently confrontational, even subtly subversive of the process itself, in the act of disagreeing
formally and publicly with one’s colleagues in general and with the putative author in particular. This expression of courtesy is the second standard element of modern minority reasons.

**Fourth:** Minority reasons locate themselves by their opposition to a specific aspect of the majority reasons. The typical wording of this third element of modern minority reasons is: “I cannot agree with respect to X” where X is a specific point of law or question of interpretation. Not only do minority reasons typically yield pride of place to the minority reasons, but they usually indicate the part of the larger majority reasons to which their arguments should be appended (and thereby implicitly accept, or at least do not explicitly reject, the rest of it).

**Fifth:** Minority reasons accept their secondary nature by being shorter, typically much shorter. The shorter length is double-caused: first by the fact that the minority reasons need only respond to the analysis and not to the other elements of the reasons; and second by the fact that usually they focus on a sub-set of the issues and ideas dealt with in the reasons. Since there are some spectacularly long minority reasons, this assertion may seem a little curious; but most of the really long minority reasons result from a vote swing within the panel—the (long) reasons that started as majority reasons lost signatures, and the (shorter) reasons that were initially drafted along the lines I have just been describing became the judgment of the Court. In a real sense, then, these “swing” decisions confirm rather than compromise the reason-writing practices that I have identified as characterizing the modern Supreme Court.

**Sixth:** The traditional discussion of precedent would have it that only majority reasons survive to steer the law, and minority reasons are at best “losers’ history,” such that it would seem that this distinctive style is a solid invitation to be ignored. But in fact the ideas expressed in minority reason remain “in play” as part

---

25. “Putative” because I assume that the reasons of the majority, although formally assigned to (usually) a single lead author, are in fact influenced by all the members of the panel; the appearance of solo authorship should not be taken literally.

of the judicial repertoire; about one-tenth of the Lamer Court’s citations to its own earlier decisions were citations of minority reasons, and although this practice has diminished somewhat more recently, it has not vanished.

To be sure, my summary oversimplifies, because the development of the various elements of this new minority style has been gradual and is not completely uniform. Some judges are less likely than others to structure their disagreement around such formal politeness; more intriguing, there are some pairings of judges that are far more likely to generate (for example) the respect terms on the occasion of disagreement, and others where it never appears. But the point remains that there is a distinctive and recurrent pattern and style to the Supreme Court’s minority reasons, an explicit way of connecting themselves to the judgment of the Court.

The combination of these two developments gives us a presentation style for Supreme Court decisions that is clearly a distinctive institutional product. The majority reasons take a specific form, carefully including a string of basic elements in a formal and labelled way; the minority reasons acknowledge themselves as such, and respectfully position themselves by giving focused consideration to one or two points of disagreement. And this disagreement is sometimes carried along with the Court’s subsequent consideration of the case, cited and discussed (in positive rather than negative terms) far more often than the traditional doctrine of stare decisis might have led us to expect.

VII. Fine-tuning formats

It would be a mistake to think about the way that an appeal court presents itself and its decisions as something secondary or epiphenomenal, some casual by-product of the interplay of a specific set of individuals serving on the bench at any given time, or something absent-mindedly copied from their predecessors. On the contrary, courts and judges often collectively consider what they are doing and how best to do it, as is demonstrated by those occasions when they change their presentation style very abruptly. To move from specific examples to the general principle, academics have suggested that there are specific demands that judges try to balance in a shifting social context, and this periodically calls for a dramatic readjustment

28. The best documented common law example is the move away from seriatim style. For England, see M. Todd Henderson, “From Seriatim to Dissensus and Back Again: A Theory of Dissent” [2007] Sup. Ct. Rev. 283 [Henderson]. For the USSC under John Marshall, see Orth, supra note 2. For the SCC, see L’Heureux-Dubé, supra note 3.
of the way that the court presents itself. Henderson suggests that courts are trying simultaneously to pursue the long-term projects of (expansively) “increasing the power of law courts over other forms of dispute resolution” and (defensively) protecting itself from social and political forces that would contain or constrict that power.\textsuperscript{29} Popkin thinks that their dual project is (externally to the legal profession) to “project judicial authority to the external public” and (internally to the legal profession) to “apply the law to decide cases (especially to adapt to change),” and adds that these external and internal goals are often in tension.\textsuperscript{30} Lasser sees them as striking a balance between mechanical application (“following the rules laid down”) and purposive policy considerations.\textsuperscript{31}

And Dorf speaks of a “tension between the concrete and the abstract” that inevitably lies “at the heart” of judicial power.\textsuperscript{32} For all four,\textsuperscript{33} the courts have long-term goals pursued through changing circumstances that call for evolving strategies, a process that Henderson describes as “punctuated equilibrium.”

Certainly there is no question about the “changing social circumstances” within which the Supreme Court of Canada has found itself over the last forty years. First, there was a dramatic transformation of the entire Canadian court system during the 1970s—the replacement of Magistrates Courts with Provincial Courts (with their own Chief Judge); the “consolidation movement” that replaced the two-tier s. 96 trial courts in most provinces with a single trial court, usually but not invariably styled the Court of Queen’s Bench; the establishment of free-standing specialized courts of appeal in all the provinces; and the establishment of judicial councils (initially at the national level, but progressively in all the provinces as well) to enhance the nonpartisan elements of judicial appointment and to solidify the practices surrounding judicial independence. For the Supreme Court itself, the Trudeau/Turner reforms transformed the credentials of a typical judge, with a greater emphasis on academic credentials and appellate judicial experience, on public service rather than partisan

\textsuperscript{29} Henderson, \textit{ibid.}


\textsuperscript{31} Lasser, \textit{supra} note 7 at ch. 2 and 6.


\textsuperscript{33} To be sure, they are pursuing quite different points as they identify these double imperatives. Henderson’s focus is the fall and more recent rise in the frequency of minority opinions; Popkin’s attention is directed more to the style and tone of judicial reasons (majority and minority alike); Lasser wishes to compare civilian and common law judicial deliberations and decisions; and Dorf is exploring whether the use of \textit{obiter dicta} has allowed U.S. courts to find a way around the apparent ban on advisory opinions on those occasions when it is useful to do so; but all suggest a strategically directed balancing act that generates different answers at different times, and that is my point.
connections, and on a diversity of personal backgrounds. There were also important institutional changes to contain a burgeoning caseload, including the creation of a two-tier Federal Court to replace the single-tier Exchequer Court, and a dramatically increased leave jurisdiction that gave the Supreme Court greatly enhanced control over its own docket.

This restructuring of the Canadian court system in general and the Supreme Court in particular was followed up by an even more significant event: the entrenchment of the Canadian Charter of Rights and Freedoms in 1982. Once this was in place, once litigant and lawyers began to understand its potential, and (perhaps most surprising of all) once Canadian judges began to demonstrate that they were taking that potential very seriously indeed (in stark contrast to the way that the statutory Canadian Bill of Rights had been effectively strangled at birth), this necessarily involved the Supreme Court in a much wider range of legislative measures and policy issues including the most controversial. The combination of these two developments meant a complete transformation of the Court and its public role, such that very few of the judges from the 1960s would have been comfortable on the Court twenty-five years later, and vice versa.

I suggest that we should see the Court's new format as a response to these new challenges. I have been describing the reasons delivered by the judges of the Supreme Court, but there is of course a second set of considerations in describing how the Court presents itself, these involving the standard textual frame within which those reasons appear in the Supreme Court Reports—and this frame has also been evolving. These reasons have always included the style of cause identifying the appellant and the respondent, the date of the hearing and of the decision, the judges in the panel, the head-notes, a summary of the case, the full text of the reasons, and a list of the participating attorneys at the end. More recently, however, it has become considerably more elaborate. The summary no longer (as it once did) provides the basic arguments of the parties, but focuses specifically on the reasons of the judges. Since the 1960s it has consistently included a list of all judicial authority cited, and of all statutes cited; since the 1980s

34. More bluntly: of people other than late-middle-aged white males of British or French descent.
35. It is also significant that during the 1960s, the Court had moved toward a regular judicial conference after oral argument, rather than the earlier practice of "listen and run."
36. On the one hand, since the Bill of Rights said that Canadians already enjoyed the listed rights, one interpretive stance was to conclude that it was not intended to create anything new or to alter existing legislative provisions; on the other hand, since later statutes prevail over earlier statutes, neither could it invalidate subsequent Acts of Parliament. The combination of the two approaches left little opportunity for a Bill of Rights jurisprudence to develop.
37. Although only since 1980 have head-notes displayed the length, and the terminological consistency, we now take for granted; before 1980, they were much briefer, much more uneven.
it has included a list of all scholarly material (academic books and journal articles, as well as references to the proceedings of Parliament and its committees, and official reports of various kinds); and since 2005 it has included a separate list of international materials cited. (And, curiously, all participating lawyers are now listed twice, once at the beginning and once at the end.) At the same time, the Court has followed a developing pattern in its use of the two official languages, best described by Scassa.  

None of this was accidental; all of it has to be seen as an ongoing attempt to restructure the way that the Court presented itself to a new and larger audience as it dealt with new and broader and more controversial issues.

I suggest that we should similarly see the Court’s new decision-delivery format as a response to these new challenges; and that we should do so in a comparative manner not because there is a single ahistorically correct way of presenting decisions on which all common law appeal courts are inexorably converging, but rather because all are dealing with the challenges of a more attentive public in an age of judicial power. In these terms, we can say that the Supreme Court of Canada has developed a unique presentation format for its decision, and one whose advantages (and therefore, arguably, whose implicit intentions) can be specifically identified.

First, the SCC format permits the easy identification of the set of reasons that carries the authority of the Court and that makes the clearest and most unambiguous contribution to precedent. In the actual text of the reasons themselves, there is (almost always) one set of reasons that is identified as “the judgment of [A, B, C, and D] was delivered by: A,” with minority reasons simply as “the reasons of [E and F] were delivered by: E.” (emphasis added) And if this were not enough, the Supreme Court has since the beginning of 2005 indicated right up front, after listing the members of the panel and before even beginning the summary, who delivered (and who joined) the “Reasons for Judgment” as well as which of their colleagues wrote or signed dissents or concurrences. From my limited survey, only the Supreme Court of the United States does likewise, with the last section of the Syllabus unambiguously designating which Justice has delivered...
“the opinion of the Court.” (emphasis added—“opinion” carrying the same meaning for the USSC as “judgment” does for the SCC) On the USSC web-page, the Opinion of the Court is identified again by always being the on the far left side of the horizontal list. For most of the period considered, this had no counterpart for the Supreme Court of Canada, where the first full-text set of reasons was not necessarily the judgment, but rather that delivered by the most senior justice\(^4\); only since 2005 have the reasons that constitute the judgment of the Court been presented first.

But the English and Australian high courts employ no similar device—majority reasons and minority positions are presented in precisely parallel ways. When the decisions are unanimous (which may mean single sentence “I concur” opinions from all the judges but one, or in Australia a joint decision coauthored by every member of the panel), this is obviously not a problem, nor does a solo minority opinion or two create much doubt. But the lack of transparency can be mildly problematic; consider, for example, the HCA decision in *Klein v. Minister for Education* 2007 HCA 2, where Kirby has written by far the longest (and the only segmented) set of reasons, but it is only in the middle of paragraph 6 of those reasons (“I disagree”) that there is any indication that his is a dissent, followed separately by the chief justice. This is, one should note, the historical and traditional way of presenting decisions by appellate panels; the *seriatim* tradition provides an outcome accompanied by a conversation between several judges about the relevant law, and it is only afterward (if ever) that it becomes clear which set of reasons was the most important for what purposes.\(^4\)

Second, the full format provides a “check list” both for those who write Supreme Court decisions and those who read them. For example: those who compile statistical data-bases of various kinds based on Supreme Court decisions have a much easier time of it since the Lamer format took hold than they did before. If you want to know whether the appealed-from provincial court of appeal allowed or dismissed the case in question, or if it divided on the question, or which judge wrote the reasons, this is very

---

40. A further complication is that USSC justices routinely write or sign more than one set of reasons in each case; this is not unheard of on the SCC, but it is much more unusual.
41. “[T]he actual precedential value of a decision could be determined only by stitching together the reasoning of the judges in the majority… What became precedent under these circumstances depended on what subsequent justices calculated had been done in earlier series of opinions. There was, in effect, no precedent until a later majority declared what it was.” Michael J. Gerhardt, *The Power of Precedent* (New York: Oxford University Press, 2008) at 62. See also Frank B. Cross, Thomas A. Smith & Antonio Tomarchio, “Warren Court Precedents in the Rehnquist Court” (2007) 24 Const. Commentary 3 at 4: “However, the meaning of a precedent over time is not constant but is an ‘iterative process’ in which the Court applies and modifies its meaning.”
Structures of Judgment: How the Modern Supreme Court of Canada Organizes its Reasons

much hit-and-miss (and usually miss) before the mid-1980s; now, there is invariably a (sometimes very brief) summary of what happened, as well as the law report citations for both that decision and the original trial. On the down side, this probably contributes to longer decisions, in that there are more “containers” calling for at least some minimal content.

At least in my opinion, this contributes to a more satisfactory mode of explanation. Earlier decisions may be shorter, but they have the feeling of giving an outcome-plus-reasons which mentions only those facts bearing directly on that package. But the current format has the appearance of presenting a neutral free-standing description of the factual and lower court background which then proceeds to a consideration of the issues on appeal. To be sure, a recital of facts can never be completely neutral—as we discover on those unusual occasions when two members of the panel write structurally parallel sets of reasons and reach different outcomes—but the segmented separation of the two elements is highly functional.

Third, the structuring of the majority and minority opinions represents an institutional project that embraces even divided opinions. The minority reasons concede temporal and logical primacy to the majority (“have read the reasons”), bow politely (“but, with respect, cannot agree”), and then confine themselves to addressing only the most focused elements of the majority reasons (“with regard to [issue X]”). The minority reasons usually cannot be read separately, but only make sense against the shared background that has to be found in the majority reasons. Such an approach stylistically reinforces rather than undermines the authority of the majority reasons—a neat trick, considering the unavoidably subversive core of public disagreement—even while it keeps “in play” a set of critical alternative ideas. On those occasions when the format fails—Amselem cited above is an example of two different judges writing their own set of free-standing reasons to reach opposite conclusions—the effect is quite striking, but such failures are relatively infrequent.43 The overall effect is a style that includes minority opinions as part of an ongoing conversation (albeit with an explicitly subordinate status), rather than marginalizing them as “loser’s history.” Conversely, the minority opinions almost invariably present themselves as part of this politely dispassionate conversation, focussing on a specific part of the larger analysis, rather than emulating the

42. An excellent example is Syndicat Northcrest v. Amselem, 2004 SCC 47.
43. On my count, they average only between two and three per term.
grenade-lobbing rhetoric of the current USSC. Thirty years ago, Redden suggested that we should understand common law judicial decisions as the combination of four dialogues—with the parties (by specifically addressing their arguments), with other members of the panel (through minority reasons), with the past (through the citation of precedent), and with the future (through explicit consideration of the implications of the ruling); the new Supreme Court format fully delivers on this second dialogue.

In the other Commonwealth courts, on the other hand, dissents are never so labelled, and may or may not identify themselves in so many words as rejecting the conclusions of a majority of their colleagues; and the notion of a separate concurrence is functionally meaningless unless there is a designated majority opinion with which one can partly but not completely agree. There are decisions (once one cobbles together the votes to identify the winner), and there are reasons (lots of sets of reasons), but there is not an institutional product that packages these as a single and collaborative intellectual product.

Fourth, the new format serves the Court's public education and public accountability role in a very useful way. The giving of reasons is an important part of the judicial role in the common law system; indeed, since only the reasons (hardly the outcome) can serve as precedent, the common law system is utterly dependent on written reasons. As the Supreme Court itself has recently declared: "Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render." In itself, this does not take us very far—all of the appeal courts in my casual survey deploy discursive reasons that can on occasion be very long. The logical extension of this point is Lasser's observation that authored reasons are an important element of the Anglo-American balance between simply following the rules laid down, and adjusting those rules in the light of social context and social

44. Scalia is rightly credited with the most routinely confrontational of these minority offerings, but he is not alone; recently, for example, Chief Justice Roberts dissented, describing the majority decision as "misguided" and "fruitless" and "grossly premature," as demonstrating "egregious" overreaching so as to create a "jurisdictionally quirky outpost," able neither to read the statute or to understand the review system that the immediate case challenged. "If this is the most the Court can muster," he scoffs, "the ice beneath its feet is thin indeed." (Boumediene v. Bush, 128 S. Ct. 2229, 171 L. Ed. 2d. 41.) The Supreme Court of Canada, by way of contrast, never indulges in such rhetorical flourishes.

47. R. v. Sheppard, 2002 SCC 26 at para. 15, Binnie J., writing for a unanimous Court. The question was revisited and the principle affirmed in the more recent case of R. v. Walker, 2008 SCC 34, Binnie again writing for a unanimous Court.
change. Even though we can be reasonably sure that the final result is at least in part a negotiated product, Supreme Court decisions are presented to us as having an author, a specific individual judge who personally accepts responsibility for those ideas. The same consideration works for the judges who write minority reasons, again accepting responsibility for certain ideas that they typically pursue across a string of cases; nor is it implausible to suggest that judges also accept responsibility when they sign on to the reasons of another rather than making their own nuanced and differentiated contributions. This makes problematic a practice such as the Australian every-judge-on-the-panel joint-authorship, or the Canadian “By the Court” decision in which a unanimous panel presents reasons that are not attributed to any individual justice—something which happens about 5% of the time.

For any written communication, one must ask not only who is doing the writing, but also who they are writing it for—that is to say, what is the audience? At one time, it would have been unproblematic to suggest that common law judges were writing for other judges and for lawyers. Supreme Court of Canada decisions from the 1960s or before, for example, are terse compact essays unrepentantly packed with technical language and assuming a very considerable legal background; references to judicial authority, for example, are usually treated as if the simple citation spoke for itself, without any indication of what the important finding might be. Indeed, as Popkin points out, common law decisions originally were entirely oral (hence the fact that for the House of Lords, the reasons in judicial decisions are still referred to as “speeches”), then were transcripts based on notes taken during these oral presentations, and only later came under the managed control of the court issuing the decisions.

But today, Canadian Supreme Court decisions are much more discursive, much more intentionally expansive, aimed at an educated lay audience that is of uncertain size but certainly reaches far outside the legal profession. To be sure, this audience is much smaller than the Supreme Court would like it to be—there is no indication that either the LexUM site or the CANLII site draw very much in the way of traffic for the full-text online decisions that they make available so promptly after they are delivered—but the important thing is that this has become the reference

48. Or, on occasion, two or even three judges co-authoring a set of reasons, something which now happens in about 10% of all reserved judgments.
49. That is: it is perfectly intelligible for a commentator to say “I am not surprised by the position taken by Justice X, but I am disappointed that Justice Y simply chose to sign on to those reasons.”
50. The practices of the USSC regarding “By the Court” (per coram) decisions are sufficiently different that they are not caught by these comments.
point, and the Supreme Court has adjusted both its format and its style to make itself more accessible.\textsuperscript{51}

I had envisioned this as a Chief-Justice inspired experimentation with a variety of formats in the mid-1980s (that is to say, the Dickson Court), accompanied by some degree of shared reflection on the experiments, culminating in a possibly informal but nonetheless collective decision as to the one that best served their purposes. Empirical verification of this plausible hypothesis is difficult, especially when it is only attempted two decades later; and my indirect enquiries (through a number of the justices’ clerks) were less than encouraging—judges who would have been part of such experiments and discussion have no recollection of any such exchanges, nor were they conscious more recently of working with a “standard format” (let alone a new one) for either judgments or minority reasons. But even should this have been an example of spontaneous ordering—the members of a new Court after an almost unprecedented wave of replacements each deciding on their own to present their reasons differently in the face of new challenges, gradually coalescing around a shared style—rather than conscious deliberation, it does not in any sense contradict my suggestions above about format serving function, and it makes the persisting uniformity of a consistent formatting style all the more impressive.\textsuperscript{52}

Conclusion

Henderson used the term “punctuated equilibrium” to deal with format and presentation issues, suggesting that there is a dominant style that persists until changing circumstances render it problematic, such that a new style emerges to meet the new challenges. On the basis of my casual comparative survey, this seems to pitch the matter rather too high—in fact, most common law high appellate courts have a repertoire that includes a variety of alternative styles and formats, between which they oscillate in an opportunistic fashion. This being the case, the emergence of a standard format is in itself one of a number of possible responses to contextual demands, changes in this format constituting a second level of response. The Supreme Court of Canada has, in recent decades, evolved a unique form of self-explanation, involving a standard format based on a fairly

\textsuperscript{51} It is also worth noting that the Supreme Court began in 1995 to publish its reasons with paragraph numbers; for the increasing number of people who rely on websites rather than published volumes for access to judicial decisions, this is an invaluable aid in citation, since html documents of any length whatever generally constitute a single page such that giving the “page number” for a direct quotation is meaningless.

\textsuperscript{52} And the suddenness and the completeness of the shift to the new format quite remarkable.
extensive set of generically labelled segments. This represents the new equilibrium between diverse demands and expectations; we can expect it to persist for some time, and we can anticipate that its significant alteration would occur only as a response to some significant change in its environment. In the meantime, we can watch to see (in this world of extensive and unremitting national high court interaction) whether there are any emulation effects in other countries.