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Nom de Plume: Who Writes the Supreme Court's "By the Court" Judgments?

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For several dozen of its major decisions, the Supreme Court in recent decades has adopted an unusual judgment style—the unanimous and anonymous "By the Court" format. Unlike judgments attributed to specific justices, "By the Court" presents an unusual and impersonal institutionalist face. But what is happening behind the façade? Are these deeply collegial products with the actual drafting divided between some (or most, or all) of the justices? Is it "business as usual" which for major judgments involves rotation between the senior judges? Or is it simply a pseudonym for the Chief Justice writing alone in an unusually emphatic way? Function word analysis is used to identify most likely authors for each "By the Court" decision; this provides a basis for understanding how Supreme Court practices for these important cases are evolving, and also carries implications for the likelihood of the current practice surviving the current Chief Justiceship.

Au cours des dernières décennies, dans un grand nombre de ses arrêts, la Cour suprême a adopté une méthode inhabituelle de rédaction—ils sont signés de manière unanime et anonyme par « la Cour. » Contrairement aux décisions signées par des juges, les arrêts signés par la Cour présentent une façade inhabituelle et impersonnelle. Mais qu'y a-t-il derrière cette façade? Ces arrêts sont-ils le produit d'un travail collectif, la rédaction étant confiée à certains juges ou la plupart d'entre eux? Est-ce que les juges travaillent comme ils le font habituellement, ce qui signifie que la rédaction des arrêts marquants est confiée à tour de rôle aux juges ayant le plus d'ancienneté? Ou est-ce simplement un pseudonyme pour la juge en chef qui rédige seule avec une empathie inhabituelle? L'analyse des mots outils, ou mots fonctionnels, est utilisée pour déterminer l'identité des auteurs les plus probables de chacun des arrêts rendus par la Cour. Cette analyse donne un point de départ pour comprendre comment évoluent les pratiques de la Cour suprême pour ces affaires importantes. Elle soulève aussi la possibilité que la pratique actuelle survivra au départ de l'actuelle juge en chef.

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Introduction

The judgments of the Supreme Court of Canada are written by the judges, but we are not always told which judge did which writing. Normally—about ninety per cent of the time—the judgments are attributed to a specific member of the panel, and authorial responsibility is unambiguously assumed. Since the mid 1990s, about ten per cent of the time they are attributed to a pair of the judges on the panel.[1] But even more occasionally, less than one per cent of the time, they are attributed to "The Court," which is to say by the panel as a whole with no specific judge being singled out. The Court as an institution, and therefore no individual judge specifically and explicitly, assumes the responsibility for the outcome and the reasons. On these unusual and often important occasions, anonymity and collective accountability replace named authorship and individual accountability.

These are "By the Court" judgments, a practice which began several decades ago[2] and which has included some of the most high-profile and controversial decisions of the Supreme Court. For earlier chief justiceships, the argument for their significance is made by cases like the *Quebec Secession Reference*[3]; for the McLachlin Court, the same point is made by the *Firearms Reference*,[4] the *Securities Reference*[5] and the *Senate Reform Reference*.[6] Both lists could easily be extended. This combination of persisting but not routine usage, narrow constitutional focus and high political profile means that those judgments cry out for (but to date have never received) focused attention. Even more to the point, the frequency of the use of "By the Court" judgments has increased significantly under the current Chief Justice, and the occasions of their use show no sign of becoming less frequent, less high-profile, or less controversial.

The striking feature of the "By the Court" form is that it violates the longstanding expectation that the individual judges in common law courts assume responsibility for their judgments by attaching their name to the reasons that they have written. The Supreme Court itself has emphasized the importance of adequate written reasons for judgment as

1. See Peter McCormick, "Sharing the Spotlight: Co-Authored Reasons on the Modern Supreme Court of Canada" (2011) 34:1 Dal LJ 165 [McCormick, "Spotlight"].
2. Most would date it from the two language decisions of the Laskin Court—*Blaikie* and *Forest*—in 1979; I think this is incorrect, and the first significant "By the Court" judgments were a dozen years earlier, in 1967. See Peter McCormick & Marc Zanoni, "The First 'By the Court' Decisions: The Emergence of a Practice of the Supreme Court of Canada" Man LJ (forthcoming).
3. *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Quebec Secession Reference*].
4. *Reference Re Firearms Act (Can)*, 2000 SCC 31, [2000] 1 SCR 783 [*Firearms Reference*].
5. *Reference Re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 [*Securities Reference*].
6. *Reference Re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 [*Senate Reference*].

an important element of judicial accountability to the broader public,[7] and Mitchel Lasser's broader theoretical framework explains the assumption of responsibility by identifiable individual judges as making it acceptable that judges enjoy a degree of discretion in resolving complex issues, to the extent of allowing policy considerations to guide them.[8] One face of this accountability is that we often assess the performance of specific appeal court judges, past and present, by carefully considering for praise or criticism the reasons they have written (majority and minority). "By the Court" judgments are problematic in that they are important decisions—among the Court's most important—that cannot be accommodated in such evaluations.

"By the Court" judgments are not attributed to any specific member of the panel, but does this mean "this was written collectively without any lead author," or does it mean "we are (for some unstated reason) not going to tell you who the lead writer was?" I admit to being sceptical about the first possibility, which implies a genuine committee product with all or most panel members participating fully; this is not impossible, but it seems somewhat unlikely in terms both of the readability of the product and the time-consuming nature of the suggested process. It seems more reasonable to assume that at least the first draft must (often? usually? always?) have been written by someone, and that that someone will (sometimes? often? always?) be a single individual. Any judicial first draft will of course have been modified in response to feedback from the other members of the panel, but such a process applies to all judgments, such that they are all collegial rather than genuinely solo products. "Circulate and revise" is therefore not enough in itself to explain the anonymous format. The question is whether it is possible, for some or all of the "By the Court" judgments, to penetrate this formal anonymity to identify the lead author or authors, this enquiry being a vehicle to a better understanding of how the Court operates in some of its most salient and high-profile cases. This paper will propose a methodology for attempting such a penetration, and will conclude by sketching the implications of the device and the way that these writing opportunities are (or are not) shared.

It might seem at least impertinent and at most subversive to go behind the Court's deliberate wall of anonymity. If they wanted us to know who did the writing, they would tell us; if they want not to tell us, there must

7. *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869 is the clearest statement of this; the case has been cited and refined upon a number of times since.

8. Mitchel de S-O-l'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004). See especially chapter 10.

be a reason that should be honoured. But speculation about who might have done the writing is a frequent sidebar to the academic reception of these decisions.[9] We already know who wrote several of the early "By the Court" judgments. Robert Sharpe and Kent Roach, in their biography of Chief Justice Dickson,[10] reveal Dickson as the author of the *Manitoba Language Reference*[11] and *Tremblay v. Daigle*[12] and point to Le Dain J. as the actual author of both *Ford v. A.G. Quebec*[13] and *Devine v. A.G. Quebec*.[14] Similarly, in his biography of Laskin, Philip Girard insists that Laskin J. was the author of one of the sets of jointly-authored reasons in the *Patriation Reference*.[15] Bora Laskin once let it slip in oral argument that Martland J. had written one of the earliest examples, and it is widely known (nobody will tell me precisely how) that McLachlin C.J. wrote the reasons in *Marshall 2*.[16] My own methodologically grounded speculations are in the tradition of this recurrent curiosity; the inquiry is perhaps impertinent, but certainly not subversive.

I. *Why does it matter?*

It might be suggested that this is a frivolous enquiry because it does not really matter who wrote the judgment, or even if it had a single lead author at all. A decision is a decision, and it will decide the immediate case and establish precedent for the future, regardless of who wrote it.[17] In a strictly technical sense, this is correct, but it is also a bit misleading. Who writes always matters because (minor routine cases aside) no two judges will justify the outcome with quite the same logical trail, or precisely the same emphasis and nuance, or quite the same implications for future cases. This is why judges sometimes write long separate concurrences, and why

9. See A Wayne MacKay, "Judicial Process in the Supreme Court of Canada" (1983) 21:1 Osgoode Hall LJ 55 at 62-63. E.g. in discussing earlier examples of anonymous and jointly authored reasons, MacKay seeks to identify the style which pervades those reasons—one bears "the distinctive style and flare" or Chief Justice Laskin, another has the "precise and logical flow" of Martland J., and a third shows the "style and structure" that characterizes the writing of Beetz.

10. Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2003).

11. *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1 [*Manitoba Language Reference*].

12. [1989] 2 SCR 530, 62 DLR (4th) 634.

13. [1988] 2 SCR 712, 54 DLR (4th) 577, decided 15 December 1988.

14. [1988] 2 SCR 790, 55 DLR (4th) 641, decided 15 December 1988.

15. Philip Girard, *Bora Laskin: Bringing the Law to Life* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005) at 510.

16. *R v Marshall*, [1999] 3 SCR 533, 179 DLR (4th) 193.

17. See James Markham, "Against Individually Signed Judicial Opinions" (2006) 56:3 Duke LJ 923. Markham not only defends the anonymous style but goes on to suggest that all direct attribution of reasons to specific justices is pernicious, and that judgments and minority reasons alike should all be presented anonymously.

sometimes those concurrences can come to be frequently cited in their own right.[18] The Supreme Court itself reinforces the "author matters" logic, not only by the fact that almost all its own decisions are linked to specific individuals, but also by the frequency with which its citations to, and especially its quotations from, earlier decisions of the Court include specific reference to the judge who wrote the reasons. Some judges are known for expertise in particular areas of the law, some carry more prestige than others,[19] and some are simply thought of as better judges.[20] As well, authored reasons indicate not only the doctrinal evolution of the Supreme Court as an institution, but also that of the specific judges.

But the stronger reason for pursuing this enquiry is that it offers an understanding of how the modern Court is organizing itself to handle particularly controversial (and almost always constitutional) matters. Consider the possible findings from this study, and the different messages that it might send.

- First, it might be the case that we discover that the writing assignments simply parallel the assignment of writing for more complex cases generally[21]—that is to say, not particularly equal, but dominated by a number of the more senior and experienced judges on the Court, one of whom is the Chief Justice. We could call this the "business as usual" model. It would leave only the opaque label itself to be explained, without suggesting anything unusual about the decision-making and decision-explaining processes themselves.
- Second, it might be the case that we find "business as usual" in a different sense, namely the two-judge co-authorships that first appeared in the mid 1990s and have become a regular element (one judgment in every ten, one set of minority reasons in every ten) for the McLachlin Court.[22] Sometimes these represent the co-

18. On concurrences, see Peter J McCormick, "Standing Apart: Separate Concurrence and the Modern Supreme Court of Canada, 1984–2006" (2008) 53:1 McGill LJ 137; on citations to minority reasons, see Peter J McCormick, "Second Thoughts: Supreme Court Citation of Dissents & Separate Concurrences, 1949–1996" (2002) 81:2 Can Bar Rev 369.

19. See Richard Posner, *Cardozo: A Study in Reputation* (Chicago: University of Chicago Press, 1993) on judicial prestige and judicial citation.

20. See Cass R Sunstein, "Home-Run Hitters of the Supreme Court," *BloombergView* (23 September 2014), online: <www.bloombergview.com>. American scholars expend a great deal of effort on the ranking of current and past judges of the United States Supreme Court. On the Canadian context, see Peter J McCormick, "The Supreme Court Cites the Supreme Court: Follow-Up Citation on the Supreme Court of Canada, 1989–1993" (1995) 33 Osgoode Hall LJ 453.

21. See Peter J McCormick, "Judgment and Opportunity: Decision Assignment on the McLachlin Court" (2014) 38:1 Dal LJ 271.

22. See McCormick, "Spotlight," *supra* note 1.

authorship of kindred spirits, linking two judges who are often together when a panel divides; sometimes they link two judges who often disagree, suggesting reasons that are more in the nature of a compromise. But in either event, this is a relatively new practice on the Court, one that is not comparably displayed by the Supreme Courts of the United States or United Kingdom. We could call this the "limited partnership" model—"partnership" because it involves more than one judge, "limited" because it typically involves only a pair of judges.

- Third, it might be the case that it is usually, or even always, the chief justice who has done the lead writing. If unanimity gives a decision more emphasis than would be the case if the panel were divided, and if attribution to the chief justice gives a unanimous decision more emphasis than attribution to another member of the panel, then perhaps we should understand "By the Court" as giving even more emphasis to a chief-justice-authored decision. It is quite true that chief justices on the modern Supreme Court have played a predominant role in the delivery of major decisions, and that this is just as true of the current chief justice as it was of her three predecessors;[23] it might be that the "By the Court" device just ratchets this up another notch. We could call this the "leader-centric" model.
- Fourth, it might be the case that "By the Court" judgments are genuinely collegial products in a much more pervasive sense than that implied by the "circulate and revise" process that the Court has adopted as a regular practice. For example, the United Kingdom Privy Council has in this century delivered only a single decision that was anonymously attributed to "The Board" rather than to an individual.[24] Because this was so unusual, the Privy Council did what our Supreme Court has never done: it began those reasons by explaining this unusual format, saying "This is a judgment to which all members of the Board have made substantial contributions."[25] Perhaps the real message of "By the Court"—at least for a number of the most portentous cases, those heavily skewed toward constitutional cases—is that the Supreme Court is resolving itself into a genuine committee. A genuine

23. See Peter J McCormick, "Who Writes? Gender and Judgment Assignment on the Supreme Court of Canada" (2014) 51 Osgoode Hall LJ 595, especially Part V, "The Chief Justice Factor."
24. *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd*, [2013] UKPC 2.
25. *Ibid*, at para 1.

> committee that produces a result that cannot be attributed to any smaller subset of its members, but can only honestly be reported as a joint product. Given that no other common law court has a similar practice, this would be a very significant finding. We could call this the "institutional" model.

It makes a very big difference which of these might be the case. The "business as usual" model would make a "By the Court" designation a red-flag priority label, but not one that actually suggests a different decision-making procedure behind it. The "limited partnership" model would see it as a cover for another emerging practice on the Court, that of co-authorship, but one that is far short of the full-panel collaboration the "By the Court" label seems to suggest. The "leader-centric" model would emphasize the growing importance of the chief justice, with obvious implications, given that the current chief justice will be leaving the Court within the next three years. The "institutional" model would highlight a genuine evolution of the decision-making performance of the Supreme Court of Canada with respect to the constitutional decisions that have become such an important part of its caseload. Different roads indeed, and the analysis in this paper will provide some evidence as to which one of them "By the Court" is actually taking.

Not out of petty curiosity for gossipy detail, but in order to reach a deeper understanding of how the Court is evolving in its decision-making and equally important decision-explaining process, it is necessary to penetrate the anonymity facade. The Supreme Court of Canada has only recently become a major national "player," largely, but not only because of the *Charter*. It is still evolving in terms of how it deals with this new role. The regular use of "By the Court" decisions for a significant subset of major constitutional cases is an innovation that our Supreme Court has adopted (and other comparable national high courts in common law countries have not) as part of that adaptive process. To this extent, the Supreme Court of Canada appears to be emerging as a different kind of court from its counterparts, one that displays a stronger institutional dimension. But we need to look behind the "By the Court" to see how deep this new appearance really goes.

II. *Penetrating anonymity: function word analysis*

My rebuttable working assumption will be that some single judge on the Court has in fact assumed the responsibility of writing the first draft of at

least the analysis section of reasons for the judgment/opinion.[26] "By the Court" judgments give no indications on their face as to the judge, so it is necessary to find some way of matching writing to writer.

We are not, of course, looking for a genuine "sole author" as if the others were passive sidelined bystanders. This is not the case even for those judgments attributed to a single judge. The better understanding is that this designation indicates the lead writer, the writer of the first draft that is then circulated for comment, revised in the light of those comments, and re-circulated through several iterations. All judgments of the Supreme Court are in this sense collegial products. The question is whether the collegiality apparently promised by the solid anonymity of "By the Court" really is something that is significantly different from the more normal style of judgment, or whether there is still a lead writer who can be empirically uncovered. Knowing about this practice of revision in response to critical feedback complicates the search, but it does not necessarily forestall it.

It would be ideal if one could find words or phrases uniquely attached to individual judges. For example, it is a fairly common device for judges to reach a conclusion, and then go on to say "I am reinforced in this conclusion by some additional argument or authority." This is so common that finding the phrase in a judgment does nothing to identify the author. A slightly more unusual way to make the same rhetorical point is to say "I am fortified in this conclusion," which has been used a much more modest number of times by a smaller number of judges. By far the most frequent user of the phrase is Laskin, so finding those words in one of the early "By the Court" judgments would suggest but not prove that Laskin J. did the writing.[27] A more unusual variant is "I am bolstered in this conclusion," a phrase so unusual that only Iacobucci J. has ever used it (or any variants of "bolster").[28] Obviously, as this example demonstrates, it is sheer luck to trip over such a uniquely idiosyncratic word or phrase, and sheer luck again to find it used in a "By the Court" judgment; as a consequence, this does not present itself as a workable solution to the challenge.

However, the extreme example makes a basic point: we can find clues as to who did the writing from looking closely at the words that were written, and in the modern world that can mean computer-assisted linguistic analysis. What makes this approach encouraging is the fact that identifying authorship is precisely the purpose to which such linguistic analysis has

26. "Judgment" is the term the Court uses for its decisions on appeals; "opinion" is the term the Court uses when it is dealing with a federal reference.

27. The more so because his contemporary colleague Martland J. was the second most frequent user of the phrase.

28. Unfortunately, this specific word does not occur in any "By the Court" judgment.

often been directed—penetrating the details of word use to decide whether or not a specific famous author did or did not write a particular poem, essay or book. One of the standard examples is proving which of the American Founding Fathers wrote the small number of Federalist Papers essays that have no stated author. The argument is that different people use words in different but persisting ways, and computer analysis of those words is therefore a way of linking texts to specific writers. This really amounts to an attempt to find a more objective way of identifying "style" than the intuitive process exemplified by A. Wayne Mackay,[29] but it is in principle the same enquiry.

One widely used example of such linguistic analysis is the *Linguistic Inquiry and Word Count* (LIWC, pronounced "luke") software developed by James Pennebaker.[30] The system is based on generating dictionaries that direct the assignment of words to categories, such as adjectives, adverbs, positive emotion words, negative emotion words, cognitive words, complexity words, certainty words. The specific purpose of the software was to track psychological coping with traumatic circumstances, the balance between different sets of words helping a psychologist to track a return to normality in pieces of writing solicited from the patient.[31] Absent trauma, these same researchers suggest that a balance between these sets of words is a persisting individual characteristic with (sometimes) an element of tactical choice, and have applied it to a consideration of, for example, the United States presidential campaign debates.[32]

Signature is an example of word-analysis software that is rather more reductionist, pursuing individual stylistic choices at an even more basic level.[33] It tracks how many times a particular piece of writing uses each letter of the alphabet or each punctuation mark, how many sentences contain how many words, and how many paragraphs contain how many sentences. This is the software that allowed Oxford professor Peter Millican to "out" J.K. Rowling (who was trying to move out from under the limiting shadow of her Harry Potter success by publishing under the

29. MacKay, *supra* note 9.

30. Software available online: <www.liwc.net>; see also James W Pennebaker, *The Secret Life of Pronouns: What Our Words Say About Us* (New York: Bloomsbury Press, 2011).

31. See James W Pennebaker, *Opening Up: The Healing Power of Expressing Emotion* (New York: Guilford Press, 1997); and James W Pennebaker & John Evans, *Expressive Writing: Words That Heal* (Enumclaw, WA: Idyll Harbour, 2014).

32. See Pennebaker's website Wordwatchers: Tracking the Language of Public Figures, online <www.wordwatchers.wordpress.com>.

33. See the *Signature* Stylometric System, online: <www.philocomp.net>.

pseudonym of Robert Galbraith) as the author of a new work of fiction.[34] I was not successful in deriving any comparable certainty or success from using this software.

I will be following instead the example of Frederick Mosteller and David L. Wallace,[35] and the way their approach was applied to a study of judicial decisions in this and other countries by Jeffrey S. Rosenthal and Albert H. Yoon.[36] This analysis works around the concept of "function words"—we can characterize writing and we can identify the stylistic practices of individual writers not by looking at the concept-content words (nouns, verbs, adjectives) in their writing, but rather by looking at the more pedestrian "function words" that connect and smooth and qualify and intensify those words. Everyone uses words like "the," "and," "of," "to," "or," "but" and "if" to such an extent that words of this sort make up a surprising proportion of everything we write. But each person relies on them to a subtly but pervasively different extent, inclining toward the use of some of them and away from others.

Reduced to single elements, these observations border on the trivial. For example:

- Binnie J. uses "but" three times as often as Karakatsanis J.
- Moldaver J. uses "could" two and a half times as often as Iacobucci J.
- McLachlin C.J. uses "must" two and a half times as often as Binnie J.
- McLachlin C.J. uses "whether" two and a half times as often as Binnie J.
- McLachlin C.J. uses "may" two and a half times as often as Abella J.
- Abella J. uses "also" twice as often as Binnie J.
- Major J. uses "if" half again as often as Rothstein J.
- Rothstein J. uses "would" half again as often as Binnie J.

Any one such observation carries little meaning or utility. Multiplied across dozens of words and for every possible pair of judges, however, they become considerably more powerful, an accumulation of small hints adding up to something much more substantial. "Magic" words

34. See Nick Clark, "I Turned Down 'Robert Galbraith,'" *The Guardian* (16 July 2013), online: <www.guardian.co.uk>.

35. See Frederick Mosteller & David L Wallace, *Inference and Disputed Authorship: The Federalist* (Reading, UK: Addison-Wesley, 1964).

36. See Jeffrey S Rosenthal & Albert H Yoon, "Judicial Ghostwriting: Authorship on the Supreme Court" (2011) 96:6 Cornell LR 1307; Kelly Bodwin, Jeffrey S Rosenthal & Albert H Yoon, "Opinion Writing and Authorship on the Supreme Court of Canada" (2013) 63:3 UTLJ 159.

as "always" or "never" indicators not being available, their precise opposite—words that every judge uses some of the time, but that some consistently use more or less often than others—can in their aggregate be just as useful.

Rosenthal and Yoon's use of the approach is directed in exactly the opposite direction from mine. They sought to characterize the use of law clerks by the justices of the United States Supreme Court and of the Supreme Court of Canada by measuring the variability in the use of a standard set of function words within the reasons for judgment delivered by individual judges. Given a tendency for any individual to display a consistent pattern of function word usage, it follows that greater levels of variance in these patterns from one judgment to the next will suggest that other individuals were involved in the drafting. Their hypothesis is that these other individuals were the law clerks that have for decades assisted Supreme Court justices in both countries. Rosenthal and Yoon are looking for diversity, for non-similarity, as a way of identifying those judges who have leaned most heavily on drafting by their clerks; I am looking for similarity, as a way of deciding which judge may have written reasons not attributed to a single judge. However, we are following the same logic—comparing the function-word frequencies of different pieces of writing, on the argument that similarity in the patterns makes it more likely, and dissimilarity in the patterns makes it less likely, that the same person did the writing.[37] I acknowledge my intellectual debt for this approach.

III. *The database*

The basic element of the methodology is to generate a baseline background pattern for the frequency of function word usage for each of the Court judges who have served on "By the Court" panels during the McLachlin chief justiceship. This involves putting very large blocks of words into a word-frequency counter and pulling out the numbers for the words that we have identified as deserving attention. This raises two questions: first, what block of words should we accumulate, and second, which words should we count? I will deal with each in turn.

The basic building block for this background word count is the solo reasons for judgment attributed to each of the judges during the full period of the McLachlin Court, but this raw material needs a double refinement before it can serve the purpose. The first refinement

37. The suggestion that a rotating collection of law clerks have done a certain amount of the writing is a problem for me. Below, I will seek to deflect this possible objection to my use of the methodology.

is the removal of the direct quotations that make up a significant part of Supreme Court judgments. I am referring only to the "block quotes" that are separated into their own double-indented blocks within the reasons. Sometimes, the word count involved in these is rather small—indeed, occasionally it is zero—but other times it can be quite significant, up to 25% or 30% of the total. For this reason, I have a reservation about Rosenthal and Yoon's application of the methodology. Unless lengthy direct quotations are excluded, they will seriously skew the measure, for the obvious reason that these quotation marks already signal that "these are not my words," and therefore "this is not my function word usage." Rosenthal and Yoon suggest that a large variation in function word usage strongly suggests a different writer (i.e., a law clerk); my point is that to a sometimes significant extent it might also—and more often for some judges than others—mean lots of direct quotations.

Overall, about one sixth of all the words in the Court's aggregated reasons for judgment take the form of a direct quotation from a statute or the constitution, from rulings of the courts below, from the judicial decisions cited as authority, from academic books and articles, or from official reports or Hansard. The proportion of block-quotation words of course varies from case to case, but to rather a surprising extent it also varies consistently from judge to judge. The variation is so pronounced—on the current Court, from the high "one word in four" for Abella J. to the low "one word in twenty" for McLachlin C.J.—that I will use this as a supplementary check on my findings.

The word count for reserved single-judge-attributed decisions for the fifteen years to date of the McLachlin Court is about six million words; removing the block quotes reduces this count to about five million—the "one word in six" generalization above.

The second problem with this word count is the one that was suggested (and allegedly confirmed) by Bodwin, Rosenthal and Yoon referred to above: at least for some judges and at least for part of the reasons of judgment, the function word-count variability is such that some of the writing seems to have been done by somebody else, and that somebody else seems not always to have been the same person. The obvious suspects are the law clerks. But if law clerks are involved in the drafting this would be more likely to involve the more routine parts of the judgment—the background facts, the facts of the case, the decisions in the lower courts—

that are a regular part of the modern format of Supreme Court decisions.[38] It seems less likely that there would be any comparable involvement in the writing of the analysis section that makes up the larger part of the reasons. Therefore, only these analysis sections will go into my background figures for each justice. This further reduces the total word count from five million to just under 3.75 million—a reduction of about one quarter.

For each justice, the remaining fragments of all their solo-attributed reasons were combined and run through the word frequency counter on http://www.writewords.org.uk. The results were accumulated into a spreadsheet and turned into percentages, and the same process was then followed for each of the "By the Court" judgments that are to be examined. The analysis that follows builds on the total of the absolute values of the differences between each judge's use of each word and the use of the word in the target judgment, resulting in "similarity scores" that fluctuate between 4 per cent and 14 per cent.

IV. *Which words?*

Judges use thousands of words. The obvious question, then, is which words provide a valid basis for comparison? There are implicit multiple criteria:

- First, they must be neutral function words, not skewed toward certain types of cases (criminal, civil, *Charter*, or whatever) or certain types of analysis that characterize some judges more than others.
- Second, they must be ordinary words that everyone uses all the time, words so obvious that they are on the one hand easily taken for granted but on the other hand such an implicit part of writing style so as to develop a regular pattern of usage, a consistent feeling for what feels right and what words help it feel right.
- Third, this frequency of use must be high enough that it will be sensitive to style. It should be such that we can expect it to occur in every reasonably long set of reasons on any question, thereby creating room for regular patterns of "a bit more than usual, a bit less than usual" to emerge.
- Fourth, there must in fact be a demonstrable and persisting variation in the usage of these words from one judge to another, so that a substantial part of the actual word usage in any specific "By the Court" judgment can reasonably be attributed to an author's tendencies rather than some more case-specific circumstance.

38. See Peter J McCormick, "Structures of Judgment: How the Modern Supreme Court of Canada Organizes its Reasons" (2009) 32:2 Dal LJ 35 for a consideration of the elements into which the modern Supreme Court judgment is divided.

Morteller and Wallace suggested a list of neutral but frequent function words. Rosenthal and Yoon modified this list, dropping words that were not used frequently enough to be useful. I have further modified the list for the same reason and on the same criteria. I arrive at a total of 44 words,[39] each of which was used at least once in every thousand words for the 3.75 million words from the database described above. Since the length of the average McLachlin Court "By the Court" judgment (minus block quotations, minus routine sections) is 8,500 words, this means that the average judgment will include eight or nine examples of even the "bottom of the list" words selected. For those words higher on this list, their occurrence within the average judgment will be correspondingly higher.

The methodology rests on several assumptions, such that the failure of any one of them would seriously compromise its credibility. The first is that the function words indicated together constitute a large enough fraction of the total, and a consistent enough fraction for the individual judges, that they can provide a reliable basis for word frequency use. This is satisfied, because these 44 words make up just over 40% of the total word-count, and the spread for individual judges is a very modest 3.7% between Arbour's 38.8% and Wagner's 42.5%. The narrow band between 40% and 42% catches 14 of 18 judges who have served on the McLachlin Court. These are not exotic words, but every-day every-communication words.

The second is that there is a reasonable but nonetheless significant variation in the use of the various words that it establishes a "more often/less often" continuum rather than an "often uses/never uses" dichotomy. This too is satisfied because over the 44 words, the average ratio between the highest and the lowest usage rate for individual judges is 2 to 1, and only one of these ("such") is as high as 4:1. The usage rates therefore reflect the differing style of judges as they use the same general set of the most fundamental words that make up the large part of anything that any of the judges have to say.

The third is that there must be real and persisting differences between the individual judges, and these differences must be small enough to show that we are looking for variations within a general behavior rather than different behaviors, and large enough that they can be detected and can constitute a reasonable basis for evaluation. For this purpose, and for the analyses of "By the Court" judgments below, these differences will be

39. Four of these "words" actually represent totals for several words. I treated "a" and "an" as the same word for counting purposes. Similarly, I have combined the various forms of the three most common verbs ("to be" and "to do" and "to have") to be treated as a single "word."

reduced to a single number which will be called the Similarity Score, calculated as follows: For each word, the absolute value of the difference between that word's percentage frequency for each of the two periods is calculated. This is then summed across the 44 words to generate a score which reflects the percentage of words which are different (either more frequent or less frequent) between the two sets. The differences between McLachlin (the Chief Justice, one of only two judges who have served the whole period, and the one with the largest total word count) with each of her colleagues are as follows:

Similarity Score Differences: McLachlin & Colleagues

Judge	**Similarity Score**	**Judge**	**Similarity Score**
Abella	4.547%	Iacobucci	3.398%
Arbour	4.554%	Karakatsanis	3.089%
Bastarache	3.693%	L'Heureux-Dubé	4.913%
Binnie	3.828%	LeBel	4.260%
Charron	4.044%	Major	3.772%
Cromwell	2.988%	Moldaver	5.438%
Deschamps	3.791%	Rothstein	3.048%
Fish	3.715%	Wagner	5.204%
Gonthier	3.290%		

These differences are large enough to support the hypothesis of a systematic and persisting difference between the individual judges in terms of the way that they use the same standard set of function words.

The fourth condition is that the total count for judges must actually reflect an enduring tendency around which their word usage in any individual judgment oscillates, rather than something more random or haphazard. This is assessed by dividing the word usage totals for the two longest serving (and therefore highest total word-count) judges—McLachlin C.J. and Binnie J., at the midpoint of the chief justiceship, and then to assess the similarity of the usage patterns for each half. For McLachlin C.J., this difference is 2.0%; for Binnie J., it is 2.25%. This is well below the differences between pairs of judges suggested above, satisfying this condition as well.

These conditions satisfied, the following are the 44 function words used for this analysis, with a frequency count from the 3.75 million word aggregate word total (and the percentage of the total word count) for each.

Function word frequency, Solo-attributed Supreme Court Judgments 2000–2014

Word	Count	Percentage	Word	Count	Percentage
The	332,510	8.91%	No	8,892	0.24%
Of	166,124	4,45%	Under	8,473	0.23%
[To be][40]	133,019	3.56%	May	8,296	0.22%
To	114,140	3.06%	Whether	7,800	0.21%
A/An[41]	100,067	2.68%	Must	7,707	0.21%
In	91,306	2.45%	There	7,662	0.20%
That	73,220	1.96%	If	7,360	0.20%
And	67,256	1.80%	Their	6,655	0.18%
Not	31,795	0.85%	Such	6,377	0.17%
As	28,553	0.76%	Will	6,366	0.17%
For	28,299	0.76%	But	6,288	0.17%
It	28,213	0.75%	Any	5,911	0.16%
[To have][42]	28,140	0.75%	Also	5,486	0.15%
At	27,816	0.74%	Only	5,467	0.15%
This	27,477	0.74%	One	5,322	0.14%
On	26,316	0.71%	Where	5,294	0.14%
Or	23,749	0.64%	All	4,907	0.13%
With	19,016	0.51%	Can	4,762	0.13%
[To do][43]	13,718	0.36%	When	4,439	0.12%
Which	12,244	0.33%	Could	4,339	0.12%
From	11,970	0.32%	More	4,090	0.11%
Would	11,883	0.32%	Who	3,765	0.10%

V. *Confronting a possible problem: the language issue*

It may seem that I have glossed over a very significant problem, that being the bilingual nature of the Supreme Court—the fact that some judges write in English (with an official French translation) and others write in French (with an official English translation). This being the case, function word analysis faces a double hurdle. First, the method will be comparing the direct language use of Anglophone judges with the translated version of

40. Including six words: are, be, been, is, was, were.
41. Including the count for both "a" and "an."
42. Including three words: had, has, have.
43. Including three words: did, do, does.

what was actually written in another language by their French colleagues. Second, we may not even know what language the "By the Court" judgment was initially written in. Thus we will not know whether the translation complication is present when we look at the scores for the English judges, or whether there is a double translation problem (first for the generation of their all-judgment patterns, then for the generation of the patterns for the particular "By the Court" judgment) underlying the scores for the francophone judges.

In fact, this is not a problem at all, because we know that all but one of the Court's "By the Court" judgments were initially written in English. This is not guesswork, but something presented directly in the *Supreme Court Reports*. The normal practice since the 1970s has been to publish judgments in both languages; but one of those two versions is introduced as the "version francaise"/"English version" of what is simply presented as "the judgment/le jugement" in what is thereby revealed to be the initial language of writing. Although many of the justices on the Supreme Court are reasonably bilingual, and some occasionally write judgments or minority reasons in their second language, it seems a reasonable assumption that for that subset of significant cases that draws the "By the Court" style, typically involving an extended analysis of constitutional issues, judges are unlikely to be writing in their second language.

This telegraphing of the language of writing was not always the case —for the (on my count) 24 major "By the Court" decisions delivered between 1979 and 1999, just over half (13) were presented in such a way as not to provide this information; "the judgment" in English was directly balanced by "le jugement" in French with no hint on the face of it as to which was the original and which the translation. All but one of the Laskin Court's major "By the Court" judgments took this form, as well as half of the "By the Court" judgments of the Dickson and Lamer Courts. For the McLachlin Court, however, only the three companion cases of *Solski/, Gosselin/,* and *Okwubi* fail to provide this "initial language of writing" indication.[44] Why this initially solid practice was first attenuated and then abandoned I could not say. It does seem to me that it undermines a practice otherwise characterized by complete anonymity.

For present purposes, however, the abandonment of the early practice is most convenient. All but one of the major "By the Court" judgments of the McLachlin Court are presented as having been first written in English,

44. *Solski (Tutor of) v Quebec (AG)*, 2005 SCC 14, [2005] 1 SCR 201; *Gosselin (Tutor of) v Quebec (AG)*, 2005 SCC 15, [2005] 1 SCR 238; *Okwuobi v Lester B Pearson School Board*, 2005 SCC 16, [2005] 1 SCR 257 [*Gosselin* trilogy].

and then translated into French, which I will take as an indication that they were written by a justice whose first language is English.[45] This being the case, the "language of writing" issue does not complicate the application of function word analysis, although under the Court's earlier practices it would have done so. I will comment later on the implications of this indication that "By the Court" seems to have been so dominated by the Anglophone judges.

VI. *Applying the methodology*

The methodology described and the background judge-by-judge totals in place, it remains to review the 22 "By the Court" judgments of the McLachlin Court. "Twenty-two in sixteen years" makes its own case for the significance of the anonymous judgment device—often enough to constitute a practice, but rare enough to be unusual. The subject matter confirms this appearance, given that it is heavily focused on constitutional issues.

"By the Court" Judgments of the McLachlin Court

Case	Citation	Reference?	Type of law	Length
Re Firearms Act	2000 SCC 31	Yes[46]	Federalism	8,417 words
R. v. Latimer	2001 SCC 1	No	Charter	10,714 words
United States v. Burns & Rafay	2001 SCC 7	No	Charter	20,139 words
Suresh v. Canada	2002 SCC 1	No	Charter	18,080 words
R. v. Powley	2003 SCC 43	No	First Nations	6,408 words
R. v. Blais	2003 SCC 44	No	First Nations	5,538 words
Wewaykum Indian Band v. Canada	2003 SCC 45	No	Courts/recusal	11,960 words
Re Same Sex Marriage	2004 SCC 79	Yes	Federalism	7,232 words
Solski v. Quebec (A.G.)	2005 SCC 14	No	Language/Charter	9,794 words
Gosselin v. Quebec (A.G.)	2005 SCC 15	No	Language/Charter	4,095 words
Okwuobi v. School Board	2005 SCC 16	No	Language/Charter	8,052 words
Mugesera v. Canada	2005 SCC 40	No	Courts/judicial review	19,641 words
Provincial Judges Assn	2005 SCC 44	No	Courts/independence	19,307 words
Canada (Justice) v. Khadr	2008 SCC 28	No	Charter	4,468 words
BCE Inc. v. Debentureholders	2008 SCC 69	No	Commercial law	15,777 words
Canada (Prime Minister) v. Khadr	2010 SCC 03	No	Charter	5,461 words

45. Both Bastarache J. and Fish J. will be included as "English first language" justices, on the grounds that their attributed judgments for the Court are almost always (19 times out of a randomly selected 20) written in English and translated into French.

46. Reference to provincial Court of Appeal, taken on appeal to Supreme Court of Canada.

R. v. Ahmad	2011 SCC 06	No	Charter	9,626 words
Re Securities Act	2011 SCC 55	Yes	Federalism	14,148 words
Re Supreme Ct Act (Nadon)	2014 SCC 21	Yes	Courts/federalism	12,205 words
Re Senate Reform	2014 SCC 32	Yes	Federalism	15,032 words
Carter v. Canada	2015 SCC 5	No	Charter	16,309 words
R. v Smith	2015 SCC 34	No	Charter	3,776 words

Actually, "22" understates the count: the real total is closer to sixty, but two-thirds of those are extremely short, including a good number of oral "from the bench" judgments. Elsewhere, I have referred to these as the "minor tradition" of "By the Court" judgments, as distinguished from the "grand tradition" decisions that are included in the list above.[47] It is not that these minor cases are without interest in their own right, but they need to be distinguished from the extended sets of reasons that settle major issues of (usually if not quite always) constitutional law. The cutoff point that I have used is 2500 words, which is to say about five pages of normal text. It does not seem to me that sets of reasons that fall below this (and many of the "minor tradition" decisions fall well below it, in the low hundreds and occasionally mere dozens of words) constitute a major contribution to the Court's jurisprudence. A further practical reason is that as the judgments get shorter there is not enough material for this methodology to get any traction.[48] The excision of the routine material (summary of facts, summary of decisions in the lower courts, statement of issues) aggravates this problem. The focus of this paper, therefore, is the twenty-two major "By the Court" judgments of the McLachlin Court.

Three of the cases depart from the normal format that introduces the reasons with the formulaic phrase "The following is the judgment delivered by THE COURT." The three unusual cases are *Wewaykum Indian Band v. Canada*, *Mugesera v. Canada (Minister of Citizenship and Immigration)*, and *Nadon*, but in my judgment they are not unusual enough to be excluded.

- *Wewaykum* 2003[49] was a case that arose when it turned out that Binnie J. had delivered the reasons for a unanimous decision of the Court (*Wewaykum* 2002[50]) despite having been involved in a much earlier stage of the case while serving as Associate Deputy

47. See McCormick & Zanoni, *supra* note 2.

48. Especially when the reasons for judgment approach or reach their reductionist apotheosis in the formulaic minimum "this appeal is dismissed for the reasons given in the court below." See e.g. *Re Privacy Act (Canada)*, 2001 SCC 89, [2001] 3 SCR 905.

49. *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259 [*Wewaykum* 2003].

50. *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245.

Minister of Justice (although it was not seriously questioned that he had simply forgotten). Obviously, he should therefore have recused himself; because he had not only taken part in the hearing of the appeal but also delivered the reasons for judgment, the band applied for an order to set the judgment aside. Binnie J. recused himself (of course) from the consideration of the application, which was unanimously dismissed by the other eight judges; this was presented as a judgment delivered jointly and collectively by all eight of the judges, their names listed in order of seniority. However, the combination of high-profile anonymity and unanimity is fully congruent with the "By the Court" style.

- *Mugesera* involved the attempt by the federal government to deport an individual for his involvement in the Rwanda massacres.[51] The Supreme Court case arose from the federal government's appeal of the judgment of the Federal Court of Appeal setting aside the deportation order. Again, recusal was an element in this case, the husband of newly appointed Abella J. having been involved in a group that had made representations to the Minister on the subject; and again there was a consideration of an application (this time for a permanent stay of proceedings) heard by the other eight judges of the Court, who unanimously dismissed it. The decision on the application was delivered in the same format as *Wewaykum*: the "judgment of the Court" was delivered jointly by the eight judges, their names listed in order of seniority. This same style—judgment by eight listed names—was carried over to the Court's judgment on the appeal itself.[52]
- The *Reference Re Supreme Court Act* (the Nadon case) is the most unusual of the three non-standard inclusions.[53] If "By the Court" implies both anonymity and unanimity, neither *Wewaykum* nor *Mugesera* is a real problem. But in *Nadon*, the Court was not unanimous, there being a solo dissent by Moldaver J. The other seven judges on the eight-judge panel[54] delivered an opinion (not a judgment, because it was a reference case) jointly attributed to the seven judges of the majority, their names listed in order of seniority.

51. *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39, [2005] 2 SCR 91 [*Mugesera*].

52. The decision on Mugesera's application is not included in this analysis because of its brevity, less than 2,000 words.

53. *Reference Re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 433 [*Nadon Reference*].

54. Rothstein J. recused himself as the only member of the Court who had been elevated from the Federal Court of Appeal, this being one of the issues at play.

> Such an anonymous format for a significant constitutional case justifies inclusion despite the dissent.

VII. *The cases*

This section will describe the application of the methodology, and the results that are generated, for each of the cases in the Table.

1. Reference Re Firearms Act (Can.)

The *Firearms Reference* was the Alberta government's challenge to the federal legislation that established the long-gun registry (since abolished by the Harper government).[55] Alberta's argument was that the legislation was not a legitimate exercise of the national government's criminal law power under section 91 of the *Constitution Act 1867*, but rather an attempt to regulate property that improperly intruded on the provincial jurisdiction over property and civil rights within the province under section 92. That is to say: it was a straightforward division of powers federalism case of the sort that has frequently occurred in Canadian history. The Court's unanimous conclusion was that the legislation was a valid exercise of Parliament's jurisdiction over the criminal law.

It is unusual for the Supreme Court to use the "By the Court" format for an appeal from a provincial reference case. The McLachlin Court to date has decided six such cases, five of which were unanimous, but only this one used the anonymous format, making it the first provincial reference appeal in two decades to take this form.[56]

A word count for the analysis section of the judgment was reduced to percentages paralleling those of each judge's accumulated word usage counts. The absolute value of the differences in the use of each word was calculated and summed for all of the words for each of the judges, generating a total that is here labeled a "similarity score." The score reflects the proportion of the total words in the judgment (calculated as a percentage of all words, not just the total for the words in the list) that differs—either higher or lower—from the distribution that would have precisely paralleled each judge's accumulated word usage percentages. Lower scores reflect a smaller departure, and therefore make the case that a particular judge is more likely to have written the reasons.

But "lower score" (in particular, "lower enough to be taken as decisive") needs a reference point, and that will be the function word count for the 3.75 million words for all of the significant judgments of the

55. *Firearms Reference*, *supra* note 4.

56. That is to say, the first since *McEvoy v New Brunswick (AG) et al*, [1983] 1 SCR 704, [1983] SCJ No 51 (QL).

McLachlin Court and its similarity score for the immediate case. This is a more objective process than simply eye-balling the numbers, suggesting the way that a notional "Justice Completely Average" would have deployed function words to generate the reasons. What will drive the choice as to whether the similarity score indicates a clear outcome is the ratio of each judge's similarity score to this "all judges" reference point.

***Similarity Scores for* Firearms Reference**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
McLachlin	6.463	85%
ALL JUDGES	7.563	
Binnie	7.671	101%
Bastarache	7.824	103%
Major	7.864	104%
Iacobucci	8.476	112%
Arbour	9.339	123%

The figures strongly support a conclusion that McLachlin C.J. is the most likely of the judges to have been the lead writer of the decision. This conclusion follows not so much from the absolute score itself as from the fact that it is lower by a comfortable margin than that of the other judges on the panel—in order to write the words of the analysis section of the *Firearms Reference*, McLachlin C.J. would have had to make much less of an adjustment to her long-term preferred word-usage than any other judge on the panel. As will be seen below, this is an unusually decisive outcome.

2. R. v. Latimer

The *Latimer* case involved Robert Latimer, who was convicted of killing his severely physically and mentally disabled daughter.[57] It was never seriously challenged that this was a mercy killing, prompted by concern for the girl's suffering as she underwent a series of painful operations with no prospect for long-term improvement. However, the *Criminal Code* dictates a statutory mandatory minimum sentence (and mandatory minimum period for parole eligibility) for second-degree murder, with no provision for mercy killing as either a defence or a mitigating circumstance.[58] The jury that convicted Latimer recommended a less-than-statutory-minimum sentence, and the presiding judge complied, but the Saskatchewan Court of Appeal allowed the Crown's appeal to restore the

57. *R v Latimer*, 2001 SCC 1, [2001] 1 SCR 3.
58. *Criminal Code of Canada*, RSC 1985, c C-46, ss 235, 745.

mandatory minimum, and the Supreme Court upheld that decision. The *Charter* challenge invoked the "cruel and unusual punishment" section of the *Charter*,[59] and the issue of a constitutional exemption was (curiously) identified by the Court as one of the issues to be dealt with, but ultimately left aside as not necessary to answer.

***Similarity Scores for* R. v. Latimer**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
Major	5.286	89%
McLachlin	5.840	98%
ALL JUDGES	5.944	
Binnie	6.597	111%
Iacobucci	6.790	114%
Arbour	7.027	118%

The similarity score figures point to Major J. as the most likely initial author of the reasons. McLachlin C.J.'s similarity score for *Latimer* is even lower than that for the *Firearms Reference*, and also lower than that of the notional average judge, but this is not the thrust of the methodology. The critical factor is not the score itself but rather the identification of the judge for whom there is the least degree of displacement from their personal preferred point. For *Latimer*, that person is Major J.

3. United States v. Burns and Rafay

This extradition case involved two Canadian teenagers who were accused (and ultimately convicted) of a gruesome murder in the United States, allegedly killing Rafay's parents and sister for his inheritance.[60] When they were arrested in Canada, the State of Washington applied to extradite them to stand trial in that state. As provided for under the *Extradition Act* and the Canada/U.S. extradition treaty, the federal Minister of Justice considered but decided against requesting assurances that the death penalty would not be sought, imposed or carried out.[61] Burns and Rafay argued that this was a violation of their *Charter* rights to liberty and security of the person,[62] and were successful in the British Columbia Court of Appeal, which set aside the extradition order.[63] The Supreme Court upheld the decision, and

59. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 12.
60. *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 [*Burns*].
61. *Ibid*, at para 3.
62. *Charter*, *supra* note 57, s 7. Curiously, they did not argue the right to life under section 7.
63. *Burns*, *supra* note 58, at para 20.

its judgment reversed the balance of the extradition treaty (from "seek assurances when particular facts warrant that special exercise" to "seek assurances unless particular facts warrant it not being exercised") with an extended argument against the death penalty grounded in judicial fallibility.[64]

***Similarity Scores for* United States v. Burns**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
ALL JUDGES	4.192	
Binnie	4.498	107%
Arbour	4.693	112%
Iacobucci	4.708	112%
Bastarache	5.117	122%
McLachlin	5.414	129%
Major	5.554	132%

The word usage similarity scores point to Binnie J. as the most likely initial author. Notwithstanding the fact that this score is the lowest that has yet emerged from this analysis, this identification is made somewhat tentative by the fact that all the similarity scores are low, particularly those of Arbour and Iacobucci JJ. The logic of this methodology still directs Binnie J. as the most likely author, and I will be taking the 5% spread in the all-judge ratio as enough to justify this conclusion, but the slight margin between Binnie J. and his colleagues necessitates treating this as more tentative and less conclusive than the previous cases considered.

4. Suresh v. Canada

Suresh involved a Convention refugee from Sri Lanka who had applied for landed immigrant status.[65] The Canadian government had commenced deportation proceedings based on findings that he was a member of a terrorist organization (the Liberation Tigers of Tamil Eelam). The Minister also issued an opinion declaring him to be a danger to the security of Canada (as provided for in the *Immigration Act*) but had neither provided him with a copy of the immigration officer's memorandum on which the finding was based nor afforded him the opportunity to respond to the finding orally or in writing.[66] Suresh applied for judicial review challenging both the Minister's decision and the fairness of the procedures provided for in

64. *Ibid*, at paras 98-104, 127.
65. *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.
66. *Ibid*, at para 1.

the legislation, and also claiming a violation of the *Charter*. The Court allowed his appeal to the extent of ordering a new deportation hearing but upheld the legislation itself as constitutional.[67]

***Similarity Scores for* Suresh v. Canada**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
McLachlin	4.432	92%
ALL JUDGES	4.793	
Bastarache	5.357	112%
Iacobucci	5.496	115%
Major	5.569	116%
Binnie	5.989	125%
Arbour	6.161	129%

The similarity score clearly points to McLachlin C.J. as the initial author. Not only is hers the lowest score of the set (indeed, the second lowest score generated for any judge in any case by this methodology), but the spread between her score and that of the closest judges on the panel is unusually high. This is one of the most decisive outcomes of the nineteen.

5a. R. v. Powley

5b. R. v. Blais

Powley involved a father and son, members of a Métis community near Sault Ste. Marie, who shot and killed a bull moose without the required hunting license or validation tag. They were charged with unlawfully hunting moose out of season. Had they been status Indians, the requirements would not have been enforced in recognition of the aboriginal right to hunt for food; because they were Métis, provincial officials did not allow them such an exemption. They argued that under section 35 of the *Constitution Act, 1982* they were entitled to the same treatment as status Indians.[68] The provincial court trial judge ruled in their favour, a decision upheld by the Ontario Superior Court of Justice, the Ontario Court of Appeal, and the Supreme Court.[69] The finding was that members of an enduring Métis community of distinctive collective identity also enjoyed the aboriginal right to hunt for food and Ontario's failure to recognize this right violated section 35.[70]

67. *Ibid*, at para 5.
68. *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207.
69. *Ibid*, at para 7.
70. *Ibid*, at paras 53-55.

Blais similarly involved a Métis, this time in Manitoba, who was charged with hunting deer out of season. He argued that he should enjoy the same right to hunt for food as the "Indians" referred to in the 1930 *Natural Resources Transfer Agreements (NRTA)*.[71] His membership in the Métis community, and the continued existence of identifiable Métis communities in Manitoba for more than a century, were not in dispute. The case was entirely about whether Métis were included in the term "Indians" as it appeared in the *NRTA*.[72] The finding at trial and on appeal was that they were not, and the Supreme Court upheld that decision, concluding that both provincial and federal legislation and documents of the time distinguished clearly between "Indians" and "half-breeds," such that it could not legitimately be concluded that the *NRTA* terms were intended to embrace both.[73]

The reasons for judgment in the two cases have been combined here for a double reason. First, the two cases are clearly companion cases—that is to say, cases dealing with closely-related issues, assigned to the same panel of judges, argued orally on the same day, and with decisions handed down on the same day. The similarities in the structure and the language of the two decisions make it entirely plausible that both were written by the same person, and common sense reinforces the idea that a single judge would be framing the initial wording of two such closely-related judgments. Secondly, the two decisions are rather short, even more so once the more routine aspects (background facts, case facts, summary of lower court judgments) are subtracted. Combining them provides better traction for the function word analysis.

***Similarity Scores for* R. v. Powley/R. v. Blais**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
McLachlin	7.337%	99%
Iacobucci	7.387%	100%
ALL JUDGES	7.422	
Binnie	7.795	105%
Arbour	8.013	108%
Major	8.124	109%
Bastarache	8.178	110%

The results are not particularly conclusive. The clustering of all six judges is rather close, but McLachlin C.J. and Iacobucci J. are the closest, not just because they are the pair of judges below the ALL JUDGES reference

71. *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236.
72. *Ibid*, at paras 1-4.
73. *Ibid*, at paras 42-44.

point but because both of them enjoy the 5% edge in the all-judge ratio that I have been treating as sufficient. It is a little surprising that Binnie J. trails this pair; if the Supreme Court has recently had a "First Nations" specialist, he is the most credible candidate.[74] The methodology, however, indicates either McLachlin C.J. or Iacobucci J. (or, of course, a collaborative exercise including both of them).

6. Wewaykum Indian Tribe v. Canada 2003

The circumstances for *Wewaykum* have been described above: an application by a litigant for an order setting aside the decision in a recent case because of the participation (to the extent of delivering the unanimous judgment) of a judge who should have recused himself for prior involvement in the subject of the dispute.[75] An eight-judge panel (excluding the judge whose participation in the earlier case was the point at issue) dismissed the application on the grounds that no reasonable observer would think that the Court's deliberations had been compromised or biased because of that judge's involvement.[76] The judgment is also interesting for its description of the Court's decision-making procedures.[77]

***Similarity Scores for* Wewaykum v. Canada**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
Bastarache	7.165	98%
Arbour	7.183	98%
ALL JUDGES	7.323	
Iacobucci	7.629	104%
Major	8.136	111%
McLachlin	8.137	111%

The similarity scores point to a virtual tie between Bastarache and Arbour, again suggesting that either one of them or both of them collaboratively seem to have done the initial drafting of the reasons.

7. Reference re Same-Sex Marriage

The historical setting of the *Same-Sex Marriage Reference* was an attempt by the Liberal government to deal with same-sex marriage in the face of opposition in Parliament and a certain degree of public discomfort

74. The Supreme Court would no doubt deny any deliberate policy of specialization, but it is not unreasonable to identify the specific legal or professional backgrounds of judges that would be relevant to specific areas of law.

75. *Wewaykum* 2003, *supra* note 49.

76. *Ibid*, at para 3.

77. *Ibid*, at paras 92-93.

with the subject.[78] The initial set of questions that were presented to the Supreme Court bordered on the innocuous (a strong suggestion that they represented a political manoeuver rather than a serious request for advice). The core question was whether Parliament had the legislative authority to alter the statutory definition of marriage.[79] Given that section 91.26 of the *Constitution Act 1867* specifically gives Parliament exclusive jurisdiction over Marriage and Divorce, a "no" answer seemed unlikely, but it is the framing of this question that explains why I earlier categorized the subject matter of this case as "federalism."[80] At the last minute, so much so as to delay the delivery of the judgment, Prime Minister Paul Martin added the question most people always assumed was at stake—whether the current statutory definition of marriage as a union between a man and a woman violated the *Charter*.[81] This would suggest that this was now a *Charter* reference rather than a federalism reference, except that the Supreme Court rather coyly declined to answer it on the grounds inter alia that it was currently before Parliament. On the initial main question the Court unsurprisingly ruled that Ottawa did have the necessary legislative jurisdiction.[82]

***Similarity Scores for* Same-Sex Marriage Reference**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
Bastarache	7.008	98%
ALL JUDGES	7.117	
Abella	7.187	101%
McLachlin	7.469	105%
Major	7.605	107%
Fish	7.607	107%
Charron	7.756	109%
Binnie	7.843	110%

78. *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 [*Marriage Reference*].
79. *Ibid*, at para 2.
80. *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s 91(26).
81. *Marriage Reference*, *supra* note 78, at para 3.
82. This is somewhat of a simplification. The proposed federal legislation had also included a section stating that the Act would not affect the freedom of officials of religious groups to refuse to perform marriages not in accordance with their religious beliefs. The Supreme Court pointed out that this section was not in Parliament's power, because authority over the performance or solemnization of marriage is exclusively allocated to the provinces under s 91(12) of the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3. This too is clearly a strict federalism ruling.

Like the two "By the Court" cases in the previous year, the *Same-Sex Marriage Reference* yields frustrating results, with all the (Anglophone) judges on the Court showing comparable similarity scores. Bastarache and Abella JJ., however, post the lowest scores by the bare margin that I have been accepting as sufficient, justifying the tentative conclusion that either or both of them did the initial drafting.

8a. Solski (Tutor of) v. Quebec (Attorney General)

8b. Gosselin (Tutor of) v. Quebec (Attorney General)

8c. Okwuobi v. Lester B. Pearson School Board

Solski/Gosselin/Okwuobi constitute a trio of companion cases—so described in the first paragraph of *Okwuobi*—dealing with the right to minority language education in the *Charter*, and specifically the procedures that Quebec has adopted for dealing with disputes arising over these rights.[83] *Solski* involved three families whose requests for certificates of eligibility to attend public English-language schools had been denied.[84] *Gosselin* involved eight families, mostly Canadian citizens and mostly educated in French in Quebec, who sought approval for their children to attend English language classes. And *Okwuobi* involved three families who had been denied admission to English-language public instruction and had sought to by-pass the administrative appeal processes laid out in the legislation by seeking an immediate remedy from the Superior Court of Quebec. The common feature of all three was that the Supreme Court decision upheld the provincial legislation regulating access to English-language public education in Quebec (although two of the families in *Solski* succeeded in persuading the Court that their children were indeed eligible for the certificates of eligibility). The "companion case" nature of the trio—assigned to identical panels, oral argument heard on the same day, judgments handed down the same day—justifies their amalgamation into a single case for present purposes, and the relatively short reasons (once the background material has been excised) makes the combination desirable for analytical purposes.

83. *Gosselin* trilogy, *supra* note 44.

84. It is curious that the case is indexed under *Solski*, because this was the only of the families involved in the case that had abandoned the appeal following the trial judgment, so that the Court found it was 'not necessary' to deal with their particular circumstances.

***Similarity Scores for* Solski/Gosselin/Okwuobi**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
ALL JUDGES	5.040	
Binnie	5.298	100%
LeBel	5.458	103%
Bastarache	5.503	104%
McLachlin	5.870	111%
Major	5.926	112%
Fish	6.440	122%
Deschamps	6.638	125%

Applying the methodology to this case is unusually difficult. For one thing, this is the only one of the McLachlin Court's "By the Court" judgments that does not make it possible to determine the language of the initial draft of the reasons; for another, the subject matter of the cases makes it more likely that those reasons would have been written in French than in English.[85] This is therefore the only case considered in this paper for which the fact that the methodology may involve comparing first-language apples with translation oranges is actually a problem, and this directs caution in declaring an outcome. With these reservations, the trio of Binnie, LeBel and Bastarache JJ. seem to stand out, either as solo authors or as collaborating authors of this set of three judgments.

9. Mugesera v. Canada (Minister of Citizenship and Immigration)

The basic content of *Mugesera* has been explained above—an immigration case against a person connected to the Rwandan massacres, with an adjudicator's finding that the allegations against Mugesera (incitement to murder, genocide and hatred, and the commission of crimes against humanity) were valid resulting in the issuing of a deportation order.[86] The Federal Court—Trial Division dismissed an application for judicial review, but the Federal Court of Appeal reviewed and reversed the findings of fact made by the Immigration Appeal Division and set aside the deportation order.[87] The Supreme Court allowed the government's appeal and restored the order.[88]

85. In a somewhat dated study, I found a strong indication that appeals from a particular province or region are more likely to be dealt with by a judge from that province or region. See Peter McCormick, "The Supervisory Role of the Supreme Court of Canada" (1992) 3:2 SCLR 1.

86. *Mugesera*, *supra* note 51.

87. *Ibid*, at para 3.

88. *Ibid*, at paras 14-18.

***Similarity Scores for* Mugesera v. Canada**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
ALL JUDGES	6.053	
McLachlin C.J.	6.296	100%
Bastarache	6.322	100%
Fish	6.598	105%
Major	6.934	110%
Binnie	7.096	113%
Charron	7.276	116%

Once again, the resulting scores are fairly closely clustered, with a virtual tie between two judges for the lowest score. McLachlin C.J. and Bastarache J. are the most likely candidates for the initial writer, either singly or jointly.

10. Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)

Companion cases are one way that the Supreme Court deals with cases that involve related or similar issues. Another device is to combine several separate appeals into a single case for a single resolution, even where the appeals are from different provinces. That was the situation with respect to the four appeals here, from New Brunswick, Ontario, Alberta and Quebec.[89] All were cases that involved the institutional and procedural arrangements for dealing with provincial judicial salaries that had resulted from the transformative 1997 decision in *Remuneration of Judges of the Provincial Court of Prince Edward Island*.[90] As a result of that earlier decision, all the provinces had established judicial compensation committees that conformed closely to the principles that had been laid down, but there had been considerable friction in the intervening years about how a provincial government could proceed if it wished to reject or modify the recommendations of those committees.[91] These concerns culminated in this set of appeals, and the Court dealt with them by (on the one hand) standing firmly by the principles of the *Remuneration Reference*

89. *Provincial Court Judges' Association of New Brunswick v New Brunswick (Minister of Justice) et al*, 2005 SCC 44, [2005] 2 SCR 286.

90. *Reference re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3, 150 DLR (4th) 577. It should be noted that this case as well involved a single decision combining appeals from three different provinces.

91. *Ibid*, at paras 11-12.

but (on the other hand) clarifying the form and procedure for governments that wished to challenge specific recommendations.[92]

***Similarity Scores for* Provincial Judges Ass'n**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
Abella	5.998	80%
Fish	6.537	88%
Binnie	7.143	96%
ALL JUDGES	7.461	
Bastarache	7.745	104%
Major	7.856	105%
McLachlin	7.942	106%
Charron	8.849	119%

Abella J. is by a good margin the most likely initial writer of the reasons for this case, this being one of a half dozen decisive results. It is worth noting that the Supreme Court has handed down a surprising number of decisions over the last twenty years dealing with various aspects of judicial independence.[93] However, this is the first one to have drawn a "By the Court" judgment—or, for that matter, to have been unanimous—and those divided earlier decisions have been written by a surprising number of different judges.

11. Canada (Justice) v. Khadr

The story of Omar Khadr and his connection to events in Afghanistan has been an enduring issue for the Canadian government and for Canadian courts. Khadr was a Canadian teenager fighting with the Taliban in Afghanistan. He was captured by the Americans and transferred to Guantanamo where he was charged with the murder of an American soldier.[94] The core problem in the immediate case was the extent to which the *Charter* applied to government actions relating to Canadian citizens acting outside of Canada.[95] This was complicated by the fact that most of the legal proceedings had been conducted by American officials in circumstances that connected only loosely to normal judicial proceedings in that country, as well as the fact that Khadr had been a minor at the

92. *Ibid*, at para 27.
93. See Peter McCormick, "New Questions About an Old Concept: The Supreme Court of Canada's Judicial Independence Jurisprudence" (2004) 37:4 Can J Political Science 839.
94. *Canada (Minister of Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125, at para 5.
95. *Ibid*, at para 19.

time.[96] The immediate case involved disclosure issues. Khadr was applying for the disclosure of records of interviews with Canadian officials, and of information given to U.S. authorities as a direct consequence of those interviews. The Federal Court of Appeal had ruled that the Canadian government had an obligation to disclose on the grounds that the principle of comity—that Canadian officials are normally bound by local laws when operating abroad—had been negated by the fact that the U.S. Supreme Court had found that those processes violated both U.S. domestic law and the international commitments to which both Canada and the U.S. subscribed. The case was appealed to the Supreme Court which upheld the decision of the Federal Court of Appeal, modestly altering the disclosure rules that that court had enunciated.[97]

***Similarity Scores for* Canada v. Khadr**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
Abella	7.717	87%
Fish	7.957	89%
Bastarache	8.771	98%
ALL JUDGES	8.916	
Binnie	9.034	101%
McLachlin	9.162	103%
Rothstein	9.188	103%
Charron	10.199	114%

The scores are such as to make Abella and Fish JJ. the most likely authors for this decision.

12. BCE Incorporated v. 1976 Debenture Holders

This was a major decision in commercial and corporate law, dealing at length with the responsibility of corporate boards of directors vis-à-vis the diverse sets of stakeholders whose interests they are obliged to consider and balance.[98] The case arose out of a leveraged buy-out that would have had the effect of reducing the short-term trading values of several major sets of debentures.[99] Although the plan was strongly supported by BCE's shareholders at the recommendation of the board, the debenture-holders sought relief under the oppression remedy in the *Canada Business*

96. *Ibid*, at para 23.
97. *Ibid*, at para 8.
98. *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, [2008] SCR 560 [*BCE*].
99. *Ibid*, at para 4.

Corporations Act.[100] The Quebec Superior Court approved the arrangement as fair and dismissed the claim, but the Court of Appeal set aside that decision while ruling that the directors had failed adequately to consider the reasonable expectations of the debenture-holders, although they found it unnecessary to consider the oppression claim.[101] BCE appealed the overturning of the trial judge's approval of the arrangements, and the debenture-holders appealed the dismissal of the claims for oppression.[102] The Supreme Court allowed BCE's appeal and dismissed that of the debenture-holders, and it did so in extended reasons that sought to clarify the duties of corporate boards.[103]

The decision sits somewhat strangely in the list of "By the Court" judgments, and does not look any more in place even should the list be expanded backward through the Lamer and Dickson Courts. By far the largest proportion of the reasonably substantive "By the Court" judgments have dealt with major constitutional issues of various kinds—the *Charter*, federalism, and First Nations are the major categories—and almost never with non-constitutional cases. But *BCE* raises no constitutional dimensions at all. On the other hand, the case was clearly a major decision dealing with important issues, and has been described as a "seminal corporate law case"[104] and a "landmark" decision,[105] although others have been more critical.[106] It still remains the fact, however, that this is the only decision dealing with commercial and corporate law that has ever been the subject of a "By the Court" judgment by the Supreme Court of Canada. Time will tell whether this is a one-shot aberration, or an early sign of an expansion of the use of the device.

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100. *Canada Business Corporations Act*, RSC 1985 c C-44, s 241.
101. *BCE*, *supra* note 98, at paras 23-28.
102. *Ibid*, at para 29.
103. *Ibid*, at para 166.
104. See Jeffrey Bone, "The Supreme Court Revisiting Corporate Accountability" *Alberta Law Review Online Supplement* (nd), online: <www.albertalawreview.com>.
105. For example, it has been included by the Ontario Justice Education Network as part of its Landmark Cases package; see http://www.ojen.ca/sites/ojen.ca/files/resources/OJEN-landmark_BCE_en/20v3-allsections.pdf.
106. See e.g. Ed Waitzer & Johnny Jaswal, "Peoples, BCE and the Good Corporate 'Citizen'" (2009) 47:3 Osgoode Hall LJ 439.

***Similarity Scores for* BCE Inc.**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
McLachlin	4.406	91%
ALL JUDGES	4.816	
Charron	5.482	114%
Bastarache*	5.558	115%
Binnie	5.905	123%
Abella	6.420	133%

The lowest similarity score for this decision is that of McLachlin C.J.; indeed, it is narrowly the single lowest score for any judge for any of the "By the Court" judgments that have been considered, and the spread between this and the second highest score makes this the most decisive finding in this paper. One might have expected a role for Deschamps J., given that she co-authored (with Major J.) the earlier case that had for several years been considered the major precedent in the field, *Peoples Department Store.*[107] Because of my concern for the language issue, I have been treating "initially written in English" as implying "by one or more Anglophones" but of course this means that a genuine co-authorship between an Anglophone and a francophone would not be detected; I concede the possibility that this particular case may be the victim of that strategy.

The inclusion (with an asterisk) of Bastarache J.'s name on the list should be explained, because Bastarache J. had retired from the Court in the interval between the oral argument on the appeal and the handing down of the decision; the *Supreme Court Act* allows a retired justice to continue to take part in the deliberations of appeal panels, but only for six months after the date of retirement,[108] and the case was reserved for long enough that Bastarache J.'s six months had expired. In their Dickson biography, Sharpe and Roach mention that some initial drafts of reasons were "orphaned" by deaths, retirements or poor health, and therefore appeared instead as "By the Court" judgments.[109] I ran the comparison numbers for Bastarache J. to see if perhaps that might explain the otherwise unprecedented use of "By the Court" for a case that raises no constitutional issues; as the numbers show, it did not.

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107. *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, [2004] 3 SCR 461.

108. *Supreme Court Act*, RSC 1985, c S-26, s 27(2).

109. Sharpe and Roach, *supra* note 10. The clearest example is *Quebec (AG) v Healey* [1987] 1 SCR 158, where the first paragraph of a "By the Court" judgment explains that the reasons were initially drafted by a justice who died before the decision could be handed down.

13. Canada (Prime Minister) v. Khadr

This case represents a continuation of the story described above. Khadr had applied to the Canadian government for repatriation to Canada, invoking *Charter* rights. The argument was that Canadian complicity in inappropriate interrogation and imprisonment as established in *Khadr 2008* engaged Canadian obligations despite the fact that his incarceration and interrogation had been in and by another country.[110] The federal government having repeatedly and emphatically refused to make any such application, Khadr made an application to the Federal Court seeking a declaration that his *Charter* rights had been violated, and an order that the government proceed with his repatriation.[111] The trial judge accepted this application (ruling that Canada must present a request to the United States for Khadr's repatriation to Canada as soon as is practicable); and the Federal Court of Appeal upheld the decision over a solo dissent.[112] The Supreme Court upheld the finding of a violation of *Charter* rights, but rather than order immediate patriation it granted a declaration advising the government of this finding and leaving it to the government to decide what actions to take in respect of Khadr that were in conformity with the *Charter*.[113]

Similarity Scores for Canada v. Khadr

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
ALL JUDGES	6.345	
Cromwell	6.594	104%
McLachlin	6.657	105%
Rothstein	6.899	109%
Fish	6.983	110%
Binnie	7.399	117%
Abella	7.940	125%
Charron	8.392	132%

The similarity scores identify not a single most likely author, but a pair of judges in a virtual tie. Cromwell J. is just marginally ahead of McLachlin C.J. This suggests that either one of these two judges, or the two working jointly, wrote the initial draft of the reasons.

110. *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr* 2010].
111. *Ibid*, at para 8.
112. *Ibid*, at paras 9-10.
113. *Ibid*, at paras 26 and 46.

14. R. v. Ahmad

This case involved the perennial judicial challenge of the appropriate balance between the constitutional guarantee of individual rights and freedoms and the pressing concerns of national security in an age of global terrorism. More specifically, it is sometimes the case that the evidence of possible or potential terrorist action will have been collected through procedures that cannot be fully explored in court because they might disclose potentially injurious or sensitive government information.[114] At issue, therefore, is the question of the capacity of the accused to hear the evidence against them and to make full answer and defence, an element that the Court has found within the notion of a right to a fair trial. As well, judicial independence is potentially compromised by rules that prevent a full exploration and explanation of the case before them.[115] The trial court judge initially hearing the application alleging a constitutional violation struck down the legislation with respect to certain issues; the case was appealed directly from the Ontario Superior Court of Justice to the Supreme Court (a *per saltum* appeal that bypassed the provincial Court of Appeal), which allowed the appeal and upheld the statute "properly understood and applied" as constitutionally valid.[116]

Similarity Scores for R. v. Ahmad

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
McLachlin	6.067	92%
Rothstein	6.191	93%
Binnie	6.368	96%
Fish	6.405	97%
Cromwell	6.620	100%
ALL JUDGES	6.630	
Charron	7.292	110%
Abella	7.372	111%

Of all the cases considered in this paper, this is the most inconclusive. The margin I have been treating as sufficient to support a result has between a 5% spread in the All-Judge Ratio, but for this case there are no fewer than four judges whose scores are within this range, with a fifth judge only slightly outside. The methodology gives no clear indication as to which judge or pair of judges might have written these reasons.

114. *R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110 at paras 1-2.
115. *Ibid*, at para 6.
116. *Ibid*, at para 3.

15. Reference re Securities Act[117]

Through the financial crises of the early 21st century, it was often observed that alone among the major economies of the world, Canada did not have a federal securities regulator; rather, each province had its own fully independent and somewhat different procedure and structures for the regulation of securities.[118] Against this backdrop, and following through on the Harper government's "open federalism" approach that sought the disentanglement of federal and provincial policies and the more vigorous assertion of appropriately federal powers, the federal government proposed establishing a national securities regulator.[119] This was welcomed by some provinces but strongly opposed by others (most notably Quebec and Alberta), and the federal government sought an advisory opinion on the constitutionality of the proposed legislation from the Supreme Court.[120] Presumably the intention was to clear up any doubts that might exist, and to position the federal government more favourably for any negotiations that might follow. If so, the gambit failed spectacularly when the Supreme Court declared that the federal government did not have the jurisdiction to enact the legislation, and it used the opportunity to give the federal government something of a lecture on modern Canadian federalism and its foundation in intergovernmental cooperation.[121] It was the first of several dramatic major setbacks for the Harper government in constitutional cases before the Supreme Court.

Similarity Scores for Securities Reference

Judge	**Similarity Score 44 most frequent words**	**All-Judge Ratio**
Fish	7.140	94%
McLachlin	7.330	95%
Abella	7.552	98%
ALL JUDGES	7.691	
Rothstein	7.924	103%
Binnie	8.016	104%
Cromwell	8.770	114%
Charron	9.319	121%

117. *Securities Reference*, *supra* note 5.
118. *Ibid*, at para 4.
119. *Ibid*, at para 29.
120. *Ibid*, at para 34.
121. *Ibid*, at paras 7-10.

Again, the similarities scores create a cluster of three judges, Fish J. and McLachlin C.J. and Abella J., who are equally likely, on the basic of function-word usage, to have written or to have collaborated in the writing of the reasons. The inclusion of Fish J. is slightly surprising, given the fact that he has tended not to be a major player on the Court during his years of service.[122]

16. Reference re Supreme Court Act, Sections 5 & 6 (Nadon)

This case grew out of Prime Minister Stephen Harper's appointment of Justice Marc Nadon to the Supreme Court vacancy created by the retirement of Fish J. A Toronto lawyer applied for a judicial declaration that Nadon J., who had been sitting on the Federal Court of Appeal, was ineligible for appointment to the Supreme Court.[123] It was an argument that hinged on the wording of section 6 of the *Supreme Court Act* (focusing on Quebec) and how it differed from section 5 (dealing with Supreme Court appointment eligibility more generally).[124] The federal government chose to cut short the decision-and-appeal process by posing the question directly to the Supreme Court, getting the answer that it definitely was not hoping for—appointments to the three Quebec seats on the Supreme Court must be from the bar of Quebec or the provincial superior courts of Quebec such that Nadon J. did not qualify and therefore had never been appointed to the Court.[125] The case is of further interest for its aftermath, in the form of an unusual—even unique – confrontation between the Chief Justice and the Prime Minister, who chose to regard her attempt to warn him about the possible complications as inappropriate "lobbying."[126]

As mentioned above, the *Nadon* decision is a "not quite" "By the Court" judgment, given that there was a solo dissent by Moldaver J. that denies the anonymous/unanimous format, but the highly unusual "joint judgment of seven names" format is similar enough in spirit to the "normal" "By the Court" that it would be unreasonable not to include it. If anything, this non-standard approach makes it more important to include it, because it so clearly signals that the Court was aiming for the impassive solidarity of a "By the Court" and narrowly missed it.

122. See McCormick, "Judgment and Opportunity," *supra* note 20.
123. *Nadon Reference, supra* note 53.
124. *Ibid*, at paras 13-14.
125. *Ibid*, at paras 69-71.
126. Leslie MacKinnon, "Beverley McLachlin, PMO give dueling statements in appointment fight," *CBC News* (1 May 2014), online: <www.cbc.ca>.

***Similarity Scores for* Nadon**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
McLachlin	9.815	98%
ALL JUDGES	10.057	
Karakatsanis	10.378	103%
Cromwell	10.564	105%
Wagner	11.141	111%
Abella	11.485	114%

The lowest similarity score is that of McLachlin C.J. who is therefore the most likely author of the initial draft (although not by as definitive as margin as has been the case for some of the other decisions that this paper has attributed to her).

17. Reference re Senate Reform

One of the campaign promises of the Conservative party had been Senate reform, and when he became prime minister, Stephen Harper introduced two different pieces of legislation—one on senator-selection procedures that would have engaged the provincial governments in an election process of sorts, another on Senatorial terms of office—that he insisted were within the jurisdiction of Parliament, but that critics argued would require a formal constitutional amendment including approval by the appropriate number of provinces (a further point of argument being whether it was the "7/50" formula or all-province unanimity that was necessary). After a number of years of controversy, brought to a head by the Quebec government's submission of its own reference question on the subject to its own provincial court of appeal, the Harper government sought an advisory opinion on a range of Senate-reform questions from the Supreme Court of Canada.[127] A unanimous Supreme Court used a "By the Court" judgment to declare that all save the most minor of the elements of those questions (specifically, the ones involving the anachronistically low property qualifications for Senatorial appointment) required formal constitutional amendment with varying degrees of provincial approval.[128]

127. *Senate Reference*, *supra* note 6.
128. *Ibid*, at para 3.

***Similarity Scores for* Senate Reform Reference**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
McLachlin	10.610	98%
ALL JUDGES	10.859	
Cromwell	11.268	104%
Rothstein	11.519	106%
Wagner	11.544	106%
Karakatsanis	11.598	107%
Abella	12.298	113%
Moldaver	13.691	126%

As with the Nadon case earlier in the same year, and by a very similar margin, McLachlin C.J. has the lowest similarity score.

18. Carter v. Canada (Attorney General)

The issue of a *Charter* claim to a right of assisted suicide was dealt with by the Supreme Court in 1993, in the *Rodriguez* case, resulting in a decision by the narrowest possible 5-4 margin that the *Criminal Code* sections prohibiting the counselling or assisting of suicide do not violate the *Charter*, either the right to life and liberty or the right to equality.[129] In 2015, the same question was back before the Court again.[130] This time it received a different answer: the relevant sections "unjustifiably infringed" section 7 of the *Charter* in a manner that was not in accordance with the principles of fundamental justice and that was not saved by the reasonable limits of section 1 of the *Charter*.[131] The declaration of invalidity was suspended for twelve months to allow governments to devise appropriate legislative and regulatory responses.[132]

129. *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, [1993] SCJ No 94.
130. *Carter v Canada (AG)*, 2015 SCC 5, [2015] 1 SCR 331.
131. *Ibid*, at para 4.
132. *Ibid*, at para 128.

***Similarity Scores for* Carter v. Canada**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
Cromwell	5.916	94%
McLachlin	6.102	97%
ALL JUDGES	6.314	
Abella	6.608	105%
Rothstein	6.635	105%
Karakatsanis	7.119	113%
Moldaver	7.676	122%
Wagner	8.872	141%

No single judge stands clear from the table for the similarity scores, but Cromwell J. and McLachlin C.J. are the two for which there is the strongest indication that they were involved, separately or jointly, in writing the initial drafts of the reasons. The gap between their scores and those of the other judges (and not just the fact that these are the two who are below the "all judges" score) is sufficient to make this finding reasonably solid.

19. R. v. Smith

Smith is a somewhat curious inclusion in the "By the Court" set, if only because of its modest length; the two *Khadr* cases aside, this is the only "By the Court," other than some of the companion cases, to fall below 7,000 words and it falls well below that notional threshold.[133] The issue was straightforward—the *Marihuana Medical Access Regulations* limit the lawful possession of medical marihuana to dried marihuana, which is problematic for those who think that other forms of marihuana are more effective, and even more so, for people who do not smoke and do not wish to smoke.[134] Agreeing with the British Columbia Court of Appeal that the distinction between the different forms of marihuana was arbitrary, the Supreme Court found the regulations unconstitutional. The threat of imprisonment triggered section 7 concerns about the right to liberty, the limits violated the principles of fundamental justice because they were arbitrary, and the disconnect between the prohibition and its alleged object meant that they were not saved by section 1 reasonable limits.[135]

133. *R v Smith*, 2015 SCC 34, [2015] 2 SCR 602.
134. *Ibid*, at para 1.
135. *Ibid*, at paras 30-34.

***Similarity Scores for* R. v. Smith 2015**

Judge	Similarity Score 44 most frequent words	All-Judge Ratio
McLachlin	7.880	90%
Cromwell	8.212	94%
Karakatsanis	9.280	106%
Wagner	10.338	118%
Abella	10.521	120%

Once again, and by a margin similar to that in *Carter*, McLachlin C.J. and Cromwell J. have the lowest similarity scores, such that it is reasonable to think that one or both of these two were involved in the initial drafting, although the short length of the reasons (less than 3,000 words once the preliminary material and the block quotes are removed) qualifies the findings.

20. *Summary*

The point of this section was to go through the "By the Court" judgments of the McLachlin Court, running function word frequencies for each of the judges against the same count for each "By the Court" judgment. On that basis, I suggested "probable" solo authors (lowest "similarity score" differences) for eight of the judgments, and two or three "possible" authors for each of the ten such cases for which there was no clear single lowest score. These results are summarized in the Table below; the asterisks indicate the most decisive of the findings.

Probable and Possible authors, "By the Court" judgments of the McLachlin Court

Case	Probable author	Possible author
Re Firearms Act	McLachlin*	
Latimer	Major*	
Burns	Binnie	
Suresh	McLachlin*	
Powley/Blais		McLachlin Iacobucci
Wewaykum		Bastarache Arbour
Re Same Sex Marriage		Bastarache Abella
Solski/Okwubi/Gosselin		Binnie LeBel Bastarache
Mugesera		McLachlin Bastarache

Provincial Judges Ass.	Abella*	
Khadr 2008		Abella Fish
BCE Inc	McLachlin*	
Khadr 2010		Cromwell McLachlin
Ahmad	*inconclusive*	
Re Securities Act		Fish McLachlin Abella
Re Supreme Court Act	McLachlin	
Re Senate Reform	McLachlin	
Carter v. Canada		Cromwell McLachlin
R. v. Smith		McLachlin Cromwell

Before proceeding to a discussion of the results, however, I would suggest a possible cross-check to confirm or qualify the findings above.

VIII. *Supplementary confirmation: the block quotation factor*

As indicated above, the first step in generating a block of words to serve as the basic comparison point for each of the judges was to remove the block quotes that make up a significant part of many Supreme Court judgments. If we are measuring how often specific judges use specific function words, it distorts the results to include passages that are taken from other writers. And the larger the proportion of such quotations, the greater the distortion. The constitutional decisions of the McLachlin Court (given that "By the Court" is used almost exclusively for constitutional cases) provide the reasonable comparison base. The highest proportion of block quotes in a single such judgment was 37.4%—that is to say, almost four words in every ten were quoted from some other source—and the case in question was the *Moreau-Berubé*[136] judgment by Arbour J. At the other extreme, the lowest proportion was zero—not a single quotation of sufficient length to be separated into block text—and the case in question was the *R. v. Godin*[137] judgment by Cromwell J. The block quotation word share for the combined single-authored reasons for judgment in all constitutional law decisions of the McLachlin Court was 13.5%.

But this identification of outliers points us to a more useful conclusion: it is not only that some cases involved a higher proportion of quoted

136. *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR 249.
137. 2009 SCC 26, [2009] 2 SCR 3.

material than others, but that some judges are much more likely than others to use high proportions of quotations. Moreover, the differences are large enough and consistent enough as to promise a degree of predictability. The table below reflects this finding:

Direct quotation proportions in constitutional judgments, by judge

Judge	Judgments	Total words	Quotation %
Abella	10	77,406	24.97%
Arbour	10	113,209	19.23%
Charron	7	69,672	19.15%
Iacobucci	7	81,612	17.84%
Major	6	42,687	17.23%
Bastarache	7	87,039	16.41%
Binnie	20	216,475	16.27%
Moldaver	4	24,255	14.14%
ALL JUDGES	159	1,587,294	13.49%
L'Heureux-Dubé	1	13,189	13.36%
Gonthier	6	91,873	13.34%
Wagner	1	10,738	12.98%
Deschamps	12	98,430	12.43%
Rothstein	6	57,148	12.29%
LeBel	18	203,038	11.90%
Fish	4	26,943	9.30%
McLachlin	34	315,379	6.52%
Cromwell	6	51,003	5.45%
Karakatsanis	1	7,198	2.92%

The standard deviation—the accepted way of assessing the degree of variation—for the quotation word percentage for the eighteen judges is 5.39%. There are three judges (Abella, Arbour and Charron JJ.) whose quotation word percentage is more than a standard deviation above (for Abella J., more than two standard deviations above) the all-judge figure; and another four (Iacobucci, Major, Bastarache and Binnie JJ.) who are more than half a deviation above the average. These two sets—that we might call very high and high respectively—together account for about 40% of all majority and unanimous authored judgments of the McLachlin Court on constitutional cases.

Conversely, there are three judges (Karakatsanis and Cromwell JJ. and McLachlin C.J.) whose quotation word percentage is more than one standard deviation below the all-judge figure; and one further judge

(Fish J.) who is more than one half a standard deviation lower than average. These two sets—that we might call very low and low respectively—together account for about 30% of the McLachlin Court's authored judgments on constitutional law.

Finally, there are seven judges (Moldaver, L'Heureux-Dube, Gonthier, Wagner, Deschamps, Rothstein and LeBel JJ.) whose quotation word percentage is within half a standard deviation of the all-court figure; this set of judges—that we might call average—together account for about 30% of the McLachlin Court's authored constitutional judgments.

This is, I suggest, simply a matter of persisting personal style. No evaluative purpose is to be read into these calculations. There is no obvious basis for suggesting that Judge X is not quoting enough, or that Judge Y is quoting too much. It is not that higher or lower quoting judges cited more (or less) judicial authority, or different judicial authority, or more (or less) academic authority; the distinction seems to be simply between those who prefer to summarize or paraphrase, and those who prefer to quote directly, before proceeding with the analysis and conclusions.

On a similar logic, we can calculate the quoted word percentage for each of the "By the Court" judgments delivered by the McLachlin Court. These figures appear below:

Direct quotations as proportion of total word length, BTC judgments

Case	Citation	Quotation %
Senate Reference	2014 SCC 32	23.96%
Solski/Okwubi/Gosselin	2005 SCC 14/15/16	20.56%
Wewaykum	2003 SCC 45	19.16%
Burns & Raffay	2001 SCC 07	18.65%
Powley/Blais	2003 SCC 43/44	14.47%
Mugesera	2005 SCC 40	14.39%
ALL "BY THE COURT"s		11.48%
Supreme Court Act (Nadon)	2014 SCC 21	11.32%
Provincial Judges Assn.	2005 SCC 44	9.95%
Re Same Sex Marriage	2004 SCC 79	7.59%
Suresh	2002 SCC 01	7.43%
Ahmad	2011 SCC 06	4.83%
BCE Inc.	2008 SCC 69	3.73%
Carter	2005 SCC 5	3.73%
Latimer	2001 SCC 01	3.71%
Khadr 2010	2010 SCC 03	2.84%

Securities Reference	2011 SCC 55	2.75%
Firearms Reference	2000 SCC 31	0.71%
Khadr 2008	2008 SCC 28	0.0%
Smith	2015 SCC 34	0.0%

The over-all quotation word percentage is slightly lower for "By the Court" judgments than for authored reasons—11.8%, as against 13.5%—and the standard deviation is higher, at 8.8%. As with judges, there are "By the Court" judgments at the top of the list for which the word percentage of block quotations is more than a standard deviation higher than the figure for all "By the Court" judgments. And there are cases at the bottom of the list that are more than a standard deviation lower.

It would be far too much to suggest that we could simply map these quotation percentages for each "By the Court" judgment onto each judge's individual percentages. Too many variables are at play to make these numbers anything more than general pointers. But the general pointers provide a second and complementary angle to the suggestions that emerged from the function word analysis. That is to say: we can identify high, medium, and low judges for quotation frequency, and we can identify high, medium, and low "By the Court" judgments on the same basis; and then we can ask whether this is consistent with the established practice of the judges who have been identified as probable or possible authors for each judgment. For example, a low quotation word count for a judgment that has been tentatively assigned to McLachlin C.J. would be consistent; a low quotation word count for a judgment tentatively assigned to Abella J. would not. If the two are consistent, this will be treated as confirmation of a sort of the attribution.

The quotation factor: Judges and "By the Court" judgments

Case	Quotation Count	Tentative Author	Quotation Usage	Confirmed?
Re Firearms Act	Very low	McLachlin	Very low	Yes
Latimer	Very low	Major	Average	No
Burns & Raffay	High	Binnie	High	Yes
Suresh	Very low	McLachlin	Very low	Yes
Powley/Blais	Medium	McLachlin Iacobucci	Very low Low	No No
Wewaykum	Very high	Bastarache Arbour	High Very high	Yes Yes
Re Same Sex Marriage	Very low	Bastarache Abella	Average Very High	No No

Solski/Okwubi/ Gosselin	Very high	Binnie Lebel Bastarache	High Low Average	Yes No No
Mugesera	Medium	McLachlin Bastarache	Very low Average	No Yes
Provincial Judges Assn.	Medium	Abella	Very high	No
Khadr 2008	Very low	Abella Fish	Very high Low	No Yes
BCE Inc.	Very low	McLachlin	Very low	Yes
Khadr 2010	Very low	Cromwell McLachlin	Very low Very low	Yes Yes
Ahmad	Very low	Inconclusive		n.a.
Re Securities Act	Low	Fish McLachlin Abella	Low Very low Very high	Yes Yes No
Re Sup.Ct Act (Nadon)	Medium	McLachlin	Very low	No
Re Senate Reform	High	McLachlin	Very low	No
Carter v Canada	Very low	McLachlin Cromwell	Very low Very low	Yes Yes
R. v. Smith	Very low	McLachlin Cromwell	Very low Very low	Yes Yes

The results are only modestly confirming. Of those eight cases for which a single probable first-draft author had been identified, only four were consistent with the quotation word count of the "By the Court" judgment involved—but for three of those the Chief Justice was the judge in question, and they include three of the five cases where the results of the function word analysis were the most strongly indicative. There were ten cases for which two or three judges had been indicated as a possible first-draft author, and for only two of these were both of the suggestions not consistent with the quotation frequency. In general, then, the quotation factor only modestly reinforces the findings of the function word analysis.

Conclusion

"By the Court" judgments are a striking and relatively recent development for the Supreme Court's presentation of its decisions. At least in terms of the "grand tradition" explained above, it is a practice largely restricted to high-profile cases involving constitutional issues. The central feature of this judgment-presentation style is anonymity, which raises the question of whether this means "we will not tell you who is the lead author" or "there is no lead author because we sat down and drafted it as a group." Using function word analysis, I attempted to penetrate this screening device to see if it is possible to identify a lead author, not denying that there is a

collegial dimension to all judgments that are the product of the circulate-and-revise process.

For almost all of the cases, probable or possible authors could be identified. The initial count of twenty-two significant "By the Court" judgments was effectively reduced to nineteen by the two sets of companion cases (*Powley* and *Blais, Solski*, *Gosselin* and *Okwuobi*), and it was possible to identify strongly probable single authors for eight of them, and to narrow the focus to (usually) two and (sometimes) three judges for all but one of the others.

This article began by suggesting that there were four different ways of understanding the "By the Court" practice, with distinctly different implications for the evolution of our recently powerful and high profile court. The first was the "business as usual" model that would have seen the lead writing rotating within a sub-set of senior judges; the second was the "limited partnership" model that would have identified a smaller subset (usually a pair of judges) within the unanimous panel; the third was the leader-centric model that would have attributed most of the judgments to the pen of the Chief Justice; and the fourth was the institutional model that would have suggested the extensive sharing of the actual writing between all or most of the judges on the specific panel. What the results actually suggest is a combination of the middle two, in such a way as to emphasize the role of the Chief Justice.

More than one-third of the "By the Court" judgments—eight out of the nineteen—exhibit function word similarity scores that justify attribution of the judgment to specific solo justices; in some cases (such as the *Firearms Reference*, *Latimer*, *Suresh*, *Provincial Judges* and *BCE*), the results are particularly clear-cut. Five of these eight solo attributions are to the Chief Justice, with one each to Major, Binnie and Abella JJ. On this segment of the decisions, the leader-centric model is clearly justified—but it only accounts for about one-third of the total.

Only a single decision (*Ahmad*) generated similarity scores such that there are four or five judges who are almost equally credible as the lead authors—raising the possibility that perhaps none of them were, and that all or most of the panel was making significant contributions to the reasons as they finally appeared. This is the institutional model, as exemplified by the self-description of the single "By the Board" decision of the UK Privy Council, referred to above—but it only accounts for a single case of the nineteen.

More than half the "By the Court" cases—ten out of nineteen—generate similarity scores suggesting that two (or, in two cases, three) members of the panel were equally or comparably likely to have written the reasons.

This is consistent with (although of course it does not prove) the possibility that they may well have collaborated in the writing of joint reasons. The joint authorship phenomenon is a relatively recent development, dating back only to the mid 1990s when Cory and Iacobucci JJ. began their unusual degree of collaboration, although the co-authorship of a pair of judges has become a more routine part of the Court's performance since then and now accounts for one judgment in every ten. If the message of these numbers is indeed this kind of joint authorship behind the curtain of anonymity, it is on the one hand fairly wide-spread—eight of the eighteen judges who served on the McLachlin C.J. court show up on this list at least once—but at the same time distinctly concentrated. McLachlin C.J. was involved in six of the ten cases. Bastarache was the other judge most likely to appear in the first half of the Chief Justiceship, Abella and Cromwell JJ. in the latter half. Between them, these four account for two-thirds of the examples of apparently shared judgment-writing. As I have suggested elsewhere,[138] one implication of the co-authorship phenomenon is an attenuation of the accountability of individual judges—we cannot know which of the judges should be given how much responsibility for which parts of the joint judgment—and this is even more the case when the co-authorship operates behind the further screen of "By the Court." At the same time, however, the leader-centric model is tangentially reinforced—just as McLachlin C.J. stands out in the "clear single author" set, so she is by a good margin the one most visibly present in the possible collaboration set.

It is also significant in this light that all but one of the McLachlin Court's "By the Court" judgments have been written in English—18 out of 19 is a remarkable predominance. It is entirely possible, of course, that some of the suggested two-person co-authorships indicated in the previous paragraph, are actually three-or-more collaborations which include francophones, but for a bilingual institution the imbalance is striking.

What this analysis does not answer is whether the present levels of "By the Court" use will continue. In recent years, the use of the device has been highlighted by a string of constitutional references from the federal government that has led to unprecedented public tensions between the Court and the national government; but the trend toward the use of this decision-presentation style started early enough in the McLachlin Chief Justiceship (even before Prime Minister Harper took office) that these cases and this tension must be seen as a culmination rather than a triggering factor. Given the use of "By the Court" for major constitutional decisions,

138. McCormick, "Spotlight," *supra* note 1.

it was perhaps inevitable that if there was to be any confrontation between Court and government, these would be the cases at the center of the controversy, but this does not answer why the McLachlin Court stepped up its use of the device in the first place.

To put the same question in blunter terms: has this truly become a standard *modus operandi* of the Court as an ongoing institution, its regular way of dealing with a subset of its important cases on constitutional issues? Or has it only become the standard practice of this particular Chief Justice, something that may or may not survive into the next chief justiceship? Given that McLachlin C.J. will retire within the next three years after the longest chief justiceship in the history of the institution, this is an important question. Without getting into the question of who is likely to succeed her,[139] the obvious question is: will the "By the Court" format retain its current levels of use and high profile? And does this depend on whether she is succeeded by a francophone or an Anglophone?

The jury is still out on whether "By the Court" is truly the new reality for the modern Supreme Court's handling of major constitutional issues, or whether the last fifteen years are simply one chapter in a larger and more complex story. What is undeniable, however, is that its recent use has been extensive enough and important enough to call for more investigation than the practice has received to date. This paper is a contribution to such an investigation.

139. Which is not to deny that I have already chimed in on this question; see Peter McCormick, "Choosing the Chief: Alternation, Duality and Beyond" (2013) 47:1 J of Can Studies 5.