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Judgment and Opportunity: Decision Assignment on the McLachlin Court

Peter McCormick
University of Lethbridge

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The workload of the Supreme Court of Canada is shared among the Court's nine members, but is this sharing equal with respect to the writing of judgments? A simple count does not provide an answer because not all cases are equally important. This paper develops an objective measure of case importance—the Legal Complexity Index—and applies it to the cases decided by the McLachlin Court. It demonstrates that judgment-delivery opportunities for significant cases have not been shared equally, either overall or with respect to any of the major subdivisions of the caseload. Some judges enjoy the spotlight, while others are relegated to the margins. An assessment of the major correlates of this inequality—gender, seniority, and the "Chief Justice factor"—indicates that their combined impact poses a significant challenge for the Court.

La charge de travail de la Cour suprême du Canada est partagée entre les neuf membres de la Cour, mais ce partage est-il égal pour ce qui est de la rédaction des arrêts? Un simple décompte ne donne pas la réponse, parce que tous les dossiers n'ont pas la même importance. L'auteur élabore une mesure objective de l'importance des dossiers—l'indice de la complexité juridique—et l'applique aux affaires tranchées par la Cour présidée par la juge en chef McLachlin. Il montre que la rédaction des décisions pour les dossiers de grande importance n'a pas été partagée également, soit dans l'ensemble, soit pour ce qui est des grandes subdivisions du volume de travail. Certains juges sont en vedette tandis que d'autres sont relégués à l'arrière-plan. Une évaluation des principaux corrélats de cette inégalité—sexe, ancienneté et le « facteur du juge en chef »—révèle que leurs incidences combinées représentent un grand défi pour la Cour.

* Department of Political Science, The University of Lethbridge.

Introduction

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Introduction

We refer to the chief justice of the Supreme Court as being the first among equals but this familiar aphorism is built on two claims, both of which call for closer examination: First, are the judges on the Supreme Court really equals? And second, is the chief justice really first? How could we tell? How could we measure Supreme Court performance in an objective way to justify or refute any such claim? I propose to answer these questions by first establishing a new empirical methodology for evaluating judicial decisions, and then applying it to the question of *who* has the opportunity to contribute *how much* to *what*.

What is it that the Court is supposed to do for us? For one thing, it is supposed to be the final decision maker with respect to disputes that raise difficult legal issues, and for another it is supposed to provide the reasons that explain and justify those decisions in such a way as to send coherent and convincing signals to lower courts and to potential litigants about how future disputes (or at least certain aspects of those disputes) will be handled. Some Supreme Court decisions accomplish these functions to a very high degree, others less so. Some are major decisions which “take”—they reset the frame within which the central issue and related matters are handled for some time into the future (at the extreme upward end, we call these “landmark” cases). Some have more limited impact, such that their reasons may need to be revisited, sometimes immediately and sometimes

later, to provide that clarity and that guidance. Still others deal with more minor or more routine issues, casting smaller precedential shadows or no such shadows at all. But there is still a strong sense in which we can say that giving firm, well-explained, professionally grounded explanations for the outcomes to legally difficult cases is what the Court is all about. It is the criterion upon which we judge a particular Court (in the standard usage, a particular chief justiceship) when we compare it with others; and it is also the criterion on which we seek to evaluate the contributions of individual judges. We praise judges for having written the powerful judgments that contribute usefully to the development of law and the clarity of the law going forward, we criticize judges for writing reasons that do not contribute appropriately to the evolving jurisprudence, and we tend to overlook judges who do not write very many reasons that show up on the radar screen at all.¹

This is perhaps somewhat reductionist—authoring judgments for the Court is not the only thing that judges do, not the only way they contribute. Judges within the majority block, whose signatures sustain the majority reasons written by one of their colleagues, take part in a collegial circulate-and-revise process that seeks to refine and perfect that final written product. Judges who write or sign dissents and separate concurrences also contribute to the evolution of the law. For one thing, they oblige the majority to explain themselves more fully and rigorously,² and in this way contribute to judgments that are more careful and complete. For another, and more directly, these ideas (sometimes) remain active and relevant because the modern Supreme Court draws upon minority reasons considerably more often than one might expect.³

1. On the lighter side, two prominent American academics engaged in a tongue-in-cheek debate in the pages of a major American law journal on this subject, namely David P Currie, “The Most Insignificant Justice: A Preliminary Inquiry” (1983) 50:2 U Chicago L Rev 466 and Frank H Easterbrook, “The Most Insignificant Justice: Further Evidence” (1983) 50:2 U Chicago L Rev 481. The current Chief Justice of the United States Supreme Court joined this conversation, in a speech to the Federalist Society on 16 November 2007. YouTube: FORA.tv, “John Roberts on the Most Insignificant Justice Ever” (9 January 2008), online: YouTube <www.youtube.com/watch?v=13ze4fl5itU>. This is the flip-side of what has been described as the “most entertaining useless exercise in the legal world,” namely ranking United States Supreme Court justices. See: Roy M Mersky & Gary R Hartman, “Rating the Justices” (1992) 84:1 Law Libr J 113; George R Currie, “A Judicial All-Star Nine” [1964] Wis L Rev 3; Bernard Schwartz, “The Judicial Ten: America’s Greatest Judges” (1979) 4:3 S Ill ULJ 405 and James E Hambleton, “The All-Time, All-Star, All-Era Supreme Court” (1983) 69:4 ABA J 462. What I am drawing on is the very basic point that this significance (or lack of it) is being evaluated in terms of the contributions made by the various justices to the body of American law through their written judgments.

2. See, e.g., Antonin Scalia, “The Dissenting Opinion” (1994) 19:1 J Supreme Court History 33 at 41.

3. See Peter McCormick, “Second Thoughts: Supreme Court Citation of Dissents and Separate

By the same token, the chief justice in particular does more than participate in the decision-making panels with her colleagues. Her duties include presiding over the administration of the Supreme Court and the other federal courts, sitting on a variety of bodies and committees (such as the Canadian Judicial Council and the selection committee for the Order of Canada), and presenting the public face of the Supreme Court—to some extent and on some occasions, of the Canadian judiciary as a whole. We should perhaps suggest as well that the chief justice is to some extent expected to speak for the Court by delivering a disproportionate share of the judgments on some significant share of its most salient and publicly controversial cases—although this, too, is mere supposition until we find some plausible empirical and objective method of testing this hypothesis.

But centring the judicial function on the writing of legally significant judgments provides the focus that leads to a quantifiable method for measuring the participation of the various judges in the judicial product of the Court. It grounds my first premise: Supreme Court justices contribute to the institution and to the law through the writing of reasons for judgment. And it leads directly to a second premise: Supreme Court justices contribute more to the extent that those reasons for judgment embody the more important cases that come before the Court. The point of this article is to move this second premise beyond the banal by creating an empirical and objective indicator for legal importance, and using this indicator to drive the assessment of individual judicial performance in a systematic and rigorous way.

I propose to start with the question of how to evaluate individual cases in terms of their legal importance; then I propose to deal with the question of how these cases can be attached to individual judges in an appropriate way, which is usually straightforward but sometimes mildly problematic. Then I propose to disaggregate the judge-by-judge data to look more closely at the major types of law into which the case load can be divided—that is, to pursue specialization and expertise. Finally, I will use this process to return to the basic questions with which I started: how equal is the Court in the assignment of opportunities for significant judicial contributions? And to what extent and with what sort of focus is the chief justice “first”?

I. *The court decides: Assigning the judgment*

There is a general description of the way that the Supreme Court deals with a case after oral argument and decides who will do the writing. That

description was first presented by Justice Bertha Wilson;⁴ later accounts in Greene,⁵ Songer,⁶ and Macfarlane⁷ have echoed the description with sufficient consistency that Wilson J.'s account cannot be thought of as being outdated. The basic elements are as follows:

After oral argument, the members of the panel meet in judicial conference to arrive at a first understanding of how the appeal should be decided and who should do the writing. The procedure is for each of the judges in order (starting with the most junior⁸) to briefly identify the major issue or issues, whether the appeal should be allowed, and the basic grounds on which that outcome will be justified. We should envisage, I believe, something more than a staccato sentence or two, but something much less than a graduate school seminar exchange. At the end of this process, it is decided (the passive voice reflects the standard description) which of the judges best reflects the spirit of the panel and should take the responsibility of writing the (majority or unanimous) reasons for judgment; minority voices may also have emerged during the discussion, and those judges will decide whether they will write in response to those reasons, although protocol is for them to wait to receive the draft judgment before circulating their draft dissents or separate concurrences.⁹ It is usually the case that judges will volunteer to write the draft judgment; if two or more judges wish to write, seniority directs the choice. Should there be no volunteers, the chief justice will politely suggest which of the judges might volunteer; should this also fail, the chief justice will assign the responsibility.

This is a more collegial practice than the American, where the senior justice on the panel (or the senior justice in the majority bloc on a divided panel) has the power simply to assign the judgment; my wording implies that the chief justice does not lose this assignment power for the majority by taking a minority position, although none of the standard descriptions of the Canadian practice makes this explicit.

4. Bertha Wilson, "Decision-making in the Supreme Court" (1986) 36:3 UTLJ 227.

5. Ian Greene et al, *Final Appeal: Decision-making in Canadian Courts of Appeal* (Toronto: James Lorimer & Company, 1998).

6. Donald R Songer et al, *Law, Ideology, and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 2012); Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008).

7. Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013).

8. On the United States Supreme Court, the procedure is precisely the opposite, with the Chief Justice speaking first and the most junior justice last.

9. This is the reason why almost all minority reasons begin with the statement that "I have read the reasons" of the initial judgment writer.

I admit to being frustrated by this description. It presents several different selection principles that are part of the process, but that may or may not apply to any specific case. First, juniority matters: to speak first is to be in a position to volunteer first, or to be the first to sketch an outcome-plus-reasons strategy which successfully anticipates (or even persuades) the positions of the other members of the panel. Politeness may make more senior members at least a little bit more reluctant to claim the prerogatives of seniority. Second, seniority matters: both because it breaks the ties should more than one judge volunteer, and because it is only later in the cycle that one can clearly see what the emerging majority position is. (For the first speaker to volunteer to write the judgment risks the embarrassment of discovering that their position promises to be a solo dissent.) It is also possible for judges later in the cycle to behave strategically, locating themselves within an emerging majority so that they can claim the judgment.¹⁰ Third, the chief justice matters: both because the chief justice is by definition always the most senior, and because the chief justice gets to ask for volunteers (and presumably can use the position of chair to encourage or discourage volunteering as the panel works through the cycle) or to assign in the absence of volunteers. None of the standard descriptions suggests that this responsibility devolves on somebody else should the chief justice herself not be in the majority.

What is not mentioned, although it is hard to imagine that it never applies, is any concern about how to ensure that “spirit of the panel” and “senior volunteer” are actually in harmony. To put it bluntly: does it ever happen that somebody volunteers, but the chief justice (or the most senior member of the panel) says “no?”¹¹ Nor is there any mention of an ethic of fairness or of taking turns, any Canadian counterpart to the general expectation of roughly equal division that now applies south of the border¹²—if a junior justice has been waiting long enough for a judgment

10. Chief Justice Burger of the USSC was infamous for deferring a statement of his position in the “seniors speak first” conference practices of that court so that he could assign reasons to himself or to an ally.

11. Even “mood of the Court” can be ambiguous if the panel divides, with either dissents or separate concurrences, or both—assuming we can locate all the judges along a single continuum, is the “mood of the Court” the centre of the majority block, the centre of the all-but-dissenters, or the centre of the whole panel including dissenters? There is a voluminous American literature on the strategies of judgment assignment that considers these questions at some length. See, e.g., Lewis A Kornhauser & Lawrence G Sager, “The One and the Many: Adjudication in Collegial Courts” (1993) 81:1 Cal L Rev 1.

12. See Gerard Magliocca, “Supreme Court Opinion Days” (21 June 2012), *Concurring Opinions* (blog), online: <concurringopinions.com/archives/2012/06/supreme-court-hand-down-days.html>: “I’m not sure when the [Supreme] Court started distributing its opinion assignments evenly...[but] [t]here was evidently a sea change in the Court’s customs in the middle of the 20th century.”

in a significant case, when does this offset a colleague's seniority, and who orchestrates this? (And, of course, what is "long enough"?) The more we assume that judgments matter to the judges, that all of them want to write some reasonable share of the decisions that are important to them, the more important these things become.

But even if one accepts the standard description at absolute face value, the question remains: how does it work out in practice? If there is some informal or unofficial collegial balancing and accommodation that overcomes the apparent opportunities for senior members to dominate the judgment assignments, how effective are these in practice? This article attempts to track down some of these implications.

II. *Assessing case importance: Toward a methodology*

Simply counting the cases in which each judge writes (or shares the writing of) the judgment is too crude a measure to be convincing, because of the enormous diversity of the cases that flow through the Supreme Court case load. The McLachlin Court has handled just over 70 cases per year—sixty per year if we consider only reserved judgments, as I believe we should—but it is constantly sending us signals that some of these cases are more important than others. Some are reserved for judgment, others are not; some are assigned to five-judge panels, others to seven-judge or nine-judge full court panels; some are resolved in half a dozen pages of text, others in more than a hundred; some are reserved for many months, some for a few days, some not at all; some divide the Court, others are unanimous; some are frequently cited, others not at all, and so on. We can only usefully count things if that counting is accompanied by an appropriate weighting of each of the things that is counted—that is to say, a weighting that reflects the relative importance of specific cases.

The criterion of importance that I propose to work from is legal difficulty—cases merit our attention and deserve heavier weighting to the extent that they deal with difficult legal matters. There are (at least) three different ways in which a case might be considered to be legally difficult.

First, the case might deal with an issue of considerable complexity, such that it resists a complete and final resolution and yet calls for continuing efforts to optimize the various factors that must be balanced and the various elements that must be appropriately incorporated. Perhaps the best examples would be the two perennial subjects of Supreme Court decision making—statutory interpretation, and standards of review. Every few years, a major case will arise that attempts (once again) to set the tone and direction for how this matter will be handled by the Supreme Court and how it should be handled by lower courts. Frequently, these are contested

decisions that divide the panel, generate lengthy reasons, and command high citation counts—only for the matter to be revisited a few years later, with a new attempt at conclusive resolution. The McLachlin Court made its own contributions to these ongoing and apparently Sisyphean efforts, with *Bell ExpressVu LP v. Rex*¹³ for the former and *Housen v. Nikolaisen*¹⁴ for the latter.

Second, the case might deal with an issue against the background of ambiguity or uncertainty in the law. Some of that uncertainty may be the product of the Court's own decisions—for example, *Law v. Canada*¹⁵ in 1999 led off by admitting that the Court's jurisprudence on equality rights had become somewhat confused because there were two or three quite distinct tendencies, each supported by different sets of the judges and each prevailing in certain types of cases, that had tended to pull the case law on this matter in several different directions. *Law* was the attempt to resolve these confusions in a single super-test, an attempt that seems in the end not to have been completely successful (as witness *R. v. Kapp*¹⁶ and *Withler v. Canada (Attorney General)*¹⁷), but that was in the interim one of the Supreme Court's most frequently cited cases.

Third, a case might involve unusual novel issues. More often than one might expect, Supreme Court judgments start off saying that this is a question, or issue that has never come before the Court before. By definition this means that there is no completely clear precedential path for the Court to call on, no obvious answer that is easily called into service. Obviously, the Supreme Court has spent the last 30 years grappling with the most monumental insertion of legal novelty imaginable, in the form of the entrenchment of the *Canadian Charter of Rights and Freedoms*. Thirty years is long enough for many of the nooks and crannies to have had precedential light shone into them, although unexplored corners remain. The McLachlin Court has spent a good part of the last decade struggling with the best way to deal with two of these corners, namely freedom of religion and freedom of association, with rather mixed and somewhat inconclusive results—which is perhaps just a way of saying that novelty, if not promptly resolved with decisive finality, devolves into ambiguity.

I will not consider a fourth element that might make a case difficult—namely, political salience—because for present purposes I want to treat the Court primarily as a legal institution that exists to resolve legal issues

13. *Bell ExpressVu LP v. Rex*, 2002 SCC 42, [2002] 2 SCR 559.

14. *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

15. *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [Law].

16. *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483.

17. *Withler v. Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396.

in ways that satisfy legal professionals. In saying this, I do not attempt to revive an earlier age of legal formalism, with its assumption of a clear demarcation and separation between the world of politics and the world of law. Rather, I recognize that even when politics contributes to the issues before the Court, when the ideology or attitudes of individual judges are thought to have intruded upon their resolution of a case, they do so not by hijacking the process completely but rather by colouring or complicating the legal material and legal processes that must be pursued to a conclusion—which is to say that they penetrate more deeply in this process to the extent that the law is difficult, rendered so by complexity, ambiguity, or novelty.

Any reader of this paper could come up with their own exemplars of the Court's more legally difficult cases and their own evaluation of how satisfactorily the Court had resolved them. The content of those lists would of course vary according to the interests, experience, and expertise of the persons creating them. What I propose to do is to penetrate the *Supreme Court Reports* to identify several objective factors, each of which attaches with some reasonable probability to the difficulty of the legal issues pursued in the case, and then to generate a "legal complexity index" which reflects the presence or absence of these factors. Considered singly, each of these indicators may well be less than perfect. But I hope to persuade the reader that assembling ten of them into an index that generates legal difficulty scores ranging between 0 and 15 will make the whole more robust and convincing than any one of its several parts. This index will generate scores for individual cases that can then be aggregated to assess whether the opportunity to contribute significantly to the law through the authorship of reasons on legally significant cases has been distributed among the justices, both overall and with respect to different major types of law.

III. *The pedigree of a complexity index*

My immediate enquiry was triggered by the methodology of Corley, Steigerwalt and Ward's recent book, *The Puzzle of Unanimity: Consensus on the United States Supreme Court*.¹⁸ The major point under investigation was finding a way to separate attitudinal/ideological elements from (more) purely legal elements as drivers of United States Supreme Court decisions.¹⁹ The dependent variable was therefore the "puzzle" of the

18. Pamela C Corley, Amy Steigerwalt & Artemus Ward, *The Puzzle of Unanimity: Consensus on the United States Supreme Court* (Stanford: Stanford Law Books, 2013) [Corley, Steigerwalt & Ward, *Puzzle*].

19. The shift from a primary reliance on attitudinal/ideological analysis to "bringing the law back

significant number of completely unanimous²⁰ judgments even on a USSC as ideologically divided as that court currently is; the independent variable was an index developed by teasing out five factors that would (as the case worked its way from trial up to the Supreme Court) strongly suggest a case that lacked any significant element of legal complexity or ambiguity.²¹ The present study borrows this basic idea—an index grounded in a number of objective attributes of the “universe” of Supreme Court cases over a specific period of time—but involves a number of significant revisions. First, obviously, I want to look not at the USSC but at the significantly different context and operation of the Supreme Court of Canada, with a corresponding shift in the factors to be included in the index. (For example: Corley, Steigerwalt and Ward do, and I will not, attach importance to whether disagreements in the court appealed from coincided with which political party appointed which judges.)

Second, I will turn the method on its head by using it to measure not legal simplicity but rather its polar opposite, legal complexity—that is, where Corley, Steigerwalt and Ward are focusing on those cases that earned *low* numbers on their complexity scale, I am more interested in identifying the cases with *higher* numbers, and how these cases have been assigned to the various members of the Court. Third, because I am not concerned with *predicting* Supreme Court behavior, but simply with *identifying* the most important cases, my index will draw on a number of aspects of the Supreme Court’s own treatment of the case to assist with this classification.

What I take from Corley, Steigerwalt & Ward’s *Puzzle*, what I think of as a very powerful idea indeed, is this notion of an index that focuses on the more purely legal dimensions and aspects of a case—not its political salience, not its headline-drawing power, not even the punchiness of

in” by finding the circumstances under which more purely legal and logical factors drive results seems to be something of an emerging trend in the American literature on judicial decision-making. See also Michael A Bailey & Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton: Princeton University Press, 2011).

20. That is to say, unanimous as to both outcome and reasons, excluding cases with separate concurrences.

21. This seems to be a strange argument—if there is no real legal complexity or ambiguity, if it is in purely legal terms truly an “easy case,” then why would one go to the time, bother and expense of taking it all the way to the highest court in the land to receive the obvious answer? Surely the most compelling question when one contemplates such an appellate route is—what are my chances? But a narrowly confined rational choice model is not necessarily the best way to study the very complex decision of whether or not to appeal, and the simple fact is that a good proportion of the case load of apex courts does involve cases that are not particularly complex. At any rate the “0” on my scale does not necessarily mean “no legal difficulty at all,” but “at the very bottom of the scale of difficulty in comparison with the other cases in the caseload”—and the bottom of that scale may be well above anything that can be regarded as “zero” in any absolute sense.

the rhetoric that the judges may have exchanged in the process, but the ambiguity, complexity, and novelty of the legal questions that need to be tackled in the case, and the behaviour that this difficulty elicits from the lower courts and the Supreme Court itself—and turning this focus into a completely objective measure that ranks cases along a continuum.

The critical point is that this index does not reflect whether I as a single observer think the case is legally important or difficult, but whether the appeal courts and the Supreme Court itself have treated it in a way that would suggest the case is important or difficult.

1. *Framing a Canadian complexity index*

The following are the variables that I will use to assemble my legal difficulty index:

1. The success or failure of the appeal from the trial decision in the court of appeal.²²
2. The unanimity or division of the court of appeal in reaching that result.²³
3. The presence or absence of interveners at the Supreme Court level.²⁴
4. The size of the panel to which the Supreme Court assigned the case.²⁵
5. Whether the case was reserved for judgment, and if so for how long.²⁶
6. Whether the Supreme Court allowed or dismissed the appeal.²⁷
7. The unanimity or division of the Supreme Court panel in reaching that result.

22. The coding is: appeal dismissed = 0; appeal allowed = 1.

23. The coding is: unanimous panel = 0; divided panel = 1.

24. The coding is: no interveners = 0; one or more interveners = 1.

25. Assignment of an appeal to a full-court nine-judge panel is a clear indication of the Court's assessment of the issue; assignment to the minimum five-judge panel is a clear indication of the Court's perception of the issue as more minor and routine. The seven-judge panel is a slightly ambivalent message, as it sometimes says "neither unusually important nor particularly routine" and sometimes "a nine judge panel was not available and seven was the largest possible." The coding here is: 5-judge panel = 0; 7-judge panel = 1; 9-judge panel = 2. There are a small number of eight-judge panels—eight by initial assignment not eight by attrition from what was originally a nine-judge panel—and these are also scored as 2.

26. The average time between a decision being reserved and the judgment being delivered is 6.5 months (197 days). One third of all cases involve deliberation time of less than 4 months; one half take between 4 months and 9 months; one sixth take longer than 9 months. The coding is: less than 4 months = 0; 4 to 9 months = 1; more than 9 months = 2.

27. The coding is: appeal dismissed = 0; appeal allowed or allowed in part = 1.

8. The length of the reasons that were necessary to explain or justify the result.²⁸
9. The presence or absence of indicators that the judgment was not delivered as assigned at the post-hearing conference.
10. How often the case has since been cited by the Supreme Court in subsequent reasons.

To be sure, none of these is a perfect indicator, but each one of them is such that it is reasonable to suggest that they are usually related to the question of whether or not a particular case raises issues of some significant degree of legal difficulty (ambiguity, complexity, novelty). For each of them we can say that they suggest there is something here that is more likely to be displayed by a legally difficult case than by a case that is not legally difficult, or that is less legally difficult. If the appeal court agrees with the trial court, if all the judges on the appeal court agree, if the Supreme Court unanimously agrees with both those sets of judges—each of these suggest a relatively routine rather than a legally challenging case. And if that is true of each one of these variables considered separately, then it must be even more true of the whole set of variables assembled as an index. A high index score corresponds to a higher likelihood that the case raises unusually challenging legal issues and has been treated as such as it moved through the judicial hierarchy to and through the Supreme Court.

Most of these elements are sufficiently straightforward as to require no further explanation—a divided panel, a reversal of a lower court decision,²⁹ the presence of interveners, or the assignment of the case to a nine-judge panel are all clear indicators of a case that is more difficult, less straightforward, and more amenable to a variety of different approaches reaching toward somewhat different or even dramatically different results and reasons. Others among these elements may not be quite so straightforward, and I will address three of these.

28. The word-count includes both judgment and minority reasons, on the grounds that this is the count that indicates the Court's response (as distinct from the majority writer's response) to the issues raised in the case. The average length is about 8,000 words; the markers of 5,000 words and 10,000 words divide the case load into roughly equal thirds. The coding is: reasons less than 5,000 words = 0; between 5,000 and 10,000 = 1; over 10,000 = 2.

29. Hettinger, Lindquist and Martinek have suggested that we should think of such reversals as indications of "vertical dissent"—just as "horizontal dissent" involves disagreement between the judges within a particular panel, "horizontal dissent" shows disagreement between judges at different levels of court. Both signal (and the absence of both denies) a legal uncertainty that invites differing but credible and defensible approaches to its resolution: see Virginia A Hettinger, Stefanie A Lindquist & Wendy L Martinek, *Judging on a Collegial Court: Influences on Federal Appellate Decision Making* (Charlottesville, VA: University of Virginia Press, 2006).

First, there is the notion of “swing” judgments. Within a divided panel, the development of written views through a circulate-and-revise process may result in some judges changing their mind as to the most appropriate result and reasons. Sometimes enough judges will be swayed that the initially assigned majority judgment becomes a dissent or separate concurrence, and an initial set of minority reasons becomes the judgment. The Court’s protocol stipulating that the initially assigned judgment should always be the first one circulated, to which minority reasons directly respond, provides a reliable marker as to when such a “swing” has occurred, because this is the only way that the reasons designated as “the judgment” can open with the comment “I have read the reasons of Justice X, and with respect, I cannot agree.”³⁰ Something of the sort does not happen particularly often, but neither is it unheard of—on my own count, the McLachlin Court has given us 85 examples, about six per year.³¹ A case where the issues are such that judges shift their position as those issues are argued out in detail through the circulation of draft reasons, and where that shifting occurs to such an extent that it alters the panel’s choice as to which line of argument best deserves endorsement as the judgment, strongly suggests a legally difficult case.

Second, it is on the face of it plausible to suggest that any decision that resolves a difficult legal issue of some importance will be cited in subsequent decisions of the Court, but there is a problem in reaching the appropriate count for the current Court—some decisions have had more than a decade to accumulate citations, while others have had only months, which really means that the age factor will overwhelm any other considerations. My solution is to do a citation count as of 31 December 2013, then divide it by the age of the cited case as of that same date, generating a citations-per-year count with a very blunt coding: never cited is “0,” cited less often than once per year is “1,” and cited more than once per year is “2.” Since the relationship between citation frequency and age (for our Supreme Court as for appeal courts generally) is not a straight line but a remarkably consistent decay curve,³² this somewhat disadvantages not the newer cases but the older ones, although given the

30. For a perfect example, see *R v Sinclair*, 2011 SCC 40 at para 43, [2011] 3 SCR 3, where the judgment of LeBel J starts with precisely these words: “I have had the benefit of reading the reasons of my colleague Fish J. With respect, I cannot agree with him.”

31. For a more complete explanation of “swing” judgments, see Peter J McCormick, “Was It Something I Said?: Losing the Majority on the Modern Supreme Court of Canada, 1984–2011” (2012) 50:1 Osgoode Hall LJ 93.

32. See Peter McCormick, “What Supreme Court Cases Does the Supreme Court Cite? Follow-Up Citations on the Supreme Court of Canada, 1989–1993” (1996) 7 SCLR (2d) 451.

relatively short time period and the bluntness of the coding, this is not a significant problem.

Third, panels can divide themselves around one or more sets of reasons in several ways. A unanimous judgment is, on the face of it, the one that is most consistent with a lower level of legal difficulty, and it is scored as “0.” A majority judgment with minority reasons suggests a greater degree of legal difficulty, dividing the Court on matters important enough to the members of the Court that they publicly disagree, and it is scored as “1.”³³ Sometimes the disagreement within the panel is more extensive; these would include plurality judgments (where no set of outcome-plus-reasons draws the support of a majority of the members of the panel), or equal division outcomes³⁴ (where the appeal fails but neither set of reasons can be taken as firm precedent), or “no judgment” cases³⁵ (where the divisions between the fragments on the panel are such that the *Supreme Court Reports* cannot designate any one of them as a judgment of the court). All these outcomes can reasonably be taken as signalling a higher degree of legal difficulty, and they are therefore scored as “2.” One might argue that this scoring is flawed because it fails to reflect the possibility that for particularly important cases (such as major constitutional cases) the Court will work particularly hard to achieve a unanimous result, such that a score of “0” is not necessarily the most appropriate marker. I will take the “By the Court” (unanimous and anonymous, in the sense of lacking a designated lead author) judgment style as sending this signal, and this relatively small group of cases will also be scored as “2.”³⁶

The range in values on the index runs from a low score of zero to a high score of fifteen. It might be expected that there would be a fairly large cluster of cases at the bottom end of the scale, representing the decisions that are rendered orally and unanimously from the bench on the same day as oral argument. This is less the case than one might expect—there are only six “0” scores, and only 30 scores of “1,” from the 1000+ decisions that have been delivered to date by the McLachlin Court, and not all of these were from-the-bench judgments.³⁷ I will nonetheless exclude the

33. Obviously a narrow one-vote decision is a better indication of complexity than a solo dissent, but it is important to keep the individual elements of the index as straightforward blunt measures.

34. For example, *R v LFW*, 2000 SCC 6, [2000] 1 SCR 132.

35. For example, *R v Brooks*, 2000 SCC 11, [2000] 1 SCR 237.

36. The “By the Court” device is, to put it mildly, an under-explored phenomenon—to the best of my knowledge, there is no literature at all dealing with it. For a preliminary attempt to understand its emergence, 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].

37. Sometimes it is a little perplexing why a case winds up as a brief from-the-bench judgment. Consider *R v JZS*, 2010 SCC 1, [2010] 1 SCR 3. In that case, leave to appeal was granted from a

from-the-bench judgments on the grounds that there is very little, if any, contribution to the law contained in the very brief and often formulaic (“for the reasons given in the court below”) reasons that accompany them.

2. *The complexity index: Cases*

One use of the index might have been to suggest that the entire case load could be divided into two sets—the legally difficult on one hand, the legally straightforward on the other—such that the index serves to direct this division, leaving only the difficulty of where to draw the line between them. This might be the most reasonable procedure if the distribution was bipolar, or “u-shaped”—but, as I will demonstrate below, this is not the case. I propose instead to treat the index as measuring the relative complexity of each case, such that each case carries its complexity score through the rest of this analysis. Rather than just saying that a “10” is more likely to be a legally complex case than, say, a “5,” I will push beyond such a dichotomous solution—instead, I will treat these scores as locating each case on a continuum from the most complex (15) to the least complex (0), such that in some sense a “10” is twice as complex as a “5,” and a “10” is more complex than a “9.”

Figure 1 distributes the 894 reserved judgments of the McLachlin Court to date over the 0-15 legal difficulty scores. The count for each score is further divided into five different broad categories of appeal: *Charter* cases, constitutional cases, public law cases, private law cases, and criminal law cases. The order of listing is the order of priority for assigning individual cases to the appropriate category; a criminal case raising a *Charter* issue is counted as a *Charter* case, and a public law case involving constitutional issues such as the division of powers or aboriginal rights is counted as a constitutional case. In all cases, the attribution to a category is based on the headnotes in the *Supreme Court Reports*. The five categories are highly unequal in size—there are more than four times as many private law or criminal law cases as constitutional law cases—but the division is adopted because it corresponds to useful distinctions within the caseload, and potentially to degrees of specialization or expertise within the Court.

judgment of the BCCA, on a *Charter* issue involving new statutory provisions that drew on minority reasons from an earlier SCC decision. The case was assigned to a nine-judge panel with several interveners—but the oral hearing was abruptly cut short with a single-sentence unanimous judgment. For a discussion, see Benjy Radcliffe, “*R v JZS*: One Small Step for the Court, One Giant Leap for Child Testimony” (21 January 2010), *The Court* (blog), online: <www.thecourt.ca>.

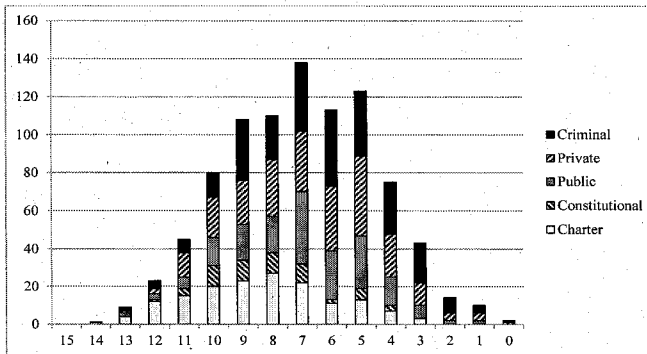


Figure 1: Index Scores, by Type of Law, Reserved Judgments SCC 2000-2013

The distribution is roughly bell-shaped, the major exception being the slight dip for a difficulty score of 6. There are very few cases at the two extremes—none with a score of the maximum possible 15, only one with 14, only nine others with 13. At the other extreme, there are two with a score of the minimum possible 0, 10 with a score of 1, and 14 with 2. The average, median, and mode are all 7.

The scores for all the cases within each of the five categories can be accumulated to generate an average case difficulty, and this is presented in Table 1. The average difficulty of *Charter* cases and constitutional law cases is somewhat above the overall average, that for the higher volume of criminal law cases is somewhat below, and public and private law fall in the middle. This seems entirely plausible. Again, the methodology on these early applications is generating results that are consistent with the findings that would have been suggested by common sense.

Type of Law	Number of Cases	Average Case Difficulty
<i>Charter</i> law	158	8.35
Constitutional law	59	8.08
Public law	182	6.87
Private law	243	6.70
Criminal law	252	6.37
All reserved judgments	894	7.02

Table 1: Cases and Case Difficulty, Reserved Judgments SCC 2000-2013

The index can also be used to suggest how the total “difficulty scores” are distributed among the various areas of law from one year to the next, and this is shown in the Figure. The general pattern stays much the same, but there is a fair degree of variation—criminal law was way up in 2000 but down in 2002; *Charter* law and constitutional law combined for

half of the total in 2010, triple their share in 2006; public law peaked in 2004–2006; and private law was at its highest in 2006–2007. But this is oscillation rather than a steadily building trend of any kind, and the general description of the difficulty-score allocation among the areas of law would be about 25% each for criminal and private law, 20% each for public law and *Charter* law, and 10% for constitutional law.

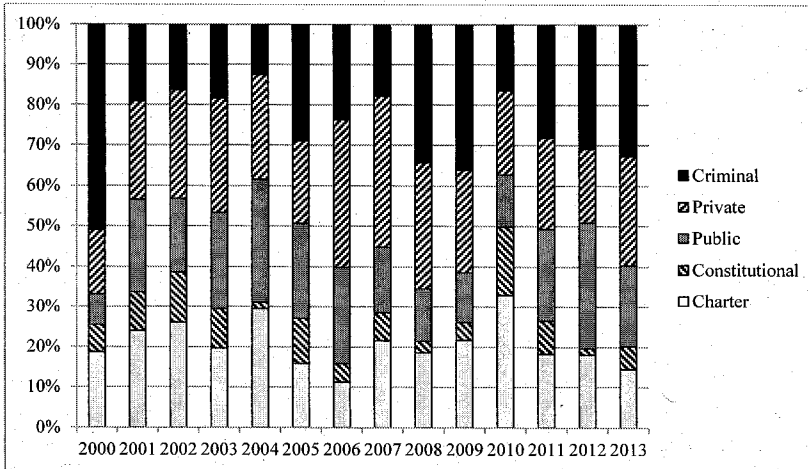


Figure 2: Proportion of Legal Complexity Scores, by Type of Law

If the first test of the index is that it generates a reasonable distribution of the cases, and the second is that it ascribes average difficulty scores among the major elements of the case load in a way that is consistent with common sense, the third is whether it identifies credible cases at the top of the list. For reasons of space, I will limit myself to the top ten: the single case with a score of 14 and the nine with a score of 13. These are listed in Table 2 (which is really a single case in first place, with a nine-way tie for second).

Case	Citation	Judgment by:	Type of law
<i>R. v. Kang-Brown</i>	2008 SCC 18	LeBel	<i>Charter</i>
<i>R. v. Sharpe</i>	2001 SCC 2	McLachlin	<i>Charter</i>
<i>R. v. Sinclair</i>	2011 SCC 40	LeBel	Criminal
<i>R. v. Cinous</i>	2002 SCC 29	McLachlin & Bastarache	Criminal
<i>R. v. Gomboc</i>	2010 SCC 55	Deschamps	<i>Charter</i>
<i>Little Sisters Books & Art v. Canada</i>	2000 SCC 69	Binnie	<i>Charter</i>
<i>Canada v. Khosa</i>	2009 SCC 12	Binnie	Public
<i>Council of Canadians v. VIA Rail</i>	2007 SCC 15	Abella	Public
<i>Doucet-Boudreau v. Nova Scotia</i>	2003 SCC 62	Iacobucci & Arbour	<i>Charter</i>
<i>Syndicat de la fonction publique v. Quebec</i>	2010 SCC 29	LeBel	Private

Table 2: Cases with Highest Complexity Scores; McLachlin Court 2000–2013

Again, the cases that score high on the index are plausible candidates for selection as the more important cases of the 14 years. Their scattering across the areas of law is similarly plausible (five *Charter* cases, two public law cases, two criminal law, and one private law); the absence of a non-*Charter* constitutional law case is at first glance curious, but explainable by the fact that the category is so small, barely a third as large as the second smallest category. Their scattering across the years of the chief justiceship is also plausible—the ten top cases are from nine different calendar years.

These three fragmentary indications are something of a first-check validation of the methodology. Discovering that the distribution of the actual cases over the range of possible scores approximates a bell-shaped curve is reassuring, because this is how many variables organize themselves—anything other than a bell-shaped curve would be sufficiently curious in itself as to require explanation, perhaps even to raise real concerns. Identifying the ten cases that earned the higher scores is reassuring, because each one is a credible candidate for the attribution of major decision status, involving an issue or issues that deserves careful attention. And the average case difficulty for the various areas of law is intuitively credible as well—*Charter* law and constitutional law involve the highest levels of legal difficulty, while the high-volume criminal (non-*Charter*) set involves the lowest (even after from-the-bench cases are omitted). A methodology should prove itself out on the easy and obvious questions before it can be used for more challenging ones. It is to the more challenging questions that I will now proceed.

3. *The complexity index: Judges*

In the slightly reductionist statement of judicial purpose that I proposed at the beginning, the function of the Supreme Court is to deliver judgments that resolve difficult legal issues in a definitive way that ripples through the system through citation and following. The function of judges on the Supreme Court is to contribute to that goal through the writing of reasons for judgment on behalf of the Court that accomplish this resolution. But if each individual case that has been decided has a legal difficulty score, a numerical value generated by the application of the index described above, then each judge must also have a total legal difficulty score that is the total of the values of all the cases for which he or she wrote the reasons for judgment. Since the same total score could result from lots of little ones or from a few big ones (and I am not prepared to tackle the philosophical question of whether one of these is pre-emptively better), this number will be accompanied by both the total number of reasons for judgment that the particular judge delivered, and by the average score for those judgments.

This description is not quite correct, and does not take us all the way to accurate figures, because the Supreme Court in recent years (on my findings, only since 1995³⁸) has adopted a practice of fairly routinely presenting co-authored, rather than single-authored, reasons for judgment. Instead of “the judgment of the court was delivered by Justice X” we now sometimes see “the judgment of the court was delivered by Justices X and Y.” Even if this happened rarely, we would still need to make sure that it did not identify some distinctively different subset of the caseload—in particular, we would want to make sure that it was not used primarily for the major cases. Since these cases account for fully 10% of the reserved judgment case load (89 examples out of a total of 894), the better course is to incorporate it—all the more so because some judges (such as McLachlin C.J., Iacobucci and LeBel JJ.) are much more likely to join in a co-authorship than some of their colleagues. Co-authored decisions seem to be, on average, slightly more legally difficult than the single-authored cases³⁹; note that two of the top ten cases in Table 1 were co-authored. Simply to drop these cases from the analysis would therefore seriously distort the results.

The process for this incorporation is as follows: I will assume that every one of the 89 co-authored reasons for judgment represents an exactly

38. See Peter J McCormick, “Sharing the Spotlight: Co-authored Reasons on the Modern Supreme Court of Canada” (2011) 34:1 Dal LJ 165.

39. The average difficulty score of a single-authored judgment is 6.95; the average difficulty score of a jointly-authored judgment is 7.66.

equal partnership between the two judges who are identified. (The order of names is always simple seniority, and therefore we cannot use it to suggest a “major author/minor author” message.) It therefore follows that the legal complexity score for each of those cases must be divided between the two judges. What the table shows is then the combination of these two figures—the total of the legal difficulty score for all the solo-authored reasons for judgment, and the equal one-half share of the legal difficulty score for all the co-authored reasons for judgment—for each of the judges who have served on the McLachlin Court.

	Judgments	Score	Average
McLachlin CJ	111.5	825	7.40
LeBel	102.5	729.5	7.12
Binnie	92	717.5	7.80
Bastarache	54	424	7.85
Abella	54.5	394	7.23
Rothstein	53.5	359	6.71
Deschamps	49.5	356	7.19
Charron	50.5	349	6.91
Iacobucci	47	344.5	7.33
Fish	54	312	5.78
Major	51	287.5	5.64
By the Court	45	254	5.64
Arbour	35	261.5	7.47
Cromwell	30	204	6.80
Gonthier	20.5	163.5	7.98
Moldaver	14	95.5	6.82
Karakatsanis	12.5	80	6.40
Wagner	7	42.5	6.07
L'Heureux-Dubé	5	37	7.40

Table 3: Total legal complexity scores, SCC 2000–2013

To make it clear what this score is measuring, we are talking not about achievement, but rather about opportunity. The index has identified and measured the legal difficulty of the cases that make up the Supreme Court case load. However, viewed from the other side, the measure of the difficulty of the case is simultaneously a measure of the opportunity it presents to the judge(s) who author the majority judgment—the extent to which it represents a chance to deliver reasons for judgment that ripple forward through the future decisions of the Supreme Court itself and

lower Canadian courts. How effectively the opportunity is used is another matter, and not part of this project. Undoubtedly, some judges in some cases do a better job than other judges in other cases (or, for that matter, the same judge in other cases). The challenge may be handled remarkably well in a way that sets the standard for years to come, or it may be handled minimally and competently, or it may be handled in a less than satisfactory way such that the issue needs to be revisited. Achievement is the product of opportunity and execution, and the current project attempts to measure only the first part of this combination. The discussion that follows is therefore not about which are the greatest judges on the Court or which will have the most lasting impact on the law. It is simply exploring which judges have had the greatest opportunity to make these contributions, in which areas of law, and in which years.

I have said above that I think it is the function of the Court to provide solid answers to difficult questions. I have suggested an index that measures the legal difficulty of each individual case, and therefore of every combination of cases, that come before the Court. I suggest that assembling those individual cases on a judge-by-judge basis measures the way the Court allocates and shares the opportunities for judgment-authoring judges to contribute to the Court's central function.

The spread is considerable, with McLachlin C.J.'s 825 points leading the way and LeBel and Binnie JJ. close behind with over 700 points, followed by a considerable drop to a second tier from which the numbers continue to drop. Taking the scores more literally than perhaps we should, these three judges have dealt with about one third of the total legal complexity that has confronted the McLachlin Court, their fifteen colleagues sharing the other two thirds; add in Bastarache and Abella JJ. and these five judges are up to one half. But it is obvious from the second column of Table 3 that the reason the three justices at the top of the table have accumulated so many legal complexity points is because they have delivered more judgments than the others, something that is not unconnected to the fact that these are the three judges who have had more years of service (see Table 6). This dimension will be explored below.

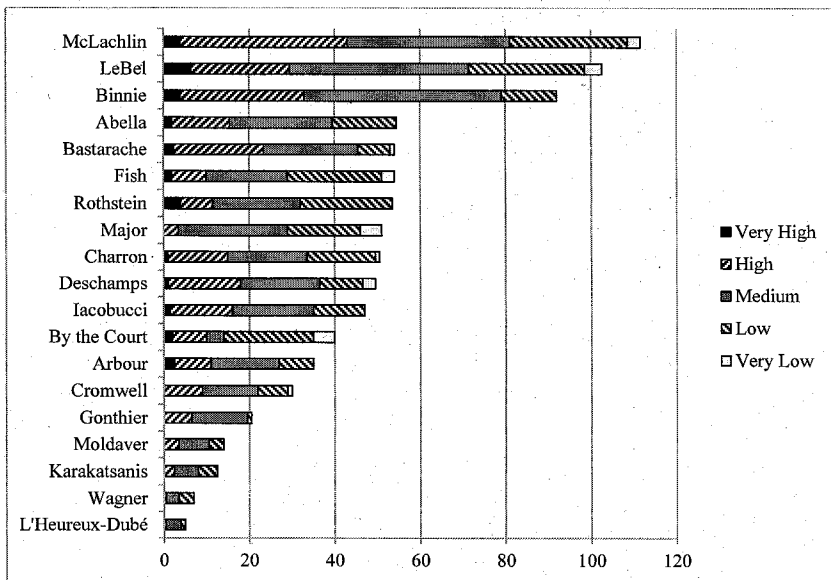


Figure 3: Number of Decisions, by Justice and Complexity Score, McLachlin Court 2000–2013

The first better measure of how equally the opportunity to make this impact has been shared (or not) would be not their total score but the average complexity score of the judgments that they did deliver, however many those may have been. All judges will have a set of judgments to write that is a mixture of high and low difficulty cases, and this is reflected in Figure 3, above. The question is whether this set might be skewed higher or lower than the overall average for different judges. Put crudely, are there “workhorse judges” who write more of the lower complexity reasons, to be distinguished from “star” judges who write fewer of the more difficult—and presumably more important—cases. These numbers vary much less, and when they do vary they create quite a different pattern, splendidly indicated by the fact that McLachlin C.J. at the top of the total complexity score table and L’Heureux-Dubé J. at the bottom both have exactly the same case average complexity score of 7.40. The average case complexity overall, as has been indicated above (see Table 1), is 7.02; ten judges scored above this value, and nine below (including “the Court”). But only three judges scored above the average by a margin that exceeds the standard deviation, those three being Gonthier, Bastarache and Binnie JJ., in that order. Only three are more than a standard deviation below the overall average, those three being Major J. (the lowest), Fish and Wagner JJ. In the aggregate, these apparently minor differences add up; Bastarache

and Abella JJ. delivered no more judgments for the Court than Fish and Major JJ., but their total complexity scores place them much further up the table.

There is one other very low figure for average complexity value, and rather surprisingly that is the one for “By the Court” (anonymous and unanimous) decisions. It has sometimes been suggested⁴⁰ that the “By the Court” style is something the Court uses to make particularly important decisions, usually bearing on constitutional issues, in a particularly emphatic way, but this does not seem to be a useful generalization for the McLachlin Court’s use of the device. It is not that there have not been examples of cases that fully fit Bzdera’s characterization—*Suresh v. Canada (Minister of Citizenship and Immigration)* and *United States v. Burns*,⁴¹ for example, both earned a complexity score of 12—but overall the complexity of “By the Court” judgments has been below the all-decisions average. If we were to personify the practice as Mr. Justice By the Court (to paraphrase Nygaard’s adroit characterization⁴²), then he would be tied for last place on the Court for average case complexity. This strongly suggests that the standard Bzdera-style description of “By the Court” judgments is catching only part of a larger story.

4. *The complexity index: Types of law*

The legal difficulty scores can also be broken down in the way suggested in Figure 1, into the five major subsets of the Supreme Court case load, to provide a more nuanced look at judgment assignment practices. For present purposes, I suggested above that there were five relevant subsets of the total case load:

- Charter law
- Constitutional law
- Public law
- Private law
- Criminal law

These five are of course equal in neither case count nor total complexity score, a consideration that needs to be carried through to a discussion of the disaggregation that follows. The proportions of both case count and total complexity of these five subsets are:

40. See, e.g., André Bzdera, “Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review” (1993) 26:1 *Can J Political Science* 3.

41. *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3; *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283.

42. Richard Lowell Nygaard, “The Maligned Per Curiam: A Fresh Look at an Old Colleague” (1994–1995) 5 *Scribes J Leg Writing* 41.

Type of law	Number of cases	Total Complexity Score
Charter law	158 (17.8%)	1320 (21.2%)
Constitutional law	59 (6.6%)	477 (7.6%)
Public law	182 (20.5%)	1250 (20.0%)
Private law	243 (27.3%)	1627 (26.1%)
Criminal law	247 (27.8%)	1562 (25.0%)

Table 4: Case Count and Total Complexity Score, Reserved judgments

With this as the background, Table 5 follows through by applying this disaggregation to each of the fifteen justices who has served on the McLachlin Court.

	Charter	constitutional	public	private	criminal	Total
McLachlin CJ	261.5	81.5	120	211	151	825
LeBel	131	54	177.5	244.5	122.5	729.5
Binnie	107.5	69.5	134.5	237	169	717.5
Bastarache	96	16	117	114	81	424
Abella	60	37.5	113.5	81.5	101.5	394
Rothstein	27.5	24	120	155.5	32	359
Deschamps	89	17.5	32	150.5	67	356
Charron	96.5	0	25	22	205.5	349
Iacobucci	73.5	35	81.5	90.5	64	344.5
Fish	54.5	0	38	17.5	202	312
Major	20	31	73	100.5	63	287.5
By the Court	81	47	52	33	41	254
Arbour	99.5	10	11	30	111	261.5
Cromwell	33	17	61.5	49.5	43	204
Gonthier	35.5	29	46	45	8	163.5
Moldaver	31	0	23	2.5	39	95.5
Karakatsanis	11	8	12.5	15	33.5	80
Wagner	0	0	5	18.5	19	42.5
L'Heureux-Dubé	12	0	7	9	9	37

Table 5: Total Complexity scores by type of law, Reserved Judgments 2000–2013

The table conveys three different pieces of information. First, the final column, echoes Table 3 by providing a simple ranking of the justices in terms of the complexity score totals for the judgments they authored and co-authored; this has already been discussed. Second, the different “shape” of the Court for the various subfields of law—a somewhat different set of

judges stand out, and different judges rank lower, for the different major types of law the Court deals with from one year to the next. *Charter* law is the only sub-field with the same top three in the same order as the overall totals, but Arbour J. from the bottom half of the table is fourth and Charron J. is fifth. Charron and Fish JJ. are major players in criminal law, Rothstein and Deschamps JJ. in private law; private law and constitutional law have the same top three but in a different order. This hints at a specialization factor—the “complexity mix” of the five subsets is significantly different from one judge to another—but further refinement of the table is necessary before we can pursue this effectively.

Third is the different shape of the complexity opportunities for each of the judges. Charron J.’s Supreme Court contributions, for example, were almost entirely in relation to criminal law and *Charter* law; she wrote judgments for no constitutional law cases, and ranks near the bottom of the Court for private law and public law. Fish J.’s involvement is if anything even more heavily overbalanced in the criminal law area. Major J. is almost the converse, contributing mostly to private law and public law, precisely the areas on which Charron J. is the least visible, and the same can be said of Rothstein J. McLachlin C.J. is considerably more balanced, but her contributions have clearly been more heavily concentrated in *Charter* cases than her colleagues.

IV. *Assessing equality: Applying the methodology*

The total complexity scores over the total length of their service does not precisely indicate the extent to which opportunity has been equally distributed among the judges for the obvious reason that the length of service has been highly unequal. Two judges (McLachlin C.J. and LeBel J.) have served for the entire 14 years; at the other extreme, four judges (Wagner, Moldaver, Karakatsanis and L’Heureux-Dubé JJ.) served for barely two. To take this into proper consideration, Table 6 presents the overall complexity score, and the complexity score for each of the types of law, on a per-year-of-service basis⁴³; the overall average figure is included for comparison purposes.

43. The average figures represent the “average of all judges” and excludes “By the Court” judgments. The exclusion does not distort the figures because the score involved—254 points, over 14 years, divided on each occasion by the seven to nine judges on the panel, and then divided among the judges roughly proportionately to their years of service—is both modest and widely distributed.

Judge	Service	Charter	constitutional	public	private	criminal	Total
Iacobucci	4.5 yrs	16.4	7.8	18.2	20.2	14.3	76.9
Binnie	11.8 yrs	9.1	5.9	11.4	20.1	14.3	60.9
McLachlin CJ	14.0 yrs	18.7	5.8	8.6	15.1	10.8	59.0
Arbour	4.5 yrs	22.2	2.2	2.5	6.7	24.8	58.4
LeBel	14.0 yrs	9.4	3.9	12.7	17.5	8.9	52.2
Bastarache	8.5 yrs	11.3	1.9	13.8	13.4	9.6	50.0
Charron	7.0 yrs	13.8	0	3.6	3.1	29.4	49.9
AVERAGE		10.0	3.5	9.7	12.9	12.3	48.5
Major	6.0 yrs	3.4	5.2	12.2	16.8	10.6	48.2
Gonthier	3.6 yrs	10.0	8.1	12.9	12.6	2.2	45.9
Rothstein	7.8 yrs	3.5	3.1	15.3	19.8	4.1	45.8
Moldaver	2.2 yrs	14.1	0	10.5	1.1	17.8	43.5
Abella	9.3 yrs	6.4	4.0	12.2	8.7	10.9	42.2
Cromwell	5.0 yrs	6.6	3.4	12.2	9.9	8.6	40.6
Karakatsanis	2.2 yrs	5.0	3.6	5.7	6.8	15.3	36.4
Deschamps	10.0 yrs	8.9	1.7	3.2	15.0	6.7	35.6
Wagner	1.2 yrs	0	0	4.0	14.9	15.4	34.3
Fish	10.1 yrs	5.4	0	3.8	1.7	20.1	31.0
By the Court		5.8	3.4	3.7	2.4	2.9	18.2
L'Heureux-Dubé	2.1 yrs	11.2	0	6.6	8.4	8.4	17.9

Table 6: Average Complexity Score, by Justice and type of law; McLachlin Court 2000–2013

This table is the top of the mountain that this article set out to climb. It is the basis for deciding on an empirical basis whether the opportunities for doctrinal contributions are allocated among the judges on the Court on a basis approaching equality, allowing for the varying length of service of those judges. If that allocation truly pursued equality, then the numbers in the final column would not vary much. The considerable degree of variation that actually prevails in that column indicates that the allocation is not particularly equal and that some judges enjoy more opportunities for enduring influence than others.

The five subset columns provide a window on a second aspect of Supreme Court opportunity allocation, and that is the somewhat tricky subject of specialization. It is obvious that the judges of the Supreme Court bring a variety of background training and experience to the Court.

From time to time, that is a factor in their selection, as (for example) when commentators look at the fairly large proportion of criminal cases in the case load, and worry whether a departing justice will be replaced by someone with a strong background in that type of law. Yet—as a justice of the Alberta Court of Appeal pointed out to me years ago—although it would clearly be foolish not to draw on the special training, experience and interests of particular judges, an appeal court has to be careful not to walk too far down that particular path. For one thing, pursued too far, it means that for a period of time the law in a particular area is dominated by a single judge rather than by the more collegial and collective approach that appeal courts are supposed to apply to such issues; for another, it can create a significant continuity problem when the “expert” leaves the Court.

The five columns of Table 6 show that there is indeed a degree of specialization—some judges whose overall per-year complexity figures are not particularly high do nonetheless rank toward the top of the Court for one or more of the various subsets, even on the rather general basis that these five subsets provide. Arbour and Charron JJ. stand out for criminal law, Iacobucci, Binnie and Major JJ. for private law, Iacobucci and Rothstein JJ. for public law, Arbour J. and McLachlin C.J. for *Charter* law, and Gonthier and Iacobucci JJ. for constitutional law. It would be a mistake to overemphasize this degree of apparent specialization, because it stops far short of a virtual monopoly or the exclusion of others, but it would also be a mistake to leave it out of the assessment. That said, the rest of this article will focus on the final column, the total per-year complexity scores.

In these terms, Table 6 can be seen as dividing the judges into three fairly clear categories. There is a top group of four judges (Iacobucci, Binnie J., McLachlin C.J. and Arbour J., in that order) whose yearly average complexity score is more than 10% greater than the all-judge average. Toward the bottom of the table there is a set of seven judges (Abella, Cromwell, Karakatsanis, Deschamps, Wagner, Fish and L’Heureux-Dubé JJ.) whose yearly average complexity score is more than 10% below the all-judge average; obviously, the years of service for Wagner, Karakatsanis and L’Heureux-Dubé JJ. are so low, and so concentrated at the low-experience beginning (for Wagner and Karakatsanis JJ.) and the end-of-service closing (L’Heureux-Dubé J.) as not to be strictly comparable. The remaining seven judges cluster within a “plus or minus 10% of average” zone. The total years of service for each of these three sets—high, medium and low per year complexity scores—is comparable at (roughly) 30%/40%/30% of the total, which makes it reasonable to use them as a basis for comparison.

Consider Binnie, Rothstein, and Fish JJ. as reasonable examples of each of the three groups, with annual complexity totals of about 60, 45 and 30 respectively, their names giving the differences more bite than abstract categories could. The fifteen-point spread in the by-year complexity scores is both powerful and convenient, given that it corresponds to the highest possible complexity score for a single case. Putting it a little differently, there are fewer than a dozen cases per year with a complexity score of ten or higher to be allocated among the judges. These scores suggest that every year Binnie J. got at least one more of these than the average judge (roughly, Rothstein J.) and Fish J. got at least one less. Over the eight-to-twelve years served by these three exemplar judges, these differences add up to something significant.

Let me unfold the impact of the allocation of complexity opportunity in a different way. In any given year, each judge will write or co-write a set of judgments that earn them an annual complexity score, and this means that for each year we can rank the nine judges on the Court from first through ninth on this complexity measure.⁴⁴ Averaging the score over a number of years may be misleading because of an unusually low score for a single year, or it may lead us to overlook a stellar year that on average vanishes behind a string of more mundane scores. A year-by-year measure will better reflect such possible variations and fluctuations. Table 7 therefore presents this information in terms of how many times the judge in question had the highest (or second highest, or third highest, and so on) complexity score for any single year. The second last column indicates the number of years over which this record has been accumulated, and the last column indicates the average annual ranking for each judge; the ordering is driven by the final column.

44. The turnover of judges on the Court is less problematic than one might expect, because they tend to leave the Court toward the middle of the year and be appointed early in the fall. That is to say, in the year of the turnover on one of the Court's nine seats, it is usually the case that the retiring judge still participates in reserved judgments for several months, while the new judge is waiting for the first reserved judgments on which they served to be delivered.

Judge	1	2	3	4	5	6	7	8	9	Yrs	Avge
Iacobucci	2	2	0	1	0	0	0	0	0	5	2.0
Binnie	2	5	0	2	2	1	0	0	0	12	3.0
McLachlin	3	3	3	1	1	1	1	1	0	14	3.4
Moldaver	1	0	0	0	0	0	1	0	0	2	4.0
Charron	2	1	0	1	1	0	1	1	0	7	4.0
LeBel	1	3	2	2	2	1	1	0	2	14	4.4
Bastarache	1	0	2	2	1	1	1	1	0	9	4.6
Rothstein	2	0	0	2	1	1	0	1	1	8	4.8
Arbour	0	0	3	0	0	0	1	1	0	5	4.8
Major	0	0	0	1	2	2	1	0	0	6	5.5
Abella	0	0	1	2	2	0	2	2	0	9	5.7
Cromwell	0	0	1	0	0	2	1	0	1	5	6.2
Deschamps	0	0	1	0	1	2	3	1	2	10	6.7
Karakatsanis	0	0	0	0	1	0	0	0	1	2	7.0
Gonthier	0	0	0	0	0	2	0	2	1	5	7.4
Fish	0	0	1	0	0	1	1	2	4	9	7.6
Wagner	0	0	0	0	0	0	0	1	0	1	8.0
L'H-Dubé	0	0	0	0	0	0	0	1	2	3	8.7

Table 7: Relative rankings for year-by-year complexity scores

This roughly tracks the average figures in the previous table—Iacobucci, Binnie JJ. and McLachlin C.J. top the table, Fish, Wagner and L’Heureux-Dubé JJ. figure toward the bottom. But this detail makes my point with even greater emphasis. Some judges have placed in the “top third” of the Court for year after year of their service—nine times in 14 years for McLachlin C.J., seven times in 12 years for Binnie J., six times in 14 years for LeBel J., four times in five years for Iacobucci J.—while some other judges definitely have not—Deschamps J., for example, did so only once in ten years, Abella J. only once in nine, Major J. never in six. Conversely, some judges frequently rank in the bottom third of the Court – Fish J. for seven years out of nine, Deschamps J. for six years out of ten, Abella J. for four years out of nine. The detail of this table reinforces the overall message of the previous one, which is that these are persisting patterns. The basic message answers the first of the questions that I posed at the beginning: how equal is the allocation of opportunity among the judges on the Court? And the answer is: not very.

<i>Charter</i>	Constitutional	Public	Private	Criminal
Arbour	Gonthier	Iacobucci	Iacobucci	Charron
Iacobucci	Iacobucci	Rothstein	Binnie	Arbour
McLachlin	Binnie	Bastarache	Rothstein	Fish
Moldaver	McLachlin	Gonthier	LeBel	Moldaver
Charron	Major	LeBel	McLachlin	Wagner

Table 8: Top five judges: per-year complexity score, by type of law

Ask the question in a different way: for each of the five subsets of law identified, who were the top five judges on a “complexity score per year” basis? This is shown in Table 8. Iacobucci J. makes the table four times, in four different areas of law, with two firsts and two seconds; McLachlin C.J. is there three times, with a third and a fourth and a fifth. Seven judges made the table twice, led by Arbour J. with a first and a second. The expectation would therefore be that these names, modified by the length of service factors, are the ones that figure most prominently in any academic survey of the Supreme Court’s development of the law in these various areas.

It is one thing to “eyeball” the tables and say that the results do not look very equal; but in fact equality in the distribution of opportunities is something that can be measured precisely. Figure 4 is a first step toward such a measurement. It graphs the distribution of complexity scores for the calendar year 2005.⁴⁵ The bottom (dashed) line is the individual complexity score for each of the nine judges, from lowest to highest, which is to be compared with the straight (solid) line which gives each of the nine the identical average score. The two upper lines then present the cumulative totals for the nine judges, the straight (dotted) line for the perfectly equal shares, and the curved (solid, diamond-studded) line for the actual and unequal numbers. The gap between the two top lines is the departure from equality, which can be expressed as a single number that measures the area under the curved line as a proportion of the area under the straight line. For 2005, that number is .845. This is roughly the degree of inequality that would exist if three judges had an average complexity total score, three had a score one third higher, and three had a score one third lower: that is, the scores of 60, 45 and 30, the Binnie/Rothstein/Fish ratios described above.⁴⁶

45. This particular year was selected because the inequality index for this year is the closest to the average index for all fourteen years of the McLachlin Court.

46. The actual inequality index score for this notional “three Binnie J., three Rothstein J., three Fish J.” court would be .867, a level of equality that the Court has exceeded only once in the last fourteen

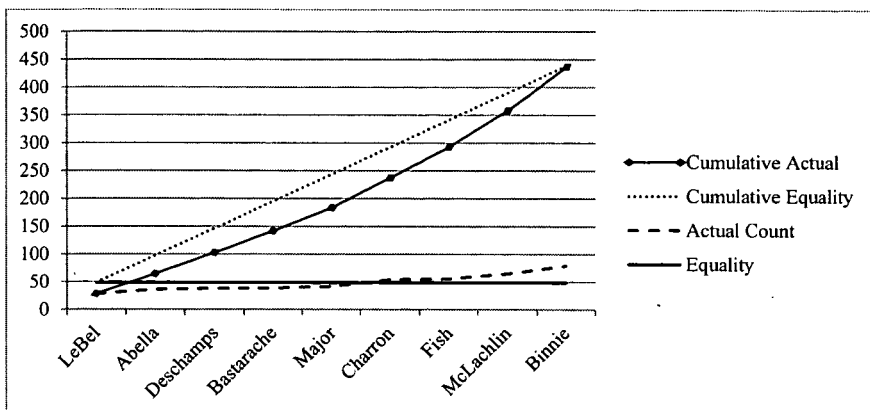


Figure 4: Inequality Curve—actual and cumulative complexity scores for calendar 2005

The same calculation can be made for each year of the McLachlin Chief Justiceship, and the results are shown in Figure 5. The equality in the allocation of cases has been slightly and gradually increasing over the decade, from scores hovering around .800 in the beginning to scores approaching .900 at the end; the average over the entire fourteen years has been .836. Figure 4 is therefore a fair reflection of the persisting level of inequality in the allocation of cases, measured in terms of complexity.

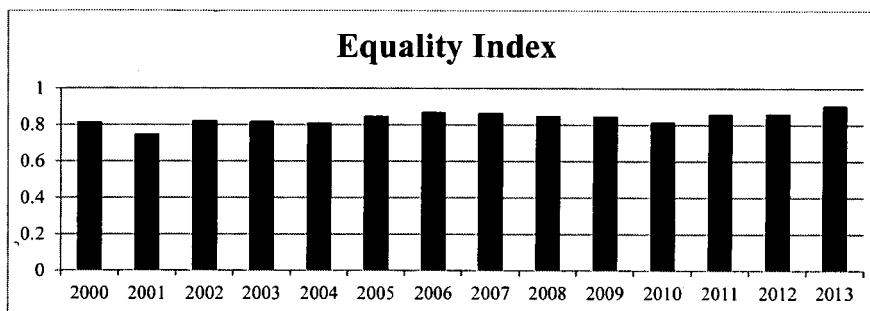


Figure 5: Equality Index for Per-Judge Complexity Scores, Supreme Court, 2000–2013

One way to look at the overall impact of this inequality is notionally to create a nineteen-judge court (including Justice By the Court as the nineteenth member), and then to populate it with the annual average complexity scores—not total scores, because this so heavily reflects differences in length of service. We can then calculate the equality curve for this court, overall and for each of the five major types of law, and for a

close look we can recalculate the curve for each of the five major areas of law. The results are shown in Figure 6.

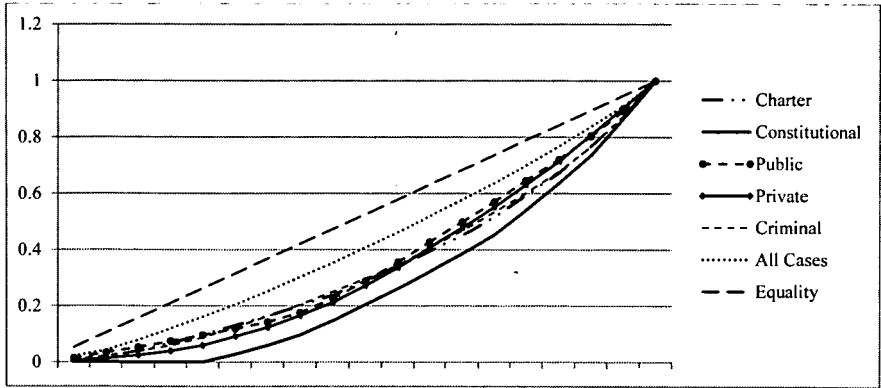


Figure 6: *Inequality Curve, all judges, by type of law*

The first thing to notice is that the inequality curve for total cases lies closer to equality than any of the curves for the five subsets, which suggests a certain element of *de facto* specialization—if there was the same amount of inequality tilted toward the same subset of judges across all types of law, then the total curve line would be somewhere in the middle of those lines, and therefore somewhat lower than is actually the case. The *de facto* specialization of judges—that is, the fact that inequality tilts toward different segments of the Court for different types of law—means that the inequality in the allocation of opportunity is to some modest extent offsetting. However, since that offset still leaves us with the inequality of Figure 4, it might be more accurate to say that the allocation of opportunity within each type of law is even more uneven than the allocation overall.

V. *Correlates of inequality*

It is one thing to identify persisting inequality in the allocation of opportunity, but another thing altogether to find who gains and who loses from that inequality. I have suggested which individuals tend to do better (and which tend to do worse); I will penetrate these figures to find the broader categories that can be linked to these patterns. Specifically, I will consider the impact of gender and seniority.

1. *Gender and opportunity*

In an earlier article,⁴⁷ using the narrower criterion of subsequent citation to isolate the major decisions of the Court, I found that women judges

47. Peter McCormick, “Who Writes? Gender and Judgment Assignment on the Supreme Court of Canada” (2014) 51:2 *Osgoode Hall LJ* 595.

were systematically and consistently disadvantaged in the assignment of the reasons for judgment. A complicating factor was a strong tendency across the three most recent chief justiceships for chief justices to be significantly over-represented in the most important cases, which created an impression of current equality in the allocation of major cases that masked the persisting reality of women puisne justices being consistently under-represented. The question now is whether that tentative finding can survive revisiting with the more robust measure and inclusive measure of legal complexity that I have proposed in this paper. The answer, as shown in Table 9, is a slightly qualified “Yes”.

	<i>Charter</i>	constitutional	public	private	criminal	Total
Men judges	8.2	3.7	11.8	14.4	11.3	49.4
Women judges incl CJ	12.9	3.2	6.6	10.6	13.9	47.1
Women judges excl CJ	10.5	2.1	5.8	8.8	15.1	42.3
All Judges	10.0	3.5	9.7	12.9	12.3	48.5

Table 9: Average per year complexity scores, by gender and type of law

Overall, women judges (including the Chief Justice) score slightly lower than men judges on complexity; their overall totals are about 5% lower, with the exception of criminal cases and especially *Charter* cases. Remove the Chief Justice from the equation, however, and their advantage on *Charter* cases largely vanishes, while overall they score 15% lower than their counterparts. The difference is not overwhelming, but it is persistent and pervasive—this is the same pattern suggested by the analysis ranking cases on citation count alone.

2. *Relative seniority*

On the standard descriptions of how the Supreme Court decides which judge on the panel should draft the majority judgment, seniority is one of the most important considerations. At the conference that follows oral argument for reserved judgments, judges have the opportunity to volunteer for the assignment. Should more than one judge volunteer, the senior judge writes the judgment. It is therefore reasonable to assume that seniority carries a real advantage in the allocation of the more complex, and therefore the more challenging and more potentially influential, cases. Table 10 calculates the complexity score for the Court in terms of where that member ranked in terms of relative seniority, from the most senior to the most junior, for each of the fourteen years of the McLachlin Chief Justiceship. The data are then broken down further by dividing it between men and women judges.

Seniority:	Women Judges	Men Judges	All Judges
Chief Justice	59.0	--	59.0
Most senior associate justice	12.3	49.7	41.7
Second most senior associate	53.0	47.2	47.6
Third most senior associate	38.8	59.5	53.6
Fourth most senior associate	40.0	43.0	42.1
Fifth most senior associate	39.6	43.7	42.2
Sixth most senior associate	48.1	53.3	50.7
Seventh most senior associate	47.3	56.4	50.6
Most junior associate	29.7	37.0	35.4

Table 10: Average per-year complexity scores, by gender and relative seniority

The figures do not support the notion that this aspect of seniority correlates at all strongly with the assignment of the more legally complex judgments of the Court. The extreme ends of the table look promising—the most junior justice of the Court has a very low average complexity score, and the Chief Justice (by definition the most senior) has a very high score—but the positions in between do not line up in any neat way. For men judges and overall, the best positions are fourth and eighth most senior; for women, it is third most senior. Certainly there is nothing approaching the step-wise gradual increase that the seniority rule for judgment assignment would have us anticipate. Despite the fact that the formal descriptions of judgment assignment seemed to direct us to relative seniority as an important tie-breaker in volunteering for the desirable cases, there is no clear indication that this factor matters for any members of the Court except the Chief Justice. On this indicator, the Chief Justice is indeed first, and by a good margin.

3. Length of service

But there is an alternative way of measuring seniority on the Court. The problem with simply counting upward from the most recently appointed judge is that appointments are not evenly distributed over time. Four-and-a-half years after his appointment to the Court, Major J. was still the most junior member of the Court; but five years after her own appointment in 1987, L'Heureux-Dubé J. was third most senior. This reflects the fact that Major J.'s appointment marked the beginning of the longest period between appointments in the history of the Supreme Court (in the American literature, this is referred to as a "natural court"), while L'Heureux-Dubé J.'s marked the beginning of a flurry of retirements and new appointments that was without parallel.

The alternative approach is to divide the judicial career into a number of periods based on length of service; although the number of such divisions and the length of each one is necessarily arbitrary, the underlying point is worth exploring. My own suggestion would be to treat the first three years of Supreme Court service as a transition period, and to characterize judges in their second three years of service as junior judges, those in their third three years of service as established judges, and those in or beyond their tenth year of service as senior judges.

This information is displayed in Table 11, which links each year’s complexity score for each judge not on the basis of which individual is involved, or on the basis of gender, but rather on the basis of how long that particular judge had been on the Court. This means, for example, that any specific judge started their service as a transition judge for three years, then a junior judge for three years, then an established judge, and so on. The number in brackets indicates the total number of “judge years” that fell within each of the categories; the number that precedes the bracket is the average complexity score for those years.

Length of service	Women	Men	All Judges
Senior Judges (incl. CJ)	49.9 (18)	53.4 (39)	52.6 (57)
Senior Judges (excl. CJ)	22.5 (4)	53.4 (39)	50.6 (43)
Established Judges	40.7 (10)	44.7 (13)	43.0 (23)
Junior Judges	44.8 (14)	42.9 (15)	43.8 (29)
Transition Judges	42.0 (14)	39.8 (15)	40.8 (29)

Table 11: Average per-year complexity score, by gender and absolute seniority

Looking at the final column first: the absolute seniority measured by years of service is much closer to generating the predicted step-wise increase as one moves up through the categories—transition justices average lower complexity scores than junior judges, and senior judges have higher average complexity scores than established judges. The clear suggestion is that judges “earn their way” through their years of service to judgment assignments that include the more complex and more important cases, and that it takes about a decade for the full effects of this to accrue. The gap between senior (ten years plus) and established (seven to nine years) judges is dramatic, all the more so because the large number of judges and judge-years that are included mean that it cannot be thought of as driven by some dramatically atypical subset. The pattern is equally strong if the Chief Justice is included or excluded.

But something very interesting happens when the length-of-service table is divided on the basis of gender. Since men account for almost double the total number of judge-years as women (excluding the Chief Justice) it is unsurprising that their numbers closely track the overall pattern, with a steady and strong step-wise increase. But the pattern for women is rather different. For women, the career track starts strong: women transition judges and women junior judges display slightly higher complexity scores than their male counterparts. This tails off slightly for the established judge category, where both the number of years and the average complexity score per year trail their male colleagues, but overall there is still not much to choose between the two columns. The striking difference occurs at the top of the table, where the complexity score for women judges drops precipitously for the senior judge category in a double sense: first, the average score is sharply down; and second, the total number of judge-years included is very low.

Both these dimensions of difference have the same explanation—very few women serve long enough for their service to rise into my senior judge category: three years for L'Heureux-Dubé J. at the start of the Chief Justiceship, one concluding year for Deschamps J. at the end of it—and, for women judges other than the Chief Justice, that is it. Arbour J. left early—after less than five years on the Court—for the U.N., Deschamps J. left after ten years (precisely), Charron J. left after seven years, and Abella J. at time of writing has not completed ten years of service. The overall effect is striking, because the number of men judges whose service lasted into the double digits is so much longer: Gonthier, Cory, Iacobucci, Major, Bastarache, Binnie, Fish and LeBel JJ.

There are, of course, two ways to read the table. The polite suggestion would be that the lower complexity score for women judges is to some extent the product of the fact that (McLachlin C.J. aside) women judges do not continue to serve into the period when length of service begins to generate the larger numbers of high-complexity cases—the “39 to 4” ratio in the second-from-the-top row makes this point very starkly. The implication is that if only the women justices had kept serving for a few years longer the gender table that led off this section would look quite different. The less happy suggestion would be that the dismally low number for women senior judges other than the Chief Justice suggests that even when women judges do serve into their second decade on the Court, the benefits of seniority do not flow to them the same way that they do to men, and the fact that so few achieve this level of seniority may hint at some discouraging factor that persuades them to leave the Court early. Either way, these findings go some way to refine the impressions

of my earlier paper—the complexity disadvantage of women judges is generated entirely at the higher seniority levels of the Court, and both men and women judges of lower seniority are accorded highly comparable opportunity shares (although, to be sure, both score lower than their senior—and, as it happens, male—counterparts).

Conclusion

I have raised the question of whether the assignment of the writing of reasons for judgment among the various members of the McLachlin Court has been equal, or whether it has been tilted in some important way toward the “first among equals” that is the chief justice. I have suggested that a simple count of judgments delivered would not be the best measure, even after from-the-bench judgments are eliminated to reduce consideration to reserved judgments, because some cases are clearly much more important than others.

I proposed a “legal complexity score” for each reserved judgment, drawing on ten different objective variables from the provenance and the handling of each case, that would allocate cases to a continuum of legal importance. And I tested this score by looking at the distribution of scores, at the average complexity for each of several types of law, and at the “top ten” highest scoring cases. I suggested that adding the scores for all the reasons for judgment by an individual judge (and evenly dividing the scores for co-authored reasons between the judges involved) would be a reasonable way of assessing the allocation of opportunity between the judges, on the assumption that dealing with legally complex cases is an important way that individual judges contribute to the Court’s impact on the law. I used these scores to rank the eighteen judges who have served on the McLachlin Court.

I used these shares of legal complexity scores between judges to measure the extent to which the allocation of cases in each year approaches an equal division of opportunity, and I suggested a common sense translation of this degree of inequality (three each of Binnie, Rothstein and Fish JJ.) to make the point. I demonstrated that this degree of inequality has been consistent from one year to the next, neither increasing nor decreasing significantly and therefore constituting a persisting dimension of the Court’s performance.

I then divided the Court’s case load into five subsets, and evaluated each separately in terms of the allocation of opportunity among judges, and used this information to identify the judges who have tended to enjoy the highest profile in each of these categories, noting that these sets of judges are quite different for different areas of law. I demonstrated that the

inequality in the allocation of opportunity is at its greatest for constitutional law; and I suggested that these inequality curves suggest a significant degree of *de facto* specialization. Finally, I used the complexity scores to examine some of the possible correlates of inequality, specifically gender and seniority. It was shown that relative seniority (first through ninth) was not a good explanatory variable, but that both gender and length of service had a strong effect, combining in such a way as to suggest that a major reason for the apparent under-representation of the women puisne judges in the delivery of major reasons is the fact that so few of them serve into their second decade on the Court.

Let us turn this back against my initial questions. To what extent is the Chief Justice “first” on the Court? In general, McLachlin C.J. is best thought of as consistently within the ranks of a dominant top third of the Court, the relative preponderance of her influence accumulating over time as senior judges leave and newer judges achieve comparable seniority. For much of the decade, the relevant triumvirate comprised McLachlin C.J. and Lebel and Binnie JJ., although Iacobucci J. was definitely a factor in the early years of the Chief Justiceship. On a closer look, the triumvirates are slightly different from one subset of law to another—Charron and Fish JJ., for example, figured very prominently in criminal law, much less so in other areas of law; for private law, one would point to Rothstein and Deschamps JJ.—reinforcing the impression of a *de facto* degree of specialization mentioned above.

The major exception to this was *Charter* law, where the Chief Justice was very much the pre-eminent contributor, especially after the departure from the Court of Arbour and Iacobucci JJ. This suggests an important nuance to the conclusion suggested in the previous paragraph: overall, the Chief Justice is a team player, albeit among the leading members of that team, except for the fact that she can enjoy a much greater pre-eminence in some focused subset of law if she chooses.

The second question was: how equal are the judges, in terms of the assignment of the cases that matter; the answer I have suggested is, not very. The importance of the length-of-service factor suggests something of an extended probationary period as judges earn their way up the assignment ladder; since some judges serve shorter terms than others, this can very much limit their capacity to work toward a larger—or more equal—share of the complex decisions. But it is still the case that some judges serve for a considerable period without getting very much to show for it; L’Heureux-Dubé J.’s senior status did not give her the opportunities that such seniority might have been expected to attract; and Fish and Deschamps JJ. accumulated complexity scores at a considerably slower

rate than average. To be sure, this is mildly offset by a certain amount of *de facto* specialization—Fish J. in criminal law, Deschamps J. in private law—such that not being part of the dominant trio overall does not preclude being part of a comparably dominant trio within some subset, but this is still enough to support the overall conclusion that there is a consistent and persisting degree of inequality within the allocation of opportunities on the Court.

Let me conclude with a disclaimer, to avoid a possible misunderstanding: I do not deny for a moment that it may well be the case that every single assignment of majority reasons was reasonable, and perhaps even optimal in a purely objective sense when considered on its own. I accept that a fully appropriate person was selected for that particular case for solid legal and professional reasons. This in no way undermines my suggestion that the overall allocation of judicial opportunities to resolve legal complexity has not been equal, and to that extent has not been “fair” to certain members of the Court. To lapse into metaphor: it may well be that every brick in the wall is a perfectly good and solid brick—but it is still worthwhile looking at the shape and the patterns in the wall that results from any particular selection and organization of those bricks, and that is what this paper has tried to do.

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The Editor
Dalhousie Law Journal
Schulich School of Law, Dalhousie University
1459 Oxford Street
Halifax, Canada
B3H 4R2
Telephone: (902) 494-1469
Fax: (902) 494-1316
E-mail: editor.dlj@dal.ca
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