

"Was it Something I Said?": Losing the Majority on the Modern Supreme Court of Canada, 1984-2011

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Abstract

Appeal court judges do not just vote and run; they vote and then they explain, at length, why theirs is the most reasonable position. Since the core of explanation is persuasion, this means that between the initial conference vote and the final decision, some of the judges sometimes change their minds; and this in turn means that sometimes an initial majority becomes a minority and vice versa, something which often leaves clear footprints in the written record. This paper demonstrates that this happens more often than we might think—some 255 times for the last three Chief Justiceships, or roughly once in every four divided panels. It identifies which judges tend to gain, and which tend to lose, from “swing” judgments, specifically finding that the phenomenon has consistently favoured male judges over their female colleagues. The paper closes with arguments as to why swings matter.

Keywords

Appellate courts; Judicial process; Judgments; Canada

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PETER J. MCCORMICK *

Appeal court judges do not just vote and run; they vote and then they explain, at length, why theirs is the most reasonable position. Since the core of explanation is persuasion, this means that between the initial conference vote and the final decision, some of the judges sometimes change their minds; and this in turn means that sometimes an initial majority becomes a minority and vice versa, something which often leaves clear footprints in the written record. This paper demonstrates that this happens more often than we might think—some 255 times for the last three Chief Justiceships, or roughly once in every four divided panels. It identifies which judges tend to gain, and which tend to lose, from “swing” judgments, specifically finding that the phenomenon has consistently favoured male judges over their female colleagues. The paper closes with arguments as to why swings matter.

Les juges des cours d'appel ne se contentent pas de voter; ils votent et se livrent ensuite à de longues explications des raisons pour lesquelles leur avis est le plus logique. Du fait que le cœur de leur argumentation réside dans la persuasion, il découle qu'entre le vote initial de conférence et la décision finale, certains des juges changent parfois d'avis; cela signifie donc qu'il arrive parfois que la majorité initiale devienne minorité et vice versa, ce qui laisse souvent des traces sans équivoque dans les écrits. Cet article démontre que ce phénomène se produit plus souvent qu'on ne l'imagine, soit 255 fois sous les trois derniers juges en chef, ou environ une fois sur quatre lorsque la décision n'est pas unanime. Cela permet d'identifier quels sont les juges qui gagnent, et quels sont ceux qui perdent, lors de revirements de verdicts, et plus particulièrement de constater que ce phénomène favorise constamment les juges masculins au détriment de leurs collègues féminines. L'article se conclut par des arguments soulignant l'importance des revirements de verdicts.

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SOMETIMES, SUPREME COURT JUDGES change their minds. More specifically, sometimes they indicate at the post-hearing conference that they are of one inclination with respect to the outcome and reasons in the immediate case, but when the decision is finally handed down they instead sign the reasons of a colleague who was drafting what started as minority reasons, or vice versa. There is of course nothing improper, let alone sinister, about this; collegial persuasion is what panel appellate court decision making is all about. Appeal court judges do not vote and run—they vote and explain, at length, in a way that constrains their own future decisions and provides guidance to lower courts and potential litigants. In the process of framing this explanation they circulate their draft judgments and invite critical comments from their colleagues on the bench. The focus of the ongoing substantive exchanges within the court is presumably non-writers suggesting revisions or refinements to the reasons that are being drafted as the judgment of the court; but these exchanges can also be directed to changing minds, to moving votes and signatures, and even to altering outcomes. Sometimes, those attempts succeed.

The regular procedure of the Supreme Court of Canada (SCC) is well understood.¹ Cases are received for hearing as appeals by right, appeals by leave of the Court itself, as reference questions from the government of Canada or one of the Houses of Parliament, or, exceptionally and unusually, by leave of

1. See e.g. Ian Greene et al, *Final Appeal: Decision-making in Canadian Courts of Appeal* (Toronto: James Lorimer & Co, 1998) at ch 6; Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008) at ch 5.

the court of appeal from which appeal is sought.² They are scheduled for oral argument and (except for a minority of cases that are decided from the bench on the same day) reserved for judgment, which typically means a delay of several months. After oral argument, the judges on the panel meet in conference for a short discussion that reveals whether the judges are inclined to allow or dismiss, and on what grounds; both of these elements may generate unanimity or may indicate one or more judges on the Court who are inclined differently. At that time, responsibility for writing the judgment of the Court is assigned,³ and over the following weeks and months, the assigned judge will circulate draft reasons among the other members of the panel and will receive suggestions as to how those reasons may be strengthened or improved. The judge or judges who found themselves in the minority at conference will also write reasons (separately, or jointly with a lead author and parallel internal circulation and modification process), which are circulated as well, but not until after the draft majority judgment has been circulated. Ultimately, the Court decides that it is ready to present the decision and schedules the public presentation of the outcome as well as supporting reasons, with the minority or minorities enjoying the right to publish their own dissenting or separately concurring reasons. In very general terms, about half of the decisions of the Court have been unanimous over recent decades, with the remainder including minority reasons that are sometimes very extensive.

If one were dealing with the United States Supreme Court (USSC), parts of this discussion would be much more focused and refined. Some USSC justices keep voluminous notes and records such that, after a not-inconsiderable time, academics are sometimes able to track the votes and positions of individual judges through the deliberation process and link any shifts to written exchanges between judges regarding the specific wording, exchanges that may involve simple persuasion, or, sometimes, explicit negotiation.⁴ (Although I note that not all judges keep such detailed records or make them available, not all academics necessarily have unfettered access to them, and—to repeat—there is often a considerable delay.) Canadian academics enjoy no comparable resources,⁵ and the Court takes

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2. For a recent example, see *HL v Canada (Attorney General)*, 2005 SCC 25, [2005] 1 SCR 401.
 3. Formally, the writing of the judgment is assigned by the Chief Justice; in practice, it is usually the case that a judge volunteers to write the reasons, it often being obvious who best reflects the majority or unanimous position, failing which the Chief Justice will suggest who might volunteer, failing which the Chief Justice asks someone to write. See Songer, *supra* note 1 at 128; Greene, *supra* note 1 at 117.
 4. See e.g. Forrest Maltzman, James F Spriggs II & Paul J Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge, UK: Cambridge University Press, 2000).
 5. More correctly: Some Canadian scholars do occasionally have access to some comparable

the principle of the confidentiality of its deliberations very seriously.⁶ For an American, then, what follows is an analysis of only the tip of the iceberg, the reason being that the rest of the iceberg is simply not available for examination.⁷ But my argument is that the tip of the iceberg is considerably larger—its content and consequences considerably more important—than one might assume, and that we are missing important clues about the behaviour of the court and the evolution of its jurisprudence unless we take it fully into account. The previous paragraphs of this article closed with the statement, “Sometimes, those attempts [to swing other judges’ votes] succeed”; it would be more accurate, and a better justification of this enquiry, to say: “Surprisingly often, those attempts succeed.” Losing the majority is something less than a routine but something more than an exceptional part of the way the Court meets its obligations.⁸ Emmett Macfarlane, after noting some examples of this vote fluidity, reports that in his interviews the justices of the Court insisted that such vote switching is unusual. However, he does conclude that this may be intentional understatement to avoid reinforcing the notion that the law is essentially indeterminate.⁹ This article lends support to this suspicion.

resources for limited periods and purposes—for example, Robert J Sharpe and Kent Roach had access to court conference notes for their biography of Chief Justice Dickson—but the point remains that such material is not generally or widely accessible in Canada to the extent that it is in the United States. See Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge’s Journey* (Toronto: University of Toronto Press, 2003).

6. At one time, I approached Chief Justice McLachlin to enquire if it was possible to find out which of the justices had been assigned at conference the responsibility for writing the judgment of the Court for a list of some dozen cases; the response was a polite but firm and categorical refusal that cited the principle of the confidentiality of its deliberations. For a description of another episode demonstrating how seriously the Court takes this principle in the face of academic enquiry, see Tim Naumetz, “Gag on SCC law clerks has ‘chilling effect’” *Law Times* (28 June 2009), online: <<http://www.lawtimesnews.com/200906294937/Headline-News/Gag-on-SCC-law-clerks-has-chilling-effect>>.
7. Such that even when I identify a “swing” judgment, I cannot identify which of the judges supporting the new judgment of the Court did the swinging; nor can I identify shifting support between the various alternatives that may just have made the bloc supporting the judgment of the Court larger or smaller. As my metaphor suggests, I assume that most shifts between majority and minority take this less dramatic form.
8. This is not to deny that there is some degree of vote-switching that does not reveal itself in my approach; for example, Sharpe and Roach indicate that Dickson’s judgment for a unanimous Court *Ogg-Moss* began as a set of dissenting reasons. See *R v Ogg-Moss*, [1984] 2 SCR 173, 14 CCC (3d) 116 [*Ogg-Moss*]; Sharpe & Roach, *supra* note 5 at 405.
9. Emmett Macfarlane, *The Supreme Court of Canada and The Judicial Role: An Historical Institutional Account* (DCL Thesis, Queen’s University Department of Politics, 2009) at 174, online: <http://qspace.library.queensu.ca/bitstream/1974/5313/1/Macfarlane_Emmett_200911_PhD.pdf> [Macfarlane].

I will suggest that relatively recent developments in the way that the Court presents its reasons (judgments and minority reasons alike) have made it possible to identify with reasonable confidence those cases in which the writing of a judgment of the Court has swung from the judge initially assigned to one who was originally writing minority reasons. This in turn makes it possible to identify which judges have tended to gain (and tended to lose) influence as a result and to discuss some legal and constitutional “might-have-beens” suggested by those “in-the-end-not-judgments.” Unfortunately, I shall have to conclude by suggesting that the Court’s more recent trends in decision delivery seem to be closing the window on the distinctions and identifications that direct this discussion. Although the timing of this enquiry was triggered by the thought that the retirement of Justices Binnie and Charron logically marks the end of the “McLachlin II” court (just as the double replacement of Justices Iacobucci and Arbour with Justices Abella and Charron in August 2004 arguably marked the end of the “McLachlin I” court), this shift in decision-delivery styles provides an even stronger justification. My research therefore covers the 26-year period defined on the one side by the appointment of Chief Justice Dickson in 1984 and the retirement of Justices Binnie and Charron at the end of June 2011 on the other.

The significance of these findings is that they present the Court as not just a “deciding court” (which, of course, it is by definition) but also as a “persuading court,” with some of this persuasive force deployed within the Court itself in both deciding an outcome and providing clear, and often extensive, reasons for that outcome to serve as a guide to the lower courts. The most dramatic aspect of any SCC decision is often the fact that it declares a winner and a loser, and this usually dominates the headlines; but my position is that over the long run the most important aspect of the decision is the formal reasons that support, defend, and explain that outcome. It is therefore fully appropriate that the process of constructing and refining those reasons should have a demonstrable capacity to move judges from one “outcome-plus-reasons” fragment of the Court to another.

I. DECISION-DELIVERY ON THE MODERN SUPREME COURT OF CANADA

The higher appeal courts in common law and other countries are routinely panel courts (that is, more than one judge sits to hear appeals, with the decision being made by a majority of the panel), but it is unclear what the implication of this multiplicity of judges is supposed to be for the delivery of decisions and reasons.

At one time, the common expectation was that each judge on the panel would deliberate separately, reach an independent conclusion (with those conclusions accumulated as votes to determine whether or not the appeal succeeded), and write independent reasons supporting that conclusion (with the central meaning of the precedent that had been established to emerge from its subsequent use by later courts¹⁰). These independent decisions were known as *seriatim* decisions. This was the style of the English House of Lords and continues to be employed by its modern successor, the United Kingdom Supreme Court; it was the style of the United States Supreme Court before Chief Justice John Marshall;¹¹ and it is still the style of the High Court of Australia, especially on constitutional matters. As Justice L'Heureux-Dubé has pointed out, this was once the dominant style of the SCC as well, although this practice clearly went into decline after the 1920s in favour of a smaller number of reasons per case and an increasing tendency for judgments by clear majorities.¹²

At the other extreme, it is sometimes the case that the several judges on a panel must, even if they disagree at deliberations, unite behind a single official statement of the outcome and the reasons supporting it.¹³ There is often a formal requirement for this single voice in the appeal courts of civil law countries; it was also long the practice of the Judicial Committee of the Privy Council,¹⁴ although in recent decades this body has allowed the publication of minority reasons. Todd Henderson has suggested that both the choice of a particular style along this continuum, and changes in that style from one period to another, are not incidental

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10. “[T]he actual precedential value of a decision could be determined only by stitching together the reasoning of the judges in the majority What became precedent under these circumstances depended on what subsequent justices calculated had been done in earlier series of opinions. There was, in effect, no precedent until a later majority declared what it was.” Michael J Gerhardt, *The Power of Precedent* (New York: Oxford University Press, 2008) at 62.
 11. See e.g. Scott Douglas Gerber, *Seriatim: The Supreme Court before John Marshall* (New York: New York University Press, 1998).
 12. The Honourable Claire L'Heureux-Dubé, “The Length and Plurality of Supreme Court of Canada Decisions” (1990) 28:3 *Alta L Rev* 581 at 584-85.
 13. As Orth has pointed out, the fact that the procedures of these panel appeal courts so routinely seek to have an odd number of judges leads to the conclusion that division between the judges is sufficiently possible that the inconclusive embarrassment of an equal division is something to be precluded in advance, and this is in itself a non-trivial statement about the nature of law and the role of the court. See John V Orth, *How Many Judges Does it Take to Make a Supreme Court? and Other Essays on Law and the Constitution* (Lawrence: University Press of Kansas, 2006) at 11.
 14. To be sure, the Judicial Committee of the Privy Council is a “quasi-court” rather than a pure court, and one that explained the practice in terms of its advisory role vis-à-vis the Crown.

or idiosyncratic epiphenomena; rather, they must be understood in terms of their legal and political contexts as well as the perceived role of the court.¹⁵

For the SCC, as for its counterparts in other countries, the conventions surrounding the delivery of reasons have steadily evolved.¹⁶ In this and in many other respects, the Laskin Court was a major watershed, experimenting with a variety of decision-reporting formats, including a short-lived “the majority”/“the minority” format, while moving toward its historically high degree of unanimity and clarity in directly and expressly identifying the judgment of the Court. As I have suggested elsewhere,¹⁷ a new uniform format clearly emerged in the early years of the Lamer Court that continues to be used today. This involved two important elements.

First, a very large majority of all judgments are divided into sections with generic labels: Introduction or Background; The Facts; The Relevant Statutory/Constitutional Provisions; The Actions of the Lower Courts; The Issues; Analysis; Conclusion or Outcome. Some of the sections—especially the Analysis—may be further divided into subsections with content-specific labels. The transitional practices of the Dickson Court may largely be categorized as following this format simply by assuming that at the appropriate place the label “Analysis” is inserted and by treating the subsequent content-specific labels as subdivisions.

Second, minority reasons acquire their own self-consciously secondary format and style, which include three elements. They acknowledge the primacy of the majority reasons (“I have read the reasons”); they soften the edge of their disagreement with explicitly respectful terms (“but with respect I cannot agree”); and they limit their disagreement to one or more specific elements of the larger package (“with regard to [specific legal issue]”). The minority does not repeat the more objective introductory elements of a full decision (background, facts, law, actions lower courts, issues before the Court), nor do they normally incorporate a complete analysis. Instead, they piggy-back on these parts of the majority reasons to highlight the specific points of disagreement. This truncated format is one reason

15. M Todd Henderson, “From Seriatim to Consensus and Back Again: A Theory of Dissent” (2007) *Sup Ct Rev* 283 at 287. See also “From Consensus to Collegiality: The Origins of the ‘Respectful’ Dissent,” Note, (2011) 124:5 *Harv L Rev* 1305.

16. For example, the current USSC format of a division into “Parts,” such that each justice can choose to sign on to some “Parts” but not to others, only emerged in the 1920s and became the standard format in the 1940s. See B Rudolph Delson, “Typography in the *U.S. Reports* and Supreme Court Voting Protocols” (2001) 76:4 *NYUL Rev* 1203.

17. For a more extensive presentation of this argument, see Peter McCormick, “Structures of Judgment: How the Modern Supreme Court of Canada Organizes Its Reasons” (2009) 32:1 *Dal LJ* 35.

why minority reasons are usually shorter—sometimes considerably so—than the majority judgments to which they attach.¹⁸

This distinctive format is not an obvious development in any simple sense, let alone an inevitable one; nothing similar has emerged in the other comparable common law national high courts. The SCC has more recently taken a further step: It is now reasonably common for the majority reasons to include comments (sometimes in a separately labeled section or subsection) directly addressing the concerns raised in the minority reasons.¹⁹ The combined effect of these developments is to give even divided decisions the logical format of a single, internally coherent structure, all the more easily read now that the *Supreme Court Reports* have (since 2005) reported the judgment first, concurrences second, and dissents third (replacing the earlier practice of presenting the various sets of reasons in order of the seniority of the writing judge). The decisions delivered by the modern SCC are therefore a unique package with clear internal markers identifying the relationship of the various elements to one another, and this is the development that allows one to identify the cases that will be discussed in this article, namely the “swing” judgments.

II. DISAGREEMENT: DISSENTS AND CONCURRENCES

My discussion will include and give equal weight to both forms of disagreement on the Court—dissents and separate concurrences.²⁰ On its face, a dissent is the

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18. Given that most readers have reacted to my “shorter reasons” comment by thinking of some of the long minority reasons they have read, I will link my “minority reasons are shorter” generalization to my basic theme by noting that almost all of the long sets of minority reasons that appear in the *Supreme Court Reports* are examples of the swing phenomenon that I will be defining and defending in this article.
 19. See e.g. *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*]. Here, the judgment of Chief Justice McLachlin and Justice LeBel includes a subsection entitled “Response to Justice Deschamps” (*ibid* at paras 49-51) and another titled “Response to Justice Rothstein” (*ibid* at paras 52-60).
 20. There is actually a third type of disagreement, the *dubitante* reasons, which indicate doubts about the majority reasons that are not serious enough to justify dissent. See Jason J Czarnecki, “The *Dubitante* Opinion” (2006) 39:1 Akron L Rev 1. There have been a number of such reasons earlier in the history of the Court, the most recent being *R v Henderson*. See [1948] SCR 226, 5 CR 112. It is also indicated in *Neil* that there were *dubitante* reasons in the Court of Appeal decision on the case under consideration. See *R v Neil*, [1957] SCR 685, 26 CR 281. Similarly, in *Ferguson* it is mentioned that a member of the Court was *dubitante* as to the Court’s jurisdiction on the application for leave to appeal. See *R v Ferguson*, [1962] SCR 229, 36 CR 271.

most serious form of disagreement because it suggests that the majority got the outcome wrong by allowing the wrong party to win on the appeal. The Supreme Court itself implicitly reinforces this impression by providing its own statistics on how many decisions were and were not unanimous as to outcome, with no parallel data on how many were or were not unanimous as to the reasons—as if the latter did not matter enough to deserve reporting. I have problems with this assumption.

The Court's responsibility is to provide a final legal determination as to which of the parties to a legal dispute deserves to prevail—that is to say, it is very much in the “decision” business. But it has the concomitant responsibility of explaining the law and the reasoning that justify the outcome—that demonstrably and conclusively make that outcome the appropriate result. And it must do so in a way that provides clear direction to lower courts and future litigants as to what the law is with respect to that particular question and closely related ones. That is to say, it is also in the “reasons” business. I suggest that except for the immediate parties (and sometimes even for them) it is these reasons—the directions they include, the shadow they cast over the future decisions of the Court and other courts—that is the real point of carrying an appeal all the way to this highest level. The judges know this, and they must constantly balance the desirability of a clear statement of the law (if not a unanimous decision, then one supported by as large a majority as possible) against the fact that they may not completely agree with their colleagues on precisely what that statement should look like. I assume that separate concurrences do not represent complete candour about every detail of the reasons, and that differences must pass a certain threshold of significance before they are aired at the expense of the firmness and clarity of the decision as a whole. If this is the case, the fact that a judge chooses to write separate minority reasons, whether concurring or dissenting, must be taken seriously; to say anything else is to insult the judges who made the choice.²¹

Moreover, although one can find occasional examples of separate concurrences that simply echo the majority reasons or that make minor “I would just add ...”

21. I make this point at some length because some reviewers of the manuscript objected to the idea that a swing judgment matters even if it did not result in a different outcome. It seems to me that this is very close to saying that the only thing that matters in a SCC decision is the outcome, and that the reasons do not matter at all—something with which I cannot agree. It seems to me that the concept of precedent is built on the notion that the *reasons* matter because only reasons can constitute precedent. If this is so, then it must matter that a set of concurring reasons has gained the judgment because those become the reasons that direct future decisions.

comments, most of them are much more substantive and their implications for the future more significant.²² This is especially true of separate concurrences that open with the apparently innocuous but in fact deeply portentous, “I reach the same outcome, but for different reasons.” These typically signal a very substantial disagreement with the majority and support for a doctrinal trail that works quite differently and would direct quite different consequences when projected into future cases. This is demonstrated by those sets of companion cases where slightly different factual circumstances can turn a concurrence in one case into a dissent (by the same judge or judges, for the same substantive reasons) in an accompanying case.²³ Certainly I see no point in suggesting that the minority reasons of Justices McLachlin (as she then was) and L’Heureux-Dubé in *Gladstone* are less noteworthy or possess less possible significance for the future than those in *Van der Peet* simply because the former takes the form of a separate concurrence and the latter a dissent. It is worth noting as well that there has been a recent surge of research on separate concurring opinions in the United States, much of it arguing that they deserve more attention and give more indications of the future directions of doctrine than has long been assumed.²⁴

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22. See Peter McCormick, “The Choral Court: Separate Concurrence and the McLachlin Court 2000–2004” (2005) 37:1 *Ottawa L Rev* 1; and Peter McCormick, “Standing Apart: Separate Concurrence and the Modern Supreme Court of Canada, 1984–2006” (2008) 53:1 *McGill LJ* 137.
23. My examples would include the three cases of the *Van der Peet* trilogy, and the twice-dissenting-but-once-concurring minority reasons of Justices McLachlin (as she then was) and L’Heureux-Dubé. See *R v Van der Peet* [1996] 2 SCR 507, 50 CR (4th) 1 [*Van der Peet*]; *Ogg-Moss*, *supra* note 8; and *R v Gladstone* [1996] 2 SCR 723, 50 CR (4th) 111 [*Gladstone*]. Another would be the first-concurring-then-dissenting performance of Justice Abella in the companion cases of *Pecore v Pecore* and *Madsen Estate v Saylor*. See 2007 SCC 17, [2007] 1 SCR 795 [*Pecore*]; and 2007 SCC 18, [2007] SCR 838 [*Saylor*]. In *Saylor*, Justice Abella makes my point precisely when she states, “In *Pecore*, the difference in our legal approaches did not lead me to a different result. In this appeal, it does” (*ibid* at para 33).
24. See *e.g.* Nancy Maveety, “Concurrence and the Study of Judicial Behavior in American Political Science” (2003) 8 *Juridica Int’l* 173; Nancy Maveety, “The Era of the Choral Court” (2005) 89:3 *Judicature* 138; Lori Beth Way & Charles C Turner, “Disagreement on the Rehnquist Court: Dynamics of Supreme Court Concurrence” (2006) 34:3 *Am Pol Res* 293; Nancy Maveety, Charles C Turner & Lori Beth Way, “The Rise of the Choral Court: Use of Concurrence in the Burger and Rehnquist Courts” (2010) 63:3 *Pol Res Q* 627; Charles C Turner, Lori Beth Way & Nancy Maveety, “Beginning to Write Separately: The Origin and Development of Concurring Judicial Opinions” (2010) 35:2 *J Sup Ct Hist* 93; and Pamela C Corley, *Concurring Opinion Writing on the U.S. Supreme Court* (New York: State University of New York Press, 2011).

III. IDENTIFYING SWING JUDGMENTS

I have suggested that the judges who are designated at conference as writing the reasons for the majority adopt a consistent and specific “standard format” that is divided into a regular set of labeled sections and that minority reasons self-identify and self-locate (“have read the reasons” “with respect” “with regard to [x]”) via a more compact format. If this is so, then it is not hard to decipher what has happened when we find a long dissent (or separate concurrence) that includes all the labeled elements attached to a short judgment that begins, “I have read the reasons of my colleague, but with respect I cannot agree.” This is what I will call a swing judgment: One or more of the judges who supported one position at conference has now been persuaded to join what was initially a minority position but now enjoys the support and the signatures of a majority of the panel. Note the two elements of this package: first, a set of minority reasons that looks like (that is, follows the standard format of) a majority judgment; and second, a judgment that looks like (is shorter and uses the introductory self-labeling of) minority reasons and presents itself as such. When both are clearly present, we have what I will call a “pure” swing.

Consider, for example, the decision in *Reference Re Public Service Employee Relations Act (Alberta)*,²⁵ the lead case of the labour trilogy.²⁶ The judgment starts off with reasons written by the Chief Justice, beginning with a short introduction followed by a statement of the questions referred to the Alberta Court of Appeal, the statutory and constitutional provisions, and a summary of that court’s decision.²⁷ There follows an extended string of smaller sections with content-specific labels that are not grouped under a mega-section called “Analysis,” but they could (and today they would) be. These reasons, some twenty thousand words long, end with a “Conclusion” of which the last sentence is “The appeal should be allowed.” But in the *Supreme Court Reports* the opinion is introduced as “The reasons of Dickson C.J. and Wilson were delivered by the Chief Justice (dissenting).”²⁸ This is not the judgment after all, although it was clearly written with that intention. Whatever the Chief Justice thought he was doing as he drafted his reasons, ultimately he wrote a dissent with a single accompanying signature.

25. [1987] 1 SCR 313, 38 DLR (4th) 161 [*Reference Re Public Service Employee Relations Act (Alberta)*].

26. The other two cases of the trio are *Public Service Alliance of Canada v Canada and Retail, Wholesale and Department Store Union v Saskatchewan*. See [1987] 1 SCR 424, 38 DLR (4th) 249; and [1987] 1 SCR 460, 38 DLR (4th) 277.

27. *Reference Re Public Service Employee Relations Act (Alberta)*, *supra* note 25 at paras 1-21.

28. *Ibid* at para 1.

Some pages later, one finds the reasons of Justice McIntyre, whose first sentence declares “I have read the reasons for judgment prepared in this appeal by the Chief Justice.”²⁹ In the settled practice of the Court, it is bad form for minority reasons to be written until after the initial draft judgment has been circulated,³⁰ so “I have read the reasons” is the clearest possible signal for “I am not writing the initial judgment.” Justice McIntyre notes that the Chief Justice has dealt with the facts, the legislative and constitutional provisions, and the reference questions themselves, and has also summarized the decision of the Alberta Court of Appeal, such that “[i]t will not be necessary for me to deal further with those matters.”³¹ In ten thousand words he then develops his own distinctly different conception of freedom of association as that notion is entrenched in the Canadian *Charter of Rights and Freedoms*³² (essentially, the freedom to do in association only those things that one is already free to do as an individual) and concludes that he would dismiss the appeal.

But Justice McIntyre’s is not the judgment either—ultimately, these are solo concurring reasons. Sandwiched between Chief Justice Dickson’s lengthy “dissent-that-doesn’t-know-it-is-a-dissent” and Justice McIntyre’s reasons are four short paragraphs (six hundred words) that constitute “the *judgment* of Beetz, Le Dain and La Forest,” delivered by Justice Le Dain.³³ Justice Le Dain acknowledges the reasons delivered by both Chief Justice Dickson and Justice McIntyre; Justice Le Dain agrees with the latter on the basic issue and the answers to the constitutional reference questions, but he makes additional comments on the nature and extent of the *Charter* right of freedom of association. This judgment includes the casual aside that has so annoyed the labour movement ever since—that is, that collective bargaining rights are not fundamental human rights but “merely” the products of legislation;³⁴ these reasons have represented the Court’s basic take on freedom of association until they were abruptly repudiated³⁵ in *B.C. Health Services*.³⁶

29. *Ibid* at para 143.

30. See Ian Green et al, *Final Appeal: Decision-making in Canadian Courts of Appeal* (Toronto: James Lorimer & Co, 1998) at 121.

31. *Reference Re Public Service Employee Relations Act (Alberta)*, *supra* note 25 at para 143.

32. *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

33. *Reference Re Public Service Employee Relations Act (Alberta)*, *supra* note 25 at para 139 [emphasis added].

34. *Ibid* at para 153.

35. Although the divided decision in *Fraser* suggests that the future status of this precedent is rather in doubt.

36. *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health Services*].

My point is this: The decision-delivery style of the modern SCC is such that we can normally identify which of the judges left the judicial conference with the responsibility of writing for the majority, even if someone else ultimately delivers the reasons that come to carry the label “the judgment” in the *Supreme Court Reports*.³⁷ The original majority writer signals this status with the “full format” reasons, and the original minority writer with “I have read the reasons.” What is intriguing in this particular case is that the judgment seems to have swung not once but twice—first, Justice McIntyre drew the signatures away from Chief Justice Dickson such that the appeal was dismissed rather than allowed; then, Justice Le Dain drew the signatures away from Justice McIntyre, such that the latter’s extended reasons ended up as a solo separate concurrence while the former’s much shorter reasons became the judgment of the Court. We know it happened this way because the judges tell us so: Justice McIntyre responds to Chief Justice Dickson’s “reasons for judgment” but not vice versa, and Justice Le Dain states that he has read both of their reasons, explicitly placing himself third in the temporal sequence. Ultimately, the reasons for judgment in one of the longest decisions of the Dickson Court—more than thirty thousand words of analysis and discussion in total—are only six hundred words long.

If this case were unique, there would be no need to belabour this description—but it is not. Limiting the count to unambiguous examples of the phenomenon and leaving aside a number of tempting but marginal “maybes” and “almosts,” in all there are 166 decisions of the Dickson, Lamer, and McLachlin Courts that show these basic features. The transparent loss of the majority in this, the lead case of the very important labour trilogy, and a judge who was initially writing a minority opinion seizing of the opportunity to set the law on a major question of constitutional meaning, is not unusual but rather something that happens dozens of times.

IV. DOUBLE-JUDGMENT CASES: THE OTHER SET OF SWING JUDGMENTS

There is another set of SCC decisions that has long puzzled me—those that I am now calling “double judgment” decisions. The label is not quite apt: In each

37. This is also a practice with its own history. In the 1960s, all sets of reasons were introduced as “the judgment” of the judges in question, and it is only more recently that the term “judgment” has been applied specifically to the majority with the others being described as “the reasons” of the judges in question.

of these cases, there is only a single set of reasons supported by a majority of the panel and carrying the label of “the judgment” in the *Supreme Court Reports*.³⁸ But in each of them there is also a second set of reasons following what I have called “full decision” format—absolutely free-standing with its own statement of the background, the facts, the actions of the lower courts, the relevant statutes, and the issues to be dealt with, followed by a full analysis and conclusion. Typically, the two sets of reasons make no reference to each other at all (not even the “I have read the reasons” introduction that Ian Greene has identified as “good form” for the circulation of draft reasons).³⁹ On the face of it, either could serve equally satisfactorily as a majority judgment. In terms of my markers from the previous section, there is still a set of minority reasons that looks exactly like the standard, full format of a modern Supreme Court decision, but in these cases the judgment of the Court now has precisely the same appearance rather than using the standard introductory format of modern minority reasons.

My “poster child” example is *Syndicat Northcrest v Amselem*,⁴⁰ the Supreme Court’s second major statement⁴¹ about the meaning of freedom of religion under the *Charter*. Justices Iacobucci and Bastarache both wrote sets of reasons, which were remarkably parallel not only in overall length (twelve thousand five hundred and twelve thousand words respectively) but also in the sequence and the length of their various elements. Both fully exemplify the standard format mentioned above. Justice Iacobucci, organizing his discussion of freedom of religion around the question of the sincerity of religious beliefs, had four colleagues sign onto his reasons; Justice Bastarache, preferring to conceptualize that freedom in terms of the orthodoxy of religious beliefs, had only two.⁴² This means that Justice Iacobucci’s is a majority judgment and Justice Bastarache’s is a dissenting minority opinion. However, there is nothing in the appearance, tone, or the content of either set of reasons such that it would make any less sense if they were simply swapped.⁴³

38. I should note that there is one genuine “double judgment” decision in the *Supreme Court Reports*, namely *Comité paritaire de l’industrie de la chemise v Potash*, which has two complete sets of reasons both supported by a majority of the judges on the panel, a phenomenon that is made possible by the fact that two judges on the panel signed on to both sets of reasons. See [1994] 2 SCR 406, 115 DLR (4th) 702. I think of this as a one-of-a-kind episode, and do not attribute it to the swing phenomenon described in this article.

39. Greene, *supra* note 1 at 121.

40. 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

41. *R v Big M Drug Mart Ltd* being the first. See [1985] 1 SCR 295, 18 DLR (4th) 321.

42. The ninth member of the panel was Justice Binnie, who wrote short reasons suggesting that there was no genuine *Charter* issue in the first place. *Amselem*, *supra* note 40 at para 182.

43. As Justice Bastarache still very much wishes they had been; when I had the occasion to

I wondered for some time what could account for this curious behaviour. It seems strange that the two judges would spend so much time writing largely duplicative “Introduction” and “Facts” and “Courts Below” sections, differing only in slight details and emphasis. Normally, even minority reasons that express vigorous disagreement simply adopt these elements from the judgment either implicitly or explicitly. It is also unusual for minority reasons to contain a complete and free-standing analysis section, as opposed to identifying the specific contained elements of the judgment’s analysis with which they differ.

It seems to me that a variant of the standard swing judgment would explain this phenomenon. On the one hand, there is a set of reasons (initially majority, now minority) that included the full set of elements that conform to the now-accepted format for judgments of the Court, and the author has no reason to delete or to rewrite them simply because some colleagues have now defected to what was initially a set of minority reasons. Often, as indicated above, the minority reasons simply retain their original format (“I have read ...”), even though they have become a judgment labeled as such in the *Supreme Court Reports*. But perhaps sometimes the “new majority” writing judge is not satisfied with the incomplete and almost backhanded nature of these reasons (“I agree with the other set of reasons except for those specific elements I here indicate explicitly”), which becomes more problematic as the original majority reasons get longer and the originally drafted minority reasons get shorter. The extreme case is *VW v DS*,⁴⁴ where then Justice McLachlin’s twenty-five word sentence becomes a swing judgment, trumping Justice L’Heureux-Dubé’s fifteen thousand words on the issue of the wrongful removal of a child. This makes the case frustrating to read: Justice McLachlin (as she then was) declares that, subject to her reasons in *another* case,⁴⁵ she agrees with L’Heureux-Dubé’s solitary reasons—but this means that the very long concurrence now has to be filtered through that earlier decision to see which elements stand as part of the current judgment.⁴⁶ Perhaps in some cases the judgment-gaining judge’s choice is to extend the courtesy of a fully articulated, free standing, and internally coherent set of reasons for what

speak to him (when he chaired an IRPP Round-table on Senate Reform in October 2010), he indicated that this dissent was the set of reasons that he thought was one of the most important that he had written while serving on the Court.

44. [1996] 2 SCR 108, 134 DLR (4th) 481 [*W v S*].

45. *Gordon v Goertz*, [1996] 2 SCR 27, 134 DLR (4th) 321.

46. All the more problematic because it gets the citation of that earlier case wrong—the year and the page number are correct, but the volume number is not 1 (as stated in *W v S* and repeated in the “cases cited”) but rather 2. See *W v S*, *supra* note 44 at para 1.

TABLE 1: NUMBER OF SWING JUDGMENTS, BY CHIEF JUSTICESHIP

Chief Justice	Concurrence Swing judgments	Dissent Swing Judgments	All Swing Judgments	Swing J's Per year
Dickson	23	45	68	11.0
Lamer	40	70	110	11.6
McLachlin	18	59	77	7.0
Total	81	174	255	9.6

is now the judgment of the Court by re-writing them from scratch. This would explain the “two judgment” appearance; I do not know what else might do so.⁴⁷

In all, there are eighty-nine decisions by the Dickson, Lamer, and McLachlin courts that qualify unambiguously as double judgment cases, seventy-seven of which are dissents and twelve of which are separate concurrences. Henceforth, I will not be keeping the “pure swing” and “double judgment” sets of cases separate for purposes of analysis and discussion; I will instead be talking about the full set of 255 swing judgment cases during these three chief justiceships.

V. DO SWING JUDGMENTS HAPPEN OFTEN ENOUGH TO MATTER?

In all, there have been 255 swing judgments during the last three chief justiceships, or just under ten per year.⁴⁸ Table 1 shows the relative frequency for each of the three Chief Justices. The initial impression it gives is that the phenomenon was more pronounced under Chief Justices Dickson and Lamer but is declining under Chief Justice McLachlin, and that this decline is especially true of concurrence swings, which I shall discuss further below.

47. To qualify this slightly: In the aftermath of the publication of Doris Anderson's excellent biography of Bertha Wilson, there were a number of media interviews in which some of Wilson's colleagues admitted that there had been times when Justice Wilson was assigned the writing of reasons at conference, but when “the boys” got together afterward, they decided that one of them should write it instead and went ahead without informing Wilson of this fact promptly. On a similar note, see Jamie Cameron, “Justice in Her Own Right: Bertha Wilson and the Canadian Charter of Rights and Freedoms” (2008) 41 Sup Ct L Rev (2d) 371 at 373. This could explain some of the “double judgments” that involve Wilson, though I doubt that it can be generalised.

48. This is rather more than the “two or three times a year” that some judges suggested to Donald Songer. See Donald Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008) at 136. Even if these judges only had the dissent swings in mind when they responded to this question, the better estimate would still be six per year.

The number 255 must of course be put in context, and the critical question is how to define this context. Over the last quarter-century the Court has handled about one hundred cases per year on average. This number drifted higher in the 1990s, peaking at just over 130 per year; then (as in the United States) the numbers began a long-term downward slide. In 2006, the Court decided only fifty-nine cases, and this number was even lower in 2007 (fifty-five cases, all panel decisions). It is not clear what is driving this downward trend (which means that the numbers may rebound), but for present purposes the long-term average of one hundred cases per year will do. On average there are about ten swing cases per year, which seems to be a modest but not insignificant proportion. More precisely, in the last twenty-seven years since the appointment of Chief Justice Dickson, the Court has handed down just under two thousand five hundred decisions, of which 255 have been swing judgments.

But the total number of decisions is perhaps not the right basis for comparison. The Supreme Court of Canada still has an “appeal by right” jurisdiction, which means that some cases are automatically entitled to a hearing without clearing the relevance hurdle of an application for leave.⁴⁹ Through the 1990s, this category accounted for one-third of the Court’s caseload, though it has declined somewhat in the new century. Some of these cases were such that an application for leave to appeal would almost certainly have been granted had it been required, but many were clearly less significant. Hundreds of SCC decisions are oral, from-the-bench decisions delivered the same day as oral argument, and these are almost always formulaic responses low on informational content.⁵⁰ In 2000, for example, these accounted for one decision in every six, not one of which drew reasons that exceeded one thousand words (most were under one hundred), and this proportion was considerably higher (routinely around one-third) for the Lamer Court. More usefully then, during the three chief justiceships there were just over one thousand nine hundred cases reserved for judgment, of which “swing” decisions represent about one in every eight. These are very much in the same ballpark as Brenner’s findings for the USSC; on the Vinson Court, a voting change transformed a

49. At present, there is an appeal by right in a criminal case when a provincial court of appeal allows a Crown appeal from an acquittal, or when there is a dissent on the provincial court of appeal on a matter of law. See *Criminal Code*, RSC 1985, c C-46 s 691. There is also an appeal by right on “reference cases” decided by provincial courts of appeal. See *Supreme Court Act*, RSC 1985, c S-26 s 36.

50. The “pure” form of this formula is the single sentence: “The appeal is dismissed for the reasons given in the Court below.”

minority into a majority 8.5 per cent of the time.⁵¹ The figures for the Warren Court were considerably higher, at 16 per cent.⁵² The 13.4 per cent that I have found for the three most recent Canadian chief justiceships falls just in between.

Perhaps we should focus on an even smaller set of cases. The SCC is considerably more likely to hand down a unanimous decision than is the USSC. Less than a thousand cases in the last twenty-seven years have involved one or more sets of minority reasons and, virtually by definition, these are the only cases where the swing phenomenon is at play in any sense that can be identified by my methodology.⁵³ This is a considerably smaller data set than the full caseload (not quite 40 per cent) as well as the reserved judgment caseload (less than half) with the logical consequence that swing judgments loom much larger on this more limited landscape. Table 2 collects these figures to provide a more focused look at the significance of the swing judgments.

TABLE 2: RELATIVE FREQUENCY OF SWING JUDGMENTS, BY CHIEF JUSTICESHIP

Chief Justice	All cases	Reserved Judgments	Non-unanimous cases	Swing Judgments	Swing as % of non-unanimous
Dickson	669	553	234	68	29.1%
Lamer	969	650	381	110	28.9%
McLachlin	820	727	307	77	25.1%
Total	2458	1930	922	255	27.7%

One striking aspect of these numbers is the very large number of same-day, oral, from-the-bench decisions for the Lamer Court, amounting to one-third of the case load (most of them appeals by right). In contrast, oral decisions accounted for only one-sixth of the Dickson Court caseload and one-eighth for the McLachlin Court. This means that current discussions about the vanishing caseload of the McLachlin Court are somewhat overstated, because much of what has been vanishing are the formulaic appeals by right; the reserved judgments, which are the bulk of the Court's workload, have declined only slightly from 68.4 per year for the Lamer Court to 63.2 per year under Chief Justice McLachlin

51. Saul Brenner, "Fluidity on the United States Supreme Court: A Reexamination" (1980) 24:3 *AJPS* 526. This is actually a composite number; it is noted that 61 per cent of all cases saw a change in vote (*ibid* at 529) and that in 14 per cent of these cases the result was to turn a minority into a majority (*ibid* at 530).

52. Saul Brenner, "Fluidity on the Supreme Court: 1956–1967" (1982) 26:2 *AJPS* 388 at 390.

53. Although we do know that at least some decisions that appear straightforward on their face were actually swing judgments. See *supra* note 7 (commentary within).

(although both are well down from the 92.2 per year of the Dickson Court). But what does distinguish the McLachlin Court from its immediate predecessor is a steep rise in unanimity rates, now accounting for 57.8 per cent of all reserved judgments as compared to 41.4 per cent under Chief Justice Lamer.

The suggestion with which this section began, namely that swing judgments are lower under Chief Justice McLachlin than under previous chief justices, is therefore the result (partly) of the lower reserved judgment caseload and (to a larger extent) of a higher unanimity rate within that caseload. But, as the final column in Table 2 demonstrates, there is a solid continuity that runs through all three chief justiceships: namely, a substantial and persisting share of all non-unanimous reserved cases—between 25 and 30 per cent—results in swing judgments. In this constrained but still significant way, the swing judgment is a persisting rather than declining phenomenon.

This seems quite remarkable, to the extent that we should perhaps rethink the standard list of motivations that direct the writing of minority reasons. Some have suggested that judges write minority reasons in order to speak to the future;⁵⁴ sometimes minority reasons are clearly and consciously the “last gasp” of the past;⁵⁵ sometimes (as in the relentless repetition of the Marshall/Brennan “death penalty dissents” in the USSC) they embody a conscious strategy;⁵⁶ sometimes they identify rogues or mavericks on the court;⁵⁷ and sometimes they are seen as signals to a broader public.⁵⁸ But based on these numbers, there is another, much more practical, reason for writing minority reasons—namely, a modest but real chance of winning over enough colleagues to write a judgment of the Court, something that has happened in fully one-quarter of all non-unanimous decisions.

Put a little differently: If the current Court is deciding sixty-three reserved cases per year, then the “fair share” of the notional average judge is one-ninth of sixty-three, or seven judgments per year. (The assignment of the writing of reasons is rather more complex than any simple rotation, of course, but the point stands.)

54. The Honourable Claire L'Heureux-Dubé, “The Dissenting Opinion: Voice of the Future?” (2000) 38:3 Osgoode Hall LJ 495.

55. Antonin Scalia, “The Dissenting Opinion” (1994) J Sup Ct Hist 33.

56. Michael Mello, “Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment” (1995) 22:3 Fla St UL Rev 591.

57. Christine Kexel Chabot & Benjamin Remy Chabot, “Mavericks, Moderates, or Drifters? Supreme Court Voting Alignments 1838-2009” (2011) 76:4 Mo L Rev 999.

58. Tonja Jacobi, “The Judicial Signaling Game: How Judges Strategically Shape Their Dockets” (2008) 16:1 Sup Ct Econ L Rev 1 at 4; Vanessa A Baird, *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda* (Charlottesville: University of Virginia Press, 2007) at 58-59.

But this is roughly the same as the number of swing judgments that the Court has averaged per year, even under the current Chief Justice, and many of the swing judgments occur in major cases that generate a significant citation trail. If a string of unanimous decisions suggests that judges are patiently waiting their turn for the direct impact of the lead authorship and settling in the meantime for the more modest influence of commenting on the circulated draft judgment, then swing judgments invoke, if you will, the image of queue-jumping, and this tactic has been rather more successful over the last quarter-century than I would have expected.

The votes and signatures of SCC judges are considerably less solid after conference than one might think, and judges who are assigned the writing of majority judgments on divided panels have to take the comments of their colleagues very seriously while paying real attention to keeping the signatures in place for their evolving draft reasons. This in turn suggests that we should not think of the “write and circulate” part of normal SCC procedure as being straightforward and routine; the real possibility of swing judgments means that this process matters very much indeed.

VI. SWING JUDGMENTS: WHO GAINS AND WHO LOSES

Just as not all cases are swing judgments, not all judges are necessarily equally likely to be involved in swing judgments, either by losing the majority to a colleague or by persuading the majority away. The breakdown of the frequency of swing judgments by judge is gathered in Table 3; I will discuss each of the columns in this Table in turn. The order of the names is driven by a “total swings” (gains plus losses) count, which does not appear in the Table.

My first set of comments will address the first three columns in Table 3, after which I will deal with the right hand three, and with the two center columns that link these two sets.

At first glance, it will seem that the numbers in the Table do not quite add up—I have identified 255 swing judgment cases and yet the Table totals only 241 “gains” and 239 “losses.” The reason for this is the relatively recent and modestly increasing phenomenon of “joint authorships”—sets of reasons signed by several judges that are indicated as having been written and delivered not by a single lead author (the normal style of the SCC and of many other comparable courts) but rather by a pair, or more rarely by a trio, of judges from that bloc. This is an

TABLE 3: SWING JUDGMENTS, BY JUSTICE

Judge	Gain	Loss	Net	Wrote Minority	Assigned Judgment	Gain Judgment Percentage	Lost Judgment Percentage	Swing Efficiency
McLachlin	32	27	+5	150	88	21.3%	30.7%	-9.3%
La Forest	22	16	+6	113	59	19.5%	27.1%	-7.6%
Lamer	17	18	-1	97	87	17.5%	20.7%	-3.2%
L'Heureux-Dubé	10	25	-15	179	48	5.6%	52.1%	-46.5%
Sopinka	20	11	+9	119	52	16.8%	21.2%	-4.3%
Cory	17	13	+4	49	80	34.7%	16.3%	18.4%
Dickson	16	13	+3	27	36	59.3%	36.1%	23.1%
Bastarache	8	18	-10	40	48	20.0%	37.5%	-17.5%
Wilson	6	18	-12	86	39	7.0%	46.2%	-39.2%
Iacobucci	9	12	-3	28	45	32.1%	26.7%	5.5%
Binnie	15	5	+10	60	27	25.0%	18.4%	6.5%
Major	7	10	-3	44	41	15.9%	24.4%	-8.5%
LeBel	9	6	+3	60	23	15.0%	26.1%	-11.1%
McIntyre	6	8	-2	33	22	18.2%	36.4%	-18.2%
Deschamps	6	8	-2	40	22	15.0%	36.4%	-21.4%
Gonthier	7	6	+1	52	31	13.5%	19.4%	-5.9%
Charron	4	9	-5	8	25	50.0%	36.0%	14.0%
Estey	5	4	+1	18	13	27.8%	30.8%	-3.0%
Le Dain	7	1	+6	18	5	38.9%	20.0%	18.9%
Abella	3	4	-1	32	20	9.4%	20.0%	-10.6%
Fish	6	0	+6	43	10	14.0%	0.0%	14.0%
Beetz	5	1	+4	22	5	22.7%	20.0%	2.7%
Arbour	2	2	0	21	13	9.5%	15.4%	-5.9%
Chouinard	1	1	0	4	6	25.0%	16.7%	8.3%
Cromwell	0	2	-2	3	8	0%	25.0%	-25.0%
Stevenson	0	1	-1	10	3	0%	33.3%	-33.3%
Rothstein	1	0	1	11	10	9.1%	0%	9.1%
Ritchie	0	0	0	3	1	0%	0%	0%
All Judges	241	239	-	1370	867	17.6%	27.6%	-10.0%

unusual development that has been explored elsewhere.⁵⁹ Fourteen of the gains in swing judgments resulted in co-authored reasons for judgment; sixteen of the losses (and therefore the “in-the-end-minority” reasons) were also co-authored. The proportion of these co-authorships, thirty out of the 510 gainers and losers in swing judgments (or 5.9 per cent), is roughly comparable with the 7.5 per cent frequency of co-authored reasons on all cases decided by the Court under the last three chief justiceships.⁶⁰

A. COUNTING SWINGS: WINNERS AND LOSERS

The most obvious question about the swing judgment process is which judges have been the most successful at turning minority reasons into judgments of the Court, with the doctrinal leadership and precedential authority that this implies. Some judges have fared better than others in this respect—that is to say, they were able to sway their colleagues and gain the majority on more occasions. The spread in this respect is dramatic.

Chief Justice McLachlin easily leads the Court, having turned a minority into a judgment thirty-two times; she is trailed by Justice La Forest (with twenty-two) and Justice Sopinka (with twenty), this trio accounting for almost 30 per cent of the total number of swings. Four other judges place in the 'teens: Chief Justice Lamer and Justice Cory (with seventeen each); Chief Justice Dickson (with sixteen); and Justice Binnie (with fifteen). It is worth noting that all three of the Chief Justices appear on this list (although the accounting for Chief Justice Dickson does not include his earlier service as an associate justice). This is perhaps to be expected. While Chief Justices are, as the phrase has it, first among equals (with only the same single vote as their colleagues), they are not only *equal* but also *first*. At the other extreme, only three judges (Justices Cromwell, Stevenson, and Ritchie) have never managed to swing a single judgment, and two others (Justices Chouinard and Rothstein) have done so only once.

One obvious aspect of the Table is the fact that the judges who top the list include several who served for the largest part of the period under examination; nevertheless, this catches only some of the longest-serving judges (McLachlin has served twenty-two years, Lamer served for twenty) and not others (such as Justices L'Heureux-Dubé, Iacobucci, Binnie, Major, and LeBel, all serving for thirteen years or more). Conversely, the bottom of the list is dominated by people whose total service, or the concluding portion of their service that fell within my

59. Peter J McCormick, “Sharing the Spotlight: Co-authored Reasons on the Modern Supreme Court of Canada” (2011) 34:1 Dal LJ 165 at 169.

60. *Ibid.*

time period, or their service on the Court to date, is very short—less than two years for four of the five.

Swing judgments are the perfect example of a zero-sum game. If somebody is writing majority reasons who was not assigned those reasons at conference, then somebody else has lost the majority and is now writing a dissent or a separate concurrence. Again, there is a dramatic spread in the frequency with which different judges appear on this list: Chief Justice McLachlin leads this list as well with twenty-seven; followed by Justice L'Heureux-Dubé with twenty-five; there is a three way-tie between Justices Lamer, Bastarache, and Wilson for third place at eighteen; and La Forest rounds out the top half-dozen with sixteen. These six combine for just under one half of the losing side of all the judgment swings.

Half of the names in this set also appeared among the judges gaining most often from swing judgments—Chief Justices McLachlin and Lamer, as well as Justice La Forest—but the other half did not. Length of service is clearly a factor, but it is not the only one since the list includes only three of the eight justices who served for a dozen or more years during the period in question and only two of the three Chief Justices. Again, the presence of Chief Justices on this side of the swing also makes sense in that they could be expected to take on a disproportionate share of the difficult cases where a significant issue is already dividing the Court at conference and the initial majority position is unusually vulnerable as a result. Finally, to point out the awkward but obvious, it includes all three of the first women to be appointed to the Court (while the list of top gainers includes only one of them).

At the other end of the Table, there are three judges who have never lost a majority (Justices Fish, Rothstein, and Ritchie) and four who have lost only one (Justices Le Dain, Beetz, Chouinard, and Stevenson). Most of these judges served for only a small part of the period considered and the majority of them were members of the Dickson Court; Justice Fish is the obvious exception, being a current member of the Court with a full eight years of service.

If we think of the post-conference distribution of the majority reasons for judgment as reflecting some institutional determination of who should write how much, and more specifically who should write what, then swing judgments interfere with this allocation by taking away decisions from one justice and allowing them to be appropriated by another. To some extent, this imbalance cancels itself out; if a judge like Justice Gonthier loses seven judgments of the Court to swings, but gains six others by writing minority reasons that become judgments, then this really has not affected the balance.⁶¹ Only if particular judges gain significantly

61. It may be, of course, that either the lost judgments or the gained judgments involve more

more judgments than they lose, or vice versa, can we have some reasonable indication of whether they are the beneficiaries or the losers from the phenomenon.

Only one SCC justice is in double figures for net gain from swings, and that is Justice Binnie with fifteen gains and five losses for a net gain of ten. Justice Sopinka is close behind with twenty gains and eleven losses for a net gain of nine. There is a three-way tie at six net gains (Justices Le Dain, La Forest, and Fish), and it is interesting that this includes one judge from each of the three chief justiceships. Chief Justice McLachlin tops off the first half dozen with a net gain for five despite leading the Court with an impressive thirty-two swing gains in total.

The bottom of the Table can be described in much more definitive terms. There are three judges who are the clearest net losers, these being Justices L'Heureux-Dubé (-15), Wilson (-12), and Bastarache (-10)—again, a trio that is interestingly distributed over the three chief justiceships. The drop-off from this point is sufficiently dramatic such that it should just be taken as identifying these three judges as standing out in this regard, as balanced against Justices Binnie and Sopinka on the positive side of the calculation.

B. SWING OPPORTUNITIES AND SWING EFFECTIVENESS

It will be fairly obvious that what the judges with the highest numbers—that is to say, the ones who have been most frequently involved in either gaining or losing judgments—have in common is length of service. Only one of the judges in the top half of the Table (Chief Justice Dickson) served for fewer than nine years, and only one of the judges in the bottom half (Justice Gonthier) served for more than nine. This could be corrected by rerunning the numbers per year of service, but there is a more focused way of adjusting the figures: taking into account not just the length of service but also the opportunities for gains or losses that each justice enjoyed. Judges create an opportunity to *gain* a swing judgment every time they choose to write minority reasons after judicial conference and the assignment of the judgment;⁶² by the same token, an opportunity to *lose* a swing judgment exists every time they are assigned the judgment and one or more of their colleagues indicate that they will be writing minority reasons.

important cases of more lasting significance, but I am not in a position at this time to attempt such an assessment.

62. Which suggests another factor that may complicate the “how important is my disagreement” threshold, namely the question of “how good are my chances of gaining the judgment.” Although successful swings are to some extent a measure of how persuasive and influential particular judges may be, they may also be a product of how good judges are at “picking their targets.”

As argued above, I regard the relevant universe as being limited to reserved judgments and non-unanimous decisions. The most useful question then is: How often did the judge in question have the majority-reasons assignment on a divided panel, and how large a fraction of this total is represented by the “lost majority” number? And, conversely, for “gained judgments,” how often did a particular judge write minority reasons on divided panels, and how large a fraction of that total is represented by the “gained majority” number? Both counts, of course, have to be corrected because the actual count of “judgments in decisions for divided panels” as they appear in the *Supreme Court Reports* already includes the gained-swing judgments, but not the lost-swing judgments. Chief Justice McLachlin, for example, delivered the decision in a total of ninety-three divided panels and wrote minority reasons in 145. However, this ninety-three already includes her thirty-two swing gains, which reduces the number to sixty-one; and it does not include the twenty-seven times that she started with the judgment assignment but lost the majority. The real count should be eighty-eight judgment assignments and 150 instances in which she chose to write minority reasons. The numbers in the “Assigned Judgment” and “Wrote Minority” columns reflect these recalculations.

On this basis, we can ask the two critical questions: first, what proportion of the times that each judge was writing the judgment on a divided panel did that judge lose the majority (the “Lost Judgment Percentage” column); and second, what proportion of the times in which each judge chose to write minority reasons were they successful in winning the majority away from the initial writer (the “Gain Judgment Percentage” column)? The second number tends to be lower for the reason that is signalled in the “All Judges” row on the Table: On a divided panel there can only be one initial judgment writer, but there can be several different sets of minority reasons.⁶³

There are several judges who stand out for the frequency with which they succeed in translating their minority reasons into judgments of the Court, these being Chief Justice Dickson (59 per cent), Justice Cory (35 per cent), and Justice Iacobucci (32 per cent) (and, based on a smaller numbers of cases, Justices Charron and Le Dain with 14 and 18.9 per cent respectively). In operational terms, put yourself in the position of a SCC justice who has just volunteered for or been assigned the majority reasons on a panel that is not clearly unanimous; the aforementioned judges are the colleagues that you would least want to hear say “I

63. Because the counts in this Table exclude co-authored judgments and minority reasons, the Table should not be understood as suggesting that there were only 867 divided panel decisions or only 1370 sets of minority reasons during the three chief justiceships.

am afraid that I may find it necessary to write separately.” At the other extreme, there are several judges who are much less effective than average at gaining the majority, including Justices L’Heureux-Dubé (5 per cent), Wilson (6 per cent), Abella (9 per cent), and Arbour (10 per cent) and, based on a smaller numbers of cases, Justice Rothstein.

Conversely, there are some judges who are unusually effective at retaining the judgment even in the face of minority reason challenges. The list is of course led by Justice Fish, who has never lost a swing, and includes Justices Arbour (15 per cent), Cory (16 per cent), Binnie (18 per cent), and Gonthier (19 per cent). This list is also led by Justice Rothstein, however, he has participated in less than 20 non-unanimous panel decisions at the time of the data collection. Others, however, are much less successful in this respect; Justice L’Heureux-Dubé is the only member of the Court to lose the majority on more than half the occasions when she faced minority reasons, followed by Justices Wilson (46 per cent) and Bastarache (38 per cent).

Combining these two figures, the final column of Table 3 uses the gain-swing and lose-swing numbers to generate a “swing efficiency” figure—that is, the percentage of the time that a judge *gains* the majority on a divided panel minus the percentage that they *lose* the majority in these situations. This is shown in the final column of the Table. For the Table as a whole, this figure is negative (-10 per cent), reflecting the fact that there are about eight sets of minority reasons for every five cases. This means that a judge who decides to write minority reasons does not have quite as good a chance of gaining the judgment as is suggested by the frequency with which judgment writers lose their majority. I have resisted the temptation to correct or normalise these figures by raising them by this 10 per cent because it does not seem to be the case that this lower number misrepresents the challenge or the accomplishment of the judges.

Because of this figure of -10 per cent, only one third of the judges have a swing efficiency number that is in positive territory, and this small group is led by Chief Justice Dickson (23 per cent), followed by Justices Le Dain (19 per cent), Cory (18 per cent), and Fish (14 per cent). At the other end of the scale, Justice L’Heureux-Dubé has a swing efficiency number of -46 per cent, followed by Justices Wilson (-39 per cent), Deschamps (-21 per cent), and Bastarache (-18 per cent). The differences between judges are considerable, and they demonstrate that some are particularly proficient or fortunate in being able to take advantage of the very real opportunity for swing judgments after the initial conference assignment, while other judges are not.

C. WOMEN JUDGES AND SWING JUDGMENTS

The list of the judges who have been the least successful in gaining swing judgments includes several of the more prominent women judges who have served or are now serving on the Court. Further, the list of the judges who are the least successful in holding on to their initial “judgment-of-the-court” assignment in the face of a challenge from a writer of minority reasons also includes several of those same prominent women judges. Even the single most impressive number in Table 3—Chief Justice McLachlin’s thirty-two gains through swing judgments, the most of any justice—turns out to be largely the product of her having served more years during the last three chief justiceships than anyone else and is offset by the fact that she has also *lost* more swing judgments than any other justice. Expressed as a percentage of opportunities, Chief Justice McLachlin has gained judgments slightly more often than average, but she has also lost judgments slightly more often than average, and her swing efficiency does not differ significantly from the figures of her colleagues taken as a whole. In other words, even the most apparently successful woman judge, when assessed in terms of the swing phenomenon, turns out not to have been very successful in gaining swings after all.

This raises the question of the extent to which this observation about women not doing well under the swing judgment phenomenon can be generalized. To this end Table 4 combines data from Table 3 for all seven women judges and for the twenty-one male judges to similarly calculate the “gained judgment” and “lost judgment” percentages as well as net swing efficiency based on total opportunities. As mentioned above, the gains and losses do not quite balance out (nor do they equal the total number of swing judgments indicated earlier) because of the phenomenon of joint (that is to say, co-authored) reasons. And the fact that the “swing efficiency figure” is negative for both men and women judges again reflects the fact that although there is only one initial judgment assignment to be lost for each non-unanimous panel, there can be (and there often is) more than one set of minority reasons potentially challenging for a swing judgment.

TABLE 4: SWING JUDGMENTS, MEN AND WOMEN JUDGES COMPARED

	Gain	Loss	Net	Wrote Minority	Assigned Judgment	Gain Judgment Percentage	Lost Judgment Percentage	Swing Efficiency
Women Judges	63	93	-30	516	255	12.2%	36.5%	-24.3%
Men Judges	178	146	32	854	612	20.9%	23.9%	-3.0%
All Judges	241	239	-	1370	867	17.6%	27.6%	-10.0%

For the three chief justiceships as a whole, the difference between these two is a full 10 per cent, as shown in the third row (repeated from Table 3).

The differences for women judges are indeed generalizable. As a group, women are a third less likely than average to gain a swing judgment when writing minority reasons and half as likely to lose the majority when writing a judgment that is challenged by minority reasons. In terms of swing efficiency, male judges as a group almost break even, despite the “more-minority reasons-than-judgments” factor mentioned above; women judges, on the other hand, collectively enjoy a swing efficiency of -24 per cent. The only two male judges who scored this low individually are Justices Stevenson and Cromwell, and both do so over such short periods of service and with so few cases that the numbers are not really comparable.

One slightly curious aspect of Table 4 is the “wrote minority” and “assigned judgment” columns (both, of course, referring to what happened at conference rather than what the totals look like post-swing). Women judges wrote 29 per cent of the initial judgements that were challenged by minority reasons, but they wrote 41 per cent of the minority reasons in divided panels. Put a bit differently, over the whole set of non-unanimous reserved judgments for three chief justiceships, men judges as a group wrote on average 1.4 sets of minority reasons for every judgment, but women wrote just over two. At first glance, this cries out for a common sense (if slightly unfriendly) explanation, which we might carefully put as: Some people are just a little more ready than others to disagree, and to express that disagreement publicly. Examples of individual judges who might be described as “frequently disagreeing” or as “seldom disagreeing” will no doubt spring into most readers’ minds. But to put this in a broader context: Songer et al have studied majority opinion assignment at the Court over a comparable time period, and one of their strongest findings was that women judges are less likely than their male counterparts to be assigned majority reasons—this holding true even when controlling for other variables, and even under a woman Chief Justice.⁶⁴

This puts a different face on things. One of the reasons that a judge writes minority reasons more often may be the fact that she enjoys relatively few opportunities to participate in the development of judicial doctrine through the writing of judgments of the court. This is a description that Songer et al are suggesting we can apply to women judges as a group. It therefore becomes more

64. My summary comments are based on Prof. Songer’s observations in Panel 45-26 at the Midwest Political Science Association annual meeting in Chicago, Illinois on 13 April 2012.

significant that the swing phenomenon again reduces the extent to which women judges wind up writing the decisions of the Court, which is to say those sets of reasons that enjoy greater precedential weight.

VII. SWING JUDGMENTS AND PLURALITY DECISIONS

One problem faced by many panel appeal courts is the problem of plurality judgments—that is, decisions where there is no single statement of “outcome-plus-reasons” that draws the support of a majority of the members of the panel. In such a situation, there is an outcome (the fact that the panels always have an odd number of judges, and that there are only two possible outcomes—allow or dismiss the appeal⁶⁵—guarantees this⁶⁶), but the “votes” that direct this result have not collected themselves in a single set of reasons, leaving one or more separate concurrences. Until recently it has been possible (for the most part) for the *Supreme Court Reports* to indicate one of these sets of reasons—not necessarily the one that has collected the largest number of signatures⁶⁷—as being the judgment of the Court.⁶⁸

In the United States, there is some question as to whether a plurality judgment carries precedential value at all (as opposed to simply deciding the immediate case) and, if so, how the substance of that precedent is to be determined.⁶⁹

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65. Some courts, such as the USSC, work with three different possibilities—allow the appeal, uphold the judgment of the lower court, or remand—and this can potentially create more complex problems that courts try hard to avoid. See H Ron Davidson, “The Mechanics of Judicial Vote Switching” (2004) 38:1 *Suffolk UL Rev* 17.
66. More precisely: *almost* guarantees this. The possibility remains that as a result of death or retirement a judge may sit on a panel but not be able to participate in the decision. There was a single decision of the McLachlin Court that ended in an equal division of the panel. See *R v LFW*, 2000 SCC 6, [2000] 1 SCR 32.
67. See e.g. *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14 at para 123. Here, the solo reasons of Justice La Forest on a five-judge panel are indicated as the judgment of the Court.
68. Although this is less true today: Six of the nine plurality decisions in the McLachlin Court’s first five years, but only two of eleven in the last six years, identified one of the sets of reasons as the judgment.
69. See e.g. John F Davis & William L Reynolds “Juridical Cripples: Plurality Decisions in the Supreme Court” (1974) 23:1 *Duke LJ* 59; “Plurality Decisions and Judicial Decisionmaking,” Note, (1981) 94:5 *Harv L Rev* 1127; Ken Kimura, “A Legitimacy Model for the Interpretation of Plurality Decisions” (1992) 77:6 *Cornell L Rev* 1593; Mark Alan Thurmon, “When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions” (1992) 42:2 *Duke LJ* 419; Aaron S Hochschild, “The Modern Problem of Supreme Court Plurality Decisions: Interpretation in Historical Perspective”

Canadian judicial citation practice seems more casual in this regard—there are a number of plurality judgments that rank among the Court’s most frequently cited decisions.⁷⁰

By my count, there have been 155 plurality decisions handed down during the three most recent chief justiceships: sixty-six by the Dickson Court, sixty-seven by the Lamer Court, and twenty-two by the McLachlin Court. Seventy-six of these, or just under half, have been swing judgments, which means that plurality judgments make up about 30 per cent of all swing judgments. One time in four, then, a set of minority reasons reduces the initial majority decision to a minority opinion; however, one time in three that swing stops short of turning the initial minority into a majority, and this accounts for half of all pluralities. The overlap between the two phenomena is not complete, but it does encompass a very large proportion of both. This finding is particularly true of the McLachlin Court, where all but five of the twenty-two plurality decisions have been swing judgments.

To be sure, this overlap is correlative rather than causative. Clearly, plurality decisions (and even more so plurality “no judgment” cases) reflect a Court that is divided to the point of being unable to generate the majority reasons that would usefully guide the lower courts, and it is safe to assume that the Court makes a genuine effort to avoid this whenever possible. Similarly, swing judgments reflect a situation in which there is a degree of fluidity within a divided panel. In those cases where swing judgments do involve plurality decisions, it might well be that all that the swing has done is change which less-than-a-majority group on the Court (sort of) prevails. Indeed, rather than suggesting that one of these two phenomena causes the other, it might be better to think of swing and plurality judgments as overlapping subsets of the broader category of cases in which the Supreme Court is expressing an unusual degree of uncertainty and division. What is important for present purposes is that it appears that the two overlap to the extent that it is not useful to discuss or consider one without considering the other as well.

(2000) 4 Wash UJL & Pol’y 261; James F Spriggs II & David R Stras, “Explaining Plurality Decisions” (2011) 99:2 Geo LJ 515.

70. See e.g. *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practice Commission)*, [1990] 1 SCR 425, [1990] SCJ no 23 (QL). Here, a five-judge panel split five ways (including three judges who “dissented in part” on different parts of the decision), and which nonetheless is one of the leading cases on the issue of corporate self-incrimination in the context of the *Charter*.

VIII. CLOSING THE WINDOW: NEW PATTERNS OF DECISION DELIVERY

I have said that in recent decades the SCC has developed a new, distinctive, and persisting style for the presentation of its decisions and reasons. The Court's judgments follow a standard format, including a number of regular elements with generic labels. If there are minority judgments, the authors identify them as such ("I have read the reasons"), show institutional deference ("with respect"), and self-locate through reference to a specific element of the majority analysis with which they cannot agree. The net result is an unusually coherent package, wherein even minority reasons are part of an institutional product that can be easily penetrated to identify areas of agreement and disagreement alike. This is enhanced by the recent *Supreme Court Reports* practice, beginning in 2005, of placing the judgment first, concurrences second, and dissents at the end.

Because of this persisting style, it has been possible for me to identify two different types of unusual decision. The first category, which is the easiest to decipher, is composed of decisions where the minority reasons are presented in the full-format style and where the judgment of the Court displays the self-identification, institutional deference, and self-location typical of minority reasons. I have suggested that this unusual pattern is caused by a defection of panel members from the initial majority reasons, assigned after the post-hearing conference, to reasons that were initially drafted as minority reasons. The second type occurs when a decision includes two different sets of reasons, one labeled a judgment and the other minority reasons, both using the full-format style and neither referring to each other or piggy-backing on the more routine parts of the standard decision style. I have suggested that this is what happens when the "winner" of a swing judgment takes the time to write a new full set of complete and free-standing reasons, replacing the minority identification flags that are no longer appropriate.

I have also suggested that this decision presentation style is perhaps fading or being replaced by another. Consider, for example, *R v JF*.⁷¹ The judgment of the Court is delivered by Justice Fish, who writes fairly briefly (four thousand words, about half the length of the average majority reasons for reserved judgments) to resolve an appeal involving allegedly inconsistent verdicts. Justice Deschamps writes a solo dissent that clearly does not signal or suggest a swing judgment (her

71. 2008 SCC 60, [2008] 3 SCR 215.

first paragraph ends: “I have read the reasons of my colleague Fish J. and, with respect, I cannot agree with his approach, which broadens the rule and creates a new but illdefined notion of inconsistent verdicts.”⁷²), but which is more than ten thousand words long and is written in what I have described above as a full format. This very much looks like a swing judgment, except it clearly isn’t.⁷³ One case, of course, proves nothing, but in fact it has considerable company: *R v DB*;⁷⁴ *AC v Manitoba (Director of Child and Family Services)*;⁷⁵ *Alberta v Hutterian Brethren of Wilson Colony*;⁷⁶ *Consolidated Fastfrate Inc v Western Canada Council of Teamsters*;⁷⁷ *Tercon Contracts Ltd v British Columbia (Transportation and Highways)*,⁷⁸ to provide only the beginning of a longer list. Finding this many exceptions to the rule suggests that there may be a new rule.

There is nothing surprising about this evolution. For one thing, the personnel of the Court are constantly changing. Chief Justice McLachlin was already the only member of the Court who could remember the transition from the Dickson to the Lamer Court, at the time when I have suggested the new decision delivery style emerged. With the departure of Justice Binnie, she now becomes the only member of the present Court to have served under Chief Justice Lamer. But more importantly, as argued by Todd Henderson,⁷⁹ we should remember that changes in style and format typically accompany changes in the context or the purposes of the Court; in the immediate case, I would suggest that the Court has in some sense entered the “post-*Charter*” era, when exploring the new frontiers of the *Charter*’s implications and applications is no longer the major item on the judicial agenda. As a result, a format by which minority reasons fit themselves transparently into a complete conversational package so as to enhance evolving meaning is perhaps less attractive as a result, and a “judgment over *here*, minority over *there*” format of greater and more explicit separation may be more useful as a signal of greater constancy and more constrained change. Readers can substitute

72. *Ibid* at para 43.

73. It is, of course, possible that this really is a swing judgment, but that Justice Fish has rewritten his “once-minority-now-majority” reasons to do away with the self-identifying and self-locating markers. It is also possible that Justice Deschamps has edited her “once-majority-but-now-minority” reasons to directly acknowledge her disagreement with the judgment of the Court delivered by Fish. However, this is now piling assumption on top of assumption in an increasingly rickety structure, and it seems preferable to take the judges at face value.

74. 2008 SCC 25, [2008] 2 SCR 3.

75. 2009 SCC 30, [2009] 2 SCR 181.

76. 2009 SCC 37, [2009] SCR 567.

77. 2009 SCC 53, [2009] 3 SCR 407.

78. 2010 SCC 4, [2010] 1 SCR 69.

79. Henderson, *supra* note 15.

their own characterizations of the two stages and their implicit functions for the one above; my point is to indicate a changing presentation format that transcends personal or idiosyncratic anomalies.

Whatever the explanation, this change deprives me of the clear markers that allowed for the identification of 255 swing judgments that appeared in the *Supreme Court Reports* between 1984 and 2011. The SCC is more careful than some courts about preventing any details of its internal deliberations to leak out into public view. The decision format of the last twenty-five years presented a window through which one could peek at part of a significant phenomenon within those deliberations, namely the movement of judges between positions initially sketched out at the post-hearing conference (though only in part, as it showed itself only when the result was to swing the judgment of the Court away from the initial assignee). If the standard decision format is indeed evolving again, this effectively closes the window such that this aspect of the Court's operations has once again become opaque. The members of the Court may well be pleased with this implication.

IX. CONCLUSION: WHY DO SWING JUDGMENTS MATTER?

I have demonstrated that swing judgments happen fairly often on the Supreme Court, but this leaves the obvious question: Why does it matter? What difference does it make to the way that we think about or study the Court, if several times every year the justice assigned the judgment loses the majority and winds up writing minority reasons?

First, the phenomenon of the swing judgment casts an interesting light on what otherwise seems to be a routinely straightforward part of the Court's procedures, namely the circulation and revision of reasons after oral argument. If, as I have suggested, more than one reserved judgment in every eight (including more than one non-unanimous reserved judgment in every four) involves movement within the panel such that the initially assigned writer of the decision loses the majority, then this is far from routine. This finding also suggests (although it does not prove) that there is even more movement that is not detected by my methodology, which is to say that it simply increases or reduces the size of a majority. This too is not trivial; a 9-0 or an 8-1 decision carries rather more weight and finality (other things being equal) than a narrow 5-4 result, and where a case finally winds up on this continuum is the product not only of the initial conference but also of the circulate-and-revise persuasion process.

Second, the phenomenon of swing judgments casts some doubt on the

appropriateness of the attitudinal approach to the study of judicial decision making at the level of supreme courts.⁸⁰ Crudely, the attitudinal approach suggests that judges come to cases with a unique set of persisting attitudes and values that predispose them to favour certain causes, interests, or parties in certain kinds of legal situations. But if judges shift their position as often as I am suggesting, then their decision processes are rather more complex and nuanced—in other words, if they have changed from their initial position at conference, then one of those times (at conference or at the final signature) they must have been acting contrary to what the attitudinal approach would have suggested for them. At the same time, the fact that these justices have taken two different positions on the same issues at two different times undermines the position-counting exercise that purportedly allows us to discern the attitudes in the first place. Persuasion clearly matters as well as predisposition.

Third, it reinforces the idea that panel appeal courts are primarily and fundamentally deliberative, reflective, collegial institutions—what we always wanted to think appeal courts were like, until the legal realists arrived. At conference, judges do not just hold a straw vote, assign the writing, and then get on with more important things—the assignment of writing responsibility is better understood as the beginning of a process, generating a package of reasons that is very much an institutional product. If the movement of signatures is pronounced enough to create the high proportions of swing decisions detected by my methodology, then there must be even more unseen movement that swells or shrinks the size of the majority of the panel even when it is not sufficient to generate a swing; and it is entirely reasonable to assume that some non-trivial proportion of the Court's unanimous decisions became so through the circulation of reasons. Swing decisions are arguably the “magic moments” for observing the Court because they catch the judges in their most visibly reflective moments, in the act of responding to persuasion rather than just digging in. The Court shows itself to be a reflective institution that thrives on persuasion and debate; what it is giving us in the end is genuine reason rather than post-hoc rationalization.

Fourth, it helps to explain why judges write minority decisions—they do so because about one-sixth of the time they are able to persuade enough judges away from the majority position such that the minority writer delivers the judgment of the Court; to look at it from the other side, one-quarter of the time the original judgment writer on a divided panel loses enough signatures such that theirs become minority reasons. This explanation also suggests that the writers of majority reasons have

80. Macfarlane makes the same point about vote-switching undermining the assumptions of the attitudinal approach. MacFarlane, *supra* note 9 at 203.

a positive incentive to pay attention to minority reasons as they circulate and to make some real attempt to accommodate their concerns at least in part. The judicial discussion at the conference that follows oral argument is therefore not sons constituting a routine follow-up. Instead, when the conference reveals some real difference of position between the judges, it can become just the first act of a more extended play, the ending of which is by no means foreordained.

Fifth, it suggests the usefulness of looking at historical “might-have-beens”—what would the law look like if the initial majority-at-conference had not been eroded so as to become a minority (in specific cases or, even more significantly, in specific areas of law). One example, introduced but not developed by my initial reference to the labour trilogy, might be the evolution (or, as labour union sympathizers might prefer, *lack* of evolution) of labour rights under the *Charter* in the context of freedom of association. Closer study may find others. Such an approach is useful to overcome the sense of inevitability that the Court likes to affect in order to reinforce its decisions and that tends to emerge in discussions of jurisprudential trends. Persuasion implies contingency; contingency implies the potential for alternatives.

Sixth, it helps to explain the problem of plurality judgments—that is, the instances when the Court fails to provide an explanation, in the form of outcome plus reasons, that is fully supported by at least a bare majority of the panel. This has occurred an average of six times a year since 1984, so it is not a marginal question but rather an ongoing issue. Further, half of all plurality judgments are the products of swings that took the majority away from the initial writer, these accounting for a third of all of the swing judgments. The two phenomena—swing judgments and plurality outcomes—are clearly linked, (presumably by sharing an underlying cause, and not in the sense that one causes the other), and understanding the one helps to explain the other.

Seventh, like the overlapping but non-identical category of plurality judgments, swing decisions represent something that is more tentative than other decisions with comparable voting fragments on the panel. The fact that some members of the panel started with a different point of view but were persuaded over time to adopt another suggests a residual attractiveness to that initial position that the subtly different issues, facts, and arguments of a subsequent case might trigger. This observation seems all the more credible where the choice is between adhering to a long-standing precedent and striking out in a new direction. It is always a disappointment for a litigant to lose an important case—at one level, it might be all the more frustrating to discover that at conference you were actually winning, only to have this support erode—but surely this is simultaneously an invitation

to try regain some ground in a later case by exploiting that softness. If your cause has lost by way of a swing judgment, then this is encouraging: The votes and the signatures were almost there, and if you find a more appealing fact situation, a stronger legal argument, or a better social context in which to present the matter (or all three), then that “there just for a moment” voting coalition might very well re-emerge and hold together. Conversely, if your cause almost lost, but only seized victory from the jaws of defeat at the last moment in a swing judgment, you are on notice that your gains are tentative rather than permanent, such that they may be nibbled away or even lost altogether in the future.

Eighth, by combining these findings with the observations of Songer and others, the swing judgment phenomenon may reveal another way in which female judges can be incorporated into full participation at this highest level of the judicial profession. Songer has suggested that women judges are disadvantaged in the assignment of reasons for judgment; my findings suggest that they are disadvantaged overall by the swing judgment phenomenon. Playing on George Orwell’s famous slogan in his extended parable *Animal Farm*: All Supreme Court justices are equal, but perhaps some are more equal than others.

In all of these ways, swing judgments cast the decision making of the Supreme Court of Canada in a different, and hopefully more useful and interesting, light while simultaneously rendering the decision of judges to write separately more understandable. Reason and persuasion, not the simple *force majeure* of a few more votes, pervades the jurisprudence of the Court, and this fact means that the boundary between winning and losing, between writing majority judgments and writing minority reasons, is thinner and more porous than it might appear. Sometimes, Supreme Court judges change their minds; we should pay attention to the signals they send us at those important moments.