

2016

‘By the Court’: The Untold Story of a Canadian Judicial Innovation

Peter McCormick

University of Lethbridge, mccormick@uleth.ca

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Recommended Citation

McCormick, Peter, "‘By the Court’: The Untold Story of a Canadian Judicial Innovation" (2016). *Osgoode Legal Studies Research Paper Series*. 171.

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Research Paper No. 37

Volume 12, Issue 8, 2016

‘By the Court’: The Untold Story of a Canadian Judicial Innovation

Osgoode Hall Law Journal, Vol. 53(3), 2016, Forthcoming.

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Abstract:

The Supreme Court of Canada has for several decades used an anonymous and unanimous decision format – 'By the Court' – for a subset of its constitutional decisions; although some of the specific cases (such as the *Quebec Secession Reference*) have been closely examined, the practice itself has never received focused consideration. This article establishes a chronology, an inventory, and a typology for the Supreme Court's 'By the Court' judgments, and concludes by suggesting that its use has become more frequent under the current Chief Justice.

Keywords:

Supreme Court, judicial decision-making, anonymity, McLachlin

Author(s):

Peter McCormick
University of Lethbridge
E: mccormick@uleth.ca

'By the Court': The Untold Story of a Canadian Judicial Innovation

What do the *BCE* case of 2008, the *Securities Reference* case of 2010, the *Senate Reform Reference* case of 2014, and the *Carter* (assisted suicide) case of 2015 have in common? All are unanimous decisions of the Supreme Court of Canada in which the reasons for judgment – the explanation as to why the outcome is the legally and constitutionally appropriate one – are not attributed to any specific named judge or judges on the Supreme Court, but rather to a mysterious entity called THE COURT.

There are not very many Supreme Court decisions that take this form. Indeed, there was a time not that long ago when no headline-worthy decision ever did – this is a practice that emerged on an identifiable date with a trackable history. Moreover, it is a purely Canadian story – it is not part of the legacy of English law, not something that crossed from south of the border by imitative osmosis,¹ not an idea copied from anybody else. It is something that was developed by Canadian judges, that emerged in response to a very specific Canadian event, and that has evolved since that first experience. This article will identify and explore this underappreciated and understudied judicial innovation.

Who Cares? Defending the Topic

Given that “By the Court” studies” are a barren wasteland, I begin by defending my choice of topic. It is striking that there is no literature for me to review as an introduction to the topic – not a single journal article, let alone a book, has ever focused on this phenomenon. Bzdera set the basic frame twenty years ago when he described the anonymous unanimous judgment as a standard high court device for constitutional questions on federalism issues² – but the citations that accompany this bold claim bear on the “unanimous” rather than the “anonymous” aspect. Although specific exemplar cases are often discussed in the literature – given the

¹ Some might doubt this claim of originality, thinking of the USSC’s *per curiam* practice as a possible model or inspiration; such an attribution is mistaken, because no USSC *per curiam* decisions are remotely like the major Canadian decisions – they are either minor and concise to the point of boilerplate or constrained staccato summaries of badly divided panels. The apparent similarity in the labels – ‘By the Court’ being a simple translation of the Latin “*per curiam*” – is completely misleading. For a description of US practices, see e.g. Stephen Wasby et al, “The Supreme Court’s Use of the *Per Curiam* Disposition” *Northern Illinois Law Review*, Vol. 13 (1992-3) 1; Stephen Wasby et al, “The *per curiam* opinion: its nature and functions” *Judicature*, Vol. 76 (1992-3) 29; and Michael Gizzi and Stephen Wasby, “*Per Curiam* Revisited” *Judicature* Vol. 96 (2012) 3. For that matter, the SCC also had a long-standing *per curiam* practice, which was like neither the USSC’s *per curiam* nor the SCC’s ‘By the Court’, but instead followed the English style, consisting not of a set of reasons for judgment, but rather a section within the headnotes.

² Andre Bzdera, “Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review” *Canadian Journal of Political Science*, Vol. 26 (1993) 3

profile of some of them, how could they not be! – their anonymity is routinely ignored.³ At most, there are passing comments, often relegated to footnotes, noting without expansion or commentary that the Court sometimes but infrequently uses anonymous judgments in constitutional cases.

Judicial biographies are little better. There are three excellent biographies that should be of real assistance – those of Laskin,⁴ Dickson,⁵ and Wilson⁶ – but they are not. The Laskin biography takes notice of only one of the several ‘By the Court’ decisions that happened on Laskin’s watch, confidently insisting that although no author is indicated, the turns of phrase are characteristic of Laskin⁷ – it says nothing about why anonymity was chosen in the first place, or who took the initiative, or how it was decided which specific cases from the broader caseload would take this form. One imagines the justices sitting around a table, one of them suggesting this novel practice and others responding with either enthusiasm or reluctance – but if any such meeting ever took place, the otherwise excellent biography has nothing to say about it. Similarly, the Dickson biography declares that although two specific decisions were reported as ‘By the Court’ judgments,⁸ Dickson’s own papers put it beyond doubt that Dickson himself wrote the reasons in question⁹ – but, again, there is no discussion of why the impersonal label was used at all, no indication of why Dickson did not assume individual responsibility in the usual way, no hint of a broader practice or policy.¹⁰ All three biographies attach considerable importance to the unanimity of some of the Supreme Court’s most important decisions; none

³ Consider, for example, the way the *Supreme Court Law Review* handled the 1979 language decisions of *Blaikie* and *Forest*, the cases that are often (and, I will suggest below, incorrectly) accepted as the beginning of the tradition. Although the content of the case was reviewed in two successive annual editions, the author noted that they were unanimous but never once mentioned the fact that they were delivered by and attributed to THE COURT rather than to a specific member of the panel.

⁴ Philip Girard, *Bora Laskin: Bringing Law to Life* (The Osgoode Society/University of Toronto Press, 2005)

⁵ Robert J. Sharpe and Kent Roach, *Brian Dickson: A Judge’s Journey* (The Osgoode Society/University of Toronto Press, 2003)

⁶ Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (The Osgoode Society/University of Toronto Press 2001)

⁷ Girard, *Laskin: Bringing Law to Life*, p. 510.

⁸ The two cases are *Re Manitoba Language Rights* [1985] 1 S.C.R. 721; and *Tremblay v. Daigle* [1989] 2 S.C.R. 530.

⁹ Sharpe & Roach, *Dickson: A Judge’s Journey*, p. 418 for *Manitoba Language Reference*, p.395 for *Tremblay v. Daigle*.

¹⁰ In the process, they illustrate one of the problems with the ‘By the Court’ style: when we write about judges, whether to praise or to criticize, we do so in terms of the reasons they wrote. But ‘By the Court’ prevents us from doing this for some very important cases – we don’t know who to commend or blame, whose evolving ideas to make those reasons part of – and Sharpe and Roach respond to this deflection by fiercely reclaiming two of those judgments for the judge who is their subject.

take any real notice of the more unusual feature of anonymity. 'By the Court' seems to be all but invisible, except when it is explained away.

And yet, today – after a tumultuous half decade that has included the *Securities Reference*,¹¹ *Nadon*,¹² and the *Senate Reform Reference*,¹³ and *Carter*¹⁴ – it is no longer possible not to notice the part that 'By the Court' played in ratcheting up tension of the Court's public contretemps with the Harper government. 'By the Court' is clearly unusual and unquestionably important, at least sometimes, and yet it remains under-explored to the point of utter neglect. This omission calls for redress, which this article will attempt to provide.

Broader Theoretical Attractions

There are two important theoretical issues that 'By the Court' judgments highlights in a dramatic way.

The first is the *presentation factor*, the suggestion being that the way the Court presents itself and its decisions (especially but not only the major ones) is a significant element of what the Supreme Court is doing at any specific point in its historical evolution. The content of a major judgment is of course important, but the packaging is important as well; given that the words in a judgment constitute the Court's only way of exercising its influence, it would be strange indeed to suggest that the mode of presentation simply does not matter, that the Court just dashes things off without any thought about how to shape and structure it to best effect. Thinking of this as the product of conscious and shared choices is made more credible by the fact that our Court's self-presentation style has evolved through identifiable stages, and has recently settled on a regular format that is globally unique in a number of ways.¹⁵

McLuhan famously said that the medium is the message; as a more modest variant, the present suggestion is that the packaging matters. Henderson warns us never to treat any aspect of the way a national high court delivers its reasons as something minor, to be shrugged off as an idiosyncratic accident of whim or personality.¹⁶ Rather, the way the Court presents itself must be understood as the consciously shaped product of the institution's reaction to the threats and challenges and opportunities of its immediate historical context, constrained by the expectations of continuity that underpin its legitimacy. Although Henderson was writing about the

¹¹ *Reference Re Securities Act* 2011 SCC 66, [2011] 3 S.C.R. 837

¹² *Reference re Supreme Court Act ss. 5 & 6* 2014 SCC 21, [2014] 1 S.C.R. 433

¹³ *Reference re Senate Reform* 2014 SCC 32, [2014] 1 S.C.R. 704

¹⁴ *Carter v. Canada (Attorney-General)* 2015 SCC 5

¹⁵ See Peter McCormick, "Structures of Judgment: How the Modern Supreme Court of Canada Organizes Its Reasons" *Dalhousie Law Journal* Vol. 32 (2009)

¹⁶ See M. Todd Henderson, "From Seriatim to Consensus and Back Again: A Theory of Dissent" 2007 *Supreme Court Review* 283.

United States Supreme Court, and specifically about the frequency of minority reasons, this observation has broader applications. The period of the modern high style of “By the Court” judgments is the period of our Supreme Court’s emergence as a major national institution, a constitutional court in the fullest sense of the term and a significant player in the major political controversies of the day. Recent decades have seen a considerable degree of constitutional turmoil and change, but arguably the most important consequence been the emergence of the Supreme Court of Canada to a national profile. And many of the decisions that make this observation the most convincing have been delivered ‘By the Court’.

The second issue is “*the many and the one*” – less cryptically, the panel court paradox of the unavoidable tension between individualism and institutionalism. On the one hand, the Court is nine fiercely independent professionals, each with a unique sense of priorities and values and a strong desire to see those priorities and values appropriately reflected in Canadian law during their service on the Court; only rarely will these perfectly coincide with the parallel preferences of any of their colleagues, let alone all of them. On the other hand, the Court is (especially today) a major national institution whose preferably unified decisions are expected to deliver finality, certainty, and clarity, especially on the larger issues; this calls for leadership (and therefore followership) and compromise. The first wing of this paradox pulls the Supreme Court toward the fragmented individualism of solo reasons, the second toward a preference at least for solid majorities and at best for unanimity. The Court’s location on this continuum is constantly being renegotiated with different answers for different time periods, for different Chief Justices, for different mixtures of personalities, for different sorts of issues and different types of law. The old *seriatim* style,¹⁷ where every judge wrote free-standing reasons without reference to those of anyone else, represents one extreme end of this continuum; the “By the Court” style, with a single judgment that does not even acknowledge a lead author, is the other extreme. This contrast is rendered all the more fascinating by the fact that there was a clearly identifiable date when our own Supreme Court switched abruptly and decisively (and therefore, presumably, deliberately) from the one to the other for certain important purposes.

Defining the Topic: What is “By the Court”?

A ‘By the Court’ judgment is a decision of the Supreme Court that is attributed to the Court itself; no specific judge (or, on more recent practice, no specific pair of judges¹⁸) is identified as the lead author(s). This is unusual, because the tradition of common law appeal courts is for individual judges to acknowledge their individual

¹⁷ But not *that* old – it vanished from the Supreme Court judgment-delivery repertoire only in the 1960s.

¹⁸ See Peter McCormick, “Sharing the Spotlight: Co-Authored Reasons on the Modern Supreme Court of Canada” *Dalhousie Law Journal*, Vol. 34 (2011) 165.

accountability by putting their name to the reasons that they write.¹⁹ We know of course that for the SCC these reasons are actually negotiated products of a collegial “circulate and revise” process, but this qualifies rather than obliterates the specific focused responsibility of the lead author, and we evaluate the performance of specific judges, for praise or blame, in terms of these attributed reasons. ‘By the Court’ flatly repudiates this expectation: the whole point is that no single judge is identified, no individual accepts responsibility, there is no hint of the “especially me” that such attribution might suggest. The Supreme Court does not adopt this accountability-cloaking device very often, making it obvious that it is a deliberate choice, and that it is therefore important to understand when and why they take the unusual step. The first step toward an understanding of ‘By the Court’ is recognizing the extraordinary nature of this anonymity.

In addition to being anonymous, ‘By the Court’ decisions are also unanimous – although this should be treated as a matter of “usually” rather than “always and by definition.” There are a small number of significant cases where the decision has been presented as a joint judgment of all the judges in the majority despite a divided panel; this is clearly part of the broader phenomenon.²⁰ These are perhaps “failed” ‘By the Court’ decisions, but the attempt to achieve the same combination of anonymity and unanimity is clear. Most of the Supreme Court’s decisions in recent decades are unanimous but not anonymous; I am drawing attention to the smaller number that are both unanimous and anonymous, but I still want to make room under the umbrella for the even smaller handful that are anonymous without being unanimous. *Nadon*²¹ is the most recent example; the *Patriation Reference*²² is the most impressive, with not one but two different sets of anonymous majority reasons for the two questions that the reference needed to address both of which are answered by a jointly-authored dissent, and the *Exported Natural Gas Reference*²³ is an intriguing echo; ²⁴ *Irwin Toy*²⁵ is perhaps the one that stretches the notion the

¹⁹ Lasser highlights this practice as anchoring an important difference between the civilian and the common law system, and justifying a more discursive and policy-conscious style of judicial decision making. See Michel Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press, 2009)

²⁰ It was an email exchange with Prof. Jamie Cameron of Osgoode Hall Law School that jolted me off the unanimity position, a recalibration of the enquiry that was enormously fruitful, and I take this occasion to express my appreciation.

²¹ *Reference re Supreme Court Act ss. 5 & 6* 2014 SCC 21, [2014] 1 S.C.R. 433

²² *Re: Resolution to Amend the Constitution* [1981] 1 S.C.R. 753

²³ *Re: Exported Natural Gas Tax* [1982] 1 SCR 1004.

²⁴ The same highly unusual “joint judgment faced by joint dissent” format appears in the Court’s recent decision in “*Carter 2*” – the granting in 2016 of the government’s request for an extension of the suspended invalidity of the Criminal Code sections on assisted suicide – with a joint judgment by five justices confronting a joint dissent by four. Since this was a fairly brief decision on a motion, rather than a full decision

furthest, co-authored by the three judges in the majority of a five judge panel. Purists might exclude these, but if anonymity is the true core of the phenomenon, then the lack of unanimity (often to the extent of a single solo dissent) is a distinction without a difference.

Toward a History of 'By the Court'

When was the first 'By the Court'? Readers will expect me to say 1979, but that would be wrong; the right answer is 1893,²⁶ or perhaps even 1891.²⁷

How many 'By the Courts' have there been? Readers will expect me to say something in the neighborhood of a couple of dozen, but that would be wrong; the correct answer is just over 500.

These answers are strictly accurate, but they are at the same time somewhat unfair, because the hundreds of early 'By the Court's were short decisions by small panels, often dealing with procedural or jurisdictional issues through a consideration of applications and motions, and rarely involving reasons that exceed two or three pages of text.²⁸ These cases are significant in terms of the institutional history of the Court,²⁹ but they are thin gruel indeed for expectations that have been shaped by cases like *Carter* or the *Quebec Secession Reference*.

So I will put aside what we might call the "minor" tradition, for all that it never came to an end and still accounts for the larger number of the "By the Court" judgments even today. I will focus instead on the more recent "grand" tradition, the one that involves major, and almost always constitutional, decisions of some profile and significance. Everything from this point will assume this adjusted focus; when I say "By the Court" it will henceforth mean "in the grand tradition."

Even this story, however, does not start when most people assume it does, which is to say with the Laskin Court's 1979 decisions in the politically explosive language

on appeal, it is not included in this discussion. See *Carter v. Canada (Attorney General)* 2016 SCC 4.

²⁵ *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 SCR 927.

²⁶ See *Baker v. La Societe de Construction Metropolitaine* (1893) 22 S.C.R. 364.

²⁷ See *Moir v. Corporation of the Village of Huntington* (1891) 19 S.C.R. 363.

²⁸ For a detailed consideration of this earlier "minor tradition" see Marc Zanoni, "An Early History of the 'By the Court' Decisions on the Supreme Court of Canada" MA Thesis, University of Lethbridge, 2016.

²⁹ As Snell and Vaughan point out, questions of the Supreme Court's jurisdictional limits, and the development of shared understandings about procedure, were important matters that needed to be sorted out, a process that took several decades; collectively if not individually these cases are therefore a significant part of the Court's evolution. See James G. Snell and Frederick Vaughan, *The Supreme Court: History of the Institution* (Osgoode Society, 1985)

cases of *Blaikie*³⁰ and *Forest*.³¹ The first true “By the Court” judgment in the grand tradition came a dozen years earlier in the *B.C. Offshore Mineral Reference*³² in November 1967, and the second was the *Board of Transport Commissioners*³³ case two weeks later. The dozen years of ‘By the Court’ silence separating them from the pair of language cases is worth noting, although it may mean little more than that constitutional cases were thin on the ground, unanimous decisions in those cases even more so. But clearly the Chief Justice presiding over the initial introduction of the practice was not Laskin but Cartwright.

All “first times” call for an explanation – dramatic new practices do not emerge spontaneously out of the blue, especially for judicial institutions whose authority is so deeply embedded in tradition and continuity. What was it that induced the Supreme Court to move the ‘By the Court’ format from minor and usually procedural cases to the center stage of major constitutional decisions? The critical event seems to have been one of the Supreme Court’s most embarrassing moments, namely the Steven Truscott affair.³⁴ The case was so unique, and the set of reasons it generated so unusual, that it is less the first true ‘By the Court’ than an important destabilizing moment of transition – an unusual event provoking an extraordinary response, but one that was thereby established as a model available for wider (but not general) subsequent application. That is to say: I suggest a strong form of path dependence – absent *Truscott*, there would have been no grand tradition of ‘By the Court’. The decisions in *Offshore Mineral Reference* and *Board of Transport Commissioners* took that particular form because they could draw on the recent example of *Truscott*; and a dozen years later *Blaikie*³⁵ and *Forest*³⁶ could do likewise because the continuing members of the Court remembered the earlier trilogy. At the center of the initial choice was Cartwright; at the center of the sequel were Martland and Ritchie.

As all will remember, Truscott was a 14 year-old student who was convicted on the basis of circumstantial evidence of the rape and murder of classmate Lynne Harper and sentenced to hang; an appeal to the Ontario Court of Appeal was unanimously dismissed, and an application for leave to appeal to the Supreme Court was rejected by a five-judge panel, although the Diefenbaker government commuted the death penalty to life imprisonment. But public unhappiness with the trial and its aftermath persisted, and several years later the pressure on the federal government was still such that they felt they had to do something. The “something” that they settled on involved posing a reference question to the Supreme Court, essentially

³⁰ *Attorney General of Quebec v. Blaikie et al* [1979] 2 SCR 1016.

³¹ *Attorney General of Manitoba v. Forest* [1979] 2 SCR 1032.

³² *Reference re Offshore Mineral Rights* [1967] S.C.R. 792, delivered November 7 1967.

³³ *The Queen v. Board of Transport Commissioners* [1968] S.C.R. 118, delivered November 20 1967.

³⁴ *Reference Re: Steven Murray Truscott* [1967] S.C.R. 309, delivered May 4 1967.

³⁵ *Blaikie v. Attorney General of Quebec* [1979] 2 S.C.R. 1016.

³⁶ *Forest v. Attorney General of Manitoba* [1979] 2 S.C.R. 1032.

asking: had you heard the appeal that you denied leave to eight years ago, would you have allowed it?

There is no way that this could not have been at least unwelcome and at most highly offensive to the Court,³⁷ because it was effectively asking them to second-guess their own earlier decision.³⁸ The discomfort was exacerbated by the fact that four of the five judges from the earlier leave to appeal panel were still on the Court, including the Chief Justice himself.³⁹ The Truscott case had drawn extraordinary public criticism that showed no signs of dying down, the government was now passing the buck, and the Court's own earlier involvement had already made it part of the controversy, such that it could not distance itself from what might otherwise have been framed as a lower court misstep. In the event, the Court chose to stand firm, and it did so by issuing a truly extraordinary decision. After an appeal process that looked more like a trial than an appeal – stretching over several days with expert testimony and extensive cross-examination⁴⁰ – and in an appellate judgment that resembled a trial judgment for its exceptional length and its detailed focus on specific pieces of evidence and extended direct quotations from witnesses, they insisted that the evidence pointed to Truscott as the only possible culprit. On the nine-judge full court panel, only one, Justice Emmett Hall, dissented (at comparable length); the enduring resentments that accompanied him for the rest of his service on the Court show how strong the feelings within the institution were running.⁴¹

The most obvious way for the Court to have spoken with clarity and firmness, especially at a time when fragmented panels were the norm and explicitly identified majority judgments were just emerging, would have been an all-but-one majority judgment made more emphatic by being delivered by the Chief Justice. This

³⁷ Although it was not unprecedented – *R. v. Coffin* [1956] S.C.R. 191 similarly responded to a federal government reference asking the Court how it would have dealt with an appeal after it had denied the application for leave in that appeal. *Reference re Milgaard* [1992] 1 S.C.R. 866 is a comparable third example.

³⁸ Technically, not quite: the Criminal Code had been amended in the meantime, and the reference asked what would have happened to the earlier application had those amendments been in place, but given a decade of public controversy over the case, I doubt this was enough to defuse the implicit challenge.

³⁹ I was not able to find the composition of the 1959 leave to appeal panel in any of the books or articles on the Truscott affair; the Registrar of the Supreme Court was kind enough to send me a copy of the record of the panel's decision.

⁴⁰ To quote from the headnotes in the Supreme Court Reports: "At this hearing, the Court received a large body of evidence, much of it relating to the medical aspects of the case and also heard the oral evidence of the accused who had not given evidence at the trial." *Reference Re: Steven Murray Truscott* [1967] S.C.R. 309.

⁴¹ Regarding "enduring resentments" see Frederick Vaughan, *Aggressive in Pursuit: The Life of Justice Emmett Hall* (University of Toronto Press, 2004). Vaughan also alludes to this in his "Emmett M. Hall: A Profile of the Judicial Temperament" *Osgoode Hall Law Journal*, Vol. 15 (1977) 306.

possibility was presumably undercut by the Chief Justice's involvement in the earlier leave-to-appeal panel, which would have enhanced the "I still agree with myself" overtones that many thought had rendered the use of the reference process problematic from the beginning. The Court opted instead for a united-front "joint opinion"⁴² by eight judges listed by name. It had never done such a thing before, but any "first ever" practice is necessarily available for subsequent emulation in different circumstances, and this is what happened six months later, in the two constitutional decisions in November. Since these two later decisions were unanimous they took the form of "joint opinion(s) of the Court".⁴³

The Laskin Court's language decisions of 1979 therefore represent not innovation but revival – and given that two members of the panels for those 1979 cases (namely Martland and Ritchie) had served on all three of the 1967 panels, it seems plausible to present their own experiences and memories as the basis for a conscious and deliberate revival. Laskin has a well-deserved reputation as the great watershed Chief Justice, presiding over the transition from the "old" Supreme Court that gutted the Diefenbaker Bill of Rights to the "new" Supreme Court celebrated today, but the credit for the innovation of the "By the Court" judgment belongs not to Laskin but to one of his predecessors, namely Cartwright.⁴⁴

Creating the Inventory of 'By the Court'

I have defined the phenomenon, described its early history and its emergence, and narrowed the focus to the "grand tradition" of major cases, which I will somewhat generously define as reserved judgments with reasons running over 4000 words.⁴⁵ There have been 50 of these in the 48 years since 1967, a number that shrinks to 45 if we treat companion cases (of which there have been three pairs and one triplet) as single examples. I have already spoken about the two early examples from the

⁴² It seems worth noting that the Supreme Court has only used the "joint opinion" self-description for a decision on three occasions, those three being *Truscott*, the *Offshore Mineral Reference*, and *Board of Transport Commissioners*.

⁴³ *Truscott* and *Offshore Minerals* both being federal reference questions, "joint opinion" is the precisely correct term; but *Board of Transport Commissioners* was a straightforward appeal from a decision of the Ontario Court of Appeal, and therefore presumably should have been labeled a "joint judgment." More recent usage has been more rigorous and consistent on the judgment/opinion distinction.

⁴⁴ Technically to Taschereau, who was still Chief Justice for *Truscott* (but not for *Offshore Minerals* and *Board of Transport Commissioners*), but as Vaughan's biography of Hall explains as delicately as possible, Taschereau was failing by the time of the *Truscott* hearings, and Cartwright – his successor presumptive – was clearly in charge.

⁴⁵ But I will stretch the point to include the much shorter decision in *Forest*, on the grounds that *Blaikie/Forest* are companion cases that should in some sense be treated as a package.

Cartwright Court in 1967; I will now provide an overview of the “grand tradition” By the Court judgments for each of the subsequent Chief Justiceships.

a. By the Court: The Laskin Court

The Laskin Court handed down nine major ‘By the Court’ judgments over a period of five years (stretching over six different calendar years). The focus is striking: six of the nine cases are reference cases posed by governments (federal or provincial), and the other three are direct constitutional challenges to the actions of provincial governments. The loose generalization that one can often find in the literature is that ‘By the Court’ judgments are all about constitutional law, and this decision string for the Laskin Court completely vindicates this notion. For the Laskin Court, we can make the generalization even more specific: By the Court judgments are all about federalism, and mostly about reference cases.

Table 1: “By the Court” judgments of the Laskin Court, 1973-1984

Case	Citation	Words	Subject
<i>Blaikie 1 v. A.G. (Quebec)</i> *	[1979] 2 SCR 1016	4,032	Federalism/Language
<i>Forest v A.G.(Manitoba)</i> *	[1979] 2 SCR 1032	1,816	Federalism/Language
<i>Re Upper House</i>	[1980] 1 SCR 54	7,245	Federalism
<i>Blaikie 2 v A.G. Quebec</i>	[1981] 1 SCR 312	6,424	Federalism/Language
<i>Patriation Reference</i>	[1981] 1 SCR 713	28,743	Federalism
<i>Re Exported Natural Gas</i>	[1982] 1 SCR 1004	12,811	Federalism
<i>Re Quebec Veto</i>	[1982] 2 SCR 793	7,768	Federalism
<i>McEvoy v N.B.</i>	[1983] 1 SCR 271	5,569	Federalism
<i>Re Nfld Continental Shelf</i>	[1984] 1 SCR 86	12,758	Federalism

Note: * = companion cases⁴⁶

But if we say “the Laskin Court,” are we necessarily saying Laskin? To put it in other words: what is really happening behind the veil of ‘By the Court’? One possibility is that the judgment really is a collective process to an extent far beyond the circulate-and-revise process that the Court usually follows.⁴⁷ In another article, I have used

⁴⁶ I note that *Blaikie 1* and *Forest* are not “pure” companion cases because they were not argued before the Court on the same day, nor were they considered by the same panel of judges, although judgment was delivered on the same day and they are directly sequential in the *Supreme Court Reports*; I think under the circumstances it is more useful than misleading to consider them as companion cases.

⁴⁷ My research has turned up only a single “By the Board” decision of the Judicial Committee of the Privy Council in this new century, and that was explained in the opening sentence in terms of every member of the panel having participated to such an extent that it would have been misleading to attribute it to a single individual; the case was *Cukurova Finance International Ltd. v Alfa Telecom Turkey Ltd*, [2013]

function word analysis⁴⁸ to explore the question of who was the initial drafter of the 'By the Court' judgments, which undermines the the "strong committee" theory of 'By the Court' by demonstrating that the methodology points usually to a single judge and only sometimes to a possible pair of judges⁴⁹ as the most likely writers; only for a single case is there such a multi-way tie as to suggest a team process.

The second possibility is that 'By the Court' is a *nom de plume* for a judgment that is actually written by the Chief Justice, a sort of judicial equivalent of the "royal we" (or "majestic plural"). In general terms, this is not borne out by the function word analysis described above; Chief Justices do the initial drafting for some but by no means all or even most of the 'By the Court' decisions. The "first among equals" leadership of the modern Chief Justice is a phenomenon that is not completely understood, but it would be a serious overstatement to reduce 'By the Court' to such a narrow framing.

This therefore leaves us with the third possibility: behind the façade of 'By the Court', it is largely business as usual with the Supreme Court, which is to say that the assignment of the responsibility of drafting the initial reasons is handled on the basis of a rotation between a number of judges, tilted strongly toward the more senior members of the Court.⁵⁰ But this, of course, just knocks out two "easy" answers as to what 'By the Court' is all about, and leaves the "why these?" question as mysterious as ever.

UKPC 2. We have had no comparable explanation, within the reasons for judgment or otherwise, of the SCC's use of the format.

⁴⁸ Function word analysis calculates each judge's relative usage patterns for fifty-some of the most common words, and then identifies the most likely author by generating similarity scores with the corresponding usage patterns in the analysis sections of each of the 'By the Court' judgments. See Peter McCormick, "*Nom de Plume: Who Writes the Supreme Court's 'By the Court' Judgments?*" *Dalhousie Law Journal*, forthcoming. The language problem – some judges initially write in English, some in French, and some are "switch-hitters" – is less of a problem than might be anticipated because the *Supreme Court Reports* tell us that almost all of the 'By the Court' judgments were initially written in English.

⁴⁹ Even assuming that the "tie" in function-word similarity scores indicates a two-judge collaboration of this sort (which is itself a bit of a stretch), this would not of itself explain the 'By the Court' format because two-judge co-authorships are a fairly common practice on the modern Supreme Court. See Peter McCormick, "Sharing the Spotlight: Co-Authored Reasons on the Modern Supreme Court of Canada" *Dalhousie Law Journal*, Vol. 34 (2011) 165.

⁵⁰ For a description of "business as usual" in the allocation of the writing of judgments, employing two different methodologies, see Peter McCormick, "Who Writes?: Gender and Judgment Assignment on the Supreme Court of Canada" *Osgoode Hall Law Journal*, Vol. 15 (2014); and Peter McCormick, "Judgment and Opportunity: Assignment of Reasons on the McLachlin Court" *Dalhousie Law Journal*, Vol. 38 (2015).

In the immediate context of the Laskin Court and the specific role of Laskin: there is some reason to doubt that Laskin himself played a strong part in the re-emergence of 'By the Court' in and after 1979. When the device was redeployed in the fall of 1979, Laskin was absent for almost the entire term, hospitalized in Vancouver and returning (to Ottawa but not to full service on the Court) just before the decisions were handed down. He is therefore more likely to have been passenger than leader on those important re-introductory examples. It is also striking that the use of 'By the Court' dates not from the early stages of Laskin's Chief Justiceship but rather from the mid-point, and in particular from the half-term when he was away from the Court. This does not make it impossible for Laskin to have played some role in the innovation, but it makes it less likely.

b. By the Court: The Dickson Court

For the Dickson Court, By the Court judgments are more numerous but their use is considerably more diffuse. Only two involved federalism issues, and one of these was the extended follow-up to *Forest* in the same way that *Blaikie 2* expanded and fulfilled *Blaikie 1*; and three others grew out of the Supreme Court's new challenge of an entrenched Charter of Rights. There is a pair of cases involving First Nations issues, but these are not decisions that loom large in the Court's development of First Nations jurisprudence. And there is a curious pair of relatively short decisions – *Dorval* and *Wigman* – striking for the fact that neither raises any constitutional issue at all. Their inclusion in the "grand tradition" is therefore mildly suspect. These two cases aside, the generalization that "By the Court" is about constitutional law is sustained, although the scope of constitutional concerns addressed is considerably broader. Only one of the cases (*Manitoba Language*) is a reference question, federal or provincial; all the others apparently involved a discretionary proactive choice by the panel to treat this particular case anonymously, although the reasons for this choice are never made explicit.

Table 2: "By the Court" judgments of the Dickson Court 1984-1990

Case	Citation	Words	Subject
A.G. (Quebec) v. Prot. Schools	[1984] 2 SCR 66	8,418	Language/Charter
Air Canada v Dorval	[1985] 1 SCR 861	4,217	Municipal law
Ref. re Manitoba Language	[1985] 1 SCR 721	18,068	Federalism/Language
A.G. (Quebec) v Healy	[1987] 1 SCR 158	6,972	First Nations
Wigman v. R.	[1987] 1 SCR 246	4,783	Criminal law
Canadian Pacific v. Paul	[1988] 2 SCR 654	8,529	First Nations
Canadian National v Clarke	[1988] 2 SCR 680	9,190	Federalism
Ford v A-G (Quebec)*	[1988] 2 SCR 713	24,634	Language/Charter
Devine v. A-G (Quebec)*	[1988] 2 SCR 790	9,277	Language/Charter
Irwin Toy Ltd v. A-G (Quebec)	[1989] 1 SCR 927	22,707	Charter
Daigle v Tremblay	[1989] 2 SCR 530	13,593	Charter

Note: * = companion cases

Eleven examples in six years certainly suggests a vigorous and deliberate ‘By the Court’ strategy on the part of Chief Justice Dickson, but the impression needs to be adjusted in light of the fact that some of the examples are clearly less a matter of strategic choice than of administrative convenience, a way of dealing with “problem” cases where a judgment simply could not be attributed in the “normal” way. As the Sharp and Roach biography shows, the Dickson Court had significant and recurring problems with the chronic poor health of several of the judges, aggravating the double challenge of a high case load and the pressure of dealing with the precedentially critical “first generation” of Charter decisions. This resulted in several ‘By the Court’ decisions that we might think as “accidental”, and the purest example is *Healy*.⁵¹ After a standard ‘By the Court’ beginning (“judgment delivered by THE COURT”), the actual text begins “We adopt the reasons for judgment written and circulated by our late and much respected Justice Chouinard during the Fall Term. The reasons follow.” That is to say: the ‘By the Court’ format notwithstanding, there is an attributed solo author, but under such circumstances that it could not be handled in the usual fashion.

The major language decisions of *Ford* and *Devine* are examples of somewhat similar circumstances.⁵² At his request, Le Dain had been assigned the drafting of the reasons for judgment and had circulated a version during the summer of 1988, only to be incapacitated and hospitalized in the fall – so much so that the work of revising the initial draft fell to Lamer and Wilson. Le Dain’s condition was serious enough that he could not sign his name to the final version, either as attributed author or even as participating and judgment-supporting panel member, and this is why the *Supreme Court Reports* indicate (in a way that is technically correct but still profoundly misleading) that he “did not participate in the judgment.” The absence of a *Healy*-style first sentence is presumably explained by the difficulty in finding an explanation that would adequately cover the ground without embarrassing anyone. *Canadian Pacific v. Paul* (handed down the same day as *Ford* and *Devine*) may be another example, with a seven-judge panel reduced by three retirements, pushing the Court very close to needing a rehearing of the case.⁵³ On function word analysis, the most likely author is Estey – but he had to be listed as “did not participate” because more than six months had elapsed since his retirement.

⁵¹ *A.G. Quebec v. Healy* [1987] 1 S.C.R. 158

⁵² See Sharpe & Roach, *Dickson: A Judge’s Journey*, pp427-432. There is no suggestion that these decisions would have taken the ‘By the Court’ appearance had Le Dain been able to follow through with the revisions himself.

⁵³ Under Supreme Court rules, five judges is the minimum for hearing an appeal, but four judges still able to “participate” in the judgment is the minimum for delivering a decision, and this only when the parties have consented to it. Judges can still participate in delivering a judgment for a case where they heard the oral arguments, but only for a period of six months after retirement.

The reduced count of seven ‘By the Court’ decisions in six years is still worthy of note, but it is curious – and further undermines any impression of a considered consolidation of the practice – that a further pair of them (*Dorval* in 1985 and *Wigman* in 1987) raise no constitutional issues whatever.

c. By the Court: the Lamer Court

The Lamer Court delivered half a dozen substantial ‘By the Court’ judgments; one was yet another installment of the Manitoba language litigation (*Forest* being “Manitoba 1”, “Manitoba 2” showing up for Dickson, and now “Manitoba 3” for Lamer), and a second was a relatively short and minor case on a municipal vote in Quebec (*Sinclair*). The other four, however, bracket the major constitutional issues of recent decades: two significant Charter cases (*Tobias* on judicial independence, *Libman* on limiting election expenses), arguably the most important case to date on federalism (*Secession Reference*), and one of the most important (certainly the most explosive and controversial) of recent cases dealing with First Nations Issues (*Marshall 2*). On the one hand, the number of these cases has declined to the point where there is a five-year period without a single example, the longest such gap since 1979; on the other hand, the focus of the subject matter is wider and the importance of (some of) the cases is unquestionable.

Table 3: “By the Court” judgments of the Lamer Court 1990-1999

Case	Citation	Words	Subject
Ref. re Manitoba Language	[1992] 1 SCR212	5,985	Federalism/Language
Sinclair v. A.G.(Quebec)	[1992] 1 SCR 579	4,046	Federalism/Language
Canada v. Tobias	[1997] 3 SCR 391	13,765	Charter
Libman v. Quebec	[1997] 3 SCR 569	15,477	Charter
Ref. re Secession of Quebec	[1998] 2 SCR 217	21,587	Federalism
R. v. Marshall 2	[1999] 3 SCR 533	9,108	First Nations

d. By the Court: the McLachlin Court

The ‘By the Court’ list for the McLachlin Court is by far the longest and most impressive of all the Chief Justiceships. This is not just a reflection of the fact that (as of September 2014) McLachlin became the longest-serving Chief Justice in the history of the institution; the “per year” count is slightly below that for the Dickson Court (and well above it if we exclude the “accidental” ‘By the Court’s). More to the point, however, a high proportion of the cases on the McLachlin list are robust cases of considerable weight, well above the 9,000 words that is the average length of the reasons for judgment in a reserved decision. This suggests that the use of ‘By the Court’ is becoming not just more frequent but also more targeted and deliberate.

Table 4: “By the Court” Judgments of the McLachlin Court, 2000-present

Case	Citation	Words	Subject
Reference Re Firearms Act	2000 SCC 31	13,655	Federalism
R. v. Latimer	2001 SCC 1	10,672	Charter
USA v Burns	2001 SCC 7	20,051	Charter
Suresh v. Canada	2002 SCC 1	18,008	Charter
R. v. Powley*	2003 SCC 43	6,422	First Nations
R. v. Blais*	2003 SCC 44	5,460	First Nations
Wewaykum v. Canada	2003 SCC 45	11,497	Supreme Court
Reference re Same Sex Marriage	2004 SCC 79	7,140	Federalism/Charter
Solski v. A.G. (Quebec)*	2005 SCC 14	10,669	Language/Charter
Gosselin v. A.G. (Quebec)*	2005 SCC 15	4,034	Language/Charter
Okwubi v. A.G. (Quebec)*	2005 SCC 16	9,355	Language/Charter
Mugesera v Canada	2005 SCC 40	19,749	Charter
Provincial Court Judges Assn.	2005 SCC 44	19,523	Judicial independence
Canada (Justice) v. Khadr	2008 SCC 28	4,448	Charter
BCE v. 1976 Debenture Holders	2008 SCC 69	15,709	Commercial law
Canada (Prime Minister) v. Khadr	2010 SCC 3	5,446	Charter
R. v Ahmed	2011 SCC 6	9,576	Charter
Reference Re Securities Act	2011 SCC 66	14,042	Federalism
Re Supreme Court Act (Nadon)	2014 SCC 21	18,513	Federalism
Reference Re Senate Reform	2014 SCC 32	12,575	Federalism
Carter v. Canada (A.G.)	2015 SCC 5	16,309	Charter
R. v. Smith	2015 SCC 34	3,778	Charter

Note: * = companion cases

Two cases in particular make the point about this targeting. The first is the *Provincial Judges* case, which is directed to clarifying certain aspects of the process for determining judicial salaries that remained problematic after the blockbuster judicial independence decision in 1997.⁵⁴ The point here is not simply that this decision is ‘By the Court’ or that it is one of the longest and therefore presumably most comprehensive of the McLachlin Court’s ‘By the Court’ judgments, although this is no small thing. More importantly, this is the very first ‘By the Court’ judgment in a remarkably extended string of Supreme Court decisions touching on the matter of judicial independence,⁵⁵ those earlier decisions having been delivered by a surprising diversity of judges. It has something of the feeling of a very deliberate period at the end of a very long sentence, and therefore a marked and very significant use of ‘By the Court’.

⁵⁴ *Reference re Remuneration of Judges of Provincial Court of P.E.I.* [1997] 3 S.C.R. 3

⁵⁵ For an extended discussion of that string of cases see Peter McCormick, “New Questions about an Old Concept: The Supreme Court of Canada’s Judicial Independence Jurisprudence” *Canadian Journal of Political Science* Vol. 37 (2004)

The second is in some ways the most curious – the decision in *BCE*, which has been welcomed⁵⁶ (and also criticized⁵⁷) as an important landmark decision in company law, dealing with the obligations of corporate boards. This is only the third ‘By the Court’ judgment in what I have been calling the grand tradition not to raise any constitutional issues whatever, the other two being the Dickson Court’s short and clearly less portentous decisions in *Dorval* and *Wigman*. With the obvious caution that it takes more than one swallow to signal a summer, this may be a first step toward the conscious use of ‘By the Court’ judgments for decisions that are intended as major and hopefully landmark contributions to unsettled corners of the law, and doing so with a somewhat wider sweep than the constitutional law issues that have provided the focus of the practice to date. However, this is not to deny for a second that the center of gravity of the device remains in the area of constitutional law, and the McLachlin Court has clearly boxed the compass in this regard with decisions dealing with federalism issues, Charter questions, and First Nations matters.

From List to Story

When I started on this project, I was confident that I knew the general outlines of the history of ‘By the Court’. That story would have started with Laskin, who (I then thought) was directly involved in the emergence of the innovation, but whose use of ‘By the Court’ was as tentative and occasional as the term “emergent innovation” implies, the more so because it began only rather late in the Chief Justiceship when his health was already failing. The story would have continued with a more frequent and enthusiastic use of the device under Dickson’s leadership, with almost a dozen solid examples that included some of the most urgent and controversial issues of the day as the language question continued to heat up and the Charter jurisprudence began to take shape. I would have described this as the “coming of age” of the practice, constrained first by the short period during which Dickson served as Chief Justice and second by a paucity of the federal reference cases that had already seemed to be earning pride of place for the practice. Lamer, however, delivered a mixed message. On the one hand, with half as many ‘By the Court’ decisions as Dickson in a Chief Justiceship that was twice as long, seemed to point to a gradual decline, a possible ending of the “glory days.” It is particularly striking that *Quebec Sales Tax Reference* in 1994 is the only unanimous decision on a federal reference question in the last fifty years that was NOT “By the Court”. On the other hand, the *Quebec Secession Reference* is arguably the quintessential ‘By the Court’ judgment, the poster-child that would lead off any focused discussion of the practice. Finally, McLachlin seemed to represent a significant revival, with a constitutional “By the Court” decision in the first six months and a subsequent per-year delivery approaching that of the Dickson Court. This would have been a story with no clear trajectory, perhaps only highlighting the discretionary role of Chief

⁵⁶ see Jeffrey Bone, “The Supreme Court Revisiting Corporate Accountability” *Alberta Law Review Online Supplement* (n.d.) at <http://www.albertalawreview.com>.

⁵⁷ See e.g. Edward Waitzer & Johnny Jaswal, “Peoples, BCE and the Good Corporate ‘Citizen’” *Osgoode Hall Law Journal*, Vol. 47 (2009) 439.

Justices, which would leave things very much open after 2018 when McLachlin retires and a new Chief Justice chooses whether to step on the gas or the brakes.

I would now back away from much of that description and will instead use the preceding chronology to deliver rather a different message. And I will do so by drawing identifying three substantively different sets of 'By the Court' decisions,⁵⁸ describing how their interplay over time generates rather a different conclusion.

a. First, the reactive conversation set

The most obvious subset of the 'By the Court' lists above is the cases involving answers to reference questions from government. I describe it as "reactive" for the obvious reason that the government has to have made the decision to ask the question in the first place; I call it a "conversation" because, as I will argue at more length below, the 'By the Court' device turns this into a conversation between government as an institution and the Supreme Court as a unified institution.

The reference process is an unusual aspect of Canadian practice that permits the government to put hypothetical or anticipatory questions before the Court. This makes them quite different from normal appeals, which involve cases that arise out of specific concrete circumstances, that come with a context that has been judicially explored by the lower courts, that have an established set of relevant facts that have been tested through an adversary process, and that are essentially retrospective, arriving at general and abstract questions only as they emerge from those concrete fact and law circumstances. By contrast, reference questions make the Court function in a way that makes it more like a legislature:⁵⁹ it is asked to work in a judicial-factual vacuum, answering hypothetical questions in general terms, and implicitly committing itself in advance to rules or principles that have not been tested in concrete circumstances or sounded out in lower court proceedings.⁶⁰

⁵⁸ Technically four, of course, if we include the "accidental" set described above for the Dickson Court, where 'By the Court' seems to have served as an administrative necessity for decisions initially assigned in the normal way that could not be reported in the normal way. In *Healy*, Chouinard had died in the interval; in *Ford* and *Devine*, LeDain had suffered a breakdown; in *Clark*, three retirements had reduced the panel to its constitutional minimum. There is no clear reason to think that this list could be expanded by any further examples

⁵⁹ This is why, when Australia amended its constitution in X to allow the federal government to pose reference questions to its own High Court, that Court promptly decided that the amendment itself was unconstitutional because it violated the principle of the separation of powers. See Helen Irving, "Advisory Opinions, the Rule of Law and the Separation of Powers" *Macquarie Law Journal*, Vol. 4 (2004).

⁶⁰ The Court always formally insists that its decisions in federal reference cases (which it self-describes as "opinions" rather than "judgments") are purely advisory and tentative and cannot serve as precedent in the same way as normal judgments;

To consider references from the federal government first: the use of federal references is subject to an easily visible ebb and flow, with periods of intense usage alternating with intervals of their complete absence – three in three years in the 1950s, followed by none for a decade; only one in the dozen years before 2010 but then six in five years – but on my count there have been 29 of these since the end of World War II, and these are shown in the table.

Table 5: Supreme Court decisions in federal reference cases, 1946-present

Reference	Citation	Panel	Unan?	Joint?
Re O.I.C. re Persons of Japanese Race	[1946] SCR 248	7	seriatim	No
Re Farm Security Act (Sask)	[1947] SCR 394	6	seriatim	No
Re Minimum Wage Act (Sask)	[1948] SCR 248	6	seriatim	No
Re Validity of Dairy Industry Act	[1949] SCR 1	7	seriatim	No
Re Wartime Leaseholds	[1950] SCR 124	7	seriatim	No
Re Bowater's Pulp Mills	[1950] SCR 608	7	seriatim	No
Re Industrial Relations Act	[1955] SCR 529	9	seriatim	No
Re: Regina v. Coffin	[1956] SCR 191	7	seriatim	No
Re: Farm Products Marketing Act	[1957] SCR 198	8	seriatim	No
Re Truscott	[1967] SCR 309	9	Divided	Yes
Re Offshore Minerals	[1967] SCR 792	7	Unanimous	Yes
Re s.16 of Crim. Law Amendments	[1970] SCR 777	9	Divided	No
Re Anti-Inflation Act	[1976] 2 SCR 373	9	Divided	No
Re Upper House	[1980] 1 SCR 54	8	Unanimous	Yes
Re Newfoundland Continental Shelf	[1984] 1 SCR 86	7	Unanimous	Yes
Re Manitoba Language Rights	[1985] 1 SCR 721	7	Unanimous	Yes
Re Milgaard	[1992] 1 SCR 866	5	Unanimous	Yes
Re Milgaard	[1992] 1 SCR 875	5	Unanimous	Yes
Re Ng Extradition	[1991] 2 SCR 858	7	Divided	No
Re Manitoba Language Rights	[1992] 1 SCR 212	9	Unanimous	Yes
Re Quebec Sales Tax	[1994] 2 SCR 715	7	Unanimous	No
Re Secession of Quebec	[1998] 2 SCR 217	9	Unanimous	Yes
Re Same Sex Marriage	2004 SCC 79	9	Unanimous	Yes
Re Assisted Human Reproduction Act	2010 SCC 61	9	Divided	No
Re Securities Act	2011 SCC 66	9	Unanimous	Yes
Re Broadcasting Act*	2012 SCC 4	9	Unanimous	Yes
Re Broadcasting Regulatory Policy*	2012 SCC 68	9	Divided	No
Re Supreme Court Act ss 5 & 6 [Nadon]	2014 SCC 21	7	Divided	Yes
Re Senate Reform	2014 SCC 32	8	Unanimous	Yes

* = federal references to Federal Court, appealed to SCC

Pushing the list back to 1946 highlights the dramatic change represented by *Truscott* in 1967. In the twelve years after the end of World War II, there were nine federal references. All were dealt with in the *seriatim* style: every judge on the panel wrote his own freestanding reasons without referring in any way to any of the others or adopting any part of them. These separate reasons may have covered very similar ground and reached very similar conclusions, but the multiple independent versions needed to be parsed closely to find the real core of an institutionally

in practice, it cites its own prior reference case decisions in just the same way as other decisions, and it has never simply repudiated them in subsequent litigation.

supported position. The abolition of appeals to the Judicial Committee of the Privy Council in 1949 had no effect on this judgment delivery style.

But *Truscott* is the great watershed – every single reference case before, but not a single such case afterward, was dealt with *seriatim*. There have been 20 reference cases in and after 1967; thirteen were unanimous, and fourteen were resolved by joint judgments, anonymous in the sense that they lacked the normal author-identifying attribution. The overlap of those two categories goes some way to explaining why ‘By the Court’ has generally been taken as implying both unanimity and anonymity: only one post-1967 reference case was unanimous without being anonymous, and only two were anonymous without being unanimous.

The significance of ‘By the Court’ in this situation is that it effectively positions the Supreme Court as a unified institution providing the other half of a conversation about national governance with the federal government. It is not that the government was not bound by the actual outcome of previous reference cases; and it is certainly not to deny that some had significant impact. The point is rather that there was no clear unified statement from the Court as an institution, no single firm collective declaration of the law and the reasons for it. It is the clarity of this product in the directly policy-relevant moment of a federal reference that makes ‘By the Court’ a significant element in the emergence of the Court as a major national institution. But one major implication of this powerful opportunity for influence is that it is necessarily reactive: one can only answer a question when and if one has been asked the question in the first place.⁶¹

To this point I have been discussing federal reference questions, but in Canadian usage the provinces have also given themselves the parallel power vis-à-vis their own provincial highest courts, with an option of appealing that decision to the Supreme Court itself. It is also worth noting, however, that these cases are not normally resolved through ‘By the Court’ decisions. Despite an early appearance to the contrary when the Laskin Court used ‘By the Court’ for provincial references as regularly and as often as federal references – the set includes the *Patriation Reference*,⁶² the *Quebec Veto Reference*,⁶³ the *Exported Natural Gas Reference*,⁶⁴ and

⁶¹ The Court can of course expand the question beyond what the government appears to have had in mind (as they arguably did in the *Quebec Secession Reference*, going beyond the “is there a right to unilateral secession” question – to which the answer was “no” – to lay out some of the ground rules for a non-unilateral secession); and by the same token they can refuse to answer one or more of the questions, (as they did in the *Same-Sex Marriage Reference*).

⁶² *Re: Resolution to Amend the Constitution* [1981] 1 S.C.R. 753

⁶³ *Re: Objection by Quebec to a Resolution to amend the Constitution* [1982] 2 S.C.R. 793.

⁶⁴ *Re: Exported Natural Gas Tax* [1982] 1 S.C.R. 1004

*McEvoy*⁶⁵ – only a single more recent provincial reference (*Firearms Reference*⁶⁶) has been dealt with this way. This is despite the fact that the Supreme Court has dealt with as many provincial as federal references in the last fifty years, that most of them have been unanimous, and that a number of them have dealt with major constitutional issues.

As a first important finding, then: ‘By the Court’ has been developed as the Court’s preferred way of dealing with federal (but not provincial) reference cases, provided unanimity can be achieved but on occasion even when it cannot.

Second, the judicial institutional set

The second set of ‘By the Court’ judgments involves cases that deal with issues that relate directly to the judiciary as an institution, sometimes focusing on the Supreme Court itself and sometimes involving more general matters. The suggested list is:

Table 6: ‘By the Court’ decisions: the judicial institutional set

Case	Citation	Words	Subject
<i>Re Truscott</i>	[1967] SCR 309	30,000	Other
<i>Canada v. Tobias</i>	[1997] 3 SCR 391	13,765	Judicial Independence
<i>R. v. Marshall 2</i>	[1999] 3 SCR 533	9,108	First Nations
<i>Wewaykum v Canada</i>	2003 SCC 45	11,497	recusal
<i>Mugesara v Canada</i>	2005 SCC 40	19,749	recusal
<i>Provincial Court Judges Assn.</i>	2005 SCC 44	19,523	Judicial independence
<i>R. v Ahmad</i>	2011 SCC 6	9,576	s.96 jurisdiction
<i>Re Supreme Court Act (Nadon)</i>	2014 SCC 21	18,513	Amendments re SCC

Two reference cases (*Truscott* and *Nadon*, the artistically neat book ends of the set) are included again here as well as in the previous section; in a way, they seem to volunteer for such “double counting” because they are two of only a handful cases which use an impersonal attribution style despite a divided panel.

Truscott has been discussed above as an unusual challenge to the prestige of the Supreme Court. *Nadon* was comparably embarrassing, dealing with a unique challenge to the validity of an appointment to the Supreme Court as well as

⁶⁵ *McEvoy v. Attorney-General for New Brunswick* [1983] 1 S.C.R. 704. Although the way that this case is indexed obscures the fact, it originated as a reference by the New Brunswick government to the New Brunswick Court of Appeal.

⁶⁶ *Reference re Firearms Act (Can.)* 2000 SCC 31, [2000] 1 S.C.R. 783.

obliquely raising unsettled questions about the constitutional amending formulae as they relate to the Supreme Court itself. *Wewaykum* and *Mugesara* both involved recusal issues on the Supreme Court, these being critically important to the judiciary because they go to the question of impartiality. *Marshall 2* was a unique institutional response (an extended denial of an application to reconsider “Marshall 1”⁶⁷) to an unexpected and unwelcome public reaction to the earlier decision which had been understood (in a way which *Marshall 2* said was unjustified) very expansively. *Tobiass* and *Provincial Judges Association* are two cases in an extensive string of important (and usually not unanimous) cases revolving around judicial independence issues.⁶⁸ And although the “up front” issue in *Ahmad* was the recurrent dilemma of the balance between individual rights and national security, the major substance of the decision dealt with the jurisdiction of the provincial superior (“Section 96”) courts, and whether a legislative assignment of certain aspects of the case to the Federal Court did or did not violate that jurisdiction.

This is not to say that all cases involving judicial institutional questions, or even all such unanimous cases, are dealt with through the anonymity of ‘By the Court’. Clearly the most important recent case dealing with the judiciary was the 1997 *Remuneration Reference*,⁶⁹ which could have been a joint judgment even over top of LaForest’s vigorous dissent, like *Truscott* and *Nadon*, but it was not. Although not as clear-cut as the first, this set seems firmly enough established to justify identifying judicial institutional matters as a second focus for ‘By the Court’ decisions.

Third: The proactive set

The third use of ‘By the Court’ is the proactive set: the Court decides on its own initiative and for its own reasons that an issue arising in a “normal” appeal (that is to say, not a reference case) deserves this unusual decision format. The label is “proactive” because the decision to elevate the matter to this decision format is made by the Court itself, without any clear external trigger (a federal reference, a judicial institutional issue) to indicate clearly and ahead of time that a case was likely to be decided ‘By the Court.’ In one sense, this is simply a residual category, the cases that are left when those that can be assigned to other categories have been removed. But in another sense, this is the most intriguing and potentially exciting use of ‘By the Court’, involving the most discretionary and inherently open-ended deployment of this new judgment-presentation device, and a standing opportunity to create or to continue or reinforce or expand a precedent in a particularly emphatic way.⁷⁰

⁶⁷ *R. v. Marshall* [1999] 3 SCR 456.

⁶⁸ See Peter McCormick, “New questions About an Old Concept: The Supreme Court of Canada’s Judicial Independence Jurisprudence” *Canadian Journal of Political Science*, Vol. 37 (2004).

⁶⁹ *Reference Re Remuneration of Judges of the Provincial Court of P.E.I.* [1997] 3 SCR 3.

⁷⁰ Or even, as Rainer Knopff intriguingly suggests, to repudiate an earlier decision and visibly change direction on some specific aspect of the law. See Rainer Knopff,

Table 7: 'By the Court' decisions: the "proactive" set

Chief Justice	Case	Citation	Subject
Cartwright	Bd. of Transport Commissioners	[1967] SCR 792	Federalism
Laskin	Blaikie 1/Forest	[1979] 2 SCR 1016, 1032	Federalism/language
Laskin	Blaikie 2	[1981] 1 SCR 312	Federalism/Language
Dickson	Protestant Schools	[1984] 2 SCR 66	Charter/Language
Dickson	Irwin Toy Ltd. v Quebec (A.-G.)	[1989] 1 SCR 927	Charter
Dickson	Tremblay v Daigle	[1989] 2 SCR 530	Charter
Lamer	Libman v Quebec	[1997] 3 SCR 569	Charter
McLachlin	R. v Latimer	2001 SCC 1	Charter
McLachlin	U.S.A. v Burns	2001 SCC 7	Charter
McLachlin	Suresh v Canada	2002 SCC 1	Charter
McLachlin	Powley/Blais	2003 SCC 43, 44	First Nations
McLachlin	Solski/Gosselin/Okwuobi	2005 SCC 14, 15, 16	Charter/Language
McLachlin	Khadr v Canada	2008 SCC 28	Charter
McLachlin	BCE v Debenture Holders	2008 SCC 69	Corporate law
McLachlin	Khadr v Canada	2010 SCC 3	Charter
McLachlin	Carter v Canada	2015 SCC 5	Charter
McLachlin	R. v. Smith	2015 SCC 34	Charter

What is most striking about the list is the extent to which it tilts late – well over half of the cases listed (and two thirds of them if we unfold for separate counting the companion cases of *Powley/Blais* and *Solski/Gosselin/Okwuobi*) are decisions of the McLachlin Court, and they are spread from the very beginning (*Latimer, Burns*) right through to the most recent decisions (*Carter* and *Smith*) of her Chief Justiceship. If it can be said to have a center of gravity, the major element is the Charter and the secondary element is constitutional language issues – this offsetting the fact that the all but invariant focus of the reference cases has been federalism questions.

The mystery that we are left with is why some cases have been selected for this unusual judgment-delivery format while others have not. At time of writing, the McLachlin Court has handed down more than a hundred unanimous constitutional law decisions that meet some minimal threshold (arbitrarily but not unreasonably: reserved judgments over 5,000 words in length), of which fewer than one in six attracts this anonymous treatment. A further question is whether the single recent foray beyond the constitutional law field – namely the landmark decision in *BCE* – is a one-of-a-kind aberration or an early sign of a possible expansion of the practice.

Telling the story: revised version

My initial story line for 'By the Court' as described above must therefore be revised in several important ways:

"Charter Reconsiderations" *National Magazine* Vol. 21 (2012), 38. *Carter* would be an obvious example.

- First, as already detailed, the device was not invented by Laskin himself or by the Laskin Court. The “minor tradition” was part of Supreme Court practice almost since the Court’s earliest days; and the transition to the modern “grand tradition” occurred before Laskin became Chief Justice (indeed, before he had even joined the Court). The central figure in the initial emergence of the modern practice is therefore not Laskin but Cartwright.
- Second, it seems unlikely that Laskin himself played a major part in the revival or continuation of the grand tradition. For one thing, he had earlier spoken on the other side of the issue. The idea of a “single judgment” format, attributed to no one or nominally to the senior member of the panel, had emerged immediately after the end of appeals to the Judicial Committee in 1949; the question was whether the new status of the Supreme Court called for a new style of judgment-delivery. The most vociferous opponent of the idea when it was debated by the Canadian Bar Association was Bora Laskin, who was concerned first that it would silence minority voices on the Court and second that it would convey a misleading impression of simplified certainty on nuanced legal issues.⁷¹ Experience can of course change such preferences, but this *volte face* seems unusually total, especially in the absence of any explicit recantation. For another, Laskin missed out on the intra-panel deliberations in *Blaikie*, and was not even included in the panel for the later-filed *Forest*, for health reasons -- he was hospitalized in Vancouver for most of the 1979 fall term and returned to Ottawa only early in December and to full duties on the Court toward the end of the following January.⁷² The revival of ‘By the Court’ on the Laskin Court in 1979 seems to have happened during the only half-term when Laskin was not a regular full participant in the Court’s internal interactions.
- Third, a good part of the Dickson Court’s apparent embrace of ‘By the Court’ seems to have been an administrative device to accommodate the unusual pressures of poor health and rapid personnel turnover on the Supreme Court in the late 1980s, as indicated above; several of them seem to have involved finding the least misleading way of dealing with unusual problems when the initial drafters of a set of reasons could not, for one reason or another, be attributed in the normal way. A couple of others – *Dorval* and *Wigman* – are curious counter-examples to the otherwise powerful generalization that ‘By the Court’ is used for constitutional decisions. If Laskin’s use of ‘By the Court’ was reluctant, Dickson’s use of it is – first impressions to the contrary notwithstanding – somewhat fitful and unfocused.

⁷¹ See Girard, *Laskin: Bringing Law to Life*, p.187.

⁷² see Girard, *Laskin: Bringing Law to Life* p.448; repeated in Philip Girard, “A Tempest in a Transatlantic Teapot: A Legal Historian’s Critical Analysis of Frederic Bastien’s *La Bataille de Londres*”, *Osgoode Hall Law Journal*, Vol. 51 (2014).

- Fourth, the picture of the Lamer Court as something of a retreat in the use of 'By the Court' is harder to support when I have just finished arguing that the Dickson Court's use of the device was considerably more constrained and qualified than it might have appeared at first glance. Assessing Lamer's use of 'By the Court' is challenging: on the one hand, six cases in ten years is not a particularly impressive count; but on the other hand, one of those six was the *Quebec Secession Reference*, the poster-child of a high-profile high-stakes constitutional decision. What tilts the balance toward my judgment of Lamer's use of the device as constrained is the only example in fifty years of a unanimous opinion in a federal reference question (*Quebec Sales Tax*) that was not handled 'By the Court', a striking departure from what seemed to be the single most generalizable rule in the use of 'By the Court'.
- Fifth, these considerations all combine to make McLachlin's use of 'By the Court' by far the most striking of the set. Her deployment of the device has been more frequent, more consistently applied to major cases, and more explicitly focused on constitutional issues of some significant profile; further, it has recently extended for the first time to a landmark decision (*BCE*) that is not related to constitutional matters. A string of the McLachlin Court's 'By the Court' judgments on federalism issues generated a degree of public confrontation between Court and government that is unprecedented in recent Canadian history. But what is even more striking is that the "pro-active" use of 'By the Court', which is to say the ones that cannot be explained as "accidents" or responses to federal references or dealing with judicial institutional matters, has stepped up so dramatically – "unfold" the companion cases for separate counting, and we can say that the McLachlin Court accounts for fully two thirds of all of these cases. If the Laskin Court revived the practice, the McLachlin Court seems on the way to invigorating it and sending it down this proactive channel.

Conclusion

'By the Court' decisions have been a surprisingly under-explored dimension of the Supreme Court's performance, but fifty years on we can see that there have been about fifty examples of what I have styled the "grand tradition." This style of anonymous judgment has generally been focused on constitutional issues down three different tracks: first, reactively to federal but not provincial reference cases; second, defensively on issues impacting directly on the judiciary; and third, proactively on constitutional issues at the Court's internal discretion. 'By the Court' is a uniquely Canadian development that dates back half a century and has embraced five different Chief Justiceships from Cartwright to McLachlin.

The McLachlin Court has transformed this commentary, to such an extent that it is not too much to say that 'By the Court' has finally come of age. It has been used by the Supreme Court often enough and importantly enough to establish the pattern of

conscious and strategic deployment that one has trouble detecting for the earlier Chief Justiceships. This raises the reason of why it has done so, of what is really going in in this important shift in how the Court handles some of its major cases, and neither in any of its reasons nor in a formal statement nor in the public speeches that the justices often make these days has there been the slightest hint of a focused answer. By way of speculation, then: it may be that McLachlin is concerned that the normal judicial attribution style, especially when the Chief Justice in recent decades has been assuming the responsibility of delivering a disproportionate share of the Court's major decisions, runs the risk of excessively personalizing those major decisions. Even more emphatically than the "normal" unanimous judgment, 'By the Court' depersonalizes and thereby institutionalizes the Court's most important doctrinal statements.

Paradoxically, however, this depersonalization is accompanied by a very personalized element: what will happen when McLachlin herself reaches retirement age in 2018? Will her replacement continue the expansion and regularization of the practice, or allow it to fade (as it vanished under Fauteux after the innovations of Cartwright)? The way that the practice has continued or even accelerated with something now approaching a complete change in the membership of the Court suggests that continuation is rather more likely than atrophy. The impression remains that the 'By the Court' has some institutional momentum behind it even while it establishes a clearer focus in its deployment, such that it may be becoming a significant and permanent element of how the Court does its major business, and perhaps not just its constitutional business.

In any event, McLachlin has done enough that we should now connect the device in its fully developed form not with any of her predecessors but with her own vigorous deployment of it. 'By the Court' has now come of age as an innovative and uniquely Canadian practice for particularly important decisions, primarily but perhaps no longer exclusively with respect to constitutional law, and in the process it has become a more reliable marker of a decision that deserves particular notice. Chief Justice Cartwright was the initial innovator; Chief Justice Laskin presided over its revival; but Chief Justice McLachlin has made it a significant feature of her Chief Justiceship. Given that I have identified 1967 as the year when the "grand tradition" emerged, we are now mere months short of a fiftieth anniversary of the practice, which makes this an appropriate time, and this article an appropriate way, to acknowledge it.