

Justice Suzanne Côté's Reputation as a Dissenter on the Supreme Court of Canada

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Part II

The Changing Court and Court Dynamics

Justice Suzanne Côté’s Reputation as a Dissenter on the Supreme Court of Canada

Vanessa A. MacDonnell*

I. INTRODUCTION

Justice Suzanne Côté was appointed to the Supreme Court of Canada in December 2014. In her brief tenure on the Court she has developed a reputation as a frequent dissenter. In this short paper I examine whether the label is justified. I examine the frequency with which Justice Côté is dissenting, both relative to the overall rate of dissents of the current Supreme Court and to historical standards. I also delve into the nature of her disagreements with the majority, including her highly unconventional practice of dissenting on leave applications. What emerges is a picture of a justice whose willingness to speak in her own voice and to disagree is at odds with the practices of the current Supreme Court, and in particular, with recently retired Chief Justice McLachlin’s efforts to achieve unanimity.¹

Perhaps equally revealing, however, is that the frequency with which Justice Côté disagrees is not necessarily notable by historical standards. In this paper I treat both concurrences and dissents as forms of disagreement.² As Belleau, Johnson & Vickers explain, “In English, the

* Associate Professor, University of Ottawa Faculty of Law. I am grateful to the students in my Supreme Court Seminar for sharpening my understanding of the significance of judges’ life stories for their judicial approach. I am also grateful to Bruce Ryder, Constance Backhouse, Marie-Claire Belleau, Stephen Bindman, Owen Rees, Amy Salyzyn, Michael Plaxton, Adam Dodek, Matan Goldblatt, Leo Russomanno, Ralston MacDonnell and the peer reviewers for useful conversations and comments, and to Sonia Lawrence and Benjamin Berger for inviting me to present on this topic at Osgoode Hall Law School’s 2018 Constitutional Cases Conference. This paper is current to March 25, 2018.

¹ Emmett Macfarlane, “Consensus and Unanimity at the Supreme Court” (2010) 52 S.C.L.R. (2d) 379. On the significance of “authorship” and “voice”, see Marie-Claire Belleau, Rebecca Johnson & Christina Vinters, “Voicing an Opinion: Authorship, Collaboration and the Judgments of Justice Bertha Wilson” (2008) 41 S.C.L.R. (2d) 53 [hereinafter “Belleau, Johnson & Vinters”].

² Mathen explains that “‘Dissent’ can refer, narrowly, to a departure from the majority in both reasoning and result It also can be used more broadly to include a departure with respect to the reasoning but not the result ..., or a departure with respect to the result but not the reasoning Some refer to dissents in the latter category as concurrences.” See Carissima Mathen, “The Upside of Dissent in Equality Jurisprudence” (2013) 63 S.C.L.R. (2d) 111, at 112 n4 [hereinafter “Mathen”].

word ‘concur’ means ‘to agree’, but in law, the concurrence is a form of disagreement. This is perhaps more evident for francophone than anglophone readers since in French, the terms dissent and concurrence are rendered as *dissidences sur les résultats* [dissents on the result] and *dissidences sur les motifs* [dissents on the reasons].³ In some instances, the fact that the concurring judge ultimately agrees with the disposition of the majority is almost beside the point. Drawing on data compiled by Belleau & Johnson on the concurring and dissenting practices of Supreme Court of Canada justices between 1982 and 2007,⁴ I show that Justice Côté’s combined rate of concurrences and dissents does not approach that of the so-called “great dissenters”, including Justices Claire L’Heureux-Dubé and Bertha Wilson.⁵ Her aggregate rate of concurrences and dissents is average when compared to this earlier period. That said, Justice Côté’s rate of dissents exceeds that of the great dissenters. This suggests that however unusual Justice Côté’s dissenting practices may be relative to the current Court, the numbers must be assessed in historical context and with the necessary nuance.

I begin this paper by sketching Justice Côté’s trajectory as a legal professional, drawing on publicly available information. Part III briefly describes the methodology I employed in this study, while Part IV outlines the findings. In Part V, I offer some tentative conclusions about Justice Côté’s rate of dissents, before concluding in Part VI.

II. BACKGROUND

Justice Suzanne Côté was appointed to the Supreme Court of Canada by then Prime Minister Stephen Harper on December 1, 2014, at the age of 56. She replaced Justice Louis LeBel, becoming one of the Supreme Court’s three Quebec judges. Her appointment restored the Court’s composition to four women and five men after the Court sat briefly as six

³ Belleau, Johnson & Vinters, *supra*, note 1, at 55.

⁴ Marie-Claire Belleau & Rebecca Johnson, “Judging Gender: Difference and Dissent at the Supreme Court of Canada” (2008) 15 *International Journal of the Legal Profession* 57 [hereinafter “Belleau & Johnson”].

⁵ Belleau, Johnson & Vinters, *supra*, note 1, at 61; Constance Backhouse, *Claire L’Heureux-Dubé: A Life* (Vancouver: University of British Columbia Press, 2017), at 373-76 [hereinafter “Backhouse”]; Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005), at 453-81 [hereinafter “Girard”].

men and three women.⁶ She is the first woman to be elevated to the Supreme Court directly from practice, and is bilingual.⁷ Justice Côté's appointment occurred after the Harper Government suspended the formal judicial appointments process in the wake of the Nadon controversy.⁸ As such, her appointment was made without the involvement of an advisory committee. She did not appear before a parliamentary committee to answer questions prior to being sworn in.⁹

Justice Côté attended law school at Laval and was called to the bar in 1981. Shortly thereafter, she purchased half of a law practice in Gaspé, where she worked for several years.¹⁰ She quickly became a leader in the community. She assumed the position of President of the Gaspé Chamber of Commerce and was urged unsuccessfully to consider a run for politics.¹¹

In 1988 Justice Côté moved to Montréal and became a civil and commercial litigator at Stikeman Elliot LLP. She rose through the ranks to become head of the litigation group. In 2010, she joined the Montréal office of Osler, Hoskin & Harcourt LLP, assuming the position of head of litigation there as well.¹² A “widely respected”¹³ lawyer, “[s]he [was] known as an extremely aggressive advocate.”¹⁴ Justice Côté was counsel

⁶ CBC News, “Suzanne Côté, Quebec lawyer, named by Harper to Supreme Court” (November 27, 2014), online: CBC News <<http://www.cbc.ca/news/politics/suzanne-c%C3%B4t%C3%A9-quebec-lawyer-named-by-harper-to-supreme-court-1.2851974>> [hereinafter “CBC, ‘Côté named by Harper’”]; Sean Fine, “PM picks Quebec lawyer Suzanne Côté for Supreme Court seat” (November 27, 2014), online: *Globe and Mail* <<https://www.theglobeandmail.com/news/politics/new-judge-named-to-supreme-court/article21808810>> [hereinafter “Fine, ‘PM picks Côté’”].

⁷ Fine, “PM picks Côté”, *id.* See also Pierre-Arnaud Barry-Camu, Amélie B. Lavigne & Marie-Pier Albert, “Entretien avec Suzanne Côté” (2015) 45:3 *Ottawa L. Rev.* 527, at 542 [hereinafter “Barry-Camu *et al.*, ‘Entretien’”].

⁸ In 2013, Prime Minister Harper nominated Federal Court of Appeal judge Marc Nadon to one of the Québec seats on the Supreme Court of Canada. His eligibility for the appointment was subsequently challenged, and in *Reference re Supreme Court Act, ss. 5 and 6*, [2014] S.C.J. No. 21, 2014 SCC 21 (S.C.C.), a majority of the Supreme Court of Canada ruled that Nadon was not, in fact, eligible for the appointment. His appointment was annulled and in his place, Justice Clément Gascon was appointed. See also Fine, “PM picks Côté”, *supra*, note 6; CBC, “Côté named by Harper”, *supra*, note 6.

⁹ Fine, “PM picks Côté”, *id.*; CBC, “Côté named by Harper”, *id.*

¹⁰ Barry-Camu *et al.*, “Entretien”, *supra*, note 7, at 532.

¹¹ *Id.*, at 534; Supreme Court of Canada, “The Honourable Suzanne Côté” (March 4, 2015), online: Supreme Court of Canada <<https://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=suzanne-cote>> [hereinafter “SCC Côté”].

¹² “Suzanne Côté leaving Stikeman to head up litigation at Osler”, online: *Montreal Gazette* <<http://montrealgazette.com/business/suzanne-ct-leaving-stikeman-to-head-up-litigation-at-osler>>.

¹³ Chris Hall, “Suzanne Côté, Harper’s Supreme Court pick, soothes a self-inflicted wound” (November 27, 2014), online: CBC News <<http://www.cbc.ca/news/politics/suzanne-c%C3%B4t%C3%A9-harper-s-supreme-court-pick-soothes-a-self-inflicted-wound-1.2852619>> [hereinafter “Hall”].

¹⁴ Fine, “PM picks Côté”, *supra*, note 6.

in several high-profile cases and commissions of inquiry, including the Bastarache Inquiry and the Inquiry regarding Justice Lori Douglas.¹⁵ Speaking with reporters following her appointment, Osler colleague Shahir Guindi referred to her as “amongst the hardest working lawyers, bar none, that I’ve ever met in my life”.¹⁶

In a 2016 interview, Justice Côté spoke of the “mixed emotions” she felt at leaving her career in private practice behind, referring to the loss of her first career as a “death”.¹⁷ In a second interview, she explained that the transition from private practice to the bench had required her to adjust to the fact that she is no longer the principal decision-maker (together with her client) on important legal matters.

SC: Coming from the private sector, when I worked in a law firm, I always worked with a team of young lawyers. Even if we worked as a team, my client and I always made the final decision. But at the Supreme Court, there are nine of us. Being a court of nine judges, and being the final court in Canada, we cannot all have a different opinion and thus arrive at nine different opinions, the citizens have the right to expect that we know what the state of the law is ...

Interviewer: Do you negotiate amongst yourselves?

SC: Well ... not necessarily negotiate, because one can never negotiate one’s opinion. We do not always automatically have the answer. There is a process of reflection, of discussion that takes place to arrive at the best possible decision. There is that aspect to which I have had to become accustomed.¹⁸

Justice Côté has explained that it is sometimes “easy” for the Supreme Court to be unanimous.¹⁹ On other occasions, however, the Court is unable to achieve unanimity and one or more justices will

¹⁵ Barry-Camu *et al.*, “Entretien”, *supra*, note 7; Drew Hasselback, “New Supreme Court of Canada appointee Suzanne Côté has national profile, known for taking on big cases” (November 27, 2014), online: *National Post* <<http://business.financialpost.com/legal-post/new-supreme-court-of-canada-appointee-suzanne-cote-has-national-profile-known-for-taking-on-big-cases>> [hereinafter “Hasselback”].

¹⁶ Hasselback, *id.*

¹⁷ Beyond Politics, “Interview with Justice Suzanne Côté” (2014), online: Canadian Public Affairs Channel <<http://www.cpac.ca/en/programs/documentaries/episodes/49689974>> [hereinafter “Beyond Politics, ‘Interview with Suzanne Côté’”].

¹⁸ Mitsou Gélinas, “Interview avec Suzanne Côté”, online: Mitsou.com <<https://www.youtube.com/watch?v=IP1jMyUFiN4>> [translation].

¹⁹ Beyond Politics, “Interview with Suzanne Côté”, *supra*, note 17.

dissent. She has pointed out that some dissents are later adopted by a majority of the Court.²⁰

III. METHODOLOGY

To assess the accuracy of the characterization of Justice Côté as a frequent dissenter, I conducted quantitative and qualitative analyses of her concurrences and dissents. At the time of writing, she had been involved in deciding 150 cases. I first examined the combined rate of concurrences and dissents of each Supreme Court justice since she joined the Court. I included concurrences and dissents the judges authored as well as ones they signed onto. I then disaggregated the data into concurrences and dissents. Partial dissents were coded as dissents. One case was excluded from consideration because the complex manner in which the Court divided made rational coding impossible.²¹ Because the judges did not all sit on the same cases during this period and participated in different numbers of cases, the data provided below is meant to give a general sense of the concurring and dissenting practices of each of the judges during the relevant time frame.

Justice Côté has also adopted the unconventional practice of dissenting on leave applications. I therefore examined the frequency with which justices have dissented on leave applications since Justice Côté joined the Court.²² I then searched the database of leave applications on the Lexum website, which covers 2006 onwards, to determine how often judges have dissented on leave applications since that time.²³ I considered leave applications separately from decisions on the merits of an appeal.

To further shed light on Justice Côté's dissenting practices, I performed a qualitative analysis of her concurrences and dissents. This involved reviewing each of the cases in which she concurred and dissented. I focused in particular on the nature of the disagreement with the majority.

²⁰ *Id.*

²¹ *Canadian Imperial Bank of Commerce v. Green*, [2015] S.C.J. No. 60, 2015 SCC 60 (S.C.C.). I also excluded *R. v. Magoon*, [2017] S.C.J. No. 101, 2018 SCC 14 (S.C.C.) and *R. v. Jordan*, [2016] S.C.J. No. 27, 2016 SCC 27 (S.C.C.), because at the time of writing these decisions had been dismissed with reasons to follow. *Lajeunesse c. 9069-4654 Québec inc.*, [2017] S.C.J. No. 24, [2017] 1 S.C.R. 473 (S.C.C.) was excluded because the appeal was found to be moot. The study therefore examined 146 cases in which Justice Côté participated.

²² I am grateful to those, including Bruce Ryder and Ranjan Agarwal, who pointed out to me the significance of Justice Côté's dissents on leave applications.

²³ Lexum, online: <<https://scc-csc.lexum.com/scc-csc/en/nav.do>>.

IV. FINDINGS

1. Quantitative Analysis

*(a) Concurrences and Dissents on Appeals***Figure 1: Dissenting Practices of Current Court during Justice Côté's Tenure (March 23, 2015 to March 25, 2018)²⁴**

Judge	Majority (%)	Dissents (%)	Concurrences (%)	Combined Concurrences and Dissents (%)	Wrote in Concurrence or Dissent (%)
Côté	63.7 (93/146)	32.2 (47/146)	4.1 (6/146)	36.3 (53/146)	21.9 (32/146)
Abella	82.5 (127/154)	13.6 (21/154)	3.9 (6/154)	17.5 (27/154)	13.6 (21/154)
Brown	84.7 (94/111)	13.5 (15/111)	1.8 (2/111)	15.3 (17/111)	9 (10/111)
Cromwell	92.8 (77/83)	2.4 (2/83)	4.8 (4/83)	7.2 (6/83)	7.2 (6/83)
Gascon	92.5 (149/161)	5.6 (9/161)	1.9 (3/161)	7.5 (12/161)	4.4 (7/161)
Karakatsanis	91.4 (148/162)	5.5 (9/162)	3.1 (5/162)	8.6 (14/162)	4.9 (8/162)
McLachlin	86.8 (125/144)	8.3 (12/144)	4.9 (7/144)	13.2 (19/144)	6.3 (9/144)
Moldaver	87.9 (138/157)	9.6 (15/157)	2.5 (4/157)	12.1 (19/157)	7 (11/157)
Rothstein	97.3 (36/37)	2.7 (1/37)	0 (0/37)	2.7 (1/37)	0 (0/37)
Rowe	79.6 (43/54)	13 (7/54)	7.4 (4/54)	20.4 (11/54)	14.8 (8/54)
Wagner	90.2 (147/163)	6.7 (11/163)	3.1 (5/163)	9.8 (16/163)	5.5 (9/163)
Average	86.3	10.3	3.4	13.7	8.6

²⁴ The first decision in which Justice Côté participated was released on March 23, 2015: see *R. v. Sanghera*, [2015] S.C.J. No. 13, 2015 SCC 13 (S.C.C.).

The data set out above reveals that since being appointed, Justice Côté has, in fact, disagreed with the majority much more often than her colleagues. Figure 1 sets out the aggregate rate of concurrences and dissents per justice since Justice Côté joined the Court. Côté was in the majority in 63.7 per cent of cases. Her combined rate of concurrences and dissents is 36.3 per cent, meaning that she concurred or dissented in just over one-third of cases. There is no strong pattern of Justice Côté concurring or dissenting with any one justice or group of justices.²⁵ She wrote for the concurrence or the dissent in 21.9 per cent of all cases during this period, and in 60.4 per cent of cases in which she was concurring or dissenting. In more than one-third of the cases in which she concurred or dissented, she was writing for herself alone.

The average aggregate rate of concurrences and dissents during this period was 13.7 per cent. The average rate at which a justice authored a concurrence or dissent was 8.6 per cent. Justice Rowe was the next most frequent dissenter after Justice Côté. He concurred or dissented in 20.4 per cent of cases. He is closely followed by Justice Abella, who concurred or dissented in 17.5 per cent of cases.

Not all of the Justices included in Figure 1 sat for the entire period under consideration. Justices Cromwell and Rothstein retired and Justices Brown and Rowe were appointed during the period. Still, Justices Cromwell and Brown participated in a substantial number of cases during the period (83 in the case of Justice Cromwell, and 111 in the case of Justice Brown). Justices Rothstein and Rowe sat on fewer cases (37 in the case of Justice Rothstein and 54 in the case of Justice Rowe). Justice Martin was excluded from consideration because of the recency of her appointment (December 2017).

The overall rate of concurrences and dissents on the current Court is low. Data collected by Belleau & Johnson covering the years 1982 to 2007 demonstrates a much livelier culture of disagreement than is currently the case. I reproduce Belleau & Johnson's data in Figure 2.

²⁵ On voting blocs, see Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: Lorimer, 2000) [hereinafter "McCormick"]; Girard, *supra*, note 5, at 453.

Figure 2: Belleau & Johnson's Data on Rate of Dissents between 1982 and 2007

Judge	Dissent (%)	Concurrence (%)	Combined (%)
Abella	21.5	10.8	32.3
Arbour	14.8	10.2	25
Bastarache	25.1	13.6	38.7
Beetz	11.1	29.1	40.2
Binnie	16.3	7.2	23.5
Charron	14.3	7.9	22.2
Chouinard	12.8	20.9	33.7
Cory	9.8	19.4	29.2
Deschamps	23.9	10.1	34
Dickson	12.2	27.9	40.1
Estey	17.8	17.8	35.6
Fish	25.6	9.8	35
Gonthier	12.5	21.3	33.8
Iacobucci	10.2	14.3	24.5
L'Heureux-Dubé	28.1	31.5	59.6
La Forest	12	30.4	42.4
Lamer	13.4	29.1	42.5
LeBel	24.7	15.1	39.8
Le Dain	5.7	24.3	30
Major	19.5	14.3	33.8
McIntyre	16.4	23.5	39.9
McLachlin	19.6	23.6	43.2
Sopinka	17.3	25.7	43
Rothstein	15.8	10.5	26.3
Stevenson	14.3	28.8	43.1
Wilson	23.2	32.4	55.6
Average (all judges in period)	16.8	19.6	36.4

The average aggregate rate of concurrences and dissents (*i.e.*, the rate of disagreement) during this period was 36.4 per cent. This is very similar to Justice Côté's aggregate rate. Several judges concurred and dissented at a rate far greater than the average, including Justice

L’Heureux-Dubé, who disagreed with the majority in 59.6 per cent of cases, and Justice Wilson, who disagreed in 55.6 per cent of cases. The rate at which Chief Justice McLachlin disagreed with the majority during this period is much higher than in the period examined by the present study. Between 1982 and 2007, then-Justice and eventually Chief Justice McLachlin concurred or dissented in 43.2 per cent of cases. During the study period (March 23, 2015 to March 25, 2018), her combined rate of concurrences and dissents was 13.2 per cent.

When the data is disaggregated, it becomes clear that Justice Côté’s rate of dissents is high, even by historical standards. Justice Côté dissented in 32.2 per cent of cases and concurred in 4.1 per cent. The average rate of dissents between 1982 and 2007 was 16.8 per cent, and the average concurrence rate was 19.6 per cent. No judge during this period matched Côté’s rate of dissents. Justice L’Heureux-Dubé, the most frequent dissenter during this time frame, dissented in 28.1 per cent of cases and concurred in 31.5 per cent of cases. The second most likely judge to disagree with the majority, Justice Wilson, dissented in 23.2 per cent of cases and concurred in 32.4 per cent of cases. Justice and later Chief Justice McLachlin dissented in 19.6 per cent of cases and concurred in 23.6 per cent. Most of the justices from this period concurred at higher rates than they dissented.²⁶

(b) Dissents on Leave Applications

Turning to dissents on leave applications, Justice Côté has dissented on 10 leave applications to date — a small proportion of the 958 leave decisions in which she participated, but significant nonetheless. Justice Côté dissented alone on all but one of these applications, where she was joined by Justice Moldaver.²⁷ The 10 dissents were from dismissals of applications for leave to appeal, meaning that she would have granted leave. Since 2006, there have only been 11 dissents on leave applications: in addition to the 10 just mentioned, Justice Ian Binnie dissented from a decision to deny leave in 2006. Seven of the 10 dissents were on cases with a private law dimension. Four involved class action

²⁶ Belleau & Johnson, *supra*, note 4.

²⁷ *R. v. Rogers*, [2016] S.C.C.A. No. 438 (S.C.C.).

cases, an area of expertise for Justice Côté.²⁸ Three originated from Québec and dealt with civil law matters (there was at least one other Québec justice on the leave panel for each of these applications). Three involved Aboriginal law issues; one was a criminal case.

On the first two occasions Justice Côté dissented from a decision to deny leave to appeal, the panel deciding the application was a standard panel of three justices. For the following eight applications, however, the entire Court signed off on the leave decision. Decisions on leave applications are always issued by “The Court”, even if the decision is made by a panel of three judges.²⁹ Once the three-person panel makes a decision on a leave application, the decision is circulated to the entire Court. If one of the justices objects to the decision of the panel, she or he may ask that the application be considered by the entire Court. It appears that the full Court will now also consider an application for leave to appeal if one of the justices on the three-person panel intends to dissent. This seems to be an innovation in response to Justice Côté’s decision to dissent on some leave applications.

Seven of the 10 times she chose to dissent on a leave application, Justice Côté was a member of the original leave panel. On three occasions she was not on the original panel, suggesting that she or some other justice (most likely she) picked the appeal off the list once the leave decisions were circulated among the justices and requested that the entire Court consider the application. She then dissented from the decision of the Court as a whole. All three of these cases were class actions. On the one occasion that she and Justice Moldaver dissented together on the leave application, they were both members of the original panel, suggesting that a majority of the initial panel was in favour of granting leave in the case, but that decision was overturned by the Court as a whole.

2. Qualitative Analysis

Further insights emerge from a qualitative examination of Justice Côté’s concurrences and dissents. A review of her decisions shows that she is willing to concur or dissent both where the legal questions are of considerable significance as well as on more technical grounds.

²⁸ I am grateful to Ranjan Agarwal for pointing this out. See also Sean Fine, “New Supreme Court judge challenged on conduct as a lawyer in two cases” *Globe and Mail* (December 5, 2014), online: <<https://www.theglobeandmail.com/news/politics/new-supreme-court-judge-challenged-on-conduct-as-a-lawyer-in-two-cases/article21964776>>.

²⁹ I am grateful to Barbara Kinkaid for pointing this out to me.

In *Caron v. Alberta*, for example, she dissented in an important language rights case.³⁰ But she also dissented on more than one occasion to correct palpable and overriding factual errors she concluded the trial judge had committed.³¹ She has also dissented on cursory, one or two paragraph decisions issued from the bench. The Supreme Court will typically decide a case from the bench where the issues are clear-cut or where an obvious error was committed in the court(s) below. It is uncommon to see dissents in these kinds of cases. In *Millington*,³² *M.J.B.*³³ and *Robinson*,³⁴ however, Justice Côté dissented from opinions delivered from the bench.

Several of Justice Côté's concurrences and dissents are notable for their rigorous approach to appellate review. Her decisions demonstrate a willingness to overturn the decisions of trial courts or other adjudicators at first instance, even when there is a presumption of deferential review.³⁵ In several dissents, Justice Côté engaged in a granular review of the evidence and/or the reasons of the trial court and/or the intermediate court of appeal.³⁶ In *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*,³⁷ she justified the use of such an approach in that case by explaining that "[i]n disputes involving an international or interprovincial aspect, jurisdiction is a matter of crucial importance. It must be approached with rigour".³⁸ In *Assn. of Justice Counsel v. Canada (Attorney General)*, Justice Côté engaged in a close reading of the adjudicator's reasons and found that his "conclusions [were] not defensible in respect of either the facts or the law."³⁹ In *Mennillo*, she held that "the trial judge made palpable and overriding

³⁰ [2015] S.C.J. No. 56, 2015 SCC 56 (S.C.C.).

³¹ See, e.g., *Benhaim v. St-Germain*, [2016] S.C.J. No. 48, 2016 SCC 48 (S.C.C.) [hereinafter "*Benhaim*"]; *R. v. Millington*, [2017] S.C.J. No. 53, 2017 SCC 53 (S.C.C.) [hereinafter "*Millington*"]; *Mennillo v. Intramodal inc.*, [2016] S.C.J. No. 51, 2016 SCC 51 (S.C.C.) [hereinafter "*Mennillo*"].

³² *Millington*, *id.*

³³ *R. v. M.J.B.*, [2015] S.C.J. No. 48, [2015] 3 S.C.R. 321 (S.C.C.).

³⁴ *R. v. Robinson*, [2017] S.C.J. No. 52, 2017 SCC 52 (S.C.C.) [hereinafter "*Robinson*"].

³⁵ See, e.g., *Benhaim*, *supra*, note 31; *Robinson*, *id.*; *Mennillo*, *supra*, note 31; *Assn. of Justice Counsel v. Canada (Attorney General)*, [2017] S.C.J. No. 55, 2017 SCC 55 (S.C.C.) [hereinafter "*Assn. of Justice Counsel*"].

³⁶ @RobertDanay, "Interesting. I have a forthcoming piece in the UofT Law Journal in which I do a quantitative analysis of the SCC's recent admin law jurisprudence (i.e. 2016-18). I found that Cote J frequently dissented/concurred to apply the correctness standard and/or overturn admin decisions." Twitter, May 17, 2018, <<https://twitter.com/RobertDanay/status/997219241697816576>> [hereinafter "*Danay*"].

³⁷ [2016] S.C.J. No. 30, 2016 SCC 30 (S.C.C.).

³⁸ *Id.*, at para. 62.

³⁹ *Association of Justice Counsel*, *supra*, note 35, at para. 55.

errors and disregarded key evidence”.⁴⁰ Her dissents are typically thorough and comprehensive treatments of the issues rather than terse expressions of disagreement. In *Mennillo*, for example, she authored a 173-paragraph dissent.⁴¹ The majority judgment was 81 paragraphs long, and there was a seven-paragraph concurrence by Chief Justice McLachlin, with whom Justice Moldaver concurred. *Godbout v. Pagé*;⁴² *Sciascia*;⁴³ *Barreau du Québec v. Québec (Attorney General)*;⁴⁴ *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*⁴⁵ and *Benhaim v. St-Germain* are other examples of this approach.

A large subset of the cases characterized by rigorous review deal with the standard of review in administrative law.⁴⁶ In these cases, Justice Côté either concluded that the standard of review was reasonableness and that it had not been satisfied, or she found that the appropriate standard of review was correctness.

Finally, Justice Côté’s dissents provide some evidence that her expertise as a corporate-commercial lawyer inform her decision-making in cases that deal with the lawyer’s role and the realities of commercial transactions. This expertise is evident in cases such as *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*,⁴⁷ an appeal concerning the awarding of costs against a lawyer personally, and *Barreau du Québec v. Québec*, a case regarding the scope of a non-lawyer’s right to make legal submissions in writing to an administrative tribunal. In *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, Justice Côté emphasized that her reading of the governing legislation “reflects the fact

⁴⁰ *Supra*, note 31, at para. 103.

⁴¹ On the significance of the length of written reasons, see generally Peter McCormick, “Standing Apart: Separate Concurrence and the Modern Supreme Court of Canada, 1984-2006” (2008) 53 McGill L.J. 137.

⁴² [2017] S.C.J. No. 18, 2017 SCC 18 (S.C.C.).

⁴³ *R. v. Sciascia*, [2017] S.C.J. No. 57, 2017 SCC 57 (S.C.C.).

⁴⁴ [2017] S.C.J. No. 56, 2017 SCC 56 (S.C.C.) [hereinafter “*Barreau du Québec v. Québec*”].

⁴⁵ [2015] S.C.J. No. 53, 2015 SCC 53 (S.C.C.).

⁴⁶ *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29, 2016 SCC 29 (S.C.C.); *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] S.C.J. No. 47, 2016 SCC 47 (S.C.C.) [hereinafter “*Edmonton East (Capilano) Shopping Centres Ltd.*”]; *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016] S.C.J. No. 38, 2016 SCC 38 (S.C.C.); *Commission scolaire de Laval v. Syndicat de l’enseignement de la région de Laval*, [2016] S.C.J. No. 8, 2016 SCC 8 (S.C.C.); *Quebec (Attorney General) v. Guérin*, [2017] S.C.J. No. 42, 2017 SCC 42 (S.C.C.); *Green v. Law Society of Manitoba*, [2017] S.C.J. No. 20, 2017 SCC 20 (S.C.C.); *British Columbia (Workers’ Compensation Appeal Tribunal) v. Fraser Health Authority*, [2016] S.C.J. No. 25, 2016 SCC 25 (S.C.C.); *Barreau du Québec v. Québec (Attorney General)*, *supra*, note 44; *Teal Cedar Products Ltd. v. British Columbia*, [2017] S.C.J. No. 32, 2017 SCC 32 (S.C.C.). See also Danay, *supra*, note 36.

⁴⁷ [2017] S.C.J. No. 26, 2017 SCC 26 (S.C.C.).

that the complaints process is pleading-driven,⁴⁸ demonstrating an awareness of the significance of the procedural aspects of lawyering. And in *Lapointe Rosenstein*, a class action lawsuit brought against law firm Cassels Brock for negligent legal advice, Justice Côté drew on her experience as a lawyer in reasoning about the factors that lawyers consider relevant when they enter into contracts. In terms of understanding commercial realities, *Ferme Vi-Ber inc. v. Financière agricole du Québec*,⁴⁹ *Mennillo; Canada (Attorney General) v. Fairmont Hotels Inc.*⁵⁰ and *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*⁵¹ are all examples of dissents in which Justice Côté drew on her understanding of commercial transactions in reaching a decision in the case.

V. DISCUSSION

1. Making Sense of the Data

Three initial conclusions can be drawn from the data on Justice Côté's dissenting practices. The first is that her rate of dissents is high, both by current and by historical standards. It exceeds that of Justice L'Heureux-Dubé, the most frequent dissenter between 1982 and 2007. The second is that her rate of dissents is high relative to the rate at which she concurs. All of the most frequent dissenters in the period covered by Belleau & Johnson's work concurred more often than they dissented. The opposite is true for Justice Côté, by a considerable margin. Third, Justice Côté's aggregate rate of dissents and concurrences is high by current standards but insignificant by historical standards. In fact, it is average for the period from 1982 to 2007.

These conclusions stand in some tension with each other. If disagreement is understood as being reflected in both concurrences and dissents, then the rate at which she disagrees is average for the period between 1982 and 2007. If we confine ourselves to dissents, however, we reach the opposite conclusion: her rate of dissents is very high, higher than that of Justice L'Heureux-Dubé, the most frequent dissenter between 1982 and 2007.

⁴⁸ *Edmonton East (Capilano) Shopping Centres Ltd.*, *supra*, note 46, at para. 99.

⁴⁹ [2016] S.C.J. No. 34, 2016 SCC 34 (S.C.C.).

⁵⁰ [2016] S.C.J. No. 56, 2016 SCC 56 (S.C.C.).

⁵¹ [2016] S.C.J. No. 55, 2016 SCC 55 (S.C.C.).

One way to resolve the tension might be to return to the issue of how different concurrences and dissents really are. After all, if the differences are marginal, then it makes little sense to separate them out and to treat concurrences as though they do not reflect meaningful disagreement. The problem, of course, is that not all concurrences are created equal. In its decisions, the Court distinguishes between “concurring reasons”,⁵² “reasons concurring in the result”,⁵³ and “reasons concurring in part”.⁵⁴ Some concurrences reflect significant agreement with the reasons of the majority. Others are concurrences in name only; they are best read as expressing profound disagreement with the majority. In between these two extremes lies a number of further permutations. This means that however one chooses to code concurrences, some nuance will be lost.

Another option for addressing the tension might be to think about why we examine rates of concurrence and dissent in the first place. What conclusions do we draw about a justice when we characterize her as a frequent dissenter? One reason for the particular interest in Justice Côté’s rate of concurrences and dissents is that it is at odds with the current practices of the Court. Since joining the Supreme Court of Canada, Justice Côté has demonstrated a willingness to disagree in spite of efforts by former Chief Justice McLachlin to achieve consensus. Justice Côté has also shown a willingness to speak in her own voice, whether in the majority, in a concurrence, or in dissent. Her dissents on leave applications further contribute to this pattern of standing apart. Justice Côté has dissented on 10 such applications since joining the Court. To put this number in context, it is important to recall that since 2006, there have only been 11 dissents on leave applications. She was the sole dissenter in all but one of these 11 cases, where Justice Moldaver also dissented. Again, this suggests a willingness to break from convention and a desire to stand apart. No other justice has followed her lead with the exception of the one instance in which Justice Moldaver also dissented.

Here, the rate of dissents is of interest because it seems to upset or at least threaten a balance that had been achieved on the current Court.⁵⁵ In

⁵² See, e.g., *British Columbia Human Rights Tribunal v. Schrenk*, [2017] S.C.J. No. 62, 2017 SCC 62 (S.C.C.).

⁵³ See, e.g., *Douez v. Facebook*, [2017] S.C.J. No. 62, 2017 SCC 62 (S.C.C.).

⁵⁴ See, e.g., *Mouvement laïque québécois v. Saguenay (City)*, [2015] S.C.J. No. 16, 2015 SCC 16 (S.C.C.). The Court has also referred to “partially concurring reasons”: see, e.g., *Cowper-Smith v. Morgan*, [2017] S.C.J. No. 61, 2017 SCC 61 (S.C.C.).

⁵⁵ On the significance of Court dynamics, see Girard, *supra*, note 5; McCormick, *supra*, note 25; Mathen, *supra*, note 2; Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: University of British Columbia Press, 2012);

assessing what Justice Côté’s numbers tell us about this issue, it is helpful to consider all the available data, including her aggregate rate of concurrences and dissents, her rate of dissents on its own, and her dissents on leave applications. All of these numbers are exceptional in terms of the current Court.

Somewhat different considerations come into play when we examine Justice Côté’s concurrences and dissents in historical perspective. Looking at a judge’s rate of concurrences and dissents in historical context may prompt a comparison of the concurring and dissenting practices of particular “Courts” at particular points in time — “the Lamer Court” versus the “McLachlin Court”, for example, or the “early-Charter Court” versus the “Court in 2018”.⁵⁶ A historical analysis can also promote a close examination of the judge herself, apart from the particular dynamics of “her” Court — what kind of judge she is, what motivates her, and what she stands for.⁵⁷ It seems logical that in assessing the historical significance of a judge’s concurring and dissenting practices, one would want to consider the aggregate rate of concurrences and dissents as well as the rate of dissents on its own. This gives us a sense of how often a judge chooses to write or sign on to reasons that express some disagreement. It represents a considered decision *not* to sign on to the majority decision in spite of the acknowledged value of achieving consensus where possible.

2. Impact on the Current Court

Even if one accepts the value of dissents as a general matter, one might reasonably ask whether Justice Côté’s persistent practice of dissenting could undermine important goals or aspects of the Court’s functioning. This includes eroding consensus where it might otherwise have been achieved with some additional work, or weakening the collegiality of the Court through resistance to the conventions of the institution.⁵⁸ Of course, one person’s agitator is another person’s leader. At the same time, collegiality and common purpose are crucial features

Backhouse, *supra*, note 5; Benjamin Alarie & Andrew Green, “Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada” (2009) 47 S.C.L.R. (2d) 475.

⁵⁶ See generally McCormick, *supra*, note 25.

⁵⁷ See generally Backhouse, *supra*, note 5.

⁵⁸ Alarie & Green, *supra*, note 55, at 479; Macfarlane, *supra*, note 55. See also the comments of then-McLachlin C.J.C. on “Inside the Supreme Court of Canada”, online: Canadian Public Affairs Channel <<http://www.cpac.ca/en/programs/documentaries/episodes/49339772>> [hereinafter “Inside the Supreme Court”].

of multi-member courts. When a single member of the Court adopts a set of practices that are at odds with the practices of the rest of the Court, there is a risk of eroding collegiality.

This concern arises in part as a result of Justice Côté's approach to judging. The intensity of the review in which she engages in some cases appears to be in tension with the nature of appellate review by an apex court and the flexibility inherent in the requirement that trial judges give sufficient reasons.⁵⁹ It is not clear that the level of rigour and granularity Justice Côté brings to her analysis is always justified, either from the standpoint of the standard of appellate review of a final court of appeal or from the standpoint of whether a narrow disagreement justifies writing a dissent in a particular case.

In a 2014 interview with Catherine Clark, Justice Côté spoke about the traditions of the Supreme Court and their significance.

I think that we have some traditions, we need to keep these traditions, for instance when we wear our red robes for official events, and things like that, and the decorum also is important, because given the type of institution that the Court is, the Court deserves respect, and I think you can reach that when you have some sort of decorum and traditions. But I think that the Court is a younger court now, and is not as traditional as it was before. Again I think it follows the evolution of the society. I'm not saying that the members of the Court are people going out every night to dance, but it is not as traditional as it was I think before.⁶⁰

It is fair to read this statement as saying that Justice Côté believes that some of the Court's traditions are valuable and should be preserved, while others are unnecessary or even harmful to the Court's progress as an institution. The difficult part, of course, is knowing how to characterize the various aspects of the Court's heritage and practices. There is also the matter of *how* changes to heritage and/or practice should occur — whether they should be the product of collective decision-making or whether it is sufficient for changes to occur organically over time.

One might deduce from Justice Côté's dissents that she does not view the practice of deciding leave applications unanimously as being an important tradition of the Court. That it is a tradition of the Court is without doubt. Until Justice Côté was appointed, there was a near-universal

⁵⁹ *Housen v. Nikolaisen*, [2002] S.C.J. No. 31, [2002] 2 S.C.R. 235, at para. 72 (S.C.C.); *R. v. Shepherd*, [2009] S.C.J. No. 35, 2009 SCC 35 (S.C.C.).

⁶⁰ "Inside the Supreme Court", *supra*, note 58.

practice of reaching decisions on whether to grant leave by consensus (or at least without communicating internal disagreements about whether leave should be granted). She has also demonstrated what might fairly be described as a lower threshold for dissenting than her current colleagues. She has done so on a Court that until recently was led by a Chief Justice who placed a very high value on consensus. This suggests that Justice Côté has a weaker commitment to consensus decision-making than other members of the Court.

It is also worth considering whether Justice Côté's willingness to dissent, even on leave applications, will lower the barriers to dissent for other Justices, and whether this is problematic. Given the persistent possibility that Justice Côté will dissent, there may be less of an incentive for the other members of the Court to strive for consensus. The less that consensus is viewed as achievable, one might imagine, the more likely it will be to see judges write for themselves.

3. Looking Back, Looking Forward

Belleau & Johnson explain that “[s]ome judicial reputations have been solidified by the power of canonical dissents.”⁶¹ This statement suggests that the quality of the concurrence or dissent matters. For example, while Justice Arbour was not a frequent dissenter, many of her dissents or concurrences have proven to be very influential, if not in the courts then in the scholarship.⁶² Her dissents in *Gosselin*,⁶³ *Malmo-Levine*; *Caine*⁶⁴ and *Canadian Foundation for Children, Youth and the Law*⁶⁵ stand out in this regard.

The impact of a dissent can be measured in a few ways. One way is to look at whether the dissent attracted the support of other judges on the Court. Another is to see whether over time, a dissenting opinion becomes a majority opinion. A third way of measuring the significance of a dissent is to assess whether the opinion is understood to voice important values, even if those values do not command majority support.⁶⁶ Sometimes the

⁶¹ Belleau & Johnson, *supra*, note 4, at 60.

⁶² *Id.*

⁶³ *Gosselin v. Québec (Attorney General)*, [2002] S.C.J. No. 85, 2002 SCC 84 (S.C.C.).

⁶⁴ *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, 2003 SCC 74 (S.C.C.).

⁶⁵ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, 2004 SCC 4 (S.C.C.).

⁶⁶ See David Cole, “The power of a Supreme Court dissent” *Washington Post* (October 29, 2015), online: <https://www.washingtonpost.com/opinions/the-power-of-a-supreme-court-dissent/2015/10/29/fbc80acc-66cb-11e5-8325-a42b5a459b1e_story.html?noredirect=on&utm_term=.a81a74e0d1f0>.

impact of a decision is evident immediately; other times its significance only becomes evident over time.

It is of some note that Justice Côté is writing on her own in concurrence or dissent 37.7 per cent of the time. This means that more than one-third of the time, her dissent did not attract the support of any other judge (though other judges may have concurred or dissented separately). It is too early to say whether some of her dissents may become majority opinions over time. The qualitative analysis suggests that this is unlikely for at least some of her dissents, since the nature of the disagreement is best characterized as being fact-based. Indeed, Justice Côté's dissents on technical matters are unlikely to have significant impact.

It is interesting to consider whether Justice Côté will continue to dissent at her current rate, or whether the frequency of her dissents might increase or decrease over time. The data demonstrates, for example, that former Chief Justice McLachlin's rate of dissents dropped dramatically over time. It seems likely that any newly appointed judge will take some time to adapt to the dynamics of a multi-member court. This is particularly so where the judge is appointed directly from practice.⁶⁷ This tends to suggest that her rate of dissents could diminish over time. However, Belleau & Johnson point out that a judge's rate of dissents does not invariably move in a downward direction. "Some judges (like Justice Wilson) generated more dissents the longer they were on the Court while others (like Justice Sopinka) started as great dissenters, but produced increasingly less dissent the longer they were on the Court."⁶⁸

The discussion above suggests that there is more to judicial decision-making than simply the merits of the appeal. While this may be controversial, there is no question that judging is a human process. It is legitimate, in other words, to ask what costs and benefits are associated with a single judge habitually departing from the conventions of the Court.

VI. CONCLUSION

As the frequency of Justice Côté's dissents have increased, so too has the level of interest in her judicial philosophy and approach. The data presented in this paper demonstrates that Justice Côté's concurring and

See also Lauren Lindsay, "Lives in Review: Comparing the Judicial Biographies of Bertha Wilson and Claire L'Heureux-Dubé" (2018) (unpublished; copy on file with author).

⁶⁷ I am grateful to Leo Russomanno for pointing this out to me.

⁶⁸ Belleau & Johnson, *supra*, note 4, at 64.

dissenting practices are indeed noteworthy. However, as I have pointed out, these practices, like all judicial practices, will not necessarily remain static. They are subject to a range of influences. There is value, therefore, in continuing to follow the concurring and dissenting practices of Justice Côté and the Court as a whole, particularly under a new Chief Justice. It is possible, for example, that her rate of concurrences and dissents will hold constant while that of other members of the Court increases, tempering the perception that she is a frequent dissenter. There are some suggestions that this might occur. It will also be interesting to see what the impact of Justice Côté's concurrences and dissents will be over time, and whether she continues to approach appellate review with the same intensity she does currently.

