2019

# A Chief and Court in Transition: The Wagner Court and the Constitution

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## Source Publication:
Forthcoming in Constitutional Cases 2018 (Supreme Court Law Reports; fall 2019-winter 2020)

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# The Wagner Court and the Constitution

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## Introduction

On December 17, 2017 and, after little more than five years as a *puisne* judge, Richard Wagner became Canada's 18th chief justice.[1] Only William Ritchie and Bora Laskin rose to office more expeditiously.[2] When appointed, Justice Wagner was less well known than Beverley McLachlin, who served ten years on the Court before becoming chief justice.[3] Between 1989 and 2000, she was a vigorous jurist, writing frequently and at times fearlessly. In part because her jurisprudence moved unpredictably between liberal and conservative outcomes, her decisions were much discussed, if imperfectly understood. By contrast, those commenting on Justice Wagner's appointment were hard pressed to cite a body of work, and focused instead on his reputation as a collegial, fair-minded, and hardworking member of the Court.[4]

An incoming chief justice will often speak of his goals and aspirations for the Court, and Richard Wagner was no different. Not long after he identified transparency and a positive image for the Court as core priorities, the Supreme Court's first online Annual Report was published in

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*Professor, Osgoode Hall Law School. I thank my colleagues, Benjamin L. Berger, Sonia Lawrence, and Emily Kidd White, for inviting me to deliver the annual review at the Constitutional Cases 2018 conference. I also thank and acknowledge Mr. Ryan Ng (JD 2021), for his invaluable research assistance, and especially for his charts on the 2018 constitutional jurisprudence.

[1] The same day, Justice Martin was sworn in as a *puisne* judge of the Supreme Court of Canada, and 2018 was also her first calendar year on the Court.

[2] Justice William Ritchie was appointed a *puisne* judge of the Supreme Court on September 30, 1875 and named Canada's 2nd Chief Justice on January 11, 1879, about 40 months later; Justice Bora Laskin was appointed to the Court on March 19, 1970 and became the 14th Chief Justice about 43 months later, on December 27, 1973. Richard Wagner was appointed on October 5, 2012 and named Chief Justice about 60 months later.

[3] Justice McLachlin arrived at the Court on March 30, 1989 and was appointed Chief Justice on January 7, 2000.

[4] See, *e.g.*, E. Raymer, "Opening the Supreme Court", *Canadian Lawyer* (12 November 2018), online: https://www.canadianlawyermag.com/author/elizabeth-raymer/opening-the-supreme-court-16456/.

February 2019, and other initiatives have followed.[5] Apart from matters of image, the Chief Justice has said little about the Court itself, and that is why his comments on the role of dissent stand out.

The McLachlin Court's legacy and former Chief Justice's style of leadership form the backdrop. Consensus and collegiality were her goals when Beverley McLachlin was appointed to the office, and throughout her tenure as chief justice. By her own account, she placed a premium on reaching the widest consensus available, indefatigably promoting internal discussion among the justices to minimize zones and points of disagreement.[6] From the outset, Chief Justice Wagner distanced himself from that practice, seeming to suggest an alternative path for his Court. As he explained, "I like dissent" because "it's normal in an open society".[7] Noting that robust dissent is "more transparent", he added that "I would be worried if we were always unanimous".[8] In his view, as long as a dissent explains a legal position "with civility", it is "a good thing".[9] On reflection, such remarks might simply represent answers to questions he was asked. Yet the Chief Justice might have been signalling his respect for difference, acknowledging the realities of

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[5] See, *e.g.*, J. Ivison, "Canada's new chief justice keen to drag Supreme Court into the light", *National Post* (22 June 2018), online: https://nationalpost.com/news/politics/john-ivison-chief-justice-keen-to-drag-supreme-court-into-the-light. For the Annual Report see Supreme Court of Canada, "Year in Review 2018", online: https://www.scc-csc.ca/review-revue/2018/index-eng.aspx. Another of Chief Justice Wagner's initiatives is the "Cases in Brief", which are short summaries of SCC decisions "drafted in reader-friendly language, so that anyone interested can learn about the decisions that affect their lives". These summaries are for members of the public; they are not part of the Court's reasons and "are not for use in legal proceedings": https://www.scc-csc.ca/case-dossier/cb/index-eng.aspx

[6] This feature of the McLachlin Court is much discussed; see, e.g., J. Tibbetts, "Building Consensus", *Canadian Lawyer* (July 2013) at 24-31; see also I. Greene and P. McCormick, *Beverley McLachlin: The Legacy of a Chief Justice* (forthcoming) (page numbers).

[7] Ivison, "New Chief Justice", *supra* note 5.

[8] A. Wherry, "Chief Justice says Supreme Court can be powerful voice for rule of law amid global tumult", *CBC News* (22 June 2018), online: https://www.cbc.ca/news/politics/richard-wagner-supreme-court-1.4717678; and T. MacCharles, "Canada's top judge says Canada should provide leadership at a time when fundamental values are being undermined in the world", *Toronto Star* (22 June 2018), online: https://www.thestar.com/news/canada/2018/06/22/canadas-top-judge-says-supreme-court-should-provide-leadership-at-a-time-when-fundamental-values-are-being-undermined-in-the-world.html.

[9] Wherry, "Powerful Voices", *ibid.*

collegial decision making, flagging his own style of leadership, or — in all modesty — voicing and accepting limits on his power as chief justice.

One chief justice's departure and another's arrival plainly mark an important transition for any apex court.[10] The chief justice is notoriously but paradoxically *primus inter pares* or "first among equals", with some over the ages more intent on their status as "*primus*" and others defining their role, more collegially, as chief "*inter pares*". One of the mysteries of any institutional history is how a chief justice exercises authority and how leadership styles shape a court, institutionally and juristically.[11] Ironically, McLachlin C.J. could not have achieved the consensus that defined her Court without exercising strong — albeit tactful — skills as first among equals.[12]

Over time, the Wagner Court will be shaped and even buffeted by variables and fortuities that defy prediction. If it is unwise to read too much into its inaugural jurisprudence, 2018 unmistakeably documents a rise – as the Chief Justice predicted and seemed to invite – of division and even of fracturing within the Court. Less invested in praise or dismay at the turn away from consensus, this analysis instead seeks insight into the dynamics and fault lines on the Wagner Court.

## Constitutional metrics

2018: a quantitative glimpse

[10] For interest, see L. Greenhouse, "How Not to be Chief Justice: The Apprenticeship of William H. Rehnquist", 154:6 U Pa L Rev 1365 (2006) (describing outgoing Chief Justice Burger as a failed leader and negative example for his successor, William H. Rehnquist).

[11] F. Cross & S. Lindquist, "Doctrinal and Strategic Influences of the Chief Justice: The Decisional Influence of the Chief Justice", 154:6 U Pa L Rev 1665 (2006) (attributing the ebbing of consensus and surge in dissenting and concurring opinions on the U.S. Supreme Court to the "leadership style and ability" of 1940s Chief Justice Stone. *Ibid.* at 1681.)

[12] See generally E. Macfarlane, "Consensus and Unanimity at the Supreme Court of Canada", (2010) 52 Sup Ct L Rev (2d) 379.

By now the annual review has become a standard, offering a handy measure of quantitative and qualitative perspectives on the Supreme Court's work each year.[13] Beyond the informational, the dynamics on the fledgling Wagner Court are the quarry and concern of this review. Descriptively, the year featured a relatively modest docket of 59 cases, of which thirteen, or close to one quarter, directly involved the Constitution and *Charter of Rights and Freedoms*.[14] Of those, four, or almost one-third, concerned the Constitution, including questions about the 1867 text, parliamentary privilege, unwritten principles, and aboriginal rights.[15] The Court's nine *Charter* decisions were grounded in s. 2's fundamental freedoms (3), the legal rights (4), and s. 15's equality guarantee (2).[16] The constitutional claim succeeded in five instances while failing in eight others.[17]

A breakdown shows the structure of decision making in 2018. The 2017 McLachlin Court is in the foreground, counting unanimity in seven of fourteen constitutional cases, or half its

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[13] See, *e.g.*, Annual Report, *supra* note 5; N. Novac, B. Fox, & N. Parker, "2018 at the Court: A Year in Review", *theCourt.ca* (19 February 2019), online: http://www.thecourt.ca/2018-scc-a-year-in-review/; J. Carpay, J. Kitchen, & D. Hersey, "The 2019 Judicial Freedom Index", Justice Centre for Constitutional Freedoms (May 2019), online: https://www.jccf.ca/wp-content/uploads/2019/05/Judicial-Freedom-Index-2019.pdf?mc_cid=8e78150e3f&mc_eid=8bdfd2ad9c.

[14] The cases are: *R v GTD*, 2018 SCC 7 [*GTD*]; *R v Comeau*, 2018 SCC 15 [*Comeau*]; *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*APTS*]; *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18 [*CSQ*]; *Ewert v Canada*, 2018 SCC 30 [*Ewert*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*TWU BC*]; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 [*TWU ON*]; *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 [*Chagnon*]; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew Cree*]; *Reference re Pan Canadian Securities Regulation*, 2018 SCC 48 [*Securities Reference*]; *R v Vice Media Canada Inc*, 2018 SCC 53 [*Vice Media*]; *R v Reeves*, 2018 SCC 56 [*Reeves*]; *R v Boudreault*, 2018 SCC 58 [*Boudreault*].

[15] *Comeau*; *Chagnon*; *Mikisew Cree*; *Securities Reference*; *ibid*.

[16] On s. 2, see *TWU* (BC and Ontario) and *Vice Media*; on legal rights, see *G.T.D.*; *Ewert*; *Reeves*; *Boudreault;* and *Vice Media* (ss. 8 and 2(b); on equality rights, see *APTS* and *CSQ*. *Ibid*.

[17] The claim succeeded in *GTD* (s. 10(b)); *APTS* (s. 15, pay equity); *Securities Reference* (division of powers); *Reeves* (s. 8, search and seizure); and *Boudreault* (s. 12, cruel and unusual punishment). The claim failed in *Comeau* (s. 121, free trade); *Chagnon* (no parliamentary privilege); *CSQ* (s. 15, pay equity); *Ewert* (s. 7); *TWU* (BC and Ontario); *Mikisew Cree* (no duty to consult in legislative process); and *Vice Media* (s. 8).

decisions.[18] To compare, the Wagner Court was unanimous and anonymous twice, in two non-*Charter* decisions, and unanimous three other times, but only as to outcome.[19] 2018's constitutional jurisprudence comprised eight majority opinion, along with twelve concurrences and seven dissents, yielding nineteen sets of parallel reasons in twelve cases with written opinions.[20] The pattern of multiple opinions is fortified in other high profile cases that evoked constitutional considerations without directly engaging the *Charter*. [21] If it is early to suggest a shift, the metrics confirm that the space for consensus, which was a hallmark of the McLachlin years, shrunk visibly and dramatically in 2018. Moreover, the consolidation of high-impact decision making by Justices Côté, Brown, and Rowe, writing on their own and in combination, was easily the most striking development this year. These hardworking, intellectually restless, and uncompromising judges wrote thirteen opinions in all, not one of which was a majority opinion.[22]

A year of not enough and too much

2018 was the year that oral reasons, a long-time standard of Supreme Court decision making, provoked backlash. Following a pattern that dates to 2014, the Court delivered summary

[18] There were 19 constitutional decisions in 2017, with written reasons in 14 cases and oral decisions in the remaining five. L. Sossin, "Constitutional Cases 2017: An Overview", (2019) 88 Sup Ct L Rev (2d) 3, at 4.
[19] *Comeau* and the *Securities Reference* were unanimous and anonymous decisions; though unanimous as to result the Court generated six sets of concurring reasons in *Mikisew Cree, Vice Media*, and *Reeves*. *Supra*, note 14.
[20] The majority opinions are: *APTS*; *Ewert*; *TWU* (2); *Chagnon*; *Reeves*; *Vice Media*; and *Boudreault*. The concurrences are: CSQ(1); TWU (x4, BC & Ontario); *Chagnon* (1); *Mikisew Cree* (3); *Vice Media* (1); and *Reeves* (2). Neither *CSQ* nor *Mikisew Cree* generated a majority opinion; Côté J.'s reasons in *CSQ* count here as a plurality concurrence. *GTD* was decided by oral reasons and is not included in this tabulation. Dissents were filed in *APTS*; *CSQ*; *Ewert* (partial); *TWU* (BC & ON); *Chagnon*; and *Boudreault*; Justice Brown's summary reasons in *GTD* explain briefly that Chief Justice Wagner dissented from the majority.
[21] See, *e.g.*, *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (5-2-2); *Groia v Law Society of Upper Canada*, 2018 SCC 27 (5-1-3); *Haaretz.com v Goldhar*, 2018 SCC 28 (3-1-1-1-3).
[22] Justice Brown's oral reasons in *GTD*, *supra* note 14, are technically a majority opinion but are not considered further. For the same reasons, *GTD* is not part of the Court's twelve written reasons in constitutional cases in 2018.

reasons from the bench in an increasing number of cases.[23] Dismissing appeals without written reasons occurs for the most part, but not exclusively, in criminal cases that reach the Court as of right. In 2018, the Court rendered oral reasons eighteen times, representing close to 30% of its docket. Even when the panel divided, which occurred five times in 2018 and once under the *Charter*, the Court was content with cursory reasons that did little but identify the dissenting judge or judges by name.[24] Put another way, the numbers confirm that the Court provided written reasons 41 times, in about 70% of its 2018 docket.

The premise of by-right appeals is that the apex court should hear a *Criminal Code* matter when there is a dissent at the provincial appellate level. Although the assumption is open to question, the Supreme Court's management of these appeals — sitting in panels of five and rendering summary oral reasons — "leaves the impression" that these cases are the docket's "second class citizens".[25] In more pointed terms, the "practice of deciding cases with only a few words of explanation … calls into question the Court's commitment to transparency", and defies its own rule that "'[r]easoned decisions [are] inherent in the judge's role'".[26] An approach to by-right appeals that strikes some observers as disrespectful may in due course affect the Court's legitimacy: the integrity of its jurisprudence is less a function of outcome than of reasons that

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[23] Between 2007 and 2013 the Court's average for oral reasons, at 5.4 per year, was low. That number rose between 2014 and 2017 to reach an average of 16.75 reasons from the bench per year. See A. Goldenberg, "*R. v. G.T.D.*: The Court decides a case from the bench – again", *McCarthy Tetrault* (5 March 2018), online: https://www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/r-v-gtd-supreme-court-canada-decides-charter-case-bench-again

[24] See *GTD*, *supra* note 14 (Wagner C.J., dissenting); *International Brotherhood of Electrical Workers (IBEW), Local 773 v. Lawrence*, 2018 SCC 11 (Abella J., dissenting); *R.A. v. the Queen*, 2018 SCC 13 (Gascon J., dissenting); *R. v. Cain*, 2018 SCC 20 (Côté J., dissenting); *R. v. Culotta*, 2018 SCC 59 (Abella and Martin JJ., dissenting). *International Brotherhood*, *ibid.*, is a relatively rare example of summary dismissal of a civil appeal.

[25] C. Schmitz, "SCC's growing number of oral judgments draws bar's fire but court says appeals get 'all the attention and resources they require'", *The Lawyer's Daily* (20 December 2018), online (quoting Nader Hasan): https://www.thelawyersdaily.ca/articles/9310.

[26] F. Addario & J. Foy, "The Supreme Court of Canada's 'new transparency' is anything but", *The Globe & Mail* (16 December 2018), online: https://www.theglobeandmail.com/opinion/article-the-supreme-court-of-canadas-new-transparency-is-anything-but/ and *ibid.* (quoting Binnie J.).

explain the disposition to parties and attend to the law's development. Moreover, on a downsized caseload, resources are not the issue; it is difficult to imagine that providing reasons in some of these cases would burden the Court.

In contrast to the summary dismissal of these appeals is the prolixity of written reasons in 2018's constitutional decisions: while oral judgments in eighteen decisions totalled 48 paragraphs, or less than three paragraphs per decision, the Court's output in twelve constitutional cases expanded to a monumental 1935 paragraphs, or on average, about 161 paragraphs per decision.[27]

On numerics alone, the weight and composition of this jurisprudence is significant. 2018's eight majority opinions accounted for 646 paragraphs, or about one-third of the volume; including 2018's two unanimous opinions elevates that number to 906 paragraphs, which is still less than half the year's total. Meanwhile, the Court's twelve concurrences and seven dissents comprised 920 paragraphs, or more than half the output.[28] In other words, majority reasons were outweighed by minority opinions, comprising concurrences and dissents, both in number and volume. As a matter of interest, 2017's comparables show a lower total of 1442 paragraphs, of which 937 — about two-thirds — were unanimous or majority opinions.[29] In addition, the 2017 McLachlin Court wrote four concurrences and six dissents, totalling 445 paragraphs, or less than one-third of the volume of reasons.[30] Put simply, a quick comparison with 2017 confirms a downward shift this year in the nature and degree of consensus in constitutional decision making.

Five members of the Wagner Court wrote a majority opinion in 2018: Karakatsanis J. led with two majority opinions and one plurality; Abella J. followed with one majority opinion and

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[27] See Appendix, R. Ng, "Quantitative Analysis of 2018 SCC Decisions".
[28] Including the Côté J. plurality in *CSQ* , concurrences contributed 533 and the dissents 387 paragraphs, to reach this total. Adding Abella J.'s lead plurality reasons in *CSQ* (56 paragraphs) and Karaktsanis's reasons in *Mikisew Cree* (53 paragraphs) brings the number to 1935 paragraphs.
[29] R. Ng, "Quantitative Analysis of 2017 SCC Decisions" (on file with author).
[30] There, the concurrences totalled 124 paragraphs and the dissents 321 paragraphs. Ng, *ibid*.

one plurality; and Chief Justice Wagner and Justices Moldaver and Martin each wrote one majority opinion.[31] None of the others — Justices Gascon, Côté, Brown, or Rowe — wrote a majority opinion on a constitutional issue in 2018. Voting but once for the claim in *R. v. Reeves*, Rowe J.'s support for the *Charter* was lowest among members of the Court.[32] Gascon J., who on April 15, 2019 announced his retirement from the Court, wrote no reasons in the 2018 constitutional jurisprudence, and placed himself on the side of the majority in every instance.[33]

While at six paragraphs Chief Justice McLachlin's *CSQ* dissent was the shortest minority opinion, Justice Rowe's 107-paragraph concurrence in *TWU* (BC) was the longest.[34] Apart from Justices Côté, Brown and Rowe, Chief Justice McLachlin was the only other member of the Court to write a dissent.[35] McLachlin C.J. and Abella J. each contributed two concurring opinions and Moldaver J. added another, with Justices Côté, Brown, and Rowe providing the remaining seven.[36]

Whether in a threesome, as a pair, or alone, Justices Côté, Brown and Rowe wrote thirteen of the Court's nineteen minority opinions.[37] This, it bears noting, is about 70% of the yield and, at 722 of the Court's 1675 paragraphs, about 40% of its non-unanimous volume. It is clear, on this

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[31] For Karakatsanis J., see *Chagnon*, *Reeves*, and *Mikisew Cree* (plurality opinion). Abella J.'s majority opinion was *APTS* and her plurality opinion was *CSQ*. While Chief Justice Wagner wrote the majority opinion in *Ewert*, Moldaver J. wrote in *Vice Media,* and Martin J. wrote the majority opinion in *Boudreault*.

[32] While the others supported the *Charter* claim three times, with four votes, Justice Brown was the *Charter*'s strongest supporter in 2018 (*TWU* (2); *Reeves*; *Boudreault* ).

[33] Statement from the Minister of Justice and Attorney General of Canada: https://www.newswire.ca/news-releases/statement-from-the-minister-of-justice-and-attorney-general-of-canada-on-the-retirement-of-supreme-court-justice-clement-gascon-830188149.html. In May 2019, Justice Gascon released a public statement acknowledging the mental health challenges he has suffered over the years. S. Fine, "Supreme Court Justice Gascon releases a statement on his health after his disappearance", *The Globe & Mail* (14 May 2019), online: https://www.theglobeandmail.com/canada/article-supreme-court-justice-gascon-releases-statement-on-his-health-after/.

[34] At four paragraphs her concurrence in *TWU (Ontario)* was shorter but simply confirmed her reasons in *TWU (BC)*.

[35] *CSQ*, *supra*, note 14.

[36] While Chief Justice McLachlin concurred in the two *TWU* cases, Justice Abella wrote full-length concurrences in *Mikisew Cree* and *Vice Media;* Moldaver J. wrote a concurrence in *Reeves*.

[37] In 2017, these judges wrote three concurrences and three dissents in 2017. R. Ng, "2017 Quantitative Analysis", *supra*, note 29.

measure alone, that these judges formed a powerhouse of significant strategic, jurisprudential, and institutional strength and intensity. As discussed below, this is not only a function of volume or paragraph counting; the Côté-Brown-Rowe jurisprudence exposed significant differences of opinion within the Court, and at times expressed flashes of attitude in doing so.

2018's qualitative metrics

Others can attest that the Court's 1935 paragraphs of written constitutional reasons challenge the most intrepid, astute, and tireless of readers. In a volume that has been published annually since 2001, *Constitutional Cases 2018* once again offers insightful commentary on the year's jurisprudence by prominent scholars, freeing this review to explore institutional themes and issues. A few observations are offered here, in overview and as prelude to a closer examination of the rise in minority reasons in 2018.

By tally, *Charter* claims succeeded in four of nine cases, including *G.T.D.*, and failed in five others.[38] Section 2's fundamental freedoms account for three of the five losses and were not supported by the Court in 2018.[39] Meanwhile, the *Charter*'s legal rights generated five decisions, including *Vice Media*, with the s. 8 claim prevailing untidily in *Reeves* and with significant impact for s. 12 in *Boudreault*.[40] Finally, the Court split the pay equity decisions from Quebec, finding in *APTS* that legislative amendments to the scheme unjustifiably violated s. 15 in *APTS*, and dismissing the claim in CSQ, where the lack of a comparator workforce justified delays in implementation of the scheme.[41]

[38] *Supra* note 17.
[39] *TWU (BC)*; *TWU (Ont.)*; and *Vice Media*, *supra* note 14.
[40] *G.T.D.*; *Ewert*; *Vice Media*; *Reeves*; *Boudreault*; *supra* note 14.
[41] *Supra* note 14.

Freedom-based claims did not fare well in 2018, and that includes the high profile decision in *R. v. Comeau*, which re-surfaced the 1867 Constitution's "free trade" clause.[42] This was not the first constitutional dispute about Canadian beer, and in *Comeau* the s. 121 issue set up against longstanding interprovincial trade barriers and grievances about fairness and equity between citizens and businesses of different provinces.[43] Despite a chronic lack of will to address this problem at the level of politics, the Court in solidarity rejected the invitation to mobilize s. 121.[44] The prospect of opening up free trade litigation and encouraging laissez-faire claims against complex regulatory schemes was, in the Court's perception, fraught with consequences.[45] Constraining, if not effectively pre-empting, a role for s. 121 preserved the status quo of routing complaints about regulation through the Constitution's s. 91 and s. 92 checklists.[46]

The Wagner Court's responses to the *Charter*'s fundamental freedoms also disappointed. Long-awaited decisions on law society accreditation of TWU's proposed law school culminated in a 5-1-1-2 split in the Court.[47] In four sets of reasons, members of the Court staked and defended strong positions but failed to engage with the concept of freedom in any meaningful way. Writing on her own, Chief Justice McLachlin voiced a strong view of breach, concluding that the parallel violations of expressive and associational freedom escalated the interference with TWU's s. 2

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[42] *Supra* note 14. The issue was whether a regulation prohibiting individuals from having, keeping, or "stocking" out-of-province beer and alcohol violated the Constitution's free trade clause.
[43] See *Labatt Breweries of Canada Ltd. v. Canada (AG)*, [1980] 1 SCR 914.
[44] Section 121 reads: "All Articles of Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces". *Constitution Act, 1867*, 30 & 31 Vict., c.3 (U.K.).
[45] *Comeau*, *supra* note 14, at para. 3 (stating that the potential reach of s. 121 is "vast", implicating agricultural supply management schemes, public health-driven prohibitions, environmental controls, and "innumerable comparable regulatory measures").
[46] Rather than invoke the language of laissez faire, the Court pointed to "constitutional hiatuses" under ss. 91 and 92 that would arise if s. 121 served as a textual mechanism of economic integration. *Ibid*. at para. 72.
[47] *TWU (BC)*; *TWU (Ontario)*, *supra*, note 14. The majority comprised Justices Abella, Karakatsanis, Moldaver, Gascon JJ. and Wagner C.J.; Chief Justice McLachlin and Rowe J. wrote sole concurrences, and Côté and Brown JJ. wrote a joint dissent.

rights.[48] The majority and Rowe J., comprising six of nine judges, subsumed the co-ordinate claims in s. 2(a), leaving unresolved the question whether and in what circumstances a compound violation of s. 2 might aggravate a breach and condition the justification analysis.

The majority opinion did not name its author, which suggests a composite of views or author(s) who chose not to be known. In principle, the battle lines between the majority and dissent formed around the scope of public interest regulation by the law societies and contested understandings of diversity. In cerebral terms, the opinions paid scant attention to freedom's requirements, and none advanced a theory of freedom. After 342 paragraphs, the Court's longest constitutional decision in 2018 yielded scarce insight on freedom of religion, expression, or association. Freedom under s. 2 remained as much a situational entitlement as before, contingent on and subject to the vagaries of context and the uncertain contours of subjectively derived *Charter* values.[49]

In *Vice Media*, s. 8 served as the host for s. 2(b) concerns and the claim also failed there, by 9-0 vote.[50] Justice Abella nonetheless wrote important concurring reasons, discussed below, urging the Court to find a breach of s. 2(b) whenever police search the press. Despite invoking customary platitudes about a free press and tweaking the *Lessard* framework, Moldaver J.'s majority opinion refused to accept that a search of the press engages s. 2(b). By reading freedom of the press into s. 8 as a marker of reasonableness, *Vice Media* effectively read the freedom down — or out — of the *Charter*; in doing so, the Court once again rebuffed s. 2(b)'s textual guarantee of press rights.[51] Elsewhere, *Charter* claims succeeded impressively, if somewhat unusually,

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[48] McLachlin C.J., the only member of the 2018 Court who also heard it, cited to, and on this point followed *Trinity Western University v. BC College of Teachers*, 2001 SCC 31; [2001] 1 SCR 772.
[49] For further discussion, see *infra*.
[50] *Supra*, note 14.
[51] In this context, the framework was set in *Canadian Broadcasting Corp. v. Lessard*, [1991] SCR 421; *Canadian Broadcasting Corp. v. New Brunswick (AG)*, [1991] 3 SCR 459.

under ss. 12 and 15. As mentioned, *APTS* held that amendments to Quebec's pay equity scheme unjustifiably violated equality, and was offset by *CSQ*, which found that the lengthy delay in access to pay equity in non-comparator workplaces did not offend the *Charter*.[52] *APTS* and *CSQ* provoked a joint dissent and plurality concurrence, both of which rejected the claim without finding a breach of s. 15.[53]

This left *R. v. Boudreault* as the one *Charter* decision that bristles with possibility.[54] There, Justice Martin's debut *Charter* opinion held that the *Criminal Code*'s mandatory victim surcharge violated s. 12's prohibition against cruel and unusual punishment. As a form of mandatory minimum, the surcharge was within the doctrinal compass of the Court's jurisprudence invalidating such measures.[55] Still, the punishment was a relatively modest fine and not the prospect of custodial or carceral punishment.[56] The extenuating circumstances of marginalized criminal defendants and departure from longstanding principles of sentencing, particularly proportionality, led the Court to invalidate the surcharge, and do so without the customary suspended declaration.[57] It remains to be seen whether *Boudreault* is context-specific or instead points s. 12 toward broader conceptual boundaries and an enlarged function.

The intellectual energy of the Wagner Court's 2018 constitutional jurisprudence may be its defining feature. Rigorous analysis in concurring and dissenting opinions exposed transparent

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[52] *CSQ* concerned the s. 15 status of pay equity in workplaces without male comparators, and the lengthy delay in access to pay equity for employees in those workplaces.
[53] For further discussion, see *infra*.
[54] *Supra*, note 14.
[55] Most notably, see *R. v. Nur*, [2015] 1 SCR 773.
[56] While Martin J. maintained that offenders subject to the surcharge could be imprisoned for non-payment, Côté J. stated, to the contrary, that impecunious offenders would never be imprisoned for non-payment; *Boudreault*, *supra*, note 14, at paras. 69-73; 137. In dissent, Côté J. also noted that a surcharge of $100 or $200 for each conviction "is not exorbitant in and of itself". *Ibid.* at para. 152.
[57] As Martin J. explained, a suspended declaration "would simply cause more offenders to be subject to cruel and unusual punishment" and place the presiding court "in the position of having to affirm the very elements of the law that render it cruel and unusual". *Ibid.* at paras. 98, 106.

and significant differences of opinion among members of the Court. It is as though a dynamic of engaged debate released or unblocked the institution from years of the McLachlin Court's ethic of consensus building.

**Transparentizing difference**

If a quest for consensus might sandpaper the "rough edges" from opinions, blurring or obfuscating the tensions at work, a multiplicity of "unnecessary" views can evoke the "narcissism of small differences," potentially triggering destabilizing internal dynamics.[58] The balance of agreement and disagreement on any apex court is necessarily fluid – organically re-calibrating with shifts in the court's composition, leadership, and docket. Supreme Court of Canada judges hold office as individuals and serve as members of a decision-making collective responsible for the enforcement and development of Canadian law. When a jurist's point of view does not align with majority sentiment, a decision to concur or dissent is inflected by considerations of strategy and timing, as well as by a conception of judicial duty, integrity, and conscience. Minority reasons are a deliberate choice by a jurist, compelled in the circumstances to present an alternative point of view.

Concurring and dissenting reasons are the register of disagreement, on reasons for decision as well as on disposition of an appeal.[59] While dissent speaks directly to the fact of disagreement,

[58] K. Makin, "Justice Binnie's Exit Interview", *The Globe & Mail*, September 23, 2011 (describing "by the court" decisions as a process of "sandpapering the rough edges, taking out the little flashes or colour and reducing it to a vanilla flavour"). The "small" or "minor" differences quote references a Freudian concept — with many applications — and describes the psychological phenomenon of small or smaller differences being inflated or exaggerated to the point of assuming large and larger dimensions, out of proportion to their importance.

[59] Peter McCormick is one of the leading scholars on these issues. See, e.g., "Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada", (2004) 42 O.H.L.J. 99; "The Choral Court: Separate Concurrence and the McLachlin Court, 2000-2004" (year), 37 Ott. L. Rev. 370; "Standing Apart: Separate Concurrence and the Modern Supreme Court of Canada, 1984-2006", (2008) 53:1 McG. L.J. 137. See also, Macfarlane, "Consensus and Unanimity", *supra*, note 12; V. MacDonnell, "Justice Suzanne Côté's Reputation as a Dissenter on the Supreme Court of Canada" (2019), 88 S.C.L.R. (2d) 47.

concurrences are far from monolithic. Modestly, a concurrence may detach its author from an aspect of majority reasons, propose an angle on doctrine, or hold an issue in place, declining to comment or decide.[60] Likewise, concurring opinions may accept an outcome but not agree with reasons that for one reason or another are uncomfortable to endorse.[61] Concurrences can have ambitious purposes, such as staking out an alternative approach or sending a doctrinal trial balloon up for consideration and debate. In courting support within the Court or appealing prospectively to law's evolution, this form of concurrence aims for impact.[62] At their strongest, concurrences may be indistinguishable from full-fledged dissent, expressing little more than baseline agreement with a majority outcome.[63]

The Wagner Court's minority opinions are rich and dense, in substance, style, and intensity presenting a vital counterpoint to the views of the majority. Though the nineteen concurrences and dissents run the gamut from relatively short to relatively long, each brought a point of principle to the fore that — in the author's opinion — could not be submerged or sidelined by majority reasons. McLachlin C.J.'s *CSQ* dissent and Justice Rowe's concurrence in *Chagnon v. SFPQ* provide examples that fall at the more modest end of the spectrum.[64] While a short, 6-paragraph dissent in *CSQ* sufficed to record the former Chief Justice's view, curtly, that the s. 15 claim should succeed, Rowe J.'s 17-paragraph concurrence in *Chagnon* was strategic. That appeal tested whether security guards at Quebec's National Assembly could be dismissed by presidential fiat, as an aspect of parliamentary privilege, or were protected by the statutory labour scheme for public servants.

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[60] *Vice Media* and *Reeves* provide an example of the reverse, where the majority resisted the challenge, set out in concurring reasons, to enlarge the scope of decision making.

[61] In 2018, Rowe J. concurred in *Chagnon* because it was unnecessary to engage the constitutional contours of privilege.

[62] The Abella concurrence in *Vice Media*, discussed below, is an example.

[63] Justice Côté's concurring reasons in *CSQ* and to some extent in *Reeves* are in this tradition.

[64] *Supra*, note 14.

Justice Rowe's sole concurrence offered a work-around that resolved the matter against privilege, albeit on statutory grounds.[65] Downplaying the stakes in that way was not of interest to majority and minority opinions that expressed divergent views on the scope and merits of parliamentary privilege.

More generally, 2018's minority reasons can be sorted according to conventional criteria of form and content. On content, Wagner Court judges unwilling to accept prescribed doctrine or align with majority positions wrote concurring opinions at key junctures, in the process ambitiously challenging or proposing modifications to *Charter* methodology. Engagement at this level of jurisprudential debate is found in *Vice Media*, *Reeves*, and *TWU*.

As for form, the style of discourse also shifted, bringing a harder, more transparent edge to disagreement in at least some cases. As already noted, Justices Côté, Brown and Rowe worked as a juristic tag team of sorts, combining and re-combining to create synergies as decision making required. The three wrote sharply in *TWU*, jointly and severally, in concurrence and in dissent.[66] Elsewhere the tone escalated, arguably crossing the line of collegiality in argumentative reasons that might be perceived by some as confrontational and even disrespectful. The joint dissent signed by the three in *APTS* and Brown concurrence in *Mikisew Cree* introduced an edge to collegial discourse that stood out in 2018. This edge contributed as much to institutional dynamics as the content of minority reasons.

<u>Concurring and dissenting differences in principle</u>

[65] He maintained that the statutory regime for National Assembly employees ousted any privilege the President could claim to dismiss security guards. In his view, it was unnecessary for the legislature to explicitly abrogate the privilege and its failure to do so meant that the security guards remained in the purview of the statute and outside any powers of dismissal the President might enjoy.

[66] Despite disagreeing as to outcome, the Rowe concurrence and joint dissent by Justices Côté and Brown provided a complementary and stinging critique of *Doré* methodology; see discussion, *infra*.

In *Vice Media* the Court's sympathy was in short supply and there was never a doubt that the claim would fail on the merits.[67] Despite the context, Justice Abella wrote a concurring opinion fiercely advocating a constitutional concept of the press. Pushing back against longstanding precedent, she maintained that a dual analysis is mandatory because s. 2(b) and s. 8 are both violated when the press is subject to search or a production order.[68] Justice Abella's reasons appealed to the "distinct" constitutional status of the press more than a dozen times, heralded the vital democratic role of the press, and called for a "new harmonized analysis" whenever police seek access to journalists, their documents, and their sources.[69] A concurrence advocating so emphatically for constitutional press rights – calling on the Court to overcome its "prior judicial hesitancy" and "openly acknowledge that freedom of the press is not a derivative right" – was not only unexpected but extraordinary; it led to a 5-4 vote and might have come close to winning majority support.[70]

Were it not for the concurrence, the Court's reasons in *Vice Media* could have been quite short, and that is why the majority opinion should be read against Justice Abella's opinion.[71] Justice Moldaver's reasons were firm on the constitutional issue, declaring it "inappropriate and unnecessary" to address the *Charter*, because *Vice Media* could be decided "without going so far

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[67] *Supra*, note 14. After a self-proclaimed terrorist sought access to the media to advance and glorify his cause, Vice Media and journalist Ben Makuch challenged the constitutionality of production orders directing them to produce the screen captures of messages exchanged with the source.

[68] *Ibid.* at para. 112 (stating, for example, that both the media's s. 2(b) rights and s. 8 privacy rights are engaged when the state seeks access to information, and a "rigorously protective harmonized analysis is therefore required").

[69] For references to the distinct and independent role of the press, see paras. 122, 123, 125, 126, 133, 141; additionally, the hallmarks of her harmonized approach are that s. 2(b) is no longer the "backdrop" in determining the constitutionality of production orders; that both media entitlements must be balanced against the state's interest; and that a proportionality analysis of salutary benefits and deleterious consequences must be added. *Ibid.* at paras. 141-45.

[70] *Ibid.* at para. 123.

[71] Though it is unclear, the structure of the decision suggests that the concurrence could have preceded majority reasons; while Moldaver J. defers to her summary of the facts and history, and responds specifically to her proposal, Abella J. unusually does not acknowledge or comment on the majority opinion at all.

as to rethink s. 2(b)."[72] Moldaver J. emphasized that the matter was not "*fully* argued," and furthermore urged caution, pointing to the "unforeseen consequences" that recognizing a constitutional free press could have on other areas of the law.[73] What surprises, in light of this, is that Justice Moldaver wrote at such length and so carefully to modify the *Lessard* search warrant criteria and tailor the *Garofoli* test to the circumstances of the press. Despite his view of s. 2(b) and the merits of the claim, he made notable concessions to the press and media.[74] This raises the interesting question whether Moldaver J. would have volunteered these modifications in any event, absent the concurrence. Rather than leave Justice Abella's forceful opinion and proposal for a dual analysis unanswered, he might have concluded that the law would be better served by yielding doctrinal ground to the press. In this way, Moldaver J. provided a corrective within the existing framework and fortified it at the same time.[75]

From that perspective and on its face, *R. v. Reeves* presents an interesting contrast. There, the majority opinion's decision not to address a key issue prompted sole concurrences by Justices Moldaver and Côté. Once again, all members of the Court agreed — in this instance — to exclude illegally obtained evidence under s. 24(2).[76] The judges otherwise divided on the s. 8 implications of police entry to shared accommodation and seizure of a shared computer. Karakatsanis J. relied on a concession by counsel to assume legal entry and focus instead on the legality of seizing a

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[72] *Ibid.* at para. 105.

[73] *Ibid.* at para. 103 (emphasis added). But note that counsel for Vice Media and other intervenors did ask the Court to revise and modify the rules around press searches and production orders.

[74] Specifically, Moldaver J. "reorganized" the *Lessard* factors to make them easier to apply in practice and proposed a modified *Garofoli* standard to allow *de novo* review of a production order, but only where information is presented to the reviewing judge, which was not before the authorizing judge and could reasonably have affected the decision to grant the order. *Ibid.* at paras. 82-83 (*Lessard*) and paras. 72-76 (modified *Garofoli* standard).

[75] Moldaver J. and Abella J. both acknowledged and were well aware of critical changes in the law recently effected by enactment of the *Journalistic Sources Protection Act*, S.C. 2017, c.22. The Court heard its first appeal under this legislation in *Denis c. Côté*

[76] *Supra*, note 14. In brief, the police entered a home, with the consent and at the invitation of the accused's common law partner, and seized a shared computer.

computer co-owned by common law spouses.[77] In doing so, she stolidly maintained that it was unnecessary and inappropriate for the Court to address the question of entry.[78] In spite of her position, Justice Moldaver wrote a concurrence giving the issue full consideration and advancing a test based on the *Waterfield* framework for common law powers of arrest.[79] He broached the tentative nature of his proposal in an unusually transparent and modest way, perhaps signalling a measure of ambivalence or discomfort in addressing the issue.[80] Whether by design or not, the Moldaver concurrence provided counterweight to Justice Côté, whose energetic concurrence was more definitive than tentative, and read much like a dissent.[81]

When a concurrence surfaces in the decision-making process, the majority opinion must choose whether and how to respond. In many cases, the reasons may be mature and the majority committed at that point in the process, as perhaps in *Reeves*. Engaging after the fact might appear defensive and can entangle the majority in an agenda not of its choosing, potentially compromising the clarity or cohesion of its reasons. At the same time, leaving a gap can lend authority to a concurrence that proposes an alternative approach that is not tested by any response, positive or negative. Members of the Court have been known to boost the authority of concurring and dissenting opinions by commenting and relying on a majority's failure to join issue or express disagreement. In this, there is a sense of missed opportunity in *Reeves* with the majority's decision not to address what was, in a literal sense, the threshold issue of prior legal entry. The gap in

[77] *Ibid.* at para. 20.
[78] *Ibid.* at para. 23 (stating that it was not "prudent" to explore the issue in the absence of full submissions).
[79] The common law police power he proposed has five criteria. *Ibid.* at para. 96.
[80] See, *e.g.*, paras. 71, 76, 100 (stating, in para. 76, that "any final determination" must be left "for another day".
[81] She maintained, for example, that her reasons for upholding police entry were "more compelling" than those of Moldaver J. (*ibid.* at para. 109); in addition, she provided detailed reasons or concluding, contrary to the majority, that police validly seized the computer.

majority reasons focused attention on and empowered the Moldaver and Côté concurrences, but in formal terms reserved the Court's position to another day.

Though concurring opinions in *Vice Media* and *Reeves* presented alternative approaches to key questions under s. 2(b) and s. 8, *TWU* provoked the most intense exchanges on issues of constitutional interpretation. Flaws in the law society process in British Columbia and divergent results in provincial appellate courts complicated the Court's task of deciding the question of accreditation for TWU's proposed law school.[82] While the majority opinion and joint dissent focused on the core issues at stake, concurring opinions by Chief Justice McLachlin and Rowe J. diverted attention to other questions. Specifically, and after effectively dissenting on the question of entitlement — because she disagreed with the exclusion of s. 2's other freedoms and belittling of the violation — Chief Justice McLachlin upheld the decision because the law society could reasonably refuse accreditation to avoid condoning TWU's discriminatory covenant.[83] In this way she converted her strong reasons on breach to weak and unpersuasive grounds of justification.[84]

Meanwhile, Justice Rowe treated *TWU* as the venue for a lengthy exegesis on the conceptual structure of *Charter* interpretation. In doing so, his 107-paragraph concurrence curiously worked backward from justification to breach. Rowe J. did not decide the preliminary issue of breach until late in his reasons, at that point finding that non-accreditation did not violate s. 2(a)'s freedom of religion, and also that non-accreditation met the standard of reasonableness.[85]

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[82] *Supra*, note 14. The discussion focuses on *TWU (BC)* as the leading decision on non-accreditation of the proposed law school.

[83] McLachlin C.J. maintained that the expressive and associational elements of TWU's claim must be included in the ambit of the s. 2(a) claim, because denial of accreditation would limit its expression of its religious beliefs and practices, and limit its right to associate as required by its religious beliefs and practices. *Ibid.* at paras. 122-6. That analysis led her to disagree with other members of the Court who concluded that the interference with constitutional rights was minor in the circumstances. *Ibid.* at para. 134.

[84] *Ibid.* at para. 140. But see para. 338 (joint dissent, maintaining that there is no basis for concern that law society accreditation would amount to condoning the content of the Covenant or discrimination against LGBTQ persons).

[85] *Ibid.* at para. 242 (concluding that s. 2(a) does not protect a right to impose religious practices on those who do not voluntarily adhere) and para. 268 (upholding the decision as reasonable).

In light of that conclusion, Rowe's long passages on "the proper approach to *Charter* rights" were, in formal terms, beside the point.[86] It was evident throughout that his clear priority in *TWU* was to position himself as an iconoclast re-thinking the foundations of *Charter* methodology. A specific goal of this bold and ambitious concurrence was to confront and challenge the *Doré* approach to *Charter*-based administrative decision making.[87]

It was not much coincidence, in light of their affinities in 2018, that Justices Côté and Brown joined forces with Justice Rowe on that issue. Having pledged not to reconsider the decision, the joint dissent added its own critique, detailing its "fundamental concerns" about the way *Doré* "betrays the promise of our Constitution".[88] Through a process of analytical counterpoint, the two minority opinions re-inforced each other's central concerns about the flaws and weaknesses of the methodology. It was a thorough job that contested the underlying assumptions of a customized *Charter* standard for administrative decisions, and then pointed to the flimsy way, in their view, that the standard applied to the non-accreditation decision.[89] In concert, the minority reasons in *TWU* left the model vulnerable and shaken, perhaps inflicting enough damage to put survival of the *Doré* approach in doubt.

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[86] *Ibid.* at paras. 162-208.

[87] *Ibid.* at 164 (stating the concern that *Doré* does not provide a "similarly rigorous protection of *Charter* rights" as *Oakes*. Among other things, Justice Rowe challenged the concept of *Charter* values (paras. 166-75, *ibid.*) and addressed the ambiguity on burden of proof under a *Doré*-based approach (paras. 195-208).

[88] *Ibid.* at para. 266. In particular, Justices Côté and Brown cited the lack of a rationale for a distinct framework for administrative decision making (para. 302); the majority's reliance on "unsourced" *Charter* values (para. 306-08); its interpretation of and the weight placed on equality as a counter-value (para. 310); and the question of onus (paras. 312-14).

[89] See joint dissent, *ibid.*, at para. 302 (stating that the justices "welcome the clarification" of the framework but "find the lack of rationale for *insisting* on a distinct framework for administrative decisions troubling" [emphasis added]); and paras. 294 (stating that "the majority simply cannot point to *any* basis whatsoever for suggesting that the [law society] Benchers conducted any balancing at all, let alone proportionate balancing" [emphasis in original].

The tipping point in *TWU* was the majority opinion's decision to uphold non-accreditation in the face of a controversial and profoundly flawed decision-making process.[90] Upholding the law society decision in such circumstances became a flashpoint for the subjective, malleable, and deferential elements of the methodology.[91] Yet the majority opinion did not take the doctrinal "bait" set in the minority opinions; unwilling or unable to answer their concerns, the majority rested its case on the strength in numbers of five votes. It is evident, following *TWU*, that there is little space for consensus, and that makes a showdown on this methodology likely in the near future.

As this brief discussion confirms, members of the Wagner Court were simply unwilling, at critical moments, to compromise their views or submerge their voices in majority reasons. The minority opinions in *Vice Media*, *Reeves* and *TWU* — as well as in the pay equity decisions, *Chagnon*, *Mikisew Cree*, and *Boudreault* — enriched, enlivened and emboldened decision making in 2018 in ways that were at least inventive and at times radical.

<u>On the edges of difference</u>

Chief Justice McLachlin's consensus-building skills and strategies have been widely praised, and her style of leadership attributed, in part, to gender and her role as Canada's first

[90] Rowe J. explained that if he had found a *Charter* infringement, he did not see "how it would be possible for the LSBC to proceed by way of a majority vote while upholding its responsibilities under the *Charter*, adding that the law society could not achieve proportionate balancing "simply by saying a majority of its members were in favour of denying accreditation". *Ibid.* at para. 256

[91] For instance, the joint dissent objected to "the imposition of judicially preferred 'values' to limit constitutionally protected rights, including the right to hold other values", adding that the majority "does not (and cannot) point to a specific legal rule or right to ground the application of a value of equality". *Ibid.* at paras. 309, 310. Also, the dissent pointed out the Court's silence on the question of onus, thereby "leaving a conspicuous and serious lacuna in the *Doré/Loyola* framework" and despite being challenged "*on this very question*" by other members of the Court. *Ibid.* at para. 312.

female chief justice.[92] She engaged those strategies in the service of minimizing or eliminating what she once described as "unnecessary concurrences" and "unnecessary voices".[93] McLachlin C.J. actively encouraged co-authorship as well as wrote memos, "highlight(ing) areas where the first drafter [could] emphasize or tone down so that he [could] bring on more voices".[94] Reportedly, she intervened directly to defuse "unnecessarily pointed remarks" in written opinions, at times inviting a rephrasing in "temperate terms" of "potentially hurtful or belittling phraseology".[95] Chief Justice McLachlin led the Court at a time when her experience and personal strengths, together with the Court's composition, was amenable to a consensus-based style of decision making. Even so, the suggestion that would-be concurrences or different voices might be "unnecessary" sends a troubling message, and other strategies hint at a heavy-handedness and top-down chill on the freedom and independence of judges to speak and write reasons as they please. As the turn to a more provocative approach to written reasons this year demonstrates, the institutional dynamics have already shifted with a change in leadership. On at least two occasions pointed remarks appeared that might have prompted a gentle intervention under former Chief Justice McLachlin.

In *APTS*, the joint dissent of Justices Côté, Brown and Rowe openly personalized its disagreements with Justice Abella's majority opinion.[96] Their concern was that Abella J. had imposed an "obligation of result" on Quebec that was "profoundly unfair."[97] Pointing out that it was a pioneer in the struggle against pay inequities, the joint dissent concluded that the province

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[92] See I. Greene and P. McCormick, *Beverley McLachlin*, *supra* , note 6 (page numbers); M. Wetstein & C. Ostberg, "Strategic Leadership on the Canadian Supreme Court: Analyzing the Transition to Chief Justice" (2005), 38:3 *Can. J. Pol. Sci.* 653 (tracing McLachlin C.J.'s transition to leadership and her strategic effort to serve as a social leader, changing the "tone and timbre" of the Court she leads; *ibid.*, 669-70).
[93] Tibbetts, "Building Consensus", *supra*, note 6.
[94] *Ibid.*
[95] *Ibid*. (citing former Justice Louis Lebel).
[96] *Supra*, note 14.
[97] *APTS*, *supra* note 14, at paras. 64, 66.

could not be faulted under s.15 of the *Charter* for modifying the implementation of a scheme that proved imperfect. The analysis was rigorous but also dismissive of and condescending toward the majority opinion, variously describing Abella J.'s analysis as "tainted", "wrong", "mistaken" and "absurd".[98]

*CSQ*, the companion case to *APTS*, reached a different outcome on a 4-4-1 split in the Court.[99] On the additional question of implementing pay equity in non-comparator workplaces, the claim failed under both plurality opinions, with Chief Justice McLachlin alone in dissent. While Abella J.'s plurality found a justifiable breach of s. 15, Côté J.'s once again held that there was no violation of s. 15. A key difference between the two is that the edge in tone that characterized the joint dissent in *APTS* did not repeat in *CSQ*. Chief Justice Wagner joined the *APTS* dissenters in *CSQ*, on the related but separate issue about the status of pay equity in non-comparator workplaces; whether his concurring vote had a moderating influence on the style of discourse is unknown.[100] It is also unclear whether it made a difference that *APTS* was a joint dissent, and Justice Côté was sole author of the plurality concurrence in *CSQ*.

Otherwise, the Court's decision in *Mikisew Cree* prompted strong differences of opinion within the Court. There, the question of a duty to consult aboriginal communities during the legislative process generated an unusual 3-2-1-3 split at the Court.[101] What stands out in *Mikisew Cree*'s profusion of reasons is the negative and even disdainful way Justice Brown spoke of Justice Karakatsanis and her reasons.[102] At face value, his concurrence reads as if written in pique,

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[98] *APTS* at paras. 83, 86, 90, 91.
[99] *Supra*, note 14.
[100] He welcomes dissent, albeit within a context of civility; *supra*, note 9.
[101] *Supra*, note 14. Justice Karakatsanis wrote for herself, Wagner C.J. and Gascon; Martin J. joined Abella J.'s concurrence; Brown J. wrote alone; and Justices Moldaver and Côté joined Rowe J.'s concurrrence.
[102] Brown J. only acknowledged the Karakatsanis opinion negatively, choosing otherwise to overtly state his agreement with the Federal Court of Appeal. For examples of the tone of this concurrence, see para. 105 (stating that he "cannot" endorse her reasons and explaining that he writes "separately in an attempt to bring some analytical clarity to the matter" (emphasis added); para. 138 (dismissing much of his colleague's speculation as

demonstrating one colleague's lack of respect for another. Though Justice Rowe's concurring opinion expressly approved and endorsed Brown J.'s analysis, neither he nor Justices Moldaver and Côté — who signed his reasons — chose to join Justice Brown.[103] In the circumstances, it is certainly possible that these judges set themselves apart to avoid endorsing or validating the dismissive tone and attitude of the Brown concurrence.

Judicial independence values and requires, but also tolerates the prerogative of every jurist to vote and decide according to her own dictates and, in doing so, to write reasons that are uncompromisingly her own. It is reality — a feature and vital element of decision making — that differences of opinion will be strongly held and expressed. There is a cautionary just the same. Escalating the discourse and rhetoric of an opinion does not necessarily or even usually improve the persuasiveness of its point of view. Moreover, when disagreements are personalized in the opinions of the Court — which constitute its official work and point of contact with the Canadian public and legal community — collegial relations will be affected; in human terms, it cannot be otherwise.

**Supreme Court DNA**

At his end-of-term press conference in June 2019, Chief Justice Wagner brushed off concerns about the incidence of division in the Court's decision making to date. As reported, the Court divided in eighteen of its first twenty-two decisions this year, marking the lowest rate of

"inapplicable"); para. 139 (stating that "my colleague is searching for a problem to solve" and "she believes she has found it"); para. 142 (referring to her "quixotic" argument); and para. 144 (stating that an "apex court should not strive to sow uncertainty").

[103] *Ibid.* at paras. 148; 150; 169.

unanimity in decades.[104] When invited to comment, Wagner C.J. cautioned of the need to be "very careful when one looks at numbers," and added that dissenting opinions are in the Supreme Court of Canada's "DNA".[105] Declaring that "I'm not afraid of that", the Chief went on to state that dissent is "very good, positive for our jurisprudence": making no mistake of the message, he added "it's good for the debate" and "good for transparency and openness".[106]

Unanimity can be overvalued and, as Chief Justice Wagner acknowledged, can mislead, staunching and disappearing lines of disagreement to present a false impression of consensus. Nor are patterns of agreement and disagreement constant over time or with changes in court leadership and composition.[107] In any event, there is no benchmark to establish when there are too many concurrences or dissents, or reasons that are too long, too contentious, or too beside the point. To place queries about Wagner Court divisions in perspective, it is worth recalling an earlier point in *Charter* history when the Supreme Court delivered twelve concurrences in four decisions on the same day, and another when the Court released eighteen concurrences on two consecutive days.[108] At this time the Wagner Court's administration is one year in the making; in due course its decision making data will take shape and find its place in the longitudinal statistics for historical rates of agreement and disagreement on the Supreme Court of Canada. The rise in minority reasons in 2018 may stand out, though perhaps only in the short term and against an extended period of unanimity and consensus under Chief Justice McLachlin.

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[104] C. Schmitz, "Halfway through 2019, SCC more divided than ever as nine judges fracture in 82 per cent of cases", *The Lawyer's Daily* (9 July 2019): https://www.thelawyersdaily.ca/articles/13592/halfway-through-2019-scc-more-divided-than-ever-as-nine-judges-fracture-in-82-per-cent-of-cases.

[105] *Ibid.*

[106] *Ibid*.

[107] McCormick, "Standing Apart", *supra* note 59 (providing data on shifts in voting patterns at the Court, from 1984-2006); see also Wetstein & Ostberg, *supra* note 92 (analyzing and discussing changes in voting and the incidence of dissent for *puisne* judges appointed chief justice).

[108] McCormick, *Ibid.* at 165.

His remarks, in 2018 and again in 2019, express the Chief Justice's confidence in his style of leadership. So far, Wagner C.J.'s conception of office has been grounded in collegial and institutional trust, demonstrating his willingness to place the Court in the hands of its judges. It is an approach that is weighted more to the *inter pares* than the *primus* side of a chief justice's equation of office. In 2018, members of the Court took the Chief Justice's cues to heart, spilling countless words on the page to advance debate about high-level questions of constitutional interpretation. Three judges – Justices Côté, Brown and Rowe – dominated the minority jurisprudence, holding the majority view to account, at times in blunt and uncompromising terms. Suffice to say, and without naming them a bloc or faction, their reasons have had significant impact on the style and content of debate at the Court. Yet concerns about internal divisions that could disturb the equilibrium of collegial decision making are premature. It is well to remember that the Court's nine judges are equal and accountable, at all times and in all cases, to the law, the Court, and their own concept of judicial duty and integrity. When a jurist's perspective does not align with the majority view, the issue is whether or how to reconcile that difference. For each jurist and for the institution that process is dynamic and cannot be orchestrated. And so, trusting his colleagues and respecting their differences, even at the edge of civility — in the faith that the Court's legitimacy can withstand and even embrace all forms of concurrence and dissent — may be Chief Justice Wagner's most important achievement in 2018.

## Appendix

### Quantitative Analysis of 2018 Supreme Court of Canada Decisions

Ryan Ng

#### 1. Length of Selected 2018 Constitutional Cases

| Case Name | Citation | # of paragraphs |
|---|---|---|
| *R. v. Comeau* | 2018 SCC 15 | 128 |
| *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux* | 2018 SCC 17 | 114 |
| *Centrale des syndicats du Québec v. Quebec (Attorney General)* | 2018 SCC 18 | 159 |
| *Ewert v. Canada* | 2018 SCC 30 | 129 |
| *Law Society of British Columbia v. Trinity Western University* | 2018 SCC 32 | 342 |
| *Trinity Western University v. Law Society of Upper Canada* | 2018 SCC 33 | 82 |
| *Chagnon v. Syndicat de la fonction publique et parapublique du Québec* | 2018 SCC 39 | 165 |
| *Mikisew Cree First Nation v. Canada (Governor General in Council)* | 2018 SCC 40 | 172 |
| *Reference re Pan-Canadian Securities Regulation* | 2018 SCC 48 | 132 |
| *R. v. Vice Media Canada Inc.* | 2018 SCC 53 | 171 |
| *R. v. Reeves* | 2018 SCC 56 | 141 |
| *R. v. Boudreault* | 2018 SCC 58 | 200 |
| **TOTAL** | **n/a** | **1935** |

## 2. Majority/Unanimous Opinions in Selected 2018 Constitutional Cases

| Case Name | Citation | # of paragraphs |
|---|---|---|
| *R. v. Comeau* | 2018 SCC 15 | 128 (unanimous, SCC) |
| *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux* | 2018 SCC 17 | 61 (A*/ML/Mo/K/W/G) |
| *Centrale des syndicats du Québec v. Quebec (Attorney General)* | 2018 SCC 18 | n/a (no majority; 4-4-1) |
| *Ewert v. Canada* | 2018 SCC 30 | 90 (W*/ML/A/Mo/K/G/B) |
| *Law Society of British Columbia v. Trinity Western University* | 2018 SCC 32 | 106 (A/Mo/K/W/G) |
| *Trinity Western University v. Law Society of Upper Canada* | 2018 SCC 33 | 43 (A/Mo/K/W/G) |
| *Chagnon v. Syndicat de la fonction publique et parapublique du Québec* | 2018 SCC 39 | 58 (K*/W/A/Mo/G/Ma) |
| *Mikisew Cree First Nation v. Canada (Governor General in Council)* | 2018 SCC 40 | n/a (no majority; 3-2-1-3) |
| *Reference re Pan-Canadian Securities Regulation* | 2018 SCC 48 | 132 (unanimous, SCC) |
| *R. v. Vice Media Canada Inc.* | 2018 SCC 53 | 108 (Mo*/G/C/B/R) |
| *R. v. Reeves* | 2018 SCC 56 | 69 (K*/W/A/G/B/R/Ma) |
| *R. v. Boudreault* | 2018 SCC 58 | 111 (Ma*/W/A/Mo/K/G/B) |
| **SUBTOTAL (unanimous)** | **n/a** | **260** |
| **SUBTOTAL (majority)** | **n/a** | **646** |
| **TOTAL** | **n/a** | **906** |

*author of reasons (if not indicated, reasons were jointly written)

### 3. Concurrences in Selected 2018 Constitutional Cases

| Case Name | Citation | # of paragraphs |
|---|---|---|
| *R. v. Comeau* | 2018 SCC 15 | 0 |
| *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux* | 2018 SCC 17 | 0 |
| *Centrale des syndicats du Québec v. Quebec (Attorney General)* | 2018 SCC 18 | 97 (C*/W/B/R)** |
| *Ewert v. Canada* | 2018 SCC 30 | 0 |
| *Law Society of British Columbia v. Trinity Western University* | 2018 SCC 32 | 45 (ML), 108 (R) = 153 |
| *Trinity Western University v. Law Society of Upper Canada* | 2018 SCC 33 | 4 (ML), 8 (R) = 12 |
| *Chagnon v. Syndicat de la fonction publique et parapublique du Québec* | 2018 SCC 39 | 17 (R) |
| *Mikisew Cree First Nation v. Canada (Governor General in Council)* | 2018 SCC 40 | 46 (A*/Ma), 48 (B), 25 (R*/Mo/C) = 119 |
| *Reference re Pan-Canadian Securities Regulation* | 2018 SCC 48 | 0 |
| *R. v. Vice Media Canada Inc.* | 2018 SCC 53 | 63 (A*/W/K/Ma) |
| *R. v. Reeves* | 2018 SCC 56 | 34 (Mo), 38 (C) = 72 |
| *R. v. Boudreault* | 2018 SCC 58 | 0 |
| **TOTAL** | **n/a** | **533** |

*author of reasons

### 4. Dissents in Selected 2018 Constitutional Cases

| Case Name | Citation | # of paragraphs |
|---|---|---|
| *R. v. Comeau* | 2018 SCC 15 | 0 |
| *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux* | 2018 SCC 17 | 53 (C/B/R) |
| *Centrale des syndicats du Québec v. Quebec (Attorney General)* | 2018 SCC 18 | 6 (ML)** |
| *Ewert v. Canada* | 2018 SCC 30 | 39 (R*/C, partial) |
| *Law Society of British Columbia v. Trinity Western University* | 2018 SCC 32 | 83 (C/B) |
| *Trinity Western University v. Law Society of Upper Canada* | 2018 SCC 33 | 27 (C/B) |
| *Chagnon v. Syndicat de la fonction publique et parapublique du Québec* | 2018 SCC 39 | 90 (C/B) |
| *Mikisew Cree First Nation v. Canada (Governor General in Council)* | 2018 SCC 40 | 0 |
| *Reference re Pan-Canadian Securities Regulation* | 2018 SCC 48 | 0 |
| *R. v. Vice Media Canada Inc.* | 2018 SCC 53 | 0 |
| *R. v. Reeves* | 2018 SCC 56 | 0 |
| *R. v. Boudreault* | 2018 SCC 58 | 89 (C*/R) |
| **TOTAL** | **n/a** | **387** |

*author of reasons (if not indicated, reasons were jointly written)

### 5. Concurrences by Côté, Brown, and Rowe JJ in 2018 Constitutional Cases

| **Concurrences by Côté J** | **# of paragraphs** |
|---|---|
| *Centrale des syndicats du Québec v. Quebec (Attorney General)* (Wagner, Brown, and Rowe JJ concurring) | 97 |
| *Mikisew Cree First Nation v. Canada (Governor General in Council)* (with Moldaver and Rowe* JJ) | 25 |
| *R. v. Reeves* | 38 |
| **SUBTOTAL (Côté J)** | **160** |
| **Concurrences by Brown J** | **# of paragraphs** |
| *Centrale des syndicats du Québec v. Quebec (Attorney General)* (with Wagner, Côté*, and Rowe JJ) | 97 |
| *Mikisew Cree First Nation v. Canada (Governor General in Council)* | 48 |
| **SUBTOTAL (Brown J)** | **145** |
| **Concurrences by Rowe J** | **# of paragraphs** |
| *Centrale des syndicats du Québec v. Quebec (Attorney General)* (with Wagner, Côté*, and Brown JJ) | 97 |
| *Law Society of British Columbia v. Trinity Western University* | 108 |
| *Trinity Western University v. Law Society of Upper Canada* | 8 |
| *Chagnon v. Syndicat de la fonction publique et parapublique du Québec* | 17 |
| *Mikisew Cree First Nation v. Canada (Governor General in Council)* (Moldaver and Côté JJ concurring) | 25 |
| **SUBTOTAL (Rowe J)** | **255** |
| **TOTAL (Côté, Brown, and Rowe JJ)** | **341** |

NB: Côté, Brown, and Rowe JJ concurred as a group in *CSQ*. Côté and Rowe JJ also concurred together in *Mikisew Cree* (97 and 25 paras. respectively). These cases are counted towards the total once.

*author of reasons (otherwise, the justice in the table heading is the sole author or co-author)

### 6. Dissents by Côté, Brown, and Rowe JJ in 2018 Constitutional Cases

| **Dissents by Côté J** | **# of paragraphs** |
|---|---|
| *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux* (joint dissent with Brown and Rowe JJ) | 53 |
| *Ewert v. Canada* (partial, with Rowe J*) | 39 |
| *Law Society of British Columbia v. Trinity Western University* (joint dissent with Brown J) | 83 |
| *Trinity Western University v. Law Society of Upper Canada* (joint dissent with Brown J) | 27 |
| *Chagnon v. Syndicat de la fonction publique et parapublique du Québec* (joint dissent with Brown J) | 90 |
| *R. v. Boudreault* (Rowe J concurring) | 89 |
| **SUBTOTAL (Côté J)** | **381** |
| **Dissents by Brown J** | **# of paragraphs** |
| *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux* (joint dissent with Côté and Rowe JJ) | 53 |
| *Law Society of British Columbia v. Trinity Western University* (joint dissent with Côté J) | 83 |
| *Trinity Western University v. Law Society of Upper Canada* (joint dissent with Côté J) | 27 |
| *Chagnon v. Syndicat de la fonction publique et parapublique du Québec* (joint dissent with Côté J) | 90 |
| **SUBTOTAL (Brown J)** | **253** |
| **Dissents by Rowe J** | **# of paragraphs** |
| *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux* (joint dissent with Côté and Rowe JJ) | 53 |
| *Ewert v. Canada* (partial, Côté J concurring) | 39 |
| *R. v. Boudreault* (with Côté J*) | 89 |
| **SUBOTAL (Rowe J)** | **181** |
| **TOTAL (Côté, Brown, and Rowe JJ)** | **381** |

NB: Côté, Brown, and Rowe JJ dissented as a group in *APTS* (53 paras.). Côté and Brown JJ also dissented together in the two *TWU* cases and *Chagnon* (83, 27, and 90 paras.). Finally, Côté and Rowe JJ dissented together in *Ewert* and *Boudreault* (39 and 89 paras. respectively). These cases are counted towards the total once.

*author of reasons (otherwise, the justice in the table heading is the sole author or co-author)

## 7. Length of 2018 Reasons from the Bench (Oral Decisions)

| Case Name | Citation | # of paragraphs | Dissent? |
|---|---|---|---|
| *R. v. Seipp* | 2018 SCC 1 | 3 | No |
| *R. v. A.R.J.D.* | 2018 SCC 6 | 3 | No |
| *R. v. G.T.D.* | 2018 SCC 7 | 6 | Yes (Wagner CJ) |
| *R. v. A.G.W.* | 2018 SCC 9 | 1 | No |
| *R. v. Black* | 2018 SCC 10 | 4 | No |
| *International Brotherhood of Electrical Workers (IBEW) Local 773 v. Lawrence* | 2018 SCC 11 | 2 | Yes (Abella J) |
| *R.A. v. Her Majesty the Queen* | 2018 SCC 13 | 1 | Yes (Gascon J) |
| *R. v. Cain* | 2018 SCC 20 | 4 | Yes (Côté J) |
| *R. v. Stephan* | 2018 SCC 21 | 3 | No |
| *R. v. Colling* | 2018 SCC 23 | 1 | No |
| *R. v. Gulliver* | 2018 SCC 24 | 2 | No |
| *R. v. Gagnon* | 2018 SCC 41 | 4 | No |
| *R. v. Normore* | 2018 SCC 42 | 4 | No |
| *Callidus Capital Corp. v. Canada* | 2018 SCC 47 | 2 | No |
| *R. v. Youssef* | 2018 SCC 49 | 2 | No |
| *R. v. Ajise* | 2018 SCC 51 | 1 (2?) | No |
| *R. v. Culotta* | 2018 SCC 57 | 2 | Yes (Abella and Martin JJ) |
| *R. v. Quartey* | 2018 SCC 59 | 3 | No |
| **TOTAL** | **n/a** | **48** | **5 (instances of dissent)** |