

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

Peter McCormick

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

Abstract

What do the BCE case of 2008, the Securities Reference case of 2010, the Senate Reform Reference case of 2014, and the Carter (assisted suicide) case of 2015 have in common? All are unanimous decisions of the Supreme Court of Canada in which the reasons for judgment—the explanation as to why the outcome is the legally and constitutionally appropriate one—are not attributed to any specific named judge or judges on the Supreme Court, but rather to a mysterious entity called THE COURT. Very few Supreme Court decisions take this form, and there was a time not that long ago when no headline-worthy decision ever did—this is a practice that emerged on an identifiable date with a trackable history. Moreover, it is a purely Canadian story—it is not part of the legacy of English law, not something that crossed from south of the border by imitative osmosis, not an idea copied from anybody else. It is something that was developed by Canadian judges, that emerged in response to a very specific Canadian event, and that has evolved since that first experience. This Commentary identifies and explores this underappreciated and understudied judicial innovation.

Keywords

Court decisions and opinions; Judicial opinions; Canada. Supreme Court; Canada

Commentaries

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

PETER MCCORMICK*

What do the *BCE* case of 2008, the *Securities Reference* case of 2010, the *Senate Reform Reference* case of 2014, and the *Carter* (assisted suicide) case of 2015 have in common? All are unanimous decisions of the Supreme Court of Canada in which the reasons for judgment—the explanation as to why the outcome is the legally and constitutionally appropriate one—are not attributed to any specific named judge or judges on the Supreme Court, but rather to a mysterious entity called THE COURT. Very few Supreme Court decisions take this form, and there was a time not that long ago when no headline-worthy decision ever did—this is a practice that emerged on an identifiable date with a trackable history. Moreover, it is a purely Canadian story—it is not part of the legacy of English law, not something that crossed from south of the border by imitative osmosis, not an idea copied from anybody else. It is something that was developed by Canadian judges, that emerged in response to a very specific Canadian event, and that has evolved since that first experience. This Commentary identifies and explores this underappreciated and understudied judicial innovation.

Qu'ont en commun l'affaire *Bell Canada* de 2008, le *renvoi de 2011 relatif à la Loi sur les valeurs mobilières*, le *renvoi de 2014 relatif à la réforme du Sénat* et l'affaire *Carter* (suicide assisté) de 2015? Tous ces jugements de la Cour suprême du Canada ont été unanimes et les raisons motivant leur verdict—l'explication précisant pourquoi le verdict était juridiquement et constitutionnellement approprié – n'ont pas été attribuées à un ou des juges en particulier, mais à une mystérieuse entité nommée LA COUR. Très peu de jugements de la Cour suprême prennent cette forme et il fut une époque pas très lointaine où aucun jugement digne de faire les manchettes ne la prenait—il s'agit là d'une pratique apparue à une date identifiable et dont l'historique est retraçable. Il s'agit de plus d'une pratique purement canadienne, qui ne nous vient ni du patrimoine juridique britannique, ni du sud de la frontière par un phénomène d'osmose imitative, ni de nulle part ailleurs. Il s'agit d'une chose qu'ont élaborée des juges canadiens en réaction à un événement très spécifique survenu au Canada et cette pratique a évolué depuis son apparition. Ce commentaire révèle et explore cette innovation juridique à la fois méconnue et rarement étudiée.

* Peter McCormick is Professor Emeritus with the Department of Political Science at the University of Lethbridge.

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WHAT DO THE *BCE*¹ CASE OF 2008, the *Securities Reference*² case of 2010, the *Senate Reform Reference*³ of 2014 and the *Carter*⁴ case of 2015 have in common? All are unanimous decisions of the Supreme Court of Canada in which the reasons for judgment—the explanation as to why the outcome is legally and constitutionally appropriate—are not attributed to any specific named judge or judges on the Supreme Court, but rather to a mysterious entity called “The Court.”

Not very many Supreme Court decisions take this form. Indeed, there was a time not that long ago when no headline-worthy decision ever did—this is a practice that emerged on an identifiable date with a trackable history. Moreover, it is a purely Canadian story—it is not part of the legacy of English law; not

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1. *BCE Inc v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560.
 2. *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837.
 3. *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.
 4. *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.

something that crossed from south of the border by osmosis;⁵ not an idea copied from anyone else. It is something that was developed by Canadian judges, that emerged in response to a very specific Canadian event, and that has evolved since that first experience. This commentary will identify and explore this underappreciated and understudied judicial innovation.

I. WHO CARES? DEFENDING THE TOPIC

I begin by defending my choice of topic. It is striking that there is no literature for me to review as an introduction to the topic—not a single journal article, let alone a book, has ever focused on this phenomenon. Andre Bzdera set the basic frame more than twenty years ago when he described the anonymous unanimous judgment as a standard high court device for constitutional questions on federalism issues, but the citations that accompany this bold claim bear on the unanimous rather than the anonymous aspect.⁶ Although specific exemplar cases are often discussed in the literature—given the profile of some of them, how could they not be!—the anonymity of their authors is routinely ignored.⁷ At most, passing comments, often relegated to footnotes, note without expansion

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5. Some might doubt this claim of originality, thinking of the United States Supreme Court's *per curiam* practice as a possible model or inspiration. Such an attribution is mistaken, because no USSC *per curiam* decisions are remotely like the major Canadian decisions—they are either minor and concise to the point of boilerplate or constrained staccato summaries of badly divided panels. The apparent similarity in the labels—"By the Court" being a simple translation of the Latin "*per curiam*"—is completely misleading. For a description of US practices, see e.g. Stephen Wasby et al., "The Supreme Court's Use of the *Per Curiam* Disposition" (1992-1993) 13 N Ill UL Rev 1; Stephen Wasby et al., "The *per curiam* opinion: its nature and functions" (1992-1993) 76 Judicature 29; Michael Gizzi & Stephen Wasby, "*Per Curiam* Revisited" (2012-2013) 96 Judicature 3. For that matter, the SCC also had a long-standing *per curiam* practice, which was like neither the USSC's *per curiam* nor the SCC's "By the Court" rulings, but instead followed the English style, consisting not of a set of reasons for judgment but rather a section within the headnotes.
 6. Andre Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review" (1993) 26:1 Can J Pol Sci 3.
 7. Consider, for example, the way the Supreme Court Law Review handled the 1979 language decisions of *Attorney General of Quebec v Blaikie* and *Forest v Manitoba (Attorney General)*, the cases that are often (and, I will suggest below, incorrectly) accepted as the beginning of the tradition. Although the content of the case was reviewed in two successive annual editions, the author noted that they were unanimous but never once mentioned the fact that they were delivered by and attributed to "The Court" rather than to a specific member of the panel. See *Attorney General of Quebec v Blaikie et al*, [1979] 2 SCR 1016, 101 DLR (3d) 394 [*Blaikie* 1]; *Forest v Manitoba (Attorney General)*, [1979] 2 SCR 1032, 101 DLR (3d) 385 [*Forest*].

or commentary that the Court sometimes but infrequently uses anonymous judgments in constitutional cases.⁸

Judicial biographies are little better. Three excellent biographies should be of real assistance—those of Justices Bora Laskin,⁹ Brian Dickson,¹⁰ and Bertha Wilson¹¹—but they are not. The Laskin biography takes notice of only one of the several “By the Court” decisions made on Laskin’s watch, confidently insisting that although no author is indicated the turns of phrase are characteristic of Laskin.¹² It says nothing, however, about why anonymity was chosen in the first place, who took the initiative, or how specific cases were chosen from the broader caseload to take this form. One imagines the justices sitting around a table, one of them suggesting this novel practice and others responding with either enthusiasm or reluctance—but if any such meeting ever took place, the otherwise excellent biography has nothing to say about it. Similarly, the Dickson biography declares that although two specific decisions were reported as “By the Court” judgments, Dickson’s own papers put it beyond doubt that Dickson himself wrote the reasons in question.¹³ But again, there is no discussion of why the impersonal label was used at all, no indication of why Dickson did not assume individual responsibility in the usual way, no hint of a broader practice or policy.¹⁴ All three biographies attach considerable importance to the unanimity of some of the Supreme Court’s most important decisions; none take any real notice of the more unusual feature of anonymity. “By the Court” seems to be all but invisible, except when it is explained away.

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8. See *e.g.* Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2015) at 15–49, n 249; or 18–20, n 114.
 9. Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: The Osgoode Society/University of Toronto Press, 2005).
 10. Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge’s Journey* (Toronto: The Osgoode Society/University of Toronto Press, 2003).
 11. Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: The Osgoode Society/University of Toronto Press 2001).
 12. Girard, *supra* note 9 at 510.
 13. Specifically, *Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1 [*Manitoba Language Reference*]; *Tremblay v Daigle*, [1989] 2 SCR 530, 62 DLR (4th) 634 [*Tremblay*]. See Sharpe, *supra* note 10 at 418 for *Manitoba Language Reference*; *Ibid* at 395 for *Tremblay v Daigle*.
 14. *Ibid.* In the process of discussing the decision, Sharpe and Roach illustrate one of the problems with the “By the Court” style: when we write about judges, whether to praise or to criticize, we do so in terms of the reasons they wrote. But “By the Court” prevents us from doing this for some very important cases—we don’t know who to commend or blame, whose evolving ideas to make those reasons part of—and Sharpe and Roach respond to this deflection by fiercely reclaiming two of those judgments for the judge who is their subject.

And yet, today—after a tumultuous half decade that has included the *Securities Reference*,¹⁵ *Reference re Supreme Court Act ss. 5 & 6*,¹⁶ *Senate Reform Reference*,¹⁷ and *Carter*¹⁸—it is no longer possible not to notice the part that “By the Court” played in ratcheting up the tension of the Court’s public contretemps with the Harper government. “By the Court” is clearly unusual and unquestionably important, and yet it remains under-explored to the point of utter neglect. This omission calls for redress, which this Commentary will attempt to provide.

A. BROADER THEORETICAL ATTRACTIONS

“By the Court” judgments highlight two important theoretical issues in a dramatic way. The first is what I will call the “*presentation factor*,” the way the Court presents itself and its decisions (especially, but not only, the major ones) are significant elements of what the Supreme Court is doing at any specific point in its historical evolution. The content of a major judgment is of course important, but the packaging is important as well; given that the words in a judgment constitute the Court’s only way of exercising its influence, it would be strange indeed to suggest that the mode of presentation simply does not matter, that the Court just dashes off opinions without any thought about how to shape and structure them to best effect. Thinking of the mode of presentation as the product of conscious and shared choices is made more credible by the fact that our Court’s self-presentation style has evolved through identifiable stages, and has recently settled on a regular format that is globally unique in a number of ways.¹⁹

Marshall McLuhan famously said that the medium is the message; as a more modest variant, the present suggestion is that the packaging matters. M. Todd Henderson warns us never to treat any aspect of the way a national high court delivers its reasons as something minor, to be shrugged off as an idiosyncratic accident or whim.²⁰ Rather, the way the Court presents itself must be understood as the consciously shaped product of the institution’s reaction to the threats, challenges, and opportunities of its immediate historical context, constrained by the expectations of continuity that underpin its legitimacy. Although Henderson was writing about the United States Supreme Court and specifically about the

15. *Supra* note 2.

16. 2014 SCC 21, [2014] 1 SCR 433 [*Nadon*].

17. *Supra* note 3.

18. *Supra* note 4.

19. See Peter McCormick, “Structures of Judgment: How the Modern Supreme Court of Canada Organizes Its Reasons” (2009) 32 Dal LJ 35.

20. See M Todd Henderson, “From Seriatim to Consensus and Back Again: A Theory of Dissent” (2007) Sup Ct Rev 283.

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

The second issue is “*the many and the one*,” or, less cryptically, the panel court paradox of the unavoidable tension between individualism and institutionalism. On the one hand, the Court is comprised of nine fiercely independent professionals, each with a unique sense of priorities and values and a strong desire to see those priorities and values appropriately reflected in Canadian law during their service on the Court; only rarely will these preferences coincide perfectly with those of any of their colleagues, let alone all of them. On the other hand, the Court is (especially today) a major national institution whose preferably unified decisions are expected to deliver finality, certainty, and clarity, especially on the larger issues. This dynamic calls for leadership (and therefore followership) and compromise. The first wing of this paradox pulls the Supreme Court toward the fragmented individualism of solo reasons, the second toward a preference for solid majorities at least and for unanimity at best. The Court’s location on this continuum is constantly being renegotiated, with different answers for different time periods, for different Chief Justices, for different mixtures of personalities, for different sorts of issues, and for different types of law. The old *seriatim* style,²¹ where every judge wrote free-standing reasons without reference to those of anyone else, represents one extreme end of this continuum; the “By the Court” style, with a single judgment that does not even acknowledge a lead author, is the other extreme. This contrast is rendered all the more fascinating by the fact that there was a clearly identifiable date when our own Supreme Court switched abruptly and decisively (and therefore, presumably, deliberately) from the one to the other for certain important purposes.

B. DEFINING THE TOPIC: WHAT IS “BY THE COURT”?

A “By the Court” judgment is a decision of the Supreme Court that is attributed to the Court itself; no specific judge (or, on more recent practice, no specific pair

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

of judges)²² is identified as the lead author or authors. This practice is unusual because the tradition of common law appeal courts is for individual judges to acknowledge their individual accountability by putting their name to the reasons that they write.²³ We know that, for the SCC, these reasons are actually negotiated products of a collegial circulate-and-revise process, but this process qualifies rather than obliterates the specific, focused responsibility of the lead author, and we evaluate the performance of specific judges, for praise or blame, in terms of these attributed reasons. “By the Court” flatly repudiates this expectation: the whole point is that no single judge is identified and no individual accepts responsibility. The Supreme Court does not adopt this accountability-cloaking device very often, making it obvious that it is a deliberate choice and that it is therefore important to understand when and why it takes this unusual step. The first step toward an understanding of “By the Court” is recognizing the extraordinary nature of this anonymity.

In addition to being anonymous, “By the Court” decisions are also unanimous—although this should be treated as a matter of “usually” rather than “always and by definition.” There are a small number of significant cases where the decision has been presented as a joint judgment of all the judges in the majority despite a divided panel; this minority is clearly part of the broader phenomenon.²⁴ These outliers are perhaps failed “By the Court” decisions, but the attempt to achieve the same combination of anonymity and unanimity is clear. Most of the Supreme Court’s decisions in recent decades are unanimous but not anonymous; I am drawing attention to the smaller number that are both unanimous and anonymous, but I still want to make room under the umbrella for the even smaller handful that are anonymous without being unanimous. *Nadon* is the most recent example;²⁵ *Reference re: Resolution to Amend the Constitution*²⁶ is the most impressive, with not one but two different sets of anonymous majority reasons for the two questions that the reference needed to address, both of which

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

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

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

25. *Supra* note 16.

26. [1981] 1 SCR 753, 125 DLR (3d) 1 [*Patriation Reference*].

are answered by a jointly-authored dissent. *Reference re: Exported Natural Gas Tax*²⁷ is an intriguing echo. *Irwin Toy Ltd. v Quebec (Attorney General)*²⁸ is perhaps the example that stretches the notion the furthest, as it was co-authored by the three judges in the majority of a five judge panel. Purists might exclude these, but if anonymity is the true core of the phenomenon, then the lack of unanimity (often to the extent of a single solo dissent) is a distinction without a difference.

II. TOWARDS A HISTORY OF “BY THE COURT”

When was the first “By the Court” decision? Readers will expect me to say 1979, but that would be wrong; the right answer is 1893,²⁹ or perhaps even 1891.³⁰ How many “By the Court” judgments have there been? Readers will expect me to say something in the neighborhood of a couple of dozen, but that would be wrong; the correct answer is just over 500.

These answers are strictly accurate, but they are at the same time somewhat unfair because the hundreds of earlier “By the Court” judgments were short decisions by small panels, often dealing with procedural or jurisdictional issues through a consideration of applications and motions, and rarely involving reasons that exceed two or three pages of text.³¹ These cases are significant in

27. [1982] 1 SCR 1004, 136 DLR (3d) 385 [*Exported Natural Gas Reference*]. See also *Carter v Canada* (15 January 2016), Ottawa, SCC 35591 (Order Motion) [*Carter Motion*]. The same highly unusual format of a joint judgment faced by joint dissent appears in the Court's recent decision in *Carter Motion*—the granting of the government's request for an extension of the suspended invalidity of the Criminal Code sections on assisted suicide—with a joint judgment by five justices confronting a joint dissent by four. Since this was a fairly brief decision on a motion, rather than a full decision on appeal, it is not included in this discussion.

28. [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy*].

29. See *Baker v La Societe de Construction Metropolitaine*, [1893] 22 SCR 364, 1893 CarswellNat 24.

30. See *Moir v Corporation of the Village of Huntington*, [1891] 19 SCR 363, 1891 CarswellNat 32.

31. For a detailed consideration of this earlier “minor tradition” see Marc Zanoni, *An Early History of the ‘By the Court’ Decisions on the Supreme Court of Canada* (MA Thesis, University of Lethbridge, 2016) [unpublished].

terms of the institutional history of the Court,³² but they are thin gruel indeed for expectations that have been shaped by cases like *Carter* or the *Reference re Secession of Quebec*.³³

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

Even this story, however, does not start when most people assume it does, which is to say with the Laskin Court’s 1979 decisions in the politically explosive language cases of *Blaikie 1* and *Forest*. The first true “By the Court” judgment in the grand tradition came a dozen years earlier in the *Reference re Offshore Mineral Rights (British Columbia)*³⁴ in November 1967, and the second was the *The Queen v Board of Transport Commissioners*³⁵ case two weeks later. The dozen years of silence separating these “By the Court” judgments from the pair of language cases is worth noting, although it may mean little more than that constitutional cases were thin on the ground and unanimous decisions in those cases even more so. In any event, the Chief Justice presiding over the initial introduction of the practice was not Laskin but John Cartwright.

All first times call for an explanation—dramatic new practices do not emerge spontaneously out of the blue, especially in judicial institutions whose authority is so deeply embedded in tradition and continuity. What induced the Supreme Court to move the “By the Court” format from minor, usually procedural cases to the centre stage of major constitutional decisions? The critical event seems to have been one of the Supreme Court’s most embarrassing moments, namely the Steven

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32. See James G Snell & Frederick Vaughan, *The Supreme Court: History of the Institution* (Toronto: Osgoode Society, 1985). As Snell and Vaughan point out, questions of the Supreme Court’s jurisdictional limits, and the development of shared understandings about procedure, were important matters that needed to be sorted out, a process that took several decades; collectively if not individually these cases are therefore a significant part of the Court’s evolution.
33. [1998] 2 SCR 217, 161 DLR (4th) 385 [*Quebec Secession Reference*]; *Carter*, *supra* note 4.
34. [1967] SCR 792, 65 DLR (2d) 353 [*Offshore Mineral Reference*]. Delivered 7 November 1967.
35. [1968] SCR 118, 65 DLR (2d) 425 [*Board of Transport Commissioners*]. Delivered 20 November 1967.

Truscott affair.³⁶ The case was so unique, and the set of reasons it generated so unusual, that it is less the first true “By the Court” than an important destabilizing moment of transition—an unusual event provoking an extraordinary response, but a response that was thereby established as a model available for wider (but not general) subsequent application. That is to say: I suggest a strong form of path dependence—absent *Truscott*, there would have been no grand tradition of “By the Court.” The decisions in *Offshore Mineral Reference* and *Board of Transport Commissioners* took that particular form because they could draw on the recent example of *Truscott*;³⁷ a dozen years later *Blaikie 1* and *Forest* could do likewise because the continuing members of the Court remembered the earlier trilogy.³⁸ At the center of the initial choice was Cartwright; at the center of the sequel were Justices Ronald Martland and Roland Ritchie.

Stephen Truscott was a fourteen-year-old student who was convicted on the basis of circumstantial evidence of the rape and murder of classmate Lynne Harper and sentenced to hang. An appeal to the Ontario Court of Appeal was unanimously dismissed, and an application for leave to appeal to the Supreme Court was rejected by a five-judge panel, although the Diefenbaker government commuted the death penalty to life imprisonment. But public unhappiness with the trial and its aftermath persisted, and several years later the pressure on the federal government was still such that they felt they had to do something. They settled on posing a reference question to the Supreme Court, essentially asking: Had you heard the appeal that you denied leave to eight years ago, would you have allowed it?

There is no way that this question could not have been, at least, unwelcome and, at most, highly offensive to the Court,³⁹ because it was effectively asking them to second-guess their own earlier decision.⁴⁰ The discomfort was exacerbated by the fact that four of the five judges from the earlier leave-to-appeal panel

36. *Reference Re: Steven Murray Truscott* [1967] SCR 309, 62 DLR (2d) 545 [Truscott]. Delivered 4 May 1967.

37. *Offshore Mineral Reference*, *supra* note 34; *Board of Transport Commissioners*, *supra* note 35.

38. *Blaikie 1*, *supra* note 7; *Forest*, *supra* note 7.

39. Although it was not unprecedented, as seen in *R v Coffin*, [1956] SCR 191, 114 CCC 1. This case was a similar response to a federal government reference asking the Court how it would have dealt with an appeal after it had denied the application for leave in that appeal. A comparable third example is *Reference re Milgaard*, [1992] 1 SCR 866, 90 DLR (4th) 1.

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

were still on the Court, including the Chief Justice himself.⁴¹ The Truscott case had drawn extraordinary public criticism that showed no signs of dying down, the government was now passing the buck, and the Court's own earlier involvement had already made it part of the controversy such that it could not distance itself from what might otherwise have been framed as a lower court misstep. In the event, the Court chose to stand firm, and it did so by issuing a truly extraordinary decision. After an appeal process that looked more like a trial than an appeal—stretching over several days with expert testimony and extensive cross-examination⁴²—and in an appellate judgment that resembled a trial judgment for its exceptional length and its detailed focus on specific pieces of evidence, the Court insisted that the evidence pointed to Truscott as the only possible culprit.⁴³ On the nine-judge, full-court panel, only one judge—Justice Emmett Hall—dissented; the enduring resentments that accompanied him for the rest of his service on the Court show how strong the feelings were running within the institution.⁴⁴

The most obvious way for the Court to have spoken with clarity and firmness, especially at a time when fragmented panels were the norm and explicitly identified majority judgments were just emerging, would have been an all-but-one majority judgment made more emphatic by being delivered by the Chief Justice. This possibility was presumably undercut by the Chief Justice's involvement in the earlier leave-to-appeal panel, which would have enhanced the “I still agree with myself” overtones that many thought had rendered the use of the reference process problematic from the beginning. The Court opted instead for a united front “joint opinion”⁴⁵ by eight judges listed by name. It had never done such a thing before, but any first-ever practice is necessarily available for subsequent emulation in different circumstances, and this is what happened

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

42. To quote from the headnotes in the *Supreme Court Reports*: “At this hearing, the Court received a large body of evidence, much of it relating to the medical aspects of the case and also heard the oral evidence of the accused who had not given evidence at the trial.” *Truscott*, *supra* note 36 at 309.

43. *Truscott*, *supra* note 36 at 366-367.

44. Regarding these enduring resentments, see Frederick Vaughan, *Aggressive in Pursuit: The Life of Justice Emmett Hall* (Toronto: University of Toronto Press, 2004); Frederick Vaughan, “Emmett M Hall: A Profile of the Judicial Temperament” (1977) 15:2 *Osgoode Hall LJ* 306.

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

six months later in the two constitutional decisions in November 1967. Since these two later decisions were unanimous they took the form of “joint opinion[s] of the Court.”⁴⁶

The Laskin Court’s language decisions of 1979 therefore represent not innovation but revival—and given that two members of the panels for those 1979 cases (Justices Martland and Ritchie) had served on all three of the 1967 panels, it seems plausible to present their own experiences and memories as the basis for a conscious and deliberate revival. Laskin has a well-deserved reputation as the great watershed Chief Justice, having presided over the transition from the “old” Supreme Court that gutted the Diefenbaker Bill of Rights to the “new” Supreme Court celebrated today, but the credit for the innovation of the “By the Court” judgment belongs not to Laskin but to Cartwright.⁴⁷

III. CREATING THE INVENTORY OF “BY THE COURT”

I have defined the phenomenon, described its emergence and early history, and narrowed the focus to the “grand tradition” of major cases, which I will somewhat generously define as reserved judgments with reasons running over 4000 words.⁴⁸ There have been fifty of these in the forty-eight years since 1967, a number that shrinks to forty-five if we treat companion cases (of which there have been three pairs and one triplet) as single examples. I have described the two early examples from the Cartwright Court in 1967; I will now provide an overview of the “grand tradition” “By the Court” judgments for each of the subsequent Chief Justiceships.

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

47. Technically to Taschereau, who was still Chief Justice for *Truscott* (but not for *Offshore Minerals* and *Board of Transport Commissioners*), but as Vaughan’s biography of Hall explains as delicately as possible, Taschereau was failing by the time of the *Truscott* hearings, and Cartwright—his presumptive successor—was clearly in charge. See *Aggressive in Pursuit*, *supra* note 44 at 210-14.

48. But I will stretch the point to include the much shorter decision in *Forest*, on the grounds that *Blaikie 1* and *Forest* are companion cases that should in some sense be treated as a package.

A. THE LASKIN COURT

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

TABLE 1: “BY THE COURT” JUDGMENTS OF THE LASKIN COURT, 1973-1984

Case	Year	Words	Subject
<i>Blaikie 1</i> ⁴⁹	1979	4,032	Federalism/Language
<i>Forest</i> ⁵⁰	1979	1,816	Federalism/Language
<i>Reference re Legislative Authority of Parliament of Canada</i> ⁵¹	1980	7,245	Federalism
<i>Quebec (Attorney General) v Blaikie</i> ⁵²	1981	6,424	Federalism/Language
<i>Patriation Reference</i> ⁵³	1981	28,743	Federalism
<i>Exported Natural Gas Reference</i> ⁵⁴	1982	12,811	Federalism
<i>Re: Objection by Quebec to a Resolution to amend the Constitution</i> ⁵⁵	1982	7,768	Federalism
<i>McEvoy v New Brunswick (Attorney General)</i> ⁵⁶	1983	5,569	Federalism
<i>Reference re Newfoundland Continental Shelf</i> ⁵⁷	1984	12,758	Federalism

Note: * = companion cases⁵⁸

49. *Supra* note 7.

50. *Supra* note 7.

51. [1980] 1 SCR 54, 102 DLR (3d) 1 [*Re Upper House*].

52. [1981] 1 SCR 312, 123 DLR (3d) 15 [*Blaikie 2*].

53. *Supra* note 26.

54. *Supra* note 27.

55. [1982] 2 SCR 793, 140 DLR (3d) 385 [*Quebec Veto Reference*].

56. [1983] 1 SCR 704, 148 DLR (3d) 25 [*McEvoy*].

57. [1984] 1 SCR 86, 5 DLR (4th) 385.

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

Court, we can make the generalization even more specific: “By the Court” judgments are all about federalism, and mostly concern reference cases.

But if we say the Laskin Court, are we necessarily saying Laskin? To put it in other words: What is really happening behind the veil of “By the Court?” One possibility is that the judgment really is a collective process to an extent far beyond the circulate-and-revise process that the Court usually follows.⁵⁹ In another article, I have used function word analysis⁶⁰ to explore the question of who was the initial drafter of the “By the Court” judgments. That article undermines the “strong committee” theory of “By the Court” rulings by demonstrating that the methodology points usually to a single judge and only sometimes to a possible pair of judges as the most likely writers; only for a single case is there enough evidence to suggest a team process.⁶¹

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

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59. My research has turned up only a single “By the Board” decision of the Judicial Committee of the Privy Council in this new century, and that was explained in the opening sentence in terms of every member of the panel having participated to such an extent that it would have been misleading to attribute it to a single individual; the case was *Cukurova Finance International Ltd. v Alfa Telecom Turkey Ltd.*, [2013] UKPC 2, [2015] 2 WLR 875. We have had no comparable explanation, within the reasons for judgment or otherwise, of the SCC’s use of the format.
60. Function word analysis calculates each judge’s relative usage patterns for fifty-some of the most common words, and then identifies the most likely author by generating similarity scores with the corresponding usage patterns in the analysis sections of each of the “By the Court” judgments. The language problem—some judges initially write in English, some in French, and some are “switch-hitters”—is less of a problem than might be anticipated because the *Supreme Court Reports* tell us that almost all of the “By the Court” judgments were initially written in English. See Peter McCormick, “*Nom de Plume*: Who Writes the Supreme Court’s ‘By the Court’ Judgments?” 39:1 Dal LJ [forthcoming in 2016].
61. See Peter McCormick, “Sharing the Spotlight: Co-Authored Reasons on the Modern Supreme Court of Canada” (2011) 34 Dal LJ 165. Even assuming that the tie in function-word similarity scores indicates a two-judge collaboration of this sort (which is itself a bit of a stretch), this would not of itself explain the “By the Court” format because two-judge co-authorships are a fairly common practice on the modern Supreme Court.

This therefore leaves us with the third possibility: Behind the façade of “By the Court,” it is largely business as usual at the Supreme Court, which is to say that the assignment of the responsibility of drafting the initial reasons is handled on the basis of a rotation between a number of judges, tilted strongly toward the more senior members of the Court.⁶² But this, of course, just knocks out two easy explanations of what “By the Court” is all about and leaves the question of “why these cases” as mysterious as ever.

In the immediate context of the Laskin Court and the specific role of Laskin, there is some reason to doubt that Laskin himself played a strong part in the re-emergence of “By the Court” in and after 1979. When the device was redeployed in the fall of 1979, Laskin was absent for almost the entire term: He had been hospitalized in Vancouver and returned to Ottawa (but not to full service on the Court) just before the decisions were handed down.⁶³ He is therefore more likely to have been passenger than leader on those important re-introductory examples. It is also striking that the use of “By the Court” dates not from the early stages of Laskin’s Chief Justiceship but rather from the mid-point, and in particular from the half-term when he was away from the Court. This does not make it impossible for Laskin to have played some role in the innovation, but it makes it less likely.

B. THE DICKSON COURT

For the Dickson Court, “By the Court” judgments are more numerous, though their use is considerably more diffuse. Only two involved federalism issues, and one of these was the extended follow-up to *Forest* in the same way that *Blaikie 2* expanded and fulfilled *Blaikie 1*. Three others grew out of the Supreme Court’s new challenge of an entrenched *Charter of Rights and Freedoms*. There was a pair of cases involving First Nations issues, but these decisions do not loom large in the Court’s development of First Nations jurisprudence.⁶⁴ And there was a curious pair of relatively short decisions—*Air Canada v Dorval (City)*⁶⁵ and *R v*

62. For a description of “business as usual” in the allocation of the writing of judgments, employing two different methodologies, see Peter McCormick, “Who Writes?: Gender and Judgment Assignment on the Supreme Court of Canada” (2014) 51:2 Osgoode Hall LJ 595; Peter McCormick, “Judgment and Opportunity: Assignment of Reasons on the McLachlin Court” (2015) 38 Dal LJ 271.

63. Girard, *supra* note 9 at 447-449.

64. *Quebec (AG) v Healy* [1987] 1 SCR 158, 3 ACWS (3d) 383 [*Healy*]; *Canadian Pacific Ltd v Paul* [1988] 2 SCR 654, 53 DLR (4th) 487 [*Canadian Pacific*].

65. [1985] 1 SCR 861, 19 DLR (4th) 401 [*Dorval*].

*Wigman*⁶⁶—which are notable for the fact that neither raises any constitutional issue at all. Their inclusion in the grand tradition is therefore mildly suspect. These two cases aside, the generalization that “By the Court” is about constitutional law is sustained, although the scope of constitutional concerns addressed is considerably broader. Only one of the cases (*Manitoba Language Reference*⁶⁷) is a reference question; all the others apparently involved a discretionary proactive choice by the panel to treat this particular case anonymously, although the reasons for this choice are never made explicit.

TABLE 2: “BY THE COURT” JUDGMENTS OF THE DICKSON COURT 1984-1990

Case	Year	Words	Subject
<i>Quebec Association of Protestant School Boards v Quebec (Attorney General)</i> ⁶⁸	1984	8,418	Language/Charter
<i>Dorval</i> ⁶⁹	1985	4,217	Municipal law
<i>Manitoba Language Reference</i> ⁷⁰	1985	18,068	Federalism/Language
<i>Healy</i> ⁷¹	1987	6,972	First Nations
<i>Wigman</i> ⁷²	1987	4,783	Criminal law
<i>Canadian Pacific</i> ⁷³	1988	8,529	First Nations
<i>Clark v Canadian National Railway</i> ⁷⁴	1988	9,190	Federalism
<i>Ford v Quebec (Attorney General)</i> ^{*75}	1988	24,634	Language/Charter
<i>Devine v Quebec (Attorney General)</i> ^{*76}	1988	9,277	Language/Charter
<i>Irwin Toy</i> ⁷⁷	1989	22,707	Charter
<i>Tremblay</i> ⁷⁸	1989	13,593	Charter

Note: * = companion cases

66. [1987] 1 SCR 246, 38 DLR (4th) 530 [*Wigman*].

67. *Supra* note 13.

68. [1984] 2 SCR 66, 10 DLR (4th) 321.

69. *Supra* note 65.

70. *Supra* note 13.

71. *Supra* note 64.

72. *Supra* note 66.

73. *Supra* note 64.

74. [1988] 2 SCR 680, 54 DLR (4th) 679 [*Clark*].

75. [1988] 2 SCR 712, 54 DLR (4th) 577 [*Ford*].

76. [1988] 2 SCR 790, 55 DLR (4th) 641 [*Devine*].

77. *Supra* note 28.

78. *Supra* note 13.

Eleven examples in six years certainly suggest a vigorous and deliberate “By the Court” strategy on the part of Chief Justice Dickson, but the impression needs to be adjusted in light of the fact that some of the examples are clearly less a matter of strategic choice than of administrative convenience, a way of dealing with problem cases where a judgment simply could not be attributed in the normal way. The Dickson Court had significant and recurring problems with the chronic poor health of several of the judges, aggravating the double challenge of a high case load and the pressure of dealing with the precedentially critical first generation of *Charter* decisions.⁷⁹ This resulted in several “By the Court” decisions that we might think of as accidental, and the purest example is *Healy*. After a standard “By the Court” beginning—“judgment delivered by The Court”—the actual text begins “We adopt the reasons for judgment written and circulated by our late and much respected Justice Chouinard during the Fall Term. The reasons follow.”⁸⁰ That is to say: The “By the Court” format notwithstanding, there is an attributed solo author, but under such circumstances that it could not be handled in the usual fashion.

The major language decisions of *Ford* and *Devine* are examples of somewhat similar circumstances.⁸¹ At his request, Justice Le Dain had been assigned the drafting of the reasons for judgment and had circulated a version during the summer of 1988, only to be incapacitated and hospitalized in the fall—so much so that the work of revising the initial draft fell to Justices Lamer and Wilson. Le Dain’s condition was serious enough that he could not sign his name to the final versions, either as attributed author or even as a participating and judgment-supporting panel member, and this misfortune is why the *Supreme Court Reports* indicate (in a way that is technically correct but still profoundly misleading) that he “took no part in the judgment.”⁸² The absence of a *Healy*-style first sentence is presumably explained by the difficulty in finding an explanation that would adequately cover the ground without embarrassing anyone. *Canadian Pacific* (handed down the same day as *Ford* and *Devine*) may be another example, with a seven-judge panel reduced by three retirements, pushing the Court very

79. Sharpe, *supra* note 10.

80. Healy, *supra* note 64 at 160-61.

81. Sharpe, *supra* note 10 at 427-432. There is no suggestion that these decisions would have taken the “By the Court” appearance had Le Dain been able to follow through with the revisions himself.

82. *Ford*, *supra* note 59 at 712; *Devine*, *supra* note 75 at 790.

close to needing a rehearing of the case.⁸³ Function word analysis indicates that the most likely author is Estey, but he also had to be listed as not taking any part in the judgment because more than six months had elapsed since his retirement.

Even without these problematic cases, the reduced count of seven “By the Court” decisions in six years is still worthy of note, but it is curious—and further undermines any impression of a considered consolidation of the practice—that a further pair (*Dorval* in 1985 and *Wigman* in 1987) raise no constitutional issues whatever.⁸⁴

C. THE LAMER COURT

The Lamer Court delivered half a dozen substantial “By the Court” judgments; one was yet another instalment of the Manitoba language litigation in *Reference re Language Rights Under s 23 of Manitoba Act, 1870 & s 133 of Constitution Act, 1867*.⁸⁵ A second was *Sinclair v Quebec (Attorney General)*,⁸⁶ a relatively short and minor case on a municipal vote in Quebec. The other four, however, address the major constitutional issues of recent decades: two significant Charter cases—*Canada (Minister of Citizenship and Immigration) v Tobias*⁸⁷ on judicial independence, *Libman v Quebec*⁸⁸ on limiting election expenses—along with arguably the most important case to date on federalism (*Quebec Secession Reference*⁸⁹), and one of the most important (certainly the most explosive and controversial) of recent cases dealing with First Nations Issues, *Marshall v Canada*.⁹⁰ On the one hand, the number of these cases had declined to the point where there was a five-year period without a single example, the longest such gap since 1979; on the other hand, the focus of the subject matter is wider and the importance of some of the cases is unquestionable.

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

84. *Dorval*, *supra* note 65; *Wigman*, *supra* note 66.

85. [1992] 1 SCR 212, 88 DLR (4th) 385 [*Language Rights Reference*].

86. [1992] 1 SCR 579, 89 DLR (4th) 500.

87. [1997] 3 SCR 391, 151 DLR (4th) 119 [*Tobias*].

88. [1997] 3 SCR 569, 151 DLR (4th) 385.

89. *Supra* note 33.

90. [1999] 3 SCR 456, 177 DLR (4th) 513 [*Marshall I*].

TABLE 3: "BY THE COURT" JUDGMENTS OF THE LAMER COURT 1990-1999

Case	Year	Words	Subject
<i>Language Rights Reference</i> ⁹¹	1992	5,985	Federalism/Language
<i>Sinclair v Quebec (Attorney General)</i> ⁹²	1992	4,046	Federalism/Language
<i>Tobias</i> ⁹³	1997	13,765	Charter
<i>Libman v Quebec</i> ⁹⁴	1997	15,477	Charter
<i>Quebec Secession Reference</i> ⁹⁵	1998	21,587	Federalism
<i>R v Marshall</i> ⁹⁶	1999	9,108	First Nations

Note: * = companion cases

D. THE MCLACHLIN COURT

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

91. *Supra* note 85.

92. *Supra* note 86.

93. *Supra* note 87.

94. *Supra* note 88.

95. *Supra* note 33.

96. [1999] 3 SCR 533, 179 DLR (4th) 193 [*Marshall 2*].

TABLE 4: "BY THE COURT" JUDGMENTS OF THE MCLACHLIN COURT, 2000-2015

Case	Year	Words	Subject
<i>Reference re Firearms Act (Canada)</i> ⁹⁷	2000	13,655	Federalism
<i>R v Latimer</i> ⁹⁸	2001	10,672	Charter
<i>United States v Burns</i> ⁹⁹	2001	20,051	Charter
<i>Suresh v Canada (Minister of Citizenship and Immigration)</i> ¹⁰⁰	2002	18,008	Charter
<i>R v Powley</i> ^{*101}	2003	6,422	First Nations
<i>R v Blais</i> ^{*102}	2003	5,460	First Nations
<i>Wewaykum Indian Band v Canada</i> ¹⁰³	2003	11,497	Supreme Court
<i>Reference re Same-Sex Marriage</i> ¹⁰⁴	2004	7,140	Federalism/Charter
<i>Solski v Quebec (Attorney General)</i> ^{*105}	2005	10,669	Language/Charter
<i>Gosselin v Quebec (Attorney General)</i> ^{*106}	2005	4,034	Language/Charter
<i>Okwuobi v Lester B Pearson School Board</i> ^{*107}	2005	9,355	Language/Charter
<i>Mugesera v Canada (Minister of Citizenship & Immigration)</i> ¹⁰⁸	2005	19,749	Charter
<i>Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice)</i> ¹⁰⁹	2005	19,523	Judicial independence
<i>Canada (Justice) v Khadr</i> ¹¹⁰	2008	4,448	Charter
<i>BCE</i> ¹¹¹	2008	15,709	Commercial law
<i>Canada (Prime Minister) v Khadr</i> ¹¹²	2010	5,446	Charter

97. 2000 SCC 31, [2000] 1 S.C.R. 783 [*Firearms Reference*].98. 2001 SCC 1, [2001] 1 SCR 3 [*Latimer*].99. 2001 SCC 7, [2001] SCR 283 [*Burns*].

100. 2002 SCC 1, [2002] 1 SCR 3.

101. 2003 SCC 43, [2003] 2 SCR 207 [*Powley*].102. 2003 SCC 44, [2003] 2 SCR 236 [*Blais*].103. 2003 SCC 45, [2003] 2 SCR 259 [*Wewaykum*].104. 2004 SCC 79, [2004] 3 SCR 698 [*Same-Sex Reference*].105. 2005 SCC 14, [2005] 1 SCR 201 [*Solski*].106. 2005 SCC 15, [2005] 1 SCR 238 [*Gosselin*].107. 2005 SCC 16, [2005] 1 SCR 257 [*Okwuobi*].

108. 2005 SCC 40, [2005] 2 SCR 100.

109. 2005 SCC 44, [2005] 2 SCR 286 [*Provincial Judges*].

110. 2008 SCC 28, [2008] 2 SCR 125.

111. *Supra* note 1.

112. 2010 SCC 3, [2010] 1 SCR 44.

TABLE 4: "BY THE COURT" JUDGMENTS OF THE MCLACHLIN COURT, 2000-2015

Case	Year	Words	Subject
<i>R v Ahmad</i> ¹¹³	2011	9,576	<i>Charter</i>
<i>Securities Reference</i> ¹¹⁴	2011	14,042	Federalism
<i>Nadon</i> ¹¹⁵	2014	18,513	Federalism
<i>Senate Reform Reference</i>	2014	12,575	Federalism
<i>Carter</i> ¹¹⁶	2015	16,309	<i>Charter</i>
<i>R v Smith</i> ¹¹⁷	2015	3,778	<i>Charter</i>

Note: * = companion cases

Two cases in particular prove the point about this targeting. The first is *Provincial Judges*, which is directed to clarifying certain aspects of the process for determining judicial salaries that remained problematic after the blockbuster judicial independence decision in 1997.¹¹⁸ The point here is not simply that this decision is "By the Court" or that it is one of the longest and therefore presumably most comprehensive of the McLachlin Court's "By the Court" judgments—although these features are significant. More importantly, *Provincial Judges* is one of the few "By the Court" judgment in a remarkably extended string of Supreme Court decisions touching on the matter of judicial independence, those earlier decisions having been delivered by a surprising diversity of judges.¹¹⁹ It has something of the feeling of a very deliberate period at the end of a very long sentence, and therefore a marked and very significant use of "By the Court."

113. 2011 SCC 6, [2011] 1 SCR 110 [*Ahmad*].

114. *Supra* note 2.

115. *Supra* note 16.

116. *Supra* note 4.

117. 2015 SCC 34, [2015] 2 SCR 602 [*Smith*].

118. *Reference re Remuneration of Judges of Provincial Court of PEI*, [1997] 3 SCR 3, 150 DLR (4th) 577 [*Remuneration Reference*].

119. For an extended discussion of that string of cases see Peter McCormick, "New Questions about an Old Concept: The Supreme Court of Canada's Judicial Independence Jurisprudence" (2004) 37:4 Can J Pol Sci 839.

The second is in some ways the most curious—the decision in *BCE*,¹²⁰ which has been welcomed¹²¹ (and also criticized)¹²² as an important landmark decision in company law, dealing with the obligations of corporate boards. This is only the third “By the Court” judgment in the grand tradition not to raise any constitutional issues whatsoever, the other two being the Dickson Court’s decisions in *Dorval* and *Wigman*.¹²³ With the obvious caveat that it takes more than one swallow to signal a summer, these examples may be a first step towards the conscious use of “By the Court” judgments for decisions that are both intended as major and landmark contributions to unsettled corners of the law, and possess a somewhat wider sweep than the constitutional issues that have provided the focus of the practice to date. However, this is not to deny for a second that the center of gravity of the device remains in the area of constitutional law, and the McLachlin Court has clearly boxed the compass in this regard with decisions dealing with federalism issues, *Charter* questions, and First Nations matters.

IV. FROM LIST TO STORY

When I started on this project, I was confident that I knew the general outlines of the history of “By the Court.” That story would have started with Laskin, who (I then thought) was directly involved in the emergence of the innovation, but whose use of “By the Court” was as tentative and occasional as the term “emergent innovation” implies, the more so because it began only rather late in the Chief Justiceship when his health was already failing. The story would have continued with a more frequent and enthusiastic use of the device under Dickson’s leadership, with almost a dozen solid examples that included some of the most urgent and controversial issues of the day as the language question continued to heat up and *Charter* jurisprudence began to take shape. I would have described this as the coming of age of the practice, constrained first by the short period during which Dickson served as Chief Justice and second by a paucity of the federal reference cases that had already seemed to be earning pride of place for the practice. Lamer, however, delivered a mixed message. On the one hand, with half as many “By the Court” decisions as Dickson in a Chief Justiceship that

120. *Supra* note 1.

121. See Jeffrey Bone, “The Supreme Court Revisiting Corporate Accountability: BCE Inc. in search of a legal construct known as the ‘Good Corporate Citizen,’” online: *Alta L Rev Online Supplement* 6 <<http://www.albertalawreview.com/index.php/alr/supplement/view/>>.

122. See *e.g.*, Edward Waitzer & Johnny Jaswal, “Peoples, BCE and the Good Corporate ‘Citizen’” (2009) 47:3 *Osgoode Hall LJ* 439.

123. *Dorval*, *supra* note 65; *Wigman*, *supra* note 66.

was twice as long, Lamer's tenure seemed to point to a gradual decline, a possible ending of the glory days. It is particularly striking that *Reference re Quebec Sales Tax*¹²⁴ in 1994 is the only unanimous decision on a federal reference question in the last fifty years that was *not* "By the Court." On the other hand, *Quebec Secession Reference* is arguably the quintessential "By the Court" judgment, the poster-child that would lead any focused discussion of the practice.¹²⁵ Finally, McLachlin seemed to represent a significant revival, with a constitutional "By the Court" decision in the first six months of her term and a subsequent annual delivery approaching that of the Dickson Court. This would have been a story with no clear trajectory, perhaps only highlighting the discretionary role of Chief Justices, which would leave things very much open after 2018 when McLachlin retires and a new Chief Justice chooses whether to step on the gas or the brakes.

I now back away from much of that description and will instead use the preceding chronology to deliver rather a different message. And I will do so by identifying three substantively different sets of "By the Court" decisions, describing how their interplay over time generates rather a different conclusion.¹²⁶

A. THE REACTIVE CONVERSATION SET

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

The reference process is an unusual aspect of Canadian practice that permits the government to put hypothetical or anticipatory questions before the Court. This makes them quite different from normal appeals, which arise out of specific concrete circumstances, come with a context that has been judicially explored by the lower courts, and have an established set of relevant facts that have been tested through an adversarial process. Appeals are essentially retrospective, arriving at general and abstract questions only as they emerge from these concrete

124. [1994] 2 SCR 715, 115 DLR (4th) 449 [*Quebec Sales Tax*].

125. *Quebec Secession Reference*, *supra* note 33.

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

factual and legal circumstances. By contrast, reference questions make the Court function in a way that makes it more like a legislature.¹²⁷ It is asked to work in a judicial-factual vacuum, answering hypothetical questions in general terms and implicitly committing itself in advance to rules or principles that have not been tested in concrete circumstances or sounded out in lower court proceedings.¹²⁸

To consider references from the federal government first: The use of federal references is subject to an easily visible ebb and flow, with periods of intense usage alternating with intervals of complete absence. There were three in three years in the 1950s, followed by none for a decade; only one in the dozen years before 2010 but then six in five years. In total, by my count there have been twenty-nine federal references since the end of World War II.

Pushing the list back to 1946 highlights the dramatic change represented by *Truscott* in 1967. In the twelve years after the end of World War II, there were nine federal references. All were dealt with in the *seriatim* style: Every judge on the panel wrote his own freestanding reasons without referring in any way to any of the others or adopting any part of them. These separate reasons may have covered very similar ground and reached very similar conclusions, but the multiple independent versions needed to be parsed closely to find the real core of an institutionally supported position. The abolition of appeals to the Judicial Committee of the Privy Council in 1949 had no effect on this style of delivery.

But *Truscott* is the great watershed—every single reference case before, but not a single such case afterward, was dealt with *seriatim*. There have been twenty reference cases since 1966; thirteen were unanimous, and fourteen were resolved by joint judgments, anonymous in the sense that they lacked the normal author-identifying attribution. The overlap of unanimous and anonymous decisions goes some way to explaining why “By the Court” has generally been taken as implying both unanimity and anonymity: Only one post-1967 reference case was unanimous without being anonymous, and only two were anonymous without being unanimous.

127. This is why, when Australia amended its *Judiciary Act* in 1910 to allow the federal government to pose reference questions to its own High Court, that Court promptly decided that the amendment itself was unconstitutional because it violated the principle of the separation of powers. See Helen Irving, “Advisory Opinions, the Rule of Law and the Separation of Powers” (2004) 4 *Macquarie LJ* 105.

128. The Court always formally insists that its decisions in federal reference cases (which it self-describes as “opinions” rather than “judgments”) are purely advisory and tentative and cannot serve as precedent in the same way as normal judgments; in practice, it cites its own prior reference case decisions in just the same way as other decisions, and it has never simply repudiated them in subsequent litigation.

TABLE 5: SUPREME COURT DECISIONS IN FEDERAL REFERENCE CASES, 1946-2015

Reference	Year	Number of Judges on Panel	Judgement Style	Anonymous or Attributed?
<i>Co-operative Committee on Japanese Canadians v Canada (Attorney General)</i> ¹²⁹	1946	7	Seriatim	Attributed
<i>Reference re s 6 of the Farm Security Act, 1944 of Saskatchewan</i> ¹³⁰	1947	6	Seriatim	Attributed
<i>Reference re Minimum Wage Act (Saskatchewan)</i> ¹³¹	1948	6	Seriatim	Attributed
<i>Reference re Validity of s 5(a) of Dairy Industry Act (Canada)</i> ¹³²	1949	7	Seriatim	Attributed
<i>Reference re Wartime Leasehold Regulations</i> ¹³³	1950	7	Seriatim	Attributed
<i>Reference re Bowater's Pulp & Paper Mills Ltd</i> ¹³⁴	1950	7	Seriatim	Attributed
<i>Reference re Industrial Relations Disputes Investigations Act (Canada)</i> ¹³⁵	1955	9	Seriatim	Attributed
<i>R v Coffin</i> ¹³⁶	1956	7	Seriatim	Attributed
<i>Reference re Farm Products Marketing Act (Ontario)</i> ¹³⁷	1957	8	Seriatim	Attributed
<i>Truscott</i> ¹³⁸	1967	9	Divided	Anonymous
<i>Re Offshore Minerals</i> ¹³⁹	1967	7	Unanimous	Anonymous
<i>Reference re Criminal Law Amendment Act, 1986-69 (Canada)</i> ¹⁴⁰	1970	9	Divided	Attributed

129. [1946] SCR 248, 3 DLR 321.

130. [1947] SCR 394, [1947] 3 DLR 689.

131. [1948] SCR 248, [1948] 3 DLR 801.

132. [1949] SCR 1, [1949] 1 DLR 433.

133. [1950] SCR 124, [1950] 2 DLR 1.

134. [1950] SCR 608, [1950] 4 DLR 65.

135. [1955] SCR 529, [1955] 3 DLR 721.

136. *Supra* note 39.

137. [1957] SCR 198, 7 DLR (2d) 257.

138. *Supra* note 36.

139. *Supra* note 34.

140. [1970] SCR 777, 10 DLR (3d) 699.

TABLE 5: SUPREME COURT DECISIONS IN FEDERAL REFERENCE CASES, 1946-2015

Reference	Year	Number of Judges on Panel	Judgement Style	Anonymous or Attributed?
<i>Reference re Anti-Inflation Act, 1975 (Canada)</i> ¹⁴¹	1976	9	Divided	Attributed
<i>Re Upper House</i> ¹⁴²	1980	8	Unanimous	Anonymous
<i>Reference Re Newfoundland Continental Shelf</i> ¹⁴³	1984	7	Unanimous	Anonymous
<i>Manitoba Language Reference</i> ¹⁴⁴	1985	7	Unanimous	Anonymous
<i>Reference re Milgaard</i> ¹⁴⁵	1992	5	Unanimous	Anonymous
<i>Reference re Milgaard</i> ¹⁴⁶	1992	5	Unanimous	Anonymous
<i>Reference re Ng Extradition</i> ¹⁴⁷	1991	7	Divided	Attributed
<i>Language Rights Reference</i> ¹⁴⁸	1992	9	Unanimous	Anonymous
<i>Quebec Sales Tax</i> ¹⁴⁹	1994	7	Unanimous	Attributed
<i>Quebec Secession Reference</i> ¹⁵⁰	1998	9	Unanimous	Anonymous
<i>Same-Sex Reference</i> ¹⁵¹	2004	9	Unanimous	Anonymous
<i>Reference re Assisted Human Reproduction Act</i> ¹⁵²	2010	9	Divided	Attributed
<i>Securities Reference</i> ¹⁵³	2011	9	Unanimous	Anonymous
<i>Reference re Broadcasting Act</i> ^{*154}	2012	9	Unanimous	Anonymous

141. [1976] 2 SCR 373, 68 DLR (3d) 452.

142. *Supra* note 51.

143. *Supra* note 57.

144. *Supra* note 13.

145. *Supra* note 39.

146. [1992] 1 SCR 866, 90 DLR (4th) 1.

147. [1991] 2 SCR 858, 84 DLR (4th) 498.

148. *Supra* note 85.

149. *Supra* note 124.

150. *Supra* note 33.

151. *Supra* note 104.

152. 2010 SCC 61, [2010] 3 SCR 457.

153. *Supra* note 2.

154. 2012 SCC 4, [2012] 1 SCR 142.

TABLE 5: SUPREME COURT DECISIONS IN FEDERAL REFERENCE CASES, 1946-2015

Reference	Year	Number of Judges on Panel	Judgement Style	Anonymous or Attributed?
<i>Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168</i> ¹⁵⁵	2012	9	Divided	Attributed
<i>Nadon</i> ¹⁵⁶	2014	7	Divided	Anonymous
<i>Senate Reform Reference</i> ¹⁵⁷	2014	8	Unanimous	Anonymous

* = federal references to Federal Court, appealed to SCC

The significance of “By the Court” in this situation is that it effectively positions the Supreme Court as a unified institution providing the other half of a conversation about national governance with the federal government. It is not that the government was not bound by the actual outcome of previous reference cases; and it is certainly not to deny that some had significant impact. The point is rather that there was no clear unified statement from the Court as an institution, no single firm collective declaration of the law and the reasons for it. It is the clarity of this product in the directly policy-relevant moment of a federal reference that makes “By the Court” a significant element in the emergence of the Court as a major national institution. But one major implication of this powerful opportunity for influence is that it is necessarily reactive: one can only answer a question when and if one has been asked the question in the first place.¹⁵⁸

To this point I have been discussing federal reference questions, but in Canadian usage the provinces have also given themselves the parallel power vis-à-vis their own provincial highest courts, with an option of appealing that decision to the Supreme Court itself. It is also worth noting, however, that these cases are not normally resolved through “By the Court” decisions. Despite an early appearance to the contrary when the Laskin Court used “By the Court” for provincial references as regularly and as often as federal references—the set

155. 2012 SCC 68, [2012] 3 SCR 489.

156. *Supra* note 16.

157. *Supra* note 3.

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

includes the *Patriation Reference*, the *Quebec Veto Reference*, the *Exported Natural Gas Reference*, and *McEvoy*¹⁵⁹—only a single recent provincial reference (*Firearms Reference*) has been dealt with this way.¹⁶⁰ The contrast is remarkable considering that the Supreme Court has dealt with as many provincial as federal references in the last fifty years, that most of them have been unanimous, and that a number of them have dealt with major constitutional issues.

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

B. THE JUDICIAL INSTITUTIONAL SET

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

TABLE 6: ‘BY THE COURT’ DECISIONS: THE JUDICIAL INSTITUTIONAL SET

Case	Year	Words	Subject
<i>Truscott</i> ¹⁶¹	1967	30,000	Other
<i>Tobias</i> ¹⁶²	1997	13,765	Judicial Independence
<i>Marshall 2</i> ¹⁶³	1999	9,108	First Nations
<i>Wewaykum</i> ¹⁶⁴	2003	11,497	Recusal
<i>Mugesera v Canada (Minister of Citizenship and Immigration)</i> ¹⁶⁵	2005	19,749	Recusal
<i>Provincial Judges</i> ¹⁶⁶	2005	19,523	Judicial independence
<i>Ahmad</i> ¹⁶⁷	2011	9,576	s 96 jurisdiction
<i>Nadon</i> ¹⁶⁸	2014	18,513	Amendments re: SCC

159. Although the way that *McEvoy* is indexed obscures the fact, it originated as a reference by the New Brunswick government to the New Brunswick Court of Appeal.

160. *Patriation Reference*, *supra* note 26; *Quebec Veto Reference*, *supra* note 55; *Exported Natural Gas Reference*, *supra* note 27; *McEvoy*, *supra* note 56; *Firearms Reference*, *supra* note 97.

161. *Supra* note 36.

162. *Supra* note 87.

163. *Supra* note 96.

164. *Supra* note 103.

165. 2005 SCC 40, [2005] 2 SCR 100 [*Mugesera*].

166. *Supra* note 109.

167. *Supra* note 113.

168. *Supra* note 16.

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

Truscott has been discussed above as an unusual challenge to the prestige of the Supreme Court. *Nadon* was comparably embarrassing, dealing with a unique challenge to the validity of an appointment to the Supreme Court as well as obliquely raising unsettled questions about the constitutional amending formulae as they relate to the Supreme Court itself. *Wewaykum* and *Mugesara* both involved recusal issues on the Supreme Court. These issues are critically important to the judiciary because they go to the question of impartiality. *Marshall 2* was a unique institutional response (an extended denial of an application to reconsider *Marshall 1*¹⁶⁹) to an unexpected and unwelcome public reaction to an earlier decision that had been interpreted in a way that *Marshall 2* said was too expansive. *Tobias* and *Provincial Judges* are two cases in an extensive string of important (and usually not unanimous) cases revolving around judicial independence issues.¹⁷⁰ And although the apparent issue in *Ahmad* was the recurrent dilemma of the balance between individual rights and national security, the main substance of the decision dealt with the jurisdiction of the provincial superior (“Section 96”) courts, and whether a legislative assignment of certain aspects of the case to the Federal Court did or did not violate that jurisdiction.¹⁷¹

This is not to say that all cases involving judicial institutional questions, or even all such unanimous cases, are dealt with through the anonymity of “By the Court” judgments. Clearly the most important recent case dealing with the judiciary was the 1997 *Remuneration Reference*,¹⁷² which could have been rendered as a joint judgment even in the face of LaForest’s vigorous dissent—in the style of *Truscott* and *Nadon*—but it was not. Although not as clear-cut as the first, this set seems firmly enough established to justify identifying judicial institutional matters as a second focus for “By the Court” decisions.

C. THE PROACTIVE SET

The third use of “By the Court” judgments is the proactive set: The Court decides, on its own initiative and for its own reasons, that an issue arising in a normal appeal (that is to say, not a reference case) deserves this unusual decision

169. *Supra* note 90.

170. See McCormick, *supra* note 119.

171. *Ahmad*, *supra* note 113 at paras 55-65.

172. *Supra* note 118.

format. The label is proactive because the decision to elevate the matter to this decision format is made without any clear external trigger (*e.g.*, a federal reference or a judicial institutional issue) to indicate clearly and ahead of time that a case is likely to be decided “By the Court.” In one sense, this is simply a residual category, the cases that are left when those that can be assigned to other categories have been removed. But in another sense, this is the most intriguing and potentially exciting use of “By the Court,” as it involves the most discretionary and inherently open-ended deployment of this new judgment-presentation device. It presents a standing opportunity to create, continue, reinforce, or expand a precedent in a particularly emphatic way.¹⁷³

TABLE 7: “BY THE COURT” DECISIONS: THE PROACTIVE SET

Chief Justice	Case	Year	Subject
Cartwright	<i>Board of Transport Commissioners</i> ¹⁷⁴	1967	Federalism
Laskin	<i>Blaikie 1/Forest</i> ¹⁷⁵	1979	Federalism / Language
Laskin	<i>Blaikie 2</i> ¹⁷⁶	1981	Federalism / Language
Dickson	<i>Quebec Association of Protestant School Boards v Quebec (Attorney General)</i> ¹⁷⁷	1984	Charter/Language
Dickson	<i>Irwin Toy</i> ¹⁷⁸	1989	Charter
Dickson	<i>Tremblay</i> ¹⁷⁹	1989	Charter
Lamer	<i>Libman v Quebec</i> ¹⁸⁰	1997	Charter
McLachlin	<i>Latimer</i> ¹⁸¹	2001	Charter
McLachlin	<i>Burns</i> ¹⁸²	2001	Charter

173. Or even, as Rainer Knopff intriguingly suggests, to repudiate an earlier decision and visibly change direction on some specific aspect of the law. See Rainer Knopff, “Charter Reconsiderations” (2012) 21 National Magazine, 38. *Carter* would be an obvious example.

174. *Supra* note 35.

175. *Blaikie 1*, *supra* note 7; *Forest*, *supra* note 7.

176. *Supra* note 52.

177. *Supra* note 68.

178. *Supra* note 28.

179. *Supra* note 13.

180. *Supra* note 88.

181. *Supra* note 98.

182. *Supra* note 99.

TABLE 7: "BY THE COURT" DECISIONS: THE PROACTIVE SET

Chief Justice	Case	Year	Subject
McLachlin	<i>Suresh v Canada (Minister of Citizenship and Immigration)</i> ¹⁸³	2002	Charter
McLachlin	<i>Powley/Blais</i> ¹⁸⁴	2003	First Nations
McLachlin	<i>Solski/Gosselin/Okwuobi</i> ¹⁸⁵	2005	Charter/Language
McLachlin	<i>Canada (Justice) v Khadr</i> ¹⁸⁶	2008	Charter
McLachlin	<i>BCE</i> ¹⁸⁷	2008	Corporate law
McLachlin	<i>Canada (Prime Minister) v Khadr</i> ¹⁸⁸	2010	Charter
McLachlin	<i>Carter</i> ¹⁸⁹	2015	Charter
McLachlin	<i>Smith</i> ¹⁹⁰	2015	Charter

What is most striking about the list is its tilt toward recent cases—well over half of the cases listed (two thirds if we count the companion cases of *Powley/Blais* and *Solski/Gosselin/Okwuobi* separately) are decisions of the McLachlin Court. They span from the earliest (*Latimer* and *Burns*) to the most recent decisions (*Carter* and *Smith*) of her Chief Justiceship. If this set can be said to have a focus, the major element is the *Charter* while the secondary focus is on constitutional language issues. This dual emphasis on the *Charter* and language offsets the fact that the all but invariant focus of the reference cases has been federalism questions.

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

183. *Supra* note 100.

184. *Powley*, *supra* note 101; *Blais*, *supra* note 102.

185. *Solski*, *supra* note 105; *Gosselin*, *supra* note 106; *Okwuobi*, *supra* 107.

186. *Supra* note 110.

187. *Supra* note 1.

188. *Supra* note 112.

189. *Supra* note 4.

190. *Supra* note 117.

V. TELLING THE STORY: REVISED VERSION

My initial story line for “By the Court” as described above must therefore be revised in several important ways. First, as already detailed, the device was not invented by Laskin himself or by the Laskin Court. The minor tradition was part of Supreme Court practice almost since the Court’s earliest days, and the transition to the modern grand tradition occurred before Laskin became Chief Justice—indeed, before he had even joined the Court. The central figure in the initial emergence of the modern practice is therefore not Laskin but Cartwright.

Second, it seems unlikely that Laskin himself played a major part in the revival or continuation of the grand tradition. For one thing, he had earlier spoken on the other side of the issue. The idea of a single judgment format, attributed to no one or nominally to the senior member of the panel, had emerged immediately after the end of appeals to the Judicial Committee in 1949; the question was whether the new status of the Supreme Court called for a new style of judgment-delivery. The most vociferous opponent of the idea when it was debated by the Canadian Bar Association was Laskin, who was concerned, first, that it would silence minority voices on the Court and, second, that it would convey a misleading impression of simplified certainty on nuanced legal issues.¹⁹¹ Experience can change such preferences, but this *volte face* seems unusually total, especially in the absence of any explicit recantation. For another, Laskin missed out on the intra-panel deliberations in *Blaikie I*, and was not even included in the panel for the later-filed *Forest*, for health reasons—he was hospitalized in Vancouver for most of the 1979 fall term and returned to Ottawa only early in December and to full duties on the Court toward the end of the following January.¹⁹² The revival of “By the Court” on the Laskin Court in 1979 seems to have happened during the only half-term when Laskin was not a regular full participant in the Court’s internal interactions.

Third, a good part of the Dickson Court’s apparent embrace of “By the Court” seems to have been an administrative device to accommodate the unusual pressures of poor health and rapid personnel turnover on the Supreme Court in the late 1980s, as indicated above; several of them seem to have involved finding the least misleading way of dealing with unusual problems when the initial drafters of a set of reasons could not, for one reason or another, be attributed

191. See Girard, *supra* note 9 at 187.

192. *Ibid* at 448; repeated in Philip Girard, “A Tempest in a Transatlantic Teapot: A Legal Historian’s Critical Analysis of Frederic Bastien’s *La Bataille de Londres*” (2014) 51:2 Osgoode Hall LJ 673.

in the normal way. A couple of others—*Dorval* and *Wigman*—are curious counter-examples to the otherwise powerful generalization that “By the Court” is used for constitutional decisions. If Laskin’s use of “By the Court” was reluctant, Dickson’s use of it was—first impressions to the contrary notwithstanding—somewhat fitful and unfocused.

Fourth, the picture of the Lamer Court as something of a retreat in the use of “By the Court” judgments is harder to support when I have just finished arguing that the Dickson Court’s use of the device was considerably more constrained and qualified than it might have appeared at first glance. Assessing Lamer’s use of “By the Court” is challenging: on the one hand, six cases in ten years is not a particularly impressive count; but on the other hand, one of those six was the *Quebec Secession Reference*,¹⁹³ the poster-child of a high-profile, high-stakes constitutional decision. What tilts the balance toward my judgment of Lamer’s use of the device as constrained is the only example in fifty years of a unanimous opinion in a federal reference question (*Quebec Sales Tax*¹⁹⁴) that was not handled “By the Court,” a striking departure from what seemed to be the single most generalizable rule in the use of “By the Court.”

Fifth, these considerations all combine to make McLachlin’s use of “By the Court” judgments the most striking of the set. Her deployment of the device has been more frequent, more consistently applied to major cases, and more explicitly focused on constitutional issues of some significant profile; further, it was recently extended for the first time to a landmark decision that is not related to constitutional matters (*BCE*).¹⁹⁵ A string of the McLachlin Court’s “By the Court” judgments on federalism issues generated a degree of public confrontation between Court and government that is unprecedented in recent Canadian history. But what is even more striking is that the pro-active use of “By the Court”—that is to say, the ones that cannot be explained as accidental, as responses to federal references, or as dealing with judicial institutional matters—has stepped up so dramatically. If we unfold the companion cases for separate counting, we can say that the McLachlin Court accounts for fully two thirds of all of these cases. If the Laskin Court revived the practice, the McLachlin Court seems on the way to invigorating it and sending it down this proactive channel.

193. *Supra* note 33.

194. *Supra* note 124.

195. *Supra* note 1.

VI. CONCLUSION

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

The McLachlin Court has transformed this category of judgments to such an extent that it is not too much to say that “By the Court” has finally come of age. It has been used by the Supreme Court often and importantly enough to establish a pattern of conscious and strategic deployment that is hard to discern for the earlier Chief Justiceships. One is left to wonder why it has done so and what is really going on in this important shift in how the Court handles some of its major cases. There has not been the slightest hint of a focused answer in any of the Court’s decisions, in any formal statements by the Court, or in the public speeches that the justices often make these days. By way of speculation, it may be that McLachlin is concerned that the normal judicial attribution style runs the risk of excessively personalizing major decisions, especially when the Chief Justice in recent decades has assumed responsibility for delivering a disproportionate share of those decisions. Even more emphatically than the normative unanimous judgment, “By the Court” depersonalizes and thereby institutionalizes the Court’s most important doctrinal statements.

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

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