The Choral Court: Separate Concurrence and the McLachlin Court, 2000-2004

PETER MCCORMICK*

Dissent on a panel court is easy to explain; more problematic is the separate concurrence, a minority opinion that endorses the outcome but not the reasons of the majority. This article considers separate concurrences on the McLachlin Court, examining their frequency, the types of cases for which they are most frequent, the judges who write (and those whose majority reasons attract) them, as well as the extent to which they tend to be solitary or collegial. Finally, a typology of concurring behavior will be offered that draws on signaling terminology within the reasons themselves, and concludes by discussing the significance of this form of judicial disagreement.

La dissidence au sein d'un tribunal s'explique facilement, mais la concordance séparée des juges qui expriment une opinion minoritaire et qui souscrivent au résultat de la majorité mais pour des motifs différents est plus problématique. Cet article examine les concordances séparées de la Cour McLachlin, leur fréquence, les genres de causes les plus propices à une telle concordance, les juges qui rédigent les motifs (et les juges qui se rallient à l'opinion majoritaire) ainsi que les tendances solitaires ou collégiales des juges. Enfin l'article propose une typologie du comportement concordant en se fondant sur la terminologie utilisée dans les motifs mêmes, puis commente l'importance de cette forme de désaccord judiciaire.

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I. INTRODUCTION

Some national high courts are formally required to deliver unanimous decisions, a single authoritative statement of the law resolving a particular dispute, but ours is not such a court. If justices of the Supreme Court of Canada disagree with a decision reached by their colleagues, they have the right to issue their own minority reasons and to seek the signatures of others. The exercise of this right is not something exceptional, not something that happens only in rare moments of deep doctrinal splits, but a normal part of the way the Supreme Court conducts its business. As long as the disagreement is not too heated and the fragmentation is not too severe, it tends to be taken for granted; however, its existence generates a number of practical and theoretical problems, and therefore deserves closer investigation.

Sometimes, the minority judges dissent, which is to say that they disagree with the outcome—they think their colleagues "got it wrong" by allowing an appeal that should have been dismissed, or vice versa. What I wish to look at in this paper, however, is the other kind of disagreement—judges who agree that the "right" side won but have concerns about the reasons for judgment that have been presented to support that outcome. Since the reasons for a national high court decision are often more important than the outcome (certainly to all save the immediate parties), this is no small thing.

In this new century, the delivery of separate concurring reasons by the Supreme Court of Canada seems to have reached a new equilibrium, less frequent than was the case for the previous decade and a half, but frequent and regular enough to suggest a persisting feature of the way the Court explains itself to its broader public. I propose to discuss the frequency and the form of disagreement for the first five full calendar years of the McLachlin Chief Justiceship, to identify the judges who are disagreeing and being disagreed with, to explore the extent and frequency and stability of collegial concurrences, to develop a typology of separate concurrence on several different dimensions, and to work toward some general statements about the way that the device is being used and the messages that it is sending.

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My title[1] is intended to suggest that we must take separate concurrences seriously as a significant and enduring element of the way that the Supreme Court accomplishes its purposes. The central drama may well be the soaring solos of single authored unanimous decisions, or the unusual unison chant of the "By the Court" decisions, but any understanding of the total product of the Court must also include an appreciation for the more complex harmonies of part singing.[2]

II. THE CURIOSITY OF CONCURRENCES

For several reasons, some practical and some more theoretical, the decision to write separate concurring reasons is a curious one.

First: in the reductively dichotomous world of the appellate court, the choice is ultimately between dismissing an appeal to uphold the decision of the lower court, and allowing the appeal to sustain the arguments of the party that lost in the lower court. Since there are almost always an odd number of judges on a panel, the Court almost always reaches a decision—one outcome gets more votes than the other—and at one level it is irrelevant whether the winning members of the panel cluster behind one set of reasons or split between several. At the most reductive level—the question of "who won"—separate concurrences simply do not matter at all.

Curiously, the Supreme Court of Canada takes precisely this position in its own statistics. In the *Statistics Bulletin* regularly published by the Court, and available on its website,[3] the Court keeps count of how many decisions for each term are "unanimous" or "split"—but a footnote indicates that "unanimous" in this context means that "all judges agreed in the disposition of the appeal." In other words—separate concurrences do not count and are not counted. This is not in my opinion a satisfactory way to keep track of the Court's performance—for example, instead of seeing the *Van der Peet* trilogy[4] as a coherent and internally consistent package, it presents two of them as badly divided but the third as joyfully unanimous; and it denies what McLachlin explicitly acknowledged in *R. v. Potvin*,[5] which is that some concurrences involve disagreement so fundamental that they call for the respect terms and

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1. My use of the term "choral court" is borrowed from Nancy Maveety, Charles C. Turner & Lori Beth Way, "Changes in the Use of Concurrence: the Burger and Rehnquist Courts Compared" (Paper presented to the American Political Science Association Annual Meeting, Chicago, September 2004) [unpublished], online: American Political Science Association <http://convention2.allacademic.com/getfile.php?file=apsa04_proceeding/2005-08-24/60449/apsa04_proceeding_ 60449.PDF&PHPSESSID=2562103a822c583981c5eb7232e07e10>.
2. Actually, the metaphor serves to accommodate dissents as well; as any music student knows, dissonance is also an important element of music, either for special effect or as something that needs to be carried to aurally pleasant resolution.
3. Supreme Court of Canada, *Statistics 1994 to 2004* (2005), online: Supreme Court of Canada <http://www.scc-csc.gc.ca/information/statistics/HTML/index_e.asp>.
4. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R]; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528; *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [*Gladstone*].
5. [1993] 2 S.C.R. 880 at 889, 105 D.L.R. (4th) 214 (concurring opinion).

the self-description of a dissent. However, the Supreme Court's own statistics send a clear message—separate concurrences, no matter how principled or fundamental or extended in their reasons, are not worth keeping track of.

Second: a major function of a Supreme Court is to provide legal certainty, to deliver authoritative statements of the law for the guidance of lower courts, to legitimate specific doctrinal interpretations and extrapolations of the law. But this is best and most convincingly accomplished by solid agreement within the Court—if not unanimity, then as large and solid a bloc as possible under the circumstances. Separate concurrences undermine that certainty, by questioning or rejecting some aspects of the majority reasons, or by suggesting alternate explanatory tracks for answering the question, or by chiding the majority for not having gone far enough (or, sometimes, for having gone too far). It may sometimes be a very good thing that minority opinions keep alternative ideas "in play" for future reference, but at least on major cases, wider agreement is preferable; the Supreme Court of Canada's strategy of using the anonymous unanimity of the "By the Court" for particularly important constitutional cases is a clear demonstration of this. Similarly, in the American literature, one reads of how hard Chief Justice Warren worked and negotiated to create a unanimous Court in *Brown v. Board of Education of Topeka*[6] (possibly *the* iconic decision of the United States Supreme Court [USSC])—speaking of "racial desegregation" rather than the more provocative "racial integration", requiring progress "with all deliberate speed" rather than some stronger phrase.[7]

Third: one of the dominant approaches to the study of judicial behaviour is the attitudinal approach, which links the votes of judges to various aspects of their background and personal experiences.[8] But votes link to outcomes, not to reasons, and on this approach, the supporting reasons are secondary to the "real" point of judicial decision-making. It is not particularly interesting to researchers if judges who agree on the outcome offer subtly different explanations for their choice, so they are coded as if they had simply signed on to the majority reasons. On the attitudinal approach, separate concurrences are an entirely marginal operation, a waste of judicial time and energy.

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6. 347 U.S. 483(1954).
7. In a recent paper, however, Robert Postic has questioned the conventional wisdom that the USSC strives for greater unanimity in landmark cases. See Robert Postic, "The Importance of Unanimity in Supreme Court Landmark Cases: Perception Meets Reality" (Paper presented to the American Political Science Association Annual Meeting, Chicago, September 2004) [unpublished], online: American Political Science Association <http://convention2.allacademic.com/getfile.php?file=apsa04_proceeding/2005-08-24/60469/apsa04_proceeding_60469.pdf&PHPSESSID=2562103a822c583981c5eb7232e07e10>.
8. This approach has not always been well-received in Canada—Sidney Peck's ground-breaking "The Supreme Court of Canada, 1958-1966: A Search for Policy Through Scalogram Analysis" (1967) 45 Can. Bar Rev. 666, was roundly condemned by the legal profession. For a more recent example see C. Neal Tate & Panu Sittiwong, "Decision Making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations" (1989) 51 Journal of Politics 900. See also C.L. Ostberg *et al.*, "The Nature and Extent of Attitudinal Decision Making in the Supreme Court of Canada" (Paper presented to the American Political Science Association Annual Meeting, Chicago, September 2004) [unpublished], online: American Political Science Association <http://convention2.allacademic.com/getfile.php?file=apsa04_proceeding/2005-08-24/60486/apsa04_proceeding_60486.PDF&PHPSESSID=bdc0af3ae0439b034f0d70a968e94e47>.

Fourth: an alternative approach to the study of judicial behaviour sees judges as constrained judicial policymakers—constrained by the institutional limitations of judicial power, strategic in that they anticipate the reactions of other relevant actors and structure their outcomes and reasons accordingly, and policymakers in the sense that they seek through their decisions to direct public law and policy toward a state of affairs that accords with their deeply held values and principles. But what this approach emphasizes is the importance of optimally large and stable coalitions working together over time, making the compromises necessary to hold the coalition together. Breaking from the outcome-supporting group to articulate one's own carefully nuanced alternative explanation is the very antithesis of coalition-building. On this approach as well, dissents may well be valuable and useful, but separate concurrences seem somehow to have misunderstood the project.

Fifth: it is not hard to understand how it is that some judges on a Supreme Court panel might have some reservations, some modest or less than modest differences from the majority reasons even when they agree with the outcome. These are often very complex issues, and the judges themselves bring different experiences, different priorities, subtly different intellectual pedigrees to bear on them; this is why, in any decision-delivering grouping, it always makes a difference who writes the reasons. But these reasons are themselves collegially negotiated. Judges meet at conferences, take up positions and assign the writing of majority and possible minority reasons, and then circulate and respond to draft judgments. Appellate decision-making is a collegial process, and the core of collegiality is a willingness to persuade and to be persuaded, which necessarily involves the expression of differences. Ideally, all of these differences (at least, all of them involving support of a specific outcome) can be reconciled in carefully crafted majority reasons; as a practical matter, there will often be some that cannot be accommodated, if only because judicial time is limited.

However, as Tonja Jacobi has provocatively pointed out, this might explain why differences remain, and why a judge might circulate a private memo to colleagues at the conclusion of the process—but it does not explain why this lingering disagreement should be formally published as part of the Court's formal written decision.[9] If the concern is to persuade one's colleagues, to make them aware of lingering concerns, to plant conceptual seeds that might one day support doctrinal growth, then a private memo is just as likely to accomplish this—arguably, *more* likely because it avoids the open challenge of publication, the publicity and the (formalized but still genuine) embarrassment of confrontation. The point of a separate concurrence is not just that one or more of the outcome-supporting judges still have reservations about the legal rationale but that this judge or judges thought it neces-

9. Tonja Jacobi, "The Judicial Signaling Game: How Judges Shape Their Dockets" (Paper presented to the American Political Science Association Annual Meeting, Philadelphia, August 2003), online: American Political Science Association <http://convention2.allacademic.com/getfile.php?file=apsa03_proceeding/2005-08-25/61999/apsa03_proceeding_61999.pdf&PHPSESSID=e3c7461ebaa3a67a37987064e4ac39a8>.

sary to let everybody know about it. This in turn suggests that separate concurrences always have a broader purpose—possibly a sending of signals to some broader public, possibly a desire to set the record straight for posterity.

The point that remains is the obvious one: despite the fact that separate concurrences are problematic in several respects, the least well understood of the three available strategies for the members of an appellate panel and therefore the one whose meaning and impact is the most mysterious, it is still the case that Supreme Court judges deliver them on a regular basis. Separate concurrences are part of the mosaic of appellate decision-making in this country, part of the Court's complex process of decision and communication as it resolves the difficult questions of law and doctrine. Clearly, judges do not think separate concurrences are a waste of time because they invest a fairly considerable amount of time preparing them; it is therefore important to work out what the judges are doing when they write them.

As it happens, the same question is being raised about the United States Supreme Court, where "special concurrences" are frequent enough to draw considerable attention. At first, the comments tended to be casual and dismissive, as when Segal and Spaeth mused in passing about whether there was "something about judicial conservatives that causes them to haggle about the details of opinions that support conservatively decided outcomes".[10] Subsequently, the phenomenon has drawn more focused scholarly attention, with Turner and Way analyzing the performance of one specific Justice over the last decade,[11] then broadening their attention to the whole Court over that period,[12] and more recently putting it into a broader temporal context,[13] and Maveety looking at the phenomenon of concurrency in more general and theoretical terms.[14] What this paper provides is a broader comparison with the experiences of another country.

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10. Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993) at 282.
11. Charles C. Turner & Lori Beth Way, "Brief Remarks: The Concurrences of Justice Thomas" (Paper presented to the American Political Science Association Annual Meeting, Boston, August 2002), online: American Political Science Association <http://convention2.allacademic.com/getfile.php?file=apsa02_proceeding/2005-08-26/65944/apsa02_proceeding_65944.pdf&PHPSESSID=836c757927c097c69255f1b374692f95>.
12. Charles C. Turner & Lori Beth Way, "Writing for the Future: The Dynamics of Supreme Court Concurrence" (Paper presented to the American Political Science Association Annual Meeting, Philadelphia, August 2003), online: American Political Science Association <http://convention2.allacademic.com/getfile.php?file=apsa03_proceeding/2005-08-25/62041/apsa03_proceeding_62041.PDF&PHPSESSID=713068073ae278e4ed3108ab3f28fa26>.
13. *Supra* note 1.
14. Nancy Maveety, "Concurrence and the Study of Judicial Behavior" (Paper presented to the American Political Science Association Annual Meeting, Boston, August 2002), online: American Political Science Association <http://convention2.allacademic.com/getfile.php?file=apsa02_proceeding/2005-08-26/65942/apsa02_proceeding_65942.pdf&PHPSESSID=69e179812fbb2bc7822c20fc6ba86cee>; Nancy Maveety, "Concurring Opinion Writing and the Bifurcation of Judicial Goals" (Paper presented to the American Political Science Association Annual Meeting, Philadelphia, August 2003) [unpublished], online: American Political Science Association <http://convention2.allacademic.com/getfile.php?file=apsa 03_proceeding/2005-08-25/62044/apsa03_proceeding_62044.PDF&PHPSESSID=a311deace9650119a9d171956cee742d>.

III. A Typology And (Brief) History of Decision-Delivery

In general terms, we can identify three different "models" for the delivery of decisions by panel appeal courts. The first is the "European model", which involves a single decision supported by brief and highly formalized reasons, anonymously delivered on behalf of the entire panel;[15] although there may have been disagreement on the panel, even to the extent of supporting a different outcome, it is neither expressed as part of the record nor supported by reasons.[16] I call this the "European model" because it describes the behaviour of the highest courts in the continental European systems; however, the same observation also applies to the performance of the Judicial Committee of the Privy Council for much of its history, including the entire time period during which it could hear appeals on Canadian cases.

The second is the "English model", which involves every (or almost every) member of the appeal panel delivering reasons supporting a preferred outcome, these "votes" being tallied to generate a result. Usually, it is not possible to identify any one of these sets of reasons as constituting a "decision of the court," partly because they tend to be largely duplicative of each other, and partly because none of them makes any reference to the outcome or the argument of any other. I call this the "English model" because it describes the decision-delivery style of the House of Lords,[17] although the same pattern prevails in a significant proportion of the decisions of the High Court of Australia to this day,[18] and it is worth noting as well that on the Norwegian Supreme Court each has "a right and a duty" to express opinions and reasons on every question before the court.[19] Given that there was always a significant overlap between the Law Lords and the membership of the Judicial Committee, it is curious that the two bodies developed and maintained such distinctive decision-delivery styles.

The third is the "American model", which we might describe (paraphrasing Mackenzie King) as "unanimity if possibly, but possibly not unanimity." In this model, there is a decision of the court, typically attributed to a single author, which is often signed by (or concurred in) by other members of the panel. Disagreement can be expressed and supported by reasons, but it typically responds to, and positions itself with respect to, the decision of the court; this disagreement can take the form of dissent (differing as to the appropriate outcome) or separate concurrence (differing as to the supporting reasons). I call this the "American model" because it is widely

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15. Michael Wells, "French and American Judicial Opinions" (1994) 19 Yale J. Int'l L. 81 at 98: "French opinions contain no dissents or concurring opinions, and the author of the decision remains anonymous."
16. Renaud Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (New York: St. Martin's Press, 1998) at 13: "Moreover, the Statute of the ECJ requires that judges' deliberations remain secret (Article 32). Judgments contain no indications either of votes taken or dissident opinions."
17. See Louis Blom-Cooper & Gavin Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (London: Oxford University Press, 1972).
18. David Solomon, "Controlling the High Court's Agenda" (1993) 23 Western Australian Law Review 33.
19. Svein Eng, "Precedent in Norway" in D. Neil MacCormick and Robert S. Summers, eds., *Interpreting Precedent: A Comparative Study* (Aldershot: Ashgate, 1997) 189 at 192.

accepted that one of Chief Justice John Marshall's lasting influences on the United States Supreme Court was to move it from the "English" practice of seriatim decisions to explicit decisions of the Court that were often unanimous;[20] although disagreement rates moved upwards through the nineteenth century, and jumped again during the 1940s, we can still characterize the USSC in these general terms.[21]

The early practice of the Supreme Court of Canada was mixed; it delivered some unanimous decisions, but in important cases (and especially in its advisory opinions to reference questions) it adopted a seriatim style. As L'Heureux-Dubé has demonstrated, this practice evolved through the middle half of the twentieth century toward the American style—progressively, unanimous decisions became more common, and disagreement took the form of focused counter-argument to the set of reasons that could be identified as the decision of the court.[22] This development accelerated when the Court adopted a regular practice of meeting after oral arguments on a case to share their reactions and to assign writing responsibilities within the groups that emerged from that discussion; it is generally agreed that regular conferencing was the practice under and after Chief Justice Cartwright in the 1960s. This evolution reached its peak during the last half of the Laskin Chief Justiceship—the proportion of unanimous decisions was higher than it has ever been before or since. On all three of the logical measures—the proportion of non-unanimous decisions, the size of the minority groups, and the number of minority opinions written—the late Laskin Court was demonstrably the least fragmented in the history of the Court. Subsequently, the levels of disagreement on all three measures have increased, ebbing again toward the end of the century.[23] We can therefore usefully describe the Supreme Court of Canada as having embraced the American style, and we can think of Chief Justice Bora Laskin as having had an effect on his Court's decision-delivery style that is comparable to that of USSC Chief Justice John Marshall—a focused and united style of decision-making that relaxed somewhat in subsequent years but never returned to what it had been before.

These general comments about the Supreme Court's style apply to both forms of disagreement—that is to say, to both dissents and separate concurrences. It is tempting to think of dissent as being the more important type of departure from unanimity, if only because it suggests the possibility of a dramatically different outcome, of different winners and losers; however, as I will show in this article, such an assumption over-simplifies a more complex reality.

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20. Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France* 5th ed. (New York & Oxford; Oxford University Press, 1986) at 209.
21. Thomas G. Walker, Lee J. Epstein & William J. Dickson, "On the Mysterious Demise of Consensual Norms in the United States Supreme Court" (1988) 50 Journal of Politics 361.
22. Claire L'Heureux-Dubé, "On the Length and Plurality of Supreme Court Decisions" Alta. L. Rev., Vol. 28 (1990), 581.
23. For an expanded discussion of the conceptualization and measurement of disagreement, and an application of those ideas to the post-war Supreme Court, see generally Peter McCormick, "Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada" (2004) 42 Osgoode Hall L. J. 99.

IV. THE FREQUENCY OF SEPARATE CONCURRENCES ON THE SUPREME COURT OF CANADA

Separate concurrences are fairly frequent on the Supreme Court of Canada. Taking 1973, the Laskin Chief Justiceship as marking the beginning of the modern Supreme Court, about one case in every six has drawn one or more separate concurrences.[24] However, the concurrency rates have not been consistent. We can identify two Chief Justiceships, the "book ends" of Laskin and McLachlin, for whom the concurrency rate was considerably lower, below one case in four; and two Chief Justiceships, those of Dickson and Lamer in the middle, for whom the concurrency rate was much higher at more than two cases in every five. Expressed in other terms, and taking the variations in annual caseload into account: under Laskin and McLachlin, Supreme Court Justices wrote about one separate concurrence per month; under Dickson and Lamer they delivered almost three concurrences per month. The relevant numbers are organized in Table 1 below.

Table 1: Separate Concurrences, by Chief Justice
Supreme Court of Canada, 1973-2004[25]

Chief Justice	Total Caseload	Concurrences Written	Cases with Concurrence	Length (yrs)	Concurrences per year
Laskin	1101	153	128	10.3	14.9
Dickson	660	205	147	6.2	33.1
Lamer	960	325	226	9.5	34.2
McLachlin	395	51	46	5.0	10.2
Total	**3116**	**734**	**547**	**31**	**24.1**

In one sense, it would seem that this article is being written at the wrong time: it is exploring a phenomenon whose heyday seems to have passed, and which was much more common in the fifteen-year period that ended with the turn of the century.[26] However, the numbers for the McLachlin period are still high enough to be worth a closer examination (and low enough to permit a close look at specific categories and unusual examples). In the process, we can get an idea of whether the specific individuals involved, or the specific kinds of cases that draw the behaviour,

24. All comments about statistical aspects of the Supreme Court's activities, as well as the tables that follow, are based on a 1949-and-after Supreme Court decision database created and maintained by the author, initially funded by the Alberta Law Foundation and the Manitoba Legal Research Institute and continuously updated.
25. *Ibid.*
26. The trend in the United States is in exactly the opposite direction, with special concurrences becoming steadily more frequent and more extended as we enter the new century.

suggest that we are looking at something that is likely to continue to decline or to rebound in the future.

Table 2: Annual Frequency of Separate Concurrences
The McLachlin Court, 2000-2004

Year (calendar)	Concurrences
2000	10
2001	10
2002	13
2003	9
2004	9
Total	**51**

Certainly a closer look at concurrences on the McLachlin Court does not suggest gradual decline, but rather something closer to a steady state. There are about ten separate concurrences (one per working month) every calendar year; and, as it happens, June 2004 has seen more separate concurrences (six) than any other month since McLachlin became Chief Justice. More generally, June is by far the most common month for concurrences with about one quarter of all the examples, presumably reflecting the attempt to finish off a block of cases before the summer break; there is no corresponding end-of-the-calendar year concentration for December.

v. What Do Concurrences Look Like?

With only a handful of exceptions (which will be discussed below), separate concurrences begin with a courteous acknowledgment of the writer of the majority reasons, and positions itself by identifying a specific element or issue of the majority reasons on which comment will be made. The tone is courteous and formal, quite different from the spectacular fireworks of the United States Supreme Court, where the analysis is often accompanied by pointed put-downs and quotable one-line zingers.

Table 3: Length (in words) of separate concurrences
The McLachlin Court, 2000-2004

Length (in words) of Concurrence	Number
Less than 100	9
101 to 1,000	11
1,001 to 10,000	24
More than 10,000	7

The typical Canadian concurrence is quite short. The average length is 3,560 words, although the average is not a particularly useful reference point for numbers whose value is bounded on the down-side but virtually unlimited on the up-side. A more useful measure is the median, which is about 1,100 words; although some concurrences are longer than this (and a handful are very much longer), by the same token some are much shorter. The shortest—LeBel's comments in *Ontario v. O.P.S.E.U.*[27]—included only twenty-six words. The longest—the jointly authored concurrence by L'Heureux-Dubé, Gonthier and Bastarache in *R. v. Sharpe*[28]—was 18,000 words long, longer than most Supreme Court decisions and considerably longer than this article.

Word lengths are being brought into the equation for two overlapping reasons. First, length obviously relates either to the number of issues being raised, or the thoroughness with which they are being addressed, or both—one can deal with more ideas in a page than in a paragraph, more in 5,000 words than in 500. Second, length is to some extent a surrogate for measuring the amount of time and effort that a judge has put into explaining the reasons for the disagreement; given that judicial time is the scarcest resource on a national high court, this must also be a measure of the seriousness that the judge attaches to the matter.[29] Obviously, this is a blunt measure rather than a finely tuned one—no importance whatever attaches to (say) the difference between a 5,500 word concurrence and one that takes 5,000—but it can still be useful.

27. [2003] 3 S.C.R. 149, 232 D.L.R. (4th) 443, 2003 SCC 64.
28. [2001] 1 S.C.R. 45, 194 D.L.R. (4th) 1, 2001 SCC 2 [*Sharpe*].
29. I am aware of the famous aphorism that judges write long decisions because they do not have time to write shorter ones, but that does not affect my point; it only suggests that if judges had more time then all of their written efforts (majority and minority reasons alike) would be shorter, or if judges had less time then all their written efforts would be longer. The comparative dimension of word-counts remains a useful assessment of the relative importance that judges attach to specific cases and issues.

VI. WHAT SORTS OF CASES DRAW CONCURRENCES?

The simple answer is—all sorts of cases draw concurrences (see Table 4). About one case in every seven draws a concurrence; for none of the four general categories of law identified (criminal, public, private and *Charter)* is this figure dramatically different, falling only to one in nine for the least-frequent private law concurrences, and rising to one in five for the most frequent *Charter* concurrences. To simplify, but not unreasonably so: concurrences are equally likely for public, criminal and private law cases, and just over half again as likely for cases involving the *Charter*.

Table 4: Concurrences (frequency and length) by type of law
The McLachlin Court, 2000-2004

Type of law	Total cases	Concurrences	Average length (words)
Charter	69	13 (18.8%)	5,946
Public	105	13 (12.4%)	2,944
Criminal	124	14 (11.3%)	2,211
Private	97	11 (11.3%)	3,169
TOTAL	**395**	**51 (12.9%)**	**3,557**

This is not a surprising finding; it has been observed elsewhere that it was primarily *Charter* issues that drove the rather spectacular fragmentation of the Supreme Court under Lamer, with *Charter* cases being more likely to draw minority reasons, more likely to draw multiple minority reasons and more likely to generate plurality decisions.[30] This finding regarding separate concurrences is simply one specific aspect of the general phenomenon. The gap between *Charter* cases and other cases may have diminished over time, but it has not disappeared.[31]

Nor is it surprising that *Charter* concurrences tend to be significantly longer than the others—almost 6,000 words, compared with 3,500 for private law, 3,000 for public law and 2,200 for criminal cases. *Charter* cases may make up the smallest of the four segments of the caseload, but we are still in the early days for the unfolding of the meaning of the *Charter*, with new questions, and new dimensions to old questions, constantly arising. When legal doctrine is first being developed, it is the most tempting—and presumably also the most efficacious—to contribute to the debate in minority reasons. The net effect of a higher concurrency frequency and a longer concurrency length means that the *Charter* cases that make up only 17% of the caseload account for 43% of the total words written in all the separate concurrences.

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30. See e.g. Peter McCormick, "The Charter Fragments the Court" (Paper presented to the Charter at Twenty Conference, York University, Toronto, April 2002) [unpublished].
31. See *supra* note 23.

Table 5: Concurrences (frequency and length) for appeals by leave and by right
The McLachlin Court, 2000-2004

Type of appeal	Cases	Concurrences	Average length (words)
Appeal by right[32]	74	7 (9.5%)	4,474
Appeal by leave	321	44 (13.7%)	3,411
Total	**395**	**51 (12.9%)**	**3,557**

Just under one case in five on the Supreme Court docket is an appeal by right (including the five cases indicated on the Supreme Court website as "mixed" appeals by leave and by right). This is a sharp drop from the previous decade, when about 30% of the cases handled by the Supreme Court were appeals by right.[33] It is not surprising that appeals by leave are more likely to elicit separate concurrences than appeals by right—by definition, all appeals by leave have, and appeals by right have not, been screened by the Court to determine whether they raise significant legal issues, and some appeals by right are dealt with extremely briefly[34] and sometimes even formulaically.[35] But there are also some appeals by right that would almost certainly have been granted leave had they been obliged to follow that route, so it is not at all unexpected that when an appeal by right draws a separate concurrence, it is fully as expansive as is the case for appeals by leave.

As a "general court of appeal" for Canada, the Supreme Court hears appeals from a wide range of "lower" courts—the ten provincial and three territorial courts of appeal, the Federal Court of Appeal, the Court Martial Appeal Board, and (on a limited range of matters) directly from the provincial superior trial courts. From time to time, it may even be asked to review some action that the Court has taken itself. The only example from the period canvassed was *Wewaykum Indian Band v. Canada*,[36] arguing that Justice Binnie's earlier involvement with the matter decided in *Wewaykum Indian Band v. Canada*[37] was such that he should have recused himself from the matter, and that the fact that he not only participated but actually delivered the

32. Includes five appeals that were partly by leave, partly by right.
33. See Peter McCormick, "Compulsory Audience: Appeals by Right and the Lamer Court 1990-1999" (Paper presented to the Canadian Political Science Association Annual General Meeting, Toronto, May 2002) [unpublished].
34. As the most recent example: *R. v. Rémillard*, [2004] 2 S.C.R. 246, 2004 SCC 41 was dismissed by a unanimous Court offering only 96 words of explanation.
35. The most common formula for the Dickson and Lamer Courts was about a dozen words that were some variant on "The appeal is dismissed for the reasons given in the court below." These have become less frequent as appeals by right have become a smaller part of the docket.
36. [2003] 2 S.C.R. 259, 231 D.L.R. (4th) 1, 2003 SCC 45.
37. [2002] 4 S.C.R. 245, 220 D.L.R. (4th) 1, 2002 SCC 79.

reasons for a unanimous Court implied that the decision should be vacated and reconsidered. The Court also has a reference jurisdiction, provided for in section 53 of the *Supreme Court Act*,[38] by which the Governor in Council may refer a question on a certain range of matters for the consideration of the Court. None of the McLachlin Court concurrences involved a case of this sort.

There is no reason on the face of it to expect any significant territorial variability, apart from the obvious fact that the larger provinces tend to make up a larger element of the caseload. There were no separate concurrences on any cases from Saskatchewan, New Brunswick, Newfoundland and Labrador, or the Northwest Territories, but together these four jurisdictions accounted for less than 10% of the docket, so it would be a mistake to read too much into this.[39] As a general statement, the three largest provinces provide the largest share of the caseload and also the largest number of cases drawing separate concurrences, about 60% of the total for both.

Table 6: Concurrences (frequency and length) by Court appealed from The McLachlin Court, 2000-2004

Court appealed from	Total cases	Concurrences	Average length (words)
British Columbia C.A.	79	15 (19.0%)	3,287
Ontario C.A.	93	9 (9.7%)	4,941
Quebec C.A.	80	9 (11.2%)	2,700
Federal C.A.	42	6 (14.3%)	4,246
Trial courts	9	4 (44.4%)	2,114
Alberta C.A.	29	4 (13.8%)	1,642
Nova Scotia C.A.	7	2 (28.6%)	4,429
Manitoba C.A.	16	1 (6.7%)	12,115
Yukon C.A.	2	1	1,848
Others	35	0	-
Total	**395**	**51 (12.9%)**	**3,557**

38. R.S., 1985, c.S-26
39. Nunavut is also a 0, not yet having sent a single appeal for resolution by the Supreme Court.

However, two features of the table deserve notice. First, there have been a surprising number of appeals from the British Columbia Court of Appeal in the last five years—more than from Quebec, and just slightly less than from Ontario, although the BCCA caseload is much smaller. This is a recent development—one could not make a similar comment about the caseload for any previous Chief Justiceship—and there is no obvious reason for it. For example, appeals from that court are only marginally more likely to succeed than appeals from other jurisdictions (48.6% to 44.4%). Compounding the curiosity is the fact that appeals from the British Columbia Court of Appeal are much more likely to draw separate concurrences—in fact, as many concurrences as Quebec and Ontario combined. With about 13% of the national population, British Columbia accounts for 20% of the caseload and 30% of the cases drawing separate concurrences. The second curiosity is that *per saltum* appeals from provincial superior trial courts (a small but reasonably constant component of the Supreme Court caseload, accounting for one or two cases every year) are spectacularly more likely to draw separate concurrences, doing so almost half the time. Over a period as short as four and a half years, neither of these correlations need be anything more than coincidence; should either persist, it might call for closer investigation.

Intervener status is the preferred form of interest group involvement in the Canadian litigation process (unlike the American practice, where the "test case" is fairly common).[40] There are several reasons to think that their participation might correlate with a plurality of reasons. For one thing, their presence serves to identify cases of broader interest and wider implications, and can be "an important indicator of a court's strategic environment" by providing some indication about sources of political support and opposition to potential decisions.[41] For another, the very purpose of their involvement is to bring to the case a very specific set of concerns and preferred approaches for the consideration of the Court, which suggests the presentation of a larger range of views would otherwise be expected. American research shows that the language of favourably received interveners' briefs is often directly reflected in the (majority and minority) reasons for judgment, and this as well suggests that cases with interveners are likely to draw longer reasons.[42]

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40. See Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002).
41. See Shannon Ishiyama Smithey, "Cooperation and Conflict: Group Activity in *R. v Keegstra*" in Patrick James, Donald E. Abelson & Michael Lusztig, eds., *The Myth of the Sacred: The Charter, the Courts and the Politics of the Constitution in Canada* (Montreal and Kingston: McGill-Queen's University Press, 2002).
42. See Wayne McIntosh, Michael Evans & Cynthia Cates, "Only Words, or Data? Assessing Relative Policy Positions in Supreme Court Briefs and Opinions" (Paper presented to the American Political Science Association Annual Meeting, Chicago, September 2004) [unpublished].

Table 7: Concurrences (frequency and length) by presence/absence of interveners The McLachlin Court, 2000-2004

Interveners?	Cases	Concurrences	Average length (words)
Yes	178	30 (16.9%)	3,962
No	217	21 (9.7%)	2,978
Total	**395**	**51 (12.9%)**	**3,557**

Almost half (45%) of the cases decided by the McLachlin Court in four and a half years involved one or more interveners, and some have had very long intervener lists indeed. There is some degree of correlation between the intervention phenomenon and concurrency behaviour, as shown in the table, but it is not particularly strong—concurrences are about twice as frequent in cases involving interveners as in cases that do not (about one in five rather than one in ten), and the concurrences that are written tend to be about a quarter again as long. These influences are in the right direction, but they are much too weak to suggest that interest group or government intervention is in any way driving concurrency.

VII. WHO WRITES AND JOINS CONCURRENCES

The most obvious question about separate concurrences is which judges are making them, and the numbers are given in Table 8. The simple count is not the most useful measure when the membership of the Court is in transition, so the first column shows the total number of panel appearances for each judge, and the third column expresses the total of concurrences written and joined as a percentage of these panel appearances; this column also orders the sequencing of the names. The numbers for Lamer[43] and Fish are so small as not to be comparable; they are included for the sake of completeness.

43. It seems anomalous to be listing Lamer as still present for part of the McLachlin Chief Justiceship, but this reflects the fact that some decisions for panels on which the previous Chief Justice served (including some for which he is delivering the reasons of the Court or dissenting) are handed down after the new Chief Justice has taken office, and the *Supreme Court Act*, R.S.C. 1985, c. S-26 specifically accommodates this transition period. During these transitions in 1984 and 1990, the Supreme Court Reports actually listed two different individuals with the title of C.J. as serving on the panel; I note that this was not the case in 2000, with Lamer continuing to draw the C.J. designation for those panels on which he sat, even after January 7, 2000.

Table 8: Concurrence frequency & length, by judge
The McLachlin Court, 2000-2004

Judge	Panel appearances	Wrote[44] /joined concurrence	Wrote + Joined as % of appearances	Words written[45]
L'Heureux-Dubé	176	8/3	6.3%	22,990
Deschamps	131	2/6	6.1%	3,942
LeBel	308	14/1	4.9%	55,298
Fish	64	1/2	4.7%	2,237
Gonthier	274	5/5	3.6%	3,730
Bastarache	358	6/3	2.5%	6,551
McLachlin C.J.	322	2/6	2.5%	46
Arbour	318	7/1	2.5%	24,011
Binnie	367	5/0	1.4%	27,421
Iacobucci	315	3/1	1.3%	17,136
Major	343	0/4	1.3%	0
Lamer	6	0/0	0.0%	0
Total	**2782**	**54[46]/32**	**1.8%**	**181,117[47]**

LeBel is by far the most prolific writer of separate concurrences, accounting for about one-third of the total for the Court, as well as about one-third of all the words written in separate concurrences. However, when we include concurrences signed as well as concurrences written, and take into account the number of panel appearances, he is actually third on the frequency list, behind (the departing) L'Heureux-Dubé and (the newly arriving) Deschamps. At the other end of the scale,

44. Or wrote jointly with one or more colleagues.
45. Omits words in jointly authored concurrences.
46. 54 authors for 51 concurrences, because one concurrence (*B v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403, 219 D.L.R. (4th) 701, 2002 SCC 66) was jointly written by McLachlin and Gonthier; and one (*Sharpe, supra* note 28) was jointly written by L'Heureux-Dubé, Gonthier and Bastarache.
47. Includes words in jointly authored concurrences.

the judges who are the least involved in separate concurrences are Binnie, Iacobucci and Major, the last named being the only member of the Court not to write a single concurrence since McLachlin became Chief Justice. During the Lamer period, one-third of all the words delivered by the Supreme Court were in minority opinions, and one-third of all the words in minority opinions were in separate concurrences; by a curious parallel, about one quarter of all the words delivered by the McLachlin Court are in minority opinions, and one-quarter of the words in minority opinions are in concurrences.

An obvious question is how this list would compare with a similarly generated list of the writers and signers of dissents. One possibility, of course, is that they are the same people, and dissents and concurrences are simply two different ways in which they express their concerns about the Court's jurisprudence in different cases. Another more intriguing possibility is that they are different people, not only disagreeing in different cases but expressing a different type of disagreement or perhaps following a different strategy. (At the fascinating extreme: what if there were three judges who frequently dissented, three who frequently wrote concurrences, and three who seldom did either? Following these combinations through the caseload would be most informative.) As it turns out, the first is the case—the judges who write concurrences the most often are also the ones who write dissents the most often, and the same is true for those writing the least often.[48]

VIII. WHO IS BEING DISAGREED WITH?

As the old saying has it—it takes two to tango. In the immediate context, it takes two to disagree. The other variable in the disagreement equation is the judge who is delivering the reasons with which the separately concurring judge does not completely agree. Table 9 presents these numbers in order to generate two comparators. The first column indicates the total number of decisions delivered (authored) by the judge since January, 2000, and the second indicates how many concurrences were written for those decisions; the ratio between the two is in some sense a measure of how frequently that judge's reasons drew the partial disagreement of a separate concurrence—crudely, how many decisions the judge writes before attracting that form of disagreement, with this number driving the sequencing of names for the table. The fourth column totals the number of judges who wrote and signed concurrences for that judge's reasons, whether this means two or three judges signing on to a single concurrence, or several different judges writing concurrences in the same case. The numbers for Lamer, Deschamps and L'Heureux-Dubé are too small to permit meaningful comment.

48. The only real exceptions to this generalization are Bastarache, who is involved in dissenting behaviour proportionately more often than concurrences, and Gonthier, of whom the reverse is true.

Table 9: Concurrences (frequency and length), by judge concurred with The McLachlin Court, 2000-2004

Judge	Decisions delivered	Decisions drawing concurrences	Ratio, [1]/[2]	Number of judges concurring	Ratio, [3]/[1]
Fish	5	0	---	---	----
Deschamps	8	2	4.0	3	0.38
Lamer	4	1	4.0	4	1.00
Bastarache	28	6	4.7	11	0.39
L'Heureux-Dubé	5	1	5.0	3	0.60
Arbour	34	5	6.8	12	0.35
McLachlin	63	8	7.9	15	0.24
Major	40	5	8.0	8	0.20
Joint decisions[49]	52	5	10.4	8	0.15
Binnie	44	4	11.0	7	0.16
Gonthier	24	2	12.0	3	0.12
LeBel	37	3	12.3	6	0.16
Iacobucci	51	3	17	6	0.18
TOTAL	**360**	**44**[50]	**8.2**	**84**	**0.23**

The first observation is the obvious one: separate concurring opinions are a pervasive rather than a narrowly focused phenomenon. Just as every judge on the Court has signed (and every judge except Major has written) a separate concurrence in the last four and a half years, so too has every judge who delivered decisions over that period (with the single exception of recently-appointed Justice Fish) drawn one or more separate concurrences to their majority reasons.

49. That is to say: decisions jointly authored by two or more members of the panel.
50. Separate concurrences in only 45 cases, because three decisions drew two concurrences each, and one (*R. v. R.N.S.*, [2000] 1 S.C.R. 149, 182 D.L.R. (4th) 103, 2000 SCC 7 [*R.N.S.*]) drew four.

Some judges draw this form of disagreement more often than others. Bastarache, for example, fails to gather the signatures of all the judges who concur as to outcome about once for every five decisions that he writes; at the other extreme, Iacobucci fails to do so only once in every 17 decisions that he writes, although he writes for the Court more often than Bastarache. On a slightly different measure, Arbour does not draw separate concurrences unusually often, but when she does there tends to be a number of judges involved; conversely, Major and Gonthier not only draw separate concurrences less often, but when they do there tends to be very few judges involved.

The language perhaps goes too far in the direction of bluntly attributing causation, but the numbers point toward an important dimension of judicial decision-making on a panel court. It is a common observation that some judges are better than others at creating stable voting and writing coalitions.[51] To use an American example: Justice William Brennan is often credited with "extraordinary leadership" based on "his personality and his strategic sense", which not only made him a highly effective and loyal lieutenant on the Warren Court but allowed the liberal wing of the Court to remain surprisingly effective through the Burger years and into the Rehnquist years.[52] Conversely, the lack of such leadership—both in holding one "wing" of the Court together and in fashioning the careful wordings and tradeoffs that often bring the "swing judges" on side—explains why the Rehnquist Court has failed to replace the "liberal revolution" of the Warren Court with its own "conservative revolution." And one of the demonstrations of this lack of leadership is the fact that Rehnquist and Scalia have so often failed to turn votes for their preferred outcomes into signatures for their reasons—that is to say, the frequency of separate (or, as they are called in American usage, "special") concurrences.

Following through on this logic, then, it could be suggested that Table 9 allows us to begin assessing this factor on the Supreme Court of Canada as well; the ability to write significant numbers of opinions with only infrequent and narrowly contained disagreement is one measure of a consolidating leadership creating a unified jurisprudence. And the person to whom Table 9 directs us as best exemplifying this would be Iacobucci.

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51. It could, of course, be suggested with equal plausibility that we might be finding instead which judges tend to draw the writing assignment in more difficult and divisive cases.

52. See, for example, the comments of Mark Tushnet (Professor of Constitutional Law at Georgetown University) as "guest blogger" on Jack Balkin's "Balkinization" web-log, particularly the three extended comments on "Understanding the Rehnquist Court" on August 22, 24 and 27, 2004, online: Balkinization <http://balkin.blogspot.com> (see archives).

IX. THE COLLEGIALITY AND THE CLUSTERING OF DISAGREEMENT

Herman Pritchett, in his ground-breaking study of the United States Supreme Court, famously wrote that dissent is a game that is not played alone—that is to say, published disagreement seldom takes the form of a judge writing alone, and typically involves several judges acting in concert.[53] More recently, a study of voting behaviour on the USSC has found that it is still the case that solo disagreement—a single judge breaking an otherwise unanimous panel—is the most unusual of all the voting configurations on the Court, a logically possible option that almost never occurs.[54]

This raises the question of the form that is taken by separate concurrence on the Canadian Court—is it also a group activity, or a game that is often played alone? Unlike the American experience, the latter is more often the case. Of the fifty separate concurrences, just over half (twenty-six) are solo efforts. LeBel wrote the largest number (eight), followed by Arbour and L'Heureux-Dubé with four each and Bastarache with three. However, it should be noted that every single member of the Court save Major[55] has written at least one solo concurrence. In this respect as in so many others, separate concurrence is a diffuse phenomenon, not one that can be identified with one specific segment of the membership.

But if half of the concurrences are solo efforts, this means that the other half represents some collaborative effort between two or more of the members of the panel. In many ways, this is the more intriguing choice. The writing of majority reasons is a constrained activity—constrained by the knowledge that one could jeopardize the signatures that create the majority by going too far on some point or by not going far enough on another, and often constrained as well by the persuasion, even negotiation, that is involved in the exchange of memos responding to progressive drafts of the judgment.[56] But the writing of solo minority reasons is an exercise in total freedom—judges can say just as much or as little as they please, push a point precisely as far as they think it should go and not one inch further, and drop suggestions for the future evolution of doctrine without worrying about offending a colleague enough to lose a signature. Justice Stevens of the USSC has suggested that concurring opinions are valuable to the institution precisely because of their uncompromised forthrightness.[57] This makes it all the more intriguing when two or more

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53. C. Herman Pritchett, "Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941" (1941) 35 American Political Science Review 890.
54. Suzanna Sherry & Paul Edelman, "All or Nothing: Explaining the Size of Supreme Court Majorities" (2000) 78 N.C.L. Rev. at 1225.
55. Except Lamer and Fish, whose panel appearances under McLachlin are too few to permit meaningful consideration.
56. See Forrest Maltzman, James F. Spriggs & Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (New York: Cambridge University Press, 2000).
57. David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 6th ed. (New York: W.W. Norton, 2003) at 300.

minority judges abandon some of this freedom, either to co-write reasons or to sign on to the reasons of another.

Fifteen separate concurrences were a two-person product; although only one was explicitly co-authored, I assume that the attachment of a judge's name to a set of legal reasons is always the product of an exchange, even a process of give-and-take, and never spontaneous or gratuitous. Only one pairing (Lebel and Deschamps) occurred as often as three times; only one other (McLachlin and Gonthier) occurred as often as twice. Nor do the larger groupings build on the core suggested by either of these pairings—Lebel and Deschamps join again in larger concurrence only twice, McLachlin and Gonthier only once. Similarly, there are eight separate concurrences that were a three-person product, one of which was explicitly co-authored; and only one of the trios (Iacobucci, Major and Bastarache) occurred as often as twice. Finally, there was a single concurrence[58] joined by four judges, transforming a court that was unanimous as to result into a narrow 5-4 majority as to reasons.

Table 10: The collegiality of concurrence: number of judges writing/signing
The McLachlin Court, 2000-2004

Number of judges	Concurrences	Average length (words)
1	26	3,044
2	16	3,284
3	8	6,319
4	1	2,148
TOTAL	**51**	**3,557**

From a slightly different angle: setting aside for the moment the unanimous decisions that make up most of the current Court's decisions, there are some decisions that divide between two voices, one supported by the majority and the other by a minority, other decisions that see three or more sets of reasons, and still others in which the division of the panel means that there is no outcome-plus-reasons that draws the support of a majority of the judges. How one feels about any of these situations, or about any particular ratio between them, depends of course on one's conception of the role of the Court and its place within the development of Canadian law, although presumably most commentators would be concerned if the disagreement and fragmentation levels rose too high. Most of the separate concurrences on the Supreme Court of Canada do not represent extreme fragmentation; on 30 of the

58. *R. v. Nette*, [2001] 3 S.C.R. 488, 205 D.L.R. (4th) 613, 2001 SCC 78.

44 occasions in which there was a separate concurrence it represented the only expression of reasons apart from the decision of the Court, the only other voice in the room.

Focusing a little more closely: eleven of these were solo separate concurrences, almost half of them by LeBel. In many ways, this represents the purest form of disagreement—a single judge standing out from an otherwise unanimous panel, expressing individual concerns or clarifications for a solid court. Of all the forms of disagreement, it is the least harmful to the evolution of doctrine, the least subversive of the Court's mission to provide clear resolution to major legal issues—with a solid eight-to-one (or six-to-one) majority, the impact of the minority voice is clearly contained. It is also the most courageous form of disagreement, standing alone and apart from one's colleagues to make an observation that not a single additional member of the Court could be persuaded to support with a signature. In another sense, it is the most curious form of disagreement—by so pointedly signaling its own isolation, it seems unlikely to generate significant influence.

There were ten cases that saw a single concurrence combined with one or more dissents, and three cases which drew both multiple concurrences and one or more dissents.[59] Apart from demonstrating a fragmentation of the Court that has been less common for the McLachlin Court than for its predecessor, the decisions are interesting for the fact that six of these thirteen cases created a plurality judgment.

A plurality judgment occurs when the Court divides in such a way that there is no outcome-plus-reasons that draws the support of a majority of the panel. Although the fragments must always[60] combine in such a way as to create a "winning" outcome, this is not quite the same thing, especially if the concurrence or concurrences are significantly discrepant. In the United States, the prevailing doctrine is that "for an opinion to become the law of the land, at least five members of the Court must join it" which means that plurality decisions "lack precedential value."[61] There is no similar rule (formal or informal) in Canadian practice, apart from the obvious observation that larger majorities generally carry great weight.

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59. Hence the fact that there were 50 separate concurrences but only 44 cases that included separate concurrences.

60. Except in the case of a panel with an even number of judges, which could result in a tie.

61. See e.g. Lee Epstein & Jack Knight, *Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae*, cited in Cornell W. Clayton & Howard Gillman, eds., *Supreme Court Decision-Making: New Institutional Approaches* (Chicago & London: University of Chicago Press, 1999), at 217. But cf. Mark Thurmon, "When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions" (1992) 42 Duke L.J. 419.

The most unusual case was perhaps *R.N.S.*, in which there were four almost identically worded brief separate concurrences from the decision of the Court. Even more unusual was the fact that this was one of the rare panels with an even number of judges,[62] so the number of separately concurring judges exactly equaled the number of judges supporting the decision of the Court. The separate concurrences were all references to another case decided earlier the same day; to heighten the drama, that decision, also by an eight-judge panel for the same reason, had been decided on equal division when the four judges jointly dissented. This is in itself a nice demonstration of the logic of *stare decisis*; the issue that was undecided at the start of the day, and therefore drew dissents from four judges, was decided by the end of the day, with the same four judges now concurring in the outcome.[63] But it is also a curious commentary on the looseness of *stare decisis* on the modern Court, in that the minority is still expressing reservations, still referring followers of the Court to their minority reasons in an earlier decision in which they failed to persuade the majority or to carry the day.

x. Types of Concurrence

Not all separate concurrences are alike. The purpose of this section will be to develop a typology of separate concurrence during the McLachlin Court, and then to apply that typology to the fifty examples. The process will help to clarify the variety of purposes to which concurrences are directed, the seriousness of the disagreement that can be reflected by a concurrence, and where on the spectrum of possibilities identified by the previous two phrases the McLachlin Court has located itself.

As one starts to generate the categories, a surprising thing happens—to a large extent, the judges already seem to be working in terms of their own categories, using a standard set of phrases in a standard location in the minority reasons (usually the first paragraph, occasionally the second) to indicate with some precision what they are doing and how their reasons relate to the majority decision. Not only do they describe their own purposes, but they do so in language that is both unambiguous and consistent from one case to another and from one judge to another. It is therefore less a question of inventing categories and then struggling to fit phenomena into them, than of identifying the purposes and labels that appear to have been developed by the judges themselves.

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62. *Supra* note 49: Apparently Cory sat as the ninth judge hearing the oral argument, but the decision was not handed down within the six months contemplated by the *Supreme Court Act* as the maximum period during which a retired judge can continue to participate in a decision.

63. *Ibid.* Although I would have thought that the failure of an appeal on equal division gives an outcome (the lower court decision stands) without establishing a precedent.

Table 12: Type of concurrence (number and length)
The McLachlin Court, 2000-2004

Type of concurrence	Number	Average length (words)
Decision-in-waiting	2	15,050
Different route	12	4,656
One more thing	7	4,391
One less thing	19	3,342
Clarification	1	465
Ditto	9	76
Not at this time	1	43
TOTAL:	**51**	**3,557**

The simplest purpose of a separate concurrence is *clarification*—not the addition of new ideas, but simply a short elaboration of a critically important element. There is one example of this type of concurrence, in the case of *R. v. Cinous*,[64] and the self-descriptive phrase (placed in the second sentence of the reasons) is: "I add these paragraphs on what I think is the decisive point."[65] The purpose is self-explanatory and there is no need to expand upon it. Curiously, this is the one example of a separate concurrence that seems to be critical of the other reasons, the closest to a negative tone that can be found in the whole set. There is a comment about colleagues "mobiliz[ing] considerable scholarship for and against all aspects of the issues" but "when the smoke clears" the issue is actually very simple—so much so that it can be explained in a few hundred words. As criticism goes, of course, this is pretty mild stuff (especially when one compares it with the vitriol and sarcasm routinely deployed by the current United States Supreme Court), but on the very polite and formal Supreme Court of Canada, it stands out.

The second category might be labeled *"just one more thing"*—complete acceptance of the reasons contained in the decision of the Court, but an explicit intention to add some specific thing that was left out of those reasons. There were seven of these, averaging about 4,400 words. The most innocuous example is perhaps L'Heureux-Dubé's comments, joined by McLachlin and Gonthier, in *R. v. A.G.*,[66] about the importance of addressing "myths and stereotypes", particularly in

64. [2002] 2 S.C.R. 3 at para. 127-31, 210 D.L.R. (4th) 64, 2002 SCC 29.
65. *Ibid.* at para. 127, Binnie and Gonthier, concurring.
66. [2000] 1 S.C.R. 439 at para. 1, 184 D.L.R. (4th) 238, 2000 SCC 17.

the context of sexual assault cases. This is a point that the Court has made a number of times, so the comments break no new ground, but it is worth noting that it is not addressed at all in Arbour's majority reasons. The most extended examples are Binnie's 12,000 word concurrence in *Mitchell v. M.N.R.*,[67] which starts with the rather disarming observation that "[t]here are, however, some additional considerations"; and LeBel's 11,000 words in *Toronto v. C.U.P.E.*,[68] "While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion."

This is in many ways a most un-subversive type of disagreement—every dispositive element of the majority reasons is approved, and all that is happening is that some additional idea or element is being added for the consideration of the broader legal public, a sort of "by the way" footnote. But it is important to note that there is a little more going on here than would appear at first glance. Judicial decisions are carefully crafted collegial artifacts. Although the majority reasons are usually attributed to the authorship of a single judge, the reality is that all the members of the panel have participated. In addition to the post-hearing conference, progressive drafts of the majority reasons have been circulated, all members of the panel have responded with their own ideas and suggestions for improvement, and these comments have been taken into consideration as the revisions continue. The "just one more thing" concurrence, then, is not spontaneously adding something that the majority somehow overlooked and the writing judge happened to think of at the last moment; instead, it is insisting on uttering something that the majority has consciously and deliberately and after reflection decided should not be in their reasons. What we are seeing is in some sense contested ground, most obviously so when the concurrences are longer than the decision itself, less so when they are very short.

Slightly more problematic is the *"just one less thing"* type of concurrence, the most common of the types making up one-third of the total. In *Babcock v. Canada*,[69] L'Heureux-Dubé "agrees substantially" with the disposition and the reasons, but flatly "cannot agree" that there are competing interests that need to be taken into account regarding disclosure. In *Gurniak v. Nordquist*,[70] Gonthier (with McLachlin) concurs with the disposition but would prefer to not explicitly overrule a decision by the BCCA. In *Ross River Dena Council Band v. Canada*,[71] Bastarache (with McLachlin and L'Heureux-Dubé) concurs with the disposition but "respectfully disagrees" with the assertion that legislation has limited the royal prerogative to create reserves. And in

67. [2001] 1 S.C.R. 911 at para. 66, 199 D.L.R. (4th) 385, 2001 SCC 33.
68. [2003] 3 S.C.R. 77 at para. 61, 232 D.L.R. (4th) 385, 2003 SCC 63.
69. [2002] 3 S.C.R. 3 at para. 64, 214 D.L.R. (4th) 193, 2002 SCC 57.
70. [2003] 2 S.C.R. 652 at para. 1, 232 D.L.R. (4th) 635, 2003 SCC 59.
71. [2002] 2 S.C.R. 816 at para. 2, 213 D.L.R. (4th) 193, 2002 SCC 54.

R. v. Nette,[72] L'Heureux-Dubé with three colleagues flatly rejects the majority's rephrasing of the standard of causation for culpable homicide.

What is happening in each case is that the minority is explicitly rejecting a fairly significant element of the majority's reasons, although typically they concur in the result and much of the analysis. They are indicating that some part of the majority's reasons are still contested ground, and they are identifying issues that will remain uncertain until they are explicitly addressed–and, to repeat Jacobi's excellent point, they are not doing this privately, in an internal memo, but in the most public of ways, flagging the disputed matters and suggesting their parameters. And we know that this public statement was made after discussion at conference and that the exchanges of memos failed to persuade their colleagues of the position.

We know the persuasion failed, because if it had succeeded, the minority would have become the majority, and conversely what was being drafted as a majority decision would have become a concurrence. Intriguingly, this clearly is precisely what happened in *Non-Marine Underwriters v. Scalera*[73] and its shorter companion case *Sansalone v. Wawanesa Mutual*.[74] These are decisions by identical seven-judge panels, with McLachlin delivering the reasons for four judges and Iacobucci writing a separate concurrence with Major and Bastarache. But the separate concurrence is written in the standard format of a Supreme Court decision—the facts, summaries of the proceedings and judgments in the lower courts, the focused identification of the issues to be addressed, and a major section headed "analysis". And the majority reasons of McLachlin read like a minority opinion—she has "read the reasons of Iacobucci"[75] and "agree[s] with his disposition of the appeal and with much of his reasoning" but "would respectfully disagree"[76] with his comments regarding consent and the tort of sexual battery. It is unmistakable that the battle of the memos between McLachlin and Iacobucci failed to convince Iacobucci, but it did move one or more of the members of the panel from supporting his ideas to signing those of the Chief Justice, a failure all the more striking for the fact that Table 9 seemed to suggest that Iacobucci was unusually good at bringing panels on-side for a decision.

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72. *Supra* note 57 at para. 1.
73. *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, 185 D.L.R. (4th) 1, 2000 SCC 24 [*Non-Marine Underwriters*].
74. *Sansalone v. Wawanesa Mutual Insurance Co.*, [2000] 1 S.C.R. 627, 185 D.L.R. (4th) 57, 2000 SCC 25.
75. *Ibid.*, at para. 1.
76. *Supra* note 73 at para. 1.

More serious yet are concurrences that reach the same outcome but *"by a different route"*[77] (or "for different reasons"[78] or on "narrower"[79] or "simpler"[80] grounds). In Canada as well as in the US, this is a code that highlights significant disagreement, because an outcome can never constitute precedent; only the reasons can. As Scalia puts it, "an opinion that gets the *reasons* wrong gets *everything* wrong which it is the function of an opinion to produce."[81] The "different reasons" terminology is a red flag identifying a level of disagreement greater than that included in some dissents.[82] LeDain's reasons in *R. v. Therens*[83] can still be cited and followed as the first *Charter* decision dealing with breathalyzer tests, even though he was writing a dissent, because his colleagues endorsed his analysis and conclusions on the core question even while they differed on the way these interacted with the facts to produce an outcome; conversely, McLachlin's separate concurrence in *Gladstone* (the third of the *Van der Peet* trilogy)[84] repeats the fundamental and vigorous challenge to Lamer's new test for the establishment of aboriginal rights that she expressed in dissent in the other two cases of the trilogy. Not surprisingly, these separate concurrences tend to be long, averaging almost 5,000 words, with L'Heureux-Dubé's "simpler grounds" in *Dunmore* being the longest at 15,000 words.

There is a small set of concurrences that I will refer to as *"decisions in waiting"*. Unlike almost all of the other separate concurrences, these lack the formal acknowledgment ("I have read the reasons of Justice X") that is the almost universal opening phrase of a minority opinion, and they also lack the explicit positioning ("differ with respect to" or "cannot agree with" or "doubt the necessity of" some specific element of the majority reasons). They are also extremely long, longer than the majority reasons in the immediate case and longer than the normal reasons for judgment in decisions of the Court, and they make no attempt to engage the reasoning of the majority but argue an entire position as if the majority reasons were not there. The concurrence in *Sharpe*, jointly

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77. See e.g. *R. v Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209 at para. 53, 205 D.L.R. (4th) 385, 2001 SCC 70, L'Heureux-Dubé J., concurring; *R. v. Brooks*, [2000] 1 S.C.R. 237 at para. 127, 182 D.L.R. (4th) 513, 2000 SCC 11, Binnie J., concurring.
78. *Musqueam Indian Band v. Glass*, [2000] 2 S.C.R. 633 at para. 59, 192 D.L.R. (4th) 385, 2000 SCC 52, Bastarache J., concurring; *R. v. Fliss*, [2002] 1 S.C.R. 535 at para. 1, 209 D.L.R. (4th) 347, 2002 SCC 16, Arbour J., concurring; *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at para. 73, 210 D.L.R. (4th) 193, 2002 SCC 23, Arbour, J., concurring.
79. *R. v. Kerr*, [2004] 2 S.C.R. 371 at para. 90, 240 D.L.R. (4th) 257, 2004 SCC 44, Lebel J., concurring.
80. *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at para. 71, 207 D.L.R. (4th) 193, 2001 SCC 94, L'Heureux-Dubé J., concurring [*Dunmore*].
81. Antonin Scalia, "The Dissenting Opinion" (1994), 1994 Journal of Supreme Court History at 33.
82. Frank Easterbrook has suggested that the concept of disagreement, and the differences between dissents and separate concurrences, is much more complex than appears at first glance. He suggests that there are "non-dissenting dissents" (differences on the outcome but no difference on the relevant law), and also "dissenting non-dissents" (of which the "different reasons" concurrence would be an example). See Frank H. Easterbrook, "Agreement Among the Justices: An Empirical Note" (1984) Sup. Ct. Rev. 389.
83. [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655.
84. *Supra* note 4; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385.

authored by L'Heureux-Dubé, Gonthier and Bastarache, is at 18,000 words the longest separate concurrence of the decade.[85] LeBel's separate reasons in *R. v. Khan,*[86] at 12,000 words, are not much shorter; this almost reads like a majority decision that lost the signatures (like *Non-Marine Underwriters*), except that it is a solo concurrence, and neither set of reasons acknowledges or engages the other; nor is there significant overlap in the authorities cited.

"Ditto" concurrences comprise about one-fifth of the total, and again their tone and style is so uniform as to suggest a solid convention. The opening phrase is always the same ("Subject to my comments" in some other case); the closing phrase is always the same ("I concur in the disposition of this appeal"); and the concurrence is always extremely short, averaging a mere 76 words. Follow through the reference, and it is always the case that the comments referred to were in minority reasons, often dissents, which makes this practice slightly curious. On the one hand, it is a characteristic of the judicial profession to attach a very strong value to consistency, and to exhibit a great reluctance to reject or repudiate positions taken earlier.[87] On the other hand, one would have thought that the doctrine of *stare decisis* implies that positions taken in minority reasons, whatever their status at the time of that first statement, are now simply error—it is the decisions and their reasons that constitute precedent, not minority reasons. On the other hand, it is clearly the case that the Supreme Court has itself changed its mind on some very important questions,[88] and that in recent decades it has exhibited a novel willingness to consider previously rejected viewpoints by citing not only concurrences but also dissents from its own prior decisions.[89] At any rate, the practice of "ditto" concurrences clearly has the effect of keeping "in play" ideas that were specifically and explicitly excluded from minority reasons.

The final category is the *"timing"* concurrence in *B v. Ontario*.[90] The reasons, jointly authored by McLachlin and Gonthier, are brief enough that it is worth quoting them in full: "We do not disagree in the result, given the findings by the Board below . . . [t]his said, we would reserve for another day the more general question of the precise meaning of discrimination on the basis of 'family status'." This comment is intriguing for the fact that it exemplifies a phenomenon which in the American literature is called "issue fluidity"——crudely, the capacity of an appeal court not simply to

85. Although, surprisingly, not the longest set of minority reasons; no less than nine dissenting opinions exceeded 20,000 words in length.

86. *R. v. Khan,* [2001] 3 S.C.R. 823, 207 D.L.R. (4th) 289, 2001 SCC 86.

87. See e.g. Reed C. Lawlor, "Personal Stare Decisis" (1968) 41 S. Cal. L. Rev. 73.

88. Such as voting rights for prisoners, which changed between *Sauvé v. Canada (Chief Electoral Officer),* [1993] 2 S.C.R. 438, 153 N.R. 24; and *Sauvé v. Canada (Chief Electoral Officer),* [2002] 3 S.C.R. 519, 294 N.R. 1, 2002 SCC 68; and the question of the rights of same-sex couples, which changed between *Egan v. Canada,* [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609; and *M. v. H,* [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577 [*M. v. H.*].

89. See Peter McCormick, "Second Thoughts: Supreme Court Citation of Dissents and Separate Concurrences, 1949-1999" (2002) 81 Can. Bar Rev. 369.

90. *Supra* note 46 at para 1.

answer the question it is asked, but to decide precisely what question it will answer, even if this sometimes means frustrating the parties on the issue that they wished to bring before the Court. In the United States, it is hotly contested whether the United States Supreme Court frequently transforms the questions that are brought before it,[91] or whether it does so only occasionally,[92] a somewhat abstruse debate, which hinges largely on the niceties of coding in the voluminous databases that researchers have developed. But neither side denies that it sometimes happens, or that it is important, or that (along with docket control) it is one of the factors that allows the court to pursue long-term strategies in pursuit of particular ends.[93] *B v. Ontario* is not a particularly dramatic example, but again on the understanding that judges never say in minority opinions something they have not earlier suggested at conference or in the memo exchanges or both, it is clear that the Court sometimes explicitly considers whether to broaden or narrow a specific question, and that the choice is not a mechanical or a casual one.

XI. CONCLUSION

I began by noting that separate concurrences were a curious practice when viewed through the lens of either the attitudinal approach or the judicial policy-maker approach to the study of judicial behaviour. But given that this type of minority opinion is a persistent and pervasive feature of the Supreme Court of Canada's performance, we can surely turn the argument around: the fact that judges devote as much time and effort as they do to the writing of separate concurrences suggests that there is something going on that is not caught by either of these two approaches. Indeed, the fact that judges are so concerned with "getting it right" that they seek to distance themselves from colleagues who got the outcome right, and even from colleagues who got the reasons almost right, is a strong vindication of the third major approach to the study of judicial behaviour, the one that insists that we should take the judges at their word by regarding substantive legal analysis as the core of what they do.[94]

As Maveety, Turner and Way point out, it has normally been assumed that for those judges on a panel who agree with the outcome (other than the one selected to write the reasons for the group), the choice has been between "speaking" and

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91. Kevin T. McGuire & Barbara Palmer, "Issue Fluidity on the U.S. Supreme Court" (1995) 89 American Political Science Review 691; Kevin T. McGuire & Barbara Palmer, "Issues, Agenda and Decision Making on the Supreme Court" (1996) 90 American Political Science Review 853.
92. Lee Epstein, Jeffrey Segal & Timothy Johnson, "The Claim of Issue Creation on the U.S. Supreme Court" (1996) 90 American Political Science Review 845.
93. See also Barbara Palmer, "Issue Fluidity and Agenda Setting on the Warren Court" (1999) 52 Political Research Quarterly 39.
94. The identification of these as the three major approaches to the study of judicial behavior is taken from Nancy Maveety, ed., *The Pioneers of Judicial Behavior* (Ann Arbor: University of Michigan Press, 2003).

"winning".[95] "Winning" means staying within the group, trying to persuade and even to bargain, but ultimately going along with one's colleagues and signing on to reasons written by one of those colleagues even when they do not absolutely coincide with the signer's views—and this is called "winning" because it is the majority reasons that carry the precedential weight, that set or steer judicial doctrine, that shape the behaviour of lower courts. "Speaking", on the other hand, means "getting it absolutely right" but at the cost of losing this impact, not only in the sense that the single judge's views will carry less weight than those of the majority or plurality group, but also to the extent that the majority reasons will not reflect the persuasion or bargaining that may have accompanied the signature.

But the Maveety paper goes on to suggest that a different view of the role of the Court on the contemporary bench is emerging, a view shared by the members of the Court and by wider communities, and that the separate concurrence—a way of both speaking and winning—is its face. "[I]f the Supreme Court's audience(s) pay attention to concurring opinions as indicative of the Court's "collective mind" . . . then why not [separately] concur when one's own views are so important to the "legal debate?"[96] The choice between speaking and winning is less stark when minority opinions can have an impact, when it is not necessarily true that the muted voice within majority reasons carries real impact but the pure solo voice of minority reasons has none.

In this context, it is striking that over the last thirty years, the Supreme Court of Canada seems to have abandoned a convention that minority reasons do not constitute authority in favour of a practice of regularly, almost routinely, citing them, to such an extent that fully one in every ten of the Supreme Court's references to earlier cases is to minority reasons.[97] Although one extraordinary example does not prove the case, it does make the point—Madame Justice Bertha Wilson's reasons in *R. v. Morgentaler*[98] were at the time a solo concurrence well away from any of the other reasons and failed to draw any favourable comments, let alone a signature, from any of her colleagues; but it is surely true that those same reasons are now the legal message that one takes from the famous case, such that when the case is cited or quoted it is usually her reasons that are referenced or quoted. Obviously, there is something of a circle here: if separate concurrences are going to be cited, then it makes more sense to write separate concurrences and to write at some length; and if substantial concurrences become more common, then there is more to cite and presumably more that is worth citing.

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95. *Supra* note 1.
96. *Ibid.* at 10-11.
97. *Supra* note 89.
98. [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385.

In his classic article, Timothy Terrell[99] suggests a spatial metaphor to explain how judicial reasons impact the development of the law. Every decision and its reasons have a specific *location* on some notional multi-dimensional grid, that location being the (for the moment) terminal point of a *line* formed by the way that the immediate case draws upon the reasons of previous decisions in its justification, and that line having a "*spin*" in the sense that the current reasons project that line forward in a particular way.

In terms of this metaphor, the significance of separate concurrences is that they constitute a shadowy alternative reality—an initial point that is slightly different (or, in the case of "by a different route", perhaps significantly different) from that of the majority reasons, implying a line through past cases to the present case that is somewhat different, and suggesting a projection into the future that is different again. To be sure, most concurring opinions announce their agreement with the majority on most points, and when future decisions pick up on these common elements, it makes no real difference that there was more than one voice. But when a future case revolves around precisely the part of the reasons on which there was no agreement, and especially when "ditto concurrences" have kept the differences alive rather then letting them lapse, then there can be some real doubt as to whether the Court will follow the major track, or the shadowy alternate track, or something in between.

Scalia has suggested that one of the functions of dissent is to record and to honour the arguments of the losing side, something that is valuable both for encouraging the loser's acceptance of the final result (knowing that someone listened closely enough to be persuaded) and as part of a complete historical record.[100] I would suggest that the function of a separate concurrence is rather different—it is to keep alternative views and ideas in play, with the possibility that they might continue to influence future decisions and perhaps eventually to prevail.[101] To see minority opinions in this light, and not as the sour grumblings of someone who cannot persuade but refuses to be persuaded, is to explain why minority reasons in general, and concurrences in particular, deserve closer study.

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99. Timothy P. Terrell, "Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles" (1984) 72 Cal. L. Rev. 288. The allusion in the title is, of course, to the "mathematical fantasy" in Edwin A. Abbott, *Flatland: A Romance of Many Dimensions* (Princeton, N.J.: Princeton University Press, 1991) originally published in 1880, which was followed up by Dionys Burger, *Spereland: A Fantasy About Curved Spaces and an Expanding Universe* trans. by Cornelie J. Rheinboldt (New York: Crowell, 1968, and then imitated by Ian Stewart, *Flatterland: Like Flatland Only More So* (Cambridge, Mass.: Perseus Pub., 2001) and Rudy Rucker, *Spaceland: A Novel of the Fourth Dimension* (New York: Tor, 2002).

100. *Supra* note 79.

101. For example: one could argue that L'Heureux-Dubé's ideas on the precise nature of section 15 of the *Charter* (that its real focus is less the promotion of equality than the somewhat different prohibition of discrimination) was enunciated over and over again in solo minority opinions until it was gradually picked up by the majority, most explicitly in *M. v. H.*, *supra* note 86.