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## Birds of a Feather: Alliances and Influences on the Lamer Court 1990-1997

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## Birds of a Feather: Alliances and Influences on the Lamer Court 1990-1997

### Abstract

The Supreme Court does not always speak with a single voice; for many decisions, there are judges who register disagreement with the majority's legal reasoning or even with the outcome. Are there identifiable fault lines dividing a persisting "majority" and "minority?" Are there one or more "swing vote" judges who allow the minority some share of the decisions of the Court? And, given that the coalitions are shifting rather than rigid, which pairings of judges most frequently (or most seldom) hold together through these shifts? This paper examines the divided panel decisions of the first seven years of the Lamer Court to suggest answers to these questions.

### Keywords

Canada. Supreme Court; Judicial process; Canada

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# BIRDS OF A FEATHER: ALLIANCES AND INFLUENCES ON THE LAMER COURT 1990-1997<sup>o</sup>

BY PETER McCORMICK<sup>\*</sup>

The Supreme Court does not always speak with a single voice; for many decisions, there are judges who register disagreement with the majority's legal reasoning or even with the outcome. Are there identifiable fault lines dividing a persisting "majority" and "minority?" Are there one or more "swing vote" judges who allow the minority some share of the decisions of the Court? And, given that the coalitions are shifting rather than rigid, which pairings of judges most frequently (or most seldom) hold together through these shifts? This paper examines the divided panel decisions of the first seven years of the Lamer Court to suggest answers to these questions.

La Cour suprême ne s'exprime pas toujours à l'unisson; dans plusieurs décisions, certains juges se dissocient de l'opinion majoritaire, ou même du résultat. Peut-on discerner une frontière entre une majorité et une minorité persistantes? Est-ce qu'il existe une tendance chez certains juges minoritaires à concéder certains points de vue de la majorité? Étant donné que les coalitions sont tergiversantes plutôt que rigides, quels sont les juges, qui très fréquemment (ou quelques fois) maintiennent leurs lignes de conduite? Cet article examine les décisions dissidentes des sept premières années, rendues sous la direction du juge en chef Lamer, afin de suggérer des réponses à ces questions.

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## I. INTRODUCTION

In strict legal formality, the nine justices on the Supreme Court of Canada are absolutely equal, with the exception of the chief justice who is, in that singularly opaque and unhelpful phrase, the "first among equals." Each of them enjoys the full protection of judicial independence, which means that they can "call it as they see it" without fear of retaliation or repercussion. Each of them can listen to and take part in the oral argument by which lawyers present to the Court their positions in an appeal. Each of them takes part in the discussion at conference that follows the oral argument and precedes the writing of the reasons for judgment.<sup>1</sup> Each of them casts an equal vote on whether or not the appeal should succeed. And each of them can sign on to the majority judgment, or write his or her own dissenting or separate concurring decision, or sign on to someone else's dissent or concurrence. It is the evolution of doctrine within these discursive reasons for judgment constituting the precedent that binds the lower courts and constrains the Supreme Court itself in its future deliberations.

But in fact this appearance of equality is, in any save the most formal sense, largely an illusion. On any appellate court that sits in large panels, there will, over time, be an identifiable group or groups that tend to prevail when the court divides; and by the same token there will be groups who tend to find themselves in the minority; and there may be one or more judges positioned strategically in between, such that their choices usually tip the balance. Court watchers and lawyers are fully aware of this, if only in the informal sense of a gut feeling for the particular judge or judges to whom the arguments might most usefully be directed in any specific appeal.<sup>2</sup> Identifying these groups and these balancers is therefore an important part of understanding the way that any panel court operates over any period of time, and this is equally true of the Supreme Court of Canada.

The crude outlines of these differences are easily observed. When the Supreme Court delivers a non-unanimous decision, which it

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<sup>1</sup> For a description of the decision-making processes of the Supreme Court of Canada see, for example, The Hon. B. Wilson, "Decision-Making in the Supreme Court" (1986) 36 U.T.L.J. 227.

<sup>2</sup> See, for example, the piece entitled "Curiously cautious [U.S. Supreme Court Justice Sandra Day] O'Connor" *The Economist* (4 October 1997) 38—which suggests that "Justice O'Connor has staked out the centre on many of the great questions before the Court," meaning that "in closely contested cases, conservatives and liberals compete for her vote, since it is often the deciding one." See also J.C. Jeffries Jr., *Justice Lewis F. Powell Jr.: A Biography*, (New York: Scribner's, 1994) at xi, introducing Powell as having been "the most powerful man in America" because of his "position at the ideological center of a divided Court."

does just over 40 per cent of the time, we can determine simply by counting all the panel appearances that some judges (such as Cory and Iacobucci JJ.) write for or sign on with the majority more than three-quarters of the time, while others (such as L'Heureux-Dubé and McLachlin JJ.) do so less than half the time. Summed over hundreds of panel appearances, these differences are significant, and it must mean for lawyers arguing their cases before the Court that they usually have greater cause for optimism if Cory and Iacobucci JJ. are nodding their heads than if McLachlin or L'Heureux-Dubé JJ. are looking pleased. All judges are formally equal, but in terms of actively contributing to the evolution of the Court's doctrine, some judges are "more equal" than others. We can identify these judges by following the shifting patterns of voting combinations and coalitions on the Court; and identifying them brings us closer to understanding how the Court works in practice.<sup>3</sup>

This is not, of course, a question of merit; there is no implication that the judges who write or join the majority decisions are necessarily "better" judges than the judges who dissent or write separately. Indeed, a string of appointments—more rarely, a single appointment<sup>4</sup>—can abruptly reverse which judges are usually on the majority side and which usually dissent. Rather, it is just to say that on controversial and disputed matters of legal doctrine, there will over any period of time be some individuals who are more successful than others at steering the Court in their preferred directions. These are the judges who are putting their mark on the law, who are contributing the most frequently and the most effectively to the articulation of doctrine, whose influence cuts the deepest and will probably endure the longest. What this article attempts to do is to identify the judges who have enjoyed this greater success—first by identifying the most frequently successful coalitions on divided courts, and second by examining the justice-to-justice voting linkages that have produced these coalitions.

I will be assuming throughout that the most important function of the Supreme Court of Canada is to deliver reasoned judgments in the process of resolving (allowing or dismissing) appeals from lower court decisions. It is a critical feature of judicial decisionmaking, especially at

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<sup>3</sup> There are, of course, other differences and inequalities that are at least as important—for example, if we know no more than the fact that both Lamer C.J. and Gonthier J. were on a panel that delivered a non-unanimous decision, we would already know that Lamer C.J. is at least four times as likely to be writing the majority decision. I will not be exploring the implications of these further differences at this time.

<sup>4</sup> See D.M. Levitan, "The Effect of the Appointment of a Supreme Court Justice" (1996) 28 U. Tol. L. Rev. 37.

the appellate level, that its results are usually accompanied by discursive explanation—by written reasons for judgment that explain the logical string of principles and definitions and doctrinal statements leading to the immediate outcome.<sup>5</sup> The reasoned opinion is “more than a device for communicating the outcome of a case;” it is “a candid and rigorous exercise in legal reasoning” that serves “important legal values” and “has value independent of the result” in the case.<sup>6</sup>

For everyone except the immediate parties (and sometimes even for them) the outcome is less important than the reasons, because it is the reasons that direct the deliberations of the lower courts and constrain the future decisions of the deciding court. Timothy Terrell suggests that we should think of any judicial decision as having not only a notional locus on a multi-dimensional grid, but also a direction (in the way that it builds on previous decisions) and a “spin” (in the way that it invites certain extensions of its generalized principles and discourages, or at least fails to invite, others).<sup>7</sup> He is, of course, talking about the reasons, not the outcome itself, which is much less communicative and can be rather ambiguous.<sup>8</sup>

But if the reasons are more important than the outcome, then we should be less concerned about whether or not a judge has voted for the particular outcome than whether or not that particular judge has joined the majority in its reasons. I will therefore be assuming that a given group of judges forms a decision-making coalition only to the extent that they all sign on to a single set of outcome-plus-reasons. At first glance, this may seem too restrictive. It is obvious that a judge who writes or joins a dissenting opinion is not part of the successful coalition in that particular case; but less obvious that the same is true of a judge who writes or joins a separate concurring opinion. But this conclusion follows if we are identifying the reasons for judgment as carrying greater

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<sup>5</sup> For a discussion of the significance of this requirement, see M. Shapiro, “The Giving Reasons Requirement” (1992) U. Chi. Legal F. 179; and F. Schauer “Giving Reasons” (1995) 47 Stan. L. Rev. 633.

<sup>6</sup> M. Wells, “French and American Judicial Opinions” (1994) 19 Yale J. Int’l L. 81 at 85.

<sup>7</sup> T.P. Terrell, “Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles” (1984) 72 Cal. L. Rev. 288.

<sup>8</sup> For example, in *Stewart v. Pettie*, [1995] 1 S.C.R. 131, a hotel appealed a decision that extended the concept of the “duty of care” in a novel direction and held the hotel liable for damages caused by an inebriated patron. The hotel “won” its case, to the extent that the damages it was required to pay were reduced. However, it is more important that the Supreme Court endorsed the extended notion of the duty of care, disagreeing only on the importance of extenuating circumstances in the immediate case. Focusing on the outcome—the hotel won its appeal—misses the whole point.

importance than the outcome itself—a separate concurrence by definition accepts the outcome of the appeal (allowed or dismissed) but explicitly distances itself from the reasons with which the majority or plurality decision of the Court justifies that result. Some American academics would push the argument a step further, suggesting that the term “dissent” should be understood as including not just members of the panel who disagree with the outcome but also members who disagree with the reasoning.<sup>9</sup> I am not going quite this far; I will instead adopt the somewhat milder wording of the Harvard Law Review’s annual survey of the United States Supreme Court, which simply refuses to “treat two Justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case and wrote separate opinions revealing very little philosophical disagreement.”<sup>10</sup>

In coding terms, a case such as *Kenora (Town) Hydro Electric Commission v. Vacationland Dairy Co-operative Ltd.*<sup>11</sup> is straightforward—there is a set of reasons for judgment delivered by Major J. and signed by four other judges, and there is a single dissenting opinion written by Iacobucci J. and signed by three other judges. This is a divided panel with a successful five-member coalition. But for my purposes, a case like *R. v. Rockey*<sup>12</sup> is exactly the same—there is a set of reasons for judgment written by Sopinka J. and signed by four other judges, and there is a single separate concurring opinion written by McLachlin J. and signed by three other judges. This is also coded as a divided panel with a five-member successful coalition. There are also cases such as *Miron v. Trudel*<sup>13</sup>—in which McLachlin J. wrote a set of reasons for judgment signed by three other judges, Gonthier J. wrote a dissenting opinion likewise signed by three other judges, and L’Heureux-Dubé J. tipped the balance by writing a separate concurring opinion supporting McLachlin J.’s outcome but differing from her reasons. In a sense, of course, this is a five-to-four Court for the actual outcome, but for my purposes this is a divided Court with a four-member successful coalition writing a plurality decision, leaving not only the dissenting Gonthier J. & Co., but also the separately concurring L’Heureux-Dubé J., outside.

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<sup>9</sup> See K.M. Stack, “The Practice of Dissent in the Supreme Court” (1996) 105 Yale L.J. 2235. See also A. Scalia, “The Dissenting Opinion,” (1994) J. Supreme Court Hist. 33.

<sup>10</sup> “The Supreme Court, 1995 Term—Leading Cases” (1996) 110 Harv. L. Rev. 135 at 369.

<sup>11</sup> [1994] 1 S.C.R. 80.

<sup>12</sup> [1996] 3 S.C.R. 829.

<sup>13</sup> [1995] 2 S.C.R. 418.

## II. TIME FRAME AND DATABASE

This discussion is built on a database that includes all the reported<sup>14</sup> panel<sup>15</sup> decisions of the Supreme Court of Canada during a seven year period bounded on the one side by Mr. Justice Lamer's ascension to the chief justiceship, and on the other, by the retirement of Mr. Justice La Forest during the summer of 1997, shortly followed by the death of Mr. Justice Sopinka in November of the same year. It seems reasonable to take Lamer C.J.'s appointment as the beginning of a distinctive period in the life of the Court—not only because of the convention by which the Court is identified with the incumbent of the centre chair, but also because a string of recent appointments left him as a very senior member of a very junior court. By the same token, it seems reasonable to take the departure of La Forest J. (who was second in seniority only to the chief justice), and the death of Mr. Justice Sopinka (who was then the third senior member of the Court) as marking the end of an important chapter in the life of the Lamer Court, and possibly even the trigger for a significant realignment.

The choice of this time period also recommends itself for the stability of Supreme Court membership during the seven years. This contrasts strikingly with the Laskin and Dickson Courts, which averaged almost an appointment a year—a turnover rate without parallel in the history of the institution. For a time it seemed that rapid turnover and a “revolving door” Court were the hallmarks of the “modern” (post-Laskin, post-*Charter*) Supreme Court, but the stability of the 1990's has put the lie to this over-hasty generalization. Only the appointment of Iacobucci J. in early 1991, and Stevenson J.'s replacement with Major J. in 1992, spoil the researcher's dream of a stable complement of nine judges sitting and interacting for the full seven years. In the American literature this is referred to as a “natural court.”

There is normally a time lag of several months between the oral hearing and the handing down of the decision, and it is the date of the oral hearing that will be used here: the database includes all those reported decisions in which the oral arguments were heard after the

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<sup>14</sup> At one time, not all Supreme Court of Canada decisions were reported in the S.C.R.; some, but not all, of the omissions are reported in the Dominion Law Reports (D.L.R.). Since 1970, however, the coverage in the S.C.R. has been all but total.

<sup>15</sup> The handful of single-judge responses to motions (such as *Richter & Partners Inc. v. Ernst & Young*, [1997] 2 S.C.R. 5; and *Esmail v. Petro-Canada*, [1997] 2 S.C.R. 3) that appear from time to time in the pages of the S.C.R. have been omitted.



beginning of the 1990-91 term and before the end of the 1996-97 term.<sup>16</sup> It seems anomalous that judges are sometimes reported as delivering decisions or issuing dissents on a date after they actually left the Court or died, but this is simply an artefact of the way that the hearing/deliberation/delivery process works for Supreme Court decisions.

There were 770 reported panel decisions of the Supreme Court for which the oral arguments were heard during the period indicated. In each of these, each judge on the panel was coded as delivering or joining the unanimous decision of the Court, or the majority decision of the Court, or the plurality decision of the Court, or a separate concurring decision, or a dissent. This coding is, by and large, straightforward—much more so than for the United States Supreme Court, whose opinions sometimes exhibit a byzantine complexity bordering on self-caricature, to such an extent that it sometimes becomes a “Herculean task” to try to determine “whether an actual majority exists behind any proposition.”<sup>17</sup> Even on the Supreme Court of Canada, it is sometimes difficult in plurality decisions to determine which of the fragments can best be taken as the closest approximation of the decision of the Court.<sup>18</sup> Sometimes the majority that forms behind part of the Court’s reasons differs from that supporting another part.<sup>19</sup> Sometimes a judge will deliver a brief decision dismissing an appeal while recording her own dissent from it.<sup>20</sup> And sometimes a decision or a concurrence or a dissent will be jointly authored by two judges, rather than written by one judge and signed on to by one or more other judges.<sup>21</sup> In these situations, which all together were not sufficiently frequent to compromise the database, the coding problems were resolved on the

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<sup>16</sup> More precisely, the statistics were collected and the analyses run on 1 November 1997. There may well be some other decisions “in the pipe-line” at the moment of writing—I note that in 1996, decisions in three of the cases argued in June of that year were handed down in early November—but they will be too few in number to affect these calculations.

<sup>17</sup> See S. Gerber & K. Park, “The Quixotic Search for Consensus on the U.S. Supreme Court” (1997) 91 Am. Pol. Sci. Rev. 391.

<sup>18</sup> As a “pure” example of this problem, albeit not one within the time frame being considered, the “majority” in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 fragmented into three sets of reasons for judgment; I take it that Dickson C.J.’s reasons are best treated as the plurality decision, and Beetz J.’s as a concurrence. More recently, *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199, posed a comparable problem.

<sup>19</sup> See, for example, *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716.

<sup>20</sup> See, for example, *R. v. Osvath*, [1997] 1 S.C.R. 7.

<sup>21</sup> See, for example, *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, which features both a co-authored decision by La Forest and Cory JJ., and a co-authored dissent by McLachlin and Major JJ.

basis of common sense supportable by a closer reading of the specific text.

For present purposes, this database will be further narrowed. The analysis will deal only with what I am calling “divided panels”—which means that I am excluding not only unanimous (and *per curiam*) decisions but also those in which a large panel splits eight-to-one, or seven-to-two, or six-to-one.<sup>22</sup> The total number of such decisions by divided panels was 240 over the seven years.

As a result, the figures that follow understate the extent to which the judges on the Supreme Court agree with each other—simply by virtue of the fact that they omit the 57 per cent of all decisions in which the panel is unanimous. However, the flip side of understating the absolute levels of agreement is a closer focus on the relative levels of agreement and disagreement—and this is what is important if we wish to understand the way that the judges line up when they do not all line up together, the way they group themselves when the Court divides. The contracted database also has the advantage of omitting the dozens of extremely brief formulaic decisions, in which a unanimous panel, and often not a minimum panel of five, deals with an appeal in a brusque and uninformative single paragraph. As a result, this analysis is built on those cases in which the Supreme Court found an issue important enough to divide it into two or more fragments, and identifying these fragments is the central thrust of what follows.

### III. JUDICIAL COMBINATIONS

#### A. *Successful Coalitions*

To begin with the obvious: the purpose of an appellate court is to deliver reasoned judgments on appeals from the decisions of lower courts. When the decision is not unanimous, of course, the number of votes within the panel on either side of the issue decides whether the appeal succeeds or fails. Usually this group signs on to a single set of reasons—or, if they split, they do so in such a way that there is still a majority of the panel supporting the reasons. When the fragmentation is more severe, such that there is not a single set of reasons with the direct support of a majority of the panel, the result is a plurality judgment, which resolves the immediate case and constitutes precedent although in

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<sup>22</sup> This number also omits the eleven cases for which the Court was so fragmented that there was not a group of three or more justices signing on to the reasons for judgment.

a way that leaves some commentators feeling very uncomfortable.<sup>23</sup> The Lamer Court delivered sixty-two such decisions<sup>24</sup> in seven years; in each of these cases, the decision-delivering coalition was taken to be the largest group signing on to a single set of reasons within the larger group supporting the outcome, unless a closer reading of the text strongly supported an alternative coding.<sup>25</sup>

The most important coalitions are those which include five judges—being the smallest number that must always prevail, even on a nine-judge panel; and, therefore, the smallest group capable of establishing a line of precedent in a particular area of the law that cannot easily be eroded.<sup>26</sup> There will, over any period of time, be more than one such coalition because there is no reason to think that there is only one dimension along which to rank the judges. Different issues will suggest different continua—not just coalitions of different sizes, but coalitions including allies on one issue who were opponents on another and vice versa. However, not all theoretically possible combinations will be actual combinations, and it is the coalitions that make the transition from theoretical possibility to concrete reality, that I am looking at, especially those which do so the most often.

Over the seven years, sixty-eight cases were decided by five-judge coalitions (including in this list five-to-two decisions as well as the minimum five-to-four). At first glance this number seems rather small; it works out to just under ten five-judge majorities per year, where the comparable figure for the United States Supreme Court is between sixteen and twenty.<sup>27</sup> One obvious explanation is the fact that the United States Supreme Court uses nine-judge panels almost exclusively, while the Supreme Court of Canada uses a more flexible mix of nine-, seven-,

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<sup>23</sup> See, for example, J.F. Davis & W.L. Reynolds “Juridical Cripples: Plurality Opinions in the Supreme Court” [1974] *Duke L.J.* 59.

<sup>24</sup> This number excludes the eleven cases mentioned in *supra* note 22.

<sup>25</sup> See, for example, *R. v. Park*, [1995] 2 S.C.R. 836, which consists of a lengthy set of reasons for judgment signed by L’Heureux-Dubé J. alone. Lamer C.J. and four other members of the panel signed a very short (two paragraphs) concurrence agreeing with the outcome and much of the reasons given, but expressly dissociating themselves from a lengthy section in L’Heureux-Dubé J.’s analysis dealing with the interaction of consent and mistake of fact in a sexual assault situation. It seems to me that the only realistic way to code this is with L’Heureux-Dubé J. delivering a one-person plurality judgment, with Lamer C.J. & Co. constituting a five-judge concurring group.

<sup>26</sup> See, for example, P.H. Edelman & J. Chen, “The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics” (1996) 70 *S. Cal. L. Rev.* 63 [hereinafter “The Most Dangerous Justice”]; and P.H. Edelman & J. Chen, “‘Duel’ Diligence: Second Thoughts About the Supremes as the Sultans of Swing” (1996) 70 *S. Cal. L. Rev.* 219 [hereinafter “‘Duel’ Diligence”].

<sup>27</sup> “The Most Dangerous Justice,” *supra* note 26 at 70-71.

and five-judge panels. By definition, a five-judge panel cannot yield a divided decision with a five-judge winning coalition, and many divided seven-judge panels will also fall short of the five-member coalition threshold when they split four-to-three. Another explanation may be that the Supreme Court of Canada simply divides less often, partly because its case-screening process<sup>28</sup> lets through a significant number of cases that can be briefly disposed of, presumably because they are routine or because they do not raise major questions of law.

There were thirty-five different successful five-judge coalitions that formed at least once over the seven years. But a combination that occurs only once in seven years is not much of a coalition, so I will limit my concern to those combinations that occurred at least three times in seven years—that is to say, roughly once every other year. There were six such combinations, listed in Table 1. What stands out from this listing is the pre-eminence of the grouping of Lamer C.J., Sopinka, Cory, Iacobucci and Major JJ. When the court divides, no five-judge grouping prevails even half so often as this particular combination; and on a further ten occasions a five-judge divided-court majority was formed by four of these judges plus a single outsider (Gonthier J. on seven occasions, McLachlin J. on three).<sup>29</sup> These numbers are not enormous, given that sixty-eight decisions of divided courts were rendered by five-judge coalitions, but it is significant that no alternative coalition was remotely as successful. Thirty decisions of divided courts were decided by six-judge coalitions, and although these were decided by fifteen different combinations of judges, only three occurred as often as three times over the seven-year span and these are listed in Table 1. Again, it is striking that all three of these combinations include the five-judge coalition identified above, which reinforces the impression that this group constitutes the solid core of the Lamer Court.

If the Court always sat in nine-judge panels, then there would be nothing more to say—only a point of view that could consistently recruit at least five judges could prevail in the long run. Although groupings smaller than five can occasionally prevail should the other Justices divide between two mutually exclusive alternatives, such plurality outcomes tend to be rare; Lynn Baker could find only two such decisions by the

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<sup>28</sup> Some cases still remain, such as appeals from decisions on indictable criminal offenses involving a dissent on a matter of law in the provincial court of appeal, which must be heard as a matter of right by the Supreme Court of Canada, regardless of whether or not the judges think the case raises a question of national importance. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 691, 693.

<sup>29</sup> Numbers given in the text may vary from totals on the tables, since the tables only reflect coalitions that occurred more than twice.

United States Supreme Court in the 1995-96 term.<sup>30</sup> Plurality decisions will also be provocative because a minority is setting the tone of the Court on important issues, and vulnerable because the minority's precedents can be overruled as soon as the majority coalesces against them. In a Supreme Court that sits almost exclusively with full nine-judge panels, five is the magic number; and by the same token, these panels display the power of the coalition members in the starkest form. Making the point by hyperbole, Paul Edelman and Jim Chen suggest that "the only time that an individual Justice's vote matters is when he is in a coalition of exactly five Justices" because it is only in these instances that "the defection of any one Justice would make losers of the other four."<sup>31</sup>

On the Supreme Court of Canada, full nine-judge panels were used for only 31 per cent of reported panel decisions over the seven-year period, more frequent than five-judge panels (27 per cent) but fewer than seven-judge panels (42 per cent). The Court attempts a logical triage, treating panels of seven as the norm with larger panels for the most critical cases and five-judge panels for civil law appeals or cases that are expected to be of lesser importance. However, this triage is necessarily imperfect, and small panels can hand down important and frequently cited decisions<sup>32</sup> while some nine-judge panels issue curt one-paragraph formulaic decisions dismissing appeals "for the reasons given in the court below." This makes it necessary to broaden the search for successful coalitions. When seven-judge panels are common, four-judge coalitions can enjoy their share of enduring successes; and when five-judge panels hear one-quarter of all the cases, three-judge coalitions can also form for effective results.

There were eighty-two cases in which four-judge coalitions delivered the decision of the Supreme Court of Canada—about twelve per year, compared with the single example Baker found for the United States Supreme Court in 1995-96.<sup>33</sup> This included forty-seven different combinations of judges,<sup>34</sup> only six of which occurred as often as three times over the seven-year period, and these are also listed in Table 1. It

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<sup>30</sup> L.A. Baker, "Interdisciplinary Due Diligence: The Case for Common Sense in the Search for the Swing Justice" (1996) 70 S. Cal. L. Rev. 187.

<sup>31</sup> "The Most Dangerous Justice," *supra* note 26 at 66.

<sup>32</sup> See, for example, *Thomson Newspapers Ltd. v. Canada (Director of Investigations and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425.

<sup>33</sup> Baker, *supra* note 30 at 217.

<sup>34</sup> The few groups which included Wilson J. or Stevenson J. have been omitted, on the grounds that these two served for too short a period for their participation to be comparable.

is striking that the most frequently successful of the four-judge coalitions includes precisely those four members of the Court who are excluded by the five-judge “core.” Sixty times—nine times a year, again compared to a single United States Supreme Court example in the 1995-96 term<sup>35</sup>—the decision of the Supreme Court of Canada was delivered by a three-judge combination, only six of the combinations occurring more than three times over the seven years. By far the most frequent of the three-judge combinations—indeed, the second most common coalition of any number of judges to deliver decisions for a divided court—is also drawn from the four judges outside the most frequently successful five-judge group.

All of these successful coalitions are pulled together in Table 1, and they seem to support several general conclusions. The first is that the most successful five-judge coalition is clearly the Lamer-Sopinka-Cory-Iacobucci-Major group, which I will call the “core,” no other coalition of whatever size has delivered as many divided court decisions. The members of this group also accounted for four-judge combinations delivering twelve decisions and three-judge combinations delivering a further ten. As well, the only three six-judge combinations to have occurred as often as three times are comprised of this five-judge group plus a single additional judge, further reinforcing the impression of enduring agreement on divisive issues. In all, the core group in its various combinations and recombinations explains a total of forty-seven of the 240 divided court decisions, more than any other comparable group. Chief Justice Lamer is clearly the leading spokesperson, having delivered seventeen-and-one-half of their decisions.<sup>36</sup>

The second identifiable group is the one formed by La Forest, L’Heureux-Dubé, Gonthier and McLachlin JJ., whom I will label “the outsiders.” This group accounts for a total of eighteen decision-delivering combinations of divided courts—five as a four-judge group and thirteen others as “contained” three-judge groups. This is quite a surprising total considering that an alternative credible four-judge group—say, Lamer C.J., Sopinka, Iacobucci, Major JJ.—accounts for only seven, and this larger number reinforces the outsider’s appearance as a coherent group. Their leading spokesperson is La Forest J., writing ten-and-one-half of their eighteen decisions.<sup>37</sup>

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<sup>35</sup> Baker, *supra* note 30 at 217.

<sup>36</sup> The half-decision refers to the jointly authored majority decision by Lamer C.J. and Sopinka J. in *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536.

<sup>37</sup> The half-decision refers to the one co-authored by La Forest and McLachlin JJ. in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12.

**TABLE 1**  
**Decision-Delivering Coalitions**

<i>Size of Coalition</i>	<i>Successful Coalition</i>	<i>Frequency</i>
6-judge	Cory, Iac., Lamer, Major, Sopinka, McL. Cory, Iac., Lamer, Major, Sopinka, Gont. Cory, Iac., Lamer, Major, Sopinka, La F.	5 times 5 times 3 times
5-judge	Cory, Iac., Lamer, Sopinka, Major Cory, Iac., Gont., La F., L.'-Dubé Cory, Gont., La F., McL, L.'-Dubé Cory, Iac., Gont., Sopinka, L.'-Dubé Cory, Iac., Lamer, Sopinka, McL. Cory, Iac., Gont., Sopinka, Major	12 times 5 times 4 times 4 times 3 times 3 times
4-judge	La F., L.'-Dubé, Gont., McL. La F., L.'-Dubé, Cory, Iac. La F., Sopinka, Iac., Major Cory, Sopinka, Lamer, Iac. Cory, Sopinka, Lamer, Major Cory, Sopinka, Iac., Major	5 times 3 times 3 times 3 times 3 times 3 times
3-judge	L.'-Dubé, La F., Gont. L.'-Dubé, Cory, McL. Lamer, Cory, Gont. Lamer, Sopinka, Major La F., Gont., McL. L.'-Dubé, Cory, Iac.	9 times 4 times 4 times 3 times 3 times 3 times

\*Divided panels. Reported Supreme Court of Canada decisions 1990-97. Minimum of three decisions.

Even more remarkably, the defection of Cory J. from “the core” to “the outsiders” creates a five-judge group that is almost as successful as the “core” itself. The “outsiders” alone account for eighteen decisions but the “outsiders” plus Cory J. account for a total of thirty-nine—almost as many as the core itself. No other defection carries even a quarter of the punch. Cory J.’s pivotal position in the Court is strongly hinted at by the fact that he is the only judge to appear in all six of the six most successful five-judge combinations. However, even if Cory J.’s adhesion so dramatically increases their success rate as to turn “the outsiders” into “the alternative core,” La Forest J. still remains the

intellectual leader of this broader grouping as well, writing nineteen of their thirty-nine decisions.

The problem is, however, that this methodology essentially takes us in the direction of finding a single situationally powerful judge (Cory J.) who appears constantly able to play the two wings of the Court off against each other. The flip-side of this characterization is that we risk turning the rest of the Court into little more than background against which he operates—the back-up group, if you will, to his virtuosic solo. But in fact the situation is nowhere near this static and polarized, and the role of the other eight is nowhere near so passive. The concepts of “core” and “outsiders” and “outsiders plus Cory J.” all put together only explain about one-third of all the divided panel decisions of the Court, leaving the other two-thirds to be explained by shifting coalition patterns across this major cleavage. At best, the “core,” the “outsiders,” and the swing position of Cory J. together constitute the single most important dynamic within the Court—and I do think this is the best way to think about it—but it cannot be the entire story.

Edelman and Chen (whose articles were the starting point for this analysis) attempt to use the list of successful coalitions to penetrate the “deep structure” of coalitions and alliances on the United States Supreme Court.<sup>38</sup> They do this by simply counting the number of times that any specific judge appears on one of the listed coalitions—in the case of the Lamer Court, six times for McLachlin J., twelve times for Sopinka J., sixteen for Cory J., and so on—and turning it into an index by comparing it with the notional “average member” of the Court. A high score indicates a high level of demonstrated ability and willingness to form alternative coalitions with other judges, which in turn suggests a judge who is able to exercise the greatest leverage within the successful coalition—the judge who must write, or the judge the writer cannot afford to annoy, by virtue of being demonstrably the most likely member of the coalition to defect. This approach makes Cory J. the end point of a continuum rather than “one of a kind,” but it seems to me that it still has the tendency to make this “powerful voting” an attribute of the individual judge rather than the product of multi-judge interactions.

What I want to do is to unfold the list of successful coalitions in a different way, a way that keeps Cory J. in the context of the rest of the Court. More specifically, I want to characterize all the members of the Court (not just Cory J.) in terms of the varying degree of flexibility they demonstrate in taking part (or refusing to take part, or being unable to take part) in a range of voting coalitions. This tendency toward cohesive

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<sup>38</sup> “The Most Dangerous Justice,” *supra* note 26; and “Duel’ Diligence,” *supra* note 26.



and persistent groupings is only clumsily approximated in the form of the “core” and “outsiders” groups identified earlier; there is a great deal more information to be teased out of the list.

The key, I think, is to treat each successful coalition as a string of pairs of judges, organized around a specific view of the central issues and their optimal resolution. For example: the trio of La Forest, L’Heureux-Dubé and Gonthier JJ. is the most frequently successful of the three-judge coalitions. But we can also treat this as three different pairs of judges (La Forest and L’Heureux-Dubé JJ., La Forest and Gonthier JJ., and L’Heureux-Dubé and Gonthier JJ.) each of whom has mutually agreed with the other to sign on to a single set of outcome-plus-reasons in a particular appeal.<sup>39</sup> What this approach emphasizes is the fact that if Gonthier J. (or whoever) enjoys “power” as a result of the interaction, he does so because L’Heureux-Dubé and La Forest JJ. have chosen to “give” it to him. The price of this “power” is that he must give comparable “power” back, and he can only keep this “power” so long as they wish him to hold it. Gonthier J., on his own, is still just one judge, one vote on the panel.

We can similarly reduce every successful coalition to a string of such agreeing pairs, and sum them for each of the thirty-six possible pairings on the Court. The results are shown in Table 2. This also has the effect of weighting the larger coalitions more heavily—each judge on a three-judge panel is part of two pairs, but each judge on a five-judge panel is part of four pairs. This is justified because five-judge coalitions are so critically important, being the smallest coalition of judges that can prevail on a stable basis against all comers, whereas three-judge coalitions depend on such fortuitous circumstances as their all being assigned to the same five-judge panel, or a fragmentation of a larger panel permitting a narrow plurality judgment.

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<sup>39</sup> For the present purposes, I will leave to one side the question of which judge is actually writing the set of reasons to which the rest are signing.

**TABLE 2**  
**Two Judge Pairings Within Successful Coalitions**  
**(Unweighted for Coalition Frequency)**

	MAJ	LAM	SOP	IAC	COR	GON	LA F	McL	L'-D
MAJ	-	6	9	9	7	2	2	1	0
LAM	6	-	8	6	8	2	1	2	0
SOP	9	8	-	10	10	3	2	2	1
IAC	9	8	10	-	11	4	4	2	3
COR	7	8	10	11	-	6	4	4	6
GON	2	2	3	4	6	-	5	3	5
LA F	2	1	2	4	4	5	-	3	5
McL	1	2	2	2	4	3	3	-	3
L'-D	0	0	1	3	6	5	5	3	-

\*Divided panels. Reported Supreme Court of Canada decisions 1990-97.

The numbers have also been used to direct the order in which the nine members of the Court are listed. The logic of sequencing is to list the core members together, and the outsiders together, and “thin out” upper right and lower left corners (which are of course simple mirror images of each other). This means letting the ranking in both directions from Cory J.—who earns the central position by virtue of his swing role—be set by the frequency with which the individual judge successfully enters coalitions with the “other” group. Among the outsiders, Gonthier J. is the one with the highest number of pairings with members of the “core” (seventeen) and L’Heureux-Dubé J. has the lowest (ten). Conversely, among the members of the “core,” Iacobucci J. is (next to Cory J.) the one with the highest number of pairings with “outsiders” (thirteen) and Major J. and Lamer C.J. are the lowest (with five). On this basis, the logical structure of the decision-delivering Court is Major - Lamer - Sopinka - Iacobucci - Cory - Gonthier - La Forest - McLachlin-L’Heureux-Dubé. The sequence is intended to suggest that adjacent justices are more likely to link than distant judges.

Table 2 just counts the number of coalitions in which each pairing of judges occurred, without paying any attention to the relative frequency with which each of these coalitions actually delivered the decision for the Court. Edelman and Chen are adamant about this “one

counts as one" logic—but their point is simply to demonstrate that a specific five-judge coalition is possible, which in turn identifies the judge most likely to defect, and this is the phenomenon with which they are concerned. If you will, they need only demonstrate that the road exists, without distinguishing the gravel road from the super-highway. However our focus is not complete coalitions but the two-judge pairings within each coalition, and this is a methodology better served by measuring the volume of traffic than by simply noting that there is a road, by counting relative frequencies, rather than just giving a flat list. For example: La Forest-L'Heureux-Dubé-Gonthier and Lamer-Sopinka-Major are both successful (decision-delivering) three-judge coalitions. But the first occurred three times as often as the second, and it seems distorting to leave this out of the assessment of how strong the various two-judge linkages are. Table 3, therefore, corrects the count by weighting each intra-coalition pairing for the frequency with which the coalition occurred.

The correction does not in any way change the basic picture, although it does stand out all the more dramatically now that the numbers in most of the cells are so much larger. Several basic impressions emerge.

**TABLE 3**  
**Two Judge Pairings Within Successful Coalitions**  
**(Weighted for Coalition Frequency)**

	MAJ	LAM	SOP	IAC	COR	GON	LA F	McL	L'-D
MAJ	-	31	40	34	31	8	6	5	0
LAM	31	-	37	28	38	9	3	8	0
SOP	40	37	-	44	44	12	6	8	4
IAC	34	28	44	-	52	17	14	8	15
COR	31	38	44	52	-	25	15	16	19
GON	8	9	12	17	25	-	27	12	27
LA F	6	3	6	14	15	27	-	12	26
McL	5	8	8	8	16	12	12	-	13
L'-D	0	0	4	15	19	27	26	13	-

\*Divided panels. Reported Supreme Court of Canada decisions 1990-97.

The first is the strength of the “core” coalition, reflected by the upper left quadrant—not a single cell outside this block is as large as the smallest number within the block (although Lamer-Iacobucci may leave just the faintest impression of a crack in the wall). The core of this alliance, and the strongest such linking on the entire table, is Cory-Iacobucci. The second is the fainter but still significant impression of the “outsider” coalition in the lower right quadrant. However, the lower numbers for McLachlin J. seriously qualify this picture, leaving the La Forest-Gonthier-L’Heureux-Dubé grouping as a frustratingly small counterbalance to the domination by the “core”—indeed, on this count, Cory J. appears to be a better member of the “outsiders” than McLachlin J. The third is the faint hint of a central block of Iacobucci-Major-Gonthier-La Forest, a combination that actually occurred twice over the seven year period (that is to say: not quite frequently enough to make it into Table 1). The fourth is the relative isolation of the two female members of the Court, McLachlin and L’Heureux-Dubé JJ., who are involved in fewer decisionmaking combinations and fewer successful two-judge linkages than any of their male counterparts—without, on the other hand, suggesting any tendency toward forming a solid linkage between themselves, either. The fifth is the central role of Cory J., who comes closer than anyone else to being everybody’s favourite partner in a coalition—core and outsiders alike. This just confirms the idea, already suggested in the concept of the “alternative core,” that Cory J. is a central player in the decisionmaking dynamics of the Lamer Court.

### B. *Voting Behaviour*

Tables 2 and 3, however informative, are really answering the question “how often do A and B sign on together for the majority”—which is to say that they are looking at only the tip of a slightly larger iceberg. Below that particular surface is the bigger question of how often A and B sign on together for any purpose, whether decision, concurrence, or dissent. This narrowing of the question is mildly distorting for an understanding of all the members of the Court—since everyone is with the minority at least one-fifth of the time—but it is particularly distorting for an understanding of those members, such as L’Heureux-Dubé J., who find themselves in the majority the least often. The way to escape this distortion is to look at all participation in divided courts, whether or not it results in a judge signing on to the decision of the Court. And this involves a series of computations for each of the

members of the Court, which are illustrated in Table 4 with respect only to Lamer C.J.

**TABLE 4**  
**Lamer's Interactions With Other Judges**

<i>Judge</i>	<i>Unan.</i>	<i>Together</i>			<i>Apart</i>		
		<i>Led</i>	<i>Followed</i>	<i>Joined</i>	<i>Differed</i>	<i>Parallel</i>	<i>Other</i>
GON	200	38	4	53	60	1	52
SOP	195	61	34	48	34	6	32
L'-D	190	7	4	25	98	0	80
McL	188	26	15	35	67	8	56
LA F	186	33	8	57	56	6	58
COR	185	59	27	53	38	5	32
IAC	184	41	19	53	35	6	31
MAJ	124	29	11	52	32	3	24

\*Divided panels. Reported Supreme Court of Canada decisions 1990-97.

Lamer C.J. sat with La Forest J. on a total of 404 panels, 218 of which resulted in divided decisions. Ninety-eight times, they signed on to the same set of outcome-plus-reasons, with Lamer C.J. writing thirty-three times, La Forest J. eight, and some other member of a coalition writing fifty-seven times.<sup>40</sup> Fifty-six times they "differed," which is to say that one (but not both) dissented from the decision of the Court. Six times they wrote parallel opinions, which means either that both wrote their own dissents or that both wrote their own separate concurrences. And fifty-eight times, one of them was in the decision-writing coalition and the other was writing or signing a separate concurrence. Similar sets of numbers can be generated for the other thirty-five pairings.

The three numbers in the "together" column measure the frequency with which any pair of judges agreed to the extent of signing the same set of reasons for judgment—this is the broader measure of which Table 3 gives a limited summary by considering only the times that

<sup>40</sup> This total would also include times that Lamer C.J. and La Forest J. joined in a common dissent or separate concurrence, although these numbers are very low across the entire Court—in seven years only about 100 separate concurrences and 150 dissents drew one or more additional signatures.

this agreement forms behind the majority/plurality decision of the Court. These new numbers allow us to generate the matrix anew, working now from *all* divided panel service for each pairing of judges and not just from those times when that particular pairing is part of the successful coalition. The results are shown in Table 5, the numbers indicating the number of times that any pair of judges joined each other as a percentage of their total appearances together on a divided panel. Again, the bottom left half of the table (below the blank cells) is simply a mirror of the upper right half.

**TABLE 5**  
**Explicit Agreement Frequency**

	MAJ	SOP	LAM	IAC	COR	GON	LA F	McL	L'-D
MAJ	-	69%	61%	64%	63%	44%	43%	40%	18%
SOP	69%	-	67%	67%	61%	45%	45%	35%	20%
LAM	61%	67%	-	61%	65%	46%	47%	37%	17%
IAC	64%	67%	61%	-	74%	56%	55%	40%	28%
COR	63%	61%	65%	74%	-	59%	53%	39%	31%
GON	44%	45%	46%	56%	59%	-	64%	45%	51%
LA F	43%	45%	47%	55%	53%	64%	-	44%	44%
McL	40%	35%	37%	40%	39%	45%	44%	-	38%
L'-D	18%	20%	17%	28%	31%	51%	44%	38%	-

\*Divided panels. Reported Supreme Court of Canada decisions 1990-97.

It might be argued that limiting the notion of agreement to include only those times when the two judges sign on together—that is to say, omitting the times when one or both are writing their own separate concurrences, or when they are both writing their own separate dissents to an outcome that both reject—unrealistically narrows the category, since these situations still mean that they both support the same result if not the same reasons. Table 6 builds on this broader notion, although it does so from the other side—it now measures only explicit and complete disagreement, drawn from the “differed” column in Table 4. That is to say, it measures the number of times that one of the judges dissented and the other did not, expressed as a percentage of the total number of times that both were members of a panel that delivered a divided

decision. Table 5 measures complete agreement; Table 6 measures complete disagreement; and what remains are a set of circumstances—both judges writing or signing different dissents, or one or both judges signing separate concurrences—that are somewhat harder to classify. Again, the lower left of the table, below the diagonal row of blank cells, mirrors the upper right; but on this table, it is the low numbers that signal a potential coalition.

**TABLE 6**  
**Explicit Disagreement Frequency**

	MAJ	SOP	LAM	IAC	COR	GON	LA F	MCL	L'-D
MAJ	-	15%	21%	23%	23%	31%	33%	38%	49%
SOP	15%	-	16%	18%	20%	32%	31%	36%	47%
LAM	21%	16%	-	19%	18%	29%	27%	32%	46%
IAC	23%	18%	19%	-	16%	22%	21%	35%	38%
COR	23%	20%	18%	16%	-	23%	23%	31%	34%
GON	31%	32%	29%	22%	23%	-	16%	27%	24%
LA F	33%	31%	27%	21%	23%	16%	-	26%	30%
MCL	38%	36%	32%	35%	31%	27%	26%	-	27%
L'-D	49%	47%	46%	38%	34%	24%	30%	27%	-

\*Divided panels. Reported Supreme Court of Canada decisions 1990-97.

As it happens, the two tables yield highly similar results for our purposes; there are no overt and systematic differences in the way that explicit disagreement relates to explicit agreement for any pairings of judges.<sup>41</sup> And the patterns in both these tables largely agree with those from Table 2 and Table 3. The one minor difference is that Lamer C.J. and Sopinka J. trade places, Lamer J. moving one slot closer to Cory J. in the centre and Sopinka J. shifting one place closer to Major J. at the outside edge of the “core” group. The new logical structure of the Court

<sup>41</sup> This is not, of course, to say that there are no such differences—just that they do not accumulate in a way that affects the demonstrated patterns. Generally, explicit disagreement accounts for 53 per cent of the cases that do not result in explicit agreement, but for the various two-judge pairings this varies from a low of 43 per cent (McLachlin-L'Heureux-Dubé) to a high of 64 per cent (all three wings of the Lamer-Iacobucci-Major connection).

is Major - Sopinka - Lamer - Iacobucci - Cory - Gonthier - La Forest - McLachlin-L'Heureux-Dubé.

But all the other elements of the earlier tables are strongly confirmed. The core group is clearly marked by the fact that all ten of the intra-core linkages show a rate of agreement of more than 60 per cent and a rate of disagreement of less than 25 per cent. The outsiders are also characterized by higher-than-average agreement rates and lower-than-average disagreement rates—but not to the same extent as the core. Cory J. still holds the centre of the Court, a solid member of the core who is at the same time more ready than most to agree with the outsiders as well, but this is not so pronounced as it appeared in the simpler coalition-driven version. Again, the strongest two-judge linkage is that between Cory and Iacobucci JJ., who sign on together in almost three-quarters of their appearances and explicitly disagree in less than one-sixth, although the Gonthier-La Forest pairing is also strong. Once again, these four at the centre show agreement rates that point toward a “shadow centre” group.

And it is also still the case that the two women judges appear to be isolated at one edge of the Court—L'Heureux-Dubé J. alone accounts for the five lowest two-judge scores, McLachlin J. for the next six lowest. Since one of these eleven scores is the one that links the two women judges themselves, neither can it reasonably be suggested that they constitute the potential core of a new group. The persistence of this pattern through several levels of analysis is significant. One of the issues that was debated when women members of the profession began to receive their share of positions on the higher courts was whether women judges would, in the words of one article title,<sup>42</sup> “make a difference.” Would female judges bring different values and different priorities to the bench, or would their behaviour reflect the same strong imprint of class and professional training as male judges? Some early studies of provincial courts of appeal suggested that the latter was the case—that there was no systematic difference in the general patterns of outcomes between male and female judges, even on such gender-sensitive issues as sexual assault.<sup>43</sup> But the patterns of Table 6 (and the earlier tables) point the opposite direction—this is exactly what one would expect to find if there were gender-linked differences in judicial performance, if there were things about the law that female judges were more likely to

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<sup>42</sup> The Hon. B. Wilson, “Will Women Judges Really Make a Difference?” (1990) 28 Osgoode Hall L.J. 507.

<sup>43</sup> P. McCormick & T. Job, “Do Women Judges Make a Difference?” (1993) 8 Can. J. L. & Soc'y 135.



identify and to highlight than male judges. This impression is reinforced by the fact that the two female judges can be so different from each other even while both differ significantly from their male colleagues. It is not my purpose at this time to tease out what those differences might be, but simply to acknowledge a strong statistical indication that such differences may well exist.

The material in Table 5 can be read a different way, as suggesting not only the absolute levels of agreement between any pair of judges (the percentage of the time they join on a judgment, or negatively in Table 6 the percentage of the time they directly disagree), but also the relative levels of agreement between each judge and his/her colleagues. For each judge, we can identify their "favourite" coalition partner, which is to say the judge with whom they directly agree the most often; and then their second favourite partner, and so on. This information is collected in Table 7. Note that the rankings in the table should be read down, not across—for example, Major J. is Iacobucci J.'s third most frequent partner, Sopinka J. his second, and so on. Note also that unlike the previous tables of similar appearance, this one is not mirrored; by definition, Cory J. agrees with Gonthier J. exactly as often as Gonthier J. agrees with Cory J., but this agreement rate—59 per cent—makes Cory J. Gonthier J.'s second favourite partner, but Gonthier J. only Cory J.'s fifth favourite.

**TABLE 7**  
**Agreement Frequency Rankings**

	MAJ	SOP	LAM	IAC	COR	GON	LA F	MCL	L'-D
MAJ	-	1st	4th	3rd	3rd	8th	8th	3rd	8th
SOP	1st	-	1st	2nd	4th	7th	5th	8th	6th
LAM	4th	3rd	-	4th	2nd	5th	4th	7th	7th
IAC	2nd	2nd	2nd	-	1st	3rd	2nd	4th	5th
COR	3rd	4th	3rd	1st	-	2nd	3rd	5th	4th
GON	5th	6th	6th	5th	5th	-	1st	1st	1st
LA F	6th	5th	5th	6th	6th	1st	-	2nd	2nd
MCL	7th	7th	7th	7th	7th	6th	6th	-	3rd
L'-D	8th	8th	8th	8th	8th	4th	7th	6th	-

\*Divided panels. Reported Supreme Court of Canada decisions 1990-97.

This presentation of the data emphasizes the strength of the Lamer-Sopinka-Cory-Iacobucci-Major “core” coalition, and the reason they stand out so prominently in the decisions of divided panels. Every one of these five has a list of preferred coalition partners topped by the four others—indeed, this could almost serve as the definition of a coherent and persistent coalition.<sup>44</sup> By the same token, Table 7 shows the weakness of the four outsiders—not only are they one judge short of the five it would take to ensure success on full-court divided panels, but they do not all reciprocate in putting each other at the top of their preferred partners list. Gonthier and La Forest JJ. are first and/or second for the other members of the group, but only L’Heureux-Dubé J. follows through by putting her third choice within the coalition as well. La Forest and Gonthier JJ. give their second and third choices—not in the same order—to Iacobucci and Cory JJ., while McLachlin J.’s third highest level of agreement is with Major J. Putting it somewhat melodramatically: McLachlin and L’Heureux-Dubé JJ. seem to be reaching toward a coalition with Gonthier and La Forest JJ., but they in turn are reaching for a coalition with Cory and Iacobucci JJ., even though the latter two are firmly within the five-member core group. This in turn strongly qualifies the appearance of a shadowy “central group” of Cory, Iacobucci, Gonthier and La Forest JJ., which seems to have a higher relative priority for the latter two than for the first two of the four.

Table 7 also implies that every judge has a preferred five-judge coalition and, for that matter, a preferred four-judge coalition should they find themselves on a divided panel, and this information is pulled together in Table 8. Examples of cases in which this four- or five-judge combination actually delivered a decision for the Court are given in the endnotes. This suggestion of “preferred coalitions” is not meant lightly. It is a serious statement of the calculations that I presume all judges would have to be making in such a situation, as soon as it becomes clear that their own feeling for the issues involved, and the optimal resolution of these issues, are not shared unanimously around the table. Surely the first step would be to identify those members of the panel with whom they were most frequently in agreement, especially on similar issues, and to try to work out some common ground with them, whether this persuasive effort takes place over the post-hearing conference table, in the drafting and editing of reasons for judgment, or in personal conversation in chambers or over coffee. These ongoing attempts at

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<sup>44</sup> They also show a striking consistency in the ranking order for the four other members of the Court—Gonthier or La Forest JJ. at the top, L’Heureux-Dubé J. at the bottom.

mutual persuasion are neither illegitimate nor marginal to the appellate process; appellate decisionmaking is not a flat “listen, vote and leave” but a collegial process organized around a rational core resulting in a discursive product.<sup>45</sup> Without ongoing, persuasive give-and-take, the process and the product are both compromised.

**TABLE 8**  
**Preferred Five- and Four-Judge Coalitions**  
**(Based on Actual Agreement Rates)**

<i>Judge</i>	<i>Preferred Five-Judge Coalition</i>	<i>Preferred Four-Judge Coalition</i>
LAM	Lam Sop Cor Iac Maj <sup>1</sup>	Lam Sop Cor Iac <sup>2</sup>
LA F	Lam La F Cor Gon Iac <sup>3</sup>	La F Cor Gon Iac <sup>4</sup>
L'-D	La F L'-D Cor Gon McL <sup>5</sup>	La F L'-D Gon McL <sup>6</sup>
SOP	Lam Sop Cor Iac Maj <sup>7</sup>	Lam Sop Iac Maj <sup>8</sup>
COR	Lam Sop Cor Iac Maj <sup>9</sup>	Lam Cor Iac Maj <sup>10</sup>
GON	La For L'-D Cor Gon Iac <sup>11</sup>	La F Cor Gon Iac <sup>12</sup>
McL	La F Gon Maj Iac Cor <sup>13</sup>	La F Gon McL Maj <sup>14</sup>
IAC	Lam Sop Cor Iac Maj <sup>15</sup>	Sop Cor Iac Maj <sup>16</sup>
MAJ	Lam Sop Cor Iac Maj <sup>17</sup>	Sop Cor Iac Maj <sup>18</sup>

\*Divided panels. Reported Supreme Court of Canada decisions 1990-97.

The more extensive the areas of persisting agreement, and the more constant the past cooperation between any pair of judges, the easier and more natural the give-and-take of persuasion must be. The bulk of the attention must surely go to the outer edge of the putative coalition, the one whose signature will most likely tilt the balance and decide who will write the majority decision and who will write the dissent. And again it is important to remember that the reasons for judgment are at least as large a part of the Supreme Court's role as getting the decision right in the first place—it is the reasons for

<sup>45</sup> See, for example, L.A. Kornhauser & L.G. Sager “Unpacking the Court” (1986-87) 96 Yale L.J. 82.

judgment that will tell lower courts and other actors what the law is, what principles have to be applied, and how the established rules have to be adjusted, or newly understood, in order to confront changing circumstances. In the fine tuning of such a text, there is a great deal of room for give and take, for persuasion and concession, for finessing differences rather than letting them stand or fall on “all or nothing” confrontations.

Cory J.’s central position is clear; he is the only member of the Court who is on every single one of his colleagues’ preferred five-judge coalitions, and also on five of the eight four-judge coalitions. Iacobucci J. enjoys a similar position, being on seven of his eight colleagues’ five-judge coalitions—one less than Cory J.—as well as six of his colleagues’ four-judge coalitions—one more than Cory J. At the other extreme, McLachlin and L’Heureux-Dubé JJ. are on one preferred five-judge coalition each, and one preferred four-judge coalition between them.

This is not, it must be stressed, a question of popularity; what is at stake here is not the Mr. or Ms. Congeniality award, nor the question of whom one would most like to be stuck in an elevator with. To be sure, in any organization with a small number of members and little turnover, it is only to be expected that personality issues will intrude from time to time. However, the phenomenon that has been explored here is primarily a question of congruent perceptions of issues and principles and priorities. Judges sign on together on a set of reasons, not because they may or may not like each other, but because they agree that it is the optimal set of reasons for this particular case at this particular time. The wording itself may have emerged from a process of bargaining and concession and compromise, and the agreement of some of the members may be tactical rather than permanent, but, for all that, it is a genuine statement of principled agreement. Judges who frequently agree are revealing, not personal friendships, but overlapping and congruent perceptions of the legal issues, and as that circle of agreement reaches to include a majority of the Court, it sets the tone for the Court’s jurisprudence.

To all the foregoing, one massive qualification must be registered: I have treated the entire block of divided panel decisions by the Supreme Court of Canada as a single coherent database, and I have discussed levels of agreement and disagreement as if they were grouped along a single dimension, as if the one-dimensional single ranking at the top of the matrices could adequately capture these relationships. In fact, there must be several dimensions, and this discussion of aggregate figures is undoubtedly blurring several different components into a single composite picture that does not perfectly reflect any of them.

Major and L'Heureux-Dubé JJ. have the lowest rate of explicit agreement of any pairing on the Court, signing on together in barely one-sixth of their joint appearances, and the matrix reflects this fact by putting them at opposite ends of the Court. But the critical thing to remember is that as often as one-sixth of the time, Major and L'Heureux-Dubé JJ. agree with each other even at times when they are both disagreeing with other colleagues on the Court with whom they normally agree. This means that there are issues or general areas of the law or types of appeal on which Major and L'Heureux-Dubé JJ. can only accurately be charted on a decision-making matrix as being located at something other than the remote extreme ends. By the same token, of course, there must be other areas in which their agreement rates are even lower.

By treating all types of cases the same, I am also implicitly treating all seven years the same. This may also be somewhat unrealistic. At the beginning of the 1990 fall term, many of the members of the Lamer Court were extremely junior—indeed, the average years of experience for the Supreme Court of Canada was lower in 1991—with the departure of Wilson J.—than it had been at any time since Fitzpatrick C.J.'s chief justiceship in 1906. At the end of the 1996 fall term, all of them were relative veterans with at least five years experience on the country's highest court. It is only to be expected that there will have been some transitional effect involved<sup>46</sup>—even for those with appellate court experience (a group which includes all but Sopinka J.), the shift to “playing without a backstop” on the Supreme Court can be challenging. It may be that some alliances—that is, inter-judge agreement rates—have strengthened and others have weakened through that process. On the other hand, it is unlikely that this settling-in process involves any major change in direction; judges even more than most professionals value consistency and continuity, and their earlier lower court decisions constitute a written record of value commitments that they will not lightly repudiate.<sup>47</sup> Therefore, of the two implicit assumptions in this methodology, “all areas” is of more real concern than “all years.”

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<sup>46</sup> See, for example, R. Carp & R. Wheeler, “Sink or Swim: Socialization of a Federal District Judge” (1992) 21 J. Pub. L. 359; L. Alpert, B.M. Atkins & R.C. Ziller, “Becoming a Judge: The Transition from Advocate to Arbitrator” (1979) 62 *Judicature* 325; and S. Goldberg, “Judicial Socialization: An Empirical Study” (1985) 11 J. Contemp. L. 423.

<sup>47</sup> See, for example, R.C. Lawlor, “Personal Stare Decisis” (1967-68) 41 S. Cal. L. Rev. 73.

#### IV. CONCLUSION

This statistical examination of seven years of divided panel decisions by the Lamer Court is based on four assumptions that should be made absolutely explicit.

First, I am assuming that the primary focus of a final court of appeal is less the resolution of immediate cases than the provision of judicial leadership for the lower courts through the articulation and elaboration and refinement of legal doctrine. This is not to suggest that outcomes are irrelevant, or that the Supreme Court is in any way casual about them, but simply to emphasize that the Court produces reasoned outcomes, and that in the long run these reasons are more important than the outcomes. The product of the Court is not just concrete lists of “winners” and “losers” but more significantly the development of a discursive body of jurisprudence.

Second, I am assuming that the appellate process is best thought of as a collegial process, one that legitimately involves persuasive argumentation, compromise, and even negotiation (“change the wording on such-and-such and I will sign on”) between the judges who sit on any panel. This conversational mode itself presumes that judges are most likely to be sympathetic to a particular argument or value or issue, and, therefore, the most promising parties for persuasion; these tactical considerations are likewise a legitimate concern for the judges, and, therefore, for court watchers as well.

Third, given that unanimity is not always possible, then majorities or even pluralities of judges must often prevail. If we are to understand the operations of the Court at such times, the search must be for those coalitions of judges who prevail on a persisting basis; and since the Supreme Court of Canada works with panels of varying sizes, this cannot be limited to five-judge coalitions. Another way of thinking about these coalitions, which are complex and dynamic rather than static and polarized, is in terms of the varying frequency of agreement between different pairs of judges on the Court, thus meshing with the persuasion argument above.

Fourth, the judicial value of transparent and principled consistency validates the search for continuity in the form of persisting levels of agreement between two or more judges. This is a rational process organized around values and principles, not a question of personal popularity, although conceivably personality factors could mildly reinforce or erode the patterns. By examining two-judge levels of persisting agreement, we are not reducing judging to a mechanical

process or treating the judges' actions as based on pre-rational orientations but, quite the reverse, we are taking them at their word as rational articulators of principled positions.

The findings of this study should not be thought of in terms as simple as "Lamer C.J. and Sopinka and Cory and Iacobucci and Major J.J. always vote together, so they always win." In part, this is because they do not always vote together, and therefore they do not always "win." The ten two-judge pairings contained within that five-judge coalition do tend to show higher levels of agreement than all but one of the other two-judge combinations on the Court, but there is nothing mechanical about this process and the (smaller number of) departures from agreement are as legitimate and as important as the (larger number of) agreements. The importance of these findings is not to treat the two-judge pairings or the five-judge coalition as if they were some kind of natural phenomenon, but rather to use them to find the values and principles and areas of law around which the agreement clusters—as well as the values and principles and areas of law about which frequently agreeing judges no longer agree. In that sense, this article is less a finished product than a simple prolegomena to a deeper understanding of the coalitions and inter-judge agreements at the core of the Lamer Court.

#### ENDNOTES FOR TABLES

1. There are twelve examples, including *R. v. Heywood*, [1994] 3 S.C.R. 761 [hereinafter *Heywood*]; and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [hereinafter *Dagenais*].
2. See *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 [hereinafter *CBC*].
3. There are no examples.
4. See *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6; and *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103 [hereinafter *Dickason*].
5. See *R. v. Gossett*, [1993] 3 S.C.R. 276; *United States of America v. Lépine*, [1994] 1 S.C.R. 286; and *Caron v. Canada (Employment & Immigration)*, [1991] 1 S.C.R. 48.
6. See *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12; *R. v. Power*, [1994] 1 S.C.R. 601; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; and *R. v. Hinckey*, [1996] 3 S.C.R. 1128.

7. There are twelve examples, including *Heywood*, *supra* note 1; and *Dagenais*, *supra* note 1.
8. See *R. v. Naglick*, [1993] 3 S.C.R. 122; and *R. v. Creighton*, [1993] 3 S.C.R. 3.
9. There are twelve examples, including *Heywood*, *supra* note 1; and *Dagenais*, *supra* note 1.
10. See *CBC*, *supra* note 2.
11. See *R. v. Jobidon*, [1991] 2 S.C.R. 714; *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611; *R. v. MacGillivray*, [1995] 1 S.C.R. 890; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; and *R. v. Badger*, [1996] 1 S.C.R. 771.
12. See *M.(K.) v. M.(H.)*, *supra* note 4; and *Dickason*, *supra* note 4.
13. There are no examples.
14. There are no examples.
15. There are twelve examples, including *Heywood*, *supra* note 1; and *Dagenais*, *supra* note 1.
16. See *R. v. Evans*, [1993] 2 S.C.R. 629 [hereinafter *Evans*]; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359 [hereinafter *Cunningham*]; *Chan v. Canada (Minister of Employment & Immigration)*, [1995] 3 S.C.R. 593 [hereinafter *Chan*]; and *R. v. Osvath*, [1997] 1 S.C.R. 7 [hereinafter *Osvath*].
17. There are twelve examples, including *Heywood*, *supra* note 1; and *Dagenais*, *supra* note 1.
18. See *Evans*, *supra* note 16; *Cunningham*, *supra* note 16; *Chan*, *supra* note 16; and *Osvath*, *supra* note 16.