Open access • Journal Article • DOI:10.1080/09695950802439700

Judging gender: difference and dissent at the Supreme Court of Canada

Marie-Claire Belleau, Rebecca Johnson

Institutions: Laval University, University of Victoria

Published on: 10 Nov 2008 - International Journal of The Legal Profession (Routledge)

Topics: Dissent and Supreme court

International Journal of the Legal Profession

Judging gender: difference and dissent at the Supreme Court of Canada

MARIE-CLAIRE BELLEAU[*] & REBECCA JOHNSON[**]

ABSTRACT *Over 25 years ago, Justice Bertha Wilson asked "Will women judges really make a difference?" Taking up her question, we consider the place of difference in gender and judging. Our focus is on those 'differences of opinion' between judges that take the form of written and published judicial dissent. We present and interrogate recent statistics about practices of dissent on the Supreme Court of Canada in relation to gender. The statistics are provocative, but do not provide straightforward answers about gender and judging. They do, however, pose new questions, and suggest the importance of better theorizing and exploring the space of dissent.*

1. Introductory observations

In a controversial 1990 speech, Justice Bertha Wilson, the first woman judge of the Supreme Court of Canada, posed a question that has occupied many theorists of law: "Will women judges really make a difference?" (Wilson, 1990). With the benefit of 25 years with women judges on Canada's highest court, it is worth returning to Justice Wilson's question. But in asking about judges, gender and difference, we want to foreground a particular kind of difference often present for appellate judges: a 'difference of opinion'. All judges grapple constantly with the unavoidable tension at the heart of law—a tension between the demands of stability and responsive change (Fitzpatrick, 2001). But the grappling is intensified for appellate judges, who bring multiple skills and divergent life experiences to bear on a single case. Working as a group to do justice in ways that best resolve the tensions between the demands of universality and particularity, appellate judges can and do disagree about the shape of the world *as it exists*, and about the ways that the world *should* be legally ordered.

And in the resolution of these disagreements, judges sometimes find themselves in the space of dissent.

Here, we want to take up the link between gender difference, and those differ- ences of opinion between appellate judges that ultimately take the form of written and published dissenting judicial opinions. In what follows, we first make some pre- liminary remarks on the Supreme Court of Canada and its practices of judicial dissent (Part 2). We present some recent statistics about these practices of dissent on the Supreme Court of Canada in relation to gender (Part 3). We then interrogate these statistics, troubling their ability to provide straightforward answers about gender and judging. We end by asking questions about difference in identity and in dissent (Part 4).

[*] Faculty of Law, Université Laval, Canada.
[**] Faculty of Law, University of Victoria, Canada.

2. The Canadian Supreme Court and practices of judicial dissent

The Supreme Court of Canada is the country's court of final appeal in all areas of law (it is not a court of uniquely constitutional or federal jurisdiction). There are nine judges on the court, each of whom is appointed by the Prime Minister, and has life- time tenure. The Court has a large measure of control over its docket, generally grant- ing leave only to those appeals it deems to raise questions of national importance, on the average hearing about 80 cases per year. The judges sit in uneven numbered benches of nine, seven, or five judges. Unlike in France, where written opinions appear as if unanimous and anonymous, opinions of the Canadian Supreme Court are generally issued in the name of specific judicial authors. Like many Commonwealth countries, Canada has moved away from a history of *seriatim* judgements (where each judge is required to give his or her own written reasons) towards a model where individual judges sign on to opinions authored by other judges.

Each written opinion addresses two matters: result and reason. The first of these—*result*—is something that can generally be expressed in binary form. Someone wins, and someone loses. But it is not enough for a judge to pronounce the 'yes or no' of a result. The judge must also give *reasons*. The reasons tell us how the thinking process proceeded from the facts to the outcome, *why* certain outcomes are desirable, justifiable or inevitable. Reasons are "the primary mechanism by which judges account to the parties and to the public for the decisions they render" (*R v. Walker* [2008] para 19).

In situations where an appellate court produces a unanimous opinion, reason and result move together. That unanimous opinion may bear the authorial imprint of one of the judge's names, or it may be issued under the 'nom de plume' of 'The Court'. While the proportion shifts over time, it has been common for unanimity to be achieved in only 50% of the Supreme Court's judgements (McCormick, 2000). It is often the case that differences emerge between judges—differences that make unanimity impossible. In such situations, the case will result in the production of multiple texts: a majority opinion (a text supported by more than half the judges hearing the case), and one or more dissenting or concurring opinions.

A terminological note is in order here, as the identification of a text as dissenting or concurring depends on the distinction between result and reason. Where the minority judges disagree with the *result* reached by the majority, the opinion is a dissenting one. Where, however, the minority judges agree with the result but disagree with the majority *reasons*, the opinion is a concurring one. In English, the word 'concur' means 'to agree', but in law, the concurrence is a form of disagreement. This is perhaps more evident for francophone than anglophone readers, since in French, the terms dissent and concurrence are rendered as 'dissidences sur les résultats' and 'dissidences sur les motifs'. This linguistic marking better exposes the distinction between reason and result, and puts emphasis on the dissenting nature of both types of opinion. The central point for the empirically minded is that, for the purposes of statistical analysis, the concurrence can be problematic. It straddles categories: it can be counted with the majority on the 'result', but with the dissent on the 'reasoning' (Belleau *et al.*, 2008; McCormick, 2005–2006).

Dissenting and concurring opinions, like their majority counterparts, seek to persuade the readers to understand the world in a specific way. While a dissent is not, strictly speaking, 'the law', the fact that the substance of the dissenting opinion is produced by a *judge* is a matter of some significance. This makes a dissenting opinion significantly different from

other attempts to persuade or convince. A dissenter has the ability to force the majority to respond, to answer, to explain, to shift or to accommodate. The words of a dissenting opinion are a direct *challenge*, and the majority may feel required to enter into dialogue. And even where a majority does not respond directly, the very fact of the dissent often means that the majority reasons must be written differently than they would have been in its absence.

Certainly, some dissents have sufficient force to become part of the 'canon' of law (Primus, 1998; Krishnakumar, 2000). Some, with time, successfully bring about change in the law: courts may explicitly revisit particular problems, expressly over- turning the law, and adopt what had formerly been a dissenting view.[1] Other dissents have brought about change in a more direct fashion: those with legislative power may be persuaded to propose statutory changes in line with those suggested in a dissent.[2] As judicial texts, dissents are a form of dialogue with a number of legal and non-legal communities, and these forms of conversation can matter in important ways (Sheehy, 2004). United States constitutional law theorist Cass Sunstein (2003) has gone so far as to claim that "societies need dissent".

Of course, to say societies need dissent is not to say that dissent must take the form of written judicial opinions. Certainly, such an assertion would not have universal resonance, since the published dissenting judicial opinion is *not* a feature of all legal regimes (Mastor, 2005). Neither has it been an unchanging feature where it has operated. The forms and manners and magnitude of judicial dissent have varied across time and location, with judges feeling, at various historical junctures, more or less pressure to speak with a unified voice (Kolsky, 1995; Post, 2001). There is a rich debate about value (and risks) of judicial dissent, with some seeing it as assuring the integrity of the justice system, and others suggesting it undermines the legitimacy and authority of the Court (Belleau & Johnson, 2004). While there are persistent debates about how much is too much, dissent is accepted, by the legal and non-legal communities alike, as inherent in the Canadian judicial tradition. It is a practice in which all judges engage.

3. Gender and dissent on the Supreme Court of Canada

But of course, to say that 'all judges dissent' is to skate over variations in dissenting practice, and differences in the significance of particular dissenting opinions. Some judicial

---

[1] So, for example, the famous dissent in *Plessey v. Ferguson* [1896] 163 US 537, would move to the centre in *Brown v. Board of Education of Topeka* [1954] 347 US 483. Note that a dissent may be adopted expressly, or in a quiet fashion; for example, in the 1995 equality trilogy cases (*Egan v. Canada* [1995] 2 SCR 513; *Miron v. Trudel* [1995] 2 SCR 418, and *Thibaudeau v. Canada* [1995] 2 SCR 627). Justice L'Heureux-Dubé articulated a new approach to equality problems. At the time, the other judges on the court made no comment on her approach. That is, in the context of the judges mutually referring to each other's reasons in the trilogy of equality cases, for the purposes of expressing both agreement and disagreement, the other judges said *nothing* of the test being proposed by Justice L'Heureux-Dubé. They did not adopt her test, nor did they reject it. The silence was deafening. However, by the time *the Law v. Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 was decided in 1999, the test was incorporated by the unanimous court. Perhaps a strategy of silence may be deployed where an idea is sufficiently new that judges simply need time and space to think.

[2] In the Canadian context, for example, Parliament introduced a set of legal reforms dealing with the disclosure of sexual assault victims' private records. Legislators can make real that which is imagined in the space of dissent. See *R v. O'Connor* [1995] 4 SCR 411, and s. 276(3) of the *Canadian Criminal Code*.

reputations have been solidified through the power of canonical dissents, and some judges are even reputed to be dissenters. The two of us were formerly law clerks to Madame Justice Claire L'Heureux-Dubé, the second woman appointed to the Supreme Court, and indeed, its first Francophone woman. We were well aware that our own judge was frequently in dissent, and that she was popularly referred to as "The Great Dissenter". Our scholarly interest was piqued, however, by the observation of court-watching political scientists that it was not simply *our* judge: they observed that Justices Bertha Wilson and Beverley McLachlin also showed heightened propensities to dissent (Morton *et al.*, 1994; McCormick, 2000).

As part of a larger research project considering gender and dissent, we began collecting and compiling data on our Supreme Court Justices, and their individual patterns of decision-making. We wondered how, if at all, the gender of a judge might be visible in either 'voting' practices (how often the judge was with the majority on result or reasons) or practices of 'authorship' (how often the judge was the author of an opinion, majority or otherwise). As other scholars had indicated, with respect to the first three women on the Court, the pattern was quite striking.

Consider Table 1, in which Justice Wilson serves as the anchor point for some comparative data on gender and dissent. Listed are the 15 Supreme Court Justices (with dates of appointment) whose tenure intersected with that of Bertha Wilson. We thus include judges who were already on the Court when the first woman judge was appointed, as well as those who arrived after her, but before her retirement in 1990. This gives us a context for examining the first three 'trailblazer' women against the male judges with whom they sat.

For each of the 15 judges included in Table 1, we list first the total number of divided cases in which that judge participated during their tenure on the court.[3] The next three columns provide a proportionate breakdown of the 'voting' practices of that judge in those divided cases: how frequently did the judge join the majority, and how often was the judge with the concurrence (agreeing with result but differing with respect to the majority reasons), or with the dissent (disagreeing with the majority result). The final column provides an indicator of 'authorial labour' in the divided cases. That is, how often was the judge a named author of one of the opinions, whether majority, dissenting or concurring.

If we consider only these 15 judges and their participation in non-unanimous cases, we have judges, on the average, with the majority 56.6% of the time. We can see that judges expressed their disagreement through the form of a concurrence 25.7% of the time, and in the form of a dissent 15% of the time. Disagreement, that is, was nearly twice as likely to be expressed through concurrence as through dissent. We also see that, on the average, judges were producing a written opinion in just over a third of the divided cases they heard.

---

[3] Chief Justice McLachlin is the only one of the 15 who is still on the Court. For her, we have given the numbers up to 15 June 2007. There are of course some clear limits to the comparative work one can do with the data captured in Table 2. For one thing, the table does not reflect a stable time period. Though each of these judges served with Justice Wilson, they did not all sit together. Justice LeDain, for example, retired five years before Justice McLachlin was appointed. And (Chief) Justice McLachlin, unlike 14 of the judges on the chart, is still a sitting justice and still in the process of hearing new cases. Table 1 portrays the differences in the decision-making practices of multiple judges situated over overlapping yet different streams of time.

Table 1. *Divided judgements and 'the Wilson cohort'*

Justice (date of appointment)	Divided cases heard (nominal)	With majority (%)	With concurrence (%)	With dissent (%)	Took part in writing (%)
Average	**298**	**56.6**	**25.7**	**15**	**35.8**
L'Heureux-Dubé ♀ 15 April 1987	531	35.6	31.5	28.1	42.7
Wilson ♀ 4 March 1982	250	40.4	32.4	23.2	55.2
McLachlin ♀ 30 March 1989	555	53.1	23.6	19.6	43.8
Sopinka 24 May 1988	382	54.2	25.7	17.3	46.1
La Forest 16 January 1985	467	54.8	30.4	12	38.8
Lamer 28 March 1980	502	54.9	29.1	13.4	44.5
McIntyre 1 January 1979	183	55.8	23.5	16.4	37.2
Stevenson 17 September 1990	70	57.1	28.8	14.3	25.7
Beetz 1 January 1974	134	57.5	29.1	11.1	22.4
Dickson 26 March 1973	229	59.4	27.9	12.2	39.3
Estey 29 September 1977	107	61.7	17.8	17.8	42.1
Gonthier 1 February 1989	506	62.6	21.3	12.5	17.2
Chouinard 24 September 1979	86	65.1	20.9	12.8	16.3
Cory 1 February 1989	397	68	19.4	9.8	35.5
Le Dain 29 May 1984	70	68.8	24.3	5.7	30

A discussion of the numbers in Table 1 cannot help but begin with the observation that the first three women judges (who were at that time also the *only* women) top the list of judges 'most likely to disagree'. Their position at the top of the table makes it nearly impossible not to re-invoke the question posed in the title of Justice Wilson's controversial speech. One could be forgiven for ironically responding with the observation that, whether or not women judges will make a difference, it appears that they will certainly differ.

The chart affirms that the label "The Great Dissenter" was indeed an apt one for Claire L'Heureux-Dubé, who agreed with the majority opinion in only 35% of the 531 divided cases she heard (against an average of 56.6%). Justice L'Heureux-Dubé dissented in 28.1% of the cases she heard, which is nearly double the average rate of dissent. Bertha Wilson, on the court for fewer years, participated in 250 divided cases, voting with the majority 40.2% of the time. She was with the concurrence 32.1% of the time and with the dissent 22.5% of the time. The profile of 'disagreement' here is particularly interesting. Justice Wilson's disagreement was more likely to take the form of concern with majority 'reasons' than with majority 'results'. In fact, if one focuses only on the concurrences, it is

Justice Wilson who tops the chart, suggesting that the label “The Great Concurrer” might have been aptly applied to her. While the divergence from the majority is not as stark for Justice McLachlin as for the other two women judges, she nonetheless appears third on this table. But we see here that she, unlike Justice Wilson, concurred at a rate below the group average, and dissented at a rate above. Of the 555 divided cases heard by Justice McLachlin, on the other hand, disagreement was more likely to take the form of dissent than concurrence.

Looking at those judges whose tenure intersected with the initial arrival of a woman at the Supreme Court, we can see that the three first women judges have the highest levels of dissents. It is difficult to avoid the conclusion that gender is linked to certain differences in the process of decision-making. And yet, does such a conclusion risk suggesting a certain form of essentialism in relation to women and the act of judging (Harris, 1990)? Do these statistics show us that women judges have a shared perspective on the world, a perspective that would stem, by necessity, from their feminine essence? Can one conclude that women judges speak in a “different voice” (Gilligan, 1982; Belenky *et al.*, 1986)? Not necessarily.

Other studies of these first three women judges indicate that the phenomenon of gendered dissent does not operate in a ‘predictive’ sort of way. Though the first three women were each dissenting at rates higher than the average, McCormick (2000) also noted that they did not dissent as a unified block (McCormick, 2000). Morton et al. (1994), in their study of the first ten years of *Charter* jurisprudence, made a similar observation. The three women, they said, were as likely to disagree with their female as with their male colleagues. Indeed, each of the three women was located as the outlier in one of three different quadrants inside a matrix assessing support for/opposition to left/right policies on ‘criminal justice’ and ‘court party’ issues. The authors used the expression ‘court party’ to describe a specific set of organised societal interests, those which exhibit a preference for non-traditional modes of political action such as litigation. They used it to include feminism, Aboriginal claims, linguistic and other minorities, environmentalism, gay rights, peace and disarmament. Justice Bertha Wilson expressed strong support for both court party and criminal rights claims; Justice Claire L’Heureux-Dubé showed strong support for court party claims but equally strong opposition to criminal rights claims; and now Chief Justice Beverley McLachlin showed strong opposition to court party claims and moderate support for criminal rights claims. Certainly, the heightened rates of gendered dissent do not allow us to predict from the judge’s gender *how* the judge will vote.

But if there seems to have been no self-evident agreement between the first three women on the substantive content of particular issues, it is also interesting to refocus on what they *did* have in common: a higher than average number of occasions on which they seemed to either see something differently from the majority, or have a different explanation for why a given result should be reached. Further, it is not just that the first three women disagreed more often in terms of their ‘votes’. In Canada, the first three women did a lot of writing. Returning to Table 1, note that each of the first three women did a significant amount of authorial work in the context of the divided cases. The three women, along with Justices Sopinka and Lamer, fill out the top five places in that column. Justice Wilson is, however, far in front. She produced a written opinion in 55% of the divided cases she heard. While Justices McLachlin and L’Heureux-Dubé did not generate authored opinions at quite the same rate, given the number of cases they heard, they too generated a significant number of authored divergent opinions. Just as one measure of that magnitude, note that, between 1982 and 1999, the first three women judges (representing three of the

23 judges to have sat on the court during that period of time) produced 455 of the total 1,272 written dissenting/concurring opinions produced by the entire court during that period of time: 13% of the judges generated 35.8% of the dissenting texts. It appeared to be not simply that the women were more likely to disagree, but also that they were more likely to express their disagreement through written reasons.

How, then, can one understand this unusual portrait of dissent and gender in the trailblazer women? Is it the case that what these women judges had in common was a substance or an essence or a feminine nature, or rather that, as the first women in a new space, they were positioned distinctively in relation to the majority and to the discursive practices which formed the centre of judicial power? They seem to have had a greater propensity than average to perceive and, later, to understand differently from the majority what had been presented to the court. But again, these women did not always share the same perspective, but rather they shared a positioning that left them seeing something different, or having a different view about how a common result should be better understood.

4. Complicating the picture

Since 1999, there have been changes to the judicial roster. Both Bertha Wilson and Claire L'Heureux-Dubé have retired, and Beverley McLachlin is now the first female Chief Justice of the Supreme Court. Four additional women have been appointed: Louise Arbour in 1999 (she stepped down in 2004), Marie Deschamps in 2002, and both Rosalie Abella and Louise Charron in 2004. In January 2008, Justice McLachlin was thus the Chief Justice of a court on which four of the nine judges were women. What do more recent data suggest about this seeming relation- ship between gender and dissent? In Table 2, we offer a portrait of judicial dissent that incorporates the new appointees. Here, arranged from the least to the most dissenting, one can see the individual practices of disagreement for all 26 judges who sat on the court between 1982 and 15 June 2007.

The first observation is that, even with the new additions to the court, the first three women remain at the top of the chart. The next four, however, are distributed more broadly amongst their judicial peers. It is hard to draw conclusions at this relatively early stage for each of these judges, particularly Justices Abella and Charron. It may be that the lower rates of dissent are reflective of the ways those judges participate, but it is also the case that judges have shown shifts in their patterns of dissent over time. Some judges (like Justice Wilson) generated more dissent the longer they were on the Court while other judges (like Justice Sopinka) started as great dissenters, but produced increasingly less dissent the longer they were on the Court. Justice Louise Arbour remains at the lower end of dissent. However, she sat on the Court for only five years before stepping down to become the United Nations High Commissioner for Human Rights. Again, it is unclear that the relatively low rate of dissent would have persisted in the context of a longer judicial career.

Table 2. *Divided judgements: Judges of the Supreme Court, 1982–2007*

Justice	Divided cases heard (nominal)	With majority (%)	With concurrence (%)	With dissent (%)	Took part in writing (%)
Average	**243.8**	**60.6**	**19.6**	**16.8**	**34.0**
L'Heureux-Dubé ♀	531	35.6	31.5	28.1	42.7
Wilson ♀	250	40.4	32.4	23.2	55.2
McLachlin ♀	555	53.1	23.6	19.6	43.8
Sopinka	382	54.2	25.7	17.3	46.1
La Forest	467	54.8	30.4	12	38.8
Lamer	502	54.9	29.1	13.4	44.5
LeBel	166	55.4	15.1	24.7	39.8
McIntyre	183	55.8	23.5	16.4	37.2
Stevenson	70	57.1	28.8	14.3	25.7
Beetz	134	57.5	29.1	11.1	22.4
Bastarache	235	58.7	13.6	25.1	41.3
Dickson	229	59.4	27.9	12.2	39.3
Deschamps ♀	109	60.6	10.1	23.9	33
Estey	107	61.7	17.8	17.8	42.1
Fish	82	62.2	9.8	25.6	22
Gonthier	506	62.6	21.3	12.5	17.2
Major	384	64	14.3	19.5	24.7
Chouinard	86	65.1	20.9	12.8	16.3
Abella ♀	65	66	10.8	21.5	30.8
Arbour ♀	108	67.6	10.2	14.8	37
Cory	397	68	19.4	9.8	35.5
Le Dain	70	68.8	24.3	5.7	30
Binnie	221	72.4	7.2	16.3	28.5
Iacobucci	420	72.9	14.3	10.2	24.8
Charron ♀	63	73	7.9	14.3	28.6
Rothstein	19	73.7	10.5	15.8	36.8

A further complexity resides in the reality that dissent, like difference itself, is deeply relational (Minow, 1990). A dissent has meaning only in the context of the majority against which it stands in opposition. This poses a difficulty. Does a shift in a judge's pattern of dissent represent a shift in how that judge thinks, or, rather, a shift in how the majority decides? Does it represent an increasing willingness by the majority to be persuaded by the voice of a colleague once seen as a dissenter?

Or does it represent a shift in the dissenter (a movement by the dissenter towards the majority)?

For example, in the context of Canadian discourse about multiculturalism, Justice John Sopinka was considered the first ethnic appointment because of his Ukrainian background. The pattern of his dissent rates was similar to Chief Justice Laskin, who was the first Jewish appointee. That is, like Laskin, Sopinka showed a very high dissent rate for the first half of his time on the Bench, followed by a sharp decline in the second half (McCormick, 2000).[4] Overall, the average dissent rates of both Justices Sopinka and Laskin met that of the Court as a whole.

[4] See McCormick (2000), Table 7.1 at p. 113 and Table 8.1 at p. 133. Between 1963 and 1973, Bora Laskin's average rate of dissent was 69% compared to the Court's average of 34. 2%

One might wonder what trends pressed Laskin and Sopinka's dissent rates down. In the case of Justice Laskin, did his appointment as Chief Justice give him greater success in influencing the members of his court, change his point of view on law and the decision-making process, or lead him to see his role differently? In the case of Justice Sopinka, can the result be explained by the natural evolution in a judge coming to the bench from practice, slowly getting accustomed to the norms followed by judges rather than by advocates? In either event, it is also interesting to compare the trajectory of Justice Sopinka with that of Justice Beverley McLachlin. The two judges were appointed at around the same time, but Justice McLachlin showed an *increase* in dissent over that same period of time (up to 1999 and before she became Chief Justice). In this, her profile is akin to that of the other first two trailblazing women, who also showed an increasing trajectory of dissent over their careers. In the case of McLachlin, is it also noteworthy that, since becoming Chief Justice, her dissent rate has decreased, again, possibly due to a shifting interest in unanimity.

Gender does not seem to be operating as a random variable, but neither does it seem to be operating in a self-evident fashion. There are further questions that need asking. For instance, whether individual dissenters (male or female) are engaged in group or solo projects: Justice McLachlin, for instance, tended to dissent in conjunction with others judges, while L'Heureux-Dubé was very frequently a lone dissenter, sometimes managing to convince one other judge to join her (Joseph, 2006). Taking these statistics into account, can it be that Justice McLachlin succeeds more often than before to sway the votes of her colleagues thus reaching a majority? The statistics alone cannot fully capture the full dynamics operating in judicial decision-making. Dissent is something that necessarily emerges out of a context, and shifts in the context matter hugely.

In understanding gender and dissent, there is another point that is important to foreground. Rates of dissent differ across the male judges, with some, like Justice Iacobucci, showing up at the very lowest end, while others, like Justice LeBel, produce a significant proportion of dissenting judgements. While the statistics suggest that gender (as a marker of 'outsider status'?) is operating in some fashion worthy of further interrogation, they also remind us that the practice of dissent is not the exclusive providence of one gender, or of any judge. Dissent as a phenomenon certainly predates the arrival of women on the court; each generation of judges has had its (male) dissenters of renown.

In the Canadian context, Bora Laskin, Canada's first Jewish appointment to the Supreme Court, was also renowned as a great dissenter. But such an observation draws us back to another question: 'Why focus on gender'? The decision to focus on gender as the primary source of difference is certainly one worthy of scrutiny. One should notice, for example, that our seven women judges share not just gender, but also whiteness. There has not yet been a single First Nations judge, or judge of colour in the history of our Supreme Court, and thus whiteness is something shared both by the women, and by all our judges. Such an important commonality can be obscured by attention to gender difference. Critical race theorists and postcolonial feminist critics have long cautioned against an approach to gender that proceeds as if the perspective of white, Western

---

(McCormick, 2000, Table 5.1 at p. 65). He became Chief Justice of the Supreme Court of Canada in 1973. His dissent rates dropped to 54.1% (Court's average of 37.3%) between 1973 and 1978 (McCormick, 2000, Table 6.1A at p. 90) and to 24.3% (a rate lower than the Court's average of 34.2%) (McCormick, 2000, Table 6.1B at p. 91).

middle-class heterosexual women were the viewpoint of all women (Spelman, 1988 ; Rajan & Park, 2000).

In making visible labels of identity, we seek to remain conscious of the risk of misapprehending as 'gendered' differences that which may find root in other sources. For marking out identity through labels does send one right to the centre of highly political debates: what identities do we privilege, what is the deemed content of those identities, and how do we know we have correctly determined which identities get attached to which bodies? In Canada, for example, debates about identity and judgement have been fierce not only around 'gender', but also around language (French/English) and culture—nationalism/cultural difference, sometimes articulated as 'the Quebec question' (Belleau, 1999). What becomes visible if we problematise the singular focus on gender, and ask also about how the judges can be identified on these two additional dimensions? Such questions force an additional level of nuance and difficulty into debates about identity and difference.

An account of judicial difference requires similar nuance, because judicial opinions matter not only for their results, but also for their reasons. The statistics, while making visible some of the variations in patterns of voting and writing, tell us very little about the substance of the disagreements, the shape of the written reasons, or the context in which the conflicts emerged. To further flesh out our snap- shot of gendered judicial judgement, we would need to know more about each of these additional dimensions of dissent. Where dissent is theorised as a space of difference, there are additional questions that arise. How do judges work in the space of dissent? How do they articulate an alternative vision of 'the real', re-describe the facts, re-draw the boundary between the legal and the social, and challenge how we think about law itself? What does the dissenting judicial text seem to require/desire of us as readers? What questions do they ask us? In what directions do they point? What courses of action do they suggest? How do they focus our attention in some places and not in others? How do they articulate and disarticulate 'reality', rendering visible the voices and values which are muted or absent in the opposing reasons? Do judges do all this differently when writing in dissent, or in majority?

Posing such questions makes visible another important dimension of the relational nature of dissent: dissent, in and of itself, it is not necessarily 'progressive' or 'reactionary'. That is, dissents can lean in the direction of change, as well as pull towards a status quo. Dissents are written in relation to majority opinions, whatever their political leaning. Thus, it is unsurprising that dissent itself can seem more or less risky given both institutional factors internal to the Court, and socio-political complexity external to the Court (Smyth, 2004). In the face of large scale social unrest, judges may feel more strongly the need to speak with a more unified voice than they might feel in periods of relative calm. Similarly, there are issues and moments in which Courts will conclude that a unanimous front (and indeed, the authorial label of 'The Court' rather than any of its single judges) is demanded by the interests of justice and politics (Belleau et al., 2008).[5]

[5] Note that this was done, for example, with the Daigle case (*Tremblay v. Daigle* [1989] 2 SCR 530, an important case from the province of Québec concerning an injunction obtained by a father to prevent the mother from having an abortion) and with the *Quebec Secession Reference (Reference re Secession of Quebec* [1998] 2 SCR 217, a case asking questions to the Supreme Court of Canada about the possi- bility of the unilateral secession of the province of Que´bec from Canada). Here, arguably, having the judgement authored by a man or woman (or a Que´bec or non-Que´bec judge) would itself have carried additional political questions into the text.

Here, we find it interesting to note that, at the current political juncture, we see evidence of both the Canadian and United States Supreme Courts moving away from patterns of the past 20 years towards an increased incidence of unanimity. Chief Justice McLachlin, while affirming the right to dissent, explained that she and her colleagues are attempting to "reduce the unnecessary differences" (Guly, 2006, p. 22). Chief Justice John Roberts of the Supreme Court of the United States was reported to say that he "wants the Justices to speak with one voice as much as possible, to decide cases 9 to 0, with no pesky dissents or concurrences" (Holding, 2007, p. 34). McCormick's work (2000) shows that historically, since 1982, the Supreme Court achieved unanimity in between 40% and 50% of its case load. In 2006, under Chief Justice McLachlin (whose dissent rate was number three of the most frequent dissenters since 1982), the Court produced 70% unanimous judgements (Gully, 2006). Again, there is a puzzle here: one of the top dissenters on the Court until the late 1990s, Justice McLachlin is now the Chief of a Court which is producing higher rates of unanimous judgement, a court in which rates of dissent and concurrence seem to be dropping. In the light of this specific historical juncture, the practices of dissent for the most recent appointees would have to be explored against the context of the particular year. For example, given the proportion of dissent in that year, are the judges at the low or high end of dissent? Certainly, the fact that dissent has sometimes had a gendered face suggests that there are reasons to think seriously about the current reduction in dissenting judgements (and particularly in concurrences).

5. Conclusion

Professor Peter McCormick, observing the high level of gendered dissent on the Canadian Supreme Court, suggested that women judges occupied the periphery, and that they passively assisted law's development and application. They were not, he suggested, taking an active part in the determination of the law: "The women members of the Supreme Court are not being absorbed—but the price they are paying for this is that they are being left outside the dominant decision-making coalitions" (McCormick, 2000, p. 138). Professor McCormick captures a common preoccupation with majority decision-making, a preoccupation we have sometimes shared, but one which often places women judges on the sidelines.

We argue that it is important to resist the tendency to think of dissent as a space of failed possibilities, as evidence of marginal status either of the dissenting judges or of the different point of view that they attempt to raise. With Professor Diana Majury, we are of the opinion that concurrences and dissents must be the objects of a more positive theorisation (Majury, 2000, paras 28–31). Dissents make manifest the struggles about difficult concepts and hard negotiations regarding how we live in the world.
Even if dissents do not constitute 'the law', they provide an authorised judicial space for the articulation and exploration of angles of visions whose public expressions are sometimes denied, concealed or silenced. Indeed, in certain contexts, it may be useful and even fundamental that courts do not deliver unanimously 'the good and clear answer'. Indeed, there are contexts when the best guarantee for justice rests in the articulation of arguments in conflict and not on a specific result. In cases where dissent allows the explanation of arguments, it is fundamental to the legitimacy of the judicial project and, consequently, to justice itself. Dissent then supersedes greatly the failure of possibilities.

The heightened proportion of times that women judges find themselves in dissent should be understood not predictively, and not as a conclusion about who or what women 'are'.

It should, however, serve as a disruption to our traditional ways of theorising judicial judgement. It should encourage us to ask more about the space of dissent. Gilles Deleuze affirms that the thinking process "is the invention of new concepts and possibilities out of the experience of friction", the friction between what we think that we know and the unpredictable events that disturb these knowledges (Connolly, 2002, p. 94). The unpredictable event, the "strange encounter", creates the moment of friction which opens the space for translation and changes of thought. Dissent often functions exactly in this manner—as a friction—a "strange encounter" which opens the space for novel ways of conceptualising or advancing on the path towards justice.

Justice Wilson asked if women judges would really make a difference. We believe that the answer is an unequivocal 'Yes'. For us, the experience of friction is in the recognition that a considerable part of difference is located in an impressive production of dissenting opinions. For decades, authors have been asserting that "the role of the judge must be re-imagined as one in which women and members of other currently underrepresented groups can comfortably and constructively occupy" (Rackley, 2002, p. 624). We suggest that it is worth thinking about the ways women and other members of under-represented groups within the judicial body already occupy their role as judges in a constructive way, both as majority decision-makers and when speak- ing from the space of dissent. Those of us who observe courts of justice must study what these judges do and say in this space of dissent. Heightened rates of dissent should lead us not to consternation but to exploration.

In response to the question originally asked by Justice Wilson, we would add two variations on a theme: "What difference does gender make?" or, again, "What difference does difference make?" We know that the places where women judges differ are not always around women. Judges' differences of opinion do not always concern issues that are self-evidently about gender. Men and women judges both dissent. The higher production level of dissent expressed by at least the first three women judges tell us perhaps more about difference itself than about the 'identity' of those particular judges. We can't say gender does not matter because in dissent we can see that women do occupy the space of difference. Gender, like dissent, matters. Currently, dissent does point us in the direction of identity. However, identity does not predict dissent and dissent does not predict identity. Indeed, dissent and identity both exceed their own predictive value.

Dissenting opinions open the space to imagine and construct a more complete vision of law, and also of humanity. The friction caused by the statistics concerning the first women judges and their levels of dissent allows us to imagine the role of judges in a way that affirms the importance of the space of dissent, the necessity of conceiving the expression of dissent as a masterpiece of the adjudication process in the context where multiple points of view must be articulated, recognised and considered seriously. The 'different point of view' opens the space in the decisional process producing sometimes a particular result by influencing the law with a unanimous or majority opinion issued from this alternative perspective. Clearly, the simple articulation of a novel perspective does not always lead to a specific result. However, the expression of difference is important for many reasons. It reveals and recalls the importance of multiple perspectives in the adjudication process. It does not presuppose that a privileged voice exists to render judgement. The presence of multiple voices opens the space to the other judges so that they consider the structure or the specificity of their own decisional process. The expression of difference is significant in the process that leads to judgement. Consequently, the judicial bench must be composed of members with varied experiences from which judges can be inspired. These

judges—women judges, visible minority judges, judges from a variety of social classes, judges with physical disabilities—will not share 'essential' perspectives but they bring an important diversity of approaches to the decisional process. It is thus possible to anticipate that one of the impacts of diversity on the bench will lead to a corresponding increase in the numbers of experiences and perspectives added to the decisional process. The space of judicial dissent is one worthy of closer examination.

Acknowledgements

The authors wish to thank the Social Sciences and Humanities Research Council of Canada for funding their research on dissenting opinions at the Supreme Court of Canada. They are also grateful for the research assistance of Julie Banville, Christine Joseph, Anik Lamontagne, Sara-Dawn Schenk, Andrew Tomilson and Christina Vinters.

References

Belenky, M.F., Clinchy, B.M., Goldberger, N.R. & Tarule, J.M. (1986) *Women's Ways of Knowing: The Development of Self, Voice, and Mind* (New York, Basic Books, Inc).

Belleau, M.-C. (1999) L'intersectionalité: feminisms in a divided world (Quebec-Canada), in: D. Lacombe & D. Chunn (Eds) *Law as a Gendering Practice* (London, Oxford University Press).

Belleau, M.-C. & Johnson, R. (2004) La dissidence judiciaire: réflexions préliminaires sur les émotions, la raison et les passions du droit/Judicial dissent: early reflections on emotion, reason and passion in law, in: M.-C. Belleau & F. Lacasse (Eds) *Claire L'Heureux-Dubé à la Cour suprême du Canada, 1987–2002* (Québec, Wilson & Lafleur).

Belleau, M.-C., Johnson, R. & Vinters, C. (2008) Voicing an opinion: authorship, collaboration and the judgments of Justice Bertha Wilson, *Supreme Court Law Review*, p. 20.

Connolly, W.E. (2002) *Neuropolitics: Thinking, Culture, Speed* (Minneapolis, University of Minnesota Press).

Fitzpatrick, P. (2001) *Modernism and the Grounds of Law* (Cambridge, Cambridge University Press). Gilligan, C. (1982) In a Different Voice: Psychological Theory and Women's Development (Cambridge, MA, Harvard University Press).

Guly, C. (2006) Beverley McLachlin: 'A model judge', *Canadian Lawyer*.

Harris, A.P. (1990) Race and essentialism in feminist legal theory, *Stanford Law Review*, 42, pp. 581–616.

Holding, R. (2007) In defence of dissent, *Time Magazine*, p. 34.

Joseph, C. (2006) All but one: solo dissents on the Supreme Court of Canada, *Osgoode Hall Law Journal*, 44, pp. 501–25.

Kolsky, M. (1995) Justice William Johnson and the history of the Supreme Court dissent, *Georgetown Law Journal*, 83, pp. 2069–98.

Krishnakumar, A.S. (2000) On the evolution of the canonical dissent, *Rutgers Law Review*, 52, pp. 781–817.

Majury, D. (2000) The charter, equality rights, and women: equivocation and celebration, *Osgoode Hall Law Journal*, 40, pp. 297–336.

Mastor, W. (2005) *Les opinions sépar.es des juges constitutionnels* (Aix-en-Provence, Presses universitaires d'Aix-Marseille).

McCormick, P. (2000) *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto, James Lorimer & Company Ltd).

McCormick, P. (2005 – 2006) The Choral Court: separate concurrence and the McLachlin Court, 2000 – 2004, *Ottawa Law Review*, 37, pp. 1–33.

Minow, M. (1990) *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca, Cornell University Press).

Morton, F.L., Russell, P.H. & Riddell, T. (1994) The Canadian Charter of Rights and Freedoms: a descriptive analysis of the first decade, 1982–1992, *National Journal of Constitutional Law*, 5, pp. 1–60. Post, R. (2001) The Supreme Court opinion as institutional practice: dissent, legal scholarship, and decisionmaking in the Taft Court, Minnesota Law Review, 85, pp. 1267–384.

Primus, R.A. (1998) Canon, anti-canon, and judicial dissent, *Duke Law Journal*, 48, pp. 243–303.

Rackley, E. (2002) Representations of the (woman) judge: Hercules, the little mermaid, and the vain and naked Emperor, *Legal Studies*, pp. 602–24.

Rajan, R.S. & Park, Y.-M. (2000) Postcolonial feminism/postcolonialism and feminism, in: H. Schwarz & S. Ray (Eds) *A Companion to Postcolonial Studies* (Oxford, Blackwell Publishing).

Sheehy, E. (Ed.) (2004) *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto, Irwin Law Inc).

Smyth, R. (2004) What explains variations in dissent rates? Time series evidence from High Court. (Australia), *Sydney Law Review*, 26, pp. 221–40.

Spelman, E.V. (1988) *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston, Beacon Press).

Sunstein, C.R. (2003*) Why Societies Need Dissent* (Cambridge, MA, Harvard University Press).

Wilson, B. (1990) Will women judges really make a difference?, *Osgoode Hall Law Journal*, 28, pp. 507–22.

Cases

Brown v. Board of Education of Topeka [1954] 347 US 483.

Egan v. Canada [1995] 2 SCR 513.

Law v. Canada (Minister of Employment and Immigration) [1999] 1 SCR 497.

Miron v. Trudel [1995] 2 SCR 418.

Plessey v. Ferguson [1896] 163 US 537.

Quebec Secession Reference (Reference re Secession of Quebec) [1998] 2 SCR 217.

R v. O'Connor [1995] 4 SCR 411.

R v. Walker [2008] SCC 34.

Thibaudeau v. Canada [1995] 2 SCR 627.

Tremblay v. Daigle [1989] 2 SCR 530.