

7-1-1995

## The Supreme Court Cites the Supreme Court: Follow-Up Citation on the Supreme Court of Canada, 1989-1993

Peter McCormick

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### Citation Information

McCormick, Peter. "The Supreme Court Cites the Supreme Court: Follow-Up Citation on the Supreme Court of Canada, 1989-1993." *Osgoode Hall Law Journal* 33.3 (1995) : 453-486.  
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## The Supreme Court Cites the Supreme Court: Follow-Up Citation on the Supreme Court of Canada, 1989-1993

### Abstract

Judges do not simply declare outcomes but also give reasons; in Canada, these reasons are typically organized around citations of judicial authority. Each citation acknowledges a contribution to the immediate decision; therefore, a statistical analysis of citation patterns is also a measure of judicial influence. This study considers follow-up citations of the Supreme Court of Canada over a five-year period to assess the influence of past and current members of the Court, developing appropriate discounts for the recency of the citation and for its nature and extent. The sui generis impact of the Charter suggests that these inferences cannot be generalized.

### Keywords

Canada. Supreme Court; Judgments

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# THE SUPREME COURT CITES THE SUPREME COURT: FOLLOW-UP CITATION ON THE SUPREME COURT OF CANADA, 1989-1993<sup>©</sup>

BY PETER MCCORMICK\*

Judges do not simply declare outcomes but also give reasons; in Canada, these reasons are typically organized around citations of judicial authority. Each citation acknowledges a contribution to the immediate decision; therefore, a statistical analysis of citation patterns is also a measure of judicial influence. This study considers follow-up citations of the Supreme Court of Canada over a five-year period to assess the influence of past and current members of the Court, developing appropriate discounts for the recency of the citation and for its nature and extent. The *sui generis* impact of the *Charter* suggests that these inferences cannot be generalized.

Les juges ne se limitent pas à annoncer des résultats mais donnent aussi les motifs pour leurs décisions; au Canada, ces motifs se basent typiquement sur des citations d'autorité judiciaire. Chaque citation sent comme contributeur à la décision en l'espèce; par conséquent, l'analyse statistique des citations est une façon de mesurer l'influence judiciaire. Cet étude examine les citations de la Cour suprême du Canada au cours d'une période de cinq ans, pour évaluer l'influence des membres de la Cour actuels aussi que les anciens membres. De plus, la nature et la portée de la décision aussi que l'année dans laquelle la décision a été rendue sont des facteurs considérés. L'impact *sui generis* de la *Chartre* suggère que il n'est pas possible de généraliser ces influences.

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## I. INTRODUCTION

One of the distinctive features of judicial decision making is that judicial decisions are typically accompanied by written reasons. A judicial decision is not simply an outcome, but rather an outcome accompanied by reasons—that is, it is a discursive explanation intended to persuade the relevant audience that the outcome is justified, and this is done by describing the path of legal logic to which the outcome is the appropriate terminus. For everyone except the immediate parties (and sometimes even for them) the outcome matters less than the reasons, which constitute both a signal to other similarly-situated actors and a resource which such actors can use for their own purposes. Canadian usage, which identifies “reasons for judgment,” is in this regard more explicitly and accurately self-descriptive than American usage, which identifies majority and minority “opinions.”

From a functional point of view, the giving of reasons limits the discretion (the “power”) of the judge in two different and important ways: first, because one cannot give decisions for which one cannot find and document the necessary and appropriate reasons, the “giving reasons requirement” is a protection against arbitrary decision making;<sup>1</sup> and second, the reasons for a specific outcome constitute something of a redeemable pledge to similarly-situated litigants in the future. As Schauer suggests, the argument from precedent is forward looking as well as backward looking, because “[t]oday is not only yesterday’s tomorrow; it is also tomorrow’s yesterday.”<sup>2</sup> Indeed, this shadow on the future that is cast by the immediate decision provides one of the reasons

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<sup>1</sup> See, for example, M. Shapiro, “The Giving Reasons Requirement” (1992) U. Chi. Legal F. 179.

<sup>2</sup> F. Schauer, “Precedent” (1987) 39 Stan. L. Rev. 571 at 573.

why, even on a unanimous panel court, it can sometimes make a considerable difference which specific judge delivers the reasons for judgment.

As Britain's distinguished jurist Lord Denning has stated, the giving of reasons is "the whole difference between a judicial decision and an arbitrary one."<sup>3</sup> This difference, in turn, explains why the American constitutional tradition regards the courts as the "least dangerous branch" of government: "[j]udges, generally speaking, have derivative, rather than primary, authority. Even though they have great power, they are *not* supposed to act free and unfettered. ... rather, [they are] bound by 'the law.'"<sup>4</sup> The need to work within the framework of authoritative citations limits the discretion of judges, and an examination of the citations that judges acknowledge as setting those limits indicates where judges find their cues and what values they seek to promote. "Citation patterns ... reflect conceptions of role. ... These patterns may be clues, too, to the role of courts in society."<sup>5</sup> It is important to remember, however, that the reasons for judgment constitute a reasoned argument by the judge as to why the indicated outcome is the most appropriate; they do not in any sense recapitulate the internal mental processes that the judge may have gone through to reach the outcome in his or her own mind. For this reason, "influence" is not the most apt word for the phenomenon I am describing, and I will be using it throughout this paper in a somewhat extended sense.

In the Anglo-American judicial tradition, however, the favoured weapon in the explanatory arsenal of judges is a reference to the decisions (that is, to the logical arguments that have been given as reasons to explain the outcome) of other judges in previously decided cases in their own and other courts. This means that the citation patterns of individual judges and, therefore, of the courts that are the collegial aggregate of those judges are an important statement of judicial influence, all the more valuable for the fact that judges have explicitly acknowledged that influence as part of the rational process that explains and justifies their actions to their fellow professionals. The preference for judicial citations in the explanatory process itself distinguishes Anglo-American judges from their continental European counterparts, who are more likely to build their own reasons for outcomes around

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<sup>3</sup> Lord A. Denning, *Freedom Under the Law* (London: Stevens, 1949).

<sup>4</sup> L.M. Friedman *et al.*, "State Supreme Courts: A Century of Style and Citation" (1981) 33 *Stan. L. Rev.* 773 at 793 [emphasis in original].

<sup>5</sup> *Ibid.* at 794.

academic textbooks.<sup>6</sup> The extent to which these citations do or do not cluster around particular courts presents further information about the sources from which particular judges and benches draw their doctrinal cues. The prominence or invisibility of current and past members of a particular court within the lists of preferred citations is a statement about immediate and enduring influence within that court.

It is this third factor that will be addressed in this article, which looks at the citation practices of the Supreme Court of Canada by focusing on its references to its own earlier decisions—these are, to use Johnson's term, "follow-up citations."<sup>7</sup> Such an analysis will reveal something about the influence patterns within the Court, and about the durability of that influence over time.

## II. THE THEORY

To begin with the obvious: "[p]resumably a citation means something to the person citing, and presumably he anticipates that it will have some meaning to a reader."<sup>8</sup> That is, judges may use a specific citation for a variety of reasons: because of the congruency of factual situations or legal contexts; because of the rigour of the doctrinal analysis or the succinctness of its conclusions; because of the status of a specific judge or a specific court; and, in general terms, because of the extent to which it will persuade the relevant audience (which is not just the immediate parties) of the appropriateness of the outcome. When interviewed about the process, judges tend to play down the degree of discretion and of individualized choice involved, saying that they cite only what they need to cite. This is especially true of judges who have taken the judgment-writing courses which stress brevity and succinctness. However, even on this description, it remains important and useful to identify the cases to which judicial practice concedes such need. Indeed, the more sparing the use of citations, the more important each individual citation and the greater the intellectual and doctrinal significance it concedes.

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<sup>6</sup> See, for example, M.R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986); and J.L. Goutal, "Characteristics of Judicial Style in France, Britain and the U.S." (1976) 24 *Am. J. Comp. Law* 43. For a similar point in a more explicitly Canadian context, see C. L'Heureux-Dubé J., "By Reason of Authority or by Authority of Reason" (1993) 27 *U.B.C. L. Rev.* 1.

<sup>7</sup> C.A. Johnson, "Follow-Up Citations in the U.S. Supreme Court" (1986) 39 *W. Pol. Q.* 538.

<sup>8</sup> J.H. Merryman, "The Authority of Authority: What the California Supreme Court Cited in 1950" (1954) 6 *Stan. L. Rev.* 612.

Judges often suggest that there is little choice involved in choosing citations—that they cite only what they need to cite, and they cite it because they need to. Such self-deprecation cannot be taken at face value, at least not for all cases and least of all for the important cases that make law. Kerans J. refers to this as the “flat rock theory” of precedent: reading cases is like turning over rocks, and if you just turn over enough rocks you will eventually find the exact piece of law you need.<sup>9</sup> But this denies the creativity whereby a judge persuasively weaves together strands of precedent to shape a just outcome for the particular case that will also serve as a guide to future cases, a process which partakes as much of art as it does of science. Even when they agree on the outcome, no two judges will fashion exactly the same logical argument to explain it; this is why it often makes a considerable difference which judge on the majority delivers the decision, and why judges who agree on the outcome sometimes find it necessary to muddy the waters with the complication of a separate concurring judgment.

With some very important qualifications, which will be expanded upon later, judges use judicial authorities in very much the same way that an academic uses footnotes: to draw the attention of the reader to a broader background against which to locate the immediate arguments, to identify specific passages in other such works for expansion or containment or criticism, to buttress statements that may seem dubious or challengeable by linking them to more respected sources, to acknowledge contributions and innovations and clarifications, to weave together insights and ideas from a variety of sources, and so on. Just as a bibliography reveals an author’s methodology, assumptions, and background, so judges reveal something significant about themselves in the selections they make from the enormous repertoire of precedents theoretically available within the common law tradition.

Indeed, in academic circles great importance is attached to citations. Voluminous indices of who is cited by whom and where and how often are regularly published;<sup>10</sup> in some disciplines, journals are ranked for prestige in terms of how often their articles are cited in their own and other journals.<sup>11</sup> The logic is transparent: articles that are

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<sup>9</sup> Justice R.P. Kerans, “Standards of Review” (Paper presented at the Canadian Appellate Court Seminar, April 1993) [unpublished].

<sup>10</sup> See, for example, the *Social Science Citation Index* (Philadelphia: Institute for Scientific Info., 1995).

<sup>11</sup> See, for example, P. Norris & I. Crewe, “The Reputation of Political Science Journals: Pluralist and Consensus Views” (1993) 41 *Pol. Stud.* 5; J.P. Lester, “Evaluating the Evaluators: Accrediting Knowledge and the Ranking of Political Science Journals” (1990) 23 *PS: Political*

frequently cited, that have some measurable impact on other work in the field, and that constitute a landmark around which other writers navigate are more meritorious than those to which no researcher ever finds need to refer. Similarly, it seems reasonable to suggest that frequently cited cases are in some objective sense more important, and that frequently cited judges are in some sense more significant, than those whose work, however careful and rigorous, has minimal impact beyond the immediate case and outcome.

There is a double limitation in the information that can be derived from the study of citations, judicial or academic. The first is that it can only measure acknowledged influence; if I choose not to mention a source from which I have drawn an idea, for example, because of forgetfulness, outright plagiarism, or a fear that my colleagues will so disdain the source as to cast doubt upon my work as well, then it will not appear in my bibliography. The second limitation is that the message drawn from an acknowledged influence may or may not coincide with the message that authority meant to convey, or the one that others typically draw from it (whether it is because of my penetrating analysis, honest error, or for other reasons from which I would derive less credit). Nonetheless, it remains true and important that specific sources are identified, that specific ideas are attributed to them, and that an explanation is built around these acknowledged contributions.

It is also true that the correlation of citation frequency with merit works better for academic citations than it does for judicial citations. The notion of an excellent and ground-breaking academic article that no other academic ever finds it necessary to refer to is almost an oxymoron, a contradiction in terms. However, it is much easier to understand why an excellent judicial decision would almost never be cited: no judge would find it necessary to cite the Supreme Court's leading case in, for example, standards of appellate review<sup>12</sup> unless the question of standards of review provides an axis around which a specific appeal is being organized. To make the similar point at a higher level of generality, private law cases are increasingly unlikely to be cited as the Supreme Court caseload becomes predominantly focused on public and criminal law. Somewhat more abstractly, Landes and Posner suggest the notion of a "superprecedent": "a precedent that is so effective in defining the requirements of the law that it prevents legal disputes from arising in the first place or, if they do arise, induces them to be settled

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Science & Politics 445; and J.A. Christenson & L. Sigelman, "Accrediting Knowledge: Journal Stature and Citation Impact in Social Science" (1985) 66 Soc. Sci. Q. 964.

<sup>12</sup> See *Lensen v. Lensen*, [1987] 2 S.C.R. 672 [hereinafter *Lensen*].



without litigation.”<sup>13</sup> In other words, there are, at least theoretically, some cases whose importance is so great that they are never cited. Although merit is undoubtedly an important component of the judicial significance reflected in citation practices, this article will begin by speaking only of the broader concept, and only later will it make even a preliminary attempt to penetrate this influence in order to isolate merit.

There are two specific features of judicial citation that cannot be attributed to the more generic practice of citation. The first is the fact that judicial decisions can be appealed to a higher court—a trial court to an appeal court, an appeal court to the Supreme Court, and, before 1949, the Supreme Court to the Privy Council—and this, presumably, creates an important and pragmatically grounded hierarchy of citability, to which the status rankings of the various journals are not even an imperfect approximation. The second feature is the fact that *stare decisis* is a stronger doctrine with sharper teeth than any academic practice of recognizing intellectual sources; there is no academic equivalent to the notion of “binding precedent.” To some extent, weaker perhaps in recent years but nonetheless important, the existence of a prior decision by a court of relevant jurisdiction is in itself a reason for following the precedent, completely apart from the persuasive train of logic that it contains. In Schauer’s words, “[t]he bare skeleton of an appeal to precedent is easily stated: The previous treatment of occurrence X in manner Y constitutes, *solely because of its historical pedigree*, a reason for treating X in manner Y if and when X again occurs.”<sup>14</sup> This, along with collegial courtesy, may explain why so few judicial citations<sup>15</sup> are critical or negative; the same is patently untrue of academic citations. However, neither consideration significantly undermines this enquiry. Because this analysis focuses on a single court making reference to its own past decisions, the question of a hierarchy of citability does not come into play; and because we are (so to speak) counting footprints rather than trying to indicate how deeply they are sunk into the ground, the question of whether and how much judicial citations differ from academic ones, of when a precedent is binding as opposed to merely persuasive, is not really triggered either.

One possible objection—that judges simply cite the cases that have been argued to them by counsel, and that citation frequencies

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<sup>13</sup> W.M. Landes & R.A. Posner, “Legal Precedent: A Theoretical and Empirical Analysis” (1976) 9 J. L. & Econ. 249 at 256.

<sup>14</sup> Schauer, *supra* note 2 at 571 [emphasis in original].

<sup>15</sup> Twenty-nine cases out of 4,642, or 0.6 per cent.

therefore say more about the lawyers that appear before the Supreme Court than about the judges themselves—should not be given undue weight. A recent American study<sup>16</sup> found that less than half of the legal authorities cited in a sample of United States appeal decisions were taken from the arguments of counsel, accounting for only one-sixth of all citations by counsel; and that in over one-fifth of the cases none of the authorities emphasized in the judgment were from the arguments of counsel. Canadian practices are not necessarily parallel; however, interviews with appeal court judges in Canada similarly suggest that they are quite prepared to cite cases not submitted to them by counsel and often do so, although when such a citation is a pivotal element of the outcome they normally allow counsel the chance to address it through written submissions.<sup>17</sup>

The point that remains is the logical one: in explaining a particular line of argument or justifying a conclusion, a judge can draw upon a variety of sources (although sometimes the choice may be rather narrow, and on occasion it may vanish altogether if there is a recent, and clear, unanimous Supreme Court decision that is directly to the point). It follows that the choice of specific citations says something both about the judge who chose the citation and the judge who delivered the original decision itself.

The study of citation patterns presupposes that such patterns are meaningful, that for all their inscrutability to the outsider citations are used in standardized ways which convey meaning to an identifiable judicial and legal community, and that the choice of what citation to use in what place and in what way is often, and to some significant extent, the product of discretion rather than unambiguously and uniquely determined by the context. This simply accepts and builds upon the common observation that it is easier to arrive at an understanding of what the outcome should be than it is to reach the best explanation of why this is so; studying the use of citations takes the judges at their word as they supply reasoned explanations built around the legal resources they share with their professional colleagues, wrapping even judicial innovation in precedential continuity. The validity of the inquiry is reinforced by the phenomenon that Lawlor has referred to as “personal

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<sup>16</sup> T.B. Marvell, *Appellate Courts and Lawyers: Information Gathering in the Adversary System* (Westport, Conn.: Greenwood, 1978) at 29.

<sup>17</sup> These comments are based on research in progress; for an analysis of an early stage of this project, see P. McCormick & I. Greene, *Judges and Judging: Inside the Canadian Judicial System* (Toronto: James Lorimer, 1990).

stare decisis"<sup>18</sup>—the extent to which the judicial profession values consistency and clarity of judgment, with the result that each judge tries to show the logical link between the immediate decision and his or her past decisions.

### III. THE DATA

The data on which this analysis is based are drawn from the reported decisions of the Supreme Court of Canada over a five-year period. Specifically, information was gathered on the judicial citations given by the court in every case reported in the *Supreme Court Reports* for the years 1989 through 1993 inclusive;<sup>19</sup> citations within dissents and separate concurrences are also included. This period includes the first three-and-one-half years of the current Chief Justiceship of Lamer, as well as the last eighteen months of Dickson's Chief Justiceship, but the material will nonetheless be treated as a single block of data; there will be no attempt to compare or contrast the two Chief Justiceships. It should be stressed that the data includes *all* reported cases, not a random sample, and that since 1970 virtually every decision of the Court is reported. The patterns that emerge from this analysis can, therefore, be taken with some confidence as fairly reflecting the overall performance of the Court over a reasonable span of time.

Over the period indicated, there were 631 reported decisions of the Court, and they included 4,848 references to the prior decisions of the Supreme Court, an average of seven or eight such citations per decision.<sup>20</sup> Not every decision included follow-up citations,<sup>21</sup> but the large majority did, and many included a dozen or more.

Not all citations are of a kind, and it is a drawback of a statistical approach such as this one that it tends to treat them as if they were. Most obviously, there is a difference between citing a case in order to embrace or expand upon the doctrinal ideas it contains and citing a case in order to reject it. The latter is illustrated by the classic phrase favoured by the Supreme Court: "this is no longer good law." In

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<sup>18</sup> R.C. Lawlor, "Personal Stare Decisis" (1968) 41 S. Cal. L. Rev. 73.

<sup>19</sup> It is a characteristic of the *Supreme Court Reports* in recent years that they contain only those decisions delivered in each calendar year.

<sup>20</sup> There were a somewhat larger number of citations to the decisions of courts other than the Supreme Court of Canada, but a consideration of these is beyond the scope of this article.

<sup>21</sup> Indeed, about 10 per cent of all Supreme Court decisions are extremely short, with a bare paragraph of text and no judicial citations whatever.

practice, however, less than one-half of 1 per cent of all citations are negative or critical to such an extent. The distortion resulting from this factor is therefore minimal. More to the point, there is a difference between a "substantive" citation, where the citing judge elaborates on the specific content of the cited case, often to the point of direct quotation; a "passing" citation, where little more than the style of cause of the cited case is given, on the apparent assumption that its content and meaning are already known by the reading public to which it is directed; and the (until recently) rare "string" citation,<sup>22</sup> where a statement of accepted doctrine is buttressed by a flat list of supporting citations. This distinction is obviously not unimportant, and it will be returned to later, but for the moment the simple fact of citation will be taken as the unit of measure.

#### IV. CITATIONS AND INFLUENCE: WHICH JUDGES COUNT

Again to begin by stating the obvious: if cases are cited in any single decision, it is because they provide a focused analysis or a definitive statement of a critically relevant point of law. A high frequency of citation for any specific case is therefore two pieces of information in one: first, it identifies the past cases that are distinguished by the fact that they provide doctrinal statements of ongoing utility and importance; and second, it provides an indication of the kind of questions of law around which the current Supreme Court caseload is in fact organizing itself.

The 4,848 follow-up citations embraced a total of 1,346 different prior decisions of the Supreme Court, meaning that the average cited case was referred to more than three, but less than four times. I have elsewhere<sup>23</sup> considered the question of which specific cases are referred to most frequently, of how they resemble each other and differ from the other decisions of the court, and what they reveal about the operations of the "influential" Court as distinct from the "routine" Court. However, for present purposes, I wish to look beyond the specific individual cases to another equally obvious dimension of citation,

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<sup>22</sup> The "string" citation is usually seen as a characteristic of American opinion writing: see J.G. Wetter, *The Styles of Judicial Appellate Opinions: A Case Study in Comparative Law* (Leyden: A.W. Sythoff, 1960) at 68-69.

<sup>23</sup> P. McCormick, "Which Supreme Court Decisions does the Supreme Court Cite?: An Analysis of Follow-up Citations on the Supreme Court of Canada, 1989-1993" (1996) 7 (2d) Supreme Court L.R. [forthcoming].

namely that with only a handful of exceptions every single set of “reasons for judgment” and every single dissent or separate concurring judgment is authored by a single specific and identifiable member of the Court.<sup>24</sup> We can therefore talk, not just about frequently cited cases, but about frequently cited judges: that is, some judges, more than others, write the decisions that contain the clarifications of judicial doctrine that visibly shape the Court’s subsequent decisions. This frequency of citation is, to some extent and with some important qualifications, an identification of the relative degrees of influence on the current Supreme Court that current and past members influence; a judge (for example, former Chief Justice Dickson) who is frequently cited is in some usable and intelligible sense projecting influence over the current Court, more so than another judge (for example, Nolan J.) who is seldom or never cited.

This impression is enhanced by the frequency with which the writing judge is explicitly identified by the citing judge—“as Dickson for the Court ...” is a surprisingly common phrase. Almost one-half of all citations include this accompanying reference to the specific judge who delivered the reasons. This is all the more surprising given the extent to which judges on the provincial courts of appeal, for example, indicate a concern for the Court as an institution with a doctrinal focus, rather than playing up or hinting at divisions within the Court by emphasizing the doctrinal contributions of specific individuals. Supreme Court decisions are as likely to refer to “Dickson for the Court” as they are to “the Court,” thereby stressing the individual contribution over the institutional achievement.

This influence is only partly the product of merit in any hard and objective sense, and the citation frequency tables that follow should not be taken in any simple way as measures of ability. How long judges served on the Court, and therefore how many decisions they have had a chance to deliver, is clearly a factor; judges like Nolan, Armour, Nesbitt, or Killam had little opportunity to make an impact, and therefore, regardless of their ability, they cannot be expected to be cited as frequently as judges like Martland and R.A. Ritchie, and former Chief Justices Kerwin and Duff. How recently the judge served is another factor; as will be discussed later, there is a mathematically quantifiable “decay rate” in the citability of Supreme Court decisions, and recent

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<sup>24</sup> This generalization is a little too strong, in that a number of decisions are jointly written by two (more rarely by three) judges for the majority, other cases are *per coram*—anonymous and unanimous—decisions; still others represent *seriatim* decisions, in which each member of the panel indicates how he or she would resolve the question without explicitly joining with or departing from the parallel explanations by their colleagues. These numbers, however, are not large.

judges carry an obvious and logically defensible advantage. Finally, there is a "luck of the draw" built into the evolving caseload patterns on the Supreme Court. As private law cases fade and criminal law cases expand as a proportion of the total caseload, judges who frequently delivered private law decisions are disadvantaged, and judges who frequently delivered criminal law decisions are advantaged, as sources of relevant citations. Although it is obvious to say that excellent judges are cited more often than mediocre ones, the operation of these intervening variables makes citation frequency by itself a highly imperfect means of assessing merit.

**Table I**  
**Most Frequently Cited Judges**  
**Supreme Court Decisions, 1989-1993**

Judge	Times Cited	Excluding self-cites
Dickson*	896 [18.5%]	826 [19.5%]
Lamer*	577 [11.9%]	434 [10.3%]
Wilson	374 [7.7%]	322 [7.6%]
<b>La Forest</b>	368 [7.6%]	255 [6.0%]
McIntyre	316 [6.5%]	303 [7.2%]
Sopinka	230 [4.7%]	136 [3.2%]
Laskin*	186 [3.8%]	186 [4.4%]
Beetz	170 [3.5%]	167 [3.9%]
McLachlin	128 [2.6%]	98 [2.3%]
W.Z. Estey	126 [2.6%]	126 [3.0%]
L'Heureux-Dubé	125 [2.6%]	77 [1.8%]
R.A. Ritchie	120 [2.5%]	120 [2.8%]
Cory	115 [2.4%]	95 [2.2%]
Le Dain	112 [2.3%]	112 [2.6%]
Martland	108 [2.2%]	108 [2.6%]
Pigeon	82 [1.7%]	82 [1.9%]
Gonthier	64 [1.3%]	50 [1.2%]
Spence	54 [1.1%]	54 [1.3%]
Duff*	52 [1.1%]	52 [1.2%]
Cartwright*	51 [1.1%]	51 [1.2%]
<b>TOTAL</b>	<b>4,848</b>	<b>4,234</b>

\* Chief Justice.

Note: boldface type indicates a member of the current Court.

The 4,848 previously cited decisions of the Supreme Court were delivered by more than sixty different members of the Court. Indeed, of

all the individuals who have ever served on the Court, only nine were not cited at all during the five-year period. Those nine meet rather obvious criteria: they served around the turn of the century (Patterson, King, and Girouard JJ.); they served for very short periods of time (Malouin J.); or both (Taschereau, Mills, Armour, Nesbitt, and Killam JJ.); and none served as Chief Justice. Another twenty-three, generally answering to similar criteria (but including Richards, Strong, and Fitzpatrick C.JJ.) were cited five times or less: that is, not more than once per year on average.

At the other end of the scale, there were twenty judges, one-third of them from the current Court, who each supplied 1 per cent or more of the follow-up citations. This cut-off point corresponds to an average of about ten citations per year and thereby indicates a significant and continuing influence. The five most frequently cited judges (Dickson and Lamer C.JJ. and Wilson, La Forest, and McIntyre JJ.) together accounted for fully one-half of all citations. The prominence of Dickson C.J. is striking, although a further breakdown for each of the five years considered would show that his influence is waning slightly, whereas Lamer C.J.'s is still building. The obvious and straightforward implication is the relative importance of recency and of the Chief Justiceship.

Most of the current members of the Court appear on this "top twenty" list, only Iacobucci and Major JJ. having been appointed so recently as not to make the 1 per cent cut-off point. The more recent Chief Justices are also high on the list, reflecting the prominence that they have enjoyed within their Court,<sup>25</sup> although it is at first glance mildly surprising that Laskin C.J. is not cited more often. As well, the only two individuals who remain on the list more than twenty years after they left the Court are Chief Justices, including Duff C.J. from before World War II. Most of the others (R.A. Ritchie, Martland, and Pigeon JJ.) served on the Court for a considerable period that ended within the last two decades, suggesting an opportunity to build up a considerable body of decisions from which citations could be drawn. The enduring impact of the few individuals who fit none of these three categories (McIntyre, Wilson, Le Dain, and Spence JJ.) is, therefore, all the more striking and noteworthy.

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<sup>25</sup> P. McCormick, "Assessing Leadership on the Supreme Court of Canada: Towards a Typology of Chief Justice Performance" (1993) 4 (2d) Supreme Court L.R. 409.

## V. CITATIONS AND INFLUENCE: THE PROBLEM OF SELF-CITATION

There is one factor that could help to explain the predominance of current members of the Court on the citation frequency list, and that is the fact that current members do (and former members do not) have the opportunity to cite themselves. Self-citations account for just over one-twelfth of all citations (614 out of 4,848, or 12.7 per cent), and all judges who served on the Court between 1989 and 1993 cited their own decisions proportionately more often than they were cited by the rest of the Court collectively. The figures are shown in Table II.

**Table II**  
**Frequency of Self-Citation**  
**Supreme Court Decisions, 1989-1993**

Judge	Self-Cites as Percentage of Cites BY Judge	Self-Cites as Percentage of Cites OF Judge
Dickson	35.2%	8.1%
McIntyre	34.2%	4.3%
Lamer	25.5%	25.6%
La Forest	21.0%	31.5%
Sopinka	13.2%	42.9%
Wilson	12.3%	14.5%
Gonthier	6.4%	23.3%
McLachlin	6.3%	25.9%
L'Heureux-Dubé	6.2%	40.0%
Cory	4.8%	18.0%
Iacobucci	3.2%	43.8%

It is, of course, perfectly understandable that self-citations should loom so large within the citation practices of the Court. First, even the judges who try most conscientiously to stay current with all the recent decisions of the Court are necessarily and by definition more familiar with their own decisions than with anyone else's. If the current case represents a clarification of, or a minor departure from, an earlier decision by the same judge, then it is appropriate—indeed, expected—that this will be pointed out. Second, as Lawlor points out,<sup>26</sup>

<sup>26</sup> Lawlor, *supra* note 18.



judges, more than the members of any other profession, value consistency and continuity, and therefore attach great importance to demonstrating how their present arguments mesh with the ideas that they have suggested earlier. Both of these considerations help to explain the relatively high level of self-citations, that is, the frequency with which judges lead off a judicial citation by writing, "as I said in ... ." To some extent, this occurs in the context of linking the current opinion to an earlier dissent or separate concurrence—19.1 per cent of all self-citations, but only 10.9 per cent of all citations, are to recorded opinions other than the decision of the Court—but not so much so that we can take this as a defining element of the practice.<sup>27</sup>

In terms of assessing influence, the practice of self-citations seems to present a double difficulty. First, it suggests an uneven playing field: only current members of the Court can cite themselves in current decisions of the Court, and the citation frequency of former members enjoys no comparable built-in boost. Second, the logic of this study is to consider the influence on current judicial decisions that is reflected in the citation of previous decisions of the Court, and it seems strange to talk of judges influencing themselves. That is, if Judge X cites Judge Y, then it makes sense to say that Judge X was influenced by Judge Y's ideas and arguments, but if Judge X cites Judge X, then "influence" no longer seems the appropriate word.

To deal with these problems in reverse order: the problem of "self-influence" largely disappears if we unfold the term "influence" for present purposes into something rather more ponderous, such as "making a doctrinal contribution in terms of which subsequent decisions are explicitly justified." Some Supreme Court decisions—for example, *R. v. Oakes*,<sup>28</sup> by far the most frequently cited single case over the five-year period—represent a seminal contribution to the resolution of a critical legal issue, in this case the meaning of section 1 of the *Canadian Charter of Rights and Freedoms*<sup>29</sup> and the logical process whereby the courts will apply it. It carries this latter significance whenever it is cited, and it makes no practical difference whether the citation is by Dickson

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<sup>27</sup> It is also intriguing that some judges, such as R.A. Ritchie J. (2.5 per cent), Martland J. (2.8 per cent), and Dickson C.J. (4.7 per cent), are almost never cited except when delivering the decision of the Court, whereas others, such as L'Heureux-Dubé J. (28.0 per cent), Wilson J. (20.1 per cent), McLachlin J. (18.1 per cent), and La Forest J. (16.8 per cent), are often cited when dissenting or delivering a separate concurring opinion.

<sup>28</sup> [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

<sup>29</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

C.J. (who wrote the reasons for judgment for the Court) or by any other member of the Court. The problem of the uneven playing field is answered by the simple fact that it almost never makes a difference to the calculations and rankings discussed in this paper; when such a difference does exist, it will be indicated.

## VI. CITATIONS AND INFLUENCE: CORRECTING FOR THE TIME FACTOR

In one sense, Table I explains itself: the citation patterns reflect how much influence each specific judge has had on the collective jurisprudence of the Supreme Court over the last five years, in the form of an explicit citation to their reasons for judgment by the judge writing a subsequent decision. But the extent to which we can infer any table of merit corresponding to the list is dubious since recency is clearly a powerful factor—so much so that it seems clearly to off-set, arguably even to overwhelm, considerations of quality. To adopt an obvious metaphor: if we think of the decision-making performance of the Court as a flat surface which is receiving light from a variety of jurisprudential sources, then the table shows how much light is being received from each of those sources, and if you are trying to read a newspaper, all you need to know is how much light you are getting. However, not all the sources are transmitting from the same distance or with the same initial brightness. The fact that the less distant sources are supplying most of the received light does not of itself prove that they are intrinsically brighter, and if you want to know something about the stars as sources of light, this is what you need to know.

The metaphor can also be turned around: if we know the relative distance at which the light sources are located, we can work out the relative brightness with which they must be transmitting in order to deliver that much light. By extension, if we know how far away in time each judge is from the cases that register judicial influence, and if we know the mathematical function that expresses how this time-distance erodes influence, then we can compare the influence generated by each of those judges. Table I measures judicial “influence” considered as an *input* to the decision making of the current court, but it can also serve as the basis for calculating measures of judicial influence considered as an *output* from the judges who are being cited.

The question then becomes how best to discount citations against time. The most tempting possibility is to treat the age decay as linear; if this were so, then the product of number of citations times

average age of citations would itself be a simple measure of “influence as output.” A linear decline, however, is unlikely. It is difficult to imagine what calculations on the part of decision-making judges would lead a case to be cited one or two fewer times each year until it simply vanishes from sight. As an alternative approach, the light metaphor is also tempting and suggests its own mathematical model: it is a scientific fact that brightness varies inversely as the square of the distance, and this suggests that we could create an influence score for each judge which is the product of the number of citations and the square of the average age of those citations. This, however, is too steep a curve because the citation rates simply do not decay that quickly. If a straight count exaggerates the influence of recent judges, an age-squared count would unduly exaggerate the influence of judges more remote in time.

**Figure 1: Frequency by Age of Citation: Supreme Court Decisions, 1989-1993**

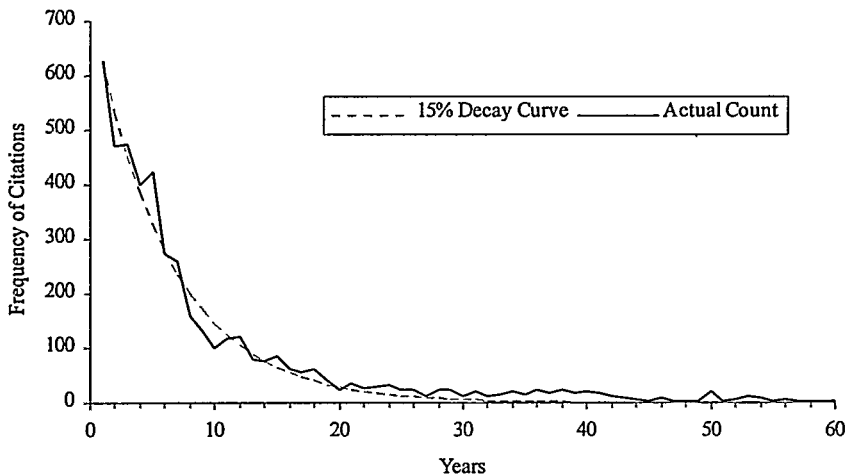


Figure 1 examines citations in terms of the length of time between the cited and the citing case, measured in years. This is a straightforward decay curve, and experimenting with various possibilities results in a rate of decay of about 15 per cent, represented by the smooth curve. The largest number of citations are made to cases that have been decided within the year previous to the citing decision. Citations to cases that are between one and two years old are only 85 per cent as common, the frequency of citations to cases between two and three years old only 85 per cent as common as that, and so on. Thus, for every one hundred citations to a one-year old case, there will be eighty-five to a two-year old case, seventy-two to a three-year old case, sixty-one to a

two-year old case, seventy-two to a three-year old case, sixty-one to a four-year old case, and so on. That "half-life" of the normal Supreme Court citation—that is, the number of years that it takes for this standard decay curve to cut the number of citations in half—is therefore just over four years. This drop-off rate is surprisingly sharp; Merryman's study of the citation practices of the California State Supreme Court in 1950, 1960, and 1970 (admittedly based on a rather different methodology) suggested a half-life closer to a decade.<sup>30</sup>

But if the rate of decay is sufficiently solid and predictable, then it becomes a discount rate that can be applied to every single citation, "correcting" for the factor of age. The influence score for each citation is therefore 1.176 (that is:  $1/0.85$ ) raised to the "n'th power, where 'n' is the age of the cite in years."<sup>31</sup> To compare the influence of judges, we would then use not a simple citation count, but rather the weighted total whereby citations from cases more remote in time are given greater weight. The results are shown in Table III, and the pattern they suggest is somewhat different from the simple count in Table I.

The rankings implied by these "influence scores" seem intuitively more satisfying as indicators of "influence as output." Dickson C.J. remains top of the list, but Laskin C.J. rises from eighth to a solid third, whereas pre-WWII Chief Justice Duff (celebrated by some contemporaries as the greatest judicial mind in the history of the Court)<sup>32</sup> vaults into second place. In general, Chief Justices dominate Table III even more dramatically than they do Table I; eleven of the twenty-five most influential justices, including eight of the top twelve, capped their career by occupying the centre chair. Conversely, the advantage of recency is so sharply offset that no member of the current Court, other than Lamer C.J. and La Forest J., makes the list. Almost certainly, this is largely a function of the way that rapid turnover has created a "Court of Juniors" and should not be generalized; in a more

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<sup>30</sup> J.H. Merryman, "Towards a Theory of Citations: An Empirical Study of the Citation Practices of the California Supreme Court in 1950, 1960, and 1970" (1977) 50 S. Cal. L. Rev. 381 at 394-95.

<sup>31</sup> The value is computed for each citation individually, not for each judge's average. For reasons of simplification, the rule is qualified by two considerations: first, no citation receives a score higher than its age in years; and second, no citation receives a score higher than forty.

<sup>32</sup> See J.G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto, 1985) at 122-3 and 146; I. Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queens University Press, 1992) at 256; W.K. Cambell, "The Right Honourable Sir Lyman Poore Duff, P.C., G.C.M.G.: The Man as I Knew Him" (1974) 12 Osgoode Hall L.J. 243; and G. Le Dain, "Sir Lyman Duff and the Consitution" (1974) 12 Osgoode Hall L.J. 261.

normal situation, with a more normal distribution of seniority across the Court, influence patterns would be less skewed away from current members. The high ranking for Rand J. will be satisfying to those who found his approach to the Supreme Court's role distinctive and innovative, a refreshing change from the mechanical approach that long dominated Supreme Court jurisprudence.<sup>33</sup>

**Table III**  
**Influence Scores for Cited Judges**  
**Supreme Court Decisions, 1989-1993**

Judge	Times Cited	Average Cite Age	Influence Score
Dickson*	896	6.0	3,158
Duff*	52	58.0	2,080
Laskin*	186	13.4	1,862
Rand	48	37.4	1,750
R.A. Ritchie	120	16.2	1,690
Martland	108	17.6	1,688
Kerwin*	41	38.8	1,487
Cartwright*	51	28.9	1,468
Fauteux*	44	27.7	1,203
Lamer*	577	3.6	1,167
Anglin*	28	68.0	1,120
Pigeon	82	15.2	1,002
Spence	54	19.3	946
McIntyre	316	5.4	857
Rinfret*	20	52.5	796
Beetz	170	7.5	780
Taschereau*	20	39.9	734
Wilson	374	3.4	698
Judson	26	26.3	683
Hall	27	22.8	614
Locke	17	35.9	604
Kellock	15	39.7	582
La Forest	368	2.5	578
W.Z. Estey	126	8.2	538
W.J. Ritchie*	11	102.0	440

\* Chief Justice.

It is interesting that almost one-quarter of the twenty-five most influential justices (although only a tenth of the top ten) come from Quebec. The three most recent French-Canadian Chief Justices all

<sup>33</sup> See, for example, Bushnell, *supra* note 32.

appear on the list; Pigeon J. is one of the top twelve, and Beetz J. also shows an enduring influence. Given that less than one-quarter of the Supreme Court caseload comes in the form of appeals from Quebec, the double disadvantage of language and of the differences between common law and civil code clearly handicaps the full participation of the Quebec judges, but not so much so as to prevent them from making a significant and enduring contribution to the Supreme Court's jurisprudence. Drawing up a "top nine" list—an "all-star Supreme Court" if you will—gives Dickson C.J. from Manitoba as Chief Justice with Duff C.J. from British Columbia, Rand J. from the Atlantic provinces, Laskin, Kerwin, and Cartwright C.JJ. from Ontario, and Fauteux C.J., Lamer C.J., and Pigeon J. from Quebec. (R.A. Ritchie and Martland JJ. would qualify for the top nine on the basis of their influence score, but are excluded for regional representation considerations).

## VII. CITING JUDGES AND CITING CASES

However, this is still not the complete story. As alluded to earlier, not all citations are of a type. To consider only two relevant considerations: some citations identify a specific Supreme Court justice by name whereas others identify only the case;<sup>34</sup> and some citations involve explicit consideration of specific points (and possibly direct quotations) from the earlier decision, whereas others do not. Not too surprisingly, there is a considerable overlap between these two distinctions, and for present purposes I will treat them as crudely interchangeable.<sup>35</sup> To be specific, I will assume that a citation which

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<sup>34</sup> This again distinguishes the citation modes of judges from that of academics. It makes no sense for me to preface a quote with the comment, "as the *Canadian Journal of Political Science* says," and leave it to the curious to work out who actually wrote the article in question; but it makes a good deal of sense for a judge to say, "as this Court has already indicated," without feeling any need to specify which current or past member the Court did the indicating. Because judges have this choice, it makes sense to examine how they use it.

<sup>35</sup> This is a slight oversimplification. The coding process was intended to distinguish between "substantive" and "passing" citations, but my students reported that although there are obvious examples of both types, in practice, citations fall along a continuum between the two with no obvious dividing line. We noted that well over 90 per cent of named citations involved some discussion of the content of the earlier decision, and that well over 90 per cent of the clear-cut passing citations did not involve the name of a specific judge. This careful wording implies a third category: unnamed citations accompanied by at least some substantive discussion of the case. These citations comprise just under one-quarter of all citations. Lacking more objective and operable categories, "named citations" shall be treated as an under-inclusive surrogate for "substantive citations" for the purposes of this article.

explicitly names a judge concedes greater significance to that judge than a citation which simply identifies the case and leaves it to further research to identify the individual who authored it. Put less bluntly, given that the judges on the current Court identify previous judges by name about one-half of the time, I assume that it is a matter of conscious choice whether they supply the name or not, and that the intention is to acknowledge the reputation of that judge in that particular area of law and thereby to acknowledge his or her significance as an expositor of doctrine. Conversely, the conscious decision not to mention the name either concedes that the point contributed is of less significance in the immediate case, or that the judge's name would not add to the weight that the reader would otherwise be prepared to assign to the citation. To paraphrase White, my suggestion is that if a judge is named, this will usually be because his or her opinions carry with them greater authority because they are his or hers.<sup>36</sup>

**Table IV**  
**Citation Practices: Frequency of Named Citation by Citing Justice**  
**Supreme Court Decisions, 1989-1993**

Judge	Cases Cited	Times Judges Cited	Named Cites as % of Total
Wilson	432	226	52.3%
L'Heureux-Dubé	774	383	49.5%
Cory	420	196	46.7%
Stevenson	71	33	46.5%
Iacobucci	219	100	45.7%
McIntyre	38	17	44.7%
Lamer	561	250	44.6%
McLachlin	474	204	43.0%
La Forest	539	221	41.0%
Gonthier	219	88	40.2%
Dickson	199	279	39.2%
Sopinka	711	78	39.2%
TOTAL	4,740 <sup>a</sup>	2,132 <sup>b</sup>	45.0%

<sup>a</sup> Omits *per coram* and *seriatim* decisions cited.

<sup>b</sup> Includes named decisions in *per coram* decisions.

<sup>36</sup> G.E. White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993) at 305.

Table IV strongly suggests that the balance between named and unnamed citations is a function of the style of the current Court as a whole rather than of the performance of distinct and sharply differentiated blocs within the Court. Wilson J. was more likely than any other member of the Court to provide the name of the judge when referring to a decision; Dickson C.J. and Sopinka J. have been the least likely to do so, but none of them varies from the Court's overall average by more than 10 per cent. This similarity entitles us to assume that there is some high degree of continuity in what the judges intend to convey by providing (or not providing) the specific name, and that the proportions between the two groups are roughly comparable regardless of which current judge is delivering the decision. There is, however, much less consistency in terms of what proportion of a cited judge's decision are accompanied by a specific reference to his or her name. Taking the 10 per cent variation rate as establishing the limits of the normal band, there are five of the reasonably frequently cited judges who are named proportionately more often than we might expect; these are Rand J. (69 per cent), W.Z. Estey J. (58 per cent), Le Dain J. (58 per cent), Wilson J. (57 per cent), and de Grandpré J. (56 per cent). Conversely, there are five judges who were named proportionately less often than we might expect from the overall pattern, these being Kerwin C.J. (17 per cent), Martland J. (28 per cent), R.A. Ritchie J. (30 per cent), Fauteux C.J. (32 per cent), and Sopinka J. (34 per cent). These differences are striking; to consider the two extremes, Rand and W.Z. Estey JJ. were both cited between 40 and 50 times, but Rand J. was named 33 times (in 48 cites) whereas Kerwin C.J. was named only 7 times (in 41 cites). This combination of a relative consistency among the citing judges and a significant variation among the cited judges can be understood as confirming the hypothesis that there is a persisting, intentional, and intelligible distinction that needs to be taken into account.

On the question of how to translate these differences into numeric terms, I propose a crude but straightforward weighting. I will assume that citations of Supreme Court decisions that are accompanied by an explicit identification of their author (and which in practice are usually accompanied by some discussion of the case and its meaning) will carry double the significance of a "normal" citation. In contrast, those citations without such explicit identification (and which in practice tend to be flat listings of the style of cause without substantive discussion) will carry one-half the significance of a "normal" citation. This process helps to distinguish those judges whose names live on and are connected with specific doctrines, from those whose contributions are transmitted more anonymously. As shown in Table V, the impact of



this further refinement is modest, but not for that reason unimportant. Most obviously, Rand J. moves even higher on the table, whereas Kerwin C.J. fades from sight to be replaced, rather surprisingly, by Anglin C.J. who led the Court during the first third of this century.

**Table V**  
**Revised Influence Scores for Cited Judges, Emphasizing Name Citations**  
**Supreme Court Decisions, 1989-1993**

Judge	Named Cites as % of All Cites	Revised Influence Score	Influence per Year on S.C.C.
Dickson*	46.2%	3,968	230.0
Rand	68.8%	2,679	167.4
Duff*	44.2%	2,420	65.0
Laskin*	43.0%	2,209	157.8
R.A. Ritchie	30.0%	1,667	65.2
Martland	27.8%	1,563	64.9
Cartwright*	37.3%	1,548	76.4
Lamer*	43.2%	1,386	100.8
Fauteux*	31.8%	1,239	51.6
Pigeon	46.3%	1,206	97.1
Anglin*	35.7%	1,160	48.3
Kerwin*	17.1%	1,147	14.7
Taschereau*	65.0%	1,066	38.7
Spence	38.9%	1,042	66.9
McIntyre	44.6%	948	93.3
Wilson	57.0%	935	105.9
Beetz	50.6%	929	63.0
Rinfret*	40.0%	878	29.5
W.Z. Estey	57.9%	734	69.4
La Forest	48.9%	728	80.9
Locke	47.1%	726	47.6
Judson	26.9%	617	31.6
Mignault	54.5%	580	53.1
Kellock	33.3%	579	43.7
W.J. Ritchie*	45.5%	520	30.6

\* Chief Justice.

#### VIII. CITATIONS AND INFLUENCE: CORRECTING FOR LENGTH OF SERVICE

The right-hand column in Table V further attempts to correct “influence as output” in terms of another factor that is clearly relevant,

namely the length of service on the bench. Duff C.J. served on the Supreme Court bench longer than has any other individual, a total of more than thirty-seven years; Wilson J., on the other hand, served for less than nine years, less than anyone else on the "top twenty-five" list. Even if everything else were equal (as, of course, it never is), this factor alone would clearly imply a greater opportunity for Duff C.J. to exert influence and, thereby, to earn a more visible presence in the current Court's citation practices. Dividing the influence score by the length of service on the Supreme Court bench creates new figures (influence per year) which suggest that the impact of Duff C.J. may be to some extent a function of his lengthy service, whereas that of Lamer C.J., and of McIntyre and Wilson JJ. may be the more noteworthy for having overcome the handicap of relatively short service on the Court. Even more striking is the situation of de Grandpré J., whose brief period of service on the bench is nonetheless generating enough citations from the current Court for an "influence per year" rating of ninety, putting him in the top half-dozen of the justices on this measure.

With some reservations because of its more abstract nature, this "influence generated per year on the bench" measure probably comes the closest to assessing merit *simpliciter*, correcting as it does for both length and recency of service. Pushing harder than the provisional nature of the calculations may permit, we tentatively suggest a "Super Court" including the nine judges with the highest "influence generated per year of service" score. Such a Court would include: Laskin C.J., Wilson, and Le Dain JJ. (Cartwright C.J. is narrowly edged out for the third slot) from Ontario; Lamer C.J., de Grandpré, and Pigeon JJ. from Quebec; Rand J. from the Maritimes; Dickson C.J. from the Prairies; and McIntyre J. from British Columbia. On the basis of this score, the Chief Justice would be Dickson C.J. It is rather striking that the "top nine" neatly match the regional quotas (statutory for Quebec, customary for the other regions) that guide appointments to the Court. Also, correcting for length of service on the bench changed less than half of the positions—McIntyre J. replaces Duff C.J., Wilson and Le Dain JJ. replace Cartwright and Anglin C.J., and de Grandpré J. replaces Fauteux C.J.<sup>37</sup>

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<sup>37</sup> From the limited feedback I have received, I gather that the inclusion of de Grandpré J. is, at first glance, the most surprising. Therefore, I would supplement it with the following comments: serving on the Court for less than four years in the mid 1970s, de Grandpré J. delivered fourteen decisions that were still being cited by the Court fifteen years later, and eleven of those were specifically linked to his name. He was cited by nine different members of the Court, L'Heureux-Dubé J. doing so most often and Dickson C.J. least often. Based on the reasons for judgment which cited him, his important contributions include the following: the "first enunciation," in *Committee*

**Table VI**  
**The "Super Court": Influence as Measured by Frequency of Citations**  
**Supreme Court Decisions, 1989-1993**

Total Influence <sup>a</sup>	Influence per Year on Bench
Dickson C.J. (Manitoba)	Dickson C.J. (Manitoba)
Rand (New Brunswick)	Rand (New Brunswick)
Duff (British Columbia)	Laskin (Ontario)
Laskin (Ontario)	de Grandpré (Quebec)
Cartwright (Quebec)	Wilson (Ontario)
Lamer (Quebec)	Lamer (Quebec) <sup>b</sup>
Fauteux (Quebec)	Pigeon (Quebec)
Pigeon (Quebec)	McIntyre (British Columbia)
Anglin (Ontario)	Le Dain (Ontario)

<sup>a</sup> Martland (Alberta) and R.A. Ritchie (Nova Scotia) scored in the top nine but are excluded because of regional considerations.

<sup>b</sup> If self-citations are excluded, Rinfret (Quebec) replaces Lamer (Quebec).

## IX. CITATIONS AND INFLUENCE: IDENTIFYING SUBFIELDS OF LAW

A further simplification is built into the analysis above, specifically the extent to which it conflates the judicial influence revealed by citation patterns into a single aggregate, even though it is almost certainly the case that the patterns will in all respects—the balance between follow-up and other citations, the average age of citations and

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*for Justice and Liberty v. Canada (Nat'l Energy Bd.)*, [1978] 1 S.C.R. 369 [hereinafter *Committee for Justice*], of the doctrine subsequently adopted by the Court regarding the test for the apprehension of bias, which was the foundation of the Court's *Charter* decisions in *Valente v. R.*, [1985] 2 S.C.R. 673, and *R. v. Lippé*, [1991] 2 S.C.R. 114, of the modern doctrine of judicial independence; a clear statement, in *Talsky v. Talsky*, [1976] 2 S.C.R. 292 [hereinafter *Talsky*], of the standards of appellate review, linked with (and seen as directly contributing to) Dickson C.J.'s *Lensen* decision, *supra* note 12, and also, again in *Committee for Justice*, a good statement, until it was supplanted by *CUPE, Local 963 v. N.B. Liquor Corp.*, [1979] 2 S.C.R. 227, of the standard of judicial review of an administrative tribunal; the best statement, in *Côté v. R.*, [1978] 1 S.C.R. 8 at 13, of one of the central principles regarding the indictment procedure, namely: "the golden rule is for the accused to be reasonably informed of the transaction alleged against him;" one of the first statements, in *Talsky*, of the notion of "the welfare of the child" which replaced the "tender years" doctrine in child custody cases; the clearest statement by the Court, in *Mercure v. Marquette & Fils*, [1977] 1 S.C.R. 547, of the role of a trustee in bankruptcy as representing the creditors; and a good discussion in *Commerce & Industry Insurance Co. v. Westend Investment Co.*, [1977] 2 S.C.R. 1036, of the implications for the interpretation of legislation directly copied from foreign legislation. Considering de Grandpré J.'s short service on the Court, this seems to represent a creditable contribution; whether he could have sustained such a pace for a longer period is clearly impossible to answer.

standard decay curve, the most frequently cited judges—be different for different areas of law: criminal law as distinct from public law as distinct from private law and so on. Although the Supreme Court is formally a generalist Court, it would be naïve to expect that the expertise of individual judges (whether it was brought to the bench or acquired from lengthy service on the Court) would not leave some imprint on decision making and citation practices, would not yield names distinguished in tax law or insurance law but much less so on criminal matters.

For present purposes—in the interests of straightforward objectivity of the coding process on the one hand, and of ensuring sufficiently large blocs of cases for meaningful analysis on the other—the categorization will remain fairly general. The most normal and straightforward division of the judicial docket in Canada is between criminal cases and civil cases; since the latter is something of a residual category, it can usefully be divided between “private law” and “public law” cases, the latter defined as non-criminal matters to which the government in an official capacity is a party. Finally, *Charter* cases can be broken out as a fourth category, drawn largely but not entirely from the criminal caseload; although *Charter* cases are always some other kind of case as well (often criminal, sometimes public, rarely private), they will for present purposes be treated as *Charter* cases only.<sup>38</sup>

As shown in Table VII, there are indeed striking differences in the follow-up citation practices of the Supreme Court for each of the four broad types of law that have been distinguished. In general terms, there are several important messages that emerge from those figures. The first (rather unsurprisingly) is the importance of *Charter* cases within the recent jurisprudence of the Court, accounting for almost one-quarter of the total caseload and for over one-half of the total number of follow-up citations. If there is in the aggregate some correlation between the number of judicial citations and the amount of research and writing time that have gone into any group of decisions, this suggests that the Supreme Court is expending the largest part of its energies on the evolution of *Charter* jurisprudence, with the concomitant implication that judicial influence within this area is in some sense more important than influence in other areas.

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<sup>38</sup> It is not always straightforward whether a specific Supreme Court case should be considered a *Charter* case. For present purposes, the list of *Charter* cases is taken from: F.L. Morton, P.H. Russell & T. Riddell, “The First Decade of the Charter of Rights, 1982-1992: A Statistical Analysis of Supreme Court Decisions” (Paper presented to the Annual Meeting of the Canadian Political Science Association, 12-14 June 1994) [unpublished]. See also F.L. Morton, T. Riddell & P.H. Russell, “The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade, 1982-1992” (1994) 5 N.J.C.L. 1.

**Table VII**  
**General Characteristics of Follow-up Citations by Case Type**  
**Supreme Court Decisions, 1989-1993**

	Charter	Public	Criminal	Private
Cases	164	117	210	123
Citations	2,401	1,056	764	627
Average Age	6.8 years	12.8 years	10.4 years	15.9 years
Median Age	3.6 years	7.0 years	5.6 years	9.4 years
Decay Rate	17.5%	10%	15%	8%
Half-Life	3.6 years	6.6 years	4.3 years	8.3 years

The second message relates to the large number of criminal cases, the largest of the four categories, and one that looms larger when remembered that most *Charter* cases have arisen in the context of criminal cases. This is a recent feature of the Supreme Court caseload, applying only to the Dickson and the Lamer Courts. On the recent Supreme Court, but not on earlier Supreme Courts, criminal law jurisprudence has been a large part of its work, and judicial influence in this subfield is correspondingly important. At the same time, however, the ratio of follow-up citations to the total number of cases suggests that much of this element of the caseload is rather routine in nature and involves little contribution to legal doctrine. Wold and Caldeira<sup>39</sup> have written about the surprisingly high proportion of routine matters within the caseload of even those courts that can control their own docket, and even a casual perusal of the *Supreme Court Reports* reveals enough one-paragraph decisions dismissing appeals "for the reasons given in the court below" to confirm that this is true of the Supreme Court of Canada as well.

The third implication, and the converse of the observation about the growing importance of the criminal caseload, is the very low number of private law appeals. As recently as the Fauteux Court, such cases constituted more than half of all the cases heard by the Supreme Court. Even under Laskin's Chief Justiceship (in this as in many other regards the important transition point for the Court), criminal cases were still

<sup>39</sup> J.T. Wold, "Going through the motions: the monotony of appellate court decisionmaking" (1978-79) 62 *Judicature* 58; and J.T. Wold & G.A. Caldeira, "Perceptions of 'Routine' Decision-Making in Five California Courts of Appeal" (1980) 13 *Polity* 334.

the largest of the four categories.<sup>40</sup> At the same time, the ratio of citations to cases suggests that the numbers do not understate the relative importance of private law cases within the caseload, while the much higher average and median ages for citations suggest a more leisurely approach to doctrinal evolution.

The fourth point relates to the public law component, the smallest of the four in terms of the number of cases but the second largest in terms of follow-up citations. Arguably, this combines with the high profile of *Charter* cases to reinforce the observations of Monahan<sup>41</sup> and Gibson<sup>42</sup> concerning the extent to which the Supreme Court of Canada has become a public law court, leaving other legal issues primarily to the attention of the provincial courts of appeal. At the same time, the relatively high average and median ages for citations suggests a much greater willingness to draw on earlier Court doctrine and, hence, to be influenced by the members of earlier Courts.

As might be expected, the patterns of judicial influence—both of total influence scores and of influence generated per year on the bench<sup>43</sup>—are quite different for each of the four areas of law. Table VIII indicates the top nine judges for each of the four subfields, generated on the basis of total influence and influence per year; Table IX assembles the same information in a more visually immediate way. It should be remembered that the total number of citations and, therefore, both the relative importance of each area within the recent Court's jurisprudence and the reliability of the numbers generated, decline fairly sharply as one moves from the left side of the table to the right. Similarly (because of the methodological problems of multiplying a very small number of cases by a very large adjustment factor to generate the influence score), only judges with at least half a dozen citations are included in the tables, a caveat that can be seen either as unfairly handicapping judges from the earlier Courts or as preventing their heavily weighted citations from distorting a reasonable reading of the patterns.

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<sup>40</sup> P. McCormick, "The Supervisory Role of the Supreme Court of Canada: Analysis of Appeals from Provincial Courts of Appeal, 1949-1990" (1992) 3 (2d) Supreme Court L.R., especially Table 2 at 7.

<sup>41</sup> P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1987) c. 2.

<sup>42</sup> D. Gibson, "The Crumbling Pyramid: Constitutional Appeal Rights in Canada" (1989) 38 U.N.B. L.J. 1.

<sup>43</sup> For each of the four areas, the citations for each subfield of law are treated separately and their scores are recalculated on the basis of the appropriate decay rate, as indicated in Table VII.

Table VIII

## The "Super Court": Influence Measured by Citation Frequency by Type of Case Supreme Court Decisions, 1989-1993

	Charter	Public	Criminal	Private
Influence Score	Dickson	Duff	Cartwright	Dickson
	Rand	Rand	Dickson	Duff
	Lamer	Anglin	Spence	Wilson
	Duff	Dickson	Kerwin	Anglin
	Laskin	Taschereau	R.A. Ritchie	W.Z. Estey
	Fauteux	Laskin	Lamer	Pigeon
	Wilson	Mignault	McIntyre	R.A. Ritchie
	Kellock	Kerwin	Fauteux	Rinfret
	Beetz	Beetz	Pigeon	Beetz
Influence per Year on Bench	Dickson	Rand	Dickson	Wilson
	Lamer	Laskin	Cartwright	Dickson
	Rand	Dickson	Spence	La Forest
	Wilson	Duff	de Grandpré	W.Z. Estey
	Le Dain	Anglin	McIntyre	Le Dain
	de Grandpré	Taschereau	Lamer	Pigeon
	McIntyre	Beetz	Kerwin	McLachlin
	Laskin	W.Z. Estey	Pigeon	Gonthier
	Fauteux	Pigeon	R.A. Ritchie	Beetz

Note: Minimum five citations within category for judge to make list.

Even breaking the patterns down into these several subfields, Dickson C.J. continues to stand out; he is the only individual to place among the top nine on all eight lists, and the only individual to top as many as four of them.<sup>44</sup> Dickson C.J.'s influence is particularly strong in the *Charter* and criminal areas,<sup>45</sup> his influence is rather more muted, but still significant, in the areas of public law and private law.

Another individual who figures very prominently is Duff C.J., who appears on four lists and tops one of them. His enduring influence is most striking in the area of public law, least evident in the area of criminal law. Given that Duff C.J. left the Court before the end of World War II, and that his influence score in public law is still higher than that of any other judge (and remains within the top four even when

<sup>44</sup> This prominence, combined with regional considerations, deny Martland J. any credit; otherwise Martland J. would have placed among the top nine on two lists and tenth on a third, but well behind fellow Westerner Dickson C.J. each time.

<sup>45</sup> For current purposes, these represent two different blocs of cases.





Among the Ontario judges, Laskin C.J. and Wilson J. each appear on four lists, closely followed by Anglin and Kerwin C.J., and W.Z. Estey J. with three appearances each. Cartwright C.J. and Spence J. both exhibit continuing influence on criminal law. However, Ontario judges crowd the top half of the influence list only for criminal (and possibly for private) law, featuring much less prominently in the other areas. Although it has contributed a number of strong judges, Ontario clearly has not dominated the jurisprudence of the Supreme Court of Canada to anything like the extent that, for example, New South Wales has dominated the Australian High Court.<sup>46</sup>

Pigeon J. leads the Quebec judges by making six lists, whereas Beetz J. has five appearances, numbers that are exceeded only by Dickson C.J.'s perfect score. Lamer C.J. appears on four lists, but the fact that he is still an active member on the Court suggests that his influence still has not peaked—the more so as his influence is strongest in the *Charter* and criminal areas that dominate the workload of the modern Court. Fauteux C.J. is also prominent, whereas de Grandpré J. scores well in terms of influence per year, suggesting that his potential impact has been significantly undercut by his relatively short period on the bench.

Ten of the twenty-four individuals who made at least one of the lists were Chief Justices, and they account for thirty-four of the seventy-two list appearances. This is only to be expected as the joint product of two tendencies: first, since the time of Laskin's Court (and possibly since that of Cartwright C.J.'s) the Chief Justice has tended to dominate the delivery of decisions by the Court; and second, with only a handful of exceptions, the Chief Justiceship has gone to the senior member of the Court subject to a Quebec/other alternation, which means that the Chiefs are never "short-term" members of the Court and normally have enjoyed a lengthy period of service over which to make an impact on the Court's jurisprudence.<sup>47</sup> Conversely, the effect of generating influence scores that weight older citations more heavily is to exclude almost all of the current Court from any of the lists. Apart from Lamer C.J., who is clearly making a major mark on Court doctrine, only La Forest,

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<sup>46</sup> See B. Galligan, *The Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (New York: University of Queensland Press, 1987).

<sup>47</sup> The average length of service for justices on the Supreme Court is 9.9 years. Chief Justices serve for 23 years, on average. Martland and R.A. Ritchie JJ. are the only two justices to have exceeded the average length of service without having becoming Chief Justice. These data do not include the current members.

McLachlin, and Gonthier JJ. make any of the lists, and all three are in the low-priority and low-citing area of private law.

## X. CONCLUSION

The suggestion has been that the citation practices of the Supreme Court of Canada provide an objective basis for assessing the enduring influence of the current and previous members of the Court. The explanatory practices of the Supreme Court demonstrate the ongoing importance of judicial citations, with about fifteen citations per case (almost half of them to prior decisions of the Supreme Court). The act of citation indicates a choice by the citing judge between alternative explanatory models and devices, accompanied by the decision to explicitly acknowledge the contribution. It is therefore a useful, objective, and intellectually transparent indication both of judicial influence and of a contribution to the judicial doctrine whereby the Supreme Court explains and legitimates its decisions.

Looking at all cited cases, Dickson and Lamer C.JJ. were by far the most frequently cited judges, with Wilson, McIntyre, and La Forest JJ. constituting a strong second rank; however, the straight citation count was heavily weighted in favour of current and recent members of the Court. Applying an appropriate discount to older citations generated a more complex influence pattern, heavily focused on Chief Justices and on some of the more long-serving members of the Court; a correction for the varying lengths of service on the Supreme Court bench cast some doubt on relative rankings while confirming the impact of Dickson and Laskin C.JJ., among others.

What emerges from all three approaches—identifying how often each judge is cited, turning citation frequencies into influence scores, and correcting for length of service on the bench—is the same general observation on the steepness of curve, the high drop-off rates for citation frequencies over time for individual cases, and individual members of the Court alike. The products sold in the Supreme Court “supermarket” have a short shelf-life; individual items become stale-dated more than twice as fast as seems to be the case for the California State Supreme Court in the 1970s<sup>48</sup> (although it is unclear whether this contrasts Canadian experience with American, national supreme court with state/province supreme court, or the 1990s with the 1970s). The high replacement rate for frequently cited cases and the rapid decline from

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<sup>48</sup> Merryman, *supra* note 30.

prominence of cases barely a decade old suggest that the Court is providing a rapidly evolving jurisprudence attuned to modern realities, but one that sits strangely with the assumption that judicial precedent and *stare decisis* imply a degree of permanence and an implicit and unavoidable focus on the (sometimes rather remote) past. One implication of this tendency is that only very important judges from previous Courts retain any ongoing visibility in the citation patterns of the current Court; another is that the jurisprudence of the current Court may be similarly short-lived and similarly quick to disappear under even more recent ideas and decisions.

The reason may be quite simple: it may be that we have picked the only period for which these patterns cannot be generalized but must instead (to use the judicial jargon) be confined to their own facts. By definition, there can and will be only one *Charter*-entrenching event for Canada, and only one "first generation" for *Charter* decisions to work that exceptional event into the routine of judicial interpretation and explanation. The recency of the event means that the first generation of *Charter* decisions will themselves be very recent, which necessarily and inevitably pulls down the average and median age for follow-up judicial citations by a Court whose intellectual efforts are largely focused on assimilating the impact of the *Charter*. But later *Charter* decisions will stand against the background of those first decisions—unlike the first decisions themselves, which largely stood on their own—and this will create a centre of gravity to citation patterns that will gradually draw the average and median age up. *Oakes*<sup>49</sup> is the most frequently cited case, not because it is new, but because it was the first *Charter* decision on section 1. Ten years from now it will still be cited whenever section 1 issues are a component of the immediate case, even though at that time it will no longer be new. At such a time, calculations of citation frequencies will presumably show a slower decay rate and a longer half-life than is the case for the five years that have been considered here—that is to say, they may well look more like the figures for public law citations in Table VII.

The transition period to the new age of *Charter* jurisprudence may be largely accomplished, and most of the cases that will provide the foundations of Supreme Court *Charter* doctrine may already have been delivered. If this is true, then the average age of follow-up citations will trend upward over the next few years. Alternatively, the Supreme Court may have taught itself a new style of judicial citation focusing on recent cases to the relative exclusion of older ones. Put bluntly: will Dickson

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<sup>49</sup> *Supra* note 28.

C.J. continue to loom large in the Supreme Court's citation patterns through and past the 1990s, or will he disappear rather quickly behind Lamer C.J. the way Laskin C.J.'s influence was eclipsed by Dickson C.J.'s on the recent Court? Either way, the patterns described in this paper constitute the empirical background against which these alternative theories can be tested, and an appropriate long-term generalization about Supreme Court citation practices developed.