Justice Côté in 2019: Great Dissenter, Voice of the Court, or Both?

SANDRINE AMPLEMAN-TREMBLAY*
WITH THE COLLABORATION OF
CAMILLE NADEAU**

ABSTRACT

This article analyzes quantitative data extracted from decisions of the Supreme Court of Canada as a way to provide a picture of the year 2019. More precisely, this paper focuses on Côté J. and her contribution to the Court. It also looks at the Court's trends in 2019 with a gender lens and thus expands on existing literature. Guided by two hypotheses, the article divides its analysis into three parts, which each examine a specific topic: dissents and concurrences (3.1), frequency of agreement (3.2), and majority authorship (3.3). The first hypothesis suggests that Côté J. is more likely to dissent and less likely to agree with her colleagues (measured through the frequency of agreement and participation, or lack thereof, with majority reasons). The second hypothesis builds on the first one and proposes that Côté J. is less likely to author a majority opinion. The first hypothesis found validation, whereas the second did not. While it is true that Côté J.'s contribution to the Court in 2019 can be examined through her dissents, we should note the following nuances: she (1) shared the top of the dissenting chart with Brown J.; (2) dissented in only one of the oral judgments in which she took part; (3) was chosen by the Chief Justice to

* DCL candidate, McGill Faculty of Law.

** LLM candidate, McGill Faculty of Law; and lawyer at the Quebec Ministry of Justice. Opinions expressed in this article are those of the authors and do not represent the opinions of any third party. Both authors would like to thank the anonymous peer reviewers of the Manitoba Law Journal, as well as Cara Locke, Pierre-Luc Racine and Heather Hui-Litwin for their helpful feedback on previous drafts.

be the voice of the Court for half of the unanimous decisions; and (4) had a majority authorship rate akin to her colleagues' average. Finally, given our sample size, we could not conclude that gender had a definite impact either on concurrences and dissents, frequency of agreement, or majority authorship. This does not mean that no gender-related data is discussed in this paper.

INTRODUCTION

Now that 2019 is behind us, we can have a better glimpse at the Supreme Court's judicial year. Russian spies, friends with benefits, a pen camera, and the Superbowl's advertisements all made their way to the docket.[1] But beyond facts, the Court contributed to the development of Canadian law in significant ways. Indeed, the Court went from refining the reasonableness standard of review (*Vavilov*)[2] to expanding the right of expatriates to vote (*Frank*),[3] and from discussing environmental obligations after bankruptcy (*Orphan Well Association*)[4] to providing guidance on evidence of prior sexual history of the complainant (*Barton*, *Goldfinch*, and *R.V.*).[5] 2019 was also marked by institutional changes. It was the first year in which all judgments were written under the Chief Justiceship of Wagner C.J.,[6] Gascon J. announced his retirement,[7] Kasirer J. was appointed to replace him,[8] and the Court sat outside of Ottawa for the first time in its history.[9]

---

1 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *R v Goldfinch*, 2019 SCC 38 [*Goldfinch*]; *R v Jarvis*, 2019 SCC 10 [*Jarvis*]; *Bell Canada v Canada (Attorney General)*, 2019 SCC 66.

2 *Vavilov*, *ibid*.

3 *Frank v Canada (Attorney General)*, 2019 SCC 1 [*Frank*].

4 *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5.

5 These three decisions were rendered in a 10-week timeframe: *R v Barton*, 2019 SCC 33 (May 24, 2019); *Goldfinch*, *supra* note 1 (June 28, 2019); *R v RV*, 2019 SCC 41 (July 31, 2019).

6 In 2018, McLachlin C.J. participated in several decisions. Wagner C.J.'s first written judgment as Chief Justice was *Lorraine (Ville) v 2646-8926 Québec inc*, 2018 SCC 35.

7 "News Release" (15 April 2019), online: *Supreme Court of Canada* <scc-csc.lexum.com/scc-csc/news/en/item/6556/index.do> [perma.cc/N752-46F6].

8 "News Release" (7 August 2019), online: *Supreme Court of Canada* <decisions.scc-

At first glance, it may be hard to see any trends crystallize across such a miscellaneous docket, especially in a single year. It may be even harder when deciding, as we did, to focus mainly on a single Justice. Indeed, after having read several Court decisions, not only in 2019 but also in previous years, as well as literature on frequent female dissenters (i.e. Wilson, L'Heureux-Dubé, Côté and McLachlin JJ. (as she then was)), we formulated two hypotheses that led us to single out Côté J.[10] Our first hypothesis was that Côté J. was more likely to appear at the top of the dissenting chart and, more generally, less likely to agree with her colleagues (measured both through the frequency of agreement and the rate of dissenting and concurring opinions combined). Likelihood of agreement here refers to agreement with the majority and her colleagues (measured on an individual basis) and, thus, goes beyond dissensus. Our second hypothesis was that Côté J. was not a leading figure in majority reasons authorship. Our analysis adds depth and nuance to previous studies and reveals some observations: the ascension of Brown J. as a dissenter, as well as Côté J.'s low level of dissensus in oral judgments, her preeminent role in unanimous decisions, and her average rate of majority authorship.

In an attempt to provide an account of the year 2019, this article analyzes sets of quantitative data extracted directly from the Court's decisions. In section 1, our selection of data and our method are laid out. In section 2, we situate our work within the existing literature on the Supreme Court by distancing ourselves from attitudinal decision-making analyses. We also explain how our piece confirms part of the literature on authorship and dissents, while adding further nuances. In section 3, we use statistics to draw a picture of Côté J. and, in some instances, of the Court as a whole. Our results are discussed in three subsections: dissenting

csc.ca/scc-csc/news/en/item/6652/index.do> [perma.cc/PPG5-94EG].

9 "News Release" (13 May 2010), online: *Supreme Court of Canada* <decisions.scc-csc.ca/scc-csc/news/en/item/6593/index.do> [perma.cc/3P4S-TFZP].

10 Mainly Vanessa A MacDonnell, "Justice Suzanne Côté's Reputation as a Dissenter on the Supreme Court of Canada" (2019) 88 SCLR (2d) 47; Marie-Claire Belleau & Rebecca Johnson, "Judging gender: difference and dissent at the Supreme Court of Canada" (2008) 15:1-2 Intl J Leg Profession 57; Peter McCormick, "Who Writes: Gender and Judgment Assignment on the Supreme Court of Canada" (2014) 51:2 Osgoode Hall LJ 595 [McCormick, "Who Writes"]; Claire L'Heureux-Dubé, "The Dissenting Opinion: Voice of the Future?" (2000) 38:3 Osgoode Hall LJ 495.

and concurring opinions (3.1), frequency of agreement (3.2) and majority authorship (3.3). Each subsection also presents results under a gender lens. The answer as to why we chose to include gender is two-fold: (1) many Justices who earned the reputation of Great Dissenter were women,[11] and (2) gender is a dominant element in the Supreme Court literature. [12]

1. DATA AND METHOD

This paper presents descriptive statistics computed from the Supreme Court of Canada's written judgments released during the year 2019. First, appeals heard in 2018 for which a judgment was rendered in 2019 were treated as 2019 cases. However, appeals heard in 2019 for which no decision was rendered in 2019 were not counted as 2019 cases. This includes judgments rendered with reasons to follow.[13] Second, oral judgments[14] and published orders[15] were not taken into account due to their summary disposition.[16] Together, these selection criteria brought our

---

11 See e.g. MacDonnell, *ibid*; Belleau & Johnson, *ibid,* at 64 (see figure); L'Heureux-Dubé, *ibid,* at 512.

12 See mainly McCormick, "Who Writes", *supra* note 10; Belleau & Johnson, *ibid*; Marie-Claire Belleau, Rebecca Johnson & Christina Vinters, "Voicing an Opinion: Authorship, Collaboration and the Judgments of Justice Bertha Wilson" (2008) 41 SCLR (2d) 53; L'Heureux-Dubé, *ibid,* at 512; Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008).

13 See *Toronto-Dominion Bank v Young*, 2020 SCC 15; *R v Friesen*, 2020 SCC 9; *International Air Transport Association v Instrubel, NV*, 2019 SCC 61; and *Michel v Graydon* (2019-11-14), [2019] SCJ No 102, 2019 CarswellBC 3375 (no neutral citation was available at the time this article was written).

14 See e.g. *R v Collin*, 2019 SCC 64. Unfortunately, by removing oral judgments from our analysis we perpetuate their "second class citizen status" such as labelled by Cameron. See Jamie Cameron, "A Chief and a Court in Transition: The Wagner Court and the Constitution" [forthcoming in SCLR, fall 2019-winter 2020], especially at 4-7, online (pdf): <digitalcommons.osgoode.yorku.ca > [perma.cc/63QJ-MJ8V].

15 See e.g. *Giovanni D'Amico v Her Majesty the Queen*, 2019 SCC 23; *Attorney General of Ontario v G*, 2019 SCC 36.

16 On summary disposition, see Peter McCormick, "Birds of a Feather: Alliances and Influences on the Lamer Court 1990-1997" (1998) 36:2 Osgoode Hall LJ 339 at 346 [McCormick, "Birds of a Feather"].

sample to 43.[17] Before delving into the details of our method, a few lines have to be dedicated to the composition of the Court in 2019. As stated in the introduction, Kasirer J. was appointed as the ninth member of the Court in September 2019.[18] Since he did not participate in any decision matching our selection criteria, he has not been included in the figures presented in this article. Also, in every representation of the data, the nine Justices are ordered following the chronology of their appointment dates (i.e., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin JJ.),[19] except for Wagner C.J., who always appears first.[20]

Across all 43 judgments, we extracted four categories of data from Lexum:[21] majorities, concurrences, dissents, and majority authorship. In other words, across all decisions, we computed the following data for all Justices forming the coram: (1) whether they participated as members of the majority, concurrence or dissent, and (2) whether they authored the majority reasons. Armed with this information, we calculated the likelihood of agreement between two Justices. For ease of reading and aesthetic concerns, all numbers were rounded to the first decimal place.

There are some limitations to this method. For example, our *n* is limited.[22] The limits with regards to our sample size (*n*) are mostly due to the nature of the Supreme Court. The institution is composed of nine Justices. Not only is the pool of Justices narrow, but panels of 5 or 7 can be assigned to a decision, thus, reducing the number of decisions per Justice in a given year. This caveat is equally true for decisions. As the

---

17 See the Appendix for a detailed list of the decisions included in the sample.

18 "The Honourable Nicholas Kasirer" (last modified 27 November 2019), online: *Supreme Court of Canada* <scc-csc.ca/judges-juges/bio-eng.aspx?id=nicholas-kasirer> [perma.cc/36AC-LMBE].

19 "Current and Former Judges" (last modified 16 September 2019), online: *Supreme Court of Canada* <scc-csc.ca/judges-juges/cfpju-jupp-eng.aspx> [perma.cc/76T9-5RMF].

20 We followed the same seniority logic as for authorship attribution. For further details, see McCormick, "Who Writes", *supra* note 10 at 619.

21 Lexum is an official database on which the Supreme Court of Canada's judgments are uploaded prior to being published in the Supreme Court Reports. "Decisions and Resources" (last modified 21 July 2020), online: *Supreme Court of Canada* <scc-csc.lexum.com/scc-csc/en/nav.do> [perma.cc/22HS-HEK2].

22 In statistics, *n* refers to the size of a sample. For further details on sample sizes, see Donald R Songer & Susan W Johnson, "Judicial Decision Making in the Supreme Court of Canada: Updating the Personal Attribute Model" (2007) 40:4 Can J Political Science 911 at 918.

country's highest court, the number of decisions rendered within a year is not as imposing as for other courts. The size of our sample means that removing or adding one Justice can significantly impact the outcome.[23] In addition, we are aware that by focusing on the number of times a Justice was part of the majority, concurring or dissenting opinions, and on majority authorship, we are omitting to examine the substance of every set of reasons and the impact of areas of law.[24]

Another example of a possible limitation could be that some decisions do not include any majority reasons (plurality). For example, the reasons of Wagner C.J. and Abella and Karakatsanis JJ. in *J.W. v Canada (Attorney General)* are not a majority *per se* since they are endorsed by only three out of seven Justices.[25] However, given that this situation occurred only once in 2019 and that the reasons of Wagner C.J. and Abella and Karakatsanis JJ. are not qualified either as 'concurring' or 'dissenting' (see cover pages of the decision), we classified this set of reasons as a majority for the purposes of our statistical analysis. We are aware of the shortcomings that this may imply (e.g., the ratio is reached by combining more than one set of reasons), but our methodology did not allow for including this kind of exception.

2. LITERATURE REVIEW

The Supreme Court of Canada has been the highest court in the country since 1933 for criminal appeals, and since 1949 in civil matters.[26] Therefore, it is hardly surprising that many authors have dedicated their entire career, or part of it, to the understanding of this institution. The use of statistical methods by political science theorists, and more recently, by legal scholars has contributed to developing our knowledge of the

---

23 *Ibid.*

24 Several authors who applied a similar methodology cautioned their readers on the limited inferences that can be drawn from such a limited set of data. See e.g. McCormick, "Birds of a Feather", *supra* note 16 at 365-66; Belleau & Johnson, *supra* note 10 at 66.

25 *JW v Canada (Attorney General)*, 2019 SCC 20 [*JW*].

26 *An Act to amend the Criminal Code*, SC 1932-33, c 53, s 17; *An Act to amend the Supreme Court Act*, SC 1949 (2nd Sess.), c 37, s 3.

Court.[27] For example, the distribution of votes and the composition of coalitions have both been analyzed at different periods. Alarie and Green looked at the Court under consensus and ideological lenses and tried to explain how Justices were voting in *Charter* appeals between 2000-2009. They concluded that the Court was cooperative and that evidence of ideological votes was relatively weak. They also observed that s. 15 appeals tended to exhibit a different pattern.[28] Looking at different factors, McCormick examined which combinations of Justices were most likely to form the majority and found that, between 1990-1997, Cory J. acted as a pivot between two groups of Justices.[29] It should not be forgotten that the Supreme Court also produces statistics every year. Nevertheless, no analysis is provided regarding the Justices' individual habits of voting.[30]

---

27 CL Ostberg & Matthew E Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007). They also wrote the following article with Ducat on attitudinal decision making in *Charter* cases under the Lamer Court: CL Ostberg, Matthew E Wetstein & Craig R Ducat, "Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991-1995" (2002) 55:1 Political Research Q 235. Several studies focused on Justices' ideological preferences and their voting preferences. For more information, see Songer & Johnson, *supra* note 22; Songer, *supra* note 12; Benjamin Alarie, "Review of Donald R Songer, 'The Transformation of the Supreme Court of Canada: An Empirical Examination'" (2011) 61:1 UTLJ 173; Donald R Songer, John Szmer & Susan W Johnson, "Explaining Dissent on the Supreme Court of Canada" (2011) 44:2 Can J Political Science 389.

28 Benjamin Alarie & Andrew Green, "Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada" (2009) 47 SCLR (2d) 475. Alarie and Green used a direct method (i.e., by appointing party) and an indirect method to measure Justices' policy preferences. For the latter as for the former, the results showed that Liberal appointees tend to vote more liberally in *Charter* appeals. However, the results were not as decisive for s. 15 appeals (see 489ff). The authors also considered Chief Justiceship, individual practices and new appointments when analyzing cooperation and ideology.

29 McCormick, "Birds of a Feather", *supra* note 16. For an article examining the role of unilingualism, see Jean-Christophe Bédard-Rubin & Tiago Rubin, "Assessing the Impact of Unilingualism at the Supreme Court of Canada: Panel Composition, Assertiveness, Caseload, and Deference" (2018) 55:3 Osgoode Hall LJ 715.

30 See "Statistics Reports" (last modified 7 May 2020), online: *Supreme Court of Canada* <scc-csc.ca/case-dossier/stat/years-annees-eng.aspx> [perma.cc/B4SE-JZML]. In 2019, the Supreme Court also started to publish statistics in its Year in Review: "Year in Review: 2018" (last modified 12 April 2019), online: *Supreme Court of Canada* <scc-csc.ca/review-revue/2018/cases-causes-eng.aspx#wb-cont> [perma.cc/N3F3-Z57P].

In the same vein, quantitative data analysis of dissenting and concurring opinions is neither a novel interest nor method. Good examples of this type of study are found in McCormick's work. This author studied judicial disagreement from 1970 to 2002 and developed a conceptual framework on the Court's fragmentation. He concluded that changes in the Court's patterns of disagreement corresponded to different events such as the appointment of Bora Laskin as Chief Justice, the arrival of Lamer J., as he then was, (and/or Chouinard J.), the entry into force of the *Charter*[31] and La Forest J.'s departure.[32] More recently, MacDonnell published a quantitative piece intending to test whether Côté J.'s reputation as a dissenter, which she believed to be well-established, was justified.[33] To achieve this purpose, MacDonnell compared Côté J.'s statistics from 2015-2018 with those of previous Great Dissenters of the Court. She concluded that Côté J. is indeed a frequent dissenter, while adding nuances as to how she compared with previous Great Dissenters. Cameron, in her work, concluded that Côté, Brown and Rowe JJ. marked the year 2018 by writing, individually or collectively, 13 minority opinions in constitutional cases.[34]

From the scholarship on dissents and concurrences was born a debate on the concept of unanimity. A first trend, endorsed by Songer and the Supreme Court, considers unanimous decisions to be decisions in which there is no dissent.[35] A second trend, to which a large part of the literature

---

31 For the impact of the Charter on the Court's level of disagreement, see e.g. Peter McCormick, "Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada" (2004) 42:1 Osgoode Hall LJ 99 at 134 [McCormick, "Blocs, Swarms and Outliers"]; Emmett Macfarlane, "Consensus and Unanimity at the Supreme Court of Canada" (2010) 52 SCLR (2d) 379 at 389-98; Belleau, Johnson & Vinters, *supra* note 12 at 61. For further information on the role of the Charter, see Songer, *supra* note 12, which often compares pre- and post-Charter eras.

32 McCormick, "Blocs, Swarms and Outliers", *ibid* at 110. As for the last period (i.e., La Forest J.'s departure), the author highlighted the death of Sopinka J. as another potential explanation (although less likely).

33 MacDonnell, *supra* note 10.

34 Cameron, *supra* note 14 at 5; see also Tonda MacCharles, "Judicial jousting emerges at Supreme Court of Canada" (27 December 2019), online: *The Star* <thestar.com/politics/federal/2019/12/27/judicial-jousting-emerges-at-supreme-court-of-canada.html> [perma.cc/QSE9-BEWR].

35 Songer, *supra* note 12 at 213; "Statistical Summary 2008 to 2018" (last modified 12

subscribes, rather argues that unanimity is reached only when there are no dissenting or concurring reasons in a given case. The latter conceives of concurrences as a form of judicial disagreement.[36] Although we agree that unanimity should not include decisions in which there is at least one set of either concurring or dissenting reasons, we believe the term disagreement to be too strong in some instances. Concurrences are meant to agree with the result reached by the majority, which may render the term 'disagreement' troublesome. This being said, the first trend has shortcomings too. It omits to consider that some Justices "fin[d] value in presenting their own ideological views rather than in speaking in a single voice."[37] It also excludes the fact that concurring opinions can reach the same result as the majority reasons through a different legal analysis. Their agreement can sometimes be purely coincidental. In order to assess whether the concurring opinions of 2019 were disagreements or complements to the majority reasons and thus examine the merits of each trend, we conducted a qualitative analysis of the concurring opinions of 2019. This means that we took a closer look at twelve decisions, namely *Frank*, *Bird*, *Jarvis*, *Barer*, *Morrison*, *J.W.*, *Mills*, *Goldfinch*, *Keatley*, *R.S.*, *Transport Desgagnés* and *Vavilov*.[38] We concluded that several concurring opinions rendered in 2019 attempted to distance themselves from the

---

September 2019), online: *Supreme Court of Canada* <scc-csc.ca/case-dossier/stat/sum-som-2018-eng.aspx> [perma.cc/5J86-3D43]; Ostberg, Wetstein & Ducat, *supra* note 27 at 239 (their method distinguishes between majority and dissent without any consideration for concurrences).

36 Macfarlane, *supra* note 31 at 384-85; Belleau & Johnson, *supra* note 10 at 58-59, 67 (they state that concurrences are a form of judicial disagreement but use the Supreme Court's statistics which consider decisions with concurrences as unanimous); Belleau, Johnson & Vinters, *supra* note 12 at 55-56; Cameron, *supra* note 14 at 13-14; McCormick, "Blocs, Swarms and Outliers", *supra* note 31 at 107.

37 Alarie & Green, *supra* note 28 at 502. For further details on concurrences, see e.g. Bonnie Androkovich-Farries, *Judicial disagreement on the Supreme Court of Canada* (Master Thesis, University of Lethbridge, 2001); Peter McCormick, "Standing Apart: Separate Concurrence and the Modern Supreme Court of Canada, 1984–2006" (2008) 53:1 McGill LJ 137.

38 *Frank*, *supra* note 3; *R v Bird*, 2019 SCC 7; *R v Jarvis*, *supra* note 1; *Barer v Knight Brothers LLC*, 2019 SCC 13; *R v Morrison*, 2019 SCC 15; *JW*, *supra* note 25; *R v Mills*, 2019 SCC 22 [*Mills*]; *Goldfinch*, *supra* note 1; *Keatley Surveying Ltd v Teranet Inc*, 2019 SCC 43; *RS v PR*, 2019 SCC 49; *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58; *Vavilov*, *supra* note 1.

majority. Only a few concurrences did not include such attempts; they were expansions or repetitions of the majority's arguments.

Concurring opinions in which Justices attempted to distance themselves from the majority took various forms (e.g., different interpretations of a concept, principle, or precedent). For example, in *Frank*, Rowe J. offered a different interpretation of the concept of residency and its role regarding the right to vote (s. 3 of the *Charter*). This divergence brought a significant difference in the s. 1 analysis. While the majority believed that the impugned provision failed at the minimal impairment and the balancing components of the *Oakes* test,[39] Rowe J. accepted not only that the objective was pressing and substantial, but also that there was a rational connection between the objective and measure. Nevertheless, he concluded that the evidence presented was insufficient to conclude that the beneficial effects supplanted the deleterious effect.[40] The conclusion of his reasons, stating "I do not want to close the door to any and all possible limits on voting federally based on residence,"[41] which he believed was the effect of the majority reasons, are revealing of Rowe J.'s opinion with regards to the role of residency in the right to vote analysis. In this sense, although Rowe J. reached the same result as the majority, his opinion showed some degree of disagreement with the majority's reasons.

Concurring reasons did not always clearly distance themselves from the majority. On some occasions, they simply supplemented or repeated the majority's reasons. A good example is found in *Mills* in which Moldaver J. simply concurred – in two brief paragraphs – with both the majority and Karakatsanis J.'s set of concurring reasons.[42] A more complex example is the opinion of Moldaver J. in *Goldfinch*, which expanded on the majority's reasons. From the onset, Moldaver J. mentioned, at paragraph 87, that the majority and him "align on many if not most of the core principles governing the s. 276 regime." This being said, he identified additional considerations relating to the hypothetical admission of

---

39 *Frank*, *supra* note 3 at paras 36-82. The majority was not convinced by the Attorney General's submissions on rational connection but did not come to a "firm conclusion" on this part of the test, see para 60.

40 *Ibid* at paras 92-109. Had the government provided more evidence on the deleterious effects, the result reached by Rowe J. could have been significantly different.

41 *Ibid* at para 110.

42 *Mills*, *supra* note 38.

evidence of prior sexual history (governed by s. 276 of the *Criminal Code*) and provided more details on the application of *R v Graveline*. Although in the *Goldfinch* case, the concurring reasons bring more to the reader in terms of legal analysis than in *Mills*, to qualify any of these opinions as 'disagreements' would be too strong.

For the reasons aforementioned, and while we agree that concurrences and dissents should not necessarily be combined from a research perspective, we deemed it important to analyze concurrences as independent from the majority for the purpose of the present article.

This debate on unanimity stems from differences of opinions on the nature of consensus (i.e., unanimity on the results versus on the substance of the majority reasons). In either case, consensus (or its lack thereof) can be influenced by the philosophy and leadership of the serving Chief Justice.[43] Connecting the literature with today's reality, Cameron concluded that Wagner C.J's philosophy as a Chief Justice constituted a departure from the consensus-oriented approach of McLachlin C.J. The author cautiously suggests that this alteration in leadership may have been the cause of the Court's fragmentation in 2018.[44] This would not be surprising, given the Chief Justice's vision of consensus. He expressed that "[differences of opinion] are proof of a lively democracy" and that "[he] would be suspicious of a Supreme Court in which Justices are always unanimous."[45]

---

43 Macfarlane, *supra* note 31 at 379-83. McCormick also noticed the impact of the Chief Justiceship without providing answers as to why the Chief Justice can impact the profusion of minority opinions. McCormick, "Blocs, Swarms and Outliers", *supra* note 31 at 134-35. Songer, Szmer & Johnson, *supra* note 27 at 402, reviewed the impact of chief justiceship on dissents. They concluded that although the Lamer Court was statistically more likely to produce dissents, L'Heureux-Dubé J.'s dissenting rate may have contributed to this outcome; see also L'Heureux-Dubé, *supra* note 10 at 499-501 (on the role of Anglin C.J., Cartwright C.J. and Lamer C.J. in reducing minority opinions).

44 Cameron, *supra* note 14 at 1-3, 12-13, 24-26. On McLachlin C.J.'s effect on consensus, see Alarie & Green, *supra* note 28 at 503-04.

45 These are excerpts from the F.R. Scott Lecture given at McGill Faculty of Law by Wagner C.J. in 2019 [translated by authors]. The French original version was: "*Et ça démontre une très grande démocratie, moi je me méfierais d'une Cour Suprême dont les juges sont toujours unanimes*." McGill University, "F.R. Scott Lecture with The Right Honourable Richard Wagner" (released 13 September 2019) at 41m:43s-43m:33s, online: *Youtube* <youtube.com/watch?v=jS7SQOtsCkk> [perma.cc/X7ZA-RVZP]. See also John Ivison, "John Ivison: Canada's new chief justice keen to drag Supreme

Another trend of the Court-centred literature was sparked by Wilson J.'s famous speech "Will Women Judges Really Make a Difference?"[46] Following this speech, many papers on the impact of gender on adjudication and judicial disagreement have been written. Here, we will focus only on legal studies using statistical methods to explain the influence of a Justice's gender. As early as 1998, McCormick declared that both L'Heureux-Dubé J. and McLachlin J. (as she then was) frequently disagreed with their male counterparts and were less likely to be part of their colleagues' "favourite coalition."[47] Songer and Johnson observed, in 2007, that female Justices were more liberal than their male colleagues in civil liberties cases, whereas gender did not seem to have a significant impact on the outcomes of economic cases.[48] Belleau and Johnson, once joined by Vinters, were rather interested in knowing whether gender (or, more largely, diversity) and the voicing of a Justice's opinions were correlated.[49] They concluded that the first three women appointed to the Court (i.e., Wilson, L'Heureux-Dubé and McLachlin JJ.)[50] distanced themselves from the majority (either in the form of concurring or dissenting opinions) more often than other Justices.[51] However, they cautioned against overgeneralizations of the impact of gender on adjudication that do not take into account the fact that these women had similar backgrounds.[52] It is interesting to connect these findings on gender to Macfarlane's piece on the deliberation process. His article highlighted

---

Court into the light" (22 June 2018), online: *National Post* <nationalpost.com/news/politics/john-ivison-chief-justice-keen-to-drag-supreme-court-into-the-light> [perma.cc/2PDH-CNVN]. This opinion on dissents and democracy is reminiscent of the discourse of L'Heureux-Dubé, *supra* note 10 at 503.

46 Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28:3 Osgoode Hall LJ 507. The paper was presented at the Betcherman Lecture.

47 McCormick, "Birds of a Feather", *supra* note 16 at 350, 360-361, 364.

48 Songer & Johnson, *supra* note 22 at 925-29. According to these authors, the tendency of female Justices to be more liberal in civil liberties cases but to reach similar results in other areas of law follows the trend observed at the United States Supreme Court (at 929). See also L'Heureux-Dubé, *supra* note 10 at 512; Songer, *supra* note 12 at 208.

49 Belleau & Johnson, *supra* note 10; Belleau, Johnson & Vinters, *supra* note 12.

50 Belleau & Johnson, *supra* note 10 at 60ff. Of note, the data analyzed do not cover McLachlin J.'s time as Chief Justice of Canada.

51 *Ibid* at 60-63.

52 *Ibid* at 65-66.

that Wilson and L'Heureux-Dubé JJ. were perhaps less likely to be included in informal processes, such as meeting in another Justice's chambers to resolve differences and potentially sign on his or her reasons. Macfarlane thus questioned whether this type of exclusion would explain some of the differences seen in Justices' vote distribution.[53] Lastly, McCormick also published a piece aiming to determine whether female Justices had as much opportunity to deliver majority reasons in high-profile cases. He paid attention to the Dickson C.J., Lamer C.J., and McLachlin C.J. (until 2012) Courts and concluded that women were generally underrepresented in high-profile cases authorship.[54] While this paper builds on considerations pinpointed by some of the aforementioned literature (i.e., authorship and judicial disagreement), we acknowledge that the literature on the influence of gender is not limited to these matters.

It is well known that authoring a decision, including in cases where there is a sole author, is a collegial exercise.[55] Besides, in some jurisdictions, authorship is not worth examining since decisions are written anonymously.[56] Given these facts, we could reasonably ask why one should frown upon an unequal rate of majority authorship at the Court. We decided to include this category of data for three main reasons. We believe (1) that the person who signs the decision takes a risk — and makes a statement — the Justices concurring with the author do not, as the case will always be associated with the author's name;[57] (2) that the voice of a Justice can mark the development of Canadian law (for example McLachlin C.J.[58] in torts or La Forest J. in environmental matters),[59] and

---

53 Macfarlane, *supra* note 31 at 394-400, 402.

54 This disadvantage was different in the McLachlin C.J. Court. Indeed, upon examination of the data, women appeared to have been favoured. However, when excluding the Chief Justice, they were still underrepresented. See McCormick, "Who Writes", *supra* note 10, especially at 618-21. This scholar also co-authored a study on the impact of female Justices on criminal law appeals by studying appeals in Alberta between 1985 and 1992 (Peter McCormick & Twyla Job, "Do Women Judges Make a Difference? An Analysis by Appeal Court Data" (1993) 8:1 CJLS 135).

55 See e.g Belleau, Johnson & Vinters, *supra* note 12 at 72-74, 76-78.

56 Belleau, Jonhson & Vinters, *supra* note 12 at 67; Belleau & Johnson, *supra* note 10 at 58.

57 Belleau, Johnson & Vinters, *supra* note 12 at 72.

58 Bruce Feldthusen, "Justice Beverley McLachlin and Tort Law: The Good, the Bad, and the Puzzling" (1 October 2018) in *Common Law Controversies at the McLachlin Court*, Vanessa Gruben, Graham Mayeda & Owen Rees, eds (University of Toronto

(3) that the results reached by McCormick in his gender-focused analysis of authorship were unsettling.[60]

While our hypotheses were born both from our impressions on the Court and the literature, our article adds to previous studies in two ways. First, this article is not limited to Côté J.'s dissents, which has been the main angle adopted to examine her work. Although we look at Côté J.'s dissents, we provide a broader portrait of her contribution by offering analyses of other factors, such as the frequency of agreement and majority authorship. Second, this piece both validates, while adding nuances to, trends reported in previous studies. While majority authorship could be more equally distributed between genders (as noted by McCormick regarding high-profile cases), gender is not necessarily a factor that influences a Justice's contribution to the Court, at least not when looking solely at our sample. More importantly, Côté J. could be overthrown as the Court's most dissenting Justice. It is also relevant to note that Côté J. has been chosen by the Chief Justice to be the voice of the Court in half of the unanimous decisions and exhibits a majority authorship rate akin to her peers, thus, showing she can be a figure of the Court's consensus.

3. QUANTITATIVE DATA ANALYSIS

Since Côté J. is at the core of our research question, and consequently, ties our variables and hypotheses together, the discussion under each figure revolves around her and how she compares with her colleagues. While dissenting and concurring opinions, frequency of agreement and majority authorship are detailed in distinct subsections, gender permeates all of them. Our first hypothesis (i.e., Côté J. was most likely to dissent and less likely to agree with her colleagues) is dealt with mostly in subsections 3.1 and 3.2. Indeed, both the number of concurrences and dissents, as well as the frequency of agreement, are revealing of Côté J.'s dissensus. As for subsection 3.3, it engages primarily with our second hypothesis on majority authorship.

Press) [forthcoming].

59 William Lahey, "Justice Gérard V. La Forest and the Uncertain Greening of Canadian Public Law" (2013) 54:2 Can Bus LJ 223. On the desire of some Justices to mark law's history, see Macfarlane, *supra* note 31 at 389.

60 McCormick, "Who Writes", *supra* note 10.

3.1 Dissenting and Concurring Opinions

This section builds on a trend in the literature, which focused on concurrences and dissents and/or unanimity when analyzing the Court's decisions. Hence, we first computed vote distribution. By vote distribution, we mean which option a Justice chose when deciding a case: Was he or she part of the majority, the concurring or the dissenting opinion? While we recognize that the term 'vote' may be troublesome, it is frequently used in the literature. We thus decided to use the terms 'voting' and 'vote distribution' for the purpose of consistency. The following figure intends to provide data regarding each of the nine Justices and includes both unanimous decisions and decisions composed of at least one set of concurring or dissenting opinions.

Figure 1: Vote Distribution by Justice in 2019

Justice	**Majority** (%)	**Dissent** (%)	**Concurrence** (%)	**Combined Concurrence and Dissent** (%)
Wagner	75.0 (30/40)	17.5 (7/40)	7.5 (3/40)	25.0 (10/40)
Abella	70.0 (28/40)	22.5 (9/40)	7.5 (3/40)	30.0 (12/40)
Moldaver	81.0 (34/42)	11.9 (5/42)	7.1 (3/42)	19.0 (8/42)
Karakatsanis	71.4 (30/42)	19.0 (8/42)	9.5 (4/42)	28.6 (12/42)
Gascon	93.5 (29/31)	3.2 (1/31)	3.2 (1/31)	6.5 (2/31)
Côté	58.3 (21/36)	33.3 (12/36)	8.3 (3/36)	41.7 (15/36)

Brown	61.9 (26/42)	28.6 (12/42)	9.5 (4/42)	38.1 (16/42)
Rowe	69.4 (25/36)	22.2 (8/36)	8.3 (3/36)	30.6 (11/36)
Martin	83.3 (30/36)	11.1 (4/36)	5.6 (2/36)	16.7 (6/36)
Average	**73.8**	**18.8**	**7.4**	**26.2**

The data of 2019 show that some Justices are more likely to side with the majority. A good example is Gascon J. who is a member of the majority opinion in 93.5% of cases. Other Justices tend to participate in dissenting opinions. Justice Côté is among them. While she already made her place as a dissenter in previous years,[61] the 2019 data shows more nuances in the Court's dynamic. Indeed, the ascension of Brown J. as a frequent dissenter is truly spectacular. He managed to achieve a dissent rate similar to Côté J., which was at no occasion reported in previous studies. These two Justices are truly leading the Court's dissensus. Without having the results of in-depth attitudinal and longitudinal studies, we cannot state why these two Justices are at the top of the dissenting chart. One may observe that Côté and Brown JJ. share at least two characteristics: (1) they have similar seniority at the Supreme Court, and (2) they were appointed by a Conservative government.[62] *A priori*, we may,

---

61 MacDonnell, *supra* note 10.

62 The respective appointment dates of these three Justices are: Gascon J. (2014-06-09); Côté J. (2014-12-01); and finally Brown J. (2015-08-31). "Current and Former Judges", *supra* note 19. Regarding their appointment, see Sean Fine, "Harper appoints Quebec Court of Appeal judge Gascon to Supreme Court" (3 June 2014), online: *The Globe and Mail* <theglobeandmail.com/news/politics/harper-nominates-quebec-court-of-appeal-judge-clement-gascon-to-supreme-court/article18976040/> [perma.cc/QM68-XZ4S]; Katherine Wilton, "New Supreme Court justice Suzanne Côté one of Quebec's top litigators" (9 February 2015), online: *Montreal Gazette* <montrealgazette.com/news/local-news/new-supreme-court-justice-suzanne-cote-one-of-quebecs-top-litigators> [perma.cc/58JM-63HK]; Sean Fine, "Appointment of Russ Brown extends Harper's influence on Supreme Court" (27 July 2015), online: *The Globe and Mail* <theglobeandmail.com/news/politics/alberta-appeal-court-judge-

however, have doubts with regards to the relevance of these characteristics, especially since Gascon J. shares them as well and is in complete opposition to both Côté and Brown JJ. in terms of vote distribution. Similarly, Alarie and Green reported that although the same government appointed Bastarache and Arbour JJ., they exhibited very different voting patterns in *Charter* appeals.[63]

As laid out in the literature review, we believe that concurrences too should be examined when dressing a portrait of the Court fragmentation. When expanding to dissenting and concurring opinions combined, Côté and Brown JJ. are not the only Justices who tend to distance themselves from the majority. Four Justices, namely Abella, Côté, Brown and Rowe JJ., exhibit rates of dissents and concurrences combined of 30% or more. Justice Karakatsanis closely follows this group with a rate of 28.6%. Although Côté and Brown JJ. appear less isolated when looking at concurrences and dissents combined rather than solely at dissents, they remain the most and second most likely to participate in dissenting and concurring opinions combined with rates of 41.7% (Côté J.) and 38.1% (Brown J.).

Our first hypothesis being rooted partially in Côté J.'s connection to other female dissenters; a few words on gender are necessary. The first three female Justices have largely contributed to Canadian dissents, and so has Côté J. (so far).[64] While many studies acknowledge this fact, we are not convinced that, in 2019, gender can help predict whether a Justice is more prone to participate in dissents or to sign on reasons separated from the majority. Our data analysis shows that the gender dissenting averages vary from 16.7% for male Justices to 21.5% for female Justices. This variation in averages could be explained by factors other than gender. For instance, the presence of an extreme data point has to be considered when looking at the average for male Justices. Justice Gascon J.'s rate of dissent (3.2%) is especially low in relation to his colleagues' dissenting rates. The second least dissenting judge is Martin J. with a rate of 11.1% (closely followed by

---

russell-brown-named-to-supreme-court-of-canada/article25728554/> [perma.cc/6MVQ-MXX9].

63 Alarie & Green, *supra* note 28 at 492-93. For further details on the influence of the appointing party, see e.g. Songer, *supra* note 12 at 195ff; Alarie & Green, *supra* note 28 at 483ff.

64 L'Heureux-Dubé, *supra* note 10 at 512; Belleau & Jonhson, *supra* note 10; MacDonnell, *supra* note 10.

Moldaver J. at 11.9%). The approximate 8% separating Gascon J. from his two colleagues shows even more compellingly how Gascon J.'s rate has influenced the gender average. Indeed, if his rate were not computed, the difference between the male and female averages would have been 1.5% instead of 4.8%. We should thus always bear in mind the very limited sample size used for this article when reading these statistics. As for dissenting and concurring opinions, the average for female Justices is 29.2%, whereas it is 23.8% for male Justices. The male average jumps to 28.2% when excluding Gascon J. The effect of Justice Gascon's removal on the data shows the caveat expressed previously on the limited size of our *n*.[65] Given these results and our sample size, we could not conclude that gender has been a determining factor in 2019 with regard to vote distribution. This being said, retaining gender as a factor without paying attention to the perspective of non-Western and non-white women is, for many, a flawed approach.[66] This caution can be extended to non-binary conceptions of gender.

The results presented in this subsection appear to validate our first hypothesis, namely that Côté J. was more likely to disagree with both the majority and her colleagues on an individual basis. However, when comparing Côté and Brown JJ.'s data in 2019 to that of MacDonnell, the answer is not that clear. MacDonnell analyzed vote distribution at the Court between March 2015 and March 2018 as a means to assess Côté J.'s dissensus.[67] We needed to include both oral decisions and judgments with reasons to follow to undertake any contrasting exercise. We, therefore, included these data only for the purpose of this comparison.[68] Our extended sample exposes that Brown J. exhibited dissensus akin to Côté J. in 2019 (27.1% against 27.8%, respectively). When extending to dissenting and concurring opinions, once again Brown J.'s rate is similar to Côté J. (33.9% against 33.3%, respectively). Oral judgments and judgments with reasons to follow accounted for 24 decisions. 21 of them were delivered orally. We can thus infer that Côté J.'s rate of dissents and

---

65 See section on "Data and Method".

66 Belleau & Johnson, *supra* note 10 at 66.

67 MacDonnell, *supra* note 10.

68 When undertaking this exercise and in order to follow MacDonnell's methodology and provide an accurate comparison, we did not remove decisions in which Kasirer J. participated.

concurrences combined decreased considerably because of her tendency to rarely dissent in oral judgments. While MacDonnell noted that Côté J.'s dissensus was visible through judgments as well as through leaves for appeal,[69] we point out that it is not necessarily true for oral judgments, at least not in 2019. Justice Côté dissented in only one of the oral judgments she took part in, a trend at odds with her dissenting reputation.

Moreover, this comparing exercise shows how cautious one should be when interpreting descriptive statistics on the Court. Legal research often omits to describe its methodology, a crucial section for other disciplines. Although this issue was highlighted mostly with regards to doctrinal studies,[70] we believe that it may be a symptom plaguing legal scholarship in general. This phenomenon was, indeed, especially troublesome while producing this piece. In many of the studies presented in our literature review, the "Data and Method" or "Methodology" sections were either very brief or non-existent. This rendered any comparative exercise much more difficult than it probably should have been. While some of the problems caused by the conciseness of the methodology sections were resolved by contacting the authors, it was not always possible.[71]

3.2 Frequency of Agreement

Many questions emerged from our analysis of dissents and concurrences rates. The results outlined in subsection 3.1 show that although Côté J. had a high dissenting rate in 2019, she should perhaps share her reputation of dissenter with Brown J. With this in mind, we developed a sub-hypothesis in order to reflect more accurately Brown J.'s dissensus. We assumed that the dissenters (i.e., Côté and Brown JJ.) would tend to disagree with their colleagues and agree with each other. Although our data show that they agree with each other 66.7% of the time, this statistic is not on its own especially significant, as both Justices have a higher frequency of agreement rate with another Justice. We thus expanded our curiosity to all Justices and tried to see whether the Court

69 MacDonnell, *supra* note 10 at 52-56.

70 Terry Hutchinson, "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law" (2015) 8:3 Erasmus L Rev 130 at 131.

71 For instance, we contacted Professor Vanessa MacDonnell who confirmed that she computed both decisions with reasons to follow and oral judgments. Other requests remained unanswered.

was divided into groups. We considered that Justices who co-signed an opinion were in agreement. This being said, we refer our readers to the discussion on the nature of concurring opinions in section 2, which outlines the caveats of considering all concurring opinions as disagreeing with the majority. The following figures, inspired by McCormick's "Bird of a Feather," present the outcomes of this questioning.[72]

Figure 2: Agreement Frequency (All Types of Reasons Combined) (%)

Justice	Wagner	Abella	Moldaver	Karakatsanis	Gascon	Côté	Brown	Rowe	Martin
Wagner		60.5	69.2	61.5	82.8	54.3	50.0	63.6	69.7
Abella	60.5		51.3	71.8	58.6	28.6	50.0	44.1	73.5
Moldaver	69.2	51.3		56.1	74.2	74.3	56.1	62.9	68.6
Karakatsanis	61.5	71.8	56.1		74.2	34.3	41.5	45.7	74.3
Gascon	82.8	58.6	74.2	74.2		55.6	56.7	77.8	78.6
Côté	54.3	28.6	74.3	34.3	55.6		66.7	59.4	44.8
Brown	50.0	50.0	56.1	41.5	56.7	66.7		71.4	51.4
Rowe	63.6	44.1	62.9	45.7	77.8	59.4	71.4		61.3
Martin	69.7	73.5	68.6	74.3	78.6	44.8	51.4	61.3	

Using the same data, we created a second figure as a means to simplify comparisons. Hence, Figure 3 shows with whom, in 2019, each Justice is most likely to agree with. To the contrary of Figure 2, Figure 3 is not mirrored and thus requires further explanation. The ranking goes from 1st to 8th, the latter being the Justice with whom his or her colleague from the upper line is more likely to disagree with. This means that results should not be read across. For example, Abella J. is Wagner C.J.'s 6th most likely partner (as opposed to his 3rd most likely partner if results were read-across).

---

72 The two figures on Justices' frequency of agreement were inspired by McCormick, "Birds of a Feather", *supra* note 16.

Figure 3: Agreement Frequency Rankings (All Types of Reasons Combined)

Justice	**Wagner**	**Abella**	**Moldaver**	**Karakatsanis**	**Gascon**	**Côté**	**Brown**	**Rowe**	**Martin**
Wagner		3rd	3rd	4th	1st	5th	6th	3rd	4th
Abella	6th		8th	3rd	6th	8th	6th	8th	3rd
Moldaver	3rd	5th		5th	4th	1st	4th	4th	5th
Karakatsanis	5th	2nd	6th		4th	7th	8th	7th	2nd
Gascon	1st	4th	2nd	2nd		4th	3rd	1st	1st
Côté	7th	8th	1st	8th	8th		2nd	6th	8th
Brown	8th	6th	6th	7th	7th	2nd		2nd	7th
Rowe	4th	7th	5th	6th	3rd	3rd	1st		6th
Martin	2nd	1st	4th	1st	2nd	6th	5th	5th	

These two figures show that some Justices are more or less likely to find themselves in agreement with their colleagues than others. For example, Abella, Côté and Brown JJ. rank 6th to 8th in 6 instances. On the other hand, Justice Gascon never comes below the 4th position and ranks as his colleagues' most likely partner three times. He thus displays some general level of agreement with his peers. Prior to dealing with our first hypothesis on Côté J., we decided to deal with our sub-hypothesis. Côté and Brown JJ. are each other's second most likely partners. They are also two out of the three Justices who are the most often placed 6th, 7th or 8th. Therefore, although they do not have the Court's highest agreement rate (i.e., 66.7% against 82.8%), nor are they each other's most likely partner, the sub-hypothesis was not completely far-fetched, especially when looking at Côté J.'s other rates of agreement. Indeed, Côté J.'s average rate of agreement with her peers is 52.3%. Justices Côté and Brown's frequency of agreement, however, is far from being as strong as predicted.

We now turn to our first hypothesis regarding Côté J.'s tendency to depart from consensus. As inspired by the literature on female Great Dissenters, we first extracted data on the impact of gender on frequency of agreement. Fascinatingly enough, in the case of Côté J., her female colleagues rank 6th, 7th, and 8th, whereas, in the case of Rowe J., his male

colleagues come in 1st, 2nd, 3rd and 4th positions. Another gender-related finding is that the lowest frequencies of agreement were found between female duos, while the highest frequency of agreement was found in a male duo. On the one hand, Wagner C.J. and Gascon J. have agreed in 82.8% of the cases in which they sat together. In addition, all male Justices except Moldaver J. have the highest frequency of agreement with another male Justice. On the other hand, Abella and Côté JJ. have disagreed in 71.4% of the cases, since their frequency of agreement was 28.6%. This does not only mean that they have 2019's lowest rate of agreement, it also means that their rate is significantly lower than the average frequency of agreement at the Court for that same year (i.e., 60.4%). The second-lowest agreement score was also between a female duo (i.e., Karakatsanis and Côté JJ., who agreed only in 34.3% of the cases when sitting together). This disagreeing duo may not come as a huge surprise since Abella, and Karakatsanis JJ. have a relatively high level of agreement (i.e., 71.8%) and rank respectively 2nd and 3rd most likely partner with each other. The disagreement between Abella and Côté JJ. is reminiscent of some of McCormick's findings on L'Heureux-Dubé and McLachlin JJ. (as she then was).[73] Indeed, although they are both two out of the three Justices who are the most likely to be their colleague's least favourite partner, they are certainly not united in their disagreement with the rest of the Court. Without asserting that gender alone can explain those results, these statistics and their relevance would be worth exploring in further analyses.

To summarize, the results highlighted by the frequency of agreement appear to act, among other things, as evidence of Côté J.'s departure from consensus. She is, with Abella and Brown JJ., more likely to be ranked among her colleagues' least favourite partners (i.e., 6th to 8th), and, when she holds such a position, she can show strong disagreements (in statistics, not necessarily in substance) with her colleagues.

3.3 Majority Authorship

While subsection 3.2 has been inspired by McCormick's "Birds of a Feather," the next section builds on another piece by that same author: "Who Writes: Gender and Judgment Assignment on the Supreme Court

[73] McCormick, "Birds of a Feather", *supra* note 16 at 360-61.

of Canada."[74] In the latter, McCormick analyzed whether female Justices were as likely as their male counterparts to author majority reasons in high-profile cases. Overall, he concluded that female Justices in the Lamer C.J., Dickson C.J. and McLachlin C.J. Court (until 2012) had a deficit of authorship in high-profile cases compared to their male counterparts.[75] To the contrary of "Who Writes," we did not exclusively look at the top ten percent of the most cited decisions for a given period for two reasons. First, the author himself pointed out several methodological caveats.[76] We share at least one with him (i.e., we did not consider Justices who signed but did not author the majority reasons as having contributed to the authorship, although they certainly did). Second, we do not know yet which decisions will be seminal to the development of Canadian law — and/or will be the most cited in years to come. A comparison with McCormick's work would be inaccurate. Consequently, we examined all the 2019 majority opinions and tested our second hypothesis by paying particular attention to Côté J.'s authorship. We also decided to expand our calculation of majority authorship to all Justices as a way to examine whether McCormick's findings on high-profile cases could be extended to 2019 majority authorship.

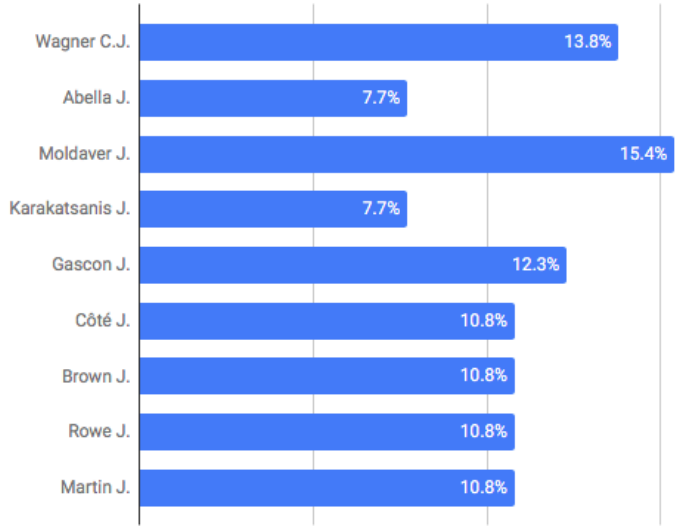
---

74 McCormick, "Who Writes", *supra* note 10.

75 *Ibid*, especially at 618-21.

76 The caveats are the following: citations are not necessarily correlated to the importance of the decision; the result could have been different if the author had looked at more than the top ten percent of decisions per Court; focusing on authorship denies the contribution of concurring Justices; looking at rates per year rather than per panel appearance has an impact on the outcomes; in the first years studied, there was a very small sample of female Justices; and when other female Justices were studied, they were either recently appointed or had served for shorter periods, thus, influencing the results. *Ibid* at 622-26.

Figure 4: Authorship of Majority Reasons per Justice in 2019



When looking at this figure, majority authorship appears to be somewhat balanced. Therefore, the first conclusion we reached from our data is that Côté J.'s authorship of the majority's reasons is not a basis for distinguishing her from her colleagues.[77] She is not a leading figure in this regard. Our second hypothesis is, thus, not valid.

In 2019, Moldaver J. and Wagner C.J., closely followed by Gascon J., wrote the highest percentages of majority opinions. They respectively authored 15.4%, 13.8% and 12.3% of the Court's majority reasons. All other Justices (except Abella and Karakatsanis JJ., who wrote 7.7% of the majority opinions) had a majority authorship rate of 10.8%. Since some decisions are co-authored, we counted the number of decisions one Justice authored and divided it by 65 (total number of majority's authors in 2019). From these calculations, we observed that female Justices had a 7.5% deficit in terms of authorship of majority reasons. To come to this number, we considered that four majority reasons out of nine should be written by a female judge.

---

77 Justices Côté and Brown authored almost half of all dissents (45.6%, or respectively 23.9% and 21.7%). Therefore, we can infer that Côté J. is a leading figure regarding dissent authorship.

In a study on authorship distribution of the most cited cases, McCormick wrote that if two or more Justices volunteer to deliver a judgment, authorship is attributed according to seniority. The Chief Justice is always considered the senior Justice, regardless of the number of years he or she served on the Court's bench.[78] Hence, one explanation for the high percentage of majority reasons written by Wagner C.J. is related to his role as Chief Justice. Justice Moldaver, on his end, is both one of the senior members of the Court and a specialist in criminal law, an area of law that is usually strongly represented in the Court's docket.[79] Since we know that Justices may defer to an expert colleague on a given subject and that authorship can be attributed according to seniority, we suggest that this could explain Moldaver J.'s contribution to majority reasons authorship.[80]

The statistics on Côté J.'s contributions are all the more interesting under this light. When looking exclusively at our version of unanimity (i.e., one that excludes judgments with either concurring or dissenting reasons),[81] the Court rendered 14.0% of their decisions unanimously, half of these being authored by Côté J. She delivered the Court's unanimous judgment in *Fleming*,[82] *Kosoian*,[83] and *Bessette*[84] (the latter in co-authorship

---

78 McCormick, "Who Writes", *supra* note 10, especially at 619 (see also following pages for a detailed account of the Chief Justice's influence). McCormick adds at 619: "For almost all of the last thirty years, the Chief Justice has also been the longest serving member of the Court, so they would win the ties even without this proviso."

79 For instance, in 2017, 43% of the appeals were in criminal law, whereas in 2018 and 2019, appeals in criminal law constituted 50% and 43% of appeals, respectively. "Statistics Report 2017 – 03 Appeals Heard" (last modified 28 February 2018), online: *Supreme Court of Canada* <scc-csc.ca/case-dossier/stat/cat3-eng.aspx#cat3b> [perma.cc/XB6E-PMMS]; "Year in Review: 2018", *supra* note 30; "Year in Review: 2019" (last visited 28 June 2020), online: *Supreme Court of Canada* <scc-csc.ca/review-revue/2019/index-eng.aspx> [perma.cc/N6YH-RULM].

80 Ostberg & Wetstein, *supra* note 27 at 211.

81 See "Literature Review" for further details.

82 *R v Fleming*, 2019 SCC 45 [*Fleming*]. This decision deals with police powers, criminal law and *Charter* rights.

83 *Kosoian v Société de transport de Montréal*, 2019 SCC 59. *Kosoian* is a civil law decision on police liability.

84 *Bessette v British Columbia (Attorney General)*, 2019 SCC 31. This decision discussed whether the accused's right to be tried by a judge speaking the same language, provided it is an official language, extended to certain provincial offences.

with Martin J.). We cannot know for sure why Côté J. was selected as the author of these decisions, especially given that other Justices with more seniority had expertise in the fields of law covered in *Fleming* and *Bessette* (e.g. Moldaver J.) or *Kosoian* (e.g. Wagner C.J. and Gascon J.).[85] One hypothesis is that Côté J. may be prone to volunteer in cases dealing with police law (see *Kosoian* and *Fleming*), but this needs to be tested. Finally, although Côté J.'s frequency of agreement rates shows significant statistical disagreement with some of her colleagues and a high dissenting rate, one should not draw hasty conclusions. These statistics certainly do not mean that she does not collaborate with her colleagues or that she never acts as the voice of the Court.

CONCLUSION

It should be noted that looking only at the numbers is insufficient to truly understand dissensus and consensus at the Supreme Court. A qualitative analysis on both Côté J.'s dissents and her unanimous decisions would draw a better picture of her contributions to the Court. Nevertheless, the numbers alone highlight tendencies that add to the current literature on the Court. Justice Côté dissents, but in 2019 she (1) shared the top of the dissenting chart with Brown J.; (2) dissented in only one of the oral judgments in which she took part; (3) was chosen by the Chief Justice to be the voice of the Court in unanimous decisions more than any other judge; and (4) had a majority authorship rate akin to her colleagues' average. While these observations are certainly worth reflecting upon, this piece helps us, as authors and jurists, to understand more than the role of Côté J. This piece is also intended to act as a plea for a more meticulous description of methods in legal scholarship and careful interpretation of data.

To conclude, Côté J.'s dissensus, her authorship of majority reasons and unanimous decisions, and Brown J.'s dissensus are only some of 2019's features. As laid out in the introduction, 2019 has also been a year of many institutional changes. What about years to come? The composition of the Court will surely change again with the retirements of

---

85 On Côté J.'s areas of expertise, see "The Honourable Suzanne Côté" (last modified 4 March 2015), online: *Supreme Court of Canada* <scc-csc.ca/judges-juges/bio-eng.aspx?id=suzanne-cote> [perma.cc/FCJ8-VB8J].

Abella and Moldaver JJ. Who is going to be the new leader in authorship? Which place will Kasirer J. take?[86] Will Brown J. exhibit more dissensus than Côté J. in years to come, or was his dissenting rate of 2019 only the fruit of the Court's docket? What will be the impact of virtual hearings prompted by COVID-19? Only time will tell, but we are sure that the answers to these questions will be the inspiration for many more pieces on the Supreme Court.

86 On considerations regarding the influence of new appointees, see Alarie & Green, *supra* note 28 at 505-06.

APPENDIX

Figure 5: Global Portrait of Judgments Retained for the Quantitative Analysis

Decision (Reference & Name)	Majority	Concurrence	Dissent
2019 SCC 1 ***Frank***	Wagner C.J. (Moldaver, Karakatsanis and Gascon JJ. concurring)	Rowe J.	Côté and Brown JJ. (*joint dissenting reasons)
2019 SCC 4 ***Metro Vancouver***	Côté J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon and Martin JJ. concurring)		Rowe J. (Brown J. concurring) (*dissenting in part)
2019 SCC 5 ***Orphan Well Association***	Wagner C.J. (Abella, Karakatsanis, Gascon and Brown JJ. concurring)		Côté J. (Moldaver J. concurring)
2019 SCC 6 ***Calnen***	Moldaver J. (Gascon and Rowe JJ. concurring)		Martin J. (*dissenting in part); Karakatsanis J.
2019 SCC 7 ***Bird***	Moldaver J. (Wagner C.J. and Abella, Côté, Brown and Rowe JJ. concurring)	Martin J. (Karakatsanis and Gascon JJ. concurring)	
2019 SCC 10 ***Jarvis***	Wagner C.J. (Abella, Moldaver, Karakatsanis, Gascon and Martin JJ. concurring)	Rowe J. (Côté and Brown JJ. concurring)	

Decision (Reference & Name)	**Majority**	**Concurrence**	**Dissent**
2019 SCC 13 ***Barer***	Gascon J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Rowe and Martin JJ. concurring)	Brown J.	Côté J.
2019 SCC 14 ***Salomon***	Gascon J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring)		Côté J.
2019 SCC 15 ***Morrison***	Moldaver J. (Wagner C.J. and Gascon, Côté, Brown, Rowe and Martin JJ. concurring)	Karakatsanis J.	Abella J. (*dissenting in part)
2019 SCC 18 ***Myers***	Wagner C.J. (Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ. concurring)		
2019 SCC 19 ***TELUS***	Moldaver J. (Gascon, Côté, Brown and Rowe JJ. concurring)		Abella and Karakatsanis JJ. (Wagner C.J. and Martin J. concurring)
2019 SCC 20 ***J.W.***	Abella J. (Wagner C.J. and Karakatsanis J. concurring	Côté J. (Moldaver J. concurring)	Brown J. (Rowe J. concurring)

Decision (Reference & Name)	Majority	Concurrence	Dissent
2019 SCC 22 ***Mills***	Brown J. (Abella and Gascon JJ. concurring)	Karakatsanis J. (Wagner C.J. concurring); Moldaver J.; Martin J.	
2019 SCC 28 ***Modern Concept***	Abella J. (Wagner C.J. and Moldaver, Karakatsanis, Gascon and Martin JJ. concurring)		Côté, Brown and Rowe JJ. (*joint dissenting reasons)
2019 SCC 29 ***Chhina***	Karakatsanis J. (Wagner C.J. and Moldaver, Gascon, Côté and Brown JJ. concurring)		Abella J.
2019 SCC 31 ***Bessette***	Côté and Martin JJ. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown and Rowe JJ. concurring)		
2019 SCC 33 ***Barton***	Moldaver J. (Côté, Brown and Rowe JJ. concurring)		Abella and Karakatsanis JJ. (Wagner C.J. concurring) (*joint reasons dissenting in part)
2019 SCC 34 ***Le***	Brown and Martin JJ. (Karakatsanis J. concurring) (*joint reasons)		Moldaver J. (Wagner C.J. concurring)

Decision (Reference & Name)	**Majority**	**Concurrence**	**Dissent**
2019 SCC 35 ***L'Oratoire St-Joseph***	Brown J. (Abella, Moldaver, Karakatsanis and Martin JJ. concurring)		Gascon J. (Wagner C.J. and Rowe J. concurring) (*dissenting in part); Côté J.
2019 SCC 37 ***1068754 Alberta Ltd.***	Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown and Martin JJ. concurring)		
2019 SCC 38 ***Goldfinch***	Karakatsanis J. (Abella, Gascon and Martin JJ. concurring)	Moldaver J. (Rowe J. concurring)	Brown J.
2019 SCC 39 ***Penunsi***	Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown and Martin JJ. concurring)		
2019 SCC 40 ***Stillman***	Moldaver and Brown JJ. (Wagner C.J. and Abella and Côté JJ. concurring)		Karakatsanis and Rowe JJ. (*joint dissenting reasons)
2019 SCC 41 ***R.V.***	Karakatsanis J. (Wagner C.J. and Abella, Moldaver and Martin JJ. concurring)		Brown and Rowe JJ. (*joint dissenting reasons)
2019 SCC 42 ***Pioneer Corp.***	Brown J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Rowe and Martin JJ. concurring)		Côté J. (*dissenting in part)

Decision (Reference & Name)	Majority	Concurrence	Dissent
2019 SCC 43 ***Keatley***	Abella J. (Moldaver, Karakatsanis and Martin JJ. concurring)	Côté and Brown JJ. (Wagner C.J. concurring) (*joint concurring reasons)	
2019 SCC 44 ***Denis***	Wagner C.J. (Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ. concurring)		Abella J.
2019 SCC 45 ***Fleming***	Côté J. (Wagner C.J. and Abella, Moldaver, Brown, Rowe and Martin JJ. concurring)		
2019 SCC 47 ***Poulin***	Martin J. (Wagner C.J. and Moldaver and Côté JJ. concurring)		Karakatsanis J. (Abella and Brown JJ. concurring)
2019 SCC 49 ***R.S.***	Gascon J. (Wagner C.J. and Moldaver, Karakatsanis and Martin JJ. concurring)	Abella J.	Brown J.
2019 SCC 50 ***Threlfall***	Wagner C.J. and Gascon J. (Abella, Karakatsanis, Rowe and Martin JJ. concurring) (*joint reasons)		Côté and Brown JJ. (Moldaver J. concurring) (*joint dissenting reasons)

Decision (Reference & Name)	Majority	Concurrence	Dissent
2019 SCC 51 ***Rafilovich***	Martin J. (Abella, Karakatsanis, Gascon, Brown and Rowe JJ. concurring)		Moldaver J. (Wagner C.J. and Côté J. concurring) (*dissenting in part)
2019 SCC 54 ***Javanmardi***	Abella J. (Moldaver, Karakatsanis, Côté and Brown JJ. concurring)		Wagner C.J. (Rowe J. concurring)
2019 SCC 55 ***K.J.M.***	Moldaver J. (Wagner C.J. and Gascon, Côté and Rowe JJ. concurring)		Abella and Brown JJ. (Martin J. concurring) (*joint dissenting reasons); Karakatsanis J.
2019 SCC 57 ***Octane Stratégie inc.***	Wagner C.J. and Gascon J. (Abella, Karakatsanis, Rowe and Martin JJ. concurring) (*joint reasons)		Côté and Brown JJ. (Moldaver J. concurring) (*joint dissenting reasons)
2019 SCC 58 ***Desgagnés Transport Inc.***	Gascon, Côté and Rowe JJ. (Moldaver, Karakatsanis and Martin JJ. concurring) (*joint reasons)	Wagner C.J. and Brown J. (Abella J. concurring) (*joint concurring reasons)	
2019 SCC 59 ***Kosoian***	Côté J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ. concurring)		

Decision (Reference & Name)	Majority	Concurrence	Dissent
2019 SCC 60 ***Resolute***	Abella, Moldaver, Karakatsanis and Martin JJ. (*joint reasons)		Côté and Brown JJ. (Rowe J. concurring) (*dissenting in part)
2019 SCC 62 ***Yared***	Rowe J. (Wagner C.J. and Abella, Brown and Martin JJ. concurring)		Côté J. (Karakatsanis J. concurring)
2019 SCC 63 ***B.C. Investment Management Corp.***	Karakatsanis J. (Abella, Moldaver, Brown, Rowe and Martin JJ. concurring)		Wagner C.J. (reasons dissenting in part)
2019 SCC 65 ***Vavilov***	Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ. (*joint reasons)	Abella and Karakatsanis JJ. (*joint concurring reasons)	
2019 SCC 66 ***Bell Canada***	Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.		Abella and Karakatsanis JJ. (*joint dissenting reasons)
2019 SCC 67 ***Canada Post Corp.***	Rowe J. (Wagner C.J. and Moldaver, Karakatsanis, Gascon, Côté and Brown JJ. concurring)		Abella J. (Martin J. concurring)

Notes:

(1) For aesthetic concerns, the cases' names do not appear fully in the figure reproduced. They were always shortened by retaining only

one of the parties' names or part of a party's name (e.g. *Orphan Well Association v. Grant Thornton Ltd.* is reported as *Orphan Well*).

(2) Interestingly, no concurring reasons were identified as "reasons concurring in part" or "reasons concurring in the results." For further information on these types of reasons, see MacDonnell, *supra* note 10 at 60.