

AN EARLY HISTORY OF THE 'BY THE COURT' DECISIONS ON THE SUPREME
COURT OF CANADA

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I would like to dedicate this thesis to my family, but especially to my parents. To my father, Frank, who is my primary source of motivation to which I make constant reference in order to be better. To my mom, Germaine, who provides me with continued support and encouragement. You both deserve more, but, at least for now, this will have to do.

Thank you.

Abstract

The Supreme Court of Canada has developed a practice of releasing some of the most important constitutional decisions as anonymous, which disregards a long standing judicial tradition of acknowledging which judge authored the opinion. Judgments that fit this style have been coined the ‘By the Court’ decisions. Supreme Court scholars have recognized this practice, but there has been no scholarship dedicated to explaining its emergence.

It is widely accepted that this practice emerged on the Supreme Court on our modern court in the 1970s, and it was a borrowed practice from a neighboring country. This thesis uses empirical evidence to demonstrate that the Supreme Court has used the By the Court style for nearly a century before the 1970s. It argues that this practice has organically grown through the Supreme Court of Canada’s own functioning, and identifies critical junctures to explain its evolution.

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Introduction

On December 6th, 1982, the Supreme Court of Canada released its judicial opinion for a case that ended the great patriation debate that dominated Canadian politics for several years. In the Quebec Veto Reference ruling, the Supreme Court rejected Quebec's last-chance constitutional challenge of the 1982 amendments by ruling that Quebec did not possess a veto.¹ The consequence of this decision was a judicial validation of the "new" constitutional amendments, despite Quebec's lonely opposition. Quebec had been seeking confirmation of a constitutional principle that most politicians and academics had taken for granted for decades, but this did not happen. Setting aside the legal implications, this case contained many resonant themes: Canada's multiple identities, and national political culture. Canada would continue to grapple with such elusive concepts, but this important legal decision concluded the constitutional chapter of the debate. Because of the magnitude of this decision, there has been extended academic scholarship dedicated to evaluating its merits and broader ramifications. I will not follow this path, however, since my curiosity was sparked when I observed an unusual feature of this decision.

The presentation style implemented in this judgment is highly mysterious, since the authorship of this opinion is not attributed to any particular justice. Instead, "THE COURT" is cryptically identified as the responsible writer of this judgment. I found it to be strange that the Supreme Court would depart from a tradition of indicating the justice that was the primary author. Most importantly, why would they choose this unusual

¹ *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793

presentation style for such a significant decision? Thus, I further inquired into cases that emulate this style.

My search for such decisions was surprisingly fruitful, as a total of 160 examples have been delivered since 1970. The Supreme Court has chosen to use this packaging for some of the most noteworthy decisions. The Laskin Court: language decisions, *Senate Reference 1*; Dickson Court: *Reference Re Manitoba Language*; Lamer Court: *Reference Re. Quebec Secession*; McLachlin: *Senate Reference 2*, and the recent assisted suicide decision in *Carter*. This practice is very pertinent today, because, under the current McLachlin Court, it has experienced its highest pace yet. The Supreme Court has resorted to this style for some of the most impactful legal decisions (including constitutional cases) that have altered the Canadian legal foundation.² Because of its track record with such decisions, some have suggested that it is reserved exclusively for only the most politically sensitive issues.

But, how did we get here? When did this practice emerge, and why did the Supreme Court resort to this mysterious style? These are the questions my thesis endeavors to solve. Before proceeding any further, however, it is necessary to specify the phenomena to which I will be directing my attention.

A 'By the Court' decision can be defined as a judicial decision that fails to identify which judge assumed the primary role of authorship. It is necessary to emphasize

² André Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review," *Canadian Journal of Political Science / Revue canadienne de science politique* 26, no. 1 (1993): 25-26.

anonymity is the key feature of these decisions. The Supreme Court strives to deliver unanimous judgments; i.e., opinions that do not contain either dissents or concurrences (disagreeing opinions). The absence of minority reasons is not exceptional, since it is achieved in many judgments. In fact, a healthy proportion of all released decisions for the McLachlin are unanimous.³ Consequently, this is not a special or defining characteristic for a unique practice. So, a ‘By the Court’ judgment is a released judgment that fails to inform the reader of the primary author, thereby creating the defining characteristic of anonymity.

The methodology that will form the cornerstone of this framework will be strictly empirical. The law reports that contain every released Supreme Court judgment will be sifted through in search of By the Court judgments. This search will start with the year 1970, and search the early periods on the Supreme Court of Canada. These cases will be assessed from as many angles as possible, but the accumulation of counts and the details of cases will form the main crux of this thesis. These statistics will include: date of publication, origin of previous appeal, panel of judges, word-count, and law-type. The data will be analyzed in search of relevant patterns that contribute to a general understanding as to why these decisions were presented in such a way. This thesis will provide insight into this practice, while attempting to situate the research findings within a broader context of the Supreme Court’s institutional operations.

³ Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013), 122-24.

In search of the origin and particulars surrounding the By the Court decisions on the Supreme Court, I began with a standard literature review—searching academic and legal databases for information regarding these decisions. After exhausting all available resources, it was concluded that no analysis that focuses primarily on the By the Court tradition on the Supreme Court of Canada. There were a few sources, however, that acknowledged in passing such judgments.

In her article, *The Dissenting Opinion: Voice of the Future?*, Justice L'Heureux Dube suggests that the Laskin Court developed the practice, which was borrowed from the Americans.⁴ However, she does not substantiate, nor provide an empirical foundation for her assertion.

Ted Morton also briefly discusses the By the Court decisions on the Supreme Court of Canada, and provides a list of some of the most influential examples of these decisions. He asserts, “It is tempting to speculate that the Supreme Court, aware of the political sensitivity of the issues raised in these cases, may have consciously borrowed the U.S. Supreme Court’s tactic in the School Desegregation case of a “united front.””⁵ However, he does not further expound on the details of this practice.

Andre Bzdera also comments on the Supreme Court of Canada’s use of anonymous judgments. He states, “...over the last 25 years the Court has frequently

⁴ Claire L'Heureux-Dube, "The Dissenting Opinion: Voice of the Future?," *Osgoode Hall Law Journal* 38, no. 3 (2000): 500-01.

⁵ F. L. Morton, ed. *Law, Politics and the Judicial Process in Canada*, 1st ed. (Calgary: University of Calgary Press, 1984).

presented single anonymous opinions in cases concerning federalism disputes and language issues”, and also says it is standard practice on other high courts of federal countries.⁶ After exploring these decisions, it is difficult to verify such a claim, since he does not provide a list of cases or citation to retrieve this information.

These few comments anchor the standard story surrounding the By the Court development on the Supreme Court of Canada. It is generally accepted that the practice originated on the Supreme Court of Canada with the language decisions in 1979 – *Att. Gen. of Quebec v. Blaikie et al.* and *Attorney General of Manitoba v. Forest*.⁷ The Quebec decision was particularly controversial, as it was dealing with Quebec’s infamous Bill 101.⁸ The decision for both of these decisions was attributed to “THE COURT”, thereby departing from the conventional attribution practice. These dates coincide with Laskin’s years as Chief Justice, and he is considered to be responsible for the creation of this practice. From where might he have received the idea? This is a contested part of the story, but it is generally assumed it was borrowed from a neighbouring country (either Britain, U.S., or France), while the United States is the most popular answer.

The inconsistencies in the standard story, as well as the lack of scholarship found in my literature review demonstrate the elusive nature of this practice. I will now discuss the importance of attribution, and why departing from this tradition deserves scholarly

⁶ Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review," 25-26.

⁷ *Att. Gen. of Quebec v Blaikie et al.*, [1979] 2 SCR 1016; *Attorney General of Manitoba v Forest*, [1979] 2 SCR 1032.

⁸ *Att. Gen. of Quebec v Blaikie et al.*, [1979] 2 SCR 1016 at 1035-1036.

attention. The purpose here is not to generate a substantive argument, but to briefly comment on some of the important and controversial aspects of these decisions.

Historically, not every decision reached by a judge was attributed. As Tiersma suggests, the current practice of identifying and attributing judicial opinions to which we are accustomed only became the norm after an evolution occurred.⁹ English judges traditionally orally declared all of their rulings, but they were not typically written down for the legal community.¹⁰ The eventual reporting of judicial decisions was important advancement in this notion of precedent, because it provided written evidence as to the judge's past ruling, thereby providing guidance for how to resolve similar legal cases in the future.¹¹ The law during this period, however, was typically orally declared by judges. Individuals in the courtrooms started to write down how the judges ruled, but it was initially used for educational purposes to familiarize law students with the profession.¹² Because of the lack of authority of these documents, individuals were not as diligent in accurately documenting how judges ruled, which created disputes over the rulings for particular cases. The judges perceived the inaccurate documentation of their rulings as a challenge to their own judicial reputation. To remedy this issue, the judges started to personally write their rulings in the form of judicial opinions, and giving them to the reporting services. Since the start of this legal reporting evolution, however, judges that delivered the opinions, either orally or written, were identified. This linked rulings to their own personal judicial reputations, which helped to ensure cases were resolved in a similar

⁹ Peter Tiersma, *Parchment, Paper, Pixels: Law and Technologies of Communication* (Chicago & London: University of Chicago Press, 2010).

¹⁰ *Ibid.*, 178.

¹¹ *Ibid.*, 180, 84-86.

¹² *Ibid.*, 179.

manner. The attribution of judicial opinions, then, is grounded in a long tradition that we have inherited from England, and it becomes increasingly important because of its roots within the British legal system.

The judge's signature also becomes increasingly important, because of the logistics of our own legal system. Another English-inherited principle that is important in our Canadian legal system is the idea of judicial independence. There are measures in place to ensure judges are insulated from the gambit of the government (and rightly so). If the government were able to tinker with the judiciary if a ruling is unfavorable, it would grossly undercut the court's legitimacy in creating a fair and impartial tribunal for all Canadians. A concomitant effect of having a sturdy, independent judiciary, however, is that there are relatively few accountability links for these appointed judges. Judges are appointed individuals that possess considerable authority, and we grant them considerable latitude in terms of the cases that they hear, and the legal remedies that they produce.¹³ This is even more prominent since the entrenchment of the Charter in 1982. Prior to this date, there were barriers in place that were used to separate legal issues spilling over into the political realm.¹⁴ Judges were restricted to the legal realm, and the vehicle that restrained extension beyond their appropriate duties was formalism – a philosophical approach that outlined the appropriate behaviors and duties of judges.¹⁵ Although there were no overt checks on judges, this conception of judicial expectations was effective in

¹³ F.L. Morton & Rainer Knopff, *The Charter Revolution & the Court Party* (Peterborough, Ont.: Broadview Press, 2000).

¹⁴ Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto, Buffalo, London: University of Toronto Press, 2010), 119-20. P. 119-120

¹⁵ *Ibid*, p. 119-120

promoting restraint because it was learned by way of legal education and understanding of our broader legal system. This can be perceived as somewhat of an internally created ‘check.’ However, the entrenchment of the Charter largely demolished this barrier, as judges now enjoy an increase in power. It seems rather difficult to argue that the recent decisions of the Supreme Court do not constantly spill over and influence the policy realm. Further, because judges’ rulings constrain the actions of elected officials, many argue that sovereignty is being transferred away from elected officials into the hands of appointed justices.¹⁶ There have been some attempts at reforms to reconcile this augmentation in power to ensure it aligns with our modern notions of democracy. For example, after a judge has been selected to fill a vacant position on the Supreme Court of Canada, a hearing is held in which he/she is questioned by a committee, including Members of Parliament. Nonetheless, it is this heightened power which creates a need for a similar degree of accompanied accountability. And, it is for this reason that the traditional accountability links, such as the judicial signature, become increasingly relevant within the broader dialogue.

The historical tradition surrounding attribution, as well as the lack of accountability imposed on judges justifies further investigating into anonymity usage on the Supreme Court of Canada. These decisions choose not to inform the reader of the justice that authored the opinion; therefore, it can be argued that this practice severely violates a long-standing judicial tradition found within our common law legal system. It is for these reasons this phenomenon necessitates further analytical attention.

¹⁶ Knopff, *The Charter Revolution & the Court Party*.

My literature review did not prove as fruitful as initially anticipated, since it did not provide evidence in support of the standard story. In light of my lack of findings, I was steered towards a variant – my supervisor, Dr. Peter McCormick, emailed a number of academics inquiring more specifically about the origins of the practice, and ‘why’ the Supreme Court chose to adopt it. We received various responses when we asked what was the motivation for the Supreme Court developing this anonymous practice, which confirmed that these decisions have not been thoroughly explored. We were presented with three origin-theories: 1) A Sharp Retort, 2) The Captor’s Influence, 3) The Envious Neighbour. Each theory will be laid-out, followed by the reasons why it does not provide a satisfactory explanation.

1) The Sharp Retort

An academic recounted to us an interview he had with a Supreme Court of Canada justice. The justice informed him that this practice was invented as a strategy by the Supreme Court of Canada to ensure compliance from a particularly recalcitrant lower court.

This theory provides a grounded explanation for the Supreme Court taking a totally united-front position. If a lower court continually disobeyed the Supreme Court’s established precedent, the anonymous feature might be unique and bold enough to provide the impetus for compliance. This circumstance fits the general idea behind the implementation of this device. This theory becomes increasingly important, because we receive first-hand knowledge, from the practitioners’ perspective, of the given circumstances that warrant a BTC decision. This is not to say that every example follows

this exact purpose, but it gives us a context in which this device was invented. Further, it provides insight as to how the judges perceive and justify its implementation. But, this proposed theory contains flaws, as the explanation does not factually fit the BTC examples.

In the 1979 language decisions, the Supreme Court affirmed the court of appeals' rulings, and dismissed the appeal. The Supreme Court made positive reference to both the original trial judge's decision, and the appeal court decision in *Blaikie* to support their own reasoning for their reached decision. Many of the other modern BTC decisions after the language decisions do not contain any overtly critical statements projected at lower courts. There are a number of decisions where the Supreme Court strongly reprimanded a lower court, but they were not By the Court, e.g. *R v. Ewanchuk, Newfoundland (Treasury Board) v. N.A.P.E. 2004*. It is interesting to ponder what grave impropriety a lower court might have committed in order to earn a brand-new judgment delivery style. But this just blurs the point; the critical thing is that these By the Court decisions do not fit this pattern.

The evidence goes contrary to this theory; it does not provide a satisfactory explanation.

2) Captor's Influence

Our second theory is the Captor's influence. The "captor" references the British, and the extent to which it has influenced our Canadian Supreme Court, as well as our legal system more generally. This theory proposes that the Supreme Court inherited the BTC practice from the British. This seems like the logical theory given the influence of

the British on the Canadian judiciary and politics in general. The Supreme Court especially has been influenced by the practices of the British. The Judicial Committee of the Privy Council (JCPC) was the final court of appeal for the Supreme Court until 1949.¹⁷ Even after it was Supreme, the Supreme Court of Canada continued to frequently rely on British authorities with a robust citation trail.¹⁸ It was only after the influence of certain justices such as Bora Laskin that the Supreme Court began to move away from treating JCPC precedents as binding. Although it was not strictly a court, the J.C.P.C. operated in a similar manner.¹⁹ The Privy Council used one-judgment rulings – it never published minority opinions, either dissents or concurrences, until some time after the end of Canadian appeals. Further, during the 19th century these judgments were delivered anonymously, matching the important feature of the By the Court judgments.

This theory, however, contains problems. In the 19th century, its decisions were often anonymous; in the 20th century, however, they were attributed to (and presumably written by) the President of the board (or, the senior member of the panel). Why would the Supreme Court follow the 19th century format over the 20th century format if they were emulating the Privy Council? Also against this theory, no other high appellate court uses an anonymous presentation style; they all deliver attributed reasons. It would be even more interesting for the Supreme Court to adopt a British practice while Laskin was Chief

¹⁷ Peter McCormick, *Canada's Courts: A Social Scientist's Ground-Breaking Account of the Canadian Judicial System* (Toronto: James Lorimer & Company, 1994).

¹⁸ *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company Ltd., 2000), 23-24.

¹⁹ *Canada's Courts: A Social Scientist's Ground-Breaking Account of the Canadian Judicial System*, 73-74.

Justice, since he was strongly critical of British influence – a discussion in which Laskin was already involved.

In 1953, there was discussion regarding whether or not the Supreme Court should adopt a “one-judgment rule” format, similar to the format used by the Judicial Committee of the Privy Council.²⁰ This style would have eliminated all disagreeing minority opinions, and only the prevailing majority opinion would be publicized. The Canadian Bar Association decided to further explore the issue and facilitated a forum for a more in-depth debate. Although there were some proponents, there was one young lawyer in particular that strongly opposed the change. Mr. Bora Laskin presented a persuasive argument against the adoption of a single judgment since eliminating minority reasons would, in his opinion, violate basic issues such as “freedom of expression and individual responsibility.”²¹ It would also militate against our current notion of the law since there is more than one way to resolve a legal dispute²². After thorough debate, it was ruled that the current format would remain as the status quo position; the conventional delivery-style was left intact.

The Captor’s Influence theory, therefore, does not provide a satisfactory explanation for the origins of the By the Court device.

3) The Envious Neighbour

²⁰ Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto, Buffalo, London: University of Toronto Press, 2013), 187-88.

²¹ *Ibid*, p. 120

²² *Ibid*, p. 121

This theory asserts that the Supreme Court of Canada borrowed the practice from the United States Supreme Court. This theory seems quite attractive for a few reasons. Two of the more prominent members of the Laskin court – Estey and Laskin himself – attended Law school in the U.S. at Harvard.²³ There were a few controversial per curiam²⁴ decisions that were delivered during Laskin’s time of enrollment.²⁵ Further evidence for this theory: it was the period of the Warren Court, and its high profile in the 1950s and 1960s. During the late 1970s, the Supreme Court was just starting to function independently from Britain and pioneering uniquely Canadian legal developments.

There are a number of points against this theory, however. The ‘per curiam’ practice that the USSC has employed is rather different than our modern By the Court judgments. The USSC has not used this judgment-structure in legally meaningful cases like in Canada, with the exception of *Bush v. Gore* in 2000.²⁶ The opposition and criticism of its usage in this decision demonstrates that it typically plays an alternative purpose – used for decisions of a pressing-nature that need to be resolved quickly, instead of important constitutional decisions.²⁷ Our modern Canadian court, alternatively, has a healthy track record of using the By the Court anonymous style for cases that qualify as some of the most important constitutional decisions, e.g. Quebec Veto decision, *Attorney General of Quebec v. Blaikie*, and *Reference re Secession of Quebec*.

²³ Girard, *Bora Laskin: Bringing Law to Life*, 80-82.

²⁴ “Per Curiam” is the anonymous delivery practice that has been adopted by the USSC. It will later be argued that this practice is distinguished from our Canadian BTC tradition.

²⁵ Ira P. Robbins, "Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions," *Tulane Law Review* 86, no. 6 (2012): 1201.

²⁶ Michael C. Gizzi & Stephen L. Wasby, "Per Curiams Revisited: Assessing the Unsigned Opinion," *Judicature* 96, no. 3 (2012): 112-13.

²⁷ *Ibid.*

Although the proximity to the United States has been influential in many areas of Canadian life, the Supreme Court has not followed its direction closely or been influenced by the USSC.²⁸ Instead, we were much more concerned with English practices. Our court has been characterized as the captive court for refusing to break-free from British influence, and only did so well into the 1970s with the Laskin court. Citation patterns and other adopted British practices lend evidence to the major influence of the British, and not American.²⁹

Also against this theory: in the process of inquiring about the origin-story of the By the Court device, Dr. McCormick emailed the law clerks serving in 1979 of both Estey and Laskin. Both of them so graciously shared with us that they were confident that their justices were not responsible for the introduction of the By the Court decisions, since they do not remember any mentioning of the sort. This does not completely obviate the fact that Laskin and Estey attended law school in the states, but the clerks could hardly have failed to notice such an innovation.

As a result of the counter-arguments, the Envious Neighbor theory is disqualified from being a credible origin story.

Where to next? I embarked on my journey, and started searching for the birth-story of the By the Court tradition. I was searching for the reason ‘why’ this practice

²⁸ McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada*, 24-25.

²⁹ *Canada's Courts: A Social Scientist's Ground-Breaking Account of the Canadian Judicial System*.

entered the Supreme Court's repertoire during the Laskin period. The standard story states that this practice was borrowed from a neighboring country. However, no satisfactory explanation was found. It was only after searching through the Supreme Court of Canada's own judgments that the inaccuracy of these assumptions appeared. The rest of this thesis focuses on the journey that this device experienced, and traces its usage by identifying critical episodes in the Supreme Court's history.

Part 1 of this thesis focuses on the early periods of the Supreme Court of Canada's history, starting with Chapter 1, which focuses on the true origin-story, and the reasons why the Supreme Court adopted this anonymous practice. Chapter 1 uses empirical evidence to demonstrate that the Supreme Court of Canada has been using anonymity for decades prior to its usage on the modern court. Compared with the modern court's usage, however, these cases are minor in terms of importance. Nevertheless, this practice was originally developed as a remedy for efficiency problems that plagued the court during its youthful years. The justices during this early period were inundated, and unable to fully handle the caseload. It got to the point that the justices were unable to write a full-set of reasons for all cases that reached the Supreme Court. The By the Court judgments were invented in response to this challenge. If the justices were unable to write complete reasons for a decision, then an anonymous summarized version was used as a substitute. The purpose the device served during this period, then, was not to package judicial reasons, but it was used as a tool to assist with institutional inefficiencies. It is important to note that the device was not used by the justices at all; the Registrar and reporting staff invented the device. Chapter 1 further details the trajectory of the device during this very early period, as well as discussing the purpose it served. Chapter 2

touches on archival research that was conducted to further understand the BTC practice. More specifically, it details how a case comes before the court, and the processes that a case undergoes before being published for the legal community to observe. The archives revealed that the By the Court decision was no longer exclusively used as a substitute when the justices were unable to write reasons for a case; it was given some additional -- albeit, related -- responsibilities. The BTC The BTC device was still used as a substitute for certain cases -- that is to say, summarized versions of cases would appear in the reports that were anonymous. But, the BTC during this period were not used only when the justices were unable to write opinions. The archives revealed just the opposite for many of the BTC cases: the judges each produced a complete set of reasons for the case, but they were simply not published for the legal community in the reporting services. In other words, the process of preparing judicial decisions for publication services is what converted these cases into BTC. Once again, though, it is important to note that the registrar and personnel in charge of the publication process were responsible for implementing the BTC device; it remained within the procedural realm, and the justices did not determine the application of the BTC format. In addition to the purpose of assisting the justices with writing reasons in a timely fashion (as discussed in chapter 1), the BTC was also used for the process of preparing cases for publication in the reporting services for the legal community. The last chapter of part 1 (Chapter 3) provides a statistical analysis of the basic features of all of the BTC decisions that were used during this period in search of overarching similarities and patterns for the cases that receive the BTC stamp.

Part 2 marks a major shift for the BTC device. All chapters in part 1 state that the BTC device was a tool that was used by the registrar in order to assist with institutional inefficiencies. However, in the 1920s, the archives reveal that the justices start taking control over the device, and it starts to be used as a tool to package judicial reasons. This marks a significant change for the BTC device, as its general purpose is changed from simply being used by the Registrar (procedural realm), and started to being used conscientiously on behalf the entire panel of justices (judicial realm). This shift in purpose is apparent in the law reports, because the BTC examples (the vast majority) are presented differently after this period. Chapter 3 explores these decisions that are published differently, and analyzes the basic features of these cases. A basic statistical analysis is conducted in order to understand which types of cases receive the BTC stamp. The accumulated averages of these cases are then compared with the findings of the earlier BTC examples. Although there are some differences when comparing the two different BTC styles, it is argued that the BTC device, regardless if it was used by the registrar or the judges, was used as a processing tool to help deal with high caseloads, or times when the justices were experiencing arduous workloads. This argument is substantiated by making reference to the Lexum database, as well as commentary on caseload provided by Snell & Vaughn. The By the Court device, then, was used as a processing tool for heavy workloads during these early periods on the court. However, it was reserved for more minor cases that did not contain a high level of legal complexities, typically dealing with procedural issues or private law matters. However, there are certain exceptions that use the BTC style for more meaningful decisions. Chapter 5 describes these decisions, and explores how the judges influenced the form and prominence of this

device. Further, it also used archival evidence to surmise which justices were likely responsible for changing and promoting the device to its more reputable position.

The BTC device from the 1880s to 1960s experienced many changes. Nevertheless, the example during this period do not reflect the Supreme Court's modern usage. For example, these cases are not comparable in terms of significance of cases such as Quebec Secession, and Senate Reference. The last part of the thesis focuses on the final elevation that occurred in order for the device to mature in its modern form of being applied to constitutional, influential cases. Chapter 6 details a particular case that presented an overwhelming challenge to the court's prestige and credibility. The public reaction to a controversial court decision made this a volatile decision. The external pressures compelled the Supreme Court to respond, and they did so by issuing the first anonymous majority opinion in a high-profile case. This marks the start of the tradition of applying the BTC organizational style for some of the most impactful cases that have come before the court in the modern era. The concluding chapter of this thesis provides a summary of the arguments that have been presented, as well as a general overview of the journey that the BTC device has experienced. It also discusses how the BTC history has been influenced and changed on our modern courts. Finally, there is a general argument presented as to whether or not our Supreme Court should continue using this unique organizational style.

Before delving into the main arguments of this thesis, however, one essential clarification is required. It is necessary to highlight that the Canadian By the Court

practice is distinct from our Canadian per curiam practice – By the Court and per curiam are not synonymous. Using these labels interchangeably blurs two different ideas.

The By the Court is a term used to describe a delivery style that is used to present judgments to the public. Another example (albeit an opposite one) of a presentation style is seriatim. These labels describe the form a judgment assumes as it appears when being published in the reporting services. The per curiam practice on the Supreme Court of Canada is very different. It is used as an element within the headnotes to make judgments more readable. It summarizes the main findings of law that grounds the decision reached by the justices. If you type “per curiam” into the Lexum database, there will be approximately 150 examples of the Supreme Court of Canada using it in this manner. We have inherited the headnotes “per curiam” usage from the British who also use it in a similar capacity.³⁰

These two ideas are likely confused for a few reasons. Firstly, the United States calls its anonymous delivery style “per curiam.” As I have previously suggested, however, we have not borrowed this practice from the US; our practice is distinct for reasons that have been previously discussed. It is necessary to stress, however, that this is the exception rather than the rule.³¹ Our Supreme Court has usually elected to apply the institutional label of “THE COURT” to attain anonymity for the By the Court judgments.

³⁰ Sixth Form Law, http://sixthformlaw.info/03_dictionary/dict_p.htm.

³¹ Only one example uses “Per Curiam” as a label for establishing anonymity: *Smith v Stevenson*, [1942] 3 DLR 604. However, this case was reported in the Dominion Law Reports. The archives revealed that the justices used the label “THE COURT” when submitting the judgment for publication to the Registrar (Archive file: 6964, Supreme Court of Canada Legal Archives).

Since we can now separate our Canadian By the Court and per curiam practices, I will direct my attention towards my research findings, starting with the origin-story of the By the Court practice on the Supreme Court of Canada.

Chapter 1 – The Origins of the BTC Tradition: The “Audible”

The Supreme Court of Canada has been issuing anonymous judgments for nearly a century before the 1979 language decisions. Prior to 1979, the Supreme Court has used anonymity in a total of 338 examples, with the earliest occurring in 1886. Not all of these decisions, however, emulate our modern examples. In fact, the delivery system that the Supreme Court engaged created many very short decisions that use an institutional label to conceal authorship. These examples are published as being anonymous, and therefore qualify as By the Court. In subsequent chapters, these decisions will be divided up according to the Supreme Court’s purpose for implementation, and according to their presentation styles found in the reporting services. It is for now sufficient to acknowledge that issuing anonymous judgments is not a recent phenomenon; the By the Court decisions occurred long before our modern court. These early decisions were very much shorter compared with constitutional cases (this is a topic that will be further explored in other chapters). Please see figure 1.1 for a yearly breakdown of these decisions.

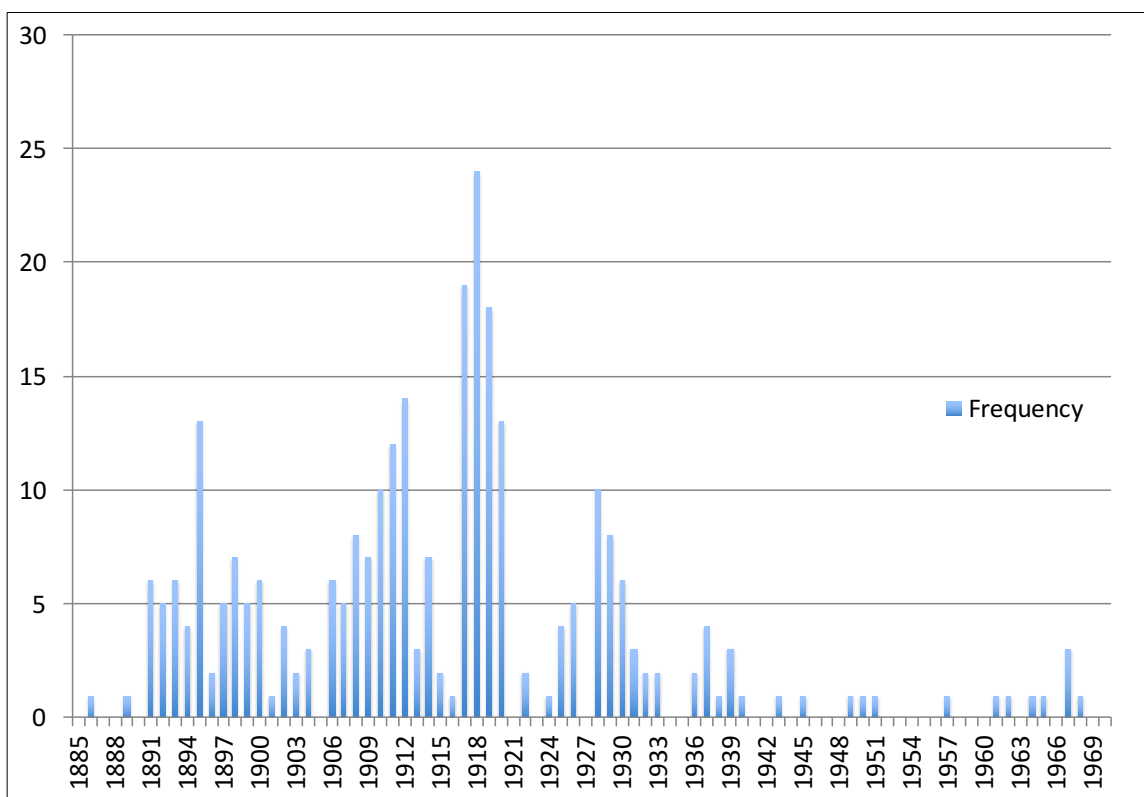


Figure 1.1 – Frequency of all ‘By the Court’ Judgments, 1885-1970

The By the Court judgments, as displayed in graph 1.1, did not play a negligible role in the Supreme Court of Canada’s history. The By the Court device got off to a slow-start, but after its inception in 1886, it was a relevant practice for the next 75 years—before it somewhat tapered off in the late 1940s. There is remarkable fluctuation in the frequency with which the Supreme Court used the device – from 24 to many separate years failing to register a single issuance. Notwithstanding, these numbers prove that the By the Court device was maintained over a long period of time on the court—to such an extent that it can be described as being firmly entrenched within the practices and operations of the court. These cases will be broken down according to their features in later chapters. For the current purpose of finding the origin-story for why this style was

introduced on the court, it is sufficient to display the overall count. In light of these newly found examples, the time periods of the earliest examples were identified in order to answer the ‘why’ question: why did this practice emerge on the Supreme Court of Canada during its youthful period? In search of a satisfactory explanation, the earliest BTC occurrences while using Snell & Vaughn’s *History of the Supreme Court* in order to help provide the broader context within which the practice emerged and evolved.

The By the Court device during this period was not used as a strategy to package judicial reasons; it was used in a very different manner. The By the Court device was used to assist the judge’s with their burdensome caseloads, and it was used by the Registrar and the supporting personnel that was in charge of maintaining and publishing judicial decisions for the legal community. In other words, the judges were not even involved in determining whether or not a BTC style was employed, and it was the Registrar’s discretion that determined the number of BTC examples. Snell and Vaughn’s work provide evidence to reach this conclusion, and it now necessary to turn to the early years of the court and why the adoption of the BTC organizational style was necessary.

Snell & Vaughn track the practices of the Supreme Court Reports while identifying different time periods according to Chief Justiceships. Much of the general idea of the book – especially discussion of the court’s younger years - seeks to explain the relatively meager influence the institution had on the broader Canadian political system, resulting in many Canadians perceiving this national institution rather negatively.³² The

³² Snell & Vaughn, *The Supreme Court of Canada: History of the Institution* (Toronto, Buffalo, London: University of Toronto Press, 1985).

discussion surrounding the Supreme Court Reports follows this general pattern, as much of the early commentary takes the form of criticism towards the reporting service. Understandably and perhaps expectedly, criticism was especially prevalent throughout the court's earliest years, as Snell & Vaughn expound on the low quality of the reports. The commentary does suggest that the reports gradually improved as the personnel garnered experience, but there seems to be one compelling, persisting problem that is highlighted: the tardiness with which a Supreme Court of Canada judgment is published for the legal community.³³

Snell & Vaughn outline the complicated process for a typical case before it was submitted to the Registrar for publication:

First, it was necessary to get the justice's notes and have them written up by a secretary; then the notes for each case had to be compiled; the copy was then sent to the printer; a gallery proof was struck and proofread; and finally the reports were printed.³⁴

This process was not likely to be the most efficient during this period, but there was one major obstacle that further compounded the effectiveness of the process: Justices were rather reticent in delivering their written reasons for certain decisions in a timely fashion, as the Registrars place much of the blame on the justices for delays in publication.³⁵ Many of the justices could not handle the workload, and were unable to write a complete set of reasons for every case. These delays were so common that the

³³ Ibid., 36-38, 110.

³⁴ Ibid., 37.

³⁵ Ibid., 37, 110-11.

Registrar had to frequently seek out justices in order to remind them of missing submissions.³⁶ These issues created a disconnect: when the court delivered a judgment, and when the legal community was informed of the ruling. The Supreme Court adopted two remedies to counteract the issue. In 1881, firstly, to expedite the process, the reporter of the Supreme Court of Canada was granted authorization by the Minister of Justice to directly send to the large law journals a copy of the written notes produced from the judicial hearing.³⁷ The journal could produce a summary version of the decision, and release it to its subscribers and the broader legal community. This would be a much quicker way of informing the lower courts, while the Supreme Court could follow up with its official publication. The second remedy to the tardiness issue was not a specific act, but a broader idea: the Canadian government eventually allocated funds to hire additional personnel to assist in the publication process. In 1885, an assistant reporter was added to the staff to assist in reporting duties. In 1893, a stenographer was hired to personally provide assistance to Justice Strong in order to get caught-up.³⁸

However, these remedies do not explain the development of the BTC practice. The By the Court judgments do not seem to conform to this “shortcut” route. Why would the lead law journals be concerned with cases that are considered to be routine? The suspense surrounding a case would not likely surface unless the case would likely influence Canadian law – the By the Court judgments cannot be characterized as such. Also, supplementing the workload of the Supreme Court staff would likely alleviate the burden, but it does not enhance our understanding of the By the Court practice. The continued

³⁶ Ibid., 37.

³⁷ Ibid., 37-38.

³⁸ Ibid., 63.

search for a solution to publication tardiness demonstrates that this was an issue for the Supreme Court. Since none of the applied methods were helpful, however, the Supreme Court adopted an alternative solution. An agreement was reached with the justice department that the publication of judgments should resume even if the judges did not submit their reasons.³⁹ Snell & Vaughn use the year 1896 to demonstrate the point: "...in four cases the result alone was given, with no reasons and no indication of the justices' votes."⁴⁰ It would seem very difficult to describe the voting of the justices, and especially difficult to attribute even a summary version to a justice without any written reasons. In lieu of the typical judicial reasons, then, a convenient delivery-style was needed in order to convey the basic information of cases to the legal community.

Coincidentally in the year 1896, the By the Court decisions experienced increased prevalence with its highest spike during the early period of the court – 13. Snell & Vaughn do not provide a list of the specific cases to which they were referring, nor do they comment on the anonymity feature displayed in the publicized version of these cases. Those in charge of publishing opinions scrambled to find a replacement when there were no judicial reasons to include; if you will, they needed to call an "audible." This audible was simply an adaptation technique to ensure the continuance of publication of judicial decisions. This was the void that the By the Court decisions filled. This also clarifies and provides context as to why anonymity was necessary.

³⁹ Ibid.

⁴⁰ Ibid., 74.

The earliest By the Court examples support the audible story for the development of the BTC examples. The first By the court decision occurred in 1886, in the case of *Martley v. Carson*.⁴¹ Similar to most released opinions, there is a brief summary of the relevant facts that pertain to the case. Similar to other decisions during this period, we would expect the court to adhere to the seriatim format for delivering opinions. For judgments that follow the seriatim format, each justice is expected to produce their own individual interpretation and reasoning for a decision with little or no deliberation with the other judges. With seriatim style, then, we expect long (and often redundant) judicial reasons, which may very well be couched in legally verbose terminology. However, there are no justice reasons attached at all, but only: “By the court: Motion refused with costs.”⁴² The audible story provides an explanation for the lackluster description of this decision. The reader is not able to access the exact reasons of the justices for the decisions, nor are they able to determine the justice breakdown. The first decision is congruent with our audible story, and, as a substitute for conventional attributed reasons from each justice, a summarized version was presented with an anonymous, “By the Court” label. This case is the shortest By the Court decision that the Supreme Court issued during this early period, but the following examples also have very limited word-counts.

For the period from 1886-1905, there are a total of 71 BTC examples. The lowest word-count for these decisions was the earliest case (*Martley v. Carson*) with a total 4 words, while the highest point in the data was 128 words - *The King v. Dominion*

⁴¹ *Martley v Carson*, [1886] 13 SCR 439

⁴² *Martley v Carson*, [1886] 13 SCR 439 at 440

*Building Corp. Ltd.*⁴³ The overall average for these cases was 38.9 words.⁴⁴ Such short judgments suggest that the justices did not take the time to write extended reasons. Only certain vague legal points were presented in an effort to very briefly touch on some of the issues found within the case. Nevertheless, these unimpressive word counts for these decisions helps to verify that full-length judicial reasons were absent for these cases, and the BTC style acted as a substitute.

The By the Court tradition on the Supreme Court of Canada was not invented on our modern court; there are hundreds of decisions that occurred during the court's youthful years. During this time period, the Supreme Court likely experienced many obstacles that compelled adaptation. One such difficulty was a kink found within the publication-system for the Supreme Court judgments to the broader legal community. The justices had a difficult time coping with their workloads, causing delays in submitting their reasons to the Registrar for publication. The By the Court judgments emerged as a remedy to this problem. For cases that the publication-personnel did not receive written reasons from the justices, they were forced to resume with the publication of Supreme Court rulings, and instead used as a substitute a summarized version detailing how the court ruled. There is no evidence to suggest that the judges were involved or determined the BTC device. Alternatively, the personnel in charge of

⁴³ *The King v Dominion Building Corp. Ltd (1932)*, 2 DLR 810

⁴⁴ There are two cases dealing with similar legal issues that were delivered the same day (companion cases). Both cases had an extended dissenting reasons – *Baker v La Société de Construction Métropolitaine*, [1893] 22 SCR 364; *Cowen v Evans / Mitchell v Trenholme / Mills v Limoges*, [1893] 22 SCR 331. I will address these two cases in subsequent chapters; they are the only two cases with attached extended judicial reasons during this early period. As a result, I omitted them from the overall word-count average for this period.

the publication process – the Registrar and likely his supporting staff – are largely responsible for the creation of this device. It was not a strategy to display a collective front to the legal community in difficult cases; it was not invented by the justices to package judicial reasons. This newly invented tool had a different task – it was applied internally to a struggle that hindered the court’s ability to function at its optimal pace.

For the years immediately following the first ever BTC usage, the court continued to use this device. The earliest examples were very short, and simply used to inform the legal community of the court’s final decision for a case. But, there were some cases that exceeded the 100-word mark, suggesting that the Supreme Court started to slightly add-on to only the final ruling, and clarify very minor points of law that were relevant for the court to make its decision. These cases still align with the audible story -- without having the written justice reasons or if there were a few justices that failed to produce their individual reasons, the Registrar would resort to the reporter’s version to ascertain only the most basic parts of the legal ruling. In the next episode of the By the Court story, the Registrar still controls the device, but the archives at the Supreme Court of Canada law library reveal that the device was granted additional responsibilities.

Chapter 2 – From the Archives to the Report

Chapter 1 explains why the By the Court practice was introduced on the Supreme Court of Canada. The judges were unable to keep up with the cumbersome caseloads at during the early periods on the court. This caused major delays in the publication process, and the speed with which the Supreme Court's rulings would be disseminated to the legal community. It was necessary to adapt to resolve this matter, and the BTC presentation style was developed as a substitute in order to resume the publication of decisions, regardless of these delays. The audible story explains the lack of information that accompanies the early By the Court decisions, and why the word-counts were so low for the earliest periods (1886-1900s). This was because these cases were published in the reporting services in a similar manner; the court's ruling was summarized using a 3rd perspective style (a topic that will be further discussed in the later chapters). However, the justices were not involved in applying the device during the earliest years on the Supreme Court; the audible story points to the Registrar and the surrounding individuals that maintain the publication process that invented and dictated the application during these early periods. If the Registrar converts these cases to BTC, this process occurs behind the scenes before the cases are published in the law reports; simply observing reported decisions would not assist in our understanding of this practice. To test this theory and to better understand the BTC examples, I was fortunate enough to be granted access to the legal archives at the Supreme Court of Canada.

The legal archives contained many legal documents besides the final judgment that was published in the law reports – previous court rulings, submitted legal documents and factums, handwritten notes. In short, the archives allowed me to review the process

that a case underwent before being published for the legal community in the reporting services. As a result, it equipped me to track the processes that a case would experience, and compare it to how these decisions were published for the legal community. This is important for understanding the general character and purpose behind the BTC decisions, but it also informs us more generally of how the institutional procedures of the Supreme Court.

This chapter will focus on the archival research conducted for this project, and will firstly present archival findings for the BTC decisions. It will be argued that the By the Court decisions were not considered to be unusual, since they were treated similar to any typical decision. These decisions were produced as By the Court, because of the general procedure for preparing decisions for the law reports. Once again, it is the Registrar that is responsible for determining whether or not a decision becomes By the Court. However, the archives revealed that the only reason was not simply because the judge's could not write decisions quick enough, similar to the audible story stated in chapter 1. After the earliest periods of the Supreme Court, the BTC device received additional (albeit related) responsibilities.

The audible story suggests that the BTC device was invented as a substitute when the judge's were not able to write judicial reasons. This helped to place the early BTC decisions in an appropriate context. They were summarized versions of cases from a 3rd person perspective. All of the BTC decisions were published in a similar manner with some subtle variations. Since the audible story implies that the Registrar had insufficient

reasons from the judges, I expected that the BTC case-file would not contain much. However, the archives revealed much more information than anticipated.

In the case-files retrieved at the archives, many of the 'By the Court' decisions took the form similar of the conventional organizational structure: each justice produced their own individual set of reasons, which were couched in formal legal terms. These judgments followed the convention of being attributed to an individual justice. There were also attached dissenting opinions that also identified justice-authorship. In summary, the archives displayed cases that largely reflected a typical decision that the Supreme Court released during the time period, with variations as to the general lengths of the opinions and level of disagreement between the justices. That is to say, most of the By the Court decisions were not By the court decisions at all; these decisions were simply omitted from the documenting services. Please view figure 2.1.

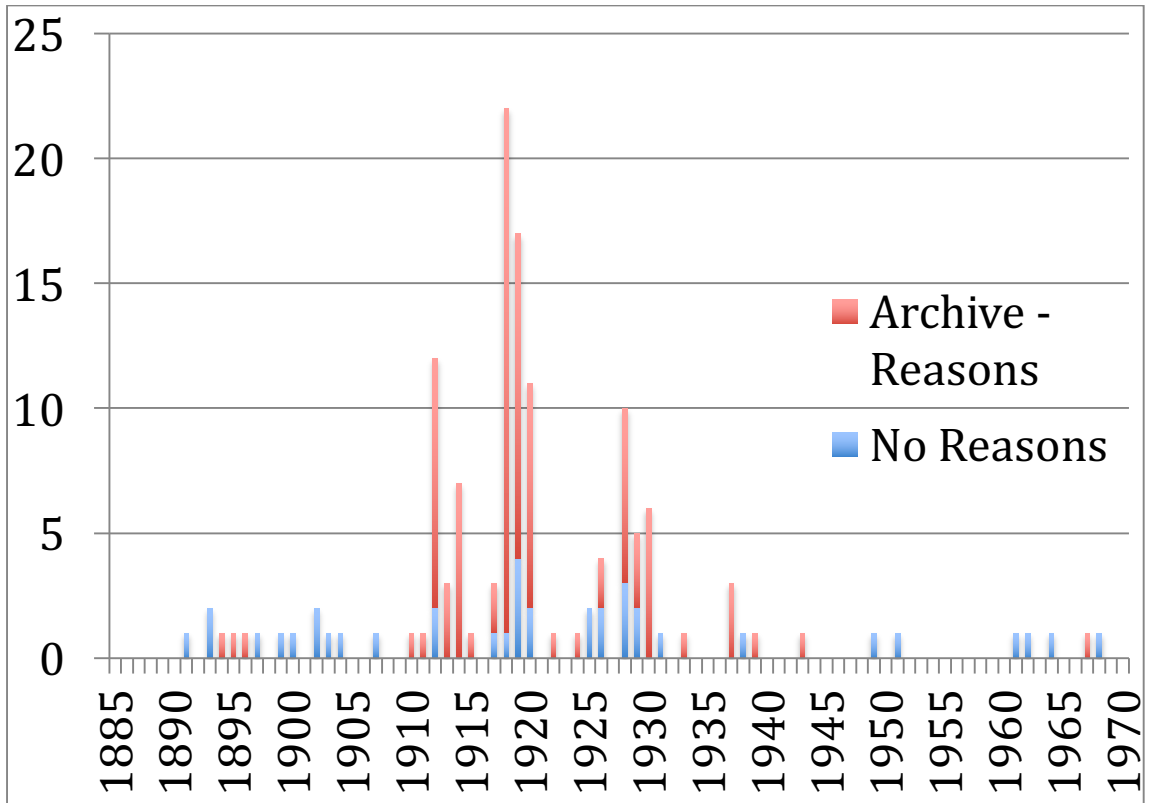


Figure 2.1 – Attributed Reasons found in Archives

The presence of attributed reasons in the archives militates against the original reason for using By the Court judgments. As discussed in the previous chapter, it was used to expedite the publication process when the justices were unable to write full-sets of reasons. These cases in the archives, however, did not lack information – many of them followed the typical seriatim style with each justice writing their own individual opinion. Did the purpose of using the By the Court device change? Why were these reasons not published in the reports?

The archives revealed that the BTC’s role expanded. It originated as a means of dealing with instances that there was not enough information (justice reasons) to publish.

The reverse is also true; the device took-on additional responsibilities. It was applied to cases that contained multiple judicial opinions (from each judge on a panel), or cases that had an abundance of information. Those decisions that were excluded from the reporting services, then, were substituted with a shortened, summarized version that took the form of a BTC decision. As a result, it morphed into a device to help prepare cases for publication in the reporting services, as well as to help select which cases that are deserving enough to be reported for the legal community. Although the device received a promotion for its duties, it is important to note that it still used by the Registrar. It still remained an institutional tool used for adapting to pressing concerns, but it was controlled and used behind the scenes by those who monitored and controlled the reporting process. To clarify, the justices still did not tinker or become involved with the device, as it remained exclusively within the procedural realm. To understand these additional responsibilities and how they vary compared with the audible story, it is necessary to review the system the Supreme Court engages to release a legal decision to the broader Canadian public.

The *Supreme Court Act*, the legislation that was passed in 1875 that established the Supreme Court of Canada, stipulates that the Supreme Court itself is responsible for the publications of its own decisions – a somewhat unique requirement for a high appellate court during this period.⁴⁵ As a result, Canada developed two official reporting services: the Supreme Court Reports, and the Federal Court Reports.⁴⁶ The Supreme Court Reports directed their attention exclusively to the decisions produced by the

⁴⁵ Anne Roland, "Official Law Reporting in Canada" (paper presented at the Second International Symposium in Official Law Reporting, New York City, 2004), 52.

⁴⁶ Ibid.

Supreme Court, whereas the Federal Court Reports were responsible for the other federal courts. Although the justices possess final oversight, the prominent position of the Registrar is responsible for the maintenance and functioning of the publication process.⁴⁷ The Registrar is an appointed position by the Governor in Council.⁴⁸

The previous Canadian Registrar, Anne Rowland, discusses the importance of effectively disseminating the Supreme Court's voice to the rest of the legal community and Canadian populace abroad. "The reporting of the law is one of the underpinnings of a democratic society. It is of fundamental importance to a country's system of justice that the law of the land is widely known; and that citizens have unimpeded access to judgments."⁴⁹ The effective transmitting of legal judgments is a necessary element that allows the Supreme Court to fulfill its duties.

Anne Rowland also expounds on the historical practices of publications at the Supreme Court level. As recently as 1977, she suggests, not every decision delivered by the Supreme Court was included in the reports. Instead, the Supreme Court adopted a selective reporting procedure, and the cases that would be reported are based on whether or not they possess "precedential value" to the legal community as determined by the Deputy Registrar.⁵⁰ For the entire early period, certain decisions failed the "precedential value" test since the reasons for judgment were not likely to contribute to Canadian law,

⁴⁷ Ibid.

⁴⁸ Supreme Court of Canada Official Website, "Administration of the Court," <http://www.scc-csc.ca/about-apropos/administration-eng.aspx>.

⁴⁹ Roland, "Official Law Reporting in Canada," 50.

⁵⁰ Ibid., 52.

and, because of limited available resources, only the end result was added in a summarized version.

Anne Rowland provides us with an explanation for the omission of some of these decisions. In order to better understand her answer, however, it is necessary to explore cases that come before the Supreme Court. The options the justices have for resolving a legal dispute will firstly be discussed. Afterwards, I will discuss how these have influenced the By the Court decisions.

When people think about the Supreme Court sitting and hearing a case, a certain image is likely to enter their mind. Extended arguments made by counsel, while the justices are perched on their towering benches listening intently. For many decisions, each counsel presents their arguments in an attempt to sway the justices in their favor, while the justices grill counsel with intellectually penetrating questions. After the justices hear arguments, however, the justices have options for how to handle cases. For some cases, the justices might resolve the case orally without calling upon the second lawyer (for the respondent). This suggests that the justices did not believe that the appellant's lawyer has not created any problems about the earlier decision.

Another path that the judges can use when handling a case is: after hearing the lawyers' arguments, they can reserve judgment. If they reserve judgment, the justices leave the courtroom before rendering a decision for the case. Typically, the final ruling is then released months later. However, the justices do not automatically produce reasons for cases that they reserve; some cases are simply dismissed at a later date without written

reasons. The justices likely further deliberate to determine if the legal questions found within the case requires judicial reasons. If it is voted that it is not necessary, the case can be dismissed without reasons.

The last path that can be used to handle a decision seems likely the most frequent route. After hearing arguments, the justices reserve judgment for a later date. The decision that they reach is then released months later in the form of legal reasons, which describes the ruling of the court.

Before a case made its way to being published for the legal community, however, there is one last stage. Not every decision was published for the legal community; cases typically underwent a screening stage to determine if they qualified for publication. The previous Registrar, Anne Rowland, suggests that this vetting stage was necessary during the time-period we are exploring, because there were limited available resources that did not allow for every case to be published.⁵¹ Instead, a decision only qualified if it was likely to influence future precedent, with all cases being weighed against this criterion before they are included in the reporting services.

This screening-process - similar to many of the court's operations – is completed behind closed doors, and it is, therefore, concealed from the public eye. However, the legal archives for the By the Court decisions were reviewed and documented. As a result, the archives provided insight into the vetting process that is employed by illuminating the legal remedies the justices used, and how they were reported.

⁵¹ Ibid.

These decisions that were reported as anonymous were not treated differently; they followed the same procedure as any other case. They start with opposing lawyers presenting their arguments for the justices, while the justice determined how to deal and resolve the legal decision. These decisions follow similar path to any other decisions.

There were judgments that were orally declared from the bench that directly quoted the presiding justice. This is not a special or unique justice-treatment for a decision – there are many oral decisions that are handed down by the justices, and they are published as such. These decisions acknowledge, and label which justices spoke on behalf of the court. But, there are a series of cases that neglect to inform the reader which justice declared the ruling, and, therefore, are classified as By the Court.⁵²

In the archives, however, these decisions were not anonymous; they attributed the oral quotes to a specific justice. This attributed transcript version was submitted to the Registrar for publication, but the complete version did not make it through the transfer. Sometimes the specific words that the justice uttered were perfectly replicated, even though the attribution for these decisions was lost.

For a very select few set of cases, the By the Court style was also used for cases that were reserved for judgment for a later date, but the ruling was given without written reasons. The archives revealed, however, that the case-files for the decisions that received

⁵² For example: *Union Investment Co. v Wells*, [1908] 41 SCR 244; *Keslering v Keslering and Att'y Gen'l for Saskatchewan*, [1922] 69 DLR 707; *Re Duncan*, [1958] 11 DLR 616, *Bozak v Rural*, [1967] 62 DLR 64.

this label contain attributed written reasons from some of the justices, but they did not receive reasons from all of the justices sitting on the panel. The cases that follow this path, then, can be interpreted as instances where the Registrar did not receive reasons from at least some of the justices. The justices might have been delayed because they felt their judicial efforts could be allocated to other more meaningful decisions. Nonetheless, when they did not have a complete set of reasons to include for publication, the By the Court style with a summarized version acted as a substitute that states that the Supreme Court, or justices “dismissed the appeal without producing written reasons.”⁵³ This explanation seems congruent with our original audible story discussed in chapter 1.

The last path that the By the Court decisions follow is when the justices reserved the judgment to release a later date for cases. But, the archival-files for these decisions contained typical reasons that were attributed. It seems that the justices produced reasons for these decisions, but they were simply excluded from the final published version.

The By the Court cases originated the same as any other case that came before the Supreme Court, and followed the typical paths. These decisions did not receive special treatment from the justices, and there is no evidence to suggest that the justices were involved in converting these decisions to anonymous judgments. All cases – regardless of

⁵³ Cases that follow this path: *Nichols v McNeil*, [1918] 39 DLR 763; *Hamel v Patenaude*, [1925] 4 DLR 577; *Bureau v Campbell et al*, [1929] 2 DLR 205; *Winnipeg Electric Co. v Symons*, [1929] 2 DLR 197; *Fidelity Trust Co. v Purdom & Northern L. Ass'ce Co.*, [1930] 1 DLR 1003; *Leeson v Havelock*, [1940] 4 DLR 791; *Contact Mining & Development Co. Ltd. v Craigmont Mines Ltd.*, *Stinson v Craigmont Mines Ltd.*, [1961] 29 DLR 592; *Minister of National Revenue v John Colford Contracting Co. Ltd.*, [1963] 36 DLR 442.

the taken path - underwent a vetting process to prepare judgments for the Reporting services. Constitutional and the most influential cases likely skipped this step. For the rest, however, it was necessary because resources were scarce during the earlier periods for the Supreme Court. It was during this stage that these cases became anonymous. In many of the examples, the justices submitted typical attributed reasons to the Registrar for publication purposes. The cases were still evaluated, though, according to their influence on the broader legal community. After assessment, it was decided which cases would be relevant enough to the legal community to publish with complete sets of reasons. For the decisions that fell short, however, there would either be parts of the rulings included, or there would instead be a summarized version that credited an institutional label for authorship, such as “THE COURT.”

The documenting services, in conjunction with the Registrar and supporting personnel, are responsible for creating much of the early By the Court tradition. A vetting stage was established as a means of assessing which cases were worthwhile for publication. However, there are numerous documenting services that report Supreme Court decisions. There are a variety of documenting services used to report legal decisions, which further complicates which cases are released as By the Court.

The Supreme Court Reports is the official reporting service of the Supreme Court of Canada.⁵⁴ It is official because the Registrar – who is accountable to the Chief Justice - is responsible for its oversight, and maintenance. But, Canada also utilizes unofficial publishing services, and, as Anne Rowland suggests, these services have played a

⁵⁴ Roland, "Official Law Reporting in Canada."

significant role in Canadian Law Reporting.⁵⁵ The documenting services that I reviewed both engaged a vetting process to prep cases for publication. Determining whether or not a case is important, however, is a discretionary decision that can produce different results. I compared two services – Dominion Law Reports and the Supreme Court Reports – and found discrepancies for which cases are published as By the Court. Some cases in one documenting service are reported as being anonymous, while the opposing service attributes the decision to a particular justice. That is to say, the employed process between separate documenting services creates an attribution discrepancy depending on what service is used. In addition to this attribution discrepancy, one documenting service might only include sections of justice reasons according to what they believe is important to the legal community, while the other one published the full-length reasons that were written by each of the justices. This makes it difficult to retrieve an exact overall count of the By the Court decisions. Nevertheless, the attribution discrepancy between the services provides evidence that the vetting process influenced the By the Court tradition; the justices were not involved in granting anonymity.

The Supreme Court developed the By the Court decisions to expedite the tardy publication process, as discussed in Chapter 1. In doing so, they formed an organizational structure for the By the Court summary style. The presentation structure remained intact, but the archives revealed that the purpose for employing this device expanded. Some examples were used because the justices did not submit their reasons, but most of the examples were used for a different purpose. For some of these decisions, the identity of which judge simply did not survive the process. The archives indicate that attribution was

⁵⁵ Ibid., 53-54.

known, but it simply was not included in the final published version – the orally declared decisions especially follow this idea. For the rest of the examples, however, the By the Court device became active during the screening process that all cases underwent before entering the Reports. It became a substitute when cases failed the “precedential” test. This convenient substitute that was usually attributed to “THE COURT” allowed the personnel in charge of the publication process to be diligent in terms of the number of cases published for the legal community, even if it was only the final ruling reached. The new purpose became a resource management tool.

The versatile nature of this practice is demonstrated by its expanded purpose. As a convenience tool, it has been applied to growing concerns that inhibit the Supreme Court’s ability to conduct and complete its judicial business. It is necessary to highlight, however, that even though the purpose was expanded, this device remained within the publication realm. Both its role in the audible story and as a resource management tool, it suggests that the individuals who maintained the publication process were responsible for the BTC usage. There is no evidence to suggest that the justice directly intervened, or used this device as a strategy to package their judicial opinions. However, it does seem likely that the justices read and kept up with the Supreme Court Reports. They had a vested interest in doing so -- the inaccurate reporting of their decisions could blemish their reputations. Although the Registrar is in charge of maintaining the Supreme Court Reports, it seems unlikely that he would disregard instruction from the Chief Justice, or any of the justices for that matter. The Registrar would likely keep the justices informed, and comply with their instructions. It also seems likely then the justices would have been familiar with the By the Court decisions. Notwithstanding, this simply suggests an

indirect role in overseeing these examples. There was no evidence that indicated that the justices were directly involved in shaping, or inventing this practice.

The By the Court device did experience a slight shift in purpose, and an expansion in its role it played. But, when did this occur? This becomes a difficult question to answer.

As a result of time and financial restraints, I did not possess the resources to review in the archives every delivered anonymous judgment. In order to put forth a comprehensive argument about the shift from the “audible” story to a resource management tool, it would be necessary to review all anonymous judgments to determine if the archives would reveal concrete evidence as to when the shift occurred. I was fortunate enough to document the cases from the archives for a month, but my time frame was still not sufficient to access every archive file. An argument of this magnitude is beyond the scope of my master’s thesis. Further, I relied on others to assist me who were very generous with their time, but the necessary effort to prepare all decisions for review (from submitting the case-list to the records center, to numbering and sequencing them for the microfilm machine), I believed, would be more of an annoyance rather than generous assistance. It is for these reasons that every archive-file for all BTC decisions was not reviewed.

Notwithstanding the aforementioned concerns, it would be possible to narrow down the approximate dates that the By the Court judgment’s purpose shifted – from audible to resource management. The presence in the archives of a full set of reasons from the justices that were submitted to the Registrar but were not included in the reports

would be indicative of the resource management purpose. As a result, the more decisions that have “full” sets of reasons that were not published would act as a guide to narrowing down the shift. Below is an estimated shift date according to the selection of the archive decisions I reviewed. As figure 2.1 (page 41) illustrates, most of the earlier archive files indicates that there were no written reasons. Out of the first 14 cases I searched with BTC cases from 1886-1909, there are only three decisions that had written reasons – 21%. Starting in 1910-1930, however, this percentage is totally reversed – 79% contain attributed reasons, while 21% of the archive-files contained no reasons. This reversal in percentages is likely the approximate period – starting in 1910 - that the purpose expanded into a resource management tool. This is not an ironclad method, but it provides us with approximate time-periods.

There are cases that still need to be addressed, however, since they do not coincide with the resource management idea. For example, the oral decisions do not align with this pattern. It was not a matter of handling resources when the justice names were not transferred from the archives to the reporting services. This seems like a very minor task that would not have exhausted resources. Why did these cases still emerge as anonymous? The general character of the institution during the court’s early years is responsible.

During its youthful years, the Supreme Court of Canada was not considered to be a particularly strong and influential institution. Snell & Vaughn provide countless examples and evidence as to the reasoning, all leading to the general conclusion that many Canadians perceived this national institution rather negatively. There were quarrels

between the justices that disrupted the court's routine,⁵⁶ while many judges who were invited on the court refused.⁵⁷ The greatest undercutting of legitimacy was likely created by the Judicial Committee of the Privy Council, which oversaw and at times overruled the Supreme Court's decisions. Further, there was a direct path to the JCPC that sometimes bypassed the Supreme Court of Canada altogether, rendering the institution as irrelevant.⁵⁸ As a result, the Canadian government for decades refused to give financial assistance beyond the usual operating costs to the Supreme Court of Canada. Snell & Vaughn agree that much of the early years the justices did not possess adequate facilities, and it was not until the 1940s that an acceptable building was built that reflected its status as highest appellate court.⁵⁹ If the government refused to improve the justices' conditions, it makes sense that the supporting staff would also - probably even more so - be subject to financial limitations. With short funding, it is feasible that a burden was placed onto the Supreme Court support staff, which could explain why the Supreme Court was compelled to develop the *By the Court* decision in the first place, and help explain why little mishaps throughout the publication process affected the quality of judgments.

Conclusion

The *By the Court* decisions replicated the normal procedure for a case to arrive before the Supreme Court of Canada. The justices did not single out these cases for anonymity, but it was only the natural process to prepare cases for the reporting services that left some cases as anonymous. The next step in understanding the story is found not

⁵⁶ Vaughn, *The Supreme Court of Canada: History of the Institution*, 39-40.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, 183-85.

⁵⁹ *Ibid.*, 174-78.

leading up to the delivered decision, but how it appears in the reporting services. The structure of these judgments is important in enhancing our understanding, and it is a topic to which I will now turn.

Chapter 3 – The 3rd Perspective Decisions

In the previous chapter, the procedure was outlined for the By the Court decisions when these cases arrived at the Supreme Court. These cases leading up to the publication stage were tracked in order to determine if these cases were treated differently, and reference to the published version was only made as a means of enhancing my understanding of the procedure before cases were decided. This chapter will be dedicated to the step after this stage; the By the Court examples will be analyzed as they appear in the reporting services, while the crux of the analysis will focus on the organization-structure, and basic features of these cases. The application history will be discussed by presenting a yearly breakdown of all By the Court judgments. These findings will anchor the ‘why’ question -- why were these decisions attractive candidates to receive the BTC style?

The Supreme Court’s delivery system has created much of the By the Court tradition. Starting in 1886, the Supreme Court departed from always attributing opinions and developed anonymity in order to deal with a particular difficulty -- publication tardiness. After the earliest examples, however, the archives uncovered that the purpose surrounding the application of this device expanded to include other duties. This shift would have gone undetected without the archival research that was done for this project. Notwithstanding, all of the BTC decisions discussed thus far were presented in the reporting services in a similar manner.

All of the By the Court decisions that occurred during the early periods of the court – the examples discussed in the previous two chapters – are all published using a 3rd

perspective summary style. This suggests that it is not the voice of a justice, but instead an observer is recounting the events that occurred at the court hearing. There are slight variations, but they all adhere to this common layout. This layout, however, is not unique or exclusive to the By the Court decisions; there are many other 3rd person perspective summary decisions that are included in the reports, but they attribute a justice for resolving the dispute. For whatever reason, there are numerous examples that do not identify the justice, and they occur over an extended period of time. These are the decisions that will be the focus of this chapter.

These decisions have been coined the 3rd perspective examples after their organizational-style, and they have been broken down chronologically according to their delivery dates. The 3rd perspective style, however, does not account for every By the Court example. There are a total of 338 By the Court decisions, and 288 of these are 3rd perspective (85.2%). In subsequent chapters, the rest of our overall total will be analyzed, as well as the significance for separating the By the Court tradition based on their presentation style. For now, though, all of the By the Court examples encompassed within both the audible story and resource management arguments adhere to this pattern. Please observe the yearly breakdown of the 3rd perspective examples in figure 3.1.

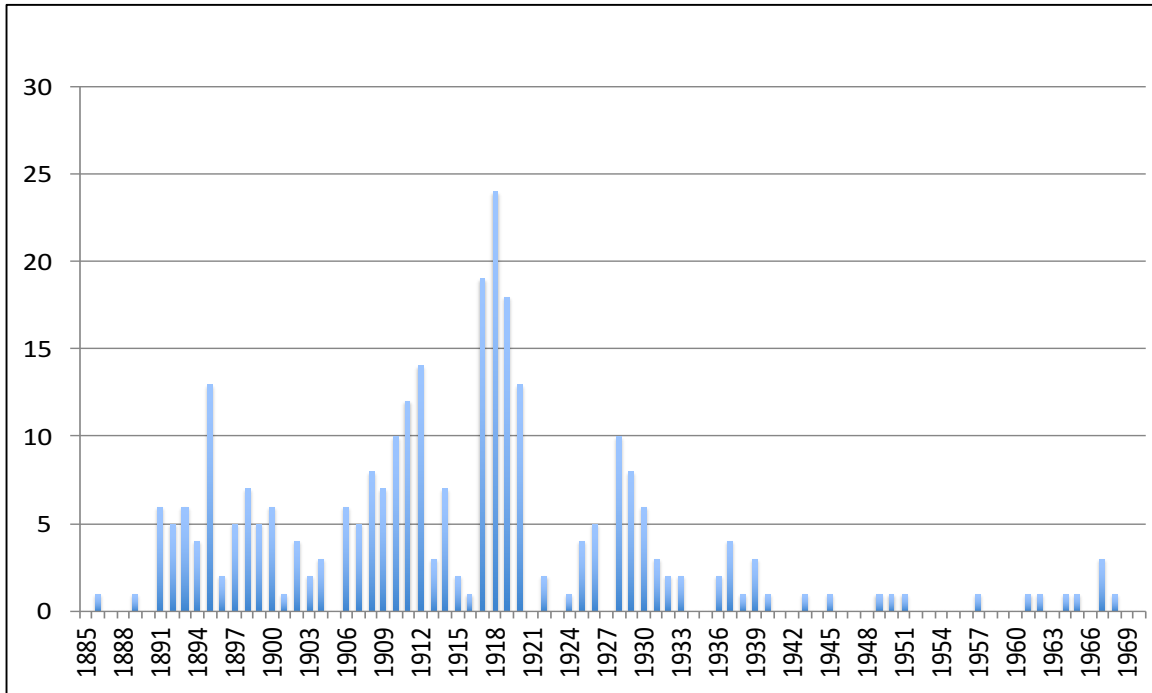


Figure 3.1 – All 3rd Perspective ‘By the Court’ Judgments, 1885-1970

The device makes its introduction in 1886, but there is a delay before it starts to jump in frequency approximately 5 years later, and then maintains a healthy pace during the 1890s. The device starts to grow in frequency from 1905 until about 1930. After this date, however, it seems that this style is general decline with very few examples leading up to 1970.

The By the Court device does not experience gradual or consistent growth, which is evident by the tremendous degree of fluctuation that is immediately apparent when reviewing the graph. Instead, the frequency grows in pulses, and declines in sharp drop-offs. Take for example, the ‘1917-1920’ cluster, which produces many BTC examples including the spike in the data that occurs in 1918 – 24. The subsequent years after 1918 are also very busy with 18 and 13 (1919 and 1920, respectively). But, there is a null

period afterwards for four years until 1925, when the frequency starts to once again gain momentum. The reason for the fluctuation and application patterns will be raised in the next chapter. But, firstly, an analysis of the basic features of these BTC decisions will be presented, including word-count, success rating, panel-size, and origin of the case.

3rd Perspective Statistics, 1886-1970 – Total: 286⁶⁰

Word-count

The story surrounding the implementation of these decisions helps to explain the word-counts. The word-counts for the period from 1886-1905 have been previously mentioned. However, the calculations immediately below include these early statistics, as well as all 3rd perspective decisions leading up to the year 1970.

The shortest judgment was 4-words, which was reached in three different decisions including the very first example.⁶¹ The rest of the cases surpassed this mark, but not by very much. There were a total of 9 decisions that exceeded the 100-word mark, while there were only 2 decisions that extended beyond 200 words. The highest value in the data occurred in 1932, in *The King v. Dominion Building Corp*, and it was 246 words.⁶² The overall word-count average for all of the 3rd perspective decisions is 108.⁶³

⁶⁰ There are a total of 288 By the Court decisions that follow the 3rd perspective style. However, two of these decisions have extended dissenting reasons. These are the only two decisions from the relevant period that contain an extended dissenting opinion. As a result, they were omitted from the data set. Cases: *Baker v La Société de Construction Métropolitaine*, [1893] 22 SCR 364; *Cowen v Evans / Mitchell v Trenholme / Mills v Limoges*, [1893] 22 SCR 331. These two cases will be discussed later in this thesis.

⁶¹ The three cases: 1) *Martley v. Carson*, [1886] 13 SCR 439; 2) *Kennedy v. Victory Land & Timber Co.*, [1922] 70 DLR 868; 3) *Harbour Commissioners of Montreal v. Sydney, Cape Breton and Montreal Steamship Co.*, [1914] 20 DLR 990.

⁶² *The King v Dominion Building Corp*, [1932] 2 DLR 810

The word-counts did not gradually increase over time; there was no consistent pattern. Instead, the decisions regarding publishing the cases determined the word-counts. As previously discussed, the editors of the legal publishers determined what segments (if any) of the justice reasons would be reported. The cases that directly quoted parts of justice reasons as well as the orally declared examples constitute most of the higher word-counts. These decisions do not overtly acknowledge the authoring justice, but some of them are attributed in other services.

Intervention⁶⁴

The success rating for these small word-counts was 14.7% (42 examples). An appeal was considered to be successful if there was any change in the previous court's ruling. For example, there were some appeals that were appealing only the damages awarded. If the Supreme Court awarded the appellant with any change from the previous court's ruling, then it was classified as a success.

The success rating does seem rather high considering many of these judgments were published with such short word-counts. Nonetheless, from 1886-1892, all appeals were dismissed. It was not until 1892 in *Penman Manufacturing Co. v. Broadhead* – a private law case - that the first appeal was allowed.

⁶³ For the case of *Re Duncan* (1958 11 DLR 616), I was unable to discern which parts were the commentary provided by the editors, and which parts described the ruling that the justices reached. Therefore, I omitted this decision from the data.

⁶⁴ Burton Atkins, "Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States," *Law & Society Review* 24, no. 1 (1990).

Panel Size

By a large majority, the panel size for these decisions was 5 justices – 84.3% (225 examples).⁶⁵ The early decisions especially followed this pattern. The first break from this routine occurred in 1891, with a 6-panel BTC decision, and it was not until 1906 that there was a panel of 4 justices. The lower panel of these decisions, however, is expected. Our current court would adjust panel-sizes according to the expected importance of a decision, which falls under the Chief Justice’s responsibilities.⁶⁶ It has been argued that this statistic can be used as an indicator as to how the court perceives the influence a case will likely exert on Canadian law.⁶⁷ However, our current court is composed of 9 justices, and, as a result, can afford the luxury of assigning judges for certain cases (although there is no evidence to suggest that this has been done to influence the outcome of a case). However, the Supreme Court historically did not possess the personnel to choose to assign smaller or larger panels of justices for important decisions. The Supreme Court started out with only six justices – 5 for the Supreme Court itself and one to manage the federal court (the judge managing the federal court would be rotated through). Even with six, however, there was tremendous difficulty for establishing the legal quorum of judges, and this continued to prove troublesome for the court.⁶⁸ Further, the panel-size was not

⁶⁵ There were 19 cases that did not inform the reader of the panel-size, so they were omitted from the data, and percentages were based on 267. [1967] 62 DLR 64; [1964] 45 DLR 770; [1919] 45 DLR 755; [1919] 45 DLR 755; [1919] 45 DLR 756; [1919] 45 DLR 757; [1919] 45 DLR 757; [1914] 16 DLR 853; [1914] 16 DLR 853; [1914] 16 DLR 853; [1914] 16 DLR 854; [1914] 16 DLR 855; [1914] 16 DLR 855; [1897] 27 SCR 682; [1896] 25 SCR 691; [1896] 26 SCR 443; [1891] 19 SCR 362; [1891] 19 SCR 359; [1891] 19 SCR 360.

⁶⁶ Matthew Hennigar Lori Hausegger, Troy Riddell, *Canadian Courts: Law, Politics, and Process*, Second ed. (Ontario: Oxford University Press, 2015).

⁶⁷ McCormick, *Canada's Courts: A Social Scientist's Ground-Breaking Account of the Canadian Judicial System*.

⁶⁸ Vaughn, *The Supreme Court of Canada: History of the Institution*, 66.

increased to 7 justices until 1928, and only in 1949 was the last hiring before reaching the current number of 9 judges.⁶⁹ It is necessary to consider such information when determining the implications of this statistic, and we would expect smaller panels for the early cases. Some of these decisions, though, did extend beyond 5 justices -- 11.6% (31 cases) saw a panel of 6 justices, while there was a panel of 7 justices for 3 examples (1.1%). In addition, there were 8 examples (3.0%) that had a panel of 4 justices, which was permitted if both parties consented. These decisions dealt with very minor issues -- the first of these decisions dealt with a motion, while the rest were used to resolve private law cases. The overall average for all 3rd perspective decisions is 5.11 justices.

Origin

There does not appear to be any apparent patterns in the origin cases. Please see table 3.2 for a breakdown according to provinces.

⁶⁹ McCormick, *Canada's Courts: A Social Scientist's Ground-Breaking Account of the Canadian Judicial System*, 88-89.

Table 3.2 – Province of Origin for ‘By the Court’ 3rd Perspective Judgments

Province	Number (%)
Ontario	76 (26.8%)
Quebec	66 (23.2%)
BC	38 (13.4%)
Alberta	29 (10.2%)
Exchequer	25 (8.8%)
Manitoba	18 (6.3%)
Nova Scotia	15 (5.3%)
Sask.	11 (3.9%)
New Brunswick	4 (0.01%)
Supreme Court⁷⁰	1 (0.004%)
N.W.T.	1 (0.004%)

There were two cases that did not indicate the province, nor did they provide a citation to locate this information. As a result, they were omitted from the data.⁷¹

Law-Type

⁷⁰ The decision of *Re Duncan*, [1958] 11 DLR 616 dealt with the conduct of a lawyer, and a decision of contempt. As a result, it originated within Supreme Court itself.

⁷¹ *Planters Nut & Chocolate Co. Ltd. v The King*, [1952] 1 DLR 385; *CPR v Murray*, [1932] 2 DLR 806.

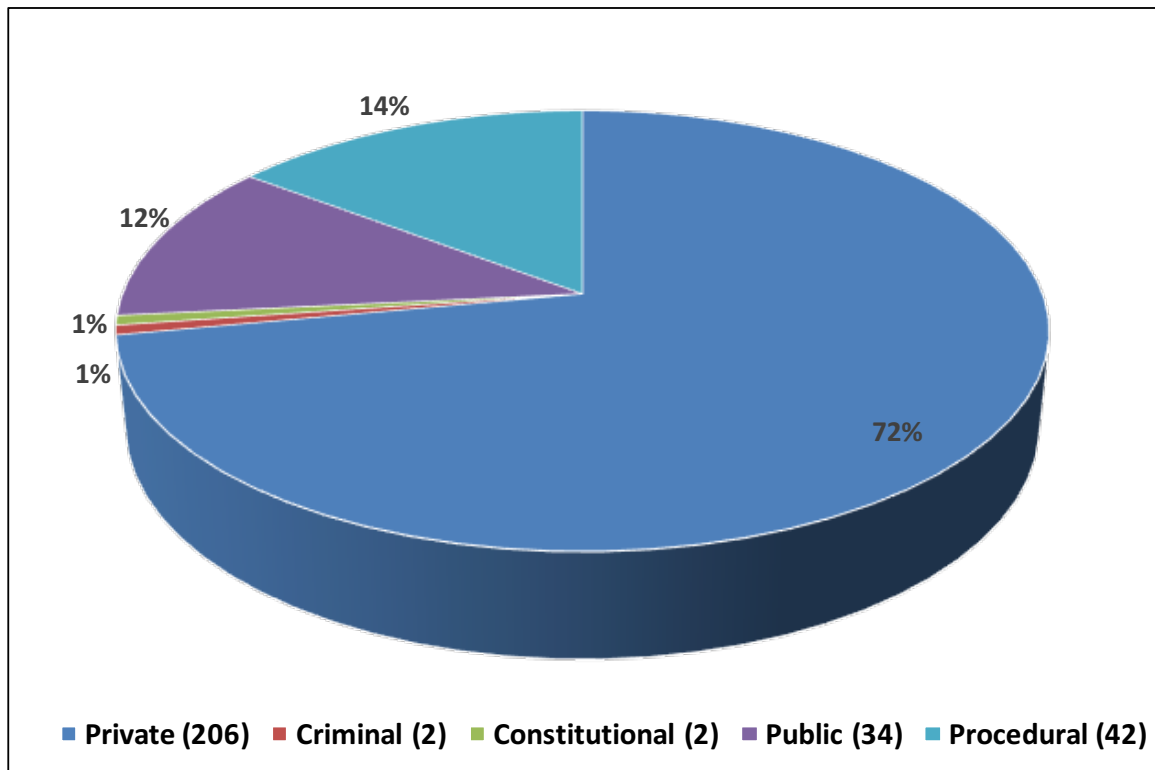


Figure 3.3 – Law Type for 3rd Perspective Judgments

Analysis

The statistics for these decisions paint a clear picture for the By the Court usage. This style was implemented by a small panel of justices in order to deal with mostly private law decisions, and they were resolved with only brief (and sometimes very brief) reasons. These are not the most complex or difficult cases. This is demonstrated not only by the very low word-counts, but also the type of law that was heard. After private law, the second highest law type was procedural issues (14%). Many of these decisions dealt with motions and applications, and such issues are not likely paramount to the Supreme Court’s duties. These statistics also support the previously discussed purposes for resorting to anonymity. The justices would likely prioritize writing reasons for other decisions instead of focuses on procedural or jurisdictional cases. Secondly, the vetting

process also evaluates cases according to their ‘importance to the legal community’ when determining which cases to publish in the reports. Procedural and private law cases would not likely reach the top tier. Nevertheless, the fact that these cases were included is still relevant, because it influences the manner in which we view the court during this period.

The Supreme Court was engaging in a dialogue, and using its legal opinions as a means of communication. But, this discussion was restricted to the legal community. They were not writing to the broader Canadian public; they did not perceive their role as such. This is reflected in the form of the judgments that were released during this period – technical and precise, assuming rather than providing extensive legal background knowledge. The statistics suggest that jurisdictional issues played a part in this discussion, as the Supreme Court during this time period was seeking to resolve issues that determined whether or not a case was eligible to be heard by the Supreme Court of Canada. From the early periods of the court, jurisdictional issues became an immediate annoyance for the Supreme Court of Canada. There were issues and ambivalences regarding the court’s jurisdiction,⁷² which created further complications. For example, from 1893-1903, there was a significant increase in the number of motions to quash for want of jurisdiction. Snell & Vaughn note that from this ten-year period there was reported 50 successful motions and even more that failed.⁷³ There were attempts made in 1907 by registrar Cameron and Chief Justice Fitzpatrick to amend the act in order to clarify these issues. The incentive behind such changes was “the hope that the amount of

⁷² Vaughn, *The Supreme Court of Canada: History of the Institution*, 107.

⁷³ *Ibid.*

time spent by the Court on jurisdiction would decrease considerably.”⁷⁴ It was an attempt to thwart threadbare appeals arriving at the Supreme Court.

Justices also weighed in on the issue, as Justice Strong was quoted voicing his opinion:

The Maritime Provinces enjoy the costly privilege of bringing appeals to this court upon such paltry amounts...That such appeals should be possible is a blot upon the administration of justice. I hope the bar from the Maritime Provinces will assist in obtaining the necessary legislation to put an end to that state of things.⁷⁵

Snell & Vaughn trace the root of this problem to the fact that many provinces did not have a bare minimum monetary threshold in place for cases that were eligible to be heard at the Supreme Court. Although Quebec always had a \$2,000 minimum, other provinces and territories failed to impose such obligations.⁷⁶ For example, there was a Nova Scotia case with the amount of controversy was around \$80.⁷⁷ Such trivial matters seemed to be out of sorts for a high appellate court.

Cases of such a low monetary limit would likely influence the types of cases the Supreme Court hears. Dr. McCormick has produced statistics from 1949 onwards, and the private law section more than doubles any other category for every court until the

⁷⁴ Ibid.

⁷⁵ Ibid., 108.

⁷⁶ Ibid., 107.

⁷⁷ Ibid.

amendment to the *Supreme Court Act* takes place in 1975 that granted the Supreme Court control largely over its own docket.⁷⁸ Before this amendment, Dr. McCormick states that 85% of the cases heard are appeals by right, while only 15% of the cases are granted leave to appeal.⁷⁹ Once again, however, we are missing precise statistics for the law-types in the earlier periods. Snell & Vaughn do comment on a few years, though. Criminal law cases were very rare during this period, and although there were a few reference decisions, nearly all of the decisions were classified as civil law cases.⁸⁰ This is a rather broad category, and Snell & Vaughn do not supply further insight into this statistic. But, it seems likely that the lack of clear jurisdictional boundaries and the lack of a monetary threshold is likely to increase the procedural and private law cases – the very specialty of our By the Court decisions.

The By the Court judgments seem to situate nicely within the broader jurisdictional issues the Supreme Court experienced. The court had difficulty establishing clear jurisdictional boundaries to inform the legal community regarding the arrival of cases before the Supreme Court. The ramifications of not imposing a minimum threshold, and having established blurry jurisdictional boundaries would likely increase the number of minor decisions. After evaluation, the justices did not deem these minor decisions worthy of a typical judicial response; hearing these decisions was not equivalent to the status of a high-appellate court. Notwithstanding, these would be the prototypical decisions for which the justices would not likely produce full-sets of reasons, and would,

⁷⁸ McCormick, *Canada's Courts: A Social Scientist's Ground-Breaking Account of the Canadian Judicial System*, 76.

⁷⁹ *Ibid.*, 77.

⁸⁰ Vaughn, *The Supreme Court of Canada: History of the Institution*, 163.

therefore, likely fall short of the reports. Because of the current state of jurisdictional issues, however, these cases presented an opportunity to provide guidance to the legal community regarding jurisdictional ambivalences.

Conclusion

Jurisdictional concerns during the younger court's years were the primary impetus for the development of the 3rd perspective By the Court decisions. Furthermore, the organizational structure used to display the BTC judgments in the reporting services becomes increasingly important. All of the By the Court judgments were presented in a similar matter in the reporting services. The fact that all of these decisions are summarized, and are therefore recounted - rather than declared - leads us to believe that the justices did not intervene to create this practice. The Supreme Court archives also lend support that the procedural realm is responsible for the creation of the early By the Court practice. However, this organizational structure is disturbed starting in the 1920s, when a new style of BTC emerges in the law reports.

Chapter 4 – The Shift: 3rd Perspectives vs. the Regular Style

In 1923, the case of *Hamilton v. Evans*⁸¹ is published in the Supreme Court Reports. This case is issued under an anonymous rubric, and therefore is a By the Court decision. The judgment reached a meager 2 sentences; it by no means can be classified as groundbreaking. But, it marks a stark departure for the Supreme Court's anonymity usage. This is the first example in the history of the Supreme Court that a By the Court decision is published with directly attached judicial reasons. Prior to this date, anonymity only materialized for decisions that summarize the court's final ruling using a 3rd perspective form, which suggests that an external observer is detailing how the court ruled. The 1923 decision, however, is published from a 1st person perspective. That is to say, it reads as if a justice is directly declaring the law, which is a bold violation of previously established BTC practices.

Throughout this chapter, the presentation structure and basic features of the By the Court decisions as they appear in the reporting services will be discussed. Contrary to the previous chapter, however, I will be focusing on cases that emulate *Hamilton v. Evans* and are published with directly attached judicial reasons. The overall application for these decisions will be investigated, including their basic features. The general statistics will then be compared to the 3rd perspective decisions in an attempt to discern the relationship between the two organizational structures.

The change in the organizational-structure in the 1923 case of *Hamilton v. Evans* demarcates a new stage for the By the Court tradition. This was not a one-time example;

⁸¹ *Hamilton v Evans*, [1923] SCR 1, [1923] 1 DLR 370

for the period of 1923-1970, this is the predominant BTC form with a total of 50 examples. For a breakdown of both the regular and 3rd perspective style, please view figure 4.1.

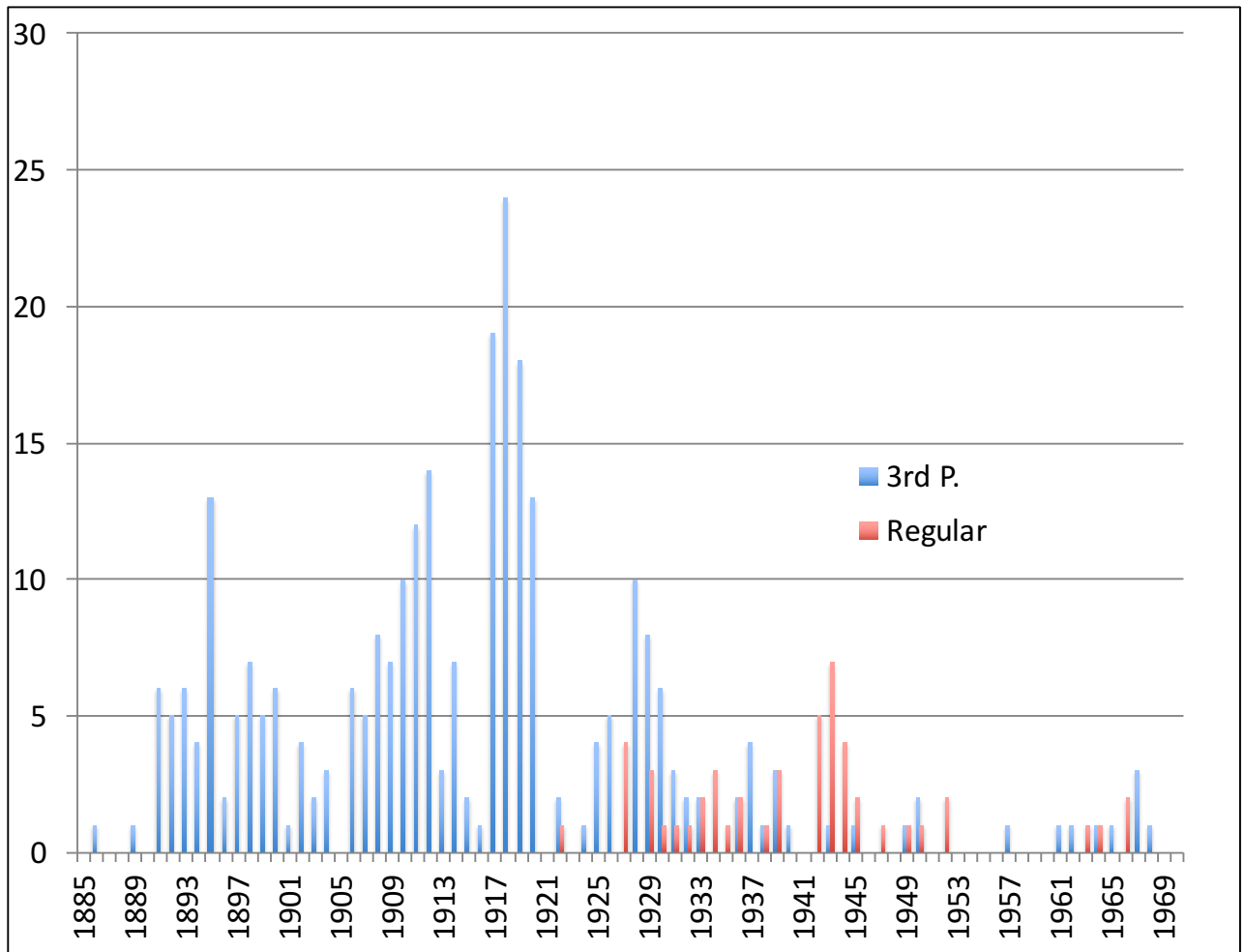


Figure 4.1 – Breakdown of both 3rd perspective and Regular Examples

The first regular example is released in 1922, but it takes five years after the first example before the practices starts to gain momentum, which is sustained from the 1930s to about 1950. Around the year of 1950, however, the practice starts to diminish – largely

motionless throughout the 1950s, while there are a select few examples that occur in the 1960s.

Similar to the 3rd perspective tradition, there seems to be a large degree of fluctuation. The peak in the data occurs in 1943 (7) in the midst of a strong yearly cluster, but there are a total of 22 separate years that fail to register an example. But, there appears to be a pattern of interaction between the two different styles. The 3rd perspective style dominates the data throughout the court's entire early period. The data illustrates a general rise that takes place over time, followed by a general decline around the 1920s period. When the 3rd perspective falls, the regular style is introduced and takes over in terms of frequency. The regular style, though, does not completely supplant the 3rd perspectives; it persists for many years thereafter – concurrent BTC practices. In the later periods, the regular style even outnumbered the 3rd perspectives.

The statistics for the 50 regular style examples that follow the regular presentation structure will now be presented, and afterwards they will be compared to the 3rd perspective style.

Word-Count

The 1923 *Hamilton v. Evans* case contained the shortest word-count at 17 words. After the first decision, however, the decisions expanded. Although there was a slight increase in general word-counts, there was no relationship between word-count and the date that a decision was delivered. Instead, the numbers appear to be sporadic. Please view the table below for a breakdown of these cases. Please view table 4.2 below.

Table 4.2 – Word-Count for all Regular style BTC Examples

Word-Count	Total
0-100	11
101-200	12
201-1,000	23
1,001-2,000	3
Over 2,001	1

The vast majority of the decisions are under 1,000 words (92%), with only four decisions fitting into larger categories. The maximum in the data is 6,429 words in *City of Toronto v. Prince* in 1934.⁸² These larger decisions do not seem to have any other related features – they did not all occur under one Chief justiceship; two of the cases deal with criminal law, while the others are private and procedural. Nevertheless, the average for all cases is 525 words. But, if we remove the four highest word-counts, then the average becomes 319 words.

Intervention

The percentage of cases that were allowed/granted is 38% (19), while the percentage of dismissed/refused is 62% (31). The successful appeals are not concentrated

⁸² *City of Toronto v Prince*, [1934] S.C.R. 414, [1934] 3 DLR 81

under one short time period, but are intermittently dispersed throughout the targeted time-period.

Panel-Size

The panel sizes for most of these decisions was 5-justices – 88%. There was also one decision that had a 4-justice panel, and three cases that had a 6-justice panel (6%). In addition, there were two decisions that had 7-justice panel (4%). The combined average for the regular style is 5.12 justices.

Origin

In 1923, the first BTC example was an appeal from the Registrar's decision regarding a procedural matter. After that, 7 out of the next 8 decisions were from either Ontario or Quebec. This pattern did not last, however, as no provinces or group of provinces dominated thereafter.

Quebec supplied a disproportionate share of the cases that were resolved this way, and Ontario's share is quite a bit lower than one might have expected, placing it third to B.C. – which over the period was considerably smaller than it is today (Saskatchewan used to be the third most populous province in Canada until the great depression). Please view table 4.3 for the complete province breakdown of all 50 regular examples.

Table 4.3 – Province of Origin for all Regular style BTC examples

Province	Number (%)
Quebec	15 (30.0%)
B.C.	9 (18.0%)
Ontario	8 (16.0%)
Sask.	6 (12.0%)
Alberta	3 (6.0%)
Manitoba	3 (6.0%)
New Brunswick	2 (4.0%)
Exchequer	2 (4.0%)
Supreme Court⁸³	2 (4.0%)

Three provinces (Nova Scotia, Prince Edward Island, Newfoundland) failed to deliver any cases that were released as By the Court.

Law Type

Please view figure 4.4 below for a breakdown of law types for the regular style.

⁸³ The decision of *Hamilton v. Evans*, ([1923] SCR 1, [1923] 1 DLR 370) dealt with a jurisdictional ruling that was made by the Registrar. As a result, this has been included as a case that originated within the Supreme Court itself, rather than a province.

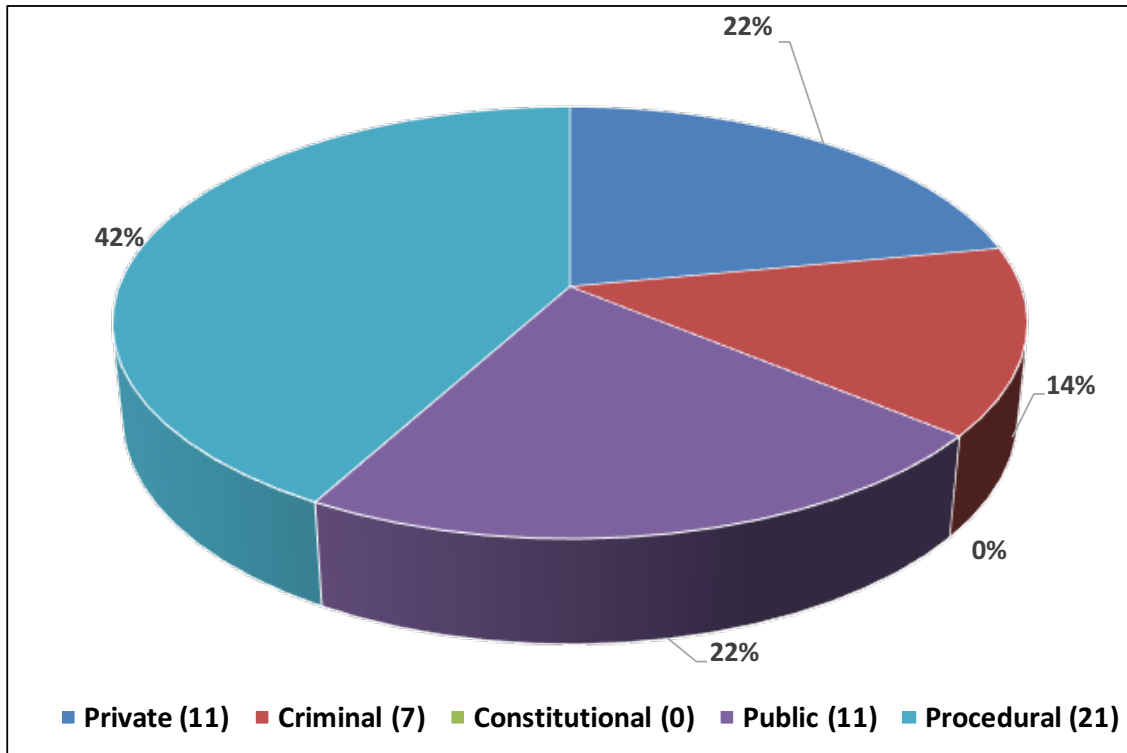


Figure 4.4 – Breakdown of all Regular style examples according to law type

Procedural issues dominate the regular style data, as they double any other law type. However, there seems to be an increase in public law, while private law is lower than expected.

Analysis

Please see table 4.5 that displays the averages of both traditions below.

Table 4.5 – Comparative chart of all basic features of 3rd perspectives vs. Regular style

<i>Category</i> <i>(Average)</i>	<i>3rd Perspectives</i>	<i>Regular Style</i>
<i>Word – Count</i>	108	525
<i>Intervention</i>	14.4%	38%
<i>Panel Sizes</i>	5.11	5.12
<i>Origin</i>	1. Ont. – 26.8%	Que. – 30.0%
	2. Que. – 23.2%	B.C. – 18.0%
	3. B.C. – 13.4%	Ontario – 16.0%
<i>Law Type</i>	<i>3rd Perspectives</i>	<i>Regular Style</i>
<i>Procedural</i>	15%	42.0%
<i>Private</i>	72.0%	22.0%
<i>Public</i>	12.2%	22.0%
<i>Criminal</i>	0.70%	14.0%
<i>Constitutional</i>	0.70%	N/A

When comparing the 3rd perspective and regular style, there are some apparent differences. There is a discrepancy in the word-counts for the two styles. This could be interpreted as an indicator that the regular decisions were resolved with a more substantive judicial opinion. In addition, the success rating for the regular style is two and a half times that of the 3rd perspective, while there are differences from where the cases originated. Ontario was the leader for the 3rd perspective decisions, while it placed third with the regular style. (I have not been able to find any answers for this. More

research needs to be conducted before making general conclusions.) Lastly, there are differences between law types. The 3rd perspective decisions are dominated by the private law, while procedural issues were important. However, the regular style has the procedural cases much higher, with an increase in public law cases. With the higher word-count and success rating, these differences seem to be quite meaningful, and it could be argued that the regular style decisions appear to be much more important. Because of historical factors, however, it is difficult to discern the increased significance of these decisions compared with the 3rd perspectives. The 3rd perspective tradition is the older tradition, while the regular style emerged while the 3rd perspective was in decline. There is overlap; one style did not simply supplant the other – this has been described as concurrent BTC practices. Nevertheless, most of the 3rd p. decisions are concentrated within an earlier period on the Supreme Court. The fact that the 3rd perspective generally occurred at a different time period might provide an explanation for some of the disparities in the statistics.

The earlier cases are expected to have a smaller panel-size. It was only in 1928, the court was raised to 7 judges, and it was in 1949 that the court reached 9 judges.⁸⁴ Most of the 3rd perspective examples occurred within this time frame, whereas the regular style is the newer practice. As a result, we would expect the later tradition (regular style) to have a larger panel-sizes in general. However, the panel sizes are essentially equal. This is by no means an ironclad indicator, but it could be argued that the earlier decisions should have a smaller panel size.

⁸⁴ McCormick, *Canada's Courts: A Social Scientist's Ground-Breaking Account of the Canadian Judicial System*, 73-76.

The discrepancy in the word-count can also be explained. The regular tradition dominated the earlier practice in this regard. As discussed in chapter 2, however, the archives provided evidence that many of the 3rd perspective examples contained attributed, full-length reasons, but they were simply omitted from the reporting services. The BTC summary 3rd perspective style was applied in lieu of typical attributed reasons simply to inform the legal community of the court's conclusion, as well as to clarify some specific points of law. Consequently, the substantial increase in word-count for the regular style over the 3rd perspective decisions must be interpreted with caution.

In terms of law type, the regular style was applied much more often to public law cases. Public law decisions are classified as such, since the legal conflict involves more than just two private parties seeking a legal remedy. Consequently, the legal rulings in such decisions have the potential of facilitating change on a higher level compared with many private law cases (generally speaking). Since the regular style possesses many more public law cases, this could be interpreted as an indicator of more important decisions that have the probability of being more influential. This regular style increase in public law cases, however, is offset by a significant increase in procedural cases. On average, it seems that procedural cases would be of bare minimum importance compared with the other law types, such as public, constitutional, and criminal. It is difficult to precisely assess the importance of cases based solely on law type, but we would typically associate procedural cases as less significant. In addition, it has been previously argued that the reason why so many BTC examples were delivered for procedural cases. As a collective group, these became important, because it was ambivalent to the legal community which

cases were eligible to be heard by the Supreme Court. Snell & Vaughn supplied evidence in order to substantiate this argument, as they have provided evidence for how these cases created confusion amongst the legal community. This commentary, however, applied to the youthful years on the Supreme Court; there was no suggestion that these concerns were sustained over an extended period of time well into the later years. It would make sense, then, if procedural cases start to dissipate over time as the Supreme Court irons out these wrinkles. We would expect, then, a gradual reduction of procedural cases as the Supreme Court gains experience, but the data showed the opposite – there was an increase proportion of BTC procedural cases from the 3rd perspective to regular style. The high proportion of procedural cases cast doubt on the assertion that the regular style was used for more important cases compared with the 3rd perspective cases.

Because of the historical factors, it becomes difficult to distinguish between the regular and 3 perspective styles. The regular were likely more important cases, but the extent to which they are more important is difficult to gauge.

Now that we have statistically compared the relationship between the two styles, general comments will be provided regarding broader ideas associated with the two styles.

The BTC device is not exclusive to one specific feature of a decision. It was not initiated when dealing solely with cases from Quebec or a specific province. Although there seems to be a disproportionate number of procedural cases, it was not directed at only one reoccurring legal issue or law-type. There are differences between the two

styles, but the data does not reveal a glaring distinction that suggests the core idea behind implementing the By the Court dramatically changed. There is, however, one important similarity between these two styles.

The decisions that receive the BTC template, whether it is the 3rd perspective or regular style, rank at a lower tier for their influence on the broader legal framework. The statistics support this conclusion. Even with an increase in word-counts, the regular style general average is very limited – 92% of the cases were under 1,000 words. This might be a significant increase compared with the 3rd perspectives, but it is considered to be very low. In addition, many of the By the Court cases were directed towards technical procedural issues. (There a few exceptions to this statement that will be discussed shortly.) Nevertheless, The By the Court decisions, then, were used more for procedural and jurisdictional rather than more complex and nuanced legal issues. Both the 3rd p. and regular, directly relate to this idea of being used for cases that are not as complex.

The By the Court device was developed as a processing tool to quickly resolve and dismiss cases that register as more minor or routine, which, in turn, mitigates the exertion of precious judicial resources.⁸⁵ This enabled the justices to redirect their attention towards more influential and meaningful disputes that were better suited for the status of Canada's highest court. This theory grounds the anonymity feature of these decisions -- it was used to bypass determining authorship, and instead supplies a convenient institutional label, which would help reduce the time spent on these minor

⁸⁵ For certain time periods, the American 'Per Curiam' device was used for a similar purpose. Laura Ray, "The Road to Bush V. Gore: The History of the Supreme Court's Use of the Per Curiam," *Nebraska Law Review* 79 (2000): 522.

decisions; any judge could quickly write-up the courts ruling. When the court's workload started to become overwhelming, the By the Court device is activated as a means of supplementing and reducing the demand on the court.

I propose that the By the Court judgments were used to preserve judicial resources. If my theory is true, there will be an increase in BTC examples when the justices are particularly backlogged. This theory is congruent with the previously asserted arguments regarding the purpose of implementing anonymity. The underlying premise of the audible theory was that the justices were unable to provide written reasons in a timely manner for all decisions. It was necessary to develop a substitute to inform the legal community of the reached ruling, which took the form of By the Court. The justices are less likely to be punctual with their reasons if they are facing larger caseloads. For the resource management tool, some examples showed that the justices did not submit reasons for these decisions similar to the audible theory. For the other examples, however, there was a rather lengthy process of converting the justice written reasons into a final published version in the reports. Some cases were not perceived as meaningful enough to include in the reports, because resources were scarce. It was a complicated process to prepare judgments – editing, drafts, revisions. The benefit derived from publishing these cases did not outweigh the necessary expenditure of resources for preparation. It would be more beneficial to reallocate these resources elsewhere. There would more likely be resources available for the more minor decisions if there were not many significant cases that need to be attended to. In such circumstances, the personnel is likely to look over the minor cases, and direct their attention towards publishing the important ones for the legal community.

For the earlier By the Court decisions, it has been argued throughout this thesis that the justices were not involved in using this device. (The next chapter will speak to the judges becoming involved in the device's application.) For now, though, it is sufficient to assert that my theory extends to the entire court as an institution – the device also helped the Registrar and the appropriate personnel with their duties. Even though justice workload was a determinant for applying anonymity, this device was used as an institutional tool, assisting more so behind the scenes instead of a strategy implemented by the justices.

To test my theory, then, I have identified years that the caseload of the justices significantly increased beyond the yearly average. These years will then be compared with the BTC frequency chart in order to determine if there is a correlation. This will not be an exact mathematical calculation; similar patterns will be identified. Because of Dr. McCormick's work in the field, we possess precise statistics for the overall caseload and types of cases from 1949 onwards. Prior to this date, however, there have been no comprehensive statistics compiled for 1875-1949; the Supreme Court did not keep a record of every heard decision. In addition, not every decision that the court heard was published in the reporting services. As a result, we do not possess complete statistics for the number of cases delivered per year by the Supreme Court. Because of the lack of statistics, we are steered towards Snell & Vaughn's *History of the Institution*, which contains calculations not for the entire period we are targeting, but for select years and relevant periods.

Snell & Vaughn provide us with some statistics that suggest that the BTC frequency is associated with the overall workload of the justices. They start out describing the workload immediately after the inception year 1875. Understandably, the very first Supreme Court sitting the justices had no cases to hear, and immediately rose.⁸⁶ In April of 1876, the Supreme Court did hear its first decision, but the workload remained rather light over the next few years. The 1890s experienced an increase in cases. From 1893–1902, the average number of cases was 87.5—a 71.9 percent increase from the 1880s.⁸⁷ The BTC decision also increased throughout this period after being somewhat quiet in the 1880s.

Snell & Vaughn also comment that the number of “inscribed” cases in the fall sitting alone in 1918 was 74.⁸⁸ Chief Justice Fitzpatrick to his Justice Anglin described this number as “alarming.”⁸⁹ This same year, the By the Court judgments experience its peak of 24 decisions in a single year. In addition, Snell & Vaughn suggest that limitation to “de plano” appeals to over \$2,000 resulted in a workload decline for the justices throughout the 1930s and 1940s, which the frequency table of the BTC judgments also reflects. Snell & Vaughn provide a chart of both reported and unreported decisions to convey the idea.⁹⁰ Please see table 5.1.

⁸⁶ Vaughn, *The Supreme Court of Canada: History of the Institution*, 19.

⁸⁷ *Ibid.*, 75.

⁸⁸ *Ibid.*, 100.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, 163.

Table 5.1 – The Supreme Court of Canada’s caseload per decade

Type	1910	1920	1930	1940
Reference	1	1	3	-
Civil	83	114	74	64
Criminal	-	3	6	4
Total	84	118	83	68
BTC	10	13	6	1

As demonstrated by the chart, the caseload produces a peak pattern and then significantly lowers in the 1940 year. For the same years, the BTC reflects this pattern. Most of the specific statistics given by Snell & Vaughn are indicators as to the extent of justice caseload, which seems to relate to the BTC frequency. However, not all statistics given by Snell & Vaughn mirror the BTC usage. When evaluating the 1918-1933 court, there is commentary that the caseload remained relatively constant. The By the Court decisions, alternatively, experienced a high level of fluctuation during this period.

Relying solely on this commentary is not a full-proof indicator of justice workload; there were many other factors that influenced the amount of work for the judges. Snell & Vaughn were not concerned only with the tracking the caseload of the Supreme Court, but present their findings in order to convey the point that the Supreme Court started to become a more relevant institution. They did have access to some

statistics, but not all commentary was empirically substantiated. In addition, as Snell & Vaughn discuss, though, other factors influenced justice workload that can provide us with evidence of specific years that experienced a high level workload, such as the low panel-size during the early court periods.

In 1875, the *Supreme Court Act* created both the Supreme Court and Exchequer Court, with a panel of 6 judges. One of the 6 judges would sit on the Exchequer court, while appeals made from the Exchequer to Supreme Court would be heard by the other 5 justices. This changed, however, in 1927 with the appointment of a seventh judge. A full quorum was, therefore, composed of 5 justices (with a proviso of a quorum of four judges with the consent of both parties), but it created low flexibility for establishing a quorum. Attendance became an immediate issue, and even for the earliest appointed court when both Justice Strong and Tascherau applied for leaves of absences.⁹¹ The government was forced to refuse Justice Tascherau's request so the court could remain in session, but, with two justices on leave, the Supreme Court nearly failed to reach a quorum on its very first sitting.

The problem of justice availability would persist for many years thereafter, obstructing the court from carrying out its functions. Although solutions to this difficulty were repeatedly debated in the House of Commons, they appeared futile, as governments were unwilling to allocate more monetary funds to an institution that was perceived negatively by many. The justices themselves even participated in expressing their discomfort with the size of the court.

⁹¹ Ibid., 101.

The justices encouraged the government to reach a solution. In 1910, Justice Anglin strongly encouraged (and even went so far to give advice for such a bill) the government to pass a bill to include ad hoc justices.⁹² However, the justices would have to wait for this step, as the government did not act on these concerns. Prior to this date, other measures were initiated to facilitate change. In 1907, there were amendments proposed in order to restrict which cases the Supreme Court would hear, but nothing materialized to resolve the matter. The accumulation of these efforts eventually compelled the government to respond, and change materialized on two important dates in the years 1918 and 1927.

In 1918, a new option was created by legislation for the Supreme Court of Canada to deal with the issue by using ad hoc judges for hearing appeals. If the Supreme Court struggled to produce a quorum, the Chief Justice was authorized to invite the senior Exchequer court judge to hear decisions.⁹³ If unavailable, the Chief Justice could then resort to a provincial chief justice seeking an available judge for temporary service. This did supply a temporary service, but Justice Davies did comment that he felt that it was not successful, leading to our second important date of 1927. In 1927, a bill was passed to add another justice to the court, expanding the composition of the court to 7 justices. The government finally changed its resistant position.

⁹² Ibid., 109.

⁹³ Ibid.

On both of these dates, Snell & Vaughn suggest that justice workload was a motivating factor for effectuating such changes. (The last expansion of the court to 9 judges was not mentioned, because it was not motivated by workload concerns.⁹⁴)

We can, therefore, infer from the government's action on two important dates that the justices experienced a high pressure-level created by a vigorous workload in the years leading up to 1918 and 1927. Why after decades of re-occurring debate and pressure did the government suddenly heed the demand to expand the court? It does not seem likely, after repeatedly refusing to implement changes and allocate funds to the Supreme Court, that the government would expand the court if there was no compelling problem that required action. To clarify, this was not likely the busiest period. But, if the Supreme Court enjoyed a leisurely workload, it seems unlikely that the government would arbitrarily change its resistant position. We must now align these dates with the BTC frequency table to determine if they coincide with a particularly popular By the Court period.

For the BTC device, 1918 was the highest recorded point in the data-set, registering a total of 24 BTC judgments. The years before and after were also very busy: 19-recorded decisions in 1917, and 18-recorded decisions in 1919. These three years are the three highest numbers found in the data. The 1927 period, alternatively, does not display an apparent rise in By the Court decisions with only 4 judgments. Right afterwards, however, there is a strong pulse – 1928, 10; 1929, 12; 1930, 7.

⁹⁴ Ibid., 110.

Nearly all of the specified years that Snell & Vaughn identify as having a significant caseload also enjoy an increase in By the Court judgments. However, there is not a completely satisfactory explanation, as there are two contradictory points – the 1927 court expansion does not observe a BTC spike, and a comment regarding a steady caseload for the years 1918-1933 does not hold-up for the By the Court judgments.

The statistics presented by Snell & Vaughn suggests that the By the Court device is related to justice caseload. Relying solely on these incomplete statistics, however, is problematic. In order to complement this argument, another substitute has been adopted: I have used the online Lexum database to calculate the total number of released judgments per year. These statistics will also be a general indicator of justice workload; they are not exact. The Supreme Court did not keep a total count of every heard case, and the reporting process can be characterized as selective since some of the delivered decisions were left unreported.⁹⁵ Since the reporting decisions do not take into account these omitted cases and the other factors for gauging workload (such as judge availability described by Snell & Vaughn), the published Supreme Court decisions do not perfectly reflect the caseload from the justice perspective. In lieu of complete statistics, then, the online Lexum database has been searched and the total number of delivered judgments has been documented for each year starting from 1876 to 1970. These findings have been converted to a graph, with a BTC frequency chart imposed for a comparative basis to determine if similar patterns exist. Please view figure 4.6.

⁹⁵ Roland, "Official Law Reporting in Canada," 52.

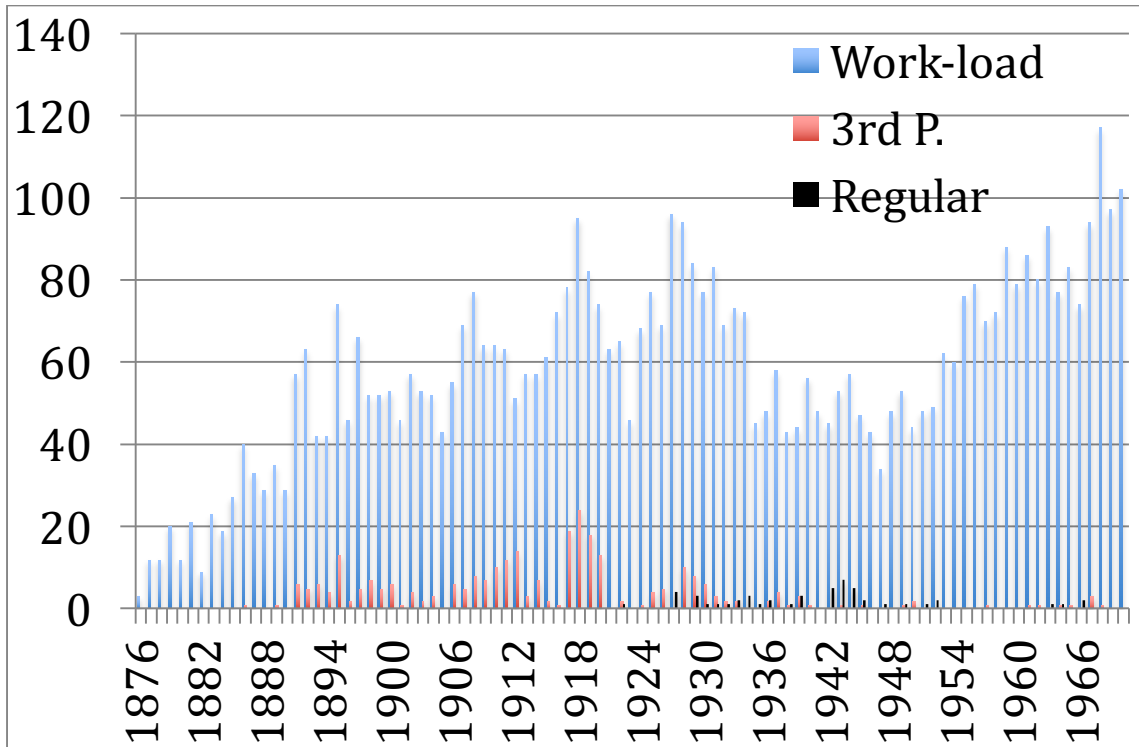


Figure 4.6 – Comparative chart of S.C.C. Workload and ‘By the Court’ frequency

The two graphs do not perfectly mirror one another, but there are apparent congruent patterns with similar spikes and pulses when comparing BTC usage to justice caseload.

From 1876-1890, the Supreme Court’s workload is low. In 1891, however, there is an immediate rise in workload, with a corresponding BTC spike with 6 judgments. The same occurs in 1895—a spike in workload (74) is accompanied with a BTC spike – 13 (double any previous year). In addition, the general rise in workload from 1905-1910 is also accompanied by a general rise in the BTC frequency.

The two most prominent BTC pulses also share an increase in justice caseload. The fluctuation patterns are similar for two strong yearly clusters: 1917-1921, and from 1925-1934. The highest yearly BTC frequency of 24 occurs in the first cluster (1918), and in the same year the caseload also registers one of its highest points, 95 cases.

The BTC examples that follow the 3rd perspective style seem to be closely associated with justice workload. After 1930, however, this style largely diminishes with only a few select examples thereafter, and the regular style becomes more noteworthy.

The lower number of regular examples makes it more difficult to determine the relationship to justice workload. For example, 11 out of the 50 examples (22.0%) were the lone example for a given year. It is difficult to make a general argument while using a solo example as evidence. Nevertheless, there are a series of cases concentrated within clusters of years. There are a total of 4 regular examples in 1927, which is accompanied by a very high level of caseload – 96 cases. Further, the strongest concentration of examples occurs in a yearly cluster from 1942-1945, with 37% of all the regular style occurring in these four years. This concentration forms a pattern on the above graph that closely reflects and follows justice workload.

Without comprehensive statistics for justice workload, two substitutes were necessary: the online Lexum database, and the *History of the Institution* by Snell & Vaughn. This tandem is by no means infallible, but together it provides us with an indication of the general work pressures placed on the justices. Both of these sources suggest – for clusters of years especially - there is an increased presence of BTC

examples when the Supreme Court is experiencing a particularly busy caseload. This has provided evidence that the By the court device was developed as a cleanup mechanism to resolve easier decisions and clear the court's agenda for more important ones. The above chart also suggests that the primary function of preserving judicial resources remained intact throughout the bifurcation in styles that started in 1923 -- 3rd perspective vs. regular. The caseload frequency was also linked to justice caseload for a large proportion of the regular style examples. In addition, the statistics of both the 3rd perspectives and regular style produced similar averages and results (compared earlier in this chapter). These results add further evidence that both styles served a similar overarching objective.

Since both styles served a similar purpose, we are now able to infer general conclusions regarding the relationship between the 3rd perspective and regular styles. The 3rd perspective style is the older tradition, and was established only 11 years after the Supreme Court's inception. The 3rd perspectives were prominent in number, and comprised much of the overall count for the BTC tradition. Starting in 1923, however, these examples start to diminish with the emergence of the regular style. This rise and decline pattern now makes sense, since the regular examples played a similar role in preserving the exertion of judicial resources (as demonstrated by chart 4.1 on page 65). Although a similar objective was reached for both styles, it was necessary to separate the two styles, because they were presented differently in the reporting services. Since they have a similar purpose of preserving judicial resources, though, it is necessary to think of the regular style as a newly emerging *style*, rather than an entirely independent practice or tradition. It is for these reasons that the newer regular examples have been discussed as exactly that – a style; it cannot be characterized as an independent practice, because the

statistics suggest that it was reserved for similar circumstances. Instead of independently, then, the regular tradition grew out of the 3rd perspectives, and into a similar role in coping with case backlog. But, some of these new cases possessed extended judicial reasons, allowing them to be applied to more noteworthy legal cases. As a result, some legal cases with intermediate legal complexities received the BTC stamp.

The principal role during this period was to quickly dismiss easier cases that did not pose an intellectual challenge to the judges. This is embodied by the low word-counts – 94% of the decisions had less than 1,000 words. Not every regular style example, however, can be characterized as serving this judicial preservation job. This job description implies that it was used for very minor cases to make room for more noteworthy ones. Out of the 50 regular examples that occurred between 1923-1970, there are a total of four exceptions that the By the Court style was applied to increasingly complex cases. This suggests that the device was starting to morph into a more meaningful tool beyond simply dismissing only minor cases effectively. These four cases are separated from the rest of the regular style, because their word-counts exceed the 1,000-word margin. These are the longest decision that we have yet to explore that received anonymity; every other regular style example fell below this word-count. These four decisions are broken down according to word-counts, starting with the shortest case.

- 1) The shortest of the four decisions occurred in 1927, in *Brooks v. The King*⁹⁶ -- a criminal law case with a word-count of 1330. The accused in this decision was charged with “procuring an abortion”, thereby violating section 303 of the Criminal

⁹⁶ *Brooks v The King*, [1927] SCR 633

Code.⁹⁷ The accused was convicted at the trial level. On appeal, however, this charge was reversed. It was ruled that the judge misdirected the jury in a “material matter” that contributed to the conviction of the accused. As a result, a new trial was ordered. The court affirmed the ruling that the judge’s misdirection required a new trial.⁹⁸ The judgment expounded on why the instruction given to the jury constitutes a judicial impropriety flagrant enough to warrant a new trial. The jury was not presented with all of the pertinent facts, and, as a result, made inferences based off of insufficient information. The final decision of the court was to allow the appeal.

2) *Fiset v. Morin* is the next decision, and it occurred in 1945.⁹⁹ This decision was 1,899 words, and it deals with a motion to quash an appeal. As a result, this case is a procedural matter, and is relevant to jurisdictional concerns.

3) The next longest decision was in 1933, *McLean v. The King*,¹⁰⁰ and is a criminal case also dealing with an impropriety committed by a judge. This case reached 1,933 words. This case came before the Supreme Court, because one of the judges dissented at the appeal level. At the court of appeal, it was agreed by all judges at the appeal level that the judge at the trial level did misdirect the jury. Disagreement arises, however, over whether or not this misdirection should result in a retrial. The dissenting

⁹⁷ *Brooks v The King*, [1927] SCR 633 at 633

⁹⁸ *Ibid.* at 636-637

⁹⁹ *Fiset v Morin*, [1945] SCR 520, [1945] 3 DLR 800. This decision was published in French, and no English translation was included, so I was unable to analyze the judgment itself. Nevertheless, it far exceeds any other case dealing with procedural issues. However, the summary and subject headings of the case are English, and the information is taken from the subject headings and summary.

¹⁰⁰ *McLean v The King*, [1933] SCR 688, [1934] 2 DLR 440

judge argues in favour of a mistrial, and asserts that the judicial mishap could have led to a change in the general direction and outcome of the case. However, the Supreme Court of Canada disagreed with this analysis. They ruled, “...no harm was done” to the general outcome of this case.¹⁰¹ As a result, the appeal was dismissed.

4) The longest decision occurred in 1934, *City of Toronto v. Prince*.¹⁰² In this case, the legal dispute hinges on whether or not the plaintiff and the city councilors reached an agreement over expropriated lands, and whether or not the actions of the councilors constituted a legally binding agreement. An offer was communicated by the “Assessment Commissioner” to the plaintiff in exchange for her land.¹⁰³ The City Council of Toronto then passed a resolution adopted the Assessment Commissioner’s report that included the arrangement for the expropriated land. However, a by-law was passed that had the effect of nullifying and repealing the arrangement. The plaintiff sued in court for the amount that she was offered, arguing that the legal transaction was complete. The Supreme Court responded with a 6,429-word judgment that was attributed to “THE COURT.” The Supreme Court allowed the appeal, and concluded that the “respondent failed to prove that an agreement was concluded in fact.”¹⁰⁴

There is not a consistent relationship for the four decisions that exceed the 1,000-words. Two of the cases are criminal law, and both deal with an impropriety committed by a judge at a lower court. The other two cases deal with public law, and a procedural

¹⁰¹ Ibid, at 693

¹⁰² *City of Toronto v Prince*, [1934] SCR 414, [1934] 3 DLR 81

¹⁰³ *City of Toronto v Prince*, [1934] 3 DLR 81 at 82

¹⁰⁴ Ibid, at 95

case. Three of these cases are concentrated within a close time frame – 1927, 1933, 1934. However, the earliest decision occurs under Chief Justice Anglin, while the latter two occur under Chief Justice Duff. Further, the last example occurred many years later (1945). The lack of consistency between these judgments suggests that this was not a structured, agreed upon approach to enhance the By the Court's prestige. Nevertheless, these cases do not simply follow the previous BTC examples.

These cases can be classified as a higher tier in terms of importance compared with all other By the Court decisions. Not only did it possess a longer judicial response, they deal with more important matters compared with the general usage of the earlier decisions. The two criminal law cases dealt with mistakes made by judges, which questioned the integrity of a trial. Further, *City of Toronto v. Prince* involved a rather large amount of money considering the time period (\$25,000). Most of the other By the Court examples dismiss appeals or deal with procedural cases in a few short paragraphs. These cases warrant distinction from all previous By the Court examples, since they are applied to cases that contain a higher level of legal complexities. As a result, these exceptions cases comprise what can be called the intermediate BTC tradition. These decisions do not fit within the minor tradition category of being used for easier cases. Nor do they coincide with the more modern examples that are used for constitutional legal cases. As a result, they mark the emergence of an intermediate tradition on the Supreme Court of Canada.

Conclusion

Starting in the 1920s, we see the emergence of the BTC regular style examples. These cases are separated from the earlier examples, since they were published in the reporting services with a different organizational style. Instead of simply rendering a summarized version of cases, these cases were published using the typical 1st person perspective, which suggests the judges themselves were declaring the law. Although these cases are separate from the earlier BTC cases, the regular examples played a similar role in terms of preserving judicial resources by using anonymity as a cleanup mechanism for various issues. However, not all examples were used for the easy decisions. An intermediate tradition emerged that demonstrates the BTC device was starting to expand its role by being applied to more significant decisions. With the emergence of the regular style in the 1920s, the BTC examples started to look promising. In substance and form, they are started to reflect the examples from our modern era. However, there were very few examples of the intermediate tradition, with the most prominent example being the *City of Toronto v. Prince* with a 6,429 words. Nevertheless, the birth of the regular style is an important advancement for the BTC device. The next chapter of this thesis will further explore the ramifications of this advancement using the archives as a tool to provide deeper insight.

Chapter 5 – The Judges’ By the Court: The Rise of the Intermediate Tradition

The By the Court story has proven to be an interesting one, fraught with many twists and turns. These twists demonstrate its versatile nature, as it has been applied to a variety of concerns. The Registrar and supporting staff, however, have up to this point been steering the car that determines its pace. They are responsible for its invention, and in applying this device. Meanwhile, the justices are the passengers – aware that the car is moving, but simply enjoying the view. This all changes, however, with the emergence of the regular style.

In 1923, the Supreme Court split the BTC tradition into two different style. These new examples are distinguished from the older, because they are accompanied by direct judicial opinions, which abandons the old 3rd perspective versions.

This chapter will be exploring issues surrounding this change. What does this shift mean for the BTC tradition? The earlier tradition was susceptible to the influence of the publication process. Is this, too, simply a manifestation of the process? Or, will it be consequential to the broader BTC ideas?

As discussed in the previous chapter, there is a series of decisions that are organized and published in the reporting service that form a new, regular style. These examples were applied to increasingly difficult cases that lead to the development of an intermediate tradition. However, this new status does not mean these decisions were immune from being influenced by the publication process.

Two cases were published in the Dominion Law Reports with the regular format style, but they were attributed in the Supreme Court Reports.¹⁰⁵ This attribution discrepancy is difficult to fully explain, but it is likely that each reporting service had a slightly different routine for decisions that were not very important. Regardless of the reasoning, is this tradition only a by-product of the publication process? My trip to the archives was indeed highly successful, as it has revealed answers to these questions, too.

Yes, the archives did reveal the extent to which the Reporting services influenced the earlier By the Court decisions. Yes, it did confirm that publication concerns were the motivation for the earliest By the Court decisions. But, the archives revealed much more than this. Firstly, there was a decision that was submitted for publication to the Registrar that identified an individual justice as the writer. However, the justice's name that authored the opinion was scratched-off of the archival-file, which had the effect of creating anonymity. This decision was published in the Supreme Court Reports with written reasons attached, and it was authored by "THE COURT."¹⁰⁶

The ramifications of this decision are rather ambiguous. There is only one judgment submitted to the Registrar, and, therefore, it is the judgment representing the entire panel of justices. However, the judgment was typed firstly with identifying the justice that wrote it, and then afterwards the name was scratched-off and therefore

¹⁰⁵ The cases: 1) *Fiset v Morin*, [1945] 3 DLR 800, [1945] SCR 520, 2) *Toronto v Famous Players Canadian Corp.*, [1936] 2 DLR 129, [1936] SCR 141.

¹⁰⁶ This case was the first BTC regular example – *Hamilton v Evans* [1923] 1 DLR 370. Further, there was another case – *Lotbiniere LBR Co. v. Fortin* [1927] 4 DLR 167 – that followed a similar pattern. The archives revealed that this decision was typed-up without identifying an author. "THE COURT" was later written in pen on the transcript file.

illegible. Consequently, it is difficult to infer at which stage of the process it became a By the Court judgment – was the justice who submitted it responsible for creating anonymity, or was the Registrar who received it? There were two cases in total that followed a similar idea, but there were another 40 examples whereby anonymity was established before the decision was submitted to the Registrar for publication.

For all of these 40 decisions, there was only one opinion submitted to the Registrar for publication; there were no other written reasons found in the archives. In other words, there was only one opinion written on behalf of the panel of justices. Many of these cases were attributed to “THE COURT” even in the typed version found in the archives.¹⁰⁷ This suggests that the Registrar or publication process did not convert these decisions to the By the Court style. Instead, it was a conscious decision by the justices (or at least one) in order to stamp these cases with anonymity.

After a justice typed these opinions they were then circulated amongst the judges, who showed approval by signing the typed version. We know this because many of the archived By the Court judgments contain signatures from the justices sitting on the panel. This suggests that there was a method used to collaborate regarding an opinion that was representative of the entire panel.

The emergence of the regular style greatly alters the complexion of the By the Court device. Prior to this date, all of the By the Court decisions were displayed using a

¹⁰⁷ Statistics relating to authorship found in the archives will be discussed later in this chapter.

3rd person perspective. The justices provided the input in the form of typical judicial reasons, but the publication process itself turned them into By the Court judgments. This suggests the influence of the personnel and specifically the Registrar in determining the application of the By the Court device; the decision to apply the 3rd person perspective has remained within the procedural realm. For the regular style examples, however, the archives show that the decision to produce an anonymous judgment often occurred before the submission of reasons to the Registrar for publication, suggesting that the justices determined the application of the regular examples. A transformative shift occurred for the By the Court tradition on the Supreme Court of Canada: a by-product of the publication process, to a technique used by the justices -- ‘process created’ vs. ‘justice created.’

It is very difficult to fully explain the choice of the judges to present decisions under the ‘By the Court’ rubric. The involvement in the application for this device occurred many decades ago, so there is no one from this period that could share this information. The works that detail the historical trajectory of the Supreme Court do not reference the court’s anonymity usage, never mind answering such a specific question. The archives as well do not overtly mention a rationale, but simply contain the cases that follow the BTC style. Nothing within these files gives us a concrete, satisfactory explanation. Nevertheless, we can focus on the first BTC decisions in search of some insights. This thesis has continually discussed the purpose of this device, and highlighted that the device’s application in certain time periods was exclusively restrained to the procedural realm without influencing, or touching the judicial realm. In reality, the Registrar is likely to work closely with the Justices, so there would be much interaction

between the two separate “realms.” There were many 3rd perspective cases that dealt with procedural matters and jurisdictional issues. These all originated in lower courts from various provinces, and then arrived at the court on appeal.¹⁰⁸ However, the first regular example originates within the Supreme Court itself, as it deals with a “motion to affirm jurisdiction.”¹⁰⁹ This is a very short decision at 17 words, but the basis for appeal is not over a previous court’s ruling; it is over an “order of the Registrar” regarding a ruling over jurisdiction. As Macfarlane states, the Registrar was granted authorization to act as judge sitting in chambers to hear some jurisdictional issues.¹¹⁰ The archives demonstrate that the judgment for this case was written by Anglin, but it was later crossed-out in pen. These unique characteristics make it likely that this case created a strong interaction between the procedural and judicial realms, and a robust enough interaction that could be responsible for the transference of the device to the judicial realm. After this case, the Supreme Court continued the regular tradition, and encapsulating judicial opinions in the BTC style.

The archive versions of these early regular examples also help to support the argument that the judges used the device in a similar capacity as the older BTC examples. In other words, the device was used to quickly eliminate mundane cases from the judicial gambit, and attempted to do so in a way that saved judicial effort. As previously mentioned, the first case of *Hamilton v. Evans* in the archives was only anonymous

¹⁰⁸ *Re Duncan* (1958 11 DLR 616) was a 3rd perspective case that originated in the Supreme Court, but it dealt only with contempt of court – an issue not likely to influence the Registrar.

¹⁰⁹ *Hamilton v. Evans*, [1923] 1 DLR 370 at 370

¹¹⁰ Emmett Macfarlane, "Administration at the Supreme Court of Canada: Challenges and Change in the Charter Era," *Canadian Public Administration* 52, no. 1 (2009): 5.

because the author's name was scratched off with pen after the transcript was typed. In addition, the fourth issued regular example – *Lotbiniere LBR. Co. v. Fortin*¹¹¹ - also follows a similar pattern. The archival transcript for this case did not have an author; it was omitted (for unknown reasons). “THE COURT” was then written in pen afterwards. This example represents the role that the BTC played even in the hands of the justices – a similar one to that of the 3rd perspective cases. “THE COURT” was added to this case after the fact, almost as if those individuals involved in the process were not sure which judge wrote the opinion. “THE COURT” appears to be a default label that is applied for housekeeping issues that need to be handled, if they are not considered to be critical. For example, the 5th BTC regular style was a memorandum that responded to questions that were brought forward about a specific issue within a broader legal case. This matter was dealt with (presumably rather quickly), and was written on behalf of THE COURT. These examples demonstrate that the general idea for the cases that received BTC are cases that require subsidiary or alternative issues that are not as significant as the major legal decisions.

The justices borrowed the earlier idea of anonymity, and applied it for judgments. The purpose that it has served in the hands of the justices has been discussed. Many of the examples are rather straight forward, but the judge's are also responsible for the creation of the intermediate tradition. To clarify, the judges are responsible for applying anonymity to cases that are more meaningful, as well as more complex than the usual BTC examples. It is in the hands of the justices when the device experiences its augmentation in scope and status, as it is applied for the intermediate tradition cases, such

¹¹¹ *Lotbiniere LBR. Co. v. Fortin*, [1927] 4 DLR 167

as *Toronto v. The Prince*, that start to leave an imprint (albeit a very light one) on Canadian law. Are we able to determine which of the justices is responsible for the sustained transformation? And, which justices are responsible for its increased proliferation? In search of a satisfactory answer to this question, the BTC decisions that were found in the archives have been broken down according to Chief Justiceships. Please see figure 5.1.¹¹²

¹¹² There were three decisions that were attributed to “THE COURT” in the archives, but they were published in the reporting services in a 3rd perspective style. To clarify, the justices intended these cases to follow the regular style, but the publication process converted them into 3rd perspectives. As a result, these cases were included in graph 5.1. The examples were: *Bozak v Rural*, [1967] 62 DLR 64; *Dallas et al. v Dallas Oil Co. Ltd.* [1931] 2 DLR 733; *Fidelity Trust Co. v Purdom & Northern L. Ass’ce Co.*, [1930] 1 DLR 1003.

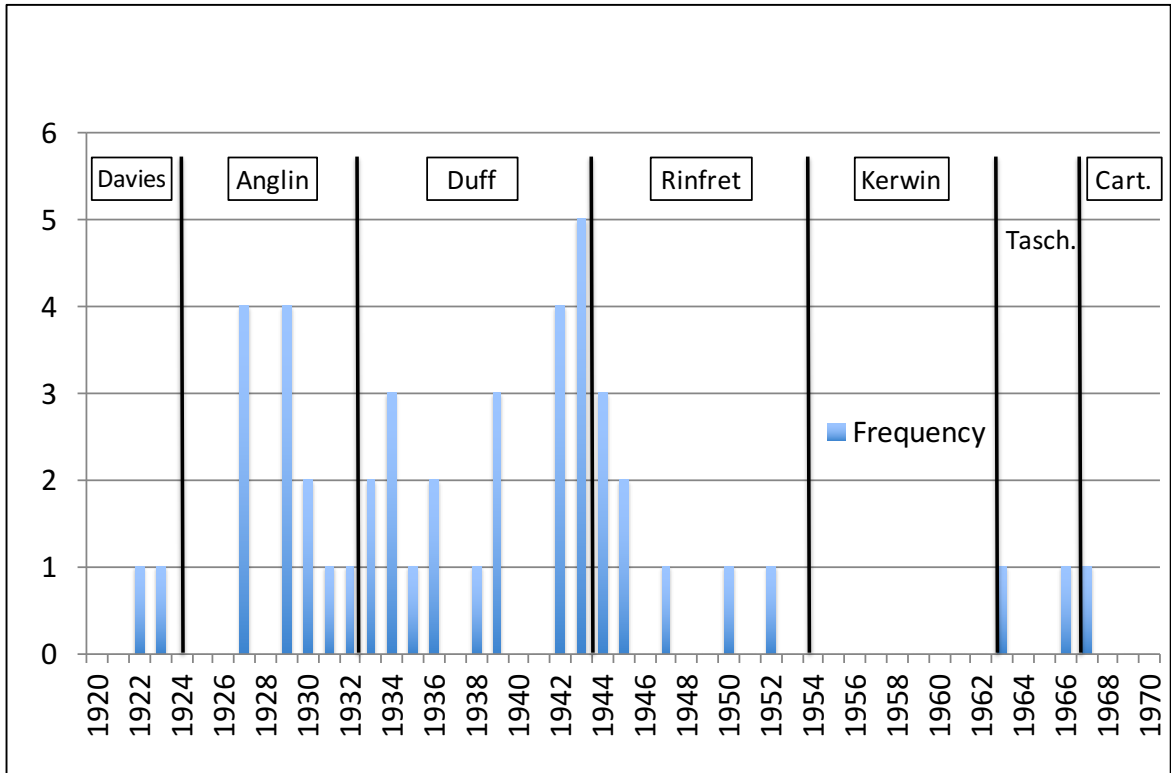


Figure 5.1 – Archival found Regular examples broken down according to Chief Justice

The most prominent years for the By the Court device occur under Chief Justice Anglin and Duff (1924-1944). Under Anglin, the device starts to gain momentum with a pace of 1.5 BTC per year. Chief Justice Duff appears to be an enthusiast, though, as the BTC device is propelled to its highest pace: 1.75 BTC/year. Thereafter, however, the BTC device tapers off starting with Rinfret (0.8/year), and very few for the next two Chief Justiceships of Kerwin and Taschereaux (0 and 2, respectively). The earliest archive documented occurrence is under Davies, but it is towards the end of his career as Chief Justice, and his successor – Anglin - is elevated to the position approximately a year after.

In our search for whose responsible for the incorporation of this device, it would seem both Anglin and Duff are attractive prospective candidates, as they oversaw an increase in By the Court examples. Although Duff experienced the most frequent BTC usage, Anglin is Chief Justice before Duff. However, the archives revealed another tool that could provide assistance in narrowing down the search.

Most typed-up legal reasons that were submitted by the justices to the Registrar for publication had an attached template. Although not every reviewed case-file contained one, the template acted as an author tracker – it identified which of the justices submitted the reasons to the Registrar. All of the 3rd perspective decisions only identified the justices that authored and submitted the reasons to the Registrar. For these newly found archive decisions, though, the template instead labeled “THE COURT” as writing the judgment for many of the decisions. However, in a total of 10 (21.7%) of the BTC cases, the template provides evidence for which one of the justices authored the opinion on behalf of the court.

Table 5.2 – ‘By the Court’ Examples with authors identified in archives

Justice (Author)	Frequency
(Total Cases: 10)	
Duff	3
Anglin	2
Lamont	2
Hudson	1
Rinfret	1
Kerwin	1

Justice Duff records the most written judgments, Lamont and Anglin tied for second, while the rest of the judges tied with one written opinion. Duff becomes increasingly appealing for influencing the outcome of the device, since he appears to be a genuine enthusiast; he greatly enhanced the influence of the By the Court tradition. Not only did he increase the number of BTC decisions, Duff was also Chief Justice when two of the four intermediate tradition cases were delivered. It is under Chief Justice Duff that the device is applied to the case of *Toronto v. Prince*, thus, marking an expansion of the device’s scope, as this is the longest, most complex BTC decision. But, I do not believe he is responsible for incorporating this device on the Supreme Court of Canada. He may very well be an avid admirer, but the exploration of the earliest archive By the Court decision tilts the scale in favour of his colleague.

For the earliest archived-documented decision, *Hamilton v. Evans*, 1923, there was one typed opinion that was submitted for publication to the Registrar. For this decision, the seriatim style was abandoned, as there was only one judicial opinion submitted to the Registrar. Which justice was responsible for submitting it was meant to be concealed, since the name of the justice was conspicuously crossed-off with pen after the reasons were typed. It is difficult to determine who scratched off the name, since it was done after the reasons were typed-up. Nonetheless, the template informs us of authorship, and it read: Justice Anglin. The second anonymous judgment emerged in 1927, with Anglin also authoring the judgment. This would be the first instance of a By the Court criminal law case, with a healthier word-count compared to many of the earlier decisions (it is one of the four exceptions that qualifies as an intermediate tradition example). The consecutive authored opinions of the two earliest decisions suggests Anglin could have been responsible for creating the By the Court device, and under his leadership as Chief Justice, it started to gain some momentum.

We do not have sufficient data (10 out of 38 examples) to form a strong conclusion. Because of his authorship role for the first two BTC regular style examples, however, Chief Justice Anglin could be responsible for transforming the device from a publication tool, to being applied in more significant legal decisions. But, both of these decisions were close to the period that Anglin became Chief Justice. The first example missed his Chief Justiceship by only a year, while he was Chief Justice for the second BTC example he wrote. Is the By the Court device simply used as a pen name for the Chief Justice? This would explain why Anglin would author the earlier decisions, since it

is close to his Chief Justiceship. No, the available data states otherwise. The Chief Justice wrote only 3 out of the 10 known authorship decisions, and only one occurred in each of the Chief Justiceships of Anglin, Duff, Rinfret.

Conclusion

The archives have revealed that the shift in the visible presentation of reasons found in the reporting services (marking the separation of the regular tradition) was also accompanied by a change in the court's operations when dealing with anonymity. It indicates the justices taking control over the device, and enhancing its prestige. It has been argued that Chief Justice Anglin is the most likely candidate that is responsible for the increased prominence of this device. In pith and substance, the regular examples during this period are structured and organized identically to many of the modern examples. With the rise of intermediate tradition, the BTC idea is being applied to cases that are classified as more important. Relative to the earlier BTC examples, the intermediate cases are an important advancement. Even with the enhancement of the scope of the device that accompanied the creation of the intermediate tradition, however, there is no comparison between this decision and the modern cases, such as the language decisions, Manitoba Language Reference, and the Quebec Veto decision. These modern cases in terms of importance weigh-in on a "grand" scale. It appears that one last step is required for the BTC device to be elevated to its modern prestige for being used for some of the most significant legal cases, and it all starts with a 14-year old boy...

Chapter 6 – Emergence of the Grand Tradition

His name was Steven Truscott. He was convicted for the rape and murder of a 12-year-old classmate, Lynne Harper. At the age of 14, the judge uttered the eerie, unnerving conviction:

“... you will be kept in close confinement until Tuesday, the 8th day of December, 1959, and upon that day and date, you be taken to the place of execution and that you there be hanged by the neck until you are dead. And may the Lord have mercy upon your soul.”¹¹³

Truscott lived in a small town in Clinton, Ontario. The population rarely exceeded 2,600 people, many of whom were affiliated with the nearby air force base. Clinton was a very conservative, religious town, as the temperance act banning alcohol was in effect.¹¹⁴ The air force base was a major hub of activity that promulgated values of compliance and obedience, especially towards authority. These values were very deeply entrenched in the everyday behaviors of the locals, none of whom would have predicted the tumultuous chain of events that would very shortly ensue in their rather stagnant, quiet town.

The era in which this incident transpired was also so very different compared to today. It was in 1959 when Maclean’s published what was considered to be a controversial article, *Going Steady: Is it Ruining our Teenagers?* Any assault of a sexual

¹¹³ Julian Sher, *Until You Are Dead: Steven Truscott's Long Ride into History* (Vintage Canada, 2002), 283.

¹¹⁴ *Ibid.*, 8.

nature always receives uproar. However, in the conservative 60s, these heinous crimes seemed to be much less frequent.¹¹⁵

The entire town of Clinton, Steven Truscott, and the province of Ontario was absolutely horrified, as Lynne Harper's body was found a few days after having gone missing – the 12 year old's clothes were ripped off her lifeless body, and there were stark bruises on her neck where she had been strangled to death. The government of Ontario went so far as to issue a bounty of \$10,000 for the murderer of Lynne Harper-- dead or alive.¹¹⁶ All available resources were dedicated to resolving this abhorrent crime, firstly focusing on the last person that was seen with Lynne Harper: Steven Truscott.

When questioned by police, Steven rendered the events of the day Lynne went missing, to the best of his knowledge, which transpired on June 9th, 1959. He adamantly asserted that Lynne asked him to give him a bike ride down to the highway. Lynne rode on the handlebars of Steven's bike and he drove her down to the requested part of the highway, where she got off his bike. Steven then turned back and rode into town. A little distance up the road, Steven stopped his bike and looked back, noticing that Lynne was getting into a grey car with an unidentifiable driver. This did not alarm Steven since Lynne told him that she was getting a ride. A few days later, however, authorities found Lynne Harper's body.

¹¹⁵ Ibid.

¹¹⁶ Ibid., 64.

The incriminating evidence during Steven's Truscott trial was purely circumstantial. The prosecution had eyewitnesses that contradicted Steven's story. However, they were all very young: most of them were around 12-15 years old. But, there were also more than two witnesses that corroborated Steven's story. During the trial, there were so many witnesses called it largely convoluted the details of that day, not to mention how youngsters so often inadvertently omit and alter their statements.¹¹⁷ Nevertheless, the testimonies were an important factor in Steven's conviction.

Another important component within the trial was the time of death deduced from a methodology analyzing the remains of Lynne Harper's stomach.¹¹⁸ There were expert battles over the validity of this method. It was allegedly accurate within two hours for time of death, which was the time Steven was with Lynne. Steven also had large lesions on the base of his penis – another vital fact that it is believed subsequently led to his conviction. It was argued by the prosecution that these perplexing scars were inflicted when raping Lynne Harper.

By no means was there compelling evidence for a conviction; there were witnesses that corroborated Steven's story. The methodology applied to the food found in Lynne Harper's stomach was questionable; experts for the defense said that no such method exists that can place a time of death within two hours by analyzing stomach content.¹¹⁹ Furthermore, an expert for the defense was called to the stand regarding the

¹¹⁷ Ibid., 42.

¹¹⁸ Ibid., 320.

¹¹⁹ Ibid., 330.

lesions and asserted the wounds were most likely caused by masturbation.¹²⁰ Nonetheless, Steven Truscott was sentenced to hang to death for the rape and murder of Lynne Harper.

The news of the conviction was the spark that translated into the conflagration of debate, controversy, and consternation surrounding Steven Truscott. Canadians could not fathom putting a 14-year-old boy to death; they could not believe that the basis for conviction was circumstantial. The ruling in the Steven Truscott case made not only national, but also international headlines in the media.¹²¹ The Steven Truscott case would become one of the most famous and controversial cases in Canadian legal history.¹²² This controversy spilled over into the Canadian political and judicial realms.

The Truscott trial created questions of fairness in the eyes of the Canadian public. Politicians attempted to respond to these complaints by searching for a solution to minimize the controversy surrounding the decision. On October 1st of 1959, Prime Minister John Diefenbaker conveyed his concern to cabinet regarding the Steven Truscott case.¹²³ Steven was granted temporary reprieve while the case made its way through the appeal process.¹²⁴ The Ontario Court of Appeal upheld Steven's conviction. After extended debate in the House of Commons, however, the government commuted his sentence to life imprisonment. The case was then directed to the last institution that could intervene on Steven's behalf—the Supreme Court of Canada. The Court, however, failed to do so, as the decision to deny application for leave was denied by a panel of 5 justices.

¹²⁰ *Ibid.*, 321.

¹²¹ *Ibid.*, 1.

¹²² *Ibid.*

¹²³ *Ibid.*, 330.

¹²⁴ *Ibid.*, 334.

In 1966, Isabel LeBourdais would produce the first book, *The Trial of Steven Truscott*, arguing for an inquiry into the case. In her book, Isabel LeBourdais extensively detailed the case that led to Steven's conviction. The book elucidated the conduct of the police during the investigation, as well as scrutinized finite details of the court proceedings.¹²⁵ It illustrated many perceived inadequacies in the legal system, and struck a resonant chord in the hearts of many Canadians. Playing on the emotions and public sympathy, the book garnered the support and created the necessary momentum that forced the government into action.

The delicate nature of the case compelled the Canadian government to act with caution. It was necessary to act quickly, especially since Truscott had already served years in prison, but the investigation into the trial must be thorough enough to alleviate concerns of an unfair trial. Many Members of Parliament argued that a Royal Commission was the appropriate means of effectively handling this difficult situation.¹²⁶ After all, the Supreme Court of Canada refused to grant application for leave just 8 years earlier, and four out of the five members that were on the panel were still members on the court. The court was being asked to evaluate its previous judgment to determine whether or not it arrived a reasonable conclusion.¹²⁷ Obliging the Supreme Court to rehear this decision would be an insult to its credibility, and the court would not likely rule contrary to its previous decision. Consequently, it was argued that using the Supreme Court would

¹²⁵ I. LeBourdais, *The Trial of Steven Truscott* (McClelland & Stewart, 1966).

¹²⁶ Sher, *"Until You Are Dead": Steven Truscott's Long Ride into History*, 321.

¹²⁷ Frederick Vaughan and History Osgoode Society for Canadian Legal, *Aggressive in Pursuit : The Life of Justice Emmett Hall* (Toronto: University of Toronto Press, 2004), Book, 205.

compromise the integrity of the inquiry, and not allow Truscott his deserved impartial ruling. The Canadian government did not heed this advice; instead, they disagreed and used the Supreme Court of Canada as the institution that would conduct the investigation.

There were some reforms to the Criminal Code that should be addressed. Since Steven's conviction in 1959, the Criminal code had been amended to give cases involving the death penalty an automatic appeal to the Supreme Court. Prior to 1961, a dissenting opinion at the provincial court of appeal level was required.¹²⁸ The amendment gave the court authority to hear and rule on issues of fact, not just issues of the law.¹²⁹ These amendments were not in place when the Supreme Court denied application for leave in 1960.

The Canadian government drafted a reference question and submitted it to the Supreme Court of Canada. Explicitly stated in the reference question was:

“There exists widespread concern as to whether there was a miscarriage of justice in the conviction of Steven Murray Truscott, and it is in the public interest that the matter be inquired into.”¹³⁰ The public was the primary impetus for the inquiry and it was by no means concealed.

¹²⁸ Sher, *"Until You Are Dead": Steven Truscott's Long Ride into History*, 311.

¹²⁹ Vaughan and Osgoode Society for Canadian Legal, *Aggressive in Pursuit : The Life of Justice Emmett Hall*, 203-04.

¹³⁰ Sher, *"Until You Are Dead": Steven Truscott's Long Ride into History*, 200.

The justices of the Supreme Court acknowledged the significance and difficulty created by the Truscott reference. Justice Cartwright acknowledged these dangers in a confidential memo sent to his colleagues stating:

“We know the reference has been made to satisfy an aroused public opinion to the effect that Truscott’s trial was unsatisfactory and that he may well be innocent. Unless every latitude is given to the defence, public opinion will be left unsatisfied. I cannot escape a feeling of regret that the government, having yielded to Mrs. LeBourdais’ cry for an inquiry, did not also accept her view that this court is not the proper tribunal to conduct it.”¹³¹

The justices were fully cognizant of the looming controversy in which they very soon might be entangled.

In reaction to the reference question, the Supreme Court for the first time in its history morphed into a trial-court. The Supreme Court of Canada, an appellate court, would hear live eyewitness testimony, and would also admit new evidence for the case.¹³² Steven Truscott himself would testify for the first time, refusing to do so on his lawyer’s advice in 1959. The court was only asked whether or not the first trial was fair, and if not, they could advocate for a new trial.¹³³

¹³¹ Ibid., 397.

¹³² Ibid., 380.

¹³³ Ibid., 403.

The difficulty of this situation cannot be overstated. There was no possible positive outcome that would reflect a credible image, as the Supreme Court was handcuffed into re-hearing and re-ruling on a case. The government did possess options, with a Royal Commission being the most sensible approach from many peoples' perspective. Instead, the Supreme Court was forced to confront the issue. Simply dodging the case was not an option, since such a move might be misconstrued negatively. Overturning their previous decision to deny application for leave, even under a differently worded Criminal Code, could be portrayed as the media influencing judicial rulings. It seems that the Supreme Court took what was perceived as the least damaging path.

The Supreme Court delivered the Steven Truscott ruling on May 4, 1967. The Supreme Court ruled to uphold the conviction of Steven Truscott, and concluded that the trial was fair and the appeal should be dismissed, which confirmed their initial appeal dismissal in 1959. The majority wrote a massive judgment detailing the particulars of the case, and providing an in-depth explanation about the evidence used to support their conclusions. The justices even made the bold move of candidly stating, "There were many incredibilities inherent in the evidence given by Truscott before us and we do not believe his testimony."¹³⁴ There was one justice, however, that refused his acquiescence to the majority and was the lone court-member in dissent. Justice Hall wrote a powerful dissent and ruled that the trial was a miscarriage of justice, and Steven Truscott should be

¹³⁴ Ibid., 443.

released. Many Canadians heralded Hall as a hero, and saw him as the only reasonable member of the court.¹³⁵

The justices in the majority must have anticipated the advanced controversy in response to result that the court reached. They already were cornered into a very difficult predicament – the Canadian government largely the culprits that arranged it. The outcry of complaints and criticisms were likely to follow, as the picture of the perceived innocent, wrongly convicted 14-year-old boy would resonate in the hearts of Canadian citizens. Canadians piled into the Supreme Court room similar to a concert, and the name Truscott would generate such notoriety that fans would travel from all over just to catch a glimpse of his face during the trial.¹³⁶ The Supreme Court was not experienced in dealing with such pressures. It was overwhelmed with scrutiny, at a time when it was considered to be a “quiet court.” How would the Supreme Court respond to assuage these concerns? What mechanism would allow the Supreme Court to deliver an authoritative thrust of a judgment, while forfeiting as little credibility manageable? The answer can be found in the released majority opinion -- not within the content itself, but the manner in which the judgment was structured and how authorship could not be traced back to any particular justice in the majority.

Authorship of the majority opinion was not attributed to one justice (not even the Chief Justice), which one would expect since it is the conventional presentation-style that was deeply grounded in tradition. Instead, for the first time in the Supreme Court’s

¹³⁵ Vaughan and Osgoode Society for Canadian Legal, *Aggressive in Pursuit : The Life of Justice Emmett Hall*, 203.

¹³⁶ Sher, *"Until You Are Dead": Steven Truscott's Long Ride into History*, 407.

history the judgment of the court in a major and high profile case was attributed jointly to all 8 members of the majority.¹³⁷ That is to say, every member of the majority was recorded as participating in authoring the judgment. For significant cases prior to this date, every produced judicial opinion credited a solo justice with authorship. It was the late 1960s, when seriatim still lingered as an acceptable manner for delivering judgments. In significant decisions especially (and even more consistently, they used it for federal reference questions, with a dozen examples between the end of the war and the Truscott Reference), the Supreme Court would often resort back to this traditional seriatim style of each justice producing a separate but complete written opinion. This emphasized the perceptions and expectations during this period of the court, and the broader ideas of justice responsibility -- the individualistic nature. In Truscott, however, the Supreme Court of Canada implemented a concerted, institutional effort to answer the sustained criticism, resulting in a complete reversal of organization and presentation—from Seriatim to By the Court. The institution generated the most collective, unified approach available in order to send the potent message that every single justices opinion was in complete alignment, with no disagreement whatsoever materializing. The strategy imposed an institutional approach on what is typically characterized as an individualistic court. This projected image softened Canadian expectations to a more collegial court, a position that the Supreme Court would eventually embrace in the future.

Anonymity was once again used after the Truscott decision; the Supreme Court of Canada elected to carry on the tradition. In November of 1967, just 7 months after Truscott, the Supreme Court used anonymity once again for two noteworthy legal

¹³⁷ *Reference Re: Steven Murray Truscott*, [1967] SCR 309

decisions. *Reference Re: Offshore Mineral Rights*¹³⁸ and *The Queen v. Board of Transport Commissioners*¹³⁹ complete the 1967 trilogy that demarcates the start of the modern grand By the Court tradition. This trilogy of cases reflects the final elevation into the grand tradition on the Supreme Court of Canada.

Even if it is largely speculative, I feel compelled to answer the ‘who’ question - who is responsible for the promotion of this device? It is fair to dismiss our previous candidate, Bora Laskin; he was not yet a member of the Supreme Court. The next logical answer seems to be the Chief Justice at the time of the Truscott decision -- Chief Justice Robert Taschereau. His leadership role as first among equals could offer him an opportunity to persuade his colleagues regarding the packaging of reasons. There is evidence, however, that demonstrates that Taschereau was struggling to fulfill his ordinary judicial duties.

Aware of the intense heat of the Truscott-spotlight, Justice Cartwright sent a memo to his colleagues displaying his uneasiness over Chief Justice Taschereau. The increased public scrutiny caused by the Truscott case could reveal the Chief Justice’s feeble state of mind. The Chief Justice’s professional (and personal) behavior was questionable, as he was stricken by alcoholism.¹⁴⁰ In addition, during the Truscott hearing

¹³⁸ *Reference Re: Offshore Mineral Rights*, [1967] SCR 792

¹³⁹ *The Queen v Board of Transport Commissioners*, [1968] SCR 118

¹⁴⁰ Vaughan and Osgoode Society for Canadian Legal, *Aggressive in Pursuit : The Life of Justice Emmett Hall*, 210-12.

itself, the Chief Justice was uttering nonsensical, incoherent questions.¹⁴¹ In his condition, it does not appear likely that Taschereau was capable of influencing his brethren.

At the Truscott trial, the next most senior judge, Justice Cartwright, was forced to cover for Chief Justice Taschereau.¹⁴² Further, he had to cover other areas of the Chief Justice's work before the Chief Justice retired.¹⁴³ It seems that it was Cartwright's court even before Taschereau retired. When he finally did retire, it was Cartwright who was named his successor as Chief Justice, and he was Chief Justice for two cases of the BTC trilogy.

The circumstances surrounding the Supreme Court during the Truscott case point to Justice Cartwright as the most likely candidate for elevating the By the Court device to its modern status. He has also been credited with other reforms to the court's operations including establishing regular conferencing.¹⁴⁴ Even though he invented the device, however, after the trilogy, the By the Court tradition – both minor and grand - experienced a hiatus. Twelve years later, when Bora Laskin was Chief Justice, the court turned to the BTC style to deal with another serious challenge in the language cases. It was no longer Chief Justice Cartwright, however; he had long since retired from the court. There were only two surviving members still on the court that were sitting for the language decisions – Justices Martland and Judson. Martland played a prominent role on the Supreme Court as one of the more senior members, while Judson was considered to

¹⁴¹ Sher, *"Until You Are Dead": Steven Truscott's Long Ride into History*, 255.

¹⁴² *Ibid.*, 256.

¹⁴³ *Ibid.*

¹⁴⁴ Vaughn, *The Supreme Court of Canada: History of the Institution*, 216.

be less influential. Although it is speculative, it seems that Martland was the link that transported the By the Court idea into the modern era starting with the 1979 Language cases.

Conclusion

In Truscott, the external pressures materialized into an existential threat that forced the justices to respond with innovation – a totally unorthodox approach for a high appellate court. Truscott was indeed a difficult challenge. It was this grave challenge that jarred the BTC device into its matured, modern form. The Supreme Court of Canada, from that day forward, possessed an additional resource in the BTC device in order to capture opportunities, and to mitigate threats to its legitimacy as an institution.

Conclusion: The BTC Journey and our Modern Courts

The By the Court device has experienced a long, arduous journey on the Supreme Court of Canada. Before discussing my general arguments, however, there is still one aspect of these cases to which I have not yet made reference, acting as a link between the different evolutionary stages.

Whenever the Supreme Court delivers a written opinion, the justices always describe their opinion using the pronouns “I/me.” For example, they will state, “I believe the appeal is dismissed”, or “I am of the opinion that the appeal should be dismissed.” This is a tradition that stems from the seriatim way of delivering opinions, and it is during the very early periods that it became a solidified routine. This makes sense; for a true seriatim style judgment, each justice was expected to produce their own individual set of reasons, while joining a colleague’s position was not as common. Even after seriatim became less frequent, however, this tradition was left intact; legal opinions still only used singular pronouns regardless if a justice is writing on behalf of a unanimous court, or writing a solo disagreeing opinion. This is a practice to which the Supreme Court of Canada is still committed today -- it is an ironclad routine that has very few exceptions.

One such exception is when the court is orally declaring their ruling from the bench, or the justices are quickly resolving a very mundane case. In such examples, the justice presiding over the case uses “we/us” when detailing the reasons for judgment, as well as the final conclusion. For example, “we believe the appeal should be dismissed” or “we are all of the opinion that the appeal should be allowed.” The point here is that only

the decisions that are basic enough to be orally resolved are often published with singular or individual pronouns.

It is necessary to highlight that no other cases are published with this difference. The By the Court examples are the only other exception to this rule. Only one out of the 50 regular style examples follows the seriatim “I” path; all of the other cases follow the “we/us” descriptors.¹⁴⁵ In addition, the grand tradition examples also carry on this unique pronoun usage. This distinct characteristic demonstrates that even as the By the Court tradition has matured into its modern practice, there are remnants still present from its very humble beginnings. This is a small detail that ties the different evolutionary stages together.

One might argue that it would make sense that such a distinction exists; By the Court means after all that the entire court is speaking in unison. However, the Supreme Court still uses “I” even when issuing totally unanimous judgments. Further, one might comment that this seems like a rather petty observation. In the USSC, Justice Breyer was criticized for using the wrong pronoun when writing a majority opinion.¹⁴⁶ A change that is consistent for all BTC decisions suggests a conscious and deliberate effort dedicated to altering subtleties for these cases.

¹⁴⁵ There are specific examples that refrain from using any pronouns, and instead make declaratory statements for the entire court.

¹⁴⁶ James Markham, "Against Individually Signed Judicial Opinions," *Duke Law Journal* 56, no. 3 (2006): 932.

The path that the BTC device has travelled, with its twists, hills, and valleys, has now been accurately documented and discussed. While travelling this path, I have challenged many preconceived ideas surrounding the By the Court practice.

I have challenged the notion that the By the Court device is a modern invention. There is documentation that suggests the Supreme Court was issuing BTC decisions only a decade after its inception. These examples, however, do not emulate our modern examples. The primary purpose for implementing these decisions was not a judicial strategy to maintain the court's legitimacy. Instead, they were a by-product of the employed delivery system for releasing judgments, which was largely maintained by the personnel in charge of the publication process. It was not until the 1920s that we see the justices take control over the device, and start using it to harness judgments. The purpose behind these examples was not to deal with political cases, but it was a tool to reserve judicial resources. Nonetheless, it was during this period that the structural foundation was laid, so that the By the Court judgments could continue to expand in importance. And, because of a series of four cases, its future looked very promising. After these cases, however, the device's overall importance started to diminish. Only a particularly challenging reference case allowed it to mature into its modern role. This transition occurred in the Truscott Reference, which posed an existential threat to the Supreme Court as an institution. In order to maintain institutional legitimacy, the Supreme Court utilized non-attribution as a resource by jointly attributed the majority opinion to each justice that signed on. This was the first "grand" tradition example that established a practice of resorting to this unique, anonymous style when hearing cases that posed a threat of the highest order.

I have challenged the notion that Laskin created this device. Chief Justice Anglin and Duff contributed important advancements. Anglin, because he was responsible for establishing the structural foundation. Duff, because he extended the scope of the device to increasingly complex cases – what I have deemed the “intermediate” tradition. The device starts to fade after their Chief justiceships, however, with only a few regular examples being applied to innocuous cases. It was neither Anglin or Duff, though, that was responsible for promoting this device into its modern prestige – the entrance of the grand tradition. Justice Cartwright was likely responsible for deciding to resort to this device in the midst of the Truscott controversies, which is the first example of the court using anonymity in a politically sensitive case. After two other examples in 1967 - the 1967 trilogy - Chief Justice Cartwright retired, and his successors did not implement either the minor, intermediate, or grand traditions for nearly a dozen years. It was not until the controversial language cases that this device would resurface, and it reappeared in its grand form to deal with the politically volatile language decisions. There were only two remaining justices from the Truscott reference that were still members of the court – Judson and Martland. I have speculated that Martland fits as the most likely candidate for reigniting the BTC device.

I have challenged the notion that the By the Court device was borrowed from a neighbouring country. Instead, it has organically grown through our own Supreme Court’s functioning. The BTC was initially developed to serve a specific purpose, and I have traced its evolution according to the purpose it served throughout different time-periods. The BTC evolution has been broken down into four different components: 1)

birth story (the audible) 2) resource management tool, 3) the transformative shift, 4) the birth of the modern tradition (the final elevation). The device's role has morphed according to the needs of different courts, which demonstrates the device's versatile nature. The By the Court examples have also been divided based on their organizational structure displayed in the reporting services. The earlier decisions were presented in a 3rd perspective summary style, and their application was largely controlled by the Registrar and other supporting personnel. This point by stating that the device remained within the procedural realm for both the birth story and resource management sections. The transformative shift occurred, however, when these cases were published in the reporting services with directly attached justice reasons. This represented the justices taking control of the device, and it breaking free from the publication realm. Even after it escaped, though, it played a similar role compared to the early decisions. The shared function suggests that it was necessary to explore these earlier 3rd p. cases in order to discern the core idea for the regular examples. That is to say, the shift in reasons does not indicate an independently grown new practice. Instead, the regular style is related to the earlier 3rd p. decisions.

This relationship suggests that every stage is essential when exploring the emergence of this practice. All of the By the Court stages, including the earliest one line decisions, were important in shaping this device into what we have come to know as our modern practice. Taken together, I believe they form a comprehensive explanation of the By the Court phenomenon on the Supreme Court of Canada.

At the beginning of this project, I expected to start with the 1979 language decisions, and end with the most recent examples on the McLachlin court. Ironically, I am now ending with the language decisions, and starting with the Supreme Court's earlier years. Before concluding, however, I would like to make a few general comments on 'how' the Supreme Court has reached anonymity. The By the Court statistics for our modern court will not be thoroughly explored; I will discuss general concepts surrounding the By the Court decisions, while applying these ideas to our current McLachlin court.

Throughout its history, the Supreme Court has used two separate paths for the By the Court decisions. The final destination takes us to the same place – anonymity. But, they have reached it in different ways.

1. Institutional Label

Anonymity is created by crediting an institutional label as authoring a judgment. The institutional label that is most frequently applied is "THE COURT" but there have been some variations. Nearly all of the BTC decisions establish anonymity in this manner – the Truscott Reference is the first departure from this method. Some of the most recent examples on our current court include, *R v. Smith*, *Carter v. Canada (Attorney General)*, *Reference re Senate Reform*.¹⁴⁷ With very few exceptions to speak of, the Supreme Court has never attached a disagreeing to these cases; they have always been totally unanimous.¹⁴⁸ In terms of the grand tradition examples, there are no exceptions to this

¹⁴⁷ *R v Smith*, [2015] 2 SCR 602; *Carter v Canada (Attorney General)*, [2015] 1 SCR 331; *Reference re Senate Reform*, [2014] 1 SCR 704.

¹⁴⁸ There have only been two exceptions to this rule in the history of the court's anonymity usage. These two decisions were delivered in the same day. The first case had

rule. If unanimity cannot be reached, however, the Supreme Court has elected to attain anonymity via an alternate route.

2. Jointly Attributed

The other way to reach anonymity is to label every justice found in the majority as jointly authoring the judgment. This also has the effect of concealing which particular justice assumed the role of primary writer. The first example is the Truscott reference that was discussed in the previous chapter, which also marked the first issued BTC example that fits the modern practice. More recently, though, this has been used for *Irwin Toy Ltd. v. Quebec (Attorney general)*, and by the MacLachlin court in the Nadon Reference (*Reference re Supreme Court Act, ss. 5 and 6*). The Supreme Court has used this means of attaining anonymity for only a select few examples; it is much rarer.¹⁴⁹ It is typically only resorted to when the court falls short of full consensus, and in these instances, the institutional label is dropped and replaced with joint-attribution.

This route has given the court an option to use anonymity in a broader range of cases. However, it should be emphasized that the anonymity has been reserved exclusively for the majority opinion for these cases. If a justice chooses to write a dissenting opinion, the author is identified similar to the typical attribution norm. In other

a dissenting opinion from Justice Fournier that reached 5,131 words, while a 173 dissent by Justice Gwynne occurred in the second case. (For the latter case, the court ruled with a judgment for a set of companion cases. As a result, the judgment contains two short dissenting opinions by Justice Gwynne.) Citations: *Baker v La Société de Construction Métropolitaine*, [1893] 2 SCR 364; *Cowen v Evans / Mitchell v Trenholme / Mills v Limoges*, [1893] 22 SCR 331.

¹⁴⁹ Jointly attributed cases: *Mugesera v Canada* (Minister of Citizenship and Immigration), [2005] 2 SCR 100; *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259; *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753.

words, we have not gotten to the point where the Supreme Court releases opinions with the judgment of the court written by “justice X”, and the dissenting reasons by “justice Y.” Because the Supreme Court has honoured the normal attribution practice for disagreeing opinions, we are always able to determine the breakdown of the justices even with the jointly attributed examples.

The Supreme Court track record implies that a judgment is only released as By the Court when either a full bloc of agreement can be reached by the justices, or very close to a full bloc. As a result, its issuance is related to the idea of displaying consensus on the court.

The institutional label BTC decisions are the most unified bloc of agreement that the court is capable of producing, while the jointly attributed opinions are a close second. The potency of an institutional BTC extends beyond a unanimous judgment authored by the “Chief Justice of Canada.” It signifies that every justices’ opinion totally replicates one another without the smallest degree of disagreement manifesting. With no dissension surfacing, this style allows for a bold decree of the law. This idea of a high level of agreement is associated with a collegial, collective court. If we were to rank the By the Court style on a continuum - a collegial, collective court on one end, and an individualistic court on the other – it would be pegged as the form that most closely embodies a collegial court. We would expect a high frequency from the more collegial courts, while we would expect the court’s that are characterized as individualistic to use the seriatim style more often.

Now that the manner through which the Supreme Court has attained anonymity has been described, more general comments about the BTC decisions on our modern court will be discussed. The primary objective is to initiate a dialogue within our Canadian context, while using our own By the Court history to anchor this discussion. This will not be a completely exhaustive debate; an exhaustive debate of all of the issues is beyond the scope of this master's thesis. Some of the main issues, however, will be touched on. Many of the following points were taken from the American literature. As previously discussed, the USSC has developed its own anonymous judgment style that has attracted some scholarly attention. It has received mixed reviews, but the majority of scholars are generally skeptical of justices using it as a tool. Even though the American anonymous practice is very different than our Canadian experience, it provides general insights and ideas that I will attempt to apply to our own Supreme Court.

The By the Court device was originally used as a device to mitigate large caseloads. With the emergence of the grand tradition, however, it became a strategy that the justices used in order to deal with politically difficult, as well as constitutional cases (with only three counter examples). Both of these reasons for using the BTC device, however, would seem very attractive to the McLachlin court for a few reasons. Firstly, Chief Justice McLachlin has highlighted the need to alleviate the current workload of the justices.¹⁵⁰ She has stressed that the current pressures placed on the justices hinders their capabilities of fulfilling their appropriate duties. Coinciding with its earlier usage of

¹⁵⁰ Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*, 121.

diminishing justice workloads, not wasting time determining authorship could be valuable in assisting with this problem. Secondly, Chief Justice McLachlin has voiced that she will be trying to increase consensus on the Supreme Court in an attempt to reduce the number of severely fragmented opinions that the court releases.¹⁵¹ As I have previously described, the Supreme Court's application record for anonymity suggests it is interconnected with consensus. From this perspective, the BTC examples could also be of assistance to our modern court. I believe, however, that the Supreme Court should only use this device similar to its initial purpose for which it was designed – a tool that is applied to only the most mundane cases for effective dismissal. Any BTC application beyond this strict usage, I argue, should be discontinued, including both the intermediate and grand traditions.

Arguments for and against using an anonymous delivery style on our Canadian Supreme Court will now be the focus of the remaining portion of this thesis. Many of the arguments were prepared for the United States Supreme Court, which has developed its own anonymous delivery style that has attracted some scholarly debate. I will be discussing four points: 1) Elimination of ideological lines, 2) A Bold Voice, 3) Invisibility Cloak, 4) Quality of Judgments. After the explication of these points, an argument will be presented that ties into our own court's operations, while integrating BTC references for support.

1) Elimination of Ideological Lines

¹⁵¹ Ibid., 122.

James Markham argues against judges signing their names to the opinions they author. Markham asserts that there is a major advantage to the court releasing opinions without indicating which particular justice wrote it. If the Supreme Court elected to accept his advice, the legal community would still be cognizant of the breakdown of the justices. However, the opinions would simply be labeled as, “the Court (majority opinion)”, “first concurrence”, and “first dissent.”

Markham argues that an opinion that is attributed is “not essential to an opinion’s legitimacy.”¹⁵² He makes reference to the value of the US per curiam practice, and the success that it has received for certain decisions. Eliminating the practice of attribution would eliminate justices preaching to ideological constituencies, which he believes has been a concern.¹⁵³ Even further, the modern court has gotten to the point that the institution as a whole has been overtaken by the 9, individual justice personalities, and makes reference to “judicial” egos.¹⁵⁴ He refers to the public profiles that have developed for many recent judges. Eliminating attribution, then, would heighten the prestige of the institution, because it would be an extra safeguard from public pressures on the justices.

2) Invisibility Cloaks

This argument has been invoked in the US, suggesting that judges have used anonymity to evade their judicial responsibilities.¹⁵⁵ Judges are powerful individuals who are granted a tremendous amount of latitude in terms of the cases that fall under their

¹⁵² Markham, "Against Individually Signed Judicial Opinions," 935-38.

¹⁵³ Ibid., 925.

¹⁵⁴ Ibid., 942-44.

¹⁵⁵ Robbins, "Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions," 1207-12.

purview. As a result of a constitutionally entrenched Bill of Rights, they are able to restrict the actions of elected government officials. Because of this power, it is essential that these individuals are held accountable, and an important means of doing so is ensuring the judges provide their signature for the legal opinions they have written. An anonymous judgment style violates this accountability principle. In addition, many of the current court operations are already concealed from the public eye. This has created somewhat of a mystique, making it difficult for citizens to relate and understand court systems. It can be argued that eliminating authorship further reduces the transparency of the judiciary, thereby placing an “invisibility cloak” on the actions of these powerful individuals.¹⁵⁶

3) Quality of Judgment

Allowing judges to bypass authorship could have the eventual effect of deteriorating the general quality of judgments. Attribution ensures a high quality, because it links the standard of authorship to an individual justice’s reputation. If we remove this link, then justices might not be as diligent in maintaining a high standard. If this persists over an extended period of time, the institutional as a whole rather than one particular justice could take the brunt of criticism, which would lower the institution’s prestige.

4) A Bold Voice

The By the Court style enables the Supreme Court to speak in one bold voice. Issuing By the Court opinions, especially the institutional label type, eliminates ambiguities regarding the Supreme Court’s ruling. People who disagree with the ruling

¹⁵⁶ Ibid., 1212.

cannot relate to a dissenting opinion, so they will be aware that the Supreme Court has spoken, and the direction is very clear. This would make it easier for lawyers to advise their clients, and Canadian citizens to be aware of the law. This argument is largely connected with reaching general consensus, but the BTC format adds another dimension - a By the Court judgment sends an even stronger message that the Supreme Court will not relinquish its position. A general increase of BTC examples over an extended period of time might push the court in a general direction that would cleanup a number of overly fragmented judgments. This could also be a way of simplifying legal rulings, making court rulings more attractive and understandable for individuals who do not study the law.

This is not a complete list of criticisms or issues surrounding anonymity. Further, these aforementioned concerns are subjective; they can be construed in either a beneficial or hurtful way. These arguments largely build-off of the American literature. The general purpose is to setup my response to these issues. I will firstly direct my attention towards the first argument, the Ideological Lines. Afterwards, the other three arguments will be addressed in a general response, starting out firstly by discussing the By the Court history, and then applying it our modern Supreme Court of Canada.

The argument regarding the breaking down of ideological barriers might be appropriate for the USSC, but it does not wield equivalent merit when discussing the Supreme Court of Canada. Our court cannot be broken down as neatly based on ideological lines.¹⁵⁷ There has been research conducted in this area that explores such

¹⁵⁷ Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*.

divisions, but their general findings suggest that the divides are not as apparent compared to our southern neighbours.¹⁵⁸ In Canada, there is not a strong commitment to an abstract label - such as conservative or liberal – that causes a similar justice breakdown regardless of the legal issue at hand. Strong voting alliances have been documented, such as the Laskin, Spence, Dickson (L-S-D connection) alliance,¹⁵⁹ or the “gang of 5” that emerged on the Lamer court.¹⁶⁰ But, this does not seem to rival the USSC which discusses swing justices possessing a tremendous magnitude of influence. In Canada, the absence of such power for individual justices has limited the amount of public attention for individual justices. In addition, I am not aware of any scholarship that suggests the justices are preaching beyond the heads of the immediate dispute, or they are not focusing enough on the dispute at hand. The justices are no doubt aware that their objective is to guide the broader community through their judgments. Without evidence to the contrary, however, the justices are mindful of those parties involved in the dispute, and their words do not appear to be directed elsewhere. The ideological argument, then, does not transfer appropriately to our supreme court.

The last three arguments that I will be touching on are interrelated, and, as a result, I have used one broader response. Before responding, I would like to make a few general comments about the Supreme Court of Canada’s practices, starting with the BTC decisions.

¹⁵⁸ Ibid.

¹⁵⁹ McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada*, 92.

¹⁶⁰ Ibid., 134-35.

Throughout its long history on the Supreme Court, the BTC device has been applied to a variety of issues, which demonstrates its versatile nature. It became a multi-purpose tool, which implies that the justices did not establish a clear-cut rule set of rules for its application, but adapted it to different concerns as they arose. Most practices on the Supreme Court likely emerge in a similar fashion; the court possesses a limited amount of resources, which makes it difficult to anticipate problems. As a result, the Supreme Court must react after the fact rather than having the ability of being proactive. It is these adaptations to troublesome scenarios that we see a shift in routine, or the invention of new practices. When the Supreme Court decides to invent a practice, they should consider general principles. As a general rule, the court should be promoting a sense of predictability. That is to say, the Supreme Court should attempt to resolve similar problems with a consistent solution. This simply coincides with the general values of the Supreme Court, encouraging consistency and routine over spontaneity and creativity. These ideas become especially relevant when dealing with the Supreme Court judgments.

The Supreme Court of Canada is a complex, dynamic institution that resolves cases that influence the everyday lives of Canadians. It does wield a tremendous amount of authority, but it does not possess a police force to ensure compliance with its rulings. Instead, it releases its decisions in the form of judgments to communicate its reached conclusion to Canadians abroad. Within these judgments, the primary weapon used by the justices is persuasion, with the primary goal of convincing others as to ‘why’ they should follow the ruling. Since it is the primary mode through which they communicate, the released judgments are very important. In addition, the presentation styles that package these judgments, such as BTC, also become very important.

Because of the importance of judgments, changes in the visible presentation of reasons should only be executed in a gradual manner; they should not be abruptly changed whenever it suits the court's needs. This idea does not necessarily apply for internal issues that occur behind the scenes – such issues can be dealt with in any manner necessary. But, the idea of applying a consistent solution holds true for all practices that can be externally observed. This helps to garner a sense of expectation as to how the Supreme Court will deal with legal cases, as well as how the judgments will be published and presented.

The Supreme Court's By the Court history demonstrates that they usually honoured these general principles. The general motivation for inventing this device was as a processing tool to deal with large judicial caseloads. It emerged as a result of a specific context in which judges were unable to quickly produce judicial reasons. After its emergence, its application was restricted only for a select set of cases, which were evaluated according to their merits on Canadian law. Significant controversy over its usage does not appear to emerge, because it was relegated only to very minor decisions. The archives did reveal that the device's purpose somewhat diversified when it was applied to other areas, but it was still only used for very minor decisions that were deemed unworthy of inclusion in the reporting services. It was the personnel in charge of the publication process that was so prudent with its BTC usage.

Starting in 1923, however, the justices started taking over the device. The archives indicate that the justices were directly involved in the application for a string of examples

that have been termed the “regular” style. While in control of the justices, however, the BTC application was not as consistent. There is an increase in the word-count variations for the regular style tradition. It is within these examples that we start to see the emergence of an “intermediate” tradition. The inconsistency implies that the justices did not reach an agreed upon structured approach prior to implementing the device. However, there are very few examples that fit the intermediate tradition, while most cases maintain the general purpose -- applied to more minor decisions in order to preserve judicial resources. Critiquing the judges or consistency during this period disregards the general pattern of how practices are introduced on the Supreme Court, imposing unrealistic expectations on the judges. Even with the emergence of the intermediate cases, this tradition developed somewhat gradually; the intermediate tradition examples were dispersed throughout a longer time-period.

The Supreme Court of Canada should be recognized for its prudent anonymity usage during this period, because they have maintained the underlying purpose (with very few counter-examples found in the intermediate tradition) of using this device as a means of dismissing easier decisions. It was only in response to *Truscott* that we see a large deviation from the BTC purpose.

Truscott marked an abrupt shift in the presentation of reasons when they used the BTC style in lieu of the conventional seriatim style for a very challenging decision. *Truscott* represents a shift in the By the Court tradition, because it deviates from its previous usage. I have argued that the justices in this case have used it as a strategic

mechanism in order to shield the institution from expected criticism. However, it is important to consider both the difficulties found within this decision, as well as the Supreme Court during this period when critiquing the Supreme Court's anonymity performance.

Truscott represents a very unique threat to the Supreme Court. It was a challenging case, but, more importantly, the surrounding circumstances that compelled the Supreme Court to rehear a decision were very problematic. In addition, the court was rarely (if ever) presented with such difficulties during this time period. The court had not yet matured into its modern form; it was not equipped to handle such external pressures. I am skeptical of the court's decision to use anonymity in such a high-profile case, but, given the circumstances, it is understandable. They possessed relatively few weapons to combat such pressures, so they were seeking alternatives. Further, the Chief Justice did not offer the type of leadership to allow them to navigate through such challenges. Given the context, the abrupt change in the presentation of reasons found in Truscott offered a different means of protecting the institution from a grave threat. Its anonymity usage in Truscott as well as the trilogy, then, seems to be acceptable.

This leads us into our modern court. After the 1967 trilogy, the Supreme Court abandoned altogether the BTC practice, as it failed to issue either a minor, intermediate, or grand tradition. The next example is used in the 1979 controversial language decisions in *Blaikie* and *Forest*. The Supreme Court has since persisted in using the BTC style after Truscott; they have carried on the BTC grand tradition in a similar capacity in applying it to very impactful legal decisions. This is true for all of our modern Chief justiceships, but

it is ratcheted up under Chief Justice McLachlin. Our contemporary court has applied the BTC device at a higher pace than any other court. However, our current Supreme Court is very different in comparison to the 1967 court that delivered Truscott.

Bora Laskin's Chief Justiceship is considered to be the delineation for our modern period on the Supreme Court, because the Supreme Court is largely transformed under his leadership. Amendments to the Supreme Court Act grant tremendous discretion to the judges in order to determine which cases to hear. There is a change in the types of personalities that are appointed to the Supreme Court. In addition, Laskin as Chief Justice starts to encourage a new conception of law, and a new conception of appropriate judicial duties. Consequently, the general character of the institution is altered in numerous ways.

Then comes the Charter. The entrenchment of the Charter has had significant ramifications on the distribution of power within Canada's political system. The Supreme Court has experienced an augmentation in its influence on the broader political framework. The Supreme Court has accommodated for this new role by adjusting some of their policies. For example, they have made a more lenient threshold for standing, mootness, and ripeness.¹⁶¹ This has had the consequence of increasing the Supreme Court's "justiciability."¹⁶² Further, the Supreme Court has been more flexible in allowing intervenors and advocacy groups to voice their positions,¹⁶³ while they more frequently

¹⁶¹ Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*, 44-49.

¹⁶² *Ibid.*, 43.

¹⁶³ F. L. Morton, ed. *Law Politics and the Judicial Process in Canada*, 3rd ed., 660 vols. (Calgary: University of Calgary Press, 2002), 302.

use social facts as a basis for their overall rulings.¹⁶⁴ The consequence of the Charter and these policies, then, the Supreme Court has greatly altered its complexion compared with the 1960s court.

Since the *Truscott* case, the Supreme Court has received a tremendous elevation in prestige and status. As an institution, their authority has been increased, but also their general purview as to which cases they are willing to rule upon. The Supreme Court is much more willing to extend their decision, and many scholars argue that these decisions impact policy. With this increase in power, then, we would expect the Supreme Court to be increasingly diligent about honoring and continuing previous practices that encourage a sense of accountability and transparency. The BTC usage during this period, however, suggests the opposite is true.

During this period of change, the modern Supreme Court has increased its BTC usage, and continued to apply it to blockbuster constitutional decisions, as well as some of the most politically charged legal cases. Rather than promoting accountability and transparency, then, the Supreme Court has chosen to dismiss a long-standing judicial tradition of attribution that conceals which judge authored the opinions. As a result, our Canadian Supreme Court is susceptible to criticism.

The Supreme Court of Canada's *By the Court* usage is especially susceptible to the invisibility cloak argument, much more so than the United States. Firstly, our practice is distinct from the United States *per curiam* practice. Although there have been

¹⁶⁴ *Ibid.*, 364-70.

fluctuations in how it has been used in the US, their device is typically reserved for time-sensitive cases that need to be decided urgently. This has produced some very important, controversial decisions – such as *Bush v. Gore* in 2000 – but these are generally the exception rather than the norm. In Canada, the grand tradition is repeatedly applied to some of the most influential legal cases that have come before the court. For example, the language decisions, Quebec Veto, Quebec Succession, Senate Reforms 1 & 2. It has developed into a practice of being applied to impactful decisions whose outcomes will reverberate for many years. The importance of these decisions far outweigh the US per curiam examples. Secondly, Canadian judges have only recently received an augmentation in power that has followed the entrenchment of the Charter. The charter has created somewhat of an amalgamation – American style judicial review with a Westminster model political system. Our British inherited legal system has historically emphasized judicial independence over accountability. As a result, some argue that this increase in judicial power has not yet been accompanied by appropriate reforms to maintain a reasonable level of accountability. The United States, on the other hand, have created measures that have emphasized accountability. For example, judges are directly elected by the people in many jurisdictions, and, during the appointment process for a justice to the USSC, the senate is able to firstly question, then vote on whether or not to accept the nomination.¹⁶⁵ In Canada, some reforms have taken place, but the Prime Minister still possesses unilateral discretion in appointing judges to the Supreme Court.¹⁶⁶ When the Prime Minister does decide to follow reforms, our Canadian version is not nearly as intrusive compared with the US methods. Because of both the BTC usage and

¹⁶⁵ Ibid.

¹⁶⁶ Prime Minister Stephen Harper has not held hearings for any of the last three appointments to the Supreme Court.

the logistics of our own judicial system, removing authorship for cases becomes increasingly important within the Canadian context.

I have expressed reservations as to how the Supreme Court's BTC usage has evolved. One might counter my argument by stating that the circumstances are ripe to use a BTC style when hearing such high-stakes cases. This would deliver a clear ruling that eliminates ambiguities in the law. However, these cases are likely to receive a lot of attention because of their future impact on Canadian law, but also because of the legal complexities they present to the Supreme Court. The Supreme Court's track record demonstrates that the BTC usage does not always result in clarity.

Dr. Emmett Macfarlane discusses the issues relating to consensus and agreement on the Supreme Court of Canada. Many of the justices he has interviewed acknowledge the advantages of avoiding severely fragmented legal opinions. There are strengths to releasing strong, collective opinions such as clarity of the law, as well as making the rulings and institution more relatable for Canadians.¹⁶⁷ Although Macfarlane comments on the benefits, he touches on a different angle, asserting that the Supreme Court when faced with controversial decisions uses anonymity as a tool preserve the legitimacy of the institution.¹⁶⁸ He provides an in-depth analysis of three very influential decisions that he believes the Supreme Court strategically reached full-consensus as a means of assuaging the criticisms that will likely follow any controversial case – 1) *Reference Re Secession of Quebec*, 2) *Tremblay v. Daigle*, 3) *Law v. Canada (Minister of Employment &*

¹⁶⁷ Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*, 122-23.

¹⁶⁸ *Ibid.*, 126-31.

Immigration).¹⁶⁹ He argues, however, that the court's strategy in producing one bold opinion did not accomplish the court's desired outcome of definitely settling the legal issues involved. Instead, the Supreme Court released judgments that were infused with compromises to the extent that it compounded the difficulty of interpreting the core meaning of the ruling.¹⁷⁰

Now, back to the By the Court examples. This argument conveyed by Dr. Macfarlane relates to the BTC tradition for a few reasons. Firstly, I have previously suggested that using an anonymous judgment style allows the court to go a step further than simply issuing a completely agreed upon (unanimous) judgment. It adds another dimension, because it signifies that the institution in its entirety is in full agreement with the declared ruling. Secondly, the Supreme Court's own track record suggests that a BTC application is interrelated to reaching unanimity on a case. The Supreme Court has never used the institutional label example when there is a disagreeing opinion present. They have created another option for anonymity by creating the jointly-attributed form, but there have only been a select few examples. Lastly, Dr. Macfarlane uses three immensely important cases to suggest that unanimity has not been effective in mitigating ambivalences in the law. Out of the three examples he used, both Quebec Secession and *Tremblay v. Daigle* were delivered as By the Court. This emphasizes the dangers of pushing for a BTC judgment, and also demonstrates, at least for some examples, the strength of the BTC style has become its weakness when it is crunch-time.

¹⁶⁹ 1) *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 2) *Tremblay v Daigle*, [1989] 2 SCR 530, 3) *Law v Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497.

¹⁷⁰ Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*, 125-32.

I have expressed concern with the BTC usage, but most of my discussion has been targeted towards the continuation of the grand tradition. It is appropriate to highlight another issue, but it is directed more so towards the intermediate and minor tradition. Justice Bertha Wilson has expressed serious alarm regarding the current workload of the justices, and believes the overwhelming workload could result in a general decline of the quality of judicial opinions.¹⁷¹ In addition, Chief Justice McLachlin has also voiced her opinion about the need to find a remedy for the workload issue. The BTC device has served such a role in the past. The court, then, might expand the BTC intermediate tradition in an attempt to reduce judicial workload. However, the Supreme Court should adopt another alternative rather than increasing the scope and frequency of the device, because its continued usage could also decrease the general quality of released opinions.¹⁷²

As I have previously stated, the BTC tradition emerged as means of dealing with a large quantity of cases. The idea behind using anonymity during the earlier periods was to get rid of simple cases quickly, and using a convenience institutional label saved time. The original purpose implies that the cases that received the BTC stamp were resolved in a hasty manner – this was its ultimate function. The Supreme Court is not likely to handle cases that will receive a tremendous amount of media and scholarly attention in a hasty manner. Nevertheless, continually producing anonymous decisions over an extended period of time for intermediate level cases could have the effect of reducing the general

¹⁷¹ Ibid., 121-23.

¹⁷² Gerard Magliocca to Concurring Opinions, June 15, 2015, 2015, <http://concurringopinions.com/archives/2015/06/more-on-signed-appellate-opinions.html>.

quality of judgments. Attribution ties an individual judge's reputation to the judgments that they produce, even if it is for a relatively easier case. This helps to ensure all cases receive the highest judicial standard.

It is for these reasons that I would advise against the future use of the BTC advice, unless it is applied only to the most rudimentary legal cases.

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