

# By the Court

## Anonymous Judgments at the Supreme Court of Canada

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## Preface

This book represents an unusual co-authoring partnership, between a senior (and now emeritus) faculty member on the one hand and a graduate student on the other. Indeed, it is sufficiently unusual to call for an explanation.

Marc Zanoni came to the University of Lethbridge to work on a Master of Arts degree in political science, to be supervised by Peter McCormick. After some discussion of alternatives, it was decided that the thesis topic would involve an examination of the Supreme Court of Canada's *By the Court* decisions – those decisions that are not attributed to any specific individual but mysteriously and cryptically to *the Court*. The thesis project was originally conceived in terms of the chronology, inventory, and typology found in Chapters 8 and 9 of this book.

This plan quickly went off the tracks, however. A routine element of any thesis is the literature review, which situates the project in relation to the work that has already been done on the subject. The first sign that there would be nothing routine about this master's thesis was the discovery (which still surprises us every time we mention it) that there was simply no academic literature on the subject. Although most court-watching academics are well aware that such decisions appear from time to time, and that at least some of them have been extremely important,

there were no books, no articles, no focused discussion of any kind of the genesis or the parameters or even the frequency of the phenomenon. So much for the literature review, which gave Zanoni nothing to go on save for passing references and occasional brief footnotes.

As an alternate starting point, then, Zanoni set to work checking out what has been generally accepted as the starting point for the practice that we refer to in this book as the “standard story” and the “Laskin thesis” – namely, the Laskin court’s two language decisions of 1979 (*Blaikie* and *Forest*), often thought of as picking up on the *per curiam* practices of the United States Supreme Court.<sup>1</sup> The plan was for him to work through the relevant judicial biographies on the one hand and academic accounts of these two specific decisions on the other, to explore and document the background that everyone was taking for granted. This might or might not unfold in such a way as to become a useful part of a revised thesis proposal in itself.

This inquiry also went in an unexpected direction, however. This was partly because many of those academic accounts focused on the content and implications of the two decisions, one focused on Manitoba and the other on Quebec, without even mentioning the unusual anonymous delivery format, which gave Zanoni nothing to work with. A greater problem was that the assumptions built into the standard story were simply not borne out, as will be explained in Chapter 7. This was somewhat embarrassing because some of McCormick’s earlier publications had become part of the footnote trail for that standard story. What had been initially contemplated as a straightforward introduction morphed into a genuinely original inquiry into the questions no one else had even considered: tracking down the “who” and “when” and “why” of the real first *By the Court* decisions. Readers are free to imagine how Zanoni felt as his literature review came up empty and his attempts to document “what everybody knew” fell through, after months of hard work with nothing much to show for it. Fortunately, this last reframing of the inquiry proved fruitful, although carrying it through required scouring through the *Supreme Court Reports* all the way back to 1875, and then following up with an exploration of the Supreme Court archives that was initially scheduled for several days but actually lasted several weeks.

The outcome was a revised thesis project that now appears in reduced form in Chapters 6 and 7, “Early History: The ‘Minor Tradition’” and “Emergence: The Birth of the ‘Grand Tradition.’” Chapter 7 began as a draft chapter for the thesis, was turned into a paper that Zanoni presented at the 2014 Canadian Political Science Association (CPSA) conference, and then became a co-authored article in the *Manitoba Law Journal*. Although that inquiry had already pushed *By the Court* back a dozen years earlier than the “standard story,” Zanoni’s scouring of the *Supreme Court Reports* suggested that such decisions were drawing on even earlier court practices, and the story of this extended early evolution became the new focus of the thesis. Chapter 6 reflects Zanoni’s weeks of toil in the Supreme Court archives, working toward an understanding of what he called the “minor tradition” of *By the Court*. That accomplished, he headed off to a PhD program in public policy at the University of Guelph. Chapter 6 is a considerably shortened version of the MA thesis, and was initially presented by Zanoni as a paper at the 2016 CPSA conference. Chapter 4 also began life as an introductory segment in the 2014 CPSA conference paper.

However, Zanoni had uncovered enough to make the *By the Court* project something that was clearly much too large and ambitious for a master’s thesis, leaving us with a much larger story still waiting to be told. For one thing, the chronology, inventory, and typology originally contemplated still needed to be tackled (Chapters 8 and 9). In addition, the academic responses to our conference papers and journal articles demonstrated the necessity of defending the originality and the uniqueness of the Canadian practice (Chapters 4 and 5), since both were often challenged. It was also obvious that we needed to defend our assumption, perhaps not entirely self-evident, that the decision presentation format itself really matters in the first place (Chapter 3). Finally, we had to establish the conceptual frame within which to locate this new development, which after a couple of false starts is now identified in terms of the “third phase” of Supreme Court judgment delivery. These were the elements of the larger project that McCormick was best qualified to tackle on the basis of three decades of research into appellate courts in general and the Supreme Court in particular.

The book is therefore not the product of collaboration in the usual sense of two authors working through circulated drafts to generate a single unified voice; rather, it consists of separate segments with different lead authors. The pivotal Chapters 6 and 7 are essentially Zanoni's; the others are McCormick's, with a more collaborative conclusion. Presenting the book as a co-authorship is the only fair way to reflect the basic reality that without the prompting of Zanoni's project, without his discovery that accepted truths were not truths at all, without his persistence in chasing down unanticipated aspects of the practice, and without his diligence in sifting through the archives and decoding those records to correct our simplistic assumptions about the every-case journey from argued hearing to reported outcome, the core discoveries of Chapters 6 and 7 would never have been made and this book could never have been written. Without Chapters 6 and 7 to anchor them, the other chapters would have lacked the central link that made them useful parts of a single larger story. Co-authorship was the only honest presentation of this product; relegating the graduate student to an enthusiastic footnote appended to two chapter titles would have been both unfair and misleading. The unusual origins of this book project undoubtedly still show through to some extent in terms of a different writing style in these two central chapters.

A number of people have contributed to this project in significant ways, including the colleagues who cheerfully responded to email inquiries, the people who commented on our conference presentations, and the external reviewers who dealt with our various journal submissions. More specifically, we would like to single out three individuals. Professor Philip Girard of Osgoode Hall Law School, Bora Laskin's biographer in his magnificent *Bringing Law to Life* and also Justice Willard Estey's law clerk in 1979–80, gave useful pointers and steered us away from some dead ends. Professor DeLloyd Guth of the University of Manitoba Law School not only commented on but also painstakingly copy-edited an early version of the *Manitoba Law Journal* piece. Finally, Alicia Loo of the Library and Information Management Branch of the Supreme Court of Canada was unstintingly generous in the assistance she provided to Zanoni as he spent several weeks working through the archives, and as he struggled to correct on the fly our naive expectations of how the

Supreme Court operated in its earlier decades. The necessary assistance was considerably greater than might be expected because the records are kept in the form of that wonderful information storage technology of the 1980s, microfilm. Our fellow researchers will appreciate the now-problematic implications of that then-virtuous technological choice – oh, for hyperlinks and search engines, to say nothing of the convenience of remote access! We are also grateful to the anonymous readers who worked through a longer and more ponderous early version of the manuscript to make helpful suggestions that provoked some major revisions, and to Randy Schmidt of UBC Press, who cheered – and prodded – us on. Responsibility for any mistakes that remain (and we do not doubt that there are some) is fully our own.

Our greatest thanks are to the members of our respective families, who were for months on end frequently obliged to share at considerable length both our enthusiasm over unexpected new findings and our frustration over false starts and dead ends, and who have been kind enough not to make too obvious their relief that this particular intellectual journey is finally over.



# PART 1

## Introduction

# What Are *By the Court* Decisions?

# 1

The last half-century has been a time of dramatic political and constitutional change in Canada. One of the most important elements of such change has been the emergence of the Supreme Court of Canada as a major national player. Far more than in earlier decades, the court now plays a significant and highly visible part in almost every major political and constitutional event, acting as the final authority such that no story about law or policy is complete until it has spoken. No one can write a history of Canada's last fifty years without devoting a major chapter to the Supreme Court (or perhaps even one to each of its last four chief justices, easily the four most visible holders of that office in the history of the institution). No one can provide a satisfactory account of political current events without mentioning the shadow of the court. This rise to such prominence is the big judicial story of the last fifty years, and this chapter will expand on and validate this assessment. We will describe it in terms of the emergence of the Supreme Court as a constitutional court – a slight overstatement, since the court has always played a constitutional role, but the scope of that role has expanded so dramatically, with such significant consequences, that this mild hyperbole is justified.

But within that large development is another story, one more important than anyone seems to have realized – the emergence of a highly unusual and uniquely Canadian style of delivering judgments for a select but impressive list of its major decisions, specifically for decisions in important constitutional cases. That judgment delivery style is the anonymous, and almost always unanimous, *By the Court* style. We consider it unusual because for Canada, as for all the comparable countries in the common law tradition, decisions of the court are typically attributed to a single specific judge – “the judgment was delivered by Justice X” – whether the decision itself is unanimous or delivered on behalf of a majority of the panel. Our own Supreme Court, however, has invented, repeatedly used, and (perhaps) recently begun to regularize a unique style for an important subset of its decisions, under the format “the judgment was delivered by THE COURT.” “Invented” and “unique” are strong claims, but we will substantiate them.

Whereas the “judicial power” story is so obvious that none would question it, the *By the Court* story has been completely overlooked. Remarkably, there has never been an academic exploration of this phenomenon, not even to the simple preliminary extent of generating an inventory of the examples. Before our own recent publications, not a single journal article, let alone a book, focused specifically on the subject.<sup>1</sup> Even when academics write about *By the Court* decisions, they often do not even mention this unusual feature; and when they do mention it, they do so as a passing acknowledgment without speculating on the reason for, or the meaning of, this departure from the norm. Our own journal submissions exploring various aspects of the development were sometimes treated dismissively by the anonymous external reviewers – not because these unusual-format decisions did not exist but simply because “anonymity doesn’t matter,” “there aren’t enough of these to worry about,” “the delivery format makes no difference,” or (our favourite) “perhaps it is the Court’s way of saying that these decisions aren’t particularly important.”<sup>2</sup>

This book will refute each of these objections. We will demonstrate that anonymity does matter, because it cuts against the practices that have characterized the history of the Supreme Court of Canada and that characterize to this day the national high courts of other comparable

countries. By establishing an inventory of several dozen such decisions, we will demonstrate that there are more of these cases than most people realize. Similarly, we will demonstrate that this inventory is by no means limited to not “particularly important” cases, first, because it is strongly focused on constitutional cases, and second, because it includes some of the court’s most salient and high-profile decisions. Most specifically, *By the Court* decisions have clearly emerged as the Supreme Court’s preferred format for dealing with another important and uniquely Canadian practice, the federal constitutional reference.

In sum, then, we will be examining a judgment delivery style for Supreme Court of Canada decisions that is characterized by an impressive list of unusual features:

- It is *a striking departure* from normal practices, specifically the common law convention that specific judges assume signed responsibility for the reasons for judicial decisions.
- It is *original* to the Supreme Court of Canada, not an imitation of the practices of any other relevant court.
- It is *recent*, having emerged only a few decades ago (although, as will be discussed below, we would say five decades rather than the “less than four” of what we call the “conventional” story).
- It is *unique*, a practice that is still not followed by any other comparable court.
- It is *infrequent but persistent*, averaging one per year for five decades, and its use is growing even as the Supreme Court caseload shrinks.
- It is *narrowly focused* on constitutional decisions (especially, but by no means only, the important subcategory of federal reference cases).
- It has been used for some of the Supreme Court’s most *politically salient and high-profile* constitutional cases, perhaps most notably the *Quebec Secession Reference*.<sup>3</sup>

It is striking that the Supreme Court itself has never provided any discussion of the practice – has never addressed the “when and why” questions regarding its use for some cases but not for others. The court has been candid (in the public speeches that Supreme Court justices

now frequently give, the journal articles that several of them write, or in some of the judgments themselves) about other changes in practice, such as the strong move toward larger panels, the “circulate and revise” practice for the writing of judgments, and the discouragement of fragmented panels in favour of more unanimity. But this special kind of unanimity remains as mysterious as when it first emerged. Although the identity of the author has always been one of the most routine and regular pieces of information provided for its judicial decisions, the court has decided, without any explanation whatsoever, to keep this fact secret for several dozen of its constitutional cases.

The obvious question is how such an unusual, original, distinctive, and self-highlighting practice could have escaped wider notice. How could this country accumulate four dozen major constitutional judgments over half a century of Supreme Court practice, precisely when the Supreme Court itself was very much in the public spotlight, without anyone focusing on this striking new way of doing business? How is it, when so many academics are assiduously tracking the evolving story of what specific judges have to say about specific aspects of the law, that no one has attached any importance to these cases where no specific judge is claiming or being given credit for these ideas?<sup>4</sup> Why has academic and professional curiosity been so muted? Perhaps the answer lies in the rather subtle distinction between “The judgment of the Court was delivered by [Justice X]” and “The judgment was delivered by THE COURT.” Perhaps it is partly due to the degree of confusion created by the fact that the Supreme Court has had a practice of using a *per curiam* (Latin for “by the court”) label that long predates the more recent *By the Court* style. This confusion is then compounded by the *per curiam* practices of the United States Supreme Court, which are in fact different from both the Canadian *per curiam* and *By the Court*.<sup>5</sup> Perhaps it is because the Supreme Court of Canada often deals with its oral from-the-bench decisions on minor appeals in single paragraphs (sometimes single sentences) that are delivered “By the Court.” Beyond these suggestions, we really cannot explain why this practice has managed to fly under the radar for so long, but we will attempt to tell the story that no one seems to have noticed and give this unique practice due attention.

We will attempt to unfold the *By the Court* story in the rest of this book. In the process, we will justify our claims that judicial delivery formats matter, that this particular style of judgment delivery has emerged only recently, that it was invented in and by the Canadian Supreme Court, that it is neither an imitation of other courts nor a standard variant of appeal court decisions, that no other common law country has a comparable practice, and that the court seems to be stepping up the frequency of such decisions. Our approach is resolutely institutionalist, focusing on how the Supreme Court as an institution has reshaped both itself and the way it presents itself through its formal judgments to deal with new challenges, rather than on the specific content of its responses. That said, we will to some extent be “naming names” and identifying the chief justices who presided over the important steps in this evolution. We give notice now that the most important of those names will not be Laskin or Dickson but McLachlin, and the first will be Cartwright. This book is intended to be a contribution to the history of the institution of the Supreme Court as it transformed itself into a court whose main business is constitutional law, but it is also a consideration of current events as a prominent chief justice has led the court through uniquely challenging times. For Chief Justice Beverley McLachlin, more than for any of her predecessors, *By the Court* was part of this process.

Let us begin with a brief description of *By the Court*. In the *Supreme Court Reports*, there is a standard format for organizing the reasons for judgment in the court’s decisions. This format has evolved considerably, as will be discussed in Chapter 3, but the current format has been in place, with some modifications, for several decades.<sup>6</sup> It begins with the name of the case (formally, the “style of cause”) that identifies the immediate parties to the case and lists any interveners (third parties, not directly involved but presenting legal arguments as to the optimal resolution of the case). This is followed by a list of judges serving on the panel; the dates for the oral argument and the delivery of the decision; the headnotes (short phrases identifying the various issues that are touched on in the reasons, generally grouped in some sort of order of centrality or importance); a short description of the case and a “Held”

paragraph that gives the outcomes and identifies dissenting reasons (if any); and a summary of the various sets of reasons that members of the panel have delivered. Finally, there is a list of cases judicially noted and of legislative/constitutional and academic materials referred to; a short statement of the provenance of the case (citations for the initial trial judgment and intervening appeal court decisions); and a list of the lawyers involved representing the immediate parties and any interveners. After all this information, which often takes up a substantial number of pages, we get the reasons for judgment written by the judges themselves (with some unknown but presumably not negligible assistance from their clerks).

If the decision was unanimous, it is introduced with the phrase “The judgment of the Court was delivered by [a specific judge].” If it was a majority decision of a divided panel, the phrase is “The judgment of [names of the judges signing on to the majority reasons] was delivered by [a specific judge].” This format suggests that the other judges involved may have done more than simply sign on to someone else’s work (the judgment delivery formats of some comparable national high courts emphasize the lead author in a way that carries no such implication, although it seems unlikely that there was not some degree of interaction). The other judges will have participated to the extent of commenting on earlier drafts of the judgment in the expectation that some accommodation will be made to those comments, and judges have indicated in speeches and articles that they take this circulation seriously and that the exchanges over revisions are much more than superficial. However, the normal practice involves attribution to a specific individual who has taken the lead in writing the reasons and who accordingly draws the praise or criticism with which the decision is received.<sup>7</sup> The Supreme Court has declared that the giving of reasons is an important aspect of its accountability to the Canadian public.<sup>8</sup> The convention of specific attribution adds a further dimension to this accountability by making those reasons, as well as their rigour and persuasive power, part of the reputation of an individual judge.

Sometimes, however, the introductory phrase is different, declaring simply that “The judgment was delivered by THE COURT.” There is no attribution, no indication of a lead author (although, curiously, the

*Supreme Court Reports* usually tell us the language in which the judgment was actually written, which narrows the range of possibilities). Unanimous judgments are not infrequent in our Supreme Court, but the general rule has long been that the substantive reasons for such judgments are attributed to a specific individual. To be sure, whether or not a specific author is identified, we can assume that all the judges must have agreed to those reasons or they would not be signing on to them (which the judges literally and physically do). We also presume that they did so only after the circulate-and-revise process has enabled them to comment on the earlier drafts and possibly to receive accommodations; there is a collegial, and to some extent even a negotiated, aspect to Supreme Court decisions.

Sometimes the court goes further in the direction of collegiality. Not only does it “circulate and revise” an initial draft but it also chooses not to identify the lead author or authors, without giving any indication of the reason for this. It may be that this signals a set of reasons for judgment where the collegiality and negotiation have been unusually pronounced – a genuine committee decision for which identifying a lead author would be misleading. We are skeptical about this, however. At the very least, it is curious that these “so extensively collegial that solo attribution would be misleading” decisions never seem to occur except in constitutional cases.

In Canadian practice, and excluding the from-the-bench decisions noted above, *By the Court* promises a single extended anonymous set of reasons directed toward explaining the outcome of a significant (and almost invariably constitutional) case. By “extended” we mean that it is thousands of words long, as opposed to a sentence or a paragraph of boilerplate text or a routine resolution of a minor case. We therefore need to distinguish what we shall call the modern practice (the “grand tradition”) from an older and continuing “minor tradition.” By “a single set” we mean that this set of *By the Court* reasons is all that is provided, without any further elaboration by a specific judge or any expressed reservation or disagreement in the form of dissents or separate concurrences by one or more of the other judges.<sup>9</sup> By “anonymous” we mean that there is no indication whatsoever as to which justice or justices on the panel may have taken a lead role in the drafting of the reasons.



The application of this very particular form of decision presentation constitutes the Canadian practice of *By the Court*.

One complicating factor in our delineation of *By the Court* is the fact that the Supreme Court has been using this label to serve two distinct purposes. On the one hand, there is a very long-standing practice (which we call the “minor tradition” and will describe in more detail in Chapter 6) that involves brief (and usually *very* brief) presentations of routine decisions in an anonymous form. Recent examples include *Aitkens* and *Peers*, which show that minor-tradition decisions can be as brief as a single cryptic paragraph or even a single sentence.<sup>10</sup> Of such decisions, we would suggest (echoing Robbins’s comment about most of the US Supreme Court’s *per curiam* judgments, a subject we will explore in Chapter 4) that it does not matter who wrote the words because those words contained nothing of any wider legal significance.<sup>11</sup> On the other hand, there is a more recent practice (which we think of as the “grand tradition”) that uses an anonymous format to present extended discursive reasons in major, and almost exclusively constitutional, cases. It is the emergence and deployment of the latter that is the focus of our analysis and that directs our use of terms: rather than refer to “*By the Court* (grand tradition)” and “*By the Court* (minor tradition),” we will speak of *By the Court* on the one hand and “the minor tradition” on the other.

But if the extremes – some of the least significant and some of the most significant of the court’s decisions (*Aitkens* and the like on the one hand, the *Quebec Secession Reference* on the other) – define themselves, the problem is deciding where to draw the dividing line. The point of our investigation is to examine when and how the Supreme Court presents its reasons anonymously in cases that really matter. For us, such cases are characterized by being assigned to a larger panel, by drawing interveners, by being reserved for a reasonable length of time, by drawing discursive reasons of at least modest length, and by being cited in later decisions of the Supreme Court.<sup>12</sup> As might be expected, there is a high degree of correlation between these factors. Turning these elements into a five-item “index” to be applied to borderline cases gives a solid cut-off point that is both objective and reasonable. The most obvious element of that cut-off point is reasons for judgment that are not less

than 2,000 words in length, or about five pages of text. A lower cut-off point risks allowing the modern practice to be swamped by routine cases (minimum panels, cryptic reasons, no interveners, or never cited). A higher cut-off point of, say, 4,000 words would have excluded only half a dozen cases from our grand-tradition set, but it would have been awkward as one of them was the 1979 *Forest* case, one of the pair of companion cases that, prior to our research, has generally been regarded as the starting point of the phenomenon.<sup>13</sup>

This anonymity is highly unusual for courts such as the Supreme Court of Canada. For major decisions, especially those dealing with constitutional issues, it is even more unusual and (as we shall demonstrate) absolutely unique to Canada, and even more so for the way that the examples continue to accumulate. This is an age in which judges of the national high courts of various countries are more aware of each other, interact with each other, and consider each other to be part of a supranational community of some sort to a greater extent than ever before – an age when the practices of one court may be expected to generate imitations or echoes in the courts of other countries.<sup>14</sup> However, the Canadian practice of *By the Court* was not copied from any other country, nor has it influenced the regular practices of any other country to date.<sup>15</sup> The constitutional *By the Court* style is a recent Canadian invention that continues to be unique in the common law world, a claim that we will substantiate in the chapters that follow.

We reject the suggestion of some commentators that *By the Court* is a way for the court to tell us that a decision is not particularly important. The “greatest hits” list of these decisions makes the argument for us. The *Quebec Secession Reference* is clearly the poster-child example of the device. It was the court’s response to the ongoing drama following Canada’s constitutional near-death experience in the 1995 Quebec referendum, rendered more provocative by the court’s transformation of the question from “Under the Canadian constitution or international law, does Quebec have the right to secede?” to “Under what circumstances and through what sort of procedure could Quebec secede?” This was not the court’s first foray into this territory, however. That distinction belongs to the 1982 decision, also *By the Court*, on the idea of a Quebec veto on constitutional change.<sup>16</sup> The *Securities Act Reference* somewhat

surprisingly stymied Ottawa's move in the aftermath of the global financial crisis to establish a national securities regulator.<sup>17</sup> Major decisions about language rights in Quebec in the face of the provincial government's measures to promote the use of French (such as *Ford* and *Devine*) signalled that the Supreme Court was once again being drawn into the conflict over Quebec's possible separation.<sup>18</sup> Directly engaging the abortion issue, *Daigle v Tremblay* was the Supreme Court's sympathetic treatment of an abortion case that rejected a Quebec Court of Appeal decision suggesting a constitutional "right to life."<sup>19</sup> *United States v Burns* provided the opportunity for the court to speak out on the question of capital punishment; at the very least, this decision effectively rewrote an extradition treaty with the United States and may also have precluded the re-introduction of the death penalty in Canadian criminal law.<sup>20</sup> *Marshall 2*, the court's salvage attempt after ambiguities in *Marshall 1* inflamed relations between First Nations communities and their neighbours, was also a *By the Court* judgment (although *Marshall 1* itself was not).<sup>21</sup> The list is nicely bookended by two extended discursive interventions in the constitutional amendment debate: the *Reference re Upper House* of 1980 and the *Reference re Senate Reform* of 2014.<sup>22</sup> The court's handful of "not quite *By the Court*" judgments (which we argue are nonetheless part of the general phenomenon) are comparably important: the *Patriation Reference* of 1981 (even more unusual for having two different sets of joint judgment reasons attributed to no specific individual judge, each of which is confronted by joint dissenting reasons similarly unattributed), the *Exported Natural Gas Tax* case of 1982, and the *Nadon* case on appointments to the Supreme Court of 2014.<sup>23</sup> The court's 2016 decision on the federal government's motion to extend the deadline on the suspended invalidation of the *Criminal Code* regarding assisted suicide is an intriguing echo, with a decision that is a joint judgment of five listed names confronted by a (partial) dissent that is a joint judgment of four listed names – there is not a specific solo attribution to be seen.<sup>24</sup> This is, we submit, a very impressive set of cases – and not at all amenable to being described as not "particularly important."

We also reject the suggestion that there are not enough of these decisions to be concerned about, not enough to justify a focused look. There have been several dozen constitutional decisions of significant length by

the Supreme Court that have taken this form, a reasonable proportion of which have been headline-grabbing blockbusters. Not all *By the Court* cases are major decisions, and not all major constitutional decisions (even unanimous ones) have taken this form, but enough of them have done so, repeatedly for several decades, under several successive chief justices, and for important enough cases, that we cannot dismiss them as curious and idiosyncratic aberrations. This book attempts to set the record straight and stimulate the continuing closer look that this style of judgment deserves.

We reject the notion that the high courts of any comparable common law jurisdictions employ the same practice, or that the Canadian device has been copied from or inspired by any other country (including, especially, the United States, which critics often suggest is the real originator of *By the Court*, albeit under a slightly different label). We have sorted through hundreds of decisions on more than a dozen court websites, and have not found anything that approaches the phenomenon that is the subject of this book (this scrutiny will be described in a later chapter).

Finally, we dismiss the casual assumption within the discipline (which we ourselves shared until evidence pointed elsewhere) that *By the Court* was an innovation dreamed up by Chief Justices Bora Laskin and Brian Dickson, briefly important but subsequently fading from its initial promise. Not only does this get the historical genesis of the practice wrong, as we will explain in a later chapter, but it completely misstates the relative frequency of the use of the practice by recent chief justices. The McLachlin court has been far and away the most frequent and the steadiest user of *By the Court* judgments from the very first days of McLachlin's tenure as chief justice. *By the Court* is not something that was important for a little while several decades ago; it is a practice that has continued to be used in important constitutional cases, more so in the 2010s than in the 1970s.

Original, unique, recent, important, and both reasonably and increasingly frequent – this is the *By the Court* phenomenon that has never before enjoyed the spotlight that we shine on it in these pages.

We assume that the use of the *By the Court* device in the modern grand tradition is not something casual or whimsical but rather a conscious

choice by the judges on the panel with strategic overtones. Unanimity (all judges agreeing on an outcome) and univocality (all judges agreeing on the reasons leading to that outcome) are important attributes of modern Supreme Court decision making, but we assume that *By the Court* signals something more, a greater degree of solidarity that implicitly invites a greater degree of attention. We assume that it is something more than happenstance that it has been targeted so directly on constitutional cases, a major component of the modern court's significant caseload. And we utterly reject the notion that one finds in some of the American literature that it is a way of reducing the workload by allowing judges to produce work that is shoddier than they would ever want to put their individual names to. These rebuttable assumptions frame our inquiry.

In Chapter 2, we will defend our assertion that about fifty years ago – not earlier – the Supreme Court of Canada became primarily a constitutional court, and we will spell out the change in the role of the Supreme Court that is implied by this shift, and the way the court has moved to accommodate it.

In Chapter 3, we will defend the idea that presentation style matters, and matters enough to merit study. Specifically, we argue that presentation style is part of a battery of choices made by courts that reflect evolving conceptions of the judicial role in general as well as the role of the individual judge within the institutional setting of a final court of appeal. So framed, this is a choice that sends signals; to fully understand the evolving judicial role, we must know how to decode these signals.

In Chapter 4, we will defend the notion that the Canadian Supreme Court's use of *By the Court* is original by refuting the standard explanations of its emergence, which see it as either following English examples or echoing developments in the United States Supreme Court.

In Chapter 5, we will defend the notion that the Canadian Supreme Court's use of *By the Court* is unique within the common law world by undertaking a survey of the most directly comparable common law courts, canvassing the variety of modes through which judicial decisions are delivered. In the process, we will demonstrate that none of these courts has a practice remotely similar to that of the Supreme Court of Canada.

In Chapters 6 and 7, we will describe the institutional background of the practice. Chapter 6 will provide an “early history” of *By the Court* that has never before been described or examined. We will call this the minor tradition and will track it through eight decades and three distinct phases. In Chapter 7, we will feature the transitional moment when the minor tradition was transformed into the modern practice (the grand tradition). The year was *not* 1979, and the judge responsible was *not* Laskin.

In Chapter 8, we will provide an inventory and chronology of the grand tradition, highlighting the major examples and tracing its evolution through the tenures of successive chief justices.

In Chapter 9, we will generate a typology of *By the Court* judgments, with each of four types having its own history and rationale. This typology will in itself provide at least a partial explanation of why the Supreme Court is using the device, why those were the cases for which it was used, and what signal or signals the use of *By the Court* is sending. Generating such a typology is made more problematic because the Supreme Court has never given any solid explanation of the device – not in any of the decisions themselves, nor in any formal statement of practice, nor in any speech or writing by any of the judges on the court.

In Chapter 10, we will move beyond typology to explanation: Why *these* cases? We will present four possible explanations, rejecting the first and focusing on the fourth and more recent consideration that is transforming the practice by making it part of a new and broader development.

In Chapter 11, we will connect our findings to the comparative literature on national judiciaries. In the process, we will indulge in some speculation about the future of the practice now that McLachlin, who presided over the most extensive use of *By the Court*, has been replaced by a new chief justice.

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