Cut to the Chase Counsellor: Patterns of Judicial Writing at the Supreme Court of Canada 1970-2015

Evan Rosevear[1] and Andrew McDougall[2]

Abstract

We created a pilot study to examine the changing structure of judicial writing on the Supreme Court of Canada. Using ten annual cohorts spaced at five-year intervals beginning in 1970, we found that although the average number of opinions per decision has declined over time, average opinion length has increased over time to the extent that the average decision length more than tripled between 1970 and 2015. We also found that, until the age of 70, Supreme Court judges tend to write longer opinions as they grow older. Upon reaching 70, however, there is a marked drop in the average opinion length, even controlling for year, subject matter, panel size, and various procedural factors. We found some indication of systematic difference in the length of female and male-authored decisions, but believe this is the product of issues faced by the initial cohort of female judges as opposed to an ongoing relationship. We found no correlation between prior judicial or academic experience and opinion length. More broadly, we believe that this study suggests that the incorporation of decision length and structure into the study of decision-making on the Supreme Court of Canada will prove to be a fruitful line of inquiry.

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> …may not the verbosity or prolixity of judicial opinions be somewhat or indirectly accountable for those "delays of justice" of which we hear so much nowadays? Are they not responsible for some of the "weighty" briefs, "that codeless myriad of precedents" that add to the labors and consequent delays of the courts and the attendant costs? (Leach 1911, 141)

I. Introduction

In contrast to work on its political role and, to a lesser extent, agreement and disagreement among its judges, there has been little academic attention to the structure of Supreme Court of Canada judgements. This is unfortunate because the structural characteristics of judgements can be revealing about many aspects of judicial behaviour, both with individual justices and as a group. For example, which justice is the most productive by word count? Which justices write the most overall? Do some types of topics yield a physically different type of opinion than others? And do the ways that judges write their judgements change noticeably over time?

We conducted a pilot study of Supreme Court of Canada judgements to begin to fill this gap. Specifically, we were interested in testing plausible hypothesis about how the structure of judgements might change over time. For example, it is often said that the state has become more complicated – has this resulted in judgements becoming longer overall? This appears to have been

[1] JD, MA, PhD Candidate, University of Toronto.

[2] LLB, PhD, Lecturer, University of Toronto Scarborough.

the case in Australia, Britain and the United States, where there is now a growing literature and list of critics on the growing length of the judgements handed down by their apex courts. One might also wonder whether or not judges "get better" at what they are doing over time and render shorter, more concise and efficient judgements. Could this be measured in any way? One might also suspect that the changing rules surrounding leave applications, and the growing control the Court has over its docket, might lead to a change in behaviour, given that more of the cases that arrive at the Court have done so by leave.

It turns out that there are indeed, interesting things that can be studied by measuring the structure of decisions across several axes. While our conclusions in this paper are quite tentative, we find that over the last 40 years the Court's output has become larger every year, that opinion length is getting longer, and that the Court is also taking more time to write each decision. We are also able to elaborate a little on the way that the career of a Supreme Court Judge changes over time, and to offer some insights about the careers of individual judges.

II. Context and Purpose

The behaviour of US Supreme Court judges on the bench has been the subject of sustained political inquiry since the 1940s (e.g., Pritchett 1941, 1948). With some notable exceptions (Peck 1967; Bushnell 1982; Heard 1991; McCormick 1993; Wetstein and Ostberg 1999; Flemming and Krutz 2002), however, the same has not been true of judges on the Supreme Court of Canada. The Court has been studied extensively, but research has tended to treat the Court as an entity, with focus being placed on the role of the Court in reconciling tensions in a federal and binational country (Strayer 1968; Russell 1969; Lederman 1981; Monahan 1987; Macfarlane 2013; Schertzer 2016), its legitimacy in a post Charter era (Mandel 1992; Knopff and Morton 2000; Roach 2001), and the relationship of the judiciary and the legislative branch in the Charter era (Hogg and Bushell 1997; Manfredi and Kelly 1999; Petter 2007; Hennigar 2007). To the extent that the judges themselves have been the focus of inquiry, research has tended to examine the process of selecting judges (Russell and Ziegel 1991; Greene 2008; Knopff 2008) or the influence of individual judges (Saywell 2004; Girard 2005; Kaplan 2009). In recent years, however, a small but growing body of research has begun to examine the behavior the Court's judges, often employing methods and theoretical models developed in reference to the US Supreme Court (Ostberg and Wetstein 2007; Alarie and Green 2007; Songer 2008; Hausegger, Riddell, and Hennigar 2013; Wetstein and Ostberg 2017). With the exception of research conducted by Peter McCormick (1994, 2009, 2011), however, there appears to have been little to no examination of the structure of the opinions with respect to length, the likelihood of concurrence and dissent, and the depth of analysis on the Court. With our current course of study, we hope to contribute to the development of this line of research.

III. Data & Method

To investigate this issue, we conducted a pilot study of Supreme Court of Canada judgments. Using the Court's online database,[3] we identified reported decisions at five-year intervals from 1970 to 2015. We selected 1970 as the starting point to facilitate a pre/post-*Charter* comparison. This process yielded 937 decisions consisting of 1,471 individual opinions authored by 42 individual judges as well as a variety of multi-author combinations.[4] An overview of this data, including the number of judgments rendered by the Court, the number of opinions written by its judges, the total written output of the Court for each year studied, as well as the percentage of matters that came before the Court as of right, motions, or were disposed of orally, is presented in Figure 1.

Figure 1. Court Output and Case Characteristics

	Output (#)			Excl. Motions and Oral (#)		Characteristics (%)		
Year	Decisions	Opinions	Total Words	Decisions	Opinions	As of Right	Motions	Oral
1970	101	171	367,791	97	167	[10.9]	2.0	3.0
1975	115	189	499,444	108	180	[5.2]	5.2	0.9
1980	111	127	373,564	80	96	14.4	7.2	26.1
1985	81	108	440,106	72	99	12.3	1.2	9.9
1990	138	255	1,210,420	111	227	27.5	5.1	14.5
1995	107	211	985,888	76	173	33.6	2.8	27.1
2000	66	98	557,166	54	84	25.8	4.5	13.6
2005	86	117	684,100	71	101	14.0	5.8	11.6
2010	66	96	554,629	58	87	25.8	6.1	6.1
2015	66	99	722,822	53	83	25.8	1.5	18.2
Total	937	1,471	6,395,930	780	1,297	19.2	4.3	13.3

[…] Matters as of right not clearly identifiable in source data prior to late 1975/early 1976

This cases in this sample were coded for opinion and decision length, subject matter, outcome, level of agreement, authorship, and a variety of procedural matters.[5] Based on data collected from, *inter alia*, the Court's biographies of current and former justices, we incorporated data on age, prior judicial and academic experience, sex, and other author-specific factors. As we were principally concerned with patterns of opinion writing, we excluded both oral judgments and judgments on motions from subsequent analysis. By necessity, we also excluded multi-author opinions when analysing opinions in relation to author characteristics.

[3] https://scc-csc.lexum.com/scc-csc/scc-csc/en/nav_date.do

[4] Excluding reference cases and oral decisions for which reasons were subsequently reported.

[5] An overview of the data collected is available from the authors on request.

In the remainder of the paper we present discuss our initial findings. While we believe there are many interesting relationships, we do caution readers to keep in mind that this is a pilot study and our findings and discussion should be treated as suggestive rather than conclusive.

IV. Discussion and Analysis

A. Output of the Court

In addition to a marked increase in both decision length and total output over time, one of the most striking findings is the sheer volume of material produced in 1990 and 1995. AS Figure 1 indicates, the written output of the Court more than doubled from less than 500,000 words in 1985 to 1.2 million words in 1990. The substantial increase in 1990 and 1995 is almost certainly the result of the first sustained wave of Charter litigation reaching the Court. Indeed, many of the Court's landmark Charter decisions were both issued in that era and the longest we observed. For example, the five longest decisions we observed were issued in the 1990s and dealt with Charter issues.[6] Although the annual output of the Court has subsided from its high point in the 1990s, it has not returned to pre-Charter levels. Prior to 1990 the average annual output of the Court was just over 400,000 words, since 2000 it has averaged 625,000 words.

Figure 2. Outcome & Length

	Outcome (%)			Length (wds)		Opinions per Decision	Appeals by Leave (#)
Year	Allowed	In Part	Dismissed	Decision	Opinion		
1970	39.2	3.1	57.7	3,777	2,194	1.72	86
1975	46.3	3.7	50.0	4,487	2,692	1.67	103
1980	38.8	2.5	58.8	4,590	3,825	1.20	70
1985	41.7	4.2	54.2	6,046	4,397	1.38	65
1990	37.8	0.0	62.2	10,698	5,231	2.05	82
1995	56.6	0.0	43.4	12,953	5,675	2.29	57
2000	51.9	1.9	46.3	10,462	6,573	1.54	41
2005	50.7	8.5	40.9	9,477	6,662	1.42	65
2010	36.2	5.2	58.6	9,320	6,213	1.50	44
2015	49.1	7.6	43.4	13,610	8,691	1.57	44
Total	44.2	3.3	52.4	8,109	4,865	1.66	657

Another point of note is that the Court continues to hear a high level of cases as of right: apart from 2005, appeals as of right have made up at least a quarter of the Court's docket since 1990. During the 1990s and possibly into the early 2000s, this can likely be explained by uncertainty surrounding the interpretation of the Charter's legal rights, particularly ss.7 & 11,

[6] *Mckinney v. University of Guelph*, [1990] 3 SCR 229 (s.15; 63,317 words); *Thomson Newspapers Ltd. v. Canada*, [1990] 1 SCR 425 (s.7; 60,312 words); *R. v. S. (R.J.)*, [1995] 1 SCR 451 (ss.7, 11, 13, 24(2); 52,576 words); *R. v. Keegstra*, [1990] 3 SCR 697 (s.7; 50,480 words); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 (s.2(b); 45,291 words).

resulting in a higher than normal reversal of acquittals and dissents on points of law in criminal cases in provincial appellate courts.[7] The continued persistence of appeals as of right, however, is somewhat puzzling. Further research on the cause and consequences of this phenomenon would likely prove to be a productive and valuable line of study.

With respect to appeals by leave, there is some evidence that the Court is evolving in its thinking about which cases to take. Specifically, the Court appears to have become increasingly selective in its leave decisions: prior to 1995, the Court granted leave to approximately eighty cases per year; since 1995 it has granted leave to roughly fifty. This pattern is reflected in Figure 2, which presents the disposition of appeals, average length of decisions and their constituent opinions, average number of opinions per decision, and the number of appeals heard by leave for all matters that were not disposed of orally and were not motions. This suggests that the Court is becoming more selective in the issues that it chooses to deal with.

When considering the success of the appellants, we get a very balanced picture. On average, appeals were dismissed just over half of the time (52.4%) and allowed in whole (44.2%) or in part (3.3%) just under half of the time. However, disaggregating the data by year reveals a shift over time. Prior to 1995, appeals were more likely than not to be dismissed; since that time, the reverse is true. However, 1990 appears to have been a particularly bad year for appellants: nearly two-thirds (62.5%) of appeals were dismissed. The Court also appears to have become more willing to grant appeals in part in the past fifteen to twenty years. The reason for this is not clear, although it may reflect changes in the law brought on by the Charter and the Court being more selective in the cases that it is taking.

While there has been a slight decline in the number of opinions over time, opinion length has increased to an extent that more than offsets the decline in the absolute number, resulting in an increase in overall length of decisions. This has been noticed in other countries too and is taken as a reflection of the fact that the world is becoming more complicated and that the courts are being forced to deal with ever more complex decisions. But it could also be connected to the fact that the bench size has been expanding to include more judges over this period. The overall decline in the number of opinions per decision might reflect a shift away from the *seriatim* tradition, in which each judge would, at least briefly, articulate how they would dispose of the appeal and their reasons for doing so. Regardless, the increase in the volume of words the Court generates is quite dramatic. In 1970, the average length of an opinion was just over 2,000 words and decisions averaged just under 4,000 words. In 2015 they were nearly 9,000 and 14,000 words, respectively.

Does a more complicated society mean that there need to be longer judgements? That is one possible explanation. With the regulatory state growing more complex and expected to regulate more areas of life, primary and secondary legislation proliferates, becomes more specialized, and cuts more deeply into society. This may reflect a need at the Court to move away from the specifics of any one case and choose those that are ripe for it to make a clear definitive

[7] In the former situation, a defendant has an appeal as of right to the Supreme Court. In the latter, both the Crown and the defendant have an appeal as of right (Criminal Code, RSC 1985 c C-46, ss.691-696).

statement and requiring the Court to reach a level of granularity that it was not expected to reach forty years ago (Cappelletti 1989; Shapiro and Stone-Sweet 2002). On the other hand, this trend may be a product of technological advancement—the use of computers has made editing and publishing decisions substantially less resource intensive than it has been in the past. Longer decisions may not be the result of a more complicated society, but of less emphasis on pithiness. Regardless, existing research suggests two things. First, concern with the increasing length of judicial decisions is a widespread phenomenon, at least in the common law world (Waye 2009; Liptak 2010; Sabur 2017). Second, as the source of the this paper's epigraph suggests, it is far from a new concern (Leach 1911).

B. Panel Size, Cohesion, and Time to Judgement

In addition to the opinion and decision length, the number of judges hearing each case has increased over time. As shown in Figure 3, in the 1970s most cases were decided by a panel of five judges—quorum for the Court. Since 2000, only about one in twenty judgements yielding written reasons have been heard by such panels. This shift may be the result of a deliberate move by the Court to change the way that it operates. It may also be connected to why the Court has decided to take fewer cases by leave.

Figure 3. Panel Size, Cohesion, and Time to Judgment

	Panel Size (%)			Cohesion (%)		Time to
Year	Nine	Seven	Five	Unanimous	Disposition*	Reasons**
1970	17.5	7.2	75.3	55.7	63.9	121
1975	33.3	5.6	50.9	56.5	63.0	159
1980	5.0	55.0	40.0	83.8	87.5	116
1985	11.1	58.3	8.3	75.0	86.1	266
1990	13.5	64.9	18.0	40.5	63.1	235
1995	52.6	38.2	9.2	29.0	57.9	174
2000	24.1	46.3	13.0	57.4	66.7	221
2005	54.9	43.7	0.0	62.0	67.6	171
2010	69.0	31.0	0.0	63.8	74.1	243
2015	24.5	67.9	3.8	52.8	64.2	205
Total	28.9	39.7	25.9	56.8	68.9	187

* All judges in agreement as to disposition.
** Number of days between last hearing and release of reasons.

In addition to increasing the number of judges hearing each case, the length of time the Court takes to issue its decisions has also increased. In the pre-Charter era, average time between the last day of oral argument and the issuing of reasons (Time to Reasons) was 134 days. The highest time to reasons we observed was in 1985, when the Court took an average of nearly nine months between hearing and reasons. This appears to be related to issues with Justice Ritchie, who was present at a most hearings but tended not to participate in the decisions themselves. We suspect

the lengthy time to reasons is largely the result of an illness or personal issue which prevented Ritchie from performing his duties and the Court attempting to wait for him to be able to participate. However, we have not been able to confirm this. Since 1990, the average time to reasons has been 209 days. This trend may well be connected to the larger panel sizes. Another contributing factor may be that the Court is dealing with increasingly complex issues, as discussed above (Cappelletti 1989; Shapiro and Stone-Sweet 2002). Regardless of the explanation, this pattern suggests that the Charter has had a strong impact.

One of the more common themes in the analysis the Supreme Court of Canada has been the relatively high level of consensus on the Court, particularly in comparison to the US Supreme Court (Alarie and Green 2007; Macfarlane 2010; Songer and Siripurapu 2009; cf. Alarie and Green 2009). Unsurprisingly, our data generally supports this finding. Nevertheless, we did observe notable variation over time; the Court appears to have been relatively divided in the 1990s, particularly with respect to the reasons for disposing of particular appeals. This is evident in the two measures of cohesion reported in Figure 3. The first, Unanimous, reflects the proportion of cases in which the full panel was in agreement as to both reasons and disposition. The second, Disposition, reflects the proportion of cases in which the panel was in agreement as to the disposition of the appeal before them but not necessarily for the same reasons. In the 1970s and, even more so, the 1980s, consensus opinions were very much the norm: two-thirds (66.1%) of cases were decided unanimously and in three-quarters (73.4%) there was agreement as to the disposition of the case. During the 1990s, however, a mere third (35.8%) of cases were unanimously decided and there was agreement to disposition in only three-fifths (61.0%). In addition, it was during the 1990s that the only decision we observed with seven opinions (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199), two of the three we observed with six opinions (*BC Telephone v. Shaw Cable (BC)*, [1995] 2 SCR 739; *CBC v Canada (LRB)*, [1995] 1 SCR 157), and thirteen of the twenty we observed with five opinions were released. Since 2000, the cohesion of the Court has been substantially higher, but has not quite reached pre-1990 levels.

The most obvious contributing factor is, once again, that the 1990s saw the Court consider the first wave of Charter cases. It would seem likely that as the "Charter Revolution" really got started in those years that different judges would take starkly different positions on a document that they did not have for most of their careers. Those early struggles over the direction of the constitution could be expected to engender particularly hard-fought disagreements in the interests of laying down the leading cases to shape the subsequent jurisprudence. The composition of the Bench at the time may also have been a factor. As discussed below,[8] this was the period when the judges we observed who were among the most isolated from their colleagues in writing judgements, particularly Justices Bastarache, L'Heureux-Dubé, and Sopinka. A third contributing factor is likely panel size: all else being equal, the more decision-makers there are, the more likely it becomes that at least one will not agree with the others.

[8] See Section IV(e).

C. Judge-Level Characteristics

Does age have an impact on how long judges write decisions? Our findings suggest that it does. As presented in Figure 4, the shortest judgements tend to be written by the youngest and the oldest judges. For the most part decision length averages between 4,000-6,000 words. Judges in their 40s tend to write opinions that are about 4,000 words long. However, the relatively small number of observations means that this may be the product of chance rather than systematic variation. Judges in their 70s, however, do appear to author significantly shorter opinions than their younger colleagues, averaging less than 4,000 words per opinion.

There are several possible explanations for this pattern. Younger judges may write shorter opinions because the cases they are responsible for tend be the more straightforward cases heard by the Court, or because they are expected to produce more judgments than their more senior colleagues. Of more interest is the pronounced drop in opinion length after 70. One explanation is that judges in this age bracket tend to lose interest as they approach their constitutionally mandated retirement. For a variety of reasons, including selection effects and anecdotal evidence of post-retirement activities,[9] we are highly skeptical of this possibility. It might also reflect a desire to allow younger judges to make their mark, only writing opinions to support their colleagues. More plausibly, we think this may be related to an increased efficiency in writing that tends to manifest in later life and/or a shift in priorities away from legal niceties and toward the substantive development of the law. It may also be the result of more senior judges having the ability, for one or another reason, to elect to write opinions only when they are relevant to an issue or area of the law about which they have strong, well-defined positions that they wish to express.

Figure 4. Opinion Length by Age

Author Age	Length	Std. Dev	95% LCI	95%UCI
45-49	4,320	665	3,016	5,624
50-54	5,221	479	4,281	6,161
55-59	4,957	350	4,270	5,643
60-64	5,365	283	4,809	5,920
65-69	5,167	283	4,611	5,723
70-75	3,909	294	3,332	4,486

One of the limitations of the sampling method selected is that it makes it difficult to analyze life-course effects, as there are a number of judges for whom we have observations in only one or two years. Nevertheless, we feel that the data does suggest that this is quite possibly a fruitful line of inquiry. An interesting future line of research in this regard would be to conduct a qualitative, content-based study of the decisions of older judges with that of their younger selves, in an effort to find out if there is a shift in focus, interest, or priority in what they are writing.

[9] E.g., Justice Binnie's return to practice, Chief Justice McLachlin's current tenure on the Hong Kong Court of Appeal.

Gender is another variable of interest with respect to judicial decision-making. Although the Court has been flirting with gender parity since the early 2000s, the appointment of female Supreme Court judges is a relative novelty in Canada, the first being Justice Wilson in 1982. The most striking pattern that has been identified with respect to gender has been the propensity of female judges to dissent. Belleau and Johnson (2008) found that between 1982 and 2007 the first three female judges on the Court were the also most likely to dissent: Justice McLachlin was in dissent 19.6% of the time, Justice Wilson 23.2%, and—living up to her unofficial title of 'The Great Dissenter'—Justice L'Heureux-Dubé was in dissent 28.1% of the time. However, this trend did not continue: as noted by Belleau and Johnson and as discussed below, subsequent female appointees do not appear to have exhibited the same level of dissent. Earlier research on decisions of the Alberta Court of Appeal by McCormick and Job (1993) also suggests the absence of systematic difference.

Figure 5. Opinion Length and Gender

	Avg. Opinion Length		Avg. Votes/Opinion		% of Total Words	Females
Year	Female	Male	Female	Male	Female-Authored	Justices
1970	.	2,083		3.25	0.0	0
1975	.	2,756		4.09	0.0	0
1980	.	4,101		5.39	0.0	0
1985	5,236	5,009	2.64	5.10	17.3	1
1990	6,082	4,701	2.98	3.53	43.6	3
1995	5,285	6,102	2.16	3.83	27.5	2
2000	4,485	7,529	4.26	4.89	22.9	3
2005	5,511	6,713	5.47	5.68	39.5	4
2010	6,699	6,534	5.41	5.85	44.8	4
2015	7,204	10,107	3.60	5.26	29.0	4
All Years	5,803	4,631	3.64	4.29	27.1	
1985-Present	5,803	6,080	3.64	4.48	33.6	

We cannot answer Justice Wilson's (1992) question as to whether women judges have made a difference, but we do believe our data offers some insight. As indicated in Figure 5, our data shows that the average female-authored opinion is longer than those of their male counterparts. However, this is a least partly a function of the absence of women on the Court before 1982, when opinions in general tended to be shorter. When considering only cases decided after the appointment of the first female justice to the Court, female-written opinions tend to be shorter, although the difference between the sexes does not appear to be significant. If we assume an even distribution of work, we can expect each judge to produce approximately 11.1% (one-ninth) of the Court's output for a given year, all else being equal. The data, however, indicate notable variations. Between 1985 and 1995, women were responsible for more words than expected. In 1985, Justice Wilson alone accounted for 17.3% (73,304 words) of the Court's output. In 1990, the combined work of Justices L'Heureux-Dubé, Wilson, and McLachlin accounted 43.6% of the total, with Justice Wilson's 241,035 words representing nearly half of that. Since then, they have been

responsible for the expected level (2005, 2010) or fewer than expected (2000, 2015). Overall, women have been responsible for about a third (33.6%) of all words written since the appointment of Justice Wilson. A similar trend is evident in the average number of judges signing on to opinions—prior to 2000, judges were less likely to sign on to female-authored opinions than those authored by their male colleagues. Since 2000, with the exception of 2015, the number of judges signing on to opinions authored by male and female judges has been comparable.

Two related explanations of the early trend of dissent and length coupled with subsequent normalization suggest themselves. The first, suggested by Belleau and Johnson and others, is that the first cohort of women judges were raising issues and perspectives that had not previously been considered by the Court. This, in turn, may have resulted in a higher than normal period of legal uncertainty and development, yielding a greater volume of writing by the (women) justices attempting to introduce them. An alternative explanation is that the first female judges were—or perceived themselves to be—held to a higher standard by their audiences, judicial or otherwise. As such, they felt it necessary to spend a greater amount of time justifying themselves.

Figure 6. Academic and Judicial Experience

	Length	Std. Dev	95% LCI	95%UCI
5 Years of Academic Experience Prior to Appointment?				
No	4,646	179	4,295	4,998
Yes	5,016	205	4,613	5,419
10 Years of Academic Experience Prior to Appointment?				
No	4,878	162	4,559	5,197
Yes	4,671	243	4,193	5,149
5 Years of Judicial Experience Prior to Appointment?				
No	4,386	223	3,949	4,822
Yes	5,237	180	4,883	5,591
10 Years of Judicial Experience Prior to Appointment?				
No	4,429	176	4,084	4,774
Yes	5,631	229	5,182	6,081

The professional background of judges has also been suggested as a possible influence on judicial behaviour (Oliveira 2008; Hausegger, Riddell, and Hennigar 2013). For present purposes we collected data on the number of years a judge had spent in academia (in either a full or part-time capacity) and the number of years they had sat on the bench prior to their appointment to the Court. This information is presented in summary form in Figure 6. To the extent either had an effect, we expected that, all else being equal, both would tend to be correlated with longer opinions. We had hypothesized that we would see that the longer time that someone worked as a practicing lawyer, the shorter the opinions that they were writing would become. We thought this because the time constraints placed on lawyers tend to be more onerous than those placed on academics or judges. As such, we hypothesized that judges who had spent more time in practice would be less

likely to engage with abstract arguments or the articulation of broad principles and focus their writing on resolving the matter before them as efficiently as possible.[10] There was no significant evidence of this with respect to academic experience, but judicial experience was correlated with longer opinions: judges with five years of prior judicial experience tended to write opinions that are about 800 words longer than their colleagues and those with ten or more years on the bench prior to their appointment tended to write opinions that were about 1,200 words longer.

D. Regression Analysis

To test the validity of our initial hypotheses and findings we employed ordinary least squares regression analysis. In doing so, we controlled for the year in which the decision was issued, the area of law dealt with, the nature of the opinion (majority, concurrence, full or partial dissent), whether the decision hinged on a single judge's vote, the level of agreement on the case, whether the appeal was granted, the presence of interveners or *mis-en-cause* parties, whether the decision was part of a concurrently heard and/or release set of decisions, bench size, whether the appeal came before the Court as of right, and the length of time the author of the opinion had been on the Court. The results of several of these models are reported in Figure 7. We have some concerns regarding heteroskedasticity and omitted variable bias which are discussed below. In the first reported results (Words), the dependent variable was the length of the opinion in words. These results displayed several statistically significant correlations, however, diagnostics suggested that the relationship was non-linear. As a result, we reran the analysis using both logged opinion length and the square root of opinion length as the dependent variable (Log1 and Sqrt1). The fourth (Log2) and fifth (Sqrt2) reported results employed an alternative subject matter classification scheme using the same dependent variables. This yielded improved results in terms of the variance explained and reduced (but did not eliminate) the heteroskedasticity present in our initial results. Omitted variable bias remains a concern. As such, our findings must be considered tentative.

With respect to our primary variables of interest, the results suggest that until they reach 70, judges' opinions tend to lengthen as they grow older. After 70, however, they tend to write substantially shorter opinions. We found no evidence that judges under the age of 50 are especially likely to write shorter opinions. We also found some evidence suggesting that, controlling for the various factors listed above women judges tend to write longer opinions. We found no evidence that prior academic or judicial experience impacts opinion length. Our models also included the year in which a decision was handed down as a series of dummy variables. The comparator year was 1970 and in all models the variables from 1980 onward were significant. Overall, they demonstrate a clear increase in average opinion length over time, but that relationship is not obviously a linear one. The data also exhibit several significant correlations with respect to our other control variables. Unsurprisingly, unanimously adopted opinions tend to be shorter. Concurring opinions and, to a much lesser extent, dissenting opinions tend to be shorter than majority opinions. We attribute this largely to the fact that the articulation of facts generally occurs

[10] Whether this is an appropriate approach for a justice of the Supreme Court is a matter for another day.

Figure 7. Regression Results

Variable	Model				
	Words	Log1	Sqrt1	Log2	Sqrt2
Author					
Age	53.39 *	0.02 **	0.47 **	0.02 **	0.45 **
Over 70	-950.52 **	-0.27 **	-7.35 **	-0.28 **	-7.48 ***
Under 50	525.44	0.20	4.23	0.15	2.96
Tenure	0.02	0.00 ***	0.00	0.00 ***	0.00
Sex	-31.95	-0.26 **	-2.70	-0.30 ***	-3.41
Chief Justice	-199.62	0.23 *	1.22	0.23	1.08
Academic Experience	19.02	-0.01	0.03	0.00	0.04
Judicial Experience	-28.43	-0.01	-0.16	-0.01	-0.21
Opinion & Decision					
Appeal as of Right	103.73	0.16	2.08	0.08	0.47
Full Bench	-181.16	-0.12	-1.84	-0.12	-2.15
Minimum Bench	-680.61 *	-0.20 *	-5.14 **	-0.20 *	-5.01 **
Main Decision	1585.23 ***	0.00	5.25	-0.06	4.67
Secondary Decision	-4280.14 ***	-1.46 ***	-33.58 ***	-1.50 ***	-34.34 ***
1 Intervener	347.58	0.07	1.73	0.08	2.16
2-4 Interveners	1899.01 ***	0.33 ***	11.42 ***	0.38 ***	11.79 ***
5+ Interveners	2888.55 ***	0.43 ***	16.32 ***	0.42 ***	15.53 ***
Appeal Granted	438.56 *	0.09	2.80 *	0.08	2.41
Unanimous	-1317.32 ***	-0.32 ***	-8.97 ***	-0.30 **	-8.63 ***
No Dissents	891.31 **	0.15	5.48	0.11	4.68 *
Close Vote	219.54	-0.01	0.59	-0.02	0.52
Dissenting Opinion	-1122.83 ***	-0.42 ***	-9.20 ***	-0.44 ***	-9.43 ***
Concurring Opinion	-4825.37 ***	-1.91 ***	-40.53 ***	-1.92 ***	-40.71 ***
Subject Matter					
Private	1031.75 ***	0.30 ***	7.64 ***		
Procedural	416.68	0.23	3.43		
Public	781.84 **	0.31 ***	6.73 ***		
Administrative				-0.08	2.08
Constitutional				-0.15	-0.95
Contract				0.00	0.64
Criminal				-0.33 ***	-5.48 **
Crim. + Const'l				0.39 **	3.32
Insurance				-0.01	1.14
Labour				-0.32 *	-7.61 **
Property				-0.05	0.89
Procedural				-0.08	-1.68
Tax				-0.05	-2.01
Tort				-0.01	4.76
Year					
1975	186.06	0.18	3.43	0.18	3.42
1980	1530.73 ***	0.55 ***	13.6 ***	0.59 ***	14.3 ***
1985	2265.49 ***	0.64 ***	18.08 ***	0.64 ***	17.99 ***
1990	3425.71 ***	0.62 ***	22.65 ***	0.58 ***	22.01 ***
1995	3444.77 ***	0.63 ***	22.68 ***	0.68 ***	23.34 ***
2000	4158.43 ***	0.98 ***	29.55 ***	0.99 ***	29.19 ***
2005	2689.76 ***	0.65 ***	20.01 ***	0.63 ***	19.52 ***
2010	3351.63 ***	0.91 ***	25.51 ***	0.91 ***	25.86 ***
2015	5199.91 ***	1.26 ***	36.86 ***	1.28 ***	37.19 ***
Constant	-584.14	6.56 ***	24.1 *	7.00 ***	33.60 **
Observations	1153	1153	1153	1153	1153
R^2	0.36	0.38	0.41	0.38	0.41
Adjusted R^2	0.34	0.36	0.39	0.36	0.38

* 90% ** 95% *** 99%

in majority opinions and they are generally not repeated in other opinions. We did attempt to distinguish between fact and analysis in the initial coding process, but the clear identification of such a distinction becomes increasingly difficult as one moves backward. We are currently attempting to develop a replicable means of making this distinction. Contrary to our expectations, we found not relationship between opinion length and whether an appeal was heard as of right.

In terms of subject matter, criminal law matters tend to be dealt with more succinctly than other matters. Where cases were heard and/or released concurrently, there is a tendency to concentrate the writing in a single "main" decision and dispose of the other cases more expediently. Interestingly, the presence of an intervener or *mis-en-cause* party was not correlated with longer opinions. However, when a case involved two or more such actors, there was a positive correlation. We also found the absence of a correlation between opinion length and whether an appeal was granted—we had expected that a combination of the Court adopting the majority opinion of the court below in dismissing an appeal and going to pains to explain why it was overruling the court below would result in longer opinions when appeals were granted. That was not the case, however. Finally, we also found that when a case was heard by a panel of five judges, opinions tend to be shorter. This is probably a function of the assignment of more straightforward and/or less contentious issues to such panels.

E. The Impact of Individual Judges

This data also allows us to make some interesting, albeit preliminary, observations about the characteristics of individual judges' patterns of opinion writing. Figure 7 presents the average length of opinion authored, the number and proportion of judges present signing on to opinions, the percentage of opinions that no other judges signed on to and the distribution of opinions between majority, concurrence, and dissent for those judges for whom we have at least twenty opinions. Of these judges, Justice Binnie was the most likely to write an opinion that would be adopted by his colleagues. In other words, his reputation as the intellectual nucleus of the Court is borne out by the statistics: more than three-quarters (76.7%) of his opinions were adopted by the Court as the majority opinion and he rarely (13.3% of the time) authored an opinion that at least one of his colleagues did not support. He did, however, tend to write relatively long opinions, averaging more than 8,000 words—the third highest observed.

Other judges are also notable in this regard. Justices Beetz and McIntyre were also very successful in getting other judges to adopt their opinions, although their opinions were only about half as long as Justice Binnie's. Justice Beetz's opinions were adopted 74% of the time, beaten by McIntyre at 77%, which is higher even than Justice Binnie. Other well received judges in this score include Justice Dickson, with 70% of his decisions adopted by the Court, and Justice Judson, with the same percentage of buy-in by the panel. Justices Estey, Lebel, Laskin, Ritchie Pigeon, Martland and Iacobucci all enjoyed more than 60% adoption rates and tended not to write particularly high percentages of solo opinions.

Of course, not all judges enjoyed the same level of support from their colleagues. One of the least popular judges was L'Heureux-Dubé when it came to getting sign-on from colleagues.

Her judgements were only endorsed by the panel 31.3% of the time. Perhaps an even more interesting statistic is the percentage of her decisions which were solo. Nearly 62.9% of her decisions are written without the endorsement of another judge.

Figure 8. Individual Judge Characteristics (20+ Observations)

	Average Per Opinion			Solo Opinion	Percentage of Decisions		
Author	Words	Judges* (#)	Panel** (%)		Majority	Concurrence	Dissent
Bastarache	8,667	4.0	53.2	16.7	50.0	8.3	41.7
Iacobucci	8,501	4.3	60.2	7.4	59.3	18.5	22.2
Binnie	8,088	5.9	75.3	13.3	76.7	3.3	20.0
Multiple	7,484	4.7	59.0	0.0	54.0	18.0	28.0
Gonthier	7,468	4.0	54.6	30.8	69.2	23.1	7.7
Wilson	6,597	2.7	44.0	32.6	34.8	30.4	34.8
La Forest	6,533	3.6	49.2	28.3	52.2	28.3	19.6
Estey	5,860	4.2	64.2	20.0	70.0	10.0	20.0
L'H-D	5,742	2.3	31.3	62.9	25.8	38.7	35.5
Lebel	5,718	5.1	60.9	18.2	59.1	27.3	13.6
Dickson	5,618	4.9	69.8	5.6	75.9	5.6	18.5
Abella	5,550	4.5	57.3	28.1	56.3	9.4	34.4
McLachlin	5,177	4.2	54.3	16.9	53.5	16.9	29.6
Cory	5,082	4.4	58.6	16.2	73.0	13.5	13.5
Lamer	4,694	4.2	55.5	26.8	64.3	30.4	5.4
Beetz	4,362	4.3	74.2	17.4	78.3	13.0	8.7
Major	4,280	5.0	67.2	19.2	69.2	7.7	23.1
Spence	3,396	3.3	54.1	30.8	43.6	2.6	53.8
McIntyre	3,334	5.0	77.0	12.0	76.0	8.0	16.0
Sopinka	3,171	3.2	42.0	42.7	39.7	44.1	16.2
Laskin	3,145	4.3	62.0	14.5	56.5	11.3	32.3
Court	3,005	7.2	100.0	0.0	100.0	0.0	0.0
Ritchie	2,632	3.9	63.0	24.5	71.4	16.3	12.2
Pigeon	2,607	3.9	64.1	17.7	66.1	12.9	21.0
Grandpré	2,572	3.6	56.5	25.0	50.0	14.3	35.7
Martland	2,153	4.7	69.3	10.6	72.3	17.0	10.6
Hall	2,033	3.2	54.8	30.4	60.9	13.0	26.1
Cartwright	1,556	2.6	40.5	50.0	35.0	30.0	35.0
Judson	1,232	4.0	70.1	5.0	75.0	5.0	20.0

* Number of judges signing on to opinion (including author).
** Percentage of judges taking part in the decision signing on to opinion (including author).

In this she remains quite the exception in the study. It is not totally clear why she is the outlier. There have been others who have noted she was often one to draw on social science evidence for her decisions. Not everyone agreed with the approach or thought that it was the correct

way to write a decision. This proves that for the Court, in general, her approaches were not as convincing as that of their colleagues. The polarizing nature of her work makes her a compelling figure in Canadian jurisprudence. In the end, the refusal of her colleagues to find this kind of opinion convincing may shed light on the limits of what the Court has internally on opinions that are perceived, rightly or wrongly, as veering too far into the policy field. Still, it would be wrong to only single out Justice L'Heureux-Dubé in this regard. There were other justices who did not get large amounts of acceptance for their opinions. A higher proportion of opinions authored by (Chief) Justice Cartwright (40.5%), for example, were not signed on to by any colleagues; the same is true of Justices Sopinka (42.0%) and Wilson (44.0%).

What is the picture when we take a look at whether or not individual judges are more likely to write a majority, concurrence or dissent? A slightly different picture emerges. Justice L'Heureux-Dubé is a little more balanced in this sense than one would think, although she was much less likely to write a majority opinion than her colleagues (34.8%). But along with Justice Sopinka she wrote the highest number of concurrences. When it comes to dissents, it was Justices Spence and Bastarache who were the most likely to write a dissenting opinion (over 50% and 40% respectively). Justices Lamer (5%) Gonthier (8%) and Beetz (9%) were the least likely to do so.

V. Conclusions & Future Research

What can we draw from this study? Overall, the most important finding is that the Court appears to be doing more with less when it comes to cases and length. There is a clear upward pressure on the word count in decisions, and that could come from a number of different causes. It is worth investigating further. Given the strength of those findings, understanding where the pressure is coming from will undoubtedly offer important insights into judicial behaviour. Probably the second most interesting finding is the growing size of the bench. Again, it will be worth exploring whether or not this tendency is the result of a deliberate action on the part of a particular Chief Justice or if it reflects a natural evolution and change in judicial behaviour. Either result would be interesting.

Another key finding is age. The sudden drop of productivity as judges reach retirement are suggestive of a number of different causes. Again, this could be a reflection of a judge slowing down or losing interest as they approach retirement. But it could reflect a kind of mentoring behaviour, or an internal practice at the Court involving senior judges that is not known to the authors. Interviews might be able to shed a little bit of light on this as well.

We do not as yet have sufficient observations to make broad generalizations about other elements of the Court's decision-making process. It will be interesting to see how the gender dynamic plays out as we fill in other cohorts and as we continue to gather more observations over time. Ultimately, we feel that examining the different structural characteristics about these decisions will shed further insights into emerging trends of Judicial behaviour at the Supreme Court of Canada.

References

Alarie, Benjamin, and Andrew Green. 2007. “Should They All Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada.” *University of New Brunswick Law Journal* 58: 73–91.

Alarie, Benjamin, and Andrew James Green. 2009. “Policy Preference Change and Appointments to the Supreme Court of Canada.” *Osgoode Hall Law Journal* 47: 1–46.

Belleau, Marie-Claire, and Rebecca Johnson. 2008. “Judging Gender: Difference and Dissent at the Supreme Court of Canada.” *International Journal of the Legal Profession* 15 (1–2): 57–71.

Bushnell, Ian. 1982. “Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance.” *Supreme Court Law Review* 3: 479–558.

Cappelletti, Mauro. 1989. *The Judicial Process in Comparative Perspective*. New York: Clarendon Press.

Flemming, Roy B., and Glen S. Krutz. 2002. “Repeat Litigators and Agenda Setting on the Supreme Court of Canada.” *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 35 (4): 811–33.

Girard, Philip. 2005. *Bora Laskin: Bringing Law to Life*. Toronto: Osgoode Society for Canadian Legal History, University of Toronto Press.

Greene, Ian. 2008. “Democracy, Judicial Independence, and Judicial Selection for Federally Appointed Judges.” *University of New Brunswick Law Journal* 58: 105–11.

Hausegger, Lori, Troy Riddell, and Matthew Hennigar. 2013. “Does Patronage Matter? Connecting Influences on Judicial Appointments with Judicial Decision Making.” *Canadian Journal of Political Science* 46 (03): 665–690.

Heard, Andrew D. 1991. “The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal.” *Canadian Journal of Political Science* 24 (2): 289–397.

Hennigar, Matthew A. 2007. “Why Does the Federal Government Appeal to the Supreme Court of Canada in Charter of Rights Cases? A Strategic Explanation.” *Law & Society Review* 41 (1): 225–50. https://doi.org/10.1111/j.1540-5893.2007.00296.x.

Hogg, Peter W., and Alison Bushell. 1997. “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All).” *Osgoode Hall Law Journal* 35 (1): 75–124.

Kaplan, William. 2009. *Canadian Maverick: The Life and Times of Ivan C. Rand*. Toronto: Osgoode Society for Canadian Legal History, University of Toronto Press.

Knopff, Rainer. 2008. “The Politics of Reforming Judicial Appointments.” *University of New Brunswick Law Journal* 58: 44–51.

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

Leach, Francis A. 1911. “The Length of Judicial Opinions.” *The Yale Law Journal* 21 (2): 141–46.

Lederman, W.R. 1981. *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada*. Toronto: Butterworths.

Liptak, Adam. 2010. “Supreme Court Opinions: Long With Limited Guidance.” *The New York Times*, November 17, 2010, sec. U.S. https://www.nytimes.com/2010/11/18/us/18rulings.html.

Macfarlane, Emmett. 2010. “Consensus and Unanimity at the Supreme Court of Canada.” *Supreme Court Law Review (Canada)* 52: 379–410.

———. 2013. *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*. Law and Society. Vancouver: UBC Press.

Mandel, Michael. 1992. *The Charter of Rights and the Legalization of Politics in Canada*. Vol. Rev. ed. Toronto: Thompson Educational Publishing.

Manfredi, Christopher P., and James B. Kelly. 1999. “Six Degrees of Dialogue: A Response to Hogg and Bushell.” *Osgoode Hall Law Journal* 37 (3): 513–527.

McCormick, Peter. 1993. “Assessing Leadership on the Supreme Court of Canada: Towards a Typology of Chief Justice Performance.” *Supreme Court Law Review* 4 (2): 409–29.

———. 1994. “Career Patterns and the Delivery of Reasons for Judgment in the Supreme Court of Canada (1949-1993).” *Supreme Court Law Review* 5 (2): 499–521.

———. 2009. “Structures of Judgment: How the Modern Supreme Court of Canada Organizes Its Reasons.” *Dalhousie LJ* 32: 35.

———. 2011. “Sharing the Spotlight: Co-Authored Reasons on the Modern Supreme Court of Canada.” *Dalhousie Law Journal* 1: 165.

McCormick, Peter, and Twyla Job. 1993. “Do Women Judges Make a Difference? An Analysis by Appeal Court Data.” *Canadian Journal of Law and Society* 8: 135.

Monahan, Patrick. 1987. *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada*. Carswell. http://digitalcommons.osgoode.yorku.ca/faculty_books/198.

Oliveira, Fabiana Luci. 2008. “Justice, Professionalism, and Politics in the Exercise of Judicial Review by Brazil’s Supreme Court.” *Brazilian Political Science Review* 3 (SE).

Ostberg, C. L., and Matthew E. Wetstein. 2007. *Attitudinal Decision Making in the Supreme Court of Canada*. Law and Society. Vancouver: UBC Press.

Peck, S.R. 1967. “The Supreme Court of Canada, 1958-1966: A Search for Policy Through Scalogram Analysis.” *Canadian Bar Review* 45 (4): 666–725.

Petter, Andrew. 2007. “Taking Dialogue Theory Much Too Seriously (or Perhaps Charter Dialogue Isn’t Such a Good Thing After All).” *Osgoode Hall Law Journal* 45 (1): 147–67.

Pritchett, C. Herman. 1941. “Divisions of Opinion Among Justices of the U. S. Supreme Court, 1939-1941.” *The American Political Science Review* 35 (5): 890–98. https://doi.org/10.2307/1948251.

———. 1948. *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947*. Macmillan Company.

Roach, Kent. 2001. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*. Toronto, ON: Irwin Law.

Russell, Peter H. 1969. *The Supreme Court of Canada as a Bilingual and Bicultural Institution*. Documents / Canada. Royal Commission on Bilingualism and Biculturalism 1. Ottawa: Queen's Printer.

Russell, Peter H., and Jacob S. Ziegel. 1991. "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees." *The University of Toronto Law Journal* 41 (1): 4–37.

Sabur, Rozina. 2017. "Court of Appeal Judges Told to Stop Writing Unnecessarily Long Judgments." *The Telegraph*, February 8, 2017. http://www.telegraph.co.uk/news/2017/02/08/court-appeal-judges-told-stop-writing-uneccesarily-long-judgments/.

Saywell, John T. 2004. *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*. University of Toronto Press.

Schertzer, Robert. 2016. *The Judicial Role in a Diverse Federation: Lessons from the Supreme Court of Canada*. University of Toronto Press.

Shapiro, Martin M., and Alec Stone-Sweet. 2002. *On Law, Politics, and Judicialization*. New York: Oxford University Press.

Songer, Donald R. 2008. *The Transformation of the Supreme Court of Canada: An Empirical Examination*. Toronto: University of Toronto Press.

Songer, Donald R., and Julia Siripurapu. 2009. "The Unanimous Decisions of the Supreme Court of Canada as a Test of the Attitudinal Model." *Canadian Journal of Political Science* 42 (1): 65–92. https://doi.org/10.1017/S0008423909090039.

Strayer, Barry L. 1968. *Judicial Review of Legislation in Canada*. Toronto: University of Toronto Press.

Waye, Vicki. 2009. "Who Are Judges Writing For?" *University of Western Australia Law Review* 34: 274–99.

Wetstein, Matthew E., and C. L. Ostberg. 1999. "Search and Seizure Cases in the Supreme Court of Canada: Extending an American Model of Judicial Decision Making Across Countries." *Social Science Quarterly* 80 (4): 757–74.

———. 2017. *Value Change in the Supreme Court of Canada*. University of Toronto Press.

Wilson, Madam Justice Bertha. 1992. "Will Women Judges Really Make a Difference?" *Family Court Review* 30 (1): 13–25.