Twenty-Seven Reserved Judgments: 2023 at the Supreme Court of Canada

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The Supreme Court decided only 27 reserved appeals in 2023, in addition to seven cases decided from the bench.[1] This is the fewest since 1947, which also had 34 total reported decisions. One must go back to 1884, less than a decade after the Court's establishment, to find a year where fewer decisions were released.[2] This makes analyzing the Court's entire output for 2023 accordingly fairly straightforward. What lessons should be drawn from the Court deciding so few cases? Does it matter which ones? What should we make of the work distribution among the judges? This article seeks to explore these issues, without opining on the substantive merits of the decisions themselves.

In this brief comment, I seek to explore three trends. First, I explore why the Supreme Court made such a small number of decisions, mostly by analyzing the types of decisions rendered — and consider some normative implications of this. Second, I look at the assignment of workload of majority decisions and, with one discrete exception, generally commend the reasonably equal distribution of work across judges and areas of law. Third, I consider who has written minority (dissenting and concurring) decisions, with Suzanne Côté J. standing out as an extremely prolific writer of dissents and concurrences.

2023 may be viewed in hindsight as a "one-off" year in terms of the Supreme Court's output due to Justice Brown's untimely departure from the Court. Or it could be viewed as a particularly striking example of recent changes and developments in the Court's docket and practices. Either way, it is worth exploring.

I. Why So Few Decisions?

1. Concentration on the 27

This article will principally analyze the 27 cases where the Court reserved judgment — or, at least, its reasons. It should be acknowledged that the Supreme Court decided seven additional cases "from the bench" — that is, the day of the hearing. In these seven decisions, brief reasons were given for dismissing or

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[1] Dylan Gibbs, "Rest and Relaxation" *Hearsay* (January 10, 2024), online: https://hearsaydaily.ca/p/rest-relaxation?utm_source=hearsaydaily.ca&utm_medium=newsletter&utm_campaign=rest-and-relaxation.

[2] Based on a January 9, 2024 search on LexUM.

allowing the appeal. Every single one of these seven cases were criminal cases where a party had a right to appeal to the Supreme Court, after a Court of Appeal judge had dissented in the Court below.[3]

This practice of decisions from the bench has been criticized in the past. Indeed, I have done some of the criticizing, particularly when a judge dissented and her reasons were reserved while the majority decided the appeal from the bench.[4] Alex Bogach, Paul-Erik Veel and Jeremy Opolsky have also noted that this creates jurisprudential uncertainty insofar as the judgments only "substantially" agree with a Court of Appeal's reasoning.[5] These cases also create perceptions of fairness concerns for the litigants, who have prepared for the Supreme Court hearing.[6] These concerns are amplified when there are dissenting reasons and dissenting judges are unable to give their "best version" of their reasons to their colleagues.[7]

Notwithstanding these concerns, I am of the view that this practice is justifiable, in certain cases, even at the Supreme Court. In cases with an appeal as of right, the Court is primarily acting as a court of error correction, not a jurisprudential Court. This is even more obviously the case in appeals (none of which occurred in 2023) where the right to appeal the Supreme Court exists because the Court of Appeal has imposed a conviction despite acquittals in courts below.[8] In these cases, the right of appeal to the Supreme Court is necessary to implement the *International Covenant on Civil and Political Rights*'s guarantee that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[9] If Courts of Appeal can summarily dismiss such appeals of convictions from the bench, there is no logical reason why the Supreme Court should not be able to do so.

Moreover, by devoting resources to cases that truly warrant them, the Court can

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[3] This right to appeal is guaranteed by the *Criminal Code*, R.S.C. 1985, c. C-46, s. 691(1)(a).

[4] Gerard Kennedy, "The Phenomenon of Deferred Reasons: A Tale of Two SCC Decisions" (May 13, 2020), online: http://www.ruleoflaw.ca/the-phenomenon-of-deferred-reasons-a-tale-of-two-scc-decisions/.

[5] Alex Bogach, Jeremy Opolsky & Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 S.C.L.R. (2d) 251.

[6] Alex Bogach, Jeremy Opolsky & Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 S.C.L.R. (2d) 251.

[7] Alex Bogach, Jeremy Opolsky & Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 S.C.L.R. (2d) 251; Gerard Kennedy, "The Phenomenon of Deferred Reasons: A Tale of Two SCC Decisions" (May 13, 2020), online: http://www.ruleoflaw.ca/the-phenomenon-of-deferred-reasons-a-tale-of-two-scc-decisions/.

[8] *Criminal Code*, R.S.C. 1985, c. C-46, s. 692(2)(b).

[9] *International Covenant on Civil and Political Rights*, December 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976, accession by Canada May 19, 1976), art. 14(5).

concentrate on the cases where it is acting *as an apex court*. As Robert Sharpe J.A. (writing extrajudicially) has noted, the Supreme Court's primary role in our legal order is delineating and refining legal rules while the primary role of the intermediary appeal courts is ensuring consistent application of settled law.[10] Of course, both levels of courts have both roles: the courts of appeal certainly delineate rules, particularly regarding provincial statutes and regulations, while the Supreme Court must dispose of each appeal before it. Even so, the *primary* role of the Supreme Court is jurisprudential. Insofar as cases where the role is error correction are addressed summarily, the Supreme Court can better concentrate on where it is uniquely meant to play a role in the judicial hierarchy.

This practice of summarily dismissing as of right appeals is also sounder when, as was generally the case in 2023, accompanied by explanatory (if brief) reasons, rather than vaguer "substantial" agreement with judges on the Courts of Appeal, which had been more common in recent years. Though the Court has not given reasons for the change in practice, Bogach, Veel and Opolosky's[11] lamenting of the uncertainty caused by such decisions may have been taken to heart. Moreover, in no case has the Court granted leave and then decided from the bench. Such decisions are unusual, because it suggests that the Court considered there to be an important jurisprudential issue before changing its mind.[12] Nor were there any cases where only the dissent was reserved, and where that judge's inability to convince her colleagues of the best version of the case was clearly important to that judge.[13] Finally, it is worth observing that criminal cases often have penal consequences. Insofar as they can be addressed quickly, that is to the benefit of all concerned.[14]

All things considered, therefore, the seven cases should be recognized as contributing to the Supreme Court's workload, but not to the same extent as the 27 cases where decisions were rendered after a period of reserve. Moreover, it was in

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[10] Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 45, 50-51, 95-96; see also Gerard J. Kennedy, "Wither the Divisional Court? Looking at the Past, Analyzing the Present, and Querying the Future of Ontario's Intermediary Appellate Court" (2021) 53:1 Ottawa L. Rev. 93 at 127. See also *Housen v. Nikolaisen*, [2002] S.C.J. No. 31, 2002 SCC 33 (S.C.C.).

[11] Alex Bogach, Jeremy Opolsky & Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 S.C.L.R. (2d) 251.

[12] Alex Bogach, Jeremy Opolsky & Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 S.C.L.R. (2d) 251.

[13] Alex Bogach, Jeremy Opolsky & Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 S.C.L.R. (2d) 251; Gerard Kennedy, "The Phenomenon of Deferred Reasons: A Tale of Two SCC Decisions" (May 13, 2020), online: http://www.ruleoflaw.ca/the-phenomenon-of-deferred-reasons-a-tale-of-two-scc-decisions/.

[14] Gerard Kennedy, "The Phenomenon of Deferred Reasons: A Tale of Two SCC Decisions" (May 13, 2020), online: http://www.ruleoflaw.ca/the-phenomenon-of-deferred-reasons-a-tale-of-two-scc-decisions/.

these 27 cases that the Court was acting as only it can do as an apex court. They will accordingly be the focus of the rest of this analysis.

2. Justice Brown's Departure

2023 witnessed the unfortunate untimely retirement of Russell Brown J. from the Supreme Court. Chief Justice Wagner said that he "put" Brown J. on leave after a Canadian Judicial Council ("CJC") complaint was made about Brown J.'s alleged intoxicated behaviour at an Arizona resort.[15] Chief Justice Wagner later stated that Brown J. "agreed" to step back from his duties pending resolution of the CJC process.[16] This would be more consistent with the language of the *Judges Act*, which holds chief justices may authorize leaves but does not suggest that they can compel them.[17] Justice Brown responded through his lawyer that "recollections may vary" regarding what Wagner C.J.C. decided.[18]

Regardless of what occurred between Wagner C.J.C. and Brown J., the implications of his being on leave were such that he could not participate in judgments under reserve. (This would not have been the case had the chief justice declined to assign him to new cases, as other CJC policy suggests is an appropriate thing to do in this situation,[19] and which is how Chief Justice Paul Crampton chose to respond to a complaint about Justice Robin Camp.[20]) Though we are not privy to what occurred behind closed doors, it is likely that the need to re-assign cases, as well as the fact that the Court was "down" a judge, prompted a delay in issuing reasons. The collateral consequences of re-assignment of work might not be completely able to be addressed even as cases where Justice Brown participated are released. Delay in

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[15] *E.g.*, David Baxter, "Ret. Supreme Court Justice heard 'serenading' complainants before altercation" (June 28, 2023), online: https://globalnews.ca/news/9863529/russell-brown-supreme-court-body-camera/.

[16] Ian Bailey, "Russell Brown's exit from Supreme Court points to need for better process, Chief Justice says" *The Globe and Mail* (June 13, 2023), online: https://www.theglobeandmail.com/politics/article-justices-exit-proves-system-works-chief-justice-richard-wagner-says/.

[17] See R.S.C. 1985, c. J-1, s. 54. See also Emmett Macfarlane, "Transparency, the Supreme Court, and allegations of misconduct against Justice Brown" (March 12, 2023), *Declarations of Invalidity*, online: https://emmettmacfarlane.substack.com/p/transparency-the-supreme-court-and.

[18] Christopher Nardi, "Lawyer appears to cast doubt on statement by Canada's chief justice about Russell Brown's resignation" (June 15, 2023), online: https://nationalpost.com/news/canada/statement-chief-justice-russell-brown-resignation.

[19] Canadian Judicial Council, "Judicial Conduct: A Reference Guide for Chief Justices" (2018), online: https://cjc-ccm.ca/sites/default/files/documents/2020/JCC%20Guide%20for%20Chiefs%20%282018%29%20v4%20final.pdf.

[20] Cristin Schmitz, "Judge frozen out of getting any new cases" *Law360* (November 26, 2015), online: https://www.law360.ca/ca/articles/1741415/judge-frozen-out-of-getting-any-new-cases.

cases where Justice Brown participated begets more delay in cases where he could not sit, in addition to increasing the workload for each judge.

Dylan Gibbs and Paul-Erik Veel have noted that the Supreme Court heard 50 appeals in 2023. Though the lowest in the past decade with the exception of 2020 (undoubtedly affected by the pandemic), this is only two and four fewer cases than 2022 and 2021, respectively. As such, it would appear as though the circumstances of Justice Brown's departure contributed to 2023 being a uniquely low volume year in terms of *decisions* as distinct from *hearings.*[21] Ultimately, therefore, 2023 may be a particular outlier in terms of a small number of reserved decisions released. Justice Brown's departure is not, however, the whole story.

3. Limited Granting of Leave

As Paul-Erik Veel has observed, the primary reason for the small number of reserved decisions released in 2023 was the small number of cases to which leave to appeal was granted in 2022.[22] Irrespective of any delays caused by Justice Brown's departure, 2023 "was always going to be low, because [the Court] granted leave to so few cases" in 2022.[23] There is some evidence that 2024 may be the beginning of the change in the tide, with the Supreme Court granting leave to appeal in five cases on the last day on which leave applications were decided in 2023,[24] and two more on the first day applications were decided in 2024.[25] Even so, the heights of 20-30 years ago, when the Court would regularly decide 70-100 cases a year,[26]

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[21] Dylan Gibbs, "Rest and Relaxation" *Hearsay* (January 10, 2024), online: https://hearsaydaily.ca/p/rest-relaxation?utm_source=hearsaydaily.ca&utm_medium=newsletter&utm_campaign=rest-and-relaxation, citing Paul-Erik Veel, "The Lenczner Slaght Supreme Court of Canada Database" *Lenczner Slaght Royce Smith Griffin LLP*, online: https://supremecourtdatabase.com/?utm_source=hearsaydaily.ca&utm_medium=newsletter&utm_campaign=rest-and-relaxation#article.

[22] Paul-Erik Veel, "As to quantity, this year was going to be low, because they granted leave to so few cases last year. Next year will be somewhat better on that metric. It won't be the SCC of 25 years ago, but it'll be better than this past year by quite a bit" *X* (December 30, 2023), online: https://twitter.com/PaulErikVeel/status/1741264146996314524.

[23] Paul-Erik Veel, "As to quantity, this year was going to be low, because they granted leave to so few cases last year. Next year will be somewhat better on that metric. It won't be the SCC of 25 years ago, but it'll be better than this past year by quite a bit" *X* (December 30, 2023), online: https://twitter.com/PaulErikVeel/status/1741264146996314524.

[24] *Saskatchewan (Minister of Environment) v. Métis Nation — Saskatchewan*, [2023] S.C.C.A. No. 200 (S.C.C.); *R. v. Pan*, [2023] S.C.C.A. No. 303 (S.C.C.); *R. v. Bharwani*, [2023] S.C.C.A. No. 236 (S.C.C.); *R. v. Varennes*, [2023] S.C.C.A. No. 458 (S.C.C.); *R. v. Bouvette*, [2023] S.C.C.A. No. 235 (S.C.C.).

[25] *John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)*, [2023] S.C.C.A. No. 26 (S.C.C.); *Duncan Sinclair v. Venezia Turismo, Venice Limousine S.R.L, Narduzzi E Solemar S.L.R.*, [2023] S.C.C.A. No. 154 (S.C.C.).

[26] Based on a January 9, 2024 search on LexUM.

are unlikely to return.[27] While 2023 may have been an outlier, the trends are clear.

4. Types of Cases

What kinds of cases did the Court address in 2023? Overwhelmingly, they addressed matters of public law. Of the 27 reserved decisions:

- two were federalism-based constitutional challenges to legislation;[28]
- four were Charter-based challenges to legislation;[29]
- four were criminal procedure-focused Charter cases, addressing delay and exclusion of evidence, three of which were as of right appeals;[30]
- seven raised other issues in the criminal context, such as: the relationship between pre-sentence conditions and mandatory minimum sentences;[31] when applications to dismiss can be addressed summarily;[32] appointment of *amicus curiae*;[33] whether a verdict was unreasonable (this was an as of right appeal);[34] and interpreting *Criminal Code* provisions, two substantive[35] and one addressing police powers;[36]
- two concerned publication bans, which have constitutional considerations;[37]

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[27] Paul-Erik Veel, "As to quantity, this year was going to be low, because they granted leave to so few cases last year. Next year will be somewhat better on that metric. It won't be the SCC of 25 years ago, but it'll be better than this past year by quite a bit" *X* (December 30, 2023), online: https://twitter.com/PaulErikVeel/status/1741264146996314524.

[28] *Reference re Impact Assessment Act*, [2023] S.C.J. No. 23, 2023 SCC 23 (S.C.C.); *Murray-Hall v. Quebec (Attorney General)*, [2023] S.C.J. No. 10, 2023 SCC 10 (S.C.C.).

[29] *R. v. Hills*, [2023] S.C.J. No. 2, 2023 SCC 2 (S.C.C.); *R. v. Hilbach*, [2023] S.C.J. No. 3, 2023 SCC 3 (S.C.C.); *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26 (S.C.C.); *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, [2023] S.C.J. No. 17, 2023 SCC 17 (S.C.C.).

[30] *R. v. Hanan*, [2023] S.C.J. No. 101, 2023 SCC 12 (S.C.C.); *R. v. McColman*, [2023] S.C.J. No. 8, 2023 SCC 8 (S.C.C.); *R. v. Zacharias*, [2023] S.C.J. No. 30, 2023 SCC 30 (S.C.C.); *R. v. McGregor*, [2023] S.C.J. No. 4, 2023 SCC 4 (S.C.C.) (the only one where leave to appeal was granted).

[31] *R. v. Basque*, [2023] S.C.J. No. 18, 2023 SCC 18 (S.C.C.).

[32] *R. v. Haevischer*, [2023] S.C.J. No. 11, 2023 SCC 11 (S.C.C.).

[33] *R. v. Kahsai*, [2023] S.C.J. No. 20, 2023 SCC 20 (S.C.C.).

[34] *R. v. Metzger*, [2023] S.C.J. No. 100, 2023 SCC 5 (S.C.C.).

[35] *R. v. Abdullahi*, [2023] S.C.J. No. 19, 2023 SCC 19 (S.C.C.); *R. v. Downes*, [2023] S.C.J. No. 6, 2023 SCC 6 (S.C.C.).

[36] *R. v. Breault*, [2023] S.C.J. No. 9, 2023 SCC 9 (S.C.C.); *Criminal Code*, R.S.C. 1985, c. C-46.

[37] *La Presse inc. v. Quebec*, [2023] S.C.J. No. 22, 2023 SCC 23 (S.C.C.); *Canadian*

- four were (quasi-)administrative law/regulatory decisions, two of which raised *quasi*-constitutional issues;[38]
- one interpreted the *Income Tax Act*;[39]
- one interpreted British Columbia anti-SLAPP legislation;[40]
- one addressed the enforceability of a domestic contract;[41] and
- one addressed corporate law liability issues under Quebec civil law.[42]

Without commenting on the volume of cases addressed, it is immediately striking that the national importance of the issues raised in the first 23 of these cases is readily apparent: issues of (*quasi*-)constitutional, administrative, and/or criminal law definitionally transcend provincial borders. They thus more easily fit into the definition of "public importance",[43] making a Supreme Court appeal appropriate. Interpreting a federal statute such as the *Income Tax Act* also makes sense as an issue of national public importance. Even though the interpretation of British Columbia's anti-SLAPP legislation[44] may not be as obviously an issue of national importance, the division in interpreting such legislation across the country made it more understandable for the Supreme Court to hear the case.[45] The final two cases, concerning a domestic contract and Quebec civil law corporate liability, are less obviously of national public importance. But nor do I purport to be an expert in these areas of law so there may be issues of legal uncertainty[46] and/or grave injustice[47] that warranted taking the cases.

Broadcasting Corp. v. Manitoba, [2023] S.C.J. No. 102, 2023 SCC 27 (S.C.C.).

[38] *Mason v. Canada (Citizenship and Immigration)*, [2023] S.C.J. No. 21, 2023 SCC 21 (S.C.C.); *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, [2023] S.C.J. No. 31, 2023 SCC 31 (S.C.C.); *Sharp v. Autorité des marchés financiers*, [2023] S.C.J. No. 29, 2023 SCC 29 (S.C.C.); *R. v. Greater Sudbury (City)*, [2023] S.C.J. No. 28, 2023 SCC 28 (S.C.C.).

[39] *Deans Knight Income Corp. v. Canada*, [2023] S.C.J. No. 16, 2023 SCC 16 (S.C.C.); *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[40] *Hansman v. Neufeld*, [2023] S.C.J. No. 14, 2023 SCC 14 (S.C.C.).

[41] *Anderson v. Anderson*, [2023] S.C.J. No. 13, 2023 SCC 13 (S.C.C.).

[42] *Ponce v. Société d'investissements Rhéaume ltée*, [2023] S.C.J. No. 25, 2023 SCC 25 (S.C.C.).

[43] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40.

[44] *Protection of Public Participation Act*, S.B.C. 2019, c. 3.

[45] The topic of the discussion between Adam Goldenberg, Asher Honickman, and Lorne Honickman, "Reputation vs Free Expression: Striking a Balance in Defamation Law" *Runnymede Society Law & Freedom 2024*, February 3, 2024, Toronto, Ontario, online: https://www.youtube.com/watch?v=VXeCbbT3CDk.

[46] See, *e.g.*, Paul-Erik Veel, "The Lenczner Slaght Supreme Court of Canada Database" *Lenczner Slaght Royce Smith Griffin LLP*, online: https://supremecourtdatabase.com/?utm_source=hearsaydaily.ca&utm_medium=newsletter&utm_campaign=rest-and-relaxation# article; Gerard J. Kennedy, *The Charter of Rights in Litigation: Direction from the Supreme*

5. Is This a Bad Thing?

While the number of decisions rendered by the Supreme Court may seem small, it should not be automatically assumed that this is a negative development.[48] The Supreme Court's role in cases where there is not a right of appeal is immensely important, but it is also narrow: to resolve jurisprudential issues of national public importance.[49] This is not likely to arise frequently. As noted in the previous subsection, the cases the Supreme Court has heard seem to be the types of cases it is suited to decide. There is no need to fill its docket unnecessarily. Moreover, each individual case may have become more complicated, whether due to longer reasons or an increased number of interveners.[50] In any event, the fact is that the Charter,[51] which transformed the Supreme Court's role, is now more than 40 years old.[52] There may be less need for guidance today from an apex court than has been the case in recent decades as frameworks are more established. Furthermore, interests of finality[53] and subsidiarity[54] should caution the Supreme Court from deciding to hear appeals unnecessarily. The fact is that provincial appeal courts have a role in interpreting provincial legislation and private law that the Supreme Court is not

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Court of Canada (Toronto: Thomson Reuters, 2020) at §4:6.

[47] Justice Kasirer noted this is a particular reason to grant leave in exceptional cases in *R. v. P. (C.)*, [2021] S.C.J. No. 19, 2021 SCC 19 (S.C.C.). See also Gerard J. Kennedy, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (Toronto: Thomson Reuters, 2020) at §4:12.

[48] Mark Mancini, "The Supreme Court's Leaves (Or Lack Thereof)" *Double Aspect* (August 19, 2021), online: https://doubleaspect.blog/2021/08/19/the-supreme-courts-leaves-or-lack-thereof/.

[49] Mark Mancini, "The Supreme Court's Leaves (Or Lack Thereof)" *Double Aspect* (August 19, 2021), online: https://doubleaspect.blog/2021/08/19/the-supreme-courts-leaves-or-lack-thereof/; Gerard J. Kennedy, *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (Toronto: Thomson Reuters, 2020) at §4:12, Chapter 4.II.B; Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 50, 95-96.

[50] Danielle McNabb, "Who Intervenes in Supreme Court of Canada Cases?" (2023) 56:3 Canadian Journal of Political Science 715.

[51] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("the Charter").

[52] Sean Fine, "Canada's Charter turned 40 on Sunday — and it's still as radical and enigmatic as it was in 1982" *The Globe and Mail* (April 17, 2022), online: https://www.theglobeandmail.com/canada/article-canada-charter-turns-40-supreme-court/.

[53] Appeals are not an intrinsic good or a necessary corollary of decision-making: Daniel Jutras, "The Narrowing Scope of Appellate Review: Has the Pendulum Swung Too Far?" (2007) 32 Man. L.J. 61 at, in particular, 65.

[54] The idea that matters should be resolved at the most local level possible: see, *e.g.*, Talia Wilson, "Defending the Federal Criminal Law Power on Subsidiarity Grounds" (2023) (unpublished).

meant to share.[55] The Federal Court of Appeal also has expertise in discrete areas of law that generally caution against the Supreme Court hearing appeals from its decisions.[56] Lastly, the Supreme Court and its judges have an important role in acting as ambassadors for Canadian law domestically and abroad.[57] If there truly are fewer cases that warrant the Court's jurisprudential attention, the judges can better fulfil their ambassadorial role.

Clearly, therefore, I am not too judgmental of the Court's modest output. Even so, Léonid Sirota has noted that these advantages are not costless. First, Sirota argues that a nine-judge panel is more likely to "get it right" in terms of the law than intermediary appeal courts that have fewer judges on a panel, fewer law clerks, fewer interveners (which may or may not be beneficial[58]), and much larger dockets.[59] While this needs to be considered alongside the aforementioned counterarguments, there is something to this. Moreover, the Court should be on guard against the risk that it chooses to decide a few "big" cases in a way that acts more like a law reform commission than more "smaller" cases that allow it to develop the law incrementally in a court-like manner.[60] Surely, there is a happy medium between the Court deciding a few cases a year (say, the six direct challenges to legislation) and granting every application for leave to appeal. This article reserves judgment, but notes that there are trade-offs in this regard.

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[55] Albert S. Abel, "The Role of the Supreme Court in Private Law Cases" (1965) 4 Alta. L. Rev. 39; Peter H. Russell, "The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform" (1968) 6 Osgoode Hall L.J. 1. Thanks to Jesse Hartery for bringing these to my attention.

[56] Gerard J. Kennedy, "The Federal Courts' Advantage in Civil Procedure" (2024) 102 Can. Bar Rev. 1.

[57] *E.g.*, Supreme Court of Canada, "2021 Year in Review", online: https://www.scc-csc.ca/review-revue/2021/index-eng.html; Marcus Moore, "Introduction: Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership" (2018) 86 S.C.L.R. (2d) lxiii at lxix.

[58] Danielle McNabb, "Who Intervenes in Supreme Court of Canada Cases?" (2023) 56:3 Canadian Journal of Political Science 715; see also *R. v. McGregor*, [2023] S.C.J. No. 4, 2023 SCC 4 (S.C.C.), *per* Rowe J. (concurring); *Le-Vel Brands, LLC v. Canada (Attorney General)*, [2023] F.C.J. No. 363, 2023 FCA 66 (F.C.A.), *per* Stratas J.A.; Gerard J. Kennedy, "Council of Canadians with Disabilities: Another Reminder to Resolve Cases on the Merits" (2023) 115 S.C.L.R. (2d) 26.

[59] Leonid Sirota, "The Supreme Court — What Is It Good for?" *Double Aspect* (August 30, 2021), online: https://doubleaspect.blog/2021/08/30/the-supreme-court%e2%80%95what-is-it-good-for/.

[60] Leonid Sirota, "The Supreme Court—What Is It Good for?" *Double Aspect* (August 30, 2021), online: https://doubleaspect.blog/2021/08/30/the-supreme-court%e2%80%95what-is-it-good-for/.

II. THE ASSIGNMENTS OF THE MAJORITY

1. Overall Numbers

Canadian Judicial Council guidelines prescribe that chief justices are to ensure relatively equal distribution of work between judges on their courts.[61] This was generally the case in 2023 as:

- Chief Justice Wagner wrote three majority decisions and co-wrote two others;
- Justice Karakatsanis wrote three majority decisions;
- Justice Côté wrote three majority decisions and co-wrote one more;
- Justice Rowe wrote three majority decisions and co-wrote two more;
- Justice Martin wrote five majority decisions;
- Justice Kasirer wrote three majority decisions;
- Justice Jamal wrote two majority decisions and co-wrote one more;
- Justice O'Bonsawin did not write any majority decisions on her own, but did co-write two; and
- One decision was released by "The Court".

By and large, with the exception of Justice O'Bonsawin, which will be addressed below, this is fairly equal distribution of work. If one considers a co-written decision to be "half" the work of a solo-written decision, six judges wrote between 2.5 and 4 majority decisions in the year. Justice Martin, the outlier, wrote five decisions. But three addressed mandatory minimums and section 12 of the Charter, two of which were released on the same day after being heard together.[62] Her writing these decisions clearly could create efficiency, even if the result is that she has more majority decisions to her name. Ultimately, this roughly equal distribution of work between the judges implies that there is not a hierarchy among judges on the Court, and accords with CJC policy.

2. Chief Justice Wagner

Chief Justice Wagner wrote three majority decisions in 2023. Two of them — *Murray Hall*[63] and the *IAA Reference*[64] — were leading federalism cases. Both took

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[61] Canadian Judicial Council Annual Report 1998-1999 at 58-59, online: https://publications.gc.ca/collections/Collection/JU10-1999E.pdf.

[62] *R. v. Hills*, [2023] S.C.J. No. 2, 2023 SCC 2 (S.C.C.) and *R. v. Hillbach*, [2023] S.C.J. No. 3, 2023 SCC 3 (S.C.C.) were released on the same day. *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26 (S.C.C.) is the third decision.

[63] *Reference re Impact Assessment Act*, [2023] S.C.J. No. 23, 2023 SCC 23 (S.C.C.).

[64] *Murray-Hall v. Quebec (Attorney General)*, [2023] S.C.J. No. 10, 2023 SCC 10 (S.C.C.).

broad, though consistent with precedent, views on provincial powers as a matter of constitutional law. The third majority decision, *La Presse*, concerned publication bans in criminal proceedings and the open court principle — a matter that goes to the role of courts in our constitutional democracy. As such, all three cases are of particular public importance, even by standards of the Supreme Court's docket. This fits into a conception of the role of the chief justice — exemplified by McLachlin C.J.C. — that the chief justice should take intellectual leadership on the court.[65]

His two co-authored decisions are also interesting, for different reasons. *Sharp* is a decision co-written with Jamal J. that concerned the jurisdiction of a Quebec administrative tribunal over non-Quebec residents in a securities enforcement proceeding.[66] A collaboration between a civil law jurist (Wagner C.J.C.) and a former commercial litigator with an expertise in public law (Jamal J.) made a great deal of sense.

The Chief Justice's other collaboration, *McColman*,[67] represented O'Bonsawin J.'s first co-authored opinion. It should be noted that this appeal was brought to the Supreme Court as of right due to Hourigan J.A.'s dissent in the Court of Appeal for Ontario. Unlike many other appeals brought as of right, the judgment was reserved. It arguably fits into the leadership role of the chief justice to collaborate with a new judge on her first written decision.

3. Justice Karakatsanis

Justice Karakatsanis wrote three majority opinions. One, *R. v. Kahsai*, concerned courts' powers and role in appointing an *amicus curiae*, as well as when the failure of *amicus* to adequately assist an accused will result in a miscarriage of justice.[68] The other two were outside the criminal realm: *Anderson v. Anderson* was a family law decision generally supportive of domestic contracts compared to the courts below. (Justice Karakatsanis chaired this panel as Wagner C.J.C. did not sit on this appeal.[69]) *Hansman v. Neufeld* interpreted British Columbia anti-SLAPP legislation.[70] The three decisions reflect a judge who, after more than a decade on the Court, has developed expertise in very different areas of law.

4. Justice Côté

As will be returned to below, Côté J.'s 2023 output may be most notable for her concurrences and dissents. But she wrote three majority opinions on very different

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[65] See, *e.g.*, Marcus Moore, "Introduction: Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership" (2018) 86 S.C.L.R. (2d) lxiii at, in particular, lxviii-lxix.

[66] *Sharp v. Autorité des marchés financiers*, [2023] S.C.J. No. 29, 2023 SCC 29 (S.C.C.); *R. v. Greater Sudbury (City)*, [2023] S.C.J. No. 28, 2023 SCC 28 (S.C.C.).

[67] *R. v. McColman*, [2023] S.C.J. No. 8, 2023 SCC 8 (S.C.C.).

[68] *R. v. Kahsai*, [2023] S.C.J. No. 20, 2023 SCC 20 (S.C.C.).

[69] *Anderson v. Anderson*, [2023] S.C.J. No. 13, 2023 SCC 13 (S.C.C.).

[70] *Hansman v. Neufeld*, [2023] S.C.J. No. 14, 2023 SCC 14 (S.C.C.).

topics. First, she authored the majority in the highly contentious *R. v. McGregor*.[71] A case concerning the extraterritorial applicability of the Charter, this attracted numerous interveners and a sharply written concurrence by Rowe J. on the appropriate role of interveners. Justice Côté's opinion, which shared many of Rowe J.'s concerns (albeit not to the same extent), held that it was not necessary to revisit the widely criticized *R. v. Hape*, and managed to command a majority of the Court.

Justice Côté also wrote the majority in *Commission scolaire francophone des Territoires du Nord-Ouest*,[72] wherein she held that "*Charter* values", if relevant, must always be balanced alongside other objectives in exercising administrative discretion. Justice Côté had been somewhat critical of "*Charter* values", a concept about which much jurisprudential and scholarly ink has been spilled.[73] Nonetheless, she had also been a defender of language rights,[74] so it was not altogether surprising seeing her lead a unanimous Court on this topic.

Her third solo-authored decision was *R. v. Breault*,[75] wherein, for a unanimous Court, she interpreted the "forthwith" requirement in (then) section 254(2)(b) of the *Criminal Code*, specifically its granting powers to police officers to demand a suspect whom they reasonably believe to be driving under the influence of alcohol to "provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made".[76] As I have summarized elsewhere, she "held that this provision can be interpreted 'flexibly' only in 'exceptional . . . unusual' circumstances".[77]

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[71] [2023] S.C.J. No. 4, 2023 SCC 4 (S.C.C.).

[72] *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, [2023] S.C.J. No. 31, 2023 SCC 31 (S.C.C.).

[73] This is likely most obviously apparent in criticisms of the Supreme Court of Canada's decision in *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12 (S.C.C.), both judicially (see, *e.g.*, the opinions of McLachlin C.J.C., Rowe J., and Côté and Brown JJ. in *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32 (S.C.C.)), and extra-judicially (see, *e.g.*, the Honourable Justice Peter Lauwers, "What Could Go Wrong with *Charter* Values" (2019) 91 S.C.L.R. (2d) 1; Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 S.C.L.R. (2d) 561; Christopher D. Bredt & Ewa Krajewska, "*Doré*: All That Glitters Is Not Gold" (2014) 67 S.C.L.R. (2d) 339). Nonetheless, this had been subject to notable scholarly defence: see, *e.g.*, Paul Daly, "The Doré Duty: Fundamental Rights in Public Administration" (2023) 101 Can. Bar Rev. 297; Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 S.C.L.R. (2d) 391.

[74] For instance, she was in the majority in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020] S.C.J. No. 13, 2020 SCC 13 (S.C.C.), where Brown and Rowe JJ. were partially dissenting.

[75] [2023] S.C.J. No. 9, 2023 SCC 9 (S.C.C.).

[76] R.S.C. 1985, c. C-46.

[77] Gerard J. Kennedy, *The Charter of Rights in Litigation: Direction from the Supreme*

Finally, Côté J. co-wrote (with Rowe J.) the 10-paragraph decision in *R. v. Hanan*[78] which applied section 11(b) of the Charter and imposed a stay of proceedings due to excessive delay in bringing a criminal case to trial. This was an as-of-right criminal appeal that a five-judge panel decided. The reserve was less than three weeks. But the decision does give guidance, especially regarding what is a "transitional exceptional circumstance" as per *R. v. Jordan*.[79]

These cases, together, again illustrate a judge who has begun to write majority decisions in a variety of areas, despite her background in commercial litigation and an absence of experience as a lower court judge.

5. Justice Rowe

Apart from co-authoring *Hanan*[80] with Côté J., Rowe J. was assigned three majority opinions in 2023. In *R. v. Abdullahi*,[81] he wrote for all judges with the exception of Côté J. in interpreting what it means to be in a "criminal organization" as that term is defined in the *Criminal Code*,[82] and whether a trial judge's charge to the jury in this regard was adequate. Second, he once again wrote for every judge except Côté J. in *Deans Knight Income Corp. v. Canada*.[83] This was a taxation case that considered whether tax avoidance transactions were abusive. Justice Rowe further authored the majority in *R. v. Metzger*,[84] where the Court divided 3-2 as to whether or not convictions were reasonable. Like *Hanan*, this was an appeal as of right where the decision was taken under reserve but reasons followed less than three weeks later. The majority reasons were only nine paragraphs. Moreover, Rowe J. co-authored the aforementioned *R. v. Hanan* concerning section 11(b) of the Charter with Côté J. Finally, he co-wrote *R. v. Zacharias* with O'Bonsawin J.[85] This was a criminal procedure decision that considered how arrests based on unlawful searches should be considered in a section 9 and section 24(2) Charter analysis. Ultimately, Rowe J. has contributed to areas of substantive criminal and public law, as his concurrence and dissent will also exemplify.

6. Justice Martin

Justice Martin authored more majority opinions in 2023 than any other judge: five. Though, as noted, it is worth observing that three of them addressed the same

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Court of Canada (Toronto: Thomson Reuters, 2020) at §2:8.

[78] [2023] S.C.J. No. 101, 2023 SCC 12 (S.C.C.).

[79] [2016] S.C.J. No. 27, 2016 SCC 27 (S.C.C.).

[80] *R. v. Hanan*, [2023] S.C.J. No. 101, 2023 SCC 12 (S.C.C.).

[81] [2023] S.C.J. No. 19, 2023 SCC 19 (S.C.C.).

[82] R.S.C. 1985, c. C-46.

[83] [2023] S.C.J. No. 16, 2023 SCC 16 (S.C.C.); *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[84] [2023] S.C.J. No. 100, 2023 SCC 5 (S.C.C.).

[85] *R. v. Zacharias*, [2023] S.C.J. No. 30, 2023 SCC 30 (S.C.C.).

issue: whether mandatory minimum sentences offended section 12 of the Charter. *R. v. Hills*[86] and *R. v. Hillbach*[87] were released the same day in January, and sought to synthesize and explain the approach to a section 12 analysis, both cases in the context of firearms offences. *R. v. Bertrand Marchand* followed 10 months later, and applied the *Hills* framework to the offence of child luring.[88]

Justice Martin also wrote the reasons for a unanimous Court in *R. v. Haevischer*, which addressed when applications in criminal proceedings can summarily be dismissed.[89] Her final decision was in the *quasi*-criminal regulatory context: *R. v. Greater Sudbury (City)*,[90] a case concerning the scope of duties of "employers" under Ontario's *Occupational Health and Safety Act*.[91] I place "majority" in scare quotes because the Court actually divided 4-4 in this decision, meaning that Martin J.'s view that the appeal should be dismissed carried the day.

It is impossible, upon looking at her 2023 output, to not notice that Martin J. has taken the lead in many criminal law matters. Given her comparative background in this area compared to many of her colleagues, this is not surprising. It will be interesting to see whether that continues now that Moreau J., who also has a considerable background in criminal law, has joined the Court.

7. Justice Kasirer

Justice Kasirer wrote three majority opinions. One of them, *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*,[92] was an extremely important constitutional decision concerning the Charter and the *Safe Third Country Agreement*.[93] He fashioned a unanimous opinion that dismissed the section 7 challenge and remitted the section 15 issue to the Federal Court. He also wrote for a unanimous Court in *Ponce v. Société d'investissements Rhéaume ltée*.[94] This case concerned *Civil Code of Québec* liability in certain corporate law contexts. It was unsurprising that Kasirer J., a leading scholar of the *Civil Code of Québec*,[95] would write the majority judgment. Finally, Kasirer J. wrote one criminal judgment, *R. v.*

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[86] [2023] S.C.J. No. 2, 2023 SCC 2 (S.C.C.).

[87] [2023] S.C.J. No. 3, 2023 SCC 3 (S.C.C.).

[88] *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26 (S.C.C.).

[89] *R. v. Haevischer*, [2023] S.C.J. No. 11, 2023 SCC 11 (S.C.C.).

[90] [2023] S.C.J. No. 28, 2023 SCC 28 (S.C.C.).

[91] R.S.O. 1990, c. O.1.

[92] [2023] S.C.J. No. 17, 2023 SCC 17 (S.C.C.).

[93] Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries, Can. T.S. 2004 No. 2 ("*Safe Third Country Agreement*").

[94] [2023] S.C.J. No. 25, 2023 SCC 25 (S.C.C.).

[95] CCQ-1991. See, *e.g.*, Jean-Maurice Brisson & Nicholas Kasirer, *Civil Code of Québec: A Critical Edition, 2023-2024*, 31st ed. (Montreal: Yvon Blais, 2023).

Basque,[96] which specifically addressed whether trial judges are permitted to "backdate" mandatory minimum periods of driving prohibition when an offender had been subject to a driving prohibition as a condition of release pending trial. Between a large Charter case, a sentencing case requiring interpretation of the *Criminal Code*, and a case uniquely suited to his expertise in Quebec private law, Kasirer J.'s 2023 decisions illustrate contributing to the Court across different areas of law.

8. Justice Jamal

As noted above, Justice Jamal co-authored *Sharp*, a case raising issues of administrative law, constitutional law and conflicts of laws, with Chief Justice Wagner. He was also the sole author of two decisions in different areas of law. First, in *Mason*,[97] he wrote an important administrative law decision that interpreted and sought to underscore the importance and comprehensiveness of *Canada (Minister of Citizenship and Immigration) v. Vavilov*[98] as guiding aspects of substantive review of administrative decisions.[99] The decision is noteworthy for both declining to hold an additional area of law to be where "correctness" review of administrative decisions is appropriate,[100] while also noting how reasonableness review is to be conducted "robustly".[101] Justice Jamal also wrote the criminal decision *R. v. Downes*, which interpreted the elements of the offence of voyeurism.[102] Though only finishing his second full year on the Court, it is clear that Jamal J. has been contributing to criminal law and public law more generally, which his dissents also illustrate.

9. Justice O'Bonsawin

Justice O'Bonsawin co-wrote only two majority decisions in 2023: *McColman* with Wagner C.J.C.; and *Zacharias* with Rowe J. Despite being decided more than

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[96] [2023] S.C.J. No. 18, 2023 SCC 18 (S.C.C.).

[97] *Mason v. Canada (Citizenship and Immigration)*, [2023] S.C.J. No. 21, 2023 SCC 21 (S.C.C.).

[98] [2019] S.C.J. No. 65, 2019 SCC 65 (S.C.C.).

[99] Discussed in, *e.g.*, Leonid Sirota, "It's Nonsense But It Works" *Double Aspect* (September 28, 2023), online: https://doubleaspect.blog/2023/09/28/its-nonsense-but-it-works/.

[100] He is clearly not in principle opposed to this, in the right case, having been in the majority in *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Assn.*, [2022] S.C.J. No. 30, 2022 SCC 30 (S.C.C.).

[101] Discussed in, *e.g.*, Paul Daly, "Context, Reasonableness Review and Statutory Interpretation: Mason v. Canada (Citizenship and Immigration), 2023 SCC 21" *Administrative Law Matters* (September 28, 2023), online: https://www.administrativelawmatters.com/blog/2023/09/28/context-reasonableness-review-and-statutory-interpretation-mason-v-canada-citizenship-and-immigration-2023-scc-21/.

[102] *R. v. Downes*, [2023] S.C.J. No. 6, 2023 SCC 6 (S.C.C.).

eight months apart and having different co-authors, both were criminal procedure decisions where it was held that the accused's Charter rights were violated but evidence should nonetheless be admitted. Presumably, O'Bonsawin J. will be given more writing assignments going forward. It is hardly unprecedented for Supreme Court judges to have a "ramp-up" period before they become prolific.[103] It is accordingly preferable[104] not to read anything into her limited jurisprudential output to date.

10. *Per Curiam*

CBC v. Manitoba[105] was released *per curiam*, with a seven-judge panel (O'Bonsawin J. did not sit). At the hearing, the Court unanimously affirmed the decision of the Manitoba Court of Appeal regarding a publication ban. The decision was quite short (15 paragraphs), as was the delay between hearing and reasons (20 days). This does not fit into the quintessential vein of a *per curiam* decision which is controversial and where the Court wishes to speak "as one".[106] This may, instead, reflect a desire to speak as one when the role of courts is at issue. The short timeframe may also reflect that the decision was never sent to a judge's chambers, with the Court wishing to render its reasons as soon as possible, but perhaps not being able to do so from the bench. This accords with Bogach, Veel and Opolsky advocating for more detailed reasons, to provide guidance to the profession, when possible, as opposed to deciding cases from the bench.[107]

11. Some Concluding Thoughts

With the exception of O'Bonsawin J., majority judgment assignment has been reasonably equal between the judges of the Supreme Court of Canada. This is

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[103] The *Globe & Mail* expressed concerns about Justice Karakatsanis's first 18 months on the Court: Editorial, "A Supreme Court justice struggles to make an impact" *The Globe & Mail* (April 3, 2013), online: https://www.theglobeandmail.com/opinion/editorials/a-supreme-court-justice-struggles-to-make-an-impact/article10748372/. The concerns have since proven baseless.

[104] See, *e.g.*, Jen Gerson & Matt Gurney, "Dispatch from the Front Line: Conservatives behaving badly" *The Line* (August 27, 2022), online: https://www.readtheline.ca/p/dispatch-from-the-front-line-conservatives?utm_medium=email, noting that they "would not be shocked if she thrives in the role" despite having an atypical career path for a Supreme Court judge. For a different view, see, *e.g.*, Leonid Sirota, "Michelle O'Bonsawin's very limited qualifications for the Supreme Court" *National Post* (August 30, 2022), online: https://nationalpost.com/opinion/leonid-sirota-michelle-obonsawins-very-limited-qualifications-for-the-supreme-court.

[105] *Canadian Broadcasting Corp. v. Manitoba*, [2023] S.C.J. No. 102, 2023 SCC 27 (S.C.C.).

[106] See, *e.g.*, *R. v. Latimer*, [2001] S.C.J. No. 1, 2001 SCC 1 (S.C.C.).

[107] Alex Bogach, Jeremy Opolsky & Paul-Erik Veel, "The Supreme Court of Canada's From-the-Bench Decisions" (2022) 106 S.C.L.R. (2d) 251.

naturally fair, and accords with CJC policy. It is generally to be commended. A logic of assignment with *quasi*-expertise is also apparent, such as in Martin J. contributing a great deal in criminal law, Jamal J. in administrative law, Wagner C.J.C. in federalism, and Kasirer J. taking the lead on a major case concerning Quebec civil law. But nor are judges becoming siloed, with all judges writing in different areas of law. This is, again, generally to be commended.

III. THE MINORITY DECISIONS

When assessing the assignment of decisions, concentration was given first to the majority assignments. Why? Because all cases require a majority and the chief justice (or presiding judge, should the chief justice not be sitting) is required to assign them. Writing a minority opinion, whether a dissent or concurrence, is a personal decision and does not raise the same issues regarding equal distribution of work. How often did each judge write a minority opinion? And what do the minority opinions say about the Court? That will now be explored.

1. Chief Justice Wagner

The most remarkable fact about Wagner C.J.C. is not that he did not write a minority opinion in 2023. Rather, it is that he did not even sign onto a minority opinion in 2023. Consistent with some of Veel's previously analysis,[108] in 2023, if Wagner C.J.C. was on a party's side, that party was carrying the day.

2. Justice Karakatsanis

Justice Karakatsanis wrote three minority opinions, each important in its own way. In *R. v. McGregor*,[109] she wrote a concurrence (with Martin J.), disagreeing with the majority that it was inappropriate to revisit the controversial precedent *R. v. Hape*,[110] despite ultimately agreeing that it was not necessary to resolve the case. She also co-wrote two concurrences in constitutional cases with Jamal J.: in *R. v. Hillbach*, she disagreed with the majority that the impugned sentences at issue did not violate section 12 of the Charter.[111] Finally, in the *IAA Reference*, they held that, properly interpreted, the *Impact Assessment Act* is *intra vires* federal government powers under section 91 of the *Constitution Act, 1867*.[112] We see, in these cases, a relatively broad view of Charter rights, as well as a centralizing tendency when federalism is at stake.

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[108] See, *e.g.*, Paul-Erik Veel, "Constitutional Cases (Pt 8) | Scrutinizing the Supreme Court with Digital Technology" *Osgoode Constitutional Cases Conference, 2023*, Toronto, Ontario, April 14, 2023, online: https://digitalcommons.osgoode.yorku.ca/constitutional_cases/13/.

[109] [2023] S.C.J. No. 4, 2023 SCC 4 (S.C.C.).

[110] [2007] S.C.J. No. 26, 2007 SCC 26 (S.C.C.).

[111] *R. v. Hillbach*, [2023] S.C.J. No. 3, 2023 SCC 3 (S.C.C.).

[112] *Reference re Impact Assessment Act*, [2023] S.C.J. No. 23, 2023 SCC 23 (S.C.C.). *Constitution Act, 1867*, 30 & 31 Vict., c. 3.

3. Justice Côté

Now to the output that is undeniably unique: Justice Côté wrote three concurring and eight dissenting opinions in 2023. In every case, she was the sole author of the opinion. Justice Karakatsanis's three co-authored minority opinions was the second most that a judge wrote. In fact, Côtê J. was the only judge to be the sole author of a dissenting opinion, and wrote three of four concurring opinions that had a sole author. (Rowe J.'s concurring opinion in *McGregor* was the other.) Moreover, in all but one case, she was writing for herself only. These cases addressed all facets of the court's docket:

- three (*Hills*,[113] *Hillbach*[114] and *Bertrand Marchand*[115]) concerned mandatory minimum sentences and section 12 of the Charter;
- *Mason* addressed the standard of review and administrative law;[116]
- *Hansman* concerned anti-SLAPP legislation and defamation law;[117]
- *Zacharias* considered what makes a detention "arbitrary" and what are relevant considerations regarding the exclusion of evidence under section 24(2) of the Charter;[118]
- *Greater Sudbury* concerned employers' workplace safety obligations (she would have acquitted the defendant while the seven other judges would have remitted, despite dividing 4-3 on the terms of remittance);[119]
- *Deans Knight* addressed tax avoidance;[120]
- *Sharp* concerned Quebec's jurisdiction over non-Quebec residents in a securities enforcement administrative proceeding;[121]
- *Abdullahi* interpreted the *Criminal Code*'s definition of "criminal organization" and considered whether a related jury charge was adequate;[122] and
- *Metzger*, where O'Bonsawin J. joined her opinion, required deciding

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[113] *R. v. Hills*, [2023] S.C.J. No. 2, 2023 SCC 2 (S.C.C.).

[114] *R. v. Hillbach*, [2023] S.C.J. No. 3, 2023 SCC 3 (S.C.C.).

[115] *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 36 (S.C.C.).

[116] *Mason v. Canada (Citizenship and Immigration)*, [2023] S.C.J. No. 21, 2023 SCC 21 (S.C.C.).

[117] *Hansman v. Neufeld*, [2023] S.C.J. No. 14, 2023 SCC 14 (S.C.C.).

[118] *R. v. Zacharias*, [2023] S.C.J. No. 30, 2023 SCC 30 (S.C.C.).

[119] *R. v. Greater Sudbury (City)*, [2023] S.C.J. No. 28, 2023 SCC 28 (S.C.C.).

[120] *Deans Knight Income Corp. v. Canada*, [2023] S.C.J. No. 16, 2023 SCC 16 (S.C.C.); *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[121] *Sharp v. Autorité des marchés financiers*, [2023] S.C.J. No. 29, 2023 SCC 29 (S.C.C.); *R. v. Greater Sudbury (City)*, [2023] S.C.J. No. 28, 2023 SCC 28 (S.C.C.).

[122] *R. v. Abdullahi*, [2023] S.C.J. No. 19, 2023 SCC 19 (S.C.C.).

whether a conviction was unreasonable.[123]

Many of these, such as *Hills* and *Mason*, clearly demonstrate profound disagreement on a jurisprudential issue of import beyond the case at hand. But several others, most notably *Metzger*, were clearly confined to the case at hand. While the volume of Côté J.'s minority opinions is accordingly very high, they are often a matter of disagreement regarding application of legal principles rather than disagreement over the legal principles *per se*.

4. Justice Rowe

Despite a reputation for being on the outside of the Court's "middle",[124] Rowe J. only wrote two minority decisions in 2023. Nor did he sign onto any other judge's minority opinion. One of these, *R. v. Greater Sudbury*, was co-written with O'Bonsawin J. They held that lower courts and Martin J.'s majority reasons gave too broad an interpretation to the obligation of "employers" to ensure worker safety. They would have remitted the matter to the provincial court to reconsider in accordance with their reasons.[125] (This is unlike Côté J., who would have acquitted the city of the regulatory offences at issue.)

Justice Rowe did write one very notable concurrence regarding the role of interveners. In *R. v. McGregor*, despite agreeing with Côté J.'s reasons and clarifying that they constituted the majority reasons of the Court,[126] he gave extensive guidance on the role that interveners should play before the Supreme Court, and critiqued the practices of many interveners, both in the case before him and more generally.[127]

5. Justice Martin

Justice Martin co-authored two minority opinions in 2023. First, with Karakatsanis J., she co-authored a concurrence in *McGregor*.[128] Despite agreeing with the majority that the accused's Charter rights were not violated, they heavily suggested that *Hape*[129] was an unsound precedent that should be revisited. Second, in *R. v. Zacharias*, she and Kasirer J. co-authored a dissent, wherein they viewed "consequential" breaches of the Charter (*i.e.*, those that are breaches only due to their connection to another breach) to be more serious than the majority. They ultimately

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[123] *R. v. Metzger*, [2023] S.C.J. No. 100, 2023 SCC 5 (S.C.C.).

[124] Gerard Kennedy, "Why 'Liberal' and 'Conservative' are unhelpful terms in Canadian courts" *The Hub* (January 21, 2022), online: https://thehub.ca/2022-01-21/liberal-conservative-are-unhelpful-terms-in-the-canadian-judicial-context/.

[125] *R. v. Greater Sudbury (City)*, [2023] S.C.J. No. 28, 2023 SCC 28 (S.C.C.).

[126] *R. v. McGregor*, [2023] S.C.J. No. 4, 2023 SCC 4 at para. 96 (S.C.C.).

[127] *R. v. McGregor*, [2023] S.C.J. No. 4, 2023 SCC 4 at paras. 97-115 (S.C.C.).

[128] *R. v. McGregor*, [2023] S.C.J. No. 4, 2023 SCC 4 (S.C.C.).

[129] *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26 (S.C.C.).

excluded the evidence obtained due to an unconstitutional search.[130] In both cases, a broad conception of Charter rights is apparent.

6. Justice Kasirer

Justice Kasirer only co-authored a single minority opinion in 2023: his joint dissent with Martin J. in *Zacharias*.[131] It is difficult to draw large conclusions based on only a single case, but his comparative reticence to be outside the majority in reserved decisions (albeit not to the same extent as Wagner C.J.C.) is perhaps indicative of a judge in the "centre" of the Court, which he also demonstrated through his concurring opinion in *9147-0732 Québec inc.*[132]

7. Justice Jamal

Justice Jamal's only minority opinions in 2023 were the two dissents he co-wrote with Karakatsanis J.: *R. v. Hillbach*,[133] where they held that the impugned sentences violated section 12 of the Charter; and the *IAA Reference*,[134] where they favoured an interpretation of the *Impact Assessment Act* that rendered it a proper exercise of federal government power.

8. Justice O'Bonsawin

Justice O'Bonsawin co-wrote one dissent with Rowe J. in 2023. In *Greater Sudbury*, she held that the lower courts and majority interpreted the obligations of "employers" to ensure worker safety too broadly.[135] But unlike Côté J., they would have remitted the matter for reconsideration as they did not view an acquittal as necessarily the appropriate disposition.

9. Concluding Thoughts

Thirteen 2023 Supreme Court of Canada decisions featured some sort of lack of unanimity. If decisions where only Côté J. was the source of that lack of unanimity are excluded, however, that number is reduced to six: *McGregor*; the *IAA Reference*; *Greater Sudbury*; *Hillbach*; *Zacharias*; and *Metzger*. This makes non-unanimity reduced from just under half of the Court's decisions to just under a quarter. *McGregor* and the *IAA Reference*, in particular, feature opinions from Karakatsanis and Martin JJ. and Rowe J. (*McGregor*) and Karakatsanis and Jamal JJ. (the *IAA Reference*) that demonstrate profound jurisprudential disagreement on constitutional matters. *Hillbach*, and to a lesser extent *Zacharias*, illustrate disagreements on the

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[130] *R. v. Zacharias*, [2023] S.C.J. No. 30, 2023 SCC 30 (S.C.C.).

[131] *R. v. Zacharias*, [2023] S.C.J. No. 30, 2023 SCC 30 (S.C.C.).

[132] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.).

[133] [2023] S.C.J. No. 3, 2023 SCC 3 (S.C.C.).

[134] *Reference re Impact Assessment Act*, [2023] S.C.J. No. 23, 2023 SCC 23 (S.C.C.).

[135] *R. v. Greater Sudbury (City)*, [2023] S.C.J. No. 28, 2023 SCC 28 (S.C.C.).

application of constitutional law principles (even if in a more established framework) in the criminal law context. And *Greater Sudbury* demonstrates concerns about practicalities in the regulatory context. *Metzger* is somewhat of an outlier as O'Bonsawin J. joined Côté J. in dissent in an as-of-right criminal appeal that was under reserve for less than three weeks, wherein they disagreed with the majority that a conviction was unreasonable. The other five decisions all featured legal disagreements of a far-reaching nature.

I would posit two lessons can be drawn from this. First, Côté J. is a singular figure in her willingness to write separately in a wide variety of contexts and irrespective of whether she is joined. One might query whether she is too eager to create a lack of unanimity. But one could just as easily note that none of her colleagues authored a dissent without a co-author. Might there be too great of a willingness to sing out of the same hymnbook? Healthy dissent is arguably good for the development of jurisprudence.[136]

Second, except for Côté J., we normally see dissents on large issues of public law, and specifically constitutional law. Dissents are quite rare in the face of relatively minor disagreements, or on issues that don't obviously transcend the specific case. This may indicate that the Wagner Court, despite its reputation for a lack of unanimity compared to the early McLachlin Court, is less divided than simply looking at the numbers may lead one to think: especially outside of Côté J., and particularly after Brown J.'s retirement. The following chart illustrates how each judge has contributed to each potential type of decision:

TABLE A

2023 RESERVED DECISIONS OF THE SUPREME COURT OF CANADA BY JUDGE

Judge	Sole Authored Majority (23)	Jointly Authored Majority (4)	Sole Authored Concurrence (4)	Joint Authored Concurrence (1)	Sole Authored Dissent (8)	Jointly Authored Dissent (4)
Wagner C.J.C.	3	2	0	0	0	0
Karakatsanis J.	3	0	0	1	0	2
Côté J.	3	1	3	0	8	0
Rowe J.	3	2	1	0	0	1
Martin J.	5	0	0	1	0	1
Kasirer J.	3	0	0	0	0	1

[136] See, for example, L'Honorable Suzanne Côté, "L'Importance de la Dissidence", Montreal, Quebec, Runnymede Society, McGill University Faculty of Law (February 27, 2019).

Judge	Sole Authored Majority (23)	Jointly Authored Majority (4)	Sole Authored Concurrence (4)	Joint Authored Concurrence (1)	Sole Authored Dissent (8)	Jointly Authored Dissent (4)
Jamal J.	2	1	0	0	0	2
O'Bonsawin J.	0	2	0	0	0	1
Per Curiam	1	0	0	0	0	0

IV. CONCLUSION

One has to go back to 1884 to find a year in which the Supreme Court of Canada decided fewer cases than it did in 2023. Irrespective of whether this is normatively advantageous (the trade-offs in this regard are noted above), and recognizing why 2023 may have been *particularly* limited in terms of output, it is comparatively easy to comprehensively analyze this year, in terms of what judges have been writing on which issues, and where judges are likely to be in the majority or minority. It is undeniable that Côté J. has been uniquely prolific as an author of concurrences and dissents. Justice O'Bonsawin's start has been slow, though not without precedent.[137] Beyond that, we see a court with divisions, but not necessarily deep ones. Moreover, work is being distributed reasonably equally, in terms of both volume and subject-matter. So despite its limited output, and while making no judgments on the merits of the decisions, the Supreme Court traversed the challenging year that was 2023 well on many metrics. That is to be commended, even if some practices could be critiqued.

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[137] The *Globe & Mail* expressed concern about Karakatsanis J.'s first 18 months on the Court: Editorial, "A Supreme Court justice struggles to make an impact" *The Globe & Mail* (April 3, 2013), online: https://www.theglobeandmail.com/opinion/editorials/a-supreme-court-justice-struggles-to-make-an-impact/article1074837. She has since manifestly excelled in the role (at least from a quantity of output perspective — this article makes no comment from a qualitatively normative perspective).