

# The Value of Dissent in Constitutional Adjudication: A Context-Specific Analysis

*David Vitale\**

*This paper addresses the long-standing international debate over whether the publication of dissenting opinions should be permitted in constitutional courts of last resort. It argues in response to this debate that a conclusion of general application is futile. Courts are not identical: their jurisdictions have unique legal histories, traditions, and cultures; they serve different functions and speak to different audiences; and, they are composed of members with fundamentally dissimilar training and backgrounds. This paper contributes to the debate by setting out a context-specific analysis for assessing the value of dissent in constitutional adjudication. It considers several contextual factors including: the jurisdiction's tradition, legal history, and culture; the credibility, function, and procedure of its court; and the background and training of its court's members. Applying this contextual analysis to Canada, this paper concludes that presently the publication of dissenting opinions is a valuable component of constitutional adjudication in the Supreme Court of Canada.*

*L'auteur de cet article aborde la discussion internationale de longue date à savoir si la publication des opinions dissidentes devrait être permise dans les tribunaux constitutionnels de dernier ressort. Il soutient en réponse à cette discussion qu'une conclusion d'application générale est vaine. Les cours ne sont pas identiques. Leurs juridictions ont des histoires, des traditions et des cultures juridiques uniques, elles remplissent des fonctions différentes et s'adressent à des publics différents. De plus, elles sont composées de membres ayant une formation et un parcours fondamentalement différents. Dans cet article, l'auteur prend part à la discussion en présentant une analyse spécifique selon le contexte visant à évaluer la valeur du dissentiment en matière de décisions constitutionnelles. Il examine de nombreux facteurs contextuels, y compris la tradition, l'histoire juridique et la culture de la juridiction, la crédibilité, la fonction et la procédure de la cour, ainsi que le parcours et la formation des membres de la cour. En appliquant cette analyse contextuelle au Canada, l'auteur conclut que la publication d'opinions dissidentes est un élément précieux des décisions constitutionnelles à la Cour suprême du Canada.*

\* PhD Candidate at the London School of Economics and Political Science.

## Introduction

In several courts of last resort, such as the Supreme Court of Canada, the United States Supreme Court, and the European Court of Human Rights, judges are permitted to publish a dissenting opinion.<sup>1</sup> However, this practice is not a universal one. In most constitutional courts of continental European nations, the publication of dissenting opinions is forbidden. There has been a long-standing debate within both the academy and the judiciary over which practice is superior. Many have derided dissenting opinions as shaking the public's faith in the courts, compromising the clarity and certainty of the law, and being an inefficient use of resources. Others have emphasized the benefits of published dissents, including their being consistent with constitutional rights to free speech and their contribution to the evolution of law.

This paper does not attempt to provide a broad normative justification for the publication of dissenting opinions.<sup>2</sup> Nor does it answer the all-encompassing question of whether dissent-permitting courts of last resort, including the Supreme Court of Canada and the United States Supreme Court, should abandon the practice of publishing dissents in favour of publishing only unanimous decisions. Instead, this paper provides a critique of the orthodoxy in the existing literature to advocate absolutely either for or against the publication of judicial dissent. In doing so, it seeks to set out a novel way of looking at the relative value of published dissenting opinions. Moreover, for states transitioning from an authoritarian or oppressive regime to constitutional democracy and deciding how to structure their court procedures, it may provide some insights.

I want to make three modest claims. First, a uniform practice across jurisdictions and courts may not necessarily be appropriate because courts of last resort are not identical, but differ in fundamental ways. Second, assessing the value of published dissents in a specific court necessitates a consideration

---

1 See e.g., Michael Kirby, "Law at Century's End — A Millennial View from the High Court of Australia" (2001) 1:1 *Macquarie Law Journal* 1 [Kirby, "Century's End"] for a summary; dissents are permitted in the European Court of Human Rights pursuant to art 45(2) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 and r 74(2) of the European Court of Human Rights, *Rules of Court* (1 July 2014), Strasbourg: Council of Europe, 2014.

2 When referring to "dissent," the focus of this paper is on minority reasons which disagree with the outcome of a case, as contrasted with minority reasons which agree on the outcome but not on the reasons given to support and justify that outcome (i.e., separate concurrences). This is, in part, for the purpose of clarity and also due to the availability of certain court statistics. However, many of the arguments in the paper apply equally to both dissents as to outcome and separate concurrences.

of the unique context within which that court operates. This paper sets out a contextual analysis for undertaking such an assessment and factors in the legal tradition of the jurisdiction, the credibility, function, and procedure of the court, and the background and training of the court's members; just as there is no universal correct practice across jurisdictions, there also may not be one appropriate permanent practice for a jurisdiction or a court since many factors can change over time. Third, applying the proposed contextual analysis to Canada, I claim that, at present, the practice of publishing dissents is a valuable component of constitutional adjudication in the Supreme Court of Canada.

This paper proceeds in three parts. In Part I, I lay the foundation for the international debate by presenting the principal arguments for and against the publication of dissenting opinions. In Part II, I argue against a uniform practice and present the proposed contextual analysis for assessing the value of published dissents in constitutional adjudication. Finally, in Part III, I apply the proposed analysis to the Supreme Court of Canada and demonstrate that, within the unique context of that particular court as it currently exists, the publication of dissenting opinions is a valuable practice.

## **I. The international debate over the publication of dissenting opinions**

### **The main arguments for publication of dissents**

#### ***a. The right to dissent***

One of the leading arguments in favour of published dissents is that a judge has a "right to dissent." This position has been adopted by jurists across the globe. William Brennan, former Justice of the United States Supreme Court, declared that the right to dissent "is one of the great and cherished freedoms that we enjoy by reason of the excellent accident of our American births."<sup>3</sup> Michael Kirby, former Justice of the High Court of Australia, similarly stated that "[o]ne of the most distinctive features of the common law judicial system is the right of appellate judges to express dissenting opinions."<sup>4</sup> Bora Laskin, former Chief Justice of the Supreme Court of Canada, has also referenced

---

3 William J Brennan, Jr, "In Defense of Dissents" (1986) 37:3 *Hastings LJ* 427 at 438.

4 Kirby, "Century's End," *supra* note 1 at 12.

judges' right to dissent, noting that "[t]he precious right to dissent ... is inherent in the constitution of the Supreme Court."<sup>5</sup>

The right to dissent has been rooted in two constitutional values: the protection of free speech and the concept of judicial independence.<sup>6</sup> On the first value, it has been argued that judges should be able to speak their minds and, if they disagree with their colleagues, to express that disagreement.<sup>7</sup> Claire L'Heureux-Dubé has stated that "accepting dissenting opinions injects a certain measure of democracy and freedom of expression into the judicial decision making process, since every judge has an opportunity to participate fully, even while the majority decision rules the outcome."<sup>8</sup> Similarly, Justice Antonin Scalia of the United States Supreme Court has said in an often-quoted passage:

To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less differing views of one's colleagues; to address precisely the points of law that one considers important and no others; to express precisely the degree of quibble, or foreboding, or disbelief, or indication that one believes the majority's disposition should engender — that is indeed an unparalleled pleasure.<sup>9</sup>

In terms of the second value, it has been said that enabling judges to dissent is a prerequisite to the guarantee of judicial independence.<sup>10</sup> This independence takes two forms: judges' mutual independence from one another<sup>11</sup> and the judiciary's independence from the other branches of government.<sup>12</sup> Dissenting opinions ensure that judges answer only to their individual consciences. Andrew Lynch argues that "[t]he ability to dissent relieves their Honours of the pressure to conform to views they do not actually hold

---

5 Bora Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29:10 Can Bar Rev 1038 at 1048.

6 See e.g., Andrew Lynch, "Is Judicial Dissent Constitutionally Protected?" (2004) 4 Macquarie Law Journal 81 [Lynch, "Judicial Dissent"]; Rory K Little, "Reading Justice Brennan: Is There a 'Right' to Dissent?" (1999) 50:4 Hastings LJ 683.

7 See The Honourable Claire L'Heureux-Dubé, "The Dissenting Opinion: Voice of the Future?" (2000) 38:3 Osgoode Hall LJ 495, at 503; Antonin Scalia, "The Dissenting Opinion" (1994) 19:1 Journal of Supreme Court History 33.

8 L'Heureux-Dubé, *ibid.*

9 Scalia, *supra* note 7 at 42 [emphasis omitted].

10 See L'Heureux-Dubé, *supra* note 7, at 513; Julia Laffranque, "Dissenting Opinion and Judicial Independence" (2003) 8 Juridica International 162 at 167; Andrew Lynch, "Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia" (2003) 27:3 Melbourne UL Rev 724 at 738 [Lynch, "Rewards and Risks"].

11 Lynch, "Rewards and Risk," *ibid.*

12 Laffranque, *supra* note 10 at 167.

and ensures that they can fulfil the promises contained within their judicial oath.”<sup>13</sup> Similarly, John Alder contends that the dissenting opinion helps to ensure equality among the judges such that no point of view is suppressed.<sup>14</sup> Moreover, some have argued that the practice of dissent makes for better judgments.<sup>15</sup> Not only do dissenting opinions help to focus and clarify the issues in the case, but they also set out a series of arguments to which the majority must respond.<sup>16</sup> As a result, the final majority judgment is more thorough and better reasoned overall.<sup>17</sup> For example, in the equality rights context, Carissima Mathen has argued that “by providing the space to fully flesh out points of disagreement, dissent has contributed to richer accounts of equality.”<sup>18</sup> It is these constitutional roots of free speech and judicial independence which have made the right to dissent an especially strong and frequently cited argument in support of publishing dissenting opinions.

### ***b. The obligation to dissent***

Aside from a “right” to dissent, it has been argued by some that there is an obligation upon judges to dissent where they have a genuine difference of opinion from their colleagues.<sup>19</sup> Justice Brennan was a major proponent of this position, commenting that when a judge is of the view that an interpretation of a constitutional text has departed too far from its essential meaning, that judge is obligated “by a larger constitutional duty to the community, to expose the departure and point toward a different path” and “where significant and deeply held disagreement exists, members of the Court have a responsibility to articulate it.”<sup>20</sup> Therefore, in these circumstances, a judge must not only be able to dissent, but *must* dissent.

### ***c. Dissent promotes the evolution of law***

The final, and perhaps the strongest, argument for published dissents is that they are an expression of judicial innovation and creativity which contributes

---

13 Lynch, “Rewards and Risk,” *supra* note 10 at 739.

14 John Alder, “Dissents in Courts of Last Resort: Tragic Choices?” (2000) 20:2 Oxford J Legal Stud 221 at 240.

15 Alder, *ibid*; Brennan, *supra* note 3 at 430.

16 Alder, *ibid*.

17 Brennan, *supra* note 3 at 430.

18 Carissima Mathen, “The Upside of Dissent in Equality Jurisprudence” (2013) 63 Sup Ct L Rev (2d) 111 at 113.

19 See Brennan, *supra* note 3 at 435-37; Kevin M Stack, “The Practice of Dissent in the Supreme Court” (1996) 105: Yale LJ 2235, at 2242-45.

20 Brennan, *supra* note 3, at 435, 437.

to the evolution of the law.<sup>21</sup> In particular, the argument from evolution focuses most heavily on the idea that a dissent may become the future's majority opinion or be adopted by the legislature.<sup>22</sup> In the famous words of Charles Evan Hughes, former Chief Justice of the United States Supreme Court:

A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.<sup>23</sup>

L'Heureux-Dubé has noted that the practice of permitting dissenting opinions ensures "that the seeds of innovation are not crushed under the weight of majority opinion, even before they are able to take root in the spirit of the law."<sup>24</sup> This argument for judicial innovation has been most forcefully made in the constitutional context because dissent is seen as lessening the danger that constitutional jurisprudence will become crystallized.<sup>25</sup> Via dissent and judicial innovation, the Constitution, as a living organism, is free to change and grow with time.<sup>26</sup>

Dissents are said to contribute to legal evolution in numerous ways. Commentators have emphasized that a dissenting opinion may not need to wait to become "tomorrow's majority" but may in fact have its glory today.<sup>27</sup> A dissenting opinion, if persuasive enough and circulated prior to the majority opinion's publication, may convince one or more judges who formed the original majority to switch sides, thereby rendering the dissent the majority judgment.<sup>28</sup> In this way, it has been said that dissents serve an "internal corrective

---

21 Charles Evan Hughes, *The Supreme Court of the United States: Its Foundations, Methods and Achievements, An Interpretation* (New York: Columbia University Press, 1936) at 68; L'Heureux-Dubé, *supra* note 7 at 517; Brennan, *supra* note 3 at 430-32.

22 Stack, *supra* note 19 at 2257.

23 Hughes, *supra* note 21 at 68.

24 L'Heureux-Dubé, *supra* note 7 at 517.

25 Kurt H Nadelmann, "Non-Disclosure of Dissents in Constitutional Courts: Italy and West Germany" (1964) 13:2 Am J Comp L 268 at 270, translating Costantino Mortati, "Prefazione" in Constantino Mortati, ed, *Le Opinioni Dissenzienti dei Giudici Costituzionali ed Internazionali* (Milan: Giuffrè, 1964) at iv.

26 *Ibid*; see also Mathen, *supra* note 18.

27 See Hon Ruth Bader Ginsburg, "The Role of Dissenting Opinions" (2010) 95:1 Minn L Rev 95 1 at 4 [Ginsburg, "Dissenting Opinions"]; Robert G Flanders, Jr, "The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable" (1999) 4:2 Roger Williams U L Rev 401 at 408-409; Cass R Sunstein, *Why Societies Need Dissent* (Cambridge, Mass: Harvard University Press, 2003) at 168, 184-86.

28 However, this benefit of dissent should not be overstated. The occurrence of such a shift is rare. As Justice Ginsburg, *ibid*, has noted: "On occasion — not more than four times per term I would estimate — a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court."

function” by giving judges the opportunity to re-think their initial positions and change those positions in appropriate circumstances.<sup>29</sup> Cass Sunstein has argued that all major institutions (including courts) need to have inbuilt institutional mechanisms to question error, to expose it and to afford pathways for the discovery of truth and reason.<sup>30</sup> Judicial dissent is such a mechanism.

Recent research by Peter McCormick on judicial voting in the Supreme Court of Canada suggests that these “swing” judgments occur more often than we might think.<sup>31</sup> McCormick found that during the last three Chief Justiceships (1984-2011), an initial minority became a majority some 255 times, or roughly one in every four divided panels. He concludes that “[l]osing the majority is something less than a routine but something more than an exceptional part of the way the Court meets its obligations.”<sup>32</sup> An earlier study by Saul Brenner on the United States Supreme Court found that in 61 percent of cases, justices of that court changed their vote. In 14 percent of those cases, the shift in vote converted a minority into a majority.<sup>33</sup>

Additionally, as referenced in the passage above by Chief Justice Hughes, a dissenting opinion may indeed sway a future court.<sup>34</sup> A published dissenting opinion remains on the books. Each time the court revisits the issue, judges must reconsider the fundamental questions raised in that dissent and re-think the result.<sup>35</sup> At a future time where the social, political, and legal circumstances have changed, that dissent may become the position of the court. A dissenting opinion thus seeks to “sow seeds for future harvest.”<sup>36</sup>

The best-known example of this effect is the dissenting opinion of Justice John Harlan in the United States Supreme Court’s judgment in *Plessy v Ferguson*.<sup>37</sup> *Plessy* dealt with the constitutionality of state laws requiring racial segregation in private institutions. The majority of the Court upheld

---

29 Flanders, *supra* note 27 at 409.

30 Sunstein, *supra* note 27, at 168, 184-186

31 Peter J McCormick, “‘Was it Something I Said?’ Losing the Majority on the Modern Supreme Court of Canada, 1984-2011” (2012) 50:1 Osgoode Hall LJ 93 [McCormick, “Something I Said?”].

32 *Ibid* at 96.

33 Saul Brenner, “Fluidity on the United States Supreme Court: A Reexamination” (1980) 24:3 American Journal of Political Science 526 at 532.

34 Hughes, *supra* note 21 at 68; Brennan, *supra* note 3 at 430-32; see also Stack, *supra* note 19, who suggests that even if dissenting opinions do not capture the majority of a future court, they are nonetheless valuable as “carriers of judicial conversation through time” at 2257.

35 Brennan, *ibid* at 436.

36 Brennan, *ibid* at 431.

37 163 US 537 (1896) [*Plessy*]; see Brennan, *supra* note 3, at 431-32 for a description of the role Justice Harlan’s dissent plays in American legal culture. Brennan states at 432: “In his appeal to the future, Justice Harlan transcended, without slighting, mechanical legal analysis; he sought to announce

the constitutionality of such laws under the “separate but equal” doctrine. Justice Harlan issued a lone dissent wherein he refuted the majority’s legal analysis and expressed his now-famous, progressive vision that “in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind.”<sup>38</sup>

The evolution of collective bargaining rights in Canada provides another example. In the 1987 case of the *Reference Re Public Service Employee Relations Act (Alta.)*, the Canadian Supreme Court, in a split decision, held that freedom of association guaranteed by section 2(d) of the Canadian *Charter* did not include a procedural right to collective bargaining because freedom of association applied only to activities capable of performance by individuals.<sup>39</sup> The dissenting judges (Dickson CJ and Wilson J) disagreed, concluding that “[i]f freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.”<sup>40</sup> After 20 years, in *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*, the Supreme Court adopted the dissent’s position.<sup>41</sup> Citing at length from the dissenting judgment in the *Alberta Reference*, the Court held that freedom of association in section 2(d) protects freedom to bargain collectively. The Court stated that the majority holding “in the *Alberta Reference* ... excluding collective bargaining from the scope of s. 2(d) can no longer stand.”<sup>42</sup>

Of course, although dissenting opinions may persuade a future court and thereby change the state of the law, some have pointed out that they rarely do.<sup>43</sup> Hunter Smith has noted, “[g]iven how rarely dissents actually do influence future decisions, it is easy to be sceptical of one of the most commonly advanced justifications for dissenting opinions in courts of last resort, that they are ‘an appeal to the intelligence of a future day.’”<sup>44</sup> Nevertheless, as Smith and others have emphasized, even if most dissents are rejected, the exis-

---

fundamental constitutional truths as well. He spoke not only to his peers, but to his society, and, more important, across time to later generations.”

38 *Plessy*, *ibid* at 559.

39 [1987] 1 SCR 313 [*Alberta Reference*].

40 *Ibid* at 362-63.

41 2007 SCC 27, [2007] 2 SCR 391.

42 *Ibid* at para 36.

43 Hunter Smith, “Individual and Institutional Authority: The Turn-of-the-Century Quest to Abolish the Dissenting Opinion”, (2010) Yale Law School Student Scholarship Papers 100 at 9.

44 *Ibid*.



tence of dissenting opinions in those rare-but-important cases where the court later reconsidered to side with the dissent help to preserve the legitimacy of the court after the majority renders a morally reprehensible decision (e.g. Justice Harlan's dissent in *Plessy*, Justice Curtis's dissent in *Dred Scott v Sandford*<sup>45</sup> and Justice Holmes's dissent in *Lochner v New York*<sup>46</sup>).<sup>47</sup> It demonstrates to the public that at least one of the judges had the wisdom and good sense to interpret the Constitution in the way we know it to be today.<sup>48</sup>

Finally, there is yet another way in which a dissenting opinion may affect the evolution of law. As Peter McCormick has noted, sometimes courts cite (or quote) dissenting opinions, not to revisit an issue and explicitly reject an earlier judgment, but as authority contributing to the explanation of a decision.<sup>49</sup> Oftentimes these dissenting opinions are cited in ways which make them indistinguishable from the references to majority or unanimous decisions. In his examination of the Canadian Supreme Court, McCormick found that the frequency of such citations has increased over time with the Laskin Court citing dissents almost 10 times per year, the Dickson Court 25 times per year and the Lamer Court almost 40 times per year.<sup>50</sup>

## The main arguments against publication of dissents

### *a. Public confidence and credibility*

One of the key arguments against dissent is the potential of a published dissent to shake the public's confidence in legal institutions and to undermine the credibility of the courts.<sup>51</sup> The argument from credibility is essentially one of institutional legitimacy.<sup>52</sup> Judge Learned Hand believed that dissent "cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends."<sup>53</sup> The argument is as follows: a dissenting opinion explicitly or implicitly calls into question the persuasiveness and authority of

---

45 60 US 393 (1857).

46 198 US 45 (1905).

47 Smith, *supra* note 43 at 10.

48 See Richard A Primus, "Canon, Anti-Canon, and Judicial Dissent" (1998) 48:2 Duke LJ 243 at 283-93, cited by Smith, *supra* note 43 at 10; Flanders, *supra* note 27 at 415.

49 Peter McCormick, "Second Thoughts: Supreme Court Citation of Dissents & Separate Concurrences, 1949-1996" (2002) 81:2 *Can Bar Rev* 369, [McCormick, "Second Thoughts"].

50 McCormick, "Second Thoughts," *ibid* at 378.

51 See Carissima Mathen, "Dissent and Judicial Authority in *Charter* Cases" (2003) 52 UNBLJ 321 at 328; Alder, *supra* note 14 at 242; Steven A Peterson, "Dissent in American Courts" (1981) 43:2 *The Journal of Politics* 412 at 429-30; Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures, 1958* (Cambridge Mass: Harvard University Press, 1958) at 71-72.

52 Mathen, *ibid*; Alder, *ibid*; Peterson, *ibid*.

53 Learned Hand, *supra* note 51 at 72.

the majority judgment. Dissents signal to the public that the law is political — i.e., a creation of individual judges expressing their predilections. This in turn leads the public to question the authority of the judiciary and the law they are formulating, and to reduce compliance.<sup>54</sup> Kevin Stack has said that “[t]he presence of a dissenting Justice demonstrates that behind the word ‘Court’ in the ‘opinion of the Court’ sit individual Justices” and this undermines the rule of law’s claim that it is not the rule of men.<sup>55</sup> It is not, however, universally accepted that the practice of dissent detracts from institutional legitimacy. Many commentators have in fact put forward the reverse position: dissenting opinions enhance the court’s legitimacy by showing the public that the arguments on both sides were taken seriously by the court.<sup>56</sup> William Douglas described this position well: “A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe.”<sup>57</sup>

### ***b. Legal certainty***

A second argument against dissent is that it has the potential to compromise the clarity of the law and to serve as an additional source of confusion in an already-complicated legal world.<sup>58</sup> The argument from legal certainty suggests that dissent unacceptably weakens the doctrine of *stare decisis*. This argument is based on an assumption that certainty is of the utmost importance relative to other values, particularly justice. For example, Louis Brandeis (former Justice of the United States Supreme Court) advocates for certainty. He was of the view that “[i]t is usually more important that a rule of law be settled than that it be settled right.”<sup>59</sup> Lord Atkins took an opposing stance, once remarking that “[f]inality is a good thing, but justice is better.”<sup>60</sup> Arthur Jacobson has echoed this position, repeating Stuart Hampshire’s claim that, “[j]ustice ... is conflict. In this, as in all the political virtues, the judiciary is our indispens-

---

54 See Mark Tushnet, *I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases* (Boston: Beacon Press, 2008) at XIII; Virginia A Hettinger, Stefanie A Lindquist & Wendy L Martinek, *Judging on a Collegial Court: Influences on Federal Appellate Decision Making* (Charlottesville: University of Virginia Press, 2006) at 19.

55 Stack, *supra* note 19 at 2240.

56 See Richard B Stephens, “The Function of Concurring and Dissenting Opinions in Courts of Last Resort” (1952) 5:4 *University of Florida Law Review* 394 (suggesting that the *custom* of publishing dissenting opinions affords assurance of judicial responsibility at 395-396); William Douglas, “Stare Decisis” (1949) 49:6 *Colum L Rev* 735 at 754.

57 Douglas, *ibid*.

58 Hettinger, Lindquist & Martinek, *supra* note 54 at 2; Alder, *supra* note 14 at 242; Peterson, *supra* note 51 at 430.

59 *Di Santo v Pennsylvania*, 273 US 34 (1927) at 42.

60 *Ras Behari Lal v King Emperor* (1933) 50 TLR 1, quoted in Alder, *supra* note 14 at 243.

able teacher. A judiciary that publishes dissents and concurrences serves as the exemplar of justice.”<sup>61</sup> As we might expect, given the validity of the arguments made by both sides, the “certainty versus justice” debate is far from settled.

### *c. Misuses and abuses of judicial power*

It is also a great concern that the power to dissent can be, and in some cases has been, misused or abused by the judiciary.<sup>62</sup> This misuse and abuse may take a few different forms. First, judges frequently publish what some consider unnecessary dissenting opinions.<sup>63</sup> In doing so, dissenting opinions no longer signal to the public a significant legal debate in the law but rather represent the ramblings of a judge that can be ignored. Second, judges sometimes dissent not for legitimate legal reasons (i.e., a genuine difference of opinion from other members of the court) but rather for strategic reasons (i.e., to form alliances with other members of the court). In a study conducted of the United States Supreme Court, Paul Wahlbeck and his colleagues found “tit-for-tat dynamics between justices” — that is, “justices are less likely to author or join any type of separate opinion if the author [of the majority opinion] has cooperated with them in the past.”<sup>64</sup> Wahlbeck and his colleagues further claim that “Supreme Court justices are rational actors who pursue their policy goals within constraints — strategic and institutional factors temper justices’ pursuit of policy preferences.”<sup>65</sup> Hence, we must be mindful that judges are strategic beings, some of whom may employ dissent as a means of advancing their career interests at the expense of justice.

Third, judges do not always exercise their dissent power in an appropriately temperate and professional manner; where a dissenting opinion unduly criticizes the majority and its judgment, and uses disparaging language to do so, it further undermines the court’s credibility.<sup>66</sup> Roscoe Pound argued decades ago that it is “not good for public respect for courts and law and the administration of justice” for an appellate judge to burden an opinion with “intemperate denunciation of [the writer’s] colleagues, violent invective, attributi[on]s of

---

61 Arthur J Jacobson, “Publishing Dissent” (2005) 62:4 Wash & Lee L Rev 1607 at 1635-1636 [footnotes omitted].

62 See Ginsburg, “Dissenting Opinions,” *supra* note 27, at 7; Paul J Wahlbeck, James F Spriggs II & Forrest Maltzman, “The Politics of Dissents and Concurrences on the US Supreme Court” (1999) 27:4 American Politics Quarterly 488 at 507, cited in Hettinger, Lindquist & Martinek, *supra* note 54 at 76.

63 Ginsburg, “Dissenting Opinions,” *ibid.*

64 Wahlbeck, Spriggs & Maltzman, *supra* note 62 at 502, 507.

65 *Ibid* at 507.

66 Roscoe Pound, “*Cacoethes Dissentiendi*: The Heated Judicial Dissent” (1953) 39:9 ABA J 794 at 795, cited in Ruth Bader Ginsburg, “Speaking in a Judicial Voice” (1992) 67:6 NYUL Rev 1185 at 1194.

bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness of [other judges].”<sup>67</sup> For instance, consider the recent dissenting judgment of Justice Scalia in *United States v Windsor* on the constitutionality of the federal *Defense of Marriage Act*.<sup>68</sup> In his dissent, Scalia accuses the majority for “how rootless and shifting its justifications are,” for improper motives including “fooling ... readers ... into thinking that this is a federalism opinion,” and of showing “real cheek” when assuring the public that a constitutional requirement to give formal recognition to same-sex marriage was not at issue before the Court.<sup>69</sup> Similarly, in *Al-Skeini and Others v the United Kingdom*, a decision of the European Court of Human Rights dealing with extra-territorial jurisdiction, Judge Bonello’s opinion (officially concurring but substantially dissenting) was highly critical, arguably unnecessarily so, of the Court’s jurisprudence on the issue.<sup>70</sup> He concludes that “the judicial decision-making process in Strasbourg has, so far, squandered more energy in attempting to reconcile the barely reconcilable than in trying to erect intellectual constructs of more universal application” and pleads for the Court “[t]o stop fashioning doctrines which somehow seem to accommodate the facts, but rather, to appraise the facts against the immutable principles which underlies the fundamental functions of the Convention.”<sup>71</sup> Hence, these examples demonstrate how a published dissent may undermine the credibility of a court and so have negative ramifications.

#### ***d. Inefficiency***

Finally, the publication of dissenting opinions has been characterized as an inefficient use of resources.<sup>72</sup> The argument from efficiency provides that the practice of dissent wastes time and energy. Dissenting opinions increase the workload of judges: not only must the dissenter herself spend time crafting a separate opinion, but those in the majority must spend time countering each of the dissenter’s arguments.<sup>73</sup> Additionally, dissenting opinions can increase the cost of publishing decisions. As a result, in some countries (e.g., member states in the European Union who frequently publish decisions in multiple

---

<sup>67</sup> *Ibid.*

<sup>68</sup> 570 US (2013) (slip op of Justice Scalia).

<sup>69</sup> *Ibid* at 15, 22.

<sup>70</sup> *Case of Al-Skeini and Others v The United Kingdom* (2011) 53 EHRR 18 (Concurring opinion of Judge Bonello).

<sup>71</sup> *Ibid* at paras 7-8.

<sup>72</sup> Peterson, *supra* note 51 at 427; Flanders, *supra* note 27 at 402.

<sup>73</sup> Peterson, *ibid*; Flanders, *ibid*.

languages), publication of dissents is limited in order to reduce expenses.<sup>74</sup> It has been suggested that dissenting opinions affect efficiency in yet another way: when judges convey unanimity, citizens and their lawyers are better able to predict the outcome of legal disputes and are thus more likely to settle their disputes without recourse to litigation.<sup>75</sup> Dissents, by reducing the certainty of law, may increase a court's caseload because lawyers, sensitive to legal uncertainty, may press litigation in those areas.

## II. A contextual analysis for assessing the value of published dissents

It is tempting to form a universal conclusion either praising or criticizing the practice of publishing dissenting opinions in constitutional adjudication. However, this is problematic because many of the arguments which I presented in Part I of this paper are not universally applicable but rather are limited to certain jurisdictions, courts, and types of legal systems. In my view, a proper normative assessment specifying whether a court should adopt or abandon the practice of publishing dissents necessitates a contextual analysis. In the following section, I outline a non-exhaustive list of factors relevant to this analysis. I must reiterate that, because many of these factors can change over time and across jurisdictions, a universal prescription for the publication of dissenting opinions may not always be appropriate for a given jurisdiction.

### *a. Legal history*

Each judicial institution stems from a specific legal history which, over time, has evolved to form that institution's current practice. This history is exceedingly relevant to assessing the value of published dissents in that court: it will impact how the law is conceptualized by the court, practitioners, and the public; it will shape how legal institutions have been and continue to be designed; and it will influence in a large way the overall level of resistance in that jurisdiction to an alternative mode of judicial decision-making.

Civil law stems from the *ius commune* of medieval Europe.<sup>76</sup> The *ius commune* was initially a law of scholars, separate and distinct from the law practised in the courts. Between the eleventh and fourteenth centuries, the *ius*

---

74 Rosa Raffaelli, *Dissenting opinions in the Supreme Courts of the Member States* (Brussels: European Parliament, 2012) online: European Parliament <<http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf>>.

75 Peterson, *supra* note 51 at 425.

76 Jacobson, *supra* note 61 at 1610-11.

*commune* was elaborated upon by scholars through what has been called a “sacred task.” Scholars relied heavily on Christian texts for which there was only *one* correct interpretation. With time, this scholarly knowledge of sacred texts (the *ius commune*) made its way into courtrooms and, by the fourteenth century, came to trump lawyerly and judicial know-how. Since the *ius commune* was based on sacred texts for which there was only one correct interpretation, it was believed that there could only be *one* true law. Now, what of dissent in a system built on this history? In the words of Arthur Jacobson: “In such a system there can be no use for different reasons. Only the right reasons matter; only they ought to be recorded and recalled. There can be no suggestion of different dispositions: One of the suggested dispositions must be animated by the wrong reasons.”<sup>77</sup>

The practice of publishing dissenting opinions in common law countries originally comes from the tradition of the English courts wherein judges rendered their judgments by individual *seriatim* opinions.<sup>78</sup> On rare occurrences, judges consulted together and gave a general opinion but the vast majority were individualized opinions. The United States Supreme Court is a good example. In its early years, although the Court operated as a sort of amalgam presenting both civilian-style opinions (single, short, unsigned opinions) and English-style opinions (*seriatim* opinions prepared by each judge), the *seriatim* mode prevailed.<sup>79</sup> The judges exercised a significant degree of freedom in writing opinions and those cases in which dissents were written were generally the more important ones.<sup>80</sup> However, as in all common law countries, the Court’s practice evolved over time. There was a short period between 1801 and 1804, with the accession of John Marshall as Chief Justice who strongly discouraged dissenting opinions, during which time decisions were invariably unanimous.<sup>81</sup> However, dissent re-emerged in the Court for at least two reasons. First, in 1804 Justice Chase delivered a one-sentence *seriatim* opinion concurring in the judgment in *Head & Amory v Providence Insurance Co.*<sup>82</sup> Second, and more significantly, there were several opponents to Marshall’s practice including Thomas Jefferson. In fact, Jefferson later wrote to Marshall’s eventual successor and Jefferson’s first Supreme Court appointee — Justice William

---

<sup>77</sup> *Ibid* at 1611.

<sup>78</sup> Karl M ZoBell, “Division of Opinion in the Supreme Court: A History of Judicial Disintegration” (1959) 44:4 Cornell Law Quarterly 186 at 187-191.

<sup>79</sup> Jacobson, *supra* note 61 at 1621.

<sup>80</sup> Donald G Morgan, “The Origin of Supreme Court Dissent” (1953) 10:3 The William and Mary Quarterly (3d) 353 at 355.

<sup>81</sup> *Ibid.*

<sup>82</sup> 6 US (2 Cranch) 127 (1804) at 169.

Johnson — deriding Marshall's practice and calling it "convenient for the lazy, the modest[, and] the incompetent."<sup>83</sup> He insisted on a return to the *seriatim* mode. And in 1807, in the case of *Ex parte Bollman and Ex Part Swartwout*,<sup>84</sup> Johnson delivered the first true dissent (or at least the first opinion explicitly acknowledged as a "dissent"). Therefore, in the United States Supreme Court, legal history points in a different direction than civilian jurisdictions. The practice of publishing dissents was not only the starting point for the Court based on the English *seriatim* style, but the institution of dissent was challenged, semi-abolished, and reinstituted as an integral part of American judicial decision-making.

### ***b. Legal tradition or culture***

Tied to a jurisdiction's legal history is its unique legal tradition or culture. Legal tradition and culture reflects both the fundamental legal concepts which a system has adopted as well as the relative weight assigned to those concepts. Relevant factors include the jurisdiction's perspective on heterogeneity in the law, the relative importance it places on freedom of expression and judicial independence, and the role or function which dissenting opinions serve within its overall legal system.<sup>85</sup>

Regarding legal heterogeneity, some commentators have noted the opposing perspectives of American and European systems.<sup>86</sup> Jacobson has observed that in European systems, heterogeneity is considered "an aberrance, a failure, a departure from the norm" which "threatens social order, as they understand social order."<sup>87</sup> These systems (influenced by French law) take pride in a "collegial judicial culture" which is defined by unanimity and anonymity.<sup>88</sup> This is in stark contrast to the American system where "[h]eterogeneity is the social order, the norm. It is neither aberrance nor failure. It is the expected, often exalted, condition of life."<sup>89</sup>

Legal systems also differ widely in the extent to which they protect the fundamental freedom of speech or expression. As indicated in the previous part, the right to dissent has been rooted in freedom of expression.<sup>90</sup> The dis-

---

83 Paul Leicester Ford, ed, *The Works of Thomas Jefferson* (New York: GP Putnam's Sons, 1904) vol 12 at 249-250, cited in Morgan, *supra* note 80 at 355.

84 8 US (4 Cranch) 75 (1807).

85 See Jacobson, *supra* note 61 at 1627; Alder, *supra* note 14 at 237.

86 Jacobson, *ibid*; Alder, *ibid*.

87 Jacobson, *ibid* at 1628.

88 Alder, *supra* note 14 at 237.

89 Jacobson, *supra* note 61 at 1628.

90 See Lynch, "Judicial Dissent," *supra* note 6; Little, *supra* note 6.

senting opinion is a manifestation of a judge's creativity, innovation and expression. It is therefore reasonable to conclude that a jurisdiction's views towards the practice of publishing dissents, and thus its value there, will depend on its understanding and application of freedom of expression. The United States, for example, has a very strong tradition of protecting expression and has been much less willing than other countries to place limitations on that freedom.<sup>91</sup> Therefore, this tradition would militate towards the permission of published dissents in the case of the United States.

### ***c. Credibility of the court***

Another important factor relevant to the issue of whether dissent is of value for a specific court is the age of the court and the associated concept of the court's credibility. Published dissents would be more difficult to justify in a younger court which has not yet established credibility than in an established court like the United States Supreme Court.

### ***d. Function of the court***

For the purposes of this analysis, one should also question which function the court serves. Although I use the term "court" indiscriminately throughout this paper, it must be remembered that different constitutional adjudicatory bodies serve different purposes and speak to different audiences. On one extreme, there are American courts which adjudicate on constitutional issues in the context of a particular case. This is referred to as *a posteriori* or "concrete" judicial review.<sup>92</sup> Therefore, the court's adjudication yields a judgment which is limited in principle to the case decided and is directed at the specific parties in the case. The parties look to the judgment to determine how their arguments were received by the court, the reasons for the court's acceptance and rejection of those arguments, and the final determination of their legal rights. For this reason, it is essential that the court's decisions take the form they do, including the publication of dissenting opinions.

This is vastly different from many constitutional courts in Europe where constitutionality is generally examined in the abstract (or *a priori*).<sup>93</sup> The constitutionality of a law is assessed in general without factoring in the precise

---

91 See e.g. Frederick Schauer, "The Exceptional First Amendment", in Michael Ignatieff, ed, *American Exceptionalism and Human Rights* (Princeton, NJ: Princeton University Press, 2005) 29.

92 Vicki Jackson & Mark Tushnet, *Comparative Constitutional Law*, 2d ed (New York: Foundation Press, 2006) at 468-70.

93 See *ibid.* There have, however, been recent changes in the last few years in certain constitutional courts, including those of Germany and France, to allow for a certain degree of *a posteriori* review.



circumstances of any particular case. The effect of the decision is *erga omnes* (i.e., applicable to all). Now, within these constitutional courts there are features which take it even further from the American model. In particular, some courts serve more of an advisory role to the government rather than acting as a true judiciary. For example, in the Judicial Committee of the Privy Council (where dissent was forbidden until 1966),<sup>94</sup> judgments were made in the form of advice to the monarch.<sup>95</sup> As Kirby explained in the context of the Privy Council, “[i]t was considered that the monarch should not be embarrassed by conflicting advice emanating from the council. A single form of advice was given.”<sup>96</sup> It is understandable why published dissents may have no place within such a tradition. Another example is the reference procedure in Canada which allows governments to refer proposed statutes and questions on hypothetical legal questions to the Supreme Court. The Supreme Court has recognized that its role in references is not judicial, but one of advising the government.<sup>97</sup> In courts such as this — where the judges are not truly adjudicating but are providing advice to be acted upon either by the government or the monarch — dissent is of little utility.<sup>98</sup> There are no parties, and no arguments have been advanced: there is no need to address anything in written form. On the contrary, a unified and concise opinion is of greatest utility. Therefore, many of the arguments for published dissents identified in the previous part do not hold in the context of a court as advisor.

### *e. Procedure of the court*

Many of the arguments for published dissents assume a collaborative decision-making process in which the judges’ initial positions are disclosed to one another and there is time for reflection and distribution of draft written opinions. For instance, the suggestion that a dissent may become the majority judgment is only plausible in a court where a dissenting opinion is circulated prior to publication. This is because “[t]he drafting of dissents for circulation amongst the court creates a dialogue which can lead to the incorporation of some of the ideas of a dissident in the opinion of the majority.”<sup>99</sup>

---

94 Since 1966, the Judicial Committee of the Privy Council has permitted dissenting opinions, but only permits one collective dissent. See Alder, *supra* note 14 at 235.

95 Michael Kirby, “Judicial Dissent — Common Law and Civil Law Traditions” (2007) 123:3 Law Q Rev 379 at 386 [Kirby, “Judicial Dissent”].

96 *Ibid.*

97 See *Attorney-General for Ontario v Attorney-General for Canada*, [1912] AC 571 (UKPC); *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 SCR 3 at 15.

98 See e.g. Lynch, “Judicial Dissent,” *supra* note 6 at 81.

99 Lynch, “Rewards and Risks,” *supra* note 10, at 741.

The entire notion of having a majority and a dissent necessitates early identification of a judge's stance on the issue at hand.<sup>100</sup> In some courts, the formal conferencing procedure adopted provides a forum in which this information may be declared. This is the case in the Supreme Court of Canada and the United States Supreme Court (although the order in which judges speak varies with the most junior judge starting in Canada and the Chief Justice going first in the United States).<sup>101</sup> However, in courts which do not have such a formalized process of communication, or worse, deliver their judgments *seriatim*, a dissenting opinion will have little to no impact. The judges in these courts are not writing their majority and dissenting opinions as part of a "dialogue"; rather, they are simply writing their individual opinions without any consideration of the position or status they will ultimately occupy. For example, the High Court of Australia has fluctuated in the degree to which it has implemented a system of conferencing like its American counterpart.<sup>102</sup> During the period when John Latham was Chief Justice, the Court was plagued by animosity. The Court did not maintain conferencing techniques, nor did the judges communicate with one another. In these circumstances, dissent would be of little value: it could not be used as a means of improving the quality of written judgments let alone as a method of persuading other judges.<sup>103</sup>

Moreover, the relative value of circulating dissent among judges depends on the extent to which judges are open to being swayed during conference discussions. In this regard, Ian Binnie, former justice of the Canadian Supreme Court, has contrasted the Canadian Court with that of the United States.<sup>104</sup> Drawing on comments of former United States Chief Justice Rehnquist, Binnie concludes that "little importance is attached to the discussion at the court conference" in the United States Supreme Court because "judges are sufficiently opinionated and independent that they are not going to change their minds based just on what their colleagues think"; in his view, "the Canadian style is more discursive. ... What you say, or fail to say, *does* make a difference."<sup>105</sup>

---

100 *Ibid.*

101 Ian Binnie, "A Survivor's Guide to Advocacy in the Supreme Court of Canada" (John Sopinka Lecture delivered at the Criminal Lawyers' Association, Toronto, 27 November 1998) at 7, online: Supreme Court Advocacy Institute <<http://www.scai-ipc.ca/pdf/Binnie-SurvivorsGuidetoAdvocacy.pdf>>.

102 Lynch, "Rewards and Risks," *supra* note 10 at 741-43.

103 *Ibid* at 742-743.

104 Binnie, *supra* note 102.

105 *Ibid* at 8-9.

### ***f. Background of the judges***

Finally, one of the fundamental differences between courts in common law and civil law jurisdictions is the background of the judges which make up those courts. In particular, they differ in the manner in which the judges are trained as well as from where they are selected.<sup>106</sup>

In common law countries, judges are generally drawn from the senior ranks of practising lawyers.<sup>107</sup> They come from fairly long and esteemed careers as practitioners and have had years to develop opinions about various legal issues. While they have no judiciary-specific training, they are trained, as all lawyers are, to see and argue both sides of a case. This background and training is most certain to yield strong-minded, opinionated, and intellectually independent individuals who are not used to thinking of themselves as members of an institution.<sup>108</sup> In maintaining honesty and personal integrity, they are much less willing to suppress their own opinions because a majority holds a different opinion. For this reason, as Jacobson puts it, “the American judiciary really does expect an opinion written by a judge, even if for the court, to be *his* opinion; if another judge composed it, the opinion really would be different. So *he* must sign; *he* must take responsibility.”<sup>109</sup>

This is not the case (at least with respect to the ordinary courts) in civilian countries where judges are drawn from a judicial career track. They are recruited for the ordinary courts soon after university graduation and specifically trained for judicial life.<sup>110</sup> The civilian judge “is the representative of an institution” and so “when the institution is functioning properly — when it is educating and professionalizing its members up to the mark — he expects that any member of the institution ought to be able to replace him in a given decision without altering the result or even the reasoning.”<sup>111</sup> Therefore, in the

---

106 See e.g., Robin CA White & Iris Boussiakou, “Separate opinions in the European Court of Human Rights” (2009) 9:1 Human Rights Law Review 37 (discussing the idea that the legal background which judges bring to the Court might influence their approach to the interpretation and application of the European Convention, including the writing of separate opinions at 57); Kirby, “Century’s End,” *supra* note 1 at 17-19; Jacobson, *supra* note 61 at 1630; Jackson & Tushnet, *supra* note 92 at 467.

107 Jacobson, *ibid.*

108 *Ibid.*

109 *Ibid* [emphasis in original].

110 Jackson & Tushnet, *supra* note 92 at 467. It should be noted that although the same rules do not necessarily apply for constitutional courts, many of the members of the constitutional courts come from the judiciary of the ordinary courts (as well as academics and practising lawyers). In any event, this a factor which should be taken into consideration in the analysis; see also John H Langbein, “The German Advantage in Civil Procedure” (1985) 52:4 U Chicago L Rev 823 at 848-49.

111 Jacobson, *supra* note 61 at 1630.

civilian system, judges are trained to think of themselves as part of an institution rather than as individuals. Their training supports a unanimous model of decision-making. Now, I recognize that this argument is not as strong for members of many civilian constitutional courts as opposed to the ordinary courts given the fact that many constitutional court members are drawn from the bar and academia, similar to the common law tradition. The importance of this argument remains, however minimal, for two reasons: members of constitutional courts are frequently pulled from the ordinary courts, and the existence of this judicial tradition is still likely to have some impact on the overall understanding or conception of judicial decision-making.

### **III. Application of the analysis to the Supreme Court of Canada**

#### ***a. Legal history***

As per the common law tradition, the dissenting opinion in Canada stems from the English common law courts.<sup>112</sup> The Supreme Court of Canada has a long history of allowing judges to proffer dissenting opinions. In fact, since the Court's inception in 1875, its judges have always been permitted to dissent.<sup>113</sup> At the end of the nineteenth century, in the first and only Canadian House of Commons debate over whether dissent should be prohibited, a majority of the members of the House decided there was no need to take legislative action.<sup>114</sup> Over the next 50 years, individual, *seriatim* opinions were gradually faded out, but dissenting opinions nonetheless remained. Therefore, dissent is an integral part of the Supreme Court of Canada's history. In fact, it may be argued that dissent is even more integral to the Canadian Supreme Court than its American counterpart that, as described in the previous part, had a short period of unanimous decision-making between 1801 and 1804. In Canada, the judiciary, practitioners, and the public know no other way than the permissibility of published dissenting opinions.

---

112 L'Heureux-Dubé, *supra* note 7.

113 In the Supreme Court of Canada's first decision — *Kelly v Sullivan*, [1876] 1 SCR 3, cited in L'Heureux-Dubé, *supra* note 7 at 499 — each judge delivered a separate opinion, including Taschereau J who dissented.

114 See L'Heureux-Dubé, *supra* note 7 at 499; James G Snell & Frederick Vaughan *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 35.

## ***b. Legal tradition or culture***

The tradition of dissent is firmly rooted in Canadian legal culture.<sup>115</sup> As L'Heureux-Dubé articulated:

Here, judges exercise their “precious right” to dissent when they believe it to be necessary, even while observing certain constraints to which they voluntarily submit in order to guarantee a minimum of institutional harmony. They have a tendency to share with their English and American colleagues a positive, sometimes even idealistic, vision of dissenting opinions, citing with admiration certain “great dissents” relating to social justice and human rights.<sup>116</sup>

Most significantly, the practice of dissent forms part of the “dialogue” theory in Canadian constitutional law.<sup>117</sup> The Supreme Court of Canada itself has adopted the theory of an institutional dialogue.<sup>118</sup> According to this theory, confrontations between the judiciary and the elected branches of government are seen as a dialogue between the two institutions. The legislature enacts a law. The courts, through judicial review, then invalidate or uphold laws under the *Canadian Charter of Rights and Freedoms*. Where the law is invalidated by the Court the legislature frequently responds. In the majority of cases, this response takes the form of the legislature modifying the law in accordance with the reasons of the Court. However, on some occasions, Canadian legislatures have responded by embracing the opinion of a dissenting judge. In this way, dissent forms part of the dialogue.

An example of this dialogue taking place is the legislative response to the Supreme Court's decision in *R v O'Connor*.<sup>119</sup> The *O'Connor* decision dealt with the common law procedure to be followed by an accused seeking production of a victim's therapeutic records in the hands of third parties. The majority of the Court set a relatively lenient threshold for the accused, accepting that such records would often be relevant to his right to make full answer

---

115 This includes Quebec courts which have always incorporated dissent into their appellate decisions. See L'Heureux-Dubé, *supra* note 7 at 502.

116 L'Heureux-Dubé, *supra* note 7 at 496-97 [footnotes omitted].

117 See Peter W Hogg and Allison A Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)” (1997) 35:1 Osgoode Hall LJ 75; Stephen Gardbaum, “Reassessing the new Commonwealth model of constitutionalism” (2010) 8:2 International Journal of Constitutional Law 167; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited — Or ‘Much Ado about Metaphors’” (2007) 45:1 Osgoode Hall LJ 1.

118 Kent Roach, “Dialogue or defiance: Legislative reversals of Supreme Court decisions in Canada and the United States” (2006) 4:2 International Journal of Constitutional Law 347 at 348 (and sources cited therein); Justice Iacobucci's comments in *Vriend v Alberta*, [1998] 1 SCR 493 at 565.

119 [1995] 4 SCR 411.

and defence. The dissent, in contrast, found that third party records generally had limited relevance and thus would have set a more rigorous threshold. Following *O'Connor*, Parliament responded by enacting legislation which closely followed the language and tenor of the dissent.<sup>120</sup> The constitutionality of this new legislation was challenged in 1999 in the case of *R v Mills*,<sup>121</sup> and this time, the Court upheld the legislation as constitutional. Of note, McLachlin CJ and Iacobucci J, who were on opposing sides in *O'Connor*, co-authored the decision which signalled the Court's unanimous acceptance of the legislation.<sup>122</sup>

### *c. Credibility of the court*

With respect to the credibility of the Supreme Court of Canada, there are two noteworthy factors: its age and its integrity. The Supreme Court of Canada is a fairly old and established institution; it was created in 1875.<sup>123</sup> The *British North America Act* of 1867 empowered Canadian Parliament to create such a court — a step which it took by introducing a bill in 1869.<sup>124</sup> Since that time, members of the Court have been permitted to publish dissenting opinions.<sup>125</sup> However, unlike its American neighbour, there are two wrinkles on the long-standing nature of the Supreme Court of Canada's judicial review power. At its inception in 1875, the Supreme Court's decisions were subject to review by the Privy Council.<sup>126</sup> The right to appeal to the Privy Council was not abolished until 1949, at which time the Supreme Court became Canada's final appellate court.<sup>127</sup> Another difference between the Canadian and American courts is the length of time they have operated with an expansive power of judicial review under a constitutional bill of rights.<sup>128</sup> Whereas the United States Supreme Court has issued rulings on rights claims for more than 200 years,

---

120 Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, 2nd Sess, 35th Parl, 1996 (assented to 25 April 1997), SC 1997, c 30.

121 [1999] 3 SCR 668.

122 Mathen, *supra* note 51 at 325. Lamer CJ dissented, in part, on the basis that the new provisions were unconstitutional since they infringed the rights of the accused by their application to records in the possession or under the control of the Crown, as opposed to the records in the possession of third parties. See also Parliament's response to the Supreme Court's decision in *R v Daviault*: [1994] 3 SCR 63; Roach, *supra* note 119 at 350.

123 David Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007) at 17.

124 *Ibid.*

125 See L'Heureux-Dubé, *supra* note 7 at 499.

126 L'Heureux-Dubé, *supra* note 7, at 499, note 12.

127 Muttart, *supra* note 124 at 18.

128 CL Ostberg & Matthew E Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007), at 26.

the *Canadian Charter of Rights and Freedoms*<sup>129</sup> is a relatively recent innovation, having been adopted in 1982. In fact, following its adoption, there was dispute among scholars as to whether the court would take on an activist role like its American counterpart or remain a more passive tribunal.<sup>130</sup> Therefore, the Supreme Court of Canada has only been ruling on rights claims for the past 30 years.

Further, any fear of misuse or abuse of the dissent power by judges in the Supreme Court of Canada should be considered minimal. One of the current Chief Justice McLachlin's key goals upon becoming chief justice was to increase consensus in the Court.<sup>131</sup> In a survey of Supreme Court judges conducted by Donald Songer and his colleagues, the judges said that although they "feel free to dissent when they have differences on principle that they deem to be important ... informal norms of collegiality and respect for the opinions of colleagues often resulted in deliberate efforts to find compromise solutions that everyone on the Court can accept."<sup>132</sup> It should be observed that, when compared with other courts such as the United States Supreme Court and the High Court of Australia, the Canadian Court has a high rate of consensus.<sup>133</sup> For example, McCormick has found for the period of 1974 to 2002 a unanimity rate of 65.2 percent.<sup>134</sup>

It is important to note that there is also variation across issue areas, with constitutional cases being the most frequent producers of dissents.<sup>135</sup> In an empirical examination, Donald Songer found that in the period of 1970 to 2003, dissents were most common in the area of "civil liberties" (which Songer defines as including equality, religion and indigenous rights, privacy, and other civil liberty matters), with 38.3 per cent of the cases having at least

---

129 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11. [Charter]

130 Ostberg and Wetstein, *supra* note 129 at 26 (and references cited therein).

131 Cristin Schmitz, "Communication, consensus among McLachlin's targets" (November 19, 1999), 19:27 *The Lawyers Weekly* 14, cited in Emmett Macfarlane, "Consensus and Unanimity at the Supreme Court of Canada" (2010) 52 Sup Ct L Rev (2d) 379 at 384.

132 Donald R Songer, John Szmer & Susan W Johnson, "Explaining Dissent on the Supreme Court of Canada" (2011) 44:2 *Canadian Journal of Political Science* 389 at 390.

133 See Peter McCormick, "Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada" 2004 42:1 Osgoode Hall LJ 99 [McCormick, "Blocs, Swarms, and Outliers"]; Macfarlane, *supra* note 132 at 380-81.

134 McCormick, "Blocs, Swarms, and Outliers," *ibid*, at 130. C.f. Macfarlane, *ibid* (stating that the United States Supreme Court "from 1975 to 2005 had a unanimity rate of only 28.4 per cent" and that the High Court of Australia "had traditionally low levels of consensus" at 380-81).

135 Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008) at 156-57.

one dissenting justice. At the other end of the spectrum, with the lowest frequency of dissenting opinions, were “tax” cases wherein dissents were published in only 18.6 per cent of cases. These statistics are relevant, and important to observe over time: even though the Court’s number of dissents may be low overall, if its constitutional-specific numbers become too large, there may be reason to reassess the possibility of misuse or abuse by the justices of the Court. However, I would suggest that at the moment there is no reason to fear abuse or misuse.

#### ***d. Function of the court***

Generally speaking, the Supreme Court of Canada serves a similar function as the United States Supreme Court. It mostly engages in concrete judicial review, adjudicating in the context of specific litigation and writing its judgment for the parties of that litigation.<sup>136</sup> This factor militates in favour of published dissenting opinions.

#### ***e. Procedure of the court***

Immediately following the end of hearings, all justices of the Supreme Court enter the conference room and discuss the case.<sup>137</sup> The conferences vary in duration from minutes to several hours. At the conference, the justices express their views of the case starting with the most junior justice and ending with the Chief Justice. By the time the Chief Justice has expressed her views, the eventual disposition is usually evident, even in the absence of a formal vote.<sup>138</sup> At the end of the conference, it is determined who will write the opinion of the Court. Once the first draft of the opinion is written and circulated, there is an informal rule that the justices will wait at least two weeks before officially “signing on” to it.<sup>139</sup> This rule affords the other justices an opportunity to raise objections to particular aspects of the opinion and to offer suggestions for revisions.<sup>140</sup> A dissenting opinion is never circulated among the justices until two weeks after the draft of the majority opinion has been received. However, a dissenting judge will usually circulate a short memo during those two weeks

---

136 This is, of course, with the exception of the Court’s jurisdiction to hear reference proceedings pursuant to section 53 of the *Supreme Court Act*, RSC 1985, c S-26 (under which the Governor in Council may refer to the Court for a non-binding opinion on important constitutional questions of law or fact). For the references which the Court hears, it may be argued that dissenting opinions should not be published, although they often do result in dissenting opinions.

137 Songer, *supra* note 136 at 126; see also Binnie, *supra* note 102 at 8-9.

138 Songer, *ibid*, at 127.

139 *Ibid* at 135.

140 *Ibid*.



indicating there will be a dissent and briefly summarizing the basis for that dissent.

Several judges of the Court have said that the current Chief Justice prefers that the Court speak in a single voice and thus encourages them to work out expressed differences.<sup>141</sup> Similarly, previous chief justices are said to have applied “gentle” pressure to reach unanimous outcomes.<sup>142</sup> Nevertheless, Songer has demonstrated, following an extensive survey of the justices of the Court, that “on the present court (as reflected in the interviews), as on several past Courts (as reflected in earlier published accounts), before an opinion is released to the public there is often a substantial amount of negotiation and give and take among the justices.”<sup>143</sup> This data is important because it may provide evidence of an internal norm and thereby reduces concerns regarding the misuse and abuse of the power to dissent in this particular court.

#### ***f. Background of the judges***

Like in the United States Supreme Court, Canadian justices are drawn from the senior ranks of practising lawyers. For the reasons outlined in the previous part, Canadian judges are often strong-minded, opinionated, and intellectually independent individuals who are less willing to suppress their own opinions.<sup>144</sup> In this context, enabling justices to publish dissenting opinions simply makes practical sense.

#### ***g. Summary of analysis***

The application of the above contextual factors to the Supreme Court of Canada militates strongly in favour of the Court maintaining its current practice of permitting the publication of dissenting opinions. Dissent is drawn out of the English tradition of issuing *seriatim* opinions and dissent has been a longstanding practice of the Court since its genesis in 1875. It is consistent with Canadian legal culture and tradition, notably the “dialogue” theory of constitutional law. There is minimal concern that the practice will undermine the Court’s credibility; dissent accords with the function, procedure, and background of the members of the Court. For all of these reasons, I conclude that published dissents are a valuable tradition in the constitutional adjudication of the Supreme Court of Canada.

---

141 *Ibid* at 136.

142 *Ibid* at 137.

143 *Ibid* at 138.

144 See *ibid* at 127.

## Conclusion

The longstanding debate among legal academics and the judiciary on the value of the practice of publishing dissenting opinions, especially in constitutional adjudication, remains unsettled. I have argued here that perhaps there is no single answer to settle this debate. As Justice Ruth Bader Ginsburg has astutely commented: “What is right for one system and society may not be right for another.”<sup>145</sup> In my view, to settle this debate, we must narrow the question we are asking and assess the value of published dissenting opinions within the context of a specific *court* in a specific *jurisdiction* at a specific *time*. As long as our arguments remain abstract, theoretical, and unspecific, we cannot expect them to have any practical relevance.

---

145 Ginsburg, “Dissenting Opinions,” *supra* note 27 at 3.