

The First “By the Court” Decisions: The Emergence of a Practice of the Supreme Court of Canada

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I. INTRODUCTION

On April 24, 2014, the Supreme Court of Canada handed down its decision in the *Senate Reform Reference*,¹ declaring unconstitutional all but the most minor elements of Prime Minister Stephen Harper's Senate Reform proposals. That the decision was unanimous was, given the fact that Harper himself had appointed a majority of them, somewhat surprising. What we want to highlight, however, is another feature of the decision, and that is the fact that it was anonymous—that is to say, it was not attributed to any specific member of the panel (not even the Chief Justice) but simply and cryptically to “THE COURT”. This is unusual; typically, a specific justice assumes responsibility for a set of reasons, and it is on the basis of the reasons to which that name has been attached that we evaluate judicial performance, whether for praise or for criticism. “By the Court” judgments represent a significant departure; responsibility is claimed by the entire panel collectively, and therefore by no single judge individually and specifically. On

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¹ *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704 [*Senate Reform Reference*].

the one hand, this raises accountability issues; on the other hand, it presumably establishes a solidarity of authority.

In the context of the 2014 decision, the format was neither novel nor surprising. Indeed, expert commentary had reflected an expectation that the judgment would be "By the Court", to the extent that it would have been somewhat surprising had the Court used any other presentation format (at least for a unanimous judgment). "By the Court" has become part of the Supreme Court's repertoire, used seldom enough that it is not routine, but often enough that it no longer astonishes.

This phenomenon, however, has never been fully inventoried, never examined to discern a core strategy either constant or evolving, never been subjected to a focused academic analysis. It is easy to come up with prominent examples—*Ford v. A.G. Quebec*,² *Tremblay v. Daigle*,³ the *Secession Reference*,⁴ the *Same-Sex Reference*,⁵ the *Securities Reference*⁶—but no one has assessed the practice as a whole. For our court and the comparable common-law appeal courts,⁷ the standard practice is for judicial reasons to be ascribed to a specific individual member of the panel⁸ (a lead authorship to a collegial process of persuasion and accommodation rather than a genuine solo product, but nonetheless directing us to a personal accountability). This deliberate and repeated departure from the Court's own long-standing norms is something that needs, but has

² *Ford c Quebec (Procureur general)/(Ford v Attorney-General of Quebec)*, [1988] 2 SCR 712 [Ford].

³ *Tremblay c Daigle*, [1989] 2 SCR 530 [Tremblay].

⁴ *Reference re Secession of Quebec*, [1998] 2 SCR 217 [Secession Reference].

⁵ *Reference re Same Sex Marriage*, 2004 SCC 79, 2004 CSC 79 [Same Sex Reference].

⁶ *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 [Securities Reference].

⁷ See e.g. Rebecca D Gill, "Consensus or Ambivalence? Why Court Traditions Matter" Available online at SSRN: <<http://ssrn.com/abstract=1881961>>.

⁸ Occasionally, and only more recently—really only since Justices Cory and Iacobucci initiated the practice on a regular basis in the mid-1990s—have reasons for judgment been attributed to a co-authoring pair of judges. See Peter McCormick, "Sharing the Spotlight: Co-Authored Reasons on the Modern Supreme Court of Canada" (2011) 34 Dal LJ 165.

never received, closer examination. This article is a first step toward that exploration.

We begin by considering a widely accepted origin story, one that carries a strong implicit message as to context, timing, purpose, and meaning, and which also serves to identify the question of who deserves the credit for having introduced it. Our immediate project is to examine that story, to point out its problems, and to present our own alternative version of the emergence of "By the Court".

II. THE LASKIN THESIS

The standard story for the invention of "By the Court" goes like this: it first appears in 1979, in a pair of language decisions—one from Quebec,⁹ the other from Manitoba¹⁰—that dealt with the status of official languages and the constitutional powers of provincial legislatures to modify that status. For Manitoba, the issue was that province's shift from bilingualism to English-only for legislative purposes in 1899; for Quebec, the province's legislation ("Bill 1", which was subsequently revised to become "Bill 101", although its official and more politically potent title was "The Charter of the French Language") sought to contain the role of English and make French the dominant language in the province. The explosive potential of these cases was obvious.¹¹ Small wonder then that the Court would be willing to consider something unusual in the way of judgment delivery; more so because this was a court led by a most unusual Chief Justice who embodied reformist ideas. "By the Court" was the way that this reformist court under its reformist leader dealt with this particular challenge, but more importantly, it

⁹ *Blaikie c Quebec (Attorney-General)*, [1979] 2 SCR 1016 [*Blaikie*].

¹⁰ *Forest v Attorney-General of Manitoba*, [1979] 2 SCR 1032 [*Forest*].

¹¹ We cannot help thinking that the judges must have heaved a sigh of relief when the Quebec case argued in June 1979 was joined in the docket by the Manitoba case argued in October 1979, allowing a symmetrical response rather than what might otherwise have appeared to be a heavy-handed response targeted on Quebec alone.

was also a device that the Court under Chief Justice Laskin and his successors carried into a more extensive string of cases.

If there is no academic literature on the question, how can one identify a “standard story”? Our solution was to email a number of the “usual suspects”, academics who, like us, study and write about the Court. We asked them flat out and without any explanation of why we were asking: “When and what was the first “By the Court” decision?” And we have been doing the same thing at conferences, working into any conversation the same naïve and unadorned question. Our targets¹² were a bit surprised at our apparent ignorance, but always polite enough to give a serious and reflective answer; and every one gave us the same answer, which is to say, the standard story.¹³

On this account, then: “By the Court” is a device invented by the Laskin Court to respond to the profound constitutional challenges occasioned by the Quiet Revolution, but even more dangerously, by the election of a sovereigntist government in Quebec, which proceeded with aggressive legislative initiatives. Canada has survived (at least so far) the Patriation controversy and the two sovereignty referenda in 1980 and 1995,¹⁴ as well as two unsuccessful attempts at further constitutional change by the federal government (Meech Lake and Charlottetown) to deal with the after-effects; but the language cases came at the front end of this challenge and put the Supreme Court on the hot seat. This was, potentially, the Canadian equivalent of the U.S. Supreme Court’s

¹² We refrain from naming them: first, because our emails and conversations contained no hint that we might make the exchange public; and second, because in the end we wound up critically demolishing all of the suggestions they had been generous and collegial enough to make.

¹³ This is not quite fair: one colleague, to whom we will give due credit later, gave the standard answer, hesitated, and said, “But I think there might have been an earlier one.”

¹⁴ Not to mention a third referendum that seemed to be looming on the horizon during the Quebec provincial election in 2014, although that specter was exorcised very effectively when the PQ government went down to a crushing defeat, at least partly because of the referendum question.

*Dred Scott v Sanford*¹⁵ decision, which has been called one of its three worst decisions¹⁶ and sometimes (a little simplistically) accused of triggering the American Civil War; the language cases were an invitation to our Supreme Court to become the *cause célèbre* for a major political showdown of comparable consequence. On the face of it, this makes it credible that a tradition-inclined institution would be willing to consider acting in an unusual way, even more so a reform-minded Court like the Laskin Court. The fact that the Laskin Court itself used the device again on a number of comparably portentous cases—the *Upper House Reference* of 1980,¹⁷ the follow-up case to *Blaikie* in 1981,¹⁸ the *Quebec Veto Reference* of 1982,¹⁹ and the *Superior Court Reference* of 1983²⁰—within the next few years anchors the reputation of this pair of decisions as the innovatory turning point, and identifies the idea of "By the Court" as something that had "legs."

The credibility of the timing for an innovation is enhanced by the somewhat unusual circumstances of the Laskin Court. Bora Laskin became Chief Justice in a highly controversial way, given his lack of seniority on the Court. There were six justices who had enjoyed longer service, and an obvious heir apparent in Alberta's Justice Ronald Martland, who was on some accounts profoundly annoyed at having been passed over.²¹ This was particularly so, given

¹⁵ *Dred Scott v Sanford*, 60 US 393 [*Dred Scott*].

¹⁶ The other two are *Plessy v Ferguson*, 163 US 537 (1896), and *Lochner v New York*, 198 US 45 (1905); some would add *Korematsu v US*, 323 US 214 (1944).

¹⁷ *Reference re Legislative Authority of Parliament of Canada in relation to the Upper House*, [1980] 1 SCR 54 [*Upper House Reference*].

¹⁸ *Attorney-General of Quebec v Blaikie et al*, [1981] 1 SCR 312 [*Blaikie 2*].

¹⁹ *Québec (Procureur général) v Canada (Procureur général) In The Matter of a Reference to the Court of Appeal of Quebec concerning the Constitution of Canada*, [1982] 2 SCR 793 [*Quebec Veto Reference*].

²⁰ Somewhat misleadingly indexed as: *McEvoy v Attorney-General of New Brunswick* [1983] 1 SCR 704 [*Superior Court Reference*].

²¹ These comments are based on a lengthy telephone conversation between one of the authors and former Chief Justice Brian Dickson, shortly before Chief Justice Dickson's death.

the firmly established convention (violated only twice up to that time, with the appointments of Chief Justices Fitzpatrick and Anglin, respectively) of treating seniority as the pre-emptive principle.²² The selection of Justice Laskin was so unexpected, so controversial, as to attract critical commentary—it was unsettling for a Prime Minister to be using discretionary choice to make an appointment with such significant institutional implications.²³

Initially, this novel appointment had precisely the institutional effect that might have been anticipated—the more senior judges closed ranks under Justice Martland's leadership and Chief Justice Laskin began earning his reputation as the Great Dissenter, authoring and joining dissents more frequently than any of his Chief Justice predecessors.²⁴ When the Court divided, the winning side more often than not was led by the three judges we might call “the Diefenbaker trio” (Justices Martland, Ritchie, and Judson), usually joined by most or all of the Quebec judges.²⁵ But the senior cohort of the Court suffered relentless attrition, and their successors were appointed by the government that appointed Chief Justice Laskin himself. Gradually, the balance shifted (most plausibly, the appointment of Justice Lamer in 1980 marked the critical moment); Chief Justice Laskin almost entirely stopped writing dissents (only four in the next five years) and the Court shifted quickly to the style that became the Laskin Court standard—an unusually high percentage of unanimous judgments, with an unusually large proportion of which were delivered by the Chief Justice. If we might put this in melodramatic terms: the Great Martland/Laskin wars

²² See Peter McCormick, “Choosing the Chief: Duality, Seniority, and Beyond” (2013) 47:1 J Can Stud 5.

²³ The implications of the appointment in terms of doctrinal direction were crystal clear—Professor Laskin, as he was before he became Justice Laskin, was a consistent champion of constitutional law ideas favouring civil liberties and of a vigorous interpretation of federal powers within the federal system.

²⁴ See Peter McCormick, “Assessing Leadership on the Supreme Court of Canada: Towards a Typology of Chief Justice Performance” (1993) 4 SCLR (2d) 409.

²⁵ See Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: Lorimer, 2000), esp Ch.6: “The Laskin Court”.

were over, the Laskin Revolution was under way. The language cases of 1979 seemed to fit neatly into this story of shifting voting balances and new emerging practices.²⁶

The two cases also display a first-glance appearance that fits this story. They are short, tight-lipped, and to-the-point, almost boiler-plate rather than expansive, nuanced explanations. They have the feeling of a somewhat tentative “test-drive”. The literature often suggests that national high courts, as well as giving final legal answers in a way that provides useful guidance to lower courts and future litigants, also have a public educative function.²⁷ Many of the later “By the Court” judgments fully deliver on this expectation, dealing at length with the background and logic and implications of the important matters they are deciding, striving mightily for a complete and persuasive resolution. Against that backdrop, these supposed “first two” are curiously reticent and constrained. *AG of Quebec v Blaikie et al*²⁸ is 4000 words long, *AG of Manitoba v Forest*²⁹ is 2000—roughly ten and five pages of text respectively, well below the average length of reasons for judgment for the Supreme Court. (We do not propose a “longer is always more important” rule, but it is still worth asking: how many significant and memorable Supreme Court judgments are less than 5,000 words in length?) The 7500 words of the *Upper House Reference*³⁰ later that same year—more than the two language case decisions combined—is closer to what we have come to expect from this style of judgment in subsequent years.

²⁶ More correctly: they almost fit, because they are actually about a year early. Justice Lamer wasn’t appointed until 1980, and one can’t even nudge the date earlier by (slightly less plausibly) considering Justice Chouinard’s 1979 replacement of Justice Pratte as the turnaround, because the critical *Blaikie* panel still included Justice Pratte, who had resigned at the time the decision was handed down.

²⁷ Ralph Lerner, “The Supreme Court as Republican Schoolmaster” 1967 Sup Ct Rev 127; and Christopher L Eisgruber, “Is the Supreme Court an Educative Institution?” (1992) 67 NYU L Rev 961. Mark Tushnet is skeptical; see “Style and the Supreme Court’s Educational Role in Government” (1994-5) 11 Const Commentary 215.

²⁸ *Supra* note 9.

²⁹ *Supra* note 10.

³⁰ *Supra* note 17.

We challenge this “Laskin thesis” on three different grounds. First, we ask where the idea for the use of “By the Court” judgments in such a context might have come from. Second, we express doubts about the notion of Laskin’s leadership role in the choice of this judgment presentation style. Third, and most importantly, we ask whether the 1979 language cases really represent the first significant examples of the practice.

III. PROBLEMS WITH THE LASKIN THESIS

A. First problem: the inspiration question

The first problem is: where might the idea of “By the Court” have come from? Courts are, for good functional reasons,³¹ not institutions that undertake innovation lightly. It seems reasonable to think that the innovation threshold is lower if the idea is copied from a comparable and respected institution. Any candidate for imitation must pass a double test: the first is “why them?”, which is to say, “why did that particular source appear both visible and attractive?”; and the second is “why then?” which is to say, “what made the attractiveness effective enough to overcome normal judicial resistance to significant institutional change?” Facing the same lack-of-a-literature problem on this question, we included this in our email “survey” and in our conference interactions, and we got four different suggestions. Since this question of inspiration could speak to purposes and implications, we will examine (and discard) each of these in turn.

³¹ That is to say: the authority of Courts is grounded in tradition and continuity, and the major weapon in their explanatory arsenal is the citation of past decisions; this in turn implies that explicit creative originality has the potential to raise accountability and power problems that might undermine broad acceptance of that authority.

1. *Inspiration Theory Number One:*

The United States: The "Model Neighbour" Theory

There is a longstanding unanimity practice on the United States Supreme Court (USSC),³² under the *per curiam* self-label, such that a Canadian style of anonymity might seem an obvious echo. The notion of an American inspiration is made more credible by the fact that two members of the Laskin Court (Chief Justice Laskin himself and Justice Estey) had done their postgraduate legal studies in the United States, both at Harvard, although a decade apart.³³ Today, the most memorable example is *Bush v. Gore*³⁴ (much too recent to be relevant to anything that did or did not happen in 1979), but this case is highly atypical; the hundreds of examples over more than a century are normally limited to cases where the legal issue is sufficiently non-problematic that it can be dealt with summarily. Somewhat paradoxically, since the 1930s, about half of their *per curiam* pronouncements have been accompanied by minority reasons, either dissenting or concurring. If "routine" may slightly overstate the convention, "(relatively) brief" does not.

Both for geographical proximity and relatively high profile, the USSC does seem an obvious focus for emulation, and this is particularly true after the high drama of the Warren Chief Justiceship (1953-1969), a transformative and watershed period whose impact is still felt in the United States.³⁵ But if today we take for granted a degree of judicial cosmopolitanism with judges from

³² See e.g. Stephen L Wasby et al, "The Supreme Court's Use of the Per Curiam Dispositions: The Connection to Oral Argument" (1992-3) 13 N Ill U L Rev 1; Stephen Wasby et al, "The per curiam opinion: its nature and functions" (1992-3) 76 Judicature 29; and Michael Gizzi & Stephen Wasby, "Per Curiam Revisited: Assessing the Unsigned Opinion" (2012) 96 Judicature 3.

³³ Chief Justice Laskin's period of study in the early 1930s coincided with a surge in the use of *per curiam* judgments by the USSC, and a considerable academic controversy about that use.

³⁴ *Bush v Gore*, 531 US 98.

³⁵ See e.g. Lucas A Powe, *The Warren Court and American Politics* (Cambridge, MA: Belknap Press of Harvard University Press, 2002)

different countries meeting to exchange ideas, this was much less the case forty years ago.³⁶ Even had Canadian courts been more open to ideas from elsewhere, the United States would not have been high on the list; the Canadian judicial attention at the time was proudly focused across the Atlantic, and the general feeling toward American courts and law was indifferent, if not actively hostile.³⁷ Even more to the point, it was not the use of anonymity for routine and legally simple cases that we have to explain, but its exact opposite—anonymity on any national high court's greatest challenge, which is to say major questions of constitutional law on controversial and divisive matters. This is not something that the American *per curiam* experience provides. As a final consideration: we are talking about the 1970s, when Canadian public opinion and public policy reflected a concern with apparently overwhelming cultural pressures from the United States, resulting in legislation to constraint foreign investment in general, and to promote Canadian content for the printed and electronic media. The suggestion of an American influence on this Canadian practice is, in our opinion, not convincing.

2. *Inspiration Theory Number Two:*

The English Courts: The "Mother Country" Theory

Although the "normal" English courts of appeal had no tradition of unanimity (tending instead toward the *seriatim* practice of all judges separately writing their own complete and largely duplicative reasons), the English quasi-court of the Judicial Committee of the

³⁶ The insularity of appeal courts until recently was, in retrospect, quite remarkable. It was not until the early 1990s, at a series of three annual conferences under the auspices of the Canadian Judicial Institute, that Canadian provincial court of appeal justices got together to compare notes and to work toward common standards on things like caseload reporting and statistics; one of the authors was an invited participant in all three conferences, and was surprised how often long-serving justices, even from neighboring provinces, were meeting for the very first time.

³⁷ For a brief discussion of this earlier anti-American tendency, see Ian Bushnell, "The Use of American Cases" (1986) 35 UNBLJ 157.

Privy Council (JCPC)³⁸ did have such a tradition. Conceiving itself as an advisor to the Crown rather than a court of appeal in a more ordinary sense, this body always delivered a single judgment and reasons, whether or not there was disagreement within the panel (as anecdotal evidence suggests there sometimes was).³⁹ But the JCPC practice during most of the post-Confederation period was for single judgments reported by the presiding chair of the panel, and not for anonymity in any strict sense. This is why Canadian constitutional law focused on specific leaders of the JCPC, such as Viscount Haldane, Lord Watson, and Viscount Sankey.⁴⁰ Only much earlier, during the nineteenth century, had the Judicial Committee delivered its decisions in a manner more like the "By the Court" style—a single set of unattributed reasons—but this practice did not persist.

Professor Laskin, before he became Justice Laskin and then Chief Justice Laskin, had been highly critical of the post-1949 Court's continued deference to the Judicial Committee—he scornfully called it the "English captivity,"⁴¹ a phrase that drove the choice of title for Professor Bushnell's massive history of the Court⁴²—and Chief Justice Laskin himself had followed through in 1976 by declaring that the Court would no longer necessarily follow Judicial Committee precedent.⁴³ A determined attempt to create

³⁸ For a description of the JCPC and its activities, see: Loren P Beth, "The Judicial Committee: Its Development, Organisation and Procedure" (1975) 3 PL 219; Loren P Beth, "The Judicial Committee of the Privy Council and the Development of Judicial Review" (1976) 24 Am J Comp L 22; John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002).

³⁹ During the 1970s, the Judicial Committee of the Privy Council began reporting minority opinions, but it never did so during the period for which it was the final court of appeal for Canada.

⁴⁰ See e.g. Frederick Vaughan, Viscount Haldane: *"The Wicked Step-father of the Canadian Constitution"* (Toronto: University of Toronto Press, 2010).

⁴¹ Bora Laskin, "The Supreme Court of Canada: A Final Court of Appeal of and for Canadians" (1951) 29 Can Bar Rev 1038.

⁴² Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queens University Press, 1992)

⁴³ Bora Laskin, "English Law in Canadian Courts since the Abolition of Privy Council

some institutional space between the Supreme Court and its once-superior English quasi-Court does not in any simple way presage an adoption of that quasi-court's decision style.⁴⁴

3. *Inspiration Theory Number Three:*

Civilian (Especially French) Courts: The "Bijural" Theory

Unattributed unanimous judgments are a routine feature of the civilian courts of continental Europe, with the French system being a prime example, and one which Canada's bijural system makes a possible source of emulation. As well, the Quebec higher courts (renamed the Quebec Court of Appeal in 1974, formerly labeled the Court of Queen's/King's Bench) had long used a style with some

Appeals," (1976) 29 Current Legal Problems 1, at 25, he states: "Servility to English decisions is no more; respect is likely to endure". Also see: Bora Laskin, "Address of the Chief Justice of Canada, The Right Honourable Bora Laskin, P.C." in *Celebration of the Centenary of the Supreme Court of Canada (1875-1975), The Role and Functions of Final Appellate Courts, Proceedings of the Symposium held on September 26 and 27, 1975 in the Lester B. Pearson Building, Ottawa*; at 26, he states:

Neither here nor in any of the countries whence come our distinguished guests is *stare decisis* now an inexorable rule for our respective final Courts. In this country, what appeared to be at times an obsessiveness about it came partly at least from our link with English law which also involved the ascendancy of English Courts, so that *stare decisis* amounted to a form of ancestor worship. We are now able to view it as simply an important element of the judicial process, a necessary consideration which should give pause to any but the most sober conclusion that a previous decision or line of authority is wrong and ought to be changed. Such a conclusion is not likely to be arrived at by any Judge or number of Judges without serious reflection on its conformity or consistency with other principles that are part of the institutional history or the institutional patterns of the Court. None of us operates without constraints that are both personal and institutional, born of both training and experience and of traditions of the legal system of which the Court is a part.

⁴⁴ By "quasi-court", we refer to the fact that the Judicial Committee was not part of the rather complicated English judicial hierarchy but rather originated—as the "Privy Council" reference signals—as an advisory body to the Crown; although much of its membership was drawn from the Law Lords of the House of Lords, this latter tribunal effectively comprised a sort of British "Supreme Court" before the United Kingdom Supreme Court was created in 2009.

echoes of the French style: a short, formal, syllogistic statement of the outcome to which was appended a more extended set of English-style discursive reasons attributed to a single member of the panel and sometimes accompanied by minority reasons. The Quebec judges who served on the Supreme Court of Canada, and especially those who had previously served on the Quebec appeal court, would present a logical transmission route for these ideas and practices.

But our description of the Quebec appeal court style contains our reason for dismissing the idea—it starts with an echo of the French compact, formal, syllogistic style, but this is followed by the more expansive English style, all the more so because it (like the English common law rather than the French civil law) relies heavily on the citation of judicial precedent. The central feature of many of the noteworthy "By the Court" judgments of recent decades is that they are lengthy explanations of highly contentious matters, and that they frequently deal with matters of constitutional judicial review. No higher French court could in any way serve as a model for either of these central features; the Quebec Court of Appeal's syllogistically staccato "Arrêt" has never had any counterpart in Supreme Court of Canada judgments, except perhaps for the single-sentence "Held" paragraph in the headnotes.

4. Inspiration Theory Number Four:

The Sharp Retort: The "Specific Event" Theory

One colleague shared an anecdote recounted to him by a justice of the Supreme Court of Canada, as an explanation of the emergence of the "By the Court" style.⁴⁵ The story ran as follows: the Court was dealing with an appeal from a provincial court of appeal in which the reasons for judgment were particularly unacceptable and objectionable. In order to make its collegial disapproval appropriately clear and dramatic—more so than simple unanimity even behind the authorship by the Chief Justice, and more so than simply including focused critical comment—the

⁴⁵ We were not told the name of the justice, and for the reasons indicated in note 12, we refrain from naming the colleague.

members of the panel decided to make their disapproval more emphatic by speaking as "THE COURT". After this one explicitly targeted example, the justice suggested, the device then came to be employed for wider purposes.

The story has a *prima facie* credibility, and a real attractiveness. It grounds the emergence of the device as a particularly emphatic response to a situation of frustration and exasperation. It creates a narrative organized around an understandable human reaction, as an optimal way of expressing a strong institutional position without any possible implications of "especially me, but others might not feel quite so strongly" overtones on the part of an attributed author. And it is reinforced by the source of the story—one would think that if anybody should know where the practice came from, it would be the judges of the Supreme Court itself.

The story is attractive, but we do not think it holds up. It does happen from time to time that a lower court comes up with a decision that is unusually aggravating, such that the Court wants to create some emphatic distance—we can think of two high-profile examples within the last fifteen years. The first included a "bonnet and crinolines" comment in a sexual assault case,⁴⁶ and the second was a lengthy appeal court diatribe against pay equity and the Supreme Court's track record on equality rights.⁴⁷ Both cases were dealt with by the Supreme Court in sets of reasons that included fairly direct rebukes to the lower courts, but neither took the form of "By the Court" judgments. Had they done so, this anecdote would carry rather more weight with us.

But there is a more serious problem with this suggestion, and that is the fact that neither *Blaikie*, nor *Forest* fit the suggested pattern. In both cases, the Court strongly affirmed both the lower court decision and the line of reasoning that supported the conclusions. There is no hint of any

⁴⁶ The case was *R v Ewanchuk*, [1999] 1 SCR 330, [*Ewanchuk*] an appeal from the Alberta Court of Appeal decision in 1998 ABCA 52, 57 Alta LR (3d) 235. At the time, it was thought that some of McClung JA's comments about male suicide may have been nastily targeted on one of the members of the SCC, making the situation even more provocative.

⁴⁷ The case was *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 [*NL Treasury Board*], an appeal from the Newfoundland Court of Appeal decision in 2002 NLCA 72. The profile of this particular appeal court decision was such that Roy B. Flemming used it as the introductory scene-setting anecdote in his book, *Tournament of Appeals: Granting Judicial Review in Canada* (Vancouver: UBC Press, 2004) at 1.

error, no overtones of harsh criticism or severe correction, no suggestion of egregious error or serious impropriety. Nor do the other significant Laskin Court's "By the Court" judgments indicated in our opening comments fit the theory any better. On our count, there are six such decisions: the two language cases, as well as a later follow-up (*Blaikie 2*); two decisions that were answers to reference questions from the federal government and not appeals from any lower court (the *Senate Reference* and the *Quebec Veto Reference*); and only a single case (the *Superior Court Reference*, indexed as *McEvoy*)⁴⁸ where a lower court decision was reversed, but with no sense of—and in our opinion no reason for—chastisement or reprimand. It is both intriguing and informative that this is to some extent the Court's own "folk history" of the practice, but although we concur that the answer is to be found in some special significant event that prompted an unusual response, we do not agree that this was the event.

In summary conclusion, then: We could not find anywhere in the literature, nor could any of our colleagues provide us with, a reasonable answer to the double-barreled "Why them? Why then?" question of an inspiration for the novelty of "By the Court" judgments, a surprising failure given the resistance to innovation that arguably characterizes judicial institutions. Although our colleagues made several interesting suggestions as to the source of the idea, we were not satisfied that any of them held up under closer investigation. The first problem remains: where did the idea for "By the Court" come from? We present our own fifth candidate theory below.

B. The second problem: the leadership question

The second problem is the leadership problem, which is to say: the Laskin question. If the first result of our non-scientific survey ("What was the first 'By the Court?'"") invariably gave us the language cases, the second ("Who was the innovator?") just as routinely gave us Chief Justice Laskin. The suggestion is entirely plausible, even compelling in its neatness. Chief Justice Laskin is the great reforming leader of a Chief Justiceship that is transitional to the Court's modern era, a transformative in-between to a dramatic

⁴⁸ *Supra* notes 9, 10, 18, 1, 19, 20; respectively.

"before" and "after" for the institution. If any period of the Supreme Court's history deserves the label "watershed", it is the Laskin Chief Justiceship; if any new idea or practice emerged during this period, then Chief Justice Laskin is the most obvious candidate.⁴⁹ But the closer we look at this in the specific context of "By the Court," the more problematic the ascription appears.

The first reason for our reservations is that the idea of a revised decision presentation format for Supreme Court decisions had been bruited in the 1950s, in the context of the end of appeals to the Judicial Committee of the Privy Council. One such idea, supported by then-Chief Justice Rinfret, was an emulation of the pre-1970 style of the Judicial Committee itself—that is to say, a single set of reasons formally attributed to the chair of the presiding chair of the panel. This idea was hotly debated, and one outspoken opponent was a young lawyer from Toronto who insisted that it would stifle the independence of judges and that it would strangle the notion that there were alternative tracks in the answering of legal questions in favour of a "single correct answer" format. That lawyer was Bora Laskin.⁵⁰ To be sure, people can change their mind, and Chief Justice Laskin may have done so as a result of his appellate court experience—first on the Ontario Court of Appeal, and then on the Supreme Court of Canada (by 1979 he was in his tenth year on the Court and his sixth year as Chief Justice)—but the earlier episode would make a Laskin leadership role in this innovation a little surprising, especially absent any explanatory recantation.

The second reason for reservations, perhaps not insurmountable, is that Chief Justice Laskin was only on the panel for one of the two companion decisions in the language cases—for *Blaikie*, but not for *Forest*.⁵¹ Indeed, as we describe below, Laskin was

⁴⁹ For a justification of these generalizations, see *supra* note 25 at ch 6.

⁵⁰ See Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005).

⁵¹ It must be conceded that *Forest* is a half-length somewhat repetitious echo of *Blaikie*, which makes *Blaikie* the stronger case for the innovation-initiating case, with *Forest* more of an abbreviated ditto mark.

in Vancouver and judicially *hors de combat* when oral argument was heard for *Forest* and for at least two months afterward, when the seven members of that panel were presumably considering the case and especially the question of who would be writing the judgment. It is not of course impossible for a Chief Justice's "Why don't we....?" to elide into a "Why don't you...." in an all-but-companion case,⁵² but it does provide a shakier initializing platform than one might have looked for. And the two language decisions are too short (4,000 words and 2,000 words, respectively) and too formal/technical to provide scope for a search for the stylistic fingerprints of a particular author.⁵³ We suggest that the panel composition element, and Chief Justice Laskin's physical absence for the months leading to delivery of the two judgments, make Chief Justice Laskin a less than completely convincing candidate for the role of innovator.

We briefly thought we had identified a third and even more conclusive reservation about the "Laskin initiator" theory: this being the fact that, according to Chief Justice Laskin's biographer, Chief Justice Laskin was not in Ottawa and therefore not participating in the Court's procedures and deliberations during the entirety of the critical Fall Term of 1979.⁵⁴ He was in Vancouver, where he had undergone emergency surgery for a life-threatening condition such that there was for a time some real question about his survival, followed by a period of convalescence which (biographer Philip Girard says) kept him away from the Court until the middle of

⁵² Companion cases are cases that raise related issues and that are argued on the same day before the same panel, with judgments handed down on the same day; *Blaikie* and *Forest* meet only the third of these criteria.

⁵³ We did briefly think that we had found such a fingerprint in the "I am fortified" phrase in *Blaikie*, given that Justice Laskin used this phrase more often than any other justice, contemporary or previous, but "more often" is too frail a reed to support a "Chief Justice Laskin must have written it" conclusion.

⁵⁴ Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005); repeated in Philip Girard, "A Tempest in a Transatlantic Teapot: A Legal Historian's Critical Analysis of Frédéric Bastien's *La Bataille de Londres*" (2014) 51:2 Osgoode Hall LJ 673.

January. Although it is not impossible to think of him having some interaction with his colleagues by telephone, this seems a weak platform for this sort of ground-breaking, innovation-creating leadership. At the same time, this absence suggests a scenario for adoption of a non-standard presentation format for the judgment: it precluded a unanimous judgment delivered by the Chief Justice, the most obvious way of giving the case its appropriate *gravitas*,⁵⁵ which suggests that a novel “By the Court” solid common front might have presented itself as an attractive alternative. But this speculation is, ultimately bootless—Professor Girard is mistaken. Chief Justice Laskin had returned to Ottawa by December and was fully participating (apparently contrary to the advice of his doctors) in the Court’s activities⁵⁶—he delivered two judgments for the Court, one separate concurrence, and six dissents in December, including a judgment delivered on the same day as the language references.⁵⁷ The interruption does explain, however, why Chief Justice Laskin was on the *Blaikie* panel (oral argument in June), but not on the *Forest* panel (oral argument in October).

C. The third problem: the timing question

The third problem is one of simple timing, which is to say: when did the first “By the Court” judgment really occur? The widespread popular acceptance of the standard timeline notwithstanding, were the language cases really the first examples of the “By the Court” device for the Court? Was 1979 truly the occasion for the first? We suggest that the answer is twice “no.” We will first give a technical

⁵⁵ For a consideration of whether the Supreme Court really does have a practice whereby the Chief Justice delivers a disproportionate share of the more important decisions, see Peter McCormick, “Who Writes? Gender and Judgment Assignment on the Supreme Court of Canada” (2014) 51:2 Osgoode Hall LJ 595, especially at 619, the section on “The Chief Justice Factor.”

⁵⁶ Both the earlier return, and the “more than his doctors wished” observation, are based on an email exchange with one of Laskin’s law clerks.

⁵⁷ The case was *Ernewein v Minister of Employment and Immigration*, [1980] 1 SCR 639 [Ernewein].

answer, a "not quite" that will annoy rather than satisfy because it simply forces a more precise reframing of the question; such a reframing reduces this objection to a quibble in a way that seems to save the standard account. Then we will give a much more resounding and conclusive answer, even to the more tightly-focused question, in such a way as to force a major reconsideration of the matter, to provide a new date of first use and to suggest a different candidate for the innovator. Moreover, it points us to a revised origin story that is rather less edifying, even embarrassing, for the Court. That answer, as well as the implications that flow from the need for a more careful refinement of the question, are the real thrust of this paper and of our attempt to rewrite this part of the history of the Supreme Court of Canada.

IV. REFINING THE QUESTION: THE MINOR TRADITION

Were there any "By the Court" judgments before the language cases of 1979? One scholar we spoke to⁵⁸ thought she remembered one earlier case, but this turned out to be an understatement. Our careful perusal of the *Supreme Court Reports*, a month spent by one of us going through the Court's archives, turned up dozens of earlier examples, the very earliest in 1891.⁵⁹

These earlier cases, however, almost all involved short reasons directed toward procedural matters (applications or motions, rather than full-fledged appeals of lower court judgments) or to minor and straightforward issues, the latter being much more prevalent when a much larger part of the caseload was comprised of appeals by right. They fell so far short of the controversial constitutional dimensions of the two language cases as to provide no real precedent whatever; nobody would be satisfied with any suggestion that their existence, in and of itself, provided a satisfactory answer to the origins

⁵⁸ Professor Jamie Cameron of the Osgoode Hall Law School; email communication.

⁵⁹ *Moir v The Corporation of the Village of Huntingdon*, (1891) 19 SCR 363, handed down on November 11, 1891 [*Moir*].

question for the modern high profile Supreme Court use of the device. We therefore rephrase our initial question in the manner that most of our readers no doubt had in mind all along: when was the first time that the anonymizing “By the Court” device was used by the Court in a significant case of high profile and major consequence? Our earlier examples melt like the snow in spring under the impact of this rephrasing, but they do not disappear entirely. Three cases survive, a trilogy within a single calendar year, and these are the serious basis for our challenge to the standard narrative.

V. THE TRUE ORIGIN OF “BY THE COURT”: THE 1967 TRILOGY

The calendar year 1967 saw an unusual trilogy of cases that we will suggest mark the true birth of the “By the Court” judgment. None of the three actually used that label—all three styled themselves as “joint opinions” instead—and one of them, the critical first case, was not even unanimous (with a single dissenter), but we do not think this compromises our suggestion that these are the true beginning of the new style; we will expand upon this argument below. At any rate, they represent the first occasion an anonymous format was used in a significant case to give an unusual emphasis to the judgment. Their transitional status is emphasized rather than refuted by the fact that they did not use the “By the Court” self-label; instead, they called themselves “Joint Opinions”—the only three judgments in the history of the Supreme Court that have used this label. The critical element of continuity, the factor that makes them the transition point, is that all three are extended anonymous judgments in major cases, and this distinction survives the fact that one of them was anonymous without being unanimous. Together, they introduce what we are calling the “grand tradition” of “By the Court” judgments, which is to say the redeployment of the device from routine and procedural matters (as had been the case for

almost a century) to major cases that dealt with deeply important matters.

Counting the trilogy back from the latest to the earliest:

- The third case of the trilogy was *Ontario v. Canada (Board of Transport Commissioners)*,⁶⁰ a constitutional law case dealing with the federal-provincial division of legislative authority; the question was whether the tolls charged for a commuter train service using provincial stock but operating on Canadian National Railway tracks were subject to the regulatory authority of the federal Board of Transport Commissioners.
- The second and middle case of the trilogy was the *Reference re: Offshore Mineral Rights*,⁶¹ also a constitutional law case dealing again with the federal-provincial division of legislative authority; at stake were proprietary rights and legislative authority over certain lands adjacent to the British Columbia coast.
- The third and earliest of the case, and (we think) the answer to the question about the emergence of the practice, was the *Reference Re: Steven Murray Truscott*.⁶²

VI. STEVEN TRUSCOTT AND THE *TRUSCOTT REFERENCE*

The name of Steven Truscott has reverberated for decades through the Canadian justice system. He lived in the small town of Clinton, Ontario and in 1959, he was convicted of the rape and murder of a 12-year-old classmate, Lynne Harper. He was only fourteen years old when the judge announced the verdict and the sentence in the famous historic formula:

... you will be kept in close confinement until Tuesday, the 8th day of December, 1959, and upon that day and date, you be taken to the place of execution and

⁶⁰ *Ontario v. Canada (Board of Transport Commissioners)*, [1968] SCR 118, [*Transport Commissioners*], decided on November 20, 1967.

⁶¹ *Reference re Offshore Mineral Rights (British Columbia)*, [1967] SCR 792, [*Offshore Mineral Rights Reference*], decided on November 7, 1967.

⁶² *Reference Re: Steven Murray Truscott*, [1967] SCR 309, [*Truscott Reference*], decided on May 4, 1967.

that you there be hanged by the neck until you are dead. And may the Lord have mercy upon your soul.⁶³

The verdict and sentence were immediately controversial for two reasons. One was the young age of the defendant, surprising in any event but even more so when it culminated in a death sentence; the other was the fact that only circumstantial evidence (some of it conflicting) linked him to the crime. An appeal to the Ontario Court of Appeal was unanimously dismissed on January 21, 1960, although the government of Canada commuted his death sentence to life imprisonment shortly afterward. An application for leave to appeal to the Supreme Court was made, but it was refused by a panel of five Supreme Court judges on February 14, 1960.⁶⁴

The unanimity of these nine judges (one trial judge, three provincial appeal court judges, and five Supreme Court justices) is striking. It seems to signal a very straightforward legal case, and yet there was persisting controversy about the trial, not just in Canada, but around the world. The picture of a fourteen-year-old boy being sentenced to death on the basis of circumstantial evidence was not the sort of thing that was expected from a country like Canada. It was a "Project Innocence" case before its time. The level of controversy was ratcheted upward considerably when Isabel LeBourdais published her book, *The Trial of Steven Truscott*⁶⁵, in 1966, an extensive analysis of the conduct of the police during the investigation and of the details of the trial proceedings themselves. The public controversy reached the point where the Canadian government felt obliged to make some formal response. It announced in April 1967 that there would be an official review of the case, and this ultimately took the form of a reference question to the Supreme Court of Canada.⁶⁶ The basic question was: had the Supreme Court of Canada heard the appeal in 1960 (as it would have

⁶³ Justice RI Ferguson to Steven Murray Truscott (September 30, 1959).

⁶⁴ It may seem curious that there was not an appeal by right for a death sentence, but under the then-wording of the *Criminal Code*, there was not; the *Code* was amended shortly afterward, at least partly in response to the outcry over the *Truscott* case, such that there would from then on be an appeal by right in such a case.

⁶⁵ Isabel LeBourdais, *The Trial of Steven Truscott* (Toronto: McClelland & Stewart, 1966).

⁶⁶ The juxtaposition of "1967" and "Minister of Justice" immediately suggest a powerful name from recent Canadian political history—that is to say, Pierre Elliot Trudeau—but the reference question was submitted to the Supreme Court some months before Trudeau assumed the Justice portfolio.

been obliged to do had the subsequent Criminal Code amendments been in place), would it have allowed the appeal?

We must admit that we find this a rather surprising maneuver.⁶⁷ Strictly speaking, it is the kind of question the Court often gets in a reference case, in the sense that it starts with a counter-factual hypothesis and invites the Court to explore such a possibility for the guidance of official actors. In the immediate circumstances, however, it carried quite different overtones. For one thing, the entire Canadian judicial system, of which the Supreme Court is the apex and in some sense the spokesperson and champion, had been the subject of sustained public criticism within Canada and around the world for a full decade; if the court system as a whole is the target of the criticism, the highest court within that system is perhaps not the optimal body to look into it. For another, the Supreme Court itself was already directly involved in the events that had contributed to the controversy: a panel of five Supreme Court justices had unanimously denied an application for leave to appeal. Worse yet, four of those justices were still on the Supreme Court and (compounding the problem) one of them was the Chief Justice himself.⁶⁸ The apparently neutral "How should this ten-year-old case have been dealt with had the statute been different?" could not be entirely stripped of its overtones of "Now that you have had time to think about, will you admit that you made a mistake?", a direct challenge to the four judges and an implicit challenge to the institution itself. These considerations made this reference case a unique existential challenge to the credibility and the prestige of the Supreme Court and its sitting members, a case quite unlike anything else in memory.⁶⁹

⁶⁷ There were real similarities to the earlier case of *R v Coffin*, [1956] SCR 191, a federal reference after the Court dismissed an application for leave to appeal, although in that case only a single Supreme Court justice had been involved in the decision on the application.

⁶⁸ We could not find a list of the names of the judges on the application panel in any of the writings about the Truscott case, but the registrar of the Supreme Court of Canada was kind enough to provide us with this information.

⁶⁹ It may be that the government was reluctant simply to issue a full pardon in such controversial circumstances because this would have meant a degree of political involvement in a purely legal case that would compromise the justice system; we fail to see how the reference question itself was not a comparably dangerous challenge to the Court, and one that in our opinion the Court ultimately failed, to its lasting discredit. LeBourdais had recommended, and internal memos now show us that the members

If the case was unique, so was its procedure. The Court sat as a full panel of nine, something that was more unusual in the 1960s than it has become more recently. Because it was admitting new evidence, it effectively turned itself into a trial courtroom with witnesses and expert testimony and cross-examination—it did not look remotely like a normal appeal court proceeding. The hearings stretched over four days, and the Court delivered its judgment three months later, on May 4, 1967. The reasons were unusually long for the time—more than 30,000 words—and unlike anything else that we have ever seen in the *Supreme Court Reports*. They read like a trial judgment rather than an appeal judgment, replete with close examination of the witness testimony, a careful dissection of expert evidence with extended quotations, and direct evaluations of witness credibility. In the end, the Court concluded that the trial court had reached an appropriate verdict, that the Ontario Court of Appeal had been right to dismiss the appeal, and that the Supreme Court panel had been right to deny the application for leave. The evidence, they said, was "not only consistent with the guilt of" Truscott but even more categorically it was "inconsistent with any rational conclusion other than that he was the guilty person." Of Truscott himself, the Court found "many incredibilities (sic)" in his evidence, and flatly concluded: "we do not believe his testimony."⁷⁰

But the decision was not unanimous; only eight of the nine judges supported it. The ninth, Justice Emmett Hall, wrote an extended dissent, finding grave errors in the conduct of the trial to such an extent that the verdict should be set aside. According to his biographer, Hall was the subject of considerable resentment within the Court for his stand on this case, feelings that lingered for the rest of his service on the bench.⁷¹ This

of the Court fully agreed, that it was not the best body to deal with this question, and an independent committee or commission of some sort—whatever its findings—would have better served the situation.

⁷⁰ *Supra* note 62 at paras 199, 202. Truscott was paroled in 1969, and his parole restrictions ended in 1974. In 2001, he made an application under more recent provisions of the *Criminal Code* to have his conviction reviewed, which led to an enquiry that resulted in the Kaufman Report in 2004, followed by a reference to the Ontario Court of Appeal which resulted in an unanimous finding that the trial resulting in his conviction was not valid and that its decision should be set aside. (*Re Truscott*, 2007 ONCA 575.)

⁷¹ Frederick Vaughan, *Aggressive in Pursuit: The Life of Justice Emmett Hall* (Toronto:

again shows how unusually highly charged the case had been—dissents are a routine feature of the Court's decisions, something that comes and goes without generating lasting resentments, and must do so if the institution is to continue to function effectively. That these resentments lingered and remained strong is a sign of the unique significance of the *Truscott Reference* to the institution.

The most obvious way for the eight judge majority to have presented its decision in such a high-profile case was a single set of reasons attributed to the Chief Justice with the concurrence of the other seven.⁷² What is interesting about the case, and central to the argument we are making about the significance of this case in the emergence of a new style of judgment delivery, is the fact that they did not do this—perhaps because the Chief Justice was one of the four who had served on the implicitly impugned panel in 1960, which would have given such a presentation format an unfortunate but unavoidably defensive appearance, and perhaps because the direct challenge to the credibility of the institution was so transparent. Instead, what we find is a "joint opinion" of the eight judges listed in order of seniority. As far as we can determine, this is the first time that the Court ever used this "joint opinion" self-description for reasons that constituted a judgment of the Court. They did not use the "THE COURT" designation, certainly because of Hall's solo dissent, and perhaps also because the case was not of the sort (minor, routine, short) that the Court had for decades been deciding under this rubric. In any event, they presented us with what was then a complete novelty for the Court—an anonymously-authored set of extended reasons in a major high-profile case.

This could of course have wound up being a "one off"—the circumstances of the *Truscott Reference* were utterly exceptional, like those "once in a century" perfect storms we hear about in the news. But in fact, it did not. Seven months later, on November 7 and November 20, the Court handed down its decisions in two constitutional cases. As in the *Truscott Reference*, both reasons were self-presented as a "Joint Opinion". The *Truscott Reference* constitutes a critically important first step toward the

University of Toronto Press, 2004).

⁷² We take it that there is some presumption that the Chief Justice will write for the Court on cases of particular significance, and conversely that this helps to give a decision a higher profile; for some supporting evidence, see note 55.

modern "By the Court" practice—it employs an anonymizing device for the resolution of a major case of broad significance, the first ever such example for the Court. But the other two cases in the trilogy represent an equally important second step: they move the anonymizing practice away from the utterly unique circumstances of the *Truscott Reference*, and they apply it to cases involving significant findings in constitution law. Just as significant, one is a reference question from the federal government, the kind of case that has provided "By the Court" with its center of gravity ever since. There may have been only one *Truscott Reference* case, but questions about constitutional law are a regular part of the caseload. Because both of these decisions (unlike the *Truscott Reference*) were unanimous, they were not joint opinions of listed judges but rather "Joint Opinion(s) of the Court," making them an interesting terminological halfway house between the "joint opinion of listed judges" of the *Truscott Reference* and the "THE COURT" designation of 1979 and after. Together, these three cases constitute a unique trilogy in which the Supreme Court of Canada first began to use an anonymous judgment format to deliver its decisions on major issues, departing from its longstanding tradition of specifically authored judgments for all but the most routine cases. This, we suggest, is where the panels of the Laskin Court found their inspiration in 1979.

We suggest that the *Offshore Mineral Reference* is the first example of what we are calling the "grand tradition", the *Truscott Reference* as the triggering transition for the emergence of the anonymous judgment for major cases. Before the *Truscott Reference* and the other cases of the 1967 Trilogy, the anonymous and impersonal style of "By the Court" promised a short set of reasons dealing with routine or procedural matters; since 1979, it is frequently a marker of a major constitutional decision and often anticipated as such. And the origin of that new practice and style can, we suggest, be directly linked to a controversial murder trial involving a fourteen-year-old boy in 1959, and to a remarkable storm of public protest whose high-water mark reached as far as the federal cabinet and finally the Supreme Court itself.

VII. INNOVATION AND PATH DEPENDENCY

Our comments assume a notion of judicial innovation that we will make more explicit. We would suggest that only reluctantly, only with very

strong reasons, and only under unusual circumstances will an institution—and particularly an institution like a national high court, which relies heavily on continuity and consistency to optimize its influence—undertake significant change in some highly visible aspect of its operations. For the Supreme Court of Canada, we think that the *Truscott Reference* was just such a situation. The Canadian justice system had been uniquely under attack, enduring an intensity of public criticism that had, in two different waves, persisted for almost a decade. Worse yet, this had happened under circumstances that had fully engaged the Supreme Court itself, which had, by denying the application for leave to appeal, implicitly attached itself to the trial result that had created the waves of criticism; for these double reasons, the Supreme Court was very much put in a defensive posture. The years went by, but the problem did not go away—it just got worse. So intense was the criticism that it eventually swayed the government itself, which yielded to the pressure for a review of the critical episode, but it did so in such a way as to ramp up the pressure on the Court by putting the Court itself firmly back in the spotlight. In the modern *Charter* era, the Court is presumably no longer surprised when, from time to time, it finds itself caught out in the open and under fire in this way; in an age when the Supreme Court could without irony be described as a “quiet court” that eschewed political controversy,⁷³ this was far from business as usual; it was the stuff of nightmares.

It is not completely surprising, then, that the Court essentially decided to double down—rather than saying “oops”; rather than saying “different rules would have generated different results, how unfortunate that we weren’t given those better rules in time”; rather than retreating or equivocating or temporizing in any way—they stood firmly by their previous position. As the “double down” metaphor implies, they did so by ramping up the rhetoric (“not consistent with any other conclusion”), by challenging the credibility of the person at the center of the storm (“we do not believe his testimony”), and by embracing the original outcome even more vigorously and emphatically. Criticized by the media, excoriated by public opinion, condemned in other countries as well as their own, abandoned by federal government that passed the buck with a problematic reference question, abandoned again by one of their own (Vaughan’s

⁷³ Ronald I Cheffins, “The Supreme Court of Canada: A Quiet Court in an Unquiet Country” (1966) 4:2 *Osgoode Hall LJ* 259.

biography of Hall fully justifies this description of how Hall's colleagues felt about his solo dissent): the judges of the Supreme Court must have felt beleaguered as no previous judges of that Court had ever been. Denied the solid front of a unanimous judgment, denied the Chief Justice as a fully credible institutional spokesperson by his own direct involvement with the earlier leave decision, but still anxious to make their point with a unified emphasis that was not normally necessary, the judges came up with a new-but-not-new idea. It was not new in that they had been using the anonymity of "The Court" to present a unified institutional position on routine and procedural matters for many decades; but it was distinctly new in that they had never used such institutional anonymity in the context of a major, controversial, high-profile case. Unique circumstances call for unique responses; innovation even in innovation-resistant institutions responds to exceptional pressure—necessity, as the old saying has it, is the mother of invention. The result was the novelty of the "Joint Opinion", of anonymity in the context of a not-quite-unanimous decision.

But if reluctant innovation under unique pressure is the important dimension of the emergence of "By the Court," path dependence explains its subsequent use. There can only be one "first", after which it is less a question of *whether* than of *when* to consider doing it again. It may well be that the justices thought of their device as having "worked", as having deflected the challenge and brought the institution through in relatively good order. With the benefit of hindsight, including Truscott's vindication by the Ontario Court of Appeal in 2007, we have our doubts about whether it actually worked that well,⁷⁴ but certainly the immediate sense of crisis dissipated and the immediate fall-out was directed elsewhere—for example, into public pressure to do away with the death penalty itself. If the device was seen by the judges of the Court itself as having succeeded, it must have made eminent sense for the person we are about to propose as its architect to consider using it again for a tangentially similar purpose to present a unified institutional response to a

⁷⁴ It seems hardly controversial to describe this as not just a challenging, but also a humiliating and embarrassing, moment in the Supreme Court's history, not least because it culminated forty years in a decision by a panel of Canada's strongest provincial Court of Appeal that emphatically and unanimously concluded that he should not have been found guilty, although it stopped just short of saying that Truscott could not possibly have committed the crime. This must stand as repudiation without precedent, a retroactive shaming of an earlier age and an earlier Court.

major question—such as a constitutional reference cases by the national government.

Path dependence implies that the sequence matters—had there been no *Truscott Reference* case, no utterly exceptional circumstances generating the highly unusual response, then we are suggesting that there would have been no “Joint Judgment of (listed judges)” that could morph into a “Joint Judgment of the Court” and then into “By the Court.”. There would, therefore, have been no new judgment-delivery device available as part of the Court’s repertoire for a broader set of future cases, less immediately threatening to the institution itself but addressing major legal issues such as constitutional matters.

A single episode cannot be assimilated to a general rule of application, but repeated episodes can turn into a generalizable practice that may not have been implicit in the initial use, may not have been fully intended or even contemplated at that time. The subsequent story of “By the Court” judgments is complicated, but we will settle now for the most obvious generalization about its use: since the *Truscott Reference*, but never before the *Truscott Reference*, the “By the Court” judgment has become the normal way that the Court has dealt with federal reference cases so long as unanimity or near-unanimity could be achieved (which it usually could).⁷⁵ It is neither fanciful nor forced for us to suggest that absent the *Truscott Reference*, this practice would almost certainly never have emerged; this is what path dependence looks like. It is not that later cases of this sort were exactly like the *Truscott Reference* because they clearly were not; not only was the direct institutional challenge much lower but many of those later cases did—and *Truscott* did not—have constitutional overtones. The point is that once unusual circumstances have prompted an unusual response, that response is available for more calculated use in other circumstances such that patterns may emerge that were not in any strong sense implicit in the first example. But the result is that “By the Court” judgments are like a highly respected family that discovers the original source of the family fortune was really a bootlegger or an embezzler; we are therefore not surprised that the academy has generated more genteel origin theories (the

⁷⁵ Justice Gonthier’s judgment for the Court in the *Reference re Quebec Sales Tax*, [1994] 2 SCR 715, is the only counter-example since 1967.

1979 cases) or that the institution itself has found its own folk history (the “sharp retort”).

VIII. A FINAL QUESTION: NAMING NAMES

One final detail: we have made our suggestions as to when and why the grand tradition of the “By the Court” style emerged; what remains is the question of “who?” Given our explanatory theory, this actually turns out to be two questions: first, who was responsible in 1979; and second, who was responsible in 1967?

As to who was responsible in 1979: someone at the judicial conference had to make the suggestion, had to say “why not an anonymous judgment, jointly attributed to the panel as a whole?” We have already suggested our reasons for doubting that it was Chief Justice Laskin—because he had strongly opposed a similar idea several decades earlier; because he was only on the panel for one of the two cases; because he was absent from Ottawa for much of the term during which the members of the two panels were working toward the December judgments. A Laskin role is not impossible—he was part of the *Blaikie* panel; he could have been interacting with colleagues by mail or on the phone for part of his convalescent period in Vancouver; and he was definitely back in Ottawa and much more active than his doctors wanted him to be for the crucial weeks just before the judgment was delivered—but we remain doubtful.

The justices we think most likely to have made the suggestion were the ones who had been there for the *Board of Transport Commissioners* case and the *Offshore Mineral Reference* and especially the *Truscott Reference* itself. These were the ones who could say: here is how we handled a challenging situation a dozen years ago that presented some real problems for the Court; perhaps we should consider using it again now. The two justices who qualify—the two who served on the 1967 panels and on both the *Forest* and the *Blaikie* panels—are Justices Martland and Ritchie. It seems to us that one or both of these justices are the most credible candidates for making the suggestion; and it is more poetically neat to make Justice Martland the stronger candidate because he was the judge passed over when Bora Laskin became Chief Justice.

Perhaps the more tantalizing question is: who was responsible in 1967, when the idea was truly new and had no precursor example on which to draw? At first glance, the most logical candidate would be the Chief Justice

at the time, namely Chief Justice Taschereau, but from Vaughan's account in his biography of Justice Hall, Chief Justice Taschereau was (to put it politely and delicately) failing, and the *de facto* leadership of the Court had devolved onto then Justice Cartwright, soon to become Chief Justice himself in time for the decisions in the other two cases in the Joint Opinion trilogy. A major role for Chief Justice Cartwright might also explain why the device subsequently vanishes for a dozen years. By 1970, Chief Justice Cartwright had retired and had been replaced by Fauteux and the "joint opinion of the court" device for constitutional cases fell into disuse—perhaps because Chief Justice Fauteux was less taken with the idea; perhaps because of a paucity of constitutional cases in general and federal reference cases in particular. Chief Justice Cartwright may be an unlikely person to have come up with a significant innovation that is typically attributed to the Laskin Court, just as Justice Martland may be a comparably unlikely conduit, but that is where the historical trail has taken us.

IX. CONCLUSION

As we started this project, there were a number of things we were confident that we knew about the "By the Court" judgment style:

- We thought they were an innovation of the Laskin Court, continued by Chief Justices Dickson, Lamer and McLachlin.
- We thought that Chief Justice Laskin himself had played some significant role in the introduction of the practice—Chief Justice Laskin having led the Court to unprecedented levels of unanimity, this seemed the next logical step, a sort of "unanimity plus".
- We thought they were anchored in the particular events of the late 1970s, which is to say the rise of Quebec/Rest of Canada tensions and challenges.
- We thought they were always used for (and therefore a reliable marker of) major decisions, primarily constitutional decisions.
- We thought they were somehow connected to the American *per curiam* tradition; the connection possibly provided by Chief Justice Laskin's graduate studies in law at Harvard.

As we accumulated and evaluated the empirical evidence, we find that we were wrong on all counts. Instead:

- The 1979 "By the Court" judgments were not an innovation in a strict sense, because the Court had been using this format to deliver decisions on routine and procedural questions for about ninety years.
- Neither was it an innovation for the Laskin Court in the late 1970s to have moved this practice from its earlier focus on routine cases to major constitutional decisions, because this, too, had already happened, a dozen years earlier.
- Neither the American *per curiam* label, nor American *per curiam* practice shed any light whatever on Canadian Supreme Court procedures through or before the 1970s.
- Far from leading the move, Chief Justice Laskin himself almost certainly was a bystander who might well have had serious reservations about it.

At any rate, what initially seemed a simple enquiry into the emergence of "By the Court"—a straightforward literature review for the first chapter of a master's thesis—turned into something considerably more complex and problematic. The hunt for answers took us back into the earlier history of the Supreme Court of Canada, and to one of its most embarrassing moments, the *Truscott Reference*. It shifted the spotlight away from the Laskin Court and its leader to an earlier Chief Justice with a much lower level of name recognition.

Remarkably, recent circumstances have given us something of a replay of the most critical moment of our story—a reference case that placed the Court as an institution in a difficult and embarrassing corner, with a single dissent that kept the Court from presenting a truly united front, to which the majority responded with the anonymizing device of a joint judgment attributed equally to a string of named judges. In 1967, this was the *Truscott Reference*; in 2014, it was the *Nadon Reference*. History may not repeat itself, but sometimes it echoes.