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The Dissenting Opinion: Voice of the Future

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THE DISSENTING OPINION: VOICE OF THE FUTURE?©

BY THE HONOURABLE CLAIRE L'HEUREUX-DUBÉ*

Madame Justice L'Heureux-Dubé explores the history and the role of dissenting opinions in Canadian law. She argues that dissents contribute to the development of the law through their prophetic potential. Dissents are also fundamental elements of judicial discourse, serving to safeguard the integrity of the decisionmaking process and judicial independence. The Canadian legal tradition, like its American counterpart, provides numerous examples of why, in 1951, future Chief Justice Bora Laskin praised the "precious right" to dissent. Unanimity is not indispensable for judicial legitimacy or legal stability. In fact, the presence of judicious dissents can portray the true complexity of legal reasoning more accurately, while offering new possibilities for the law's evolution to judges, lawyers, and the public.

Madame le juge L'Heureux-Dubé examine l'histoire et le rôle des opinions dissidentes en droit canadien. Elle maintient que les dissidences contribuent au développement du droit en raison de leur potentiel prophétique. Les jugements dissidents sont un élément fondamental du discours juridique puisqu'ils servent à préserver à la fois l'intégrité du processus de prise de décision et l'indépendance judiciaire. Les traditions juridiques canadiennes et américaines fournissent de nombreux exemples qui appuient l'idée du "droit précieux" d'être dissident énoncé en 1951 par le futur juge en chef Bora Laskin. L'unanimité n'est pas indispensable pour assurer la légitimité judiciaire et la stabilité juridique. En effet, la présence des dissidences représente fidèlement la complexité réelle du raisonnement juridique, tout en offrant aux juges, avocats et aux citoyens de nouvelles possibilités évolutives du droit.

I. INTRODUCTION	496
II. THE TRADITION OF THE DISSENTING OPINION IN CANADIAN LEGAL CULTURE	499
III. DISSENT AND PROPHECY	504
IV. DISSENTING OPINIONS AND DIALOGUE	509
V. THE DISSENTING OPINION: SAFEGUARDING THE INTEGRITY OF THE LAW AND JUDICIAL INSTITUTIONS	512
VI. CONCLUSION	516

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I. INTRODUCTION

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.¹

A thousand years ago, the choirs of Europe sang Gregorian chant in unison; their melodies were beautiful, clear and orderly. But these melodies could not satisfy the human spirit, which conceived of a multitude of polyphonic harmonies and other musical forms. Courts, too, may speak in unison or in a plurality of voices: the tradition of dissent in the courts of common law countries has long allowed for a certain measure of polyphony in the voices of the law.

In my view, dissenting opinions² in Canada have encouraged a blossoming of legal concepts and solutions, without going so far as to cast a pall of dysfunctional dissonance over the courts. The tradition of dissent is deeply rooted in Canada. Here, judges exercise their "precious right" to dissent when they believe it to be necessary,³ even while observing certain constraints to which they voluntarily submit in order to guarantee a minimum of institutional harmony. They have a tendency to

¹ C. Hughes, *The Supreme Court of the United States* (New York: Columbia University Press, 1928) at 68. Chief Justice Hughes was of the United States Supreme Court.

² It is essential that we define "dissenting opinion" at the outset, to provide a framework for the discussion to follow. A dissent may relate either to the result arrived at by the majority in applying the law, or to the principles of law on which that result is based. The latter form of dissent is of particular interest to us here, since it is more likely to have a significant impact on the law in the future than would a dissenting opinion disputing only the result. It should also be noted that in Canada, as in England and the United States, there may be several individual opinions that are in mutual agreement or disagreement with one another. This may lead to a "plurality" decision (the opinion supported by the greatest number of judges), accompanied by other opinions which may agree in the result, but not as to the method by which the result is reached. In such cases, there are no majority reasons *per se*. These types of decisions—now relatively rare in Canada—are a legitimate target for criticism, as they tend to detract from the clarity and authority of the decision. See C. L'Heureux-Dubé, "The Length and Plurality of Supreme Court of Canada Decisions" (1990) 28 *Alta. L. Rev.* 581.

³ The former Chief Justice of Canada, Bora Laskin, spoke of the "precious right" of dissent. See B. Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 *Can. Bar Rev.* 1038 at 1048. In Canada, however, little has been written about the tradition of the dissenting opinion, although dissenting opinions are often the subject of comment in law reviews. See *infra*, note 46.

share with their English⁴ and American⁵ colleagues a positive, sometimes even idealistic, vision of dissenting opinions, citing with admiration certain "great dissents" relating to social justice and human rights.

Justice Brennan of the United States Supreme Court eloquently conveyed the essence of this vision in his observation that the ideal dissenting opinion is both prophetic and persuasive.⁶ He suggested that the dissenting opinion also safeguards the integrity of judicial institutions by requiring the majority to justify the rationale for, and the implications of, its decision.

Most dissenting opinions, however, do not fully live up to this description. This may be because they advance essentially the same analysis (if not the same result) as the majority, or because the vision of the law they propound holds no attraction for future generations.⁷

⁴ See the comments of a number of English Law Lords during the 1960s in A. Paterson, *The Law Lords* (Toronto: University of Toronto Press, 1982) at 104-09.

⁵ Much has been written in the United States regarding the contribution of dissenting opinions to American law. See, for example, P. Jackson, *Dissent in the Supreme Court* (New York: William S. Hein & Co., 1991); D.E. Lively, *Foreshadows of the Law* (Westport, Conn.: Praeger, 1992); A.S. Krishnakumar, "On the Evolution of the Canonical Dissent" (2000) 52 Rutgers L. Rev. 781; R. Primus, "Canon, Anti-Canon, and Judicial Dissent" (1998) 48 Duke L.J. 243; K. Stack, "The Practice of Dissent in the Supreme Court" (1995) 105 Yale L.J. 2235; T. Shea, "The Great Dissenters: Parallel Currents in Holmes and Scalia" (1997) 67 Miss. L.J. 397; F.P. O'Connor, "The Art of Collegiality: Creating Consensus and Coping with Dissent" (1998) 83 Mass. L. Rev. 93; M. Mello, "Adhering to our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment" (1995) 22 Fla. St. U.L. Rev. 591; E. Gaffney Jr., "The Importance of Dissent and the Imperative of Judicial Civility" (1994) 28 Val. U.L. Rev. 583; and M. Bergman, "Dissent in the Judicial Process: Discord in Service of Harmony" (1991) 68 Den. U.L. Rev. 79.

⁶ W.J. Brennan Jr., "In Defense of Dissents," Mather O. Tobriner Memorial Lecture, reproduced in H. Clark, *Justice Brennan: The Great Conciliator* (Secaucus, N.J.: Birch Lane Press, 1995) at 256. His exact words were as follows:

The dissent is "offered as a corrective—in the hope that the Court will mend the error of its ways in a later case. ... The most enduring dissents are the ones in which the authors speak, ... as 'Prophets with Honor.' These are the dissents that often reveal the perceived congruence between the Constitution and the 'evolving standards of decency that mark the progress of a maturing society,' and that seek to sow seeds for future harvest. These are the dissents that soar with passion and ring with rhetoric. These are the dissents that, at their best, straddle the worlds of literature and law. ... [T]he dissent ... safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."

⁷ Jackson, *supra* note 5 at 3, put it clearly:

Generally the dissenter has viewed the core of mass acceptance with skepticism and found it wanting. He has supplied the "con" in the debate that lies at the basis of modern democracy. He has borne the scorn of the herd whose collective thinking he challenges. He is the heretic whose heresy may not stand the rays of established thought or the spectrum of time. Or he may be the prophet whose heresy of today becomes the dogma

Indeed, even the most ardent defender of dissenting opinions will be compelled to admit that in most cases, it is the majority opinion which blazes the law's trail.

Despite this reality, Canadian, American, English and other judges remain profoundly attached to their right to dissent. Moreover, neither elected legislators nor the legal profession has shown any serious desire to deprive judges of this right, although they have occasionally expressed the need for judges to exercise their right to dissent with greater restraint. Thus, while the idea of permitting the members of France's constitutional court (the Conseil constitutionnel) to dissent may seem revolutionary and even preposterous to some in that country, it would be equally shocking, in our countries, if it were seriously suggested that dissents should be banned.

In an effort to explain this enduring attachment to the tradition of dissent, I will seek to substantiate the theory that dissenting opinions make an important contribution to the development of the law, as they are rich sources of all that is potential and possible in law. In order to do so, I will begin by providing an institutional context by examining the tradition and culture of judicial dissent in Canada.⁸ Next, the institutional context will be broadened so as to undertake a more comprehensive examination of the role of dissenting opinions and their benefits for judges and for legal institutions. This analysis will focus on the three themes suggested by Justice Brennan's characterization of dissents: prophesy, dialogue, and the role of dissenting opinions in safeguarding the integrity of the judicial decisionmaking process and, ultimately, of the law.

of tomorrow.

⁸ This paper will deal primarily with the constitutional decisions of the Supreme Court of Canada, although the jurisdiction of that court covers all areas of Canadian law. It must also be noted that the judges of the provincial courts of appeal also write dissenting opinions. To give just one example, the dissenting opinions that are written by an appellate court are an essential part of the law of criminal procedure, since the accused has an automatic right to appeal to the Supreme Court of Canada the decision of an appellate court in which one of the judges dissented: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 691(1)(a) and 691(2)(a).

II. THE TRADITION OF THE DISSENTING OPINION IN CANADIAN LEGAL CULTURE

The origins of the dissenting opinion in Canada go back to the traditions of the English common law courts. As of the fourteenth century, judges of these courts hearing cases on appeal rendered their judgments by individual (*seriatim*) opinions.⁹ Both the judges and their society were evidently of the view that the majority decision ruled, and therefore that a dissenting opinion would not in itself detract from the authority of the judgment or the institution. This acceptance of individual opinions and dissents was eventually transplanted to Canada. A number of changes were made to the model, however, with the aim of mitigating certain weaknesses which became apparent in the new and particular institutional context of the Supreme Court of Canada.

Since their first decision in 1877,¹⁰ Canadian Supreme Court judges have rendered their decisions in multiple voices, including dissenting ones. Neither the legal profession nor elected legislators were very impressed with the Court's early decisions, criticizing them on several occasions for being somewhat incoherent and repetitive.¹¹ These concerns culminated in the first—and last—Canadian House of Commons debate, held at the end of the nineteenth century, over whether the Court's procedures should be amended to solve these perceived problems. Ultimately, a majority of the members of the House decided that there was no need to take legislative action to prohibit *seriatim* and dissenting opinions.¹²

⁹ See, on this point, K. Zobell, "Division of Opinion in the Supreme Court: A History of Judicial Disintegration" (1959) 44 Cornell L.Q. 186 at 187-91. See also Paterson, *supra* note 4 at 96-100. The *seriatim* format, however, was not the only one in existence in England. While the judges of the House of Lords have rendered their decisions individually and sometimes in dissent since the nineteenth century, this was not always the case. See Zobell at 189. As well, the Privy Council, the court of last resort for the former British colonies, almost always rendered its decisions unanimously. Apparently the Privy Council deemed that in its role as "Her Majesty's adviser," it should not provide contradictory advice to the head of state. See Laskin, *supra* note 3 at 1073.

¹⁰ *Prince Edward Island (Commissioner of Public Lands) v. Sullivan*, [1877] 1 S.C.R. 3. The bench was composed of five judges. Each judge delivered an opinion; Taschereau J. dissented.

¹¹ See L'Heureux-Dubé, *supra* note 2 at 583-84.

¹² Perhaps this is because, at that time, there was still a right of appeal to the Privy Council in England, a division of the House of Lords hearing appeals from the former British colonies. See: J. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 35. It is worth comparing the early years of the Supreme Court of Canada with those of the United States Supreme Court. In the early 1800s, one of the first U.S. Chief Justices, John Marshall, sought to have all decisions rendered in the name "of the Court" (that is, *per curiam*, or unanimously and anonymously) as often as possible. He believed that *seriatim*

No reform having been imposed from the outside, the judges of the Supreme Court of Canada, and specifically Chief Justices Anglin, Cartwright and Laskin, undertook a gradual reform of the Court's internal procedures. Aware of the weaknesses of the *seriatim* opinion model as it functioned in Canada, Anglin C.J. decided during the 1920s that it was desirable for the judges to coordinate their efforts in order to eliminate the repetition and incongruities to which their individual opinions gave rise. Accordingly, whenever possible, he encouraged judges to draft a single majority opinion that provided a clear and concise statement of the material facts and the principles of law upon which the judges agreed. When unanimity was impossible, however, the Supreme Court judges continued to write majority and dissenting opinions.¹³

Between 1930 and 1950, individual opinions were gradually abandoned. When the Supreme Court became Canada's final appellate court in 1949,¹⁴ however, members of the legal community continued to voice complaints about the frequency of multiple opinions issued by the Court.¹⁵ In response, during the 1960s Cartwright C.J. introduced judges' case conferences after every hearing. This innovation played a key role in reducing the number of multiple opinions and in improving relations among the judges. Subsequently, Laskin C.J. went one step further toward reducing multiple opinions. He borrowed from the Americans, who had developed the format of the unanimous and

opinions tended to foster dissent and inconsistency. At the same time, however, no less a figure than Thomas Jefferson was trying to convince the other judges, and specifically Justice Johnson, that the judges should fight to preserve the *seriatim* format. According to one author, President Jefferson was trying to undermine the influence of the Chief Justice, of whose opinions he was not particularly fond. See Jackson, *supra* note 5 at 20-25. Since that time, however, the American Supreme Court has never had a practice of systematically delivering unanimous decisions "of the court" in all cases and, in fact, has tended generally in the opposite direction.

¹³ See L'Heureux-Dubé, *supra* note 2 at 584.

¹⁴ See Snell & Vaughan, *supra* note 12 at 142.

¹⁵ See, for example, the words of Prof. Bora Laskin, *supra* note 3 at 1047, who in 1973 became Chief Justice of the Supreme Court of Canada, but who said in 1951:

Some of the cases reported in 1950 would indicate that from time to time there is a serious effort to arrive at an opinion of the Court in the sense of having one judge speak for all. But there are enough other cases reported in the same year which indicate—if I may so say, with respect—a conspicuous waste of time and an unnecessary cluttering of the reports with separate reasons by individual judges amounting to mere repetition. A perusal of three recent cases—the rent control reference (*Reference re Wartime Leasehold Regulation*, [1950] S.C.R. 124), the inter-delegation case (*Nova Scotia (A.G.) v. Canada (A.G.)*, [1951] S.C.R. 31) and the margarine reference (*Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1, aff'd [1950] 4 D.L.R. 689 (P.C.))—reveals that, aside from the dissenting judgments in the last case, the judges of the majority could easily have said once what is set out several times to the same effect.

anonymous decision "of the Court" for certain important cases, in which unanimity was regarded as both desirable and possible.¹⁶

The enactment of the *Canadian Charter of Rights and Freedoms*¹⁷ in 1982 was a pivotal moment in the history of the Court. With the *Charter*, Parliament introduced a form of constitutional judicial review based on fundamental rights and freedoms. This change raised the visibility and importance of courts in Canadian society virtually overnight.¹⁸ Perhaps in response to this new challenge, dissenting opinions became proportionately less frequent, on average, for the Court overall.¹⁹ Paradoxically, however, they also became more common in cases involving constitutional guarantees of fundamental human rights and freedoms.²⁰

Thus, the judges of the Supreme Court appear to have recognized over time, even if unconsciously, that they must exercise a degree of self-discipline in order to avoid having multiple, redundant opinions detract from the quality of the Court's decisions and thereby diminish its legitimacy. At no time has it been suggested, however, that dissenting opinions should be suppressed. Moreover, Supreme Court judges have fairly clearly retained what Chief Justice Dickson once called their "fiercely independent" spirits,²¹ particularly in the realm of constitutional law.

¹⁶ See P. McCormick, "The Supervisory Role of the Supreme Court of Canada" (1992) 3 Supreme Court L.R. (2nd series) 1 at 27. This format is still the exception rather than the rule. It was used in 1.6 per cent of the decisions rendered by the Court while Laskin was Chief Justice, and in 9.8 per cent of decisions under Dickson C.J.

¹⁷ Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹⁸ See, for example, P. McCormick, "Follow the Leader: Judicial Power and Judicial Leadership on the Laskin Court, 1973-1984" (1998) 24 Queen's L.J. 237 at 239; and B. Wilson, "Decision-Making in the Supreme Court" (1986) 36 U.T.L.J. 227 at 239.

¹⁹ Thus, although the Court has never sought to impose unanimity in all cases, the frequency of dissenting opinions has fallen considerably, from 41 per cent in 1949 to 20 per cent in 1990. More generally, the Court now renders fewer and fewer multiple concurring opinions. See McCormick, *supra* note 16 at 24-25.

²⁰ The Supreme Court does not publish statistics regarding the frequency of dissenting opinions in the various areas within the Court's jurisdiction. However, a preliminary search based on the electronic Quicklaw database of the Court's decisions, allows for an approximate calculation of the frequency of dissenting opinions in appeals raising constitutional issues. The average frequency of dissenting opinions in all constitutional law cases for the years 1877 to 1984 was 50 per cent. The average frequency from 1985 to January 2000 for the same category of cases was 57 per cent. Between 1982 and January 2000, in contrast, the average frequency of dissenting opinions in constitutional appeals involving fundamental human rights under the *Charter* was 78 per cent.

²¹ Ontario Lawyers Weekly (27 July 1984) 14 at 14.

Institutional tradition is not the only element which fosters such independence of spirit. It also draws much of its inspiration from the legal culture of the common law. From the first days of their legal education, common-law lawyers are instilled with a narrative and an adversarial culture in which the justification of one's reasoning is given pride of place. For this reason, common-law lawyers tend to view the drafting of opinions which seek to justify the choice of one of several competing solutions as indispensable to the legal system. In addition, they view judicial opinions as a source of guidance for resolving similar issues in the future.²² There is a vision of the law and of the role of judicial decisions that readily admits of the possibility of a number of divergent opinions on any given issue.

Notwithstanding the fact that the tradition of dissents is clearly interwoven into the fabric of Anglo-Saxon legal tradition and culture, however, the example of Quebec tends to show that neither tradition nor culture is entirely determinative when it comes to dissenting opinions. Although the legal system in Quebec is a hybrid of French and English tradition and culture, the French influence remains very strong both in private law and in the civil law approach to the hierarchy of sources of law. Yet appellate courts in Quebec have, since the mid-nineteenth century, adopted the practice of dissenting opinions, apparently without detracting from the authority of their decisions or the coherence of the civil law.²³

²² See M. Wells, "French and American Judicial Opinions" (1994) 19 Yale J. Int'l L. 81 at 86. Although a majority of the opinions written may not conform exactly to this description, it provides a good sense of the expectations of lawyers trained in the common law tradition. According to Wells, there are various other possible explanations for the differences in style between French and Anglo-American opinions, including the "formal" deductive reasoning of the civil law model, as opposed to the more "substantive" American model (reasons based on social values and "judicial policy"); the role of the courts in society (that is, the much broader scope of constitutional review historically granted to American (and eventually Canadian) courts); and the legal history of revolutionary France and the public's distrust of judges, as compared to the somewhat higher esteem in which judges are held in the common law countries in which judges were more inclined to subject governments to the rule of law.

²³ The format of Quebec Court of Appeal decisions differs somewhat from the more typically "common law" format of the decisions of the Supreme Court of Canada, in that they begin with a fairly formal statement of the result in the name of "The Court." The body of Quebec Court of Appeal decisions often retains the more typically Anglo-American narrative and didactic style, however, as well as allowing for the possibility of dissenting opinions. See E. Deleury & C. Tourigny, "L'organisation judiciaire, le statut des juges et le modèle des jugements dans la province de Québec" in H.P. Glenn, ed., *Droit québécois et droit français: communauté, autonomie, concordance* (Quebec City: Editions Yvon Blais, 1993) 191 at 215. Given that publication of decisions in Quebec remained sporadic until the mid-nineteenth century, it is difficult to ascertain when the first dissenting opinion was rendered in Quebec. See R. Crete, S. Normand & T. Copeland, "Law Reporting in Nineteenth-Century Quebec" (1995) 16 J. Legal Hist. 147. It is therefore very difficult

Thus, the acceptance of dissenting opinions within the judicial decisionmaking framework may depend more on the adoption of the following three hypotheses than on legal tradition and culture *per se*. The first hypothesis is that dissenting opinions do not jeopardize the coherence of the law, provided that the law is understood to allow for the existence of several possible solutions to a single question, at least in the absence of clear and precise statutory provisions. The second is that the institutional legitimacy of the courts is compatible with the individual independence and impartiality of judges. The third hypothesis, essentially a necessary corollary of the two initial ones, is that a majority opinion will be viewed as sufficient to lend authority to judicial decisions. In other words, unanimity is not the condition *sine qua non* of judicial legitimacy or legal stability.

To some extent, accepting these hypotheses and permitting dissents assists in making the rule of law more transparent, since they allow courts to convey, in majority and dissenting reasons, the many ideas and principles that often compete within a single normative system. In addition, accepting dissenting opinions injects a certain measure of democracy and freedom of expression into the judicial decisionmaking process, since every judge has an opportunity to participate fully, even while the majority decision rules the outcome.

Some jurists may be concerned by the potential for incompatibility between democracy—an inherently political concept—and the rule of law. As Dickson C.J. has observed, however, any functional democracy requires both freedoms and internal limits, in order to balance social forces of order and dissent, of the individual and collective will, and of certainty and flexibility:

[T]he values and principles essential to a free and democratic society ... I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. ... The rights and freedoms ... are not, however, absolute. It may become necessary to limit rights and

to establish the source of dissenting opinions in Quebec. During the 1850s, however, the Lower Canada law reports regularly show dissenting opinions. See *Desbarats v. La Fabrique du Québec* (1851) 1 L.C. Rep. 79 (Q.B.), Rolland J. dissenting; *British Fire and Life Assurance Company v. McCuaig* (1851) 1 L.C. Rep. 157 (Q.B.), Rolland J. dissenting; *Lina v. Boyer* (1851) 1 L.C. Rep. 139 (Sup. Ct.), Vanfelson J. dissenting. At the same time, however, these reports contain at least one decision made by a panel of judges *per curiam*: *Bruneau v. Fosbrooke* (1851) 1 L.C. Reports 92 (Sup. Ct.). This suggests, then, that Quebec's hybrid and unique format reveals the influence of the English, French and American traditions in Quebec. All three are still evident in the present format of the Quebec Court of Appeal's decisions.

freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.²⁴

On the one hand, as past Canadian experience suggests, it must be acknowledged that dissenting opinions have the potential to destabilize judicial institutions if judges completely ignore certain necessary constraints, whether voluntary or otherwise, designed to ensure the efficient and effective functioning of the courts. On the other hand, dissenting opinions may be viewed both as innovative yet, paradoxically, potentially stabilizing forces in the law, particularly when these opinions are oriented toward the future and invite dialogue with those who are unsatisfied with, or feel excluded by, the majority decision.

III. DISSENT AND PROPHECY

Turning more generally to the role of dissenting opinions in a legal system, I adapt one of John Locke's well-known observations to the legal context: new opinions in law are often suspect and are opposed for the sole reason that they are not already shared by a majority of the profession.²⁵ Yet society is continually undergoing transformation, whether it be due to the advent of new technologies, globalization or growing multiculturalism, to give just a few contemporary examples. These challenges demand new ideas and the evolution of legal thought. The following discussion of a few well-known dissenting opinions in the Canadian and American Supreme Courts illustrates some of the ways in which dissenting opinions may provide judges with a valuable means of expressing new and alternative ideas and approaches, without going so far as to cause an immediate change to the status quo.

In Canada, prior to the *Charter's* enactment, Supreme Court decisions dealt primarily with private law and the division of powers between the federal and provincial governments. Although dissenting opinions of the first decades of the Court's existence occasionally took the law in a new direction, they did not generally capture the imagination of the legal profession or the public. During the 1970s, however, dissenting opinions began to garner greater attention, as they

²⁴ *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136, Dickson C.J. See also K. Stack, *supra* note 5, who suggests that the justification for dissenting opinions lies more in the theory of deliberative democracy than in the concept of the rule of law.

²⁵ J. Locke, *An Essay Concerning Human Understanding* (Oxford: Clarendon Press, 1894).

dealt with issues such as women's economic status and the rights of the accused in criminal law.

Chief Justice Laskin, one of Canada's eminent jurists, often found himself in dissent in these cases, at least during his early years on the Supreme Court. His dissenting opinion in *Murdoch v. Murdoch*,²⁶ for example, may be viewed as an effort to refashion an ancient concept of English property law, the "constructive trust,"²⁷ to effect a more just result in family law. He found that the constructive trust allowed for the recognition of the right of a spouse, who has contributed to family property through unpaid labour, to a share in that same property upon divorce. His opinion later became the plurality opinion in *Rathwell v. Rathwell*.²⁸ It was then adopted by the majority in *Pettkus v. Becker*.²⁹ Although it may not have been expressly stated at the time, it seems clear in retrospect that Laskin C.J.'s dissenting opinion in *Murdoch* appealed to a new and emerging social and political awareness of the need to recognize women's rights to equality.

For his part, Dickson J. often found himself in dissent in criminal law cases prior to the advent of the *Charter*, often in conjunction with Laskin C.J. and Spence J. In *R. v. Leary*,³⁰ for example, Dickson J. expressed his profound disagreement with the majority on the question of whether to uphold the common law rule that a general intent offence could never be met with a defence of intoxication.³¹ Much of his

²⁶ [1975] 1 S.C.R. 423.

²⁷ This concept recognizes that a person may hold an equitable interest in property, even where the person does not hold legal title to the property, in cases where denial of the equitable interest would result in the "unjust enrichment" of the legal owner.

²⁸ [1978] 2 S.C.R. 436. In fact, Laskin C.J., Dickson, and Spence JJ. were with the majority in the result, but did not have the majority's support for the basis on which they arrived at that result, that is, the application of the "constructive trust." According to the two other judges who agreed with Laskin C.J., Dickson, and Spence JJ. in the result, it was not necessary to invoke this doctrine since the narrower and more traditional concept of "resulting trust" was sufficient for resolving the issues arising on the facts of that case.

²⁹ [1980] 2 S.C.R. 834. This development is particularly worth noting because this decision acknowledges that the logic of the constructive trust may apply to common-law spouses. The Court also relied on the constructive trust analysis in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, interpreting the provisions of a new statute on the division of matrimonial property which essentially incorporated the reasoning of Justices Laskin and Dickson.

³⁰ [1978] 1 S.C.R. 29 [hereinafter *Leary*].

³¹ Canadian criminal law distinguishes between general intent offences (including sexual assault) and specific intent offences (generally very serious crimes, such as murder). In 1978, the defence of intoxication was available to an accused only in respect of a specific intent offence. Justice Dickson sought, in his dissent, to elucidate the difficulties stemming from this distinction, including the fact that it deprived the accused of a potential defence to numerous crimes. He

reasoning was later adopted by Madam Justice Wilson, writing for the minority in *R. v. Bernard*.³² It was ultimately adopted by the majority in *R. v. Daviault*,³³ which found, as Dickson J. had anticipated, that the strict rule laid down by the majority in *Leary* violated fundamental human rights principles, now guaranteed by the *Charter*.

The "great dissents" of the nineteenth and twentieth centuries in the United States provide additional and persuasive evidence of the potential contribution of dissenting opinions to the law's evolution. At the end of the nineteenth century, for example, Justice Harlan dissented in a number of cases dealing with the constitutional right to equal protection of the laws in the context of racial discrimination. With great prescience, he foreshadowed the destructive social consequences to which the majority's flawed vision of equality would lead.³⁴ During the 1950s, the majority of the U.S. Supreme Court ultimately transformed the spirit of Harlan J.'s dissenting voice into law when Chief Justice Warren's Court held that racial segregation in public schools constituted a violation of constitutional equality rights.³⁵

Perhaps more than any others, the "great dissenters" of the early twentieth century, Oliver Wendell Holmes Jr. and Louis Brandeis, embodied the role of the prophetic dissenting judge, all the while staying within the bounds of the judge's role in a democracy. They were on the bench at a pivotal moment in the development of the welfare state in the United States. Despite the contrary views of a majority of the judges on the Court, they vigorously defended their opinion that courts should not thwart the government's political will, as expressed in legislation, each time the state sought to limit individual property rights and contractual freedoms in the name of social justice and the rights of the disadvantaged. Justices Holmes and Brandeis remained acutely aware, however, of the potential for abuse through the exercise of such political

considered the rule to be incompatible with the fundamental principle that "generally speaking, guilt depends upon proof by the Crown that the accused intended to do the acts with which he is charged": *Leary*, *ibid.* at 32, 43.

³² [1988] 2 S.C.R. 833, Wilson and L'Heureux-Dubé JJ. with the majority in the result, although in the minority as to the ratio. In fact, Dickson C.J. dissented with Lamer J., expressing the view that Wilson J.'s opinion did not go far enough in terms of adopting his dissenting opinion in *Leary*, *supra* note 30.

³³ [1994] 3 S.C.R. 63.

³⁴ See *Civil Rights Cases*, 109 U.S. 3 (1883), Harlan J. dissenting; and *Plessy v. Ferguson*, 163 U.S. 537 (1896), Harlan J. dissenting. Justice Harlan held unconstitutional a statute prohibiting "citizens of the black race" from travelling in the same train cars as white passengers, while the majority affirmed its constitutionality, under the "separate but equal" doctrine. See also Gaffney, *supra* note 5 at 601-4.

³⁵ *Brown v. Board of Education*, 347 U.S. 483 (1954).

powers. Thus, they were prepared, in turn, to invalidate legislation that interfered excessively with the fundamental freedoms of expression and religion.³⁶ Percival Jackson summarizes the contribution made by these judges as follows:

The years of this [the Holmes and Brandeis] Court ... might well be termed the era of qualitative dissent, as those of later years became the eras of quantitative dissent. ... [T]heir dissenting opinions cast beams that lighted the subsequent ways of the law.

So Justices Holmes and Hughes furnished the prologue in the Frank case³⁷ for Holmes's majority opinion in the Moore case.³⁸ And it was Holmes and Brandeis whose dissents in the child labor case³⁹ found later affirmation by Congress and the Court; ... whose clear and present danger rule became the Court's guidance in the nineteen forties⁴⁰ ... Truly [this] court attested the need and value of dissent.⁴¹

Notwithstanding the ultimate success of their ideas, it is valid to ask whether the law today would be substantially different if Justices Laskin and Dickson, or Justices Harlan, Brandeis, and Holmes, had been prevented from communicating their dissenting opinions from the bench. While the answer to this question is necessarily a speculative one, many suggest that their dissenting opinions did play a key role in the

³⁶ See, for example, *United States v. Schwimmer*, 279 U.S. 644 (1929), in which Holmes and Brandeis JJ. dissenting, asserted that the decision to deny citizenship to a foreigner should not depend on the applicant's political opinions, including, in this instance, the pacifist beliefs of a Jewish Hungarian woman.

³⁷ *Frank v. Mangum*, 237 U.S. 309 (1915) [hereinafter *Frank*]. The dissenting judges argued that the procedural rights of the accused, the owner of a business who was charged with killing one of his employees, had been violated at his trial, since it had attracted national attention and had been conducted in an atmosphere of prejudice and under threat from violent mobs.

³⁸ *Moore v. Dempsey*, 261 U.S. 86 (1923). Holmes J., this time for the majority, cited his dissenting opinion in *Frank*, *ibid.*, in support of his conclusion that a trial of African Americans charged with murder had violated their constitutional rights to a fair and equitable trial, because the court had been influenced by an "irresistible wave of public passion."

³⁹ *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Holmes and Brandeis JJ. and two other judges dissented in this appeal, in which the majority held unconstitutional Congress's prohibition on the shipment of any product from a cotton mill in which children under fourteen were employed. This decision was overruled in *United States v. Darby*, 312 U.S. 100 (1941), in which the Court upheld the *Fair Labor Standards Act* prohibiting, *inter alia*, the shipment and delivery of products manufactured using the labour of children under the age of sixteen.

⁴⁰ These were the words of Holmes J., dissenting with Brandeis J. in *Schenck v. United States*, 249 U.S. 47 (1919), on the question of the limits of freedom of expression. At the time they were writing, they sought to limit the power of the government to prohibit the expression of political opinion supporting the Socialist Party, among others.

⁴¹ Jackson, *supra* note 5 at 168-69 [footnotes added by the author].

gradual liberalization of constitutional interpretation in both countries.⁴² It seems fairly safe to suggest, however, that the fact that certain Supreme Court judges voiced their opposition to discrimination, for example, should not be credited as having led directly to the victories won by the civil rights movement in the United States.

Yet, we should not discount the impact of there having been at least a few voices on the American Supreme Court promoting a more equitable vision of society and of fundamental constitutional guarantees. These voices may have given some hope to advocates and to concerned members of the public that this alternative vision might one day become a reality. In addition, the existence of such dissenting opinions within the courts' own jurisprudence may have somewhat facilitated the task of reiterating alternative views on equality and discrimination before the courts, since their seeds were already planted in the law's fertile soil.

In addition to this important prophetic role, these "great dissents" also gave the jurists of the time an opportunity to debate and to analyse the relative merits of the majority and minority approaches to important legal questions of the day. More generally, dissenting opinions will often be very useful in appeals raising novel constitutional law issues, as these opinions may identify a number of points requiring further examination, although it may still be too early for the parties and the courts to anticipate all of the possible ramifications of the majority approach.⁴³ In such cases, dissenting opinions are not only prophetic, but they are also an invitation for dialogue about the law's development in these areas.

A number of dissenting judges have in fact pointed to this very important aspect of dissents, by emphasizing that dissenting opinions are often intended more for the legal minds of tomorrow than for those of

⁴² For the Canadian judges, see McCormick, *supra* note 16 at 24; for the American judges, see Gaffney, *supra* note 5 at 608.

⁴³ In Canada, for example, the constitutional right to freedom of expression has prompted a number of dissenting opinions. While the first attempt to define the scope of the new guarantee provided in section 2(b) of the *Charter* was rendered unanimously (see *Ford v. Québec (A.G.)*, [1988] 2 S.C.R. 712), the judges of the Supreme Court were much less likely, in subsequent decisions, to agree on the powers of the government to impose limits on that right under section 1 of the *Charter*, which allows freedoms to be restricted "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." See, for example, *Irwin Toy v. Québec (A.G.)*, [1989] 1 S.C.R. 927, Beetz and McIntyre JJ. dissenting; *R. v. Keegstra*, [1990] 3 S.C.R. 697, La Forest, Sopinka and McLachlin JJ. dissenting; *R. v. Zundel*, [1992] 2 S.C.R. 731, Gonthier, Cory and Iacobucci JJ. dissenting; *R.J.R.-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*], La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. dissenting; *Thomson Newspapers v. Canada (A.G.)*, [1998] 1 S.C.R. 877, Lamer C.J., L'Heureux-Dubé and Gonthier JJ. dissenting.

today.⁴⁴ It is important for courts and judges to be able to speak to future generations, and to suggest that it is possible for the law to evolve internally, at least "interstitially," as well as through legislative reform.⁴⁵ Without this capacity for internal renewal, courts risk being perceived as an obstacle to change rather than as a viable forum for obtaining legal recourse against injustice.

IV. DISSENTING OPINIONS AND DIALOGUE

Dissenting opinions have the potential, therefore, to lay the foundations for future decisions, to be gradually constructed by people who are interested in developing new approaches to existing law. In so doing, they help to generate a fruitful dialogue among the courts, academics, legislative assemblies, and future generations of lawyers. In Canada, this dialogue has played an important role in the development of the law, as academics make a practice of commenting on decisions and arguing the relative merits of opinions, including dissenting opinions.⁴⁶ Regardless of whether their comments are intended to clarify

⁴⁴ See Hughes, *supra* note 1; and Clark, *supra* note 6.

⁴⁵ U.S. Supreme Court Justice Ruth Bader Ginsburg used this expression in the form of a quotation from Prof. Gerald Gunther to describe the limited but significant power of the courts to guide the development of the law in its interstices, without going too far by engaging in judicial legislation. See R. Bader Ginsburg, "Speaking in a Judicial Voice" (1992) 67 N.Y.U. L. Rev. 1185 at 1209.

⁴⁶ Examples of comments and articles on the decisions of the Court, including those discussing dissenting opinions, are far too numerous to list here. Recently, for example, there has been a good deal of commentary regarding decisions of the Court on important social issues which have attracted considerable attention in the media and the legal community, including, for example, the constitutional rights of the accused and the complainant in sexual assault prosecutions; euthanasia; the federal government's power to regulate advertising by tobacco companies; homosexuals' equality rights; and the constitutional rights of the Aboriginal peoples of Canada. On the constitutional right of an accused to cross-examine a victim of sexual assault and to tender evidence of the victim's prior sexual conduct, see, for example, P. Kobly, "Rape Shield Legislation: Relevance, Prejudice and Judicial Discretion" (1992) 30 Alta. L. Rev. 988; S. Martin, "Some Constitutional Considerations on Sexual Violence Against Women" (1994) 32 Alta. L. Rev. 535; E. Shilton & A. Derrick, "Sex Equality and Sexual Assault: In the Aftermath of *Seaboyer*" (1991) 11 Windsor Y.B. Access Just. 107; J. McInnes & C. Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29 U.B.C. L. Rev. 341. On the right of the accused to have access to the medical and therapeutic records of victims of sexual assault, see the following articles and case comments, which tend to support the dissenting opinions in the numerous decisions of the Court on this subject: K. Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997) 9 C.J.W.L. 148; J. Smith & R. Haigh, "Valorizing the Subjunctive: The Unfortunate Judicial Contribution of *R. v. Carosella*" (1998) 32 U.B.C. L. Rev. 127; L. Colton, "*R. v. Stinchcombe*: Defining Disclosure" (1995) 40 McGill L.J. 525. On the power of the federal Parliament to regulate advertising by tobacco manufacturers and the dissenting opinion in *RJR-MacDonald*, *supra* note 43:

the majority opinion in light of the dissenting opinion, or to transform the dissenting opinion into positive law, they are always helpful to the courts and to the legal community, and are often cited in the decisions of the Supreme Court.

Dissenting opinions may also contribute to an ongoing dialogue between the courts and legislative assemblies.⁴⁷ Over the past two decades in Canada, for example, there has been a virtually constant dialogue between the federal Parliament and the Supreme Court concerning the prosecution of sexual offences such as sexual assault. More specifically, certain statutory provisions protecting complainants against cross-examination on irrelevant matters such as past sexual history were initially found unconstitutional by the majority of the Court. This gave rise to a dialogue between Parliament and the courts, in which Parliament ultimately relied on both the majority and minority approaches in drafting subsequent legislation on this and other similar issues.

During the early 1980s, Parliament amended the *Criminal Code* to protect victims of sexual assault against the airing in cross-examination of the intimate details of their prior sexual history.⁴⁸ In *R. v. Seaboyer*,⁴⁹ the majority of the Court held that the new provisions were unconstitutional in part, because they violated the right of the accused to make full answer and defence.

M. Parrish, "On Smokes and Oakes: A Comment on *RJR-MacDonald Inc. v. Canada (A.G.)*" (1997) 24:3 Man. L.J. 665. On the question of euthanasia and *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519; I. Dundas, "Case Comment: Rodriguez and Assisted Suicide in Canada" (1994) 32(4) Alta. L. Rev. 811. On the equality rights of homosexuals and the dissenting opinions in the Court's early decisions on that question, see: R. Wintemute, "Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter in *Mossop, Egan and Layland*" (1994) 39 McGill L.J. 429; B. Donais, "Three Strikes and Human Rights is Out: Case Comment on *Canada (A.G.) v. Mossop*" (1993) 57 Sask. L. Rev. 363. On the constitutional rights of the Aboriginal peoples of Canada and the dissenting opinions of certain judges of the Court on that question, see, for example, D. Elliott, "Fifty Dollars of Fish: A Comment on *R. v. Van Der Peet*" (1997) 35 Alta. L. Rev. 759.

⁴⁷ See generally P. Hogg & A. Bushell, "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75.

⁴⁸ *Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, s. 19.

⁴⁹ [1991] 2 S.C.R. 577 [hereinafter *Seaboyer*], L'Heureux-Dubé J. dissenting. For a discussion of the divergent approaches within the Court to the constitutional rights of victims and accused persons, as they arise in the context of sexual assault prosecutions, see S. Martin, "Some Constitutional Considerations on Sexual Violence against Women" (1994) 32 Alta. L. Rev. 535.

Parliament legislated again, essentially enacting the guidelines laid down by the majority in *Seaboyer*.⁵⁰ Shortly thereafter, however, the Court was called upon to examine a different aspect of the rules of evidence in this type of case, namely, disclosure to the accused of victims' medical and therapeutic records. In the absence of legislative guidance on this issue, the majority in *R. v. O'Connor*⁵¹ established a relatively low threshold for disclosure of this type of evidence. The dissenting opinion formulated a more stringent test, based not only on criteria of relevance and the importance of the accused's constitutional right to make full answer and defence, but also on the constitutional rights of sexual assault complainants to equality and privacy.⁵²

Parliament rejected the approach taken by a majority of the Court, which allowed for the admission of facts that were often completely devoid of relevance, and legislated again, essentially adopting the higher threshold for disclosure proposed in the dissenting opinion in *O'Connor*. When the constitutionality of these provisions was challenged in 1999, the Court unanimously concluded that the minority's alternative approach as enacted in the new legislation did not violate the accused's constitutional rights, with one relatively minor reservation expressed by the chief justice.⁵³

Dissenting opinions may also generate a dialogue that goes beyond exchanges among the courts, academics and legislatures. They may be used as a valuable educational tool in the law faculties, which focus on studying and discussing judicial decisions in relation to legal doctrine and principles. Students may be asked to evaluate the relative merits of the majority and dissenting opinions, each in light of the other, in order to develop their analytical skills and make them aware of the fact that the law may sometimes allow for several possible solutions to a single problem.

In addition, since dissenting opinions often provide a new perspective or approach to familiar concepts, they are particularly well suited to initiating a dialogue with future generations who may share such emerging perspectives. It is perhaps not surprising, for example,

⁵⁰ See S.C. 1992, c. 38. The constitutionality of this legislation was recently upheld in *R. v. Darrach*, [2000] 2 S.C.R. 443.

⁵¹ [1995] 4 S.C.R. 410 [hereinafter *O'Connor*].

⁵² See *ibid.*, L'Heureux-Dubé J. dissenting, LaForest, Gonthier, and McLachlin JJ. concurring.

⁵³ See *R. v. Mills*, [1999] 3 S.C.R. 668. This time, Lamer C.J. dissented in part, on the basis that the new provisions were unconstitutional in part, 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 records in the possession of third parties.

that the four women who have sat on the Supreme Court of Canada since 1982⁵⁴ have written or supported dissenting opinions more often than average,⁵⁵ particularly in interpreting constitutional equality rights, be they directly at issue or indirectly at issue in criminal⁵⁶ and tax law cases.⁵⁷

Last but not least, dissenting opinions may contribute to an international legal dialogue, as courts seeking solutions to problems in areas where they do not yet have a wealth of jurisprudence may look to, and choose from, any one of the various approaches developed in majority or minority decisions emanating from other jurisdictions. For instance, a number of dissenting opinions of the Supreme Court of Canada have been cited by the majority of the Constitutional Court of South Africa, in the course of interpreting its new constitution, and specifically the provisions regarding equality rights.⁵⁸

V. THE DISSENTING OPINION: SAFEGUARDING THE INTEGRITY OF THE LAW AND JUDICIAL INSTITUTIONS

In addition to their potential contribution to the law's development, dissenting opinions serve other important functions. Specifically, they may enhance the judiciary's legitimacy by preserving

⁵⁴ Justices Bertha Wilson (who sat from 1982 to 1991), Beverley McLachlin (appointed in 1989, now Chief Justice), I (appointed in 1987), and Louise Arbour (appointed in 1999) are the four. It is too early to comment on this trend in relation to our new colleague, Justice Louise Arbour, who was appointed in June 1999.

⁵⁵ See F.L. Morton, P.H. Russell & T. Riddell, "The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade 1982-1992" (1996) 5 N.J.C.L. 1 at 39; and P. McCormick, "The Most Dangerous Justice: Measuring Judicial Power in the Lamer Court, 1991-97" (1999) 22(1) Dal. L.J. 93 at 123.

⁵⁶ See, for example, and again in the context of prosecutions for sexual offences, *R. v. Osolin*, [1993] 4 S.C.R. 595, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting; *O'Connor*, *supra* note 51, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting; and *R. v. Esau*, [1997] 2 S.C.R. 777, L'Heureux-Dubé and McLachlin JJ. dissenting.

⁵⁷ See *Symes v. Canada*, [1993] 4 S.C.R. 695, L'Heureux-Dubé and McLachlin JJ. dissenting; and *R. v. Thibault*, [1995] 2 S.C.R. 627, L'Heureux-Dubé and McLachlin JJ. dissenting. We do not always speak, however, in a unanimous voice. See, for example, *Seaboyer*, *supra* note 49; and *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571.

⁵⁸ See *Hugo v. State President of the Republic of South Africa*, [1997] S.A.J. No. 4, online: QL(SAJ), in which the Court approved, in part, the rationale of one of the dissenting opinions in *Egan v. Canada*, [1995] 2 S.C.R. 513, L'Heureux-Dubé J. See also *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others*, [1999] S.A.J. No. 82, online: QL(SAJ). See generally C. L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34 Tulsa L.J. 15

and strengthening judicial independence, by fostering collegiality among judges and by enhancing the coherence of courts' decisions.

Dissenting opinions strengthen individual judicial independence by ensuring that at the end of the day, judges answer only to their individual consciences. In contrast, prohibiting the expression of dissenting opinions risks jeopardizing judicial independence, impartiality and open-mindedness.⁵⁹ For if it is impossible to dissent, a judge who is open to persuasion by the evidence and submissions may nevertheless be prevented from acting in accordance with his or her own understanding of the applicable law, where this understanding does not conform to that of the majority.⁶⁰ Where there is serious disagreement, a judge's inability to express his or her own opinion creates a situation entirely antithetical to the Canadian conception of the role of the impartial and open-minded judge.

Dissenting opinions also tend to preserve a judge's personal integrity: the judge is not obliged to sign onto opinions with which he or she disagrees. One need look no further than the examples of Justices Thurgood Marshall and William Brennan Jr. in the United States, who repeatedly expressed their unwavering dissent from the majority's acceptance of the constitutionality of the death penalty,⁶¹ to imagine the internal conflicts and the frustration experienced by judges faced with a total inability to express their profound disagreement.

At the institutional level, dissenting opinions tend to foster collegial relations among judges, even while they allow them to be true to themselves. First, judges who have a different and minority perspective on certain questions are not obliged to confront their colleagues at every turn, in the hope of having at least a few of their views incorporated into the majority decision. Instead, they may choose to communicate their opinion directly to the legal community and to the

⁵⁹ In Canada, impartiality is defined as "a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions." See *R. v. R.D.S.*, [1997] 3 S.C.R. 484.

⁶⁰ This is not to say, however, that dissenting opinions do or should put a definitive end to the process of discussion, and therefore of mutual influence, that is inevitably a part of the act of judging together with a number of colleagues. Justice Brandeis, for example, apparently used drafts of dissenting opinions strategically on occasion, not so much because he was particularly eager to dissent, but rather because he knew that by forcing the majority to compare its reasons to his own dissenting opinion, he would very likely persuade the majority of the importance of changing their reasons to reflect his analysis. See P. Strum, *L.D. Brandeis, Justice for the People* (New York: Schocken Books, 1988) at 369-70.

⁶¹ See, for example, *Clark v. Arizona*, 449 U.S. 1067 (1980); and Gaffney, *supra* note 5 at 620-21.

public, rather than seeing it nipped in the bud. Secondly, the majority is not continually obliged to attempt to arrive at a compromise that may accommodate as many views as possible at the expense of the clear and coherent enunciation of principles.⁶²

Interestingly enough, in Canada the incoherence and lack of clarity of certain majority decisions has generally tended to come under greater fire than the writing of dissenting opinions.⁶³ This suggests that both the public and the legal profession recognize that it would be unrealistic to expect judges to be unanimous at all times, perhaps because the constitutional questions submitted to the courts are almost always highly controversial and often very difficult to resolve to everyone's satisfaction. Instead, it seems accepted that the quality of its reasoning, rather than unanimity *per se*, provides the best safeguard of the judiciary's institutional legitimacy and the authority of courts' decisions.

In fact, in my view, one creates a false dichotomy by equating unanimous opinions with clarity and authority, while associating dissenting opinions with incoherence. Where there is profound disagreement among judges, the law itself is the greatest beneficiary of dissenting opinions: instead of sacrificing lucidity to an overriding need to accommodate diverging views, judges may focus their efforts on the logical and persuasive justification of their own understanding of the law, whether it be a minority or majority one.

⁶² Chief Justice Hughes of the United States Supreme Court wrote the following on this subject, *supra* note 1 at 67:

When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at the time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided.

⁶³ In Canada, this was the problem created by *seriatim* opinions, which diminished the authority of judgments because it was impossible to determine the actual ratio approved by the majority, since each judge stated it differently. See Snell & Vaughan, *supra* note 12 at 35. However, this problem did not totally disappear when *seriatim* opinions were abandoned. In *R. v. Mills*, [1986] 1 S.C.R. 863, for example, a road map was needed to identify both the principles and the outcome approved by the majority (Beetz, McIntyre and Chouinard JJ. wrote together, while La Forest J. wrote a separate opinion), or even those approved by the dissenting judges (Dickson C.J. and Lamer J. writing together, with Wilson J. writing a separate dissenting opinion). For more recent examples of this phenomenon, see *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *RJR-MacDonald*, *supra* note 43; and *O'Connor*, *supra* note 51. This phenomenon is increasingly rare. The difficulty it creates for lawyers and judges lies not in the fact that there are dissenting opinions, but rather in the fact that there are several opinions, agreeing in the result but not in the reasoning by which it is reached.

In addition, dissenting opinions may contribute to improving the quality of judicial decisions by keeping the majority accountable. On the one hand, the judge writing for the majority must persuade his or her colleagues of the soundness of the majority opinion, or else risk losing their support.⁶⁴ For their part, dissenting judges will often make a conscientious effort to demonstrate the weak links in the majority's reasoning. In some cases, this may lead the majority to make changes to its reasoning. It may even lead to a change in who ultimately writes for the majority, if the dissenting judge is able to persuade several colleagues of the soundness of his or her criticism. Thus, dissenting judges will strive to provide a rigorous analysis of the questions at issue in order to persuade both their colleagues and the public that their approach is to be preferred. Indeed, to understand the qualities which guarantee the enduring resonance of an important dissenting opinion, one need only look to the examples discussed above, with their reasoning based on meticulous research and on an entirely justifiable approach to the law.

Nevertheless, and as past Canadian experience has tended to suggest, the indiscriminate exercise of the right to write a separate opinion has the potential to jeopardize the integrity of the law and of legal institutions. Institutional legitimacy necessitates certain limits on the exercise of this right so as to avoid the negative excesses of total individualism. On this point, Justice Ruth Bader Ginsburg of the United States Supreme Court has correctly suggested that the few real dangers posed by dissenting opinions include: the too frequent use of dissenting opinions for trivial reasons; and the use of immoderate and overly critical language with respect to the majority decision.⁶⁵ She goes on to observe that the most effective dissents are those which can be read independently of the majority opinion. These dissents state the points of disagreement with the majority, without adopting an unnecessarily vicious tone that could jeopardize professional relations between judges,

⁶⁴ See Wilson, *supra* note 18 at 236. This article, written by a former judge of the Supreme Court of Canada, provides a detailed and accurate description of how the Court operates at 235-38. The principal steps in drafting reasons, as she accurately describes them, include (1) the conference after the hearing, during which the judges exchange ideas and coordinate the drafting of the opinion or opinions; (2) the drafting of opinions and circulation of drafts to the judges; (3) exchanges of comments among the judges and, if necessary, recirculation of new drafts. At this stage, even if the conference resulted in a unanimous Court, there may be one or more judges who will decide that they cannot concur with the majority opinion and that they must write a separate opinion; (4) the judges concur with one or another of the opinions, having read all of the opinions circulated.

⁶⁵ See Bader Ginsburg, *supra* note 45 at 1191.

as well as the public's respect for, and confidence in, the courts.⁶⁶ Both the Canadian and American "great dissenters" remain role models in all of these respects, since they dissented only when they considered it to be absolutely necessary and made sure to support their opinions with well-developed legal argument.⁶⁷

Returning to the present, it is interesting to note that over the past ten years, approximately 70 per cent of the Supreme Court of Canada's judgments have been unanimous.⁶⁸ This provides a clear indication that judges write separate or dissenting opinions only when there are important points of disagreement. Thus, in most appeals, even these "fiercely independent" judges apparently agree that the benefits of a coherent unanimous decision outweigh their more minor individual concerns. This trend is entirely consistent, moreover, with the higher incidence of dissenting opinions in the area of constitutional law,⁶⁹ since this field inevitably involves questions that may be expected to generate more profoundly divergent views.

VI. CONCLUSION

In this polyphonic world, it is important to acknowledge the value of all potential sources of new melodies. The highest constitutional court in the land is one such potential source. In my view, the Canadian and American experiences show that dissenting opinions in decisions having major significance for civil society, or raising novel questions of law, allow the law to adapt to society's new values and realities. This adaptation occurs gradually, through judges' explorations and explanations of various possible approaches to a single problem, in tandem with the efforts of present and future legal minds. Dissents tend to strengthen the legitimacy of judicial institutions by reinforcing judicial

⁶⁶ See *ibid.* at 1196. It seems that in the United States, the problem of extremely harsh criticism by one judge of another is beginning to be a cause for concern. Canada has not yet really had this kind of problem to date. See also Gaffney, *supra* note 5.

⁶⁷ See Bader Ginsburg, *supra* note 45 at 1191; Jackson, *supra* note 5 at 18-19. Even Holmes J., one of the "great dissenters," said that it is pointless and generally undesirable to dissent, except when a judge is profoundly persuaded of his opinion. See *Northern Securities v. United States*, 197 U.S. 244 (1904); O.W. Holmes, *His Book Notices and Uncollected Letters and Papers* (New York: Central Book, 1936) 196.

⁶⁸ See Supreme Court of Canada, *Statistics: 1990 to 2000*, available online: Supreme Court of Canada, <<http://www.scc-csc.gc.ca/information/statistics/download/ecourt.pdf>> (date accessed: 26 February 2001).

⁶⁹ See *supra* note 20.

impartiality and collegiality and by enhancing the coherence of judicial decisions. In constitutional law, dissenting opinions may play a particularly useful role with respect to human rights issues, for example, as dissents tend to facilitate the development of a rich jurisprudence capable of evolution over time.

Of course, dissenting opinions will not always contribute to the law in a significant way. They often become obsolete the instant they are published, since lower courts generally cite only the majority opinion,⁷⁰ given that dissenting opinions are generally of little precedential value. Sometimes, however, dissenting opinions retain their full force and are ultimately transformed into fundamental legal principles that might never have seen the light of day if dissenting opinions had been prohibited. Indeed, within this very uncertainty lies one of the most persuasive justifications of all for allowing dissents: by permitting dissenting opinions, we ensure 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.

⁷⁰ The lower courts in Canada cite the majority opinion of the Supreme Court 90 per cent of the time. See P. McCormick, "The Most Dangerous Justice: Measuring Judicial Power" (1999) 22 Dal. L.J. 93 at 103.

