The Copyright Pentalogy

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The Context of the Supreme Court’s Copyright Cases

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A. Setting the Stage

In the summer of 2012, the Supreme Court of Canada created history by simultaneously releasing five copyright judgments: Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada [ESA], Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada [Rogers], Society of Composers, Authors and Music Publishers of Canada v Bell Canada [Bell], Alberta (Education) v Canadian Copyright Licensing Agency [Alberta (Education)], and Re:Sound v Motion Picture Theatre Associations of Canada [Re:Sound].

This historic event reverberated in a number of domains.

These five judgments mark the final moments before a long-anticipated major reform in Canada’s copyright law: on 12 July 2012, when the five judgments were released, the Copyright Modernization Act had been passed by Parliament but had not been declared in force.

In addition to marking the end of one version of the Copyright Act, in the context of intellectual property development in Canada, the “pentalogy” instantly enormously multiplied the total jurisprudence from Canada’s highest court that bears on copyright. Indeed, between
the time McLachlin J became Chief Justice of the Supreme Court in 2000 and the release of the pentalogy, there had only been five copyright judgments from the Court: 8 Théberge v. Galérie d’Art du Petit Champlain [Théberge], 9 CCH Canadian Ltd v. Law Society of Upper Canada [CCH], 10 Society of Composers, Authors, and Music Publishers of Canada v. Canadian Association of Internet Providers [SOCAN v. CAIP], 11 Robertson v. Thomson Corp [Robertson], 12 and Euro-Excellence Inc. v. Kraft Canada Inc. [Toblerone]. 13 Taken together, these ten cases represent a greater volume of interest from the Supreme Court in copyright than has been evinced at any time since it became Canada’s final appeal court. 14 For example, in Ian Bushnell’s history of the Federal Court, spanning 1875 to 1992, there is mention of only one intellectual property case being appealed to the Supreme Court, 15 a trademark case, Benson & Hedges v. St. Regis Tobacco Corporation. 16 Others did reach the Supreme Court but did not merit discussion in Bushnell’s history: for example, in copyright, on appeal from the Exchequer Court (predecessor to the Federal Court), the Supreme Court decided Cuisenaire v. South West Imports Ltd in 1969—but consideration of copyright by the Supreme Court under previous Chief Justices has definitely been infrequent. 12 One reason for this relative paucity of copyright cases in the Supreme Court may be the strong contribution to intellectual property jurisprudence between 1964 and 1980, which is universally acknowledged as being made by Jackett CJ of the Federal Court. 18

But, beyond the context of copyright jurisprudence, the release of these five copyright decisions together was a landmark in the history of Supreme Court jurisprudence in general. This chapter will focus on the historic copyright “pentalogy” but, rather than considering these judgments primarily in light of Canadian copyright jurisprudence—or, indeed, in light of intellectual property jurisprudence more broadly—the discussion will focus on these five judgments in the context of Canada’s Supreme Court jurisprudence generally.

Although scholarly attention to Canadian courts is slowly gaining momentum, it still lags behind the academic attention given, for instance, to the United States Supreme Court (USSC). A seminal monograph, as recently as 1985, about the Supreme Court was James Snell and Frederick Vaughan’s The Supreme Court of Canada: History
of the Institution. \cite{19} Sometime later, in 1992, Ian Bushnell published a second major study, *The Captive Court: A Study of the Supreme Court of Canada*, in which he analyzed the “voices” of individual justices as revealed in a selection of cases from the period 1876 to 1989, selected because their reasons discussed issues concerning the function of the judiciary. \cite{20} A decade later, Saywell’s *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* appeared. \cite{21} Over twenty years after Snell and Vaughan’s ground-breaking work, there was a flurry of academic interest in the Supreme Court engendered by Prime Minister Stephen Harper’s procedural changes in the way appointments to the Court were to be made. \cite{22} At about that same time, C. L. Ostberg and Matthew E. Wetstein published *Attitudinal Decision Making in the Supreme Court of Canada*, \cite{23} which self-consciously emulated empirical methodologies pioneered in the American scholarship about the USSC \cite{24} and applied them to analyze decisions of the Supreme Court of Canada. \cite{25} This was followed by Donald Songer’s *The Transformation of the Supreme Court of Canada: An Empirical Examination*. \cite{26} Recently, marking the occasion of a decade of Chief Justice Beverley McLachlin’s leadership of the Court, a festschrift honouring the Chief Justice appeared in 2011: *Public Law at the McLachlin Court: The First Decade*. \cite{27}

Probably because of the relative dearth of copyright decisions rendered by the Supreme Court, this growing scholarship about the Supreme Court tends to overlook copyright decisions, \cite{28} either ignoring them altogether \cite{29} or incorporating them into databases of decisions so large that the role of the copyright jurisprudence in the analysis becomes insignificant. As an example of the former, Graham Mayeda’s recent study “Between Principle and Pragmatism: The Decline of Principled Reasoning in the Jurisprudence of the McLachlin Court” \cite{30} is based upon analysis of a set of decisions of the Court, none of them copyright cases. \cite{31} As mentioned, in the latter instance, in studies based upon quantitative methodologies, the very small numbers of copyright decisions will render their influence on the results negligible. Peter McCormick’s work, as an example, draws upon a database “initially created in the mid-1990s to cover Supreme Court of Canada decisions since 1949 [and]… kept up to date on a personal and voluntary basis.” \cite{32} While, in addition to his quantitative
work, McCormick’s analysis also includes discussion of a good number of specific cases, none of them is a copyright case. Donald Songer and Julia Siripurapu, on the other hand, rely solely on quantitative analysis in their study and, consequently, make no reference to individual decisions, copyright or otherwise. Nonetheless, their analysis, using data from 1970 up to and including 2002, would have included the *Théberge* decision—however, it represents but a tiny fraction of the 1,639 cases comprising the “N” in Table 1 of their analysis. In Songer’s earlier monograph based on data from the same period, the category “other private law”, itself a subset of the category “private economic law”, accounts for only 5.2 percent of the Court’s docket.

This chapter will focus directly upon the copyright-related decisions of the Supreme Court since 2002, including the pentalogy, and establish whether they fit patterns identified in studies of the larger jurisprudence of the Court.

Songer and Siripurapu studied the unanimous decisions of the Court between 1970 and 2003, concentrating particularly on the period 1982 to 2002 (after the passage of the *Charter of Rights and Freedoms*), complemented by interviews with ten then current or recent justices of the Court (and four former law clerks).

Emmett Macfarlane also focused on the unanimous decisions of the Court, conducting twenty-eight research interviews with then current and retired justices, former law clerks and other staff.

Peter McCormick focused on analysis of concurrent reasons, from the start of Dickson CJ’s Court (April 1984) until the end of December 2006.

Finally, Christine Joseph focused on solo dissents, examining all 133 solo dissent judgments rendered between 1974 and 2003.

With respect to unanimous judgments of the Court, Songer and Siripurapu established that the fewer the number of separate legal issues raised in a case, the more likely the decision was to be unanimous. Emmett Macfarlane noted that previous research had established that the Court achieved unanimity in 63 percent of cases, and concluded from his own analysis that this relatively high degree of unanimity should “be viewed as a natural by-product of the institution’s norms and processes, rather than as an overt goal of the justices.”
McCormick demonstrated, through his data, that “separate concurrences are a regular and ongoing aspect of the work of the Supreme Court of Canada...[and that] all judges participate to a greater or lesser degree.” However, although he found 600 concurrences in twenty-three years of activity at the Supreme Court, concurring reasons peaked in 1995–1996 and declined thereafter. McCormick attributes this change to the fact that the dynamic period of flux and change has come to an end...[as] most of the major questions [raised by the Charter] have been answered; as a result, fewer “big” questions are coming before the Court, and few policy-divergent responses need to be generated to prepare the field within which these can be managed.

McCormick made this observation based on the theory that “divided decisions demonstrate a court that is both open to a variety of arguments (and that therefore mollifies the losing side) and willing to change its mind over time (which keeps the losing side in the game).”

Christine Joseph established that the rate of solo dissents was rising in the Supreme Court, with solo dissents in the McLachlin Court (to 2003) reaching a rate of 6.3 percent of cases. She describes three categories of solo dissent: free-standing (extensive, reasoned arguments similar in style to the form of majority opinions), limited (generally shorter, focused on a specific point of divergence from the majority judgment) and adoptive (“brief, content-free analyses which reiterate the reasons from the lower court”). She also asked whether there was a relationship between the overall disagreement on the Court in a particular case and the likelihood of a solo dissent and found that, although the McLachlin court (to 2003) had the highest rate of solo dissents, it also had the lowest disagreement rate (34 percent).

Joseph’s data also indicated that though the proportion of solo dissents rises as the size of the panel sitting moves from five justices to seven justices, it drops to its lowest level when all nine justices are sitting. The analysis also showed that in the five-justice panels and seven-justice panels, the solo dissents were most often “free-
dissents, while when the full Court was sitting, the solo dissents were most often “limited” dissents.\textsuperscript{56}

\textbf{B. The Decisions}

Although heard as a group and released at the same time, each judgment in the recent copyright pentalogy is unique and has its own set of characteristics. For instance, the group includes two unanimous judgments (\textit{Re:Sound} and \textit{Bell}), a decision with concurring reasons Rogers, and two decisions with majority judgments and minority reasons (\textit{ESA} and \textit{Alberta (Education)}). Although LeBel J wrote for the Court in \textit{Re:Sound}, Abella J wrote for the Court in \textit{Bell}. Rothstein J wrote for the majority in \textit{Rogers}, with Abella J writing concurring reasons. Moldaver and Abella JJ wrote for the majority in \textit{ESA}, while Abella J wrote alone for the majority in \textit{Alberta (Education)}; Rothstein J wrote for the minority in both \textit{Rogers}, and \textit{Alberta (Education)}.

While the five cases each involved copyright, the issues in each were quite distinct from one another and highlighted different facets of the copyright regime. The issue in \textit{Re:Sound} was focused on the question of what is protected under the \textit{Copyright Act} as “other subject matter”. Both \textit{ESA} and \textit{Rogers} centred upon the ambit of \textit{s.3(1)(f)} of the \textit{Copyright Act}, the rights holder’s right “to communicate the work to the public by telecommunication.” The \textit{Bell} case, on the other hand, was concerned with the user’s right of “fair dealing” and the \textit{Alberta (Education)} case was concerned with the user’s rights provided under the \textit{Copyright Act} for “Educational Institutions” as defined by the \textit{Act}.

For purposes of this analysis, then, the five cases of the pentalogy released in 2012 will be considered, together with five previous copyright judgments of the Court that dealt with the same version of the \textit{Copyright Act} as do the pentalogy judgments.\textsuperscript{57} These latter are the same five mentioned at the outset as having been decided since McLachlin CJ has headed the Court: \textit{Théberge} (2002), \textit{CCH} (2004), the \textit{SOCAN v CAIP} decision (2004), \textit{Robertson} (2006), and the \textit{Toblerone} decision (2007). In addition, this analysis will include consideration of one libel decision rendered in 2011 by the Supreme Court, \textit{Crookes v Newton} [\textit{Crookes}].\textsuperscript{58}

The \textit{Crookes} decision, although rendered in defamation and not a copyright case, is included in this analysis, in part, because it invokes
a concept of “context”—a concept that was raised by the majority in the Supreme Court’s copyright decision in Robertson. In Robertson, LeBel and Fish JJ wrote the joint majority judgment in which they de-emphasized a “process” analysis in favour of focusing on the “context” in which the articles written by Heather Robertson appeared in the various products created by the respondent Thomson. Abella J, writing for the dissenting justices, favoured the kind of analysis the Court had previously used in the SOCAN v CAIP decision.

Consideration of the concept of “context” by the courts is not the only way in which the Crookes case is linked to copyright. Crookes focused on the question of the meaning of “publication” in an Internet environment—a question germane to both copyright and defamation. There is no statutory definition of “publish” in either the libel or copyright context, although the concept is relevant to both. Specifically, the question before the Court in Crookes was whether the inclusion of a hyperlink to another website in a given website constituted publication by the given website of the material to which the link was made on the other website.

The British Columbia Court of Appeal, in both the majority and minority reasons in Crookes, used the language of “context”. The majority agreed the following:

If it is apparent from the context in which the hyperlink is used that it is being used merely as a biographical or similarly limited reference to an original source, without in any way actively encouraging or recommending to the readers that they access that source then…this would not amount to publication. Factors tending toward a finding of publication, however, would include the prominence of the hyperlink, any words of invitation or recommendation to the reader associated with the hyperlink, the nature of the materials which it is suggested may be found at the hyperlink…the apparent significance of the hyperlink in relation to the article as a whole, and a host of other factors dependant upon the facts of a particular case.

The Supreme Court released its judgment in the Crookes appeal in 2011 and all three sets of reasons rendered in the decision use language broad enough to be adopted in the context of copyright
publication as well as in the circumstances of this libel case itself.

Abella J, writing the majority decision for herself and Binnie, LeBel, Charron, Rothstein and Cromwell JJ, holds that hyperlink technology is technologically neutral and creates no more than a footnote—which is not “publishing” the underlying content. McLachlin CJ and Fish J co-author concurring reasons in which they agree that there is no publication on the facts of the case before the Court but leave open the possibility that there could be situations in which linking can constitute publication. Deschamps J, writing separately and concurring in the result, holds that the analogy between footnotes and links is not helpful to the question before the Court because both footnotes and links may be defamatory in a given case, although not the one before the Court. Not one of the three sets of reasons referred to the Robertson decision, although both the majority reasons and Deschamps J’s reasons refer to the Court’s copyright decision in the SOCAN v CAIP case.

It is interesting to note, in this connection, that in the Toblerone decision, the copyright decision that the Court made in 2007, the justices writing three of the four sets of reasons refer to the Robertson decision, but in no instance is any reference made to the concept of “context”. While in several of the pentalogy decisions, Robertson is also cited, it is, again, not cited with reference to “context.” In ESA, both the majority and minority cite it in support of their own perspectives on media neutrality. In the unanimous decision in the Bell case, Robertson is also cited for the proposition that the Copyright Act is to be interpreted as media neutral. In Rogers, the majority judgment cites it in support of the proposition that the Copyright Act applies to new technologies, while Abella J, concurring, does not refer to it. The Crookes case, rather than any of the subsequent copyright cases, therefore, is the Supreme Court’s most recent word on the “context” approach, and the majority judgment, written by Abella J, does not favour it.

For these two reasons—the Court’s views on publishing and on “context” (concepts that bear equally on defamation and on copyright)—it appears appropriate to include the Crookes defamation case in this analysis of copyright jurisprudence.

In examining the set of eleven cases just described, then, a first
observation is that the Supreme Court that has decided the copyright pentalogy, with the addition of Karakatsanis and Moldaver JJ, is a court different in composition from the Supreme Courts that decided the earlier six cases. The Court that decided the pentalogy is also, at the same time, a court that will never again decide a copyright case: Deschamps J retired from the Court on 7 August 2012 and has been replaced by Wagner J. (See Figure 1.)

Figure 1. The composition of the court deciding copyright-related cases since 2002

It may also be noted that only two justices of the Court that existed at the time the Théberge case was heard in 2002 remain on the bench (the Chief Justice and LeBel J). As it happens, both participated in the decision in Théberge, although that bench involved only seven of the justices (Arbour and Bastarache JJ did not participate). It is striking to notice that all the copyright cases after Théberge have been heard by the full panel of nine, as was the Crookes libel case. This is surely an indication of the importance to society the Court is recognizing in this area of law.

When Théberge was decided, all three civil law judges were sitting—and comprised the dissent in the decision. The majority was comprised entirely of common law–trained judges. In their reasons,
Gonthier J, for the minority, and Binnie J, for the majority, explicitly referred to the common and civil law traditions behind copyright concepts.\textsuperscript{23} It might have been thought that the division that occurred in that case between the common- and civil law–trained judges would be seen in subsequent copyright decisions. As shown in Figure 2, no such pattern emerges in the subsequent judgments of the Court.

In her study, discussed above, Joseph looked at the solo dissenting patterns of the individual Supreme Court judges who had sat or were sitting between 1974 and 2003. Among the thirty-two judges examined, L’Heureux-Dubé J accounted for almost 25 percent of all the solo dissents written.\textsuperscript{26} L’Heureux-Dubé J sat on the Théberge appeal under consideration here, before retiring from the Court, but, although she did dissent, she did not do so “solo” and she was not the author of the dissenting reasons.\textsuperscript{27}

Table 1 below has been developed from Joseph’s study and shows those judges who were included in the study and have sat on at least one of the copyright-related decisions under consideration in this chapter.\textsuperscript{28}

\textit{Table 1. Solo dissents record for Justices involved in the decisions under review and sitting in 2002 or appointed by the end of 2003}

<table>
<thead>
<tr>
<th>Justice (bold indicates on the Court for the pentalogy)</th>
<th>Frequency of solo dissent reported by Joseph (up to and including 2003)</th>
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<tbody>
<tr>
<td>Major</td>
<td>More than average</td>
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<tr>
<td>Arbour</td>
<td>More than average</td>
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<tr>
<td>L’Heureux-Dubé</td>
<td>More than average</td>
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<tr>
<td>Bastarache</td>
<td>More than average</td>
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<td>McLachlin</td>
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<td>LeBel</td>
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<td>Iacobucci</td>
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<tr>
<td>Gonthier</td>
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<tr>
<td>Deschamps</td>
<td>Less than average</td>
</tr>
<tr>
<td>Binnie</td>
<td>Never</td>
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<tr>
<td>Fish</td>
<td>Never</td>
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</tbody>
</table>
McLachlin CJ, LeBel and Fish JJ, shown in bold in Table 1, are the only three judges of those studied by Joseph who remain on the Supreme Court (DesChamps J, also shown in bold because she was part of the “pentalogy court,” has now retired).

Of those whom Joseph found wrote solo dissents a “more than average” number of times, only Bastarache J wrote in the eleven cases under consideration here, writing concurring reasons in the Toblerone case, for himself and for LeBel and Charron JJ. The Toblerone case is itself a bit of an outlier among these eleven decisions because it really involved questions about the limits of grey marketing and turned not on copyright infringement issues directly, but on the issue of secondary infringement. Much of the disagreement within the Court (which produced four separate sets of reasons in the case—see Figure 2, below) focused on questions involving assignment of rights.

Despite the fact that McLachlin CJ and LeBel J were found by Joseph to tend to write solo dissenting reasons at an “average” rate, and though both have written reasons among the eleven cases under consideration, neither has written a dissent in any of these eleven, let alone a solo dissent. In fact, there have been no solo dissenting reasons written in these eleven cases (see Figure 2, below). This complete lack of solo dissents is clearly not because the judges never write solo reasons in these cases. Of the twenty-two separate sets of reasons written in the eleven cases, four were concurring reasons written by one judge and not adopted by any other. LeBel J wrote his own reasons in the SOCAN v CAIP case, concurring in the result and with most of the areas of the majority judgment but dissenting in part and also alone raising the issue of privacy. Fish J wrote his own concurring reasons in the Toblerone case. Deschamps J concurred in the result in the Crookes case, but for her own reasons. Abella J concurred in the Rogers case, but for her own reasons.

On the other hand, of the eleven cases under consideration, only in three has the Court been unanimous (see Figure 2, below). In the 2004 decision in the CCH case, the Chief Justice wrote the judgment (her only reasons written in all the ten strictly copyright cases under discussion: she did write concurring reasons with Fish J in the Crookes libel case). Two of the 2012 pentalogy are unanimous judgments: Bell, for which Abella J wrote, and Re:Sound, for which LeBel J wrote. Even
allowing for the fact that the number of judgments being considered here is very small, three of eleven (or 27 percent) is a far cry from the 63 percent proportion of unanimous cases found in research based upon the full range of cases undertaken by the Court. The difference may suggest that these copyright cases possess unique characteristics that make it more difficult for the Court to achieve consensus.

The CCH case raised many difficult issues for the Court, among them the appropriate test for originality, the relationship of the more recent “Libraries, Archives and Museums” statutory exceptions to the older “Fair Dealing” provisions of the Copyright Act, whether a concept of agency could be involved in exercising rights under the Act, the ambit of “Fair Dealing” and so on. It could hardly be described as a case with a small number of separate legal issues. Re:Sound might be characterized as involving a more discrete problem: is a soundtrack in a movie within the s.2 definition of “sound recording”? The Bell case

Figure 2. The judgments in the eleven cases
again, however, raised more than one question: do music previews fall within the category of “research” under s 29? And, if so, do they meet the requirements of “Fair Dealing”? Thus, despite Songer and Siripurapu’s expectation that cases with fewer separate legal questions are more likely to produce unanimous judgments, the three unanimous judgments in these copyright-related cases (i.e. the *Bell*, *Re:Sound* and *CCH* cases) defy this expectation, ranging, as they do, from more straightforward to extremely complex.

McCormick has noted that, between 1984 and late 2007, judges of the Supreme Court co-authored eighty-six times. Amongst the twenty-two sets of reasons in these eleven cases, there are three instances of co-authorship (14 percent): the majority judgment in Robertson was co-authored by LeBel and Fish JJ, one of the sets of concurring reasons in the *Crookes* case was co-authored by the Chief Justice and Fish J, and the majority judgment in ESA was written by Moldaver and Abella JJ.

C. Conclusions
The increased interest in copyright that the SCC seems to be demonstrating is at odds with the overall decline in docket space that the Supreme Court is assigning to “private economic law” cases generally (of which copyright would form a subset) as identified since 1970 by Donald Songer.

Within the limited domain of these eleven cases, McCormick’s assertion that “all judges participate to a greater or lesser degree” in concurring reasons is not borne out: Major, Rothstein, Binnie, Karakatsanis, Iacobucci, Moldaver, Cromwell, Gonthier, Arbour and L’Heureux-Dubé JJ did not write or participate in concurring reasons in any of these cases. On the other hand, of the twenty-two sets of reasons involved in the eleven cases, six are concurring reasons (27 percent, more than one quarter of all the reasons written in the cases). There are concurring reasons in four of the eleven cases (36 percent)—which is exactly identical to the percentage of concurring reasons McCormick found in his 1,716 judgments between 1984 and 2006. This certainly makes this data on the Supreme Court’s copyright-related judgments between 2002 and the present consistent with McCormick’s earlier data right across the ambit of cases heard by
the Supreme Court, which showed that “separate concurrences are a regular and ongoing aspect of the work” of the Court.

Of the eleven decisions reviewed here, there are five decisions in which the Court has been divided into a majority and minority (Théberge, Robertson, Toblerone, ESA and Alberta (Education)) and three decisions in which the majority has been accompanied by concurring judgments but no minority dissent (SOCAN v CAIP, Crookes and Rogers): eight of the eleven copyright-related decisions of the past eleven years. This data makes it clear that there are divided opinions at the highest level in Canada over issues related to copyright. It is evident that, with only three unanimous decisions in that period, unanimity is more the exception than the rule in copyright cases, in marked contrast to the prevailing prevalence of unanimous decisions found overall in the Supreme Court’s jurisprudence. Moreover, there is a complete absence of solo dissents across this data, which would appear to suggest that the reasons for lack of unanimity in the copyright area are more likely to be those same reasons that McCormick identified as leading to concurrent judgments: copyright is in a “dynamic period of flux and change”, “‘big’ questions are coming before the Court” and “policy-divergent responses [would appear to] need to be generated to prepare the field within which these can be managed.”

Since joining the Court in 2004 after the CCH and SOCAN v CAIP copyright cases were decided, Abella J has written (or co-written, in the case of the majority judgment in ESA) reasons for every one of the eight subsequent copyright-related cases discussed here, except the unanimous judgment in Re:Sound (which LeBel J authored). Rothstein J, who joined the Court just in time to participate in all the same decisions, has written reasons in half of the same eight cases. This makes him the second most prolific author of copyright reasons of those participating in any of the copyright-related judgments examined here. Fish and LeBel JJ have authored reasons in three cases each, of the eleven analyzed here, and all the other judges discussed here, past and present, have authored fewer.

It is interesting to compare the relative positions of the two leading authors in the copyright area. While they have obviously been in agreement in the Court’s two unanimous copyright judgments
delivered since they both joined the Court (in Bell Abella J wrote the judgment, in Re:Sound, as mentioned, LeBel J did), Abella and Rothstein JJ have rarely otherwise agreed. In their first copyright case together on the Supreme Court, Robertson, Rothstein J agreed with the majority while Abella J wrote the dissent. Immediately following, in Toblerone, Rothstein J wrote the majority judgment and, again, Abella J penned the dissent. In the libel case, Crookes, which appears to have such strong copyright implications, Abella J wrote the majority and, here, Rothstein J agreed with her. In the three pentalogy judgments that were not unanimous, however, the two judges again differ. In Rogers, their differences are not great: Rothstein J writes the majority judgment and Abella J pens her own concurring reasons (the only concurring reasons written), differing with Rothstein J over his views of the proper characterization of the authority of the Copyright Board. But in the ESA and Alberta (Education) cases, the differences between their two views in copyright matters are marked, with Abella J writing for the majority and Rothstein J for the dissent in each case.

In each of the eight cases, Rothstein J has found himself of like mind with other members of the bench; this has been the case for Abella J in seven of the eight, the single exception being Abella J’s lone concurrence in Rogers. Although Fish J seems to view matters consistently from Rothstein J’s perspective, and Cromwell J has also agreed with Rothstein J in these copyright-related matters since joining the Court, neither Karakatsanis nor Moldaver JJ, in deciding the pentalogy cases as part of the Court for the first time on copyright matters, always sided with one or the other of Rothstein or Abella JJ. Nor has the Chief Justice or LeBel J sided with one or the other consistently.

Looking at this pattern of copyright-related judgments in the Supreme Court since 2002 and comparing the judges’ participation and roles within these cases with the patterns discerned in other studies about the Supreme Court’s jurisprudence, it has been demonstrated that the Court’s decision-making patterns in these copyright-related areas differ from the overall patterns of Supreme Court judgments in a number of ways: the lack of solo dissents; the good number of concurring reasons being written, both where there is a dissent and where there is not; the relatively low number
of unanimous judgments. In his own work based on data since 1949, McCormick saw a decline in these kinds of patterns, overall, when the major questions raised by the Charter after 1982 had, as he said, “been answered.” But here, in copyright, we see evidence of the patterns McCormick associated with an area that the whole Court recognizes as important and yet in a dynamic state and one that requires the Court to canvass and welcome a diversity of policy- divergent responses from among its members.

1 The author would like to thank Western Law JD student Dr. Matthew Frontini for his assistance and the reviewers of this chapter for their careful review and thoughtful suggestions.


2 Passed 29 June 2012, much of the Copyright Modernization Act, SC 2012, c 20 <http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2012_20/FullText.html>, amending the Copyright Act, RSC 1985, c C-42 <http://laws.justice.gc.ca/en/C-42/>, has been brought into force on 7 November 2012. Those sections of the revised Copyright Act which are not yet in force (but pending implementation under the Copyright Modernization Act when declared in force) are, new or revised, s 2(1) (the definitions of “moral rights” and “treaty country” replaced), s 5 (1.01) to (1.03) replaced, s 15 (2.2) added, s 15(4) added, s 18(2) replaced, s 18(2.2) added, s 18(4) added, s 19(1.2) added, s 19.2 added, s 20(1.2) added, s 20 (2.1) added, s 22(1) replaced, ss 41.25, 41.26 and 41.27(3) added and, finally, s 58(1) replaced <http://canadagazette.gc.ca/rp-pr/p2/2012/2012-11-07/html/si-tr85-eng.html>.

The Judicial Committee of the Privy Council had oversight of Canada's Supreme Court in criminal cases until 1933 and in civil cases until 1949. Ian Bushnell, in introducing his *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992), makes the observation that the Supreme Court was not an important part of Canadian society until after 1949 when appeal to the Privy Council of the House of Lords in England was abolished (see xi).


WR Jackett became President of the Exchequer Court, predecessor to the Federal Court, in 1964 and was made Chief Justice of the Federal Court when it was created in 1971. He retired in October of 1979. See Richard W Pound, *Chief Justice Jackett: By the Law of the Land* (Montreal: McGill-Queen's University Press, 1999) at 185-192 and 270-276. There was tension between the Federal Court and the Supreme Court in those years, and especially between Jackett CJ of the Federal Court and Laskin CJ of the Supreme Court (1973–1984), especially over the jurisdiction of the Federal Court. However, this tension played out in fields other than intellectual property. See both Pound's monograph, cited here, and Bushnell's *The Federal Court of Canada, supra* note 15 at 220-23.


*Supra* note 14, at xiii.


Ostberg & Wetstein were challenged in this task by the differences between the legal cultures of the United States and Canada. For example, in a study emulating American studies of the attitudes of individual judges, these scholars of the Canadian court were challenged by the relative dearth of personal information available about Canadian Supreme Court appointees. They therefore used proxies for actual evidence of the judges’ attitudes: the party of the appointing Prime Minister for the judge’s political affiliation, for example (see ibid at 47-85).

24 Decisions of the Court from the period 1984 to 2003 in selected categories (criminal, civil rights and liberties, and economics (predominantly union-management disputes)) were analyzed. There is no mention of any intellectual property dispute.

25 Donald Songer, The Transformation of the Supreme Court of Canada: An Empirical Examination (Toronto: University of Toronto Press, 2008). This work combined in-depth interviews with judges of the Supreme Court and analysis of three decades of the Court’s decisions in criminal law, the Charter and economic disputes (see 10-12). Here, again, there is no mention of either intellectual property generally or copyright specifically.


27 For instance, the festschrift (ibid), which focused on public law, contains sections with papers on administrative law, federalism and aboriginal law, equality and fundamental freedoms and criminal and international law. It may be recalled that copyright is public law creating private limited-term monopoly rights through statute and therefore might have been considered for inclusion.

28 For instance, there is nothing about intellectual property generally or copyright specifically in Bushnell’s The Captive Court (supra note 14). Neither is there any mention of intellectual property or copyright in Saywell’s The Lawmakers (supra note 21).


Decided in 2002 (supra note 9).

Songer & Siripurapu, supra note 33 at 80.

Songer, supra note 26 at 55. Lawsuits arising from copyright are maintained between private parties over economic rights, even though, as mentioned at supra note 28, the rights are created through public laws.

Songer & Siripurapu, supra note 33 at 66.

Ibid at 77.


The analysis was based on a total of 610 judgments. See supra note 32 at 142. McCormick has since published “Structures of Judgments: How the Modern Supreme Court of Canada Organizes its Reasons” (2009) 32 Dal LJ 35, in which he analyzed every written decision handed down between 1 July 1990 and 31 December 2007. In it he identifies the fact that the Court has changed its attitude to reasons being advanced by the minority in a decision, acknowledging before completing the drafting that these reasons will not govern the outcome of the case at bar and thus keeping them quite short and relying on elements of the majority opinion such that the minority reasons cannot be read as stand-alone judgments. This, in turn, has led to a shift in nomenclature about the reasons wherein the majority reasons are generally termed “judgments” while the minority reasons, whether concurring or in dissent, are not and are referred to as “reasons”. That nomenclature is used in this chapter, but not consistently in the sources upon which it draws.

between January 2000 and October 2007, 175 dissents were reported, including solo dissents: McCormick supra note 32 at 140.


Richard Posner reports that the American Supreme Court judges, between 1975 and 2005, were only unanimous in 28 percent of cases; see How Judges Think (Cambridge: Harvard University Press, 2008) at 50. See also Macfarlane, supra note 39 at 381, citing to a study by Paresh Kumar Narayan and Russell Smyth (“The Consensual Norm on the High Court of Australia: 1904–2001” (2005) 26 Int Pol Sci Rev 147), for the proposition that Australia traditionally also has a lower rate of consensus.

Macfarlane, supra note 39 at 383.


Ibid at 164.

Ibid at 166.


The Laskin Court having a rate of 3.8%, the Dickson 2.7%, and the Lamer 5.5%; Joseph, supra note 42, Table 1, at 506.

Ibid at 505.

Ibid at 506. Joseph appears to use the term “disagreement rate” to refer to the total number of dissents (solo or otherwise) in the cases decided.

As opposed to the Dickson Court disagreement rate of 35.5%, the highest.

Joseph, supra note 42 at 512.

In five-person panels, 46.8%; in seven-person panels, 37.7% (ibid at 513).

Ibid. When the full Court sat, solo dissents were “limited” in 63.7% of cases. Although Joseph did not comment on this point, to this author, Joseph’s finding that solo dissents occurred less often when the full Court was sitting is completely consistent with her finding that, when they do occur, they are most often “limited” dissents.

The previous major revision to the Copyright Act before the Copyright Modernization Act (SC 2012, c 20), which had not yet come into force at the time of the release of the pentalogy, as mentioned above, occurred through the Act to Amend the Copyright Act, SC 1997, c 24.


The Robertson appeal was unusual in that argument was first heard before the full Court, which included Major J, on 14 December 2005, but then Major J retired on Christmas, 2005. When he was replaced by Rothstein J on 1 March 2006, there followed

On the consent of the parties, the Court will rehear the appeal by reviewing the transcript and viewing the videotape of the hearing held on December 6, 2005. Any questions arising during the re-hearing shall be addressed to counsel for the parties, in writing. Counsel shall be given the opportunity to answer and reply in writing in accordance with dates as directed by the Registrar.

This was what occurred on 18 April 2006 and is recorded as the “re-hearing”, which included Rothstein J.

60 Distinguishing the approach taken by the Court in its earlier *SOCAN v CAIP* decision.

61 *See Copyright Act, supra* note 7, s 3.

62 Saunders JA, for herself and Bauman JA.

63 Prowse JA.

64 *Crookes v Newton*, 2009 BCCA 392 at para 59 [<http://canlii.ca/t/25md2>].

65 *Ibid* at para 60.

66 *Crookes, supra* note 58.


68 It may be noted that neither the majority nor minority reasons in the Court of Appeal (see *supra* note 64) referred to the *Robertson* decision (*supra* note 12) of the Supreme Court either—nor did the Judge Kelleher in the original summary trial judgment. However, the majority in the Court of Appeal referred, in *obiter*, to the *SOCAN v CAIP* decision of the Supreme Court (*supra* note 11).

69 *Toblerone, supra* note 13, the majority at para 36, the dissent at para 118 and Fish J in his concurring reasons at para 55. Bastarache J, for himself and for Charron and LeBel JJ, does not refer to the case in his concurring reasons.

70 It is not cited in the *Alberta (Education)* case (*supra* note 5), by either the majority or dissent, nor in the unanimous judgment in *Re:Sound (supra* note 6).

71 *ESA, supra* note 2. In the majority judgment, see para 5, and in the dissenting reasons, see para 121.

72 *Bell, supra* note 4 at para 43.

73 *Rogers, supra* note 3 at para 39.

74 This is noted in Figure 2 by the “n/a” beside each of their names on the line descending from “*Théberge*.”

75 *Théberge, supra* note 9. Binnie J at paras 6, 15, 16, 28 and 63 and Gonthier J at paras 116, 120, and 121 (explicitly disagreeing in para 121 with Binnie J’s characterization of the role of the civilian tradition with respect to the issues at bar).

76 *Joseph, supra* note 42 at 518.

77 Those were written by Gonthier J—and LeBel J joined Gonthier and L’Heureux-Dubé J. Indeed, as discussed above, all the judges who were civilly trained dissented from the majority judgment in this case, which came to the Court from the Quebec Court of Appeal. See discussion above.
Joseph, supra note 42 at 518, Table 14. Joseph’s data does not extend to Abella, Rothstein, Cromwell, Moldaver or Karakatsanis JJ, who were part of the Court deciding the pentalogy but were all appointed to the Supreme Court after 2003. But Joseph’s data showed that solo dissent rates were higher for those with more than five years of judicial experience prior to being appointed to the Supreme Court of Canada (ibid at 523). Extrapolating from her finding, we would expect, then, that all of Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ are more likely to write solo dissents because all have had more than five years’ experience on various benches before being appointed to the Supreme Court.

Copyright Act, supra note 7, s 27(2)(e).

The Chief Justice wrote for the unanimous court in the CCH case (supra note 10) and, with Fish J, concurring reasons in Crookes (supra note 58), LeBel J wrote for the majority in Robertson (supra note 12) and the unanimous court in Re:Sound (supra note 6) as well as writing concurring reasons in (SOCAN v CAIP, supra note 11).

There is another concurring judgment in Toblerone, written by Bastarache J, who was joined by LeBel and Iacobucci JJ (see Toblerone, supra note 13 at paras 57-100). In Figure 2, Fish J’s solo concurrence is marked by a large “C”, while Bastarache J, writing the concurring judgment in which LeBel and Iacobucci JJ joined, is marked by “C+2” and LeBel and Iacobucci JJ are each then marked with a small boxed “c”.

Treating the libel case of Crookes here (supra note 58), as the author has done throughout this analysis, as a “copyright” case because of the direct relevance of its decision about “publishing” to the copyright environment.

McCormick, supra note 32 at n 1.

It may be significant that two of the three co-authorships involve Fish J, but it is impossible to determine this without further information.

Songer, supra note 26 at 65-66.

Ibid.

It must be recalled that because of the limitations of what can be graphed (in terms of maintaining visual clarity amid complex information), what appear to be separate concurring judgments of the Chief Justice and Fish J under the Crookes case (supra note 58) in Figure 2 are actually one co-authored concurring judgment, as noted above.

Rounding from the 35.5% extrapolated from the data presented in McCormick, supra note 32, Table 1 at 144.

McCormick, supra note 32 at 163.

Ibid at 166.