“The Life of a Reserve”: How Might We Improve the Structure, Content, Accessibility, Length & Timeliness of Judicial Decisions?

by

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Abstract

This thesis explains how judicial decisions may impact access to justice and how might we make decisions a better source of data while also making them more timely, concise, accessible, and consistent. It examines the historical and theoretical underpinnings of Canadian decisions and the relationship of decision-writing to decision-making. It then discusses the results of an original empirical study of the evolution of British Columbia trial decisions over the last forty years and a survey of Canadian courts. It argues that the current process for writing and issuing Canadian judicial decisions likely does not further the goals of access to justice and may even hinder them.

To improve access to justice, it suggests that governments, academics, and judiciaries should rely on human-centered design to design standardized structures and templates for decisions, and it provides a design plan for such reforms and examines the ways judicial independence may impact such reforms.
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Introduction

In 2012, an Ontario Superior Court judge did something unusual: he tracked the time it took him to write a decision. The disproportionate result is surprising: to address a 1.5-day dispute that occupied .86% of Justice Brown’s allocated yearly sitting time, he had to use 21% of his allocated yearly writing time.1 Unsurprisingly, Justice Brown then called for more writing time as one way “to restore the health of Ontario’s ailing civil litigation system.”2

But would more writing time really help restore the litigation system’s health? We do not know. No scholarship or data addresses how long Canadian judges take to write trial and appellate decisions or trial decisions’ length and structure. We cannot easily analyze if Justice Brown’s writing time (75 hours) or the parties’ seven-month wait-time for the decision are typical;3 if the 1.5 day hearing required such a lengthy (276 paragraphs/95 pages) and complex decision (24 cases and three statutes were cited);4 if judges are generally taking longer to issue decisions;5 or if the decision satisfied the parties. The implication of such “lousy data is lousy knowledge.”6

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1 Western Larch Limited v Di Pocca Management Limited, 2012 ONSC 7014 at paras 269-277 (Brown J did this analysis) [“Western Larch”].
2 Ibid at paras 276-277.
3 No Canadian database tracks this concept. Loom Analytics, a private company, is tracking how long judges take to issue reasons (see Loom Analytics, online: <https://www.loomanalytics.com/>). But Loom does not track how judges use their time, e.g., reading evidence/case law vs. drafting decisions. See also Cristin Schmitz, “Ontario Superior Court to review management of judicial tardiness” (29 May 2017) The Lawyers Daily, online: <https://www.thelawyersdaily.ca/articles/3830/ontario-superior-court-to-review-management-of-judicial-tardiness>

“[Whether the judiciary… has dropped the ball in addressing an apparently persistent problem [(delay in issuing decisions)] is "hard to know without more context"]. For one of the only historical discussions on delay in issuing Canadian decisions, see Robert J Sharpe & Kent Roach, Brian Dickson: A Judge’s Journey (University of Toronto Press: Toronto, 2004) at 370-375 [discussing the Supreme Court of Canada (“SCC”) backlog in issuing decisions when Chief Justice Dickson was appointed and how he resolved it].
4 Supra note 1. Lengthy opinions are likely infrequently useful (see Gerald Lebovits, Alifya V Curtin & Lisa Solomon, “Ethical Judicial Opinion Writing” (2008) 21 Geo J Leg Ethics 238 at 252-258).
One thing we certainly do know is that Canada is experiencing an access to justice plague. In the words of former Chief Justice McLachlin: “access to justice is the most important issue facing the legal system.” Canada’s legal system is complacent, slow, inconsistent, and expensive. What we do not know, however, is how to cure the plague we failed to prevent: Canada is experiencing a data deficit about its legal system and many common legal issues that Canadians face every day.

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9 Jordan, supra note 7 at paras 4, 29, 40, 41, 104; Office of the Children’s Lawyer v Balev, 2018 SCC 16 at para 82.

10 Hryniak, supra note 7 at paras 1-2; Jordan, supra note 7 at para 40; Cody, supra note 1 at para 1 [“Cody”].


13 CBA, “Equal Justice”, supra note 7 at 51 [“there are still many gaps in our knowledge and these gaps impact our capacity for reform … the empirical basis for decision making is still extremely limited compare to what is known about health and education. The justice system has a long way to go in terms of what information is collected, how it is collected and how open it is.”]; Access to Justice Coordinating Committee, “Final Report: 2018” at 13, online: <http://courts.ns.ca/News_of_Courts/documents/A2JCRreport_WEB.pdf> [“Much of the feedback on the functionality of the legal system is based on anecdotal evidence. The lack of reliable statistics to support decision-making is an impediment…”]; Standing Senate Committee on Legal and Constitutional Affairs, “Delays in the Administration of Justice” 2017 Final Report at 29-31, online: <https://sencanada.ca/content/sen/committee/421/LCJC/Reports/CourtDelaysStudyInterimReport_e.pdf>; Canadian Centre for Justice Statistics, “Civil Courts Study Reports” at 16-17, online: <http://publications.gc.ca/Collections-R/Statcan/85-549-XIE/0009985-549-XIE.pdf>.

14 Tavia Grant & Eric Andrew Gee, “In the information age, Canada is falling behind” (25 January 2019) The Globe and Mail, online: <https://www.theglobeandmail.com/canada/article-in-the-information-age-canada-is-falling-behind/> [“On everything from public health to housing, the economy and education, the country does not have the data it needs to make smart decisions. We are tracking the gaps and their effect on your everyday life.”]; Eric Andrew Gee & Tavia Grant, “In the dark: The cost of Canada’s data deficit” (26 January 2019) The Globe and Mail, online: <https://www.theglobeandmail.com/canada/article-in-the-dark-the-cost-of-canadas-data-deficit/>; Tavia Grant & Eric Andrew Gee, “Experts urge Ottawa to fix Canada’s data deficit” (27 January 2019) The Globe and Mail, online: <https://www.theglobeandmail.com/canada/article-experts-make-recommendations-about-how-canada-can-fix-its-data-deficit/> [“By data gap, we mean areas at the national level in which data are not collected or readily accessible. These could be areas where there is no ability to compare across provinces or cities, where the existing information is years out of date, published infrequently or not comparable with prior years.”].
In light of such knowledge, lousy data about decisions—the end product of the judicial process\textsuperscript{15} and a fundamental cache of data\textsuperscript{16}—is inexcusable.

This thesis seeks to remediate part of that data deficit. It also seeks to explain how judicial decisions may impact access to justice and how might we make decisions a better source of data while also making them more timely, concise, accessible, and consistent.

This thesis employs a multifaceted analysis and proceeds in six parts:

- **Part I** is historical and theoretical: it examines the decision’s history in the common law and the relationship of decision-writing to decision-making;
- **Part II** is quantitative and qualitative: it examines the evolution of British Columbia trial decisions over the last 40 years;
- **Part III** is qualitative: it presents survey results from a survey of most s. 96 courts, statutory appeal courts, and federal courts;
- **Part IV** is prescriptive: it examines possible reforms to decisions that rely on human-centered design and empirical legal principles;
- **Part V** is doctrinal: it discusses how the principle of judicial independence may impact such reforms and notes areas for further research; and
- **Epilogue** is prescriptive: it suggests some solutions for Canada’s legal data deficit and Canadian law schools’ limited approaches to empirical legal studies and legal data science.

This analysis offers one overarching conclusion: the current process for writing and issuing Canadian judicial decisions likely does not further the goals of access to justice—it may even hinder them. Instead of sleepwalking into the future and waiting for some technology to fix the problems that decisions may cause,\textsuperscript{17} governments, academics, and judiciaries should collaboratively rely on human-centered design and empirical legal principles to design standardized structures and templates for judicial decisions.

\textsuperscript{15} See Dan Simon, “A Psychological Model of Judicial Decision Making” (1998) 30 Rutgers LJ 1 at 133 [“Judicial opinions deserve serious attention because of their formative impact on the legal culture. More than just providing solutions to particular controversies, the judicial opinion is a major progenitor of legal discourse”] [Simon, “A Psychological Model”].

\textsuperscript{16} Andrew Manuel Crespo, “Systemic Facts: Toward Institutional Awareness in Criminal Courts” (2016) 129 Harv L Rev 2049 [Crespo argues that courts maintain a vast body of data that should be availed].

Part I: A brief history of the common law decision and the relationship of decision-writing to decision-making

Divorcing theoretical and empirical research from historical facts can be misleading: people frequently form opinions based on historically incorrect facts.18 As legal historian Lawrence Friedman notes, “People have ideas that just don’t turn out to be historically correct … [people think] we’ve always had that …. [But we should ask] where did these things come from and why…. [this approach] doesn’t answer any questions, but it makes us more sophisticated in judging our present system.”19

Friedman made those comments when discussing the history of the American criminal justice system. But they apply equally to the history of judicial decisions. To ensure that our discussion of decisions and reforming them is grounded in historical facts, Part I briefly summarizes two histories: the history of decisions in the common law—with a particular focus on the United Kingdom (“UK”)—and the lack of any historical common law requirement for reasoned decisions in Canada. It then discusses the theoretical relationship of decision-making to decision writing through the lens of the judicial labour market model. This analysis yields one conclusion: decision-writing is neither inherent nor intrinsic to decision-making.

i. A brief history: accurate, published, written, reasoned decisions and stare decisis were developed as tools to legitimize the judiciary’s role in the UK legal system

Somewhat surprisingly, before William Popkin’s seminal text, Evolution of the Judicial Opinion: Institutional and Individual Styles, no work comprehensively studied the evolution of judicial decisions and writing styles in the common law with a specific focus on the UK and the United States (“U.S.”).20 Since its release, no other work has comprehensively analyzed the decision’s evolution in the common or civil law systems. Accordingly, this section relies heavily on Popkin’s historiography. Other general works on the history of the UK common law, influential figures in the UK common law, and decisions are consistent with Popkin’s historiography and do not imply weakness in his approach or theses.

19 Ibid.
This lack of attention is surprising. Judicial decisions are the judiciary’s public face and a primary source of law in common law jurisdictions.\textsuperscript{21} As Simon argues, the study of decisions deserves “serious attention because of their formative impact on legal culture. More than just providing solutions to particular controversies, the judicial opinion is a major progenitor of legal discourse.”\textsuperscript{22}

This lack of attention is also problematic. It has likely led Canadian scholars, lawyers, and judges astray. One example comes from the Supreme Court of Canada’s (“SCC”) seminal 2002 decision in \textit{R. v. Sheppard} [“\textit{Sheppard}”]. In \textit{Sheppard}, the SCC discussed the duty to deliver reasoned decisions in criminal proceedings and held “the delivery of reasoned decisions is inherent in the judge’s role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.”\textsuperscript{23} The SCC’s use of the word “inherent” is curious and misleading. The requirement to deliver decisions is inherent in the French civil law system; it also arises in other civil law jurisdictions.\textsuperscript{24} But the decision’s history is incontrovertible: common law judges have no historic or inherent duty to issue oral or written reasoned decisions.\textsuperscript{25} Six years after \textit{Sheppard}, the SCC conceded this point\textsuperscript{26} when it reiterated that Canadian judges still have no inherent duty to issue reasoned decisions in most cases.\textsuperscript{27}

The accurate, written, reasoned, published decision—as we now know it—did not arise out of some inherent duty; obligation to the public; or because decision-writing is intrinsic or inherent to decision-making. Rather, its 18\textsuperscript{th} & 19\textsuperscript{th} century genesis likely arose out of the UK judiciary’s

\textsuperscript{21} Ibid.
\textsuperscript{22} Simon, “A Psychological Model”, supra note 15 at 133.
\textsuperscript{23} \textit{R v Sheppard}, 2002 SCC 26 at para 55 [“Sheppard”] [emphasis added]. As we will shortly discuss, this “obligation” cannot be read in isolation. One must pay close attention to para 19 when reading \textit{Sheppard}: the holding was directed to the criminal context.
\textsuperscript{26} The SCC recognized these points in \textit{R v REM}, 2008 SCC 51 paras 8-10 [“REM”]
\textsuperscript{27} Ibid at para 10 [“There is no absolute rule that adjudicators must in all circumstances give reasons. In some adjudicative contexts, however, reasons are desirable, and in a few, mandatory”]. Stewart argues that \textit{REM} walked back the principles that \textit{Sheppard} established (Hamish Stewart, “The Trial Judge’s Duty to Give Reasons for Judgment in Criminal Cases” (2009) 14:1 Can Crim L Rev 19).
rivalry with Parliament. To explain this point, I will briefly discuss two periods of the decision’s evolution in the UK (pre-1750s & 1750s – 1960s).

(a) Pre-1750s: accurate, published, written decisions were not a creature of this period

The broad historical perspective, beyond the UK, suggests that Roman and pre-modern European courts did not give reasoned decisions. As Cohen argues, judges’ “task was to decide cases, not to issue explanations.” In the twelfth and thirteenth centuries, reasoned decisions were perceived as potentially compromising the courts’ power and legitimacy. This history is frequently overlooked, and people incorrectly assume the common law traditionally imposed a requirement to give reasoned decisions. As Dyzenhaus and Taggart note, however, “that assumption has hardly ever been the case.” Unfortunately, the assumption likely persists today. Many lawyers and judges likely believe judges must issue reasoned decisions. But reasoned decisions are actually optional in most contexts and only mandatory in a few contexts.

In this period, the common law was pre-eminent in the UK and was largely based on non-binding “oral opinions.” Such opinions were not binding because stare decisis did not yet exist.

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28 Popkin, Evolution, supra note 20 at 4, 6-7, 14-19, 22, 41-42; see also Richard H Helmholz, “The Ratio Decidendi in England: Evidence from the Civilian Tradition” in W Hamilton Bryson & Serge Dauchy, eds, Ratio Decidendi—Guiding Principles of Judicial Decisions, vol 1 (Duncker & Humbold: Berlin, 2006) 73 at 77 [the historic practice was that UK judges did not provide reasoning for their decisions]. Other factors were also at play in this evolution, like the ability to more easily print decisions. For a fascinating discussion of the debate over printing law, see Richard J Ross, “The Commoning of the Common Law: The Renaissance Debate over Printing English Law, 1520-1640” (1998) 164:2 U Pa L Rev 323 [“Ross, “The Commoning”].

29 Cohen, “Not to Give Reasons”, supra note 24 at 486.

30 Ibid at 487.

31 Ibid; for a somewhat contrary view, see Dyzenhaus & Taggart, “Reasoned Decisions”, supra note 25 at 137.

32 Cohen, “Not to Give Reasons”, supra note 24 at 486, 491.


35 REM, supra note 23 at para 10.

36 Popkin, Evolution, supra note 20 at 6, 21-23. For a brief history of the early part of the first period, see Paul Brand, “Judges and Judging 1176 -1307” in Paul Brand & Joshua Getzler, eds, Judges and Judging: The History of the Common Law and Civil (Cambridge: Cambridge University Press, 2007) 3. For a brief history of the 15th century UK common law, see David Seipp, “Formalism and realism in the fifteenth-century English Law: Bodies corporate and bodies natural” in Paul Brand & Joshua Getzler, eds, Judges and Judging: The History of the Common Law and Civil (Cambridge: Cambridge University Press, 2007) 37; see also David Slapper & David Kelly, The English Legal System (Routledge: New York, 2012) at xi [“In its early stages of development, the legal system had no organised law reporting so, in law courts, previous cases were analysed only in an oral way with lawyers and judges giving accounts of previous cases from memory, whereas today we have libraries full of voluminous law reports and all major decisions published in full online”].
Statutes were believed to play a subsidiary role in resolving conflicts; they supplemented and patched oral, common law doctrine.\textsuperscript{37} Despite the common law’s pre-eminence, oral decisions were not codified particularly well, if at all. In the 13\textsuperscript{th} century, private Yearbooks presented information about what occurred in courts, but “[s]ubstantive law was often neglected….”\textsuperscript{38} In the 16\textsuperscript{th} century, the private Yearbooks ceased, and the UK was left with a system of unofficial written reports comprised of lawyers’ or judges’ transcribed notes and additional material for context. Such reports were not intended for publication. Apart from a few collections, they were far from accurate; court proceedings were “simply not reported, reported inaccurately, or reported late.”\textsuperscript{39} Some reports were “so bad that some judges actually refused to permit their citation.”\textsuperscript{40} In sum, the first period’s history suggests that the common law did not embrace accurate, published, written, reasoned decisions. Instead, the common law was alleged to be “infinite, and without order or end.”\textsuperscript{41}

\textbf{(b) 1750s-1960s: The genesis of the accurate, published, written, reasoned decision}

Accurate, published, written, reasoned decisions evolved considerably in this period. This period is the likely genesis of many aspects of today’s version of the Canadian written decision. As the power of the UK Parliament grew,\textsuperscript{42} judging was seen as a “rival source of law to statutes….”\textsuperscript{43}

\textsuperscript{37} Popkin, \textit{Evolution}, supra note 20 at 9; Richard A Posner, “Blackstone and Bentham” (1976) 19 JL & Econ 569 at 585; see also Theodore FT Plunknett, \textit{A Concise History of the Common Law}, 2d (The Lawyers Co-operative Publishing Co: Rochester, 1936) at 50-51 [for his discussion on the common law’s sovereignty] [Plunknett, \textit{A Concise History}].

\textsuperscript{38} Popkin, \textit{Evolution}, supra note 20 at 11; see also Plunknett, \textit{A Concise History}, supra note 37 at 242 [“One thing at least is clear. The Year Books did not exist for the same reason as the modern law report. They were not intended to collect precedents whose authority should be binding in later cases. This is clear from examining the manuscripts; from the style of the handwriting it is obvious that the manuscripts were written within a few years of the cases they contained.”].


\textsuperscript{41} Ross, “The Commoning”, supra note 28 at 365.

\textsuperscript{42} See Plunknett, \textit{A Concise History}, supra note 37 at 62, 72-74 [for a discussion of philosophy’s impact in this period and the rise of statutory prominence]; see also Lori Hausegger, Matthew Hennigar & Troy Riddell, \textit{Canadian Courts: Law, Politics, and Process} (Oxford University Press: Oxford, 2009) at 12-13 [“after the Glorious Revolution of 1688-9, which established the principle of parliamentary supremacy, it became clear that laws passed by Parliament would trump common law by judges if there was a conflict between the two….”] [Hausegger, Hennigar & Riddell, \textit{Canadian Courts}].

\textsuperscript{43} Popkin, \textit{Evolution}, supra note 20 at 15. For a further view on these reforms, see Michael Lobban, “The politics of English law in the nineteenth century” in Paul Brand & Joshua Getzler, eds, \textit{Judges and Judging: The History of the Common Law and Civil} (Cambridge: Cambridge University Press, 2007) 102; see also Plunknett, \textit{A Concise History},
Nonetheless, despite Parliament’s increasing eminence as the source of law, the judiciary developed a public image of judging as a parallel, legitimate source of law by creating a semi-official reporting system that gave decisions a written status akin to legislation. Mansfield’s approach after becoming Chief Justice in 1756 and the rise of the reported decision showcase these efforts.

Mansfield is alleged to have seen legislation as a rival to judicial power: he wrote decisions that were more “legislative”; he placed a greater emphasis on general principles; he was determined to rewrite the common law; and he projected the judiciary’s role and power in the UK by abandoning the UK seriatim practice to ensure that “judging would speak with a single voice, like legislation.” Not all judges accepted Mansfield’s approach; some judges argued he

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supra note 39 at 177 [he argues this conflict and crisis started in the first period with common law lawyers forming “the grandiose plan of making their system sole and supreme over all persons and causes.”], 251 [“For a moment it had been uncertain how far the common law would survive either in substance or in its traditional technique. Many proposals were in the air, some for a codification of the common law, others for a resort to a somewhat formless equity. If either of these had succeeded, English law would have developed a different set of tools, new methods of handling them, and, in consequence, a very different spirit. It was the influence of Coke, assisted by the political conditions of the Stuart conflict, which prevented all this.”] & 301 [Coke “hoped to subject both Crown and Parliament to a paramount common law, and for a time we find some decisions which accept this theory. In the eighteenth century, however, the principle was slowly abandoned—not so much because the mediaeval authority for it adduced by Coke is unconvincing as because subsequent events had proved that there were no legal limitations upon the powers of Parliament.”].

44 Popkin, *Evolution*, supra note 20 at 6-7, 14-16.
45 *Ibid* at 16; Norman S Poser, *Lord Mansfield: Justice in the Age of Reason* (McGill-Queen’s University Press: Montreal & Kingston, 2003) at 202 [“Seldom has any new judge been better prepared for his job. He handed down some of his most important and carefully thought-out decisions, particularly those involving commercial law and insurance law, during his first few years in office, and he continued to make significant contributions to the English common law for the next thirty years’’]; see also at 396-403.
46 Popkin, *Evolution*, supra note 20 at 16; see also Plunkett, *A Concise History*, supra note 37 at 67-69 [discussing the industrial revolution’s impact on the law and the beginnings of the reform movement] & 216-224 [for a discussion of this period and Mansfield]. Interestingly, some scholars quote a line alleged to be from Mansfield that does not represent his practice as decision-maker—e.g., Ho argues that “on how to be a great judge, Lord Mansfield is reported to have advised: “[N]ever give your reasons; - for your judgment will probably be right, but your reasons will certainly be wrong.” (see HL Ho “The judicial duty to give reasons” (2000) 20:1 Society of Legal Scholars 42 at 42). Mansfield actually provided the anecdotal advice to a friend who became chancellor (see John Campbell, *The Lives of the Chief Justice of England*, vol IV (Cockcroft & Company: New York, 1878) at 572. Out of context, the anecdote, is not representative of Mansfield’s views, his practice, or his influence on the common law. For example, Poser argues that “To be painstaking in his work was certainly an enduring personal practice, but he also felt it to be his duty as a judge. In one criminal case, he said: ‘I never give a judicial opinion upon any point, until I think I am master of every material argument and authority relative to it. It is not only a justice due to the Crown and the party, in every criminal case where doubts arise, to weigh well the grounds and reasons of the judgment; but it is of great consequence, to explain them with accuracy and precision, in open Court.’” (Poser, supra note 45 at 204). A clear example of such detail can be found in *Somerset v Stewart*, (1772) 98 ER 499. As Poser goes on to argue, “Mansfield did not believe that this advice, while appropriate for a layman, should be followed by a professional judge. He himself gave reasons for decisions, because he believed that a judge’s job included setting down rules, based on general principles, which would provide guidance for future litigants.” (Poser, supra note 45 at 214).
exercised excessive discretion. But Mansfield appears to have caught the eye of James Burrow, the now famous law reporter who created Burrow’s Reports. Burrows arguably created the modern pattern of law reports and perhaps even the basis for a modern structure of the written decision—i.e., factual summary, followed by summarizing counsel’s arguments, concluding with the court’s judgment. Around the year 1800, the judiciary impliedly subscribed to the ethos of Mansfield’s project. Judges started experimenting with using “authorized” reporters in their courts. And some judges even began writing their opinions out and examining reporters’ drafts to ensure accuracy. Despite these efforts, the reporting continued to be “late, inaccurate, incomplete, and expensive” with the experiment ending in the 1830s.

Then, in the 1840s, the bar also implicitly subscribed to the ethos. They complained about how judicial decisions were being reported, including “the discrepancy between officially published legislation and inadequate arrangements for publishing reports of judicial opinions.” They called for the government to publish decisions like legislation. But the government did not. Instead, the bar began publishing decisions because of concerns with too much government control over the law. The move to more accurate, published, written decisions was paradigm shifting: it “signaled a transition from judging as the product of a group of professional experts with access to a specialized body of legal knowledge to judging as something more analogous to legislation—the articulate voice of government institution.” Despite this shift, the profession simply could not maintain judging’s pre-eminent historical status: its status was now neither pre-eminent to, nor akin to, Parliament or legislation; its status was now finally subservient.

47 Popkin, Evolution, supra note 20 at 17.
48 Ibid at 16-17.
50 Popkin, Evolution, supra note 20 at 17; see also Plunknett, A Concise History, supra note 37 at 249 [“Burrow’s Reports (1756-1772) introduced a new standard. At last we find a clear discrimination between facts, arguments and decision, and from his day onwards the necessary qualities of a good law report were understood, although sometimes they were not always reached. By the close of the eighteenth century, judges adopted the practice of looking over the draft reports of their decisions, and in this way certain reporters were regarded as ‘authorised.’ This was the first step towards the establishment of the official series of law Reports in 1865.”].
51 Popkin, Evolution, supra note 20 at 17-18.
52 Ibid at 18.
53 Ibid at 19; see also Duxbury, Nature and Authority of Precedent, supra note 40 at 55-56.
54 Popkin, Evolution, supra note 20 at 4; on Mansfield’s prominence, see Plunknett, A Concise History, supra note 37 at 312-313.
55 Popkin, Evolution, supra note 20 at 20; see also Plunknett, A Concise History, supra note 37 at 304.
The doctrine of binding precedent, *stare decisis*, was also birthed in this period with the House of Lords’ 1861 decision in *Beamish v. Beamish*. Its birth was also a likely reaction to the rise of Parliament’s power and dominance. Its relationship to written decisions is symbiotic:57

[the] 19th-Century embrace of the doctrine of binding precedent was a reaction to the dominance of legislation as the quintessential form of law. A binding judicial opinion is like legislation, purporting to contain the law within the four corners of a single written document. … Binding precedent, therefore, had the happy dual characteristic of asserting judicial power to legislation through initial declaration of law and deferring to the legislature by acknowledging that lawmaking had shifted to Parliament, thereby leaving any change in judge-made law to the sovereign. … The doctrine of binding precedent was, therefore, an example of a shift away from considering law as a set of principles existing outside for the judges who applied them and toward an image of law as a statement issued by a government institution….58

In sum, the second period’s history suggests that accurate, published, written, reasoned decisions are a recent phenomenon that appears to have arisen during the judiciary’s rivalry with Parliament as a mechanism to protect the judiciary’s role and status.59

**ii. Another brief history: the requirement to issue reasoned decisions—in certain contexts—is a recent Canadian phenomenon**

With this knowledge in hand, we now turn to another brief history. This time, however, the historical examination only takes us back to the 1970s and is limited to Canada.

The Canadian practice of providing robust, reasoned decisions in most cases—either oral or written—is new. The SCC’s 1994 decision *R. v. Burns* [“*Burns*”] showcases how far Canadian

57 Ibid at 25.
59 One could certainly argue that the judiciary was trying to maintain a check and balance over Parliament’s power. Regardless of the motivation, the point this brief history stresses remains: the modern judicial decision arose out of a rivalry.
law has come in a short time. Just over 25 years ago, the SCC proffered this general rule: “a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points.” The SCC’s reasoning in Burns closely tracked its reasoning in the 1976 decision Macdonald v. the Queen [“Macdonald”]. In Macdonald, the SCC held that the “Mere failure of a trial judge to give reasons, in the absence of any statutory or common law obligation to give them, does not raise a question of law [i.e., a legal error].” The SCC went on to find no such statutory or common law duty. It did, however, recognize and cite a common argument from Hooper in favour of reasoned decisions. Decisions are a check and balance on legal realism’s oft-noted criticism of judging, i.e., overreliance on intuition:

The arguments in favour of reasoned judgments are obvious. The process of publicly formulating his reasons may lead the judge to a conclusion other than that reached on the basis of ‘intuition’. The parties to the case, both the Crown and the defence, will want to assure themselves that the judge properly understood the issues before him and will want to know whether he reached any conclusion of law or fact that could be challenged at the appellate level. The general public, or at least the victim if there was one, may have an interest in knowing why a certain verdict was reached. The SCC’s recognition, however, was insufficient to create some general, common law duty in criminal cases to issue reasoned decisions. Instead, the SCC only noted that giving reasoned decisions is a “preferable practice.” The SCC’s recognition of the “process” justification for requiring reasoned decisions was prescient. It became a prominent point in the SCC’s discourse

60 R v Burns, [1994] 1 SCR 656 at 664. The SCC made the same pronouncement a year later in R v Barrett when the Court overturned an appellate decision that found “reasons must be given … for [particular findings of facts].” (see 1993 CanLII 3426 (ON CA)). Again, the SCC again held that “While it is clearly preferable to give reasons and although there may be some cases where reasons may be necessary, by itself, the absence of reasons of a trial judge cannot be a ground for appellate review” (see R v Barrett, [1995] 1 SCR 752 at para 1).

61 Macdonald v the Queen, [1977] 2 SCR 665 at 672 [Macdonald].

62 Anthony Hooper, “Comment” (1970) XLVIII Can Bar Rev 584 at 584; see also at 594 [“It has been shown that the law is in a state of confusion. If the courts are unwilling to make reasons for judgment obligatory, it is submitted that the legislature should do so, following the experience of a number of American jurisdictions. One sensible limitation would be that adopted, for example, by the federal courts in the United States. In these courts, reasons need only be given if either party requests it.”] [emphasis added].


64 Macdonald, supra note 61 at 672 [emphasis added].

65 Ibid.
on the purpose for reasoned decisions in administrative and criminal proceedings, and it remains prominent in theoretical frameworks that address the relationship of decision-writing and decision-making. Despite the SCC recognizing the utility of providing reasoned decisions, however, the SCC has never created a blanket common law rule that requires judges to provide written or oral reasoned decisions in all criminal or civil cases. Cases that suggest otherwise are not based on any SCC decision. This “missing” rule distinguishes Canada from the UK and Australia where the common law (and perhaps even constitutional law) appears to require reasoned decisions in most cases; failing to provide them can even be an error of law.

In 2002, the SCC broke away from the Macdonald approach in Sheppard. As discussed, the SCC held that delivering reasoned decisions was inherent to a judge’s role in criminal proceedings and that judges have a duty to issue reasoned decisions in criminal proceedings. While Sheppard was “directed to the criminal justice context”, its impact is ubiquitous in Canada’s common law. Courts of appeal have applied Sheppard’s principles in the civil context to find that judges have a duty to issue reasoned decisions in criminal and civil proceedings. But despite this impact and such cases, the SCC was clear in its 2008 decision R. v. REM [“R.E.M.”].

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66 Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at para 39 [“The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review”] [“Baker”]; Sheppard, supra note 23 at paras 23 [“it is widely recognized that having to give reasons itself concentrates the judicial mind on the difficulties that are presented …. The absence of reasons, however, does not necessarily indicate an absence of such concentration….] & 51 [“the act of formulating reasons may further focus and concentrate the judge’s mind, and demands an additional effort of self-expression, the requirement of reasons as such is directed only to having the trial judge articulate the thinking process that it is presumed has already occurred in a fashion sufficient to satisfy the demand of appellate review.”]; REM, supra note 26 at para 12 [“In addition, reasons help ensure fair and accurate decision making; the task of articulating the reasons directs the judge’s attention to the salient issues and lessens the possibility of overlooking or under-emphasizing important points of fact or law.”].

67 [Infra note 139.


69 Supra note 34.


71 Sheppard, supra note 23 at paras 19, 55.

72 Ibid at para 19.

73 As of February 2019, Canadian courts had cited Sheppard 1915 times.

74 Supra note 34.
law on the requirement for reasoned decisions has evolved; Canadian law, however, does not impose a general duty on judges to issue reasoned decisions in all criminal or any civil trials:

Judicial reasons of the 19th and early 20th century, when given, tended to be cryptic. One searches in vain for early jurisprudence on the duty to give reasons, for the simple reason, one suspects, that such reasons were not viewed as required unless a statute so provided. This absence of such a duty is undoubtedly related to the long-standing common law principle that an appeal is based on the judgment of the court, not on the reasons the court provides to explain or justify that judgment: see e.g. Glennie v. McD. & C. Holdings Ltd., 1935 CanLII 32 (SCC), [1935] S.C.R. 257, at p. 268.

The law, however, has evolved. There is no absolute rule that adjudicators must in all circumstances give reasons. In some adjudicative contexts, however, reasons are desirable, and in a few, mandatory. As this Court stated in R. v. Sheppard, [2002] 1 S.C.R. 869, 2002 SCC 26 (CanLII), at para. 18, quoting from Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 43 (in the administrative law context), “it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision”. A criminal trial, where the accused’s innocence is at stake, is one such circumstance.75

One could argue the SCC has held that all Canadian judges have a general duty to issue reasoned decisions.76 But R.E.M. is clear about no absolute duty, and it is still the binding precedent. In short, what is frequently not said or recognized in Canada’s common law is this important point. Aside from judge-alone criminal trials where innocence is at stake, the SCC has neither held that litigants have a common law right to oral or written reasoned decisions nor do courts have a common law duty to provide them (absent a statutory requirement).77

One might suggest my interpretation of Sheppard and R.E.M. is incorrect or overly legalistic.78 Practically, I concede that most Canadian lawyers assume a right to reasoned decisions for their

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75 REM, supra note 26 at paras 9-10 [emphasis added]; the SCC made a similar holding in R v Gagnon, 2006 SCC 17 at para 13 [“Gagnon”].

76 See, R v Dinardo, 2008 SCC 24 at para 24 [the SCC quotes Sheppard to imply such a duty. Again, however, Dinardo was a criminal decision, and Sheppard’s holding is clearly qualified] [“Dinardo”].

77 Bosland & Gill, supra note 68 at 493, n67; Roman N Komar, Reasons for Judgment: A Handbook for Judges and Other Judicial Officers (Butterworth and Co: Toronto, 1980) at 4 [“Some statutes compel a court to set out its reasons for judgment. Other legislation insists that the court at least set out the facts upon which reliance is based. Beyond these isolated statutory demands, however, there is no legal duty upon a tribunal to disclose its reasons for a decision … It is not even considered a disregard of the rules of natural justice to fail to disclose reasons.”].

78 See, e.g., Taggart, “Legally Required”, supra note 33 at 8 [“Notwithstanding the consistent categorical denial by some commentators of the existence of any judicial obligation to state facts and reasons in civil cases, it has always been the case that a trial judge's failure in this regard might, in certain circumstances, result in reversal by the
clients and that courts assume a responsibility to provide them. But those views are not based on any legal principle.

The SCC itself tacitly endorsed such views just one year before *R.E.M* in its 2007 decision *Hill v. Hamilton-Wentworth Regional Police Services Board* [“*Hill*”]. In *Hill*, the SCC rejected the appellant’s argument that the trial judge’s reasons were inadequate. Then, without explaining why *Sheppard* applied—recall the SCC explicitly held that *Sheppard*’s reasoning was “directed to the criminal justice context”—the SCC applied *Sheppard*’s reasoning about adequate reasons to a tort dispute. The SCC’s analysis suggests individuals have a right to “adequate reasons.” But a careful reading suggests no such right, and such a reading would also be inconsistent with *Sheppard* and *R.E.M*. The SCC applied *Sheppard* again in the civil context in *F.H. v. McDougall* [“*F.H.*”] when it released *R.E.M*. Like in *Hill*, the SCC in *F.H.* did not hold that courts have the same duty in civil cases as criminal cases. Rather, the SCC again focussed on the sufficiency or adequacy of reasons. Moreover, after *Hill* and *F.H.*, the SCC went on to be clear: failure to provide reasoned decisions or providing insufficient reasons in a civil case does not yet attract the same scrutiny as in criminal cases—e.g., an error of law.

This point is a distinction with a difference. In criminal cases, judges have a duty to issue reasoned decisions, so judges must issue adequate reasoned decisions. But if judges decide not to issue reasoned decisions in civil cases, their reasons clearly do not have to be sufficient.

Where judges voluntarily decide to provide reasons, however, then SCC jurisprudence is clear: those reasons must be sufficient or adequate. This distinction between failing to provide reasoned decisions and failing to provide sufficient reasons has led to a somewhat circular reality. What contributes to the circularity is that the “the absence of a statement of reasons may cause an appellate court to be unable to perform its statutorily prescribed appellate function.” In other
words, sufficient reasons allow appellate courts to more easily do their job. But until the SCC or statute impose a requirement to issue reasoned decisions in all cases, the common law neither requires nor supports what has become the current practice of giving reasoned decisions in almost all disputed cases. Instead, Canadian law only requires reasoned decisions in judicial proceedings where (1) innocence is at stake and (2) where statutes require such decisions.87

This distinction raises three important points that must be remembered throughout this thesis:

1. Judicial independence may not provide judges broad freedom over the content and structure of written decisions, like one might assume. Rather, it may only provide them the freedom to independently reason and adjudicate the dispute. Part V will briefly address this point. While judges historically had broader freedom over issuing decisions, such freedom can be permissibly yanked away with the simple passing of a statute or the stroke of an SCC decision.

2. Confusion around issuing reasoned decisions and what are sufficient reasons is an access to justice problem. As Part II demonstrates, the shift in the SCC’s approach may have profoundly impacted the length and timeliness of Canadian decisions. That shift appears to have started before Sheppard. Further research is needed on whether the marked shift from short, terse reasoned decisions in the 1980s to longer, fulsome reasoned decisions in the 2000s was because of jurisprudential nudges before Sheppard88 or simply the use of computers.89

3. Since judges have no historic or current duty to issue reasoned decisions in most cases, decision-writing is likely neither inherent nor intrinsic to decision-making.


88 As noted, the SCC did not impose a general requirement for reasoned decisions in criminal trials before Sheppard. But the idea was gaining traction in the cases following Burns. See, e.g., R v McMaster, [1996] 1 SCR 740 at para 27 [“in a case where it appears that the law is unsettled, it would be wise for a trial judge to write reasons setting out the legal principles upon which the conviction is based so that an error may be more easily identified, if error there be.”]; R v R (D), [1996] 2 SCR 291 at para 55 [“The above-quoted passage does not stand for the proposition that trial judges are never required to give reasons. Nor does it mean that they are always required to give reasons. Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions.”].

This section relies on a judge’s opinion about judicial decision-making theory. It seeks to further understand the relationship between decision-making and decision-writing in light of the two histories we just discussed. Understanding the current relationship is key to legal reform; it may reveal possible ways to improve judicial decisions’ structure and content, the topic of Part IV.

Before beginning this analysis, I must state a fundamental point. No theory can satisfactorily illuminate the black box of judicial decision-making. As Drobak and North argue,

we only know a little bit about what lies behind the curtain, although we know something is there. The judicial world is not like the Land of Oz, where we can pull back the curtain to see the real source of decisions. No matter how hard we try today, we cannot understand all the hidden factors that influence judicial outcomes.

This black box appears to have at least two root causes:

1. As one Canadian judge noted, judges have different, inherent senses of justice: “Judges are products of specific backgrounds, upbringings, education, etc., and their views have been influenced by parents, teachers, and colleagues. Their conceptions of justice vary considerably.” These extralegal influences may considerably affect how judges decide.

2. Even if scholars’ perspectives or theories seem to illuminate the phenomena they seek to understand about judicial behaviour, our current knowledge about the brain is “too primitive to let us judge with any confidence which cognitive theories are correct or, at least, which parts of which theories are correct.”

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90 Richard A Posner, Overcoming Law (Harvard University Press: Harvard, 1995) at 122 [“the core judicial function is decision, that is, voting, rather than articulating the grounds of the decisions”].


In short, every theory about judicial decision-making, including the one on which this thesis relies, is incomplete and flawed: “No single perspective is capable of capturing judging comprehensively.”\(^7\) So where can we go from here? As the introduction suggests, Canada needs far better quantitative and qualitative data about judicial decisions and the judicial decision-making process. The current data and knowledge gaps, however, do not preclude the recognition that judges’ decisions are a combination of “what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do … within the context of group, institutional, and environmental constraints.”\(^8\) To understand the theoretical relationship of decision-making to decision-writing, we must therefore rely on models that can “incorporate effects operative at varying levels of analysis,”\(^9\) including historical perspectives.

Judge Posner’s “judicial labour market model” presents one of the best theoretical perspectives for understanding what judges intentionally or unintentionally do.\(^10\) The model’s greatest utility is that it humanizes judges and decision-making: it reminds us that donning judicial robes does not make judges superhuman. It does not bring about the *Herculean* judge that Dworkin envisioned—one with infinite competence, intelligence, and resourcefulness.\(^11\) Instead of being superhuman, judges are like any other person: fallible workers.\(^12\) With this humanness in mind, the model invites us to examine a multiplicity of factors that may influence a judge’s behaviour, and it suggests we should, to the best of our ability, test them.

The model’s strength is its quick recognition of the insights and limits of the various theories on judicial decision-making (e.g., attitudinal, strategic, sociological, psychological, economic, organizational, phenomenological, and legalistic).\(^13\) Instead of choosing one theory, the model

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99 *Ibid* at 32; see also Simon, “A Psychological Model”, *supra* note 15 at 11 [“to understand the central features of judicial reasoning one must investigate the cognitive operations through which these decisions are made.”].
102 Posner, *How Judges Think, supra* note 91 at 57. An excellent way to examine these claims would be to actually survey judges or to review judicial applications. But social scientists suggest skepticism about such interviews (see Hausegger, Henniger & Riddell, *Canadian Courts, supra* note 42 at 139).
103 For a summary of these theories see Posner, *How Judges Think, supra* note 91 at 19-56; see also Gibson, *supra* note 99 at 7 [he also identifies other theories of judicial decision making theory that are similar to the ones that
seeks to integrate them into a multivariate framework. On their own, these theories are incomplete and misleading. But if you conceive of judges as workers in a somewhat unusual labour market, you can integrate these theories, and they become more useful.104 Such integration also avoid the traps of legal formalism (judging is seen as a mechanical task or “engineering” that involves no discretion)105 and legal realism (judging is seen as an intuitive-based process because law is “irrational and should be classified as an illusion or myth”).106 Instead of joining one ideological camp, the model accepts that formalism and realism concurrently impact decision-making. This statement captures the model’s essential thesis:

the judge … [is] a participant in a labor market—the judicial labor market … a judge conceived of as a participant in a labor market can be understood as being motivated and constrained, as other workers are, by costs and benefits both pecuniary and nonpecuniary, but mainly the latter: nonpecuniary costs such as effort, criticism, and workplace tensions, nonpecuniary benefits such as leisure, esteem, influence, self-expression, celebrity (that is, being a public figure), and opportunities for appointment to a higher court; and constrained also by professional and institutional rules and expectations and by a ‘production function’—the tools and methods that the worker uses in his job and how he uses them.107

In sum, judges, like other workers, may seek their position for remuneration; deference; power; respect; security; leisure; prestige; to avoid having to kowtow to clients; and to be good judges and workers.108 The employers in this market are governments: they want to hire good judges who will impartially enforce legal norms and without interference109 and who will tilt in favour of the administration’s political goals.110 While judges are similar to other workers, however,

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108 Posner, *How Judges Think*, supra note 91 at 59-60; for dated survey data on the reasons of Albertan and Ontario judges that are similar to this list, see McCormick & Greene, *Judges & Judging*, supra note 133 at 84-95, 98 who note both negative factors and positive incentives, like “escaping to the bench”, “boredom”, “overload”, “pragmatic calculation”, “new challenge”, “culmination of legal career”, “pinnacle of profession”, “flattering honour”.
110 *Ibid* at 57-59.
their position is atypical, and their independence alters the traditional employee-employer relationship:

Judges are employees, and employers use a variety of carrots and sticks to cause their employees to be faithful agents. But because of the immense social and political value of an independent judiciary, the employer … has been given few of the usual carrots and sticks with which to motivate its judicial employees. The biggest carrot the government has is, paradoxically, the promise of independence itself, for that makes a judgeship attractive; and the biggest stick it has is conflict-of-interest rules … which fairly compel judges to be independent.…

Other possible influences on judges’ behaviour are the promotion carrot and the reversal-by-a-higher-court stick. Internal influences include judges’ desire for self-respect and respect from other judges and legal professionals; the intrinsic satisfaction of judging; propensity for less work and more leisure; and finally, the institutional constraint of precedent. Clearly, the constraints on judges versus normal workers are attenuated. You cannot simply fire judges when you disagree with their approach.

Before proceeding further, I must note three of the model’s limits. First, the chief weakness of the model is its heavy reliance on “expected utility theory”, Bayes theorem, and rational

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111 Ibid at 370.
112 Ibid at 140-141, 371.
113 Ibid.
115 Posner, How Judges Think, supra note 91 at 43, 144-145.
116 Ibid at 139-140; for a further unpacking of the model, see Epstein, Landes & Posner, The Behaviour, supra note 105 at 25-37.
117 See, e.g., Nicole Ireland, “Robin Camp case: What does it take to remove a judge from the bench?” (12 November 2015) CBC, online: <https://www.cbc.ca/news/canada/judge-removal-canadian-judicial-council-1.3314962> [“Only two judges have been recommended for removal by the Canadian Judicial Council — a group of federally appointed judges tasked with investigating complaints about their peers — since it was created in 1971. In both cases, the judges resigned before the recommendations made it to Parliament, which ultimately decides whether or not to dismiss a Canadian judge. … In the last four decades, the judicial council has ordered public inquiries for 11 complaints against judges. Two of those inquiries are still ongoing. In some cases, the judge resigned before the inquiry was complete. For example, the late Judge Robert Flahiff was convicted in 1999 for laundering money for a drug dealer back in the 1980s, before he became a judge. He resigned before the judicial council finished its inquiry. … The rarity of judges removing their peers from the bench is a reflection of the value Canada places on an independent judiciary, said Trevor Farrow, a professor and associate dean at Osgoode Hall Law School in Toronto.”].
actor theory. Such theories suggest that human decision-making is somewhat akin to computerized decision-making or imbued with rationalism. But cognitive scientists and experimental psychologists have demonstrated that rational choice theory does not explain how the mind actually works. To his credit, Posner concedes that the unconscious (including bias) plays a role in judicial decision-making. He also recognizes some utility in behavioural economics. To be clear, I am not suggesting that judges are irrational or making some pejorative criticism. Rather, I am suggesting that cognitive science, experimental psychology, and behavioral economics have aptly demonstrated the shortcomings of over-emphasis on utility and rationality. All humans, including judges, make mistakes, rely on heuristics, and make unconsciously biased decisions.

Second, the model’s chief architect, Posner, “discounts the role of judicial history as a determinant of the judicial role.” But, as discussed, attempting to understand historical context

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121 Drobank & North, supra note 92 at 140-141; Robert Epstein, “The empty brain” (18 May 2016) Aeon, online: <https://aeon.co/essays/your-brain-does-not-process-information-and-it-is-not-a-computer> [“Senses, reflexes and learning mechanisms – this is what we start with, and it is quite a lot, when you think about it. If we lacked any of these capabilities at birth, we would probably have trouble surviving. But here is what we are not born with: information, data, rules, software, knowledge, lexicons, representations, algorithms, programs, models, memories, images, processors, subroutines, encoders, decoders, symbols, or buffers – design elements that allow digital computers to behave somewhat intelligently. Not only are we not born with such things, we also don’t develop them – ever.”]; Russell Korobkin, “Daniel Kahneman’s Influence on Legal Theory” (2013) 44:4 Loy U Chi LJ 1349 at 1350; see also Cass R Sunstein, Christine Jolls & Richard H Thaler, “A Behavioral Approach to Law and Economics” (1998) 50 Stanford Law Rev 1471; Daniel Kahneman, Thinking, Fast and Slow (Farrar, Straus, and Giroux: New York, 2013).


123 Posner, How Judges Think, supra note 91 at 107, 110 [“At every stage, the judge’s reasoning process is primarily intuitive. Given the constraints of time, it could not be otherwise; for intuition is a great economizer on conscious attention.”].

124 Richard A Posner, “Rational Choice, Behavioral Economics, and the Law” (1997) 50 Stan Law Rev 1551 at 1551 [“I don’t doubt that there is something to behavioral economics, and that law can benefit from its insights.”].

125 Kahneman, supra note 121 at 411 [“The definition of rationality as coherence is impossibly restrictive; it demands adherence to rules of logic that a finite mind is not able to implement. Reasonable people cannot be rational by that definition, but they should not be branded as irrational for that reason. Irrational is a strong word, which connotes impulsivity, emotionality, and a stubborn resistance to reasonable argument. I often cringe when my work with Amos [Tversky] is credited with demonstrating that human choices are irrational, when in fact our research only showed that Humans are not well described by the rational-agent model.”].


“makes us more sophisticated in judging our present system.”

It assists in understanding what may be inherent or intrinsic about decision-making. Accordingly, this thesis incorporates historical analysis within the model and does not discount its relevance.

Third, the model is American-centric. In comparison to the U.S., Canadian scholarship on judicial-decision making is underdeveloped. Despite calls to action, Canadian scholarship less frequently addresses the linked questions of “[w]hat judges do and why they do it.” The Canadian research that does exist supports using a multivariate approach to understand these questions. The largest analysis of Canadian appellate courts to date argues that extra-legal factors do explain appellate decisions’ outcomes—e.g., judges’ personal values, court procedures, and interpersonal relations in the court.

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128 Friedman, supra note 18.
129 Different judiciaries may have different cultures, so their decision-making patterns may differ (see CL Ostberg & Matthew E Wetstein, Attitudinal Decision Making in the Supreme Court of Canada (UBC Press: Vancouver, 2007) at 3-4.
131 Hausegger, Hennigar & Riddell, Canadian Courts, supra note 42 at 127.
132 See Peter H Russell, “Overcoming Legal Formalism: The Treatment of the Constitution, the Courts and Judicial Behaviour in Canadian Political Science” (1986) 1 CJLS/RCDS 5 at 26 (“An adequate understanding of the political significance of Canada's legal and judicial systems will require Canadian political scientists to make use of the impressive body of research carried out by social scientists in other disciplines, including the work of empirically-oriented legal scholars. In this sense, to overcome its past neglect of legal phenomena, Canadian political science will have to transcend its own boundaries”).
135 Greene et al, Final Appeal, supra note 133 at 199-210.
Despite these limitations, the model presents an excellent framework to understand the relationship of decision-writing to decision-making. As this thesis’s emphasis is judicial decisions, the rest of this part focuses on two elements: the role of decisions within the model and the concept of judges seeking to be good workers. I do not propose to address or canvass the traditional reasons for why judges should write reasoned decisions. Such literature is rich. I focus on these two points because many, if not most, Canadian superior, appellate, and federal court judges issue reasoned decisions in many cases where the law does not require them to issue reasoned decisions. Assuming that judges are rational and want to optimize their utility and leisure, this practice is curious.

(a) Decisions in the model: decision-writing is a check on decision-making

In contrast to arbitrators, who frequently engage in decision-making without issuing written decisions, the model suggests that judicial decision-writing can be understood as a check and balance on judicial decision-making:

The judicial opinion can best be understood as an attempt to explain how the decision, even if (as is most likely) arrived at on the basis of intuition, could have been arrived at on the basis of logical, step-by-step reasoning. That is a check on the errors to which intuitive reasoning is prone because of its compressed, inarticulate character; hence the value of a judge having a suit of emotions that does not cut him off from considering challenges to his intuitive take on a case.

This view is consistent with the SCC’s view on the point of writing decisions, i.e., the “process” justification for reasoned decisions that we discussed earlier:

- **Baker**: “the process of writing reasons for decision by itself may be a guarantee of a better decision.” This holding, however, addressed administrative decision-makers.

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137 For a recent summary, see Mullins, supra note 136.
140 *Supra* note 66.
141 *Baker*, *supra* note 66 at para 39.
• *Sheppard*: “having to give reasons itself concentrates the judicial mind on the difficulties that are presented…”, “the act of formulating reasons may further focus and concentrate the judge’s mind, and demands an additional effort of self-expression”;¹⁴² and

• *R.E.M.*: “the task of articulating the reasons directs the judge’s attention to the salient issues and lessens the possibility of overlooking or under-emphasizing important points of fact or law….”¹⁴³

This view has logical appeal. Posner (and others)¹⁴⁴ argue that decision-writing exposes the “it won’t write” phenomenon and the situations where a judge’s initial intuition is wrong:

Novelists and judges further resemble each other in being to a great extent intuitive reasoners, in the sense … that much of their creative thinking is unconscious. A novelist writes a passage one way rather than another because it feels right; he may be unable to explain why it feels right. A judge often has a strong sense of which way a case should be decided, but when he tries to explain the decision in a judicial opinion the explanation will often turn out to be a rationalization of a result reached on inarticulable grounds, though sometimes the effort to explain will operate to refine and perhaps reverse the intuition that drove his vote.¹⁴⁵

As Part IV explains, however, this check and balance may not operate efficiently or consistently. It may even lead to flawed outcomes. It needs improvement.

(b) Judges as good workers: identifying with the mission

I anticipate that something else motivates Canadian judges to issue reasoned written decisions. The model suggests that governments hire judges who will do a good job and who subscribe to the “high commitment” culture: they want people who will “identify with the mission.”¹⁴⁶

The abundance of Canadian judges who issue written, reasoned decisions—in the absence of a legal requirement—suggests the current Canadian judicial mission is providing lengthy, reasoned, written decisions. I cannot, with any certainty, explain why Canadian judges appear to

¹⁴² *Sheppard*, supra note 23 at paras 23, 51.
¹⁴³ *REM*, supra note 26 at para 12.
¹⁴⁶ Epstein, Landes & Posner, *The Behaviour, supra* note 105 at 34-35; see also Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (University of Toronto Press: Toronto, 2018) at 12 [writing extrajudicially, Sharpe notes that “my scholarly work was largely aimed at helping lawyers and judges solve practical and immediate day-to-day problems … it seemed better to me that whatever knowledge and skills he had acquired would be better deployed if I were a judge. So when the chance came, I opted for a judicial career.”] [Sharpe, *Good Judgment*]. I assume other judges may hold this view and similarly want to do a good job. Further research should be done on reviewing judicial applications about their motivations for becoming a judge and how they have played out practically.
choose or accept this mission. And, as Part II’s empirical study demonstrates, this mission appears to be new.

Relying on the model and empirical studies from the U.S. and abroad that test the model’s assumptions, I can suggest six aims that judges may have. These aims do not suggest that decision-writing is inherent, intrinsic, or endogenous to decision-making. Rather, they suggest other extrinsic or exogenous factors. Finally, to be clear, I do not suggest the following aims are frivolous or that judges should abandon decision-writing.

First, perhaps Canadian judges think like Justice Aaron Barak:

[the] judgment is the voice of the judge, through which the judge realizes his role in a democracy. … Only through the judgment does the individual act as a judge. The judgment is the judge’s means of expression, the exclusive means through which the judicial voice is actualized in practice.147

His quote is similar to the Sheppard rhetoric.148 It is also consistent with the model: when judges seek to be “good workers”, they conform to the standard around them.149 So if some Canadian judges, e.g., the SCC, profess a hortatory standard about reasoned, written decisions, other judges may conform to the norm although they do not have to. Couple this view with legislative inertia: if legislatures are not legislating on a certain subject, judges may feel urged—perhaps even responsible—to respond to this inertia.150 Without reasoned written decisions, judges may also feel like they are not working or that they are not promoting the rule of law. Without decisions, they would only solve the immediate dispute. They would not develop or influence the common law;151 they could not place their indelible mark on Canadian law.

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148 Sheppard, supra note 23 at para 23.
149 Posner, How Judges Think, supra note 91 at 61; Gibson, “From Simplicity to Complexity”, supra note 99 at 17.
150 Kent Roach, “A Dialogue about Principle and a Principled Dialogue: Justice Iacobucci’s Substantive Approach to Dialogue” (2007) 57:2 UTLJ 449 at 456 [“Courts, in developing the common law, are commonly responding to legislative inertia, which can be seen as a tacit delegation of authority to the judiciary. … If judges become too creative for the legislature’s liking, the legislature can enact reply legislation…..”]; Sharpe, Good Judgment, supra note 146 at 94 [“Legislatures tend to be preoccupied with more general issues of public policy, matters such as health, welfare, education, public safety, infrastructure, and budget. The practical reality is that legislatures rarely engage with the intricacies of the common law, so if the courts do not act, the law will remain static”].
I do not quarrel with this view. As Part IV makes plain: my aim is improving decisions not reducing their importance or eminence. Their significance in Canada’s legal system is the catalyst for my scholarship.

Second, Canadian judges may actually think issuing reasoned decisions is a legal requirement. What judges ought to think they do may explain what they do. What suggests the likelihood of this possibility is that decision-writing is a very time-consuming process. Like any other worker, the more judges write, the more they work and the less leisure they experience. Additionally, the more time judges spend on one written decision (versus issuing it orally or not issuing a decision) necessarily means that judges spend less time on other decisions thereby causing parties to wait longer for their decisions to be issued.

Third, some Canadian judges may write reasoned decisions for reputational motives or to increase promotional chances. Indeed, reputation is a prime factor in the model. Some Canadian judges have gained notoriety for how they write. Further studies should examine the

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152 Those who subscribe to this view should concede this view assumes legislative inertia. It may even facilitate or encourage legislative inertia. This view may also be imbued with vestiges of the mentioned 18th and 19th rivalry.
153 I found little on this subject either from scholars or extrajudicial writing. One paper from a sitting provincial court justice notes that “Canadian law does not require that judges place their reasons for judgment in writing.” (see Gorman, “Ours Is to Reason Why”, supra note 87 at 302); yet see also Wayne K Gorman, “An Evolution in Canadian Judging” (2015) 51 Ct Rev 132 at 134 [”It is clear that reasons are required in a wide range of situations”].
154 Gibson, supra note 99 at 9, 16-20.
155 Western Larch, supra note 1 at paras 269-277; Hon Justice Debbie Mortimer, “Some Thoughts on Writing Judgements In, and For, Contemporary Australia” (2018) 42(1) Melbourne UL Rev 274 at 275; Court of Appeal for Ontario, “Court of Appeal for Ontario: Annual Report 2013” at 30, online: <http://www.ontariocourts.ca/coa/en/ps/annualreport/2013.pdf> [“judges of the Court often reserve their judgments after the appeal has been heard. In many cases, the reasons for judgment can be complex and lengthy. Preparation of these reasons represents one of the most significant and time-consuming aspects of the workload of the Court. In 2013 judgments were reserved in approximately 55% of the cases heard.”] [emphasis added] [“ONCA Annual Report: 2013”]; see also Sharpe, Good Judgment, supra note 146 at 46 for his view of the reserve process.
156 Choi, Gulati & Posner, supra note 114 at 518; Epstein, Landes & Posner, The Behaviour, supra note 105 at 36; Boyd, supra note 151 at 256.
157 See, e.g., Harris, “The continuing struggle”, supra note 70 at 224.
effect, if any, of Canadian trial judges’ decisions on their appointment to appeal courts, e.g., were their trial level decisions more doctrinal than their colleagues?

Fourth, perhaps Canadian judges write longer decisions to allay appeal-aversion or criticism. Much like a worker does not want to be reprimanded, neither do judges. Even if judges are not overturned, appeal courts may frown upon judges who fail to provide reasoned decisions. In fact, Canadian higher courts have criticized lower courts for failing to provide reasoned decisions since 1912 despite no legal requirement to do so.

Fifth, perhaps the Charter of Rights and Freedoms is a factor. It may have changed how judges think of themselves and the law. An indication of this possibility is the marked increase of the length of some decisions since the Charter’s inception.

Sixth, perhaps the Canadian practice is a response to legal realism’s criticisms and the academicization of law. As Simon argues, the judicial process has remained in daunting disarray ever since “American realism’s onslaught on formalist jurisprudence.” The increasing number of written Canadian decisions and their increased length over the last forty years coincides with the development of the academic institution of law in Canada, which exploded over the last 70 years. Canadian law has become far more scholarly since the 1983 Arthurs Committee on Legal Education, Law, and Learning. An example is the proliferation of Canadian law

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Ontario Superior Court of Justice; Justice Watt of the Court of Appeal for Ontario; and Justice Nakatsuru of the Ontario Superior Court of Justice]; Elaine Craig, “Judicial Audiences: A Case Study of Justice David Watt’s Literary Judgments” (2019) 64: 2 McGill LJ [Forthcoming].


162 Komar, Reasons for Judgment, supra note 81 at 7-8.

163 See Songer, supra note 133 at 153; see also Rosevear & McDougall, supra note 89. On the length of appeal decisions, see Greene et al, Final Appeal, supra note 133 at 134. Infra Part II addresses the evolution of BCSC decisions.

164 Simon, “A Psychological Model”, supra note 15 at 3; see also Drobak & North, supra note 92 at 136 [“the Legal Realists made a valuable contribution to jurisprudence by their emphasis on the importance of the hidden factors in judicial decision-making. Their legacy remains influential today.”].


professors with PhDs since that report. Having a PhD is now the expected standard for entering the legal academy. Perhaps the academization of law has led to the academization of decisions. Either consciously or unconsciously, judges may feel increased pressure to write academically worthy decisions versus terse, rote decisions notwithstanding that judges are very different workers than academics.

These six aims offer some possibilities about why Canadian judges are issuing lengthy, written reasoned decisions. These aims make sense when you think of judges as workers trying to do a good job, namely ensuring justice for litigants. But despite these aims’ laudability, five reasons suggest that decision-writing is still not inherent or intrinsic to decision-making:

1) The Canadian common law does not actually require reasoned decisions for most disputes. Decision-writing therefore cannot be inherent to Canadian decision-making. If it ought to be inherent in Canada, the SCC or Parliament would require it for all decisions no matter how small. But such a requirement would still not mean that decision-writing is intrinsic to decision-making.

2) For centuries, common-law judges did not issue reasoned decisions. To suggest these judges were missing an inherent or intrinsic step in decision-making, despite resolving disputes for centuries, seems illogical. The historical narrative we discussed suggests that no legal duty catalyzed the accurate, published, written, reasoned decision. Its genesis appears more related to legitimizing the judiciary and common law against the backdrop of Parliament’s increasing prominence. Put another way, the requirement to give reasoned decisions is not a pillar of the common law, either generally or in Canada. Rather, the proposed requirement is a modern idea.

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169 I thank Martin Taylor, Q.C. for a fantastic discussion on this idea and for causing me to think about how education may have impacted what judges do now vs. what they did 40 years ago. I also thank Colin Campbell, Q.C. See Posner, How Judges Think, supra at 217-218; Daphne Barak-Erez, “Writing Law: Reflections on Judicial Decisions and Academic Scholarship” (2015) 41 Queen’s LJ 255.
170 Posner, How Judges Think, supra note 91 at 206.
171 Other models may suggest other reasons, and they should be explored. See, e.g. David A Hoffman, Alan J Izenman & Jeffrey R Lidicker, “Docketology, District Courts, and Doctrine” (2007) 85:4 Wash L Rev 681 at 682 [“judges do not write opinions to curry favor with the public or with powerful audiences, nor do they write more when they are less experienced, seeking to advance their careers, or in more interesting case types. Instead, opinion writing is significantly affected by procedure….”].
173 See, e.g., Cohen, “Not to Give Reasons”, supra note 24 at 486.
3) As Posner (and others) plainly concede, U.S. clerks write most appellate decisions. The Canadian experience is another black box. But clerks likely also write Canadian decisions. Similarly, U.S. federal trial courts frequently do not issue written, reasoned decisions (or anything more than an order). And when they do write, they rely extensively on clerks. If judicial decision-making is contingent on decision-writing, then perhaps none of these delegating judges, trial courts, or arbitrators are actually making robust, reasoned decisions. Again, this idea seems illogical.

4) The SCC does not issue reasoned decisions in most of its decisions, i.e., leave to appeal decisions, even though some argue it should. The decision to grant or deny leave is one of the most important legal decisions in Canada. Yet reasoned decisions are neither given nor required.

5) Juries do not issue reasoned decisions, but they clearly engage in decision-making, and in contrast to judges, we do not presume they know the law.

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176 From conversations with Canadian appellate and SCC clerks, the same practice appears to occur in Canada but to a lesser degree. As Lorne Sossin argued in 1996, “The virtual silence on law clerks in Canada is in striking contrast to the United States, where a rich and vast literature on the institutional dynamics of clerking proliferates … probing the contribution of the law clerk carries with it the implicit threat of undermining credibility of the institution itself by exposing that clerks contribute too much decision making of the Court” (see Lorne Sossin, “The Sounds of Silence: Law Clerks, Policy Making, and The Supreme Court of Canada” (1996) 30:2 UBC L Rev 279 at 283).


178 Bodwin, Jeffrey S Rosenthal & Albert H Yoon, “Opi...
Recognizing these points is fundamental for any discussion about improving decisions’ content and structure and to understand the relationship of decision-writing and decision-making. Giving reasoned decisions is not an inherent requirement of decision-making. Instead, in their current form, written, reasoned decisions are, at best, a complement to decision-making and, at worst, a tool that misleads judges and that frustrates access to justice—a point Parts II & IV thoroughly discuss.

Before moving to Part II’s empirical study, I recognize the apparent is-ought problem or fallacy that Part I may have highlighted: past and current practice is not dispositive of the future, and I am not suggesting that judges should not issue written, reasoned decisions in most cases. To be clear, the purpose of Part I’s historical, doctrinal, and theoretical discussion is setting the stage for the reforms Part IV discusses as well as Part V’s discussion about judicial independence. Properly contextualized, what Part IV proposes is not as revolutionary as one might assume, including how such reforms might impact judicial independence. Accordingly, Part I’s purpose is a historical, doctrinal, and theoretical benchmark for the remainder of this thesis.

Part II: The evolution of the length, structure, and delivery time of British Columbia trial decisions

Canadian governments and courts appear to have a paucity of data on Canadian trial and appeal decisions.182 Unlike New Zealand, for example, Canada’s federal government does not track how long it takes s. 96 courts to issue decisions. Only the SCC maintains such a public database.183 Canada’s federal government has embarked on the pursuit of gathering better data about its s. 96 courts. But its current data does not offer information about the evolution of decisions, including their length or delivery time. The data also cannot answer the questions posed in this thesis’s introduction.184

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183 Supra note 5.
Some s. 96 and provincial appeals courts issue annual reports, but most reports do not track the average time parties wait for decisions or decisions’ structure and length.\textsuperscript{185} Two courts release some information about decisions’ delivery time: the BC Court of Appeal notes that 89% of its decisions are released under six months,\textsuperscript{186} and the SCC notes a mean delivery time of 4.6 months.\textsuperscript{187} Most courts, however, have no public annual reports.\textsuperscript{188} Put plainly, “public reporting on the work load of [Canada’s provincial courts] is poor and relatively inaccessible….\textsuperscript{189}

Scholars have generated a similar lack of data in their scholarship. The limited research and data on decisions’ structure, length, and delivery time focusses on the SCC and appeal courts.\textsuperscript{190} But


\textsuperscript{186} “BCCA Annual Report: 2018”, \textit{supra note 5} at 21.


\textsuperscript{188} The following courts do not appear to publish annual reports: the Court of Appeal for Alberta; the Saskatchewan Court of Queen’s Bench & the Saskatchewan Court of Appeal; the Manitoba Court of Queen’s Bench & Manitoba Court of Appeal of Manitoba; the Court of Appeal of Quebec (although it does publish some statistics—see Court of Appeal of Quebec, “Statistics and Publications”, online: <http://cours appellatequebec.ca/en/about-the-court/statistics-et-publications/#e362>); the Supreme Court of Newfoundland and Labrador & the Court of Appeal of Newfoundland and Labrador; the Supreme Court of Prince Edward Island & the Prince Edward Island Court of Appeal; the Nova Scotia Supreme Court & the Nova Scotia Court of Appeal; the Nunavut Court of Appeal; the Northwest Territories & the Court of Appeal for the Northwest Territories; and the Supreme Court of Yukon & the Court of Appeal of Yukon. Notably, however, many provincial courts publish annual reports. So provincial courts seem to have the capability to do so (see, e.g., the Provincial Court of Newfoundland and Labrador, “Publications: Annual Reports”, online: <https://court.nl.ca/provincial/publications/index.html>).

\textsuperscript{189} Hausegger, Hennigar & Riddell, \textit{Canadian Courts}, \textit{supra} note 42 at 40; see also at 333. This accessibility is likely due to funding and resources. In contrast, the Federal Court releases data four times a year (see Federal Court, “Reports and Statistics”, online: <https://www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics>).

that research and data is mostly dated and sparse. The focus on the SCC and appellate courts is also curious. SCC decisions certainly have sweeping impact. But most SCC decisions do not affect people as much as trial level decisions, *i.e.*, the thousands of people that interact with the trial process because of civil, family, and criminal disputes every year.

To fill some of this data deficit; to explore the decisions’ evolution in one Canadian province; to determine if and how trial level decisions are contributing to Canada’s access to justice plague; and finally, to identify areas most suitable to the reforms Part IV addresses, Part II discusses an empirical study of British Columbia Supreme Court (“BCSC”) decisions from 1980 to 2018. It addresses the study’s design, its limitations, and its findings about decisions’ length and delivery time. This analysis demonstrates these trends: BCSC decisions’ length and delivery time have continually increased over the last forty years; BCSC judges are increasingly taking longer than 180 days to issue decisions; and self-representation rates continue to rise. This analysis yields one conclusion: either in isolation or tandem, these trends suggest the current process for decision-writing is leading to slower decision-making and more complex decisions. It may not improve access to justice; in fact, the current process may be compromising access to justice.

191 Rosevear & McDougall, *supra* note 89 at 1, 2 [“In contrast to work on its political role and, to a lesser extent, agreement and disagreement among its judges, there has been little academic attention to the structure of Supreme Court of Canada judgements. This is unfortunate because the structural characteristics of judgements can be revealing about many aspects of judicial behaviour, both with individual justices and as a group. For example, which justice is the most productive by word count? Which justices write the most overall? Do some types of topics yield a physically different type of opinion than others? And do the ways that judges write their judgements change noticeably over time?”]. For a recent notable example, see Xavier Beauchamp-Tremblay & Antoine Dusséaux, “Not Your Grandparents’ Civil Law: Decisions Are Getting Longer. Why and What Does It Mean in France and Québec?” (20 June 2019) Slaw, online: <http://www.slaw.ca/2019/06/20/not-your-grandparents-civil-law-decisions-are-getting-longer-why-and-what-does-it-mean-in-france-and-quebec/> [“From 2003 to 2017, the length of lower court decisions (CQ and CS) has increased by about 40% and the length of the CA decisions has increased by 20%.”].

192 As of 2017/2018, 337,495 civil case were active in Canada’s superior courts (see Statistics Canada, “Active civil court cases, by elapsed time from case initiation to first disposition, Canada and selected provinces and territories”, online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510011601&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.2&pickMembers%5B2%5D=3.2>.

193 As of 2017/201, 142,000 family cases were active in Canada’s superior courts (see Statistics Canada, “Active civil court cases, by elapsed time from case initiation to first disposition, Canada and selected provinces and territories”, online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510011601&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.2&pickMembers%5B2%5D=3.3>.

194 No such data appears to be available (see Statistics Canada, “Integrated Criminal Court Survey”, online: <http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&Id=1209304>.
Design of the empirical study and explanation of methodology

The dataset was designed to facilitate both descriptive (e.g., how have decisions’ delivery time evolved over the last forty years) and predictive analysis (e.g., what factors best explain that evolution from a statistically significant perspective). The goal of the descriptive analysis is straightforward: describe the evolution of decisions’ length and delivery time over the last forty years as well as any other notable trends. The goal of the predictive analysis is also straightforward: identify which dataset variables are most likely to predict longer decisions (i.e., word count) and slower delivery time (i.e., the number of days it takes to issue decisions).

To facilitate that analysis, I gathered all reported BCSC decisions in Quicklaw from 1980, 2000, and 2018 and hand-coded 16 variables: (1) case name; (2) Quicklaw citation; (3) registry; (4) whether the decision or Quicklaw provided hearing information; (5) the date the hearing concluded; (6) how many court days were required for the decision; (7) the date the decision was released; (8) how many days lapsed before the decision was released; (9) judge; (10) moving party-type; (11) responding party-type; (12) subject; (13) word count; (14) use of headings; (15) self-rep information; and (16) appeal information. Before removing cases with invalid data points, I gathered 4,993 decisions (i.e., observations) using filtered search terms. After removing cases with invalid data points, 4,988 decisions remained. 1980 provided the smallest sample with 1,186 decisions; 2000 provided the largest sample with 1,925 decisions,

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195 I relied on all reported cases from Quicklaw as Quicklaw offered more reported cases than Westlaw or CanLII. For an explanation of how I gathered the cases and why I chose Quicklaw, see Appendix A. See Figures 10 & 11 in Appendix E for a graphical representation of overall sample and breakdown by subject matter.

196 See Appendix B for my coding manual.

197 See Appendix A for the search parameters.

198 See, e.g., Wuerch v Hamilton, [1980] BCJ No 1332 (no hearing data given; only the month was given); McCallum Mercury Sales Ltd v Zurich Insurance Co., [1980] BCJ No 76 (oral judgment given in 1978 and decision filed in 1980); Royal Bank of Canada v Telecommunications Workers Union of British Columbia, [1980] BCJ No 2179 (duplicate); First Bauxite Corp (Re), [2019] BCJ No 94 (unclear as to when decision was actually given); Young v Young, [2018] BCJ No 3012 (judge delivered reasons in 2015 but did not sign the transcript. So they were not delivered until 2018).

199 Some decisions did not include hearing information. I could assume that when hearing information was not provided, the decision was an oral decision. This assumption may be true. The dataset included 527 observations where no hearing information was given. The dataset included 392 observations where no hearing information was given but where the decisions were listed as oral decisions. Nonetheless, the dataset also included 135 observations where no hearing information was given, and the decisions were not listed at oral. So, for greater accuracy, I tested removing the decisions where no hearing information was given when I measured delivery time and word count. In some years, the increases were less substantial but still significant. In the following analysis, I have tested with and without these “no hearing information” observations and noted any change in the footnotes.
and 2018 provided the second largest sample with 1,877 decisions.\textsuperscript{200} To ensure that Quicklaw’s reported decisions in 1980, 2000, and 2018 were representative of the surrounding years in Quicklaw’s database, I searched the surrounding years to observe how many cases Quicklaw reported. The observations in 1980, 2000, and 2018 were largely consistent with their surrounding years when using the same search parameters.\textsuperscript{201}

Based on the dataset’s descriptive trends, I had three hypotheses about longer and slower decisions:

1. Longer trials (\textit{i.e.}, more court days), particular judges, and particular subjects lead to longer decisions. In other words, the independent variables of “court days”, “judge”, and “subject” are “significant predictors” of longer decisions;
2. Longer trials (\textit{i.e.}, more court days), particular judges, and particular subjects lead to slower decisions. In other words, “court days”, “judge”, and “subject” are significant predictors of slower decisions; and
3. The relationship between the “word count” variable and delivery time (the “days to issue” variable) is bi-directional, \textit{i.e.}, they are significant predictors of each other (more words leads to longer delivery time and \textit{vice versa}).

With a data scientist’s assistance,\textsuperscript{203} two methods were used to test these hypotheses and to examine what dataset variables are significant predictors of word count and delivery time: (1) classification and regression trees (\textit{aka} a CART model); and (2) random forest models.\textsuperscript{204} In short, both methods avail algorithmic machine learning and decision trees to analyze data and to

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\textsuperscript{200} Very few times did multiple decisions arise from the same case with the same hearing dates (once in 1980, 12 times in 2000, and 10 times in 2018). The coding does not, however, classify those rare situations as duplicates. Rather, it treats each decision separately as Quicklaw records since the decisions dealt with different issues, \textit{e.g.} motions. Accordingly, each case is a separate entry in the court days count. In most situations, however, where multiple decisions arose from the same case, they had their own, separate dates. If a decision was a clear duplicate, I did not include it in the dataset.

\textsuperscript{201} For example, in 1979 & 1981, Quicklaw reported 1,138 & 1,103 cases, respectively; in 1999 & 2001, Quicklaw reported 2,181 cases & 1,855 cases, respectively; and in 2016 and 2017, Quicklaw reported 2,073 & 1,974 cases, respectively.

\textsuperscript{202} By “significant predictor”, I mean a statistically significant relationship between the two variables. In contrast to some statistics or economics literature, data science uses the terms “predictor and response variables” more than the terms “independent and dependent variables.” As I am relying on random forest models—a data science tool—I have used the term “predictor” in the analysis rather than “independent variable.”

\textsuperscript{203} Thanks to Jonathan Kroening for creating these models, for his keen attention to detail, and for his interest in this project. All errors are my own.

\textsuperscript{204} For a further explanation of how these models were designed and their metrics, see Appendix C. For a breakdown of the ranger coding package the model availed, see Marvin N Wright, Stefan Wagner & Philipp Probst, “Package ‘ranger’” (7 March 2019), online: <https://cran.r-project.org/web/packages/ranger/ranger.pdf>.
\end{flushright}
offer predictions on significant variables.\footnote{For an analysis and detailed explanation of classification and regression trees, see Leo Breiman \textit{et al.}, \textit{Classification and Regression Trees} (Chapman & Hall: New York, 1993); see also Dan Steinberg, “CART: Classification and Regression Trees” in Xidong Wu & Vipin Kumar, eds, \textit{The Top Ten Algorithms in Data Mining} (CRC Press: Boca Raton, 2009) 179. For an analysis and detailed explanation of random forest models, see Leo Breiman, “Random Forests” (2001) Statistics Department – University of California Berkeley, online: <https://www.stat.berkeley.edu/~breiman/randomforest2001.pdf>; see also Andy Liaw & Matthew Wiener, “Classification and Regression by randomForest” (2002) 2/3 R News 18.} One of the CART models that was run on the 1980 sample is included in Figure 1 to help explain the machine learning process.

\textit{Figure 1: Sample CART Model}

As you can see, CART models usefully visualize the hypothesis or problem you seek to understand by outputting a decision tree. Because CART models only build a single decision
tree, however, they can be biased. For example, one dominant independent variable with many subcategories or levels, e.g. like the dataset’s judge variable, may appear a biased amount of times in the single decision tree. In the above tree, judge appears at 3 of the 7 nodes. Due to the potential for this bias, single CART models are less robust than random forest models. Accordingly, I did not rely on the single CART models in Part II’s analysis to draw conclusions.

Part II’s conclusions relied exclusively on random forest models. Rather than relying on a single decision tree—like a single CART model does—random forest models create multiple, uncorrelated decision trees to increase analytical robustness and to avoid one predictor dominating the model. Part II’s analysis could have relied on classic regression analysis, e.g., multiple linear regression or multiple nonlinear regression. Random forest models, however, can consistently outperform some classic regression models. As Katz et al note, random forest models are “unreasonably effective in a wide array of supervised learning contexts”, and they consistently outperform common approaches to predictive analysis. Similarly, as Breiman notes, random forests are extremely accurate and can supply more and better information than existing regression models. Part II’s reliance on random forests models therefore enabled robust predictions about the statistically significant relationship between the examined variables and delivery time and word count.

Effectively, Part II’s random forest models employed this machine learning prediction sequence:

1. Random samples were drawn from my dataset (these samples are called bootstraps and are equivalent to the size of the original dataset but sampled with replacement—i.e., a

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207 See Appendix D for another CART model in a larger size.

208 For context, regression analysis is a form of predictive modeling that investigates relationships between dependent and independent variables.


211 The upside of regression analysis over random forest analysis is that regression analysis can provide more interpretability. The criticism of random forest models is the lack of interpretability, i.e., the so-called “black box” problem. As Breiman notes, however, this “[f]raming the question as the choice between accuracy and interpretability is an incorrect interpretation of what the goal of a statistical analysis is. The point of a model is to get useful information about the relation between the response and predictor variables as well as other information about the data structure.” (see Leo Breiman, “RF/Tools: A Class of Two-eyes Algorithms” (2003) Siam Workshop at 29, online: <https://www.stat.berkeley.edu/~breiman/siamtalk2003.pdf> [Breiman, “RF/Tools”].
single observation can present itself multiple times while others may be missing in the sample). This random sampling (with replacement) simulated collecting more “new data” and added variability so that predictions are robust when this simulated “new data” is introduced;

2. Those samples grew multiple decision trees (i.e., they created multiple CART models similar to the one you just observed);

3. At each split in one of those trees (commonly known as a node), the model randomly limited the number of predictors the tree could choose. So the tree had to choose the best split from only some of the predictors. Coupled with what I noted in point 1, such limiting improves the model’s generalizability and predictive power;

4. Multiple trees continued to grow, form nodes, and split until 1,000 trees were created;

5. Those trees formed a “forest” of randomly created trees hence the name random forest model;

6. This process of creating a random forest produced a ranking of predictors. Predictions were made by averaging all decision trees’ votes. To validate and explain those predictions, the model relied on multiple evaluation metrics that are explained further in an attached appendix, including a cut-off p-value of <0.05; and

7. The random forest models tested those predictions by permuting the predictors. It measured any decrease in accuracy with the permuted predictor on a holdout data set (known as the out-of-bag set). For example, when the random forest model for delivery time permuted the “word count” variable and tested it on the out-of-bag sample, the prediction worsened by 36 days (in other words, the prediction was off by 36 days). Accordingly, that model indicated that “word count” is the most significant predictor of delivery time.

The models did not consider the impact of the registry variable or the five information variables as predictors of word count or delivery time. Registry was excluded because over 50% of decisions occurred in Vancouver, and the information variables were excluded because they did not provide sufficient predictive power. The models did, however, consider the impact of eleven of the earlier mentioned variables—(6) how many court days were required for the decision; (7) the date the decision was released (the dates were amalgamated into “hearing year”); (8) how many days lapsed before the decision was released; (9) judge; (10) moving party-type; (11) responding party-type; (12) subject; (13) word count; (14) use of headings; (15)

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212 For an accessible breakdown of random forests, see Leo Breiman & Adele Cutler, “Random Forests”, online: <https://www.stat.berkeley.edu/~breiman/RandomForests/cc_home.htm#intro>; Breiman, “RF/tools”, supra note 211; see also Gérard Biau & Erwan Scornet, “A random forest guided tour” (2016) 25:2 TEST 197.

213 See Appendix C.

214 Effectively, the predictor is scrambled to become noisy and kept in the model to observe the impact.

215 These information variables are (1) case name; (2) Quicklaw citation; (4) whether the decision provided hearing information; (5) the day the hearing concluded; and (7) the date the decision was released.

216 One could arguably consider the month in which a decision is delivered.
self-rep information; and (16) appeal information—and the models were instructed to use those variables as predictors of word count and delivery time.

Despite not relying on the single CART models to draw conclusions, they were invaluable in identifying the potential dominance of the “hearing year” (1980, 2000, and 2018) and the “judge” variables. The “hearing year” was a dominant variable because decisions in 2018 are clearly longer and issued slower than decisions in 1980. As discussed with the CART example, the “judge” variable was also dominant (but less so) because the variable included over 290 subcategories of individual judges, so it naturally could appear more than other variables despite the random forest’s sampling and limiting. Accordingly, nine random forest models were run to ensure robust predictions and to facilitate comparing/contrasting the evolution of significant predictors and the relationship of the “judge” variable with other variables:

1. **entire dataset model**: including the “hearing year” and “judge” variables provided a holistic analysis but one that is potentially biased and correlated;
2. **entire dataset model with the “judge” variable excluded**: removing the “judge” variable facilitated the chance of less bias and correlation;
3. **entire dataset model with “hearing year” and “judge” variables excluded**: removing the “hearing year” and “judge” variables facilitated the chance of less bias and correlation;
4. **1980 models with the “judge” variable included and excluded**: including the “judge” variable facilitated observing the variable’s impact on other variables, and removing the “judge” variable facilitated the chance of less bias and correlation;
5. **2000 models with “judge” variable included and excluded**: including the “judge” variable facilitated observing the variable’s impact on other variables, and removing the “judge” variable facilitated the chance of less bias and correlation; and
6. **2018 models with “judge” variable included and excluded**: including the “judge” variable facilitated observing the variable’s impact on other variables, and removing the “judge” variable facilitated the chance of less bias and correlation.

Despite the metrics on which Part II relies and running multiple models, random forest models are just models. Notwithstanding the thoroughness of any design, random forests are fallible, and they do not indicate influence, causation, or correlation. They only indicate statistically significant relationships. As Breiman and Cutler aptly note, “Take the output of random forests not as absolute truth, but as smart computer generated guesses that may be helpful in leading to a deeper understanding of the problem.”217

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ii. Summary of descriptive and predictive analysis

(a) Descriptive conclusions

This dataset does not demonstrate a marked mean or median increase in the amount of court days (trial time) per decision like one might expect as Figure 2 demonstrates:

- In 1979, the median court days was two, and the mean court days was four;
- In 1980, the median court days was one, and the mean court days was two;
- In 1999, the median court days was two, and the mean court days was four;
- In 2000, the median court days was one, and the mean court days was 2.6;
- In 2017, the median court days was three, and the mean court days was six; and
- In 2018, the median court days was one, and the mean court days was 3.8.

![Figure 2: Evolution of mean and median court days](image)

But the assumption, which I formed from anecdotal conversations with lawyers and judges, that 2018 would include more “mega” and longer trials than 1980 is true.\(^{218}\) Despite more “mega” and longer trials, the median and mean of court days per decision did not increase.\(^{219}\)

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\(^{218}\) In 1979, the longest trial was 45 days; in 1980, it was 50 days; in 1999, it was 40 days; in 2000, it was 91 days; in 2017, it was 73 days, and in 2018, it was 125 days. I thank Geoff Cowper, Q.C. for his fantastic insight on this point and the issue of longer and “mega” trials. See Figure 12 in Appendix E for the court days distribution broken down in bins of five for 1980, 2000, 2018.

\(^{219}\) See Figure 13 in Appendix E for the breakdown of the entire dataset’s court days by subject matter. Family, criminal, civil procedure, personal injury, and tort are the top five and occupied the most days.
These averages, however, should be approached with caution since the amount of trials over five and ten days have markedly increased since 1980 as Figures 3 and 4 demonstrate.

*Figure 3: Amount of trials over 5 days*

*Figure 4: Amount of trials over 10 days*

Recognizing this increase of trials over five and 10 days is important. The random forest models we will shortly discuss indicate the “court days” variable is the most significant predictor of word count, and one of the most significant predictors of delivery time.

As Part I suggested, the longer judges spend on one decision necessarily means that judges spend less time on other decisions or have to altogether delay writing other decisions. So, when judges are assigned one, or more, “mega” or longer trials, they simply may not have the time to write decisions for their shorter trials/applications or the time to write a short decision. The old adage “If I had more time, I would have written a shorter letter” likely also applies to decisions.
This dataset demonstrates a clear increase in the mean and median of decision length and delivery time. Sometimes, a picture is worth a thousand words. In this case, a picture is worth 3x as many words and 3x as many days. On median, BCSC judges in 2018 take 3x longer to issue decisions that are 3x longer than their 1980 colleagues as Figures 5 and 6 demonstrate:

- In 1980, the median word count was 1,483 words, and the median delivery time was eight days.\(^{220}\)
- From 1980 to 2000, the median word count increased almost a thousand words to 2,434 words, and the median delivery time increased 12 days to 20 days.\(^{221}\) When comparing decisions by subject—from 1980 to 2000—the highest median word count more than doubled,\(^{222}\) and the highest mean word count almost doubled.\(^{223}\) The slowest median delivery time increased four-fold,\(^{224}\) and the slowest mean delivery time doubled.\(^{225}\)
- From 2000 to 2018, the median word count increased almost 2,300 words to 4,740 words, and the median delivery time increased eight days to 28 days.\(^{226}\) When comparing decisions by subject—from 1980 to 2018—the highest median word count increased almost six-fold,\(^{227}\) and the highest mean word count increased four-fold.\(^{228}\) The slowest median delivery time increased more than eight-fold,\(^{229}\) and the slowest mean delivery time increased almost four-fold.\(^{230}\)

\(^{220}\) The mean word count was 2,017 words, and the mean delivery time was 23 days with all observations included. Considering the greatest number of observations without hearing information occurred in 1980, I tested the median word count and delivery time without those observations: the median word count increased slightly to 1,575 words, and the median delivery time increased to 15 days. The exclusion also increased the mean word count to 2,171 days and the mean delivery time to 29.98 days.

\(^{221}\) The mean word count was 3,376 words, and the mean delivery time was 42 days. Excluding the observations without hearing information increased the median word count to 2,578 words and the median delivery time to 25 days. The exclusion also increased the mean word count to 3,566 words and the mean delivery time to 48 days.

\(^{222}\) The 1980 sample for contracts decisions relied on 108 observations, and the 2000 sample for tort decisions relied on 92 observations.

\(^{223}\) The 1980 sample for tort decisions relied on 56 observations, and the 2000 sample for tort decisions relied on 92 observations.

\(^{224}\) The 1980 sample for administrative decisions relied on 59 observations, and the 2000 sample for tort decisions relied on 92 observations.

\(^{225}\) The 1980 sample for contracts decisions relied on 108 observations, and the 2000 sample for tort decisions relied on 92 observations.

\(^{226}\) The mean word count was 6,777 words, and the mean delivery time was 56.75 days. Excluding the observations without hearing information did not increase the median hearing time, but it increased the median word count by 22 words to 4,762 words. The exclusion increased the mean word count to 6,799 words and the mean delivery time to 57 days.

\(^{227}\) The 1980 sample for contracts decisions relied on 108 observations, and the 2018 sample for tort decisions relied on 44 decisions.

\(^{228}\) The 1980 sample for tort decisions relied on 56 observations, and the 2018 sample for tort decisions relied on 44 observations.

\(^{229}\) The 1980 sample for administrative decisions relied on 59 observations, the 2018 sample for tort decisions relied on 44 observations.

\(^{230}\) The 1980 sample for contracts decisions relied on 108 observations, and the 2018 sample for tort decisions relied on 44 observations.
The current length of BCSC decisions rivals that of U.S. Supreme Court decisions (these averages are actual decisions versus certiorari decisions).\textsuperscript{231} Increased length likely increases decisions’ complexity and may have significant economic impact. Such complexity does not

\textsuperscript{231} While the median word count for 2018 in the dataset is 4,740 words, the mean word count is 6,777 words. That mean rivals the mean of U.S. Supreme Court decisions in early 2018 (see Adam Feldman, “Empirical SCOTUS: An opinion is worth at least a thousand words (Corrected)” (3 April 2018) SCOTUSblog, online: <https://www.scotusblog.com/2018/04/empirical-scotus-an-opinion-is-worth-at-least-a-thousand-words/>.
increase access to justice and may even decrease it. Increased length is likely related to increased delivery times. The random forest models suggest as much, a point we will shortly discuss.

Another related and concerning upward trend is the increase of BCSC decisions taking 180 days\textsuperscript{232} or longer to be released that Figure 7 demonstrates:

- In 1980, 1.1\% of decisions were released after 180 days or more;
- In 2000, 3.8\% of decisions were released after 180 days or more; and
- In 2018, 8.0\% of decisions were released after 180 days or more.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure7.png}
\caption{Decisions over 180 days}
\end{figure}

Recalling the idea of judges as workers in the judicial labour market model that Part I discussed, the economic cost of increased complexity and delay impacts both judges and any user of decisions. The longer judges spend writing, the less leisure time judges have and the longer parties have to wait for decisions to resolve their ongoing disputes. Similarly, lengthy, complex decisions do not further the aims of Canada’s rule of law—e.g., predictability, accessibility, and consistency. Theoretically, lawyers have to read these longer decisions when preparing for litigation. Practically, however, the length likely forces lawyers to skim decisions. Other users

\textsuperscript{232} The Canadian Judicial Council recognizes that decision-writing is a time-consuming and difficult exercise. Accordingly, it prescribe a six-month timeline to deliver all decisions, except in special circumstances (see Canadian Judicial Council, “Ethical Principles for Judges” at 21; Canadian Judicial Council Resolution, September 1985).
must also expend time trying to digest these lengthy, unstandardized decisions. Part IV further explores these points.

Another concerning upward trend is the increase of self-representation over the past forty years that Figure 8 demonstrates:

- In 1980, only 3% of decisions had some type of self-representation;
- In 2000, 12.7% of decisions had some type of self-representation; and
- In 2018, 15.9% of decisions had some type of self-representation.

**Figure 8: Increased rates of self-representation**

Increased self-representation may be related to the increase of longer decisions and more complex decisions. Further research on this relationship is needed. As Part IV further discusses, longer and more complex decisions may increase legal services’ price tag, a large part of Canada’s access to justice plague. And for the individuals that proceed to litigation without a

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233 See, e.g., Martin Teplitsky, “Excessive cost and delay: Is there a solution?” (2000) 19:2 Advocates’ Soc J 5 [“Another factor contributing to increased cost is both the large volume of reported decisions and the availability on the Internet of all written decisions, whether reported or not. The task of comprehensive legal research is much more difficult than it was in 1966. I recall Dean Wright, the long-time editor of the D.L.R.s and the O.R.s, telling our class that he would not publish cases which were ‘wrong.’ The ‘law’ was found in the D.L.R.s. Of course, back then there were few, if any, specialized reports. Today, publishers want to sell more volumes and publish many decisions that do not seem to add anything to the existing jurisprudence. I am not sure what, if anything, can be done about this problem. I suspect nothing. We should at least realize that, in the final analysis, the client pays the tab directly for additional research and indirectly through the higher overhead costs of maintaining law libraries.”] [emphasis added] [Teplitsky, “Excessive cost and delay”].

234 Farrow et al, supra note 11.
lawyer, longer decisions and more complex decisions likely make the litigation experience harder for them, and by extension, the judges who have to resolve their disputes.

Decisions’ structure over the last 40 years has also changed. Paragraphs were introduced and are now the norm, and headings have also become ubiquitous as Figure 9 demonstrates:

- In 1980, only 8% of decisions availed headings;
- In 2000, 45% of decisions availed headings; and
- In 2018, 81% of decisions availed headings.

Such use of headings, however, is not standardized. And without standardization, their use may not increase readability, clarity, or length. In fact, decisions with headings were considerably longer than decisions without headings in 1980, 2000, and 2018, and they also had considerably slower delivery times.  

Figure 9: Increased use of headings

![Figure 9: Increased use of headings](image)

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236 Decisions’ median word count with headings in 1980 was 2,945 words, in 2000 was 3,598 words, and 2018 was 5,705 words. Decisions’ median word count without headings in 1980 was 1,357 words, in 2000 was 1,629 words, and in 2018 was 2,047 words. The mean word counts were also all higher for decisions with headings.

237 Decisions’ median delivery time with headings in 1980 was 26 days, in 2000 was 32 days, and in 2018 was 35 days. Decisions’ median delivery time without headings in 1980 was 7 days, in 2000 was 11 days, and in 2018 was 2 days. The mean delivery times were also all higher for decisions with headings.
Finally, in creating this dataset, I noted four noteworthy points:

- Oral decisions still occur at the end of some trials. But oral decisions are not issued like they were in 1980. In fact, the median delivery time for oral decisions went from zero days in 1980 to two days in 2018, and the mean delivery time went from 1.25 days in 1980 to 13 days in 2018. The suggestion of more oral decisions to reduce delay has been proposed, and the random forest model conclusions we are about to discuss indicate the suggestion is meritorious. But oral decisions delivered 13 days after trial are no longer true oral decisions. Rather, they are just written decisions delivered orally in court. Nonetheless, those decisions are still faster than traditional written decisions.
- *Per incuriam* errors still occur despite technology that should preclude them.
- Some judges appear to be writing decisions as longer civil and criminal trials proceed as they issue decisions at the end of a trial or very soon after. Whether this practice is efficient versus deciding too quick is unknown.
- Some judges batch issue decisions. This practice make sense considering that some judges get writing weeks. One must wonder, however, how the practice affects reasoning—e.g., does some cross-contamination of reasoning occur? And if such contamination is occurring, how might we prevent or alleviate it?

(b) Predictive conclusions

The random forest models of the entire dataset also showcase some useful overall predictive conclusions for word count and delivery time. They demonstrate that only facets of my initial three hypotheses about longer and slower decisions were valid:

- **Hypothesis 1**: only one of the three hypothesized variables for longer decisions—“court days”—significantly predicted word count. But the other two variables—“judge” and “subject”—did not.
- **Hypothesis 2**: only two of the three hypothesized variables for slower decisions—“court days” and “judge”—significantly predicted delivery time. But the other variable—“subject”—did not.
- **Hypothesis 3**: the relationship between “word count” and “days to issue” is not bi-directional: “word count” significantly predicts “days to issue” (*i.e.*, “delivery time”), but not the converse.

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238 See, e.g., *Bains v Chatakanonda*, 2018 BCSC 2412.
239 See Figure 14 in Appendix E.
241 See, e.g., *Saltman v Sharples Contracting Ltd*, 2018 BCSC 883.
1. Word count

Regardless of whether the earlier discussed dominant variables (“judge” and “hearing year”) were included or excluded, the result was the same in all three models of the entire dataset: the “court days” variable was the only significant predictor of word count.\textsuperscript{243} Accordingly, the relationship between “court days” and “word count” is robust. When the random forest models of this entire dataset permuted the “court days” variable, the three models demonstrate that the prediction was off by 4,390 words (the mean of all three models).

In sum, court days are a significant predictor of word count—the more court days, the longer the decision. While court days have not markedly increased, on mean or median, from 1980 to 2018, the amount of longer trials clearly has (2018 has far more trials with more than five court days), and this increase likely explains this variable’s significance. Additionally, the six possible aims of Canadian judges as workers in the judicial labour market model, which Part I discussed, largely explain my intuition about why decisions have become so much longer in the past forty years. For example, the evolution of length is certainly consistent with the academization of law, the advent of the \textit{Charter}, and the evolution of the seminal jurisprudence on reasons. Further research, such as empirical surveys of judges, should seek to test how these six aims may impact decision length.

2. Delivery time

Regardless of whether the earlier discussed dominant variables (“judge” and “hearing year”) were included or excluded, one result was the same in all three models of the entire dataset: the “word count” and “court days” variables were significant predictors of delivery time.\textsuperscript{244} Accordingly, the relationship between “word count”, “court days”, and delivery time is robust. When the models permuted the “word count” variable, the three models demonstrate that the delivery time prediction was off by 33 days (the mean of all three models) Similarly, when the models permuted “court days”, the prediction was off by 28 days (the mean of all the three models).

\textsuperscript{243} See Figure 15-17 in Appendix E.
\textsuperscript{244} See Figure 18-20 in Appendix E.
The results for the other variables become slightly less clear in the models of the entire dataset that included and excluded the “judge” and “hearing year” variables:

- **“Judge” and “hearing year” included:** “oral judgment”, “hearing year”, and “judge” are significant predictors of delivery time. When the “oral judgment” variable was permuted, the prediction was off by 24 days. Considering the potential dominance of the “hearing year” and “judge” variables, one must approach those predictors with some caution. Decisions’ delivery time has markedly increased over the past forty years, so the “hearing year” variable’s classification as a significant predictor makes sense. But due to the historical evolution, the prediction is not overly informative. The “judge” variable can be approached with slightly less caution since it was not overly dominant in the individual 1980 and 2000 models, which we will discuss in a moment. When the “judge” variable was permuted, the prediction was off by 16 days.  

- **“Judge” excluded:** the result is the same as the “judges” and “hearing year” included model except permuting “oral judgment” made the prediction be off by 22 days (versus 24 days when judges were not excluded). “Judge” is clearly no longer a predictor and “hearing year” is also no longer a predictor.  

- **“Judge” & “hearing year” excluded:** only “word count” and “court days” are significant. “Subject” almost becomes statistically significant, but it did not pass the requisite statistical threshold.

In sum, “word count” and “court days” are significant predictors of delivery time—the more words and court days, the slower the delivery time. The phenomenon of increased words over the last forty years explains, at least partly, the evolution of slower delivered decisions. Finally, similar to my intuition about longer decisions, the six possible aims of Canadian judges as workers in the judicial labour market model also largely explain my intuition about why decisions have become slower over the past forty years.

### iii. Word count, delivery time, and judges’ workload: granular results

To further understand the evolution of BCSC decisions, the remainder of Part II examines the specific trends of word count, delivery time, and judges’ workload. When examining these trends and how they relate to particular subject matters (e.g., tort disputes), I relied only on median and mean word counts and delivery times with more than ten decisions. In some cases, particular subjects had higher medians and means than the ones I ranked as highest, but those averages

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245 See Figure 18 in Appendix E.  
246 See Figure 19 in Appendix E.  
247 See Figure 20 in Appendix E.  
248 I set a cut off p-value of <.05. If a variable did was outside of the cut-off threshold, I did not consider it.
were based on small sample sizes (so I did not classify them as the highest). The attached figures in Appendix E include all results and their rankings regardless of sample size.

(a) Word count

1980:249 Contract decisions had the highest median word count (2,208 words).250 Civil procedure decisions (1,001 words) had the lowest median word count.251 Tort decisions had the highest mean word count (3,656 words). Appeal decisions had the lowest mean word count (1,192 words).252 The random forest models for 1980 indicate that “court days” are the only significant predictor of word count.253 Including versus excluding judges made no difference to the predictions.

2000:254 Tort decisions had the highest median word count (4,885 words).255 Civil procedure decisions had the lowest median word count (1,907 words). Tort decisions had the highest mean word count (6,556 words).256 Debtor/creditor decisions had the lowest mean word count (2,156 words). The random forest models for 2000 indicate that “court days” and “headings” are significant predictors of word count (in 1980, only “court days” was a significant predictor).257 The addition of “headings” as a significant predictor make sense in comparison to its absence in 1980 since hardly any judges used headings in 1980. Including versus excluding judges made no difference to the predictions.

249 See Figure 21 in Appendix E for the mean and median breakdowns of word count in 1980.
250 Technically, IP decisions had the highest median word count (2,742 words), but that median is only based on two observations. So this result was disregarded.
251 Technically, tax decisions had the lowest median word count (722 words), but that median is only based on one observation. So this result was disregarded.
252 Technically, tax decisions had the lowest mean word count (722 words), but that mean is only based on one observation. So this result was disregarded.
253 See Figures 22-23 in Appendix E.
254 See Figure 24 in Appendix E for the mean and median breakdowns of word count in 2000.
255 Technically, Aboriginal decisions had the highest median word count (19,487 words), but that median is only based on two observations. So this result was disregarded.
256 Technically, Aboriginal decisions had the highest mean word count (19,487 words), but that mean is only based on two observations, so this result was disregarded. Constitutional (12,342 words) and public law (6,835 words) had higher means than tort decisions, but those results are based on six and three decisions, respectively. So these results were disregarded.
257 See Figures 25-26 in Appendix E.
Tort decisions had the highest median word count (12,475 words). Civil procedure had the lowest median word count (3,096 words). Tort decisions had the highest mean word count (14,981 words). Civil procedure decisions had the lowest mean word count (4,415 words). The random forest model for 2018 with judges included indicates that “court days” and “headings” are significant predictors of word count. With judges excluded, court days are the only significant predictor of word count (in 2000, headings remained significant even with judges removed). The relationship between the “headings” and “judge” variables makes sense as some judges use headings more frequently than others. As discussed, all decisions with headings in 1980, 2000, and 2018 are longer than those without headings, and headings were increasingly used in 2000 and 2018. The significance of “headings” in both 2000 and 2018 therefore makes sense. Notably, the “court days” predictions have remained constant since the 1980 sample. Accordingly, the prediction is robust. It also again demonstrates that Hypothesis 1 was partially valid.

Summary: The dominance of tort decisions as the longest decisions in all sample years is curious. Considering Part I’s discussion about the strict requirement for reasoned decisions in criminal decisions, this dominance is surprising. Either tort law is unclear or parties are generating large evidentiary records (the importance of “court days” as a significant predictor of length in the random forest models suggests the latter is likely true). Either way, judges are increasingly issuing lengthy decisions about private law disputes between two parties that did not involve accidental physical injury, so these decisions should include less expert evidence (unless it was medical malpractice). That civil procedure decisions were the shortest is promising. It

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258 See Figure 27 in Appendix E for the mean and median breakdowns of word count in 2018.
259 Technically, Aboriginal decisions (130,321 words) and constitutional decisions (13,491) had higher median word counts, but those medians are only based on one and five observation(s), respectively. So these results were disregarded.
260 Technically, public law (2,993 words) and OCPA decisions (449 words) had the lowest median word counts, but the medians are each based on one observation. So these results were disregarded.
261 Aboriginal decisions (130,321 words) and constitutional decisions (13,917) had higher mean word counts, but those means are only based on one and five observation(s), respectively. So these results were disregarded.
262 Technically, public law (2,993 words) and OCPA decisions (449 words) had the lowest mean word count, but these means are each based on one observation. So these results were disregarded.
263 Similar to the random forest models of the entire data set, only one of the three hypothesized variables for longer decisions—“court days”—consistently predicted word count. The judge” and “subject” variables did not.
264 Personal injury was coded separately from tort. Some of these tort decisions included medical malpractice where multiple expert opinions would likely be present.
suggests that such issues are perhaps clearer and that parties put forward less evidence. Both tort and civil procedure are likely amendable to the reforms that Part IV discusses about redesigning the decision: judges and parties need more guidance on content and structure in tort decisions, and civil procedure decisions may be open to more standardization. Finally, the relationship of “court days” to decision length is likely the dominant consideration in improving decisions’ delivery time. Aside from the reforms that Part IV discusses, reducing the need for “mega” and longer trials is one way to reduce decisions’ length.

(b) Delivery time

1980:266 Administrative decisions had the slowest median delivery time (18 days).267 Criminal decisions had the quickest median delivery time (0 days). Contract decisions had the slowest mean delivery time (41 days).268 Criminal decisions had the fastest mean delivery time (5.5 days).269 The random forest model with judges included for 1980 indicates that “oral judgment” is the only significant predictor of delivery time. Considering how fast oral decisions were released in 1980 explains this significance. The random forest model with judges excluded changes that prediction: “court days”, “oral judgment”, and “word count” are all significant predictors of delivery time.270 This change demonstrates the earlier discussed power of the “judge” variable and its clear relationship to other variables, especially in the delivery time models. Nonetheless, the “judge” variable still was not a significant predictor of delivery time.

2000:271 Tort decisions had the slowest median delivery time (60 days).272 Criminal decisions had the quickest median delivery time (4 days). Tort decisions had the slowest mean delivery

266 See Figure 30 in Appendix E for the mean and median breakdowns of delivery time in 1980.
267 Municipal also had the same median delivery time (18 days). Technically, IP (117 days), insolvency (52 days), and constitutional (38.5 days) decisions had slower median delivery times. But these medians are based on two, seven, and eight observations, respectively. So these results were disregarded.
268 Technically, IP (117 days), insolvency (52 days), and constitutional (44.9 days) decisions had slower mean delivery times. But these means are based on two, seven, and eight observations, respectively. So these results were disregarded.
269 Technically, tax decisions (0 days) had the fastest mean delivery time, but that mean is based on one observation. So this result was disregarded.
270 See Figures 31-32 in Appendix E.
271 See Figure 33 in Appendix E for the mean and median breakdowns of delivery time in 2000.
272 Technically, Aboriginal (207 days), constitutional (112 days), and tax (110 days) decisions had slower median delivery times, but these medians are based on two, six, and one observation(s), respectively. So these results were disregarded.
time (84 days). Criminal decisions had the fastest mean delivery time (17 days). Both random forest models indicate that “court days”, “word count”, and “oral judgment” are all significant predictors of delivery time.

2018: Tort decisions again had the slowest median delivery time (151 days). Equitable decisions had the fastest median delivery time (6.5 days). Tort decisions had the slowest mean delivery time (151.7 days). Equitable decisions had the fastest mean delivery time (18.7 days). The random forest model for 2018 with judges included indicates that “oral judgment”, “word count”, and “judge” are all significant predictors of delivery time. Notably, this 2018 model was only model where the judge became significant in the year-by-year random forest models. The random forest model with judges excluded maintains the “oral judgment” and “word count” variables as significant predictors, and “court days” now also become a significant predictor (the same change happened in 1980 but not 2000). This change is intriguing: it suggests some relationship between the “judge” and “court days” variables. I currently have no intuition for this relationship. It could be because some judges in 2018 sat more court days than their colleagues. Notably, the “court days” and “word count” predictions have remained largely constant since the 1980 sample. Accordingly, the prediction is robust. It also again demonstrates that Hypothesis 2 was partially valid.

**Summary:** Considering tort decisions’ length, their dominance as the slowest decision in 2000 and 2018 is unsurprising. The same points about tort decisions’ length apply equally to their slow delivery time, including the random forest conclusions. That criminal decisions are typically one

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273 Technically, Aboriginal (207 days), constitutional (125 days), and tax (110 days) decisions had slower mean delivery times, but these means are based on two, six, and one observation(s), respectively. So these results were disregarded.
274 See Figures 34-35 in Appendix E.
275 See Figure 36 in Appendix E for the mean and median breakdowns of delivery time in 1980.
276 Technically, Aboriginal (508 days) and IP (220 days) decisions had the slowest median delivery time, but those medians are each based on one observation. So these results were disregarded.
277 Technically, OPCA decisions (0 days) had the fastest median delivery time, but that median is based on one observation. So this result was disregarded.
278 Technically, Aboriginal (508 days) and IP (220 days) had the slowest mean delivery time, but those means are each based on one observation. So these results were disregarded.
279 Technically, OPCA decisions (0 days) had the fastest mean delivery time, but that result is based on one observation. So these results were disregarded.
280 See Figures 37-38 in Appendix E.
281 Similar to the random forest models of the entire data set, only one of the three hypothesized variables for longer decisions—“court days”—consistently predicted delivery time. The judge” and “subject” variables did not.
of the fastest decisions is an important consideration for reducing delay in criminal proceedings.\textsuperscript{282} This fact suggests that delay in the criminal process is likely due to other factors, e.g., the trial process itself and administrative delay. The relationship of “court days”, “word count”, and “oral judgment” to decisions’ length is a dominant consideration in improving decisions’ delivery time.\textsuperscript{283} Reducing the need for “mega” and longer trials and increasing the use of oral decisions are two possible ways to improve delivery time. Reducing decisions’ length—as well as testing and addressing the underlying reasons for greater length that we just discussed—is another. The solutions that Part IV proposes could address all three issues.

\textit{(c) Judges’ workload}

\textbf{1980:} The dataset captured 70 judges issuing decisions in 1980. The median output of decisions per judge was 12.5 decisions,\textsuperscript{284} and the median court days per judge was 23.5 days.\textsuperscript{285} The amount of days judges sat in court varied broadly (from 121 days to 1 day):

- The judge with the most sitting days (121 days) was also the fifth most prolific decision writer (issued 46 decisions); was above the median word count (1,888 words) and the mean word count (2,228 words); and above the median delivery time (21 days) and well above the mean delivery time (52 days).
- The judge with the second most sitting days (110 days) was the eighth most prolific writer (issued 39 decisions); was above the median word count (1,800 words) and mean word count (2,219 words); and was just above the median delivery time (11 days) and mean delivery time (27 days).
- The judge with the most decisions (50 decisions) sat for 96 days.

\textbf{2000:} The dataset captured 115 judges issuing decisions in 2000. The median output of decisions per judge was 16 decisions,\textsuperscript{286} and the median court days per judge was 43 days.\textsuperscript{287} The amount of days judges sat in court again varied broadly (from 175 days to 1 day):

- The judge with the most sitting days (175 days) was the fifth most prolific decision writer (issued 44 decisions); was just above the median word count (2,456 words) but below the

\textsuperscript{282} While not noted in the analysis for 2018, criminal decisions were also some of the fastest issued decisions (the median was 7 days, and the mean was 28 days).
\textsuperscript{283} Similar to the random forest models of the entire dataset, the individual year random forest models for 1980, 2000, and 2018 did not demonstrate a bi-directional relationship between “word count” and “days to issue”.
\textsuperscript{284} The mean was 16.9 decisions.
\textsuperscript{285} The mean was 36.8 days.
\textsuperscript{286} The mean was 16.77 decisions.
\textsuperscript{287} The mean was 47 days.
mean word count (3,012 words); and below the median delivery time (11 days) and well below the mean delivery time (15 days).

- The judge with the second most sitting days (153 days) was not a prolific decision writer (issued 15 decisions); was above the median word count (3,580 words) and the mean word count (4,811 words); and was well below the median delivery time (0 days) and mean delivery time (15 days).
- The judge with the most decisions (54 decisions) sat for 89 days.

2018: The dataset captures 127 judges issuing decisions in 2018. The median output of decisions per judge was 15 decisions,288 and the median court days per judge was 50 days.289 The amount of days judges sat in court again varied broadly (from 224 days to 1 day). The 224 days involved multiple observations of the same matter. The better range is 147 days to 1:

- The judge with the third most sitting days (147 days) was not a prolific writer (issued 19 decisions); was below the median word count (4,155 words) but above the mean word count (9,382 words); and below the median days to issue (50 days) but above the mean days to issue (122 days).
- The next most sitting judge (146 days) was not a prolific writer (18 decisions); was above the median word count (7,414 words) and the mean word count (9,382 words); and was above the median days to issue (30 days) and the mean days to issue (73.9 days).
- The judge with the most decisions (40 decisions) sat for 85 days.

Summary: On the whole, the 1980, 2000, and 2018 samples demonstrate a clear subjectivity in judges’ outputs: some judges took longer and were more expressive than their colleagues. On median, judges’ outputs in 2018 are similar to their 1980 colleagues (15 versus 12.5 decisions). But, on mean, judges in 1980 actually issued more decisions than their 2018 colleagues (16.9 versus 14.77 decisions). Importantly, while judges in 1980 issued more decisions in this dataset than their 2018 colleagues, those decisions were much shorter and faster on median and mean. The amount of decisions they outputted does not mean they were more productive or efficient than their 2018 colleagues. On median and mean, judges in 2018 sat in court more days than their 1980 colleagues (50 versus 23.5 days & 53.88 versus 36.8 days, respectively). This jump in sitting time is consistent with the dominance of court days as an important predictive variable. Again, the idea of judges as workers in a judicial labour market from Part I likely explains the variance and subjectivity in workload and output: some judges are likely assigned more cases than others based on their past performance (as well as their expertise); some judges likely want

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288 The mean was 14.77 decisions.
289 The mean was 53.88 days.
290 The judge at 224 days and 149 days mainly sat on the same matter.
to write more or less than their colleagues and make more or less of an impact on Canadian law; some judges likely want to work less or more than their colleagues; and finally, some judges likely follow the trends of longer decisions more than some of their colleagues.

iv. Limitations and suggestions for further research

These results are limited to the dataset I created and my coding protocol. I have not checked them against other reported databases, historical court data, or unreported decisions. Similar research should be conducted on all trial and appeal decisions in Canadian jurisdictions, e.g., comparing length, delivery time, structure, etc. In the late 1990s, Greene et al noted that appeal decisions’ average length hardly changed in the 20th century. I anticipate the data would now show such changes, e.g., the SCC’s average page length spiked from below 30 pages to above 40 pages in the early 2000s, and the SCC’s average page length has only increased since then. This dataset, along with a broader dataset from other Canadian provinces, should also be used to explore predicting future trends and to test the predictors the random forest models identified as significant in other jurisdictions. In sum, Part II’s research is the beginning. Further research is fundamental for improving access to justice and for the design plan that Part IV discusses for improving the structure and content of Canadian decisions.

v. Conclusion

In 1980, former Chief Justice Wilson of the BCSC opined that “some judgments are too brief, many more are too long.” This thesis questions what he would say now. BCSC judges are increasingly taking longer to issue decisions and issuing longer decisions. Increased delivery times could be related to many factors. A key one that should be explored is the relationship of decision length to delivery time that the random forest models identified as significant. Shorter decisions likely lead to faster delivery time. The models also suggested a strong relationship

291 I did check Quicklaw’s reported appeal rate in 1980 using Westlaw. It was largely consistent.
292 Greene et al conducted a cross-Canada wide survey of all appeal courts. Their data showed a wide divergence of average page lengths from 10.4 pages in British Columbia to 3.1 pages in New Brunswick and a wide divergence of delivery times with New Brunswick, P.E.I., Newfoundland only having 11 decisions over 30 days vs. Quebec having over 50 decisions and Nova Scotia having 35 decisions (see Greene et al, Final Appeal, supra note 133 at 138, 168, respectively).
293 Greene et al, Final Appeal, supra note 133 at 132.
294 Songer, supra note 133 at 153.
295 Rosevear & McDougall, supra note 89 at 4.
296 Hon JO Wilson, A Book for Judges (Minister of Supply and Services Canada: 1980) at 79 [emphasis added].
between longer decisions, slower delivery time, and more court days. Further research should be done on why longer trials are producing longer decisions. As Part IV further explains, this thesis rejects the notion that long trials are necessary for complex issues; that long trials are necessarily more complex; and that long trials require complex, lengthy decisions. A prime example from this dataset is the seminal trial level decision, *Auton v. A.G.B.C.* The decision addressed complex s. 15 issues under the *Charter of Rights and Freedoms.* Yet the trial judge issued a faster and shorter decision in 2000 than most tort decisions in 2018:

- The initial trial decision took 89 days to issue and was 13,111 words.\(^{297}\)
- The trial decision dealing with remedy took 84 days to issue and was 6,642 words.\(^{298}\)
- The appeal decision took 231 days to issue and was 19,301 words (with a dissent) and 14,677 words (without the dissent).\(^{299}\)
- The SCC decision took 164 days to issue and was only 6,636 words.\(^{300}\)

An even more striking historical example is the “Person’s case” of 1930, *Edwards v. Canada (Attorney General).*\(^{301}\) It is one of the most impactful cases in Canada’s common law. Yet, it too, is quite short with only 6,365 words.

As the individual random forests for 1980, 2000, and 2018 demonstrated, aside from the “word count”, “oral judgment”, and “court days” variables, the other variables have not remained constant as significant predictors over a forty-year period. Accordingly, future prediction studies should focus on these variables. That the individual judge has become one of delivery time’s significant predictors in 2018 is concerning. One explanation is that the judicial process is becoming more subjective over time, including the impact of judges on delivery time.

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298 *Auton v AGBC*, 2001 BCSC 220.
299 *Auton (Guardian of) v British Columbia (Attorney General)*, 2002 BCCA 538
300 *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78.
301 *Edwards v Canada (Attorney General)*, 1929 CanLII 438 (UK JCPC).
The study of alleviating judicial delay in issuing decisions is occurring elsewhere in the international legal community as is the study of reducing length. These topics are hardly discussed in Canada. Reducing decisions’ length and delivery time needs far more Canadian and comparative study. The reforms this thesis proposes in Part IV—standardized structures and populated templates—are two such reforms, and they could positively impact both length and delay. As mentioned, my intuition is that the old adage of “If I had more time, I would have written a shorter letter” likely applies to the issues Part II identified. Judges simply may not have the time or confidence to write shorter decisions that would lead to quicker delivery times and more digestible decisions—especially if they write one or two long decisions a year.

Part IV seeks to directly address these issues and to understand why the working experience of judges in 2018 seems to markedly differ from their 1980 colleagues. Such study is vital. Canada has almost no research on how judges write decisions or how people consume decisions. This thesis seeks to change that reality. Before turning to Part IV’s suggested design plan for improving decisions’ structure, content, and timeliness, however, Part III will now consider the views of Canadian courts on judicial independence and how they currently approach the structure, style, and timeliness of decisions. Similar to Part I, such views are a fundamental benchmark for any possible reform.

302 See Jonathan Petkun, “Can (and Should) Judges be Shamed? Evidence from the ‘Six-Month List’” (2018) Draft Paper, online: <https://ssrn.com/abstract=3205398> [Petkun discusses the merits of social incentivizes for increasing judicial speed, including the statutory six-month list in the U.S. that discloses the number and name of motions that have been pending for longer than six months]; Miguel de Figueiredo, Alexandra D Lahav & Peter Siegelman, “Against Judicial Accountability: Evidence From The Six Month List” (2018) Draft Paper, online: <https://ssrn.com/abstract=2989777> [Figueiredo, Lahav & Siegelman argue that judges may be making more errors to comply with the U.S. statutory six-month list and that incentivizing judges to process cases faster is likely a mistake]; Paige Skiba, Alessandro Melcarne & Giovanni B Ramello “The Role of Legal Justification in Judicial Performance: Quasi-Experimental Evidence” (2018) Vanderbilt University Law School Working Paper 18 – 45, online: <https://ssrn.com/abstract=3195922> [Skiba, Melcarne & Ramello argue that Italian judges issue decisions faster when they do not have to provide legal justification, e.g., reasons]; Sha-Shana Crichton, “Justice Delayed is Justice Denied: Jamaica’s Duty to Deliver Timely Reserved Judgments and Written Reasons for Judgment” (2016) 44 Syracuse J Int’l L & Com 1 [Crichton argues that Jamaica is facing a problem of excessive delay in its reserved judgments and offers potential solutions].

303 See Meg Penrose, “To Say What the Law Is Succinctly” (2017) 50 Loy LA L Rev 101 [Penrose proposes a voluntary word count for majority, concurring, and dissenting U.S. Supreme Court opinions].

304 For an excellent example of comparative analysis of decisions, see Folke Schmidt, The Ratio Decidendi: A Comparative Study of French, a German, and an American Supreme Court Decision (Almqvist & Wiksell: Stockholm, 1965).
Part III: How Canadian courts currently approach the structure, style, and timeliness of decisions

Canadian scholars seem to rarely survey Canadian courts. Two of the only examples are from McCormick and Greene who surveyed judges from all Alberta courts in the early 1980s and Greene et al who surveyed most courts of appeal in the 1990s. One point from these surveys is clear: neither courts nor judges are homogenous. They have different views about the same topics. Accordingly, lumping judges or courts together when discussing reforms is unsound. One court or judge may accept a reform while another court or judge may reject it. One of the clearest examples that is relevant to this thesis is how 41 judges view decision-making and “the general process by which … [they] reach a decision on a particular case.” The following four categories of those judges’ views fall into two groups, the earlier discussed formalism and discretion. These four categories demonstrate that judges clearly have differing views on judicial decision-making (and by implication, decision-writing):

- **Improvisers (low formalism, low discretion):** “There is no single process of making a decision because cases present too much variety; nevertheless, different judges would usually come to the same decision about the same case.”

- **Strict formalists (high formalism, low discretion):** “The making of judicial decisions often revolves around highly technical and objective questions requiring little in the way of a conscious formal intellectual process for their application.”

- **Pragmatic formalists (high formalism, high discretion):** “There is a conscious, understandable process that all judges should follow in reaching a judicial decision. This process can be formulated in terms of a ‘check list’ of items, or ‘shifting balance’ between the two sides, or ‘water rising’ to a specific level.”

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305 McCormick & Greene, Judges and Judging, supra note 133 at 60. Greene also surveyed Ontario judges in his PhD dissertation (see Ian Greene, The Politics of Judicial Administration: The Ontario Case (PhD Dissertation, University of Toronto, 1983) [unpublished].

306 Greene et al, Final Appeal, supra note 133 at 213.

307 See generally Greene et al, Final Appeal, supra note 133.

308 A clear example is judges’ views on admired qualities in other judges, what they strive to be like, and their approaches to consulting colleagues (see McCormick & Greene, Judges and Judging, supra note 133 at 102-115 & 141-150, respectively. Another clear example is the time that appeal judges spend preparing for hearings or how they use their clerks (see Greene et al, Final Appeal, supra note 133 at 68, 120 respectively). See also Greene et al, Final Appeal 133 at 199 (“each appellate court develops an idiosyncratic set of procedures based on the impact of customs and habits over time, and these procedural differences not only differentiate particular courts from each other, but they have an impact on the outcome of particular cases and case flow in general.”); see also 203-207.

309 A common critique to my research is that judges or courts will never agree to what I am proposing in Part IV. My response is that courts and judges, like this data shows, are not homogenous.

310 McCormick & Greene, Judges and Judging, supra note 133 at 122-138.

311 Ibid at 121.

312 Ibid at 123. For further discussion of these groups and the various responses within them, see 121-138.

313 Ibid.

314 Ibid.
• **Intuitivists (low formalism, high discretion):** “The process of a judicial decision is best described in terms of a ‘gut feeling’ about the trial as a whole, a key ‘moment’ in a trial around which everything revolves, or arriving at a feeling of what the most fair outcome should be, and then putting the rationale that justifies reaching the outcome.”

To better understand how courts and judges approach decision-writing in 2019 and to ascertain how courts view the relationship of decision-writing to judicial independence, Part III presents a survey of most Canadian courts on seven aspects of decision-writing. It discusses the survey design, participation, and findings. This analysis yields three main conclusions: courts’ views are not homogenous, perhaps even on judicial independence and deliberative secrecy; some courts believe that judicial independence precludes them from imposing structural or stylistic requirements upon judges; and some courts are concerned with data analytics and improving decisions. These conclusions are vital for understanding how courts may view the reforms Part IV proposes, including how judicial independence might impact those reforms, the topic of Part V.

i. **Survey design**

After receiving ethics approval, I sent a survey to most s. 96 courts, provincial appeals courts, and Federal Courts. In total, I surveyed 27 Canadian courts, on seven questions:

1. Does the [surveyed court] have a suggested time for issuing written judgments (if so, what is it)?
2. Does the [surveyed court] have mandatory style guides for written judgments (if so, how does the Court track if judges follow it)?

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315 Ibid.
316 In my approach was to locate a contact in the court; send an information and consent letter; and follow-up by phone and email. I successfully completed those steps for 27/28 courts with the exception of the Superior Court of Québec because I could not identify a contact person.
317 On file with author.
318 I sought to contact legal officers and executive legal officers. Some Canadian courts do not have executive legal officers or legal officers. In those situations, I contacted registrars. In contrast to the approach of Greene et al in their appeal courts survey, I sought to coordinate all responses to question 7 through the same person who coordinated responses to question 6. Greene et al availed a different approach: they directly wrote to each court’s chief justice and sought advice about contacting judges to request interviews. Each chief justice agreed to be interviewed, provided guidance in arranging interviews with other judges, forwarded interview requests to other judges, and even scheduled interviews for them. This approach is instructive: it may provide a greater likelihood of individual judges responding vs. relying on legal officers or chief justices—who are both extremely busy—to canvas participation. In designing further studies, such an approach is worth emulating (see Greene et al, Final Appeal, supra note 133 at 213-214).
319 I unfortunately did not have any direct communication with the Québec Superior Court despite attempts by phone and email. I did follow-up with all courts by phone and email.
3. Does the [surveyed court] have a mandatory structure for written judgments (if so, how
does the Court track if judges follow it)?
4. Does the [surveyed court] have any statistical data on judgments aside from what it
releases in the Court’s annual reports (if so, is it available for research purposes)?
5. Does the [surveyed court] track how long written judgments are under reserve (if so, how
does the Court address reserves that are three months old, six months old, and over six
months old)?
6. Is the [surveyed court] examining any initiatives about improving or changing written
judgments?
7. Would some [surveyed court] judges track their time for drafting written judgments like
Brown J. (as he then was) did in the judgment attached to this email—Western Larch
Specifically, I request that judges track the (a) case’s subject matter, number of parties,
and days of court time; and (b) out of court time spent on the judgment process, including
the time they spend (i) reviewing evidence, applicable case law, statutes, and any related
research memoranda; (ii) discussions with clerks or other judges; and (iii) the actual
drafting of judgments. This data would be anonymized.

Each question had a specific goal:

1. **Question 1**: determine if the surveyed court had any internal timelines outside of statutory
requirements or the Canadian Judicial Council’s six-month resolution;
2. **Question 2**: determine if the surveyed court had any style guides for decisions and the
surveyed court’s view about decisions’ style and judicial independence;
3. **Question 3**: determine if the surveyed court had any mandatory structures for decisions
and the surveyed court’s view about decisions’ structures and judicial independence;
4. **Question 4**: determine if the surveyed court keeps data and if that data is available to
researchers;
5. **Question 5**: determine how the surveyed court deals with delay in issuing decisions;
6. **Question 6**: determine if the surveyed court is exploring any initiatives to improve the
decision, e.g., oral decision initiatives or using some kind of writing software; and
7. **Question 7**: determine if judges of the surveyed court had similar experiences to Justice
Brown, and develop a further understanding of Canadian judges’ work flow.

**ii. Participation**

As of July 2019, five courts indicated they would not participate, nine courts participated, and 12
courts were non-responsive.\(^{320}\)

\(^{320}\) While I did have some email and phone correspondence with 13 non-responsive courts, they never responded to
the survey and did not indicate they would not be participating: Court of Appeal for the Northwest Territories;
Nunavut Court of Justice; Nunavut Court of Appeal; Court of Appeal of Alberta; Manitoba Court of Queen’s Bench;
Manitoba Court of Appeal; Court of Appeal for Ontario; Court of Appeal of Quebec; Supreme Court of Prince
Edward Island; Court of Queen’s Bench of New Brunswick; Court of Appeal of New Brunswick; and Nova Scotia
Superior Court.
(a) Non-participating courts

The Court of Appeal of Newfoundland and the Federal Court did not indicate why they would not participate. The responses from the other non-participating courts were similar:

- SCC: “some of the issues you propose to canvass touch on matters relating to the Court’s deliberative process, it would be inappropriate for the Court to participate in your survey.”
- Court of Appeal for Saskatchewan: “The Court of Appeal for Saskatchewan has determined that it would not be appropriate for it to participate in your study of the Court’s decision-making process.”
- Federal Court of Appeal: “the Federal Court of Appeal is unable to participate as the information that you seek pertains to the internal deliberative process of the Court.”

These responses appear to indicate a belief that the survey questions fell within the bounds of deliberative secrecy. Courts’ views about judicial independence may also explain the reticence. Perhaps the non-responding courts maintain similar views. Additionally, while no court raised this point, the survey could showcase subjectivity in the decision-making process, especially question 7, and courts typically deny such subjectivity as Posner argues:

Judges want to deny the role of subjectivity in judicial decision making lest they undermine their claim to be a deservedly independent branch of government in which reason rules, obviating a need for political or other external constraints on their exercise of discretion.

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321 Correspondence on file with author.
322 Ibid.
323 Ibid.
324 Ibid.
325 Commission scolaire de Laval v Syndicat de l’enseignement de la région de Laval, 2016 SCC 8 at para 57 [“The need to shield the judicial decision-making process from review by the other branches of government flows from the principle of separation of powers that is reflected in the constitutional requirement of judicial independence.”] [“Commission scolaire”]; see also MacKeigan v Hickman, [1989] 2 SCR 796 [“MacKeigan”].
326 One could argue that judges’ idiosyncratic tendencies make the judicial process less impartial. I do not mean impartial in a biased or pejorative sense. Rather, I mean impartial in the sense that parties’ experiences when receiving decisions is largely based on the judge who writes it. France’s current approach to issuing decisions and judicial analytics may lend credence to this view (see Michael Livermore & Dan Rockmore, “France Kicks Data Scientists out of Its Courts” (21 June 2019) Slate, online: <https://slate.com/technology/2019/06/france-has-banned-judicial-analytics-to-analyze-the-courts.html> [“Judges might prefer to be insulated from the kind of outside scrutiny that, for example, has found shocking amounts of arbitrariness in U.S. immigration proceedings, but the public and policymakers deserve access to this information”]; Florence G’sell, “Predicting courts’ decisions is lawful in France and will remain so” (24 June 2019) Blog de Florence G’sell, online: <https://gsell.tech/predicting-courts-decisions-is-lawful-in-france-and-will-remain-so/> [“One could certainly argue that transparency commands that judges be applied judicial analytics on a personal basis. The issue is that this eventuality would be questionable in the French legal system, since the function of the French judges has never been to deliver opinions in their own name.”].
327 Posner, How Judges Think, supra note 91 at 72.
Despite non-participation, the Federal Court and Federal Court of Appeal provided relevant information:

- **Federal Court**: The Court encourages all judges and prothonotaries to follow the Canadian Judicial Council’s resolution. The Court provides templates for decisions (both decisions and orders) to ensure standardization and uniformity.\(^{328}\)
- **Federal Court of Appeal**: The Court strives to respect the Canadian Judicial Council’s resolution to deliver decisions within six months of hearing, absent special circumstances.\(^{329}\)

\((b)\) **Participating courts**

Five provincial superior courts, three provincial appeal courts, and one federal court participated: the BCSC; British Columbia Court of Appeal; Supreme Court of the Northwest Territories; Court of Queen’s Bench of Alberta; Ontario Superior Court of Justice; Prince Edward Island Court of Appeal; Supreme Court of Newfoundland and Labrador; Nova Scotia Court of Appeal, and Tax Court of Canada. All participating courts declined to participate in question 7.\(^{330}\) But they provided relevant, helpful information for questions 1-6. The answers are summarized in Appendix F.

Only two courts explained why they would not participate in question 7:

- **British Columbia Court of Appeal**: “The Court of Appeal is not in a position to respond to question 7, given the extent to which the question engages the deliberative process of the judiciary.”\(^{331}\) This explanation again invokes the earlier discussed deliberative secrecy.
- **Tax Court of Canada**: “In the interest of judicial independence, judges of the TCC will not participate in Question 7.”

The Ontario Superior Court of Justice did not explain why it would not participate. But it noted that judges must release decisions in a timely manner and that the time required to draft a decision can vary greatly. Accordingly, “nothing would be advanced by tracking such data.”\(^{332}\) Such views and the general reticence of Canadian courts to have judges track their time is both surprising and unsurprising. A similar project where judges tracked aspects of their writing and

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328 Correspondence on file with author.
329 Ibid.
330 Ibid.
331 Ibid.
332 Ibid.
sitting time was completed in Australia. The results are fascinating and greatly advance the understanding of the judicial process.\textsuperscript{333} A key point from that study’s authors is consistent with Posner’s comment and likely explains the reticence to participate in question 7 or generally:

Unwarranted delay in producing judgments can be perceived as a reflection on individual judicial officers and on the efficiency of the court as a whole. Court delay raises concerns about access to justice, while methods to improve efficiency may be perceived as infringing judicial independence.\textsuperscript{334}

Nonetheless, despite concerns about judicial independence, broad surveys and studies—with participation of courts and judges—have occurred in Australia.\textsuperscript{335} They have led to excellent analysis\textsuperscript{336} of “judicial performance and emotion”; “gender and judging”; “courts and social change”; “judicial workload allocation”; “judicial practice in court”; “background which Australian judges and magistrates bring to their judicial practice and decision-making”; and “the attitudes and experiences of the Australian judiciary, particularly their views about everyday work.”\textsuperscript{337} In short, Australian courts and judges seem to recognize the utility of more versus less data and transparency versus secrecy. The same should be true in Canada.

\textit{iii. Summary}

Participation rates were moderate: 53.8\% of courts responded (14 out of the 26 surveyed courts) and 34\% of courts provided answers to six out of the seven questions. In contrast to the non-participating and non-responsive courts, the participating courts clearly did not view questions 1-6 as falling within deliberative secrecy. Nor did they invoke judicial independence. The different approaches again demonstrate, similar to the findings of Greene \textit{et al} that courts’ views are not


\textsuperscript{334} \textit{Ibid} at 1 [emphasis added].


\textsuperscript{336} Flinders University, “Publications and Presentations” Flinders University, online: <http://www.flinders.edu.au/ehl/law/research-activities/judicial-research-project/publications-&-presentations/publications-&-presentations_home.cfm>.

\textsuperscript{337} “Judicial Research Project”, \textit{supra} note 335.
homogenous. The different approaches also illustrate Part I’s conclusion about judicial decision-making and that no single perspective can comprehensively capture judging or judicial behavior. The following list aggregates the key principles from the nine participating courts’ responses for questions one to six:

- **Question 1**: Six courts strive to follow the Canadian Judicial Council’s six-month resolution to issue decisions; three courts have their own statutory timeline; and one court has no formal rule (rather, it has a shared expectation that decisions will be issued in three to four months).

- **Question 2**: Three courts have their own optional style guides. Three courts rely on the Canadian Citation Committee’s guide for “The Preparation, Citation, and Distribution of Canadian Decisions.” One court has a “judgment template” that includes a number of pre-set features—e.g., “it automatically populates the style of cause, file number, date, publication ban wording, counsel, and the rest of the information in the cover....” The template also includes space to briefly summarize the case, and it has a pre-set font; paragraph and line spacing, and other formatting prescriptions. Four courts did not indicate reliance on any internal or external style guide. All courts which have style guides or rely on external guides explicitly or tacitly indicated that judicial independence precludes imposing stylistic requirements on judges. Accordingly, no court tracks use of the optional or suggested style guides.

- **Question 3**: Five courts have templates; two courts offer structural guidance; and four courts did not indicate if they have any templates or offer structural guidance. Similar to question 2, the courts with templates indicate that judicial independence precludes imposing structural requirements on judges. These templates do not appear to prescribe suggested headings. One court explicitly noted this point and that judges will structure their decisions to their writing style and decisions’ requirements. These templates appear to be directed at formatting.

- **Question 4**: Five courts maintain statistical data (some of which is issued in annual reports); three courts maintain additional data outside of their annual reports that is available for research purposes; three courts do not maintain statistical data, e.g., because of resource constraints; one court did not respond to this question; and one court indicated its data is for internal use only.

- **Question 5**: All nine courts carefully track their reserves; five courts indicated they have a specific policy for monitoring reserves; and four courts indicated that they consistently review such lists, e.g., in monthly intervals. The Chief Justice of most courts is responsible for reviewing such lists and for any discussions with the assigned judge about the delay. Some courts provide the assigned judge with additional resources or assistance to expedite issuing the delayed reserve decisions—e.g., more decision writing time or producing a hearing’s written transcripts.

- **Question 6**: Courts are interested in improving decisions. One court is piloting a Digital Hearing Workspace that will allow judges to directly issue written decisions to the parties through an electronic app. Three courts indicated that they encourage their judges to participate in continuing judicial education on decision-writing.
In sum, this data indicates that courts have expansive views about judicial independence: they believe that judicial independence precludes them from imposing structural or stylistic requirements upon judges. It also indicates that courts are clearly interested in preventing and addressing judicial delay in issuing decisions. That some courts maintain data that can be used for research purposes is promising. Again, an air of secrecy surrounds this data as scholars have to apply to use it. Presumably, some of the data contains personal information and should not be released. But data about Canadian courts belongs to Canadians. Such data, as the epilogue notes, should be publicly stored and available without having to apply for it. Some courts are likely unable to maintain further data through no fault of their own. Such courts clearly need more resources and funding. Finally, courts are interested in improving decisions. The question is how might we improve them, a subject that Part IV will now comprehensively address.

**Part IV: How human-centered design could improve judicial decisions’ structure, length, accessibility, content, and timeliness**

The human-centered design method, aka “design thinking”, “user-centered design” or “user-centric design”, presents one of the best mechanisms to improve the decision. Part IV briefly explains what human-centered design is; its use in the legal system; and why scholars, judiciaries, and governments should collaboratively rely on it to redesign the decision to solve some of the issues that Part II identified. It then provides a five-step hypothetical design plan for redesigning the decision that thoroughly addresses the method’s stepwise process. This analysis yields one conclusion: using human-centered design to improve the decision could revolutionize Canadian law and drastically improve access to justice.

### i. The background of human-centered design and its use in the legal system

With origins in ergonomics, engineering, computer science, and artificial intelligence, human-centered design depends on prototypes, experiments, and user-consultation throughout the design process. Deep understanding and empathy are the method’s foundation. Designers identify and

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comprehensively evaluate users, their problems, and their needs before ever contemplating solutions. Failure is expected and welcomed; designers are not wed to outcomes or initial data projections. In fact, human centered-design’s mantra is failing early and often.\(^{339}\) Failure promotes fodder for new ideas and experiments;\(^{340}\) failure lets designers know what does not work so they can abandon or redesign initial solutions. When designers faithfully execute the stepwise design process, its unique, tested, iterative solutions resonate with users because the solutions are likely to meet users’ needs and solve their problems.\(^{341}\)

Designers who use human-centered design are concerned with more than data or empiricism. Empirical methods and evidence-based solutions alone cannot solve the problems in Canada’s legal system. Using empirical evidence to reduce uncertainty before implementing legal reforms is useful.\(^{342}\) But on its own, empiricism is still prone to error or guesswork because it lacks experimentation. Empirical evidence is just a starting point in the human-centered design method: evidence drives stakeholder consultation, user input, interviews, experiments, ideation, and iteration. Hagan concisely addresses the difference between the empirical and the design approaches: “Empirical legal scholars focus on rigorous testing of the outcomes … of

\(^{339}\) Tim Brown, *Change By Design: How Design Thinking Transforms Organizations and Inspires Innovation* (Harper Business: New York, 2009) at 32; IDEO, “The Field Guide to Human-Centered Design: Design Kit” (2015) IDEO at 21 [“Failure is an inherent part of human-centered design because we rarely get it right on our first try. In fact, getting it right on the first try isn’t the point at all. The point is to put something out into the world and then use it to keep learning, keep asking, and keep testing. When human-centered designers get it right, it’s because they got it wrong first.”] ["Field Guide"].

\(^{340}\) “Field Guide”, *supra* note 339 at 21 [“Thomas Edison put it well when he said, ‘I have not failed. I’ve just found 10,000 ways that won’t work.’ And for human-centered designers, sorting out what won’t work is part of finding what will.”].

\(^{341}\) *Ibid*.

interventions, while a design approach focuses on the development of better interventions to test rigorously.”

Finland and the UK are relying on human-centered design and empirical principles to design legal reforms. Instead of guessing how to implement reforms, these countries are attempting to deliberately design them by:

1. seeking to understand their users, their problems, existing data, and the literature;
2. implementing corresponding, iterative experiments and experimental solutions;
3. evaluating identified impacts; and
4. finally, considering, designing, and implementing evidence-based, tested reforms.

Finland’s universal basic income experiment is an excellent working example of using human-centered design in the legal system to design a new law. Finland’s government believes the evidence is clear: universal basic income is necessary. That evidence alone, however, does not offer enough insight into how Finland should design its universal basic income law. So Finland’s government began using human-centered design to fill the design gap. It amended Finnish law to facilitate testing and started its first experiment by giving 2000 people a universal basic income. This approach to universal basic income may sound familiar to some Canadians. Ontario implemented a universal basic income pilot in 2016 (it is now defunct). Finland’s first

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346 Ontario, “Ontario Basic Income Pilot (Archive)”, online: <https://www.ontario.ca/page/ontario-basic-income-pilot>. For a comparison of the two experiments, see Sigal Samuel, “Finland gave people free money. It increased
experiment, however, differs from Ontario’s: it is not a pilot project to see if universal basic income works. Rather, it tests how it works. Finland’s experiment is also not a one-off. If Finland follows the human-centered design framework, this experiment is likely the first of multiple experiments or iterations. Iteration’s purpose in human-centered design is promoting further ideas that will ultimately lead to designing solutions.347 Such iteration and ideation may eventually lead to designing a universal basic income law in Finland.348

Finland—which at one point had 26 projects that relied on human-centered design—is not alone in recognizing human-centered design’s benefits.349 Other countries, including Mexico,350 Singapore,351 and the U.S.,352 have also explored using human-centered design to design policies and reforms, including in the legal system.

The use of human-centered design in Canada’s legal system is more conservative than the Finnish universal basic income example. But initial buy-in is promising. Canada’s federal government is slowly starting to recognize its utility,353 but the federal government has not

their trust in social institutions” (6 April 2019) Vox, online: <https://www.vox.com/2019/4/6/18297452/finland-basic-income-free-money-canada>.  
347 Supra notes 338, 339, 344; Matt Reynolds, “No, Finland isn’t scrapping its universal basic income experiment” (26 April 2018) Wired, online: <https://www.wired.co.uk/article/finland-universal-basic-income-results-trial-cancelled>.  
353 The ISED Innovation Lab is currently “resetting its mission and will re-launch soon…” (see Government of Canada, “Innovation Lab” Government of Canada, online: <https://www.ic.gc.ca/eic/site/096.nsf/eng/home>). A
deployed it the legal system. Academics have endorsed its use—e.g., Sossin advocates for using human-centered design in redesigning administrative tribunals;354 Aylwin also endorses its use and is exploring its use in Yukon’s legal system with the Yukon Family Justice Design Workshop.355 The clearest, most promising example comes from British Columbia.356 The designers of the new British Columbia Civil Resolution Tribunal (“CRT”)357 relied heavily on human-centered design when designing the CRT and continue to rely on its methods as the CRT evolves.358 Initial results after 7,539 completed disputes seem promising: users are demonstrating high satisfaction rates, and most users are likely to recommend the CRT to others.359 The CRT’s success is also garnering world-wide recognition.360

Some of the CRT’s initial success is likely due to designing and building the CRT from scratch versus renovating an existing, entrenched framework.361 That novelty distinguishes the CRT from the judicial decision or other aspects of Canada’s legal system with established traditions. But novelty is not a pre-requisite to human-centered design. In fact, human-centered design

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356 British Columbia’s legal community appears to be embracing human-centered design, and it is also relying on principles from healthcare improvement: see BC Family Innovation Lab, “BC Family Justice Innovation Lab”, online: <https://www.bcfamilyinnovationlab.ca/about/>; Access to Justice BC, “User-centered”, online: <https://accesstojusticebc.ca/approach/user-centred/>; Access to Justice BC, “The Access to Justice Triple Aim”, online: <https://accesstojusticebc.ca/approach/the-access-to-justice-triple-aim/>.
357 Civil Resolution Tribunal, online: <https://civilresolutionbc.ca/>.
361 Salter & Thompson, supra note 357 at 135.
thrives on improving existing experiences and problems. The decision is such an existing problem, and four reasons showcase why the method should be used to redesign the decision:

1. The judicial decision was never actually designed. Rather, as Part I discussed, it evolved to its current form against the backdrop of decreasing prominence and authority.
2. As Part II discussed, Canada has a paucity of data on trial and appeal decisions and no data on what litigants and stakeholders actually require from decisions.
3. Unless decisions get appealed, trial and appellate courts get little to no feedback. Even then, litigants and stakeholders do not provide direct feedback to judges or courts. Essentially, courts do not know if their decisions are meeting Canadians’ needs, or if and how decisions are contributing to Canada’s access to justice plague. Part II suggested that decisions are increasing legal complexity and delay because of decisions’ increased length and delay in issuing them.
4. Canadians desire more input and control over litigation. A clear example is the proliferation of Canadians availing arbitration versus the judicial system. A key reason for arbitration’s popularity is the flexibility that arbitration provides users to design their arbitration process, including whether they want a reasoned decision and faster results.

To showcase human-centered design’s utility and specifically explain how it could address those four points, I now present a five-part hypothetical design plan that delineates how a design team

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362 For a fascinating example of applying human-centered design to the pre-existing airport security experience, see Brown, supra note 339 at 185-188.
363 Some academics argue the legal system was designed by lawyers for lawyers (see, e.g., Salter & Thompson, supra note 358 at 117; UK, LJ Briggs, Civil Courts Structure Review: Interim Report (London, UK: December 2015) at paras 5.27-5.36, online: <www.judiciary.gov.uk/wp-content/uploads/2016/01/cscr-interim-report-dec-15-final1.pdf>; Sossin, Designing Administrative Justice, supra note 354 at 88). I disagree. The legal system does not demonstrate the same deliberateness that the design process requires. Rather, many aspects of the legal system evolved or were created based on precedent, tradition, and feeling. For a similar view, see Rose, supra note 338.
364 Supra notes 3, 5. Canada also has no data on the average length or structure of trial and appeal level decisions.
365 I could not locate data or scholarship addressing this issue. At best, judges perceive or strive to meet litigants’ desires. But without concrete data, these attempts are only inspirational. Certainly, judges choose what to include in decisions based on the parties’ pleadings. Here, however, I am speaking more about content, structure, and style.
366 From informal conversations with judges, my understanding is that judges can provide sample judgments for some feedback when they attend writing workshops.
367 Feedback and evaluation systems have been proposed. But no court has ever implemented them (see Martin L. Frielan, A place apart: judicial independence and accountability in Canada (Canadian Judicial Council: Ottawa, 1995; Greene, The Courts, supra note 133 at 102-103, 161; Russell, The Judiciary, supra note 133 at 189-190).
368 See, e.g., Salter & Thompson, supra note 358 at 122.
could design a better judicial decision.\textsuperscript{371} The design process is not a strict recipe;\textsuperscript{372} different scholars and designers parse out the process differently. But all human-centered design models have consistent phases: (i) empathize and discover; (ii) define users and problem(s); (iii) brainstorm and build solutions for identified problem(s); (iv) test and retest solutions; (v) rinse, repeat, move forward.\textsuperscript{373} This thesis mainly addresses the first two phases, but it offers a suggested design plan and possible outcomes for all five phases. Each phase includes a goal and deliverable for the design team as well as prescriptions for achieving them. This plan, of course, is subject to change based on further research, iteration, and ideation.

\textit{ii. Phase I: develop empathy about how judges write decisions and how people consume them}

Goal: Phase I’s goal is immersion in the experiences of the users the design team wants to help. Deep empathy is the centerpiece of human-centered design.\textsuperscript{374} For designers, empathy is not the typical noun version: “I am sorry you had a bad day at work.” Empathy is far more deliberate for designers. It is a verb: understand the status quo and your users’ point of view; try to see and experience their problem(s) like they do.\textsuperscript{375} When empathizing with users, designers must avail an arsenal of tools. They must deep dive into the terrain they seek to understand (like Part I sought to do); review data and consult subject-matter experts (like Part II sought to do); observe users and their behavior (like Parts II & III sought to do); and directly engage users to conduct interviews and elicit stories about users’ experiences and problems (like Part III sought to do).\textsuperscript{376}

Deliverable: Phase I’s deliverable for the design team is precisely identifying users and goals. Too many users or goals will lead to too many, or disharmonious, goals. Such disharmony leads

\textsuperscript{371} For a fascinating summary of an actual human-centered design project to remake the court system from the self-represented litigant’s perspective that involved the collaboration of a leading design school and leading law school, see Charles L Owen, Ronald Staudt, Edward B Pedwell, Access to Justice Meeting the Needs of Self-Represented Litigants” (2001) Institute of Design and Chicago-Kent College of Law, Illinois Institute of Technology, online: <https://www.kentlaw.iit.edu/sites/ck/files/public/component/access-to-justice-meeting-the-needs.pdf>.

\textsuperscript{372} Hagan, \textit{Law by Design}, supra note 338; Ball, supra note 338 at 821; Brown, supra note 339 at 16.


\textsuperscript{375} Hagan, Hagan, \textit{Law by Design}, supra note 338.

to failed outcomes. This thesis suggests decisions have two users: the judges who write them and the people who consume them. The reforms this thesis proposes address both users’ needs, but the goal is largely the same—timely, concise, consistent, accessible, and data rich decisions. Scholars and governments have failed to develop deep empathy about how judges write decisions. Similarly, scholars, governments, and judiciaries have failed to develop deep empathy about how people consume decisions. To fill part of that empathy gap, the rest of this section discusses these users’ experiences with decisions. It prescribes areas of future research for the design team that would enable further empathy for decisions’ users, their experiences, and their problems.

(a) How judges write decisions: the understudied craft of writing decisions

As Kmiec noted in a conversation with Justice Alito of the U.S. Supreme Court, “The craft of judicial writing—is a subject that is remarkably understudied.” This comment applies equally in the Canadian context, perhaps even more so as Canadian scholars have spent far less time studying judicial behavior than their American colleagues. Canadian and American scholars have studied the theory of why judges should write, what judges ought to include in decisions, and some best practices. But governments, scholars, and the judiciary have not empirically tested those theories. And governments and scholars have not comprehensively conversed with judges and courts about decision-writing. Most importantly, Canadian scholars and governments have not comprehensively studied the craft of how Canadian judges actually write decisions—e.g., do they use templates; do they dictate; do they handwrite, use computers, or tablets; do they write as the trial proceeds or wait until the end; do they make outlines; how long do they take to write;

377 David Dunne, “Think twice about ‘design thinking’” (11 January 2019) *The Globe and Mail*, online: <https://www.theglobeandmail.com/business/careers/leadership/article-think-twice-about-design-thinking/> [“you do have to make a choice. If you try to stretch design thinking too far, you are likely to be disappointed. Disruptive innovators can become isolated from their organization – ‘crazy cowboys’ who are not taken seriously – or, in an attempt to gain legitimacy, can take on incremental projects and become overwhelmed.”].


379 See, e.g., Taggart, “Legally Required”, supra note 33.


381 See Hagan, *Law by Design*, supra note 338 for an excellent example of questions to ask and things to learn in this phase.
how long are their decisions; what factors lead to longer decisions versus shorter ones; why do some judges take longer than others, etc. Such paths are untraveled.

This thesis has started travelling some of those paths and pointed toward other paths that could and should be travelled to gain further knowledge. Part II’s empirical analysis and Part III’s survey were attempts to empathize with judges and courts. But judges’ and courts’ views about decisions need far greater exploration. Since Greene and McCormick’s seminal texts, the study of judicial behaviour has not been adequately pursued in Canada. Even those texts do not, however, address this thesis’s arguments or Justice Brown’s disproportionate experience.

These knowledge gaps could and should be filled. In Phase I, the design team should pursue two avenues to gather further information that they could use to empathize with judges’ experiences:

1. **systemic data:** the team should gather Canada-wide data from all trial and appeal courts to build on the analysis that Part II commenced, including building more models like Part II’s random forest models or classic regression models. They should examine more Canada-wide correlative and causative factors related to length, structure, and delay—e.g., how does subject-matter and party-type affect delivery time and length; do lay-litigants affect how judges write decisions; are some decision structures appealed more than others; do length and delivery time impact appeal rates; why do some judges issue simpler, shorter decisions; how do judges’ (both individually and generally) writing styles change over time (e.g., do they get longer or shorter); etc. The design team could use the existing data that courts have available for research purposes that Part III discussed and CanLII’s REST API tools that facilitate electronic scraping of data.

2. **individual data and user experience:** instead of contacting courts like I did in Part III, the team should contact judges individually to discuss their experience drafting decisions and to find judges willing to track their time like Justice Brown did to ascertain efficiencies/inefficiencies in the writing process.

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382 Supra note 133.
383 See Rosevear & MacDougall, “Cut to the Case”, supra note 89.
384 See Richard S Miller, “A Program for the Elimination of the Hardships of Litigation Delay” in Selected Readings: Court Congestion and Delay, Glenn R Winter, ed (American Judicature Society: Chicago, 1971) 1 at 5 (“It should be recognized that the crucial question is what does the judge do with his time when he is not hearing a case.”).
Some similar work, as mentioned, was done in Australia, and it provided a large basis for research and reform. The CBA has called for better data on court management since 1996 and further evidence about the effectiveness and efficacy of Canada’s legal system. These two avenues would capture both calls to action.

(b) How people consume decisions: the understudied experience of consuming decisions

To empathize with the second broad group of users, the design team should pursue one focused avenue: they should conduct a broad survey of librarians, academics, law clerks, court staff, lawyers, litigants, judges, the public, governments, data scientists, and legal analytics companies. This survey should canvass how these users consume and use decisions; what they require from decisions; and what they wished was and was not in decisions.

The question “for whom are judges writing” is notorious. Professor Berry, who has worked as one of the National Judicial Institute’s chief educators, argues that answering the question for “whom is one writing … is one of the most difficult questions in judgment writing....” Instead of intuition-based views, this broad survey would provide qualitative foundations for the questions “who are judges writing for” and “what is the purpose of their decisions?”

Although dated, U.S. survey data suggests that decisions’ length and complexity is a long-standing problem. U.S. lawyers have been dissatisfied since 1940 and academics since at least 1911. U.S. decisions have only gotten longer since. This dissatisfaction makes sense: longer

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388 Supra note 186.


390 Berry, supra note 380 at viii.


392 See Waye, supra note 182 for a general discussion on this topic.

393 Gerald Lebovits, “Short Judicial Opinions: The Weight of Authority” (2004) 76:7 New York State Bar Association 64 at 64. For one of the only Canadian perspectives I could find, see Brian Manarin, “216 – Of Tardy Judges and Timely Justice” (2011) 57 CLQ 216.


395 Lebovits, “Short Judicial Opinions”, supra note 393 at 64.
decisions and more complex decisions may lead to longer prep time and more protracted and expensive litigation. Lawyers then download these costs to their clients.

Part II suggests that Canadian decisions may be succumbing to the same increases (they certainly are in British Columbia and the SCC, and limited data suggests they also are occurring in Quebec).\(^\text{396}\) Considering the duty to issue decisions is owed to the Canadian public in certain cases,\(^\text{397}\) research on Canadians’ views about decisions is fundamental. It would allow judges to better execute their job.

Simon’s, Scurich’s, and Farganis’s research on public reactions to decisions demonstrates the utility of asking the public what they actually think about decisions. Their work also includes a useful starting point for the kinds of questions the design team could pose in the broad survey. Multiple points from their research are noteworthy:

- The lay public may hardly ever read decisions.\(^\text{398}\)
- How decisions are reasoned—e.g., ranging from no reasons, a single reason supporting the outcome, multiple reasons supporting one outcome, multiple reasons supporting both sides of the dispute—may have no effect on the public. Instead, outcomes—not reasoning—may drive whether the public views decisions as legitimate.\(^\text{399}\)
- How decisions are reasoned may actually be irrelevant if the public agrees with outcomes. Reasoning may have some impact, however, if individuals disagree with outcomes.\(^\text{400}\) This finding is consistent with the Canadian judges who argue they write for the “loser.”\(^\text{401}\)
- Reasoning that addresses the complexity and uncertainty of the issues in decisions (aporetic reasoning) appears to increase individuals’ views about the legitimacy of decisions they disagree with versus overstated reasoning (monolithic reasoning).

\(\text{Monolithic reasoning may also reduce the legitimacy of decisions for individuals who}\)

\(^{396}\) See Beauchamp-Tremblay & Dusséaux, supra note 191.

\(^{397}\) Sheppard, supra note 23 at paras 22, 55.


\(^{400}\) Scurich, “Styles of Argumentation”, supra note 398 at 212.

\(^{401}\) Laskin, supra note 391. I have heard similar comments from judges to whom I have posed this question.
disagree with their outcomes. Notably, *monolithic* reasoning is a dominant form of reasoning in American appellate decisions (it also appears to be the same in Canada); its use therefore use merits further study.\textsuperscript{402}

In sum,

There are many unanswered questions concerning how the laity reacts to judicial opinions … Reasoned elaboration contained in judicial opinions is one avenue to combat this perception. But it is important to recognize that reasoned elaboration is only one piece of the puzzle. Other factors that might influence whether …. decisions are perceived as principled and fair ought to be the object of future empirical research.\textsuperscript{403}

iii. Phase II: define the problems of judges and other users

Goal: Phase II’s goal is synthesizing the information and insights gained in Phase I about users, stakeholders, and the system in which the problem(s) exists. Designers use two tools to achieve this goal. First, designers craft meaningful point-of-view statements that focus on users’ experiences.\textsuperscript{404} Such persona statements from hypothetical (or actual) users are incredibly useful:\textsuperscript{405} they focus and frame users’ problems; inspire the design team; and ensure targeted goals.\textsuperscript{406} Second, designers rely on those persona statements to craft “how might we” (aka “HMW”) questions to navigate between general and specific ideas to improve users’ experiences and to generate solutions to users’ problems.\textsuperscript{407}

Deliverable: Phase II’s deliverable for the design team is creating hypothetical point-of-view, persona statements and “how might we questions” for both user groups and synthesizing the information gained in Phase I. After creating those statements, the team must identify and explain the problems they seek to address in Phase III.

\textsuperscript{402} Scurich, “Styles of Argumentation”, *supra* note 398 at 212.

\textsuperscript{403} *Ibid* at 216 [emphasis added]. Litigants likely want judges to avoid legalese and to write in plain English: see Christopher Trudeau & Christine Cawthorne, “The Public Speaks, Again: An International Study of Legal Communication” (2017) U Ark Little Rock L Rev 249 at 281 [Trudeau & Cawthorne conducted a world-wide survey about legal information, and “no matter what the English-speaking country, people overwhelmingly prefer clear language to traditional legal language.”].


\textsuperscript{405} *Law by Design*, *supra* note 338.


The following is an example of a hypothetical point-of-view, persona statement for judges:

Justice Smith: Before becoming a judge, Smith J. exclusively practiced administrative law. Her first trial was tort law. The plaintiff alleged the defendant was negligent. The defendant alleged the opposite. The trial lasted 30 days and had 13 experts who addressed damages and liability. Smith J. is stressed and worried. The parties’ lawyers do not have great reputations, and they handed her a giant book of authorities. She is struggling with who to believe and what cases/facts matter. She has two fears: (1) She will not write a “good” decision.\textsuperscript{408} The parties might not be satisfied, and they might appeal her. She might even get overturned; and (2) drafting the decision may take a long time. She is busy and her reserve list is growing.

Based on that statement, the design team might ask these “how might we” questions:

- How might we increase Smith J.’s confidence?
- How might we reduce Smith J.’s worries and stress?
- How might we provide Smith J. evidence-based indications of what makes decisions “good” for all involved stakeholders?
- How might we provide Smith J. evidence-based indications of what her decisions should include?
- How might we improve the structure of Smith J.’s decisions?
- How might we improve the content of Smith J.’s decisions?
- How might we improve Smith J.’s ability to quickly evaluate expert evidence?
- How might we help Smith J. know what cases are most applicable?
- How might we help Smith J. determine what facts are significant/insignificant?
- How might we help Smith J. save time?
- How might we decrease the amount of time Smith J. spends writing decisions?
- How might we increase the readability of Smith J.’s decisions?
- How might we ensure that Smith J.’s decisions are sound?\textsuperscript{409}

The following is an example of a hypothetical point-of-view, persona statement for the broader group of users:

Mr. Jones: Mr. Jones is a senior lawyer. His infant client was tragically injured in a car collision. He sued multiple parties on her behalf. He is not quite sure who is truly liable, but he wants to ensure the best result for his client and her parents. Mr. Jones carries two

\textsuperscript{408} As Posner notes, we do not have a system for evaluating judicial decisions. He raised this point when he criticized an idea of Chief Justice Roberts of the U.S. Supreme Court. Roberts analogized that judges are like umpires. Posner says this analogy is flawed because the MLB installed cameras to photograph pitches so that pitches could be objectively determined: “If the judiciary had a similar system for evaluating judicial decisions, Robert’s analogy would be spot-on. But of course it does not. As is usually true of ‘reasoning by analogy,’ what is interesting about the comparison between umpires and judges is not the similarity but the differences.” (see Posner, \textit{How Judges Think}, supra note 91 at 79).

\textsuperscript{409} Aspects of these questions and persona statement were developed in a Legal Design Class in Fall, 2018 at the University of Toronto.
hundred files. He relies heavily on associates to run those files. But his associates also work on hundreds of other files. As Mr. Jones prepares for trial, one defendant provides him 15 decisions on liability and a thorough settlement offer that suggests it is not liable. He does not know what to do and does not want to waste time or money.

Based on that statement, the design team might ask these “how might we” questions:

- How might we increase Mr. Jones’s ability to digest decisions?
- How might we decrease the amount of time Mr. Jones has to spend reading decisions?
- How might we improve Mr. Jones’s ability to predict outcomes for his files?
- How might we help Mr. Jones recognize jurisprudential patterns in decisions?
- How might we help Mr. Jones know what evidence and facts are truly important?
- How might we help Mr. Jones know if his files are worth bringing to trial?

Part II’s conclusions about delay and length lend credence to both hypothetical users’ experiences, and facets of these hypothetical persona statements and “how might we questions” likely apply to all judges who choose to write decisions and all people who consume decisions.

Based on the synthesis of these persona statements, the “how might we questions”, Part II’s empirical analysis that demonstrated substantial increases to decision’s length and delivery time; Part III’s survey; and current theoretical research, this thesis has identified three problems with decisions that relate to access to justice that are amendable to solutions driven by human-centered design.\textsuperscript{410} The rest of this section discusses those three problems while keeping in mind these persona statements; the “how might we questions”; Part II and III’s empirical findings; and current theoretical research.

\textit{(a) Problem one: how might we help judges issues shorter and more timely decisions?}

Further research must examine if the same evolution of length and delay that Part II identified has occurred elsewhere in Canada. For sake of analysis, I am assuming it has.

One could argue judges write longer decisions and take longer to issue them because Canadian law has become complicated and parties run longer trials.\textsuperscript{411} As Part II indicated, court days are a significant predictor of decision length. Further testing on the relationship must occur, including building models to predict which decisions are most likely to be lengthy and succumb to slower

\textsuperscript{410} The first two points are ones that I have discussed and workedshopped in 2019 in the Legal Design lab at the University of Toronto. I spent time discussing them with members of my design team, members of the design lab, former judges, academics, lawyers, and members of a legal tech start-up.

\textsuperscript{411} I have heard these comments from academics and practitioners.
delivery times. Trials becoming longer could be because the law is more complicated. But if the law is actually more complicated today than the 1980s, such complication is compromising Canada’s rule of law. Canadian common law should be getting clearer not more complicated. The question then becomes who is responsible and how might we make it less complicated.

But perhaps the law is not inherently more complicated. Perhaps some trials have become longer because of the proliferation of published decisions and decisions’ increased length. The proliferation of jurisprudence increases complexity and inconsistency. Computers also enable judges to easily execute the court-reporter phenomenon that ultimately leads to longer decisions. The potential for error and inconsistency likely increases with such surplusage of facts and law. Coupled together, these phenomena likely contribute to the increased length of decisions, delivery time, and “mega” trials that Part II discussed. Unless decisions’ content and structure are simplified, these increases may simply continue to perpetuate, especially since judges may be seeking to conform to standards of longer decisions. Recalling the idea of judges as workers, judges may believe that long, detailed decisions are indicia of good work.

Regardless of the reason for longer and less timely decisions, judges are likely spending far longer writing decisions than sitting in court—recall Justice Brown’s experience—and all other users are likely spending far longer reading decisions (if they actually read them). The economic cost on both groups is accordingly increasing.

(b) Problem two: how might we help judges write more digestible decisions?

Recall the first fear of the hypothetical Smith J., making her decision “good.” Common law judges are not professional writers. Unlike other workers who chose to be professional writers

412 See, e.g., Teplitsky, “Excessive cost and delay”, supra note 233.
413 Berry, supra note 380 at 36 [the “temptation to tell the whole story (much of which may be irrelevant) proves sometimes irresistible.”].
414 Simon Stern, “Narrative in the Legal Text: Judicial Opinions and Their Narratives” in Michael Hanne & Robert Weisberg, eds Narrative and Metaphor in the Law (Cambridge: Cambridge University Press, 2018) 121 at 123, 135-139 [Stern draws on literary analysis and Barthes’s “reality effect”. He argues that judges employ a literary tool that is similar to fictional authors (fiction includes superfluous details to attest to the text’s verisimilitude). Judges also avail this tool: they include more details and law than necessary—i.e. doctrinal or legal surplusage. Stern calls this the “legality effect”. In sum, “the reality effect testifies to the narrator’s comprehensive knowledge about the world of the fiction, the legality effect may serve a parallel function in the analytical part of the judgment.” (at 137)]; see also Schmidt, The Ratio Decidendi, supra note 304 at 17 [“the accumulation of citations of cases and quotations from legal writing, which have no direct bearing upon the points in issue, gives a false impression of strength. It may disguise the lack of other relevant elements.”].
and who may be trained professional writers (e.g., journalists), judges likely do not have the same experience or training. They certainly do not have the same training as their civil law colleagues, many of whom have the strict obligation to issue reasoned decisions. Canadian judges do receive training when they first become judges and have annual conferences where decision-writing is a topic for further training. And as Part III noted, some courts encourage judges to attend continuing education (I assume most, if not all, courts encourage continuing education). Notably, in contrast to the U.S., Canada’s training materials are confidential. So I have been unable to review how judges’ training may impact the historical trends in Part II or this thesis’s conclusions. I have also been unable to review if judicial education remains a patchwork quilt, like Ontario’s former Chief Justice William Howland once alleged. Further research on current training must be completed. But training materials would have to be made public for any analysis.

In any event, neither courts, nor the National Judicial Institute, nor the Canadian Judicial Council stipulate particular structures for decisions or what must be in them. No legislation addresses structural requirements. In contrast, the U.S. has imposed structural requirements upon federal trial courts since 1935. Canada only has one national standardized guide for the uniform

417 See, e.g., NJI, “Judicial Education in Canada” National Judicial Institute, online: <https://www.nji-inn.ca/index.cfm/judicial-education/judicial-education-in-canada/>
419 Why such training materials are confidential is unknown. The reasoning is likely similar to the earlier discussed points about deliberative secrecy and judicial independence.
421 McCornick and Greene, Judges and Judging, supra note 133 at 55.
422 Ibid at 254-258.
423 Stern, supra note 414 at 121 at 132 n129.
preparation of decisions. While courts use it, as Part III noted, that guide says nothing about structural elements like headings; it does not even encourage using headings. As Part II showcased, however, the use of headings is now ubiquitous (at least in British Columbia). But they are far from standardized, and they may not be increasing clarity or digestibility. And their use is linked to longer and slower decisions.

What Canadian judges do know is that the SCC provides doctrinal requirements. As discussed, however, such doctrinal guidance technically only applies to criminal decisions where judges must issue decisions. Such guidance is neither a how-to nor is it based on empirical methods, deliberate design, or consultation with readers. The SCC’s guidance is that decisions should provide “a logical connection between the ‘what’ — the verdict — and the ‘why’ ….” The “logical connection between the verdict and the basis for the verdict must be apparent.” These instructions, however, with words like “what”, “why”, “apparent”, and “logical” are akin to saying “bake a cake with ‘flour’ and ‘mix vigorously’ without specifying which flour to use, what to mix with, or recognizing that vigorously is subjective.” A clear example of such directions’ insufficiency is the amount of appeals that occur because of alleged insufficient reasons. Better guidance on structures and content is needed. As eluded to earlier, some judges’ structural styles likely make law harder to understand for current and future stakeholders. Berry puts it plainly:

The traditional structure not only discourages conciseness; it tends to inhibit clear contexts. … If an introductory issue statement is followed immediately by separate boxes

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424 The guide, to its credit, does an excellent job of standardizing the elements of a decision’s style of cause page. The newest guide removed the word mandatory from it (in contrast, the previous guide included mandatory vs. optional—see Canadian Citation Committee, “Canadian Guide to the Uniform Preparation of Judgments” (2002) Canadian Judicial Council, online: <https://www.cjcccm.gc.ca/cmslib/general/news_pub_techissues_GuidelinesCM_20020930_en.pdf>). Instead, all essential information appears to be mandatory or strongly encouraged: see Canadian Citation Committee, “The Preparation, Citation, and Distribution of Canadian Decisions” (2009), online: <https://www.cjcccm.gc.ca/cmslib/Committee/JTAC/JTAC-Consolidation-of-Standards-2009-04-02-E.pdf>; see also Frédéric Pelletier, Ruth Rintoul & Daniel Poulin, “The Preparation, Citation and Distribution of Canadian Decisions” (13 April 2009) Lexum, online: <https://lexum.com/en/blog/the-preparation-citation-and-distribution-of-canadian-decisions/>.

425 Ibid.

426 REM, supra note 26 at para. 10.

427 Ibid at para 17.

428 Ibid at para 35.

429 I have used this quoted example elsewhere in other work.

430 Using “‘insufficient” or ‘inadequate’” as search term and appeal courts as a filter generates 6,200 cases in CanLII.
called ‘Evidence’ and ‘Law’, the information within these boxes divides and floats free of the issues to which it should be tied. The reader must wait until the section on ‘Analysis’ for evidence, law, and issues to be integrated conceptually. In a thirty-page judgment, this may mean asking readers to retain information for ten or fifteen pages before understanding its significance. This causes problems for all readers, but especially for lay readers who lack the legal training that makes delayed gratification seem natural.431

Such structures likely do not facilitate easy searching and processing.432 They make the law far more like a detective novel. Format and presentation are generally important.433 These points, as Berry noted, are especially important for lay litigants. When structures impede the law’s accessibility, Canada’s rule of law is again compromised.434 Judges’ individual structural styles also impede data collection and make decisions less amenable to data science and machine learning,435 key tools that one day may cure aspects of Canada’s access to justice plague.

(c) Problem three: how might we help judges use decision-writing to improve decision-making?

Recall the SCC and Posner’s process justification for decisions that Part I discussed. Despite this tempting logic, decision-writing may not offer the suggested check-and-balance on decision-making. Decision-writing may just offer the “illusion of objective reasoning.”436 Posner, working from the judicial labour market model, concedes that the check-and-balance is imperfect. Judges might be engaging in justificatory versus exploratory reasoning that entrenches confirmation and outcome bias or other error-prone heuristics:

It is an imperfect check … it is distorted by confirmation bias—the well-documented tendency, once one has made up one’s mind, to search harder for evidence that confirms rather than contradicts one’s initial judgement. … The published opinion often conceals the true reasons for a judicial decision by leaving them buried in the judicial unconscious. Had the intuitive judgment that underlies the opinion been different, perhaps an equally plausible opinion in support of it could have been written. If so, the reasoning in the

431 Berry, supra note 380 at 37.
432 Waye, supra note 182 at 298.
434 R v Ferguson, 2008 SCC 6 at paras 68-69 (“Ferguson”).
435 See Benjamin Alarie, Anthony Niblett & Albert Yoon, “How Artificial Intelligence Will Affect the Practice of Law” (7 November 2017) TSPACE at 10, online <http://dx.doi.org/10.2139/ssrn.3066816?>. I have also discussed this issue with engineers at ROSS Intelligence.
436 Cohen, “Not to Give Reasons”, supra note 24 at 518 [“a number of cognitive and experimental psychologists have questioned whether thinking really improves the decision quality. … the reasoning process constructs post hoc justifications—even if individuals experience the illusion of objective reasoning.”].
opinion is not the real cause of the decision, but a rationalization. This is not to denigrate the social value of opinions but merely to indicate their limitations.\footnote{Posner, \textit{How Judges Think}, \textit{supra} note 91 at 110-111; see Sisk, Heise \& Morriss, \textit{supra} note 94 at 1411.}

Similarly, Simon, who studies the intersection of law and psychology, argues that decisions are not a panacea to resolving incorrect intuitions and biases:

\begin{quote}
One problem is that opinions tend to be over-inclusive, in that they include reasons that were not taken into consideration by the judge by the time the decision was made. It is a common feature of human decision making that after the decision is made, the person engages in rationalization of the decision. This ex post facto justification typically includes selective searches for information and the making of biased inferences. Judges are likely no exception; it is broadly believed that judges (or their clerks) introduce reasons into opinions merely to decorate, or \textit{pad} them. … At the same time, opinions also tend to be under-inclusive. That is, opinions do not include all the reasons which actually influenced the judge’s decision. … There does not seem to be any solution to this under-inclusiveness.\footnote{Simon, \textit{“A Psychological Model}, \textit{supra} note 15 at 36-37; see also Frank B Cross, \textit{“Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance”} (1997) 92 Nw UL Rev 251 at 267 [“Legal realists and critical legal scholars have long maintained that opinions are post-facto rationalizations of results dictated by judicial ideology.”].}
\end{quote}

Like other writers, many judges have likely also encountered the mentioned “it just won’t write” problem.\footnote{Taggart, \textit{“Legally Required"}, \textit{supra} note 33 at 6; Waits, \textit{supra} note 144 at 931.} This problem may signal that a judge’s initial intuition is wrong.\footnote{Cohen, \textit{“Not to Give Reasons"}, \textit{supra} note 24 at 511-512.} But when judges do not encounter the “it just won’t write” problem, the decision still may not be reasoned. Its reasoning may be manufactured: “An act of manufacturing reasons need not be overtly malicious to be problematic; whenever reasons are written to justify an essentially prejudged outcome, they will not have served their proper purpose.”\footnote{Lo, \textit{supra} note 139 at 354; see also Edward L Rubin, \textit{“The Concept of Law and the New Public Law Scholarship”} (1991) 89 Mich L Rev 792 at 801.} As Cohen argues, “a number of cognitive and experimental psychologists have questioned whether thinking really improves the decision quality. … the reasoning process constructs post hoc justifications—even if individuals experience the illusion of objective reasoning.”\footnote{Cohen, \textit{“Not to Give Reasons"}, \textit{supra} note 24 at 518.} Such analyses may lead to insincerity and artificiality rather than accountability and transparency.\footnote{For a discussion of imposing strict reasoning giving requirements and potential compromises to accountability and transparency, see Cohen, \textit{“Not to Give Reasons"}, \textit{supra} note 24 at 522.} What is more, these problems are likely accentuated by the passing of time between hearing an application or presiding over a trial.
and issuing a decision, a phenomenon that has increased three-fold in British Columbia since 1980.

Finally, as mentioned, most Canadian judges are not professional writers. In contrast to civil law jurisdictions, common-law judges become judges later in their careers. When they become judges, they are, for the most part, on their own: their training is a lot of learning by doing. For most of their careers, they had strict, fiduciary obligations to their clients. They wrote one-sided arguments that likely availed the earlier discussed monolithic reasoning. Their ethics and job required them to be partial and subjective; they were forced to divorce themselves from impartiality and neutrality. Such a thinking process may have developed and engrained heuristics, biases, and patterns in their writing and thinking. Those processes could easily appear in their decision-making and decision-writing. Unfortunately, recognizing these facts likely does not weaken their force:

Greater recognition of the role of the personal, the emotional, and the intuitive in judicial decisions would not weaken the force of these factors in judicial decision making, because there are no adequate alternatives and judges have to decide their case with the tools at hand.

This thesis suggests, however, that judges need adequate alternatives, and we can design them using human-centered design. Judges should be deciding cases with more tools on hand—the question is how might we provide those tools and what might they be.

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444 Menashe, “The Requirement”, supra note 33 at 236-237, 242; Justice Nicole Duval Hesler, “Speech - Welcome Dinner for New Federally Appointed Judges” (8 February 2015) at 3, online: <http://courdappelduquebec.ca/fileadmin/Fichiers_client/Informations_generales/Allocutions_de_la_Juge_en_chef/ALLOCUTION_DE_BIENVENUE_AUX_NOUVEAUX_JUGES_-_FEB_8_2015_-_CIAJ.pdf> [“remember that the best quality of a judgment is its being actually rendered. A great many of you who are former litigators well know the paralyzing effect that an uncertain outcome exerts on the parties. Render judgment as soon as you can. And if you really want to be in a position to do so, write the portion of the judgment dealing with facts and evidence straight away, before other cases chase the particulars of a given case from your mind.”] [emphasis added].

445 See, e.g. Kirby, “Modes of Appointment and Training”, supra note 416.


447 Ibid [“while training programs are provided to new judges, and continuing education is available, judges are by and large on their own.”].

448 Posner, How Judges Think, supra note 91 at 118; for a discussion of the upsides and downsides of the civil and common law models of training, see McCormick & Greene, Judges and Judging, supra note 133 at 57-58.

449 See, e.g., Peer & Gamlie, “Heuristics and Bias”, supra note 126.

450 Posner, How Judges Think, supra note 91 at 120 [emphasis added].
iv. **Phase III: brainstorm and build ideas—aka “ideation”—for improving decisions’ structure and content**

**Goal:** Phase III’s goal is creating ideas (ideation) and prototyping them (iterating). Ideas should be feasible (technically possible); viable (sustainable); and desirable (what users really want). Key rules for success are deferring judgment; encouraging wild ideas; building on others’ ideas; generating as many ideas as possible; staying focused on identified goals; and being visual, e.g., sketching ideas out versus just discussing them. Once brainstorming is complete, the design team must choose which ideas are worth prototyping.

**Deliverable:** Phase III’s deliverable for the design team, based on this thesis’s conclusions, is prototyping two ideas as possible solutions to the three problems we just discussed:

1. **standardized structures:** I currently define standardized structure as an established, consistent structure of the order in which judges address issues and standardized headings for various sections—e.g., sections for introduction/overview, issues, analysis, conclusion, costs, and order (and what should be in those sections). The earlier discussed CRT appears to use a standardized structure.

2. **populated templates:** I currently define populated template as a template that includes the applicable law—e.g., in a negligence case, it could include the law on duty of care, standard of care, causation, etc.

I identify standardized structures and populated templates as possible solutions for three reasons: structure and content are the only things one can change about decisions; judges have no tested, evidence-based, practical guidance on structure or content; and some international practice supports using standardized structures and formats. The rest of this section examines why

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453 Design thinking avails the “six thinking hats” for structured discussions that Dr. Edward De Bono popularized (see de Bono Group, “Six Thinking Hats” The de Bono Group, online: <http://www.debonogroup.com/six_thinking_hats.php>). A hat of limited use in this phase is the “black hat” or judgment.
456 Most CRT decisions include the same sections—introduction; jurisdiction and procedure; issues; evidence and analysis; and order—in the same order.
457 As discussed, judges receive training at the National Judicial Institute, and one instructor is Edward Berry. But in reviewing the publicly available material on judicial training, e.g., Berry’s text, *Writing Reasons: Handbook for Judges*, *supra* note 380, I do not observe any empirical guidance. Rather, it appears anecdotal.
these two solutions are worth iterating and what these solutions might look like. Before proceeding to that analysis, I recognize, as Part III noted, that courts already have some templates. But such templates appear to be geared at formatting, not content. I also recognize that some judges may rely on their own standardized structures or templates.459 Some of those judges likely agree that certain things should always be in decisions, like overviews.460 Such material, however, is not publicly available, and it likely was not created through a deliberate process.

(a) Solution 1: Canadian courts do not have a standardized structure for decisions461

The design team’s goal for the structure prototypes could be two-fold: design standardized structures that provide empirical, practical direction to judges; ensure those structures are amendable to easy comprehension and data science.462

One could argue that courts would not standardize decisions’ structure. But some standardization already exists in Canadian decisions.463 At one-point, written decisions did not use paragraph numbers (before 1990, it was uncommon), but paragraph numbers are clearly now a standard norm because the change benefited everyone.464 The same is true for neutral citations.

Moreover, as Part III noted, some courts are clearly interested in improving decisions, and Canadian courts are also interested in data analytics.465 For courts and judges who remain hesitant, standardization’s benefits simply outweigh maintaining the status quo. Standardization has worked in some medical systems. Some medical procedures have become quicker and more

459 Some BCSC judges likely avail some standardized structures. Justice Sinclair Prowse of the BCSC in my dataset, e.g., used to (see Albayrak v Neshitt Burns et al, 2000 BCSC 1486; 456559 BC Ltd v Cactus Cafe et al, 2000 BCSC 1652); see also Hon Justice Jamie WS Saunders, “Reflections on the Art and Science of Decision-Making and Decision Writing” (2017) Nova Scotia Court of Appeal at 44, online: <http://www.courts.ns.ca/From_The_Bench/documents/From_The_Bench-DECISION-MAKING.pdf>; see also responses in Part II.
460 Ibid at 47.
461 Some evidence suggests the SCC follows a similar structure or style (see McCormick, “Structures of Judgment”, supra note 190).
462 In speaking with legal software engineers, decisions’ lack of standardization is one of their biggest obstacles.
463 Supra note 424.
consistent, and hospital stays are shorter. Key reasons for these improvements are user-centered standardization and protocols.466

The medical system offers an excellent example of an attempt to redesign a commonly used document that is somewhat akin to a judicial decision, the electronic medical record. In 2013, the U.S. White House issued a design challenge: $50,000 to the individual/team who transforms the standard electronic medical record from a confusing, text-heavy computer read out to something more digestible and easy to use.467 230 submissions were provided, and the challenge is touted as a success.468 Decisions are clearly different than medical records, but they have three similarities, and anyone who considers or resists standardization should carefully examine them, including the failures of electronic medical records that have occurred because of ignoring users, i.e., doctors and patients.469

First, if you were a medical patient receiving your medical record before the redesign challenge, your record “looks and feels like a receipt. If you are patient with many health conditions, the record is unwieldy because of the lack of presentation and hierarchy.”470 Lay litigants receiving decisions may also have the “receipt” experience.” And lawyers, academics, and other users of decisions likely have the “lack of presentation and hierarchy” experience because of some

470 “The Patient Record”, supra note 468.
decisions’ unwieldy structure or because of differing structures between decisions. When readers sit down to read decisions, they must figure out the structure before digesting content. Such idiosyncratic structural differences may not have anything to do with judicial independence, as Part V briefly discusses, and they add an unnecessary layer of complexity as Dvorkina and MacFarlane plainly describe:

> reading and analyzing case reports is very challenging…. Try not to get discouraged if the case report you are reading seems unclear or confusing. Some judicial writing is vague and ambiguous. Some of the ‘elements’ described … might not be present in the case report, or they may be organized in a different sequence. Sometimes important facts will be omitted, making the reasoning hard to follow.

These points are especially true for lay litigants. Indeed, the preceding quote is directed to lay litigants, but it also applies to any user of decisions.

Second, as the winning design team noted, “buried in [medical] records is information that can help us understand our bodies and empower us to be smarter about our own health.” The same is true of decisions: buried in them is invaluable information that can help judiciaries, governments, and scholars better understand judges and litigants, and information that can help litigants better understand judiciaries. This invaluable information—what Crespo calls “systemic facts”—could empower judiciaries, governments, scholars, and litigants to be smarter about Canada’s legal system and access to justice.

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471 Whole guides are written on how to “read” decisions. See, e.g., Orin S Kerr, “How to Read a Legal Opinion” (2007) 11:1 The Green Bag 51. I part ways with Kerr’s view that most opinions follow a simple and predictable formula. This view may be his experience in the United States. But Canadian trial decisions do not follow a formula. What is interesting is that Kerr’s short paper is one of the most downloaded SSRN papers (ranked 26th with 43,118 downloads as of May 2019). For a position contrary to Kerr, see Jack G Conrad & Daniel D Dabney, “A Cognitive Approach to Judicial Opinion Structure: Applying Domain Expertise to Component Analysis” (2001) 8th International Conference on Artificial Intelligence and Law, ICAIL 2001 at 1 [“If there exists an apparent lack of structure at the corpus level, such absence of universal form is even more pronounced at the individual case level. As many professors of law will assert, no one style of judicial opinion writing fills all judges. Moreover, the surface level-structure that one finds in a body of cases is nearly as varied as the subject matter it addresses. This is despite that fact that over time judges and others have tried to establish effective ways of writing opinions.”] [emphasis added]. For a Canadian perspective on reading decisions, see Dvorkina & Macfarlane, supra note 235.

472 Ibid at 4.

473 Berry, supra note 380 at 34.


475 Crespo, “Systemic Facts”, supra note 16 at 2052, 2066.
While Crespo was speaking about the criminal justice system, his view of systemic facts likely applies to all facets of the judicial system:

Unlike adjudicative facts, systemic facts are not case specific; they concern phenomena broader than the who, what, when, where, or why of a specific factual incident. But unlike legislative facts, systemic facts do not relate to social phenomena detached or removed from the judiciary itself. Rather, systemic facts look inward: they are facts about the criminal justice system itself, and about the institutional behavior of its key actors. Because criminal courts and their judges are themselves key institutional actors within that system, and because they are constantly and serially engaged with the other institutional actors composing the system, they often have both privileged access to and an imbued sense of familiarity with this special body of information. Indeed, systemic facts frequently reside within the considerable amounts of information *already within criminal courts’ custody and control.*

Such systemic facts are far from an abstraction:* decisions are an incredible data cache about the issues that drove people to litigation and the ways in which judges solved those issues. Improving decisions’ structure is the first way to improve access to systemic facts and trends in jurisprudence about litigants, judges, and legal/factual issues.

Instead of court staff, scholars, governments, or analytics companies laboriously restructuring the unstructured data in decisions after judges issue them,* a standardized structure could ensure the data is already structured in a logical, consistent order—much like some of the better redesigned electronic medical records. Such information would be far easier to extract and digest. A standardized structure could make decisions more amendable to text-parsing, artificial intelligence, and general readability. Notably, some artificial intelligence companies, Blue J

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476 *Ibid* at 2052.
477 *Ibid* at 2070.
478 Addison Cameron-Huff, “We need Digital Law for a digital world” (18 June 2019) *CBA – National*, online: <https://www.nationalmagazine.ca/en-ca/articles/law/access-to-justice/2019/we-need-digital-law-for-a-digital-world> [“Courts, agencies, boards, ministries, and governments publish laws in thousands of unstructured formats, without any standardization (if at all). It’s problematic because laws are data, and right now that data isn't structured in a way that computers can understand (‘Garbage in, garbage out’”).]
Legal & ROSS Intelligence, are already improving access to justice by providing some free access to their products for legal aid and pro-bono lawyers.

Improving decisions’ structure could also increase decisions’ communication effect. Film and literature contain structural elements that increase their communication effect, and narrative scholars use narrative tools to understand such elements and their effects on viewers and readers. If courts truly want to improve access to justice and simplify the litigation process, they should welcome the same analysis and reforms that promote better communication.

Third, both medicine and law rely on recipes. Imagine individuals who go grocery shopping without checking the recipe of a dish they have never made. When they get home, they realize they forgot a key ingredient, a common experience for most cooks. Newer medical records seek to avoid such follies. They promise consistency and efficiency. They are checklists that promote doctors extracting as much information as necessary. Their use ensures that doctors do not miss key ingredients in diagnosing and treating their patients. The same is true for judging, diagnosing, and solving legal problems. The example of a recipe is not meant to trivialize what

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479 Peter Boisseau, “Blue J Legal startup now offering AI-powered employment law product” (Fall/Winter 2018) Nexus, online: <https://www.law.utoronto.ca/news/nexus/nexus-archives/nexus-fallwinter-2018-0/blue-j-legal-startup-now-offering-ai-powered> [“the DLS community legal clinic operated by the University of Toronto Faculty of Law has free access to a new tool from Blue J Legal, an emerging AI start-up firm founded by U of T law professors Benjamin Alarie, Anthony Niblett and Albert Yoon. … ‘We have a high demand for our services, and without a tool like this, we wouldn’t have the time to take on these summary advice cases for people who fall in that [income] gap,’ says Jennifer Fehr, DLS staff lawyer, adding that the clinic now uses the Blue J Legal software for about 70 per cent of the cases in its Employment Law Division.”] [emphasis added].

480 See Andrew Arruda, “The world’s first AI Legal assistant”, TED Institute, online: <https://www.youtube.com/watch?v=wwbr0fombFs> [“Justice shouldn’t have different price tags … Legal aid lawyers are overworked … At ROSS, we made a pledge, that we would give our technology completely for free to these [legal aid] lawyers on the front lines, to those lawyers working pro-bono cases, to those lawyers in your neighbourhood clinics … so we can best help them do their jobs.”].


483 Lance N Long, “Is There Any Science Behind the Art of Legal Writing” (2016) 16 Wyo L Rev 287 at 288 [“empirical and scientific studies of legal writing are a necessary, but largely absent, area of legal writing scholarship.”].

judges do. As Berry notes, the recipe is an apt example for the law.485 A standardized structure could serve as a standardized recipe for judges from the outset of proceedings. It puts them in control, especially when paired with pre-populated template content, the second solution we are about to discuss.

In sum, a designed, standardized structure would be an excellent step that could benefit both judges and the broader group of users. For judges, like the hypothetical Smith J., decision-writing would likely be easier and more consistent with standardized structures:

- Judges would have “a pattern to follow that has proven itself in the past …. [and such patterns make judges] more efficient and less likely to err.”486 Such patterns could also alleviate the biases or heuristics that decision-writing is supposed to cure or reduce, i.e., the “process” justification for decisions that Part I discussed.
- Standardized structures would provide a behavioural nudge to judges: judges are being trained to deploy issue-driven structures that promote issue-driven reasoning.487 Standardized structures could promote the very thing judges are trained to do.
- Standardized structures would also improve trend analytics: judges themselves could empirically explore their decision-making patterns, e.g., why they decide certain ways.489 Put plainly, judges could audit and evaluate their decision-making.490 Such auditing would allow judges to ensure they are consistently approaching similar facts and legal principles. With such improved understanding, judges could improve their decision-making.491 Such improvements could also reduce the likelihood of appeal: decisions could be made more “appeal-proof.”492

485 Berry, supra note 380 at 34. Justice David Paciocco of the Ontario Court of Appeal also relied on the recipe analogy as an academic. In particular, he discussed how the criminal law is like a recipe: if you are missing ingredients, the criminal charge should not be laid because the charge will not result in a conviction.
486 Berry, supra note 380 at 34.
487 Ibid at 37. As mentioned, Berry argues that the traditional fact-driven structure discourages conciseness and forces the reader to wait for the analysis section for “evidence, law, and issues to be integrated conceptually.” It also violates the proximity principle—the notion that closely-related ideas and information should be kept together: “The evidence only becomes truly meaningful, and memorable, when it is close to the issues to which it belongs.” (see at 37).
492 Hesler, supra note 444; for an appellate judge’s perspective on the kinds of errors that trial judges make, see Côté, “The Appellate Craft”, supra note 89
For the broader group of users, like the hypothetical Mr. Jones, decision-reading, analysis, and comprehension would likely also be easier with standardized structures:

- Standardized structures may “be reassuring to habitual readers of decisions, who expect that information will be delivered in a familiar order.”
- Reducing personal approaches to style improves the likelihood of more robust analytics, and these users could conduct the same analytics that judges could conduct.

(b) Solution 2: Canadian judges have no populated templates to avail for decisions

The design team’s goal for the template prototype could be creating law sections for judges that they could insert into decisions. These populated templates could be similar to criminal jury charges or codification that has occurred elsewhere in the common law. Notably, some Canadian judicial commentary and other jurisdictions already recognize the potential for templates or guideline frameworks.

Populated templates could considerably benefit both judges and the broader group of users:

- They may drastically reduce judges’ workloads and allow judges to more easily hone in and analyze the key dispute in most cases—the facts. Such a reduction in work load could directly address the issues of length and delay that Part II identified.
- They may assist in reducing judicial inconsistency by reducing how judges paraphrase applicable law.
- They may address some judges’ practice of only relying on counsel for the applicable law and potentially missing key authorities.

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493 Berry, supra note 380 at 34.
494 See Alarie, Niblett & Yoon, supra note 435 at 10.
496 The design team could work with a supernumerary judge, retired judges, a court clerk, and perhaps a staff lawyer. I recognize that resource constraints are a significant access to justice barrier.
500 Sharpe, Good Judgment, supra note 146 at 42.
They may reduce decisions’ length by reducing doctrinal surplusage, i.e., citing too many authorities.\(^\text{501}\) The UK Court of Appeal has recognized the pitfalls of long decisions and is advocating for short-form appeal decisions in certain cases.\(^\text{502}\) As a former UK Supreme Court President noted, “lengthy judgments are sometimes valuable … at best [however, they are] a waste of time and space, and, at worst, confusion and uncertainty.”\(^\text{503}\)

They may help reduce some unnecessary subjectivity and alleviate the up-and-coming reality where litigants use software tools to gain advantages before particular judges based on judges’ idiosyncratic tendencies and past approaches to particular legal or factual issues,\(^\text{504}\) i.e., money ball litigation.\(^\text{505}\)

(c) What these two solutions might look like and how they might operate

These solutions could rely on agile, simple computer software that works in conjunction with existing decision publication software.\(^\text{506}\) These solutions, however, do not have to be sophisticated or rely on any technology. During Phase III, the solutions should actually be simple, basic word documents to save time and money and to facilitate rapid prototyping.

More advanced software could also be developed over time to rely on more sophisticated technology where decisionmakers could avail a “smart” type of template and structure driven by basic machine learning.\(^\text{507}\) Again, some newer electronic medical records offer an excellent parallel. Some of the better designed electronic medical records are becoming more than just a

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\(^\text{501}\) Stern, supra note 414 at 136-139.


\(^\text{503}\) Ibid; Arden, supra note 161 at 516 [“there comes a point when a judgment is so long that it becomes inaccessible and threatens the rule of law.”].


\(^\text{505}\) See, e.g., Barney Thompson, “Big data: legal firms play ‘Moneyball’” (6 February 2019) Financial Times, online: <https://www.ft.com/content/ca351ff6-1a4e-11e9-9e64-d150b3105d21>.

\(^\text{506}\) It could easily pair with decisia by Lexum, the decision publishing solution for many Canadian courts, including the SCC (see Lexum, “decisia by Lexum”, online: <https://lexum.com/en/products/decisia/>).

\(^\text{507}\) Such ideas are not novel. Indeed, basic computer programs were discussed in the late 90’s: see L Karl Branting, James C Lester, and Charles B Callaway, “Automating Judicial Document Drafting: A Discourse-Based Approach” (1998) 6 AI & L 111. For an intriguing discussion of historical, computer-based tools for the judiciary including Canadian ones, see Uri S Schild, “Criminal Sentencing and Intelligent Decision Support” (1998) 6 AI & L 151.
tool for recording information. Some doctors are now using them as a “diagnostic dashboard” in real-time with patients. Designers could create a similar “smart decision dashboard” for judges. Using such technology would not lead to boilerplate reasoning. As Daly notes, although speaking about administrative decision-making, technology can greatly improve decision-making without compromising analysis. Judges could focus more on the main point of contention in most cases, the facts:

Technology could help decision-makers to provide standardised reasons that are also good reasons. Drop-down menus and templates can usefully focus decision-makers’ minds on issues that regularly recur and generally prompt one of several responses. With technology focusing their minds on what is relevant, decision-makers can then turn their surplus attention to providing good reasons that are responsive to the facts presented.

To date, little research exists on developing a smart software tool to assist judges in writing decisions. In fact, the research has been almost non-existent in the United States, and as far as

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509 Justice R Kerans, “The Art of Judging in the Common Law Tradition” (23 April 1986) CIAJ at 2 [“In most cases, some rule of law will govern and should be applied. The first art of judging is to acknowledge that in 90 per cent of the cases all that is asked of the judge is that he or she finds the facts, find the governing rule, and apply it. The first art, then is not to make a sow’s ear from a silk purse. Most cases do not require a pedantic analysis of the previous 100 cases. They require only that the judge find and state the governing rule, and state which precedent, binding or persuasive, is relied upon.”] [emphasis added]


511 Two tools were developed in the United States: JEDA (Judicial Expert Decisional Aid) & Law Clerk. But little is written on them. For a discussion of JEDA and how a U.S. administrative law judge with the U.S. Department of Labour used it, see, Charles P Rippey, “Computer-Assisted Decision Writing” (1994) 33 Judges J 36 [“Computer software can assist the judicial decision-writing process beyond the now well-known powers of word processing. I have found software to be incredibly valuable organizing raw evidence randomly entered; analyzing it by comparing objective medical test results against regulatory standards; displaying descriptions of the evidence relevant at each logical step of presentation a complex presumption; and suggesting, for editing, introductory and transition language for decisions. Unfortunately, this type of software isn’t yet commonly available—but it can be customized.”] [emphasis added]; see also VP Pethe, CP Rippey & LV Kale, “A specialized expert system for judicial decision support” (1989) Proceedings on the 2nd International Conference on Artificial Intelligence and the Law 190. Unfortunately, Judge Rippey was the only judge to use JEDA, and JEDA appears to no longer be in use (see LK Branting, “An issue-oriented approach to judicial document assembly” (1993) Proceedings of the Fourth International Conference on Artificial Intelligence and Law, Amsterdam, The Netherlands, online: <http://www.karlbranting.net/papers/icail2.ps>. For a description of the second tool, see “Court Technology Conference Covers Variety of Technical Innovations” (1994) 8 State-Federal Judicial Observer 3 [“Artificial intelligence (AI) for judges was described in one session—‘how judges can use AI-based systems in the decision—
I can tell, it is non-existent in the Canadian context. Corporations are likely developing such tools. But the current tools appear focused on judges’ workflow and managing caseloads.

v. Phase IV: test and retest possible solutions

Goal: Phase IV’s goal is testing ideas, gathering feedback, and refining ideas into more finished and promising prototypes. Testing allows the design team to sift through the many concepts and versions they identified earlier in the design process. Continuous testing helps refine design choices, focus, features, styles, and functions. No design is good the first, or second, or third time: “Iteration keeps us nimble, responsive, and trains our focus on getting the idea and, after a few passes, every detail just right.” The design team can use iterative processes to tune into users’ needs and test earlier formed hypotheses. Feedback is the greatest gift in the design process.

Deliverable: If such structures and templates were designed, Phase IV’s deliverable for the design team would be presenting them to the National Judicial Institute, the Canadian Judicial Council, legal officers, and chief justices of Canadian courts. If these organizations or courts are unwilling or unable to facilitate broad participation, the team could seek participation with groups of individual judges (recall the mentioned lack of homogenous views among courts and judges that Part III discussed). Different structures and templates could be tested and developed in different provinces. Like Part II suggested, testing could start with less contentious, formulaic, repetitive issues, e.g. chambers motions for civil procedure issues, and it could also start with

making process.” Two computer software programs—Judicial Expert Decision Aid (JEDA), developed for repetition-type cases, such as black lung and other occupational disease litigation, and Law Clerk, created to assist in the preparation of opinions in cases involving fraud relating to food stamp benefits—were demonstrated.”

Currently, legal apps seem to be directed to two primary users, lawyers and the general public (see Bouclin, McGill & Salyzyn, supra note 504 at 237).


Building partnerships is a crucial step (see “Field Guide”, supra note 339 at 140).
areas of law where decisions seem to consume a large amount of time—e.g., tort decisions. Such testing could be rolled into existing pilots, like the one judge pilot in Ontario. Following such tests, results could be compared and contrasted. The structures and templates that work best could be developed further or abandoned for new structures and templates.

vi. **Phase V: rinse, repeat, and move forward**

**Goal:** Phase V’s goal is developing the ideas the design team has tested into scalable solutions.

**Deliverable:** Engage a team to implement these ideas into a scalable solution. I recognize that Canadian courts have resource constraints, but the financial and opportunity costs of maintaining the status quo are likely higher than any financial or opportunity costs of improving decisions. Academics, e.g., PhD students, could complete the design process this thesis proposes, and governments could fund such research.

The possibilities of such collaboration are quite promising. Judges spend countless hours writing decisions. Yet governments do meagre empirical analysis of the factual findings that judges generate (adjudicative facts) and not enough analysis of the systemic implications and themes within those factual findings (systemic facts). A potential reason for the meagre analysis is the unwieldy, inconsistent structure and length of many decisions. Some Canadian scholars review how legislative changes or decisions affect litigation outcomes or subsequent jurisprudence. Such empirical studies infrequently occur, however, and they rarely grapple with the granular information contained in adjudicative or systemic facts, especially in trial decisions. This

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519 See, e.g., Greene, *The Courts*, supra note 133 at 156.

520 See Crespo, supra note 16.


absence makes sense: the exercise of reading cases and hand-coding datasets is extremely time-consuming.

But if judiciaries and innovators knew what was truly necessary in decisions, they could redesign decisions’ structures to become shorter and more consistent. And those structures could also include the discussed pre-populated content. Then, these outcomes are possible:

- Judges could more easily do their jobs. They could issue short, timely, accessible decisions. Much like a properly designed medical record can promote consistency, efficiency, and better health, so too could a judicial decision with standardized structure and content.
- With better designed decisions, empirical analysis of adjudicative and systemic facts could be easier. Governments and other stakeholders could then more easily study and identify legislative, substantive, and procedural issues and implement human-centered design case-studies to address thematic issues. They would also have improved datasets about judicial decision-making and adjudicative and systemic facts. In the era of big data, high-quality, accessible information is vital. A redesigned standardized structure would make decisions more amenable to data science, text parsing, artificial intelligence, and machine-learning. Those tools could be then used to address a key problem in Canada’s access to justice plague: the lack of reliable data.523
- Governments could more easily dialogue with courts: they could quickly make evidence-based changes to statutes or create statutes to address jurisprudential inconsistencies.524
- Empirical studies could be used to shorten decisions and trials because such studies could reveal what evidence is necessary for judges to make decisions. Legal officers, judges, and designers could continually populate templates for judges to use and litigants to access. If templates included the most applicable, settled law, judges and litigants could save time and money and focus on the main point of contention in most cases—the facts.

These outcomes may provide some potential cures for Canada’s access to justice plague. And using human-centered design principles to institute reforms to decisions may allow Canadians to access what their Constitution promises: speedy, consistent, predictable, and affordable justice.525

523 Hadfield, supra note 6 at 218.
524 See Peter W Hogg & Allison A Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)” (1997) 35:1 Osgoode Hall LJ 75.
525 See, e.g., Ferguson, supra note 434 at paras 67-69; Trial Lawyers Association of British Columbia v British Columbia (Attorney General), 2014 SCC 59 at para 38.
Part V: Does judicial independence protect as much as we think?

If governments can require Canadian judges to issue written decisions, they perhaps can also dictate decisions’ structure and certain content. Put another way, judicial independence does not prevent governments from requiring judges to issue reasoned decisions. By implication, it therefore may not preclude governments requiring standardized structures or standardized content like Part IV just proposed. I raise the possibility of government intervention because such intervention seems possible. Such intervention, however, would be a mistake and contrary to what we just discussed about designing the decision. While governments are a key stakeholder and user of decisions, having judges and courts participate in the design process is invaluable to gaining insight about the judicial process and developing successful solutions.

To outline areas for further research, Part V discusses the relationship between judicial independence and the statutory requirement for written reasoned decisions. It then examines the potential relationship between judicial independence and a statutory requirement for standardized structures and content. This analysis yields one conclusion: while further research is necessary, judicial independence does not seem to preclude requiring standardized structures or content in decisions like courts seem to believe as Part III noted.

i. The statutory requirement for written, reasoned decisions

Similar to France, some U.S. jurisdictions legislated the requirement for written decisions.526 For example, the Constitution of California included a requirement for written decisions, but it does not address where and how decisions are to be reported or the requirements for decisions (other states included a similar requirement, e.g. Alabama, Arizona, Indiana, Maryland, Ohio, Oregon, and South Carolina).527 California’s requirement was held to be a “palpable encroachment upon the independence of [the judicial] department’ and was unconstitutional.”528

But the Canadian requirements for reasoned decisions were never alleged to be unconstitutional. Some statutes required Canadian judges to issue reasoned decisions, in certain circumstances,

527 Ibid at 486-487. Other states included the requirement—Missouri, Florida, Maryland, West Virginia, Kansas, Nebraska, Iowa, and Indiana—but courts held the provisions “were directory not mandatory” (at 491).
528 Ibid at 487.
long before *Sheppard* in some civil and criminal proceedings.\(^{529}\) In *Sheppard*, the SCC discussed this point and noted that Parliament had intervened to require judges to issue reasoned decisions in specific circumstances, e.g., admissibility of complainant’s sexual history, document production, and sentencing.\(^{530}\) Interestingly, the SCC opined that Parliament created those provisions to facilitate appellate review—not because of the “process” justification for decisions that Part I discussed: “The only discernable purpose for these provisions is to facilitate appellate review of the correctness of the conviction or acquittal or sentence.”\(^{531}\) Notably, the same justification underlies the requirement for administrative decision-makers to issue reasoned decisions, *i.e.*, to enable review by courts.\(^{532}\) Again, such justifications do not support the idea that decision-writing is intrinsic or inherent to decision-making. Indeed, if parties have no right to appeal (much like many arbitration decisions) then decisions, under this justification, are largely irrelevant.

### ii. What about a statutory requirement for standardized structures and content?

Based on Part III’s survey findings, one can easily envision judges or courts arguing that any requirement to issue decisions with a particular structure or content would breach judicial independence. To support a claim that judicial independence precludes governments from restructuring and improving decisions’ structure and content, judges would have to show that such changes removed their ability to fairly and impartially decide the cases before them.\(^{533}\) Such arguments would likely also have to demonstrate that the current status quo provided to litigants is more fair and impartial than redesigned structures and content. They would also have to demonstrate that using standardized structures and populated templates would make the judiciary

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\(^{529}\) Supra notes 77, 87.

\(^{530}\) Sheppard, supra note 23 at para 20.

\(^{531}\) Ibid.

\(^{532}\) Cohen, “Not to Give Reasons”, supra note 24 at 529 [“The underlying idea is that if in fact administrative judgments are reviewable by courts, then agencies must provide judges with a record of their decision-making processes and their justifications for reaching a particular outcome.”].

unable to independently resolve disputes. Further research on these points must be completed. But three reasons suggest that such arguments may not be sound.

First, as discussed, decision-writing is likely not inherent to decision-making. Moreover, Canadian governments have already forced judges to issue decisions. Such requirements do not run contrary to the principle established in Knowles trial that was adopted into Canadian law.

Second, governments consistently dictate parts of the litigation process—even what parties can and cannot put in pleadings; how parties file applications and what they can include; how and what parties can appeal and what they can include; the structure and content of expert opinions, etc. Similarly, Parliament specifically tells judges what they must consider when they conduct sentencing hearings and various other statutory rules do the same. These dictates arguably impact decision-making, and they certainly constrain judges’ discretion in their courtrooms. Yet no one argues that such dictates infringe judicial independence. Indeed, the SCC has held that courts do not have the absolute power to control their administration; Parliament and legislatures can enact laws related to courts’ functioning. Moreover, while inherent jurisdiction is clearly different than judicial independence, the SCC has similarly held that Parliament and legislatures can structure how superior courts exercise their powers. What this thesis proposes may fall within that holding versus some judicial independence analysis.

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534 See, e.g., Application under s 83.28 of the Criminal Code (Re), 2004 SCC 42 at para 90 [“Application under s 83.28”].
535 For a recent thorough summary of the concept and sources of judicial independence in Canada, see Micah Rankin, “Access to Justice and the Institutional Limits of Independent Courts” (2012) 30:1 Windsor YB Access Just 101 at 113-121; see also Hausegger, Hennigar & Riddell, Canadian Courts, supra note 42 at 173-211; Greene, The Courts, supra note 133 at 81-93; see also the 45th volume of the UNBLJ from 1996.
536 Mackeigan, supra note 325 at 828-831; see also Commission scolaire, supra note 325 at para 57.
537 See, e.g., Groia v Law Society of Upper Canada, 2018 SCC 27 at para 54.
538 Mackeigan, supra note 325 at 832.
Third, jurisprudence does not seem to foreclose the possibility. Judicial independence has two dimensions that capture the oft-cited three components of judicial independence (security of tenure, financial security, and institutional independence):\(^{541}\)

- **institutional independence**: court management; assignment of judges; conduct review; removal; and administrative and institutional relationships; and
- **adjudicative independence**: impartial decision making; security of tenure; financial security; continuing education; ethics and conduct standards; and accountability.\(^ {542}\)

Those dimensions require and provide the following safeguards:

- Judicial independence requires judges to be fair, objective, and impartial. They must not demonstrate a reasonable apprehension of bias.\(^ {543}\)
- Judicial independence requires that judges must appear demonstrably independent\(^ {544}\) and be reasonably seen to be independent.\(^ {545}\)
- Judicial independence requires that judges are insulated against all sources of outside influence;\(^ {546}\) they “must be completely separate in authority and function from all other participants in the judicial system.”\(^ {547}\)
- Judicial independence requires that judicial discipline committees be composed primarily of judges.\(^ {548}\)
- Judicial independence provides judges security of tenure, financial security, and institutional independence.\(^ {549}\)
- Judicial independence provides judges the right to refuse to answer to the executive or legislative branches about how and why they arrived at a particular judicial conclusion.\(^ {550}\)

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541 See, e.g., *Provincial Court Judges’ Assn of New Brunswick v New Brunswick (Minister of Justice)*, 2005 SCC 44 at paras 5, 7 [“Provincial Court Judges’ Assn of New Brunswick’].


543 *Committee for Justice and Liberty c Canada (National Energy Board)*, [1978] 1 SCR 369 at 394-395; *R v Généreux*, [1992] 1 SCR 259 at 283-284; see also *R v Lippé*, [1991] 2 SCR 114 at 139; *R v S (RD)*, [1997] 3 SCR 484 at paras 33-49; *Therrien (Re)*, 2001 SCC 353 at para 111; *Cojocaru*, supra note 83 at paras 18-20. Judicial independence differs from judicial impartiality: “impartiality relates to the mental state possessed by a judge; judicial independence, in contrast, denotes the underlying relationship between the judiciary and other branches of government which serves to ensure that the court will function and be perceived to function impartially. Thus the question … is not whether the government action in question would in fact affect a judge's impartiality, but rather whether it threatens the independence which is the underlying condition of judicial impartiality in the particular case” (see *Mackeigan*, supra note 325 at 826).

544 *Provincial Court Judges’ Assn of New Brunswick*, supra note 541 at para 1; Application under s 83.28, supra note 534 at para 90.


546 *Canada (Minister of Citizenship and Immigration) v Tobia*, [1997] 3 SCR 391 at paras 71-72.

547 *The Queen v Beauregard*, [1986] 2 SCR 56 at para 30 [“Beauregard”].

548 *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at paras 44-47.

549 *Valente v The Queen*, [1985] 2 SCR 673 at paras 27, 40, 47; *Beauregard*, supra note 547 at para 33; see also *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3.

550 *Mackeigan*, supra note 325 at 830.
Judicial independence provides judges the exclusive jurisdiction over challenges to the validity of legislation under the Constitution.\textsuperscript{551} Judicial independence provides judges immunity from suit and prosecution.\textsuperscript{552}

Despite the many safeguards for judges, the SCC has been clear: judicial independence does not exist for the benefit of judges; it “exists for the benefit of the judged….”\textsuperscript{553} The Canadian Judicial Council’s view is similar: the “fundamental concept of judicial independence exists for the benefit of all citizens, not judges.”\textsuperscript{554} Similarly, as Hughes argues,

Judicial independence is often misunderstood as something that is for the benefit of the judge. It is not. It is the public’s guarantee that a judge will be impartial. Judicial independence protects individuals and the community. The protection of judicial independence is enforced so that the parties will know they were dealt with fairly, that they received a fair trial, and a fair hearing from a judge insulated from any improper outside influence and who was bound only by his or her oath of office, which is to render justice according to law.\textsuperscript{555}

If standardized structures and populated templates would benefit Canadians, then judicial independence seems to have no place in precluding them. In fact, to use judicial independence to preclude a procedural change that may benefit all citizens would frustrate the concept. It may also expand the principle of judicial independence to a constitutional guarantee of judicial governance, a proposition the SCC has already rejected.\textsuperscript{556}

In sum, initial research suggests that a purposive interpretation of judicial independence may not preclude governments from restructuring decisions or improving decisions’ content.

\textsuperscript{552} Mackeigan, supra note 325 at 830.
\textsuperscript{553} Ell v Alberta, 2003 SCC 35 at para 29.
\textsuperscript{555} CJC, “Judicial Independence”, supra note 533 at 6; see also Ell, supra note 553 at para 29 [“Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice”]; see also Provincial Court Judges Reference, supra 549 at para 9 [“The principle exists for the benefit of the judged, not the judges. If the conditions of independence are not interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts”].
\textsuperscript{556} British Columbia v Imperial Tobacco Canada Ltd, 2005 SCC 49 at para 54; see also Ian Greene, “The Doctrine of Judicial Independence Developed by the Supreme Court of Canada” (1988) 26:1 Osgoode Hall LJ 177 at 178-179 [“if judicial independence is interpreted too broadly, then the judiciary will have the opportunity to expand its power and its privileges for reasons not related to liberal democratic theory.”].
Conclusion: “No Sacred Cows”

This thesis ends like it began, with the experience of Justice Brown. After completing his analysis, he provided a prescription for Canada’s access to justice plague:

If we are to restore the health of Ontario’s ailing civil litigation system … No sacred cows, judicial or otherwise, should stand immune from scrutiny behind some firewall. **Everything must be on the table for examination and reform.** Restoring the health of our province’s civil litigation system requires no less.\(^{557}\)

Both judges and their decisions, like everything else in Canada’s legal system, must be on the table for examination and reform. This thesis seeks to open that dialogue.

Decision-writing in Canadian courts has been, and remains, largely immune from examination and reform. As Greene argued over ten years ago, the “tendency for courts to be inward looking rather than public serving is one of their legacies as predemocratic institutions.”\(^{558}\) Comparing the Canadian Judicial Council reports beginning in the late 90’s to the early 2000’s to the Council’s latest report demonstrates Greene’s point and the opposite trend that Part II discussed: while decisions are getting longer, the reports are getting shorter and including far less information.\(^{559}\) Part III’s survey also appeared to demonstrate similar trends. Many reasons could explain the participating courts’ reticence to participate in question 7 and the non-participating courts’ reticence to participate at all. Some courts appeared to invoke deliberative secrecy, and other courts may share their view. The participating courts’ expansive views of judicial independence, which Part III discussed, may also have played a role.

Those views, however, seem inconsistent with the historical, doctrinal, and theoretical underpinnings of decision-writing and judicial independence that Parts I and V discussed. Inward-looking tendencies and expansive views of judicial independence may also be inconsistent with judges’ roles in Canada’s democracy. As Part I discussed, while governments are judges’ employers, their true employer is the Canadian public. And, as the SCC reiterated in

\(^{557}\) *Western Larch*, *supra* note 1 at para 277 [emphasis added].

\(^{558}\) Greene, *The Courts*, *supra* note 133 at 29.

its 2003 decision *Ell. v. Alberta* and its 2005 decision *Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, if judicial independence is not “interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts….”

Over the last forty years, we have failed to provide the Canadian public transparent, accessible, concise, and speedy decisions. If Part II’s empirical conclusions apply to other provinces, the current process for writing and issuing Canadian judicial decisions is likely hindering access to justice. The current process is undeniably not aiding access to justice. Without reform, the process may continue to worsen for both judges and litigants. All users of decisions will continue to experience the negative effects of complexity and delay that Part II and IV discussed.

Part IV suggested that access to justice is a design problem and that one cause of that problem is decisions’ lack of design. It offered a detailed design plan to redesign decisions’ structure and content. If the design plan was executed, we could drastically improve our knowledge about how judges write decisions, how people consume decisions, and how to improve both users’ experiences. Decisions could also become a far better source of data—a key problem in Canada’s access to justice plague—while also becoming more timely, concise, accessible, and consistent. The design plan’s proposed reforms are not revolutionary. As Part I demonstrated, the accurate, published, written, reasoned decision is not a longstanding hallmark of the common law, either in Canada or abroad. This history is important. It shows that the decision was never deliberately designed and that decision-writing is a recent phenomenon that is likely neither inherent nor intrinsic to decision-making. In light of this history, while the proposed reforms could revolutionize access to justice, they do not set out to, nor should they, alter judges’ roles or affect their decision-making ability.

Part V concluded, on a preliminary basis, that judicial independence may not preclude governments from imposing structural or content-based requirements for written decisions. If

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560 *Ell, supra* note 553 at para 29; *Provincial Court Judges’ Assn of New Brunswick, supra* note 541 at para 6.


562 For a discussion of this idea, see Bill Henderson, “Is access to justice a design problem?” (23 June 2019) *Legal Evolution*, online: <https://www.legalevolution.org/2019/06/is-access-to-justice-a-design-problem-099/>.
courts, the National Judicial Institute, or the Canadian Judicial Council do not examine implementing the design plan’s proposed reforms, governments might. But this thesis advocates against totalitarian approaches. Judges and courts must participate in the design process for us to develop successful solutions.

No stone can go unturned in addressing Canada’s access to justice plague. This thesis has prescribed a way to improve access to justice that also provides an excellent opportunity for Canada to examine the utility of applying human-centered design to the legal system. Using human-centered design to institute reforms, like redesigning the decision, may allow Canadians to access what their Constitution and Canada’s rule of law promises—speedy, consistent, predictable, and affordable justice. I hope scholars, courts, judiciaries, and governments agree.
Epilogue: A call to action

Canadian empirical legal research pales in comparison to U.S. empirical legal research. Despite this apparent gap, no Canadian law schools offer legal empirical methods or law and statistics classes. Hardly any law schools offer classes that enable students to design empirical studies. In this brief epilogue, I offer three suggestions to ameliorate Canada’s legal data deficit.563

i.  Law schools should place far greater emphasis on empirical research and legal analytics

As this thesis noted at the outset, the implication of “lousy data is lousy knowledge.”564 Despite the noted data deficit, Canadian law schools do not seem concerned notwithstanding the incredible importance of better data.565 Indeed, most Canadian law schools have no classes on basic statistics; machine learning; data analytics; law and statistics; or basic coding.566 Only two

563 See Hwong, supra note 489 at 375-382 for some similar views on the lacking Canadian approach to data and the law.
564 Hadfield, supra note 6 at 218.
565 See Patricia Hughes, “Whither English-Canada Law Schools” (7 May 2019) Slaw, online: <http://www.slaw.ca/2019/05/07/whither-english-canada-law-schools/>. For a discussion of the necessity of such research, including the limited scope of socio-legal research in Canada, see Michael Lines, “Empirical Study of Civil Justice Systems: A Look at the Literature” (2005) 42:3 Alta Law Rev 887 at 903 [“The limited scope of socio-legal research in Canada has not gone unnoticed abroad, either. Recently, as part of a survey of the health of the field in the United Kingdom, input on the Canadian scene was solicited. The responses from several Canadian scholars are unequivocal: there is a lack of empirical research in Canada because, in sharp contrast to other social sciences, legal academics are not trained in methodological issues and perverse academic publishing expectations discourage long-term research. Further, almost all the research that is conducted focusses on criminal topics to the detriment of civil justice research.”]. 904 [“the neglect of this work by practicing academics and the failure of law schools to adapt their core curricula to include empirical approaches and methodologies is barrier to future research.”]. 905 [“Unless a renewed and sustained effort is made to support the empirical study of civil justice systems in Canada, our conceptions of our own legal system will remain distorted by ignorance, and we will continue to struggle with counter seemingly intractable problems such as delay.”] [emphasis added].
Law schools offer classes on coding and the law; only one school offers instruction on qualitative and quantitative survey design (but it is not open to all law students); only one school offers a specific class on legal data analytics; and only one school has a legal analytics lab. Some law schools are encouraging more innovation, including legal design, “app” building, access to justice studies, law reform, and legal IT (including some analytics). Such courses are excellent and perhaps should even be mandatory. Some schools also offer traditional classes in law and economics where students presumably will be exposed to some data-driven analysis.

See Alberta, “Curriculum”, supra note 566 (“LAW599 Coding the Law (Morris); Ryerson University Faculty of Law, “Program Information”, online: <https://www.ryerson.ca/law/program/>.

See Windsor, “Master Course Descriptions, supra note 566 [LAW & SOCIAL WORK].


See Queen’s University, “Conflict Analytics”, online: <https://conflictanalytics.queenslaw.ca/>; see also Cyberjustice, “Cyberjustice Laboratory”, online: <https://www.cyberjustice.ca/en/).

See University of Toronto, Faculty of Law, “Problems in Legal Design (LAW498H1F)”, online: <https://www.law.utoronto.ca/2018/19/problems-in-legal-design>; University of Toronto, Faculty of Law, “Legal Design Lab (LAW492H1S)”; online: <https://www.law.utoronto.ca/2018/19/legal-design-lab>.

See TRU Law, “LAWF 3400 Lawyering in the 21st Century (0,3,0)”, online: <https://www.tru.ca/campus/current/calendar/current/LAWF3400.htm>.


See Saskatchewan, “Course Descriptions”, supra note 566 [LAW 413.3: Current Issues in Law Reform].


See Saskatchewan, “Course Descriptions”, supra note 566 [LAW 2246 – Economic Analysis of Law].; Dalhousie University, Schlich School of Law, “LAWS 2246 – Economic Analysis of Law”, online: <https://cdn.dal.ca/content/dam/dalhousie/pdf/law/Academic%20Information%20Syllabi%20Moots%20Regulations/Syllabi/LAWS%202246%20Course_Outline%20Economic%20Analysis%20of%20Law%202018.pdf> [the course,
Overall, however, Canadian law schools do not appear to be adequately ensuring their graduates will be able to develop empirical studies or understand how empirical tools work. Many graduates simply will not be able to converse with technologists about these concepts or tools based on such concepts. This lack of training is a mistake. Such training is fundamental for access to justice and ethical, responsible lawyering in the future:\textsuperscript{577}

all law schools should wrestle with how to educate today’s students for a future practice. However transformative, in the end, legal analytics is a tool. Tomorrow’s lawyers should be prepared to exploit its advantages, while also understanding where those advantages end and human judgment begins.\textsuperscript{578}

\textit{ii. Create more open source data sets and make existing data publicly and easily available}

Again, in contrast to the U.S.,\textsuperscript{579} Canadian scholars have hardly any pre-existing, public, open-source data sets in formats amendable to statistical analysis or data modeling.\textsuperscript{580} Rather, each time scholars, such as myself, seek to do research, they either have to create their own datasets or contact other scholars for their datasets. But even then, these datasets are rarely in the large-scale format like various U.S. datasets.\textsuperscript{581} Open datasets and open data about courts should be the norm not the exception.\textsuperscript{582} Such data provides the basis for a broad variety of analysis, including

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\textsuperscript{580} See University of South Carolina - The Judicial Research Initiative (JuRI), “National High Courts Database” online: <http://artsandsciences.sc.edu/poli/juri/highchts.htm> for one of the only Canadian databases online. Notably, a U.S. institution hosts it.

\textsuperscript{581} For a discussion of open judicial datasets, see Marko Markovic \textit{et al}, “Survey of Open Data in Judicial Systems” (2016) 6th International Conference on Information Society and Technology; for a discussion of the lack of data of Canadian courts, see also Hausegger, Hennigar & Riddell, \textit{Canadian Courts, supra} note 42 at 40. Ontario and BC, e.g., seem to encourage open data, but as noted in Part II, some court data does not seem to fall into this bundle as researchers have to apply to use it (see Ontario, “Ontario’s Open Data Directive”, online: <https://www.ontario.ca/page/ontarios-open-data-directive>; British Columbia, “Data Catalogue”, online:
for courts and judges. Canadian scholars and courts should make more data readily available to increase the chance of legal analytics and empirical legal research. Such datasets and data could be accumulated in a legal data commons.

iii. Create more online tool kits and how-to guides outlining the advantages and disadvantages of certain existing tools

Canadian law schools, law societies, and law foundations should collaborate to improve Canadian scholars’ and researchers’ knowledge of existing empirical tools, e.g., discussions on the advantages and disadvantages of research tools for empirical legal research. I will offer this brief, benign example of the information it could contain. For my empirical study, I chose to rely on LexisNexis Quicklaw Advance because it had the largest dataset in 1980. But aspects of its interface lack Westlaw’s sophistication for empirical research—e.g., Westlaw allows users to download some aspects of case information in .xlsx (excel) format whereas Quicklaw does not. Such information was learned by doing versus availing some readily available guide targeted at empirical, Canadian legal research.


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Appendices

Appendix A – Gathering the Dataset

The 1980 sample was the first sample of the dataset I sought to create. I had to make two choices about it:

1. The British Columbia County Court—the intermediary court between the BCSC and BCPC—operated until 1990. I excluded it from the sample. I was only concerned with the BCSC. Including the BCCC could affect later results as it stopped operating in 1990.
2. I initially planned to use CanLII as it permits electronic scraping of some data points. It does not, however, begin its continuous coverage of the BCSC until 1990 (it only had 370 decisions from 1980). So I decided to use Westlaw or Quicklaw. Each service has a slightly different search system and produces slightly different lists of cases.

**Westlaw:** Westlaw does not allow users to search using blank terms like “”. It does, however, allow users to search by year, jurisdiction, and specific court. 586 So I specified “1980” and “Supreme Court”. I then applied two more filters (1) “British Columbia Supreme Court” and (2) “British Columbia Supreme Court in Chambers”. That search generated 1088 unique cases, and it could list them in chronological order.

Westlaw does not always list registries in their case view version. Most Westlaw entries, however, included original registry versions of cases (but not always); that version lists the registry and shows all original version features, e.g., paragraphs.

Westlaw does not allow users to formally save their searches. It does, however, keep the search saved in its history.

**Quicklaw:** Unlike Westlaw, Quicklaw will not allow a search just by jurisdiction, court, and year. 587 But Quicklaw allows users to search using blank terms like “”. So I searched “” and applied five filters: (1) “BC; Court decisions” (2) “1 January 1980 to 31 December 1980”; (3) “Supreme Court of British Columbia”; (4) “Court Decisions”; (5) “British Columbia and Yukon Judgments.” That search generated 1,188 unique cases, and it could list them in chronological order.

Quicklaw appeared to have more oral and chambers decisions. Quicklaw more consistently listed registries in their case version. But it does not include the original registry version of cases. So it provided no way of checking paragraphs or stylistic formatting. No version in the 1980s, however, appeared to have paragraphs. Rather, they were issued either (1) without paragraphs; or (2) without paragraphs and transcript style line numbers on the right side of the page. I attempted to decipher a pattern between those with transcript numbers and those without—e.g., by seeing if it was a particular registry—but no pattern seemed apparent. I abandoned this pursuit as it appeared insignificant. Notably though, it showcases a previous structure that then changed to including paragraph numbers in 1990. Finally, QL allows users to formally save your search.

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586 I confirmed this searching strategy with Westlaw, by phone, on 28 November 2018.
587 I confirmed this searching strategy with Quicklaw, by phone, on 28 November 2018
Choice of search engine: The difference between the sample size in 1980 was around 100 cases. Westlaw and Quicklaw both included appeal information right in the main viewing window. Accordingly, both engines presented a time-saving tool to determine my appeal data point. That Quicklaw more consistently shows registry information right in its case view saves time. But not being able to see the original to query any structural points (e.g. did the actual version include headings like the Westlaw or Quicklaw version) caused me some concern. I decided I could address that issue, however, if it arose by double-checking the Westlaw version.

I then queried 1990, 2000, 2010, and 2018 in Quicklaw and Westlaw. Quicklaw consistently provides more cases than Westlaw. Accordingly, I chose Quicklaw to ensure I had the largest dataset.
Appendix B – Coding Manual

1. **Case Name**
   - **Include**: Case name as QL cites it
   - **Transfer from decision**: Cut and paste
   - **Data validation**: Allows anything in this box

2. **QL Citation**
   - **Include**: QL citation as QL cites it
   - **Transfer from decision**: Cut and paste
   - **Data validation**: Allows anything in this box

3. **Neutral Citation**
   - **Include**: Nothing

4. **Registry**
   - **Include**: Select from drop down menu
     - 1 - Campbell River
     - 2 - Chilliwack
     - 3 - Courtenay
     - 4 - Cranbrook
     - 5 - Dawson Creek
     - 7 - Duncan
     - 8 - Fort St. John
     - 8 - Golden
     - 9 - Kamloops
     - 10 - Kelowna
     - 11 - Nanaimo
     - 12 - Nelson
     - 13 - New Westminster
     - 14 - Penticton
     - 15 - Port Alberni
     - 16 - Powell River
     - 17 - Prince George
     - 18 - Prince Rupert
     - 19 - Quesnel
     - 20 - Revelstoke
     - 21 - Rossland
     - 22 - Salmon Arm
     - 23 - Smithers
     - 24 - Terrace
     - 25 - Vancouver
• 26 - Vernon
• 27 - Victoria
• 28 - Williams Lake
• 29 - Grand Forks
• 30 - Richmond
• 31 - No registry info
• 32 - Surrey
• 33 - Fernie
• 34 - 100 Mile House
• 35 - Port Hardy
• 36 - Creston
• 37 - Invermere
• 38 - Rossland
• 39 - Fort Nelson
• 40 - Oliver

• **Data validation**: Only allows the list
• **Multiple registries**: If two registries are listed, use the registry where application/motion/trial is heard. If, however, only one registry is listed and it is heard in another registry, use home registry

5. **Hearing information**

• **Include**: Select from drop down menu
  o 1 – Yes
  o 2 – No
• **Data validation**: Only allows the list

6. **Hearing concludes**

• **Include**: Date the hearing concludes. If parties provide written submissions after hearing, deem the hearing to end on the last date of written submissions (written submissions only count as one day)
• **Transfer from decision**: Cut and paste or manually enter
• **Data validation**: Allows anything in this box

7. **Court days**

• **Include**: How many hearing days
• **Transfer from decision**: Count days out and manually enter. For longer trials, mark in blocks on paper, then sum. If the decision includes a block of days that does not exclude weekends, then use this date calculator (https://www.timeanddate.com/calendar/?year=1979&country=27): tell the calculator to exclude weekends and holidays. If parties only provide written submissions or provide them after a hearing (e.g., to address costs), then treat them as one court day
• **Data validation**: Only allows a numerical value
8. **Decision issued**

- **Include:** Date court issued decision
  - At times, QL uses the word “filed” before decision vs. just “judgment issued”
  - Use the first date that QL provides (I am assuming the date given is the date the decision was issued. The date could have been earlier—e.g., if QL failed to include “filed”)
  - Some oral decisions are given and then filed later. Use the given date vs. the filed date
  - At times, no hearing date is given for oral decisions. Assume the hearing date and oral decision date were the same day (in analysis, note this point)
  - Do **not** include any other days
- **Transfer from decision:** Cut and paste or manually transfer
- **Data validation:** Allows anything

9. **Days to issue**

- **Include:** Nothing
- **Using formula builder:** DAYS (end_date,start_date)
- **Data validation:** Allows a numerical value

10. **Judge**

- **Include:** Judge’s name
- **Transfer from decision:** Cut & paste for the first time. Then enter name until Excel auto-populates
- **Data validation:** Allows anything

11. **Applicant/Appellant/Plaintiff**

- **Include:** Select from drop down list
  - 1 – Government
    - **Include:** municipal, provincial, federal government; board or agency or government association; sheriff; assessor; regulatory agency (e.g., college of dentists, physicians, etc.)
  - 2 – Society
    - **Include:** law society
    - **Does not include:** entities labeled as associations or societies
  - 3 – Corporation
    - **Include:** hospitals, unions, stratas, associations, co-operatives, universities, ICBC, crown corporations, federations, established trusts, societies
  - 4 – Individual
    - **Include:** representative plaintiffs; estates responding to claims from individual plaintiffs or the government; trustees
o 5 – Aboriginal
  ▪ Include: Indigenous individuals (if clear); Indigenous bands; representative Indigenous individuals who represent an Indigenous band, e.g., a chief or council member

o 6 – Other
  ▪ Include: Any combination of the above; plaintiff’s carrying on business as; bankruptcy trustee; an entity that does not fit into another category; political parties

o 7 – None
  ▪ Include: No plaintiff/applicant or respondent/defendant

• **Data validation:** only allows the list

• **Notes:**
  o Code using the style of cause for civil and family proceedings
  o Code for the moving party in criminal, bankruptcy, and creditor proceedings (if clear)
  o When two actions are combined, combine the plaintiff and defendants when coding; if they do not match, use other
  o Combine third parties and defendants; if they do not match, use other

12. **Respondent/Defendant**

• **Include:** Select from drop down list
  o 1 – Government
    ▪ Include: municipal, provincial, federal government; board or agency or government association; sheriff; assessor; regulatory agency (e.g., college of dentists, physicians, etc.)
  o 2 – Society
    ▪ Include: law society
    ▪ Does not include: entities labeled as associations or societies
  o 3 – Corporation
    ▪ Include: hospitals, unions, stratas, associations, co-operatives, universities, ICBC, crown corporations, federations, established trusts, societies
  o 4 – Individual
    ▪ Include: representative plaintiffs; estates responding to claims from individual plaintiffs or the government; trustees
  o 5 – Aboriginal
    ▪ Include: Indigenous individuals (if clear); Indigenous bands; representative Indigenous individuals who represent an Indigenous band, e.g., a chief or council member
  o 6 – Other
    ▪ Include: Any combination of the above; plaintiff’s carrying on business as; bankruptcy trustee; an entity that does not fit into another category; political parties
  o 7 – None
    ▪ Include: No plaintiff/applicant or respondent/defendant

• **Data validation:** only allows the list
• Notes:
  o Code using the style of cause for civil and family proceedings
  o Code for the moving party in criminal, bankruptcy, and creditor proceedings (if clear)
  o When two actions are combined, combine the plaintiff and defendants when coding; if they do not match, use other
  o Combine third parties and defendants; if they do not match, use other

13. Self-Rep

• Include: Select from drop down list
  o 1 – No – All parties represented
    ▪ Include: no parties self-rep (even if one party does not attend)
  o 2 – One self rep
    ▪ Include: one party is self-rep
  o 3 – All self rep
    ▪ Include: both parties are self-rep
  o 4 – Other
    ▪ Include: More than one self-rep, but some parties have counsel
  o 5 – No information given
    ▪ Include: When information is included for one party but not for the other

• Data validation: only allows the list
• Assume when it says no one appears that it means the party and counsel did not show up

14. Subject

• Include: Select from drop down list
  o 1 – Administrative
    ▪ Include: any judicial review; reviews of assessment boards; tax set-aside proceedings; umpire review; statutory “appeals” of administrative decision-makers; reviews of arbitration decisions & leave to appeal of arbitration decisions; reviews of orders-in-council; motions related to ongoing administrative proceedings (e.g., for delay) or for pending proceedings; reviews of regulatory decisions; administrative remedies (e.g., mandamus); stated-case proceedings from administrative proceedings or regulatory statutes; injunctions to stop administrative processes
  o 2 – Constitutional
    ▪ Include: division of powers disputes; questions of vires and jurisdiction
  o 3 – Civil procedure
    ▪ Include: any civil procedure issue, including pleadings, discovery, limitations, costs, taxation, motions-to-strike (including for jurisdictional purposes); summary judgment; summary trial; contempt; applying to appoint an arbitrator; security for costs; applications to set aside orders; applications to reaffirm original decision; applications for direction; applications for proceedings on point of law; applications to amend orders;
applications to compel medical examinations; applications for default judgment and any related default judgment issues; applications for special cases on procedural and limitation issues; applications related to contingency agreements; applications to enforce foreign judgments; applications over evidentiary issues during trial; applications over jurisdictional disputes (e.g., *forum non conveniens*); applications for no or insufficient evidence; applications for leave to reopen judgment after reserve (if during trial, use subject matter code); applications for want of prosecution; applications related to notifying interested parties; applications for summary trial suitability; applications for civil publication bans; applications to set aside based on jurisdiction; applications for disqualification; conflict of interest applications; applications to approve settlements; applications to strike out notice of appeal; applications for indigent status; applications to settle order; applications to stay proceedings; applications for restraining orders; applications for *Anton Pillar* orders; applications to have non-lawyers represent parties; applications to enforce arbitration award; applications to stay action because of arbitration agreement; applications to draw adverse inference or other trial procedure that are not subject specific; applications on what issues to put to the jury; applications to refuse to enter jury verdict; proceedings arising from the *Barristers and Solicitors Act*

- **4 – Contract**
  - Include: oral agreements; leases; guarantees; specific performance or other contractual remedies; disputes under *Sale of Goods Act*; enforcing disputed settlement agreements; actions for undue influence to unwind contract
  - Does not include: insurance disputes (Code 13) or employment contracts (Code 7)

- **5 – Corporate/Commercial**
  - Include: anything related to the *Companies Act*; oppression; winding up; shareholder disputes; securities disputes; debenture; corporate loans; corporate mortgage disputes; issues related to society’s or association’s bylaws or constitutions; joint ventures; applications to pierce the corporate veil

- **6 – Criminal**
  - Include: procedural issues; evidentiary motions; *habeas corpus*; detention under mental health or forensic grounds; extradition; mutual legal assistance; constitutional motions in criminal proceedings; civil forfeiture; criminal forfeiture; detention of property in the criminal context; applications for disclosure of retained evidence after trial/conviction; publication bans or disclosure issues related to media
  - Does not include: criminal appeals

- **7 – Employment**
  - Include: wrongful dismissal; issues related to the *Canada Labour Code*; employment contract disputes; strike and picketing issues; restrictive covenants in employment and corporate agreements
8 – Environmental
  ▪ Never occurred. Always fell into another category
9 – Estate/Trusts
  ▪ **Include:** applications under the *Testators’ Family Maintenance Act*; resulting trusts; will variation applications; orders regarding survivorship and death; breach of trust by trustee; fees that arise out of a will before trial; applications to deem someone incapable of managing own affairs under the *Patients Property Act*; issues related to Public Guardian and Trustee; breach of fiduciary duty; costs related to executrix duties; leave applications under the *Wills, Estates and Succession Act*; recommendations from Registrar before confirmation hearings; motions under the *Cremation, Interment and Funeral Services Act*; disputes over funds in lawyers’ trust accounts
10 – Family Law
  ▪ **Include:** all things related to family law, including all applications or petitions; protection orders; adoption; applications to confirm registrar’s recommendation; applications under the *Family Relations Act* and the *Family Relations Act Interim Rules*; custody; injunctions under the *Family Relations Act*; variations under the *Interjurisdictional Support Orders Act*
11 – Human rights
  ▪ Never occurred. Always fell into another category
12 – Insolvency
  ▪ **Include:** bankruptcy; trustee’s motions related to their role in the proceedings; taxation of trustee’s fees
13 – Insurance
  ▪ **Include:** declarations of death; workers’ compensation eligibility; issues of ownership of vehicles in car accidents
14 – IP
  ▪ **Include:** theft of an idea; passing off; trademark
15 – Municipal
  ▪ **Include:** petitions related to bylaws; land registry disputes; land use contracts; applications brought under the *Municipal Act*; municipal statutory injunctions
16 – Personal Injury
  ▪ **Include:** car accident; slip and fall; snow clearing; occupier’s liability; claims for death under the *Family Compensation Act*
  ▪ **Does not include:** other torts. Do not include any injury arising from professional negligence, e.g. against a doctor; instead use Code 21
17 – Public Law
  ▪ **Include:** crown grant of land; provincial election issues; cabinet confidences
18 – Property
  ▪ **Include:** replevin orders for property; partition orders; petitions to approve sale; setting aside conveyances; aboriginal title and other property related issues (otherwise use Code 26); modifying charge registered against property; restrictive covenants; easements; bailment; remedies under the
Land Titles Act; remedies under the Fraudulent Conveyances Act; orders for detention, custody, or preservation of property (including under the Supreme Court Civil Rules); petitions under the Commercial Tenancy Act (including application to set hearings); issues under the Property Law Act; damages for improper filing of lis pendens; disputes under the Condominium Act; bailment; strata disputes; Partition of Property Act proceedings; issues related to property co-ops; expropriation, including costs of those proceedings

19 – Regulatory
  - Include: applications to become notaries; applications relating to the Mobile Home Act; applications under the Hospital Act relating to doctor’s privileges; Law Society Act proceedings; Motor Vehicle Act proceedings; Legal Profession Act & Legal Society Act proceedings; applications under the Health Profession Act and Midwives Regulation (including injunctions); Freedom of Information and Protection of Privacy Act requests; Health Professional Act proceedings; Notaries Act proceedings

20 – Appeal
  - Include: any civil or criminal appeal from provincial court, master, or registrar; leave to appeal for lower than BCSC (including the Civil Resolution Tribunal)
  - Does not include: family appeals

21 – Tort
  - Include: assault; negligence arising from professional duties; conversion, battery; negligent, fraudulent, or innocent misrepresentation; negligent misstatement; trespass; bullock orders after judgment; fraud; conversion; libel; nuisance; breach of trust
  - Does not include: personal injury (Code 16)

22 – Creditor debtor
  - Include: sheriff seizures; foreclosure; remedies on personal covenant; garnishment; order nisi; statutory liens; setting aside mortgaged property sale; discharge of mortgage; remedies under the Fraudulent Preference Act; rates of interests related to mortgages in foreclosure proceeding; plan of arrangement for creditors; remedies under Companies’ Creditors Arrangement Act; repossession; setting aside liens; appointment of a receiver; remedies under the Court Order Enforcement Act; applications for certificates of pending litigation (and variance)

23 – Tax
  - Include: disputes over funds linked to tax implications; order for property tax exemption; rectification motions with tax implications

24 – Equitable
  - Include: injunctions; applications to set aside injunctions; quantum meruit; unjust enrichment; damages arising from injunctions; applications under the Law and Equity Act; mareva injunctions; breaching confidentiality of agreements that require an injunction; claims for rectification; rescission
  - Does not include: family law injunctions or employment related injunctions
25 – Class action
   - Include: applications to certify class; applications related to settling the class agreement (including costs); interventions in class proceedings; pre-certification applications relating to the certification (e.g., document production)
26 – Aboriginal
   - Include: any land disputes involving Indigenous litigants and the government or constitutional disputes
27 – OPCA
   - Include: any free-people-of-the-land type litigation

- Data validation: only allows the list
- Notes:
  - If a decision addresses multiple causes of action, attempt to choose the one that occupies the majority of the decision

15. Word count

- Include: Word count from beginning of decision until end
- Transfer from decision: Manually enter or cut and paste
- Do not include: Any schedules to decision or addendums
- Notes:
  - Use google chrome embedded tool (Word Counter Plus). After right clicking the selected text of all the text in the paragraphs, use that number for the word count
  - For 1980, subtract the paragraph numbers from word count. The original decisions did not have paragraphs

16. Headings

- Include: Select from drop down list
  - 1 – Headings
  - 2 – No headings
- Data validation: only allows list

17. Appeal

- Include: Select from drop down list
  - a. 1 – No appeal
  - b. 2 – Appeal granted
  - c. 3 – Appeal denied
  - d. 4 – Appeal (no info)
  - e. 5 – Leave to appeal denied
- Data validation: only allows drop down list

---

588 “Word Counter Plus”, online: <https://chrome.google.com/webstore/detail/word-counter-plus/fpjegfbcldijfkeenlfoehpcafkglj?hl=en>.
Appendix C – Design of the Random Forest Models & Explanation of Metrics

The final dataset and initial hypotheses were provided. As discussed, based on the initial hypotheses, certain variables from the dataset were excluded (i.e., information variables and registry).

Models were first run to evaluate possible significant predictors and for discussion. The models deemed for further exploration were then trained on a grid of hyperparameters using 1-fold cross validation to best tune the following inputs:

- mtry: the number of features randomly evaluated in the determination of each split (values of 1 to the total number of features were evaluated); and
- min.node.size: a cut-off ensuring that a node is only split further if it meets this minimum number of observations (a sequence from 5 to 100 by 5 were evaluated).

These models used for tuning were run with 100 trees. All models in this analysis employed the “variance” splitrule that chooses splits based on what best reduces variance in the dependent variable.

Hypothesis notes:

- the final models were run on the entire data set and by sample years of 1980, 2000, and 2018;
- for the overall data set, hearing year was included and excluded. The models were also run with judge included and excluded; and
- for the sample years of 1980, 2000, and 2018, hearing year was excluded as a predictor since the sample was based on hearing year. The models were also run with judge included and excluded.

Model notes:

- the models were coded in the R language (code available on request);
- the models availed the ranger package;
- all final models were run with 1000 trees; the models for tuning hyperparameters were run with 100 trees (availed the caret package);
- mtry and min.node.size were tuned to the best performance using 10-fold cross validation on a grid search of those parameters; and
- 50 permutations (forests) were used in the Altmann method for computing variable importance with p-values, where the null hypothesis is that there is no association of the independent variables on the dependent variable.
Explanation of metrics:

1. **RF RMSE (root mean squared error):** For the purpose of the word count and delivery time models, the RF RMSE provides the amount the prediction would worsen if you ran the model with this variable permuted (*i.e.*, scrambled)—*e.g.*, scramble the words variable in the entire random forest model for delivery time, and the prediction would be off by 36 days, etc.\(^{589}\) Similar to RF-Squared, no absolute criterion exists for a good RMSE value.\(^{590}\)

2. **RF Prediction Error:** The RF Prediction Error is the RMSE of the full model (with all predictors). This calculation is the amount of error, on average, one can expect the random forest to have on the predictions it makes. This value is calculated from the predictions on a holdout (out-of-bag) sample of the data.

3. **RF R-Squared:** It indicates how well the model explains the variability in the dependent variable (*e.g.*, word count or delivery time). For example, if the number is .50, then approximately half the model’s features can explain the observed variation. Lower R-squared does not, however, indicate poor prediction power.\(^{591}\)

4. **Altmann p-value:** P-values provide one way of measuring uncertainty and error probability.\(^{592}\) Part II’s random forest model availed the Altmann approach to estimating p-values of random forest predictors: “non-informative predictors do not receive significant p-value.”\(^{593}\) Part II employs a cut-off p-value of <0.05. Anything higher (*e.g.* 0.1) is not treated as a significant predictor of word count or delivery time.

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\(^{589}\) See Matthew Baumer, “randomForest” (16 December 2015) RPubs, online: <https://rpubs.com/mbaumer/randomForest>.

\(^{590}\) See Robert Nau, “What’s the bottom line? How to compare models” Duke School of Business, online: <https://people.duke.edu/~rnau/rsquared.htm>; see also Hapfelmeier & Ulm, *supra* note 206 at 51; see also C Strobl, J Malley & G Tutz, “An introduction to recursive partitioning: rationale, application, and characteristics of classification and regression trees, bagging, and random forests” (2009) 14(4) Psychological Methods 14 323 at 343. Larger values demonstrate predictive power between the predictor variable and the dependent variable.

\(^{591}\) See Robert Nau, “What’s a good value for r-squared” Duke School of Business, online: <https://people.duke.edu/~rnau/rsquared.htm>; see also Clay Ford, “Is R-Squared Useless?” (17 October 2015) University of Virginia Library, online: <https://data.library.virginia.edu/is-r-squared-useless/>.

\(^{592}\) Alan S Rigby, “Getting past the statistical referee: moving away from P-values and towards interval estimation” (1999) 14: Health Education Research 713 at 713.

\(^{593}\) Andre Altmann *et al*, “Permutation importance: a corrected feature importance measure” (2010) 26:10 Bioinformatics 1340 at 1340; see also 1347 [“The PIMP P-values are easier to interpret and provide a common measure that can be used to compare feature relevance among different models”].
Appendix D – Sample CART Model

Words CART – 1998–2000, No Judges

Further CART models available on request. They were run for the entire dataset.
Appendix E – Dataset Figures

Figure 10: Sample size of dataset and hearing information

<table>
<thead>
<tr>
<th>Hearing information</th>
<th>Oral Judgment</th>
<th>Number of Records</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 - No</td>
<td>2 - Yes</td>
<td>392</td>
</tr>
<tr>
<td>1 - No</td>
<td>1 - No</td>
<td>135</td>
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<tr>
<td>2 - Yes</td>
<td>2 - Yes</td>
<td>642</td>
</tr>
<tr>
<td>2 - Yes</td>
<td>1 - No</td>
<td>3,819</td>
</tr>
</tbody>
</table>

**Total:** 4,988
**Figure 11: Total decisions by subject**

![Diagram showing total decisions by subject across various categories such as Civil Procedure, Family Law, Criminal, Personal Injury, etc.](image-url)
Figure 12: Bins of court days for 1980, 2000, and 2018
Figure 13: Total court sitting days by subject

- Family Law: 1,441, 1,084, 435
- Criminal: 1,755, 920, 80
- Civil Procedure: 713, 718, 232
- Personal Injury: 668, 389, 398
- Tort: 424, 624, 268
- Contract: 326, 360, 373
- Administrative: 230, 266, 96
- Estate/Trusts: 247, 203
- Corporate/Commercial: 158, 87, 161
- Employment: 101, 149
- Appeal: 126
- Property: 166
- Debtor/creditor: 85, 74
- Equitable: 83, 73
- Insurance: 72
- Aboriginal: 146
- Constitutional: 1
- Municipal: 1
- Insolvency: 1
- Class Action: 1
- Regulatory: 1
- Public Law: 1
- IP: 1
- Tax: 1
- OPCA: 1
Figure 14: Evolution of oral decisions

Year of Judgment Issued

Avg. Days to Issue

Number of Records

1980  2000  2018

1.25  0.80  13.10

242  178  614
Figure 15: Entire dataset random forest predictions for word count (hearing year and judge included)

<table>
<thead>
<tr>
<th>Feature</th>
<th>RF RMSE</th>
<th>Altmann MSE</th>
<th>Altmann p-value</th>
<th>CART % of Goodness Of Splits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Courtdays</td>
<td>4349.30826</td>
<td>18916482.4</td>
<td>0.01960784</td>
<td>0.4577427</td>
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<tr>
<td>HearingYear</td>
<td>2120.45761</td>
<td>4496340.46</td>
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<td>0.04955385</td>
</tr>
<tr>
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<td>DaystolIssue</td>
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<td>2544472.39</td>
<td>0.78431373</td>
<td>0.01774056</td>
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<tr>
<td>Judge</td>
<td>1050.3217</td>
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<td>0.36457057</td>
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<td>989598.782</td>
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<td>0.04327795</td>
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<td>464311.412</td>
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<td>0.00013957</td>
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<td>Oral Judgment</td>
<td>522.497927</td>
<td>273004.084</td>
<td>0.98039216</td>
<td>NA</td>
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<td>0.02845381</td>
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<tr>
<td>Appeal</td>
<td>95.7554847</td>
<td>9169.11285</td>
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<td>0.00384881</td>
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<td>Selfrep</td>
<td>77.880478</td>
<td>6065.36886</td>
<td>0.74509804</td>
<td>0.00561018</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Feature</th>
<th>RF RMSE</th>
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</thead>
<tbody>
<tr>
<td>RF Prediction Error (RMSE)</td>
<td>3400.39851</td>
</tr>
<tr>
<td>RF R-Squared</td>
<td>0.60607581</td>
</tr>
<tr>
<td>CART Prediction Error (RMSE)</td>
<td>4258.0863</td>
</tr>
<tr>
<td>CART R-Squared</td>
<td>0.68624936</td>
</tr>
</tbody>
</table>
Figure 16: Entire dataset random forest predictions for word count (hearing year included and judge excluded)

<table>
<thead>
<tr>
<th>Feature</th>
<th>RF RMSE</th>
<th>Altmann MSE</th>
<th>Altmann p-value</th>
<th>CART % of Goodness Of Splits</th>
</tr>
</thead>
<tbody>
<tr>
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<td>0.03921569</td>
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<td>816.288396</td>
<td>666326.746</td>
<td>0.88235294</td>
<td>0.00954958</td>
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<tr>
<td>OralJudgment</td>
<td>565.767332</td>
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<td>0.96078431</td>
<td>0.00615984</td>
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<td>110.218163</td>
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<td>NaN</td>
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</table>

RF Prediction Error (RMSE) 3488.42034
RF R-Squared 0.58541781
CART Prediction Error (RMSE) 4003.6095
CART R-Squared 0.5862947
Figure 17: Entire dataset random forest predictions for word count (hearing year and judge excluded)

<table>
<thead>
<tr>
<th>Feature</th>
<th>RF RMSE</th>
<th>Altmann MSE</th>
<th>Altmann p-value</th>
<th>CART % of Goodness Of Splits</th>
</tr>
</thead>
<tbody>
<tr>
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<td>DaystoIssue</td>
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<td>4009438.01</td>
<td>0.09803922</td>
<td>0.08106606</td>
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RF Prediction Error (RMSE) 3927.18536
RF R-Squared 0.47456885
CART Prediction Error (RMSE) 4203.90867
CART R-Squared 0.45441117
Figure 18: Entire dataset random forest predictions for delivery time (hearing year and judge included)

<table>
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<tr>
<th>Feature</th>
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<th>Altmann p-value</th>
<th>CART % of Goodness Of Splits</th>
</tr>
</thead>
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<td>Courtdays</td>
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<td>OralJudgment</td>
<td>24.7105137</td>
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<td>HearingYear</td>
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</tr>
<tr>
<td>Appellant/Applicant/Plaintiff</td>
<td>6.69121582</td>
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<td>0.01004105</td>
</tr>
<tr>
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<tr>
<td>CART Prediction Error (RMSE)</td>
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<tr>
<td>CART R-Squared</td>
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</tr>
</tbody>
</table>
Figure 19: Entire dataset random forest predictions for delivery time (hearing year included and judge excluded)

<table>
<thead>
<tr>
<th>Feature</th>
<th>RF RMSE</th>
<th>Altmann MSE</th>
<th>Altmann p-value</th>
<th>CART % of Goodness Of Splits</th>
</tr>
</thead>
<tbody>
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<td>0.09846143</td>
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RF Prediction Error (RMSE) 55.4769921
RF R-Squared 0.25083379
CART Prediction Error (RMSE) 56.5447345
CART R-Squared 0.26928844
Figure 20: Entire dataset random forest predictions for delivery time (hearing year and judge excluded)

<table>
<thead>
<tr>
<th>Feature</th>
<th>RF RMSE</th>
<th>Altmann MSE</th>
<th>Altmann p-value</th>
<th>CART % of Goodness Of Splits</th>
</tr>
</thead>
<tbody>
<tr>
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Figure 21: "1980" - Median and mean word counts.
Figure 22: “1980” - Random forest predictions for word count (judge included)

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Figure 23: “1980” - Random forest predictions for word count (judge excluded)

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Figure 24: "2000" - Median and mean word counts
Figure 25: “2000” - Random forest predictions for word count (judge included)

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CART R-Squared 0.58327041
Figure 26: “2000” - Random forest predictions for word count (judge excluded)

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### Median and Mean Word Counts

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Figure 27: "2018" - Median and mean word counts
Figure 28: “2018” - Random forest predictions for word count (judge included)

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Figure 29: “2018” - Random forest predictions for word count (judge excluded)

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p-value

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- (0.01,0.05)
- (0.05,0.1]
- (0.1,1]
Figure 30: "1980" - Mean and median delivery time
Figure 31: “1980” - Random forest predictions for delivery time (judge included)

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CART Prediction Error (RMSE) 42.8806883
CART R-Squared 0.29369921
Figure 32: “1980” - Random forest predictions for delivery time (judge excluded)

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CART Prediction Error (RMSE)      | 43.7569778  |
CART R-Squared                   | 0.15376719  |
Figure 33: “2000” - Mean and median delivery time

- 6 - Criminal
- 7.0 - Class action
- 0.0 - Appeal
- 13.0 - Depreciation
- 1.0 - Contract
- 1.0 - Property
- 18.0 - Procedure
- 19.0 - Administrative
- 20.0 - Family law
- 21.0 - Municipal
- 21.5 - Administrative
- 24.0 - Equitable
- 36.0 - Public law
- 6.0 - Insurance
- 2.0 - Insolvency
- 6.0 - Estate
- 3.0 - Trust
- 16.0 - Personal injury
- 33.0 - Corporate/commercial
- 19.0 - Regulation
- 4.0 - Contract
- 7.0 - Employment
- 21.0 - Tort
- 23.0 - Tax
- 2 - Constitutional
- 26.0 - Administrative

Judgment Issued
**Figure 34: “2000” - Random forest predictions for delivery time (judge included)**

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Figure 35: “2000” - Random forest predictions for delivery time (judge excluded)

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| CART Prediction Error (RMSE)     | 53.595498   |             |                 |                             |
| CART R-Squared                   | 0.23337154  |             |                 |                             |
Figure 36: "2018 - Mean and median delivery time"
Figure 37: “2018” - Random forest predictions for delivery time (judge included)

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Figure 38: “2018” - Random forest predictions for delivery time (judge excluded)

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Appendix F – Summarized Answers to Court Survey

- **Question 1:**

  - **Ontario Superior Court of Justice:** Section 123(5) of the *Courts of Justice Act* stipulates timelines for written decisions.
  - **BCSC:** The Court has suggested deadlines for written decisions in keeping with the Canadian Judicial Council’s resolution (three months for applications and six months for actions or longer matters).
  - **British Columbia Court of Appeal:** The Court maintains a suggested deadline of six months as the Canadian Judicial Council resolved.
  - **Supreme Court of the Northwest Territories:** The Court does not have a suggested timeline. Different timelines are appropriate for different decisions. The Court expects judges to issue written decisions as quickly as possible. The Court follows the general guidelines from the Canadian Judicial Council’s Ethical Principles for Judges.
  - **Prince Edward Island Court of Appeal:** The PEI *Judicature Act* requires that decisions be rendered in six months. The Court’s practice is rendering written decisions as soon as possible. Decisions are usually rendered within one to two months; the Court rarely takes three or four months to issue a decision.
  - **Court of Queen’s Bench of Alberta:** The Court’s suggested timeline is the Canadian Judicial Council six-month timeline for issuing decisions. If written submissions are provided, the six-month timeline begins after those submissions are received.
  - **Supreme Court of Newfoundland and Labrador:** The Court adheres to the Canadian Judicial Council’s “Ethical Principles for Judges”—i.e., except for special circumstances, the Court should issue decisions six-months after hearings.
  - **Nova Scotia Court of Appeal:** The Court has no formal rule. The Court’s shared expectation is that decisions are usually issued in less than three or four months but for exceptional circumstances.
  - **Tax Court of Canada:** Section 18.22 of the *Tax Court of Canada Act* requires decisions to be rendered no later than 90 days after Informal Procedure hearings conclude. For matters under the Court’s general procedure, the Court follows the Canadian Judicial Council Guideline of six months absent special circumstances.

- **Question 2:**

  - **Ontario Superior Court of Justice:** The Office of the Chief Justice publishes a *Protocol for the Preparation, Release, and Publication of Judicial Decisions*. The *Protocol* references the Canadian Citation Committee’s guide as a best practice. It outlines suggested instructions for preparing, releasing, and publishing decisions. Using the *Protocol* is strongly encouraged but not required. The Court does not track the *Protocol’s* use: “Judges have discretion in determining both the form and function of their judicial decisions because maintaining and preserving judicial independence is one of the core tenants of the Superior Court of Justice.”
  - **BCSC:** The Court has an optional style guide for decisions. Consistent with the principle of judicial independence, its use is not tracked.
  - **British Columbia Court of Appeal:** The Court has an optional style guide. The principle of judicial independence means that judges’ preferences take precedence over the style guide. The Court does not track if judges follow the guide.
Supreme Court of the Northwest Territories: The Court has no mandatory style guidelines for written decisions.

Prince Edward Island Court of Appeal: The Court uses the Canadian Citation Committee’s guide, “The Preparation, Citation, and Distribution of Canadian Decisions.”

Court of Queen’s Bench of Alberta: The Court has no mandatory style guides for written decisions.

Supreme Court of Newfoundland and Labrador: The Court does not have an official style guide for written decisions. But the Court relies on four documents to ensure consistency in its written decisions: the 6th edition of the McGill Guide for citations; the Canadian Citation Committee’s “Uniform Case Naming Guidelines” and “The Preparation, Citation, and Distribution of Canadian Decisions”; and the Canadian Judicial Council – Judicial Advisory Committee’s “Use of Personal Information in Judgments and Recommended Protocol”. The Court also has a Microsoft Word “judgment template” that includes a number of pre-set features (e.g., “it automatically populates the style of cause, file number, date, publication ban wording, counsel, and the rest of the information in the cover of an NLSC judgment.”). The template also includes space to briefly summarize the case, and it has a pre-set font; paragraph and line spacing, and other formatting prescriptions. Adhering to the documents and templates is not mandatory, and the Court does not track their use. The Court periodically circulates the documents to the judges and includes the documents’ information in training materials for judicial assistants.

Nova Scotia Court of Appeal: The Court has no mandatory style guides for written decisions.

Tax Court of Canada: To ensure judicial independence, the Court has no mandatory style guides.

Question 3:

Ontario Superior Court of Justice: The Court provides templates for decisions and endorsements to ensure standardization and uniformity. Because of the principle of judicial independence, the templates are not mandatory. Use is not tracked.

BCSC: The Court has templates and resources on structuring decisions. Because of the principle of judicial independence, their use is not mandatory and is not tracked.

British Columbia Court of Appeal: Judges have various templates and resources available to assist them in structuring decisions. Because of the principle of judicial independence, their use is not mandatory and is not tracked.

Supreme Court of the Northwest Territories: The Court has no mandatory structures for written decisions.

Prince Edward Island Court of Appeal: The Court uses the Canadian Citation Committee guide, “The Preparation, Citation, and Distribution of Canadian Decisions.”

Court of Queen’s Bench of Alberta: The Court has templates that provide minimal structure for written decisions (e.g., reasons for decision and memorandum of decision templates), but the Court does not track their use.
• **Supreme Court of Newfoundland and Labrador**: The Court has no mandatory structure for written decisions. And the Court’s “judgment template” does not prescribe suggested headings, and judges will structure their decisions to their writing style and decisions’ requirements.

• **Nova Scotia Court of Appeal**: The Court has no mandatory structures for written decisions.

• **Tax Court of Canada**: To ensure judicial independence, the Court has no mandatory structures.

**Question 4:**

• **Ontario Superior Court of Justice**: The provincial government collects data on the Court’s behalf, and requests can be made to access the data.

• **BCSC**: Most of the Courts’ data on decisions is released in its annual reports. Researchers may apply for additional data, and the Court will determine if releasing the data is appropriate.

• **British Columbia Court of Appeal**: The Court collects a variety of data with its case tracking system. If a request for data complies with the purposes and requirements of the Court’s policies, the Court releases data in response to requests.

• **Supreme Court of the Northwest Territories**: The Court does not maintain any statistical data on decisions, in part, because of a lack of resources.

• **Prince Edward Island Court of Appeal**: The Court does not compile statistics. It renders 20 to 30 decisions a year.

• **Court of Queen’s Bench of Alberta**: The Court did not respond to this question.

• **Supreme Court of Newfoundland and Labrador**: The Court does not produce annual reports. But the Court tracks the number of issued written decisions on a yearly basis, the number of decisions on reserve, and how long decisions are on reserve.

• **Nova Scotia Court of Appeal**: The Court has no statistical data on written decisions.

• **Tax Court of Canada**: The Court has data on decisions for internal use only.

**Question 5:**

• **Ontario Superior Court of Justice**: The Court carefully monitors reserves: it employs an internal tracking system to monitor decisions. If judges fail to issue decisions within the statutory timeline, the Chief Justice may extend the timeline on a case-by-case basis. If the statutory timelines are exceeded, the Regional Senior Justice provides a specific release date to counsel.

• **BCSC**: The Court uses an internal tracking system that collects data on reserved decisions by judge and aggregate statistics for the court.

• **British Columbia Court of Appeal**: The Court tracks how long written decisions are under reserve. Most decisions are released in six months as the Court’s annual reports indicate. All judges and some court staff receive a list of all decisions under reserve on a monthly basis: cases are listed by hearing date and are ranked by longest delay. The Chief Justice monitors the list and may discuss reserves with judges that are three, six, and more than six months old.

• **Supreme Court of the Northwest Territories**: The Court maintains a reserve list for every judge, including the matters under reserve and the date they were reserved.
The Chief Justice reviews the list every three months. If operationally feasible, the Chief Justice assigns additional writing time. In contrast to other superior courts, the Court does not have pre-set sitting weeks. Because of the Court’s uniqueness as a circuit court, writing weeks are assigned as the schedule permits.

- **Prince Edward Island Court of Appeal:** The PEI *Judicature Act* requires that decisions be rendered in six months. The Court’s practice is rendering written decisions as soon as possible. Decisions are usually rendered within one to two months; the Court rarely takes three or four months to issue a decision.

- **Court of Queen’s Bench of Alberta:** The Court tracks how long written decisions are under reserve. The Court provides the Chief Justice and Associate Chief Justice a monthly report of all the decisions that have been under reserve for over four months. That report includes the date the decision was reserved and the progress on completing the decision.

- **Supreme Court of Newfoundland and Labrador:** The Court tracks how long written decisions are on reserve, and the Chief Justice monitors the list. When decisions have been reserved for longer than six months, the Chief Justice discusses the reason for delay with the assigned judge. If required, the Chief Justice may provide the judge with additional resources or assistance to expedite issuing the decisions—e.g., more decision writing time or producing a hearing’s written transcripts.

- **Nova Scotia Court of Appeal:** The Court tracks how long decisions are under reserve. But the Court has no specific policy for addressing reserves. The chair of the hearing panel (or the Chief Justice) is responsible for accounting for delays and ensuring that reserved decisions are rendered in a timely manner.

- **Tax Court of Canada:** The Chief Justice and Associate Chief Justice have reserve information available to them, and they follow-up monthly with members of the Court.

**Question 6:**

- **Ontario Superior Court of Justice:** The Court “is always looking for ways to improve its policies and procedures.” The Court is currently piloting a Digital Hearing Workspace for the Toronto Commercial List—one feature allows judges to directly issue written decisions to the parties through an electronic application.

- **BCSC:** The Court consistently works on improving decisions’ quality and timeliness. It encourages using shorter forms of decisions if appropriate. Internal education is provided to new judges and on an ongoing basis. Educational topics include delivering oral decisions and efficiently producing decisions.

- **British Columbia Court of Appeal:** The Court continuously investigates ideas to improve and change written decisions, including updating the publication process, improving the Court’s tracking system, and other initiatives.

- **Supreme Court of the Northwest Territories:** The Court does not have any ongoing initiatives.

- **Prince Edward Island Court of Appeal:** The Court has no formal, ongoing initiatives. The Court, however, is always looking at how to communicate effectively.

- **Court of Queen’s Bench of Alberta:** The Court has no reforms related to decision templates.
Supreme Court of Newfoundland and Labrador: The Court produced the mentioned “judgment template” that helps standardize formatting decisions. Judges are also encouraged to attend the National Judicial Institute’s education seminars for decision-writing and oral decision-making.

Nova Scotia Court of Appeal: The Court is not aware of any initiatives. The Court takes decision writing very seriously, and the editing process has varying objectives and stages: “Judgments will have been edited many times before the author(s) are satisfied that it meets the expected standards….” Finally, the Court’s judges are encouraged to participate in continuing judicial education, including decision-writing, as their schedules permit.594

Tax Court of Canada: The Court has no initiatives.

594 Correspondence on file for all answers.