Majority, Concurring, and Dissenting Decisions

Courts of appeal and the Supreme Court of Canada have multiple judges deciding together on the same case. Sometimes there can be more than one decision included in the case. When all the judges on a court agree, only one decision is delivered. If there is disagreement by the judges on what the outcome of the case should be, there will be two or more decisions: a majority decision, and dissenting and/or concurring decisions.

Majority Decisions

Majority decisions are the ones where a majority of the judges agree. For example, there are nine judges on the Supreme Court of Canada. What the majority of the judges on the Court decide on, becomes the majority decision. For example, if five judges agree on a matter, their decisions become the majority decision. This occurred in the *Amselem* decision. In that case, five judges reached the same conclusion. The majority decision delivered represented the decisions of Justices Iaccobucci, McLachlin, Major, Arbour, and Fish.[1]

If all nine judges agree and reach the same conclusion, then a unanimous decision is delivered. An example of a case where there was a unanimous decision is the *Bedford* case, in which all nine judges agreed that the challenged prostitution laws were unconstitutional.[2]

Dissenting Decisions

Sometimes there are judges who do not agree with the majority of the Court. Judges who reach a different conclusion can deliver a dissenting opinion. For example, if eight judges agree on a matter, the single judge who disagrees would write their dissenting decision. An example of this occurs in the 2020 case of *Toronto-Dominion Bank v Young*. In this case Chief Justice Wagner wrote the majority decision for the Court, which represented the decisions of himself, and Justices Abella, Moldaver, Karakatsanis, Brown, Rowe, Martin, and Kasirer. However, Justice Côté disagreed with the majority and wrote her own dissenting decision.[3]

Concurring Decisions

In addition to the majority and dissenting decisions, there is a third type of decision a court can deliver called a concurring decision. These decisions result when a judge agrees with the ultimate conclusion made by the majority of the court but disagrees on how they reached that decision.

For example, in the 1990 *Prostitution Reference* case, Justice Lamer agreed with the majority's conclusion, but disagreed on certain legal points. This resulted in Chief Justice

Dickson writing the majority decision for the court, which represented the decisions of himself, and Justices La Forest and Sopinka. Justice Wilson disagreed with the majority and wrote a dissenting decision which also represented that of Justice L'Heureux-Dubé. Justice Lamer (as he then was[4]) wrote a concurring decision.[5]

Precedent

Majority decisions become "precedent". A precedent is set by a decision from a higher court which a lower court judge must follow when facing a case with similar facts.[6] In other words, it is binding. For example, a trial court in Alberta is bound by the decisions of the Alberta Court of Appeal, which is a higher level of court, as well as the decisions of the Supreme Court of Canada. Even though the Supreme Court of Canada is not bound by its previous decisions, the Court will often follow those previous decisions to allow for consistency and certainty in legal interpretation.

Concurring or dissenting decisions are not binding; however, they can act as "persuasive" authority that can guide future decisions. For example, in the 1993 *Rodriguez*[7] decision, Justice McLachlin (as she then was) wrote a dissenting opinion, which later influenced the majority decision in the 2015 *Carter*[8] decision dealing with medical assistance in dying. With some exceptions,[9] only the Supreme Court has the ability to change how courts are to interpret the law. However, there must be good reason for the Court to overrule a previous decision, such as a change in social realities or a different legal principle being raised.

Sometimes there can be multiple sets of concurring decisions. More concurring decisions can make it more difficult to understand the main point of a case. For example, in the 2018 *Mikisew Cree*[10] decision, the Supreme Court delivered a majority decision, and three sets of concurring decisions. While the overall conclusion remains the same across all four decisions, the fact that the judges were so divided on points of law provides less clarity or guidance for lawyers or lower courts who have to apply that law. An outcome like this can be contrasted with the decision delivered in *Bedford* in which all nine judges agreed.[11] A decision where all judges agree offers greater guidance and

[1] *Syndicat Northcrest v Amselem*, 2004 SCC 47.

[2] *Canada (Attorney General) v Bedford*, 2013 SCC 72 .

[3] *Toronto-Dominion Bank v Young*, 2020 SCC 15.

[4] This phrase indicates that Justice Lamer was not Chief Justice of the Supreme Court of Canada at this point in time. This phrase is used for judges that became Chief Justice later in their career, but still served on the Supreme Court before they became Chief Justice. This phrase is used later in this article in reference to Chief Justice McLachlin.

[5] *Reference re ss. 193 and 195.1(1)(C) of the Criminal Code (Man.)*, [1990] 1 SCR 1123, [1990] 4 WWR 481 .

[6] Halsbury's Laws of Canada, Civil Procedure (2017 reissue) at para 27.

[7] *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342.

[8] *Carter v Canada (Attorney General)*, 2015 SCC 5.

[9] "… [A] trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."; *Bedford*, *supra* note 2 at para 42.

[10] *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.

[11] *Bedford*, *supra* note 2.