

**THE TRANSNATIONAL JUDICIAL DIALOGUE OF  
THE SUPREME COURT OF CANADA AND ITS IMPACT**

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## ABSTRACT

Through personal interviews with ten current and former judges of the SCC, case analyses, a review of archival documents, and a quantitative examination of all judgments between 2000–2016, this study offers a comprehensive exploration of the mechanisms, extent, purpose, and effects of transnational judicial dialogue of the SCC and its justices. Contrary to expectations, SCC participation in this dialogue does not occur only through the citation of foreign judgments. Instead, the SCC incorporates almost all forms of non-domestic legal sources of both an international and a comparative nature (legal mechanisms). However, the judicial dialogue resulting from genuine engagement, interactions, and exchanges in “extra-curial” activities—which vary from face-to-face meetings to formal relationships and creating judicial organizations (extra-judicial mechanisms)—is far more extensive than the one that forms around legal mechanisms. Remarkably, judicial conversation occurs not only through courts as institutions but also through individual justices, who are increasingly becoming key actors. This study reveals that transnational judicial dialogue is part of the broader epistemic dissemination of knowledge, and its multifaceted development is driven by a set of reasons that are, on the one hand, pragmatic, historical, diplomatic, and universal, but are, on the other, individual, institutional, national, transnational, and global.

Significantly, this study finds both legal and extra-judicial forms of transnational judicial conversation may have tangible impacts on SCC decision-making. Judicial dialogue conducted through legal mechanisms sometimes directly influences resulting opinions. Judicial dialogue through extra-judicial activities also arguably influences decision-making, albeit indirectly. Although less noticeable, such interactions prompt the SCC to reference both a greater number and a higher quality of non-domestic legal sources. Another crucial finding is that transnational judicial conversations have a demonstrable impact on court management, other internal practices and procedures, and may also influence individual judges. Although beyond the aim of this study, the collected data suggest the effect of judicial dialogue reaches beyond the Court, having both a domestic and transnational/international influence. Finally, transnational judicial dialogue appears to be a significant factor fostering the evolution of the role of judges from interpreters of the law to policy-makers to their modern position as diplomats, networkers, and crucial actors in foreign relations, a role that certainly cannot continue without debate.

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*We shall not cease from exploration  
And the end of all our exploring  
Will be to arrive where we started  
And know the place for the first time.<sup>1</sup>*

## **CHAPTER 1 INTRODUCTION**

### **I. FOREWORD AND RESEARCH QUESTION**

My interest in judicial dialogue with foreign counterparts began when I was a judge in Europe. Whenever we needed to resolve a difficult case, in almost any field of law, it was normal, and indeed invaluable, to examine judgments of prestigious foreign or international/supranational courts. These judgments informed us how similar issues are resolved elsewhere; they also provided new perspectives that supplemented our knowledge, allowing us to better decide our issues at home.

The simple examining of judgments was not our only form of contact with non-domestic courts and judges. Increasingly, we judges, of all levels, were also meeting face-to-face with foreign colleagues from across the globe, visiting each other's courts, engaging in judicial training activities and conferences, and establishing and participating regularly in permanent transnational judicial associations. We also used modern technology to

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<sup>1</sup> T.S. Eliot, "Little Gidding", Four Quartets

communicate with one another, became part of electronic networks exclusive to judges, and even built friendships with many foreign colleagues. We felt we belonged to an ever-expanding community of judges who wanted to share their best practices. The interaction felt natural; our fundamental goal was to become a better judge at home.

As in other fields of human activity such as politics, science, sport, art, film, or music, in the judiciary, certain actors—courts and judges—have a global influence, and play starring roles. The Supreme Court of Canada (SCC), and several of its justices, are among the most well-known. The Court’s judgments and legal tests are often used as guidance. The speeches, academic papers, and general leadership of several individual judges of the SCC came to inspire many of us younger judges from across the world. When I moved to London to pursue an LLM in European Union (EU) Law, I met more foreign colleagues working at both the national and international level and realized the influence of the SCC and its justices was even more widespread.

Although my LLM thesis focused on the globalization of EU member states’ national courts, it was evident this phenomenon was not limited to Europe. What was happening among courts and judges (including myself) at the regional level in Europe was simply a portion of the broader dialogue occurring among courts and judges on every continent.

For my doctoral research, I chose to study the phenomenon of transnational judicial dialogue in the modern age of globalization. As a former judge who had been an actor in these conversations and networks, I both understood its significance and wanted to know more about it, and to share my findings with judges, academics, and the wider community. Conducting the research at Osgoode Hall in Toronto, Canada, allowed me to focus on the SCC.

I decided my study would be a comprehensive exploration of the phenomenon of transnational judicial dialogue of the SCC, its mechanisms, extent, purpose, and main effects.

The trick was conducting the research in a way that exposed and explained the process of judicial dialogue across all of its forms and directions. Many scholars have made important contributions through their work examining the exchange of citations of foreign judgments by the SCC. However, as I researched the subject further, I began to understand that the SCC also refers to other forms of non-domestic sources, such as international treaties, judgments of international courts, and even the constitutions and statutes of foreign nations. Hence, one of the goals of this study was to contribute to the existing scholarship by providing a comprehensive quantitative analysis that includes all forms of non-domestic legal sources used by the SCC.

Yet, my experience had taught me that courts and judges do not communicate solely through their judgments. The judicial dialogue occurring across borders and conducted amidst various settings often assumes different forms, from a diplomatic smile to a long-term friendship. To demonstrate the existence of the “extra-judicial” dimension of this dialogue—these types of “outside the courtroom” activities among courts and judges—was necessary, but collecting the data extremely challenging. The public websites of courts, media, and legal journals, as well as other online and publicly available materials, provide very little information about these types of meetings, keeping them almost entirely outside the public eye. Two other methodological instruments could reveal this kind of data: searching the archives of the SCC and interviewing as many current and former justices of the Court as possible. When I told one of my senior professors at Osgoode Hall that I needed not only to

search the archives of the SCC, but also interview several justices to discover their extrajudicial activities, her immediate answer was, “Good luck with that!” She spoke from experience: It would be extremely hard, or even impossible, to access the Court’s archives to find records of non-public activities. It would be even more difficult to interview SCC justices, let alone make them comfortable enough to speak personally with me about transnational judicial activities that often occur behind closed doors.

However, I was fortunate enough to achieve the near-impossible; not only accessing the archives of the Court, but interviewing ten SCC justices, four current and six former. The latter occurred thanks to the intervention and collaboration of several actors, including my supervisors and at least two judges of the SCC that I interviewed early in the project. The interviewed judges appreciated this comprehensive study that examined both the formal and non-formal dimensions of judicial dialogue, and to my surprise were very direct and quite open with me. They shared their personal stories and perspectives on transnational judicial dialogue. The justices also did not hesitate to speak about the impact of judicial dialogue on the Court’s decision-making, institutional management, and procedures, and even discussed their individual judicial philosophies.

To examine this topic and contribute to the existing academic literature, my research question is: Whether, to what extent, for what purpose, and through which mechanisms the Supreme Court of Canada participates in the process of transnational judicial dialogue over the past 17 years (2000–2016), and whether this phenomenon has affected the Court. For the purpose of this study, *transnational judicial dialogue* is defined as a global dynamic and unsystematic process of diverse horizontal, diagonal, and vertical interaction, cooperation, and

networking between courts and judges, beyond national borders, involving the exchange of substantive, procedural, ethical, and court management ideas and experiences, using a variety of both formal legal and extrajudicial mechanisms. These *formal legal mechanisms* or *juridical mechanisms* involve the use of non-domestic legal sources of an international and/or foreign nature in judicial decisions. Such mechanisms constitute the primary means by which judicial conversation and networking occurs, leading to the cross-fertilization and harmonization of jurisprudence across borders. *Extrajudicial mechanisms*, on the other hand, include the “extra-curial” (outside the courtroom) interactions of courts and judges (here the SCC and its justices), such as face-to-face meetings, participating in transnational associations of judges/courts, transnational judicial training activities, or judicial electronic networks.

In order to explore the above research question, I have structured this doctoral project as follows. In Chapter 2, by reviewing the current scholarship, I aim to uncover the process of transnational judicial dialogue, both theoretically and through existing studies on the practical participation of the SCC. In Chapter 3, I address the juridical mechanisms of dialogue by conducting a comprehensive quantitative analysis of all forms of non-domestic legal sources cited in all SCC cases in 2000–2016. In Chapter 4, I focus on the extra-judicial dimension of dialogue by providing an overview of interactions between the SCC and its justices with foreign counterparts. Chapter 5 presents an in-depth qualitative analysis of a specific case, *US v Burns*.<sup>2</sup> The goal is to examine whether the process of transnational judicial dialogue affected the outcome in *Burns*, by analysing the impact of both juridical and extra-judicial mechanisms. Finally, Chapter 6 will discuss the main impact of transnational judicial dialogue on the SCC and its individual justices. At the end of Chapter 6, I will speculate on the effects

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<sup>2</sup> *United States v Burns* [2001] 1 SCR 283.

of this development at the national, transnational, and international levels, the possible risks and pitfalls, and future developments. Finally, by focusing on what motivates judges to engage in such interactions, the study concludes with reflections on theories of transnational judicial dialogue.

By evaluating the existing studies in the field, undertaking a comprehensive search of all judgments issued in 2000–2016, analyzing individual judgments, accessing non-public data from the Court’s archives, and particularly through sharing the experiences and wisdom of ten SCC justices, this study makes a significant contribution to the stream of scholarship on the globalization of judiciaries. In presenting these diverse perspectives it reveals the various mechanisms of the transnational judicial dialogue of the SCC and its justices, sheds light on the dialogue’s extent and purpose, and attempts to reveal the possible effects of such a phenomenon.

## **II. THEORETICAL FRAMEWORK AND HYPOTHESIS**

The process of transnational judicial dialogue and the globalization of courts is an intricate one, involving many actors, mechanisms, and driving forces. As such, any singular theory used to explain it risks falling apart. Pure constitutional or general legal theories do not suffice, nor do pure sociological or political science ones.

Given this, my theoretical point of departure is the *global government networks theory* (GGNT). Ann-Marie Slaughter introduced and developed this model in her landmark 2004 book, “A New World Order”.<sup>3</sup> In my view, the GGNT model can be considered a substantive

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<sup>3</sup> Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) at 1, 4-6, 261.

part of a bigger picture, namely global governance theory.<sup>4</sup> According to Slaughter, we live in a new world order that is no longer governed by unitary states and international organizations.<sup>5</sup> Instead, the sovereignty of states is functionally disaggregated into the legislative, executive, and judiciary branches. States interrelate with each other not as unitary entities, but in a disaggregated modus, establishing global or regional government networks of legislators, administrators, and judges.

Despite the existence of these “global government networks,” Slaughter admits that the role of the state is still central to this new world order.<sup>6</sup> “The state is not disappearing; it is disaggregating”<sup>7</sup> by producing a “disaggregated sovereignty.”<sup>8</sup> In other words, a “legislative, executive and judicial sovereignty.”<sup>9</sup> At the national level, there is little or no disagreement that modern states allocate governance to the legislature, executive, and judicial powers. The same is happening, according to Slaughter, in transnational and international relations and activities. Thus, one of the biggest consequences of global government networks is the shift from a unitary state sovereignty to a disaggregated one, producing distinct legislative sovereignty, executive sovereignty, and judicial sovereignty.

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<sup>4</sup> Pascal Lamy, “Global Governance: From Theory to Practice” 15:3 *Journal Int’l Econ Law* at 721-728; Martin Hewson & Timothy J Sinclair, eds, *Approaches to Global Governance Theory* (Albany: State University of New York, 1999).

<sup>5</sup> Slaughter, *supra* note 3 at 5. She urges us to: “Stop imagining the international system as a system of states-unitary entities like billiard balls or black boxes-subject to rules created by international institutions that are apart from, “above” these states. Start thinking about a world of governments, with all the different institutions that perform the basic functions of governments-legislation, adjudication, implementation-interacting both with each other domestically and also with their foreign and supranational counterparts. States still exist in this world; indeed, they are crucial actors. But they are “disaggregated.” They relate to each other not only through the Foreign Office, but also through regulatory, judicial, and legislative channels.”

<sup>6</sup> *ibid* at 13-14.

<sup>7</sup> *ibid* at 32.

<sup>8</sup> *ibid* at 266.

<sup>9</sup> *ibid* at 268.

Using the above theoretical framework as my departing point of this study, I will focus on one branch of global governance: the judiciary; specifically, the global network of judges from the perspective of the SCC. In this study, I perceive the SCC as exercising sovereignty not only nationally but also in the transnational and international arenas. Whenever the SCC and its judges participate in transnational judicial dialogue and networks, through mechanisms that vary from face-to-face meetings to the signing of bilateral or multilateral agreements with foreign counterparts, the SCC is in fact exercising its judicial sovereignty. The SCC does so not only transnationally (in its relationships with foreign nations), but also at an international level, as the highest authority able to interpret international treaties in Canada. To what extent such a theoretical perspective explains the transnational judicial conversation of the SCC over the last 17 years remains to be seen. For the moment, it is sufficient to note that because this is an empirical study, it can contribute to the theory by testing it from the perspective of the SCC, using mainly deductive, but also inductive, reasoning.

The lens offered by GGNT allows me to consider the networking of courts as part of the bigger picture of today's global governance, which occurs through the interplay of several actors, factors, and networks. Second, it views the dialogue and interaction among courts not as an end in itself, but as the first step toward a more permanent and conscious process that creates transnational judicial networks. Such networks have great consequences for the national, transnational, and international legal orders. Third, the government networks theory allows for the study of transnational judicial dialogue and globalization of courts as a dynamic process rather than a static one.

It is important to note that the GGNT is not the only theoretical framework I will use, though it remains the departing point. Other theories I may draw on to make sense of the complexity of the dialogue, interactions, networks, and process of judicial globalization include “the moral universalism theory”, “the pragmatic theory”, “the historical imperative theory”, and “the organizational theory”. These additional theories will not only enrich the GGNT with other perspectives, but will also offer independent viewpoints on the complex process of transnational judicial interaction in general, and of the SCC and its judges in particular. I will expand on each of these theories in Chapter 2.

The hypothesis of this research comprises several sub-hypotheses. The first sub-hypothesis is that the process of transnational judicial dialogue, networking, and globalization of courts in general is dynamic and ongoing, and does not occur as the result of a single mechanism. Instead, the process happens through a variety of juridical and extra-judicial mechanisms that interact. The second sub-hypothesis theorizes that despite the reasonable, self-evident role of the SCC and its judges as the central actors of dialogue, other actors, seemingly “less direct” or “less primary,” are of real importance, and play a significant role in transnational judicial networking, interaction, and cooperation, including the exchange of substantive, procedural, and court management ideas and experiences. Finally, my most noteworthy sub-hypothesis is that transnational judicial dialogue has a significant impact not only on the substantive decision-making of the SCC, but also on its procedures, organization, and management. Overall, according to my hypothesis, transnational judicial dialogue should be viewed as a highly complex process that is driven by the relationship among several actors,

mechanisms, and factors, which significantly affects the SCC and others, including courts, around the world.

### **III. METHOD**

My research is interdisciplinary, spanning legal and socio-political disciplines. Such an approach is necessary as it corresponds with the hybrid nature of the transnational judicial dialogue process and the role of the SCC, whereas a solely legal, theoretical, or doctrinal analysis would risk falling short of adequately grasping the complicated nature of the topic. This research is empirical and comprises both quantitative and qualitative components.

This study is narrowed in scope based on timeline, jurisdiction, and actors. The timeline of my research is from January 1, 2000 to December 31, 2016. The rationale for making such a choice is based on several factors. First, a relatively long period is needed to better evaluate the transnational judicial dialogue of the SCC and its possible consequences. Second, from a global governance perspective, this period encompasses several important events relating to human rights and the rule of law. Third, this period also covers significant developments in all forms of globalization, world interconnectedness, the movement of population, goods and capital, technology, the Internet, and social networking websites.

*Jurisdiction and actors:* The primary jurisdiction of this study is Canada, and the key actor is the SCC. I concentrate on the SCC for several reasons. As mentioned above, the SCC is respected, both within and beyond Canadian borders, as a progressive constitutional court that promotes human rights and rule of law principles. Although a worldwide empirical study is lacking, it is widely accepted among scholars that the SCC is one of the courts most often cited by other national or international courts, particularly on human rights. In addition,

Canada is factually and historically well suited to the process of transnational judicial dialogue due to the presence of both common law and civil law in its legal system, its Commonwealth background, its multicultural society, and its broad participation in many international conventions, including its leading role in human rights. Moreover, its historical, cultural, and economic ties to both the United Kingdom and the United States, and the ties of Quebec with civil law systems, particularly France, have influenced its legal and court structure. Therefore, the SCC is one of the most suitable actors in the world for studying the process of global judicial dialogue and its possible impact.

In addition to the Court itself, key actors include for my purposes, all former and current justices that served in the SCC between January 1, 2000 and December 31, 2016.<sup>10</sup> This amounts to 21 individual judges, 8 current<sup>11</sup> and 13 former judges.<sup>12</sup> The Right Honourable Beverley McLachlin served until recently as Chief Justice,<sup>13</sup> whereas 20 operated as *puisne* justices.<sup>14</sup>

The methodological instruments that appear to be most useful in tracking the mechanisms of transnational judicial dialogue and networks of key actors, particularly the SCC, Chief Justice, and its *puisne* justices are *web-based research*, *case analysis*, *archival research*, and *interviews*. Case analysis is rather straightforward and is primarily used in

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<sup>10</sup> I deal with the rationale for considering individual judges as significant actors of transnational judicial dialogue in another chapter. See Chapter 2 “Understanding Transnational Judicial Dialogue From a Theoretical Perspective: An Overview of the SCC”.

<sup>11</sup> Current Judges: The Right Hon. Beverley McLachlin; The Hon. Rosalie Silberman Abella; The Hon. Michael J. Moldaver; The Hon. Andromache Karakatsanis; The Hon. Richard Wagner; The Hon. Clément Gascon; The Hon. Suzanne Côté; The Hon. Russell S. Brown.

<sup>12</sup> Former Judges: The Hon. Claire L'Heureux-Dubé; The Hon. Charles Doherty Gonthier; The Hon. Frank Iacobucci; The Hon. John C. Major; The Hon. Michel Bastarache; The Hon. William Ian Corneil Binnie; The Hon. Louise Arbour; The Hon. Louis LeBel; The Hon. Marie Deschamps; The Hon. Morris J. Fish; The Hon. Louise Charron; The Hon. Marshall Rothstein; The Hon. Thomas Albert Cromwell.

<sup>13</sup> Chief Justices, The Right Hon. Beverley McLachlin, since January 7, 2000.

<sup>14</sup> Supreme Court Act, R.S.C., 1985, c. S-19, s. 4. According to the Supreme Court Act, the court consists of nine judges: one Chief Justice and eight *puisne* judges.

Chapter 5, which focuses on the SCC case *US v Burns*.<sup>15</sup> The other instruments used to uncover the juridical and extra-judicial mechanisms of transnational judicial dialogue are more complex and will be explained in more detail below.

## 1. WEB-BASED RESEARCH

Web-based research is used to uncover not only the quantity of non-domestic legal sources cited by the SCC in its judgments, but also to shed light on the extra-judicial forms of conversation of both the SCC and its individual judges.

### 1. Researching Non-Domestic Legal Sources Used By The SCC (2000–2016)

In order to include all SCC decisions issued within the 17-year period, judgments were accessed through its official website, “Judgments of the SCC”, which is maintained by LEXUM.<sup>16</sup> A year-by-year search of SCC judgments was conducted, with each decision reviewed individually.<sup>17</sup> The following elements were sought within each judgment’s contents: field of law, judges who formed the majority and penned the decision, dissenting judges, all four categories of non-domestic legal sources (foreign case law; foreign constitutions, statutes and regulations; international case law; international treaties), and the scholarship used in each decision.

Fortunately, the text of SCC judgments now contains several of the above elements under the subheadings “Cases Cited,” “Statutes and Regulations Cited,” “Treaties and Other International Instruments,” and “Authors Cited.” Nonetheless, the “Cases Cited” sections of

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<sup>15</sup> *United States v Burns* [2001] 1 SCR 283.

<sup>16</sup> The judgements of the Supreme Court of Canada are available online at: <[http://scc-csc.lexum.com/scc-csc/scc-csc/en/nav\\_date.do](http://scc-csc.lexum.com/scc-csc/scc-csc/en/nav_date.do)> [hereinafter SCC Judgements].

<sup>17</sup> The researched materials exceed 50,000 pages.

all 1,223 decisions had to be reviewed on a case-by-case basis to identify all citations of foreign and international courts. Unfortunately, the judgments of other nations and of international courts referred in these decisions are still mixed with Canadian case law in the “Cases Cited” sections. Hence, to find them, all 24,509 cases (19,492 in majority decisions and 5,017 in dissents) cited during the 17-year period had to be checked. Then all non-Canadian cases had to be identified, matched with the appropriate jurisdiction (foreign national court or international), and then divided according to their domestic jurisdictions (highest court or lower court).

Another decision related to foreign case law involved the United Kingdom. The SCC formally became the Court of last resort for criminal appeals in 1933 and for all other appeals in 1949.<sup>18</sup> Prior to 1949, litigants could appeal to the Judicial Committee of the Privy Council. In these circumstances, British courts could not be considered “foreign” for the purpose of this study; therefore, all UK cases delivered before 1949 (and criminal cases before 1933) were excluded. Another decision had to be made regarding the name and jurisdiction of the highest UK court. On 1 October 2009, the United Kingdom transferred judicial authority away from the House of Lords, creating a Supreme Court for the United Kingdom (SCUK).<sup>19</sup> To accommodate this, the names and cases of both courts (the House of Lords and the SCUK) were included in the present study when counting precedents of the highest court of the United Kingdom.

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<sup>18</sup> The Supreme Court of Canada, “Creation and Beginnings of the Court”, online: <<http://www.scc-csc.ca/court-court/creation-eng.aspx>>.

<sup>19</sup> The Supreme Court, “History”, online: <<https://www.supremecourt.uk/about/history.html>>.

The Judicial Committee of the Privy Council (JCPC), one of the highest judicial bodies within the Commonwealth,<sup>20</sup> has limited domestic jurisdiction.<sup>21</sup> However, its primary role is as a supranational court. Therefore, for the purpose of this study, it appears on the list of “International and Supranational Courts.”

Yet another methodological decision involved the names of the highest courts of other nations. As the names and jurisdictions of these courts change over time,<sup>22</sup> as a group they will be referred to as “Highest Courts” for the sake of simplicity. In addition to the two highest UK courts (House of Lords and the Supreme Court of the UK), the only other foreign highest court that will be referred to by name (due to its special status in the Canadian legal community) is the Supreme Court of the United States (SCOTUS). All other highest courts that have seen their decisions used by the SCC will be referred to as the “Highest Court” of that particular nation. Meanwhile, during the research phase of this study, it was observed that the SCC often cites the lower courts of other nations, of first instance or appeal. Again, to stay focused and avoid confusion generated by these names, these types of ordinary courts have been labelled “Other Lower Courts” for each particular nation.

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<sup>20</sup> “The Judicial Committee of the Privy Council (JCPC) is the court of final appeal for UK overseas territories and Crown dependencies, and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee.” Judicial Committee of the Privy Council, online: <<https://www.jcpc.uk/>>.

<sup>21</sup> The Judicial Committee of the Privy Council hears UK domestic appeals from the Disciplinary Committee of the Royal College of Veterinary Surgeons; against certain schemes of the Church Commissioners under the Pastoral Measure of 1983; appeals from the Arches Court of Canterbury and the Chancery Court of York in non-doctrinal faculty causes; appeals from Prize Courts; disputes under the House of Commons Disqualification Act; appeals from the Court of Admiralty of the Cinque Ports; and appeals from the High Court of Chivalry. Judicial Committee of the Privy Council, “Role of the JCPC”, online: <<https://www.jcpc.uk/about/role-of-the-jcpc.html>>.

<sup>22</sup> For example, in South Africa, before the Constitutional Court was established in 1994, the highest structures of the judiciary were the Supreme Court and the Appellate Division. The Constitutional Court of South Africa, “History”, online: <<http://www.constitutionalcourt.org.za/site/thecourt/history.htm>>. See also, The High Court of Australia, “History of the Court”, online: <<http://www.hcourt.gov.au/about/history>>; The Supreme Court of New Zealand, “Supreme Court Established”, online: <[http://www.courtsofnz.govt.nz/about-the-judiciary/copy\\_of\\_overview/#supremeestab](http://www.courtsofnz.govt.nz/about-the-judiciary/copy_of_overview/#supremeestab)>.

When researching foreign citations, the “Statutes and Regulations Cited” sections of all 1,223 SCC judgments had to be checked manually due to the lack of separation of comparative laws from Canadian statutes and regulations. To find the comparative statutes and regulations, all 5,647 statutes and regulations used by the SCC had to be reviewed, identified, matched with the appropriate jurisdiction (nation state), and divided according to jurisdiction.

The only category of non-domestic legal sources that allowed for a more straightforward identification procedure was that of international treaties, which the SCC labels as “Treaties and Other International Instruments.” However, even this simpler approach was not always possible. Previously, international treaties were included under the category, “Statutes and Regulations”; it was only in 2005 that the SCC distinguished them under a separate subheading in a case penned by Justice Ian Binnie (the subheading was then titled “International Documents”).<sup>23</sup> This practice of separating international treaties is still followed, which helps not only the reader of SCC judgments but also the Court itself to be more self-reflective of the citation of international legal instruments as a distinct category of legal sources.

The collection of quantitative data relating to individual judges also required important methodological choices. First, all judges that served on the SCC between January 1, 2000 and December 31, 2016 had to be identified. As stated above, 21 individual judges were found to have served or are serving on the Court, of which eight are current and 13 are former judges. The next step was to look at all 1,223 decisions of the SCC to determine which judge penned

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<sup>23</sup> *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 SCR 425, 2005 SCC 70.

or contributed to each decision, with additional notes made regarding which judges penned decisions that cited non-domestic legal sources. Notes were kept on the types of non-domestic legal sources cited, and in which fields of law. Whenever the Court decisions provided detailed information on the judges who wrote the decisions and which non-domestic legal sources they cited, the information was attributed in the study's notes to that particular judge.

Of the separate sections used to formulate SCC decisions, only the "Cases Cited" category outlines how each judge contributed to the writing of the decision when more than one judge was involved; the "Statutes and Regulations" and "International Documents" sections do not provide this information. In the present study, the judges who appear in the "Case Cited" section have been recorded by name; the sections that do not provide this information have been attributed to the same judges and logged as "joined."

SCC judgments also contain information about cases cited by dissenting judges. Although the central focus of this research is the impact of non-domestic legal sources on the Court's judgments, it was decided to include the data on dissenting judges. The inclusion of dissenting opinions paints a broader picture of the engagement of individual judges with foreign legal sources. Moreover, such a choice allows for a more accurate count of the number of references of foreign legal sources by the SCC. In addition, occasionally dissenting judgments inspired by non-domestic legal sources prompt the Court change its previous practice and embrace transnational or international standards.

The SCC engages in conversation with scholars from across the globe. Here, the methodological choice involved how to count scholarship. SCC judgments have a separated section called "Authors Cited," in which academic articles, books, government reports, or

similar sources are listed. For this research, only academic sources, such as books or articles, were counted. In addition, sources were counted rather than authors. For example, in co-authored pieces, the piece itself was counted, not all the authors who contributed to that piece. No distinction was made between domestic and foreign scholarship. In an increasingly globalized and interconnected world, the difference between domestic and foreign scholarship is diminishing, and the nationality of scholarship has almost no relevance to judges using such sources.

## 2. Researching Extra-judicial Interacting Activities Of The SCC And Its Judges

“Web-based research” is one methodological instrument used to uncover the participation and contribution of the SCC and its judges to extrajudicial activities with foreign counterparts. The literature review and preliminary empirical findings for this study prompted the decision to distinguish the SCC as an institution from the individual justices of the Court. Such a distinction is essential to comprehending the complexity of transnational judicial dialogue and to understanding the process of judicial globalization in general.<sup>24</sup> In fact, during the collection of data, such a distinction was crucial to revealing the different mechanisms of judicial conversations.

Based on this distinction, web-based research was conducted using “The Supreme Court of Canada” and the names of the 21 former and current individual judges as keywords

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<sup>24</sup> Individual judges have to be conceptualized also as autonomous actors from the SCC as an institution, in transnational judicial interactions. The data in this Chapter will demonstrate that this distinction is not only theoretical, but also in practice. As the data will show, individual judges are actors who have the *discretion* and *decision-making capacity* to engage, or not engage, in judicial networking with other foreign courts and judges in different settings. For example, they meet face-to-face with foreign counterparts, establish and participate individually in transnational judges associations, training institutions, or use electronic networks.

in search engines and electronic databases.<sup>25</sup> This comprehensive exploration included the skimming of several thousands of web pages that appeared under these keywords. The significant sites visited include the official website of the SCC, websites of other highest national courts and international courts that appeared to have a relationship with the SCC, transnational court organizations and associations, transnational judicial training institutions, universities, judicial and social networking websites, daily newspapers, and academic journals. Notes were recorded on judicial biographies and materials relevant to transnational activities of the Court and individual judges and kept in a separate file for each of the above actors. The research revealed that beyond the SCC as an institution, several individual judges have directly or indirectly expressed their views on this process through academic papers, public speeches, public interviews, seminars, conferences, trainings, face-to-face meetings, and participation in judicial organizations. Thus, for the purpose of this research, all the above documents were primary sources.

## **2. ARCHIVAL RESEARCH**

Another method used to collect data about transnational extra-judicial activities of the SCC and its judges was archival research. The goal was to locate documents that reflect these types of activities with foreign or international courts and judges, such as minutes and final reports of meetings with foreign judges, documents about organizations in which the Court or its judges participate, documents about judicial trainings and conferences with foreign judges,

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<sup>25</sup> The two most popular search engines were used: Google and Yahoo. The search also includes legal electronic databases such as Westlaw and Quick Law, and official websites of courts and other organizations and judicial institutions.

and formal signed documents of relationships with other courts. Essentially, this was a search on the “foreign relationships” of the institution.

This was a challenging task, not only because of the hierarchy of the institution, and of the typology of documents that I was searching, but also because several current and former judges of the SCC that I interviewed confirmed that activities with foreign judges are confidential, generally informal, and minutes are rarely, if ever, kept.

In order to exhaust all possible means to check for this data, I followed the steps in the “Policy for Access to Supreme Court of Canada Court Records,” as published on the official website of the SCC.<sup>26</sup> I also wrote a formal request to a senior official of the SCC, explaining the project and asking whether data or documents about such activities existed in the archives of the SCC, and whether I could access them. The senior official responded and noted that generally, such activities are informal, almost no documents are produced, and most communications are electronic. However, the senior official searched the archives of the SCC, located existing relevant information, and provided me with two summarized written documents. The first was a list of the transnational judicial organizations and associations of which the SCC is a member, and the representatives of the Court in such organizations. The second was an explanatory document outlining how other forms of SCC interaction with foreign and international judges work. The senior official then invited me to the Court for a personal conversation on these matters, during which I was provided with another document, “Handbook of Best Practices for Registrars of Final/Appellate, Regional or International

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<sup>26</sup> Supreme Court of Canada, “Policy for Access to Supreme Court of Canada Court Records”, online: <<http://www.scc-csc.gc.ca/case-dossier/rec-doc/pol-eng.aspx>>.

Courts and Tribunals,”<sup>27</sup> to which the SCC contributed. Through the assistance of this senior official of the Court, I was able to access the archives of the SCC and collect these three crucial documents.

### 3. PERSONAL INTERVIEWS WITH CURRENT AND FORMER JUDGES

This was by far the most difficult methodological tool used to collect the necessary data. As other empirical studies concerning courts and judges have revealed, it is extremely challenging to obtain a sufficiently large and representative number of participants.<sup>28</sup> Interviewing judges of the highest court—that is, conducting “elite interviews”—means that the difficulty is even greater. Plainly speaking, the success of this research was dependent on the willingness of current and former judges of the SCC to participate. Although 21 judges fall within the timeframe of this study (8 current and 13 former), unfortunately, Justice Charles Gonthier is deceased, leaving 20 potential interviewees. Thanks to the intervention and collaboration of several actors, including my supervisors, and at least two judges of the SCC that I interviewed early on, I was able to interview ten current and former judges, or 50%. Eight were interviewed in person, one by phone, and one responded via email. I later met with this last judge in person.

In order to interview as many current judges of the SCC as possible, in addition to the snowball method, I sent a formal letter to each, introducing the project and myself and asking

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<sup>27</sup> Commonwealth Secretariat, *Handbook of Best Practice for Registrars of Final/Appellate, Regional and International Courts and Tribunals*, (Commonwealth Secretariat, London, 2012) [hereinafter Handbook].

<sup>28</sup> Concerning highest court judges, see: Elaine Mak, *Judicial Decision-making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts*, *Hart Studies in Comparative Public Law; Volume 3* (Oxford: Hart Publishing, 2013) at 62-63; Brian Flanagan & Sinéad Ahern, “Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges” (2011) 60 ICLQ 1; Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Oxford: Hart Publishing, 2011); Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Leiden, Boston: Martinus Nijhoff Publishers, 2014).

for an interview. I sent a similar note to the former judges, but via email. The goal was to personally inform all current and former judges that fall within the timeframe of this study about this project. The interviews were conducted between February 2016–October 2017.

One challenge was to ensure the interviews were representative; this required a balanced proportion of current and former judges. I succeeded in interviewing four of the eight current judges eligible for this study,<sup>29</sup> and six of the twelve former judges,<sup>30</sup> or 50% of each group.

I particularly wanted to interview judges who had served the Court for many years within the timeframe of this study (2000–2016). Without giving the names of the 10 judges, as not all agreed to be identified, the ten interviewed judges served 996 months of the 1806 months served by the 21 eligible judges, which constitutes 55.1%.

Another challenge was to be able to cover the entirety of the 17 years, which required interviewing judges that had served at different times during 2000–2016. The best scenario would be to be able to interview more than one judge for each year. Ultimately, not only did I

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<sup>29</sup> The SCC is comprised of nine justices. However, only eight of the current justices served prior to December 31, 2016: The Right Hon. Beverley McLachlin, The Hon. Rosalie Silberman Abella, The Hon. Michael J. Moldaver, The Hon. Andromache Karakatsanis, The Hon. Richard Wagner, The Hon. Clément Gascon, The Hon. Suzanne Côté, and The Hon. Russell S. Brown. The Hon. Malcolm Rowe was appointed on 28 October 2016 and his ceremony was held on 2 December 2016; therefore, he did not contribute to judgements delivered in 2016 and therefore falls outside the scope of this study. The Supreme Court of Canada, “Current Judges”, online: <<http://www.scc-csc.ca/court-cour/judges-juges/current-actuel-eng.aspx>>.

<sup>30</sup> There are 13 former judges that have served within the timeframe of this study: The Hon. Claire L'Heureux-Dubé, The Hon. Charles Doherty Gonthier, The Hon. Frank Iacobucci, The Hon. John C. Major, The Hon. Michel Bastarache, The Hon. William Ian Corneil Binnie, The Hon. Louise Arbour, The Hon. Louis LeBel, The Hon. Marie Deschamps, The Hon. Morris J. Fish, The Hon. Louise Charron, The Hon. Marshall Rothstein, and The Hon. Thomas Albert Cromwell. The Supreme Court of Canada, “Current and Former Judges”, online: <<http://www.scc-csc.ca/court-cour/judges-juges/cfpju-jupp-eng.aspx>>. However, The Hon. Charles Doherty Gonthier, was deceased on July 17, 2009, at the age of 80. The Supreme Court of Canada, “The Honourable Charles Doherty Gonthier”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=charles-doherty-gonthier>>.

find a justice to represent each year, but for each year I was able to interview at least five judges that sat on the Court.

One of my goals was to interview judges from different backgrounds, different legal systems (common law and civil law), and of different gender. Of the ten current and former judges interviewed, four represent the Province of Quebec, and six are from other provinces. In terms of gender, the interviewees represent proportionally the composition of the Court throughout the period, as six of the judges are men and four are women.

I also felt it necessary to interview judges that fall within the spectrum of each of the three categories that will be discussed in Chapter 3: “globalist,” “moderate globalist,” and “localist” judges. Although, in order to preserve their anonymity, I am unable to provide more details, I was able to interview judges from the entire spectrum.

Finally, it should also be noted that, although this study focuses on the SCC and its judges, a former SCC justice provided me the contact details of a former Canadian judge of a provincial court, who is the founder and administrator of an electronic judicial network. The purpose of the resulting interview was to better understand these types of interactions and networks, knowing they have been far from the eyes of the public. Several SCC judges have participated in this transnational network, making it particularly relevant.

A structured form of the questions used when interviewing the SCC judges can be found in Appendix 1.<sup>31</sup>

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<sup>31</sup> See Appendix 1 “Interview Questions”.

**CHAPTER 2**  
**UNDERSTANDING TRANSNATIONAL JUDICIAL**  
**DIALOGUE FROM A THEORETICAL PERSPECTIVE:**  
**AN OVERVIEW OF THE SCC**

**I. FOREWORD**

The goal of this chapter is twofold. First, to review the existing literature on the phenomenon of transnational judicial dialogue and more generally globalization of judiciaries; to identify, engage, and critically evaluate the ongoing academic conversations on this topic, and pinpoint gaps in the existing literature; and to discuss how this study relates to the literature. Second, to expose transnational judicial conversation and the primary theories behind it; to identify “how” this process is happening along with the main actors; and to evaluate “why” it is happening. In other words, to ascertain the principal driving forces that compel the SCC to participate in this dialogue.

**II. WHAT IS TRANSNATIONAL JUDICIAL DIALOGUE?**  
**— DEBATING THE DEFINITION**

Before debating the definition of “transnational judicial dialogue” (or “judicial globalization”, as some distinguished scholars label it), it is important to describe the broader existing factual and academic landscape within which it is taking place.

We live in the era of modern globalization, a development that is both dynamic and highly controversial; it engages many actors, factors, and mechanisms, and appears in various

fields and forms. As acknowledged by the United Nations General Assembly, globalization is “not merely an economic process but [one that] has social, political, environmental, cultural and legal dimensions.”<sup>32</sup> It is difficult to dispute Thomas Friedman’s prediction that the general process of globalization will profoundly affect law.<sup>33</sup> “Globalization of law may be defined as the worldwide progression of transnational legal structures and discourses along the dimensions of extensity, intensity, velocity, and impact.”<sup>34</sup> In other words, it includes the globalization of legal institutions and legal instruments at national and international levels.

Transnational judicial conversation amongst courts and judges from across the globe is at the core of this globalization of the judiciaries, which in itself constitutes a significant part of legal globalization. Moreover, the dialogue among courts is part of a wider epistemic dialogue and flow of information that is occurring in many fields.

Most scholars, when addressing the process of interaction and globalization of judiciaries, attribute the definition and description of this concept to Anne-Marie Slaughter’s landmark article, “Judicial Globalization,” from 1999.<sup>35</sup> She defines judicial globalization (JG) as a “diverse, and messy process of judicial interaction between courts and judges across, above, and below borders, exchanging ideas and cooperating in cases involving national as well as international law.”<sup>36</sup> However, she was not the first to have introduced JG to the academic and judicial community. Another prominent figure highly involved in exchanges with foreign judges, and later with the study of this phenomenon, is the Honourable Claire

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<sup>32</sup> Res Nr. 63/176, 20 March 2009, of The General Assembly of the UN on “Globalization And Its Impact On Full Enjoyment Of All Human Rights”, online: <<http://www.worldlii.org/int/other/UNGARsn/2008/199.pdf>>.

<sup>33</sup> Thomas L Friedman, *The World Is Flat: A Brief History Of The Twenty-First Century* (Farrar, Straus and Giroux, 2006) at 237, 411.

<sup>34</sup> Terence C Halliday & Pavel Osinsky, “Globalization of Law” (2006) 32 *Annu Rev Sociol* 447.

<sup>35</sup> Anne-Marie Slaughter, “Judicial Globalization” (1999-2000) 40 *Va J Int’l L* 1103 at 1104.

<sup>36</sup> *ibid* at 1104.

L’Heureux-Dubé, former SCC Justice. In 1998, at least a year before Slaughter, former Justice L’Heureux-Dubé referred to “judicial globalization” as a process that would be refined through “meeting face to face, building relationships and sharing ideas between judges from different jurisdictions.”<sup>37</sup> However, Slaughter’s article and corresponding definition of judicial globalization is the most widely cited.

Most scholars and judges who engage with the transnational judicial interaction and the globalization of judiciaries do not dispute Slaughter’s definition. They generally accept it as a given, although they sometimes use it interchangeably with synonymous concepts or replace it altogether. For example, Carl Baudenbacher, a Swiss academic, judge, and former President of the Court of Justice of the European Free Trade Association States (EFTA Court), considers JG a term “used to describe the phenomenon of high court judges (whether international, regional, or national) entering into a global conversation by referring to and borrowing from each other and—similar to political leaders—gathering information as they see each other at special meetings or even at summits.”<sup>38</sup> Hence, according to Baudenbacher, JG is the “global conversation” of courts. Meanwhile, Elaine Mak and Gianluca Gentili use the concept of JG throughout their paper, although they replace it with a synonym, “transnational judicial communication”.<sup>39</sup> The two acknowledge there are different labels applied to the process.<sup>40</sup>

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<sup>37</sup> The Honourable Claire L’Heureux-Dubé, “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court” (1998) 34:1 Tulsa LJ 15 at 26.

<sup>38</sup> Carl Baudenbacher, “Judicial Globalization: New Development or Old Wine in New Bottles?” (2003) 39 Texas Intl L J: Special Symposium: Globalization and the Judiciary 505 at 505.

<sup>39</sup> Gianluca Gentili & Elaine Mak, “The Supreme Court of Canada’s Transnational Judicial Communication on Human Rights (1982-2014)”, in Amrei Müller, ed. *Judicial Dialogue and Human Rights*, ed, Studies on International Courts and Tribunals (Cambridge: Cambridge University Press, 2017) 114.

<sup>40</sup> *ibid* at 114. (See footnote 3)

Justice Kathryn Neilson of the British Columbia Court of Appeal does not offer her own definition of JG, but simply refers to Slaughter’s definition.<sup>41</sup> Yet Neilson’s article does not embrace the full meaning of Slaughter’s definition, limiting it to the citation of foreign legal sources. This is significant because by not defining JG, many scholars, as will be seen below, make assumptions that appear to equate JG (in other words, the process of transnational judicial dialogue) with the citation of foreign judgments. In fact, as stated in Chapter 1, transnational judicial dialogue is a broad phenomenon that goes well beyond cross-citation.

It should be noted that perhaps even Slaughter’s definition of JG needs to be updated. In my view, it is still narrow, in that it does not encompass several essential elements, including its dynamism, the variety of mechanisms involved and actors that participate, and most importantly its impact. The definition of terms is particularly important in academic conversations. Scholarship centred on JG or judicial dialogue often uses the concepts interchangeably and excludes discussions of the terms. Consequently, scholars often use these terms to describe very different things.

Amrei Müller and Hege Elisabeth Kjos, editors of one of the most recent and comprehensive study on the phenomenon of judicial dialogue, define it as such:

Judicial dialogue is understood as the use of external judicial decisions by courts as an element of influence (even if very limited) in interpretation and application of the law. External judicial decisions include judicial decisions of foreign national and international courts, as well as of quasi-judicial UN human rights treaty bodies.<sup>42</sup>

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<sup>41</sup> Justice Kathryn Neilson, “‘Judicial Globalization’ – What Impact on Canada” (21 October 2009), online: [http://www.brandeis.edu/ethics/pdfs/internationaljustice/Judicial\\_Globalization\\_Neilson\\_Oct\\_2009.pdf](http://www.brandeis.edu/ethics/pdfs/internationaljustice/Judicial_Globalization_Neilson_Oct_2009.pdf) at 1.

<sup>42</sup> Amrei Müller and Hege Elisabeth Kjos, “Introduction”, in Amrei Müller, ed. *Judicial Dialogue and Human Rights*, ed, Studies on International Courts and Tribunals (Cambridge: Cambridge University Press, 2017) 1 at 12. This important volume is the result of the research project “International Law through the National Prism: The

The book is comprised of essays contributed by distinguished scholars in the field, and its editors acknowledge “outside the courtroom” engagement among courts and judges. Yet, while broad, its definition does not include these other forms of dialogue, and focuses primarily on the exchange of precedents. My own research contributes to the conversation by proposing a new and more comprehensive definition of “transnational judicial dialogue” as:

a global dynamic and unsystematic process of diverse horizontal, diagonal, and vertical interaction, cooperation, and networking, between courts and judges, beyond national borders, involving the exchange of substantive, procedural, ethical, and court management ideas and experiences, using a variety of both, formal legal and extra-judicial mechanisms.<sup>43</sup>

“Transnational judicial dialogue” is not the only term that is used to describe this development. As mentioned above, scholars have used a variety of terms, including, judicial internationalization,<sup>44</sup> judicial cosmopolitanism,<sup>45</sup> international judicial dialogue,<sup>46</sup> trans-judicial dialogue,<sup>47</sup> transjudicial communication,<sup>48</sup> transjudicialism,<sup>49</sup> transnational judicial

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Impact of Judicial Dialogue”, and a conference hosted by the University of Oslo on whether, how, when and why courts engage in judicial dialogues on human rights, and what is the purpose and effects of this practice.

<sup>43</sup> See Chapter 1 “Introduction”.

<sup>44</sup> Mak, *supra* note 28 at 2; Michel Bastarache, “How Internationalization Of The Law Has Materialized In Canada”, (2009) UNBLJ 190.

<sup>45</sup> Sam Muller & Sidney Richards, “Introduction: Highest Courts and Globalization” in Sam Muller & Sidney Richards, eds, *Highest Courts and Globalisation* (The Hague: Hague Academic Press, 2010) 4.

<sup>46</sup> Ronald J Krotoszynski, “‘I’d Like To Teach the World to Sing (In Perfect Harmony)’: International Judicial Dialogue and the Muses — Reflections on the Perils and the Promise of International Judicial Dialogue” (2006) 104 Mich L Rev 1321.

<sup>47</sup> Naomi Hart, “Complementary Protection and Transjudicial Dialogue: Global Best Practice or Race to the Bottom?” Int J Refugee Law (2016) 28 (2): 171-209; Birgit Peters, “The Rule of Law Dimensions of Dialogue between National Courts and Strasbourg”, in Machiko Kanetake & Andre Nollkaemper, eds, *The Rule of Law at the National and International Levels* (Hart Publishing, 2016).

<sup>48</sup> Anne-Marie Slaughter, “A Typology of Transjudicial Communication” (1994) 29:1 U Rich L Rev 99 at 100.

<sup>49</sup> Justice Sandra Day O’Connor, *Remarks at the Southern Center for International Studies 2–3* (28 Oct 2003), online: [http://www.southerncenter.org/Oconner\\_transcript.pdf](http://www.southerncenter.org/Oconner_transcript.pdf); Muller & Richards, *supra* note 45 at 4.

communication,<sup>50</sup> migration of constitutional ideas,<sup>51</sup> legal transplants,<sup>52</sup> judicial engagement with foreign law,<sup>53</sup> cross-pollination between jurisdictions,<sup>54</sup> or plainly, judicial dialogue.<sup>55</sup>

“Judicial dialogue,” a straightforward term, is perhaps most widely used. Adam Dodek uses judicial dialogue to refer to the JG process in his article, claiming that Slaughter was the first scholar to use the term in 1994.<sup>56</sup> Other notable authors who use the term of “judicial dialogue” include Claire L’Heureux-Dubé,<sup>57</sup> Sujit Choudhry,<sup>58</sup> and Ronald J. Krotoszynski Jr.<sup>59</sup>

Former Justice L’Heureux-Dubé’s idea of judicial dialogue influenced many scholars, many of whom cite this passage:

[A]s courts look all over the world for sources of authority, the process of international influence has changed from *reception* to *dialogue*. Judges no longer simply receive the cases of other jurisdictions and then apply them or modify them for their own jurisdiction. Rather, cross-pollination and dialogue between jurisdictions is increasingly occurring. As judgments in different countries increasingly build on each other, mutual respect and dialogue are fostered among appellate courts. Judges around the world look to each other for persuasive authority, rather than some judges being “givers” of law while others are “receivers.” Reception is turning to dialogue.<sup>60</sup> [Emphasis added]

“Cross-pollination” between jurisdictions is another key concept contributed by

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<sup>50</sup> Gentili & Mak, *supra* note 39 at 114.

<sup>51</sup> Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006).

<sup>52</sup> Muller & Richards, *supra* note 45 at 4.

<sup>53</sup> Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010); Muller & Richards, *supra* note 45 at 4.

<sup>54</sup> L’Heureux-Dubé, *supra* note 37 at 17.

<sup>55</sup> *ibid* at 17; Slaughter, *supra* note 48 at 100; Sujit Choudhry, “Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Adjudication” (1999) 74 Ind LJ 819 at 835-36, 855-65 (describing “dialogic interpretation”); Adam M Dodek, “Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities” (2009) 47 Sup Ct L Rev (2d) 445.

<sup>56</sup> *ibid* at 447 (Dodek). See also, Slaughter, *supra* note 48 at 100.

<sup>57</sup> L’Heureux-Dubé, *supra* note 37 at 26.

<sup>58</sup> Choudhry, *supra* note 55 at 835-36, 855-65.

<sup>59</sup> Krotoszynski, *supra* note 46.

<sup>60</sup> L’Heureux-Dubé, *supra* note 37 at 17.

L’Heureux-Dubé. According to this idea, courts in different countries increasingly build on each other’s jurisprudence, not only by fostering respect and dialogue among constitutional courts, but also by creating a common jurisprudence of human rights,<sup>61</sup> and as this study will show, in almost every other realm of law (such as constitutional law, commercial, economic and financial law, security law, and labour law). The common global jurisprudence that is continuously being established in various fields of law is not the product of a single national or international court, but is the outcome of cross-pollination and dialogue between constitutional and international courts around the world.

Ana Maria Guerra Martins and Miguel Prata Roque view transnational judicial dialogue as occurring in a multilevel network of constitutional courts.<sup>62</sup> This dialogue, they suggest, goes beyond conversations conducted by way of cross-citation of foreign precedents and extends to three different levels – “direct dialogue”, “mediated dialogue”, and “voluntary dialogue”. “Direct dialogue between courts” is defined as “formal cooperative proceedings, namely by the establishment of several judicial networks that are charged with activities like the exchange of information, organization of summits and conferences, editing of papers and books about Constitutional Law.”<sup>63</sup> In their view, this type of dialogue occurs among national constitutional courts and is “not so uncommon.”<sup>64</sup> It is comparable with what I label “extra-judicial” conversation among courts and judges.<sup>65</sup> The second type of dialogue, or what

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<sup>61</sup> Louis LeBel, “A Common Law of the World: The Reception of Customary International Law in the Canadian Common Law” (2014) 65 UNBLJ 3; Klodian Rado, “The Relationship between Judicial Globalization and Human Rights” (2015) 2 Transnat’l H R Rev, 103 at 130.

<sup>62</sup> Ana Maria Guerra Martins & Miguel Prata Roque, “Judicial Dialogue in a Multilevel Constitutional Network: The Role of the Portuguese Constitutional Court”, in Mads Andenas & Duncan Fairgrieve, eds, *Courts and Comparative Law* (Oxford: Oxford University Press, 2015) 300.

<sup>63</sup> Martins & Roque, *supra* note 61 at 304.

<sup>64</sup> *ibid* at 304.

<sup>65</sup> See Chapter 1 “Introduction”.

Martins and Roque call “mediated dialogue,” “expresses itself through the analysis and reception of other foreign courts’ jurisprudence.”<sup>66</sup> This dialogue is less direct, occurring through the cross-citation of decisions; it is partially what I label “formal legal” or “juridical dialogue.”<sup>67</sup> The third category is “voluntary dialogue,” which according to Martins and Roque occurs “through the reception of legal scholarship.”<sup>68</sup> As they note, in this type of dialogue “it is rather common to find plenteous quotations of foreign authors along the decisions of the Constitutional Courts.”<sup>69</sup>

Considering the above variety of terminology used by the existing scholarship, the new data revealed in this research, and my own contribution to the definition, for the purpose of this study I will use “transnational judicial dialogue” as the key term. This term is more self-explanatory and appears to be easier to grasp by a wide range of audiences. During the interviews, the justices of the SCC seemed more confident using this term than JG, which appears to be a more open-ended and vague concept. In addition, I should note that sometimes synonyms like “conversation” or “interaction” replace “dialogue” throughout this dissertation; however, the concept remains the same.

### **III. THEORIES ON TRANSNATIONAL JUDICIAL DIALOGUE**

Theories on judicial dialogue are significant for better understanding this phenomenon, and particularly its driving forces. Yet, as Olga Frishman observes, only “a few scholars have tried

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<sup>66</sup> Martins & Roque, *supra* note 61 at 305.

<sup>67</sup> See Chapter 1 “Introduction”.

<sup>68</sup> Martins & Roque, *supra* note 61 at 305.

<sup>69</sup> *ibid* at 305. See e.g. Iddo Porat, “The use of foreign law in Israeli constitutional adjudication” (2011) Tel Aviv University 3, online: <<http://www.clb.ac.il/uploads/Porat%20-%20Foreign%20Law%20-%20May%204.pdf>>; Mila Versteeg & David Law, “The Evolution and Ideology of Global Constitutionalism” (2011) 99 Calif L Rev 1116 at 1166–1177.

to conceptualize and theorize the transnational judicial dialogue.”<sup>70</sup> A brief review of their efforts follows.

Kenneth Kersch, in comparing American and European judges, argues that they have different reasons for their participation or non-participation in transnational judicial dialogue, which vary from practical to more theoretical.<sup>71</sup> Indeed, as my data will show, the reasons behind participating or not participating in this type of conversation might vary even within the same state among courts of different levels, among different courts of the same level, or even among different judges within the same court. In fact, even the reasons for participating in one, but not the other, form of transnational dialogue might also be very different. To understand the theoretical framework of SCC justices, they were asked about their reasons for participation, or lack thereof, during the interviews.<sup>72</sup>

In an article on the Supreme Court of the United States, Justice L’Heureux-Dubé outlines a number of reasons the legal community is becoming globalized. While some reasons are the same as those driving globalization in general, others are specific to the legal community. Of the latter, she asserts that the four primary reasons are (1) similar issues; (2) the international nature of human rights; (3) advances in technology; and (4) personal contact among judges.<sup>73</sup>

Slaughter highlights a number of reasons that drive judges and courts to participate in

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<sup>70</sup> Olga Frishman, “Should Courts Fear Transnational Engagement?” (2015) *Vanderbilt Journal of Transnational Law* 1 at 1, online: <<https://ssrn.com/abstract=2620944>>.

<sup>71</sup> Kenneth I Kersch, “The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law” (2005) 4:2 *Wash U Glob Stud L Rev* 345 at 373.

<sup>72</sup> See Appendix 1 “Interview Questions”. See also Chapter 6 “The Impact of Transnational Judicial Dialogue of the SCC”.

<sup>73</sup> L’Heureux-Dubé, *supra* note 37 at 23. Regarding technology and the judiciary see: Shirley S Abrahamson & Michael J Fisher, “All the World’s a Courtroom: Judging in the New Millenium” (1997) 26 *Hofstra L Rev* 273 at 291.

the process of JG, including international treaties, the globalization of commerce, and the need for judicial training.<sup>74</sup> She also discusses independence of the highest courts from the legislative and executive branches,<sup>75</sup> their desire for “empowerment,” and competition with other national or transnational courts for prestige and power.<sup>76</sup> Moreover, Slaughter argues that economic globalization and judicial cooperation in resolving transnational disputes also motivate courts to look to each other.<sup>77</sup> In this era of economic and cultural globalization, the number of transactions and transnational disputes are increasing. Such factors undoubtedly influence the process of transnational judicial conversation.

One particularly interesting idea is Slaughter’s concept of “transnational judicial cooperation” or the “judicial comity.”<sup>78</sup> She claims that JG is here to stay, and cites the formation of the Committee on International Judicial Relations, created as a foreign policy arm of the United States Federal Judiciary, as an example.<sup>79</sup> For the purpose of this research, I explored whether such a body exists in Canada. My findings indicate no similar committee exists, a fact that was confirmed by several current and former judges.

Finally, Slaughter considers the shared consciousness of judges as a core factor of JG.

She writes:

[J]udges see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders. This recognition is the core of judicial globalization, and judges, like the litigants and lawyers before them, are coming to understand that they inhabit a wider world.<sup>80</sup>

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<sup>74</sup> Slaughter, *supra* note 35 at 1104.

<sup>75</sup> *ibid* at 1105.

<sup>76</sup> *ibid* at 1107.

<sup>77</sup> *ibid* at 1113.

<sup>78</sup> Anne-Marie Slaughter, “Court to Court” (1998) 92 Am J Int’l L 708.

<sup>79</sup> Slaughter, *supra* note 35 at 1123.

<sup>80</sup> *ibid* at 1124.

In Slaughter's view, "[J]udges themselves who are meeting, reading, and citing their foreign and international counterparts are the first to acknowledge a change in their own consciousness."<sup>81</sup> This suggests that transnational judicial dialogue is a conscious process among national courts and judges, which is exercised through various forms of interaction at both institutional and judge-individual levels.<sup>82</sup>

The advancement of human rights, particularly in regards to international norms, is another reason why judges are participating in judicial dialogue with foreign counterparts, in the view of Justice Michael Kirby of the Australian High Court.<sup>83</sup> Indeed, there appears to be a strong relationship between judicial dialogue and human rights, as this study will show. The most obvious is the fact that the transnational judicial conversation, similar to other forms of globalization,<sup>84</sup> affects human rights by promoting and fostering related causes at national, transnational, and international levels. This is not a one-way relationship; human rights also have an impact on the process of JG. As I noted in a previous article, human rights "seem to be not only one of the main principles of the JG process, but also the spirit and the engine of it."<sup>85</sup>

Kersch identifies two strands of reasons influencing transnational judicial dialogue and the globalization of the judiciaries. The first strand, which is supported by other scholars, is the "historical imperative" of globalization.<sup>86</sup> Given the historical destiny of globalization in

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<sup>81</sup> Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44 Harv Int'l LJ 191 at 194.

<sup>82</sup> Slaughter, *supra* note 35 at 1113.

<sup>83</sup> Michael D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1998) 62 Austl LJ 514 at 515.

<sup>84</sup> Res. Nr. 63/176, *supra* note 18.

<sup>85</sup> Rado, *supra* note 61 at 111.

<sup>86</sup> Kersch, *supra* note 71 at 364. See also: Anne-Marie Slaughter, "Courting the World" (2004) Foreign Pol'y 78 at 78; Jonathan Ringel, "O'Connor Speech Puts Foreign Law Center Stage", *Fulton County Daily Report* (31 October 2003), online: <<http://www.dailyreportonline.com/id=1202552394856/OConnor-Speech-Puts-Foreign->

general, JG seems to simply be part of it. The second strand concerns the practical argument, or in other words, better judicial performance and decision-making. As Kersch states, “the argument here is simply that more information is better than less.”<sup>87</sup> Or, in Slaughter’s words, “A good idea is still a good idea, even if it comes from France.”<sup>88</sup> A number of other scholars, including judges, believe the practical argument to be an important one.<sup>89</sup>

The above views offer only a brief glimpse of the many theoretical opinions on transnational judicial dialogue. To better understand this process, I will provide an overview of the most important theories, which I have grouped into five categories: a) the global government networks theory (or diplomatic theory), b) the moral universalism theory, c) the pragmatic theory, d) the historical imperative theory, and e) the organizational theory.

#### **A. THE GLOBAL GOVERNMENT NETWORKS THEORY (DIPLOMATIC THEORY)**

As discussed in Chapter 1, this theory constitutes the departing point of this study. To avoid repetition, I will only touch upon the most important concepts here. This theory views transnational judicial conversation and collaboration as a process that leads to the establishment of global judicial networks, which are one of the primary mechanisms of global governance. Slaughter’s progressive views lead her to perceive the international legal order and relations through the lens of government networks, disaggregated states, and

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Law-Center-Stage?slreturn=20151018105739> at 1; Wiktor Osiatynski, “Paradoxes of Constitutional Borrowing” (2003) 1 Int’l J Const L 244 at 244-245.

<sup>87</sup> Kersch, *supra* note 71 at 365.

<sup>88</sup> Slaughter, *supra* note 86 at 78.

<sup>89</sup> Vicki C Jackson, “Yes Please, I’d Love to Talk With You” (2004) Legal Aff 43 at 43; Stephen G Breyer, The Supreme Court and the New International Law, “Speech to the American Society of International Law” (Apr 4, 2003), online: <[http://www.supremecourtus.gov/publicinfo/speeches/sp\\_04-04-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html)>; Gary Jeffrey Jacobsohn, “The Permeability of Constitutional Borders” (2004) 82:7 Tex L Rev 1763. Mak, *supra* note 28 at 2.

disaggregated sovereignty. Although she is not the only scholar to adopt this stance, her work is distinguished by her ability to set the theory within the bigger picture of global governance and the “new world order”. “Judicial foreign policy” is an essential element of her theory, in which “National and international judges are networking, becoming increasingly aware of one another . . . [and] are building a global community of law.”<sup>90</sup>

Other scholars and judges have expressed similar ideas.<sup>91</sup> Justice Stephen Breyer of the United States Supreme Court, in his recent book, devotes a chapter to “The Judge as Diplomat,” in which he explains the role of judges in modern times.<sup>92</sup> “Can members of our legal community (American judges) act effectively as “constitutional diplomats?” he asks. “Can American judges help their foreign counterparts further the rule of law itself?” and answers them in the affirmative.<sup>93</sup> Referring to public statements made by a former justice of the US Supreme Court, Justice Sandra Day O’Connor, Kersch rightly notes:

[A]t least some of the Court’s justices consider themselves peacemakers (*diplomats*) in this regard, and increasingly see themselves as ambassadors doing their part, through judicial globalization, to improve the reputation of United States abroad. Such a selfconception, among some members of a Court frequently noted for its attraction to aggrandizing its power, is a phenomenon worth noting in its own right.<sup>94</sup> [Emphasis added]

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<sup>90</sup> Anne-Marie Slaughter, “The Real New World Order”, (September - October, 1997), 76: 5 Foreign Affairs 183 at 186.

<sup>91</sup> Robert O Keohane & Joseph S Nye, “Transgovernmental Relations and International Organizations” (1974) 27:1 World Politics 39 at 41-43; Abram Chayes & Antonia H Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995) at 26-27; Wolfgang H Reinecke, *Global Public Policy: Governing Without Government* (Brookings Institution Press, 1998) at 127, 132-134.

<sup>92</sup> Stephen G Breyer, *The Court and the World: American Law and the New Global Realities*. 1<sup>st</sup> Ed, (New York: Alfred A Knopf, 2015). See Part IV at 247-281.

<sup>93</sup> Breyer, *supra* note 92 at 247-281.

<sup>94</sup> Kersch, *supra* note 71 at 354. See also, O’Connor, *supra* note 49.

Eyal Benvenisti extends the diplomatic theory further, calling for the empowerment of sub-state units, namely the legislature, executive branch, and the judiciary, to be able to enter into international agreements.<sup>95</sup> In other words, courts and judges would exercise judicial sovereignty not only nationally, but also transnationally and internationally, through participation in regional or global networks of courts and judges, and the signing of bilateral and multilateral international judicial agreements. It is for this reason that the theory of government networks can be considered one of the modes of global governance theory. Its main feature is that it conceptualizes global governance as horizontal and vertical networks of legislators, administrators, and judges, through which a more effective and just world system of governance can be achieved.<sup>96</sup>

This theory is also called the “diplomatic theory”, primarily by political scientists and international relations scholars,<sup>97</sup> who examine the diplomatic nature of the process.<sup>98</sup> In her academic writings, including her landmark book, “A New World Order”, Slaughter considers judges and courts to be important actors of modern diplomacy and transjudicial relations.<sup>99</sup> Other scholars, such as Thomas Keck<sup>100</sup> and Gary Jacobsohn,<sup>101</sup> look at the US Supreme Court’s modern activism through judicial diplomacy lenses.

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<sup>95</sup> Eyal Benvenisti, “Domestic Politics and International Resources: What Role for International Law?” in Michael Biers, eds, *The Role of Law in International Politics* (New York: Oxford University Press, 2000) 107 at 109.

<sup>96</sup> Slaughter, *supra* note 3 at 4-6, 13-14, 266, 269.

<sup>97</sup> For a full view of this theory as developed by political and international scientists, see: Paul Sharp, *Diplomatic Theory of International Relations* (Cambridge: Cambridge University Press, 2009).

<sup>98</sup> Mak, *supra* note 28 at 83-84.

<sup>99</sup> Slaughter, *supra* note 3 at 67-69, 131. For her previous ideas on this matter see also: Slaughter, *supra* note 35 at 113-114, 1123; Slaughter, *supra* note 81 at 205.

<sup>100</sup> Thomas M Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism*, 1st ed (Chicago: University of Chicago Press, 2004) at 48-54.

<sup>101</sup> Jacobsohn, *supra* note 89 at 1764 n. 12.

It is worth emphasizing that the diplomatic theory is taken seriously not only by scholars and individual justices, but also by institutions. Several constitutional courts, including very powerful ones, have begun to establish foreign relations offices.<sup>102</sup> The existence of such branches within courts highlights the growing exercise of diplomatic power by the judiciary. Furthermore, various highest courts, including the SCC, are increasingly entering into formal bilateral and multilateral agreements with their foreign counterparts and international courts, a development that will be discussed in Chapter 4 and 6.

## **B. THE MORAL UNIVERSALISM THEORY**

Moral universalism has a broader focus than the theory of global governance, and is mainly supported by philosophers and non-positivist-oriented constitutional theorists. According to moral universalism, as proposed by Kant and others,<sup>103</sup> the same universal standards of justice, ethics, and morals should apply to all humans situated in similar conditions. In law and justice, this theory is adapted as the “natural law school of thought”, or more concretely as the “constitutional theory of universal good”. According the latter, advanced by Ronald Dworkin,<sup>104</sup> the “universal good” is essential ground for promoting universal values of peace and justice.<sup>105</sup> If fundamental principles of justice and human rights values constitute the

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<sup>102</sup> See for example: The Federal Constitutional Court of Germany, online: <[http://www.bundesverfassungsgericht.de/EN/Das-Gericht/Beziehungen-zu-anderen-Gerichten/beziehungen-zu-anderen-gerichten\\_node.html](http://www.bundesverfassungsgericht.de/EN/Das-Gericht/Beziehungen-zu-anderen-Gerichten/beziehungen-zu-anderen-gerichten_node.html)>. For the US judiciary see, International Judicial Relations Committee of the Judicial Conference, established since 1993, online: <[http://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp\\_04-08-02a](http://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_04-08-02a)>.

<sup>103</sup> Immanuel Kant, *Grounding for the Metaphysics of Morals*, 3 ed, translated by James W Ellington (Indianapolis: Hackett, 1993); Richard M Hare, *The Language of Morals* (Clarendon: Oxford University Press 1991); Nelson T Potter & Mark Timmons “Morality and Universality: Essays on Ethical Universalizability” (1985) Faculty Publications - Department of Philosophy. Paper 23, online: <<http://digitalcommons.unl.edu/philosfacpub/23>>.

<sup>104</sup> Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985).

<sup>105</sup> Bruce Aune, *Kant's Theory of Morals* (Princeton, NJ: Princeton University Press, 1979).

universal good, then there is no reason to limit the participation of courts in transnational judicial conversation and networking to promote universal values of peace and justice.

Jeremy Waldron uses the well-known Roman concept *ius gentium* (law of nations) to argue for the broadening of the theory of universal good beyond international law, creating something like the “common law of mankind.”<sup>106</sup> To advocate for this broader understanding of *ius gentium* and its benefits to humanity, Waldron uses an analogy between the law of nations and the established body of scientific findings:

[T]his is exactly what *ius gentium* provided—the accumulated wisdom of the world on rights and justice. The knowledge is accumulated not from the musings of philosophers in their attics but from the decisions of judges and lawmakers grappling with real problems. And it was ‘accumulated’ not just in the crude sense of one thing adding to another, but in the sense of overlap, duplication, mutual elaboration, and the checking and rechecking of results that is characteristic of true science.<sup>107</sup>

Judges sharing the philosophy of moral universalism understand the world as naturally globalized, where humanity shares the same roots, and where justice, fairness, liberty, equality, and dignity are inalienable concepts of natural law, embodied within each human being. Therefore, the beliefs of every society should be heard in order to better understand these common grounds, particularly when we speak of delivering justice. Justice is universal, and the desire of the elite of society, such as judges and academics, to gain a comprehensive understanding of it is an imperative in the best interests of humanity. As will be seen in the coming chapters, such a view is shared by a few of the interviewed justices of the SCC.

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<sup>106</sup> Jeremy Waldron, “Foreign Law and Modern *Ius Gentium*”, in Mad Andenas & Duncan Fairgrieve, eds, *Courts and Comparative Law* (Oxford: Oxford University Press, 2015) 536 at 539.

<sup>107</sup> *ibid* at 544.

### C. THE PRAGMATIC THEORY

According to pragmatic theory, courts and judges engage in judicial conversation and networking for technical and problem-solving reasons. In other words, judges are driven by their need to resolve their domestic cases, and they look abroad to learn from the experience of their foreign colleagues. This may involve substantive, procedural, ethical, or court administration ideas. Making the pragmatic argument, Vicki Jackson argues that more information is always better than less.<sup>108</sup> It aids the problem-solving process, it assists the standard and aspirational interpretations, and it can even help make imperfect constitutions better through interpretation.<sup>109</sup>

Kersch builds off this argument,<sup>110</sup> stating that the fundamental question should not be whether it is good to look abroad for more ideas, but whether it is done properly and whether judges have the sufficient knowledge to do so.<sup>111</sup> This also concerns Justice Neilson, who admits that Canadian judges “lack ‘comparative literacy’ as well as institutional competence in international law.”<sup>112</sup>

Pragmatic arguments in favour of judicial dialogue across borders are often made by scholars,<sup>113</sup> but they are also put forth by judges, such as Justice Breyer of the US Supreme

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<sup>108</sup> Jackson, *supra* note 89 at 43.

<sup>109</sup> Breyer, *supra* note 89; Jacobssohn, *supra* note 89 at 1763.

<sup>110</sup> Kersch, *supra* note 71 at 365.

<sup>111</sup> *ibid* at 369.

<sup>112</sup> Neilson, *supra* note 41 at 28.

<sup>113</sup> Malcolm M Feeley & Edward L Rubin, *Judicial Policymaking and the Modern State: How the Courts Reformed America's Prisons* (Cambridge: Cambridge University Press, 1998) at 1-25, 348-349 (discussing the role of courts in the modern administrative state); Kersch, *supra* note 71 at 353 (discussing the judges as quasi-autonomous cosmopolitan administrators); Ken I Kersch, “The Synthetic Progressivism of Justice Stephen Breyer” in Earl M. Maltz, ed, *Rehnquist Justice: Understanding the Court Dynamic* (Lawrence, KS: University Press of Kansas, 2003) at 241-276 (discussing the nature of Justice Breyer’s pragmatism); Mak, *supra* note 28 at 5-6.

Court.<sup>114</sup> Another judge, Aharon Barak, former President of the Supreme Court of Israel, notes: “Law and court decisions, like the eagle have two ‘wings’, logic and experience. Like the eagle, they are stable only when they are moving with both ‘wings’.”<sup>115</sup> This well-reasoned idea closely resembles the pragmatic theory. In their struggle to comprehend the “logic” of law and discover its “experience,” courts have to be in conversation with other courts and learn from their practices. As this study shows, the pragmatic view is shared by the majority of the SCC judges.

#### **D. THE HISTORICAL IMPERATIVE THEORY**

Historical imperative theory also plays a role in explaining the phenomenon of transnational judicial conversation. According to this theory, we live in an era of general globalization, and the harmonization and globalization of judiciaries can be viewed as one aspect of this trend. In other words, general globalization is an “historical imperative” that courts cannot deny or resist. As mentioned above, Kersch identifies the “historical imperative” of globalization as one of the two strands of causes influencing transnational judicial dialogue and the globalization of the judiciaries.<sup>116</sup> Given the historical destiny of globalization in general, globalization of the judiciaries seems to simply be part of it.

Another way of examining this theory is from the perspective of past historical forces, and current waves of globalization. Baudenbacher consider history as very important factor in shaping the current trend and intensity of current judicial dialogue, by looking at the export of

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<sup>114</sup> Breyer, *supra* note 89.

<sup>115</sup> Aharon Barak, “Institutions, Constitutions Symposium: The Judiciary’s Role in the 21<sup>st</sup> Century” (Remarks delivered to the Osgoode Hall Law School, Osgoode Professional Development, Toronto, 27 September 2016).

<sup>116</sup> Kersch, *supra* note 71 at 364. See also: Slaughter, *supra* note 86 at 78; Ringel, *supra* note 86 at 1; Osiatynski, *supra* note 86 at 244-245.

laws in different points of history.<sup>117</sup> Ran Hirschl also in trying to explain the theory and factors of comparative citations among courts, consider “historical accounts of engagement with the constitutive laws of others” as one the first sources from which emanate the possible answers.<sup>118</sup>

The main force, however, is the general process of globalization, which according to Friedman has now entered in a “whole new era: Globalization 3.0” that “is shrinking the world from a size small to a size tiny”.<sup>119</sup> According to him, different from Globalization 1.0 where the dynamic force was countries globalizing, and Globalization 2.0 where the main force was companies, in Globalization 3.0 “the dynamic force . . . is the newfound power for individuals to collaborate”.<sup>120</sup> In this new circumstances, besides courts as institutions, judges as individuals have indeed found ways to go global easily. In Slaughter’s view, if American judges do not participate in the process of JG they risk being left behind by the sweep of history.<sup>121</sup> Yet, it is well known that globalization is also highly controversial, and in the last few years, the world appear to be entering a “new momentum” which some have gone as far as to consider it “deglobalization.”<sup>122</sup> Despite the controversies, this study shows that the historical imperative view is shared by a few of the interviewed SCC judges.

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<sup>117</sup> Baudenbacher, *supra* note 38 at 506.

<sup>118</sup> Ran Hirschl, “Judicial Review and the Politics of Comparative Citations: Theory, Evidence & Methodological Challenges” (28 May 2017). Forthcoming in: *Comparative Judicial Review* Erin F. Delaney and Rosalind Dixon, eds. (Edward Elgar, 2018), at 5. Available at SSRN: <https://ssrn.com/abstract=2975986>.

<sup>119</sup> Friedman, *supra* note 33 at 10.

<sup>120</sup> Friedman, *supra* note 33 at 10.

<sup>121</sup> Slaughter, *supra* note 86 at 78.

<sup>122</sup> Geoffrey G Jones, “We Are In A Deglobalization Period”, online:

<<http://www.livemint.com/Companies/tKamdGDvvyCt8Smn39TQMK/We-are-in-a-deglobalization-period-Business-historian-Geoff.html>; S J Babone, “Deglobalization” (2012) *The Wiley-Blackwell Encyclopedia of Globalization*, online: <<http://onlinelibrary.wiley.com/doi/10.1002/9780470670590.wbeog136/references>>.

## E. THE ORGANIZATIONAL FIELD THEORY

The organizational field theory is a concept that developed from its classical form<sup>123</sup> into the new institutionalism approach to organizational studies.<sup>124</sup> In general, there are four main components to the definition of organizational theory: relational systems, cultural-cognitive systems, organizational archetypes, and repertoires of collective action.<sup>125</sup> An organizational field comprises a group of organizations that see each other as performing similar social roles and that influence each other in a variety of ways. In later years, this theory has been developed to encompass law and legal institutions, including courts.

According to Frishman, four criteria show how this theory describes the latest developments in the transnational conversation among courts.<sup>126</sup> As she explains, “Nowadays courts interact with each other extensively, [hence] the communication between courts fulfills the first criterion of the process of structuration, and is therefore a strong indicator for the emergence of a transnational organizational field of courts.”<sup>127</sup> The second criterion is the “emergence of a sharply defined interorganizational structure of domination and pattern of

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<sup>123</sup> John W Meyer & Brian Rowan, “Institutional Organizations: Formal Structure as Myth and Ceremony” (1997) 83 Am J Sociology 340. In this classic article they provided an early statement of this approach. See also, Trish Reay & C. R. (Bob) Hinings, “The Recomposition of an Organizational Field: Health Care in Alberta” (2005) 26 Org Stud 351; Gerald F Davis & Christopher Marquis, “Prospects for Organizational Theory in the Early Twenty-First Century” (2005) 16 Org Sci 332. In the past organizational fields were referred to as institutional spheres, institutional fields, societal sectors, and institutional environment, see Mellissa Wooten & Andrew J Hoffman, “Organizational Fields: Past, Present and Future”, in Royston Greenwood et al, eds, *The Sage of Handbook of Organizational Institutionalism* (2008) 130 - 131.

<sup>124</sup> The new institutionalism approach belongs to the open systems model in organization theory. See, Henry L Tosi, “About Theories of Organization”, in Henry L. Tosi, ed, *Theories of Organization* (SAGE Publications, 2009) 1 at 15.

<sup>125</sup> Richard Scott, *Institutions and Organizations: Ideas and Interests* (3d. ed.) (Los Angeles: SAGE Publications, 2008) 85-87, 185-90.

<sup>126</sup> Olga Frishman, “Transnational Judicial Dialogue as an Organizational Field” (2013) 19 Eur LJ 739 (arguing that transnational judicial dialogue should be conceptualized as an organizational field).

<sup>127</sup> Frishman, *supra* note 70 at 20.

coalition.”<sup>128</sup> It is argued that a defined interorganizational structure is emerging, where some courts are considered dominant and leading courts. The third criterion, which includes the “Increase in the information load with which organizations (courts) in the field must contend,” addresses the amount of information to which courts are exposed. This consists of two types: the relevant information that courts are able to access, and the information that the courts have to take into account when making their decisions.<sup>129</sup> Finally, there is a “development of a mutual awareness among participants (courts) in a set of organizations that they are involved in a common enterprise.”<sup>130</sup> According to this criterion, courts see themselves as involved in a global community of judiciaries and as sharing the same goals. These developments “suggest that there are strong indications of the emergence of a transnational organizational field of courts.”<sup>131</sup>

Notably, unlike the others, this theory takes into account “three main ways in which courts and judges interact: face-to-face interactions, IT-based communication, and cross-citations.”<sup>132</sup> Moreover, it evaluates its possible effects on courts, emphasizing that this process causes “convergence between courts’ characteristics that is expected to negatively affect courts’ national social legitimacy.”<sup>133</sup>

As none of the above theories is fully developed, they provide only a starting point for analyzing transnational judicial dialogue and its influence. Except for the organizational theory, which appears to be more inclusive and acknowledges the effects of this process, they appear to do not fully map the different mechanisms of conversation between courts and

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<sup>128</sup> *ibid* at 20.

<sup>129</sup> *ibid* at 25.

<sup>130</sup> *ibid* at 27.

<sup>131</sup> *ibid* at 27.

<sup>132</sup> *ibid* at 15.

<sup>133</sup> *ibid* at 27.

judges, and arguably do not consider the possible consequences. Judicial conversation across borders can be better understood if both its *objective* (external) and *subjective* (internal) dimensions are analyzed. Although this is not a theoretical study, this research aims to shed light on each dimension. Externally, the empirical data demonstrate how the process occurs and show the different mechanisms from the perspective of the SCC and its justices. From an internal standpoint, the driving forces that prompt the SCC and its judges to participate in this process will be examined, and their primary effects will be explored. First, however, this chapter will consider the scholarly conversation that focuses on these topics, beginning with the objective dimension: the mechanisms that allow the transnational judicial dialogue to occur.

#### **IV. TRANSNATIONAL JUDICIAL DIALOGUE: THE LEGAL AND EXTRA-JUDICIAL MECHANISMS**

After exploring the theories regarding the process of transnational judicial dialogue, I will now shift to the scholarly debates regarding the role of the SCC. These debates are organized into two categories: a) The Historical Background of Transnational Judicial Dialogue in Canada; and b) The Primary Mechanisms of Dialogue used by the SCC.

## A. THE HISTORICAL BACKGROUND OF TRANSNATIONAL JUDICIAL DIALOGUE IN CANADA

Is the legal and judicial exchange a new development, or it is simply “old wine in new bottles”?<sup>134</sup> Two American comparativists, John Merryman and David Clark, state, “From ancient times . . . those wishing to establish a just legal system have sought inspiration and example from other lands.”<sup>135</sup> History has seen a number of periods in which the law has traveled across borders. During the age of colonization, English common law was exported to what is now known as the Commonwealth world, and the French Civil Code to Quebec, to other European countries, and to countries of Latin America. After World War II, US legal principles were disseminated to other parts of the world. During this time, many global and regional international organizations were established and treaties signed, which caused further harmonization and grounds for courts to look to one other. After the end of Cold War, another wave of legal globalization traveled across the globe, which has caused “convergence of many areas of the law.”<sup>136</sup> The spread of legal precedents from one court to another has been influenced by historical factors, and is simply part of the broader process of globalization of law.

Even the networking process, which is occurring among courts, is not specific only to judiciaries. Networks of government officials exist in many areas, including the legislative and executive, and “are a key feature of world order in the twenty-first century.”<sup>137</sup> Yet, even “government networks established for limited purposes such as postal and

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<sup>134</sup> Baudenbacher, *supra* note 38.

<sup>135</sup> John Henry Merryman & David S Clark, eds, *Comparative Law: Western European And Latin American Legal Systems: Cases And Materials* (Bobbs-Merill, 1978) 1.

<sup>136</sup> Baudenbacher, *supra* note 38.

<sup>137</sup> Slaughter, *supra* note 3 at 1.

telecommunications have existed for almost a century.”<sup>138</sup> Moreover, it is important to note that the exchange of precedents among judiciaries is part of the broad exchange of information and best practices among epistemic communities, including judges, and is certainly part of the process of the “globalization of the mind.”<sup>139</sup>

Besides this broader picture, and before looking at recent developments, it is helpful to examine the history of judicial conversations in Canada. As a matter of fact, it seems that the majority of scholarship is centred on the narrative of the citation of foreign precedents by the SCC, and rarely consider other forms of interaction. In addition, it is very likely that not all mechanisms of judicial dialogue have the same history. Some, such as the citation of foreign judgments, may have been used more widely, and may have a longer history, than, say, the use of electronic networks or the establishment of transnational judicial associations. Chapter 4 provides empirical data on each of these mechanisms of transnational judicial dialogue of the SCC. Here I provide a short chronicle of the primary mechanisms of dialogue outlined in the literature.

In general, the cross-citation of case law is quite common, particularly among colonial powers and their colonies. One of the best examples is the Commonwealth (formerly the British Empire), where the jurisprudence of the Judicial Committee of the Privy Council had a huge influence on former colonies from the nineteenth century until after the Second World War.<sup>140</sup> As with most of the highest courts in British colonies, the SCC was bound by the judgements and the jurisdiction of the Judicial Committee of the Privy Council, which did not

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<sup>138</sup> *ibid* at 10.

<sup>139</sup> Harry W Arthurs, “Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields” (1997) (Spec. issue) 12:2 CJSLS 219 at 223, 245-246.

<sup>140</sup> See, H Patrick Glenn, “The Use of Comparative Law by Common Law Courts in Canada”, in Canadian Comp. Law Ass'n & Quebec Soc'y of Comp. Law eds, *Contemporary Law/Droit Contemporain* (1994) 85 (discussing the use of foreign decisions by Canadian common law courts, including the SCC).

end until 1933 for criminal appeals, and 1949 for civil appeals.<sup>141</sup> Yet, as L’Heureux-Dubé observes, “[T]he influence of British jurisprudence on Canadian courts remained strong.”<sup>142</sup>

After the end of the Second World War, American influence increased across the globe. The US Supreme Court became an important point of reference for the SCC, although the influence was often not reciprocal. In the view of L’Heureux-Dubé, Canadian courts read and used American decisions much more regularly than American courts considered Canadian cases.<sup>143</sup> Justice Gérard La Forest, however, suggests that the number of American precedents increased particularly after the Charter.<sup>144</sup> A one-way pattern of the use of foreign precedents also occurred in the province of Quebec. Having also a civil law system, Quebec’s courts often used French precedents, even though their decisions were not observed with the same frequency in France.<sup>145</sup>

The scope of my research encompasses 2000–2016, so to determine whether the use of foreign precedents by the SCC has changed in recent years, I will use both original empirical research and secondary sources. Several scholars have observed that the number of foreign precedents cited by the highest courts, including the SCC, have not changed much throughout the years.<sup>146</sup> However, others note that, from a qualitative perspective, there is a difference. Both judges and academics point to a number of important features of the modern use of

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<sup>141</sup> See “Creation and Beginnings of the Court”, *supra* note 18.

<sup>142</sup> L’Heureux-Dubé, *supra* note 37 at 23.

<sup>143</sup> *ibid* at 23.

<sup>144</sup> Gérard La Forest, “The Use of American Precedents in Canadian Courts” (1994) 46 Me L Rev 211 at 212-213.

<sup>145</sup> L’Heureux-Dubé, *supra* note 37 at 17.

<sup>146</sup> TB Smith, “Legal Imperialism and Legal Parochialism” (1965) 10 Jurid Rev (New Series) at 39; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974); Alan Watson, “Legal Change: Sources of Law and Legal Culture” (1983) 131 U Pa L Rev 1121 at 1121-1146; Bijon Roy, “An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation” (2004) 62 UT Fac L Rev 99 at 103, 123-124; Peter McCormick, “American Citations and the McLachlin Court: An Empirical Study” (2009) 47 Osgoode Hall LJ 84 at 90-92; Dodek, *supra* note 55 at 447-448.

foreign case law.<sup>147</sup> These include “the identity of the participants, the interactive dimension of the process, the motives for transnational borrowings, and the self-conscious construction of a global judicial community.”<sup>148</sup> Such features are relevant to the modern process of transnational judicial conversation in which the SCC engages. A more comprehensive view of the modern features of this process will be outlined in the next chapters, after analyzing the current empirical data and the views of justices and former justices of the SCC. Former L’Heureux-Dubé notes, “[T]he process of international influence has changed from *reception* to *dialogue*.”<sup>149</sup> She also observes, “[J]udges no longer simply *receive* the cases of other jurisdictions and then apply them or modify them for their own jurisdiction.”<sup>150</sup> Instead, judges of the highest courts are engaging in “crosspollination and dialogue,” building on each other's opinions in a way that advances “mutual respect and dialogue . . . among appellate courts.”<sup>151</sup>

Another distinctive feature of the modern era of judicial dialogue of the SCC is the creation of the Canadian Charter of Rights and Freedoms. After the Charter, “the Supreme Court could decide social, economic and political issues that affect every Canadian. Now the Supreme Court began to run our lives,” emphasizes Philip Slayton, a Canadian lawyer, academic, and best-selling author.<sup>152</sup> In subsequent sections, I analyze the role of the Charter in the dialogue process. For the purpose of this section, it is sufficient to note that the Charter

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<sup>147</sup> L’Heureux-Dubé, *supra* note 37 at 17; Choudhry, *supra* note 55; Vicki C Jackson & Mark Tushnet, *Comparative Constitutional Law*, Vol. 1 (Foundation Press, 1999) at 153-189; Abrahamson & Fisher, *supra* note 73; Frederick Schauer, “The Politics and Incentives of Legal Transplantation” in Joseph S Nye & John Donahue, eds, *Governance in a Globalizing World* (Washington DC: Brookings Institution Press, 2000) 253.

<sup>148</sup> Slaughter, *supra* note 81 at 195.

<sup>149</sup> L’Heureux-Dubé, *supra* note 37 at 17.

<sup>150</sup> *ibid* at 17.

<sup>151</sup> *ibid* at 17.

<sup>152</sup> Philip Slayton, *Mighty Judgment: How the Supreme Court of Canada Runs Your Life* (Penguin Group Canada, 2011) at 35.

is a key development in understanding the background of the process of transnational judicial conversation in Canada. Therefore, dividing the historical timeline into pre-Charter and post-Charter periods would create an important distinction needed when analyzing the process of this dialogue of the SCC.

## **B. THE PRIMARY MECHANISMS OF TRANSNATIONAL JUDICIAL DIALOGUE USED BY THE SCC**

In this study, “mechanisms” refers to the variety of tools and modalities that courts, judges, and other actors use to participate in the process of transnational judicial dialogue. To remain focussed, I limit myself to the main mechanisms that the SCC and its judges use to engage in conversation and to establish or develop judicial networks with other foreign judges and courts. The identification of such mechanisms remains one of the most important challenges for my doctoral research. These mechanisms are highly interconnected, involve almost every field of law, and vary from face-to-face meetings with foreign judges to the harmonization of their judgments. However, as mentioned in the “Introduction” for the purpose of this dissertation, I have limited my analysis to two types of mechanisms critical to the process of transnational judicial dialogue: “juridical mechanisms” and “extra-judicial mechanisms”.

To reveal this phenomenon, which arguably occurs through the interplay of both juridical and extra-judicial tools, I conducted empirical research on both types of mechanisms.<sup>153</sup> In order to uncover and better comprehend such mechanisms, this chapter will map and identify the main academic conversations that empirically demonstrate several of the

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<sup>153</sup> See Chapter 3 “The Use of Juridical Mechanisms by the SCC: A Quantitative Analysis of Cases (2000-2016)”; See also, Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

transnational interactions of the SCC and its justices. I have grouped their activities into the following subcategories: 1) Citation of foreign judgments by the SCC; 2) Face-to-face meetings of SCC judges with other foreign judges; 3) Participation in global and regional associations; 4) Participation in transnational electronic networks and information systems; and 5) Participation in transnational judicial education and training institutions.

## 1. CITATION OF FOREIGN JUDGMENTS BY THE SCC

There are an impressive number of academic works on the engagement of the SCC with foreign case law.<sup>154</sup> This interest is mainly explained by the excellent reputation of the SCC in

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<sup>154</sup> Although this is a long list of this type of scholarship, it is certainly not exhaustive. The list below is comprised by some of the most distinguished pieces on the field. See e.g.: Gianluca Gentili, “Canada: Protecting Rights in a ‘Worldwide Rights Culture’ – An Empirical Study of the Use of Foreign Precedents by the Supreme Court of Canada (1982-2010)” in Tania Groppi & Marie-Claire Ponthoreau, eds, *The use of Foreign Precedents by Constitutional Judges* (Oxford: Hart Publishing, 2013) 39; Gianluca Gentili, “Enhancing Constitutional Self-Understanding through Comparative Law: An Empirical Study of the Use of Foreign Case Law by the Supreme Court of Canada (1982-2013)” in Mads Andenas & Duncan Fairgrieve, eds., *Courts and Comparative Law* (Oxford: Oxford University Press, 2015) 378; Adam M Dodek, “Canada as Constitutional Exporter: The Rise of the ‘Canadian Model’ of Constitutionalism” (2007) 36 Sup Ct L Rev (2d) 309; Dodek, *supra* note 55; Adam M Dodek, “The Protea and the Maple Leaf: The Impact of the *Charter* on South African Constitutionalism” (2004) 17 NJCL 353; Anne Warner La Forest, “Domestic Application of International Law in Charter Cases: Are We There Yet?” (2004) 37:1 UBC L Rev 157; Beverley McLachlin, “Decision-making in the SC” (2007) 56 UNBLJ 328; Beverley McLachlin, “The Charter of Rights and Freedoms: A Judicial Perspective” (1988–1989) 23 UBC L Rev 579; Roy, *supra* note 146; Christopher McCrudden, “A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights” (2000) 20 Oxford J Legal Stud 499; Christopher P Manfredi, “The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms” (1992) 40 Am J Comp L 213; Christopher P Manfredi, “The Use of United States Decisions by the Supreme Court of Canada under the Charter of Rights and Freedoms” (1990) 23 Can J Pol Sci 499; CL Ostberg & Matthew E Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007); Claire L’Heureux-Dubé, “Two Supreme Courts: A Study in Contrast” in Marian C McKenna, ed, *The Canadian and American Constitutions in Comparative Perspectives* (Calgary: Calgary University Press, 1993); Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008); Mak, *supra* note 28; Gentili & Mak, *supra* note 39; ER Alexander, “The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms” (1990) 40 UTLJ 1; FM Bevilacqua, *The Supreme Court of Canada: A Politically Legal Role: A Study of the Policy-Making Role of the Courts and the Impact of the Canadian Charter of Rights and Freedoms* (Kingston (Ontario): Queen’s University, 1990); Gérard La Forest, “The Use of International and Foreign Material in the Supreme Court of Canada” (1988) 17 Can Council Int’l L Proc 230; Gérard La Forest, “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996) 34 Can YB Int’l L 89; La Forest, *supra* note 144; Gib van Ert, *Using International Law in Canadian Courts*, 2d ed (Toronto: Irwin Law, 2008); H Patrick Glenn, “The Use of Comparative Law by Common Law Courts in Canada”, in Canadian Comp. Law Ass’n &

the global arena. Although all these studies are certainly important for better understanding this phenomenon, as mentioned above, several authors equate the concept of transnational judicial dialogue with the citation of foreign case law and use them interchangeably, or minimize the dialogue as happening only through the citation of foreign precedents.<sup>155</sup> This section addresses few of the most notable studies on the field.

Many scholars, not only those from a Canadian background, consider the SCC a global frontrunner in the process of transnational judicial interaction, particularly in regards to the citation of foreign judgments. However, this has not always been so. In a theoretical article based on earlier literature, Hirschl argues that before the mid-twentieth century, the most prestigious exporting court was the United Kingdom; from the mid-twentieth century to its end, the main reference shifts from the United Kingdom to the United States; the United States then declines in influence after the end of the twentieth century.<sup>156</sup> At this time, the

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Quebec Soc'y of Comp. Law eds, *Contemporary Law/Droit Contemporain* 85 (1994); Ian S Bushnell, "The Use of American Cases" (1986) 25 UNBLJ 157; JM McIntyre, "The Use of American Cases in Canadian Courts" (1964) 2 UBC L Rev 478; Louis LeBel & Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002) 16 Sup Ct L Rev (2d) 23; LeBel, *supra* note 61; Michel Bastarache, "The Globalisation of the Law and the Work of the Supreme Court of Canada" in Sam Muller & Sydney Richards, eds, *Highest Courts and Globalization* (The Hague: Hague Academic Press, 2010) 41; McCormick, *supra* note 146; Peter McCormick, "Assessing Leadership on the Supreme Court of Canada: Towards a Typology of Chief Justice Performance" (1993) 4 Sup Ct L Rev 409; 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 Osgoode Hall LJ 75; Rebecca Lefler, "A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, The Supreme Court of Canada and the High Court of Australia" (2001) S Cal Interdisc LJ 165; Robert Harvie & Hamar Foster, "Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the Charter" (1990) 28 Osgoode Hall LJ 729; Stephen J Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001) 80 Can Bar Rev 535; Sujit Choudhry, "Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory" (2007) 5 Int'l J Const L 606.

<sup>155</sup> See e.g. David S Law & Wen-Chen Chang, "The Limits of Global Judicial Dialogue" (2011) 86 Wash L Rev 523; Choudhry, *supra* note 154.

<sup>156</sup> Hirschl, *supra* note 118 at 3; See also, Pradyumna K Tripathi, "Foreign Precedents and Constitutional Law." (1957) 57 Columbia Law Review at 319–47; David Law & Mila Versteeg, "The Declining Influence of the United States Constitution." (2012) 87 New York University Law Review at 762; Sheldon Lyke, "Brown Abroad: An Empirical Analysis of Foreign Judicial Citation and the Metaphor of Cosmopolitan Conversation" (2012) 45 Vanderbilt Journal of Transnational Law 83; Kim Lane Scheppele, "Aspirational and Aversive

three most frequently cited courts in the world became the European Court of Human Rights (ECtHR), the German Federal Constitutional Court, and the Supreme Court of Canada.<sup>157</sup>

The SCC is perceived not merely as an active participant in this process, but as a global leader. According to Gentili and Mak, who are experts in the field, the SCC “has established itself as one of the most progressive constitutional judiciaries worldwide ... [and] appears to be at the forefront of judicial globalisation when it comes to its transnational connections with other courts.”<sup>158</sup> Their conclusion is based on a quantitative general overview of the SCC’s references to foreign case law from 1982–2014,<sup>159</sup> and a quantitative analysis of the trends of SCC citation of foreign case law.<sup>160</sup> They also qualitatively analyze the reasons for this frequency citation and its development over time, particularly regarding the “limitations clause.”<sup>161</sup> Their conclusions are significant because they are based on their previous individual empirical work on the SCC.<sup>162</sup>

Frederick Schauer agrees that the “ideas and constitutionalists of Canada have been disproportionately influential,” in part because “Canada, unlike the United States, is seen as reflecting an emerging international consensus rather than existing as an outlier.”<sup>163</sup> Slaughter, too, demonstrates the same respect for the SCC.<sup>164</sup> When trying to identify the most influential

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Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models” (2003) 1 International Journal of Constitutional Law 296; Sujit Choudhry, “The Lochner Era and Comparative Constitutionalism” (2004) 2 International Journal of Constitutional Law 1.

<sup>157</sup> Hirschl, *supra* note 118 at 3.

<sup>158</sup> Gentili & Mak, *supra* note 39 at 114.

<sup>159</sup> *ibid* at 124. (See Section 4.3.1.1)

<sup>160</sup> *ibid* at 131. (See Section 4.3.2)

<sup>161</sup> *ibid* at 137. (See Section 4.3.4)

<sup>162</sup> See, Mak, *supra* note 28; Gentili, *supra* note 154.

<sup>163</sup> Schauer, *supra* note 147.

<sup>164</sup> Slaughter, *supra* note 81 at 198; Anne-Marie Slaughter, “A Brave New Judicial World” in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 277 at 289.

“donor” or “lender” of judicial precedents in recent years, she names the SCC as a highly influential court, even more so than the US Supreme Court.<sup>165</sup>

Other scholars have praised the SCC’s judicial communication and influence in the global arena. In 2008, after conducting an empirical study on the use of foreign judgments by Australian State Supreme Courts over the last 40 years, Russell Smyth discovered that the citation of Canadian cases in Australia had increased to the point where only the citation of New Zealand cases was greater, whereas the citation of American cases had decreased.<sup>166</sup> In an empirical study on the citation of overseas authorities in rights litigation in New Zealand, James Allan, Grant Huscroft, and Nessa Lynch revealed that Canadian courts, particularly the SCC, are cited by New Zealand courts far more than those from any other jurisdiction, and twice as often as American cases. In their view, Canadian judges are “the most judicially activist in the common law world—the most willing to second guess the decisions of the elected legislatures.”<sup>167</sup>

However, other scholars, including those of Canadian origin, are more skeptical and critical of the role of the SCC. Gib van Ert, who recently served as Executive Legal Officer of the Supreme Court of Canada,<sup>168</sup> voices a common critique; namely, that the SCC shows “an inconsistent and even unintelligible approach to international human rights and their sources.”<sup>169</sup> He adds that the Court has failed to develop a theoretical basis to guide other courts and counsel in the use of such law. Meanwhile, Jutta Brunnée and Stephen Toope

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<sup>165</sup> Slaughter, *supra* note 3 at 74.

<sup>166</sup> Russell Smyth, *Citations of Foreign Decisions in Australian State Supreme Courts Over the Course of the Twentieth Century: An Empirical Analysis* (2008), online: <[http://works.bepress.com/russell\\_smyth/1](http://works.bepress.com/russell_smyth/1)>.

<sup>167</sup> James Allan, Grant Huscroft & Nessa Lynch, “The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite” (2007) 11 *Otago L Rev* 433.

<sup>168</sup> Supreme Court of Canada, “New Release 12 August 2015”, online, <https://scc-csc.lexum.com/scc-csc/news/en/item/4969/index.do>

<sup>169</sup> van Ert, *supra* note 154 at 326

consider Canadian judges (including the SCC) too conservative. In their view, “Canadian courts seem to be embracing international law, employing fulsome words of endearment, but the embrace remains decidedly hesitant and the affair is far from consummated.”<sup>170</sup> Professor Anne Bayefsky criticizes Canadian judges in general for inaccurate use of international law:

While judicial enthusiasm for using international human rights law has grown dramatically since the advent of the *Charter*, judicial comprehension of public international law has not. The references to international law include many examples of basic errors. Canadian courts have spoken of ratification of General Assembly or ECOSOC Resolutions, and ratification of treaties by provinces. They have misstated the jurisprudence of the European Convention on Human Rights, confused the European Court of Human Rights with the European Court of Justice, identified Canada as a signatory to the European Convention on Human Rights.<sup>171</sup>

Bijon Roy, in an empirical study conducted in 1998–2003, shows that the SCC used few international instruments or foreign jurisprudence in reaching its decisions. According to this study, 34 of the 402 cases referenced foreign sources; half were from American jurisprudence, and most of the rest from other Commonwealth countries. Qualitatively, Roy found that the SCC followed foreign jurisprudence only in one case, and half of the cases were categorized as merely “supportive.”<sup>172</sup> Roy asserts that the SCC recognizes the danger of adopting excessive foreign jurisprudence, which is why it is unwilling to treat such judgments as authoritative. Nonetheless, Roy acknowledges the open-minded approach of the SCC to the consideration of foreign and international sources, despite its strongly grounded approach to domestic law.

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<sup>170</sup> Jutta Brunnée & Stephen J Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002) *Can YB Int’l L* 3 at 4.

<sup>171</sup> Anne F Bayefsky, “International Human Rights Law in Canadian Courts” in Benedetto Conforti & Francesco Francioni, eds, *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff Publishers, 1997) 295 at 325.

<sup>172</sup> Roy, *supra* note 146.

Peter McCormick is another Canadian scholar who is skeptical of the role of the SCC in the process of judicial dialogue. “We are told that this is an age of judicial globalization, characterized by an international community of judges who are more aware of each other and more engaged in active communication and interaction than ever before,” McCormick states at the beginning of his article.<sup>173</sup> Nonetheless, he argues, “[I]f there are universalist tendencies buried in some of the ‘global community’ rhetoric,<sup>174</sup> Canadian judges are not responding to them.”<sup>175</sup> He bases this conclusion on the current citation practice of the SCC, looking at the number of citations of foreign judicial authorities, and considers the talk of a “global community of judges” to be “somewhat overblown.”<sup>176</sup>

McCormick also claims that the SCC generally cites old cases. For example, he argues that when citing American judgments the SCC relies on cases from the Burger or Rehnquist courts written, in other words, judges now retired or deceased. As a result, McCormick questions how genuine transnational judicial dialogue is among current judges, which Dodek also contemplates.<sup>177</sup> These arguments regarding the “oldness” of the foreign cases cited is in line with my assertion that the dialogue with foreign courts occurs not only through the citation of foreign case law. Instead, it is taking place through other mechanisms, which I investigate empirically in this study.

Elsewhere, Dodek admires the role of the SCC in promoting the “Canadian model of constitutionalism” abroad and exporting its case law and Charter ideals to other jurisdictions

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<sup>173</sup> McCormick, *supra* note 146 at 84.

<sup>174</sup> For ideas about “universalist” tendencies build through courts see: David M Beatty, *The Ultimate Rule of Law* (New York: Oxford University Press, 2004); Trevor RS Allen, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001). For a critique of these “universalist” ideas, see: Jeffrey Goldsworthy, "Homogenizing Constitutions" (2003) 23 *Oxford J Legal Stud* 483.

<sup>175</sup> McCormick, *supra* note 146 at 129.

<sup>176</sup> *ibid* at 128.

<sup>177</sup> *ibid* at 128; Dodek, *supra* note 55 at 473.

such as New Zealand, Israel and South Africa, which he considers as a component of “Canada’s ‘soft power’.”<sup>178</sup> In a later article, however, he criticizes the SCC’s limited engagement with foreign case law in 2008 by highlighting missed opportunities, and labels the Court’s practice of this as “quite modest.”<sup>179</sup> Dodek argues that such limited engagement with foreign case law may jeopardize the future of the SCC’s international reputation and its influence in the global arena.<sup>180</sup>

Another criticism of the SCC’s role in the transnational judicial arena, and particularly in the citation of foreign case law, is that not all SCC judges contribute or invest the same effort in the process. Dodek, referring to Justice Binnie, states, “[M]ost of the comparative analysis was undertaken by a single judge.”<sup>181</sup> Of the same opinion, McCormick looked at the number of US case citations used by every SCC judge, and found that Justice Binnie cited them five times more on average than the others, and personally accounted for more than one-third of all American cases cited by the Court.<sup>182</sup> According to McCormick’s findings, other judges who made a significant contribution to the use of foreign case law are Justices Iacobucci, Bastarache, L’Heureux-Dubé, and LaForest.<sup>183</sup>

Other scholars, such as Gentili and Mak, emphasize the central role of individual judges, including Justices LaForest, L’Heureux-Dubé, LaBel, and Binnie, stating they have made “their mark on the development of the use of comparative law in the Supreme Court of

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<sup>178</sup> See, Dodek, *supra* note 154 (The Protea and the Maple Leaf). For other authors see: Choudhry, *supra* note 154. On the idea of “soft power” see: Joseph S Nye Jr., *Soft Power* (New York: Public Affairs, 2004).

<sup>179</sup> Dodek, *supra* note 55 at 447.

<sup>180</sup> *ibid* at 473.

<sup>181</sup> *ibid* at 473.

<sup>182</sup> McCormick, *supra* note 146 at 95, 97.

<sup>183</sup> *ibid* at 97.

Canada.”<sup>184</sup> Indeed, criticism suggesting the SCC’s engagement in the transnational judicial conversation, and particularly its citation of foreign case law, is confined to a few judges, should be evaluated. Such arguments imply individual judges of the SCC do not equally participate and contribute to the dialogue, at least not through similar mechanisms. In order to examine these claims, this study assesses the judges’ individual participation in both the formal legal and extra-judicial mechanisms of judicial dialogue.<sup>185</sup>

Justices of other apex courts of different countries have expressed their appreciation for the role of the SCC. Aharon Barak, former President of the Supreme Court of Israel, applauds the SCC for its decisions and its use of foreign judgments.<sup>186</sup> When mapping the use of foreign case law in the most active courts of the world, Justice Barak calls the SCC “particularly noteworthy for its frequent and fruitful use of comparative law.”<sup>187</sup> It is for this reason that “Canadian law serves as source of inspiration for many countries around the world.”<sup>188</sup> The Honourable Richard Goldstone, a former judge of the Constitutional Court of South Africa, also praises the Supreme Court of Canada for its cosmopolitan decisions and its use of comparative law.<sup>189</sup> After outlining a number of cases in which the Constitutional Court of South Africa followed the SCC’s lead,<sup>190</sup> he concludes, “South Africa has good reason to

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<sup>184</sup> Gentili & Mak, *supra* note 39 at 128.

<sup>185</sup> See Chapter 4 and Chapter 5.

<sup>186</sup> Aharon Barak, “Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116 *Harv L Rev* 19 at 110.

<sup>187</sup> *ibid* at 114.

<sup>188</sup> *ibid* at 114.

<sup>189</sup> The Honourable Richard J Goldstone, “The First Years of the South African Constitutional Court” (2008) 42:2 *Sup Ct L Rev* 25.

<sup>190</sup> *ibid* at 30-31.

feel indebted to Canada for the advances we have made on the often difficult road from oppression to freedom and democracy.”<sup>191</sup>

Another former justice of the Constitutional Court of South Africa, the Honourable Albie Sachs, recently wrote:

I am reminded of the enormous assistance that we got from the Supreme Court of Canada in creating a completely new form of legal reasoning. . . . And at the other end of the Earth, we see that we are donors as well as recipients; judges in Canada take account of our approach to truth commissions, capital punishment, acknowledging living customary law in a way that produces gender equality, prisoners’ right to vote, same-sex marriages, aboriginal title and more.<sup>192</sup>

Justice Ruth Bader Ginsburg of the US Supreme Court also admires the SCC, admitting that it is “probably cited more widely abroad than the U.S. Supreme Court.”<sup>193</sup> There is one reason for that, she says, which is, “You will not be listened to if you don’t listen to others.”<sup>194</sup>

Other judges of lower courts, politicians and media commentators have all expressed positive views about the role of the SCC in the process of transnational judicial dialogue. For example, Justice Kathryn Neilson of the Court of Appeal of British Columbia considers the SCC’s citation of foreign judgements a good example of its participation in the conversation.<sup>195</sup> She speaks of an evolutionary process, where the SCC is not only exporting but also importing ideas from other constitutional courts.<sup>196</sup> While she notes the generally

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<sup>191</sup> *ibid* at 33.

<sup>192</sup> Albie Sachs, “Judicial Influence, by Osmosis”, *The Globe and Mail* (19 May 2016) online: The Globe and Mail <<http://www.theglobeandmail.com>>.

<sup>193</sup> Adam Liptak, “Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa” *The New York Times* (11 April 2009), online: The New York Times <[www.nytimes.com](http://www.nytimes.com)>.

<sup>194</sup> *ibid*.

<sup>195</sup> Neilson, *supra* note 41 at 1.

<sup>196</sup> *ibid* at 13.

positive comments of foreign scholars regarding the reputation of the SCC, she also refers to the criticism of several Canadian scholars.<sup>197</sup> Acknowledging at least three pitfalls for Canadian judges in using foreign sources—over-liberalism, over-conservatism, and ignorance of international law—she responds, “Clearly, we [judges] can’t please everyone.”<sup>198</sup>

Unlike the United States, where the use or non-use of foreign case law by the US Supreme Court justices was the subject of heated political debate in Congress, and widely reported in the media,<sup>199</sup> in Canada such debate is almost nonexistent. Politicians in Canada seem to appreciate the SCC’s positive reputation, both domestically and abroad. This view is made clear by the former Minister of Justice, Irwin Cotler, who asserts that the Supreme Court of Canada is appreciated around the world “as a model of what a vital, learned, and independent judicial institution should be ... Supreme Court decisions are constantly cited by courts in diverse jurisdictions across the globe.”<sup>200</sup>

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<sup>197</sup> *ibid* at 22. Judge Neilson refers to several authors criticizing the role of the SCC, see: Brunnée & Toope, *supra* note 170; van Ert, *supra* note 154; William A Schabas & Stephane Beaulac, *International Human Rights and Canadian Law*, 3d ed (Toronto: Thomson Carswell, 2007); Anne Warner La Forest, *supra* note 154; Toope, *supra* note 154; Kent Roach, “Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience” (2005) 40 *Tex Int’l LJ* 537.

<sup>198</sup> Neilson, *supra* note 41 at 23.

<sup>199</sup> “Transcript: Day One of the Roberts Hearings” *The Washington Post* (12 September 2005), online: The Washington Post, <[www.washingtonpost.com](http://www.washingtonpost.com)>; “Transcript: Day Two of the Roberts Hearings” *The Washington Post* (13 September 2005), online: The Washington Post, <[www.washingtonpost.com](http://www.washingtonpost.com)>; “Transcript: Day Three of the Roberts Hearings” *The Washington Post* (14 September 2005), online: The Washington Post, <[www.washingtonpost.com](http://www.washingtonpost.com)>; “Transcript: Day Four of the Roberts Hearings” *The Washington Post* (15 September 2005), online: The Washington Post, <[www.washingtonpost.com](http://www.washingtonpost.com)>; “Transcript: Sotomayor Confirmation Hearings, Day 2” *The New York Times* (14 July September 2009), online: The New York Times, <[www.nytimes.com](http://www.nytimes.com)>; “Transcript: Sotomayor Confirmation Hearings, Day 3” *The New York Times* (16 July September 2009), online: The New York Times, <[www.nytimes.com](http://www.nytimes.com)>; “Transcript: Sotomayor Confirmation Hearings, Day 4” *The New York Times* (17 July September 2009), online: The New York Times, <[www.nytimes.com](http://www.nytimes.com)>.

<sup>200</sup> The Hon. Irwin Cotler, P.C., M.P., “Speaking Notes for Irwin Cotler, Minister of Justice and Attorney General of Canada, on the Occasion of a Presentation to the Ad Hoc Committee on Supreme Court of Canada Appointments” (August 25, 2004), online: <[http://www.justice.gc.ca/eng/news-nouv/spe-disc/2004/doc\\_31212.html](http://www.justice.gc.ca/eng/news-nouv/spe-disc/2004/doc_31212.html)>.

Finally, the SCC and its judges have recently considered the reference to foreign case law an important part of the “intellectual perspective of the SCC.”<sup>201</sup> To what extent, however, such a mechanism constitutes a significant proportion of the entire transnational judicial dialogue and networks remains to be seen. Therefore, a review of the other forms of conversation used by the SCC and its judges is essential.

## 2. FACE-TO-FACE-MEETINGS OF SCC JUDGES WITH OTHER FOREIGN JUDGES

In this era of globalization and the Internet, judges from around the world not only engage passively with their foreign counterparts by citing their case law; they meet them face-to-face.<sup>202</sup> Judges are increasingly extending invitations and travelling to other parts of the world to meet colleagues from other nations or international/supranational courts.

It is almost impossible to track all face-to-face meetings of SCC judges with national or international judges within and outside of Canada. I therefore note only face-to-face meetings of SCC judges for which there are public records, or meetings spoken about by other scholars or judges.<sup>203</sup>

Face-to-face meetings of judges have attracted the attention of various scholars and judges. Anne-Marie Slaughter considers these meetings a “category of judicial interaction,”<sup>204</sup> which helps to create judicial networks “that are powerful channels for cross-fertilization.”<sup>205</sup> In her writings, Slaughter also mentions the most typical organizers and sponsors of such

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<sup>201</sup> Gentili & Mak, *supra* note 39 at 138; Mak, *supra* note 28.

<sup>202</sup> Slaughter, *supra* note 35 at 1120.

<sup>203</sup> See Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

<sup>204</sup> Slaughter, *supra* note 35 at 1104.

<sup>205</sup> Slaughter, *supra* note 81 at 215; Slaughter, *supra* note 3 at 65-103.

meetings.<sup>206</sup> Mak, one of the very few scholars who have tried to track face-to-face meetings of SCC justices, reveals that the “Court receives about 25 delegations of foreign judges every year.”<sup>207</sup> These include *ad hoc*, occasional, and recurring sessions, and involve courts from both developed and developing countries. Two examples of *ad hoc* bilateral face-to-face meetings are the SCC’s visits to the German *Bundesverfassungsgericht* (Federal Constitutional Court) in Karlsruhe and to the ECtHR in Strasbourg, both of which took place in 2010.<sup>208</sup> Judges from Russia, the Philippines, Ukraine, and Ghana – amongst others – have also visited the SCC.<sup>209</sup> Mak refers to ongoing exchanges between the SCC and the highest courts of France, India, the US, the UK, and the ECtHR.<sup>210</sup> She discusses the Pacific Conference, in which judges of the SCC meet with judges from Australia, New Zealand and Hong Kong.<sup>211</sup> One unexpected finding is that during these face-to-face meetings, judges exchange ideas not just on substantive law, but also on procedural matters.<sup>212</sup> In addition, during interviews with two former and two current SCC judges, Mak found that face-to-face meetings and contact with Western courts, particularly courts from a Commonwealth background or courts using the English or French language, is considered more useful than contact with courts of developing countries.<sup>213</sup>

Canadian judges confirm the existence of face-to-face meetings with foreign counterparts, and provide interesting perspectives on them. For example, Justice Michel Bastarache acknowledges the existence of this type of meetings; but states, “Contact with

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<sup>206</sup> Slaughter, *supra* note 81 at 215.

<sup>207</sup> Mak, *supra* note 28 at 85.

<sup>208</sup> *ibid.*

<sup>209</sup> *ibid.*

<sup>210</sup> *ibid.*

<sup>211</sup> *ibid* at 86.

<sup>212</sup> *ibid* at 85.

<sup>213</sup> *ibid* at 86.

other judges is restricted to a few members of the Court.”<sup>214</sup> Justice Neilson does not necessarily consider face-to-face meetings of judges an important instrument of judicial dialogue. Nevertheless, she acknowledges that such meetings occur at various events such as conferences and training sessions.<sup>215</sup>

Looking beyond Canada, in his latest book, Justice Breyer of the US Supreme Court discusses face-to-face judicial communication:

[E]ven outside the context of specific litigation, federal judges are increasingly thinking about and discussing foreign and international law. This is happening through encounters with members of foreign judiciaries, which are occurring ever more frequently out of a common wish to share professional experiences. . . . Since 2010, American judges have met with judges, prosecutors, and judicial administrators from, for example, Albania, Bangladesh, Brazil, Botswana, Bulgaria, Cambodia, China, Colombia, Ecuador, Ghana, Indonesia, Ireland, Liberia, Mauritania, Namibia, Qatar, Russia, Ukraine, Tunisia, and the United Arab Emirates.<sup>216</sup>

Finally, face-to-face meetings between SCC judges and their colleagues from other national or international courts should not be considered too informal or unimportant to contribute to the transnational dialogue and development of jurisprudence. On the contrary, such exchanges have been increasingly institutionalized and “to some degree, the meeting process has become formalized.”<sup>217</sup> Through these meetings, judges have established transnational judicial conversations, and are acting on cosmopolitan and global ideas. They are also creating global and regional judicial networks, formal organizations, associations and judicial training institutions.

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<sup>214</sup> Bastarache, *supra* note 154 at 54.

<sup>215</sup> Neilson, *supra* note 41 at 14.

<sup>216</sup> Breyer, *supra* note 92 at 249.

<sup>217</sup> *ibid* at 248.

### 3. ESTABLISHING AND PARTICIPATING IN GLOBAL AND REGIONAL JUDICIAL NETWORKS (ASSOCIATIONS AND ORGANIZATIONS)

Formal regional or global judicial networks represent another venue for transnational judicial dialogue. Surprisingly, academics have almost ignored the role that the SCC and other courts play in such networks, which include judicial associations and organizations. Yet, “Network analysis has become increasingly popular in the last three decades. It started in sociology but it has also been used in politics, economics, business, psychology, anthropology, and, more recently, law.”<sup>218</sup>

Focusing on European judicial networks, but drawing few general conclusions about their effects, Monica Claes and Maartje de Visser argue that formal judicial networks have significant potential to increase the quality of judicial dialogue and the relationships amongst judges and between courts.<sup>219</sup> The distinction they make between networks established by judges themselves and networks established by other institutions demonstrates the complexity of this mechanism.<sup>220</sup> To understand the judicial networks the SCC participates in, I have

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<sup>218</sup> Martin Gelter & Mathias Siems, “Networks, Dialogue, or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe’s Highest Courts, in Courts and the World”, *Utr’t L Rev* 88 at 94. For general introduction about networks, see Robert A Hanneman and Mark Riddle, *Introduction to Social Network Methods* (2005), online: <<http://faculty.ucr.edu/~hanneman/nettext/>>; David Knoke & Song Yang, *Social Network Analysis* 2nd edn (Sage Los Angeles 2008); John Scott and Peter J Carrington (eds.), *The SAGE Handbook of Social Network Analysis* 2nd edn (Sage London 2011). For network analysis in law, see eg, Thomas A Smith, “The Web of Law” (2007) 44 *San Diego Law Review* 309; Reza Dibadj, “Networks of Heightened Scrutiny in Corporate Law” (2009) 46 *San Diego Law Review* 1; Reza Dibadj, “Networks of Fairness Review in Corporate Law” (2008) 45 *San Diego Law Review* 1; Mathias Siems, “The Web of Creditor and Shareholder Protection: A Comparative Legal Network Analysis” (2010) 27 *Arizona Journal of International and Comparative Law* 747.

<sup>219</sup> Monica Claes & Maartje de Visser, “Are You Networked Yet? On Dialogues in European Judicial Networks” (2012) 8(2) *Utr’t L Rev* 100 at 113.

<sup>220</sup> *ibid* at 107.

created similar classifications: associations and organizations established by courts, and organizations and associations established by individual judges.<sup>221</sup>

Martin Gelter and Mathias Siems empirically demonstrate the existence of such networks. Writing on cross-citation among ten European highest courts, they note, “Highest court judges are increasingly involved in transnational networks with the aim of fostering collaboration and communication.”<sup>222</sup> Jens Meierhenrich analyzes judicial networks from a more theoretical level. He argues, “The nature of judicial networks is far more heterogeneous, their contribution to international governance far less consequential, and their operation far more complex than is commonly assumed.”<sup>223</sup>

Mak, in a comparison of the constitutional courts of Canada, France, the Netherlands, the United Kingdom, and the United States, concluded that judicial networks are a significant development.<sup>224</sup> Through interviews, she found that judges participate in such formal networks individually or through the court as an institution.<sup>225</sup> Such networks, according to the judges interviewed, are useful not only for decision-making in individual cases, but also for issues of court procedures and court organization and management.<sup>226</sup> Mak also gives several examples of organizations of which the SCC is a member.<sup>227</sup> However, she does not distinguish judges’ associations or organizations as a separate mechanism of dialogue. Slaughter, on the other hand, gives more weight to judicial and court networks, and notes their

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<sup>221</sup> See Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

<sup>222</sup> Gelter & Siems, *supra* note 218 at 99.

<sup>223</sup> Jens Meierhenrich, “Judicial Networks” in Anthony J Langlois and Karol Edward Soltan, eds, *Global Democracy and its Difficulties* (London: Routledge, 2009) 82 at 82.

<sup>224</sup> Mak, *supra* note 28 at 83.

<sup>225</sup> *ibid* at 84.

<sup>226</sup> *ibid*.

<sup>227</sup> *ibid* at 86. For examples of such associations, see: Association des Cours Constitutionnelles ayant en Partage l’Usage du Français (AHJUCAF), online: <[www.ahjucaf.org/Les-congres.html](http://www.ahjucaf.org/Les-congres.html)>; Association des Cours Constitutionnelles ayant en Partage l’Usage du Français (ACCPUF), online: <<http://www.accpuf.org/>>.

role in the interaction among the judiciaries. According to her, such judicial organizations constitute “networks of networks” in a horizontal dimension.<sup>228</sup>

In my view, the process of establishing and participating in such organizations is not merely an extension of occasional face-to-face meetings. On the contrary, the creation of a network, which is permanent, with clear goals and the intention to hold periodic meetings, demonstrates a much higher state of conversation, consciousness, and sense of belonging. As such, it is distinct from, and much more formal than, occasional face-to-face meetings, and is an instrument worthy of separate analysis; this will be provided in Chapter 4.

#### 4. ESTABLISHING AND PARTICIPATING IN ELECTRONIC NETWORKS AND SYSTEMS

We live in the era of the Internet and technology. Judges, like almost everyone else, use these tools for personal reasons, but also for professional purposes, including judicial networking. To test to what extent such a mechanism is used by the SCC and its judges, in Chapter 4 I engaged in original empirical research and investigate the electronic networks and programmes established or used by the SCC and its judges. First, however, I reviewed the literature on electronic judicial dialogue.

Frishman considers IT-based communication one of the “three main ways in which courts and judges interact.”<sup>229</sup> According to her, “Judges use technology to talk to each other, or to read each other’s decisions.”<sup>230</sup> She recognizes that communication through decision reading is not like a real conversation, yet asserts, “[A] judge can write in a way that transmits

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<sup>228</sup> Slaughter, *supra* note 3 at 135-144.

<sup>229</sup> Frishman, *supra* note 70 at 15.

<sup>230</sup> *ibid.*

a certain message to the judges that read her decision.”<sup>231</sup> Frishman notes that communication through technology includes legal databases such as Westlaw and LexisNexis as well as online forums for judges.

Mak, after conducting interviews with high court judges from five different jurisdictions, including the SCC, discusses the use of electronic systems and databases. Referring to the interviews, she states that such electronic databases are established and used “out of the wish to create an exchange of ideas.”<sup>232</sup> A notable example, according to Mak, is the *Association des Hautes Juridictions de Cassation des pays ayant en partage l'usage du Français* (AHJUCAF), of which the SCC is one of 50 members,<sup>233</sup> which maintains a database of case law in French.<sup>234</sup> Mak also refers to the Hague Institute for the Internationalization of Law (now The Hague Institute for Innovation of Law) (Hiil); although it was not created by judges, its electronic features have benefitted judges of the highest courts.<sup>235</sup>

Justice Neilson writes that judges use electronic networks, systems, and legal databases to find legal materials and foreign case law in particular.<sup>236</sup> She indicates that a tremendous number of comparative and international sources are available, which she considers another factor in the wide use of foreign case law. Examples of databases used by Canadian judges include WorldLii,<sup>237</sup> CODICES,<sup>238</sup> and GlobalCourts.<sup>239</sup>

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<sup>231</sup> *ibid.*

<sup>232</sup> Mak, *supra* note 28 at 92.

<sup>233</sup> See Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

<sup>234</sup> Association des Cours Constitutionnelles ayant en Partage l'Usage du Français (AHJUCAF), online: <<http://www.ahjucaf.org/-Membres-.html>>.

<sup>235</sup> Mak, *supra* note 28 at 95; See Online: The Hague Institute for the Internationalisation of Law <<http://www.hiil.org/>>.

<sup>236</sup> Neilson, *supra* note 41 at 15.

<sup>237</sup> Worldjudiciary, online: <<http://worldjudiciary.org/>>.

Although social media and electronic networks such as Facebook, Twitter, and LinkedIn are thriving, there has been no research on the SCC's use of these tools. Indeed, it is difficult to track to what extent SCC and its justices rely on these electronic systems and networks. To better understand these instruments, I have conducted web-based research and interviews, and the results will be presented in Chapter 4.<sup>240</sup>

The academic debate on this topic is far from developed. This may be because, although electronic networking is recognized, this type of judicial communication is not considered a separate mechanism of transnational judicial dialogue that occurs almost everywhere. In this study, I consider electronic judicial networking a distinct mechanism of dialogue, classified as an "extra-judicial" tool; it too will be analyzed in Chapter 4.<sup>241</sup>

## 5. ESTABLISHING AND PARTICIPATING IN REGIONAL AND GLOBAL JUDICIAL EDUCATION AND TRAINING INSTITUTIONS

Transnational judicial education, which is becoming increasingly significant, is another modern mechanism of judicial dialogue. However, it is not easy to track this phenomenon, as public records are not always available. This may be one reason why scholarship regarding judicial training of SCC judges, is rare. This section focuses on the academic and judicial conversation that more broadly encompasses this issue.

Mak considers the SCC active in judicial training activities, both in bilateral and multilateral settings.<sup>242</sup> She points to various training institutions that SCC judges have

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<sup>238</sup> International Commission of Jurists, online: <<http://www.icj.org/>>.

<sup>239</sup> GlobalCourts, online: <[www.globalcourts.com](http://www.globalcourts.com)>.

<sup>240</sup> See Chapter 4 "The Transnational Extra-judicial Activities of the SCC and its Justices".

<sup>241</sup> See Chapter 4 "The Transnational Extra-judicial Activities of the SCC and its Justices".

<sup>242</sup> Mak, *supra* note 28 at 87.

attended, particularly the Canadian Institute for the Administration of Justice (CIAJ)<sup>243</sup> and the National Judicial Institute (NJI).<sup>244</sup> Mak also mentions that the SCC has trained judges from the Philippines, Ghana, Ukraine, Russia, and China. Canadian SCC judges have travelled to Russia and China to conduct training on topics such as the methodology of judicial decision-making and cultural diversity.<sup>245</sup> In an interview with Mak, one SCC judge observed, “Developing countries prefer to come to Canada for guidance as they consider the United States as negative or too overwhelming, while the United Kingdom and France are in most cases the former colonial power. Canada is perceived to be neutral.”<sup>246</sup>

Justice Neilson asserts that international judicial education provides opportunities for judges to meet foreign colleagues, and is therefore a significant factor influencing the increased use of foreign case law.<sup>247</sup> She refers to a number of organizations that provide such training activities, including the International Organization for Judicial Training,<sup>248</sup> the International Association of Women Judges,<sup>249</sup> and the International Society for the Reform of Criminal Law.<sup>250</sup> Justice Bastarache also touches on the judicial training issue, stating, “The Supreme Court of Canada . . . believes in cooperation and, especially, participating in the training of judges, but will not partake in any jockeying for status.”<sup>251</sup>

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<sup>243</sup> The Canadian Institute for Administration of Justice, online: <<http://www.ciaj-icaj.ca/>>

<sup>244</sup> The National Judicial Institute, online: <<https://www.nji-inm.ca/index.cfm/index.cfm?langSwitch=en>>

<sup>245</sup> Mak, *supra* note 28.

<sup>246</sup> *ibid.*

<sup>247</sup> Neilson, *supra* note 41 at 14.

<sup>248</sup> The International Organization of Judicial Training, online: <<http://www.iojt.org/>>

<sup>249</sup> International Association of Women Judges, online: <<http://www.iawj.org/index.html>>.

<sup>250</sup> The International Society for the Reform of Criminal Law, online: <<http://www.isrcl.org/>>

<sup>251</sup> Bastarache, *supra* note 154 at 54.

Frishman does not consider judicial training or conferences a distinct mechanism of dialogue, but rather a type of face-to-face meeting, one that occurs in a different setting.<sup>252</sup> In addition to the international and regional conferences conducted by the International Organization for Judicial Training,<sup>253</sup> she mentions the meetings organized by the International Association of Judges,<sup>254</sup> or more generally the conferences listed in the report by the Hague Institute for the Internationalization of Law, which includes 32 international judicial organizations that facilitate face-to-face interactions.<sup>255</sup>

Slaughter, meanwhile, considers the training of judges to be exceedingly important, as they may be viewed as a cross-fertilization process that provide more opportunities to them.<sup>256</sup> She also asserts that the growing support of judges from around the world for global judicial education is a conscious and psychological indicator of the progress of JG.<sup>257</sup>

This mechanism demonstrates that the transnational judicial conversation includes not only judges and courts, but also other actors, particularly distinguished academics. As the empirical data of this study show, two other groups directly influence global judicial training.<sup>258</sup> The first is law schools. NYU, Harvard, Yale, and many other law schools around

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<sup>252</sup> Frishman, *supra* note 70 at 15.

<sup>253</sup> *ibid.* The International Organization of Judicial Training, online: <<http://www.iojt.org/>>.

<sup>254</sup> The International Organization of Judicial Training, “News & Events”, online <<http://www.iaj-uim.org/news/>>.

<sup>255</sup> The Changing Role of Highest Courts in an International World: Inventory and Bibliography (2008) 63 – 70, online: [http://haguehcnetwork.org/assets/233/ac2008\\_inventory.pdf](http://haguehcnetwork.org/assets/233/ac2008_inventory.pdf); The Hague Institute for the Internationalisation of Law organized judicial meetings, see Michael Kirby, “Transnational, Judicial Dialogue, Internationalisation of Law and Australian Judges” (2008) 9 *Melb J Int L* 171.

<sup>256</sup> Slaughter, *supra* note 35 at 1117.

<sup>257</sup> Slaughter, *supra* note 164 at 280; Clifford Wallace, “Globalization of Judicial Education” (2003) 28 *Yale Journal of International Law* 355-364; For an example of such activities, see also: Conference brochure for the Second International Conference on the Training of the Judiciary “Judicial Education in a World of Challenge and change” October 31-November 3, 2004, Fairmont Chateau Laurier Hotel, Ottawa, Ontario, Canada.

<sup>258</sup> See Chapter 4 and Chapter 6.

the world,<sup>259</sup> are opening their doors to judicial training sessions and conferences, helping judges to build judicial networks and channels that have the power to foster the process of judicial globalization.<sup>260</sup> The second category includes “transnational civil society,”<sup>261</sup> foundations, and political movements that are sponsoring an increasing number of seminars, conferences, training, and workshops aimed at turning judges into “globalists” or “cosmopolitans” by encouraging them to adopt a universal understanding of human rights.<sup>262</sup>

Finally, the establishment of judicial educational organizations with worldwide mandate, such as the International Organization for Judicial Training (IOJT)<sup>263</sup> and the Commonwealth Judicial Education Institute (CJEI),<sup>264</sup> is another indicator of the growing closeness among judges from around the globe. More detailed empirical data on the extent to which justices of the SCC contribute to regional, foreign, or Canadian national training and educational institutions is found in Chapter 4.

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<sup>259</sup> One of the most recent events which included the participation of several academics, legal practitioners, and judges, including Justice Rosalie Abella of the SCC, and which I personally attended, is: “Institutions, Constitutions Symposium: The Judiciary’s Role in the 21<sup>st</sup> Century”, Osgoode Hall Law School, Osgoode Professional Development, Toronto, 26-27 September 2016.

<sup>260</sup> Slaughter, *supra* note 35 at 1122; Thomas M Frank, “NYU Conference Discusses Impact of International Tribunals”, 1 *International Judicial Observer* (September 1995) at 3; James G Apple, “British, U.S. Judges and Lawyers Meet, Discuss Shared Judicial, Legal Concerns”, 2 *International Judicial Observer* (January 1996) at 1; James G Apple, “Yale Law School Establishes Seminar on Global Constitutional Issues”, 4 *International Judicial Observer* (June 1997) at 2.

<sup>261</sup> Kersch, *supra* note 71 at 347 (He uses this term to identify “non-governmental organizations or NGOs, in conjunction with transnational social movements and with the financial backing of private and public contributors, which now “undertake voluntary collective action across state borders in pursuit of what they deem the wider public interest”).

<sup>262</sup> Richard Price, “Transnational Civil Society and Advocacy in World Politics” (2003) 55 *World Pol* 579 at 579; Tamir Moustafa, “Law Versus the State: The Judicialization of Politics in Egypt” (2003) 28 *Law & Soc Inquiry* 883 at 883.

<sup>263</sup> International Organization for Judicial Training, online: <<http://www.iojt.org/>>.

<sup>264</sup> The Commonwealth Judicial Education Institute, online: <<http://cjei.org/index.html>>.

## V. ACTORS IN THE TRANSNATIONAL JUDICIAL DIALOGUE OF THE SUPREME COURT OF CANADA

In this study, “actors” are defined as active participants who provide a direct contribution to the judicial dialogue of the SCC. To better comprehend this process and its complexity, it is necessary to identify these actors. The role of the SCC as an institution, the Chief Justice, the other individual justices and former justices should be assessed. In addition, the importance of other actors, including law clerks, registrars, parties and their counsel, interveners, NGOs, universities, associations of judges, judicial training institutions and academics, should be evaluated.

I address the role of these actors in Chapter 4, 5 and 6; here, I discuss the main scholarly conversations on this matter.

The role of the SCC as an institution and primary actor in the judicial dialogue is inarguable, and is considered significant by many previously mentioned scholars and judges. Therefore, it is the role of individual judges, which is more debateable and deserves to be assessed. Christa Rautenbach, in her study on the South African Constitutional Court, notes, “The willingness of the judiciary to consider foreign law is illustrated by members’ personal views.”<sup>265</sup> In other words, whether and to what extent a certain court will engage with foreign precedents depends on the will of its individual judges. According to Ursula Bentele, Johann Van der Westhuizen, professor and former Justice of the South African Constitutional Court,

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<sup>265</sup> Christa Rautenbach, “South Africa: Teaching an ‘Old Dog’ New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court (1995-2010), in Tania Groppi & Marie-Claire Ponthoreau, eds, *The use of Foreign Precedents by Constitutional Judges* (Oxford: Hart Publishing, 2013) 185 at 196.

appears to share this belief.<sup>266</sup> In her view, judges are eager to become part of the transnational and international community, and considering foreign precedents is a logical extension of such a desire. Johann Kriegler, another former Justice of the South African Constitutional Court, echoes the same sentiments regarding the role of individual judges.<sup>267</sup>

Gentili and Mak inquire about the role of individual judges in the SCC, and seem unsatisfied by the engagement of academics on this issue thus far. They argue, “Until now, it remains unclear to what extent the personal approaches of judges, their perceptions or opinion regarding their role, influence the extent, purpose and effects of the citation of foreign case law.”<sup>268</sup> To investigate this issue, the authors used different research methods and explored various sources, such as academic articles by individual judges of the SCC, public interviews, public speeches, and qualitative analysis of case law. They also relied upon interviews with four judges of the SCC, two current and two former, which were conducted by Elaine Mak.<sup>269</sup> Gentili and Mak conclude, “Individual justices are considered to have put their mark on the development of the use of comparative law in the Supreme Court of Canada.”<sup>270</sup> They determined that the judges who were most engaged with the use of foreign case law, and showed a high interest in comparative law, were La Forest,<sup>271</sup> L’Heureux-Dubé,<sup>272</sup> LeBel,<sup>273</sup>

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<sup>266</sup> Ursula Bentele, “Mining for Gold: The Constitutional Court of South Africa’s Experience with Comparative Constitutional Law” (2009) 37 *Georgia Journal of International and Comparative Law* 219, 222–223, 229.

<sup>267</sup> *ibid.*

<sup>268</sup> Gentili & Mak, *supra* note 39 at 117-118.

<sup>269</sup> Mak, *supra* note 28 at 6–8 and 62–66.

<sup>270</sup> Gentili & Mak, *supra* note 39 at 128.

<sup>271</sup> Beyond various SCC decisions where Justice La Forest have used foreign case law, see also several academic articles regarding the comparative law interest of justice Gérard La Forest: La Forest, *supra* note 154 (The Use of International and Foreign Material in the Supreme Court of Canada); La Forest, *supra* note 154 (The Expanding Role of the Supreme Court of Canada in International Law Issues); La Forest, *supra* note 144.

<sup>272</sup> Beyond various SCC decisions where Justice L’Heureux-Dubé have used foreign case law, see also several academic articles regarding the comparative law interest of justice L’Heureux-Dubé: L’Heureux-Dubé, *supra* note 37; L’Heureux-Dubé, *supra* note 154.

and Binnie.<sup>274</sup> Mak argues, “A judge's personal approach is a highly determinative factor as regards both the influence granted to binding foreign legal sources, such as international law ... and the use of non-binding foreign legal materials, such as foreign case law, in the deciding of cases.”<sup>275</sup> In other words, she claims that individual views of globalist or localist judges “have an important influence on the way in which foreign law is used in their court.”<sup>276</sup> Thus, in Mak’s—and a few other scholars’—opinion, the personal characteristics of judges, such as views, approaches, education, and personal and professional experience, are important.<sup>277</sup>

Mak also asserts that judges have contributed beyond the use of foreign cases, through other forms of engagement. She argues judges are “engaged in politics,” as evidenced by their contributions concerning reform of the highest courts or the exposition of their work to foreign courts.<sup>278</sup> Obviously, not all judges are engaged in this process to the same extent. Looking at SCC judges, Mak considers several to be leaders in this development “both through their judicial work and through public speeches.”<sup>279</sup> Interestingly, she also emphasizes the particular influence of chief justices of the highest courts, including the SCC, by referring to their interviews and their public roles.<sup>280</sup>

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<sup>273</sup> Beyond various SCC decisions where Justice LeBel have used foreign case law, see also several academic articles regarding the comparative law interest of Justice LeBel: LeBel & Chao, *supra* note 154; LeBel, *supra* note 61.

<sup>274</sup> Beyond various SCC decisions where Justice Binnie have used foreign case law, see also several academic articles regarding the comparative law interest of justice Binnie: Ian Binnie, “Judging the Judges: ‘May They Boldly Go Where Justice Rand Went Before?’” (2013) 26:1 Can JL & Jur 5; Ian Binnie, “Foreign Sources: Searching for Enlightenment or a Fig Leaf?” (London (UK), July 2010).

<sup>275</sup> Mak, *supra* note 28 at 4.

<sup>276</sup> *ibid* at 4, 6.

<sup>277</sup> *ibid* at 138. For other important views regarding the role of the individual judge see especially: Barak, *supra* note 186; Aharon Barak, *The Judge in a Democracy* (Princeton, NJ: Princeton University Press, 2006); Richard A Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008).

<sup>278</sup> Mak, *supra* note 28 at 107.

<sup>279</sup> *ibid* at 107. For another interesting article regarding the influence of individual judges on the development of the Supreme Court's decision-making, see: Songer, *supra* note 154.

<sup>280</sup> Mak, *supra* note 28 at 107.

Peter McCormick has also examined the role of individual judges, including the influence of chief justices.<sup>281</sup> In an article in which he analyzes the citation of American cases by the McLachlin Court, he reveals, “Not all judges use American citations to the same extent.”<sup>282</sup> By looking at the use of American citations among the fourteen judges who served on the court in 2000–2008,<sup>283</sup> he found the five most active were Justices Binnie, Iacobucci, Bastarache, L’Heureux-Dubé, and LeBel.<sup>284</sup> Some scholars, such as Ian Bushnell, attribute this tendency to the American education of SCC judges,<sup>285</sup> an idea supported by Justice La Forest.<sup>286</sup> McCormick also lends credence to this theory, indicating that justices with American legal training started this practice.<sup>287</sup> However, he also points out that at the time of his article in 2009, “there is not a single judge on the SCC with a law degree from an American university.”<sup>288</sup>

Examining SCC case law from 2008, Dodek confirms McCormick’s finding that not all judges engage with comparative law to the same degree. He cites Justice Ian Binnie as an example, who used comparative law more than all the other judges combined.<sup>289</sup> Dodek makes a strong qualitative statement, arguing, “The engagement with comparative law is further limited because with the exception of Binnie J., most of its use lacks much depth of analysis.”<sup>290</sup> Slaughter also highlights the importance of the role of individual judges.<sup>291</sup>

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<sup>281</sup> McCormick, *supra* note 154.

<sup>282</sup> McCormick, *supra* note 146 at 94.

<sup>283</sup> June 2008.

<sup>284</sup> McCormick, *supra* note 146 at 97.

<sup>285</sup> Bushnell, *supra* note 154 at 169.

<sup>286</sup> La Forest, *supra* note 144 at 213.

<sup>287</sup> Especially Chief Justice Laskin and Justice La Forest.

<sup>288</sup> McCormick, *supra* note 146.

<sup>289</sup> Dodek, *supra* note 55; McCormick, *supra* note 146.

<sup>290</sup> Dodek, *supra* note 55 at 456.

Although she does not call them “actors” in the JG process, she argues that the role and consciousness of individual judges is crucial to the creation of a “Global Community of Courts.”<sup>292</sup>

Indeed, the role of individual judges is crucial to the transnational judicial dialogue for several reasons. The Supreme Court Act dictates the Court is comprised of nine individual judges; hence, they constitute the most central actors of the SCC.<sup>293</sup> They are the only actors (excluding the SCC as an institution) who have the discretion and decision-making capacity to engage, or not engage, in judicial networking with other foreign courts and judges.

As will be shown in Chapter 4, beyond the networking mechanisms officially used by the Court as an institution, these individual judges also engage independently in the judicial networking process using other mechanisms. They meet face-to-face with foreign counterparts, establish and participate individually in transnational judges’ associations or training institutions, or use electronic networks.

Because the SCC as an institution may also be understood as a group of individual judges, in order to comprehend the actions of such a group, it is imperative to understand the actors—in other words, the individual judges. The justices of the SCC, particularly the Chief Justice, are influential and highly public figures. Their individuality is on display in many formal and non-formal settings, including the dissenting opinions of the Court, academic papers, public speeches, and interviews. They also participate in trainings, seminars,

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<sup>291</sup> Slaughter, *supra* note 164; Slaughter, *supra* note 81 at 191; Slaughter, *supra* note 48; Slaughter, *supra* note 78 at 708; Slaughter, *supra* note 86; Slaughter, *supra* note 35 at 1103; Slaughter, *supra* note 3.

<sup>292</sup> Slaughter, *supra* note 81 at 192.

<sup>293</sup> See *Supreme Court Act*, RSC 1985, c S-19, s 4.

conferences, and judges' associations and organisations.<sup>294</sup> The transnational reputation of a court, an essential element of judicial globalization, depends on the reputation (or lack thereof) of its justices. In addition, the "localist" or "globalist" approach of a court depends on the attitudes of its judges. A court in which the majority of individual judges have a globalist mindset will naturally appear to be a globalist court, and vice versa. Finally, even the widely accepted definition of the process of judicial globalization, given by Slaughter and used by many scholars, indicates that judicial networking includes not just courts, but also individual judges.<sup>295</sup> She defines judicial globalization as a "diverse, and messy process of judicial interaction between courts and *judges*" [Emphasis added].

Other internal and external actors foster the process of transnational judicial dialogue through both juridical and extra-judicial mechanisms. Such actors may be considered "internal", such as law clerks, registrars, other administrative staff, parties and their counsel, amici curia, and interveners, or "external", such as universities, academics, judicial associations, judicial training institutions, and NGOs. As stated in the Introduction, this study does not encompass these actors; therefore, the literature regarding them will not be reviewed. Here it is sufficient to note that subsequent chapters will offer empirical data regarding the role of these actors (particularly academics) in the transnational dialogue and globalization of the SCC.<sup>296</sup>

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<sup>294</sup> See, Chapter 4 "The Transnational Extra-judicial Activities of the SCC and its Justices".

<sup>295</sup> Slaughter, *supra* note 35 at 1104.

<sup>296</sup> See Chapter 3, 4, 5, and 6.

## **VI. THE DRIVING FORCES BEHIND THE TRANSNATIONAL JUDICIAL CONVERSATION— WHY IS IT HAPPENING?**

The goal of this section is to explain the reasons why transnational judicial conversation occurs by examining why courts and judges, including the SCC and its judges, participate in the dialogue and networks. Different disciplines stress various factors when explaining this phenomenon. Hirschl characterizes three as very important: historical factors, the significance of various structural and disciplinary elements, and strategic and socio-political factors.<sup>297</sup> As stated above individual judges, in addition to courts as institutions, are key actors in this process. To understand “why” they participate in this judicial exchange, it is important to realize that different actors may have different motives. In addition, various driving forces push each form of dialogue. Hence, an exhaustive classification of the reasons for participation is almost impossible. For the purpose of this study, I have grouped the scholarly debates on these motivations into five categories: a) Individual-Judge Driving Forces, b) Court-Institutional Driving Forces, c) National Driving Forces, d) Transnational Driving Forces, and e) International/Global Driving Forces.

### **A. INDIVIDUAL-JUDGE DRIVING FORCES**

A number of motives drive individual judges to participate in judicial dialogue and judicial networks. According to various scholars, these include their globalist or localist mindset,<sup>298</sup>

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<sup>297</sup> Hirschl, *supra* note 118 at 5.

<sup>298</sup> Barak, *supra* note 277 at 118. See also, Arthurs, *supra* note 139 at 223, 245-246; Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986); Mak, *supra* note 28 at 102, 106-107, 228-229.

pragmatic forces or motivations,<sup>299</sup> building and maintaining one's individual reputation,<sup>300</sup> judicial philosophy,<sup>301</sup> and the consciousness of individual judges.<sup>302</sup>

Mak perceives the role of individual judges as central to the process of conversation. Looking at the use of foreign case law, she argues that the most important motivation compelling judges in North America to consult foreign case law is the "personal choice for a globalist or a localist approach to judicial decision-making."<sup>303</sup> According to Mak, a judge's personal approach is constructed around his or her affinities, which in turn are shaped by personal background, including legal education, legal culture, and personal and professional experiences. As the hybrid Canadian legal system is influenced by both the English and French, she argues, "[A]n open approach to foreign law is natural" for Canadian judges.<sup>304</sup> However, she acknowledges that, within the same court, there can exist diverse individual approaches, and that such differences may be related to previous education and professional and personal experiences, including knowledge of foreign languages and cultures. The judges

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<sup>299</sup> Shannon Ishiyama Smithey, "A Tool, Not A Master. The Use of Foreign Case Law in Canada and South Africa" (2001) 34 *Comp Pol Stud* 1188; Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 *Yale LJ* 1225; Cheryl Saunders, "Judicial Dialogue in Common Law Countries" in P. Bon, R. Ghevontian, D. Maus, F. Melin-Soucramanien, A. Roux, eds, *Renouveau du droit constitutionnel: Melanges en l'honneur de Louis Favoreu* (Paris: Dalloz, 2007) at 423.

<sup>300</sup> Jackson, *supra* note 53 at 240; Beverley McLachlin, "The Use of Foreign Law" (Remarks delivered at the 104th ASIL's Annual Meeting, 24-27 April 2010, in Washington, DC, USA), online: <<http://www.fora.tv>>; La Forest, *supra* note 144.

<sup>301</sup> Barak, *supra* note 277 at 118; Aharon Barak, "Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia" (Law Symposium: International Influences on National Legal Systems, Haifa, 29 January 2006), online: <[http://www.fulbright.org.illfileadmin/fulbright/editor/images/news/Documents\\_for\\_news/Barak\\_50th\\_symposium\\_speech.doc](http://www.fulbright.org.illfileadmin/fulbright/editor/images/news/Documents_for_news/Barak_50th_symposium_speech.doc)>; Ostberg & Wetstein, *supra* note 154; Jackson, *supra* note 53 at 97. For an opposite view on the importance of "judicial philosophy" in the decision-making, see: Kirk Makin, "Justice Ian Binnie's Exit Interview", *The Globe and Mail* (23 September 2011) online: *The Globe and Mail* <<http://www.theglobeandmail.com>>; McLachlin, *supra* note 154 (Decision-making in the SC); Arthurs, *supra* note 139 at 223, 245-246.

<sup>302</sup> Slaughter, *supra* note 35 at 1113; Slaughter, *supra* note 78 at 708; Slaughter, *supra* note 81 at 192, 194, 195-196; Philippe Sands, "Turtles and Torturers: The Transformation of International Law" (2001) 33 *NYU J Int'l L & Pol* 527 at 553; Kersch, *supra* note 71 at 359; Bastarache, *supra* note 154 at 54.

<sup>303</sup> Mak, *supra* note 28 at 228.

<sup>304</sup> *ibid.*

she interviewed agree that their personal backgrounds have shaped their approach toward the citation of foreign case law.<sup>305</sup>

Mak, in attempting to answer her central question, “Why do judges cite foreign law?”<sup>306</sup> finds, “The individual use of foreign law by judges in deliberations and in judgments, beyond the mandatory use of sources, depends on three main factors: legal tradition, language and the prestige of foreign courts.”<sup>307</sup> After differentiating between binding international law and non-binding foreign law,<sup>308</sup> Mak observes that Canadian judges use generally foreign law and cases for persuasive reasons.<sup>309</sup> She states that the “judges confirmed that they do not look at foreign sources for solutions, but for ideas.”<sup>310</sup>

Mak distinguishes between “localist” and “globalist” judges, and classifies each into two subcategories. She argues that one group of localist judges assumes an “absolutely resistant” stance against the use of non-binding foreign legal sources, based on the absence of formal legal authority of such sources.<sup>311</sup> The second group of localist judges does not contest the formal use of foreign case law. However, due to the differences between legal systems, they remain unconvinced about the guidance that might derive from the study and use of foreign law.<sup>312</sup>

Although Mak does not name the two groups of globalist judges, she differentiates between judges who are absolute globalists, and strive for the convergence and harmonization of national laws with other foreign transnational and international laws, and judges who are

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<sup>305</sup> *ibid* at 107.

<sup>306</sup> *ibid* at 3, 6, 200.

<sup>307</sup> *ibid* at 4, 214.

<sup>308</sup> *ibid* at 139.

<sup>309</sup> *ibid* at 166.

<sup>310</sup> *ibid* at 182.

<sup>311</sup> Justice Scalia may be considered the typical of this category.

<sup>312</sup> Mak, *supra* note 28 at 228-229.

not absolutely in favour of such a view. According to Mak, most of the judges that she interviewed, although seemingly globalists, “are not absolutely in favour of striving for convergence with the laws of other countries or with international law.”<sup>313</sup> They express different degrees of willingness to engage with global inspirations. Hence, it appears that judges’ views are associated with the degree of usefulness of foreign law in decision-making. Other reasons that inspire globalist judges to consult foreign law include inspiration, finding solutions to difficult cases,<sup>314</sup> and the need to meet transnational and international standards.<sup>315</sup> Elsewhere, Mak divides judges into three categories: “globalist,” “localist,” and “in between,”<sup>316</sup> demonstrating the justified difficulty in clearly classifying individual judges.

Another factor that may play a role in determining whether a judge’s approach is more globalist or localist is building and maintaining one’s individual reputation. After all, the reputation of a court is built upon the reputation of its individual judges. The SCC enjoys a reputation as a globalist court, and its justices established this. They show their globalist mindset not only through their judgments and dissenting opinions, but also through public speeches, academic papers, media interviews, and active participation in transnational judicial networks. As Vicki Jackson notes, “[J]udges from Canada may experience satisfaction from being regarded as committed to a cooperative transnational project of judging and human rights.”<sup>317</sup> Reading the words of several SCC judges, this perception appears accurate. Chief Justice McLachlin considers her court to operate within a new “worldwide rights culture,”<sup>318</sup>

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<sup>313</sup> *ibid* at 229.

<sup>314</sup> Barak, *supra* note 277 at 118. See also, Dworkin, *supra* note 298.

<sup>315</sup> Mak, *supra* note 28 at 229.

<sup>316</sup> *ibid* 102-106.

<sup>317</sup> Jackson, *supra* note 53 at 240.

<sup>318</sup> McLachlin, *supra* note 300.

whereas Justice LaForest has an optimistic view of legal cosmopolitanism, believing the SCC to have a “sincere outward-looking interest in the views of other societies.”<sup>319</sup>

“Judicial philosophy” also helps mould the globalist or localist mindset of judges. The former President of the Supreme Court of Israel, Aharon Barak, defines judicial philosophy as “an organised thought about the way in which a judge is to contend with the problematics of a hard case,” or, to put it differently, “a system of considerations that the judge takes into account when exercising discretion.”<sup>320</sup> Justice Barak, himself an active participant in the transnational dialogue among courts, who has held multiple positions including judge, Chief Justice, and academic, defends the globalist view:

When a national jurist—a judge, a professor of law, or an attorney—is confronted with the need to understand a legal phenomenon—for example, “what is law?”; “what is a right?”; “what is a legal person?”; “what is the relationship between morality and law?”—that jurist is certainly permitted, and it is even desirable, to examine the understanding of legal phenomena and legal concepts beyond his national framework. These are all universal aspects which cross national boundaries, and in order to understand them, it is worthwhile to turn to all thought which has been developed on the subject, be its geographical origin as it may. So did our forefathers through the years. And so did Holmes, Cardozo (judges), Roscoe Pound, Hohfeld, Fuller, Llewellyn (professors), and many others. They did not shut themselves inside their national borders. The entire world was before them.<sup>321</sup>

Justice Binnie, however, considered by many to be one of the most globalist judges on the SCC, appears to disagree about the importance of judicial philosophy, or as he calls it “personal views and biases” of judges. In his view, the effects of personal beliefs and background of judges on the adjudicating process are often exaggerated:

I think that the media greatly overstates the room for personal views and biases. When I got to the court and participated in court conferences, the

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<sup>319</sup> La Forest, *supra* note 144.

<sup>320</sup> Barak, *supra* note 277 at 118.

<sup>321</sup> Barak, *supra* note 301.

overwhelming issue was one of professionalism. . . . I think that as far as the judges are concerned, every judge believes he or she is interpreting and applying the law. Whether others accuse the courts of making up the law or not depends on whether they agree with the outcome.<sup>322</sup>

To what extent, however, the judicial philosophy of judges plays a role in the globalist or localist view of judges is difficult to assess. C.L. Otsberg and Matthew Wetstein suggest that ideological and philosophical divisions between Canadian Supreme Court judges do affect how judges vote in individual cases.<sup>323</sup> Chief Justice Beverley McLachlin acknowledges the different judicial philosophies of judges of the SCC, but when asked “whether there are ideological camps within the court,” she answered:

I would say no. There are of course judges who approach issues from a different perspective because of their own experience and philosophies; this gives the appearance of uniform approaches to certain issues especially in criminal law where it is often tempting to say one judge is pro-defendants and the other pro-Crown. But this is a simplification that should be avoided. Commentators have often tried to define some judges as liberal or conservative particularly with regard to social issues, minority rights, and Aboriginal rights. But here too this is a simplification that makes no sense. Every case is dealt with on its facts.<sup>324</sup>

Judicial philosophy is one component of the wider “philosophy of law” and more generally of the “philosophy of life” of individual judges. According to professor Harry Arthurs, a “globalist judicial philosophy” of judges may be influenced by the “globalization of the mind” process occurring in many elites.<sup>325</sup> As judges are part of the elite, it is likely their mindset will be affected by the process of globalization.

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<sup>322</sup> Makin, *supra* note 301.

<sup>323</sup> Ostberg & Wetstein, *supra* note 154.

<sup>324</sup> McLachlin, *supra* note 154 (Decision-making in the SC).

<sup>325</sup> Arthurs, *supra* note 139 at 223, 245-246.

Moreover, judges who are more inclined to the “moral universalist” school of thought, as established by Kant and later developed by Dworkin, are more likely to exhibit a globalist mindset than other judges.<sup>326</sup> In the view of these judges, fundamental human rights and rule of law principles might be considered the “universal good”; therefore, there is no reason to limit the participation of courts in global conversations and networks.<sup>327</sup> On the other hand, judges who are skeptical of natural law and the universal good, whose views are more aligned with positivist or sociological ideas,<sup>328</sup> tend to see law as the creation of humans and national institutions, and may be more localists. Judicial philosophy may be related to the “constitutional philosophy” of judges. For example, those who embrace the “living tree” doctrine<sup>329</sup> tend to be more globalist than “intentionalist” or “originalist” judges.<sup>330</sup> Nevertheless, as Eric Voeten observes, the role of judicial philosophy or ideology in the process of trans-judicial networking has rarely been explored.<sup>331</sup> Most scholarship on this issue focuses on the US Supreme Court.

The consciousness of individual judges appears to be another factor that drives trans-judicial networking. Slaughter gives reasons why this is a conscious process, by relating it to judicial cooperation in resolving transnational disputes, in other words cases with foreign elements (what is known as international private law). She notices the emergence of “judicial

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<sup>326</sup> Rado, *supra* note 61 at 127.

<sup>327</sup> *ibid* at 127-128.

<sup>328</sup> H L A Hart, *The Concept of Law*, 2nd ed (Oxford: Oxford University Press, 1994) at 250; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) at 47-50.

<sup>329</sup> *Edward v Canada* (AG), AC 124 (1930) 136. Lord Sankey in his opinion for the Privy Council used for the first time the ‘living tree’ doctrine of constitutional interpretation, recognizing the right of women to sit in the Canadian Senate. He argued that: “The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits ... Their Lordships do not conceive it to be the duty of this Board ... to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation”.

<sup>330</sup> Jackson, *supra* note 53 at 97.

<sup>331</sup> Eric Voeten, “Borrowing and non-Borrowing among International Courts” (2010) 39:2 J Legal Stud 547 at 572.

comity,” by referring to four strands: respecting foreign courts and their decisions; recognizing judges’ share of transnational disputes as co-equals in cases with foreign elements; emphasizing the importance of individual rights and their protection; and recognizing legal globalization as both cause and consequence of economic globalization.<sup>332</sup> The “community of courts” is created by the self-awareness of judges, who are increasingly coming together.<sup>333</sup> She points to their meetings, seminars, training institutes, and judicial organizations. In other words, she perceives the entire dialogue process as driven by the individual consciousness of judges. Slaughter, however, is very careful to acknowledge the limitations of this process:

[T]he vision of a global community of courts may seem a bit starry-eyed, projecting too much too quickly from too little. The language and conception is ambitious, but the reality *is* there. The judges themselves who are meeting, reading, and citing their foreign and international counterparts are the first to acknowledge a change in their own consciousness. They remain very much national or international judges, charged with a specific jurisdiction and grounded in a particular body of law, but they are also increasingly part of a larger transnational system.<sup>334</sup>

Philippe Sands observes, a “powerful new international judiciary . . . [that] has taken on a life of its own and has already, in many instances, shown itself unwilling to defer to traditional conceptions of sovereignty and state power.”<sup>335</sup> Relying heavily on Slaughter’s ideas, Kersch echoes her view about the role of the consciousness of judges in the process of judicial globalization. Citing Slaughter’s statement that judges “are remarkably self-conscious about what they are doing” as they participate in “the self-conscious construction of a global

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<sup>332</sup> Slaughter, *supra* note 35 at 1113; Slaughter, *supra* note 78 at 708.

<sup>333</sup> Slaughter, *supra* note 81 at 192.

<sup>334</sup> *ibid* at 194.

<sup>335</sup> Sands, *supra* note 302 at 553.

judicial community,”<sup>336</sup> Kersch asserts that, “indeed, this is precisely what they [judges] observe happening among judges.”<sup>337</sup> [Emphasis added]

The consciousness of individual judges, as a driving force for the process of transnational judicial dialogue and globalization of courts, is also acknowledged by the judges of the SCC. Justice Bastarache views the consciousness of judges as critical to the globalization process,<sup>338</sup> although the reasons for such consciousness may differ between judges or courts. “For judges of developing countries, the realisation that there is an international community of judges has created the desire to be part of it,” argues Bastarache, whereas “for developed countries, it is in effect a matter of cross-fertilization, and the importance of being part of a common enterprise for individual judges.”<sup>339</sup>

Finally, pragmatic forces or motivations appear to influence individual judges to use non-domestic legal sources and participate in conversation with their foreign counterparts. The most pragmatic reason for a judge is their need for new ideas in resolving difficult cases. “[J]udges confirmed that they do not look at foreign sources for solutions, but for ideas,” claim Gentili and Mak after interviewing several judges.<sup>340</sup> Such utilitarian motivations are reasonable, because the most important concern for a judge is, and indeed should be, how to reach the best possible decision. When domestic jurisprudence is insufficient, judges look to their foreign counterparts for new ideas and solutions.<sup>341</sup> Such a practice, Mark Tushnet

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<sup>336</sup> Slaughter, *supra* note 81 at 195-196.

<sup>337</sup> Kersch, *supra* note 71 at 359.

<sup>338</sup> Bastarache, *supra* note 154 at 54.

<sup>339</sup> *ibid* at 54.

<sup>340</sup> Gentili & Mak, *supra* note 39 at 142. See also, Mak, *supra* note 28 at 182.

<sup>341</sup> Smithey, *supra* note 299.

explains, might direct the judges to new theories they may want to consider,<sup>342</sup> and may help them become more aware of the directions they wish to pursue.<sup>343</sup>

Certainly, new ideas are important for better judicial reasoning, to persuade the public, interested parties, and their colleagues when disagreement arises.<sup>344</sup> The statistics of the SCC support this theory. According to research by Gentili and Mak, in the SCC “the number of foreign judgments cited increases along with the level of disagreement on a specific issue and the number of opinions filed.”<sup>345</sup> In my view, judges use foreign judgments to persuade others, making their decisions more acceptable to other government institutions such as Parliament, the executive, and other agencies. Gentili and Mak’s research indicates, “[O]n average, judges appear to resort more often to foreign case law when overturning government action than when upholding it.”<sup>346</sup>

Certain scholars remain skeptical about the individual forces driving judges to engage in dialogue with foreign counterparts. Some point out that when judges turn to other jurisdictions for ideas, it is to legitimize decisions already made.<sup>347</sup> In other words, it is simply results-driven. Justice Bastarache, acknowledging the above studies and drawing upon his own experience, states, “In my view, judicial borrowing in Canada exists but remains largely legitimising in nature.”<sup>348</sup>

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<sup>342</sup> Tushnet, *supra* note 299.

<sup>343</sup> Saunders, *supra* note 299 at 423.

<sup>344</sup> Voeten, *supra* note 331 at 550.

<sup>345</sup> Gentili & Mak, *supra* note 39 at 136. (See Figure 4.2)

<sup>346</sup> Gentili & Mak, *supra* note 39 at 137; For a number of such cases see e.g.: *R v Morgentaler* [1988] 1 SCR 30 (19 foreign judgments); *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 (20 foreign judgments); *R v Seaboyer* [1991] 2 SCR 577 (18 foreign judgments); *Miron v Trudel* [1995] 2 SCR 418 (14 foreign judgments); *R v Ruzic* [2001] 1 SCR 687 (23 foreign judgments); *R v Kang-Brown* [2008] 1 SCR 456 (13 foreign judgments).

<sup>347</sup> For such ideas, see, e.g., Roy, *supra* note 146 at para 26, 60, 97; Bushnell, *supra* note 154.

<sup>348</sup> Bastarache, *supra* note 154 at 51.

Other critics view judges' motivations as "judicial activism" or following a particular "political agenda."<sup>349</sup> Still others suggest there might be political or strategic considerations underlying the judicial use of foreign law by various courts and judges.<sup>350</sup> Voeten mention a few factors that may constitute the "agendas" or "interests" of judges: "Judges have goals, such as to see the law reflect their policy preferences, to advance their careers, or to enhance the institutional authority of the court on which they serve."<sup>351</sup>

## B. INSTITUTIONAL DRIVING FORCES

Scholars and judges have noted various motives or forces that drive courts as institutions, including the SCC, into further participation in transnational dialogue and judicial networks. Such forces include resolving complex cases and improving the quality of their decisions,<sup>352</sup> lack of domestic jurisprudence or the need to re-examine or change established precedents,<sup>353</sup> influencing and helping other courts,<sup>354</sup> the reputation and prestige of the Court,<sup>355</sup> judicial independence,<sup>356</sup> judicial diplomacy,<sup>357</sup> and effectiveness and efficiency.<sup>358</sup>

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<sup>349</sup> Alan Mason, "The Judge as Law-maker" (1996) 3 James Cook U L Rev 1 at 1; Michael D Kirby, "Judicial Activism" (1997) 27 West Austl L Rev 1 at 1, 10; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs*, 2<sup>nd</sup> ed (Toronto: University of Toronto Press, 1997); Hogg & Bushell, *supra* note 154 at 75, 80.

<sup>350</sup> Eyal Benvenisti, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts" (2008) 102 Am J Int'l L 241; Ryan C Black & Lee Epstein, "(Re-)Setting the Scholarly Agenda on Transjudicial Communication" (2007) 32:3 L & Soc Inq 789; Jack Knight & Lee Epstein, "The Norm of Stare Decisis" (1996) 40:4 Am J Pol Sci 40(4): 1018; Schauer, *supra* note 147 at 253.

<sup>351</sup> Voeten, *supra* note 331 at 553.

<sup>352</sup> Neilson, *supra* note 41 at 9; Slaughter, *supra* note 81 at 201; Voeten, *supra* note 331 at 550; L'Heureux-Dubé, *supra* note 37 at 23, 36; Vicki C Jackson, "Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality", Rights and Federalism" (1999) 1 Up AJ Const L 583 at 583; Dodek, *supra* note 55 at 454.

<sup>353</sup> For an empirical study touching also on this matter, *see, e.g.*, Gentili & Mak, *supra* note 39 at 143-144; Binnie, *supra* note 274 ("Foreign Sources: Searching for Enlightenment or a Fig Leaf?").

<sup>354</sup> Stephen J Choi & G Mitu Gulati, "Bias in Judicial Citations: A New Window into the Behavior of Judges?" (2008) 37 J Legal Stud 87 at 87. For the idea that, the more participator a court appears in the trans-judicial dialogue and networks, the higher are the chances that this court will be cited and influence other courts, *see, e.g.*, Barak, *supra* note 186 at 72, 114; L'Heureux-Dubé, *supra* note 37 at 26-27; Slaughter, *supra* note 81 at 198; Schauer, *supra* note 147 at 258; Voeten, *supra* note 331 at 551.

It can be said that the primary force that drives the SCC as an institution to participate in transnational judicial dialogue, through various mechanisms, including the use of foreign case law, is its desire to accomplish its constitutional duty: resolving disputes of national importance.

Voeten agrees that national courts use foreign decisions to improve the quality of their own work.<sup>359</sup> Such a practice is particularly helpful in deciding the most difficult cases; it is often helpful to review foreign judgements and learn from their experience.<sup>360</sup> Hence, the nature of cases and their similarity is an essential reason why courts look abroad for ideas and solutions.

Former Justice L'Heureux-Dubé, when evaluating the reasons constitutional courts engage in judicial dialogue, argues:

Whether sitting in Canada or the United States, Germany or the United Kingdom, South Africa or Zimbabwe, Japan or Australia, Argentina or Chile, national courts are facing similar claims and problems, to which each can contribute and from which each can learn.<sup>361</sup>

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<sup>355</sup> For writings about the high reputation of the SCC, see, e.g., Jackson, *supra* note 53 at 240; Slaughter, *supra* note 81 at 198; Schauer, *supra* note 147 at 258; L'Heureux-Dubé, *supra* note 37 at 26-27; Barak, *supra* note 186 at 72, 114; Liptak, *supra* note 193; Goldstone, *supra* note 189; Bastarache, *supra* note 154 at 41-42; La Forest, *supra* note 154 (The Expanding Role of the Supreme Court of Canada in International Law Issues) at 100-101.

<sup>356</sup> Frank Iacobucci, "The Supreme Court of Canada: Its History, Powers, and Responsibilities" (2002) 4:1 J App Pr & Pro 27 at 40; Slaughter, *supra* note 35 at 1105, 1107; Bastarache, *supra* note 154 at 54. See also: Cotler, *supra* note 200. He emphasizes that the Supreme Court of Canada is respected nationally and around the world "as a model of what a vital, learned, and independent judicial institution should be ... Supreme Court decisions are constantly cited by courts in diverse jurisdictions across the globe".

<sup>357</sup> Kersch, *supra* note 71 at 354; Slaughter, *supra* note 3 at 65-103; Slaughter, *supra* note 81 at 215; Mak, *supra* note 28 at 83-84.

<sup>358</sup> Mak, *supra* note 28 at 34; Ian Greene, *The Courts: Canadian Democratic Audit* (Vancouver: UBC Press, 2006). See also, Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances* (Antwerp: Intersentia, 2007); Daniela Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (Barnham (UK) & Burlington (VT): Ashgate, 2010).

<sup>359</sup> Voeten, *supra* note 331 at 550.

<sup>360</sup> Mak, *supra* note 28 at 39.

<sup>361</sup> L'Heureux-Dubé, *supra* note 37 at 36.

Such issues are happening in different courts throughout the world “perhaps more than ever.”<sup>362</sup> According to her, “similar issues” in human rights, including abortion, assisted suicide, hate speech, freedom of religion, environmental protection, privacy, rule of law, judicial independence, provide strong motivation to engage in conversation. Vicki Jackson seems to support such an assertion, advocating the relevance of “judgments reached by the constitutional courts of other nations considering similar problems.”<sup>363</sup>

Slaughter also, considers resolving complex cases and improving the quality of their decisions as one of the primary reasons judges look abroad. She asserts:

For these judges, looking abroad simply helps them do a better job at home, in the sense that they can approach a particular problem more creatively or with greater insight. . . . It provides a broader range of ideas and experience that makes for better, more reflective opinions. This is the most frequent rationale advanced by judges regarding the virtues of looking abroad.<sup>364</sup>

Dodek also observes that courts face common problems and advocates for the use of comparative legal sources. He believes “that the use of comparative law can strengthen the legitimacy of the reasons of the Supreme Court of Canada.”<sup>365</sup> Dodek extends this argument, noting that consideration of foreign case law can serve as an accountability mechanism of courts, limiting judicial discretion.<sup>366</sup> Mak also contends that the nature of cases guides the use of foreign law, in two ways; first, in cases where binding international law is involved, and second, in specific fields of law, such as extradition or private international law cases.<sup>367</sup>

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<sup>362</sup> *ibid* at 23.

<sup>363</sup> Jackson, *supra* note 352 at 583.

<sup>364</sup> Slaughter, *supra* note 81 at 201.

<sup>365</sup> Dodek, *supra* note 55 at 454.

<sup>366</sup> *ibid*.

<sup>367</sup> Mak, *supra* note 28 at 232.

Lack of domestic jurisprudence, or the need to re-examine or change established precedents,<sup>368</sup> are other possible motives that prompt the SCC to consider foreign legal sources. Gentili and Mak show empirically that the number of foreign references increased when the new Charter cases reached the court, and declined between the end of 1990 and the 2000s.<sup>369</sup> Such a trend seems to indicate that once the SCC develops its own domestic jurisprudence, it relies on it, lessening the need to examine foreign sources. Meanwhile, Justice Binnie suggests that one of the reasons to cite foreign law is “to encourage re-examination of earlier Canadian precedents.”<sup>370</sup> One such example concerns the extradition of individuals to countries where they would possibly face the death penalty, as in *Burns*.<sup>371</sup> The review of foreign case law in such cases, declares Justice Binnie, “assured the legal community and the broader public in Canada that all potential sources of enlightenment had been taken into account.”<sup>372</sup>

The desire to influence and help other courts can be seen as another reason the SCC participates in the process of transnational judicial dialogue. The goal is not just to assist lower Canadian courts, which is natural, but to share ideas and solutions with foreign, supranational, and international courts. A judge of the SCC confirms, “the Courts of Appeal in the Canadian provinces appreciate the citation of foreign sources by the Supreme Court.”<sup>373</sup> Despite their willingness to engage more with foreign case law, “the Courts of Appeal do not

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<sup>368</sup> For a typical case, see, *United States v Burns* [2001] 1 SCR 283. See also, Chapter 5 “Case Study - *US v Burns*: Analysis From a Transnational Judicial Dialogue Perspective”.

<sup>369</sup> Gentili & Mak, *supra* note 39 at 125-12 (see Table 4.1, Column D.)

<sup>370</sup> Binnie, *supra* note 274 (“Foreign Sources: Searching for Enlightenment or a Fig Leaf?”).

<sup>371</sup> *United States v Burns* [2001] 1 SCR 283.

<sup>372</sup> Binnie, *supra* note 274 (“Foreign Sources: Searching for Enlightenment or a Fig Leaf?”).

<sup>373</sup> Gentili & Mak, *supra* note 39 at 143.

have the same resources as the Supreme Court regarding the research of foreign legal sources.”<sup>374</sup>

As the data of this study will show later,<sup>375</sup> the transnational and international influence of the SCC also compels the Court and its judges into a further dialogue with foreign counterparts. Judges and current scholarship suggest that the more a court participates in transnational judicial dialogue and networks, the higher the chance that this court will be cited and influence other courts. Justices Barak and L’Heureux-Dubé, and Professors Schauer and Slaughter all agree that the US Supreme Court is losing its transnational and international influence, whereas the SCC is increasing its reputation.<sup>376</sup> At a more theoretical level, looking at empirical evidence, Stephen Choi and Mitu Gulati demonstrate that judges tend to cite the judges who frequently cite them.<sup>377</sup> As the SCOTUS is less inclined to cite non-US sources, foreign courts not surprisingly cite SCOTUS judgments with increasing reluctance.

The reputation and prestige of the Court is a visible force that drives the SCC toward greater participation in the process of dialogue. Building and maintaining a national, transnational, and international reputation is not an easy task. One way to achieve prestige in the global arena is through active participation in transnational conversations. As mentioned above, many scholars,<sup>378</sup> including Canadian and foreign judges,<sup>379</sup> regard the SCC as a court with an excellent national, transnational, and international reputation.

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<sup>374</sup> *ibid.*

<sup>375</sup> See Chapter 4 and 6.

<sup>376</sup> Barak, *supra* note 186 at 72, 114; L’Heureux-Dubé, *supra* note 37 at 26-27; Slaughter, *supra* note 81 at 198; Schauer, *supra* note 147 at 258. See also: Voeten, *supra* note 331 at 551.

<sup>377</sup> Choi & Gulati, *supra* note 354.

<sup>378</sup> See for example: Jackson, *supra* note 53 at 240; Slaughter, *supra* note 81 at 198; Schauer, *supra* note 147 at 258; Voeten, *supra* note 331 at 551.

<sup>379</sup> L’Heureux-Dubé, *supra* note 37 at 26-27; Claire L’Heureux-Dubé, “The Importance of Dialogue: Globalization, the Rehnquist Court, and Human Rights” in Martin H Belsky, ed, *The Rehnquist Court: A*

The desire to achieve greater judicial independence may motivate courts to participate in transnational judicial dialogue. However, this might work differently for developed and developing countries. For developed countries such as Canada, the greater the external global reputation of the court and higher its place in the global network of courts, arguably the greater its domestic reputation, credibility, and consequently independence from the other two branches of governance. Indeed, strong public confidence and the high global and national reputation of the Court constitute important factors that foster its independence.<sup>380</sup>

For developing countries, the desire for greater judicial independence might drive their constitutional courts to become more involved in transnational dialogue and transjudicial networking activities. By belonging to a wider global community of courts, national courts and judges of developing countries can enhance their credibility, and thus assert greater judicial independence from the legislative and executive branches.<sup>381</sup> This may be one reason why courts of developing countries tend to cite more foreign judgments than courts of developed countries.<sup>382</sup>

Judicial diplomacy, or bilateral or multilateral judicial relations, also may drive courts to engage in transnational dialogue. Indeed, a number of scholars see the process of dialogue among courts as a diplomatic phenomenon. Kersch identifies a number of scholars who view

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*Retrospective* (Oxford: Oxford University Press, 2002) 234; Barak, *supra* note 186 at 72, 114; Liptak, *supra* note 193; Goldstone, *supra* note 189; Bastarache, *supra* note 154 at 41-42; La Forest, *supra* note 154 (The Expanding Role of the Supreme Court of Canada in International Law Issues) at 100-101; LeBel & Chao, *supra* note 154; Louis LeBel & Andrea Gonsalves, *Comments on the Integration of International Law into the Canadian Legal System*, online: International Law and Litigation for US Judges, Federal Judicial Center <[http://www.fjc.gov/public/pdf.nsf/lookup/Intl0616.pdf/\\$file/Intl0616.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Intl0616.pdf/$file/Intl0616.pdf)>; Binnie, *supra* note 274; Beverly McLachlin, "Canada and the United States: A Comparative View of the Use of Foreign Law" (Remarks delivered to the American College of Trial Lawyers Northwest Regional Conference, Jasper, Alberta, 8 August 2009).

<sup>380</sup> See for example: Cotler, *supra* note 200.

<sup>381</sup> Slaughter, *supra* note 35 at 1105, 1107.

<sup>382</sup> Law & Chang, *supra* note 155 at 523, 529, 575.

the process of harmonization through courts as a “form of effective diplomacy.”<sup>383</sup> Slaughter considers the process of judicial globalization as a kind of judicial diplomacy.<sup>384</sup> Mak goes so far as to speak of the “international relations of highest courts.”<sup>385</sup> These relations are carried out through judicial networks and exchanges, individual views concerning globalization, and national judges in international courts.

A final consideration that may prompt courts into dialogue with their foreign counterparts is effectiveness and efficiency. While courts do learn about substantive case law and specific cases when engaging with other jurisdictions, arguably they learn more about foreign courts’ procedures, ethics, organization, and administration. Hence, the exchange of information through trans-judicial networks can help courts achieve higher levels of effectiveness and efficiency domestically. These foreign practices concerning court management, organization, or procedure can migrate more easily across national borders, because they constitute issues that are less politically controversial. Mak is one scholar who identifies judicial effectiveness and efficiency as important factors that can affect the use of foreign case law.<sup>386</sup> In my view, court management issues create non-politicized potential for courts from different sides of the world to learn from each other. Court management is essential to due process, because it allows decisions to be made within a reasonable time, and courts through dialogue and networking are learning a lot from each other.<sup>387</sup>

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<sup>383</sup> Kersch, *supra* note 71 at 354.

<sup>384</sup> Slaughter, *supra* note 3 at 65-103; Slaughter, *supra* note 81 at 215.

<sup>385</sup> Mak, *supra* note 28 at 83-84.

<sup>386</sup> *ibid* at 34.

<sup>387</sup> Greene, *supra* note 358. See also, Ng, *supra* note 358; Piana, *supra* note 358.

### C. NATIONAL DRIVING FORCES

It is likely the process of dialogue in general, and of the SCC in particular, is driven by other factors at the national, transnational, and global levels. At the Canadian national level, I have identified the following influences, based on my literature review of the existing scholarship: the Canadian Charter of Rights and Freedoms,<sup>388</sup> the Canadian constitutional framework,<sup>389</sup> legal tradition and the particularities of the legal system,<sup>390</sup> Canadian multiculturalism,<sup>391</sup> and Canadian national policy.<sup>392</sup>

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<sup>388</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act, 1982 (UK), 1982, c.11, s.52(1). For an idea on the use of the foreign case law by the SCC, see, Judgements of the Supreme Court of Canada, online: <<http://scc-csc.lexum.com/scc-csc/en/nav.do>>.

For scholarly literature about the role of the Charter in the use of foreign case law by the SCC, see, e.g., L'Heureux-Dubé, *supra* note 37 at 19; Basil S Markesinis & Jorg Fedtke, *Engaging with Foreign Law* (Oxford: Hart Publishing, 2009); Jackson, *supra* note 53; Makin, *supra* note 301; McLachlin, *supra* note 379 at 1; McLachlin, *supra* note 154 (The Charter of Rights and Freedoms: A Judicial Perspective) at 580; Neilson, *supra* note 41 at 5. For few important cases of the SCC that have used extensively the Charter and foreign case law, see, e.g., *R. v. Big M Drug Mart Ltd.*, [1984] 1 S.C.R. 295; *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161; *R v Oakes*, 1 SCR 103.

<sup>389</sup> Denis J Galligan, "The Paradox of Constitutionalism or the Potential of Constitutional Theory?" (2008) 28 Oxford J Legal Stud 343 at 344; Mak, *supra* note 28 at 25. For scholarly views focusing on important normative and constitutional transformations by the SCC, see, e.g., Patrick Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell Legal Publications, 1987); Alexander, *supra* note 154 at 1; FM Bevilacqua, *supra* note 154. For an example of how constitutional and legal norms can constrain judicial globalization in general, see: Bill HB2582 (*Arizona Foreign Decisions Act* 2011), art 12-181, stating that: "A court shall not use, implement, refer to or incorporate any case law or statute from another country or a foreign body or jurisdiction that is outside of the United States and its territories in any decisions, finding or opinion as either: 1) controlling or influential authority; 2) precedent or the foundation for any legal theory". See also, Bill Raftery, *Bans on Courts' Use of Sharia/International Law: Pennsylvania Bill Introduced*, online: Gavel to Gavel (28 November 2011) <<http://gaveltogavel.us/2011/11/28/bans-on-court-use-of-shariainternational-law-pennsylvania-bill-introduced/>>. For one of the best examples of how constitutional and legal norms can encourage constrain judicial globalization see: For the best example see: Constitution 1996 (South Africa), art 39: "(1) When interpreting the Bill of Rights, a court, tribunal or forum-(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law." For critical ideas on how the SCC might involve into judicial activism see: Robert Ivan Martin, *The Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (Montreal: McGill-Queen's University Press, 2003).

<sup>390</sup> Gentili & Mak, *supra* note 39 at 131; Choudhry, *supra* note 55 at 838; McCormick, *supra* note 146 at 88-90, 91-92; Mak, *supra* note 28 at 230-233, 270.

<sup>391</sup> Neilson, *supra* note 41 at 19.

<sup>392</sup> Bastarache, *supra* note 154 at 54; Voeten, *supra* note 331 at 552-553; Black & Epstein, *supra* note 350 at 789.

The Canadian Charter of Rights and Freedoms (Charter) appears to be one of the most significant forces driving the SCC in the process of transnational judicial dialogue.<sup>393</sup> Thus, the guaranteeing of human rights, freedoms, and principles can be said to motivate the SCC to participate in such interactions.

Such a view is supported by several justices of the SCC. Chief Justice Brian Dickson, who is considered the first judge to write judgments based on the Charter, took into account foreign precedent and general international consensus when resolving Charter cases.<sup>394</sup> Justice L'Heureux-Dubé believes that the SCC was motivated to consult with foreign colleagues in order to interpret the Charter.<sup>395</sup> Justice Binnie, in his exit interview with the media, identifies the Charter as an important factor in the enhanced use of foreign precedents by the SCC.<sup>396</sup> Other SCC judges interviewed by scholars confirm that “comparative law initially obtained more interest in the Court after the Charter entered into force.”<sup>397</sup> Chief Justice McLachlin also appears to emphasize the impact the Charter had on the use of foreign case law.<sup>398</sup> In an article written shortly after the Charter was implemented, she notes:

The difficulty is that the Canadian Charter . . . is a new experience. We have not had anything like it before. Our judges cannot rely on their own experience to breathe life into the Charter; instead they must find that life elsewhere.<sup>399</sup>

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<sup>393</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act, 1982 (UK), 1982, c.11, s.52(1).

<sup>394</sup> *R. v. Big M Drug Mart Ltd.*, [1984] 1 S.C.R. 295; *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 (Justice Dickson dissenting); *R v Oakes*, 1 SCR 103 (1986) (proportionality test); See also, Robert J Sharpe & Roach Kent, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003).

<sup>395</sup> L'Heureux-Dubé, *supra* note 37 at 19.

<sup>396</sup> Makin, *supra* note 301.

<sup>397</sup> Gentili & Mak, *supra* note 39 at 138.

<sup>398</sup> McLachlin, *supra* note 379 at 1.

<sup>399</sup> McLachlin, *supra* note 154 (The Charter of Rights and Freedoms: A Judicial Perspective) at 580.

Gentili and Mak also recognize the Charter's central role in the Court's involvement in transnational dialogue.<sup>400</sup> They emphasize that the SCC became one of the most progressive constitutional judiciaries, finding its place at the forefront of the global community of courts, after the Charter was adopted in 1982.<sup>401</sup> Such a view seems to be shared by other scholars.<sup>402</sup> The Constitution Act of 1982, which expressly endowed the Court with the power of judicial review of constitutional rights,<sup>403</sup> encouraged the SCC to be more open to the use of foreign legal sources.<sup>404</sup> Statistics and empirical research show that the SCC caseload increased significantly in the first 10 years under the Charter, with constitutional cases reaching around 40% of the Court's total judgments, and the use of foreign case law became much more common at this time.<sup>405</sup>

There is no doubt that the Charter plays a role in the use of foreign case law. The empirical data show that it evidently did. The question is whether the Charter also prompted the SCC to use other mechanisms of dialogue, or to participate in global judicial networks. This will be discussed in later chapters.<sup>406</sup>

The Canadian constitutional framework may also affect SCC participation in the process of judicial dialogue. According to Denis Galligan, certain legal theories, namely "constitutional theories," demonstrate the significance of constitutional norms in the governing system.<sup>407</sup> Such theories may help explain the Canadian approach to transnational

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<sup>400</sup> Gentili & Mak, *supra* note 39 at 114.

<sup>401</sup> *ibid.*

<sup>402</sup> Markesinis & Fedtke, *supra* note 388; Vicki C Jackson, *supra* note 53.

<sup>403</sup> *Constitution Act*, 1982 being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11, s 52(1).

<sup>404</sup> Gentili & Mak, *supra* note 39 at 114.

<sup>405</sup> See, *Judgments of the Supreme Court of Canada*, online: <<http://scc-csc.lexum.com/scc-csc/en/nav.do>>; Gentili, *supra* note 154.

<sup>406</sup> See Chapter 4, and Chapter 6.

<sup>407</sup> Galligan, *supra* note 389 at 344.

judicial dialogue.<sup>408</sup> Constitutional norms can constrain,<sup>409</sup> permit, or even encourage<sup>410</sup> the use of foreign law by national courts. Depending on whether the law emanates from a foreign or international source, constitutions may provide different guidelines. The role and approach of the constitutional court is also important. For example, the SCC is considered to have introduced vital normative and constitutional changes, particularly in the Charter era.<sup>411</sup> Such changes, particularly the striking down of acts of Parliament, have induced strong reactions, with some going so far as to accuse judges of “judicial activism.”<sup>412</sup>

Generally speaking, constitutional flexibility or inflexibility towards the use of non-domestic legal sources is an essential factor in determining whether a national court will engage with such sources,<sup>413</sup> but it is not the only determinative factor. As this chapter and the empirical data of this research demonstrate, this matter is much more complex, including both subjective and objective factors.

Legal tradition and the particularities of the legal system may also influence the SCC’s use or non-use of non-domestic legal sources and its general participation in transnational dialogue. Officially, Canada is a bijural (probably tri-jural) and bilingual country.<sup>414</sup> It predominately follows a common law tradition; however, in Quebec, private law matters fall

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<sup>408</sup> Mak, *supra* note 28 at 25.

<sup>409</sup> Bill HB2582 (Arizona Foreign Decisions Act 2011), art 12-181, stating that: “A court shall not use, implement, refer to or incorporate any case law or statute from another country or a foreign body or jurisdiction that is outside of the United States and its territories in any decisions, finding or opinion as either: 1) controlling or influential authority; 2) precedent or the foundation for any legal theory”. See also, Raftery, *supra* note 389.

<sup>410</sup> For the best example see: Constitution 1996 (South Africa), art 39: “(1) *When interpreting the Bill of Rights, a court, tribunal or forum-(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.*”

<sup>411</sup> For few of such views see: Monahan, *supra* note 389; Alexander, *supra* note 154 at 1; FM Bevilacqua, *supra* note 154.

<sup>412</sup> Martin, *supra* note 389.

<sup>413</sup> Mak, *supra* note 28 at 25; Galligan, *supra* note 389 at 344.

<sup>414</sup> Note that considering also the indigenous legal framework, it can also be considered as tri-jural. Such idea was also confirmed through interview with anonymous Justice Nr 2 and Justice Nr 9.

under a civil law system. Such particularities likely shape the way the SCC uses foreign legal sources. Canada has particularly strong roots within the Commonwealth legal system and a long history of using precedents from other Commonwealth countries, particularly the UK.<sup>415</sup> Mak, however, considers the doctrine of precedent or *stare decisis*, which is central to the Commonwealth legal tradition, as having “only a limited influence on judicial practices regarding the reference to non-binding foreign case law.”<sup>416</sup> She also claims that legal tradition plays a role in the selection of specific foreign courts from which to cite.<sup>417</sup> For example, the genealogic relationship between the legal traditions of Canada, the United Kingdom, and the United States makes it almost natural that they look to each other for inspiration, a fact supported by empirical evidence.<sup>418</sup> Empirical studies also show that, in *Quebeçois* cases, the SCC often quotes French judgments, reflecting the province’s French heritage.<sup>419</sup>

Legal tradition can also include the monist or dualist approach toward the implementation of international law.<sup>420</sup> Interestingly, empirical studies based on interviews with judges have found that the binding or non-binding status of a foreign legal norm is not that relevant. Instead, the substance and the persuasiveness of foreign sources—in other

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<sup>415</sup> Choudhry, *supra* note 55 at 838; McCormick, *supra* note 146 at 88.

<sup>416</sup> Mak, *supra* note 28 at 230-231.

<sup>417</sup> *ibid* at 231.

<sup>418</sup> Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer, 2000); La Forest, *supra* note 144 at 212, 217; L’Heureux-Dubé, *supra* note 37 at 18, 29; McCormick, *supra* note 146 at 88-80, 91-92; Bastarache, *supra* note 154 at 48; Choudhry, *supra* note 55 at 838.

<sup>419</sup> Mak, *supra* note 28 at 270.

<sup>420</sup> *Monism* and *dualism* are used to explain two theories of the relationship between national and international law. The most famous scholar that advocated the monist system is Hans Kelsen, with his landmark book: *Peace Through Law* (Union, New Jersey, 2000). One of the most notable proponents of the dualist theory was German jurist and philosopher Heinrich Triepel, with his work: *Volkerrecht und Landesrecht* (Leipzig: C.L. Hirschfeld 1899, repr. Aalen: Scientia, 1958). See also, Dionisio Anzilotti, *Corso di diritto internazionale*, 3d edn (Rome, Athenaeum, 1948).

words, their usefulness—is the primary reason they are referenced.<sup>421</sup> Canadian multiculturalism may also be a factor in the “globalist” approach of the SCC.

Canadian national politics may affect the SCC’s role in transnational judicial dialogue in general, and its citation of non-domestic legal sources in particular. For instance, in an academic paper Bastarache argues, “The Supreme Court is interested in pursuing a course governed by considerations of national policy and will continue to do so, as exemplified by its recent decisions in matters relative to the development of the common law.”<sup>422</sup> He states that in Canada there is little concern about global awareness and the need to be accepted, and claims, “The Supreme Court does not believe in harmonisation of results and wants to chart its own way, conscious nevertheless of the difficulty in having different interpretations of international instruments and universal values.”<sup>423</sup> It seems that Justice Bastarache is stressing national policy as the “guiding star.”

Executive or legislative political agendas, or pressures from civil society, may significantly influence the global openness of the SCC. Ryan Black and Lee Epstein argue that judges may be willing to cite more foreign decisions when the executive and legislative branches of a country are more cosmopolitan.<sup>424</sup> On the other hand, the opposite may occur if the relevant political actors are more nation-centred; such trends are increasing in the United States and Europe. Other scholars appear to share this perception.<sup>425</sup> Speaking in general, but mostly pointing at the US Supreme Court, Kersch notes, “Foundations and political activists have sponsored an increasing number of workshops and seminars aimed at persuading lawyers

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<sup>421</sup> Mak, *supra* note 28 at 232-233.

<sup>422</sup> Bastarache, *supra* note 154 at 54.

<sup>423</sup> *ibid.*

<sup>424</sup> Black & Epstein, *supra* note 350 at 789.

<sup>425</sup> Voeten, *supra* note 331 at 554-555.

and judges to adopt a global sensibility in arguing and deciding domestic constitutional cases.”<sup>426</sup> On the other hand, for an example of how influential the unwilling actors of national politics may become towards the dialogue of their Court and its judges, particularly the use of foreign law, we need to look at the US paradigm as the most typical.<sup>427</sup> Although this does not appear to be the case in Canada, where political actors seem to appreciate the SCC’s global reputation,<sup>428</sup> the Canadian government can shift the globalist or localist leanings of the SCC through judicial appointments, avoiding candidates with well-known globalist mindsets or *vice versa*, depending on the political agenda.

#### D. TRANSNATIONAL DRIVING FORCES

In addition to national factors, transnational forces may shape courts’ globalist or localist leanings, including the SCC and its judges. The literature review reveals the main transnational factors influencing the process of judicial dialogue and generally the globalization of judiciaries are the increase of transnational litigation,<sup>429</sup> common transnational legal standards,<sup>430</sup> and transnational civil society<sup>431</sup>.

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<sup>426</sup> Kersch, *supra* note 71 at 347; Ken I Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge: Cambridge University Press, 2004) at 357-358.

<sup>427</sup> Besides the above political and judicial debates regarding the use of foreign case law by the SC of the United States, see also: Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human] kind: The Value of a Comparative Perspective in Constitutional Adjudication”, (2005) 64 Cambridge LJ 575; Mak, *supra* note 28 at 106-107.

<sup>428</sup> Cotler, *supra* note 200. As mentioned above, Cotler, as Minister of Justice and Attorney General of Canada asserted that the Supreme Court of Canada is appreciated around the world “as a model of what a vital, learned, and independent judicial institution should be ... Supreme Court decisions are constantly cited by courts in diverse jurisdictions across the globe.”

<sup>429</sup> Slaughter, *supra* note 81 at 192; Slaughter, *supra* note 35 at 1112-1113; Bastarache, *supra* note 154 at 45; Neilson, *supra* note 41 at 9, 14-15. For an example of a guideline fostered by the increase of transnational litigation, see: The Supreme Court of British Columbia, “Notice to the Profession: Re Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases”, November 22, 2004, online: <[http://www.courts.gov.bc.ca/supreme\\_court/practice\\_and\\_procedure/practice\\_directions\\_and\\_notices/General/Guidelines%20Cross-Border%20Cases.pdf](http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/General/Guidelines%20Cross-Border%20Cases.pdf)>.

<sup>430</sup> Jeremy Waldron, “Foreign Law and the Modern *Ius Gentium*” (2005) 119 Harv L Rev 129 at 136, 144; Eric A Posner & Cass R Sunstein, “The Law of Other States” (2006) 5:1 Stand L Rev 131 at 131, 146; L’Heureux-Dubé,

The increase of transnational litigation appears to be the most obvious transnational force that motivates courts to engage in greater dialogue and networking. Transnational litigation encompasses “cases between states (with individuals typically in the wings), between individuals and states, and between individuals across borders.”<sup>432</sup> On the one hand, as free trade agreements among states and regions increase, the number of transnational cases is likely to increase. Particularly after the Canada - European Union (EU) Comprehensive Economic and Trade Agreement (CETA), the judicial conversation of the Canadian judiciary with EU courts and its member states is expected to intensify. On the other hand, if the United States pulls out of NAFTA, such a development would likely cause a decrease of transnational litigation with the US. Multilateral agreements notwithstanding, resolution of transnational disputes can be a significant motive why courts in general, and the SCC in particular, look to cooperate with other courts, not just willingly, but often out of necessity. Transnational litigation has been identified by Slaughter as a factor of dialogue among courts.<sup>433</sup> In her view, “Transnational litigation . . . encompasses [both] domestic and international tribunals.”<sup>434</sup> Slaughter develops this idea further, suggesting that this approach makes the process of JG a conscious process among national courts and judges.<sup>435</sup>

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*supra* note 37 at 19, 26-27; L’Heureux-Dubé, *supra* note 154 at 164; La Forest, *supra* note 154 (The Use of International and Foreign Material in the Supreme Court of Canada) at 236. For scholars thinking that transnational standards might become dangerous because of the “travel of constitutional ideas” see, e.g., Kim Lane Scheppelle, “The Migration of Anti-constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency” in Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 347.

<sup>431</sup> Kersch, *supra* note 71 at 360; Price, *supra* note 262 at 579-580, 584.

<sup>432</sup> Slaughter, *supra* note 81 at 192.

<sup>433</sup> *ibid* at 191-192; Slaughter, *supra* note 35 at 1112-1113.

<sup>434</sup> Slaughter, *supra* note 81 at 191 at 192.

<sup>435</sup> Slaughter, *supra* note 35 at 1112.

In Canada, the “Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases”<sup>436</sup> is an excellent example of judicial dialogue, particularly for the lower courts. The guidelines “are directed to harmonizing global litigation through communication with and deference to foreign courts, and encourages dialogue between the adjudicative bodies of the world community.”<sup>437</sup> Whilst issues concerning transnational litigation may appear more relevant to lower courts, it is not always limited to them. According to Justice Bastarache, cases of private international law—in other words, transnational litigation—have been “the most significant cases dealing with international issues” in the SCC.<sup>438</sup>

Harmonized transnational legal standards are an additional significant factor that compels the SCC into the process of dialogue. Following legal standards of progressive foreign nations, particularly those related to human rights and other constitutional matters, appears to be a reason why the SCC participates in such exchange activities. Courts are looking abroad for ideas and standards, and trying to implement the quality standards at home, whilst avoiding the bad ones.<sup>439</sup> This permits courts to not only improve internally, but also strengthen their reputation abroad. Waldron argues that both foreign and international law constitute a modern *ius gentium* (law of nations),<sup>440</sup> representing a global consensus of

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<sup>436</sup> Supreme Court of British Columbia, "Notice to the Profession: Re Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases", November 22, 2004, online: <[http://www.courts.gov.bc.ca/supreme\\_court/practice\\_and\\_procedure/practice\\_directions\\_and\\_notices/General/Guidelines%20Cross-Border%20Cases.pdf](http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions_and_notices/General/Guidelines%20Cross-Border%20Cases.pdf)>.

<sup>437</sup> Neilson, *supra* note 41 at 14-15.

<sup>438</sup> Bastarache, *supra* note 154 at 45.

<sup>439</sup> For a detailed example, see Chapter 5 “Case Study - *US v Burns*: Analysis From a Transnational Judicial Dialogue Perspective”.

<sup>440</sup> The *ius gentium* or *jus gentium* (Latin, “law of nations”) is a well-known concept of international law originated in the ancient Roman legal and existent in Western law traditions. The *ius gentium* is not a legal code or a body of statute law, but rather customary, thought to be held in common by all *gentes* (“peoples” or “nations”) in “reasoned compliance with standards of international conduct.” See, David J Bederman, *International Law in Antiquity* (Cambridge University Press, 2004) 85.

civilized nations on various constitutional issues.<sup>441</sup> In other words, he is declaring that not just international law, but also transnational legal standards are a kind of *ius gentium*. Waldron analogizes the law to the sciences:

[S]olutions to certain kinds of problems in the law might be best established in the way that scientific theories are established. They do not get established as infallible, they change over the years, and there are always outliers who refuse to accept them — some cranky, some whose reluctance leads eventually to progress.<sup>442</sup>

Eric Posner and Cass Sunstein, who call transnational legal standards “the law of other nations,” argue that the laws and practices of other nations provide crucial information that courts ought not to ignore.<sup>443</sup> They support this argument with the “Condorcet Jury Theorem,” asserting that if the majority of nations believe that something is true, there are strong reasons to believe that it is in fact true.<sup>444</sup> However, the two impose certain conditions courts should consider before looking to foreign practices: 1) the other state is sufficiently similar; 2) the judgment embodied in the practice of the other state is independent and given by independent courts; and 3) the foreign decisions or laws reflect the real judgment of the affected population or decision makers.<sup>445</sup>

Justice L’Heureux-Dubé acknowledges that similar legal standards might motivate the SCC to examine and use precedent from certain nations:

Our courts have held that one factor in making this determination is examination of experience and practice in other free and democratic societies. As a neighbouring country, with values similar in some ways to our own,

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<sup>441</sup> Waldron, *supra* note 430 at 144.

<sup>442</sup> *ibid.*

<sup>443</sup> Posner & Sunstein, *supra* note 430.

<sup>444</sup> *ibid.*; Waldron, *supra* note 430 at 136.

<sup>445</sup> Waldron, *supra* note 430 at 136.

America's statutes and jurisprudence have played a prominent role in this comparison of foreign approaches.<sup>446</sup>

In another article, she appears even more determined to encourage the consultation of foreign sources. She advises the SCC and Canadian judges that they should not “blindly [accept] the Canadian experience as the last word on how a free and democratic society ought to conduct itself.”<sup>447</sup> Other justices accept that “the study of comparative law is part of the intellectual perspective of the SCC,”<sup>448</sup> particularly the jurisprudence of very visible courts, such as the ECtHR. In an interview, one SCC judge observed that the Court “has an obligation to the legal community in Canada to show that the Court has informed itself about relevant foreign sources, even though their citation is not mandatory.”<sup>449</sup> This idea seems to be shared by Justice Breyer of the US Supreme Court, who cites a number of foreign constitutions in his dissenting judgments, and argues, “experience [of foreign courts and judges] may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.”<sup>450</sup> [Emphasis added]

Looking at other jurisdictions helps the SCC to better understand Canadian standards, and to improve them through quality decisions. Justice L’Heureux-Dubé builds upon this idea, suggesting:

[It helps] not only when we *accept* the solutions and reasoning of others, but when we *depart* from them, since even then, understanding and articulating the

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<sup>446</sup> L’Heureux-Dubé, *supra* note 37 at 19.

<sup>447</sup> L’Heureux-Dubé, *supra* note 154 at 164. For same ideas see also: La Forest, *supra* note 154 (The Use of International and Foreign Material in the Supreme Court of Canada) at 236.

<sup>448</sup> Gentili & Mak, *supra* note 39 at 138. Elaine Mak interviewed judges for her post-doc thesis, published as a book: Mak, *supra* note 28 [Elaine Mak, *Judicial Decision-making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts*, Hart Studies in Comparative Public Law, Vol. 3 (Oxford: Hart Publishing, 2013)].

<sup>449</sup> Gentili & Mak, *supra* note 39 at 143.

<sup>450</sup> *Printz v. United States*, 117 S. CL 2405 (1997).

reasons a different solution is appropriate for a particular country helps make a better decision.<sup>451</sup>

It is the most important cases—the cases of high public interest, involving issues such as the death penalty, the principle of proportionality, or torture—that are more likely to be considered through the lens of transnational legal standards.<sup>452</sup> One such example is the decision of the SCC in the case of *United States v Burns*, a case involving two Canadian citizens facing extradition to the United States, where they could receive the death penalty.<sup>453</sup> This case will be examined further in Chapter 5.

However, others note the limitations and question the importance of foreign case law and transnational legal standards. Justice Bastarache acknowledges that globalization in general and the use of international law and foreign precedents in particular are now part of the decision-making process of the SCC. However, he does not appear convinced that transnational standards should have a significant influence on Canadian jurisprudence:

The minority was willing to review a number of non-binding foreign sources and international law principles not as passing references but in a concerted effort to ensure consistency between domestic law and that of comparable jurisdictions. This, I believe, is contrary to the jurisprudence of the Supreme Court of Canada. Although globalisation is having a certain effect on domestic legal affairs, there is a clear demarcation between domestic law and international law.<sup>454</sup>

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<sup>451</sup> L’Heureux-Dubé, *supra* note 37 at 26-27.

<sup>452</sup> *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858; *United States v Burns* [2001] 1 SCR 283.

<sup>453</sup> *United States v Burns* [2001] 1 SCR 283.

<sup>454</sup> Bastarache, *supra* note 154 at 44. See also cases, *Harvard College v Canada* [2002] 4 S.C.R. 45; *National Corn Growers Assn. v Canada (Import Tribunal)* [1990] 2 S.C.R. 1324.

Other critics question the expertise of Canadian judges regarding the proper use of foreign case law and even international law.<sup>455</sup> Justice Neilson admits:

[Canadian judges] lack “comparative literacy” as well as institutional competence in international law. . . . The same can be said for most lawyers. It has been my experience that self-represented litigants are more likely than lawyers to refer to international law. The obvious answer, identified by many critics, is the need to educate the Bar, and count on them in turn to educate us.<sup>456</sup>

Ultimately, even Justice Bastarache admits the SCC has made official its openness towards foreign sources and international law through its deliberations and written judgments.

He writes that the SCC has:

[E]xpanded the rules of interpretation to permit reference to international treaties and foreign judgments in all cases in which domestic legislation under review has been expressly or impliedly enacted or amended in order to implement an international obligation. This was confirmed specifically as the norm the case of *National Corn Growers*.<sup>457</sup>

This indicates that review of transnational legal standards before deciding important cases containing international obligations has been an SCC practice since at least 1990 when *National Corn Growers* was decided.

However, there is a significant risk in transmitting constitutional ideas from one court to another. As Kim Lane Scheppele and others have rightly suggested, it might well be that in addition to progressive constitutional ideas, regressive ideas are also transferred, as occurred with the *Guantanamo Cases*.<sup>458</sup>

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<sup>455</sup> Bayefsky, *supra* note 171 at 325; van Ert, *supra* note 154 at 326; Brunnée & Toope, *supra* note 170 at 4.

<sup>456</sup> Neilson, *supra* note 41 at 28.

<sup>457</sup> Bastarache, *supra* note 154 at 44-45. See also, *National Corn Growers Assn. v Canada (Import Tribunal)* [1990] 2 S.C.R. 1324

<sup>458</sup> Scheppele, *supra* note 430.

Unfortunately, several optimistic human rights developments that began in the 1990s appear to be in danger lately, particularly in light of terrorism, concerns about the refugee crisis, and “deglobalization” waves. Such an environment demonstrates why transnational judicial dialogue, which has the potential to allow constitutional courts across the globe to safeguard important principles of international or transnational human rights law, and at the very least allows them to support each other, is essential. Aharon Barak, former President of the Supreme Court of Israel, speaking to a high profile gathering of judges and scholars, in the light of the “new momentum” noted, “It is the duty of courts that through an increased judicial networking and support with each other to be able to uphold the high standard of human rights.”<sup>459</sup>

Another transnational driving force is the prestige of other foreign courts. The reputation of other courts appears to be a significant factor determining which court the SCC decides to cite, or with which it will network or enter into conversation. Scholars and judges argue that reputation is a crucial element in selecting which court to cite or not cite.<sup>460</sup> Mak’s interview with a Canadian judge reveals that SCC judges regard the ECtHR as a prestigious court that balances rights and freedoms in its decision-making, much as their Court does.<sup>461</sup> Justice L’Heureux-Dubé points to other factors that play a role in determining the SCC’s willingness to refer to other courts: availability and accessibility of sources, focus of legal literature, and, particularly, legal education.<sup>462</sup>

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<sup>459</sup> Barak, *supra* note 115 (Remarks delivered to the Osgoode Hall Law School, Osgoode Professional Development, Toronto, 27 September 2016).

<sup>460</sup> Mak, *supra* note 28 at 206.

<sup>461</sup> *ibid* at 208. See for example the case: *R v National Post* [2010] SCC 16, [2010] 1 SCR 477, paras 8-25. In this case the SCC used the same line of reasoning as the ECtHR in: *Sanoma Uitgevers v The Netherlands* 2010] ECHR 1284 (ECtHR, 14 September 2010).

<sup>462</sup> L’Heureux-Dubé, *supra* note 37 at 20.

Finally, several scholars speak about the emergence of transnational civil society as a significant force behind transnational judicial dialogue and the globalization of courts. While civil society might be considered a national force, perhaps “national agendas” are simply a reflection of “transnational agendas,” driven by transnational civil society. My extended research has not revealed any studies that directly examine the role of transnational civil society in the decision-making or transnational conversation process of the SCC. However, looking at more general studies, scholars such as Kersch and Richard Price seem to suggest that transnational civil society is an important factor in the process of the globalization of courts.<sup>463</sup> Civil society organizations do not only “undertake voluntary collective action across state borders in pursuit of what they deem the wider public interest,” they also engage judges in their actions.<sup>464</sup> According to Price, transnational civil society follows a clear step-by-step strategy that begins by “identifying a problem of international concern and providing information,” then proceeds through “creating norms or recommending policy change,” on to “building networks and coalitions of allies;” and finally to “employing tactics of persuasion and pressure to change practices and/or encourage compliance with norms.”<sup>465</sup> According to Kersch, “all of these activities are now routinely aimed at domestic judges deciding domestic cases in constitutional democracies around the world.”<sup>466</sup> The SCC is not likely to be excluded from these tactics.

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<sup>463</sup> Kersch, *supra* note 71 at 360; Price, *supra* note 262 at 579-580.

<sup>464</sup> Price, *supra* note 262 at 579.

<sup>465</sup> *ibid* at 584.

<sup>466</sup> Kersch, *supra* note 71 at 360.

## E. INTERNATIONAL AND GLOBAL DRIVING FORCES

Various observers have identified additional global and international forces that may play a role in the process of dialogue and transnational judicial networks. According to scholars and judges, the most influential international or global factors include, international obligations and standards,<sup>467</sup> the internationalization of human rights,<sup>468</sup> the emerging global jurisprudence among the courts of the world,<sup>469</sup> the existence and increasing number of international and regional courts,<sup>470</sup> the establishment of a global community of courts through

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<sup>467</sup> For a starting point to understand the place of international norms in the Canadian constitutional framework, see the oft-cited passage from the dissenting judgment of Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161; See also, LeBel, *supra* note 61 at 4. He gives a number of cases to show such a trend, example: *Re Foreign Legations*, [1943] SCR 208, [1943] 2 DLR 481 [*Foreign Legations* cited to SCR]; *Saint John v. Fraser-Brace Overseas Corp.*, [1958] SCR, 263, 13 DLR 2d [177 [*Fraser-Brace* cited to SCR]; *PSAC v. United States Defence Department*, [1992] 2 SCR 50, 91 DLR (4th) 449 [*Re CLC* cited to SCR]; *R v. Hape*, 2007 SCC 26, [2007] 2 SCR 292 [*Hape*]. For scholarly argument on this issue, see, e.g., Elaine Mak, *supra* note 28 at 225; Anne F Bayefsky, “International Human Rights Law in Canadian Courts” in Irwin Cotler & F Pearl Eliadis, eds, *International Human Rights Law: Theory and Practice* (Canadian Human Rights Foundation, 1992) 115 at 125-129. For critics, see, e.g., Brunnée & Toope, *supra* note 170 at 4; Neilson, *supra* note 41 at 8, 24.

<sup>468</sup> L’Heureux-Dubé, *supra* note 37 at 24; Justice Kirby of the Australian High Court goes considers that even the Australian Constitution “accommodates itself to international law” in, *Newcrest Mining (WA) Ltd. & Another v. Commonwealth of Australia & Another* (1997) 147 A.L.R. 42, 148 (Austl); Neilson, *supra* note 41 at 8, 9.

<sup>469</sup> Slaughter, *supra* note 81 at 191 at 202; Schauer, *supra* note 147 at 258-259; Carsten Smith, “The Supreme Court in Present-Day Society,” in Stephan Tschudi-Madsen ed, *The Supreme Court of Norway* (Oslo: H. Aschenhoug & Co., 1998) 96 at 134-135; Bastarache, *supra* note 154 at 44. Justice Bastarache speaks here about the extradition case risking death penalty in the USA: *United States v Burns* [2001] 1 SCR 283; LeBel, *supra* note 61 at 20.

<sup>470</sup> There are at least 17 courts with that status to date: International Court of Justice (ICJ); International Tribunal for the Law of the Sea (ITLOS); International Criminal Tribunal for the former Yugoslavia (ICTY); International Criminal Tribunal for Rwanda (ICTR); International Criminal Court (ICC); Special Court for Sierra Leone (SCSL); European Court of Human Rights (ECHR); Inter-American Court of Human Rights (IACHR); World Trade Organization dispute settlement system, and, in particular, the Appellate Body (WTO AB); Court of Justice of the European Union (CJEU); European Free Trade Area Court of Justice (EFTA Court); Court of Justice of the Andean Community (TJAC); Caribbean Court of Justice (CCJ); Permanent Review Court of the MERCOSUR; Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (CCJA); Court of Justice of the Economic Community of West African States; Court of Justice of the Economic and Monetary Community of Central Africa (CEMAC).

For a scholarly view on this topic see, e.g., Daniel Terris, Cesare PR Romano & Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World’s Cases* (Oxford: Oxford University Press, 2007) at 4-8.

a conscious judicial global networking process,<sup>471</sup> the general process of globalization,<sup>472</sup> and new technology, particularly the Internet.<sup>473</sup>

International obligations and standards might be considered one of the most influential factors in this category. Canada is a signatory to numerous international treaties, and participates in many global and regional organizations. Consequently, meeting international obligations and standards in various fields of law is likely an important concern for the SCC. Looking at international or supranational courts, or even horizontally to counterpart courts, and understanding their interpretation and application of these international standards, is imperative.

The place of international norms in the Canadian constitutional framework is described in the oft-cited passage from the dissenting opinion of Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alberta)*:

Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. The general principles of constitutional interpretation require that

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<sup>471</sup> Slaughter, *supra* note 81 at 192, 215-216; Kersch, *supra* note 71 at 352; Bastarache, *supra* note 154 at 54. See also, Guido Calabresi, an American legal scholar and senior judge on the U.S. Court of Appeals for the Second Circuit perceiving judges as members of the “adjudicative bodies of the world community” in, *Euromepa, S.A. v R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (2d Cir. 1995).

<sup>472</sup> Dodek, *supra* note 55 at 459; For an interesting idea about the “globalization of the mind” as a starting point of globalization, see: Harry W Arthurs, *supra* note 139; See also: Kersch, *supra* note 71 at 364; Ringel, *supra* note 86; Osiatynski, *supra* note 86 at 245.

<sup>473</sup> L’Heureux-Dubé, *supra* note 37 at 23-24; Bastarache, *supra* note 154 at 54; Mak, *supra* note 28 at 214; For ideas that question the neutrality of internet and technology, see, e.g., Paul Ganley & Ben Allgrove, “Net Neutrality: A User’s Guide, Computers, Law and Security Review”, (2006) 2:6, 454-463; Charles Arthur, “Net neutrality, Internet must remain neutral”, *The Guardian* (15 September 2010) online: The Guardian <<http://www.theguardian.com>>; Nicolas Vermeys, “Law in the Age of Technology” (ATLAS Seminar delivered at the Faculty of Law, University of Montreal, 17 June 2015) [unpublished]; See Online: <<http://netneutralitymap.org/>>; “Not Neutral about Net Neutrality: Barack Obama jumps into the debate about how to regulate broadband”, *The Economist* (15 Nov 2014) online: <<http://www.economist.com/news/business/21632511-barack-obama-jumps-debate-about-how-regulate-broadband-not-neutral-about-net>>.

these international obligations be a relevant and persuasive factor in *Charter* interpretation. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1984] 1 S.C.R. 295, at p. 344, interpretation of the *Charter* must be “aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter’s* protection”. The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of the “full benefit of the *Charter’s* protection”. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada’s international obligations under human rights conventions.<sup>474</sup>

In this view, international standards are important for the SCC because they are rooted and embodied in the text of the Canadian Charter itself. International human rights treaties and covenants played a significant role in the drafting of the Charter, particularly the European Convention of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.<sup>475</sup> It is for this reason that Gentili and Mak argue, “It should not come as a surprise . . . that in interpreting the Charter, the SCC is open to citation of foreign materials coming from the ECtHR or from other jurisdictions.”<sup>476</sup>

Canada is often considered to operate as a dualist system, meaning it requires national and provincial legislation to implement international legal norms in domestic law. However, in a recent academic article former SCC Justice Louis LeBel suggests this is not always the case, stating, “Customary international law is now directly incorporated into the common law

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<sup>474</sup> *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161; *R. v. Big M Drug Mart Ltd.*, [1984] 1 S.C.R. 295, at p. 344

<sup>475</sup> Bayefsky, *supra* note 467 at 125-129; Bayefsky, *supra* note 171 at 310; Jackson, *supra* note 53 at 239; John E Claydon, “International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms” (1982) 4 Sup Ct L Rev 287 at 287.

<sup>476</sup> Gentili & Mak, *supra* note 39 at 135.

of Canada and is effective immediately without the need for further legislative or executive action.”<sup>477</sup> In his view, what he calls a “common law of the world” has been created. Obviously, the role of the SCC is fundamental in building this “common law of the world” through a variety of mechanisms of dialogue, including the citation of international law and foreign judgments. As I will show in Chapter 5,<sup>478</sup> the SCC, through the use and interpretation of international law, is driving Canada towards a monist system.

In addition to Justice LeBel, other SCC justices of the SCC confirm the system is changing. In an article on the internationalization of law and the role of the SCC, Justice Bastarache argues:

Canada’s system of receiving international law into the domestic legal order is neither monist nor dualist; *it is a hybrid of the two*, demanding the implementation of conventional international law but allowing for the incorporation of customary international law” [emphasis added].<sup>479</sup>

Justice La Forest also tends toward a monist approach, acknowledging that the SCC has increasingly adopted interpretative techniques that align the Charter with international treaties: “[O]ur Court . . . is willing to recast the law, if need be, to conform to evolving international conditions.”<sup>480</sup> Former Justice L’Heureux-Dubé has also shown an almost monist approach to the use of international law, not only through her judicial decisions, but also

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<sup>477</sup> LeBel, *supra* note 61 at 4. He gives a number of cases to show such a trend, example: *Re Foreign Legations*, [1943] SCR 208, [1943] 2 DLR 481 [*Foreign Legations* cited to SCR]; *Saint John v. Fraser-Brace Overseas Corp.*, [1958] SCR, 263, 13 DLR 2d [177 [*Fraser-Brace* cited to SCR]; *PSAC v. United States Defence Department*, [1992] 2 SCR 50, 91 DLR (4th) 449 [*Re CLC* cited to SCR]; *R v. Hape*, 2007 SCC 26, [2007] 2 SCR 292 [*Hape*].

<sup>478</sup> See, Chapter 5 “Case Study - *US v Burns*: Analysis From a Transnational Judicial Dialogue Perspective”.

<sup>479</sup> Bastarache, *supra* note 44 at 3.

<sup>480</sup> La Forest, *supra* note 154 (The Expanding Role of the Supreme Court of Canada in International Law Issues) at 89, 96. This is especially evident in *Libman v. The Queen*, [1985] 2 S.C.R. 178.

through her very active role in many transnational judicial activities,<sup>481</sup> particularly her contribution to the Bangalore Principles:<sup>482</sup>

It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.<sup>483</sup>

There are, however, those who are critical of this “creeping monism,” and of the SCC’s ability to genuinely follow international obligations and standards. Neilson raises the point that Canadian judges lack “institutional competence in international law.” The reasons for this include “the vast array of international instruments and conventions,” and “the complexities surrounding their reception into Canadian law,” the “need to educate the Bar” and the need to include more international law in law schools.<sup>484</sup> Meanwhile, although Justice Bastarache admits that international instruments are used to inform “human rights jurisprudence throughout the world,” he believes that international instruments should be viewed through the lens of the Charter, and in one case even suggested, “[I]nternational consensus was used to support domestic principles.”<sup>485</sup>

Internationalization of human rights through increasing formal international legal instruments may also be propelling the SCC toward a more globalist approach. After the Second World War, human rights became a central concern throughout much of the world,

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<sup>481</sup> See, Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

<sup>482</sup> Micheal Kirby, “The Impact of International Human Rights Norms: ‘A Law Undergoing Evolution’” (1995) 25 Western Australian Law Rev 130. For a later version of this article visit also: <[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_bang11.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_bang11.htm)>.

<sup>483</sup> Principle 7 of *Bangalore Principles*. The Bangalore Principles are set out in 62 Austl. LJ 531(1988) and 14 Commonwealth L. Bull. 1196 (1988). The Bangalore meeting was followed by seven later meetings of Commonwealth judges.

<sup>484</sup> Neilson, *supra* note 41 at 24.

<sup>485</sup> Bastarache, *supra* note 154 at 44. See also: *United States v Burns* [2001] 1 SCR 283.

which lead to the passage of the Universal Declaration of Human Rights, and later the adoption of International Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights, all signed by Canada. Canada is also a signatory to numerous other international human rights covenants and treaties, at the global and regional level. Since 1990, Canada has been a member of the Organization of American States (OAS), although it has neither signed the American Convention of Human Rights nor submitted to the jurisdiction of the Inter-American Court of Human Rights.<sup>486</sup> These formal links to international law, a significant part of it binding on the SCC, as well as a common understanding and language of human rights, undoubtedly drive the SCC to look at international, supranational, and constitutional courts across the globe. Former Justice L'Heureux-Dubé seems to share this understanding, emphasizing that the “international nature of human rights” is a leading factor in the transnational judicial dialogue occurring in the field of human rights.<sup>487</sup> Justice Kirby of the Australian High Court goes even further, arguing:

[The Australian Constitution] accommodates itself to international law ... the reason for this is that the Constitution not only speaks to the people of Australia who made it and accepted it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.<sup>488</sup>

The emerging global jurisprudence among the courts of the world might also motivate the SCC to participate in transnational dialogue. Justice Bastarache appears to acknowledge the emergence of a global jurisprudence when he states that foreign legal sources are cited by

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<sup>486</sup> Organization of American States, online: <[http://www.oas.org/en/about/our\\_structure.asp](http://www.oas.org/en/about/our_structure.asp); <http://www.corteidh.or.cr/index.php/en>>.

<sup>487</sup> Neilson, *supra* note 41 at 23-24.

<sup>488</sup> *Newcrest Mining (WA) Ltd. & Another v. Commonwealth of Australia & Another* (1997) 147 A.L.R. 42, 148 (Austl).

the SCC in human rights cases, “to demonstrate established or emerging patterns informing human rights jurisprudence throughout the world.”<sup>489</sup> As mentioned above, Justice LeBel also speaks of a global jurisprudence or a “common law of the world.”<sup>490</sup> However, by the end of his article, he concedes, “The development of a law ‘of some nations’ may present a more realistic picture of the future than the rise of ‘a common law of the world’.”<sup>491</sup> Nonetheless, scholars perceive the SCC and its judges as “progressive,” “outward-looking,” and consciously “part of a global debate on human rights in democratic societies.”<sup>492</sup>

Slaughter considers “the emergence of global jurisprudence” to be occurring not only in the human rights arena, but on “any particular issue.”<sup>493</sup> She sees such a phenomenon happening through an “active dialogue among the world's judges in the language of a common set of precedents.”<sup>494</sup> Looking at this phenomenon Schauer argues, “[I]deas that are seen as close to an emerging international consensus are likely to be more influential internationally.”<sup>495</sup> However, this apparent global legal unity and harmonization raises concerns for some. Justice Carsten Smith of Norway, on the one hand, appeals to his colleagues, “We should especially contribute to the ongoing debate on the courts’ position and on international human rights”; on the other hand, he insists it is necessary “to weigh the advantages of international legal unity in various legal areas against the need to protect the legal foundation of national and local cultures.”<sup>496</sup> Even Slaughter acknowledges such risks,

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<sup>489</sup> Bastarache, *supra* note 154 at 44. Justice Bastarache speaks here about the extradition case risking death penalty in the USA: *United States v Burns* [2001] 1 SCR 283.

<sup>490</sup> LeBel, *supra* note 61 at 4.

<sup>491</sup> *ibid* at 20.

<sup>492</sup> Gentili & Mak, *supra* note 39 at 148.

<sup>493</sup> Slaughter, *supra* note 81 at 191 at 202.

<sup>494</sup> *ibid* at 202.

<sup>495</sup> Schauer, *supra* note 147 at 258-259.

<sup>496</sup> Smith, *supra* note 469 at 134-135.

and admits, “No one answer is the right one; the principles of pluralism and legitimate difference again prevail.”<sup>497</sup> Nevertheless, like Justice L’Heureux-Dubé, Slaughter argues, “[F]ailure to participate in this dialogue—to listen as well as to speak—can sharply diminish the influence of any individual national court.”<sup>498</sup>

Another global factor that could be construed as promoting judicial dialogue and the globalization of courts is the existence and increasing number of international and regional courts. There are at least 17 courts with that status to date.<sup>499</sup> As mentioned above, and as the empirical data of my study will show,<sup>500</sup> the jurisprudence of several of them, such as the ECtHR, International Court of Justice (ICJ), and the Court of Justice of the European Union (CJEU), is often referred to by the SCC. Several scholars agree that the establishment of international and regional courts, and the emerging global jurisprudence of these courts, which is later adopted by constitutional courts from across the globe, are significant factors that enhance dialogue and harmonization of judiciaries.<sup>501</sup>

Establishing a global community of courts through a conscious judicial global networking process could be viewed as another reason the SCC participates in the process of dialogue. Guido Calabresi, an American legal scholar and senior judge on the U.S. Court of

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<sup>497</sup> Slaughter, *supra* note 81 at 202.

<sup>498</sup> L’Heureux-Dubé, *supra* note 37 at 16; Slaughter, *supra* note 81 at 202.

<sup>499</sup> International Court of Justice (ICJ); International Tribunal for the Law of the Sea (ITLOS); International Criminal Tribunal for the former Yugoslavia (ICTY); International Criminal Tribunal for Rwanda (ICTR); International Criminal Court (ICC); Special Court for Sierra Leone (SCSL); European Court of Human Rights (ECHR); Inter-American Court of Human Rights (IACHR); World Trade Organization dispute settlement system, and, in particular, the Appellate Body (WTO AB); Court of Justice of the European Union (CJEU); European Free Trade Area Court of Justice (EFTA Court); Court of Justice of the Andean Community (TJAC); Caribbean Court of Justice (CCJ); Permanent Review Court of the MERCOSUR; Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa (CCJA); Court of Justice of the Economic Community of West African States; Court of Justice of the Economic and Monetary Community of Central Africa (CEMAC).

<sup>500</sup> See Chapter 3, 5, and 6.

<sup>501</sup> Neilson, *supra* note 41 at 9; Terris, Romano & Swigart, *supra* note 470 at 4-8.

Appeals for the Second Circuit, argues in one of his judgments that international cooperation by judges requires “an ongoing dialogue between the adjudicative bodies of the world community.”<sup>502</sup> Slaughter views this reality as a conscious and ongoing process, and acknowledges the need for further development of a community of courts, which she believes can only be accomplished through a bottom–up process.<sup>503</sup> The broadening of this community in a self-conscious way, the building of common norms and principles, and viewing the judiciaries of every country as part of a wider family all suggest that this global community is a reality.<sup>504</sup>

Drawing heavily on the ideas of Slaughter, Kersch looks at new democracies from a “global governance” perspective. He considers the entire process of judicial dialogue and harmonization as a “*sine qua non* of the construction of judicial legitimacy” in such nations.<sup>505</sup> Similarly, Justice Bastarache notes, “For judges of developing countries, the realisation that there is an international community of judges has created the desire to be part of it, not just to discover new perspectives and possibilities, but to gain in credibility.”<sup>506</sup>

Another factor influencing the globalist approach of the SCC is the general process of globalization. Globalization of individual minds,<sup>507</sup> societies, economies, politics, and cultures is thought to play a key role on the process of globalization of the judiciaries. Dodek recognizes globalization as a factor that “necessitates comparison” because of the technology, global communication, and access to information. In his view, “[T]he failure to engage in comparison has the potential to raise questions about the legitimacy of the Supreme Court’s

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<sup>502</sup> *Euromepa, S.A. v R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (2d Cir. 1995).

<sup>503</sup> Slaughter, *supra* note 81 at 215-216.

<sup>504</sup> *ibid.*

<sup>505</sup> Kersch, *supra* note 71 at 352.

<sup>506</sup> Bastarache, *supra* note 154 at 54.

<sup>507</sup> Arthurs, *supra* note 139.

decisions.”<sup>508</sup> As noted above, other scholars believe general globalization to be an “historical imperative” that courts cannot deny or resist. Kersch, speaking about American judges, argues the globalization of courts is “a foreign policy imperative in an increasingly globalized world.”<sup>509</sup>

New technology, particularly the Internet, appears to have a role in transnational judicial conversation and the globalization of courts. Former Justice L’Heureux-Dubé considers “advances in technology” to be one of the most important factors favouring the “internationalization of courts,” especially electronic databases, which allow computer searches of foreign decisions.<sup>510</sup> Justice Bastarache also shares the view that the development of technology has had a significant impact on the accessibility of foreign law, although he believes its importance extends beyond electronic searches: “Outside of official organisations and initiatives, the Internet has played an important role in the process of judicial globalisation.”<sup>511</sup> According to Justice Bastarache, the Internet has influenced other social forms of judicial conversation, including direct contact among judges through electronic communication, cross-fertilization of ideas, and influencing and raising the consciousness of judges of their global community.<sup>512</sup>

Few scholars also consider the Internet and digitalization to contribute to the current advanced stage of the globalization process of courts, including the SCC.<sup>513</sup> However, some scholars,<sup>514</sup> and even the media,<sup>515</sup> doubt the positive role of technology and the Internet.<sup>516</sup>

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<sup>508</sup> Dodek, *supra* note 55 at 459.

<sup>509</sup> Kersch, *supra* note 71 at 364. See also: Ringel, *supra* note 86; Osiatynski, *supra* note 86 at 245.

<sup>510</sup> L’Heureux-Dubé, *supra* note 37 at 23-24.

<sup>511</sup> Bastarache, *supra* note 154 at 54.

<sup>512</sup> *ibid.*

<sup>513</sup> Mak, *supra* note 28 at 214; Gentili & Mak, *supra* note 39 at 139.

<sup>514</sup> Ganley & Allgrove, *supra* note 473.

They question the neutrality of such tools, stating that although they seem to be neutral, such human creations can be only as neutral as the humans who produce them. Others recall that this is not the only “age of technology” that humanity has ever faced.<sup>517</sup>

## VII. CRITICS OF TRANSNATIONAL JUDICIAL DIALOGUE

Several academics and judges actively oppose the use of non-domestic legal sources in national decision-making, and more broadly, the process of judicial dialogue, networks, and the globalization of the judiciaries. Debates about the use of comparative law can be divided into two groups, which sometimes overlap: debates about *legitimacy* and debates about *utility*.<sup>518</sup>

Thomas Kadner Graziano writes, “In the early 21st century, it might seem surprising to still ask the question whether it is legitimate for judges to use the comparative method in their reasoning”; yet, there are a number of arguments that question the practice.

The primary argument is the lack of democratic legitimacy.<sup>519</sup> According to these critics, a judge is only bound by domestic law and ratified international agreements, and only

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<sup>515</sup> Arthur, *supra* note 473.

<sup>516</sup> “Not Neutral about Net Neutrality: Barack Obama jumps into the debate about how to regulate broadband”, *The Economist* (15 Nov 2014) online: <<http://www.economist.com/news/business/21632511-barack-obama-jumps-debate-about-how-regulate-broadband-not-neutral-about-net>>; See Online: <<http://netneutralitymap.org/>>.

<sup>517</sup> Vermeys, *supra* note 473. Indeed, it seems that every age of human history was an age of technology. Important landmarks in human development such as, the discovering of fire, wheel, internal combustion engines, electricity, printing press, radio, television, telephone, and so on, are the best testifiers of this idea.

<sup>518</sup> Thomas Kadner Graziano, *Is it Legitimate and Beneficial for Judges to Compare? in Courts and Comparative Law* (Oxford, 2015) at 25-26; Mads Andenas & Duncan Fairgrieve, “Introduction - Courts and Comparative Law: In Search of Common Language for Open Legal Systems”, in *Courts and Comparative Law* (Oxford: Oxford University Press, 2015) 5.

<sup>519</sup> See e.g. Ernest A Young, “Foreign Law and the Denominator Problem” (2005) 119 Harv. L. Rev. 148 at 163. He notes: “[I]mporting foreign law into the domestic legal system through constitutional interpretation circumvents the institutional mechanism by which the political branches ordinarily control the interaction between the domestic and the foreign”; David J Pfeffer, “Depriving America of Evolving Its Own Standards of Decency? An Analysis of The Use of Foreign Law In Eighth Amendment Jurisprudence and Its Effect On Democracy” (2007) 51 Saint Louis U. L. J. 855 at 879; Zachary Larsen, “Discounting Foreign Imports: Foreign

a national legislature has the democratic legitimacy to guide the courts about the applicable laws. Jeremy Rabkin sees cross-citation and the wider process of dialogue as moving in an anti-legal and anti-constitutional direction.<sup>520</sup> He argues that judges, courts, and judicial bodies should not be actors in the globalization process, and that the process of judicial globalization should not be allowed without considerable scrutiny.<sup>521</sup> Wiktor Osiatynski opposes the use of foreign legal sources, citing issues such as the absence of legitimacy and differences in identity and citizenship.<sup>522</sup> Christopher McCrudden is another critic of the process of judicial dialogue and particularly the citation of foreign legal sources. He calls this type of judicial interaction “judicial adventurism,”<sup>523</sup> asserting that comparative law is not democratic and that foreign judges should have no role in shaping the domestic laws of another nation.

One of the most well-known arguments against the citation of foreign judgments, the danger of “cherry-picking,” is frequently used by critics of the comparative approach, most notably Justice Antonin Scalia<sup>524</sup> and Chief Justice John Roberts of the US Supreme Court.<sup>525</sup>

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Authority in Constitutional Interpretation & the Curb of Popular Sovereignty” (2009) 45 Willamette L. Rev. 767 at 784.

<sup>520</sup> Jeremy A Rabkin, *Law without Nations?: Why Constitutional Government Requires Sovereign States*, (Princeton: Princeton University Press, 2005) at 22-23.

<sup>521</sup> *ibid.*

<sup>522</sup> Osiatynski, *supra* note 86 at 267. For more authors criticizing the use of foreign case law, see: Martin S Flaherty, “Judicial Globalization in the Service of Self-Government” (2006) 20 Ethics & Int’l Aff 477; Mark Tushnet, *Taking the Constitution away from the Courts* (Princeton, NJ: Princeton University Press, 1999); Robert H Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Vintage Canada, 2003); Jed Rubenfeld, “The Two World Orders” (2003) Wils Q 22.

<sup>523</sup> Christopher McCrudden, “Judicial Comparativism and Human Rights” in Esin Örucü & David Nelkin, eds, *Comparative Law: A Handbook* (Portland, Oregon: Hart Publishing, 2007) at 371.

<sup>524</sup> For an emphatic statement against the use of comparative law by US Federal courts, see Antonin Scalia, “Keynote Address: Foreign Legal Authority in the Federal courts”, in American Society of International Law, *Proceedings of the 101st Annual Meeting (American Society of International Law), Vol 98* (2004) 305, online: <<http://www.jstor.org/pss/25659941>>. Scalia, notes at 309: “Adding foreign law ... is much like legislative history, which ordinarily contains something for everybody and can be used or not used, used in one part or in another, deemed controlling or pronounced inconclusive, depending upon the result the court wishes to reach ... The Court’s reliance has also been selective as to when foreign law is consulted *at all*”; *Ibid.*: “To invoke alien

Cherry-picking, the argument goes, permits a court to search foreign law in support of a favourable solution, but to reject the outcomes of similar cases when they differs from the decision the judges seek. This may explain why, in an examination of the weaknesses resulting from the use of foreign case law, Mark Rahdert finds such comparative use is opportunistic, haphazard, simplistic, highly selective, and results-driven.<sup>526</sup>

Broader arguments invoking the lack of legitimacy in these processes concern the legal system as national system,<sup>527</sup> specific to the national situation,<sup>528</sup> and the fact that legal

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law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making but sophistry", dissenting opinion in *Roper v Simmons*, US S.Ct., 543 US 551 [2005] 627.

<sup>525</sup> Chief Justice of the US Supreme Court John Roberts: "Foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking over a crowd for support and picking out your friends ... And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent ... and use that to determine the meaning of the Constitution", in US Senate Judiciary Committee, Hearing on the Nomination of John Roberts to be Chief Justice of the Supreme Court, Transcript, Day Two, Part III, 13.09.2005, online: <<http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301210.html>>; see also Richard Posner, *Legal Affairs*, July/August 2004, online <[http://www.legalaffairs.org/issues/July-August-2004/feature\\_posner\\_julaug04.msp](http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp)>.

<sup>526</sup> Mark C Rahdert, "Comparative Constitutional Advocacy" (2007) 56 Am U L Rev 553 at 636.

<sup>527</sup> Antonin Scalia, "Commentary", 40 *St. Louis U. L. J.* [1996] 1119 at 1122: "[we] judges of the American democracies are servants of our peoples, sworn to apply ... the laws that those peoples deem appropriate. We are not some international priesthood empowered to impose upon our free and independent citizen supra-national values that contradict their own." In the USA, some critics have argued that an "unchecked comparative practice" was "subversive of the whole concept of sovereignty", see: Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 108th Cong., 2d Sess. 77 (2004) at 72 (testimony of Prof. Jeremy Rabkin, Cornell Univ.).

<sup>528</sup> In *Lawrence et al. v Texas* 539 US 558 [2003] 598 (on the constitutionality of a statute of the State of Texas prohibiting certain sexual acts between persons of the same sex; held that this law violates the 'Due Process Clause' of the US Constitution), p. 598: "The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court ... should not impose foreign moods, fads, or fashions on Americans." With reference to *Foster v Florida*, 537 US 990, note (2002) (Justice Thomas): "Justice Breyer has only added another foreign court to his list while still failing to ground support for his theory in any decision by an American court. *Ibid*, at 990. While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans".

science is a largely national science.<sup>529</sup> Another criticism of the use of foreign judgments is the lack of knowledge of foreign law and linguistic barriers.<sup>530</sup> Richard Posner specifically notes the ignorance of judges concerning the complexity of the “socio-historico-politico-institutional background” of cases.<sup>531</sup>

Other scholars argue against the *utility* of comparative case law, questioning whether it is a beneficial method for judges. Carlos Rosenkrantz, who argues against the constitutional borrowing of foreign legal sources by national courts, asserts that his reasons are both conceptual and practical.<sup>532</sup> In his view, the use of foreign legal sources is problematic because of “the heterogeneity of constitutional law” and “reference to foreign law adds unnecessary complexity to decisions by courts.”<sup>533</sup>

Mary Ann Glendon emphasizes the difficulty in fully grasping foreign law and its political and legal context, stating, “The problem of gaining an accurate understanding of foreign material should not be underestimated.”<sup>534</sup> She continues by asserting that many supporters for increased judicial use of foreign law, including justices of the highest courts, “do not seem to appreciate the ways in which the political, constitutional, procedural, and

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<sup>529</sup> Louis Blum, “Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication”, (2002) 39 San Diego L Rev 157 at 163; Brinton Lucas, “Structural Exceptionalism and Comparative Constitutional Law”, (2010) 96 Virginia L Rev 1965.

<sup>530</sup> Graziano, *supra* note 518 at 29; Ewoud Hondius, “Comparative Law in the Court-Room: Europe and America Compared”, in A. Büchler/M. Müller-Chen (eds.), *Festschrift für Schwenger*, Vol. 1 (Bern: Stämpfli, 2011) 759 at 769: ‘The high quality of the [foreign] expert opinions is apparent from the reports on Dutch law. And yet ... when reading the expert opinion on Dutch law, I sometimes know almost for certain that a Dutch court would decide differently now’.

<sup>531</sup> Richard A Posner, *No Thanks, We Already Have Our Own Laws*, online: Legal Affairs, The Magazine at the Intersection of Law and Life <[http://www.legalaffairs.org/issues/July-August-2004/feature\\_posner\\_julaug04.msp](http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp)>.

<sup>532</sup> Carlos F Rosenkrantz, “Against Constitutional Borrowings and Other Nonauthoritative Uses of Foreign Law” (2003) 1 Int’l J Const L 269.

<sup>533</sup> *ibid.*

<sup>534</sup> Mary Ann Glendon, *Comparative Law in the Age of Globalization*, 52 Duq L Rev 1, 24 (2014) at 14.

cultural contexts of other nations are different from our own.”<sup>535</sup> Comparative constitutional scholar Mark Tushnet voices similar concerns, noting, “Differences in constitutional cultures complicate the task of doing comparative constitutional law, perhaps to the point where the payoff in any terms other than the increase of knowledge is small.”<sup>536</sup>

Schauer, in an interesting critique of the use of foreign case law, claims that courts are quite particular about whom they borrow from and in what circumstances. In other words, he argues that the choice of foreign judgment is more likely to depend on political and symbolic factors than on the substantive merits of the legal ideas.<sup>537</sup> Voeten, in an article on borrowing amongst international courts, offers thought-provoking arguments against the citation of foreign legal sources that can be applied to national courts.<sup>538</sup> One of Voeten’s criticisms is that the citation of foreign case law is results-driven, in that “judges use external citations purposively in order to achieve a desired effect with a particular audience.”<sup>539</sup> Voeten also criticizes the cross-citation of foreign precedent, suggesting, “[T]here is no evidence for the reciprocity hypothesis;”<sup>540</sup> courts do not respond to each other’s citations, and the old models of legal transplantation are still in place. Only courts from the most developed countries are being cited; courts almost never use cases from the developing countries. In his view, a genuine network of horizontal trans-judicial dialogue does not exist among courts.<sup>541</sup>

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<sup>535</sup> *ibid.*

<sup>536</sup> Mark Tushnet, “Some Reflections on Method in Comparative Constitutional Law”, in Sujit Choudhry ed, *The Migration of Constitutional Ideas* (Cambridge University Press, 2007) 67 at 68.

<sup>537</sup> Schauer, *supra* note 147 at 292.

<sup>538</sup> Voeten, *supra* note 331.

<sup>539</sup> Eric Voeten, “Borrowing and non-Borrowing among International Courts” (2010), online: [http://ducis.jhfc.duke.edu/wp-content/uploads/2009/02/voeten2009\\_0226.pdf](http://ducis.jhfc.duke.edu/wp-content/uploads/2009/02/voeten2009_0226.pdf) at 3.

<sup>540</sup> Voeten, *supra* note 331 at 572.

<sup>541</sup> *ibid.*

Similarly, according to David Law and Wen-Chen Cheng, judicial dialogue is not truly global, but is focused on the usual high-prestige countries. It is very elitist, very exclusionary, and very non-representative, much of the so-called dialogue is very one-sided, and there is a tendency to stretch the word “dialogue” to describe situations in which there is no actual interaction between the parties in question, to the point that it becomes unclear what the term “dialogue” even means.<sup>542</sup> Furthermore, based on empirical evidence, they suggest there are only one-sided citations: that of highly prestigious courts by other, less prestigious courts.<sup>543</sup>

Hirschl focuses on several methodological challenges of the comparative citation aspect of transnational judicial dialogue: the lack of scholarship that deals with the history of this phenomenon; the available evidence is almost exclusively from the Western world; the challenge of “cherry-picking”; the limitations of simply counting foreign citations; constitutional courts refer to a roughly similar set of jurisdictions with common legal cultures; and the fair use of foreign citations requires a degree of knowledge about the studied jurisdictions and their political context in addition to their legal and constitutional traditions.<sup>544</sup>

Frishman, who advocates the organizational theory in relation to courts, extends her analysis beyond the reference of non-domestic legal sources, and emphasizes:

[T]he danger does not come from citing or looking at foreign law, but rather, other types of interaction, such as meetings at judicial organizations, judicial delegations, or judicial conferences. The result of these transnational judicial interactions will be convergence on certain practices of courts, especially in the way courts understand their national roles, the ways they present themselves to their national audiences, and the methods they use to do so. The adoption of

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<sup>542</sup> Law & Chang, *supra* note 155 at 523, 529, 575.

<sup>543</sup> *ibid* at 523.

<sup>544</sup> Hirschl, *supra* note 118 at 16-18.

these similar practices across national borders is likely to distance the courts from their national audiences and cause courts to lose their national support.<sup>545</sup>

This critique calls for further academic attention to the other forms of transnational judicial dialogue; those forms are at the centre of this doctoral research. Although Frishman's study recognizes only "three main ways in which courts and judges interact: face-to-face interactions, IT-based communication, and cross-citations,"<sup>546</sup> missing other institutional and judge-individual mechanisms of dialogue, it is a crucial step toward understanding how the judicial conversation proceeds.

Justice Breyer of the US Supreme Court of the US also acknowledges that foreign citations are overemphasized, and highlights the direct dialogue occurring among judges in various settings, as a phenomenon that is almost unseen and is likely to have very significant effects:

[T]hese interactions are typically invisible to the general public. I focus on them here because they may affect the way a justice of our Court understands part of his role. And that understanding may have more important consequences for the law than many matters that receive more attention, such as the debate over referring to the decisions of foreign courts.<sup>547</sup>

As seen above, judges are also divided on the legitimacy and utility of the process of judicial dialogue with foreign counterparts. The most famous controversy among judges involves US Supreme Court justices. Several recent cases in the US Supreme Court have prompted debate on controversial topics, including the execution of mentally disabled

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<sup>545</sup> Frishman, *supra* note 70 at 1.

<sup>546</sup> *ibid* at 15.

<sup>547</sup> Breyer, *supra* note 92 at 5-6.

persons,<sup>548</sup> the execution of juvenile offenders,<sup>549</sup> affirmative action in university admissions,<sup>550</sup> and the criminal prohibition of homosexual activity.<sup>551</sup> In these cases, the practice of referring to foreign court decisions divided the court, most notably between Justice Scalia, who opposed the practice, and Justice Breyer, who supports it. These debates caught the attention of not only academics,<sup>552</sup> but also politicians and the public.<sup>553</sup>

As a Court of Appeals judge in 1991, Justice Breyer, a well-known advocate of the judicial globalization process, introduced a ground-breaking idea. In a widely cited passage he reasoned that the question facing judges around the globe was how to “help the world's legal systems work together, in harmony, rather than at cross purposes.”<sup>554</sup> He envisioned judges as partners, participating in one of the most important and difficult undertakings of human

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<sup>548</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>549</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>550</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>551</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>552</sup> For views in favour of using foreign law by US courts, see: Vicki C Jackson, “Constitutional Comparison: Convergence, Resistance, Engagement” (2005) 119 Harv L Rev 109; Mark Tushnet, “Transnational/Domestic Constitutional Law” (2003) 49 Loy LA L Rev 109; Mark Tushnet, “When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law” (2005-2006) 90 Minn L Rev 1275; Melissa A Waters, “Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law” (2005) 93 Geo LJ 487. For views opposing the use of foreign law by US courts see: John O McGinnis, “Foreign to Our Constitution” (2006) 100 Nw U L Rev 303; Ernesto J Sanchez, “A Case Against Judicial Internationalism” (2005) 38 Conn L Rev 185; Richard A Posner, “Foreword: A Political Court” (2005) 119 Harv L Rev 31; Robert J Delahunty & John Yoo, “Against Foreign Law” (2005) 29 Harv JL & Pub Pol’y 291. For an interesting article regarding debate among US Supreme Court judges see: Norman Dorsen, “The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer” (2005) 3 Int’l J Const L 519.

<sup>553</sup> “Transcript: Day Two of the Roberts Hearings” *The Washington Post* (13 September 2005), online: The Washington Post, <[www.washingtonpost.com](http://www.washingtonpost.com)>; “Transcript: Day Three of the Roberts Hearings” *The Washington Post* (14 September 2005), online: The Washington Post, <[www.washingtonpost.com](http://www.washingtonpost.com)>; “Transcript: Day Four of the Roberts Hearings” *The Washington Post* (15 September 2005), online: The Washington Post, <[www.washingtonpost.com](http://www.washingtonpost.com)>; “Transcript: Sotomayor Confirmation Hearings, Day 2” *The New York Times* (14 July September 2009), online: The New York Times, <[www.nytimes.com](http://www.nytimes.com)>; “Transcript: Sotomayor Confirmation Hearings, Day 3” *The New York Times* (16 July September 2009), online: The New York Times, <[www.nytimes.com](http://www.nytimes.com)>; “Transcript: Sotomayor Confirmation Hearings, Day 4” *The New York Times* (17 July September 2009), online: The New York Times, <[www.nytimes.com](http://www.nytimes.com)>; Elizabeth Greathouse, “Justices See Joint Issues with the E.U.”, *The Washington Post* (9 July 1998) online: The Washington Post <<https://www.washingtonpost.com/>> at A24 (quoting Justice O’Connor and Justice Breyer).

<sup>554</sup> *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991).

society, the judging process. In his latest book, Justice Breyer maintains his globalist ideas about the benefits of referring to foreign decisions, and even envisions “judges as diplomats.”<sup>555</sup>

Another important advocate of the use of foreign law by US courts is Justice Sandra Day O'Connor. Beyond her citation of foreign case law in her judgments, and her active participation in face-to-face meetings with foreign judges,<sup>556</sup> in public speeches and in academic papers she also encouraged the use of foreign case law,<sup>557</sup> advising American lawyers to pay more attention to foreign law.<sup>558</sup> In her view, both judges and lawyers tend to forget that other legal systems exist.<sup>559</sup> She argues that US judges need to look to both international and foreign law, not only to compare and learn from these systems but also to facilitate the flow of transnational commerce.<sup>560</sup>

At least two other current US Supreme Court justices are also supportive of the comparative practice. Ruth Bader Ginsburg writes:

The US judicial system will be poorer, I believe, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own . . . we are not so wise that we have nothing to learn from other democratic legal systems newer to judicial review for constitutionality.<sup>561</sup>

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<sup>555</sup> Breyer, *supra* note 92 at 247-248.

<sup>556</sup> See e.g. Press Briefing, *U.S. Justices Compare U.S., E. U. Judicial Systems* (July 8, 1998), online: <<http://www.useu.be/archive/justic708.html>>; Press Briefing, *U.S. Justices Compare U.S., E. U. Judicial Systems* (July 8, 1998), <<http://www.useu.be/archive/justic708.html>>; Elizabeth Greathouse, “Justices See Joint Issues with the E.U.”, *The Washington Post* (9 July 1998) online: *The Washington Post* <<https://www.washingtonpost.com/>> at A24.

<sup>557</sup> O'Connor, *supra* note 49.

<sup>558</sup> Sandra Day O'Connor, “Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law” (1998) 45 *Fed Law* 20.

<sup>559</sup> Speech at the 41st Congress of the Union Internationale des Advocates in September 1997, see: O'Connor, *supra* note 558.

<sup>560</sup> O'Connor, *supra* note 558.

<sup>561</sup> Ginsburg, *supra* note 427 at 576.

Justice Sonia Sotomayor, stated in the year of her appointment, “To the extent that we have freedom of ideas, international law and foreign law will be very important in the discussion of how to think about the unsettled issues of our legal system.”<sup>562</sup>

Several judges of lower courts also seem to favour of the process of transnational judicial exchange and interaction. For example, Judge Calabresi of the Second Circuit Court of Appeals supports the judicial dialogue, noting, “Wise parents do not hesitate to learn from their children.”<sup>563</sup> In various cases,<sup>564</sup> he expresses a vision of international cooperation, and calls for a “[d]ialogue between the adjudicative bodies of the world community.”<sup>565</sup> Even certain prominent scholars view such a vision as “truly extraordinary”.<sup>566</sup> It has been called “a vision of a global legal system, that is established not by the World Court in The Hague, but by national courts working together around the globe.”<sup>567</sup> Chief Justice Shirley Abrahamson, of the Wisconsin Supreme Court, is another advocate of the judicial dialogue process, writing about the “increasingly worldly role state judges might play as we approach the new millennium.”<sup>568</sup>

As mentioned above, one of the most well-known opponents of the use of foreign judgements is Antonin Scalia, former justice of the US Supreme Court.<sup>569</sup> In 1998, when confronted with foreign judgments cited in a case regarding the death penalty, he stated, “We

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<sup>562</sup> Steven Groves, Questions for Justice Sotomayor on the Use of Foreign and International Law, The Heritage Foundation, July 6, 2009, online at: <<http://www.heritage.org/research/reports/2009/07/questions-for-judge-sotomayor-on-the-use-of-foreign-and-international-law>>.

<sup>563</sup> *US v Manuel Then*, 2nd Circuit, 56 F.3d 464 (1995).

<sup>564</sup> *United States v. Then* 56 F.3d 464, 468-69 (1995). He argued that US courts should look at other court, and that US does not have any more the “monopoly on constitutional judicial review”. Very interestingly he stated that: “Wise parents do not hesitate to learn from their children”.

<sup>565</sup> *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 E3d 1095, 1101 (2d Cir. 1995).

<sup>566</sup> Slaughter, *supra* note 81 at 204.

<sup>567</sup> *ibid.*

<sup>568</sup> Abrahamson & Fisher, *supra* note 73 at 273.

<sup>569</sup> Justice Antonin Scalia of the SC of the US died recently in February 13, 2016.

must never forget that it is a Constitution for the United States that we are expounding.”<sup>570</sup> He expressed his views in several dissenting opinions, speeches and publications. Scalia thought that comparative law should only be used in the process of writing a constitution, not interpreting one.<sup>571</sup> He often cited the “cherry-picking” argument, reasoning that the majority will look over the heads of the crowd and pick out their friends.<sup>572</sup> In addition to Scalia and Chief Justice Roberts, other US Supreme Court judges opposed to the use of foreign judgments are Chief Justice Rehnquist<sup>573</sup> and Justice Thomas.<sup>574</sup>

Nevertheless, in my view, Justice Scalia was not really a localist, nor was he against any form of foreign exchange or transnational judicial interaction. He might have been critical of the citation of the foreign legal sources, but he openly embraced other forms of judicial dialogue. As rightly acknowledged by some scholars, and even by his colleague Justice Breyer,<sup>575</sup> Justice Scalia actively participated in face-to-face meetings and exchanges with fellow judges from China, Italy, Austria, and other European countries.<sup>576</sup> Some might argue that this was simply “judicial tourism,” or that he was motivated by other reasons. While that might be the case, it shows that even the seemingly most critical judges typically participate in the transnational judicial conversation, using different tools to interact with their foreign fellows.

While the debate among US Supreme Court judges is not within the scope of my doctoral research, many of their views regarding the legitimacy and utility of foreign

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<sup>570</sup> *Thomson v Oklahoma*, 487 U.S. 815, 869 n.4 (1988).

<sup>571</sup> *Printz v. United States*, 521 U.S. 898, 977 (1997).

<sup>572</sup> *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

<sup>573</sup> *Raines v. Byrd* 521 U.S. 811, 828 (1997)

<sup>574</sup> *Knight v. Florida* 120 S. Ct. 459, 459 (1999)

<sup>575</sup> Breyer, *supra* note 92 at 271.

<sup>576</sup> Mak, *supra* note 28 at 88.

judgments, are equally important for other jurisdictions, including Canada. Other judges have participated in similar debates over the use of foreign case law and the globalization of courts in general. Carsten Smith, Chief Justice of the Norwegian Supreme Court, is a strong advocate of the process of transnational judicial dialogue. However, he does not merely speak about the citation of foreign precedents. Instead, he believes that judicial dialogue includes taking part “in international collaboration among the highest courts.”<sup>577</sup> He writes, “It is the duty of national courts—and especially of the highest court in a small country—to introduce new legal ideas from the outside world into national judicial decisions.”<sup>578</sup>

Aharon Barak is another proponent of transnational judicial dialogue and use of foreign citations. In 2002, he criticized the US Supreme Court justices who did not cite foreign judgments, noting, “They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems” and partly as a consequence, the US Supreme Court “is losing the central role it once had among courts in modern democracies.”<sup>579</sup> Laurie Ackermann, of the South African Constitutional Court, is also a proponent of comparative law. Never considering foreign precedents as binding or persuasive, and carefully protecting the independence of his Court, he declares:

[F]oreign law is not in any sense binding on the court that refers to it. There seems to be the fear that in referring to foreign law one is bowing to foreign authority and thereby endangering the national sovereignty of one’s own legal system. This is manifestly not so. One may be seeking information, guidance, stimulation, clarification or even enlightenment, but never authority binding on

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<sup>577</sup> Smith, *supra* note 469 at 134-135.

<sup>579</sup> Barak, *supra* note 186.

one's own decision. One is doing no more than keeping the judicial mind open to new ideas, problems, arguments, and solutions.<sup>580</sup>

## VIII. CONCLUSION

This chapter identified a number of theories that help explain the phenomenon of transnational judicial dialogue. The majority of studies examine this dialogue through the use of pure constitutional theories, comparativism, or sociological theories. However, knowing that transnational judicial dialogue is an ongoing, complex, and dynamic process that is creating an increasingly visible global network of courts and judges, I chose global government networks theory as the departing point of this study. This theory considers transnational judicial conversation and collaboration to have an impact at the national, transnational, and international levels. Nationally, the judiciary is considered as the holder of judicial sovereignty, whereas transnationally and internationally, it leads to the establishment of global judicial networks, which are the primary mechanisms of global governance.

The SCC is considered a key actor in this process. In addition to identifying the main theories regarding transnational judicial dialogue, I have identified also the main scholarly debates concerning the role of the Court. These debates are organized into two categories: a) the historical background of transnational judicial dialogue in Canada and b) the primary mechanisms of dialogue used by the SCC.

Notably, almost all scholarship centres on the narrative of the citation of foreign precedents by the SCC, and rarely consider other forms of interaction such as: face-to-face

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<sup>580</sup> See the discussion of Laurie WH Ackermann, "Constitutional Comparativism in South Africa" (2006) 123 S. African L J 497 at 510-513.

meetings of SCC judges with other foreign judges, participation in judicial organizations, international electronic networks and information systems, and in international judicial education and training institutions. Many scholars consider the citation of foreign case law by the SCC, particularly from the UK, the natural influence of colonization; jurisprudence traveled between colonial powers and their colonies. After the end of the Second World War, American influence increased across the globe. The US Supreme Court became a strong point of reference for the SCC, although the influence was often not reciprocal. Meanwhile, Quebec's courts, which operate under both common and civil law, often used French precedents, even though their decisions were not observed with the same frequency in France.<sup>581</sup> Another milestone was the establishment of international organizations and institutions, and the signing of numerous treaties, a significant step in the process of the internationalization of law.

Several scholars have observed that the number of foreign precedents cited by the highest courts, including the SCC, have rarely changed throughout the years. However, others suggest there is a significant difference. Both judges and academics highlight significant features of the modern use of non-domestic legal sources. These include the interactive dimension of the process, its intensity and frequency, the identity of the participants, the motivation to borrow non-domestic judgments, and the self-conscious construction of a global judicial community. Others indicate that the Internet and other various tools of technological communication have changed the process of international influence from reception to dialogue. Another distinctive feature of the modern era of judicial dialogue of the SCC is the Canadian Charter of Rights and Freedoms. Therefore, dividing the historical timeline into pre-Charter

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<sup>581</sup> L'Heureux-Dubé, *supra* note 37 at 17.

and post-Charter periods creates a crucial distinction needed when analyzing the process of this dialogue from the perspective of the SCC.

To better comprehend the various mechanisms of judicial dialogue, this chapter mapped and identified the main academic conversations that empirically demonstrate several of the transnational networking activities of the SCC and its justices. Although most scholarship does not distinguish between the formal juridical and extra-judicial mechanisms of dialogue, it is easy to detect the use of both. Viewed from the framework of this study, I have identified and grouped the ongoing conversations into the following subcategories: a) citation of foreign case law by the SCC; b) face-to-face meetings of SCC judges with other foreign judges; b) participation of SCC judges in associations of judges; d) participation of SCC judges in transnational electronic networks; and e) participation of SCC judges in transnational judicial education and training institutions. Such a categorization help to better understand the complexity and various forms of dialogue, and the extent of scholarship dealing with each of them.

As mentioned above, there are an impressive number of academic works on the engagement of the SCC with judgments of foreign or international courts, or the citation of Canadian precedents by foreign courts. This interest is primarily due to the excellent reputation of the SCC in the global arena, where it is viewed as a worldwide leader. However, although very significant, it seems that the existing scholarship does not provide a comprehensive picture of all forms of non-domestic legal sources cited by the SCC in all its judgments within the timeframe of this study. Therefore, one of the purposes of this study is to

contribute to the existing academic conversation on this topic by providing a more comprehensive picture.

Face-to-face meetings of judges, considered by some scholars as a category of judicial interaction, help create judicial networks that are powerful channels for cross-fertilization. Others have gone as far as to note that during these face-to-face meetings, judges exchange ideas not just on substantive law, but also on procedural matters. Notably, SCC judges consider face-to-face meetings and contact with Western courts, particularly courts from a British Commonwealth background or courts using the English or French language, more useful than contact with courts of developing countries. While it has been demonstrated that Canadian judges participate in such meetings, one SCC judge insists that such contact is restricted on only a few Court members.<sup>582</sup>

While formal regional or global judicial networks undeniably exist, academics have rarely focussed on the role the SCC and other courts play in such networks, which include judicial associations and organizations. Hence, one of the contributions of this study is to shed light on these judicial organizations and associations, and identify those in which the SCC participates.

It is also clear that little academic attention is given to electronic judicial communication, which is more private and difficult to demonstrate. However, in this study I consider it a distinct mechanism of extra-judicial dialogue, and my exploration of two exclusive electronic networks for judges will help explain its importance.

Transnational judicial education, which is becoming increasingly significant, is another modern mechanism of judicial dialogue. However, as with judicial associations and

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<sup>582</sup> Bastarache, *supra* note 154 at 54.

electronic networks, scholarship regarding judicial training of SCC judges is still rare. Scholars consider training sessions exceedingly important, as they provide more opportunities for cross-fertilization. In addition, the growing support of judges from around the world for global judicial education further indicates the globalization of the judiciaries. Further analysis of global judicial education could help demonstrate that judges are making a conscious decision to move toward a globalization of the judiciaries. Existing scholarship and the results of this study demonstrate that the transnational judicial conversation includes not only judges and courts, but also other actors, particularly distinguished academics. Meanwhile, universities and transnational civil society also influence global judicial education.

Most writings in this stream of literature consider courts as institutions to be the primary actors in transnational judicial dialogue; however, the role of individual judges deserves greater attention. Some scholars have already expressed their dissatisfaction with the lack engagement by academics on this issue. Existing scholarship acknowledges that personal characteristics of judges, such as views, approaches, education, and personal and professional experience, influence their participation in the transnational judicial dialogue. Scholars discussing the SCC argue that not all justices use numerous foreign citations or engage in dialogue to the same extent. Chief justices are also considered important actors, the role and influence of whom is crucial for the participation of a court in dialogue with foreign counterparts. A noticeable gap in the existing literature is the little attention to other actors, including law clerks, registrars, parties and their counsel, interveners, academics, and NGOs.

This review of the literature highlighted the debate regarding the driving forces behind the transnational judicial conversation. To better comprehend this phenomenon, I have

grouped the scholarly debates on these motivations into five categories. By examining these categories, I hope to demonstrate the complexity, multi level and multidimensional driving forces of judicial dialogue.

Like globalization in general, judicial globalization and transnational judicial dialogue are often criticized. Several academics and judges actively oppose the use of non-domestic legal sources in national decision-making, as well as the process of judicial dialogue, networks, and the general globalization of the judiciaries. Debates about the use of comparative law encompass both *legitimacy* and *utility*. The arguments against judicial globalization include that it is illegitimate and undemocratic, foreign sources are irrelevant, it prompts “cherry-picking” and judicial activism, it adds unnecessary complexity to decisions by courts, it leads to network dominance and hegemony, that convergence on certain practices is likely to distance courts from their countries’ standards, and even that judges are too ignorant of foreign or international law.

## CHAPTER 3

### THE USE OF JURIDICAL MECHANISMS BY THE SCC: A QUANTITATIVE ANALYSIS OF CASES (2000-2016)

#### I. INTRODUCTION

This chapter represents a quantitative analysis of the 1,223 SCC judgments delivered between January 1, 2000 and December 31, 2016.<sup>583</sup> The goal is to identify to what extent within this 17-year period the SCC cited all forms of non-domestic legal sources, or what I have referred before as “juridical mechanisms” of transnational judicial dialogue.<sup>584</sup> It was anticipated that judgments of other nations, as the most natural form of judicial exchange for many scholars,<sup>585</sup> would be nearly the only legal foreign source to deal with. The data of this research, including the content of the SCC judgments themselves,<sup>586</sup> show to the contrary that in addition to foreign judgments, the Court has also frequently cited three other forms of non-domestic legal sources: constitutions, statutes and regulations of other nations; case law of international or supranational courts; and international treaties. Hence, to measure the full scope of the reference of non-domestic legal sources by the SCC, and in response to academic

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<sup>583</sup> SCC Judgements, *supra* note 16.

<sup>584</sup> See, Chapter 1 “Introduction”.

<sup>585</sup> See e.g. Bastarache, *supra* note 154; Gentili & Mak, *supra* note 39; Mak, *supra* note 28; Choudhry, *supra* note 154; Law & Chang, *supra* note 155.

<sup>586</sup> It is interesting to note that the judgments of the SCC include clear sections entitled “Cases Cited,” “Statutes and Regulations Cited,” “Treaties and Other International Instruments,” and “Authors Cited.” See SCC Judgements, *supra* note 16.

urging,<sup>587</sup> all the above four types of non-domestic legal sources found within the text of SCC judgments have been included here.

In this chapter, non-domestic legal sources are categorized into two main groups: *comparative legal sources*, comprised of *comparative case law* and *comparative law* (constitutions, codes, statutes and regulations of other nations); and *international legal sources*, comprised of *international case law* and *international treaties*. By focusing on all forms of non-domestic legal sources, this empirical study can provide, at least quantitatively, a full picture of juridical dialogue through foreign formal legal sources, which certainly extends beyond the borrowing of precedents among courts.

As elaborated in Chapter 2 of this study, the scholarly literature about the SCC on this matter is extensive and very important for comprehending the extent and content of judicial dialogue through foreign citations. However, some studies focus only on one or few fields of law (mainly constitutional);<sup>588</sup> most consider only the citation of comparative case law of one particular foreign jurisdiction (US or UK);<sup>589</sup> others focus solely on international courts or the use of international law;<sup>590</sup> and nearly all the literature regards the Court as a whole.<sup>591</sup> Hence,

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<sup>587</sup> Ran Hirschl, “Going Global? Canada As Importer and Exporter of Constitutional Thought” in Richard Albert & David R Cameron, eds., *Canada In The World: Comparative Perspectives On The Canadian Constitution* (Cambridge: Cambridge University Press, 2017) 16. Hirschl states, “Perhaps the time has come to extend an invitation for Canadian constitutional scholars, jurists and policy makers—indeed to the Canadian citizenry at large—to engage more closely with the world of new constitutionalism, not merely as producers and exporters of innovative constitutional thought or as analysers of fleshy rights issues, but also as curious observers who study the constitutional experiences of other polities.”

<sup>588</sup> See e.g. Gentili, *supra* note 154 (Enhancing Constitutional Self-Understanding through Comparative Law); Dodek, *supra* note 5; Dodek, *supra* note 55; McCrudden, *supra* note 154.

<sup>589</sup> See e.g. Dodek, *supra* note 154 (The Protea and the Maple Leaf); La Forest, *supra* note 144; Manfredi, *supra* note 154 (United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms); Manfredi, *supra* note 154 (The Use of United States Decisions by the Supreme Court of Canada under the Charter of Rights and Freedoms).

<sup>590</sup> See e.g. La Forest, *supra* note 5; LeBel, *supra* note 5.

<sup>591</sup> See e.g. FM Bevilacqua, *supra* note 154; Alexander, *supra* note 154; La Forest, *supra* note 154 (The Expanding Role of the Supreme Court of Canada in International Law Issues).

a comprehensive quantitative research that includes within the same “picture” all forms of non-domestic legal sources used by this Court in all its decisions within the timeframe of this study, viewed also from the perspective of individual judges, is still missing.

To fill this gap, this chapter, based on the methodological decisions explained in the Introduction,<sup>592</sup> first, will present quantitative data on the citation of comparative legal sources throughout the years by focusing not only on judgments of foreign nations, but also on primary comparative legal sources such as constitutions, codes, statutes, and regulations of other nations. Second, the focus will shift to quantitative data on references to international legal sources of both, primary nature, such as international conventions and treaties, and secondary sources, such as decisions of international or supranational courts.<sup>593</sup> Third, acknowledging that the process of court globalization and transnational judicial communication is part of a broader process of globalization and the traveling of knowledge, as well as admitting the key role of academics as one of the important vehicles by which ideas are disseminated, a quantitative survey on the use of scholarship (secondary literature) in all judgments of the SCC within the 17-year timeframe of the current research will be included. Finally, in addition to the quantitative analysis of the citation of non-domestic legal sources from the Court’s perspective, a quantitative analysis will also be performed from an individual judge’s perspective, by identifying the judges most and least engaged with non-domestic legal sources.

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<sup>592</sup> See, Chapter 1, Section III “Method”.

<sup>593</sup> *Statute of International Court of Justice*, TS 993 art 38/1 § a-d (entered into force 24 Oct 1945).

## II. QUANTITATIVE DATA ON THE CITATION OF COMPARATIVE LEGAL SOURCES

Comparative legal sources are formal legal acts of the legislative, executive and judicial branches of other countries. To gain a better understanding of the variety of legal sources used by the SCC in its transnational judicial dialogue, and based on how the Court itself distinguishes and categorizes legal sources, the quantitative data have been separated into two subcategories: “comparative case law” and “comparative law”. Comparative case law refers to all judicial decisions enacted by national courts outside Canada; whereas comparative law includes everything else, particularly formal legal acts (e.g., constitutions, codes, statutes and regulations) passed by the legislative and executive branches of foreign countries.

*Comparative Case Law:* — The present research shows that of the 1,223 judgments delivered by the SCC between 2000 and 2016, the SCC cited in total 1,791 decisions from the courts of other nations. 1,360 foreign decisions were cited in majority and unanimous judgments, whereas 431 times in the dissenting reasoning. This is a significant number even when compared to the 24,509 cases cited by the Court in total during the relevant 17 years, of which 22,592 were Canadian cases and 126 international or supranational.<sup>594</sup> This means that for every 12 to 13 Canadian cases cited in its judgments, the SCC referred one precedent from another nation.

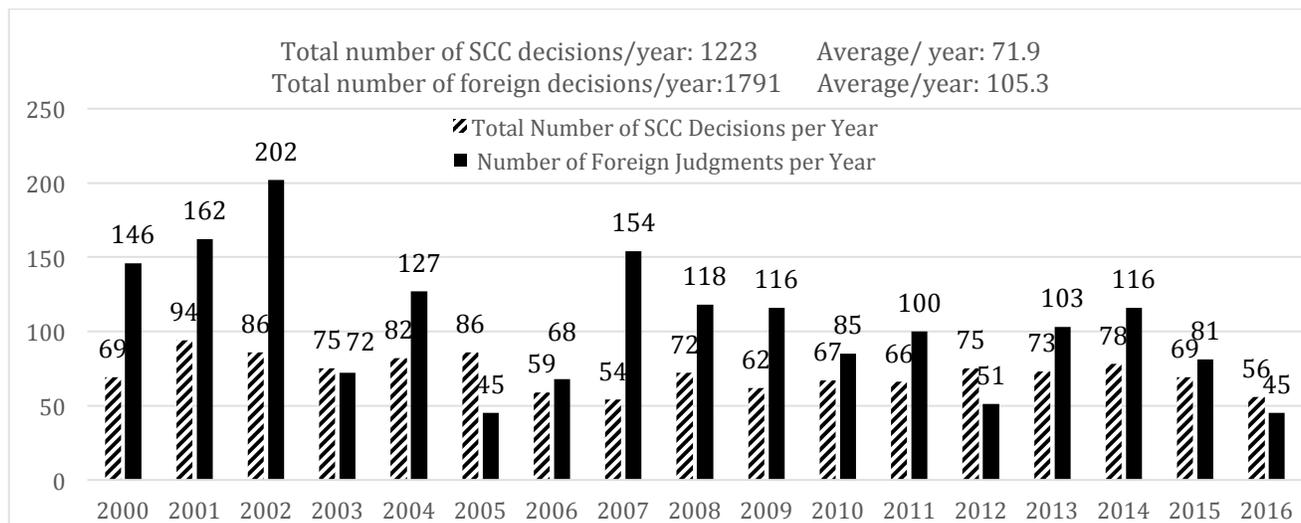
It is very important to note that the SCC cited foreign judgments constantly throughout the 17 years of this study; indeed, there was no single year in which the SCC failed to cite a foreign precedent in its decisions. Figure 1 demonstrates that the SCC has not simply cited

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<sup>594</sup> From the 24,509 cases, which is total number of cases cited in 17 years, 19,492 cases were used in unanimous or majority decisions and 5017 cases cited in dissenting.

1,791 foreign precedents, but in fact has referred a good number of them throughout the analyzed 17-year period constantly, with an average of 105 foreign precedents per year (25 in dissenting judgments). However, Figure 1 illustrates noticeable fluctuations. From the 146, 162 and 202 comparative cases per year cited respectively in 2000, 2001 and 2002, there is a sharp decrease in 2015 and 2016 when the Court fell below its 17-year average, citing only 81 and 45 foreign judgments. Considering that in 2016, the SCC cited only 29 foreign precedents in unanimous and majority decisions (and 16 in dissenting), this year constitutes the lowest year not only in the entire studied period, but also in all history of the SCC since the Charter entered into force.<sup>595</sup>

**Figure 1: Citation of Comparative Case Law by the SCC**



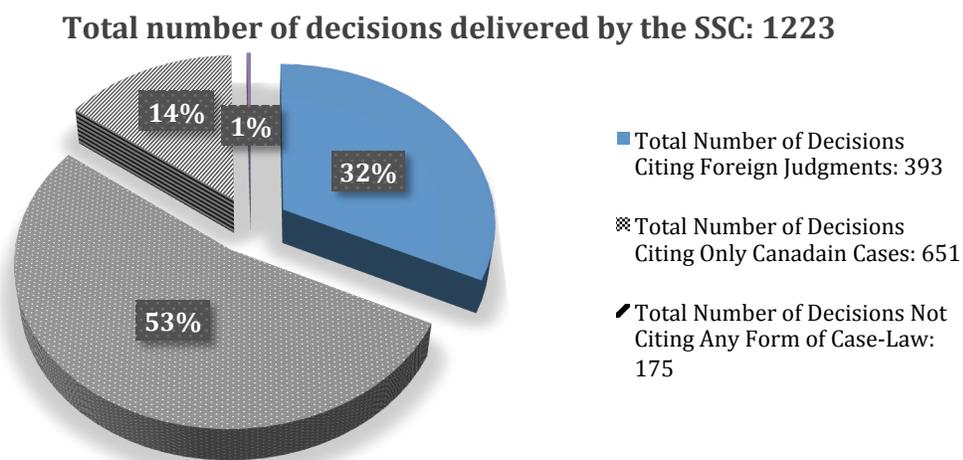
Still, these numbers may not be very significant in terms of the Court’s actual holdings, because it may happen that all or most of the comparative precedents were only cited in one or

<sup>595</sup> Gentili & Mak, *supra* note 39 at 125. (Table 4.1 of this article shows the number of foreign citations by the SCC since 1982-2014, and no other year has used only 29 citations, as in 2016).

a few SCC decisions. Therefore, the next question is: How many of the 1,223 SCC judgments cited comparative precedents, and how were they spread over the 17 years of this study?

The data here show that the SCC cited foreign judgments in 393 of its 1,223 decisions for an average of approximately 32.1 percent of all judgments (see Figure 2). In other words, nearly one-third of all SCC decisions cite precedents of other nations, making for an average of approximately 23 decisions that cite comparative case law per year (see Table 4).

**Figure 2: Percentage of SCC Decisions Citing Comparative Case Law (2000–2016)**



The citation of comparative case law is even higher, if the number of judgments in which the SCC did not mention any case law at all is taken into account. As seen in Figure 2, of the 1,223 judgments delivered, 175 decisions (14.3% of all cases or an average of approximately 10 decisions per year) were made without the citation of any case law at all (including Canadian cases). In the remaining 1,048 SCC decisions that referred a case law, the Court cited precedents of foreign nations in 393 judgements; in other words in 37.5% of all its decisions. In 651 decisions the Court cited only Canadian case law, whereas in 4 decisions,

the SCC besides domestic jurisprudence, has referred to judgments of international courts (without referring any judgments of foreign nations).<sup>596</sup>

Many interesting findings regarding the use of non-domestic legal sources can be found in dissenting decisions (Table 3). Of the 1,223 SCC judgments issued in 2000–2016, 299 are accompanied by dissenting opinions (approximately 25%). Of these 299 dissents, 127, or 42.4%, included engagement with non-domestic legal sources. This percentage is higher than the approximately 32.1 % of unanimous or majority decisions citing foreign judgments. In addition, the density of use of non-domestic legal sources is higher in dissenting than in majority and unanimous decisions. In 229 dissents, the dissenting judges used 468 non-domestic legal sources, with an average of about 1.5 sources per dissent. Meanwhile, the 1,223 decisions cited 1,360, with an average of about 1.1 non-domestic sources per judgment. This data indicates that in dissenting decisions, judges look more often to international and comparative legal sources. In their internal debate over the best possible solution, it seems that judges look for inspiration beyond Canadian borders. This data is significant because a dissenting decision may pave the way for a change of practice in the SCC. As one SCC judge said to an interviewer, “A dissenting decision . . . is the law of tomorrow.”<sup>597</sup>

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<sup>596</sup> The data about international judgments will be in Section 3 (A). Here we brought the data just to give the full picture of non-domestic judgments in the decisions of the SCC.

<sup>597</sup> Slayton, *supra* note 152 at 215.

**Table 3: Data about Citation of Non-Domestic Legal Sources in Dissenting Judgments**

Year	Total nr. of SCC Decisions per Year	Cases with Dissenting	Dissenting Decisions Containing Non-Domestic Legal Sources	Non-Domestic Legal Sources per Year in Dissenting Decisions
2000	69	19	9	41
2001	94	16	5	10
2002	86	22	15	56
2003	75	16	7	18
2004	82	20	9	42
2005	86	22	7	12
2006	59	15	4	18
2007	54	20	11	68
2008	72	17	6	19
2009	62	22	8	28
2010	67	15	8	33
2011	66	13	4	19
2012	75	18	5	11
2013	73	21	7	20
2014	78	13	7	49
2015	69	13	6	8
2016	56	17	9	16
Total	1223	299	127	468
Average	71.9			

Overall, the number of SCC decisions that cited foreign judgments was not consistent over the 17 years (see Table 4). SCC judgments cited foreign precedents most frequently in 2001, 2002, and 2013 (30, 38, and 32 judgments respectively). The lowest number was cited in 2010, 2011, 2014, and 2016 (18, 14, 17 and 18 judgments respectively). Except for 2013, in which the SCC cited foreign case law in 32 of its judgments, it seems that the last years, the number of SCC judgments with foreign case law has been decreased and is below the average

(23 per year).<sup>598</sup> The reasons for the decrease may vary, and may be external and/or internal. The concluding section of this chapter includes an analysis and discussion of some of the possible internal explanations. In terms of percentage, however, the picture is slightly different. The highest percentage of foreign citations is in 2007, when of the 54 decisions of the SCC, 28 (or 51.8%) cited foreign precedents (see Table 4). Again, except for 2013, in the last years, the SCC is below the average. However, in the last two years the number of SCC decisions citing foreign precedents is only slightly below the average (see Table 4).

**Table 4: SCC Decisions Citing Judgments of Foreign Nations**

Year	Total Number of SCC Decisions per Year	Number of SCC Decisions Citing Foreign Judgments Law per Year	Percentage of SCC Decisions Citing Foreign Judgments per Year
2000	69	25	36.2%
2001	94	30	31.9%
2002	86	38	44.1%
2003	75	21	28%
2004	82	24	29.2%
2005	86	19	22%
2006	59	22	37.2%
2007	54	28	51.8%
2008	72	25	34.7%
2009	62	21	33.8%
2010	67	18	26.8%
2011	66	14	21.2%
2012	75	19	25.3%
2013	73	32	43.8%
2014	78	17	21.7%
2015	69	22	31.8%
2016	56	18	32.1%
Total	1223	393	
Average	71.9	23.1	32.1%

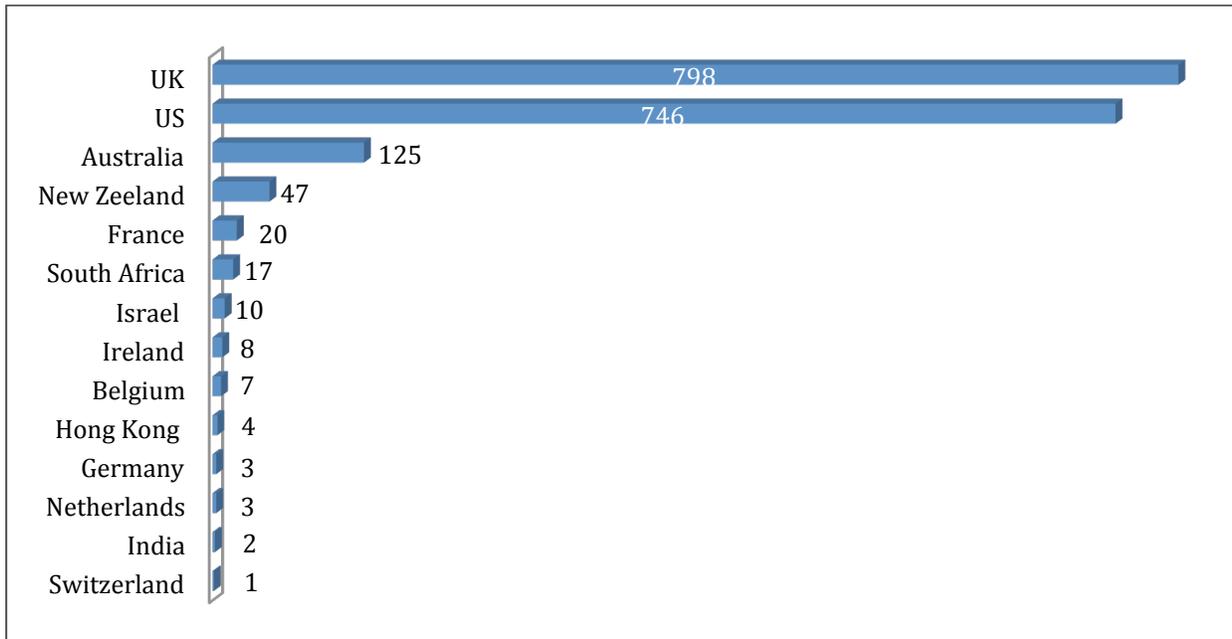
<sup>598</sup> See Table 4.

The next goal of this research is the identification of the foreign courts upon which the SCC relies. This was important for pinpointing the foreign courts with which the SCC is in horizontal conversation, and from which it borrows precedents. Research showed that the SCC cited precedents from courts of 14 different nations from all continents, except South America, including: the US, UK, Australia, New Zealand, South Africa, France, Israel, Ireland, Hong Kong, Belgium, Germany, the Netherlands, India and Switzerland (see Figure 5). Not all of these nations' courts were consulted uniformly, however. Four of them, namely the UK (798 precedents), US (746 precedents), Australia (125 precedents) and New Zealand (47 precedents) accounted for more than 95 percent of the entire number of comparative citations.<sup>599</sup> Figure 5 provides a simple visualization of the foreign countries that the SCC refers to most regularly.

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<sup>599</sup> Interestingly, in unanimous and majority decisions, US precedents are the most cited, 608 times; whereas UK judgments are cited 542 times. In dissenting reasoning, UK precedents were cited much more by overpassing in total the US precedents. UK judgments were cited in total 256 times, whereas US courts were cited 138 times.

**Figure 5: Foreign Nations from which the SCC Cites Judgments**



What foreign *courts* does the SCC refer to? Upon first consideration, it is reasonable to think that the SCC would cite only its counterparts, the highest courts of other nations. In fact, this research data shows that the SCC have cited precedents not only from the highest courts of the above states, but have also heavily referred precedents from lower foreign courts. As shown in Figure 6, the 1,791 comparative precedents that the SCC cited in the 17-year period of this study, more than half of them (980 precedents, or 54.7% of all citations) were cases from ordinary courts.<sup>600</sup>

<sup>600</sup> Note that the number of precedents from lower courts cited by the SCC is smaller than highest courts if we do not include the citation of foreign judgments in dissenting reasoning. According to the data of this study, from the 1,360 comparative precedents that the SCC cited in the 17-year period of this study, less than half of them (673 precedents, or 49.5% of all citations) were cases from ordinary courts. The rest of 687 cases (or 50.5%) were from the highest courts of other nations. In dissenting reasoning, from the 431 times in total that the SCC cited foreign judgments, 307 citations are from lower courts and only 124 citations are from the highest courts of foreign nations (its counterparts).

**Figure 6: Percentage of Citation of Comparative Case Law from Highest and Lower Courts**

Total Nr of Judgments of Foreign Nations Cited by the SCC:  
1791



Table 7 shows that the SCC has referred to decisions of lower courts from nine different nations, the most frequently cited being: UK courts (491), US (411), and Australia (55). Another argument that can be made is that the SCC is also open to transnational judicial dialogue with lower courts.<sup>601</sup> Sceptics may argue that in its efforts to validate decisions already made (i.e., the “cherry picking” process), the SCC will look everywhere it can. Regardless of the reasoning behind the citation of lower courts by the SCC, however, both scenarios prove the openness of the SCC to new ideas and solutions from abroad, which in turn opens the Court to legal globalization.

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<sup>601</sup> Bastarache, *supra* note 2 at 41.

**Table 7: SCC Comparative Case-Law & the Lower Courts of Other Nations**

Lower Courts	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
UK	38	39	56	27	42	20	24	36	34	37	15	22	13	21	22	22	23	491
US	58	33	52	8	34		22	37	15	18	15	29	13	26	28	21	2	411
Australia	2	13	7			1		6	6	2	1	3	1	3	3	5	2	55
N. Zealand			2			1		1		1	2			1				8
Belgium															5		2	7
France						1									3			4
Hong Kong														1	1			2
Ireland	1																	1
Israel								1										1

In looking at SCC counterparts, or the highest courts of other nations cited by the Court, the data revealed that the SCC mentioned precedents from 13 different nations. Of these, the two most cited highest foreign courts are: The Supreme Court of the United States (SCOTUS) with 336 cases, and the House of Lords (now known as the Supreme Court of the UK) with 307 cases (see Table 8).<sup>602</sup>

<sup>602</sup> “1 October 2009 marks a defining moment in the constitutional history of the United Kingdom: transferring judicial authority away from the House of Lords, and creating a Supreme Court for the United Kingdom.” For a short history, see The Supreme Court of the United Kingdom, “History”, online: <<https://www.supremecourt.uk/about/history.html>>. My research showed that the Supreme Court of the UK was cited seven times by the SCC, to which I added to the total number of citations from the House of Lords.

**Table 8: SCC Comparative Case Law & the Highest Courts of Other Nations**

HIGHEST COURTS	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
SCOTUS	25	49	34	15	32	7	12	24	19	24	21	14	6	21	13	15	5	336
House of Lords/SCUK	14	19	21	19	14	12	9	22	34	21	21	21	8	26	25	10	11	307
Australia	3	4	10	1	3	2		6	8	3	4	9	8	4	4			69
New Zealand	3		13	2		1		4	1	2	2	1	2		7	1		39
South Africa	2	2	2					1		5	2				1	2		17
France			1			1		11		3								16
Israel			1			1		4								3		9
Ireland		1	2												2	2		7
Germany												1			2			3
Netherland			1								2							3
Hong Kong							1		1									2
India			2															2
Switzerland								1										1

Other highest foreign courts frequently cited by the SCC include the Australian highest court with 69 precedents; the New Zealand highest court with 39 precedents; the South African highest court with 17 precedents; France’s highest court with 16 precedents and the highest courts of Israel with 9 precedents. The rationale behind the reference to each of the above courts is beyond the scope of this chapter. Here, it is sufficient to note that the reasons are diverse and complex, with relevance in history, legal tradition, politics, economy, culture, language, education, geography and judicial behaviour.<sup>603</sup>

*Comparative Law:* — As stated above, the second form of comparative legal sources cited by the SCC is formal legal acts passed by the legislative and executive branches of other foreign countries, such as constitutions, codes, statutes and regulations. Table 9 reveals that, during

<sup>603</sup> Posner, *supra* note 277 at 19 (explaining the nine theories of judicial behaviour: attitudinal, strategic, sociological, psychological, economic, organizational, pragmatic, phenomenological, and legalist).

the 17 years of this study, the SCC cited such legal sources of other nations a total of 242 times. This is a significant number even within the 5,647 statutes and regulations cited by the SCC during the study period (including Canadian statutes and regulations and international treaties). Approximately 4.3% of all statutes and regulations quoted by the SCC in its decision making are comparative ones; or, put more simply, the SCC cites one primary source from another nation for approximately every 23 Canadian statutes and regulations.

**Table 9: Citation of Foreign Constitutions, Codes, Statutes and Regulations by the SCC per Year**

COUNTRIES	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
UK	3	7	10	1	3	8	4	12	1	2	5	6	3	7	9	6	12	99
US	1	4	4	3	3	2	14	6	2	4	4	6	3	5	5	1	2	69
Australia		2	3	1	2	1	1	5	3		5		4	2	8		3	40
New Zealand		1	1		3	1		1	1				1		1		1	11
France								3				3				1	1	8
South Africa											1		1			1	1	4
Ireland		1												1				2
Belgium		1																1
India				1														1
Rwanda						1												1
Romania											1							1
Germany												1						1
Spain																1		1
Portugal																1		1
Italy																1		1
Sweden																	1	1
TOTAL	4	16	18	6	11	13	19	27	7	6	16	16	12	15	23	12	21	242

Another interesting finding is that the SCC has cited comparative law every year for the last 17 years (2000–2016). Table 9 illustrates that the SCC used a good number of foreign constitutions, statutes and regulations steadily throughout the analyzed years, with an average

of 14 to 15 comparative law citations per year. The number of comparative law references per year ranged from four in 2000 (the lowest) to 27 in 2007.

Which countries' laws does the SCC cite in its decisions? The present research shows that, just as with the citation of comparative precedents, the SCC has cited the constitutions, codes, statutes and regulations of other countries from all continents, except South America; in total 16 different foreign countries, including the UK, US, Australia, New Zealand, France, South Africa, Ireland, Belgium, Germany, India, Rwanda, Romania, Spain, Portugal, Italy and Sweden (Table 9). The comparative laws of the five countries referred the most are: the UK (99 times), the US (69), Australia (40), New Zealand (11) and France (8). It is interesting to note that the SCC has cited UK and US laws in every single year of the 17 years researched here, followed by Australia law (cited in 14 years). In addition, as with foreign precedents, the most cited comparative statutes and regulations were from the UK.

Table 9 reveals that the number of countries from which the Court referenced constitutions, codes, statutes and regulations is higher (16) than the number (14) from which it examined court judgments.<sup>604</sup> Three notes observations follow: First, there are a number of countries to which the SCC refers for both comparative law and comparative case law (the UK, US, Australia, New Zealand, France, South Africa, Ireland, Belgium, India, and Germany). Second, the SCC has referred to several nations only for court decisions (Israel, Hong Kong, the Netherlands and Switzerland). Third, the SCC has cited a number of nations simply as references for their laws rather than their courts' precedents (Rwanda, Romania, Spain, Portugal, Italy and Sweden). As with the reasons for citing foreign precedents, the reasons to

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<sup>604</sup> See Figure 5. The 14 countries that the SCC used to cite the precedent of their courts are the United States, the United Kingdom, Australia, New Zealand, South Africa, France, Israel, Ireland, Hong Kong, Belgium, Germany, Netherlands, India, and Switzerland.

cite the comparative law of a particular country, and for avoiding those of other countries, are diverse and complex and are out of the scope of this Chapter. The reasons and impacts of comparative legal sources on the decision-making of the SCC are discussed in more detail in Chapter 6.

To avoid misinterpretation of the above numbers, another way to look at the extent of citation of comparative law by the SCC is to look at the number of SCC decisions that have referred to foreign constitutions, statutes and regulations per year. Table 10 shows that the SCC has cited comparative law in 106 decisions, making an average of 6 to 7 decisions per year. The number of SCC decisions citing comparative law has remained constant, ranging between four percent of cases in 2003 (3 decisions) the lowest, and 20.4 percent in 2007 (11 decisions) the highest. This means that nearly one tenth of all SCC decisions cite laws of other nations, an average that was also maintained through 2016.

***Table 10: SCC Decisions Citing Foreign Constitutions, Codes, Statutes and Regulations per Year***

<b>YEAR</b>	<b>Total Number of SCC Decisions per Year</b>	<b>Number of SCC Decisions Citing Comparative Law per Year</b>	<b>Number of SCC Decisions Citing Comparative Law per Year in Percentage</b>
2000	69	4	5.8%
2001	94	6	6.4%
2002	86	7	8.1%
2003	75	3	4%
2004	82	6	7.3%
2005	86	6	7%
2006	59	6	10.2%
2007	54	11	20.4%
2008	72	5	6.9%
2009	62	6	9.7%
2010	67	6	9%

2011	66	8	12.1%
2012	75	7	9%
2013	73	6	8.2%
2014	78	9	11.6%
2015	69	5	7.2%
2016	56	5	8.9%
TOTAL	1223	106	Average/Year 9%

*Field of Law:* — Beyond the above quantitative numbers, an important question has yet to be answered by the academic community or the annual statistical reports of the SCC: In what fields of law is the SCC citing such comparative legal sources?

While some scholars admit that the SCC may refer to foreign precedents in more than one field of law,<sup>605</sup> these claims are mostly anecdotal and not based in any comprehensive research regarding the field of law. Others focus on constitutional law and human rights as the most natural field of law and simply ignore the other legal fields.<sup>606</sup> Hence, the question remains: Is it true that the SCC cites foreign case law just on constitutional law (particularly human rights cases), or is it a practice that is used also in other fields of law?

With this important question in mind, all 393 SCC decisions that cited foreign judgments were reviewed so as to identify the fields of law for every case (as designated in the SCC's published reports).<sup>607</sup> Surprisingly, the results outlined in Figure 11 revealed that the SCC cites foreign precedents not only in constitutional and international law cases as would

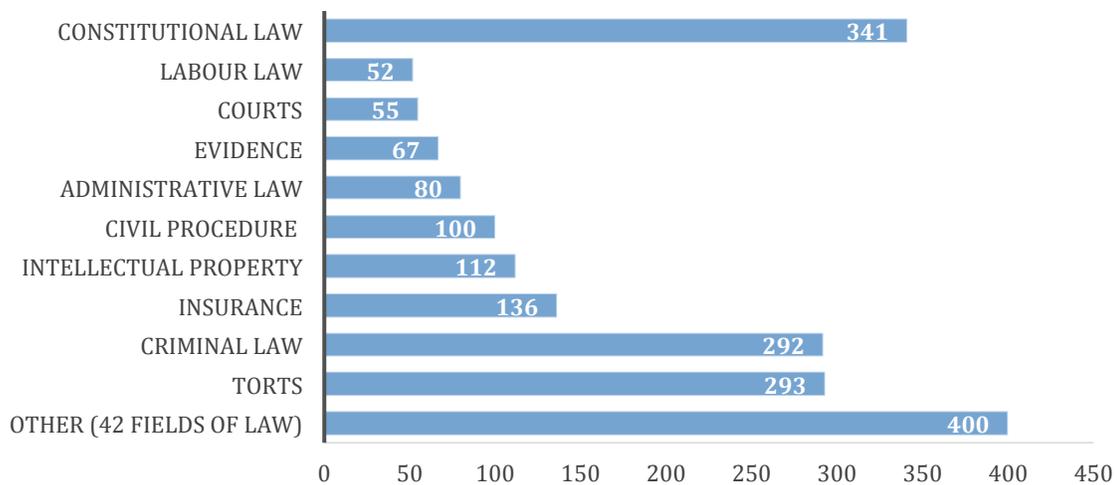
<sup>605</sup> “[T]he SCC’s tendency to refer to foreign case law is present not only in constitutional cases, but also in other areas of law, a fact highlighting the SCC’s generally favourable attitude towards cross-section citation of foreign case law.” Gentili, *supra* note 6 at 390.

<sup>606</sup> Alexander, *supra* note 154; Manfredi, *supra* note 154 (United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms); McCrudden, *supra* note 154; Roy, *supra* note 146.

<sup>607</sup> It is interesting to note that all SCC judgements have a clear section called “Subjects,” which refers to the field of law for every case. See SCC Judgements, *supra* note 16.

be expected, but also in other 50 different fields of both public and private law.<sup>608</sup> The 10 fields of law that have generated the highest number of foreign precedents are: constitutional law, torts, criminal law, insurance, intellectual property, civil procedure, administrative law, evidence, courts and labour law, ranging from 341 precedents (cited in constitutional law cases) to 52 precedents (cited in labour law cases).

**Figure 11: Top 10 Fields with the Highest Number of Citation of Foreign Case Law**



However, these numbers may not be very significant in terms of the Court's outcome if all or most of these comparative precedents were used in only one SCC case for each field of law. Therefore, the next question is: How many Court decisions citing comparative law correspond to each field of law? To gain a better understanding of the citation of foreign precedents in the different fields, the distribution of the precedents over the SCC decisions

<sup>608</sup> Other fields of law include Taxation, Commercial Law, Statutes, Property Law, Aboriginal Law, Immigration Law, Municipal Law, Access to Information, Appeal, Customs and Excise, Pensions, Securities, Arbitration, Bankruptcy & Insolvency, Family Law, Maritime Law, Transportation, Agency, Civil Law, Communications Law, Education Law, Elections, Expropriation Law, Extradition, Financial Institutions, Health Law, Lease, Public Utilities, Sale, State, Trust Law, Negligence & Causation, and Motor Vehicle Accident, Contract Law, Action, Professional Law, International Law (private and public), and Mortgages.

was examined. This was a challenging task because many of the Court decisions are classified in more than one field of law; this meant that in addition to cases with a single field of law, the study's calculations had to include the cases with two or more fields.

The results of this investigation revealed that although the Court has cited foreign precedents in 52 different fields of law, not all of these fields attracted the same number of SCC judgments with comparative case law. The top three fields with the highest number of SCC judgments are: constitutional law, with 102 decisions (21.6%); criminal law, with 94 decisions (20%); and torts, with 36 decisions (7.6%). These numbers show that the current general perception that SCC judgments cite comparative case law only on constitutional cases is inaccurate. It is true that constitutional law judgments attract the largest number of foreign decisions, yet these cases constitute only about one fifth (21.6%) of all SCC judgments that cite foreign precedents. Besides criminal law and torts mentioned above (which together with constitutional law count for about 50%), the rest, in other words about 50% of SCC decisions who cite foreign judgments belong to other fields of law, such as administrative law and civil procedure (31 respectively); intellectual property (20); courts (19); insurance (17); evidence and contract law (13 respectively); international law (12).

Another important question is: In what fields does the SCC cite the laws of other nations? This research shows that the SCC has cited comparative laws in 32 different fields of law, of both public and private sphere.<sup>609</sup> As can be seen in Table 12, the top seven fields of law that have attracted the reference of comparative law are: constitutional law (124 times),

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<sup>609</sup> The 32 fields of law are Constitutional Law, Criminal Law, Intellectual Property, Administrative Law Evidence, Civil Procedure, Labour Law, Torts, International Law (Public), Immigration Law, Transportation, Courts, Contract, Taxation, Elections, Insurance, Professional Law, Social Law, Arbitration, Maritime Law, Aboriginal Law, Appeal, Health Law, Action, Commercial Law, Customs and Excise, Access to Information, Extradition, Sale, Lease, and State.

criminal law (61 times), intellectual property (27 times), administrative law (22 times), evidence (14 times), labour (13 times) and civil procedure (13 times).

**Table 12: Top 10 Fields of Law with the Highest Number of Citation of Foreign Constitutions, Codes, Statutes and Regulations**

FIELDS OF LAW	Total Number of Citations of Comparative Law per Field of Law	Percentage from the Total Number of Citations of Comparative Law
Constitutional Law	124	36%
Criminal Law	61	18%
Intellectual Property	27	8%
Administrative Law	22	6.5%
Evidence	14	4%
Civil Procedure	13	3.8%
Labour Law	13	3.8%
Torts	9	2.6%
International Law (Public & Private)	9	2.6%
Immigration Law	5	1.4%
Other (22 Fields of Law)	48	13.9%

But how are the comparative legal sources spread over the SCC decisions? To gain a better perspective of the citation of foreign legislation in different fields of law, and to avoid misreading these numbers (as sometimes, a single case may represent a large number), the ways in which these foreign legal sources are spread over SCC decisions were examined. As shown in Table 13, the SCC tends to rely on comparative legal sources in the fields of constitutional law (38 decisions, 25%), criminal law (26 decisions, 17%), intellectual property (14 decisions, 9%), administrative law (11 decisions, 7%), civil procedure (8 decisions, 5%), torts (8 decisions, 5%) and international law (7 decisions, 4.6%).

**Table 13: SCC Decisions with Foreign Constitutions, Codes, Statutes and Regulations & Their Fields of Law**

Fields of Law	Total Number of SCC Decisions with Comparative Law per Field of Law	Percentage from the Total Number of Decisions per Field of Law
Constitutional Law	38	25%
Criminal Law	26	17.1%
Intellectual Property	14	9.2%
Administrative Law	11	7.2%
Civil Procedure	8	5.3%
Torts	8	5.3%
International Law (Public & Private)	7	4.6%
Evidence	6	3.9%
Immigration Law	3	2%
Courts	3	2%
Other (22 Fields of Law)	28	18.5%

### III. QUANTITATIVE DATA ON THE CITATION OF INTERNATIONAL LEGAL SOURCES

After comparative legal sources, the next essential category of non-domestic legal sources is “international legal sources”. Based on the categorization of sources and the way in which the SCC itself has classified these international legal sources, they can be divided into the subcategories of “international case law” and “international treaties”. As defined above, international case law includes judicial decisions enacted by international or supranational courts, whereas, international conventions, international customs and the general principles of law, for the purpose of this doctoral project are considered international treaties.

*International Case Law:* — Although the reference of case law from international and supranational courts is far below the citation of courts of other nations, the SCC have cited

such precedents in 54 different decisions over the 17 years of this research (see Table 15). Simply put, the SCC cites the precedents of international courts in 3.2 percent of its total number of decisions per year. Despite the lower numbers compared to foreign judgments, the citation of international and supranational judgments was observed in 13 of the 17 years under study.

**Table 15: Citation of International Case Law by the SCC**

<b>YEAR</b>	<b>Total Nr of SCC Decisions</b>	<b>Number of SCC Decisions Citing International / Supranational Case Law</b>	<b>Total International / Supranational Case Law per Year</b>
2000	69	0	0
2001	94	5	11
2002	86	4	7
2003	75	2	3
2004	82	4	4
2005	86	3	15
2006	59	0	0
2007	54	7	11
2008	72	2	5
2009	62	3	10
2010	67	5	11
2011	66	3	5
2012	75	0	0
2013	73	5	10
2014	78	5	23
2015	69	6	11
2016	56	0	0
<b>TOTAL</b>	<b>1223</b>	<b>54</b>	<b>126</b>
<b>AVERAGE PER YEAR</b>	<b>71.9</b>	<b>3.2</b>	<b>7.4</b>

Another way to observe the extent of international case law citation by the SCC is to look at the number of international and supranational precedents referred by the Court per

year. This research shows that from 2000 to 2016, the Court cited 126 decisions of such courts, which are found in 54 different judgments of the SCC. This means that the SCC cites on average 7.4 international/supranational precedents per year. As Table 15 shows, not all years exhibit the same extent of citation. The SCC cited the most international court precedents in 2005 and 2014, at 15 and 23 international precedents, respectively. In 2000, 2006, 2012 and 2016, the SCC did not cite any international or supranational case law at all.

Another important task of this research was to identify the international and supranational courts upon which the SCC has relied. The SCC cited precedents from most well reputed international courts with global jurisdiction, as well as international and supranational regional courts from across the globe. In other words, all the above numbers arguably demonstrate that the SCC is in a vertical and diagonal dialogue with international and supranational courts. By vertical dialogue, I define the interaction between national courts and/or judges (in this case of the SCC) with supranational or international courts and judges. Diagonal dialogue occurs between a national constitutional court and a regional or supranational court, but the state of that specific constitutional court is not a member of that particular international or supranational organization. The best example of this model is the conversation between the SCC and the European Court of Human Rights (ECtHR) or the Court of Justice of the European Union (CJEU).

As seen in Table 16, the SCC cited precedents of 14 different international and supranational courts (and *quasi* courts); namely, the European Court of Human Rights (ECtHR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Court of Justice (ICJ), the Court of Justice of the European Union (CJEU), the

International Criminal Tribunal for Rwanda (ICTR), the International Criminal Court (ICC), the Inter-American Court of Human Rights (IACHR), the Permanent Court of Arbitration (League of Nations) (PCA), the European Commission of Human Rights (ECHR), the Permanent Court of International Justice (PCIJ),<sup>610</sup> the Commission of the European Union (CEU), the European Patent Office (EPO), the United Nations Human Rights Council (UNHRC), and the UK Privy Council (UKPC).

**Table 16: International/Supranational Courts Cited by the SCC**

INT/NL COURTS	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
ECHR <sup>611</sup>		8	4		1			3		4	7	2		3		9		41 (32.5%)
ICTY <sup>612</sup>			1			6					1			3	2			13 (10.3%)
ICJ <sup>613</sup>						1		1						1	7			10 (7.9%)
CJEU <sup>614</sup>						2									6			8 (6.3%)
ICTR <sup>615</sup>						5												5 (3.9%)
ICC <sup>616</sup>														4				4 (3.2%)
IACHR <sup>617</sup>															4			4 (3.2%)

<sup>610</sup> “The establishment of the Permanent Court of International Justice (PCIJ), the predecessor to the International Court of Justice, was provided for in the Covenant of the League of Nations. It held its inaugural sitting in 1922 and was dissolved in 1946. The work of the PCIJ, the first permanent international tribunal with general jurisdiction, made possible the clarification of a number of aspects of international law, and contributed to its development.” International Court of Justice, “The Permanent Court of International Justice”, online: <<http://www.icj-cij.org/en/pcij>>.

<sup>611</sup> European Court of Human Rights.

<sup>612</sup> International Criminal Tribunal for the Former Yugoslavia

<sup>613</sup> International Court of Justice

<sup>614</sup> Court of Justice for the European Union

<sup>615</sup> International Criminal Tribunal for Rwanda

<sup>616</sup> International Criminal Court

<sup>617</sup> Inter-American Court of Human Rights

PCA <sup>618</sup>							1							1		2 (1.5%)
ECHR <sup>619</sup>							1									1 (0.8%)
PCIJ <sup>620</sup>							1									1(0.8%)
CEU <sup>621</sup>				1												1 (0.8%)
EPO <sup>622</sup>			1													1(0.8%)
UNHRC <sup>623</sup>														1		1 (0.8%)
JCPC <sup>624</sup>	3	1	3	2	1		4	5	6	3	3		2	1		34 (27%)

As stated above, it can reasonably be argued that another court with supranational character with which the SCC is in dialogue with, is the UK Privy Council, which was cited 34 times by the SCC. If included, this Court becomes the second most cited supranational Court, after the ECtHR. The reasons behind the citation of the Privy Council are not difficult to comprehend, stemming from the roots of Canadian juridical and historical tradition.<sup>625</sup>

As Table 16 shows, the most influential international court to the SCC is by far the ECtHR. This court has been cited 41 times (of 126 international/supranational precedents that SCC referred), comprising one third of the total number of all international citations. The reference of ECtHR case law can be explained by the Court’s global reputation in the realm of human rights.<sup>626</sup> Some scholars consider it a “sort of world court of human rights,”<sup>627</sup> that has surpassed by far the SCOTUS in terms of global influence.<sup>628</sup> Another reason could be

<sup>618</sup> Permanent Court of Arbitration (League of Nations)

<sup>619</sup> European Commission of Human Rights

<sup>620</sup> Permanent Court of International Justice (Predecessor of the ICJ)

<sup>621</sup> Commission of the EU

<sup>622</sup> European Patent Office. It is one of the two organs of the European Patent Organisation, which acts as the executive body of the Organisation, online: <<https://www.epo.org/index.html>>.

<sup>623</sup> United Nations Human Rights Council.

<sup>624</sup> Judicial Committee of the Privy Council.

<sup>625</sup> See “Creation and Beginnings of the Court”, *supra* note 18.

<sup>626</sup> L’Heureux-Dubé, *supra* note 37 at 19.

<sup>627</sup> JG Merills, *The Development of International Law by the European Court of Human Rights*, 2nd ed (Manchester: Manchester University Press, 1993) at 12–18.

<sup>628</sup> David Zaring, “The Use of Foreign Decisions by Federal Courts: An Empirical Analysis” (2006) 3 J Empirical Legal Stud 297 at 326; Adam Liptak, “U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations” *The New York Times* (18 September 2008) at A1.

quantitative. The ECtHR has produced more decisions than all the other international or transnational courts.<sup>629</sup> For instance, statistics show that in 2016 alone, the ECtHR issued 38,505 decisions and had a backlog of 79,750 cases.<sup>630</sup> Arguably, with this volume of decisions, any court, including the SCC, can find cases and legal issues of interest. Thus, despite the fact that Canada is not a signatory of the European Convention of Human Rights, and that the judgments of ECtHR have only persuasive authority, those judgments have served as a significant point of reference,<sup>631</sup> since 1986 when it all started.<sup>632</sup> Other reasons why the SCC looks to the jurisprudence of the ECtHR may include common ground between the European Convention on Human Rights and the Canadian Charter, as well as their accessibility in English and French. However, critics like Justice Bastarache of the SCC would like to see more reliance on it, dismissing the reference to the ECtHR as “very limited”.<sup>633</sup> The other five most cited international courts by the SCC are the ICTY (13 cases), the ICJ (10 cases), and the CJEU (8 cases) (see Table 16).<sup>634</sup>

*International Treaties:* — As clarified in Chapter 1, the SCC has been classifying these international instruments separately from international judgment in its decisions, and generally

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<sup>629</sup> Voeten, *supra* note 331 at 549.

<sup>630</sup> The European Court of Human Rights, “European Court of Human Rights Statistics” online: <[http://www.echr.coe.int/Documents/Stats\\_annual\\_2016\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_annual_2016_ENG.pdf)>.

<sup>631</sup> See L’Heureux-Dube, *supra* note 51 at 18; see also, Gentili & Mak, *supra* note 39 at 135, 146.

<sup>632</sup> The SCC first cited a judgment of the European Commission of Human Rights (which served, until 1998, to determine whether a case was admissible to the ECtHR) in *R v Oakes* [1986] 1 SCR 103.

<sup>633</sup> Bastarache, *supra* note 2 at 48.

<sup>634</sup> The Court also cited the Permanent Court of Arbitration (League of Nations) (2 cases), the Permanent Court of International Justice (1 case), the European Commission of Human Rights (1 case), and the Commission of the European Union (1 case).

analyzes them in clear divided sections.<sup>635</sup> However, as mentioned in Chapter 2, there are scholars, including those of Canadian origin, who are sceptical and critical of the SCC engagement with international law.<sup>636</sup>

With the above understanding of international treaties and the academic controversies in mind, one of the most important findings of this research was that the SCC referred to international treaties during all 17 years of the study. The research data revealed that the SCC applied treaties from various global and regional organizations, including bilateral treaties with other nations, a total of 336 times. This number is even higher than the number of times that the SCC cited comparative statutes and regulations (242 times),<sup>637</sup> and is significant even in the context of the 5,647 statutes and regulations mentioned by the Court during the 17-year research period. This means that for every 16 domestic statutes and regulations it considers, the SCC cites one international treaty.

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<sup>635</sup> This practice of distinguishing international treaties in a separate subheading began in 2005 with *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425, 2005 SCC 70, and is still being followed.

<sup>636</sup> Brunnée & Toope, *supra* note 170 at 4 (considering Canadian judges too conservative and hesitant, towards the use of international law); Bayefsky, *supra* note 171 at 325 (criticizing Canadian judges in general, including the SCC for the inaccurate use of international law); van Ert, *supra* note 154 at 326 (noting that SCC shows “an inconsistent and even unintelligible approach to international human rights and their sources.”).

<sup>637</sup> See *supra* Table 9.

**Table 17: Citation of International Treaties by the SCC**

<b>YEAR</b>	<b>Total Nr of SCC Decisions per Year</b>	<b>Decisions Citing International Treaties</b>	<b>Percentage of Decisions Citing International Treaties</b>	<b>Total Nr of Citation of International Treaties per Year</b>
2000	69	7	10.1%	11
2001	94	8	8.5%	45
2002	86	11	12.7%	50
2003	75	5	6.6%	10
2004	82	5	6.1%	20
2005	86	9	10.5%	18
2006	59	8	13.6%	14
2007	54	6	11.1%	13
2008	72	5	7%	9
2009	62	3	4.8%	9
2010	67	6	9%	14
2011	66	4	6%	11
2012	75	11	14.7%	15
2013	73	3	4.1%	16
2014	78	5	6.4%	37
2015	69	10	14.5%	33
2016	56	4	7.1%	11
AVERAGE	72	6.5	9%	19.8
TOTAL	1223	110		336

As Table 17 shows, the citation of international treaties by the SCC fluctuates from year to year, ranging from a maximum of 50 international treaties cited in 2002 to a low of 9 in 2008 and 2009. On average, the SCC referred to international treaties approximately 20 times per year. However, in 2016 the SCC reached only half this average, citing only 11 international treaties.

Another way to look at the extent of international treaty citation by the SCC is to observe the number of SCC judgments per year that involve international instruments. Over

the research period, the SCC cited international treaties in 110 different decisions. This means that the SCC cited international treaties for an average of 6 to 7 decisions per year, or one in every 10 decisions. Just as with the number of treaties, the number of SCC decisions that cited international treaties varied between years. The highest number of SCC decisions citing international treaties were recorded in 2002, 2012 and 2015, at approximately 12.7, 14.7 and 14.5 percent of the total decisions per year, respectively. The lowest numbers were recorded in 2009, 2011, 2013 and 2016, with only 3 to 4 decisions per year.

How many different international treaties does the SCC cite, and what types of international treaties are mentioned the most? This research shows that the SCC has consulted 191 different international treaties not only those of global jurisdiction, but also regional and bilateral.<sup>638</sup> This list of international treaties reveals that the SCC has cited international instruments from almost all the continents.

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<sup>638</sup> See Appendix 2 “Data About the Citation of International Treaties by the SCC (2000-2016)”.

**Table 18: Top 10 International Treaties Cited by the SCC**

<b>International Treaties</b>	<b>Number of Times Cited</b>
<b>International Covenant on Civil and Political Rights</b>	22
<b>Convention for the Protection of Human Rights and Fundamental Freedoms [the European Convention on Human Rights]</b>	15
<b>Universal Declaration of Human Rights</b>	13
<b>Convention on the Rights of the Child</b>	12
<b>Vienna Convention on the Law of Treaties</b>	10
<b>International Covenant on Economic, Social and Cultural Rights</b>	9
<b>Convention Relating to the Status of Refugees</b>	9
<b>Berlin Convention for the Protection of Literary and Artistic Works</b>	6
<b>North American Free Trade Agreement (NAFTA)</b>	6
<b>ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize</b>	5
<b>(Other 181 International Treaties)</b>	229
<b>TOTAL</b>	336

Table 18 illustrates the top 10 most influential and often cited international legal documents. In total, these key international legal documents have been cited 107 times, accounting for almost one third of all 336 times that international treaties were used in the 17 years of this study. The three most cited are: the International Covenant on Civil and Political Rights (cited 22 times), the Convention for the Protection of Human Rights and Fundamental Freedoms [the European Convention on Human Rights] (15 times), and the Universal Declaration of Human Rights (13 times).

By consulting this list of the most cited international treaties, as well as the full 191 international documents cited by the SCC over the research period,<sup>639</sup> it can be observed that the SCC has also cited international treaties that Canada has not ratified and conventions promulgated by organizations to whom Canada does not belong. The most notable instance

<sup>639</sup> See Appendix 2 “Data About the Citation of International Treaties by the SCC (2000-2016)”.

constitutes also the second most cited international document by the SCC: the European Convention of Human Rights, which is the key supranational document of the European legal order on human rights. This document can be also considered as the “constitution” of the ECtHR, which was also the most cited international court by the SCC.<sup>640</sup> This shows that the SCC, in its effort to ensure justice, goes well beyond the formal legal sources of international jurisdiction of which Canada is part. This strengthens the argument that the SCC’s process of globalization is influenced not just by formal legal relations and obligations, but also by comparative and international documents with persuasive force. Such engagement shows the openness of the SCC towards the use of international law, as well as its movement from a dualist legal system of international law towards a monist one.<sup>641</sup> This is helped by the fact that international covenants and human rights treaties weighed heavily in the drafting of the Canadian Charter.<sup>642</sup>

*Field of Law:* — As with the comparative legal sources, one of the most significant ambitions of this study was to discover how the citation of international legal sources was distributed among the SCC decisions in different fields of law.

According to Figure 19, the SCC has cited international precedents in 13 different fields of law of both public and private law. The three fields of law that attracted the highest number of international judgments are: constitutional law (78 times), immigration law (44),

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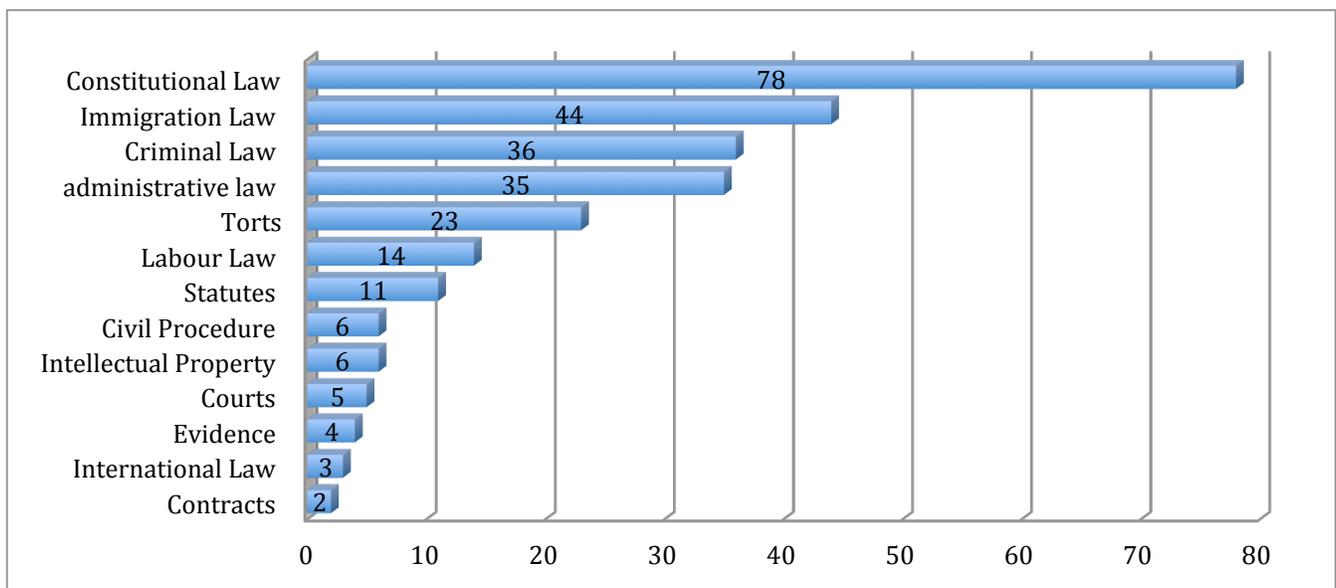
<sup>640</sup> See *supra* Table 16.

<sup>641</sup> For a deeper analysis of this issue, see Bastarache, *supra* note 44; Melissa A Waters, “Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties” (2007) 107 *Colum L Rev* 628; Melissa A Waters, “The Future of Transnational Judicial Dialogue” (2010) 104 *Proceedings of the Annual Meeting (Am Soc Int’l L)* 465 at 467.

<sup>642</sup> For more information on the role of international covenants and human rights treaties in the Charter’s drafting, see, Bayefsky, *supra* note 467 at 125–129; Jackson, *supra* note 53 at 239.

and criminal law (36).<sup>643</sup> Looking at the citation of international judgments, from the perspective of the SCC decisions citing such precedents according to field of law, constitutional law decisions constitute the most often decisions which involve international judgments (41%), followed by immigration law, administrative law and criminal law, at approximately 8% each.

**Figure 19: SCC Decisions Citing International Judgment According to Fields of Law**

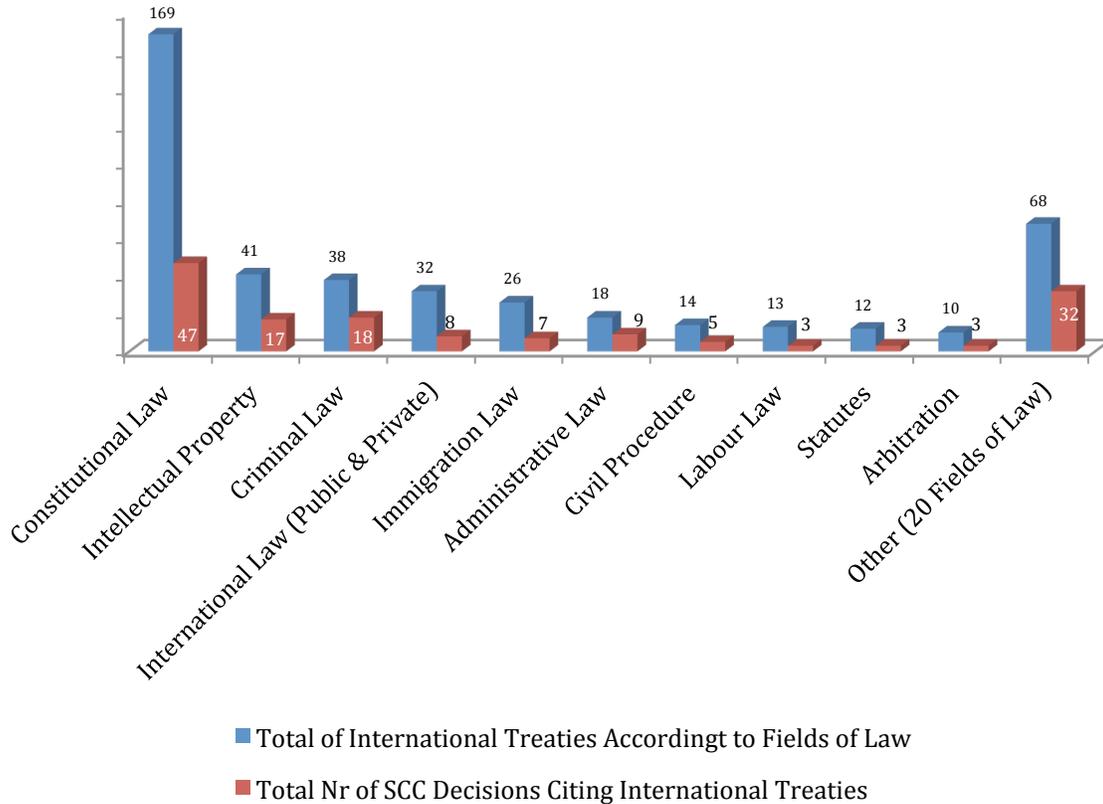


Besides international judgments, international treaties also are referred in many fields of law. More specifically, Figure 20 reveals that the SCC referred international treaties in 30 different fields of law, of both public and private realms.<sup>644</sup> The top 10 fields of law that attracted international treaties were constitutional law (169 times), intellectual property (41),

<sup>643</sup> Note that some of these SCC judgments which have cited international and transnational precedents, sometimes were more than in one field of law. Hence, for the purpose of counting, each field of law is included separately.

criminal law (38), international law (32), immigration law (26), administrative law (18), civil procedure (14), labour law (13), statutes (12) and arbitration (10).<sup>645</sup>

**Figure 20: SCC Decisions Citing International Treaties and Their Fields of Law**



#### IV. QUANTITATIVE DATA ON THE USE OF ACADEMIC SOURCES

The above sections demonstrated the openness of the SCC towards comparative and international legal sources, and arguably provided convincing evidence of the existence of a

<sup>645</sup> The other 20 fields of law are Evidence, Courts, Commercial Law, Torts, Contract, Action, Civil Law, Maritime Law, Extradition, Elections, Taxation, Customs and Excise, Aboriginal Law, Pensions, Environmental, Insurance, Bankruptcy & Insolvency, Family Law, Education Law, and Communications Law.

horizontal, vertical and diagonal transnational judicial conversation between the SCC and foreign courts. But the question remains: Is this all? Are these formal legal sources the only sources of conversation, exchange and openness towards the globe of the SCC and its justices?

Looking at the content of all 1,223 SCC judgments, another source of knowledge and insight emerges from the text of the judgments of the SCC itself: “Authors Cited”. Under this section, which is found in the majority of SCC judgments, the Court lists all the authors and literature used for that particular decision. This shows that the SCC and its judges are engaged in another type of conversation: the dialogue with scholars and researchers from across the globe. Hence, in addition to its participation in the transnational judicial conversation and the well-known dialogue with the Canadian parliament,<sup>646</sup> the SCC appears to be in transnational conversation also with scholars.

The data of this research show that the conversation of the SCC with academia is occurring in two major ways: first, in formal legal sources, by citing scholarship in SCC judgments; and second, “extra-curial” (outside the courtroom) interacting with many academics in numerous extra-judicial activities.<sup>647</sup>

To start with the legal dimension of conversation, Table 21 shows that the Court has used in its decisions 6,310 pieces of scholarship in near equal distribution during the 17 years of this study.<sup>648</sup> The Court used the highest number of “Authors Cited” in 2002 (521

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<sup>646</sup> This notion entered the academic mainstream with the very well-known article: Hogg & Bushell, *supra* note 154; See also, Peter W Hogg, Allison A Bushell & Wade K Wright, “Charter Dialogue Revisited: Or ‘Much Ado About Metaphors’” (2007) 45.1 Osgoode Hall LJ 1 at 5. As Professor Hogg *at al* admitted openly in this academic article: “We could not possibly have anticipated back in 1997 that the article, and in particular our use of the dialogue metaphor, would become the subject of so much discussion, debate, and deconstruction by judges, law professors, and political scientists.”

<sup>647</sup> These extra-judicial interactions of SCC justices with academics will be demonstrated in Chapter 4 “The Transnational Extra-Judicial Activities of the SCC and its Justices”.

<sup>648</sup> See Table 21

citations);<sup>649</sup> the year with the lowest number of citations was 2006 with 248 cited academic sources. It is interesting to note also that during the last four years (2013, 2014, 2015 and 2016), the Court has maintained a high use of scholarship, citing 438, 472, 464 and 394 academic sources, respectively. This is significantly higher than the average 371 sources cited per year.

Another significant finding from this research is that the SCC uses more academic sources than non-domestic legal sources. The four forms of non-domestic legal sources combined were used 2,495 times by the SCC (1,791 foreign judgments; 242 foreign constitutions, statutes and regulations; 126 international judgments; 336 international treaties),<sup>650</sup> while the total number of “academics cited” is two to three times bigger, 6,310.<sup>651</sup> These numbers clearly indicate that the SCC and its judges consider academics and scholarship to be key sources of information and ideas.

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<sup>649</sup> See Table 21.

<sup>650</sup> This is the total number of all forms of non-domestic legal sources used by the SCC within the 17 years period of this study.

<sup>651</sup> See Table 22.

**Table 21: Total Number of Academic Sources per Year**

Year	Total Number of SCC Decisions per Year	Total Number of Academic Sources per Year
2000	69	342
2001	94	497
2002	86	521
2003	75	355
2004	82	303
2005	86	340
2006	59	248
2007	54	419
2008	72	289
2009	62	372
2010	67	275
2011	66	313
2012	75	268
2013	73	438
2014	78	472
2015	69	464
2016	56	394
TOTAL	1223	6310
Average/Year	72	371

Admittedly, it is difficult to have a full and fair picture of the extent of scholarship use without looking at how scholarship is spread over the SCC’s decisions. Table 22 shows that from the 1,223 decisions that the SCC delivered between January 1, 2000 and December 31, 2016, the Court used academic sources in 784 of its judgments, constituting almost two thirds (64.1%) of the total number of its decisions.<sup>652</sup> In terms of the percentage of decisions using scholarship per year, the minimum use of academic sources occurred in 2005 when the court used scholarship in 48 of its 86 decisions, still constituting 55.8 percent.<sup>653</sup> The highest percentage of scholarship use occurred in 2002 when the Court cited authors in 63 of its 86

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<sup>652</sup> See Table 21.

<sup>653</sup> See Table 22.

decisions, constituting 73.2 percent of its total decisions for that year.<sup>654</sup> Once again, during the last two years (2015 and 2016), the SCC has kept a high use of academic sources well above the average, using scholarship in 45 decisions out of 69 and 38 out of 56, respectively for scores of 65.2 and 67.8 percent, both higher than the total average (64.1%).<sup>655</sup>

**Table 22: Data About Number of Decisions of the SCC Using Scholarship per Year**

<b>Year</b>	<b>Total Number of SCC Decisions per Year</b>	<b>Number of Decisions Using Scholarship</b>	<b>Number of Decisions Not Using Scholarship</b>	<b>Percentage of Decisions Using Scholarship</b>
2000	69	37	32	53.6%
2001	94	55	39	58.5%
2002	86	63	23	73.2%
2003	75	47	28	62.6%
2004	82	51	31	62.2%
2005	86	48	38	55.8%
2006	59	42	17	71.2%
2007	54	38	16	70.4%
2008	72	44	28	61.1%
2009	62	43	19	69.3%
2010	67	39	28	55.2%
2011	66	45	21	58.2%
2012	75	49	26	65.3%
2013	73	52	21	71.2%
2014	78	48	30	61.5%
2015	69	45	24	65.2%
2016	56	38	18	67.8%
<b>TOTAL</b>	<b>1223</b>	<b>784</b>	<b>439</b>	
<b>AVERAGE PER YEAR</b>	<b>72</b>	<b>46.1</b>	<b>25.8</b>	<b>64.1%</b>

<sup>654</sup> See Table 22.

<sup>655</sup> See Table 21 and Table 22.

This section suggests that academics are cited and routinely included in almost all categories of SCC cases. Still, the data in this section is only quantitative. More qualitative research is needed to determine whether and to what extent the use of scholarship by the SCC is meaningful and affects decision-making, issues which fall beyond the scope of this study. This engagement with scholarship, however, certainly opens the minds of the involved judges to other and different comparative and international perspectives, triggering what Professor Harry Arthurs calls the legal elite's "globalization of the mind."<sup>656</sup> Indeed, the quantitative data suggests that the extensive use of scholarship speaks to the existence of a vivid dialogue between courts and academia. This scholarship is a vital force for the dissemination of ideas, and appears to provide judges with different perspectives.

How is this conversation with academia connected to the transnational judicial dialogue and globalization of the SCC? This engagement in conversation with academics indicates transnational judicial dialogue is part of the broader conversation occurring in epistemic communities, where national borders are increasingly less relevant. It is beyond the scope of this study to identify the extent and impact of "foreign" scholarship in SCC decision-making. However, the list of cited academic sources reveals the variety of scholarship, publishers, authors, and titles referred by the SCC, evidencing the comparative and international dimension of these sources. This indicates that the SCC appears to be in conversation with scholars from across the globe and does not distinguish between domestic and foreign scholarship. The difference between domestic and foreign scholarship is diminishing, and actually, judges rarely consider the nationality of the scholarship they use. In addition, the qualitative data of this study show the SCC engages in serious conversation with

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<sup>656</sup> Arthurs, *supra* note 139 at 223, 245-246.

academics from across the globe on crucial issues.<sup>657</sup> In cases that involve the citation of non-domestic legal sources, scholarship helps judges better interpret international and comparative law, and introduces important research findings.

The list of these academic sources also shows the SCC takes into account non-legal studies, including those from the fields of medicine, economics, philosophy, psychology, anthropology, and political science. In trying to find the best possible solution, it seems the justices often consider the opinions of experts outside the law. Scholars who focus on other constitutional courts have also noted the relationship between judges and professors and the significance not only of legal scholarship, but also of non-legal literature such as medicine, psychology, and anthropology.<sup>658</sup>

From a transnational judicial dialogue perspective, beyond the fostering of “formal legal mechanisms”, academics are also of great value for the other wing of conversation: the extra-judicial mechanisms. Academics contribute to the transnational judicial dialogue not only through their published works, but also through a significantly more direct and active role. As the next chapter will discuss, academics are constantly involved in the ongoing conversation with judges from across the globe: they meet face-to-face, build close relationships, invite and participate in conferences and establish and support various

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<sup>657</sup> For an example on how the SCC used the academic sources in its decision-making, regarding key issues such as: extradition, the death penalty, wrongful convictions, international relationships, and the proportionality test, see: *United States v Burns* [2001] 1 SCR 283. See also my analysis on this matter on Chapter 5 “Case Study - *US v Burns*: Analysis From a Transnational Judicial Dialogue Perspective”.

<sup>658</sup> Lucio Pegoraro, “Judges and Professors: the Influence of Foreign Scholarship on Constitutional Courts’ Decisions”, in *Courts and Comparative Law* eds. Mads Andenas & Duncan Fairgrieve (Oxford University Press: 2015) at 329. This study is focused on the Philippines, South Africa, Israel, and Argentina, all belonging to different legal systems.

transnational judicial projects.<sup>659</sup> Hence, academics constitute one of the most important categories of “other actors.” They influence the transnational judicial dialogue indirectly by shaping the “globalist” mindset and judicial philosophy of judges, and actively by participating and contributing in numerous activities.

Another reason why academics enjoy a special status in the process of transnational judicial dialogue is that, besides the courts, academics are the only actors that Article 38 of the Statute of International Court of Justice recognizes with a formal status in international law. According to the Article, “the teachings of the most highly qualified publicists of the various nations” are sources of international law.<sup>660</sup> Although scholarship is considered a derivative or secondary source of international law, its contribution is significant towards a harmonious understanding and interpretation of international law, the globalization of law and the dispersion of ideas, including the trans-judicial interaction process.<sup>661</sup> However, as of yet these statistics all relate to the SCC as an institution. To what extent, then, might the individual judges contribute to the citation of non-domestic legal sources and to the globalization of the

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<sup>659</sup> See, Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”. One of the most recent events which included the participation of several academics, legal practitioners, and judges, including Justice Rosalie Abella of the SCC, and which I personally attended, is: “Institutions, Constitutions Symposium: The Judiciary’s Role in the 21<sup>st</sup> Century”, Osgoode Hall Law School, Osgoode Professional Development, Toronto, 26-27 September 2016. Some famous non-Canadian law schools have gone even further, such as: Harvard Law School, Yale Law School, NYU Law School, and many others around the world, including Canada, are increasingly opening their doors to judicial training institutes and conferences, helping judges to build networks that foster the JG process. See, Frank, *supra* note 260 at 3; Apple, *supra* note 260 (British, U.S. Judges and Lawyers Meet, Discuss Shared Judicial, Legal Concerns) at 1; Apple, *supra* note 260 (Yale Law School Establishes Seminar on Global Constitutional Issues) at 2; Slaughter, *supra* note 35 at 1122.

<sup>660</sup> See Article 38/1, Section d, of the Statute of International Court of Justice.

<sup>661</sup> One of the best examples of the importance of the role of academics is the contribution of Anne Marie Slaughter, who although an academic, has played a tremendous role in the global acknowledgment of the process of judicial globalization with her articles, books and speeches. See my engagement with her scholarship on Chapter 2 “Understanding Transnational Judicial Dialogue From a Theoretical Perspective: An Overview of the SCC”.

Court? To answer this requires a focus on the numbers from the perspective of individual judges.

## **V. QUANTITATIVE DATA BASED ON INDIVIDUAL JUDGES**

For a better understanding of the citation of non-domestic legal sources of a comparative and international nature by the SCC, it is important to go beyond the Court as an institution and look also at the roles of individual judges. As explained in Chapter 2, in addition to the SCC as an institution, individual judges of this Court are key actors in the process of transnational judicial networks.<sup>662</sup> They participate and contribute not only through the use of extra-judicial mechanisms,<sup>663</sup> but also through formal juridical ones by deciding whether and to what extent to engage with comparative and/or international legal sources. The key aim of this section is to find out whether and to what extent individual judges cite non-domestic legal sources (comparative or international) in their decision-making.

Immediately, it is important to acknowledge that all 21 judges of the SCC (13 former and 8 current) have cited non-domestic legal sources in their decisions. This means that every current and former judge of the SCC has contributed, through his or her engagement with non-domestic legal sources, to the global profile of this Court. However, as is discussed in Chapter 2, other scholars have noted that, not all the judges contributed to the same extent or referred with the same frequency to non-domestic legal sources. A few were exceptional, having cited

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<sup>662</sup> See Chapter 2 “Understanding Transnational Judicial Dialogue From a Theoretical Perspective: An Overview of the SCC”, Section V “Actors”.

<sup>663</sup> See, Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

such legal sources several times more than the others.<sup>664</sup> Dodek states that “most of the comparative analysis was undertaken by a single judge,” pointing to the role of Justice Binnie.<sup>665</sup> Of the same opinion, McCormick looked at the number of US case citations used by every SCC judge and found that Justice Binnie cited five times more than the average of every other judge, accounting for more than one third of all American cases cited by the entire court.<sup>666</sup> According to McCormick’s findings, other judges who made a significant contribution in the citation of foreign case law were Justice Iacobucci, Justice Bastarache, Justice L’Heureux-Dubé and Justice LaForest.<sup>667</sup> Other scholars, such as Gentili and Mak, have identified the central roles of individual judges, including Justices LaForest, L’Heureux-Dubé, Lebel and Binnie, suggesting they have put “their mark on the development of the use of comparative law in the Supreme Court of Canada.”<sup>668</sup>

Although undeniably important, it seems that all these claims relate almost exclusively to the citation of foreign decisions and do not rely on comprehensive empirical data that includes also the other three forms of non-domestic legal sources (international judgments, international treaties, and laws of other nations). Hence, this research seeks to contribute in the existing body of scholarship, by revealing a broader picture regarding the extent of citation of all forms of non-domestic legal sources by individual former and current justices of the SCC.

This research began by counting the number of times each individual judge cited non-domestic legal sources of a comparative or international nature. To be more comprehensive, as

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<sup>664</sup> As will be demonstrated later in this section, the judge who used the most non-domestic legal sources did so about seven times more often than the judge who used the least, even when taken as an average of use per month served. See *infra* Table 24.

<sup>665</sup> Dodek, *supra* note 6 at 473.

<sup>666</sup> McCormick, *supra* note 146 at 95–97.

<sup>667</sup> *ibid.*

<sup>668</sup> Gentili & Mak, *supra* note 39 at 128.

with the previous sections, the citations of such sources in dissenting opinions are also included. As indicated by the SCC, as it is well known, “Decisions of the Court need not be unanimous: a majority may decide, in which case the minority will give dissenting reasons.”<sup>669</sup> Each judge may write dissenting reasons, and may rely on foreign legal sources when doing so. Notably, the content of SCC decisions, under the “Cases Cited” section, has a separate subsection for dissenting judges, which includes all case law cited in the dissenting reasons. Therefore, in order to best compile the profile of each individual judge, the foreign judgments used in dissenting reasons are also counted.

As shown in Table 23, the judge who referred the most to formal non-domestic legal sources in the SCC was indeed Justice Binnie. He cited foreign sources 497 times during his 11 years and 10 months of service in the Court (within the 17-year timeframe of this study). The SCC judge with the second-highest citation of non-domestic legal sources was former Chief Justice McLachlin. She is the only judge to serve the entire 17 years included in this study, and during this period of time she cited non-domestic legal sources 393 times. The third most active judge in this regard was Justice LeBel. During his 14 years and 11 months of service, he cited non-domestic legal sources 371 times. The judges with the lowest citation of non-domestic legal sources are all current judges: Justice Wagner (now CJ), Justice Gascon, and Justice Brown. During his 4 years and 3 months in the Court, Justice Wagner has cited non-domestic legal sources 30 times. Justice Gascon has cited 22 non-domestic legal sources within a timeframe of 2 years and 7 months, and Justice Brown has cited non-domestic legal sources 20 times in the 16 months that he has served in the Court.

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<sup>669</sup> See, Supreme Court of Canada, Role of the Court, online: <<https://www.scc-csc.ca/court-cour/role-eng.aspx>>.

**Table 23: Data About the Total Number of Citation of Non-Domestic Legal Sources by Individual Judges of the SCC (2000-2016)**

<b>Judges</b>	<b>Total Number of Times Citing Non-Domestic Legal Sources</b>	<b>Period Served (within my timeframe)</b>	<b>Time Served in Months</b>
Binnie	497	(01.01.2000 - 20.10.2011)	142
Chief Justice McLachlin	393	(07.01.2000 - 31.12.2016) (Current)	204
LeBel	371	(07.01.2000 - 30.11.2014)	179
Abella	248	(30.08.2004 - 31.12.2016) (Current)	148
Bastarache	190	(01.01.2000 - 30.06.2008)	102
Cromwell	183	(22.12.2008 - 31.08.2016)	92
Deschamps	180	(07.08.2002 - 07.08.2012)	120
Rothstein	126	(01.03.2006 - 30.08.2015)	114
Charron	123	(30.08.2004 - 30.08.2011)	84
Iacobucci	115	(01.01.2000 - 30.06.2004)	54
Fish	111	(05.08.2003 - 31.08.2013)	121
Arbour	97	(01.01.2000 - 30.06.2004)	54
Major	96	(01.01.2000 - 25.12.2005)	72
L'Heureux-Dubé	72	(01.01.2000 - 01.07.2002)	30
Gonthier	65	(01.01.2000 - 31.07.2003)	43
Moldaver	55	(21.10.2011 - 31.12.2016) (Current)	62
Coté	53	(01.12.2014 - 31.12.2016) (Current)	25
Karakatsanis	38	(21-10-2011 - 31.12.2016) (Current)	62
Wagner	30	(05-10-2012 - 31.12.2016) (Current)	51
Gascon	22	(09-06-2014 - 31.12.2016) (Current)	31
Brown	20	(31.08.2015 - 31.12.2016) (Current)	16

However, as Table 23 shows, a fair critique of the above numbers is that not all former and current judges have served the same amount of time within the Court, and therefore it is difficult to evaluate by numbers alone. To create a better and fairer picture of the citation of

non-domestic legal sources by each individual judge requires the calculation of average citation per month, done so by dividing the number of times that each judge cited non-domestic legal sources by the number of months served in the Court during the research period. Table 24 classifies the judges according to this average; the judge with the highest citation of non-domestic legal sources per month was still Justice Binnie, with an average of 3.5 foreign sources per month. The second and third rankings fell to Justice L’Heureux-Dubé, with an average of 2.4 foreign sources per month; and Justice Iacobucci, with 2.129 sources per month. Former Chief Justice McLachlin, who was the second highest judge in terms of total number of citation, fell to seventh place under this more accurate system with her average of 1.92 non-domestic sources per month. The three judges with the lowest averages of citation per month are Justice Gascon with 0.7 sources per month, Justice Karakatsanis with 0.61 sources per month and Justice Wagner with 0.58 sources per month.

***Table 24: Classification of SCC Judges According to the Average of Citation per Month of Non-Domestic Legal Sources (2000-2016)***

<b>Judges</b>	<b>Average of Citation per Month</b>	<b>Number of Times Citing Non-Domestic Legal Sources</b>
Binnie	3.5	497
L’Heureux-Dubé	2.4	72
Iacobucci	2.129	115
Coté	2.12	53
LeBel	2.07	371
Cromwell	1.98	182
Chief Justice McLachlin	1.92	393
Bastarache	1.86	190
Arbour	1.79	97

Abella	1.67	233
Gonthier	1.51	42
Deschamps	1.5	180
Charron	1.46	123
Major	1.33	96
Brown	1.25	20
Rothstein	1.1	125
Fish	0.91	109
Moldaver	0.88	55
Gascon	0.7	22
Karakatsanis	0.61	38
Wagner	0.58	29

It is interesting that the three judges with the lowest average of non-domestic legal source citation are all current judges, while the top three are all former judges. Perhaps even more intriguing is that nearly all the other current SCC judges rank on the bottom half of the total classification list; the only two current judges to appear on the top half of the list are Justice Côté, who scored fourth and is the first from all the current judges, and former Chief Justice McLachlin, who as stated above scored seventh.

By comparing the average numbers of the current judges to those of the former ones, it becomes evident that the SCC is moving from a court with a high citation of non-domestic legal sources towards one that arguably is more sceptical about global legal sources, consisting of (apparently) more localist (i.e., domestic-centred) judges. These numbers based on individual judges can explain why the SCC appears to have become less “globalist”, and is perhaps one of the best explanations of why it is happening. When the SCC is comprised of judges who are sceptical towards the reference of non-domestic legal sources, no doubt the entire institution and its decision-making processes will become more so as well.

The significance of this shift is evident when looking at Table 24, which shows the difference of numbers between the former Justice Binnie (first in the classification), with 3.5 legal sources per month, and the current Chief Justice Wagner (then Justice, last in the classification), with 0.58 non-domestic legal sources per month. A difference that shows that the former cites approximately 7 times more than the current. The image is almost the same when we compare the averages per month of the top three judges (all former judges with an average of approximately 2.6 non-domestic legal sources per year) with the three bottom judges (all current judges with an average of 0.6 sources per month). The difference is still 4-5 times more citation of non-domestic legal sources, by the former judges.

Even when looking at Table 25, which compares the 13 former judges with the 8 current ones, the data shows that the former judges have cited on average 1.8 sources per month (2226 non-domestic legal sources in total) while the current judges average 1.2 sources per month (859 sources in total). This comparative picture shows that the current judges cite non-domestic legal sources on average 1.5 times less than the former judges.

*Table 25: Comparing Current Justices with Former Justices on the Citation of Non-Domestic Legal Sources*

<b>CURRENT JUDGES</b>	<b>Nr of Times Citing Non-Domestic Legal Sources</b>	<b>Average of Citation per Month</b>
<b>Coté</b>	53	2.12
<b>Chief Justice McLachlin</b>	393	1.92
<b>Abella</b>	248	1.67
<b>Brown</b>	20	1.25
<b>Moldaver</b>	55	0.88
<b>Gascon</b>	22	0.7
<b>Karakatsanis</b>	38	0.61
<b>Wagner</b>	30	0.58
<b>TOTAL</b>	859	1.21

<b>FORMER JUDGES</b>	<b>Nr of Times Citing Non-Domestic Legal Sources</b>	<b>Average of Citation per Month</b>
<b>Binnie</b>	497	3.5
<b>Iacobucci</b>	115	2.129
<b>Cromwell</b>	183	1.98
<b>LeBel</b>	371	2.07
<b>L'Heureux-Dubé</b>	72	2.4
<b>Bastarache</b>	190	1.86
<b>Charron</b>	123	1.46
<b>Major</b>	96	1.33
<b>Arbour</b>	97	1.79
<b>Deschamps</b>	180	1.5
<b>Gonthier</b>	65	1.46
<b>Rothstein</b>	126	1.1
<b>Fish</b>	111	0.91
<b>TOTAL</b>	2226	1.8

The picture becomes even more troubling considering that one of the most “globalist” judge, Chief Justice McLachlin, who has cited non-domestic legal sources almost same as all the other current justices combined,<sup>670</sup> just retired on December 2017.<sup>671</sup> Without her, the average of citation per month of the current Court would drop significantly to an average of 1.1 foreign legal sources per month, approximately two times less than the average of all former judges. This becomes even more worrisome in the context of the special role that the Chief Justice has on the transnational judicial dialogue and on the global reputation of the Court. The Chief Justice represents the Court in the global arena and is the most important actor in its communications with other foreign courts, judges and transnational institutions. Having lost a highly “globalist” Chief Justice who referred extensively to non-domestic legal sources, and at first sight, having acquired a more skeptical one, one might argue that there is a risk that the SCC may be on the verge of forfeiting its international reputation and influence in the global arena, currently valued by domestic and foreign scholars,<sup>672</sup> judges,<sup>673</sup> and even domestic politicians.<sup>674</sup> As Hirschl elegantly describes the role of the SCC in the global arena, the “constitutional thought of every variety is now one of Canada’s main intellectual exports”.<sup>675</sup>

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<sup>670</sup> Chief Justice McLachlin has cited non-domestic legal sources 393 times, whereas the other seven current judges have cited in total only 450 times.

<sup>671</sup> Chief Justice McLachlin retired on December 15, 2017. See, The Right Honourable Beverley McLachlin, The Supreme Court of Canada, online: <http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=beverley-mclachlin>.

<sup>672</sup> There are several scholarly articles available discussing “Canada’s soft power” and the exportation of Canadian constitutional ideas by the SCC. See, e.g., Adam M Dodek, *The Charter . . . In the Holy Land?* 8 CONST. F. 5 (1996); Dodek, *supra* note 7; Dodek, *supra* note 5; Hirschl, *supra* note 118 at 7–8. For information on “soft power” see, Nye Jr., *supra* note 178.

<sup>673</sup> See, e.g., Barak, *supra* note 186; Goldstone, *supra* note 189; Sachs, *supra* note 192.

<sup>674</sup> Cotler, *supra* note 200. According to Former Minister of Justice and Attorney General Irwin Cotler, the Supreme Court of Canada is appreciated around the world.

<sup>675</sup> Hirschl, *supra* note 118 at 7. See also, Sujit Choudhry, “The Globalization of the Canadian Constitution” (2012) *The Trudeau Found Papers* 91 at 98–104; Dodek, *supra* note 5; Law & Versteeg, *supra* note 156 at 809–823; Mark Tushnet, “The Charter’s Influence Around the World” (2013) 50 *Osgoode Hall LJ* 527.

It is true that the new Chief Justice of the SCC, Wagner, refers to non-domestic legal sources 3–4 times less often than his predecessor.<sup>676</sup> However, we should note that it is impossible and even unfair to assess the “globalist” profile of a judge (or a court as an institution) by focusing only on the formal or juridical dialogue occurring through the exchange of non-domestic legal sources. Other, more real and dynamic forms of transnational judicial interactions are happening at both the institutional and judge-individual levels, as will be described in Chapter 4.<sup>677</sup> Hence, a more accurate picture of the “globalist” or “localist” approach of individual judges will be provided later in Chapter 4.

Next, I provide a more detailed review of the individual justices’ citation of each of the four forms of non-domestic legal sources. As will be seen, not all current and former justices of the SCC have referred to all forms of non-domestic legal sources; however, the majority of them have done so. As Table 26 shows, 16 of the 21 justices have cited all four types of non-domestic legal sources. Of the five justices that have not cited all four types of foreign sources, four of them (Justice Iacobucci, Justice Gascon, Justice Brown and Justice Arbour) cited three of the above four non-domestic legal sources (except for international judgments). Justice Côté was the only judge to cite only foreign judgments and international treaties (omitting international judgments and comparative statutes and regulations). It is interesting to note also that of the eight judges who did not cite all forms of non-domestic legal sources, five are current judges.

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<sup>676</sup> See Table 22.

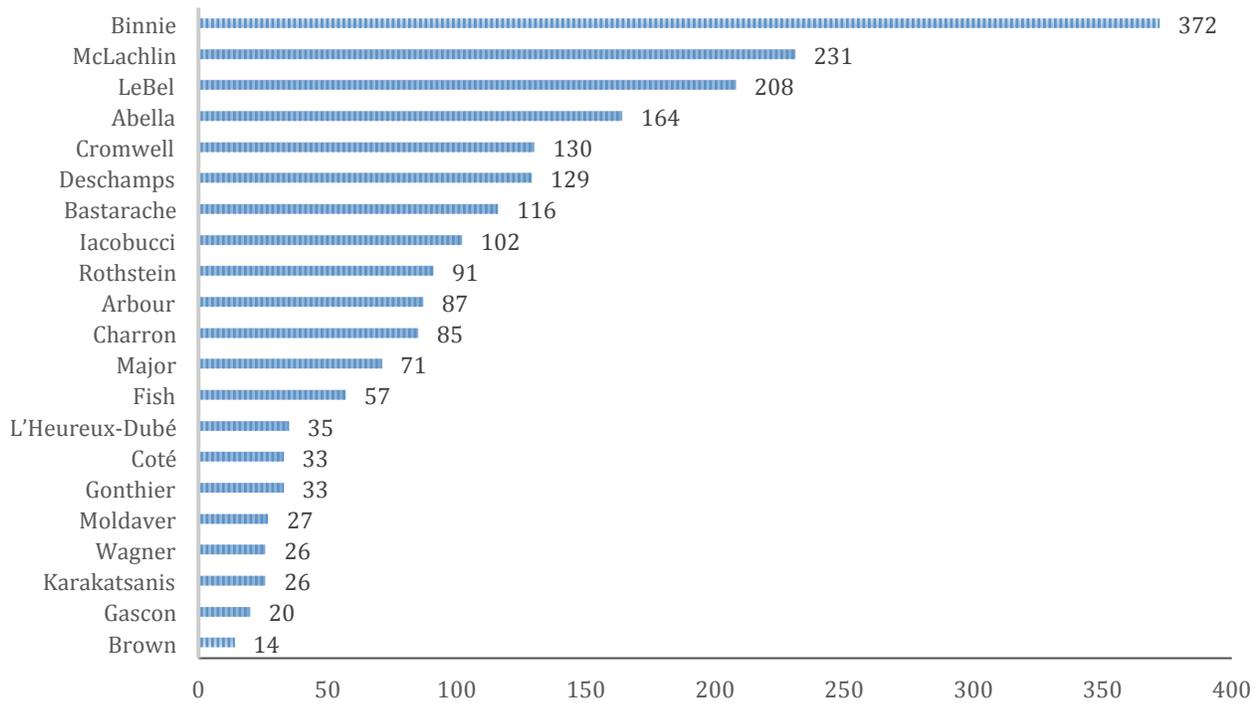
<sup>677</sup> The focus of this chapter does not allow me to go into more details into the extra-judicial interaction activities with foreign or international courts. Here is suffice to say that the transnational judicial activities of the SCC can be classified in two main groups: activities of the SCC as an institution; and activities of individual judges. For more details see, Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

**Table 26: Total Citation of All Four Forms of Non-Domestic Legal Sources According to Individual Judges**

JUDGES	Comparative Case Law	International Case Law	Comparative Statutes and Regulations	International Treaties
Binnie	372	18	49	58
McLachlin	231	20	58	84
LeBel	208	44	35	84
Abella	164	21	38	25
Bastarache	116	12	19	43
Cromwell	130	5	24	24
Deschamps	129	14	13	24
Rothstein	91	1	11	23
Charron	85	12	21	5
Iacobucci	102	0	5	8
Fish	57	21	17	16
Arbour	87	0	8	2
Major	71	12	8	5
L'Heureux-Dubé	35	2	11	24
Gonthier	33	4	13	15
Moldaver	27	2	10	16
Coté	33	0	0	20
Karakatsanis	26	1	9	2
Wagner	26	1	2	1
Gascon	20	0	1	1
Brown	14	0	2	4

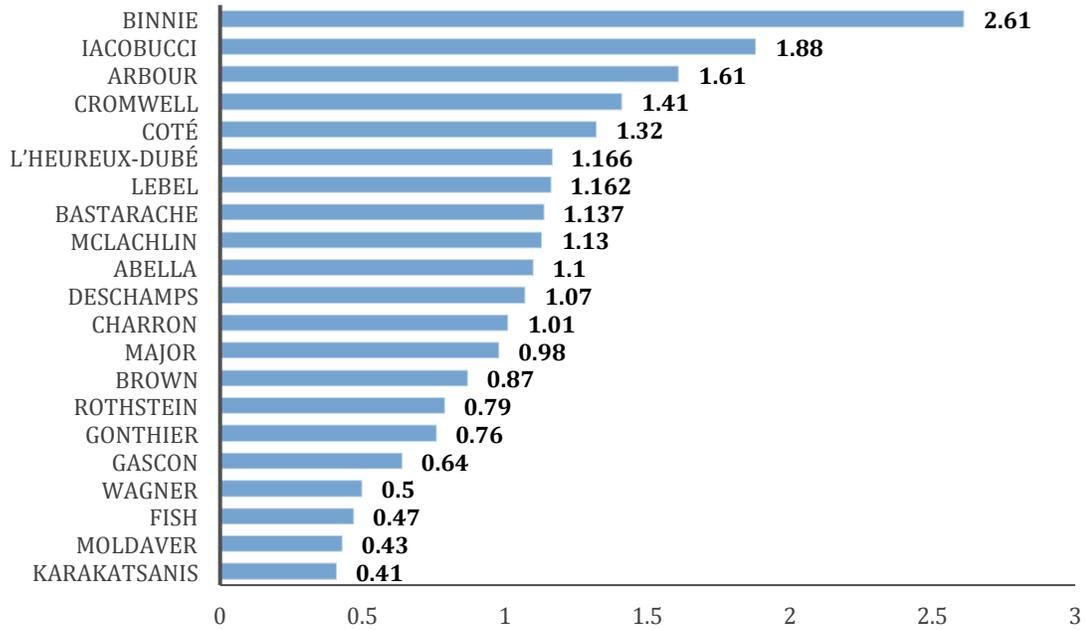
*Foreign Judgments:* Figure 27 reveals that Justice Binnie led the list with 372 citations throughout his career. Second was former Chief Justice McLachlin, with 231 citations of foreign judgments; in third place was Justice LeBel with 208 citations. The four judges with the lowest number of citations were Justice Wagner and Justice Karakatsanis (26 respectively), Justice Gascon (20) and Justice Brown (14).

**Figure 27: Citation of Foreign Judgments by Individual Judges**



Average citations per month were also considered, as not all judges have served the same amount of time on the Court. Figure 28 shows that the three judges with the highest averages were Justice Binnie with 2.61 citations of foreign judgments per month, Justice Iacobucci with 1.88 citations per month and Justice Arbour with 1.61 citations per month. The judges with the lowest percentage of comparative case law citation per month were Justice Fish (0.47 citations/month), Justice Moldaver (0.43 citations/month) and Justice Karakatsanis (0.41 citations/month).

**Figure 28: Citation of Foreign Judgments by Individual Judges  
(Average per Month)**



*International/Supranational Judgments*: is the second category of non-domestic legal sources cited by the judges of the SCC, which illustrates also the vertical and diagonal conversation of the SCC with international and supranational courts. As stated above, not all judges cited this type of source in the period of research. As evidenced by Figure 29, the judge with the highest number of citation of judgments of international courts was Justice LeBel, at a total of 44 occasions, followed by Justice Abella and Justice Fish with 21 citations of international case law. The five judges who did not cite any international case law are Justice Iacobucci, Justice Arbour, Justice Coté, Justice Gascon, and Justice Brown.

**Figure 29: Citation of International Judgments by Individual Judges**

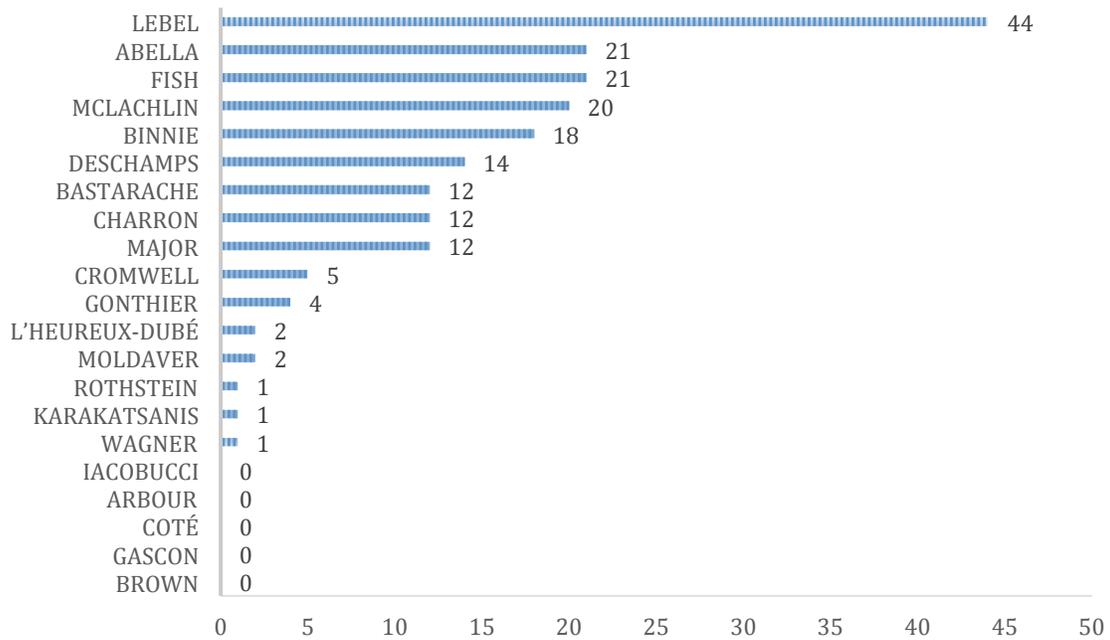
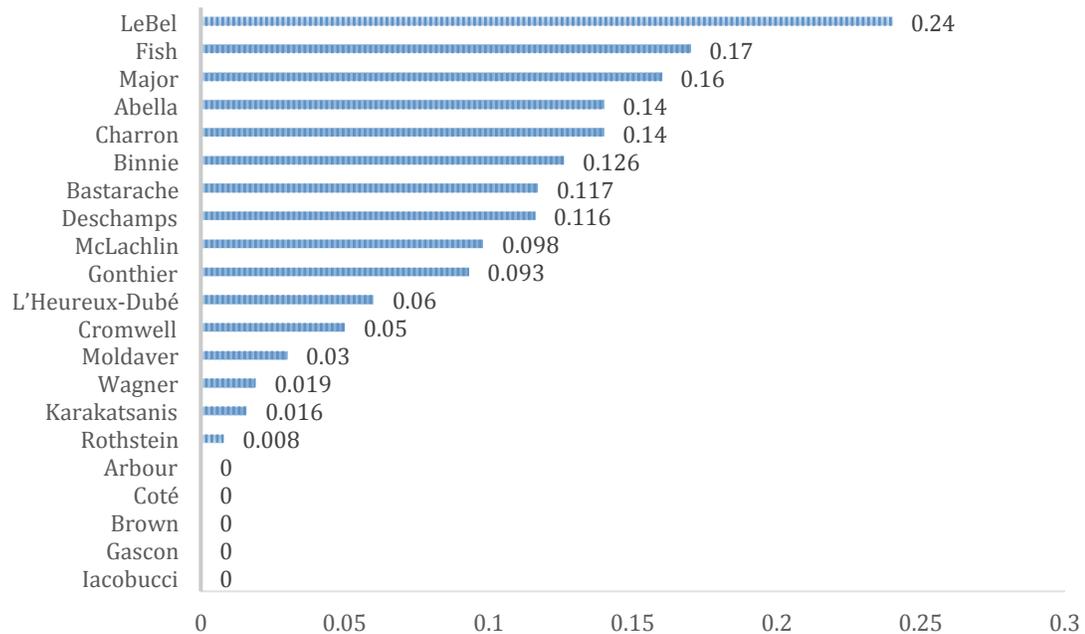


Figure 30 outlines the average citations of international cases per month for each judge; the three judges with the highest monthly averages were Justice LeBel with 0.24 citations, Justice Fish with 0.17 citations and Justice Major with 0.16 citations.

**Figure 30: Citation of International Judgments by Individual Judges (Average per Month)**

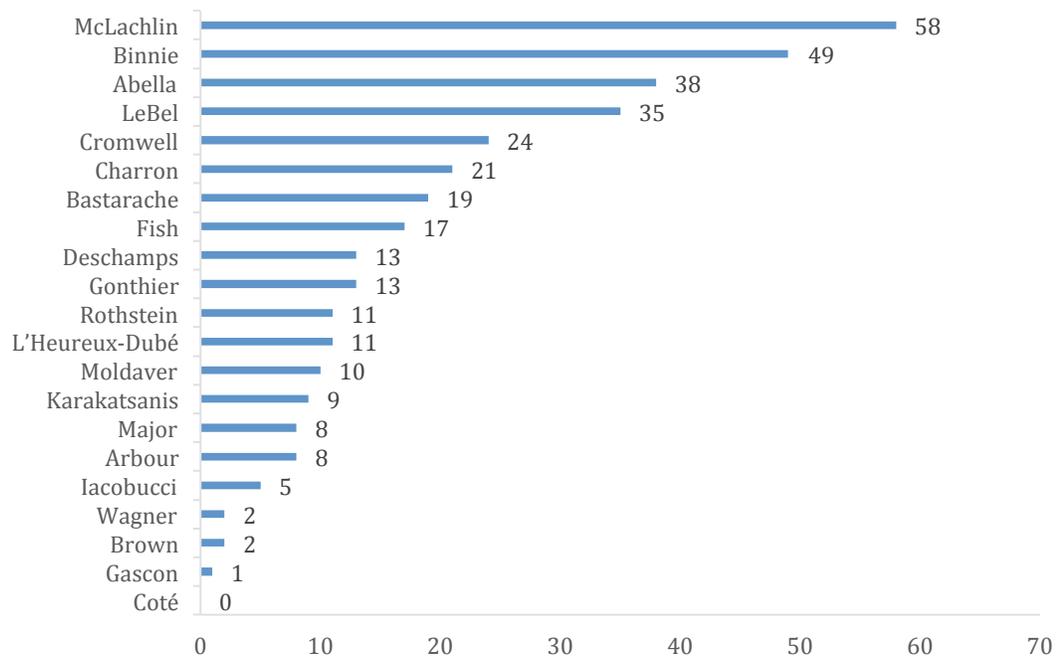


*Constitutions, Statutes and Regulations of Foreign Countries*: or what I call in this study as comparative law is another important category that shows the transnational mindset of the SCC judges. Citation of this type of foreign legal sources indicates that the judges are aware of the transnational legal order comprised by the laws of other nations, and that the Court as an institution testifies its openness towards comparative legal sources. Interestingly, all former and current judges of the SCC cited this type of foreign legal source throughout their careers, with the single exception of Justice Côté.<sup>678</sup> Figure 31 shows that the judge with the highest citation of comparative law was former Chief Justice McLachlin, with 58 occasions over the 17 years of research. Second was Justice Binnie with 49 instances, and third was Justice

<sup>678</sup> Justice Côté was appointed to the Supreme Court of Canada on 1 December 2014. The Supreme Court of Canada, “The Honourable Suzanne Côté”, online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=suzanne-cote>>.

Abella with 38 occasions of citing this type of foreign legal source.<sup>679</sup> Aside from Justice Coté, who as stated above did not cite any comparative statutes and regulations, the other judges with most minimal use of statutes and regulations from other nations were Justice Brown (2 times), current Chief Justice Wagner (2 times) and Justice Gascon (1 time).

**Figure 31: Citation of Comparative Statutes & Regulations by Individual Judges**

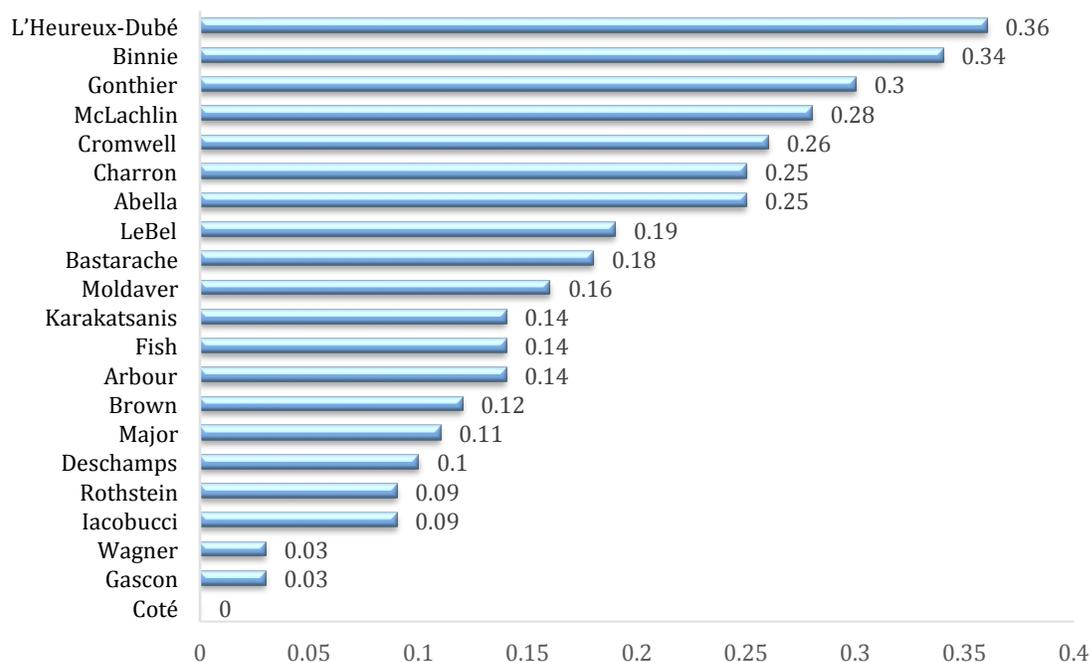


As with the other categories, average monthly citation was plotted as well. Here the picture changes significantly. As noted in Figure 32, the judge with the highest average per month was Justice L'Heureux-Dubé with 0.36 comparative statutes and regulations per month. The judge with the second-highest monthly average was Justice Binnie (0.34 per month), and the third was Justice Gonthier (0.3 per month). Former Chief Justice McLachlin was the

<sup>679</sup> Justice Rosalie Abella is known for participating in face-to-face meetings and transnational judicial conferences, such the annual Global Constitutionalism Seminar at Yale Law School. See Yale Law School, online: <<https://law.yale.edu/centers-workshops/gruber-program-global-justice-and-womens-rights/global-constitutionalism-seminar>>. See, Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

fourth in this classification with 0.28 comparative statutes and regulations per month. This classification that shows Justice L’Heureux-Dubé at the top of all 21 former and current Justices of the SCC, is in complete harmony with the scholarly perception of her as one of the most globalist, open-minded, and high- global-reputation judge to ever sit in the SCC.<sup>680</sup>

**Figure 32: Citation of Comparative Statutes & Regulations by Individual Judges (Average per Month)**



At the other end of the scale, the three judges with the lowest percentage of monthly comparative law citation were Justice Gascon (0.03 comparative statutes per month), Current Chief Justice Wagner (0.03 per month) and Justice Coté (none). Notably, the top three judges were former judges and the bottom three current judges according to both the raw and average

<sup>680</sup> Hirschl, *supra* note 118 at 13; Ajmal Mian, *A Judge Speaks Out* (Oxford: Oxford University Press, 2004) at 135 (Mian, a former Chief Justice of Pakistan, takes great pride in the fact that Justice Claire L’Heureux-Dubé—a major proponent of international constitutional cross-fertilisation—visited the Supreme Court of Pakistan and expressed keen interest in its jurisprudence on constitutional matters).

numbers, highlighting once more the different approaches of the current SCC judges towards the reference of comparative law.

*International Treaties*: is the fourth category of non-domestic legal sources, which is cited by the judges of the SCC. The interpretations, techniques and reference of international legal instruments (particularly unratified ones) suggest that the SCC is indeed converting Canada from a *dualist*,<sup>681</sup> towards a *monist* legal system.<sup>682</sup> International legal norms are among the pillars of a transnational judicial dialogue, providing “courts with common reference points around which to shape a dialogue.”<sup>683</sup> In the absence of a global constitutional court that decides the final interpretation of international treaties (particularly on human rights) with *erga omnes* effects, national courts—through their transnational judicial dialogue—ensure consistency in their interpretation.<sup>684</sup>

Interestingly, all 21 former and current judges of the SCC cited this type of foreign legal source (international treaties) throughout their careers (see Figure 33). The judges with the highest number of citation, in terms of raw numbers, were Former Chief Justice

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<sup>681</sup> William A Schabas, “Twenty-Five Years of Public International Law at the Supreme Court of Canada” (2001) 79 Can Bus Rev 174 at 177; Gibran van Ert, “Using Treaties in Canadian Courts” (2000) 38 Can YB Int’l L 3 at 4.

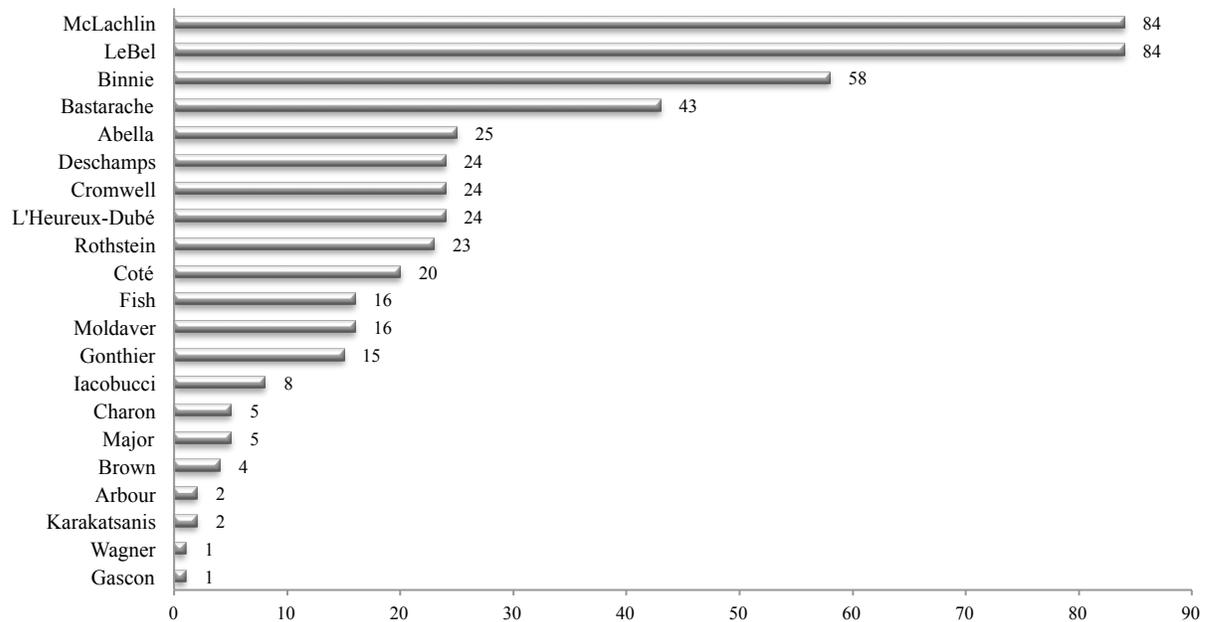
<sup>682</sup> As mention above, in general, *monism* and *dualism* are used to explain two theories regarding the relationship between national and international law. In a *monist legal system*, international law is considered part of the internal legal order of the state, is superior to domestic law, and is directly applicable and enforceable in domestic courts without the necessity of domestic implementation by way of legislation; moreover, this framework creates a single and unitary legal system. The most famous scholar that advocated the monist system is Hans Kelsen. Kelsen, *supra* note 420 (Peace Through Law). In a *dualist legal system*, international law is considered separate from the internal legal order of the state, is not superior to domestic law, and is not directly applicable and enforceable in domestic courts, instead requiring necessary domestic implementation. This framework creates a dual and separated legal system for national and international law. One of the most notable proponents of the dualist theory was German jurist and philosopher Heinrisch Triepel. Triepel, Kelsen, *supra* note 420 (Volkerrecht und Landesrecht).

<sup>683</sup> For further information, see, Waters, *supra* note 71 at 466.

<sup>684</sup> Rado, *supra* note 61 at 130–31.

McLachlin and Justice LeBel, each having drawn on international treaties on 84 occasions throughout the 17 years of the research period. Also in the top three was Justice Binnie, who cited international treaties 58 times. In contrast, the judges with the lowest use were three current justices of the SCC: Justice Karakatsanis (2 times – same as Justice Arbour), Justice Gascon (1 time), and Current Chief Justice Wagner (1 time).

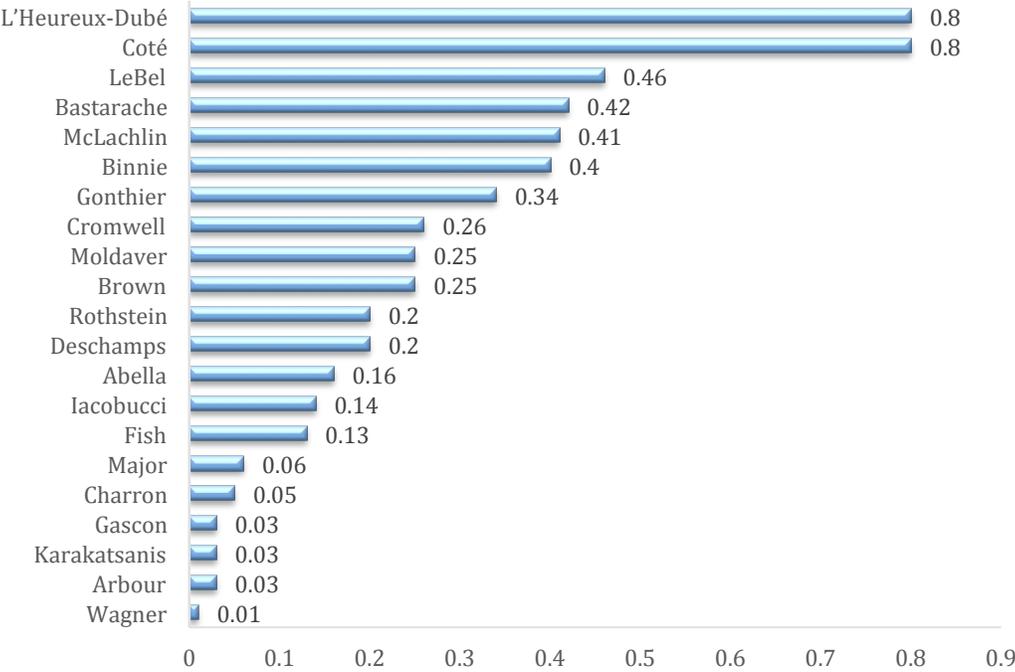
**Figure 33: Citation of International Treaties by Individual Judges**



However, this pattern changes when one taken into account monthly averages. As seen in Figure 34, the top two judges were Justice L’Heureux-Dubé (0.8 treaties per month), who tied in average with the current Justice Côté. As was observed with the citation of comparative law, Justice L’Heureux-Dubé ranked with the highest average of citation also of international treaties, confirming once again her label as an “exception” and one of the most “globalist”

judges.<sup>685</sup> Hirschl describes her in a recent paper “as an international champion of inter-jurisdictional constitutional cross-fertilization [that] helped to entrench this trend within the Canadian judiciary”.<sup>686</sup> Also in the top three judges with the highest average of citation of international treaties per month was Justice LeBel with an average of 0.46 per month. Former Chief Justice McLachlin, who had the highest number of citation of international treaties in total, placed fifth in this classification with an average of 0.41 international treaties per month. On the lower half, the bottom three judges remained the same: Justice Karakatsanis (0.03 per month), Justice Gascon (0.03 per month) and current Chief Justice Wagner (0.01 per month).

**Figure 34: Citation of International Treaties by Individual Judges (Average per Month)**



<sup>685</sup> See Gentili & Mak, *supra* note 2 at 128; Mian, *supra* note 680 at 135.

<sup>686</sup> Hirschl, *supra* note 118 at 13.

## **SPECTRUM OF INDIVIDUAL JUDGES: FROM “GLOBALIST” TO “LOCALIST”**

Finally, with these rankings in mind, the question remains: Is it possible to classify the current and former justices of the SCC based on their approaches to the citation of non-domestic legal sources? In other words, can we categorize these judges as “globalists” or “localists” based on this data?<sup>687</sup>

Before attempting any categorization, it is important to note that the goal of this section is not to provide clear-cut categories, but rather to suggest a spectrum based on the amount of citation of non-domestic legal sources. Yet even this spectrum has its limitations, because assessing how engaged in the transnational network of courts and how “globalist” or “localist” a judge is, constitutes a much more complex task than simply looking at their commitment to non-domestic legal sources. There are various objective factors that do not depend on the judge, but can significantly shape these numbers, including: the type of cases they are given to write, their duration on the Court, their law clerks’ ability to locate relevant non-domestic legal sources, and the role of parties, their counsel, and interveners in introducing such foreign sources. One interviewed judge explains how SCC judges differ in their engagement with non-domestic legal sources, and whether such engagement expresses the “globalist” or “localist” mindset of judges:

There are many reasons for the engagement or non-engagement with non-Canadian legal sources. First, we have to realize that . . . until last year, it was

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<sup>687</sup> In fact, scholars have labeled judges as “globalist” and “localist” also in previous scholarship. See e.g. Mak, *supra* note 28 at 6, 228–29.

the Chief Justice who decided which judge was going to write each decision. The nature of the case is key, because, obviously, you cannot involve non-domestic legal sources, foreign or international, in every case. There are only specific cases that have that potential. And if you are not called to write on those decisions, of course you will not appear in the list of judges who referred to such sources. Second, it depends on whether you are with the majority or minority. Third, it depends whether it [the case] comes from Quebec, or another province. That can certainly have an impact on how much a judge is contributing. Fourth, the number of years that judges have served in the Court also plays a role. The longer a judge serves, the more confident is the judge with non-domestic legal sources. Fifth, many references to international or foreign legal sources will be found by the clerks. So, clerks play an important role in presenting these sources to the judge. To sum up, there are many factors that [influence] whether and to what extent a judge engages with non-domestic legal sources.<sup>688</sup>

Indeed, as the same judge noted: “Just looking at the numbers cannot tell you much, because these numbers may misguide you on how a judge perceives the role of foreign legal sources in our decision-making.”<sup>689</sup> In addition, the “globalist” or “localist” mindset of a judge cannot be defined solely by the citation of non-domestic legal sources. As Chapter 4 shows, in addition to the use of formal legal tools, judges also utilize extra-judicial mechanisms, which include face-to-face meetings, judicial associations and organizations, and electronic networks, to enter into dialogue with their counterparts.<sup>690</sup> Judges’ participation in these extra-judicial activities certainly adds to their profile.

Hence, in order to reveal whether a relationship between such extra-judicial mechanism and the extent of citation of non-domestic legal sources actually exists (which will be assessed in Chapter 4), and to better comprehend the role of individual judges, it is useful

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<sup>688</sup> Interview with Justice Nr 7.

<sup>689</sup> Interview with Justice Nr 7.

<sup>690</sup> See e.g. Rado, *supra* note 61 at 116–123; Slaughter, *supra* note 74 at 1120–1123.

to attempt providing such a categorization. Table 35 shows that the 21 former and current justices of the SCC can be placed on a spectrum that divides into three identifiable groups.<sup>691</sup>

**Table 35: Spectrum of SCC Judges According to their Citation of Non-Domestic Legal Sources (2000-2016) (Average per Month)**



In the first group are the top seven justices with the highest averages of citation of non-domestic legal sources per month. They are: Justice Binnie, Justice L'Heureux-Dubé, Justice Iacobucci, Justice Coté, Justice LeBel, Justice Cromwell, and former Chief Justice McLachlin. These justices with high reference of non-domestic legal sources can be labeled as “highly globalist justices”. It is interesting to note that in this top group, only two are current justices, former Chief Justice McLachlin and Justice Coté. However, as we mentioned above, although in terms of average of citation per month (in service) Justice Coté appears to be at the first

<sup>691</sup> Despite the limitations, this classification of current and former justices of the SCC in the above three categories is interesting, because it is based on precise numbers gleaned from research on the use of all four forms of non-domestic legal sources. In addition, as noted above, I am not the only researcher to use these labels. See e.g. Mak, *supra* note 28 at 6, 102–106, 228–229.

group, she has only cited judgments of foreign courts and international treaties.<sup>692</sup> This can certainly put into question her belonging into the first group.

In the second group are the middle seven justices with a medium average of citation of all types of non-domestic legal sources per month. They are: Justice Bastrache, Justice Arbour, Justice Abella, Justice Gonthier, Justice Deschamps, Justice Charron, and Justice Major. These justices with a moderate citation of non-domestic legal sources can be labeled as “moderately globalist justices”.<sup>693</sup> Once again, it is worthy to mention that in this middle group, only one is current justice (Justice Abella), while the other six are former justices.

Table 35 reveals that the last group is comprised of the seven justices with the lowest average of citation of non-domestic legal sources per month. They are: Justice Brown, Justice Rothstein, Justice Fish, Justice Moldaver, Justice Gascon, Justice Karakatsanis and Justice Wagner. Their averages ranged from 1.25 non-domestic legal sources per year (Justice Brown) to 0.58 non-domestic legal sources per year (Justice Wagner), the lowest average of all 21 judges. These justices with a low number of citations of non-domestic legal sources may be labeled as “localist justices”.

Looking at the third group, one fact stands out: an absolute majority of them (5 out of 7) are current justices of the SCC. Moreover, the three justices with the lowest averages of non-domestic references are all current justices (Justice Gascon, Justice Karakatsanis and current Chief Justice Wagner). As noted previously, their combined average was 4-5 times lower than the average of the top three justices (all former), which explains the different

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<sup>692</sup> See *supra* Table 27 & Table 33.

<sup>693</sup> This classification of current and former justices of the SCC in the above three categories is unique, because it is based on precise numbers gleaned from research on the use of all four forms of non-domestic legal sources. However, as noted above, I am not the only researcher to use these labels. See e.g. Mak, *supra* note 28 at 6, 102–106, 228–229.

approach of the current Court towards the citation of non-domestic legal sources. These findings, as noted in the literature review chapter,<sup>694</sup> seem consistent with those of other studies.<sup>695</sup> As one researcher observed, in referring to a personal interview with a judge of the SCC, “the interest of the judges in international consensus, and in foreign law as such, has faded over the years.”<sup>696</sup>

## VI. CONCLUSION

This chapter constituted a comprehensive quantitative study of all forms of non-domestic legal sources referenced by the SCC in 2000–2016. During this 17-year period, the SCC extensively engaged with all four forms of non-domestic sources: a) judgments of foreign courts; b) constitutions, codes, statutes, and regulations of other countries; c) international case law; and d) international treaties. Between 2000 and 2016, the SCC cited 1,791 decisions from the courts of other nations, averaging 105 foreign precedents per year. The data also showed the SCC cited these foreign judgments in 393 of its 1,223 decisions. In other words, nearly one-third of all SCC decisions cite precedents of other nations. The research reveals that during this period the SCC cited precedents of courts of 14 nations; four of which, the United States, the United Kingdom, Australia, and New Zealand, accounted for more than 95% of the comparative case law cited by the SCC. The two most cited highest foreign courts were the Supreme Court of the United States (336 cases), and the Supreme Court of the UK (307 cases).

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<sup>694</sup> See, Chapter 2 “Understanding Transnational Judicial Dialogue From a Theoretical Perspective: An Overview of the SCC”.

<sup>695</sup> See, Chapter 2 “Understanding Transnational Judicial Dialogue From a Theoretical Perspective: An Overview of the SCC”.

<sup>696</sup> Mak, *supra* note 28 at 150.

Notably, the SCC cites foreign precedents not only in constitutional and international law cases as would be expected, but also in 50 other fields of law.

I also found that the SCC cited formal legal acts passed by the legislative and executive branches of other countries, such as constitutions, codes, statutes, and regulations, 242 times. The data demonstrates that the SCC has cited the constitutions, codes, statutes, and regulations of 16 foreign countries; the United Kingdom (99 times), the United States (69), Australia (40), New Zealand (11) and France (8), are cited the most. The Court has cited comparative laws in 32 different fields of law, particularly when deciding constitutional and criminal law cases.

The results also show that the Court uses both primary and secondary international legal sources. The Court's use of international treaties is particularly intriguing; it referenced a treaty from a global or regional international organization, including bilateral treaties with another state, at least once in each of the 17 years of the study, 336 times total. On average, the SCC referred to international treaties approximately 20 times per year, in 110 different decisions. This study also reveals that the SCC consulted 191 different international treaties, including those that Canada has not ratified and those from international organizations of which it is not a member.

The results show that during 2000–2016, the SCC cited 126 decisions of international courts, which are found in 54 judgments of the Court. The study also finds that the SCC cited precedents from 14 different international and supranational courts (and *quasi* courts). The different fields of law cited were considered and the analysis revealed that the Court cited international precedent in 13 different fields of law, both public and private, most often

constitutional, immigration, criminal, and administrative law. Meanwhile, the SCC references to international treaties were even more diverse, encompassing 30 fields of law, both public and private.

Yet, the empirical data demonstrate that compared to previous years, the current Court appears to be less reliant on these foreign sources, which may jeopardize its globalist reputation in the transnational network of courts. This decline may be attributed to both external and internal forces, but such reasons remain to be uncovered by future studies.

In addition to the institutional viewpoint, this article analyzes empirical data on judges' individual engagement with non-domestic legal sources, by putting the 21 former and current justices of the SCC into a spectrum which can arguably form three identifiable groups: "high globalist judges," "moderate globalist judges," and "localist judges." Such a categorization, certainly, does not aim to be exhaustive regarding the "globalist" or "localist" profile of individual judges, rather than to provide a spectrum of categories. In addition, this categorization does not take into account the other side of the transnational judicial conversation, the "extra-judicial" conversation. Yet, if the SCC wishes to maintain a high globalist profile, the Court as an institution and its individual judges must carefully continue to consider non-domestic legal sources of both an international and a comparative nature. Their tendency to do so lately appears to be declining.

This study also reveals that the SCC and its judges are engaged in another type of conversation: a dialogue with scholars and researchers from across the globe. The data of this research show that the conversation of the SCC with academia follows two primary streams: first, through the use of formal legal sources, by citing scholarship in SCC judgments; and

second, by interacting with academics in numerous extra-judicial activities. The goal of this chapter was to offer a general overview on the extent of the citation of scholarship in all SCC decisions delivered in 2000–2016. The resulting data show the Court used thousands of pieces of scholarship in near equal distribution during the 17 years of this study, with an average of about four hundred sources cited per year. It used academic sources in nearly two-thirds of its 1,223 decisions delivered during this time. Another significant quantitative finding is that the SCC uses more academic sources than non-domestic legal sources. These numbers appears to indicate the existence of a vivid dialogue between the SCC and its judges and academia, and that scholarship is considered a key source of information and ideas regarding comparative and international legal sources.

Although beyond the aim of this study, the data of this research suggest the SCC interacts with scholars from across the globe and does not discriminate against foreign scholarship. In this increasingly globalized and interconnected world, the difference between domestic and foreign scholarship is diminishing, and judges rarely consider the nationality of the scholarship they use. The list of these academic sources also shows the SCC consults non-legal studies, indicating that in trying to find the best possible solution, the justices often consider the opinions of experts outside the law. Academics also enhance the judicial conversation by participating in the extra-judicial mechanism. As Chapter 4 will show, they contribute to this process not only through their published works, but also through a significantly more direct and active role, through numerous activities in which they interact with judges.

Overall, this chapter demonstrates that the SCC engages extensively with all forms of non-domestic legal sources, be it international or of foreign nations. At least quantitatively, it shows that the Court has a global consciousness. Yet, it is difficult, and indeed unwise, to evaluate the globalist or localist profile of the SCC and its engagement in dialogue, just by looking at this numbers. Although a large number of citations of non-domestic legal sources were found, this does not necessarily indicate that the SCC is indeed participating in this dialogue, and has or will continue to maintain its globalist profile. Therefore, this data will be combined in other chapters with a qualitative analysis of such citations in concrete cases evaluating their impact in the decision-making, and most importantly with the empirical data concerning the extra-judicial engagement of the Court as institution and its individual judges. The goal of this chapter was to provide a quantitative assessment of all forms of non-domestic legal sources used by the SCC (as an institution and as individual justices). Whether and to what extent such results reflect and are consistent also with what is referred to here as the “extra-judicial dialogue” will be evaluated in the next chapter.

## **CHAPTER 4**

# **THE TRANSNATIONAL EXTRA-JUDICIAL ACTIVITIES OF THE SCC AND ITS JUSTICES**

### **I. INTRODUCTION**

This chapter outlines the interaction and networking activities occurring between the Supreme Court of Canada and its justices, and its foreign and international counterparts. In Chapter 3, I introduced empirical data explaining the citation of non-domestic legal sources by the SCC and its justices, which can be considered the formal legal side of the transnational conversation occurring among courts and judges. However, the process of transnational judicial interaction is much more complex, and has also an “extra-judicial” or less formal aspect. Courts and judges have become increasingly involved in genuine conversation and exchange activities that transcend national borders. Unlike the exchange of non-domestic legal sources, where the concept of “dialogue” among courts is more of a metaphor, here its meaning is quite literal. Courts and judges from across the globe, including the SCC, are actively participating in direct dialogue, exchanging information amongst themselves. Hence, whenever the phenomenon of globalization of the judiciaries is analyzed, it is unfair to assess the “globalist” profile of a court by focusing only on the formal or juridical dialogue occurring through the exchange of legal sources. This is indeed only the “tip of the iceberg.” Other forms of transnational judicial interactions are occurring, which are potentially of even greater significance.

The goal of this chapter is to provide empirical data on these extra-judicial interactions. As explained in Chapter 1, three methodological tools were used to collect the data for this chapter: a) web-based research, b) archival research at the SCC, and c) personal interviews with current and former judges of the SCC. First, this chapter will reveal the main mechanisms or forms used by the SCC and its justices to participate in this type of genuine dialogue, by focusing on both the Court as institution and on the role of individual judges. Second, the chapter will provide a short overview of the “global” background of current and former justices of the SCC (that served between 2000 and 2016), and will attempt to provide a classification of individual judges.

## **II. EXTRA-JUDICIAL TRANSNATIONAL ACTIVITIES OF THE SCC**

I define extra-judicial transnational activities of courts and judges, as the various forms of interactions that occur among courts and judges with their counterparts from across the globe, using a variety of mechanisms. Such mechanisms or forms of interaction include face-to-face meetings, formal bilateral relationships among courts, and affiliation with international judicial organizations.

The first decision, which was informed by the literature review and the preliminary empirical findings for this study, was to distinguish the SCC as an institution from the individual judges of the Court. As explained in Chapter 2, such a distinction is essential to comprehending the complexity of the process of transnational judicial interactions and its

different mechanisms, and to understanding judicial globalization in general.<sup>697</sup> In fact, during the collection of data, such distinction was crucial to revealing the different mechanisms of judicial conversations.

Several criteria can be used in classifying the different forms of extra-judicial interactions among the SCC and foreign courts and judges. When the Court as institution conducts such interaction, it is classified as “institutional”, or court-to-court interaction, while interaction between judges is considered “individual”, or judge-to-judge interaction. Judicial interaction, based on jurisdiction, might be classified as a “horizontal interaction”, a “vertical interaction”, or a “diagonal interaction”. Finally, interaction can be classified by form, based on whether it is face-to-face interaction, interaction through transnational judicial organizations, interaction through transnational judicial training institutions or other legal education institutions, or interaction through transnational electronic networks and systems.

These distinctions reflect the various aspects of transnational judicial dialogue and demonstrate its complexity. Although each is important, as will be seen, a combination of the first and last categories best explains the different forms of extra-judicial activities. Taken together, they create a comprehensive picture of all mechanisms used by the SCC and its justices. Based on the above, the transnational conversation activities will be classified into two broad categories, a) extra-judicial activities of the SCC as an institution, and b) extra-

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<sup>697</sup> See Chapter 2 “Understanding Transnational Judicial Dialogue From a Theoretical Perspective: An Overview of the SCC”, Section V “Actors”. Individual judges have to be conceptualized also as autonomous actors from the SCC as an institution, in transnational judicial interactions. Beyond the existing literature, the data in this Chapter will demonstrate that this distinction is not only theoretical, but also in practice. As the data will show, individual judges are actors who have the *discretion* and *decision-making capacity* to engage, or not engage, in judicial networking with other foreign courts and judges in different settings. In other words, it is under their discretion to engage with non-domestic legal sources, to meet face-to-face with foreign counterparts, establish and participate individually in transnational judges associations, training institutions, or use electronic networks.

judicial activities of individual judges. Within these categories, they will be discussed based on the form they take.

### **A. EXTRA-JUDICIAL ACTIVITIES OF THE SCC AS AN INSTITUTION**

The SCC is one of the most cosmopolitan, most active, and most well-known courts in the transnational judicial exchanges occurring across the globe.<sup>698</sup> As one of the interviewed judges stated, “The SCC has this enormous global prestige because it did not remain behind closed doors; instead, it was involved in all sorts of activities and exchanges with courts and judges from around the world, to the point that when we were visiting them, the red carpets were deployed in most places.”<sup>699</sup> My research, including the data collected through interviews with former and current justices of the SCC, reveals that court-to-court institutional exchanges take three forms: 1) regular bilateral relationships, 2) transnational courts associations and organizations, and 3) occasional contacts.

#### **1. REGULAR BILATERAL RELATIONSHIPS WITH FOREIGN COURTS**

Throughout the years, the SCC has been in contact with a multitude of national and international courts. The Court has built ongoing and longstanding relationships with several, particularly the highest courts of certain countries. These official, established, and ongoing contacts are considered to be the “regular bilateral relationships” the SCC has with foreign and even supranational courts.

My research data demonstrate that the SCC is engaged in this type of regular relationship with the highest courts of eight countries: the Supreme Court of the United

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<sup>698</sup> See the scholarship on Chapter 2 “Understanding Transnational Judicial Dialogue From a Theoretical Perspective: An Overview of the SCC”.

<sup>699</sup> Interview with Anonymous Justice 1.

Kingdom, the Supreme Court of the United States, the *Cour de Cassation* (and *Conseil d'État*) of France, the High Court for Australia, the Supreme Court of New Zealand, the Federal Constitutional Court of Germany, the Supreme Court of India, and the Supreme Court of Israel.<sup>700</sup> This type of formal bilateral relationship constitutes perhaps the highest form of horizontal dialogue of the SCC with its counterparts.

The SCC also has a longstanding relationship with the European Court of Human Rights (ECtHR), a supranational regional court established by the European Convention on Human Rights under the Council of Europe.<sup>701</sup> The regular exchange meetings with the ECtHR began approximately 10 or 12 years ago, and both Courts send on turns delegations to each other and have regular meetings every 2–3 years.<sup>702</sup> According to a senior official of the SCC, “the Court has on average 1-2 bilateral meetings per year, one in Canada and one abroad”.<sup>703</sup>

As a rule, these bilateral relationships are not established by a formal document. However, sometimes a memorandum of understanding may be signed, stating that the courts will meet at regularly scheduled intervals.<sup>704</sup> According one current judge of the SCC:

Usually such memorandums are done with courts that want this sort of thing, and usually are electronic. It is not in our tradition to ask or make these sorts of documents. There are different traditions; some European courts might ask about a formal document, while Asians, for example, might not. We rarely do it. But we are quite happy to meet with them, and work with them. We operate on this generally in an informal way.<sup>705</sup>

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<sup>700</sup> “An Overview on the International Affiliations of the Supreme Court of Canada”, document prepared by a senior official of the SCC after accessing the Archives. Confirmed also by most justices that I interviewed.

<sup>701</sup> *Ibid.* See also: Interview with Anonymous Justice 10, Justice 9, and Justice 5.

<sup>702</sup> Interview with Anonymous Justice 10.

<sup>703</sup> Interview with an anonymous senior official of the SCC.

<sup>704</sup> “An Overview on the International Affiliations of the Supreme Court of Canada”, document prepared by a senior official after accessing the Archives.

<sup>705</sup> Interview with Anonymous Justice 2.

All current and former judges interviewed confirmed the existence of the SCC's ongoing relationships with the above courts, stressed their importance, and shared their experiences.

Depending on the agreement, such meetings are held every two, three, or four years, alternating between the SCC and the foreign court. When the meeting is held abroad, the Chief Justice and a few other SCC judges usually represent the Court; when held in Canada, all judges of the Court may attend. Depending on the topic of discussion, the Chief Justice's executive legal officer may also attend, as may the registrar.<sup>706</sup>

One goal of this research was to uncover the purpose and the subjects of these regular meetings. As a plaque hanging in the Grand Entrance Hall of the SCC states, “[J]udges participate in regular judicial exchanges in which they either receive delegations from abroad or travel to a foreign country as part of Canadian delegation. The main purpose of such exchanges is to share information and best practices.” All interviewed justices also confirmed such a purpose. The same plaque reads, “The range of topics discussed is quite broad, ranging from substantive legal principles, such as approaches to interpreting constitutional rights, to more administrative issues, such as dealing with self-represented litigants.” When asked, the judges verified that the subject and agendas for these exchanges are mutually agreed upon beforehand by the participating courts' judges. A few judges explained how these regular meetings proceed.<sup>707</sup> They usually consist of presentations or speeches on agreed-upon topics

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<sup>706</sup> “An Overview on the International Affiliations of the Supreme Court of Canada”, document prepared by a senior official of the SCC after accessing the Archives.

<sup>707</sup> Interview with Anonymous Justice 4 and Justice 9.

followed by discussion.<sup>708</sup> One discussion might focus on substantive legal issues, such as human rights or important constitutional principles, while another might concentrate on court management and administration issues, including budgets, caseloads, social media, the administration of security, or the court’s relationship with the public.<sup>709</sup> In addition, visiting judges sometimes attend a sitting of the host court in order to better understand how it operates.

Speaking about the benefits and specificity of such regular meetings compared to occasional meetings, one judge remarked:

The idea was that it wouldn’t be meetings like the ones we had before, where we were explaining simply what we were doing. Instead, we would have a theme and we would have presentations. For instance, one year was Private Law, and we would take three cases from one country and three cases from the other on the same subject and then we would have presentations. Judges would make presentations and then we would compare our methods, our use of precedents, our results, and so on. The exchange was really a debate about best practices, the way we deal with the questions that are common to our courts.<sup>710</sup>

These regular meetings are not public, and courts have agreed not to keep any formal records. The private and usually confidential nature of the discussions, according to one judge, “allows us to speak very openly and freely. That’s why these activities and their content are not out there for publication.”<sup>711</sup> Other current and former judges, as well as a senior official of the Court, confirmed this practice.

Bilateral relationships with other courts may change over time. Some may end, while new relationships are established. For instance, one judge stated:

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<sup>708</sup> “An Overview on the International Affiliations of the Supreme Court of Canada”, document prepared by a senior official of the SCC after accessing the Archives.

<sup>709</sup> Interview with Anonymous Justice 4, Justice 6, Justice 9, and Justice 10.

<sup>710</sup> Interview with Anonymous Justice 4.

<sup>711</sup> Interview with Anonymous Justice 2.

During my first years at the Court, there were regular exchanges with the Russian and Chinese Supreme Courts, which went on for a few years. However, after 2005, I think, the relationship with them kind of froze, or slowed down. I think the last official meeting with the Russian Constitutional Court was about ten years ago (2007).<sup>712</sup> [Emphasis added]

Another judge believes this interruption may have occurred because the newer SCC judges were not interested in exchanges with these courts.<sup>713</sup> This belief is reinforced by another judge, who declared, “Personally, I would not exchange or participate in meetings with foreign judges that come from nations under autocratic regimes.”<sup>714</sup> It is clear that both political context and changes in the membership of a court are central considerations in building or maintaining regular transnational judicial conversations.

While a change to the leadership or membership of a court may not terminate a court-to-court relationship, it may alter the tone of the regular meetings. One of the interviewed judges admitted he experienced a shift in the tone of the regular relationship between the SCC and the US Supreme Court:

When Justice Roberts became the new Chief Justice, I think he wanted to limit conversation to court management issues, and avoid substantive topics. On the contrary, Chief Justice Rehnquist was much more open to substantive issues. The discussion of substantive matters with the Supreme Court of the US, like the impact of international law or foreign law on our decision-making, became a matter of discussing with individual justices, like Justice Breyer, or Justice O’Connor, but no longer institutional.<sup>715</sup>

In such an interconnected world, changing political situations in other countries might reflect not only on the openness and global engagement of their courts, but also on the SCC itself. If the highest courts of other nations become sceptical towards transnational judicial

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<sup>712</sup> Interview with Anonymous Justice 10.

<sup>713</sup> Interview with Anonymous Justice 4.

<sup>714</sup> Interview with Anonymous Justice 6.

<sup>715</sup> Interview with Anonymous Justice 10.

dialogue, alter or terminate ongoing relationships, or stop participating in the global judicial conversation altogether, the SCC will be affected. One justice explained, “If the highest courts of other nations will not participate in the transnational judicial conversation, of course it will be more difficult for the SCC, because with whom would they be in conversation?”<sup>716</sup> It is evident that political context, shifts in judicial culture, and the willingness of other courts to participate in such conversations affect the openness of the transnational judicial conversation and the globalization of the SCC itself. The more courts of other nations are willing to engage in dialogue and exchanges with the SCC, the more likely such conversations will thrive; and vice versa, the more other courts will choose to pull back from such interactions, the more likely the foreign judicial relations of the SCC will shrink.

My research, particularly the interviews with current and former justices of the SCC, suggests that regular bilateral relationships between the SCC and other courts constitute perhaps the most vital and useful mechanism of conversation. This type of relationship is a modern development that deserves greater attention, not only by courts and judges, but also by scholars. Several features, including the formal nature of such relationships, their continuity and periodicity, mutually agreed upon agendas, and the exchange of ideas and best practices, speak to the uniqueness of this development. Speaking about the last feature, as I stated above, these are exchanges not just on substantive legal issues, but also on court management and administration. Such factors make this instrument one of the most significant modern mechanisms of transnational judicial conversations generally, and for the SCC specifically.

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<sup>716</sup> Interview with Anonymous Justice 10.

## 2. TRANSNATIONAL COURT ASSOCIATIONS AND ORGANIZATIONS

The SCC actively participates in transnational judicial associations and organizations, which differ from bilateral relationships in that they involve multiple courts—sometimes more than a hundred. Transnational judicial associations and organizations are judicial or legal in nature, have a transnational or international scope, and accept only courts, not individuals, as members. According to the interviewed senior official of the SCC, “the Court has on average 2-3 multilateral meetings per year, and locations vary from year to year”.

From a “bigger picture perspective”, although it goes beyond the scope of this Chapter, it should be noted that the existence of some of these judicial associations is the result of an initiative of the Government of Canada, which decided to establish, fund, and promote these types of organizations.<sup>717</sup> One SCC judge noted that the French and Canadian governments signed in the mid 1990s a bilateral international agreement to establish permanent networks of supreme courts that use the French language.<sup>718</sup> According to him, the governments agreed set up two different associations: the *Association des Cours Constitutionnelles ayant en Partage l'Usage du Français* (ACCPUF) [Association of Constitutional Courts Sharing the Use of French]<sup>719</sup> and the *Association des Hautes juridictions de Cassation des pays ayant en partage l'usage du Français* (AHJUCAF) [Association of the High Courts of Cassation of Countries Sharing the Use of French].<sup>720</sup> Unlike bilateral relationships between courts, the initiative for building transnational judicial associations or organizations, and their very existence, does not

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<sup>717</sup> According to several interviewed judges this practice started in the mid 1990s, under PM Chrétien, and the support for such type of judicial continued also with next governments although from a different political stripe.

<sup>718</sup> Interview with Anonymous Justice 10.

<sup>719</sup> Association des Cours Constitutionnelles ayant en Partage l'Usage du Français (ACCPUF), online: <<http://www.accpuf.org/>>.

<sup>720</sup> Association des hautes juridictions de Cassation des pays ayant en partage l'usage du français (AHJUCAF), online: <<http://www.ahjucaf.org/-Membres-.html>>.

always stem from judges themselves. As explained above, at least two of the organizations that the SCC belongs to are the result of a diplomatic initiative of the French and Canadian Governments to promote the networking of the highest courts that use French.

My research reveals that the SCC is currently a member of six international judicial associations/organizations: ACCPUF,<sup>721</sup> AHJUCAF,<sup>722</sup> the *Association internationale des hautes juridictions administrative* (AIHJA) [International Association of Supreme Administrative Jurisdictions],<sup>723</sup> the World Conference on Constitutional Justice (WCCJ),<sup>724</sup> the Commonwealth Magistrates' and Judges' Association (CMJA),<sup>725</sup> and the Asia Pacific Judicial Colloquium (APJC).<sup>726</sup> The Court is represented at these organizations by a judge designated by the Chief Justice.<sup>727</sup> A judge of the SCC will sometimes serve on the board of directors of associations in which the Court participates. In the case of at least three such transnational judicial associations, the registrar often attends the meetings.<sup>728</sup>

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<sup>721</sup> Association des Cours Constitutionnelles ayant en Partage l'Usage du Français (ACCPUF), online: <<http://www.accpuf.org/>>.

<sup>722</sup> Association des hautes juridictions de Cassation des pays ayant en partage l'usage du français (AHJUCAF), online: <<http://www.ahjucaf.org/-Membres-.html>>.

<sup>723</sup> Association internationale des hautes juridictions administrative (AIHJA), online <<http://www.aihja.org/>>.

<sup>724</sup> World Conference on Constitutional Justice (WCCJ), online: <[http://www.venice.coe.int/WebForms/pages/?p=02\\_WCCJ](http://www.venice.coe.int/WebForms/pages/?p=02_WCCJ)>.

<sup>725</sup> Commonwealth and Magistrates' and Judges' Association (CMJA), online: <<http://www.cmja.org/index.html>>.

<sup>726</sup> Vancouver Bar Association "Welcome Reception for Asia Pacific Judicial Colloquium", online <<https://vancouverbar.ca/event/welcome-reception-asia-pacific-judicial-colloquium/>>.

<sup>727</sup> "An Overview on the International Affiliations of the Supreme Court of Canada", document prepared by a senior official of the SCC after accessing the Archives.

<sup>728</sup> *ibid.*

i. Association of Constitutional Courts Sharing the Use of French (ACCPUF)

The SCC is a member of ACCPUF.<sup>729</sup> Founded in 1997 to strengthen links among nations of the French-speaking world, ACCPUF brings together 48 constitutional courts and equivalent institutions from Africa, Europe, the Americas and Asia (45 member courts and 3 observer members). The aim of the association is to promote the deepening of the rule of law through the development of relations between institutions.<sup>730</sup> The SCC is not only an active actor in the ACCPUF, but alongside the French court has been one of the leaders. CJ McLachlin is a former president of the ACCPUF,<sup>731</sup> and the SCC has always been represented on the executive body of this association.

The ACCPUF organizes meetings, conferences, and training for its members, particularly those in developing countries, and has built electronic networks and databases to store the court decisions of member courts. However, exchanges and collaboration among members of ACCPUF have not always been easy. One justice remarked, “During these meetings we would meet judges from mostly French-speaking countries, including those in Africa, and we discovered how difficult it was to work with them because their local conditions were such that they would recognize the principles, but they could not put them into effect.”<sup>732</sup> In addition to the CJ, Justice Bastarache and Justice Deschamps have

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<sup>729</sup> Association des Cours Constitutionnelles ayant en Partage l'Usage du Français (ACCPUF), online: <<http://www.accpuf.org/>>.

<sup>730</sup> Association des Cours Constitutionnelles ayant en Partage l'Usage du Français (ACCPUF), online: <<https://www.accpuf.org/index.php/l-association>>.

<sup>731</sup> Interview with Anonymous Justice 4.

<sup>732</sup> Interview with Anonymous Justice 4.

represented the SCC at the ACCPUF, while Justice (now CJ) Wagner is the current representative.<sup>733</sup>

ii. The Association of the High Courts of Cassation of Countries Sharing the Use of French (AHJUCAF)

The SCC is a leading member of AHJUCAF, another transnational judicial association. In the French civil law system, unlike in Canada, there is a distinction between *Cour de cassation* and *Conseil d'État*. This distinction necessitated the establishing of AHJUCAF to supplement the ACCPUF, an organization for constitutional courts. AHJUCAF, established in 2001, consists of 49 members (including two African international courts).<sup>734</sup> Its main objective is to strengthen cooperation between judicial institutions, in particular through training and different expert missions in various countries. Like the ACCPUF, the SCC has always been represented on the executive body of AHJUCAF.<sup>735</sup> Previously Justice LeBel represented the SCC; after his retirement, Justice Gascon assumed the role.<sup>736</sup>

iii. International Association of Supreme Administrative Jurisdictions (AIHJA)

AIHJA, established in 1983, is a network of 93 supreme administrative jurisdictions, located in every region of the globe.<sup>737</sup> The aim of the association is to advance the rule of law,

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<sup>733</sup> “Activités internationales de la CSC/ International activities of the CSC”, document prepared by a senior official of the SCC after accessing the Archives.

<sup>734</sup> *Association des hautes juridictions de Cassation des pays ayant en partage l’usage du français* (AHJUCAF), online: <<http://www.ahjucaf.org/-Membres-.html>>.

<sup>735</sup> Interview with Anonymous Justice 8.

<sup>736</sup> “Activités internationales de la CSC/ International activities of the CSC”, document prepared by a senior official of the SCC after accessing the Archives.

<sup>737</sup> *Association internationale des hautes juridictions administrative* (AIHJA), online: <<http://www.aihja.org/>>.

develop cooperation among members, and promote exchanges.<sup>738</sup> Compared to the above two associations, the SCC is less active in AIHJA. One of the interviewed justices of the SCC even stated that around 2000, the Court terminated its membership in AIHJA. He reasoned, “The SCC is a small Court with nine judges, and general jurisdiction, whereas the French Administrative Cassation has almost 200 judges. So, we were too stretched, and we decided that we would rather focus on the other two French-speaking associations.”<sup>739</sup> However, according to the archival documents I collected, the SCC is still officially a member of AIHJA, and its official representative is Justice Côté.<sup>740</sup>

#### iv. The World Conference on Constitutional Justice (WCCJ)

The WCCJ was created in 1993 by the Venice Commission of the Council of Europe and the Constitutional Court of the Republic of South Africa, and now includes 112 Constitutional Courts, Councils, and Supreme Courts from the Americas, Africa, Asia, Oceania, and Europe.<sup>741</sup> According to the statute of the WCCJ, its objectives are to promote “constitutional justice as a key element for democracy, the protection of human rights and the rule of law.”<sup>742</sup> Its other aims include “organizing regular Congresses uniting all members on a global scale; participating in regional conferences and seminars; promoting the exchange of experiences and case-law within the regional and linguistic groups, between them and with individual

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<sup>738</sup> *ibid.*

<sup>739</sup> Interview with Anonymous Justice 10.

<sup>740</sup> “Activités internationales de la CSC/ International activities of the CSC”, document prepared by a senior official of the SCC after accessing the Archives.

<sup>741</sup> Council of Europe, Venice Commission, “World Conference on Constitutional Justice – 112 Members”, online: < [http://www.venice.coe.int/WebForms/pages/?p=02\\_WCCJ](http://www.venice.coe.int/WebForms/pages/?p=02_WCCJ)>.

<sup>742</sup> Statute of the World Conference on Constitutional Justice, online: <<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-WCCJ%282011%29001-e>>.

members.”<sup>743</sup> The SCC was represented by Justice Binnie at the 2nd World Congress in Brazil.<sup>744</sup> Although the Court did not participate in the 3rd Congress, it is now a full member, and participates actively in the WCCJ’s transnational judicial dialogue.<sup>745</sup> Justice (now CJ) Wagner, the designated representative of the SCC at the WCCJ, attended the 4th Congress in 2017.<sup>746</sup>

v. Commonwealth Magistrates’ and Judges’ Association (CMJA)

The CMJA, founded in 1970 as the Commonwealth Magistrates’ Association, aims

to advance the administration of the law by promoting the independence of the judiciary; to advance education in the law, the administration of justice, the treatment of offenders and the prevention of crime within the Commonwealth; to disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth.<sup>747</sup>

One judge spoke about Canada’s role in the association, explaining that the UK Supreme Court had been in charge of the Commonwealth Supreme Courts, but decided to take a step back, and the SCC was asked to take over in 2017.<sup>748</sup> Justice (now CJ) Wagner, who also represents the SCC at ACCPUF, enjoys being involved with both organizations.<sup>749</sup>

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<sup>743</sup> *ibid.*

<sup>744</sup> 2<sup>nd</sup> Congress of the World Conference on Constitutional Justice, online: <[http://www.venice.coe.int/WCCJ/Rio/WCCJ\\_List\\_of\\_Participants.pdf](http://www.venice.coe.int/WCCJ/Rio/WCCJ_List_of_Participants.pdf)>.

<sup>745</sup> Council of Europe, “Venice Commission, World Conference on Constitutional Justice – 112 Members”, online: <[http://www.venice.coe.int/WebForms/pages/?p=02\\_WCCJ](http://www.venice.coe.int/WebForms/pages/?p=02_WCCJ)>.

<sup>746</sup> “Activités internationales de la CSC/ International activities of the CSC”, document prepared by a senior official of the SCC after accessing the Archives.

<sup>747</sup> Commonwealth Magistrates’ and Judges’ Association, online: <<http://www.cmja.org/about.html>>.

<sup>748</sup> Interview with Anonymous Justice 7.

<sup>749</sup> “Activités internationales de la CSC/ International activities of the CSC”, document prepared by a senior official of the SCC after accessing the Archives.

vi. Asia Pacific Judicial Colloquium (APJC)

The APJC is a less formal association than those listed above, and includes five courts: the Supreme Court of Canada, the High Court of Australia, the Court of Final Appeal of Hong Kong, the Supreme Court of New Zealand, and the Supreme Court of Singapore.<sup>750</sup> The aim of the APJC is to bring these courts closer together and to exchange best practices. The 2017 Asia Pacific Judicial Colloquium was hosted by the Supreme Court of Canada and included the Chief Justices of each of the above courts, as well as several other justices. The hosts were represented by CJ McLachlin, Justice Wagner, and Justice Karakatsanis.<sup>751</sup>

vii. Organization of Supreme Courts of the Americas (OSCA)

In addition to these six judicial associations, the SCC was a member of the Organization of Supreme Courts of the Americas (OSCA), although it appears this organization is no longer active. OSCA was established in October 1995 during the Second Conference of the Chief Justices of the Supreme Courts of the Americas, which included the highest courts of 25 western hemisphere countries.<sup>752</sup> The organization's goal was to promote judicial independence and the rule of law. The next month, the SCC attended the first conference, which focused on judicial cooperation and networking, exchanging views, sharing information, and promoting the better understanding of other legal systems.<sup>753</sup> According to the charter of the organization, its aim is to promote and strengthen "judicial independence and the rule of

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<sup>750</sup> Vancouver Bar Association "Welcome Reception for Asia Pacific Judicial Colloquium", online: <<https://vancouverbar.ca/event/welcome-reception-asia-pacific-judicial-colloquium/>>.

<sup>751</sup> Vancouver Bar Association, "Welcome Reception for Asia Pacific Judicial Colloquium", online: <<https://vancouverbar.ca/event/welcome-reception-asia-pacific-judicial-colloquium/>>.

<sup>752</sup> Slaughter, *supra* note 3 at 97.

<sup>753</sup> See online: <[http://www.uscourts.gov/News/TheThirdBranch/95-11-01/Organization\\_of\\_Supreme\\_Courts\\_of\\_the\\_Americas\\_Holds\\_Conference.aspx](http://www.uscourts.gov/News/TheThirdBranch/95-11-01/Organization_of_Supreme_Courts_of_the_Americas_Holds_Conference.aspx)>.

law among the members, as well as the proper constitutional treatment of the judiciary as a fundamental branch of the State,” and to promote human rights.<sup>754</sup> Later, OSCA was tasked with creating a Centre for Exchange of Information in Judicial Matters.<sup>755</sup> Although the goal was to establish a permanent organization, it does not appear to have succeeded, perhaps for political and diplomatic reasons. There is almost no available electronic data about the activities of this judicial organization after 2000, maybe because it became inactive. In fact, OSCA was not included in the archival documents of the SCC. Only one of the interviewed judges mentioned OSCA, but did not go into detail, simply saying the Court was *invited* to participate in the meeting of this organization.<sup>756</sup>

### 3. OCCASIONAL CONTACTS

In addition to its court-to-court regular bilateral relationships and membership in multilateral transnational court associations, the SCC participates in judicial conversations through occasional contact with other courts. Occasional contacts, refers to isolated communication with one or more courts that does not occur often enough to be considered a regular relationship. All interviewed judges recognized the existence of this type of occasional communication and visits from foreign courts. According to the interviewed senior official of the SCC, “the Supreme Court of Canada has on average about 20 occasional visits per year from various foreign courts”. One judge labelled this type of visit as an “isolated exchange,” using as an example an exchange in 2005. “The SCC received a visit from a few Supreme

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<sup>754</sup> Slaughter, *supra* note 35 at 1120; Slaughter, *supra* note 90 at 183.

<sup>755</sup> Slaughter, *supra* note 3 at 97.

<sup>756</sup> Interview with Anonymous Justice 8.

Court judges from Sweden. Later our Chief Justice went there, but that was it.”<sup>757</sup> This judge also noted that the SCC had a number of such types of occasional exchanges with supranational courts, namely the Court of Justice of the European Union (CJEU). A SCC delegation visited the CJEU in Luxemburg once, but never on a regular basis.<sup>758</sup>

Other interviewed judges remarked upon visits to or from the highest courts of several countries, including Russia, China, Poland, Hungary, Austria, South Africa, Saudi Arabia, Peru, Venezuela, Mexico, Guatemala, Mongolia, Vietnam, and Japan. “During these visits and exchanges judges often receive gifts from their counterparts.”<sup>759</sup> Most of these visits were short, with the delegates simply hearing a presentation about the Court, or sometimes attending a sitting of the host court. One judge referred to these visits as “judicial tourism”, stating, “Many times we received delegations from other foreign courts that came here just to visit Ottawa.”<sup>760</sup> He also suggests that the visits to other courts by a few SCC justices fell into this category.<sup>761</sup>

However, occasionally there were longer visits lasting up to a week, with formal sessions focused on specific topics. For instance, a delegation from the Supreme Court of Japan visited the SCC. The Japanese judges, who were members of a committee for the revision of law in Japan, wanted to know more about the Canadian system of constitutional judicial review under the Charter, wondering whether they could adopt such a system in Japan.

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<sup>757</sup> Interview with Anonymous Justice 10.

<sup>758</sup> Interview with Anonymous Justice 10.

<sup>759</sup> In the Grand Entrance Hall of the SCC, one corner is given over to a remarkable glass box. Inside the box is a metal plaque on which the above citation is carved. This box holds several symbolic gifts that have been given to the Canadian Supreme Court in various transnational judicial activities by the highest courts of several states: Saudi Arabia, Mongolia, India, Vietnam, and the People’s Republic of China.

<sup>760</sup> Interview with Anonymous Justice 4.

<sup>761</sup> Interview with Anonymous Justice 4.

“On these occasions we discuss and exchange ideas on very serious stuff,” noted one SCC judge.<sup>762</sup>

The relationship between the SCC and the Constitutional Court of South Africa is an interesting one. Two of the judges that I interviewed considered it a regular and ongoing bilateral relationship, whereas most others believed it had never risen to this level. The visits were only occasional and usually involved South African judges visiting the SCC, and the association was primarily based on individual relationships among judges. However, it never became formally institutionalized.

Most judges noted a difference between the way the SCC regards its regular relationships and the occasional contacts. The ongoing relationships are considered a two-way exchange that is beneficial to both sides. On the other hand, occasional contacts or visits tend to be less formal, less engaging, and consequently less advantageous. The country involved also affects the exchange. With developed countries, the communication was often more reciprocal, whereas with developing countries, as one justice said, “The exchanges tend to be more ad hoc, just a visit or a short presentation about our Court, so it is more of a one-way traffic, where they try to learn from our experience and apply it at home.”<sup>763</sup>

Finally, I sensed that there are concerns among SCC judges regarding the courts with which they choose to engage. All were open to occasional exchanges and even to establishing new ongoing relationships with the highest courts of countries that follow the rule of law and have similar legal and political principles to Canada. However, some judges were sceptical as

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<sup>762</sup> Interview with Anonymous Justice 4.

<sup>763</sup> Interview with Anonymous Justice 6.

to the benefit of exchanging with developing countries or countries that belong to other political systems. One asserted,

The risk is that an engagement with a particular court of a developing country may give legitimacy to the political regime that controls that court. Personally, I would not exchange and participate in meetings with foreign judges that come from nations under autocratic regimes.<sup>764</sup>

On the other hand, he acknowledged that it is possible the judges are trying to overcome their countries' problems and simply need help. In these circumstances, advised the interviewed judge,

We may want to think about how to give them a hand and to legitimize their disagreements with the regime; but at the same time, you may end up legitimizing the regime. It is tricky; we have to look at each case as it comes, and receive more information about that court or that particular country before entering any kind of relationship.<sup>765</sup>

Each of the three forms of institutional court-to-court exchanges—regular bilateral relations, transnational judicial associations or organizations, and occasional exchanges—are essential to the transnational judicial conversation. It is also important to note that the Court's international affiliations, as described above, are separate from and unrelated to the international judicial activities of the Office of the Commissioner of Federal Judicial Affairs and the National Judicial Institute.<sup>766</sup> Finally, such extra-judicial activities show that the Court plays a broader role, venturing outside the legal realm to participate in the diplomatic arena. The Canadian government typically supports these activities, expressing pride in its Court's

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<sup>764</sup> Interview with Anonymous Justice 6.

<sup>765</sup> Interview with Anonymous Justice 6.

<sup>766</sup> Interview with Anonymous Justice 9, and Justice 4.

global influence.<sup>767</sup> Justices of the SCC, however, emphasize that the SCC has retained its independence, and does not take orders from the Canadian government.

However, despite all the three forms of court-to-court relationships of the SCC, this is not all. The SCC has another very powerful set of mechanisms that helps to bring its participation in the transnational judicial conversation to another level: the transnational judicial conversation of individual justices. It is there that I now turn.

## **B. EXTRA-JUDICIAL ACTIVITIES OF INDIVIDUAL JUDGES**

Individual judges play a significant role in transnational judicial conversations and exchanges. My research data, confirmed by judicial interviews, show that former and current judges of the SCC generally interact with foreign and international judges not only within official meetings organized by the SCC, or as part of the Court's delegation, but also individually.

It is not always easy to distinguish between the Court's institutional activities and individual-judge actions. However, such a distinction is vital. The archival material from the SCC, and almost every judge interviewed, recognized such a distinction.<sup>768</sup> This distinction between the institution and the individual is also theoretical, and demonstrates the different dimensions of transnational judicial dialogue.

A judge can be said to be engaging in individual-judge exchanges when he or she independently decides to become a member of a transnational association of judges, to participate in transnational judicial training, to visit a foreign court, or to participate in

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<sup>767</sup> Cotler, *supra* note 200.

<sup>768</sup> "An Overview on the International Affiliations of the Supreme Court of Canada", document prepared by a senior official of the SCC after accessing the Archives.

electronic judicial networks. Moreover, as some of the interviewed SCC judges noted, the interest of individual judges varies. *Some* judges are regularly engaged, while others have less interest in these interactions. In some instances, the Chief Justice of a certain court may not be interested in a particular type of activity and thus distances the institution from it, while individual judges of that court might hope to become involved—or vice-versa. When speaking about the SCC, one judge said,

I think that the Chief Justice’s philosophy on the global conversation that is occurring among courts could make a difference. Our current Chief Justice is well aware, very active, and very sensitive to these issues.<sup>769</sup>

Elaborating further, the justice explained,

If you do not have that openness and open-mindset, of course you will limit your international activities. In our case, we are lucky to have a Chief Justice that was and still is open to that, and I am very happy to see that in our Court. Hopefully this tradition will continue with the next Chief Justice, because we really have to.<sup>770</sup>

When discussing SCC judges’ desire to interact individually with other judges, one interviewee noted, “What I must say is that, generally speaking, the majority of my colleagues, during the time that I served in the Court, were interested in those contacts.”<sup>771</sup>

Their interest is indeed extensive; it is almost impossible to keep track of all the extra-judicial activities of individual SCC judges. The data gathered for this section are certainly not exhaustive. The SCC senior official confirmed that while data about the foreign activities of the Court as an institution are kept, records of SCC judges’ memberships in judicial or legal

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<sup>769</sup> Interview with Anonymous Justice 7.

<sup>770</sup> Interview with Anonymous Justice 7.

<sup>771</sup> Interview with Anonymous Justice 10.

associations, and of their individual visits and public engagements, are not.<sup>772</sup> When discussing their individual-judge transnational activities, the interviewed judges highlighted their most important experiences and thoughts, but stressed that they were not providing exhaustive lists of these activities.

Despite this limitation, this section will provide an overview of judge-to-judge transnational activities and identify the primary mechanisms behind them. According to one judge, “We talk, we meet, we go to international conferences and seminars, and we read each other’s books and articles and listen to others’ speeches. The main form [of interaction] is that we read each other’s judgments.”<sup>773</sup> Based on these forms of judge-to-judge interaction, the extra-judicial networking activities of judges of the SCC can be classified into four categories: 1) face-to-face meetings with foreign judges; 2) participation in transnational judicial associations; 3) participation in judicial training and other legal education institutions; 4) participation in electronic judicial networks.

#### 1. FACE-TO-FACE MEETINGS WITH FOREIGN JUDGES

Judges from around the world, including judges of the SCC, are not only passively engaging with their foreign counterparts by simply reading and citing their case law. Judges are also meeting face-to-face.<sup>774</sup> They are increasingly extending invitations and travelling to other parts of the world to meet colleagues from other nations or justices of international/supranational courts.

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<sup>772</sup> “An Overview on the International Affiliations of the Supreme Court of Canada”, document prepared by a senior official of the SCC after accessing the Archives.

<sup>773</sup> Interview with Anonymous Justice 2.

<sup>774</sup> Slaughter, *supra* note 35 at 1120.

My research reveals that there are two types of face-to-face meetings, “occasional” and “ongoing”. As the labels suggest, occasional meetings occur once or twice, in different settings, and while judges exchange information and ideas, the relationship remains intermittent. Ongoing interactions are continuing judge-to-judge relationships, which make use of various instruments of interaction, and often become personal friendships.

Judges conduct occasional face-to-face meetings in different settings, such as conferences, judicial training sessions, formal delegations, and individual visits. As one judge noted, foreign colleagues struggle with the same issues as us, and “In these meetings you exchange ideas and practices, and can learn about their jurisprudence. You find out about other judicial activities; for example, about judicial seminars or conferences.”<sup>775</sup> Another SCC judge highlighted the importance of face-to-face meetings with other judges, stating,

Sometimes, I think you can get more candour from those foreign judges than from your colleagues in your Court. Why? Because you don’t have to have an ongoing relationship with them, or need to try to find common ground with them, so they will be very direct about what they think.<sup>776</sup>

The same judge continued, “Having a conversation with judges of other nations may provide not just another perspective, but may bring also more frankness to the table.”<sup>777</sup>

Occasional face-to-face meetings with foreign judges can evolve into an ongoing relationship. As one of the SCC judges acknowledged,

These interactions among judges of different nations, at a personal level, can become ongoing. I had a relationship with a UK Supreme Court Judge . . . He and I had met before in academic settings, and then he came here with the UK Supreme Court delegation last year, and since then he and I occasionally would email each other. For example, he read and commented on something I wrote,

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<sup>775</sup> Interview with Anonymous Justice 3.

<sup>776</sup> Interview with Anonymous Justice 6.

<sup>777</sup> Interview with Anonymous Justice 6.

or I read something he had written, exchange decisions, or discuss various legal issues.<sup>778</sup>

Almost all the interviewed judges said that through their occasional face-to-face meetings they have established ongoing relationships, and even friendships, with foreign colleagues. One justice noted, “When the Canadian judges met Aharon Barak, the Former Chief Justice of Israel, we fell in love with his mind; his judgments and academic talks and papers were very influential, and many of us kept an ongoing relationship with him.”<sup>779</sup> The same judge continued,

There are also other judges, for example, European judges that we have personal relationships with. We send our judgments to each other, read them, and use them. . . . There is always something to learn. Even if it is something that you do not agree with, it can still make you refine your own ideas.<sup>780</sup>

Another SCC judge spoke even more highly about these individual relationships. “The friendship that we create with judges from other nations enhances the dialogue on those issues that come before us or them, which benefits us all.”<sup>781</sup>

A wonderful picture of the interaction between SCC judges and their foreign counterparts was painted by Albie Sachs, a former judge of the South African Constitutional Court, who wrote in a recent newspaper “op-ed” article,

We South African judges got to know Claire, Frank, Beverley, Rosie and Charles very well, and our counterparts in turn became friendly with Arthur, Ismail, Sandile, Kate, Pius and Albie—first-name friendships. We visited each other's courts, met at international colloquia, served on various bodies together. We unconsciously imbibed each other's styles and modes of comportment and expression.<sup>782</sup>

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<sup>778</sup> Interview with Anonymous Justice 6.

<sup>779</sup> Interview with Anonymous Justice 5.

<sup>780</sup> Interview with Anonymous Justice 5.

<sup>781</sup> Interview with Anonymous Justice 1.

<sup>782</sup> Sachs, *supra* note 192.

In the next chapter, I will address the effects of such interactions in more detail; however, it should be noted here that occasional or ongoing face-to-face meetings between judges, including those of the SCC with their fellows from other national or international courts, should not be considered informal or unimportant. At these meetings, judges exchange views on their decisions; however, they also generate substantive, procedural, and court management ideas, and often turn these ideas into action. They are establishing global and regional judicial networks such as formal organizations, judicial training institutions, or electronic networks.

## 2. PARTICIPATION IN TRANSNATIONAL JUDICIAL ASSOCIATIONS

Another form of transnational judicial dialogue involving individual judges is the establishment of and participation in judicial associations. Transnational judicial associations, unlike organizations that are exclusive to courts, accept only individual judges as members. My research shows that judges are increasingly joining such associations, a trend also evidenced in the SCC judges. Some have even continued their membership in these associations after their retirement. Others admitted that they chose not to participate in transnational judicial association, for various personal reasons. As noted above, the Court does not keep records on individual judges' organizational memberships, because such affiliations are considered an aspect of their personal independence.<sup>783</sup> However, one judge mentioned, "We are very careful about what associations or organizations we join. If these organizations have a public policy, we need to be very careful to stay impartial and to be seen as impartial.

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<sup>783</sup> "An Overview on the International Affiliations of the Supreme Court of Canada", document prepared by a senior official of the SCC after accessing the Archives.

We cannot join organizations that have programs for advancing a particular law or a particular agenda.”<sup>784</sup>

Surprisingly, academics have rarely focused on the role of judicial associations as a mechanism of transnational judicial dialogue. To try to fill this gap in the literature, I have compiled examples of such associations in which SCC justices actively participate.

*i. International Association of Women Judges (IAWJ)*

One of the most well-known associations that SCC judges participate in is the International Association of Women Judges (IAWJ). This association is a global network of more than 5,000 judges (not only women) from 82 nations.<sup>785</sup> The IAWJ may be considered a judicial “network of networks,” as it brings together member associations and chapters from 36 different nations on all continents.<sup>786</sup>

The IAWJ was established in 1991 as a non-profit, non-governmental organization, whose members are active at all levels of the judiciary worldwide, and share a commitment “to advancing human rights and equal justice for all.”<sup>787</sup> One of the primary goals of the IAWJ and its members is to “develop a global network of women judges and create opportunities for judicial exchange through international conferences, trainings, the IAWJ newsletter and

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<sup>784</sup> Interview with Anonymous Justice 2.

<sup>785</sup> International Association of Women Judges: Who We Are, online: <<http://www.iawj.org/who-we-are.html>>.

<sup>786</sup> Get to Know the IAWJ Member Associations and Chapters, online: <<http://www.iawj.org/Association-ChapterList.html>>.

<sup>787</sup> Get to Know the IAWJ Member Associations and Chapters, online: <<http://www.iawj.org/Association-ChapterList.html>>.

website, and an online community’ to support and promote ‘the rule of law’, ‘judicial independence’ and ‘equal access to justice’.”<sup>788</sup>

In 1994, upon the initiative of the Honorable Claire L’Heureux-Dubé—the second woman to be appointed to the SCC—and Beverley McLachlin, Chief Justice, the Canadian Chapter of the International Association of Women Judges was created.<sup>789</sup> Its central mission is “to enhance the work of women judges nationally and internationally in pursuit of equality, judicial independence and the rule of law.”<sup>790</sup> Former Justice Deschamps and Justice Karakatsanis have also been, and still are, members of the IAWJ.

ii. *International Commission of Jurists (ICJ)*

Another organization of global importance is the International Commission of Jurists (ICJ).<sup>791</sup> As the name suggests, the ICJ is not limited to current judges, but is comprised of senior judges, attorneys, and academics who are dedicated to ensuring respect for international human rights standards through the law.<sup>792</sup> Two former justices of the SCC have been and continue to be active in this organization and in the ICJ Canada.<sup>793</sup> Justice L’Heureux-Dubé was the President of the ICJ whilst she was at the SCC,<sup>794</sup> and is an honorary member.<sup>795</sup> Former SCC Justice Ian Binnie also during his tenure served as a member of the Executive Committee from 2004 to 2008, and is currently serving his third term as an ICJ

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<sup>788</sup> Get to Know the IAWJ Member Associations and Chapters, online: <<http://www.iawj.org/Association-ChapterList.html>>.

<sup>789</sup> International Association of Women Judges Canadian Chapter, online: <<http://iawjcc.com/>>.

<sup>790</sup> International Association of Women Judges Canadian Chapter, online: <<http://iawjcc.com/>>.

<sup>791</sup> International Commission of Jurists, online: <<http://www.icj.org/>>.

<sup>792</sup> International Commission of Jurists, online: <<http://www.icj.org/>>.

<sup>793</sup> International Commission of Jurists Canada, online: <<http://www.icjcanada.org/index.php/en/>>.

<sup>794</sup> See online: <<http://www.icj.org/judiciary-compromised-by-executive-interference-and-corruption/>>.

<sup>795</sup> See online: <<http://www.icj.org/commission/honorary-members/>>.

commissioner.<sup>796</sup> Other SCC justices connected to the ICJ are the Honorable Bertha Wilson and the Honorable Rosalie Abella, who were long time members and supporters of ICJ Canada, and in 2003 both received the prestigious Justice Prize of the Peter Gruber Foundation in recognition of their commitment to and passion for social justice, equality and human rights.<sup>797</sup>

### 3. ESTABLISHING/PARTICIPATING IN JUDICIAL TRAINING AND OTHER LEGAL EDUCATION INSTITUTIONS

Global judicial education and training institutions constitute another forum for transnational social interaction among individual judges. As scholars rightly observe, the growing support of judges from around the world for global judicial education is a remarkable indicator of the progress of judicial globalization in general, and judicial dialogue and interaction among judges in particular.<sup>798</sup> In addition, judges want their judicial education and training sessions to be conducted, to the greatest extent possible, only by judges. According to one judge, “It is well known in the judiciary that judges are the best and most effective teachers of judges, as opposed to professional professors or lecturers, who are often perceived as outsiders. Besides, judges are very jealous of their independence, which is not a problem from peer to peer.”<sup>799</sup> Indeed, judges are more comfortable with other judges, making it more likely they will open up and share their views and concerns.<sup>800</sup> This is a crucial factor in why transnational judicial

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<sup>796</sup> International Commission of Jurists, online: <<https://www.icj.org/commission/commissioners-from-the-americas/>>.

<sup>797</sup> International Commission of Jurists, online: <<http://www.icj.org/peter-gruber-justice-prize-won-by-two-canadian-jurists/>>.

<sup>798</sup> Slaughter, *supra* note 81 at 280.

<sup>799</sup> Interview with Anonymous Justice 1.

<sup>800</sup> Interview with Anonymous Justice 1.

training is increasingly becoming one of the most important mechanisms of judicial interaction in the modern world. The role of academia however, remains still central, particularly in organizing and facilitating transnational conferences where judges often participate.

After the end of the Cold War, the resulting political and legal changes that occurred created a growing need for judicial training and judge-trainers in many countries. The Canadian government became very active in not only funding such training, but also contacting and convincing Canadian judges of all levels, including justices of the SCC, to participate. As at least two interviewed justices confirmed, the involvement of SCC and its judges gave more credibility to some of these programs, particularly with larger players in the global arena, such as China and Russia.<sup>801</sup>

A few judges spoke about other public international institutions, and even private transnational actors, who were assembling transnational training programs. Their attempts to recruit Canadian judges actually raised concerns. According to one judge,

Private enterprise was organizing educational missions to other countries, that were in fact business development initiatives, or they were bidding on contracts for CIDA [Canadian International Development Agency] to put on these training, and they would recruit or try to recruit judges, including from the SCC. That was generating some concerns about judicial independence, because judges were involved in something that was essentially a commercial matter. So, the National Judicial Council developed some principles to guide the participation of Canadian judges in such transnational judicial involvements.<sup>802</sup>

With these principles in mind, SCC judges became leaders of many transnational judicial training programs across the globe, and participated in numerous sessions and

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<sup>801</sup> Interview with Anonymous Justice 4, and Justice 1.

<sup>802</sup> Interview with Anonymous Justice 9.

conferences on almost every continent.<sup>803</sup> My research reveals that the participation of SCC judges in transnational judicial training activities is made possible through the contribution and involvement of several public and private actors. The institutions that have initiated or supported such transnational judicial training or educational sessions fall into three categories: i) Canadian Government Institutions; ii) Judicial Associations; and iii) Universities and NGOs.

*i. Canadian Government Institutions*

As stated above, the Canadian government is a significant supporter of transnational judicial training programs, particularly in developing countries. My research reveals that several Canadian institutions were involved in these developments, including the National Judicial Institute (NJI), the Canadian International Development Agency (CIDA), the Department of Justice, and the Office of the Commissioner for Federal Judicial Affairs Canada (OCFJAC). All these institutions contacted distinguished Canadian judges of all levels. However, to increase the credibility of such programmes, the government institutions were particularly interested in involving justices of the SCC. Almost all interviewed judges noted this fact in their discussions with me. One emphasized his involvement in such training activities in Russia and China, where the participation of the SCC justices was necessary to establish these judicial training projects, as otherwise it would have been impossible to make the Russian and Chinese judges interested.<sup>804</sup>

In the beginning, these meetings with foreign judges and courts, funded by the Canadian government, involved a basic exchange of experiences, such as, “Tell me what you

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<sup>803</sup> Interview with Anonymous Justice 1.

<sup>804</sup> Interview with Anonymous Justice 4.

do in your country and we will tell you how we do things here. This was usually one-day meeting or something very short. There was no real sharing of information that you would consider to be relevant to decision-making.”<sup>805</sup> Then, as one judge noted, “the Office of the Commissioner for Federal Judicial Affairs Canada decided that we should share some of our experience in training judges in Canada, and make that available to foreign judges, especially in developing countries.”<sup>806</sup> As stated above, the two most noticeable examples are the training sessions with the judges of the Constitutional Court of Russia (1999–2009), and the School of Judges in China (2002–2003; 2005–2009). Other nations that received judicial training funded by Canadian government institutions, very often through the expertise of SCC judges, include: Bangladesh, India, Sri Lanka, Nepal, Pakistan (all between 2003–2008), Ethiopia (2000–2005), Ghana (2010–2013), Palestine (2012–2013), Ukraine (1996–2002, 2006–11, 2012–14, 2015–2020), Jamaica (2010–2014), Mexico (2010–2012), and Peru (2010–2013).<sup>807</sup>

Through the National Judicial Institute, one SCC judge participated in judicial education all over the world, including the above countries, Eastern Europe, and Vietnam. This judge emphasized that several other SCC justices were involved with similar training activities across the globe, referring to them by name. According to this justice, such training activities “are one of the key factors that made the SCC much more known to the world, and helped the dissemination of the case law of the SCC everywhere.”<sup>808</sup>

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<sup>805</sup> Interview with Anonymous Justice 4.

<sup>806</sup> Interview with Anonymous Justice 4.

<sup>807</sup> Office of the Commissioner for federal Judicial Affairs Canada, “A Map of International Judicial Cooperation Initiatives”, online: <<http://www.fja.gc.ca/cooperation/index-eng.html>>.

<sup>808</sup> Interview with Anonymous Justice 1.

The role of the Canadian government in transnational judicial training was not limited to the agreements with developing countries. A few judges remarked that SCC justices participated in such activities in developed countries, including Australia, New Zealand, and Scotland.<sup>809</sup> The purpose of these types of training activities was to introduce new ideas and methods on how to achieve more effective judicial training, and to discuss the better administration of courts.

Another remarkable example of the collaboration between the SCC and the Canadian government is the establishment of new transnational judicial training institutions. The NJI, which is chaired ex-officio by the CJ of the SCC, has been particularly involved with the creation of these institutions. The most well-known are the International Organization for Judicial Training (IOJT)<sup>810</sup> and the Commonwealth Judicial Education Institute (CJEI)<sup>811</sup>

In March 2002, judges from 24 countries, including Canada, created the IOJT “to promote the rule of law by supporting the work of judicial education institutions around the world.”<sup>812</sup> Exchanges, including international and regional conferences, help the organization realize its mission, and as of October 2017, the IOJT includes 129 member institutes from 75 countries.<sup>813</sup> In addition to the NJI, four other Canadian institutions—the Office of the Commissioner for Federal Judicial Affairs, the Federation of Law Societies of Canada, the Commonwealth Judicial Education Institute, and the Canadian Institute for the Administration of Justice—have joined the IOJT.<sup>814</sup>

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<sup>809</sup> Interview with Anonymous Justice 9 and Justice 1.

<sup>810</sup> International Organization for Judicial Training, online: <<http://www.iojt.org/>>.

<sup>811</sup> The Commonwealth Judicial Education Institute, online: <<http://cjei.org/index.html>>.

<sup>811</sup> The Commonwealth Judicial Education Institute, online: <<http://cjei.org/governance.html>>.

<sup>812</sup> *ibid.*

<sup>813</sup> International Organization for Judicial Training, online: <<http://www.iojt.org/Members.aspx>>.

<sup>814</sup> Members of International Organization for Judicial Training, online: <<http://www.iojt.org/Members.aspx>>.

Canadian judges, including SCC justices, are also heavily involved in the CJEI.<sup>815</sup> Chief Justice McLachlin participated in the governance of this institute.<sup>816</sup> The CJEI is a “network of Commonwealth judicial educators knowledgeable in judicial education techniques and methodology,” whose goal is to “create and deliver judicial education curricula supportive of contemporary judicial reform.”<sup>817</sup>

Despite all this, two of the justices that I interviewed mentioned that Canadian government funding for transnational judicial training activities has decreased recently. As one justice noted, under the Harper government, the funds for such judicial activities were drastically slashed, although not eliminated.<sup>818</sup> The other judge remarked that the decline of these activities corresponds with the termination of the Canadian International Development Agency (CIDA), which administered foreign aid programs in developing countries. In 2013, CIDA was merged into the Department of Foreign Affairs.<sup>819</sup> However, this may have affected only government funding of judicial training in developing countries, or might have simply been the judge’s perception. Speaking more generally about the extra-judicial activities of the SCC, most judges stressed that the Court did not have such budgetary issues.<sup>820</sup> They said that regular bilateral relationships with foreign courts and judicial organization activities were continuing as normal. The senior official of the SCC confirmed, “The trend is clearly towards more transnational activities, and this includes particularly the SCC involvement in international organizations as well as bilateral events involving the SCC.” Yet one judge

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<sup>815</sup> The Commonwealth Judicial Education Institute, online: <<http://cjei.org/index.html>>.

<sup>816</sup> The Commonwealth Judicial Education Institute, online: <<http://cjei.org/governance.html>>.

<sup>817</sup> The Commonwealth Judicial Education Institute, online: <<http://cjei.org/index.html>>.

<sup>818</sup> Interview with Anonymous Justice 10.

<sup>819</sup> Interview with Anonymous Justice 4.

<sup>820</sup> Interview with Anonymous Justice 5 and Justice 9.

acknowledged, “There were some foreign courts that were less able to visit or receive visits from as a result of their budget difficulties.”<sup>821</sup>

*ii. Judicial Associations*

As mentioned above, several judicial organizations, with which SCC justices are associated, are involved in transnational judicial training. Two interviewed justices of the SCC confirmed that at least three transnational judicial associations, the ACCPUF, the AHJUCAF, and the CMJA, conduct training sessions for their members, particularly in developing countries.<sup>822</sup> However, one judge states that judicial training with some developing countries were not very effective, because it is difficult “to work with them because their local conditions were such that they would recognize the principles but they could not put them into effect.”<sup>823</sup>

*iii. Universities and NGOs*

My research suggests, and the interviewed judges concur, that universities and NGOs have become increasingly important in facilitating transnational judicial conversations. Harvard Law School, Yale Law School, New York University School of Law, Cambridge University, and many others around the world, including law schools in Canada,<sup>824</sup> are increasingly opening their doors to a considerable number of seminars, training sessions, conferences and other research programs to help judges and other interested actors create networks and channels that have the power to foster the process of transnational judicial dialogue and

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<sup>821</sup> Interview with Anonymous Justice 9.

<sup>822</sup> Interview with Anonymous Justice 4 and Justice Nr 9.

<sup>823</sup> Interview with Anonymous Justice 4.

<sup>824</sup> One of the most recent events which included the participation of foreign judges, several academics, and legal practitioners, including Justice Rosalie Abella of the SCC, and which I personally attended, is: “Institutions, Constitutions Symposium: The Judiciary’s Role in the 21<sup>st</sup> Century”, Osgoode Hall Law School, Osgoode Professional Development, Toronto, 26-27 September 2016.

globalization of courts.<sup>825</sup> Ongoing transnational judicial seminars, hosted by universities, bring together not only judges, but also distinguished academics and lawyers from around the world. Several SCC justices participate in these events.

*Global Constitutionalism Seminar, Yale Law School:* One of the most highly regarded ongoing transnational judicial forums is the Global Constitutionalism Seminar.<sup>826</sup> This yearly event dates back to 1996, and brings together Supreme Court and Constitutional Court judges from more than 25 nations.<sup>827</sup> In this intensive seminar-style setting, which lasts several days, they discuss critical legal issues with distinguished professors from Yale Law School. Both Justice Iacobucci and Justice Abella have participated regularly in this global seminar of constitutional judges.

*The Cambridge Lectures:* This seminar was established by the Canadian Institute for Advanced Legal Studies in 1979.<sup>828</sup> Former CJ McLachlin has attended almost every biannual session, and three to four other SCC judges have participated in each event, including Justices Iacobucci, Binnie, Charron, Rothstein, Fish, Abella, Brown, Karakatsanis, and (now CJ) Wagner.<sup>829</sup> The seminar is notable because it is attended not only by justices from various nations, but also by prominent academics and lawyers, opening up new venues of conversation between them. As stated in previous chapters, academics are becoming

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<sup>825</sup> Slaughter, *supra* note 35 at 1122; Frank, *supra* note 260 at 3; Apple, *supra* note 260 (British, U.S. Judges and Lawyers Meet, Discuss Shared Judicial, Legal Concerns) at 1; Apple, *supra* note 260 (Yale Law School Establishes Seminar on Global Constitutional Issues) at 2.

<sup>826</sup> Yale Law School, “Global Constitutionalism Seminar”, online: <<https://law.yale.edu/centers-workshops/gruber-program-global-justice-and-womens-rights/global-constitutionalism-seminar>>.

<sup>827</sup> Interview with Anonymous Justice 3 and Justice 5.

<sup>828</sup> The Cambridge Lectures, online: <<http://www.canadian-institute.com/english/speakers-e.html>>.

<sup>829</sup> The Cambridge Lectures, online: <<http://www.canadian-institute.com/english/speakers-e.html>>.

increasingly important in facilitating transnational judicial conversations and generally in the globalization of the judiciaries, including the SCC.

*Les Journées Strasbourgeoises*: The Canadian Institute for Advanced Legal Studies established a similar series of lectures held in Strasbourg, France, every four years. “Les Journées Strasbourgeoises” are conducted in French, but their purpose parallels the Cambridge Lectures.<sup>830</sup> Although this is a somewhat smaller forum, both Justice Binnie and Justice (now CJ) Wagner have attended.<sup>831</sup>

Universities have also conducted smaller, occasional transnational judicial seminars. One of the best examples is a joint initiative of the Faculty of Law at the University of Windsor, the Institute of Law at Birzeit University, and the Palestinian Judicial Institute, supported by CIDA, called “The Project on Judicial Independence and Human Dignity.”<sup>832</sup> This judicial education program promoted the principles of judicial independence and human dignity. Justice L'Heureux-Dubé and other Canadian judges assisted in training Palestinian judges.<sup>833</sup>

Scholars recognize that NGOs and universities support the globalization of judiciaries in at least two ways, through organizing transnational judicial seminars, and through the internationalization of their programmes. Indeed, some scholars suggest that NGOs and universities sponsor seminars, conferences, training, and workshops in hopes of turning judges

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<sup>830</sup> Les Journées Strasbourgeoises, online: <<http://www.canadian-institute.com/french/strasbourg-f.html>>.

<sup>831</sup> Les Journées Strasbourgeoises, online: <<http://www.canadian-institute.com/french/strasbourg-f.html>>.

<sup>832</sup> University of Windsor Faculty of Law, “KARAMAH – The Project on Judicial Independence and Human Dignity”, online: <<http://web4.uwindsor.ca/karamah>>.

<sup>833</sup> Interview with Anonymous Justice 1.

into globalists or cosmopolitanists.<sup>834</sup> The increased importance of international and comparative law in the judicial decision-making process is one of the main reasons why universities in Canada and across the globe have added more courses in these subjects, thus “globalizing” their curricula.<sup>835</sup> Describing “law and learning in the era of globalization,” professor Harry Arthurs writes,

Some law schools have declared themselves “global law schools,” adopted a “global curriculum,” hired a “global faculty,” established research centres on “global law,” and entered “global partnerships” with foreign institutions. Others have begun to offer courses on globalization and the law, on global governance, global lawyering, and global security—amongst many other “global” offerings. Many have introduced global perspectives into conventional courses, acting either on the initiative of interested faculty members or as the result of explicit academic planning decisions. Law school conferences, books written by legal academics, even legal periodicals published by law schools are devoted entirely to exploring the impact of globalization on law.<sup>836</sup>

Another distinguished scholar, William Twining, writing on globalization and legal scholarship, asserts, “Today no scholar, or even student, of law can focus solely on the domestic law of a single jurisdiction.”<sup>837</sup>

#### 4. PARTICIATION IN ELECTRONIC JUDICIAL NETWORKS

We live in a connected era, drawn together through the Internet and technology. Judges, like most others, use these tools for personal reasons, but also for professional purposes, including judicial conversation and networking. Each interviewed justice acknowledged that these electronic instruments have become influential tools, increasing transnational judicial dialogue

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<sup>834</sup> Price, *supra* note 262 at 579; Moustafa, *supra* note 262 at 883.

<sup>835</sup> For a detailed understanding of how deep international and comparative law courses are offered in various law schools, refer to the websites and official programs of study of various laws schools in Canada and across the globe. See for example, Osgoode Hall Law School Program, online: <<http://www.osgoode.yorku.ca/programs/jd-program/>>.

<sup>836</sup> See, Harry W Arthurs, “Law and Learning in an Era of Globalization”, (2009) 7:10 German LJ 629 at 634.

<sup>837</sup> William Twining, *Globalisation and Legal Scholarship* (Wolf Legal Publishers, 2011) at 30.

and interaction. One said, “Electronic interaction is indeed becoming the most important form of communication, and electronic networks the most important tools of networking; Canadian judges are active participators and contributors.”<sup>838</sup> The circulation of information through electronic networks is increasingly becoming a powerful force of judicial conversation, enabling the SCC judges and their fellows in other countries to draw inspiration from each other’s practice. In addition, electronic databases have become fundamental not only for individuals, but also for public institutions, including courts. When speaking to a group of academics and judges, Justice Bastarache acknowledged that “the Internet has played an important role in the process of judicial internationalization.”<sup>839</sup>

The electronic databases used by judges can be of a “general nature” or a “specific legal nature”. Similarly, electronic communication systems and networks can be of “general type”, or “exclusive only to judges”. All forms of electronic databases or electronic communication systems are undoubtedly powerful tools for fostering the transnational judicial conversation, and the process of judicial globalization as a whole.

*Legal electronic databases:* In addition to search engines like Google and Yahoo, which are general and routinely used by almost everyone, including judges, there are many exclusive legal databases used by lawyers, judges, academics, and law students worldwide.<sup>840</sup> These include LexisNexis, Westlaw, HeinOnline, WorldLII, EUR-Lex, Constitutions of the World, AsianLII, Lexis China, HUDOC, and CODICES, which provide international and

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<sup>838</sup> Interview with Anonymous Justice 1.

<sup>839</sup> Bastarache, *supra* note 44. This paper is largely based on a speech delivered during the conference Law of the Future 2008 at the Peace Palace, The Hague, under the auspices of the Hague Institute for the Internationalization of Law, October 23, 24 2008.

<sup>840</sup> For a fairly long list of such legal databases see:

<http://guides.library.cornell.edu/onlinelegalresources/AlphabeticalDatabases>

comparative legislation and court decisions from almost every country. For example, the World Legal Information Institute, or WorldLII, is comprised of 1,829 databases from 123 countries.<sup>841</sup> As confirmed by the interviews, SCC justices and their clerks, when dealing with human rights or other constitutional cases, use WorldLII to help them develop a global perspective. The Canadian Legal Information Institute (CanLII)<sup>842</sup> provides the Canadian databases searchable via WorldLII.<sup>843</sup>

Another example is CODICES, a system established and operated by the Venice Commission that collects and summarizes decisions from more than fifty constitutional courts and courts of equivalent jurisdiction worldwide, including the SCC.<sup>844</sup> Its primary languages are English and French, but information is available in 24 other languages, and the entire database can be searched using a keyword or phrase, allowing judges and other researchers to quickly find information on human rights and constitutional issues.<sup>845</sup> CODICES contains more than 4,000 summaries and the full text of approximately 5,000 decisions and is updated three times a year.

Courts and associations of courts have also created judicial electronic databases. AHJUCAF created one such database, of case law in French, and the network currently has almost 50 members, including the SCC.<sup>846</sup> The ICJ developed a database of decisions related to human rights and the independence of the judiciary from jurisdictions all over the world,

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<sup>841</sup> World Legal Information Institute, online: <[www.worldlii.org](http://www.worldlii.org)>.

<sup>842</sup> Canadian Legal Information Institute, online: <<http://www.canlii.org/>>.

<sup>843</sup> World Legal Information Institute, online: <[http://www.worldlii.org/worldlii/sponsors/#supporting\\_liis](http://www.worldlii.org/worldlii/sponsors/#supporting_liis)>.

<sup>844</sup> Council of Europe Venice Commission, online: <[http://www.venice.coe.int/WebForms/pages/?p=02\\_Regional](http://www.venice.coe.int/WebForms/pages/?p=02_Regional)>.

<sup>845</sup> Council of Europe Venice Commission, online: <[http://www.venice.coe.int/WebForms/pages/?p=01\\_Constitutional\\_Justice](http://www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice)>.

<sup>846</sup> Interview with Anonymous Justice 10. Association des Cours Constitutionnelles ayant en Partage l'Usage du Français (AHJUCAF), online: <<http://www.ahjucaf.org/-Membres-.html>>.

including global and regional reports, bulletins, and journals on human rights.<sup>847</sup> As mentioned above, SCC justices have been very active in this organization.<sup>848</sup>

*Electronic communication systems and networks:* Electronic communication is one of the most popular forms of communication today. In addition to email, which has become the standard form of communication, numerous other programs and networks have made possible bilateral or multilateral communication, in all forms, writing, audio, or video. The judiciary is no exception. Courts and judges from across the globe have joined social media networks such as Twitter, Facebook, and LinkedIn.<sup>849</sup> The SCC has Twitter,<sup>850</sup> Facebook,<sup>851</sup> and LinkedIn<sup>852</sup> pages, and occasionally the judicial conversation revolves around the use of such electronic systems.<sup>853</sup>

*Electronic networks and systems exclusively for judges:* General electronic communication systems and social media tools are increasingly transforming the world, including the judiciary, and have brought the judges of the SCC closer to their counterparts from all over the globe. However, the public, and most academics, are unaware that judges have established and are able to communicate through electronic networks and systems created *exclusively* for judges. Justice Bastarache appeared to be referring to this type of communication when he declared, “The Internet has provided a means for continuous direct contact between judges, a

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<sup>847</sup> International Commission of Jurists, online: <<http://www.icj.org/>>.

<sup>848</sup> ICJ Canada, online: <<http://www.icjcanada.org/ICJenglish/about.html>>.

<sup>849</sup> Supreme Court of Canada, “Stay Connected”, online: <<http://www.scc-csc.ca/connected-branches/index-eng.aspx>>.

<sup>850</sup> Official Twitter account of the Supreme Court of Canada, online: <[https://twitter.com/SCC\\_eng](https://twitter.com/SCC_eng)>.

<sup>851</sup> Supreme Court of Canada, online: <<https://www.facebook.com/supremecourtofcanada>>.

<sup>852</sup> Supreme Court of Canada, online: <<https://www.linkedin.com/company-beta/5018408/>>.

<sup>853</sup> Interview with Anonymous Justice 7.

sort of international chat room, which, for some, has created a break in isolation and an opportunity to consult on ways of dealing with common issues.”<sup>854</sup>

My research revealed that there are two principal transnational judicial electronic networks exclusive for judges. The French-speaking world uses *LOINET*,<sup>855</sup> while English speakers use *LAWNET*.<sup>856</sup> From my interviews, I got the sense that each network has over 500 judges from over 50 countries. From six to eight SCC justices have participated in either *LOINET* or *LAWNET*, and some continue to do so. However, of the ten judges I interviewed, only three were members, and only one, a member of both electronic networks, agreed to provide details:

[These networks are] informative, interesting for the subjects discussed, and for interpersonal relationships. Some of the main topics of our exchange are on jurisprudence, process, other management issues within the judiciary, and other more general legal conversations. Through this setting, judges, often from different countries, who have never met, organize dinners or other gatherings specially to meet. . . . I should admit, these online conversations among judges are unique and facilitate judicial globalization to a great extent.<sup>857</sup>

When speaking about *LOINET*, the judge remarked,

[*LOINET*] is a Canadian creation . . . Rightly, it is a source of pride for us Canadians, and it deserves to be supported. Yet, the Canadian judges are not using it sufficiently. Perhaps because it is not well known in Canada. I encourage new generations of judges to register to this network.<sup>858</sup>

It is likely that only one judge agreed to talk about these networks because their crucial characteristic is that they are confidential. Therefore, only by speaking with judges, or the

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<sup>854</sup> Bastarache, *supra* note 44. As mentioned above, this paper is largely based on a speech delivered during the conference Law of the Future 2008 at the Peace Palace, The Hague, under the auspices of the Hague Institute for the Internationalization of Law, October 23, 24 2008.

<sup>855</sup> This is not the real name of the French-speaking electronic network. For security reasons the name was changed in order to preserve the anonymity of the network.

<sup>856</sup> This is not the real name of the English-speaking electronic network. For security reasons the name was changed in order to preserve the anonymity of the network.

<sup>857</sup> Interview with Anonymous Justice 1.

<sup>858</sup> Interview with Anonymous Justice 1.

website administrators (who are also judges), can one learn more about these networks. Through the intervention of one of the SCC justices, the founder and administrator of *LOINET* agreed to speak with me. This former lower court judge shared information only after he had consulted with network members.

When asked why he founded *LOINET*, he said,

I decided to start this electronic network for judges back in 1995—at the beginning of the Internet—for three reasons. First, to address the loneliness of judges; second, to advocate for the presence of the French language in the then-English-only Internet; and third, to tame the differences in the legal profession by mingling with different law cultures.<sup>859</sup>

Expanding upon the first reason, he explained, “Judges are all alone with their conscience and their backgrounds in a constant evolving society. Well, private networking among judges doesn’t leave you alone anymore.”<sup>860</sup>

The founder of *LOINET* said that its members are from all three levels of the judiciary; however, “In addition to justices of Constitutional or Supreme Courts, we have many judges from the appeal court level in different countries, but the core of the network is made up of first level judges.”<sup>861</sup> Several members of the highest courts of several African countries are part of the network, and “the Chief Justice of the Court de Cassation in France was a member of *LOINET*.”<sup>862</sup> He revealed that three or four SCC judges have been or are members.

In response to a question about why these electronic networks are not known to the public, he answered, “For security reasons. Judges expect complete privacy. We don’t want hackers to access our emails. We don’t want to attract prying eyes. If nobody knows about it,

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<sup>859</sup> Interview with Anonymous Judge 12.

<sup>860</sup> Interview with Anonymous Judge 12.

<sup>861</sup> Interview with Anonymous Judge 12.

<sup>862</sup> Interview with Anonymous Judge 12.

nobody is going to look for it.”<sup>863</sup> Comparing these private networks with classic social media networks, he said,

Judges are sceptical about the use of social media, mainly because those are still public places. Judicial bodies have stated that judges may open a Facebook or Twitter account to stay in touch with family and friends, but they have to be very careful of their writings because those are public spaces. That’s why we have these private electronic networks, which are private electronic spaces for judges where they can keep in touch and exchange ideas without worrying. And that’s why we are very careful that these electronic networks remain private.<sup>864</sup>

The judges stressed that these electronic judicial networks are not only a great venue for social interaction among judges, but can also be beneficial when their distant counterparts are in trouble. Both the *LOINET* administrator and one of the SCC justices shared a story about a judge in ill health and the network’s generosity:

A judge of a Court of Cassation in Africa suffered from a lung disease that leaves a breathing capacity of about ten per cent. He did not have the financial means to buy a mobile respirator, so he was suffering from this disease, his life was in danger, and he had a horrible quality of life. The members of [*LOINET*] were mobilized. A fundraiser, discreet and exclusively voluntary, made it possible to raise the necessary money to buy a respirator for this African colleague. Over the past year, he had to go to the hospital and, had it not been for the respirator, he could not have done so safely.<sup>865</sup>

According to its administrator, *LOINET* “is not only about laws and social fun, it is also about helping people . . . Once you have done that in your personal life, you bring that state of mind into your courtroom.”<sup>866</sup> In his view, “[*LOINET*] can make you a better person and probably a better judge as well.”<sup>867</sup>

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<sup>863</sup> Interview with Anonymous Judge 12.

<sup>864</sup> Interview with Anonymous Judge 12.

<sup>865</sup> Interview with Anonymous Justice 1.

<sup>866</sup> Interview with Anonymous Justice 1.

<sup>867</sup> Interview with Anonymous Judge 12.

Most forms of institutional or even individual conversation are more formal, and generally require an official involvement. In addition, they are usually expensive, and happen only occasionally. Electronic networking, on the other hand, is free, fast, and continuous, making bilateral or multilateral judge-to-judge contact much easier and more readily available. The advent of the Internet, and particularly of exclusive electronic judicial networks, means that the opportunity to establish personal or professional contacts with other judges is no longer solely the prerogative of formal institutions. This has enabled transnational conversation to flourish, as evidenced by the remarks of the administrator of *LOINET*:

The globalization of the judiciary definitely started with the Internet, and it has built up from there. The Internet allowed the creation of private chat rooms or forums; in other words, permanent vehicles dedicated to the judiciary. That was a novelty and it opened the door to judicial conversation and globalization of courts, on a permanent basis.<sup>868</sup>

### **III. FOREIGN FEATURES INFLUENCING INDIVIDUAL JUDGES OF THE SCC**

This section focuses on the personal and professional background of all 21 current and former judges that fall within the timeframe of this study. Other scholars,<sup>869</sup> like the judges I interviewed, suggest that the more “foreign” features, such as foreign education, foreign languages, or interactions with foreign judges, that a judge has been exposed to, the more the judge is predisposed to look beyond borders, and probably to cite non-domestic legal sources.

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<sup>868</sup> Interview with Anonymous Judge 12.

<sup>869</sup> Martin Gelter and Mathias M Siems, “Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe” (2013) *Supreme Court Economic Review* 21; Mak, *supra* note 28 at 112-114.

Indeed, the profiles of individual judges are a key factor in determining whether the court, as an institution, will be more “globalist” or “localist.” In a keynote speech to foreign and international judges, former Justice Louise Arbour proposed that the reputation of a court as an institution is connected with the reputation of its individual judges: “The reputation of the college [Court as institution]—in terms of quality, suitability, performance and integrity of its members, cannot often be greater than its weakest member, much like the strength of a chain being at the mercy of its weakest link.” [Emphasis added]<sup>870</sup>

There is no denying that the current and former judges of the SCC are some of the most brilliant and most respected legal minds of Canada. They are public figures with multidimensional careers and contributions, and some are well-known in the global arena and have a huge international presence.<sup>871</sup> Hence, due to the space and time limits of this study, it is impossible to provide a comprehensive background for each of the 21 individual judges. Instead, the focus will be on the components of their bios that, according to some scholars,<sup>872</sup> are most relevant to assessing the globalist or localist profile of a judge, highlighting the foreign and international qualities of their careers. The factors which I have selected as the most relevant from the perspective of this study are: “education”; “career” in legal practice, judiciary, or academia; “interaction with foreign courts and judges”; “international public contributions”; “international awards”; and “foreign languages”.

Before introducing how many of these foreign components have each of the judges in their bios, a few methodological decisions must be clarified. Because of space limits, the short

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<sup>870</sup> Louise Arbour, Keynote: Education, Ethics, and Governance for an International Judiciary, 6 November 2008, North American Judicial Colloquium, Brandeis University, online: <<http://www.brandeis.edu/ethics/events/arbour.html>>.

<sup>871</sup> For example: Justice L’Heureux Dube, Justice Arbour, Justice Binnie, Justice Abella.

<sup>872</sup> Mak, *supra* note 28 at 112-114.

bios incorporating the foreign qualities of each of the 21 judges are included in a separate appendix to this chapter.<sup>873</sup> The personal data for each individual judge incorporates only publicly available information from reliable documents and official webpages. No information collected through personal interviews with SCC justices was used to create these biographies. This decision was taken not only to preserve the anonymity of the judges who participated in this study, but also to not place in an unfair position the judges who did not. The judges in the Appendix 3 and in Table 1 are listed according to the order used on the official website of the SCC, which is based on the date of appointment to the Court.<sup>874</sup>

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<sup>873</sup> See Appendix 3 “Short Bio of Judges of the SCC”.

<sup>874</sup> Supreme Court of Canada, “Current and Former Judges”, online: <<http://www.scc-csc.ca/judges-juges/cfpju-jupp-eng.aspx>>.

**Table 1: Foreign Features in the Bios of SCC Judges**

	Foreign Education	Interaction with Foreign Courts & Judges		Career with Foreign Contributions		Awards		Bilingual & Foreign Languages
		Judicial Associations	Training & Seminars	Pre-SCC	During-SCC	Foreign	Int'l	
L'Heureux-Dubé		✓	✓	✓	✓	✓	✓	✓
Gonthier		✓	✓			✓		✓
McLachlin		✓	✓		✓	✓	✓	✓
Iacobucci	✓		✓	✓	✓	✓		✓
Major			✓			✓		
Bastarache	✓	✓	✓		✓	✓		✓
Binnie	✓	✓	✓	✓	✓	✓		✓
Arbour			✓	✓		✓	✓	✓
LeBel		✓	✓			✓		✓
Deschamps		✓	✓			✓		✓
Fish	✓		✓			✓		✓
Abella			✓			✓	✓	✓
Charron			✓			✓		✓
Rothstein			✓	✓				
Cromwell	✓		✓			✓	✓	✓
Moldaver			✓			✓		
Karakatsanis		✓	✓			✓		✓
Wagner		✓	✓	✓				✓
Gascon		✓	✓					✓
Côté		✓	✓					✓
Brown			✓					✓

Table 1 contain the names of all 21 judges, divided into several columns representing each “foreign” component found in their bio. This table measures the degree of international exposure and recognition of each of the judges. For instance, if a judge has studied outside Canada, it will be considered a “foreign” component in his or her bio, and therefore will get a check (✓); if a judge is bilingual (English and French) or speaks one or more foreign

languages he or she will receive another check (✓). To specify more “foreign” features, three of the columns, namely, columns 2, 3, and 4, also have sub-columns.

As noted above, interactions of individual judges with foreign and international courts and judges assume several forms, and many are significant. However, to be included in the above data, the interaction needed to fulfill two criteria: it must be based on authoritative sources of information, and must demonstrate an individual judge commitment. Face-to-face meetings of judges and participation in electronic networks were excluded, because they are not recorded in official sources. Ultimately, Column 2, “Interaction with Foreign Courts and Judges”, was limited to “transnational judicial associations and organizations” and “transnational judicial trainings and seminars.”

Column 3, “Career with Foreign Contributions”, details contributions of individual judges to international public or private institutions. My research showed that these contributions may have occurred before their time with the SCC (pre-SCC), and during their tenure (during-SCC). Therefore, in order to identify both aspects of their contribution, I separated this column into two sub-columns. In fact, there are several former justices of the SCC, which have been very active in transnational judicial activities, and other international contributions, also after their retirement from the Court.<sup>875</sup> However, I have decided to do not include it, because the inclusion of the “post-SCC” category in the table would put former judges in a favourable position compared to current judges, and would automatically make it more likely that retired judges would have higher scores.

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<sup>875</sup> For example: Justice L’Heureux-Dubé, Justice Arbour, and Justice Binnie.

Column 4, “Foreign/International Awards”, incorporates honorary degrees or other awards bestowed on SCC justices by other nations or international organizations. In order to recognize both types of awards, I have separated them into “Foreign” and “International (Int’l),” allowing judges that have received both to earn a check (✓) for each type.

Because this is not an exact science, there is room for subjectivity and inaccuracy; as such, the categorizations found in Table 1 can be contested. For example, the above-identified foreign components do not hold the same weight when constructing a “globalist” profile (e.g., a foreign degree and a foreign award may be valued differently). However, in order to be as fair and objective as possible, I have focused more on the diversity of such features and less on their substance or extent; in addition, I have used only official data. While I acknowledge the type of foreign components and the extent to which each judge possesses them are also significant factors in identifying globalist judges, I leave it to the reader to examine Appendix 3 and make his or her own evaluation.<sup>876</sup> In Table 2 (below), a modest attempt at creating a spectrum of the foreign features held by individual judges, it should be noted that when judges have a similar number of features, I also consider their extent.

### **AN ATTEMPT TO CLASSIFY THE JUDGES OF THE SCC**

Table 1 and the Appendix 3 highlight the primary “foreign” components of the justices’ careers. Yet a question remains: Is it possible to identify the most globalist individual justices that have served on the SCC, based on the diversity of such foreign features in their bios? Is a classification possible, simply by looking at these numbers?

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<sup>876</sup> See Appendix 3 “Short Bio of Judges of the SCC”.

Regarding the first question, it is important to acknowledge that, as the Appendix 3 and Table 1 show, all 21 judges have at least a few “foreign” components in their career. Obviously, not all judges have the same background or interests; therefore, their profile is built on different foreign features. In addition, certain current and former judges engage in more diverse international activities and are much more involved in conversations with foreign judges and courts than others.

As to the question on classification, must be acknowledged that a strict classification cannot be made. Even if it were attempted it would be far from perfect, and its purpose would not be to establish a hierarchy of globalist or localist profiles in the SCC. Instead it would provide the sum of the different foreign features identified in each justice’s career, as shown in Table 1. Rather than strict classification, a spectrum of categories according to the diversity of such foreign components is offered. The goal of this spectrum is to be able to compare it with its counterpart outlined in Chapter 3, concerning judges’ engagement with non-domestic legal sources. The purpose is to assess whether a relationship exists between the foreign components in the profiles of individual judges and their participation in extra-judicial networking activities and use of non-domestic legal sources.

Several interviewed judges acknowledged a relationship between the extra-judicial involvement of judges and their citation of non-domestic legal sources. According to these justices, such interactions allowed them to develop personal relationships with foreign judges, to be informed of their jurisprudence, to become aware of new ideas and solutions, and to trust and rely on the judge behind the decision.<sup>877</sup> They

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<sup>877</sup> Interview with Anonymous Justice 1, Justice 2, Justice 3, Justice 5, Justice 9, and Justice 10. Interview with Anonymous Judge 12: Here it is how this judge as the administrator of one of the transnational

noted also the importance of previous experience and knowledge for their transnational judicial interactions and citation of non-domestic legal sources. According to them, foreign education and prior professional experiences abroad or in international institutions, provide judges with more knowledge and new perspectives, which become key factors for their willingness to engage in foreign exchanges. In addition, judges considered their personal background, particularly foreign languages, as another fundamental element that impacts directly the ability of judges to participate in transnational judicial interaction and citation of non-domestic legal sources. As one of them puts it, “language is very important in these meetings, and some times can become a barrier.”<sup>878</sup> The same judge suggests further, “we would use foreign legal sources that we were able to access, in other words, in languages that we could understand.”<sup>879</sup> Hence, SCC judges seem to suggest that there is a relationship between such foreign components in the bios of judges, including language, and their willingness and ability to engage in extra-judicial activities or formal legal exchanges. In order to evaluate whether this is true, a viable spectrum based on judges’ international profiles must first be created.

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electronic networks puts it: “Before getting an idea from a colleague from another country or citing case law from other countries, these face to face meetings helps to know the judge on personal level. You end up understanding more the judges behind their decisions and say: “OK, I can trust him and I can rely to the man behind the decision, and that decision is not that foreign anymore”. So, relating to the man behind the decision is certainly a plus. When I started practicing law, we did not have such opportunities to meet the man behind the decision.”

<sup>878</sup> Interview with Anonymous Justice 10.

<sup>879</sup> Interview with Anonymous Justice 10.

**Table 2: Spectrum of SCC Judges Based on the Total Number of Foreign/International Features in Bios**

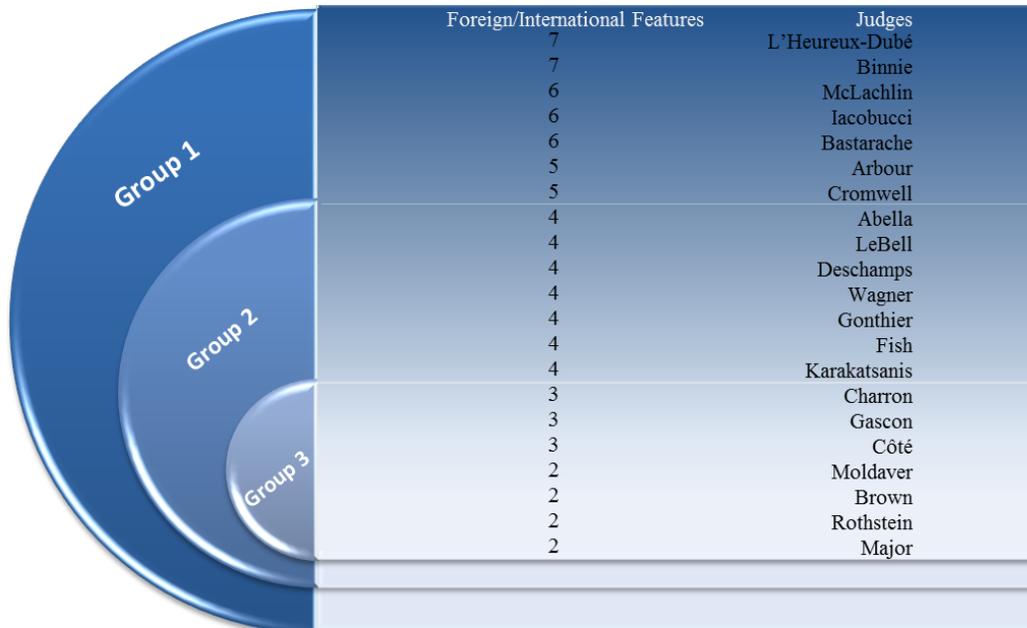


Table 2 reveals that all 21 judges have at least a few foreign features in their career, although the amount varies from two to seven; those with more appear to have a richer variety. Unfortunately, the scope and length of this chapter does not allow the inclusion of details regarding the extent of their engagement with all forms of extra-judicial activities, which would certainly add more depth.

In addition to the limitations addressed above, other issues with this classification need to be taken into consideration. First, several components, like foreign education, foreign and international awards, bilingualism or foreign languages, were included, despite the fact that these may go beyond engagement conducted while at the SCC. In addition, features counted when determining a justice's classification may be tied to his or her tenure on the Court. For example, not all SCC judges have served the same amount

of time, and those with less time served may have had fewer opportunities to engage transnationally. Another factor to consider is the period during which the justices served. As mentioned above, government funding for transnational judicial trainings in developing countries, which would bring more opportunities for transnational engagement of current judges, is becoming more limited. Finally, not all judges were at the same point in their career. Some are at the beginning, and have not had the opportunity to engage sufficiently or to connect with foreign justices, whereas others have served longer.

Despite the limitations, the data in Table 2 show that three groups are convincingly identified on the above spectrum. The top seven judges have five–seven foreign components in their bios, the middle seven have four such features, and the final seven have two or three. The first group—Justice L’Heureux-Dubé, Justice Binnie, Chief Justice McLachlin, Justice Iacobucci, Justice Bastarache, Justice Arbour, and Justice Cromwell—can be persuasively labeled “highly globalist justices,” due to their diversity of foreign features, which reflects high engagement in extra-judicial transnational conversations. Notably, only Chief Justice McLachlin was still serving during this study.

Table 3 compares the spectrum on foreign/international features (given above in Table 2) with the spectrum on citation of nondomestic legal sources (given in Chapter 3).<sup>880</sup> As Table 3 shows, five of the justices in this group—Justice L’Heureux-Dubé, Justice Binnie, Chief Justice McLachlin, Justice Iacobucci, and Justice Cromwell—are also in the top section of the spectrum based on the amount of citation of non-domestic legal sources (labeled “highly globalist justices”).<sup>881</sup> Justice Bastarache and Justice

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<sup>880</sup> See Table 35 in Chapter 3.

<sup>881</sup> See Table 35 in Chapter 3.

Arbour, although are found in the middle group of the spectrum on non-domestic legal sources, are in fact the top two.

**Table 3: Comparing Spectrums on “Foreign/International Features of Individual Judges” & “Average of Citation of Non-domestic Legal Sources”**



Justice Abella, Justice LeBel, Justice Deschamps, Justice Wagner, Justice Gonthier, Justice Fish, and Justice Karakatsanis have a moderate variety of foreign components in their careers compared to the first group, and are still quite engaged in extra-judicial conversations. As in Chapter 3, this middle group could be labeled as “moderately globalist justices”.<sup>882</sup> Justice Abella, Justice (now CJ) Wagner and Justice Karakatsanis are currently serving, while the other four are former justices. As Table 3

<sup>882</sup> This classification of current and former justices of the SCC in the above three categories is connected with the classification we did in Chapter 3 which was based on precise numbers gleaned from research on the use of all four forms of non-domestic legal sources. However, as noted above, I am not the only researcher to use these labels. See e.g. Mak, *supra* note 28 at 6, 102–106, 228–229.

shows, if we compare the justices in this group with the “moderately globalist justices” (classified based on the amount of citation of non-domestic legal sources), the picture matches partially; Justice Abella, Justice Gonthier, and Justice Deschamps appear in both groups.

The seven justices with the lowest variety of foreign features in their career are Justice Charron, Justice Gascon, Justice Coté, Justice Moldaver, Justice Brown, Justice Rothstein, and Justice Major. These justices with more moderate foreign components in their bios are found at the bottom section of the spectrum, and may be arguably labeled as “localist justices”. What stands out about this group is that the majority are current justices: Justice Gascon, Justice Coté, Justice Moldaver, and Justice Brown. Once again, as Table 3 shows, if we compare the judges found in the bottom part of both spectrums, there is a noticeable overlap. Four of them, Justice Brown, Justice Gascon, Justice Moldaver, and Justice Rothstein are included on both lists (Table 3).

As both spectrums in Table 3 show, the data used in this section reveals a relatively strong relationship between the variety of foreign components in a judge’s background and their engagement with non-domestic legal sources. This connection is more obvious when examining the top section of the spectrums (the more globalist judges), and the bottom section (the more localist judges). Hence, this study suggest that if a judge has a multiplicity of foreign components in his/her career, in other words, is bilingual or speaks a foreign language, has a foreign education, and participates in transnational judicial associations and judicial training with foreign counterparts, it is more likely that a particular judge is predisposed to engage with non-domestic legal sources in his or her decisions. For example, justices with foreign education are found at

the top half of the spectrum exposed in Table 2, which suggests that these justices have had opportunities to look in more depth at other legal systems, and are more open to non-domestic legal sources. In addition, justices with international or foreign commitments before or during their tenure at the SCC appear to be more willing to cite non-domestic legal sources; the same can be said about justices with higher participation in the activities of transnational judicial associations or other forms of interaction activities. As noted above, explicit statements provided by the judges in their interviews support this finding.

#### **IV. CONCLUDING REMARKS**

As demonstrated throughout this chapter, the globalist or localist profile of a court cannot be evaluated solely by its engagement with non-domestic legal sources, be it international or comparative. The data reveal that extra-judicial interacting activities of courts and judges are even more essential for dialogue, exchanges, and for developing relationships with foreign courts and building a globalist profile. The SCC and its judges certainly understand the importance of these activities, which is why they have been so engaged, particularly over the last 20 years. The data show that the SCC and its justices are highly committed to establishing institutional and judge-individual relationships with foreign and transnational courts and judges from various parts of the globe, using several conversation mechanisms.

The judicial conversation occurring among the highest courts is one element of the globalization of courts, which in turn is part of the wider globalization process in both the legal and political realms. Several judges perceived the participation of the SCC in

the transnational judicial conversation as part of Canada's foreign policy. One judge remarked, "Often the judicial collaboration and dialogue of the SCC with foreign counterparts is one piece of the larger engagement strategy that Canada wishes to have as a country in the global arena."<sup>883</sup> In fact, as the above data shows, the NJI, CIDA, the Department of Justice, and the Office of the Commissioner for Federal Judicial Affairs Canada have often initiated or supported transnational judicial training activities in developing countries.<sup>884</sup> In other words, it seems that such data, including the perception of several justices of the SCC, are suggesting that, from time to time, the Government of Canada, as part of its foreign policy, has promoted these transnational judicial exchanges. In turn, the SCC and its judges have played a key role in giving more credibility to Canadian projects in the international arena. This two-way relationship improved the international reputation of both (SCC and the Canadian government), as Canadian governmental agencies were supported by the intervention of the SCC, and the Canadian government supported the international activities of the SCC.

However, one judge made it clear that this does not mean that the Canadian government orchestrates the external engagements of the SCC or Canadian judges.<sup>885</sup> The judge emphasized,

It is important to understand that the Court certainly doesn't take any direction from the government on how it engages in interactions with foreign courts. In any case, the SCC would not do something that would be contrary to Canada's foreign relations. The judicial exchange may be a useful adjunct to other pieces of the puzzle, and the Court wants to engage in ways that furthers Canada's national interests, but it still very much insists on its own independence, in the way these meetings occur. There is

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<sup>883</sup> Interview with Anonymous Justice 9.

<sup>884</sup> Office of the Commissioner for Federal Judicial Affairs Canada, "A Map of International Judicial Cooperation Initiatives" online: <<http://www.fja.gc.ca/cooperation/index-eng.html>>.

<sup>885</sup> Interview with Anonymous Justice 9.

never any sort of political involvement; the sessions and everything about them are designed by the judges.<sup>886</sup>

It appears that the judges are suggesting that a bigger picture exists: the SCC, through its participation in external exchanges and relationships with courts of other nations, and sometimes even through the signing of bilateral agreements, is in fact contributing to Canada's diplomacy and international relations. In addition, as stated above, they emphasize that Court maintains its own independence in its external engagements, and does not take any direction from the Canadian government. Such a belief echoes Slaughter's global government networks theory (GGNT),<sup>887</sup> which constitutes the departing point of this study. According to this theory, states are disaggregated into at least three branches: legislative, executive, and judicial. States interrelate with each other not as unitary entities, but in a disaggregated modus, establishing global or regional government networks of legislators, administrators, and judges. In other words, today international relations are exercised not only through official governments, but also through a web of horizontal, diagonal, or vertical global networks of national and supranational judges, legislators, and regulators.<sup>888</sup> The regular bilateral relationships of the SCC with other foreign or supranational courts, and its membership in multilateral transnational judicial organizations, provide excellent examples. Through these engagements, the SCC is participating in a form of external relations, which are exercised in a relatively autonomous manner by the Court.

However, the desire of most nations of the world to come together, to build international organizations and treaties, and to promote common values, which began as a

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<sup>886</sup> Interview with Anonymous Justice 9.

<sup>887</sup> Slaughter, *supra* note 3 at 1, 4-6, 261.

<sup>888</sup> Slaughter, *supra* note 3 at 13-14.

reaction to World War II and particularly flourished after the end of Cold War, as mentioned above and in Chapter 2, is losing momentum. This is evidenced by recent political movements in Europe and the United States. I asked the SCC judges about the SCC's transnational judicial relationships in this new political climate. Most acknowledged the change, and agreed that it may affect the transnational conversation among courts in several ways, such as lack of budgetary support, or through judicial appointments that are more sceptical of these judicial exchanges. However, several remained optimistic, and at least one explained that the importance of conversation among courts is even more important now:

Although the latest political movements in different nations have shown that it is not the same momentum any more, the good news is that the judiciary has taken over. Executive and legislative branches are no longer the main actors of globalization or of the legal harmonization among nations. Nowadays, a lot of these rest on the judiciaries' shoulders. And that's why is very important to have independent judiciaries, who are not and should not be influenced by such political scepticism. So, courts are becoming even more important actors . . . because very often the judiciary will have to make decisions that the executive branch may not like at all.<sup>889</sup>

Judicial dialogue is one way in which the world can maintain its connectedness. Although extra-judicial activities may first appear less important than the citation of foreign legal sources, the reality is very different. My research demonstrates that through these extra-judicial conversations, courts and judges exchange not only ideas, but also substantive and court management best practices. Indeed, as most judges emphasized, these extra-judicial networking activities and meetings with foreign counterparts extend well beyond the discussion of case law; in fact, they may have a greater impact on court

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<sup>889</sup> Interview with Anonymous Justice 8.

management matters. Thus, this phenomenon deserves greater attention from scholars, judges, and policymakers.

In addition, unlike the metaphoric “dialogue” that occurs through the citation of international or comparative legal sources, these activities incorporate the actual conversation happening among courts and judges. Moreover, this conversation is often beneficial to all parties. As one judge explained, “The dialogue and friendships that we as judges will necessarily develop with judges of other countries are an enrichment in itself. In this process, the judges, including those of the SCC, not only teach but they also learn a lot.”<sup>890</sup> The same judge spoke about another significant aspect of these interactions, “The fact that justices of the Supreme Court and of other Canadian courts did participate in judicial education programs, and in all other sorts of interactions around the world, indisputably helped to disseminate our jurisprudence.”<sup>891</sup>

To conclude, considering both types of mechanisms of dialogue, the legal formal and extra-judicial, it seems that the transnational judicial dialogue is built around three pillars: the universality, similarity and difficult nature of cases; international law; and transnational legal standards. First, the judicial dialogue tends to develop around issues relating to common or universal values and difficult questions, which transcend national borders, such as: human dignity, equality, death penalty, extradition, terrorism, free speech, or euthanasia. Regarding the second pillar, transnational judicial dialogue tended to be more apparent in cases that involve international law, that is, in matters involving existing international treaties such as international human rights instruments. Hence, courts seem to be willing to examine each other’s jurisprudence on interpreting

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<sup>890</sup> Interview with Anonymous Justice 1.

<sup>891</sup> Interview with Anonymous Justice 1.

international treaties. Third, the judicial dialogue is evident also around transnational legal standards, principles, legal tests, or cases involving multiple nations or common to several nations, which are not regulated by international treaties or where the treaties are not well-defined. Hence, in their struggle to resolve the difficult questions before them, and to best interpret the domestic or international law, apex courts tend to look for solutions and learn from the experience of international courts, or other constitutional courts that have already dealt with such cases. It will better inform them about the “logic” of law and their previous practices. Even when they do not embrace their practices, examining other courts’ decisions help shape their judicial philosophy and domestic decision-making.

Yet, whether and to what extent extra-judicial activities alone, or in combination with the citation of non-domestic legal sources, have any tangible impact on the SCC or beyond is outside the scope of this chapter. The goal of this chapter was to reveal the existence of these interactions at both the institutional and individual-judge levels, and to explain their primary mechanisms. Chapter 6 will explore the main effects of both forms of transnational judicial conversation, formal legal and extra-judicial interaction.

## CHAPTER 5

# CASE STUDY - *UNITED STATES V BURNS*: ANALYSIS FROM A TRANSNATIONAL JUDICIAL DIALOGUE PERSPECTIVE

### I. INTRODUCTION

After revealing broad quantitative and qualitative data on the SCC's participation in both formal legal and extra-judicial mechanisms of the transnational judicial conversation, in this chapter, I present an in-depth qualitative analysis of a specific case, *United States v Burns*.<sup>892</sup> The objective is to examine whether the phenomenon of judicial interaction with foreign counterparts, and more generally the process of globalization of courts, affected the outcome in *Burns*.

In this chapter, I first introduce the facts, history, and quantitative data on *United States v Burns*.<sup>893</sup> I then scrutinize the juridical mechanisms and the extent of their impact on the outcome of this case, if any. Third, I investigate the extra-judicial networking activities of the SCC and its justices to determine their degree of influence on *Burns*. Fourth, I identify and examine whether other actors affected the *Burns* outcome. Finally, I conclude by using *Burns* to demonstrate that transnational judicial dialogue is an integrated process (comprising both juridical and extra-judicial mechanisms), and to address potential criticisms of such a dialogue.

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<sup>892</sup> *United States v Burns* [2001] 1 SCR 283.

<sup>893</sup> *United States v Burns* [2001] 1 SCR 283.

## II. CASE FACTS, HISTORY, AND QUANTITATIVE

### DATA

#### A. WHY US V BURNS?

I selected *Burns* in accordance with the rationale revealed in the preceding chapter, where I identified at least three pillars around which the transnational judicial conversation is developed: universality, likeness and difficult nature of cases; reference to international law; and reference to comparative law. In *Burns*, all three pillars of the conversation can be clearly identified: it deals with universal and difficult matters, the death penalty and extradition; it involves extensive use of international law; and it refers to comparative and transnational law standards.

#### B. FACTS AND HISTORY:

*United States v. Burns* is a case that progressed through three hearings in the SCC.<sup>894</sup> On March 22, 1999, the justices present were: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.<sup>895</sup> However, following changes in membership of the SCC, the case was reheard in May 23, 2000 and February 15, 2001. This time the SCC comprised McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, and LeBel JJ.<sup>896</sup> The appellant was the Minister of Justice, respondents were Glen Sebastian Burns and Atif Ahmad Rafay, and the interveners were Amnesty International, International Centre for Criminal Law &

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<sup>894</sup> On March 22, 1999; May 23, 2000; and February 15, 2001.

<sup>895</sup> See opening section, *United States v Burns* [2001] 1 SCR 283.

<sup>896</sup> *ibid.*

Human Rights, Criminal Lawyers' Association (Ontario), Washington Association of Criminal Defence Lawyers, and the Senate of the Republic of Italy.

The respondents Burns and Rafay were each wanted on three counts of aggravated first-degree murder in the State of Washington. If found guilty, they were to face either the death penalty or life in prison without the possibility of parole. The respondents were both Canadian citizens and were 18 years old when the father, mother and sister of the respondent Rafay were found bludgeoned to death in their home in Bellevue, Washington, in July 1994. They returned to Canada where they were arrested, and United States authorities commenced proceedings to extradite them to the State of Washington for trial. After evaluating the respondents' particular circumstances, including their age and Canadian nationality, the Minister of Justice for Canada ordered their extradition pursuant to Section 25 of the Extradition Act without seeking assurances from the United States under Article 6 of the extradition treaty between the two countries that the death penalty would not be imposed, or, if imposed, would not be carried out.<sup>897</sup>

Burns and Rafay appealed the Minister of Justice's decision in the British Columbia Court of Appeal, launching a number of charter challenges, relying particularly on Section 6 of the Canadian Charter of Rights and Freedoms – Mobility Rights. Their main legal argument was that because the case involved Canadian citizens, it was distinguished from the 10-year-old *Kindler* case, which held that it was not a breach of fundamental justice to extradite persons regardless of the risk of execution.<sup>898</sup> In a majority decision, the British Columbia Court of Appeal, agreed with Burns and Rafay and ruled that “the unconditional extradition order would violate the mobility rights of

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<sup>897</sup> These facts are an extract from the judgment *United States v Burns* [2001] 1 SCR 283.

<sup>898</sup> *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779.

the respondents under Section 6(1) of the Canadian Charter of Rights and Freedoms.” The Court of Appeal therefore set aside the Minister’s decision and directed him to seek assurances that Burns and Rafay would not be subject to capital punishment, as a condition of approving extradition.<sup>899</sup> The Minister of Justice then appealed in the SCC. Relying heavily on international and comparative law, the SCC overturned its previous well-established precedent in *Kindler*<sup>900</sup> and *Ng*<sup>901</sup>, and dismissed the appeal.<sup>902</sup> According to the Court, the respondents should not be extradited to the US without assurances that they would not face the death penalty.

### C. QUANTITATIVE DATA:

This section presents concise quantitative data on the extent of non-domestic legal instruments referred to by the SCC in *Burn v US*. Such instruments, as defined in Chapter 1, include all formal legal sources that originate outside Canada’s national or provincial legal systems.<sup>903</sup> As explained in Chapters 1 and 3, I have identified four categories of non-domestic legal instruments that courts are using in order to participate in the transnational judicial conversation: international law, international case law, comparative law, and comparative case law.<sup>904</sup>

In its decision in *Burns*, the SCC cited a total of 18 statutes and regulations and 38 court decisions. Of the 18 statutes and regulations, 7 were domestic and 11 were non-domestic instruments (international treaties: 9; comparative legislation: 2). In addition,

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<sup>899</sup> *United States v Burns* [2001] 1 SCR 283, par 20.

<sup>900</sup> *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779.

<sup>901</sup> *Reference Re Ng Extradition (Can)* [1991] 2 SCR 858.

<sup>902</sup> *United States v Burns* [2001] 1 SCR 283, par 144.

<sup>903</sup> See definitions in Chapter 1 “Introduction”. See also, Chapter 2 “Understanding Transnational Judicial Dialogue from a Theoretical Perspective: An Overview of the SCC”.

<sup>904</sup> I deal with the rationale of this categorization point in a previous chapter. See Chapter 2 “Understanding Transnational Judicial Dialogue from a Theoretical Perspective: An Overview of the SCC”.

the SCC cited 9 international soft-law sources.<sup>905</sup> Moreover, of the 38 court decisions that the SCC discussed in *Burns*, 10 were non-domestic, of which nine were judgments of foreign courts, and one was a decision from an international court.<sup>906</sup>

This inventory of non-domestic legal instruments cited in *Burns*, suggests that the SCC indeed has a global consciousness. Its extensive reliance on non-domestic legal sources demonstrates that the Court is alert to how these issues are regulated internationally and are resolved in other countries. Yet, do these numbers sufficiently indicate how “globalist” or “localist” was the SCC in *Burns*? To obtain a much more comprehensive picture, a qualitative analysis of this case is necessary.

### **III. THE JURIDICAL MECHANISMS: IMPACT OF THE CITATION OF NON-DOMESTIC LEGAL INSTRUMENTS IN *BURNS* - A QUALITATIVE ANALYSIS**

In its unanimous and anonymously written decision in *Burns*,<sup>907</sup> the SCC decided to look beyond the Canadian legal authorities, in order to confront the key issues in this case, including extradition, the death penalty, wrongful convictions, international relationships,

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<sup>905</sup> It is difficult to find an authoritative definition of “soft law”, since this term has been the subject of passionate academic debates between those denying the existence of such law and those who consider it as a new quasi source of international law. Briefly, it can be defined as “normative provisions contained in non-binding texts.” See Dinah Shelton, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) at 292.

<sup>906</sup> For a bigger picture of this phenomena, see Chapter 3 “The Use of Juridical Mechanisms by the SCC: A Quantitative Analysis of Cases (2000-2016)”.

<sup>907</sup> *United States v Burns* [2001] 1 SCR 283. Interestingly the SCC did not reveal who penned *Burns*, however, some sources indicate that Justice Binnie was the actual writer of it. See, Kirk Makin, “A rare look at the inner-workings of the Supreme Court of Canada,” *The Globe and Mail* (23 September 2011) online: The Globe and Mail <<http://www.theglobeandmail.com>>.

and the proportionality test. In almost all these fields, the SCC considered solutions from all four categories of non-domestic authorities that I have previously identified.

## 1. CITATION OF INTERNATIONAL LAW

At the outset, it is worth noting that the SCC's citation of international law in *Burns* was extensive, referring to nine different international legal instruments of global, regional, and bilateral provenance, some of which had not even been ratified by Canada.<sup>908</sup>

The first concern in this case was the extradition of respondents Burns and Rafay to the state of Washington, where they would face the death penalty if convicted. The key question that the SCC had to resolve was “whether the Constitution supports the Minister’s position that assurances [from U.S. authorities that the death penalty would not be imposed] need only be sought in exceptional cases, or whether the Constitution supports the respondents’ position that assurances must always be sought barring exceptional circumstances, and if so, whether such exceptional circumstances are present in this case.”<sup>909</sup> After referring to the relevant Canadian Constitutional provisions, the SCC addressed this issue in a section of its judgment entitled “*Relevant Provisions from International Documents*”.<sup>910</sup>

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<sup>908</sup> *United States v Burns* [2001] 1 SCR 283. The nine international legal instruments used by the SCC in *Burns* are: *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Art. 37(a); *European Convention on Extradition*, Eur. T.S. No. 24, Art. 11; *Extradition Treaty between Canada and the United States of America*, Can. T.S. 1976 No. 3, Art. 6, 17 bis [ad. Can. T.S. 1991 No. 37, Art. VII]; *International Covenant on Civil and Political Rights with Optional Protocol*, Can. T.S. 1976 No. 47, Art. 6(5); *Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America*, Can. T.S. 1991 No. 37, Art. VII; *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, Eur. T.S. No. 114; *Rome Statute of the International Criminal Court*, A/CONF.183/9, 17 July, 1998; *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128 (December 15, 1989).

<sup>909</sup> *United States v Burns* [2001] 1 SCR 283, par 30.

<sup>910</sup> *ibid* at Section V. The title of this section is misleading, because under this title the SCC used not just international legal instruments (international treaties and decisions of international organizations), but also

The primary international legal source analyzed by the SCC was the *Extradition Treaty between Canada and the United States of America*.<sup>911</sup> The Court interpreted this treaty to “permit the requested state (in this case Canada) to refuse extradition of fugitives unless provided with assurances that if extradited and convicted they will not suffer the death penalty.”<sup>912</sup> This Court’s interpretation stood in opposition to the Minister of Justice’s understanding of the treaty that: “assurances should only be sought in exceptional circumstances,” which he decided did not exist in this case and therefore declined to ask for such assurance.<sup>913</sup>

What prompted this interpretation by the SCC, despite awareness of the differing interpretation of this treaty in the 10-year-old *Kindler* and *Ng* cases?<sup>914</sup> Significantly, in deciding *Burns* the SCC went well beyond the bilateral extradition treaty, and relied heavily on other non-domestic legal sources, both international and comparative.

First, the court noted that Article 6 of the Canada-U.S. treaty is identical to Article 4(d) of the *Model Treaty on Extradition* that was “passed by the General Assembly of the United Nations in December 1990 which states that extradition may be refused.”<sup>915</sup> Further the SCC held that:

The United Nations Commission on Human Rights Resolutions 1999/61 (adopted April 28, 1999) and 2000/65 (adopted April 27, 2000) call for the abolition of the

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comparative instruments (laws and court decisions from other nations). The mix of these two totally different types of legal instruments and labeling them as “international” is problematic, and in a personal interview with one of the justices of the SCC, she confirmed me that they are reviewing it.

<sup>911</sup> *Extradition Treaty between Canada and the United States of America (amended by an Exchange of Notes)*, Can. T.S. 1976 No. 3, in force March 22, 1976, Article 6; and then the *Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America*, Can. T.S. 1991 No. 37 (in force November 26, 1991), Article VII, Article 17 bis.

<sup>912</sup> *United States v Burns* [2001] 1 SCR 283, par 5.

<sup>913</sup> The Minister of Justice declined to seek such assurances because of his policy. See, *United States v Burns* [2001] 1 SCR 283, par 5.

<sup>914</sup> *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, and *Reference Re Ng Extradition (Can.)*, [1991] 2 SCR 858.

<sup>915</sup> *United States v Burns* [2001] 1 SCR 283, par 82.

death penalty, and in terms of extradition state that the Commission: requests States that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that capital punishment will not be carried out.<sup>916</sup>

Moreover, in deciding *Burns*, the SCC looked beyond international legal instruments signed and ratified by Canada or by international organizations of which Canada is a member. For example, the SCC referred to Article 11 of the *Council of Europe's European Convention on Extradition*,<sup>917</sup> noting that it “is virtually identical to Article 6 of the Canada-U.S. treaty.”<sup>918</sup>

Another very important issue that pushed the SCC to look for solutions in non-domestic legal instruments is the death penalty. In dealing with such a universal concern, the analysis of the court is organized around various sub-issues: abolition of the death penalty, right to life, death and death-row as cruel and unusual punishments, and the personal characteristics of the fugitive as mitigating factors in death penalty cases.

In dealing with the abolition of death penalty, the SCC looked first at legal instruments originating in international organizations of which Canada is a member. For example:

The Abolition of the Death Penalty Has Emerged as a Major Canadian Initiative at the International Level”<sup>919</sup> (...) These include: Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur, U.N. Doc. E/CN.4/1997/60, at para. 79; Extrajudicial, summary or arbitrary executions: Note by the Secretary-General, U.N. Doc. A/51/457, at para. 145; United Nations Commission on Human Rights Resolutions 1997/12 (Canada voted in favour), 1998/8 (Canada sponsored the resolution and voted in favour), and 1999/61 and

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<sup>916</sup> *ibid* at par 84.

<sup>917</sup> *Council of Europe's European Convention on Extradition*, Eur. T.S. No. 24.

<sup>918</sup> *United States v Burns* [2001] 1 SCR 283, par 82.

<sup>919</sup> *United States v Burns* [2001] 1 SCR 283, par 78, point b).

2000/65 (discussed, *supra*). In this connection, Canada's representative is reported as stating to the Commission as follows:<sup>920</sup>

Suggestions that national legal systems needed merely to take into account international laws was inconsistent with international legal principles. National legal systems should make sure they were in compliance with international laws and rights, in particular when it came to the right to life.<sup>921</sup>

The inclusion of these remarks of the Canadian representative in its final judgment, suggests that the SCC was willing to acknowledge that the current understanding that national legal systems' need only to "take into account" international laws appears to be out-dated and inconsistent in relation to the general principles of international law. The Court therefore analyzed Canada's laws on extradition to ensure that they are in compliance with international law.

Indeed, the SCC went further. It referred to the *Statute of the International Criminal Tribunals for the former Yugoslavia and for Rwanda*.<sup>922</sup> Despite the heinous nature of the crimes alleged against the accused individuals subject to their jurisdiction, the Court noted, the UN Security Council excluded the death penalty as a possible punishment.<sup>923</sup> As the SCC reports, "this exclusion was affirmed in the Rome Statute of the International Criminal Court, signed on December 18, 1998 and ratified on July 7, 2000 by Canada."<sup>924</sup>

Some legal instruments referenced by the SCC originated to organizations where Canada was a member, but had not yet ratified their legal acts, such as: the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at*

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<sup>920</sup> *ibid* at par 85.

<sup>921</sup> Press Release HR/CN/788 (April 7, 1997)

<sup>922</sup> See, *Resolution 827, May 25, 1993 for Yugoslavia, and for Rwanda, Resolution 955, November 8, 1994.*

<sup>923</sup> *United States v Burns* [2001] 1 SCR 283, par 88.

<sup>924</sup> *United States v Burns* [2001] 1 SCR 283, par 88.

*the Abolition of the Death Penalty*,<sup>925</sup> and the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*.<sup>926</sup> Remarkably, the SCC also relied on legal instruments of international institutions to which Canada did not belong. It referred to several instruments from the Council of Europe and the European Union, such as *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*,<sup>927</sup> and *Resolutions adopted by the Parliamentary Assembly of the Council of Europe*,<sup>928</sup> and *the European Parliament*.<sup>929</sup> All these international instruments appeal to all countries to abolish the death penalty.<sup>930</sup>

Additionally, the SCC cited international legal instruments regarding personal characteristics of the fugitive in death penalty cases, such as youth, pregnancy, insanity, and mental retardation. The court relied on *Article 6(5) of the International Covenant on Civil and Political Rights*,<sup>931</sup> and *Article 37(a) of the Convention on the Rights of the Child*,<sup>932</sup> signed and ratified by Canada. These acts prohibit the execution of individuals who were under age 18 at the time of the commission of the offence.

Another significant aspect examined by the SCC in *Burns* was Canada's international relationships with other nations, specifically the US. The Court stated that

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<sup>925</sup> *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128 (December 15, 1989 - in force in 1991).

<sup>926</sup> *Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990) (Organization of American States)*, [1990] 29 I.L.M. 1447.

<sup>927</sup> *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty* (the Council of Europe), Eur. T.S. No. 114

<sup>928</sup> *Resolution 1044 (1994)*.

<sup>929</sup> *Resolutions B4-0468, 0487, 0497, 0513 and 0542/97 (1997)*.

<sup>930</sup> *United States v Burns* [2001] 1 SCR 283, par 87. For example, *The Declaration of June 29, 1998 of the European Union's General Affairs Council* states that: "The [European Union] will work towards the universal abolition of the death penalty as a strongly held policy now agreed by all [European Union] Member States"

<sup>931</sup> *The International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47.

<sup>932</sup> *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3.

“there is no doubt that it is important for Canada to maintain good relations with other states.”<sup>933</sup> The SCC admitted that it plays a key role in interpreting international treaties, which, in this case, is the extradition agreement between Canada and the US. The Court emphasized that the treaty “explicitly provides for a request for assurances and Canada would be in full compliance with its international obligations by making it.”<sup>934</sup> According to the Court, “by insisting on assurances, Canada would not be acting in disregard of international extradition obligations undertaken by the Canadian government, but rather exercising a treaty right explicitly agreed to by the United States.”<sup>935</sup> By legally interpreting Canada’s international relationships with foreign countries, the SCC shows that it perceives itself to be an institution with jurisdiction to address national and international legal orders, whenever Canada is a party. Sometimes, as noted above, the Court goes much further, by interpreting and relying also on international legal instruments to which Canada is not a party.

The references to international law in *Burns* indicates that the SCC is capable of extending its jurisdiction beyond domestic law, by engaging with international legal order and foreign relationship issues. However, the question remains: is the SCC mandated to influence Canadian foreign policy? The Court itself denies this, “[t]he Charter does not give the court a general mandate to set Canada’s foreign policy on extradition.”<sup>936</sup> The SCC admits that the executive (in this case the Minister) is responsible for Canada’s international law enforcement obligations. Indeed, when it comes to foreign policy issues, the SCC had shown judicial restraint in at least on extradition cases. Justice McLachlin

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<sup>933</sup> *United States v Burns* [2001] 1 SCR 283, par 136.

<sup>934</sup> *ibid.*

<sup>935</sup> *ibid* at par 8.

<sup>936</sup> *ibid* at par 35.

(as she was then) noted in *Kindler*, “[t]he superior placement of the executive to assess and consider the competing interests involved in particular extradition cases suggests that courts should be especially careful before striking down provisions conferring discretion on the executive.”<sup>937</sup>

Yet, the extensive use of international law in *Burns* suggests that the SCC perceives itself as the highest authority that can interpret international legal instruments in Canada. In the case of a conflict between domestic and international law, the SCC is expected to interpret domestic law from both, a Canadian constitutional and international law perspective. As mentioned in previous chapters, this dual role of the SCC locates the Court not only as one of the most important domestic institutions, but also as the highest agent of international law within Canada.

## 2. CITATION OF INTERNATIONAL CASE LAW

Judgments of international or supranational courts involving either global or regional jurisdiction were the second type of non-domestic legal source that significantly influenced the outcome in *Burns*. The most influential international judgment was a landmark European Court of Human Rights (ECtHR) decision, *Soering v UK*.<sup>938</sup> Although as mentioned in Chapter 3, the ECtHR is a regional international/supranational court under the Council of Europe (Canada is not a member-state of this regional organization), the SCC relied really heavily on *Soering* in deciding the issues of extradition with assurances in *Burns*. As stated by the SCC:

In *Soering*, supra, the European Court of Human Rights held that, in the circumstances of that case, extradition of a West German national from the United

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<sup>937</sup> *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779, at pp. 849.

<sup>938</sup> *Soering v United Kingdom* 161 Eur. Ct. H.R. (ser. A) (1989).

Kingdom to face possible execution in the United States would violate the European Convention on Human Rights. West Germany was willing to try Soering in Germany on the basis of his nationality. The European Court ruled that the option of a trial of Soering in West Germany was a “circumstance of relevance for the overall assessment under Article 3 in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case” (para. 110) and that “[a] further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration” (para. 111). By “another means”, the court had in mind the trial of Soering in West Germany. *In the present appeal as well, “the legitimate purpose of extradition could be achieved by another means”, namely extradition with assurances, in perfect conformity with Canada’s commitment to international comity.*<sup>939</sup> [Emphasis added]

The SCC also cited the *Soering* case for another key issue in *Burns*, “the right not to be subjected to any cruel and unusual treatment or punishment” under Section 12 of the Canadian Charter of Rights and Freedoms. The key concern was whether the imposition of the death penalty would contradict this provision of the Charter, since the state of Washington, and not the government of Canada, would impose and carry out the death sentence. A *stricto sensu* interpretation of the Charter appears to suggest that it only guarantees certain rights and freedoms from infringement by “the Parliament and Government of Canada”<sup>940</sup> and “the legislature and government of each province.”<sup>941</sup> Indeed, such a strict view was also accepted in previous SCC cases, where Justice La Forest writing for the Court stated that “there cannot be any doubt that the Charter does not govern the actions of a foreign country (...) and cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted.”<sup>942</sup> The same assessment was also made for *Kindler* and *Ng*,<sup>943</sup> both cited

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<sup>939</sup> *United States v Burns* [2001] 1 SCR 283, par 137.

<sup>940</sup> See, s. 32(1) (a) of the Canadian Charter of Rights and Freedoms.

<sup>941</sup> See, s. 32(1) (b) of the Canadian Charter of Rights and Freedoms.

<sup>942</sup> *Canada v Schmidt* [1987] 1 SCR 500 and *Spencer v The Queen* [1985] 2 S.C.R. 278.

<sup>943</sup> *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779, and *Reference Re Ng Extradition (Can.)* [1991] 2 SCR 858.

extensively in *Burns*. In these two cases, the Court had “concluded that extradition by the Canadian government did not violate the guarantee against cruel and unusual punishment because the only action by the Canadian government was to hand the fugitives over to law enforcement authorities in the United States, not to impose the death penalty.”<sup>944</sup>

Although the case law of the SCC appeared to be well-established, the Court ignored its own previous judgment, and looked for help beyond national borders, by referring to *Soering*:

In sum, *the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 [of the Convention for the Protection of Human Rights and Fundamental Freedoms, which is equivalent to section 12 of our Charter ], and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.*<sup>945</sup> [Emphasis added]

Following the ECtHR’s line of reasoning, the SCC concluded that:

*“The “responsibility of th[e] State” is certainly engaged under the Charter by a ministerial decision to extradite without assurances. While the Canadian government would not itself inflict capital punishment, its decision to extradite without assurances would be a necessary link in the chain of causation to that potential result”.*<sup>946</sup> [Emphasis added]

This conclusion is diametrically opposite to the SCC’s holding in *Kindler*, “[t]he punishment, if any, to which the fugitive is ultimately subject will be punishment imposed, not by the Government of Canada, but by the foreign state.”<sup>947</sup>

Although not explicitly acknowledged by the SCC, it followed the decision of the European Court (ECtHR) rather than its own previous holdings. This reflects the

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<sup>944</sup> *United States v Burns* [2001] 1 SCR 283, par 56.

<sup>945</sup> *Soering v United Kingdom* 161 Eur. Ct. H.R. (ser. A) (1989), par 91.

<sup>946</sup> *United States v Burns* [2001] 1 SCR 283, par 54.

<sup>947</sup> *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779, at pp. 845-846.

significant impact of transnational judicial conversation, which through juridical mechanisms—particularly through the citation of international case law—not only shaped the outcome of the case, but also reversed the SCC’s well-established precedents. In addition, it suggests the existence of a virtual judicial dialogue between the SCC and other courts, including the ECtHR.

### 3. CITATION OF COMPARATIVE LAW

Another third category of non-domestic legal sources that the SCC cited in *Burns* was, “constitutions, statutes and regulations of other nations” (comparative law). The Court analyzed the legal practices of several foreign nations, beyond the U.S.,<sup>948</sup> and referred to a submission made by an intervener, Amnesty International: “Canada [concluded the Court] currently *is the only country in the world*, to its knowledge, that has abolished the death penalty at home but continues to extradite without assurances to face the death penalty abroad” [Emphasis added].<sup>949</sup> Such language demonstrates that the SCC not only looks at other foreign nations, but also critically analyzes how such important issues are solved elsewhere.

The SCC also discussed “the speculative argument that an American government might prefer to let accused persons go without trial by refusing to give assurances.”<sup>950</sup> In response, the SCC referred to foreign legal sources, noting that “[a]s European states now routinely request assurances that the death penalty will not be imposed on an extradited

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<sup>948</sup> *United States v Burns* [2001] 1 SCR 283, par 83.

<sup>949</sup> *ibid.*

<sup>950</sup> *ibid* at par 138.

person, there is little indication that U.S. governments would ever refuse such guarantees.”<sup>951</sup>

The SCC also surveyed the legal experience and solutions of several U.S. states and of other foreign nations on the abolition of the death penalty. The SCC’s impressive comparative analysis noted that:

The abolitionist view is shared by some, but not a majority, of the United States. Michigan, Rhode Island and Wisconsin in fact abolished the death penalty for murder in the 1840s and 1850s, years before the first European state, Portugal, did so, and over a century before Canada did. At present, 12 states are abolitionist while 38 states retain the death penalty. The State of Washington, in which the respondents are wanted for trial on charges of aggravated first degree murder, is a retentionist state.<sup>952</sup>

Further, following an in-depth analysis of the provisions of the Revised Code of Washington,<sup>953</sup> the SCC concluded that:

[A]n individual convicted of aggravated first degree murder in Washington State thus will either die in prison by execution or will die in prison eventually by other causes. Those are the possibilities. Apart from executive clemency, the State of Washington does not hold out the possibility (or even the “faint hope”) of eventual freedom.<sup>954</sup>

Similarly, the SCC conducted a comparative survey of American law regarding personal characteristics as mitigating factors in death penalty cases. It noted that the Revised Code of Washington “recognizes youth as a potential mitigating factor against imposition of the death penalty. The respondents, at 18 years of age, had just passed the borderline from ineligibility to eligibility for the death penalty in Washington

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<sup>951</sup> *ibid.*

<sup>952</sup> *ibid* at par 4.

<sup>953</sup> Regarding *Sentences for aggravated first-degree murder* (Revised Code of Washington, 10.95.030), *Special sentencing proceedings* (Revised Code of Washington, 10.95.040), and *Death Penalty – How Executed* (Revised Code of Washington, 10.95.180).

<sup>954</sup> *United States v Burns* [2001] 1 SCR 283, par 28.

State.”<sup>955</sup> The SCC also considered the legislation of all 38 retentionist states of the US, and pointed out that 16 of them have an age limitation of 18 years, five states have selected 17 years, while the others use age 16 by law or judicial interpretation.<sup>956</sup> Of note, in the final decision on this issue, the SCC relied *only* on non-domestic legal sources, whether comparative or international. As acknowledged by the SCC, “Canada would hold the respondents fully responsible for their actions under the Criminal Code, but Canada is an abolitionist country,”<sup>957</sup> and does not have laws to regulate this issue.

The SCC relied on comparative legal sources also in dealing with “death row” and wrongful convictions. It examined the legal practices from various states in the US and the UK.<sup>958</sup> In their comparative analysis in *Burns*, the SCC engaged also with the constitutional principles of the presumption of innocence,<sup>959</sup> and trial by jury, in the state of Washington.<sup>960</sup> The SCC analyzed the Revised Code of Washington to evaluate possible convictions; if the respondents were found guilty, they would have faced either life in prison without the possibility of parole or the death penalty.<sup>961</sup> The SCC also elaborated on the form of execution in detail, “Washington State provides for execution by lethal injection unless the condemned individual elects execution by hanging.”<sup>962</sup> Hence, based on their analysis of comparative legal sources concerning wrongful convictions and death row in various countries including the U.S., the SCC decided

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<sup>955</sup> *ibid* at par 93.

<sup>956</sup> *ibid*.

<sup>957</sup> *United States v Burns* [2001] 1 SCR 283, par 93.

<sup>958</sup> The SCC introduced several examples from retentionist states in the US—Washington, Illinois, New Hampshire, Nebraska, Wisconsin, etc.—that are engaged in concrete legal and political action to abolish the death penalty because of the high rates of wrongful convictions. See, *United States v Burns* [2001] 1 SCR 283, par 108.

<sup>959</sup> *United States v Burns* [2001] 1 SCR 283, par 12.

<sup>960</sup> *ibid*.

<sup>961</sup> *ibid* at par 13.

<sup>962</sup> *ibid*. (Revised Code of Washington §10.95.180(1))

against the extradition without assurances. It appears that comparative legal sources were influential instruments for the outcome of the case on these particular issues.

#### 4. CITATION OF COMPARATIVE CASE LAW (FOREIGN JUDGMENTS)

Last but not least, another juridical mechanism that the SCC cited in *Burns*, are court decisions of other nations. In addressing the abolition of the death penalty, the SCC consulted judgments of foreign courts, including especially a landmark case of the South African Constitutional Court.<sup>963</sup> This judgment abolished the death penalty in South Africa, and relied in turn on foreign judgments from almost every continent.<sup>964</sup> In *Burns*, the Canadian SCC followed the South African jurisprudence on the death penalty stating that: “Canadian courts share the duty described by President Arthur Chaskalson of the Constitutional Court of South Africa in declaring unconstitutional the death penalty in that country.”<sup>965</sup>

To address the death row phenomenon and wrongful convictions—used as arguments against extradition in *Burns*—the SCC referred to comparative case law from

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<sup>963</sup> *The State v T Makwanyane and M Mchunu*, Case No. CCT/3/94 (June 6, 1995) (South Africa), par 88.

<sup>964</sup> The South African Constitutional Court on the death penalty historic decision cited decisions from the highest national courts of almost all continents, namely: The Supreme Court of Canada, the German Constitutional Court, the Supreme Court of Hungary, the Supreme Court of India, the Tanzania Court of Appeal, and the Supreme Court of the United States.

<sup>965</sup> *United States v Burns* [2001] 1 SCR 283, par 67. To explain this duty, the SCC quoted *The State v T Makwanyane and M Mchunu*, Case No. CCT/3/94 (June 6, 1995) (Constitutional Court of South Africa), par 88: “Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised. . . . The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected.”

the highest courts in the UK and US. Regarding the death penalty and wrongful convictions, the SCC referred to *Pratt v. Attorney General for Jamaica of the Judicial Committee of the Privy Council*,<sup>966</sup> and highlighted dissenting opinions from two judges of the SCOTUS. The SCC observed that:

Frankfurter J. of the United States Supreme Court, dissenting, in *Solesbee v. Balkcom*, 339 U.S. 9 (1950), at p. 14, noted that the “onset of insanity while awaiting execution of a death sentence is not a rare phenomenon”. Related concerns have been expressed by Breyer J., dissenting from decisions not to issue writs of certiorari in *Elledge v. Florida*, 119 S. Ct. 366 (1998), and *Knight v. Florida*, 120 S. Ct. 459 (1999). In the latter case, Breyer J. cited a Florida study of inmates which showed that 35 percent of those committed to death row attempted suicide.<sup>967</sup>

Additionally, regarding wrongful convictions, the SCC referred to two UK cases, *R. v. Bentley*<sup>968</sup> and *R. v. Mattan*.<sup>969</sup>

To sum up, it appears that the citation of judgments of foreign nations not only influenced the outcome in *Burns*, but it demonstrated that an horizontal judicial dialogue exist between the SCC and other constitutional courts, such as with the Supreme Court of the US, UK courts, and the South African Constitutional Court. As revealed in Chapter 4, the SCC is in a formal bilateral relationship with the SCOTUS, whereas the South African Constitutional Court is among the closest allies and followers of the SCC.<sup>970</sup> This

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<sup>966</sup> *Pratt v Attorney General for Jamaica*, [1993] 4 All E.R. 769 (P.C.), at pp. 783.

<sup>967</sup> *United States v Burns* [2001] 1 SCR 283, par 122.

<sup>968</sup> *R v Bentley (Deceased)*, [1998] E.W.J. No. 1165 (QL).

<sup>969</sup> *R v Mattan* [1998] E.W.J. No. 4668 (QL), par 39.

<sup>970</sup> See Chapter 4. The Honourable Albie Sachs a former justice of the Constitutional Court of South Africa, in a recent report for a Canadian daily newspaper remarkably said: “*I am reminded of the enormous assistance that we got from the Supreme Court of Canada in creating a completely new form of legal reasoning... And at the other end of the Earth, we see that we are donors as well as recipients; judges in Canada take account of our approach to truth commissions, capital punishment, acknowledging living customary law in a way that produces gender equality, prisoners’ right to vote, same-sex marriages, aboriginal title and more*”. See, Sachs, *supra* note 192. The Honourable Richard Goldstone is another former judge of the Constitutional Court of South Africa who praises the role Supreme Court of Canada for its cosmopolitan decisions and its use of comparative law. He writes that: “*South Africa has good reason to*

closeness is built not just on the reciprocal use of each other's judgments, but most importantly, on a continuous and vital judicial dialogue fostered through institutional and individual interactions, including friendships between judges.<sup>971</sup>

## **5. CITATION OF NON-DOMESTIC LEGAL SOURCES IN BURNS' "PROPORTIONALITY TEST"**

Last but not least, one of the most important parts of the judgment in *Burns*, which was also heavily influenced by non-domestic legal authorities, is the "proportionality test" developed in *R. v. Oakes*;<sup>972</sup> a judicial balancing process conducted under Section 1 of the Charter.<sup>973</sup> In *Burns* the SCC decided that "the infringement of the respondents' rights under s. 7 of the Charter cannot be justified under s. 1."<sup>974</sup> The "proportionality test" is one of the best illustrations of the impacts of judicial dialogue on the jurisprudence of the SCC, particularly on its decision-making process. This legal test goes beyond *Burns*, and deserves special analysis, which I will provide in Chapter 6. Here it suffices to note that the proportionality test found in *Oakes* is in fact imported from foreign courts, demonstrating the influence of non-domestic legal sources on the SCC's decision-making.

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*feel indebted to Canada for the advances we have made on the often difficult road from oppression to freedom and democracy.*" See, Goldstone, *supra* note 189 at 33.

<sup>971</sup> Sachs, *supra* note 192.

<sup>972</sup> *R v Oakes* [1986] 1 SCR 103; *United States v Burns* [2001] 1 SCR 283, par 134.

<sup>973</sup> *United States v Burns* [2001] 1 SCR 283, par 133.

<sup>974</sup> *ibid* at par 143.

## 6. IMPACTS OF THE JURIDICAL MECHANISMS IN *BURNS*:

### OVERALL REMARKS

The key conclusion of this section is that, non-domestic legal sources—the “global context”<sup>975</sup> and “international experience” as the SCC labels them<sup>976</sup>—influenced the outcome of this case in several respects. Issues surrounding the death penalty, extradition, wrongful convictions, and the proportionality test, transcend national borders and “raise many complex problems of both a philosophic and pragmatic nature.”<sup>977</sup> For example, fundamental questions, such as “whether the state is justified in taking the life of a human being within its power”, is universal, and decisions made by foreign states become important considerations. The SCC explicitly admitted that “a rule requiring that assurances be obtained prior to extradition in death penalty cases not only accords with *Canada’s principled advocacy on the international level*, but is *also consistent with the practice of other countries with whom Canada generally invites comparison*”<sup>978</sup> [emphasis added].

In *Burns*, the SCC reversed its own precedents in *Kindler* and *Ng* by relying largely on non-domestic legal instruments, arguing that “the international trend against the death penalty has become clearer.”<sup>979</sup> The Court acknowledged that the evidence did not yet establish “an international law norm against the death penalty, or against extradition to face the death penalty,” but found that it indicated a “significant movement towards international acceptance.”<sup>980</sup>

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<sup>975</sup> *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at pp. 833.

<sup>976</sup> *United States v Burns* [2001] 1 SCR 283, par 27, 28.

<sup>977</sup> *ibid* at par 127.

<sup>978</sup> *ibid* at par 128.

<sup>979</sup> *ibid* at par 131.

<sup>980</sup> *ibid* at par 89.

These findings were critical. In the final paragraph of its judgment, the SCC admitted that developments in relevant foreign jurisdictions were key in the balancing process and in the outcome of the case, albeit, labelling these developments as “factual.” A deeper reading of this judgment and the extensive reference to the non-Canadian legal instruments undoubtedly shows that the SCC uses this term broadly to include “legal” developments:

The “*balancing process*” must take note of factual developments in Canada and in relevant foreign jurisdictions. When principles of fundamental justice as established and understood in Canada are applied to these factual developments, many of which are of far-reaching importance in death penalty cases, a balance which tilted in favour of extradition without assurances in *Kindler and Ng* now tilts against the constitutionality of such an outcome. For these reasons, the appeal is dismissed.”<sup>981</sup> [Emphasis added]

Several justices of the SCC have supported this broad reading and explicitly consider *US v Burns* as a case where non-domestic legal sources were determinative of the outcome. The Chief Justice of Canada, considered *Burns* as one of several cases which the use of foreign legal instruments significantly influenced the outcome of the final judgment. In a public lecture she confirmed, “the Supreme Court again relied on international law principles in *Burns*, where the issue was whether the *Charter* permitted the extradition of Canadian citizens wanted on charges of murder in the United States to a state where conviction would attract the death penalty.”<sup>982</sup> Justice Bastarache cites *Burns* as an example of the SCC’s participation in global jurisprudence on human rights when discussing the conformity of Canadian legal principles and laws.<sup>983</sup> In his view, the SCC

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<sup>981</sup> *United States v Burns* [2001] 1 SCR 283, par 144.

<sup>982</sup> Simons Lecture, 2008, Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, see: <http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2008-10-21-eng.aspx>

<sup>983</sup> Bastarache, *supra* note 44.

uses international law and judgments “to demonstrate established or emerging patterns informing human rights jurisprudence throughout the world.”<sup>984</sup>

Finally, the key conclusion of this Section is that the above non-domestic legal sources of international and comparative nature impacted significantly the decision in *Burns*. In other words, it uncovered a convincing relationship between the citation of such legal sources and the outcome of this case.<sup>985</sup>

#### **IV. THE EXTRA-JUDICIAL MECHANISMS: IMPACTS ON *BURNS***

As explained in previous chapters, the process of transnational judicial dialogue occurs through the interaction of both “juridical” and “extra-judicial mechanisms”. The previous section showed how formal legal mechanisms—four categories of non-domestic legal instruments—significantly influenced the judicial decision in *Burns*. Yet, is this the whole picture? Is it possible that the outcome in *Burns* was also influenced by the participation of the SCC and its justices in various extra-judicial transnational activities of both institutional and judge-individual nature? In this section, based on the findings displayed in Chapter 4, I present an investigation of such extra-judicial activities and examine the extent of their influence on the outcome in *Burns*. Hence, the most important question that I attempt to answer is: whether the judges deciding the *Burns* case were

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<sup>984</sup> *ibid* at at 190.

<sup>985</sup> The concept of “relationship” in this Chapter is not used in the strict statistical sense of the term. Instead, its meaning is more legal and generic, as informed by the above analysis and the personal interviews with Justices of the SCC.

active in such transnational judicial activities; and is there a relationship between these activities and their decision in *Burns*?

Since I dealt extensively with the extra-judicial activities of the SCC as an institution and of individual judges in Chapter 4, I will only include a short summary on the nine judges that decided *Burns*. As stated above, the nine justices that participated on the second and third hearing in *Burns* and decided the final outcome of this case were McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, and LeBel JJ.<sup>986</sup>

The vast majority of judges that have served on the SCC since 2000 have actively participated in transnational judicial activities.<sup>987</sup> Yet, it is very difficult to demonstrate conclusively that the nine judges who decided *Burns* were influenced by such participation. Theories of adjudication recognize judicial decision-making as a very complex process involving several variables and philosophies.<sup>988</sup> Thus, while judges' activities may reasonably include these decisive variables, it is almost impossible to prove the existence of a direct relationship between the extra-judicial transnational activities of the SCC and its justices, and case outcome, as in the *Burns* case. However, by focussing on the extra-judicial activities of justices who participated in both *Kindler* and *Burns*, it may be possible to discover whether such factors might conceivably have played a role in their decision to abandon the earlier precedents, which they helped to set.

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<sup>986</sup> *United States v Burns* [2001] 1 SCR 283. See the first part of the judgment.

<sup>987</sup> For a broader view on such activities, see Chapter 4 "The Transnational Extra-judicial Activities of the SCC and its Justices", and Appendix 3 "Short Bio of Judges of the SCC".

<sup>988</sup> Posner, *supra* note 277 at 19. The nine theories of judicial behavior developed by the American judge, Richard A Posner are: the *attitudinal*, the *strategic*, the *sociological*, the *psychological*, the *economic*, the *organizational*, the *pragmatic*, the *phenomenological*, and the *legalist theory*. See also, Emmet Macfarlane, *Governing From the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver, Toronto: UBC Press 2013) at 38.

## 1. FROM *KINDLER* AND *NG* TO *BURNS*

The Canadian and non-domestic formal legal sources that were used in *Burns* had not changed, or changed very little, since *Kindler* and *Ng*. Why was the outcome different in *Burns*? According to the SCC, the holdings in *Kindler* and *Ng* had to be “revisited on the weight to be given to the “factor” of capital punishment because of changed circumstances in the 10 years since those cases were decided.”<sup>989</sup> Hence, as the SCC admits in *Burns*, the reason of such shift is the changed “factual developments” that occurred both in Canada and relevant foreign jurisdictions.<sup>990</sup> Both, internal factual developments and the changed circumstances in the global context appear to have influenced the shift in the balancing process in *Burns*.

In *Kindler*, Justice La Forest suggested that “the global context must be kept squarely in mind.”<sup>991</sup> Ironically, it is exactly “global-context” that altered the outcome of *Burns*, against the extradition without assurances. But what global-context factors changed during this period? First, the Court pointed to the international trend against the death penalty and its increasingly problematic status in the U.S. The SCC stated “the international trend against the death penalty has become clearer,” the “death penalty controversies in the requesting State – the United States – are based on pragmatic, hard-headed concerns about wrongful convictions,” and although “none of these factors is conclusive, taken together they tilt the s. 7 balance against extradition without assurances.”<sup>992</sup> Moreover, the 1991–2001 decade saw many international and national developments including the end of the Cold War, the beginning of a new era in

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<sup>989</sup> *United States v Burns* [2001] 1 SCR 283, par 63.

<sup>990</sup> *ibid* at par 144.

<sup>991</sup> *Kindler v. Canada (Minister of Justice)* [1991] 2 SCR 779, at pp. 833.

<sup>992</sup> *United States v Burns* [2001] 1 SCR 283, par 131.

international law and human rights, globalization, increased world interconnectedness, the expansion of the Internet, the modern technology boom, and so on. This period also includes the years 1998–2000, when the concept of judicial globalization was first introduced to the judicial and academic arenas by Justice L’Heureux-Dubé and Anne-Marie Slaughter, causing greater consciousness among judges regarding this phenomenon. While these factors are obviously relevant, can the change in the SCC’s jurisprudence from *Kindler and Ng* to *Burns*, be reasonably attributed to the Court’s transnational judicial dialogue with international or foreign counterparts, which may have influenced the court to rely more on non-domestic legal sources?

To answer this question, I investigated whether any of the judges common to *Kindler/Ng* and *Burns* changed position in *Burns*. Next, I examined whether these judges participated in extra-judicial transnational activities during 1991–2001. And finally, I developed an hypothesis about the potential relationship between such activities and their decision-making in *Burns*.

Of the seven judges who decided *Kindler and Ng*, only three were also present in *Burns*—McLachlin, L’Heureux-Dubé, and Gonthier JJ.<sup>993</sup> All three of them decided in favour of extradition without assurances in *Kindler and Ng*, and remarkably, all three changed their position in *Burns*, deciding against the extradition without assurances. Are there reasonable indications that transnational judicial conversation and events may have influenced them?

Several possible factors may have influenced their shift in *Burns*. To be sure, they may have been responding to other influences, some revision in their “judicial

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<sup>993</sup> See cases: *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779, and *Reference Re Ng Extradition (Can)* [1991] 2 SCR 8581 and *United States v Burns* [2001] 1 SCR 283.

philosophy”,<sup>994</sup> the presence of six new justices,<sup>995</sup> or other national developments. However, to better understand whether the shift of jurisprudence from *Kindler* and *Ng* to *Burns*, was in part determined by their participation in transnational dialogues; I examined the extrajudicial activities of the three judges who sat on all three cases, and then summarized such activities of the six new justices.<sup>996</sup>

#### A. Three Remaining Judges in *Burns*: McLachlin, Dube, and Gonthier

Chief Justice McLachlin’s status changed the most since *Kindler* and *Ng*. In 1991 she sat as a *puisne* judge, whereas in January 2000, she had been elevated to become the Chief Justiceship, and had held this position for more than a year when *Burns* was decided.<sup>997</sup> During this 10-year interval between 1991–2001, Chief Justice McLachlin had also become an increasingly “global” figure, and under her leadership the SCC had developed into one of the most cosmopolitan and influential courts worldwide.<sup>998</sup> In 2000, Chief Justice McLachlin became the Chairperson of the Canadian Judicial Council, Chairperson of the Board of Governors of the National Judicial Institute, and the Deputy Governor General.<sup>999</sup> Her multidimensional role transformed her into the most important SCC judge, not only *de jure* because of her *ex officio* status, but also *de facto* as the

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<sup>994</sup> For scholarship touching the importance of “judicial philosophy”, see: Barak, *supra* note 277 at 118; Barak, *supra* note 301 (Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia); Ostberg & Wetstein, *supra* note 154; Jackson, *supra* note 53 at 97; Voeten, *supra* note 331 at 552. For an opposite view on the importance of “judicial philosophy” in the decision-making, see: Makin, *supra* note 301; McLachlin, *supra* note 154 (Decision-making in the SC); Arthurs, *supra* note 139 at 223, 245-246.

<sup>995</sup> As stated above, the six new justices that joined the SCC in *Burns* were: *Iacobucci*, *Major*, *Bastarache*, *Binnie*, *Arbour*, and *LeBel JJ*.

<sup>996</sup> For a more detailed view on the extra-judicial activities used by the SCC and its judges, see Chapter 4.

<sup>997</sup> See a short biography of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada on the official website of the SCC, online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=beverley-mclachlin>>.

<sup>998</sup> Gentili & Mak, *supra* note 39 at 114.

<sup>999</sup> Reference from the short biography of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada on the official website of the SCC, online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=beverley-mclachlin>>. See also, Appendix 3 “Short Bio of Judges of the SCC”.

person most responsible for transnational judicial activities. She participated in several important judicial networking activities during this period, demonstrating an increasingly globalist judicial philosophy. As mentioned in Chapter 4, after joining the International Association of Women Judges, together with Justice L’Heureux-Dubé she established the Canadian Chapter of this Association in 1994.<sup>1000</sup> In 2000 she became a patron and governing-committee member of the Commonwealth Judicial Education Institute (CJEI).<sup>1001</sup> Together with judges from 24 countries, she played a key role in establishing the International Organization for Judicial Training (IOJT).<sup>1002</sup> Since 1991, and particularly after she became the Chief Justice, McLachlin has participated in face-to-face meetings with foreign judges from almost every continent.<sup>1003</sup> Hence, it is reasonable to conclude that these trans-judicial networking activities and foreign relationships in conjunction with factual national and international developments may have influenced her judicial philosophy, tending to a more globalist approach in 2001, when *Burns* was decided.

Justice L’Heureux-Dubé’s response and approach in *Kindler* and *Ng* changed to a much more “globalist” approach in *Burns*. She was in fact the first public figure to introduce the concept of “judicial globalization” to the global judicial and academic arena.<sup>1004</sup> Justice L’Heureux-Dubé was an early and active invoker of all forms of non-domestic legal instruments. In addition, she participated actively in numerous institutional and

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<sup>1000</sup> International Association of Women Judges Canadian Chapter, online: <<http://iawjcc.com/>>.

<sup>1001</sup> Ibid at <<http://cjei.org/governance.html>>.

<sup>1002</sup> International Organization for Judicial Training, online: <<http://www.iojt.org/>>.

<sup>1003</sup> See on this Chapter, Section IV “Extra-Judicial Mechanisms”.

<sup>1004</sup> L’Heureux-Dubé, *supra* note 37 at 15, 26.

judge-individual extrajudicial activities with international and foreign counterparts from all over the world.<sup>1005</sup>

An excellent example of how her participation in trans-judicial activities may have led to an altered approach is her contribution to the “Bangalore Principles.”<sup>1006</sup> These principles were developed through a series of eight judicial colloquia that involved face-to-face meetings of mainly prominent constitutional court justices from 37 countries from mostly the common law world, including Canada.<sup>1007</sup> The object of these colloquia was to address and increase common law courts’ engagement with international human rights. These colloquia were held in 1988–1998 and 2000–2001, and led as well to the adoption of the well-known Bangalore Code of Judicial Conduct. Justice L’Heureux Dube, in her capacity as President of the International Commission of Jurists, participated in these colloquia and was a key actor in drafting the Principles and the Code.<sup>1008</sup> These trans-judicial and international activities may have influenced her views on the use of international law and other non-domestic legal sources, which was evident in her contributions to SCC judgments, including those in *Burns*.

Justice Gonthier is another judge whose position in *Burns* was diametrically opposite to his earlier views in *Kindler* and *Ng*; and had demonstrated a globalist approach even before embarking on his career on the SCC. He was Chair of the Commission for

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<sup>1005</sup> See Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”. See also, Appendix 3 “Short Bio of Judges of the SCC”.

<sup>1006</sup> Kirby, *supra* note 482.

<sup>1007</sup> Judges at the colloquia represented the following countries: Antigua and Barbuda, Australia, Bangladesh, Barbados, Belize, Botswana, Brazil, British Virgin Islands, Canada, Dominica, Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Mauritius, New Zealand, Nigeria, Pakistan, Papua New Guinea, Seychelles, Sierra Leone, South Africa, Sri Lanka, St. Lucia, Tanzania, Trinidad and Tobago, Uganda, the United Kingdom, the United States, Zambia, and Zimbabwe.

<sup>1008</sup> See, “Commentary on the Bangalore Principles”, United Nations, September 2007, at 11, 13, 21, online: <<https://www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComment.PDF>>.

National Judges of the First World Conference on the Independence of Justice in Montréal (1983), President of the Canadian Institute for the Administration of Justice (1986–87), and President of the Canadian Judges Conference (1988–89). In these roles he had many opportunities to meet and engage with foreign counterparts.<sup>1009</sup> However, his career as Justice in the SCC may have furthered his “globalist” approach, by offering new dimensions and opportunities. In addition, the chronology of his publications shows his growth to a “globalist” mindset, reaching its zenith with his writings on judicial and constitutional “fraternity” published in 2000, where he praises the concept of “fraternity/brotherhood as a constitutional value”.<sup>1010</sup> This period in his career coincided

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<sup>1009</sup> The Hon. Charles Doherty Gonthier, The Supreme Court of Canada, “Current and Former Judges”, online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=charles-doherty-gonthier>>; See also, online: <<http://cisdl.org/gonthier/about-judge-gonthier/biography.html>>. See also, Appendix 3 “Short Bio of Judges of the SCC”.

<sup>1010</sup> See below chronologically the publications of Justice Gonthier, where even their titles show such a “globalist” trend: “Les Chartes — nos rôles et défis. Valeurs, droit et éthique”, dans Conférence des juristes de l’État, *Actes de la XVIIe Conférence des juristes de l’État*. Cowansville: Y. Blais, 2006 at 99-120; “Sustainable Development and the Law / Le développement durable et le droit”, *Introductory note by the Honourable Charles D. Gonthier / Préface de l’honorable Charles D. Gonthier* (2005) 1 *McGill J.S.D.L.P.* 11-18 / (2005) 1 *R.D.P.D.D. McGill* 11-18; “Le rôle du juge et l’indépendance judiciaire”, dans *Claire L’Heureux-Dubé à la Cour suprême du Canada 1987-2002 = Claire L’Heureux-Dubé at the Supreme Court of Canada 1987-2002*, Montréal: Wilson & Lafleur, 2004, 635-646; “Law and Morality” (2003) 29 *Queen’s LJ* 408; “Les tribunaux, le parlement et les médias au service du public et de la justice” dans Institut canadien d’administration de la justice, *Dialogues sur la justice: le public, le législateur, les tribunaux et les médias = Dialogues About Justice: the Public, Legislators, Courts and the Media*. Montréal: Éd. Thémis, 2003, 415; “Allocution Inaugurale: L’Influence d’une Cour Suprême Nationale sur la Tradition Civiliste Québécoise”, (2003) 33 *R.G.D.* 337; “Notes, informations et documents. Quelques réflexions sur le bijuridisme convergences et valeurs” (2003) 33 *R.G.D.* 305-317; “Legal Fraternity”, *Civil Litigation Conference – 2000*, Vancouver, Continuing Legal Society of BC, 2000, p. 1.1.01-1.1.11; “Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy” (2000) 45 *R.D. McGill* 567; “Le rôle de la jurisprudence et des juges», dans Institut canadien d’études juridiques supérieures, *Droits de la personne: “les bio-droits”. Aspects nord-américains et européens*. Actes des Journées strasbourgeoises 1996. Cowansville: Y. Blais, 1997, 499; “Réflexions sur le temps et le droit inspirées de décisions récentes de la Cour suprême du Canada. Conférence de clôture”, dans *Le temps et le droit: actes du 4e Congrès international de l’Association internationale de méthodologie juridique*. Cowansville: Y. Blais, 1996, 339; “Some Comments on the Common Law and the Civil Law in Canada: Influences, Parallel Developments and Borrowings” (1993) 21 *Canadian Business Law Journal* 323-334; “Le droit de la concurrence – Préface” (1993) 38 *R.D. McGill* 513; “Chroniques. Le témoignage d’experts: à la frontière de la science et du droit” (1993) 53 *R. du B.* 187-196; “What is professionalism?: Le professionnalisme” (1992) 26 *Gazette* 10-19; “Remarks on the Charter: Rights, Duties and Responsibilities” (1991) 40 *UNBLJ* 193; “L’influence d’une cour suprême nationale sur la tradition civiliste québécoise” dans *Enjeux et valeurs d’un Code civil moderne — Journées Maximilien-Caron 1990*, Montréal: Éd. Thémis,

with the *Burns* case, and his later globalist activities and ideas, is likely to have influenced him to join the unanimous decision.

From a broader perspective, it is also interesting to note that the above three judges ranked high on the globalist/localist spectrums showed in Chapter 3 and 4.<sup>1011</sup> They had high reliance on non-domestic legal sources and high engagement in extra-judicial activities.

#### B. Six New SCC Judges in *Burns*:

Six judges were appointed in the SCC after *Kindler and Ng* was decided: Iacobucci, Major, Bastarache, Binnie, Arbour, and LeBel JJ.<sup>1012</sup>

Justice Iacobucci was a member and president of several legal organizations concerned with globalization/internationalization of law and legal institutions, and with national and transnational judicial training.<sup>1013</sup> The international and transnational objectives of organizations that he participated in and the transnational activities, involved several institutional judge-individual networking activities, and even personal interactions with various national and international judges. In addition, his appointment in the SCC since 1991, served Justice Iacobucci with other numerous transnational judicial activities within and outside Canada. Hence, his multidimensional international career, personal globalist undertakings, and his service in the SCC, are important factors that nurtured the

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1991, 3-9 ou (1990) 24 *R.J.T.* 413; “L’attitude du tribunal”, dans *Formation permanente du Barreau du Québec, Application des Chartes des droits et libertés en matière civile*. Cowansville: Y. Blais, 1988, 125.

<sup>1011</sup> See Table 35 in Chapter 3, and see Table 3 in Chapter 4.

<sup>1012</sup> See opening section, *United States v Burns* [2001] 1 SCR 283.

<sup>1013</sup> For a short biography of the Honourable Frank Iacobucci, see the official website of the SCC, online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=frank-iacobucci>>. See also, Appendix 3 “Short Bio of Judges of the SCC”.

openness and globalist mindset of Justice Iacobucci.<sup>1014</sup> All these activities with international and foreign counterparts suggest a convincing relationship between them and his willingness to engage with non-domestic legal sources as determinative instruments in his decision-making in *Burns*.

Justice Binnie, as mentioned in Chapter 4 and 5, demonstrated a very strong “globalist” approach as a SCC judge. He played a key role in developing the cosmopolitan global reputation of the Court as an institution. According to several scholars, and my own research, Justice Binnie contributed through both, legal mechanisms, by extensively citing non-domestic legal instruments,<sup>1015</sup> and extrajudicial mechanisms, by being very actively involved in numerous transnational judicial activities and organizations.<sup>1016</sup>

Justice Binnie had an excellent international reputation as a judge.<sup>1017</sup> His influence is likely to have contributed to the SCC’s more favorable global reputation. Justice Binnie has shown his cosmopolitanism, through the SCC judgments that he wrote—including *Burns*—activities, academic papers, and public speeches. He highlighted the importance

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<sup>1014</sup> For a more comprehensive view on the extra-judicial activities of Justice Iacobucci, see Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

<sup>1015</sup> McCormick found in his empirical research that Justice Binnie alone have cited 5 times more than the average of every other single judge, and accounts for more than one-third of all American cases cited by the entire court. See, McCormick, *supra* note 146 at 95, 97. Adam Dodek also claims that “most of the comparative analysis was undertaken by a single judge”, referring to Justice Binnie. See, Dodek, *supra* note 55.

<sup>1016</sup> For a more comprehensive view on the extra-judicial activities of Justice Binnie, see Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”. See also, Appendix 3 “Short Bio of Judges of the SCC”.

<sup>1017</sup> When he retired in 2001, he was described by Law Presse as: “*peut-être le juge le plus influent au Canada dans la dernière décennie*” (*Perhaps the most influential judge in Canada in the last decade*), by The Globe and Mail as “*arguably the country’s premier judge*” and as “*one of the strongest hands on the court*” by the Toronto Star. See, Yves Boisvert, La Presse, Ian Binnie quite «le grand théâtre», Publié le 19 décembre 2011, online: <<http://www.lapresse.ca/debats/chroniques/yves-boisvert/201112/19/01-4479140-ian-binnie-quitte-le-grand-theatre.php>>; Makin, *supra* note 907; Tonda Maccharles, “Supreme Court appointments highlight a secret process”, *The Toronto Star* (17 October 2011), online: The Toronto Star <<http://www.thestar.com>>.

of the global setting in constitutional interpretation<sup>1018</sup> and called on the Canadian criminal system to borrow ideas from those in other countries.<sup>1019</sup> In his view, national and international legal systems should be harmonized for human rights and economic laws, “you cannot have a functioning global economy with a dysfunctional global legal system.”<sup>1020</sup> These local and trans-judicial activities are consistent with his global approach and the extensive usage of non-domestic legal sources in his decision-making in general, including in *Burns*, which he wrote.<sup>1021</sup>

Justice Bastarache is another judge of the SCC who has demonstrated clearly a “globalist” approach even before his contribution in *Burns*. He was an academic and legal practitioner with strong international law approach.<sup>1022</sup> As Chapter 4 demonstrates, Justice Bastarache was very involved in extrajudicial transnational activities of almost all forms. In his academic and public speeches, he acknowledges that he interacted with foreign justices during his career in the SCC; and also notes that the Court participates in various activities conducted by international organizations, including cooperation with foreign courts.<sup>1023</sup> In addition, he was a member of several international legal

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<sup>1018</sup> Ian Binnie, “Judging the Judges: May they boldly go where Justice Rand went before”, Fourth Annual Coxford Lecture, Western Law on February 16, 2012, online: <[http://law.uwo.ca/news/2012/ian\\_binnie\\_judges\\_the\\_judges\\_at\\_coxford\\_lecture.html](http://law.uwo.ca/news/2012/ian_binnie_judges_the_judges_at_coxford_lecture.html)>.

<sup>1019</sup> Justice Binnie, Canadian Institute for the Administration of Justice’s, Annual Conference 2013, Toronto, stating: “Canada should follow Australia in requiring more than DNA proof”, online: <<http://www.lawtimesnews.com/201310143527/headline-news/canada-should-follow-australia-in-requiring-more-than-dna-proof-binnie>>.

<sup>1020</sup> Cristin Schmitz, “Binnie calls for corporate accountability” *The Lawyers Weekly* (29 August 2008).

<sup>1021</sup> Makin, *supra* note 907.

<sup>1022</sup> For a short biography of the Honourable Michel Bastarache, see the official website of the SCC, online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=michel-bastarache>>. See also, Appendix 3 “Short Bio of Judges of the SCC”.

<sup>1023</sup> Bastarache, *supra* note 44. This paper is largely based on a speech delivered during the conference Law of the Future 2008 at the Peace Palace, The Hague, under the auspices of the Hague Institute for the Internationalization of Law, October 23, 24 2008. In his speech, Justice Bastarache admits that: “The Supreme Court of Canada takes part in a number of international organizations and contributes to a limited

organizations and/or associations, and recognized the importance of electronic instruments as tools for judicial networking.<sup>1024</sup> These views and the various extrajudicial activities of Justice Bastarache, suggest that they may have influenced the meaningful engagement with non-domestic legal sources in *Burns*.

Justice LeBel is another active judge participating in numerous extrajudicial activities with foreign counterparts during his tenure.<sup>1025</sup> In his academic papers Justice LeBel acknowledged that “the use of international law continues to rise,” and supported this movement proclaiming also that, “Courts should look forward to increased dialogue on this topic.”<sup>1026</sup> Through papers and conferences he went even further, advising judges to be informed about the global setting.<sup>1027</sup> In his view, it is no longer permissible for Canadian lawyers and judges to have a limited international legal understanding.<sup>1028</sup> Remarkably, Justice LeBel distinguished *Burns* as a SCC case with a strong globalist approach that used international and comparative law extensively. These findings suggest consistency between Justice LeBel’s transnational judicial activities, his globalist mindset

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number of projects designed to provide assistance to foreign courts [and] delegations from the Court visit colleagues in other countries and receive return visits by these colleagues”.

<sup>1024</sup> See for example: Bastarache, *supra* note 44. For a more comprehensive view on the extra-judicial activities of Justice Bastarache, see Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

<sup>1025</sup> For a more comprehensive view on the extra-judicial activities of Justice Louis LeBel, see Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”. See also, Appendix 3 “Short Bio of Judges of the SCC”.

<sup>1026</sup> LeBel & Chao, *supra* note 154 at 59.

<sup>1027</sup> The Honourable Louis LeBel, The Act of Judging Between Knowledge and Distance from the World, pg. 136, 2008 Judges’ Conference “Which Judge for Which Society?”. See also, Justice Louis LeBel, “Customary International Law and its Reception in Canada”, 2013 Viscount Bennett Lecture, October 22, 2013, UNB Faculty of Law, online:

<<http://www.unb.ca/fredericton/law/news/2013/viscountbennett2013.html>>.

<sup>1028</sup> The Honourable Louis LeBel, Effective use of International Law before Canadian Courts Conference, May 6, 2015, Kirsch Institute, online: <<http://www.kirschinstitute.ca/curriculum/effective-use-of-international-law-arguments-before-canadian-courts/>>.

as expressed in his academic papers, and the high engagement with non-domestic legal sources in his decision-making, including his contribution in *Burns*.

Justice Arbour is a former academic, international prosecutor, constitutional judge, high-ranking diplomat, and leader of a global NGO, with clearly demonstrated “globalist” approach.<sup>1029</sup> Before joining the SCC, she was already a global legal figure.<sup>1030</sup> She left her mark on international law as Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda (1996–1999). Later, she was appointed as Justice of the SCC (1999–2004), as the United Nations High Commissioner for Human Rights (2004–2008), and as President and CEO of the International Crisis Group (2009–2014).<sup>1031</sup> Her multidimensional career in international law and global concerns, as an academic,<sup>1032</sup> and particularly as international Chief Prosecutor, were very likely influential assets for the globalist approach of the SCC in deciding *Burns*. These international commitments, together with her participation in transnational judicial activities of the SCC,<sup>1033</sup> indicate a persuasive connection between her involvement in judicial sociological activities and the usage of non-domestic legal sources in her contribution in *Burns*.

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<sup>1029</sup> For a short biography of the Honourable Louise Arbour, see the official website of the SCC, online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=louise-arbour>>. For a more comprehensive view on the extra-judicial activities of Justice Arbour, see Chapter 4 “The Use of Extra-Judicial Mechanisms of JG by the SCC”. See also, Appendix 3 “Short Bio of Judges of the SCC”.

<sup>1030</sup> See the official website of the Government of Canada, Global Affairs Canada, on “Madam Justice Louise Arbour”, online: <[http://www.international.gc.ca/odskelton/arbour\\_bio.aspx?lang=eng](http://www.international.gc.ca/odskelton/arbour_bio.aspx?lang=eng)>.

<sup>1031</sup> For a short biography of the Honourable Louise Arbour, see the official website of the SCC, online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=louise-arbour>>.

<sup>1032</sup> She taught at Osgoode Hall Law School, York University, first as a Lecturer (1974), then as Assistant Professor (1975), Associate Professor (1977-87), and finally as Associate Professor and Associate Dean (1987).

<sup>1033</sup> For a more comprehensive view on the extra-judicial activities of Justice Arbour, see Chapter 4 “The Use of Extra-Judicial Mechanisms of JG by the SCC”.

Justice Major, in comparison to the eight other SCC judges that decided *Burns*, demonstrated the least “globalist” approach, with limited involvement in transnational judicial activities.<sup>1034</sup> He is generally perceived as believing in judicial deference to government decisions and had a concise style of writing.<sup>1035</sup> Although some considered him a restraint judge whose main philosophy was “judicial constraint”, on issues related with the Canadian Charter, yet, Justice Major has demonstrated a remarkable openness, which might have influenced also his decision-making in *Burns*.<sup>1036</sup> As Justice Major admits in a published interview, the “Charter of Rights and Freedoms was a big step forward for individual rights in Canada,” and courts were better able to address these issues than politicians were.<sup>1037</sup> He goes even further and recommends the deletion of Section 33 of the Charter of Rights and Freedoms—the “notwithstanding clause” which allows federal and provincial governments to override certain charter rights and freedoms.<sup>1038</sup> In addition, in his 13-year stint as justice of the SCC and as a member of the Canadian Institute for the Administration of Justice and the Canadian Judges Conference, no doubt, Justice Major have had numerous opportunities to meet, interact,

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<sup>1034</sup> See Table 2 and Table 3 in Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”, where Justice Major scored less than all the other 8 justices involved in *Burns*. See also, Appendix 3 “Short Bio of Judges of the SCC”.

<sup>1035</sup> See, Mattawa Historical Society News Release, Mattawa celebrates Supreme Court Justice John C Major, at the Mattawa and District Museum on Friday, July 1, 2015, online: <<https://www.baytoday.ca/local-news/mattawa-celebrates-supreme-court-justice-john-c-major-34094>>. In their news release, Mattawa Historical Society states about Justice Major that: “During much of his time of the Court, he was known for his belief in providing deference to government and for his particularly *succinct* writing style”.

<sup>1036</sup> Chris Schafer, Interview with former Supreme Court of Canada Judge John (Jack) Major, online: <<http://www.c2cjournal.ca/2012/03/interview-with-former-supreme-court-of-canada-judge-john-jack-major/>>.

<sup>1037</sup> *ibid.*

<sup>1038</sup> *ibid.*

network, and participate in various trans-judicial activities with foreign colleagues.<sup>1039</sup>

One might speculate that there is a correlation between his transnational judicial activities and his somewhat uncharacteristic choice to join the other 8 judges in *Burns*.

In conclusion, this analysis appears to demonstrate a reasonable connection between the participation of the SCC and its individual judges in extra-judicial transnational activities, the exposure towards more non-domestic legal sources, and the outcome in *Burns*.<sup>1040</sup> *Burns* was primarily decided based on non-domestic legal sources, and the participation in transnational judicial activities may have influenced the extent of this substantive engagement. As the data in Chapter 4 suggest, the more a judge is involved in such extrajudicial activities, the more non-domestic legal sources that judge is exposed to and arguably is willing to engage with.<sup>1041</sup>

## V. ROLE OF OTHER ACTORS

*Burns* demonstrates as well the significant influence of “other” non-judicial actors. It confirms my hypothesis—and in fact a key contribution of this doctoral research—that the process of transnational judicial dialogue occurs not only through the contributions of courts and judges but also through the influence of other actors. These, initially, less visible actors, play a role in the general process of the globalization of law, and they also affect the globalization of courts and their final decisions, as they did in *Burns*. In the previous chapters, beyond courts and judges, I have identified several other important

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<sup>1039</sup> For more detailed data about possible involvement in extra-judicial activities of Justice Major see Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”, and Appendix 3 “Short Bio of Judges of the SCC”.

<sup>1040</sup> As note above, the concepts of “connection” or “relationship” in this Chapter are not used in the strict statistical sense of the terms. Instead, their meaning is more generic as informed by the above analysis and the personal interviews with Justices of the SCC.

<sup>1041</sup> See Table 3, Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

actors, such as: parties and their counsel, interveners, NGOs, law clerks, the registrar, amici curiae, universities, judicial training institutions, and distinguished academics.<sup>1042</sup> Although this study is focused only on the role of the SCC, and its individual justices,<sup>1043</sup> to prove one of my sub-hypothesis that this process is highly influenced also by other actors, I examine also their role and influence on the decision-making in *Burns*. In the *Burns* case, three categories of actors were visible within the text of the decision: parties and their counsel, interveners, and academics.

Before analysing their individual role, it is important to note that the non-domestic legal instruments used in *Burns* were generally not initiated by the Court *suo moto* (on its own initiative). In fact, the other actors initiated almost all of them. Canada has an adversarial legal system, and parties and interveners are often the main actors to introduce non-domestic legal sources during SCC proceedings. It is the role of the parties to convince the Court that their perspective—often based on foreign authorities—on the case is right. Interestingly, in *Burns* the Court recognized explicitly that the respondents and interveners had provided international and comparative legal sources.<sup>1044</sup> However, for a comprehensive picture of the parties and intervener’ role in *Burns*, I have also examined their *facta*.

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<sup>1042</sup> See Chapter 2 “Understanding Transnational Judicial Dialogue from a Theoretical Perspective: An Overview of the SCC”, and Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”

<sup>1043</sup> For a more comprehensive on “Actors” see Chapter 1 “Introduction” and Chapter 2 “Understanding Transnational Judicial Dialogue from a Theoretical Perspective: An Overview of the SCC”.

<sup>1044</sup> The SCC admits it across the decision—and one of the most remarkable examples is in par 81—that Amnesty International submitted the information about non-domestic sources.

## 1. PARTIES AND THEIR COUNSEL

*Appellant:* The Minister of Justice relied almost entirely on domestic legal authorities in its factum; which did, however, cite the Washington legislation on the death penalty in brief and also the international bilateral extradition treaty.<sup>1045</sup>

*Respondents:* Burns and Rafay submitted separate facta on the first hearing of the case,<sup>1046</sup> and conjoint factum on the rehearing.<sup>1047</sup> On the first hearing, Burns relied almost exclusively on domestic legal instruments. The only non-domestic instrument that Burns referred were the bilateral international agreement between US and Canada,<sup>1048</sup> a brief analysis of the Washington Criminal Code regarding the death penalty,<sup>1049</sup> and a general mention of Canada's international obligations.<sup>1050</sup> Non-Canadian legal instruments were used superficially and were not considered a central reference for the outcome of the case.

This was also true for the second respondent, Rafay, whose factum cited no international treaties other than the bilateral extradition treaty.<sup>1051</sup> However, Rafay did introduce a short comparative element in his factum, by addressing the US position on the death penalty and considering it in "marked contrast to that of western countries."<sup>1052</sup>

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<sup>1045</sup> Appellant's Factum (The Minister of Justice), deposited on March 2, 1998.

<sup>1046</sup> See, Respondent Burns' Factum (Glen Sebastian Burns), deposited on May 15, 1998; and Respondent Rafay's Factum (Atif Ahmad Rafay), deposited on September 15, 1998. The first hearing was on March 22, 1999. Justices Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

<sup>1047</sup> Factum of the Respondents Glen Sebastian Burns and Atif Ahmad Rafay, deposited on April 11, 2000. The second hearings were held on May 23, 2000 and February 15, 2001. Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

<sup>1048</sup> Respondent Burns' Factum (Glen Sebastian Burns), deposited on May 15, 1998, at pp 10.

<sup>1049</sup> *ibid* at pp 2.

<sup>1050</sup> *ibid* at pp.14.

<sup>1051</sup> Respondent Rafay's Factum (Atif Ahmad Rafay), deposited on September 15, 1998, at pp. 4-5.

<sup>1052</sup> *ibid* at pp. 9, 26, 27, 28.

Rafay also mentioned the *Soering* case,<sup>1053</sup> in the list of authorities at the end of the factum, but did not elaborate an argument based on it.<sup>1054</sup>

At the rehearing, respondents Burns and Rafay introduced a joint factum and appeared with a much more cosmopolitan document relying heavily on non-domestic legal instruments. The real reasons for this shift are unknown, but based on the dates of the documents, it is very likely that they were inspired by the factums of the interveners who had a profound international and comparative vision. Hence, at the rehearing, respondents and their counsel took non-Canadian legal authorities much more seriously, relying on all four types of non-domestic legal sources: international treaties, international judgments, legislation of foreign nations, and decisions of foreign courts.

Regarding international treaties, they examined issues of citizenship in international law, relying on the *Universal Declaration of Human Rights*, Article 15; *International Covenant of Civil and Political Rights*, Article 25; and *Vienna Convention on Consular Relations*, Article 36.<sup>1055</sup> Interestingly, the respondents also based their arguments on other international treaties that are not binding on Canada, such as the bilateral extradition agreements between the US and other states,<sup>1056</sup> and on legislation of regional international organizations such as the Council of Europe and the European Union.<sup>1057</sup>

The respondents also brought to the attention of the SCC also decisions of several international courts. They mentioned *Soering* case from the ECtHR,<sup>1058</sup> and the acts and

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<sup>1053</sup> Eur. Court H.R., *Soering* case, judgment of 7 July 1989, Series A No. 161.

<sup>1054</sup> Respondent Rafay's Factum (Atif Ahmad Rafay), deposited on September 15, 1998, at pp 32.

<sup>1055</sup> Factum of the Respondents Glen Sebastian Burns and Atif Ahmad Rafay, deposited on April 11, 2000, at pp 13. Yet, the SCC in the final judgment did not use such acts.

<sup>1056</sup> *ibid* at pp 28. Yet, the SCC in the final judgment did not use these international instruments.

<sup>1057</sup> *ibid* at pp 51.

<sup>1058</sup> *ibid* at pp 63.

decisions of the International Criminal Court and the ad hoc International Courts on Former Yugoslavia and Rwanda.<sup>1059</sup>

The respondents also relied on legal sources of foreign nations (comparative law). They analyzed the Washington state criminal law and procedures,<sup>1060</sup> and drew attention to “the undeniable international trend in comparable countries to abolish the death penalty”,<sup>1061</sup> by citing decisions from other constitutional courts, including the South African Constitutional Court case on the death penalty,<sup>1062</sup> the Privy Council,<sup>1063</sup> and the Italian Constitutional Court.<sup>1064</sup>

Finally, the respondents openly invited the SCC to place its decision in the global context. Endorsing the position of Amnesty International, they argued that the majority of countries are now abolitionist *de jure* or *de facto*,<sup>1065</sup> and condemned the US as the only Western country that retains the death penalty.<sup>1066</sup> They specifically called on the SCC to look at Canada’s commitment to international law, and its active role in internationally advocating the abolition of the death penalty.<sup>1067</sup>

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<sup>1059</sup> *ibid* at pp 53.

<sup>1060</sup> *ibid* at pp 2.

<sup>1061</sup> *ibid* at pp 31.

<sup>1062</sup> *ibid* at pp 35 and 49. See case, *The State v. T Makwanyane and M Mchunu*, Case No. CCT/3/94 (June 6, 1995) (South Africa), par 88. Remarkably, this fragment of the South African case was cited in the final judgment in *Burns*.

<sup>1063</sup> Factum of the Respondents Glen Sebastian Burns and Atif Ahmad Rafay, deposited on April 11, 2000, at pp 35. See case, *Pratt v. Attorney General for Jamaica*, [1993] 4 All E.R. 769.

<sup>1064</sup> Factum of the Respondents Glen Sebastian Burns and Atif Ahmad Rafay, deposited on April 11, 2000, at pp. 51. However this case was not even mentioned by the SC in *Burns*.

<sup>1065</sup> This element appears to be key, because as a matter of fact, when it was considered by the SC in *Kindler*, La Forest stated that the “vast majority” of countries retained death penalty.

<sup>1066</sup> Factum of the Respondents Glen Sebastian Burns and Atif Ahmad Rafay, deposited on April 11, 2000, at pp. 49.

<sup>1067</sup> *ibid* at pp 47.

## 2. INTERVENERS

As stated above, my research revealed that the interveners were responsible for introducing almost all non-domestic legal sources in this case. This gives credibility to Justice Bastarache's comments in an academic article, acknowledging that "very few counsel have recourse to international instruments in their facta or oral arguments; most of the time an international perspective will be presented by *interveners* or raised by *members of the Court themselves*." [Emphasis added]<sup>1068</sup> The facta of Amnesty International, the International Centre for Criminal Law & Human Rights, Criminal Lawyers' Association (Ontario), Washington Association of Criminal Defence Lawyers, and Senate of the Republic of Italy, confirm Justice Bastarache's observation.

Amnesty International (AI)—one of the most influential and cosmopolitan interveners in this case—relied on all four types of non-domestic legal instruments and several of its arguments became key to the SCC's final judgment in *Burns*.

Regarding international law, AI stressed that the death penalty violated two fundamental human rights—the right to life and the right not to be subject to cruel and unusual punishment.<sup>1069</sup> It also invited the SCC to consider the "international trend towards the abolition of death penalty,"<sup>1070</sup> and the condemnation of the US death penalty by the international community.<sup>1071</sup> AI also referred to the Council of Europe and European Union resolutions on the death penalty, two regional organizations of which

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<sup>1068</sup> Bastarache, *supra* note 44 at 3.

<sup>1069</sup> Factum of the Intervener Amnesty International, deposited (unknown), at pp 2. They referred to: The Universal Declaration of Human Rights (Article 3, 5); International Covenant on Civil and Political Rights (Art 6,7).

<sup>1070</sup> Factum of the Intervener Amnesty International, deposited (unknown), at pp 6.

<sup>1071</sup> *ibid* at pp 8-9.

Canada is a non-member.<sup>1072</sup> AI also reminded the Court about the *Ng* petition in the UN Human Rights Committee that found Canada in violation of Article 7 of the Covenant in the extradition of *Ng*.<sup>1073</sup>

Regarding international case law, AI relied on the judgments of the International Court of Justice,<sup>1074</sup> the International Criminal Court, and the *ad hoc* courts for Rwanda and the Former Yugoslavia, as evidence that the jurisprudence of these courts rejects the death penalty.<sup>1075</sup> Surprisingly, the SCC did not include the case law of these international courts in *Burns*.<sup>1076</sup>

AI relied also on the law of other nations, stressing that new tendencies have emerged since *Kindler*. In 1991, Justice La Forest had written for the SCC that “the vast majority of the nations of the world retain the death penalty.”<sup>1077</sup> However, AI argued that his statement in *Kindler* had become outdated. Using statistics from UN documents, AI emphasised that over 102 countries had abolished the death penalty *de jure* or *de facto*.<sup>1078</sup>

AI brought the developments in the jurisprudence of other constitutional courts to the SCC’s notice, including the Constitutional Court of Italy,<sup>1079</sup> the Privy Council,<sup>1080</sup>

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<sup>1072</sup> *ibid* at pp 7.

<sup>1073</sup> *ibid* at pp 13.

<sup>1074</sup> *Paraguay v United States of America*, International Court of Justice 1998, interim order of April 9, 1998.

<sup>1075</sup> Factum of the Intervener Amnesty International, deposited (unknown), at pp. 8. See, “Statute of the International Criminal Tribunal for the former Yugoslavia,” S.C. Res. 827, Annex, art. 24; Statute of the International Criminal Tribunal for Rwanda,” S.C. Res. 955, Annex art. 23.

<sup>1076</sup> *Paraguay v United States of America*, International Court of Justice 1998, interim order of April 9, 1998.

<sup>1077</sup> *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779, pp. 5, 72 (according to the Word format).

<sup>1078</sup> Factum of the Intervener Amnesty International, deposited (unknown), at pp. 6.

<sup>1079</sup> *ibid* at pp 11. See case, *Venezia v United States*, Decision no. 223, June 25, 1996.

<sup>1080</sup> Factum of the Intervener Amnesty International, deposited (unknown), at pp. 11. See case, *Pratt v. Attorney General for Jamaica*, [1993] 4 All E.R. 769 (P.C.).

and the South African Constitutional Court,<sup>1081</sup> but the SCC relied only on the latter two in its final decision.

In conclusion, based on these non-domestic legal instruments, AI invited the Court to revisit their decision taken in September 1991 in the *Kindler* and *Ng* cases.<sup>1082</sup> Their key argument was the evolving international and comparative standards, and the increasingly new global consensus favouring abolition of the death penalty. According to AI, these factors were determinative in the constitutional evaluation and final decision in *Kindler*,<sup>1083</sup> and should therefore also apply in *Burns*. AI argued that the current decision should be based on the current global reality, under which, “extradition now to the death penalty would shock the conscience.”<sup>1084</sup> In their view, “to come to a decision in the present case that is correct in law, the Court (...) should address the current state of international law, not the state of international law as it was at the time that *Kindler* and *Ng* were decided.”<sup>1085</sup> Indeed, according to Canadian common law, international law knows no doctrine of *stare decisis*. While customary international law is part of Canadian common law, this refers to current customary international law, and not customary international law as determined by Canadian courts in the past.

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<sup>1081</sup> Factum of the Intervener Amnesty International, deposited (unknown), at pp. 11. See case, *The State v. T Makwanyane and M Mchunu*, Case No. CCT/3/94 (June 6, 1995) (South Africa).

<sup>1082</sup> Factum of the Intervener Amnesty International, deposited (unknown), at pp. 3. See cases, *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779; and, *Reference Re Ng Extradition (Can)* [1991] 2 SCR 858.

<sup>1083</sup> Indeed, such a idea was directly supported also by Justice La Forest who writing for the majority, stated openly in that case that: “In considering whether such surrender may constitutionally take place, the global setting where the vast majority of the nations of the world retain the death penalty must be kept in mind. (...) More important, it takes place in a global setting where the vast majority of the nations of the world retain the death penalty.” See, *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779, pp. 5, 72 (according to the Word format).

<sup>1084</sup> Factum of the Intervener Amnesty International, deposited (unknown), at pp. 4.

<sup>1085</sup> *ibid* at pp 5.

The International Centre for Criminal Law & Human Rights (ICCLHR) was another intervener that cited extensive international law—both binding and non-binding international treaties—in its factum. Their focus was on the right to life under international law, where they referred to *the Universal Declaration of Human Rights*,<sup>1086</sup> *the International Covenant of Civil and Political Rights*,<sup>1087</sup> *the American Declaration on the Rights and Duties of Man*,<sup>1088</sup> *the American Convention on Human Rights*,<sup>1089</sup> *the European Convention on Human Rights and Fundamental Freedoms*,<sup>1090</sup> and *the African Charter on Human and People's Rights*.<sup>1091</sup> Regarding the extradition bilateral treaty between US and Canada, the interveners called for an interpretation that was in accordance with Canada's other international human rights obligations and with international customary law.<sup>1092</sup>

The ICCLHR also included a comparative perspective. It analyzed the Washington state law and institutions in order to demonstrate the arbitrariness of the death penalty in the US;<sup>1093</sup> the abuse of foreign citizens in US death penalty cases;<sup>1094</sup> and the lack of meaningful appellate review of death sentences in Washington.<sup>1095</sup> Interestingly, the ICCLHR did not rely extensively on foreign case law. It also cited a Dutch case,<sup>1096</sup> as the best way to overcome *Kindler*.<sup>1097</sup> However, neither the Dutch case

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<sup>1086</sup> Factum of the Intervener International Centre for Criminal Law & Human Rights, deposited on February 5, 1999, at pp. 2. Article 3 of UDHR.

<sup>1087</sup> *ibid* at pp 2. Article 4,6 of ICCPR.

<sup>1088</sup> *ibid* at pp 3. Article 1 of ADRDM.

<sup>1089</sup> *ibid* at pp 4. Article 3 of ACHR.

<sup>1090</sup> *ibid* at pp 3. Article 2 of ECHR.

<sup>1091</sup> *ibid* at pp 3. Article 4 of ACHPR.

<sup>1092</sup> *ibid* at pp 3, 5, 16.

<sup>1093</sup> *ibid* at pp 6-7 and 10-11.

<sup>1094</sup> *ibid* at pp 8-10.

<sup>1095</sup> *ibid* at pp 13.

<sup>1096</sup> *ibid* at pp 17. See case, *Short v The Netherlands* 76 Rechtspraak van de Week 358; Dutch Supreme Court, Dec 30, 1990.

<sup>1097</sup> *ibid* at pp 19.

and nor the other international legal instruments were mentioned by the SCC in its judgment.

The Criminal Lawyers' Association Ontario (CLAO) also used foreign legal instruments in its arguments, and explicitly invited the SCC to “re-examine its decision in *Kindler* in light of developments in the jurisprudence in other countries, the acceptance of courts in the United States that the innocent may be executed, the racially discriminatory use of the death penalty in the United States, and the unfair nature of the trial process in death penalty cases in the US.”<sup>1098</sup> Although the intervener introduced comparative cases from the US, the UK, India, and Zimbabwe, the SCC only cited the UK and US cases, ignoring the cases from Zimbabwe and India.<sup>1099</sup>

The Washington Association of Criminal Defence Lawyers (WACDL), an active intervener, used all four types of non-domestic legal sources. The Association submitted that “the extradition of Canadian citizens to face the death penalty would subject them to a legal process which does not accord with international law.”<sup>1100</sup> They included two extremely important international treaties: the *International Covenant on Civil and Political Rights*,<sup>1101</sup> and the *Vienna Convention on Consular Relations*.<sup>1102</sup> Remarkably, the Vienna Convention was ignored and not included by the SCC in their final decision. This is a reminder that although the role of interveners is important in an adversarial

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<sup>1098</sup> Factum of the Intervener Criminal Lawyers Association, deposited on February 5, 1999, at pp. 1.

<sup>1099</sup> *ibid* at pp 13, 14.

<sup>1100</sup> Factum of the Intervener Washington Association of Criminal Defence Lawyers, deposited on February 24, 2000, at pp 3.

<sup>1101</sup> *ibid* at pp 4.

<sup>1102</sup> *ibid* at pp 7.

system, the SCC is the final authority in including or excluding non-domestic sources in its decision-making.

The WACDL also cited US cases from several state and federal courts, emphasizing that the US judicial system lacks fairness in the review process of capital convictions,<sup>1103</sup> and noted that the US jurisprudence indicates that “persons may be executed in the United States of America in violation of international covenants.”<sup>1104</sup> The WACDL also referred to two relevant decisions of the International Court of Justice, concerning the abuse of international law by the US in death penalty cases.<sup>1105</sup> Strikingly, both these judgments were not even mentioned by the SCC in its judgment in *Burns*. There might have been different reasons for this. Hence, it is important to note that, although the role of parties and interveners to introduce non-domestic legal sources is very important, the assessment, choice, and decision to include or ignore such foreign authorities in the final judgment, remains with the SCC and its judges.

The Senate of the Republic of Italy also introduced important non-domestic legal authorities, in all four forms. It submitted that “the extradition of the respondents without assurances that they will not face the death penalty (...) would also violate Canada’s international obligations under the International Covenant on Civil and Political Rights and other international agreements to which Canada is a signatory.”<sup>1106</sup> The Italian Senate noted the decision of the UN Human Rights Committee, stating that “the infliction of

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<sup>1103</sup> *ibid* at pp 9, 16.

<sup>1104</sup> *ibid* at pp 9.

<sup>1105</sup> *ibid* at pp 8-9. See cases, *Paraguay v United States*, International Court of Justice (April 9, 1998), General List 99; *Germany v United States*, International Court of Justice (March 3, 1999), General List No. 104),

<sup>1106</sup> Amended Factum of the Intervener, The Senate of the Republic of Italy, deposited on May 10, 2000, at pp. 4.

death penalty in the case of Ng was a violation of Article 7 of the International Covenant on Civil and Political Rights” by Canada.<sup>1107</sup> In fact, the SCC did not mention this instrument in its final decision.

The Senate also relied on the judgments of international courts, particularly on two judgments from the ECtHR. The first case was *Selmouni v. France*,<sup>1108</sup> which the Italian Senate considered to be very relevant, showing the need for the jurisprudence of domestic courts to keep pace with international human rights developments. While the SCC ignored this case, it relied on *Soering*,<sup>1109</sup> the second case cited in the Senate factum, and a key case for the final outcome in *Burns*.

The Italian Senate’s comparative references included laws of other nations in Europe regarding the abolition of death penalty, which stated that the 40 member-states of the Council of Europe would not extradite to the US without assurances.<sup>1110</sup> In addition, this intervener relied on relevant comparative case law from the constitutional courts of Italy, UK, France, Hungary, and South Africa.<sup>1111</sup> From this pool of cases, the SCC used only the cases from South Africa<sup>1112</sup> and the UK.<sup>1113</sup>

### 3. ACADEMICS

Academics are another category of actors that appear prominently in *Burns*. As a matter of fact, as Chapter 3 demonstrated, academics are cited and routinely included in almost all categories of cases of the SCC. In cases that involve the use of non-domestic legal

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<sup>1107</sup> *ibid* at pp 6.

<sup>1108</sup> *ibid* at pp 5. See case, *Selmouni v France*, ECHR, Application no. 25803/94, 28 July 1999, at par 101.

<sup>1109</sup> *ibid* at pp 6, 8.

<sup>1110</sup> *ibid* at, at pp 10. See also, Protocol 6 of the European Convention of Human Rights.

<sup>1111</sup> *ibid* at pp 19.

<sup>1112</sup> *The State v T Makwanyane and M Mchunu*, Case No. CCT/3/94 (June 6, 1995) (South Africa).

<sup>1113</sup> *Pratt v Attorney General for Jamaica* [1993] 4 All E.R. 769 (P.C.).

sources, such as *Burns*, scholarship helps judges better interpret international and comparative law and also introduces important research data.

In *Burns*, the SCC cites ten academic and newspaper publications.<sup>1114</sup> These publications provided the SCC with important statistics about abolition of the death penalty abolishment, extradition, death rows, error rates in capital cases; above all, these publications contributed to a better understanding of international and comparative law, practice, and policy on the death penalty and extradition.<sup>1115</sup> Academic commentaries also appeared in the factums of all counsel and interveners.<sup>1116</sup> Hence, *Burns* confirms that academic commentaries and publications of highly qualified academics and publicists were a significant help, not only for the SCC and its justices, but also for the parties and interveners.

#### 4. OTHER NON-VISIBLE ACTORS

In addition to the above visible actors, less-visible players may have inspired the use of non-domestic legal sources in *Burns*. As this study revealed, law clerks are important internal actors in finding such legal sources.<sup>1117</sup> Other studies have shown similar

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<sup>1114</sup> The publications that were cited in *Burns* are: Ken Armstrong & Steve Mills, “Death Row Justice Derailed: First of a Five-Part Series” (1999) Chicago Tribune; Leigh B Bienen, “The Quality of Justice in Capital Cases: Illinois as a Case Study” (1998) 61 Law & Contemp Probs 193; Herbert H Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996); John Kifner, “A State Votes to End Its Death Penalty: New Hampshire Legislature Acts, but Governor Pledges to Veto Bill” *The New York Times*, May 19, 2000, p. 16; Marc Lacey & Raymond Bonner, “Reno Troubled by Death Penalty Statistics” *The New York Times*, September 12, 2000, p. 17; James S Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, June 12, 2000; James S Liebman, Jeffrey Fagan & Valerie West, “Capital Attrition: Error Rates in Capital Cases, 1973-1995” (2000) 78 Tex L Rev 1839; William A Schabas, *The Abolition of the Death Penalty in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 1997); Berry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (New York: Random House, 2000); Welsh S White, “Capital Punishment’s Future” (1993) 91 Mich L Rev 1429.

<sup>1115</sup> For examples of how the SCC used in *Burns* these publications see, *United States v Burns* [2001] 1 SCR 283, par 33, 48, 91, 108, 109 and 110.

<sup>1116</sup> See factums of all parties and interveners in *Burns*.

<sup>1117</sup> See Chapter 4 “The Transnational Judicial Activities of the SCC and its Justices”.

results.<sup>1118</sup> After conducting interviews with justices from five constitutional courts—including four former and current judges of the SCC—Mak observed that law clerks play a significant role in research on foreign judgments and international law.<sup>1119</sup> She found that judges admit to asking their law clerks to conduct research on foreign cases, sometimes for even one third or half of their cases.<sup>1120</sup> Macfarlane, who interviewed several law clerks and judges of the SCC, also confirmed the important role of law clerks, whose main task is to “prepare bench memoranda for their justice on each case.”<sup>1121</sup> The length typically varies from 20–100 pages<sup>1122</sup> and includes research and references on non-domestic legal sources, particularly those in the factums.

Law clerks first refer to non-domestic legal sources brought forward by parties and interveners, or by reading related papers; sometimes they may make original contributions by introducing new foreign authorities. Thus, law clerks provide additional assistance to SCC justices. The final decision-making always remains with the justices who must exercise their discretion to refer or not to these non-domestic legal sources. In order to better comprehend their contribution, I tried to access the bench memos prepared by law clerks in *Burns*. However, I was told that they were considered confidential and were not available. Nonetheless, the role of law clerks although very important, is always indirect, and their influence varies from justice to justice.

To summarize, the analysis of the SCC judgment and facta in *Burns* confirms one of my central hypothesis that the role of “other actors”, such as parties and their counsel,

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<sup>1118</sup> Marie Gren, “An Empirical Study of Judicial Fertilization: The Use of Foreign Clerks by the Israeli Supreme Court” (IACL World Congress, Oslo, June 2014), online: <[jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws5/w5-gren.pdf](http://jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws5/w5-gren.pdf)>.

<sup>1119</sup> Mak, *supra* note 28 at 23-24.

<sup>1120</sup> Mak, *supra* note 28 at 23-24.

<sup>1121</sup> Macfarlane, *supra* note 987 at 90.

<sup>1122</sup> Macfarlane, *supra* note 987 at 90.

interveners, and academics, is highly significant to the process of transnational judicial dialogue, and particularly to the final outcome of cases. I have little doubt that in the absence of these actors, the SCC would have been much more Canadian-centric, and the outcome of *Burns* (and likely other decisions) would have been different. In an adversarial legal system like Canada, where courts perceive themselves as passive actors, it is only natural for them to follow their previous well-established precedent, if there is not a good reason to do otherwise. Indeed, as I have discussed above, during the first hearing, the parties and their counsel had a purely domestic approach in their factums, and tried to make their arguments without challenging the existing precedents. However, because of changes in the SCC's membership, the case received a second and a third hearing; at which five very active interveners were able to steer the case in a new direction.<sup>1123</sup> They introduced a completely new perspective and lent *Burns* into a cosmopolitan character, where the global context was the key concern. Moreover, both respondents, Burns and Rafay, changed their counsel and submitted an altogether different joint factum based on a more global perspective. And indeed, it worked.

## VI. CONCLUSION

The objective of this chapter was to examine whether the phenomenon of transnational judicial interaction with foreign counterparts, and more generally the process of globalization of courts, affected the outcome in *United States v Burns*.<sup>1124</sup> The quantitative data used in this study reveals the high number of non-domestic legal

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<sup>1123</sup> The Amnesty International; The International Centre for Criminal Law & Human Rights; The Criminal Lawyers' Association (Ontario); The Washington Association of Criminal Defence Lawyers; and The Senate of the Republic of Italy.

<sup>1124</sup> *United States v Burns* [2001] 1 SCR 283.

instruments cited by the SCC in *Burns*. This suggests that the Court has a global consciousness, indicating judges are aware of how these issues are regulated internationally and are resolved in other countries.

However, to obtain a more comprehensive picture, a qualitative analysis of this case was necessary. The goal was to determine which non-domestic legal instruments had a substantial impact on the outcome in *Burns*. The analysis reveals a number of key issues the Court confronted, including extradition, the death penalty, wrongful convictions, international relationships, and the proportionality test. In almost all these subjects, the SCC considered solutions from all four categories of non-domestic authorities. In deciding *Burns*, the SCC looked even beyond international legal instruments signed and ratified by Canada or by international organizations of which Canada is a member. In its legal analysis, the SCC acknowledged that the current understanding that national legal systems' need to simply take into account international law was outdated and inconsistent with the general principles of international law. Therefore, the Court analyzed national legal instruments to ensure compliance with international law.

Another significant aspect of *Burns* was Canada's international relationships with other nations, specifically the United States. By legally interpreting Canada's international relationships with foreign countries, the SCC shows that it perceives itself as an institution with jurisdiction to address national and international legal orders. The extensive use of international law in *Burns* suggests that the SCC views itself as the highest authority that can interpret international legal instruments in Canada. When a conflict between domestic and international law occurs, the SCC is expected to clarify the

compliance of domestic law with international standards. This dual role of the SCC as the highest authority of the interpretation of the Canadian Constitution and as an interpreter of international law, signals the Court is not only one of the most important domestic institutions, but also the highest agent of international law within Canada.

The analysis of *Burns* revealed a convincing relationship between the citation of non-domestic legal sources and the outcome of this case.<sup>1125</sup> Well-established precedents—*Kindler* and *Ng*—allowed for extradition to the United States without any assurances regarding the death penalty. *Burns* overturned well-established precedents that allowed for extradition to the United States without any assurances regarding the death penalty. The SCC reversed its own precedents by relying largely on non-domestic legal instruments, arguing that it indicated a significant movement towards international acceptance.<sup>1126</sup> In the final paragraph of the judgment, the SCC admitted that developments in relevant foreign jurisdictions were key in the balancing process and in the outcome of the case.

In the second part of Chapter 5, I investigated whether the extra-judicial activities of all judges who decided *Burns* might have influenced the judges to engage with non-domestic legal sources, and ultimately the outcome of the case. As a matter of fact, the vast majority of judges that have served on the SCC since 2000 actively participated in transnational judicial activities.<sup>1127</sup> However, it is exceedingly difficult to demonstrate conclusively that the nine judges who decided *Burns* were influenced by such participation. Theories of adjudication recognize judicial decision-making as a complex

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<sup>1125</sup> As noted above, the concept of “relationship” in this Chapter is not used in the strict statistical sense of the term. Instead, its meaning is more legal and generic, as informed by the above analysis and the personal interviews with Justices of the SCC.

<sup>1126</sup> *United States v Burns* [2001] 1 SCR 283, par 89.

<sup>1127</sup> For a broader view on such activities, see Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

process involving several variables and philosophies.<sup>1128</sup> Thus, while judges' activities may reasonably include these decisive variables, it is almost impossible to prove the existence of a direct relationship between the extrajudicial transnational activities of the SCC and the outcome of a case. Yet, the above analysis demonstrates a convincing relationship between the participation of the SCC and its individual judges in extrajudicial transnational activities, their increased engagement with non-domestic legal sources, and the outcome in *Burns*.

Of the seven judges who decided *Kindler* and *Ng*, only three were also present in *Burns*—McLachlin, L'Heureux-Dubé, and Gonthier. All three decided in favour of extradition without assurances in *Kindler and Ng*, but remarkably, all three changed their position in *Burns*. After examining the extra-judicial activities of the three judges who sat on all three cases, and then summarizing such activities of the six new justices, and based on the broader data of Chapter 4 on extrajudicial activities, the data show that the shift of jurisprudence from *Kindler* and *Ng* to *Burns* may have, at least in part, determined by the increase of transnational dialogue of the SCC and its justices. The results of this study, supported explicitly by several justices of the SCC, suggest that the higher the participation in transnational judicial activities, the higher the number of non-domestic legal sources judges are exposed to, and the greater their influence on judicial decision-

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<sup>1128</sup> Note that, although it appears that the process of transnational judicial dialogue may affect judicial decision-making and generally judicial behaviour, the study of the relationship between the existing theories of judicial behaviour and transnational judicial dialogue is beyond the scope of this study. As mentioned above, the most comprehensive way of analyzing judicial behavior and judgment, are the nine theories of judicial behavior developed by the American judge, Richard A Posner. According to him, the nine theories are: the *attitudinal*, the *strategic*, the *sociological*, the *psychological*, the *economic*, the *organizational*, the *pragmatic*, the *phenomenological*, and the *legalist theory*. Posner, *supra* note 277 at 19. Emmet Macfarlane, a Canadian political scientist that analyzed the judicial behavior the SCC and its judges also develop almost similar theories. According to him there are many factors that contribute to the work of the SCC, yet many of his finding “not only support the underlying theories of the attitudinal and strategic approaches, but also demonstrate how judicial policy preferences become influential in certain stages of the Court’s decision-making process”. See, Macfarlane, *supra* note 987 at 38.

making. Indeed, *Burns* is a case that was predominantly decided based on non-domestic legal sources, and a higher participation in transjudicial social activities likely influenced the extent of such references.

*Burns* is also excellent case for demonstrating the role and influence of other actors. It confirmed my hypothesis—and a key contribution of this doctoral research—that the process of transnational judicial dialogue occurs not only through the contributions of courts and judges but also through the influence of other actors. These often less visible actors play a role in the general process of the globalization of law, and affect the dialogue between courts and their final decisions, as they did in *Burns*. The analysis of the SCC judgment and *facta* in *Burns* suggests that the role of other actors, such as parties and their counsel, interveners, and academics, was highly significant to the process of transnational judicial dialogue, and particularly to the final outcome of this case. I have little doubt that in the absence of these actors, the SCC would have been much more Canadian-centric, and the outcome of this decision would have been a very different one.

In this chapter, I explored whether and to what extent the process of transnational judicial dialogue affected the decision-making of the SCC, using *US v Burns* as a case study. After carefully analyzing both the legal and extra-judicial aspects of this process, I became convinced that this type of transnational dialogue had a noteworthy influence on the decision-making of the SCC in *Burns*. However, without the comprehensive quantitative data examined in Chapter 3 and Chapter 4, which address the legal and extra-judicial aspects, respectively, of this process, the claim that transnational judicial dialogue influenced *Burns* would have carried much less weight.

Despite the convincing evidence of transnational judicial dialogue in *Burns*, and its likely impact on the overall decision-making of the SCC, it should be noted there are several weaknesses inherent in process of using a single case to demonstrate this relationship.

One possible critique is that *Burns* was an “easy” case, because it includes a foreign party (the United States) and involves the compulsory use of a non-Canadian legal instrument, the bilateral treaty on extradition. Although I acknowledge this as a fair critique, I chose *Burns* because it met the fundamental criteria around which the judicial dialogue and interaction is built. *Burns* dealt with universal and difficult matters such as the death penalty and extradition, it involved the extensive use of international and comparative law, and it referred to transnational legal standards. In short, it was a case that involved extensive recourse to non-domestic legal sources, which significantly affected its outcome.

That said, however, sceptics may argue that the references to non-domestic legal sources were not very significant for the outcome of the case, and may point to other factors such as internal factual developments. No doubt, the outcome in *Burns*, as in every other case, is a product of multiple factors and actors. Domestic legal or factual developments may have played a role; in fact, the Court explicitly holds that in the balancing process, it ought to rely on both “factual developments in Canada and in *relevant foreign jurisdictions*” [Emphasis added].<sup>1129</sup> Yet, we need to recognize that many of these “factual developments in Canada” are connected with its involvement in

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<sup>1129</sup> *United States v Burns* [2001] 1 SCR 283, par 144. The SCC concluded that: “The “balancing process” must take note of factual developments in Canada and in relevant foreign jurisdictions. When principles of fundamental justice as established and understood in Canada are applied to these factual developments, many of which are of far-reaching importance in death penalty cases, a balance which tilted in favour of extradition without assurances in *Kindler and Ng* now tilts against the constitutionality of such an outcome. For these reasons, the appeal is dismissed.”

international communities. One dimension of that involvement has been the participation of the Canadian judiciary, in the early 21<sup>st</sup> century, in transnational judicial meetings and networking activities with foreign counterparts, that in turn has led to greater awareness and more extensive use of non-domestic legal sources in the SCC's decision-making. In *Burns*, the process of transnational judicial interaction, and particularly the citation of non-domestic legal sources, were persuasively connected to and influenced the outcome of the decision.

Sceptics may also claim that non-Canadian legal sources were used in *Burns* to justify decisions that the Court may have made on other grounds.<sup>1130</sup> However, when engaging with non-domestic legal sources, constitutional courts, including the SCC, are extremely cautious. To avoid accusations of illegitimate use or over-dependence on external legal sources, courts may compensate by avoiding or concealing their reliance on such sources. And indeed, as I show in Chapter 6, many of such foreign influence are covered. In *Burns*, although the SCC was aware of such possible criticisms, it did not—and perhaps could not—hide the extensive use of non-domestic legal sources. Instead, the Court openly admitted that external sources were key to the final outcome of the case, a statement that the SCC included even in the very final passage of the judgment.<sup>1131</sup>

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<sup>1130</sup> There are scholars claiming that the Supreme Court of Canada's use of foreign materials is generally *legitimizing* in nature. In other words, they suggest that the SCC judges use foreign case law to justify decisions already made. See, Roy, *supra* note 146 at para 26, 60, 97. Bushnell is another scholar claiming that Canadian judges adopt foreign jurisprudence if they generally agree with the foreign decision, but ignore it if they disagree with it. See, Bushnell, *supra* note 154.

<sup>1131</sup> *United States v Burns* [2001] 1 SCR 283, par 144. The SCC concluded that: "The "balancing process" must take note of factual developments in Canada and in relevant foreign jurisdictions. When principles of fundamental justice as established and understood in Canada are applied to these factual developments, many of which are of far-reaching importance in death penalty cases, a balance which tilted in favour of extradition without assurances in *Kindler and Ng* now tilts against the constitutionality of such an outcome. For these reasons, the appeal is dismissed."

“Cherry-picking” is yet another possible critique, often identified as a weakness of the judicial dialogue. However, my qualitative analysis of *Burns* showed that the use of non-domestic legal sources was systematic.<sup>1132</sup> The SCC did not randomly pick non-domestic jurisprudence in its favour. In fact, the Court cautiously identified the lengthy judicial conversation on extradition in death penalty cases and the death penalty in general. In its first encounter with the issues, in *Kindler* and *Ng*, the SCC rejected the ECtHR decision in *Soering*, allowing extradition without assurances in death penalty cases. In 2001, after closely following the transnational judicial conversation, the SCC abandoned its previous position, agreeing that extradition in cases in which the death penalty was a possible outcome violated both the Canadian constitution and international standards.<sup>1133</sup> Although the SCC does not explicitly acknowledge its participation in the judicial dialogue, its effects are reflected in the content and arguments in the *Burns* judgment.

In conclusion, I should note that using of a single case, *Burns*, as an analytical tool, was a very important exercise for this study. Both, the comprehensive quantitative data on the amount of citation of non-domestic legal sources by the SCC in 2000–2016 provided by Chapter 3, and the data on the engagement of the SCC and its judges in extra-judicial transnational activities in Chapter 4, were crucial for revealing and comprehending the broader picture of this phenomenon. The goal of this chapter was to expose how both legal and extra-judicial mechanisms shaped the decision in *Burns*.

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<sup>1132</sup> See above the Section VI, where I deal with the *cross-fertilization of constitutional jurisprudence and emerging of trans-judicial dialogue*. In that section I showed how the SCC participated actively in the judicial dialogue with other international and foreign courts, about death penalty and extradition issues.

<sup>1133</sup> *United States v Burns* [2001] 1 SCR 283.

However, a question remains: Does the process of transnational judicial dialogue produce broader effects? The next chapter seeks to answer this question.

## **CHAPTER 6**

# **THE IMPACT OF THE TRANSNATIONAL JUDICIAL DIALOGUE OF THE SCC**

### **I. INTRODUCTION**

This research reveals that the SCC and its individual justices participate extensively in transnational judicial dialogue, not only through the citation of non-domestic legal sources, but also via a number of extra-judicial mechanisms. However, it is yet to be determined whether this entire socio-legal phenomenon has any concrete effect on the SCC or beyond. This question will be addressed in this final Chapter.

The process of transnational judicial dialogue and more broadly of globalization of the judiciaries has been a subject of discussion for both academics and judges. However, as has been noted in previous chapters, the majority of scholarship seems to be focused on the citation of foreign or international legal sources, rarely dealing with its possible effects. Also, the scholarship that addresses other forms of interaction among courts and judges (which I call extra-judicial dialogue) and their influence is rare.<sup>1134</sup>

Perhaps the literature shies away from this subject because it is difficult to trace all the different forms of transnational judicial interaction, and even more challenging to

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<sup>1134</sup> For few examples, see: *Judicial Dialogue and Human Rights*, Amrei Müller, ed, Studies on International Courts and Tribunals (Cambridge: Cambridge University Press, 2017); L'Heureux-Dubé, *supra* note 37; Frishman, *supra* note 70 at 1.

demonstrate their effects. These difficulties are acknowledged by one of the most “globalist” judges, Justice L’Heureux-Dubé. She observed:

First, it is appropriate to note the difficulty of coming to conclusions about the impact of a given court on others. Though an examination of the number of citations to the judgments of a certain court may generate impressive statistics, these statistics only give a partial picture of a court's “impact”. . . . “Impact,” in short, is impossible to completely assess in a scientific way and its measure will necessarily be based on general impressions formed by talking to judges and reading judgments from around the world.<sup>1135</sup>

After completing this study, I am convinced that Justice L’Heureux-Dubé is correct, particularly her observation that “these statistics only give a partial picture of a court’s ‘impact.’”<sup>1136</sup> Therefore, to paint a fuller picture of a court’s impact, in this Chapter I will try to assess the effect of the entirety of the SCC’s transnational judicial dialogue, looking beyond the statistics of citation of non-domestic legal sources.

As demonstrated in Chapter 4, the SCC and its judges actively participate in many extra-judicial activities with their foreign counterparts. These activities should be included in the analysis. In addition, the effects of transnational judicial dialogue can only be assessed by observing the impact this dialogue has on other actors or factors. As one of the judges I interviewed noted, “This process impacts not just our decision-making, it impacts our court management and internal processes, it influences the way we judges think, and certainly the impact goes beyond our institution.”<sup>1137</sup>

This remarkable statement has shaped this final chapter, in which the primary effects of the transnational judicial dialogue of the SCC and its judges will be identified. The first section, which comprises the majority of the chapter, will examine both legal

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<sup>1135</sup> L’Heureux-Dubé, *supra* note 37 at 27.

<sup>1136</sup> L’Heureux-Dubé, *supra* note 37 at 27.

<sup>1137</sup> Interview with Anonymous Justice 1.

and extra-judicial forms of transnational judicial interaction, and will assess whether such communication mechanisms have affected the SCC in its decision-making and institutional arrangements. Second, the effects of the process on individual judges will be outlined. Third, although beyond the aim of this study, in order to encourage future research on this topic, I will share my findings that demonstrate that this process has broader national, transnational, and international impacts. In the fourth section, the possible risks inherent in transnational judicial interaction will be highlighted. Fifth, I share the interviewed justices' views on the future of transnational judicial dialogue, particularly the challenges it may face, and I bring my own reflections. Finally, I conclude by focusing on the motives the interviewed justices offered regarding why they engage in such interaction, and reflect on which theories of judicial globalization inform this process.

## **II. THE IMPACT ON THE DECISION-MAKING OF THE SCC**

The goal of this section is to identify the effects of the SCC and its judges' transnational judicial interactions on the decision-making of the Court. In this section, both the legal and extra-judicial mechanisms of such interaction will be analyzed.

First, it is essential to note that the ten current and former judges of the SCC interviewed for this study all agreed that transnational judicial dialogue influences the decision-making of the Court. However, they differ as to the extent of such an impact, and often do not agree on the ways in which it occurs. The judges also indicated that there is a noticeable difference between the impact caused by the citation of non-

domestic legal sources (legal mechanisms) and the influence of outside the courtroom activities with foreign courts and judges (extra-judicial mechanisms). The following analysis is made with this crucial distinction in mind.

## 1. THE IMPACT OF CITATION OF NON-DOMESTIC LEGAL SOURCES

As shown in Chapter 3, the SCC references a significant amount of non-domestic legal sources of both an international and a comparative nature. This section will explore whether these non-domestic legal sources influence the decision-making of the Court in any way.

First, however, it is essential to note the critical distinction between international legal sources (originating from international institutions), and comparative legal sources (originating from institutions of other nations). One judge emphasized, “One thing that is important: We need to distinguish between international law and comparative law of other nations. To me they are very different.”<sup>1138</sup> The majority of the judges hold this view; even the judges who do not explicitly refer to this distinction implicitly recognize a noticeable difference in the impact of international legal sources and comparative sources. Various scholars and even written constitutions have also noted this distinction.<sup>1139</sup> In addition, the empirical results showed in this study support this assertion.

There is no doubt that international law is different from comparative law, not only because of its origin, jurisdiction, institutions, implementation, and way of operating, but because it is entirely different in terms of its impact on the legal order of states.

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<sup>1138</sup> Interview with Anonymous Justice 2. See also, McLachlin, *supra* note 154 (Decision-making in the SC); Slaughter, *supra* note 81 at 199.

<sup>1139</sup> There are also constitutions that make this difference between international and comparative legal sources. See for example: Constitution of South Africa (1996), art 39: “(1) When interpreting the Bill of Rights, a court, tribunal or forum-(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.” See also, Slaughter, *supra* note 81 at 199; Mak, *supra* note 28 at 3.

Despite the different legal systems (monist, dualist, or hybrid) each state uses to structure its relationship with international law, international legal instruments ratified by that nation are legally binding. On the other hand, comparative law, which draws upon legal sources from other states, including foreign constitutions, legislative acts, and court decisions, has no legal effect in other jurisdictions (it may be only persuasive). With this important distinction in mind, the following sections analyze the effects of the citation of both international and comparative legal sources.

#### A. THE IMPACT OF INTERNATIONAL LEGAL SOURCES

As defined in Chapter 1, international legal sources include all formal primary sources, including international conventions, international customs, and the general principles of law recognized by civilized nations; and secondary sources, such as judicial decisions of international or supranational courts, recognized by Article 38 of the Statute of the International Court of Justice.<sup>1140</sup> To better assess the impact of international legal sources on the decision-making of the Court, both quantitative and qualitative analyses are necessary. Before entering into the qualitative analysis, the main quantitative empirical findings of Chapter 3 will be shortly summarized.

In Chapter 3, a comprehensive quantitative study of all forms of non-domestic legal sources referenced by the SCC was performed. The results show that the Court used both primary and secondary international legal sources. The Court's use of international treaties is particularly intriguing; it referenced a treaty from a global or regional international organization, including bilateral treaties with another state, at least once in

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<sup>1140</sup> *Statute of International Court of Justice*, TS 993 art 38/1 § a-d (entered into force 24 Oct 1945).

each of the 17 years of the study,<sup>1141</sup> 336 times total. On average, the SCC referred to international treaties approximately 20 times per year, in 110 different decisions. Chapter 3 also revealed that the SCC consulted in total 191 different international treaties,<sup>1142</sup> including those that Canada has not ratified and those adopted by international organizations of which it is not a member.<sup>1143</sup>

The results also show that during 2000–2016, the SCC has cited in total 126 decisions of international courts, in 54 of its judgments.<sup>1144</sup> The data also reveals that the SCC cited precedents from 14 different international and supranational courts and *quasi* courts.<sup>1145</sup>

When analyzing the effect of international legal sources on the decision-making of the SCC, the number of different fields of law cited should be considered. As seen in Chapter 3, the Court has cited international precedents in 13 different fields of law, both public and private, most often constitutional law, immigration law, criminal law and administrative law.<sup>1146</sup> Meanwhile, the SCC references to international treaties were even more diverse, encompassing 30 different fields of law, both public and private.<sup>1147</sup>

This quantitative picture of the use of international legal sources by the SCC, detailed in Chapter 3, reveals essential elements of the story, but it is necessary to go deeper. Examining specific cases reveals whether international sources were important in the decision-making of the SCC. Chapter 5 does just that in providing a qualitative

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<sup>1141</sup> See Chapter 3, Table 17.

<sup>1142</sup> See Appendix 2 “Data About the Citation of International Treaties by the SCC (2000-2016)”.

<sup>1143</sup> The most notable instance constituting also the second most cited international document by the SCC, is the *European Convention of Human Rights*, which is the key supranational document of the European legal order on human rights (under the Council of Europe).

<sup>1144</sup> See Chapter 3, Table 15.

<sup>1145</sup> See Chapter 3, Table 16.

<sup>1146</sup> See Chapter 3, Figure 19.

<sup>1147</sup> See Chapter 3, Figure 20.

analysis of the *Burns* case,<sup>1148</sup> explaining how these international sources were arguably determinative for the outcome of the case.

Yet a question remains: was the Court's decision-making influenced by international legal sources during other cases? This question was posed to the ten interviewed judges. Eight spoke explicitly about the effect of international law on the decision-making of the Court, and declared that international legal sources have greatly influenced the outcome of several of the decisions at the SCC. As one judge noted, "International treaties had real influence and were of great importance in a good number of cases of the SCC."<sup>1149</sup>

Before mentioning specific cases, judges were careful to describe the broader relationship between the Canadian legal order and international legal sources, from a constitutional perspective. As one judge explained, "Like the UK, formally speaking, Canada has a dualist system of international law about the incorporation of international law."<sup>1150</sup> The judge clarified, "After the Charter, in matters of human rights, international treaties started to influence and maybe govern our interpretation of the Canadian Charter. So, international treaties did not come through the door, but they came through the window."<sup>1151</sup> In the view of this judge, this method of applying international treaties began in the 1980s with the former Chief Justice Dickson, and was developed further in subsequent years. Since then, the guiding principle is that the protection of human rights under the Charter should not be inferior to those international treaties to which Canada is

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<sup>1148</sup> *United States v Burns* [2001] 1 SCR 283.

<sup>1149</sup> Interview with Anonymous Justice 10.

<sup>1150</sup> Interview with Anonymous Justice 10.

<sup>1151</sup> Interview with Anonymous Justice 10.

a party.<sup>1152</sup> The international standards serve as a minimum threshold, below which the interpretation of the Charter by the SCC cannot go. The same judge explained that, with the increase of communication among judges and courts, the importance of and reference to international treaties has increased. In his view, “International treaties define the values and the approach to fundamental rights in modern constitutional democracies, including Canada.”<sup>1153</sup>

Two other judges also mentioned the importance of international law to the constitutional perspective. One noted:

We do look at international law and we are guided by the Canadian constitutional framework. And in my view, we use international law quite frequently. International laws have been often used and applied and the Court has relied on them.<sup>1154</sup>

The other judge stated, “When Canada is a member of an international treaty, of course the Court would apply and uphold that treaty to respect Canada’s international obligations.”<sup>1155</sup>

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<sup>1152</sup> The starting point of such an understanding of international law is the oft-quoted passage from the dissenting judgment of Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 (Justice Dickson dissenting): “Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1984] 1 S.C.R. 295, at p. 344, interpretation of the *Charter* must be “aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter’s* protection”. The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of the “full benefit of the *Charter’s* protection”. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada’s international obligations under human rights conventions.” [Emphasis added]

<sup>1153</sup> Interview with Anonymous Justice 10.

<sup>1154</sup> Interview with Anonymous Justice 3.

<sup>1155</sup> Interview with Anonymous Justice 7.

Another judge approached the question from a different perspective, emphasizing that many existing Canadian statutes and regulations are in fact nothing more than international legal norms transformed into domestic legislation. In his view, many international treaties have been introduced into various areas of domestic legislation at the federal or provincial level, often without reference to their international origin. He remarked:

I think that lot of domestic law now, especially in international commerce or international criminal law, is really international law. It is enacted as Canadian law, but in fact is either completely taken from or heavily relying on Canada's obligations in international conventions and treaties. So it is inevitable that this kind of exchanges will occur between courts. It even seems desirable that if countries enter into international arrangements, those arrangements should be understood in the same way by all parties. And the role of the supreme courts is key in establishing this common understanding through their final interpretation.<sup>1156</sup>

It appears that, in states in which domestic legislation is similar and the same recognized international legal norms are followed, exchange between national courts is not only possible, but also beneficial. The highest courts contribute to the establishment of a common and harmonious interpretation of such international norms, which then influence their decision-making.

Almost all the interviewed justices mentioned cases in which international legal sources had a direct influence on the SCC's decision-making. One judge emphasizes the importance of international treaties in a case from 2007:<sup>1157</sup>

International treaties were of great importance for the outcome of *Health Services* case. In this case, based on international treaties, we changed the interpretation of the guarantee of the freedom of association. We looked at relevant international instruments to which Canada was a party, to hold

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<sup>1156</sup> Interview with Anonymous Justice 9.

<sup>1157</sup> *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27.

that the current interpretation of this right was inconsistent with the approach in international law.<sup>1158</sup>

When reviewing the content of this judgment, I found the SCC relied on four different international treaties, which were fundamental to the outcome.<sup>1159</sup>

The same judge also referenced two 2015 cases, *Mounted Police Association of Ontario (MPAO) v. Canada*,<sup>1160</sup> and *Saskatchewan Federation of Labour v. Saskatchewan*,<sup>1161</sup> which address the right to organize, bargain collectively and strike. The judge notes that international legal norms were used extensively and ultimately influenced the outcome of these cases. From my research I found that in the *MPAO* case, the SCC cites two instances of foreign judgments,<sup>1162</sup> three international treaties,<sup>1163</sup> and one international court judgment,<sup>1164</sup> whereas in *Saskatchewan* it cites the constitutions of

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<sup>1158</sup> Interview with Anonymous Justice 10.

<sup>1159</sup> *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17; *Declaration on Fundamental Principles and Rights at Work*, 6 IHRR 285 (1999); *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 22(1), (2); *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, Art. 8(1)(c).

<sup>1160</sup> *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3.

<sup>1161</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245.

<sup>1162</sup> *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)

<sup>1163</sup> *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17, art. 9; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 22; *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, art. 8..

<sup>1164</sup> *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII (ECtHR).

five nations,<sup>1165</sup> six international treaties,<sup>1166</sup> three decisions of foreign courts,<sup>1167</sup> and three judgments of international courts.<sup>1168</sup>

The same judge also pointed to the *Kazemi* judgement as an example of the importance of international legal sources.<sup>1169</sup> In this case, the SCC considered whether Canadian courts could entertain claims involving the institutions of states that had used torture on Canadian citizens. The judge notes, “We used international instruments, and there was much discussion about how to interpret the Canadian statutes in the spirit of international treaties, and we relied on international law to resolve this case.”<sup>1170</sup> A review of this case reveals that the SCC cited all four forms of non-domestic legal sources: 9 instances of foreign legislation, 8 examples of foreign judgments, 17 international treaties, and 11 international court decisions.<sup>1171</sup>

The judge also mentioned cases like *Ezokola v. Canada*,<sup>1172</sup> where the Court “looked a lot at international treaties, and even at the jurisprudence of international courts, and even relied on them” when making its decision.<sup>1173</sup> These cases, said the judge, “are

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<sup>1165</sup> *Constitution of France*, preamble § 7; *Constitution of Italy*, art. 40; *Constitution of Portugal*, art. 57; *Constitution of South Africa*, s. 23(2); *Constitution of Spain*, art. 28(2).

<sup>1166</sup> Charter of the Organization of American States, Can. T.S. 1990 No. 23, art. 45(c); *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17, art. 3(1); *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 [*the European Convention on Human Rights*], art. 11; *European Social Charter*, E.T.S. No. 35 [revised E.T.S. No. 163], art. 6(4); *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 22; *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, art. 8(1), (2), (3).

<sup>1167</sup> *Attorney-General v. National Labour Court*, [1995-6] Isr. LR 149 (Israel Supreme Court); *New Histadrut General Workers' Union v. State of Israel*, [2006] 25 ILLR 375 (Israel Supreme Court); *Koach La Ovdim v. Jerusalem Cinematheque*, [2009], 29 ILLR 329 (Israel Supreme Court).

<sup>1168</sup> *Demir v. Turkey*, No. 34503/97, ECHR 2008-V (ECtHR); *Enerji Yapi-Yol Sen v. Turquie*, No. 68959/01, 21 April 2009 (HUDOC) (ECtHR); *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, No. 31045/10, 8 April 2014 (HUDOC) (ECtHR).

<sup>1169</sup> *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176.

<sup>1170</sup> Interview with Anonymous Justice 10.

<sup>1171</sup> See, *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176.

<sup>1172</sup> *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678. In this case the SCC referred to 3 international treaties and conventions and 7 cases from international courts.

<sup>1173</sup> Interview with Anonymous Justice 10.

just four to five examples that come to my mind right now, but there are certainly many others.”<sup>1174</sup>

Other justices highlighted different SCC judgements to demonstrate the impact of international law on the Court’s decision-making. *Spraytech*<sup>1175</sup> and *Baker*<sup>1176</sup> were discussed by one judge.<sup>1177</sup> According to the judge, in *Baker*,<sup>1178</sup> the Convention on the Rights of the Child, namely the “highest interest of the child” principle, was a key factor in its outcome.<sup>1179</sup> The Court found that this international principle had not been taken into account by the immigration officer, and therefore decided in favour of Baker. In *Spraytech*, the SCC determined that exhaustive proof of the danger of pesticides to public health was not necessary, relying on the “precautionary principle” which is considered part of customary international law.<sup>1180</sup> In this case, the SCC not only cited previous cases that clarified the status of international law within the domestic legal order, such as *Baker*,<sup>1181</sup> but also relied on two cases from the Supreme Court of India, which considered the precautionary principle to be “part of the Customary International Law.”<sup>1182</sup>

The judges mentioned a number of other cases in which non-domestic legal sources, particularly international sources, were considered decisive for the outcome of the case, including *Burns*,<sup>1183</sup> *B010 v Canada*,<sup>1184</sup> *Thibodeau v Air Canada*,<sup>1185</sup> *Peracomo*

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<sup>1174</sup> Interview with Anonymous Justice 10.

<sup>1175</sup> *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 SCR 241, 2001 SCC 40

<sup>1176</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

<sup>1177</sup> Interview with Anonymous Justice 1.

<sup>1178</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

<sup>1179</sup> Interview with Anonymous Justice 1.

<sup>1180</sup> Interview with Anonymous Justice 1.

<sup>1181</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817

<sup>1182</sup> *A.P. Pollution Control Board v. Nayudu*, 1999 S.O.L. Case No. 53, at para. 27; *Vellore Citizens Welfare Forum v. Union of India*, [1996] Supp. 5 SCR 241.

<sup>1183</sup> *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283.

*v. Telus*,<sup>1186</sup> *Bedford*,<sup>1187</sup> *Suresh*,<sup>1188</sup> *Khadr*,<sup>1189</sup> and *Carter*.<sup>1190</sup> *Burns*,<sup>1191</sup> analyzed extensively in Chapter 5, was mentioned by several justices as one of the most significant cases in this category.<sup>1192</sup> The judges were explicit in stating that international legal sources were decisive for the outcome of these cases.

It is worth noting that two judges stated that international treaties, combined with judgments of international courts, or judgments of other nations, were not only decisive for the outcome of certain cases; at times they caused the SCC to change settled precedents and embrace a different legal rule.<sup>1193</sup> They referred to the change from *Kindler*<sup>1194</sup> and *Ng*<sup>1195</sup> to *Burns*,<sup>1196</sup> explained in Chapter 5, and the shift from *Rodriguez*<sup>1197</sup> to *Carter*,<sup>1198</sup> where the court allowed medical assistance to dying.

In my research, I found other cases in which the SCC not only referred to international decisions, but according to the text of the judgements, “applied” international court decisions and overturned its previous well-established practice. For example, in *Mugesera v. Canada*,<sup>1199</sup> the SCC overruled its established precedent in *R. v. Finta*<sup>1200</sup> by referring to and directly applying 12 decisions of several international courts

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<sup>1184</sup> *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704.

<sup>1185</sup> *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 SCR 340.

<sup>1186</sup> *Peracomo Inc. v. TELUS Communications Co.*, 2014 SCC 29, [2014] 1 SCR 621.

<sup>1187</sup> *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 SCR 1101

<sup>1188</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.

<sup>1189</sup> *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 SCR 125.

<sup>1190</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.

<sup>1191</sup> *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283.

<sup>1192</sup> Interview with Anonymous Justice 1, Justice 2, and Justice 3.

<sup>1193</sup> Interview with Anonymous Justice 1 and Justice 7.

<sup>1194</sup> *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779.

<sup>1195</sup> *Reference Re Ng Extradition (Can.)*, [1991] 2 SCR 858.

<sup>1196</sup> *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283.

<sup>1197</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519.

<sup>1198</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.

<sup>1199</sup> *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 2005.

<sup>1200</sup> *R. v. Finta*, [1994] 1 SCR 701.

such as the International Criminal Tribunal for Rwanda,<sup>1201</sup> the International Criminal Tribunal for the former Yugoslavia,<sup>1202</sup> and the International Court of Justice.<sup>1203</sup> In this case, the SCC also referred to four international treaties.<sup>1204</sup>

Yet another judge indicated international legal sources were crucial in two other cases:

Foreign legal sources have real impacts, and in some areas, I think they have been *decisive*. Right now, I can think of at least two cases. One had to do with the international convention of carriage by air in *Thibodeau v Air Canada*, and the other case had to do with the marine collision convention, which I think was a case from Quebec, *Peracomo v Telus*. In both cases, there was a significant body of jurisprudence from other courts from around the world, interpreting the very same provisions of international conventions that we were dealing with. So, I think *is fair to say that, in at least several cases that come to my mind right away, the foreign jurisprudence was very important for the final decision*. Especially in the case of carriage by air that comes to my mind now,<sup>1205</sup> there were emerging two approaches to the interpretation. The Supreme Court of the United States, the Supreme Court of the United Kingdom, and I think the High Court of Australia, had all gone one way, and so did we.<sup>1206</sup> [Emphasis added]

Upon further examination of these cases, I confirmed the SCC had relied heavily on all four forms of non-domestic legal sources. In *Thibodeau*,<sup>1207</sup> the SCC cited 16 judgments

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<sup>1201</sup> *Prosecutor v. Akayesu*, 9 IHRR 608 (1998), aff'd Case No. ICTR-96-4-A, 1 June 2001; *Prosecutor v. Ruggiu*, 39 ILM 1338 (2000); *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T-I, 3 December 2003; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T-I, 6 December 1999; *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T-II, 21 May 1999.

<sup>1202</sup> *Prosecutor v. Kunarac, Kovac and Vukovic*, ICTY, Case Nos. IT-96-23-T-II & IT-96-23/1-T-II, 22 February 2001, aff'd Case Nos. IT-96-23-A & IT-96-23/1-A, 12 June 2002; *Prosecutor v. Blaskic*, 122 ILR 1 (2000); *Prosecutor v. Kordic and Cerkez*, ICTY, Case No. IT-95-14/2-T-III, 26 February 2001; *Prosecutor v. Kupreskic*, ICTY, Case No. IT-95-16-T-II, 14 January 2000; *Prosecutor v. Mrksic, Radic and Sljivancanin*, 108 ILR 53 (1996); *Prosecutor v. Tadic*, 112 ILR 1 (1997), aff'd in part 124 ILR 61 (1999).

<sup>1203</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1951, p. 15.

<sup>1204</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, art. II, III(c); *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998, art. 7(2)(a); *Statute of the International Criminal Tribunal for Rwanda*, U.N. Doc. S/RES/955, 8 November 1994; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, U.N. Doc. S/RES/827, 25 May 1993.

<sup>1205</sup> *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 SCR 340.

<sup>1206</sup> Interview with Anonymus Justice 9. See also, *Peracomo Inc. v. TELUS Communications Co.*, 2014 SCC 29, [2014] 1 SCR 621.

<sup>1207</sup> *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 SCR 340.

of foreign courts from 10 nations,<sup>1208</sup> 7 international treaties and conventions,<sup>1209</sup> and 4 judgments of the Court of Justice of the European Union.<sup>1210</sup> In *Peracomo*,<sup>1211</sup> it cited two comparative pieces of legislation,<sup>1212</sup> eight judgments of foreign courts,<sup>1213</sup> and four international treaties.<sup>1214</sup> These cases confirm the existence of horizontal and diagonal

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<sup>1208</sup> *Stott v. Thomas Cook Tour Operators Ltd.*, [2014] UKSC 15, [2014] 2 WLR 521 (UK Supreme Court); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999) (US Supreme Court); *Morris v. KLM Royal Dutch Airlines*, [2002] UKHL 7, [2002] 2 AC 628 (House of Lords); *Sidhu v. British Airways Plc.*, [1997] AC 430 (House of Lords); *In re Deep Vein Thrombosis and Air Travel Group Litigation*, [2005] UKHL 72, [2006] 1 AC 495 (House of Lords); Civ. 1<sup>re</sup>, 14 June 2007, *Bull. civ.* 6, No. 230 (France – lower court); *Ong v. Malaysian Airline System Bhd.*, [2008] 3 HKLRD 153 (Hong Kong – lower court); *Hennessey v. Aer Lingus Ltd.*, [2012] IEHC 124 (BAILII) (High Court of Ireland); *Emery Air Freight Corp. v. Nerine Nurseries Ltd.*, [1997] 3 NZLR 723 (Court of Appeal of Wellington –New Zealand); *Potgieter v. British Airways Plc.*, [2005] ZAWCHC 5 (SAFLII) (High Court off South Africa); BGH Az. X ZR 99/10 (2011) (Federal Constitutional Court of Germany); *McAuley v. Aer Lingus Ltd.*, [2011] IEHC 89 (The High Court of Ireland); *King v. American Airlines, Inc.*, 284 F.3d 352 (2002) (US lower court); *Gibbs v. American Airlines, Inc.*, 191 F.Supp.2d 144 (2002) (US lower court); *Turturro v. Continental Airlines*, 128 F.Supp.2d 170 (2001); *Brandt v. American Airlines*, 2000 WL 288393 (US lower court).

<sup>1209</sup> *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 U.N.T.S. 309 [Montreal Convention], preamble, arts. 3(4), 17, 18, 19, 21, 22, 26, 29, 49; *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 137 L.N.T.S. 11 [Warsaw Convention], arts. 17, 18, 19, 20, 22, 23, 24, 25; *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, 500 U.N.T.S. 31 [Guadalajara Convention]; *Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air* signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955, 2145 U.N.T.S. 31; *Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 478 U.N.T.S. 371 [Hague Protocol]; *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971* (not in force); *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, art. 31.

<sup>1210</sup> *International Air Transport Association v. Department for Transport*, C-344/04, [2006] ECR I-403 (Court of Justice of EU); *Wallentin-Hermann v. Alitalia*, C-549/07, [2008] ECR I-11061 (Court of Justice of EU); *Sturgeon v. Condor Flugdienst GmbH*, C-402/07 and C-432/07, [2009] ECR I-10923 (Court of Justice of EU); *Nelson v. Deutsche Lufthansa AG*, C-581/10 and C-629/10, [2013] 1 CMLR 42 (p. 1191) (Court of Justice of EU).

<sup>1211</sup> *Peracomo Inc. v. TELUS Communications Co.*, 2014 SCC 29, [2014] 1 SCR 621

<sup>1212</sup> *Carriage by Air Act*, 1961 (U.K.), 9& 10 Eliz. 2, c. 27; *Marine Insurance Act*, 1906 (U.K.), 6 Edw. 7, c. 41, s. 55(2)(a).

<sup>1213</sup> *Nugent v. Michael Goss Aviation Ltd.*, [2000] 2 Lloyd's Rep. 222 (UK lower court); *Margolle v. Delta Maritime Co. (The "Saint Jacques II" and "Gudermes")*, [2002] EWHC 2452, [2003] 1 Lloyd's Rep. 203 (UK lower court); *Schiffahrtsgesellschaft MS "Mercur Sky" m.b.H. & Co. K.G. v. MS Leerort Nth Schiffahrts G.m.b.H. & Co. K.G. (The "Leerort")*, [2001] EWCA Civ 1055, [2001] 2 Lloyd's Rep. 291 (UK lower court); *The "Bowbelle"*, [1990] 1 Lloyd's Rep. 532 (UK lower court); *MSC Mediterranean Shipping Co. S.A. v. Delumar BVBA (The "MSC Rosa M")*, [2000] 2 Lloyd's Rep. 399 (UK lower court); *Attorney General's Reference* (No. 3 of 2003), [2004] EWCA Crim 868, [2005] Q.B. 73 (UK lower court); *Thomas Cook Group Ltd. v. Air Malta Co.*, [1997] 2 Lloyd's Rep. 399 (UK lower court); *Daina Shipping Co. v. Te Runanga O Ngati Awa*, [2013] NZHC 500, [2013] 2 NZLR 799 (New Zealand High Court).

<sup>1214</sup> *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 137 L.N.T.S. 11 [Warsaw Convention], art. 25; *Convention on Limitation of Liability for Maritime Claims*, 1976, 1456

dialogue of the SCC with the highest courts of other nations or international courts, whenever it needs to interpret international treaties. Such cases demonstrate that international law constitutes one of the pillars upon which the transnational judicial conversation is constructed. Referring to the conversation among courts regarding the interpretation of international treaties, the same judge says:

I certainly think that, as much as possible as a Court, we should stick with the international consensus, unless we find that something very important is not right. Oftentimes, some international provisions have more than one reasonable interpretation, and it seems to me that serving the purposes of the convention and having a common understanding from courts would be important. I think in those settings, the jurisprudence of the highest courts of different nations and of international courts would be very important. In the carriage by air case (*Thibodeau v Air Canada*), there was a bit of pulling between domestic jurisprudence that seemed to be going in one direction, and the international jurisprudence through the Court of Justice of the European Union seemed to go in another direction.<sup>1215</sup>

Other SCC cases demonstrate the existence of such horizontal, diagonal, or vertical judicial conversation around the interpretation of international legal sources. *World Bank Group v. Wallace*<sup>1216</sup> is an excellent example of the Court engaging in horizontal dialogue with other nations. Although the SCC itself labels the case as “public international law,” and the Court refers to six international treaties,<sup>1217</sup> it did not cite to any international courts. Instead, in order to interpret the referenced treaties, it engaged in a judicial dialogue with courts of four other nations.<sup>1218</sup> Meanwhile, in *Amaratunga v.*

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U.N.T.S. 221, arts. 1, 2, 4; Protocol to amend the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 478 U.N.T.S. 371 [Hague Protocol]; *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, art. 32.

<sup>1215</sup> Interview with Anonymous Justice 9.

<sup>1216</sup> *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207

<sup>1217</sup> *Charter of the United Nations*, Can. T.S. 1945 No. 7, art. 105; *Convention on the Privileges and Immunities of the United Nations*, Can. T.S. 1948 No. 2, art. II, s. 4; *Covenant of the League of Nations*, art. 7, published in (1920), 1 League of Nations O.J. 3; *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, art. 1(1)(k), “consular archives”; *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29, art. 24; *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, arts. 31, 32.

<sup>1218</sup> *Scimet v. African Development Bank* (1997), 128 ILR 582 (Belgium lower court); *Shearson Lehman Bros. Inc. v. Maclaine Watson & Co. (No. 2)*, [1988] 1 All ER 116 (House of Lords); *R. (Bancoult) v.*

*Northwest Atlantic Fisheries Organization*,<sup>1219</sup> the SCC cited 11 international treaties<sup>1220</sup> and referred to the interpretation of the International Court of Justice,<sup>1221</sup> demonstrating the existence of the vertical conversation.

Finally, two judges mention the significance of international law not only to the final conclusion, but also to the deliberating, decision-making, and decision-writing process. One remarked, “Before deciding how to interpret a certain provision of an international treaty, we look carefully at international law principles, and we also look at how other courts interpret them, and what other courts have done.”<sup>1222</sup> Another judge offered a similar statement:

As a process, judges will start by looking at domestic law, and then they have a tendency to compare and check with other nations. Often judges would also look to international norms for support. If it is the case, then the judge will refer to it; and if it does not correspond, then they will have to offer a justification. So obviously, transnational norms and international norms are an important part of the judicial-making process.<sup>1223</sup>

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*Secretary of State for Foreign and Commonwealth Affairs (No. 3)*, [2014] EWCA Civ 708, [2014] 1 WLR 2921 (UK lower court); *Taiwan v. United States District Court for the Northern District of California*, 128 F.3d 712 (1997) (US lower court); *Iraq v. Vinci Constructions (2002)*, 127 ILR 101 (Belgium lower court); *Owens, Re Application for Judicial Review*, [2015] NIQB 29 (Northern Ireland lower court).

<sup>1219</sup> *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 SCR 866

<sup>1220</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221; *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, Can. T.S. 1979 No. 11, art. II; *Convention on the Privileges and Immunities of the Specialized Agencies*, 33 U.N.T.S. 261; *Convention on the Privileges and Immunities of the United Nations*, 1 U.N.T.S. 15, art. II(2); Headquarters Agreement between the Government of Canada and the International Civil Aviation Organization, Can. T.S. 1992 No. 7; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 14; Supplementary Agreement between the Government of Canada and the International Civil Aviation Organization regarding the Headquarters of the International Civil Aviation Organization, Can. T.S. 1999 No. 20; Supplementary Agreement between the Government of Canada and the International Civil Aviation Organization regarding the Headquarters of the International Civil Aviation Organization, 2013 [not yet in force]; *United Nations Convention on Jurisdictional Immunities of States and Their Property*. New York: United Nations, 2004 [not yet in force]; United Nations. Human Rights Committee. General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32, August 23, 2007; United Nations. International Law Commission. “Jurisdictional immunities of States and their property”, in Report of the Commission to the General Assembly on the work of its thirty-second session, U.N. Doc. A/35/10, published in Yearbook of the International Law Commission 1980, vol. II, Part Two. New York: United Nations, 1981, 137.

<sup>1221</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, I.C.J. (February 3, 2012)

<sup>1222</sup> Interview with Anonymous Justice 2.

<sup>1223</sup> Interview with Anonymous Justice 8.

Again, even for this judge, “Non-domestic legal sources, be they international or of other nations, have real impacts on the decision-making of the SCC.”<sup>1224</sup>

Both the data and the remarks from current and former SCC justices make it clear that international legal sources (both international treaties and decisions of international courts) have a significant influence on the Canadian constitutional and legal order, on the Court’s deliberation and the writing of its judgements, and ultimately on the decision-making of the SCC. To put it more simply, in the words of one judge:

The effects are that they [international laws] decide the case, one way or the other. The whole issue is how you interpret that particular international law. . . . The effect of the use of international law is that the result of the case depends on it.<sup>1225</sup>

Of course, this is not to say that international legal sources are the only consideration upon which the cases are decided in the SCC. The point is that such legal sources are often indeed significant sources for the decision-making of the Court; and transnational judicial dialogue appears to foster its use.

## B. THE IMPACT OF COMPARATIVE LEGAL SOURCES

In addition to international legal sources, the quantitative data obtained by this research shows that the SCC also extensively cites comparative legal sources.<sup>1226</sup> In this section,

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<sup>1224</sup> Interview with Anonymous Justice 8.

<sup>1225</sup> Interview with Anonymous Justice 2. However, we should emphasize that not all international legal norms have the same impact in the domestic (Canadian) legal order. As Graham Hudson notes, on the one hand, “international legal norms come in a variety of types (binding/nonbinding, hard/soft law, rules/principles/standards)” and on the other, its “general effectiveness is affected by its intersections with a wide range of informal normative frameworks”. See, Graham Hudson, “The Art of Persuasion: International Comparative Human Rights, the Supreme Court of Canada and the Recognition of the Canadian Security Certificate Regime”, (2012) PhD Dissertations, Osgoode Hall Law School, at 252, online: <<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1016&context=phd>>; Graham Hudson, “Neither Here Nor There: The (Non-) Impact of International Law on Judicial Reasoning in Canada and South Africa” (2008) 21:2 Canadian Journal of Law and Jurisprudence, 321 at 324.

<sup>1226</sup> See Chapter 3 “The Use of Juridical Mechanisms by the SCC: A Quantitative Analysis of Cases (2000-2016)”.

the impact of such legal sources on the decision-making of the SCC will be examined. As defined in Chapter 1, comparative legal sources are formal legal acts enacted by the legislative, executive, and judicial branches of foreign nations, including their constitutions. Like international legal sources, in order to better assess the influence of comparative law on the Court's decision-making, it is essential to obtain a quantitative perspective to complement the qualitative analysis of specific cases.

Full data about the extent of comparative legal sources cited by the SCC are found in Chapter 3; this section highlights only the findings that will be most helpful in assessing the impact of these sources. Between 2000 and 2016, the SCC cited in total 1,791 decisions from the courts of other nations, with an average of 105 foreign precedents per year. The data shows also that the SCC cited these foreign judgments in 393 of its 1,223 decisions.<sup>1227</sup> In other words, nearly one-third of all SCC decisions cite precedents of other nations. The research reveals that during this period the SCC cited precedents of courts of 14 nations; four of them, namely the United States, the United Kingdom, Australia, and New Zealand accounted for more than 95% of the comparative case law cited by the SCC.<sup>1228</sup> The two most cited apex foreign courts are the Supreme Court of the United States (336 cases), and the Supreme Court of the UK (307 cases).<sup>1229</sup> Notably, the SCC cites foreign precedents not only in constitutional and international law cases as would be expected, but also in about 50 different fields of law, of public and private sphere.<sup>1230</sup>

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<sup>1227</sup> See Figure 2, Chapter 3.

<sup>1228</sup> See Figure 5, Chapter 3.

<sup>1229</sup> See Table 8, Chapter 3.

<sup>1230</sup> See Figure 11, Chapter 3.

This research also shows that the SCC cited formal legal acts passed by the legislative and executive branches of 16 other countries, such as constitutions, codes, statutes, and regulations, 242 times.<sup>1231</sup> The legal acts of the United Kingdom (99 times), the United States (69), Australia (40), New Zealand (11) and France (8), are cited most frequently. The SCC's references to comparative laws cover 32 different fields of law, constitutional law and criminal law being at the top of the list.<sup>1232</sup>

With this quantitative picture in mind, I asked the ten judges about the influence of comparative legal sources on the SCC's decision-making. As noted above, most make a sharp distinction between the impact of international and comparative legal sources. However, all ten judges acknowledge that they have used comparative legal sources in their decision-making, and all consider such sources extremely helpful. One said:

The openness towards other jurisdictions is “mother’s milk” for us; why wouldn’t you do it, for Heaven’s sake! Why would you close your mind to new ideas, and to the thinking of people who have already had to consider the same or similar questions?<sup>1233</sup>

However, while international legal sources are generally considered *binding* by the SCC justices, comparative sources are referred to as the “authority of reason” or “persuasive authority.” Eight out of ten of the judges use almost this same language when discussing these sources; as one says, “The use of comparative legal sources is important for the decision-making of the SCC, but as persuasive authority. These judgments tend to be used more and more as authority of reason.”<sup>1234</sup>

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<sup>1231</sup> See Chapter 3, Table 9. The 16 countries are: the United Kingdom, the United States, Australia, New Zealand, France, South Africa, Ireland, Belgium, Germany, India, Rwanda, Romania, Spain, Portugal, Italy, and Sweden.

<sup>1232</sup> See Table 12, Chapter 3.

<sup>1233</sup> Interview with Anonymous Justice 6.

<sup>1234</sup> Interview with Anonymous Justice 10.

The remarks of the interviewed judges suggest the impact of comparative legal sources can be sorted into three main categories: i) substantive direct effects from individual cases, ii) interpretative effects, and iii) broader systemic effects.

i. Substantive Direct Effects

Substantive direct effects occur when the SCC directly applies specific judgments of foreign courts to particular cases, generally by adopting or importing a new legal test or principle. As a rule, the SCC uses other language, such as “referred to” or “considered” when citing non-domestic jurisprudence. However, my research reveals that in several cases, the SCC notes it “applied” foreign judgments.

For example, in at least four tort cases,<sup>1235</sup> the Court notes that it directly applied *Anns v. Merton London Borough Council* (a judgment of the House of Lords),<sup>1236</sup> which articulates a two-stage test (*Anns* test) to determine whether a person owes a duty of care.<sup>1237</sup> The SCC acknowledges this test “is affirmed and explained by this Court in a number of cases.”<sup>1238</sup>

Another example in which the SCC directly applies foreign cases is *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*<sup>1239</sup> In its judgement, the SCC applies two British Court of

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<sup>1235</sup> *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263, at paras. 47-50; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 47; *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129, at paras 115-117; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45.

<sup>1236</sup> *Anns v. Merton London Borough Council*, [1978] AC 728.

<sup>1237</sup> This test according to *Anns test* involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) If so, are there any residual policy considerations which ought to negate or limit that duty of care?

<sup>1238</sup> See, *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 4, [2007] 3 S.C.R. 129, at para 20. In this decision, the SCC acknowledges that the *Anns test* is affirmed and explained also in several previous cases such as: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 SCR 537, at paras. 25 and 29-39; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 SCR 562, at para. 9; *Odhavji Estate v. Woodhouse*, 2008 SCC 69, [2003] 3 SCR 263, at paras. 47-50; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 SCR 643, at para. 47.

<sup>1239</sup> *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, [2008] 3 SCR 265.

Appeal cases, *Windsurfing*<sup>1240</sup> and *Pozzoli*,<sup>1241</sup> from which it adopts and directly applies the four-part “obvious to try” test, which has now come to guide many of its decisions in intellectual property law.<sup>1242</sup>

Another interesting case is *A.C. v. Manitoba*,<sup>1243</sup> in which the Court directly applies three British judgments (including *Gillick*, a case from the House of Lords)<sup>1244</sup> that “currently represent the law for adolescents’ medical decision-making capacity in the United Kingdom.”<sup>1245</sup> In this case the SCC adopts the *Gillick* “mature minor principle”, which was decisive for the outcome of the case. According to this principle, adolescents under the age of 16 theoretically could consent to medical treatment, thereby relieving doctors from liability in tort for proceeding without the consent of the parents.<sup>1246</sup>

The interviewed justices confirm the existence of this category of cases, where foreign judgments have had a direct impact on the decision-making of the SCC. At least one of current judge believes that such comparative cases have become part of Canadian jurisprudence:

We use comparative law, and it gives us new ideas. . . . We look abroad for new ideas, substantive or managerial. And obviously, *there are a number of really important ideas and legal tests coming from other countries that are now part of our jurisprudence*. For example, for over a century, the law of England became part of our jurisprudence, and now all

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<sup>1240</sup> *Windsurfing International Inc. v. Tabur Marine (Great Britain) Ltd.*, [1985] RPC 59.

<sup>1241</sup> *Pozzoli SPA v. BDMO SA*, [2007] F.S.R. 37 (p. 872), [2007] EWCA Civ 588.

<sup>1242</sup> The four steps of this test are: (1) (a) Identify the notional “person skilled in the art”; (b) Identify the relevant common general knowledge of that person; (2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it; (3) Identify what, if any, differences exist between the matter cited as forming part of the “state of the art” and the inventive concept of the claim or the claim as construed; (4) Viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art or do they require any degree of invention?

<sup>1243</sup> *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181.

<sup>1244</sup> *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1985] 3 All ER 402 (House of Lords); *Re W (a minor) (medical treatment)*, [1992] 4 All ER 627 (UK lower court); *Re R (a minor) (wardship: medical treatment)*, [1991] 4 All ER 177 (UK lower court)

<sup>1245</sup> *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181, par 56.

<sup>1246</sup> *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181, par 48-49.

the English common law is there. And, after the Charter, we got the principle of proportionality, which was developed in Germany, and is now available.<sup>1247</sup> [Emphasis added]

Although this judge formally acknowledged the non-binding character of foreign jurisprudence, it seems the judge gives much more credit to it, emphasizing that many of these “foreign ideas and legal tests” “are now part of our [Canadian] jurisprudence.”<sup>1248</sup> Undoubtedly, in the case of English common law, this process was initially mandated by colonial and post-colonial legislation. However, lately this process is influenced by transnational judicial conversations.

The proportionality test under Section 1 of the Charter is a spectacular example of the influence of foreign precedents on Canadian jurisprudence. It demonstrates how a key principle imported from foreign courts, has since been used in almost all SCC human rights cases adjudicated under the Charter.<sup>1249</sup> The proportionality test will be explained in detail below.<sup>1250</sup>

Judges not only acknowledged the influence of comparative law on Canadian jurisprudence, but also were willing to explain the process of why these sources become part of decisions. According to one judge:

Non-domestic legal sources, be they international or of other nations, have a real impact on the decision-making of the SCC. . . . So obviously, transnational norms and international norms are an important part of the judicial-making process. . . . As the world is operating nowadays, you cannot ignore what is going on in other countries, and what is going on in the transnational judicial dialogue that is happening among judges.<sup>1251</sup>

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<sup>1247</sup> Interview with Anonymous Justice 2.

<sup>1248</sup> Interview with Anonymous Justice 2.

<sup>1249</sup> *R v Oakes* [1986] 1 SCR 103.

<sup>1250</sup> See below in the 3d subsection.

<sup>1251</sup> Interview with Anonymous Justice 8.

Despite the arguably extensive and effective use of comparative legal sources mentioned above, at least two justices expressed their regrets at not seeing these sources used more often. In their view, the number of references to foreign sources remains insufficient, and has had limited influence. When one was asked about the impact of comparative legal sources on Canadian jurisprudence, the judge answered:

I would say very little. I really would like to see more of it, but I don't know. As I said, the other judges didn't seem to be engaged and had little interest in that. But I found that our judgments had an impact on other courts. It seems mostly to be "one way traffic," from us to other courts, and mostly to courts of developing countries.<sup>1252</sup>

Another judge believes the limited citation of foreign decisions is due to language barriers:

One of the problems that we have with the citation of foreign jurisprudence is that most of us can read only English and French, but we don't read German, Hebrew, Italian, and so on. So, by necessity we tend to have a limited view of what the other foreign courts are saying. . . . And that's a real practical problem that we have.<sup>1253</sup>

## ii. Interpretative Effect

Information provided by the judges suggests that the judgments of foreign courts influence also the interpretation of both international and domestic law, which I label as the "interpretative" or "indirect effect".<sup>1254</sup> Hence, in addition to the substantive direct effect, the research shows another way in which comparative sources are influential, which, while less obvious, is still significant. Courts, including the SCC, often look to

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<sup>1252</sup> Interview with Anonymous Justice 4.

<sup>1253</sup> Interview with Anonymous Justice 9.

<sup>1254</sup> It should not be confused with the *indirect effect doctrine* in European Union Law, through which the Court of Justice of the EU compels national courts of member-states to interpret, as far as possible, national legislation in accordance with the spirit and aims of EU and international law, even when domestic legislation has failed to implement them. This new instrument granted to national judges, strengthened the "national courts' interpretative duty." See, Case 14/83 *Von Colson* [1984] ECR 1891; See also, Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law (Second Edition)* (Cambridge: Cambridge University Press, 2010) at 295.

foreign judgments to help them interpret domestic and international laws applicable to the case at hand. Often these foreign judgments have a significant influence on the Court, particularly on the interpretation of international treaties, but also on the interpretation of domestic law, such as the Charter or other important constitutional texts. Because the interpretation of legal norms is the first and most important of a judge's responsibilities, the interpretative effect is undoubtedly worthy of analysis.

The interpretative effect and its significance were explained by at least two justices of the SCC. One noted:

You will see the influence of foreign court decisions in both, in the interpretation of our own laws, but also in the interpretation of international treaties, which become the law of the country. So to what extent a foreign decision or court will influence our decisions could be found in the ways in which we interpret our own domestic legislation, or international law.<sup>1255</sup>

This judge went on to explain the mechanism of interpretation and how it affects the decision-making of the SCC:

When we look at our fundamental rights in the Charter, it is possible that our interpretation of our domestic law could be influenced by the way other countries are looking at the same issues. For example, the *Carter* case had to do with assisted suicide, we moved from *Rodriguez* to *Carter* by looking at foreign jurisdictions. We still applied our own law, but we look at what other courts are doing in dealing with the same issues. Another case is *Bedford*, where we again looked at the position of other courts from around the world on these matters. It doesn't mean that we did not apply our own Charter, but we had to look at how these rights and freedoms are interpreted elsewhere.<sup>1256</sup>

Another judge remarked:

I certainly think that, as much as possible as a Court, we should stick with the international consensus, unless we find that something very important is not right. Oftentimes, some international provisions have more than one reasonable interpretation, and it seems to me that serving the purposes of

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<sup>1255</sup> Interview with Anonymous Justice 7.

<sup>1256</sup> Interview with Anonymous Justice 7.

the convention and having a common understanding from courts would be important. I think in those settings, the jurisprudence of the highest courts of different nations and of international courts would be very important.<sup>1257</sup>

iii. Broader Systemic Effects

Beyond explaining the impact of certain individual foreign judgments on specific SCC cases, a few judges provided a broader perspective. They noted that in addition to individual cases, particular foreign legal systems, as shaped by their courts, have a wider influence on the Canadian domestic legal order. According to these judges, the precedents of the UK and US legal systems are the most influential. Their perception is confirmed by the data of this study, which show that decisions of UK courts (cited 798 times) and US courts (cited 746 times), constitute about 86% of the total number of foreign law citations of the SCC in the last 17 years.<sup>1258</sup> Speaking about UK legal sources, one said:

British law and precedents tended to remain very influential in Canadian courts, including the SCC, and were commonly used in their judgments. I must note that, although formally non-binding, the Court became less and less reluctant to take different positions from British courts.<sup>1259</sup>

This observation is in line with my quantitative analysis which show that in the last 17 years, UK precedents were the most cited in the SCC.<sup>1260</sup> For another SCC judge, the over-influence of British precedents became a real concern for the entire Court. This judge reveals:

Many of our lower courts were making final decisions based on English precedents. So we decided, although it was hard, that we wanted to get rid of English precedents and create Canadian precedents. Because it gave the appearance that we were still a colonial state. And I think we almost did it

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<sup>1257</sup> Interview with Anonymous Justice 9.

<sup>1258</sup> See Chapter 3, Figure 5.

<sup>1259</sup> Interview with Anonymous Justice 10.

<sup>1260</sup> See Chapter 3, Figure 5.

on purpose sometimes, not to follow a British precedent, just to prove that we weren't being led by those precedents. And of course, in the process, we were quoting more American cases, particularly after the Charter was adopted.<sup>1261</sup>

Again, from a broader systemic perspective, as mentioned above and as the data of this research show, US jurisprudence is one of the most influential (second after the UK), particularly after the Charter. Almost all judges that I interviewed acknowledged a deep reliance on American jurisprudence. Some attribute this to geographical closeness and economic ties, others to common political values, others to the reputation of the US Supreme Court, and still others to the regular relationship that the SCC has with the US Supreme Court.

The evidence demonstrates convincingly that foreign judgments have influenced Canadian jurisprudence in at least three ways: substantive direct effects from individual cases, interpretative effects, and broader systemic effects. When viewing the overall picture of how SCC judges perceive comparative legal sources, particularly the judgments of foreign courts, it seems all agree these sources are not formally binding to the SCC. This is undoubtedly true. However, most judges acknowledged that a deeper examination of the legal analysis and outcome of many Canadian cases reveals a different reality. Several legal tests or principles that are applied in SCC cases, and even the outcome of many cases, are very much “judicial imports” introduced from the jurisprudence of foreign courts. At times, the SCC has even altered its previous jurisprudence based on the influence of non-domestic legal sources, particularly when it

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<sup>1261</sup> Interview with Anonymous Justice 4.

has combined comparative legal sources with international law.<sup>1262</sup> Therefore, while the citation of foreign judgments may be *formally* non-binding for the Court, *substantively*, in a good number of cases, it seems that they have had a concrete effect on the decision-making of the SCC, to the point that they have now become part of its jurisprudence.

In addition, the majority of the justices interviewed believed the use of comparative and international legal sources to be connected to the Charter or more generally to constitutional cases. Their perception is confirmed by the quantitative findings of this study, as shown in Chapter 3. The data reveal that constitutional cases (which include the Charter) are the SCC cases that have the highest number of citations of non-domestic legal sources, of all four forms.<sup>1263</sup> To demonstrate whether and to what extent such constitutional cases have cited non-domestic legal sources, I conducted a comprehensive legal analysis of all the key cases in this field.

### C. THE IMPACT OF NON-DOMESTIC LEGAL SOURCES ON SCC DECISION-MAKING IN KEY CONSTITUTIONAL CASES

In the final part of this section, I will examine several of the most significant constitutional cases of the SCC, and determine whether non-domestic legal sources influenced these judgments. In order to identify the most important constitutional topics, and the 2–3 key cases associated with each, I relied on a classic Canadian constitutional law text by Professor Hogg.<sup>1264</sup> As space limitations prohibit a full quantitative and

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<sup>1262</sup> The most notable examples, which were noted also by the interviewed justices, are when the SCC changed its previous precedent by moving from *Kindler and Ng* to *Burns*, and from *Rodrigues* to *Carter*. Our analysis in Chapter 5 (*Burns* case) demonstrates in more detail this change.

<sup>1263</sup> According to the findings demonstrated in Chapter 3, constitutional cases are the most likely to attract the use of non-domestic legal sources of both international and comparative nature.

<sup>1264</sup> Peter W Hogg, *Constitutional Law of Canada, 2016 Student Edition* (Toronto: Thomson Reuters Canada, 2016).

qualitative analysis of all key constitutional law cases of the SCC, this section will summarize the most significant quantitative data for each case.

When asked to name cases that exemplify the influence of non-domestic legal sources on the SCC's decision-making, the majority of justices referenced the *Oakes* case (which established the well-known "Oakes test" or "proportionality test" under Section 1 of the Charter).<sup>1265</sup> Therefore, this section begins with an examination of this case, and will include a short qualitative analysis.

i. Limitation of Rights<sup>1266</sup>

In *R. v. Oakes*,<sup>1267</sup> the SCC established the famous *Oakes test*, which constitutes a two-step analysis of the limitations clause of the Canadian Charter that allows reasonable limitations on rights and freedoms through legislation if it can be "demonstrably justified in a free and democratic society".<sup>1268</sup> In this case the SCC cited five foreign judgments,<sup>1269</sup> two international court cases,<sup>1270</sup> three statutes and regulations of other

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<sup>1265</sup> *R. v. Oakes*, [1986] 1 SCR 103.

<sup>1266</sup> *Constitution Act*, 1982, s.1.

<sup>1267</sup> *R. v. Oakes*, [1986] 1 SCR 103. In this case the SCC established the famous *Oakes test* in a two-step analysis: "Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. ... Second, the party invoking *s. 1* must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be."

<sup>1268</sup> *Constitution Act*, 1982, s.1.

<sup>1269</sup> *Tot v. United States*, 319 U.S. 463 (1943); *Leary v. United States*, 395 U.S. 6 (1969); *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979); *In Re Winship*, 397 U.S. 358 (1970); *Bater v. Bater*, [1950] 2 All ER 458 (C.A.).

<sup>1270</sup> *Pfunders Case (Austria v. Italy)* (1963), 6 Yearbook ECHR 740; *X against the United Kingdom*, Appl'n No. 5124/71, Collection of Decisions, ECHR, 135.

nations,<sup>1271</sup> and five international treaties.<sup>1272</sup> Viewed from a quantitative perspective, this case demonstrates a heavy reliance on non-domestic legal sources. In addition, this case relies on *Big M Drug Mart*,<sup>1273</sup> the case in which the SCC introduced the proportionality test to Canadian jurisprudence for the first time.<sup>1274</sup> *Big M Drug Mart* cites seven foreign judgments,<sup>1275</sup> indicating an even stronger reliance on foreign sources. Surprisingly however, in introducing the proportionality test, neither *Oakes* nor *Big M Drug Mart*, do not mention a foreign legal source.<sup>1276</sup>

Nonetheless, almost all the interviewed justices consider *Oakes* a prime example of the influence non-domestic legal sources can have on the SCC's decision-making. The fact that no exact foreign source is mentioned in the proportionality test, is acknowledged also by Chief Justice McLachlin, who, in a public speech, noted:

Although documentary evidence of the precise origins of the *Oakes* test is scarce, it is highly likely that jurisprudence from the European Court of Human Rights played an important role. [And] the European Court of Human Rights is widely held to have been influenced by the German Constitutional Court in its writings on proportionality.<sup>1277</sup>

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<sup>1271</sup> *Constitution of the United States of America*, 5th and 14th Amendments; *Misuse of Drugs Act* 1971, 1971 (U.K.), c. 38; *Misuse of Drugs Act* 1975, 1975 (N.Z.), No. 116;

<sup>1272</sup> *International Covenant on Civil and Political Rights*, 1966, art. 14(2); *Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium*; *Single Convention on Narcotic Drugs*, 1961; *Universal Declaration of Human Rights*, art. 11(I); *The European Convention on Human Rights*.

<sup>1273</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295.

<sup>1274</sup> See, *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, par 139.

<sup>1275</sup> *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Koshers Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961), distinguished; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Education v. Barnette*, 319 U.S. 624 (1943); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1970).

<sup>1276</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, see par 70, 139.

<sup>1277</sup> Simons Lecture, 2008, Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, online: <<http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2008-10-21-eng.aspx>> (see footnote 11); The case that appears to have influenced Chief Justice Dickson is the European Court of Human Rights, *Handyside v. The United Kingdom* (1976) 24 Eur. Ct. H.R. (Ser. A) 23 at par. 49. The Chief Justice of Canada, making this point, she refers to several academics, such as: Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 UTLJ 383 at 384; Georg Nolte, "General Principles of German and European Administrative Law - A Comparison in Historical

Justice Bastarache also considers the *Oakes* proportionality test a good example of judicial borrowing, acknowledging its German origins.<sup>1278</sup> Several scholars also espouse this belief. Sharpe and Roach suggest that Chief Justice Brian Dickson, in developing the *Oakes* test, relied heavily on the ECtHR and the German Federal Constitutional Court.<sup>1279</sup> Their claim is given greater credence as Sharp served under Chief Justice Dickson as Executive Legal Officer at the SCC from 1988 to 1990.<sup>1280</sup> Other scholars and judges have also suggested that Chief Justice Dickson was influenced by foreign judgments when writing the *Oakes* decision. Dieter Grimm, an academic and former justice of the Federal Constitutional Court of Germany, noted:

There is, however, one jurisdiction that could have served as a model, namely Germany. Here the proportionality test has been applied since the late 1950s, whenever the Constitutional Court has had to review laws limiting fundamental rights, or administrative and judicial decisions applying such laws. From Germany the principle of proportionality spread to most other European countries with a system of judicial review, and to a number of jurisdictions outside Europe. Likewise, it is in use in the European Court of Human Rights and in the European Court of Justice.<sup>1281</sup>

Aharon Barak, former president of the Supreme Court of Israel, at a recent conference involving SCC judges, academics, and legal practitioners, called the proportionality test a “judicial scale developed by judges for balancing rights and principles.”<sup>1282</sup> When viewed from a transnational judicial dialogue perspective, it becomes clear that the components of this scale are produced and increasingly improved

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Perspective” (1994) 54 Mod L Rev 191; Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at 334. (See CJ McLachlin’s footnotes nr 9, 11, 12).

<sup>1278</sup> Bastarache, *supra* note 44 at 2.

<sup>1279</sup> See, Sharpe & Roach, *supra* note 1277 at 334.

<sup>1280</sup> See, Robert J Sharpe biography, University of Toronto, online: <<http://www.law.utoronto.ca/faculty-staff/distinguished-visitors/robert-j-sharpe>>.

<sup>1281</sup> Grimm, *supra* note 1277 at 384.

<sup>1282</sup> Aharon Barak, “Institutions, Constitutions Symposium: The Judiciary’s Role in the 21<sup>st</sup> Century” (Remarks delivered to the Osgoode Hall Law School, Osgoode Professional Development, Toronto, 27 September 2016).

through a worldwide conversation among courts and judges, including the SCC. This judicial scale has traveled from one court to another, and is now used successfully around the world.

The “proportionality test” also highlights the role of academics in the process of transnational judicial conversation, which constitutes another key contribution of this research. In Chapter 3, 4, and 5, academics are shown as crucial facilitators of, and even participants in, transnational judicial conversations in various settings; in addition, they help improve “judge-made products,” including the proportionality test. Numerous academics have written about how to improve this “judge-made scale,” and continue to be in conversation with courts and judges on the subject.<sup>1283</sup> This illustration shows the exchange of foreign precedents and constitutional ideas amongst courts, judges, and academics, allowing constitutional jurisprudence to “cross-pollinate” and produce key legal tests and principles. These types of conversations, on the logic and experience of law, result in an increasingly harmonized global jurisprudence, not only in international law and various constitutional matters, but also in other legal fields.

From a Canadian perspective, the SCC uses this judicial scale—the *Oakes* test—as a key procedural and substantive judicial device in all cases that involve Section 1 of the Canadian Charter of Rights and Freedoms. The Court has confirmed that the principle

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<sup>1283</sup> It is simply impossible to track all the academic writings on the “principle of proportionality”, because it is written from perspectives of almost every nation. For a Canadian perspective scholarship see: Sujit Choudhry, “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1” (2006) 34 Sup Court L Rev 501; Vicki C. Jackson, “Constitutional Law in an Age of Proportionality” (2014) 124 Yale LJ 3094; Benjamin L Berger, “Constitutional Principles”, in Markus Dubber and Tatjana Hoernle, eds. *Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 422; Michael Taggart, “Proportionality, Deference, Wednesbury” (2008) NZL Rev 423; Amir Attaran, “Wobbly Balance-A Comparison of Proportionality Testing in Canada, the United States, the European Union and the World Trade Organization, A.” (2007) 56 UNBLJ 260; Tom Hickman, “Proportionality: comparative law lessons” (2007) 12:1 Judicial Rev 31; Grant R Hoole, “Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law” (2011) 49 Alta L Rev 107.

of proportionality is not merely a simple rule of interpretation, but rather “a source of the courts’ power to intervene in case management.”<sup>1284</sup> It is likely Justice Bastarache was referring to the proportionality test when he spoke about the effects of “judicial internationalization,” acknowledging “it has changed the decision-making process.”<sup>1285</sup> Such judicial tests are now widely used in various fields of law, by almost every court, including the SCC.<sup>1286</sup>

As stated above, beyond the “limitation of rights” discussed in this section, other significant constitutional subject matters are examined. This research identifies the 2–3 key cases for each of these constitutional topics, and then determines whether such cases have cited non-domestic legal sources.

## ii. Sources of Constitutional Law and the Nature of the Canadian Constitution

The two core SCC cases that define this matter in Canadian constitutional law are *Reference re Secession of Quebec*<sup>1287</sup> and *Baker*.<sup>1288</sup> The SCC relies on non-domestic legal sources in both. In *Reference re Secession* the SCC cites two foreign cases,<sup>1289</sup> seven foreign statutes and regulations,<sup>1290</sup> and six international treaties,<sup>1291</sup> while in *Baker*, the SCC cites six foreign decisions<sup>1292</sup> and two international treaties and covenants.<sup>1293</sup>

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<sup>1284</sup> *Marcotte v. Longueuil City*, 2009 SCC 43.

<sup>1285</sup> Bastarache, *supra* note 44 at 194.

<sup>1286</sup> For a list of “legal tests” that have been imported from foreign courts see above Section “Impact of Comparative Legal Sources”.

<sup>1287</sup> *Reference re Secession of Quebec*, [1998] 2 SCR 217.

<sup>1288</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

<sup>1289</sup> *De Demko v. Home Secretary*, [1959] AC 654 (House of Lords); *Muskrat v. United States*, 219 U.S. 346 (1911) (US Supreme Court).

<sup>1290</sup> Ala. Code 1975 § 12-2-10; *Bill of Rights of 1689* (Eng.), 1 Will. & Mar. sess. 2, c. 2; Del. Code Ann. tit. 10, § 141 (1996 Supp.). (Delaware, USA); *Magna Carta* (1215); *Statute of Westminster, 1931* (U.K.), 22 & 23 Geo. 5, c. 4 [reprinted in R.S.C., 1985, App. II, No. 27]; *Union Act, 1840* (U.K.), 3-4 Vict., c. 35 [reprinted in R.S.C., 1985, App. II, No. 4]; United States Constitution, art. III, § 2.

<sup>1291</sup> *Charter of the United Nations*, Can. T.S. 1945 No. 7, Arts. 1(2), 55; *Convention for the Protection of Human Rights and Fundamental Freedoms*, Protocol No. 2, Europ. T.S. No. 5, p. 36; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, Art. 1; *International Covenant on Economic,*

iii. Peace, Order, and Good Government

The crucial SCC case, which contains the test used in these cases, is *R. v. Crown Zellerbach Canada Ltd.*<sup>1294</sup> In this case the SCC cites two international treaties.<sup>1295</sup>

iv. Property and Civil Rights

The key case in this area is *Reference re Securities Act.*<sup>1296</sup> In this case, the SCC cites four foreign statutes and regulations<sup>1297</sup> and two judgments of foreign courts.<sup>1298</sup>

v. Trade and Commerce

Again, the *Reference re Securities Act*<sup>1299</sup> is a significant case in this field of law, as is *General Motors of Canada Ltd.*,<sup>1300</sup> in which the SCC cites one foreign judgment.<sup>1301</sup>

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Social and Cultural Rights, 993 U.N.T.S. 3, Art. 1; *Statute of the Inter-American Court of Human Rights* (1979), Art. 2 ; Treaty establishing the European Community, Art. 228(6).

<sup>1292</sup> *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All ER 651; *R. v. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All ER 310; *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 AC 531; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] ICR 120; *Tavita v. Minister of Immigration*, [1994] 2 NZLR 257; *Vishaka v. Rajasthan*, [1997] 3 LRC 361.

<sup>1293</sup> *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, preamble, Arts. 3(1), (2), 9, 12; *Declaration of the Rights of the Child* (1959), preamble.

<sup>1294</sup> *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401.

<sup>1295</sup> *Convention on the Law of the Sea* (1982); *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*, signed by Canada on December 29, 1972, Art. I, III(3).

<sup>1296</sup> *Reference re Securities Act*, 2011 SCC 66.

<sup>1297</sup> Basic Law (F.R.G.), art. 72(1), (2) (German Constitution); *National Securities Markets Improvement Act of 1996*, Pub. L. 104-290, § 102, 110 Stat. 3416, 3417 [amending *Securities Act of 1933*, s. 18 (now 15 U.S.C. § 77r)]; *Securities Act of 1933*, s. 18 [now 15 U.S.C. § 77r]; United States Constitution, arts. I, § 8, cl. 3, VI, cl. 2.

<sup>1298</sup> *Re Wakim; Ex parte McNally*, [1999] HCA 27, 198 CLR 511 (High Court of Australia); *R. v. Hughes*, [2000] HCA 22, 202 CLR 535 (High Court of Australia)

<sup>1299</sup> *Reference re Securities Act*, 2011 SCC 66.

<sup>1300</sup> *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641.

<sup>1301</sup> *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1967).

vi. Language Rights

Here, the key case is *Nguyen v. Quebec*.<sup>1302</sup> *Nguyen* does not cite non-domestic legal sources, likely due to the specific nature of the case, bilingualism in Canada. However, the SCC uses the *Oakes* test, which, as noted above, is a foreign legal test adopted by the Court.<sup>1303</sup>

vii. Aboriginal and Treaty Rights

Both core cases in this subject area do refer to non-domestic legal sources. In *Haida Nation v. British Columbia*,<sup>1304</sup> the SCC cites one example of foreign soft law,<sup>1305</sup> and in *Tsilhqot'in Nation v. British Columbia*,<sup>1306</sup> the Court quotes one foreign judgment.<sup>1307</sup>

viii. Application of the Charter of Rights and Freedoms

As mentioned above, the interviewed judges consider cases involving the Canadian Charter to be the most likely to attract non-domestic legal sources. The crucial cases relating to the application of the Charter are *Eldridge v. British Columbia*<sup>1308</sup> and *Greater Vancouver Transportation Authority v. Canadian Federation of Students*.<sup>1309</sup> In *Elbridge*, the SCC cites four foreign judgments<sup>1310</sup> and three statutes and regulations of foreign

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<sup>1302</sup> *Nguyen v. Quebec (Education, Recreation and Sports)*, 2009 SCC 47.

<sup>1303</sup> *R. v. Oakes*, [1986] 1 SCR 103. As mentioned above, in *Oakes*, the SCC cited 5 comparative cases, 2 international court cases, 3 statutes and regulations of other nations, and 5 international treaties.

<sup>1304</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

<sup>1305</sup> New Zealand. Ministry of Justice. *A Guide for Consultation with Māori*. Wellington: The Ministry, 1997 (soft law).

<sup>1306</sup> *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

<sup>1307</sup> *Western Australia v. Ward* (2002), 213 CLR 1 (High Court of Australia).

<sup>1308</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624.

<sup>1309</sup> *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31.

<sup>1310</sup> *Minister of Home Affairs v. Fisher*, [1980] AC 319 (Privy Council); *Washington, Mayor of Washington, D.C. v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

nations.<sup>1311</sup> In *Canadian Federation of Students*, the Court cites two foreign judgments.<sup>1312</sup>

ix. Freedom of Conscience and Religion<sup>1313</sup>

These cases, which contain the legal tests applicable to these rights, rely on non-domestic legal sources. In *Syndicat Northcrest v. Amselem*,<sup>1314</sup> the SCC cites the First Amendment of the United States Constitution<sup>1315</sup> and two judgments of foreign courts,<sup>1316</sup> while in *Alberta v. Hutterian Brethren of Wilson Colony*,<sup>1317</sup> the SCC cites a US case<sup>1318</sup> and a case from the European Court of Human Rights.<sup>1319</sup>

x. Freedom of Expression<sup>1320</sup>

The two core cases are *Montreal (City) v. 2952-1366 Quebec Inc.*<sup>1321</sup> and *Saskatchewan (Human Rights Commission) v. Whatcott*.<sup>1322</sup> In the latter, the SCC cites two judgments of foreign courts.<sup>1323</sup> In *Montreal*, the Court does not cite non-domestic legal sources but relies on the *Oakes* test.

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<sup>1311</sup> United States Constitution, Fourteenth Amendment; *Rehabilitation Act*, 29 U.S.C. § 794 (1997); *Americans with Disabilities Act*, 42 U.S.C. §§ 12182-12189 (1997).

<sup>1312</sup> *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Herring v. United States*, 555 U.S. 1 (2009).

<sup>1313</sup> *Constitution Act*, 1982, s.2(a).

<sup>1314</sup> *Syndicat Northcrest v. Amselem*, 2004 SCC 47.

<sup>1315</sup> United States Constitution, First Amendment.

<sup>1316</sup> *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989).

<sup>1317</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

<sup>1318</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>1319</sup> Eur. Court H. R., *Kokkinakis v. Greece*, judgment of 25 May 1993, Series A No. 260-A.

<sup>1320</sup> *Constitution Act*, 1982 s.2(b).

<sup>1321</sup> *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62.

<sup>1322</sup> *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11.

<sup>1323</sup> *Abrams v. United States*, 250 U.S. 616 (1919); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

xi. Life, Liberty, and Security of the Person<sup>1324</sup>

As explained above, the interviewed justices consider *Canada v. Bedford*<sup>1325</sup> and *Carter v. Canada*<sup>1326</sup> examples of cases in which non-domestic legal sources were critical to the final decision. Both cases fall under this category. In *Bedford*, the SCC cites only one foreign legal source;<sup>1327</sup> however, it also references many of the most well-known SCC cases that rely heavily on international and comparative legal sources.<sup>1328</sup> The interviewed justices note that in each of these cases, non-domestic legal sources were important to the decision. In *Carter*, the SCC cites four foreign cases<sup>1329</sup> and one judgement from an international court.<sup>1330</sup>

xii. Equality Rights<sup>1331</sup>

This area features three significant cases, *Andrews v. Law Society of British Columbia*,<sup>1332</sup> *R. v. Kapp*,<sup>1333</sup> and *Withler v. Canada*.<sup>1334</sup> In *Andrews*, the SCC cites one

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<sup>1324</sup> *Constitution Act*, 1982, s.7.

<sup>1325</sup> *Canada v. Bedford*, 2013 SCC 72.

<sup>1326</sup> *Carter v. Canada*, 2015 SCC 5.

<sup>1327</sup> *Shaw v. Director of Public Prosecutions*, [1962] AC 220 (House of Lords).

<sup>1328</sup> Such as: *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44; and *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791.

<sup>1329</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997) (USSC); *Vacco v. Quill*, 521 U.S. 793 (1997) (USSC); *Fleming v. Ireland*, [2013] IESC 19 (Ireland Supreme Court); *R. (on the application of Nicklinson) v. Ministry of Justice*, [2014] UKSC 38, [2014] 3 All E.R. 843 (UK Supreme Court).

<sup>1330</sup> *Pretty v. United Kingdom*, No. 2346/02, ECHR 2002-III.

<sup>1331</sup> *Constitution Act*, 1982, s.15. The engagement of the SCC with non-domestic legal sources appears to be even broader in this area. As Bruce Ryder *at al* note in his empirical overview of the Charter: “In resolving the challenges posed by section 15 of the Charter, the courts have drawn significant guidance from anti-discrimination jurisprudence developed under Canadian human rights statutes, from the experience of other nations and from international law.” See, Bruce Ryder, Emily Lawrence & Cidalia Faria, “What’s Law Good For? An Empirical Overview of Charter Equality Rights Decisions” (2004) 24 *Supreme Court Law Review* (2d) 103.

<sup>1332</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.

<sup>1333</sup> *R. v. Kapp*, 2008 SCC 41.

<sup>1334</sup> *Withler v. Canada (Attorney General)*, 2011 SCC 12.

foreign constitution,<sup>1335</sup> four decisions of US courts,<sup>1336</sup> and one judgment of an international court.<sup>1337</sup> The dissent cites three other non-domestic judgments, two comparative cases, and one international case.<sup>1338</sup> Meanwhile, no non-domestic legal sources are cited in *Kapp* or *Withler*; in both the *Andrews* and *Oakes* tests are applied.

xiii. Override of Rights (the Notwithstanding Clause)<sup>1339</sup>

Although *Ford v. Quebec*<sup>1340</sup> is an earlier case, it shows a heavy reliance on non-domestic legal sources; the Court cites five international cases,<sup>1341</sup> and four judgments from foreign nations.<sup>1342</sup>

xiv. Amending Procedures<sup>1343</sup>

Again, the essential case is *Reference re Secession of Quebec*.<sup>1344</sup> As mentioned above, the SCC cites two foreign cases,<sup>1345</sup> seven foreign statutes and regulations,<sup>1346</sup> and six international treaties.<sup>1347</sup>

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<sup>1335</sup> *Constitution of the United States of America*, 14th Amendment.

<sup>1336</sup> *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Buck v. Bell*, 274 U.S. 200 (1927); *Fontiero v. Richardson*, 411 U.S. 677 (1973); *In re Griffiths*, 413 U.S. 717 (1973).

<sup>1337</sup> *Reyners v. The Belgian State*, [1974] 2 Common Market Law R. 305 (European Court of Justice).

<sup>1338</sup> 2 comparative cases: *Dennis v. United States*, 339 U.S. 162 (1950); *Graham v. Richardson*, 403 U.S. 365 (1971); and 1 international judgment: *Belgian Linguistic Case (No. 2)* (1968), 1 EHRR 252 (ECtHR).

<sup>1339</sup> *Constitution Act*, 1982, s.33

<sup>1340</sup> *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712

<sup>1341</sup> *23 Inhabitants of Alsemberg and Beersel v. Belgium* (1963), 6 Yearbook of the European Convention on Human Rights 332; *Inhabitants of Leeuw-St. Pierre v. Belgium* (1965), 8 Yearbook of the European Convention on Human Rights 338; *X. v. Belgium* (1965), 8 Yearbook of the European Convention on Human Rights 282; *X. v. Ireland* (1970), 13 Yearbook of the European Convention on Human Rights 792; *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium"* (1968), 11 Yearbook of the European Convention on Human Rights 832.

<sup>1342</sup> *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 106 S.Ct. 2968 (1986)

<sup>1343</sup> *Constitution Act*, 1982, Part V. ss.38-49.

<sup>1344</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 21

<sup>1345</sup> *De Demko v. Home Secretary*, [1959] AC 654 (House of Lords); *Muskrat v. United States*, 219 U.S. 346 (1911) (US Supreme Court).

xv. Remedies<sup>1348</sup>

The two key cases on this subject are *Vriend v. Alberta*<sup>1349</sup> and *Vancouver (City) v. Ward*.<sup>1350</sup> In *Vriend*, the Court cites earlier cases that rely on comparative and international legal sources,<sup>1351</sup> as well as the well-known *Oakes* decision.<sup>1352</sup> In *Ward*, the SCC cites eight cases from various foreign nations.<sup>1353</sup>

This section demonstrates that non-domestic legal sources, of either an international or a comparative nature, are cited in almost every key constitutional law case. This finding supports the remarks of the justices, who note that constitutional cases are more likely to rely on non-domestic legal sources. Such cases represent “good law” in

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<sup>1346</sup> Ala. Code 1975 § 12-2-10; *Bill of Rights* of 1689 (Eng.), 1 Will. & Mar. sess. 2, c. 2; Del. Code Ann. tit. 10, § 141 (1996 Supp.). (Delaware, USA); *Magna Carta* (1215); *Statute of Westminster, 1931* (U.K.), 22 & 23 Geo. 5, c. 4 [reprinted in R.S.C., 1985, App. II, No. 27]; *Union Act, 1840* (U.K.), 3-4 Vict., c. 35 [reprinted in R.S.C., 1985, App. II, No. 4]; United States Constitution, art. III, § 2.

<sup>1347</sup> *Charter of the United Nations*, Can. T.S. 1945 No. 7, Arts. 1(2), 55; *Convention for the Protection of Human Rights and Fundamental Freedoms*, Protocol No. 2, Europ. T.S. No. 5, p. 36; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, Art. 1; *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, Art. 1; *Statute of the Inter-American Court of Human Rights* (1979), Art. 2; Treaty establishing the European Community, Art. 228(6).

<sup>1348</sup> *Constitution Act*, 1982, s.24, 52.

<sup>1349</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

<sup>1350</sup> *Vancouver (City) v. Ward*, 2010 SCC 27.

<sup>1351</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624. In this case the SCC cited 4 comparative case law: *Minister of Home Affairs v. Fisher*, [1980] AC 319 (Privy Council); *Washington, Mayor of Washington, D.C. v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); and 3 statutes and regulations of foreign nations: United States Constitution, Fourteenth Amendment; *Rehabilitation Act*, 29 U.S.C. § 794 (1997); *Americans with Disabilities Act*, 42 U.S.C. §§ 12182-12189 (1997). *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. In this case the SCC cited 7 comparative cases: *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961), distinguished; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Education v. Barnette*, 319 U.S. 624 (1943); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1970).

<sup>1352</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103

<sup>1353</sup> *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 NZLR 136 (New Zealand other court); *Anufrijeva v. Southwark London Borough Council*, [2003] EWCA Civ 1406, [2004] Q.B. 1124 (UK other court); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (USSC); *Taunua v. Attorney-General*, [2007] NZSC 70, [2008] 1 NZLR 429 (Supreme Court of New Zealand); *Fose v. Minister of Safety and Security*, 1997 (3) SA 786 (Constitutional Court of South Africa); *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328 (Privy Council); *Smith v. Wade*, 461 U.S. 30 (1983) (USSC); *Simpson v. Attorney-General*, [1994] 3 NZLR 667 (New Zealand other court).

Canada, and most contain important legal tests used in many other SCC judgments. As revealed above, almost all key constitutional cases, which drive Canadian legal practice, rely extensively on non-domestic legal sources. While the empirical quantitative numbers provided in Chapter 3 indicate that non-domestic legal sources influence the SCC's decision-making, the reference to borrowed legal tests in this section confirm that their impact is far more substantial than previously thought.

Although the above analysis focuses on key cases, we should note that *ordinary* cases, which constitute the majority of SCC cases, are also influenced by non-domestic legal sources. In ordinary cases, a phenomenon I call “covering of foreign citations” often occurs. But how is this phenomenon happening?

As shown in Chapter 3, nearly two-thirds of SCC cases do not refer to international or comparative legal norms. However, a deeper analysis reveals that many of these cases reference previous SCC cases, particularly primary cases, which make considerable use of non-domestic legal sources. Consequently, the foreign source on which the primary case is based is not cited, as the Canadian case is deemed sufficient. As a result, the original, foreign source of the legal tests or principles that become an integral part of Canadian jurisprudence is “covered.”

The famous *Oakes test*, which is applied to cases that fall under Section 1 of the Canadian Charter of Rights and Freedoms, provides once again an excellent illustration of this process.<sup>1354</sup> As demonstrated above, in *Oakes*,<sup>1355</sup> the SCC, when analyzing the

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<sup>1354</sup> *R. v. Oakes*, [1986] 1 SCR 103.

<sup>1355</sup> *R. v. Oakes*, [1986] 1 SCR 103. In this case the SCC cited 5 comparative cases: *Tot v. United States*, 319 U.S. 463 (1943); *Leary v. United States*, 395 U.S. 6 (1969); *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 (1979); *In Re Winship*, 397 U.S. 358 (1970); *Bater v. Bater*, [1950] 2 All ER 458 (C.A.); 2 international court cases: *Pfunders Case (Austria v. Italy)* (1963), 6 Yearbook ECHR 740; *X against the United Kingdom*, Appl'n No. 5124/71, Collection of Decisions, ECHR, 135; 3 statutes and regulations of other nations: *Constitution of the United States of America*, 5th and 14th Amendments; *Misuse of Drugs Act 1971*, 1971

limitation clause (Section 1 of the Charter), looked to international law for inspiration, and decided to use the well-known “proportionality test” of the European Court of Human Rights (which in fact was an invention of German Courts).<sup>1356</sup> Subsequent SCC judgments analyzing the limitation clause (Section 1 of the Charter) and applying the proportionality test do not cite the original foreign legal source (the ECtHR judgement), used to introduce the test. Later cases only cite the Canadian case (*Oakes* case), thereby “covering” the original foreign legal source.

Many other ordinary cases lack citation of foreign jurisprudence (or other forms of non-domestic legal sources); the foreign sources were incorporated into earlier SCC case law. For example, in *Health Services v. British Columbia*,<sup>1357</sup> the SCC relies on four international treaties,<sup>1358</sup> but does not cite foreign cases. Instead, it cites several major cases that are well known for their use of all four forms of non-domestic legal sources.<sup>1359</sup> A similar situation occurs in *United States of America v. Ferras; United States of America v. Latty*,<sup>1360</sup> in which the SCC incorporates primary cases that use foreign case law, but cites only one case of the US Supreme Court.<sup>1361</sup>

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(U.K.), c. 38; *Misuse of Drugs Act 1975*, 1975 (N.Z.), No. 116; and 5 international treaties: *International Covenant on Civil and Political Rights*, 1966, art. 14(2); *Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium; Single Convention on Narcotic Drugs*, 1961; *Universal Declaration of Human Rights*, art. 11(I); *The European Convention on Human Rights*.

<sup>1356</sup> *Pfunders Case (Austria v. Italy)* (1963), 6 Yearbook ECHR 740; *X against the United Kingdom*, Appl'n No. 5124/71, Collection of Decisions, ECHR, 135.

<sup>1357</sup> *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391.

<sup>1358</sup> *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17; *Declaration on Fundamental Principles and Rights at Work*, 6 IHRR 285 (1999); *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 22(1), (2); *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, Art. 8(1)(c).

<sup>1359</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3; *R. v. Oakes*, [1986] 1 SCR 103; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791.

<sup>1360</sup> *United States of America v. Ferras; United States of America v. Latty*, 2006 SCC 33, [2006] 2 SCR 77.

<sup>1361</sup> *Glucksman v. Henkel*, 221 U.S. 508 (1911)

Another interesting example is *B010 v. Canada*,<sup>1362</sup> which is a classic case in which the SCC relies upon international treaties,<sup>1363</sup> but does not cite foreign or international court decisions, as those had been incorporated into Canadian jurisprudence through previous judgments. Here, the SCC refers to *R. v. Hape*,<sup>1364</sup> which extensively relies on all four forms of non-domestic legal sources.<sup>1365</sup> The SCC also relies on a case from the Federal Court of Appeal, *de Guzman v. Canada*,<sup>1366</sup> which is itself a seminal case on the binding nature of international law and provides the framework for assessing whether legislation violates international law. In *Divito v. Canada*,<sup>1367</sup> the SCC again cites international treaties,<sup>1368</sup> but not comparative or international case law, because it references Canadian cases that rely on these sources.<sup>1369</sup> The covering process explained in the above cases further demonstrates that non-domestic legal sources are arguably far more influential than the quantitative data alone indicates.

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<sup>1362</sup> *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704.

<sup>1363</sup> Interview with Anonymous Justice 2.

<sup>1364</sup> *R. v. Hape*, 2007 SCC 26, [2007] 2 SCR 292.

<sup>1365</sup> Comparative law: *Statute of Westminster, 1931* (U.K.), 22 Geo. 5, c. 4 [reprinted in R.S.C. 1985, App. II, No. 27], s. 3; Comparative case law: *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529; *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWJ No. 4947 (QL), [2002] EWCA Civ. 1598; International treaties: *Charter of the United Nations*, Can. T.S. 1945 No. 7, art. 2(1); United Nations. General Assembly. *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), 24 October 1970; International case law: *Customs Régime between Germany and Austria* (1931), P.C.I.J. Ser. A/B, No. 41 (Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice – 1922-46); *Island of Palmas Case (Netherlands v. United States)* (1928), 2 RIAA 829 (Permanent Court of Arbitration); *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, [1986] ICJ Rep. 14 (International Court of Justice).

<sup>1366</sup> *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655.

<sup>1367</sup> *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 SCR 157.

<sup>1368</sup> *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, arts. 12, 21; *Treaty Between Canada and the United States of America on the Execution of Penal Sentences*, Can. T.S. 1978 No. 12, arts. II, III, IV; United Nations Office on Drugs and Crime. Handbook on the International Transfer of Sentenced Persons. Vienna: United Nations, 2012 (soft law).

<sup>1369</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624; *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283; *R. v. Hape*, 2007 SCC 26, [2007] 2 SCR 292, etc.

## 2. THE IMPACT OF EXTRA-JUDICIAL MECHANISMS

As revealed in the previous section, non-domestic legal sources, of both international and comparative nature, impact the SCC's decision-making. This section will explore whether extra-judicial interaction with foreign courts and judges influences the SCC or its justices. When this question was put to current and former judges of the SCC, almost all confirmed that such activities are not unimportant, and do have an effect. However, their views varied. One judge asserted, "Extrajudicial activities of judges are of great importance,"<sup>1370</sup> while a more skeptical judge argued that the effect of such activities is difficult to determine, but is sure they influence the Court "in some ways."<sup>1371</sup> This judge explained further:

We go to these conferences, and we have these conversations with other judges to get new perspectives. Around the world, judges are facing the same problems. So when we are grappling with these difficult issues, we can find it useful to listen to the perspectives of someone else. It is not that we are going to just adopt that, or that is going to directly change our decision. But we hope that it enriches our thinking, the way we think about our problems. We may accept some new ideas, we may reject them, or we may use and adopt them in a different form. But we are basically looking for new perspectives on problems that we might face, substantive or organizational, and then what we do with them; well, it depends on the nature of the problem or the case.<sup>1372</sup>

The majority of the other judges also acknowledged the difficulty in assessing the impact of extra-judicial activities, particularly in comparison with discerning the influence of non-domestic legal instruments on the Court. According to the judges, this is because the impact of extra-judicial activities is less visible on the decision-making of the Court, whereas on Court management matters, these effects are more direct.

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<sup>1370</sup> Interview with Anonymous Justice 8.

<sup>1371</sup> Interview with Anonymous Justice 2.

<sup>1372</sup> Interview with Anonymous Justice 8.

This section will examine the two forms of extrajudicial activities explained in Chapter 4, “court-to-court” (institutional) and “judge-individual interactions”.

#### A. Court-to-Court Activities

As discussed in Chapter 4, there are at least three forms of court-to-court transnational judicial interactions: regular bilateral relationships with foreign courts, transnational court associations and organizations, and occasional contacts. Chapter 4 also revealed that the SCC has built official, and ongoing relationships with at least nine courts, eight of which are the highest courts of foreign nations (the UK, the US, France, Australia, New Zealand, Germany, India, and Israel), and one of which is a supranational court (the ECtHR). Depending on the agreement, such meetings are held every two, three, or four years, alternating between the SCC and the foreign court.

The main purpose of such exchanges is to share information and best practices. The range of topics discussed is quite broad, ranging from substantive legal principles, such as approaches to interpreting constitutional rights, to more administrative issues, such as dealing with self-represented litigants.<sup>1373</sup>

This inscription, found in the Grand Entrance Hall of the SCC, indicates that such meetings influence two key aspects of the Court: decision-making and court management. All interviewed judges emphasized that extrajudicial activities create two types of impacts: a) substantive, on the decision-making of the court, and b) managerial, on court administration and internal procedures. Court management issues will be discussed in a subsequent section;<sup>1374</sup> here the focus is on the effects of extra-judicial activities on the decision-making of the Court.

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<sup>1373</sup> Part of the citation on the metal plaque in the Grand Entrance Hall of the SCC.

<sup>1374</sup> See below Section 3.

The interviewed justices note that judges share information and best practices about substantive legal principles, exchanging views on case law related to almost every field of law. However, as noted in Chapter 4, the substantial legal issues discussed most often in these official meetings are human rights or other important constitutional principles. Speaking about these regular court-to-court exchanges, one judge remarked:

We would take three cases from one country and three cases from the other on the same subject and then we would have presentations. Judges would make presentations and then we would compare our methods, our use of precedents, our results, and so on. The exchange was really a debate about best practices, the way we deal with the questions that are common to our courts.<sup>1375</sup>

It appears the central goal of these formal meetings is for judges to discuss and debate ideas to better prepare them for the substantive issues they face daily. However, this does not imply that such best practices or foreign judgments will necessarily be adopted. As one of the interviewed judges explained:

It is not that we are going to just adopt that, or that is going to directly change our decision. But we hope that it enriches our thinking, the way we think about our problems. We may accept some new ideas, we may reject them, or we may use and adopt them in a different form.<sup>1376</sup>

Even if the SCC does not change its practices, such meetings allow for the sharing of information, the better understanding of foreign judgments, and the exchange and cross-fertilization of jurisprudence. Most judges that I interviewed agree.

In fact, it seems that a persuasive correlation exists between extra-judicial activities with a specific court and the citation of judgments of that particular court. The list of foreign national courts with which the SCC is currently in a regular court-to-court

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<sup>1375</sup> Interview with Anonymous Justice 4.

<sup>1376</sup> Interview with Anonymous Justice 2.

relationship<sup>1377</sup> and the list of courts that the SCC cited in the last 17 years are remarkably similar. The SCC has cited each of these nine courts.<sup>1378</sup> The connection appears to be even more convincing when the six most cited foreign courts are examined: the Supreme Court of the United States, the Supreme Court of the United Kingdom, the High Court of Australia, the Supreme Court of New Zealand, *Cour de Cassation* (and *Conseil d'État*) of France, and the Supreme Court of Israel.<sup>1379</sup> Each of these top six courts, is a court with which the SCC has a regular bilateral relationship.<sup>1380</sup> Moreover, from all 13 highest foreign courts which the SCC have cited, only 4 courts are not in a bilateral relationship with the SCC;<sup>1381</sup> they are cited in total only 13 times (1.6% of all cases). The rest, 98.4% (or 798 out of 811 cases) are from courts with which the SCC is in a formal bilateral relationship. Similarly, the ECtHR, with which the SCC is in such a relationship, is the most cited international court, cited almost as often as all the other international courts combined.<sup>1382</sup> Hence, the empirical data, reinforced by the interviews with judges, confirm a convincing relationship between extrajudicial activities among courts (particularly in the form of bilateral relationships), and the citation of their judgments in SCC decisions.

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<sup>1377</sup> See Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”. This list contains 10 courts, 9 highest national courts and 1 supranational court: The Supreme Court of the United Kingdom, the Supreme Court of the United States, the *Cour de Cassation* (and *Conseil d'État*) of France, the High Court for Australia, the Supreme Court of New Zealand, the Federal Constitutional Court of Germany, the Supreme Court of India, the Supreme Court of Israel, and the European Court of Human Rights (ECtHR).

<sup>1378</sup> For a list of all highest courts cited by the SCC see Table 10 in Chapter 3. These courts are: The Supreme Court of the United States, the Supreme Court of the United Kingdom, the High Court for Australia, the Supreme Court of New Zealand, the Constitutional Court of South Africa, the *Cour de Cassation* (and *Conseil d'État*) of France, the Supreme Court of Ireland, the Supreme Court of Israel, the Federal Constitutional Court of Germany, the Supreme Court of India, the Supreme Court of the Netherlands, the Court of Final Appeal of Hong Kong, the Federal Supreme Court of Switzerland.

<sup>1379</sup> See Chapter 3, Table 10.

<sup>1380</sup> See Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

<sup>1381</sup> See Chapter 3, Table 10. These four courts are: the Supreme Court of Ireland, the Supreme Court of the Netherlands, the Court of Final Appeal of Hong Kong, the Federal Supreme Court of Switzerland.

<sup>1382</sup> See Chapter 3, Table 13.

## B. Extrajudicial Activities of Individual Judges

These activities, which fall into four categories as identified in Chapter 4,<sup>1383</sup> may arguably influence the decision-making of the SCC. Such individual contacts can be developed in different settings. The majority of the interviewed judges acknowledge that their contacts with individual judges of foreign or international courts enable them to exchange ideas and learn about different jurisprudential approaches. One of the judges spoke about the impact of such contacts:

Face-to-face meetings with foreign judges in different settings are very, very important venues, where we speak about our case law. . . . It is important to note that generally a lot of it has to do with the judges we have met with and respect.<sup>1384</sup>

Another judge conveyed a similar message:

Yes, these meetings with foreign judges do play a role in referring more to international or transnational legal sources. . . . Such meetings with foreign colleagues open up my mind to what is going on in other countries.<sup>1385</sup>

Another judge also mentioned that these meetings are critical venues for learning about other courts' cases, emphasizing that foreign judges struggle with the same issues, and noting, "In these meetings we exchange ideas and practices, and can learn about their jurisprudence."<sup>1386</sup>

The above indicates that probably the most significant effect of such individual connections is that they bring case law from foreign or international courts to the attention of SCC judges. The majority of interviewed justices acknowledged a connection between the extrajudicial activities of judges with foreign counterparts and their reference

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<sup>1383</sup> a) Face-To-Face Meetings With Foreign Judges; b) Participation In Transnational Judicial Associations; c) Establishing And Participating In Global Judicial Training Institutions; d) Participation In Electronic Judicial Networks

<sup>1384</sup> Interview with Anonymous Justice 5.

<sup>1385</sup> Interview with Anonymous Justice 8.

<sup>1386</sup> Interview with Anonymous Justice 3.

to non-domestic legal sources.<sup>1387</sup> Such a link seems to be confirmed by the data of this study, as the judges with the highest number of references to non-domestic legal sources are often the same judges that have been most active in such activities and have a more “globalist” profile.<sup>1388</sup> Hence, it appears that, the more active an individual judge (or even the Court as an institution) is in transnational contexts, the more that particular judge (or Court) is willing to use non-domestic legal sources in their judicial decisions.

Another beneficial effect of such individual connections is that they not only bring to attention new case law, but also provide much more information and background on the circumstances of the case. Through these meetings with foreign counterparts, judges learn more about the context of such judgments, including the socio-legal, historical, and political background, which enables them to use these cases much more appropriately. One judge reinforced that finding:

The importance of these meetings is that you not only get informed about such foreign sources, but you get also to know and understand more about their judicial culture, and the historic or political background of such cases. I have been obviously sensitized to international law, through my participation in such meetings, where I was often invited to speak.<sup>1389</sup>

As the interviewed judges themselves recognize, another significant effect of these interactions is that they allow them to develop personal relationships, and even friendships, with foreign judges. This in turn builds trust among judges, increases their confidence in using each other’s case law, and makes it easier to rely on the judge behind the decision.<sup>1390</sup> “Building trust” is a vital element in judge-to-judge relationships, which

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<sup>1387</sup> Interview with Anonymous Justice 1, Justice 2, Justice 3, Justice 5, Justice 9, and Justice 10.

<sup>1388</sup> See Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

<sup>1389</sup> Interview with Anonymous Justice 8.

<sup>1390</sup> Interview with Anonymous Justice 1, Justice 2, Justice 3, Justice 5, Justice 9, and Justice 10. Interview with Anonymous Judge 12: Here it is how this judge as the administrator of one of the transnational electronic networks puts it: “Before getting an idea from a colleague from another country or citing case law from other countries, these face to face meetings helps to know the judge on personal level. You end up

then may influence the general transnational judicial dialogue at both the institutional and individual levels, a process that further may influence the decision-making process. As one of the judges of the SCC explained: “The friendships that we create with judges from other nations enhance the dialogue on those issues that come before us or them, which benefits us all.”<sup>1391</sup>

Hence, it seems fair to say that extra-judicial interaction at both the institutional and judge-individual levels may even have an impact on the decision-making of the SCC. It is through these extra-curial activities that the SCC and its judges are brought into conversation with foreign counterparts, allowing them to exchange ideas and best practices, refer to the judgments of each other, learn more about the context of such decisions, and built trust with each other. Yet it must be noted that the impact of extra-judicial activities on the decision-making of the SCC is non-direct. As one judge stated:

I think that the impact of such extrajudicial activities on the decision-making of the SCC is probably indirect . . . . I can't think of an instance where I was in some sort of international exchange with foreign judges, and learned something, and the next day it happened that I needed to use the foreign decision that I learned. I mean, that's not how the judiciary works. These meetings certainly give you new ideas, and you can learn and exchange best practices there, which later can be of use, as it has been in many instances.<sup>1392</sup>

Although the effect of extra-judicial activities is not visible to the public, several judges indicate that such interactions prompt the SCC to reference both a greater number and higher quality of non-domestic legal sources.

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understanding more the judges behind their decisions and say: “OK, I can trust him and I can rely to the man behind the decision, and that decision is not that foreign anymore”. So, relating to the man behind the decision is certainly a plus. When I started practicing law, we did not have such opportunities to meet the man behind the decision.”

<sup>1391</sup> Interview with Anonymous Justice 1.

<sup>1392</sup> Interview with Anonymous Justice 9.

Finally, transnational judicial dialogue, through both formal legal and extra-judicial mechanisms, not only may influence when the SCC and its judges elect to adopt such ideas and practices, but also when it decides to avoid them. These interactions expose judges to a vast number of ideas and practices from around the world, and some, as many judges note, would be unacceptable in Canada. As one elegantly remarked:

International legal sources or practices of other countries are helpful not only when you want to adopt them, but also when you don't want to adopt them. . . . Hence, even when you don't cite them you still learn from them, because it is a decision you want to avoid in Canada.<sup>1393</sup>

As in other areas of life, learning what needs to be avoided is as important as learning what should be emulated. While foreign decisions that have been followed, often can be found in the text of SCC decisions, it is impossible to know which judgments were avoided without speaking with judges. Hence, another finding of this research is that the avoided foreign decisions, perhaps, have also had an impact in shaping SCC judgments through their absence.

### **III. THE IMPACT ON SCC MANAGEMENT AND PROCEDURES**

The transnational judicial conversation of the SCC and its judges may affect not only the decision-making of the Court, but also court management.<sup>1394</sup> One judge asserted, “These extrajudicial networking activities and meetings with foreign counterparts may have an

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<sup>1393</sup> Interview with Anonymous Justice 3.

<sup>1394</sup> Indeed, several judges believe that interactions with foreign courts and judges may influence Court management more than substantive issues. Interview with Anonymous Justice 6, Justice 7, Justice 8, and Justice 10.

even greater impact on court management matters.”<sup>1395</sup> One reason, according to a senior official of the SCC, is that “Court management issues are less political and controversial, hence the exchange on these matters is more acceptable and maybe easier to adapt from one court to the other.”<sup>1396</sup>

In addition to the senior official of the Court, almost all interviewed judges (nine out of ten) note that transnational judicial dialogue affects court organization and management, or institutional arrangements and internal procedures. As one judge emphasized, “These extrajudicial activities, such as face-to-face meetings, associations, and judicial organizations, bring many changes, particularly to the operation of the Court.”<sup>1397</sup>

Speaking about court management and internal procedures, one judge stated, “We can get good ideas everywhere and on every matter. There is always somebody who has a good idea about something. The smartest thing you can ever learn as a judge is to have an open mind.”<sup>1398</sup> With this universal statement in mind, this section will provide examples of the effects of transnational judicial conversation on court management, most of which fall into one of three categories: 1) specific occasional effects, 2) development of universal guidelines, and 3) continuous checking process.

## **1. SPECIFIC OCCASIONAL EFFECTS**

These effects may occur as a result of a discussion with one or more foreign courts around a specific issue concerning court management and internal practices. Several interviewed justices provided examples of these effects. For instance, one said:

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<sup>1395</sup> Interview with Anonymous Justice 9.

<sup>1396</sup> Interview with a High Administrative Officer.

<sup>1397</sup> Interview with Anonymous Justice 7.

<sup>1398</sup> Interview with Anonymous Justice 5.

Let me give you an example of how judicial administration ideas can travel and be of great help. We have a practice here that we developed, I guess, the last 3–4 years, to not circulate drafts of judgments in the month of August. The rationale is that it allows us, and our staff, to take a real holiday. This idea came from our meetings with the judges of the US Supreme Court. . . . These meetings are very important not just for the law, but also about how we operate as judges, how our collegial practices can be improved.”<sup>1399</sup>

Another judge noted this example and added that this imported practice is prompting the SCC to make changes in the way it schedules appeals, saying, “There are discussions to move in that direction and organize our cases in that way,” referring to the US Supreme Court.<sup>1400</sup> He further explained the influence of this foreign custom on the internal practice of the Court:

One example is the practice of the US Supreme Court that all hearings of judgments are to be completed by the end of June. I think they have to issue all the judgments by the end of June, and if they don’t, they have to rehear the case. We don’t have any such rule, but that practice made us think that it would be in the interest of the Court to have a period where everybody closes what they are doing and gets a real holiday. And the idea was that it would serve our legal staff who are extremely busy, trying to get the judgments translated, and some working on the holidays, and so on. In our view, it would be good if there was a slowdown. That led us to some changes of practice, in terms of both scheduling appeals and an informal rule among colleagues that they wouldn’t circulate any memos during summertime. I would say those changes in our internal practices and procedures were a direct result of discussions that we had with our US colleagues.<sup>1401</sup>

These changes indicate that the conversation with the US Supreme Court has not only influenced the SCC’s appeals schedule, but also its internal procedures on the drafting of judgments. During summer, justices do not circulate memos and draft-judgments. Other judges clarified the importance of the issue, noting that the drafting of

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<sup>1399</sup> Interview with Anonymous Justice 6.

<sup>1400</sup> Interview with Anonymous Justice 9.

<sup>1401</sup> Interview with Anonymous Justice 9.

judgments was also discussed in other bilateral and multilateral transnational venues.<sup>1402</sup>

They acknowledged that such interactions helped them improve their writing abilities, which affects both the form and substance of the judgments.

Another oft-mentioned example involves the relationship of the Court with the public in the digital age. Judges are aware that social media play a central role in their communication with the public, and as these platforms are constantly developing, judges seek to adopt new ways to enter into conversations. One remarked:

Before we would rely on traditional media to report our decisions and legal affairs, but now things have changed and the traditional media does not play that unique and important role. So, how do we react to that? We need to think on how to react on that, and communicating with other courts is always a great way to improve things at home.<sup>1403</sup>

The SCC looked to the UK Supreme Court for help resolving this issue. One judge noted:

In the UK, we learned that when an important decision of the Supreme Court is delivered, they will prepare a short summary of the judgment, and they will publish on YouTube a video of a judge reading this summary of the judgment.<sup>1404</sup>

Another judge mentioned the same discussion:

In our meeting with the UK Supreme Court judges, we spent quite a bit of time talking with them about the presentation of our judgments to the wider public. . . . After some discussion with our colleague justices of the Supreme Court of the UK, we are actively thinking about ways on how to do it here, in order to improve our relationship with the public.<sup>1405</sup>

These meetings prompted the SCC to implement several internal organizational changes, creating new offices and hiring new staff. A current judge provides further details on new developments related to improving the Court's relationship with the public:

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<sup>1402</sup> Interview with Anonymous Justice 7 and Justice 4.

<sup>1403</sup> Interview with Anonymous Justice 7.

<sup>1404</sup> Interview with Anonymous Justice 7.

<sup>1405</sup> Interview with Anonymous Justice 6.

We recently advertised that the Court is hiring a media relations officer who will write summaries of our decisions for the media, which I will expect will also be tweeted, because the Court now has Twitter and Facebook accounts. This practice allows us to put our voice, in explaining our decisions directly to the public, in very short and more understandable terminology. This entire development is not all attributable to our discussions with our UK peers, but it has certainly been an important part. That's another fairly concrete example of how our conversation with the UK Supreme Court led to improvements in our Court.<sup>1406</sup>

## 2. DEVELOPMENT OF UNIVERSAL GUIDELINES

Court management issues are also discussed in multilateral settings; in such meetings, the participants may agree to develop general guidelines or best practices for the management of highest courts. This research reveals that a few years ago, several courts, including the SCC, decided to put forward a set of norms, principles, guidelines, and best practices, which can be of great help not just to the participating courts, but also to international courts or highest courts of other countries that want to improve their court management.

In 2008, the Commonwealth Meeting of Justices and Registrars of Final/Appellate Courts and Regional Courts highlighted the importance of convening a transnational meeting “to discuss issues and exchange information about best practice in registries.”<sup>1407</sup> As a result of this recommendation, court administrators from across the Commonwealth were invited to submit detailed written papers and attend a meeting in Ottawa hosted by the Supreme Court of Canada (the “Ottawa meeting”). The outcomes of the conference were outlined in a user-friendly, practical manual, *Handbook of Best Practice for Registrars of Final/Regional Appellate Courts and International Tribunals* (hereinafter

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<sup>1406</sup> Interview with Anonymous Justice 6.

<sup>1407</sup> Handbook, *supra* note 27 at iii.

Handbook).<sup>1408</sup> This Handbook was later published, and as one of the senior officials of the SCC mentions, it serves not only the courts that participated in constructing it, but has become essential for many courts across the globe. The issues the Handbook addresses are: “institutional matters” (such as budget, security, court governance, media relations, and recruitment of administrative staff), “information and document management” (such as e-filing, the judiciary and technology, and moving to an IT-based system), “the needs of the court and court/tribunal users” (such as legal aid, witness and victim support, areas of state responsibility), and “eradicating inefficiencies and abuses of process”.<sup>1409</sup>

The creation of the Handbook suggests that transnational judicial conversations surrounding management issues have been much more effective than those relating to substantive decision-making. Exchanges regarding substantive issues have led to cross-fertilization and the development of various legal tests and principles, but have never prompted a multilateral gathering of judges, who come together to discuss substantive issues, and then develop global guidelines on various legal issues that concern the majority of courts across the globe.<sup>1410</sup> Speaking about the future of transnational judicial conversation, one judge explains why it is unlikely a formal process that provides homogenous laws or principles will be implemented:

If there was a sort of formal process saying: we are going to put forward an idea where we can get more homogenous laws or principles, in a very formal sense, that somehow would be binding on us, or even presumptively “the right answer”; but I don’t see us going that way at all.

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<sup>1408</sup> *ibid.*

<sup>1409</sup> *ibid.*

<sup>1410</sup> There is however an interesting development regarding the establishing of a “handbook” on substantive issues in the context of the European Union, called “The Draft Common Frame of Reference” (DCFR). The DCFR contains the results of the work of the Study Group of scholars and judges on a European Civil Code (Study Group) and the Research Group on existing Community law in the area of general contract law (Acquis Group). Christian von Bar and Eric Clive (eds.), *Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (Full Edition, Sellier European Law Publishers 2009) Intr. 1 p. 1 marginal no. 1.

Because each court has to be and remain independent, and develop its jurisprudence in conjunction with the laws and constitution, and culture of its own country. All this is very valuable, but formalizing it, I do not know how it can happen. If, for example, there would be a sort of commission from the global community of judges that would say, “Let’s go for solution, a, b, or c,” towards some sort of omnipresent international law, but we are not there and I do not see how it would work in our legal framework.<sup>1411</sup>

As mentioned above, the SCC justices acknowledge that it is difficult to find global common ground on substantive issues, as they are more political and controversial. Court management, on the other hand, is much smoother. The exchanges between several highest courts in the Commonwealth have led to the establishment of a set of global guidelines that address almost all issues regarding court management. This development directly stems from the transnational judicial conversations that have occurred over the last two or three decades.

### **3. CONTINUOUS CHECKING PROCESS**

Beyond the singular occasional effects and the establishment of universal guidelines analyzed above, the court management of the SCC seems to be influenced also by a *continuous checking process*. Unlike the previous two categories, this type of practice, as the label itself suggest, is a development that occurs through a constant checking process, which sometimes leads to changes and effects that are more gradual, often minor, and much more difficult to notice. Certain interviewed judges and the high administrative official described this as a “confirmation of views” process.<sup>1412</sup> By definition, courts are very sensitive to legal rules, and operate cautiously, gradually, and thoughtfully. Hence,

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<sup>1411</sup> Interview with Anonymous Justice 2.

<sup>1412</sup> Interview with Anonymous Justice 6, Justice 7 and Justice 9.

as a rule, modifications in their institutional arrangements are minor and very gradual. A senior official of the SCC explained the process:

The interchange is a two-way traffic, and we certainly learn from each other. But I would say that is more sometimes just checking how we do it, and whether what we are doing make sense. For example, we look at the websites of other courts, and by looking at it, it gives us new ideas, and maybe it causes us to change our own. We also ask questions of our counterparts, and learn from them. For example, “Have you ever faced this type of situation, and if yes, how do you handle it?” One example is the funding. “How are courts funded by the government, how are the funds administrated in the Court, what is the decision-making power of the minister regarding court funding, and so on.” So, we check with other courts, and try to improve our system. For sure, we are in conversation with other courts, sharing our experiences, and for sure, we are interested to know what they do. This conversation helps our own thinking. It is mostly practical, instrumental. In other words, is a process of learning from others; we learn from others but we also share our own experience with our counterparts.<sup>1413</sup>

Another judge also mentioned exchanging ideas regarding funding:

In almost every country, the government does not invest enough in the justice system. So the issue of a limited budget in the justice system is a global issue. It is the same in Canada, and in other countries in Europe, and you realize this when you speak with foreign colleagues, that the budgets are not there anymore, and we have to work with means that are less available, and we have to work in new ways to shorten delays, as we do not have the same facilities anymore. These problems are the same across the democratic nations and beyond. So we compare notes, and we look at each other and see how we can do things with a lower budget, and we try to deal with what we have, and how to use facilities and resources that are more limited. That’s only one example, which is shared by many countries from all over the world, but we can certainly expand the examples to other areas of judicial administration. And when you discuss with this people, I can tell you, they live the same problems as we do.<sup>1414</sup>

The process of continuous checking also occurs in multilateral venues, such as organizations or associations of which the SCC is a member. As one judge stated:

Within the organization of ACCPUF [Association of Constitutional Courts Sharing the Use of French], we compared notes with the Conseil

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<sup>1413</sup> Interview with a Senior Official of the SCC.

<sup>1414</sup> Interview with Anonymous Justice 7.

Constitutionnel of France and the Constitutional Court of Switzerland, and it was very interesting and we learned from each other. The way we deliberate is different, the means that we give to the media people to help them to inform the public about our decisions are different, and we tried to learn from each other in this aspect, in order to improve our own system.<sup>1415</sup>

However, although less controversial than substantive issues, even court management exchanges are not without challenges. One interviewed judge explained:

The main difficulty in exchanges of ideas regarding court management is that each court has its own structures and challenges. Obviously, we do not have the same structure and number of appeals as the Indian Supreme Court or the ECtHR, which have tens of thousands of cases on backlog. Yet, some supreme courts, like the US Supreme Court or the Supreme Court of the UK, are closer to our Court, in terms of the number of judges and number of cases, so we can have pretty useful discussions about the management of the Court.<sup>1416</sup>

The senior administrative officer expressed a similar view:

Every supreme court is different. Yes, we are all supreme or constitutional courts, but none does exactly the same thing, because of history, culture, legal system, and so on. In other words, we need also to be aware of our differences. Yet we do try to learn as much as we can from each other and from the experience of others.<sup>1417</sup>

Despite the fact that court management exchanges appear to be less political and controversial, the various differences among the highest courts make this process challenging.

As with the exchanges on case law, conversations on court administration and management expose judges not only to ideas that they want to follow, but also to practices they wish to avoid. An interviewed judge offered two examples:

I remember in one of our meetings with the Mexican Supreme Court, we were hearing about how this Court deliberates in public, and we discussed the pros and cons of such a practice, and about another practice, that it is

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<sup>1415</sup> Interview with Anonymous Justice 7.

<sup>1416</sup> Interview with Anonymous Justice 10.

<sup>1417</sup> Interview with a Senior Official of the SCC.

the Secretariat who drafts judgments rather than the judges themselves. And we thought this is something that we want to avoid. . . . Another interesting example was when we discussed with the Supreme Court of the US about the way they distribute cases, and again we thought that it is something that we may not want to follow.<sup>1418</sup>

The same judge continued:

There are also a number of other instances where we learn about other processes or court management issues from other courts, and often we say that we do not want that in our Court. In other words, it is not just learning what you want to adopt at home, but also sharing of experiences of other courts, which are important to teach us about what we may want to avoid.<sup>1419</sup>

Other judges explicitly reference the benefits of learning about “bad” practices.<sup>1420</sup> Indeed, the benefits of such interactions occur not only when the SCC adopts such practices or ideas, but also when the Court decides to avoid them, learning from the experience of other courts. Another judge succinctly stated, “There is always something to learn. Even if it is something that you do not agree with, it can still make you refine your own ideas.”<sup>1421</sup>

It is important to add that unlike exchanges of judicial decisions, which are exclusive to judges, exchange on institutional arrangements also occur at the administrative level, where court officers and administrators interact with each other. As one senior official of the Court explained:

There are two types of exchanges between courts: 1) exchanges between the Court as institution or between judges focusing on case law, and 2) exchanges focused on Court administration, on how we can be helpful to other court officials in order to better manage their court.<sup>1422</sup>

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<sup>1418</sup> Interview with Anonymous Justice 8.

<sup>1419</sup> Interview with Anonymous Justice 8.

<sup>1420</sup> Interview with Anonymous Justice 3.

<sup>1421</sup> Interview with Anonymous Justice 5.

<sup>1422</sup> Interview with a Senior Official of the SCC.

The second category of exchanges goes beyond judges and often involves administrative staff of courts, particularly high administrative officers. Although it is beyond the scope of this study, it should be noted that like judges, court administrators also network and share their best practices with one another, and their exchanges are significant for the administration of courts.<sup>1423</sup>

As demonstrated above, transnational judicial conversations of the SCC and its judges have a noticeable impact on court management and other internal practices. One interviewed judge noted:

All kinds of aspects of our work can be influenced by our conversation with foreign courts. It could be on the substance, but also on procedures and practices on how to draft judgments. . . . In other words, this process and influence is very open to all kinds of aspects. We are always looking to adapt new best practices in every aspect. Always, because all is changing so fast and we need to adapt in the best way possible.<sup>1424</sup>

Although the SCC is considered to be an institution that handles its management issues well, “the SCC does not come into these meetings with the idea of teaching other courts how to do it.”<sup>1425</sup> Even when it is not embracing an instant “good practice” from another court, or not following a universal guideline, or simply checking the practices of other courts, still this development may have its own significant effects. However, the greatest impact is felt in the cross-fertilization of court management practices, where courts, including the SCC, continuously check their best practices, comparing them with one another and often implementing any needed adjustments. Moreover, this process also shapes the thinking of the SCC administrators and judges and allows them to make

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<sup>1423</sup> See for example International Association for Court Administration (IACA) in which Canadian high administrators, like the Registrar of the SCC are members. See, IACA, online: <http://www.iaca.ws/>. IACA was created in 2004 by court system executives and managers. Its founding principles envision a global association of professionals collectively engaged in promoting the effective administration of justice.

<sup>1424</sup> Interview with Anonymous Justice 7.

<sup>1425</sup> Interview with Anonymous Justice 9.

further improvements in Court management and their internal procedures.<sup>1426</sup> In addition to influencing the decision-making and institutional arrangements of the Court, transnational judicial interaction may also influence individual judges.

#### **IV. EFFECTS ON INDIVIDUAL JUDGES OF THE SCC**

Although the central aim of this study is to try to reveal the effects of transnational judicial interactions of the SCC as an institution, particularly on the decision-making of the Court and Court management and internal procedures, the research uncovers the influence of these activities on the judges themselves. The majority of the interviewed judges acknowledged this influence, particularly on their judicial philosophy, their national or transnational reputation, and their “globalist” or “localist” mindset. Transnational judicial interactions may even transform their judicial identity. Such effects may be caused by both forms of transnational judicial interactions, formal legal (through the citation of non-domestic legal sources) and through extra-judicial interactions among judges. These interactions can influence judges’ reasoning in SCC judgments or cause them to dissent, and can impact their extra-judicial activities, such as their interviews, public speeches, academic papers, attendance at conferences, judicial networking activities, and even the judges’ reputation in general. Once a judge opens his or her mind to “globalist” approaches, it is difficult to go back to a narrow “localist” mindset. One judge summarized the effect of transnational judicial dialogue on individual judges:

I think that it has an impact on our mind-sets and our philosophy of law. It causes a broadening of the intellectual perspectives of judges; giving us a sense that there are also other perspectives, experiences, or things to consider outside Canada; creating an inclination to look beyond the scope

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<sup>1426</sup> Interview with Anonymous Justice 10.

of the national legal system. I must note that interactions with foreign judges had a significant impact within the Court itself. Judges coming from one legal system, for example common law judges, will be introduced to civil law, and vice versa, and interaction with foreign judges would make the process of understanding each other in our Court easier. So, the interaction with foreign judges opens our minds.<sup>1427</sup>

Another judge agreed, saying, “This process impacts not just the Court as an institution, but also individual judges,” and explained further, “Such meetings with foreign colleagues open up my mind to what is going on in other countries, adhering to what I call *jus cogens*, norms that are really common, but also being very careful about not accepting everything.”<sup>1428</sup>

Almost all the justices emphasized the educational value of transnational judicial dialogue.<sup>1429</sup> One said, “This process is important. It has an educational impact on judges. Judges are learning how different legal systems and courts respond to similar problems.”<sup>1430</sup> Around the world, judges face the same problems, so when they meet with their foreign counterparts, listen to their perspectives, and learn about solutions, it enriches their thinking. Another judge noted:

I was always curious to know what is going on elsewhere, because I have always believed that ignorance is the source of bias and prejudice. So the more you know, I think the better person you will be, the better judge you will become, and the better you will serve your country.<sup>1431</sup>

From these remarks, it appears that learning from other judges, and opening their minds to new perspectives, is perhaps one of the most significant effects of transnational judicial dialogue.

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<sup>1427</sup> Interview with Anonymous Justice 10.

<sup>1428</sup> Interview with Anonymous Justice 8.

<sup>1429</sup> Interview with Anonymous Justice 3 and Justice 2.

<sup>1430</sup> Interview with Anonymous Justice 3.

<sup>1431</sup> Interview with Anonymous Justice 7.

Another justice stated that dialogue with foreign counterparts shapes judges' philosophy of law and judicial philosophy; further, such views can determine the type of judges with whom they form relationships:

To be perfectly honest with you, most of justices with whom I am in contact with and share judgments, and who have influenced me in one way or another, are judges who share the same judicial philosophy and concept of justice that I do. Judges who are not "Diceyan," in other words, who are not technical black-letter lawyers. I much prefer judges with a bigger picture approach, who go beyond the rule and try to understand what the impact is down the road.<sup>1432</sup>

Many of the interviewed judges also referred to the transformation of their judicial identity.<sup>1433</sup> The justices of the SCC appear to conceptualize national judiciaries as having a dual responsibility. On the one hand, they have a duty to protect the national legal order, on the other, they perceive themselves as guarantors of the international legal order within the domestic sphere. One judge specified, "In our daily job as judges of the highest court, we need to protect both legal orders, the Canadian, but also the international one that Canada has signed and is certainly bound by."<sup>1434</sup> Such a transformation of courts and their judicial identity is recognized in an academic paper by SCC Justice La Forest:

*[O]ur courts—and many other national courts—are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another's experience. Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.*<sup>1435</sup> [Emphasis added]

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<sup>1432</sup> Interview with Anonymous Justice 5.

<sup>1433</sup> Interview with Anonymous Justice 9, Justice 1, Justice 4, and Justice 5.

<sup>1434</sup> Interview with Anonymous Justice 1.

<sup>1435</sup> La Forest, *supra* note 154 (The Expanding Role of the Supreme Court of Canada in International Law Issues) at 100.

Such a view is particularly evident when it comes to the protection of individual human rights, where judges consider not just domestic legislation, but also international legal norms.

Several scholars also mention the transformation of the judicial identity of the judges of highest courts. Waters writes, “Domestic judges are fashioning a new identity for themselves as key mediators between international human rights norms and their own domestic legal systems.”<sup>1436</sup> Rather than seeing themselves as “domestic actors concerned primarily with the domestic legal sphere, courts active in dialogue increasingly view themselves as true transnational actors.”<sup>1437</sup> Slaughter also observes this transformation, noting, “Judges see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders.”<sup>1438</sup>

An arguably deeper aspect of such a transformation occurs when judges perceive themselves as having a role in a country’s international relations. One judge, when asked whether the judicial dialogue with foreign counterparts affects Canada’s international relationships and diplomacy, answered, “Well, yes. It is obvious than when we have these meetings, we are trying to build some sort of international relationship. Otherwise, we would have been not doing that.”<sup>1439</sup> Another judge stressed the role of SCC judges in the international arena and how they shape international relations:

Once a judge steps out of the country, the judge is in a very unusual position, because your job as a judge seems to not have any international

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<sup>1436</sup> Waters, *supra* note 641 (The Future of Transnational Judicial Dialogue) at 466.

<sup>1437</sup> *Ibid* at 466.

<sup>1438</sup> Slaughter, *supra* note 35 at 1124.

<sup>1439</sup> Interview with Anonymous Justice 2.

dimension to it; but it frequently will serve the bigger agenda of Canada's foreign policy and external relations.<sup>1440</sup>

This judge also emphasized the independence of the Court in such relations, noting, "It is important to understand that the Court certainly doesn't take any direction from the government on how it engages in interactions with foreign courts."<sup>1441</sup> Another judge, while not denying the international dimensions of the judicial role, observed that any impact on Canada's diplomacy is indirect. Such effects are not the reason SCC judges engage in transnational interactions:

It may have an impact in the global reputation of the SCC and of Canada as a country. It shows that Canada and the SCC are part of the world . . . and shows that SCC has respect for the works of Courts of other countries. And if that means that Canada and the SCC are good international players, that's fine. But we don't do it for that reason. The reason that we do it is that we want to have the best outcome in our judgments, in other words, how can we make the best decisions?<sup>1442</sup>

The empirical data in Chapter 4 shows that the SCC as an institution also believes its role in Canada's international relations has been transformed. The signing of formal bilateral memorandums and establishing of regular bilateral relationships with foreign or supranational courts, and its membership in multilateral transnational judicial organizations, support this perception. Through these engagements, the SCC is participating in a form of external relations, which are conducted in a relatively autonomous manner by the Court. As they participate in transnational judicial dialogue, constitutional courts, including the SCC, tend to move from a "localist" or "nationalist" approach toward a "globalist" or "cosmopolitan" conception of their judicial role. In this way, national courts, particularly constitutional courts and judges, are increasingly

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<sup>1440</sup> Interview with Anonymous Justice 9.

<sup>1441</sup> Interview with Anonymous Justice 9.

<sup>1442</sup> Interview with Anonymous Justice 3.

becoming the most powerful “mediators between the domestic and international legal regimes.”<sup>1443</sup>

Even the judicial reasoning within a single judgment (such as *Burns*, analyzed in Chapter 5) can be considered “a fascinating example of this transformation in judicial identity.”<sup>1444</sup> The extensive use of international law in *Burns* suggests that the SCC perceives itself as the highest authority that can interpret international legal instruments in Canada.<sup>1445</sup> The various examples mentioned above reinforce the new judicial identity of the judges of the SCC. This dual role of the SCC as the highest authority on the final interpretation of the Canadian Constitution and as an interpreter of international law signifies that the Court is not only one of the most important domestic institutions, but also the highest agent of international law within Canada. The dynamic role of the SCC and its judges in the international arena, evidenced through both their judgments and their active participation in transnational judicial activities, has elevated their global reputation.

One judge remarked:

The SCC has this enormous global prestige because it did not remain behind closed doors; instead, it was involved in all sorts of activities and exchanges with courts and judges from around the world, to the point that when we were visiting them, the red carpets were deployed in most places.<sup>1446</sup>

Finally, the majority of judges pointed out the two-way relationship that exists between the amount of citation of foreign legal instruments by individual judges, and their participation in extrajudicial transnational activities with foreign counterparts. As they explained, the more a judge is involved in such extra-judicial activities, the more

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<sup>1443</sup> Waters, *supra* note 641 (Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties) at 634.

<sup>1444</sup> *Ibid.*

<sup>1445</sup> *United States v Burns* [2001] 1 SCR 283. The SCC used nine formal international legal instruments in this decision.

<sup>1446</sup> Interview with Anonymous Justice 1.

non-domestic legal sources that judge is exposed to and arguably is willing to engage with, and vice versa; the more a judge uses such non-domestic legal sources, the more open that judge is to extra-judicial interaction activities with foreign colleagues.<sup>1447</sup> The empirical data reflecting the citation of non-domestic legal sources,<sup>1448</sup> and the extra-judicial activities of individual judges, both show that such a relationship exists between these two sets of mechanisms.<sup>1449</sup> The judges who reference non-domestic legal sources are usually the judges who are most active in extra-judicial activities.<sup>1450</sup>

## **V. OTHER NATIONAL AND INTERNATIONAL / TRANSNATIONAL EFFECTS**

The goal of this concluding Chapter is to identify the primary effects of transnational judicial dialogue on the SCC and its judges. However, the research, including the interviews with former and current justices of the SCC, reveals that the influence of transnational judicial dialogue reaches beyond the SCC and its judges. Although beyond the direct scope of this research, this section will note few of these other effects, not only to demonstrate the broader impact of such a process, but also to assist future scholars who may choose to address these topics at length. The impact of transnational judicial conversation can be divided into two main categories: a) domestic or national effects and b) external or international/transnational effects.

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<sup>1447</sup> Interview with Anonymous Justice 1, Justice 2, Justice 3, Justice 4, Justice 5 and Justice 8.

<sup>1448</sup> See Chapter 3 “The Use of Juridical Mechanisms by the SCC: A Quantitative Analysis of Cases (2000-2016)”.

<sup>1449</sup> See Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”.

<sup>1450</sup> See Table 3, Chapter 4.

## A. NATIONAL EFFECTS

The influence of the transnational judicial dialogue of the SCC and its judges with foreign counterparts it seems that reaches beyond the Court. This research reveals two types of national effects: “constitutional impact” (such as the transformation of the legal system from a dualist towards a monist system, fertilization and change of constitutional jurisprudence, the transformation of the role of the judiciary, and the disaggregation of national sovereignty), and “impact on other actors” (such as other domestic courts, the executive branch, the legislative branch, the national bar, academia, and politics).

### 1. Constitutional Impact

Transnational judicial dialogue, as part of the general process of globalization as well as the globalization of courts, can even “effectively amend the Constitutions of states.”<sup>1451</sup> As the qualitative analysis of *Burns* shows, and the other cases mentioned in the above sections affirm,<sup>1452</sup> the SCC is arguably driving Canada towards a *monist* system. Most scholars consider Canada to be constitutionally a *dualist*-oriented country;<sup>1453</sup> however, others suggest that a shift is occurring.<sup>1454</sup> Various interpretive techniques, as well as the references to unincorporated international legal instruments mentioned in the previous chapters,<sup>1455</sup> indicate persuasively that the SCC is moving Canada towards a monist system. According to Waters, this shift away from dualism is a trend among almost all highest common law courts across the globe, including the SCC, who by, “participating

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<sup>1451</sup> Arthurs, *supra* note 836 at at 634.

<sup>1452</sup> See Section “Impact from International Legal Sources”.

<sup>1453</sup> Schabas, *supra* note note 681 at 177; van Ert, *supra* note note 681 at 4.

<sup>1454</sup> Waters, *supra* note 641 (Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties); Waters, *supra* note 641 (The Future of Transnational Judicial Dialogue) at 467; Bastarache, *supra* note 44 at 3.

<sup>1455</sup> See Chapter 3 and Chapter 5.

in [judicial] dialogue, are overcoming the dualism obstacle by engaging in ... ‘creeping monism’.’<sup>1456</sup> She explains the transforming process and its techniques:

Using a variety of novel interpretative incorporation techniques, these courts are eroding the dualist approach to treaties that has long characterized the common law world. Despite the absence of implementing legislation, courts are judicially incorporating human rights treaties into domestic law acting more and more like courts in monist-oriented legal systems.<sup>1457</sup>

SCC Justice La Forest also tends toward a monist approach, acknowledging that the SCC has increasingly adopted interpretative techniques that align the Charter with international treaties. “Our Court . . . is willing to recast the law, if need be, to conform to evolving international conditions.”<sup>1458</sup> However, in an article on the internationalization of law and the role of the SCC, Justice Bastarache argues:

Canada’s system of receiving international law into the domestic legal order is neither monist nor dualist; *it is a hybrid of the two*, demanding the implementation of conventional international law but allowing for the incorporation of customary international law.<sup>1459</sup> [Emphasis added]

One interviewed judge acknowledged this trend, and noted that:

As you are aware, like the UK, formally speaking, Canada has a dualist system of international law regarding the incorporation of international law in our legal system. Formally speaking, generally it was not a direct application of international treaties, but after the Charter, in matters of human rights, the international treaties started to influence and maybe govern our interpretation of Canadian Charter rights.<sup>1460</sup>

The same judge provided an example of a time when, in deference to international law, the SCC changed their interpretation of a particular constitutional right:

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<sup>1456</sup> Waters, *supra* note 641 (Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties) at 628; Waters, *supra* note 641 (The Future of Transnational Judicial Dialogue) at 467.

<sup>1457</sup> Waters, *supra* note 641 (The Future of Transnational Judicial Dialogue) at 467.

<sup>1458</sup> La Forest, *supra* note 154 (The Expanding Role of the Supreme Court of Canada in International Law Issues) at 89, 96. This is especially evident in *Libman v. The Queen*, [1985] 2 SCR 178.

<sup>1459</sup> Bastarache, *supra* note 44 at 3.

<sup>1460</sup> Interview with Anonymous Justice 10.

In the *Health Services* case in 2007,<sup>1461</sup> based on international treaties, we changed the interpretation of the guarantee of the freedom of association. We looked at relevant international instruments to which Canada was a party, to hold that the current interpretation of this right was inconsistent with the approach in international law.<sup>1462</sup>

There are several such examples where constitutional rights have been altered based on international law, demonstrating the shift towards a monist or creeping monist system. For instance, as shown in Chapter 5, the “monist or creeping monist” approach is evident in *Burns*. In this case, the SCC did not hesitate to quote the convincing declaration of the official representative of Canada to the United Nations Commission on Human Rights (1997) in its final decision:

Suggestions that national legal systems needed merely to take into account international laws was inconsistent with international legal principles. *National legal systems should make sure they were in compliance with international laws and rights*, in particular when it came to the right to life.<sup>1463</sup> [Emphasis added]

In this passage, the Court appears to suggest that the Canadian legal system cannot merely consider international laws; this notion is outdated and inconsistent with general principles of international law. Instead, the SCC recommends that national legal instruments and institutions need to ensure compliance with international law. Thus, international law becomes a yardstick for the domestic legal order, indicating Canada’s movement toward a monist-oriented legal system. As revealed in the above sections,

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<sup>1461</sup> *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 SCR 391.

<sup>1462</sup> Interview with Anonymous Justice 10.

<sup>1463</sup> *United States v Burns* [2001] 1 SCR 283, par 85. See also, Press Release HR/CN/788 (7 April 1997).

many other cases demonstrate this trend, including *Baker*,<sup>1464</sup> *B010*,<sup>1465</sup> *Thibodeau*,<sup>1466</sup> *Peracomo*,<sup>1467</sup> *Suresh*,<sup>1468</sup> *Khadr*,<sup>1469</sup> and *Health Services*.<sup>1470</sup>

The SCC's evolution from a dualist toward a hybrid or monist legal system is perhaps also influenced by the extra-judicial activities of Canadian judges with their counterparts. Other common law constitutional courts have shown similar trends in the last 10–20 years. A prime example of how this communication influenced the evolution of the common law dualist system toward a significantly more monistic system is the Bangalore Principles colloquia.<sup>1471</sup> Through eight successive judicial meetings, representatives of almost 40 common law countries attempted to address the issue of their courts' engagement with international human rights.<sup>1472</sup> From the conservative approach in 1988, in which they supported dualism,<sup>1473</sup> over the course of successive judicial colloquia, "the Bangalore Principles evolved toward a significantly more monistic approach to the role of unincorporated treaties in interpreting domestic law."<sup>1474</sup> Dualism barely received a mention in the 1998 Bangalore Principles, which instead advised common law courts:

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<sup>1464</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

<sup>1465</sup> *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704.

<sup>1466</sup> *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 SCR 340.

<sup>1467</sup> *Peracomo Inc. v. TELUS Communications Co.*, 2014 SCC 29, [2014] 1 SCR 621.

<sup>1468</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.

<sup>1469</sup> *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 SCR 125.

<sup>1470</sup> *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 SCR 391.

<sup>1471</sup> Kirby, *supra* note 482.

<sup>1472</sup> Judges at the colloquia represented the following countries: Antigua and Barbuda, Australia, Bangladesh, Barbados, Belize, Botswana, Brazil, British Virgin Islands, Canada, Dominica, Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, Mauritius, New Zealand, Nigeria, Pakistan, Papua New Guinea, Seychelles, Sierra Leone, South Africa, Sri Lanka, St. Lucia, Tanzania, Trinidad and Tobago, Uganda, the United Kingdom, the United States, Zambia, and Zimbabwe.

<sup>1473</sup> The concluding statement noted, "[w]hile it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs."

<sup>1474</sup> Waters, *supra* note 641 (Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties) at 645.

It is the vital duty of . . . [the] judiciary . . . to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.<sup>1475</sup>

As mentioned above, in addition to the move toward a monist system, the transnational judicial dialogue of the SCC seems to have also influenced the constitutional jurisprudence, the transformation of the role of the judiciary, and the disaggregation of national sovereignty, all of which are discussed in greater detail above and in other chapters.<sup>1476</sup>

## 2. Impact on Other Actors

The judicial conversation occurring across borders appears to indirectly affect other significant actors in the public and legal domains, including, national politics, other domestic courts, law societies, and law schools. Overall, transnational judicial dialogue is a process that is influenced by different actors, and several of them play a crucial role in shaping this development. In a similar and reciprocal way, transnational judicial conversation and the globalization of courts also influence these actors.

### *i. National Politics*

Unlike in the United States, where several political actors have criticized their domestic courts or particular “globalist” judges for their participation in the transnational judicial

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<sup>1475</sup> Passage from the Bangalore Statement reproduced in Lord Lester of Herne Hill ‘The challenge of Bangalore: Making human rights a practical reality’ 1999 *EHRLR* 1–20; See also, Commonwealth Secretariat, *Developing Human Rights Jurisprudence: Volume 8: Eighth Judicial Colloquium on the Domestic Application of International Human Rights Norms*, Bangalore, India 27-30 December 1998 at 267-270.

<sup>1476</sup> See Chapter 3, 4, and 5.

conversation, in Canada, politicians do not publicly criticize this process.<sup>1477</sup> Canadian political actors of both the legislative and the executive branch seem to appreciate the SCC's high global reputation and its contributions in the transnational judicial arena.<sup>1478</sup> As explained in Chapter 4, the SCC is in harmony with the two other federal branches, supporting each other in the foreign relationships of Canada. Yet, even in Canada, during public hearings of judicial nominations to the SCC, the candidates' "judicial activism" and "globalist" views can prompt discussion and generate controversy.<sup>1479</sup>

The impact of transnational judicial dialogue on national politics was directly mentioned by a few of the interviewed judges,<sup>1480</sup> one of whom provided details on how this process can affect the other branches of the federal system:

It is important to add here that even the legislative or the executive can be affected by the reference to international law or laws of other nations, because even though they may not be aware of what is going on in other countries, they will learn about it through the SCC judgments. For example, in the *Carter* case, which deals with medically assisted suicide, after reading the *Carter* case, and how other nations have regulated this issue, the Canadian government amended its Criminal Code. You can see that the government answers directly to the SCC. First, it decided to conduct a study, by giving to the Council of Canadian Academies the responsibility to conduct research on these matters. . . . Before legislating, the government wanted to inform the public discussion with this research. A panel was assembled with experts from the Netherlands, Belgium, the United States, and the United Kingdom, all who were knowledgeable in medically assisted suicide laws. So the government really relied on experts

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<sup>1477</sup> For few examples, see: "Transcript: Day One of the Roberts Hearings" *The Washington Post* (12 September 2005), online: The Washington Post, [www.washingtonpost.com](http://www.washingtonpost.com); "Transcript: Sotomayor Confirmation Hearings, Day 2" *The New York Times* (14 July September 2009), online: The New York Times, [www.nytimes.com](http://www.nytimes.com); "Transcript: Sotomayor Confirmation Hearings, Day 3" *The New York Times* (16 July September 2009), online: The New York Times, [www.nytimes.com](http://www.nytimes.com); "Transcript: Sotomayor Confirmation Hearings, Day 4" *The New York Times* (17 July September 2009), online: The New York Times, <[www.nytimes.com](http://www.nytimes.com)>.

<sup>1478</sup> Cotler, *supra* note 200.

<sup>1479</sup> For an example, see the questions that were asked to Justice Marshall Rothstein by the Canadian Parliament in 27 February 2006. The Ad-Hoc Committee to Review a Nominee for the Supreme Court of Canada asked justice Rothstein about his judicial philosophy and his views on judicial activism. See further, online: <[http://gutenberg.us/articles/marshall\\_rothstein#Early\\_life](http://gutenberg.us/articles/marshall_rothstein#Early_life)>; and online: <<http://www.hotboulevard.com/node/935>>

<sup>1480</sup> Interview with Anonymous Justice 9, Justice 8, Justice 4.

from other nations. This is a good example to show how the impact of relying on foreign legal sources can also influence legislative and executive acts. This is the full circle.<sup>1481</sup>

*ii. Canadian Lower Courts*

Almost all the interviewed judges acknowledged that interaction between the SCC and its foreign counterparts also influences the Canadian lower courts; in other words, the judiciary as a whole.<sup>1482</sup> They mention several ways in which this occurs. Lower courts are bound to follow the judgments of the SCC, which often rely on international or comparative legal instruments. In addition, judges of lower courts also participate in transnational judicial interactions. Several interviewed judges noted that they had participated in such activities while serving on lower courts,<sup>1483</sup> and a lower court judge also confirmed this.<sup>1484</sup> Sometimes justices of the SCC and justices of lower courts participated in the same transnational judicial conversations.<sup>1485</sup> And finally, as one SCC justice stated, “The process of conversation among courts is impacting even lower courts. They also refer to thousands of US and UK judgments, all the time.”<sup>1486</sup>

*iii. Law Societies and Bar Associations*

An excellent example of the far-reaching influence of the SCC’s transnational judicial interactions, and of legal and judicial globalization in general, is the recent actions of bar associations. Law societies in Canada have increasingly advised lawyers to take

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<sup>1481</sup> Interview with Anonymous Justice 8.

<sup>1482</sup> Interview with Anonymous Justice 1, Justice 2, Justice 3, Justice 5, Justice 7, Justice 8, Justice 9, and Justice 10.

<sup>1483</sup> Interview with Anonymous Justice 8, Justice 9, and Justice 10.

<sup>1484</sup> Interview with Anonymous Judge 12.

<sup>1485</sup> See Chapter 4 “The Transnational Extra-judicial Activities of the SCC and its Justices”, the “Oxford Lectures” and “Strasburg Lectures”.

<sup>1486</sup> Interview with Anonymous Justice 3.

international and comparative law into consideration.<sup>1487</sup> Yet, the Federation of Law Societies of Canada does not include international law in the list of mandatory courses law students must take.<sup>1488</sup> Some judges and scholars attribute this to the limited exposure of bar associations, and law schools to international and comparative law. In a recent conference on the effective use of international law in Canadian courts, Justice LeBel stated that it is no longer permissible for Canadian lawyers and judges to have a limited understanding of the global context.<sup>1489</sup> Former US Supreme Court Justice Sandra Day O'Connor advised American lawyers and judges to pay more attention to international and foreign law,<sup>1490</sup> not only to compare and learn from these systems, but to also facilitate the flow of transnational commerce.<sup>1491</sup>

#### *iv. Law Schools*

As mentioned in previous chapters, academics and law schools are important actors in the process of transnational judicial dialogue. However, these actors are themselves affected by the globalization of judiciaries. The judicial dialogue, globalization of courts, and the transnationalization of law schools are part of the wider process of globalization, which is shaped by many other interconnected factors. For instance, the global judicial conversation has influenced law schools in Canada, and many other countries, including their programs, organization, and even their philosophy. In the last 10–20 years, as

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<sup>1487</sup> The Canadian Bar Association, International Law, online: <<https://www.cba.org/Sections/International-Law>>.

<sup>1488</sup> Federation of Law Societies of Canada, “Our Members: Canada’s Law Societies”, online: <<https://flsc.ca/about-us/our-members-canadas-law-societies/>>. For more details, follow the links for all 14 Canada’s law societies.

<sup>1489</sup> The Honourable Louise LeBel, Effective use of International Law before Canadian Courts Conference, 6 May 2015, Kirsch Institute, see online: <<http://www.kirschinstitute.ca/curriculum/effective-use-of-international-law-arguments-before-canadian-courts/>>.

<sup>1490</sup> O’Connor, *supra* note 558.

<sup>1491</sup> *Ibid.*

mentioned in Chapter 4, law schools have added transnational law programs and subjects, have increased the variety of comparative and international law courses they offer, and have created networks, institutes and programs, designed to foster judicial globalization.<sup>1492</sup>

## B. INTERNATIONAL AND TRANSNATIONAL EFFECTS

It is beyond the scope of this study to outline the international and transnational effects of the judicial dialogue of the SCC and its justices. However, in order to encourage future studies, I will share my findings that indicate the existence of such effects.

### 1. International Law

Almost all the interviewed judges agreed that judicial conversation has a significant influence on international human rights. This dialogue shapes international law and leads to the advancement of “international human rights law and the emergence of domestic courts as [international and] transnational actors.”<sup>1493</sup> As stated above, international legal norms are one of the pillars around which these conversations are built, and “provide courts with common reference points around which to shape a dialogue.”<sup>1494</sup> One justice noted, “Through it [transnational judicial conversation] we acquired better understanding of human rights and other constitutional principles, but also on other fields of law, including private law.”<sup>1495</sup>

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<sup>1492</sup> For a detailed understanding, refer to the websites and official programs of study of various laws schools in Canada and across the globe. For one of the most prominent transnational law programs in the globe see: King’s College London, “The Dickson Poon Transnational Law Institute”, online: <<https://www.kcl.ac.uk/law/tli/index.aspx>>.

<sup>1493</sup> Waters, *supra* note 641 (The Future of Transnational Judicial Dialogue) at 465.

<sup>1494</sup> Waters, *supra* note 641 (The Future of Transnational Judicial Dialogue) at 466.

<sup>1495</sup> Interview with Anonymous Justice 10.

The analysis of *Burns* alongside the empirical data in Chapters 3 and 4 demonstrate that although national constitutional courts, through their horizontal conversation, are the central players, the content of their dialogue is often derived from international legal norms. In the absence of a global constitutional court interprets international human rights treaties with *erga omnes* effects, national courts—through their transnational judicial dialogue—contribute to consistency in their interpretation.<sup>1496</sup> Moreover, the horizontal conversation among the highest courts of nations, often including vertical or diagonal dialogue with international courts, may possibly lead to the development of a global common law on individual human rights and may play a significant role in the expansion of customary international law and *jus cogens*.<sup>1497</sup>

## 2. Transnational Law

According to most interviewed judges, the citation of international and comparative legal norms, and participation in transnational judicial activities, has significant effects at the comparative or transnational level. For example, before *Burns*, the SCC permitted extradition in death penalty cases without assurances; after *Burns*, the Court abandoned its own precedent and joined other Western constitutional courts that refused to extradite without assurances. By creating stronger and more consistent transnational legal standards in cases in which extradition carried the risk of the death penalty, *Burns* helped reshape the transnational legal order. SCC justices have also acknowledged the transnational consequences of the SCC's decision-making and its contribution to creating a more cohesive transnational jurisprudence in other cases. Justice La Forest argued:

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<sup>1496</sup> Rado, *supra* note 61 at 103, 130-31.

<sup>1497</sup> LeBel, *supra* note 61; Waters, *supra* note 641 (The Future of Transnational Judicial Dialogue) at 466. See also Interview with Anonymous Justice 8.

[I]n the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international experience.<sup>1498</sup>

Justice L'Heureux-Dubé, observed, “Judges no longer simply receive the cases of other jurisdictions and then apply them or modify them for their own jurisdiction.”<sup>1499</sup> Instead, in her view, judges of the highest courts engage in a transnational “crosspollination and dialogue,” building on each other’s opinions in a way that advances “mutual respect and dialogue . . . among appellate courts.”<sup>1500</sup>

Several interviewed judges indicated that a number of constitutional and even international courts were influenced by SCC judgments, including the UK Supreme Court, the High Court of South Africa, the Supreme Court of India, the High Court of Australia, the Supreme Court of New Zealand, the Supreme Court of Israel, the Supreme Court of Nepal, the Supreme Court of Zimbabwe, and the ECtHR.<sup>1501</sup> One judge stated:

We hope that we have contributed something in better shaping these principles, and in building more harmonized precedents around the world. I think the Canadian legal system now no longer only receives or imports, it now also gives or exports ideas and inspirations across the globe.<sup>1502</sup>

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<sup>1498</sup> La Forest, *supra* note 154 (The Expanding Role of the Supreme Court of Canada in International Law Issues) at 100.

<sup>1499</sup> L'Heureux-Dubé, *supra* note 37 at 17.

<sup>1500</sup> *Ibid* at 17.

<sup>1501</sup> Interview with Anonymous Justice 1, Justice 4, Justice 5, Justice 7, and Justice 10.

<sup>1502</sup> Interview with Anonymous Justice 10.

## VI. RISKS OF THE TRANSNATIONAL JUDICIAL

### DIALOGUE OF THE SCC

The research reveals that the SCC and its justices value their transnational judicial interaction with foreign counterparts. Each of the ten judges that I interviewed considered it a positive process, as it helps better the development of the rule of law and human rights, brings greater awareness of international and transnational standards, builds dialogue and friendships with foreign counterparts which then can help in resolving difficult domestic cases, spreads best practices in both substantive law and court managerial issues, and in general is a learning process that enriches the minds of judges with new perspectives. In fact, one justice compared elegantly these activities to the joys of tasting new foods:

The interaction and dialogue among judges, and how we can benefit from them, is like cuisine, food. I have yet to meet any country that doesn't have some recipe that I thought was out of this world, delicious! Whether it is in Africa, or is in Asia, or whether it is in South America, or in North America, it is unbelievable how each country has some fantastic dishes. I have yet to be proven wrong on this. That's how I feel about law. Like food, law to me has many good manifestations in every country. When you learn about a country, when you learn about a court, you can learn from the court, you can learn from the country, you can learn from the foreigner, from another culture, from another legal system. It may not always be something good, sometimes it may be something bad, but still you can learn from it, because it is something you need to avoid.<sup>1503</sup>

However, many of the judges warned that such interactions must be handled with care, as the process is replete with problems, and even carries a few risks.

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<sup>1503</sup> Interview with Anonymous Justice 3.

## A. TIME-CONSUMING

The judges expressed concern that these interactions may distract them from their primary task, deciding cases, and may become very time-consuming. As one judge noted:

I think the Court is an institution that is working hard, and has a small number of judges. There is a risk of overreaching, spending too much time on those interactions with foreign courts and judges. I think keeping such activities within reasonable limits is a challenge for the Court and judges.<sup>1504</sup>

Similarly, another judge remarked, “The biggest risk is the risk of anything that takes the judge away from the immediate task of getting cases decided. So, it’s time-consuming. I don’t see any other downside to it.”<sup>1505</sup> Meanwhile, another judge stated that the SCC, as an institution, was unable to participate in many such activities, because “we are there to decide cases.”<sup>1506</sup> However, another judge, aware of these concerns, responded:

Judges use their own time to participate in these activities. For example, the court does not usually sit between December 15 and January 15. I have used that time to attend judicial education programs in South Asia, India, Pakistan, Nepal, Sri Lanka, and so on, since their judges also had time off or were able to find time to attend. The summer period also provides more time to engage in these activities.<sup>1507</sup>

## B. MISAPPLICATION OF FOREIGN PRECEDENTS

Several judges mentioned that whenever they decide to cite a judgement of a foreign court, they try to avoid taking it out of context or misunderstanding it. One judge said:

There is a risk of using foreign materials out of context, without understanding how the other foreign legal system works, especially when looking at case law of other nations. I think this is a significant challenge and risk. And I think this is one of the criticisms that some of the US

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<sup>1504</sup> Interview with Anonymous Justice 10.

<sup>1505</sup> Interview with Anonymous Justice 9.

<sup>1506</sup> Interview with Anonymous Justice 2.

<sup>1507</sup> Interview with Anonymous Justice 1.

Supreme Court judges make, calling it “cherry-picking.” There is always a risk of misunderstanding, or taking out of context. We need to understand that when you take a judgment from another nation, you need to understand the legal system, the cultural background, and the legal history, which is quite a challenge.<sup>1508</sup>

This may be one reason why Canadian judges often cite Commonwealth countries, the United States, or France, countries whose legal systems, history, and cultural background they understand. That is why it is much more challenging for them to look at the jurisprudence of other nations. Another judge also urged caution when applying foreign precedents:

The process of globalization of courts and the interaction and dialogue that is happening among them also has its pitfalls, particularly regarding the use of foreign precedents. You don’t know the legal and political factors, social background of that country, or the case, so you have to be very careful. When we are looking at these foreign instruments, we need to look at the principles of foreign judgments or laws and we can see whether there is something we can learn or apply from these principles. We need not be blind on how we apply these foreign citations. We need to look at the context of that country, the different culture, different legal system, and so on. Judges need to be careful about that. You cannot use a foreign precedent in the way you would use a domestic precedent.<sup>1509</sup>

Other judges expressed similar concerns, but emphasized the rather low risk inherent in citing foreign precedents, especially for the SCC. One argued:

There are some pitfalls in comparative law; you cannot lift perhaps one idea out of its context and then just put it in somewhere else. But surely judges that have made it at the highest level of their countries can figure that out.<sup>1510</sup>

Another stated:

The risk, which I don’t think is very high, is to buy something that would not be very suitable here in Canada.”<sup>1511</sup>

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<sup>1508</sup> Interview with Anonymous Justice 10.

<sup>1509</sup> Interview with Anonymous Justice 3.

<sup>1510</sup> Interview with Anonymous Justice 9.

<sup>1511</sup> Interview with Anonymous Justice 8.

The third noted:

We can't simply borrow somebody else's law or case and "plug it in." Nor can we take a suggestion from a current court, a body, or an NGO and say, "We are going to go with that." We have to always remain true to the Canadians and the Canadian jurisprudential framework. Therefore, we use comparative law in that way."<sup>1512</sup>

### C. THE SPREAD OF UNCONSTITUTIONAL IDEAS

A few judges noted that the transnational judicial dialogue process might cause unconstitutional ideas, or ideas that may be questionable from a human rights perspective, to spread. They reference the spread of the Guantanamo cases a few years ago, or current judicial decisions that support questionable domestic policies that seem to violate international norms on the rights of refugees.<sup>1513</sup> Judges expressed their concern, noting that courts, including the SCC, should be very careful to not be influenced by such policies or foreign judgments, particularly in this "new momentum" of more national-centric policies. However, other judges were confident that questionable and nondemocratic ideas would be unconstitutional in Canada. One sitting judge asserted:

We will certainly not accept an unconstitutional idea, something that we thought was unconstitutional in Canada. We have to be true to our Canadian Charter, Canadian Constitution, and international treaty obligations. Others' ideas may somehow enrich us and help us develop our thinking, but I don't think we would ever accept something that is unconstitutional. Absolutely not!<sup>1514</sup>

Another judge relies on the ability of SCC judges to distinguish "good" ideas from "bad" ones:

We are speaking about the highest Court, which by definition is very independent, comprised of independent-minded judges, so I am not

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<sup>1512</sup> Interview with Anonymous Justice 2.

<sup>1513</sup> Interview with Anonymous Justice 1, Justice 6, Justice 7, and Justice 10.

<sup>1514</sup> Interview with Anonymous Justice 2.

worried about getting brainwashed . . . . Indeed, traveling of the so-called “bad ideas” may be another perceived risk. Obviously, you cannot have a box that says, “Only good ideas can be spread;” you have to trust your own judges. And looking at the judges of our Court, dissemination of “bad ideas,” I don’t think is a real concern.<sup>1515</sup>

#### **D. POLITICIZATION OF THE JUDICIARY**

Several justices worry that the SCC and its judges may become politicized by being engaged extensively in the global arena. Interacting with foreign courts and judges from very different legal and political systems, or participating in certain transnational or international organizations or associations, is concerning to certain judges. One remarked:

I am a very strong believer that we should never get involved in politics. So when we join or are asked to join an international judicial organization, sometimes other courts may have a different view on certain matters or on the role of a certain organization. In any case, we should be clear—we don’t do politics. Some other tribunals or courts may be tempted to do some, but that is not the case with us. There is a risk, but we always have to be careful and to be comfortable with the international judicial organizations that we join. We can certainly talk about the rule of law, judicial independence, human rights, constitutionalism, but never criticize foreign countries or foreign jurisdictions for their own internal problems.<sup>1516</sup>

This last remark, referring to engagement with internal problems of other nations, is of great concern to the interviewed judges. Many suggest that their colleagues be extra-cautious when interacting with foreign counterparts. One judge even believes that this element of the transnational judicial conversation requires further contemplation:

I think that the international community of judges has to be very careful about injecting itself to domestic disputes between governments and the judiciary. Every time a judge is fired or criticized somewhere in the world, we tend to say, “Isn’t that terrible?” But it may very well be the case that the fired judge was appointed by a corrupt regime, and was a part of that corrupted regime. If you don’t know the full picture, is difficult to judge. So, from time to time Canadian judges are asked to inject themselves into

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<sup>1515</sup> Interview with Anonymous Justice 9.

<sup>1516</sup> Interview with Anonymous Justice 7.

concerns about treatment of judges in other countries. Sometimes it may be worth it to get involved in those kinds of issues, but I think that aspect of the transnational conversation is very difficult. National judges are not international actors, in the sense that their authority is confined to their duties under particular national statutes. So we have to be very careful not to stick our nose into international relations . . . Of course, there are occasions that our decisions have implications for international relations, but I am talking about cases that are unrelated to our duties, for example saying, “They should have not fired that judge in India, Turkey, Pakistan, and so on.” In my view, that part of the transnational judicial conversation, needs to be thought about more.<sup>1517</sup>

Although this judge perceives transnational judicial interaction as “entirely a positive development” and calls for judges to “look at ways to facilitate it in terms of language,” when speaking about the political aspect of judicial conversation, the judge stated, “We should be very careful about it.”<sup>1518</sup>

Another judge suggests a more radical solution:

The risk is that an engagement with a particular court of a developing country may give legitimacy to the political regime that controls that court. Personally, I would not exchange and participate in meetings with foreign judges that come from nations under autocratic regimes.<sup>1519</sup>

However, ceasing conversation with the courts of countries that have different political systems than Canada is problematic. According to another judge, there may be a better solution:

We should not necessarily look for courts of countries and judicial organizations that look like us. The process of seeking improvements and sharing best practices involves engagement with courts that do not do the same things as we do. I should emphasize that these improvements go both ways. Even if you discuss and deal and meet with courts or judges that come from a country that does not share the same system of democracy, that does not mean that you should not meet with them, or learn from them, or teach them. If only to allow and help them to change

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<sup>1517</sup> Interview with Anonymous Justice 9.

<sup>1518</sup> Interview with Anonymous Justice 9.

<sup>1519</sup> Interview with Anonymous Justice 6.

their own ways of looking at things, it would be worth it. Remaining open to different views, solutions, and practices is very important.<sup>1520</sup>

The risks mentioned by the SCC judges cannot and should not be ignored. They are practical as well as ideological or political in nature. Moreover these issues will likely arise more frequently under the “new momentum,” where the United States, several European nations, and others are endorsing nation-centric and “illiberal” political views. The identification of the best mechanisms to check this process and keep it “healthy” is beyond the scope of this research. However, this research demonstrates the significance of transnational judicial dialogue, indicating that academics should pay far greater attention to this topic.

## **VII. THE FUTURE OF TRANSNATIONAL JUDICIAL DIALOGUE**

At the end of the interviews with the former and current justices of the SCC, they were asked to look back on the past, analyze the current situation, and share their views about the future of transnational judicial conversation of the SCC and, more generally, globalization of courts.

When asked about the future, six out of the ten judges indicated that this process was inevitably going to expand.<sup>1521</sup> They justified their opinions by pointing to the general process of globalization, noting that courts are not an exception. One stated, “As the world is becoming more and more globalized, judicial interaction and globalization of

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<sup>1520</sup> Interview with Anonymous Justice 7.

<sup>1521</sup> Interview with Anonymous Justice 1, Justice 2, Justice 3, Justice 5, Justice 7, and Justice 9.

courts will become more and more necessary for the global judicial community, and Canada is no exception.”<sup>1522</sup>

Technology and new means of communication will drive the expansion of judicial interaction across the globe. One judge noted:

With the increased technology that we are facing, we can have more and more access to each other and to the laws of other nations and their court decisions. And not just judges, but also other actors can have more access, starting from the students, the academics, lawyers, and so on.<sup>1523</sup>

Another judge made a similar remark:

I don’t think that this is a process that can be stopped, whether you want it to or not. And why wouldn’t you want the conversation? With the means of communication that we have today, it is inevitable, and what is happening is unstoppable. I will give you an example. When I was in the Court, we had a challenge to the patent for Viagra coming to the Court. That patent I think is been challenged in at least five countries. My law clerk in about 10 minutes was able to dig up all of the decisions of all of foreign courts, including in China. Through these decisions, we could see how this patent had been interpreted. And that’s not going to go away; on the contrary, it is going to be more accessible. There is no way you are going to close that door; and why would you want to close it?<sup>1524</sup>

However, this judge was also concerned about certain impediments that need to be addressed, such as the barrier of language. The judge remarked:

We need to be thinking about ways of trying to overcome that . . . . If you only look at the jurisprudence from only English or French speaking countries, you are missing a big perspective on the way the world operates. . . . It would be very useful to have more ways of having that jurisprudence more readily accessible to us.<sup>1525</sup>

Another judge posed the question, “How do you handle the huge amounts of information that you can get? Practically speaking, how can you use it as a resource or

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<sup>1522</sup> Interview with Anonymous Justice 1.

<sup>1523</sup> Interview with Anonymous Justice 3.

<sup>1524</sup> Interview with Anonymous Justice 9.

<sup>1525</sup> Interview with Anonymous Justice 9.

tool to develop the law?”<sup>1526</sup> It is likely that future technology will respond to this concern through the development of programs that can help narrow down the available data. Nonetheless, in the end, the judge decides which information is relevant, and the judge decides which particular legal source to use. Having more legal perspectives and ideas on resolving difficult legal questions is better than having less, and certainly cannot cause harm. Law is both logic and practice, and a contribution from every nation would be an enrichment in itself. The judge who raised the question remains optimistic, however:

The more countries develop their legal system, the more they will be contributing to the recipes, like in food. They will be contributing, and such contributions will not be just from the English cuisine, but also from the French cuisine, the Italian cuisine, the American cuisine, and so on.<sup>1527</sup>

Not all judges showed the same optimism for the future of transnational judicial dialogue. Considering the “new momentum” of globalization in general, and in particular the latest national political movements in the United States and several nations in Europe, in which international human rights and universal principles are often discarded, a few justices appeared skeptical. One said:

I feel that there are trends working both ways: some against globalization and others for it. For example, you see recent national political movements that rely on nationalism and borders, like in the US or some states in Europe, where we see more reluctance to work in a globalized and harmonized world. Even the mindset that there are universal and shared values around the world is being challenged. You must look at current political realities in China, Russia, the Muslim world, and even the US, or in different nations in Europe, like Poland or Hungary; all these developments indicate a drawback on the process of legal harmonization and globalization.

On the other hand, there are globalization forces that we cannot deny, such as technology, economy, culture, communication, and so on, that indicate

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<sup>1526</sup> Interview with Anonymous Justice 3.

<sup>1527</sup> Interview with Anonymous Justice 3.

that judicial interaction and conversation among courts may increase. So for me, it is a question mark. It depends on how the history of the next 20 or more years develops. There is a risk that we might go as far as to actually start questioning whether we truly have international law. This is our reality today.<sup>1528</sup>

The same judge stresses the importance of the role of courts as the guarantors of human rights, yet continues to worry about the current state of the world:

The role of courts becomes even more important now, for the protection of human rights and universal values. However, we must not forget that their ability to protect human rights and such values may very well be impacted by what is happening in their national settings.”<sup>1529</sup>

Another judge, after acknowledging the problems caused by the new momentum, also highlighted the increased importance of courts. In this judge’s view, their role in defending universal values has become even greater.<sup>1530</sup>

It is hard to answer. 25 years ago, I might have thought, “It is going to expand, because look at the new democracies that are being established in many countries, like Eastern Europe, and so on.” However, with the new political discourse and nationalist movements that we see in many countries lately, it is hard to predict. We seem to be in a bit of geopolitical flux right now, but I am still confident that the role of courts remains important, and maybe even more important now, because it is their responsibility to defend the principles of rule of law, human rights, and democracy. Yet we should not forget that these responsibilities are shared with legislators, and these latest political movements may certainly have an impact.<sup>1531</sup>

Another judge also acknowledges the problems caused by the new momentum and the damage done to universal principals in international law. However, in this judge’s view, transnational judicial dialogue will still increase:

I don’t see it being ended any time soon. It will go on expanding, even though lately the politics in different countries may have embraced more

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<sup>1528</sup> Interview with Anonymous Justice 10.

<sup>1529</sup> Interview with Anonymous Justice 10.

<sup>1530</sup> Interview with Anonymous Justice 6.

<sup>1531</sup> Interview with Anonymous Justice 6.

nationalist ideas. We need to remain open-minded and see that other nations may have ways that may serve as inspiration. The fact that people want to be autonomous, that doesn't change the fact that there are universal commonalities regarding what is right and wrong in terms of justice. And such common ground can be found in many key international legal documents, and in *jus cogens*.<sup>1532</sup>

This judge appears to view the objective existence of shared values among nations as the basis for increased development of transnational judicial conversation. This vision embraces the core concept of “justice,” and not simply “law,” as the real focus of dialogue among judiciaries. Such a view perceives “right” and “wrong” not in terms of national or international legislation, but in terms of “justice,” a natural and universal concept that is irrelevant to borders. As mentioned in the universal theory,<sup>1533</sup> such an understanding recognizes conversation among the global judicial community as a necessity, as a common goal used to discover principles of natural justice that persist regardless of national borders. Another judge explicitly argues that the concepts of “law” and “justice” are different, and it is the duty of judges to help each other to better understand and provide justice. “It’s the “rule of justice,” and not just the “rule of law,” that is the highest principle that should guide our institutions”, notes this judge.<sup>1534</sup>

According to this view, if judges are willing to look beyond the strict letter of their national law, and enter into conversation with the global judicial community in search of best practices, common shared values, and universal principles that guide humanity as a whole, they will then be able to pursue true justice. Conversation among judges, across the globe, would become a necessity, and it may prompt changes that would cause this process to be less messy and unsystematic in the future. In fact, as

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<sup>1532</sup> Interview with Anonymous Justice 7.

<sup>1533</sup> See Chapter 2 “Understanding Transnational Judicial Dialogue from a Theoretical Perspective: An Overview of the SCC”.

<sup>1534</sup> Interview with Anonymous Justice 5.

demonstrated earlier, the increased permanency and formalization of bilateral, multilateral, and transnational judicial organizations indicate a greater “formalization” of the judicial dialogue. The *Handbook of Best Practice for Registrars of Final/Regional Appellate Courts and International Tribunals*<sup>1535</sup> might be considered one of the first products of this formalization, and more such “products” may be developed in the future, including those related to substantive matters. As mentioned above, one judge touched upon the possibility of the formalization of the transnational judicial conversation also in substantive issues.<sup>1536</sup>

In fact, such a process could be risky, and may raise concerns of “judicial activism” on a *glocal* (regional) or global scale, and cause alarm regarding the “tyranny of judges.” If judicial activism is considered dangerous at a national level, through the “judicial usurpation of politics,”<sup>1537</sup> at a regional or global level, it may be considered even more threatening if it is seen as usurping the international legal order. A group of unelected professionals would have the power to establish “best global practices” and “universal common values,” defining what is “right” and what is “wrong” without democratic process.

The interviewed judges made it clear that in exercising their power, they are restrained by the Canadian Constitution and international treaties. However, heeding the words of the former Chief Justice of the US Supreme Court, Charles Evans Hughes, “We are under a Constitution, but the Constitution is what the judges say it is,”<sup>1538</sup> and the

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<sup>1535</sup> Handbook, *supra* note 27.

<sup>1536</sup> Interview with Anonymous Justice 2.

<sup>1537</sup> See, First Things “The End of Democracy? The Judicial Usurpation of Politics”, by *Various*, (November 1996), online: <<https://www.firstthings.com/article/1996/11/001-the-end-of-democracy-the-judicial-usurpation-of-politics>>.

<sup>1538</sup> Speech before the Chamber of Commerce, Elmira, New York (3 May 1907), published in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (1908), at 139.

claim of some critics that the judiciary is increasingly declaring its independence from morality,<sup>1539</sup> this process may become precarious. If in the future, constitutional and international courts and judges choose to take transnational judicial interaction to a more formal and deeper level, the only remaining safeguard is their self-restraint, because no effective legal and political limitations are available.

However, it is likely dangerous to rely solely on judicial self-restraint. As former US Supreme Court Justice Scalia asked more than two decades ago, “What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court?”<sup>1540</sup> Certainly none. Therefore, the public, politicians, and even academics, may want to pay more attention to transnational judicial conversation to prevent it from going too far and becoming an unchecked process. Transnational judicial dialogue should be closely examined in the near future, as it may fall prey to practical or ideological risks. The dialogue process can be time-consuming and take the focus of the judge away from the decision-making process; might influence the spread of undemocratic ideas; or could politicize the judiciary at national or international levels.

## **VIII. REFLECTIONS ON THEORIES OF TRANSNATIONAL JUDICIAL DIALOGUE**

The literature review and the empirical findings demonstrate that a number of different motives drive transnational judicial conversation. Such motivations are also important for

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<sup>1539</sup> Supra note 1537.

<sup>1540</sup> Justice Scalia in a case of the Supreme Court of the United States: *Board of Comm'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668 (1996) (A case about the First Amendment rights of independent contractors with government contracts).

reviewing the departing point of this study, and for informing the main theories on transnational judicial dialogue and on judicial globalization more generally. The theories that help explain this process are: a) the pragmatic theory, b) the historical imperative theory, c) the global government networks theory (or the diplomatic theory), d) the moral universalism theory, and e) the organizational theory. These five theories are explained in more detail in Chapter 2. The goal of this section is to reveal what motivates SCC judges to participate in such a dialogue, be it through non-domestic legal sources or extra-judicial interactions.

The qualitative and quantitative data generated by this research demonstrate that none of the above theories can fully explain the process of transnational judicial dialogue in particular and more generally the globalization of the judiciaries. The reasons for engaging in extra-judicial conversation are much more complex. It is true that “pragmatic” reasons motivate justices of the SCC (and arguably across the globe) to interact with their foreign counterparts. While these account for the majority of reasons these interactions occur, “historic imperatives” are another driving force. In addition, while “diplomatic theory” (global government network) and “moral universalism” motivate judges to engage with one another, neither can fully explain transnational judicial interactions.

All ten current and former SCC justices specified the reasons why they participate in judicial conversation with foreign counterparts; in fact, all offered more than one reason why they are active in such interactions. The various reasons they provide often correspond with the theories listed above (except for the organizational theory which is more abstract).

## 1. PRAGMATIC OR PRACTICAL REASONS

All interviewed judges stated that they engage in transnational interactions with foreign counterparts for pragmatic reasons, such as their desire to learn more, to become better judges, and to more easily resolve difficult cases. One judge remarked:

The main reason is that we want to get the best answers to difficult problems. Often these problems are shared problems with other countries, and if they have courts that have considered these problems, it may be of interest and useful to see what these courts have done.<sup>1541</sup>

Another judge offered a similar rationale:

For a court, it is very attractive to find out what other countries are doing to deal with a particular problem, what solution are they giving about the same problems. It is a process of learning from each other's experiences. This is happening not just in constitutional law or human rights, but also in criminal law, and in other fields of law. All these are catalysts for bringing judges together. It has been an evolution, a development, and it continues.<sup>1542</sup>

Yet another justice emphasized that judges engage in transnational interactions to better serve the public:

First of all, we do it because we want to get it right. It is happening for practical reasons. There is no magic to it. It is not a personal motivation. If you are there as a judge, you want to give the best possible decision, and to do it rigorously, and nowadays rigorously means to do it according to international and transnational standards. The philosophy behind it is to want to deliver justice and serve better our people.<sup>1543</sup>

## 2. HISTORICAL AND GENERAL GLOBALIZATION IMPERATIVES

Around two thirds of the judges made reference to this era of general globalization, and asserted that the interaction and globalization of judiciaries are simply part of the general

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<sup>1541</sup> Interview with Anonymous Justice 2.

<sup>1542</sup> Interview with Anonymous Justice 3.

<sup>1543</sup> Interview with Anonymous Justice 8.

trend—reasons that align with the historical imperatives theory. One judge takes a broader view, asserting that events that led to the elevation of international human rights can explain the current process of judicial interaction:

What is happening, in my view, is this process is part of a wider development. There is globalization occurring everywhere, economically—we know that markets have become increasingly global; crime is international, not just national; education is international; the environment is of course international.

Historical factors are also key to this. We got our legal principles from Europe, such as France in the civil law system, and England in the common law system. The common roots of our legal systems are one of the reasons or components why is this all happening.

Then after the Second World War, human rights and international law attracts attention. Why? Human rights became very important, such as the Universal Declaration of Human Rights in 1948. . . . And the West became more interested in human rights, and their collaboration become greater. Everybody was interested in human rights. With the collapse of the Communist regimes, other countries from East Europe and Asia included human rights documents in their constitutions. This is one reason why legal systems and judges became closer. People have more to talk about in having similar human rights documents.<sup>1544</sup>

Another judge also emphasized historical context and changing transnational forces:

Another reason is history. We have always been open about this in Canada. We took our civil law from the French Civil Code; we took our common law from England. Later on, with the development of international law, we relied on international law, and with the increase in contacts with other courts, we are open to enrichment from them.<sup>1545</sup>

### **3. GLOBAL GOVERNMENT NETWORKS THEORY (DIPLOMATIC THEORY)**

Interestingly, half of the interviewed judges perceived the SCC's participation in these conversations as part of Canada's foreign policy, and used this particular lens to explain

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<sup>1544</sup> Interview with Anonymous Justice 3.

<sup>1545</sup> Interview with Anonymous Justice 2.

the process of transnational judicial interactions. Such a perception from the SCC judges, involves the global government networks theory, which also constitutes the departing point of this study. According to one judge:

One of the reasons to engage in transnational judicial dialogue is because it is necessary to keep good relations with foreign jurisdictions. We need to insure our international reputation across the world, and it is our responsibility to maintain that good reputation. . . . The Supreme Court of Canada has become like a branding of our country. And the branding of Canada, of course, is the rule of law. More and more people, and foreign judges that I have met around the world, are looking at us as their reference on the rule of law and judicial independence. I hold the view that we need to work hard on that, to maintain this good global reputation. And we need to always keep working on it, and never forget it! We need to avoid the assumption that we are done with this, because that would be the biggest mistake we can make. As you know, this has happened in other courts that are losing that global reputation.<sup>1546</sup>

This diplomatic responsibility, to maintain good relationships with other countries and to promote Canada worldwide, was also mentioned by another judge, who believes the Canadian government itself promotes this process:

When I joined the SCC, I felt that the Canadian government really expected Canadian courts to be in contact and engage with other foreign courts, and to support particularly the courts of developing countries. And this was not limited to the SCC; it included judges of lower courts who were very much engaged.<sup>1547</sup>

Another judge remarked, “Often the judicial collaboration and dialogue of the SCC with foreign counterparts is one piece of the larger engagement strategy that Canada wishes to have as a country in the global arena.”<sup>1548</sup> However, the judge made it clear that this does not mean that the Canadian government orchestrates the external engagements of the SCC or Canadian judges:

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<sup>1546</sup> Interview with Anonymous Justice 7.

<sup>1547</sup> Interview with Anonymous Justice 10.

<sup>1548</sup> Interview with Anonymous Justice 9.

It is important to understand that the Court certainly doesn't take any direction from the government on how it engages in interactions with foreign courts. In any case, the SCC would not do something that would be contrary to Canada's foreign relations. The judicial exchange may be a useful adjunct to other pieces of the puzzle, and the Court wants to engage in ways that furthers Canada's national interests, but it still very much insists on its own independence, in the way these meetings occur.<sup>1549</sup>

Further to the strong global reputation of the SCC, and the established good relationships with courts of other nations, this judge feels that Canadian judges have a moral duty to help their counterparts:

The second reason why we participate in such activities, I think, is a sense of responsibility to assist other judiciaries if they want our help. There are certainly a lot of places in the world that appreciate the kind of privileged position we occupy as judges in Canada, and they think we can help them. And between us judges, there is a sense that we should do that, help other judiciaries to develop and achieve better standards.<sup>1550</sup>

The data in Chapter 4 regarding the three forms of institutional court-to-court exchanges—regular bilateral relations, transnational court associations, and occasional exchanges—show that the SCC plays a broader role, venturing outside the legal realm to participate in the diplomatic arena, and that the Canadian government typically supports these activities, expressing pride in its Court's global influence.<sup>1551</sup> In fact, although the judges did not mention a diplomatic motive, they expressed an understanding that states relate to one other not as unitary entities, but in a disaggregated modus, establishing global or regional government networks of legislators, administrators, and judges. One judge noted:

This exchange of best practices is happening in the other branches of government. When I was a deputy Attorney General, we would go to other countries to learn about their legal models. For example, I went to England to learn about the system of appointing judges, and honestly, I didn't learn

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<sup>1549</sup> Interview with Anonymous Justice 9.

<sup>1550</sup> Interview with Anonymous Justice 9.

<sup>1551</sup> Cotler, *supra* note 200.

much that I liked. But still that is part of the process of looking for legal ideas and solutions beyond our borders. . . . [This] is what is behind globalization in general and judicial globalization. This development is part of the whole, and you can't divorce it from that.<sup>1552</sup>

In other words, international relations today are exercised not only through official governments, but also through a web of horizontal, diagonal, or vertical global networks of national and supranational judges, legislators, and regulators.<sup>1553</sup> The regular bilateral relationships of the SCC with other foreign or supranational courts, and its membership in multilateral transnational judicial organizations, provide excellent examples of such a development. Through these engagements, the SCC is participating in a form of external relations, which are exercised in a relatively autonomous manner by the Court.

#### 4. MORAL UNIVERSALIM THEORY

At least three justices viewed the transnational judicial conversation from a broader philosophical perspective, in line with moral universalism theory.<sup>1554</sup> According to them, there is a set of fundamental principles of justice and universal values, constituting the universal “good,” which is a prime motivation for their own participation, and for the participation of the entire global community of courts and judges, in extensive conversations and networks. One remarked:

Understanding universal justice is one of the most important reasons why judges ought to come together and speak to each other. Laws are rules, but justice is much more than that. It's the “rule of justice,” and not just the “rule of law,” that is the highest principle that should guide our institutions.

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<sup>1552</sup> Interview with Anonymous Justice 3.

<sup>1553</sup> Slaughter, *supra* note 3 at 13-14.

<sup>1554</sup> Interview with Anonymous Justice 5, Justice 7, Justice 8.

Hence, it is always helpful to see what other democracies are doing and how they are responding to these universal issues.<sup>1555</sup>

The other two justices, who shared a similar vision about transnational judicial interaction, refer to such universal norms as *jus cogens*.<sup>1556</sup> *Jus cogens* are known in international law as peremptory norms of universal nature, from which no derogation is ever permitted.<sup>1557</sup> One judge stated, “Such meetings with foreign colleagues open up my mind, to what is going on in other countries, in adhering to what I call *jus cogens*, norms that are really universal and common for everyone.”<sup>1558</sup> The third judge asserted:

The fact that people want to be autonomous, that doesn't change the fact that there are universal commonalities regarding what is right and wrong in terms of justice. And such common ground can be found in many key international legal documents, and in *jus cogens*.<sup>1559</sup>

This philosophy suggests the contribution of every nation is needed to better understand universal commonalities, particularly those related to justice. If “justice” and “natural laws” are universal, every appeal for a universal understanding from the elite of a society, such as judges and academics, is in the best interests of all humanity. Yet, judges have normal human limits and interests, and may misinterpret the universal norms.

## **IX. HYBRID THEORY AND FINAL REFLECTIONS ON DRIVING FORCES**

It is clear the above theories all help explain why transnational judicial dialogue, and more generally the globalization of courts, are occurring. It is happening for pragmatic

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<sup>1555</sup> Interview with Anonymous Justice 5.

<sup>1556</sup> Interview with Anonymous Justice 7, and Justice 8.

<sup>1557</sup> See, Ian Brownlie, *Principles of Public International Law* (5th ed., Oxford, 1998).

<sup>1558</sup> Interview with Anonymous Justice 8.

<sup>1559</sup> Interview with Anonymous Justice 7.

reasons, as all judges agreed, but it is also due to an historical imperative driven by the modern forces of globalization, and is motivated by diplomatic impulses and universal common values.

Consequently, it is necessary to use a “hybrid theory”, which recognizes this process as a complex development driven by a number of reasons. After reviewing the existing scholarship in the field, and based on my collected data, informed particularly by ten judicial interviews, I have identified five categories of forces or motives that drive the SCC in this process: a) Individual-Judge Driving Forces; b) Court-Institutional Driving Forces; c) Canadian National Driving Forces; d) Transnational Driving Forces; and e) International/Global Driving Forces.

*Individual-Judge Driving Forces:* There are various motives compelling individual judges to participate in the transnational judicial conversation. Based on the literature review in Chapter 2, and on the data revealed in this study, these include their “judicial philosophy”, the “consciousness of judges about their dual responsibility” (at both national and international levels), their “globalist or localist mindset”, “building and maintaining an impressive individual reputation”, and, of course, “pragmatic forces or motivations”.

*Court-Institutional Driving Forces:* I have identified several reasons the SCC engages in further participation in the process of judicial dialogue, including “resolving complex cases and improving the quality of their decisions”, “lack of domestic jurisprudence”, the need to “re-examine or change previous established precedents”, to “influence and help

other courts”, to “maintain the global reputation and prestige of the Court”, to “strengthen judicial independence”, and to “increase effectiveness and efficiency”.

*Canadian National Driving Forces:* Beyond individual and institutional forces, the process of transnational judicial dialogue of the SCC is driven by other factors at the national, transnational, and global levels. At the Canadian national level, the Court is influenced by the “Canadian Charter of Rights and Freedoms”, the “Canadian constitutional framework”, the country’s “legal traditions and particularities of its legal system”, “Canadian multiculturalism”, and “Canadian national policy”.

*Transnational Driving Forces:* The globalist or localist approach of the SCC and its judges, are also a response to the increase of “transnational litigation”, the expansion of “transnational networks” among courts, the development of “common transnational legal standards”, the existence of “previous colonial ties”, and the influence of “transnational civil society” and “academia”.

*International and Global Driving Forces:* Additional factors affect judicial globalization in general. This study indicates the most influential of these are the “internationalization of human rights”, the presence of “other international obligations and standards”, the emerging “global jurisprudence” among the courts of the world, the existence and increasing number of “international and regional courts”, establishing a “global community of courts through a conscious judicial global networking process”, the

“economic and general process of globalization”, and the expansion of “new technology, particularly the Internet”.

These forces influence the SCC’s participation in the transnational judicial dialogue and may do the same for its foreign counterparts. However, as this study revealed, different actors, including individual judges on the same court, may have different motivations. The same is true for courts as institutions. Different courts may have a wealth of reasons for participating or not participating in the process of judicial dialogue with foreign counterparts. Moreover, national driving forces might vary across dissimilar states. Even transnational and global forces might not exert the same influence on different regions of the globe, nations, courts, or even individual judges. Furthermore, different mechanisms of transnational judicial interaction might have diverse driving forces.

The complexity of the forces shaping the process of transnational judicial dialogue indicates that the global government networks theory (diplomatic theory), which was the departing point of this study, cannot fully explain the SCC’s participation in the conversation. Neither do any of the other theories analyzed above. Instead, a more comprehensive view, or hybrid theory, is needed. This acknowledges transnational judicial dialogue (and more generally the globalization of judiciaries) is a multifaceted process driven by a set of reasons that, on the one hand, are pragmatic, historical, diplomatic, and universal; but on the other are individual, institutional, national, transnational, and global. As the world continues to change, it is likely that new forces will help shape the process; these may even supersede the old.

## CONCLUSION

This study offers a comprehensive analysis of the phenomenon, mechanisms, extent, purpose and effects of transnational judicial dialogue of the SCC and its justices. When I began this project, I thought that the SCC and its justices played a role in the global arena mostly through their exchange of judgments, and my goal was to expose whether and how this exchange impacted its decision-making. Six years later, I see an entirely different picture of judicial dialogue, one that is much more complex and involves a variety of mechanisms, actors, factors and driving forces, all of which have important impacts. In addition, during the last two–three years of this study, many things have changed, particularly in the global arena, and consequently the new reality has had to be firmly kept in mind.

*Mechanisms of Transnational Judicial Dialogue:* Contrary to my expectation, the participation of the SCC in transnational judicial dialogue does not occur only through the citation of foreign judgments. Instead, the SCC participates in almost all forms of non-domestic legal sources of both an international and a comparative nature. More importantly, the real dialogue of the SCC does not happen through the citation of non-domestic legal sources (legal mechanisms), some of which has been diminishing lately. The real conversation of the SCC occurs through genuine engagement, interactions and exchanges in extrajudicial activities, which vary from face-to-face meetings to the establishing of formal bilateral or multilateral relationships and the building of global or regional judicial organizations and networks (extra-judicial mechanisms).

Remarkably, judicial conversation occurs not only through courts as institutions but also through individual justices, who are increasingly becoming key actors. The Chief Justice is no doubt one of the most important. Moreover, there are other internal and external actors who play a key role in the development of judicial dialogue, particularly academics, law schools and NGOs. The SCC and its judges consider academics to be key actors in judicial dialogue, who contribute by introducing and interpreting non-domestic legal sources and also by taking part and sometimes even organizing many extra-judicial activities with judges. The extensive use of scholarship by the SCC speaks to the existence of a vivid dialogue between courts and academia from across the globe, making no distinction between domestic and foreign scholarship and often considering the opinions of experts outside the legal field.

This research identified three types of transnational judicial dialogues in which the SCC participates: *horizontal*, *vertical* and *diagonal dialogue*. Horizontal dialogue comprises interaction with foreign counterparts of the same level; vertical dialogue consists of interaction with international courts and judges of international organizations of which Canada is a member; and diagonal dialogue takes place with regional or supranational courts of international organizations of which Canada is not a member and whose jurisprudence is not binding.

*Extent of Transnational Judicial Dialogue:* The reference of non-domestic legal sources in decision-making is a very significant form of judicial dialogue on the part of the SCC and its justices. During the 17-year period of this study, the SCC engaged extensively with all four forms of non-domestic sources: judgments of foreign courts; constitutions,

codes, statutes and regulations of other countries; international case law; and international treaties. The Court cited judgments of foreign courts in nearly one-third of all its decisions, and foreign legislation was cited hundreds of times. Whereas it was expected that these comparative legal sources had been mainly used in human rights and constitutional cases, in fact, this study revealed that they were used in over 50 different fields of law. This Court mainly uses the foreign decisions and laws of Western liberal democracies, whereas the choice of cited courts is generally determined by historical, cultural, legal, linguistic and political ties, and includes mainly Commonwealth states. In other words, strong conceptual divergences among courts, particular those arising from legal, political, social and language factors, are a formidable barrier to judicial dialogue.

The SCC referred extensively also international treaties and judgments of international courts, including those that Canada has not ratified and those from international organizations of which it is not a member. During 2000–2016, the SCC cited 126 decisions of 14 different international and supranational courts, which are found in 54 judgments of the Court. The international court that has by far the most influence on the SCC is the ECtHR, with which the SCC is also in a formal bilateral relationship. Again, contrary to expectation, the study revealed that the Court cited international precedent in 13 different fields of law, whereas international treaties were found in over 30 different fields of law.

Yet, even the comprehensive quantitative data of this study do not show the entire picture. Although, nearly two-thirds of SCC cases do not refer to international or comparative legal norms, a deeper analysis reveals that many of these cases reference previous SCC cases, particularly primary important cases, which make considerable use

of non-domestic legal sources. Consequently, the foreign source on which the primary case is based is not mentioned, as the Canadian case is deemed sufficient. As a result, the original, non-domestic source of the legal tests or principles that become an integral part of Canadian jurisprudence is “covered”, a phenomenon which I call “covering of foreign citations”. The covering process explained in several cases further demonstrates that non-domestic legal sources are far more influential than the quantitative data alone indicate. In addition, on occasion, the influence of such foreign legal sources is felt by their absence.

This study revealed that justices of the SCC use different methods to discover comparative and international legal sources, which vary from judge to judge, particularly according to their education, language, previous experience, participation in extrajudicial activities with foreign counterparts, law clerk and involvement in academia. There are two principal ways in which non-domestic legal sources reach the SCC, namely through internal and external actors. Internally, these sources come through the SCC judges, mainly from extrajudicial activities and dialogue with foreign counterparts or academics, from their personal research or from reading law reports and academic books. Another internal method is through the research of their law clerks. Judges discover non-domestic legal sources also from external actors, such as parties and their counsel, amici curiae and interveners. It is important to stress that the research on comparative and international legal sources in the SCC is neither formalized nor conducted systematically, and is mostly related to the personal interests of and affinities with the comparative and international legal sources of individual judges.

The extent of judicial dialogue through extra-judicial mechanisms is far greater than the dialogue that occurs through the use of formal non-domestic legal sources. The present study found two main transnational conversation activities: extra-judicial activities of the SCC as an institution and extrajudicial activities of individual judges. Often such interactions establish permanent networks of courts and judges, which provide them with greater opportunities to interact with one another. The study revealed that the SCC participates in three different types of court-to-court institutional relationships: a) regular bilateral relationships, b) transnational courts associations and organizations, and c) occasional contacts. Depending on the agreement, regular bilateral relationships are held every two, three or four years; thus, in total, the Court has on average two bilateral meetings per year, one in Canada and one abroad. The Court has on average two–three multilateral meetings per year, in locations that vary from year to year, and these judicial associations and organizations accept only courts, not individuals, as members. This research revealed that the Supreme Court of Canada has on average about 20 occasional visits per year from various foreign courts. Each of the three forms of institutional court-to-court exchanges is essential to the transnational judicial conversation, showing that the Court plays a broader role, venturing outside the legal realm to participate in the diplomatic arena.

In addition to the above three forms of court-to-court relationships, there is another very powerful set of mechanisms that helps to bring the SCC's participation in the transnational judicial conversation to another level: the transnational judicial conversation of individual justices. There are four main categories of extrajudicial networking activities of judges of the SCC: a) face-to-face meetings with foreign judges;

b) participation in transnational judicial associations; c) participation in judicial training and other legal education institutions; and d) participation in electronic judicial networks. Such a distinction between the Court's institutional activities and individual-judge interactions with foreign colleagues is both practical and theoretical, and is vital for understanding the different dimension and complexity of transnational judicial dialogue.

Overall, the “globalist” or “localist” profile of a court cannot be evaluated solely by its engagement with non-domestic legal sources, be they international or comparative. The data in this study revealed that extra-judicial interacting activities of courts and judges are even more essential for the development of relationships with foreign courts and for building a globalist profile. The SCC and its judges certainly understand the importance of these activities, which is why they have been so engaged in them, particularly over the last 20 years. The data showed that the SCC and its justices are highly committed to establishing institutional and individual-judge relationships with foreign and transnational courts and judges from various parts of the globe, using several interaction mechanisms.

*Purpose of Transnational Judicial Dialogue:* This study has also exposed the motives of the SCC and its justices regarding their participation in or avoidance of judicial dialogue. The empirical findings demonstrated that there are a number of different motives for transnational judicial conversation, which sometimes overlap. It is true that pragmatic reasons motivate justices of the SCC (and arguably across the globe) to interact with their foreign counterparts. While these represent the majority of reasons for the interactions,

historic imperatives, diplomatic theory (global government networks) and moral universalism are other driving forces.

The data generated by this research demonstrate that no one theory, including the theoretical point of departure for this study (global government networks theory), can fully explain transnational judicial dialogue from the perspective of the SCC. Hence, one of the crucial findings of this study is that judicial dialogue is a highly complex process involving several actors, factors and forces. Therefore, in order to better comprehend it, it is necessary to use a hybrid theory that recognizes judicial dialogue as an elaborate and multifaceted development driven by a set of reasons that are, on the one hand, pragmatic, historical, diplomatic and universal, but are, on the other, individual, institutional, national, transnational and global.

*Effects of Transnational Judicial Dialogue:* This study reveals that both legal and extra-judicial forms of transnational judicial conversation may have tangible impacts in the decision-making of the SCC. Judicial dialogue through the reference of non-domestic legal sources (international and comparative) sometimes directly influences the decision-making of the Court. International legal sources often have a direct significant influence on the Canadian constitutional and legal order, on the Court's deliberation and the writing of its judgments and ultimately on its decision-making. Comparative legal sources have also occasionally influenced Canadian jurisprudence in at least three ways, namely substantive direct effects from individual cases, interpretative or indirect effects, and broader systemic effects. Although formally non-binding for the Court, substantively,

foreign judgments sometimes have been very influential on the decision-making of the SCC, to the point that several of them have now become part of its jurisprudence.

Judicial dialogue through extra-judicial activities of the Court may also arguably influence decision-making, albeit indirectly. Although less noticeable, such interactions prompt the SCC to reference both a greater number and a higher quality of non-domestic legal sources. As the data of this research demonstrate, it is mainly through these extrajudicial activities that the SCC and its judges are brought into conversation with foreign counterparts, allowing them to exchange ideas and best practices, learn about their judgments and the context of such decisions and build trust with one another.

Another significant finding is that transnational judicial conversations of the SCC and its judges have a demonstrable impact also on court management and other internal practices and procedures. These impacts take three main forms: occasional specific effects, the development of universal guidelines, and a continuous checking process. All these types of effects are noticeable in the institutional arrangements of the SCC.

Judicial dialogue may also influence individual judges. The majority of the interviewed judges acknowledged this influence, particularly on their general philosophy of law and judicial philosophy, their national or transnational reputation and their globalist or localist mindset. Transnational judicial interactions may even transform their judicial identity.

The existence of a relationship between the number of citations of foreign legal instruments used by individual judges and their participation in extra-judicial transnational activities with foreign counterparts is another important finding of this study. The more a judge is involved in such extra-judicial activities, the more non-

domestic legal sources that judge is exposed to and arguably is willing to engage with, and vice versa.

Although beyond the direct aim of this study, the collected data suggest that the influence of judicial dialogue reaches beyond the SCC and its judges, having both a domestic and transnational/international influence. Nationally, judicial dialogue of the SCC may have a constitutional impact, such as the transformation of the legal system from a dualist into a hybrid or monist system, fertilization and change of constitutional jurisprudence, the transformation of the role of the judiciary and the disaggregation of national sovereignty. It may also have an impact on other domestic actors, such as other domestic courts, the executive branch, the legislative branch, the national bar and academia. The data of this study suggest that the judicial dialogue of the SCC may also have international and transnational effects. Internationally, judicial conversation seems to have a significant influence, particularly on human rights, but also on other fields. Overall, international legal norms are one of the main pillars on which these conversations are built, providing courts with common reference points. Through such a dialogue, the SCC blends national law with international and transnational norms, which then helps to create stronger and more consistent and harmonized legal standards in almost every field of law.

Overall, although seemingly a progressive development, transnational judicial dialogue has several possible pitfalls and risks, the opportunities for which are increasing. Such dialogue may distract courts and judges from their primary task, deciding cases, and can become very time-consuming. Another risk, admitted by several justices of the SCC, is the misapplication of foreign precedents, out of context and without understanding of

how the legal system works. A further risk, also noted by the judges, is that the transnational judicial dialogue process could cause the spread of unconstitutional ideas that may be questionable from a human rights perspective. In addition, participation in judicial dialogue may raise questions over whether being engaged extensively in the global arena may politicize the SCC and its judges. Interacting with foreign courts and judges from disparate legal and political systems, or participating in certain transnational or international organizations, may be politically challenging. Finally, there are fears that judicial dialogue may prompt an increase in “judicial activism” on a regional or global scale. If judicial activism is considered questionable at a national level because it is interpreted as the “judicial usurpation of politics”, at a regional or global level, it may be considered even more threatening.

In addition, this study reveals that the transnational judicial dialogue of the SCC and its judges is still disorderly, unchecked, too far from the public eye, the media and political institutions, and even shielded from the scrutiny of academics. As such, it is recommended that academics, politicians and even the public should pay far greater attention to the topic of judicial dialogue to prevent the process from going unchecked. Transparency would undoubtedly give more legitimacy to the practice of judicial dialogue and would probably further it. Yet, judicial dialogue is a complex phenomenon. It was beyond the aim of this study to deal with the solutions to these problems, yet, it is for this reason that future studies in this field must be conducted, sooner rather than later.

With regard to the future of the transnational judicial conversation of the SCC and, more generally, the globalization of the courts, the data of this study indicate that judicial interaction among courts and judges will very likely increase and almost certainly

become more necessary for the global judicial community. However, in the context of the “new momentum” of globalization, the future of judicial dialogue may be uncertain and at the same time more critical (in protecting human rights, the rule of law, democracy and universal values). These responsibilities are shared with lawmakers, and these latest political movements are almost certain to have an impact.

In an increasingly globalized world, conversation among judges may prompt changes that would cause this process to be less disorderly and unsystematic in the future. In fact, the increased permanency and formalization of bilateral, multilateral and transnational judicial organizations indicate a greater formalization of the judicial dialogue. Such more formal interactions and networks may be a means of creating changes that establish a cleaner, more systemic process. However, recent political changes have created an environment that poses a challenge to a smooth development in this direction.

Overall, it seems convincing that the transnational judicial dialogue of the SCC and its judges, through both legal and extra-judicial mechanisms, exerts significant influence on the Court’s decision-making, institutional arrangements and individual judges. The effects of these interactions sometimes appear to reach other national, transnational and international actors, and are almost certainly impacted by them. In addition, judicial dialogue appears to be a significant factor fostering the evolution of the role of judges from interpreters of the law to policy-makers and finally to their modern role as diplomats, networkers and crucial actors in foreign relations, roles that certainly cannot continue without debate.

In conclusion, this study demonstrates that the transnational judicial dialogue of the SCC and its judges is a progressive development. It is indeed a high forum of elite legal minds capable of debating competing opinions in searching for the best solutions. From a national perspective, this dialogue improves democratic and human rights standards and enhances the rule of law, assists in resolving difficult domestic cases and enriches the minds of judges by encouraging them to continuously seek further knowledge. From a transnational and international perspective, judicial dialogue brings greater awareness of best practices in both substantive law and court management, may affect the development and harmonization of international and transnational law in almost every field, is an important device in the diplomatic arena, and draws attention to the need for more coherent international and transnational standards. Hence, it is the professional duty of a judge to constantly expand and consolidate his or her knowledge and use of international and comparative law. As Eliot poetically notes, judges, like all of us, “shall not cease from exploration”, and judicial dialogue will help them better “know the place for the first time”<sup>1560</sup>; in other words, to better comprehend their dual role in the domestic arena and in the global legal order. Being perceived as part of the broader epistemic dissemination of knowledge, in combination with academic research and policy-making, judicial dialogue has the potential to become an important tool towards progress in finding the best solutions.

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<sup>1560</sup> Eliot, *supra* note 1.

## APPENDIX 1: INTERVIEW QUESTIONS

1. In general, do you agree or disagree with the proposition that a process of transnational judicial dialogue or interaction, and a general globalization of courts are under way?
2. In your view, has the Supreme Court of Canada as an institution participated in the process of transnational judicial dialogue and networks in the last 17 years (2000-2016)? If yes, what are some of the mechanisms/tools by which it does so?  
For example:
  - Does the Court have a formal/non-formal rule or policy regarding the use of foreign legal sources, such as comparative and/or international law or case law, or any other form of foreign sources in its decisions?  
(If yes, please give examples)
  - Does the Court maintain any formal or informal relationships with other national, supranational, or international courts?  
(If yes, please give examples)
  - Does the Court organize and/or participate in meetings with other national, supranational, or international courts/judges?  
(If yes, please give examples)
  - Has the Court established part of any regional or global organization/association of courts/judges; and does it actively participate in it/them?  
(If yes, please give examples)
  - Has the Court established or does it participate in or contribute to bilateral or multilateral regional or global judicial training?  
(If yes, please give examples)
  - Has the Court established or is it part of any electronic networks and systems that facilitate dialogue between national/supranational/international courts/judges?  
(If yes, please give examples)
  - Any other forms?
3. Have you (as Justice of the SCC), participated in the process of transnational judicial dialogue and networks over the years that you served in the SCC? If yes, what are some of the mechanisms/tools by which you did so? Specific examples drawn from your personal experience would be appreciated.  
For example:
  - Have you relied on or referred to comparative and/or international law or case law, or any other form of foreign legal sources in decisions/dissenting? If yes, how?

- Have you organized and/or participated in face-to-face meetings with other national, supranational, or international judges? (If yes, please give examples)
  - Have you established and/or participated in regional or global organization/association of judges/courts? (If yes, please give examples)
  - Have you organized and/or participated in bilateral or multilateral regional or global judicial training institutions? (If yes, please give examples)
  - Have you participated in electronic networks and systems that facilitate dialogue between national/supranational/international court/judges? (If yes, please give examples)
  - Any other forms?
4. In your view, what are some of the main effects or consequences derived from the use of non-domestic legal instruments (international laws; international case laws; comparative laws; and comparative case laws) by the Supreme Court of Canada and its judges?

For example:

Do the use of non-domestic legal instruments have significant effects on the:

- Decision-making of the Supreme Court of Canada (judgments)?  
(If yes, please give examples)
  - Supreme Court of Canada as an institution (organization, management, procedures, relationship with media/public)?  
(If yes, please give examples)
  - Individual judges of the Supreme Court?
  - Canadian judiciary?
  - Canadian legislature and/or executive?
  - Canadian international relationships and diplomacy?
  - Comparative law and/or international law?
  - Other foreign or international/supranational courts?
  - Any other effects/consequences?
5. In your view, what are some of the main effects or consequences derived from the participation of the Supreme Court of Canada and its judges in extra-judicial networking activities (such as: face-to-face meetings with foreign judges; judicial relationships with foreign courts; membership in transnational judicial associations and organizations; contribution in transnational judicial training institutions; and participation in global electronic networks)?

For example:

Do such activities have significant direct or indirect effects on the:

- Decision-making of the Supreme Court of Canada (judgments)?
- Supreme Court of Canada as an institution (organization, management, procedures, relationship with media/public)? (If yes, please give examples)
- Individual judges of the Supreme Court?
- Canadian judiciary?

- Canadian legislature and/or executive?
  - Canadian international relationships and diplomacy?
  - Comparative law and/or international law?
  - Other foreign or international/supranational courts?
  - Any other consequences?
6. In your view, who are the main actors that have led, contributed, or fostered the participation of the Supreme Court of Canada in the process of transnational judicial dialogue and networks in the last 17 years (2000-2016)?  
For example:
- The Supreme Court of Canada as an institution itself?
  - The Chief Justice?
  - Individual current or former judges?
  - Law Clerks?
  - External Actors, such as:
    - o Parties and their counsel?
    - o Amici curiae and interveners?
    - o Academic and professional commentators?
    - o Canadian or foreign NGOs?
    - o Canadian or foreign universities or other educational institutions?
    - o Parliamentary committees or government officials?
    - o Media?
    - o Others?
7. In your view, what are the main reasons and/or forces that motivate judges of the Supreme Court of Canada (or the institution itself) to participate (or not) in the process of transnational judicial dialogue and networks?
8. In your view, what are some of the main principles that guide the participation of the Supreme Court of Canada and its judges in the process of transnational judicial dialogue and networks?
9. In your view, are there any risks/pitfalls from the participation of the Supreme Court of Canada and its judges in the process of transnational judicial dialogue and networks? If yes, please explain.
10. The Normative Question: In your view, is the participation of the Supreme Court of Canada and its judges in the process of transnational judicial dialogue and networks a positive or a negative process for the development of the rule of law, constitutionalism, and human rights in Canada (and abroad)? Please explain.
11. What do you think about the future of the process of transnational judicial dialogue, networks, and generally the globalization of courts in Canada and abroad? (Any thoughts here are welcomed)

12. Is there anything else that would you like to add from your experience on these issues?

## **APPENDIX 2: DATA ABOUT THE CITATION OF INTERNATIONAL TREATIES BY THE SCC (2000-2016)**

### **D) TOP 10 MOST CITED INTERNATIONAL TREATIES**

1. *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171. (22 times)
2. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 [the *European Convention on Human Rights*], art. 11. (15 times)
3. *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948), 71. (13 times)
4. *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Art. 3(1). (12 times)
5. *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, Arts. 53, 64. (10 times)
6. *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3. (9 times)
7. *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6, Art. 33. (8 times)
8. *Berlin Convention for the Protection of Literary and Artistic Works*, November 13, 1908. (6 times)
9. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2, art. 1709(2). (6 times)
10. *Convention (No. 87) concerning freedom of association and protection of the right to organize*, 68 U.N.T.S. 17, art. 3(1). (5 times)

**II) ALL CITED INTERNATIONAL TREATIES IN ALPHABETICAL ORDER:**

1. *1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, September 27, 1968, *Official Journal of the European Communities*, Notice No. 98/C 27/01.
2. *African Charter on Human and Peoples' Rights*, 21 I.L.M. 58, Art. 5. (2 times)
3. *Agreement Between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, Can. T.S. 1980 No. 29.
4. *Agreement on Government Procurement*, 1915 U.N.T.S. 103 (being Annex 4(b) of the *Marrakesh Agreement establishing the World Trade Organization*, 1867 U.N.T.S. 3), Ann. 1.
5. *Agreement on Internal Trade*, (1995) 129 Can. Gaz. I, 1323, Preamble, Chapter One, arts. 100, 101, Chapter Five, arts. 501, 502, 504, 506, 513, 514, 518, Ann. 502.1A.
6. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, 1869 U.N.T.S. 299 (being Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*, 1867 U.N.T.S. 3). (5 times)
7. *Air Transport Agreement Between the Government of Canada and the Government of the United States of America* (1995), Annex I, s. 1.
8. *American Convention on Human Rights*, 1144 U.N.T.S. 123, Art. 5. (3 times)
9. *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, G.A. Res. 60/147, U.N. Doc. A/Res/60/147, December 16, 2005.
10. *Berlin Convention for the Protection of Literary and Artistic Works*, November 13, 1908. (6 times)
11. *Berne Convention for the Protection of Literary and Artistic Works*, 828 U.N.T.S. 221, September 9, 1886; rev. in Berlin November 13, 1908, art. 11, 13, 14; rev. in Rome June 2, 1928, art. 11bis. (2 times)
12. *Canada-Chile Free Trade Agreement*, art. Kbis-13, Ann. Kbis-01.1-3, Schedule of Canada, Section A, para. 2.

13. *Canada-Colombia Free Trade Agreement*, art. 1412, Ann. 1401-3, Schedule of Canada, Section A, para. 2.
14. *Canada-Peru Free Trade Agreement*, art. 1412, Ann. 1401.1-3, Schedule of Canada, Section A, para. 2.
15. *Canada-U.S. Free Trade Agreement*, 1987, arts. 2005, 2006.
16. *Canada-United Kingdom Civil and Commercial Judgments Convention Act*, R.S.C. 1985, c. C-30 .
17. *Charter of the International Military Tribunal*, 82 U.N.T.S. 279, art. 8.
18. *Charter of the Organization of American States*, Can. T.S. 1990 No. 23, art. 45(c).
19. *Charter of the United Nations*, Can. T.S. 1945 No. 7, art. 105. (2 times)
20. *Constitution of the International Labour Organisation*, 15 U.N.T.S. 40, Art. 19(5)(e). (2 times)
21. *Convention (No. 11) concerning the Rights of Association and Combination of Agricultural Workers*, 38 U.N.T.S. 153, Art. 1 .
22. *Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation*, 362 U.N.T.S. 31.
23. *Convention (No. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development*, *I.L.O. Official Bulletin*, vol. LVIII, 1975, Series A, No. 1, p. 28, Art. 2 .
24. *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*. General Conference of the International Labour Organisation, June 27, 1989, Art. 32.
25. *Convention (No. 87) concerning freedom of association and protection of the right to organize*, 68 U.N.T.S. 17, art. 3(1). (5 times)
26. *Convention (No. 98) concerning the application of the principles of the right to organise and to bargain collectively*, 96 U.N.T.S. 257, Art. 4.
27. *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Can. T.S. 1990 No. 42, Art. 3(2). (2 times)
28. *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, Arts. 1, 2(1), (2), 3(1), 16(2), 17-24. (2 times)

29. *Convention Between Canada and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, S.C. 1986, c. 48, Sch. I.
30. *Convention between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, Can. T.S. 1987 No. 29, art. IV, s. 1(g).
31. *Convention for the Creation of an International Union for the Protection of Industrial Property*, March 20, 1883.
32. *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, Eur. T.S. No. 164, c. II, art. 6.
33. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 [the *European Convention on Human Rights*], art. 11. (15 times)
34. *Convention for the Suppression of the Unlawful Seizure of Aircraft*, Can. T.S. 1972 No. 23.
35. *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 U.N.T.S. 309 [*Montreal Convention*], preamble, arts. 3(4), 17, 18, 19, 21, 22, 26, 29, 49. (3 times)
36. *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, Can. T.S. 1979 No. 11, art. II.
37. *Convention on International Civil Aviation*, Can. T.S. 1944 No. 36, art. 19.
38. *Convention on limitation of liability for maritime claims, 1976*, 1456 U.N.T.S. 221, arts. 1, 2, 4.
39. *Convention on the Choice of Court*, The Hague Convention, concluded November 25, 1965, arts. 5, 6.
40. *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35, art. 13(b).
41. *Convention on the Elimination of All Forms of Discrimination against Women*, Can. T.S. 1982 No. 31, Arts. 5(b), 16(1)(d).
42. *Convention on the Grant of European Patents*, 1065 U.N.T.S. 199. (3 times)

43. *Convention on the Law Applicable to Contractual Obligations* (Rome 1980), art. 3.
44. *Convention on the Physical Protection of Nuclear Material*, 18 I.L.M. 1419.
45. *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, art. II, III(c).
46. *Convention on the Privileges and Immunities of the Specialized Agencies*, 33 U.N.T.S. 261.
47. *Convention on the Privileges and Immunities of the United Nations*, 1 U.N.T.S. 15, art. II(2). (2 times)
48. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 U.N.T.S. 3, art. II. (4 times)
49. *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Art. 3(1). (12 times)
50. *Convention Refugee Determination Division Rules*, SOR/93-45, s. 2.
51. *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6, Art. 33. (8 times)
52. *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, 500 U.N.T.S. 31 [*Guadalajara Convention*].
53. Council of Bars and Law Societies of Europe. *Charter of Core Principles of the European Legal Profession*, in *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers*, edition 2013, 5 (online: <http://www.ccbe.eu/index.php?id=32&L=0>).
54. Council of Europe. *Parliamentary Assembly. Resolution 1044 (1994) on the Abolition of Capital Punishment, October 4, 1994.*
55. *Covenant of the League of Nations*, art. 7, published in (1920), 1 *League of Nations O.J.* 3.
56. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, U.N. Doc. A/Res/40/34, November 29, 1985.
57. *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees*, HCR/MMSP/2001/09.
58. *Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV) (1959), preamble.

59. *Declaration on Fundamental Principles and Rights at Work*, 6 IHRR 285 (1999).
60. *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452 (XXX), U.N. Doc. A/3452/XXX, December 9, 1975, art. 3.
61. *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”)*, [2000] O.J. L. 178/1, Preamble, clauses 17, 19, 22, 42, arts. 3(1), 13(1).
62. *Directive 98/44/EC of the European Parliament and of the Council of July 6, 1998 on the legal protection of biotechnological inventions*, [1998] O.J. L. 213/13. (2 times)
63. *Draft Joint Action to combat child pornography on the Internet*, [1999] O.J.C. 219/68, art. 1.
64. *Draft of the Inter-American Declaration on the Rights of Indigenous Peoples*. Inter-American Commission on Human Rights, September 18, 1995, Art. 24.
65. *Draft United Nations declaration on the rights of indigenous peoples*. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 1994/45, Art. 35.
66. European Communities. *First Council Directive 89/104/EEC of 21 December 1988 to Approximate Laws Relating to Trade Marks*, [1989] O.J. L. 40/1, art. 3(1)(e). (2 times)
67. European Communities. *Commission Decision 99/352 of 28 April 1999 establishing the European Anti-fraud Office (OLAF)*, [1999] O.J. L. 136/20, art. 2.
68. European Communities. *Council Decision 99/394 of 25 May 1999 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities’ interests*, [1999] O.J. L. 149/36.
69. European Communities. *Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community Trade Mark*, [1994] O.J. L. 11/1.
70. European Communities. *Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] O.J. L. 12/1, art. 5(1), (3).

71. European Communities. Staff Regulations of officials of the European Communities, [1968] O.J. L. 56/1, arts. 22a and 22b [added by *Council Regulation 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities*, [2004] O.J. L. 124/1].
72. *European Convention on Extradition*, Eur. T.S. No. 24, Art. 3(2) . (2 times)
73. *European Convention on State Immunity*, 11 I.L.M. 470 (1972), Art. 11.
74. *European Parliament. Resolutions B4-0468, 0487, 0497, 0513 and 0542/97 (1997)*.
75. *European Social Charter*, E.T.S. No. 35 [revised E.T.S. No. 163], art. 6(4).
76. *Extradition Treaty between Canada and Germany*, Can. T.S. 1979 No. 18.
77. *Extradition Treaty between Canada and the United States of America*, Can. T.S. 1976 No. 3, Art. 6, 17 *bis* [ad. Can. T.S. 1991 No. 37, Art. VII];
78. *Extradition Treaty between Canada and the United States of America*, Can. T.S. 1976 No. 3, art. 17 *bis* [ad. Can. T.S. 1991 No. 37, Art. VII]. (4 times)
79. *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, Can. T.S. 1989 No. 3.
80. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Can. T.S. 1965 No. 20, p. 25, Art. 3. (4 times)
81. *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Can. T.S. 1965 No. 20, p. 163, Art. 3. (2 times)
82. *Geneva Convention Relative to the Treatment of Prisoners of War*, Can. T.S. 1965 No. 20, p. 84, Art. 3. (2 times)
83. *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, December 22, 2009.
84. *Headquarters Agreement between the Government of Canada and the International Civil Aviation Organization*, Can. T.S. 1992 No. 7, arts. 4, 5, 21, 32, 33. (3 times)

85. International Bar Association. *International Principles on Conduct for the Legal Profession*, adopted May 28, 2011 (online: <http://www.ibanet.org/Publications>).
86. *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 496 U.N.T.S. 43, Arts. 3, 10, 12.
87. *International Convention for the Suppression of Terrorist Bombings*, 37 I.L.M. 249.
88. *International Convention for the Suppression of the Financing of Terrorism*, GA Res. 54/109, 9 December 1999, Annex, Art. 2(1).
89. *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, art. 6 .
90. *International Convention on the Harmonized Commodity Description and Coding System*, Can. T.S. 1988 No. 38.
91. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. Res. 45/158, U.N. Doc. A/Res/45/158, December 18, 1990, arts. 15, 16(9), 18(6), 83.
92. *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171.  
(22 times)
93. *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3.  
(9 times)
94. *International traffic in child pornography*, ICPO-Interpol AGN/65/RES/9 (1996).
95. *James Bay and Northern Québec Agreement*, ss. 2.5, 2.7, 2.9.7, 2.15, 16.0.2, 22, 23.
96. *Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955*, 2145 U.N.T.S. 31.
97. *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2, art. 1709(2). (6 times)
98. North Saanich Treaty of 1852.
99. *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography*, A/RES/54/263 (2000), Annex II.

100. Organisation for Economic Co-operation and Development. *Transfer Pricing*
101. *Guidelines for Multinational Enterprises and Tax Administrations*. Paris: The Organisation, 1995.
102. *Patent Cooperation Treaty*, Can. T.S. 1990, No. 22.
103. *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 2241 U.N.T.S. 480, arts. 2, 3(a) “smuggling of migrants”, 6, 11, 19. (2 times)
104. *Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America*, Can. T.S. 1991 No. 37, Art. VII.
105. *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, Eur. T.S. No. 114.
106. *Protocol relating to the Status of Refugees*, 606 U.N.T.S. 267. (4 times)
107. *Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 478 U.N.T.S. 371 [Hague Protocol].
108. *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955*, signed at Guatemala City on 8 March 1971 (not in force).
109. *Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 478 U.N.T.S. 371 [Hague Protocol].
110. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 2237 U.N.T.S. 319, art. 14(1). (2 times)
111. *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, 29 I.L.M. 1447.
112. *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Eur. T.S. No. 9, Art. 3 .
113. *Revised Berne Convention*, art. 1.

114. *Rio Declaration on Environment and Development*, UN Doc. A/Conf. 151/5/Rev. 1 (1992).
115. *Rome Convention for the Protection of Literary and Artistic Works*, June 2, 1928.
116. *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, July 17, 1998. (4 times)
117. *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, G.A. Res. 44/128 (December 15, 1989).
118. *Second Protocol amending the Treaty on Extradition between the Government of Canada and the Government of the United States of America*, Can. T.S. 2003 No. 11.
119. *Single Convention on Narcotic Drugs, 1961*, Can. T.S. 1964 No. 30, Art. 28(2).
120. *Single Convention on Narcotic Drugs, 1961*, Can. T.S. 1964 No. 30, Art. 36.
121. *Standard Minimum Rules for the Treatment of Prisoners*, G.A. Res. 663 C (XXIV) and 2076 (LXII), U.N. Doc. ST/HR/1/Rev. 5 (1994), p. 243.
122. *Statute of the International Criminal Tribunal for Rwanda*, U.N. Doc. S/RES/955, November 8, 1994.
123. *Statute of the International Criminal Tribunal for the Former Yugoslavia*, U.N. Doc. S/RES/827, May 25, 1993.
124. *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V) (1950), s. 7 .
125. *Supplementary Agreement between Canada and the International Civil Aviation Organization*, Can. T.S. 1980 No. 18, arts. II, VI, VII. (2 times)
126. *Supplementary Agreement between the Government of Canada and the International Civil Aviation Organization regarding the Headquarters of the International Civil Aviation Organization*, Can. T.S. 1999 No. 20.
127. *Supplementary Agreement between the Government of Canada and the International Civil Aviation Organization regarding the Headquarters of the International Civil Aviation Organization*, 2013 [not yet in force]
128. *Treaty Between Canada and the United States of America on the Execution of Penal Sentences*, Can. T.S. 1978 No. 12, arts. II, III, IV.

129. *Treaty of Extradition between the Government of Canada and the Government of the United Mexican States*, Can. T.S. 1990 No. 35, art. VIII.
130. Treaty of Paris (1763).
131. *Treaty on Extradition Between Canada and the United States of America*, Can. T.S. 1976 No. 3, Art. 4.
132. *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17 (1985), Annex I, art. 8(1).
133. *United Nations Convention against Transnational Organized Crime*, 2225 U.N.T.S. 275, arts. 2(a) “Organized criminal group”, (c) “Structured group”, 5. (3 times)
134. *United Nations Convention on Jurisdictional Immunities of States and Their Property*. New York: United Nations, 2004 [not yet in force]. (2 times)
135. United Nations High Commissioner for Refugees. “Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees”, HCR/GIP/03/05, September 4, 2003 (online: [www.unhcr.org](http://www.unhcr.org)). (2 times)
136. United Nations High Commissioner for Refugees. *Guidance Note on Extradition and International Refugee Protection*. Geneva: The Commissioner, 2008 (online: <http://www.unhcr.org/refworld/docid/481ec7d92.html>).
137. United Nations Office on Drugs and Crime. *Handbook on the International Transfer of Sentenced Persons*. Vienna: United Nations, 2012.
138. United Nations. Commission on Human Rights. *Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography*, 55th Mtg., 1992/74.
139. United Nations. Commission on Human Rights. *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117*. U.N. Doc. E/CN.4/Sub.2/1996/17, May 24, 1996.
140. United Nations. Commission on Human Rights. *Report on the Thirty-sixth Session*, UN ESCOR, 1980, Supp. No. 3, UN Doc. E/CN.4/1408.
141. United Nations. Commission on International Trade Law. *Report of the Working Group on International Contract Practices on the work of its fifth session* (New York, 22 February - 4 March 1983) (A/CN.9/233).

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143. United Nations. Committee against Torture. *Conclusions and Recommendations of the Committee against Torture: Canada*, UN Doc. CAT/C/XXV/Concl.4 (2000).
144. United Nations. Committee on the Rights of the Child. *Report adopted by the Committee at its 233rd meeting on 9 June 1995*, Ninth Session, CRC/C/43.
145. United Nations. Committee on the Rights of the Child. *Consideration of Reports Submitted by State Parties Under Article 44 of the Convention*, Thirty-fourth Session, CRC/C/15/Add.215 (2003).
146. United Nations. Committee on the Rights of the Child. *Report adopted by the Committee at its 209th meeting on 27 January 1995*, Eighth Session, CRC/C/38.
147. United Nations. Economic and Social Council. *Question of the Death Penalty: Report of the Secretary-General Submitted Pursuant to Commission Resolution 1997/12*, U.N. Doc. E/CN.4/1998/82, January 16, 1998.
148. United Nations. Economic and Social Council. *Extrajudicial, summary or arbitrary executions: Report by the Special Rapporteur*, U.N. Doc. E/CN.4/1997/60, December 24, 1996.
149. United Nations. General Assembly. *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), 24 October 1970.
150. United Nations. General Assembly. *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 3452 (XXX), UN Doc. A/10034 (1975).
151. United Nations. General Assembly. *Extrajudicial, summary or arbitrary executions: Note by the Secretary-General*, U.N. Doc. A/51/457, October 7, 1996.
152. United Nations. General Assembly. *Model Treaty on Extradition*, U.N. Doc. A/RES/45/116, December 14, 1990, Art. 3(b).
153. United Nations. General Assembly. *Model Treaty on Extradition*, U.N. Doc. A/RES/45/116, December 14, 1990, Arts. 3, 4.

154. United Nations. General Assembly. *Report of the Human Rights Committee, U.N. Doc. A/46/40, October 10, 1991.*
155. United Nations. General Assembly. *Sale of Children, Child Prostitution and Child Pornography: Note by the Secretary-General, U.N. Doc. A/49/478 (1994).*
156. United Nations. General Assembly. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, November 29, 1985, Annex, Rule 8. (2 times)*
157. United Nations. Human Rights Committee. “General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights”, General Comment No. 25 (57), Annex V, CCPR/C/21, Rev. 1, Add. 7, August 27, 1996.
158. United Nations. Human Rights Committee. *General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32, August 23, 2007.*
159. United Nations. International Law Commission. “Jurisdictional immunities of States and their property”, in *Report of the Commission to the General Assembly on the work of its thirty-second session, U.N. Doc. A/35/10, published in Yearbook of the International Law Commission 1980, vol. II, Part Two. New York: United Nations, 1981, 137.*
160. United Nations. International Law Commission. *Guide to Practice on Reservations to Treaties, Report of the International Law Commission, U.N. Doc. A/66/10/Add.1 (2011).*
161. United Nations. Office on Drugs and Crime. *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, December 6-8, 2002 (online: [http://www.unodc.org/pdf/model\\_treaty\\_extradition\\_revised\\_manual.pdf](http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf)).*
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163. United Nations. *Report of the Human Rights Committee, vol. I, UN GAOR, Fifty-fifth Session, Supp. No. 40 (A/55/40) (2000).*
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165. United Nations. Security Council. U.N. Doc. S/RES/827, May 25, 1993.
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168. United Nations. Commission on International Trade Law. *Legislative Guide on Insolvency Law*. New York: United Nations, 2005.
169. United Nations. Commission on International Trade Law. *Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, 41st Sess., U.N. Doc. A/CN.9/656/Add.1 (2008).
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171. United Nations. Committee on Economic, Social and Cultural Rights. *Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)*, E/C. 12/1/Add.31, 4 December 1998.
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173. United Nations. International Law Commission. “Draft Articles on Jurisdictional Immunities of States and Their Property and Commentaries Thereto” in *Report of the International Law Commission on the work of its forty-third session*, U.N. Doc. A/46/10, in *Yearbook of the International Law Commission 1991*, vol. II, Part Two. New York: United Nations, 1994, 13.
174. United Nations. International Law Commission. *Fifth Report on Jurisdictional Immunities of States and their Property*, U.N. Doc. A/CN.4/363 and Add.1, in *Yearbook of the International Law Commission 1983*, vol. II, Part One. New York: United Nations, 1985, 25.
175. United Nations. *Report of the Human Rights Committee*, vol. I, UN GAOR, Fifty-fourth Session, Supp. No. 40 (A/54/40) (1999).
176. United Nations. *World Programme of Action concerning Disabled Persons*, G.A. Res. 37/52, 90th Plenary Session, December 3, 1982.
177. *Universal Copyright Convention* (1952), Can. T.S. 1962 No. 13. (3 times)

178. *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948), 71. (13 times)
179. *Universal Islamic Declaration of Human Rights* (1981), 9:2 *The Muslim World League Journal* 25, Art. VII.
180. *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, art. 1(1)(k), “consular archives”.
181. *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29, art. 24. (2 times)
182. *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, Arts. 53, 64. (10 times)
183. *WHO Framework Convention on Tobacco Control*, 2302 U.N.T.S. 229, ss. 11(1)(a), 13(4)(a).
184. *WIPO Copyright Treaty*, CRNR/DC/94, December 23, 1996, art. 1(4). (3 times)
185. *WIPO Performances and Phonograms Treaty*, CRNR/DC/95, December 23, 1996.
186. World Customs Organization. *Explanatory Notes to the Harmonized Commodity Description and Coding System*, 5th ed. Brussels: Customs Co-operation Council, 2012.
187. World Health Organization. *International Classification of Impairments, Disabilities, and Handicaps: A Manual of Classification Relating to the Consequences of Disease*. Geneva: The Organization, 1980. (2 times)
188. World Health Organization. *The World Health Report 1999: Making a Difference*. WHO, 1999.
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190. World Intellectual Property Organization. *WIPO Intellectual Property Handbook: Policy, Law and Use*, chapter 5, “International Treaties and Conventions on Intellectual Property”, No. 489, 2nd ed. Geneva: WIPO, 2004.
191. World Trade Organization. Report of the panel, Canada — Patent Protection of Pharmaceutical Products, complaint by the European Communities and their member States, WTO Doc. WT/DS114/R, March 17, 2000.

## APPENDIX 3: SHORT BIO OF JUDGES OF THE SCC

### THE HON. CLAIRE L'HEUREUX-DUBÉ<sup>1561</sup>

**I. Education:** Monastère des Ursulines, Rimouski, Collège Notre-Dame de Bellevue, Québec (1947); University Laval Law Faculty, LL.L. (1951)

#### II. Career:

**1. Judiciary:** Supreme Court of Canada (Apr 15, 1987 - Jul 1, 2002); Quebec Court of Appeal (Oct 1979 – Apr 1987); Superior Court of Quebec (Feb 1973 - Oct 1979)

**2. Academia:** Lecturer in Family Law, Cours de formation professionnelle du Barreau du Québec, (1970-1973)

**3. Legal practice:** Quebec Bar (1952); Q.C., Sept. 1969; Bard, L'Heureux & Philippon (1969); L'Heureux, Philippon, Garneau, Tourigny, St-Arnaud & Associates (1952-1973)

**4. International public contributions (pre-SCC):** President of the International Commission of Jurists (Canadian Section), 1981-1983; Member of the Board of Directors of the International Society on Family Law (1977); Vice-president of the International Society on Family Law (1982-1988)

**5. Other:** Member of Quebec Association of comparative law (President 1984-90)

#### III. Interaction with foreign courts and judges:

**1. Transnational Judicial Associations:** Member of International Association of Women Judges (IAWJ); Co-Founder of the Canadian Chapter of the International Association of Women Judges (CCIAWJ)<sup>1562</sup>

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<sup>1561</sup> Supreme Court of Canada, “The Honourable Claire L'Heureux-Dubé”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=claire-lheureux-dube>>.

<sup>1562</sup> International Association of Women Judges Canadian Chapter, online: <<http://iawjcc.com/>>.

**2. Transnational Judicial Training & Seminars:** Numerous seminars, presentations, lectures and speeches with foreign judges. Tenth of judicial trainings and seminars in: India, Pakistan, Sri Lanka, Bangladesh, Nepal, Fiji, Cameroon, Morocco, Palestine, South Africa, Zimbabwe and several countries in Easter Europe.

#### **IV. International public contributions (during SCC):**

Vice-President of International Commission of Jurists) (1992-1998); President of International Commission of Jurists (1998 to 2002);<sup>1563</sup> Associate member of International Academia of Comparative law (1992)

#### **V. International public contributions (post-SCC):**

Honorary President of Lawyers Without Borders Canada (currently);<sup>1564</sup> Member of the Board of Directors of Lawyer's Rights Watch Canada (2006);<sup>1565</sup> Equal Rights Trust (I was a member of the Board at one point);<sup>1566</sup> Member of the Advisory Board of Equality Now (2011)<sup>1567</sup>

#### **VI. International Awards:**

Honorary doctoral degrees from Gonzaga University (1996); Associate member of International Academia of comparative law (1992); Recipient of Margaret Brent Women Lawyers of Achievement Award from the American Bar Association Commission on Women in the Profession, 1998-2002; Recipient of "The Yves Pélicier Award" presented by the International Academy of Law and Mental Health (2002); The IAWJ Human

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<sup>1563</sup> International Commission of Jurists, online: <<http://www.icj.org/>>.

<sup>1564</sup> Lawyers Without Borders Canada, Administration, online: <<http://www.asfcanada.ca/en/about-lwbc/our-teams/direction>>.

<sup>1565</sup> Lawyers Rights Watch Canada, online: <[http://www.lrwc.org/ws/wp-content/uploads/2012/03/2006\\_Annual\\_Report.pdf](http://www.lrwc.org/ws/wp-content/uploads/2012/03/2006_Annual_Report.pdf)>.

<sup>1566</sup> Equal Rights Trust, online: <[http://www.equalrightstrust.org/ertdocumentbank/err7\\_whole\\_issue.pdf](http://www.equalrightstrust.org/ertdocumentbank/err7_whole_issue.pdf)>.

<sup>1567</sup> Equality Now, online: <[http://www.equalitynow.org/sites/default/files/annualreport\\_2011.pdf](http://www.equalitynow.org/sites/default/files/annualreport_2011.pdf)>.

Rights Award (2012);<sup>1568</sup> Honorary Member of the American College of Trial Lawyers, 1995; Member of the American Law Institute (1995)

**VII. Foreign languages:** English, French

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<sup>1568</sup> International Association of Women Judges, Bringing Judicial Worlds Together, online: <[http://www.ukawj.org/downloads/PagesfromBenchmark\\_may2012.pdf](http://www.ukawj.org/downloads/PagesfromBenchmark_may2012.pdf)>.

## THE HON. CHARLES DOHERTY GONTHIER<sup>1569</sup>

### **I. Education:**

Collège Stanislas, Montréal (baccalauréat Paris); B.C.L., McGill University (1951)

### **II. Career:**

**1. Judiciary:** Quebec Superior Court (Oct 1974 - May 1988); Quebec Court of Appeal (May 1988 – Feb 1989); Supreme Court of Canada (Feb 1, 1989 - Jul 31, 2003)

**2. Academia:** Chairman of the Board of Governors of the Centre for International Sustainable Development Law at the Law Faculty of McGill University of which he was Wainwright Senior Research Fellow.

**3. Legal practice:** Bar of Quebec (1952); Appointed Q.C. (1971) Practised law in Montréal with Hackett, Mulvena & Lavery (1952-57); Hugessen, Macklaier, Chisholm, Smith & Davis, later known as Laing, Weldon, Courtois, Clarkson, Parsons, Gonthier & Tétrault (1957-74).

**4. International public contributions (pre-SCC):** Secretary of the Montréal Branch of the Canadian Institute of International Affairs (1957-58).

**5. Other:** President of the Canadian Institute for the Administration of Justice (1986-87); President of the Canadian Judges Conference (1988-89); Chairman of the Commission for National Judges of the First World Conference on the Independence of Justice in Montréal (1983); President of l'Association des anciens du Collège Stanislas (1954-55)

### **III. Interaction with foreign courts and judges:**

**1. Transnational Judicial Associations:** ACCPUF

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<sup>1569</sup> Supreme Court of Canada, “The Honourable Charles Doherty Gonthier”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=charles-doherty-gonthier>>.

**2. *Transnational Judicial Training & Seminars:*** Numerous seminars, presentations, lectures and speeches with foreign judges.

**IV. International public contributions (during SCC):**

**VI. International Awards:**

Knight of l'Ordre des palmes académiques – France (1988); Fellow, American College of Trial Lawyers (hon.), 1996.

**VII. Languages:** French, English

## THE RIGHT HON. BEVERLEY MCLACHLIN (CJ)<sup>1570</sup>

### I. Education:

University of Alberta, B.A. in Philosophy (1965); University of Alberta, M.A. in Philosophy (1968); University of Alberta, LL.B. (1968)

### II. Career:

**1. Judiciary:** Vancouver County Court (Apr 1981 – Dec 1985); British Columbia Court of Appeal (Dec 1985 – Sept 1988); Chief Justice of the Supreme Court of British Columbia (Sep 1988 – Apr 1989); Justice of the Supreme Court of Canada (Apr 1989 – Jan 2000); Chief Justice of Canada (Jan 2000 – Dec 2017)

**2. Academia:** Tenured Associate Professor, University of British Columbia (1974 – 1981)

**3. Legal practice:** Alberta Bar in 1969; British Columbia Bar in 1971; practised law in Alberta and British Columbia (1969 – 1975)

**4. International public contributions (pre-SCC):**

**5. Other:** Served as the Deputy of the Governor General of Canada and performed the duties of the Governor General as the Administrator of Canada; Chair of the Canadian Judicial Council; Chair of the Advisory Council of the Order of Canada; Chair of the Board of Governors of the National Judicial Institute

### III. Interaction with foreign courts and judges:

**1. Transnational Judicial Associations:** Member of International Association of Women Judges (IAWJ); Co-Founder of the Canadian Chapter of the International Association of

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<sup>1570</sup> Supreme Court of Canada, “The Right Honourable Beverley McLachlin, P.C.”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=beverley-mclachlin>>.

Women Judges (CCIAWJ);<sup>1571</sup> Former President of Association of Constitutional Courts  
Sharing the Use of French (ACCPUF)

**2. *Transnational Judicial Training & Seminars:*** Numerous seminars, presentations, lectures and speeches with foreign judges. Example: The Cambridge Lectures. Contributed in the establishment of the International Organization for Judicial Training (IOJT);<sup>1572</sup> Governing committee members of the Commonwealth Judicial Education Institute (CJEI).<sup>1573</sup>

**IV. International public contributions (during SCC):** Member of the Queen's Privy Council for Canada

**VI. International Awards:**

Commander of the Legion of Honour by the Government of France (2008); Commander of the Venerable Order of Saint John (2006); *Yes She Can Award*, Balmoral Hall School (2005); Queen's University Belfast Doctor of Laws (LL.D) (2004); University of Maine at Fort Kent (Doctor of Human Letters (DHL) (2005); Ateneo de manila University (Doctor of Laws) (LL.D) (2006); University of Edinburg - Doctorate (2014); Bridgewater State College – Doctor of Laws (2014).

**VII. Languages:** English, French

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<sup>1571</sup> International Association of Women Judges Canadian Chapter, online: <<http://iawjcc.com/>>.

<sup>1572</sup> International Organization for Judicial Training, online: <<http://www.iojt.org/>>.

<sup>1573</sup> Commonwealth Judicial Education Institute, online: <<http://cjei.org/governance.html>>.

## THE HON. FRANK IACOBUCCI<sup>1574</sup>

### **I. Education:**

University of British Columbia (1961); University of British Columbia LLB (1962); Cambridge University LLM (1964); Cambridge University Diploma in International law (1966).

### **II. Career:**

**1. *Judiciary:*** Chief Justice of the Federal Court of Canada (1988); Court Martial Appeal Court (1989); Permanent Court of Arbitration (1997); Supreme Court of Canada (Jan 7, 1991 - Jun 30, 2004).

**2. *Academia:*** Associate Professor and Professor, Faculty of Law, University of Toronto (1967-85); Associate Dean, Faculty of Law, University of Toronto (1973-75); Vice-President, Internal Affairs, University of Toronto (1975-78); Visiting Fellow, Wolfson College, Cambridge University (1978); Dean, Faculty of Law, University of Toronto (1979-83); Vice President and Provost, University of Toronto (1983-85); McMaster University 2008.

**3. *Legal practice:*** Bar of Ontario (1970); Q.C. (Federal) (1986); Associate, Dewey, Ballantine, Bushby, Palmer & Wood, New York, N.Y. (1964-67)

**4. *International public contributions (pre-SCC):*** Member, Board of Directors, National Congress of Italian Canadians, Toronto District (1979-83); Vice President, National Congress of Italian Canadians (1980-83); Director, Cambridge Canadian Trust (1984-91)

**5. *Other:*** Deputy Minister of Justice and Deputy Attorney General for Canada (1985-88); Vice President and Member, Board of Governors, Canadian Institute for Advanced Legal Studies (1981-85), (1991-1998); Governor, Canadian Judicial Centre / National Judicial Institute (1989-present); Canadian Judicial Council and Education Committee (1988–

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<sup>1574</sup> Supreme Court of Canada, “The Honourable Frank Iacobucci”, online: <<http://www.scc-csc.ca/court-court/judges-juges/bio-eng.aspx?id=frank-iacobucci>>.

1991) (member); Governor, Canadian Judicial Centre / National Judicial Institute (1989-present)<sup>1575</sup>; Vice President and Member, Board of Governors, Canadian Institute for Advanced Legal Studies (1981-1985), (1991-1998); Member, Canadian Judicial Council and Education Committee (1988-1991).

### **III. Interaction with foreign courts and judges:**

#### ***1. Transnational Judicial Associations:***

***2. Transnational Judicial Training & Seminars:*** Numerous seminars, presentations, lectures and speeches with foreign judges. Example: *Global Constitutionalism Seminar, Yale Law School*; The Cambridge Lectures.

### **IV. International public contributions (during SCC):**

Member, Advisory Council, International Center for Criminal Law Reform and Criminal Justice Policy (1991-93), Director (1993-present); Permanent Court of Arbitration (1997)

### **VI. International Awards:**

Former Elder, Islington United Church. Italo-Canadian of the Year Award, Confratellanza Italo-Canadese (Vancouver) (1985); Honorary Doctorates from: Università della Calabria (Cosenza Italy) (2003); Distinguished Fiji Award, The Fraternity of Phi Gamma Delta (1987); Commendatore dell'Ordine Al Merito della Repubblica Italiana (1993); Medaglia d'Argento del Presidente della Repubblica Italiana (2000); Premio Italia nel Mondo/Italy in the World Award (2001); Valigia d'Oro Award, 2002; Honorary Citizenship, Mangone (Cosenza), Italy, (1996); Cepegatti (Pescara), Italy (2001). Honorary Fellow, St. John's College, Cambridge University (1999); Honorary Fellow, American College of Trial Lawyers (1999).

### **VII. Languages:** English, Italian

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<sup>1575</sup> Supreme Court of Canada, “The Honourable Frank Iacobucci”, online: <<http://www.scc-esc.ca/court-court/judges-juges/bio-eng.aspx?id=frank-iacobucci>>.

## THE HON. JOHN C. MAJOR<sup>1576</sup>

### **I. Education:**

Bachelor of Commerce, Loyola College (now Concordia University) (1953); Bachelor of Laws, University of Toronto Faculty of Law (1957).

### **II. Career:**

**1. Judiciary:** Alberta Court of Appeal (Jul 11, 1991 – Nov 1992); Supreme Court of Canada (Nov 13, 1992 - Dec 25, 2005).

**2. Academia:**

**3. Legal practice:** Alberta Bar (1958). Practised law: Bennett, Jones, Verchere at Calgary (1967); Appointed Q.C. (1972).

**4. International public contributions (pre-SCC):**

**5. Other:** September 27, 2005, acting Governor General of Canada (also referred to as Deputy of the Governor General of Canada or Administrator of Canada) due to the absence of Chief Justice Beverley McLachlin during the transition from Adrienne Clarkson to Michaëlle Jean; Member of the Canadian Institute for the Administration of Justice; Member of the Canadian Judges Conference.<sup>1577</sup>

### **III. Interaction with foreign courts and judges:**

**1. Transnational Judicial Associations:**

**2. Transnational Judicial Training & Seminars:** Participated in few seminars, presentations, lectures and speeches with foreign judges.

### **IV. International public contributions (during SCC):**

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<sup>1576</sup> Supreme Court of Canada, “The Honourable John C. Major”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=john-c-major>>.

<sup>1577</sup> Bennett Jones, online: <<https://www.bennettjones.com/MajorJohn/>>

**VI. International Awards:**

Fellow of the American College of Trial Lawyers (1980)

**VII. Languages:** English

## THE HON. MICHEL BASTARACHE<sup>1578</sup>

### I. Education:

University of Moncton (B.A.) (1967); University of Montréal (LL.L.) (1970); University of Nice (graduate degree in public law) (1972); University of Ottawa (LL.B.) (1978)

### II. Career:

**1. *Judiciary:*** New Brunswick Court of Appeal (Mar 1, 1995 - Sep, 1997); Supreme Court of Canada (Sep 30, 1997 - Jun 30, 2008).

**2. *Academia:*** Law professor and Dean at the University of Moncton Law School (1978-83); Associate Dean, Common Law Section, Faculty of Law, University of Ottawa (1984-87).

**3. *Legal practice:*** New Brunswick Bar (1980); Alberta Bar (1985); Ontario Bar (1986); Quebec (2008); British Columbia (2014); Queen's Counsel for New Brunswick (2013); Practised law in Ottawa: Lang, Michener, Lash, Johnston (1987-89); Moncton: with Stewart, McKelvey, Stirling, Scales (1994-95); Lang Michener Lash Johnston (1987 – 1988).

**4. *International public contributions (pre-SCC):***

**5. *Other:*** President and Chief Executive Office of Assumption Mutual Life (1989 - 1994); Editor-in-Chief of the *Canadian Bar Review* (1998-2005); Vice-Chair, National Judicial Institute (2004-2008); Member of numerous committees on legal education and the practice of law; Member of the Continuing Education Committee (Canadian Bar Association New Brunswick Branch and New Brunswick Bar Association) (1996-1997); Member of the Social Reality Training Advisory Committee, National Judicial Institute (1997); Vice-Chair, National Judicial Institute (2004-2008).

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<sup>1578</sup> Supreme Court of Canada, “The Honourable Michel Bastarache”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=michel-bastarache>>.

### **III. Interaction with foreign courts and judges:**

*1. Transnational Judicial Associations:* ACCPUF - [Association of Constitutional Courts sharing the use of French]

*2. Transnational Judicial Training & Seminars:* Numerous seminars, presentations, lectures and speeches with foreign judges. Examples: Russia, China.

### **IV. International public contributions (during SCC):**

Member of the Canadian National Group to the Permanent Court of Arbitration (2005);  
Member of the Board of Directors of the Association internationale des juristes, (1997-2008)

### **VI. International Awards:**

Fellow, American College of Trial Lawyers (2001); Officier de la Légion d'honneur (France) (2003)

### **VII. Languages:** French, English

## THE HON. WILLIAM IAN CORNEIL BINNIE<sup>1579</sup>

### I. Education:

McGill University, B.A. (1960); Cambridge University, LL.B. (1963); Cambridge University, LL.M. (1988); University of Toronto, LL.B. (1965).

### II. Career:

**1. *Judiciary*:** Supreme Court of Canada (Jan 8, 1998 - Oct 20, 2011).

**2. *Academia*:** Part-time lecturer on aboriginal rights, Osgoode Hall Law School (1975 – 1979); Lecturer for the Law Society of Upper Canada, the Canadian Bar Association, The Advocates' Society and other professional associations.

**3. *Legal practice*:** Queen's Counsel (Ontario) in 1979; English Bar (1966); Ontario Bar (1967); Yukon Territory Bar (1986); Admitted to practice before the International Court of Justice in (1984); Bars of British Columbia, Alberta (occasional) (1986); Saskatchewan, Manitoba and Newfoundland (occasional) (1997); Lenczner Slaght Royce Smith Griffin, Toronto (2012 - ).

**4. *International public contributions (pre-SCC)*:** Legal counsel to the Government of Tanzania (1970 to 1971); Counsel representing Canada before the International Court of Justice against the United States in the Gulf of Maine dispute in 1984; Member of Canada's legal team before an international tribunal, against France, in the Saint-Pierre & Miquelon maritime boundary dispute (1991)

**5. *Other*:** Member Canadian Council on International Law; Associate Deputy Minister of Justice for Canada From (1982 to 1986); Canadian Institute for the Administration of Justice.<sup>1580</sup>

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<sup>1579</sup> Supreme Court of Canada, “The Honourable William Ian Corneil Binnie”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=william-ian-corneil-binnie>>.

<sup>1580</sup> Arbitration Place, “The Honourable William Ian Corneil Binnie, Q.C.”, online: <<http://www.arbitrationplace.com/our-people/member-arbitrators/ian-binnie/>>.

### **III. Interaction with foreign courts and judges:**

**1. *Transnational Judicial Associations:*** World Conference on Constitutional Justice (WCCJ); International Commission of Jurists (ICJ)<sup>1581</sup>

**2. *Transnational Judicial Training & Seminars:*** Numerous seminars, presentations, lectures and speeches with foreign judges. Examples: The Cambridge Lectures, *Les Journées Strasbourgeoises*, *The World Conference on Constitutional Justice*.

### **IV. International public contributions (during SCC):**

Commissioner of the International Commission of Jurists (2003 - ); Chaired the Rhodes Scholarship Selection Committee (1999 to 2004)

### **VI. International Awards:**

President of the Cambridge Union Society; Fellow of the American College of Trial Lawyers (1993)

### **VII. Languages:** English, French

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<sup>1581</sup> International Commission of Jurists, online: <<http://www.icj.org/>>.

## THE HON. LOUISE ARBOUR<sup>1582</sup>

### I. Education:

Collège Régina Assumpta in Montréal, B.A. (1967); Faculté de droit of the Université de Montréal, LL.L. (1970)

### II. Career:

**1. *Judiciary:*** Supreme Court of Ontario (High Court of Justice) (1987 – 1990); Court of Appeal for Ontario (1990 - 1996); Supreme Court of Canada (September 15, 1999 - Jun 30, 2004).

**2. *Academia:*** Assistant then Associate Professor, Osgoode Hall Law School, York University (1974-87); Associate Dean, Osgoode Hall Law School (1987)

**3. *Legal practice:*** Quebec Bar (1971); Ontario Bar (1977)

**4. *International public contributions (pre-SCC):*** Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda (UN, Security Council) (Oct 1996-Sept 1999)

**5. *Other:*** Law Clerk for the Honourable Mr. Justice Louis-Philippe Pigeon, Supreme Court of Canada (1971-72); Special Representative for International Migration (2017-present);<sup>1583</sup> President and CEO of the International Crisis Group (2009 to 2014); United Nations High Commissioner for Human Rights (2004 to 2008); Member of the Advisory Board for the 2011 World Bank Development Report (2010); Global Commission on Elections, Democracy and Security (2010); Member of the Global Commission on Drug Policy (Apr 2011); Member of the Commission of the International Institute for Democracy and Electoral Assistance (2012); Commission member of the International Commission Against the Death Penalty (ICDP).

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<sup>1582</sup> Supreme Court of Canada, “The Honourable Louise Arbour”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=louise-arbour>>.

<sup>1583</sup> United Nations, “Meetings Coverage and Press Releases”, online: <<https://www.un.org/press/en/2017/sga1712.doc.htm>>.

### **III. Interaction with foreign courts and judges:**

#### ***1. Transnational Judicial Associations:***

***2. Transnational Judicial Training & Seminars:*** Numerous seminars, presentations, lectures and speeches with foreign judges.<sup>1584</sup>

#### ***3. Transnational Electronic Networks:***

### **IV. International public contributions (during SCC):**

### **VI. International Awards:**

Hon. LL.D., Université Libre de Bruxelles (2000); Chicago-Kent College of Law (2000); Hon. LL.D., Glasgow University (2000); Hon. LL.D., Université de Picardie Jules Verne, Amiens, France (2003); Medal of Honour of the International Association of Prosecutors (1999); Prix de la Fondation Louise Weiss, Paris (1999); Pennsylvania Bar Foundation's Second Annual Service to Humanity Award, Harrisburg, Pennsylvania (2000); Franklin & Eleanor Roosevelt Four Freedoms Medal (Freedom from Fear), Roosevelt Study Centre, Middleburg, The Netherlands (2000); Wolfgang Freidman Memorial Award, Columbia Law School (2001); Justice in the World International Prize, International Association of Judges (2002); Hall of Fame, International Women's Forum (2003); Honorary Fellowship, American College of Trial Lawyers (2003); Honorary Professor, University of Warwick, Coventry, U.K. (1999-2004); Honorary Member, American Society of International Law (2000); Member, International Crisis Group, Board of Trustees, 2000; Honorary Bencher of Grays Inn, London, England (2001); Member of the International Council, Institute for Global Legal Studies of Washington University School of Law, St. Louis, Missouri (2001); Member, Advisory Board, International Journal of Constitutional Law, Oxford University Press (New York Law School) (2001);

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<sup>1584</sup> Global Affairs Canada, Madam Justice Louise Arbour, online: <[http://www.international.gc.ca/odskelton/arbours\\_bio.aspx?lang=eng](http://www.international.gc.ca/odskelton/arbours_bio.aspx?lang=eng)>.

Member, Board of Editors, Journal of International Criminal Justice (2003); Council of Europe's North South Prize; Grand Officer of the Order of the Crown, Kingdom of Belgium (2015); United Nations Prize in the Field of Human Rights 2008

**VII. Languages:** French, English

## THE HON. LOUIS LABEL<sup>1585</sup>

### **I. Education:**

Collège des Jésuites in Quebec City, B.A. (1958); Laval University, LL.L. (1961); Laval University, Graduate degree (DES) in Private Law (1965); University of Toronto, LL.M. (1966)

### **II. Career:**

**1. Judiciary:** Quebec Court of Appeal (Jun 28, 1984 – Jan 2000); Supreme Court of Canada (Jan 7, 2000- Nov 30, 2014)

**2. Academia:** He taught as a visiting professor at the University of Ottawa and Laval University.

**3. Legal practice:** Quebec Bar (1962); Practiced in Quebec City: LeBel, Letarte, Bilodeau, Boily (1963 – 1964); Désilets, Grondin, LeBel & Associés (1964 to 1971); Grondin, LeBel, Poudrier, Isabel, Morin & Gagnon (1971 to 1984)

**4. International public contributions (pre-SCC):**

**5. Other:**

### **III. Interaction with foreign courts and judges:**

**1. Transnational Judicial Associations:** Representative of the SCC in the (AHJUCAF) [Association of the High Courts of Cassation of countries sharing the use of French] (2003-2014)

**2. Transnational Judicial Training & Seminars:** Several seminars, presentations, lectures and speeches with foreign judges.

### **IV. International public contributions (during SCC):**

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<sup>1585</sup> Supreme Court of Canada, “The Honourable Louis LeBel”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=louis-lebel>>.

**VI. Foreign/International Awards:**

Honorary Fellow of the American College of Trial Lawyers (2004)

**VII. Languages:** French, English

## THE HON. MARIE DESCHAMPS<sup>1586</sup>

### I. Education:

Université de Montréal, Licentiate in Laws (1974); McGill University, LL.M. (1983)

### II. Career:

**1. Judiciary:** Quebec Superior Court (Mar 29, 1990 – May 1992); Quebec Court of Appeal (May 6, 1992 – Aug 2002); Supreme Court of Canada (Aug 7, 2002 - Aug 7, 2012)

**2. Academia:** Associate Professor at the Université de Sherbrooke (2006); Faculty Researcher at the McGill University Faculty of Law (2012 - ); Trainer, Université de Montréal's advocacy classes and Barreau du Québec's advocacy seminars for more than 25 years.

**3. Legal practice:** Quebec Bar (1975) Martineau Walker and Sylvestre et Matte in commercial, family and civil law, Rouleau, Rumanek and Sirois in criminal law, finally at Byers Casgrain in commercial and civil law (1975-1990)

**4. International public contributions (pre-SCC):**

**5. Other:** Independent Review Panel on UN Response to Allegations of Sexual Abuse by Foreign Military Forces in Central African Republic (2015); While at the Supreme Court of Canada, sat on a number of committees of the Canadian Judicial Council and the National Judicial Institute.<sup>1587</sup>

### III. Interaction with foreign courts and judges:

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<sup>1586</sup> Supreme Court of Canada, “The Honourable Marie Deschamps”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=marie-deschamps>>.

<sup>1587</sup> Trudeau Foundation, online: <<http://www.trudeaufoundation.ca/en/community/marie-deschamps>>; United Nations, “Meetings Coverage and Press Releases”, online: <<https://www.un.org/press/en/2015/sgsm16864.doc.htm>>.

**1. Transnational Judicial Associations:** *International Association of Women Judges (IAWJ)*; *Representing the SCC at the (ACCPUF)* [Association of Constitutional Courts sharing the use of French]; *Organization of Supreme Courts of the Americas (OSCA)*

**2. Transnational Judicial Training & Seminars:** Numerous seminars, presentations, lectures and speeches with foreign judges. Example: The Cambridge Lectures.

**IV. International public contributions (during SCC):**

**VI. International Awards:**

Member of the American College of Trial Lawyers in 2005

**VII. Languages:** French, English, Italian, Spanish

## THE HON. MORRIS J. FISH<sup>1588</sup>

### I. Education:

McGill University, B.A. (1959); Faculty of Law at McGill, B.C.L. (1962); Université de Paris, Postgraduate Studies in Constitutional Law and Public Liberties (1962-63)

### II. Career:

**1. Judiciary:** Québec Court of Appeal (Jun 30, 1989 – Aug 2003); Supreme Court of Canada (Aug 5, 2003 - Aug 31, 2013)

**2. Academia:** Adjunct Professor in the Faculty of Law at McGill University (1973-80) and (1986-89); Faculty of Law, University of Ottawa (1971-1974); Université de Montréal (1969 - 1971)

**3. Legal practice:** Bars of Quebec (1964); Prince Edward Island (1968); Alberta (1974) He was an associate (1964-67) and partner (1967-89) in the Montréal law firm of Cohen, Leithman, Kaufman, Yarosky and Fish; Queen's Counsel in 1984.

**4. International public contributions (pre-SCC):**

**5. Other:** Consultant to the Federal Department of Justice, Revenue Canada, and the Law Reform Commission of Canada;<sup>1589</sup> Field reporter for The Montreal Star, covering various international events (1962-1963);<sup>1590</sup> Reporter and editorial writer for The Montreal Star (1959-70), with special assignments in France, Sweden, Israel, Greece, Taiwan, Japan, the United States and the former USSR.

### III. Interaction with foreign courts and judges:

**1. Transnational Judicial Associations:**

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<sup>1588</sup> Supreme Court of Canada, “The Honourable Morris J. Fish”, online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=morris-j-fish>>.

<sup>1589</sup> The Bar of Montreal, “The Honourable Morris J. Fish c.r.”, online: <<https://www.barreaudemontreal.qc.ca/en/avocats/honourable-morris-j-fish-cr>>.

<sup>1590</sup> *ibid.*

**2. *Transnational Judicial Training & Seminars:*** Numerous seminars, presentations, lectures and speeches with foreign judges. Example: The Cambridge Lectures.

**IV. International public contributions (during SCC):**

**VI. International Awards:**

Honorary LL.D. from Yeshiva University (2009);<sup>1591</sup> Honorary Fellow of the American College of Trial Lawyers (2006)

**VII. Languages:** English, French

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<sup>1591</sup> Supreme Court of Canada, “The Honourable Morris J. Fish”, online: <<http://www.scc-csc.ca/court-court/judges-juges/bio-eng.aspx?id=morris-j-fish>>.

## THE HON. ROSALIE SILBERMAN ABELLA<sup>1592</sup>

### **I. Education:**

Royal Conservatory of Music in classical piano (1964); University of Toronto, B.A. (1967); University of Toronto, LL.B. (1970)

### **II. Career:**

**1. *Judiciary:*** Ontario Family Court (1976); Ontario Court of Appeal in 1992; Supreme Court of Canada (2004)

**2. *Academia:*** Boulton Visiting Professor, Faculty of Law of McGill University (1988 - 1992); Mackenzie King Distinguished Visiting Professor at Harvard; Floersheimer Distinguished Jurist in Residence at Cardozo; Distinguished Visiting Faculty at the University of Toronto Law School; Bright International Jurist in Residence at the University of Hawaii School of Law.

**3. *Legal practice:*** Ontario Bar (1972) Practiced civil and criminal litigation (1972-1976)

**4. *International public contributions (pre-SCC):***

**5. *Other:*** Commissioner of the Federal Royal Commission on Equality in Employment (1984); Commissioner on the Ontario Human Rights Commission; Member of the Ontario Public Service Labour Relations Tribunal; Vice-Chair of the Board of Governors of the National Judicial Institute.

### **III. Interaction with foreign courts and judges:**

**1. *Transnational Judicial Associations:***

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<sup>1592</sup> Supreme Court of Canada, “The Honourable Rosalie Silberman Abella”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=rosalie-silberman-abella>>.

**2. *Transnational Judicial Training & Seminars:*** Numerous seminars, presentations, lectures and speeches with foreign judges in Canada and around the world. Example: Global Constitutionalism Seminar Yale Law School, The Cambridge Lectures.

**IV. International public contributions (during SCC):**

**VI. International Awards:**

Fellow of the American Academy of Arts and Sciences (2007); Judge of the Giller Literary Prize; International Justice Prize of the Peter Gruber Foundation; Global Jurist of the Year from Northwestern Pritzker School of Law (2016); Brooklyn Law School, LL.D. (Hon.); Robert Anderson Fellow of Yale Law School (2004); Honorary Fellow of the American College of Trial Lawyers (2007)

**VII. Languages:** English, French, Hebrew

## THE HON. LOUISE CHARRON<sup>1593</sup>

### **I. Education:**

Carleton University, B.A. (1972); University of Ottawa, LL.B. (1975)

### **II. Career:**

**1. *Judiciary:*** High Court of Ontario in Ottawa (1988 – 1990); Ontario Court of Justice (General Division) (1990-1995); Ontario Court of Appeal (1995) and Deputy Judge of the Nunavut Court of Justice (1999 – 2004); Supreme Court of Canada (Aug30, 2004 - Aug 30, 2011)

**2. *Academia:*** Lecturer in the French common law section of the University of Ottawa’s Faculty of Law (1978 to 1985); Assistant Professor, University of Ottawa’s Faculty of Law (1985-1988).

**3. *Legal practice:*** Ontario Bar (1977) Practised law: Lalonde & Chartrand (1977 – 1980)

**4. *International public contributions (pre-SCC):***

**5. *Other:*** Assistant Crown Attorney for the Judicial District of Ottawa-Carleton (1978 – 1988); Continuing education for judges and lawyers, and was Associate Director of the National Judicial Institute (1994 – 1996).

### **III. Interaction with foreign courts and judges:**

**1. *Transnational Judicial Associations:***

**2. *Transnational Judicial Training & Seminars:*** Several seminars, presentations, lectures and speeches with foreign judges. Example: The Cambridge Lectures.

### **IV. International public contributions (during SCC):**

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<sup>1593</sup> Supreme Court of Canada, “The Honourable Louise Charron”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=louise-charron>>.

**VI. International Awards:**

Honorary fellowship in the American College of Trial Lawyers in 2007.

**VII. Languages:** French, English

## THE HON. MARSHALL ROTHSTEIN<sup>1594</sup>

### I. Education:

University of Manitoba, B. Com. (1962); University of Manitoba, LL.B. (1966)

### II. Career:

**1. Judiciary:** Trial Division of the Federal Court of Canada (June 24, 1992 – Jan 1999) (while a judge of the Trial Division, he also served as a member *ex officio* of the Appeal Division, a judge of the Court Martial Appeal Court of Canada and a judicial member of the Competition Tribunal); Federal Court of Appeal (Jan 21, 1999 – Feb 2006); Supreme Court of Canada (Mar 1, 2006 - Aug 31, 2015)

**2. Academia:** Lecturer in the University of Manitoba's Faculty of Law (1970 – 1983) (1988 – 1992); Bar Admission Course lecturer for the Law Society of Manitoba (1970 – 1975)

**3. Legal practice:** Manitoba Bar (1966); Practising: Thorvaldson, Eggertson, Saunders and Mauro (1969 – 1992) Member and periodic Chairman of the Management Committee/Executive Board (1981 to 1992) Queen's Counsel (1979)

**4. International public contributions (pre-SCC):** Member of a NAFTA Extraordinary Challenge Panel (2005).<sup>1595</sup>

**5. Other:** Adjudicator under the Manitoba *Human Rights Act* (1978 – 1983); Member of the Canadian Human Rights Tribunal (1986 – 1992); Chairman, Ministerial Task Force on International Air Policy (Canada) (1990-1991)

### III. Interaction with foreign courts and judges:

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<sup>1594</sup> Supreme Court of Canada, “The Honourable Marshall Rothstein”, online: <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=marshall-rothstein>>.

<sup>1595</sup> Arbitration Place, “The Honourable Marshall Rothstein Q.C.” online: <<http://www.arbitrationplace.com/our-people/member-arbitrators/marshall-rothstein/>>.

***1. Transnational Judicial Associations:***

***2. Transnational Judicial Training & Seminars:*** Several seminars, presentations, lectures and speeches with foreign judges. Example: The Cambridge Lectures.

**IV. International public contributions (during SCC):**

**VI. International Awards:**

**VII. Languages:** English<sup>1596</sup>

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<sup>1596</sup> Justice Rothstein's appointment by the Conservative government was criticized because of his unilingualism. He was the only justice of the Supreme Court who was not bilingual, prior to the 2011 appointment of Justice Michael Moldaver. The Star, online: <<http://www.thestar.com/news/canada/2015/08/31/marshall-rothstein-muses-on-nine-years-in-canadas-supreme-court.html>>.

## THE HON. THOMAS ALBERT CROMWELL<sup>1597</sup>

### **I. Education:**

Queen's University, B. Mus. (1973); A.R.C.T. Royal Conservatory of Music (1974); Queen's University LL.B. (1976); Oxford University, B.C.L. (1977)

### **II. Career:**

**1. *Judiciary:*** Nova Scotia Court of Appeal (Aug 27, 1997 – Dec 2008); Supreme Court of Canada (Dec 22, 2008 - Sept 1, 2016)

**2. *Academia:*** Sessional lecturer Queen's Law School (1980 – 1982); Professor of law Dalhousie University (1982 – 1992) (1995 – 1997)

**3. *Legal practice:*** Bar Ontario (1979); Bar Nova Scotia (1984); British Columbia (2017)

**4. *International public contributions (pre-SCC):***

**5. *Other:*** Honorary Director, Canadian Institute for the Administration of Justice; Chair, Canadian Forum on Civil Justice (2007-2008); Commissioner, Law Reform Commission of Nova Scotia (2002-2007); President, Canadian Institute for the Administration of Justice (1999-2001); Secretary, Board of Governors, National Judicial Institute (1992-1995); Vice Chair, Nova Scotia Labour Relations Board and Construction Industry Panel (1991-1992); President The Canadian Association of Law Teachers (1988 – 1989); Labor arbitrator and adjudicator (1984-1997); Executive Legal Officer in the chambers of then-Chief Justice of Canada Antonio Lamer (1992-1995)

### **III. Interaction with foreign courts and judges:**

**1. *Transnational Judicial Associations:***

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<sup>1597</sup> Supreme Court of Canada, “The Honourable Thomas Albert Cromwell”, online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=thomas-albert-cromwell>>.

**2. *Transnational Judicial Training & Seminars*:** Several seminars, presentations, lectures and speeches with foreign judges.

**IV. International public contributions (during SCC):**

**VI. International Awards:**

Honorary Member, Golden Key International Honour Society; Honorary Fellow of Exeter College Oxford and of the American College of Trial Lawyers.

**VII. Languages:** English, French

## THE HON. MICHAEL J. MOLDAVER<sup>1598</sup>

### I. Education:

University of Toronto, B.A. (1968); University of Toronto, LL.B. (1971)

### II. Career:

**1. *Judiciary:*** Ontario Court of Justice (General Division) (April 12, 1990 – Dec 1995); Court of Appeal for Ontario (Dec 22, 1995 - Oct 2011); Supreme Court of Canada (Oct 21, 2011 – present).

**2. *Academia:*** Lecturer at Osgoode Hall Law School and University of Toronto Law School (1978 – 1995). Teaching criminal law to newly appointed judges from across Canada, and instructing in the Ontario Crown Attorneys' Association, Criminal Lawyers' Association and Ontario Bar Association continuing education programs.

**3. *Legal practice:*** Ontario Bar (1973). Practicing: Pomerant, Pomerant and Greenspan (later Greenspan, Gold and Moldaver) (partner in 1975). Queen's Counsel (1985). Goodman and Goodman (1988 – 1990).

#### **4. *International public contributions (pre-SCC):***

**5. *Other:*** Former co-chair of the Canadian Bar Association – Ontario Advocacy Symposium Committee; Director Advocates' Society; Member of the Board of Governors – Advocate Society Institute; Council Member – University of Toronto Alumni Association; Co-chair, University of Toronto Academic Tribunal – Discipline Subsection.<sup>1599</sup> Co-chaired the 1989 Advocacy Symposium at Massey Hall as well as the 1990 Advocacy Symposium at Roy Thomson Hall in Toronto, which featured a panel

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<sup>1598</sup> Supreme Court of Canada, "The Honourable Michael J. Moldaver", online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=michael-j-moldaver>>.

<sup>1599</sup> Court of Appeal for Ontario, Archive Today, "Brief Biographical Note of Justice Michael J. Moldaver", online: <<http://archive.li/v0IFF>>.

composed of Canadian Chief Justice Dickson, U.S. Chief Justice Rehnquist, and U.K. Lord Chancellor MacKay.<sup>1600</sup>

### **III. Interaction with foreign courts and judges:**

#### ***1. Transnational Judicial Associations:***

***2. Transnational Judicial Training & Seminars:*** Numerous seminars, presentations, lectures and speeches with foreign judges.

### **IV. International public contributions (during SCC):**

### **VI. International Awards:**

Honorary Fellow of the American College of Trial Lawyers.

### **VII. Languages:** English<sup>1601</sup>

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<sup>1600</sup> <http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=michael-j-moldaver>

<sup>1601</sup> Justice Moldaver's nomination received criticism for his inability to speak French. He expressed his respect for the French language, apologized for his inability to speak it, and he committed himself to becoming more proficient in the future. <http://www.cbc.ca/news/politics/supreme-court-nominee-vows-to-improve-french-skills-1.1075599>

## THE HON. ANDROMACHE KARAKATSANIS<sup>1602</sup>

### **I. Education:**

University of Toronto, B.A. (1977); Osgoode Hall Law School, LL.B. (1980).

### **II. Career:**

**1. Judiciary:** Ontario Superior Court of Justice (Dec 2002 – Mar 2010); Court of Appeal for Ontario (Mar 2010 – Oct 2011); Supreme Court of Canada (October 2011 – Present)

**2. Academia:**

**3. Legal practice:** Ontario Bar (1982); Law clerk to the Ontario Court of Appeal. In private practice, she practiced criminal, civil and family litigation in Toronto for several years.

**4. International public contributions (pre-SCC):**

**5. Other:** Chair and Chief Executive Officer of the Liquor Licence Board of Ontario (1988-1995); Assistant Deputy Attorney General and Secretary for Native Affairs (1995-1997); Deputy Attorney General (1997-2000); Secretary of the Cabinet and Clerk of the Executive Council of the Government of Ontario in 2000; Ontario's Secretary of the Cabinet and Clerk of the Executive (2000 – 2002); Chaired of the Circle of (Ontario Tribunal) Chairs (1992 to 1995)

### **III. Interaction with foreign courts and judges:**

**1. Transnational Judicial Associations:** IAWJ

**2. Transnational Judicial Training & Seminars:** Several seminars, presentations, lectures and speeches with foreign judges. Example: The Cambridge Lectures.

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<sup>1602</sup> Supreme Court of Canada, “The Honourable Andromache Karakatsanis”, online: <<http://www.scc-csc.ca/court-cour/judges-juges/bio-eng.aspx?id=andromache-karakatsanis>>.

**IV. International public contributions (during SCC):**

**VI. International Awards:**

Grand Commander of the Order of Honour by the Government of Greece (2015)

**VII. Languages:** English, French, Greek

## THE HON. RICHARD WAGNER<sup>1603</sup>

### I. Education:

University of Ottawa, B.Soc.Sc. (1978); University of Ottawa's Faculty of Law LL.L. (1979)

### II. Career:

**1. Judiciary:** Quebec Superior Court for the District of Montréal (Sep 24, 2004 – Feb 2011); Quebec Court of Appeal (Feb 3, 2011 – Oct 2012); Supreme Court of Canada (October 5, 2012 – Present)

**2. Academia:** Trial advocacy courses at the École du Barreau du Québec (1989-1990), (2001), (2003)

**3. Legal practice:** Quebec Bar (1980) Practiced law: Lavery, de Billy (formerly Lavery, O'Brien and Lavery, Johnston, Clark, Carrière, Mason & Associés) (1980 – 2004).

**4. International public contributions (pre-SCC):** Member of the International Young Lawyers Association

**5. Other:** As a Superior Court of Québec judge, he served as a member on several of the Court's committees, including its Judicial Practice Committee; Member of the Board of Directors, and President of the Quebec Superior Court Judges Conference (2006 – 2009); Member of the Judicial Conduct Review Committee and the Remuneration Committee of the Canadian Superior Courts Judges Association (2011); Member of the Court of Appeal New Judges Welcoming Committee and the Court Web Site Modification Committee (2011).<sup>1604</sup>

### III. Interaction with foreign courts and judges:

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<sup>1603</sup> Supreme Court of Canada, "The Right Honourable Richard Wagner, P.C., Chief Justice of Canada", online: <<https://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=richard-wagner>>

<sup>1604</sup> Slaw, Canada's Online legal Magazine, online: <<http://www.slaw.ca/2012/10/02/richard-wagner-from-the-cour-dappel-to-the-cour-supreme/>>

**1. Transnational Judicial Associations:** Represent the Court at the *Association des Cours Constitutionnelles ayant en Partage l'Usage du Français* (ACCPUF) [Association of Constitutional Courts sharing the use of French]; Represent the SCC in the World Conference of Constitutional Justice (WCCJ); Commonwealth Magistrates' and Judges' Association (CMJA)

**2. Transnational Judicial Training & Seminars:** Numerous seminars, presentations, lectures and speeches with foreign judges. Example: The Cambridge Lectures, *Les Journées Strasbourgeoises*.

**IV. International public contributions (during SCC):**

**VI. International Awards:**

**VII. Languages:** French, English

## THE HON. CLÉMENT GASCON<sup>1605</sup>

### **I. Education:**

Collège Jean-de-Brébeuf, D.E.C. (1978); McGill University B.C.L. (1981)

### **II. Career:**

**1. Judiciary:** Quebec Superior Court (Oct 10, 2002 – Apr 2012); Quebec Court of Appeal (Apr 5, 2012 – Jun 2014); Supreme Court of Canada (Jun 9, 2014 – Present)

**2. Academia:** Taught business law, labour law and construction law at the Département des sciences comptables of the Université du Québec à Montréal, at the McGill University Faculty of Law and at the Barreau du Québec; Faculty member at the Seminar for New Federally Appointed Judges.

### **3. Legal practice:**

Quebec Bar (1982) Practiced: Heenan Blaikie in Montreal (1982-2003)

### **4. International public contributions (pre-SCC):**

**5. Other:** Co-chaired the Judgment Writing Seminar of the Canadian Institute for the Administration of Justice (2007 to 2012)

### **III. Interaction with foreign courts and judges:**

**1. Transnational Judicial Associations:** AHJUCAF - [Association of the High Courts of Cassation of countries sharing the use of French]

**2. Transnational Judicial Training & Seminars:** Numerous seminars, presentations, lectures and speeches with foreign judges.

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<sup>1605</sup> Supreme Court of Canada, “The Honourable Clément Gascon”, online: <<http://www.scc-csc.ca/court-court/judges-juges/bio-eng.aspx?id=clement-gascon>>.

**3. *Transnational Electronic Networks:***

**IV. International public contributions (during SCC):**

**VI. International Awards:**

**VII. Languages:** French, English

## THE HON. SUZANNE CÔTÉ<sup>1606</sup>

### **I. Education:**

Université Laval LL.B. (1980)

### **II. Career:**

**1. *Judiciary:*** Supreme Court of Canada (Dec 1, 2014 – Present).

**2. *Academia:*** Taught evidence and litigation at the École du Barreau du Québec; lectured at the Université du Québec à Rimouski and at the Université de Montréal.

**3. *Legal practice:*** Quebec Bar Association (1981); Canadian Bar Association (1980); Partner at Osler, Hoskin & Harcourt LLP, Stikeman Elliott (23 years); Gaspé Peninsula (8 years)

**4. *International public contributions (pre-SCC):***

**5. *Other:*** Member of the board of directors of the Fondation Jean Duceppe; Member of the board of directors of the Société d'histoire de la Gaspésie; President of both the Gaspé Chamber of Commerce and the Chambre de Commerce de la Gaspésie.

### **III. Interaction with foreign courts and judges:**

**1. *Transnational Judicial Associations:*** AIHJA - [International Association of Supreme Administrative Jurisdictions]

**2. *Transnational Judicial Training & Seminars:*** Several seminars, presentations, lectures and speeches with foreign judges.

### **IV. International public contributions (during SCC):**

### **VI. International Awards:**

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<sup>1606</sup> Supreme Court of Canada, “The Honourable Suzanne Côté”, online: <<http://www.scc-csc.ca/court-court/judges-juges/bio-eng.aspx?id=suzanne-cote>>.

**VII. Languages:** French, English, Gaspé native

## THE HON. RUSSELL BROWN<sup>1607</sup>

### **I. Education:**

University of British Columbia, B.A. (1987); University of Victoria, LL.B. (1994); University of Toronto, LL.M. (2003); University of Toronto, SJD (2006).

### **II. Career:**

**1. *Judiciary:*** Court of Queen's Bench of Alberta (Feb 8, 2013 – Mar 2014); Court of Appeal of Alberta (Mar 7, 2014 – Aug 2015) (As a Court of Appeal judge sitting in Edmonton, Justice Brown also served as a Judge of the Court of Appeal for the Northwest Territories and a Judge of the Court of Appeal of Nunavut); Supreme Court of Canada (Aug 31, 2015 – Present)

**2. *Academia:*** Professor (the last two years as an associate dean) Faculty of Law at the University of Alberta (2004 – 2013)

**3. *Legal practice:*** Bar of British Columbia (1995); Bar of Alberta (2008); Associate at Davis & Company (now DLA Piper LLP) in Vancouver (1995 – 1996); Carfra & Lawton (now Carfra Lawton LLP) in Victoria (1996 to 2004); Associate counsel to Miller Thomson LLP.

**4. *International public contributions (pre-SCC):***

**5. *Other:*** Chair of the Health Law Institute of the University of Alberta; Chair of the University Appeals Board and Professional Review Board at the University of Alberta; Member of the governing board of the Canadian Forum on Civil Justice. He also served on the Advisory Board to the Salvation Army in Victoria and in Edmonton, including as chair in Edmonton.

### **III. Interaction with foreign courts and judges:**

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<sup>1607</sup> Supreme Court of Canada, “The Honourable Russell Brown”, online: <<http://www.scc-csc.ca/court-court/judges-juges/bio-eng.aspx?id=russell-brown>>.

***1. Transnational Judicial Associations:***

***2. Transnational Judicial Training & Seminars:*** Numerous seminars, presentations, lectures and speeches with foreign judges. Example: The Cambridge Lectures.

**IV. International public contributions (during SCC):**

**VI. International Awards:**

**VII. Languages:** English, French<sup>1608</sup>

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<sup>1608</sup> CTV News, online: <<http://www.ctvnews.ca/politics/russell-brown-brings-wide-experience-to-scc-says-chief-justice-1.2491163>>.

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*Supreme Court Act*, R.S.C., 1985, c. S-19, s. 4

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*Constitution 1996* (South Africa), art 39

*Ala. Code* 1975 § 12-2-10

*Americans with Disabilities Act*, 42 U.S.C. §§ 12182-12189 (1997)

Basic Law (F.R.G.), art. 72(1), (2) (German Constitution)

*Bill HB2582* (Arizona Foreign Decisions Act 2011), art 12-181

*Bill of Rights* of 1689 (Eng.), 1 Will. & Mar. sess. 2, c. 2;

*Carriage by Air Act*, 1961 (U.K.), 9& 10 Eliz. 2, c. 27;

*Death Penalty – How Executed* (Revised Code of Washington, 10.95.180)

*Del. Code Ann. tit. 10*, § 141 (1996 Supp.). (Delaware, USA)

*Grutter v. Bollinger*, 539 U.S. 306 (2003)

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*Rehabilitation Act*, 29 U.S.C. § 794 (1997)

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*Union Act, 1840* (U.K.), 3-4 Vict., c. 35 [reprinted in R.S.C., 1985, App. II, No. 4]

*United States Constitution*, art. III, § 2

*United States Constitution*, arts. I, § 8, cl. 3, VI, cl. 2

*United States Constitution*, First Amendment

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*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 SCR 1101

*Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 SCR 125.

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*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331

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*Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 SCR 643

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*R v. Ruzic* [2001] 1 SCR 687  
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*Abrams v. United States*, 250 U.S. 616 (1919)

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