Waiting for Globalization: An Empirical Study of the McLachlin Court's Foreign Judicial Citations

BY PETER MCCORMICK*

A burgeoning literature celebrates the emergence of a global community of judges and a resulting international cross-fertilization of jurisprudence, especially as it bears upon constitutionally entrenched rights. This paper explores the Supreme Court of Canada's citations to judicial authority since 2000, and in more general terms its citations patterns since 1949, to see whether and to what extent this supports the notion of a growing globalization of law. The paper argues that the notion of non-Canadian citation must be disaggregated into three component parts—English, American, and everything else—before it can usefully be examined, these three exhibiting quite different patterns; and it concludes that in none of them can the "expanding globalization" thesis be sustained. As well, it finds that the practice of the citation of non-Canadian authority is increasingly practiced by a single member of the Court, rather than being diffused across its entire membership. Finally, it looks at the kinds of cases that tend to include non-Canadian citations, and suggests that not only are we still waiting for globalization, but to the extent that we are focusing primarily on rights-based jurisprudence, we may also be looking in the wrong place.

Une littérature abondante encense l'émergence d'une communauté mondiale de juges et d'un enrichissement mutuel international de la jurisprudence, surtout dans la mesure où cela repose sur des droits enchâssés dans la Constitution. Ce texte dresse l'inventaire des références que fait la Cour suprême du Canada à la jurisprudence depuis l'an 2000, et de façon plus générale, ses schémas de références depuis 1949, pour voir si et dans quelle mesure ces constats étayent la thèse d'une mondialisation croissante du droit. Dans ce texte, l'auteur soutient qu'il faut subdiviser la notion de références non canadiennes en trois composantes géographiques, soit l'Angleterre, les États-Unis et le reste du monde, si on veut en faire un examen utile, car ces trois éléments présentent des schémas bien distincts; il conclut qu'aucune de ces composantes ne permet d'étayer la thèse du phénomène d'une « mondialisation en plein essor ». Il constate en outre que la pratique consistant à citer de plus en plus souvent des autorités non canadiennes est en réalité le fait d'un seul membre de la Cour et non pas de l'ensemble des juges qui la composent. Enfin, l'auteur examine les types de causes qui renferment des références non canadiennes, et conclut que non seulement il ne s'agirait pas d'une tendance à la mondialisation, mais que dans la mesure où l'on se concentre essentiellement sur la jurisprudence fondée sur des droits, nous ne regardons sans doute pas au bon endroit.

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All over the world, we are told, the judges of national high courts are meeting each other, reading each other, and citing each other more so than ever before. "Like everything else," says Ken Kersch, "constitutional reasoning is going global,"[1] and Anne-Marie Slaughter says that "judges are globalizing as well."[2] Jenny Martinez writes of the emergence of a "common culture" among judicial bodies around the world, [3] and Claire L'Heureux-Dubé describes a dialogue among courts and judges that is promoting a globalization of human rights law and deplores the fact that the Supreme Court of the United States (USSC) under Rehnquist is no longer an active part of this conversation.[4] According to Lefler, "a growing legal dialogue is being created and developed by some of the world's most brilliant legal minds,"[5] and Lawrence Friedman undertakes to sketch the basic content of an emerging "global legal order."[6] Hannah Buxbaum registers a rare sour note, wondering if talk of globalization is just another way of talking about lesser jurisdictions conforming "to a standard imposed by the leading powers" in order to obtain the "approval of the states that lead the global community."[7] The Registrar of the Supreme Court of Canada (SCC) includes the "international community of judges" in its list of stakeholders, because of the Court's "active role" as a member of this community.[8]

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1. Ken Kersch, "The 'Globalized Judiciary' and the Rule of Law" (2004) 13 The Good Society 17 at 17.
2. Anne-Marie Slaughter, "Judicial Globalization" (2003) 40 Va. J. Int'l L. 1103 at 1103.
3. Jenny S. Martinez, "Towards an International Judicial System" (2003) 56 Stan. L. Rev. 429, at 436–37.
4. Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34 Tulsa L. J. 15.
5. 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" (2001–02) 11 S. Cal. Inter-Disciplinary L.J. 165 at 167 [Lefler].
6. Lawrence M. Friedman, "Erewhon: The Coming Global Legal Order" (2001) 37 Stan. J. of Int'l L. 347.
7. Hannah L. Buxbaum, "From Empire to Globalization . . . and Back? A Post-Colonial View of Transjudicialism" (2004) 11:1 Ind. J. Global Legal Stud. 183 at 185.
8. *A Report on Plans and Priorities 2006–2007 Estimates* (Ottawa: Office of the Registrar of the Supreme Court of Canada) at 9, online: <http://www.tbs-sct.gc.ca/rpp/0607/sc-cs/sc-cs-eng.pdf>.

But what does this globalization look like in practice? Christopher McCrudden has suggested that "the increased citation by judges of 'foreign' legal materials, in particular judicial opinions, from jurisdictions that have no legal authority in the 'receiving' jurisdiction"[9] is one of the significant vectors for this process. This paper will pick up on this idea by investigating first, how often the SCC cites "foreign"—that is to say, non-Canadian—authority; and second, in what context and by what judges this authority is used. Smithey[10] and Roy[11] have looked at the use of foreign law in the more focused context of rights jurisprudence. My purpose is both to examine this phenomenon in terms of the entire Supreme Court caseload, and to do so in direct comparison to the citation of domestic authority—not just how many times but also in what proportion.

The United States has long prided itself on the exportability of its judicial practices and insights[12] but this "supply side" legal globalization has not been matched by "demand side" performance, and in recent years the "foreign law" issue has become very controversial. The major cause célèbre has been a decision dealing with the criminal prohibition of homosexual activity,[13] and the American academy has divided itself into hostile camps over the issue.[14] Even the USSC has split on the matter, taking its disagreement public.[15]

The American controversy has had no Canadian counterpart, to such an extent that Anne Warner La Forest describes as "trite" the academic discussion about the impact of international legal norms and comparative law on judicial decisions in this country.[16] American courts and judges may be reluctant to import judicial citations from other countries, and may draw critical fire from academics and politicians alike when they do so, but Canadian courts and judges run no comparable gauntlet.

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9. Christopher McCrudden, "Judicial Comparativism and Human Rights" in Esin Örücü & David Nelken, eds., *Comparative Law: A Handbook* (Oregon: Hart Publishing, 2007) 371.
10. 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, at 1192–99 [Smithey].
11. Bijon Roy, "An Empirical Survey of Foreign Jurisprudence and International Instruments in *Charter* Litigation" (2004) 62 U.T. Fac. L. Rev. 99.
12. See e.g. Louis Henkin & Albert J. Rosenthal, eds., *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990) at 1–2.
13. *Lawrence v. Texas* 123 S.Ct. 2472 (2003), 2003 U.S. LEXIS 5013.
14. For example, Richard A. Posner warns against "judicial cosmopolitanism" in his "A Political Court" (2005) 119 Harv. L. Rev. 32 at 86; while Mark Tushnet pithily poses the opposed point of view in his transparently titled "When is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law" (2006) 90 Minn. L. Rev. 1275; and Austen L. Parrish dismisses the whole debate as "A Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law" (2007) 2 U. Ill. L. Rev. 637.
15. See e.g. the "'conversation' on the validity of using foreign law in U.S. constitutional cases" between Justices Scalia and Breyer at: "A conversation between U.S. Supreme Court justices" (2005) 3 ICON 519.
16. Anne Warner La Forest, "Domestic Application of International Law in *Charter* Cases: Are We There Yet?" (2004) 37 U.B.C. L. Rev. 157 at 157.

However—to anticipate my conclusion—it is nonetheless the case that when we apply the McCrudden test and look for the footprints of this increasing global impact on Canadian jurisprudence, we find very little evidence of such impact, such that the citation of foreign judicial decisions comprises a constrained and diminishing share of judicial citations. To the extent that judicial citation is a useful measure of globalization, we are still, to paraphrase the famous title of Samuel Beckett's play, "waiting for globalization," and the sub-title of La Forest's article—"Are We There Yet?"—remains apt.

I. The Theory of Studying Citations

The decision of a common law court does not consist simply of an outcome, but also of a set of reasons that go on (sometimes at considerable length) to explain and justify that outcome. This is because judicial decision-making is seen as "a fundamentally argumentative endeavour, in which individual judges and litigants must engage in generally accessible—and thus democratically accountable—exercises of public reason."[17] A successful judicial decision is one that persuades other courts and judges that the outcome is appropriate and that elements of the reasoned argument provided to support it can, and should, be drawn upon in similar cases. One of the major devices of this persuasion is the judicial citation, which locates the legal issues of the immediate case within a broader framework by linking them to the prior judicial decisions of their own and other courts. Other sources of authoritative information—such as books and legal periodicals—are also used to some extent, but they are much less common and, until relatively recently,[18] they were much less welcome.

The most obvious type of citation is the hierarchical citation: judges citing prior decisions of their own court (horizontal authority), or of a higher court to which the immediate decision could be appealed (vertical authority).[19] However, the

17. Mitchel de S.-O.-l'E Lasser, "Transforming Deliberations" in Nick Huls, Maurice Adams & Jacco Bomhoff, eds., *The Legitimacy of Highest Courts' Rulings* (The Hague: T.M.C. Asser Press, 2009) 33 at 43 [Lasser, "Transforming Deliberations"]. Lasser is making his comment specifically about the American system, but the SCC itself has described the giving of adequate reason as "the primary mechanism by which judges account to the parties and to the public for the decisions they render." See *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, 210 D.L.R. (4th) 608, at para. 15.

18. In 1950, Rinfret, C.J. famously interrupted counsel citing a *Canadian Bar Review* article with the pithy remark that the journal "is not an authority in this Court." For a discussion of this incident, see G.V.V. Nicholls, "Legal Periodicals and the Supreme Court of Canada" (1950) 28 Can. Bar Rev. 422. Twenty years later, the citation of legal periodicals was still highly unusual, with only two such citations (total) in 1967, 1968 and 1969. See Peter McCormick, "Do Judges Read Books, Too? Academic Citations by the Lamer Court 1991–96" (1998) 9 Sup. Ct. L. Rev. (2d series) 463 at 467 [McCormick, "Lamer Court"].

19. For the SCC, of course, there has not been a 'higher court' since the ending of appeals to the Judicial Committee of the Privy Council after 1949.

hierarchical aspects of the court system must be paradoxically juxtaposed with the horizontal collegiality of the common law, in which all judges are jointly engaged in the process of finding and explaining the law. Sometimes the Supreme Court criticizes lower court decisions to identify their error, or chooses between the differing positions of the courts in different provinces; but much of the time, the tone is polite, even deferential, and the reasons of "learned colleagues" in lower courts are praised and followed.

Not all decisions are created equal; some become major contributions to the law—a "leading decision"—that provides a useful reference point with regard to specific issues for considerable periods, with subsequent decisions expanding or refining or cabining its ideas. Any experienced practitioner will be able to identify the clusters of cases centered on a leading decision that deal with specific issues or questions; these clusters are the collective product of the judicial system, shared (and cited) similarly by everyone. The point is that citations to the decisions of Canadian courts are drawn from an established universe of domestic legal discourse; each citation is a content-filled place-holder for specific aspects of the contemporary meaning of the law, conveying known and shared legal information. Domestic citation takes place within an established context and a settled frame of conventions and understandings. What, then, of citations of the judicial decisions of other countries?

These are directed by quite a different set of expectations and considerations. It will generally be the case that there is an established body of law relevant to the question at issue, and it is the judge's responsibility to fit the immediate decision and reasons into this established framework, with appropriate deference to the decisions of other courts. But the decisions of the courts of other countries are not part of this framework, and "[w]e should expect citation of foreign precedent to be relatively rare under normal circumstances."[20] There are no foreign cases that *must* be cited, no decisions from other countries that absolutely must be taken into account, no sets of reasons from judges of other nations that cannot simply be ignored if the current judge or panel wishes. Even referring to them as "precedent" or "authority" cannot be taken literally; they are never binding, never anything more than persuasive. The purpose of this paper is to provide a closer look at the use of these non-Canadian authorities.

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20. Smithey, *supra* note 10 at 1192.

II. The Data-Base

The analysis that follows is drawn from a data-base consisting of every judicial citation in the published reasons of the SCC since January 1, 2000, a period which coincides with the McLachlin Chief Justiceship. What is being counted is the number of times that a set of reasons included at least one reference to a specific case: if both majority and minority cite the same case, both citations are counted; but if a directly relevant case is cited or quoted several times within a single set of reasons (as sometimes happens) it is only counted once. "Published reasons" limits consideration to reserved judgments, and excludes those cases (about one in every six) where the decision is handed down from the bench on the same day as oral argument. My decision to include citations from minority reasons reflects their status as part of the Supreme Court's institutional product, and my reasoned conviction that these are not just "loser's history" but rather a meaningful contribution to an evolving discourse about the law.[21]

The period under consideration is an awkward 8.5 years. My discussion will be in terms of calendar years rather than Supreme Court terms because this is the way that the Supreme Court itself now organizes its own material. The decisions were accessed on the SCC decision website maintained by LEXUM.[22]

III. The Supreme Court and Judicial Citations

Between January 1, 2000 and June 30, 2008 the Court handed down 632 decisions with a total of 13,602 citations to judicial authority. More usefully, 550 cases were reserved for judgment after formal argument, and on average the reasons in each case used 25 judicial citations. These judicial citations were drawn from a wide variety of sources—from trial courts and appeal courts, to the decisions of boards and tribunals and those of a dozen different countries besides Canada. The breakdown of citations is shown in Table 1.

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21. It is worth noting that the SCC frequently cites minority reasons from its own prior cases; see Peter McCormick, "Second Thoughts: Supreme Court Citation of Dissents & Separate Concurrences, 1949–1999" (2002) 81 Can. Bar Rev. 369

22. *Judgments of the Supreme Court of Canada*, online: <http://scc.lexum.umontreal.ca>.

Table 1: Sources of judicial authority:
SCC reserved decisions, 2000–2008

Source of citations	Number	Percentage
Supreme Court of Canada	7,985	58.7%
Canadian appeal courts	2,541	18.0%
Canadian trial courts	1,479	10.9%
Canadian boards & tribunals	162	1.2%
TOTAL CANADIAN	**12,167**	**88.8%**
England	821	6.0%
United States	476	3.5%
Other countries & supranational	222	1.6%
TOTAL NOT-CANADIAN	**1519**	**11.1%**
TOTAL	**13,686**	

The most obvious and most important statement about judicial citation is conveyed by the top line—the SCC cites its own prior decisions almost half again as often as all other sources of judicial authority combined. Equally significant is the overwhelming predominance of domestic citations, with almost nine in every ten references to judicial authority picking up on decisions of Canadian courts and tribunals. The numbers show a relentless and steady attrition: decisions of Canadian appeal courts are cited about one third as often as Supreme Court decisions; Canadian trial decisions half as often as Canadian appeal court decisions; English cases half as often as Canadian trial courts; American decisions half as often as English; and the decisions of other countries and supra-national tribunals half as often as American cases. Of every ten citations to judicial authority, six are to the Court's own prior decisions, two are to the decisions of provincial, federal and territorial courts of appeal, one is to the decision of a Canadian trial court, and one is to the decision of a court in a country other than Canada.

Table 1 shows the figures for a single time period—the McLachlin Court in the early 21st century. How this compares with earlier periods, and what the longer

term trends look like, is shown in Table 2.[23] Most striking is the relentless growth of Canadian citations, once a minority of all citations but now approaching nine in every ten, increasing by about eight percent for each chief justiceship. Conversely, the citation of the decisions of the courts of other countries has retreated from a solid 60 percent to a current level about one fifth as high.

Table 2: Sources of judicial authority by chief justiceship: SCC decisions, 1949–2008

Chief Justice	Years	Canadian	English	U.S.	Other
Rinfret	1949-1954	38.4%	59.8%	0.8%	1.0%
Kerwin	1954-1963	50.1%	46.9%	1.5%	1.5%
T/C/F[24]	1963-1973	63.1%	32.8%	3.1%	1.1%
Laskin	1973-1984	67.8%	27.0%	3.3%	1.9%
Dickson	1984-1990	74.2%	16.6%	7.2%	2.0%
Lamer	1990-2000	83.3%	9.4%	5.6%	1.8%
McLachlin	2000-	88.8%	6.1%	3.5%	1.6%

In the American literature, the "American or not-American" dichotomy may be adequate (if only because non-American citations are so rare),[25] but following the same practice here begs too many questions. I will suggest three sets of "foreign"

23. Pulling together the information from a series of chapters in Peter McCormick, *Supreme at Last: The Evolution of the Supreme Court of Canada* (Toronto: James Lorimer & Company, 2000) c. 1-c. 10.
24. The three short chief justiceships of Taschereau, Cartwright and Fauteux are combined for convenience into a single composite chief justiceship.
25. For calculations of this frequency, see David Zaring, "The Use of Foreign Decisions by Federal Courts: An Empirical Analysis" (2006) 3 JELS 297 at 301.

citations—English, American, and everything else. I will discuss below why this tripartite division is necessary, but it is clear from Table 2 that each has followed its own distinct evolution. The English citations, once dominant, have fallen steadily from 60 percent for the Rinfret Court to six percent for the McLachlin Court—the "English captivity"[26] Justice Laskin complained of is truly over. American citations increased sharply for the Dickson and Lamer Courts, but this is revealed as neither a rising trend-line toward the future, nor even a jump to a new plateau, but only a temporary departure from a long-term *status quo*. Justice La Forest's expectation that "the use of American, international and foreign materials will continue to grow" now stands revealed as a time-bound comment appropriate only to the early 1990s.[27] Citations for my residual "other" category have oscillated slightly over the period, never less than one percent or more than two percent of all citations to authority, trending (very) slightly upward.

The overall proportion of foreign citations is one measure of their significance; another is the proportion of cases within which they are found. This is shown in Table 3, which shows the number of cases in each calendar year that used foreign citations.

Table 3: Cases including foreign citations by calendar year:
SCC reserved decisions, 2000–2008

Year	All reserved decisions	Cases with UK citations	Cases with US citations	Cases with other citations	Cases with "foreign" citations
2001	76	30	17	10	38
2002	73	35	23	15	43
2003	60	25	10	6	28
2004	70	30	15	9	33
2005	72	23	6	7	29
2006	53	20	13	5	28
2007	53	22	17	14	30
2008 [28]	38	11	7	5	14
Total	**550**	**218**	**124**	**76**	**269**
Average	65	26	15	9	32

Only one citation in ten is to non-Canadian sources; but half of all reserved decisions include at least one such reference. Juxtaposing the two observations (relatively few citations, spread over many cases) carries its own message: it suggests that the impact (such as it is) of foreign precedents spreads thin rather than penetrating deep. Following up on this thought, later in this paper I will look more closely at those cases that use the largest number of foreign citations.

IV. Disaggregating Foreign Citations: English Cases

The McLachlin Court has made just over 1500 citations to non-Canadian judicial authority, this comprising roughly one-tenth of all judicial citations. I have suggested that we should think of this not as an aggregate, but as comprising three distinct elements. I will now defend this disaggregation, and at the same time examine each of the elements more closely.

The largest single block of non-Canadian citations is that made up of English decisions, using this term narrowly to include only England and Wales, excluding the other parts of the United Kingdom. There were 800+ of these citations, roughly 100 per year; Table 4 provides a more focused look. The first subset demonstrates the problems involved in assessing English citations. The Judicial Committee of the Privy Council (JCPC) was the entity established by the British government to deal with legal issues arising from the colonies, most specifically the possibility of conflict between imperial legislation and the laws and acts of colonial governments; since the *British North America Act* represented a consolidation of British colonial holdings rather than the realization of formal independence, this role continued after 1867. When a Supreme Court was established in 1875, it was subject to appeal to the Judicial Committee,[29] a condition that lasted until 1949. Even then, the SCC continued to regard itself as bound to follow JCPC precedent, a commitment it did not explicitly repudiate until the 1970s.[30]

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26. Bora Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 29 Can. Bar Rev. 1038 at 1045–46 [Laskin, "Final Court"].
27. Gérard V. La Forest, "The Use of American Precedents in Canadian Courts" (1994) 46 Me. L. Rev. 211 at 212, 217 [La Forest, "American Precedents"].
28. Refers only to first half of calendar year 2008.
29. See Loren P. Beth, "The Judicial Committee: Its Development, Organisation and Procedure" (1975) 3 P.L. 219 at 222–23, 232; Loren P. Beth, "The Judicial Committee of the Privy Council and the Development of Judicial Review" (1976) 24 Am. J. Comp. L. 22 at 22–23.
30. The critical case is *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 at 1256–57, 84 D.L.R. (3d) 257.

Table 4: English citations by court of origin
SCC decisions, 2000–2008

Source	Citations
Judicial Committee of the Privy Council	145
English House of Lords	231
English Court of Appeal	240
Other English courts	205
Total:	**821**

If the JCPC was Canada's highest court of appeal for the eight decades after 1867, it can hardly be considered a "foreign" court.[31] This applies not just to JCPC decisions on cases originating in Canada, which make up the overwhelming majority of the citations; under the then-prevailing doctrine of precedent, "decisions of the Judicial Committee of the Privy Council bind all colonial courts of whatever status or jurisdiction."[32] Of these 145 decisions, then, only the 22 handed down by the JCPC since 1949 (and perhaps only the 15 since 1973) can be considered as "foreign" decisions of a purely persuasive nature.

There is a further problem due to the status of the English common law within the Canadian legal system. The English common law was formally adopted as the foundation of Canadian law at various dates for different jurisdictions, with many predating 1867. However, the date of adoption makes no difference to the authority of English case law because the theory was that there was a single, monolithic body of common law.[33] This common law was "conceived of as a comprehensive body of doctrine, which was uniform throughout the British Empire."[34] This unity and uni-

31. Strictly speaking, it was not a "court" in the first place. "Because the Judicial Committee is a committee rather than a court, it does not render a judgment, but merely 'advises' the Queen as to the disposition of each appeal," Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 212–13 [Hogg]. However, its membership was dominated by English Law Lords, supplemented by high court judges from the more established colonies, and its proceedings and decisions always looked very much like those of a court.
32. T.O. Elias, "Colonial Courts and the Doctrine of Judicial Precedent" (1955) 18 Mod. L. Rev. 356 at 361.
33. See W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 68.
34. Hogg, *supra* note 31 at 32.

formity was maintained by reference to the decisions of the English House of Lords, whose primacy was unaffected by the fact that no decisions of "colonial" courts (including those of Canada) could be appealed to it;[35] and the courts of each colonial jurisdiction "absorbed without question" developments in the common law of England as declared by the highest English courts.[36] Only in the late 1960s did the English courts relent, accepting that in many areas the need for uniformity in the common law "is not compelling."[37] As Lefler warns us, the special status of English common law cases means that we must exclude "the historic English cases used to explain common law roots"[38] before we can talk about "foreign" citations.

Even after the abolition of appeals beyond the Supreme Court, contemporary English decisions continued to be important. For example, the common law basis of police authority laid down in the 1963 English Court of Appeal decision in *R. v. Waterfield*[39] was formally adopted by the SCC in *Dedman v. The Queen* in 1985,[40] and has been cited in this context half a dozen times by the McLachlin Court. However, Bushnell speaks of the waning of the binding effect of English cases "by the late 1960s."[41] It seems reasonable to suggest that English decisions handed down after 1973 (the beginning of the Laskin Court) might be well on the way to becoming "foreign" citations in a way that earlier decisions were not.[42]

Putting to one side the pre-1973 decisions of the JCPC (as "Canadian" cases in a very important sense); and then putting aside the pre-1973 decisions of other English courts because of their authoritative role within the English common law, we are left with less than 300 English decisions that might be thought comparable to foreign decisions; the count in Table 1 significantly overstates the "foreign" element.

V. Disaggregating Foreign Citations: American Cases

American citations are also a special case, but in quite a different way. At first thought, one would expect reasonably high levels of Canadian citations of American

35. See e.g. S.I. Bushnell, "The Use of American Cases" (1986) 35 U.N.B.L.J. 157 at 165 [Bushnell]: "Canadian judges considered the House of Lords the ultimate court, even though it did not entertain Canadian cases."
36. Hogg, *supra* note 31 at 33.
37. W.S. Clarke, "The Privy Council, Politics and Precedent in the Asia-Pacific Region" (1990) 39 I.C.L.Q. 741 at 743.
38. Lefler, *supra* note 5 at 166.
39. [1963] 3 All E.R. 659 at 661, 3 W.L.R. 946.
40. [1985] 2 S.C.R. 2 at 13–15, 20 D.L.R. (4th) 321.
41. Bushnell, *supra* note 35 at 165.
42. Although the "proximity test" for the duty of care established by the House of Lords decision in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 at 751–52 was adopted by the SCC in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2 at 8, 12–13, 10 D.L.R. (4th) 641 and the language is less "here is an interesting idea from another country" than "here is an authority"; this case has been cited by the McLachlin court a dozen times.

authority, because the parallels between the two systems are obvious. Both are former English colonies (although their means of ending that status were rather different); both use (at least predominantly) the same language; both are and always have been (economically) capitalist and (politically) democratic. Both countries have legal systems based directly on the English common law; more specifically, both faced the similar project of adapting the English common law to the different and challenging circumstances of the frontier. Justice La Forest's example is the matter—unknown to England but shared by, and important to, both Canada and the United States—of "a public right to float logs on navigable streams."[43] And when Canada followed the twentieth-century trend of moving legal education into universities, it was the American model of law degrees and law schools that was largely followed, not the English.

MacIntyre[44] and Bushnell[45] both agree that the early SCC made extensive use of American authorities, Bushnell going so far as to suggest that during the Court's first decade this achieved a frequency that has not since been matched. However, this tendency did not survive into the twentieth century, and American citations became increasingly unusual. One of the reasons for this may have been something as prosaic as the poor American holdings in an under-funded Supreme Court library;[46] MacIntyre also mentions the overt hostility to American authorities expressed by senior English courts and judges.[47] Whatever the reason, American cases were (in Justice La Forest's words) "infrequent, sometimes shallow, and definitely overshadowed" by the use of English precedents.[48] By the 1940s, an unsigned note in the *Canadian Bar Review* could casually refer to "a prejudice, commencing in the law schools and extending to the courtroom, against the use of American authorities and texts."[49] The early rows of Table 2 pick up on this low point for American citations by the Supreme Court. As the use of English authorities declined through the 1960s, there was a modest increase in the number of American citations; what moved into the void left by the steady decrease of English cases was not American authority but Supreme Court references to its own prior cases.

One reason that American citations did not fill the gap may have been that the decade of the 1960s was preoccupied with questions of national identity and

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43. La Forest, "American Precedents," *supra* note 27 at 211.
44. J.M. MacIntyre, "The Use of American Cases in Canadian Courts" (1966) 2 U.B.C. L. Rev. 478 at 479–80 [MacIntyre].
45. Bushnell, *supra* note 35 at 157–58.
46. *Ibid.* at 160.
47. MacIntyre, *supra* note 44 at 481.
48. La Forest, "American Precedents," *supra* note 27 at 213.
49. "The Use of American Legal Literature," Editorial Comment, (1943) 21 Can. Bar. Rev. 57 at 57.

Canadian culture. Although the citing of foreign authority can be seen as demonstrating the confidence to draw ideas from elsewhere, Allen and Anderson observe that it also raises the question: "does the [SCC] believe that the work of foreign jurists is better than that of Canadian Judges?"[50] Harvie and Foster note that even in the 1980s, "the Supreme Court's attitude continues to be sensitive to the issue of cultural sovereignty in the law."[51]

From Table 2, it may be observed that the frequency of American citation jumps dramatically for the Dickson and Lamer Courts. The numbers are striking: 1977 was the first year in which SCC citations of American cases topped 50, 1985 the first year they topped 100 and 1990 the first year they topped 200. The major reason for this was Canada's constitutional transformation, specifically the entrenchment of the *Canadian Charter of Rights and Freedoms* (*Charter*) in 1982. Smithey, generalizing from the Canadian and South African experiences, suggests that major constitutional change creates major demands on the high court, and it does so in circumstances where that very novelty implies a relative dearth of domestic judicial precedent to guide its decisions.[52] To normalize its new legal environment, the novelty-confronted SCC reaches out to the ideas and the experiences of other countries; foreign precedent is drawn into the relative judicial vacuum. Justice La Forest, who served on the Court through this process, similarly sees this in terms of dealing with ideas that were new to Canada but not at all new to the United States;[53] and Bushnell points out that the Court included an unusually high number of members with American graduate training—Justices Spence (appointed 1963), Laskin (appointed 1970), Estey (1977) and La Forest himself (1985).[54] This double explanation surely captures the major elements, but there are some minor difficulties. For one, the increase in American citations began in the second half of the 1970s, seven years before *Charter* entrenchment and nine before the first *Charter* case. Second, even if American-trained judges initiated the use of American citations, by the 1990s five of the six most frequent citers of American cases had no American training.[55] Third, it explains only the use of American case law in *Charter* cases, which make up only a modest part of the increase.

50. Thomas Allen & Bruce Anderson, "The Use of Comparative Law by Common Law Judges" (1994) 23 Anglo-Am. L. Rev. 435 at 459.
51. 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 L.J. 729 at 736.
52. Smithey, *supra* note 10 at 1192–94.
53. La Forest, "American Precedents," *supra* note 27 at 211, 213.
54. Bushnell, *supra* note 35 at 169.
55. See Peter McCormick, "The Supreme Court of Canada and American Citations 1945–1994: A Statistical Overview" (1997) 8 Sup. Ct. L. Rev. (2d) 527 at 537 [McCormick, "American Citations"].

The use of American citations could have continued to drive upwards, or it could have leveled off at a new and higher level in the *Charter* era. However, Table 2 shows that the higher figures of the Dickson and Lamer Courts soon sagged; under the McLachlin Court, they subsided to pre-*Charter* levels. By 1995, American citations were back down below 100 per year and for several years in this new century they have fallen below 50. This fits Smithey's analysis—if novelty and a lack of domestic case law generates higher foreign citation, then it follows that familiarity and routinization will see them displaced as domestic jurisprudence accumulates. Justice La Forest's expectations were more ambivalent; on the one hand, he anticipated that the rate of American citations in *Charter*-related matters would "become less necessary" as Canadians developed "a more extensive and distinctive domestic jurisprudence in the area," but he also thought that "the use of American, international and foreign materials will continue to grow in other areas."[56] The latter has not happened, which leaves a double puzzle. First, contrary to Smithey, foreign citation was not particularly centered on rights cases; and second, contrary to Justice La Forest, when foreign citation in rights cases sagged within a decade, similar citations in the broader range of cases not only failed to grow but sagged with it.

Table 5: American citations by court of origin:
SCC reserved decisions, 2000–2008

Source	Citations
United States Supreme Court	220
United States federal courts (trial & appeal)	110
United States state courts (trial & appeal)	149
United States boards and agencies	6
Total:	**476**

The evolution of the current level of American citations is not easily described in summary terms. Today's numbers are below the figures for what we might call the "*Charter* spike"[57] of the decade centered on 1990, but they are higher than they were

56. La Forest, "American Precedents," *supra* note 27 at 217.
57. For a graphical representation of annual citation frequencies justifying this label, see McCormick, "American Citations," *supra* note 55 at 534–35. In 1990 there were 230 US citations by the SCC; the only other years that (barely) topped 100 were 1987, 1991, 1992 and 1993.

for the first two-thirds of the twentieth century. The spread of citations across the variety of US courts, indicated in Table 5, shows a slightly surprising diffusion; the High Court of Australia not only cites American sources much more often than the SCC in this century (about 300 times per year), but its citations are much more focused on the USSC (which accounts for about two-thirds of the total).[58]

These proportions are significant because there are two different (albeit overlapping) contexts in which one could discuss American citations. The first possible frame is the common law: although English citations long enjoyed a significant priority in this respect, it is of course not only English citations but also citations from the courts of other common law countries that represent contributions to common law jurisprudence that might usefully (if relatively rarely) be referenced by Canadian judges. As suggested above, the logic of the common law is as much horizontal conversation as formal hierarchy; in this context, the citation of lower American courts—federal circuit courts of appeal, federal district courts, state appeal and trial courts—is completely appropriate and unsurprising.

However, the alternative frame, and the one which triggered the exploration that resulted in this article, is judicial globalization, which involves increased interaction and awareness between the judges of today's national high courts. In this context, the citation of lower court decisions (which are not even definitive or final within their own legal environment) is more curious. As an American scholar commented on an earlier version of this paper, such citation suggests less an acceptance of authority than casual ornamentation or even opportunistic selection ("cherry picking").[59] It is similarly noteworthy that SCC citations of the USSC itself are not focused on recent decisions (in the way that its citations to its own prior decisions are) but rather scatter over a remarkably wide range of earlier decisions by earlier courts.[60]

VI. Disaggregating Foreign Citations: "Other" Cases

Citations from the rest of the world have always been present, but they have always occurred at a very modest level. Table 2 suggests that before the *Charter* era, they typically accounted for just over one percent of total judicial citations; since then, they comprise just under two percent.

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58. Paul von Nessen, "Is There Anything to Fear in Transnational Development of Law? The Australian Experience" (2006) 39 Pepp. L. Rev. 883 at 917, 919.
59. Elliott E. Slotnick, "Influences on Opinion Writing" (Verbal Comments as Chair of Panel 42–25, at the Midwest Political Science Association, Chicago, 2–5 April 2009) [unpublished].
60. See Peter McCormick, "American Citations and the McLachlin Court: An Empirical Study" (2009) 47 Osgoode Hall L.J. 83 at 92–93.

Table 6: "Other" citations by country/court of origin:
SCC reserved decisions, 2000–2008

Source	Citations
Other Commonwealth courts[61]	129
Other UK courts[62]	8
Courts of European countries[63]	38
Other[64]	8
Supra-national courts & tribunals[65]	24
International courts & tribunals[66]	15
Total:	**222**

What is striking about Table 6 is the absence of a solid block of citations that would respond to the "other half" of Canada's bijural system. Canada is both a common law system and (by virtue of Quebec) a civil law system, a significant reality that is reflected in the fact that three of the nine judges on the SCC must be from the bar of the province of Quebec. But the citation process is overwhelmingly dominated by decisions from common law countries—only the 36 French citations, and a single citation from a state court in Louisiana, provide the civil law counter-examples.[67]

One reason may be that the role, and therefore the nature and appearance, of a judicial decision in the civil law system is rather different.[68] It typically consists of a

61. Australia (86), New Zealand (29), South Africa (7), Hong Kong (3), India (2), East Africa (1), Fiji (1).
62. Scotland (4), Ireland (4).
63. France (36), Netherlands (1), Switzerland (1).
64. Israel (8): almost all in a single SCC case (*Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, 288 D.L.R. (4th) 257 [*Bruker*]) dealing with a Jewish marriage.
65. Europe (23 [ECHR (17), European Commission (3), European Patent Office (1), European Office of Harmonization (1), ECJ (1)]), NAFTA panel (1).
66. International criminal tribunals (11), International Court of Justice (3), International arbitration panel (1).
67. Since my concern in this paper is non-Canadian citations, I am of course omitting mention or consideration of citations to the courts of Quebec.
68. My comments are based on the more extensive consideration of the civilian (especially the French) judicial decision that can be found in Mitchel de S.-O.-l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004) and John Bell, *French Legal Cultures* (London: Butterworths, 2001).

tightly formulaic structure: whereas (Code section); and whereas (terse statement of facts); therefore (outcome) and compact "single sentence syllogisms. . . ."[69] characterized by "Cartesian formulations and . . . rigid phrasing."[70] If common law readers are expecting an extended discursive discussion that will lay out alternative resolution tracks before justifying a choice, provide something of a history of the relevant law and its interpretation, respond to contextual particularities, and sometimes directly consider policy implications they will go away disappointed: "[W]hile the published judicial decision is undoubtedly central to the American master narrative, it is much less so in the French one."[71] These elements do exist, but they are typically found in the notes, commentaries and critiques written by distinguished academics that are often juxtaposed in the reports to these brief decisions. When these are cited, they are as likely to be listed by the Supreme Court itself under the "authors cited" rubric as under "cases cited."[72] But even adding these to the list hardly redresses the balance; at most, it would increase the French count from 36 to 39. The conclusion from the citation data is obvious—judicial citation, at least in Canada, reaches out almost exclusively to common law systems, bijuralism notwithstanding.

VII. Who Uses Foreign Citations?

To talk about the Court using a certain proportion of foreign (or English or American) citations is not inaccurate, but it is hardly to be expected that all members of the Court cite the same set of sources in the same proportions. Table 7 therefore allocates foreign citations in general, and each of the three subtypes of foreign citations individually, to each of the 14 judges who have served on the SCC since January 1, 2000.

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69. Lasser, "Transforming Deliberations," *supra* note 17 at 39.
70. Nick Huls, "Introduction: From Legitimacy to Leadership" in Huls, Adams & Bomhoff, *supra* note 17 at 3.
71. Lasser, "Transforming Deliberations," *supra* note 17 at 39.
72. *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29, [2009] 2 S.C.R. 94, 309 D.L.R. (4th) 323.

Table 7: Foreign (English/American/other) citations per year by SCC justice: SCC reserved decisions, 2000–2008[73]

Justice	English citations (per year)	American citations (per year)	Other citations (per year)	Total foreign citations (per year)
Binnie	195 (22.9)	170 (20.0)	71 (8.4)	436 (51.3)
Iacobucci	46 (10.2)	60 (13.3)	5 (1.1)	111 (24.6)
LeBel	70 (8.2)	40 (4.7)	29 (3.4)	139 (16.4)
McLachlin CJC	96 (11.3)	18 (2.1)	12 (1.4)	126 (14.8)
Rothstein	23 (10.0)	7 (3.0)	4 (1.7)	34 (14.8)
Arbour	48 (10.7)	14 (3.1)	4 (0.9)	66 (14.7)
Major	53 (8.8)	23 (3.8)	5 (0.8)	81 (13.5)
Bastarache	47 (5.5)	40 (4.7)	8 (0.9)	95 (11.2)
Gonthier	20 (5.6)	11 (3.1)	7 (1.9)	38 (10.6)
Deschamps	16 (2.7)	23 (3.9)	21 (3.6)	60 (10.2)
Charron	14 (3.7)	13 (3.4)	10 (2.6)	37 (9.7)
L'Heureux-Dubé	5 (2.0)	12 (4.8)	7 (2.8)	24 (9.6)
Abella	15 (3.9)	7 (1.8)	11 (2.9)	33 (8.7)
Fish	15 (3.1)	7 (1.4)	3 (0.6)	25 (5.1)

The absolute numbers for each type of citation are not particularly useful because of the high degree of turnover in the Court. More useful is the bracketed number which indicates citations per year, correcting for the varying lengths of serv-

73. Period considered is 8.5 years, not the full nine years; reduction of all counts to "per year" figures therefore reflects division by 8.5.

ice; the ordering is driven (in decreasing order) by the foreign citations per year number in the total foreign citations column. The totals for each column are slightly less than those in Table 1, because they omit the citations in "by the Court" decisions (in Canadian usage, unanimous decisions not attributed to the authorship of a specific judge), or in the two- and three-authored sets of reasons.[74]

What stands out is the unique and distinctive performance of Justice Binnie. First, he clearly leads the judges for the overall citation of foreign precedent. Second, he leads not only for overall citation, but also for each of the three subcategories. Third, his lead overall and for each category is simply overwhelming—only for American citations does he fail at least to double the citation frequency of any other single member of the Court, and even here he has half again the frequency of the runner-up. Justice Binnie alone accounts for one-third of all the foreign citations by individual judges: 30 percent of the English citations, 36 percent of the other citations, and 38 percent of the American citations. He cites non-Canadian cases at the rate of more than 50 per year, quadruple the average of all other justices; Justice Iacobucci is second at only half the annual frequency and Justice LeBel third at a third of the annual frequency. At the opposite low-citing end of the table are Justices Charron, L'Heureux-Dubé, Abella and (especially striking) Fish.

But if all the columns look the same to the extent that Justice Binnie has an overwhelming lead, the same cannot be said of the rest of the list. For English citations, Chief Justice McLachlin places second, just marginally ahead of a cluster of Justices Arbour, Iacobucci, and Rothstein; for American citations, Justice Iacobucci places second, more than doubling the third place tie between Justices L'Heureux-Dubé, LeBel and Bastarache; and for other citations, Justice Deschamps places second, nosing out Justice LeBel.

To move beyond specific individuals: the four judges who served the entire 8.5 years (Chief Justice McLachlin and Justices Binnie, Bastarache, and LeBel, indicated in Table 7 with boldface) average 23.4 foreign citations per judge per year. The five judges who left the Court after January 1, 2000 (Justices L'Heureux-Dubé, Gonthier, Arbour, Iacobucci and Major, indicated in Table 7 by italics) together account for an average of 15.2 foreign citations per judge per year.[75] Finally, the five judges appointed since January 1, 2000 (Justices Deschamps, Fish, Abella, Charron, and Rothstein) average only 9.1 foreign citations per judge per year. The reasonable implication of these numbers is that foreign citations will con-

74. There are about four "by the Court" decisions, and about nine sets of two- or three-authored reasons per year.

75. I note that Bastarache served the whole period but left the Court on the last day under consideration.

tinue to decline as an element of the judicial authority acknowledged by the SCC, with a significant further drop when Justices Binnie and LeBel, both in the top quarter of the table, leave the Court.[76]

VIII. When Does the Supreme Court use Foreign Citations?

Just as not all judges are equally likely to use foreign citations, not all cases are equally likely to draw them. The normal division of the Supreme Court caseload is between criminal cases and civil cases—these are the dichotomous categories that you will find, for example, if you look up individual cases on the SCC website. But working with only these two categories is frustrating: it is obvious that civil cases are reduced to something of an extremely large and diverse residual grab-bag.

I therefore propose a four-element differentiation of the Supreme Court case-load. My first category will still be criminal cases, a constitutionally well-defined category that involves a confrontation between the state and an individual (more rarely, a corporation) within very well defined procedural and evidentiary parameters. These cases have made up 25.6 percent of the reserved caseload of the SCC over the 8.5 years.

My second category will be public law—cases involving government actors or entities acting in that capacity, litigating against (or being litigated against by) individuals or corporations or other government entities. These cases have made up 27.5 percent of the reserved caseload.

My third category is private law—cases between individuals and/or corporations, involving the obvious range from tortious liability through contract to insurance. These cases have made up 28.5 percent of the caseload.

My final category is "*Charter* law"—cases involving claims against government brought under the *Charter*. This category is not quite the same as the others. Although the first three can reasonably be treated as mutually exclusive categories, *Charter* cases are also something else (that is to say, one of the other three) in addition to raising the *Charter* issue. The *Charter* looms sufficiently larger in contemporary Canadian law and politics as to justify breaking these cases out as a separate category. *Charter* cases have made up 18.4 percent of the caseload.

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76. This sentence assumes that we are looking at a cohort phenomenon: there is something distinctive about this set of four judges that does not echo previous sets and is not echoed by subsequent sets. An alternative hypothesis would be an acclimation effect: the frequency of citation of non-Canadian authority rises as the length of service on the SCC increases. However, the (much) lower figures for the second (leaving) group make this less likely as an explanation.

Table 8: Foreign (English/American/Other) citations by type of case: SCC decisions 2000–2008

	Canadian citations	Foreign citations	Eng citations	US citations	Other citations
Charter cases	92.7%	7.3%	2.7%	3.8%	0.8%
Criminal cases	91.5%	8.5%	4.2%	3.5%	0.7%
Public cases	89.9%	10.1%	6.7%	2.1%	1.3%
Private cases	81.7%	18.3%	10.1%	4.8%	3.8%
TOTAL	**88.8%**	**11.2%**	**6.0%**	**3.5%**	**1.6%**

Table 8 shows the relative frequency of Canadian and foreign citations for each of these four types of case; the rank ordering is driven by the decreasing frequency of Canadian citations. *Charter* cases earn the top row—these cases use the highest proportion of Canadian (and therefore the lowest proportion of foreign) precedent. Overall, Canadian citations outnumber foreign citations by about eight to one; but for *Charter* cases, the ratio is closer to 13 to one. The effect is more pronounced for English and other citations (less than half the proportion for *Charter* cases than overall) than it is for American citations (fractionally more likely for *Charter* cases than overall), but not enough to undermine the observation that domestic authority is the most overwhelmingly predominant for these cases.

This is a little unexpected, because both Justice La Forest and Smithey seem to have predicted otherwise. Justice La Forest suggested that it was the *Charter* that made American authorities attractive in the late 1980s and early 1990s, and that the use of American (and other foreign) law would spread from this bridgehead to other areas of law; and Smithey suggested that it was the general phenomenon of constitutional novelty (in Canada's case, the *Charter*) that created the precedential vacuum into which foreign citations were drawn. To be sure, both were making comments about citation practices for "first generation" *Charter* decisions, and both anticipated that growing domestic *Charter* jurisprudence would gradually displace the practice of frequent foreign citation. However, even if this is the case, it has fallen surprisingly far and surprisingly quickly.

Conversely, foreign citations are the most common for private law cases, and this statement is true for all three sub-categories of foreign law. If the overall ratio between Canadian and non-Canadian citations is about eight to one, for private law cases it is much lower, barely four to one. More than 40 percent of all foreign cita-

tions (but less than 25 percent of all Canadian citations) are found in private law cases. To be sure, this is hardly surprising for English citations (where the proportion is 43 percent), but the ratio is even higher (at 55 percent) for other foreign authority.

Smithey also suggested that the frequency of foreign citations should be higher in those cases involving disagreement, and higher again as the extent of disagreement (the number of different opinions written) increased.[77] This hypothesis is explored in Table 9. The three segments of that table explore three slightly different applications of the Smithey thesis.

Table 9: Foreign (English/American/other) citations by unanimous/non unanimous reasons: SCC reserved decisions, 2000–2008

	Canadian citations	Foreign citations	English citations	US citations	Other citations
Unanimous	88.2%	11.8%	7.3%	2.9%	1.6%
Non-unanimous	89.2%	10.8%	5.2%	3.9%	1.7%
Non-unanimous decision	89.0%	11.0%	5.5%	3.7%	1.9%
Non-unanimous minority	89.4%	10.6%	5.0%	4.2%	1.5%
Majority cases	89.4%	10.6%	5.4%	3.6%	1.7%
Plurality cases	87.8%	12.2%	3.8%	6.8%	1.5%

The first two rows compare the citation patterns for reasons in unanimous cases with the same patterns for all reasons (decision and minority) in non-unanimous cases. The differences are so slight as to suggest that there is really no difference at all; but if there is a difference, it is in the wrong direction. The reasons in non-unanimous cases are no more likely (and possibly marginally less likely) to use foreign citations than unanimous decisions. Although unanimous decisions are more common (328 of the 550 reserved decisions), about 60 percent of the foreign citations are found in the divided reasons; but this higher level of citations is also true

77. Smithey, *supra* note 10 at 1202.

(and slightly more true) for Canadian citations as well. What the numbers do suggest, however, is that English citations seem slightly higher for unanimous decisions, and American citations slightly higher for the reasons in non-unanimous cases.

This suggests that we should chase the Smithey hypothesis one step further by dividing the reasons in non-unanimous cases into the two obvious sub-categories of non-unanimous decisions, and non-unanimous minority reasons. In terms of the relative proportions of Canadian and foreign citations, this takes us absolutely nowhere—the difference between divided decisions and minority reasons is even smaller than the difference between unanimous decisions and non-unanimous reasons. But intriguingly, we can still make the same comment about English and American citations: English citations are slightly more likely in decisions, and American citations slightly more likely in minority reasons. These differences, however, are still very small.

But perhaps we should push Smithey's ideas in a slightly different direction. The first half of her suggestion, that foreign citations should be more frequent in divided than unanimous cases, was not sustained; but the second half was that the difference should be particularly pronounced for those cases involving higher levels of disagreement, particularly in the form of multiple sets of reasons rather than a simple majority/minority split. There is a subset of Supreme Court decisions that involve reasons dividing the panel in such a way that there is no single set of outcome-plus-reasons that draws the signatures of a majority of the panel; these are plurality decisions.[78] There were only 18 of these between January 1, 2000 and June 30, 2008,[79] so the numbers are too small to permit strong conclusions. Although the differences remain small, they are at least in the right direction: plurality cases, when compared with either majority-divided cases or unanimous decisions, are slightly less likely to use Canadian authority, and concomitantly slightly more likely to use foreign authority. They also repeat the general pattern already noted, of being less likely to use English cases and more likely to use American cases. Overall, however, the differences are so modest that it is probably more justified simply to treat Smithey's hypothesis as not being sustained by the present data.

78. The American doctrine is that plurality decisions decide the immediate case but do not constitute binding precedent; there is no corresponding Canadian expectation, so plurality reasons carry greater weight in this country.

79. One involved an equal division of an eight-judge panel.

IX. Which Cases?

I will round out this discussion by presenting, and then briefly discussing, lists of the sets of Supreme Court reasons with the highest number of citations to English, American and other authorities. The logic of letting the cases select themselves by the very frequency of citation is attractive in itself, but there is a further reason that relates to the distinctive circumstances of foreign citation. When courts cite domestic authority, each case comes (as it were) with a specific context and an accompanying cloud of related decisions that contain, qualify or refine the basic legal principles involved; even when these additional cases are not cited (which is not to deny that they often are) it can be assumed that the legally relevant audience is very much aware of them and takes them into consideration. The problem with foreign cases is that although they also have a similar contextual cloud within their own legal community, it is much less likely to be known to the Canadian audience or to be completely and solidly understood by them. A particular problem in foreign citation is the risk of using a citation or taking a quotation out of context, either deliberately or inadvertently. One of the "threshold problems" in comparative law is ensuring that there is an adequate understanding of the legal concepts and the legal context;[80] and one of the ways to avoid the "out of context" problem is to provide the context by including adequate consideration of the cluster of cases that both flesh out and contain the message from a single case. But only multiple citations provide this opportunity; solo citations cannot do so without extensive textual expansion, which is almost always lacking.

Table 10 lists the ten sets of reasons with the highest number of English citations. Considering the number of English citations overall, the numbers are rather low; *Canadian Western Bank*[81] leads the table with only 15 citations, and the bottom of the table is a six-way tie for fifth with 11 citations. There is also a six-way tie for eleventh, at 10 English citations. This reinforces the suggestion that English citations are spread pervasively throughout the cases, and not concentrated in specific cases or even specific sub-fields, more so than either American or other citations.

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80. Cheryl Saunders, "The Use and Misuse of Comparative Constitutional Law" (2006) 13 Ind. J. Global Legal Stud. 37 at 67.

81. *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 [*Canadian Western Bank*].

Table 10: SCC reasons using largest number of English citations: SCC decisions, 2000–2008

Case	UK Citations	Judge[82]	Type of Case
Canadian Western Bank v. Alberta 2007 SCC 22[83]	15	**Binnie & LeBel**	constitutional law, division of powers
R. v. Boulanger 2006 SCC 32[84]	13	**McLachlin**	breach of trust by public officer
Non-Marine Underwriters 2000 SCC 24[85]	12	**McLachlin**	insurance, tort of sexual battery
Oldfield v. Transamerica Life Insurance 2002 SCC 22[86]	12	**Major**	life insurance, death while committing crime
H.L. v. Canada 2005 SCC 25[87]	11	*Bastarache*	standard of review, question of fact
House of Commons v. Vaid 2005 SCC 30[88]	11	**Binnie**	constitutional law parliamentary privilege
FreeWorld v. Electro Sante 2000 SCC 66[89]	11	**Binnie**	intellectual property, patent infringement
Ryan v. Moore 2005 SCC 38[90]	11	**Bastarache**	limitation of actions
Fidler v. Sun Life Insurance 2006 SCC 30[91]	11	**McLachlin & Abella**	compensatory damages, mental distress
Apotex Inc. v. Wellcome Foundation 2002 SCC 77[92]	11	**Binnie**	standard of review, mixed fact and law

82. Boldface indicates the judge writing the decision of the Court; underlining indicates unanimous judgment; normal typeface indicates separate concurrence; italics indicate dissent.
83. *Canadian Western Bank*, *supra* note 81.
84. *R. v. Boulanger*, 2006 SCC 32, [2006] 2 S.C.R. 49 [*Boulanger*].
85. *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 [*Non-Marine Underwriters*].
86. *Oldfield v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 22, [2002] 1 S.C.R. 742 [*Oldfield*].
87. *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 [*H.L.*].
88. *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 [*Vaid*].
89. *FreeWorld Trust v. Électro Santé Inc.*, 2000 SCC 66, [2000] 2 S.C.R. 1024 [*FreeWorld*].
90. *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 [*Ryan*].
91. *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 [*Fidler*].
92. *Apotex Inc. v. Wellcome Foundation Ltd.*, 2002 SCC 77, [2002] 4 S.C.R. 153 [*Apotex*].

Canadian Western Bank[93] exemplifies the use of Judicial Committee decisions; all 15 of the majority's references to English authority are to that body's constitutional decisions in the late nineteenth and early twentieth centuries, and the cases would be familiar to any student of Canadian constitutional history. Most of the other cases are straightforward examples of private law, dealing with liability and insurance; the "standards of review" cases relate to an ongoing challenge of appeal courts in a common law system (crudely: how big a mistake and of what sort an initial decision maker has to make to justify intervention by an appeal court). Reflecting the fact that Canada inherited its Parliamentary system from the United Kingdom, one case involves issues of parliamentary privilege. There are no *Charter* cases on the list.

Justice Binnie and Chief Justice McLachlin dominate the table; more than half of the reasons using unusually large numbers of English references were written (or co-written) by them. And all but one were judgments of the Court, six of them unanimous. Only in a single set of reasons (Justice Bastarache's dissent in *H.L. v. Canada*)[94] is there a concentration of English citations in a minority opinion, reinforcing the impression that English references are at least mildly skewed away from cases in which there is a significant degree of controversy and division within the Court.

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93. *Canadian Western Bank*, *supra* note 81.
94. *H.L.*, *supra* note 87.
95. Boldface indicates the judge writing the decision of the Court; underlining indicates unanimous judgment; normal typeface indicates separate concurrence; italics indicates dissent.
96. *Non-Marine Underwriters*, *supra* note 85.
97. *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385 [*Smith*].
98. *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857 [*Burke*].
99. *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74 [*Canadian Forest*].
100. *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 [*Mitchell*].
101. *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 [*Whiten*].
102. *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209 [*Advance Cutting*].
103. *Family Insurance Corp. v. Lombard Canada Ltd.*, 2002 SCC 48, [2002] 2 S.C.R. 695 [*Family Insurance*].
104. *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23, [2006] 1 S.C.R. 824 [*Veuve Clicquot*].
105. *R. v. A.M.*, 2008 SCC 19, [2008] 1 S.C.R. 569 [*A.M.*].
106. *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239 [*Trochym*].
107. *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992 [*Araujo*].
108. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 [*ATCO*].
109. *Non-Marine Underwriters*, *supra* note 85.

Table 11: SCC sets of reasons using largest number of US citations: SCC reserved decisions, 2000–2008

Case (citation)	US Citations	Judge[95]	Type of Case
Non-Marine Underwriters 2000 SCC 24[96]	29	Iacobucci	insurance, tort of sexual battery
R. v. Smith 2004 SCC 14[97]	15	**Binnie**	appellant dies before decision
R. v. Burke 2002 SCC 55[98]	14	**Major**	judge mishears jury verdict
B.C. v. Canadian Forest 2004 SCC 38[99]	13	**Binnie**	liability for damages from forest fire
Mitchell v. M.N.R. 2001 SCC 33[100]	11	Binnie	aboriginal rights, trans-border trade
Whiten v. Pilot Ins. 2002 SCC 18[101]	10	**Binnie**	insurance, punitive damages
R. v. Advance Cutting 2001 SCC 70[102]	10	**LeBel**	labor unions, competency certificates [Ch]
Family Insurance 2002 SCC 48[103]	10	**Bastarache**	overlapping insurance policies
Veuve Clicquot 2006 SCC 23[104]	10	**Binnie**	intellectual property
R. v. A.M. 2008 SCC 19[105]	9	Binnie	search & seizure, sniffer dogs [Ch]
R. v. Trochym 2007 SCC 6[106]	9	**Deschamps**	hypnotically refreshed evidence
R. v. Araujo 2000 SCC 65[107]	9	LeBel	wiretap evidence
ATCO v. Alberta 2006 SCC 4[108]	9	*Binnie*	standards of review; admin bd jurisdiction

Table 11 lists the cases with the largest number of references to American cases; a four-way tie for tenth stretches this list to 13. *Non-Marine Underwriters*[109] leads with 29 citations; but this single example aside, the numbers are comparable to those

for English citations. Since overall American citations are only half as frequent as overall English citations, this must imply that American citations tend to be more concentrated in a smaller number of cases.

The subject matter can generally be summarized as insurance, evidence and liability. There are two *Charter* cases, and a third rights-based case involving aboriginal rights; as a percentage of the list, this approximates the proportion of rights-based cases in the overall case-load. There is another "standards of review" case (as stated above, this is a recurrent matter for appeal courts in general and national high courts in particular), and two legal novelties—an appellant who died before his case was decided, and a judge who misheard the jury's verdict.

Justice Binnie dominates this list, with seven of the top 13 (and three of the top five) sets of reasons. No other judge has more than a single written opinion in this set. A majority (eight of the 13) are decisions of the Court, three of them unanimous. Of the five sets of minority reasons on the list, four are separate concurrences and only one is a dissent. About 40 percent of reserved decisions are non-unanimous, but dissents are twice as frequent (and when they occur, they are on average twice as long) as separate concurrences.[110] This reinforces the impression, suggested above, that American citations are slightly more common in more controversial decisions.

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110. For a closer consideration of the SCC's practices with respect to separate concurrences, see Peter McCormick, "The Choral Court: Separate Concurrence and the McLachlin Court 2000–2004" (2006) 37 Ottawa L. Rev. 3; and Peter McCormick, "Standing Apart: Separate Concurrence and the Modern Supreme Court of Canada 1984–2006" (2008) 53 McGill L.J. 137.
111. Boldface indicates the judge writing the decision of the Court; underlining indicates unanimous judgment; normal typeface indicates separate concurrence; italics indicates dissent.
112. *Whiten*, *supra* note 101.
113. *Bruker*, *supra* note 64.
114. *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39, [2005] 2 S.C.R. 91 [*Mugesera*].
115. *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 [*Hill*].
116. *Théberge v. Galerie d'Art du Petit Champlain Inc.*, 2002 SCC 34, [2002] 2 S.C.R. 336 [*Théberge*].
117. *Bruker*, *supra* note 64.
118. *Free World*, *supra* note 89.
119. *R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687 [*Ruzic*].
120. *Advance Cutting*, *supra* note 102.
121. *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281 [*Mount Sinai*].
122. *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461 [*ABB*].
123. *Bruker*, *supra* note 64.

Table 12: SCC sets of reasons using largest number of "other" citations: SCC reserved decisions, 2000–2008

Case	"Other" Citations	Judge[111]	Type of Case
Whiten v. Pilot Insurance 2002 SCC 18[112]	22	**Binnie**	insurance, punitive damages
Bruker v. Marcovitz 2007 SCC 54[113]	13	*Deschamps*	marriage, breach of agreement with religious context
Mugesera v. Canada 2005 SCC 40[114]	11	**By the Court**	standards of review, removal for crimes against humanity
Hill v. Hamilton-Wentworth 2007 SCC 41[115]	10	*Charron*	torts, negligence, duty of care
Théberge v. Galerie Petit-Champlain 2002 SCC 34[116]	8	**Binnie**	copyright; ownership of copies
Bruker v. Marcovitz 2007 SCC 54[117]	8	**Abella**	marriage, breach of agreement with religious context
Free World v. Électro Santé 2000 SCC 66[118]	7	**Binnie**	intellectual property, patent infringement
R. v. Ruzic 2001 SCC 24[119]	6	**LeBel**	defence of compulsion by threats [Ch]
R. v. Advance Cutting 2001 SCC 70[120]	5	**LeBel**	labor unions, competency certificates [Ch]
Mount Sinai Hospital v. Quebec 2001 SCC 41[121]	5	Binnie	judicial review, ministerial discretion
ABB v. Domtar 2007 SCC 50[122]	5	**LeBel & Deschamps**	sales, damages, limitation of liability

Table 12 lists the cases with the largest number of citations to "other" authority—this time, the top 11 because of the three-way tie for ninth. Not surprisingly, given the lower number of these citations in the overall caseload, the cut-off point for the list is much lower. Justices Binnie, LeBel and Deschamps appear on the list the most often. One case (*Bruker*)[123] makes the list twice, first for Justice

Deschamps' dissent, then for Justice Abella's majority reasons. Private law cases dominate the list, although there are two *Charter* cases (as many as for American citations, more than for English) as well as another "standards of review" case. Eight of the 11 are decisions of the Court, and four are unanimous (one being a "by the Court" decision); only three are minority reasons (two of them dissents), written by three different judges.

Overall, these lists confirm the notion that English, American and other citations are being driven by different considerations and embody different dynamics. There are only three cases (*Whiten*,[124] *Advance Cutting*,[125] and *Non-Marine Underwriters*[126]) that appear on as many as two of the lists, and none that appear on all three. All three lists confirm the primacy of private law cases in the practice of foreign citation; and they also confirm the leading role of Justice Binnie, although this is most pronounced for American citations. Finally, they confirm the notion that majority and unanimous decisions of the Court (rather than minority reasons) are the primary vehicles for the importation of foreign judicial ideas, although this is least true of American citations.

X. Conclusion

In this paper, I have looked at the citation of "foreign" (that is to say, non-Canadian) authority by the SCC. The citation of this sort of authority is an established part of Supreme Court practice—it accounts for just over 10 percent of all citations to judicial authority, and occurs in about half of all reserved decisions. However, there are some problems with the best way to describe the English citations that make up more than half of this body of precedent: first, because an English quasi-court (the JCPC) was Canada's final court of appeal until 1949; and second, because many English judicial decisions are an integral part of the English common law that was formally adopted as a basic element of Canadian law. The actual impact of "truly foreign" precedent may therefore be somewhat less than the raw numbers suggest.

An earlier study[127] found that the practice of foreign (the focus was more specifically on American) citations was fairly widespread, with a majority of the members of the Court doing so with comparable frequency at a level that suggested ongoing familiarity. For the current Court, this critical mass has vanished. Justice

124. *Whiten*, *supra* note 101.
125. *Advance Cutting*, *supra* note 102.
126. *Non-Marine Underwriters*, *supra* note 85.
127. McCormick, "American Citations," *supra* note 55.

Binnie cites foreign authority at least twice as often as any of his colleagues, and his predominance extends over all three of the sub-categories of foreign citation (English, American, and "other"). Moreover, the frequency of foreign citation is lower for the recently appointed members of the Court than it is for either the judges they replaced or the judges who have served the whole period since January 1, 2000. This suggests that the rates of foreign citation are more likely to decline than to increase over the next few years.

Perhaps the failure to find the incorporation (or at least the careful consideration) of foreign ideas is simply the consequence of looking in the wrong place. The last few decades have seen a weakening of the notion of precedent, such that the Supreme Court is now willing on occasion bluntly and candidly to reverse itself and to renounce earlier doctrine; in a sense, all precedent is persuasive now, and none is binding (which is not to deny that precedent from some sources is generally more persuasive than others). At the same time, the Court has abandoned its pre-1970 indifference to legal periodicals and now regularly cites these sources in much the same way that it uses prior judicial decisions. Perhaps this is a better place to look for the modern transmission of judicial ideas.

Bale[128] has looked at the Supreme Court's citation of legal periodical scholarship for a period that includes almost all of the Dickson Court, and another article[129] looked at half a dozen years of the Lamer Court. On Bale's findings, the Dickson Court cited legal periodicals 80 times a year,[130] and 37 percent of these citations were to non-Canadian journals; on my earlier findings, the Lamer Court cited legal periodicals 175 times a year, and 40 percent of these were to non-Canadian journals. But the current McLachlin Court cites legal periodicals less than 100 times a year, and only 27 percent are to non-Canadian sources. Citations to legal periodicals today are much less common than citations to judicial authority (1600 per year); they are much less frequent than they were a decade ago; and the proportion of foreign citations within the mix has fallen by a third.

For judicial citations and legal periodical citations alike, the patterns do not support the recent emphasis in the literature on the emerging global community of judges, allegedly accompanied by a rising level of transnational citation of judicial authority. The rates for citation of American and "other" judicial authority are similar

128. Gordon Bale, "W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada" (1994) 19 Queen's L.J. 36.

129. McCormick, "Lamer Court," *supra* note 18.

130. Bale's total numbers, and his discussion of their significance, is based on an eight-year period including the first three years of the Lamer Court; using the numbers from his Table 1 on page 56, I have recalculated averages and percentages for the five Dickson Court years.

to those of the 1950s and 1960s. There was a sharp rise in American citations around 1990, coincident with the rising importance of the new *Charter*. However, when applied to a wider variety of legal issues, this was not sustained, such that it should be seen as a temporary spike rather than a new trend—aberration rather than normalisation. A spike of interest on the part of the Lamer Court in the citation of legal periodicals in general, and of foreign legal periodicals as a major element in the mix, has likewise not been sustained. If a single label captures the long-term evolution of SCC citation patterns, it would be "nationalism" (or perhaps the even more pointed "decolonization"); for every Chief Justiceship since the end of appeals to the JCPC, English citations have fallen and Canadian citations (especially but not only to the decisions of the SCC itself) have risen.

Some commentators have suggested that the level of foreign citation correlates with the presence of legal controversy manifested by judicial disagreement, especially by the proliferation of fragments on the Court. The Canadian patterns do not show any strong support for this suggestion. At most, English citations are lower, and American citations higher, for the extreme form of judicial disagreement which results in a plurality decision, in which there is not a majority of the panel behind any single statement of reasons. However, these decisions are so much less common than they used to be (barely two per year) that they cannot support a strong conclusion. Despite the fact that much of the literature emphasizes the importance of transnational authority in the context of the rights jurisprudence that is becoming such an important element of modern judicial power, foreign citations by the SCC are at their lowest in *Charter* cases and at their highest (by far) for the more traditional area of private law.

Foreign citations by the Supreme Court must be dis-aggregated into the three sub-categories, each of which can be described in a different way. English authority provides the most numerous set of non-Canadian citations, but it has been falling steadily for a number of decades and is barely a shadow of what it once was. American authority rose sharply in the early *Charter* era, but has now fallen back to its modest pre-*Charter* levels, these references failing to reflect more recent American jurisprudence. Citations of the decisions of other countries are much more modest, only slightly more frequent than they were 50 years ago. If we take the "international community of national high court judges" absolutely at face value—that is, if we limit consideration to decisions of national high courts or comparable courts that have been handed down since the slightly arbitrary date of 1990—then we are really looking at the modest total of 178 such citations[131] rather than the initially more impressive 1500 from Table 1.

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131. Drawn roughly equally from England (59), from the United States (50) and the rest of the world (69).

In this first decade of the twenty-first century, Justice Laskin's end-of-the-appeals rallying call of a law "by and for Canadians"[132] is still by far a more useful description of our Supreme Court's performance than Anne-Marie Slaughter's talk of an emerging transnational community of judges.[133] The globalization of law may be coming, but we are still waiting.

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132. Laskin, "Final Court," *supra* note 26 at 1059.

133. Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44 Harv. Int'l L.J. 191.