Foreign Influenced? The Supreme Court of Canada's Reliance on Foreign Jurisprudence

Myriam Seers, Melody Burke and Emily Stewart[1]

I. INTRODUCTION

> *The vitality of a culture is in its capacity to assimilate foreign influences. The culture that's defensive and closed condemns itself to decadence.*
>
> *Spanish poet Juan Goytisolo*

In contrast:

> *Against the insidious wiles of foreign influence . . . the jealousy of a free people ought to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.*
>
> *George Washington, cited in a 2019 tweet by former FBI Director James Comey*

The interconnectivity of today's world is unprecedented. Governments, businesses and people communicate across borders constantly, with relatively few impediments. Governments increasingly look to each other's approaches in informing their policy decisions. A large and growing number of businesses operate seamlessly across borders. Technology has diminished the barriers associated with physical distance, and rendered possible an unprecedented degree of communication and information flow across borders. At the same time, the fear of the "other" continues to fuel nationalist and protectionist fervour around the world.

The question that arises in this context is whether, like other institutions, our Canadian courts have been influenced by foreign courts' decisions as they shape and apply to Canadian law. In what contexts have our courts done so? How do they use foreign jurisprudence? And most importantly, should they?

In partial answer to these questions, this article provides a survey of the decisions of the Supreme Court of Canada (the "Court") from the latter half of 2008 to July 2020, which rely on foreign jurisprudence. A recent example, as of the time of writing, is the Court's judgment in *Nevsun Resources Ltd. v. Araya*.[2]

---

[1] Myriam Seers and Melody Burke practice in the litigation and dispute resolution group, and Emily Stewart in the corporate group, in the Toronto office of Torys LLP. We gratefully acknowledge the helpful comments we received from Justice Todd Archibald and Gib van Ert as we prepared this article. Any errors or omissions are our own.

[2] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (S.C.C.) [*Nevsun*].

The issues were whether the act of state doctrine forms part of Canadian law, and whether customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity can ground claims for damages under Canadian law. In answering those questions, the majority and both dissenting judgments made extensive reference to foreign jurisprudence. They accepted the reasoning from some of the foreign cases, and rejected that of others.

This survey demonstrates that the Court has made extensive use of foreign jurisprudence over this time period for a variety of purposes, which can be summarized into the following categories: (1) to align Canadian law with that of other jurisdictions; (2) to confirm that existing Canadian law remains good policy; (3) to apply existing legal principles to novel fact patterns, that have been considered in the foreign jurisdiction; (4) to explain and flesh out existing legal doctrines, including their historical development and purpose; and (5) to interpret the same international treaties or identical or similar statutes.

Where the Court has rejected the use of foreign jurisprudence, it has usually done so because: (1) the Court disagrees with the policy underlying the foreign court's approach; (2) the Court considers that Canada does not need the doctrine adopted by the foreign court or that existing Canadian legal principles are sufficient; or (3) the foreign legal system or statutory regime is not sufficiently comparable, such that it would not be appropriate to adopt the foreign court's approach.

Perhaps unsurprisingly, the Court relies most often on decisions from the United Kingdom (the "U.K."), the United States (the "U.S."), Australia and New Zealand, and France for civil law matters. But not exclusively. The list of jurisdictions on whose decisions the Court has relied is long and varied, and includes Ireland, South Africa, Hong Kong, Singapore, Belgium, the Netherlands, Switzerland, Germany and Israel, as well as the decisions of international courts such as the International Court of Justice (the "ICJ"), the International Criminal Court (the "ICC"), the European Court of Justice (the "ECJ") and the European Court of Human Rights (the "ECHR").[3]

In this article, we address the prior research that has been done on the topic of the use of foreign jurisprudence by Canadian courts, and explain the methodology that we employed to identify the cases in which the Court has relied on foreign jurisprudence. The balance of the article is divided by area of law, and explores for each area the Court's reliance on foreign cases.

---

[3] We recognize that decisions of international courts such as the ICJ are not "foreign" in the same sense as the decisions of the domestic courts of foreign states, in particular to the extent that those decisions interpret international law that also forms part of Canadian law. However, since those decisions emanate from courts outside of Canada, we have included them in our analysis.

II. EXISTING RESEARCH

Literature on the use of foreign jurisprudence in Canadian courts does exist but its scope is varied. Given the great number of Canadian decisions that exist in which foreign law is cited, many authors have focused on a specific subject-matter area or a specific level of court. For example, in his treatise *Using International Law in Canadian Courts*, Gib van Ert examined the use of foreign jurisprudence in interpreting and applying international law.[4] Intellectual property is another area in which the use of foreign case law by Canadian courts has been investigated.[5]

Another common approach for observing the trends in Canada with respect to foreign case law is by looking specifically at its use by the country's highest court, the Supreme Court of Canada. There have been empirical studies exploring the Court's use of foreign jurisprudence in relation to constitutional law,[6] and more narrowly, the *Charter of Rights and Freedoms*.[7] Peter McCormick has thoroughly investigated American citations at the Court.[8] He also conducted an empirical study of all the Court's foreign judicial citations from 2000 to 2008.[9]

Analyses of the use of foreign jurisprudence by Canadian courts, over various time periods and covering disparate subject matters, have yielded a variety of results and generated diverging conclusions. Some authors have concluded that Canadian courts have indeed begun to rely increasingly on foreign decisions. Randy Ai, writing in 2008, concluded that the Court, faced with the option to either "close ranks and concentrate only on the national experience" or to

---

4 Gib van Ert, *Using International Law in Canadian Courts* (2d) (2008), Irwin Law Inc.

5 Myra J. Tawfik, "No Longer Living in Splendid Isolation: The Globalization of National Courts and the Internationalization of Intellectual Property Law" (Spring 2007), 32 Queen's L.J. 573.

6 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)", Mads Andenas and Duncan Fairgrieve (Eds.), *Courts and Comparative Law* (September 2015), Oxford University Press, Oxford; Ran Hirschl, "Constitutional Renewal: Comparative Lessons for Canada" (Fall 2015), 41 Queen's L.J. i.

7 Bijon Roy, "An Empirical Survey of Foreign Jurisprudence and International Instruments in *Charter* Litigation" (Spring 2004), 63 U.T. Fac. L. Rev. 99.

8 Peter McCormick, "The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview" (1997), 8 SCLR (2d) 527; Peter McCormick, "American Citations and the McLachlin Court: An Empirical Study" (2009), 47 Osgoode Hall L.J. 83.

9 "Waiting for Globalization: An Empirical Study of the McLachlin Court's Foreign Judicial Citations" (2009-2010), 41 Ottawa L. Rev. 209. See also: Randy Ai, "The Use of Foreign Jurisprudence by the Supreme Court" (December 2008); Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (2013).

"readily accept the transfer of legal ideas and the opportunities of transnational legal discourse", had opted for the latter option.[10] Similarly, Stephen Clarke, writing in 2010, concluded that although "foreign law does not appear to have ever played a major role in the development of Canadian jurisprudence", statistics offered some substantiation that Canadian judges have consistently shown an interest in American law, although they have been more influenced by English law.[11]

Other authors have concluded that the use of foreign jurisprudence was not as great as expected. Writing in 2009, Peter McCormick's research "confirm[ed] previous academic findings that the use of American citations have been modest, with a strictly contained impact, and thus casts doubt on the notion of a globalizing transnational judicial community."[12] In 2010, the same author concluded that in none of three categories of foreign jurisprudence — English, American and "everything else" — could the "expanding globalization" thesis be sustained.[13]

Peter McCormick's research also demonstrated that, to the extent non-Canadian authority was cited, this was a practice of a single member of the Court (Justice Binnie), rather than a more widespread practice of the Court as a whole.[14] In a survey of the Court's *Charter* decisions from 1998 to 2003, Bijon Roy found that although the Court cited foreign jurisprudence in 34 cases, it followed foreign jurisprudence only once.[15]

Still others acknowledged the Court's use of foreign jurisprudence, but concluded that it was mostly used to legitimize (or support) the Court's analysis. Writing in 2009, former justice of the Court Michel Bastarache opined that "judicial borrowing in Canada remains primarily subservient to the domestic jurisprudence" and that "[t]he logic employed by other courts provides guidance to Canadian courts rather than precedents to be followed."[16]

Authors in other jurisdictions have conducted similar analyses of their own courts' use of foreign jurisprudence.[17] A review of this existing body of research

---

[10] Randy Ai, "The Use of Foreign Jurisprudence by the Supreme Court" (2008), available online at: < http://www.thecourt.ca/714/ > .

[11] Stephen F. Clarke, "The Impact of Foreign Law on Domestic Judgments: Canada" (March 2010), available online at: < https://www.loc.gov/law/help/domestic-judgment/canada.php > .

[12] Peter McCormick, "American Citations and the McLachlin Court: An Empirical Study" (2009), 47 Osgoode Hall L.J. 83.

[13] Peter McCormick, "Waiting for Globalization: An Empirical Study of the McLachlin Court's Foreign Judicial Citations" (2009-2010), 41 Ottawa L. Rev. 209 at 210.

[14] *Ibid*. at 228.

[15] Bijon Roy, "An Empirical Survey of Foreign Jurisprudence and International Instruments in *Charter* Litigation" (Spring 2004), 63 U.T. Fac. L. Rev. 99.

[16] Michael Bastarache, "How Internationalization of the Law Has Materialized in Canada" (2009), 59 U.N.B. L. J. 190.

[17] See *e.g*. The Law Library of Congress, "The Impact of Foreign Law on Domestic

suggests that there is a need to update the research to analyze the Court's use of foreign jurisprudence from the latter half of 2008 onward. There is also a need for analysis of the various subject matters that have given rise to the Court's use of foreign jurisprudence.

III. METHODOLOGY

Building on the existing research, our research and analysis focused specifically on the decisions of the Court issued from July 2008 to July 2020, in which non-Canadian jurisprudence was cited. This date range was selected to build upon Peter McCormick's research, which analyzed decisions from 2000 to the first half of 2008.[18] We chose to identify all decisions which cite foreign jurisprudence, rather than focusing on one particular subject area, in order to comprehensively identify the areas of law in which the Court has cited foreign jurisprudence.

To create our data set, we reviewed each judgment issued by the Court between July 1, 2008 and July 31, 2020, published on the Court's website.[19] For each judgment, we reviewed the section listing cases cited by the Court or the majority and determined whether any foreign cases were cited. If no foreign case was cited, we removed the judgment from the data set.

We defined foreign jurisprudence as any decision of a court or other judicial organ that is not located in Canada. We included the decisions of international courts such as the ICJ and the ICC, even though those decisions are not "foreign" to Canada in the same sense as the decisions of the domestic courts of foreign states are, given that their interpretations of international law are authoritative.[20] We felt that these decisions nevertheless merited inclusion, since the Court's treatment of, and deference to, the decisions of international courts is equally of interest as its treatment of the decisions of foreign courts.

We considered the decisions of courts of the U.K., Australia, New Zealand and other Commonwealth countries to be foreign jurisprudence for the purpose of our analysis. These are arguably less "foreign" than the courts of other states, given the shared legal heritage amongst Commonwealth countries, which is reflected in the frequency with which the Court cited cases from those jurisdictions. We aimed to analyze the Court's reliance on all jurisprudence

---

Judgments" (2010); Christopher Roberts, *Foreign Law?: Congress v. The Supreme Court* (2014), LFB Scholarly Publishing LLC; Petra Butler, "The Use of Foreign Jurisprudence in New Zealand Courts" (2014), 4 VUWLRP 123.

[18] Peter McCormick, "Waiting for Globalization: An Empirical Study of the McLachlin Court's Foreign Judicial Citations" (2009-2010), 41 Ottawa L. Rev. 209, at 215.

[19] Supreme Court of Canada, "Supreme Court Judgments", decisia by Lexum, available online at: < https://decisions.scc-csc.ca/scc-csc/scc-csc/en/nav_date.do > .

[20] See *Nevsun* at paras. 95-97, in which Justice Abella confirmed that public international law is not to be treated as "foreign law", but rather as part of Canadian law.

emanating from sources outside Canada, and therefore it was important to include jurisprudence from Commonwealth countries. However, with respect to U.K. jurisprudence, we considered it important to focus on the Court's reliance on "modern" cases that are no more binding on Canadian courts than are the decisions of the courts of any other state, rather than older U.K. cases that stem from the legacy of reception of the common law and from a time when appeals to the Privy Council from Canadian decisions were still available. We selected 1949 as a "cut-off" date, which is the date by which all appeals to the Privy Council had been abolished. Therefore, if the only foreign jurisprudence cited in a judgment was U.K. jurisprudence from 1949 or earlier, that judgment was not included in our data set.

If one or more foreign cases was cited, we included the judgment in a chart that identified (1) the citation for the foreign case, (2) the jurisdiction of origin, (3) the area of law involved, (4) the utilization of the foreign case (i.e., did the Court rely on the foreign case, use the foreign case to support its own conclusions, or reject the foreign case), and (5) the citation of the foreign case by the majority's reasons, concurring reasons, or dissenting reasons. Minority reasons (dissents or concurrences) were only reviewed for foreign jurisprudence if the majority decision also cited foreign jurisprudence. Following this approach, we analyzed a total of **143** judgments.

We then organized the judgments in which the Court relied on foreign cases into categories based on the area of law involved, and analyzed, for each area of law, the nature and extent of the Court's reliance on foreign jurisprudence.

IV. THE SUPREME COURT'S RELIANCE ON FOREIGN JURISPRUDENCE BY AREA OF LAW

The areas of law in which the Court has relied on foreign jurisprudence during the period under review are as follows:

1) international law and international human rights law;
2) *Canadian Charter of Rights and Freedoms* and Canadian human rights law;
3) constitutional law (non-Charter);
4) private international law;
5) torts;
6) contracts;
7) equity;
8) administrative law;
9) employment law;
10) criminal law;
11) evidence;
12) statutory interpretation;

13) civil procedure and courts.

The balance of this article analyzes the Court's reliance on foreign jurisprudence systematically under the rubric of each of these areas of law.[21]

1. International Law and International Human Rights Law

It should come as no surprise that the Court has relied extensively on foreign jurisprudence in considering and deciding questions of international law, including international human rights law. By their very nature, the interpretation and application of international law involves questions that transcend Canadian borders. When tasked with interpreting and applying principles of international law, it makes sense that the Court would look to the decisions of courts outside of Canada that may have interpreted and applied those same principles. As Gib van Ert posited in *Using International Law in Canadian Courts*, "it is eminently desirable that Canadian courts make use of relevant decisions of foreign and international courts in determining international legal questions."[22]

As van Ert explained in his text, judicial decisions in international law are not strictly binding on anyone but the parties. In a similar vein, they are not binding on the Canadian courts that consider them in the same precedential way appellate decisions are, but they cannot be safely disregarded by Canadian courts either. In Chapter 8, van Ert highlighted how the Court in *Mugasera v. Canada (Minister of Citizenship and Immigration)*[23] marked an interesting shift at the Court level — it took "the unusual step of partially overruling one of its own decisions so as to accord better with subsequent international jurisprudence on the elements of a crime against humanity," thus making it clear that foreign and international jurisprudence were not to be ignored, despite their non-binding (in terms of our familiar view of precedent) nature.[24]

In the decade of decisions that we reviewed, the Court cited the decisions of foreign courts and international courts (such as the ICJ and the ECHR) in several instances to deal with principles of international law. Most of these decisions involved the application of customary international law or the interpretation of international treaties. In the one decision that did not involve those issues, *World Bank v. Wallace*, the Court made extensive use of foreign

---

[21] While we have made every effort to be comprehensive, we were not able to include every single decision in which foreign jurisprudence was cited.

[22] Gib van Ert, *Using International Law in Canadian Courts* (2d) (2008), Irwin Law Inc. at 281.

[23] *Mugasera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 (S.C.C.) [*Mugasera*].

[24] Gib van Ert, *Using International Law in Canadian Courts* (2d) (2008), Irwin Law Inc. at 280.

cases regarding the "inviolability" of archives of international organizations from document production orders.[25]

(a) The *Nevsun* decision and customary international law

In its February 2020 decision in *Nevsun*, the Court made extensive use of foreign case law to justify its conclusion that customary international law forms a part of the common law, but also rejected the foreign approach to the act of state doctrine.

In *Nevsun*, three Eritrean workers claimed they were subjected to violent, cruel, inhuman, and degrading treatment while working at a mine in Eritrea owned by a Canadian company, Nevsun Resources Ltd. The workers started class proceedings in British Columbia that included damages for breaches of customary international law prohibitions and for breaches of domestic torts. Nevsun brought a motion to strike the pleadings on the basis of the act of state doctrine, which precludes domestic courts from assessing the sovereign acts of a foreign government. Nevsun also argued that the claims based on customary international law should be struck because they had no reasonable prospect of success.

Both the British Columbia Court of Appeal and the majority of the Court agreed with the chambers judge's dismissal of Nevsun's motion to strike. All three sets of reasons given at the Court level cited foreign case law in their analyses of the application of the act of state doctrine and the availability of a right of action at common law for a breach of customary international law that took place abroad.

Justice Abella, while writing for the majority, began her analysis with the history of the act of state doctrine in England and briefly canvassed the relevant cases from Australia. She noted that both jurisdictions continue to reaffirm and reconstruct the foreign act of state doctrine.[26] Acknowledging that some of the English common law cases which are now recognized as forming the basis of the doctrine had been received into Canadian law, the majority ultimately found that Canadian jurisprudence had since addressed the principles underlying the doctrine within its conflict of laws and judicial restraint jurisprudence, with no attempt to unite them under the act of state doctrine. The majority clarified that "[t]o now import the English act of state doctrine and jurisprudence into Canadian law would be to overlook the development that its underlying principles have received through considered analysis by Canadian courts" and concluded that the "doctrine is not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence are a bar to the Eritrean workers' claims."[27]

---

[25] *World Bank v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207 (S.C.C.) [*World Bank*].
[26] *Nevsun* at paras. 28-44.
[27] *Ibid.* at paras. 58-59.

In her analysis of the availability of a right of action for breach of customary international law, Justice Abella placed less focus on foreign jurisprudence to reach the conclusion that it forms part of Canadian law. She cited many international legal sources, including foreign and international cases, to explain what qualifies as a norm of customary international law.[28] However, in her analysis of whether customary international law is part of the common law and gives rise to a private right of action, she relied mainly on Canadian cases and on academic articles.[29] The one exception was her reliance on English jurisprudence (among other sources) to conclude that "customary international law is automatically adopted into domestic law without any need for legislative action" and that the "adoption of customary international law as part of domestic law by way of automatic judicial incorporation can be traced back to the 18th century."[30]

The two sets of dissenting reasons also relied on foreign jurisprudence, albeit for different reasons. In their joint reasons dissenting in part, Justices Brown and Rowe used foreign case law to guide their reasoning as to why they disagreed with the majority's use of customary international law. They relied on a 2007 decision of the U.K. House of Lords to support their conclusion that a rule of customary international law may need to be adapted to fit the differing circumstances of common law.[31] They also relied on a case from the U.S. to support their view that states are free to meet their international obligations according to their own domestic institutional arrangements and preferences, and that customary international law does not govern the form in which obligations must be met.[32]

In the other dissenting decision by Justice Côté (Justice Moldaver concurring), foreign cases were directly relied upon in two instances to support a finding: that a court cannot abandon the test for international custom in order to recast international law into a form more compatible with its own preferences[33] and that the choice of law branch of the act of state doctrine establishes a general rule that a foreign state's domestic law will be recognized and normally accepted as valid and effective.[34] Justice Côté also used cases from the U.K. and the U.S. to provide cautionary examples. She cited two decisions of the U.K. House of Lords — *Oppenheimer v. Cattermole* and *Kuwait Airways Corp. v. Iraqi Airways Co. (Nos. 4 and 5)* — to identify the built-in exception

---

[28] *Ibid.* at paras. 77-82.
[29] *Ibid.* at paras. 85-132.
[30] *Ibid.* at paras. 86-87.
[31] *Ibid.* at paras. 175-176.
[32] *Ibid.* at para. 197.
[33] *Ibid.* at para. 269, citing the English case *Jones v. Ministry of Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.) at 298 [A.C.], per Lord Hoffman.
[34] *Nevsun* at para. 279, citing the English case *Belhaj v. Straw*, [2017] UKSC 3, [2017] A.C. 964 (S.C.) at paras. 35, 121-122.

mechanisms in the act of state doctrine, i.e. the public policy exception.[35] She further cited the U.S. decision in *Presbyterian Church of Sudan v. Talisman Energy, Inc.* as "an example of how private litigation can interfere with the responsibility of the executive for the conduct of international relations."[36]

Nevsun was not the only example of the Court looking beyond Canadian case law to determine questions involving customary international law. It also did so in *Kuwait Airways Corp. v. Iraq*[37] and *Kazemi Estate v. Islamic Republic of Iran*,[38] both of which involved the doctrine of state immunity, a rule of customary international law prohibiting national courts from determining the merits of a claim against a foreign state or its agents. In Canada, this rule and the exceptions to it are codified in the *State Immunity Act*.[39]

In *Kuwait Airways*, the Court observed that the U.S. and the U.K. have legislation similar to the *SIA*, and explored how in these jurisdictions, state immunity is "limited to true sovereign acts, with the exceptions being used to confirm an interpretation that corresponds to the restrictive theory of state immunity that has been developed in public international law."[40] This supported the Court's unanimous finding that Iraq could not rely upon its state immunity since its actions fell squarely within the commercial activity exception in section 5 of the *SIA*.[41]

The direction from foreign jurisprudence was not so clear-cut in *Kazemi*. In its decision, the Court considered case law from several national courts and international tribunals for principles of international law to determine whether the *SIA* permitted victims of torture and their families to bring civil claims against states and government officials responsible for the torture.

The majority of the Court ruled that the exceptions to sovereign immunity set out in the *SIA* were exhaustive and any change would need to be made by the legislature, finding that "the peremptory norm prohibiting torture has not yet created an exception to state immunity from civil liabilities in cases of torture committed abroad."[42] The majority distinguished decisions of U.S. courts stemming from similar legislation by noting differing statutory language and the

---

35 *Nevsun* at para. 280, citing *Oppenheimer v. Cattermole* (1975), [1976] A.C. 249 (U.K. H.L.) and *Kuwait Airways Corp. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, [2002] 2 A.C. 883 (H.L.).

36 *Nevsun* at para. 299, citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846 (S.D. N.Y.).

37 *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571 (S.C.C.) [*Kuwait Airways*].

38 *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 (S.C.C.) [*Kazemi*].

39 *State Immunity Act*, R.S.C. 1985, c. S-18 [*SIA*].

40 *Kuwait Airways* at paras. 14, 25-30.

41 *Ibid.* at para. 35.

42 *Kazemi.*

existence of other legislation directly enacted to address victims of torture.[43] Relying on several ICJ decisions and subsequent approval of those findings from the ECHR, the High Court of New Zealand, and the House of Lords, the majority cemented its view that there was no exception to state immunity claims in situations of torture.[44] In her dissent, Justice Abella found that the doctrine of sovereign immunity is not entirely codified under the *SIA*, and therefore the plaintiff's claims fell outside the scope of the *SIA* and the proceedings were not barred by immunity *ratione materiae*.[45] In reaching this conclusion, Justice Abella relied in part on jurisprudence from the U.K. and the U.S.,[46] as well as ICJ decisions.[47]

(b) Interpreting international treaties

Looking to foreign case law is particularly appropriate when a court is interpreting international treaties. In van Ert's words, it is especially desirable for courts to have regard to foreign jurisprudence to interpret multilateral treaties to which Canada is a party because "foreign judgments arising from the same treaty will be helpful not only in elucidating its meaning but also in ensuring, wherever possible, that it is accorded the same meaning in each of the state parties."[48]

Six Supreme Court decisions from our review period relied extensively on foreign and international jurisprudence in interpreting an international treaty: *Office of the Children's Lawyer v. Balev*.[49] *Németh v. Canada (Justice)*,[50] *Ezokola v. Canada (Citizenship and Immigration)*,[51] *Peracomo Inc. v. Telus Communications Co.*,[52] *Thibodeau v. Air Canada*[53] and *Febles v. Canada (Citizenship and Immigration)*.[54]

---

43 *Ibid.* at paras. 91-93, 106-107.

44 *Ibid.* at paras. 154-157. Another case in which the Court (quite naturally) relied on ICJ jurisprudence regarding state immunity is *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866 (S.C.C.) at para. 27.

45 *Kazemi* at para. 231.

46 *Ibid.* at paras. 201, 206-207, 209, 211.

47 *Ibid.* at paras. 203-205, 213.

48 Gib van Ert, *Using International Law in Canadian Courts* (2d) (2008), Irwin Law Inc. at 280-281.

49 *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398 (S.C.C.) [*Balev*].

50 *Németh v. Canada (Justice)*, 2010 SCC 56, (*sub nom.* Németh v. Canada (Minister of Justice)) [2010] 3 S.C.R. 281 (S.C.C.) [*Németh*].

51 *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678 (S.C.C.) [*Ezokola*].

52 *Peracomo Inc. v. Telus Communications Co.*, 2014 SCC 29, (*sub nom.* Peracomo Inc. v. TELUS Communications Co.) [2014] 1 S.C.R. 621 (S.C.C.) [*Peracomo*].

53 *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 (S.C.C.) [*Thibodeau*].

In *Balev*, the Court needed to interpret an international treaty in the context of a custody dispute. Specifically, the Court needed to assess which of the different approaches to the determination of "habitually resident" in Article 3 of the *Convention on the Civil Aspects of International Child Abduction*[55] applied in Canada. Both the majority and the dissenting reasons turned to foreign case law. Chief Justice McLachlin (as she then was), writing for the majority, even highlighted the need for consistency and cautioned that Canadian courts should give serious consideration to decisions by the courts of other contracting states with regards to treaty interpretation to avoid frustrating the harmonizing purpose behind the treaty.[56] With this in mind, the majority adopted a multi-factored hybrid approach in keeping with the "clear trend" of the relevant jurisprudence, pointing to recent decisions from the ECJ, the U.K., Australia, New Zealand and the U.S,[57] rather than relying on the approach in the existing Canadian jurisprudence for domestic cases dealing with the same issue. The dissent disagreed, and would have adopted the parental intention approach rather than the hybrid approach adopted by the majority.[58] In reaching this conclusion, the dissent cited several American cases to outline the parental intention approach,[59] identified case law from both the U.S. and the U.K. that suggested even those courts applying the hybrid approach afforded considerable weight to parental intent[60] and distinguished the facts in the other foreign jurisprudence relied on by the majority.[61]

In *Németh*, the Court was tasked with interpreting the 1951 United Nations *Convention Relating to the Status of Refugees* ("*Refugee Convention*") in relation to Canada's *Extradition Act*. In interpreting the thresholds required pursuant to various articles of the *Refugee Convention*, the Court highlighted support for its interpretation found in decisions in the U.K., Australia, and New Zealand, and outright rejected a contrary approach that had emerged in a decision of the U.S. Supreme Court.[62] However, when it came to interpreting an *Extradition Act*, the Court distinguished English and Australian authorities based on the statutory language at play, and instead relied on decisions from the Netherlands and the Swiss Federal Court.[63]

---

54 *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431 (S.C.C.) [*Febles*].
55 *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35.
56 *Balev* at para. 33,
57 *Ibid.* at paras. 50-57.
58 *Ibid.* at para. 111.
59 *Ibid.* at paras. 112-118.
60 *Ibid.* at paras. 136, 140.
61 *Ibid.* at paras. 141-145.
62 *Febles* at paras. 100-101.
63 *Nemeth* at paras. 92-95.

Both *Ezokola* and *Febles* also involved the *Refugee Convention*, albeit in very different contexts that did not involve extradition legislation. In *Ezokola*, in order to determine the application of Article 1F(a) of the *Refugee Convention*, the Court needed to explore the relevant sources of international criminal law for views on the complicity analysis, and found the *Rome Statute* and related International Criminal Court decisions to be the best place to start.[64] In *Febles*, the majority of the Court turned to foreign jurisprudence from the U.K., Australia, New Zealand, the ECJ, Belgium, France and Germany to interpret Article 1F(b) of the *Refugee Convention*. The majority found that "the dominant tide of the jurisprudence" led to an interpretation of the provision that was actually inconsistent with the Court's own previous *obiter* statements and stated that those statements "should no longer be followed", instead adhering to the interpretation supported by a body of foreign case law.[65]

The Court also turned to foreign jurisprudence in *Peracomo* in order to interpret the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, also referred to as the *Warsaw Convention*.[66] The interpretative exercise was fairly straightforward. The Court used English authorities and a decision from the High Court of New Zealand to support the intended fault required under the *Warsaw Convention*, ultimately applying the standard outlined in the foreign jurisprudence.[67]

The exercise was not so simple in *Thibodeau*, because it involved interpreting the *Warsaw Convention* in relation to its successor treaty, the *Convention for the Unification of Certain Rules for International Carriage by Air*, also known as the *Montreal Convention*.[68] The Court acknowledged that in order to properly interpret the *Montreal Convention*, it would be necessary to go back to its predecessor and noted that decisions respecting the *Warsaw Convention* would be helpful in understanding the purposes of the *Montreal Convention*.[69] To clarify the intentions and purposes behind the Articles in question regarding liability and limits on that liability, the majority examined and agreed with analyses of those provisions from a variety of foreign jurisdictions. For instance, in exploring the exclusivity principle at play, the majority identified a "strong

---

64 *Ezokola* at para. 48.

65 *Febles* at paras. 49-59. But see Justice Abella's dissent (Justice Cromwell concurring) at paras. 123-127, where foreign jurisprudence is also used to identify recent approaches to the interpretation of Article 1F that are more generous.

66 *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 137 L.N.T.S. 11 [*Warsaw Convention*].

67 *Peracomo* at paras. 29-35. The majority and the dissent both also turned to foreign case law to interpret "wilful misconduct" in the context of a Canadian insurance statute: see paras. 60, 85-87.

68 *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 U.N.T.S. 309 [*Montreal Convention*].

69 *Thibodeau* at para. 31.

current of jurisprudence" and noted that the "highest courts of the U.K., the U.S., and France have endorsed the exclusivity principle." The majority also cited judicial decisions in Hong Kong, New Zealand, Singapore, South Africa, Germany and Ireland for this same point.[70] While the majority of the Court dismissed a line of jurisprudence coming from the ECJ relating to "standardized damages", this was because the majority considered them to be irrelevant to the issue confronted by the Court, not because the Court rejected the findings in those cases.[71]

2. Charter of Rights and Freedoms and Human Rights Legislation

Given the universal nature of human rights, it is no surprise that the court, on occasion, looked outside Canadian borders for guidance on interpreting *Charter* rights and human rights legislation. Bijon Roy commented in his 2004 article "An Empirical Survey of Foreign Jurisprudence and International Instruments in *Charter* Litigation" that the court's use of foreign jurisprudence in its *Charter* decisions "reflects an open-minded approach that remains receptive to new approaches to universal concepts like human rights, even while remaining strongly grounded in the cultural, historical, and political particularities of Canada's domestic law."[72] The cases in this section reveal that this observation continues to hold true.

In the decisions we reviewed, the Court relied on foreign jurisprudence in connection with its interpretation of a wide variety of *Charter* and statutory human rights, including the rights to life, liberty and security of the person, the rights to freedom of religion and association, the right to freedom from discrimination, the right to be free from unreasonable search and seizure, the right to counsel, the right to a lesser available punishment, and damages for breach of *Charter* rights.[73] While the Court accepted the foreign approach in several cases, in other cases the foreign approach was considered and explicitly rejected.

(a) Life, liberty and security of the person

The Court considered foreign jurisprudence in several cases involving section 7 of the *Charter*, which guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." This section examines the following section 7

---

[70] *Ibid*. at paras. 44-46, 48, 51-57.

[71] *Ibid*. at paras. 80-81.

[72] Bijon Roy, "An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation" (Spring 2004), 63 U.T. Fac. L. Rev. 99.

[73] In addition, Justice Abella relied on cases from the U.S., England and the European Court of Human Rights concerning the protection of journalistic sources in *R. v. Vice Media Canada Inc*., 2018 SCC 53, [2018] 3 S.C.R. 374 (S.C.C.) at paras. 125, 131.

cases: *Carter v. Canada (Attorney General)*,[74] *A.C. v. Manitoba (Director of Child and Family Services)*[75,76] and *India v. Badesha*.[77]

In *Carter*, the landmark decision that reversed the prohibition on physician assisted suicide in Canada, the Court considered foreign law for two purposes. First, the Court used foreign law to demonstrate a changed legal landscape since 1993, when the Court considered the same issue in *Rodriguez v. British Columbia (Attorney General)* and upheld the prohibition.[78] The Court noted that at the time *Rodriguez* was decided, not a single Western jurisdiction had legalized physician assisted suicide. There was, at that time, "substantial consensus in Western countries that a blanket prohibition [was] necessary to protect against the slippery slope."[79] Some jurisdictions have not departed from this view, as demonstrated by case law cited in the *Carter* decision from the U.K. and the U.S., at a federal level.[80] However, the Court chose not to follow these jurisdictions. It found that there was no longer a "substantial consensus" on this issue because, as of 2015, eight jurisdictions had legalized physician assisted suicide: the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, Montana and Colombia. As such, the legal landscape had changed and could be distinguished from the one that existed when *Rodriguez* was decided.

The second way in which the Court used foreign law in *Carter* was as evidence that safeguards can be effective against protecting from the social harms and possible abuse in a system where physician assisted suicide is legal. This allowed for the conclusion that a blanket prohibition was not necessary to protect against the slippery slope. However, the Court also noted that the trial judge cautioned against complete reliance on other jurisdictions: "[w]hile stressing the need for caution in drawing conclusions for Canada based on foreign experience, the trial judge found that "weak inference[s]" could be drawn about the effectiveness of safeguards and the potential degree of compliance with any permissive regime."[81]

---

74 *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.) [*Carter*].

75 *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 (S.C.C.) [*A.C.*].

76 The Court's analysis in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 (S.C.C.) [*Khadr*] also raises section 7 of the *Charter*, however the case considers foreign jurisprudence mainly in considering section 24(1) remedies, so it is discussed in more detail in that section below.

77 *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127 (S.C.C.) [*Badesha*].

78 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.) [*Rodriguez*].

79 *Carter* at para. 47.

80 *Ibid.* at para. 9.

81 *Ibid.* at para. 25.

In *A.C.,* the Court used foreign jurisprudence to interpret the "mature minor" principle. The Court reinforced the Canadian interpretation by showing its alignment with the interpretation of courts in the U.K., the U.S. and Australia. At issue in *A.C.* was a court-ordered blood transfusion on a 14-year-old girl who did not consent to the procedure due to her religious beliefs as a Jehovah's Witness. Section 25(8) of the *Manitoba Child and Family Services Act* allows a court to authorize a medical treatment on a child under the age of 16 when it is in the best interest of that child.[82] The appellant challenged the constitutionality of the provision under sections 2, 7 and 15 of the *Charter*. She argued that the "mature minor" principle should apply and be interpreted in a way that treats the medical decision-making capability of a child with sufficient maturity to understand the procedure and the risks associated with refusal of such procedure, as equal to an adult.

The Court first looked to the history of the "mature minor" principle in the U.K., where it originated, and emphasized that the U.K. did not treat the medical decision-making capacity of a mature minor as equivalent to an adult. The Court also noted that "[t]o date, no court in the U.K. ha[d] allowed a child under 16 to refuse medical treatment that was likely to preserve the child's prospects of a normal and healthy future."[83] The Court reinforced its analysis by showing that the approaches in the U.S. and Australia were in line with its interpretation.

Lastly, in *Badesha*, the Court considered whether the Minister of Justice infringed the section 7 rights of individuals ordered to be extradited to India to face charges for conspiracy to commit murder, in circumstances in which the Indian authorities provided diplomatic assurances with respect to the treatment of the individuals. The Court cited an ECHR decision setting out a list of factors regarding how diplomatic assurances should be considered in deportation cases, which it considered persuasive, although not exhaustive.[84] It also cited other ECHR jurisprudence establishing that the state considering extradition may consider the general human rights situation in the state requesting extradition.[85]

(b) Freedom of religion

The Court also referred to foreign jurisprudence in the context of the freedom of conscience and religion. In addition to *A.C.*, discussed above, the Court also turned outside Canadian jurisprudence in *Alberta v. Hutterian Brethren of Wilson Colony*.[86] In *Hutterian Brethren,* Chief Justice McLachlin, writing for the

---

[82] *Manitoba Child and Family Services Act*, C.C.S.M. c. C80, s. 25(8).
[83] *A.C.* at para. 57.
[84] *Badesha* at paras. 47-51.
[85] *Ibid.* at paras. 44, 61.
[86] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 (S.C.C.) [*Hutterian Brethren*].

majority, looked briefly to foreign law in two circumstances within her analysis of the deleterious effects section of the Oakes test under section1 of the *Charter*. First, she quoted a case from the ECHR when describing the pluralistic context of religion,[87] as did Justice Abella in dissent.[88] Second, she quoted a decision from the U.S. Supreme Court as support for the seriousness of a limit on religious freedom that amounts to state compulsion on matters of belief.[89]

Another example was in *R. v. N.S.*, in which the Court had to determine when, if ever, a witness who wears a niqab for religious reasons can be required to remove it when testifying. The majority quoted a New Zealand case regarding the importance of non-verbal communication during cross-examinations, which had considered the question of whether a witness could testify wearing a burka.[90]

(c) Freedom of association

The Court cited foreign jurisprudence in two cases that involved the freedom of association, protected under section 2(d) of the *Charter* in the context of labour rights. The first was *Saskatchewan Federation of Labour v. Saskatchewan*, where the Court considered Saskatchewan legislation that prohibited striking for employees of essential businesses.[91] Justice Abella, writing for the majority, looked to jurisdictions throughout the world to demonstrate that there is "an emerging international consensus that, if it is to be meaningful, collective bargaining requires a strike."[92] She cited case law from the ECHR and Israel, a journal article on labour law in Germany, and the constitutions of France, Italy, Portugal, Spain and South Africa.[93]

Justice Rothstein and Justice Wagner (as he then was), while dissenting in part, critiqued the majority's reliance on foreign cases and constitutions: "[h]owever, the express inclusion of the right to strike in domestic constitutions and charters other than our own has little relevance to this Court's interpretation of "freedom of association" under section 2(d). If anything, the absence of an express right to strike in the *Charter* — which was enacted subsequent to many of the constitutions cited by the majority — indicates Parliament and the provincial legislatures' intention to exclude such a right."[94]

---

87 *Hutterian Brethren* at para. 90, citing *Kokkinakis v. Greece* (May 25, 1993), Doc. A No. 260-A (European Ct. Human Rights).
88 *Ibid.* at para. 128.
89 *Hutterian Brethren* at para. 91, citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
90 *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 (S.C.C.) at para. 26.
91 *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 (S.C.C.) [*Saskatchewan Federation of Labour*].
92 *Ibid.* at para. 71.
93 *Ibid.* at paras. 71-75.
94 *Ibid.* at para. 158.

The second case was *Mounted Police Association of Ontario v. Canada*, in which the Court cited an American case (in addition to a Canadian case) when discussing the protection of collective bargaining rights under the *Charter*.[95]

(d) Freedom from discrimination

The Court also relied on foreign jurisprudence in interpreting the right to freedom from discrimination, either pursuant to section 15 of the *Charter* or provincial human rights legislation. In two cases, *Kahkewistahaw First Nation v. Taypotat* and *Moore v. British Columbia (Education)* the Court cited the same decision of the U.S. Supreme Court, *Griggs v. Duke Power Co*., which dealt with the discriminatory impact of a facially neutral education requirement in the context of a particular job.[96]

In *Kahkewistahaw First Nation*, the Court considered whether education level was an enumerated or analogous ground under section 15 of the *Charter*.[97] The Court used *Griggs* as an example of when education requirements could have a discriminatory impact in violation of section 15, but found no demonstrated discriminatory impact on the facts of the case before it.[98] In *Moore*, the Court also relied on *Griggs*, for the statement that a practice is discriminatory whether it has an unjustifiable adverse impact on a single individual or systemically on several.[99] The case also cited *Brown v. Board of Education*,[100] another U.S. Supreme Court decision, when discussing the risk of descending into a "separate but equal approach."[101]

Foreign jurisprudence was also considered in *McCormick v. Fasken Martineau DuMoulin LLP*, in which the Court considered whether a partner in a law firm was in an employment relationship with the firm such that he could bring a complaint under the British Columbia *Human Rights Code* alleging age discrimination in the employment context.[102] The Court looked to jurisprudence from the U.S., the U.K., Australia and New Zealand to reinforce its finding that a partnership is not an employment relationship. Courts in each of these

---

95 *Mounted Police Association of Ontario v. Canada*, 2015 SCC 1, (*sub nom.* Mounted Police Association of Ontario v. Canada (Attorney General)) [2015] 1 S.C.R. 3 (S.C.C.) at para. 64 [*Mounted Police Association of Ontario*].

96 *Griggs v. Duke Power Co*., 401 U.S. 424 (N.C. S.C., 1971) [*Griggs*].

97 *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 (S.C.C.) [*Kahkewistahaw First Nation*].

98 *Ibid.* at para. 23.

99 *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 (S.C.C.) [*Moore*] at para. 58.

100 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (Kan. S.C., 1954) [*Brown*].

101 *Moore* at para. 30.

102 *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108 (S.C.C.) [*McCormick*].

jurisdictions have generally found that partnerships are not relationships of employment for the purposes of protective legislation.[103]

(e) Right to be free from unreasonable search and seizure

In several cases dealing with the right to be free from unreasonable search and seizure, protected by section 8 of the *Charter*, the Court cited decisions of the U.S. Supreme Court and other U.S. courts.[104] The Court adopted the U.S. approach in some cases, but explicitly rejected it in others.[105]

In *R. v. Fearon*, Justice Cromwell, writing for the majority, used case law from the U.S. in two places. [106] First, in his discussion of the law enforcement objectives that justify cell phone searches conducted incidental to a lawful arrest, he relied on an American case as an example of a situation where the cell phone was used to evade or resist law enforcement and therefore public safety justified the search.[107] Later, Justice Cromwell considered a categorial exclusion for cell phone searches from the power to search incident to arrest. This categorial exclusion had already been put in place for the non-consensual seizure of bodily samples in *R. v. Stillman*[108] and in the U.S. for cell phone searches in *Riley v. California*.[109] However, Justice Cromwell chose not to follow this approach, because the considerations present in *Stillman* did not apply, and meaningful limits could be put in place to regulate such searches, instead of imposing a blanket exclusion.[110]

The Court in *R. v. Vu* looked to American jurisprudence as support for its finding that it was not necessary to impose search protocols for computer searches. It cited decisions of U.S. courts that had tried implementing such a policy, but that had moved away from this approach because of the difficulty of predicting in advance where files would be placed on a computer.[111]

In *R. v. Chehil*, the Court turned to American jurisprudence in a number of places within its decision.[112] First, the Court relied on several U.S. cases when

---

[103] *Ibid.* at paras. 34-37.

[104] The Court also cited foreign law without any discussion in two cases. *Katz v. United States*, 389 U.S. 347 (1967) at 361, per Harlan J., concurring, was cited in addition to Canadian cases on the reasonable expectation of privacy requirements in *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608 (S.C.C.) at para. 10; *Florida v. Jardines*, 133 S.Ct. 1409 (U.S. Sup. Ct., 2013) was also cited in *R. v. MacKenzie* on the use of sniffer dogs in contexts such as the home where there was a heightened privacy interest.

[105] In addition to the cases discussed below, the concurring judgment of Justice Cromwell in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631 (S.C.C.), quoted *R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), which in turn cited *Beavers v. Haubert*, 198 U.S. 77 (1905) at 87.

[106] *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621 (S.C.C.) [*Fearon*].

[107] *Ibid.* at para. 48.

[108] *R. v. Stillman*, [1997] 1 S.C.R. 607 (S.C.C.).

[109] *Riley v. California*, 134 S.Ct. 2473 (U.S. Sup. Ct., 2014).

[110] *Fearon* at para. 60.

[111] *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657 (S.C.C.) [*Vu* (2013)] at para. 58.

considering the "reasonable suspicion" standard. It did so in finding that a constellation of factors was not sufficient to meet this standard if it only amounted to a generalized suspicion; the constellation of factors must be particularized.[113] Second, the Court found that reasonable suspicion is not the only inference that can be drawn from a constellation of factors; exculpatory or neutral evidence cannot be disregarded. However, the Court relied on American jurisprudence to note that the "obligation of the police to take all factors into account does not impose a duty to undertake further investigation to seek out exculpatory factors."[114] Lastly, the Court looked to American case law to bolster its finding that, in the context of a sniff search, dog reliability is an important factor in determining whether the reasonable and probable grounds exist to justify police action. The Court noted that a similar approach had been taken by the U.S.[115]

Another example of the Court adopting U.S. jurisprudence in a search and seizure case is *R. v. Patrick*, in which the Court cited the U.S. Supreme Court's finding that there is no reasonable expectation of privacy in garbage left at the curbside.[116]

The Court in *R. v. Morelli* relied on U.S. cases concerning the "reasonable grounds to believe" test for obtaining a search warrant.[117] The dissent, written by Justice Deschamps, relied on several U.S. cases to conclude that it is not erroneous to rely on information provided by two police officers on the propensity of child pornography offenders to collect and hoard such materials as part of the factual basis that gives rise to the reasonable and probable grounds for issuing search warrants.[118] Justice Deschamps stated that she agreed with the approach taken by Justice Rehnquist in *Illinois v. Gates* on how to determine whether evidence gives rise to reasonable grounds to believe under the requirements to obtain a warrant.[119] She also cited American case law in concluding that "Canadian and American courts have frequently upheld warrants issued months and even years after the occurrence of the facts relied

---

[112] *R. v. Chehil*, 2013 SCC 49, [2013] 3 S.C.R. 220 (S.C.C.) [*Chehil*].
[113] *Ibid.* at para. 30.
[114] *Ibid.* at para. 34.
[115] *Ibid.* at para. 54.
[116] *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579 (S.C.C.), para. 61 [*Patrick*]. The Court acknowledged that some states have taken a contrary approach. Earlier in the decision, another U.S. Supreme Court decision is cited for the principle that the Fourth Amendment "protects people, not places": para. 14.
[117] *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 (S.C.C.) [*Morelli*]. Another example of the Court citing U.S. jurisprudence in this area is *R. v. MacDonald*, 2014 SCC 3 (S.C.C.), in which the Court cited U.S. Supreme Court authority that the police must harbor reasonable suspicion that a person is armed and dangerous before conducting a search for officer safety reasons: para. 75.
[118] *Morelli* at para. 162.
[119] *Ibid.* at para. 129, citing *Illinois v. Gates*, 462 U.S. 213 (Ill. S.C., 1983).

upon for the search." Justice Fish, writing for the majority, disagreed with this conclusion and distinguished the American case.[120] However, elsewhere in his decision, Justice Fish cited U.S. cases when discussing the permitted inferences that can be drawn from impugned generalizations, because such requirement was "well explained" by the American court.[121]

In *R. v. Cole*, the Court explicitly rejected the American doctrine of third-party consent.[122] At issue in the case was the warrantless search of the accused's work computer. The Crown argued that the search was justified by the third-party consent from the employer. The Court rejected this argument and stated that Canada, unlike the U.S., does not use the doctrine of third-party consent and that such a doctrine is inconsistent with the Court's jurisprudence on first-party consent.[123]

(f) Right to counsel

The Court considered U.S. jurisprudence when addressing the right to counsel under section 10(b) of the *Charter* in *R. v. Sinclair*.[124] The Court rejected the adoption of a Miranda-like regime as found in the U.S. In doing so, the Court stated that section 10(b) must be read in light of other elements of the Canadian context and "adopting procedural protections from other jurisdictions in a piecemeal fashion risks upsetting the balance."[125] In addition, the Court noted several significant differences between the Canadian and American regimes such as the breadth of the meaning of "in custody" and the admissibility of evidence obtained in violation of section 10(b) at trial. Lastly, the Court looked to empirical research on the Miranda warning and found no definitive conclusion on the nature or magnitude of its effects.[126]

(g) Right to a lesser available sentence

In *R. v. Poulin*, the Court considered the interpretation of section 11(i) of the *Charter*, which provides that any person found guilty of an offence has the right to the benefit of the lesser punishment, if the punishment has been varied between the time of commission of the offence and the time of sentencing. The Court interpreted this right as a binary right, meaning that the accused is entitled to the lesser of the punishments that were available on the date of commission and on the date of sentencing. It rejected the interpretation that the right is a global right, pursuant to which the accused would be entitled to a lesser

---

[120] *Morelli* at para. 87.
[121] *Ibid.* at para. 85.
[122] *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34 (S.C.C.) [*Cole*].
[123] *Cole* at paras 74-77.
[124] *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310 (S.C.C.) [*Sinclair*].
[125] *Sinclair* at para. 38.
[126] *Ibid.* at paras. 37-41.

punishment that was available in the interval between commission and sentencing, but not on either of those two dates. In reaching this interpretation, the Court accepted the interpretation by the U.K. Supreme Court of a similar right set out in the *European Convention on Human Rights*, which found the right to be binary.[127]

(h) Damages for breach of *Charter* rights

The Court referred to foreign law in two interesting cases that raise the right to damages for breach of *Charter* rights, pursuant to section 24(1) of the Charter: *Vancouver (City) v. Ward*[128] and *Canada (Prime Minister) v. Khadr*. In *Ward*, Chief Justice McLachlin, writing for the majority, held that three purposes exist for awarding damages for a breach of constitutional rights: compensation, vindication and deterrence. She found that these functions "[we]re supported by foreign constitutional jurisprudence and, by analogy, foreign jurisprudence arising in the statutory human rights context."[129] She relied on authority from the U.S., the U.K. and New Zealand regarding the compensation purpose, from South Africa regarding the vindication purpose, and from Canada, the U.S. and the U.K. regarding the deterrence purpose.[130]

When the Court in *Khadr* addressed the appropriate remedy for a breach of Mr. Khadr's *Charter* rights under section 24(1), the Court relied on a case from the Constitutional Court of South Africa to find that a court is not equipped to determine the diplomatic steps to be taken upon such a breach.[131] The case also relied on U.S. case law in finding that the U.S. military commission regime in place during Mr. Khadr's detention was in violation of fundamental human rights, which explained why the principles of international law and comity that might otherwise preclude application of the *Charter* did not apply.[132]

3. Constitutional Law (Non-Charter)

Outside the context of the *Charter*, the Court looked to foreign law when considering constitutional questions related to parliamentary sovereignty, the division of powers and parliamentary privilege.[133] In these cases, the Court often

---

[127] *R. v. Poulin*, 2019 SCC 47 (S.C.C.) at paras. 76, 106 [*Poulin*]. The Court also distinguished an ECHR decision (also distinguished by the U.K. Supreme Court), that found the right to be a global one, citing differences in the applicable legislation and factual differences: paras. 107-108.

[128] *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 (S.C.C.) [*Ward*].

[129] *Ward* at para. 26.

[130] *Ibid.* at paras. 26-29.

[131] *Khadr* at para. 44.

[132] *Ibid.* at para. 16.

[133] Justice Karakatsanis and Justice Wagner, in their concurring reasons in *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162 (S.C.C.) at para. 50, quoted a decision of the U.S. Supreme Court on the role of the media in ensuring the public can

surveyed the law in several jurisdictions in order to provide background information on the constitutional principle at issue and confirmation that the Canadian approach was in line with others.

In *Reference re Securities Act*, the Court considered the constitutional validity of federal legislation aimed at creating a single Canadian securities regulator. The main issue was whether the subject matter covered by the *Securities Act* fell within the exclusive jurisdiction of the provincial legislature or the federal legislature. In the first part of the decision, the Court noted that it falls within the competence of both legislatures. As support for this statement and as confirmation that an appropriate balance can be struck between the local and national levels, the Court surveyed the law in Australia, the U.S. and Germany by looking at the constitution of each jurisdiction and relevant case law. These jurisdictions have each successfully addressed the balance of power between central and local levels of government in the area of securities regulation and within the limitations of a written constitution.[134]

In 2018, the Court again considered the possibility of a single Canadian securities regulator in *Reference re Pan-Canadian Securities Regulation*.[135] The Court held that the proposed securities regulation system would be permitted under the Constitution because it did not infringe parliamentary sovereignty. The Court looked to the U.K. and Australia in its discussion of parliamentary sovereignty.

Case law from the U.K. was used to highlight the history and importance of the principle. Canada adopted the concept of parliamentary sovereignty from the U.K. but in a more limited way given the qualifications set out in our written constitution, such as the heads of power listed in sections 91 and 92 of the *Constitution*, which limit the legislative jurisdiction of the federal and provincial governments.[136]

The Court later used an Australian case to "clearly exempli[fy]" the rule of parliamentary sovereignty that the executive cannot bind the legislature. The Court also remarked that the same Australian case, *West Lakes Ltd. v. South Australia*,[137] had been cited in two earlier decisions of the Court as support for the same principle.[138] The Court considered the constitutional principle of

---

access information about the courts, in a decision that addresses the open court principle.

134 *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 (S.C.C.) [*Reference re Securities Act*] at paras. 48-52.

135 *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 (S.C.C.) [*Pan-Canadian Securities*].

136 *Pan-Canadian Securities* at para. 56.

137 *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389 (Australia S.C.).

138 *Pan-Canadian Securities* at para. 65, citing *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.) and *Reference Re Canada Assistance Plan*, (*sub nom.* Reference re Canada Assistance Plan (British Columbia)) [1991] 2 S.C.R. 525 (S.C.C.).

parliamentary privilege in *Chagnon v. Syndicat de la function publique et parapublique du Québec*.[139] At issue in the case was the dismissal of three security guards employed by the National Assembly of Québec and whether parliamentary privilege shielded these dismissals from review by a labour arbitrator.

Justice Karakatsanis cited foreign jurisprudence in two instances in the decision, both in the context of providing background information on the principle of parliamentary privilege. First, when discussing the purpose, she stated that legislative privileges "allow legislative bodies to fearlessly hold the executive branch of government to account" and cited a case from the U.S. Supreme Court in support.[140] Second, Justice Karakatsanis looked to U.K. jurisprudence to discuss the history of parliamentary privilege.[141]

The Court also used foreign jurisprudence when considering the scope of judicial immunity in *Ernst v. Alberta Energy Regulator*.[142] At issue in the case was the constitutional validity of a clause in the *Energy Resources Conservation Act* that provided immunity to the Alberta Energy Regulator. The Court surveyed the law in Australia, New Zealand and the U.K. to demonstrate that "the strong common law immunity of judges from civil suits has been extended by common law and statute to many quasi-judicial bodies and agencies."[143] The Court held that the immunity clause was constitutional and the provision was upheld. The Court also looked to case law from the U.K. and Australia in discussing the basic principles of public interest immunity in *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*.[144]

4. Private International Law

The Court has also used foreign jurisprudence in the realm of private international law. In three decisions, the Court cited foreign cases to reinforce its approach by demonstrating that Canadian law was in line with that of several other jurisdictions. In *Chevron Corp. v. Yaiguaje*, the Court considered whether it was necessary, in an action for recognition and enforcement of a foreign

---

[139] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687 (S.C.C.) [*Chagnon*].

[140] *Ibid.* at para. 21.

[141] *Ibid.* at para. 22.

[142] *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3 (S.C.C.) [*Ernst*]. The main issue in the decision was whether an immunity clause in the *Energy Resources Conservation Act* was constitutionally valid under section 24(1) of the *Charter*; we have included this case in this section and not in the *Charter* section because it looked to foreign law for the general constitutional principle of judicial immunity.

[143] *Ibid.* at para. 50.

[144] *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia, 2020 SCC 20 at paras. 103, 117.*

judgment, for the defendant to have assets in the jurisdiction where enforcement was sought. In that case, the Ecuadorian plaintiffs sought to enforce in Ontario a US$9.51 billion Ecuadorian court judgment rendered against the American company, Chevron Corporation, in connection with extensive environmental pollution of the oil-rich Lago Agrio region of Ecuador.

This judgment could not be enforced against Chevron Corporation in the U.S, because U.S. courts had already determined that the judgment was tainted by corruption and other abuses of process.[145] The plaintiffs sought to seize the shares of Chevron Canada Limited, which was a seventh-degree subsidiary of the American entity. Chevron Corporation did not itself have any directly-held assets in Canada.

Justice Gascon, writing the unanimous decision, stated:

> I find persuasive value in the fact that other common law jurisdictions — presumably equally concerned about order and fairness as our own — have also found that the presence of assets in the enforcing jurisdictions is not a perquisite to the recognition and enforcement of a foreign judgment.[146]

As support for this statement, Justice Gascon provided examples from case law in the U.K., the U.S. and Ireland.[147] The U.K. and Irish decisions provided that the presence of assets in the jurisdiction in question was not a pre-requisite to enforcement. Courts in the U.S. were divided on this issue; some courts have similarly not required the presence of assets to recognize and enforce a foreign judgment while others have either required the presence of assets or held that even the presence of assets was not necessarily sufficient to establish personal jurisdiction.

Although the Court held that Ontario courts had jurisdiction despite Chevron Corporation's lack of assets in Ontario, the Ontario Court of Appeal later found that the plaintiffs could not seize the shares of Chevron Canada Limited, since these were not directly held by Chevron Corporation, and found no basis on which to pierce the corporate veil.[148] The Court denied leave to appeal from that decision.

The Court in *Douez v. Facebook Inc.*, considered foreign jurisprudence in the context of forum selection clauses. The Court noted that Canadian courts have recognized that the test for the enforcement of a forum selection clause may

---

[145] *Chevron Corp. v. Donziger*, 768 F.Supp.2d 581 (U.S. Dist. Ct. S.D. N.Y., 2011); *Chevron Corp. v. Naranjo*, 667 F.3d 232 (U.S. C.A. 2nd Cir., 2012); and *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (U.S. Dist. Ct. S.D. N.Y., 2014).

[146] *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69 (S.C.C.) at para. 58 [*Chevron*].

[147] *Ibid.* at paras. 59-62.

[148] *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 141 O.R. (3d) 1 (C.A.), leave to appeal refused *Daniel Carlos Lusitande Yaiguaje, et al. v. Chevron Corporation, et al.*, 2019 CarswellOnt 5162 (S.C.C.) [*Yaiguaje*].

apply differently depending on the contractual context. In support of this statement, the Court went on to note that both English and Australian courts have also recognized this.[149] In addition, Justice McLachlin and Justice Côté, in dissent, noted that forum selection clauses are supported by strong policy considerations and are routinely enforced around the world. They cited case law from the U.S., the U.K. and New Zealand in support.[150]

Finally, in *Uber Technologies Inc. v. Heller*, the majority of the Court pointed to U.K. jurisprudence awarding full indemnity costs against a party who improperly ignores an arbitration clause, as a tool available to prevent misuse of court processes for improper ends.[151]

5. Torts

In the context of tort law, the Court has looked to cases from the U.K., the U.S. and other common law jurisdictions. The reasoning for this varied; sometimes the Court looked to these other jurisdictions in the absence of Canadian precedent, sometimes because it would ensure consistency of the Canadian approach with the approaches in other common law jurisdictions, sometimes because the foreign approach was aligned with Canadian principles, and sometimes it was a mix of all or some of these reasons.

Most often, when looking outside Canada in analyzing tort issues, the Court referenced U.K. or other Commonwealth jurisprudence. However, this was not always the case. In *Alberta v. Elder Associates of Alberta Society*, the Court cited a U.S. decision in deciding that a *prima facie* duty of care arising from statutory duties would be negated by policy considerations — specifically, the famous "unlimited liability to an unlimited class" caution from Justice Cardozo in *Ultramares Corp. v. Touche*.[152] In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, the Court cited the U.S. Supreme Court's decision in *TSC Industries, Inc. v. Northway, Inc.* in its analysis of the materiality test for disclosure, while explicitly adopting the American approach.[153]

---

[149] *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751 (S.C.C.) at para. 34 [*Douez*].

[150] *Ibid.* at para. 148.

[151] *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paras. 42, 96.

[152] *Alberta v. Elder Associates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 (S.C.C.) [*Elder Associates*], para. 74, citing *Ultramares Corp. v. Touche*, 174 N.E. 441 (U.S. N.Y. Ct. App., 1931) at 444. While the Court cited to one of his decisions as a New York court judge, Justice Cardozo later became Chief Justice of the U.S. Supreme Court, but not before he wrote several seminal decisions on torts, including *Palsgraf v. Long Island Rail Road*, 162 N.E. 99, 248 N.Y. 339 (U.S. N.Y. Ct. App., 1928) (regarding proximate cause): see Warren A. Seavey, "Mr. Justice Cardozo and the Law of Torts" (January 1939), 48 *The Yale Law Journal* 3 at 390-425.

[153] *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175 (S.C.C.) at paras. 41, 45-53, 66, citing *TSC Industries Inc. v. Northway Inc.*, 426 U.S. 438 (Ill. S.C., 1976).

In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, the Court referred to foreign case law from several jurisdictions, but only American jurisprudence in addressing the tort issue regarding the application of the passing on defence.[154] The proposed class action in *Pro-Sys* was brought by a class of indirect purchasers who alleged that Microsoft overcharged for one of their products and the overcharge was passed on by the direct purchasers. Since the Court had rejected passing on as a defence, Microsoft argued that it must also reject passing on when used offensively, such as a claim brought by indirect purchasers. Microsoft based this argument premised upon a 1977 decision of the U.S. Supreme Court: *Illinois Brick Co. v. Illinois*.[155] The Court noted that both Canada and the U.S. have rejected passing on as a defence, however, it held that this did not preclude the offensive use of passing on.

The Court considered and rejected each of the arguments made in *Illinois Brick*. It also surveyed the reception of the case in the U.S. since 1977. It found that while the holding remains law at the federal level, it has been overturned by legislation or case law in many states.[156] In addition, while the case originally received some scholarly support, this had since changed and many notable scholars had been critical of its application.[157] In light of these criticisms, the Court decided not to follow *Illinois Brick* and found that Canadian law does not preclude an action brought by indirect purchasers.

Aside from *Elder Associates*, *Sharbern*, and *Pro-Sys*, when it came to tort issues, the Court predominantly relied on case law from the U.K. and other Commonwealth jurisdictions when it turned to foreign jurisprudence. In *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, the Court used U.K. jurisprudence to outline the reasonableness analysis involved in a nuisance claim.[158] In *Miazga v. Kvello Estate,* the Court turned to case law from the U.K. and other common law jurisdictions because there was no Canadian case law whatsoever on the topic.[159] In that case, the Court proposed that in order to meet the burden of showing an absence of reasonable and probable cause necessary to succeed in an allegation of malicious prosecution, a plaintiff would need to show either an absence of subjective belief in the legitimacy of the prosecution or an absence of objective reasonable grounds for the prosecution.

---

[154] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 (S.C.C.) [*Pro-Sys*]. The Court also turned to foreign jurisprudence in its analysis pertaining to waiver of tort (discussed in Section G of this article) and class action certification requirements (discussed in Section N).

[155] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (Ill. S.C., 1977) [*Illinois Brick*].

[156] *Pro-Sys* at para. 51. See also the companion case, *Infineon Technologies AG v. Option des consommateurs*, 2013 SCC 59, [2013] 3 S.C.R. 600 (S.C.C.) at paras. 109-111.

[157] *Pro-Sys* at paras. 52-59.

[158] *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594 (S.C.C.) at paras. 40-45.

[159] *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339 (S.C.C.) [*Miazga*].

The Court observed that while there was "no clear precedent to that effect in Canadian case law, the weight of precedent in England and other common law jurisdictions [New Zealand]" supported that proposition.[160]

The Court's decision in *Knight v. Imperial Tobacco Canada Ltd.* was an example of a situation where the Court turned to foreign jurisprudence to ensure consistency between the Canadian approach and that of other common law jurisdictions.[161] In *Imperial Tobacco*, the Court needed to decide what constituted a government policy decision immune from tort liability. After outlining the approaches adopted in the U.K., Australia and the U.S., the Court concluded that "core policy" government decisions immune from tort liability are those decisions that are "based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."[162] This conclusion was deemed "consistent with the basic thrust of Canadian cases on the issue" and "also supported by the insights of emerging jurisprudence here and elsewhere."[163]

The Court also considered Commonwealth and U.S. jurisprudence in clarifying the "unlawful means" requirement in the context of economic torts in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*[164] The Court recognized the "unfortunate state of the common law in relation to the unlawful means tort" and noted the lack of consensus and consistency. After the Court examined the approaches to the unlawful means tort in the U.K., Australia and New Zealand,[165] it observed that the approach in several U.S. states imposing liability where the conduct is merely "improper" (rather than unlawful) presented a marked departure from the narrow approach in the Commonwealth jurisprudence.[166] In declining to follow the U.S. approach, the Court ultimately concluded that the narrow approach evoked in the common law courts best aligned with Canadian principles and would be consistent with that trend of authority from comparable common law jurisdictions.[167]

Another area in the realm of torts that illustrated a combination of the above reasons for turning to foreign jurisprudence is defamation. In the Court's 2009 *Grant v. Torstar Corp.* decision, it had to determine where Canada fell in terms of balancing the right to free expression and the adequate protection of

---

[160] *Ibid.* at para. 70.
[161] *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.) [*Imperial Tobacco*].
[162] *Ibid.* at paras. 79-90.
[163] *Ibid.* at para. 90.
[164] *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.) [*Bram*].
[165] *Bram* at paras. 25, 31, 51-55.
[166] *Ibid.* at para. 56.
[167] *Ibid.* at paras. 32, 42, 74.

reputation.[168] After providing an overview of the various approaches to balancing these interests in several jurisdictions, the Court outlined the options. On one end of the spectrum, it could follow the traditional common law defence of qualified privilege, which offered no protection in respect of publications to the world at large (which the U.K. and other common law jurisdictions had moved away from, but remained the approach in Canada at the time of hearing this case).[169]

At the other end was "the American approach of protecting all statements about public figures, unless the plaintiff can show malice." The Court ultimately decided to choose a middle path between these two extremes, one that had been chosen by courts in Australia, New Zealand, South Africa and the U.K.: a defence that would allow publishers to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest.[170] The Court specifically identified how this third option, in the context of relevant *Charter* principles, represented "a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Canadian society."[171]

Two years later, the Court once again wrestled with the balance between protecting reputation and protecting freedom of expression in *Bou Malhab v. Diffusion Métromédia CMR inc.*[172] and *Crookes v. Newton*.[173] In these cases, the Court regarded the American approach as being at least somewhat in line with the Canadian approach, among other jurisdictions.

In *Bou Malhab*, the Court highlighted that the Canadian approach was "part of a trend" of increasing concern about protecting the freedom of expression that could be observed in many democracies, including the U.K., Australia, New Zealand, the U.S., Germany and France, as well as decisions of the ECHR.[174] The Court also looked to foreign jurisprudence from France, the U.K., the U.S. and Australia to examine factors in the defamation analysis, such as the size and nature of the group and the real target of the defamation. In doing so, the Court emphasized certain differences, such as the importance of the size of the group (more important in the U.S. than anywhere else).[175]

In the context of determining whether hyperlinks to defamatory content constituted "publishing" defamatory remarks, both the majority reasons written by Justice Abella and the concurring reasons written by Justice Deschamps in

---

[168] *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.) [*Torstar*].
[169] *Ibid.* at paras. 65-85.
[170] *Ibid.* at para. 85.
[171] *Ibid.* at para. 86.
[172] *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214 (S.C.C.) [*Bou Malhab*].
[173] *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269 (S.C.C.) [*Crookes*].
[174] *Bou Malhab* at paras. 20-21.
[175] *Ibid.* at paras. 62-65, 71-74.

Crookes considered foreign case law.[176] The majority used cases from the U.K. and the U.S. to discuss whether some acts, such as a simple reference like a hyperlink, are so passive that they should not be held to be publications, noting that referring to content via hyperlink in the U.S. generally does not lead to liability.[177] Following similar logic used in these foreign cases, the majority found that "[i]nterpreting the publication rule to exclude mere references not only accords with a more sophisticated appreciation of *Charter* values, but also with the dramatic transformation in the technology of communications."[178]

In her concurring reasons, Justice Deschamps also noted that the law had begun incrementally imposing limitations on the nature and types of actions that can attract liability for defamation at common law, and found it "helpful to look broadly at cases from both the U.S. and other common law jurisdictions, such as England and Australia."[179] She expressed caution with respect to relying on U.S. cases, and stated that "we must be mindful of the impact of the First Amendment on the protection of expression in the U.S., and of certain significant statutory limits on liability."[180] In support of this caution, Justice Deschamps pointed to two cases (one from Australia and one from the U.K.) for "comments to this effect" — however, it should be noted that she did not comment or expand on why Canadian courts in particular must be mindful of the impact of the First Amendment (especially noteworthy given the similar language employed in section 2(b) of the *Charter* and the First Amendment). Even in light of the caution, however, Justice Deschamps pointed to American case law (alongside an English case) and their reluctance to completely exclude hyperlinks from the scope of the publication rule to emphasize that the Court should be reluctant to create a bright-line rule when it comes to hyperlinks, given the "fluidity that characterizes the Internet and of the variety in types of hyperlinks."[181]

While the above discussion suggests that approaches in tort law from common law jurisdictions are largely viewed favourably, there are several cautionary exceptions. One exception is *Deloitte & Touche v. Livent Inc. (Receiver Of)*, where the dissent would have adopted the U.K. approach to recovery for pure economic loss arising from a negligent misrepresentation, while the majority neither accepted nor rejected it, but determined that the issue should be left for another day.[182] The majority followed decisions from the

---

[176] The concurring reasons delivered by Justices Abella and Fish did not turn to foreign case law: *Crookes* at paras. 46-53. The concurring reasons did, however, "agree in large part with the reasons of Abella J." and those reasons did use foreign jurisprudence: *Crookes* at para. 46.

[177] *Crookes* at paras. 21-23, 28.

[178] *Ibid.* at para. 33.

[179] *Ibid.* at para. 84.

[180] *Ibid.* at para. 84.

[181] *Ibid.* at paras. 103-104.

U.K., the U.S. and Australia in determining the proper approach to establishing liability in cases of pure economic loss arising from negligent misrepresentation or performance of a service.[183]

Another exception was *Saadati v. Moorhead*, in which the Court confirmed that the Canadian approach to the recovery of damages for mental injury generally remained distinct from the English and Australian lines of authority and subsequent approaches.[184] The Court also explicitly rejected one component of this approach: the threshold in the U.K., Australia and New Zealand that restricts recovery for mental injury to claimants who can adduce expert psychiatric evidence verifying a condition recognizable to the expert.[185] This marked a new departure from the law established in the common law jurisprudence (as well as by lower court decisions in Canada). The Court highlighted how psychiatric diagnoses can be controversial among practitioners and that the categories in the often-cited diagnostic manual are not static and "continue to be revised to reflect evolving psychiatric consensus on the classification of psychiatric disorders."[186] The Court also noted that there is no cogent basis to create distinct rules precluding liability in cases of mental injury but not in cases of physical injury.[187] Ultimately, the Court concluded that the lack of a diagnosis cannot on its own be dispositive, and the trier of fact can choose to weigh against evidence supporting the existence of a mental injury.[188]

Another stark exception to the Court's tendency to favourably look to common law jurisdictions in tort cases (and more generally) can be found in the majority's rejection of the U.K. approach to the test for material contribution to risk in *Clements v. Clements*.[189] In explaining the "but for" test for causation, the majority directly cited U.K. and Australian case law to support the components of the existing test. The majority also agreed with U.K case law (as well as other Canadian jurisprudence) which applied the "material contribution" test instead of the "but for" test in situations involving multiple tortfeasors where it is impossible to apply the "but for" test.[190] However, the majority departed from U.K. jurisprudence on the issue of whether the material contribution to risk approach should apply to a single tortfeasor, while taking

---

[182] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855 (S.C.C.) [*Deloitte*].
[183] *Ibid.* at paras. 30-31, 43.
[184] *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543 (S.C.C.) [*Saadati*] at paras. 14-19.
[185] *Ibid.* at paras. 28-38.
[186] *Ibid.* at paras. 32-33.
[187] *Ibid.* at para. 35.
[188] *Ibid.* at para. 38.
[189] *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181 (S.C.C.) [*Clements*].
[190] *Ibid.* at paras. 17-41.

into account the U.K. Supreme Court's own difficulty with doing so and concluding that nothing should compel a similar result in Canada.[191]

6. Contracts

The Court also relied on foreign jurisprudence in analyzing principles of contract law. In *Bhasin v. Hrynew*, the Court relied on foreign jurisprudence in recognizing a basic organizing principle of good faith in contract law and a duty to act honestly in the performance of contractual obligations.[192] The Court cited jurisprudence from Australia and the U.K. to demonstrate that other jurisdictions have started moving toward the recognition of a duty of good faith. While neither Australia nor the U.K. had formally recognized such a duty, case law from both jurisdictions had held that it may be implied in certain circumstances.[193]

The Court also surveyed the application of a duty of good faith by lower courts in Canada. The Court's survey of both domestic and foreign jurisprudence led to the conclusion that the duty of good faith in contract law had been applied in an inconsistent and piecemeal way.[194] As a result, the Court held that recognizing a duty to act honestly would provide certainty and consistency to Canadian contract law.

In formulating the contents of the organizing principle of good faith, the Court relied on American jurisprudence. It noted that both the *Uniform Commercial Code* and the *Restatement (Second) of Contracts* recognized a general duty of good faith in contract law. The Court also identified a similar duty imposed by the *Québec Civil Code*. It noted that a key component in both jurisdictions was the honest performance of contractual obligations. The Court developed an approach that was "similar in principle to that § 1-302(b) [of the *Uniform Commercial Code*]" in stating that the "precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect the minimum core requirements."[195]

The Court also regarded the U.S. experience to provide reassurance that recognizing such a duty in Canada would not impede contractual activity or contractual stability.[196] In the context of insurance contracts, the Court rejected a principle of Australian contract law in *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*.[197] At issue in the case was whether the insurer was liable to pay the losses for a damaged tunnel boring machine

---

[191] *Ibid.* at paras. 29, 42.
[192] *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.) [*Bhasin*].
[193] *Ibid.* at paras. 57-58.
[194] *Ibid.* at para. 36.
[195] *Ibid.* at para. 77.
[196] *Ibid.* at para. 85.

under an all-risk insurance policy. The policy contained a faulty or improper design provision.

The insurer alleged that the claim was exempted from the policy under this provision. In Australia, the Queensland principle provides that upon a loss occasioned by the design, the failure was *prima facie* proof that the design was faulty or improper because the product was not fit for its intended purpose. While this principle had been recognized by some lower courts in Canada and in the U.K., the Court rejected its adoption because it would result in discharging the onus of proof of the insurers regardless of the reason for the failure. The Court found that a failure was not always caused by a faulty design.[198]

In contrast, in another important contracts case, *Sattva Capital Corp. v. Creston Moly Corp.*, the Court rejected U.K. jurisprudence, and the historical approach applied in Canada, that treated contractual interpretation as a question of law reviewable by appellate courts on a correctness standard.[199] The Court was of the view that this approach should be abandoned. It determined that contractual interpretation involves issues of mixed fact and law, because it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.[200] Accordingly, the Court considered that it was no longer good policy to follow the historical approach that was still being followed by U.K. courts.

In the insurance context, the Court referred to a number of U.S. and U.K. cases to determine whether complications arising from herpes that resulted from unprotected sex were an "accident" pursuant to an insurance policy.[201]

7. Equity

The Court also turned to foreign jurisprudence (often, understandably, from the U.K.) in grappling with equitable principles. First, the Court considered the doctrine of proprietary estoppel in *Cowper-Smith v. Morgan*.[202] It first laid out the three requirements to establishing an equity under the doctrine of proprietary estoppel, as set out by Lord Walker in the House of Lords decision in *Thorner v. Major*: 1) a representation or assurance made on the basis

---

[197] *Canadian National Railway Co. v. Royal and SunAlliance Insurance Co. of Canada*, 2008 SCC 66, [2008] 3 S.C.R. 453 (S.C.C.) [*CN Railway*].

[198] *CN Railway* at para. 48.

[199] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.) at para. 44 [*Sattva*].

[200] *Ibid.* at para. 50. The Court in *Sattva* also cited U.K. authority for the principle that the meaning of words is derived from their context: para. 48. That authority was again accepted by the Court in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 (S.C.C.) at para. 106.

[201] *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605 (S.C.C.) at paras. 16, 19, 29, 32, 58, 60.

[202] *Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754 (S.C.C.) [*Cowper-Smith*].

of which the claimant will enjoy some right or benefit, 2) a reasonable reliance on the representation or assurance by the claimant, by doing or refraining to do something, and 3) a detriment suffered by the claimant as a result of his or her reliance such that it is unfair or unjust.[203] The Court found that each of these requirements was satisfied in this case.

The Court also relied upon decisions from appellate courts in England and Wales on the prerequisites to establishing proprietary estoppel. The Court held that it did not matter whether the equity was personal or proprietary in nature. If the sister had an interest in the property that was sufficient to fulfill the brother's expectation, proprietary estoppel would give effect to the equity by making the promise binding.[204]

Turning to the appropriate remedy, the Court again relied on U.K. jurisprudence and also turned to a High Court of Australia decision. It found that a court can exercise discretion in determining a remedy that is appropriate in the circumstances.[205] Justice Brown, dissenting in part, also relied heavily on U.K. jurisprudence. He disagreed with the remedy awarded in the majority's decision and found that equity only arose when the property interest was actually acquired and referenced U.K. case law to demonstrate that proprietary estoppel could only be granted once the promisor acquires the interest in the property.[206]

In *Valard Construction Ltd. v. Bird Construction Co.*, the Court considered foreign jurisprudence when discussing the nature of a trustee's fiduciary obligation to disclosure regarding the existence of a trust.[207] The Court noted that the issue of whether a beneficiary needs to be informed of a trust's existence often arises in the context of a beneficiary attaining the age of majority. As support for this statement, the Court cited a number of U.K. decisions.[208] The Court also noted that a trustee has a duty to disclose the existence of the trust when "it could be said to be to the unreasonable disadvantage of the beneficiary not to be informed of the trust's existence."[209] The Court cited a decision from the New South Wales Court of Appeal to interpret the meaning of an "unreasonable disadvantage" and found that it depends on the nature and terms of the trust and the social or business environment in which it operates.[210] Applied to the facts at hand, the Court found that the sub-contractor was

---

[203] *Ibid.* at para. 15, citing *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776 (H.L.).
[204] *Ibid.* at paras. 15-17.
[205] *Ibid.* at paras. 46-47.
[206] *Ibid.* at para. 66.
[207] *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, [2018] 1 S.C.R. 224 (S.C.C.) [*Valard*].
[208] *Ibid.* at para. 19.
[209] *Ibid.* at para. 19, citing *Waters' Law of Trusts* at 1125-26.
[210] *Valard* at para. 19.

unreasonably disadvantaged by the contractor's failure to inform it of the trust's existence.[211]

In *Atlantic Lottery Corp. Inc. v. Babstock*, both the majority and dissenting decisions relied on U.K. jurisprudence in analyzing the equitable remedy of restitution for disgorgement.[212] The majority adopted the main elements of the approach outlined by the House of Lords in *Attorney General v. Blake*, but disagreed with U.K. approach in terms of including quasi-fiduciary relationships as a factor justifying a disgorgement remedy.[213] The dissent would have applied the U.K. approach in its entirety.[214]

Lastly, in *Pro-Sys* (facts discussed above in Section 5), the Court referred to foreign jurisprudence when addressing waiver of tort. In that case, the plaintiff class alleged several causes of action in its claim, including several causes of action in tort. However, it also claimed the waiver of tort and sought to recover the unjust enrichment accruing to the defendant, Microsoft. Waiver of tort occurs when a plaintiff gives up the right to sue in tort and elects to base its claim in restitution. The Court cited a decision of the U.K. House of Lords when noting that causes of action in tort and restitution are not mutually exclusive; they can be alternative remedies to a concurrent claim.[215] Microsoft argued that in order to waive a claim for tort, the underlying tort must be established, including the element of loss.[216]

The Court surveyed the law on this issue and found that "[t]he U.S. and U.K. jurisprudence as well as the academic texts on the subject have largely rejected the requirement that the underlying tort must be established in order for a claim in waiver of tort to succeed"; a number of cases from each jurisdiction were cited in support.[217] However, it also noted that some lower courts in Canada and one decision in the U.K. have held the opposite. One of which, a decision of the British Columbia Supreme Court, suggested that "a reluctance to eliminate the requirement of proving loss as an element of the cause of action is part of the reason for requiring the establishment of the underlying tort."[218] The Court left this issue for trial but found that it was not plain and obvious that a cause of action in waiver of tort would not succeed.[219]

---

[211] *Ibid.* at para. 20.
[212] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 [*Babstock*].
[213] *Babstock* at paras. 51-60.
[214] *Ibid.* at paras. 111-128.
[215] *Pro-Sys* at para. 93.
[216] *Ibid.* at para. 94.
[217] *Ibid.* at para. 96.
[218] *Ibid.* at para. 96, citing *Reid v. Ford Motor Co.*, 2006 BCSC 712 (S.C.), para. 17.
[219] *Ibid.* at para. 97.

8. Administrative Law

In the context of administrative law, the Court made reference in a number of decisions to the U.S. Supreme Court's decision in *City of Arlington, Texas v. Federal Communications Commission*.[220] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the majority cited *Arlington* as authority that reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended.[221] The Court also made reference to *Arlington* in earlier decisions, as part of its discussion of whether true questions of jurisdiction could be distinguished from questions of law.[222]

In her reasons concurring in the result in *Vavilov*, Justice Abella cited a large number of U.S., U.K., Australian, New Zealand and South African cases in support of her conclusion that the majority had disregarded the high threshold required to justify a departure from precedent.[223]

9. Employment Law

In the employment law context, the Court relied upon foreign jurisprudence to support its analysis in several instances. As noted in Section B above, in *McCormick*, the Court looked to cases from the U.S., the U.K., Australia and New Zealand to support its finding that a partnership did not constitute an employment relationship. In *Dionne v. Commission scolaire des patriotes*, the Court cited Justice Ruth Bader Ginsburg's dissenting opinion in a U.S. Supreme Court case, as well as Canadian cases, to explain the underlying reasons for health and safety protections for pregnant women.[224]

In *IBM Canada Limited v. Waterman*, the majority made extensive use of case law from the U.K., Australia, New Zealand and the U.S. to determine that pension benefits are not deductible from compensatory damages for wrongful dismissal.[225] The majority cited American jurisprudence to highlight the difficulties in determining what exactly should be considered a collateral benefit.[226] In reviewing the well-recognized exceptions of charitable gifts and

---

[220] *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013).

[221] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.) at para. 68 [*Vavilov*].

[222] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.) at para. 25 and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 (S.C.C.) at paras. 35, 41.

[223] *Vavilov* at paras. 256-66, 271-74.

[224] *Dionne v. Commission scolaire des patriotes*, 2014 SCC 33, (*sub nom.* Dionne v. Commission Scolaire des Patriotes) [2014] 1 S.C.R. 765 (S.C.C.) [*Dionne*], para. 28.

[225] *IBM Canada Limited v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985 (S.C.C.) [*Waterman*].

[226] *Ibid.* at para. 27. The dissent did not reject these cases, but rather distinguished them by

private insurance to the strict application of the compensation principle that a defendant should compensate a plaintiff only for their actual loss, the majority cited several U.K. cases establishing these exceptions.[227] Specifically, the majority used the leading House of Lords decision in *Parry v. Cleaver* as authority (among Canadian decisions) that retirement pension benefits fall within the private insurance exception.[228] The majority noted that "the dominant tide of the jurisprudence in the common law world is that non-indemnity pension benefits should not be deducted" and identified Commonwealth decisions concluding that pension benefits should not be deducted from a damages award because pension benefits are not meant to compensate the plaintiff for the injury or breach of contract or to act as wage replacement.[229]

10. Criminal Law

In the criminal law sphere, the Court considered U.S. jurisprudence more often than that of any other country. Most criminal law cases that reach the Supreme Court level rely only on a small number of Canadian authorities. However, of the 34 criminal cases issued during our review period in which the Court looked to jurisprudence outside Canada, 22 considered American jurisprudence.[230] By contrast, fewer cited to other foreign jurisprudence: 16 decisions cited cases from the U.K., eight cited from Australia, and two cited cases from New Zealand.

Not only did the Court in criminal cases rely upon U.S. jurisprudence more frequently than Commonwealth jurisprudence, but also there are several examples of the Court explicitly adopting the U.S. approach and rejecting the U.K. approach or that of other Commonwealth jurisdictions. The reasons for this trend are not immediately obvious. One reason for this may be a perceived alignment between Canadian and American criminal law, as well as Constitutional protections against unreasonable search and seizure. In this latter area, the Court could simply be drawing on the wealth of experience the

---

noting that in neither of these cases did the facts before the court establish that it would be inconsistent with the terms of the employment contract for the plaintiff to receive both tort damages and his employment benefits, thereby contrasting the facts in those cases with the facts before the Court: *Waterman* at para. 146.

227 *Waterman* at paras. 38-41, 44, 47.

228 *Ibid.* at para. 47, citing *Parry v. Cleaver* (1969), [1970] A.C. 1 (U.K. H.L.) [*Parry*]. The dissent also relied on *Parry* as an authority on the rationale for the private insurance exception in order to suggest that applying the private insurance exception to this case would not be consistent with the justification for the exception: *Waterman* at para. 141.

229 *Waterman* at para. 60.

230 This includes the cases concerned with *Charter* violations, discussed in Section B, and cases addressing evidentiary issues, discussed in Section K.

U.S. courts have in interpreting the Fourth Amendment to the U.S. Constitution, which still outstrips Canada's by two hundred years.[231]

(a) Criminal cases citing favourably only U.S. decisions, or U.S. decisions and those of other jurisdictions

In the 2012 decision in *R. v. Vu*, after defining the offences of kidnapping and false imprisonment at common law, the Court relied on U.S. (and Australian) jurisprudence to confirm this meaning, emphasizing the element of movement that differentiates kidnapping from that of false imprisonment.[232] The majority in *R. v. Wong* used U.S. case law to exemplify why reviewing courts run a serious risk of doing injustice to an accused when they attempt to substitute their own view of what someone in the accused's circumstances would have done,[233] and thus found that a subjective framework to assess prejudice in the context of pleas would be consistent with U.S. jurisprudence.[234] The dissent also pointed favourably to different U.S. case law to support the observation that Canadian courts were adopting a broad approach in accepting that an accused person's awareness of immigration consequences were relevant to the determination of whether a plea was sufficiently informed.[235] Subjective knowledge was also at issue in *R. v. Ryan*, in which the Court had to determine whether an accused's knowledge of potential threats or coercion for the purposes of a duress defence should be subject to a subjective or objective standard.[236] After noting that in Australia and the U.S., subjective knowledge of possible threats or coercion is required to make out the defence of duress, the Court followed suit and adopted a subjective standard.[237]

In another case, the majority updated its own approach to interpreting a military law exception in the *Charter*, which was originally based on a U.S. Supreme Court decision, after noting that the U.S. decision had since been overturned. In that case, *R. v. Stillman*, the Court was faced with determining the constitutionality of a provision in the *Charter* that provided an exception to the right to a trial by jury for "an offence under military law."[238] Both the majority and the dissent identified a line of Canadian cases based on the heightened "military nexus" doctrine from the U.S. Supreme Court decision in *O'Callahan v. Parker*.[239] In *O'Callahan*, the U.S. Supreme Court ruled that in

---

[231] See, for example, then-Chief Justice Dickson's description in *R. v. Simmons*, [1988] 2 S.C.R. 495 (S.C.C.) at para. 26.
[232] *R. v. Vu*, 2012 SCC 40, [2012] 2 S.C.R. 411 (S.C.C.) at para. 30.
[233] *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696 (S.C.C.) [*Wong*] at paras. 12-13.
[234] *Ibid.* at para. 31.
[235] *Ibid.* at para. 73.
[236] *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14 (S.C.C.) [*Ryan*].
[237] *Ibid.* at paras. 79-80.
[238] *R. v. Stillman*, 2019 SCC 40 (S.C.C.) [*Stillman*].

order for a court martial to have jurisdiction over a particular offence, the offence had to have a connection to service, rather than merely relying on the fact that the accused was a member of the military.[240]

The majority rejected this heightened "military nexus" doctrine in favour of an interpretation that the accused's military status was sufficient for the application of the exception to the *Charter*.[241] In doing so, the majority's analysis included noting that the U.S. Supreme Court had later overruled *O'Callahan* in a subsequent decision, which had also ruled that the jurisdiction of courts martial depended solely on the accused's military status.[242] This perspective was not a major factor in the majority's analysis, which outlined a variety of "compelling reasons why the 'military nexus' doctrine should not be resurrected", including conducting a statutory interpretation exercise, reconciling existing Canadian jurisprudence, and highlighting that adding a heightened standard would create "an unwieldy and unhelpful threshold inquiry". It is notable that the majority confirmed that the same standard currently required in the U.S. for a military offence applied in this case.[243] In finding that the heightened "military nexus" doctrine still had a place in Canadian law despite being abandoned by the U.S. Supreme Court in *Solorio v. United States*,[244] the dissent stated its agreement with the dissenting judges in *Solorio*, particularly the fact that the requirement "must not be discarded simply because it may be less expeditious."[245]

In some cases, the U.S. case law was directly quoted to support a proposition: The majority in *R. v. Ahmad* pointed to a passage in a U.S. Supreme Court decision to support the proposition that an objective standard should be applied to police conduct within the entrapment doctrine rather than a subjective standard requiring an element of bad faith.[246] In Justice Martin's concurring opinion in *R. v. Bird*, she excerpted a decision of the U.S. Supreme Court in support of the view that a trial judge must balance full answer and defence considerations and fair trial rights against rigid adherence to limited administrative structures.[247] In *R. v. Mian*, the Court quoted Justice Ginsburg

---

[239] *Ibid*. at paras. 89-91, 167-169, citing *O'Callahan v. Parker*, 395 U.S. 258 (Pa. S.C., 1969) [*O'Callahan*].

[240] *Ibid*. at para. 89.

[241] Which the majority noted had already been established in *Moriarity* without directly referring to American jurisprudence and was not in the same *Charter* context: *Stillman* at para. 118.

[242] *Stillman* at paras. 90-92.

[243] *Ibid*. at paras. 88-104.

[244] *Solorio v. United States*, 483 U.S. 435 (1987) [*Solorio*].

[245] *Stillman* at paras. 171-172.

[246] *R. v. Ahmad*, 2020 SCC 11 at para. 29. In dissent, Justice Moldaver (also writing for Chief Justice Wagner and Justices Côté and Rowe) reviewed a number of U.K., U.S. and Australian decisions regarding the entrapment doctrine at paras. 149-153.

in *Greenlaw v. United States*[248] to identify the principle of party presentation, "under which 'courts rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present'."[249] Similarly, in *R. v. R.E.M.*, the Court directly quoted an American judge to supplement its analysis of why reasons help ensure fair and accurate decision making. The Court also used U.K. and Australian case law to show that the common law historically recognized no legal duty upon a tribunal to disclose its reasons for a decision or to identify what evidence has been believed and what disbelieved, but then noted that the law had since evolved, and used the American case among Canadian case law to emphasize this evolution.[250]

(b) Criminal cases citing U.S. cases favourably while rejecting the approach taken elsewhere

There are examples in the criminal law context of the Court adopting the U.S. approach while rejecting the approach taken in the U.K. or elsewhere. At issue in *R. v. Mabior* was whether an HIV-positive person who engaged in sexual relations without disclosing his condition committed aggravated sexual assault.[251] The question at issue was whether failure to inform of HIV positive status vitiates consent. The Court needed to determine whether the approach set out in its previous 1998 decision in *R. v. Cuerrier* remained valid for determining whether fraud vitiates consent to sexual relations. While the Court went through the history of fraud vitiating consent and discussed extensively the strict approach found in the relevant English authorities dating back to the 1800s, more relevant for our purposes is the Court's investigation into the experience of other common law jurisdictions[252] and its identification of early American case law suggesting a more generous approach to fraud vitiating consent in contrast to the strict approach in the U.K.[253]

For the former, the Court undertook what it described as a "survey of comparative law" to highlight that other common law jurisdictions (Australia, New Zealand and the United Kingdom) tend to criminalize the actual sexual transmission of HIV (when the HIV-positive person is aware of their status and the partner does not give informed consent to the risk of infection) and treat these offences as offences involving bodily harm, rather than as sexual offences,

---

[247] *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409 (S.C.C.) at para. 140.
[248] *Greenlaw v. United States*, 554 U.S. 237 (2008) at 243.
[249] *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689 (S.C.C.) [*Mian*] at para. 38. The Court also turned to previous Supreme Court decisions citing U.K. cases concerning judicial intervention in relation to party presentation: paras. 39-40.
[250] *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 (S.C.C.) [*R.E.M.*] at paras. 8, 12.
[251] *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584 (S.C.C.) [*Mabior*].
[252] *Ibid.* at paras. 49-55.
[253] *Ibid.* at para. 41.

but deception that exposes a partner to *risk* of transmission is not criminalized.[254] The Court acknowledged this contrast between the Canadian approach and the approach taken in these common law jurisdictions, and noted that "while the experience of other jurisdictions is not conclusive, it sounds a note of caution against extending the criminal law beyond its appropriate reach in this complex and emerging area of the law."[255] Even still, the Court ultimately preferred the U.S. approach that failure to inform vitiates consent, and therefore found that the accused had committed a sexual assault in Canada (as opposed to the finding of simple assault that would have been found in the other common law jurisdictions).

In another case, *Mission Institution v. Khela*, the Court noted its previous approval of a U.S. Supreme Court decision regarding the purpose of *habeas corpus*[256] and then, in discussing the approach to *habeas corpus*, **rejected** a U.K. line of cases on the topic. The Court rejected the U.K. cases that suggested a decision was unlawful only if it was outside the decision maker's jurisdiction, because it would "result in the bifurcated jurisdiction this Court explicitly rejected" previously and because those cases contradicted a higher line of authority from the U.K.[257]

(c) Cases citing other common law jurisprudence

Of the remaining criminal cases where the Court looked to foreign case law other than U.S. jurisprudence, the references to these other jurisdictions were often brief but not insubstantial. For example, in deciding whether an improper jury instruction constituted a "harmless" error of law provoking the application of the curative proviso, both the majority and the dissent in *R. v. Sarrazin* referred to the decision of the High Court of Australia in *Gilbert v. The Queen*.[258] The majority agreed with the approach in *Gilbert* and concluded that failing to provide the jury with a valid verdict option constituted an error of law that could not be considered harmless, and thus the curative proviso could not be applied.[259] The dissent disagreed, by noting the inherent inconsistencies in the approach in *Gilbert* (that a jury will uphold the required standard of causation, but also that a jury will alter the required causation upon hearing other options)

---

[254] *Ibid.* at paras. 50-51.
[255] *Ibid.* at paras. 54-55.
[256] *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 (S.C.C.) [*Khela*] at para. 54.
[257] *Ibid.* at paras. 68-69.
[258] *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505 (S.C.C.) [*Sarrazin*] at paras. 36, 50-51, citing *Gilbert v. The Queen*, [2000] HCA 15, 201 C.L.R. 414 (H.C.) [*Gilbert*]. The dissent also referred to two U.K. court decisions at paras. 50-51: *Bullard v. The Queen*, [1957] A.C. 635 (Trinidad & Tobago P.C.) and *R. v. Coutts*, [2006] UKHL 39, [2006] 4 All E.R. 353 (H.L.).
[259] *Sarrazin* at paras. 36-41.

and would have applied the curative proviso and allowed the appeal, restoring the jury's verdict at trial.[260]

There was a similar disagreement between the majority and the dissent in *R. v. A.D.H.* regarding whether the fault element for the offence of child abandonment was subjective or objective.[261] Both the majority and the dissent relied on U.K. jurisprudence to form their conclusions on the fault requirement. In finding that the offence required subjective fault, the majority pointed to a line of English authority confirming this approach.[262] Justice Moldaver, in his dissent, disagreed and concluded that the offence had an objective fault requirement. He based this conclusion in part on two of the same U.K. cases relied on by the majority but suggested that the cases stood for different propositions.[263]

The Court rejected the U.K. approach in two cases involving jury instructions. In the unanimous decision of the Court in *R. v. Rojas*, the Court discussed "the *Duncan* instruction", a mixed statement instruction from the trial judge to the jury indicating that the incriminating parts of an accused's statement are likely to be true, "otherwise why say them?", whereas excuses for one's behavior do not necessarily carry the same weight. This instruction originated from the English Court of Appeal's 1981 decision in *R. v. Duncan*. The Court ultimately deemed the instruction "dangerous" and indicated that it "should not be adopted by Canadian trial courts" but found that its use in this instance did not constitute a misdirection resulting in an unfair trial.[264] The *Duncan* instruction was later found to be improper by both the majority and the dissenting opinions in *R. v. Illes*.[265]

11. Evidence

The Court has considered foreign jurisprudence in a number of cases relating to evidence, in addition to the cases referred to in Section B concerning the *Charter* right to be free from unreasonable search and seizure. These decisions touch on a number of topics, including (1) expert evidence, (2) third-party suspect evidence, (3) privilege, (4) admissibility of prior judgments, and (5) standard of proof. Case law from the U.S. and the U.K. was cited most frequently, however, cases from Australia and New Zealand were also referred to. The Court turned to the U.K. particularly for background on principles of common law such as litigation privilege and the civil standard of proof. In a number of cases, the Court borrowed language from American case law to

---

[260] *Ibid.* at paras. 50-59.
[261] *R. v. A.D.H.*, 2013 SCC 28, [2013] 2 S.C.R. 269 (S.C.C.) [*A.D.H.*].
[262] *Ibid.* at paras. 20, 32-34, 39, 46.
[263] *Ibid.* at paras. 132-134, 143.
[264] *R. v. Rojas*, 2008 SCC 56 (S.C.C.) [*Rojas*] at paras. 4-6, 40.
[265] *R. v. Illes*, 2008 SCC 57, [2008] 3 S.C.R. 134 (S.C.C.) at paras. 3, 23, 41, 57-58.

provide an example or explanation of a concept. Last, some of the cases surveyed the law in several jurisdictions to provide confirmation that the existing Canadian approach should be maintained, or context for the issue at hand.

(a) Expert evidence

The Court also considered foreign jurisprudence in the context of expert evidence. In *White Burgess Langille Inman v. Abbott and Haliburton*, the Court considered whether the impartiality and independence of an expert should go to the admissibility or to the weight of the evidence.[266] The Court referred to both Canadian and foreign jurisprudence to demonstrate that there was no broad consensus on this issue. The decision summarized the approaches taken in Australia, the U.K. and the U.S. and noted that "[o]utside Canada, the concerns related to independence and impartiality have been addressed in a number of ways. Some are similar to the approach in Canadian law."[267] The approach of U.K. courts was most in line with that of Canada because of the independence and impartiality of an expert go to the admissibility of expert evidence, while in Australia and the U.S., these generally go to the weight of the evidence.[268] The Court ultimately confirmed that the independence and impartiality of expert evidence goes to the admissibility of that evidence.

In *Benhaim v. St-Germain*. the Court cited an American case to support its finding that expert evidence is not required to prove factual causation, as that is a matter for the trier of fact to decide.[269]

(b) Third party suspect evidence

In *R. v. Grant*, the Court considered foreign jurisprudence in the context of third-party suspect evidence.[270] The Court held that the test for third party evidence where the third party was known is not applicable where the third party was unknown.[271] The Court referenced an American case to demonstrate that there was no reason to require that a connection be established by evidence relating to a third party where that individual was unknown.[272] Where the third

---

[266] *White Burgess Langille Inman v. Abbott and Haliburton*, 2015 SCC 23, [2015] 2 S.C.R. 182 (S.C.C.) [*White Burgess*].

[267] *Ibid*. at para. 41.

[268] *Ibid*. at paras. 42-44.

[269] *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 (S.C.C.) [*Benhaim*] at para. 47. In a different context, the Court in *Masterpiece Inc. v. Alavida Lifestyles Inc*., 2011 SCC 27, [2011] 2 S.C.R. 387 (S.C.C.) accepted U.K. authority regarding the use of expert evidence in a trademark confusion case: paras. 88-92.

[270] *R. v. Jesse*, 2012 SCC 21, [2012] 1 S.C.R. 716 (S.C.C.), discussed below also considers similar fact evidence but looks to foreign law in the context of prior judgments so we have included it in that section.

[271] *R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475 (S.C.C.) [*Grant*] at para. 24.

[272] *Ibid*. at para. 26.

party's identity is unknown, the nature of the connection must reflect a different factual matrix, generally similarities between the crime charged and another crime that the accused could not possibly have committed. In adopting this approach, the Court also looked to other jurisdictions for confirmation: "this is consistent with the approaches taken by other common law jurisdictions in assessing defence-led evidence of similar acts." Case law from Australia, the U.K. and the U.S. was cited in support.[273]

(c) Privilege

In *Lizotte v. Aviva Insurance Company of Canada,* the Court addressed litigation privilege. In addition to citing older English cases concerning the origin and nature of litigation privilege,[274] the Court quoted a lengthy passage from a U.S. Supreme Court decision when considering whether litigation privilege was extended to a third-party investigator with a duty of confidentiality and discretion.[275] The Court held that "it must be possible to assert the privilege over him or her" because any uncertainty could have a chilling effect on parties preparing for litigation. The U.S. authority "gave a good description of this chilling effect" and was used by the Court to emphasize the risk and reinforce its holding that privilege applies in this circumstance.[276]

The Court also looked to foreign jurisprudence in *Canada (Citizenship and Immigration) v. Harkat*, in the context of informer privilege. At issue in the case was whether the *Immigration and Refugee Protection Act*,[277] security certificate scheme is constitutional and whether Canadian Security Intelligence Service human sources are protected by class privilege. The majority cited case law from the U.K. in two instances in its decision: to highlight the importance of the open court principle and to contextualize sufficient disclosure to meet the "reasonably informed" standard.[278] Justices Abella and Cromwell, dissenting, turned to the U.S. case law on another topic: informer privilege. They rejected a case-by-case approach to the protection of informer privilege. Such an approach was also rejected by the U.S. Supreme Court, which Justice Abella and Justice Cromwell referred to for a quote on the risks of leaving disclosure to individual judges.[279] In another case involving informer privilege, the Court cited U.K. authority regarding the dangers of having defence counsel present at the *voir dire*.[280]

---

[273] *Ibid*. at para. 29.
[274] *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521 (S.C.C.) [*Lizotte*] at paras. 20, 57.
[275] *Ibid*. at para. 53, citing *Hickman v. Taylor*, 329 U.S. 495 (Pa. S.C., 1947).
[276] *Ibid*. at para. 53.
[277] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
[278] *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33 (S.C.C.) [*Harkat*] at paras. 24, 56.
[279] *Ibid*. at para. 121.
[280] *R. v. Basi*, 2009 SCC 52, [2009] 3 S.C.R. 389 (S.C.C.) at para. 46.

With respect to settlement privilege, the Court in *Sable Offshore Energy Inc. v. Ameron International Corp.* cited U.K. authority that settlement privilege is a class privilege which extends beyond communications explicitly marked without prejudice.[281]

(d) Admissibility of prior judgments

In the context of the admissibility of prior judgments, the Court also looked to foreign jurisprudence. In *R. v. Jesse*, the appellant argued that a prior conviction was not admissible because it stemmed from a jury trial and not a guilty plea.[282] He argued that a jury trial is a combination of hearsay evidence and opinion evidence and therefore unreliable on the issue of identity (i.e., whether the accused is the person who committed the prior crime) and inadmissible. This line of thinking stemmed from an old decision of the English Court of Appeal in *Hollington v. F. Hewthorn & Co.*[283] The Court rejected this approach and found that jury verdicts and verdicts rendered by judges alone are presumptively reliable and should be treated that way on the issue of identity.[284]

In *British Columbia (Attorney General) v. Malik*, the Court again considered *Hollington.,* as the appellant suggested the British Columbia Court of Appeal was influenced by the rule in this case. The Court noted that more recent cases from the U.K. had found that this rule is "generally thought to have taken the technicalities of the matter much too far."[285] They also looked to case law from New Zealand to confirm this view. The Court held that this rule "simply has no application at this stage of proceedings in British Columbia."[286] It stated that the rule was not in line with the British Columbia *Supreme Court Rules* which expressly permit the admission of hearsay evidence on an interlocutory application, and did not conform with modern day concerns about the unnecessary multiplicity of proceedings.[287]

(e) Standard of proof

The Court considered foreign jurisprudence in the context of the civil standard of proof in *F.H. v. McDougall*.[288] The appellant argued that the British Columbia Court of Appeal applied the incorrect standard of proof when it used

---

[281] *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623 (S.C.C.) at paras. 12-15.
[282] *R. v. Jesse*, 2012 SCC 21, [2012] 1 S.C.R. 716 (S.C.C.) [*Jesse*] at para. 37.
[283] *Hollington v. F. Hewthorn & Co.*, [1943] 1 K.B. 587 (C.A.) [*Hollington*].
[284] *Jesse* at paras. 37-38.
[285] *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, [2011] 1 S.C.R. 657 (S.C.C.) [*Malik*] at para. 44, citing *Arthur J.S. Hall & Co. v. Simons*, [2000] UKHL 38, [2002] 1 A.C. 615 (H.L.) at 702 [A.C.], per Lord Hoffman.
[286] *Malik* at para. 44.
[287] *Ibid.* at para. 45.
[288] *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.) [*F.H.*].

a standard of proof that "was commensurate with the occasion." The Court first summarized the law in British Columbia and in the rest of Canada. It noted that courts in British Columbia "have tended to follow the approach of Lord Denning in *Bater v. Bater*" who held that there may be varying degrees of probability within the standard of a balance of probabilities, depending on the subject matter.[289] However, this approach had not been consistently applied elsewhere in Canada.

The Court then looked at how this approach had developed in the U.K. and similarly found a lack of consistency. However, in 2008, the U.K. House of Lords recognized these inconsistencies, and held that neither the seriousness of the allegation nor the seriousness of the consequences changed the civil standard of proof that is the balance of probabilities.[290] The Court adopted this approach when it stated "[l]ike the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities."[291]

(f) Media and journalistic source privilege

In 2010, the Court rejected the adoption of a class privilege for journalistic confidential sources in two cases. Both cases refer to foreign jurisprudence, each for differences purposes. In one case the Court referred to foreign jurisprudence from several countries to bolster its position in not recognizing a class privilege for journalistic confidential sources. In the second case, the Court relied on U.S. law to find that a wrong committed by a confidential source when leaking information should not be automatically imposed on the journalist or newspaper collecting the information.

The first case was *R. v. National Post*, where the Court considered the issue in the context of a criminal investigation. The Court looked at a number of approaches to protecting journalistic confidential sources, including a class privilege that would be available as of right to shield against the compelled disclosure of secret source identities in a court proceeding. The Court rejected the adoption of a class privilege for journalistic confidential sources but it established a case-by-case approach to privilege for such sources using the "Wigmore criteria" of evidence law.[292] The "Wigmore criteria" consist of a four-step framework generally used to establish confidentiality at common law. The Court laid out the four steps, in the circumstances of the case, as follows: (1) the communication must originate in a confidence that the identity of the information will not be disclosed, (2) the confidence must be essential to the

---

[289] *Ibid.* at para. 27, citing *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.).
[290] *Ibid.* at para. 38.
[291] *Ibid.* at para. 40.
[292] *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 (S.C.C.) [*National Post*] at para. 50.

relationship in which the communication arises, (3) the relationship must be one which should be "sedulously fostered" in the public good, and (4) the public interest be served by protecting the identity of the information from disclosure must outweigh the public interest in getting at the truth.[293]

In its analysis, the Court discussed class privilege in common law jurisdictions. It noted that "[j]ournalistic-confidential source privilege has not previously been recognized as a class privilege by our Court [. . .], and has been rejected by courts in other common law jurisdictions with whom we have strong affinities."[294] The Court looked to the law in the U.K., Australia and the U.S., all of which have rejected such a class privilege.[295] However, the Court also noted that journalistic-secret source privilege has been covered by legislation in the U.K., in New Zealand, in many American states, in Australia at the federal level and in New South Wales. While similar legislation had been proposed in Canada, none had ever been approved.[296]

The Court's decision in *Globe and Mail v. Canada (Attorney General)* considered journalistic confidential source privilege in the civil context.[297] The Court again rejected a class-based privilege for journalistic confidential sources, and applied the Wigmore criteria, a common law principle, in the context of Québec civil law.

The Court looked to foreign jurisprudence in *Globe and Mail* when considering a publication ban ordered by the Québec Superior Court on the state of negotiations between the respondent and the Attorney General, part of which was leaked and published in the Globe and Mail. The Court cited a 1794 U.K. decision to emphasize the long history of settlement privilege and confidentiality.[298] It went on to note that this historical rule has been translated into a rule of evidence in modern day, where settlement negotiations are inadmissible in a proceeding.

The Court then considered whether the publication of the content of the settlement negotiations was a civil fault committed by the journalist and newspaper. It held that it was not. The wrong was committed by the government source who leaked the information, not the reporter or newspaper. The Court relied on two decisions of the U.S. Supreme Court to find that journalists should not automatically be subjected to the legal constraints and obligations imposed on their sources. The American authorities held that where a newspaper obtained truthful information about a matter of public importance, and did so

---

[293] *National Post* at para. 53.
[294] *Ibid.* at para. 43.
[295] *Ibid.* at para. 47.
[296] *Ibid.* at paras. 47-49.
[297] *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592 (S.C.C.) [*Globe and Mail*].
[298] *Ibid.* at para. 80.

in a lawful manner, the state should not publish the publication of the information.[299] Applied to the facts of the case, the civil fault committed by the leak could not be imposed on the journalist or on the newspaper.

12. Statutory Interpretation

The Court turned to foreign case law for several reasons when engaging in statutory interpretation: (1) to examine approaches in jurisdictions with similar statutory regimes, (2) to distinguish approaches taken in jurisdictions with different statutory regimes, and (3) to provide context while determining the application of a concept or action within a statutory regime.

(a) Foreign jurisdiction followed because of similarities in statutory regime

It is not surprising that the Court turned to foreign case law in situations where the statutory regime was so similar or based on the same principles that the related foreign jurisprudence was relevant to the statutory interpretation exercise. The Court considered jurisprudence from Australia, New Zealand, and the U.K. in interpreting the *Copyright Act* in *Keatley Surveying Ltd. v. Teranet Inc*. The Court considered the interpretation of section 12 of the *Copyright Act*, which is modeled after the *Copyright Act, 1911 (U.K.)*, and on which the copyright statutes of Australia and New Zealand are also modeled. That section provided for government ownership of works that it prepared or published, or of which it directed or controlled the preparation or publication.[300]

The Court relied on jurisprudence from Australia, New Zealand and the U.K. in its decision. In its analysis, the Court considered the interpretation of the words "by or under the direction or control" and found that this related to the acts of preparation or publication, even if done by a third party acting under the Crown's direction or control. The Court supported this interpretation by noting that it "accords with that given to broadly similar Crown copyright provisions in other Commonwealth statutes". It provided an example from Australian case law.[301]

The Court also considered jurisprudence from New Zealand in two instances in its decision. First, when interpreting the meaning of "prepared" in section 12 of the *Copyright Act*, it cited a case from New Zealand to support its statement that it is "not sufficient for the purposes of the 'prepared' prong for the Crown to determine that, if the work is to be made, it will be made a particular way".[302]

Additionally, when discussing the possibility that independent contractors may have different rights "vis-à-vis the Crown than with other 'employers'", the

---

[299] *Ibid*. at para. 85.
[300] *Keatley Surveying Ltd. v. Teranet Inc*., 2019 SCC 43 (S.C.C.) [*Keatley*].
[301] *Ibid*. at paras. 115-117.
[302] *Ibid*. at para. 118.

Court provided an example from New Zealand which had "theorized" that the U.K. progenitor of section 12 of the *Copyright Act* was enacted partly to make a provision for Crown servants, and not for those under contracts of service.[303]

The Court also took into account foreign approaches with similar jurisprudence in the patent context. In *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, the Court turned to U.K. and U.S. jurisprudence to examine whether selection patents are invalid in principle or on the facts of the specific case, on the grounds of anticipation, obviousness, and double patenting. For each of these components that required analysis, the Court cited directly to U.K. case law to supplement the Court's reasoning, and only cited to U.S. case law in the obviousness analysis. In reviewing the general law of patents as well as the approach to selection patents, the Court specifically noted that certain U.K. cases were the "*locus classicus* describing selection patents",[304] "the most recent reference to the law of patents being wholly statutory",[305] or "accepted" as authority.[306]

In going through the approach to obviousness, the Court concluded that "[t]he convergence of the United Kingdom and the United States law on this issue suggests that the restrictiveness with which the [previous decision by the Court's] test has been interpreted in Canada should be re-examined."[307] The Court ultimately followed the approach in the U.S. and the U.K. jurisprudence, and adopted a specific four-step approach to obviousness from the U.K. line of authority.[308]

Similarly, in *Merck Frosst Canada Ltd. v. Canada (Health)*, the majority of the Court cited Australian decisions interpreting a similar statutory scheme with identical language to assist in interpreting the reasonable expectation of harm standard in access to information legislation.[309] The majority used the findings in the Australian decisions alongside a textual analysis of the statute, to conclude that the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate "that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm."[310]

---

[303] *Ibid.* at para. 61.
[304] *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, 2008 SCC 61, [2008] 3 S.C.R. 265 (S.C.C.) [*Apotex*] at para. 9.
[305] *Ibid.* at para. 12.
[306] *Ibid.* at paras. 11, 22.
[307] *Ibid.* at para. 60.
[308] *Ibid.* at paras. 60-68.
[309] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23 (S.C.C.) at para. 204.
[310] *Ibid.* at paras. 192-206.

In *Teva Canada Ltd. v. TD Canada Trust*, the Court needed to determine whether to apply a subjective or objective approach to the interpretation of "fictitious or non-existing" payees in the *Bills of Exchange Act*.[311] The language from the relevant provision was based on the U.K. *Bills of Exchange Act, 1882*.[312] The majority went through "four influential U.K. cases" that interpreted the terms "fictitious" and "non-existing", ultimately outlining how these cases and subsequent Canadian jurisprudence supported treating "fictitious" and "non-existing" as two distinct notions.[313] The majority concluded, in agreement with the U.K. case law, that the fictitious payee analysis incorporates a subjective standard and the non-existing payee analysis is an objective assessment.[314] The dissent relied heavily on a different U.K. case to support a simplified, objective approach to "fictitious or non-existing" payees,[315] which the majority addressed and observed that the case "offer[ed] no basis for concluding that the common law was changed by [the provision]" and that it "survived for less than 20 years before it was categorically rejected by the House of Lords."[316] Thus, once again, the majority of the Court accepted the prevailing view in the U.K. as part of its statutory interpretation exercise.

Finally, in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, in which the Court had to determine whether, in the context of a utilities regulator determining just and reasonable rates pursuant to the regulator's enabling statute, the regulator was required to apply a particular test in evaluating those utility costs.[317] In finding that the statutory regime gave the regulator broad latitude to determine the methodology to use in assessing utility costs, the majority of the Court relied extensively on U.S. case law that similarly regarded the prudent investment test as being a useful tool "rather than a mandatory feature of utilities regulation that must be applied regardless of [. . .] statutory language to that effect."[318]

The U.S. authorities were also in the context of applying statutory provisions giving a regulator the power to fix "just and reasonable" rates.[319] While acknowledging the "very different political and constitutional-legal regimes" between Canada and the U.S., the majority ultimately took a similar stance to the relevant U.S. case law, finding that the statute did not mandate a prudent investment test and that the utilities regulator therefore had the latitude to

---

311 *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317 (S.C.C.) [*Teva*].
312 *Ibid.* at para. 19.
313 *Ibid.* at paras. 23-26, 51.
314 *Ibid.* at para. 52, 55, 59.
315 *Ibid.* at paras. 81, 94-107.
316 *Ibid.* at para. 63.
317 *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147 (S.C.C.) [*OPG*] at paras. 1-4.
318 *Ibid.* at paras. 88-94.
319 *Ibid.* at paras. 92, 135-136.

determine the methodology to use in assessing the utility costs, and thus did not err in not applying the prudent investment test.[320] The dissent also cited to U.S. case law to clarify the prudent investment test, but came to a different conclusion from the majority by finding the test mandatory based on Canadian jurisprudence (which the majority distinguished).[321]

(b) Foreign jurisprudence distinguished because of differences in statutory regimes

In contrast, the Court also rejected analogies to foreign jurisprudence where the statutory scheme in question differed from its Canadian counterpart. In finding that perpetual contracts are not prohibited under the *Québec Civil Code,* the majority of the Court in *Uniprix inc. v. Gestion Gosselin et Bérubé inc.* rejected an analogy with French law, noting specifically that "the French legislature recently enacted a provision expressly prohibiting all perpetual contracts" while the "Quebec legislature has not seen fit to do the same" — thus concluding that "the positions of the two legislatures are therefore not comparable."[322]

Similar to the majority in *Uniprix*, the majority of the Court in *Threlfall v. Carleton University* distinguished the French approach by noting the differences in the statutory regimes relating to the status of persons and how long an absentee is presumed to be alive. The majority identified that the rebuttal of the French presumption of life operated prospectively only in cases specifically contemplated within a specific provision of the French *Civil Code* — an equivalent which does not exist in the *Québec Civil Code*.[323] The dissent recognized the absence of an equivalent provision, but would have found a similar operation of the presumption of life provision in the *Québec Civil Code* given the "common Germanic inspiration" of the French *Civil Code* and the *Québec Civil Code* amendments that created the provision in question.[324]

In the context of the *Copyright Act*, the Court distinguished the copyright statutory regime in Canada from that of other jurisdictions in five decisions dealing with copyright law released on July 12, 2012. These decisions were landmarks in Canadian copyright law and became known as the Copyright Pentalogy of 2012. Each of these decisions referred to and rejected foreign

---

[320] *Ibid.* at paras. 88, 102-103.
[321] *Ibid.* at paras. 101, 135-138.
[322] *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59 (S.C.C.) [*Uniprix*] at para. 85.
[323] *Threlfall v. Carleton University*, 2019 SCC 50 (S.C.C.) [*Threlfall*] at para. 30.
[324] *Threlfall* at paras. 154, 184-187. The dissent also pointed to decisions by the French Cour de cassation which dealt with whether the similar *Civil Code* provision distinguished between rights of third parties and rights of absentees during the presumption period: paras. 204-207.

jurisprudence, generally because of key differences in the wording of the *Copyright Act* and the foreign copyright legislation. Some of these cases include the rejection of U.K., Australian and New Zealand jurisprudence, despite the similarities and common roots of these statutory regimes discussed above. They demonstrate that the copyright legislation in each country has developed differently on certain issues. In addition, several cases considered American copyright jurisprudence, but the Court cautioned against this many times, because of key differences in the wording of the copyright legislation in the U.S. and policy reasons.

In *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, the Court considered whether a teacher who photocopied a textbook for use by students had engaged in fair dealing (such that the publisher's copyright was not infringed).[325] The respondents relied on "three key Commonwealth cases" from the U.K. and New Zealand to argue that this was not fair dealing.[326] These authorities had found that it was the purpose of the person doing the photocopying that was determinative. The teacher was not the person using the documents for "private study" and therefore, the copying did not constitute fair dealing. The Court rejected this approach and found that it was the purpose of the user that was determinative, and in this case, the user was the student. As such, this constituted fair dealing.[327]

The Court noted that the foreign authorities were not helpful, in part because "courts in the U.K. have tended to take a more restrictive approach to determine the "purpose" of the dealing".[328] The Court provided an example of the differing interpretations to the breadth of the purposes of "research" in fair dealing. Section 178 of the *Copyright, Designs and Patents Act 1988* (U.K.), 1988, c. 48, excludes "commercial purposes" from the definition of "private study" in fair dealing and as such, U.K. courts have also interpreted "research" to exclude commercial purposes. Whereas in Canada, the purpose of "research" is not limited to non-commercial purposes and is to be given a "large and liberal interpretation."[329]

The second case in the Copyright Pentalogy of 2012, *Re:Sound v. Motion Picture Theatre Associations of Canada*, considered whether a pre-existing recording incorporated into the soundtrack of a cinematographic work constituted a sound recording subject to payment of a tariff.[330] The appellant

---

[325] *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345 (S.C.C.) [*Access Copyright*].

[326] *Ibid.* at para. 16.

[327] *Ibid.* at para. 19.

[328] *Ibid.* at para. 19.

[329] *Ibid.* at para. 19, citing *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 (S.C.C.).

[330] *Re:Sound v. Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 S.C.R. 376 (S.C.C.) [*Re:Sound*].

argued that the word "soundtrack" refers only to the aggregate of sounds that accompanies a cinematographic work and that "support for its position can be found in foreign jurisprudence."[331] The Court considered legislation in the U.K. and in Australia and found that there were considerable differences between these jurisdictions and the *Copyright Act*.[332] The U.K. and Australian copyright legislation include the concept of an "aggregate" of sounds in their definitions of "sound recording", while Canada does not. The Court found this distinction to be "clear enough to discount any persuasive value that the cases in which this concept was applied might otherwise have had."[333] In addition, the Court rejected a decision of the Australian High Court which held that a soundtrack is not a sound recording, on the basis that the Australian legislation differed and the court was deeply divided on the issue, with two judges dissenting.[334]

In each of *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada,*[335] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*[336] and *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*,[337] the Court rejected American jurisprudence dealing with copyright law. In each decision, the Court also cautioned against reliance on U.S. copyright legislation due to key differences in policy and legislative wording.

In *SOCAN,* the Court rejected a U.S. approach to research, as a fair dealing purpose. The appellants argued that the purpose of "research" requires the creation of something new. This argument stemmed from U.S. copyright legislation and case law. The Court rejected this approach because the wording of the Canadian legislation is broader. The Court also emphasized that its previous cautions against Canadian courts relying on American copyright jurisprudence "has resonance in the fair dealing context" as the Canadian approach differs significantly.[338]

In *Rogers*, the Court rejected an American approach to the right to communicate a work to the public by telecommunication, due to differences in the legislation.[339] The appellants argued that in streaming a musical work, the potential audience of each point to point transmission was to be considered to

---

[331] *Ibid*. at para. 41.
[332] *Ibid*. at paras. 42-43.
[333] *Ibid*. at para. 44.
[334] *Re:Sound*, para. 45.
[335] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36, [2012] 2 S.C.R. 326 (S.C.C.) [*SOCAN*].
[336] *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 (S.C.C.) [*Rogers*].
[337] *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231 (S.C.C.) [*ESA*].
[338] *SOCAN* at para. 23-26.
[339] *Rogers* at paras. 50-51.

determine if a work was being communicated to the "public". This was the approach taken in *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121 (U.S. C.A. 2nd Cir., 2008). The Court rejected this argument because the language in the *Copyright Act* is broader than its American counterpart.[340]

Last, in *ESA*, Justice Rothstein, dissenting, noted that the appellants relied on an American decision of the Second Circuit Court of Appeals, which held that the right to download a work did not fall within the scope of the right to perform in public, as defined in American copyright legislation. Justice Rothstein found key differences in the wording of legislation and in policy which made these authorities unhelpful to determining the Canadian approach.[341]

(c) To provide context to assist in interpreting a statute

The Court also turned to foreign jurisprudence in order to provide context in order to determine whether a certain concept or action applied under the statute. For example, the Court in *Theratechnologies Inc. v. 121851 Canada Inc.* quoted a case from the U.S. Supreme Court regarding the risks of excessive disclosure to provide further context in determining whether disclosure obligations under the *Securities Act* had been triggered, and to conclude they had not.[342] More recently, in *Pioneer Corp. v. Godfrey*, the Court quoted an explanation of umbrella pricing from the European Court of Justice in analyzing whether umbrella purchasers would have a cause of action under the *Competition Act* (ultimately concluding that they would).[343]

In determining whether withdrawal of treatment constituted "treatment" under the applicable healthcare consent regime, the majority of the Court in *Cuthbertson v. Rasouli* found that the applicable law was clear that treatment could not be administered without consent, regardless of the ethical imperative that physicians may have felt.[344] The majority highlighted that a physician's duty of care may require that treatment not be withdrawn despite similar ethical obligations, and pointed to a U.K. case to support this finding.[345] The dissent rejected the application of the statutory regime entirely, instead positing that the common law governed.[346] The dissent then embarked on an analysis of the relevant common law jurisprudence, pointing to U.K. and U.S. jurisprudence

---

[340] *Ibid.* at para. 50.
[341] *ESA* at paras. 102-103.
[342] *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106 (S.C.C.) at paras. 55-56.
[343] *Pioneer Corp. v. Godfrey*, 2019 SCC 42 (S.C.C.) at paras. 58, 78.
[344] *Cuthbertson v. Rasouli*, 2013 SCC 53, [2013] 3 S.C.R. 341 (S.C.C.) [*Cuthbertson*].
[345] *Ibid.* at para. 73.
[346] *Ibid.* at para. 124.

supporting that — outside the statute — the case law generally suggests that consent is not required to withdraw treatment.[347]

In *Saulnier v. Royal Bank of Canada*, the Court needed to determine whether a fisher's commercial fishing licences constituted "property" within the scope of bankruptcy and insolvency legislation and personal property security legislation.[348] The Court reviewed the different potential approaches to answering this question. First, the Court identified the traditional "property" approach, whereby the right of access to a resource is considered a form of common law property, and pointed to a High Court of Australia decision that noted the analogy of a commercial fishing licence to a right of access.[349] Then the Court turned to the regulatory approach, which provides that "a licence holder's ability to request a renewal or reissuance of a licence [. . .] forms part of a 'bundle of rights' which collectively constitute a type of property in which a security interest can be taken," and pointed to a similar approach in an English case (although also noting differing language in the relevant legislation).[350] Finally, the Court identified the "commercial realities" approach, which identified fishing licences as having value and that to "ignore [this] commercial reality would be to deny creditors access to something of significant value," and noted that English cases have expressed a similar approach.[351] After going through these approaches, the Court outlined its preferred approach: to look at the substance of what was conferred to find that a fishing licence should be included in the definition of property under both the bankruptcy and insolvency legislation and the personal property security legislation.[352]

In *Cinar Corporation v. Robinson*, the Court relied on U.K. jurisprudence and rejected U.S. jurisprudence on the concept of substantiality within copyright law.[353] First, when considering the scope of protection afforded by the *Copyright Act*, the Court relied on two decisions of the House of Lords for what constitutes a substantial part of a work. The Court also cited a U.S. decision for the same proposition.[354] In addition, the Court cited U.K. jurisprudence, along with Canadian authorities, for the standard of review on the issue of substantiality. Both jurisdictions have held that the issue is one of mixed fact and law and consequently, an appellate court will generally show deference to

---

[347] *Ibid.* at paras. 173, 182-185.
[348] *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166 (S.C.C.) [*Saulnier*] at para. 1.
[349] *Ibid.* at para. 31.
[350] *Ibid.* at para. 36.
[351] *Ibid.* at para. 41.
[352] *Ibid.* at paras. 46, 52.
[353] *Cinar Corporation v. Robinson*, 2013 SCC 73, (*sub nom.* Cinar Corp. v. Robinson) [2013] 3 S.C.R. 1168 (S.C.C.) [*Cinar*].
[354] *Ibid.* at paras. 26-27.

the trial judge's finding, absent an error or law or a palpable and overriding error of fact.[355]

However, the Court rejected the U.S. approach to assessing substantiality. The appellants argued that the trial judge should have applied a three-step approach, instead of the holistic approach generally used in Canada. The Court noted that the suggested three-step test resembled the "abstraction-filtration-comparison" approach used in the U.S. to assess substantiality in the context of computer software infringement. The Court found that while in that context, the approach may at some point be appropriate, "many types of works do not lend themselves to a reductive analysis" and found that, for the case at hand, the trial judge did not err in applying a holistic approach.[356]

13. Civil Procedure and Courts

When the Court looked beyond Canadian jurisprudence in the context of civil procedure and court functions and requirements, it tended to cite the foreign approaches with approval and used these approaches to support or confirm the approach ultimately taken by the Court. As one example, in weighing whether a class action was preferable to other available dispute resolution processes, the Court used a U.S. Eleventh Circuit Court of Appeals judgment to identify the proper approach for the weighing exercise.[357] Similarly, in *Canadian National Railway Co. v. McKercher LLP*, the Court cited U.K. case law to reinforce the consistent approach to the bright line rule holding that a law firm cannot act for a client whose interests are adverse to those of another existing client, unless both clients consent.[358] In another example, noting that the Court had never previously ruled on the matter, the Court pointed to case law from the U.K., Hong Kong, Australia, and the U.S to confirm its finding that it is acceptable for judges to copy a party's submissions into their reasons, and that copying, on its own, does not form a basis to overturn a judge's decision.[359]

In both *Ontario (Attorney General) v. Fraser*[360] and *Canada v. Craig*,[361] the Court grappled with whether to overrule a previous Supreme Court decision. In his concurring decision in *Fraser*, Justice Rothstein quoted a passage from a High Court of Australia decision with approval for its description of the cautious and careful approach courts must use when deciding to overrule a prior

---

[355] *Ibid.* at para. 30.
[356] *Ibid.* at para. 35.
[357] *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 (S.C.C.) at para. 23, citing *Klay v. Humana Inc.*, 382 F.3d 1241 (11th Cir., 2004) at 1269.
[358] *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, 2013] 2 S.C.R. 649 (S.C.C.) at paras. 20, 31.
[359] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357 (S.C.C.) at paras. 37-42.
[360] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3 (S.C.C.) [*Fraser*].
[361] *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.) [*Craig*].

decision, as well as American cases that provided other considerations.[362] In *Craig*, the Court used the same Australian High Court passage as the required approach in deciding to overrule a prior decision.[363] While the majority of the Court in *Fraser* did not ultimately overrule its prior decision on the relevant topic (regarding collective bargaining rights), the Court in *Craig* did (regarding the interpretation of the *Income Tax Act* provision concerning deductions for farming losses). Similarly, as set out above, in her reasons concurring in the result in *Vavilov*, Justice Abella cited a large number of U.S., U.K., Australian, New Zealand and South African cases in support of her conclusion that the majority had disregarded the high threshold required to justify a departure from precedent.[364]

In *Ontario v. Criminal Lawyers' Association of Ontario*, the majority cited a decision from the High Court of Australia to confirm that courts may not exercise non-judicial functions that would diminish public confidence in the integrity of the judiciary as an institution.[365] With respect to judicial impartiality, the Court in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)* cited a decision of the South African Constitutional Court in its consideration of the test for reasonable apprehension of bias.[366]

The Court in *Carey v. Laiken* cited foreign jurisprudence to provide context, without accepting or rejecting it.[367] The Court needed to examine the mental element required for civil contempt, specifically in the context of a lawyer's contempt of court.[368] One of the lawyer's arguments against the contempt finding was that he, as a third party to the order that had been breached, could not be held liable for contempt of court without proof that he intended to interfere with the administration of justice.[369] The Court acknowledged the existence of some authority in the U.K. and Australia that an intent to interfere with the administration of justice is a prerequisite for finding a third party in contempt. However, the Court decided not to address whether that line of authority should be accepted in Canada or not, finding instead that even if it were accepted, the lawyer was not in the same category as the third parties

---

362 *Fraser* at paras. 132, 136, 138.
363 *Craig* at para. 26.
364 *Vavilov* at paras. 256-66, 271-74.
365 *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3 (S.C.C.) [*CLAO*] at para. 79.
366 *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282 (S.C.C.) [*Yukon Francophone School Board*] at para. 35.
367 *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79 (S.C.C.) [*Carey*].
368 *Ibid.* at paras. 1-2.
369 *Ibid.* at paras. 28, 39.

discussed in the foreign line of authority, and thus the argument was inapplicable.[370]

In contrast, the Court in *Pro-Sys* (discussed above in Sections E and G) rejected U.S. authority. In that case, the Court needed to determine the standard of proof for the requirements of certification in a class action and the weight that should be given to expert evidence at the certification stage. The Court rejected the U.S. approaches to both of these issues. The Court found that the American "balance of probabilities" standard of proof to meet certification requirements would be contrary to the "some basis in fact" standard already established by a previous decision of the Court.[371] The Court also rejected the American approach to weighing conflicting expert testimony at certification in a "robust" and "rigorous" manner, finding that doing so would be inappropriate at the certification stage because in Canada, unlike the U.S., pre-certification discovery does not occur as a matter of right.[372]

V. CONCLUSION

We opened this paper by asking four questions. Have Canadian courts, like other institutions, been influenced by foreign courts' decisions as they shape and apply to Canadian law? In what contexts have our courts done so? How do they use foreign jurisprudence? And most importantly, should they?

Our analysis of the Court's decisions from July 2008 to July 2020 demonstrates that the Court has indeed been "foreign influenced". The Court's reliance on foreign jurisprudence is broad in three different respects. First, the Court has relied on foreign jurisprudence covering a wide variety of subject-matters, as set out in each of the sections in the body of the paper above. Second, that jurisprudence is from a number of different jurisdictions, albeit (unsurprisingly) heavily focused on the U.S., U.K., Australia and New Zealand. Third, the Court relied on foreign jurisprudence for a number of different reasons — and rejected foreign jurisprudence based on various rationales — for which we propose a typology below.

1. Breadth of Subject-Matter

The body of this paper set out systematically the areas of law in respect of which the Court relied on foreign jurisprudence. We divided these into the following areas: (a) international law and international human rights law; (b) the *Charter* and Canadian human rights law; (c) constitutional law (non-Charter); (d) private international law; (e) torts; (f) contracts; (g) equity; (h) administrative

---

[370] *Ibid.* at paras. 45-46

[371] *Pro-Sys* at para. 101, citing *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.).

[372] *Ibid.* at paras. 117-119.

law; (i) employment law; (j) criminal law; (k) evidence; (l) statutory interpretation; and (m) civil procedure and courts. The areas in which the Court relied on foreign jurisprudence most frequently were: (i) criminal law (34), including *Charter* and evidentiary issues arising from criminal law cases; (ii) statutory interpretation (19); (iii) torts (14); and (iv) *Charter* and human rights (13, plus 14 included as criminal cases).

2. Breadth of Jurisdictions

As we embarked upon this project, our working assumption was that the U.K. would — by far — be the "winner" as the jurisdiction whose jurisprudence the Court relied upon most frequently, perhaps followed by that of other Commonwealth jurisdictions like Australia and New Zealand. We assumed a certain skepticism toward U.S. courts generally and the U.S. Supreme Court in particular. We assumed that such skepticism, if it existed, meant that the Court would not frequently rely on U.S. jurisprudence. We tested this hypothesis with several colleagues, who nearly unanimously shared our view.

Our data confirmed that the U.K. remains the clear leader as the jurisdiction whose decisions the Court relied upon the most frequently: the Court has accepted or cited favourably U.K. jurisprudence in 72 decisions during our review period. However, we were surprised that the runner-up jurisdiction was the United States. Far from being irrelevant to the Court, U.S. jurisprudence is accepted or cited favourably in 56 decisions, substantially more than the jurisprudence of any other jurisdiction except the U.K.

The following table sets out the number of cases in which the Court (majority decisions only) cited jurisprudence from each country listed, and whether it accepted or cited favourably, or rejected or distinguished that jurisprudence.

Country	**Accepted / Cited Favourably**	**Rejected / Distinguished**	**Total**
United Kingdom	74	15	89
United States	56	19	75
Australia	39	6	45
New Zealand	19	3	22
South Africa	4	0	4
France	3	2	5
Germany	2	0	2
Ireland	2	1	3
Hong Kong	2	0	2
Belgium	2	0	2

Country	**Accepted / Cited Favourably**	**Rejected / Distinguished**	**Total**
Singapore	1	0	1
The Netherlands	1	0	1
Switzerland	1	0	1
Israel	1	0	1
International courts			
European Court of Human Rights (ECHR)	6	1	7
International Court of Justice (ICJ)	3	0	3
European Court of Justice (ECJ)	2	0	2
International Criminal Court (ICC)	1	0	1
Inter-American Court of Human Rights	1	0	1

The Court's reliance on U.S. jurisprudence was especially pronounced in the areas of criminal law and evidence, which perhaps reflects similarities in U.S. and Canadian criminal and evidence law and procedure. The Court appears to have found helpful guidance in the wealth of jurisprudence emanating from U.S. courts in those areas. It will be interesting to see whether this trend continues as the U.S. Supreme Court becomes more conservative. In two of the judgments in our data set, the Court relied explicitly on opinions authored by Justice Ruth Bader Ginsburg,[373] known to be the most liberal member of the U.S. Supreme Court. As the ideological balance of the U.S. Supreme Court shifts to the right, the Court's reliance on its judgments may change.

We also found interesting the Court's reliance on cases from jurisdictions that are not traditional sources of jurisprudential inspiration for Canadian courts. For example, the Court relied on decisions of the South African Constitutional Court in several cases involving various constitutional issues and judicial impartiality,[374] decisions of various Israeli and German courts regarding the right to strike,[375] decisions of Irish, German, French, Hong Kong, Singapore and South African courts regarding the exclusivity principle in the *Warsaw Convention*,[376] and decisions from Belgium, France, Germany and the European

[373] *Mian* at para. 38 and *Dionne* at para. 28.
[374] *Ward* at paras. 26-29; *Khadr* at para. 44; *Yukon Francophone School Board* at para. 35.
[375] *Saskatchewan Federation of Labour* at paras. 72-73.
[376] *Thibodeau* at paras. 55-56.

Court of Justice in interpreting the *Refugee Convention*.[377] Also noteworthy was the Court's reliance in six different decisions on jurisprudence from the ECHR.[378]

We take this as a positive signal that the Court is willing to be inspired from jurisdictions other than those which have been the traditional sources of inspiration. An increase in the breadth of jurisdictions from which the Court draws influence can only lead to increased perspectives and creativity as the Court grapples with crafting solutions to the novel legal issues that arise in today's interconnected world. The influence will likely be reciprocal, as courts in other jurisdictions are equally likely to continue referring to the Court's jurisprudence.[379]

---

[377] *Febles* at paras. 54-57.

[378] *Kazemi* at paras. 50, 87, 96, 144, 155, 207; *Hutterian Brethren* at paras. 90, 128; *Saskatchewan Federation of Labour* at para. 71; *Bou Malhab* at para. 20; *Vice Media* at paras. 126, 131; *Chagnon* at para. 20, fn. 2; *Carter* at para. 9. In *Poulin*, the Court cited an ECHR decision, but distinguished it on the facts (paras. 107-108).

[379] For examples of foreign courts citing the Court's jurisprudence, see *e.g.* **ICJ**: *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, ICJR 2012 at 99, para. 64, citing *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269 (S.C.C.); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, ICJR 2010 at 403, para. 55, citing *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.); **ECHR**: *Vinter and others v. United Kingdom*, 66069/09, [2012] ECHR 61 at paras. 59-62, citing *United States v. Burns*, [2001] 1 S.C.R. 283 (S.C.C.) and other decisions; **U.S. Supreme Court:** *Monasky v. Taglieri*, 140 S.Ct. 719 (2020), citing *Balev*; **U.K. Supreme Court**: *Barclays Bank plc v. Various Claimants*, [2020] UKSC 13, paras. 10-11, citing *Bazley v. Curry*, [1999] 2 S.C.R. 534 (S.C.C.) and *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 (S.C.C.); **High Court of Australia**: *Comcare v. Banerji*, [2019] HCA 23 at para. 98, citing *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 (S.C.C.); **New Zealand Supreme Court:** *Dotcom v. United States of America*, [2014] NZSC 24, citing several Supreme Court of Canada cases relating to extradition; **Supreme Court of Ireland**: *Flightlease (Irl) Ltd. (In Vol Liq) & Cos Act*, [2012] IESC 12 (S.C.), citing *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416 (S.C.C.); **Singapore Court of Appeal:** *Wee Chiaw Sek v. Ng*, [2013] SGCA 36 at para. 174, citing *Pettkus v. Becker*, [1980] 2 S.C.R. 834 (S.C.C.) and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.); **Hong Kong Court of Appeal**: *HKSAR v. Lam Hon Kwok Popy and others*, [2006] HKCA 599 at paras. 14, 30-32, citing *R. v. Duarte*, [1990] 1 S.C.R. 30 (S.C.C.), *R. v. Broyles*, [1991] 3 S.C.R. 595 (S.C.C.) and *R. v. Liew*, [1999] 3 S.C.R. 227 (S.C.C.); **South African Constitutional Court:** *Helen Suzman Foundation v. Judicial Service Commission* (CCT289/16), [2018] ZACC 8 at para. 173, 177, citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, (*sub nom.* Ontario (Public Safety & Security) v. Criminal Lawyers' Association) [2010] 1 S.C.R. 815 (S.C.C.), *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 (S.C.C.), *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796 (S.C.C.); **Supreme Court of India:** *Madras Bar Association v. Union of India*, [2014] INSC 717, citing *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714 (S.C.C.) and other decisions.

3. Breadth of Purposes

We also found that the reasons why the Court chose to rely on foreign jurisprudence were varied, but could be broadly grouped into categories. We propose the following typology of purposes for which the Court relied on foreign jurisprudence: (1) to align Canadian law with that of other jurisdictions; (2) to confirm that existing Canadian law remains good policy; (3) to apply existing legal principles to novel fact patterns, that have been considered in the foreign jurisdiction; (4) to explain and flesh out existing legal doctrines, including their historical development and purpose; and (5) to interpret the same international treaty or identical or similar statutes.

Where the Court rejected the use of foreign jurisprudence, it usually did so because: (1) the Court disagreed with the policy underlying the foreign court's approach; (2) the Court considered that Canada did not need the doctrine adopted by the foreign court or that existing Canadian legal principles are sufficient; or (3) the foreign legal system or statutory regime was not sufficiently comparable, such that it would not be appropriate to adopt the foreign court's approach.

(a) *Reason to accept #1:* to align Canadian law with that of other jurisdictions, where the Court considers the foreign approach to be good policy

The first category in our typology is that in which the Court — faced with a novel legal issue for Canada or one in which Canadian law needs to evolve — drew upon foreign jurisprudence to craft a novel legal solution to the novel problem. For example, in *Torstar*, the Court departed from the existing Canadian approach to qualified privilege for defamation and adopted the approach followed in the U.K., Australia, New Zealand and South Africa, which allows publishers to escape liability for defamation if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest.[380] In *Chevron*, the Court relied on U.K., Irish and U.S. decisions to determine that the presence of assets in the enforcing jurisdiction is not a prerequisite to the recognition and enforcement of a foreign judgment.[381] Another example is *Miazga*, in which the Court relied on U.K. and New Zealand jurisprudence in determining the elements of the tort of malicious prosecution where there was "no clear precedent in Canadian case law" on the issue.[382]

---

[380] *Torstar* at para. 85.
[381] *Chevron* at para. 58.
[382] *Miazga* at para. 70.

(b) *Reason to accept #2:* to confirm that existing Canadian law remains good policy

Another situation that frequently led the Court to cite foreign jurisprudence was where the Court was interested in confirming, by looking to the experience of other jurisdictions, that the existing Canadian approach remained good policy. For example, in *Kazemi*, the majority relied on jurisprudence from the ICJ, the ECHR and courts in the U.K. and New Zealand to confirm its view that there is no exception to state immunity under the *State Immunity Act* in situations of torture.[383] Another example is *Douez*, in which the majority cited U.K. and Australian cases to support its conclusion that the test for the enforcement of a forum selection clause may apply differently depending on the contractual context.[384]

(c) *Reason to accept #3:* to apply existing legal principles to novel fact patterns that have been considered in the foreign jurisdiction

As might be expected, the Court relied on foreign jurisprudence in a number of cases involving novel factual situations, where the foreign court had addressed a legal problem not yet addressed by Canadian courts, or not addressed to the same degree. For example, the Court cited U.S. cases in considering unreasonable search and seizure of cell phones[385] and computers,[386] and U.S. and U.K. cases in determining whether hyperlinking to defamatory content is defamatory.[387]

(d) *Reason to accept #4:* to explain and flesh out an existing legal doctrine, including its historical development and purpose

The Court frequently turned to foreign jurisprudence to explain and flesh out existing legal doctrines that the foreign jurisdiction had in common with Canada. In these situations, the Court used the foreign jurisprudence much as it would Canadian jurisprudence, to inform its analysis without purporting to make new law. For example, in *R. v. R.E.M.*, the Court relied on U.K. and Australian cases to show that the common law historically recognized no legal duty upon a tribunal to disclose its reasons for a decision or to identify what evidence had been believed versus disbelieved.[388] In *Reference re Pan Canadian Securities Regulation*, the Court cited an Australian case that "clearly exempli[fied]" the rule of parliamentary sovereignty that the executive cannot

---

[383] *Kazemi* at paras. 154-157.
[384] *Douez* at para. 34.
[385] *Fearon* at para. 48.
[386] *Vu* (2013) at para. 58.
[387] *Crookes* at paras. 21-23, 28.
[388] *R.E.M.* at paras. 8, 12.

bind the legislature.[389] In *Chagnon*, the Court looked to U.S. jurisprudence in discussing the purpose of parliamentary privilege, and to U.K. cases in discussing the history of the doctrine.[390]

(e) *Reason to accept #5*: to interpret the same international treaty or identical or similar statutes

The Court also relied extensively on foreign jurisprudence when interpreting international treaties or statutes with identical or similar counterparts in the foreign jurisdiction in question. The Court relied on decisions from the U.K., Australia, New Zealand, the ECJ, Belgium, France and Germany in interpreting various international treaties.[391] In *Balev*, Chief Justice McLachlin (as she then was) emphasized that the desirability of a harmonized interpretation of the relevant international treaty weighed heavily in favour of following the dominant thread of foreign jurisprudence, rather than the existing Canadian jurisprudence.[392] The Court also relied on decisions of foreign courts to interpret a variety of different statutory provisions that have foreign equivalents, as set out in section IV.9 above. The Court even turned to foreign jurisprudence to interpret the *Charter*: in *Poulin*, the Court relied on a decision of the U.K. Supreme Court that interpreted a provision of the *European Convention on Human Rights* that was substantially identical to section 11(i) of the *Charter*.[393]

(f) *Reason to reject #1:* the Court considers whether to deviate from an existing legal principle to align with a foreign approach, and rejects that approach because it is bad policy

Although the Court relied on foreign jurisprudence in a great variety of contexts, it did so critically, and was not shy to reject that jurisprudence when to accept it would be bad policy. A notable example of this was *Carter*, in which the Court overturned its prior decision in *Rodriguez* regarding the constitutionality of the criminal prohibition on assisted suicide. The Court refused to follow U.S. and U.K. case law that had held that a blanket prohibition on assisted suicide was necessary. The Court noted that there was no longer a substantial consensus on the issue, since eight jurisdictions had legalized assisted suicide as of 2015.[394] In *Mabior*, in the context of deciding whether the failure to inform a sexual partner of HIV-positive status vitiates consent, the Court rejected a line of authority from the U.K., Australia and New Zealand

---

[389] *Pan-Canadian Securities* at para. 56.
[390] *Chagnon* at paras. 21-22.
[391] *Balev* at paras. 50-57; *Febles* at paras. 49-59; *Nemeth* at paras. 92-95, 100-101; *Ezokola* at para. 48; *Peracomo* at paras. 29-35; *Thibodeau* at paras. 44-46, 48, 51-57, 80-81.
[392] *Balev* at para. 57.
[393] *Poulin* at para. 106.
[394] *Carter* at para. 9.

which treat the actual transmission of HIV as a bodily assault, rather than a sexual assault. It preferred the U.S. approach, which treats the situation as a sexual assault.[395] Other examples of the Court rejecting foreign jurisprudence that it considers to be bad policy are *Clements*[396] and *Sattva*.[397]

(g) *Reason to reject #2:* the Court considers that Canada doesn't need the principle espoused by the foreign court / existing legal principles are sufficient

Another reason the Court has cited to reject a principle arising from foreign jurisprudence is that the principle is not needed in Canada. In *Nevsun*, for example, the majority forcefully rejected the act of state doctrine, because the principles underlying the doctrine have been addressed within Canadian conflict of laws and judicial restraint jurisprudence. It found that importing the act of state doctrine into Canadian common law would overlook the development that the underlying principles had received through considered analysis by Canadian courts.[398] Another example is *Bram*, in which the Court rejected the approach to the unlawful means tort adopted in several U.S. states which impose liability for conduct that is "improper", but not unlawful. The Court held that a narrower approach to the unlawful means tort best aligned with Canadian principles and the trend of authority from comparable common law jurisdictions.[399]

(h) *Reason to reject #3:* the foreign legal system or statutory regime is not comparable, such that it would not be appropriate to adopt the legal principle

The last reason we identified for which the Court rejects foreign jurisprudence is that it is simply not applicable because the legal system or statutory regime in question is not comparable, such that it would not be appropriate to adopt the legal principle. For example, in the Copyright Pentalogy of 2012, the Court distinguished cases from the U.K., Australia, New Zealand and the U.S. on the basis of key differences in wording of the *Copyright Act* and the copyright legislation of those jurisdictions.[400] In *Sinclair*, the Court rejected the adoption of a Miranda-like regime as found in the U.S. In doing so, the Court stated that section 10(b) must be read in light of other elements of the Canadian context and "adopting procedural protections from other jurisdictions in a piecemeal fashion risks upsetting the balance."[401]

---

[395] *Mabior* at paras. 54-55.
[396] *Clements* at paras. 29, 42.
[397] *Sattva* at paras. 45, 50.
[398] *Nevsun* at paras. 58-59.
[399] *Bram* at paras. 32, 42, 74.
[400] *Access Copyright* at paras. 16, 19; *Re:Sound* at paras. 41-45; *SOCAN* at para. 23-26; *Rogers* at paras. 50-51; *ESA* at paras. 102-103.

* * *

Having provided some analysis of whether, how much and why the Court has relied on foreign jurisprudence, the question that remains to be answered is whether the Court should continue to rely on and consider foreign jurisprudence in the decade to come. In our view, it will be important for it to continue to do so, as Canadian courts, and courts around the world, are confronted continually by changing technology, changing social norms and increasing interconnectivity. As the Court grapples with novel legal issues, it makes good sense for it to survey how other jurisdictions have responded to similar issues, always taking care — as it did in the cases we reviewed — to apply a critical filter and to reject foreign analysis that is inconsistent with Canadian values, incoherent with Canadian law or is simply not desirable policy.

---

[401] *Sinclair* at para. 38.