

ARTICLE

The use of non-domestic legal sources in Supreme Court of Canada judgments: Is this the *judicial slowbalization* of the court?

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Observed from the perspective of citation of foreign judgments, the Supreme Court of Canada (SCC) is often considered one of the world's most cosmopolitan and proactive actors in transnational judicial conversation. However, there are also other forms of non-domestic legal sources that Courts engage with, such as: foreign law, international case law, and international treaties. Hence, the 'globalist' or 'localist' approach of a court cannot be assessed without looking from this broader perspective. By examining all the 1223 judgments issued by the SCC over 17 years (2000–2016), this study offers a comprehensive picture of citations of all forms of non-domestic legal sources. Remarkably, the empirical data show that the Court has extensively engaged with all forms of non-domestic legal sources, and cites such foreign authorities in approximately 50 different fields of law.

This article is distinct in that it combines two different perspectives when analyzing the data: the *SCC as an institution* and its *individual judges*. From an institutional perspective, such all-inclusive records demonstrate that foreign citation is decreasing, a trend which may jeopardize the high prestige of the SCC in the global arena. Similar trend is noticeable when the data is analyzed also from an individual-judge perspective. In providing an empirical picture of individual judges' engagement with non-domestic legal sources, this Article attempts to categorize the 21 justices that have served in the SCC during the 17-year timeframe into three groups: 'high globalist judges', 'moderate globalist judges', and 'localist judges'. The article ends with few remarks regarding whether this is a *judicial slowbalization* of the Court.

Keywords: transnational judicial dialogue; Supreme Court of Canada; judicial slowbalization; non-domestic legal sources; comparative law; international law; globalist/localist judges

1. Introduction

We live in the era of modern globalization, a development that is both dynamic and highly controversial; it engages many actors, factors, and mechanisms, and appears in various fields and forms. As acknowledged by the United Nations General Assembly, globalization is 'not merely an economic process but [one that] has social, political, environmental, cultural and legal dimensions'.¹ It is difficult to dispute Thomas Friedman's prediction that the general process of globalization will profoundly affect law.² 'Globalization of law may be defined as the worldwide progression of transnational legal structures and discourses along the dimensions of extensity, intensity, velocity, and impact.'³ In other words, it includes the globalization of legal institutions and legal instruments at national and international levels.

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¹ Res Nr. 63/176, 20 March 2009, of The General Assembly of the UN on 'Globalization And Its Impact On Full Enjoyment Of All Human Rights', <<http://www.worldlii.org/int/other/UNGARsn/2008/199.pdf>>.

² Thomas L. Friedman, *The World Is Flat: A Brief History Of The Twenty-First Century* (Farrar, Straus and Giroux, 2006) 237, 411.

³ Terence C. Halliday & Pavel Osinsky, 'Globalization of Law' (2006) 32 *Annu Rev Sociol* 447.

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

As in other fields of human activity such as politics, science, sport, art, film, or music, in the judiciary, certain actors—courts and judges—have a global influence, and play starring roles. The Supreme Court of Canada (SCC), and several of its justices, are among the most well-known. The Court's judgments, legal tests and best practices, are often used as guidance. Indeed, many scholars, not only those from a Canadian background, consider the SCC a global frontrunner in the process of transnational judicial interaction, particularly in regards to the citation of foreign judgments.

There are an impressive number of academic works on the engagement of the SCC mostly with foreign case law.⁴ This interest is mainly explained by the excellent reputation of the SCC in the global arena.

Slaughter, one of the prominent experts in the field, demonstrates a high respect for the SCC.⁵ When trying to identify the most influential 'donor' or 'lender' of judicial precedents in recent years, she names the SCC as a highly influential court, even more so than the US Supreme Court.⁶ Frederick Schauer, too, agrees that the 'ideas and constitutionalists of Canada have been disproportionately influential,' in part because 'Canada, unlike the United States, is seen as reflecting an emerging international consensus rather than existing as an outlier.'⁷

According to Gentili and Mak, the SCC 'has established itself as one of the most progressive constitutional judiciaries worldwide ... [and] appears to be at the forefront of judicial globalisation when it comes to its transnational connections with other courts.'⁸ Their conclusion is based on a quantitative general overview of the SCC's references to foreign case law from 1982–2014,⁹ and a quantitative analysis of the trends of SCC citation of foreign case law.¹⁰

Other scholars have praised the SCC's judicial communication and influence in the global arena. In 2008, after conducting an empirical study on the use of foreign judgments by Australian State Supreme Courts over the last 40 years, Russell Smyth discovered that the citation of Canadian cases in Australia had increased to the point where only the citation of New Zealand cases was greater, whereas the citation of American cases had decreased.¹¹ In an empirical study on the citation of overseas authorities in rights litigation in New Zealand, James Allan, Grant Huscroft, and Nessa Lynch revealed that Canadian courts, particularly the SCC, are cited by New Zealand courts far more than those from any other jurisdiction, and twice as often as

⁴ As Giuseppe Franco Ferrari rightly mentions in his final edited book regarding the usage of foreign or international sources by constitutional courts in general *The relevant literature has become so voluminous that is difficult to master*. Giuseppe Franco Ferrari. 'Introduction: Judicial Constitutional Comparison and Its Varieties.' *Judicial Cosmopolitanism*. Brill Nijhoff, 2019. 1–25, 1ff. For a literature regarding the SCC, Adam M Dodek, 'Canada as Constitutional Exporter: The Rise of the "Canadian Model" of Constitutionalism' (2007) 36 Sup Ct L Rev 309; Beverley McLachlin, 'Decision-making in the SC' (2007) 56 UNBLJ 328; Bijon Roy, 'An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation' (2004) 62 UT Fac L Rev 99; Christopher McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 Oxford J Legal Stud 499; Christopher P Manfredi, 'The Use of United States Decisions by the Supreme Court of Canada under the Charter of Rights and Freedoms' (1990) 23 Can J Pol Sci 499; Claire L'Heureux-Dubé, 'Two Supreme Courts: A Study in Contrast' in Marian C McKenna, ed, *The Canadian and American Constitutions in Comparative Perspectives* (Calgary: Calgary University Press, 1993); Elaine Mak, *Judicial Decision-making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts, Hart Studies in Comparative Public Law, Volume 3* (Oxford: Hart Publishing, 2013); Gianluca Gentili & Elaine Mak, 'The Supreme Court of Canada's Transnational Judicial Communication on Human Rights (1982–2014)', in Amrei Müller, ed, *Judicial Dialogue and Human Rights*, ed, Studies on International Courts and Tribunals (Cambridge: Cambridge University Press, 2017) 114; Louis LeBel, 'A Common Law of the World: The Reception of Customary International Law in the Canadian Common Law' (2014) 65 UNBLJ 3; Michel Bastarache, 'The Globalisation of the Law and the Work of the Supreme Court of Canada' in Sam Muller & Sydney Richards, eds, *Highest Courts and Globalization* (The Hague: Hague Academic Press, 2010) 41; Peter McCormick, 'American Citations and the McLachlin Court: An Empirical Study' (2009) 47 Osgoode Hall LJ 84; Sujit Choudhry, 'Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory' (2007) 5 Int'l J Const L 606.

⁵ Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harv Int'l LJ 191 at 198; Anne-Marie Slaughter, 'A Brave New Judicial World' in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 277, 289ff.

⁶ Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) 74ff.

⁷ Frederick Schauer, 'The Politics and Incentives of Legal Transplantation' in Joseph S Nye & John Donahue, eds, *Governance in a Globalizing World* (Washington DC: Brookings Institution Press, 2000) 253.

⁸ Gentili & Mak, (n 4), 114ff.

⁹ *ibid* 124ff. (See Section 4.3.1.1).

¹⁰ *ibid* 131ff. (See Section 4.3.2).

¹¹ Russell Smyth, 'Citations of Foreign Decisions in Australian State Supreme Courts Over the Course of the Twentieth Century: An Empirical Analysis' (2008) <http://works.bepress.com/russell_smyth/1>.

American cases. In their view, Canadian judges are ‘the most judicially activist in the common law world—the most willing to second guess the decisions of the elected legislatures.’¹²

Although all these studies and academic conversations are certainly important for better understanding the phenomenon of transnational judicial dialogue and the role of the SCC, most authors seem to equate such dialogue with the citation of foreign case law, and use them interchangeably. Moreover, the existing scholarship does not provide a comprehensive picture of all forms of non-domestic legal sources cited by the SCC in all its judgments within the timeframe of this study. Some studies focus only on one or few fields of law (mainly constitutional);¹³ most consider only the citation of comparative case law of one particular foreign jurisdiction (US or UK);¹⁴ others focus solely on international courts or the use of international law;¹⁵ and nearly all the literature regards the Court as a whole.¹⁶ Hence, one of the main purposes of this paper is to offer to the existing scholarship comprehensive and empirical quantitative data that includes within the same ‘picture’ all forms of non-domestic legal sources used by this Court. This broader perspective is key for assessing the ‘globalist’ or ‘localist’ approach of a court and its genuine place in the judicial global network.

A significant criticism of the SCC’s role in the transnational judicial arena, and particularly in the citation of foreign case law, is that not all SCC judges contribute or invest the same effort in the process.¹⁷ Such a criticism is worth it to be evaluated empirically, and that constitutes another central goal of this paper. By providing an empirical picture of individual judges’ engagement with all forms of non-domestic legal sources, this article aims to contribute to the existing academic conversation by providing a more comprehensive picture from both, an institutional and judge individual perspective. Such a dual perspective can also help for the contextualization and explanation of the results, and the theorization of transnational judicial dialogue. Moreover, without looking at the level of engagement of all forms of non-domestic legal sources, the ‘globalist’ or ‘localist’ approach of a court or a judge cannot be fairly assessed, because it will be incomplete to say the least.

After clarifying the methodology, this article, first, will present quantitative data on the citation of comparative legal sources throughout the years by focusing not only on comparative case law (foreign judgments), but also on primary comparative legal sources such as constitutions, codes, statutes, and regulations of other nations. Second, the focus will shift to presenting quantitative data on the reference of international legal sources of both, primary nature, such as international conventions and treaties, but also secondary sources such as judicial decisions of international or supranational courts.¹⁸ Finally, in addition to the quantitative analysis of the citation of non-domestic legal sources from the Court’s perspective, a quantitative analysis will also be performed from an individual judge’s perspective by identifying the most and least proactive judges according to their engagement with non-domestic legal sources. The goal of this section is not to provide clear-cut categories, but rather to suggest a spectrum of individual judges based on the amount of use of these non-domestic citations.

¹² James Allan, Grant Huscroft & Nessa Lynch, ‘The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite’ (2007) 11 *Otago L Rev* 433.

¹³ 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* in *COURTS AND COMPARATIVE LAW* (Mads Andenas & Duncan Fairgrieve eds., 2015); Dodek, (n 4); Adam M. Dodek, *Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities*, 47 *SUP. CT. L. REV.* (2d) 445 (2009); McCrudden, (n 4).

¹⁴ Adam M. Dodek, *The Protea and the Maple Leaf: The Impact of the Charter on South African Constitutionalism*, 17 *NAT’L J. OF COMP. L.* 353 (2004); Gérard La Forest, *The Use of American Precedents in Canadian Courts*, 46 *ME. L. REV.* 211 (1994); Christopher P. Manfredi, *The Use of United States Decisions by the Supreme Court of Canada under the Charter of Rights and Freedoms*, 23 *CAN. J. POL. SCI.* 499 (1990).

¹⁵ Gérard La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues*, 34 *CAN. Y.B. INT’L L.* 89 (1996); LeBel, (n 4).

¹⁶ F.M. Bevilacqua, *THE SUPREME COURT OF CANADA: A POLITICALLY LEGAL ROLE: A STUDY OF THE POLICY-MAKING ROLE OF THE COURTS AND THE IMPACT OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (1990); E.R. Alexander, *The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms*, 40 *U. TORONTO L.J.* 1 (1990); La Forest, (n 15).

¹⁷ Dodek, referring to Justice Binnie, states, ‘[M]ost of the comparative analysis was undertaken by a single judge.’ (ibid 473ff). Of the same opinion, McCormick looked at the number of US case citations used by every SCC judge, and found that Justice Binnie cited them five times more on average than the others, and personally accounted for more than one-third of all American cases cited by the Court (McCormick, (n 4) 95ff, 97ff). According to McCormick’s findings, other judges who made a significant contribution to the use of foreign case law are Justices Iacobucci, Bastarache, L’Heureux-Dubé, and LaForest (ibid 97ff). Other scholars, such as Gentili and Mak, emphasize the central role of individual judges, including Justices LaForest, L’Heureux-Dubé, LeBel, and Binnie, stating they have made ‘their mark on the development of the use of comparative law in the Supreme Court of Canada.’ (Gentili & Mak, (n 4) 128ff).

¹⁸ The Statute of International Court of Justice art. 38/1 § a–d, T.S. 993 [date of entry into force 24 Oct 1945].

2. Methodology

The key methodological instrument that was used to uncover the quantity of non-domestic legal sources cited by the SCC in all its 1223 judgments issued by the SCC over the 17 years (2000–2016), is the *web-based research*. In order to include all SCC decisions issued within the 17-year period, judgments were accessed through its official website.¹⁹ A year-by-year search of SCC judgments was conducted, with each decision reviewed individually.²⁰ The following elements were sought within each judgment's contents: field of law, judges who formed the majority and penned the decision, dissenting judges, and all four categories of non-domestic legal sources (foreign case law; foreign constitutions, statutes and regulations; international case law; international treaties).

Fortunately, the text of SCC judgments now contains several of the above elements under the subheadings 'Cases Cited,' 'Statutes and Regulations Cited,' and 'Treaties and Other International Instruments'. Nonetheless, the 'Cases Cited' sections of all 1,223 decisions had to be reviewed on a case-by-case basis to identify all citations of foreign and international courts. Regrettably, the judgments of other nations and of international courts referred in these decisions are still mixed with Canadian case law in the 'Cases Cited' sections. Hence, to find them, all 24,509 cases (19,492 in majority decisions and 5,017 in dissents) cited during the 17-year period had to be checked individually. Then all non-Canadian cases had to be identified, matched with the appropriate jurisdiction (foreign national court or international), and then divided according to their domestic jurisdictions (highest court or lower court).

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

The only category of non-domestic legal sources that allowed for a more straightforward identification procedure was that of international treaties, which the SCC labels as 'Treaties and Other International Instruments.' However, even this simpler approach was not always possible. Previously, international treaties were included under the category, 'Statutes and Regulations'; it was only in 2005 that the SCC distinguished them under a separate subheading in a case penned by Justice Ian Binnie (the subheading was then titled 'International Documents').²¹ This practice of separating international treaties is still followed, which helps not only the reader of SCC judgments but also the Court itself to be more self-reflective of the citation of international legal instruments as a distinct category of legal sources.

The collection of quantitative data relating to individual judges also required important methodological choices. First, all judges that served on the SCC between January 1, 2000 and December 31, 2016 had to be identified. Twenty-one individual judges were found to have served or are serving on the Court, of which eight were current and 13 were former judges. The next step was to look at all 1,223 decisions of the SCC to determine which judge penned or contributed to each decision, with additional notes made regarding which judges penned decisions that cited non-domestic legal sources. Notes were kept on the types of non-domestic legal sources cited, and in which fields of law.

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

3. Quantitative data on the citation of non-domestic legal sources from the perspective of the SCC as an *institution*

As mentioned above, this article represents a quantitative analysis of the 1,223 SCC judgments delivered between January 1, 2000 and December 31, 2016. The goal is to identify to what extent within this 17-year period, the SCC cited all form of non-domestic legal sources.

¹⁹ The judgements of the Supreme Court of Canada <http://scc-csc.lexum.com/scc-csc/scc-csc/en/nav_date.do> [hereinafter SCC Judgements].

²⁰ The researched materials exceed 50,000 pages.

²¹ *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 SCR 425, 2005 SCC 70.

It is anticipated that foreign precedents of other nations (or what will be referred to here as 'comparative case law'), as the most natural form of court globalization for many scholars,²² will be nearly the only legal foreign source to deal with. The data of this research, including the content of the SCC judgments themselves,²³ conversely show that in addition to comparative case law, the Court has also cited three other forms of non-domestic legal sources on a constant basis; namely: *constitutions, statutes and regulations of other nations; case law of international or supranational courts; and international treaties*. Hence, to provide the full picture of the reference of non-domestic legal sources by the SCC, and as a response to academic calls,²⁴ all four types of non-domestic legal sources found within the text of SCC judgments have been included here.

In this paper, non-domestic legal sources are categorized into two groups: *comparative legal sources*, comprised of *comparative case law* (foreign judgments) and *comparative law* (constitutions, codes, statutes and regulations of other nations); and *international legal sources*, comprised of *international case law* and *international treaties*. By focusing on all forms of non-domestic legal sources, this empirical study can provide, at least quantitatively, a much broader picture of the 'globalist' character of the SCC, which certainly extends beyond the borrowing of precedents among courts.

3.1. Comparative legal sources

Comparative legal sources are formal legal acts of the legislative, executive and judicial branches of other countries. To gain a better understanding of the variety of legal sources used by the SCC in its transnational judicial dialogue, and based on how the Court itself distinguishes and categorizes legal sources, the quantitative data have been separated into two subcategories: 'comparative case law' and 'comparative law.' Comparative case law refers to all judicial decisions enacted by national courts outside Canada (foreign judgments); whereas comparative law includes everything else, particularly formal legal acts (e.g., constitutions, codes, statutes and regulations) passed by the legislative and executive branches of foreign countries.

3.1.1. Comparative case law (foreign judgments)

The present research shows that of the 1,223 judgments delivered by the SCC between 2000 and 2016, the SCC cited in total 1,791 decisions from the courts of other nations. 1,360 foreign decisions were cited in majority and unanimous judgments, whereas 431 times in the dissenting reasoning. This is a significant number even when compared to the 24,509 cases cited by the Court in total during the relevant 17 years, of which 22,592 were Canadian cases and 126 international or supranational.²⁵ This means that for every 12 to 13 Canadian cases cited in its judgments, the SCC referred one precedent from another nation.

It is very important to note that the SCC cited foreign judgments constantly throughout the 17 years of this study; indeed, there was no single year in which the SCC failed to cite a foreign precedent in its decisions. **Figure 1** demonstrates that the SCC has not simply cited 1,791 foreign precedents, but in fact has referred a good number of them throughout the analyzed 17-year period constantly, with an average of 105 foreign precedents per year (25 in dissenting judgments). However, **Figure 1** illustrates noticeable fluctuations. From the 146, 162 and 202 comparative cases per year cited respectively in 2000, 2001 and 2002, there is a sharp decrease in 2015 and 2016 when the Court fell below its 17-year average, citing only 81 and 45 foreign judgments. Considering that in 2016, the SCC cited only 29 foreign precedents in unanimous and majority decisions (and 16 in dissenting), this year constitutes the lowest year not only in the

²² Michel Bastarache, *The Globalisation of the Law and the Work of the Supreme Court of Canada* in *Highest Courts and Globalization* 41 (Sam Muller & Sydney Richards eds., 2010); Gianluca Gentili & Elaine Mak, *The Supreme Court of Canada's Transnational Judicial Communication on Human Rights (1982–2014): An Empirical Assessment*, in *JUDICIAL DIALOGUE AND HUMAN RIGHTS* 114 (Amrei Muller & Hege Elisabeth Kjos eds., 2017); Mak, (n 4); Choudhry, (n 4); David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 *WASH. L. REV.* 523 (2011).

²³ It is interesting to note that the judgments of the SCC include clear sections entitled 'Cases Cited,' 'Statutes and Regulations Cited,' 'Treaties and Other International Instruments,' and 'Authors Cited.' See SCC Judgements, (n 19).

²⁴ Ran Hirschl, *Going Global? Canada As Importer and Exporter of Constitutional Thought*, in *CANADA IN THE WORLD: COMPARATIVE PERSPECTIVES ON THE CANADIAN CONSTITUTION* 16 (Richard Albert & David R. Cameron eds., 2017). Hirschl states, 'Perhaps the time has come to extend an invitation for Canadian constitutional scholars, jurists and policy makers—indeed to the Canadian citizenry at large—to engage more closely with the world of new constitutionalism, not merely as producers and exporters of innovative constitutional thought or as analyzers of fleshy rights issues, but also as curious observers who study the constitutional experiences of other polities.'

²⁵ From the 24,509 cases, which is total number of cases cited in 17 years, 19,492 cases were used in unanimous or majority decisions and 5017 cases cited in dissenting.

entire studied period, but also in all history of the SCC since the Canadian Charter of Rights and Freedoms entered into force.²⁶

The data here show that the SCC cited foreign judgments in 393 of its 1,223 decisions for an average of approximately 32.1 percent of all judgments (**Figure 2**). In other words, nearly one-third of all SCC decisions cite precedents of other nations, making for an average of approximately 23 decisions that cite comparative case law per year (**Table 2**).

The citation of comparative case law is even higher, if the number of judgments in which the SCC did not mention any case law at all is taken into account. As seen in **Figure 2**, of the 1,223 judgments delivered, 175 decisions (14.3% of all cases or an average of approximately 10 decisions per year) were made without the citation of any case law at all (including Canadian cases). In the remaining 1,048 SCC decisions that referred a case law, the Court cited precedents of foreign nations in 393 judgements; in other words in 37.5% of all its decisions. In 651 decisions the Court cited only Canadian case law, whereas in 4 decisions, the SCC besides domestic jurisprudence, has referred to judgments of international courts (without referring any judgments of foreign nations).²⁷

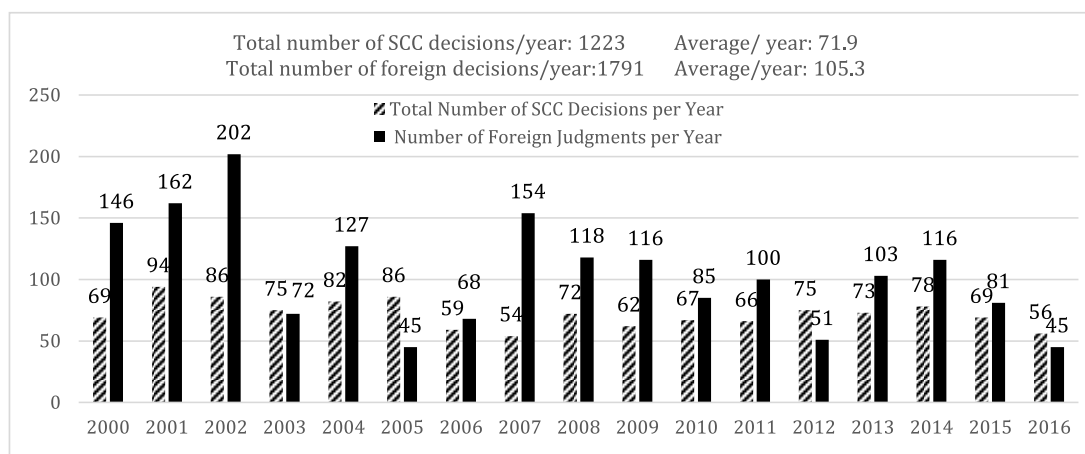


Figure 1: Citation of comparative case law by the SCC.

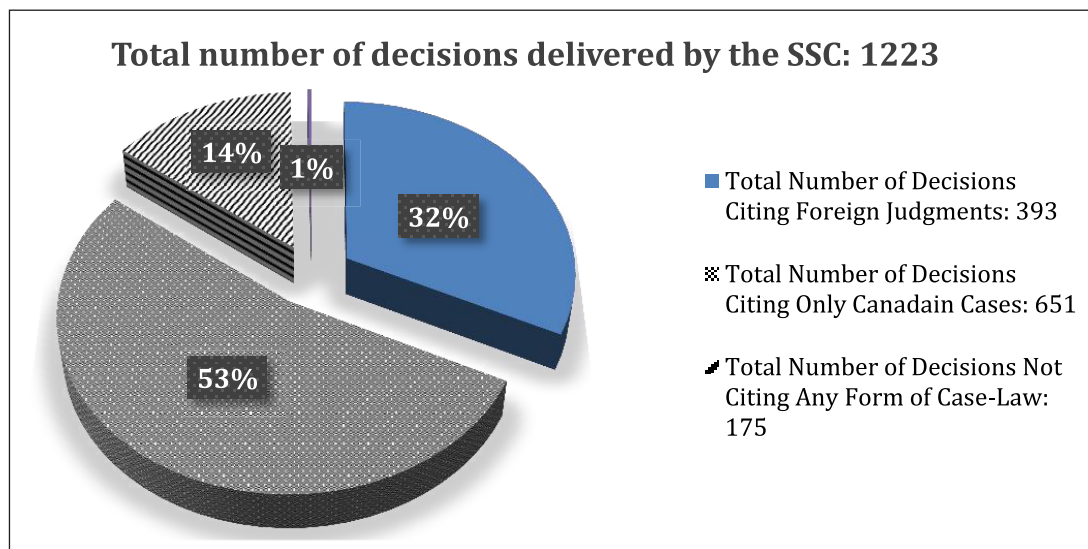


Figure 2: Percentage of SCC decisions citing comparative case law (2000–2016).

²⁶ Gentili & Mak, (n 4) 125ff. (Table 2.1 of this article shows the number of foreign citations by the SCC since 1982–2014, and no other year has used only 29 citations, as in 2016).

²⁷ The data about international judgments will be in Section 3 (A). Here we brought the data just to give the full picture of non-domestic judgments in the decisions of the SCC.

Many interesting findings regarding the use of non-domestic legal sources can be found in dissenting decisions (**Table 1**). Of the 1,223 SCC judgments issued in 2000–2016, 299 are accompanied by dissenting opinions (approximately 25%). Of these 299 dissents, 127, or 42.4%, included engagement with non-domestic legal sources. This percentage is higher than the approximately 32.1% of unanimous or majority decisions citing foreign judgments. In addition, the density of use of non-domestic legal sources is higher in dissenting than in majority and unanimous decisions. In 229 dissents, the dissenting judges used 468 non-domestic legal sources, with an average of about 1.5 sources per dissent. Meanwhile, the 1,223 decisions cited 1,360, with an average of about 1.1 non-domestic sources per judgment. This data indicates that in dissenting decisions, judges look more often to international and comparative legal sources. In their internal debate over the best possible solution, it seems that judges look for inspiration beyond Canadian borders. This data is significant because a dissenting decision may pave the way for a change of practice in the SCC. As one SCC judge said to an interviewer, ‘A dissenting decision ... is the law of tomorrow.’²⁸

Overall, the number of SCC decisions that cited foreign judgments was not consistent over the 17 years (**Table 2**). SCC judgments cited foreign precedents most frequently in 2001, 2002, and 2013 (30, 38, and 32 judgments respectively). The lowest number was cited in 2010, 2011, 2014, and 2016 (18, 14, 17 and 18 judgments respectively). Except for 2013, in which the SCC cited foreign case law in 32 of its judgments, it seems that the last years, the number of SCC judgments with foreign case law has been decreased and is below the average (23 per year).²⁹

The next goal of this empirical paper is the identification of the foreign courts upon which the SCC relies. This is important for pinpointing the foreign courts with which the SCC is in horizontal conversation,³⁰

Table 1: Data about citation of non-domestic legal sources in dissenting judgments.

Total nr. of Year	SCC Decisions per Year	Cases with Dissenting	Dissenting Decisions Containing Non-Domestic Legal Sources	Non-Domestic Legal Sources per Year in Dissenting Decisions
2000	69	19	9	41
2001	94	16	5	10
2002	86	22	15	56
2003	75	16	7	18
2004	82	20	9	42
2005	86	22	7	12
2006	59	15	4	18
2007	54	20	11	68
2008	72	17	6	19
2009	62	22	8	28
2010	67	15	8	33
2011	66	13	4	19
2012	75	18	5	11
2013	73	21	7	20
2014	78	13	7	49
2015	69	13	6	8
2016	56	17	9	16
Total	1223	299	127	468
Average	71.9			

²⁸ Philip Slayton, *Mighty Judgment: How the Supreme Court of Canada Runs Your Life* (Penguin Group Canada, 2011) 215ff.

²⁹ Table 2.

³⁰ By horizontal conversation or dialogue I label the interaction with foreign counterparts of the same level.

Table 2: SCC decisions citing judgments of foreign nations.

Year	Total Number of SCC Decisions per Year	Number of SCC Decisions Citing Foreign Judgments Law per Year	Percentage of SCC Decisions Citing Foreign Judgments per Year
2000	69	25	36.2%
2001	94	30	31.9%
2002	86	38	44.1%
2003	75	21	28%
2004	82	24	29.2%
2005	86	19	22%
2006	59	22	37.2%
2007	54	28	51.8%
2008	72	25	34.7%
2009	62	21	33.8%
2010	67	18	26.8%
2011	66	14	21.2%
2012	75	19	25.3%
2013	73	32	43.8%
2014	78	17	21.7%
2015	69	22	31.8%
2016	56	18	32.1%
Total	1223	393	
Average	71.9	23.1	32.1%

and from which it borrows precedents. Research showed that the SCC cited precedents from courts of 14 different nations from all continents, except South America, including: the US, UK, Australia, New Zealand, South Africa, France, Israel, Ireland, Hong Kong, Belgium, Germany, the Netherlands, India and Switzerland (**Figure 3**). Not all of these nations' courts were consulted uniformly, however. Four of them, namely the UK (798 precedents), US (746 precedents), Australia (125 precedents) and New Zealand (47 precedents) accounted for more than 95 percent of the entire number of comparative citations.³¹ **Figure 3** provides a simple visualization of the foreign countries that the SCC refers to most regularly.

What foreign *courts* does the SCC refer to? Upon first consideration, it is reasonable to think that the SCC would cite only its counterparts, the highest courts of other nations. In fact, this research data shows that the SCC has cited precedents not only from the highest courts of the above states, but has also heavily referred precedents from lower apex courts. As shown in **Figure 4**, the 1,791 comparative precedents that the SCC cited in the 17-year period of this study, more than half of them (980 precedents, or 54.7% of all citations) were cases from ordinary lower courts.³²

Table 3 shows that the SCC has referred to decisions of lower courts from nine different nations, the most frequently cited being: UK courts (491), US (411), and Australia (55). Looking at these numbers, another argument that can be made is that the SCC is also open to transnational judicial dialogue with lower courts.³³

³¹ Interestingly, in unanimous and majority decisions, US precedents are the most cited, 608 times; whereas UK judgments are cited 542 times. In dissenting reasoning, UK precedents were cited much more by overpassing in total the US precedents. UK judgments were cited in total 256 times, whereas US courts were cited 138 times.

³² Note that the number of precedents from lower courts cited by the SCC is smaller than highest courts if we do not include the citation of foreign judgments in dissenting reasoning. According to the data of this study, from the 1,360 comparative precedents that the SCC cited in the 17-year period of this study, less than half of them (673 precedents, or 49.5% of all citations) were cases from ordinary courts. The rest of 687 cases (or 50.5%) were from the highest courts of other nations. In dissenting reasoning, from the 431 times in total that the SCC cited foreign judgments, 307 citations are from lower courts and only 124 citations are from the highest courts of foreign nations (its counterparts).

³³ Bastarache, (n 4) 41ff.

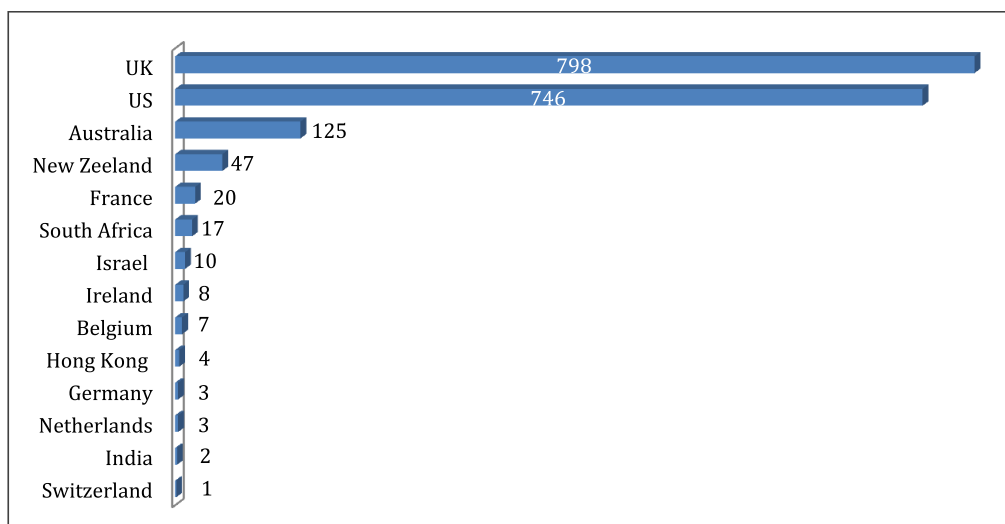


Figure 3: Foreign nations from which the SCC cites judgments.

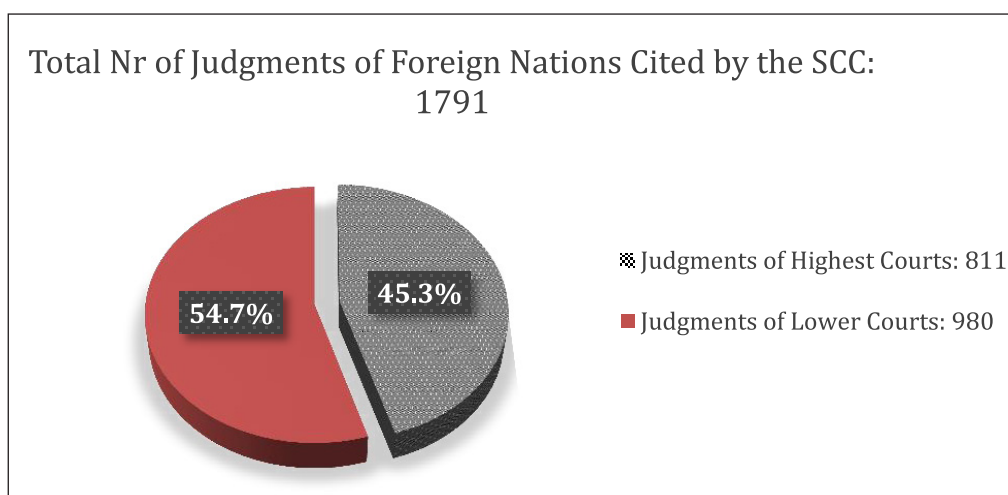


Figure 4: Percentage of citation of comparative case law from highest and lower Courts.

Sceptics may argue that in its efforts to validate decisions already made (i.e., the 'cherry picking' process), the SCC will look everywhere it can.³⁴ Regardless of the reasoning behind the citation of lower courts by the SCC, however, both scenarios prove the openness of the SCC to new ideas and solutions from abroad, which in turn opens the Court to legal globalization.

In looking at SCC counterparts, or the apex courts of other nations cited by the Court, the data revealed that the SCC mentioned precedents from 13 different nations. Of these, the two most cited highest foreign courts are: The Supreme Court of the United States (SCOTUS) with 336 cases, and the House of Lords (now known as the Supreme Court of the UK) with 307 cases (**Table 4**).³⁵

Other highest foreign courts frequently cited by the SCC include the Australian apex court with 69 precedents; the New Zealand apex court with 39 precedents; the South African apex court with 17 precedents; France's apex court with 16 precedents and the apex of Israel with 9 precedents.

³⁴ One of the most well-known arguments against the citation of foreign judgments, the danger of 'cherry-picking,' is frequently used by critics of the comparative approach, most notably Justice Antonin Scalia and Chief Justice John Roberts of the US Supreme Court. For an emphatic statement against the use of comparative law by US Federal courts, see Antonin Scalia, 'Keynote Address: Foreign Legal Authority in the Federal courts,' in American Society of International Law, *Proceedings of the 101st Annual Meeting (American Society of International Law)*, Vol 98 (2004) 305, <<http://www.jstor.org/pss/25659941>>.

³⁵ '1 October 2009 marks a defining moment in the constitutional history of the United Kingdom: transferring judicial authority away from the House of Lords, and creating a Supreme Court for the United Kingdom.' For a short history, see The Supreme Court of the United Kingdom, 'History' <<https://www.supremecourt.uk/about/history.html>>. My research showed that the Supreme Court of the UK was cited seven times by the SCC, to which I added to the total number of citations from the House of Lords.

Table 3: SCC comparative case-law & the lower courts of other nations.

Lower Courts	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
UK	38	39	56	27	42	20	24	36	34	37	15	22	13	21	22	22	23	491
US	58	33	52	8	34	22	22	37	15	18	15	29	13	26	28	21	2	411
Australia	2	13	7		1	1		6	6	2	1	3	1	3	3	5	2	55
N. Zealand			2		1	1		1		1	2			1				8
Belgium															5		2	7
France					1										3			4
Hong Kong														1	1			2
Ireland	1																	1
Israel								1										1

Table 4: SCC comparative case law & the highest courts of other nations.

HIGHEST COURTS	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
SCOTUS	25	49	34	15	32	7	12	24	19	24	21	14	6	21	13	15	5	336
House of Lords/SCUK	14	19	21	19	14	12	9	22	34	21	21	21	8	26	25	10	11	307
Australia	3	4	10	1	3	2		6	8	3	4	9	8	4	4			69
New Zealand	3	13	13	2		1		4	1	2	2	1	2	7	7	1		39
South Africa	2	2	2					1		5	2			1	1	2		17
France			1		1	1		11		3								16
Israel			1		1	1		4								3		9
Ireland		1	2												2	2		7
Germany												1			2			3
Netherland			1								2							3
Hong Kong							1		1									2
India			2															2
Switzerland								1										1

3.1.2. Comparative law (laws of other nations)

As stated above, the second form of comparative legal sources cited by the SCC is formal legal acts passed by the legislative and executive branches of other foreign countries, such as constitutions, codes, statutes and regulations. **Table 5** reveals that, during the 17 years of this study, the SCC cited such legal sources of other nations a total of 242 times. This is a significant number even within the 5,647 statutes and regulations cited by the SCC during the study period (including Canadian statutes and regulations and international treaties). Approximately 4.3% of all statutes and regulations quoted by the SCC in its decision making are comparative ones; or, put more simply, the SCC cites one primary source from another nation for approximately every 23 Canadian statutes and regulations.

Another interesting finding is that the SCC has cited comparative law every year for the last 17 years (2000–2016). **Table 5** illustrates that the SCC used a good number of foreign constitutions, statutes and regulations steadily throughout the analyzed years, with an average of 14 to 15 comparative law citations per year. The number of comparative law references per year ranged from four in 2000 (the lowest) to 27 in 2007.

Which countries' laws does the SCC cite in its decisions? The present research shows that, just as with the citation of comparative precedents, the SCC has cited the constitutions, codes, statutes and regulations of other countries from all continents, except South America; in total 16 different foreign countries, including the UK, US, Australia, New Zealand, France, South Africa, Ireland, Belgium, Germany, India, Rwanda, Romania, Spain, Portugal, Italy and Sweden (**Table 5**). The comparative laws of the five countries referred the most are: the UK (99 times), the US (69), Australia (40), New Zealand (11) and France (8). It is interesting to note that the SCC has cited UK and US laws in every single year of the 17 years researched here, followed by Australia law (cited in 14 years). In addition, as with foreign precedents, the most cited comparative statutes and regulations were from the UK.

Table 5 reveals that the number of countries from which the Court referenced constitutions, codes, statutes and regulations is higher (16) than the number (14) from which it examined court judgments.³⁶

Three notes observations follow: First, there are a number of countries to which the SCC refers for both comparative law and comparative case law (the UK, US, Australia, New Zealand, France, South Africa, Ireland, Belgium, India, and Germany). Second, the SCC has referred to several nations only for court decisions (Israel, Hong Kong, the Netherlands and Switzerland). Third, the SCC has cited a number of nations simply as references for their laws rather than their courts' precedents (Rwanda, Romania, Spain, Portugal, Italy and Sweden).

Table 6 shows that the SCC has cited comparative law in 106 decisions, making an average of 6 to 7 decisions per year. The number of SCC decisions citing comparative law has remained constant, ranging between four percent of cases in 2003 (3 decisions) the lowest, and 20.4 percent in 2007 (11 decisions) the highest. This means that nearly one tenth of all SCC decisions cite laws of other nations, an average that was also maintained through 2016.

3.1.3. Field of law

In what fields of law is the SCC citing such comparative legal sources? The results outlined in **Figure 5** revealed that the SCC cites foreign precedents not only in constitutional and international law cases as would be expected,³⁷ but also in other 50 different fields of both public and private law.³⁸ The 10 fields of law that have generated the highest number of foreign precedents are: constitutional law, torts, criminal law, insurance, intellectual property, civil procedure, administrative law, evidence, courts and labour law, ranging from 341 precedents (cited in constitutional law cases) to 52 precedents (cited in labour law cases).

The next question is: How many Court decisions citing comparative law correspond to each field of law? The results of this investigation revealed that not all fields attracted the same number of SCC judgments with comparative case law. The top three fields with the highest number of SCC judgments are: constitutional law, with 102 decisions (21.6%); criminal law, with 94 decisions (20%); and torts, with 36 decisions (7.6%). These numbers show that the current general perception that SCC judgments cite comparative case law only on constitutional cases is inaccurate. It is true that constitutional law judgments attract the largest number

³⁶ Figure 4. The 14 countries that the SCC used to cite the precedent of their courts are the United States, the United Kingdom, Australia, New Zealand, South Africa, France, Israel, Ireland, Hong Kong, Belgium, Germany, Netherlands, India, and Switzerland.

³⁷ ER Alexander, 'The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms' (1990) 40 UTLJ 1; Christopher P Manfredi, 'The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms' (1992) 40 Am J Comp L 213; McCrudden, (n 4); Roy, (n 4); Nino Olivetti Rason and Sara Pennicino. 'Comparative Law in the Jurisprudence of the Supreme Court of Canada.' *Judicial Cosmopolitanism*. Brill Nijhoff, 2019. 140–176.

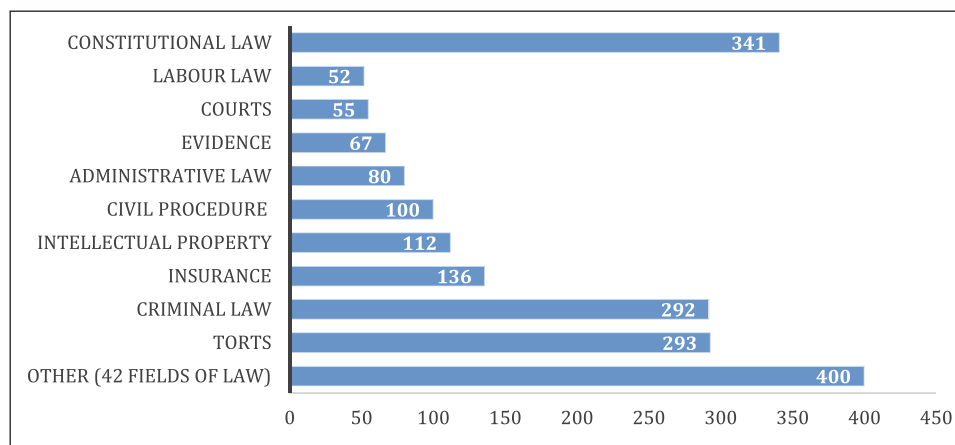
³⁸ Other fields of law include Taxation, Commercial Law, Statutes, Property Law, Aboriginal Law, Immigration Law, Municipal Law, Access to Information, Appeal, Customs and Excise, Pensions, Securities, Arbitration, Bankruptcy & Insolvency, Family Law, Maritime Law, Transportation, Agency, Civil Law, Communications Law, Education Law, Elections, Expropriation Law, Extradition, Financial Institutions, Health Law, Lease, Public Utilities, Sale, State, Trust Law, Negligence & Causation, and Motor Vehicle Accident, Contract Law, Action, Professional Law, International Law (private and public), and Mortgages.

Table 5: Citation of foreign constitutions, codes, statutes and regulations by the SCC per year.

COUNTRIES	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
UK	3	7	10	1	3	8	4	12	1	2	5	6	3	7	9	6	12	99
US	1	4	4	3	3	2	14	6	2	4	4	6	3	5	5	1	2	69
Australia		2	3	1	2	1	1	5	3		5		4	2	8		3	40
New Zealand		1	1		3	1		1	1				1		1		1	11
France								3				3				1	1	8
South Africa										1			1		1	1	1	4
Ireland		1												1				2
Belgium		1																1
India				1														1
Rwanda						1												1
Romania										1								1
Germany												1						1
Spain																1		1
Portugal																1		1
Italy																1		1
Sweden																	1	1
TOTAL	4	16	18	6	11	13	19	27	7	6	16	16	12	15	23	12	21	242

Table 6: SCC decisions citing foreign constitutions, codes, statutes and regulations per year.

YEAR	Total Number of SCC Decisions per Year	Number of SCC Decisions Citing Comparative Law per Year	Number of SCC Decisions Citing Comparative Law per Year in Percentage
2000	69	4	5.8%
2001	94	6	6.4%
2002	86	7	8.1%
2003	75	3	4%
2004	82	6	7.3%
2005	86	6	7%
2006	59	6	10.2%
2007	54	11	20.4%
2008	72	5	6.9%
2009	62	6	9.7%
2010	67	6	9%
2011	66	8	12.1%
2012	75	7	9%
2013	73	6	8.2%
2014	78	9	11.6%
2015	69	5	7.2%
2016	56	5	8.9%
TOTAL	1223	106	Average/Year 9%

**Figure 5:** Top 10 fields with the highest number of citation of foreign case law.

of foreign decisions, yet these cases constitute only about one fifth (21.6%) of all SCC judgments that cite foreign precedents. Besides criminal law and torts mentioned above (which together with constitutional law count for about 50%), the rest, in other words about 50% of SCC decisions who cite foreign judgments belong to other fields of law, such as administrative law and civil procedure (31 respectively); intellectual property (20); courts (19); insurance (17); evidence and contract law (13 respectively); international law (12).

Another important question is: In what fields does the SCC cite the laws of other nations? This research shows that the SCC has cited comparative laws in 32 different fields of law, of both public and private sphere.³⁹ As can be seen in **Table 7**, the top three fields of law that have attracted the reference of comparative law are: constitutional law (124 times), criminal law (61 times), and intellectual property (27 times).

³⁹ The 32 fields of law are Constitutional Law, Criminal Law, Intellectual Property, Administrative Law Evidence, Civil Procedure, Labour Law, Torts, International Law (Public), Immigration Law, Transportation, Courts, Contract, Taxation, Elections, Insurance, Professional Law, Social Law, Arbitration, Maritime Law, Aboriginal Law, Appeal, Health Law, Action, Commercial Law, Customs and Excise, Access to Information, Extradition, Sale, Lease, and State.

But how are the comparative legal sources spread over the SCC decisions? Same as above, **Table 8** shows that the top three fields of law which attract the most SCC decisions relying on comparative legal sources are: constitutional law (38 decisions, 25%), criminal law (26 decisions, 17%), and intellectual property (14 decisions, 9%).

3.2. Quantitative data on the citation of international legal sources

After comparative legal sources, the next essential category of non-domestic legal sources is *international legal sources*. Based on the categorization of sources and the way in which the SCC itself has classified these international legal sources, they can be divided into the subcategories of 'international case law' and 'international treaties'.

3.2.1. Citation of international case law

International Case Law: – Although the reference of case law from international and supranational courts is far below the citation of courts of other nations, the SCC have cited such precedents in 54 different decisions over the 17 years of this research (**Table 9**). Simply put, the SCC cites the precedents of international courts in 3.2 percent of its total number of decisions per year. Despite the lower numbers compared to foreign judgments, the citation of international and supranational judgments were spread in 13 of the 17 years of this study.

Table 7: Top 10 fields of law with the highest number of citation of foreign constitutions, codes, statutes and regulations.

FIELDS OF LAW	Total Number of Citations of Comparative Law per Field of Law	Percentage from the Total Number of Citations of Comparative Law
Constitutional Law	124	36%
Criminal Law	61	18%
Intellectual Property	27	8%
Administrative Law	22	6.5%
Evidence	14	4%
Civil Procedure	13	3.8%
Labour Law	13	3.8%
Torts	9	2.6%
International Law (Public & Private)	9	2.6%
Immigration Law	5	1.4%
Other (22 Fields of Law)	48	13.9%

Table 8: SCC decisions with foreign constitutions, codes, statutes and regulations & their fields of law.

FIELDS OF LAW	Total Number of SCC Decisions with Comparative Law per Field of Law	Percentage from the Total Number of Decisions per Field of Law
Constitutional Law	38	25%
Criminal Law	26	17.1%
Intellectual Property	14	9.2%
Administrative Law	11	7.2%
Civil Procedure	8	5.3%
Torts	8	5.3%
International Law (Public & Private)	7	4.6%
Evidence	6	3.9%
Immigration Law	3	2%
Courts	3	2%
Other (22 Fields of Law)	28	18.5%

This research shows that from 2000 to 2016, the Court cited 126 decisions of international and supranational courts, which are found in 54 different judgments of the SCC. In other words, the SCC cites on average 7.4 international/supranational precedents per year. As **Table 9** shows, not all years exhibit the same extent of citation. The SCC cited the most international court precedents in 2005 and 2014, at 15 and 23 international precedents, respectively. In 2000, 2006, 2012 and 2016, the SCC did not cite any international or supranational case law at all.

Another important task of this research was to identify the international and supranational courts upon which the SCC has relied. The SCC cited precedents from most well reputed international courts with global jurisdiction, as well as international and supranational regional courts from across the globe. In other words, all the above numbers arguably demonstrate that the SCC is in a vertical and diagonal dialogue with international and supranational courts. By vertical dialogue, I define the interaction between national courts and/or judges (in this case of the SCC) with supranational or international courts and judges. Diagonal dialogue occurs between a national constitutional court and a regional or supranational court, but the state of that specific constitutional court is not a member of that particular international or supranational organization. The best example of this model is the conversation between the SCC and the European Court of Human Rights (ECtHR) or the Court of Justice of the European Union (CJEU).

As **Table 10** shows, the SCC cited precedents of 14 different international and supranational courts (and *quasi* courts); the top three being, the European Court of Human Rights (ECtHR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Court of Justice (ICJ). Another court with supranational character is the UK Privy Council, which was cited 34 times by the SCC. If included, this Court becomes the second most cited supranational Court, after the ECtHR. The reasons behind the citation of the Privy Council are not difficult to comprehend, stemming from the roots of Canadian juridical and historical tradition.⁴⁰

Table 9: Citation of international case law by the SCC.

YEAR	Total Nr of SCC Decisions	Number of SCC Decisions Citing International/Supranational Case Law	Total International/Supranational Case Law per Year
2000	69	0	0
2001	94	5	11
2002	86	4	7
2003	75	2	3
2004	82	4	4
2005	86	3	15
2006	59	0	0
2007	54	7	11
2008	72	2	5
2009	62	3	10
2010	67	5	11
2011	66	3	5
2012	75	0	0
2013	73	5	10
2014	78	5	23
2015	69	6	11
2016	56	0	0
TOTAL	1223	54	126
AVERAGE PER YEAR	71.9	3.2	7.4

⁴⁰ *Creation and Beginnings of the Court*, THE SUP. CT. OF CAN, <<http://www.scc-csc.ca/court-court/creation-eng.aspx>>.

Table 10: International/supranational courts cited by the SCC.

INT/NL COURTS	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
ECtHR ⁴¹	8	4	1	1	1	6	3	3	4	7	2	2	3	3	9	9	41 (32.5%)	
ICTY ⁴²	1	1	1	1	1	1	1	1	1	1	1	1	1	1	2	2	13 (10.3%)	
ICJ ⁴³						1	1	1	1	1	1	1	1	1	7	7	10 (7.9%)	
CJEU ⁴⁴					2	2									6	6	8 (6.3%)	
ICTR ⁴⁵					5	5											5 (3.9%)	
ICC ⁴⁶													4	4			4 (3.2%)	
IACHR ⁴⁷															4		4 (3.2%)	
PCA ⁴⁸								1							1		2 (1.5%)	
ECHR ⁴⁹								1									1 (0.8%)	
PCIJ ⁵⁰								1									1 (0.8%)	
CEU ⁵¹					1												1 (0.8%)	
EPO ⁵²																	1 (0.8%)	
UNHRC ⁵³																1	1 (0.8%)	
JCPC ⁵⁴	3	1	3	3	2	1	4	4	5	6	3	3	2	2	1	1	34 (27%)	

⁴¹ European Court of Human Rights.

⁴² International Criminal Tribunal for the Former Yugoslavia.

⁴³ International Court of Justice.

⁴⁴ Court of Justice for the European Union.

⁴⁵ International Criminal Tribunal for Rwanda

⁴⁶ International Criminal Court.

⁴⁷ Inter-American Court of Human Rights.

⁴⁸ Permanent Court of Arbitration (League of Nations).

⁴⁹ European Commission of Human Rights.

⁵⁰ Permanent Court of International Justice (Predecessor of the ICJ).

⁵¹ Commission of the EU.

⁵² European Patent Office. It is one of the two organs of the European Patent Organisation, which acts as the executive body of the Organisation <<https://www.epo.org/index.html>>.

⁵³ United Nations Human Rights Council.

⁵⁴ Judicial Committee of the Privy Council.

Besides the horizontal dialogue with foreign counterparts demonstrated in the above sections, **Table 10** shows that the SCC participates also in a vertical and diagonal dialogue. Vertical dialogue consists of interaction with international courts and judges of international organizations of which Canada is a member (such as the ICJ); and diagonal dialogue takes place with regional or supranational courts of international organizations of which Canada is not a member and whose jurisprudence is not binding, for example the ECtHR. In fact, as **Table 10** shows the most influential international court to the SCC is by far the ECtHR. This court has been cited 41 times (of 126 international/supranational precedents that SCC referred), comprising one third of the total number of all international citations. The reference of ECtHR case law can be explained by the Court's global reputation in the realm of human rights.⁵⁵ Some scholars consider it a 'sort of world court of human rights,'⁵⁶ that has surpassed by far the SCOTUS in terms of global influence.⁵⁷ Another reason could be quantitative. The ECtHR has produced more decisions than all the other international or transnational courts.⁵⁸ For instance, statistics show that in 2016 alone, the ECtHR issued 38,505 decisions and had a backlog of 79,750 cases.⁵⁹ Arguably, with this volume of decisions, any court, including the SCC, can find cases and legal issues of interest. Thus, despite the fact that Canada is not a signatory of the European Convention on Human Rights, and that the judgments of ECtHR have only persuasive authority, those judgments have served as a significant point of reference,⁶⁰ since 1986 when it all started.⁶¹ Other reasons why the SCC looks to the jurisprudence of the ECtHR may include common ground between the European Convention on Human Rights and the Canadian Charter, as well as their accessibility in English and French.

3.2.2. Citation of international treaties

International treaties, or simply 'international law' are the key form of international legal sources as defined by Article 38 of the Statute of International Court of Justice. International law includes international conventions, customs and the general principles of law recognized by civilized nations.⁶² In fact, the SCC has been classifying these distinctions separately in its judgments, and generally analyzes them in clear divided sections.⁶³ However, as mentioned above, there are scholars, including those of Canadian origin, who are skeptical and critical of the SCC engagement with international law.⁶⁴

With the above understanding of international treaties and the academic controversies in mind, one of the most important findings of this research was that the SCC referred international treaties during all 17 years of the study. The research data revealed that the SCC applied treaties from various global and regional international organizations, including bilateral treaties with other nations, a total 336 times. This number is even higher than the number of times that the SCC cited comparative statutes and regulations (242 times),⁶⁵ and is significant even in the context of the 5,647 statutes and regulations mentioned by the Court during the 17-year research period. This means that for every 16 domestic statutes and regulations, the SCC cites one international treaty.

As **Table 11** shows, the citation of international treaties by the SCC fluctuates from year to year, ranging from a maximum of 50 international treaties cited in 2002 to a low of 9 international treaties in 2008 and

⁵⁵ The Honourable Claire L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34:1 *Tulsa LJ* 15, 19ff.

⁵⁶ JG Merills, *The Development of International Law by the European Court of Human Rights*, 2nd ed (Manchester: Manchester University Press, 1993)12–18.

⁵⁷ David Zaring, 'The Use of Foreign Decisions by Federal Courts: An Empirical Analysis' (2006) 3 *J Empirical Legal Stud* 297, 326ff; Adam Liptak, 'U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations' *The New York Times* (18 September 2008) A1.

⁵⁸ Eric Voeten, 'Borrowing and non-Borrowing among International Courts' (2010) 39:2 *J Legal Stud* 547, 549ff.

⁵⁹ The European Court of Human Rights, 'European Court of Human Rights Statistics' <http://www.echr.coe.int/Documents/Stats_annual_2016_ENG.pdf>.

⁶⁰ L'Heureux-Dubé, (n 55) 18ff; see also, Gentili & Mak, (n 4), 135, 146ff.

⁶¹ The SCC first cited a judgment of the European Commission of Human Rights (which served, until 1998, to determine whether a case was admissible to the ECtHR) in *R v Oakes* [1986] 1 SCR 103.

⁶² Statute of International Court of Justice, (n 18).

⁶³ This practice of distinguishing international treaties in a separate subheading began in 2005 with *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, [2005] 3 S.C.R. 425 (Can.), 2005 SCC 70, and is still being followed.

⁶⁴ Jutta Brunnée & Stephen J Toope, *A Hesitant Embrace: The Application of International Law by Canadian Courts*, 40 *CAN. Y.B. INT'L L.* 3, 4 (2002); Gib van Ert, *USING INTERNATIONAL LAW IN CANADIAN COURTS* 326 (2nd ed. 2008); Anne F. Bayefsky, *International Human Rights Law in Canadian Courts*, in *ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS* 295, 325 (Benedetto Conforti & Francesco Francioni, eds., 1997).

⁶⁵ Table 5.

Table 11: Citation of international treaties by the SCC.

YEAR	Total Nr of SCC Decisions per Year	Decisions Citing International Treaties	Percentage of Decisions Citing International Treaties	Total Nr of Citation of International Treaties per Year
2000	69	7	10.1%	11
2001	94	8	8.5%	45
2002	86	11	12.7%	50
2003	75	5	6.6%	10
2004	82	5	6.1%	20
2005	86	9	10.5%	18
2006	59	8	13.6%	14
2007	54	6	11.1%	13
2008	72	5	7%	9
2009	62	3	4.8%	9
2010	67	6	9%	14
2011	66	4	6%	11
2012	75	11	14.7%	15
2013	73	3	4.1%	16
2014	78	5	6.4%	37
2015	69	10	14.5%	33
2016	56	4	7.1%	11
AVERAGE	72	6.5	9%	19.8
TOTAL	1223	110		336

2009. On average, the SCC referred international treaties approximately 20 times per year. However, in 2016 the SCC reached only half this average, citing only 11 international treaties.

Another way to look at the extent international treaty citation by the SCC is to observe the number of SCC judgments per year that involve international instruments. Over the research period, the SCC cited international treaties in 110 different decisions. This means that the SCC cited international treaties for an average of 6 to 7 decisions per year, or one in every 10 decisions. Just as with the number of treaties, the number of SCC decisions that cited international treaties varied between years. The highest number of SCC decisions citing international treaties were recorded in 2002, 2012 and 2015, at approximately 12.7, 14.7 and 14.5 percent of the total decisions per year, respectively. The lowest numbers were recorded in 2009, 2011, 2013 and 2016, with only 3 to 4 decisions per year.

The next important question is: How many different international treaties does the SCC cite, and what types of international treaties does it mention the most? This research shows that the SCC has consulted 191 different international treaties not only those of global jurisdiction, but also regional and bilateral. This list of international treaties reveals that the SCC has cited international instruments from almost all the continents.⁶⁶

Table 12 illustrates the top 10 most influential and often cited international legal documents. The top 3 most cited are: the International Covenant on Civil and Political Rights (cited 22 times); the Convention for the Protection of Human Rights and Fundamental Freedoms [the European Convention on Human Rights] (15 times); and the Universal Declaration of Human Rights (13 times). In total, these key international legal documents have been cited 107 times, accounting for almost one third of all 336 times that international treaties were used in the 17 years of this study.

By consulting this list of the most cited international treaties, as well as the full 191 international documents cited by the SCC over the research period, it can be observed that the SCC has also cited international

⁶⁶ Because of space limitations, we could not include the list of the international treaties here, but only the top 10 most cited.

Table 12: Top 10 international treaties cited by the SCC.

International Treaties	Number of Times Cited
International Covenant on Civil and Political Rights	22
Convention for the Protection of Human Rights and Fundamental Freedoms [The European Convention on Human Rights]	15
Universal Declaration of Human Rights	13
Convention on the Rights of the Child	12
Vienna Convention on the Law of Treaties	10
International Covenant on Economic, Social and Cultural Rights	9
Convention Relating to the Status of Refugees	9
Berlin Convention for the Protection of Literary and Artistic Works	6
North American Free Trade Agreement (NAFTA)	6
Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize	5
(Other 181 International Treaties)	229
TOTAL	336

treaties that Canada has neither ratified nor is a member of their international organizations. The most notable instance constitutes also the second most cited international document by the SCC: the European Convention of Human Rights, which is the key supranational document of the European legal order on human rights. This document can be also considered as the 'constitution' of the ECtHR, which was also the most cited international court by the SCC.⁶⁷ This shows that the SCC, in its effort to ensure justice, goes well beyond the formal legal sources of international jurisdiction of which Canada is part. This strengthens the argument that the SCC's process of transnational judicial conversation and general globalization of the Court is influenced not just by formal legal documents of which Canada is part, but also through comparative and international documents with persuasive force. Such engagement shows the openness of the SCC towards the use of international law, as well as its movement from a dualist legal system towards a monist one on international law.⁶⁸ This is helped by the fact that international covenants and human rights treaties weighed heavily in the drafting of the Canadian Charter.⁶⁹

3.2.3. Field of law

As with the comparative legal sources, one of the most significant ambitions of this study was to discover how the citation of international legal sources was distributed among the SCC decisions in different fields of law.

According to **Figure 6**, the SCC has cited international precedents in 13 different fields of law of both public and private law. The three fields of law that attracted the highest number of international judgments are: constitutional law (78 times), immigration law (44), and criminal law (36).⁷⁰ Looking at the citation of international judgments, from the perspective of the SCC decisions citing such precedents according to field of law, constitutional law decisions constitute the most often decisions which involve international judgments (41%), followed by immigration law, administrative law and criminal law, at approximately 8% each.

⁶⁷ Table 10.

⁶⁸ For a deeper analysis of this issue, see, Michel Bastarache, *How Internationalization of the Law has Materialized in Canada*. <[https://www.thefreelibrary.com/How internationalization of the law has materialized in Canada.-a0205906535](https://www.thefreelibrary.com/How+internationalization+of+the+law+has+materialized+in+Canada.-a0205906535)>; Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007); Melissa A. Waters, *The Future of Transnational Judicial Dialogue*, 104 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC. INT'L L.) 465, 467 (2010).

⁶⁹ For more information on the role of international covenants and human rights treaties in the Canadian Charter's drafting, see Anne F. Bayefsky, *International Human Rights Law in Canadian Courts* in INTERNATIONAL HUMAN RIGHTS LAW: THEORY AND PRACTICE 115, 125–9 (Irwin Cotler and F. Pearl Eliadis, eds., 1992); Vicky C. Jackson, *Constitutional Engagement in a Transnational Era* 239 (2009).

⁷⁰ Note that some of these SCC judgments that have cited international and transnational precedents, sometimes were more than in one field of law. Hence, for the purpose of counting, each field of law is included separately.

Besides international judgments, international treaties also are referred in many fields of law. More specifically, **Figure 7** reveals that the SCC referred international treaties in 30 different fields of law, of both public and private realms.⁷¹

4. Quantitative data based on individual judges

For a better understanding of the citation of non-domestic legal sources of a comparative and international nature by the SCC, it is important to go beyond the Court as an institution and look also at the roles of individual judges. In addition to the SCC as an institution, individual judges of this Court are key actors in the process of transnational judicial networks.⁷² They participate and contribute not only through the use of

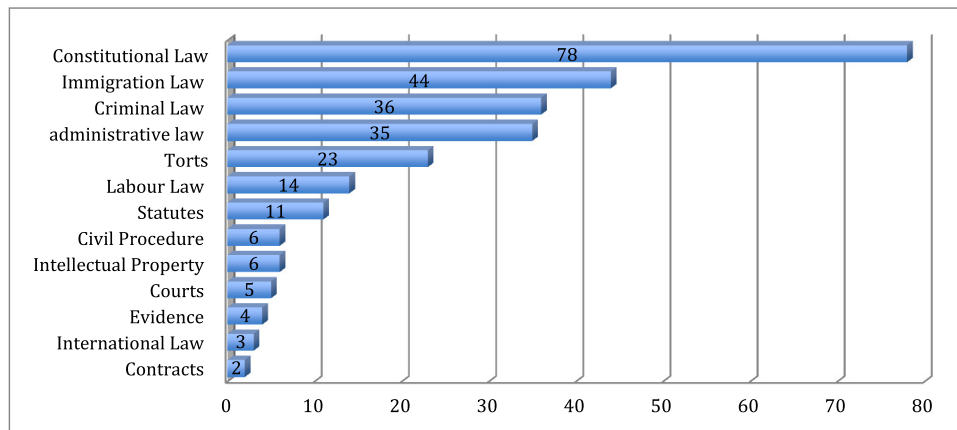


Figure 6: SCC decisions citing international judgment according to fields of Law.

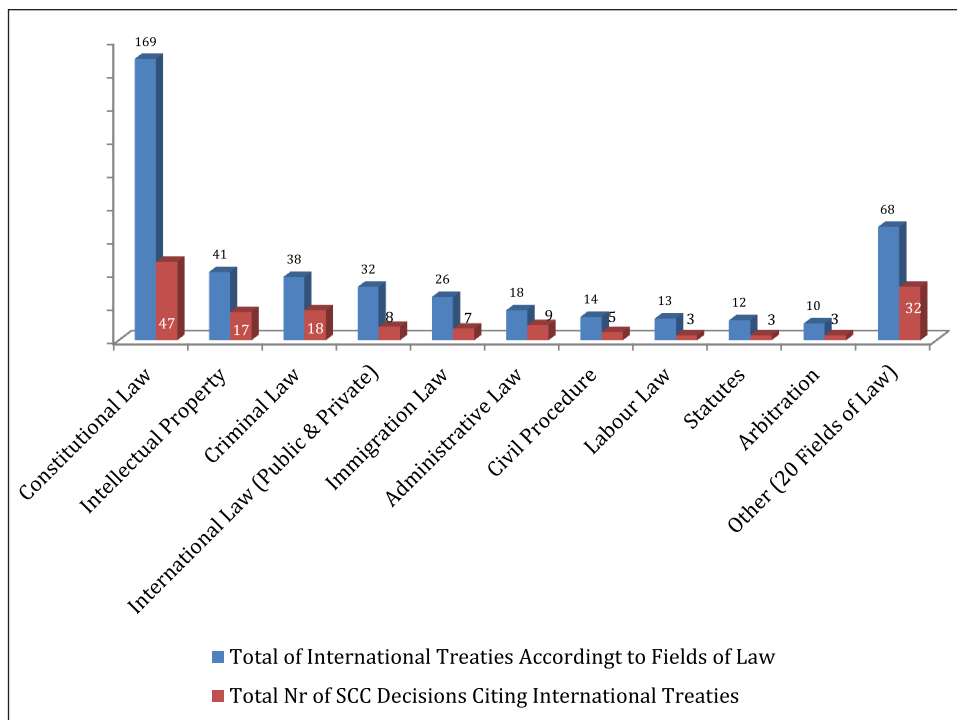


Figure 7: SCC decisions citing international treaties and their fields of law.

⁷¹ The other 20 fields of law are: Evidence, Courts, Commercial Law, Torts, Contract, Action, Civil Law, Maritime Law, Extradition, Elections, Taxation, Customs and Excise, Aboriginal Law, Pensions, Environmental, Insurance, Bankruptcy & Insolvency, Family Law, Education Law, and Communications Law.

⁷² As mentioned above, the role of individual judges is crucial for several reasons. According to the Supreme Court Act, the Court consists of nine individual judges; hence, they constitute the most central actors of the SCC. See Supreme Court Act, R.S.C., 1985, c. S-19, s. 4.

extra-judicial mechanisms, but also through legal ones by deciding whether and to what extent to engage with comparative and/or international legal sources. The key aim of this section is to find out whether and to what extent individual judges cite non-domestic legal sources (comparative or international) in their decision-making.

Immediately, it is important to acknowledge that all 21 judges of the SCC (13 former and 8 current)⁷³ have cited some form of non-domestic legal sources in their decision writing and reasoning processes. This means that every current and former judge of the SCC has contributed, with his or her engagement with non-domestic legal sources, to the global profile of this Court. However, as noted above, it seems that not all the judges contributed the same amount or referred the same amount of non-domestic legal sources.⁷⁴ A few were exceptional, having cited such legal sources several times more than the others.⁷⁵ Yet, all these claims relate only to the citation of foreign judgments and do not rely on comprehensive empirical data that includes also the other three forms of non-domestic legal sources (comparative law, international case law and international treaties). Hence, this research seeks the full picture regarding the extent of citation of all forms of non-domestic legal sources by individual former and current justices of the SCC.

As **Table 13** shows, the judge who referred the most formal non-domestic legal sources in the SCC is Justice Binnie. He cited these foreign sources 497 times during his 11 years and 10 months of service in the Court (within the 17-year timeframe of this study). The SCC judge with the second-highest citation of non-domestic legal sources was former Chief Justice McLachlin. She is the only judge to serve the entire 17 years included in this study, and during this period of time she cited non-domestic legal sources 393 times. The third most notable judge was Justice LeBel. During his 14 years and 11 months of service (within the timeframe of this study), he cited non-domestic legal sources 371 times. The judges with the lowest citation of non-domestic legal sources are all current judges: Justice Wagner (now CJ), Justice Gascon, and Justice Brown. During his 4 years and 3 months in the Court, Justice Wagner has cited non-domestic legal sources 30 times. Justice Gascon has cited 22 non-domestic legal sources within a timeframe of 2 years and 7 months, and Justice Brown has cited non-domestic legal sources 20 times in the 16 months that he has served in the Court.

However, as **Table 13** shows, a fair critique of the above numbers is that not all former and current judges have served the same amount of time within the Court, and therefore it is difficult to evaluate by numbers alone. To create a better and fairer picture of the citation of non-domestic legal sources by each individual judge requires the calculation of average citation per month, done so by dividing the number of times that each judge cited non-domestic legal sources by the number of months served in the Court during the research period.

Table 14 classifies the judges according to this average; the judge with the highest citation of non-domestic legal sources per month was still Justice Binnie, with an average of 3.5 foreign sources per month. The second and third rankings fell to Justice Dube, with an average of 2.4 foreign sources per month; and Justice Iacobucci, with 2.129 sources per month. Former Chief Justice McLachlin, who was the second highest judge in terms of total number of citation, fell to seventh place under this more accurate system with her average of 1.92 non-domestic sources per month. The three judges with the lowest averages of citation per month are Justice Gascon with 0.7 sources per month, Justice Karakatsanis with 0.61 sources per month and Justice (now CJ) Wagner with 0.58 sources per month.

It is interesting to note that the three judges with the lowest average of non-domestic legal source citation are all current judges, while the top three were all former judges. Perhaps even more intriguing

⁷³ There are 13 former judges that have served within the timeframe of this study: The Hon. Claire L'Heureux-Dubé, The Hon. Charles Doherty Gonthier, The Hon. Frank Iacobucci, The Hon. John C. Major, The Hon. Michel Bastarache, The Hon. William Ian Corneil Binnie, The Hon. Louise Arbour, The Hon. Louis LeBel, The Hon. Marie Deschamps, The Hon. Morris J. Fish, The Hon. Louise Charron, The Hon. Marshall Rothstein, and The Hon. Thomas Albert Cromwell. The Supreme Court of Canada, 'Current and Former Judges' <<http://www.scc-csc.ca/court-cour/judges-juges/cfpju-jupp-eng.aspx>>. However, The Hon. Charles Doherty Gonthier, was deceased on July 17, 2009, at the age of 80. The Supreme Court of Canada, 'The Honourable Charles Doherty Gonthier' <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=charles-doherty-gonthier>>.

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

⁷⁴ 'Introduction' of this paper, where are identified several scholars suggesting that the SCC judges with the highest contribution in the citation of foreign case law were Justices Binnie, L'Heureux-Dubé, Iacobucci, Bastarache, LaForest, and LeBel.

⁷⁵ Table 14.

Table 13: Data about the total number of citation of non-domestic legal sources by individual judges of the SCC (2000–2016).

Judges	Total Number of Times Citing Non-Domestic Legal Sources	Period Served (within my timeframe)	Time Served in Months
Binnie	497	(01.01.2000–20.10.2011)	142
Chief Justice McLachlin	393	(07.01.2000–31.12.2016) (Current)	204
LeBel	371	(07.01.2000–30.11.2014)	179
Abella	248	(30.08.2004–31.12.2016) (Current)	148
Bastarache	190	(01.01.2000–30.06.2008)	102
Cromwell	183	(22.12.2008–31.08.2016)	92
Deschamps	180	(07.08.2002–07.08.2012)	120
Rothstein	126	(01.03.2006–30.08.2015)	114
Charron	123	(30.08.2004–30.08.2011)	84
Iacobucci	115	(01.01.2000–30.06.2004)	54
Fish	111	(05.08.2003–31.08.2013)	121
Arbour	97	(01.01.2000–30.06.2004)	54
Major	96	(01.01.2000–25.12.2005)	72
L'Heureux-Dubé	72	(01.01.2000–01.07.2002)	30
Gonthier	65	(01.01.2000–31.07.2003)	43
Moldaver	55	(21.10.2011–31.12.2016) (Current)	62
Coté	53	(01.12.2014–31.12.2016) (Current)	25
Karakatsanis	38	(21-10-2011–31.12.2016) (Current)	62
Wagner	30	(05-10-2012–31.12.2016) (Current)	51
Gascon	22	(09-06-2014–31.12.2016) (Current)	31
Brown	20	(31.08.2015–31.12.2016) (Current)	16

is that nearly all the other current SCC judges rank on the bottom half of the total classification list; the only two current judges to appear on the top half of the list are Justice Coté, who scored fourth and is the first from all the current judges, and former Chief Justice McLachlin, who as stated above scored seventh.

By comparing the average numbers of the current judges to those of the former ones, it seems that the SCC is moving from a court with a high citation of non-domestic legal sources towards one that arguably is more sceptical about global legal sources. Someone can argue that these numbers can explain why the SCC appears to have become less 'globalist,' and is perhaps a fair explanation. When the SCC is comprised of judges who are sceptical towards the reference of non-domestic legal sources, no doubt the entire institution and its decision-making processes will become more so as well.

The significance of this shift is even more evident when looking at **Table 14**, comparing the averages per month of the top three judges (all former judges with an average of approximately 2.6 non-domestic legal sources per year) with the three bottom judges (all current judges with an average of 0.6 sources per month). The difference is still 4–5 times more citation of non-domestic legal sources, by the former judges.

Even when looking at **Table 15**, which compares the 13 former judges with the 8 current ones, the data shows that the former judges have cited on average 1.8 sources per month (2226 non-domestic legal sources in total) while the current judges average 1.2 sources per month (859 sources in total). This comparative picture shows that the current judges cite non-domestic legal sources on average 1.5 times less than the former judges.

The picture becomes even more troubling considering that one of the most 'globalist' judge, former Chief Justice McLachlin, who has cited non-domestic legal sources almost same as all the other current justices

Table 14: Classification of SCC judges according to the average of citation per month of non-domestic legal sources (2000–2016).

Judges	Average of Citation per Month	Number of Times Citing Non-Domestic Legal Sources
Binnie	3.5	497
L'Heureux-Dubé	2.4	72
Iacobucci	2.129	115
Coté	2.12	53
LeBel	2.07	371
Cromwell	1.98	182
Chief Justice McLachlin	1.92	393
Bastarache	1.86	190
Arbour	1.79	97
Abella	1.67	233
Gonthier	1.51	42
Deschamps	1.5	180
Charron	1.46	123
Major	1.33	96
Brown	1.25	20
Rothstein	1.1	125
Fish	0.91	109
Moldaver	0.88	55
Gascon	0.7	22
Karakatsanis	0.61	38
Wagner	0.58	29

combined,⁷⁶ retired on December 2017.⁷⁷ Without her, the average of citation per month of the current Court would drop significantly to an average of 1.1 foreign legal sources per month, approximately two times less than the average of all former judges.

This becomes even more worrisome in the context of the special role that the Chief Justice has on the transnational judicial dialogue and on the global reputation of the Court. The Chief Justice represents the Court in the global arena and is the most important actor in its communications with other foreign courts, judges and transnational institutions. Having lost a highly 'globalist' Chief Justice who referred extensively to non-domestic legal sources, one might argue that there is a risk that the SCC may be on the verge of forfeiting its international reputation and influence in the global arena, currently valued by domestic and foreign scholars,⁷⁸ judges,⁷⁹ and even domestic politicians.⁸⁰ As Hirschl elegantly describes the role of the

⁷⁶ Chief Justice McLachlin has cited non-domestic legal sources 393 times, whereas the other seven current judges have cited in total only 450 times.

⁷⁷ Chief Justice McLachlin retired on December 15, 2017. *The Right Honourable Beverley McLachlin*, THE SUP. CT. OF CAN., <<http://www.scc-csc.ca/judges-juges/bio-eng.aspx?id=beverley-mclachlin>>.

⁷⁸ There are several scholarly articles available discussing 'Canada's soft power' and the exportation of Canadian constitutional ideas by the SCC. Adam M. Dodek, *The Charter ... In the Holy Land?* 8 CONST. F. 5 (1996); Ran Hirschl, 'Judicial Review and the Politics of Comparative Citations: Theory, Evidence & Methodological Challenges' (28 May 2017). Forthcoming in: *Comparative Judicial Review* Erin F. Delaney and Rosalind Dixon, eds. (Edward Elgar, 2018), 7–8ff. Available at SSRN: <https://ssrn.com/abstract=2975986>. See also Choudhry, (n 4). For information on 'soft power,' see JOSEPH S. NYE, JR., *SOFT POWER* (2004).

⁷⁹ Aharon Barak, *Forward: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 110, 114 (2002); Richard J. Goldstone, *The First Years of the South African Constitutional Court*, 42 SUP. CT. L. REV. 25 (2008); Albie Sachs, *Judicial Influence*, by *Osmosis*, THE GLOBE AND MAIL (May 19, 2016), <<https://www.theglobeandmail.com/opinion/judicial-influence-by-osmosis/article30087147/>>.

⁸⁰ According to Former Minister of Justice and Attorney General Irwin Cotler, the Supreme Court of Canada is appreciated around the world '[A]s a model of what a vital, learned, and independent judicial institution should be ... Supreme Court decisions are con-

Table 15: Comparing current justices with former justices on the citation of non-domestic legal sources.

CURRENT JUDGES	Nr of Times Citing Non-Domestic Legal Sources	Average of Citation per Month
Coté	53	2.12
Chief Justice McLachlin	393	1.92
Abella	248	1.67
Brown	20	1.25
Moldaver	55	0.88
Gascon	22	0.7
Karakatsanis	38	0.61
Wagner	30	0.58
TOTAL	859	1.21
FORMER JUDGES	Nr of Times Citing Non-Domestic Legal Sources	Average of Citation per Month
Binnie	497	3.5
Iacobucci	115	2.129
Cromwell	183	1.98
LeBel	371	2.07
L'Heureux-Dubé	72	2.4
Bastarache	190	1.86
Charron	123	1.46
Major	96	1.33
Arbour	97	1.79
Deschamps	180	1.5
Gonthier	65	1.46
Rothstein	126	1.1
Fish	111	0.91
TOTAL	2226	1.8

SCC in the global arena, the 'constitutional thought of every variety is now one of Canada's main intellectual exports.'⁸¹

In fact, from a strictly quantitative perspective, it seems that Wagner, the new Chief Justice of the SCC, refers to non-domestic legal sources 3–4 times less often than Former Chief Justice McLachlin.⁸² However, it is impossible and even unfair to assess the 'globalist' profile of a court, or an individual judge by focusing only on the formal or juridical dialogue occurring through the exchange of legal sources, be it international or comparative. This is indeed only the 'tip of the iceberg.' As the last section of this paper clarifies, other forms of extra-judicial transnational judicial interactions and conversations are occurring, which are much more real and dynamic, and are occurring at both institutional and judge-individual levels.

stantly cited by courts in diverse jurisdictions across the globe.' Irwin Cotler, *Speaking Notes for Irwin Cotler, Minister of Justice and Attorney General of Canada, on the Occasion of a Presentation to the Ad Hoc Committee on Supreme Court of Canada Appointments*, GOV. OF CAN. (Aug. 25, 2004) <http://www.justice.gc.ca/eng/news-nouv/spe-disc/2004/doc_31212.html>.

⁸¹ Hirschl, (n 78) 7ff. Sujit Choudhry, *The Globalization of the Canadian Constitution*, THE TRUDEAU FOUND. PAPERS 91, 98–104 (2012); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, N.Y.U. L. REV. 87 762–858, at 809–823 (2012); Mark Tushnet, *The Charter's Influence Around the World*, OSOODE HALL L. J. 50 527–546 (2013).

⁸² Table 14.

To form a more detailed view of the individual justices' citation of non-domestic legal sources, their approaches to each of the four forms of non-domestic legal sources were examined. As a general note, it is important to acknowledge that not all current and former justices of the SCC have referred to an extensive variety of all forms of non-domestic legal sources; however, the majority of them have done so. As **Table 16** shows, 16 of the 21 justices have cited all four types of non-domestic legal sources. Of the five justices that have not cited all four types of foreign sources, four of them (Justice Iacobucci, Justice Gascon, Justice Brown and Justice Arbour) cited three of the above four non-domestic legal sources (except for international case law). Justice Coté was the only judge to cite only comparative case law and international treaties (omitting international case law and comparative statutes and regulations). It is interesting to note also that of the eight judges who did not cite all forms of non-domestic legal sources, five are current judges.

4.1. Spectrum of individual judges: from 'globalist' to 'localist'

Finally, with these rankings in mind, the question remains: Is it possible to classify the current and former justices of the SCC based on their approaches towards the citation of non-domestic legal sources? In other words, can we categorize these judges as 'globalists' or 'localists' based on the data seen here?⁸³

Before attempting any categorization, it is important to note that the goal of this section is to suggest a spectrum based on the amount of citation of non-domestic legal sources, and not to provide clear-cut categories. Yet even this spectrum has its limitations, because assessing how engaged in the transnational network of courts and how 'globalist' or 'localist' a judge is, constitutes a much more complex task than simply looking at their commitment to non-domestic legal sources. There are various objective factors that do not depend on the judge, but can significantly shape these numbers, including: the type of cases they are given

Table 16: Total citation of all four forms of non-domestic legal sources according to individual judges.

JUDGES	Comparative Case Law	International Case Law	Comparative Statutes and Regulations	International Treaties
Binnie	372	18	49	58
McLachlin	231	20	58	84
LeBel	208	44	35	84
Abella	164	21	38	25
Bastarache	116	12	19	43
Cromwell	130	5	24	24
Deschamps	129	14	13	24
Rothstein	91	1	11	23
Charron	85	12	21	5
Iacobucci	102	0	5	8
Fish	57	21	17	16
Arbour	87	0	8	2
Major	71	12	8	5
L'Heureux-Dubé	35	2	11	24
Gonthier	33	4	13	15
Moldaver	27	2	10	16
Coté	33	0	0	20
Karakatsanis	26	1	9	2
Wagner	26	1	2	1
Gascon	20	0	1	1
Brown	14	0	2	4

⁸³ In fact, scholars have labeled judges as 'globalist' and 'localist' in previous works. Mak, (n 4), 6, 228–29ff.

to write, their duration on the Court, their law clerks' ability to locate relevant non-domestic legal sources, and the role of parties, their counsel, and interveners in introducing such foreign sources. One interviewed judge explains how SCC judges differ in their engagement with non-domestic legal sources, and whether such engagement expresses the 'globalist' or 'localist' mindset of judges:

There are many reasons for the engagement or non-engagement with non-Canadian legal sources. First, we have to realize that ... until last year, it was the Chief Justice who decided which judge was going to write each decision. The nature of the case is key, because, obviously, you cannot involve non-domestic legal sources, foreign or international, in every case. There are only specific cases that have that potential. And if you are not called to write on those decisions, of course you will not appear in the list of judges who referred to such sources. Second, it depends on whether you are with the majority or minority. Third, it depends whether it [the case] comes from Quebec, or another province. That can certainly have an impact on how much a judge is contributing. Fourth, the number of years that judges have served in the Court also plays a role. The longer a judge serves, the more confident is the judge with non-domestic legal sources. Fifth, many references to international or foreign legal sources will be found by the clerks. So, clerks play an important role in presenting these sources to the judge. To sum up, there are many factors that [influence] whether and to what extent a judge engages with non-domestic legal sources.⁸⁴

Indeed, as the same judge noted: 'Just looking at the numbers cannot tell you much, because these numbers may misguide you on how a judge perceives the role of foreign legal sources in our decision-making.'⁸⁵ In addition, the 'globalist' or 'localist' mindset of a judge cannot be limited simply on the citation of non-domestic legal sources. Indeed, assessing how engaged in the transnational network of courts and how 'globalist' or 'localist' a judge is, constitutes a much more complex task than just looking at their commitment to non-domestic legal sources. Besides the usage of formal legal tools, judges utilize also extra-judicial mechanism to network and enter into dialogues with their counterparts, such as: face-to-face meetings, judicial associations and organizations, judicial training institutions and electronic networks.⁸⁶ Judges' participation in these extrajudicial activities certainly adds to their profile.

However, just by looking at the above data, **Table 17** shows that the 21 former and current justices of the SCC can be placed on a spectrum that divides into three identifiable groups.⁸⁷

In the first group are the top seven justices with the highest averages of citation of non-domestic legal sources per month. They are: Justice Binnie, Justice L'Heureux-Dubé, Justice Iacobucci, Justice Coté, Justice LeBel, Justice Cromwell, and former Chief Justice McLachlin. These justices with high reference of non-domestic legal sources can also be labeled as *highly globalist justices*. It is interesting to note that in this top group, only two are current justices, former Chief Justice McLachlin and Justice Coté. However, as we mentioned above, although in terms of average of citation per month (in service) Justice Coté appears to be at the first group, she has only cited judgments of foreign courts and international treaties.⁸⁸ This can certainly question her merits to belong in the first group.

In the second group are the middle seven justices with a medium average of citation of all types of non-domestic legal sources per month. They are: Justice Bastrache, Justice Arbour, Justice Abella, Justice Gonthier, Justice Deschamps, Justice Charron, and Justice Major. These justices with a moderate citation of non-domestic legal sources can also be labeled as *moderately globalist justices*.⁸⁹ Once again, it is worthy to mention that in this middle group, only one is current justice (Justice Abella), while the other six are former justices.

⁸⁴ Interview with Justice Nr 7 of the SCC (I have interviewed 10 former and current judges of the SCC for my doctoral studies; the data from such interviews will be published later in subsequent papers).

⁸⁵ *Id.*

⁸⁶ Klodian Rado, 'The Relationship between Judicial Globalization and Human Rights' (2015) 2 *Transnat'l H R Rev.* 103, 116–23ff; Anne-Marie Slaughter, 'Judicial Globalization' (1999-2000) 40 *Va J Int'l L* 1103, 1120ff, 1123ff.

⁸⁷ Despite the limitations, this classification of current and former justices of the SCC in the above three categories is interesting, because it is based on precise numbers gleaned from research on the use of all four forms of non-domestic legal sources. In addition, as noted above, I am not the only researcher to use these labels. See e.g. Mak, (n 4), 6, 102–106, 228–229ff.

⁸⁸ Table 16.

⁸⁹ This classification of current and former justices of the SCC in the above three categories is based on precise numbers gleaned from research on the use of all four forms of non-domestic legal sources. However, as noted above, I am not the only researcher to use these labels. See e.g. Mak, (n 4), 6, 102–106, 228–229ff.

Table 17: Spectrum of SCC judges according to their citation of non-domestic legal sources (2000–2016) (average per month).

Binnie	3.5	
L'Heureux-Dubé	2.4	
Iacobucci	2.129	
Coté	2.12	
LeBel	2.07	
Cromwell	1.98	
McLachlin	1.92	
Bastarache	1.86	
Arbour	1.79	
Abella	1.67	
Gonthier	1.51	
Deschamps	1.5	
Charron	1.56	
Major	1.33	
Brown	1.25	
Rothstein	1.1	
Fish	0.91	
Moldaver	0.88	
Gascon	0.7	
Karakatsanis	0.61	
Wagner	0.58	
Judges	Non-Domestic Legal Sources	

Table 17 reveals that the last group is comprised of the seven justices with the lowest average of citation of non-domestic legal sources per month. They are: Justice Brown, Justice Rothstein, Justice Fish, Justice Moldaver, Justice Gascon, Justice Karakatsanis and Justice Wagner. These justices with a low number of citations of non-domestic legal sources, despite the limitations of assessing by these numbers alone mentioned above, may be labeled as *localist justices*.

Looking at this group, it stands out that the absolute majority (5 out of 7) are current justices of the SCC. Moreover, the three bottom justices with the lowest averages of references are all current justices (Justice Gascon, Justice Karakatsanis and current Chief Justice Wagner). As noted previously, their combined average was 4–5 times lower than the average of the top three justices (all former), which is one of the ways to explain the different approach of the current Court towards the citation of non-domestic legal sources. Such findings seem to be in agreement with some of the existing literature. One researcher who wrote extensively about the globalization of the SCC, in referring to a personal interview with a judge of the SCC, observed rightly that, ‘the interest of the [SCC] judges in international consensus, and in foreign law as such, has faded over the years.’⁹⁰

5. Instead of a conclusion: is this the judicial slowbalization of the court?

By empirically analyzing all the judgments of the SCC between 2000–2016, I demonstrated that the SCC and its judges extensively engaged with all forms of non-domestic sources, be it international or of foreign nations. The data show that the Court has indeed a global consciousness. However, more detailed numbers indicate that there is a ‘slowbalization,’ or in other words, a decrease of the use of non-domestic sources in the latest year. The reasons for the decline may vary, and may be external and/or internal, however, they are beyond the scope of this paper. Yet, it is worth it to touch some of the main possible explanations of such a *judicial slowbalization* of the SCC, since they are directly connected with the motives why courts and judges engaged with non-domestic sources in the first place.

The main reasons why judges cite foreign counterparts are pragmatic, such as their desire to learn more, to become better judges, and to more easily resolve difficult cases. With the growth of Canadian jurisprudence, SCC judges have fewer motives to cite from the decisions of their counterparts. Historical context is another important explanation. The cross-citation of case law is quite common, particularly among former colonial powers and their colonies, which explains the high number of citation of British jurisprudence

⁹⁰ Mak, (n 4), 150ff.

and jurisprudence of other developed Commonwealth countries such as Australia and New Zealand. At the earlier years the intensity of this process was particularly influenced by the colonial and post-colonial legislation, which later diminished. Other reasons for the use of foreign legal sources are based on legal tradition, language, strong ties in economy, culture, education, politics, geography, and of course the reputation of the foreign court. The US Supreme Court is the best example, the influence of which increased across the globe, and became an important point of reference for the SCC, particularly after the Canadian Charter entered into force.⁹¹

Overall, the reasons for use or non-use of foreign legal sources are diverse and complex, with relevance in history, legal tradition, politics, economy, culture, language, education, geography and even judicial behaviour.⁹² Indeed, as the section on individual judges suggest, the extent of use of non-domestic legal sources depends heavily on the judicial behaviour of individual judges, which means, their judicial philosophy, education, knowledge of foreign languages, previous experience, and participation in dialogue with foreign counterparts.

As a matter of fact, the SCC and its judges are increasingly engaged in a genuine conversation with foreign counterparts, the extent of which is far greater than the metaphorical 'dialogue' that occurs through the use of formal non-domestic legal sources. Often such interactions establish permanent networks of courts and judges, which provide them with greater opportunities to interact with one another. SCC participates in court-to-court institutional relationships in several forms, including the establishment of regular bilateral relationships with foreign counterparts, joining transnational courts associations and organizations, and hosting occasional visits from different foreign courts. Each of the forms of institutional court-to-court exchanges is essential to the transnational judicial conversation, showing that the Court plays a broader role, venturing outside the legal realm to participate in the diplomatic arena.⁹³

In addition to the court-to-court relationships, there is another very powerful set of mechanisms that helps to bring the SCC's participation in the transnational judicial conversation to another level, the transnational judicial conversation of individual justices. Judges are increasingly participating in face-to-face meetings with foreign counterparts, joining transnational judicial associations, contributing in transnational judicial training and other legal education institutions, and even establishing and participating in electronic judicial networks. All these forms of interactions, from both Court's-institutional and individual-judge perspectives, are vital for understanding the different dimension and complexity of transnational judicial dialogue.

To conclude, the 'globalist' or 'localist' profile of a court cannot be evaluated solely by its engagement with non-domestic legal sources, be they international or comparative. In fact, extra-judicial interacting activities of courts and judges are even more essential for the development of relationships with foreign courts and for building a 'globalist' profile. The SCC and its judges certainly understand the importance of these activities, which is why they have been so engaged in them, particularly over the last two decades. The SCC and its justices seem to be highly committed to establishing institutional and individual-judge relationships with foreign and transnational courts and judges from various parts of the globe. Despite the '*slowbalization*' as the new trend of general globalization,⁹⁴ if the SCC wishes to maintain a central and high profile in the global network of courts, the Court as an institution and its individual judges must carefully continue to engage not just with non-domestic legal sources of both international and comparative nature, but also in real conversation with their counterparts. The effects of these interactions and dialogue appear to be a significant factor fostering the evolution of the role of judges from interpreters of the law, to policy-makers,

⁹¹ La Forest, (n 14) 212–213ff.

⁹² Richard A Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008) 19 (explaining the nine theories of judicial behaviour: attitudinal, strategic, sociological, psychological, economic, organizational, pragmatic, phenomenological, and legalist).

⁹³ For more about the role of 'judicial networks' see: Anne-Marie Slaughter, 'The Real New World Order', (September–October, 1997), 76: 5 *Foreign Affairs* 183,186ff; Ana Maria Guerra Martins & Miguel Prata Roque, 'Judicial Dialogue in a Multilevel Constitutional Network: The Role of the Portuguese Constitutional Court', in Mads Andenas & Duncan Fairgrieve, eds, *Courts and Comparative Law* (Oxford: Oxford University Press, 2015) 300,304ff; Stephen G Breyer, *The Court and the World: American Law and the New Global Realities*. 1st Ed, (New York: Alfred A Knopf, 2015). See Part IV, 247–281ff; Mak, (n 4) 83–84ff. Janet M Box-Steffensmeier, Dino P. Christenson, and Claire Leavitt. 'Judicial Networks.' *The Oxford Handbook of Political Networks*. 2018.

⁹⁴ Luca D'Urbino, 'Slobalization – The Steam Has Hone Out of Globalization', *The Economist* (2019). <<https://www.economist.com/leaders/2019/01/24/the-steam-has-gone-out-of-globalisation>>; Barret Kupelian, 'Predictions for 2020: Slowbalisation is the New Globalisation', *Global Economy Watch* (2020). <<https://www.pwc.com/gx/en/issues/economy/global-economy-watch/assets/pdfs/predictions-2020.pdf>>.

and finally to their modern role as diplomats, networkers and crucial actors in foreign relations, roles that certainly cannot continue without debate.

Competing Interests

The author has no competing interests to declare.

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