

THE JUDGES AND THE JOURNALS: CITATION OF PERIODICAL LITERATURE BY THE SUPREME COURT OF CANADA, 1985 – 2004

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The Supreme Court of Canada does not just declare outcomes – it also provides reasons that are constructed around citations to judicial authority. However, in recent decades the Court has also begun to cite academic authorities as well. This article examines the citation of a specific type of academic authority – namely periodical journals – over the twenty-year period marked by the new Supreme Court Reports format listing “Authors Noted” as well as “Cases Cited”. It explores the evolving frequency of such citations, identifies the judges who use them, and the journals, the authors, and the specific articles that have been cited most frequently.

La Cour suprême du Canada ne se contente pas de rendre des décisions, elle donne aussi ses motifs, jurisprudence à l'appui. Toutefois, au cours des dernières décennies, elle a entre autre commencé à citer des œuvres doctrinales. Cet article explore, dans les arrêts de la Cour suprême des 20 dernières années un type spécifique de doctrine - les périodiques - présentée sous la rubrique « doctrine citée » ou « jurisprudence citée ». Le texte analyse l'évolution de la fréquence des citations, identifie les juges qui en sont friands ainsi que les périodiques, les auteurs et les articles le plus fréquemment cités.

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I. Introduction

In 1985, the *Supreme Court Reports* adopted a new format. In addition to the list of citations to judicial authority, which had long been provided between the case summary and the first of the reasons for judgment, the *Reports* now included a list of statutes and regulations referred to, and a list of “Authors Noted.” Such a revision carries an implicit double message. The first is that references to “authors” within the body of Supreme Court reasons occur frequently enough that there is something to list, if not all the time then at least much of the time. The second is that the use of these materials within the decisions is important enough that it is worth highlighting them in this way. After twenty years, it is surely time to explore this double suggestion,¹ although for present purposes I will limit my attention to one specific subset of these references, namely citations of periodical literature (that is to say: journals).²

II. Decisions, Citations and Authority

It is an important element of judicial power that judges do not simply deliver an outcome for the immediate dispute, but they also support that outcome with discursive and often lengthy reasons. This is a deceptively simple and obvious statement, appearing to be little more than common sense, but “in reality it is densely packed with past legal and constitutional experience and replete with potential for development.”³ Lord Denning pointed out that the giving of reasons is “the whole difference between a judicial decision and an arbitrary one,”⁴ and our own Supreme Court has declared that “reasons for judgment are the primary mechanism by which judges account to the

¹ The question has been considered in three previous articles – Black & Richter, “Did She Mention My Name? Citation of Academic Authority by the Supreme Court of Canada 1985-1990” (1993) 16 Dal. L.J. 377; Bale, “W.R. Lederman and the Citation of Legal Periodicals by the Supreme Court of Canada” (1994) 19 Queen’s L.J. 36; and Peter McCormick, “Do Judges Read Books, Too? Academic Citations by the Lamer Court 1991-96” (1998) 9 Sup. Ct. L.R. (2d) 463 – but these studies are both broader (in the sense that they look at a wider range of cited material) and narrower (in that they consider a shorter span of years) than this article.

² The other sub-categories that will be excluded from consideration are books, articles in edited collections, dictionaries and encyclopedias, official reports, and committee or legislative proceedings.

³ Martin Shapiro, “The Giving Reasons Requirement” University of Chicago Law Forum 1992; reprinted in Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press, 2002); see also Frederick Schauer, “Giving Reasons” (1995) 47 Stan. L.R. 633.

⁴ Alfred, Lord Denning, *Freedom Under Law* (London: Stevens, 1949).

parties and to the public for the decisions they render.”⁵

It is also important that these reasons are typically organized around a string of citations to a broader body of legal material. This citation process is important for a number of reasons. For one, the most obvious, it demonstrates the author’s familiarity with the material, which fellow professionals can easily assess by observing the selection and the organization of the cited material. For a second, it adds weight to the author’s decision and reasons, particularly when the purpose is to identify established practices rather than to introduce innovation. For a third, when any degree of intentional and explicit originality or creativity is involved, it allows the author to locate herself and her ideas in relation to this established broader body of material, something which is equally important whether it is a question of extending or retrenching or revising specific details of existing legal doctrine. The general function of the process is to downplay the potential appearance of arbitrariness in the act of decision – that is to say, the selection of the appropriate outcome – by linking it through reasonable explanation to a framework of already existing ideas that have been articulated by a number of other professionals. This does not deny or prevent a degree of creativity, but it does very much serve to contain it.⁶

In the Anglo-American judicial tradition, the favoured weapon in the explanatory arsenal of judges is a reference to the decisions (that is to say, to the logical arguments that have been given as reasons to explain the outcome) of other judges in previously decided cases of their own and other courts. The preference for judicial citations in the explanatory process distinguishes Anglo-American judges from their continental European counterparts, who are more likely to relate their outcomes to the legal codes or to academic works.⁷ The need to work within the framework of authoritative citations limits the discretion of judges, and an examination of the citations that judges acknowledge as setting those limits will help us to understand where the judges are finding their cues and what values they seek to promote. “Citation patterns...reflect conceptions of role...These patterns may be clues, too, to the role of courts in society.”⁸

⁵ *R. v. Sheppard*, [2002] 1 S.C.R. 869 per Binnie J. for the Court at para. 15.

⁶ For a more extended discussion, see *e.g.* Frederick Schauer, “Precedent” (1995) 39 *Stan. L.R.* 633.

⁷ See *e.g.* Mirjan Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven & London: Yale University Press, 1986); and Goutal, “Characteristics of Judicial Style in France, Britain and the U.S.” (1976) 24 *Am. J. Comp. L.* 43. For a similar point in a more explicitly Canadian context, see Madame Justice Claire L’Heureux-Dube, “By Reason of Authority or by Authority of Reason” (1993) 27 *U.B.C. L.R.* 1.

⁸ *Ibid.*, p. 794.

Elsewhere, I have examined the patterns of judicial citation in order to outline some of these shifting conceptions of role, and also to identify some of the past and present members of the Supreme Court who have had the greatest impact on Canadian case-law.⁹ My purpose here, however, is to point out a more recent and supplementary development – namely the fact that Canadian courts in general, and our own Supreme Court in particular, have come to cite sources other than judicial authority in the reasons that they give for the outcomes that they have reached, and one important set of these additional sources is the periodical literature, primarily the law reviews. If judicial citation serves to connect the immediate reasons to a broader body of judicial doctrine, then the citation of journals serves to connect the immediate reasons to a broader body of intellectual exploration of legal and other ideas, and this is the phenomenon that I wish to explore.

III. The Supreme Court of Canada and the Citation of Periodicals

It would, of course, be a mistake to assume that the Supreme Court of Canada has a long tradition of citing academic material, periodical or otherwise. At one time, the prevailing rule was that one could not cite as any kind of authority a still-living author; and Nichols tells the story of the Supreme Court's annoyance as recently as 1950 when this rule was violated by a reference to a recent article in the *Canadian Bar Review*.¹⁰ Even when this rule was gradually relaxed, such citation was still unusual. My perusal of the Supreme Court reports for the last three years of the 1960s, for example, turned up only two dozen references to books and two brief references to any legal periodicals. In this respect, we stayed closer to British practices, where extra-judicial citation was still unusual in the 1980s,¹¹ than to American, where this debate worked itself out in the late 1920s.¹²

But the great watershed in the performance of the Supreme Court

⁹ Peter McCormick, "The Supreme Court Cites the Supreme Court: Follow-up Citation on the Supreme Court of Canada, 1989-1993" (1995) 33 Osgoode Hall L.J. 453; Peter McCormick, "What Supreme Court Cases Does the Supreme Court Cite?: Follow-up Citations on the Supreme Court of Canada, 1989-1993" (1996) 7 Sup. Ct. L.R. (2d) 451; Peter McCormick "The Supreme Court of Canada and American Citations 1949-1994: A Statistical Overview" (1997) 8 Sup. Ct. L.R. (2d) 527; and Peter McCormick, "Do Judges Read Books, Too?: Academic Citations by the Supreme Court of Canada 1991-7" (1998) 9 Sup. Ct. L.R. (2d) 463.

¹⁰ Nicholls, "Legal Periodicals and the Supreme Court of Canada" (1950) 28 Can. Bar. Rev. 422.

¹¹ See e.g. Alan Patterson, *The Law Lords* (London; Macmillan, 1982).

¹² Radin, "Sources of the Law – New and Old" (1928) 1 So. Cal. L.R. 411; Maggs, "Concerning the Extent to which the Law Review Contributes to the Development of the Law" (1930) 3 So. Cal. L.R. 181.

of Canada came with the arrival of Bora Laskin, and especially after his elevation to the Chief Justiceship. There was a new style of decision-making – “contextualism” rather than “formalism” – and this necessarily involved a broader explanatory net than the narrowly legal focus of past practices. There was a new and more expansive form of explanation of reasons, less technical and jargon-ridden and apparently directed to a broader (although hardly a mass) audience. And there was a new type of judge dominating the appeal benches, more likely than before to have had significant appellate experience, to have done graduate study in law, and to have taught in university law schools. Snell and Vaughan describe the Trudeau/Turner judicial appointments as “the most learned and scholarly group of justices ever to join the Supreme Court,”¹³ and Saywell notes that “Of the twenty-two puisne judges who sat on the court between 1980 and 2000, eleven were or had been full-time law professors at one stage of their careers and many others had lectured part-time.”¹⁴ If only because so many judges had been academics themselves before they went on the bench, there was some reason to expect a change in the types of authority on which the Supreme Court would be willing to draw, and the new format after 1985 provides some confirmation of this changed emphasis.

The fact that many more judges had been academics before they sat on the bench suggests a further complicating factor; not only had these judges published, sometimes extensively, in the same journals that are now being cited, but in recent years they have continued to publish such articles even while sitting on the bench.¹⁵ A skim of the journal citations in this study suggests that this factor is actually rather modest – there were only 43 such citations in twenty years, about 1.5% of the total – but the fact that there are any examples at all demonstrates a new relationship between judges and journals.

IV. The Rise (and Decline?) of the Citation of Periodicals

The first question is both the most obvious and the most important: has there in fact been a consistent practice on the Supreme Court over the last two decades of citing academic material in general and material from the periodical literature in particular? The answer is clearly yes: over the twenty years, there have been more than 2500 such references, or about ten dozen a year – well up from the “two every three years” of

¹³ James G. Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto, University of Toronto Press, 1985) p. 236.

¹⁴ John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto, University of Toronto Press, 2002), p. 276.

¹⁵ See e.g. Peter McCormick, “Judges, Journals and Exegesis: Judicial Free Speech in Academic Scholarship” (1996) U.N.B.L.J. 139.

the late 1960s. This has supplemented and not in any sense replaced the judicial citation that has long been the preferred weapon in the arsenal of judicial explanation – these are much more frequent, typically about 1500 per year in recent years – but the number is still easily high enough to merit attention.

Table 1: Frequency of Citation of Periodicals, by Year; 1985-2004

Dickson Court	Lamer Court	McLachlin Court
1985: 55	1990: ¹⁷ 156	2000: 132
1986: 65	1991: 156	2001: 123
1987: 79	1992: 205	2002: 117
1988: 81	1993: 243	2003: 95
1989: 114	1994: 129	2004: 73
1990: ¹⁶ 56	1995: 164	
	1996: 160	
	1997: 141	
	1998: 91	
	1999: 135	
Avge: 82/yr	Avge: 166/yr	Avge: 108/yr

Table 1 presents a simple year-by-year count of citations to periodical literature, divided into the three Chief Justiceships. The numbers confirm that such citation has become a steady and persisting element of the Supreme Court’s explanatory practices, reaching well into the dozens for every single year since 1985. The new SCR format has indeed signalled, and perhaps reinforced, a new aspect of the way that the Supreme Court identifies the sources and the reference points for its ideas. It is now the case, as it was not the case decades ago, that one of the ways to have some impact on the way that the Supreme Court handles the important questions that it seeks to resolve is to publish in the law reviews; this is not a small thing, and it is not a small point to identify it, to confirm it, and to put it in some proportional relationship to the purely judicial sources of ideas that once defined judicial citation and still dominate it. In calendar 2003, for example, the Supreme Court of Canada made 367 citations to non-judicial material (books, journal articles, official reports, Hansard, dictionaries and the like), of which roughly one-quarter (95) were citations to periodical literature; this compares with just under 1400 citations of judicial decisions. If we combine these to create a single category of “judicial and academic authority” then judicial decisions account for roughly 80% of the composite category, and the journals account for about 5%.

¹⁶ Up to 1 August, 1990.

¹⁷ After 1 August, 1990.

But there is a second pattern that stands out from the table, and that is that the numbers are neither constant nor steadily growing. Instead, there appears to be a steady rise in the frequency of academic citation through the Dickson years and into the early Lamer years, reaching a peak in 1993, and then gradually falling through the later Lamer years and into the McLachlin Court. The obvious question is how we are to understand this pattern. Are we looking at yesterday's fad rather than today's practice? If so, is it something that will continue to decline in the future, or will it level out at something close to current figures? Or is there a pattern of oscillation from decade to decade, which might suggest that the declining numbers may one day reverse themselves?

What makes the pattern particularly intriguing is that similar observations have been made of the United States Supreme Court, which now cites the periodical literature roughly as often as the Supreme Court of Canada, but which used to do so much more often in the 1980s and the early 1990s.¹⁸ Some commentators have linked this to the new personality of the United States Supreme Court, dominated by conservative and originalist judges rather than by liberal and activist ones (although since both wings continue to exist and to air their differences, it seems to me that this would result less in an overall reduction in citations to the periodical literature than to the changing frequency with which such citations are found in minority opinions as opposed to decisions). Another factor that seems at least as important is the fact — again curiously parallel both north and south of the border — that Supreme Court caseloads have been declining for some time.¹⁹ The frequency of periodical citation has fallen by about a third between the Lamer Court and the McLachlin Court; but the caseload has also fallen by about a similar amount over this same period. Perhaps, then, what we have observed is a steady increase in the citation of periodicals through the Dickson years, since when the citation rate has levelled off but not fallen *relative to caseload*, and can now be thought of as a stable element of the Court's practices. To generalize, we can say that it is now routinely the case that between 30% and 40% of the cases decided by

¹⁸ See Louis J. Sirico, "The Citing of Law Reviews by the Supreme Court: 1971-1999", (2000) 75 Ind. L.J. 1009.

¹⁹ See e.g. Phillip Alan Lacovara, "The Incredible Shrinking Court" *American Lawyer* (December 2003); Stephen M. Shapiro "Certiorari Practice: The Supreme Court's Shrinking Docket" on-line: <<http://appellate.net>>; David M. O'Brien, "The Rehnquist Court's Shrinking Docket" (1997) 81 Jud. 58. But see Kevin M. Scott, "It's a Good Job if You Can Get It: The Supreme Court's Shrinking Caseload", paper presented at American Political Science Association Annual Meeting (Philadelphia, Pennsylvania; August 2003) arguing that the apparently smaller docket can be explained almost entirely by the removal of the Court's mandatory appellate jurisdiction in 1988.

the Supreme Court will include one or more references to the academic literature, and that the average periodical-citing decision will include between three and four such references. This pattern, that has “chased the numbers down” as the Supreme Court caseload constricts, will presumably “chase the numbers back up” if the caseload were to grow again in the future.

Table 2: Number of citations of periodicals, number of cases including citations of periodicals, and number of judges citing periodicals; by year, 1985-2004

Year	Citations of Periodicals	Cases citing Periodicals	Judges citing periodicals
1985	55	18	8
1986	65	18	8
1987	79	23	9
1988	81	26	8
1989	114	42	11
1990	212	49	9
1991	156	31	10
1992	205	37	9
1993	243	43	8
1994	129	31	8
1995	164	37	9
1996	160	32	9
1997	141	37	9
1998	91	29	9
1999	135	35	9
2000	132	24	10
2001	123	34	9
2002	117	37	9
2003	95	25	9
2004	73	27	10
Total:	2570	635	23

Table 2 deepens the count from Table 1, asking not only how many citations to periodic literature occurred in each year, but also how many cases included such references and how many judges were involved in making them. This confirms the impression of continuity — every year, there are dozens of references that occur in dozens of cases, and each and every year every single member (or almost every single member) makes such references. The citation of periodical literature has become a routine element of Supreme Court practices, albeit one that applies to a substantial minority rather than to the entirety of the caseload. What this element of the caseload looks like is the next question I will address.

V. What Types of Cases?

Not all cases are equally likely to draw citations of the academic periodical literature, which in turn raises the question of which types of cases are most likely to do so. My database divides the Supreme Court caseload into four categories. The first and most obvious is criminal law, which involves the Crown (acting through either the provincial or the federal government) operating against an individual or a corporate entity; these are easily identified. The second involves what I will call “public law” which involves a government actor or agency or department, excluding the criminal category. The third is “private law” which involves actions between two natural persons and/or corporate entities embracing the obvious categories such as tort and contract. And the fourth involves *Charter* cases. (This fourth category is not quite like the others, because all *Charter* cases are already some other type of case – often criminal, but increasingly often public – as well.)

Table 3: Number of citations, by type of law
SCC decisions 1985-2004

Type of law	Number of citations
private	848 (33.0%)
Charter	796 (31.0%)
public	550 (21.4%)
criminal	375 (14.6%)
Total:	2569

As shown in Table 3, it is private law cases that draw the largest share of the academic citations, with just under one in every three such citations, followed by *Charter* cases (31.0%), public law cases (21.4%) and criminal cases (14.6%). This is mildly surprising. For one thing, private law cases are numerically the smallest of the four categories as an element of the Supreme Court docket, and the average private law decision is shorter and uses fewer judicial citations than the other categories; it is also less likely to draw minority reasons, which in itself reduces the frequency of any type of citation of authority.²⁰ *Charter* cases are the second smallest element of caseload, but for obvious reasons these cases are typically lengthy and heavily studded with citations, and also constitute the category that is most likely to generate minority opinions. But criminal cases are the largest element of caseload and (as I will show later) authors whose work is in the area of

²⁰ For the Lamer Court, for example, the total number of words in minority reasons amounted to one half of the words in the (majority or unanimous) decisions of the Court, although this has fallen to one third for the McLachlin Court.

criminal law loom very large on the lists, so it is somewhat surprising that this area of law is proportionately under-represented in academic citation.

As another way of coming at the phenomenon: I have said that the typical periodical-citing decision makes between three and four such citations. But this implies that there are a number of cases that cite fewer than this number, and others that cite more (and possibly much more). Table 4 lists the 29 Supreme Court decisions that have made the largest number of references to periodical literature, the “cut-off” point being a dozen such citations.

Table 4: Decisions including the largest number of citations of periodicals
Supreme Court of Canada decisions, 1985-2004.

Case	Journal citations
<i>Moge v. Moge</i> [1992] 3 S.C.R. 813	41
<i>London Drugs v. Kuehne & Nagel</i> [1992] 3 S.C.R. 475	36
<i>Young v. Young</i> [1993] 4 S.C.R. 3	33
<i>McKinney v. University of Guelph</i> [1990] 3 S.C.R. 229	27
<i>R v. Starr</i> [2000] 2 S.C.R. 144	26
<i>R. v. Daviault</i> [1994] 3 S.C.R. 391	26
<i>R. v. Seaboyer</i> [1991] 2 S.C.R. 154	25
<i>Canada v. Mossop</i> [1993] 1 S.C.R. 554	25
<i>R. v. Keegstra</i> [1990] 3 S.C.R. 649	20
<i>A. v. B.</i> [1995] 4 S.C.R. 536	20
<i>Comm. for Commonwealth of Canada v. Canada</i> [1991] 1 S.C.R. 139	18
<i>Gordon v. Goertz</i> [1996] 2 S.C.R. 27	18
<i>R. v. van der Peet</i> [1996] 2 S.C.R. 507	18
<i>Miglin v. Miglin</i> 2003 SCC 25	18
<i>Symes v. Canada</i> [1993] 4 S.C.R. 695	17
<i>Hall v. Hebert</i> [1993] 2 S.C.R.159	16
<i>R. v. L.</i> [1993] 4 S.C.R. 419	16
<i>R. v. Gruenke</i> [1991] 3 S.C.R. 534	15
<i>Canadian National v. Norsk</i> [1992] 1 S.C.R. 1021	15
<i>M. v. M.</i> [1992] 3 S.C.R. 6	14
<i>R. v. S.</i> [1995] 1 S.C.R. 451	14
<i>G. v. B.</i> [1995] 3 S.C.R. 370	14
<i>W. v. S.</i> [1996] 2 S.C.R. 108	14
<i>Houle v. Canadian National Bank</i> [1990] 3 S.C.R. 122	14
<i>Canadian Dredge & Dock Co. v. R.</i> [1985] 1 S.C.R. 662	13
<i>R. v. Elshaw</i> [1991] 3 S.C.R. 24	12
<i>Finta v. Canada</i> [1994] 1 S.C.R. 701	12
<i>Hill v. Church of Scientology</i> [1995] 2 S.C.R. 1130	12
<i>Toronto (City) v. C.U.P.E. Local 79</i> 2003 SCC 63	12

In terms of the type of law raised and the public profile of the case, this looks at first like something of a strange grab-bag of cases. On closer investigation, however, there are some distinct clusters.

The first cluster comprises ten cases with a total of 186 periodical citations. These are the *Charter* cases, many of which would appear on the “must” list of any constitutional law course: *McKinney*, *Seaboyer*, *Mossop*, *Keegstra*, *Committee for the Commonwealth of Canada*, *Symes*, *R. v. L.*, *R. v. S.*, *Elshaw*, *Finta*. But what is striking about the list is that it includes only one or two of the cases that we would take as comprising the relevant case-law for any of the major *Charter* issues: only *Mossop* from the cases that have established “gay rights” as part of the constitution, for example, and only *Keegstra* and *Commonwealth of Canada* from the freedom of expression cases. The message would seem to be less that the Supreme Court always uses such material, than that every once in a while it decides to buttress the case-law by doing a solid sweep of the journals.

The second major sub-set comprises many of the major family law cases, totalling seven cases with a total of 168 periodical citations. The cases on this list are: *Moge*, *Young*,²¹ *Gordon v. Goertz*, *Hall v. Hebert*, *M. v. M.*, *G. v. B.*, *W. v. S.*

A third set, with six cases and 110 periodical citations would be non-*Charter* criminal cases, a list including *Starr*, *Daviault*, *Gruenke*, *Toronto v. CUPE*, *A. v. B.* and *Canadian Dredge & Dock Co.* This particular sub-set is all the more striking because of the general under-representation within the periodical-citing cases of criminal cases outside of the *Charter* context.

A fourth set, with four cases and 76 citations, includes a variety of tort and liability cases such as *London Drugs*, *Norsk Pacific*, *Houle*, and *Hill*.²²

The only outlier from these four categories is the aboriginal rights case of *van der Peet* (the core case of the critically important “*van der Peet* trilogy”), although no other aboriginal rights cases of the last twenty years are anywhere close to the cut-off point.

When one considers the enormous variety of issues with which the Supreme Court is obliged to deal, and the range of highly controversial

²¹ *Young* could, of course, also be considered a *Charter* case relating to freedom of expression, but both the head-notes and the way that the cases focuses on the “best interests of the child” doctrine suggest that the family law designation is more appropriate.

²² *Hill* also raises *Charter* issues, but I think it is more accurate to consider it as primarily a case about the law of slander.

issues that they have dealt with in recent years, this is a surprisingly narrow focus. The cases that use unusually large numbers of periodical citations are family law cases, or non-Charter criminal cases, or tort cases, or represent an episodic focus on periodic literature from within the Charter jurisprudence.

VI. Which Justices?

One obvious correlate for periodical citation is the one discussed above: what kinds of case (or, more pointedly, what specific cases) include the highest number of these citations? But there is an even more obvious and direct factor – since every single citation to whatever kind of authority is made by a specific judge (or, in the case of jointly authored decisions, by a specific and identifiable set of judges), we can ask how much has been contributed to the total mass of periodical citation by each individual member of the court. The “count” is given in Table 5 below. “Per coram” decisions refer to the unanimous anonymous decisions that were delivered by the court, primarily during the Laskin and Dickson years (when some commentators suggested that they implied the emergence of a new and distinctive style of Supreme Court decision making), but less often since. Although it is sometimes an open secret which of the members dominated the authorship, the convention is to attribute these to the full panel. “Joint” reasons refer to the practice – rare before the Lamer Court, but a regular if minor feature since – of two or more rarely three judges co-authoring a set of reasons; Iacobucci appears to have been the initiator, and for some time the most frequent practitioner, of this style, but almost all members of the Court have done so from time to time.

Table 5: Judges making the most citations of periodical material; Supreme Court of Canada decisions, 1985-2004

Judge	Citations
L'Heureux-Dubé	613 (23.9%)
La Forest	247 (9.6%)
<i>McLachlin</i>	204 (7.9%)
Lamer	174 (6.8%)
Gonthier	152 (5.9%)
Iacobucci	152 (5.9%)
Wilson	136 (5.3%)
<i>Binnie</i>	135 (5.3%)
Cory	123 (4.8%)
Dickson	73 (2.8%)

<i>Bastarache</i>	72 (2.8%)
Sopinka	70 (2.7%)
<i>LeBel</i>	70 (2.7%)
<i>Major</i>	43 (1.7%)
McIntyre	30 (1.2%)
Arbour	28 (1.1%)
Beetz	23 (0.9%)
Estey	20 (0.8%)
Le Dain	20 (0.8%)
<i>Deschamps</i>	15 (0.6%)
Stevenson	6 (0.2%)
Chouinard	3 (0.1%)
<i>Fish</i>	1 (0.1%)
joint reasons	113 (4.4%)
per coram decisions	46 (1.8%)
Total:	2569

It is worth noting that every single one of the 23²³ judges who served on the Court since January 1, 1985, has made some citations to periodical literature – there are no “zeros” in the table, although Fish J. (with 1), Chouinard J. (with 3) and Stevenson J. (with 6) come close. But the spread from the top to the bottom of the table is astonishing – we are not talking about a practice that has diffused evenly across the Court, but rather about a style practiced by some judges that has been adopted much less enthusiastically by others, and barely followed at all by a few. One quarter of all periodical citations of the past 20 years were made by a single judge, Madame Justice L’Heureux-Dubé; one third were made by the top two judges; one half by the top four; and two thirds by the top seven. Conversely, the bottom seven judges – the bottom third of those who served over the last two decades — account for less than 4% of the total. Two quick characterizations stand out: four of the top five judges on the table are francophones; and three of the top seven are women.

There is, of course, one obvious factor that complicates the simplicity of Table 5, and that is the fact that the different judges have served for rather different lengths of time. Wilson J. and Iacobucci have made about the same number of citations to academic periodicals, but she served for less than a third of the period under consideration and Iacobucci for almost all of it; similarly, Major and LeBel JJ. have similar totals but Major J. has served for almost three times as long. Table 6 therefore combines the citation numbers with the length of service for each judge to generate a “periodicals citations per year”

²³ Excluding Abella and Charron J J., who have not yet delivered reasons for the Court.

count that facilitates direct comparison.

Table 6: Judges making the most periodical citations per year
Supreme Court of Canada decisions, 1985 - 2004

Judge	Citations / Years	Citations/yr
L'Heureux-Dubé	613 / 15.2	40.3
Wilson	136 / 6.0	22.6
La Forest	247 / 12.7	19.5
<i>Binnie</i>	135 / 7.0	19.3
<i>LeBel</i>	70 / 5.0	14.0
Dickson	73 / 5.5	13.3
<i>McLachlin</i>	204 / 15.8	13.0
Cory	123 / 10.4	11.8
Lamer	174 / 15.0	11.6
Iacobucci	152 / 13.5	11.3
Gonthier	151 / 14.5	10.4
<i>Bastarache</i>	72 / 7.3	10.0
Sopinka	70 / 9.5	7.4
McIntyre	30 / 4.1	7.3
<i>Deschamps</i>	15 / 2.4	6.3
Beetz	23 / 3.8	6.1
Estey	20 / 3.3	6.1
Arbour	28 / 4.8	5.9
Le Dain	20 / 3.9	5.1
<i>Major</i>	43 / 12.1	3.5
Stevenson	6 / 1.7	3.5
Chouinard	3 / 2.1	1.4
<i>Fish</i>	1 / 1.6	0.6
Average		13.3 ²⁴

Note: italics indicate current members of the Court

In these terms, the judges divide themselves into straightforward categories. There is one Justice (L'Heureux-Dubé) who cited journals much more often than the notional average judge, and three Justices (Wilson, La Forest and Binnie) who did so more often than average. Eight Justices (McLachlin, Dickson, LeBel, Cory, Lamer, Iacobucci, Gonthier and Bastarache) are clustered around the average number; seven (Sopinka, McIntyre, Deschamps, Beetz, Estey, Arbour and LeDain) are below average; and four (Major, Stevenson, Chouinard and Fish) are well below average.

²⁴ Total citations per year, less citations in "joint" and per coram reasons, divided by 9.

Two obvious observations can be made. The first is that most of the frequent citers of periodical literature have left the court. L’Heureux-Dubé, Wilson and La Forest JJ. no longer sit on the bench; of the newer appointments, only Binnie J. cites journals at a comparable level. The second is that many of the recent judicial appointments cite journals at a lower level than the judge who was being replaced. Bastarache J. does so at only half the rate of La Forest J., Deschamps J. at one quarter of the rate of L’Heureux-Dubé J. and although it remains to be seen if Fish J. will approach the figures for Justice Gonthier, after a year and a half it seems unlikely. On the other hand, LeBel J. cites the journals slightly more often than Lamer C.J., and Binnie J. does so more often than Justice Sopinka did, so the trend is not quite unidirectional. There may also be a tendency for judges to cite the literature more often as their years of service go up, which could be a significant factor for a court as junior as the McLachlin Court is becoming.

VII. What Kinds of Periodicals?

The first question is what kinds of journals are being cited, and Table 3 answers this in terms of some very basic categories. It is hardly surprising that law journals – that is to say, periodicals published by university law schools, or by professional associations, or by commercial publishers using an academic peer review process – account for a majority of these citations; but it is perhaps surprising that the dominance is so massive. Fully nineteen periodical citations out of every twenty are to legal sources.

Table 7: Citations of periodical, by type of publication
Supreme Court of Canada decisions, 1985 - 2004.

Type of periodical	Number of citations
law	2435 (94.8%)
social science	45 (1.8%)
financial	40 (1.6%)
science	25 (1.0%)
news-magazines	10 (0.4%)
daily newspapers	9 (0.4%)
other	5 (0.2%)

It might have been suggested that the new rights-driven agenda of the modern Supreme Court of Canada, particularly given the new purposive and contextual decision-making style, would have driven it to seek authoritative material from a broader sweep of academic disciplines. After all, the Supreme Court is now called on to “second

guess” legislatures in a wider variety of policy areas, and to assess the consequences and implications of action (or inaction) in many dimensions. It was not inconceivable, or even unlikely, that this would be reflected in a growing readiness to refer to sociological or economic or (given the importance of environmental issues) scientific authorities, the more so because social science evidence and expert testimony is becoming more frequent for certain types of cases.²⁵ There is some of this, but less than might have been anticipated – it does not amount to more than one or two citations per year, hardly a revolution or a major change in direction.

Since the sources other than the law journals are so marginal in this category, we can simply ignore the debate that is going on in the United States about this subject. A number of commentators in that country have become concerned about the extent to which citations of non-legal material (mainly from the natural and social sciences) have become much more common, especially in the federal courts.²⁶ One article in particular rather ominously warns that “if this trend continues and signals a change in acceptable authority, it may foreshadow the decreased dominance of the traditional canon of legal information, which may, in turn, produce the phenomenon we call the “delegalization” of law.”²⁷ But since non-legal material makes up such a small part of the citation of periodical literature by the Canadian Supreme Court, which itself stands in such a small ratio to the citation of judicial decisions, no such fears lie down this track.

The next obvious question is where the cited material is coming from; are we looking at Canadian material, or American influences, or global interaction? It is a fairly simple matter to track down the geographical location of each of the cited periodicals – not that it is always obvious on the face of it, just that internet searches will pull up publisher web-pages for almost all of them – and these results are shown in Table 8.

²⁵ See e.g. Christopher Nowlin, *Judging Obscenity: A Critical History of Expert Evidence* (Montréal, McGill-Queens University Press, 2003).

²⁶ See e.g.: John H. Hasko, “Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions” (2002) 94 Law Lib. J. 427; Ellie Margolis, “Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs” (2000) 34 U.S.F.L.R. 197, 202; and Frederick Schauer & Virginia J. Wise, “Legal Positivism as Legal Information” (1997) 82 Cornell L.R. 1080.

²⁷ Frederick Schauer & Virginia J. Wise, “Nonlegal Information and the Delegalization of Law” (2000) 29 J. Leg. St. 495.

Table 8: Citations of periodicals, by country of publication
Supreme Court of Canada decisions, 1985 - 2004

Country	Number of citations
Canada	1634 (63.6%)
U.S.	576 (22.4%)
U.K.	207 (8.1%)
Australia & New Zealand	62 (2.4%)
France	45 (1.8%)
other ²⁸	45 (1.8%)
Total:	2569

Again, the basic pattern is hardly surprising. Canadian journals make up a solid majority of all the citations, just under two in every three. American journals are in second place but well back, with roughly a third as many citations, and the United Kingdom trails again by a comparable margin. Other sources (mainly Australian, French and New Zealand) are considerably more infrequent, barely topping half a dozen per year.

What is interesting about this pattern is that although Canadian sources dominate, they do so by smaller margin than is the case for judicial citations. In recent years, about 85% of all citations to judicial decisions, compared with just over 60% of all citations to periodical literature, are to Canadian sources; about 6% of all judicial citations, but almost a quarter of all academic citations, are to American sources; and British and “other” sources make up about the same share of both sources of authority. To the extent that other countries – and especially the United States – are having an impact on Canadian law, this is proportionately more likely to be coming through the law journals than through the law reports. And for all the talk about a “globalization of law” between national high courts that one finds in the recent law journals,²⁹ the total citation picture for the Supreme Court of Canada

²⁸ Mostly other European except for two from South Africa and one from Singapore.

²⁹ See e.g. Martin Shapiro, “The Globalization of Law” (1993) 1 *Global Leg. St.J.*; Shirley S. Abrahamson & Michael J. Fischer, “All the World’s a Courtroom: Judging in the New Millenium” (1997) 26 *Hofstra L.R.* 273; Claire L’Heureux-Dube, “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court” (1998) *Tulsa L.J.* 34; Ann-Marie Slaughter, “Judicial Globalization” (2000) 40 *Va.J. Int.L.* 1103; Reem Bahdi, “Globalization of Judgment: Transjudicialism and the five faces of international law in domestic courts” (2000) 34 *Geo. Wash. Int. L.R.* 555; Ann-Marie Slaughter, “A Global Community of Courts” (2003) 44 *Harv. Int. L.J.* 18; Carl Baudenbacher, “Judicial Globalization: New Development or Old Wine in New Bottles?” (2003) 38 *Texas Int. L.J.* 397.

shows a strongly Canadian conversation that occasionally visits the English courts and the American law journals, and not much else.

VIII. Which Journals? Which Articles? Which Authors?

Canadian journals account for nine of the top ten, and sixteen of the top twenty, most frequently cited journals;

Table 9: Most frequently cited Canadian law journals
Supreme Court of Canada decisions, 1985 - 2004

Name of journal	Citations
Canadian Bar Review	303
Criminal Reports	98
Criminal Law Quarterly	84
McGill Law Journal	84
University of Toronto Law Journal	57
Alberta Law Review	47
Canadian Family Law Quarterly	46
Ottawa Law Review	44
Osgoode Hall Law Journal	44
Canadian Business Law Journal	44
Queen's Law Journal	42
Revue Generale de Droit	38
Manitoba Law Journal	38
University of British Columbia Law Review	37
Supreme Court Law Review	34
Revue Juridique Themis	32
Report on Family Law	31
Advocates' Quarterly	27
Canadian Journal on Family Law	27
Revue de Droit Universite de Sherbrooke	21
University of Toronto Faculty of Law Review	21
Saskatchewan Law Review	20
Dalhousie Law Journal	18
Canadian Tax Journal	13
Canadian Journal of Women & the Law	12
National Journal of Constitutional Law	12
Canadian Journal of Admin. Law & Practice	11
Cahiers de Droit	10
Revue de Notariat	10

The *Canadian Bar Review* is by far the most frequently cited journal, validating the claim that is made on the journal web-page.³⁰ It has been cited by every single Supreme Court Justice to serve since

January 1, 1985 except for Justices Chouinard and Fish; and it is the most frequently cited journal for every Justice except those two and McIntyre J.³¹ It dominates the count for both French and English citations; indeed, if one divided the citations by language, the *Canadian Bar Review* would still be in first place (with 211 citations), and the *Revue du Barreau canadien* would be in third (with 92). In all, it accounts for one in every nine citations to periodicals, a pre-eminence that has no counterpart in (say) the United States Supreme Court.³² The top two American law journals combined (the *Harvard Law Review* and the *Yale Law Journal*) are cited by the United States Supreme Court about 18 times per year; the *Canadian Bar Review* is cited by the Supreme Court of Canada more than 15 times per year. This influence spreads across many of the sub-fields of law, although not with equal impact. Using my four-part categorization explained above, the *Canadian Bar Review* accounts for almost one journal citation in every five (18.4%) in public law cases, one citation in every seven in private law cases (14.0%), one in every fourteen in Charter cases (7.3%), and about one in every twenty for criminal cases (5.4%); in this final category, it falls into third place among Canadian journals behind *Criminal Reports* and the *Criminal Law Quarterly*, these three combining for almost one third of all citations to journals.

The most frequently cited American journal would have placed eleventh on the combined list, just ahead of the *Queens Law Journal*; the second most frequently cited would have tied (with *Supreme Court Law Review*) for seventeenth. Another seven exceeded the cut-off point of roughly one citation every other year.

Table 10: Most frequently cited American law journals
Supreme Court of Canada decisions, 1985 - 2004

Journal	Citations
Harvard Law Review	43
Yale Law Journal	34
Columbia Law Review	19
Michigan Law Review	17
Virginia Law Review	14
California Law Review	12
Stanford Law Review	11
New York University Law Review	10
University of Pennsylvania Law Review	10

³⁰ Online: <<http://www.cba.org/CBA/Pubs/main/>>.

³¹ In the case of Stevenson J., it is tied for the most frequently cited.

³² See e.g. Louis J. Sirico, "The Citing of Law Reviews by the Supreme Court: 1971- 1999" (2000) 75 Ind. L.J. 1009.

These nine also rank among the most frequently cited law journals by the United States Supreme Court. The order of the top four is identical for the two courts, but the United States Supreme Court put the *University of Chicago Law Review* in fifth place, the *Cornell Law Review* tied for seventh, and both the *Duke Law Journal* and the *Vanderbilt Law Review* at the bottom of the top ten; none of these four came close to making this corresponding list for the Supreme Court of Canada.³³ The use of citations to American law reviews is the most pronounced in Charter cases, where they make up 30% of all citations to periodical literature; it is the lowest in private law cases, where it accounts for only one such citation in every six (17.2%). This is somewhat surprising for both the direction and the size of the disparity; citation of American case-law (especially for American courts other than the United States Supreme Court itself) looms much larger in private law cases than in other components of the case-load.³⁴ One final curiosity: although as an academic, I tend to think that the major reason for searching journals over books is the fact that journal articles get into print quicker than books, the American law reviews have been cited twenty times for articles that were published 75 or more years ago.³⁵

The most frequently cited British journal would have tied for twelfth on the list with the *Queens Law Journal*, and the second would have ranked seventeenth (just behind the *UBC Law Review*). Only five in all reached or passed the level of roughly one citation every other year. To make the obvious point: although American journals are cited more frequently overall than British law journals, the British *Law Quarterly Review* is cited about twice per year, a citation frequency virtually identical to that of the favorite American review (the *Harvard Law Review*). The British journals are most frequently cited in criminal law cases, where they make up about one-ninth of the total (11.8%), and least frequently cited in public law cases (3.6%).

³³ Louis Sirico, "Citing of Law Reviews by the Supreme Court" Appendix III at p. 1023.

³⁴ See Peter McCormick, "The Supreme Court of Canada and American Citations 1949-1994: A Statistical Overview" (1997) 8 Sup. Ct. L.R. (2d) 527.

³⁵ It is worth noting that one of those citations was to an article – Samuel Warren and Louis Brandeis, "The Right to Privacy" (1890) 4 Harv. L.R. 193 – that has been described as "perhaps the most influential law review article ever published." Alex Kozinski, "The Relevance of Legal Scholarship to the Judiciary and Legal Community: Who Gives A Hoot About Legal Scholarship?" (2000) 37 Houston L.R. 295.

Table 11: Most frequently cited English law journals
Supreme Court of Canada decisions 1985 - 2004

Journal	Citations
Law Quarterly Review	42
Criminal Law Review	36
Cambridge Law Journal	19
Modern Law Review	18
Oxford Journal of Legal Studies	10
Current Legal Problems	9

Journals other than Canadian, American and English journals are not cited very often; only four such journals (barely) make the list. Two of them are Australian, one is French, and one is European (a Kluwer publication directed at an international audience.) They make up a negligible share of the periodical citations for all types of law. Gonthier and L’Heureux-Dubé JJ. (in that order) account for almost all of the citations to French periodicals; Cory, L’Heureux-Dubé and Iacobucci JJ. were the only ones to reach double figures for the Australian and New Zealand journals.

Table 12: Most frequently cited “other” law journals
Supreme Court of Canada decisions, 1985 - 2004

Journal	Citations
Criminal Law Journal (Aus.)	11
Law & Human Behavior (Eur.)	11
Australian Law Journal	9
Juris Classeur Periodique (Fr.)	9

Of course, in an important sense it is not the journal that is being cited, but rather the author (or authors) who wrote the article that appears in the journal. Since many academics publish in more than one journal, it is particularly useful to track this down. Table 13 lists the most frequently cited authors over the last twenty years, and indicates their university affiliation.

Table 13: Most frequently cited authors of articles in periodicals
Supreme Court of Canada decisions, 1985 - 2004

Author	Times cited
McLeod, James G. (U.W.O.)	20
Gibson, Dale (U. of A.)	18
Slattery, Brian (Osgoode Hall)	17
Hogg, Peter (Osgoode Hall)	15

Delisle, R.J. (Queen's)	15
Ziegel, Jacob (Toronto)	14
Lederman, W.R. (Queen's)	13
Bala, Nicholas (Queen's)	13
Williams, Glanville (Oxford)	13
Colvin, Eric (Bond University, Aus)	12
Paciocco, David M. (U. of Ottawa)	12
Stuart, Don (Queen's)	12
Mayrand, Albert (Montreal)	11
Mewett, Alan W. (Toronto)	11

There are fourteen authors whose articles have been cited ten times or more over the last two decades, although the spread from the top to the bottom of the table is surprisingly small – only two to one. Not too surprisingly, all of them are (or, since several are deceased, were) Canadians, and all but two of them were affiliated with law schools at Canadian universities. (The exceptions are the late Glanville Williams from Oxford, and Eric Colvin, formerly of the University of New Brunswick, from Bond University in Australia.) Although criminal cases generally yield disproportionately few of the periodical citations, fully half of the authors on this list (McLeod, DeLisle, Colvin, Paciocco, Stuart, Williams and Mewett at a minimum) publish primarily in this field. Queen's University law school leads the way with four of its past or current faculty on the list; Osgoode Hall and the University of Toronto follow with two each.

The most closely focused question is which specific articles have been cited the most often by the Supreme Court. Table 14 lists the twelve most frequently cited articles, but the counts are surprisingly low. The list is led by a two-way tie at eight citations in 20 years, and the cut-off point for the top 12 is as low as 4 – that is to say, the citation of periodical literature is spread across a wide field rather than concentrating on a specific sub-set, and there are not many credible candidates for iconic significance. The twelve most cited articles were published in eleven different journals; only the *Canadian Bar Review* placed two articles (albeit the top two) on the list. There is one article on the list from each of the 1950s and 1960s, two from the 1970s, five from the 1980s, and three from the 1990s. Ten of the articles appeared in Canadian journals, one in an English journal, and one in an American law review; only one was published in French. Only two of the fourteen most-cited authors (Slattery and Hogg) show up on the list of most cited articles, again demonstrating diversity rather than focused concentration within the available literature.

Table 14: Most frequently cited articles in periodicals
Supreme Court of Canada decisions, 1985 - 2004

Most frequently cited articles
Cited eight times: Lederman, W.R. "The Independence of the Judiciary" 34 <i>Canadian Bar Review</i> (1956) Slattery, Brian, "Understanding Aboriginal Rights" 66 <i>Canadian Bar Review</i> (1987)
Cited seven times: Jacob, I.H. "The Inherent Jurisdiction of the Court" 23 <i>Current Legal Problems</i> (1970) Hogg, Peter & Allison A. Bushell, "The Charter Dialogue Between Courts and Legislatures" 35 <i>Osgoode Hall Law Journal</i> (1997)
Cited five times: Anne McClellan and Bruce Elman, "To Whom Does the Charter Apply?" 24 <i>Alberta Law Review</i> (1986) Weinrib, Ernest J., "The Fiduciary Obligation" 25 <i>University of Toronto Law Journal</i> (1975)
Cited four times: Feldthusen, Bruce "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" 17 <i>Canadian Business Law Journal</i> (1991) Rogerson, Carol J. "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act 1985" 7 <i>Canadian Family Law Quarterly</i> (1991) Marshall, Patricia, "Sexual Assault, the Charter, and Sentencing Reform" 63 <i>Criminal Reports</i> (3d) (1988) Etherington, Brian "Freedom of Association and Compulsory Union Dues" 19 <i>Ottawa Law Review</i> (1987) Perret, Louis, "De l'impact de la Charte de droits et libertés de la personne sur le droit civil des contrats et de la responsabilité au Québec" 12 <i>Revue Generale de Droit</i> (1981) Emerson, Thomas, "Towards a General Theory of the First Amendment" 72 <i>Yale Law Journal</i> (1963)

IX. Conclusion

The purpose of this article has been to consider the Supreme Court of Canada’s citations of periodical literature, to see if the implicit promise of the Supreme Court Reports new 1985 format has been fulfilled. With almost 2500 examples of such citation in 20 years, it is clear that the answer is affirmative; the suggestion that “authors noted” would be a category worth watching has been fulfilled.

The deeper question, of course, is the significance of these

numbers. In this context, the first point to make is that when the Court uses a citation to an academic journal, it does so in a way that is virtually indistinguishable from the way that it uses a judicial citation. Sometimes the Court does not only cite a source, but goes on to quote from it directly or to discuss its contents at some length; this is proportionately as likely for journal citations as for judicial citations. Indeed, the American-style “string citations”³⁶ that are now very frequent in Supreme Court decisions often contain a mixture of judicial citations, journal citations, and legal textbook citations, further emphasizing an equivalence in the significance and the implications of the various types of citation. When academic citations are quoted or discussed, they are treated with the same degree of seriousness as a judicial citation, and when the author is specifically named, the reference usually contains an honorific (typically “professor”) as well.

This generalization must be qualified in three ways. First, and most obviously, judicial citations outnumber journal citations by more than ten to one; the bulk of the justificatory burden within the Supreme Court’s decisions is carried by references to other cases, and not by the more academic sources.³⁷ Second, when referring to a judicial citation, the Court will usually describe it as having “found” the law; but this term is never used when referring to an academic citation. (“Suggested” or “noted” are more common descriptors.) This suggests a somewhat different status for the ideas about the law that are found in the two types of source, with the higher status being reserved for what judges say about the law within the reasons for a judicial decision. Third, although it is sometimes the case that a particular decision will organize itself so completely around an earlier decision as to make the immediate decision little more than a gloss on the earlier one,³⁸ I have never found a journal article enjoying a comparable primacy within a decision.

These qualifications are not trivial, but they do not undermine the general suggestion that the Supreme Court is using the various types of

³⁶ That is to say – a statement of legal doctrine, followed by a bracketed list of sources that support the statement, but without either further exploration of the idea or any indication of how the various sources relate to it.

³⁷ It has been suggested, however, that the ratios do not really tell the story, because “the opinions most likely to rely on the works of academics are those written in the gray areas of the law where precedent doesn’t provide a clear-cut answer” which means that “the work product of academics often finds its way into the most difficult cases.” Alex Kozinski, “The Relevance of Legal Scholarship to the Judiciary and Legal Community: Who Gives A Hoot About Legal Scholarship?” (2000) 37 *Houston L.R.* 295.

³⁸ For example: *Arndt v. Smith* [1997] 2 S.C.R. 539 is very tightly built around *Reibl v. Hughes* [1980] 2 S.C.R. 880.

cited material in an essentially similar way, to support and to suggest reference points for the ideas that it is developing in its reasons. The Supreme Court of Canada has always used judicial citation to locate the current decision in relation to the existing body of caselaw, a consideration that was even more important when the doctrine of *stare decisis* applied with more rigor than it does today. It is significant that over the last two decades, the Supreme Court has also used the citation of periodical literature to locate its current decision in the context of academic research as well.

But the process of citation also shows something else very important – it shows where the Supreme Court is getting some its ideas from. You cannot cite something if you have not read it; you do not bother citing it if you do not think that your audience will be familiar with it so as to recognize, and to value, the reference as well. With more than one hundred journal citations a year, the Supreme Court is clearly demonstrating that it is following the academic literature, and that it is willing to attribute evolving ideas or reformulations of legal principles to the material that it finds in such sources. And this in turn means that today, much more so than twenty or thirty years ago, one of the ways potentially to influence the Supreme Court's jurisprudence is to publish in the journals that the Court is following, by far the most prominent of which is the *Canadian Bar Review*.

