ONTARIO, LISTEN UP: CITATIONAL PRACTICES IN THE ONTARIO COURT OF APPEAL

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This article shows that while the Court of Appeal for Ontario is the most cited among provincial courts of appeal in Canada, it does not engage with the caselaw of its counterparts in other provinces to the same extent as those courts do. Arguing that citational practices reflect deep unarticulated assumptions about legal authority, the author raises questions about the place of appellate courts in general, but especially the Court of Appeal for Ontario, in shaping Canadian law. Relying on a short history of the project of a Canadian body of legal thought and a demonstration of the diverse citational practices of other Canadian appellate courts, contrasting those with the well-documented practices of the Supreme Court of the United States, the author argues that there is an "outward-looking" Canadian way of making law, by which the Court of Appeal for Ontario does not seem to abide. Her critique reiterates the importance—at the heart of the judicial office—of dialogue and considering the reasons of others.

Cet article montre que, bien qu'elle soit la cour d'appel provinciale la plus citée au Canada, la Cour d'appel de l'Ontario ne s'intéresse pas à la jurisprudence de ses homologues des autres provinces dans la même mesure que ces dernières. Proposant que les pratiques de citation reflètent des présupposés profondément enracinés, mais pas nécessairement articulés sur la nature de l'autorité juridique, l'autrice soulève des questions sur la place des cours d'appel en général, mais surtout de la Cour d'appel de l'Ontario, dans l'élaboration des traditions juridiques du Canada. S'appuyant sur un bref historique du projet d'un corps canadien de pensée juridique et sur une démonstration des diverses pratiques de citation d'autres cours d'appel canadiennes, comparant celles-ci aux pratiques bien documentées de la Cour suprême des États-Unis, l'autrice soutient qu'il existe une façon canadienne « tournée vers l'extérieur » de faire du droit, à laquelle la Cour d'appel de l'Ontario ne semble pas se conformer. Sa critique rappelle l'importance du dialogue et de la considération des raisons d'autrui au cœur de la fonction judiciaire.

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Contents

1. Introduction

This article examines the citational practices of the Court of Appeal for Ontario (ONCA) and seeks to track the specific practices of that court to compare them with those of other Canadian appellate courts, including the Supreme Court of Canada (SCC). Practices of legal actors reveal a great deal about their assumptions. While one can dwell endlessly on questions of principle, practices tell us about one's blind spots—the things one forgets to think about and the things one believes without even knowing that one believes them. As such, practices matter when it comes to understanding the ways in which the law in this country develops, to the point where they have been called "an implicit or inferential law."[2] For this, they are worth studying.

Looking at statistical data concerning a few courts of appeal, one remarks that while the ONCA is the most cited appellate court in the land after the SCC, it is also the court that seems to refer to the work of its sister courts the least. As I will show, not only do the ONCA's citational practices reveal some of the court's assumptions about the relevance of other appellate decisions for the purpose of answering questions of law,

2 Roderick A MacDonald, "Pour la reconnaissance d'une normativité juridique implicite et 'inférentielle'" (1986) 18:1 Sociologie et sociétés 47.

but they also have implications for the development of the law in Canada as a whole.

2. Practices of Judicial Lawmaking

The lawmaking practices of the judges of the SCC have attracted a fair amount of attention among Canadian legal scholars.[3] One is taught in law school that they are "the court of ultimate appeal and the arbiter of Canada's constitutional questions."[4] But this narrative about the importance of the Supreme Court in our legal order overlooks an important practical aspect of judicial lawmaking in this country: the SCC decides about 60 cases a year on the merits (59 cases in 2021 to be precise). Since Canada's legal traditions rely on judicial decisions to interpret and apply statutes as well as common law and civil law rules, this is a modest number. Legal questions are more often decided by provincial courts of appeal. The ONCA, Canada's most prolific appellate court, decides about 930 cases a year,[5] Quebec's Court of Appeal (QCCA) about 730 cases a year[6] and the

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3 Some of these analyses of practices have been presented as parts of biographical works on individual justices. See RJ Sharpe & K Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2003) at 202, ff; Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005), at 365, ff; R Janda, "Constitutional Transitions: Le Dain's Approach to Jurisdiction over the Environment" in GB Baker & R Janda, *Tracings of Gerald Le Dain's Life in the Law*, (Montreal: McGill-Queen's University Press, 2019) at 30, ff; S Van Praagh, *Building Justice: Frank Iacobucci and the Life Cycles of Law* (Toronto: University of Toronto Press, 2022). While I would agree that some practices involve elements of "personal style" that belong to an individual and often warrant celebration, exposing the inner workings of a court can also cause scandal. See Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster 2005). However, from a French sociological perspective, some mundane bureaucratic workings (such as producing footnotes) and institutional factors (such as the way legal research is done in one place) can also be considered central to lawmaking. See Bruno Latour, *La fabrique du droit: une ethnologie du Conseil d'État* (Paris: La découverte, 2002). For an analysis of lawmaking practices in the SCC, see D Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008) at 110, ff. For an analysis that deals more with judgment as sources, see D Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007) at 41, ff.

4 JG Snell & F Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 2.

5 According to the ONCA's website, the court decided 932 cases in 2021. See Court of Appeal for Ontario, "Decisions of the Court", online: *Court of Appeal for Ontario* <https://tinyurl.com/zex8mwbf> [perma.cc/7U5S-2CB9].

6 According to the QCCA's website, the court decided 738 cases in 2021. See Court of Appeal of Quebec, "Statistics and speeches of Chief Justice", online: *Court of Appeal*

British Columbia Court of Appeal (BCCA) approximately 480 cases year.[7] Each court of appeal has its own set of internally defined and evolving lawmaking practices, which reveal something about how the court views the exercise of the highest judicial oversight in their province, and indeed its participation in superintending decisions in Canada as a whole.

The idea that courts of appeal contribute to a body of caselaw for all of Canada was articulated as early as 1935 by Ontario Justice William R. Riddell in the introduction to the first edition of the *Canadian Abridgment*:

> That the decisions of the courts of the other Provinces, which have as their basic law the Common law of England, are of much weight in our Ontario Courts, is universally acknowledged, just as the decisions in our Ontario Courts, are of weight in these Courts of the other provinces. It is not, of course, suggested that the decisions in one of such Provinces are binding in any other; but they have great persuasive weight.[8]

At the time, the editors of the *Abridgment*, Justice Riddell and University of Toronto Professor Frederick Clyde Auld, sought to counteract the influence of British caselaw by making Canadian caselaw more widely available:

> A Canadian manner of thought too frequently has been clouded by sectionalism; nowhere is this more true than in the field of legal theory and practice. The Lawyer has been astute to search the record of Supreme Court decisions and of decisions in the Courts of his own province; but, failing the support of recorded decisions there, his immediate recourse has been to English decisions.[9]

The editors explained that the *Abridgment*, by making legal research in the caselaw of all provinces easier, would ensure that the law could become

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of Quebec <www.courdappelduquebec.ca/en/about-the-court/statistics-and-speeches-of-chief-justice/> [perma.cc/5KF3-QSKE].

7 According to the BCCA's annual report from 2021, the court decided more cases. See Courts of British Columbia, "Annual Reports", online: *Courts of British Columbia* <www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/annual_report/index.aspx>. However, LexisNexis only has 480 cases from the BCCA and CanLII has 477 cases. In any event, this is the approximate sample size I had.

8 WR Riddell, "Introduction" in *The Canadian Abridgment: A Digest of Decisions of the Provincial and Dominion Courts, Including Appeals therefrom to the Privy Council, but Excluding Decisions Based on the Quebec Civil Code,* 1st ed, (Toronto: Burroughs, 1935) at v.

9 FC Auld, "Preface" in *The Canadian Abridgment: A Digest of Decisions of the Provincial and Dominion Courts, Including Appeals therefrom to the Privy Council, but Excluding Decisions Based on the Quebec Civil Code,* 1st ed, (Toronto: Burroughs, 1935) at vi.

a self-standing national endeavour, a "living common law jurisprudence as it functions in Canada."[10] And the idea of a "Canadian manner of thought" in law came to force in 1949, in the shape of the amendment to the *Supreme Court Act* that ended all appeals to the Judicial Committee of the Privy Council.[11]

My interest in the practices of courts of appeal and how they contribute to the law in Canada was sparked—after my experience working as a law clerk in the QCCA from 2018 to 2020—when I undertook a study aimed at demonstrating the relevance of the QCCA's recent decision to hire a professional legal translator to translate some of its decisions from French to English.[12] My study exposed a discrepancy between the QCCA and ONCA's influence on decisions of other Canadian appellate courts, including the SCC. In the study, I measured the courts' influence by comparing the sheer number of cases citing at least one decision from the relevant court and calculating the difference in percentages between the courts. The result of the study was rather telling; it demonstrated that, between 2015 and 2020, the SCC cited at least one judgment from the ONCA in more than 50% of its decisions. The QCCA was cited a third less often, even though the two courts render comparable numbers of decisions per year and many cases decided by the QCCA are about areas of the law shared throughout the country, such as criminal law. Furthermore, other courts of appeal in the country cite ONCA decisions roughly 600 to 700% more often than QCCA decisions.[13] In conducting the study, I was focused on the language of decisions as a factor in the modes of production of law: put simply, if no one can read decisions from the QCCA, Quebec lawyers and justices do not get to participate as much as they can or should in making the law in this country, even in areas such as criminal law or interpretation of federal statutes, where the law is substantively the same across the country.[14] The arguments of the Quebec legal profession and the ideas of Quebec justices, written in French, are thus *de facto* overlooked by their anglophone colleagues.

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10 *Ibid*.

11 *Supreme Court Act*, RSC 1985, c S-26, s 54(2). See also William S Livingston, "Abolition of Appeals from Canadian Courts to the Privy Council" (1950) 64:1 Harv L Rev at 104–112.

12 See Mireille Fournier, "Quebec Talks Back : nouvelles pratiques linguistiques à la Cour d'appel du Québec?" (2021) 66:4 McGill LJ 603.

13 See Appendix 1. The results of this experiment were previously published as part of the above-cited article. See Fournier, *supra* note 15.

14 An argument made by Nicole Duval Hesler ("Allocution, rentrée judiciaire 2019" delivered at the Montreal Court House, 5 September 2019). See also Jean-Louis Baudouin, "L'art de juger en droit civil: réflexion sur le cas du Québec" (2016) 57:2 Cahiers de droit 327 at 336.

However, in my previous study, I could not rule out another factor that may be related to, but not determined by the language divide: the influence of ONCA decisions on other Canadian appellate courts. In this article, I examine this question and explain why we should pay attention to such trends. The first part of this article is a quantitative analysis of the citational practices in some Canadian appellate courts. While the ONCA is the most cited court in Canada after the SCC, it is also the provincial court of appeal that seems to cite its sister courts the least. The second part of this article is more qualitative in nature; I look into what these practices reveal regarding the assumptions and preconceptions about the ONCA's role in establishing a legal tradition for Ontario and for Canada. I conclude with thoughts about why it should matter to those who care about the way law is made in this country. But, before I start my analyses, I begin with a few thoughts by lawyers and legal anthropologists on why citation as a legal practice is significant.

3. The Importance of Citation as a Practice

As lawyers we usually describe citations as the result of the doctrine of *stare decisis*, and one could argue that any omissions in citing of relevant landmark cases would create an opportunity to overturn a decision on appeal. But beyond those obvious reasons for which appellate justices cite other decisions, one could further observe that such citations have an "emblematic"[15] character, such as referring to *R v W(D)*[16] every time there are contrasting versions of testimony, or *R v Oakes*[17] every time there is a decision about section 1 of the *Charter* or *R v Grant*[18] every time there is a decision on detention or on the exclusion of evidence under section 24(2) of the *Charter*. They are meant to be recognized by the individual reading the decision as textual guideposts along the way to resolving the question. Such recognition also confirms that the author and the reader belong to the same community: that of legally trained people in Canada. Citations are not mere exercises in invoking an authority, an example or a counterexample. Citations construct identities, understandings of knowledge and subjectivities. As explained by a trio of anthropologists:

> A lawyer's citation of precedent involves quoting the relevant text of the case's written opinion, but it can also be accomplished merely by stating the case's name ("Miranda requires it, your honor"). At least in some circumstances, the latter can constitute a mode of citationality that marks the speaker as a bearer of multiple

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15 Antoine Compagnon, *La seconde main ou le travail de la citation* (Paris: Édition du Seuil, 1979) at 258.

16 [1991] 1 SCR 742, 63 CCC (3d) 397.

17 [1986] 1 SCR 103, 24 CCC (3d) 321.

18 2009 SCC 32.

> orders of institutional expertise and subjective knowledge, by pointing not only to the prior relevant case (here, *Miranda v Arizona*) but also to the registers of pragmatic experience, with legal discourse signaled by the metonymic use of the proper noun "Miranda" as a felicitous reference to the case and/or the police practices it requires.[19]

Studying judges' citational practices is thus more than a simple matter of understanding how *stare decisis* works or of studying individual judicial style. It goes to the question of which cases are constructed as relevant or authoritative through the act of citation itself. Citation is in large part a way of giving voice to texts and of bringing them to bear on the question at hand—in the words of a linguist, bringing the present text into a conversation or a dialogue with past texts.[20] Of course, referring to decisions of the SCC is an obligatory gesture for almost all appellate court decisions according to our commonly shared understanding of what such a decision is, but references to other appellate courts—or the absence of them—tell us a great deal about something else: with whom do the judges believe themselves to be in conversation? Whom do they find persuasive or not?

From that point of view, citation is more than a mere textual practice: it tells us something about how the parties, law clerks and ultimately judges have done their research on the problem at hand. Now of course, there is a trope according to which courts ought not do additional research and decide cases on law that was not raised by the parties. But is that really the case? Why then are justices assisted by law clerks, if not because gaps in the parties' legal research ought to be supplemented to reach an answer that is sound in law? While one ought to agree that the courts are not the only ones responsible for what ends up in the footnotes of their decisions, as the parties' pleadings also influence the outcome, some courts these days are nevertheless equipped with research departments full of young lawyers who work full time at doing legal research for them. It would thus appear disingenuous, in our view, to say that courts' citational practices merely depend on the quality of the parties' pleadings.

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[19] Jane E Goodman, Matt Tomlinson & Justin B Richland, "Citational Practices: Knowledge, Personhood, and Subjectivity" (2014) 43 Annual Review of Anthropology 449 at 457.

[20] Ignacio Vázquez Orta, "A genre-based view of judgments of Appellate Courts in the common law system: intersubjective positioning, intertextuality and interdiscursivity in the reasoning of judges" in Maurizio Gotti & Christopher Williams, eds, *Legal Discourse Across Languages and Cultures* (New York: Peter Lang, 2010) at 263–284; TO Beebee, *Citation and Precedent: Conjunctions and Disjunctions of German law and Literature* (New York: Continuum, 2012). Legal scholars have also described the common law as a conversation. See Karen Crawley & Shauna Van Praagh, "Academic Concerns—Caring about Conversation in Canadian Common Law" (2011) 34:2 Dalhousie LJ 405.

What about necessity? There is another trope according to which a court only looks at persuasive authorities from another jurisdiction when there is no caselaw in its own jurisdiction on the question at hand. This trope does not hold up to basic scrutiny. As judges are supposed to be looking for good answers to difficult legal problems, their citations show that they have searched widely for such answers, or parts of answers, in the past work of other judges. More than the citation itself, what matters is the intellectual process of paying attention to what their colleagues have decided to do when confronted with similar problems. Citation shows that this has happened: that the judges have sought to be in a conversation with colleagues who have worked on related questions. I begin now by showcasing my statistical claims.

4. A Few Numbers

The following tables look at the number of decisions by the ONCA, BCCA, ABCA and QCCA that cite to other courts over a period of five years. In the tables, each row represents a year within the five-year period. The second to fifth columns name each other court cited by the court under study. In parentheses are the percentages of the decisions where the relevant court cited to her sister court, calculated based on the total number of decisions that the court under study rendered that year. As we will see, the number and percentage of ONCA decisions mentioning other appellate courts are lower than any other of the most prolific courts of appeal (BC, Alberta and Quebec). While the ONCA produces roughly a quarter of all Canadian appellate caselaw, which makes it understandable that the other courts would mention its decisions often, this fact does not justify that the ONCA would not refer to other appellate courts in its own decisions.

Table 1. Number of ONCA decisions citing other courts of appeal in the last five years[21]

Court cited	BCCA	ABCA	MBCA	QCCA	NBCA
In 2018 (1052 decisions)	59 (5.6%)	38 (3.6%)	17 (1.6%)	12 (1.1%)	13 (1.2%)
In 2019 (1022 decisions)	66 (6.5%)	44 (4.3%)	22 (2.2%)	21 (2.1%)	15 (1.5%)
In 2020 (840 decisions)	73 (8.7%)	40 (4.8%)	16 (1.9%)	12 (1.4%)	10 (1.2%)
In 2021 (920 decisions)	78 (8.5%)	61 (6.7%)	31 (3.4%)	19 (2.1%)	13 (1.4%)
In 2022 (889 decisions)	76 (8.5%)	46 (5.2%)	29 (3.3%)	10 (1.1%)	8 (0.9%)
Average Percentage over 5 years	7.6%	4.9%	2.5%	1.5%	1.2%

Table 2. Number of BCCA cases citing other courts of appeal in the last five years

Court cited	ONCA	ABCA	MBCA	QCCA	NBCA
In 2018 (490)	173 (35.3%)	54 (11.02%)	32 (6.5%)	17 (3.5%)	12 (2.5%)
In 2019 (469)	184 (39.2%)	67 (14.3%)	40 (8.5%)	16 (3.4%)	15 (3.2%)
In 2020 (384)	176 (45.8%)	78 (20.3%)	34 (8.8%)	21 (5.5%)	10 (2.6%)
In 2021 (478)	174 (36.4%)	70 (14.6%)	38 (7.9%)	28 (5.9%)	11 (2.3%)
In 2022 (444)	150 (33.8%)	60 (13.5%)	37 (8.3%)	15 (3.4%)	17 (3.8%)
Average Percentage over 5 years	38.1%	14.8%	8%	4.3%	2.9%

[21] The numbers in this table were generated through CanLII by searching for the terms "BCCA" or "BC CA" in the decisions entitled "2021 ONCA," then "ABCA" or "AB CA," and so on. All the numbers in Tables 1 to 4 were generated in a similar fashion. CanLII is a publicly available resource, and their collection of cases is complete as of 2001, so I insisted on using this resource. CanLII also offers a feature that was important to Part 4 of this article. Therefore, in the interest of consistency, I used CanLII throughout.

Table 3. Number of ABCA cases citing other courts of appeal in the last five years

Court cited	ONCA	BCCA	MBCA	QCCA	NBCA
In 2018 (446)	116 (26%)	63 (14.1%)	33 (7.4%)	10 (2.2%)	8 (1.8%)
In 2019 (512)	143 (27.9%)	74 (14.4%)	35 (6.8%)	17 (3.3%)	19 (3.7%)
In 2020 (482)	156 (32.4%)	104 (21.6%)	39 (8.1%)	25 (5.2%)	16 (3.3%)
In 2021 (438)	142 (32.4%)	103 (23.5%)	36 (8.2%)	26 (5.9%)	15 (3.4%)
In 2022 (418)	127 (30.4%)	82 (19.6%)	35 (8.4%)	17 (4.1%)	13 (3.1%)
Average Percentage over 5 years	29.8%	18.6%	7.8%	4.1%	3.1%

Table 4. Number of QCCA cases citing other courts of appeal in the last five years[22]

Court cited	ONCA	BCCA	ABCA	MBCA	NBCA
In 2018 (--)	115 (--)	62 (--)	61 (--)	25 (--)	14 (--)
In 2019 (692)	148 (21.4%)	72 (10.4%)	47 (6.8%)	23 (3.3%)	20 (2.9%)
In 2020 (540)	129 (23.9%)	62 (11.5%)	48 (8.9%)	31 (5.7%)	16 (3%)
In 2021 (738)	169 (22.9%)	82 (11.1%)	61 (8.3%)	32 (4.3%)	23 (3.1%)
In 2022 (--)	141 (--)	83 (--)	53 (--)	33 (--)	20 (--)
Average Percentage over 3 years	22.7%	11 %	8%	4.4%	3%

One observation that almost jumps off the page is that even the QCCA, which deals with an entirely different legal tradition for private law cases, cites other Canadian courts of appeal twice if not three times more often (when one looks at percentages) than the ONCA. As for the BCCA and the ABCA, they both cite their sister courts three to four times more often than does the ONCA. These numbers should give us pause.

While the ONCA produces about a quarter of all appellate court decisions in Canada,[23] which means that there is a higher probability that the ONCA will be cited by whichever court including itself, the larger number of ONCA decisions alone does not explain these discrepancies in practices. After all, while the ONCA cites any other appellate court in approximately 15 % of its cases,[24] the QCCA, which is the closest to

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22 For the QCCA, unfortunately, CanLII also includes the decisions on motions. As such, I used number of decisions obtained from the court's website. This is why the chart contains blanks (--). See Court of Appeal of Quebec, *supra* note 9.

23 The total of appellate judgments per year is slightly below 4000, and the ONCA produces roughly 1000 decisions.

24 This is an average: The ONCA cited any other Canadian appellate court in 16.1% of all their cases in 2022 (143 decisions) 17.8 % in 2021 (164 decisions), 15.5% in

Ontario in the size of the caselaw it generates, cites to another appellate court in roughly 30% of its cases.[25] That is twice as often. So, what is it about the ONCA that makes it markedly less permeable to decisions from other Canadian jurisdictions? How should one interpret these practices? Again, the aim of this article is to tease out some of the unstated assumptions that underlie the practices of judicial lawmaking in Canada.

5. Whom Are They Citing [If Not Us]? Inward-Looking and Outward-Looking Courts

The analysis of courts' citational habits is far from novel. Scholars in Canada, the United States and the rest of the world have been curious about the extent to which domestic courts are willing to cite international instruments,[26] foreign legal scholarship[27] or foreign court decisions.[28] My preoccupation lies somewhere else. The question is not whether appellate courts in Canada cite international instruments or foreign law, but rather how the domestic law is made, through modes of production that include citing (or not citing) counterpart courts. As we have just seen, most appellate courts in Canada are engaged in the practice of citing each other's decisions to a significant degree, making the law very much like a conversation among those sitting in different jurisdictions.[29] But one of these courts, the ONCA, does not seem to engage in this exchange to the same degree.

2020 (130 decisions), 13.6% in 2019 (139 decisions) and 12.1% in 2018 (127 decisions).

25 The QCCA cited other Canadian courts in 170 judgments (2018), 194 in 2019, 177 in 2020, 222 in 2021, 188 in 2022, so that is 28%, 32%, 30%. As I explained in FN 23, I had to use the total number of decisions from the QCCA website to calculate this, which is the reason I calculate it over 3 years and not 5.

26 Joel R Carbonell & Christopher P Banks, "An empirical analysis of US state court citation practices of international human social rights treaties" (2015) 19:1 Intl JHR at 1-15; Joshua Karton & Samantha Wynne, "Canadian Courts and Uniform Interpretation: An Empirical Reality Check" (2013) 18:2 Unif L Rev 281. See also N Duval Hesler, "L'influence du droit international sur la Cour d'appel du Québec" (2013) 54:1 Les Cahiers de droit at 177–201.

27 Christian Atias, *Savoir des juges et savoir des juristes : Mes premiers regards sur la culture juridique québécoise* (Montréal: Centre de recherche en droit privé et comparé, 1990) at 133, ss.

28 Martin Gelter & Mathias M Siems, "Citations to Foreign Courts—Illegitimate and Superfluous, or Unavoidable? Evidence from Europe" (2014) 62:1 Am J Comp L 35; Mads Andenas & Duncan Fairgrieve, eds, *Courts and Comparative Law* (Oxford: Oxford University Press, 2015); S Clarke, *The Impact of Foreign Law on Domestic Judgments* (Washington: Library of Congress, Global Legal Research Center, 2010) at 13.

29 See Crawley & Van Praagh, *supra* note 21.

My question thus becomes: Who do the justices of the ONCA cite if not their own Canadian sister courts? Do they tend to cite lower courts,[30] foreign courts,[31] doctrinal authors or other sources? I decided to conduct a detailed review of the 200 longest decisions written in 2021 (all decisions that were 18 pages and longer), to observe the extent to which the court cited other sources. The reasons why I consulted the longest decisions are threefold: first, longer decisions often concern more complex cases; second, longer decisions often necessitate more research work; and third, I had the intuition that the ONCA would cite more cases from other jurisdictions in longer decisions than in shorter decisions.[32] I did this for the sole purpose of making sure that I was not missing some important aspect of the citational practices and patterns of the ONCA in my analysis. After consulting these cases, I can safely affirm that besides the SCC and the ONCA itself, the ONCA does not cite any sources from outside Ontario to any significant degree.[33] Let us see what the distribution looks like.

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[30] The answer to this question is that the ONCA does cite lower courts from Ontario. This is normal to some extent, like where the court is interpreting an Ontario statute. However, the ONCA citing lower courts does not, alone, resolve the question of why the ONCA does not cite other Canadian appellate courts to the same degree as others.

[31] As I understand that Canadian courts used to have a practice of citing courts in the UK, I reviewed the question of foreign courts closely. I found a few (10) references to UK courts, as well as a few references to US courts (6). I searched explicitly for cases from the US Supreme Court, and from the jurisdictions of Delaware, New York and California. Citations to cases from the UK were found in: *Desjardins General Insurance Group v Campbell*, 2022 ONCA 128; *Kawaguchi v Kawa Investments Inc*, 2021 ONCA 770; *Barsoski Estate v Wesley*, 2022 ONCA 399; *R v Gregson*, 2021 ONCA 685; *Lalonde v Agha*, 2021 ONCA 651; *McGrath v Joy*, 2022 ONCA 119; *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corp*, 2021 ONCA 592; *Martin v 11037315 Canada Inc*, 2022 ONCA 322; *N v F*, 2021 ONCA 614; *Restoule v Canada (AG)*, 2021 ONCA 779. Citations to the US Supreme Court ("US") were found in: *R v Zakos*, 2022 ONCA 121; *Restoule v Canada (Attorney General)*, 2021 ONCA 779. Citations to Delaware ("Del") were found in: *Vale Canada Ltd v Royal & Sun Alliance Insurance Company of Canada*, 2022 ONCA 448; *Extreme Venture Partners Fund I LP v Varma,* 2021 ONCA 853. Citations to New York ("NY") were found in: *Vale Canada Ltd v Royal & Sun Alliance Insurance Company of Canada,* 2022 ONCA 448. Citations to California ("Cal") were found in: *MDS Inc v Factory Mutual Insurance Co*, 2021 ONCA 594 *Cronos Group Inc v Assicurazioni Generali SpA,* 2022 ONCA 525. Globally, none of these citations points to a practice of citing more foreign than Canadian courts.

[32] I checked and indeed, 13/19 of the references to the QCCA for 2021 were in the 200 longest decisions, along with 21/25 MBCA references, 10/13 NBCA references, 42/60 ABCA references and 47/80 of BCCA references.

[33] This includes doctrinal authors. The number of cases where doctrinal authors were cited in the sample was extremely low. I did not produce formal numbers because that is not the point of this article. However, the justices do not usually cite doctrinal authors for private law or criminal cases, leaving only some important public law cases

Table 5. Distribution of the 200 longest ONCA decisions (all decisions 18 pages or more) from 2021 based on the number of citations to courts of other jurisdictions.[34]

Cases from other jurisdictions cited	None	One	Two	Three	Four	Five or more
Number of decisions	98	54	17	8	10	13
Percentage of decisions	49%	27%	8.5%	4%	5%	6.5%

In 76% of these 200 longest cases, the ONCA cited only one or no source from another jurisdiction. Seeing these numbers by themselves, one cannot help but ask, has it always been that way? One way to contextualize these results is to compare this group with a group of decisions taken from the ONCA's decisions thirty years ago, in 1991. One might postulate that with the ever-increasing electronic access to legal materials from other jurisdictions, the trend among the justices would be to cite more sources from other jurisdictions today than they did 30 years ago.

On CanLII, there are only 151 decisions available from 1991, ranging from 1 to 91 pages long. The reason they are available on CanLII is that they were cited in subsequent cases. This means that we are not dealing with all the longest decisions from 1991, but nevertheless with a group of 151 "significant cases" (otherwise, why would they have been cited afterwards?). While this comparison is not an absolute match, I would argue that it is still a relevant comparison to make. Let us then look at the distribution. I first looked at 55 cases that were 18 pages or more from the 1991 cases available on CanLII, and then I looked at all the cases.

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where justices actually engage with the work of doctrinal authors, notably in Aboriginal law and constitutional law cases.

[34] Methodology: These cases were generated by CanLII using "2021 ONCA" as the search term in the name of the case and then selecting the filter that arranges all the decisions according to their page number. I then consulted the first 200 cases that appeared, which means any case of 18 pages or more. I checked and between two thirds and 75% of all references to other courts counted in Section 2 of the article were part of this group of 200 longest cases, so I am confident that this is the relevant group to look at. References to the ONCA, ONSC, ONCJ and SCC were not counted as "other jurisdictions." I counted the FC, FCA and JCPC UK as other jurisdictions, although this is debatable. I did not count references to other courts that are part of quotes from SCC or ONCA judgments. As these cases are only meant to speak for themselves and not for the 932 total cases, I do not need to provide a margin of error.

Table 6. Distribution of 55 decisions of 18 pages or more from 1991 based on the number of citations to courts of other jurisdictions[35]

Number of Cases from other jurisdictions cited	None	One	Two	Three	Four	Five or more
Number of decisions of the ONCA	18	18	5	5	1	8
Percentage of decisions	32.7%	32.7%	9.1%	9.1%	1.8%	14.5%

First, a striking aspect of the citations in these cases from 1991 is that UK courts, in particular courts of appeal and the House of Lords (now the UK Supreme Court), were frequently referenced in 1991 and much less so in 2021.

The trend one observes in comparing these two groups of significant cases is that, compared to those of 2021, only 65.4% of these 55 significant decisions of 18 pages or more from 1991 cited only one or no source from another jurisdiction. This means that more than a third of these significant 1991 decisions engaged with courts of other jurisdictions to some degree, whereas this proportion fell to 24% in 2021. If one looks at all the 151 decisions available on CanLII, the proportion of cases engaging with two or more cases from other jurisdictions remain significantly higher than in 2021.

Table 7. Distribution of 151 decisions from 1991, based on the number of citations to courts of other jurisdictions.

Number of Cases from other jurisdictions cited	None	One	Two	Three	Four	Five or more
Number of decisions of the ONCA	72	34	16	11	4	14
Percentage of decisions	47.7%	22.5%	10.6%	7.3%	2.6%	9.3%

Here, one can see that 70.2% of all significant cases available on CanLII for the year 1991, include one or no citation to caselaw from other jurisdictions. This means that 29.8% of the significant cases have two citations or more.

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[35] Methodology: These cases were generated by CanLII using "1991 ONCA" as a search term in the name of the case and then selecting the filter that arranges all the decisions according to their page number. I read the first 55 decisions, which were all decisions of 18 pages and longer. The reason I did not select a sample from Quicklaw is that a random sample taken from Quicklaw would not be a good comparison for my 200 longest cases from 2021. I decided that these decisions from CanLII were the best comparison I could make, given that Quicklaw and Westlaw do not seem to have a specific search filter that arranges decisions per number of pages.

This is still a higher proportion of citations to other jurisdictions than in the 200 longest cases from 2021. This comparison between two different groups of "significant cases" warrants many caveats. Nonetheless, one can observe that despite the better access to Canadian and foreign legal sources one has today, the practice of engaging with other jurisdictions, including in complex cases, seems to have atrophied rather than grown.

One might suggest that the way the justices do their work today has nothing in common with the way they did it 30 years ago. To begin with, the caseload could have caused an increase in the pace of work at the court compared with that of the previous generation. The habit of writing short "endorsements" rather than full-fledged reasons, could have freed time for the justices in 1991, leaving them with a limited number of cases that warranted more thorough research. The mounting specialization of legal questions and the enactment of many new provincial statutes since 1991 may have changed the justices' willingness to engage with caselaw from other jurisdictions. Doing research electronically rather than in physical copies of law reports is also one of the main changes to the way justices do their work today compared with 1991.[36] And electronic databases, unlike some law reports, like the *Canadian Abridgment,* easily allow one to exclude cases from other jurisdictions by selecting "Ontario" as a research filter.

Is it possible that such a change in judicial practices would reflect a change in some of the commonly shared assumptions about what sources are considered relevant for the purpose of making law? As noted above, UK cases used to be deemed relevant sources for making law in Ontario in 1991, a practice one sees much less frequently in 2021. However, with time and contrary to what the early editors of the *Canadian Abridgment* expected, these citations to English authorities do not seem to have been replaced by further citations to other Canadian courts. Instead, the practice of citing caselaw from other jurisdictions simply diminished. Was there a change in assumptions about what sources are relevant to make law? Is the common law becoming less *common* than it used to be or are some justices, law clerks or barristers representing the parties becoming more parochial in their approach and less inclined to rely on persuasive

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[36] Paradoxically, doing research electronically might enable the exclusion of sources that are not from Ontario. One can now do research with keywords in the caselaw of Ontario alone, whereas, before, one might have done research in "Canadian Criminal Cases" (CCC), the "National Reporter" (NR), the Canadian Rights Reporter (CRR), the "Western Weekly Reports" (WWR) or any other law report containing cases from many provinces, as well as in sources like the *Canadian Abridgement*, cited above, that would have organized, per topic, the caselaw of many provinces, and in which one could not readily have excluded cases that are not from Ontario. That said, there always were the Ontario Reports.

authorities from other jurisdictions? [37] These questions, while they remain mere questions of practice, go to the heart of shifting conceptions of legal authority.

Returning to my group of 200 longest cases for 2021, I sought to pay more attention to judgments in areas of the law that are entirely common to Canada as a whole, to make sure that I did not miss something about the way the ONCA cites authorities in areas such as criminal law, *Charter* cases, Aboriginal law or bankruptcy. Here, I cease to make purely statistical or quantitative claims and try to also assess the method found in those decisions qualitatively. As I have explained, this group of cases is not representative of the whole, as it only comprises the longest and perhaps most complicated cases. However, and even if a focus on these cases does not prove an overall trend, the observations I make matter in gaining an understanding the court's method for answering questions of law.

A) Criminal Law

In criminal law, the caselaw is mostly made by provincial appellate courts, because while the SCC lays out frameworks, it is far from having a very detailed caselaw in this field, as the total number of cases it considers per year is limited. I thus considered the ONCA's citation habits specifically for criminal law cases to check if their habits in this field depart from the trend observed so far. After careful consideration of the matter, they do not.

In the 200 longest decisions for 2021, 97 were criminal law cases. In these cases, the average number of out-of-Ontario decisions cited was 1.1 per case. Now, people who have worked in a court of appeal understand that not all criminal appeals raise questions of law, and that many criminal appeals only involve making sure that the trial judge made no mistake. These cases do not raise any significant legal matters that would necessitate legal research into the appellate caselaw of Canada as a whole. But criminal cases that raise questions of law do arise. When they do, it is rather puzzling to observe that relevant cases from other jurisdictions may have been overlooked.

For instance, in *R v ZWC*, there was a question about introduction of evidence regarding the prior conduct of the accused in a sexual assault case (while the judge calls it a "domestic violence" case, the case was in fact about a man found guilty of sexually assaulting his wife and older

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[37] On the notion of persuasive authority, see H Patrick Glenn, "Persuasive Authority " (1987) 32:2 McGill LJ 261.

daughter on more than one occasion).[38] The judge, in this case, offered a lengthy explanation of the law regarding the use of such evidence in domestic abuse cases, relying exclusively on the caselaw of the SCC and the ONCA. Although caselaw on domestic abuse and evidence of prior conduct is perhaps scant, a BCCA case from 2020 addressed the specific issue of adducing evidence of prior conduct, in a case of sexual assault involving people living in a domestic arrangement.[39] Nonetheless, the relevant caselaw regarding evidence of prior conduct in cases of sexual assault is rather abundant: it derives from *R v Handy* and deals often with similar fact evidence, one of the main exceptions to the exclusion of evidence of prior disreputable conduct. [40] And while the SCC in *Handy* thought the probative value of the evidence adduced at that trial, in a sexual assault case, was outweighed by the moral prejudice of admitting it, courts since then have held differently in many other cases. In *D'Amico v R*, for example, Justice Vauclair gave a somewhat lengthy explanation (in English), about the introduction of evidence of prior conduct in a sexual assault case and the kind of probative value it can have.[41] His reasons were not cited in *R v ZWC*.

Another instance that caught my attention was *R v Okojie*, a case regarding continuing offences in the context of importation of prohibited substances[42] where justices of the ONCA sat as a panel of five.[43] The principles at issue were decided by the SCC in *Bell v R* and by the ONCA in *R v Foster*.[44] In *Okojie* the court carefully followed the arguments it made in cases subsequent to *Foster*, making it seem that all relevant cases analyzing the principles laid out in *Bell* and *Foster* were written by the ONCA.[45] Interestingly, in 2020, just a year before *Okojie*, the principles regarding continuing offences in the context of importation of substances, were examined at least twice by the QCCA, and the jurisprudence of *Bell* and *Foster* were analysed.[46] In those cases, the court summarized the rules regarding the termination of the offence for the purpose of including or

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38 2021 ONCA 116.

39 *R v A L*, 2020 BCCA 18.

40 2002 SCC 56.

41 2019 QCCA 77 at paras 236–252.

42 2021 ONCA 773.

43 The justices of the ONCA sit as a panel of five specifically when the court is being asked to overturn some of its previous jurisprudence. I understand this was the case in *R v Okojie*.

44 [1983] 2 SCR 471, 3 DLR (4th) 385; 2018 ONCA 53.

45 The ONCA thus referred to *R v Onyedinefu*, 2018 ONCA 795; *R v Buttazzoni*, 2019 ONCA 645; *R v Anderson*, 2020 ONCA 780.

46 In *McClelland c R*, 2020 QCCA 324, a border agent was found guilty of participating in the importation offence because the offence had not terminated when her willful blindness allowed a suspect's car to pass the border. In *Charron c R*, 2020 QCCA

excluding the participation of an accused, the very question at issue in *Okojie*. The QCCA reasons were not considered by the ONCA panel.

B) The Charter

In cases involving the interpretation of the *Canadian Charter of Rights and Freedoms*, the average number of citations to the caselaw of courts outside Ontario was 0.9 per case, thus many *Charter* cases did not mention any cases from outside Ontario. Some explanatory factors may be the following. First, in the case of the constitutional review of the application of an Ontario statute, as was the case in *Ontario Nurses' Association v Participating Nursing Homes*, one may understand that the ONCA seeks to rely on ONCA and SCC caselaw.[47] Second, as for criminal law cases pertaining to *Charter* applications, one must acknowledge that just as in criminal law appeals, appeals based on the application of the *Charter* in a criminal law context may often raise no significant legal question. There is, moreover, a third possibility: the ONCA could also be a trailblazing court, the only beacon of hope in a country that has trouble identifying the constitutional infringements of its law enforcement. It is the case, for example, that Canadian appellate courts have trouble reviewing trial judges' findings where there is evidence that suggest racial profiling. The ONCA has effectively been a trailblazer in setting up a test for recognizing racial profiling and developing caselaw on the question, a framework other appellate courts seem to have been slow to adopt.[48] This would explain why, in a case such as *R v Sitladeen*,[49] the ONCA refers to its own caselaw extensively on the question of identifying racial profiling.[50]

That said, there are other cases that raise questions of law where the expertise of other Canadian appellate courts might have been of assistance and where again their work was overlooked. For instance, in *R v Hillier*,[51] a question of law was raised about destruction of evidence by the police, impeding a full answer and defence. Other appellate courts have contributed abundantly to the caselaw on the destruction of evidence. In *Cartier c R*, Justice Doyon wrote more than ten paragraphs summarizing the law on the destruction of evidence, which included consideration of a

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1599, a man was found innocent of importation because he was an intermediary between the importer and a buyer, after the offence of importing the substance was complete.

47 2021 ONCA 197.

48 See *R v Brown*, [2003] 64 OR (3d) 161,173 CCC (3d) 23.

49 2021 ONCA 303.

50 Even in a trailblazing case, I am not implying that cases from other jurisdictions cannot assist. In *R v Lam*, 2003 ABCA 201, the ABCA drew an interesting parallel between suspicions of racial profiling and the conclusion of the trial judge that there were no articulable grounds for a search.

51 2021 ONCA 180.

summary in ten propositions previously written by Justice Roscoe of the NSCA.[52] This new ONCA restatement of the law on the destruction of evidence fails to engage with either of these previous restatements of the law.

C) Aboriginal Law

Only three cases out of the 200 longest decisions of 2021 pertained to an Aboriginal law question. Of course, these three cases are by no means a representative sample, but this does not preclude a qualitative analysis of the citational practices found in them. That said, two out of three were not relevant for the purpose of this analysis, as one was a case in which the Court declined to apply the Aboriginal law doctrine of the honour of the Crown, and was otherwise assessing an arbitrator's decision based on commercial contractual interpretation,[53] and the other was a single-judge decision on a motion.[54] The only relevant case to analyse is thus *Restoule v Canada (AG)*.[55]

Restoule,[56] a several-hundred-page Aboriginal law decision bearing notably on the interpretation of a treaty and on the Crown's fiduciary duty, contains 17 references to cases from other courts of appeal,[57] half of which are to cases where leave to appeal to the SCC had been refused.[58] While such a reference in the citation is helpful especially where the record might indicate that an appeal at the SCC was sought, could the recurrence of these citations to cases where such an appeal has been refused be indicative of something else: perhaps of a tendency to ascribe more authority to such cases? Given that the SCC, in these cases, has declined to hear the appeal, should one attribute a more "final" authority to these decisions from other courts of appeal? I would argue that the answer to this question is no.

Indeed, it is doubtful that refusing leave to appeal constitutes any kind of endorsement of the appellate court's reasons by the SCC; it simply entails a refusal to consider the case, possibly because there are more pressing national questions to decide in other cases or because the Court wishes to wait for a larger body of caselaw to develop. Additionally, whether an appeal to the SCC is sought (and thus granted or refused) depends, in each

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52 2015 QCCA 329.

53 *Ontario First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2021 ONCA 592.

54 *Fontaine v Canada (AG)*, 2021 ONCA 313.

55 2021 ONCA 779.

56 *Ibid*.

57 Not counting those that form part of citations to the SCC. See, e.g. *ibid* at para 597.

58 *Ibid* at nn 106–7, 184, 366, 423, 450, 461.

case, on the degree of motivation of the litigants (or their "deep pockets"), which has little to do with the merits of the appellate decision itself. Thus, it is more than debatable that a refusal by the SCC to grant leave to appeal constitutes any sort of "vetting" process by which court of appeal decisions might be confirmed.

Thus, and I hope my reading would appeal to legal pluralists who cherish the existence of different legal interpretations and possible arguments, judgments from other appellate jurisdictions ought to be considered persuasive authority[59] notwithstanding whether leave to appeal to the SCC has been sought, granted or refused.

D) Bankruptcy

There are only three bankruptcy cases in the 200 longest decisions of 2021, so while again the number of cases is insufficient to draw any statistically relevant conclusions, one might still make some anecdotal findings. In *Hillmount Capital Inc v Pizale*, *McEwen (Re)* and *Shaver-Kudell Manufacturing Inc v Knight Manufacturing Inc*[60] the court considered a question of interpretation of the *Bankruptcy and Insolvency Act*. In doing so, they referred to four or five out-of-province decisions each time. Now, these observations alone do not mean that there is anything inherently different with bankruptcy cases. However, they still go to show that some cases or questions warrant a more serious engagement with out-of-province sources, or that some individual justices have a practice of looking at other appellate court decisions to render their decisions.

In looking at these 200 longest cases from 2021, I sought to verify that I did not omit something important in the ONCA's citational practices. Having reviewed these cases, I can affirm that including in caselaw pertaining to questions of law in areas of the law that apply to Canada as a whole, the ONCA often does not engage with caselaw from other Canadian appellate courts. In fact, 30 years ago, judges of the ONCA used to engage with out-of-province caselaw more than they do now. Thus, while some decisions indicate a willingness to engage broadly with the law made by other appellate courts (maybe especially decisions where leave to appeal by the SCC has been refused), their citation patterns otherwise gravitate toward citing the SCC, itself and some Ontario lower courts. In instances, especially in criminal law and *Charter* cases, even where one finds recent cases on point from other jurisdictions, the ONCA has not engaged with those decisions.

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59 See Glenn, *supra* note 43.

60 2021 ONCA 364; 2021 ONCA 566; 2021 ONCA 925.

E) Is the Court of Appeal for Ontario an Inward-Looking Court?

While it is true, especially in common law jurisdictions, that individual justices each have their own style or their own habits, such as more or less willingness to engage with sources from other jurisdictions, the numbers exposed in Section 2 of this article suggest that some of the habits identified are of an institutional rather than individual nature. Indeed, courts in Canada, the US and around the world have different practices associated with different conceptions of legal authority and different beliefs regarding relevant lawmaking sources. For example, the Supreme Court of the United States is known for its narrow interpretation of positive legal authority, only citing US authorities.[61] This corresponds to a way of making law, taught at American law schools that one might call "inward-looking."[62]

In contrast, most Canadian courts traditionally hold different assumptions about lawmaking, which translate into different practices, especially regarding the use of persuasive sources from other jurisdictions. This is possibly because Canadian courts resorted to using English caselaw for a long time. Canadian courts may traditionally be regarded as "outward-looking": appellate courts in Canada sometimes refer to US, UK, Australian or other relevant legal authorities, and the Quebec Court of Appeal is known for its uninhibited use of French doctrinal sources in private law.[63] But this observation begs the question: does Canada have its exceptions?

What makes a court more inward- or outward-looking in its citational practices? Are these practices subject to trends in how many authorities from other jurisdictions justices are willing to cite? Is the common law becoming less *common* than it used to be (notably because of the enactment of statutes that differ from place to place) or is it so because some justices consider that decisions from other jurisdictions are no longer relevant

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61 This narrow interpretation of positive legal authority has been described in Antonin Scalia & Amy Gutmann, *A Matter of Interpretation: Federal Courts and the Law - New Edition* (Princeton: Princeton University Press, 2018). Foreign or modern legal ideas are described as "smuggled" by judges into their readings of the constitution, a word one associates with the "threats" of illegal migration. This view is, of course, deplored by some progressive justices. See Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (New York, Penguin Random House, 2015) at 236, ff.

62 While it is seldom used in legal scholarship, the term "inward-looking court" has a discrete meaning in architecture. It simply refers to a building in which all openings converge on an inner courtyard. Wherever you look out from the inside, the only thing you can see is the same building.

63 See Atias, *supra* note 30.

to their work, which suggests a shifting conception of the relevance of persuasive authorities for the elaboration of the common law?[64] These are some of the questions raised by the observations presented here, and indeed answering them fully is beyond the scope of this article.

For now, it is sufficient to note that, after reviewing the 200 longest decisions from 2021, it appears that the Court of Appeal for Ontario, working on questions of law, mostly cites the SCC as well as its own caselaw. Could the ONCA justly be called an "inward-looking court"?[65] Our demonstration at this stage is incomplete insofar as it shows little about how the ONCA's way of doing its work differs from other Canadian appellate courts in practice.

6. How Green is the Grass Elsewhere?

A comparative analysis of the work of different courts would usually be a fraught exercise, as not all questions or cases warrant an outward-looking approach. Nonetheless, an example that might lend itself to a proper comparative analysis is the set of decisions rendered in the *References re Greenhouse Gas Pollution Pricing Act*.[66] The constitutionality of this act of Parliament was assessed separately by the courts of appeal in Saskatchewan, Ontario and Alberta. In these references, the three appellate courts, sitting

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64 In the US, this is made utterly visible by Frederick Schauer's suggestion that "persuasive authorities" might be better referred to as "optional authorities." See Frederick Schauer, "Authority and Authorities" (2008) 94:8 Va L Rev 1931 at 1946. An observation on the relevance of sources from other jurisdictions may also be made when looking at the websites of libraries from Ivy League law schools, where "Foreign and Comparative" studies are presented as a luxury experience abroad and speciality enabled by a generous trust fund or an extra service offered by the law school to researchers. See Harvard Law School, "International Legal Studies", online: *Harvard Law School* <https://hls.harvard.edu/ils/> [perma.cc/8FNT-B6SR]; Columbia Law School, "The Parker School of Foreign and Comparative Law", online: *Columbia Law School* <https://parker-school.law.columbia.edu/> [perma.cc/M6XL-UPPU]; Yale Law School, "Foreign, Comparative, and International Legal Research", online: Yale Law School <https://tinyurl.com/36cd4fam> [perma.cc/ZD84-KLAA]. None of the schools present foreign and comparative law as an intrinsic part of studying, practising or making law. The question thus becomes: do some Canadian justices increasingly view the practice of citing decisions from other jurisdictions as a "luxury" unnecessary to making law? Are some of us moving away from a belief in "some Canadian manner of legal thought?" See Auld, *supra* note 12.

65 It would not be the first time that someone observes the influence of an "American way of life" on how some justices in Canada conceive of their work. See Yves-Marie Morissette, "A Personal Perspective on Judgment Writing" (2022) 26 Can Crim L Rev 131 at 141.

66 *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544; *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74.

as panels of five justices, considered the exact same question of law, although the decisions were rendered over a period of two years. Although this is only a set of three judgments, the fact that they bore on the exact same question make them relevant in assessing whether the ONCA can be called an anomaly in the way it approaches the work of answering a complex question of law.

On May 3, 2019, a panel of five justices of the SKCA rendered a 3-2 split decision concluding that the *Act* was constitutional. As one can imagine in any case raising a federalism issue, the opinions of the majority and the dissent relied heavily on caselaw from the SCC and the Judicial Committee of the Privy Council (JCPC). However, the majority decision, authored by Chief Justice Richards, also referred to decisions of the Federal Court of Appeal,[67] and the dissenting opinion by Justice Ottenbreit and Justice Caldwell referred to a wide range of decisions from the Federal Court of Appeal, the Federal Court, the Alberta Court of Queen's Bench, the New Brunswick Court of Appeal, the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal.[68] Altogether, the reasons of the SKCA referred to the work of several other Canadian courts.

On June 28, 2019, in the wake of the SKCA decision, a panel of five justices of the ONCA rendered a 4-1 split decision concluding that the *Act* was constitutional. In this decision, rendered not even two months after the SKCA decision,[69] neither the majority reasons authored by Chief Justice Strathy nor the concurring reasons authored by Justice Hoy referred to the judgment of the Saskatchewan Coucurt of Appeal. Only the dissent authored by Justice Huscroft referred to the Saskatchewan decision, and only once.[70] Again, the opinions of all the justices relied heavily on cases from the SCC and the JCPC, citing a single case from the Federal Court of Appeal. Apart from the single mention, in the dissenting opinion, of the SKCA's decision in the same matter, no other provincial court of appeal was cited. The majority and concurring judge seem to have been operating in a state of splendid isolation.

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67 See 2019 SKCA 40 at para 196.

68 *Ibid* at paras 262, 331, 379, 380.

69 While two months may seem like a long time, it is not uncommon for justices to circulate their reasons internally for several weeks before rendering judgment. It is therefore possible that the opinion of the majority and the concurring judge were finished before the SKCA rendered its decision. However, during and after the circulation phase, modifications can still be made to the decisions, including adding a reference to, or a discussion of the work of their out-of-province colleagues. One notes that the Court did not delay the release of its decision until it could fully take account of the Saskatchewan judgment.

70 See 2019 ONCA 544 at para 196.

Lastly, on February 24, 2020, the ABCA, sitting in a panel of five justices, rendered a 4-1 split decision, holding that the *Act* was unconstitutional. The majority began their analysis by acknowledging that they had had the benefit of the ONCA and SKCA decisions, giving entire summaries of the decisions.[71] Other courts cited in the majority reasons and concurring opinion included the BCCA and the US Supreme Court,[72] while other courts cited by the dissent included the BCCA and the Ontario Superior Court.[73]

Of course, one might argue that references are advisory opinions sought from courts and that they are distinct from caselaw, although most jurists would consider them to set a precedent.[74] However, one might also say that this is precisely why they are the right place to look to notice a shifting conception of the role of persuasive authority. The example of the carbon tax *References* suggests that other appellate courts in Canada have a practice that differs from that of the ONCA, including when they consider the exact same question of law. The former included a wide range of sources in their opinions, some authoritative, some rather persuasive, whereas the majority and concurring ONCA judges, in the absence of a citation to the opinion of the Court that rendered a decision before them *on the same matter*, appear to have different assumptions about what is authoritative or persuasive.[75] One may go so far as to find the latter approach lacking in judicial comity.[76] Indeed, while no one would expect that all three courts would rule the same way out of respect for one another, it is quite something else to abstract from other judges' reasons completely.

7. Why Does It Matter?

Why do judicial lawmaking practices matter? Does the fact that appellate justices outside Ontario continue to cite the ONCA on so many issues,

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71 *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, paras 115–124.

72 *Ibid* at paras 209, 553.

73 *Ibid* at paras 934, 995.

74 See C Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (London: Bloomsbury Publishing, 2019).

75 The Court may have considered that on a very complex question of federalism, the persuasive authority of doctrinal scholars was more appropriate than caselaw from other appellate courts to resolve the question. However, they only cite four doctrinal sources in the case, two general treatises by Peter Hogg, one article by Jean Leclair and one 1974 article by Gerald Le Dain.

76 On global trends in the application of the notion of comity see Elisa D'Alterio, "From Judicial Comity to Legal Comity: A Judicial Solution to Global Disorder?" (2011) 9 International Journal of Constitutional Law 2 at 394–424.

while ONCA justices do not extend the same courtesy in return, change anything about the law in this country? Is this question purely academic or do judges engage in a different kind of work when they cite more broadly?

If one only considers the numbers provided in Section 2 of this article, specifically in Tables 2 and 3, one notices that the courts of appeal of common law jurisdictions in Canada, such as BC and Alberta, cite the ONCA in 20 to 25% of their total decisions. Even the QCCA, which works with a different legal tradition for private law matters,[77] cites the ONCA in 16% of its decisions. This already constitutes a very significant number of decisions citing as an authority a court whose practices suggest a radically different conception of what a relevant authority is. And what about the Supreme Court?

Table 8. Reasoned SCC decisions (of three pages or more and excluding decisions on leave) for 2021 and number of citations to other appellate courts per decision

Decision	Number of citations to the ONCA	Number of citations to the BCCA	Number of citations to the ABCA	Number of citations to the QCCA
Canadian Broadcasting Corp v Manitoba[78]	10	6	4	1
Reference re Code of Civil Procedure (Que.), art 35[79]	0	0	0	1
R v Esseghaier[80]	4	0	0	1
Grant Thornton LLP v New Brunswick[81]	5	1	2	0
R v RV[82]	5	0	3	0
R v GF[83]	12	2	1	2

[77] The case of Quebec can sometimes be misunderstood by legal practitioners who have not had occasion to study or work in the Quebec legal world. Quebec does not have some other law altogether. Quebec shares the criminal law with all of Canada and shares the legal principles applicable to any question of federal law, such as Aboriginal law, or judicial review of administrative action. There are also several areas of the law where the caselaw of the SCC has been determined to apply even in questions of private law where the *Civil Code of Québec* applies, such as insurance, for example.

[78] 2021 SCC 33.

[79] 2021 SCC 27.

[80] 2021 SCC 9.

[81] 2021 SCC 31.

[82] 2021 SCC 10.

[83] 2021 SCC 20.

(… continued) **Decision**	**Number of citations to the ONCA**	**Number of citations to the BCCA**	**Number of citations to the ABCA**	**Number of citations to the QCCA**
Colucci v Colucci[84]	10	4	12	0
Ethiopian Orthodox Tewahedo Church of Canada St Mary Cathedral v Aga[85]	5	1	1	0
R v Khill[86]	21	4	1	3
Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada[87]	6	0	0	0
R v Chouhan[88]	17	1	0	1
R v Parranto[89]	17	4	42	4
Canada v Canada North Group Inc[90]	12	3	0	0
Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District[91]	8	2	5	3
Barendregt v Grebliunas[92]	10	13	6	1
Ontario (AG) v Clark[93]	4	1	1	0
R v Cowan[94]	5	1	2	0

84 2021 SCC 24.
85 2021 SCC 22.
86 2021 SCC 37.
87 2021 SCC 47.
88 2021 SCC 26.
89 2021 SCC 46.
90 2021 SCC 30.
91 2021 SCC 7.
92 2022 SCC 22.
93 2021 SCC 18.
94 2021 SCC 45.

(… continued) **Decision**	**Number of citations to the ONCA**	**Number of citations to the BCCA**	**Number of citations to the ABCA**	**Number of citations to the QCCA**
Montréal (City) v Deloitte Restructuring Inc.[95]	5	8	2	10
R v CP[96]	3	2	1	1
Northern Regional Health Authority v Horrocks[97]	5	4	4	2
Sherman Estate v Donovan[98]	3	2	0	1
Toronto (City) v Ontario (AG)[99]	1	0	0	0
Grant Thornton LLP v New Brunswick[100]	5	1	2	0
HMB Holdings Ltd v Antigua and Barbuda[101]	1	3	1	0
R v Desautel[102]	3	1	0	0
Southwind v Canada[103]	3	0	0	0
Saulnier v Royal Bank of Canada[104]	4	2	0	0
Corner Brook (City) v Bailey[105]	1	3	0	0
R v Goforth[106]	1	0	2	0

95 2021 SCC 53.
96 2021 SCC 19.
97 2021 SCC 42.
98 2021 SCC 25.
99 2021 SCC 34.
100 2021 SCC 31.
101 2021 SCC 44.
102 2021 SCC 17.
103 2021 SCC 28.
104 2008 SCC 58.
105 2021 SCC 29.
106 2022 SCC 25.

(… continued) **Decision**	**Number of citations to the ONCA**	**Number of citations to the BCCA**	**Number of citations to the ABCA**	**Number of citations to the QCCA**
References re Greenhouse Gas Pollution Pricing Act[107]	1	1	0	0
R v Albashir[108]	0	0	0	0
MediaQMI Inc v Kamel[109]	1	0	0	12
York University v Canadian Copyright Licensing Agency (Access Copyright)[110]	0	0	0	0
Nelson (City) v Marchi[111]	0	0	1	0
Canada v Loblaw Financial Holdings Inc[112]	0	0	0	0
R v TJM[113]	0	0	0	0
R v Morrow[114]	0	0	1	0
R v Yusuf[115]	1	0	0	0
Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)[116]	0	0	0	7
Canada v Alta Energy Luxembourg SARL[117]	0	1	0	0

107 2021 SCC 11.
108 2021 SCC 48.
109 2021 SCC 23.
110 2021 SCC 32.
111 2021 SCC 41.
112 2021 SCC 51.
113 2021 SCC 6.
114 2021 SCC 21.
115 2021 SCC 2.
116 2021 SCC 43.
117 2021 SCC 49.

(… continued) **Decision**	**Number of citations to the ONCA**	**Number of citations to the BCCA**	**Number of citations to the ABCA**	**Number of citations to the QCCA**
Association de médiation familiale du Québec v Bouvier[118]	0	1	0	5
Montréal (City) v Deloitte Restructuring Inc[119]	5	8	2	10
Colucci v Colucci[120]	10	4	13	0
6362222 Canada Inc v Prelco Inc[121]	0	0	0	11
R v Khill[122]	20	3	1	3
TOTAL	**224**	**87**	**110**	**79**

Although I explained above that the SCC is far from being the only court that makes the law in this country, nonetheless it is striking that in 2021, the SCC cited the ONCA more than twice as often as any other court of appeal, and more than three times as often as some courts of appeal. Thus, not only is the ONCA constantly cited by courts of appeal across the country, it appears that its decisions also have a greater influence on the SCC when compared with the influence of other appellate courts. Again, this is to some degree understandable given that the ONCA makes a quarter of the appellate caselaw and it also makes up a quarter of the cases that end up at the SCC—although the SCC use of ONCA caselaw goes beyond that proportion. Furthermore, those are the very reasons why the lawmaking practices that the ONCA adopts matter to all of us: the ONCA contributes to making Canadian law to a significant degree. If the ONCA has a different conception of legal authority and a different method for answering complex questions of law that affect all of us, these concepts and methods influence the decisions of all our courts of appeal and decisions of the SCC.

8. Conclusion

For those who are skeptical about my statistical demonstrations, the observations about the practices of courts of appeal in Canada should

118 2021 SCC 54.
119 2021 SCC 53.
120 2021 SCC 24.
121 2021 SCC 39.
122 2021 SCC 37.

matter for other reasons. As I have noted above, citational practices do not simply reflect our assumptions about what sources are "authoritative" or "persuasive." Citational practices also reflect our aspirations about the work of appellate judges. They show that judges care to place themselves in conversation with other justices who have thought about the question at hand, to weigh the reasons of the other justices, and to give their own reasons in addressing the same issue. The law is enriched when legal arguments are challenged not only by counsel but also by judges. The judicial dialogue, in which justices participate when they engage with the reasons of other justices, produces resources for the future development of the law.[123] Therefore, judicial parochialism or a narrow conception of positive legal authority impoverishes the law for all of us.

It is not that one should ask justices to perform the academic exercise expected from doctrinal authors, although some justices do impose that standard on themselves. But one should perhaps ask of judges—at least appellate judges—that they inquire and weigh what their judicial counterparts have said on the problem they have before them. The late Justice LeBel called this a "duty of cultivation" on the part of justices.[124] This duty matters especially if our society is to entrust these non-elected jurists with the resolution of some of the most complex social issues we have. Citational practices form part of our implicit and inferential law and speak to our aspirations regarding the role of appellate courts in our society. They also speak to the nature of legal authority and the possibility of a common law embodying a tradition of persuasion and legal learning.

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[123] Marie-Claire Belleau & Rebecca Johnson, "Judging Gender: Difference and Dissent at the Supreme Court of Canada" (2008) 15:1-2 Int'l J Legal Prof 57. See e.g. *Archambault c R*, 2022 QCCA 1170 at paras 22–31, where Justice Healy disagreed with Justice Doherty, or *D'Amico v R*, 2019 QCCA 77 at paras 91–117, where Vauclair JA disagreed with the opinion of the ABCA in *R v Delaa*, 2009 ABCA 179.

[124] Louis LeBel, *L'art de juger* (Québec: Presses de l'Université Laval, 2019) at 161–166.

APPENDIX[125]

TABLE 1. Comparison of the number of SCC judgments citing at least one judgment of the QCCA / the ONCA, from 2015 to 2020[126]

	QCCA	ONCA	Difference
2015	25	41	+64 %
2016	29	39	+34 %
2017	27	38	+41 %
2018	24	42	+75 %
2019	37	51	+38 %
2020 (on the 27-07-2020)	12	19	+58 %

TABLE 2. Comparison of the number of provincial appellate court judgments citing at least one judgment of the QCCA / the ONCA, from 2015 to 2020[127]

	QCCA	ONCA	Difference
2015	44	332	+655 %
2016	47	341	+626 %
2017	55	425	+673 %
2018	53	452	+753 %
2019	60	500+	+733 %
2020 (on the 27-07-2020)	44	307	+598 %

[125] For the source of these tables, see Fournier, *supra* note 15.

[126] The numbers were generated through the Westlaw database. The keywords used were "QCCA BUT NOT leave" or "ONCA BUT NOT leave" and the period was set between 01-01-2015 and 31-12-2015, or an analogous period for the other years. These terms allow one to exclude the decisions on leave which, if they were included, might falsify the results.

[127] The numbers were generated through the CanLII platform. The keywords searched were "QCCA" or "ONCA". The jurisdictions selected were all the provincial jurisdictions except that of the court selected "2015" or another year was used as a research filter. The decisions obtained were then organized by hierarchy of court, allowing one to count those of the provincial court of appeal.

TABLE 3. Comparison of the number of provincial appellate court judgments citing at least one judgment of the QCCA / the ONCA, only in criminal matters, from 2015 to 2020[128]

	QCCA	ONCA	Difference
2015	34	208	+512 %
2016	30	213	+610 %
2017	35	243	+594 %
2018	38	252	+563 %
2019	39	294	+654 %
2020 (on the 26-10-2020)	43	240	+458 %

TABLE 4. Comparison between the number of QCCA judgments citing the ONCA and vice versa, from 2015 to 2020[129]

	QCCA	ONCA	Difference
2015	7	52	+643 %
2016	8	53	+563 %
2017	12	91	+658 %
2018	11	89	+709 %
2019	13	112	+762 %
2020 (on the 12-08-2020)	6	49	+717 %

[128] The numbers were generated through the CanLII platform. The keywords searched were "QCCA" or "ONCA". The jurisdictions selected were all the provincial jurisdictions except that of the court selected. "2015" or another year was used as a research filter, as well as a citation to the *Criminal Code*, a standard reference for cases dealing with criminal matters. The decisions obtained were then organized by hierarchy of court, allowing one to count those of the provincial court of appeal.

[129] As explained above, the numbers were generated through the CanLII platform, using the keywords "QCCA" and "ONCA", selecting the designated province and the year and ordering decisions by hierarchy of court to count those of the court of appeal. So the QCCA column counts citations to the QCCA by the ONCA. The ONCA column counts citations to the ONCA by the QCCA.