



The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 47 (2009)

Article 16

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Adam M. Dodek

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Citation Information

Dodek, Adam M.. "Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 47. (2009).
<http://digitalcommons.osgoode.yorku.ca/sclr/vol47/iss1/16>

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Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities

Adam M. Dodek^{*}

I. INTRODUCTION

Canadian politicians and jurists have been known to boast about the international impact of the *Canadian Charter of Rights and Freedoms*¹ and of the Supreme Court of Canada. In testifying before the Ad Hoc Committee on Appointment of Supreme Court Justices in August 2004, then Minister of Justice and Attorney General Irwin Cotler asserted that the Supreme Court of Canada is respected around the world “as a model of what a vital, learned, and independent judicial institution should be ... Supreme Court decisions are constantly cited by courts in diverse jurisdictions across the globe”.² Elsewhere I have previously written about this phenomenon and identified what I described as a “Canadian model” of constitutionalism and the use of the Charter by jurisdictions such as Israel, South Africa and New Zealand, and how this could be viewed as an element of Canada’s “soft power”.³

^{*} Associate Professor, Faculty of Law, University of Ottawa, Common Law Section. Thank you to Daphne Gilbert and Jamie Cameron for providing helpful comments on earlier versions of this paper and thank you to Kyle Kirkup, LL.B. 2009, for his excellent research assistance. The author gratefully acknowledges funding from the Law Foundation of Ontario which facilitated the research for this article.

¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

² The Hon. Irwin Cotler, P.C., M.P., “Speaking Notes for Irwin Cotler, Minister of Justice and Attorney General of Canada, on the Occasion of a Presentation to the Ad Hoc Committee on Supreme Court of Canada Appointments” (August 25, 2004), online: <http://www.justice.gc.ca/eng/news-nouv/spe-disc/2004/doc_31212.html>.

³ See Adam M. Dodek, “Canada as Constitutional Exporter: The Rise of the ‘Canadian Model’ of Constitutionalism” (2007) 36 S.C.L.R. (2d) 309 (also published in Ian Peach *et al.*, *A Living Tree: The Legacy of 1982 in Canada’s Constitutional Evolution* (Markham, ON: LexisNexis Canada, 2007); Adam M. Dodek, “The Protea and the Maple Leaf: The Impact of the Charter on South African Constitutionalism” (2004) 17 N.J.C.L. 353; and Adam M. Dodek, “The Charter ... In

In this paper, I turn to the other end of the equation: the extent to which the Supreme Court of Canada uses the decisions of other countries in its constitutional interpretation. In this sense, I distinguish between “comparative” and “international” law. By “comparative” law, I mean the law of other jurisdictions, usually countries (such as those noted above) but also including supra-national entities such as the European Union. The key factor is that Canada is not part of whatever legal system is invoked and hence the foreign law is used in a purely comparative sense. The use of comparative law is thus the essence of “persuasive authority” — authority that has no official status in our jurisdiction; it attracts adherence rather than commanding it.⁴ Comparative law is thus to be distinguished from international law, which is the “law among states” and includes treaties, declarations, decisions, soft law, *etc.*⁵ International law may have direct relevance to Canada as a state actor⁶ and how Canadian courts deal with international law is an issue unto

The Holy Land?” (1996) 8 Const. Forum 5. See also Sujit Choudhry, “Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory” (2007) 5 Int. J. Const. Law 606. On “soft power” see Joseph S. Nye Jr., *Soft Power* (New York: Public Affairs, 2004).

⁴ See H.P. Glenn, “Persuasive Authority” (1987) 32 McGill L.J. 261, at 263.

⁵ See, *e.g.*, John H. Currie, Craig Forcese & Valerie Oosterveld, *International Law; Doctrine, Practice and Theory* (Toronto: Irwin Law, 2007), at 4. See also John H. Currie, *Public International Law*, 2d ed. (Toronto: Irwin Law, 2008).

⁶ To further complicate matters, at times international law may be used for comparative purposes. See Cassandra Kirewskie, “Extending the Theory of the Unwritten Constitution” (2007) 37 S.C.L.R. (2d) 139, at 146-47; and Anne Warner La Forest, “Domestic Application of International Law in Charter Cases: Are We There Yet?” (2004) 37 U.B.C. L. Rev. 157, at 183 [hereinafter “Warner La Forest, ‘Are We There Yet?’”] (describing a “comparativist” approach to the use of international law wherein judges see themselves as actively engaged in international law and open to ideas from international, regional and comparative law, blurring the lines between international and comparative law).

itself.⁷ Together the use of comparative and international law may be conceived as facilitating an international “judicial dialogue”.⁸

This paper examines the use of comparative law by the Supreme Court of Canada in its 2008 constitutional cases. In this paper, I attempt to strip away the rhetoric about the Supreme Court of Canada as a global constitutional actor and endeavour to analyze when and how it used comparative law in its constitutional cases during in the 2008 Term. My goal is to reveal what the use of comparative constitutional law looks like during this period and what broader questions this may lead us to pose.

I conclude that the Supreme Court’s use of comparative law in the 2008 Term was quite modest.⁹ The Supreme Court decided 12 constitutional

⁷ See, e.g., Hugh M. Kindred, “The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach”, in Oonagh E. Fitzgerald, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006), at 5; Anne Warner La Forest, “Evidence and International and Comparative Law”, in Oonagh E. Fitzgerald, *id.*, at 367; Ed Morgan, “In the Penal Colony: Internationalism and the Canadian Constitutionalism” (1999) 49 U.T.L.J. 447; Warner La Forest, “Are We There Yet?”, *id.*; Robert Sze-Kwok Wai, “Justice Gérard La Forest and the Internationalist Turn in Canadian Jurisprudence”, in R. Johnson & J. McEvoy, eds., *Gérard V. La Forest at The Supreme Court of Canada, 1985-1997* (Winnipeg: Canadian Legal History Project & The Supreme Court of Canada Historical Society, 2000) 471 [hereinafter “Wai”]; Karen Knop, “Here and There: International Law in Domestic Courts” (2000) 32 N.Y.U.J. Int’l Law & Pol. 501; Stephen J. Toope, “The Uses of Metaphor: International Law and the Supreme Court of Canada” (2001) 80 Can. Bar Rev. 534; Stephen J. Toope, “Inside and Out: The Stories of International Law and Domestic Law” (2001) 50 U.N.B.L.J. 11.

⁸ I believe that Anne-Marie Slaughter, writing in 1994, was the first to use the term “judicial dialogue” and attempt to explain it with any comprehensiveness. See Anne-Marie Slaughter, “A Typology of Transjudicial Communication” (1994) 29 Univ. Richmond L. Rev. 99, at 100 [hereinafter “Slaughter, ‘Typology’”]: “Within both the European Union and the Council of Europe, courts are entering into forms of judicial dialogue ... At the same time, national courts are also talking to each other.” See generally Claire L’Heureux-Dubé, “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court” (1998) 34 Tulsa L.J. 15; Sujit Choudhry, “Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Adjudication” (1999) 74 Ind. L.J. 819, at 835-36, 855-65 (describing “dialogic interpretation”) [hereinafter “Choudhry, ‘Globalization’”]; Ronald J. Krotoszynski Jr., “I’d Like To Teach the World to Sing (In Perfect Harmony)”: International Judicial Dialogue and the Muses — Reflections on the Perils and the Promise of International Judicial Dialogue” (2006) 104 Mich. L. Rev. 1321 (describing a strong and weak form of “international judicial dialogue” (“IJD”)) [hereinafter “Krotoszynski”].

⁹ While this paper is restricted to constitutional cases in the 2008 Term, research undertaken for this paper reviewed all Supreme Court decisions in the 2008 Term which revealed a comparable frequency of cases that contained some reference to foreign law as in the three of 12 (25 per cent) constitutional cases that contained some reference to comparative law. Of the 69 decisions rendered by the Supreme Court in 2008, 15, or 22 per cent, contained citations to foreign authorities: *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.) (administrative law); *R. v. Kang-Brown*, [2008] S.C.J. No. 18, [2008] 1 S.C.R. 456 (S.C.C.) [hereinafter “Kang-Brown”] (constitutional law; search and seizure); *Société de l’assurance automobile du Québec v. Cyr*, [2008] S.C.J. No. 13, [2008] 1 S.C.R. 338 (S.C.C.) (administrative law); *R. v. M. (A.)*, [2008] S.C.J. No. 19, [2008] 1 S.C.R. 569 (S.C.C.) [hereinafter “M. (A.)”] (constitutional law; search and seizure); *Canada (Justice) v. Khadr*, [2008] S.C.J. No. 28, [2008] 2 S.C.R. 125 [hereinafter “Khadr”] (constitutional

cases in 2008.¹⁰ It used comparative law in three cases: *Canada (Justice) v. Khadr*,¹¹ *R. v. Kang-Brown*,¹² and *R. v. M. (A.)*.¹³ The latter two were companion cases involving the use of sniffer dogs for searches. As I explain in this paper, in my analysis, the Supreme Court's use of comparative constitutional law in 2008 can be described in terms of limited engagement and missed opportunities.

There are five parts to this paper in addition to this introduction. In Part II, I discuss why we should be interested in the use of comparative law in the decisions of the Supreme Court of Canada. As many have stated, a court's legitimacy hinges on its interpretive methodology. The use of comparative law is part of this process and therefore worthy of analysis for this reason alone. However, beyond identifying this bare reason for why comparative law matters, I sketch out a brief version of my argument as to not only why comparative law matters but also why

law; right to fair trial); *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, [2008] S.C.J. No. 46, [2008] 2 S.C.R. 604 (S.C.C.) (age discrimination under human rights code); *R. v. H. (L.T.)*, [2008] S.C.J. No. 50, [2008] 2 S.C.R. 739 (S.C.C.) (criminal); *R. v. M. (R.E.)*, [2008] S.C.J. No. 52, [2008] 3 S.C.R. 3 (S.C.C.) (criminal); *H. (F.) v. McDougall*, [2008] S.C.J. No. 54, [2008] 3 S.C.R. 41 (S.C.C.) (torts); *R. v. Rojas*, [2008] S.C.J. No. 58, [2008] 3 S.C.R. 111 (S.C.C.) (criminal); *Saulnier v. Royal Bank of Canada*, [2008] S.C.J. No. 60, [2008] 3 S.C.R. 166 (S.C.C.) (bankruptcy); *RBC Dominion Securities Inc. v. Merrill Lynch Canada*, [2008] S.C.J. No. 56, [2008] 3 S.C.R. 79 (S.C.C.) (employment law); *R. v. Mahalingan*, [2008] S.C.J. No. 64, [2008] 3 S.C.R. 316 (S.C.C.) (criminal); *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, [2008] S.C.J. No. 67, [2008] 3 S.C.R. 53 (S.C.C.) (insurance); *Apotex Inc. v. Sanofi-Synthelabo Canada Inc.*, [2008] S.C.J. No. 63, [2008] 3 S.C.R. 265 (S.C.C.) (patents). The three constitutional cases that contained references to foreign law are discussed in this paper. For a more detailed study of the use of foreign law from one jurisdiction across all types of Supreme Court of Canada decisions, see Peter McCormick, "American Citations and the McLachlin Court: An Empirical Study" (2009) 47 Osgoode Hall L.J. (forthcoming) (draft on file with author) [hereinafter "McCormick, 'American Citations'"].

¹⁰ The 12 constitutional cases from 2008 are: *620 Connaught Ltd v. Canada (Attorney General)*, [2008] S.C.J. No. 7, [2008] 1 S.C.R. 131 (S.C.C.); *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.); *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, [2008] S.C.J. No. 15, [2008] 1 S.C.R. 383 (S.C.C.); *Lake v. Canada (Minister of Justice)*, [2008] S.C.J. No. 23, [2008] 1 S.C.R. 761 (S.C.C.); *R. v. B. (D.)*, [2008] S.C.J. No. 25, [2008] 2 S.C.R. 3 (S.C.C.); *R. v. Wittwer*, [2008] S.C.J. No. 33, [2008] 2 S.C.R. 235 (S.C.C.); *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] S.C.J. No. 39, [2008] 2 S.C.R. 326 (S.C.C.); *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483 (S.C.C.) [hereinafter "Kapp"]; *Kang-Brown, id.; M. (A.), id.; Khadr, id.*; and *Confédération des syndicats nationaux v. Canada (Attorney General)*, [2008] S.C.J. No. 69, 2008 SCC 68 (S.C.C.). I adopt and use Professor Monahan's definition of "constitutional" cases: "A case is defined as a 'constitutional case' if the decision of the Court involves the interpretation or application of a provision of the 'Constitution of Canada', as defined in s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11." See, e.g., Patrick J. Monahan & James Yap, "Constitutional Cases 2008: An Overview" (2008) 47 S.C.L.R. (2d) 3, at 3, note 1 [hereinafter "Monahan & Yap"].

¹¹ *Khadr, supra*, note 9.

¹² *Kang-Brown, supra*, note 9.

¹³ *M. (A.), supra*, note 9.

the Supreme Court should engage in comparative analysis in constitutional cases. With this analysis and argument, I turn in Part III to the actual use of comparative law in the two sniffer dog cases and explain why these cases demonstrate a limited form of engagement with foreign sources. I use the term “limited engagement” in a descriptive rather than a normative sense. Justice Binnie’s extensive and deep use of American law goes significantly beyond the limited engagement of his colleagues. I then turn to the use of comparative law in *Khadr* in Part IV and explain how the Supreme Court’s use of comparative law in this case is anomalous and does not really constitute comparative law at all. From this I move to Part V which examines the non-use of comparative law in *R. v. Kapp*,¹⁴ the Court’s most important equality decision in a decade. In this part I explain why I view *Kapp* as a great missed opportunity for the use of comparative law. Finally, I end with some tentative conclusions about the Supreme Court’s use of comparative law and some questions for further investigation.

II. COMPARATIVE LAW: WHY BOTHER?

As is well known in constitutional circles, over the first decade of the 21st Century a battle raged over the use of comparative law at the U.S. Supreme Court as a result of the inclusion of foreign references in several cases, including *Atkins v. Virginia*,¹⁵ *Lawrence v. Texas*¹⁶ and *Roper v. Simmons*.¹⁷ The modest use of comparative law in these cases unleashed a wave of scholarship, a torrent of political and popular criticism as well as a rare public debate between U.S. Supreme Court Justices on the subject.¹⁸ The use of comparative constitutional law in

¹⁴ *Supra*, note 10.

¹⁵ 536 U.S. 304 (2002) [hereinafter “*Atkins*”] (holding that it was unconstitutional to execute mentally retarded offenders).

¹⁶ 539 U.S. 558 (2003) [hereinafter “*Lawrence*”] (holding that the criminalization of sodomy violates the due process clause of the U.S. Constitution).

¹⁷ 543 U.S. 551 (2005) [hereinafter “*Roper*”] (holding it unconstitutional to execute offenders who were minors at the time that they committed their crimes).

¹⁸ The title of the debate was the “Constitutional Relevance of Foreign Decisions”. It was styled as a discussion between Justices Antonin Scalia and Stephen Breyer, moderated by N.Y.U. Law Professor Norman Dorsen, and the event was sponsored by the U.S. Association of Constitutional Law, which represents constitutional professors in the U.S. The discussion took place at Washington College of Law at American University in Washington, D.C. on January 13, 2005. A verbatim record of the discussion is available online at: <<http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>>. An edited version of the transcript has been published as “A conversation between U.S. Supreme Court justices” (2005) 3 Int. J. of Constitutional Law 519. See also Charles Lane,

Lawrence was seen to “portend a possible shift of tectonic plates”,¹⁹ while soon after *Roper* was decided one critic of comparative constitutionalism saw in that case “the birth of a new comparative jurisprudence”.²⁰ He remarked that the U.S. Supreme Court was not simply deciding a case in *Roper*, it was also “defining and defending a movement: a movement that has the potential to change the course of constitutional law”.²¹ Both proponents and opponents of these developments viewed the U.S. Supreme Court as becoming a participant in the international judicial dialogue referred to earlier. However, at the end of this decade, observations about any such trend and support or concern for American participation in this international dialogue appear vastly exaggerated. The U.S. Supreme Court has not used comparative law since John Roberts became Chief Justice in 2005.

American fascination with the relatively modest use of comparative constitutional law contrasts sharply with the practices in other countries where comparative law is more frequently used but rarely questioned. In addition to Canada, the highest courts in South Africa, New Zealand, and Israel frequently cite decisions from other jurisdictions. To some degree, the American reaction (both negative and positive) to comparativism is exaggerated while in other countries the practice is under-theorized. Just as the vociferous objection to the use of foreign sources in the United States should not make its use illegitimate; similarly, the acquiescence to its use in Canada does not legitimize the comparative analysis in constitutional cases.

The importance of analyzing the Supreme Court’s use of comparative law is an aspect of the recurring question of the legitimacy

“The Court is Open for Discussion: AU Students Get Rare Look at Justices’ Legal Sparring”, *Washington Post* (January 14, 2005), A1.

¹⁹ Donald E. Childress III, “Note, Using Comparative Constitutional Law to Resolve Domestic Federal Questions” (2003) 53 *Duke L.J.* 193, at 194.

²⁰ Roger P. Alford, “*Roper v. Simmons* and Our Constitution in International Equipose” (2005) 53 *U.C.L.A. L. Rev.* 1, at 3.

²¹ Alford, *id.* For a more modest view of the novelty of the use of foreign sources in *Roper*, *supra*, note 17, see A. Mark Weisburd, “*Roper* and the Use of International Sources” (2005) 45 *Va. J. Int’l L.* 789, at 798 (dismissing the view of *Roper*’s international references as constituting “harbingers of a wholesale importation of foreign or international derived concepts into American constitutional law” and arguing that *Roper* takes an approach to foreign and international decisions consistent with their use in prior Eighth Amendment cases and leaves open the question of the impact of such sources in other areas of American constitutional law where they have traditionally been considered irrelevant).

of the exercise of judicial power.²² Courts are supposed to be different from political actors. This simple assertion has led to deep and divisive battles between realist and anti-realist scholars over the last century which continued with the rise of critical legal studies in the academy. The need for judges to justify their interpretive methodology extends to their use of comparative law. As Sujit Choudhry has argued, courts' very legitimacy hinges on interpretive methodology, so "courts *must* explain why comparative law should count".²³ If they do not, "judicial review is open to the charge of simply being politics by other means ... In each and every country where the migration of constitutional ideas is on the rise, the demands of justification must be met".²⁴ In the American context, the question has been posed as to why a court should resort to comparative material to resolve whether a particular measure violates a particular provision of its own constitution?²⁵ This question applies with equal force to the use of comparative law by the Supreme Court of Canada in its constitutional cases.

Attempts to justify the use of comparative law in constitutional cases can generally be classified in terms of *thin* or *thick universalism*.²⁶ The basic premise of universalist approaches is that constitutions around the world share certain fundamental principles.²⁷ Universalist approaches to comparative law differ in the extent to which they emphasize normative or procedural elements. *Thick universalism* has both normative and process-based content. It posits the strong universal application of specific norms and values as well as a global network that facilitates the

²² For more on this question of legitimacy, see Adam M. Dodek, "A Tale of Two Maps: The Limits of Universalism in Comparative Judicial Review" (2009) 47:2 Osgoode Hall L.J. (forthcoming).

²³ Sujit Choudhry, "Migration as a New Metaphor in Comparative Constitutional Law", in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (New York & Cambridge: Cambridge University Press, 2006) 1, at 5.

²⁴ Choudhry, *id.*

²⁵ Roger P. Alford, "In Search of a Theory For Constitutional Comparativism" (2005) 52 U.C.L.A. L. Rev. 639, at 644 (asking why the U.S. Supreme Court should "resort to comparative material as a device to resolve whether a particular measure violates a particular provision of the U.S. Constitution").

²⁶ What I call *thick* and *thin* universalism parallels to some degree Ronald Krotoszynski's *strong* and *weak* forms of "International Judicial Dialogue" (IJD). See Krotoszynski, *supra*, note 8, at 1323-25.

²⁷ Mark Tushnet, "Some Reflections on Method in Comparative Constitutional Law" in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2007) 67, at 69 [hereinafter "Tushnet, 'Some Reflections on Method in Comparative Constitutional Law'"]. See, e.g., David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) and David Beatty, *The Ultimate Rule of Law* (Oxford and New York: Oxford University Press, 2004).

communication and reinforcement of these values. In a thick universalist model, comparative constitutional law is an imperative. It becomes the conduit for the communication of universal norms and values between and among constitutional systems.²⁸ At times it is conceived in terms of a dialogue between those who study comparative constitutional law and those who study international human rights.²⁹ Thus, one of the most concise articulations of this approach is provided by Harold Koh, who contends that concepts like liberty, equality and privacy are not exclusive to any particular constitution but are part and parcel of the global human rights movement. There are many civilized societies with human rights concepts constantly evolving as courts in different countries apply “somewhat similar legal phrases to somewhat similar circumstances”.³⁰ Former Supreme Court of Canada Justice Claire L’Heureux-Dubé asserted that links to international law help to form a kind of “common denominator” for constitutional interpretation around the world.³¹ The similarity in context and values provides the basis for universalist claims to comparison.

In contrast, *thin universalism* presents a more modest argument about universal values. It recognizes the existence of a global network of courts as an interchange for ideas, but its focus is more on the universal nature of problems that courts face rather than on the norms that apply. It is problem-based rather than norm-centred. A thin universalist believes that comparative constitutional law *may* be of assistance because courts around the world face common problems.³² A thick universalist believes

²⁸ Three leading examples of thick universalism are Aharon Barak’s *purposive interpretation*, David Beatty’s *ultimate rule of law* and Lorraine Weinrib’s *postwar paradigm*. See Aharon Barak, *Purposive Interpretation in Law* (Princeton & Oxford: Princeton University Press, 2005); David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995); David Beatty, *The Ultimate Rule of Law* (Oxford and New York: Oxford University Press, 2004); Lorraine E. Weinrib, “The Postwar Paradigm and American Exceptionalism” in Sujit Choudhry, ed., *The Migration of Constitutional Ideas*, *supra*, note 23, 84; and Lorraine E. Weinrib, “Constitutional Conceptions and Constitutional Comparativism” in Vicki C. Jackson & Mark Tushnet, eds., *Defining the Field of Comparative Constitutional Law* (Westport, CT: Praeger, 2002), at 3.

²⁹ See Tushnet, “Some Reflections on Method in Comparative Constitutional Law”, *supra*, note 27, at 69.

³⁰ Harold Koh, “International Law as Part of Our Law” (2004) 98 Am. J. Int’l Law 43, at 54 quoting Stephen Breyer, “Keynote Address” (2003) 97 American Society of International Law Proceedings 265.

³¹ Claire L’Heureux-Dubé, “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court” (1998) 34 Tulsa L.J. 15, at 24 [hereinafter “L’Heureux-Dubé, ‘The Importance of Dialogue’”].

³² See *e.g.*, *id.*, at 23:

that the translation of norms between constitutional courts *requires* comparative law.

Anne-Marie Slaughter has developed the process-based aspect of thin universalism in the most detail through her idea of the existence of a global network of judges.³³ In Slaughter's *New World Order*, government networks — judicial among them — are understood as a form of global governance as well as foreign policy.³⁴ Constitutional cross-fertilization is one feature of this judicial network.³⁵ Slaughter's account is thinly universal in that it describes the participation of courts in a common judicial enterprise but it recognizes the possibility of conflict and embraces pluralism and legitimate difference.³⁶ It lacks the universalizing element common to thick universalist accounts. Instead, it recognizes the variety of different approaches to similar legal problems. Her thinly universal account describes the existence of a "spirit of genuine transnational deliberation within a newly self-conscious transnational community".³⁷

Justice Claire L'Heureux-Dubé is a leading proponent and theorist of judicial comparativism. Her 1998 article was one of the first to explain, promote and defend the practice that has become known as "international judicial dialogue". In "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court", she argued that globalization was facilitating this international judicial dialogue. She attributed this development to a number of factors: similarity of issues facing courts around the world; the international nature of human rights; advances in technology; and a growth in personal contact among judges.³⁸

perhaps more than ever, the same issues are facing many courts throughout the world. Issues like assisted suicide, abortion, hate speech, gay and lesbian rights, environmental protection, privacy, and the nature of democracy are being placed before judges in different jurisdictions at approximately the same time. As social debates and discussion around the world become more and more similar, so, of course, do the equivalent legal debates.

³³ See Anne-Marie Slaughter, *A New World Order* (Princeton & Oxford: Princeton University Press, 2004), at 65-103 (describing the existence and workings of a global legal system); Anne-Marie Slaughter, "A Brave New Judicial World" in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton & Oxford: Princeton University Press, 2005); Anne-Marie Slaughter, "A Global Community of Courts" (2003) 44 Harv. Int'l L.J. 191; Anne-Marie Slaughter, "Judicial Globalization" (2000) Virginia J. of Int'l Law 1103; Slaughter, "Typology", *supra*, note 8.

³⁴ Slaughter, *New World Order*, *id.*, at 1-4.

³⁵ *Id.*, at 69.

³⁶ *Id.*, at 68-69.

³⁷ *Id.*, at 78.

³⁸ L'Heureux-Dubé, "The Importance of Dialogue", *supra*, note 31, at 23-26.

I subscribe to a thin universalist vision of constitutional law for Canada.³⁹ Constitutional courts like the Supreme Court of Canada certainly face common problems, but I do not believe that the goal for Canada (nor for other countries) should be the convergence towards common norms or solutions.⁴⁰ Rather, I believe that the use of comparative law can strengthen the legitimacy of the reasons of the Supreme Court of Canada. Courts face common problems and consideration of how other courts have addressed them can act as an accountability mechanism for judicial discretion. In constitutional cases, comparative law can play an important role because of the enduring nature of constitutional rulings which are generally not subject to legislative override and may take years for a court to revisit.⁴¹

The comparative inquiry can also assist the Court to understand the uniqueness of our Constitution and reach a decision appropriate for our circumstances. Over a half century ago, Bora Laskin implored the newly supreme Supreme Court to engage in this sort of inquiry.⁴² What

³⁹ See Adam M. Dodek, *Complementary Comparativism: A Jurisprudence of Justification* (LL.M. Thesis, Faculty of Law, University of Toronto, 2008) [unpublished].

⁴⁰ Jeremy Waldron has argued that foreign and international law constitute a modern *ius gentium* which represents an international consensus of civilized nations on various constitutional issues. Analogizing to the sciences, Waldron's *ius gentium* idea is that "solutions to certain kinds of problems in the law might be best established in the way that scientific theories are established. They do not get established as infallible, they change over the years, and there are always outliers who refuse to accept them — some cranky, some whose reluctance leads eventually to progress". Jeremy Waldron, "Foreign Law and the *Modern Ius Gentium*" (2005) 119 Harv. L. Rev. 129, at 144. Eric Posner and Cass Sunstein use the Condorcet Jury Theorem to make a slightly different argument. See Eric A. Posner & Cass R. Sunstein, "The Law of Other Nations" (2006) 59 Stan. L. Rev. 131. Under Posner and Sunstein's account, the practices of other states provide relevant information which courts ought not to ignore. The Condorcet Jury Theorem asserts that if the majority of states believe that something is true, there is reason to believe that it is in fact true: *id.*, at 136. The authors assert that the Jury Theorem cautions when such information would be relevant by imposing three conditions on the consideration of foreign practices: (1) those practices reflect the judgment of the affected population or decision makers; (2) the other state is sufficiently similar; and (3) the judgment embodied in the practice of the other state is independent: *id.* I have vastly simplified Posner and Sunstein's argument, which is far more complicated than I have summarized here.

⁴¹ Cass Sunstein has written about the spectre of "the risk of future regret" due either to over- or under-inclusiveness of judicial reasons. Cass R. Sunstein, "Incompletely Theorized Agreements" (1995) 108 Harv. L. Rev. 1733, at 1755. A good example of this is the Supreme Court of Canada's decision in *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (S.C.C.). Justice Peter Cory stated publicly that he and his high court colleagues were taken by surprise by the government's response of staying thousands of criminal charges following his Court's decision in *Askov*, on the right to trial within a reasonable time. See David Vienneau, "High court shocked at Ontario dismissals" *Toronto Star* (July 16, 1991), A9. Canada's *Askov* experience would be useful knowledge for a court considering a similar issue and comparative analysis may have been of assistance in *Askov*.

⁴² See Bora Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951) 27 Can. Bar Rev. 1038, at 1045-47. This portion of Laskin's article is discussed in Philip

has changed since Laskin's time is the availability and speed of access to constitutional decisions of other countries. Thin universalists like L'Heureux-Dubé J. and Anne-Marie Slaughter argue that globalization facilitates comparativism. I contend that globalization necessitates it. In 1951, Bora Laskin thought that comparativism was worth the bother; his arguments have only strengthened since that time.

III. LIMITED ENGAGEMENT: SNIFFER DOGS

Most accounts of the use of comparative law by the Supreme Court of Canada have focused on the prevalence of the use of foreign sources⁴³ or the use of foreign sources from a single jurisdiction, usually the United States.⁴⁴ They tend to involve quantitative assessments of the Court's use of foreign sources.⁴⁵ Such analyses are necessary but not sufficient accounts of the use of comparative law. Here I attempt to complement these quantitative accounts with a detailed qualitative account of how and under what circumstances comparative law was used and not used in several cases in 2008. In this part, I examine its use in the two sniffer dog cases in the 2008 Term.

Girard, *Bora Laskin: Bringing Law to Life* (Toronto: Osgoode Society for Legal History, 2005), at 202.

⁴³ See, e.g., Peter McCormick, "American Citations and the McLachlin Court: An Empirical Study" (2009) 47 Osgoode Hall L.J. (forthcoming) (draft on file with author); Peter McCormick, "The Supreme Court of Canada and American Citations 1945-1994: A Statistical Overview" (1997) 8 S.C.L.R. (2d) 527; Bijon Roy, "An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation" (2004) U.T. Fac. L. Rev. 99.

⁴⁴ See J.M. McIntyre, "The Use of American Cases in Canadian Courts" (1964) 2 U.B.C. L. Rev. 478; S.I. Bushnell, "The Use of American Cases" (1986) 25 U.N.B.L.J. 157; Robert Harvie & Hamar Foster, "Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the Charter" (1990) 28 Osgoode Hall L.J. 729; Robert Harvie & Hamar Foster, "Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the Charter" (1992) 24 Ottawa L. Rev. 41; Gerard La Forest, "The Use of American Precedents in Canadian Courts" (1994) 46 Maine L. Rev. 211; Christopher P. Manfredi, "The Use of United States Decisions by the Supreme Court of Canada under the Charter of Rights and Freedoms" (1990) 23 Can. J. Pol. Sci. 499; Christopher P. Manfredi, "The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms" (1992) 40 Am. J. Comp. L. 213.

⁴⁵ Manfredi is an exception in this respect. See Christopher P. Manfredi, "The Use of United States Decisions", *id.*; Christopher P. Manfredi, "The Canadian Supreme Court and American Judicial Review", *id.* See also Shannon Ishiyama Smithey, "A Tool, Not a Master: The Use of Foreign Case Law in Canada and South Africa" (2001) 34 Comp. Pol. St. 1188; Rebecca Lefler, "A Comparison of Comparison: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, The Supreme Court of Canada and the High Court of Australia" (2001) S. Cal. Interdisc. L.J. 165.

In April 2008, a deeply divided court decided the two sniffer-dog cases, *Kang-Brown* and *M. (A.)*. A sniffer dog is a police canine that is trained to sniff narcotics through clothes or luggage and respond affirmatively. *Kang-Brown* involved the use of sniffer dogs by the RCMP at the Calgary bus terminal. *M. (A.)* involved their use by the police at a high school in Sarnia, Ontario at the invitation of the school's principal. In both cases, the Court divided the same way: LeBel J. wrote a short judgment for a plurality of four justices,⁴⁶ Binnie J. wrote a long set of partially concurring reasons for himself and the Chief Justice,⁴⁷ Deschamps J. wrote dissenting reasons for herself and Rothstein J.,⁴⁸ and Bastarache J. wrote his own dissenting reasons.⁴⁹ These cases are the high-water mark for comparative constitutional law at the Supreme Court in 2008⁵⁰ yet they also demonstrate the Supreme Court's limited engagement in this area.

The Supreme Court's engagement with comparative law is limited in a number of senses. It is limited because these are the only cases in the 2008 Term where the Supreme Court uses foreign law in a comparative sense. As discussed in the next section, the use of foreign law in *Khadr* is of a different character. The Court's use of comparative law is further limited because Binnie J. makes more use of foreign sources than all the other judges combined.⁵¹ The engagement with comparative law is further limited because with the exception of Binnie J., most of its use lacks much depth of analysis. While the engagement in these cases is limited, the use of comparative sources in the sniffer dog cases should not be considered surprising.

Search and seizure cases under the Charter lend themselves to comparativism for a number of reasons. First, the right to be free from unreasonable search or seizure is a general right that faces the challenge of being applied in innumerable contexts. It is thus not a specific right like the right to trial by jury in criminal cases⁵² or the right to use English or French in Parliament.⁵³ Section 8 of the Charter starkly provides that

⁴⁶ *Kang-Brown*, *supra*, note 9, at paras. 1-17 *per* LeBel J. (Fish, Abella and Charron JJ., concurring); *M. (A.)*, *supra*, note 9, at paras. 1-2.

⁴⁷ *Kang-Brown*, *id.*, at paras. 18-105; *M. (A.)*, *id.*, at paras. 3-99.

⁴⁸ *Kang-Brown*, *id.*, at paras. 106-211; *M. (A.)*, *id.*, at paras. 100-149.

⁴⁹ *Kang-Brown*, *id.*, at paras. 212-256; *M. (A.)*, *id.*, at paras. 150-191.

⁵⁰ See McCormick, "American Citations", *supra*, note 9.

⁵¹ Justice Binnie's use of comparative law in this constitutional area appears to be consistent with the Court's general trend in this area. See McCormick, *id.*

⁵² See Charter, s. 11(f).

⁵³ See Charter, s. 17(1).

“[e]veryone has the right to be secure against unreasonable search or seizure.” As Binnie J. noted in *M. (A.)*, section 8 “has proven to be one of the most elusive *Charter* provisions despite the apparent simplicity of its language”.⁵⁴ Second, on the level of principle, the right to be free from unreasonable search and seizure is in no way uniquely Canadian (as say perhaps language rights are), but is found in the constitutional systems of many countries. Thus the values or the purposes underlying the right are widely perceived as universal ones: privacy and autonomy. They transcend national boundaries and adhere to individuals as human beings. They implicate philosophical inquiry and the need to develop an analytical framework for their practical application. At first glance, such an assertion supports thick universalist constitutional visions outlined in Part II. However, this is misleading in two interrelated respects. The goal is not the convergence of universal norms such as privacy and autonomy in part because even if such norms can be considered universal or universalizing, they are too abstract to provide answers to the concrete disputes that courts face in the context of search and seizure issues. So while the Supreme Court recognized in *Hunter v. Southam Inc.*⁵⁵ that the jurisprudential foundations of section 8 drew inspiration from American Fourth Amendment decisions,⁵⁶ comparativism is the beginning not the end of the inquiry.

Third, the right to be free from unreasonable search and seizure is a right that in particular intersects with the dynamic nature of society and changes in technology. In addition to the sniffer-dog cases, recent search and seizure issues involve the use of infra-red imaging devices,⁵⁷ Internet monitoring,⁵⁸ and body-scan imaging for lie detection.⁵⁹ As demonstrated

⁵⁴ *M. (A.)*, *supra*, note 9, at para. 5.

⁵⁵ [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

⁵⁶ *M. (A.)*, *supra*, note 9, at para. 10, *per* Binnie J. It is also notable that the leading American treatise on the Fourth Amendment, upon which the Supreme Court relies in *M. (A.)* and *Kang-Brown*, is six volumes and over 5,000 pages long, providing a wealth of comparative material for consideration. See Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, 4th ed. (Minnesota: West Publishing, 2004) [hereinafter “LaFave”].

⁵⁷ See *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432 (S.C.C.). See generally James A. Fontana, *The Law of Search and Seizure in Canada*, 6th ed. (Markham, ON: Butterworths, 2005), at 597; Scott C. Hutchison, James C. Morton & Michael P. Bury, *Search and Seizure Law in Canada* (Toronto: Carswell, 2005).

⁵⁸ See LaFave, *supra*, note 56, § 2.2(f). See Daphne Gilbert, Ian R. Kerr & Jena McGill, “The Medium and the Message: Personal Privacy and the Forced Marriage of Police and Telecommunications Providers” (2007) 51 *Crim. L.Q.* 469.

⁵⁹ LaFave, *id.*, at § 2.2(d). See generally Ian R. Kerr, Max Binnie & Cynthia Aoki, “*Tessling* on My Brain: The Future of Lie Detection and Brain Privacy in the Criminal Justice System” (2008) *Can. J. Crimin. & Crim. Just.* 8.

in *Kang-Brown*, the use of such technologies often originates in one country and then is adopted by other countries. In *Kang-Brown*, the RCMP officers who searched the Calgary bus depot had trained in the United States in the GATEWAY program there.⁶⁰ Because the underlying factual circumstances that raise issues of the reasonableness of search and seizure arise or may originate in other jurisdictions, it would make sense for courts to examine how those foreign jurisdictions have addressed the constitutional issues that arise with such use.

Kang-Brown and *M. (A.)* demonstrate the thin universalism that I asserted in Part II provides the normative foundation for comparativism in constitutional adjudication at the Supreme Court of Canada. These cases are about the impact of globalization, the drug trade being an example of a globalized activity that crosses national borders. In part, the division of opinion among the justices reflects differing approaches to questions on this issue. Is a bus station like an airport or a border crossing? Is entering a schoolyard equivalent to crossing the border of a foreign state? In *Kang-Brown*, Binnie J. answers both questions in the negative: “[b]order considerations do not apply at the Calgary bus station or at the local public school in *A.M.* Nobody should expect to be randomly cross-examined by the police when boarding the Vancouver to Calgary bus.”⁶¹ In *M. (A.)*, LeBel J. states that “[e]ntering a schoolyard does not amount to crossing the border of a foreign state.”⁶² In *Kang-Brown*, Deschamps J. states that “[d]rug traffickers have shown that there are no limits to their imagination when it comes to concealing hard drugs, whose odours are often imperceptible to humans, and then spiriting them across international borders and across the country.”⁶³ Similarly, Bastarache J. concludes that bus depots are analogous to airports.⁶⁴ This globalization invites comparison, both at the level of the factual circumstances as well as at the level of constitutional doctrine. Moreover, globalization necessitates comparison because not only is the comparison possible because of the common problems faced by such technology across borders, but another aspect of globalization — the globalized nature of communications — makes access to information

⁶⁰ *Kang-Brown*, *supra*, note 9, at para. 88.

⁶¹ *Id.*, at para. 71.

⁶² *M. (A.)*, *supra*, note 9, at para. 1.

⁶³ *Kang-Brown*, *supra*, note 9, at para. 207.

⁶⁴ *Id.*, at para. 251: “a public bus terminal is precisely the type of environment where a sniffer-dog search subsequent to *generalized suspicion* is appropriate ... I find public depots to be analogous to airports” (emphasis in original).

regarding the practices and jurisprudence of other jurisdictions readily available. In such circumstances, the failure to engage in comparison has the potential to raise questions about the legitimacy of the Supreme Court's decision.

I begin by examining Binnie J.'s use of comparative law because it is the most extensive and because he explicitly recognizes the impact of American jurisprudence on *Hunter v. Southam Inc.* and the subsequent development of the Canadian law of search and seizure.⁶⁵ After this acknowledgment, Binnie J. proceeds to directly confront the American Supreme Court jurisprudence which has found that the use of narcotic sniffer dogs lies entirely outside the protections of the Fourth Amendment. Justice Binnie explains this decision as being motivated by what I would term pragmatic considerations by the U.S. Supreme Court. He speculates that the American decision may be a function of the fear that once a police activity has been found to engage a reasonable expectation of privacy, it triggers a presumption of necessity for prior judicial authorization, *i.e.*, a warrant.⁶⁶ Later in his opinion in *M. (A.)*, Binnie J. implicitly distinguishes between what is generally an all-or-nothing approach in American Fourth Amendment jurisprudence and the more tiered framework of Canadian search and seizure law.⁶⁷ What is notable here is the extent to which Binnie J. confronts the authority against the position that he ultimately adopts.⁶⁸

Justice Binnie expressly disagrees with the decision to place the use of police sniffer dogs outside of constitutional regulation, although he does accept the empirical basis for the American decision: "the

⁶⁵ *M. (A.)*, *supra*, note 9, at para. 10.

⁶⁶ *Id.*

⁶⁷ *Id.*, at paras. 52-55. Justice Binnie notes that the "all-or-nothing" approach to the U.S. Fourth Amendment was eventually rejected by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), where that Court authorized warrantless investigative police "stops" based on a standard of reasonable suspicion (*i.e.*, "Terry stops"). Justice Binnie notes that this approach was accepted by the Supreme Court of Canada in a prior case. *M. (A.)*, *id.*, at para. 53. However, he notes that the American approach is still far more categorical than the Canadian, which is more nuanced. Justice Binnie states that "our jurisprudence ... recognizes that *within* the *Charter* the need for privacy 'can vary with the nature of the matter sought to be protected, the circumstances in which and the place where state intrusion occurs, and the purposes of the intrusion'" (quoting *R. v. Colarusso*, [1994] S.C.J. No. 2, [1994] 1 S.C.R. 20, at 53 (S.C.C.)). *M. (A.)*, *id.*, at para. 55.

⁶⁸ On the use of comparative law as a "negative comparison" see, *e.g.*, Tania Groppi, "A User-friendly Court: The Influence of Supreme Court of Canada Decisions Since 1982 on Court Decisions in Other Liberal Democracies" (2007) 36 S.C.L.R. (2d) 337, at 344 [hereinafter "Groppi"]. Robert Wai has suggested that La Forest J. frequently used American jurisprudence in this respect. See Wai, *supra*, note 7, noting that where La Forest J. referred to comparative law at length it was mostly American law and was mostly used to distinguish his position.

minimally intrusive, contraband-specific nature and, where established, accurate olfactory capacity of a properly trained dog”.⁶⁹ Thus, Binnie J. accepts the foreign facts but not the legal conclusion. The American legal framework remains influential however because it leads Binnie J. to articulate a standard of “reasonable suspicion” as the basis for the police use of sniffer dogs and to conclude that in such cases, no prior judicial authorization will be required.⁷⁰ Justice Binnie uses the comparative jurisprudence not as a source of inspiration for ideas to be adopted or transplanted, but in a dialogical fashion — to identify differences between the Canadian and American approaches and to develop a distinctly Canadian framework for the issue.⁷¹

Justice Binnie continues to directly confront American jurisprudence in *M. (A.)* because the Crown relied on it in asserting that a student has no reasonable expectation of privacy in contraband. Justice Binnie reviews three U.S. Supreme Court cases upon which the Crown relies.⁷² He distinguishes this line of American cases by focusing not on the reasonable expectation of privacy in contraband, but on the students’ reasonable expectation of privacy in their backpacks, likening them to briefcases, purses and suitcases. In a triumph for students’ rights, Binnie J. asserts that “[n]o doubt ordinary businessmen and businesswomen riding along on public transit or going up and down on elevators in office towers would be outraged at any suggestion that the contents of their briefcases could randomly be inspected by the police without any ‘reasonable suspicion’ of illegality.”⁷³ Thus, Binnie J. concludes that backpacks objectively command a measure of privacy because of the role that they play in the lives of students.⁷⁴

Justice Binnie still must tackle the Crown’s American-inspired argument that there is no legitimate privacy interest in contraband. Here he cites the proposition of the U.S. Supreme Court being urged upon the Court by the Attorneys General: “because the [dog’s] sniff can only reveal the presence of items devoid of any legal use, the sniff ‘does not implicate legitimate privacy interests’ and is not to be treated as a

⁶⁹ *M. (A.)*, *supra*, note 9, at para. 11.

⁷⁰ *Id.*, at paras. 12-13.

⁷¹ *Cf.* L’Heureux-Dubé, “The Importance of Dialogue”, *supra*, note 31; and Choudhry, “Globalization”, *supra*, note 8, at 835-36, 855-65 (describing “dialogic interpretation”).

⁷² *M. (A.)*, *supra*, note 9, at paras. 56-60, citing and discussing *United States v. Place*, 462 U.S. 696 (1983); *United States v. Jacobsen*, 466 U.S. 109 (1984); and *Illinois v. Caballes*, 543 U.S. 405 (2005).

⁷³ *M. (A.)*, *id.*, at para. 62.

⁷⁴ *Id.*

search”.⁷⁵ Justice Binnie rejects the American position on two bases. First, he discusses the serious problems that it has created in its own jurisdiction, giving the example of a raid on a school of 2,780 students where the students were locked down but the media was invited in and the dog in that case falsely identified a student as having contraband (she had in fact been playing with one of her own dogs on the morning of the search and her dog was in heat).⁷⁶ Second, Binnie J. uses prior Canadian jurisprudence to demonstrate that the American authorities are asking the wrong question — at least in respect to how the constitutional protection of privacy is understood in this country. Justice Binnie quotes La Forest J. from a 1990 case:

[I]t would be an error to suppose that the question that must be asked in these circumstances is whether persons who engage in illegal activity behind the locked door of a hotel room have a reasonable expectation of privacy. Rather, the question must be framed in broad and neutral terms so as to become whether in a society such as ours persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy.⁷⁷

To continue to drive a wedge between the American jurisprudence and its applicability to Canada, Binnie J. notes that even in the United States the position is not uniform and numerous judges continue to argue for the wider privacy interest, quoting at length from a 1984 dissent of Brennan J.’s (in which Thurgood Marshall J. concurred).⁷⁸ Similarly, Binnie J.

⁷⁵ *M. (A.), id.*, at para. 69, quoting *United States v. Place*, *supra*, note 72, at 707 and *Illinois v. Caballes*, *supra*, note 72, at 411.

⁷⁶ *M. (A.), id.*, at para. 69.

⁷⁷ *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36, at 50 (S.C.C.), *per* La Forest J., quoted in *M. (A.), id.*, at para. 70.

⁷⁸ *M. (A.), id.*, at para. 71, quoting Brennan J., dissenting (Marshall J. concurring) in *United States v. Jacobsen*, *supra*, note 72, at 138, as follows:

[U]nder the Court’s analysis in these cases, law enforcement officers could release a trained cocaine-sensitive dog — to paraphrase the California Court of Appeal, a “canine cocaine connoisseur” — to roam the streets at random, alerting the officers to people carrying cocaine. Cf. *People v. Evans*, 65 Cal. App. 3d 924, 932, 134 Cal. Rptr. 436, 440 (1977). Or, if a device were developed that, when aimed at a person, would detect instantaneously whether the person is carrying cocaine, there would be no Fourth Amendment bar, under the Court’s approach, to the police setting up such a device on a street corner and scanning all passersby. In fact, the Court’s analysis is so unbounded that if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present. In short, under the interpretation of the Fourth Amendment first suggested in *Place* and first applied in this case, these surveillance techniques would not constitute searches and therefore could be freely pursued whenever and wherever law enforcement

quotes from the 2005 dissent of Ginsburg J. (Souter J. concurring) in *Illinois v. Caballes*:

Under today's decision, every traffic stop could become an occasion to call in the dogs, to the distress and embarrassment of the law abiding population. ...

... Nor would motorists have constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green.⁷⁹

Essentially, Binnie J. concludes that he preferred Ginsburg J.'s reasoning over that of the U.S. Supreme Court's majority. This is consistent with the Supreme Court of Canada's approach in focusing not on the object of the search but on where it takes place, leading Binnie J. to ultimately conclude that the ends of the search cannot justify its means.⁸⁰

In *Kang-Brown*, Binnie J. turned to comparative law to assist in determining this standard because Canadian jurisprudence was lacking in this area and because American jurisprudence had been used by the Ontario Court of Appeal in fashioning this test.⁸¹ In crafting the doctrinal standard, Binnie J. quotes from the U.S. Supreme Court decision in *Alabama v. White* on the difference between "reasonable suspicion" and reasonable grounds of belief (or what is called "probable cause" in American law):

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity and content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.⁸²

Having determined the standard, Binnie J. next turns to its content.

officers desire. Hence, at some point in the future, if the Court stands by the theory it has adopted today, search warrants, probable cause, and even "reasonable suspicion" may very well become notions of the past.

⁷⁹ *Supra*, note 72, at 422, *per* Ginsburg J., dissenting (Souter J. concurring), quoted with approval by Binnie J. in *M. (A.)*, *id.*, at para. 71 (further citing K. Lammers, "Canine Sniffs: The Search That Isn't" (2003) 1 N.Y.U.J.L. & Liberty 845, at 849-50).

⁸⁰ *M. (A.)*, *id.*, at para. 72.

⁸¹ Justice Binnie notes that in the context of entrapment Lamer J. had elected not to generalize about what "reasonable suspicion" constitutes. See *Kang-Brown*, *supra*, note 9, at para. 75, citing *R. v. Mack*, [1988] S.C.J. No. 91, [1988] 2 S.C.R. 903, at 965 (S.C.C.) and also citing *R. v. Cahill*, [1992] B.C.J. No. 793, 13 C.R. (4th) 327 (B.C.C.A.).

⁸² *Alabama v. White*, 496 U.S. 325, at 330 (1990), quoted in *Kang-Brown*, *id.*, at para. 75.

Justice Binnie then describes how the Ontario Court of Appeal reviewed American Fourth Amendment cases and was persuaded by their articulation of the need for objectively discernible facts as a prerequisite to a finding of reasonable cause in order to avoid indiscriminate and discriminatory exercises of the police power.⁸³ Justice Binnie adopts this approach in determining objective indicators and applies it to the facts before him. He states that in American cases, production of false identification or travelling under an assumed name is a marker of reasonable suspicion as is flight from the police or furtive actions or an attempt to conceal one's true identity.⁸⁴ In the case before him, neither marker was present. Similarly, Binnie J. agreed with the American position that Kang-Brown's opposition to what would have been a non-consensual illegal search was not something that should be used against him as indicia of reasonable suspicion.⁸⁵ In placing weight on these American decisions, Binnie J. implicitly recognizes their persuasive value and they play an important role in his decision.

In moving from the general indicia of reasonable suspicion to the particular indicia in regards to drug trafficking, Binnie J. explicitly refers to the U.S. in identifying the objectives of Jetway and other programs as attempting to identify characteristics "generally associated with narcotics traffickers"⁸⁶ without sweeping up "a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure".⁸⁷ This reference is not surprising given that the RCMP officers in *Kang-Brown* went to the U.S. for training at Los Angeles International Airport.⁸⁸

Up to this point, Binnie J. has engaged in what I would term "doctrinal comparativism": the use of comparative law to develop categories and rules for analyzing a particular issue.⁸⁹ In addition to this

⁸³ *Kang-Brown, id.*, at para. 76, citing *R. v. Simpson*, [1993] O.J. No. 308, 12 O.R. (3d) 182, at 202 (Ont. C.A.), per Doherty J.A.

⁸⁴ *Kang-Brown, id.*, at para. 87, citing *United States v. Sokolow*, 490 U.S. 1 (1989); *Sibron v. New York*, 392 U.S. 40 (1968); *Florida v. Royer*, 460 U.S. 491 (1983).

⁸⁵ *Kang-Brown, id.*, at para. 92, citing *United States v. Eustaquio*, 198 F.3d 1068 (8th Cir. 1999).

⁸⁶ *Kang-Brown, id.*, at para. 79, citing LaFave, *supra*, note 56, vol. 4, at 503.

⁸⁷ *Kang-Brown, id.*, quoting *Reid v. Georgia*, 448 U.S. 438, at 441 (1980).

⁸⁸ *M. (A.)*, *supra*, note 9, at para. 87.

⁸⁹ For different categories of comparison see Groppi, *supra*, note 68; Heinz Klug, "Model and Anti-Model: The United States Constitution and the 'Rise of World Constitutionalism'" (2000) *Wisconsin L. Rev.* 597; Kim Lane Schepelle, "Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models" (2003) 1:2 *Int'l J.*

analytical comparativism, comparative law can also be used for empirical purposes, to draw on the experience of other countries to provide the necessary factual foundations for a constitutional conclusion.⁹⁰ Each of Binnie, LeBel, Deschamps and Bastarache JJ. engages in empirical comparativism.

In *M. (A.)*, Binnie J. notes the lack of data in Canada regarding the efficacy of sniffer dogs. To address this gap, he turns to comparative law. He cites American cases where the dog erred and produced a false positive, *i.e.*, wrongly identified individuals as having drugs in their possession or on their person when they did not.⁹¹ Justice Binnie then cites a report from the Ombudsman of the Australian state of New South Wales which involved 17 different sniffer dogs totalling over 10,000 sniffer indications. The report found that these sniffs lead to a search successfully finding drugs in only 26 per cent of cases, leading the report to note (in a portion emphasized by Binnie J.): “[t]hat is, almost three-quarters of all indications did not result in the location of prohibited drugs.”⁹²

Justice Deschamps uses comparative law to reach the opposite conclusion. In *Kang-Brown*, she uses comparative law to buttress her finding that sniffer dogs are an accurate and useful law enforcement tool. She states that sniffer dogs “have been used in Canada for decades to fulfill numerous law enforcement functions”, providing examples of different types of uses from Quebec⁹³ and noting the trial judge’s finding of a 92 per cent reliability for sniffer dogs, concluding that sniffer dogs can be likened to a very reliable informant.⁹⁴ Justice Deschamps then turns to comparative law to support this empirical point, citing examples from Australia and the United States to show that “sniffer dogs have long

Const. L. 296; Sujit Choudhry, “The *Lochner* Era and Comparative Constitutionalism” (2004) 2 Int’l J. Const. L. 1.

⁹⁰ On analytical and empirical variants of comparative law see Choudhry, “Globalization”, *supra*, note 8; and Louis J. Blum, “Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication” (2002) 39 San Diego L. Rev. 157, at 186-95.

⁹¹ *M. (A.)*, *supra*, note 9, at paras. 85-87. Justice Binnie notes that such positives may be the result of a number of factors: outright error or sniffing drug odours which attach to money; “[i]n the sniffer-dog business, there are many variables.” *Id.*, at para. 88.

⁹² *M. (A.)*, *id.*, at para. 86, quoting New South Wales Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001* (2006), at ii.

⁹³ *Kang-Brown*, *supra*, note 9, at para. 131 (noting that the provincial police force and municipal police forces in Quebec have used sniffer dogs to detect drugs and explosives and to find missing persons since the 1960s, and that Société de la faune et des parcs du Québec uses sniffer dogs to detect fish, meat and ammunition in order to intercept poachers).

⁹⁴ *Id.*, at para. 132.

been used as a law enforcement tool in other countries”.⁹⁵ She concludes on this point by stating that:

[w]hile these examples do not obviate the need to engage in a critical review of the constitutionality of the use of sniffer dogs under s. 8 of the *Charter*, they do suggest that the sniffer dog has served as a helpful tool for various purposes, such as ensuring public safety, being proactive in preventing and detecting crime, investigating specific crimes and dealing with exigent circumstances.⁹⁶

For Justice Deschamps, comparative experience establishes a presumption.⁹⁷

Justice LeBel examines the comparative experience and reaches the opposite conclusion. Of LeBel J.’s reasons in the two cases, *Kang-Brown* is the only one that is more than a few paragraphs. In this decision, he also reaches out to comparative law in an empirical functionalist way. He states that “serious doubt has occasionally been cast on the reliability of sniffer dogs” and proceeds to cite some of the authorities relied upon by Binnie J. to cast doubt on the accuracy of the sniffer dogs: the dissent of Souter J. in a 2005 U.S. Supreme Court case and the Discussion Paper by the Ombudsman of New South Wales.⁹⁸

Justice Deschamps moves from empirical comparativism to doctrinal comparativism in a way that demonstrates a limited engagement with the foreign sources. Ultimately, Deschamps J. adopts the reasonable suspicion standard for sniffer-dog searches. In justifying this decision, she rests in part on the justification that “numerous [American] state courts have adopted the reasonable suspicion standard for sniffer-dog searches” and proceeds to cite decisions from New York, New Hampshire, Alaska, Pennsylvania and one of the leading treatises on search and seizure that cites other state decisions. She also cites a U.S. Supreme Court

⁹⁵ *Id.*, at para. 133, citing (from Australia): *Law Enforcement (Powers and Responsibilities) Act 2002* (N.S.W.), ss. 145-150 (drug detection dogs), and ss. 193-196 (firearms and explosives detection dogs); *Police Powers and Responsibilities Act 2000* (Qld.), 2000, No. 6, ss. 34-39, as amended by *Police Powers and Responsibilities (Drug Detection Dogs) Amendment Act 2005* (Qld.), 2005, No. 63; *Australian Federal Police Act 1979* (Cth.), s. 12A; and Questions of Law Reserved (No. 3 of 1998) (1998), 71 S.A.S.R. 223 (S.C.). From the United States, see *Illinois v. Caballes*, *supra*, note 72; *People v. Dunn*, 564 N.E.2d 1054 (N.Y. Ct. App. 1990); *State v. Pellicci*, 580 A.2d 710 (N.H. Sup. Ct. 1990); *McGaham v. State*, 807 P.2d 506 (Alaska Ct. App. 1991); and *Commonwealth v. Johnston*, 530 A.2d 74 (Pa. Super. Ct. 1987).

⁹⁶ *Kang-Brown*, *supra*, note 9, at para. 133.

⁹⁷ See comments, *supra*, note 40, on the Condorcet Jury Theorem.

⁹⁸ See *Kang-Brown*, *supra*, note 9, at para. 15 (citing *Illinois v. Caballes*, *supra*, note 72, at 410-13, *per* Souter J., dissenting and New South Wales Ombudsman, *Discussion Paper: Review of Police Powers (Drug Detection Dogs)* (2004)).

decision.⁹⁹ The limited nature of her comparative inquiry is demonstrated by Deschamps J.'s practice of simply citing a U.S. Supreme Court decision, the decisions of four state high courts and a leading American treatise on the subject. There is no discussion of what these courts said in these cases, let alone why she found their decisions persuasive. Rather, Deschamps J. appears to be stacking up the foreign authority in order to support her conclusion by the weight of decisions of relevant and respected high courts.

Justice Bastarache also engages in a limited use of doctrinal comparativism. He begins by noting that sniffs are not even considered searches under the U.S. Constitution: “[i]t is the narrow specificity of the canine sniff search which led the United States Supreme Court to determine that it did not constitute a search within the meaning of the Fourth Amendment of the *United States Constitution*.” He then quotes two paragraphs from a 1983 U.S. Supreme Court decision.¹⁰⁰ Justice Bastarache is not willing to go this far in the Canadian context, but he finds the American jurisprudence relevant nonetheless:

Although I would not go so far as to say that the nature of the dog sniff renders it a “non-search” under the Canadian *Charter*, I do agree with the United States Supreme Court that a canine sniff is “much less intrusive” than other forms of police search.¹⁰¹

Finally, at the end of his opinion, Bastarache J. invokes the constitutional experience of other countries to support his doctrinal conclusion that sniffer dogs should be allowed to be used to perform random,

⁹⁹ See *United States v. Place*, *supra*, note 72, at 723, cited in *Kang-Brown, id.*, at para. 193.

¹⁰⁰ *Kang-Brown, id.*, at para. 238, citing *United States v. Place, id.*, at 707:

A “canine sniff” by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer’s rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here — exposure of respondent’s luggage, which was located in a public place, to a trained canine — did not constitute a “search” within the meaning of the Fourth Amendment.

¹⁰¹ *Kang-Brown, id.*, at para. 239.

generalized searches. He states: “Finally, I wish to note that several other countries already allow sniffer dogs to perform random, generalized searches” and proceeds to cite the United States, the Australian state of Queensland, the United Kingdom and New Zealand.¹⁰² Like Deschamps J., Bastarache J. simply cites these jurisdictions without any further elaboration, indicating that he attributes some persuasive value by the bare fact of the existence of the practice of generalized dog sniffing in these jurisdictions.

What we see in *Kang-Brown* and *M. (A.)* is a limited form of engagement with comparative law. Each judge does appear to see some relevance in the experience and the law of other countries but the nature of their respective comparative inquiries differs. Justices Deschamps and Bastarache use comparative law largely in a supporting role, to buttress their conclusion or to reinforce the empirical foundations for their legal conclusions.¹⁰³ Justice LeBel uses comparative law in an even more limited sense, to strike a cautionary note about the efficacy of sniffer dogs. Only Binnie J. seems prepared to engage the comparative materials in any depth, but even he devotes little time to examining opposing authority. And all of the judges focus the great bulk of their energies on the United States, understandably so given the connections between our section 8 jurisprudence and the American Fourth Amendment, as well as the sheer volume of comparative experience south of the border. However, even the casual references to Australia, New Zealand and England indicate the existence of potentially relevant sources elsewhere. These references remain unexplored, raising more questions than they answer. From the most extensive use of comparative law in the 2008 Term, I now turn to a most unusual use of it.

¹⁰² *Kang-Brown, id.*, at para. 253:

Finally, I wish to note that several other countries already allow sniffer dogs to perform random, generalized searches. As has been previously mentioned, the United States Supreme Court held that dog sniffs are not “searches” under the Fourth Amendment, and random use of sniffer dogs is therefore permissible in that country. In Queensland, Australia, legislation allows drug dogs to search, without a warrant, at licensed premises; at any place at which a sporting, recreational, entertainment, or “special” event is being held; and at any “public place” (*Police Powers and Responsibilities Act 2000* (Qld.), 2000, No. 6, ss. 34 to 36). The use of sniffer dogs is also common practice in the United Kingdom and New Zealand.

¹⁰³ On the use of comparative law in this respect see Groppi, *supra*, note 68.

IV. COMPARATIVE ANOMALY? *CANADA V. KHADR*

The legal proceedings surrounding Omar Khadr have become well known. They are the subject of countless news profiles, a book and an organized campaign to repatriate the notorious Canadian youth detained by the American government since 2002 at Guantanamo Bay, Cuba.¹⁰⁴ Khadr was one of the first “detainees” to be tried by the military commissions set up by the Bush government, although that trial was adjourned indefinitely as part of President Obama’s suspension of military commissions in one of his first acts as President of the United States.¹⁰⁵ The Supreme Court of Canada case involved the attempt by Khadr’s Canadian lawyers to obtain disclosure of the records of interviews conducted by Canadian officials of Khadr at Guantanamo. In a short decision authored by “The Court”, the Court ordered such disclosure, distinguishing its 2007 decision in *R. v. Hape* which held that the Charter does not apply to the conduct of Canadian agents operating outside of Canada, unless there are clear violations of international law.¹⁰⁶ According to the *Khadr* Court, the crux of the issue was whether Khadr was being held in conformity with Canada’s international obligations. If so, the Charter would have no application. If Canada was participating in a process that violated “Canada’s binding obligations under international law”, then the Charter would apply “to the extent of that participation”.¹⁰⁷

The Supreme Court thus articulated the critical issue as being whether Khadr’s detention complied with international law. Because the U.S. Supreme Court had pronounced on this issue, the Supreme Court of Canada reviewed its decisions. Thus, the *Khadr* Court reviewed

¹⁰⁴ See, e.g., Michelle Sheppard, *Guantanamo’s Child: The Untold Story of Omar Khadr* (Toronto: John Wiley, 2008); “The Omar Khadr Project”, online: <<http://www.omarkhadrproject.com/>>; “He Was 15”, online: <<http://www.hewas15.com/>>; University of Toronto Faculty of Law, “The Omar Khadr Page”, online: <http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/3/4/0/0&contentId=1617>; Amnesty International, “Bring Omar Khadr to Justice. Bring him to Canada”, online: <http://www.amnesty.ca/take_action/actions/canada_bring_khadr_justice.php>.

¹⁰⁵ See “Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities”, Executive Order 13492 of January 22, 2009, 74: 16 Federal Register 4897.

¹⁰⁶ [2007] S.C.J. No. 26, [2007] 2 S.C.R. 292 (S.C.C.). For comment and analysis on this case see Donald J. Rennie & Ramona Rothschild, “The *Canadian Charter of Rights and Freedoms* and Canadian Officials Abroad” (2009) 47 S.C.L.R. (2d) 127 and Kent Roach, “When Secret Intelligence Becomes Evidence: Some Implications of *Khadr* and *Charkaoui II*” (2009) 47 S.C.L.R. (2d) 147.

¹⁰⁷ *Khadr*, *supra*, note 9, at para. 19.

the U.S. Supreme Court decisions in *Rasul v. Bush*¹⁰⁸ and *Hamdan v. Rumsfeld*.¹⁰⁹ In *Rasul*, the U.S. Supreme Court held that non-U.S. citizen Guantanamo detainees like Khadr could challenge the legality of their detention by way of the statutory right to *habeas corpus*. In *Hamdan*, the U.S. Supreme Court held that procedural rules for military commissions established by executive order violated both the American Uniform Code of Military Justice as well as the *Geneva Conventions*. The *Khadr* Court used foreign law not in a comparative sense but for the direct consequences of its holding: for the finding by the U.S. Supreme Court that *American* action had violated international law. From this finding, it found that the participation of Canadian officials in interviewing Khadr at Guantanamo implicated them in a violation of international law.

As Patrick Monahan has noted, the situation in *Khadr* was unusual because it involved a prior ruling by the U.S. Supreme Court on the particular issue before the Supreme Court: the legality of the proceedings under international law.¹¹⁰ A decidedly different circumstance would arise in the absence of such a prior finding. More interesting and potentially problematic from a number of perspectives would be if the U.S. Court had found no violation of international law in these proceedings. To what extent would the Supreme Court of Canada have deferred to such findings or engaged in its own independent analysis? This raises the possibility of high courts of different countries reaching different conclusions on the interpretation of international law to the same proceedings. This would certainly be an international judicial dialogue, albeit a loud and messy one.

The use of foreign law in *Khadr* is thus decidedly different than in the sniffer dog cases. In some ways it resembles private international law cases involving the enforcement of foreign judgments where a Canadian court examines the law in a foreign jurisdiction because it has direct bearing on the issues before the Canadian court.¹¹¹ Moreover, *Khadr* demonstrates the increasing entanglement of international law and foreign law in domestic constitutional issues. Finally, we turn to the last example of the (non-) use of comparative law in 2008 — the most important equality decision in a decade.

¹⁰⁸ 542 U.S. 466 (2004) [hereinafter "*Rasul*"].

¹⁰⁹ 126 S.Ct. 2749 (2006) [hereinafter "*Hamdan*"].

¹¹⁰ See Patrick J. Monahan & James Gotowiec, "Constitutional Cases 2007: An Overview" (2008) 42 S.C.L.R. (2d) 3, at 13-14.

¹¹¹ See, e.g., *Beals v. Saldanha*, [2003] S.C.J. No. 77, [2003] 3 S.C.R. 416 (S.C.C.) (enforceability of a Florida judgment by a Quebec court).

V. OPPORTUNITY MISSED: *R. v. KAPP*

R. v. Kapp is certainly one of the most significant constitutional cases of the 2008 Term if not the decade. In *Kapp*, the Supreme Court appeared to turn its back on its 1999 *Law* decision and its problematic multi-contextual dignity analysis.¹¹² The Court harkened back to the beginning of its section 15 analysis, returning to its 1989 decision in *Andrews v. Law Society of British Columbia*.¹¹³ *Kapp* is remarkable on many different levels and will continue to be the subject of much analysis for some time. Here I wish to focus solely on one aspect of it: its use of comparative law. Or, to be more precise, its absolute failure to use comparative law. There is no comparative law in *Kapp* and this was an opportunity missed for reasons described below.

In *Kapp*, a group of commercial fishers challenged the federal government's Aboriginal Fisheries Strategy in British Columbia, which granted a communal fishing licence to three Aboriginal Bands permitting fishers designated by the Bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The commercial fishers asserted that the granting of such licences violated their equality rights under section 15(1) of the Charter. The Court upheld the program as a valid ameliorative program under section 15(2) of the Charter and further elaborated on the relationship between the two subsections of section 15.¹¹⁴ Most notably, however, the Court acknowledged the deficiencies in the *Law* analysis and harkened back to *Andrews*.¹¹⁵

The place of and for comparative law in *Kapp* is intertwined with the larger narrative of the case. Given the criticism of *Law* from the bar and the academy, it is not surprising that the Supreme Court would elect to reconsider the complicated multi-factored framework set out in that case. However, the Court gave no indication prior to rendering its decision that

¹¹² *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 10, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter "*Law*"]. For academic criticism of *Law*, see the sources cited in *Kapp*, *supra*, note 10, at para. 22, notes 1 and 2. I acknowledge that this interpretation of *Kapp* is contested and that some interpret *Kapp* as a natural progression from *Law*. How one views *Kapp* is important not only for one's view of the interpretative framework under s. 15 of the Charter but also for the role of comparative law in *Kapp* and under s. 15.

¹¹³ [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.) [hereinafter "*Andrews*"]. A 2009 decision appears to confirm the abandonment of *Law* and return to the *Andrews* framework. See *Ermieskin Indian Band and Nation v. Canada*, [2009] S.C.J. No. 9, 2009 SCC 9 (S.C.C.).

¹¹⁴ For more discussion of *Kapp*, see Michael H. Morris & Joseph K. Cheng, "*Lovelace* and *Law* Revisited: The Substantive Equality Promise of *Kapp*" (2009) 47 S.C.L.R. (2d) 281.

¹¹⁵ See *Kapp*, *supra*, note 10, at paras. 14-24.

it was considering revisiting *Law* in *Kapp*.¹¹⁶ To be sure, the Court did not overrule or expressly disavow *Law* in *Kapp* and one interpretation of *Kapp* is of incremental change to the section 15 framework rather than of wholesale doctrinal change.¹¹⁷ I do not believe, however, that this is the best reading of the Court's decision in *Kapp* and the Supreme Court's subsequent pronouncements in the area support the contention that, at the least, *Law* has been shelved for the meantime.¹¹⁸

The return to the *Andrews* framework was highly significant. However, it was accompanied by minimal analysis of other possible approaches to the interpretation of section 15. This failure to consider and evaluate other doctrinal approaches to equality in *Kapp* does reveal, however, the positive role that comparative law can potentially play in constitutional adjudication. The lack of transparency in the *Kapp* judgment is problematic. In many ways, the judgment raises more questions than it answers. We do not know why the Court decided to revisit *Law* in this case. We do not know why the Court did not ask the parties or the intervenors to address this issue in their factums or at the hearing.¹¹⁹ We do not know what other competing frameworks for section 15 the Court considered. It is clear that the Court must have explicitly turned its mind to the issue of the appropriate rubric for section 15 analysis; it just did not disclose this process in its reasons. A fuller canvassing of the alternative approaches to the interpretation of equality could have answered some of these questions and strengthened the legitimacy of the Court's reasons in *Kapp*.

The use of comparative law would have been particularly appropriate in this case because the line from *Kapp* to *Andrews* is not a direct one. Much has transpired jurisprudentially and contextually between *Andrews* in 1989 and *Kapp* nearly two decades later. Brian Dickson was still Chief

¹¹⁶ As Counsel for the intervenor Attorney General of Ontario in *Kapp* explained, no party raised the issue of revisiting the *Law* framework for s. 15 in their factums, nor did the Court query any of the parties or the intervenors on this issue at the hearing. See Sarah T. Kraicer, "R. v. *Kapp*: Aboriginal Fishing, *Andrews* and Affirmative Action in the Supreme Court of Canada" (2009) 25 N.J.C.L. 153, at 155 (asserting that *Kapp* provided an opportunity for the Court to respond to some of the critical commentary about *Law* — that it is overly complex and unduly focused on the difficult concept of "human dignity". "[N]one of the parties before the court, however, had raised these concerns with the *Law* analysis").

¹¹⁷ On the idea of judicial minimalism, see Cass R. Sunstein, "Incompletely Theorized Agreements" (1995) 108 Harv. L. Rev. 1733 and Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge & London: Harvard University Press, 1999).

¹¹⁸ See *Ermineskin Indian Band and Nation v. Canada*, *supra*, note 113, in which the Supreme Court does not mention *Law* and refers only to *Andrews* for the s. 15 framework of analysis.

¹¹⁹ See *supra*, note 110.

Justice and not a single member of the current Supreme Court had yet been appointed to Ottawa.¹²⁰ Jurisprudentially, the Court has struggled with the interpretation of equality for 20 years. Methodologically, much has been written about equality analysis since then.¹²¹ Socially, hopes of ameliorating inequality through section 15 have mellowed, some would say dashed.¹²²

Turning to the broader international context of equality, since 1989, South Africa has enacted a Constitution with a Bill of Rights significantly influenced by the Charter and New Zealand now also has a (statutory) Bill of Rights with an even stronger Canadian influence. Canadian equality decisions — including *Andrews* — have been studied, cited, adopted, distinguished and disapproved by courts in these countries.¹²³ While the Supreme Court in *Kapp* took note of the academic criticism of *Law*, it did not consider other various possibilities, preferring instead to wipe clean the 20-year slate of equality jurisprudence and return to 1989. Comparative analysis could have shown how Canadian equality decisions have been received in other jurisdictions and how other countries approach this “most difficult right”.¹²⁴ Comparative analysis could have also responded to some of the questions raised by the *Kapp* decision. Following the advice of the Chief Justice from 2001, comparative analysis could have been used “to survey the general geography” before the Court set off to “chart a new road and lay down the heavy pavement”.¹²⁵

¹²⁰ In fact, McLachlin J. (as she then was) authored the lower court decision in *Andrews* which the Supreme Court of Canada rejected. *Andrews* was decided in February 1989 and McLachlin J. was appointed to the Supreme Court the next month.

¹²¹ There are many articles and numerous books. See, e.g., papers contained in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006); *Journal of Law and Equality*; and the ongoing Women’s Court of Canada project published in the *Canadian Journal of Women and the Law*.

¹²² See generally the papers contained in Sheila McIntyre & Sanda Rogers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham, ON: LexisNexis Canada, 2006) (papers by Bruce Porter, Margot Young, Mayo Moran, Sheila McIntyre, Sonia Lawrence, Dianne Pothier, Yves Le Bouthillier, Sunera Thobani, Lee Lakeman, Nathalie Des Rosiers, Pearl Eliadis, Coleen Sheppard, Sanda Rogers, Hester Lessard, Shelley Gavigan, Pauline Rosenbaum & Ena Chadha, David Schneiderman and Mary Eberts).

¹²³ See *supra*, note 3.

¹²⁴ The Rt. Hon. Beverley McLachlin, P.C., “Equality: The Most Difficult Right” (2001) 14 S.C.L.R. (2d) 17, at 20-25 (reviewing equality analysis of other countries).

¹²⁵ *Id.*, at 27. See also *id.*, at 26 (“we may find it useful to look abroad”).

VI. TENTATIVE CONCLUSIONS AND FURTHER QUESTIONS

The cases from the 2008 Supreme Court Term necessarily only provide a snapshot of the Court's use of comparative law in constitutional cases. Further qualitative and quantitative work is needed in order to provide a fuller account of the Court's use of comparative law.¹²⁶ However, the cases from the Court's 2008 Term do provide the opportunity for some tentative conclusions and raise a number of further questions for consideration.

First, the Court's use of comparative law was limited. Essentially, it only truly engaged in comparative analysis in two companion cases which are better viewed as a single constitutional double-feature. In these cases most of the comparative analysis was undertaken by a single judge, Binnie J., and most of the comparative attention was focused on a single jurisdiction, the United States. With the exception of one reference to a 2005 U.S. Supreme Court case, all of these American references were to cases of the Rehnquist or Burger courts, to judges now retired or deceased. Together, these features give pause to talk about an ongoing "international judicial dialogue".

Second, the Court's use of comparative law in the 2008 constitutional cases raises questions about the future prospects of the Court's international influence. I began this paper with references by the Minister of Justice and others to the influence of the Charter and the Supreme Court of Canada on countries such as Israel, South Africa and New Zealand. With the exception of a sole passing reference to New Zealand, these jurisdictions were not mentioned in the limited comparative analysis undertaken by the Supreme Court in 2008. If influence is a function of the willingness to engage with other countries,¹²⁷ reciprocity may be lacking at the Supreme Court of Canada and may portend a future decline in its international influence.

Finally, *Khadr* and *Kapp* each in their own way demonstrate possibilities for future comparative engagement. With increasing globalization and international entanglements, whether that be sniffer dogs or Canadians detained abroad, Canadian courts will likely be called upon to review relevant decisions of foreign tribunals. While this may raise the potential for conflict, it also creates the possibility of, if not the necessity for, deeper engagement with comparative constitutional law.

¹²⁶ In this respect see McCormick, "American Citations", *supra*, note 9.

¹²⁷ See L'Heureux-Dubé, "The Importance of Dialogue", *supra*, note 31.

