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Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990

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Introduction

Readers of court judgments will have observed that in the course of expressing reasons for the decisions they reach, judges commonly refer to books and articles written by academics. This is not surprising. Many scholarly publications contain information, arguments and opinions pertinent to the choices that judges must make, and lawyers commonly refer to such works in the written and oral arguments they present to courts. We would therefore expect the judges who must assess and respond to such arguments to make mention of that scholarly material. Moreover a certain portion of academic writing—in particular, a preponderance of law review articles—is written as more or less direct exhortation to judges about how to decide cases expected to come before them.[1] Possibly this is no more than a rhetorical stance, for it may be that law professors are really writing to other law professors (or to no one), and that the practice of pretending to talk to appellate courts is simply a stylistic device which they ritualistically, perhaps unthinkingly, adopt. But presumably some portion of the writing that legal scholars ostensibly direct at judges is actually intended to be read by them and to influence the decisions they make. In any event, given the amount of writing couched as advice to judges, the amount of writing on legal matters generally, and lawyers' practice of citing such material in argument, it comes as no shock to see that judges make reference to academic publications in their judgments.

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1. It is remarkable how much legal academic writing is directed to judges, particularly appellate ones, as opposed to the relatively small amount directed at legislators and administrators. For a helpful recent discussion of the audience for law review articles see S. Levinson, "The Audience for Constitutional Metatheory (Or, Why, and to Whom, Do I Write the Things I Do?)" (1992), 63 U. Colo. L. Rev. 389. See also the comments on Levinson's paper by D. Ebel, P. Bobbitt and P. Schlag in the same issue of that journal.

Although there has been research on this phenomenon in American courts,[2] we know of no published work which attempts to look in a systematic way at the practice of judicial citation of academic writing in Canada. Some studies in this country, such as the *Arthurs Report*,[3] have made a few remarks on the subject, and in 1950 George Nicholls published some fascinating observations,[4] but there is a lack of published material approaching the subject in a quantitative fashion. What follows is an initial attempt at an empirical examination of forensic citation of scholarly writing in Canada. We focus on a limited recent period of time and on the judgments of just one court, the Supreme Court of Canada.

Methodology

We start with some remarks on taxonomy and methodology. While an important functional unit of our study was Supreme Court decisions, a more important and more frequently used unit was the judgment. Throughout this paper we use the term 'judgment' to denote a separate set of reasons written by an individual judge or group of judges. Generally a judgment has only one author, though occasionally two or more judges put their names to a particular set of reasons. It is important to distinguish judgments from decisions. A decision (or case) is one or more judgments that comprise the totality of the Court's published reasoning in a particular matter. Thus a unanimous decision contains just one judgment, to which all of the judges who heard the matter subscribe. A non-unanimous decision, on the other hand, comprises more than one judgment and represents a difference of opinion among the judges, even if the judges all eventually reach the same result.

We searched Supreme Court cases for citations of academic writing, compiling separate data for individual judgments and for co-authored judgments. In attributing citations we ignored any judges who concurred in a particular judgment. That is, if Justice A wrote a one-sentence

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2. W. Daniels, "'Far Beyond the Law Reports': Secondary Source Citations in United States Supreme Court Opinions, October Terms 1900, 1940, and 1978" (1983), 76 Law Library J. 1; C. Newland, "Legal Periodicals and the United States Supreme Court" (1959), 7 Kansas L. Rev. 477; J. Schurlock, "Scholarship and the Courts" (1964), 32 UKMC L. Rev. 228; L. Siroco and J. Marguiles, "The Citing of Law Reviews by the Supreme Court: An Empirical Study" (1986), 34 U.C.L.A. L. Rev. 131; and N. Bernstein, "The Supreme Court and Secondary Source Material: 1965 Term" (1968), 57 Georgetown L. J. 57.

3. Consultative Group on Research and Education in Law, *Law and Learning*, Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law, (Chair, H. W. Arthurs, 1983), pp. 62-3.

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

judgment which said only that she concurred in the judgment written by Justice B, then even if Justice B's reasons contained a number of citations of academic authority we did not consider Justice A to have cited any such authority. In other words, our focus was on the authors of the judgments in question and not on judges who merely expressed agreement with those authors.

For each of the Court's decisions from 1985 to 1990 inclusive, we compiled information about the author(s) of the judgment(s), giving us a database of 620 cases comprising 993 separate judgments. We also collected data about which academic authorities were cited in each judgment. In addition we compiled information about whether a decision was unanimous or non-unanimous, whether an issue concerning the *Canadian Charter of Rights and Freedoms* was raised, and whether the case involved Québec's *Civil Code*. Where possible, we identified the gender of the authors being cited. All of this information we entered into a database, from which we produced the reports appearing in this article.

As our study developed, we were forced to make a number of judgment calls about the ways in which we would collect our data. So, for example, we decided that certain types of cases reported in the *Supreme Court Reports* would not qualify as decisions and would not be included in our study. These cases involved such matters as an application to vary an order refusing leave to appeal, an application for an extension of time to apply for leave to appeal, an application to quash an appeal, a rehearing on the issue of costs, and various motions and orders relating to the Court's internal procedures. In short, we chose to focus only on those Supreme Court decisions relating to the merits of the disputes brought before the Court.

We also had some difficulty deciding what would constitute an 'academic', 'secondary' or 'scholarly'—we use those adjectives interchangeably—authority. Some of the works cited by the judges of the Court were clearly non-academic and were therefore excluded from our study. Examples include works of fiction,[5] non-legal encyclopediae, edited collections of public documents, United Nations resolutions, and non-legal dictionaries. Other works fell more nearly on the borderline.

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5. In excluding from our study references to works of imaginative literature we do not mean to imply that we consider them irrelevant to 'the law'. They are, and for a very amusing analysis of this point see D. Fraser, "The Owls Are Not What They Seem: David Lynch, the Madonna Question, and Critical Legal Studies" (1993), 18 Queen's L. J. 1. In our view, however, when Supreme Court judges drop a reference to *Bleak House* or *The Merchant of Venice*, they think they are doing something different than what they do when they quote Peter Hogg's *Canadian Constitutional Law*, and the activity which is the subject of this paper is the latter.

Ultimately we excluded political speeches (including references to Hansard), legal dictionaries, committee proceedings, and professional handbooks such as the Canadian Institute of Chartered Accountants' Handbook and the Canadian Bar Association's *Code of Professional Conduct*. On the other hand, we included the *Canadian Encyclopedic Digest, American Jurisprudence, Corpus Juris Secundum*, and United Nations studies and reports.

On a related matter, we encountered some metaphysical problems concerning issues of identity with respect to a particular authority. In particular, we wondered whether multiple editions of a textbook, some with different authors, were all to count as the *same* authority. Many of the major legal texts undergo a number of revisions over the years, with new authors being substituted as the original authors retire or pass away.[6] Ultimately we decided that multiple editions of a work constitute one authority, and that such a work's original authors are its only authors.

A Canadian twist on this problem is whether a work published in both French and English nevertheless remains the same authority. In some cases the same work would be cited by some judges in French (usually the original) and by other judges in English (usually a translation). We had less difficulty with these works: we treated them as the same authority. We also treated corporate authors, such as law reform commissions, as single authors.

Having determined what would constitute an authority, we also had to decide what would count as a *citation* of any particular authority. One problem that arose on several occasions was the difference between a judge's simply *mentioning* an authority and a judge's actually *relying* on one. Where a judge referred to an authority and relied on that authority to make a point, we counted the reference as a citation. On the other hand, when a judge referred to an authority in the course of recounting or summarizing the decision of the lower courts, but did not use the authority in giving his or her own opinion, we did not count it. The difficult cases were where a judge referred to an authority in giving his or her own opinion but did not explicitly rely on it. In those cases, we assumed that the inclusion of an authority was meant to buttress the judge's argument, or at least to import into it some meaning beyond the mere description of another court's activity, so we counted them as citations. We contemplated drawing a distinction between those instances when judges expressed agreement with a work they were citing and those where they

6. See, for example, the many editions of Cheshire & Fifoot's *Law of Contracts* and Laskin's *Canadian Constitutional Law*.

expressed disagreement, but in the end we decided that such a distinction would be too difficult to implement. There are a great many instances where judges merely state that they have read a certain book or article on the subject before them, without otherwise telling us whether they agreed or disagreed with it. Likewise they often cite or quote a secondary source and then express some partial agreement, or say that while they do not wholeheartedly endorse it they found it to be helpful. In short, we encountered a wide variety of nuances of judicial reaction to the scholarly sources judges mentioned, and we ultimately decided to attempt no distinction among them.

In enumerating citations of academic authority, we laid down an arbitrary rule that a work could be cited only once per judgment. Thus, if Dickson C.J.C. cited Hogg's *Canadian Constitutional Law* three times in the same judgment, we counted that as just a single citation. On the other hand, if within the same case two or more judges cited Hogg's book in separate judgments, we attributed each judge with one citation of that book. Thus while a work could be cited only once per judgment, it might be cited several times in a given decision.

Final issues we had to consider were how to distinguish between *Charter* and non-*Charter* decisions, and between *Civil Code* and non-*Civil Code* decisions. In some cases, one of the parties would raise a *Charter* issue but the Court would reach its decision without resort to the *Charter*. We wondered whether such decisions should count as *Charter* decisions or whether we should only include cases actually decided on the basis of the *Charter*. Ultimately we decided that any case in which a *Charter* issue was raised would count as a *Charter* decision, regardless of whether the Court relied on the *Charter* in reaching its decision. We were similarly inclusive with *Civil Code* decisions. We included in that category any case on appeal from the courts of Québec in which a *Civil Code* issue or argument was raised. We did not, however, include in the *Civil Code* category all Québec cases dealing with private law. So appeals from Québec courts dealing with federal private law (bankruptcy, for example) or with Québec legislation apart from the *Civil Code* (for example, its statutes dealing with labour relations and consumer protection, or its *Code of Civil Procedure*) were not included in the *Civil Code* category unless the *Civil Code* was also mentioned.

Results

Our initial observation is that, while the Supreme Court as a whole is quite consistent in its frequency of academic citation over the period in

question, the practice of individual judges vis-à-vis other judges varies considerably.

First the Court as a whole. The Court cited academic authority in just under half the decisions it rendered (298 out of 620 = 48%). As Table 1 shows, 40% of the 993 judgments written by members of the Court featured at least one mention of a scholarly source. Of course many of those contained more than one citation, and the average number of citations per judgment was 2.0. If we isolate just those judgments in which there is some mention of secondary authority and check for the frequency of academic citation in them, then, as the lower right-hand box in Table 1 shows, the average number of such references during the six-year period was 5.3.

Table 1
Citation Record of the Supreme Court of Canada by Year, 1985-90

	Total judgments	Percent of judgments with citations	Total cites	Average # of cites per judgment	Average # of cites per judgment with cites
1985	112	35.7% (40)	208	1.9	5.2
1986	117	44.4% (52)	205	1.8	3.9
1987	152	35.5% (54)	276	1.8	5.1
1988	155	38.7% (60)	284	1.8	4.7
1989	207	42.5% (88)	382	1.8	4.3
1990	250	41.2% (103)	659	2.6	6.4
Total 1985-90	993	40.0% (397)	2,014	2.0	5.3

It is possible to arrive at differing assessments of these general data as to frequency of citation of academic sources; some persons may be surprised at how commonly the Court cites such sources, while others may lament that the Court does not refer to such materials more often. Certainly there is academic writing on virtually every issue which comes before the Supreme Court, so the fact that such works are mentioned in only 48% of cases and just 40% of individual judgments may be construed as indicating that in the majority of instances the members of the Court were either unaware of that scholarship or simply did not find it necessary or helpful to their deliberations. On the other hand, it should be noted that a significant number of the Court's decisions are very brief and say little more than that the Court dismisses the appeal and agrees with the reasoning of the court(s) below. Such decisions display no detailed reasoning and of course contain no citations (academic or

otherwise), but they counted as judgments for the purposes of this study.[7] If such decisions were removed from consideration, one could say of those remaining Supreme Court decisions which do display detailed reasoning that academic authority is cited more often than not.

Regardless of whether one considers the rate of citation in this six-year period to be high or low, it represents a notable increase over the rate that prevailed a generation earlier, a period when, as the *Arthurs Report* noted, "[l]egal treatises and articles were seldom cited in argument or referred to in judgments".[8] While the focus of this study was not principally an inter-temporal one, we did undertake limited examinations of the *Supreme Court Reports* for 1957, 1967 and 1977 so that some comparison might be made with the period on which our study mainly focuses. A perusal of the *Supreme Court Reports* for 1957 revealed that in that year just 15% of decisions therein (10 out of 66) made any mention of secondary writing.[9] Ten years later things had not changed: the *Supreme Court Reports* for 1967 contain citations only in 13.3% decisions (12 out of 90). Another decade on, the Court's citation rate showed only a modest increase: the *Supreme Court Reports* for 1977 reveal citations in 21.6% of the decisions (35 out of 162). By this historical measure, the fact that 48% of decisions in the 1986-1990 period display citations to secondary authority reveals that in the span of a generation the frequency of reference to scholarly writing has more than tripled.

Within the six-year period under consideration there is little indication of significant temporal change in the percentage of judgments which

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7. We contemplated trying to differentiate these judgments so that we could then focus exclusively on the lengthier ones, but there seemed no obvious dividing line between short and long judgments. Some are only two or three sentences long (and rarely contain citations), others are two or three paragraphs, others two or three pages, and so on. Ultimately we decided not to attempt any classification into short and long judgments.

8. *Supra*, note 3, at p. 65. The quotation comes in a passage describing the state of Canadian legal scholarship previous to the expansion of law faculties in the 1960s and 1970s. The *Arthurs Report* goes on to note that this was a period in which "the view prevailed in some quarters that living authors could not be cited [in court]." (p. 65) For further discussion of this see G. V. V. Nicholls, *supra*, note 4.

9. Most of those references were brief, and five of the ten decisions which contained references to academic writing were cases dealing with the Québec *Civil Code*, where the use of doctrine is a long established tradition. See *infra* at Table 4 and accompanying text. Note that our enumeration of the frequency of citation in the *Supreme Court Reports* for 1957, 1967 and 1977 did not look at individual judgments, did not take note of which judges made reference to secondary authority, and did not take note of which authors were cited. It merely made note of which decisions contained references to academic sources and which did not. It should also be noted that the *Supreme Court Reports* for 1957 and 1967 did not report all judgments handed down by the Court for that year, whereas the S.C.R.s for 1977 and for the ten-year period covered by our study did include virtually all decisions made by the Court in the respective years.

mentioned academic authority. As the third column in Table 1 shows, the portion of judgments which cited such authority hovered around 40% in each of the six years. As the fourth column reveals, the raw number of citations per year did show a general increase. However this is attributable to the fact that the number of judgments per year increased, more than doubling between 1985 and 1990, principally due to the fact that the number of decisions increased over that period. In other words, in the six-year period we looked at, the number of academic citations increased only because the number of judgments and decided cases increased. Despite the considerable change in the composition of the Court during the time in question, the average number of citations per judgment remained remarkably stable at about 1.8 over the first five years of the six-year period, and jumped significantly only in the final year.

In addition to examining the work of the Supreme Court as a whole, we looked at the behaviour of its members. Several individual judges—Beetz, Chouinard, Cory, Estey and Le Dain JJ., and Dickson C.J.—cite secondary authority with a frequency approaching the Court's norm. Not surprisingly, however, others adopt a practice which departs from the norm. As the third column of Table 2 demonstrates, some judges refer to secondary sources far more frequently than do others.

The judge with the greatest propensity to cite academic authority during the years in question was L'Heureux-Dubé J., who did so in 58.9% of her judgments. Although six judges (Wilson, Lamer, La Forest, McIntyre and Sopinka JJ., and Dickson C.J) wrote more judgments than did L'Heureux-Dubé J., only one (Wilson J.) made a greater number of references to secondary sources. Not only did L'Heureux-Dubé J. refer to secondary authority in a higher percentage of her judgments than any other judge—58.9% compared to 38.8% for the Court as a whole without her—she also cited more frequently in those judgments. For example, La Forest J. referred to academic authority in almost the same percentage of his judgments (56.1%) as did L'Heureux-Dubé J. However, as the right-hand column of Table 2 shows, those judgments by L'Heureux-Dubé J. which did feature academic citations contained on average 72.5% more citations than did those judgments by La Forest J. containing citations: 8.8 for L'Heureux-Dubé J., 5.1 for La Forest J.

At the other end of the scale, judgments written by Lamer J. were the least likely to make mention of secondary sources, doing so just 25.7% of the time. However when he did choose to refer to academic writings Lamer J. did not hold back: those of his judgments which did cite scholarly writing made reference to an average of 4.8 different sources, more than any other judge except L'Heureux-Dubé, La Forest and Wilson JJ., and Dickson C.J.

Table 2
Citation Record of Individual Judges, 1985-90

	Total judgments	Percent of judgments with citations		Total cites	Average # of cites per judgment	Average # of cites per judgment with cites
Beetz	50	38.0%	(19)	84	1.7	4.4
Chouinard	17	41.2%	(7)	32	1.9	4.6
Cory	37	40.5%	(15)	38	1.0	2.5
Dickson	107	38.3%	(41)	239	2.2	5.8
Estey	35	42.8%	(15)	64	1.8	4.2
Gonthier	17	47.0%	(8)	56	3.3	4.3
L'Heureux-Dubé	56	58.9%	(33)	290	5.8	8.8
La Forest	98	56.1%	(55)	284	2.9	5.1
Lamer	136	25.7%	(35)	168	1.2	4.8
Le Dain	38	36.8%	(14)	64	1.7	4.5
McIntyre	81	32.1%	(26)	99	1.2	3.8
McLachlin	41	51.2%	(21)	77	1.9	3.7
Sopinka	70	34.2%	(24)	77	1.1	3.3
Wilson	147	51.7%	(76)	388	2.6	5.1
Mixed[10]	63	12.7%	(8)	52	.8	6.5
SCC total	993	40.0%	(397)	2,014	2.0	5.3

This distinction between the percentage of judgments which contain citations and the tendency to cite a lot is significant. For example Dickson C.J. was slightly less likely than other members of the Court to write reasons featuring references to academic sources, doing so in just 38.3% of his judgments. But when he did decide to deliver a judgment displaying references to scholarly authority, the former chief justice cited an average of 5.8 different sources, more than anyone except L'Heureux-Dubé J. By way of contrast, McLachlin J. might be categorized as a judge who is more likely than not—and more likely than the average member of the Court—to cite secondary authority, but who is unlikely to cite a wide range of such sources: fully 51.2% of her judgments contain citations, but those of her judgments which do include cites display fewer on average (3.7) than anyone except those by Sopinka and Cory JJ.

While we were compiling our data we wondered whether the Court's citation practice might be affected by the judges' clerks. Some American studies, for example, have suggested that the tendency of the United States Supreme Court to cite the Harvard Law Review more than any other legal periodical might be attributable to the fact that a dispropor-

10. We described as 'mixed' those judgments written by more than one judge. Such judgments did not figure in the data for individual judges but are included in the data collected for the court as a whole.

tionate number of the judges' clerks are graduates of Harvard Law School.[11] We were unable to determine from our data whether clerks at the Supreme Court of Canada have any effect on *which* sources are cited, though it seems reasonable to think that the clerks might have some effect by bringing certain sources to the judges' attention while deciding that other sources discovered in their research are not useful or relevant. We also wondered whether the judges' clerks had any effect on frequency of citation. During the period of our study Supreme Court judges had more than one clerk (two from 1985-1988 and three thereafter), so even if the clerks did have a significant impact on frequency of citation this impact would not likely be revealed by our data unless all the clerks of a given judge were influencing citation rates in the same direction—either upward or downward. Even if a judge's clerks were capable of having such a collective influence, however, we found no significant variations in annual citation rates. As Table 1 showed, there were no significant variations for the Court as a whole, and while we have not reproduced here a year-by-year breakdown of data for each judge our observation is that most judges are consistent from year to year. Table 3 sets out the six-year breakdown for academic citation by Dickson C.J., whose consistency over time is characteristic of the other judges.

Table 3
Citation Record of Dickson C.J., 1985-90

	Judgments	Judgments with cites	Total cites	Average # of cites per judgment	Average # of cites per judgment with cites
1985	19	6	35	1.8	5.8
1986	12	6	32	2.6	5.3
1987	19	6	39	2.0	6.5
1988	22	8	38	1.7	4.8
1989	15	8	37	2.5	4.6
1990	20	7	58	2.9	8.2
Total	107	41	239	2.2	5.8

While this table reveals some variation from year to year, there is far less annual fluctuation than one would expect to observe if the frequency of that judge's reference to secondary sources was heavily influenced by his clerks. Similarly, L'Heureux-Dubé J., a frequent and prolific citer, was consistently so; her citation rate was above the Court average for each

11. See W. Daniels, *supra*, note 2, at 15-16 and N. Bernstein, *supra*, note 2, at 67.

of the six years. And in each of the six years judgments written by Lamer J. were less likely than those of the Court as a whole to contain a reference to secondary authority. In short, we did not find much evidence to suggest that the identity of a judge's clerk had any great influence on that judge's propensity to mention academic writings in his or her judgments.

Some interesting observations emerge from examinations of various groupings of judges. The three judges who before their appointment to the bench had worked as full-time legal academics (Beetz, La Forest and Le Dain JJ.) cited in 47.0% of their judgments, while those who had not pursued academic careers cited in 40.1%. Thus, while the sample is not large, one can tentatively suggest that the fact that before elevation to the bench a judge has worked as a legal academic may increase the likelihood that that judge will write decisions containing references to scholarly publications.

Likewise a judge's gender appears to have an effect on citation behaviour. The three female judges were among the four most frequent citers on the Court. Those three (McLachlin, L'Heureux-Dubé and Wilson JJ.) cited academic authority in 53.3% (130/244) of the judgments they wrote; the males in just 38.2% (259/678).

One might expect that the Québec judges as a group would be more frequent in their reliance on academic authority than their common law counterparts, for theory has it that *la doctrine* is a significant source of law in the civil law tradition while in the common law tradition it is merely a guide. However as a group the Québec judges (Beetz, Chouinard, Gonthier, L'Heureux-Dubé and Lamer JJ.) cited in only 36.9% of their judgments, while the others cited in 43.9% of theirs. However if one isolates the relatively small number of judgments dealing with Québec's *Civil Code*, those judgments—almost all of which are written by the Québec judges—are far more likely to contain references to secondary authority than are non-*Civil Code* judgments. As Table 4 shows, fully 87.5% (21 out of 24) of decisions dealing with *Civil Code* matters displayed such references. In addition the average number of citations in *Civil Code* cases, 6.9, was well above the average of 3.0 for those cases which did not deal with the *Civil Code*.

Table 4
Citations in *Civil Code* and Non-*Civil Code* Cases

	Number of cases		Cases with cites		Total cites	Average # of cites per case	Average # of cites per case with cites
Civil Code	24	3.9%	21	87.5%	201	8.4	9.5
Non-*Civil Code*	596	96.1%	277	46.5%	1813	3.0	6.5

In short, the tradition of referring to scholarly writings to interpret the *Civil Code* is followed in the Supreme Court, but those same judges who write the *Civil Code* judgments are by no means as likely to refer to academic writing in their non-*Civil Code* judgments.

Other breakdowns by case type also reveal interesting differences in the practice of judicial citation of academic writing. Judges are far more likely to make reference to secondary sources when they are writing non-unanimous judgments than when they are writing something with which the rest of the bench agrees, as Table 5 shows.

Table 5
Citations in Unanimous and Non-Unanimous Cases

	Number of cases		Cases with cites		Total cites	Average # of cites per case	Average # of cites per case with cites
Unanimous	395	63.7%	140	35.4%	701	1.8	5.0
Non-Unanimous	225	36.3%	158	70.2%	1313	5.8	8.3

Although non-unanimous cases accounted for only 36.3% of all cases decided by the Court in the period under investigation, those cases accounted for fully 65.2% (1313/2014) of all citations. Fully 70.2% of non-unanimous cases contained citations, and both the average number of citations per case and the average number of citations per case containing citations was significantly greater in non-unanimous than in unanimous decisions (5.8 to 1.8 and 8.3 to 5.0 respectively). It would thus appear that when a judge is writing for a Court which is united in its thinking, he or she is unlikely to appeal to academic publications for support. However, a judge composing a judgment which pursues an approach different than that chosen by fellow judges is far more likely to make mention of the published works of scholars. Evidently the act of disagreeing with one's colleagues increases the need to enlist support from the academy.

We hypothesized that judicial use of scholarly writings might be different in cases involving the *Canadian Charter of Rights and Freedoms*. The *Charter* is relatively new, and at least in the early years covered by this study there was relatively little judicial authority on its interpretation and application. Consequently judges who wished to buttress their judgments in *Charter* cases by appeals to authority might, in the the absence of available judicial authority, have to resort to scholarly writings. In addition, the requirement to refer to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" which appears in s. 1 of the *Charter* might be expected to

promote forensic use of empirical sociological data, and such data are often found in scholarly publications. Accordingly we drew a distinction between *Charter* and non-*Charter* cases and compared citation rates between the two groups. As Table 6 shows, that comparison confirmed our hypothesis that *Charter* cases are somewhat more likely to display references to secondary sources than non-*Charter* cases. Moreover, those *Charter* cases which contain citations contain on average more citations than do those non-*Charter* cases with citations.

Table 6
Citations in *Charter* and Non-*Charter* Cases

	Number of cases		Cases with cites		Total cites	Average # of cites per case	Average # of cites per case with cites
Charter	162	26.1%	89	54.9%	763	4.7	8.5
Non-*Charter*	458	73.9%	209	45.6%	1251	2.7	6.0

In addition to looking to see which judges cited most frequently and in what sort of cases citations most commonly appeared, our study focussed on *who* was cited by the Supreme Court. We looked to see which authors and works were cited most often by the Court and were not surprised to see Peter Hogg head the list, narrowly outpolling even the Law Reform Commission of Canada, which is included as a corporate author. Indeed Hogg was mentioned more than twice as much as any other individual author, with fully one out of every 44 citations made by the Court (46/2014). Table 7 sets out a list of those authors cited at least 10 times during the period in question, along with the names of the judges responsible for the greatest number of citations to those authors.

In addition to checking for which authors were most frequently cited, our database allowed us to ascertain the most frequently cited individual works. This search shows that Peter Hogg's *Constitutional Law of Canada* is by far the Court's favourite single academic source. Putting aside *Halsbury's Laws of England* (a multi-volume general reference work), Hogg's tome was cited more than twice as much as any other book. Table 8 sets out the authorities cited 8 times or more, and the number of times each was cited.

Table 7
Authors Cited 10 or More Times, 1985-1990

1.	*Hogg, Peter*[12]	46	Wilson (11)
2.	L.R.C. of Canada	44	La Forest (12)
3.	Halsbury	26	Estey (7)
4.	Cross, Rupert	21	Sopinka (7)
5.	Coté, Pierre-André	20	Lamer (5)
6.	Driedger, Elmer	18	La Forest (5)
7.	Wigmore, John	17	Sopinka (5)
8.	Tarnopolsky, Walter	16	Wilson, La Forest & McIntyre (3)
9.	*Gibson, Dale*	15	Wilson (5)
	Manning, Morris	15	Wilson, McIntyre & Lamer (4)
	Stuart, Don	15	Lamer (4)
	Williams, Glanville	15	Wilson (6)
10.	*Mewett, Alan*	14	McIntyre, McLachlin & Lamer (3)
11.	*Sharpe, Robert*	13	La Forest & Wilson (2)
12.	Fleming, John	12	Wilson (5)
	de Smith, S.A.	12	Estey & L'Heureux-Dubé (3)
13.	Colvin, Eric	11	Lamer (5)
	Baudouin, J.-L.	11	L'Heureux-Dubé (5)
	Laskin, Bora	11	La Forest (3)
	Weiler, Paul	11	Wilson, Dickson, La Forest & McIntyre (2)
14.	Garant, Patrice	10	L'Heureux-Dubé (3)
	Pepin, Gilles	10	L'Heureux-Dubé (5)

Table 8
Works cited 8 or more times, 1985-90

1.	Hogg, Peter	*Constitutional Law of Canada*	36
2.	Halsbury	*Halsbury's Laws of England*	26
3.	Coté, P.-A.	*Interpretation of Legislation in Canada*	17
	Cross, Rupert	*Cross on Evidence*	17
	Wigmore, John	*Evidence in Trials at Common Law*	17
4.	Driedger, E.	*Construction of Statutes*	14
5.	Stuart, Don	*Canadian Criminal Law*	12
6.	Fleming, John	*Fleming on Torts*	11
7.	de Smith, S.A.	*Judicial Review of Administrative Action*	10
8.	Maxwell, Peter	*Maxwell on Interpretation of Statutes*	9
	McWilliams, P.	*Canadian Criminal Evidence*	9
	Mewett, A. & Manning, M.	*Criminal Law*	9
9.	Blackstone, W.	*Commentaries on the Laws of England*	8
	Pepin, G. & Ouellette, Y.	*Principes de contentieux administratif*	8
	Tribe, L.	*American Constitutional Law*	8
	Weiler, Paul	*Reconcilable Differences*	8

12. Italicization of an author's name denotes that citations to that person include works of joint authorship. Note that this has the effect of making some citations count more than once. For example, both Morris Manning and Alan Mewett have published works of sole authorship which were cited by the Court (6 and 5 times respectively). There were also 9 citations to a work of joint Mewett and Manning authorship, and these counted 9 times for each author, promoting both to the 10-and-over list.

The 16 works in Table 8 are all treatises; no periodical articles are among them. Indeed, the most frequently mentioned article, A.G. Amsterdam's "Speedy Criminal Trials: Rights and Remedies",[13] was mentioned by the Court on just four occasions. It is unsurprising that no articles are referred to as often as the most frequently cited books. Books are longer and typically deal in detail with several different issues, so a single book might be viewed as a source of authority on a range of issues. Articles, on the other hand, generally deal with a more confined issue, and obviously are likely to be cited only in connection with that one matter. There is another difference between books and articles which may go some way to explain the disparity in citation frequency. As an overgeneralization, it might be said that articles often advance cutting-edge normative arguments while books tend to contain positive statements of the way the law is. Certainly that observation holds true of many of the books in Table 8, which are standard pedagogic texts/professional resource books. That supports the observation that in many cases the Supreme Court cites scholarship simply as an authoritative statement of the way the law presently is, not as an instance of an argument for how the law should be changed.

The 16 most-cited works can be grouped into a smaller set of categories: three are evidence texts; three are books on statutory construction; there are two books each on constitutional, administrative and criminal law; there are also two general treatises on English law; and there is one book on torts and one on labour law. These are all areas in which the Court does substantial work, so one is not surprised to see the frequent citation of books on those fields. It should be noted, however, that there are other such areas in which the Supreme Court does a significant amount of work but where no texts are found on the most-cited list—contracts, family law, succession, immigration, property law, equity, trusts, intellectual property and taxation.

Practitioners appearing before the Supreme Court may be interested in knowing which of the standard legal texts are most favoured by the Court. As Table 8 indicates, the most frequently cited evidence texts are the treatises by Cross and Wigmore (17 citations each). Schiff was cited 7 times, Phipson and Archbold were cited 6 times each, and Delisle 3 times. Interestingly, the popular text by Sopinka and Lederman was cited only once during the period of our study (by Dickson C.J.). In administrative law de Smith received the most citations (10), followed by Pepin & Ouellette (8), Wade and Dussault & Borgeat (5 each), Garant (3) and

13. (1975), 27 Stan. L. Rev. 525.

Davis (2). The ranking for texts on statutory interpretation was as follows: Coté (17), Driedger (14), Maxwell (9), Pigeon (4) and Craies (3). In tort law, Fleming's text was the overwhelming favourite of the Court (11 citations), followed by Linden (3) and Salmond (2). In addition two French language texts on delictual responsibility were frequently cited: Baudouin (5) and Nadeau & Nadeau (3). In the area of contract law, on the other hand, there was no clear favourite: Anson's text had 3 citations, as did Cheshire & Fifoot, Corbin and Waddams; Chitty, Treitel and Fridman each had two, while Williston was mentioned just once. Two French language texts on the law of obligations were frequently cited: Tancelin (4) and Baudouin (3). Property texts were cited infrequently.

There are a number of authors whose names appear on the most-cited author list but whose works do not appear on the most-cited works list. These would appear to be instances where the Court owes an allegiance to an author but not to any particular work of that author. In some such cases the Court values an author's work in a certain area. For example the Court's 15 citations to Dale Gibson are to 10 different works by that author, but those are all in the field of Canadian constitutional law. Similar observations can be made about Walter Tarnopolsky in human rights (16 cites to 6 different works) and Glanville Williams in criminal law (15 cites to 8 different works). However this is not always the case: the Court's 13 citations to Robert Sharpe are to eight different works in seven relatively distinct fields: free speech, enforcement of foreign judgments, habeas corpus, product liability, injunctions, mootness and federal court jurisdiction.[14]

Our gender breakdown of the list of persons cited by the Supreme Court indicates that men outnumbered women by more than ten to one

14. We initially speculated that this might in part be due to Dean Sharpe's employment as Executive Legal Officer at the Supreme Court of Canada. It is not implausible to assume that the fact that a scholar is present in the Supreme Court Building on a daily basis might increase the likelihood of that person's scholarship being cited by the Court. However our data do not bear this out. Dean Sharpe began working at the Court in January of 1988, but citations to his work begin well before that (*e.g.*, 4 in 1985) and are fairly evenly spread over the 1985-90 period covered by our study.

(721/71).[15] Moreover, as a glance at the lists of most cited authors and most cited works reveals, those women who were mentioned by the Court were not among those writers mentioned most often; none appears on either list. The most-cited females were Katherine Swinton and Christine Boyle, each of whom was mentioned four times. The four references to Swinton were to three different articles, and those to Boyle were all to her book *Sexual Assault* (making that the most cited work written by a woman in the period covered by our study). This is a significant under-representation, for certainly women account for well over 10% of the scholarly writing on matters which come before the Court. No doubt there are 'structural features' which may be invoked to explain this gender imbalance. For example, many of the works frequently cited by the Court are works by established, senior scholars (or dead scholars, such as Wigmore), and one would expect a preponderance of males among such sources. No doubt there is a cycle at work here. Writers get cited by the court in part because they are perceived to be authorities, and that in turn confers on those writers (who are mostly male) a renewed authority which increases the likelihood that they will be cited in the future. The citation practice of the Supreme Court of Canada does little to disrupt this cycle.[16]

Another interesting area of investigation concerns the citation of authors and works available only in French. A familiar complaint of québecois francophone legal scholars is that their works, particularly those unavailable in English translation, are ignored by English speaking Canadians.[17] The data provide some support for this. Of course one is not surprised to see that citations to works on the civil law are made virtually

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15. Our method of sexing the scholars was as follows. For those we did not know personally, we classified them by given names; for example, persons named Robert were assumed to be male, while those named Elizabeth were assumed to be female. When the Supreme Court's citation gave only the initials of the author's given name(s) we went to other sources, such as the work cited or various directories of law professors, in order to locate full names so that we might determine the writer's gender. Those with sexually ambiguous names, such as Robin, were not assigned to either category unless we could otherwise determine their sex. For books and articles written by more than one author, we counted them as gendered only if all authors were of the same sex; otherwise we excluded them from this calculation. Law reform commissions were viewed as sexless and so were likewise excluded. Thus when we report that men outnumber women 721 to 71, that covers only those secondary sources to whom we were able to assign a gender. Moreover it seems likely that there is some error in this figure due to the fact that our method will wrongly classify some writers (*e.g.*, any men named Sue).

16. Nor, as a glance at our footnotes reveals, does the citation practice in this article.

17. J. Deschênes, "On Legal Separatism in Canada" (1978), 12 L.S.U.C. Gazette 1. See also J.-L. Baudouin, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec" in *The Role of Judicial Decisions and Doctrine in Civil Law and Mixed Jurisdictions*, J. Dainow, ed., (Baton Rouge: Louisiana State U. Press, 1974), at p. 18 and R. Macdonald, "Understanding Civil Law Scholarship in Quebec" (1985), 23 Osgoode Hall L.J. 373, at 374.

exclusively by the Québec judges, for it is they who write the judgments on civil law matters. However there are books in French by québecois scholars dealing with national legal subjects such as evidence, constitutional law, statutory interpretation and criminal law, and none of those made it onto Table 8's list of most cited works. For example neither Jacques Fortin's *Traité de Droit Pénal Général* nor his *Preuve Pénal* was ever cited by an anglophone judge, and neither appears on the 8-and-over list, though several works in English on those subjects do. Similarly Guy Tremblay's *Droit Constitutional* is not cited by any anglophone judge. By way of contrast, more than one quarter of the citations of Hogg's *Constitutional Law of Canada* (which has not appeared in French translation) are attributable to Québec judges. The sole French-only book to appear on the 8-and-over list is Pepin and Ouellette's *Principes de Contentieux Administratif*, with 8 citations, and 7 of those 8 citations were by Québec judges. By way of contrast, the other administrative law text on the 8-and-over list was de Smith's *Judicial Review of Administrative Action* with 10 citations, exactly half of which were by Québec judges. In short, our study provides support for the claim that while québecois judges are quite prepared to utilize scholarship available only in English, non-Québec judges, as a group, are slow to make use of works available only in French. It should be pointed out, however, that Québec judges do not alway seem as vigorous as they might be in referring to francophone legal scholarship. While the three books by Tremblay and Fortin just referred to were never cited by an anglophone judge, each was cited only once by a judge from Québec.

Conclusion

None of the findings of our study came as a shocking revelation to us. Most of what our research confirmed—from the fact that Peter Hogg was the most frequently cited scholar to the fact that the Court is more likely to cite academic authority in a *Charter* case than in a non-*Charter* case—might have been predicted in advance by a casual reader of the Supreme Court's work. In addition there are many features of the practice of academic citation by the Supreme Court on which this study failed to touch. This work is limited in scope and made no effort to examine citation practice in a comprehensive fashion. Nevertheless, despite the uncontroversial and relatively limited nature of our findings, we found it useful to achieve some statistical confirmation of our intuitions. We found many of these data to have a certain intrinsic interest and present them here in the hope that others will think the same.