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A Perspective from Canada – Including Networking and Intelligent Tools

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A Perspective from Canada – Including Networking and Intelligent Tools

By Simon Chester[1]

Introductory Comments

In a globalized world where information flows, economic trade and capital markets span national borders, old single nation approaches to private international law can become strained - alternative methods of approaching disputes and addressing the difficult issues posed by the intersection of legal systems are increasingly needed. Domestic laws can not resolve disputes alone when so many parties are transborder entities. Dispute resolution in the 21st Century necessarily requires access to accurate texts and norms and an informed understanding of foreign law, and how foreign law might be relevant to particular disputes[2].

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2. These factors have expressly informed the Supreme Court of Canada's significant recent decisions in the conflict of laws, which have been described as constituting a revolution: *Morguard Investments Ltd. v. De Savoye*, 1990 CanLII 29 (SCC); *Hunt v. T&N plc*, 1993 CanLII 43 (SCC); *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, 1994 CanLII 44 (SCC); *Beals v. Saldanha*, 2003 SCC 72 (CanLII), at http://canlii.ca/t/1g7bw; *Pro Swing Inc. v.*

The ways by which foreign law is accessed and employed in civil proceedings vary across jurisdictions. The issues of pleading and proof of foreign law have been described by Professor Richard Fentiman as "the crux" and "at the fulcrum of private international law"[3].

In some jurisdictions, foreign law is proven as a matter of fact, and in others, courts can adopt a more active research stance and take judicial notice of foreign law[4].

Elta Golf Inc., 2006 SCC 52 (CanLII), 2006 SCC 52 (CanLII), http://canlii.ca/t/1q0dw . The commentary is extensive: Vaughan Black and John Swan, New rules for the enforcement of foreign judgments: *Morguard Investments Ltd. v. De Savoye*, Advocates' Quarterly. 12.4 (May 1991): p489-512; Joost Blom, Conflict of laws - enforcement of extraprovincial default judgment - real and substantial connection, Canadian Bar Review. 70.4 (Dec. 1991): p733-753; Elizabeth Edinger, The constitutionalization of the conflict of laws, Canadian Business Law Journal. 25.1 (May 1995): p38-65 ; Gerald Goldstein and Jeffrey A. Talpis Les perspectives en droit civil québécois de la réforme des règles relatives à l'effet des décisions étrangères au Canada, Canadian Bar Review. 75.1 (Mar. 1996): p115-145; Janet Walker, The great Canadian comity experiment continues, Law Quarterly Review. 120 (July 2004): p365-369; Stephen G.A. Pitel, Reformulating a real and substantial connection, University of New Brunswick Law Journal. 60 (Annual 2010): p177.

3. Richard Fentiman, *Foreign Law in English Courts*, (Oxford University Press, 1998), at pages 1 and 6, as observed in *Yordanes v. Bank of Nova Scotia*, 2006 CanLII 1777 (ON SC), http://canlii.ca/t/1mfrt.

4. The comparative literature is considerable. The seminal work is Richard Fentiman, *Foreign law in English courts: pleading, proof, and choice of law*. Oxford; Oxford University Press, 1998; Richard Fentiman, Foreign law in English courts, Law Quarterly Review, 108 (Jan. 1992) p. 142-156; Richard Fentiman, Laws, foreign laws, and facts, Current Legal Problems. (Annual 2006) p. 391-426; Trevor C. Hartley. Pleading and proof of foreign law: the major European systems compared. International and Comparative Law Quarterly, 45.2 (Apr. 1996) p. 271-292; Barry J. Rodger and Juliette Van Doorn, Proof of foreign law: the impact of the London Convention. International and Comparative Law Quarterly. 46.1

What is becoming standard in all jurisdictions is the growing presence of internationally accessible and comprehensive legal databases with increasingly

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(Jan. 1997) p. 151-173; Benoît Vouilloz, *Le rôle du juge civil à l'égard du droit étranger*. Fribourg, Éditions universitaires, 1964; *La Loi étrangère devant le juge national*: congrès de Strasbourg 10-14 septembre 1990 ; rapports de la Commission Droit international privé, Union internationale des avocats. Bruxelles: E. Story-Scientia, 1992; Sofie Geeroms, Foreign Law in Civil Litigation: A Comparative and Functional Analysis (Oxford, OUP: 2004); Rainer Hausmann, Pleading and Proof of Foreign Law - a Comparative Analysis, The European Legal Forum (E) 1-2008, 1 – 14 at http://www.simons-law.com/library/pdf/e/878.pdf ; Carlos Esplugues, José Luis Iglesias, Guillermo Palao, *Application of foreign law*, Munich: Sellier, 2011, is a recent conference report, surveying the European landscape with chapters covering Austria and Germany, the Baltic Countries, Belgium, Bulgaria, Cyprus, Czech Republic and Slovak Republic, France, Greece, Hungary, Poland, Portugal, Romania, the Scandinavian Countries, Slovenia, Spain and the United Kingdom. *Die Anwendung ausländischen Rechts im internationalen Privatrechts,* D. Müller (ed.), Berlin, de Gruyter, 1968; I. Zajtay, The application of foreign law, *International Encyclopedia of Comparative Law,* Volume III, Chapter 14, 1972; D.T., Tueller, Reaching and Applying Foreign Law in West Germany: A Systematic Study, 19 Stan. J. Int'l L., 1983, 99; J. Dolinger, Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law, 12 Ariz. J. Int'l & Comp. L. 1995, 225.; W.L. De Vos, International Aspects of Civil Procedural Law, 7 Stellenbosch L. Rev. 163 (1996); G. Wegen, Qualifying, Proving and Interpreting the Law of Another Country in Litigation in Germany, 21 Int'l Legal Prac. 8, 1996, p. 10; J.A. Jolowicz, On *Civil Procedure, Cambridge Studies in International and Comparative Law,* 2000; M. Jänterä-Jareborg, Foreign Law in National Courts: a Comparative Perspective, in Collected Courses of the Hague Academy of International Law, vol. 304 (2003), 181-386; J. Mc Comish, Pleading and Proving Foreign Law in Australia, Melbourne University Law Review, 2007, 400 ff; R.Hausmann, Pleading and proof of foreign law – a Comparative Analysis, The European Legal Forum, Issue 1-2008, 1-61.

sophisticated search interfaces, which allow legal practitioners and judges to access the law of their own legal system and other systems more easily. Although intelligent tools and international co-operation may ultimately facilitate access and transform cross-border litigation, they do not yet enhance the understanding one should have of foreign law, to the extent that they could supplant old rules and practices. Nor do any existing portals, as good as some are, yet offer reliable and comprehensive access to large numbers of national bodies of law let alone the entire corpus of global law.

This paper describes the experience of one jurisdiction, Canada, in how its judges and legal practitioners engage with foreign law, and how it is validated for use in Canadian cases. The Canadian rules are well-established and rarely controversial. In the second more speculative part of the paper, I describe a few experiments taking place in a number of jurisdictions to use intelligent tools and networking tools to enhance access to legal information.

The Canadian Experience

Canada is a useful nation to consider for a number of reasons. It has borrowed heavily in establishing a system of domestic law from legal traditions in England, France and the United States. In addition, the significance of international trade and the proximity of the United States have meant that our practitioners necessarily encounter foreign law.

Canada has two official languages and a hybrid legal system with both civil and common law. The largely French speaking province of Québec has preserved a civil law system that derived from French law, as long as 1663 ago in the Coutume de Paris, adapted to the frontier conditions of New France.[5]. Québec has recently been

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5. See Royal Edicts of April 1663 and May 1664 in *Edits, Ordonnances royaux, Déclarations et Arrêts du Conseil d'état du roy concernant le Canada*, De la presse à vapeur de E.R. Fréchette, Québec, 1854 at http://www.archive.org/stream/ditsordonnances04qugoog/ditsordonnances04qugoog_djvu.txt; A. Morel, Histoire du droit (Montréal: Librairie de l'Université de Montréal, 1974) J.G. Castel,

described as mixed, interstitial and in flux, in terms of its legal consciousness.[6] Private law in Québec is governed by the *Civil Code of Québec* extensively modernized twenty five years ago and which departs significantly from the Civil Code of Lower Canada.[7] Every other province's private law, as well as the three territories in the far north, is governed by the common law. Criminal law, on the other hand, is governed by the *Criminal Code* and the common law in all provinces. Constitutionally, criminal law falls under federal jurisdiction, in contrast to private law which is generally a provincial head of jurisdiction, as part of "property and civil rights".[8] This means that Québec practitioners often practice within two systems of law, the civilian traditions of private law together with federally regulated domains of law like criminal law, insolvency, and intellectual property whose intellectual underpinnings derive from the common law.

A single final court of appeal, the Supreme Court of Canada, can hear appeals that may have originated in any court in the country – there are fourteen courts of appeal from which it may receive appeals[9]. The court's nine justices are required to include three justices trained in the civil law, and the court strives to be functionally bilingual. Counsel can argue in either official language. The diversity of background means that the court has a

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The Civil Law System of the Province of Québec (Toronto, Butterworths, 1962)

6. Nicholas Kasirer, Legal Education as Métisage, (2003) 78 Tul. L.R. 481 as quoted in Helge Dedek, Complexity of Transnational Sources, Report to the XVIIIth International Congress of Comparative Law (2010) at p. 48.

7. The Civil Code contains a Book on Private International Law, which draws upon the Swiss Code's provisions on conflicts of laws.

8. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91(27), 92(13), 92(16), reprinted in RSC 1985, App II, No 5.

9. Ten provincial courts of appeal, including the Québec Cour d'Appel, three appellate courts in the three Northern territories, and the Federal Court of Appeal, which unlike its American namesake, has only a statutory and fairly limited jurisdiction.

wide range of experiences to draw upon. The court has an overall supervisory oversight of Canadian law, and frequently cases will be argued before it in which different provincial courts of appeal have taken different positions. The Supreme Court will thus be concerned with statutory provisions and case law from other Canadian jurisdictions than the one from whose court of appeal a specific appeal is taken.

Because of Canada's hybrid legal system, "foreign" law takes on two meanings. Laws from other countries were historically considered foreign. Equally, laws from common law provinces are considered in some sense foreign, in the province of Québec[10]. For common law provinces, themselves, some judges continue to regard the law of adjacent common law provinces as foreign[11], despite the activities of the Uniform Law Conference of Canada in promoting uniform statutes, to avoid distortions in national markets. Thus, in Canada, access to foreign law requires a focus on both the national and international level.

For Canadian lawyers, the first place to search for their local law is on the website of the Canadian Legal Information Institute[12]. CanLII offers free, online access to the laws and regulations of all jurisdictions across Canada as well as to over 800,000 court decisions from Canadian Courts. It is funded by the Federation of Law Societies of Canada, through a levy on the annual membership of all practising Canadian lawyers.

The Importance of Accessing Foreign Law

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10. See art 3077, para 1 CCQ: "Where a country comprises several territorial units having different legislative jurisdictions, each territorial unit is regarded as a country." *C.f. General Motors Acceptance Corporation of Canada Ltd v Town and Country Chrysler Ltd*, 2007 ONCA 904 (CanLII), to see how Ontario courts have interpreted Québec law.

11. See for example *Nystrom v. Tarnava* (1996), 6 C.P.C. (4th) 326, 191 A.R. 325, 44 Alta. L.R. (3d) 355,Yanosik J. (Alta. Q.B.). Ruskin v. Dewar, 2005 SKCA 89 (CanLII).

12. See Canlii Annual Report at http://www.canlii.org/en/info/report2009.pdf

Access to foreign law remains important since it allows courts to resolve disputes with international components. But access to foreign law is doubly important because it allows different legal traditions to interact which each other. For example, the civil law's approach to pure economic loss informed the Supreme Court of Canada's landmark decision on pure economic loss for common law provinces.

In *Canadian National Railway Co v Norsk*, a government-owned bridge was damaged by a ship. The bridge was used by a railway company under the terms of a contract with the government. Because the railway company was required to reroute shipments during the bridge's repairs, the railway company sued the ship's owner for relational economic loss.

The Supreme Court of Canada was concerned that allowing the railway company's claim would open the floodgates for subsequent claims and allow, as cautioned Justice Cardozo, "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[13] Justice McLachlin, speaking for the majority, reviewed how other jurisdictions addressed the issue of pure economic loss and specifically examined the obligations regime in the province of Québec, which, in principle, does not disallow recovery for pure economic loss:

> This is not to say that the civil law does not impose limits on the recovery of economic loss. The control mechanism against unlimited loss in the civil law lies not in the type of loss but in the factual determination of whether the loss is a direct, certain and immediate result of the negligence. It appears to have worked well in avoiding frivolous claims and the threat of unlimited liability. Thus Tetley, supra[14], concludes at p. 584:

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13. *Canadian National Railway Co v Norsk Pacific Steamship Co*, 1992 CanLII 105 (SCC), [1992] 1 SCR 1021 at 1137, citing *Ultramares Corp v Touche*, 174 N.E. 441 (NY 1931) at 444.

14. The reference is to Professor William Tetley, "Damages and Economic Loss in Marine Collision: Controlling the Floodgates" (1991), 22 *J. Mar. Law & Com.* 539.

> The vigorous application of this solid theoretical framework to the analysis of damage claims of all types in the civil law appears to result in `economic loss' (to use the common law term) being compensated in approximately the same types of cases as in common law jurisdictions, without the `indeterminate' liability so much dreaded in those latter jurisdictions actually ensuing in practice.[15]

Justice McLachlin concludes that the common law should not preoccupy itself with excluding the recovery of a certain type of loss to prevent indeterminate liability, but rather with mechanisms to control the scope of recovery. To that end, whereas the civil law constrains itself to a "theoretical framework" to avoid indeterminate liability, the common law can rigorously apply the notion of proximity to achieve the same result:

> In summary, it is my view that the authorities suggest that pure economic loss is prima facie recoverable where, in addition to negligence and foreseeable loss, there is sufficient proximity between the negligent act and the loss. Proximity is the controlling concept which avoids the spectre of unlimited liability.[16]

There are many other similar examples of a continuing conversation[17], particularly within the Supreme Court of Canada[18] and the Federal Department of Justice[19] between the two Canadian legal traditions.

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15. *Canadian National Railway Co v Norsk Pacific Steamship Co, supra* at footnote 13 at 1143.

16. *Ibid* at 1152.

17. For a forceful argument that this so-called conversation has been somewhat one-sided, and that common law Canada ignores its sister legal tradition, see Jules Deschênes, "On Legal Separatism in Canada" (1978) 12 Law Society Gazette 1

18. For example see *Farber v. Royal Trust Co.* 1997 CanLII 387 (SCC), [1997] 1 S.C.R. 846, *Chablis Textiles Inc. (Trustee of) v. London Life Insurance Co.* 1996 CanLII 256 (SCC), [1996] 1 S.C.R. 160, and *Perron-Malenfant v. Malenfant* 1999 CanLII 663 (SCC), [1999] 3 S.C.R. 375

Ascertaining the content of foreign law in Canadian Provinces

On a more practical level, courts are often called upon to apply foreign law. Justice La Forest, speaking for the Supreme Court of Canada in *Tolofson v. Jensen*[20] noted the differences between contemporary courts and courts in the Victorian era, struggling with the difficulties of proving foreign law. He expressly states that "the problem of proof of foreign law has now been considerably attenuated in light of advances in transportation and communication":

> Because of its dominant position in the world, it must have seemed natural to extend the same approach to foreign countries, especially when this dominance probably led to the temptation, not always resisted, that British laws were superior to those of other lands (see *Chaplin v. Boys*[21], *supra*, at p. 1100). There was, as well, the very practical consideration that proof of laws of far-off countries would not have been easy in those days, and the convenience of using the law with which the judges were familiar must have proved irresistible. All the social considerations enumerated above are gone now, and the problem of proof of foreign law has now been considerably attenuated in light of advances in transportation and communication, as Lord Wilberforce acknowledged in *Chaplin v. Boys*. And as he further indicated (at p. 1100), one of the ways in which this latter problem can be minimized in practice is by application of the rule that, in the absence of proof of foreign law, the *lex fori* will apply. Thus the parties may either tacitly or by agreement choose to be governed by the *lex fori* if they find it advisable to do so[22].

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19. See *Out of the Shadows: The Civil Law Tradition in the Department of Justice Canada, 1868–2000* at http://canada.justice.gc.ca/eng/dept-min/pub/civil/toc-tdm.html

20. *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, 1994 CanLII 44 (SCC).

21. *Boys v Chaplin* [1971] AC 356, [1969] 2 All E.R. 1085 (H.L.)

22. *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, 1994 CanLII 44 (SCC), at pp. 48-49.

We have no figures that would be reliable on how often issues of foreign law arise, nor whether we anticipate any increases or decreases in the future. Our sense is that there is an inherent increase in the need to access foreign law as a result of international trade. But this does not necessarily mean that the issue manifests itself in particular areas of law. Commercial litigation between sophisticated parties will generally be settled by resort to the parties' express choice of law, or by the application of convenient forum principles. Extradition has not proved problematic[23], since Canadian law will be applied on whether an extradition offence has been made out. Courts dealing with family law issues, including custody, manage proof of foreign law[24], applying the traditional standards of proof or relying on consent. In practice the Canadian Immigration and Refugee Board must routinely wrestle with proof of foreign law[25]. Indeed, the Canadian Immigration and Refugee Board has published its own guidelines for adjudicators and parties dealing with proof of foreign law[26].

In common law provinces such as Ontario, foreign law must be proven as fact with the aid of expert evidence.[27] Thus, common law jurisdictions in Canada require "pleading and proof" of foreign law. Experts are also required to give evidence on the effect of the foreign law on the dispute at hand. To gain a better understanding, the expert is able to give information regarding the

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23. *McVey v. United States of America*, 1992 CanLII 48 (SCC); *Thailand v. Saxena*, 1999 CanLII 5139 (BC SC); *U.S.A. v. Cheema et al*, 2003 BCSC 1483 (CanLII).

24. *D.H. v. C.B.*, 2006 ONCJ 521 (CanLII); In *Werbicki v. Werbicki*, 2009 SKQB 80 (CanLII), the court had insufficient evidence of Norwegian law to assess its impact.

25. *Afzal v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17147 (FC), [2000] 4 FC 708

26. http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/alltous/weiapp/Pages/evidence06.aspx#613

27. See e.g. *General Motors Acceptance Corporation of Canada Ltd v Town and Country Chrysler Ltd*, 2007 ONCA 904 (CanLII), 2007 ONCA 904, (2007) 88 OR (3d) 666.

social, cultural and economic underpinnings of the foreign law.[28] The judge will then be in a position to make a finding of fact on the content and effect of foreign law like any other factual determination in a case.[29] Expert testimony goes beyond demonstrating the content of primary law – that is, legislative texts, or even jurisprudence. Laws are not enacted in a vacuum and ascertaining the content of foreign law may require a contextual approach which only an expert can provide.[30]

An expert's credentials must satisfy certain criteria before a court will give his or her evidence any weight. An expert will be competent if the expert was a legal practitioner or teacher of law in the foreign country. Simply having studied foreign law is not sufficient. Judges are likely to require more credentials from the expert if the foreign law is not akin or similar to the law

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28. Markus Koehnen, *Proof of Foreign Law in Common Law Courts* (Toronto: McMillan Binch, 2000) at 5-6. The Canadian literature is fairly thin. See J-G Castel, Proof of Foreign Law, (1972) 22 U. of Toronto L.J. 33; Gavin Wood, Proof of foreign law in the Manitoba courts. Manitoba Law Journal. 15.1 (Spring 1985) p. 53-83; Janet Walker and J-G Castel, Canadian Conflict of Laws, 6 ed looseleaf (Markham: Butterworths, 2005); Janet Walker and J-G Castel, Halsbury's Laws of Canada: Conflict of Laws (Markham: LexisNexis, 2006); Ronald Petersen and Stephen Maddex, Proving a Foreign Cause of Action in Ontario: Implications for Discovery and Trial, The Litigator November 2010 at p. 11 at http://www.mcmillan.ca/Files/119504_Proving%20a%20Foreign%20Cause%20of%20Action%20in%20Ontario%20Implications%20for%20Discovery%20and%20Trial%20%28Ronald%20Petersen%29.pdf

29. *Ibid* at 2-3.

30. See e.g. *Inter-American Convention on general rules of private international law*, Art 2, requiring judges to apply foreign law as it would be applied in the foreign jurisdiction: "Judges and authorities of the States Parties shall enforce the foreign law in the same way as it would be enforced by the judges of the State whose law is applicable, without prejudice to the parties' being able to plead and prove the existence and content of the foreign law invoked."

of the domestic forum. Finally, an expert may be approved if the expert holds an office which requires the knowledge of the foreign law in question.[31]

In cases of conflicting evidence on foreign law, courts approach the issue of whether a judge can review an expert's sources differently. In *Drew Brown Ltd v The 'Orient Trader'*,[32] Laskin J demurred, commenting that it was not for him to "re-examine" all the authorities presented by the expert. At most, Laskin J thought he could "look to his sources to see if his reliance on them [was] borne out."[33] That said, a judge is not supposed be a "conduit" for the expert's testimony; a judge is supposed to bring a certain critical analysis to the expert's testimony, especially when confronted with conflicting testimony.[34] Some courts in Canada have taken a more liberal approach. The Saskatchewan Court of Appeal takes the position that once foreign law is introduced in evidence, judges may inspect the expert's sources and draw their own conclusions.[35]

Failing to prove the content of foreign law will activate a common law presumption that the applicable law is the same as the law of the forum.[36] Similarly, if neither party raised the issue of foreign law in their pleadings, a court will resolve the dispute by using the laws of the forum.[37] Moreover, factual findings on foreign law are treated differently on appeal. Although determinations on foreign law are questions of fact, appellate courts will

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31. See J.D. Falconbridge, Essays on the conflict of laws at 834-835; See also Markus Koehnen, *supra* note 28 at 4.

32. *Drew Brown Ltd v The 'Orient Trader'*, 1972 CanLII 194 (SCC), [1974] SCR 1286.

33. *Ibid* at 1324, Laskin J, referring to *Allen v Hay* 1922 CanLII 25 (SCC), (1922), 64 SCR 76 at 81.

34. Markus Koehnen, *supra* note 28 at 8.

35. *Bondholders Security Corp v Manville*, reflex, [1933] 4 DLR 699, [1933] 3 WWR 1.

36. Markus Koehnen, *supra* note 28 at 13.

37. *Pettkus v Becker*, 1980 CanLII 22 (SCC), [1980] 2 SCR 834 at 853-854, Dickson J.

give them less deference. Therefore, an appellate court can substitute its own decision for the one of the court below. This makes foreign law appealable on the same bases as domestic law.[38]

Although the common law requires pleading and proof of foreign law, there are exceptions. Some common law provinces, such as Nova Scotia, take a more flexible approach to prove the content of foreign law. A judge may take into consideration any relevant material, whether submitted by the parties or not, to ascertain the content of foreign law.[39]

While the Federal authorities, as well as a number of Canadian provinces[40], are committed to make the texts of statutes and regulations available in both official languages, namely English and French, those source materials must speak for themselves. In other words, asking for official translations of statutes or regulations may well result in no response. Official bodies responsible for the translation of statutory material are not equipped to provide private translations or certification of official translations.

Québec Variations

The province of Quebec, although a civil law jurisdiction, takes a similarly flexible approach. Note that the Supreme Court of Canada has confirmed that the common law

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38. Markus Koehnen, *supra* note 28 at 8; See also *General Motors Acceptance Corporation of Canada Ltd v Town and Country Chrysler Ltd*, *supra* note 27 at paras 28-35; *Civil Procedure Rules*, NS Reg 420/2008, Rule 32.23(1), *infra*.

39. *Civil Procedure Rules*, NS Reg 420/2008, Rule 32.23(1): "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 31. The court's determination shall be treated as a ruling on a question of law."

40. Bilingual laws are available from Manitoba, Ontario, Québec and New Brunswick as well as the Federal jurisdiction. All can be found at http://www.canlii.ca

revolution described in the cases cited at footnote 2 on page 5 does not automatically extend to Québec[41].

> The "real and substantial connection" requirement set out in *Morguard* is not an additional criterion that must be satisfied in establishing the jurisdiction of Quebec courts. This case was decided in the context of an inter-provincial jurisdictional dispute and its findings cannot be extended beyond this context. Moreover, it is a common law principle not to be imported into the civil law.

Although the Court held that the real and substantial connection test is a common law principle not to be imported in the civil law, the Court's analysis leads to the conclusion that the real and substantial test is nevertheless subsumed in Art 3148. The rules of private international law in Québec are codified in Book Ten of the Code Civil. The principles of comity, order and fairness are not codified in Book Ten and thus they are not binding – at best, they remain guiding principles which are useful for interpretive purposes.

Québecois Courts can take judicial knowledge of foreign law, provided it has been pleaded. Courts may also require that parties prove foreign law by way of expert testimony or a jurisconsult certificate.[42] A jurisconsult is

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41. *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 CSC 78 (CanLII), [2002] 4 SCR 205.

42. Art 2809 CCQ: "Judicial notice may be taken of the law of other provinces or territories of Canada and of that of a foreign state, provided it has been pleaded. The court may also require that proof be made of such law; this may be done, among other means, by expert testimony or by the production of a certificate drawn up by a jurisconsult. Where such law has not been pleaded or its content has not been established, the court applies the law in force in Québec / Le tribunal peut prendre connaissance d'office du droit des autres provinces ou territoires du Canada et du droit d'un État étranger. Il peut aussi demander que la preuve en soit faite, laquelle peut l'être, entre autres, par le témoignage d'un expert ou par la production d'un certificat établi par un jurisconsulte. Lorsque ce droit n'a pas été allégué ou que sa teneur n'a pas été établie, il applique le droit en vigueur au Québec."

someone who is considered able to give advice on foreign law and who has a certain level of notoriety.[43]

Before the advent of the new Civil Code in 1994, the approach taken was linked to the factual nature of foreign law, with the result that the judge could not take notice of foreign law which had to be pleaded by the party who wished to rely upon it. This approach frequently led to the application of the awkward presumption of identity of laws. After 1994 Québec judges tend to treat foreign law more as law, not as fact, which permits, but does not oblige the Court to take, on its own initiative, judicial notice of the laws of foreign jurisdictions as long as foreign law has been pleaded. Exceptionally, the judge is obliged to take notice of foreign law[44]. Once judicial notice is triggered, the judge plays a more active role than in common law Canada in finding the relevant law[45].

On a national level, the requirement of pleading and proof is not always the method of choice. For example, the Supreme Court of Canada will take judicial notice of the laws of every province in Canada, whether or not the content of that law was sufficiently proven in the lower

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43. Art 2809 CCQ, Ministère de la Justice, *Le* Code civil du Québec - *Commentaires du ministre de la Justice*, tome II, Montréal, Les Publications du Québec, 1993 at 1758.

44. See, for example, Articles 574 and 3092 Code Civil in relation to adoption. The judge has to verify that the conditions for adoption have been complied with in the State of origin. A similar rule exists in relation to the placement of a child whose residence is outside Québec (Art. 568 Code Civil) and with regard to international child abduction (Art. 28 of the Loi sur les aspects civils de l'enlèvement international et interprovincial d'enfants, L.R.Q., c. A-23.01).

45. Drawn from The Hague Conference on Private International Law Feasibility Study on the Treatment of Foreign Law Summary Tables on the Status of and Access to Foreign Law in a Sample of Jurisdictions, Preliminary Document No 21 B of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference at http://www.hcch.net/upload/wop/genaff_pd21be2007.pdf at p.6

courts.[46] From a trial level perspective, provincial courts will likely accept the content of the laws of other provinces without more proof other than copies of the legislation. In Ontario, copies of "legislation of any state or province within the Queen's dominions[47] shall be admitted to prove [their] contents".[48]

Restatement of Principles of Proof of Foreign Law in Canada

It may be helpful to recapitulate how the principles apply in practice – they are well accepted in Canada and reasonably unproblematic.

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46. *John Morrow Screw and Nut Co v Hankin* (1918), 58 SCR 74: "Although we are required to render the judgment which the court appealed from should have rendered ("Supreme Court Act," section 51), it is the settled jurisprudence of this court that it is bound to follow the rule laid down by the House of Lords in the case of *Cooper v Cooper* [13 App. Cas. 88] in 1888, and to take judicial notice of the statutory or other laws prevailing in every province and territory in Canada, *suo motu*, even in cases where such statutes or laws may not have been proved in evidence in the courts below (…)."; See also *Pettkus v Becker*, [1980] SCR 853-854; *Hunt v T&N plc*, 1993 CanLII 43 (SCC), [1993] 4 SCR 289 at 306.

47. This quaint phrase may not be precisely coterminous with the Commonwealth: the Republic of India certainly would not consider itself "within the Queen's dominions", though it is a member of the Commonwealth. For a Québec case on proving the law of India, see *Singh c. Bhuller*, 1987 CanLII 1098 (QC CA).

48. *Evidence Act*, RSO 1990, c E.23, s 25: "Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be printed by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession within the Queen's dominions, shall be admitted in evidence to prove the contents thereof."

1. Foreign law is generally treated by trial courts as a fact, which must be specifically pleaded by the party relying upon it, and which must be proved to the satisfaction of the court, generally by expert evidence[49].
2. Canadian courts generally do not take judicial notice of foreign law[50].
3. For this purpose, the different provinces and territories of Canada are considered foreign countries, and their law must be proved in the same manner[51].
4. The courts may be willing to apply this requirement flexibly, when counsel consent and the "foreign law" is simply that of another province[52].
5. Although foreign law is a question of fact, the effect of that law upon the rights of the parties is a question of law[53].
6. Canadian courts will apply the law of the forum unless applicable foreign law is pleaded and proved[54].

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49. J. Walker and J-G Castel, *Canadian Conflict of Laws* (6th edition, looseleaf), § 7.1; J-G Castel, Proof of Foreign Law (1972), 22 U of Toronto, L.J. 33.

50. Halsbury's Laws of Canada HCF-96 citing *Canadian National Steamships Co. v. Watson* [1939] 1 D.L.R. 273, [1939] S.C.R. 11 (S.C.C.); reversing (1937), 64 Que. K.B. 11 (Que. K.B.); affirming (1937), 75 Que. S.C. 123 (Que. S.C.) *Crosby v. Constable* reflex, reflex, (1957), 23 W.W.R. 32 (B.C. S.C.); *Walkerville Brewing Co. v. Mayrand* (1929), 63 O.L.R. 573, [1929] 2 D.L.R. 945 (C.A.); reversing (1928), 63 O.L.R. 5, [1928] 4 D.L.R. 500 (H.C.)

51. *Smith v. Smith* reflex, (1956), 19 W.W.R. 580 (Sask. C.A.).

52. *Pearson v. Boliden Ltd.* http://canlii.ca/t/5g5t, 2002 BCCA 624 (CanLII); however see *Viroforce Systems Inc. v. R&D Capital Inc.*, http://canlii.ca/t/259fz, 2009 BCSC 1150 (CanLII), upheld on appeal *Viroforce Systems Inc. v. R&D Capital Inc.*, http://canlii.ca/t/flw9s 2011 BCCA 260 (CanLII), Court declines to accept excerpt from the *Code of Civil procedure*, as evidence as to the law in Quebec as to self-represented companies and persons appearing before the Quebec courts.

53. Markus Koehnen, *supra* note 28 at 8.

54. Markus Koehnen, *supra* note 28 at 13.

7. Since the Supreme Court of Canada can hear appeals from all provinces and territories, it takes judicial notice of provincial or territorial law which is material to the issues before the court
    a. Provided such law, if different from the law of the jurisdiction appealed from, has been pleaded in the courts below[55].
8. Statutes at both the Federal[56] and provincial[57] levels have provided for judicial notice, or even proof, to be taken of the law of other provinces and territories, and to a lesser extent, of the law of certain foreign countries.
9. Québec has special rules, since Article 2809 of the Code Civil provides that judges can take judicial notice of foreign law if it has been alleged by one of the parties, and may require proof by way of an expert or a jurisconsult certificate[58]. The term jurisconsult refers to any duly qualified practitioner licensed to practice law in the jurisdiction in question.
10. The pleadings of the party relying on the foreign law must set forth the effect of that law and adduce evidence to prove

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55. *Canadian Pacific Railway v. Parent*, [1917] A.C. 195 (P.C.); *Logan v. Lee* (1907), 39 S.C.R. 311 at 313 *John Morrow Screw & Nut Co. v. Hankin* (1918), 58 S.C.R. 74; *Pettkus v. Becker*, 1980 CanLII 22 (SCC), 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834; *Canadian National Steamships Co. v. Watson*, [1939] S.C.R. 11; *Upper Ottawa Improvement Co. v. Ontario Hydro-Electric Power Commission*, 1961 CanLII 7 (SCC), [1961] S.C.R. 486.

56. R.S.C. 1985, c. C-5, s. 17.

57. *Alberta Evidence Act*, R.S.A. 2000, c. A-18, ss. 28, 29 ;http://www.canlii.org/en/bc/laws/regu/bc-reg-335-2006/latest/bc-reg-335-2006.htmlEvidence Act, R.S.B.C. 1996, c. 124, s. 25(3), (4); (5) [am. B.C. Reg. 335/2006, Schedule, s. 9], (5)(b) [rep. & sub. B.C. Reg. 335/2006, Schedule, s. 9], (6), (7);http://www.canlii.org/en/bc/laws/regu/bc-reg-335-2006/latest/bc-reg-335-2006.html; Manitoba Evidence Act, R.S.M. 1987, c. E150 (also C.C.S.M., c. E150), s. 36; Evidence Act, R.S.O. 1990, c. E.23, ss. 25, 26 [am. 1993, c. 27, Sched.]; Evidence Act, S.S. 2006, c. E-11.2, ss. 41, 44.

58. Art 2809, *supra* note 42.

it as a fact. They must set out the particular provisions of the foreign statute relied upon with reasonable certainty.

11. In many provinces pleadings must contain a concise statement of the material facts upon which the party relies but not the evidence by which they are to be proved; by analogy, a pleading of foreign law should contain a concise statement of the provision of foreign law relied upon, so that, together with the facts pleaded, its effect upon the issue before the court is shown[59].

12. A Canadian court will not generally conduct its own research into foreign law. Foreign law must be proved in court by a properly qualified witness, although the witness need not necessarily be entitled to act as a legal practitioner in the foreign country in question. Thus, any person whose occupation makes it necessary to have knowledge of the law of a foreign country may be a competent and qualified witness, the competence and qualification of the witness being a matter for the court's assessment[60]. Foreign counsel for a party is not competent[61] and the witness must be independent of the parties.

13. The burden of proving foreign law lies on the party who bases his claim or defence on it[62].

14. The function of the expert witness in relation to the interpretation of foreign statutes is to tell the Court what

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59. Walker and Castel, *Canadian Conflict of Laws* (6th edition, looseleaf), § 7.2

60. Walker and Castel, *Canadian Conflict of Laws* (6th edition, looseleaf), § 7.2

61. Though see *Murphy Estate v. Minister of National Revenue* (1974), [1974] C.T.C. 552, 74 D.T.C. 6394, (Fed. T.D.)

62. *Lear v. Lear* (1974) 17 R.F.L. 136, 5 O.R. (2d) 572, 51 D.L.R. (3d) 56; *Gold v. Reinblatt* (1928), [1929] S.C.R. 74, [1929] 1 D.L.R. 959 (S.C.C.), *Worthington v. Macdonald* 1884 CanLII 3 (SCC), (1884), 9 S.C.R. 327 (S.C.C.)). Biddlecomb v. Labelle 2004 ABQB 623 (CanLII), 2004 ABQB 623, [2004] W.D.F.L. 590, [2004] A.W.L.D. 588, 364 A.R. 372

the statute means, explaining his opinion if necessary, by reference to foreign rules of construction[63].

15. If the evidence of the expert witness is uncontradicted, it will generally be accepted[64], unless it appears unreliable or extravagant[65]. Where there is conflicting evidence in the materials before the court, the court may examine them and draw its own conclusions[66].

16. On occasion, a court will determine foreign law for itself by examining the statutes and case law of a foreign country, without the assistance of expert testimony, and without formal proof, but both parties must consent to such a course of action[67].

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63. *Bausch & Lomb Optical Co. v. Maislin Transport Ltd.* (1975) 10 O.R. (2d) 533, 64 D.L.R. (3d) 19

64. *Wedig v. Gaukel* 2007 ONCA 521 (CanLII), 38 R.F.L. (6th) 91

65. *United States v. Webber* (1912), 5 D.L.R. 866, 11 E.L.R. 379 at 383, 20 C.C.C. 6 (N.S. T.D.);

66. *Estonian State Cargo & Passenger Steamship Line v. "The Elise"* [1948] Ex. C.R. 435, [1948] 4 D.L.R. 247, reversed on other grounds 1949 CanLII 37 (SCC), [1949] S.C.R. 530; *Lyon v. Lyon* [1959] O.R. 305, 18 D.L.R. (2d) 753, *Allen v. Hay*, 1922 CanLII 25 (SCC), (1922) 64 S.C.R. 76, [1922] 3 W.W.R. 366, 69 D.L.R. 193, S.C.C.); affirming (1922), reflex, [1922] 1 W.W.R. 646, 30 B.C.R. 481, 67 D.L.R. 248, (B.C. C.A.); affirming (1921), reflex, [1921] 2 W.W.R. 33, 29 B.C.R. 323, (B.C. S.C.) at page 81 (SCR), per Duff, J.: ,

   > These experts may, however, refer to codes and precedents in support of their evidence and the passages and references cited by them will be treated as part of their testimony; and it is settled law that if the evidence of such witnesses is conflicting or obscure the Court may go a step further and examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion.

67. *Patton v. Reed*, reflex, [1972] 6 W.W.R. 208 (B.C. S.C). see Jones v. Smith, 56 O.L.R. 550, [1925] 2 D.L.R. 790 (C.A.); Smith v. Smith, 13 W.W.R. 207, [1955] 1 D.L.R. 229 (B.C.S.C.).

17. Foreign law may be proved by admission in the pleadings[68].

18. In the absence of any proof to the contrary the foreign law must be presumed to be similar to that of the forum[69].

19. Parties may either tacitly or by agreement choose to be governed by the law of the forum if they find it advisable to do so[70].

20. Canadian courts have clarified that the law of the forum will be applied as it is the only law available. The ambit of the application of the law of the forum has been limited to common law and to statutory provisions of the law potentially having some degree of universality, but not provisions of a localized or regulatory character, which should be excluded because they are particular to the forum[71].

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68. *Merritt v. Copper Crown Co.* (1902), 36 N.S.R. 383 (C.A.); *Estonian State Cargo & Passenger Steamship Line v. The Elise*, [1948] Ex. C.R. 435 (Can. Ex. Ct.); reversed on other grounds 1949 CanLII 37 (SCC), [1949] S.C.R. 530.

69. *Consumers Cordage Co. v. Connolly* (1900) 31 S.C.R. 244: *Weingarden v. Moss* reflex, (1955) 15 W.W.R. 481, 63 Man. R. 243 at 253, [1955] 4 D.L.R. 63, *Bank of Nova Scotia v. Wassef* (2000) 11 C.P.C. (5th) 338. 1. Traders Realty Ltd. v. Sibley 1982 CanLII 1155 (AB QB), (1982), 20 Alta. L.R. (2d) 378 (Q.B.); *Cressey Estate v. Easton*, [1997] A.J. No. 289 (Q.B.); and *Edmonton (City) v. Lovat Tunnel Equipment Inc.*, 2000 ABQB 882 (CanLII), 2000 ABQB 882 (CanLII), [2001] 4 W.W.R. 490 (Q.B.).

70. La Forest J., writing for the majority, in *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, 1994 CanLII 44 (SCC), 1994 CanLII 44 (SCC), [1994] 3 S.C.R. 1022, adopting the reasoning of Lord Wilberforce in *Chaplin v. Boys*, [1969] 2 All E.R. 1085

71. *Royal Trust Corporation of Canada v. A.S. (W.) S.*, 2004 ABQB 284 (CanLII), 2004 ABQB 284 (CanLII), http://canlii.ca/t/1gw6v; Amosin v. The Mercury Bell, reflex, [1986] 3 F.C. 454. The Federal Court of Appeal in *Amosin v. The Mercury Bell*, reflex, [1986] 3 F.C. 454 notes the constant theme in the cases of a "reluctance of the judges to dispose of litigation involving foreign people and foreign law on the basis of provisions of our legislation peculiar to local situations or linked to local conditions

21. Some Canadian appellate courts review lower court findings with respect to foreign law on a standard of correctness, and attach a lesser level of deference to the trial judge's findings[72]. Others regard evidence of foreign law as yet another area where the trial judge has the advantage of first hand examination of the evidence and the competing views of the parties[73].

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or establishing regulatory requirements. Such reluctance recognizes a distinction between substantive provisions of a general character and others of a localized or regulatory character".

72. *General Motors Acceptance Corporation of Canada, Limited v. Town and Country Chrysler Limited*, 2007 ONCA 904 (CanLII), 2007 ONCA 904 (CanLII) http://canlii.ca/t/1v99n

> [T]he rationale that supports a high degree of deference for findings of fact made by a trial judge does not apply to findings and determinations made in respect of foreign law. Those factors, supporting a high degree of deference to a trial judge's findings of fact, are either not present in a trial judge's consideration of foreign law or, if they are present, they are not significant.
>
> The credibility of an expert witness testifying on legal issues is, in my view, just as easily assessed on appellate review as at trial. A witness testifying on questions of law is testifying on issues squarely within the province of an appellate court, which is well accustomed to evaluating the persuasiveness of legal arguments. The question of time and the allocation of judicial resources is simply not a significant issue when it comes to questions of foreign law. While globalization is a fact of life, Ontario courts do not appear taxed by foreign law issues. Similarly, it is highly unlikely that the autonomy or integrity of trial courts will in any way be put at risk if appellate courts do not defer to the trial judge's findings in respect of questions of foreign law.

73. *Friedl v. Friedl* 2009 BCCA 314 (CanLII), [2009] B.C.W.L.D. 5717, [2009] B.C.W.L.D. 5747, [2009] B.C.W.L.D. 5685, [2009] B.C.W.L.D. 5686, [2009] B.C.W.L.D. 5662, [2009] W.D.F.L. 3537, [2009] W.D.F.L. 3608, 67 R.F.L. (6th) 239, 95 B.C.L.R. (4th) 102, 273

22. Canada is not a signatory to any multinational instruments relating to proof of foreign law such as the London Convention of 1968 or the Montevideo Convention of 1979. Although the British Law Ascertainment Act, 1859 is likely still in effect within Canada, it has not been used in 130 years, and is effectively a *dead letter*[74]. Commentators ninety years ago and seventy years ago described it as "dilatory and expensive process which has been very little used". Ostensibly it provides a mechanism for referring stated facts to a superior court of any other part of the British Commonwealth for its opinion on the applicable law. However useful this might have appeared in 1859, it simply

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B.C.A.C. 212, 461 W.A.C. 212 and *JPMorgan Chase Bank v. Lanner (The)*, [2008 FCA 399 (CanLII)](), http://canlii.ca/t/220ht

74. The British Law Ascertainment Act, 1859 (at http://www.legislation.gov.uk/ukpga/Vict/22-23/63) is "an imperial act in force in Canada, does indeed provide for referring the stated facts to a superior court of any other part of the British dominions for its opinion as to the law applicable thereto-a superior if dilatory and expensive process- but the act has been very little used, even the Annual Practice being almost silent on it, and it is safe to say that it is practically a dead letter", see John Willis Uniformity of Law in a Federal System – Canada at 5 U. Toronto L.J. 367 (1943-1944). The futility of the Act is noted by A. Chase-Casgrain, "Proof of Foreign and Extra-provincial Laws-Anomalies" in 3 Canadian Bar Review (1925), at p. 240, which points out only one instance when the statute was invoked in Canada – see *Noad v. Noad* (1877) 21 LCJ 312. For English and American perspectives on the use of the Act, see Julius Hirschfeld, Proof of Foreign Law; 11 L. Q. Rev. 241 (1895) and Arthur Nussbaum, The Problem of Proving Foreign Law, 50 Yale L. J. 1018 (1940-1941) at 1030. A similar Imperial statute, the *Foreign Law Ascertainment Act, 1861* was never invoked and was repealed in 1973, see Cross & Tapper on Evidence, 9th Edition at p. 668 and Phipson on Evidence 16th Edition at §33-59. The potential use of the court submitting questions to a foreign court can be illustrated by the English courts submitting questions to the court in Bengal in *Login v The Princess Victoria Gouramma of Coorg* [1862] EngR 452; (1862) 30 Beav 632; 54 E.R. 1035.

has no operative force today and can be remarked as being only of theoretical interest[75].

The Use of Comparative Legal Materials as Exemplary

There has been a sea change in the use by Canadian courts of foreign legal materials[76] since the advent of the Canadian Charter of Rights and Freedoms[77] because the courts are now expressly required when considering whether a limitation is justifiable to look at section 1, which provides, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it

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75. For a slightly more sanguine approach to the potential of referring matters to a foreign court, see Chief Justice J.J. Spigelman, Proof of Foreign Law by Reference to the Foreign Court, (2011) 127 LQR 208 at p. 213.

76. In this respect, the Canadian courts differ markedly from the position of the US Supreme Court where a vigorous debate has emerged between Justice Scalia and Justices O'Connor and Kennedy on resort to non-US materials. See the seminal article by Justice Sandra Day O'Connor. Broadening our horizons: why American lawyers must learn about foreign law, The Federal Lawyer. 45.8 (Sept. 1998) p. 20-21. The debate is explored in Vlad F. Perju, The Puzzling Parameters of the Foreign Law Debate, 2007 Utah L. Rev. 167 (2007); Jeremy Waldron, Foreign Law and the Modern *Ius Gentium*, 119 Harv. L. Rev. 129 (2005); Harold H. Koh, International Law as Part of Our Law, 98 Am. J. Int'l. L. 43, 45ff. (2004); Mark Tushnet, When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court References to Non-U.S. Law, 90 Minn. L. Rev. 1275 (2005); Eric D. Blumenson, Constitutional Kabuki: Fidelity and Opportunism in the Foreign Law Debate, 43 Suffolk U. L. Rev. 136 (2009); Richard A. Posner, Foreword: A Political Court, 119 Harv. L. Rev. 31, 84-90 (2005). Vicki C. Jackson Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors (2006) at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1110&context=facpub

77. Enacted as Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11, http://laws-lois.justice.gc.ca/eng/charter/CHART_E.PDF

subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society[78]". However there is a significant difference in considering foreign law through a Brandeis Brief or otherwise, as an aid in developing the law in an area[79], and considering foreign law because one party has introduced it as the law governing the issues in dispute. It is only the latter for which the traditional questions of pleading and proof are considered relevant.

Canadian courts have long embraced[80] comparative materials as exemplary or persuasive[81], and judges[82] have

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78. At an early stage of Charter litigation, the Ontario Court of Appeal established that when a court refers to foreign law for comparative purposes (the court examined legislative approaches in 26 American states, all the Australian states, New Zealand and the United Kingdom), it was not necessary to prove these laws through expert evidence. The Court would also be open to Brandeis Briefs containing comparable legislative and policy materials. See *Re Southam and The Queen (No. 1)* (1983) 41 OR (2d) 113 (CA), commented on by J. Gregory Richards, Proof of Foreign Law under Section 1 of the Charter, Advocates Journal, May 1984, at p. 21.

79. For empirical studies on this trend, see Peter McCormick, Waiting for globalization: an empirical study of the McLachlin court's foreign judicial citations, Ottawa Law Review. 41.2 (Spring 2010): p209, and Bijon Roy, An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation, 62 U.Toronto. Fac. L. Rev. 99 (2004).

80. Lorraine E. Weinrib, Constitutional Conceptions and Constitutional Comparativism, in *Defining the Field of Comparative Constitutional Law* 3, 25 (Vicki C. Jackson & Mark Tushnet eds., 2002) states that Canadian justices frequently considered foreign law in the years immediately following the 1982 adoption of the Canadian Charter of Rights and Freedoms but "often did not note their sources".

81. H. Patrick Glenn, Persuasive Authority, (1987) 32 McGill LJ 261

82. There are a number of extra-curial writings by Justices of the Supreme Court of Canada commenting on the court's use of foreign and international materials. Gérard V. La Forest, The Use

told me that the advent of Legal Information Institutes around the world has allayed historic concerns that the Canadian court might have dated materials that did not reflect the current state of the foreign law.

Exploring Access to Foreign Law with Networking and Intelligent Tools

Throughout history, legal "specialists" were always required to express, articulate, organize and navigate the law. They were repositories of the law and actively participated in shaping the content and application of laws. Today, the legal specialists are professional lawyers. Through their work, lawyers rationalize the law. Max Weber explained that,

> The increased need for specialized legal knowledge created the professional lawyer. This growing demand for experience and specialized knowledge and the consequent stimulus for increasing rationalization of the law have almost always come from increasing significance of commerce and those participating in it. For the solution of the new problems thus created, specialized, i.e., rational, training is an ineluctable requirement. Our interest is centered upon the ways and consequences of the "rationalization" of the law, that is the

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of American Precedents in Canadian Courts, (1994) 46 Maine LR 211; Gérard V. La Forest, The Expanding Role of the Supreme Court of Canada in International Law Issues, 34 Can. Y.B. Int'l L. 89 (1996); Claire L'Heureux-Dubé, The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court, 34 Tulsa L.J. 15, 40 (1998); Michel Bastarache, The Honourable Justice G.V. La Forest's Use of Foreign Materials in the Supreme Court of Canada and his Influence on Foreign Courts, in Gérard V. La Forest and the Supreme Court of Canada: 1985-1997 433 (Rebecca Johnson & John P. McEvoy, eds., 2000); Louis Lebel & Gloria Chao, The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law, 16 S.C.L. Rev. (2d) 23 (2002); Michel Bastarache, How Internationalization of the Law Has Materialized in Canada, 59 U.N.B.L.J. 190 (2009).

> development of those "juristic" qualities which are characteristics of it today.[83]

Different legal cultures place different emphasis on legal 'honoratiores' to rationalize national systems. Common lawyers would still recognize the truth beneath Thomas E. Holland's caricature:

> Some of you, gentlemen, may think that I attach an exaggerated importance to a good classification of the statutes, in fact, **the old fashioned English lawyer's idea of a satisfactory body of law was a chaos with a full index**. I believe, however, that this was just the weakest point of the old fashioned lawyer, and that to introduce logical method into any one department of our law would be to confer upon it the greatest possible benefit – a benefit too which would spread ere long to other departments.[84]

By contrast, for Dutch lawyers, "Finding law (rechtsvinding) is both an intellectual and an intuitive moral activity".[85] However in all legal systems, technology brings new opportunities for storing locating and categorizing the law for easier reference and analysis.

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83. Max Rheinstein, *Max Weber on Law in Economy and Society* (New York: Simon and Schuster, 1954) at 96-97; original text at Max Weber, Grundriß der Soziologie, Wirtschaft und Gesellschaft, Zweiter Teil. Die Wirtschaft und die gesellschaftlichen Ordnungen und Mächte, Kapitel VII. Rechtssoziologie, § 4. Die Typen des Rechtsdenkens und die Rechtshonoratioren at http://www.zeno.org/nid/20011439661 .

84. Thomas E. Holland, Essays upon the Form of the Law (London, Butterworths, 1870) at p. 171, at http://openlibrary.org/books/OL24152398M/Essays_upon_the_form_of_the_law

85. Asser, C. and Scholten, P. (1931) Handleiding tot de beoefening van het Nederlandsch burgerlijk recht Algemeen deel. (Zwolle: Tjeenk Willink), as quoted in Esther Hoorn and Dore van Hoorn, Critical assessment of using wikis in legal education at http://go.warwick.ac.uk/jilt/2007_1/hoorn.pdf

Commercial legal databases like Lexis and Westlaw have provided lawyers with invaluable information for the last thirty-five years[86]. For example, a lawyer is capable of identifying how many times a case has been subsequently cited to assess its persuasiveness. An entire family of over thirty Legal Information Institutes, are public and offered at no cost. These tools assist legal professionals with the process of "rationalizing" the law, and offer the public at least a theoretical opportunity to know the law.

The Potential of Intelligent Tools

There are a number of experiments underway with intelligent tools which are designed to facilitate access to laws. Researchers have studied the possibility of automatic abstracting of legal texts (such as the Belgian SALOMON project). These systems would automatically recognize text structures and identify themes within a case.[87] This type of intelligent tool has its limits when

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86. The early history is recounted at Jon Bing, Handbook of Legal Information Retrieval (1991) at http://www.lovdata.no/litt/hand/hand-1991-0.html

87. Marie-Francine Moens, Caroline Uyttendaele and Jos Dumortier, "Abstracting of Legal Cases: The SALOMON Experience" in *Proceedings of the 6th ICAIL* (New York: ACM Press, 1997) at 114-122 and https://www.law.kuleuven.be/icri/publications/43AILAW.pdf; originally published as Moens, M.-F., Uyttendaele, C. & Dumortier, J. (1998) Het automatisch samenvatten van vonnissen: kort overzicht van het SALOMON-project. Computerrecht, 2, 58-63; see also Marie-Francine Moens and Roxana Angheluta: Concept Extraction from Legal Cases: The Use of a Statistic of Coincidence. ICAIL 2003: 142-146, Marie-Francine Moens, Caroline Uyttendaele, Jos Dumortier: Information extraction from legal texts: the potential of discourse analysis. Int. J. Hum.-Comput. Stud. 51(6): 1155-1171 (1999), Marie-Francine Moens, Caroline Uyttendaele, Jos Dumortier: Abstracting of Legal Cases: The Potential of Clustering Based on the Selection of Representative Objects. JASIS 50(2): 151-161 (1999), Marie-Francine Moens: Combining Structured and Unstructured Information in a Retrieval Model for Accessing Legislation. ICAIL 2005: 141-144,

applied in legal texts. The retrieval of legal cases is dependent on concepts, not necessarily common keywords. As a result, cases are indexed by humans because machines remain far from a sophisticated understanding of natural language (such as being able to make intelligent inferences about subject matter or normative status from the text itself).[88]

Internal Perspectives and External Users

This criticism is demonstrable in a recent initiative by the Government of Quebec. A web-based questionnaire advises businesses on the juridical form in which they should be constituted. At the end of the questionnaire, the applicable and relevant bodies of law that should be considered are identified.[89]

One flaw appears to be that answering the questions requires a more than rudimentary knowledge of the various corporate forms allowable under Quebec law, that is unlikely to be shared by most non-Québecois users. The first series of questions asks what corporate form the individual would like to use. If one does not have a working understanding of the distinction between a corporation, a co-operative and a private business under the laws of Quebec, then the tool will be less than helpful[90]. Moreover, the tool does not provide an answer based on diagnosis, but simply identifies a relevant body of laws, which may be dauntingly extensive.

The Potential Use of Networked Tools

Crowd-sourcing and networked tools are again in their infancy. The public legal information institutes track how frequently particular cases are accessed and how often

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88. Marie-Francine Moens, "Innovative techniques for legal text retrieval" (2001) 9 Artificial Intelligence and Law at 29-57.

89. See Service Quebec Entreprises, online: <http://www.gouv.qc.ca/portail/quebec/pgs/commun>.

90. Indeed, most Canadian lawyers outside Québec might have difficulty knowing the relevant distinctions. Often national legal information systems assume that access will be from internal national users who understand the language and concepts used in the legal texts.

they are in turn cited or referred to in subsequent cases. Frequency of reference may not map precisely to significance or importance but it does seem as if the working corpus of meaningful cases may be somewhat smaller than the mountains of cases that the courts release and that the legal information systems publish. Turning to commercial systems, Thomson West has since 2010 enhanced its Westlaw system by adding into its databases and search algorithms its Key Numbering system, its integrated citation system and its wealth of secondary resources – again frequency of citation reference rather than a mere relevance ranking based on the occurrence of key terms affects the search results[91]. Users accustomed to Google's power and algorithms expected better performance from their legal information systems[92].

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91. See Simon Chester, The Future of Westlaw at http://www.slaw.ca/2010/01/28/the-future-of-westlaw-a-slaw-canadian-exclusive, Ronald E. Wheeler. Does WestlawNext really change everything? The implications of WestlawNext on legal research. Law Library Journal. 103.3 (Summer 2011) p. 359-377 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773767 and Ken Adams, Kicking the Tires of WestlawNext at http://www.adamsdrafting.com/2010/02/01/kicking-the-tires-of-westlawnext

92. There is an extensive theoretical literature on precision and recall and the difficulty of locating relevant legal texts. For seminal texts, see Jon Bing, Handbook of Legal Information Retrieval (1991) at http://www.lovdata.no/litt/hand/hand-1991-0.html , Graham Greenleaf, Jon Bing and the History of Computerised Legal Research - Some Missing Links in Et Tilbakeblikk På Fremtiden ("Looking Back at the Future"), pp. 61-75, Olav Torvund and Lee Bygrave, eds., Unipub, 2004, D Blair and M E Maron, "An evaluation of retrieval effectiveness for a full-text document retrieval system", Communications of the ACM, 1985, vol 28, issue 3, pp 289 et seq. found at http://opim-sun.wharton.upenn.edu/~sok/papers/b/blair-maron.pdf critiqued by G Greenleaf, A Mowbray and D Lewis, Australasian Computerised Legal Information Handbook, Butterworths, Sydney, 1988.Greenleaf, Mowbray and Lewis at http://www2.austlii.edu.au/cal/guides/retrieval/handbook/index-

One recent experiment repurposes documents obtained from search results on the US Courts PACER system, which requires subscriptions and payments for access[93]. Launched in 2009, the RECAP system encourages PACER users to contribute the documentary texts they have located – and paid for above cost recovery[94] - into an open public database. The corpus represents not the entirety of the decisions of the Federal Courts, but only those which have interested at least one searcher. This crowd-sourced database may simply represent a temporary way-station as part of a campaign to make all PACER materials available free of charge[95] as part of the movement represented by the Montréal Declaration on Public Access to Law[96].

3.html#Heading61 and http://www2.austlii.edu.au/cal/guides/retrieval/retrieval-3.html#Heading29 . and two US Patents on inventions by Howard Turtle, 5,265,065, 1993, Method and apparatus for information retrieval from a database by replacing domain specific stemmed phases in a natural language to create a search query and 5,418,948, 1995 Concept matching of natural language queries with a database of document concepts. A good summary is at Ranking and Classifying Legal Documents using Conceptual Information by Kees van Noortwijk, Johanna Visser and Richard V. De Mulder at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2006_1/noortwijk/noortwijk.pdf

93. Using software to liberate U.S. case law. By Harlan Yu, Stephen Schultze, December 2011. at http://xrds.acm.org/article.cfm?aid=2043244

94. Schultze, S. What does it cost to provide electronic public access to court records? Managing Miracles, May 2010; http://managingmiracles.blogspot.com/2010/05/what-is-electronic-public-access-to.html

95. H. Yu, Assessing PACER's access barriers. Freedom to Tinker, August 2010; https://freedom-to-tinker.com/blog/harlanyu/assessing-pacers-access-barriers

96. The Declaration is available at http://www.paclii.org/other/Montrealdec.html

Collaboration tools such as Wikis offer tantalizing opportunities to deploy group authorship and editorship to produce legal texts and commentary. It seemed in the mid-2000s as if collaboration tools like Wikis offered great opportunities to produce legal texts through the leverage of enthusiastic volunteers. Despite initial scepticism and the odd well-publicized scandalous error, the surprising thing about Wikipedia[97], the massive encyclopaedia which is open to general contributions and editing, was how accurate it was[98]. Processes of editorial scrutiny and feedback, ultimately raised its accuracy level to that of the Encyclopaedia Britannica. Could such a model be useful in the law? Although some commentators argue for the use of similar techniques in law, the need for integrity and quality control has constrained progress. The Wikipedia approach is to invite open contributions at large, but subject to rigorous editing.

The boldest initiative was taken by the Legal Information Institute at Cornell University which launched, in 2006, an ambitious legal dictionary and encyclopaedia called Wex[99]. Because the legal norms with which Wex was concerned emanated from official sources – the integrity, accuracy and currency of such norms was vital. Secondly, the necessity to apply specialist legal knowledge to the writing of these materials led to an early decision to restrict contributions to those who could satisfy the organizers of Wex that they had the necessary

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97. Andrew Lih, The Wikipedia Revolution: How a Bunch of Nobodies Created the World's Greatest Encyclopedia London, Aurum Books, 2009

98. Joseph Michael Reagle Jr., Good Faith Collaboration: The Culture of Wikipedia (History and Foundations of Information Science) The MIT Press (August 27, 2010) and Wikipedia: a Republic of Science Democratized Shun-Ling Chen(2010) 20 Alb. L.J. Sci. & Tech. 247 at http://ssrn.com/abstract=1826325

99. The Wex legal dictionary and legal encyclopædia is at http://www.law.cornell.edu/wex/. The restriction on contributions is justified at http://www.law.cornell.edu/wex/faq and http://www.law.cornell.edu/wex/why_not_Wikipedia and http://www.law.cornell.edu/wex/editorial_contributions

professional qualifications or competences. Time alone will tell whether these restrictive policies were justified.

While Wex offers a creditable legal dictionary, its encyclopaedia appears less than useful to users from other legal system or comparative legal scholars. In this, it's progress may be usefully contrasted with experiments currently underway in Australia[100], Canada[101], and with those concerned about the United States Supreme Court[102], to monitor and assess the scholarly quality of the general Wikipedia articles on legal topics. Progress in this area has also been slow. The jury is still out on whether Wikipedia offers a possible model for promoting future access to law[103].

The most significant development in enabling free access to the law has been the rise of national legal information institutes and their joining a loose federation. Each of the

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100. http://en.wikipedia.org/wiki/Wikipedia:WikiProject_Australian_law

101. http://en.wikipedia.org/wiki/Wikipedia:WikiProject_Canadian_law

102. http://en.wikipedia.org/wiki/Wikipedia:WikiProject_US_Supreme_Court_Cases

103. More optimistic assessments can be followed at Normann Witzleb, "Engaging with the World: students of comparative law write for Wikipedia" [2009] UMonashLRS 18 at http://www.austlii.edu.au/au/journals/UMonashLRS/2009/18.html ; Ethan Katsh and Beth Simone Noveck. Peer to peer meets the world of legal information: encountering a new paradigm. Law Library Journal. 99.2 (Spring 2007) p. 365-376. In this paper, Katsh and Noveck describe a proposal for crowd-sourcing the scrutiny of patent applications by leveraging global knowledge of prior art. For a more general argument for the use of collaborative tools like Wikis in legal training, see Beth Simone Noveck Wikipedia and the future of legal education.Journal of Legal Education. 57.1 (Mar. 2007) p. 3-9. Finally law firms are starting to use collaborative tools: Wiki me this Law firms are starting to embrace the use of this browser-based collaborative system for creating, editing, linking, and organizing information, by Gerry Blackwell at http://www.hicksmorley.com/images/WIKI.pdf

legal information institutes reflects the structure and organization of its own legal system. Each institute was designed with the needs of local users (both judges, lawyers and members of the public) in mind. Use by foreign researchers has surprised many of the institutes. Of course, there is the danger that foreign users will not be sensitive to either the legal language, the substantive or procedural background, or the legal concepts at play in a particular foreign system.

At an early stage of development of the legal information institutes, the Norwegian scholar Jon Bing voiced the concern that an uncoordinated patchwork of institutes might present difficult problems of access, if each national system was approached and structured in a different way. This, he argued[104], brought forth both possibilities and problems in the development of national legal information services:

> One of the fascinations with the new technology was the ease and low cost of establishing home pages, enabling institutions to present themselves and to provide information to the external world. Rather than using the technology to collect information from many sources, presenting them in a coordinated and integrated way, a profusion of initiatives was taken – each court, each agency, each institution presented their own site to the public. Initially, therefore, the tendency to fragment was further emphasised. The user, who wanted to search for national sources, was presented with a rather differentiated, if not confused situation.

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104. Jon Bing, "The Policies of Legal Information Services: A Perspective of Three Decades", Lee A Bygrave (ed), Yulex 2003, Institutt for rettsinformatik / Norwegian Research Centre for Computers and Law, Oslo, 2003, pp 37–55, at http://www.jus.uio.no/ifp/om/organisasjon/seri/forskningsomrader/publikasjoner/yulex/Yulex_2003.pdf as quoted in Graham Greenleaf, Jon Bing and the History of Computerised Legal Research – Some Missing Links at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=537142

Largely due to the pioneering activities of Graham Greenleaf and his colleagues in Australia, Tom Bruce and his colleagues at Cornell[105] and Daniel Poulin in Montreal, significant steps have been made in ensuring that legal information institutes currently under development take advantage of the experience of more established institutes, and that they are similarly structured and accessible. The Worldlii search engine does permit cross-searching of multi-legal information institutes. A global approach to access to law may thus be in its infancy[106].

Tentative Conclusions

Canada's experience with access to foreign law for the purposes of dispute resolution has been a good one. Neither courts nor commentators identify any major unaddressed issues of principle. Of course, technologies may offer possibilities which our legal culture will enthusiastically address. While intelligent tools, especially public online databases, provide indispensable information, comprehending and analyzing legal information is complex. Nothing can replace the invaluable resourcefulness of the legal practitioner because, namely, laws cannot be dissociated from the social, cultural and economic background in which they were created. Legal practitioners are and are likely to remain the most reliable source for accessing foreign law.

Nor do Canadian lawyers see any huge problem in the proof of foreign law, that requires new instruments or initiatives to solve. While better access points to foreign law might well be useful, maintaining a comprehensive and up to date list of links to authoritative statements of foreign laws, through a global portal, is likely currently beyond the capabilities of any single national or transnational body.

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105. Thomas R. Bruce, Public Legal Information: Focus and Future, 1 J. INFO., L. & TECH., (2000), at http://elj.warwick.ac.uk/jilt/00-1/bruce.html

106. Michael W. Carroll, "The Movement for Open Access Law - Symposium." Lewis & Clark Law Review 10, no.4 (Winter 2006) 741-760.