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## International and Foreign Law North of the Border: The Canadian Constitutional Experience

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## International and Foreign Law North of the Border: The Canadian Constitutional Experience

*Drew S. Days, III\**

[L]aw like technology is very much the fruit of human experience. Just as very few people have thought of the wheel yet once invented its advantages can be seen and the wheel used by many, so important legal rules are invented by a few people or nations, and once invented their value can readily be appreciated, and the rules themselves adopted for the needs of many nations.<sup>1</sup>

The question of the extent to which American judges should consult foreign and international authorities has occupied Supreme Court Justices, members of Congress and legal commentators<sup>2</sup> for the past several years. This is evident in the opposing positions of the Justices in recent decisions on capital punishment and homosexual sodomy.<sup>3</sup> The question has also spawned a public debate between two Supreme Court Justices,<sup>4</sup> as well as congressional proposals explicitly permitting federal judges to consult only domestic sources.<sup>5</sup>

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<sup>1</sup> ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 100 (2d ed. 1993).

<sup>2</sup> Tim Wu, *Foreign Exchange: Should the Supreme Court Care What Other Countries Think?*, SLATE, Apr. 9, 2004, <http://slate.msn.com/id/2098559>.

<sup>3</sup> See *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that executions of mentally retarded criminals are cruel and unusual punishments prohibited by the Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that state law making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed).

<sup>4</sup> See Press Release, Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer (Jan. 13, 2005) available at <http://www.freerepublic.com/focus/f-news/1352357/posts>. Justice Antonin Scalia: “[W]e don’t have the same moral and legal framework as the rest of the world, and never have. If you told the framers of the Constitution that [what] we’re after is to, you know, do something that will be just like Europe, they would have been appalled.” *Id.* Justice Stephen Breyer: “[O]f course foreign law doesn’t bind us . . . [b]ut these are human beings...who have problems that often, more and more, are similar to our own. They’re dealing with certain texts, texts that more and more protect basic human rights. Their

At one level, the controversy over whether and, if so, to what extent foreign and international law should figure in the process of U.S. constitutional decision-making is rather surprising, given the Court's past practice. For example, the U.S. Supreme Court explicitly cited to foreign and international rulings a decade ago in *Washington v. Glucksberg*,<sup>6</sup> where it rejected the claim that the Due Process Clause of the Constitution "protects a right to commit suicide, which itself includes a right to assistance in doing so."<sup>7</sup> Included in Chief Justice Rehnquist's opinion for the Court were references, among other sources, to a 1995 report of the Senate of Canada and to a Supreme Court of Canada decision,<sup>8</sup> which rejected a terminally ill plaintiff's claim that she had a constitutional right to "physician-assisted suicide."<sup>9</sup>

But at a deeper level, the controversy has very serious consequences, for I think that it presents the question of whether the U.S. is going to join a "global constitutional conversation" in which it has not desired to engage up to now. Since World War II, a significant number of countries have dedicated themselves to writing modern constitutional documents, embodying their fundamental commitments to human rights and human dignity and enforced by "constitutional courts" of varying structural design.<sup>10</sup> To the extent that our Supreme Court wishes to overcome the powerful obstacle that American exceptionalism poses in this regard, I would suggest that Canada may provide a constructive model, for the Canadian Supreme Court has shown a remarkable ability to consider foreign courts' jurisprudence, including that of the U.S., while, at the same time, remaining true to its own constitutional values and history.<sup>11</sup> Justice Ruth Bader Ginsburg seems to

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societies more and more have become democratic and they're faced . . . with some of the really difficult ones where there's a lot to be said on both sides." *Id.*

<sup>5</sup> H.R. Res. 97, 109th Cong. (1st Sess. 2005); S. Res. 92, 109th Cong. (1st Sess. 2005) (expressing the view that judicial determinations regarding the meaning of the U.S. Constitution should not be based on determinations of foreign institutions "unless [they] inform an understanding of the original meaning of the Constitution of the United States").

<sup>6</sup> 521 U.S. 702 (1997).

<sup>7</sup> *Id.* At 723

<sup>8</sup> *Id.* At 718, n. 15 & 16.

<sup>9</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 319.

<sup>10</sup> Ruti Teitel, *Transnational Jurisprudence: The Role of Law in Political Transformation*, 106 Yale L.J. 2009, 2060 n. 205 (1997) (noting the similarities between South Africa's and Germany's postwar constitutions); D.M. Davis, *Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience*, 1 INT'L J. CONST. L. 181, 186-188 (2003) (noting that the South African Constitution contains numerous provisions and rights modeled after or copied from the constitutions of the U.S., Canada, Germany and Malaysia).

<sup>11</sup> See Claire L'Heureux-Dubé, *Two Supreme Courts: A Study in Contrast*, in THE CANADIAN AND AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE 149, 164 (Marian C. McKenna ed., 1993); Gerard V. La Forest, *The Use of American Precedents in Canadian*

share this view. In a recent interview, in response to a question suggesting that U.S. judges' consultation of foreign law might be improper, she said: "No one who sees the value of looking abroad suggests that a decision, say, of the Canadian Supreme Court would be binding on us; we read it for its persuasive value, for the quality of its reasoning."<sup>12</sup>

In so saying, she may have been implicitly acknowledging that Canada and the U.S. have much in common. Former British colonies, both are predominantly English-speaking modern industrial societies. They are connected by innumerable commercial and economic relationships and share a several thousand-mile East-West border. These commonalities raise at least the possibility that U.S. judges might profit from consulting what their fellow judges "North of the Border" have to say on legal questions common to both countries.<sup>13</sup> But I think that she may have meant *more* than that. Perhaps she was acknowledging the progressive role played by the Supreme Court of Canada over the past quarter-century under its late 20<sup>th</sup> Century basic constitutional document.

In 1982, Canada amended its 1867 Constitution (The British North America Act) by adding the Charter of Rights and Freedoms, a document designed, first, to "constitutionalize" certain statutorily guaranteed individual rights protections.<sup>14</sup> Second, it embodied in its constitution rights and freedoms recognized by Canada through its adherence to a number of international human rights accords. Third, it borrowed features from other constitutional documents around the world, including selected provisions of the U.S. Bill of Rights. Fourth,

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*Courts*, 46 ME L. REV. 211, 216-220 (1994); Shannon Ishiyama Smithey, *A Tool, Not a Master: The Use of Foreign Case Law in Canada and South Africa*, 34 COMP. POL. STUD. 1188, 1192-1209 (2001).

<sup>12</sup> Ruth Bader Ginsburg & Paul Berman, *An Open Discussion with Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1042 (2004).

<sup>13</sup> See, e.g., Smithey, *supra* note 11, at 1205-1209 (using case law from the Canadian Supreme Court and African Constitutional Court to argue that judges rely on foreign precedent because of its utility in cutting information costs, decreasing uncertainty, and providing justification). Professor Smithey argues:

Faced with contentious arguments over new questions, judges found it useful to take advantage of the experience of other courts that had dealt with the same sorts of questions. They found foreign and domestic precedent particularly useful when there were higher rates of disagreement and their need for justification was highest.

*Id.* at 1207. However, Professor Smithey went on to explain that "[r]ather than merely following foreign majority opinions, judges in Canada and South Africa have often found the logic of foreign dissenting opinions to be more persuasive." *Id.* at 1209.

<sup>14</sup> Constitution Act, 1982 (schedule B) Charter of Rights & Freedoms [hereinafter Charter].

it moved Canada in significant respects from a system of parliamentary supremacy to one in which judicial review would play a central role in the interpretation and implementation of the Charter's provisions.<sup>15</sup>

Moreover, in the course of drafting the Charter, Canadian parliamentarians held public hearings, and debated at great length the pros and cons of adopting provisions that paralleled those in our Bill of Rights.<sup>16</sup> What resulted was a fundamental document that resembles, in certain respects, U.S. provisions, while also differing in several notable respects.<sup>17</sup> In particular, it affords protection for "life, liberty and the security of the person"<sup>18</sup> (not "property") – a difference which parliamentarians claim is meant to avoid the problems which their "neighbors to the South" (a phrase used by some parliamentarians) encountered with the legacy of *Lochner v. New York*<sup>19</sup> and substantive due process. Also, it contains a section that ensures *both* the right to equal protection and the right of the government to practice affirmative action,<sup>20</sup> so as to preempt any debate like those preceding and following the U.S. Supreme Court's decision in *The Regents of the University of California v. Bakke*.<sup>21</sup> The Charter contains a provision guaranteeing its rights and freedoms "equally to male and female persons[,]"<sup>22</sup> one that was included as a Canadian response to the failure in the U.S. of the Equal Rights Amendment (ERA).<sup>23</sup> Another provision grants broad standing to anyone whose rights or freedoms have been infringed or denied.<sup>24</sup>

Two other provisions, quite curious ones to most U.S. constitutional scholars and political scientists must be mentioned. The first is the non obstante or "notwithstanding" clause.<sup>25</sup> In effect, it allows for

<sup>15</sup> Drew S. Days, III, *Civil Rights in Canada: An American Perspective*, 32 AM. J. COMP. L. 307, 328-338 (1984); Lorraine Weinrib, *Canada's Charter: Rights Protection in the Cultural Mosaic*, 4 CARDOZO J. INT'L & COMP. L. 395, 403-410 (1996).

<sup>16</sup> Richard S. Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111, 150-153 (1984).

<sup>17</sup> William Black, *A Walk Through the Charter*, in RIGHTING THE BALANCE: CANADA'S NEW EQUALITY RIGHTS, 47-81 (Lynn Smith et al. eds., 1986).

<sup>18</sup> Charter, *supra* note 14, at §7.

<sup>19</sup> 198 U.S. 45 (1905).

<sup>20</sup> Charter, *supra* note 14, §15; *Lovelace v. Ontario* [2000] 1 S.C.R. 950 (Can.); Edward J. Iacobucci, *Antidiscrimination and Affirmative Action Policies: Economic Efficiency and the Constitution*, 36 OSGOODE HALL L.J. 293, 317-337 (1998); Stephen F. Ross, *Charter Insights for American Equality Jurisprudence*, 21 WINDSOR Y.B. ACCESS JUST. 227, 235-241 (2002).

<sup>21</sup> 438 U.S. 265 (1978).

<sup>22</sup> Charter, *supra* note 14, at § 28.

<sup>23</sup> 2 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 52-55 & n. 241 (2005).

<sup>24</sup> See Frank Iacobucci, *The Supreme Court of Canada, Its History, Powers and Responsibilities*, 4 J. APP. PRAC. & PROCESS 27, 37-39 (2002).

<sup>25</sup> Charter, *supra* note 14, at § 33.

the suspension of applications of certain Charter provisions for five years by action of the federal parliament or a provincial legislature.<sup>26</sup>

The second, often referred to as a “reverse onus” clause, guarantees the rights and freedoms set out in the Charter subject only to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>27</sup>

One final feature of the Canadian constitutional framework is that the Supreme Court of Canada is authorized to render advisory opinions,<sup>28</sup> something that the U.S. Supreme Court may not do, in view of the “case or controversy” requirement in Article III of the Constitution.<sup>29</sup>

At least at the rhetorical level, one of the complaints about the task of consulting relevant foreign precedents is that, even where they can be found, there is a rather low level of confidence that one sufficiently understands the political, cultural and historical context out of which they emerged.<sup>30</sup> But it is reasonable to think that such laments with respect to Canadian law have much less justification, given the history of the Charter’s development and its connection to U.S. law. Moreover, from a purely statistical perspective, the decisions of the Supreme Court of Canada in applying a modern Constitution to 20<sup>th</sup> and 21<sup>st</sup> Century problems reflect a clarity and directness in stating the nature of the problems before the Court and the reasoning of the concurring views of its Justices.<sup>31</sup> Although it could probably not be oth-

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<sup>26</sup> See Barbara Billingsley, *The Charter’s Sleeping Giant*, 21 WINDSOR Y.B. ACCESS JUST. 331 (2002); see also Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U.TORONTO L.J. 221, 273 (2002).

<sup>27</sup> Charter, *supra* note 14, at § 1; *The Queen v. Oakes*, [1986] 1 S.C.R. 103, 105; see also Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,” Rights and Federalism*, 1 U.PA. J. CONST. L. 583, 606-611 (1999).

<sup>28</sup> James L. Huffman & MardiLyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court’s Reference Jurisdiction*, 74 MINN. L. REV. 1251, 1251 (1990).

<sup>29</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>30</sup> Insofar as Canada and the U.S. are concerned, a long-standing debate continues about the extent to which differences in histories and cultural values complicate efforts to draw reliable analogies between their constitutional jurisprudence. See Stephen F. Ross, *Charter Insights for American Equality Jurisprudence*, 21 WINDSOR Y.B. ACCESS JUST. 227, 241-254 (2002). Regarded as the seminal work in this respect is SEYMOUR MARTIN LIPSET, *CONSTITUTIONAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA* 1-56 (1990) (arguing that the two cultures differ, among others, in their attitudes towards individual rights (U.S.) and communitarian values (Canada) that can be traced to the different paths each followed after the American Revolution).

<sup>31</sup> This is not to suggest that the decision-making process and jurisprudence of the Supreme Court of Canada have been free of controversy, particularly with respect to the Court’s relationship with Parliament and the provincial legislatures. See Peter W. Hogg and Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 OSGOODE HALL L.J. 75, 76-78 (1997); see also Hon. Beverly McLachlin, *Charter Myths*, 33 U. BRIT. COLUM. L. REV. 23, 23

erwise, decisions of our Supreme Court, aided but often burdened by the perceived need of the Justices to reconcile and shore up their views by citation to over two centuries of precedent, may leave some readers with the impression that they just do not “get it.”<sup>32</sup> One might conclude, however, given the differences described above, that neither the U.S. nor the Canadian Supreme Court will gain very much from considering the other’s constitutional jurisprudence.

But that has not been the case in Canada.<sup>33</sup> In interpreting its own Constitution, the Supreme Court of Canada has acknowledged a healthy tension between seeking assistance from U.S. jurisprudence while at the same time being fully cognizant that certain fundamental differences between the two countries argue against U.S. law providing any “quick fixes.” As the Court said in *The Queen v. Keegstra*,<sup>34</sup> its leading precedent on “hate speech”:

While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the U.S. Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances . . . .<sup>35</sup>

In that 1990 decision the Court upheld, in the face of a constitutional challenge, a criminal provision that penalized “everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group...”<sup>36</sup> The Court did so, however, only after a thorough, sophisticated canvas of U.S. First

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(1999); Christopher P. Manfredi, *The Life of a Metaphor: Dialogue in the Supreme Court 1998-2003*, 23 *S.C.L.R.* (2d) 105 (2004); Christine A. Bateup, *Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective* 44 (2006) (unpublished JSD Candidate Working Papers) (on file with New York University School of Law).

<sup>32</sup> See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 145-168 (1991) (arguing that U.S. rights jurisprudence would benefit if American lawyers and judges in difficult and novel cases examined important decisions of leading courts elsewhere).

<sup>33</sup> See C.L. Ostberg *et al.*, *Attitudes, Precedents and Cultural Change: Explaining the Citation of Foreign Precedents by the Supreme Court of Canada*, 34 *CAN. J. POL. SCI.* 377, 387 (2002) (noting that almost 30% of the cases decided between 1984 and 1995 cited U.S. authorities). Ostberg argues this is largely a result of “policy convergence” defined as “the tendency of societies to grow more alike, to develop similarities in structures, processes and performance ‘over time’ and policy emulation (or doctrinal convergence) between the Supreme Court and other courts, most notably the Supreme Court of the U.S.” *Id.* at 377-78, 380.

<sup>34</sup> See *The Queen v. Keegstra*, [1990] 3 S.C.R. 697, 699, 702.

<sup>35</sup> *Id.*, citing *R. v. Rahey* [1987] 1 S.C.R. 588, 639 (La Forest, J., concurring).

<sup>36</sup> 319 (2) of the Criminal Code of Canada R.S.C., 1985, c. (46).

Amendment jurisprudence with respect to “hate speech” in order to determine “the reasons why or why not American experience might be useful to its analysis.”<sup>37</sup> Moreover, a dissenting Justice vigorously joined issue with the majority on the same American jurisprudential terrain.<sup>38</sup>

In turn, Canada’s interpretation of its Charter provisions may offer U.S. courts new ways of thinking about the degree to which our Equal Protection Clause might embrace a broader list of groups and rights than is presently the case;<sup>39</sup> and how equal protection and affirmative action can live in harmony with one another.<sup>40</sup> It may also, by offering a thoughtful “counterpoint” to the U.S. Supreme Court’s decisions in the field of criminal law and national security, allow for more open and robust debate among our Justices in those respects.<sup>41</sup>

In the field of criminal law, for example, the constitutionality of the use by law enforcement of thermal-imaging devices has occupied both the U.S. and Canadian Supreme Courts. The former court found the practice unconstitutional in *Kyllo v. United States*,<sup>42</sup> whereas the latter held it consistent with the search and seizure provision of the Canadian Charter of Rights and Freedoms in *R. v. Tessling*.<sup>43</sup> What is particularly notable is that the Canadian Supreme Court’s unanimous

<sup>37</sup> Keegstra, *supra* note 34.

<sup>38</sup> See Kathleen Mahoney, *The Canadian Constitutional Approach to Freedom of Expressions in Hate Propaganda and Pornography*, 55 LAW & CONTEMP. PROBS. 77, 80-90 (1992). See also Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of the American and Canadian Approaches to the Regulation of Hate Speech*, WIS. L. REV. 1425, 1481-1514 (1994). The Supreme Court of Canada followed a similar analytic approach in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130. There, the Court was faced with the assertion that the common law of defamation should be modified in order to provide protection under the Charter for criticism of public officials. After a thorough review of U.S. jurisprudence in this regard, the Court declined to adopt the “actual malice” standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>39</sup> See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 145 (grounds of discrimination enumerated in s. 15 (1) -- race, national origin, colour, religion, sex, age or mental or physical disability -- are not exhaustive but may extend to “analogous” ones that are not enumerated). See also Beatrice Vizkelety, *Adverse Effect Discrimination in Canada: Crossing the Rubicon from Formal to Substantive Equality*, in NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 22 (Loenen & Rodrigues eds., 1999).

<sup>40</sup> See *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 (“affirmative action” provision of Charter, s. 15(2) confirmatory and supplementary to its “equality” provision, s. 15(1)).

<sup>41</sup> And although Canada does not have an Establishment Clause, a result of a constitutional compromise at the foundation of the Nation, the Canadian Supreme Court decisions speak with great force about the importance of freedom of religion. See Donald L. Beschle, *Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada*, 4 PA. J. CONST. L. 451, 474-92 (2002); but see, *Adler v. Ontario*, [1996] 3 S.C.R. 609 (government funding of religious schools).

<sup>42</sup> 533 U.S. 27 (2001). “Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye.” *Id.* at 29.

<sup>43</sup> [2004] 3 S.C.R. 432 (holding that use of such devices did not violate Charter, s. 8: “Everyone has the right to be secure against unreasonable search and seizure.”).



opinion is devoted largely to setting out its disagreement with the ruling in *Kyllo* and advancing arguments that echo those of the *Kyllo* dissent. As it said there:

The United States Supreme Court declared the use of FLIR [Forward-Looking Infra-Red] technology to image the outside of a house to be unconstitutional in *Kyllo v. United States* (citation omitted) based largely on the “sanctity of the home.” We do not go so far. The fact that it was respondent’s home that was imaged using FLIR technology is an important factor but it is not controlling and must be looked at in context and in particular, in this case, in relation to the nature and quality of the information made accessible by FLIR technology to the police.<sup>44</sup>

The U.S. Supreme Court might also profit from a series of rulings of the Supreme Court of Canada attempting to define the proper role of constitutional courts in reconciling the government’s anti-terrorism legislative and executive action, on the one hand, and fundamental protections of individual rights and liberties, on the other, given the intense, on-going legal controversies in that regard here at home.<sup>45</sup> As the Canadian Court stated in a 2004 decision upholding an Anti-Terrorism Act provision:

The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and the protection of society through respect for the rule of law. Indeed a democracy cannot exist without the rule of law. So, while Cicero long ago wrote “*inter arma silent leges*” (the laws are silent in battle) (citation omitted) we, like others, must strongly disagree.<sup>46</sup>

In this and other decisions, both before and since the devastating terrorist attack upon the World Trade Center on September 11, 2001, the Supreme Court of Canada’s decisions have been similarly concerned with the values of judicial independence and the rule of law.<sup>47</sup>

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<sup>44</sup> [2004] 3 S.C.R. 432 at ¶ 45.

<sup>45</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S.Ct. 3067 (2007).

<sup>46</sup> Application under s. 83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248, at 17 (validation of Anti-Terrorism Act restrictions on right to counsel).

<sup>47</sup> See, e.g., *The Vancouver Sun*, [2004] 2 S.C.R. 332 (holding that lower court judge applied the Anti-Terrorism Act incorrectly by conducting the investigation in secret instead of in accordance with judicial openness principle and freedom of expression); *Suresh v. Canada*, [2002] 1 S.C.R. 3 (upholding Anti-Terrorism Law by interpreting it according to *Charter* requirement of

As the foregoing reflects, The Supreme Court of Canada has now, for over two decades, attempted to engage the U.S. Supreme Court in dialogue by either openly adopting, rejecting, modifying, or critiquing major decisions of our Court with little or no acknowledgment here that this other constitutional voice even exists. Only time will tell whether this “constitutional conversation” will ever get off the ground.

But as the Canadian Supreme Court remarked in this respect:

[T]he use of foreign material affords another source, another tool for the construction of better judgments. Recourse to such materials is, of course, not needed in every case, but from time to time a look outward may reveal refreshing perspectives. The greater use of foreign materials by court and counsel in all countries can, I think, only enhance their effectiveness and sophistication. In this era of increasing global interdependence and, in particular, of ever closer American-Canadian relations, it seems normal that there should be sharing in and among our law and lawyers alike.<sup>48</sup>

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robust procedural safeguards before deportation of suspected terrorist); *Charkaoui v. Canada*, [2007] S.C.R. 9 (holding that the Immigration and Refugee Protection Act’s provisions with respect to detention denied subject a fair hearing before an independent and impartial magistrate in violation of the Charter). See generally Kent Roach, *Ten Ways to Improve Canadian Anti-Terrorism Law*, 51 CRIM. L. Q. 102 (2005) (arguing for reforms to ensure that Canada’s response to terrorism is properly focused and proportionate); Kim Lane Schepple, *North American Emergencies: The Use of Emergency Powers in Canada and the United States*, 4 INT’L L. J. CONST. L. 213 (2006) (discussing divergent approaches of Canada and the U.S. to emergency powers from the 1970s to the present).

<sup>48</sup> Gerard V. LaForest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 220 (1994).