

**THE MOST-CITED LAW REVIEW ARTICLES  
OF ALL TIME BY THE SUPREME COURT OF CANADA**

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*Scholars use citation counts to measure the impact of scholarly works in a wide range of disciplines, including law. The aims of this study are twofold: to present the methods most commonly used to measure the impact of scholarly works and to determine which law reviews and articles the Supreme Court of Canada has cited most since its creation. Part II of this study reveals that legal scholars typically use three methods to generate lists of important works: the periodical citation method; the judicial citation method; and the peer rating method. The choice of method depends on the research objective. Part III of this study adopts the judicial citation method to identify the law reviews and articles most cited by the Supreme Court and provides a qualitative analysis of the top three articles. It focuses solely on publications in generalist, peer-reviewed, and university-based law reviews that were created in or before 1982. This study finds that two law reviews — the McGill Law Journal and the University of Toronto Law Journal — and 39 articles have been particularly successful. These articles were predominantly written in English by male law professors holding degrees from elite law schools and concern pressing constitutional law issues. As society shifts to tackle biases in all professions, including academia and law, the attributes of the most-cited articles can be expected to evolve — and the gender gap to close — in the years to come.*

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**I. INTRODUCTION**

There have never been as many law schools or law professors in Canada as there are today. Nor have there been as many scholarly works published in legal periodicals. But not

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all law reviews and articles are equally important. Some law reviews are prestigious, others less so; some articles will become classics, while others will receive comparatively less attention. This study provides tools to measure the impact (or influence; the terms are used interchangeably) of scholarly works and illustrates how these tools can be applied. Part II presents three methods commonly used by scholars to assess the impact of scholarly works, namely, the “periodical citation method,” the “judicial citation method,” and the “peer rating method.” Each method serves different objectives, is vulnerable to different biases, and yields different results. Part III identifies the law reviews and articles most cited by the Supreme Court of Canada, based on the judicial citation method. It also provides a quantitative analysis of the data along with a qualitative analysis of the top three articles. The results show that two law reviews have been especially successful and that the most-cited articles share common attributes. The value of this study goes beyond fulfilling the curiosity of identifying the most-cited law reviews and articles. It enables readers of legal literature to better identify what to read and assists authors in deciding what to write about and where to publish if they want to increase their chances of being read and cited by the legal community.

## II. METHODOLOGICAL CONSIDERATIONS

Scholars have used citation counts to measure the impact of scholarly works for a wide range of disciplines, from natural sciences to humanities, including law.<sup>1</sup> As one journalist has put it, “[t]he law professor equivalent of career hits is the ‘number of times cited’ in journals.”<sup>2</sup> While a plethora of studies engage in “historiography” or “legal citology,”<sup>3</sup> very little literature identifies and analyzes the various methods for assessing the impact of articles on the development of legal science, particularly in Canada. Part II aims to fill that gap. It describes the three most-used methods to evaluate an article’s influence — the periodical citation method, the judicial citation method, and the peer rating method — and assesses their respective objectives, strengths, and weaknesses.

### A. PERIODICAL CITATION METHOD

Counting the number of times an article is cited in other articles is a widely used method to measure an article’s influence.<sup>4</sup> Because this approach is quantitative, it is an effective way

<sup>1</sup> Measuring the impact of an article or book based on the number of citations it receives in other articles or books is known as “citation analysis” in bibliometric studies — a field that studies citation patterns to evaluate the impact of scholarly works. See generally Eugene Garfield, “Citation Analysis as a Tool in Journal Evaluation” (1972) 178:4060 *Science* 471.

<sup>2</sup> Joe Palazzolo, “The Most-Cited Law Review Articles of All Time,” *The Wall Street Journal* (1 June 2012), online: <[www.wsj.com/articles/BL-LB-42728](http://www.wsj.com/articles/BL-LB-42728)>.

<sup>3</sup> “Legal citology” has been defined as “the systematic study of the citation practices of those professors, research assistants, and law review editors who produce articles in journals widely circulated in the legal academy”: JM Balkin & Sanford Levinson, “How to Win Cites and Influence People” (1996) 71:3 *Chicago-Kent L Rev* 843 at 843.

<sup>4</sup> Jonathan R Cole & Stephen Cole, *Social Stratification in Science* (Chicago: University of Chicago Press, 1973) (“straight citation counts are highly correlated with virtually every refined measure of quality” at 35). See also Eugene Garfield, *Citation Indexing—Its Theory and Application in Science, Technology, and Humanities* (New York: Wiley, 1979) at 241 [Garfield, *Citation Indexing*]; Stephen J Bensman, “Journal Collection Management as a Cumulative Advantage Process” (1985) 46:1 *College & Research Libraries* 13 (“citations and peer ratings appear to be virtually the same measurement” at 23); Fred R Shapiro, “The Most-Cited Legal Scholars Revisited” (2021) 88:7 *U Chicago L Rev* 1595 [Shapiro, “Legal Scholars Revisited”] (“[b]y 1979, Garfield was able to point to seven major studies linking citedness with ‘peer judgments, which are widely accepted as a valid way of ranking scientific

to measure the “‘productivity,’ ‘significance,’ ‘quality,’ ‘utility,’ ‘influence,’ ‘effectiveness,’ or ‘impact’” of authors and their scholarly works.<sup>5</sup> Indeed, some academic institutions treat citation counts as a form of academic currency and use them as a metric to evaluate and promote professors and researchers, or to grant awards.<sup>6</sup> Being highly cited is generally equated with influence (the sort of influence that can be counted, that is). In the words of Herma Kay, one of the first female professors and the first female dean at Berkeley Law, “[i]f you’re cited, that means you’re identified as a player in the game: a scholar of significance.”<sup>7</sup> In the legal field, the periodical citation method has been used primarily by Fred Shapiro — associate library director, lecturer at Yale Law School, and leader in legal citology — in a series of articles.<sup>8</sup> Over the years, Shapiro has relied on databases such as Shepard’s Law Review Citations, the Social Sciences Citation Index, HeinOnline, and Web of Science to trace the number of times law-related articles have been cited in other articles and rank them based on their citation counts. In his third and most comprehensive study on the subject, “The Most-Cited Law Review Articles of All Time,” published in 2012, Shapiro, along with Michelle Pearse, identified the top 100 law-related articles of all time published in the United States.<sup>9</sup> For context, the articles on their list were cited between 645 and 5,157 times in total.<sup>10</sup> In his latest study, published in 2021, Shapiro identified the most-cited authors in the US based on the number of citations in articles and books.<sup>11</sup> That study crowned Richard Posner (cited 48,852 times), Cass Sunstein (cited 35,584 times), and Ronald Dworkin (cited 20,778 times) as the greatest citation champions of all time in law.<sup>12</sup>

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performance” at 1611 [citation omitted]). But see Alfred L Brophy, “The Signaling Value of Law Reviews: An Exploration of Citations and Prestige” (2009) 36:2 Fla St UL Rev 229 (“citations are a measure of popularity of sorts. Yet, popularity is not always a measure of quality” at 233).

<sup>5</sup> Fred R Shapiro, “The Most-Cited Articles from *The Yale Law Journal*” (1991) 100:5 Yale LJ 1449 at 1454 [Shapiro, “Articles from *Yale Law Journal*”].

<sup>6</sup> Garfield, *Citation Indexing*, *supra* note 4 at 240. See also Colin A Chapman et al, “Games Academics Play and their Consequences: How Authorship, H-Index and Journal Impact Factors are Shaping the Future of Academia” (2019) 286:1916 Proceedings Royal Society B 1 at 2, 6, 8; Jeffrey L Harrison & Amy R Mashburn, “Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study” (2015) 3:1 Texas A&M L Rev 45 at 59–60; Shapiro, “Articles from *Yale Law Journal*,” *ibid*.

<sup>7</sup> Herma Hill Kay, “In Defense of Footnotes” (1990) 32:3 Ariz L Rev 419 at 426.

<sup>8</sup> See especially Fred R Shapiro, “The Most-Cited Law Review Articles” (1985) 73:5 Cal L Rev 1540 [Shapiro, “Most-Cited Articles”]; Shapiro, “Articles from *Yale Law Journal*,” *supra* note 5; Fred R Shapiro, “The Most-Cited Law Review Articles Revisited” (1996) 71:3 Chicago-Kent L Rev 751 [Shapiro, “Articles Revisited”]; Fred R Shapiro, “Response to Landes and Posner” (1996) 71:3 Chicago-Kent L Rev 841; Fred R Shapiro & Michelle Pearse, “The Most-Cited Law Review Articles of All Time” (2012) 110:8 Mich L Rev 1483 [Shapiro & Pearse, “Most-Cited of All Time”]; Fred R Shapiro, “The Most-Cited Articles from the *Iowa Law Review*” (2014) 100:1 Iowa L Rev 1; Fred R Shapiro, “The Most-Cited Articles from the *Minnesota Law Review*” (2016) 100:5 Minn L Rev 1735 [Shapiro, “Articles from *Minnesota Law Review*”].

<sup>9</sup> See Shapiro & Pearse, “Most-Cited of All Time,” *ibid* at 1486–88. The authors relied primarily on HeinOnline to identify the most-cited law-related articles. They first searched for all articles with the term “law” and then sorted the results by the number of times the articles were cited. They also conducted a similar search in Web of Science, a social science database published by Thomson Reuters, and added the additional articles to the list. Finally, they used the total citation count to rank the 100 most-cited articles of all time. To ensure the list represented law-related scholarship, they limited their list to articles in which 50 percent of the subsequent citations appeared in law reviews or interdisciplinary law journals. Because citations take time to accumulate, the authors devised additional rankings for the five most-cited articles published each year between 1990 and 2009. Similarly, because certain subject matters are more popular than others (such as constitutional law, civil procedure, contracts, property, torts, and criminal law), they created specific rankings for smaller fields (such as antitrust law, corporate and securities law, family law, intellectual property, international law, labour and employment law, and legal ethics and the legal profession).

<sup>10</sup> *Ibid* at 1489–92.

<sup>11</sup> Shapiro, “Legal Scholars Revisited,” *supra* note 4.

<sup>12</sup> *Ibid* at 1598–600, 1602. See also the earlier version of Shapiro’s study, in which the three most-cited legal scholars were Richard Posner, Ronald Dworkin, and Oliver Wendell Holmes: Fred R Shapiro, “The Most-Cited Legal Scholars” (2000) 29:1 J Leg Stud 409 at 424 [Shapiro, “Legal Scholars”].

While such information is certainly valuable, this article focuses on how to assess the impact of articles — not authors — as evaluating the latter would require embarking on the more complex task of counting citations to books in addition to articles.<sup>13</sup>

The periodical citation method is a useful tool for measuring an article's impact, but it has its shortcomings. The main problem with this method is that the correlation between an article's citation count and its influence on legal scholarship is not exact. Sometimes, the correlation is clear; for example, the most-cited article on Shapiro and Pearce's list (cited 5,157 times), "The Problem of Social Cost" by Ronald Coase, helped establish a new way of analyzing legal rules and contributed to Coase receiving a prize in economic sciences in memory of Alfred Nobel.<sup>14</sup> In other cases, however, the correlation is less clear.<sup>15</sup> According to Shapiro, citation counts measure a "socially defined" quality: a citation reflects the usefulness of an article for the author citing it, as opposed to the article's intrinsic value — or merit.<sup>16</sup> In other words, citation counts may be an indication that an article "has commanded attention" or "[has] been useful to other scholars," but they "should not be regarded as affirmations [of its] correctness or quality."<sup>17</sup>

The following six factors can impact the reliability of citation counts as a measure of influence and should therefore be considered by researchers:<sup>18</sup>

1. Peripheral citations — when an article is cited for reasons unrelated to the author's reasoning or thesis — can undermine the correlation between an article's citation

<sup>13</sup> From a methodological perspective, it is "formidably difficult" to count citations of books with the objective of establishing a comprehensive and accurate ranking. In the US, Shapiro was able to overcome this challenge by gaining access to rich citation data from the West Group and the Institute for Scientific Information. See Shapiro, "Legal Scholars," *ibid* at 410–11. In his most recent article on the subject, Shapiro was able to rely on the new "powerful capabilities of HeinOnline" to update the results. See Shapiro, "Legal Scholars Revisited," *ibid* at 1598.

<sup>14</sup> RH Coase, "The Problem of Social Cost" (1960) 3 *JL & Econ* 1; Shapiro & Pearce, "Most-Cited of All Time," *supra* note 8 (a high citation count is correlated with winning the Nobel Prize at 1503). See Garfield, *Citation Indexing*, *supra* note 4 at 249; Jonathan Cole & Stephen Cole, "Measuring the Quality of Sociological Research: Problems in the Use of the *Science Citation Index*" (1971) 6:1 *American Sociologist* 23 at 23–24. Similarly, researchers with higher citation counts tend to receive a greater number of awards. See Stephen Cole & Jonathan R Cole, "Scientific Output and Recognition: A Study in the Operation of the Reward System in Science" (1967) 32:3 *American Sociological Rev* 377 at 379, 389–90.

<sup>15</sup> See e.g. note 21, below. See also Balkin & Levinson, *supra* note 3 at 866; Shapiro, "Articles Revisited," *supra* note 8 at 754.

<sup>16</sup> Shapiro, "Most-Cited Articles," *supra* note 8 at 1544; Shapiro, "Articles from *Yale Law Journal*," *supra* note 5 at 1454.

<sup>17</sup> Shapiro, "Legal Scholars Revisited," *supra* note 4 at 1613.

<sup>18</sup> The phenomenon known as "obliteration" is not among the six factors listed. This phenomenon occurs when "[t]he work of [an author] is so influential that it becomes integrated into the common body of knowledge to the point that scholars no longer feel it necessary to cite it explicitly": Shapiro, "Most-Cited Articles," *supra* note 8 at 1543–44. An example of work that no longer needs to be cited explicitly is Albert Einstein's theory of special relativity ( $E = mc^2$ ). Nearly five decades ago, a physicist commented, "[a]nybody today who cited Einstein's original paper when he writes down  $E = mc^2$  would be laughed at" [emphasis in original]; Michael J Moravcsik, "Measures of Scientific Growth" (1973) 2:3 *Research Policy* 266 at 269. As Shapiro points out, it is difficult to assess this phenomenon, and, in any event, "any work so successful as to achieve this status would have already amassed [an] impressive citation total before becoming 'obliterated'": Shapiro, "Most-Cited Articles," *ibid*. There are also minor biases specific to the legal field that are not discussed in this study. See Yaniv Reingewertz & Carmela Lutmar, "Academic In-Group Bias: An Empirical Examination of the Link Between Author and Journal Affiliation" (2018) 12:1 *J Informetrics* 74 ("[i]n law, one study that used a natural experiment in the assignment of lead articles found that the first article in an issue tends to accrue more citations, regardless of its quality.... Another study of law journals found that articles with shorter titles, fewer footnotes per page and fewer equations accumulate more citations" at 75 [citations omitted]).

count and its influence.<sup>19</sup> For example, an article may be cited because it effectively summarizes basic principles<sup>20</sup> or coins a term.<sup>21</sup> Or an author citing a work may simply require an authority to support their own claim. A citation does not mean that the citing author has actually read the article cited, let alone understood it.<sup>22</sup> American legal scholars Jeffrey Harrison and Amy Mashburn conducted an empirical study using both the periodical and judicial citation methods.<sup>23</sup> In assessing the results obtained using the former method, they found that only 2 percent of articles were cited to engage with the author's reasoning or thesis, while the rest were cited either: (1) to support a fact or an opinion; or (2) for reasons that could not be connected to the substance of the work.<sup>24</sup> Moreover, as their colleagues Jack Balkin and Sanford Levinson emphasize, "many citations ... to the most canonical pieces of legal scholarship, are citations to what the article symbolizes rather than acknowledgements of the truth of what the article says."<sup>25</sup> The fact that an article is cited for what it symbolizes does not mean the article is not influential; rather it means that it is influential for reasons that may not be directly related to the author's thesis or arguments, for example, because the author has coined a new term.<sup>26</sup>

2. Negative citations — when authors cite an article to express disagreement with its thesis or findings — can also undermine the correlation between an article's citation count and its influence. An article may be cited numerous times to be criticized rather than praised.<sup>27</sup> The fact that such an article generates a high citation count does not necessarily indicate that the author's ideas have influenced how others think. While this is a concern, it should not be overstated. As British astronomer and information scientist Jack Meadows has noted,

the scientific community does not normally go out of its way to refute incorrect results. If incorrect results stand in the way of the further development of a subject, or if they contradict work in which someone has a vested interest, then it may become necessary

<sup>19</sup> For a list of the various reasons why authors cite legal scholarship, see Shapiro, "Legal Scholars Revisited," *supra* note 4 at 1610.

<sup>20</sup> Brophy, *supra* note 4 at 233; Shapiro, "Articles Revisited," *supra* note 8 at 754.

<sup>21</sup> For example, one of Gerald Gunther's articles was the most-cited article in Shapiro's 1985 study. However, Balkin and Levinson argue this was likely because Gunther coined the phrase "the new equal protection," which gained iconic status. They hypothesized that authors subsequently referred to Gunther's article for ease of reference when using that phrase. Such articles are cited "because they are useful symbols of important trends and movements in legal culture." See Gerald Gunther, "The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection" (1972) 86:1 Harv L Rev 1; Balkin & Levinson, *supra* note 3 at 862, 866–67; Shapiro, "Most-Cited Articles," *supra* note 8 at 1549.

<sup>22</sup> Shapiro, "Articles from *Yale Law Journal*," *supra* note 5 at 1485; Balkin & Levinson, *ibid* at 867. Balkin and Levinson also point out that law students and assistant professors tend to cite "canonical articles" more often than senior professors because they must "demonstrate familiarity with the literature in the field in which they write": *ibid* at 861.

<sup>23</sup> Harrison & Mashburn, *supra* note 6.

<sup>24</sup> *Ibid* at 74.

<sup>25</sup> Balkin & Levinson, *supra* note 3 at 862.

<sup>26</sup> See e.g. note 21, above.

<sup>27</sup> This is the case with Robert Bork's articles, which are heavily cited yet highly contentious. See e.g. Robert H Bork, "Neutral Principles and Some First Amendment Problems" (1971) 47:1 Ind LJ 1, which ranked seventh on Shapiro's 1996 list; Shapiro, "Articles Revisited," *supra* note 8 at 767. Bork's article is often cited for the controversial claim that America's majority government should have unlimited power thus "turning [the American] constitutional republic into a de facto parliamentary [constitution]": Balkin & Levinson, *supra* note 3 at 862, n 70. Citing Bork serves as an efficient means to criticize such a view, which was largely rejected by other scholars. See also Balkin & Levinson, *ibid* at 862–63.

to launch a frontal attack. Otherwise, it generally takes less time and energy to bypass erroneous material, and simply allow it to fade into obscurity.<sup>28</sup>

In addition, the fact that an idea in an article was considered and rejected may be proof that the idea has influenced how people think about a given subject. In other words, given that a negative citation sparks debate and shapes the scholarly discussion, such citations could still be perceived as reflecting influence.<sup>29</sup>

3. Self-citations — when authors cite their own work — can be used to manipulate citation counts and undermine the integrity of citation rankings.<sup>30</sup> But, similar to negative citations, this concern is perhaps more “theoretical than real” since there is no evidence that self-citations are prevalent and, even if they were, they would be unlikely to distort outcomes in the long run, especially in large datasets.<sup>31</sup> Moreover, an author would be hard-pressed to take advantage of this practice without it being obvious. Citation analysis pioneer Eugene Garfield explains:

Theoretically, self-citations are a way of manipulating citation rates... [But] it is quite difficult to use self-citation to inflate a citation count without being rather obvious about it. A person attempting to do this would have to publish very frequently to make any difference. Given the refereeing system that controls the quality of the scientific literature in the better known journals, the high publication count could be achieved only if the person had a lot to say that was at least marginally significant. Otherwise, the person would be forced into publishing in obscure journals. The combination of a long bibliography of papers published in obscure journals and an abnormally high self-citation count would make the intent so obvious that the technique would be self-defeating.<sup>32</sup>

In other words, self-citations do not seriously threaten the integrity of citation rankings insofar as the rankings are accompanied by a qualitative assessment examining the sources of the article’s citations, which would expose any self-citation bias.

4. Institutional biases — tendencies based on the law review in which an article is published and the author’s affiliation — can have an impact on citation counts.<sup>33</sup>

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<sup>28</sup> AJ Meadows, *Communication in Science* (London, UK: Butterworths, 1974) at 45, cited in Garfield, *Citation Indexing*, *supra* note 4 at 244.

<sup>29</sup> Shapiro, “Legal Scholars Revisited,” *supra* note 4 (“anyone who is criticized in print thousands of times must be a controversial but important contributor to the scholarly conversation” at 1600); Shapiro, “Most-Cited Articles,” *supra* note 8 (“although the purposes underlying particular citations may be various and sometimes capricious, and all citations do not merit equal weight, large numbers of citations to a publication are strong evidence of its scholarly influence” at 1543). See also Balkin & Levinson, *supra* note 3 (“[a] piece of garbage, like a citation, is a sign or trace of previous cultural trends and influences.... [N]o matter how eagerly we disavow belief in a correlation between citation rates and quality, our fascination with these lists remains, for strength of citation counts surely bears some connection to a scholar’s importance and influence” at 843–44).

<sup>30</sup> For a satirical illustration of self-citation, see Balkin & Levinson, *ibid* at 856–59. Similarly, a high citation count may be the result of “citation circles” — that is, a group of scholars who cite each other’s work: *ibid* at 859, 868.

<sup>31</sup> Garfield, *Citation Indexing*, *supra* note 4 at 244–45.

<sup>32</sup> *Ibid* at 245.

<sup>33</sup> Brophy, *supra* note 4 (“some schools are reputed to pay bonuses for articles placed in highly regarded journals. This is because evaluators use journal placement as a proxy for article quality” at 230).

Institutional bias is a concern for scholars across a variety of fields and manifests itself in two ways: (1) articles published in elite journals are typically cited more often than articles published in other journals; and (2) authors affiliated with elite universities are typically cited more often than authors affiliated with other universities. Recognizing this twofold bias, Balkin and Levinson offer the following advice: “[Make sure that you have already attended] Harvard, Yale, or the University of Chicago Law Schools,” and then “[p]ublish all of your articles in the *Harvard Law Review*, the *Yale Law Journal*, or the *University of Chicago Law Review*.”<sup>34</sup> Indeed, over 70 percent of authors whose articles made Shapiro’s 1996 list of 100 most-cited articles attended Harvard, Yale, or the University of Chicago Law School, and over 60 percent of the articles were published in the *Harvard Law Review*, *Yale Law Journal*, or *University of Chicago Law Review*.<sup>35</sup> As explained by Australian scholar Russell Smyth, “[a]n influential periodical develops a ‘brand name’ which reflects prestige and the brand name reduces the cost of searching for high-quality articles to cite.”<sup>36</sup> This phenomenon raises the correlation versus causation question: does publishing in a top law journal cause articles to be cited more, or do authors with groundbreaking and novel ideas choose to publish their articles in top journals in the hope of gaining credibility and visibility? Highly regarded periodicals are often associated with reputable law schools; yet whether a periodical “brand name” is a good proxy for an article’s quality remains an open question.<sup>37</sup>

5. Subject matter bias — tendencies based on an article’s topic — can also affect citation counts.<sup>38</sup> Writing about a pressing constitutional law issue, rather than an obscure antitrust law issue, can lead to greater visibility and, as a result, more widespread citations.<sup>39</sup> Many articles in Shapiro and Pearse’s list of the most-cited articles are about constitutional law — a hot topic.<sup>40</sup> That said, it is unclear whether hot topic articles are truly more impactful than articles on more obscure subject matters.
6. Publication dates — the number of years an article has been available — are another source of bias that can skew citation counts.<sup>41</sup> The concern is that newer articles have

<sup>34</sup> Balkin & Levinson, *supra* note 3 at 849 [emphasis in original]. An individual who, in addition, obtains a teaching position at one of these law schools would become what Balkin and Levinson label a “triple threat” scholar: *ibid* at 850. See also Shapiro, “Legal Scholars Revisited,” *supra* note 4 at 1607–608.

<sup>35</sup> Shapiro, “Articles Revisited,” *supra* note 8 at 763, 765. See also Brophy, *supra* note 4 at 238; Richard A Mann, “The Use of Legal Periodicals by Courts and Journals” (1986) 26:4 *Jurimetrics* J 400 (“[t]he principal finding of this study is that a relatively small number of journals accounted for a large portion of the total citations in both the journals and the court decisions” at 419); Olavi Maru, “Measuring the Impact of Legal Periodicals” (1976) 1:1 *American Bar Foundation Research J* 227 at 233–34 (“[t]he principal finding of this study is that a small group of periodicals [namely, the *Harvard Law Review*, the *Yale Law Journal*, and the *Columbia Law Review*] has a very powerful scholarly impact” at 249).

<sup>36</sup> Russell Smyth, “Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court” (1998) 17:2 *U Tasm L Rev* 164 at 169 [Smyth, “Academic Writing and the Courts”]. While Smyth made the comment in applying the judicial citation method, it is equally applicable to the periodical citation method.

<sup>37</sup> Brophy, *supra* note 4 at 232. See also Dennis J Callahan & Neal Devins, “Law Review Article Placement: Benefit or Beauty Prize” (2006) 56:3 *J Leg Educ* 374 at 375 (the authors found that high-quality articles are cited wherever they are published, while poor-quality articles are not cited regardless of where they are published).

<sup>38</sup> Brophy, *ibid* at 232–33; Balkin & Levinson, *supra* note 3 at 854–55; Shapiro, “Articles from *Yale Law Journal*,” *supra* note 5 at 1459–60.

<sup>39</sup> Balkin & Levinson, *ibid*.

<sup>40</sup> Shapiro & Pearse, “Most-Cited of All Time,” *supra* note 8 at 1489–92.

<sup>41</sup> William M Landes & Richard A Posner, “Heavily Cited Articles in Law” (1996) 71:3 *Chicago-Kent L Rev* 825 at 826–27.

not had sufficient time to amass citations, whereas older articles may have accrued overly generous citation counts by virtue of their lengthy availability on the scholarly market. Recognizing this bias, in their 2012 study, Shapiro and Pearce included the five most-cited articles published each year between 1990 and 2009.<sup>42</sup> They note, however, that older articles (those from the early and mid-twentieth century) tended to cite articles less frequently than newer articles, which could mitigate their advantage over the latter.<sup>43</sup> In addition, regression analysis can be used to control for publication date bias.<sup>44</sup> Yet, the fact that older articles may yield higher citation counts than newer ones is not pertinent if the goal is simply to identify the most-cited articles at a specific point in time.

In sum, researchers adopting the periodical citation method should acknowledge that ranking the most-cited articles will not necessarily indicate their merit. While a correlation may exist between an oft-cited article and its influence on legal scholarship, researchers would be wise to consider the factors that may impact citation volume, such as peripheral citations, negative citations, self-citations, institutional bias, subject matter bias, and publication date bias. When these factors are properly accounted for, the periodical citation method offers a rather objective approach to determining the most widely cited articles and provides a “rough measure” of an article’s impact.<sup>45</sup> That said, researchers should avoid characterizing the articles most cited as being the most influential based simply on citation counts. Rather, it would be beneficial to complement any list of the most-cited articles — a quantitative measure — with a qualitative assessment of the articles.<sup>46</sup> Although such a process may be tedious, it reveals a more accurate picture of the most-cited articles’ influence on the development of legal science.

## B. JUDICIAL CITATION METHOD

The second method, the judicial citation method, is specific to the legal field. It involves counting the number of times an article is cited by the courts within a given time frame to assess an article’s impact on the development of the law. Researchers adopting this method typically limit their studies to reviewing a specific court within a specific jurisdiction and a specific time frame. For example, Deborah Merritt and Melanie Putnam identified the ten articles published in 1989, 1990, and 1991 that earned the most court citations in the US.<sup>47</sup> In Canada, Vaughan Black and Nicholas Richter determined the articles and authors most cited by the Supreme Court of Canada between 1985 and 1990.<sup>48</sup> Peter McCormick examined

<sup>42</sup> Shapiro & Pearce, “Most-Cited of All Time,” *supra* note 8 at 1488.

<sup>43</sup> *Ibid* (“[o]lder articles are also handicapped by the fact that the citing literature was much smaller and the footnoting practices much less developed in the period before the late twentieth century”). See also

Shapiro, “Articles from *Minnesota Law Review*,” *supra* note 8 at 1736.

<sup>44</sup> See e.g. Landes & Posner, *supra* note 41 at 829–32.

<sup>45</sup> Shapiro, “Articles from *Yale Law Journal*,” *supra* note 5 at 1454.

<sup>46</sup> This is precisely the exercise Shapiro and Pearce undertake in their “analysis” section after presenting their tables of most-cited articles. See Shapiro & Pearce, “Most-Cited of All Time,” *supra* note 8 at 1503–508.

<sup>47</sup> Deborah J Merritt & Melanie Putnam, “Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?” (1996) 71:3 Chicago-Kent L Rev 871 at 873.

<sup>48</sup> Vaughan Black & Nicholas Richter, “Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985–1990” (1993) 16:2 Dal LJ 377. The authors relied on the following factors: which judge cited the secondary source; whether the citations were in unanimous cases; whether the judgment was based on the *Civil Code*; and whether the citations were in *Charter* cases (*ibid* at 379). For the authority to count as a citation, it had to be cited to make a point or buttress an argument (*ibid* at 380).

the most-cited articles at Canada's highest Court from 1985 to 2004.<sup>49</sup> Patricia McMahon studied the influence of the *University of Toronto Faculty of Law Review* on all levels of Canadian courts since the law review's inception.<sup>50</sup> And finally, Yan Campagnolo and Kyle Kirkup studied the influence of articles published in the *Ottawa Law Review* on the Supreme Court between 1966 and 2017.<sup>51</sup>

Historically, Canadian courts did not rely heavily on secondary sources such as articles in their judgments.<sup>52</sup> This practice reflected the British approach, where citing secondary sources was an unusual practice until the 1980s,<sup>53</sup> especially if the author being cited did not hold judicial office<sup>54</sup> or was still living.<sup>55</sup> This changed in 1976 after the Supreme Court of Canada formally accepted the use of extrinsic evidence for statutory interpretation.<sup>56</sup> In the following years, the Supreme Court began citing law-related articles more regularly, even more so after the adoption of the *Constitution Act, 1982*, which included the *Canadian Charter of Rights and Freedoms*.<sup>57</sup>

<sup>49</sup> Peter McCormick, "The Judges and the Journals: Citation of Periodical Literature by the Supreme Court of Canada, 1985–2004" (2004) 83:3 Can Bar Rev 633.

<sup>50</sup> Patricia McMahon, "Canadian Judicial Citations of Articles Published in the *University of Toronto Faculty of Law Review*" (2001) 59:2 UT Fac L Rev 367. The author identified 41 articles published in the law review that were cited in 49 judgments from courts across Canada. After identifying the most-cited articles, she proceeded to highlight the relevant subject matters and assessed each article's influence by discussing why it was cited. She concluded that the law review had significantly contributed to the development of Canadian law—a remarkable finding considering it publishes articles authored by students only (*ibid* at 369–70, 385).

<sup>51</sup> Yan Campagnolo & Kyle Kirkup, "Assessing the Influence of the *Ottawa Law Review* at the Supreme Court of Canada (1966–2017)" (2019) 50:3 Ottawa L Rev 89. The authors reviewed the most-cited articles in detail to evaluate each article's influence on the Supreme Court. By analyzing the article, exploring why the article was cited, and considering the broader context, Campagnolo and Kirkup were able to understand the circumstances of the citation, the article's treatment by the Supreme Court, and the extent to which the Supreme Court engaged with the article.

<sup>52</sup> It has been reported that, in 1950, the Chief Justice of Canada forbade counsel to refer to an article published in the *Canadian Bar Review* because "the Canadian Bar Review is not an authority in this Court." See GVV Nicholls, "Legal Periodicals and the Supreme Court of Canada" (1950) 28:4 Can Bar Rev 422 at 422.

<sup>53</sup> Brian Dickson, "The Role and Function of Judges" (1980) 14 L Soc'y Gaz 138 ("[t]he British tradition of resistance to juristic writings (a consequence of the fact that there were no teachers of English law at the universities until fairly recently) has been swept aside" at 164). In contrast, in the US, a practice of citing secondary sources was established in the late 1920s. See McCormick, *supra* note 49 at 636. Dickson, *ibid*.

<sup>54</sup> Smyth, "Academic Writing and the Courts," *supra* note 36 ("[t]his reflected a view that some contributors to periodicals write with the express purpose of influencing the outcome of a case.... This convention, however, no longer exists in England and the view that academic authors are not detached has received stringent criticism" at 167).

<sup>56</sup> *Re: Anti-Inflation Act*, [1976] 2 SCR 373 at 470–71; McMahon, *supra* note 50 at 369, n 2; WH Charles, "Extrinsic Evidence and Statutory Interpretation: Judicial Discretion in Context" (1983) 7:3 Dal LJ 7 at 26–27, 37; Dickson, *supra* note 53 at 163. Moreover, in 1985, the Supreme Court Reports adopted a new format that included a section entitled "Authors Cited," in which all secondary sources cited in judgments were identified. This change suggests that from this moment onward, the Supreme Court relied on secondary sources often enough to justify adding this section and that these sources were sufficiently important to be highlighted in this manner. See McCormick, *supra* note 49 at 634.

<sup>57</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Some authors hypothesize that the Supreme Court of Canada began citing more to secondary sources following the adoption of the *Charter* to give meaning to its provisions, buttress their judgments, and help interpret the limitation clause in section 1 using empirical sociological data. See Black & Richter, *supra* note 48 at 388–89. McCormick further notes that between 30 percent and 40 percent of the cases decided by the Supreme Court between 1985 and 2004 have at least one citation to a law review article, and the average periodical-citing judgment has between three and four citations to law review articles: McCormick, *ibid* at 639–40.

To understand this phenomenon, it is necessary to consider why judges cite secondary sources in their judgments. They do so for various reasons, including: to present an authoritative statement of the law; to assist in determining how earlier cases were decided; to respond to the parties' arguments; to buttress their interpretation of the law (in such cases, citations are used as rhetorical devices to add persuasive authority to the court's opinion); to supplement the judge's lack of expertise on a specific subject matter; to support the development or modification of legal rules; and to extract social science evidence relevant to deciding the issue in dispute.<sup>58</sup> McCormick eloquently explains the importance of citations in judgments:

[The] citation process is important for a number of reasons. For one, the most obvious, it demonstrates the author's familiarity with the material, which fellow professionals can easily assess by observing the selection and the organization of the cited material. For a second, it adds weight to the author's decision and reasons, particularly when the purpose is to identify established practices rather than to introduce innovation. For a third, when any degree of intentional and explicit originality or creativity is involved, it allows the author to locate herself and her ideas in relation to this established broader body of material, something which is equally important whether it is a question of extending or retrenching or revising specific details of existing legal doctrine. The general function of the process is to downplay the potential appearance of arbitrariness in the act of decision — that is to say, the selection of the appropriate outcome — by linking it through reasonable explanation to a framework of already existing ideas that have been articulated by a number of other professionals.<sup>59</sup>

The principle of *stare decisis* requires judges to follow the rules established in previous judgments. When presented with a new case — or changing circumstances — judges must sometimes adapt these rules. In this context, secondary sources can help judges understand the rules or provide a justification for changing established rules, therefore diminishing any perception of arbitrariness in the judicial decision-making process. Moreover, it is necessary to consider what weight judges give to secondary sources. In the words of Brian Dickson, the late Chief Justice of Canada, “[t]he weight to be given a citation depends upon the cogency of the argument, the intellectual honesty of scholarship, the thoroughness of the research and, yes, the reputation of the author.”<sup>60</sup> It is generally safe to assume that, if a secondary source is cited by a judge in their reasons for judgment, these criteria have been met.

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<sup>58</sup> For other reasons, see generally JE Côté, “Far-Cited” (2001) 39:3 *Alta L. Rev.* 640. See also Russell Smyth, “Other Than ‘Accepted Sources of Law’?: A Quantitative Study of Secondary Source Citations in the High Court” (1999) 22:1 *UNSWLJ* 19 at 22–24; Smyth, “Academic Writing and the Courts,” *supra* note 36 at 166–67; William O Douglas, “Law Reviews and Full Disclosure” (1965) 40:2 *Wash L. Rev.* 227 at 227.

<sup>59</sup> McCormick, *supra* note 49 at 635.

<sup>60</sup> Dickson, *supra* note 53 at 165. Chief Justice Dickson relied heavily on law review articles in his judgments and can be said to have accelerated the practice throughout the Supreme Court. For an overview of Chief Justice Dickson's use of secondary sources, see Black & Richter, *supra* note 48 at 385. With 239 citations, Chief Justice Dickson was among the four judges who made the most use of secondary sources as authorities at the Supreme Court of Canada between 1985 and 1990. The only three judges with more were Justices Wilson (388 citations), L'Heureux-Dubé (290 citations), and La Forest (284 citations). In a study that examined law review citations at the Supreme Court between 1985 and 2004, the judges who most often cited law review articles were Justices L'Heureux-Dubé (613 citations), La Forest (247 citations), McLachlin (204 citations), and Lamer (174 citations): McCormick, *ibid* at 644.

While the judicial citation method is widely adopted in the legal field to measure articles' influence, researchers intending to use it should be mindful of the following six considerations:

1. The judicial citation method typically yields different results from the periodical citation method. Merritt and Putnam, for instance, point out that their three lists do not include many of the articles that have a high citation count based on the periodical citation method. Indeed, “[o]nly five of the thirty articles on [their] three lists also appear on Shapiro’s [1996] lists.... [And] [m]ore than two-thirds of the articles most cited in scholarly journals [as identified by Shapiro] have received no more than a single judicial citation.”<sup>61</sup> Perhaps shockingly, Coase’s leading article, “The Problem of Social Cost,” did not make Merritt and Putnam’s list of most influential articles based on the judicial citation method, as it earned only one judicial citation in the 1960s, five in the 1970s, and 20 in the 1980s.<sup>62</sup> In light of this finding, they cautiously acknowledge that “[t]he articles included on [their] lists are not necessarily the ‘best’ or ‘most useful’ articles.”<sup>63</sup>
2. The impact of institutional biases — especially the preference to cite as an authority an article published in an elite law review with a high prestige rating — is less important in judicial citation counts than periodical citation counts. In their study, Merritt and Putnam controlled for this factor and found that, while judges and scholars rely more heavily on elite law reviews, relatively speaking, judges cited more articles published by other law reviews.<sup>64</sup> Merritt and Putnam also found that judges are more willing than scholars to cite articles authored by non-academics, such as other judges, lawyers, and students.<sup>65</sup>
3. As with scholars, judges sometimes cite an article for reasons unrelated to the reasoning or thesis of the author (see the discussion of “peripheral citations” in the section dealing with the periodical citation method). In assessing the results obtained by the judicial citation method, Harrison and Mashburn found that only 18 percent of articles were cited in reference to the author’s reasoning or thesis, while 54 percent were cited for their descriptive content, and 28 percent were cited for reasons that could not be clearly ascertained.<sup>66</sup> This is not to say that the articles in the third category have no influence; they are still being used by the courts as an authority.

<sup>61</sup> Merritt & Putnam, *supra* note 47 at 880. Conversely, they found that “two of the articles most frequently cited by courts [had] received no scholarly citations”: *ibid.*

<sup>62</sup> Coase, *supra* note 14; Merritt & Putnam, *ibid* at 881.

<sup>63</sup> Merritt & Putnam, *ibid* at 873.

<sup>64</sup> *Ibid* at 888–90. This conclusion is supported by other studies. See Harrison & Mashburn, *supra* note 6 (the authors found that “[p]ublishing in a top-15 review doubled the likelihood that a work would be cited by a court [and] nearly quadrupled the likelihood of [it] being cited by another scholar” at 64–65); Louis J Sirico Jr, “The Citing of Law Reviews by the Supreme Court: 1971-1999” (2000) 75:3 *Ind LJ* 1009 at 1010; Louis J Sirico Jr & Beth A Drew, “The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis” (1991) 45:5 *U Miami L Rev* 1051 at 1054–55; Louis J Sirico Jr & Jeffrey B Margulies, “The Citing of Law Reviews by the Supreme Court: An Empirical Study” (1986) 34:1 *UCLA L Rev* 131 at 132–34. A possible explanation for this phenomenon is that scholars are more likely to engage with articles published in elite law reviews because they want to be part of high-profile academic debates in order to get noticed and advance their careers, while judges dealing with specific cases and sets of facts need sources that touch on a much wider variety of issues.

<sup>65</sup> Merritt & Putnam, *ibid* at 891.

<sup>66</sup> Harrison & Mashburn, *supra* note 6 at 71. The authors concluded that while “courts cite [articles] less frequently [they] tend to be more attentive to the substance of a work”: *ibid* at 77.

Indeed, by citing an article, judges enhance the article's visibility, give it credibility, and reveal that it is on their mind.<sup>67</sup>

4. Researchers should, however, be aware that secondary sources cited in judgments are not necessarily selected by judges themselves. As Chief Justice Diane Wood of the US Court of Appeals for the Seventh Circuit points out, in many cases, law clerks write the first drafts of reasons for judgments and are often the ones selecting the secondary sources to be cited.<sup>68</sup> Canadian scholar Peter Weiler warns that “[t]he worst danger is that the judge will make an intuitive judgment about the case and then ask his clerk to write an opinion justifying this result in the light of the ‘authorities.’”<sup>69</sup> That said, this concern should not be overstated. First, Weiler recognizes that it is not supported by empirical evidence.<sup>70</sup> Second, law clerks are not free to cite any secondary source they wish: in principle, in an adversarial system, the court should rely only on works that have been cited in the litigants’ submissions.<sup>71</sup> Third, even if law clerks select the secondary sources cited in the first draft of the judgment, the judge may agree or disagree with the selection and choose to cite other sources. And, in any event, the final version of the judgment must be taken to reflect the judge’s views — it is, after all, the judge’s reasons for judgment, not those of the law clerk.
5. When courts cite articles in their judgments, these articles play a special role in the judicial process. The mere fact that a judge cites a secondary authority can transform it into a legal principle. As American legal scholar John Merryman explains, “[w]hether secondary authorities are or are not law depends on what the courts do with them. If the courts cite them then they are in some sense law as a result of the citation, they become a part of the judicial process.”<sup>72</sup> In a common law system, under *stare decisis*, judicial decisions of higher courts are binding precedents on lower

<sup>67</sup> With respect to a citation increasing an article’s visibility, a judge citing legal scholarship in their judgment increases the probability the work will be read and used in the future by litigants, the courts, or scholars. See William H Manz, “The Citation Practices of the New York Court of Appeals, 1850-1993” (1995) 43:1 *Buff L Rev* 121 at 121.

<sup>68</sup> Diane P Wood, “Legal Scholarship for Judges” (2015) 124:7 *Yale LJ* 2592 (“who is writing the opinion drafts, who is including the citation to the article, and who actually read the article? If you are thinking that it might not have been the judge, you are correct. Law clerks write a very large number of first drafts, and they are the ones who propose citations to support the result in the opinion. Citations to the Constitution, to statutes, and to regulations are easy for the judge to check; so are citations to judicial opinions. But some citations to articles may appear without much judicial oversight” at 2595). See also Black & Richter, *supra* note 48 (“[w]e were unable to determine from our data whether clerks at the Supreme Court of Canada have any effect on *which* sources are cited, though it seems reasonable to think that the clerks might have some effect by bringing certain sources to the judges’ attention while deciding that other sources discovered in their research are not useful or relevant” at 386 [emphasis in original]); Kelly Bodwin, Jeffrey S Rosenthal & Albert H Yoon, “Opinion Writing and Authorship on the Supreme Court of Canada” (2013) 63:2 *UTLJ* 159 (“[o]ur findings provide empirical support for anecdotal accounts that recent and current justices rely more on law clerks in writing opinions than did their predecessors” at 189).

<sup>69</sup> Paul Weiler, “Two Models of Judicial Decision-Making” (1968) 46:3 *Can Bar Rev* 406 at 452.

<sup>70</sup> *Ibid.*

<sup>71</sup> The more secondary sources litigants cite to support their positions, the more likely some of these sources will be cited by the court in its reasons for judgment. This phenomenon is referred to as “citation stickiness.” See Kevin Bennardo & Alexa Z Chew, “Citation Stickiness” (2019) 20:1 *J App Pr & Pro* 61 (“[a] citation is sticky if it appears in one of the parties’ briefs and then again in the court’s opinion” at 64). As noted by the authors, “[i]n a perfect adversarial world, the percentage of sticky citations in courts’ opinions would be something approaching 100%,” meaning judges would include in their reasons for decision only those articles cited in litigants’ materials: *ibid* at 62.

<sup>72</sup> John Henry Merryman, “The Authority of Authority: What the California Supreme Court Cited in 1950” (1954) 6:4 *Stan L Rev* 613 at 621.

courts. Hence, higher courts' decisions that rely on secondary authorities to interpret or apply an existing legal rule (or create a new one) become binding authorities for lower courts within the same jurisdiction and persuasive authorities for other courts.

6. Over the past 25 years, the courts appear to have relied less and less on secondary sources, especially in the US. In a study published in 1998, Michael McClintock, a former law clerk at the US Court of Appeals for the Tenth Circuit, found a 47.35 percent decrease in overall citations by US courts from 1975 to 1996.<sup>73</sup> This decline, when combined with pleas from judges and lawyers for more "practical" articles, can be seen as "evidence that modern legal scholarship is losing touch with the practice of law."<sup>74</sup> In fact, several judges have voiced concern that legal scholarship is increasingly irrelevant to the bench and dominated by "out-of-touch faculty members."<sup>75</sup> For example, Justice Ellen Peters of the Connecticut Supreme Court notes that "there is an increasing divergence between the theoretical interests of the aspiring academic lawyer and the pragmatic interests of the successful practitioner."<sup>76</sup> Likewise, Chief Justice Wood recently underlined the "disconnect between the bulk of legal scholarship and the judicial decision-making process."<sup>77</sup> In her experience, when judges cite law-related articles, they usually cite them as a source of legal doctrine rather than to introduce new ideas, help shift norms, or subtly affect the development of the law.<sup>78</sup> Because scholars writing in periodicals are free to explore novel approaches to law, their work may not be addressed to the bench, but rather to other scholars. It is not entirely clear whether Canadian judges feel the same way; however, in 2004, McCormick found that, after a steady rise in the frequency of scholarly citations at the Supreme Court of Canada during the Dickson and Lamer years, a gradual decline began in the early years of the McLachlin court.<sup>79</sup>

In short, researchers adopting the judicial citation method should acknowledge that it yields different results from the periodical citation method. As a result, they should reflect on their objectives before favouring one method over the other. If the goal is to evaluate how articles have generally shaped legal scholarship, they should adopt the periodical citation method. In contrast, if researchers are interested in assessing how articles have influenced the development of the law, they should adopt the judicial citation method. While these

<sup>73</sup> Michael D McClintock, "The Declining Use of Legal Scholarship by Courts: An Empirical Study" (1998) 51:4 Okla L Rev 659 at 660, 684. See also Sirico, *supra* note 64 at 1011; Sirico & Margulies, *supra* note 64 at 134–35.

<sup>74</sup> McClintock, *ibid* at 688.

<sup>75</sup> This view was expressed by Justice Laurence Silberman of the US Court of Appeals for the District of Columbia Circuit in *United States v Six Hundred and Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars (\$639,558) in United States Currency*, 955 F (2d) 712 at 722 (DC Cir 1992). See also Merritt & Putnam, *supra* note 47 at 871; Harry T Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91:1 Mich L Rev 34 at 42. But see Lee Petherbridge & David L Schwartz, "An Empirical Assessment of the Supreme Court's Use of Legal Scholarship" (2012) 106:3 Nw UL Rev 995. The authors state that "[t]he overall trend during the last sixty-one years has been an increase in the use of legal scholarship by the Supreme Court" (*ibid* at 998). In addition, they found that "the Court disproportionately uses scholarship when cases are either more important or more difficult to decide" (*ibid*).

<sup>76</sup> Ellen A Peters, "Reality and the Language of the Law" (1981) 90:5 Yale LJ 1193 at 1193.

<sup>77</sup> See Wood, *supra* note 68 at 2592.

<sup>78</sup> *Ibid*. See also Balkin & Levinson, *supra* note 3 ("[a]nyone who wants to be cited by the judiciary and the practicing bar should be writing much more doctrinal, narrowly focused pieces than most of those found on Shapiro's lists" at 865).

<sup>79</sup> McCormick, *supra* note 49 at 639.

methods measure different qualities and provide only a rough impression of an article's influence, they are both quantitative and rather objective in nature.<sup>80</sup> Hence, researchers using either method would benefit from supplementing their lists of the most-cited articles with a qualitative assessment to understand how the articles were used by the courts. Doing so would allow for greater clarity when attempting to draw inferences about an article's influence.

### C. PEER RATING METHOD

The third method — the peer rating method — consists of examining scholars' assessments of law-related articles to evaluate their influence. This method was adopted by Harvard legal scholars David Kennedy and William Fisher in their 2006 book *The Canon of American Legal Thought*, in which they identify and discuss the 21 most influential articles on legal thought written by American scholars.<sup>81</sup> Their methodology consisted of canvassing their colleagues at Harvard for their respective views on a dozen of the most influential works, and then compiling and sending out a list of the responses to friends and counterparts at various universities.<sup>82</sup> Finally, they selected the articles that garnered the widest consensus amongst the consulted scholars.<sup>83</sup> While Kennedy and Fisher did not select the 21 articles based on citation counts (because citation practices change over time), they pointed out that five of the articles on their list appear among the ten most-cited articles in Shapiro's 1996 list.<sup>84</sup> Because the authors were interested in legal philosophy, many fields, including "legal history, international law, criminal law, family law, administrative law, [and] local government law" were absent from their book, and "[p]ublic law [was generally] underrepresented."<sup>85</sup>

The primary weakness of the peer rating method is its rather subjective nature. In contrast to the objectivity of the periodical and judicial citation methods, this method is based on the personal assessment of a few scholars. It is therefore bound to produce a list of works that are considered influential by a specific subset of individuals. In addition, this approach can be applied effectively only when dealing with a specific subject matter (such as legal theory) in a specific jurisdiction (such as the US), because scholars' areas of expertise are usually limited to specific subject matters and jurisdictions. It is hard to imagine how this method could be used to identify influential law-related articles without such limitations. That said,

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<sup>80</sup> Smyth, "Academic Writing and the Courts," *supra* note 36 ("[t]he main advantage of using citation practice is that it provides a quantitative indicator of influence" at 169).

<sup>81</sup> David Kennedy & William W Fisher III, eds, *The Canon of American Legal Thought* (Princeton: Princeton University Press, 2006) at 1. The authors focused on works written by American scholars working in the US ("[t]hese articles represent the course of methodological innovation among lawyers and legal scholars in the United States over the last century. As far as we can determine, they were all written by American citizens working in the United States, so in that simple sense, of course, they are 'American'" at 14). They were primarily interested in selecting works that deal with legal reasoning rather than specific topics. Their articles were organized into eight schools of thought: legal realism; legal process; law and economics; law and society; critical legal studies; modern liberalism; feminist legal thought; and critical race theory (*ibid* at 7).

<sup>82</sup> *Ibid* at 13.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid*, citing Shapiro, "Articles Revisited," *supra* note 8 at 767. The articles in Shapiro's top ten were the following: Coase, *supra* note 14; Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73:1 Harv L Rev 1; Oliver Wendell Holmes Jr, "The Path of the Law" (1897) 10:8 Harv L Rev 457; Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harv L Rev 1281; Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89:8 Harv L Rev 1685.

<sup>85</sup> Kennedy & Fisher, *ibid* at 14.

even if this method is the least objective one, its qualitative nature allows for meaningful discussion of an article's influence on legal scholarship. Shapiro agrees that gathering peer-reviewed evaluations of articles is an effective method of assessing their influence. Indeed, citation counts are justified because the number of citations an article obtains correlates closely with peers' judgment of its quality.<sup>86</sup> Hence, peer rating is a useful complement to the periodical and judicial citation methods of identifying the most influential articles.

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Identifying the most influential articles is a challenging task. Such an undertaking requires not only a sufficient understanding of the various methods, but also an appreciation of what the results convey. Each of the three methods discussed in Part II has been proven to generate a list of important works. The common theme among them is that, rather than definitively revealing the most influential articles, they generate at least one starting point to stimulate discourse on influential works.<sup>87</sup> Each method produces a different result because of the different practices of scholars and judges in their respective roles.

Accordingly, researchers should first identify their objective before relying on a method. Those attempting to identify which articles have had a meaningful impact on legal scholarship should adopt the periodical citation method. In contrast, if researchers seek to determine which articles have had a meaningful impact on the development of the law, the judicial citation method should be preferred, given that courts predominantly determine the law. If, instead, researchers are interested in producing a list of important works in a specific subject matter and jurisdiction, based on the assessment of specific experts, the peer rating method is appropriate. Finally, researchers could also use a combination of these methods — and cross-reference the results obtained with each of them — to identify the most influential articles.

Using a combination of methods is what scholar Shauhin Talesh does in his foreword to Mark Galanter's book *Why the Haves Come Out Ahead: The Classic Essay and New Observations*, where he explains why Galanter's article, "Why the Haves Come Out Ahead," is "one of the most influential pieces of legal scholarship ever written."<sup>88</sup> To support this assertion, Talesh first notes that the article ranked 13th on Shapiro's 1996 list of the most influential articles; second, he observes that the article is also included in Kennedy and Fisher's book *The Canon of American Legal Thought*; and third, he points out that the article is cited in numerous casebooks and judicial decisions.<sup>89</sup> Finally, he makes general qualitative comments on the impact of Galanter's article on scholarship. Talesh's analysis is convincing because it combines all the relevant approaches to generate a comprehensive assessment of Galanter's article. Indeed, it implicitly recognizes the strengths and weaknesses of the three methods and paints a complete picture of the article's influence.

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<sup>86</sup> Shapiro, "Articles from *Yale Law Journal*," *supra* note 5 at 1454; Shapiro, "Most-Cited Articles," *supra* note 8 at 1542.

<sup>87</sup> Likewise, Shapiro "[invites] readers not to attach any more significance to [his] numbers than is warranted but, rather, to peruse [the] lists and use them as windows into a rich scholarly conversation, through which a spotlight is directed at some very noteworthy participants in that conversation": Shapiro, "Legal Scholars," *supra* note 12 at 426.

<sup>88</sup> Shauhin A Talesh, "Foreword" in Marc Galanter, *Why the Haves Come Out Ahead: The Classic Essay and New Observations* (New Orleans: Quid Pro Books, 2014) iii at iii.

<sup>89</sup> *Ibid*; Shapiro, "Articles Revisited," *supra* note 8; Kennedy & Fisher, *supra* note 81.

### III. THE MOST-CITED LAW REVIEW ARTICLES

#### A. OVERVIEW

Part III of this study answers the following question based on the judicial citation method: What are the most-cited law reviews and articles of all time at the Supreme Court of Canada, that is, from 1875 (the year the Supreme Court was founded) to 2021?<sup>90</sup> It focuses solely on publications in generalist, peer-reviewed, and university-based law reviews that were created in or before 1982.<sup>91</sup> The data was collected from the English search engine available on Lexum — the database in which the Supreme Court publishes its decisions. The data collected was organized into two tables, which are reproduced at the end of the study: Table 1 identifies the most-cited law reviews in Supreme Court of Canada judgments, and Table 2 lists the most-cited articles in Supreme Court of Canada judgments. Part B contains a quantitative analysis of the data collected, and Part C presents a qualitative analysis of the three most-cited articles.

#### B. QUANTITATIVE ANALYSIS

Table 1 provides a list of 16 law reviews cited in Supreme Court of Canada judgments from 1875 to 2021. This study's emphasis on law reviews, as opposed to books, is justified by the central role law reviews play in disseminating knowledge and developing academic careers. The authors of a previous study examined the citation practices of Canada's highest Court and explained this role:

Law reviews remain the primary way of disseminating legal scholarship. Publication in law reviews is the "single most important factor in law professors' attainment of tenure and other forms of career advancement...." To be sure, law professors are hired, promoted and granted tenure mainly based on their number of publications in peer-reviewed journals. Publication counts for much more than their "teaching prowess or service to the legal community," and being able to publish in the most prestigious law reviews tends to lead to greater rewards. Journal placement is often seen, rightly or wrongly, as a proxy for an article's quality.<sup>92</sup>

<sup>90</sup> More specifically, between 8 April 1875 and 16 April 2021. In this article, the term "judgment" refers to the totality of a court's published reasons in a particular case.

<sup>91</sup> While the current study excludes law reviews that either are not generalist, peer-reviewed, or university-based, or that were created after 1982, it should be noted that some of the excluded journals, especially the *Canadian Bar Review*, the *Criminal Reports*, and the *Criminal Law Quarterly*, have been heavily cited by the Supreme Court of Canada. A study published in 2004 indicates that the *Canadian Bar Review* was cited 303 times by the Supreme Court from 1985 to 2004, the *Criminal Reports* was cited 98 times, and the *Criminal Law Quarterly* was cited 84 times. In addition, the 2004 study states that the two most-cited articles are Brian Slattery, "Understanding Aboriginal Rights" (1987) 66:4 Can Bar Rev 727 and WR Lederman, "The Independence of the Judiciary" (1956) 34:10 Can Bar Rev 1139. See McCormick, *supra* note 49 at 650, 655. A search reveals that Slattery's article has been cited in 15 Supreme Court judgments while Lederman's article has been cited in seven Supreme Court judgments. Search Slattery /p "Understanding Aboriginal Rights" and search Lederman /p "The Independence of the Judiciary," between 8 April 1875 and 16 April 2021 in "Decisions and Resources," online: <ccc-csc.lexum.com/ccc-csc/en/nav.do>. The search results are current as of 16 May 2022.

<sup>92</sup> Campagnolo & Kirkup, *supra* note 51 at 91, quoting Fred R Shapiro, "The Most-Cited Law Reviews" (2000) 29:1 J Leg Stud 389 at 389 and Brent E Newton, "Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis" (2012) 4:2 Drexel L Rev 399 at 400.

The quoted study focused on the period from 1966 to 2017. The authors found that the three most-cited law reviews by the Supreme Court were the *McGill Law Journal*, the *University of Toronto Law Journal*, and *Queen's Law Journal*.<sup>93</sup> Even though the current study adopts a much wider scope and expands the search to the inception of the Supreme Court, the top three law reviews remain the same: the *McGill Law Journal* was cited in 150 judgments, the *University of Toronto Law Journal* in 100 judgments, and the *Queen's Law Journal* in 86 judgments. In fact, except for minor variations, the results of both studies are strikingly similar. The similarity is not surprising considering that the Supreme Court started to cite law review articles more regularly after the adoption of the *Constitution Act, 1982*.<sup>94</sup> The law reviews associated with the top law schools in Canada — McGill University and the University of Toronto, in particular — have consequently maintained their rankings over the years.<sup>95</sup> While the Supreme Court is more likely to cite elite law reviews, which suggests the existence of an institutional bias, it has nonetheless cited articles published by the law reviews of nearly all Canadian law schools (albeit to lesser and varying degrees).

Table 2 identifies the most-cited law review articles in Supreme Court of Canada judgments from 1875 to 2021. To be included in the list, an article had to be cited in at least three different judgments. Table 2 lists the 39 articles that meet this threshold. The articles are organized based on the number of judgments in which they were cited, in descending order. Articles cited in an equal number of judgments are arranged alphabetically by the primary author's surname. Furthermore, Table 2 lists the professional status of the primary author at the time the article was published and the subject matter of the article. The following six observations are derived from Table 2:

1. Three articles appear to have been especially influential: “The Neglected Logic of 91 and 92” by Albert Abel of the University of Toronto Faculty of Law was cited in eight Supreme Court judgments;<sup>96</sup> “The Fiduciary Obligation” by Ernest Weinrib of the University of Toronto Faculty of Law was cited in seven Supreme Court judgments;<sup>97</sup> and “The *Charter* Dialogue Between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)” by Peter Hogg and Allison Bushell of Osgoode Hall Law School was cited in six Supreme Court judgments.<sup>98</sup> As for the remaining articles, four of them were cited in five Supreme Court judgments, nine were cited in four Supreme Court judgments, and 23 were cited in three Supreme Court judgments. The top three articles and the way the Supreme Court used them in its decision-making process are analyzed in Part C, below.

<sup>93</sup> *Ibid* at 106–107. The *McGill Law Journal* has an advantage over the other law reviews, except for the *Ottawa Law Review*, because it publishes common law and civil law articles in English and French. In other words, it is bilingual and bilingual in character.

<sup>94</sup> *Constitution Act, 1982*, *supra* note 57.

<sup>95</sup> The University of Toronto and McGill University are consistently number one and two in Canadian law school rankings, respectively. See especially “QS World University Rankings by Subject 2022: Law & Legal Studies,” online: <[www.topuniversities.com/university-rankings/university-subject-rankings/2022/law-legal-studies](http://www.topuniversities.com/university-rankings/university-subject-rankings/2022/law-legal-studies)>; “World University Rankings 2022 by Subject: Law,” online: <[www.times-highereducation.com/world-university-rankings/2022/subject-ranking/law#!/page/0/length/25/sort\\_by/rank/sort\\_order/asc/cols/stats](http://www.times-highereducation.com/world-university-rankings/2022/subject-ranking/law#!/page/0/length/25/sort_by/rank/sort_order/asc/cols/stats)>.

<sup>96</sup> Albert S Abel, “The Neglected Logic of 91 and 92” (1969) 19:4 UTLJ 487.

<sup>97</sup> Ernest J Weinrib, “The Fiduciary Obligation” (1975) 25:1 UTLJ 1.

<sup>98</sup> Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue Between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)” (1997) 35:1 Osgoode Hall LJ 75.

2. Thirty-six of the articles listed in Table 2 (92.31 percent) were written by law professors. Of the remaining three articles, two were written by judges (5.13 percent) and one by a lawyer (2.56 percent). As commentators have observed, “[t]his is not surprising considering that it is the vocation of law professors to publish scholarly articles in law reviews.”<sup>99</sup> Only two authors appear more than once on the list: legal scholar Dale Gibson authored three articles<sup>100</sup> listed in Table 2, and legal scholar Paul Weiler authored two.<sup>101</sup> Twenty of the primary authors (55.56 percent) held degrees from elite law schools, such as Harvard, Columbia, Oxford, Cambridge, McGill, and Toronto.<sup>102</sup> Yet, while the majority of authors held degrees from such schools, most of the law professors listed in Table 2 did not teach at these institutions; rather, at the time of publication, 19 of them (52.78 percent) were teaching at one of the following institutions: Osgoode Hall Law School, the University of Montreal, the University of Ottawa, or the University of British Columbia.<sup>103</sup>
3. Thirty-two of the articles listed in Table 2 (82.05 percent) deal with public law and seven with private law (17.95 percent). Of the public law articles, 24 relate to constitutional law (61.54 percent), which is undoubtedly the most popular subject matter, five to criminal law (12.82 percent), two to administrative law (5.13 percent), and one to statutory interpretation (2.56 percent).<sup>104</sup> Of the private law articles, two relate to trusts and conflict of laws (5.13 percent each), and one to either civil procedure, family law, or torts (2.56 percent each). The fact that the Supreme Court cited more public law articles can be explained by the adoption of the *Constitution Act, 1982*, which entrenched new constitutional protections.<sup>105</sup> Indeed, one-third of all

<sup>99</sup> Campagnolo & Kirkup, *supra* note 51 at 92.

<sup>100</sup> Dale Gibson, “Constitutional Jurisdiction Over Environmental Management in Canada” (1973) 23:1 UTLJ 54; Dale Gibson, “Measuring ‘National Dimensions’” (1976) 7:1 Man LJ 15; Dale Gibson, “Distinguishing the Governors from the Governed: The Meaning of ‘Government’ Under Section 32(1) of the Charter” (1983) 13:4 Man LJ 505. Each article was cited in three different Supreme Court of Canada judgments.

<sup>101</sup> Paul C Weiler, “The Supreme Court and the Law of Canadian Federalism” (1973) 23:3 UTLJ 307; Paul C Weiler, “The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law” (1990) 40:2 UTLJ 117. The first article was cited in five different Supreme Court judgments, and the second in three judgments.

<sup>102</sup> Harvard: Albert Abel, Ernest Weinrib, Peter Hogg, Paul Weiler, Aharon Barak, Joost Blom, Jean-Gabriel Castel, Dale Gibson, and Alan Young. Columbia: Jamie Cameron, John Kernochan, and Elizabeth Sheehy. Oxford: Joost Blom (counted once under Harvard), William Lederman, Yves-Marie Morissette, and Brian Slattery. Cambridge: Nigel Bankes and Albert McClean. McGill: Jamie Cameron (counted once under Columbia), Gerald Le Dain, and Brian Slattery (counted once under Oxford). Toronto: Ernest Weinrib (counted once under Harvard), Paul Weiler (counted once under Harvard), Anne McGillivray, and Louis LeBel.

<sup>103</sup> Osgoode Hall Law School: Peter Weiler, Peter Hogg, Jamie Cameron, Gerald Le Dain, Jean-Gabriel Castel, Brian Slattery, and Alan Young. University of Montreal: Jean Leclair, José Woehrling, Pierre Carignan, François Chevette, and Pierre-André Côté. University of Ottawa: Ed Ratushny, Louis Perret, William Pentney, and Elizabeth Sheehy. University of British Columbia: Joost Blom, Peter Burns, and Albert McClean. Only five law professors listed in Table 2 were teaching at elite law schools: Peter Weiler (Harvard, after leaving Osgoode), John Kernochan (Columbia), Yves-Marie Morissette (McGill), Albert Abel (Toronto), and Ernest Weinrib (Toronto).

<sup>104</sup> To put things in perspective, 23.86 percent of the cases heard by the Supreme Court of Canada between 2018 and 2020 were categorized as “constitutional law” cases (including *Charter* cases), while 38.64 percent were “criminal law” cases (excluding *Charter* cases); “administrative law” cases did not represent a meaningful percentage. Proportionally, then, the Supreme Court seems to rely more on law review articles when dealing with constitutional law cases. No data is available for 2021, as the Supreme Court did not clearly separate constitutional law cases from other public law cases that year. For an account of the Supreme Court’s activities in 2018, 2019, 2020, and 2021, see “Year in Review,” online: <[www.scc-csc.ca/case-dossier/stat/years-annees-eng.aspx?pedisable=true](http://www.scc-csc.ca/case-dossier/stat/years-annees-eng.aspx?pedisable=true)>.

<sup>105</sup> Likewise, in Australia, the High Court seems to cite more periodicals in constitutional law cases. See Smyth, “Academic Writing and the Courts,” *supra* note 36 at 176.

the articles listed in Table 2 (13 articles) pertain to post-1982 constitutional rights (*Charter* and Aboriginal rights).

4. Thirty-three of the articles listed in Table 2 (84.62 percent) were written in English, and six were written in French (15.38 percent). While the percentage of French articles is lower than the proportion of appeals heard by the Supreme Court of Canada from Quebec (approximately 20 percent in 2018, 30 percent in 2019, 20 percent in 2020, and 17 percent in 2021)<sup>106</sup> and the proportion of francophones in Canada (21.40 percent in 2021),<sup>107</sup> three of the English articles cited by the Supreme Court were written by francophones.<sup>108</sup> The proportion of articles written by francophones — nine, or 23.08 percent — is thus slightly higher than the weight of their demographic group. It is also noteworthy that the primary authors were mostly men — 31, or 86.11 percent — as opposed to women — five, or 13.89 percent.<sup>109</sup> This imbalance could be explained by the fact that, in the not-so-distant past, legal academia was dominated by men.<sup>110</sup> Given advances to close the gender gap in all sectors, including legal academia and the legal profession, one would expect the numbers to be more balanced in the future.
5. Thirty-five of the articles listed in Table 2 were published before 2000 (89.74 percent), with two being published in the 1960s (5.13 percent), eight in the 1970s (20.51 percent), 15 in the 1980s (38.46 percent), and ten in the 1990s (25.64 percent). Only four articles listed in Table 2 were published in the 2000s (10.26 percent). The articles most relevant to the work of the Supreme Court of Canada were those published in the 1980s and 1990s, in the immediate aftermath of the adoption of the *Constitution Act, 1982*. The articles listed in Table 2 were cited by the Supreme Court six times in the 1970s, 21 times in the 1980s, 62 times in the 1990s, 28 times from 2000 to 2009, and 29 times from 2010 to 2021. These results are consistent with McCormick’s findings that citations grew in number during the Dickson years, peaked during the Lamer years, and declined thereafter.<sup>111</sup>
6. Two-thirds of the articles listed in Table 2 (26 articles) were published in five law reviews. The *University of Toronto Law Journal* leads the group with eight articles (20.51 percent), followed by the *McGill Law Journal* with six articles (15.38 percent), and the *Queen’s Law Journal*, the *UBC Law Review*, and the *Osgoode Hall Law Journal* with four articles each (10.26 percent). Aside from minor variations, these results are consistent with those presented in Table 1, thus confirming the dominance

<sup>106</sup> For an account of the Supreme Court’s activities in 2018, 2019, 2020, and 2021, see “Year in Review,” *supra* note 104.

<sup>107</sup> Government of Canada, “While English and French are still the Main Languages Spoken in Canada, the Country’s Linguistic Diversity Continues to Grow,” online: <[www150.statcan.gc.ca/n1/daily-quotidien/220817/dq220817a-eng.htm](http://www150.statcan.gc.ca/n1/daily-quotidien/220817/dq220817a-eng.htm)>.

<sup>108</sup> Jean Leclair, Jean-Gabriel Castel, and Yves-Marie Morissette.

<sup>109</sup> Given the data available, the primary authors could not be broken down by ethnicity or sexual orientation. Likewise, Shapiro noted that only two women were represented in his list of the 50 most-cited US legal scholars. See Shapiro, “Legal Scholars Revisited,” *supra* note 4 at 1609.

<sup>110</sup> See generally Susan B Boyd, “Spaces and Challenges: Feminism in Legal Academia” (2011) 44:1 *UBC L Rev* 205. See also Shapiro, “Legal Scholars Revisited,” *ibid* (“I attribute the low number of women scholars on [the list of most-cited US legal scholars] to the historical scarcity of women in legal academia and the legal profession, prejudice against those women who did participate in law, and sociological factors such as the greater demands on women to juggle work and family obligations”).

<sup>111</sup> McCormick, *supra* note 49 at 639.

of the *University of Toronto Law Journal* and the *McGill Law Journal* (in reverse order this time).

In brief, the Supreme Court of Canada's most-cited law reviews that met the criteria for inclusion in this study are the *McGill Law Journal* and the *University of Toronto Law Journal*, which are considered elite law reviews. The most-cited articles were predominantly written in English by male law professors who held degrees from elite law schools. These articles primarily dealt with pressing constitutional issues that arose following the patriation of the Constitution. To paraphrase Balkin and Levinson, it would therefore seem that the best way for an author to be cited by the Supreme Court is to be connected to prestigious institutions and publish on a subject connected to constitutional law in the most reputable law reviews.<sup>112</sup>

### C. QUALITATIVE ANALYSIS

This section provides an analysis of the three most-cited articles at the Supreme Court of Canada and examines how the arguments the authors put forth were used by the Supreme Court in its decision-making process.

#### *FIRST PLACE — THE NEGLECTED LOGIC OF 91 AND 92*

In 1969, Albert Abel of the University of Toronto Faculty of Law published a critical and influential article on federalism.<sup>113</sup> Abel was undoubtedly on a mission to bring order to chaos with respect to the judicial interpretation of sections 91 and 92 of the *Constitution Act, 1867*,<sup>114</sup> which divide legislative powers between the Parliament of Canada and provincial legislatures. According to Abel, the chaos in question stemmed from the flawed reasoning of the Judicial Committee of the Privy Council — an institution that “had no experience with nor feel for written constitutions or federal systems” — as the final court for Canada until 1949.<sup>115</sup>

The article starts with the wording of sections 91 and 92 of the *Constitution Act, 1867*, which enables Parliament and legislatures “to make laws in relation to [a] matters [b] coming within ... [c] [certain] classes of subjects.”<sup>116</sup> Consequently, when the constitutionality of a statute is impugned on federalism grounds, the text of the Constitution requires the courts to “(1) identify the ‘matter’ to which a statute relates, (2) define the scope of each ‘class of subjects’ which might be thought to be relevant, [and] (3) assign the ‘matter’ as identified to the most appropriate ‘class of subjects’ as defined.”<sup>117</sup> But in 1969, the courts were not following this methodology; rather, they were “collaps[ing] ‘matter’ and ‘class of subjects’

<sup>112</sup> Balkin & Levinson, *supra* note 3 at 849–52, 854–56.

<sup>113</sup> Abel, *supra* note 96.

<sup>114</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91, 92, reprinted in RSC 1985, Appendix II, No 5.

<sup>115</sup> Abel, *supra* note 96 (“the court of last resort in the critical first eight decades of national life, with only a casual *ex officio* interest in Canada and its constitution, instead of undertaking a fundamental analysis contented itself as each case arose with phrasemaking to fit it. Over time, the phrases summed up to a jumble of jargon which led everywhere and nowhere but the mishmash was universally echoed and professedly followed” at 488).

<sup>116</sup> *Ibid* at 487.

<sup>117</sup> *Ibid*.

into a single inquiry.”<sup>118</sup> Abel points out that the matter of a statute and the classes of subjects listed in sections 91 and 92 are two different things. The matter “amounts to an abstract of the statute’s content, instancing the subjects or situations to which it applies and the ways it proposes to govern them, spelled out sufficiently to inform anyone asking, ‘What’s it all about?’”<sup>119</sup> What is important is the pith and substance of the statute, not its form.<sup>120</sup> In contrast, the classes of subjects listed in sections 91 and 92 are “general” in nature, and their scope must be defined in order to determine under which class a “specific” matter should be categorized. Abel observes that the classes of subjects allotted to Parliament are mostly connected to economic matters, while those attributed to legislatures are mostly connected to social matters.<sup>121</sup> The “matter ... is the key,” he wrote, while the classes of subjects are “the lock ... to the portal of constitutionality.”<sup>122</sup> The two must fit together. The final part of the test provides that the matter must be assigned to a class of subjects for exclusive competence to be given to either Parliament or legislatures. Abel argues that each matter comes within one, and only one, class of subjects.<sup>123</sup> He concludes by hoping the courts will pay more attention to the text of the Constitution and, by asking the “right questions” in the “right order,” give more “intelligible” — not to say “intelligent” — answers.<sup>124</sup>

The Supreme Court cited Abel’s article in eight judgments issued between 1985 and 2021: (1) to make the point that the “matter” of a statute must be distinguished from the “classes of subjects” listed in sections 91 and 92 of the *Constitution Act, 1867*; (2) to define what the “matter” of a statute is; and (3) to stress that substance is more important than form in the division of powers analysis. In *References re Greenhouse Gas Pollution Pricing Act*, Justice Russell Brown, dissenting, referred to Abel’s article in explaining the methodology to be followed to determine a statute’s constitutionality on federalism grounds.<sup>125</sup> In order to do so, the court must first identify the matter and then classify it within one head of power listed in sections 91 and 92.<sup>126</sup> The danger of not clearly separating these two steps is that “the whole exercise will become blurred and overly oriented towards results.”<sup>127</sup> This statement is significant because it directly ties the approach advocated by Abel back in 1969 to the methodology that the Supreme Court has since been using to resolve division of powers issues.<sup>128</sup> In that case, a 6–3 majority of the Supreme Court concluded that the matter of the impugned statute — that is, the creation of a national framework to price and reduce

<sup>118</sup> *Ibid* at 490.

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid* (“as with other written texts, form is not controlling in the determination of essential character” at 494).

<sup>121</sup> *Ibid* (“[b]roadly, the federal ‘classes of subjects’ had regard to Canada as an economy, the provincial to Canadians as members of societies” at 501).

<sup>122</sup> *Ibid* at 507.

<sup>123</sup> *Ibid* at 509. Abel points out that there is a “matter” for every statute but not necessarily a “class of subject” for every matter. Matters that do not lie within a listed class of subject either fall within the residuary clause (within Parliament’s authority) or are considered a “local or private” matter (within provincial legislatures’ authority) (*ibid* at 508). Moreover, according to Abel, a statute’s matter could over time shift from one class of subject to another (*ibid* at 506–507, 520).

<sup>124</sup> *Ibid* at 521.

<sup>125</sup> 2021 SCC 11 at para 313.

<sup>126</sup> *Ibid*.

<sup>127</sup> *Ibid*. See also *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19 at para 16.

<sup>128</sup> In his comments on this study, Peter Oliver acutely observed that the influence of Abel’s article may be explained by the fact that the key points of his analysis were also adopted by Peter Hogg in his book, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 80, n 14, 81, n 18, 87, n 51, 95, n 102, 96, n 106, which has deeply influenced the courts. The fact that Bora Laskin, Abel’s colleague at the Faculty of Law, University of Toronto, was appointed to the Supreme Court of Canada in 1970, and promoted to Chief Justice of Canada in 1973, may also have played a role.

greenhouse gas emissions — falls within Parliament’s power to legislate in respect of the “peace, order and good government of Canada” as a matter of “national concern,” as opposed to the provincial authority over “property and civil rights” pursuant to section 92(13) of the *Constitution Act, 1867*.<sup>129</sup>

Abel’s article was also cited for the way it summarizes how the courts should proceed to identify the matter of a statute. In *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, Chief Justice Beverley McLachlin began her analysis by stating that the first step of the division of powers analysis is to identify the matter of the statute, which she defined by citing Abel, as “an abstract of the statute’s content.”<sup>130</sup> In that case, the impugned statute was a provincial law regarding “land use planning and agriculture.”<sup>131</sup> Based on that statute, the authorities had requested the demolition of a small aerodrome built on agricultural land without prior authorization from the province.<sup>132</sup> For a 7–2 majority, Chief Justice McLachlin ruled that the provincial statute, while valid, was inapplicable because it impaired the federal power over “aeronautics.”<sup>133</sup> Moreover, Abel’s phrase “an abstract of the statute’s content” was cited by the Supreme Court of Canada in *Re BC Motor Vehicle Act* and *References re Greenhouse Gas Pollution Pricing Act*.<sup>134</sup> In the same vein, in *Desgagnés Transport Inc. v. Wärtsilä Canada Inc., Reference re Genetic Non-Discrimination Act*, and, once again, *References re Greenhouse Gas Pollution Pricing Act*, the Supreme Court stated that the matter of a statute must be, in Abel’s words, “spelled out sufficiently to inform anyone asking, ‘What’s it all about?’” to emphasize that it must be precisely identified.<sup>135</sup>

Finally, the Supreme Court relied on Abel’s article when discussing the colourability doctrine. This doctrine is invoked when a statute seems on its face to relate to a matter within the authority of the enacting legislature, but in fact is not when the pith and substance of that statute is properly analyzed. In *Quebec (Attorney General) v. Canada (Attorney General)*, Justices Thomas Cromwell and Andromache Karakatsanis, for a 5–4 majority, cited Abel to make the point that, under the colourability doctrine, “form is not controlling in the determination of [a statute’s] essential character.”<sup>136</sup> In that case, the majority upheld the

<sup>129</sup> *References re Greenhouse Gas Pollution Pricing Act*, *supra* note 125; *Constitution Act, 1867*, *supra* note 114, s 92(13).

<sup>130</sup> 2010 SCC 39 at para 16 [*Canadian Owners and Pilots Association*].

<sup>131</sup> *Ibid* at para 21. Land use planning and agriculture may fall within provincial authority under section 92(13) (property and civil rights), section 92(16) (matters of a merely local or private nature), or section 95 (agriculture) of the *Constitution Act, 1867*, *supra* note 114.

<sup>132</sup> *Canadian Owners and Pilots Association*, *ibid* at para 5.

<sup>133</sup> *Ibid* at para 4.

<sup>134</sup> *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 496; *References re Greenhouse Gas Pollution Pricing Act*, *supra* note 125 at paras 315, 333. See also *Whitbread v Walley*, [1990] 3 SCR 1273 at 1286 (in this case, Abel’s phrase, “an abstract of the statute’s content,” is used without being expressly attributed to him).

<sup>135</sup> *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 35 [*Desgagnés Transport*] (at issue was whether a contractual claim against the seller of a crankshaft was regulated by the federal non-statutory law pertaining to navigation and shipping pursuant to section 91(10) of the *Constitution Act, 1867*, *supra* note 114, or the provincial statutory law pertaining to property and civil rights pursuant to section 92(13); a 6–3 majority of the Supreme Court concluded that both laws were valid and overlapped, but gave priority to the provincial law because of its statutory nature); *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras 31, 163 (at issue was whether a federal statute that criminalizes compulsory genetic testing and non-voluntary use or disclosure of genetic test results was within Parliament’s authority over criminal law pursuant to section 91(27) or within provincial authority over property and civil rights pursuant to section 92(13); a 5–4 majority of the Supreme Court found that the statute was within Parliament’s authority); *References re Greenhouse Gas Pollution Pricing Act*, *ibid* at para 52.

<sup>136</sup> 2015 SCC 14 at para 31 [*Quebec v Canada*].

validity of a federal statute that repealed the registration requirement for long guns, decriminalized the possession of an unregistered long gun, and required that the registry data be destroyed.<sup>137</sup> To achieve this result, the majority characterized the matter of the statute as “public safety” and classified it within Parliament’s authority over “criminal law” under section 91(27) of the *Constitution Act, 1867*, as opposed to the provincial authority over “property and civil rights” under section 92(13).<sup>138</sup> The Supreme Court referred to the article in similar contexts in *R. v. Morgentaler* and *Husky Oil Operations Ltd. v. Minister of National Revenue*.<sup>139</sup>

Abel’s article has thus been cited both for its thesis (the steps of the division of powers analysis must be clearly separated) and for peripheral reasons (especially his description of the matter of a statute as “an abstract” that must be sufficiently precise to explain what the statute is all about, and his insistence on the statute’s substance rather than its form). It is striking that the article has been cited in three different judgments since 2015, suggesting that the current bench still finds Abel’s writing particularly relevant and compelling when addressing federalism issues.

#### SECOND PLACE — THE FIDUCIARY OBLIGATION

Published in 1975, “The Fiduciary Obligation” was written by Ernest Weinrib of the University of Toronto Faculty of Law, who is recognized internationally as a leading figure in the theory of private law.<sup>140</sup> In his foundational article, Weinrib sought to identify the central ideas underpinning the legal concept of “fiduciary obligation,” which imposes on an individual (the fiduciary) the duty to act in the best interest of another (the beneficiary), thus prohibiting conflicts of interest and unauthorized profit making.<sup>141</sup>

The article demonstrates that there are two important policies that justify the imposition of fiduciary obligations by the courts: the first is the need to control the fiduciary’s discretion in order to protect the beneficiary; the second is the need to safeguard the integrity of the marketplace. Addressing the first policy, Weinrib states that the “hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion.”<sup>142</sup> In other words, it is a relationship in which the fiduciary has discretionary powers over the affairs of the beneficiary that can be used to affect the latter’s interests, therefore placing the beneficiary in a position of vulnerability.<sup>143</sup> Over time, the law

<sup>137</sup> *Ibid* at para 3.

<sup>138</sup> *Ibid* at paras 41, 45, 176; *Constitution Act, 1867*, *supra* note 114, ss 91(27), 92(13).

<sup>139</sup> *R v Morgentaler*, [1993] 3 SCR 463 at 496–97 [*Morgentaler*] (at issue was the validity of provincial legislation that prohibited abortion in places other than in a hospital based primarily on the legislature’s authority over healthcare pursuant to section 92(7) of the *Constitution Act, 1867*, *ibid*); the Supreme Court ruled that the statute was unconstitutional because the province had attempted to regulate in the area of criminal law, which is within the authority of Parliament pursuant to section 91(27)); *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 at para 45 [*Husky Oil*] (at issue was the application of a valid provincial statute that had the effect of reordering the priority of creditors in the context of bankruptcy, a subject within Parliament’s authority; a 5–4 majority of the Supreme Court held that the provincial law was inapplicable in the circumstances).

<sup>140</sup> Weinrib, *supra* note 97.

<sup>141</sup> *Ibid* at 1.

<sup>142</sup> *Ibid* at 7.

<sup>143</sup> In addition to the discretionary power of the fiduciary and the corresponding vulnerability of the beneficiary, Weinrib stressed that “the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement”: *ibid* at 6.

has recognized that certain categories of relations give rise to fiduciary obligations per se, such as the relations between trustee and beneficiary, agent and principal, director and corporation, and solicitor and client. Weinrib stresses that the list is not exhaustive and, as such, “the categories of fiduciary should not be considered closed.”<sup>144</sup> The central point is that courts should be open to imposing fiduciary obligations, on an ad hoc basis, whenever the facts indicate that, as a result of a norm, undertaking, or agreement, one party’s exercise of discretion over another’s affairs can be used to undermine the latter’s interests. Turning to the second policy, Weinrib argues that another objective of fiduciary obligation is to “[raise] the morality of the marketplace.”<sup>145</sup> How? By preventing fiduciaries from benefiting from the breach of their duties (for example, by accepting a secret commission from a third party), even where such a breach does not cause a monetary loss to the beneficiaries. Hence, the fiduciary obligation’s aim is also to encourage people to behave appropriately and in good faith.

The Supreme Court of Canada cited Weinrib’s article in seven judgments issued between 1984 and 2009; it was cited not only as a central authority on the concept of “fiduciary obligation,” but also to develop the relevant legal rules and establish clear criteria to determine whether new fiduciary relationships should be recognized outside the existing categories. Justice Brian Dickson first cited the article in *Guerin v. R.*, in which the Supreme Court held that the Crown had breached its fiduciary obligation to the Musqueam Indian Band by granting a lease to the Shaughnessy Heights Golf Club on reserve land on terms that were less advantageous than those that the band had approved.<sup>146</sup> At the time, the relationship between the Crown and Aboriginal peoples had not been recognized as a category of fiduciary relationship. Nonetheless, echoing Weinrib, Justice Dickson stated that “[i]t is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty” and accepted that the categories of fiduciary are not closed.<sup>147</sup> In *Guerin*, the imposition of a fiduciary obligation was justified by the following facts: the Crown had a statutory duty to act in the best interest of the band; by surrendering the land to the Crown, the band had given the Crown control over the land; and the band was vulnerable to the exercise of the Crown’s discretion.<sup>148</sup> These principles were confirmed — and Weinrib’s article was cited once again — in a similar case nearly 20 years later: *Wewaykum Indian Band v. Canada*.<sup>149</sup>

In the aftermath of *Guerin*, the Supreme Court of Canada further clarified and extended the concept of “fiduciary obligation.” In the context of family law, in *Frame v. Smith*, Justice Bertha Wilson, dissenting, held that a woman — the custodial parent — could be in breach of her fiduciary obligation to her former spouse — the non-custodial parent — by violating his access rights and preventing him from seeing their children.<sup>150</sup> Justice Wilson broke new ground by setting out the general characteristics of fiduciary relationships based *inter alia* on Weinrib’s work and recognizing that a fiduciary relationship could exist between a

<sup>144</sup> *Ibid* at 7.

<sup>145</sup> *Ibid* at 3.

<sup>146</sup> [1984] 2 SCR 335 at 389 [*Guerin*].

<sup>147</sup> *Ibid* at 384.

<sup>148</sup> *Ibid* at 385.

<sup>149</sup> 2002 SCC 79 at para 80 [*Wewaykum*] (in this case, the claim was ultimately unsuccessful).

<sup>150</sup> [1987] 2 SCR 99 at 153 [*Frame*].

custodial and non-custodial parent.<sup>151</sup> These characteristics were subsequently approved by the Supreme Court in another family law case: *M.(K.) v. M.(H.)*.<sup>152</sup>

The Supreme Court also relied on Weinrib's article to ascertain the scope of fiduciary obligations in commercial cases. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, dissenting on this point, Justice Gérard La Forest concluded that a mining corporation — Lac Minerals — breached its fiduciary obligation to a smaller rival — Corona — by using information Corona communicated in confidence to acquire a valuable mining property for itself.<sup>153</sup> Recognizing that arm's length mining promoters could owe fiduciary obligations to one another in the context of pre-contractual negotiations was controversial; however, access to the confidential information gave Lac Minerals discretionary power and placed Corona in a corresponding situation of vulnerability.<sup>154</sup> By virtue of a practice in the mining industry, Lac Minerals was bound not to use the information in a manner detrimental to Corona. Weinrib was cited not only for the general characteristics of fiduciary obligations and the idea that the categories of fiduciary are not closed, but also for the second policy: the importance of maintaining the integrity of the marketplace.<sup>155</sup> Justice La Forest stressed that the law ought to sanction Lac Minerals to encourage businesspeople to bargain in good faith in similar circumstances in the future.<sup>156</sup>

A few years later, Justice La Forest held, for the majority this time, that an accountant — David Simms — had breached his fiduciary obligation by making a secret commission on an investment he had recommended and sold as a tax shelter to a stockbroker — Robert Hodgkinson.<sup>157</sup> This decision was also controversial, as the relation between financial advisers and their clients did not give rise to a fiduciary relationship per se and both parties were depicted as experienced investors. Yet, professional norms imposed on Simms the duty to act in the best interest of his client, and he could affect his client's interests by

<sup>151</sup> *Ibid* at 135–36. According to Justice Wilson, *ibid* at 136:

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics: (1) [t]he fiduciary has scope for the exercise of some discretion or power[;] (2) [t]he fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests[;] and (3) [t]he beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

<sup>152</sup> [1992] 3 SCR 6 at 61–64 [*M(K)*]. Justice La Forest, writing for the Supreme Court of Canada on this point, ruled that the relationship between parent and child is a fiduciary relationship and that sexual abuse of the child by the parent would be a breach of fiduciary obligation. In his reasons for judgment, Justice La Forest cited the relevant extracts of *Guerin*, *supra* note 146, and *Frame*, *ibid*.

<sup>153</sup> [1989] 2 SCR 574 at 655–56 [*Lac Minerals*]. While a 4–1 majority of the Supreme Court ruled that there was no fiduciary relationship between Lac Minerals and Corona, both Justice Sopinka, for the majority on this point (*ibid* at 596, 599–600), and Justice La Forest, dissenting on this issue (*ibid* at 644–45, 651), relied on Weinrib's article to support their reasoning.

<sup>154</sup> Justice Sopinka, in contrast, held that Corona put itself in a situation of vulnerability by not concluding a non-disclosure agreement with Lac Minerals before sharing information about the property. On that basis, he refused to recognize that Lac Minerals owed a fiduciary obligation to Corona. *Ibid* at 606–608. Citing a term coined by Weinrib, *supra* note 97 at 4, he also referred to fiduciary obligation as “the law's blunt tool,” that is, a tool that “must be reserved for situations that are truly in need of the special protection that equity affords”: *Lac Minerals*, *ibid* at 596.

<sup>155</sup> As stated by Justice La Forest, “[t]he essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions”: *Lac Minerals*, *ibid* at 672.

<sup>156</sup> According to Justice La Forest, in the circumstances, the appropriate remedy was to declare that Lac Minerals held the property as a constructive trustee for the benefit of Corona. Yet, Justice La Forest stated, echoing Weinrib, that judges should not conclude that a fiduciary obligation exists simply because they want to impose a constructive trust as a remedy in a case. *Ibid* at 649–52; Weinrib, *supra* note 97 (“one cannot both define the relation by the remedy and use the relation as a triggering device for remedy” at 5). On the appropriate remedy, Justice La Forest was writing for a 3–2 majority of the Supreme Court, along with Chief Justice Lamer and Justice Wilson.

<sup>157</sup> *Hodgkinson v Simms*, [1994] 3 SCR 377 at 439 [*Hodgkinson*].

recommending a specific investment. While the parties may not have had different bargaining strength at the outset, what matters according to Weinrib is the relative position of the parties after, not before, they enter a relationship. In other words, the vulnerability must arise from the relationship.<sup>158</sup> This point was reiterated in *Galambos v. Perez*.<sup>159</sup> The key ingredients of a fiduciary relationship were thus present in *Hodgkinson*, and the financial adviser was compelled to fully indemnify the client for the loss sustained on the investment.<sup>160</sup> Again, in line with Weinrib's argument, Justice La Forest stated that the law ought to dissuade financial advisers from making secret commissions to maintain the integrity of the relationship between them and their clients.<sup>161</sup>

This brief survey shows that Weinrib's article has greatly influenced the interpretation and application of the concept of "fiduciary obligation."<sup>162</sup> The Supreme Court cited Weinrib primarily for his thesis or reasoning, not for peripheral reasons. It relied on his article to identify the general characteristics of fiduciary relationships, to lay the foundation for recognizing new relationships beyond existing categories, and to protect the integrity of the marketplace.

### THIRD PLACE — THE CHARTER DIALOGUE BETWEEN COURTS AND LEGISLATURES

"The *Charter* Dialogue Between Courts and Legislatures," a core reading in Canadian public law, was authored by one of Canada's most influential constitutional scholars — Peter Hogg<sup>163</sup> — with one of his students at Osgoode Hall Law School — Allison Bushell. The article challenges a widespread objection to the legitimacy of judicial review of legislation under the *Charter*.<sup>164</sup> The objection is the assumption that it is undemocratic for unelected and unaccountable judges to be vested with the power to invalidate laws adopted by citizens' elected representatives.<sup>165</sup>

To rebut this objection, the article adopts the view that "judicial review is part of a 'dialogue' between judges and the legislatures"; a dialogue is possible whenever a legislature

<sup>158</sup> *Ibid* at 406. In contrast, Justices Sopinka and McLachlin declined to recognize the existence of a fiduciary obligation because Simms did not formally exercise discretion over the affairs of Hodgkinson, who was not, in their view, in a position of vulnerability. Indeed, while Simms made a recommendation, the decision to proceed with the investment was made by Hodgkinson. *Ibid* at 471–73. Still, this reasoning ignores the fact that Hodgkinson was a complete neophyte with respect to tax shelters and trusted Simms to provide unbiased advice and recommend a suitable investment.

<sup>159</sup> 2009 SCC 48 [*Galambos*] ("fiduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship" at para 68 [emphasis in original]).

<sup>160</sup> *Hodgkinson*, *supra* note 157 at 439.

<sup>161</sup> *Ibid* at 421, 453–54.

<sup>162</sup> In fact, the concept of "fiduciary" has become so far-reaching in this country that Sir Anthony Mason, former Chief Justice of Australia, is reported to have said that "[a]ll Canada is divided into three parts: those who owe fiduciary duties, those to whom fiduciary duties are owed, and judges who keep creating new fiduciary duties!": *A(C) v Critchley* (1998), 60 BCLR (3d) 92 at para 74.

<sup>163</sup> Hogg's foundational work, *Constitutional Law of Canada*, is the most-cited book in the history of the Supreme Court of Canada. See Elizabeth Raymer, "Renowned Legal Scholar and Lawyer Peter Hogg Dead at 80," *Canadian Lawyer* (6 February 2020), online: <[www.canadianlawyermag.com/news/general/renowned-legal-scholar-and-lawyer-peter-hogg-dead-at-80/325955](http://www.canadianlawyermag.com/news/general/renowned-legal-scholar-and-lawyer-peter-hogg-dead-at-80/325955)>. Hogg's book has been cited in 196 Supreme Court judgments. Search Hogg /p "Constitutional Law of Canada," between 8 April 1875 and 16 April 2021, in "Decisions and Resources," online: <[scc-csc.lexum.com/scc-csc/en/nav.do](http://scc-csc.lexum.com/scc-csc/en/nav.do)>. The search results are current as of 16 May 2022.

<sup>164</sup> Hogg & Bushell, *supra* note 98 at 77.

<sup>165</sup> *Ibid*.

can reverse, modify, or avoid a judicial decision that strikes down a law on *Charter* grounds.<sup>166</sup> The dialogue between courts and legislatures stems from the structure of the Constitution, especially the override (section 33) and limitation (section 1) clauses of the *Charter*.<sup>167</sup> Indeed, pursuant to the override clause, a legislature can re-enact a law that has been invalidated by the courts — without even changing it — to maintain its legal effect.<sup>168</sup> While the override clause is subject to certain limits,<sup>169</sup> it empowers legislatures to have the last word on public policy. The limitation clause is less drastic than the override: it allows legislatures to limit rights — insofar as the limit is reasonable, prescribed by law, and justifiable in a free and democratic society — as opposed to simply disregarding them.<sup>170</sup> Hence, the limitation clause enables a legislature to enact a new law to pursue the same objective as the one that was invalidated, but in a manner that is more respectful of the *Charter*.<sup>171</sup> To support their theory, Hogg and Bushell rely on an empirical study of 66 cases in which the courts struck down a legislative provision on *Charter* grounds. It turns out that, in 80 percent of these cases, legislatures responded to the decisions by enacting new laws.<sup>172</sup> The authors conclude that “[c]ritique of the *Charter* based on democratic legitimacy cannot be sustained” and stress that “[j]udicial review is ... the beginning of a dialogue as to how best to reconcile the individualistic values of the *Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole.”<sup>173</sup>

The article gave rise to a considerable body of literature on what is now known as the “dialogue theory,” with some scholars supporting the theory<sup>174</sup> and others criticizing it for

<sup>166</sup> *Ibid* at 79–80.

<sup>167</sup> *Ibid* at 82–91; *Charter*, *supra* note 57, ss 33, 1. In addition to the override (section 33) and limitation (section 1) clauses, the authors point out that the provisions of the *Charter*, which establish qualified rights (sections 7, 8, 9, and 12) and protect the right to equality (section 15), also provide room for a legislative response to a judicial declaration of invalidity. Hogg & Bushell, *ibid*.

<sup>168</sup> For example, in response to the Supreme Court’s decision in *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 [*Ford*], which struck down key provisions of the *Charter of the French language*, RSQ, c C-11, the Quebec legislature re-enacted the impugned provisions and invoked the override clause to prevent further legal challenges. See *An Act to amend the Charter of the French language*, SQ 1988, c 54, s 10. The override lapsed five years later and was not renewed.

<sup>169</sup> A section 33 declaration is valid for a period of five years and can be made only prospectively to override section 2 and sections 7 to 15 of the *Charter*. See sections 33(1) and (3) of the *Charter*, *supra* note 57; *Ford*, *ibid* at 743–45.

<sup>170</sup> The test to determine whether a limit on *Charter* rights can be justified was set out in *R v Oakes*, [1986] 1 SCR 103 at 138–40. In short, to be justified under the limitation clause, an impugned provision must pursue an important objective, it must be rationally connected to the objective, it must minimally impair *Charter* rights, and it must be proportional.

<sup>171</sup> The authors summarize the dynamic as follows: “(1) the law impaired a *Charter* right; (2) the law pursued an important purpose; and (3) the law was more restrictive of the *Charter* right than was necessary to accomplish the purpose. In each case, the invalidity of the law could be corrected by the enactment of a new law that was more respectful of the *Charter* right while still substantially accomplishing the important purpose”: Hogg & Bushell, *supra* note 98 at 87.

<sup>172</sup> *Ibid* at 97. In a follow-up article, the authors identify 23 additional cases and note that nearly 61 percent of them elicited a response from legislatures. See Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “*Charter* Dialogue Revisited — Or ‘Much Ado About Metaphors’” (2007) 45:1 Osgoode Hall LJ 1 at 51.

<sup>173</sup> Hogg & Bushell, *ibid* at 105. The authors nonetheless recognize that there is room for debate about what counts as “dialogue” (*ibid* at 98) and that, in exceptional situations (for example, where the limitation clause does not apply, where the objective of the law is unconstitutional, or where the political context precludes legislative action), a legislative response may not be possible (*ibid* at 92–96).

<sup>174</sup> See especially Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, revised ed (Toronto: Irwin Law, 2016); Kent Roach, “Sharpening the Dialogue Debate: The Next Decade of Scholarship” (2007) 45:1 Osgoode Hall LJ 169; Kent Roach, “Dialogic Judicial Review and its Critics” (2004) 23 SCLR (2d) 49.

various reasons.<sup>175</sup> Hogg and Bushell also took part in the debate on the dialogue theory in follow-up articles.<sup>176</sup> The Supreme Court of Canada cited the article in six judgments issued between 1998 and 2002: (1) to support the legitimacy of judicial review; (2) to justify specific remedies for unconstitutional statutes; and (3) to determine the level of scrutiny appropriate in assessing legislative responses. The Supreme Court first referred to the article in *Vriend v. Alberta*, where it held that Alberta's human rights legislation violated the right to equality guaranteed by section 15 of the *Charter* because it was under-inclusive: it did not prohibit discrimination based on sexual orientation.<sup>177</sup> As a remedy, a 7–1 majority decided to “read in” sexual orientation to the list of prohibited grounds of discrimination in the legislation, even if it had been intentionally omitted by the legislature.<sup>178</sup> For the majority, Justice Frank Iacobucci cited Hogg and Bushell's article to justify the controversial remedy imposed by the Supreme Court. He stated that the term “dialogue” properly describes the relationship between courts and legislatures and that a judicial decision is not the end of the discussion.<sup>179</sup> In that case, the legislature retained the “final word,” because it could override the Supreme Court by virtue of section 33 of the *Charter*, “the ultimate ‘parliamentary safeguard.’”<sup>180</sup> In another controversial decision about same-sex relationships — *M. v. H.* — Justice Michel Bastarache, in concurring reasons, quoted Hogg and Bushell to support the legitimacy of judicial review, stressing that it is part of a dialogue between courts and legislatures, as opposed to “a veto over the politics of the nation.”<sup>181</sup>

In *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, the Supreme Court of Canada had to decide whether provisions of the federal customs legislation, which prohibited importing obscene materials, violated *inter alia* the right to equality (section 15) because it was applied more zealously to books and magazines containing homosexual content.<sup>182</sup> While the Supreme Court ruled that custom officials had breached the right to equality, the judges disagreed on the proper remedy.<sup>183</sup> Justice Ian Binnie, for the majority, held that the problem was the manner in which customs officials had exercised their discretion in applying the customs legislation; on his interpretation, the impugned provisions

<sup>175</sup> See especially Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed (Don Mills, Ont: Oxford University Press, 2001); Christopher P Manfredi & James B Kelly, “Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures” (2001) 64:2 Sask L Rev 323; FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000); Christopher P Manfredi & James B Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell” (1999) 37:3 Osgoode Hall LJ 513. For criticism from the left side of the political spectrum, see Andrew Petter, “Twenty Years of *Charter* Justification: From Liberal Legalism to Dubious Dialogue” (2003) 52 UNBLJ 187; Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010).

<sup>176</sup> See especially Hogg, Bushell Thornton & Wright, *supra* note 172; Peter W Hogg & Allison A Thornton, “Reply to ‘Six Degrees of Dialogue’” (1999) 37:3 Osgoode Hall LJ 529.

<sup>177</sup> [1998] 1 SCR 493 at paras 127–28 [*Vriend*]; *Charter, supra* note 57, s 15.

<sup>178</sup> *Vriend, ibid* at para 179.

<sup>179</sup> *Ibid* at para 138 [citation omitted]:

[T]he *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a “dialogue”.... In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches.... [M]ost of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives.... By doing this, the legislature responds to the courts; hence the dialogue among the branches.

<sup>180</sup> *Ibid* at paras 137, 178. As one could expect, the Supreme Court decision was followed by a spirited debate about the use of the override clause, but ultimately, the Alberta government wisely decided not to use it because public opinion did not favour this option. See Hogg, Bushell Thornton & Wright, *supra* note 172 at 9, 42.

<sup>181</sup> [1999] 2 SCR 3 at para 328 [*M v H*], quoting Hogg & Bushell, *supra* note 98 at 105.

<sup>182</sup> 2000 SCC 69 at para 35 [*Little Sisters Book*].

<sup>183</sup> *Ibid* at paras 108–25.

did not envisage differential treatment between heterosexual and homosexual erotica.<sup>184</sup> In contrast, Justice Iacobucci, for the dissenters, held that the Supreme Court should invalidate the impugned provisions, as they needed to be redrafted to provide clearer guidance to customs officials.<sup>185</sup> In doing so, he quoted from Hogg and Bushell's article to make the point that striking down the provisions would promote dialogue and encourage Parliament to address the issue by enacting new legislation.<sup>186</sup> In other words, when legislation is constitutionally flawed, it is up to legislatures — not courts — to fix it. In the same spirit, in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, Justice Claire L'Heureux-Dubé, in concurring reasons, relied on Hogg and Bushell's article to defend suspending a declaration of invalidity to give the legislature time to consult stakeholders and decide how to fix a constitutional problem.<sup>187</sup>

The final two decisions — *R. v. Mills*<sup>188</sup> and *Sauvé v. Canada (Chief Electoral Officer)*<sup>189</sup> — offer illustrations of dialogue at play between courts and legislatures. In *Mills*, the Supreme Court of Canada examined the constitutionality of a new statutory regime governing disclosure of the complainant's private records (such as therapeutic records) to the accused in sexual assault trials.<sup>190</sup> In an earlier case, *R. v. O'Connor*, the Supreme Court had recognized that failure to disclose such records could prejudice the accused's right to make full answer and defence and could justify a stay of proceedings.<sup>191</sup> However, the Supreme Court had been divided on the approach necessary to properly balance the accused's right to make full answer and defence (section 7) with the complainant's right to privacy (section 8) and right to equality (section 15) under the *Charter*. The new statutory regime established by Parliament in the aftermath of *O'Connor* was more in line with the approach of the dissenters than that of the majority. Even so, in *Mills*, the Supreme Court upheld the new regime by a 7–1 majority. Relying on the dialogue theory, the majority held that it should defer to Parliament's judgment “as to where to draw the line between the competing rights.”<sup>192</sup> The majority's decision in *O'Connor*, which had set out a specific solution to deal with this issue under the common law, was not the last word on the subject; Parliament was free to adopt a different solution.<sup>193</sup>

Similarly, in *Sauvé*, the Supreme Court examined a second attempt by Parliament to disqualify prisoners from voting. In a decision nine years earlier, the Supreme Court had struck down a provision of the federal election legislation that disenfranchised all prisoners as an unjustified violation of the right to vote under section 3 of the *Charter*.<sup>194</sup> Because of this challenge, Parliament enacted a narrower disqualification to accomplish the same objective: only prisoners serving a sentence of two or more years were disenfranchised. When the new provision was challenged, the Supreme Court divided 5–4: all agreed that the provision limited section 3, but not on whether it could be justified under section 1. Justice

<sup>184</sup> *Ibid* at para 125.

<sup>185</sup> *Ibid* at para 270.

<sup>186</sup> *Ibid* at para 268.

<sup>187</sup> [1999] 2 SCR 203 at para 116 [*Corbiere*].

<sup>188</sup> [1999] 3 SCR 668 [*Mills*].

<sup>189</sup> 2002 SCC 68 [*Sauvé*].

<sup>190</sup> *Mills*, *supra* note 188 at para 17.

<sup>191</sup> [1995] 4 SCR 411 [*O'Connor*].

<sup>192</sup> Hogg, Bushell Thornton & Wright, *supra* note 172 at 21 [emphasis omitted]; *Mills*, *supra* note 188 at para 57.

<sup>193</sup> *O'Connor*, *supra* note 191 at para 133.

<sup>194</sup> *Sauvé v Canada (Attorney General)*, [1993] 2 SCR 438.

Charles Gonthier, for the dissenters, evoked the concept of “dialogue” to support the position that the courts should defer to Parliament’s judgment on what constitutes a reasonable limit on the right to vote, particularly when such a limit is adopted in response to an earlier judicial decision. In other words, the Supreme Court “[should let] Parliament have the last word.”<sup>195</sup> In contrast, Chief Justice McLachlin, for the majority, held that limits on the right to vote, a right that is crucial in a democracy governed by the rule of law, “require not deference, but careful examination.”<sup>196</sup> In the end, she invalidated the new provision because, in her view, the legislative objective was flawed.<sup>197</sup>

While *Sauvé* was the last Supreme Court judgment in which Hogg and Bushell’s article was cited,<sup>198</sup> the dialogic dynamic they empirically observed remains intact: legislatures usually respond to judicial decisions striking down legislation, and in doing so, they carefully consider the courts’ guidance.<sup>199</sup> While the fact that the article dealt with a hot topic surely increased its popularity, it is Hogg and Bushell’s compelling thesis and the term “dialogue” they coined (or, at least, popularized) that have made it hugely influential not only with judges, but also with political scientists and legal scholars.

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The three articles discussed above have undoubtedly had a great influence on the development of Canadian law. To say, however, that one has been more influential than the others would be perilous. To be sure, if one focuses only on Supreme Court of Canada citations, then Abel’s article is the clear winner. But if one also considers citations by lower courts and other authors, the results are different. Abel’s article was cited in only four lower court judgments<sup>200</sup> and 35 articles.<sup>201</sup> In comparison, Weinrib’s article was cited in 69 lower

<sup>195</sup> *Sauvé*, *supra* note 189 at para 104:

[T]he heart of the dialogue metaphor is that neither the courts nor Parliament hold a monopoly on the determination of values.... [Hence,] when, after a full and rigorous s. 1 analysis, Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and democratic society, the dialogue ends; the court lets Parliament have the last word and does not substitute Parliament’s reasonable choices with its own.

<sup>196</sup> *Ibid* at para 9.

<sup>197</sup> *Ibid* at para 26.

<sup>198</sup> Note, however, that their follow-up article — Hogg, Bushell Thornton & Wright, *supra* note 172 — was cited in two other Supreme Court judgments: *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 11 [*JTI-Macdonald*]; *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 282. In addition, the Supreme Court has sometimes referred to the dialogue theory without citing Hogg and Bushell’s article, which suggests some form of “obliteration” (see note 18, above). See e.g. *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at paras 65–66; *R v Hall*, 2002 SCC 64 at paras 43, 123–28; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 35, 53.

<sup>199</sup> See e.g. *Carter v Canada (Attorney General)*, 2015 SCC 5, and its aftermath.

<sup>200</sup> In total, Abel’s article was cited in 12 Canadian judgments: eight times by the Supreme Court, one time by a court of appeal, and three times by courts of first instance. Search Abel /p “The Neglected Logic of 91 and 92,” between 8 April 1875 and 16 April 2021 in “Search all databases,” online: <www.canlii.org/en/>. The search results are current as of 16 May 2022.

<sup>201</sup> This search was conducted using the periodical citation method. The following methodology was used: (1) from the homepage of HeinOnline, under the heading “Browse Databases By Name,” click on “Law Journal Library”; (2) in the search bar at the top of the page type Abel /p “The Neglected Logic of 91 and 92”; (3) on the left side of the page under “Date,” type “1875 to 2021”; (4) on the left side of the page under “Section Type,” click “Articles,” “Comments,” “Notes,” and “Reviews”; and (5) subtract one from the total count to exclude Abel’s original article. The search results are current as of 16 May 2022.

court judgments<sup>202</sup> and 269 articles,<sup>203</sup> and Hogg and Bushell's article was cited in 11 lower court judgments<sup>204</sup> and 386 articles.<sup>205</sup> Weinrib is thus first in terms of judgment citations, while Hogg and Bushell are first in terms of article citations. Overall, Weinrib's article seems to be the real champion, as it scores high in all categories.

An acute observer would also note that the three main authors were all trained at elite law schools (all attended *inter alia* Harvard Law School), taught at famous law schools located in Toronto (two at the University of Toronto; one at Osgoode Hall Law School), and published in law reviews affiliated with their law schools (two in the *University of Toronto Law Journal*; one in the *Osgoode Hall Law Journal*). Moreover, all the articles were written in English and, except for Weinrib's article, dealt with constitutional law (federalism and the *Charter*) — a hot topic. Even Weinrib's article has a connection to constitutional law, as it was cited by the Supreme Court to support the recognition of the Crown's fiduciary duty to Aboriginal peoples. Consequently, the top three articles exemplify the type of scholarly work the Supreme Court is most inclined to cite.

#### IV. CONCLUSION

The aims of this study were twofold: (1) to identify methods that can be used to measure the impact or influence of scholarly works; and (2) to determine which law reviews and articles were most cited by the Supreme Court since its creation. First, this study reveals that legal scholars typically use three methods to generate lists of important works: the periodical citation method, the judicial citation method, and the peer rating method. The first two are quantitative and rather objective, while the third is qualitative and rather subjective. The choice of method depends on one's research objective: the periodical citation method is useful for assessing articles' impact on legal scholarship; the judicial citation method can be applied to evaluate articles' impact on the development of the law; and the peer rating method can be used to identify important works in specific subject matters and jurisdictions based on specific experts' views. Second, relying on the judicial citation method, this study demonstrates that two law reviews (among those that are generalist, peer-reviewed, and university-based, and that were created in or before 1982) — the *McGill Law Journal* and the *University of Toronto Law Journal* — and 39 articles stand out. The articles share

<sup>202</sup> In total, Weinrib's article was cited in 76 Canadian judgments: seven times by the Supreme Court, 11 times by courts of appeal, 56 times by courts of first instance, and two times by administrative tribunals. Search Weinrib /p "The Fiduciary Obligation," between 8 April 1875 and 16 April 2021 in "Search all databases," online: <[www.canlii.org/en/](http://www.canlii.org/en/)>. The search results are current as of 16 May 2022.

<sup>203</sup> This search was conducted using the periodical citation method. The following methodology was used: (1) from the homepage of HeinOnline, under the heading "Browse Databases By Name," click on "Law Journal Library"; (2) in the search bar at the top of the page type Weinrib /p "The Fiduciary Obligation"; (3) on the left side of the page under "Date," type "1875 to 2021"; (4) on the left side of the page under "Section Type," click "Articles," "Comments," "Notes," and "Reviews"; and (5) subtract one from the total count to exclude Weinrib's original article. The search results are current as of 16 May 2022.

<sup>204</sup> In total, Hogg and Bushell's article was cited in 17 Canadian judgments: six times by the Supreme Court, five times by courts of appeal, and six times by courts of first instance. Search Hogg /p "The Charter Dialogue between Courts and Legislatures," between 8 April 1875 and 16 April 2021 in "Search all databases," online: <[www.canlii.org/en/](http://www.canlii.org/en/)>. The search results are current as of 16 May 2022.

<sup>205</sup> This search was conducted using the periodical citation method. The following methodology was used: (1) from the homepage of HeinOnline, under the heading "Browse Databases By Name," click on "Law Journal Library"; (2) in the search bar at the top of the page type Hogg /p "The Charter Dialogue between Courts and Legislatures"; (3) on the left side of the page under "Date," type "1875 to 2021"; (4) on the left side of the page under "Section Type," click "Articles," "Comments," "Notes," and "Reviews"; and (5) subtract one from the total count to exclude Hogg and Bushell's original article. The search results are current as of 16 May 2022.

common attributes: they were predominantly written in English by male law professors who held degrees from elite law schools and wrote about pressing constitutional law issues before the turn of the new millennium. While this information provides valuable insight into what has influenced the Supreme Court thus far, it can be expected (or, at least, hoped) that the profiles of the authors cited by the Supreme Court in the future will be more representative of today's increasingly diverse Canadian law schools.

**TABLE 1:  
MOST-CITED LAW REVIEWS IN SUPREME COURT OF CANADA JUDGMENTS<sup>206</sup>**

Rank	Name	Inception	Citations
1st	<i>McGill Law Journal</i>	1952	150 <sup>207</sup>
2nd	<i>University of Toronto Law Journal</i>	1935	100 <sup>208</sup>
3rd	<i>Queen's Law Journal</i>	1971	86 <sup>209</sup>
4th	<i>Alberta Law Review</i>	1955	82 <sup>210</sup>
5th	<i>UBC Law Review</i>	1959	71 <sup>211</sup>
6th	<i>Osgoode Hall Law Journal</i>	1958	70 <sup>212</sup>
7th	<i>Ottawa Law Review</i>	1966	62 <sup>213</sup>

<sup>206</sup> Table 1 identifies the most-cited generalist, peer-reviewed, university-based law reviews that were created in or before 1982 in Supreme Court judgments between 8 April 1875 and 16 April 2021, based on the Lexum database. The search results are current as of 16 May 2022.

<sup>207</sup> The *McGill Law Journal* was cited in 150 judgments. It was cited as the "McGill LJ" in 145 judgments, the "McGill Law Journal" in two judgments (one judgment cited "McGill LJ" and "McGill Law Journal" but was only counted once as "McGill LJ": *Martineau v Matsqui Disciplinary Bd*, [1980] 1 SCR 602 [*Martineau*]), the "McGill L J" in one judgment (one judgment cited "McGill LJ" and "McGill L J" but was only counted once as "McGill LJ": *McKinney v University of Guelph*, [1990] 3 SCR 229 [*McKinney*]), the "McGill L Jo" in one judgment, and the "RD McGill" in one judgment.

<sup>208</sup> The *University of Toronto Law Journal* was cited in 100 judgments. It was cited as the "UTLJ" in 87 judgments, the "U of T LJ" in eight judgments (one judgment cited "UTLJ" and "U of T LJ" but was only counted once as UTLJ: *Lac Minerals, supra* note 153), the "Univ of Tor LJ" in three judgments (one judgment cited "UTLJ" and "Univ of Tor LJ" but was only counted once as "UTLJ": *Martineau, ibid*), the "U of T Law Journal" in one judgment, and the "University of Toronto Law Journal" in one judgment.

<sup>209</sup> The *Queen's Law Journal* was cited in 86 judgments. It was cited as the "Queen's LJ" in 84 judgments (two judgments cited "Queen's LJ" and "Queen's L J" but were only counted once as "Queen's LJ": *R v Chaulk*, [1990] 3 SCR 1303 [*Chaulk*] and *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084) and the "Queens LJ" in two judgments.

<sup>210</sup> The *Alberta Law Review* was cited in 82 judgments. It was cited as the "Alta L Rev" in 78 judgments, the "Alberta Law Review" in three judgments, and the "Alta Law Rev" in one judgment.

<sup>211</sup> The *UBC Law Review* was cited in 71 judgments. It was cited as the "UBC L Rev" in 62 judgments, the "UBC Law Rev" in five judgments, the "UBCL Rev" in three judgments (two judgments cited "UBC L Rev" and "UBCL Rev" but were only counted once as "UBC L Rev": *Quebec (Attorney General) v Moses*, 2010 SCC 17 [*Moses*] and *R v Ahmad*, 2020 SCC 11), and the "UBC Law Review" in one judgment (two other judgments cited the "UBC Law Review" but were not counted because they referred to book chapters as opposed to articles: *Canadian Broadcasting Corp v Canada (Labour Relations Board)*, [1995] 1 SCR 157 and *TWU v British Columbia Telephone Co*, [1988] 2 SCR 564).

<sup>212</sup> The *Osgoode Hall Law Journal* was cited in 70 judgments. It was cited as the "Osgoode Hall LJ" in 67 judgments, the "Osgoode Hall Law Journal" in two judgments, and the "OHLJ" in one judgment.

<sup>213</sup> The *Ottawa Law Review* was cited in 62 judgments. It was cited as the "Ottawa L Rev" in 54 judgments, the "Ottawa LR" in three judgments (one judgment cited "Ottawa L Rev" and "Ottawa LR" but was only counted once as "Ottawa L Rev": *R v Smith*, [1987] 1 SCR 1045), the "Ottawa Law Rev" in two judgments, the "Ott LR" in one judgment, the "Ott L Rev" in one judgment, and the "U Ott LR" in one judgment.

Rank	Name	Inception	Citations
8th	<i>Cahiers de droit</i>	1954	58 <sup>214</sup>
9th	<i>Revue juridique Thémis</i>	1951	50 <sup>215</sup>
10th	<i>Manitoba Law Journal</i>	1962	46 <sup>216</sup>
11th	<i>Revue générale de droit</i>	1970	45 <sup>217</sup>
12th	<i>Dalhousie Law Journal</i>	1973	41 <sup>218</sup>
13th	<i>Saskatchewan Law Review</i>	1936	33 <sup>219</sup>
14th	<i>Revue de droit de l'Université de Sherbrooke</i>	1970	30 <sup>220</sup>
15th	<i>University of New Brunswick Law Journal</i>	1947	21 <sup>221</sup>
16th	<i>Windsor Yearbook of Access to Justice</i>	1979	10 <sup>222</sup>

<sup>214</sup> The *Cahiers de droit* was cited in 58 judgments as the “C de D.” The results exclude a judicial decision that was reprinted in the *Cahiers de droit* and cited in *Aubry v Éditions Vice-Versa Inc.*, [1998] 1 SCR 591 [Aubry].

<sup>215</sup> The *Revue juridique Thémis de l'Université de Montréal* was cited in 50 judgments. It was cited as the “RJT” in 48 judgments and the “RJTUM” in two judgments.

<sup>216</sup> The *Manitoba Law Journal* was cited in 46 judgments. It was cited as the “Man LJ” in 43 judgments and the “Man L J” in three judgments (one judgment cited “Man LJ” and “Man L J” but was only counted once as “Man LJ”: *Société des Acadiens v Association of Parents*, [1986] 1 SCR 549).

<sup>217</sup> The *Revue générale de droit* was cited in 45 judgments. It was cited as the “RGD” in 44 judgments and the “Revue générale de droit” in one judgment. The results exclude a judicial decision that was reprinted in the *Revue générale de droit* and cited in *Re Manitoba Language Rights*, [1985] 1 SCR 721.

<sup>218</sup> The *Dalhousie Law Journal* was cited in 41 judgments. It was cited as the “Dalhousie LJ” in 23 judgments, the “Dal LJ” in 17 judgments (one judgment cited “Dalhousie LJ” and “Dal LJ” but was only counted once as “Dalhousie LJ”: *References re Greenhouse Gas Pollution Pricing Act*, *supra* note 125), and the “Dal L J” in one judgment.

<sup>219</sup> The *Saskatchewan Law Review* was cited in 33 judgments. It was cited as the “Sask L Rev” in 30 judgments and the “Sask Law Rev” in three judgments.

<sup>220</sup> The *Revue de droit de l'Université de Sherbrooke* was cited in 30 judgments as the “RDUS.”

<sup>221</sup> The *University of New Brunswick Law Journal* was cited in 21 judgments. It was cited as the “UNBLJ” in 20 judgments and the “UNB LJ” in one judgment (one judgment cited “UNBLJ” and “UNB LJ” but was only counted once as “UNBLJ”: *Prud'homme v Prud'homme*, 2002 SCC 85 [Prud'homme]).

<sup>222</sup> The *Windsor Yearbook of Access to Justice* was cited in ten judgments as the “Windsor YB Access Just.”

**TABLE 2:**  
**MOST-CITED ARTICLES IN SUPREME COURT OF CANADA JUDGMENTS**<sup>223</sup>

Rank	Author, Title, and Reference	Citations	Status	Subject
1st	Albert S Abel, “The Neglected Logic of 91 and 92” (1969) 19:4 UTLJ 487	8 <sup>224</sup>	Professor (Toronto)	Public Law (Constitutional)
2nd	Ernest J Weinrib, “The Fiduciary Obligation” (1975) 25:1 UTLJ 1	7 <sup>225</sup>	Professor (Toronto)	Private Law (Trusts)
3rd	Peter W Hogg & Allison A Bushell, “The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35:1 Osgoode Hall LJ 75	6 <sup>226</sup>	Professor (Osgoode)	Public Law (Constitutional)
4th	Jean Leclair, “The Supreme Court of Canada’s Understanding of Federalism: Efficiency at the Expense of Diversity” (2003) 28:2 Queen’s LJ 411	5 <sup>227</sup>	Professor (Montreal)	Public Law (Constitutional)
–	A Anne McLellan & Bruce P Elman, “To Whom Does the Charter Apply? Some Recent Cases on Section 32” (1986) 24:2 Alta L Rev 361	5 <sup>228</sup>	Professor (Alberta)	Public Law (Constitutional)
–	Louis Perret, “De l’impact de la Charte des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité au Québec” (1981) 12:1 RGD 121	5 <sup>229</sup>	Professor (Ottawa)	Public Law (Constitutional)

<sup>223</sup> Table 2 identifies the articles that were most cited in Supreme Court judgments between 8 April 1875 and 16 April 2021, among those published in generalist, peer-reviewed, university-based law reviews that were created in or before 1982 listed in Table 1, based on the Lexum database. The column titled Citations identifies the number of Supreme Court judgments in which an article is cited. The column titled Status identifies the professional status of the author at the time the article was written; when an article was written by more than one author, only the professional status of the primary author is identified; when the primary author is a professor, the institution where the professor was teaching at the time of publication is also specified. The search results are current as of 16 May 2022.

<sup>224</sup> *Re BC Motor Vehicle Act*, *supra* note 134; *Morgentaler*, *supra* note 139; *Husky Oil*, *supra* note 139; *Canadian Owners and Pilots Association*, *supra* note 130; *Quebec v Canada*, *supra* note 136; *Desgagnés Transport*, *supra* note 135; *Reference re Genetic Non-Discrimination Act*, *supra* note 135; *References re Greenhouse Gas Pollution Pricing Act*, *supra* note 125.

<sup>225</sup> *Guerin*, *supra* note 146; *Frame*, *supra* note 150; *Lac Minerals*, *supra* note 153; *M(K)*, *supra* note 152; *Hodgkinson*, *supra* note 157; *Wewaykum*, *supra* note 149; *Galambos*, *supra* note 159.

<sup>226</sup> *Vriend*, *supra* note 177; *M v H*, *supra* note 181; *Corbiere*, *supra* note 187; *Mills*, *supra* note 188; *Little Sisters Book*, *supra* note 182; *Sauvé*, *supra* note 189.

<sup>227</sup> *Canadian Western Bank v Alberta*, 2007 SCC 22 [*Canadian Western Bank*]; *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23; *Quebec (Attorney General) v Lacombe*, 2010 SCC 38; *R v Comeau*, 2018 SCC 15; *References re Greenhouse Gas Pollution Pricing Act*, *supra* note 125.

<sup>228</sup> *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 [*Dolphin Delivery*]; *McKinney*, *supra* note 207; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 [*New Brunswick Broadcasting*]; *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.

<sup>229</sup> *Quebec (Public Curator) v Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 SCR 211; *Béliveau St-Jacques v Fédération des employés et employés de services publics inc*, [1996] 2 SCR 345; *Aubry*, *supra* note 214; *Gauthier v Beaumont*, [1998] 2 SCR 3; *Hinse v Canada (Attorney General)*, 2015 SCC 35.

Rank	Author, Title, and Reference	Citations	Status	Subject
–	Paul C Weiler, “The Supreme Court and the Law of Canadian Federalism” (1973) 23:3 UTLJ 307	5 <sup>230</sup>	Professor (Osgoode)	Public Law (Constitutional)
8th	Aharon Barak, “Proportional Effect: The Israeli Experience” (2007) 57:2 UTLJ 369	4 <sup>231</sup>	Judge	Public Law (Constitutional)
–	Nigel Bankes, “Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia” (1991) 29:4 Alta L Rev 792	4 <sup>232</sup>	Professor (Calgary)	Public Law (Constitutional)
–	Jamie Cameron, “The Past, Present, and Future of Expressive Freedom under the <i>Charter</i> ” (1997) 35:1 Osgoode Hall LJ 1	4 <sup>233</sup>	Professor (Osgoode)	Public Law (Constitutional)
–	Gerald Le Dain, “Sir Lyman Duff and the Constitution” (1974) 12:2 Osgoode Hall LJ 261	4 <sup>234</sup>	Professor (Osgoode)	Public Law (Constitutional)
–	Anne McGillivray, “Abused Children in the Courts: Adjusting the Scales After Bill C-15” (1990) 19:3 Man LJ 549	4 <sup>235</sup>	Professor (Manitoba)	Public Law (Criminal)
–	DJ Mullan, “Fairness: The New Natural Justice?” (1975) 25:3 UTLJ 281	4 <sup>236</sup>	Professor (Queen’s)	Public Law (Administrative)
–	Marcia Neave, “Resolving the Dilemma of Difference: A Critique of ‘The Role of Private Ordering in Family Law’” (1994) 44:1 UTLJ 97	4 <sup>237</sup>	Professor (Monash)	Private Law (Family)

<sup>230</sup> *Bell Canada v Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 749; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3; *R v Demers*, 2004 SCC 46; *Canadian Western Bank*, *supra* note 227; *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53.

<sup>231</sup> *JTI-Macdonald*, *supra* note 198; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*]; *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21; *R v KRJ*, 2016 SCC 31 [*KRJ*].

<sup>232</sup> *Northrop Grumman Overseas Services Corp v Canada (Attorney General)*, 2009 SCC 50; *Moses*, *supra* note 211; *Canada (Attorney General) v British Columbia Investment Management Corp*, 2019 SCC 63; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48.

<sup>233</sup> *R v Lucas*, [1998] 1 SCR 439; *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877; *Hutterian Brethren*, *supra* note 231; *KRJ*, *supra* note 231.

<sup>234</sup> *Re: Anti-Inflation Act*, *supra* note 56; *R v Hauser*, [1979] 1 SCR 984; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 [*Crown Zellerbach*]; *References re Greenhouse Gas Pollution Pricing Act*, *supra* note 125.

<sup>235</sup> *R v L (DO)*, [1993] 4 SCR 419; *R v Levogiannis*, [1993] 4 SCR 475; *R v R (D)*, [1996] 2 SCR 291; *R v Friesen*, 2020 SCC 9.

<sup>236</sup> *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311; *MNR v Coopers and Lybrand*, [1979] 1 SCR 495; *Martineau*, *supra* note 207; *Homex Realty v Wyoming*, [1980] 2 SCR 1011.

<sup>237</sup> *Willick v Willick*, [1994] 3 SCR 670; *G (L) v B (G)*, [1995] 3 SCR 370; *Miglin v Miglin*, 2003 SCC 24; *Rick v Brandsema*, 2009 SCC 10.

Rank	Author, Title, and Reference	Citations	Status	Subject
–	Ed Ratushny, “Is There a Right Against Self-Incrimination in Canada?” (1973) 19:1 McGill LJ 1	4 <sup>238</sup>	Professor (Ottawa)	Public Law (Criminal)
–	José Woehrling, “L’obligation d’accommodement raisonnable et l’adaptation de la société à la diversité religieuse” (1998) 43:2 McGill LJ 325	4 <sup>239</sup>	Professor (Montreal)	Public Law (Constitutional)
17th	Joost Blom & Elizabeth Edinger, “The Chimera of the Real and Substantial Connection Test” (2005) 38:2 UBC L Rev 373	3 <sup>240</sup>	Professor (UBC)	Private Law (Conflict of Laws)
–	Peter Burns, “Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest” (1982) 16:2 UBC L Rev 229	3 <sup>241</sup>	Professor (UBC)	Private Law (Torts)
–	Pierre Carignan, “La raison d’être de l’article 93 de la Loi constitutionnelle de 1867 à la lumière de la législation préexistante en matière d’éducation” (1986) 20:3 RJT 375	3 <sup>242</sup>	Professor (Montreal)	Public Law (Constitutional)
–	Jean-Gabriel Castel, “The Uncertainty Factor in Canadian Private International Law” (2007) 52:3 McGill LJ 555	3 <sup>243</sup>	Professor (Osgoode)	Private Law (Conflict of Laws)
–	François Chevette, “La disposition limitative de la Charte des droits et libertés de la personne: le dit et le non dit” (1987) 21:3 RJT 461	3 <sup>244</sup>	Professor (Montreal)	Public Law (Constitutional)

<sup>238</sup> *Marcouly and Solomon v R*, [1976] 1 SCR 763; *Rothman v R*, [1981] 1 SCR 640; *R v Hebert*, [1990] 2 SCR 151; *R v S (RJ)*, [1995] 1 SCR 451.

<sup>239</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem*]; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6; *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16.

<sup>240</sup> *Club Resorts Ltd v Van Breda*, 2012 SCC 17 [*Club Resorts*]; *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 [*Lapointe*]; *Haaretz.com v Goldhar*, 2018 SCC 28 [*Goldhar*].

<sup>241</sup> *Cement LaFarge v BC Lightweight Aggregate*, [1983] 1 SCR 452; *Frame*, *supra* note 150; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959.

<sup>242</sup> *Greater Montreal Protestant School Board v Quebec (Attorney General)*, [1989] 1 SCR 377; *Reference re Education Act (Que)*, [1993] 2 SCR 511; *Adler v Ontario*, [1996] 3 SCR 609.

<sup>243</sup> *Club Resorts*, *supra* note 240; *Lapointe*, *supra* note 240; *Goldhar*, *supra* note 240.

<sup>244</sup> *Devine v Quebec (Attorney General)*, [1988] 2 SCR 790; *Aubry*, *supra* note 214; *Amselem*, *supra* note 239. In 1989, this article was also republished as a book chapter, which was then cited by the Supreme Court in *Godbout v Longueuil (City)*, [1997] 3 SCR 844. This result was not counted in Table 2.

Rank	Author, Title, and Reference	Citations	Status	Subject
–	Pierre-André Côté, “La détermination du domaine du droit civil en matière de responsabilité civile de l’Administration québécoise — Commentaire de l’arrêt <i>Laurentide Motels</i> ” (1994) 28:2 RJT 411	3 <sup>245</sup>	Professor (Montreal)	Public Law (Administrative)
–	G Ferguson, “A Critique of Proposals to Reform the Insanity Defence” (1989) 14:1 <i>Queen’s LJ</i> 135	3 <sup>246</sup>	Professor (Victoria)	Public Law (Criminal)
–	Dale Gibson, “Constitutional Jurisdiction over Environmental Management in Canada” (1973) 23:1 <i>UTLJ</i> 54	3 <sup>247</sup>	Professor (Manitoba)	Public Law (Constitutional)
–	Dale Gibson, “Measuring ‘National Dimensions’” (1976) 7:1 <i>Man LJ</i> 15	3 <sup>248</sup>	Professor (Manitoba)	Public Law (Constitutional)
–	Dale Gibson, “Distinguishing the Governors from the Governed: The Meaning of ‘Government’ Under Section 32(1) of the <i>Charter</i> ” (1983) 13:4 <i>Man LJ</i> 505	3 <sup>249</sup>	Professor (Manitoba)	Public Law (Constitutional)
–	John M Kernochan, “Statutory Interpretation: An Outline of Method” (1976) 3:2 <i>Dal LJ</i> 333	3 <sup>250</sup>	Professor (Columbia)	Public Law (Interpretation)
–	Louis LeBel, “L’appel des jugements interlocutoires en procédure civile québécoise” (1986) 17:1&2 <i>RGD</i> 391	3 <sup>251</sup>	Judge	Private Law (Civil Procedure)
–	WR Lederman, “The Concurrent Operation of Federal and Provincial Laws in Canada” (1963) 9:3 <i>McGill LJ</i> 185	3 <sup>252</sup>	Professor (Queen’s)	Public Law (Constitutional)

<sup>245</sup> *Doré v Verdun (City)*, [1997] 2 SCR 862; *Proulx v Quebec (Attorney General)*, 2001 SCC 66; *Montréal (City) v Octane Stratégie inc.*, 2019 SCC 57. In 1995, this article was also republished as a book chapter, which was then cited by the Supreme Court in *Prud’homme*, *supra* note 221. This result was not counted in Table 2.

<sup>246</sup> *Chaulk*, *supra* note 209; *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625; *R v Ruzic*, 2001 SCC 24.

<sup>247</sup> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3; *R v Hydro-Québec*, [1997] 3 SCR 213; *References re Greenhouse Gas Pollution Pricing Act*, *supra* note 125.

<sup>248</sup> *Schneider v R*, [1982] 2 SCR 112; *Crown Zellerbach*, *supra* note 234; *References re Greenhouse Gas Pollution Pricing Act*, *ibid.*

<sup>249</sup> *Dolphin Delivery*, *supra* note 228; *McKinney*, *supra* note 207; *New Brunswick Broadcasting*, *supra* note 228.

<sup>250</sup> *Harel v Deputy Minister of Revenue (Quebec)*, [1978] 1 SCR 851; *Will-Kare Paving & Contracting Ltd v Canada*, [2000] 1 SCR 915; *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26.

<sup>251</sup> *Garcia Transport Ltée v Royal Trust Co.*, [1992] 2 SCR 499; *Kelvin Energy Ltd v Lee*, [1992] 3 SCR 235; *Willmor Discount Corp v Vaudreuil (City)*, [1994] 2 SCR 210.

<sup>252</sup> *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161; *Bank of Montreal v Hall*, [1990] 1 SCR 121; *GMAC Commercial Credit Corp – Canada v TCT Logistics Inc.*, 2006 SCC 35.

Rank	Author, Title, and Reference	Citations	Status	Subject
–	AJ McClean, “Constructive and Resulting Trusts – Unjust Enrichment in a Common Law Relationship – <i>Pettkus v. Becker</i> ,” Case Comment, (1982) 16:1 UBC L Rev 155	3 <sup>253</sup>	Professor (UBC)	Private Law (Trusts)
–	Ian B McKenna, “Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be Resolved?” (1997-98) 29:1 Ottawa L Rev 153	3 <sup>254</sup>	Professor (Lethbridge)	Public Law (Constitutional)
–	Yves-Marie Morissette, “The Exclusion of Evidence under the <i>Canadian Charter of Rights and Freedoms</i> : What to Do and What Not to Do” (1984) 29:4 McGill LJ 521	3 <sup>255</sup>	Professor (McGill)	Public Law (Constitutional)
–	William Pentney, “The Rights of the Aboriginal Peoples of Canada in the <i>Constitution Act, 1982</i> , Part II, Section 35: The Substantive Guarantee” (1988) 22:2 UBC L Rev 207	3 <sup>256</sup>	Professor (Ottawa)	Public Law (Constitutional)
–	Tim Quigley, “Reform of the Intoxication Defence” (1987) 33:1 McGill LJ 1	3 <sup>257</sup>	Professor (Sask)	Public Laws (Criminal)
–	Alan D Reid & Alison Harvison Young, “Administrative Search and Seizure under the Charter” (1985) 10:2 Queen’s LJ 392	3 <sup>258</sup>	Lawyer	Public Law (Constitutional)
–	Elizabeth Sheehy, “Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?” (1989) 21:1 Ottawa L Rev 151	3 <sup>259</sup>	Professor (Ottawa)	Public Law (Constitutional)
–	Brian Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1983) 8:1&2 Queen’s LJ 232	3 <sup>260</sup>	Professor (Osgoode)	Public Law (Constitutional)

<sup>253</sup> *Sorochan v Sorochan*, [1986] 2 SCR 38; *Rawluk v Rawluk*, [1990] 1 SCR 70; *Soulos v Korkontzilas*, [1997] 2 SCR 217.

<sup>254</sup> *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27; *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15.

<sup>255</sup> *R v Collins*, [1987] 1 SCR 265; *R v Burlingham*, [1995] 2 SCR 206; *R v St-Cloud*, 2015 SCC 27.

<sup>256</sup> *R v Sparrow*, [1990] 1 SCR 1075; *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

<sup>257</sup> *R v Bernard*, [1988] 2 SCR 833; *R v Penno*, [1990] 2 SCR 865; *R v Daviault*, [1994] 3 SCR 63.

<sup>258</sup> *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425; *R v McKinlay Transport Ltd*, [1990] 1 SCR 627; *British Columbia Securities Commission v Branch*, [1995] 2 SCR 3.

<sup>259</sup> *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577; *R v Ewanchuk*, [1999] 1 SCR 330; *R v W (G)*, [1999] 3 SCR 597.

<sup>260</sup> *Van der Peet*, *supra* note 256; *Delgamuukw*, *supra* note 256; *R v Kapp*, 2008 SCC 41.

Rank	Author, Title, and Reference	Citations	Status	Subject
–	Paul C Weiler, “The <i>Charter</i> at Work: Reflections on the Constitutionalizing of Labour and Employment Law” (1990) 40:2 UTLJ 117	3 <sup>261</sup>	Professor (Harvard)	Public Law (Constitutional)
–	Alan Young, “All Along the Watchtower: Arbitrary Detention and the Police Function” (1991) 29:2 Osgoode Hall LJ 329	3 <sup>262</sup>	Professor (Osgoode)	Public Law (Criminal)

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<sup>261</sup> *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211; *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989; *UFCW, Local 1518 v KMart Canada Ltd*, [1999] 2 SCR 1083.

<sup>262</sup> *R v Elshaw*, [1991] 3 SCR 24; *R v Mann*, 2004 SCC 52; *R v Grant*, 2009 SCC 32.

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