Foreign Law and the Charter: Unresolved Issues After *Québec inc.*

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I. INTRODUCTION

For many years, the Supreme Court has used foreign law to interpret the *Canadian Charter of Rights and Freedoms*.[1] In one of its very first Charter cases, a unanimous Court wrote that "it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts".[2]

Not every high court in the world shares the Supreme Court of Canada's enthusiasm for foreign jurisprudence. For example, the U.S. Supreme Court has divided sharply on the use of foreign law to interpret its Constitution.[3] In contrast, the Supreme Court of Canada has not experienced much disagreement on this issue, as it has frequently cited the laws of other nations, known as comparative law, and multilateral treaties, referred to in this essay as international law, to interpret the Charter.[4]

Despite the Court's frequent use of comparative law and international treaties to interpret the Charter, it long provided little guidance on whether, when and how to use foreign sources to interpret the Charter. In the Court's 2020 decision in *Quebec*

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "Charter"].

2 *Law Society of Upper Canada v. Skapinker*, [1984] S.C.J. No. 18, [1984] 1 S.C.R. 357 at para. 12 (S.C.C.).

3 In *Lawrence v. Texas*, 2003 U.S. LEXIS 5013, 539 U.S. 558 (2003), the six-justice majority cited the European Court of Human Rights to support its decision to strike down an anti-sodomy law (at 573 and 576). In dissent, Scalia J., joined by Rehnquist C.J. and Thomas J., criticized "the Court's discussion of these foreign views" (at 598). In *Roper v. Simmons*, 2005 U.S. LEXIS 2200, 543 U.S. 551 (2005), the five-justice majority cited foreign law to support its ruling that imposing the death penalty for crimes convicted while the offender was under the age of 18 was unconstitutional (at 575-578). In dissent, Scalia J., again joined by Rehnquist C.J. and Thomas J., criticized the majority's use of foreign law (at 622-628). In a separate dissent, O'Connor J. also expressed disagreement with the majority's use of foreign law (at 604-605).

4 In this essay, the term "comparative law" refers to the laws of other nations outside of Canada and the term "international law" refers to multilateral treaties that multiple nations are parties to. The term "foreign law" encompasses both comparative and international law.

(Attorney General) v. 9147-0732 Québec inc.,[5] Brown and Rowe JJ. wrote for the majority and remarked that "this Court . . . has not always explained how or why different international sources are being discussed or relied on, while others are not. The result has been a want of clarity, even confusion."[6] They also acknowledged the following:

> [W]e are not alone in expressing concern about the need for structure when citing international and foreign sources. Commentators have called for clarification in this regard, noting that courts should provide "greater analytical rigour" and "approach international law in a principled and coherent manner, providing clarity as to precisely what effect is accorded to international law in a given case and why".[7]

In *Québec inc.*, the majority declared that a "principled framework" for citing foreign law in Charter interpretation was both "necessary and desirable".[8] While it confirmed that there is "a role for international and comparative law in interpreting *Charter* rights",[9] it cautioned the following:

> If [foreign] sources are to be accorded a persuasive character, it must be done by way of a coherent and consistent methodology. Coherence and consistency in a court's reasons are important, because they are critical means by which it may account to the public for the manner in which it exercises its powers. This is particularly so on a matter so fundamental as constitutional interpretation.[10]

In an attempt to provide coherence and consistency, *Québec inc.* declared that Charter analysis "*must begin* by considering the text of the provision".[11] As well, because the Charter is a "made in Canada" document, "its provisions are primarily interpreted with regards to Canadian law and history".[12]

Regarding comparative law, *Québec inc.* held that "[p]articular caution should . . . be exercised when referring to what other countries have done domestically, as the measures in effect in other countries say little (if anything at all) about the scope of the rights enshrined in the Canadian *Charter*"[13] and that "all foreign decisions ultimately influence Canadian law based on persuasive, rather than binding, authority".[14] As for international treaties, binding international treaties should carry

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[5] *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32 (S.C.C.) [hereinafter "*Québec inc.*"].

[6] *Québec inc.* at para. 24.

[7] *Québec inc.* at para. 26 [citations omitted].

[8] *Québec inc.* at para. 27.

[9] *Québec inc.* at para. 28.

[10] *Québec inc.* at para. 3.

[11] *Québec inc.* at para. 8 [emphasis in original].

[12] *Québec inc.* at para. 20.

[13] *Québec inc.* at para. 43.

[14] *Québec inc.* at para. 43, citing Michel Bastarache, "How Internationalization of the

more weight than non-binding treaties,[15] and treaties that pre-date the Charter should be accorded more weight than those that post-date the Charter.[16] As well, the "normative value and weight of international and comparative sources [must be] tailored to reflect the nature of the source and its relationship to our Constitution".[17]

Despite these salutary statements in *Québec inc.*, the Court's use of foreign law remains far from coherent or consistent. This essay presents a detailed analysis of three longstanding issues pertaining to the Supreme Court's use of foreign law in Charter cases and makes the argument that these three issues remain unresolved, either because *Québec inc.* simply did not address them, or because the Court has ignored the *Québec inc.* framework in subsequent cases. It examines each issue through pre-*Québec inc.* cases, assesses whether each issue was dealt with in *Québec inc.*, and looks at how the Court has treated each issue in post-*Québec inc.* jurisprudence.

First, this essay deals with the question of whether foreign law is relevant in interpreting the Charter. This is a threshold question that must be answered before the Court decides which foreign law sources to cite. However, the Court has been inconsistent on this question, ruling in some cases that foreign law is relevant to interpreting the Charter, while ruling in other cases that foreign law is of little relevance in interpreting the Charter.

Second, the issue of choosing which specific foreign sources to cite is addressed. If a court has determined that foreign law is relevant in a particular Charter case, it must decide which foreign sources to cite. With the wide diversity in foreign sources that exist today, courts need guidance to ensure consistency in the sources they choose to interpret the Charter. Unfortunately, while *Québec inc.* rightly recognized the Supreme Court's long inconsistency on this question, the Court's subsequent cases have failed to follow the guidance from *Québec inc.* that was meant to improve consistency in the selection of foreign sources.

Third, this essay critiques the Court's misrepresentation of foreign legal sources. If the Supreme Court plans to use foreign law to interpret the Charter, it must ensure that it quotes foreign law sources correctly. A Canadian court would be committing an error of law if it quoted a domestic decision incorrectly. However, the Supreme Court has misrepresented comparative and international sources in a number of landmark Charter cases, which casts doubt on the legal reasoning in these cases.

Ultimately, this essay suggests that the Court must build upon the framework laid out in *Québec inc.* and provide further guidance in order to bring coherence and consistency to the use of foreign law to interpret the Charter.

Law has Materialized in Canada" (2009) 59 U.N.B.L.J. 190 at 196.

[15] *Québec inc.* at para. 38.

[16] *Québec inc.* at para. 42.

[17] *Québec inc.* at para. 46.

II. WHEN DOES FOREIGN LAW MATTER?

Canadian courts are not required to, or prevented from, considering foreign law to interpret the Charter. Deciding whether to cite foreign law in Charter cases is an entirely discretionary choice. However, as the Court noted in *Québec inc.*, its discretionary power to cite foreign law in Charter cases must be guided by coherence and consistency.

Unfortunately, *Québec inc.* had little guidance to offer courts in determining when to cite foreign law to interpret the Charter.

1. Before *Québec inc.*

The Court's use of foreign law to interpret the Charter goes back decades. For example, it invoked the laws of many foreign nations in *United States of America v. Burns*,[18] when it ruled that extraditing an individual to a country where that individual might face the death penalty violated section 7 of the Charter. The Court cited foreign law as support for its holding in the case, describing the practice of other nations as a factor "weigh[ing] against extradition without assurances that the death penalty will not be imposed".[19]

However, there have been other cases where the Court has ignored relevant foreign law, often without providing any explanation for doing so. In *Sauvé v. Canada (Chief Electoral Officer)*,[20] the majority struck down a law that disenfranchised offenders who were serving sentences of two years or longer. The majority largely refrained from mentioning foreign sources cited in argument, with the exception of one reference to the Constitutional Court of South Africa that was used to bolster the majority's argument that the right to vote was connected to the dignity inherent in each individual.[21] As the dissent documented, however, laws restricting certain convicts from voting could be found in the United Kingdom, New Zealand, many European countries, and a majority of jurisdictions in Australia and the United States.[22] As well, the House of Lords had ruled that a right to vote did not forbid the disenfranchisement of felons.[23]

The *Sauvé* dissent also cited international treaties, quoting the United Nations Human Rights Committee's commentary on the *International Covenant on Civil*

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[18] *United States of America v. Burns*, [2001] S.C.J. No. 8, 2001 SCC 7 (S.C.C.).

[19] *United States of America v. Burns*, [2001] S.C.J. No. 8, 2001 SCC 7 at para. 75 (S.C.C.).

[20] [2002] S.C.J. No. 66, 2002 SCC 68 (S.C.C.).

[21] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68 at para. 35 (S.C.C.).

[22] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68 at paras. 122-134 (S.C.C.).

[23] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68 at para. 132 (S.C.C.).

and Political Rights,[24] which stated that restrictions on the right to vote should be "objective and reasonable" and that "[i]f conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence".[25] The dissent's many citations of foreign law went unanswered by the majority.

Nearly two decades later in *Frank v. Canada (Attorney General)*,[26] the Court again ignored foreign law in a section 3 case, holding that the federal government could not limit the voting rights of Canadians who had been absent from the country for more than five years and did not intend to return to Canada.

While *Frank* acknowledged that "residence is a requirement of electoral laws in other Westminster democracies", the majority quickly dismissed the relevance of comparative law.[27] Writing for the majority, Wagner C.J.C. stated that "the fact that other democracies have legislated residence-based voting restrictions is of little assistance to us in determining what is required by *Canadian* democratic rights, as enshrined in this country's *Charter*".[28]

While *Frank* may have held that foreign law is of little relevance in interpreting section 3 because the Charter is a uniquely Canadian document, the Court has not applied this "Canadian" line of reasoning to interpreting other provisions of the Charter. As the Court noted in *Burns* (quoting *Reference re Motor Vehicle Act (British Columbia) S 94(2)*[29]), "international law and opinion is of use to the courts in elucidating the scope of fundamental justice [under section 7]".[30]

It is unclear why foreign law would be relevant to interpreting section 7, but not section 3. While the Court has emphasized the relevance of international law in interpreting section 7, it has also seemingly assigned much greater weight to Canadian law than foreign law in a number of section 7 cases. This has been especially true in a number of cases involving the principles of fundamental justice. The test for recognizing a new principle of fundamental justice comes from *R. v.*

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[24] 999 U.N.T.S. 171 [hereinafter "ICCPR"].

[25] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, 2002 SCC 68 at para. 133 (S.C.C.); United Nations Human Rights Committee, "General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights", General Comment No. 25 (57), Annex V, CCPR/C/21, Rev. 1, Add. 7, August 27, 1996.

[26] [2019] S.C.J. No. 1, 2019 SCC 1 (S.C.C.).

[27] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1 at para. 62 (S.C.C.).

[28] *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1 at para. 62 (S.C.C.) [emphasis in original].

[29] [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

[30] *United States of America v. Burns*, [2001] S.C.J. No. 8, 2001 SCC 7 at para. 79 (S.C.C.).

Malmo-Levine,[31] where the majority held that "for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate".[32]

In several subsequent cases, the Court's societal consensus inquiry was overwhelmingly focused on *Canadian* society, with barely any mention given to foreign law. In *R. v. B. (D.)*,[33] the majority's societal consensus analysis spanned 20 paragraphs,[34] all devoted to Canadian society except for two paragraphs referring to international opinion.[35] Similarly, in *Canada (Attorney General) v. Federation of Law Societies of Canada*,[36] the majority's societal consensus analysis included six paragraphs about Canadian jurisprudence and only one about international statements of principles.[37]

Furthermore, the Court's approach to using foreign law in section 7 cases has been inconsistent, citing foreign law when it can find sources to support its reasoning, as in *Burns*, and ignoring foreign sources which do not, such as in *R. v. Martineau*.[38]

In *R. v. Martineau*, the majority largely ignored foreign sources when it struck down the constructive murder offence, holding that requiring subjective foresight of death in murder convictions was a principle of fundamental justice. However, as L'Heureux-Dubé J. noted in dissent, "a subjective foresight standard for the crime of murder is most novel, and finds no parallel in Great Britain, Australia, New Zealand or the United States. While each of these jurisdictions imposes different requirements for the crime of murder, none has adopted the requirement of subjective foresight of death."[39] The *Martineau* majority did not respond to her argument.

The Court has also been inconsistent in its use of international treaties to interpret the Charter. As Benjamin Oliphant noted in a 2014 paper, "the Court has so far used international human rights law inconsistently and imprecisely in the process of

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[31] *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, 2003 SCC 74 (S.C.C.).

[32] *R. v. Malmo-Levine; R. v. Caine*, [2003] S.C.J. No. 79, 2003 SCC 74 at para. 113 (S.C.C.).

[33] *R. v. B. (D)*, [2008] S.C.J. No. 25, 2008 SCC 25 (S.C.C.).

[34] *R. v. B. (D.)*, [2008] S.C.J. No. 25, 2008 SCC 25 at paras. 48-67 (S.C.C.).

[35] *R. v. B. (D.)*, [2008] S.C.J. No. 25, 2008 SCC 25 at paras. 60, 67 (S.C.C.).

[36] *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] S.C.J. No. 7, 2015 SCC 7 (S.C.C.).

[37] *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] S.C.J. No. 7, 2015 SCC 7 at paras. 95-101 (S.C.C.).

[38] *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

[39] *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 at para. 61 (S.C.C.).

Charter interpretation".[40] In his paper, Oliphant cited two cases that illustrate the Court's willingness to cite international treaties in some cases and not in others, without any apparent consistency.

First, in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*,[41] the majority had no qualms about citing multiple international treaties[42] to support its conclusion that section 2(d) contained a right to collective bargaining.[43] In *R. v. Advance Cutting & Coring Ltd.*,[44] however, the plurality opinion did not find international law to be relevant for the purposes of interpreting section 2(d), when it upheld a Quebec law that forced construction employees to join a union.[45] As Oliphant noted, the Court's ruling "appears to run contrary to ILO interpretations of the relevant international law, which provide that people should be free to not join a union, and to join a union of their choosing".[46] Indeed, the relevant international sources were noted by the *Advance Cutting* dissent, which cited multiple international human rights treaties in support of its argument. The dissent also noted that the international instruments it cited had been used by the Court to interpret the Charter in previous cases.[47]

However, the plurality opinion dismissed the relevance of foreign law by

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[40] Benjamin J. Oliphant, "Interpreting the Charter with International Law: Pitfalls and Principles" (2014) 19 Appeal 105 at 105, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2380161.

[41] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27 (S.C.C.) [hereinafter "*Health Services*"].

[42] *Health Services* at paras. 69-79.

[43] *Health Services* at para. 87.

[44] *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.J. No. 68, 2001 SCC 70 (S.C.C.).

[45] In *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.J. No. 68, 2001 SCC 70 (S.C.C.), the Court considered the constitutionality of a Quebec law that effectively required certain construction workers to join a union in order to obtain competency certificates that would allow them to carry on their trade. A majority of the Court, comprised of five justices, held that the law was constitutional. Four justices would have held the law to be unconstitutional. However, the five justices who voted to uphold the law could not agree on a single opinion. The plurality opinion, authored by LeBel J. and joined by Gonthier and Arbour JJ., held that the law did not violate s. 2(d) of the Charter, but that even if it did violate s. 2(d) of the Charter, the law would be saved by s. 1 of the Charter. In a concurring opinion, L'Heureux-Dubé J. agreed that the law was constitutional, but disagreed with the plurality on whether s. 2(d) contained a negative right to be free from compelled association. In another concurring opinion, Iacobucci J. would have found an infringement of s. 2(d) that could be saved under s. 1 of the Charter.

[46] Benjamin J. Oliphant, "Interpreting the Charter with International Law: Pitfalls and Principles" (2014) 19 Appeal 105 at 112, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2380161 [emphasis and citations omitted].

[47] *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.J. No. 68, 2001 SCC 70 at paras. 11-15 (S.C.C.).

emphasizing the distinct, Canadian nature of the Charter, writing that:

> The labour laws of a country evidence a social and political compromise about the place of unions in that society and the proper balance between unions and employers. Thus, interesting as it may be, the consideration of European jurisprudence is not determinative, although it confirms an interpretation whereby a limited right to refuse to associate should be read into s. 2(*d*) of the *Charter*.[48]

As highlighted by these cases, the Court's pre-*Québec inc.* jurisprudence was often inconsistent on the relevance of foreign law in Charter interpretation. In some instances, the Court was eager to cite foreign law. In other instances, the Court dismissed the relevance of foreign law, appealing to the "Canadian" character of the Charter, an argument which it selectively chose to deploy in some cases and not in others without much, if any, explanation. In so doing, the conclusion from the Court's pre-*Québec inc.* jurisprudence is that foreign law carries little relevance for interpreting provisions like sections 2(d) and 3, but is relevant for interpreting section 7, even though all three provisions belong to the same Charter.

2. *Québec inc.*

While *Québec inc.* recognized a limited role for foreign law in interpreting the Charter,[49] the majority opinion did not provide specific guidance for when courts should consider foreign law. Instead, it only provided vague statements that have not resolved the inconsistency on the question of when foreign law should be used to interpret the Charter.

Although the Court recognized that it "has not always explained how or why different international sources are being discussed or relied on, while others are not", creating "a want of clarity, even confusion",[50] it did not say much to address this issue. Despite offering several points on the primacy of purposive interpretation over foreign law sources and the importance of distinguishing between different types of foreign law sources, *Québec inc.* did not address the specific question of when foreign law should be used to interpret the Charter, nor the inconsistent use of foreign law in the Court's precedents.

In light of *Québec inc.*'s lack of guidance on this issue, the Court's subsequent jurisprudence continues to suffer from inconsistency when it comes to citing foreign law. As the following paragraphs illustrate, the Court has continued to cite foreign law in cases where it finds sources that agree with its own reasoning, while ignoring foreign law sources that undermine the Court's reasoning, often without any consistent explanation for doing so.

3. After *Québec inc.*

Two cases decided in 2022 illustrate the Court's continued inconsistency on the

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[48] *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.J. No. 68, 2001 SCC 70 at para. 251 (S.C.C.).

[49] *Québec inc.* at paras. 22, 47.

[50] *Québec inc.* at para. 24.

question of whether to cite foreign law. In *R. v. Bissonnette*,[51] the Court cited a plethora of foreign sources to support its reasoning. In *R. v. Brown*,[52] however, it barely cited foreign law, despite the existence of relevant sources. Additionally, the Court provided no explanation for not citing foreign law in *Brown*.

In *Bissonnette*, the Court held that section 12 of the Charter prohibits parole ineligibility periods of longer than 50 years.[53] The Court invoked various foreign laws to support its reasoning. To illustrate what it described as "the severity of Canada's mandatory minimum sentence for first degree murder",[54] the Court listed seven European countries which have lesser sentences for convicted murderers.[55] The Court also cited several decisions of the European Court of Human Rights for the proposition that "every prisoner must have a possibility of being released".[56]

While the Court claimed that it was referring to foreign cases "only for the purposes of illustration",[57] it confirmed that it was nonetheless assigning "weight" to these cases.[58] The Court also wrote that "*support* for the conclusion that this sentence is unconstitutional can also be found in international and comparative law",[59] a clear statement that comparative law was not simply being used for illustrative purposes, but instead as support for the Court's own reasoning.

In addition to comparative law, the *Bissonnette* opinion cited the *Charter of the United Nations*[60] and the ICCPR[61] for the proposition that "in international law, the concept of dignity finds expression through the commitment to reintegrating offenders into society by offering them a possibility of being released".[62]

In *Brown* however, where the Court ruled that Parliament's law abolishing the extreme intoxication defence violated the principles of fundamental justice, it barely cited foreign law, despite the existence of relevant sources. While the Court cited several decisions of the House of Lords to describe the common law position on

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[51] *R. v. Bissonnette*, [2022] S.C.J. No. 23, 2022 SCC 23 (S.C.C.) [hereinafter "*Bissonnette*"].

[52] *R. v. Brown*, [2022] S.C.J. No. 18, 2022 SCC 18 (S.C.C.).

[53] *Bissonnette* at para. 9.

[54] *Bissonnette* at para. 92.

[55] *Bissonnette* at para. 91.

[56] *Bissonnette* at para. 104.

[57] *Bissonnette* at para. 105.

[58] *Bissonnette* at para. 103.

[59] *Bissonnette* at para. 98 [emphasis added].

[60] Can. T.S. 1945 No. 7 [hereinafter "UN Charter"].

[61] *Bissonnette* at paras. 99-100.

[62] *Bissonnette* at para. 100.

intoxication and automatism,[63] it did not cite the 1996 U.S. Supreme Court decision in *Montana v. Egelhoff*,[64] which upheld a Montana law restricting the consideration of voluntary intoxication for the purposes of determining whether a defendant had the requisite *mens rea*. In the *Egelhoff* plurality opinion, Scalia J. wrote that a defendant's right to have a jury consider evidence of voluntary intoxication was not a "fundamental principle of justice",[65] language that is strikingly similar to section 7's "principles of fundamental justice".

Despite the similarities in text between section 7 of the Charter and the Fourteenth Amendment's Due Process Clause, as well as between the legal issue in both cases, the Court did not even mention *Egelhoff* in *Brown*. The decision not to cite *Egelhoff* is difficult to understand, particularly in light of cases like *Burns* which emphasize the relevance of foreign law in interpreting section 7. By ignoring relevant foreign law like *Egelhoff*, the Court's decision in *Brown* continues the Court's inconsistent practice of citing foreign law in some Charter cases and not in others, without providing any explanation for doing so.

Québec inc. also muddied the waters on the issue of whether to cite foreign law in Charter cases. The majority opinion quoted *Frank*, holding that "[p]articular caution should, however, be exercised when referring to what other countries have done domestically, as the measures in effect in other countries say little (if anything at all) about the scope of the rights enshrined in the Canadian *Charter*".[66]

By endorsing *Frank*'s "Canadian Charter" argument without addressing its prior repeated endorsements of the relevance of foreign law to interpreting multiple provisions of the Charter, *Québec inc.* furthered the longstanding tension between the Court's reasoning in cases like *Burns* and *Health Services*, which support the use of foreign law to interpret the Charter, and its reasoning in cases like *Frank* and *Advance Cutting*, which emphasize the unique Canadian nature of the Charter.

Additionally, *Québec inc.* was silent on whether courts should address foreign sources that are raised directly by parties. As Ravi Amarnath and Courtney Harris noted:

> [I]n *Ktunaxa Nation*, the Supreme Court did not explain why it did not consider the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") even though multiple interveners raised UNDRIP. Post *9147-0732 Québec inc.*, there is nothing in the Court's reasons which would require a court to explain how it

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[63] *R. v. Brown*, [2022] S.C.J. No. 18, 2022 SCC 18 at paras. 43, 47 (S.C.C.).

[64] *Montana v. Egelhoff*, 1996 U.S. LEXIS 3878, 518 U.S. 37 (1996).

[65] In *Montana v. Egelhoff*, 1996 U.S. LEXIS 3878, 518 U.S. 37 (1996), a majority of the U.S. Supreme Court held that a law that forbade juries from considering a defendant's voluntary extreme intoxication in determining *mens rea* did not violate the U.S. Constitution. The plurality opinion so concluded (518 U.S. 51) and was joined by four justices (518 U.S.), with Ginsburg J. writing a separate opinion concurring in the judgment (518 U.S. 58-59).

[66] *Québec inc.* at para. 43.

grappled with the declaration (if it did not rely upon it in its reasons).[67]

While *Québec inc.* noted that foreign law, if used, should always play a supporting role in Charter interpretation, it did not provide enough guidance on *when* courts should use foreign law. There is ultimately very little in the majority opinion to help courts understand if or when to cite foreign law in Charter cases. As a result, the inconsistent use of foreign law that pre-dated *Québec inc.* has continued and will likely continue until the Court provides further guidance.

III. WHICH FOREIGN SOURCES ARE RELEVANT?

After a court has decided that foreign law is relevant to a particular case, there is still the issue of *which* foreign sources to cite. Without a principled framework to guide judges, the use of foreign law can easily become an exercise in cherry-picking, where courts simply select sources that they agree with and ignore those that they disagree with, without any consistent underlying principle. As Stratas J.A. wrote in a 2023 opinion, "international law is not a box of chocolates from which one can take what one wants, leaving the rest in the box. Instead, international law is a specialized field calling for discipline, intellectual rigour and careful judgment when applying it to domestic issues".[68]

Québec inc. acknowledged that the Court had often cited foreign sources without any discussion of why such sources were selected. To remedy this, the majority opinion held that any use of foreign law must be "accompanied by an explanation of why a non-binding source is being considered and how it is being used, including the persuasive weight being assigned to it"[69] and that "the normative value and weight of international and comparative sources has been tailored to reflect the nature of the source and its relationship to our Constitution".[70] While this was helpful guidance, the Court has not followed this guidance in subsequent cases.

1. Before *Québec inc.*

As the Court acknowledged in *Québec inc.*, "it has not always explained how or why different international sources are being discussed or relied on, while others are not. The result has been a want of clarity, even confusion."[71] The following paragraphs illustrate the Court's long inconsistency on the question of which foreign sources to cite in Charter cases.

One reason the Court has repeatedly cited for not adopting foreign jurisprudence

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[67] Ravi Amarnath & Courtney Harris, "Rigour Required: Recent Direction from the Supreme Court of Canada on Binding and Non-Binding Sources of International Law in Charter Interpretation" (2022) 104 S.C.L.R. (2d) 123 at 136 [emphasis and citations omitted].

[68] *Canada v. Boloh 1(a)*, [2023] F.C.J. No. 713, 2023 FCA 120 at para. 50 (F.C.A.).

[69] *Québec inc.* at para. 47.

[70] *Québec inc.* at para. 46.

[71] *Québec inc.* at para. 24.

is that textual differences exist between the Charter and foreign constitutions. For example, the Court has stated its reluctance to adopt American jurisprudence on religion, freedom of association or justifying rights infringements, because the Charter does not contain an Establishment Clause[72] and because the U.S. Constitution has neither an equivalent of section 2(d) of the Charter[73] nor anything like section 1 of the Charter.[74]

Even where both the Charter and a foreign constitution contain similar provisions, there can still be important textual differences between provisions. For example, a three-judge plurality in *R. v. Pearson*[75] noted that while the Charter and the U.S. Constitution both mention bail, section 11(e) of the Charter states that individuals charged with offences are presumptively to be granted reasonable bail, whereas the Excessive Bail clause of the U.S. Constitution only states that excessive bail should not be required.[76]

Similarly, two justices in *R. v. Rahey*[77] rejected the U.S. Supreme Court's speedy trial jurisprudence, noting that "[the American] approach appears to be predicated upon the *particular wording and structural features* of the American Constitution, which differ considerably from the *Charter*".[78]

Aside from textual differences, the Court has provided other reasons not to import American jurisprudence, such as broad differences in jurisprudence between the two countries on specific issues. In *R. v. Sinclair*,[79] the majority rejected the U.S.

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[72] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 at paras. 104-105 (S.C.C.).

[73] *Lavigne v. Ontario Public Service Employees Union*, [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211 at paras. 82-83, 245 (S.C.C.).

[74] *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 at para. 17 (S.C.C.).

[75] *R. v. Pearson*, [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665 (S.C.C.). Seven justices participated in the *Pearson* decision. Five justices allowed the appeal and restored the trial judge's dismissal of the respondent's application for *habeas corpus*. The plurality opinion, authored by Lamer C.J.C. and joined by Sopinka and Iacobucci JJ., and the concurring opinion, authored by Gonthier J. and joined by L'Heureux-Dubé J., were largely in agreement. However, the concurring opinion disagreed with the plurality opinion's finding that s. 515(10)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 was unconstitutional, an issue over which Lamer C.J.C. and Gonthier J. disagreed in *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.).

[76] *R. v. Pearson*, [1992] S.C.J. No. 99, [1992] 3 S.C.R. 665 at para. 47 (S.C.C.).

[77] *R. v. Rahey*, [1987] S.C.J. No. 23, [1987] 1 S.C.R. 588 (S.C.C.).

[78] *R. v. Rahey*, [1987] S.C.J. No. 23, [1987] 1 S.C.R. 588 at para. 28 (S.C.C.) [emphasis added] (Dickson C.J.C., joined by Lamer J., as he then was). Eight justices participated in the *Rahey* decision. Four concurring opinions were written, each garnering the support of two justices.

[79] *R. v. Sinclair*, [2010] S.C.J. No. 35, 2010 SCC 35 (S.C.C.).

Supreme Court's holding from *Miranda v. Arizona*, stating that "significant differences exist between the Canadian and American regimes" that apply to individuals who have been detained.[80]

Likewise, the Court in *Hill v. Church of Scientology*[81] did not adopt the "actual malice" defamation standard from *New York Times v. Sullivan*,[82] writing that "[n]one of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar".[83]

However, the foregoing reasons do not easily apply when it comes to comparing section 8 of the Charter and the Fourth Amendment. First, the texts of these two provisions are very similar. Section 8 of the Charter states that "[e]veryone has the right to be secure against unreasonable search or seizure", while the Fourth Amendment of the U.S. Constitution states that "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated".

Second, there are no major structural differences between the Fourth Amendment and section 8 that would affect this analysis. For an example of a structural difference between the Charter and the American Constitution, the majority noted that while *Sinclair* was a section 10(b) case, sections 9 and 24(2) considerations were also relevant, and thus differences between American and Canadian detention and exclusion of evidence jurisprudence weighed against importing the *Miranda* rule into Canadian law.[84] None of these structural differences are present when one compares the Fourth Amendment and section 8 of the Charter. Over the last several decades, the Court has been inconsistent on whether Fourth Amendment jurisprudence law is relevant to interpreting section 8 of the Charter, adopting American jurisprudence in some cases,[85] while not adopting American jurisprudence in other cases[86] — or even demonstrating a mixed approach in a single case.[87]

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[80] *R. v. Sinclair*, [2010] S.C.J. No. 35, 2010 SCC 35 at para. 39 (S.C.C.).

[81] *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 (S.C.C.).

[82] *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 at paras. 122, 139-140 (S.C.C.).

[83] *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 at para. 139 (S.C.C.).

[84] *R. v. Sinclair*, [2010] S.C.J. No. 35, 2010 SCC 35 at para. 39 (S.C.C.).

[85] See *R. v. Plant*, [1993] S.C.J. No. 97, [1993] 3 S.C.R. 281 at para. 20 (S.C.C.), adopting *United States v. Miller*, 1976 U.S. LEXIS 148, 425 U.S. 435 (1976); *R. v. Wise*, [1992] S.C.J. No. 16, [1992] 1 S.C.R. 527 at paras. 13-14 (S.C.C.), partially adopting the "markedly lesser expectation of privacy by the users of motor vehicles" from *United States v. Knotts*, 1983 U.S. LEXIS 135, 460 U.S. 276 (1983).

[86] See *R. v. Tessling*, [2004] S.C.J. No. 63, [2004] 3 S.C.R. 432 at para. 45 (S.C.C.), declining to adopt the holding from *Kyllo v. United States*, 2001 U.S. LEXIS 4487, 533 U.S. 27 (2001); *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 at paras. 84-85 (S.C.C.),

While the Court cautioned in its very first section 8 case that "the terms of the Fourth Amendment are not identical to those of s. 8 and American decisions can be transplanted to the Canadian context only with the greatest caution",[88] it has not written much on what this caution entails. For example, in the cases referred to in the preceding paragraph that did adopt American jurisprudence, the majority opinion did not mention any supposed caution that would weigh against importing Fourth Amendment jurisprudence.

As those competing cases illustrate, the Court has adopted Fourth Amendment analysis into section 8 jurisprudence in some cases, while not doing so in others. In all of these cases, it has never laid down *consistent* guidelines for when Fourth Amendment jurisprudence should be adopted, and when such jurisprudence should not be adopted.

The issue with selective citation of foreign sources also applies to the Court's use of international treaties. In several seminal section 2(d) cases, the Court cited a number of international law sources to support its broad reading of section 2(d), while ignoring other sources which undercut its reasoning.

In *Health Services*, where the Court held that section 2(d) includes a right to collective bargaining, the majority wrote that "Canada's international obligations can assist courts charged with interpreting the Charter's guarantees. Applying this interpretive tool here supports recognizing a process of collective bargaining as part of the Charter's guarantee of freedom of association."[89]

The *Health Services* majority cited ILO *Convention No. 87*[90] to support its reasoning, claiming that "*Convention No. 87* has also been understood to protect collective bargaining as part of freedom of association"[91] and citing a 2000 report that claimed that "the right to collective bargaining is a fundamental right endorsed by the members of the ILO in joining the Organization".[92]

However, as Rothstein J. pointed out four years later in his concurrence in

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declining to adopt the holding from *Schmerber v. California*, 1966 U.S. LEXIS 1129, 384 U.S. 757 (1966).

[87] In *R. v. Silveira*, [1995] S.C.J. No. 38, [1995] 2 S.C.R. 297 (S.C.C.), the dissent would have adopted a statement from *Elkins v. United States*, 1960 U.S. LEXIS 1989, 364 U.S. 206 (1960) to exclude evidence found in breach of s. 8, with the sole exception of exigent circumstances (*Silveira* at paras. 90-91). The majority did not adopt *Elkins* in this way and instead adopted a case-by-case framework for excluding evidence, expressly drawing this from other United States jurisprudence (*Silveira* at paras. 156-161).

[88] *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 at 161 (S.C.C.).

[89] *Health Services* at para. 69 [citations omitted].

[90] *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17.

[91] *Health Services* at para. 75.

[92] *Health Services* at para. 77.

Ontario v. Fraser,[93] the 2000 report was not written about *Convention No. 87*, but rather *Convention No. 98*,[94] a provision that, unlike *Convention No. 87*, Canada had not ratified.[95] Furthermore, Rothstein J. included a quote from the 2000 report that the *Health Services* majority omitted, which specifically stated that "collective bargaining" in *Convention No. 98* had significant differences with the "collective bargaining" constitutionalized by the decision in *Health Services*.[96] The *Ontario v. Fraser* majority did not address Rothstein J.'s points directly, but merely stated that *Health Services* endorsed the "general principle" endorsed by the ILO in 1994.[97]

Four years after *Ontario v. Fraser*, the same issues with cherry-picking international law sources would arise again in *Saskatchewan Federation of Labour v. Saskatchewan*.[98] In that decision, the majority claimed that "Canada's international obligations clearly argue for the recognition of a right to strike within s. 2(*d*)",[99] citing the ICCPR, the *Charter of the Organization of American States*,[100] ILO *Convention No. 87* and the *International Covenant on Economic, Social and Cultural Rights*.[101]

In dissent, Rothstein J. and Wagner J. (as he then was) provided direct sources undermining the majority's claim that international law supported its decision to constitutionalize a right to strike. In several paragraphs, the dissenting opinion either quoted the treaties directly or provided relevant commentary on *Convention No. 87*, the ICESCR and the ICCPR that undercut the majority's reasoning.[102] As the dissent argued, "where this Court opts to rely on non-binding interpretations of international

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[93] *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, [2011] 2 S.C.R. 3 at 117 (S.C.C.).

[94] *Convention (No. 98) concerning the application of the principles of the right to organise and to bargain collectively*, 96 U.N.T.S. 257.

[95] *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, [2011] 2 S.C.R. 3 at para. 248 (S.C.C.).

[96] *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, [2011] 2 S.C.R. 3 at para. 249 (S.C.C.).

[97] *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, [2011] 2 S.C.R. 3 at para. 95 (S.C.C.).

[98] *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, 2015 SCC 4 (S.C.C.).

[99] *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, 2015 SCC 4 at para. 65 (S.C.C.).

[100] Can. T.S. 1990 No. 23.

[101] *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, 2015 SCC 4 at paras. 65-70 (S.C.C.); *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 [hereinafter ICESCR"].

[102] *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, 2015 SCC 4 at paras. 152-155 (S.C.C.).

conventions, it should not cherry pick interpretations to support its conclusions".[103] The dissent's arguments went largely unaddressed by the majority.

2. *Québec inc.*

While *Québec inc.* recognized that the Court must be more consistent in how it chooses foreign sources in Charter cases, it did not address the inconsistencies in its section 8 and section 2(d) jurisprudence. Its section 8 jurisprudence is inconsistent because the Court has decided that some cases decided by the U.S. Supreme Court interpreting the Fourth Amendment are persuasive, while other cases decided by the same foreign court interpreting the same foreign provision are not, without providing any consistent rationale for doing so. Unfortunately, *Québec inc.* had nothing to say about when foreign cases interpreting the same foreign provision should be persuasive and when they should not be.

Similarly, the Court has been inconsistent in its section 2(d) cases by selectively citing interpretations of foreign treaties that it agrees with, while ignoring other interpretations from well-respected commentators, without explaining its reasons for preferring the former over the latter. By doing so, the Court's cases lack any consistent overarching principles that can explain why some commentators are cited, and others are not.

3. After *Québec inc.*

Québec inc. stated that "courts drawing from a non-binding instrument should be careful to explain *why* they are drawing on a particular source and *how* it is being used".[104] While this is helpful, the Court has not followed its own guidance. In *Bissonnette*, decided just two years after *Québec inc.*, the Court cited the laws of more than 10 countries without providing any real explanation of why it selected those specific countries, nor what weight was being assigned to each source. The most that the Court offered was that some of the countries that it cited respected the "rule of law",[105] a statement that says nothing about the relationship between these sources and the Constitution.

Instead of providing reasons for its selection of foreign law, a number of sources chosen by the Court in *Bissonnette* seem highly cherry-picked. For example, consider the Court's mention of Portugal and Norway as examples of "countries where life imprisonment quite simply does not exist".[106] The Court cited Portugal and Norway to highlight what it described as "the severity of Canada's mandatory minimum sentence for first degree murder".[107] However, the Court provided no

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[103] *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, 2015 SCC 4 at para. 151 (S.C.C.).

[104] *Québec inc.* at para. 38 [emphasis in original].

[105] *Bissonnette* at paras. 91, 107.

[106] *Bissonnette* at para. 91.

[107] *Bissonnette* at para. 92.

reason why the laws of these two countries were relevant to the case.

First, the Court's statement that Portugal and Norway are "countries similar to Canada" is a vague sentence that does very little to explain why the laws of these countries are relevant to interpreting the Charter. Second, there are other countries that share similarities with Portugal and Norway, such as neighbouring Spain and Sweden, respectively. Like Portugal and Norway, Spain and Sweden are democratic European countries that respect the rule of law. Third, there is also no indication that Portugal's or Norway's laws are any more relevant to interpreting Canada's Constitution than the laws of Spain or Sweden. However, one major difference between the latter and the former is that Spain[108] and Sweden[109] both have life sentences, while Portugal and Norway do not.

Had the Court cited Spain and Sweden, Canada's mandatory minimum life sentence for murder would not have looked as severe. By ignoring two countries whose laws undermine the Court's reasoning and instead highlighting two neighbouring countries whose laws support the Court's reasoning, without providing any reasons for doing so, the Court's selection of comparative law appears highly cherry-picked.

In fairness to the Court, they mentioned several European countries that have life sentences, including France, Switzerland, Germany, Denmark and Finland.[110] However, even in light of this fact, the Court's opinion never explained why the laws of these countries, or any foreign country, should matter for the purposes of deciding whether consecutive parole ineligibility periods would violate section 12 of the Charter.

Furthermore, the Court in *Bissonnette* ignored the importance of assigning normative weight on the basis of a source's relevance to the Charter. In *Québec inc.*, itself a section 12 case, the Court ruled that "the Eighth Amendment is highly relevant" to understanding the protections outlined in section 12.[111] However, in *Bissonnette*, another section 12 case, the Court was much less excited about the

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[108] Patricia Ortega Dolz, "2021, a year of high-profile crimes and convictions in Spain", *El País* (January 6, 2022), online: https://english.elpais.com/spain/2022-01-06/2021-a-year-of-high-profile-crimes-and-convictions-in-spain.html; "Ana Julia Quezada sentenced to life in jail for Gabriel Cruz murder", online: https://english.elpais.com/elpais/2019/09/30/inenglish/1569838397_687916.html; "Spanish court gives Serbian man life sentence for 3 murders", online: https://apnews.com/article/europe-baeae7ec1586411782fb9c1e48f54439; " 'El Chicle,' killer of Madrid teenager Diana Quer, given life sentence", online: https://english.elpais.com/elpais/2019/12/17/inenglish/1576588136_492817.html.

[109] *The Swedish Criminal Code* (brottsbalken, SFS 1962:700), ch. 3, s. 1 (Sweden), online: https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/.

[110] *Bissonnette* at para. 91.

[111] *Québec inc.* at para. 41.

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persuasiveness of Eighth Amendment jurisprudence, writing that the United States "has a narrower interpretation of the concept of cruel and unusual punishment".[112] The Court also made no reference to the Eighth Amendment being relevant for interpreting section 12.

The incoherence surrounding the Eighth Amendment's relevance is not limited to *Bissonnette*. Despite holding in *Québec inc.* that the Eighth Amendment was "highly relevant" to interpreting section 12, the Court has repeatedly ignored Eighth Amendment jurisprudence in deciding challenges to mandatory minimum sentencing laws under section 12.

In 2020, the Alberta Court of Appeal upheld a four-year mandatory minimum sentence for the offence of discharging a firearm into or at a home.[113] In his concurring opinion, Wakeling J.A. correctly noted that "[t]he United States Supreme Court bases its decisions on real-world scenarios — not hypotheticals so unlikely to occur that no one should make important decisions in reliance on them".[114]

However, the Supreme Court reversed the Alberta Court of Appeal's judgment, holding that the four-year mandatory minimum sentence violated section 12 of the Charter. Writing for the majority in *R. v. Hills*, Martin J. criticized Wakeling J.A.'s reasons multiple times.[115] Despite claiming that "Justices O'Ferrall and Wakeling's desire to excise the use of reasonably foreseeable scenarios from this Court's s. 12 framework is thus completely contrary to both precedent and principle",[116] Martin J. did not address Wakeling J.A's argument that the use of reasonable hypotheticals does not exist in Eighth Amendment jurisprudence.

In fact, Martin J.'s majority opinion, which spanned 175 paragraphs, did not mention American jurisprudence at all. In two additional mandatory minimum cases decided under section 12 by the Court in the same year, the majority opinions also ignored American law.[117]

Therefore, the Court has taken three different positions on applying Eighth Amendment jurisprudence in recent section 12 cases. First, *Québec inc.* declared that the Eighth Amendment is highly relevant to interpreting section 12. Second, *Bissonnette* did not treat Eighth Amendment jurisprudence as highly relevant to section 12. Third and finally, the Court's mandatory minimum cases simply ignore Eighth Amendment cases altogether. The result of these varied approaches is a lack

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[112] *Bissonnette* at para. 107.

[113] *R. v. Hills*, [2020] A.J. No. 740, 2020 ABCA 263 (Alta. C.A.).

[114] *R. v. Hills*, [2020] A.J. No. 740, 2020 ABCA 263 at para. 140 (Alta. C.A.).

[115] *R. v. Hills*, [2023] S.C.J. No. 2, 2023 SCC 2 at paras. 31, 43, 49, 67, 75, 98-100 (S.C.C.).

[116] *R. v. Hills*, [2023] S.C.J. No. 2, 2023 SCC 2 at para. 75 (S.C.C.).

[117] *R. v. Hilbach*, [2023] S.C.J. No. 3, 2023 SCC 3 (S.C.C.); *R. v. Bertrand Marchand*, [2023] S.C.J. No. 26, 2023 SCC 26 (S.C.C.).

of clarity and incoherence as to the Court's position on how American law should influence the interpretation of section 12 of the Charter.

Like its section 12 jurisprudence, the Court's inconsistent treatment of Fourth Amendment jurisprudence in section 8 cases has continued after *Québec inc*. Two 2022 cases, decided several days apart from each other, illustrate this continued inconsistency. In *R. v. Tim*,[118] the Court did not adopt the holding from *Heien v. North Carolina*,[119] a Fourth Amendment case. Writing for the majority, Jamal J. asserted that there was no need to import American jurisprudence in light of "Canadian precedents on point"[120] and the Charter's more flexible and contextual approach to the admissibility of evidence than the United States Constitution.[121]

However, just a week before *Tim* was decided, the Court found Fourth Amendment jurisprudence to be persuasive in *R. v. Stairs*,[122] a section 8 case, even though the same factors that *Tim* had said weighed against importing American jurisprudence were also present in *Stairs*.

In *Stairs*, the Court adopted a new rule governing warrantless searches in homes and referenced Fourth Amendment jurisprudence, noting that "a similar approach has been adopted in the United States, where the jurisprudence distinguishes between areas inside and outside the arrested person's physical control".[123] The majority wrote that "these cases, while obviously not binding, provide helpful persuasive authority illustrating the need to establish different standards for searches of areas inside and outside the arrested person's physical control".[124]

It is difficult to understand why Fourth Amendment jurisprudence was unpersuasive in *Tim*, but persuasive in *Stairs*. Indeed, the reasoning in *Stairs* undercut its decision not to adopt foreign law in *Tim*.

First, while *Tim* noted that there were relevant Canadian precedents on point, this is not as strong a point as might initially seem. At issue in *Tim* was whether a warrantless arrest and search based on a mistake of law violated sections 8 and 9 of the Charter.[125] Until *Tim*, the Court had not addressed this question. The "Canadian precedents on point" were civil liability or non-Charter criminal law cases.[126] This kind of reasoning — analogizing from similar cases — is present in almost every case decided by the Court. If such cases constitute "relevant Canadian precedents",

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[118] [2022] S.C.J. No. 12, 2022 SCC 12 (S.C.C.).

[119] 2014 U.S. LEXIS 8306, 574 U.S. 54 (2014).

[120] *R. v. Tim*, [2022] S.C.J. No. 12, 2022 SCC 12 at para. 32 (S.C.C.).

[121] *R. v. Tim*, [2022] S.C.J. No. 12, 2022 SCC 12 at para. 35 (S.C.C.).

[122] [2022] S.C.J. No. 11, 2022 SCC 11 (S.C.C.).

[123] *R. v. Stairs*, [2022] S.C.J. No. 11, 2022 SCC 11 at para. 62 (S.C.C.).

[124] *R. v. Stairs*, [2022] S.C.J. No. 11, 2022 SCC 11 at para. 64 (S.C.C.).

[125] *R. v. Tim*, [2022] S.C.J. No. 12, 2022 SCC 12 at para. 1 (S.C.C.).

[126] *R. v. Tim*, [2022] S.C.J. No. 12, 2022 SCC 12 at para. 29 (S.C.C.).

the Court should rarely, if ever, cite foreign law in Charter cases.

Second, while *Tim* held that the U.S. Constitution's absence of an equivalent provision to section 24(2) of the Charter is one factor that weighs against importing Fourth Amendment jurisprudence, the opinion in *Stairs* did not address this factor at all.

Third, the Court has not applied its reasoning consistently. Indeed, there were relevant Canadian precedents in *Stairs* that the Court could and did rely on. As the Court acknowledged, the common law standard for searches incident to arrest had been addressed by the Court on a number of occasions.[127] Yet, it still chose to cite and adopt foreign law.

As well, citing and adopting Fourth Amendment cases where there are "relevant" Canadian precedents long predates *Tim* and *Stairs*. In *R. v. Chehil*,[128] a section 8 police dog-sniffer case, the Court had several of its own precedents that were highly relevant to the case, including recent section 8 cases involving sniffer dogs.[129] Despite these relevant Canadian precedents, the Court in *Chehil* chose to cite three Fourth Amendment cases for the proposition that "American jurisprudence supports the need for a sufficiently particularized constellation of factors".[130]

Fifteen years before *Chehil*, the Court in *R. v. M. (M.R.)*[131] also cited American law to support its decision regarding searches in schools. Despite acknowledging that it had relevant decisions on hand, the majority held that "the test set out in [*New Jersey v.*] *T.L.O.* can be applied in the elementary and secondary school setting in Canada. Significantly the same result reached in *T.L.O.* can be obtained by applying principles to be derived from decisions of this Court".[132] In light of cases like *Stairs*, *Chehil* and *M. (M.R.)*, *Tim*'s holding that having relevant Canadian cases weighs against adopting Fourth Amendment jurisprudence is inconsistent with its own decisions, both before and after *Québec inc*.

While *Québec inc.* recognized that the Court must explain why it is using and relying on foreign sources in Charter cases, it has not done so in several important post-*Québec inc.* cases. Instead, it has continued to cite foreign sources without providing specific reasons for doing so. As well, even when it provides reasons for either adopting or not adopting foreign sources to interpret the Charter, its reasons

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[127] *R. v. Stairs*, [2022] S.C.J. No. 11, 2022 SCC 11 at para. 6 (S.C.C.).

[128] [2013] S.C.J. No. 49, [2013] 3 S.C.R. 220 (S.C.C.).

[129] See *R. v. Chehil*, [2013] S.C.J. No. 49, [2013] 3 S.C.R. 220 at para. 1 (S.C.C.), citing *R. v. Kang-Brown*, [2008] S.C.J. No. 18, [2008] 1 S.C.R. 456 (S.C.C.); *R. v. M. (A.)*, [2008] S.C.J. No. 19, [2008] 1 S.C.R. 569 (S.C.C.).

[130] *R. v. Chehil*, [2013] S.C.J. No. 49, [2013] 3 S.C.R. 220 at para. 30 (S.C.C.).

[131] [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393 (S.C.C.).

[132] *R. v. M. (M.R.)*, [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393 at para. 42 (S.C.C.); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), aff'g 94 N.J. 331 (1983).

are often inconsistent with its reasons in other Charter cases.

IV. MISREPRESENTING FOREIGN LAW

A third issue with the Court's use of foreign law in Charter cases is misrepresenting comparative and international sources. For the purposes of this essay, misrepresenting foreign law refers to instances when the Court cites a foreign source for a proposition that the cited source does not actually stand for.

1. Before *Québec inc.*

It would not be inaccurate to describe the Court as having misrepresented foreign law in several major section 2(d) cases. As mentioned in the previous section of this essay, the majority opinion in *Health Services* claimed that ILO *Convention No. 87* stood for a principle it did not, citing a report from 2000 that was not even written about *Convention No. 87*.[133] Additionally, while relying on the 2000 report as support for constitutionalizing collective bargaining under section 2(d), the majority omitted elements from the report that clearly differentiated the ILO's definition of collective bargaining from that of the *Health Services* majority.

While the section 2(d) cases are problematic, the Court's section 15(1) jurisprudence has been much more egregious in repeatedly misrepresenting foreign law. In multiple cases, it has cited the 1971 U.S. Supreme Court case of *Griggs v. Duke Power Co.*[134] for propositions for which *Griggs* does not stand.

In *Griggs*, the U.S. Supreme Court ruled that a North Carolina power company violated Title VII of the *Civil Rights Act of 1964* by introducing intelligence and aptitude tests into their hiring process. These requirements had the effect of disqualifying black applicants at a substantially higher rate than white applicants. While the U.S. Supreme Court ruled that instituting these tests resulted in an impermissible disparate impact on black test-takers, it did not rule that aptitude tests or disparate impact were illegal.

Instead, *Griggs* held that "[n]othing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance."[135]

However, the Supreme Court of Canada has taken *Griggs* to stand for much more than its actual holding. In the 2015 case of *Kahkewistahaw First Nation v. Taypotat*,[136] the Court ruled the following:

> There is no question that education requirements for employment could, in certain

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[133] *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, [2011] 2 S.C.R. 3 at para. 248 (S.C.C.).

[134] *Griggs v. Duke Power Co.*, 1971 U.S. LEXIS 134, 401 U.S. 424 (1971).

[135] *Griggs v. Duke Power Co.*, 1971 U.S. LEXIS 134, 401 U.S. 424 at 436 (1971).

[136] [2015] S.C.J. No. 30, [2015] 2 S.C.R. 548 (S.C.C.).

> circumstances, be shown to have a discriminatory impact in violation of s. 15. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), for example, the United States Supreme Court concluded that it was a violation of Title VII of the *Civil Rights Act of 1964* for an employer to require that employees have a high school diploma to work as, among other things, a coal handler or in maintenance at a power plant.[137]

Although the Court correctly described the holding in *Griggs*, it transposed this holding to the Canadian constitutional context without providing any reason for doing so. In *Taypotat*, the Court cited *Griggs* to support its claim that "education requirements for employment could, in certain circumstances, be shown to have a discriminatory impact in violation of section 15".[138] However, as an American case, *Griggs* never even mentioned section 15 of the Charter, and was decided 11 years before the Charter came into force.

Furthermore, *Griggs* was not even a constitutional case. Just five years after *Griggs*, the U.S. Supreme Court ruled in *Washington v. Davis*[139] the following:

> We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today . . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.[140]

The statement that *Griggs* is not a constitutional case is not controversial. According to Reva Siegel, one of the most-cited constitutional law scholars in the United States,[141] "we know that, as a matter of black letter law, the Constitution allows state action with racially disparate impact, so long as it is not motivated by a discriminatory purpose . . . The Court's 1971 decision in *Griggs v. Duke Power Co* . . . was a statutory decision interpreting Title VII of the 1964 Civil Rights Act — not a constitutional decision".[142] Therefore, it is unclear why a pre-Charter American statutory interpretation case should be used to interpret section 15(1) of

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[137] *Kahkewistahaw First Nation v. Taypotat*, [2015] S.C.J. No. 30, [2015] 2 S.C.R. 548 at para. 23 (S.C.C.).

[138] *Kahkewistahaw First Nation v. Taypotat*, [2015] S.C.J. No. 30, [2015] 2 S.C.R. 548 at para. 23 (S.C.C.).

[139] 1976 U.S. LEXIS 154, 426 U.S. 229 (1976).

[140] *Washington v. Davis*, 1976 U.S. LEXIS 154, 426 U.S. 229 at 239 (1976).

[141] Brian Leiter, "20 most cited Constitutional Law faculty in the U.S., 2019-2023", *Brian Leiter's Law School Reports* (August 26, 2024), online: https://leiterlawschool.typepad.com/leiter/2024/08/20-most-cited-constitutional-law-faculty-in-the-us-2019-2023.html.

[142] Reva B. Siegel, "The Constitutionalization of Disparate Impact — Court-Centered and Popular Pathways: A Comment on Owen Fiss's Brennan Lecture" (2018) 106:6 Cal. L. Rev. 2001 at 2005, online: https://www.californialawreview.org/print/the-constitutionalization-of-disparate-impactcourt-centered-and-popular-pathways-a-comment-on-owen-fisss-brennan-lecture [citation omitted].

the Charter. If there was an explanation for why *Griggs* should be used this way, the Court did not provide one in *Taypotat*.

Five years after *Taypotat*, the Court doubled down on its misrepresentation of *Griggs* in another section 15(1) case. In *Fraser v. Canada (Attorney General)*,[143] the majority invalidated an RCMP benefits scheme under section 15(1),[144] ruling that in disparate impact discrimination cases, claimants need prove neither that an impugned law was enacted with any discriminatory intent to make out a section 15(1) violation, nor that their protected characteristic caused disparate impact.[145] Writing for the majority, Abella J. cited *Griggs* multiple times in support of her reasoning.[146] However, *Griggs* never held that disparate impact constitutional claims can succeed without proving intent or causation. Instead, a closer look reveals that American constitutional law actually stands for the opposite holding of *Fraser* — that is to say, disparate impact constitutional claims cannot succeed unless claimants prove intent or causation.

The U.S. Supreme Court has long rejected *Fraser*'s central holding that indirect unconstitutional discrimination claims can succeed without proving intent. In the 1977 case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[147] the U.S. Supreme Court ruled that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is *required* to show a violation of the Equal Protection Clause".[148]

Altogether, the foregoing paragraphs provide several major reasons why the *Fraser v. Canada* opinion's reading of *Griggs* is flawed. Lest there be confusion about whether *Fraser v. Canada* merely cited *Griggs* in dicta, the Court confirmed just two years later that the *Fraser v. Canada* opinion "relied" on *Griggs*.[149]

A related issue is the Court's misrepresentation of foreign law that results when it selectively cites some elements of another country's jurisprudence. When it does so, the Court provides an incomplete and misleading picture of another country's law. As Côté J. remarked in her *Fraser v. Canada* dissent, "*Griggs* is limited in its

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[143] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 (S.C.C.).

[144] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 at para. 5 (S.C.C.)

[145] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 at paras. 69-70 (S.C.C.).

[146] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 at paras. 32-34, 38, 53, 55 and 70-71 (S.C.C.).

[147] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 1977 U.S. LEXIS 28, 429 U.S. 252 (1977).

[148] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 1977 U.S. LEXIS 28, 429 U.S. 252 at 264-265 (1977) [emphasis added].

[149] *R. v. Sharma*, [2022] S.C.J. No. 39, 2022 SCC 39 at para. 48 (S.C.C.).

scope, such that it cannot stand for the proposition that statistical disparity alone is sufficient", citing a number of American cases that held that adverse impact discrimination claimants must show causation to succeed under a number of different statutory regimes.[150]

When the *Fraser* majority decided only to cite *Griggs* and not any subsequent cases that greatly narrowed its scope, it presented a misleading description of American discrimination law. Instead, when the full jurisprudence on this issue is highlighted, it becomes clear that American jurisprudence undercuts, rather than supports, *Fraser v. Canada*'s holding.

2. *Québec inc.*

The issue of misrepresenting foreign law was not addressed at all in *Québec inc*. Without acknowledging this issue in *Québec inc.*, this issue has continued to persist in subsequent cases.

3. After *Québec inc.*

In a post-*Québec inc.* section 15(1) case, the Court again cited *Griggs* to inform its section 15(1) jurisprudence. In *R. v. Sharma*, it held that because the claimants in *Griggs* were required to show causation, "demonstrating that a law created or contributed to a disproportionate impact on a protected group is sufficient for step one [of the section 15(1) test]".[151] However, *Sharma* did not address any of the aforementioned issues, such as the problems with applying a pre-Charter American statutory interpretation case to interpreting the Charter. Furthermore, just as in *Fraser v. Canada*, the majority in *Sharma* did not address *Griggs*' limited scope in the American context, or the plethora of cases in Côté J.'s *Fraser v. Canada* dissent that directly undercut *Fraser v. Canada*'s holding.

As if the Court's repeated misrepresentations in its section 2(d) and section 15(1) cases were not problematic enough, the Court has also continued to misrepresent international treaties, as it did in *Bissonnette*. In *Bissonnette*, the Court cited two treaties — the UN Charter and the ICCPR — to emphasize "the importance of dignity as the foundation of fundamental rights and freedoms" that "underlies the recognized rights rather than as a right in itself".[152] The Court's statement that dignity is an important concept in international human rights law is not an issue. However, the Court's interpretation of the word "dignity" is problematic.

In *Bissonnette*, the Court equated the concept of dignity to a supposed right of offenders to have a realistic opportunity of parole. It held that "in the context of sentencing, in international law, the concept of dignity finds expression through the

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[150] *Fraser v. Canada (Attorney General)*, [2020] S.C.J. No. 28, 2020 SCC 28 at para. 246 (S.C.C.).

[151] *R. v. Sharma*, [2022] S.C.J. No. 39, 2022 SCC 39 at para. 48 (S.C.C.).

[152] *Bissonnette* at para. 99.

commitment to reintegrating offenders into society by offering them a possibility of being released".[153]

However, the Court's claim that the UN Charter and ICCPR provide support for its holding in *Bissonnette* — that "imprisonment for life without a realistic possibility of parole is intrinsically incompatible with human dignity"[154] — is incorrect.

First, the Court did not provide much evidence for its assertion that the word "dignity" encompasses a right to apply for parole within 50 years.[155] Dignity is an open-ended term, capable of many meanings to different people. As an American jurist once noted in discussing the word "privacy" — "'[p]rivacy' is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things".[156] The same can be said for dignity, a similarly broad, abstract and ambiguous term.

Therefore, if the Court is to interpret the word dignity *for its meaning in a particular document*, such as in the two treaties it cites, it must take great care to ensure that it does not substitute its own interpretation of such an ambiguous term for how the word is commonly understood in the treaties.

Ensuring precision in interpreting ambiguous terms is a foundational concept in international law. As Articles 31 and 32 of the *Vienna Convention of the Law of Treaties*[157] explain, the text of international treaties should be interpreted by examining the ordinary meaning of its terms, context and object and purpose of the treaty, which include examining the text and practice by state parties.[158] All of these factors contain an objective element that goes beyond an interpreting court's subjective belief. Indeed, the Supreme Court of Canada has confirmed that "interpretation of an international treaty that has been directly incorporated into Canadian law is governed by Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*".[159]

However, *Bissonnette*'s interpretation of "dignity" in the context of the UN Charter and ICCPR falls well short of the standard demanded by the *Vienna*

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[153] *Bissonnette* at para. 100.

[154] *Bissonnette* at para. 8.

[155] *Bissonnette* at para. 9.

[156] *Griswold v. Connecticut*, 1965 U.S. LEXIS 2282, 381 U.S. 479, at 509 (1965) (Black J., dissenting).

[157] Can. T.S. 1980 No. 37.

[158] *Febles v. Canada (Citizenship and Immigration)*, [2014] S.C.J. No. 68, 2014 SCC 68 at para. 12 (S.C.C.).

[159] *Febles v. Canada (Citizenship and Immigration)*, [2014] S.C.J. No. 68, 2014 SCC 68 at para. 11 (S.C.C.).

Convention. First, when considering the ordinary meaning of the word dignity, the Court did not provide a single dictionary definition of dignity to support its claim that the word encompassed a right to apply for parole.

Second, the factual context surrounding these treaties does not support the Court's conclusion. At the time the UN Charter was signed in 1945, all five permanent members of the UN Security Council had capital punishment, as did many other signatories, including Canada.[160] Similarly, Article 6 of the ICCPR specifically "permits the use of the death penalty in limited circumstances".[161] Again, the Court did not provide any evidence to suggest that "dignity" was understood at the signing of either treaty to include a right to apply for parole within a reasonable time.

Third, the Court misrepresented the ICCPR by taking its words out of context and claiming that they stand for principles that they do not. In *Bissonnette*, the Court cited article 10(1) of the ICCPR, which states that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the

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[160] The five permanent members of the U.N. Security Council in 1945, when the UN Charter was signed, were the United States, the United Kingdom, France, the Soviet Union, and the Republic of China. The United States has never abolished capital punishment. While some states have ended the practice, capital punishment has never been repealed at the federal level. While the U.S. Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) led to a pause in capital punishment across the United States, the U.S. Supreme Court ruled just four years later in *Gregg v. Georgia*, 428 U.S. 153 (1976) that "the punishment of death does not invariably violate the Constitution" (at 169). Although some states have ended capital punishment, it remains legal at the federal level and in many states. The United Kingdom ended capital punishment in 1965: "Attitudes to capital punishment in the 20th century", *BBC* (accessed February 28, 2025) online: https://www.bbc.co.uk/bitesize/guides/z8bd3k7/revision/9. France ended capital punishment in 1981: "Abolition of the death penalty", *France Diplomacy*, (accessed February 28, 2025), online: https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/abolition-of-the-death-penalty/. The Soviet Union briefly ended capital punishment in 1947 but restored the death penalty in 1954: Jack Redden, "Soviet capital punishment", *UPI Archives* (July 3, 1988), online: https://www.upi.com/Archives/1988/07/03/Soviet-capital-punishment-A-bullet-UPI-NewsFeature/9640583905600/. The Republic of China (later renamed Taiwan) has never ended capital punishment. Likewise, the People's Republic of China, which replaced the Republic of China as a permanent member of the Security Council, has not abolished capital punishment, where it remains a legal form of punishment today. Canada ended the death penalty in 1976: Helen McKenzie, "Capital Punishment in Canada", *Government of Canada Publications* (November 19, 1979), online: https://publications.gc.ca/collections/collection_2017/bdp-lop/YM32-1-79-36-eng.pdf.

[161] United Nations Human Rights Office of the High Commissioner, "Death penalty: The international framework", OHCHR, online: https://www.ohchr.org/en/topic/death-penalty/international-framework. See also *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 6 (entered into force March 23, 1976, accession by Canada May 19, 1976), which states that "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes."

human person", as alleged support for its conclusion that mass murderers must have a realistic chance of applying for parole.[162]

However, article 10(1) says nothing about the length of a convicted offender's sentence at all. Instead, article 10(1) addresses the treatment of prisoners *within* a prison, an interpretation confirmed by the United Nations Office on Drugs on Crime ("UNODC"). In its discussion on article 10(1) of the ICCPR, the UNODC focused on "conditions of detention", without mentioning sentencing a single time.[163] Notably, the Court has cited the UNODC as an authoritative commentator on international law.[164]

Similarly, in surveying the jurisprudence of the United Nations Human Rights Committee ("HRC"), the body tasked with monitoring state compliance with the ICCPR, the Association for the Prevention of Torture concluded that "from the jurisprudence of the HRC, it seems that the Committee tends to apply Article 10(1) to general conditions of detention".[165] If these sources are correct, Article 10(1) does not address concerns about the length of a penal sentence.

Perhaps most telling are the HRC's own comments about Canada and the ICCPR. As a party nation to the ICCPR, Canada is required to submit reports on its compliance with the ICCPR to the HRC. In 2015, responding to Canada's submission, the HRC made no mention of the impugned sentencing law at issue in *Bissonnette*, which was already in force at the time the report was published,[166] a strong suggestion that life without parole is not an issue to which the ICCPR speaks.[167]

In *Bissonnette*, the Court did not cite a single source, other than itself, for its claim that article 10(1) supports creating a right to apply for parole. Just as with the Court's repeated misuse of *Griggs*, its erroneous claims regarding international treaties in *Bissonnette* amount to misrepresentation of foreign law.

As the post-*Québec inc.* jurisprudence illustrates, the Court's failure in *Québec inc.* to address the issue of misrepresenting foreign law has had negative conse-

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[162] *Bissonnette* at para. 100.

[163] United Nations Office on Drugs and Crime, "International Covenant on Civil and Political Rights" (July 2018), online: https://www.unodc.org/e4j/zh/terrorism/module-9/key-issues/international-covenant-on-civil-and-political-rights.html at 9.

[164] *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47, 2013 SCC 47 at para. 40 (S.C.C.).

[165] Association for the Prevention of Torture, "Torture in International Law: A Guide to Jurisprudence" (2008), online: https://policehumanrightsresources.org/torture-in-international-law-a-guide-to-jurisprudence at 9.

[166] *Bissonnette* at para. 35.

[167] United Nations Human Rights Committee, "Concluding observations on the sixth periodic report of Canada" (August 13, 2015), online: https://docs.un.org/en/CCPR/C/CAN/CO/6.

quences. Without first acknowledging that misrepresenting foreign sources is a real issue, it is difficult to see how or why the Court will stop this practice in the future.

V. CONCLUSION

After years of incomplete and often inconsistent guidance on how foreign law should be used to interpret the Charter, the Court's decision in *Québec inc.* rightly recognized the need for coherent and consistent methodology in this regard. While the opinion provided useful guidance in some areas, more guidance is needed to resolve longstanding issues, which have continued post-*Québec inc*.

Going forward, the Court must provide further guidance on when courts should consider foreign law in Charter interpretation and which foreign sources to cite, and it must address the misrepresentation of foreign sources, beginning with its own cases. Of course, some things are easier than others. Recognizing that courts should be accurately describing foreign sources is immediately remediable. On the other hand, providing a consistent framework for courts to use in determining when and how to use foreign law is a much more complicated task.

Finally, it must be said that even if a framework is established, courts must follow it. As the post-*Québec inc.* jurisprudence has shown, the Court's guidance means nothing if it is not actually followed, with *Bissonnette* providing a prime example of this issue. Additionally, even where the Court explains why it is using a particular foreign source to interpret the Charter, it must ensure that its explanation is consistent with its own precedents, both to avoid future inconsistencies and to resolve existing inconsistencies, such as with the Court's section 8 jurisprudence. If the Supreme Court cannot clearly articulate how foreign law should be used to interpret the Charter, this will only increase confusion for lower courts. Ultimately, until further guidance is given and until the Supreme Court decides to follow its own guidance, the Court's use of foreign law to interpret the Charter will continue to lack coherence and consistency.