Case Comments and Notes/ Chronique de jurisprudence et notes

The Use of American Cases

The creation of the *Canadian Charter of Rights and Freedoms*[1] as part of the *Constitution Act, 1982* has raised a number of questions and will continue to do so for some time. One concerns the use that will be made of American decisions, not only as they relate to issues arising from the provisions in the *Charter*, but also their potential impact on our laws in general.

Civil liberty issues are not new to our legal system or our society. The rights and freedoms articulated in the *Charter* derive their meaning from the values of our society. In the past we have assumed that social values would temper our lawmakers the legislators, and consequently that our laws would conform to social values. The values that limited the law-makers would also temper our judiciary and ensure that the interpretation of our laws would reflect those values. Now, the *Charter* has given the judiciary the power to determine overtly the validity of law based on social values. When judges assess the validity of laws they put their estimate of social values against that made by legislators. In order for judges to maintain credibility in the event of a conflict, they must be able to articulate clearly and directly their concern with values in their reasons for judgment. Otherwise their decisions will appear to be without substance. In this task our judges need assistance. Traditionally, the Canadian judiciary has masked concern with values, or policy, by simply applying rules to facts in a mechanical fashion. Judges, the saying goes, do not make law, but merely interpret it. This masking is not possible when the validity of law based on the provisions of the *Charter* is the concern of the judiciary.

The only Canadian example illustrating open discussion of such concerns is that of the Supreme Court of Canada in the 1950s; and then, perhaps, only with Rand J., who, interestingly, received his legal education in the United States.[2] That country has enjoyed two centuries of experience with questions such as those generated by our *Charter*. Accordingly, once the need for help in articulating arguments and reasons for judgment when dealing with *Charter* issues is acknowledged, it is inevitable that eyes will be turned south. The

[1]Part I, *Constitution Act, 1982* which is Schedule B, *Canada Act 1982*, 1982 (U.K.) c. 11.

[2]Harvard University, LLB 1912.

value-laden nature of law in general, and constitutional law in particular, means that we must be concerned with the input into Canadian society of American values as expressed in their law. The spectre of that vast body of law, the product of 51 jurisdictions, introduced into our courts, coupled with the usual concerns related to American cultural dominance, makes reference to American law problematic.

The intent of this paper is to study the question of the historical use of American cases in Canada, in particular with civil liberty issues both before and after the *Charter*.

The Supreme Court of Canada and The Use of American Cases

The Supreme Court was selected as the focus of the historical study for several reasons. The Court readily provides a national dimension since cases from all areas of the country are involved. Also, the chances are that decisions on average would be of greater public importance than those of other courts. As the highest court in Canada it would also have a more overt influence on the lower courts. Lastly, the volume of cases involved gave much more manageable data and allowed a complete survey rather than sampling. The Supreme Court of Canada cases examined were those for which there had been both a hearing on the merits and reasons for judgment reported in the *Supreme Court Reports, Cameron's Supreme Court Cases* or *Coutlee's Supreme Court Cases*. Omitted were all motions, summary decisions and cases unreported in the above Reports. The methodology used was to examine the Table of Cases Cited in each volume of the reports for citations of American reports. The extent of the use made of American law was estimated by finding the number of Supreme Court cases in which at least one American case was cited and then calculating those cases as a percentage of the total number heard on their merits and reported.[3] The statistics were calculated for the Court Year or Term in which the case was heard. The last Term surveyed was 1982-83, as it is the latest for which virtually all the cases heard have been decided.[4]

There exist cases in which there is a reference to American law, but no case cited. These cases could only be identified by reading all the cases or sampling. It was decided to omit them from the statistics after a sampling indicated that the percentage of the total number of cases containing a reference to American law increased only slightly per Term and appeared uniform over the years. The conclusion is that the statistics to be presented would be increased slightly overall with respect to the percentage of cases concerned with United States law. The Supreme Court has existed for 110 years; to present all

[3]Omitted are discussions of the use of American law in provincial courts, although what studies there have been indicate that use would be less than for the Supreme Court: See B. Laskin, *The British Tradition in Canadian Law* (London: Stephens, 1969) 104, where statistics obtained from a three-year survey of the *Dominion Law Reports* show a low rate of use of American cases; and MacIntyre, *infra*, footnote 10 at 489. Also omitted are conflict of law cases unless the American case was used for other than evidence of U.S. law. An interesting study would have been to examine the cases for the use of American textbooks and digests. This study is under way and hopefully will be available in the future. Another aspect of the question of the use of American cases would be the availability of U.S. reports, or law in general, through libraries or lawyers' offices. This study also must wait for the future.

[4]At the time of writing only one case remained for which judgment had not been rendered.

of those statistics as a table was considered to be too cumbersome. Throughout the years there have been fluctuations from Term to Term in the degree of use of U.S. cases, and although the variations are great on occasion[5], it was considered better after analysis to group Terms to facilitate study. The result is shown in Table One.

Table One

Cases in Which an American Case Was Cited, as a Percentage of the Total Number of Cases heard on their Merits, and for Which Reasons for Judgment were Reported

Period	Terms	Number of Terms	Cases	Per Cent
1	1876 to 1886-87	12	350	19.1
2	1887-88 to 1889-90	3	158	10.8
3	1890-91 to 1892-93	3	172	5.8
4	1893-94 to 1900-01	8	456	10.3
5	1901-02 to 1904-05	4	252	17.9
6	1905-06 to 1913-14	9	473	8.7
7	1914-15 to 1916-17	3	172	15.1
8	1917-18 to 1925-26	9	504	9.9
9	1926-27 to 1931-32	6	378	5.8
10	1932-33 to 1934-35	3	172	11.1
11	1935-36 to 1940-41	6	269	3.7
12	1941-42 to 1957-58	17	872	7.2
13	1958-59 to 1965-66	8	624	3.8
14	1966-67 to 1969-70	4	372	1.6
15	1970-71 to 1982-83	13	1218	10.0

A further reduction in the number of periods yielded the results in Table Two.

[5]For example, 15.4 *per cent* in 80-81, and 30.8 *per cent* in 1881-82; 1.9 *per cent* in 1923-24, compared to 16.1 *per cent* in 1924-25.

Table Two

Cases in which an American Case was Cited, as a Percentage of the Total Number of Cases heard on their Merits, and for Which Reasons for Judgment were Reported

Period	Terms	Number of Terms	Cases	Per Cent
1	1876 to 1886-87	12	350	19.1
2	1887-88 to 1900-01	14	786	9.4
3	1901-02 to 1904-05	4	252	17.9
4	1905-06 to 1925-26	21	1149	10.2
5	1926-27 to 1969-70	44	2687	5.4
6	1970-71 to 1982-83	13	1218	10.0
	Totals	108	6442	9.0 (8.97)

A number of simple observations are possible from a glance at the above tables. The level of reference to American cases in the first 12 years of the Court's existence (1876 to 1887) has not been surpassed to date: 30 *per cent* in 1877 and 30.8 in 1881-82 remain the two highest Terms. I can give no specific reason for the decline in reference in 1887-88. However a problem with the library holdings of American law reports at the Supreme Court was evidenced in 1889 by a decision of the government to spend money correcting the fact that the "library had become defective in its complement of American reports".[6] This expenditure was repeated in 1890[7]; the incomplete nature of the sets of American reports was also noted in 1894 and 1898.[8] Robert Borden observed in 1898 that the American reports had earlier been discontinued, but no reason was being offered.[9]

There has been little direct comment in legal literature concerning the use of American law. Only four articles were found.[10] Concern in the early literature centres on the word "authorities", and what it means. This point will be discussed later. However, a 1943 comment stated: "...until recently ... there has existed a prejudice, commencing in the law schools and extending to the courtroom, against the use of American authorities and texts."[11] No reasons are given to explain this occurrence, but the implication from the use

[6]House of Commons Debates, 3rd session, 6th Parliament, 1889, at 205; *per* Sir John Thompson, Minister of Justice.

[7]House of Commons Debates, 4th session, 6th Parliament, 1890, at 482.

[8]House of Commons Debates, 4th session, 7th Parliament, 1894, at 3345, and 3rd session, 8th Parliament, 1898, at 6638.

[9]*Ibid.*, 1898 Debates at 6638-39.

[10]O. Mowat, "Observations on the Use and Value of American Reports in Reference to Canadian Jurisprudence" (1857), 3 *U.C.L.J.* 3; Lex, "The Authority of American Decisions in Canadian and English Courts" (1899), 35 *C.L.J.* 518; Comment, "The Use of American Legal Literature" (1943), 21 *Can. Bar Rev.* 57; J.M. MacIntyre, "The Use of American Cases in Canadian Courts" (1964-66), 2 *U.B.C. Law Rev.* 478.

[11]*Ibid.*, Comment at 57.

of the words "until recently" is that the author was unaware of the relatively high periods of use prior to the late 1920s. The decline commenced with the 1926-27 Term. MacIntyre comments in his article that cases from New England were cited frequently by Nova Scotia judges until about 1930. This article, although appearing during the period of lowest use of American cases, was written due to both the exposure a law student would have to American law in law faculties, and the fact that the student

> may — and often does — enter the world of practice with the attitude that the courts in this country are not interested in having American cases cited to them, or even that the courts actively dislike such citations and consider them as evidence of a weak case.[12]

The majority of the present members of the bar, both in teaching and practice, are products of legal education from the late 1940s to the late 1960s, years of minimal reference to American cases. The impression I have received from talking to members of the legal community is that the use of cases from the United States is very rare, a response which is consistent with the structure of legal education during this period.

The 13 years from 1970-71 to 1982-83 have been above average (10 *per cent* compared to an average of 8.97 *per cent*); but this increase is a considerable one over the low use evidenced in the 1960s. What caused the drop to virtual disappearance in the late 1960s requires further study. Finally, the simplest observation is that the use of American cases has varied over the years, with periods of high to low usage.

Uses

The statistics for the Supreme Court presented in the above Tables do not give the complete story. They indicate the general use by identifying cases in which at least one case from the United States was cited. But by looking at the particular use made of the American cases cited, we may glean a better idea of the influence of U.S. law. Each case with an American citation was analyzed; from the usage made by the various judges, an answer was sought to the hypothetical question: "How do you use U.S. law?". Since more than one use could be made of American cases in a single case or judgment, each different use was noted.

The uses obtained from the judgments were grouped into five categories: used, same, qualified, special and differ. The explanation of the category titles is as follows:

1. **Used**: In these instances American decisions appearing in a judgment are cited for a proposition either alone or with English or Canadian cases. Sometimes quotations from the American cases appear. The characteristic of this category is that there is nothing in the judgment to indicate that anything out of the ordinary is happening. Cases from the United States appear to be used as the judge would use any case he considered an authority. The implica-

[12] *Ibid.*, MacIntyre at 478. Apparently, the exposure of law students at the time to U.S. law was neither uniform nor extensive.

tions are that the judge is not self-conscious about the use of foreign decisions, and would not be averse to future use.

2. **Same**: In this category the American cases are used with the comment that they state the same law as that derived from English or Canadian decisions. The citation of American cases usually follows a discussion of English or Canadian authorities and adds support to the judge's interpretation of domestic case law. Such cases do not discourage the use of American cases if used to support a reasonable interpretation of the English or Canadian cases.

3. **Qualified**: Cases from the United States are used by a judge with a distinct qualification added, such as that the American decisions are not binding, can be used only in the absence of English or Canadian authorities, or are being used merely as guides.[13] The qualifications recognize the non-binding nature of the cases. A self-consciousness is present, creating the need for an explanation. A limited use is suggested rather than use as a matter of course. This group was separated from category 2 due to the nature of the qualification. In the latter, there did not appear the self-consciousness which would create a need to qualify the use.

4. **Special**: Occasionally a special reason was offered by a judge to justify use of an American case. English cases are expressly rejected in favour of American due to the similarity of social conditions in Canada and the United States. Examples were: Canadian statute copied from an American one, Indian rights, navigable rivers, similar patents, municipal bonds, franchises, maritime practice, issuance and collection of railway tickets, turnpike trusts, practice of insurance companies, and — as will be examined in detail later — *The Canadian Bill of Rights*[13a].

5. **Differ**: In this category a judge expressly rejects use of American decisions due to a perceived conflict between them and English authorities.

In a judgment it may occur that American cases have been used in more than one way. The following table presents the usage made of the cases as a percentage of the total number of different uses. There were 578 cases in which an American case was cited. The following table shows the uses as a percentage of the total number. The Periods referred to are those from Table Two.

[13]Some other qualifications seen were the words: not direct application, not directly decisive, adopted by an English case, example, illustration, worth noting and persuasive.

[13a]S.C. 1960, c. 44.

Table Three

The Uses of American Cases as a Percentage of the Total Number of Uses

	Period	Total Uses	Percentages				
			Used	Same	Qualified	Special	Differ
1	1876 to 1886-87	106	51	23	10	8	8
2	1887-88 to 1900-01	86	56	21	13	6	5
3	1901-02 to 1904-05	64	73	16	8	2	2
4	1905-06 to 1925-26	152	64	9	20	2	7
5	1926-27 to 1969-70	184	54	10	27	4	5
6	1970-71 to 1982-83	164	46	8	27	5	13

Again, a number of quick observations can be made. Instances wherein American cases are described as stating the same law have changed markedly from the nineteenth to the twentieth century, from 23 *per cent* in Period 1 to eight *per cent* in Period 6. The number of qualified uses has increased markedly since the turn of the century, reaching 27 *per cent*.

The uses the Supreme Court made of the American cases would be dependent on the use that they made of cases in general. At the beginning of this research paper reference was made to the role of social values in judicial decision-making. Although it seems inevitable that courts must be concerned with social values and must decide cases in conformity with them, a reading of many judgments by the Supreme Court causes one to question this contention. Taken at face value many of the judgments display a lack of concern with anything other than the mechanical act of rule-application.

Since the establishment of the Court until recently, the dominant philosophy of judicial decision-making has been that a judge should not make or develop the law, but simply discover it. According to this view, the law was created by the legislature or judges in the virtually mythical age of the common law, before legislatures had reached a significant level of law-making activity. The Supreme Court has more than once been described as a "captive court",[14] lacking a distinctive legal doctrine and independent judicial tradition. It was the legal philosophy which created the captivity; and a captivity forged by one's own mental attitude is the most rigid of all. Hence, "finding the law" meant that any show of creativity other than that entailed in interpretation was forbidden. Whether or not the judges actually believed this may be ques-

[14]B. Laskin, "The Supreme Court of Canada: A Final Court of and for Canadians" (1951), 29 *Can. Bar Rev.* 1038 at 1075.

tionable, but such a view demands that judges give the appearance of neutrality. Before creation of law became the concern of the legislatures, the source of law was the common law. While in practice the common law was judicially created, in theory it was perceived differently. According to Blackstone it was a complete body of rules existing from time immemorial, unchangeable except to the limited extent that legislatures altered rules through enactment. Today legislative involvement is not as limited as at the time of Blackstone. The "common law", even today, may appear on occasion as an ideal system of law discernable by the human mind.[15]

The United States is in the main an inheritor of the same mythical "common law" (as well as the real common law) as Canada; whether it is the House of Lords in England, the United States Supreme Court or the Supreme Court of Canada which is searching through the cases for a rule does not matter. In theory what an American court finds would probably be the same as that discovered by an English or Canadian court. This phenomenon provides an explanation for the high percentage of cases in the nineteenth and very early twentieth century in which U.S. law was perceived to be identical to Canadian law.

This view of the judicial function causes the problem with the word "authorities", referred to earlier. Since a judge is looking for a rule, his sources are restricted to those in which the rule will be found — the "authorities". Should a judge look elsewhere, his actions might be questioned. With a mind set that requires "authorities", what does one do with "persuasive cases"? Also, the qualification frequently added to a citation of a U.S. case that it is "not binding" means that it is not an "authority". Use of American cases raised a further problem due to the number of jurisdictions of equal authority. It was very difficult on occasion to find an "American" rule, as opposed to one from Massachusetts or Michigan. This lack of uniformity created a problem unless one went with the "weight of authority". Thus the need for a choice to be made involved something more than merely finding a rule.[16]

In Canada the view of the judicial function as finding, rather than creating, law was given greater meaning by use of the equation: **THE LAW OF CANADA = THE LAW OF ENGLAND.** If one were to ask at any moment what the law of Canada was (excluding of course the civil law of Quebec) a search would be made of the common law of England.[17] A consequence of the

[15]I have perceived this phenomenon recently in *Descoteaux* v. *Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.), and *R.* v. *Rao* (1984), 46 O.R. (2d) 80 (C.A.).

[16]This problem surfaced in *Canada Southern Railway Co. v. Phelps* (1884), [1888] 14 S.C.R. 132 at 146 (Strong J.); *North American Life Assurance Co.* v. *Craigen* (1886), [1887] 13 S.C.R. 278 at 286 (Ritchie C.J.); *Livesley* v. *E. Clemens Horst Co.*, [1924] S.C.R. 605 (Duff J.); *Vancouver Milling & Grain Co.* v. *C.C. Ranch Co.*, [1924] S.C.R. 671 (Duff J.); and *Hewson* v. *The Queen* (1978), [1979] 2 S.C.R. 82 (Ritchie J.).

[17]Statute law was different, unless the Canadian statute was based on an English statute, and then the equation applied: *Trimble* v. *Hill* (1879), [1879-80] 5 App. Cas. 342 (P.C.). *Trimble* v. *Hill* and *City Bank* v. *Barrow* (1880), [1879-80] 5 App. Cas. 664 (H.L.), dealt with the interpretation of a Canadian statute based on an English act. In *City Bank* Lord Blackburn stated: "The Canadian lawyers who gave evidence in this case tell us ... that in construing the effect of the Canadian law when taken from the English, they look to English decisions, and say the English law is to be understood, and is meant by these acts to be carried over, bodily, to Canada..." Although specifically concerned with statutes, *Trimble* v. *Hill* was occasionally cited as authority for the wider proposition indicated by the equation.

equation was that Canadian judges considered the House of Lords the ultimate court, even though it did not entertain Canadian cases. As Fournier J. of the Supreme Court of Canada said: "... la question est réglée par la plus haute autorité judiciaire de l'empire celle de la chambre des Lords siégeant comme cour d'appel. Ce haut tribunal n'est pas, il est vrai, notre cour de dernier ressort comme le Conseil Privé...."[18] Another member of the Supreme Court, Anglin J. (later Chief Justice of Canada) writing in the *Canadian Bar Review* in 1923, could assert that a decision of the House of Lords "carries authority almost equal to that of an Act of Parliament".[19] Judicial development of the law, then, was left to English courts.

There are several consequences resulting from the attitude of the judges of the Supreme Court to the judicial function and the existence of the Equation, with respect to the use of American cases. The "no law-making" stance needs precedents to give the appearance of neutrality. As Strong J. said in 1881: "In the absence of any decisions upon the point in our own courts as well as in England, we may have recourse to American authorities...."[20]

The law expressed in American cases could not be adopted by Canadian courts unless the princples were said to be the same as those of the English common law. In the nineteenth century the majority of judgments emanating from the courts in the United States were based on the common law. With increased legislative activity, American law deviated from English law. New social developments accompanying legislation made it less feasible to rely on the common law. Consequently, American cases based on legislation would be ignored. In addition, as English cases refined legal doctrine and extended into novel areas, American cases became less influential.

By the late 1960s the binding effect of English cases waned, but a habit of the non-use of American cases had also been established. In addition, the surge of concern with Canadian values and needs, beginning in the 1930s and flourishing in the late 1940s and early 1950s, could not be ignored. However, courts still continued to adhere to the "no law making" philosophy. Once subservience to the law of England ended, there might have been a return to American decisions since there would still be a need to find an "authority". Cases were needed.

There does not appear in the Supreme Court of Canada to have been any specific attitude favouring rejection of American case law, which tends to support the view that rejection would have been due to the Equation, philosophy and habit. If American law had been used beyond what was considered appropriate, one might find judicial criticism of its use. Yet, no general condemnation was ever made of American cases in any judgment rendered by the Supreme Court. In fact, the only case in which the use of American cases became a focal point of discussion was *St. Lawrence & Ottawa Railway Co.* v.

[18] *Sweeney* v. *Bank of Montreal* (1885), [1887] 12 S.C.R. 661 at 697.

[19] F.A. Anglin, "Some Differences Between the Law of Quebec and the Law as Administered in the Other Provinces of Canada" (1923), 1 *Can. Bar Rev.* 33 at 38.

[20] *Cosgrave* v. *Boyle*, [1882] 6 S.C.R. 165 at 173.

Lett.[21] The case was heard in May 1885, before Sir W.J. Ritchie C.J., Fournier, Henry, Taschereau and Gwynne JJ. Judgment was rendered in November of the same year, near the end of the period of high use of American decisions (Period 1). The issue was the award of damages to a husband and children for death of the wife due to the railway's negligence. In 1882 at trial damages of $5800 had been awarded. (In today's purchasing power I estimate the award to be more than $100,000.) Interestingly, no argument on appeal was directed to the question of excessive damages. Instead, the appellant railway took the case to the Privy Council on the basis that that no damages should have been awarded. The action was based on an Ontario statute duplicating *Lord Campbell's Act*[21a], which permitted an action to be brought when the victim died, thereby changing the common law rule. It appeared that the statute only permitted recovery for pecuniary losses.[22] While the law in the United States was generally the same, certain states permitted recovery of damages by a surviving husband.[23] While the death of the wage earner in a family could be translated into damages, that of a wife and mother could not so easily be reduced to financial terms. On appeal to three judges of the Queen's Bench Division of the Supreme Court of Ontario, a majority held that loss of a wife and mother was not of sufficiently pecuniary character to support an award of damages. The majority rejected the use of certain American cases as they were not in accordance with the law of England. Armour J., dissenting, relied on American cases to support his opinion. In a further appeal the Ontario Court of Appeal in a 3-to-1 decision reversed the Queen's Bench Division. The dissenting judge held that the U.S. cases were not authoritative. In the majority two judges did refer to U.S. cases (one approving Armour's judgment), while Patterson J. decided in favour of an award of damages without referring to any American authority.

The Supreme Court of Canada split 3 to 2 on the question. The majority dismissed the appeal and thus supported the award of damages. The controversy among the judges resulted because the majority used American cases, not to support their understanding of English law as had Armour in the Queen's Bench Division, but directly, as the foundation of their decision. Ritchie C.J. referred to American cases and then reviewed English cases in support of his view. The dissenting judges took issue with the use of American decisions since, as Gwynne J. said, "Some of the American courts, it must be admitted, have gone far beyond the decisions in the English courts".[24]

This was the first and last time that the Supreme Court overtly used American cases to alter the trend of decisions. This case, however, suffered a fate which may be instructive. *Underhill on Torts* refers to the *Lett* case for what it decided with respect to the award of damages for loss of a wife and

[21](1885), [1886] 11 S.C.R. 422. Leave to appeal to the Privy Council was refused.

[21a]*The Fatal Accidents Act*, 1846 (9 & 10 Vict) c. 93.

[22]J.D. Mayne, *Mayne's Treatise on Damages*, 4th ed. (London: Stevens & Haynes, 1884) 487; and F. Pollock, *The Law of Torts* (Philadelphia: Blackstone, 1887) 60.

[23]See T.M. Cooley, *Law of Torts*, 2nd ed. (Chicago: Callaghan & Co., 1888) 323.

[24]*Supra*, footnote 21 at 443.

mother.[25] In 1888 the Privy Council rendered a judgment that could be interpreted as emphasising the pecuniary basis of the damage award.[26] In the second Canadian edition of *Underhill on Torts* (1906) the reference is to the Queen's Bench Division decision. Both the Supreme Court of Canada's decision and that of the Ontario Court of Appeal have disappeared.[27]

There has been no general condemnation in the Supreme Court of the use of American cases, such as that expressed by the members of the English Court of Appeal, Lord Halsbury L.C., Fry and Cotton L.JJ., who considered the citation of American authorities to be both wrong and unnecessary.[28] Only *Lett*[29] generated any extensive debate among the judges. On the other hand, there *were* instances of encouragement: decisions of the United States Supreme Court are "always entitled to the greatest consideration";[30] are entitled to "every respect";[31] and "I feel quite safe in following the decisions"[32]. Expressions such as the "high authority of the great court", when speaking of the Supreme Court of the United States, would not discourage recourse to that court's decisions.[33] Also noted were: "regarded with respectful consideration and have often afforded valuable assistance";[34] and, "the powerful reasoning of the great judges who decided these cases, would, if there could be any doubt upon the point now presented, be conclusive in the present case"[35]. In more recent times, words of encouragement have been less enthusiastic: "helpful",[36] "useful",[37] "great interest",[38] "some assistance",[39] and "not discount[ed] as being irrelevant here"[40].

[25]A. Underhill, *A Summary of the Law of Torts* (Toronto: Canada Law Book Co., 1900) 322.

[26]*Grand Trunk Railwy Co.* v. *Jennings*, [1888] 13 App. Cas. 800 (P.C.).

[27]A. Underhill, *A Summary of the Law of Torts*, 2d ed. (Toronto: Canada Law Book Co., 1906) 163.

[28]*Re Missouri Steamship Co.*, [1889] 42 Ch. D. 321 at 330. The negative views towards the use of American cases were expressed during the argument of counsel.

[29]*Supra*, footnote 21.

[30]Taschereau J. in *Monaghan* v. *Horn* (1882), [1884] 7 S.C.R. 409 at 450.

[31]Ritchie C.J. in *Re Sproule* (1886), [1887] 12 S.C.R. 140 at 198; and Rinfret J. in *Burt Business Forms Ltd.* v. *Autographic Register Systems Ltd.*, [1933] S.C.R. 230 at 239 and *Equitable Life Assurance Society of the United States* v. *Larocque*, [1942] S.C.R. 205 at 239.

[32]Henry J. in *Church* v. *Fenton* (1880), [1882] 5 S.C.R. 239 at 257.

[33]Strong C.J. in *Robertson* v. *The Grand Trunk Railway Co. of Canada*, [1895] 24 S.C.R. 611 at 617; "well worthy of consideration" in *Niagara District Fruit Growers Stock Co.* v. *Stewart* (1896) [1897] 26 26 S.C.R. 629 at 639; and "justly entitled to the greatest respect" in *McCleave* v. *City of Moncton*, [1902] 32 S.C.R. 106 at 108 (speaking of the Supreme Court of Massachusetts).

[34]Fitzpatrick C.J. in *Nova Scotia Car Works* v. *City of Halifax*, [1913] 47 S.C.R. 406 at 417.

[35]Strong J. in *The Queddy River Driving Boom Co.* v. *Davidson* (1883), [1885] 10 S.C.R. 222 at 235.

[36]Laskin J. in *Banque Provinciale du Canada* v. *Ogilvie* (1972), [1973] S.C.R. 281 at 300; Laskin C.J. in *Morgentaler* v. *The Queen* (1975), [1976] 1 S.C.R. 616 at 629, and *Harrison* v. *Carswell* (1975), [1976] 2 S.C.R. 200 at 210.

[37]Laskin C.J. in *Pacific Coast Coin Exchange* v. *Ontario Securities Commission* (1977), [1978] 2 S.C.R. 112 at 116.

[38]Pigeon J. in *Upper Lakes Shipping Ltd.* v. *Sheehan*, [1979] 1 S.C.R. 902 at 919.

[39]Estey J. in *Compo Co. Ltd.* v. *Blue Crest Music Inc.*, [1980] 1 S.C.R. 357 at 367.

[40]Laskin C.J. in *Miller and Cockriell* v. *The Queen*, [1977] 2 S.C.R. 680 at 689.

There were 39 instances of encouragement found, of which only two judges had more than three — Strong C.J. (1875-1902) with eight and Laskin C.J. (1970-1984) with 6. These instances occurred in 36 cases in which American cases were cited. Of the 36 cases, 23 (64 *per cent*) occurred prior to 1926, and 10 (28 *per cent*) after 1973. Thus in the 47-year period from 1926 to 1973 there were only three instances (eight *per cent*); between 1942 and 1973 there were no instances.

In comparison there were 92 instances when American law was rejected on the basis that it differed from English law. With the exception of civil liberty cases which will be examined later, in no other instance could there be said to be deprecation of American decisions. In several instances there was praise for the U.S. position; but once it was determined that the American law differed from English law, judges became powerless to adopt it. Then, legislation or development by the courts in England, became necessary.[41] Only in *Bank of Toronto* v. *Perkins*[42] were there greater implications, when Strong J. rejected a decision of the United States Supreme Court's interpretation of a similar statute on the ground that the American court considered the policy, or purpose, of an enactment in its interpretation, rather than its language.

From Table Three it can be seen that the percentage of instances when a U.S. case was rejected on the basis of a difference is the highest in the last and most recent period. The reason may be in the increased use of the cases by counsel; with the abandonment of *stare decisis* by the Court, counsel could be urging law reform. Also, the Equation has weakened considerably.

Judges

It is entirely possible that individual judges exert a controlling influence on the statistics presented in Table One since all that is needed is one American case to be used in one judgment, even though five or more judgments may have been written. The earlier tradition of writing *seriatim* judgments made the potential influence of a single judge more pronounced. In order to determine an individual judge's use of American cases it would have been most helpful to have been able to calculate the number of judgments written by a particular judge in which a U.S. case was cited as a percentage of the total number of judgments written by the judge, but a lack of the latter statistic makes this impossible. Simple attention to the composition of panels in a high or low period would, of course, be informative.

As an alternative way of determining the influence of individual judges, cases in which U.S. law appeared were examined. These were cases in which it was definitely known that American law had been introduced. The total number of judgments written by a particular judge in those cases was calculated, as well as the number of the judgments in which a U.S. case appeared. A percentage of the total written was calculated for those in which the

[41] See *Page* v. *Austin* (1894), [1885] 10 S.C.R. 132 at 151-53 (Strong J.); *Clark* v. *The King* (1921), [1920-21] 61 S.C.R. 608 at 622 (Anglin J.); *Guardian Realty Co. of Canada* v. *Stark & Co.*, [1922] 64 S.C.R. 207 at 216 (Anglin J.) and *Canadian Pacific Railway Co.* v. *Anderson*, [1936] S.C.R. 200 at 232 (Davis J.).

[42] (1883), [1884] 8 S.C.R. 603 at 613-14.

judge cited an American case. The percentages obtained were examined in relation to the period in which the judge sat. While the statistics obtained cannot be presented due to their volume, certain observations can be made.

The period from 1901-02 to 1904-05 (Period 5), with a high rate of American case use, was dominated by Nesbitt J. (1903-05). The increase in use, beginning in 1970-71 and continuing to the present, owed its existence in good part to Laskin C.J., together with present Chief Justice Dickson and Estey J. Of the current members of the Supreme Court, Dickson C.J. uses American decisions frequently, as if they were a usual source of law. Estey J., along with McIntyre J., cite American cases frequently, but generally with qualifications. In the early period Strong C.J. (1875-1902) stands out in using U.S. cases, while Gwynne J. (1879-1902) used very few even though he sat in the period of greatest use.

Six of the 62 judges of the Supreme Court received legal education in the United States: David Mills (LLB Michigan, 1855), Ivan Rand (LLB Harvard, 1912), J.W. Estey (LLB Harvard, 1915), Wishart Spence (LLM Harvard, 1929), Bora Laskin (LLM Harvard, 1937) and W.Z. Estey (LLM Harvard, 1946). Laskin and W.Z. Estey have been referred to above as contributing to the present increase in use. Laskin C.J. could be credited with stimulating the increase. Mills J., who sat for only a short time (1902-03), was clearly a high user during this period. Rand J. sat on the bench in the period of the lowest use, but would rank in the middle of any listing of judges. Of those judges who sat during his years on the Court (1943-1959), Rand J. was the greatest user of American cases, followed closely by J.W. Estey. There appears to be a not unexpected connection between exposure to U.S. legal education and use of American cases. Judges with exposure to a legal education in England are correspondingly relatively low on a list of users of American law. Those with an English education include Gwynne (referred to above), Louis Davies (1901-24), Ronald Martland (1957-82) and Beetz J. (who is presently on the bench).

R.A. Ritchie had a moderately high percentage of citations of U.S. cases, but on many occasions this use was due to rejection of the case. The judges who ranked lowest were all from Quebec: Robert Taschereau (1940-67), Pierre Basile Mignault (1918-29), Gérald Fauteux (1949-73) and Douglas Abbott (1954-73). With the civil law system in that province it would be natural to suppose that U.S. cases have little place there, although in the early periods Quebec judges ranked much higher. Finally, Nolan J. and Chournard J. had too small a sample to make a determination.

Origin of The Case

As a follow-up to this last point about Quebec and American law, it was decided to examine briefly whether the practice of using U.S. law was more prevalent in some provinces than others. The origin of cases heard in the Supreme Court was noted; the following calculations resulted.

Table Four

Percentage of Cases that Contained a Citation of a U.S. Case

Origin	Cases	Per Cent of Total	Per Cent with U.S.
References	72	1.1	16.7
New Brunswick	256	4.0	14.8
Nova Scotia	393	6.1	11.7
Ontario	1553	24.1	10.1
Territories	49	0.8	10.2
Manitoba	268	4.2	9.7
Other	107	1.7	9.3
Federal Court	873	13.5	9.0
Alberta	400	6.2	8.5
British Columbia	616	9.6	8.1
Quebec	1591	24.7	6.9
Saskatchewan	214	3.3	5.1
Newfoundland	18	0.3	5.6
Prince Edward Is.	34	0.5	0
Total[43]	6444		

Federal Court cases and "others" (usually meaning federal boards and commissions) have been included in the above table for completeness.

The high position of the two Maritime provinces is not surprising. It has been noted elsewhere[44] that American cases were extensively used in that region. Newcombe J. of the Supreme Court noted in 1925 that "the Massachusetts' decisions were always regarded in Nova Scotia as sources of wisdom".[45] Finally, a pronounced change in the use of American decisions was observed in two provinces. New Brunswick was 19.8 *per cent* from 1876 to 1934-35, and 6.4 *per cent* from 1935-36 to 1982-83. Quebec from 1876 to the 1925-26 Term was 11.1 *per cent*, while from 1926-27 to 1982-83, the percentage was 3.6. The high percentage for Quebec in the nineteenth century was due to frequent reference to cases from Louisiana.

Subject Matter

It was considered that a survey of the cases for the prime area of law involved might be generally interestng and informative. Table Five, below, presents these results.

[43]This total is two greater than the total cases heard due to the *Constitutional Act Amendment Reference* case, [1981] 1 S.C.R. 753, in which appeals from three provincial courts (Manitoba, Newfoundland and Quebec) were joined together.

[44]See McIntyre, *supra*, footnote 10 at 480.

[45]*Petrie* v. *Rideout*, [1925] S.C.R. 347 at 360.

Table Five

Area of Law and the Use of American Cases

Area of Law	Cases	Per Cent of Total	Per Cent with U.S.
Insurance	289	4.5	17.6
Intell. Prop.	179	2.8	15.6
Crown	112	1.7	13.4
Admiralty	105	1.6	13.3
Constitutional	361	5.6	12.7
Negligence	731	11.3	9.6
Contracts	491	7.6	9.6
Company	118	1.8	9.3
Other Torts	93	1.4	8.6
Administrative	143	2.2	8.4
Criminal	641	10.0	8.3
Procedure	271	4.2	8.1
Property	677	10.5	7.8
Municipal	214	3.3	7.5
Commercial	258	4.0	7.0
Family	94	1.5	6.4
Taxation	498	7.7	5.6
Labour	123	1.9	4.9
Wills	190	2.9	3.7
Expropriation	126	2.0	3.2
Election	69	1.1	2.9
Bankruptcy	64	1.0	1.6
Miscellaneous	595	9.2	10.1
Bill of Rights	23	0.4	39.1
Stocks, brokers	14	0.2	35.7
Banking	35	0.5	20
Indians	23	0.4	17.4
Other	500	7.8	6.8
Total	6444		

Each area of law in Table Five is at least one *per cent* of the total. Areas listed as miscellaneous were less than one *per cent*; but due to the high percentage of cases in which an American case was cited they were listed in a special position. Some fields of law mentioned were formed by joining together various areas. The following include those areas indicated and what each would normally include: **property** — leases, privileges, conveyances, landlord and tenant, marital property, timber licences and sale of land (equity in an agreement); **commercial** — sale of goods, bills and notes, guarantees, debtor-creditor and carriage of goods; **procedure** — actions, standing and limitation of actions; **company** — partnership; **taxation** — assessment and succession duty; **contracts** — sale of land and Statute of Frauds. Civil liberties and the *Bill of Rights* will be discussed later.

Areas of law with a relatively high percentage of cases citing a case from the United States have attracted some comment. For example, with respect to insurance law, Nesbitt J. had stated in 1904:

> Although the American cases are not authorities in our courts the opinion and reasoning of the learned judges of courts in the United States, especially in insurance cases, have always been regarded with respectful consideration in this court and in England as affording valuable assistance.[46]

Seventy years later Laskin C.J. said: "Cases in the United States on insurance matters have been freely cited in Canadian Courts because form policies developed in the United States have found their way into policies issued by insurers here".[47]

American constitutional decisions concerning issues of federalism were a natural source of law for Canadian judges. The *Canada Law Journal* at the time of the creation of the Supreme Court in 1875 stated:

> The Supreme Court will find a series of well-reasoned decisions on constitutional questions by the Supreme Courts in the United States, which will be useful as furnishing general principles of constitutional interpretation applicable in a great measure to the federal system of Canada.[48]

With respect to patents Ritchie C.J. wrote in 1887: "In the United States where the subject of patents has undergone so much judicial discussion, we naturally turn to ascertain the reasoning which had led to the decisions in that country".[49] In 1883 Strong J. noted that Canadian patent laws were more like American law than English.[50]

For securities legislation Laskin C.J. noted in 1977: "The more extensive judicial experience in the United States has been regarded as useful for Canadian Courts called upon to wrestle with similar problems of interpretation and application".[51] Cases included under "Crown" involved questions of government involvement in the affairs of society such as turnpikes, liability for torts committed by servants, recovery of land and contract liability.

It was initially thought that many of the instances of encouragement noted above would involve areas of law with a relatively high percentage of American cases cited. This proved not to be the case since, of 36 cases involving words of encouragement towards the use of U.S. material, half concerned areas of law which were below average for use of American cases. The remainder were above average.

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[46] *Victoria-Montreal Fire Insurance Co.* v. *Home Insurance Co. of New York* (1904), [1905] 35 S.C.R. 208 at 219-20.

[47] *Co-Operative Fire & Casualty Co.* v. *Saindon* (1975), [1976] 1 S.C.R. 735 at 740.

[48] (1875), 11 *C.L.J.* 236 at 237.

[49] *Ball* v. *Crompton Corset Co.*, [1887] 13 S.C.R. 469 at 477.

[50] *Smith* v. *Goldie* (1883), [1885] 9 S.C.R. 46 at 59.

[51] *Supra*, footnote 37 at 116.

Civil Liberties, The Charter and The Use of American Cases

This research paper has two points of focus: first, an examination of the use of U.S. law in general, and secondly, a consideration of the use of American law in relation to the *Charter*. The latter has been expanded to cover civil liberties in general.

When considering the areas of law involved in the cases, it was noticed that constitutional law had a relatively high percentage of cases in which an American decision was cited. Naturally none of those cases involved the *Charter*, while those involving the *Bill of Rights* were placed in their own category. Civil liberty concepts existed within our society and law prior to the *Charter* and the *Canadian Bill of Rights*. Both the *Charter* and the *Bill of Rights* expressed existing rights and freedoms, although it does not necessarily follow that the content of the rights and freedoms were in any way frozen at the date of enactment.

Our civil liberties share a common origin with the American *Bill of Rights*: the *Magna Carta*, the *Bill of Rights* of 1688[52] and the "common law". Through interpretation a law could be neutralized by the judiciary, but in the pre *Charter* period its validity could not be directly challenged except on jurisdictional grounds. The protection of civil liberties was said to exist solely through the political constitution and social values operating on the political process, not through judicial interpretation of the legal constitution. Although judges were ostensibly restrained from declaring laws invalid on civil libertarian grounds, the perceived strength of those concepts within the fabric of our society caused the appearance in the 1950s of a "Charter" of rights and freedoms in decisions of the Supreme Court of Canada. This "Charter" was said to be implied from the terms of *British North America Act*.[53] J. Willis, in his article, "Statute Interpretation in a Nutshell" in 1938,[54] pointed out that the presumptions employed by judges in interpreting laws were in the nature of "a sort of common law 'Bill of Rights' ". For example, in *Boucher* v. *The King* (1949),[55] Rand J. together with four others would render the leading civil liberties decision more than 30 years before the *Charter*; that judgment could be expressed in the same manner today.

Since the American *Bill of Rights* was part of the "written constitution" of the United States, American judges were able to engage in substantive judicial review while in Canada, except for the implied "Charter", judges were prevented from doing so by the prime constitutional doctrine of parliamentary supremacy. One therefore does not expect American cases concerning the American *Bill of Rights* to appear in the judgments of Canadian judges because our constitution theoretically denied courts the power to

[52]1688 (1 Wm. & Mary 2) c. 2.

[53]See S.I. Bushnell, "Freedom of Expression — The First Step" (1977), 15 *Alta. L. Rev.* 93, in which the development of the "implied Bill of Rights" is discussed.

[54](1938), 16 *Can. Bar Rev.* 1 at 17.

[55][1950] 1 D.L.R. 657, and on rehearsing [1951] S.C.R. 265, [1951] 2 D.L.R. 369.

declare a law void on such grounds. In *Boucher*[56] (which in my opinion is our greatest civil liberty judgment), the only reference to American law is by Kerwin J. who rejects its application.[57] In not one of the implied "Bill of Rights/Charter cases" or other civil liberty cases of the 1950s is an American case cited.

The enactment of the *Canadian Bill of Rights* in 1960 created the opportunity for the judges to openly engage in the review of legislation on substantive grounds. However, perceiving that Canadian society was not yet willing to accept a constitutional position that would enable the judiciary to frustrate the legislative process, judicial interpretation neutralized the impact of the *Bill of Rights*. The protection of civil liberties remained at the pre *Bill of Rights* stage. Cases concerning the *Bill of Rights* reveal a certain division in the Supreme Court, Laskin openly encouraging the use of American cases in keeping with his view that the *Bill of Rights* should have constitutional status.[58] Ritchie and Fauteux, preferring to confine civil liberties to the political arena, openly rejected the use of American cases. This tension is reflected in the following statements:

> This Court has found [U.S. cases] to be helpful in the past and remains receptive to their citation...[59]
>
> [U.S.] decisions are of no assistance in view of the differences existing between the systems of Government obtaining in Canada and in the U.S.A.[60]
>
> Even if I found it necessary to enter upon a discussion of these cases in the United States Supreme Court, I would be disinclined to adopt them as applicable in interpreting ... the Bill of Rights. ... the U.S. Constitution ... differs so radically [from the *Bill of Rights*] in [its] purpose and content that judgments rendered in the interpretation of one are of little value in interpreting the other.[61]

The use of American decisions in *Bill of Rights* cases did not depend on a general attitude to consider such cases, but upon the issues involved in the cases. If a judge favoured substantive review on a civil libertarian basis, such cases were valuable; if a judge adopted a non-interventionist position consistent with the principle of parliamentary supremacy, American views were either ignored or excluded.

An unusual case that deserves mention in this context is that of *Harrison* v. *Carswell*[62], the most interesting part of which is the judgment of Freedman C.J. of the Manitoba Court of Appeal.[63] The case concerned the right of striking supermarket employees to picket on a sidewalk adjacent to and within a

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[56] *Supra*, footnote 53.

[57] *Ibid.*, at 671 ([1950] 1 D.L.R.). There were no cases cited.

[58] He called it "quasi-constitutional"; the use of the prefix "quasi" simply recognized its parentage as an enactment of the federal Parliament: *Hogan* v. *The Queen*, [1975] 2 S.C.R. 574, 48 D.L.R. (3d) 427, 26 C.R.N.S. 207.

[59] Laskin C.J. in *Morgentaler* v. *The Queen*, *supra*, footnote 36 at 629.

[60] Fauteux C.J. in *Smythe* v. *The Queen*, [1971] S.C.R. 680 at 687.

[61] Ritchie J. in *Miller and Cockriell* v. *The Queen*, [1977] 2 S.C.R. 680 at 706-707.

[62] [1976] 2 S.C.R. 200, 62 D.L.R. (3d) 68, [1975] 6 W.W.R. 673.

[63] *R.* v. *Carswell* (1974), 48 D.L.R. (3d) 137, 17 C.C.C. (2d) 521.

shopping centre. The court was thus required to balance the proprietary in- Laskin C.J. adopted the reasons of Freedman C.J. and added the following important comment with respect to American cases: "Making every allowance for any constitutional basis upon which Courts [in the United States] grappled with this problem, their analyses are helpful because they arise out of the same economic and social setting in which the problem arises here."[66]

Because civil liberty cases directly engage concerns related to social values, one must be certain when referring to cases from the United States that the values expressed are either identical or desirable. Laskin C.J. made such a determination by his reference to "the same economic and social setting", although the opening words of the quotation recognize theoretical differences between the two countries. With the enactment of the *Charter* there is no terests of the owner of the shopping centre against the freedom of the striking employees to express themselves by engaging in peaceful picketing. In a majority decision, the Manitoba Court of Appeal held that there was a legal right of freedom of expression and that "in the conflict between the property right of the owner of the sidewalk, and the policy right of the employee to engage in peaceful picketing in the course of a lawful strike, the latter right should prevail." Freedman C.J. for the majority added: "It seems ... that considerations both of public policy and good sense dictate such a conclusion." In reaching their decision, the majority relied on cases from the United States dealing with freedom of speech under the first amendment to the American Constitution. The majority stated that whenever the American courts referred to the constitutional right of freedom of speech or expression, Canadian courts should substitute the phrase "common law right".[64] In this case there was an active use of American cases and in the result the creation of a Canadian equivalent of the American constitutional right.

The Manitoba Court of Appeal decision was reversed by the Supreme Court of Canada. In the Supreme Court the majority judgment delivered by Dickson J. (as he then was) stands in stark contrast to that of Freedman C.J. Dickson J. did not view the American cases as helpful. He avoided consideration of the liberty issue and determined that a previous decision of the Court required him to find in favour of the shopping centre owner. The dissenting Supreme Court judgment rendered by Laskin C.J., minced no words: "This Court, above all others in this country, cannot be simply mechanistic about previous decisions."[65] In the view of the dissenting judges, to simply accept the previous decision as controlling was to adopt one side of a controversial issue and to conclude the debate without full consideration of competing views.

[64]The expression "common law right" has occurred in other cases, and means that the judge is giving the right asserted the status of an American constitutional right. This is an example of "the common law Bill of Rights". The most obvious and active use of the idea was in the *Carswell* case. With the *Charter* this expedient is no longer necessary, except with respect to a right to property, which has been recognized to be a "common law right". Examples include: right to property — *Montreuil* v. *Ontario Asphalt Co.* (1922), [1921-22] 63 S.C.R. 401 (Anglin J.) and *City of Prince George* v. *Payne*, [1978] 1 S.C.R. 458; natural justice — *Children's Aid Society of Metropolitan Toronto* v. *Lyttle*, [1973] S.C.R. 568 (Laskin J.); self-incrimination — *R.* v. *Shaw*, [1964] 43 C.R. 388, [1965] 1 C.C.C. 130 (B.C.C.A.); engage in a lawful occupation — *Henderson* v. *Johnston*, [1959] S.C.R. 655 and *City of Prince George* v. *Payne*, *supra*.

[65]*Supra*, footnote 62 at 205.

[66]*Supra*, footnote 62 at 210.

longer any need to acknowledge such differences and correspondingly no easy reason to reject the application of American decisions.

The Canadian Charter of Rights and Freedoms

When the Supreme Court of Canada was created in 1875 the following comment was made in the *Canada Law Journal*:

> The Supreme Court will find a series of well-reasoned decisions on constitutional questions by the Supreme Court of the United States, which will be useful as furnishing general principles of constitutional interpretation applicable in a great measure to the federal system of Canada.[67]

Although the constitutional cases of 1875 referred to did not involve *Charter* issues, the quotation is appropriate today — that is, the Court will find a series of decisions by American courts useful in furnishing general principles of constitutional interpretation with respect to the *Charter*. Do the decisions of provincial Courts of Appeal and the Supreme Court of Canada concerning the interpretation of *Charter* provisions in fact support the contention that American case law will assume increasing importance?

Due to the fact that the statistics presented in the early part of the paper concluded with the 1982-83 Term, *Charter* cases are excluded. The first *Charter* cases were heard by the Supreme Court in the October session of the 1983-84 Term. As of 1 October 1985, nine cases have been decided by the Supreme Court of Canada dealing with *Charter* issues.[68] Of these cases, seven contain references to American cases while one further case refers to American cases on a non-*Charter* issue.[69]

In *Operation Dismantle* v. *The Queen* American cases were cited when counsel for the Canadian government argued that the Court should adopt the "political questions" principle of American constitutional law. This idea was rejected. Other decisions citing American cases illustrate potential limits on the use of such authorities. It is of interest that in *Hunter* v. *Southam Inc.* the initial point made by Dickson C.J. is that the history of the United States may influence the weight accorded American cases.[69a] This view is reminiscent of one expressed in relation to the *Bill of Rights*: the different nature of the American and Canadian constitutions made American case law irrelevant. Now we have a constitution similar in principle to that of the United States. However, the meaning of the words of the constitution, although similar, is conditioned by a different historical context. History creates values; history has also created certain differences in the wording of the American *Bill of*

[67] *Supra*, footnote 48 at 237.

[68] *Hunter et al.* v. *Southam Inc.*, [1984] 2 S.C.R. 145; *Operation Dismantle Inc.* v. *The Queen*, [1985] 1 S.C.R. 441; *Le Procureur général du Québec* v. *Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66; *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357; *The Queen* v. *Big M. Drug Mart Ltd. et al.*, [1985] 1 S.C.R. 295; *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 58 N.R. 1; *The Queen* v. *Therens*, [1985] 1 S.C.R. 613, 18 C.C.C. (3d) 481; *Trask* v. *The Queen*, [1985] 1 S.C.R. 655, 18 C.C.C. (3d) 514; *Rahn* v. *The Queen*, [1985] 1 S.C.R. 659, 18 C.C.C. (3d) 516; *Krug* v. *The Queen*, [1985] 2 S.C.R. 255; and *Spencer* v. *The Queen*, [1985] 2 S.C.R. 278.

[69] *Spencer* v. *The Queen*, *ibid.*

[69a] See also, *infra*, "The Charter in the Courts of Appeal".

Rights and our *Charter*, which suggests that while courts should consider American cases in terms of broad principles, caution ought to be applied in relying upon particular decisions as precedent. As Dickson C.J. said: "The terms of the Fourth Amendment are not identical to those of s. 8 and American decisions can be translated to the Canadian context only with the greatest caution."[70] This point is also made in *The Queen* v. *Big M Drug Mart Ltd.* and *The Law Society of Upper Canada* v. *Skapinker* in which Estey J. makes references only of the most general nature.

Finally, Chief Justice Marshall of the United States is referred to in two cases with respect to the techniques or principles of American constitutional construction; again this reference is for very general application.[71] Wilson J. referred to present Chief Justice Burger with respect to the general point that there must be a change in analytic approach when considering the *Charter*.[72]

The Charter in the Courts of Appeal

In order to obtain a more complete picture of the use of American cases in interpretation of the *Charter*, decisions of various provincial courts of appeal were reviewed. A detailed discussion of the *Charter* is not intended, but in presenting the information obtained, some excursion into *Charter* issues becomes inevitable. In order to simplify matters the *Canadian Rights Reporter* (C.R.R.) was consulted for court of appeal decisions[73], as well as the *Canadian Weekly Law Sheet*[74]. Omitted were decisions of appeal court judges sitting in Chambers.

Using the month and year of the rendering of the judgments the following statistics were obtained:

Table Six

Percentage of Charter cases from Courts of Appeal in which an American Case is cited.

Period	Number of Cases	Number with U.S.	Per Cent
1982	10	1	10
1983	78	26	33
1984	90	29	32
1985	20	8	40
Total	198	64	32

The 198 cases examined were divided into those containing legal rights issues in criminal cases (sections 7-14) and those containing fundamental

[70] *Hunter* v. *Southam, supra,* footnote 68 at 161.

[71] *Law Society of Upper Canada* v. *Skapinker,* and *Hunter* v. *Southam Inc., supra,* footnote 68.

[72] *The Queen* v. *Big M. Drug Mart Ltd., supra,* footnote 68.

[73] The C.R.R. was surveyed to volume 14, part 2.

[74] The Weekly Sheet was surveyed to Number 8546, 15 November, 1985.

freedom issues and legal rights issues in a non-criminal setting. The following statistics were obtained:

Table Seven

	Number of Cases	Cases with U.S. law	Per Cent
Criminal	156	51	33
Non-criminal	42	13	31

At present it seems clear that American cases enjoy no greater use in criminal than in non-criminal cases.

As with the Supreme Court cases, *Charter* cases were divided by province and territory. Decisions of the Federal Court were also included.

Table Eight

Percent of Cases that Contained a Citation of a U.S. Case

Origin	Number of Cases	Per Cent
Ontario	62	52
Alberta	12	50
Federal Court	10	40
P.E.I.	5	40
British Columbia	31	39
N.W.T.	3	33
New Brunswick	4	25
Nova Scotia	23	22
Manitoba	19	11
Saskatchewan	18	0
Newfoundland	18	0
Quebec	5	0
Yukon	1	0
C.M.A.C.	1	0
Total	198	

I will allow the above Table to speak for itself, and will only comment that the low position of Saskatchewan in this Table corresponds to that province's position in Table Four.

A review of cases involving the use of American decisions yields mixed signals from judges, although an early decision of the Ontario Court of Appeal is clear:

> ...no doubt the decisions of courts of the United States of America may be persuasive references in some cases under our new Charter but it is important that we seek to develop our own model in response to present values on the facts of cases as they arise rather than adopting the law of another country forged in response to past events.[75]

[75] *R.* v. *Carter* (1982), 2 C.R.R. 280 (Ont. C.A.) at 283.

The signal of independence through the articulation of a perceived need to shape the interpretation of the rights and freedoms in the *Charter* by reference to Canadian values, history and a tradition of protection of civil liberties, is consistent with the opinion of Zuber J. in the *Altseimer* case that the *Charter* was not intended to transform our legal system.[76] The significance of different legal histories and traditions surfaced with respect to freedom of the press in *Re Global Communications Ltd.*, in which Thorson J.A. for the Ontario Court of Appeal referred to a "different tradition of legal history".[77]

The caution sounded by Dickson J. (as he then was) in the Supreme Court of Canada in *Hunter* v. *Southam Inc.*[78] regarding use of American case law was repeated in *R.* v. *MacAusland*[79] in the Supreme Court of Prince Edward Island, while the Ontario Court of Appeal in *R.* v. *Rao* considered that

> ... the omission from s. 8 of the *Charter* of a warrant provision similar to that contained in the second clause of the Fourth Amendment signals caution in the extent of the use of the American jurisprudence under the Fourth Amendment. There is an additional reason for the exercise of caution in the use of American jurisprudence. The case law under the Fourth Amendment is replete with refined distinctions which, in my view, ought to be avoided in developing our jurisprudence under s. 8 of the *Charter*.[80]

A sharp rejection of American law was made by Seaton J.A. of the British Columbia Court of Appeal in *R.* v. *Collins*[81] with regard to the exclusionary rule of evidence. Under the *Charter*, this rule is contained in section 24(2) which states that evidence obtained in a manner that infringed an individual's constitutional rights may be excluded if its admission would "bring the administration of justice into disrepute". The mandatory exclusion rule developed in the United States was clearly rejected by Seaton J.A. who stated that American experience with respect to automatic exclusion taught that such exclusion would bring the administration of justice into disrepute. This view is shared by the Manitoba Court of Appeal in *R.* v. *Pohoretsky*.[82]

Encouragement of the use of American cases has occasionally appeared. In a case involving the validity of a reverse onus provision, Stevenson J. of Alberta was of the view that "considerable assistance" could be gained from their use, and noted that in the appeal before the court there had been no reference to American authorities.[83] Tarnopolsky J. of the Ontario Court of Appeal thought it "useful" to consider U.S. cases in a search and seizure case

[76] *R.* v. *Altseimer* (1982), 2 C.R.R. 119, 38 O.R. (2d) 783 (C.A.).

[77] (1984), 7 C.R.R. 22 (Ont. C.A.) at 37.

[78] *Supra*, footnote 68.

[79] (1985), 14 C.R.R. 179 (P.E.I.S.C.).

[80] (1984), 10 C.R.R. 275 (Ont. C.A.) at 299.

[81] (1983), 5 C.R.R. 1 (B.C.C.A.).

[82] (1985) 14 C.R.R. 328 (Man. C.A.).

[83] *R.* v. *Stanger* (1983), 6 C.R.R. 257 (Alta. C.A.).

(section 8),[84] but the other justices[85] were less enthusiastic, considering them to be of no assistance in the circumstances.

There has been a noticeable difference of opinion in the Federal Court of Appeal. In *Ziegler* v. *Hunter* Marceau J. stated:

> The provisions of s. 8 of the Charter correspond to those of the Fourth Amendment of the *United States Constitution*. The position of the United States Supreme Court ... should be directly on point and of incomparable value as a guide.[86]

However, in *M.N.R.* v. *Kruger*, in which Marceau J. dissented, Pratte J. stated:

> There is a striking similarity between the language of [section 8] and the first clause of the Fourth Amendment to the United States Constitution. However, it would be dangerous, in my view, to rely on American precedents in interpreting s. 8 since the second clause of the Fourth Amendment, which has no counterpart in the *Charter*, has greatly influenced the American decisions on this subject.[87]

In *Howard* v. *The Presiding Officer of the Inmate Disciplinary Court of Stony Mount Institution*[88], MacGuigan J. thought that "on balance ... the American precedents are helpful."

One American case has been extensively quoted — that of *Barker* v. *Wingo*[89] — with respect to interpretation of section 11(b) of the *Charter*; the judgment of Powell J. has been enthusiastically welcomed by Canadian courts. Powell J. outlined four factors to be considered in a determination of whether there has been a denial of the right to a speedy trial.[90] Also, a case based on section 7 of the *Charter* made extensive use of American decisions. In *R.* v. *Robson*[91] the British Columbia Court of Appeal was faced with a challenge to the constitutional validity of legislation authorizing the police to suspend a driver's licence for 24 hours if the driver showed symptoms of alcohol consumption. Relying heavily on U.S. (case law) to invalidate the legislation, there appeared for the first time a qualification on the use of such cases. Esson J.A. stated: "American decisions are not, of course, to be treated as conclusive and due regard must be had to the differences in wording between the two documents and in the history, traditions and attitudes between the two countries."[92] Active use of U.S. cases, accompanied by activism on the part of the court, created self-consciousness about using the American law.

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[84] *R.* v. *Simmons* (1984), 8 C.R.R. 333, 45 O.R. (2d) 609 (C.A.).

[85] Howland C.J.O., Martin, Lacourcière and Houlden JJ.A.

[86] (1983), 8 C.R.R. 47 (Fed. C.A.) at 58.

[87] (1984), 12 C.R.R. 45 (Fed. C.A.) at 51. Ryan J. concurred with Pratte J.

[88] Unreported, judgment rendered 1 March 1985.

[89] 92 S.Ct. 2182, 407 U.S. 514 (1972).

[90] *R* v. *Antoine* (1983), 4 C.R.R. 126 (Ont. C.A.) is the leading case. Citation of *Barker* v. *Wingo* accounts for eight cases, 12 *per cent* of those in which a U.S. case was cited.

[91] (1958), 31 M.V.R. 220 (B.C.C.A.).

[92] *Ibid.*, at 230.

Finally, there is the possible use of American cases to justify application of section 1 of the *Charter*[93], although it has been suggested that the interpretive approach required by section 1 will consequently limit the use of American authorities.[94] In many cases, however, there is a token reference to American cases,[95] perhaps out of courtesy to counsel.

Conclusion

Use of American law has been a feature of Canadian judicial decision-making since Confederation. The questions created by the *Charter* are only beginning to arise; the appropriate status of American cases will continue to be debatable. What this paper has attempted to do is give a background upon which to build, by filling in gaps in our knowledge about the use of American decisions and examining the corresponding process of judicial decision-making, with particular focus on civil liberties and the *Charter*. The input of values into decision-making is obvious, and nowhere more so than with civil liberty issues.

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[93] See *R.* v. *Bryant* (1984), 11 C.R.R. 219 (Ont. C.A.), *per* Houlden J.A. at 240.

[94] *Reference re Public Service Employee Relations Act* (1984), 35 Alta L.R. (2d) 124 (C.A.) *per* Kerans J.A. at 132.

[95] See *Re Skapinker* (1983), 3 C.R.R. 211 (Ont. C.A.); *Southam Inc.* v. *Hunter* (1983), 4 C.R.R. 368 (Alta C.A.); *R.* v. *Villeneuve* (1983), 4 C.R.R. 1 (Ont. C.A.); *R.* v. *Southam* (1983), 6 C.R.R. 1 (Ont. C.A.); *Re Donald and the Law Society of British Columbia* (1983), 7 C.R.R. 305 (B.C.C.A.); *R.* v. *Speid* (1983), 7 C.R.R. 39 (Ont. C.A.); *R.* v. *Konechny* (1983), 6 D.L.R. (4th) 350 (B.C.C.A.); *Basile* v. *Attorney General of Nova Scotia* (1984), 8 C.R.R. 374 (N.S.C.A.); *R.* v. *Dubois* (1984), 9 C.R.R. 61 (Alta C.A.); *R.* v. *Noble* (1984), 12 C.R.R. 138 (Ont. C.A.); *Reference re Justices of the Peace Act* (1984), 12 C.R.R. 12, (Ont. C.A.); and *Reference re Education Act of Ontario and Minority Language* (1894), 11 C.R.R. 17, 10 D.L.R. (4th) 491 (Ont. C.A.).

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