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Using Citation Analysis to determine the use of information sources  
from the European Union by Judges of the Supreme Court of Canada

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Can a Supreme Court library be virtual? This conference attests to the efforts of member countries of the European Union, and others around the world to make the laws of their countries and judgments from their court systems freely accessible on the Internet, and to improve the production of electronic legal materials. However, a strong print collection remains the backbone of appeal court judgment writing and law reporting in Canada, and, I suspect, elsewhere around the world. The impact of digitization projects for historical materials will be less relevant than comprehensive digital preservation strategies and robust authentication of digital copies in moving court reporters and judges to adopt citations to electronic resources as their exclusive source of reference.

This paper is organized in three parts. The first part presents background information on the Supreme Court of Canada and its library. The second part presents and discusses the results of a research project at the Supreme Court of Canada Library to determine the nature and extent to which the Library's research collection of print and electronic sources meets the information needs of the Judges and lawyers working at the Court. The study covers the period 2006 and 2007 and used the reference lists of decisions in the judgments of the Supreme Court for those years as data sources. The outcome of the study was that citation analysis is one valid measure of the use of print and electronic sources in the library's collection, and the degree of success the Library has in fulfilling its mandate of providing the information base the Court requires to render decisions of national importance. I

The third part discusses the use of European Union and international legislative and case law sources in the decisions of the Supreme Court of Canada through further citation analysis, and discusses in a preliminary way the possible influences on the judges of access to EU legal information in electronic format.

## Context

To situate the Supreme Court of Canada, it is important to understand a little about the organization of Canada's judicial system. By virtue of the Constitution Act, 1867, authority for the judicial system in Canada is divided between the federal government and the ten provincial governments. The provincial governments control "the administration of justice" in their respective provinces, which includes jurisdiction over "the constitution, organization and maintenance" of the courts, both civil and criminal, in the province, as well as civil procedure in those courts.

The courts in Canada are organized in a four-tiered structure. The Supreme Court of Canada sits at the apex of the structure and hears appeals from both the federal court system, headed by the Federal Court of Appeal and the provincial court systems, headed in each province by that province's Court of Appeal.<sup>1</sup>

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<sup>1</sup>Supreme Court of Canada website "About the Court"  
<http://www.scc-csc.gc.ca/court-cour/sys/index-eng.asp> viewed on Oct. 22, 2008.

Additionally, Canada has a bijural legal system. The Civil Law of Quebec co-exists with the Common Law of the other provinces and territories. By law, 3 of the 9 judges of the Supreme Court are appointed from the Province of Quebec and are trained in both civil and common law. Bilingualism in both of Canada's official languages is also an asset for Supreme Court judges. Seven of the eight sitting judges are bilingual in both English and French and we are waiting for the appointment of a ninth judge to fill a vacancy left by the retirement of Justice Michel Bastarache. The nominee, a Court of Appeal justice from the Province of Nova Scotia, is known to be fully bilingual.

Canada is a federal democracy with a constitution that guarantees the fundamental rights and freedoms of every person in the country. Since 1982, these guarantees have been found in a constitutional Bill of Rights, which is called the *Canadian Charter of Rights and Freedoms*.

### Library of the Supreme Court

The Library of the Supreme Court of Canada is a statutory library, constituted by authority of the Supreme Court of Canada Act, which reads:

16. The Registrar shall, under the supervision of the Chief Justice, manage and control the library of the Court and the purchase of all books therefor. <sup>2</sup>

The Library consists of a staff of 16, and houses a collection of approximately 350,000 print volumes, as well as extensive electronic resources which are delivered to the judges and staff of the Court via a robust intranet. Customized current awareness products are created by the library staff and pushed to the desktop - these include a daily media monitoring service covering any mention of the Court and its decisions in the Canadian media, as well as media coverage of the International Criminal Court, the European Court of Human Rights, the Supreme Courts of other commonwealth countries and trends in judicial administration; a monthly compilation of the major decisions released by high courts in foreign jurisdictions, including the UK, Australia, New Zealand, France, the European Court of Human Rights, the USA and the South African Constitutional Court; bibliographies on case commentaries on Supreme Court judgments rendered and case commentaries on scheduled cases; and an occasional review of new websites and links of interest.

Library staff work together with a Judges' Library Committee to design and validate the usefulness of new product offerings, and the tools are customized to meet the information needs of the Court within constraints of budget, resourcing issues and staff language skills. For example, although the judges have requested that additional High Courts from the European Union countries be monitored, library staff lack the language competencies to include judgments from foreign courts unless they are available in either English or French. The availability of RSS feeds from foreign courts, as well as digests or headnotes in either English or French, improves

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<sup>2</sup>Revised Statutes of Canada 1985, c. s-26, s. 16

the likelihood that decisions will be included in our products. Similarly, the library limits its purchases in print to books in either English or French, although from time to time other language materials will be acquired on special request.

Our interest in measuring citations against the library collection is to assure ourselves that the collection satisfies our judges and lawyers specific needs, and that the editors of the Supreme Court Reports can verify references cited in the Court's judgments using our print and electronic collection. Additionally, we hope that future researchers will be able to rely on our collection for access to the background documentation which influenced the judges' thinking.

## Methodology

The study used citation analysis as the method. Essentially, the method comprised the analysis and measurement (counting) of citations into predetermined categories; quantification and ordering/ranking of the categories; analysis of data against the Supreme Court Library's catalogue of held print and electronic titles; and interpretation of the data.

As a data source, the study looked at all the references cited in Supreme Court of Canada decisions rendered in 2006 and 2007. No sample was taken. The Court renders, on average, 75 judgments on appeal each year.<sup>3</sup> In 2006, 79 appeal judgments were released; 4 were rendered from the bench with no written reasons. A number of related cases were heard together. In total 59 judgments are available from 2006 for analysis. In 2007, 58 appeal judgments were released; 2 were pronounced from the bench with no written reasons following. Including one case where the appeal was combined, there are a total of 55 judgments available for analysis from 2007.

The 114 judgments provided a total of 3,848 citations for the two year period, and the mix of cases heard was fairly representative of the Court's normal caseload, although the number of appeals heard in 2006 was 12% lower than the average number of appeals heard over the previous 10 years (91),<sup>4</sup> and accounts for the lower number of judgments rendered in 2007.

Using the electronic version of the judgment reported by the Court to LexUM<sup>5</sup>, a library assistant captured the complete citation from the Cases, Statutes and Regulations, and Authors (secondary sources) Cited sections of the judgments, and downloaded it into an Excel spreadsheet. The data was organized by the judgment's neutral citation, and by broad category (case law, legislation,

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<sup>3</sup>Based on appeal judgments rendered between 1997 and 2007. Source: "Statistics: 1997 to 2007" Supreme Court of Canada, Bulletin of Proceedings, Special Edition, 2008.

<sup>4</sup>"Statistics: 1996 to 2006" Supreme Court of Canada, Bulletin of Proceedings, Special Edition, 2007, p.1.

<sup>5</sup>[www.scc.lexum.umontreal.ca/en/index.html](http://www.scc.lexum.umontreal.ca/en/index.html)

and secondary sources). Subsequently, the library assistant verified whether the cited references were owned by or whether access was provided electronically by the Library through free or for-a-fee services, whether the item had been acquired from another library through interlibrary loan and whether the item was only available in electronic format, or both print and electronic format.

In order to answer the secondary question on the use of European Union materials by the Supreme Court of Canada, a further analysis of primary and secondary materials was conducted, to isolate the foreign cases, legislation, and international treaties and conventions cited.

## Findings

In 2006, of the total 1,701 citations in the Supreme Court judgments, 1182 (or 69%) reference case law, 277 (or 16%) of the citations are for statutes and regulations, while 242 (14%) of the citations are for secondary sources (articles, books and parliamentary reports or Hansard, for example).

Of the 2,147 citations in the 2007 judgments, 1413 (65.8%) of the citations were to case law, 261 (or 12%) referred to legislation (statutes, regulations or treaties), and 473 references (22%) were to secondary material.

Since the main purpose of our study was to determine whether our Library's print collection was meeting the judges' needs, each citation was examined against the Library's catalogue. Predictably, the vast majority of all jurisprudence, legislation and secondary sources cited were available in the Library's print collection.

In 2006, 93% of the cited material was available in our print collection of books, journals and primary source material. Another 4% were available in a fee-based electronic resource licensed by the Library, and 1% was obtained through interlibrary loan. In all, almost 99% of all cited sources could be accessed by the Judges using the Library's print and electronic resources. Only slightly more than 1% of the citations were to sources that were not represented in the Library's collection.

In 2007, 88.6% of the citations could be found in the print collection, while 5.3% were available only in electronic databases licensed by the Library, and an additional 2% were obtained through interlibrary loan. Overall, the fulfillment rate dropped to 95.9% from the Library's collection, while 4.1% of cited references were not available in the Library's collection.

Predictably, material cited that was not available in the print collection fell into distinct categories:

- unpublished cases
- cases from foreign jurisdictions (i.e. Hong Kong, Fiji)
- provincial board or tribunal cases (i.e. Alberta Public Utilities Board, Atomic Energy

- Control Board)
  - cases cited from a reporter only available electronically
  - International treaties and agreements
  - First Nations treaties
  - City By-laws
  - Draft legislation or legislation that was not available in a published print format at the time the judgment was written
  - world wide web publications
  - Senate and Legislative Committee hearings
  - foreign government publications
  - foreign law reviews
  - Canadian government publications
  - Income Tax Rulings
  - International Organization publications
  - provincial legislative debates
  - provincial government reports

Looking at Figure A, it becomes much more obvious that although case law and legislation is largely available through print or electronic sources, the Library's collection fares less well in supplying the Judges' needs for secondary sources.

Figure A	Cases		Legislation		Secondary		Total	
	2006	2007	2006	2007	2006	2007	2006	2007
Number of Items								
In SCC Print	1115	1330	270	245	197	327	1582	1902
Not in SCC Print	64	83	7	16	45	74	116	173
ILL Service	6	1	4	3	11	40	21	43
Other (electronic access)	47	69	5	12	21	32	73	113
Combined Availability at SCC Lib	1168	1400	279	260	229	399	1676	2059
From other, non-library sources	14	13	-2	1	13	2	25	88
Total # Cited in Decision	1182	1413	227	261	242	401	1701	2147

In 2006, while 97% of legislation cited, and 94% of cases cited were available in print in the Library's collection, only 81% of secondary material was available in the print collection. Overall availability of cited references (in print, in electronic format and via interlibrary loan) through the Library was 99% in 2006.

In 2007, availability of case law remains fairly constant in print, at 94.1%; however the availability of legislative material cited drops to 93.9%, while 81.5% of secondary material is available in the print collection. With the addition of electronic sources and interlibrary loan, availability improves to 99.2%.

Despite availability in the print collection, we cannot be certain which format was used in the research process. The majority of all citations to case law are available in both print and electronic formats, with electronic access from fee-sources, such as LexisNexis, Westlaw, or Justis, or from a free access to the law site, such as CanLII, BAILII or EUR-LEX. Once beyond the research stage, however, the Supreme Court Reports editors have a clear and traditionally held preference to cite to the print source. Thus, the citations to electronic resources and websites in the Supreme Court judgments are a sure sign that no alternative source was available at the time the judgment was first released to the parties and posted on the Internet.

Citations in the Supreme Court judgments go through a second validation process prior to publication in the print Supreme Court Reports. At that time, a citation to a case, statute or secondary source which originally referred to an electronic only source, may be updated by the editors to cite to a published print source. The very few citations that cannot be found in print at the time of publication cite to a URL; however a print-out of the cited passage may be added to the Court file for future access.

The Library staff continue to monitor the citations in the Supreme Court appeal judgments. Work is beginning on the 2008 judgments. With the increase in availability of legal information in electronic format, the move of some jurisdictions to publish legislation in electronic format only (such as Nunavut and New Brunswick for example), and the cancellation of print subscriptions to foreign law journals and law reporters where electronic versions exist and are stable (i.e., licensed in perpetuity or available from an official source), we anticipate that the percentage of citations available in print in the Library's collection will decrease. We hope to maintain a balance between access in print and access in electronic format without any reduction in overall availability to the judges and staff of the Court.

#### Foreign case law and legislation in the Supreme Court judgments

Although the original intent of our citation analysis was not to study the actual patterns of citation by the Supreme Court judges, the data can certainly be manipulated to permit other uses. Other legal scholars, most notably Peter McCormick, Professor of Political Science at the University of Lethbridge (Alberta) have made extensive use of the citation practices of the Supreme Court of Canada to discuss the Court's preferences or reliance on persuasive authority

from other jurisdictions.

In summarizing the value of citation analysis, McCormick reasons that judges use a specific citation for a reason:

- because of the congruency of factual situation or legal context;
- because of the rigour of the doctrinal analysis or the succinctness of the conclusions;
- because of the status of a specific judge or a specific court;
- because of the extent to which it will persuade the audience of the appropriateness of the outcome.

Additionally, citations are used to demonstrate a basic knowledge of the relevant subject matter, to locate the immediate analysis in the context of established principles and standards and to add weight and credibility to the arguments being advanced.<sup>6</sup>

With over 50 years of data, covering every case in the Supreme Court Reports from 1944 onwards, Professor McCormick is in an excellent position to evaluate which judicial citations the Judges of the Supreme Court are relying on. His findings are fairly consistent with our own: overwhelmingly, the judges of the Supreme Court refer to their own prior decisions. Well over a third of the total citations fall in to this category. This ensures consistency in the application of the law. Judicial citation to other Canadian Appeal and lower Court decisions make up another large percentage (27% between 1944 and 1993) of the references in SCC decisions. Based on McCormick's historical citation analysis, deference by the Supreme Court to the Judicial Committee of the Privy Council, and to other English Courts, remained fairly high, at 28.29% between 1944 and 1993.<sup>7</sup> For the first 75 years of its existence, the Supreme Court of Canada was subject to appeal to the Judicial Committee of the Privy Council in London. However, by the turn of the new Millenium, the Supreme Court of Canada is a mature Court with no need to defer to the Courts of other jurisdictions. The citations to foreign courts and to non-Canadian legislation in the 2006 and 2007 decisions of the SCC illustrate this:

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<sup>6</sup>McCormick, Peter and Tammy Praskach "Judicial Citation, the Supreme Court of Canada, and the Lower Courts: A Statistical Overview and the Influence of Manitoba" *Manitoba Law Journal* 24 (2) at pp.338-339.

<sup>7</sup>*Ibid.*, p. 341.

	Foreign Sources Cited	Legislation	Cases	Total
Australia	8	15	23	
EU	0	4	4	
France	3	13	16	
International	10	4	14	
Israel	1	4	5	
New Zealand	1	5	6	
Switzerland	1	1	2	
UK	12	89	101	
US	6	59	65	
<b>Total</b>	<b>42</b>	<b>194</b>	<b>236</b>	

Figure C - 2006 Citations to non-Canadian cases and legislation

	Foreign Sources Cited	Legislation	Cases	Total
Australia	4	3	7	
East Africa	0	1	1	
Hong Kong	0	1	1	
International	8	0	8	
South Africa	0	1	1	
UK	4	68	72	
US	15	33	48	
<b>Total</b>	<b>31</b>	<b>107</b>	<b>138</b>	

Figure D - 2007 Citations to non-Canadian cases and legislation

Whereas in the 50 years between 1944 and 1993 the Supreme Court cited to foreign court decisions (UK, US and other countries) 34.59% of the time, by 2006 and 2007 the percentage had dropped to 9% and 13.7% respectively. Cases from the UK, followed by the US, still predominate. We are starting, however, to see an increase in the importance of Australia, the European Court of Human Rights, the South African Constitutional Court and the Israeli Supreme Court.

But far from seeing a decline in the influence of international law on domestic law, judges and legal scholars alike agree that globalization has had a profound effect on judging. Globalization in judging means that courts now look all over the world for sources of persuasive authority, particularly in the areas of human rights law, trade, terrorism, extradition, and intellectual property, to name just a few. Courts throughout the world face similar issues, communications technology has improved access to international documents, legislation and jurisprudence from around the world and judicial exchanges and conferences such as this one also contribute to a growing interest in international law.<sup>8</sup>

In a recent speech given by Chief Justice Beverley McLachlin on “judicial globalization” she remarked that “National courts are increasingly influenced by law beyond their borders. This happens in two distinct processes. The first is the process of incorporating into domestic law values from international treaties and customary law to which the court’s country has subscribed, whether or not the treaties and conventions have been incorporated into domestic statutes. The second is the .... much more diverse and messy process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international law.”

Among the reasons that the courts cite to foreign and international legislation and cases are:

- to uphold their country’s international treaty obligations;
- from a desire to harmonize rules with those in force in other jurisdictions, particularly in areas such as trade and intellectual property;<sup>9</sup>
- to persuade by giving evidence of foreign support for the legal reasoning of the domestic court;
- to bolster the legitimacy of the judges’ decision by showing its consistency with the decisions of other judges in jurisdictions which share a common legal or cultural heritage;
- simply to provide a survey of the jurisprudence or legislation on a similar area of law in other jurisdictions;
- for direction in new areas of the law which have not yet been tested within the borders of their own country and/or where another country is known to be a leader.

In the past two years, the Supreme Court has cited to foreign and international law in 57 of its 114 decisions(50%). Figure E illustrates the areas of law covered by those decisions. Predictably there are cases which discuss human rights, international trade, extradition, etc., where references to EU law, to international treaties and to the experiences in other countries might reasonably be expected to provide guidance to Canadian jurists.

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<sup>8</sup>L’Heureux-Dubé, Claire. “From Many Different Stones: A House of Justice.” (2003) 41:3 Alberta Law Review, p.661.

<sup>9</sup>Bachand, Frédéric. “The “Proof” of Foreign Normative Facts which influence Domestic Rules,” (2005) 43:3 Osgoode Hall Law Journal, pp. 269-288.

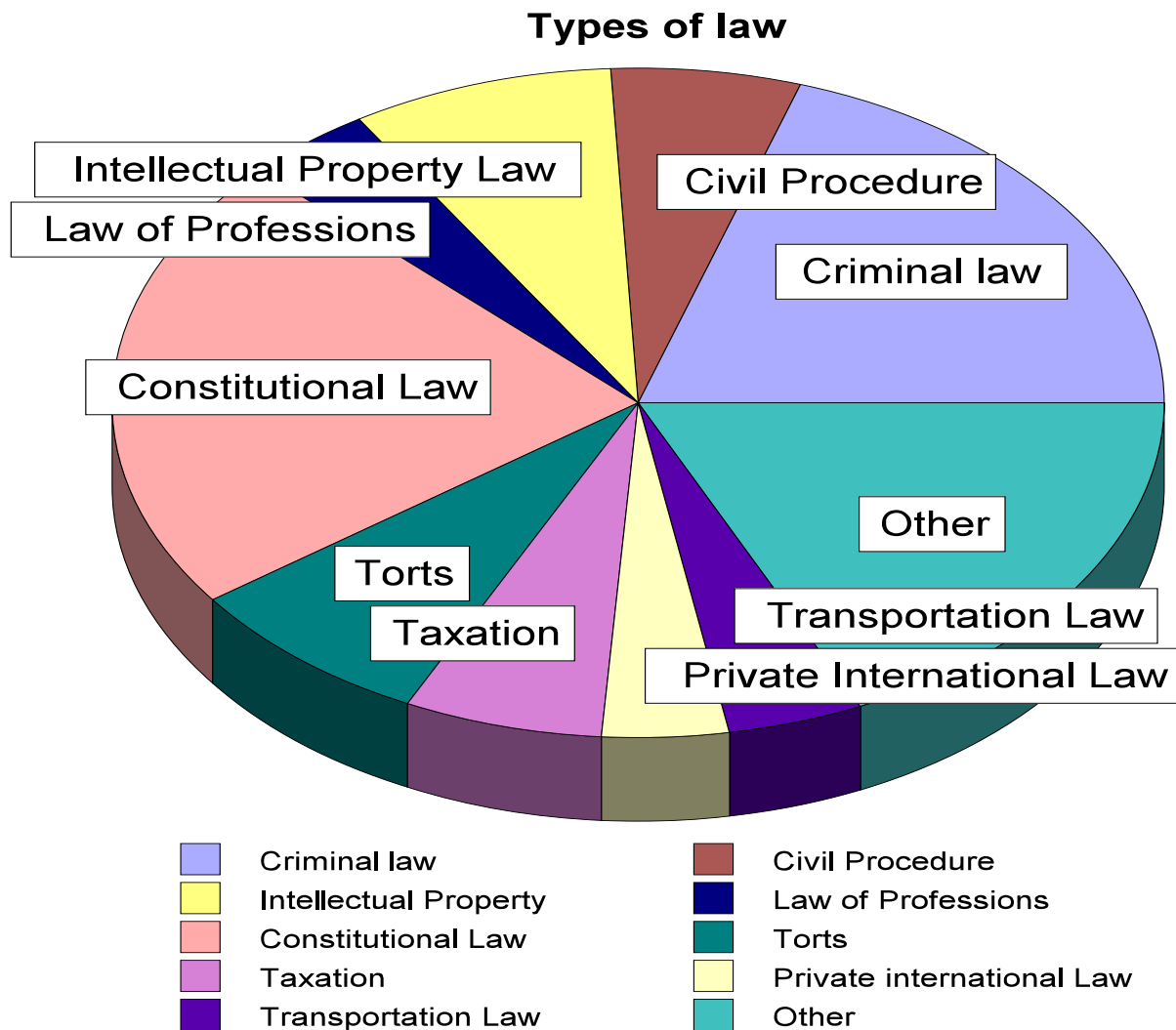


Figure E

As an example, the case of *Pecore v. Pecore*, 2007 SCC 17 looks at the presumption of advancement in a dispute over a gratuitous transfer, where a father held a joint bank account with his daughter. The father died, leaving his estate to be divided equally between the daughter and her spouse. The daughter subsequently was divorced from her husband, but retained control over the bank account. In arguing the case, the Court referred to one of the earliest documented cases where a judge applied the presumption of advancement, a 17th century British decision : *Grey (Lord) v. Grey (Lady)* (1677), Rep. Temp. Finch 338, 23 E.R. 185. The Court goes on to review

the case law in both Canada and the United Kingdom with respect to the evidence required to rebut a presumption, and looks at the issue of gifts as a right of survivorship in Australia and the United States. In the dissent, Abella J reviews the legislation on the origins of the presumption of resulting trust, referring to the British Statute of Uses, 1535, 27 Hen. 8, c. 10, and then surveying the legislation in eight of the Canadian provinces.

This example illustrates that there seems to be a move toward a certain degree of harmony among different jurisdictions, however context remains very important, as does a shared cultural heritage. In a recent speech given at the University of Moncton, retired Justice Michel Bastarache of the Supreme Court stated : "Harmony does not mean uniformity," The judge went on to say that while courts in some countries do what is called "judicial borrowing" from other countries, citing decisions from other countries in decisions affecting cases in their own, it is vital to recognize that systems of law address the specific circumstances of the societies they govern.

Supreme Court justices often cite rulings from other countries in their decisions, but never as a means to guide those decisions. Justice Bastarache is quoted as saying:

"Such instruments are treated only as sources of support," meaning international decisions are used only to back up domestic precedents. The Supreme Court can be persuaded by international decisions, but it cannot be bound by them.<sup>10</sup>

This appears to be consistent with judicial thinking in the European Union as well, as illustrated by the following extract from a recent case in the Court of First Instance of the European Union, which decided on a trade mark case involving Lego:

En premier lieu, s'agissant de la référence de la grande chambre de recours à une décision de la Cour suprême du Canada et du fait qu'elle aurait écarté un arrêt rendu aux Pays-Bas, il suffit de relever que la requérante elle-même reconnaît que les décisions de juridictions nationales sont sans incidence sur les décisions des chambres de recours de l'OHMI. En effet, le régime communautaire des marques est un système autonome et la légalité des décisions des chambres de recours s'apprécie uniquement sur la base du règlement n° 40/94, tel qu'interprété par le juge communautaire [voir arrêt du Tribunal du 12 mars 2008, Suez/OHMI (Delivering the essentials of life), T-128/07, non publié au Recueil, point 32, et la jurisprudence citée]. Par ailleurs, il ressort de la décision attaquée que la grande chambre de recours n'a pas appuyé sa décision sur la décision canadienne, mais que, ayant déjà conclu à la fonctionnalité de la brique Lego, elle a observé que son analyse était confirmée par la jurisprudence de nombreuses juridictions nationales, y compris par l'arrêt de la Cour suprême du Canada.<sup>11</sup>

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<sup>10</sup>Fredericton Daily Gleaner, November 13, 2008, p. A3

<sup>11</sup>Lego Juris A/S c. Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI), Le Tribunal De Première Instance Des Communautés Européennes

The dialogue between Courts, in Canada and in Europe, the United States, Australia, New Zealand and Africa is facilitated by the Internet, which has played a major role in the growing trend of internationalization of the law, as it gives arbiters of the law greater access to foreign judgments. It also has led to more communication among judges in different parts of the world, leading to "a real break in isolation and an opportunity to consult."<sup>12</sup>

While there is no empirical evidence gathered as part of this study which would suggest that the internet has increased the number of citations to international and foreign law in Supreme Court decisions, it is certain that research is facilitated by access to electronic databases and internet sites which provide the full text of judicial decisions and legislation. However, percentage-wise, more references in the SCC decisions are to the official or print version of the cited case or statute, even when the case is available in electronic format.

The Association of Reporters of Judicial Decisions, an international association which represents the interests of courts which officially report decisions relied upon for their precedential value, recently issued a Position Paper on "Official" Online Documents.<sup>13</sup> In it, the Association states that until issues of authenticity and preservation are resolved through encryption, digital signatures or some other computerized process to safeguard documents from tampering and until such time as the permanency of digital publications is guaranteed, through successive electronic media migrations, the "official" version of court decisions and government publications should remain the print. Any discrepancy between electronic and print versions should be resolved through consultation of the "official" print version, and no government publication should be declared "official" in its electronic format without meeting the test for authentication and permanence.

Courts will continue to cite to the print versions of cases and legislation, even in the face of growing availability of electronic versions, until such time as those digital sources are recognized as "official". Courts will likewise rely on libraries to collect the print versions of law reports, statutes and regulations, in order to ensure that future generations can verify and locate the source material relied upon by the judges in their decisions. The Supreme Court of Canada Library is meeting this need by balancing a strong print collection with access to electronic databases and internet sources as a means of access, particularly to recent cases not yet published in print. When jurists no longer feel the need to cite to the print in their judgments, we will know that

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(huitième chambre), T-270/06, 12 novembre 2008, at para. 91.  
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=fr>

<sup>12</sup>Fredericton Daily Gleaner, op cit., p. A3

<sup>13</sup>Association of Reporters of Judicial Decisions, "Statement of Principles on "official" online documents," May 2008, viewed on November 10, 2008 at [http://arjd.washlaw.edu/ARJD\\_Statement%20of%20Principles\\_May2008.pdf](http://arjd.washlaw.edu/ARJD_Statement%20of%20Principles_May2008.pdf)

digital legal information has truly come of age.