KEYNOTE ADDRESS: THE USE OF FOREIGN LAW—A COMPARATIVE VIEW OF CANADA AND THE UNITED STATES

This address was delivered by Beverley McLachlin, P.C., Chief Justice of Canada, at 5:30 p.m. on Friday, March 26, 2010.

Today, we have in our vocabulary a new word, loved by some, embraced by others. That word is “globalization.” The great debate over this phenomenon usually focuses on economic and social effects. But globalization has also had an impact on the law. As Justice Bertha Wilson, a former colleague at the Supreme Court of Canada, explained, “more and more courts, particularly within the common law world, are looking to the judgments of other jurisdictions.”1 Of course, the exchange of legal knowledge across state boundaries is nothing new.2 What is new is the speed and the amount of jurisprudential exchange. Some welcome this exchange as enriching. Others fear that the bombardment, if left unchecked, may erode the fundamental values upon which their nation’s legal systems rest. Focusing on the Canadian and American approaches, it is this controversy that I wish to address.

Allow me to begin with Canada. In their early history, Canadian courts were on the receiving end of foreign law. In fact, their job was largely to apply foreign law, albeit in the Canadian context. But even when Canada achieved full independence and British law was no longer binding, it remained a strong influence on the development of Canadian law, with courts making frequent references to British jurisprudence.3

Nevertheless, quietly and case by case, Canadian courts were developing their own law. Increasingly, reliance was placed on Canadian cases. Still, the old appetite for foreign law, while abated, remained robust, with approximately one out of every three citations being to a foreign source.4 Interest in foreign jurisprudence was renewed once again after the enactment of the Canadian Charter of Rights and Freedoms in 1982. In the first ten years of Charter appeals, the use of American authorities doubled, from three percent to almost seven percent.5 In its very first Charter case, the Supreme Court noted the importance of the American experience interpreting the Bill of Rights: “The courts in the United States have had almost two hundred years experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts.”6

And with good reason. American courts had been wrestling with issues like freedom of speech, liberty, and equality for more than two centuries. Why would Canadian judges, confronted with these issues, not look to the United States?7

5 Id.
7 Canadian Council of Churches v. Can. (Minister of Employment and Immigration), [1992] 1 S.C.R. 236 (in which the court compared the Canadian position to the position taken by courts in the United Kingdom, the United States, and Australia); Charkaoui v. Can. (Citizenship and Immigration), 2007 SCC 9, [2007] 1 S.C.R. 350 (in which the court relied on the use of special council in the United Kingdom to demonstrate that less intrusive alternatives exist to protect the individual while keeping critical information confidential).
Yet for all their willingness to consult foreign sources, Canadian courts have made it clear that they cannot be implemented blindly. Chief Justice Dickson wrote that while “it [is] helpful to summarize the American position and determine the extent to which it should influence the . . . analysis . . . in this appeal,” we must examine American constitutional law with a critical eye.

Canada and the United States are not alike in every way, nor have the documents entrenching human rights in our two countries arisen in the same context. It is only common sense to recognize that, just as similarities will justify borrowing from the American experience, differences may require that Canada’s constitutional vision depart from that endorsed in the United States.

This, then, is the Canadian experience—one that has, from the beginning, accepted foreign law as capable of providing useful insights and perspectives, while increasingly forging its own unique jurisprudential brand.

The United States’ experience has been very different. The United States, like Canada, built its legal system on the foundation of the English common law. But over the centuries, the distinct U.S. jurisprudential experience has morphed into the inference, albeit with some exceptions, that foreign cases should not be cited in U.S. courtrooms.

In recent years this view has come under siege, with some people in the United States asking the obvious question: Why should our courts not be able to consider foreign jurisprudence when it is relevant to the question at hand?

This has sparked national debate. At the moment, U.S. jurists and political actors appear to be sharply divided on the propriety of looking beyond their nation’s borders. In a 2002 speech, Justice Sandra Day O’Connor voiced her approval of citation to foreign sources of law, noting that “while ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.” Indeed, the U.S. Supreme Court has in recent years cited foreign law in cases on capital punishment, gay rights, and affirmative action. Against this, Justice Antonin Scalia in *Lawrence v. Texas* characterized the use of foreign views in interpreting the U.S. Constitution as “meaningless” and “dangerous dicta.”

Those who condemn the practice of citing foreign law base their opposition on two principal arguments. The first argument is that citing foreign law undermines judicial legitimacy by impermissibly expanding judicial discretion. In his confirmation hearings, Chief Justice John Roberts suggested that relying on foreign precedent allows a judge “to incorporate his or her own personal preferences, [and] cloak them with the authority of precedent.”

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9 *Id.* at 740.
The second argument is perhaps more fundamental. It is that citing foreign law is inconsistent with sovereignty. U.S. law, it is argued, must reflect U.S. values and experience, and none other. Blum sums this argument up: “[T]he United States Constitution is unique and . . . the experience surrounding it is unique.” Period. End of argument.

What explains the different attitudes in Canada and the United States toward foreign jurisprudence? The explanation for our different attitudes toward foreign jurisprudence lies, I believe, in the fact that our institutions, our founding documents, and our values have been shaped by distinctly different histories. The United States arose out of a revolution against foreign authority. Canada, in contrast, never revolted against its European colonial past—we grew away from it over time. Revolution in the United States; evolution in Canada. Rejection of foreign authority in the United States; acceptance of foreign traditions in Canada.

But in my observation, the use of foreign law does not prevent national courts from expressing their own unique national character—a character based on the particular country’s history, values, and needs. Independent courts working within the rule of law will develop distinctive legal approaches and doctrines that respond to the traditions and needs of their countries. And a willingness to look at foreign law is no impediment to developing and maintaining distinctive legal approaches that respond to the particular history, values, and needs of a nation.

The critics of using foreign jurisprudence are correct to caution that improperly understood foreign cases patched on band-aid style to indigenous legal principles leads to confusion and risks betrayal of fundamental national values. But judges in democratic countries around the world are increasingly facing similar issues in interpreting constitutional guarantees such as freedom of speech, the right to privacy, and due process rights, to name but a few. To be sure, the constitution of every country is different, and we should not slavishly follow the decisions of other countries. But the thinking and experience of other nations on constitutional issues may provide a perspective which enriches our thinking about our domestic constitutional guarantees.

16 Anderson, supra note 14, at 47–49.