

**THE JUDICIAL DIPLOMACY OF THE
SUPREME COURT OF CANADA AND ITS IMPACT:
AN EMPIRICAL OVERVIEW**

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Courts and judges across the globe, including the Supreme Court of Canada, are actively engaged in a metaphorical “dialogue” through the exchange of their judicial decisions. Is it the only type of communication happening among courts and judges? This empirical study, centred on interviews with ten current and former justices of the Supreme Court and non-public archival documents, shows that courts have established regular bilateral relationships with foreign counterparts, participate in multilateral transnational judicial associations and organizations, and have occasional contacts with other foreign courts, which I call “judicial diplomacy.”

In addition to these institutional court-to-court relationships, the transnational judicial conversation occurs also between individual justices. Judges play a key role in such transnational conversations and exchanges. This article reveals that former and current justices of the Supreme Court interact with foreign and international judges not only within official meetings of the Supreme Court, or as part of the Supreme Court’s delegation, but also individually through several mechanisms.

The bilateral or multilateral foreign relationships of the Supreme Court, whether as an institution or through individual justices, should not be considered informal or unimportant as they have demonstrable effects. It is through these meetings that they exchange views on their decisions and generate substantive, procedural, and court management ideas, often turning these ideas into action, such as establishing global and regional judicial networks, judicial training institutions, or electronic networks. Ultimately, the data of this research demonstrates that this dialogue with foreign counterparts also have a broader impact on Canada’s global reputation and foreign policy.

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I. INTRODUCTION

Many have written about the transnational metaphoric “dialogue” occurring between courts and judges through the exchange of precedents.¹ The Supreme Court of Canada is considered as a major actor in this process.² The question remains whether this is the only type of communication that is happening among courts and judges. This empirical study, centred on interviews with ten current and former justices of the Supreme Court and non-public archival documents, shows that courts and judges have become increasingly involved in genuine conversations and exchange activities that transcend national borders: in other words, a kind of “judicial diplomacy.” Unlike the exchange of non-domestic legal sources, where the dialogue among courts is more of a metaphor, here the meaning is much more genuine. Courts and judges from across the globe, including the Supreme Court of Canada, actively participate in such a dialogue exchanging information and best practices amongst themselves.

Hence, whenever the phenomenon of globalization of the judiciaries is analyzed, it is impossible and even unfair to assess the “globalist” profile of a court by focusing only on the metaphoric conversations occurring through the exchange of legal sources with foreign courts. This is indeed only the tip of the iceberg. Other, more tangible, and more dynamic

¹ This list is quite longer, however, here are some of the most typical examples: Anne-Marie Slaughter, “A Typology of Transjudicial Communication” (1994) 29:1 *U Rich L Rev* 99 at 100; The Honourable Claire L’Heureux-Dubé, “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court” (1998) 34:1 *Tulsa LJ* 15 at 23–26; Sujit Choudhry, “Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation” (1999) 74:3 *Ind LJ* 819 at 835–36, 855–65; Ronald J Krotoszynski, Jr, “I’d Like To Teach the World to Sing (In Perfect Harmony): International Judicial Dialogue and the Muses — Reflections on the Perils and the Promise of International Judicial Dialogue” (2006) 104:6 *Mich L Rev* 1321.

² Gianluca Gentili, “Canada: Protecting Rights in a ‘Worldwide Rights Culture’. An Empirical Study of the Use of Foreign Precedents by the Supreme Court of Canada (1982–2010)” in Tania Groppi & Marie-Claire Ponthoreau, eds, *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart, 2013) 39; Adam M Dodek, “Canada as Constitutional Exporter: The Rise of the ‘Canadian Model’ of Constitutionalism” (2007) 36 *SCLR* (2d) 309; Anne Warner La Forest, “Domestic Application of International Law in *Charter* Cases: Are We There Yet?” (2004) 37:1 *UBC L Rev* 157; Bijon Roy, “An Empirical Survey of Foreign Jurisprudence and International Instruments in *Charter* Litigation” (2004) 62:2 *UT Fac L Rev* 99; Christopher McCrudden, “A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights” (2000) 20:4 *Oxford J Leg Stud* 499; Christopher P Manfredi, “The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms” (1992) 40:1 *Am J Comp L* 213; SI Bushnell, “The Use of American Cases,” *Case Comment*, (1986) 35 *UNBLJ* 157; JM MacIntyre, “The Use of American Cases in Canadian Courts” (1966) 2:3 *UBC L Rev* 478; The Honourable Justice Louis LeBel, “A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law” (2014) 65 *UNBLJ* 3.

forms of transnational judicial interactions and conversations also occur. Unfortunately, whereas numerous studies address the conversation through the use of foreign judicial decisions by the Supreme Court, studies that focus exclusively on extrajudicial interaction activities with foreign or international courts are almost non-existent.

Therefore, the goal of this article is to provide empirical data on the foreign relations of the Supreme Court of Canada and its justices — in other words, on the extrajudicial dialogue with their foreign counterparts and with international judges. First, this article will identify the main methodological tools used to collect the empirical data. Second, it will reveal the primary mechanisms or forms used by the Supreme Court and its justices to participate in extrajudicial dialogue, focusing on both the Supreme Court as an institution and on the role of individual justices. Third, this article will reveal the effects of such a development on both the decision-making of the Supreme Court and its institutional arrangements. Finally, the article will conclude with a discussion on the greater impact of the Supreme Court's judicial diplomacy on Canada's global reputation and foreign policy.

II. METHODOLOGY

The first decision, which was informed by the preliminary empirical findings for this study, was to distinguish the Supreme Court of Canada as an institution from the individual justices of the Supreme Court. Such a distinction is essential to comprehending the complexity of the process of transnational judicial interactions and its different mechanisms, and to understanding judicial globalization in general.³ In fact, during the collection of data, such a distinction was crucial to revealing the different mechanisms of judicial conversations. Three methodological tools were used to collect the data for this article: (1) web-based research; (2) archival research on the Supreme Court; and (3) personal interviews with current and former justices of the Supreme Court. Web-based research is more straightforward compared to the other two methodological instruments;⁴ therefore, a bit more elaboration is needed.

A. ARCHIVAL RESEARCH

One of the key methodological instruments used to collect data about judicial diplomacy activities of the Supreme Court of Canada and its justices was archival research in the institution itself. The goal was to find archival documents that reflect these types of activities with foreign or international courts and judges, such as: minutes and final reports of meetings with foreign judges in the Supreme Court, documents about associations or organizations in which the Supreme Court or its justices are members or participate, minutes of face-to-face meetings with foreign judges, documents about transnational judicial trainings and

³ Individual justices also have to be conceptualized as autonomous actors from the Supreme Court as an institution in transnational judicial interactions. The data in this article will demonstrate that this distinction is not only theoretical, but also in practice. As the data will show, individual justices are actors who have the *discretion* and *decision-making capacity* to engage, or not engage, in judicial networking with other foreign courts and judges in different settings.

⁴ I entered the key words "The Supreme Court of Canada" and all 21 names of former and current individual justices into search engines or databases. This comprehensive exploration included the skimming and scanning of several thousands of web pages that appeared under these keywords.

conferences, and formal signed documents of bilateral or multilateral relationships with other courts. Essentially, this was a search on the “foreign affairs” of the institution.

This was a challenging task, not only because of the hierarchy of the institution, and of the typology of documents that I was searching, but also because many of the Supreme Court justices that I interviewed confirmed that activities with foreign judges are confidential, generally informal, and no minutes are kept. Through the assistance of a senior official of the Supreme Court, I was able to access the archives of the Supreme Court and collect crucial documents for this study.

B. PERSONAL INTERVIEWS WITH CURRENT AND FORMER JUSTICES

This was by far the most difficult methodological tool to use and to achieve results. As other empirical studies concerning courts and judges have revealed, it is extremely challenging to obtain a sufficiently large and representative number of participants.⁵ Interviewing judges of the highest court — that is, conducting “elite interviews” — means that the difficulty is even greater. Plainly speaking, the success of this research was dependent on the willingness of current and former justices of the Supreme Court to participate. There were in total 21 justices that have served on the Supreme Court of Canada within the 17 year period of this study:⁶ eight current⁷ and 13 former.⁸ Unfortunately, Justice Charles Gonthier is deceased, leaving 20 potential interviewees. Thanks to the intervention and collaboration of several actors, and at least two justices of the Supreme Court that I interviewed early on, I managed to interview in total ten current and former justices, or 50 percent. Nine were interviewed in person, and one by phone.

It should also be noted that, although this study focuses on the Supreme Court of Canada and its justices, a Supreme Court justice suggested I interview a former Canadian judge of a provincial court, who is the founder and administrator of a transnational electronic judicial network, which I did. The purpose of the interview was to understand as much as possible about these types of interactions and networks, knowing they have been far from the eyes of

⁵ Concerning highest court judges, see Brian Flanagan & Sinéad Ahern, “Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges” (2011) 60:1 ICLQ 1; Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Oxford: Hart, 2011); Urszula Jaremba, *National Judges As EU Law Judges: The Polish Civil Law System* (Leiden: Martinus Nijhoff, 2014); Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford: Hart, 2013) at 62–63.

⁶ The time frame of this study is from 1 January 2000 to 31 December 2016. However, many of the foreign relations activities included in this article have started before and are continuing beyond this time frame and are still ongoing.

⁷ The Supreme Court of Canada is comprised of nine justices. However, only eight of the current justices served prior to 31 December 2016: Justice Beverley McLachlin, Justice Rosalie Silberman Abella, Justice Michael J Moldaver, Justice Andromache Karakatsanis, Justice Richard Wagner, Justice Clément Gascon, Justice Suzanne Côté, and Justice Russell S Brown. Justice Malcolm Rowe was appointed on 28 October 2016 and his ceremony was held on 2 December 2016; therefore, he did not contribute to judgments delivered in 2016: “Current and Former Judges,” online: <www.scc-csc.ca/judges-juges/cfjju-jupp-eng.aspx>. See also “The Honourable Malcolm Rowe,” online: <www.scc-csc.ca/judges-juges/bio-eng.aspx?id=malcolm-rowe>.

⁸ Justice Claire L’Heureux-Dubé, Justice Charles Doherty Gonthier, Justice Frank Iacobucci, Justice John C Major, Justice Michel Bastarache, Justice William Ian Corneil Binnie, Justice Louise Arbour, Justice Louis LeBel, Justice Marie Deschamps, Justice Morris J Fish, Justice Louise Charron, Justice Marshall Rothstein, and Justice Thomas Albert Cromwell, “Current and Former Judges,” *ibid.*

the public. Several Supreme Court justices have participated in this network, making it particularly relevant.

III. FOREIGN RELATIONS OF THE SUPREME COURT OF CANADA

I define judicial foreign relations as the various forms of interaction and networking activities that occur among courts and judges of all levels (particularly of apex courts) with their counterparts from across the globe, using a variety of mechanisms. Such mechanisms or forms of interaction include all forms of communication, including face-to-face meetings, formal bilateral relationships among courts, and affiliation with international judicial organizations.⁹

Several criteria can be used in classifying the different forms of interactions among the Supreme Court and foreign courts and judges. When such interaction is conducted by the Supreme Court as an institution, it is classified as *institutional*, or court-to-court interaction; while interaction between judges is considered *individual*, or judge-to-judge interaction. Judicial interaction based on jurisdiction might be classified as a *horizontal interaction*, which, for the Supreme Court is an interaction with the highest courts or judges of other nation (its foreign counterparts). A *vertical interaction* is an interaction with courts or judges of international organizations to which Canada is a signatory member, while a *diagonal interaction* is an interaction between the Supreme Court and a supranational regional or global court of which Canada is not a member. Finally, interaction can be classified by form, based on whether it is *face-to-face interaction*, *interaction through transnational judicial associations or organizations*, *interaction through transnational judicial training institutions or other legal education institutions*, or *interaction through transnational electronic networks and systems*.

These criteria reflect the various aspects and dimensions of transnational judicial dialogue and demonstrate its complexity. Although each criterion is important, based on my collected empirical data, a combination of the first and last categories best explain the different forms of extrajudicial activities. Taken together, they create a comprehensive picture of all mechanisms used by the Supreme Court and its justices. Based on the above, the transnational conversation activities will be classified into two broad categories: *foreign relations activities of the Supreme Court as an institution* and *foreign relations activities of individual justices*.

⁹ The different types of such interactions were first introduced by Anne-Marie Slaughter, "Judicial Globalization" (2000) 40:4 Va J Intl L 1103 at 1104. She notes that there are five different categories of judicial interaction: relations between national courts and the European Court of Justice (ECJ) in the European Union (EU); interactions between the European Court of Human Rights and national courts; the emergence of "judicial comity" in transnational litigation; constitutional cross-fertilization; and face-to-face meetings among judges around the world. However, this article goes much deeper by developing them further, classifying them, and providing empirical data about such activities in the Supreme Court.

A. FOREIGN RELATIONS ACTIVITIES OF THE SUPREME COURT OF CANADA AS AN INSTITUTION

The Supreme Court of Canada is one of the most cosmopolitan, most active, and most well-known courts in the transnational judicial exchanges occurring across the globe.¹⁰ Regrettably, this perception is almost always solely based on the metaphorical “conversation” that the Supreme Court has with different courts through the citation of non-domestic legal sources. However, this picture is far from the whole truth. As one of the interviewed justices elegantly stated, “the Supreme Court has this enormous global prestige because it did not remain behind closed doors; instead, it was involved in all sorts of activities and exchanges with courts and judges from around the world, to the point that when we were visiting them, the red carpets were deployed in most places.”¹¹

By elaborating on the *foreign relations activities of the Court as an institution*, this research reveals that court-to-court institutional exchanges take three forms: *regular bilateral relationships*, *transnational judicial associations and organizations*, and *occasional contacts*.

I. REGULAR BILATERAL RELATIONSHIPS WITH FOREIGN COURTS

Throughout the years, the Supreme Court of Canada has been in contact with a multitude of national and international courts. The Supreme Court has built ongoing and long-standing relationships with several, particularly the highest courts of certain countries. These official, established, and ongoing contacts are considered to be the *regular bilateral relationships* the Supreme Court has with foreign and even supranational courts.

My research revealed that the Supreme Court of Canada is engaged in this type of regular relations with the highest courts of eight countries: the Supreme Court of the United Kingdom, the Supreme Court of the United States, the *Cour de Cassation* (and *Conseil d'État*) of France, the High Court for Australia, the Supreme Court of New Zealand, the Federal Constitutional Court of Germany, the Supreme Court of India, and the Supreme Court of Israel.¹² The reasons of engaging in this type of regular foreign relations with foreign apex courts vary and seem to be based mostly on legal tradition, language, strong ties in economy, culture, education, politics, geography, and the reputation of the foreign court.¹³

¹⁰ See e.g. Aharon Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116:1 Harv L Rev 19 at 110, 114; The Hon Justice Richard J Goldstone, “Constitutional Cases 2007 The First Years of the South African Constitutional Court” (2008) 42 SCLR (2d) 25; Gianluca Gentili & Elaine Mak, “The Supreme Court of Canada’s Transnational Judicial Communication on Human Rights (1982–2014): An Empirical Assessment” in Amrei Müller in collaboration with Hege Elisabeth Kjos, ed, *Judicial Dialogue and Human Rights* (Cambridge, UK: Cambridge University Press, 2017) 114; Frederick Schauer, “The Politics and Incentives of Legal Transplantation” in Joseph S Nye & John D Donahue, eds, *Governance in a Globalizing World* (Washington, DC: Brookings Institutions Press, 2000) 253; Anne-Marie Slaughter, “A Global Community of Courts” (2003) 44:1 Harv Intl LJ 191 at 198.

¹¹ Interview with Anonymous Justice 1.

¹² “An Overview on the International Affiliations of the Supreme Court of Canada,” document prepared by a High Administrative Officer of the Supreme Court after accessing the Archives [“International Affiliations”]. Confirmed also by most justices that I interviewed.

¹³ There may also be other causes. For example, it is interesting to note that the discussion on the composition of the New Zealand’s Supreme Court included a proposal for overseas judges. Justices of the Canadian Supreme Court were considered given their expertise in aboriginal matters. Although the proposal by Maori groups was rejected, it is then not surprising that the New Zealand Supreme Court

The Supreme Court also has a longstanding relationship with the European Court of Human Rights (ECtHR), a supranational regional court established by the European Convention on Human Rights under the Council of Europe.¹⁴ The regular exchange meetings with the ECtHR began approximately ten or 12 years ago, and both Courts alternate sending delegations to each other and have regular meetings every two or three years.¹⁵

Interestingly, as a rule, such bilateral relationships are not established by a formal written and signed document between the courts. The only official record might be an occasional memorandum of understanding, stating that the courts will meet at regularly scheduled intervals.¹⁶ According to one of the interviewed justices of the Supreme Court:

Usually such memorandums are done with courts that want this sort of thing, and usually are electronic. It is not in our tradition to ask or make these sorts of documents. There are different traditions; some European courts might ask about a formal document, while Asians, for example, might not. We rarely do it. But we are quite happy to meet with them, and work with them. We operate on this generally in an informal way.¹⁷

All current and former judges interviewed confirmed the existence of the Supreme Court's ongoing relationships with the above courts, stressed their importance, and shared their experiences.

Depending on the agreement, such meetings are held every two, three, or four years, alternating between the Supreme Court of Canada and the foreign court. When the meeting is held abroad, the Chief Justice and a few other Supreme Court justices usually represent the Supreme Court; when held in Canada, all justices may attend. Depending on the topic of discussion, the Chief Justice's executive legal officer may also attend, as may the High Administrative Officer.¹⁸

One goal of this research was to uncover the purpose and the subjects of these regular meetings. As a plaque hanging in the Grand Entrance Hall of the Supreme Court of Canada states “[j]udges participate in regular judicial exchanges in which they either receive delegations from abroad or travel to a foreign country as part of Canadian delegation. The main purpose of such exchanges is to share information and best practices.”¹⁹ All interviewed justices also confirmed such a purpose. The same plaque reads “[t]he range of topics discussed is quite broad, ranging from substantive legal principles, such as approaches to interpreting constitutional rights, to more administrative issues, such as dealing with self-represented litigants.”²⁰ When asked, the justices verified that the subject may be *substantive* or *managerial*, and agendas for these exchanges are mutually agreed upon beforehand by the participating courts' judges. A few justices even explained even how

sought to establish a good relationship with the Canadian Supreme Court. See Advisory Group, *Replacing the Privy Council: A New Supreme Court: A Report To Hon Margaret Wilson, Attorney-General and Associate Minister of Justice* (Wellington: Office of the Attorney General, 2002).

¹⁴ Interview with Anonymous Justice 10, Justice 9, and Justice 5.

¹⁵ Interview with Anonymous Justice 10.

¹⁶ “International Affiliations,” *supra* note 12.

¹⁷ Interview with Anonymous Justice 2.

¹⁸ “International Affiliations,” *supra* note 12.

¹⁹ See Klodian Rado, *The Transnational Judicial Dialogue of The Supreme Court of Canada and its Impact* (PhD Dissertation, Osgoode Hall Law School, York University, 2018) [unpublished] at 212 [emphasis added] [Rado, *Judicial Dialogue*].

²⁰ *Ibid* [emphasis added].

these regular meetings proceed,²¹ which usually consist of presentations or speeches on agreed upon topics followed by discussion.²² Hence, discussions might focus on *substantive legal issues*, such as human rights or important constitutional principles, but also might concentrate on *court management and administration issues*, including budgets, caseloads, social media, the administration of security, or courts' relationships with the public.²³ In addition, visiting judges sometimes also attend a sitting of the host court in order to understand more about how it operates.

Speaking about the benefits and specificity of such regular meetings compared to occasional meetings, one justice remarked:

The idea was that it wouldn't be meetings like the ones we had before, where we were explaining simply what we were doing. Instead, we would have a theme and we would have presentations. For instance, one year was Private Law, and we would take three cases from one country and three cases from the other on the same subject and then we would have presentations. Judges would make presentations and then we would compare our methods, our use of precedents, our results, and so on. The exchange was really a debate about best practices, the way we deal with the questions that are common to our courts.²⁴

It is interesting to note that these regular meetings are not public, and courts have agreed not to keep any formal records. The discussions are private and usually confidential, which, according to one justice, "allows us to speak very openly and freely. That's why these activities and their content are not out there for publication."²⁵ Other current and former justices, as well as the High Administrator of the Supreme Court, confirmed this practice.

Such bilateral relationships with other courts may change over time. Some may cease to exist, while new relationships are established. For instance, one judge stated:

During my first years at the Court, there were regular exchanges with the Russian and Chinese Supreme Courts, which went on for a few years. However, after 2005, I think, the relationship with them kind of froze, or slowed down. I think the last official meeting with the Russian Constitutional Court was about ten years ago.²⁶

Another justice believes this interruption may have occurred because the newer Supreme Court justices were not interested in exchanges with these courts.²⁷ This belief is reinforced by the words of another justice, who declared, "personally, I would not exchange or participate in meetings with foreign judges that come from nations under autocratic regimes."²⁸ It is clear that both political context and changes in the membership of a court are central considerations in building or maintaining regular transnational judicial conversations.

²¹ Interview with Anonymous Justice 4 and Justice 9.

²² "International Affiliations," *supra* note 12.

²³ Interview with Anonymous Justice 4, Justice 6, Justice 9, and Justice 10.

²⁴ Interview with Anonymous Justice 4.

²⁵ Interview with Anonymous Justice 2.

²⁶ Interview with Anonymous Justice 10.

²⁷ Interview with Anonymous Justice 4.

²⁸ Interview with Anonymous Justice 6.

While a change to the leadership or membership of a foreign court may not terminate a court-to-court relationship, it may alter the tone of the regular meetings. One of the interviewed justices admitted they experienced a shift in the tone of the regular relationship between the Supreme Court of Canada and the US Supreme Court:

When Justice Roberts became the new Chief Justice, I think he wanted to limit conversation to court management issues, and avoid substantive topics. On the contrary, Chief Justice Rehnquist was much more open to substantive issues. The discussion of substantive matters with the Supreme Court of the US, like the impact of international law or foreign law on our decision-making, became a matter of discussing with individual justices, like Justice Breyer, or Justice O'Connor, but no longer institutional.²⁹

In such an interconnected world, changing political situations in other countries might reflect not only on the openness and global engagement of their courts, but also on the Supreme Court itself. If the highest courts of other nations become skeptical to transnational judicial dialogue, alter or terminate ongoing relationships, or stop participating in the global judicial conversation altogether, the Supreme Court will be affected. One justice explained, “if the highest courts of other nations will not participate in the transnational judicial conversation, of course it will be more difficult for the Supreme Court, because with whom would we be in conversation?”³⁰ It is evident that political context, shifts in judicial culture, and the willingness of other courts to participate in such conversations affect the openness of the transnational judicial conversation and the globalization of the Supreme Court itself.

This research, particularly the interviews with current and former justices of the Supreme Court, suggests that regular bilateral relationships between the Supreme Court and other courts constitute perhaps the most vital and useful mechanism of conversation. This type of relationship is a modern development that deserves greater attention, not only by courts and judges, but also by scholars. Several features, including the formal nature of such relationships, their continuity and periodicity, mutually agreed upon agendas, and the exchange of ideas and best practices, speak to the uniqueness of this development. Speaking about the last feature, as I stated above, these are exchanges not just on substantive legal issues, but also on court management and administration. Such factors make this instrument one of the most significant modern mechanisms of transnational judicial conversations generally, and for the Supreme Court specifically.

2. TRANSNATIONAL JUDICIAL ASSOCIATIONS AND ORGANIZATIONS

The Supreme Court of Canada actively participates in transnational judicial associations and organizations, which differ from bilateral relationships in that they involve several courts — sometimes more than a hundred. Transnational judicial associations and organizations are judicial or legal in nature, have a transnational or international scope, and accept only courts — not individuals — as members.

²⁹ Interview with Anonymous Justice 10.
³⁰ *Ibid.*

Although it goes beyond the scope of this article, it should be noted that the existence of some of these judicial associations is the result of an initiative of the Government of Canada, who decided to establish, fund, and promote these types of organizations. One Supreme Court justice noted that the French and Canadian governments signed a bilateral international agreement to establish permanent networks of supreme courts that use the French language.³¹ According to this justice, the governments agreed to set up two different associations: the *Association des Cours Constitutionnelles Francophones* (ACCF) [Association of Constitutional Courts Francophone]³² and the *Association des Hautes Juridictions de Cassation des pays ayant en partage l'usage du Français* (AHJUCAF) [Association of the High Courts of Cassation of Countries Sharing the Use of French].³³ Unlike bilateral relationships between courts, the initiative for building transnational judicial associations or organizations, and their very existence, does not always stem from judges themselves. Both of the French speaking organizations that the Supreme Court belongs to are the result of a diplomatic initiative of the French and Canadian Governments to promote the networking of the highest courts that use French.

The Supreme Court of Canada is currently a member of six international judicial associations or organizations: ACCF,³⁴ AHJUCAF,³⁵ the *Association internationale des hautes juridictions administrative* [International Association of Supreme Administrative Jurisdictions],³⁶ the World Conference on Constitutional Justice,³⁷ the Commonwealth Magistrates' and Judges' Association (CMJA),³⁸ and the Asia Pacific Judicial Colloquium.³⁹ The Supreme Court is represented at these organizations by a justice designated by the Chief Justice.⁴⁰ A justice of the Supreme Court will sometimes serve on the board of directors of associations in which the Supreme Court participates. In the case of at least three such transnational judicial associations, the High Administrative Officer often attends the meetings.⁴¹

3. OCCASIONAL CONTACTS

In addition to its *court-to-court regular bilateral relationships* and *membership in multilateral transnational judicial associations*, the Supreme Court of Canada participates in judicial conversations through *occasional contacts* with other courts. *Occasional contacts* refers to isolated communication with one or more courts that does not occur often enough to be considered a regular bilateral relationship. All interviewed justices recognized the existence of this type of occasional communication and visits from foreign courts. One justice labelled this type of visit as an “isolated exchange,” using as an example an exchange in 2005: “[t]he Supreme Court received a visit from a few Supreme Court judges from

³¹ *Ibid.*

³² See online: *Association de cours constitutionnelles francophones* <accf-francophonie.org> [ACCF].

³³ See online: *Cour suprême judiciaires francophones* <www.ahjucaf.org/> [AHJUCAF].

³⁴ ACCF, *supra* note 32.

³⁵ AHJUCAF, *supra* note 33.

³⁶ See online: *Association internationale des hautes juridictions administrative* <www.aihja.org/>.

³⁷ See “World Conference on Constitutional Justice — 117 members!,” online: *Council of Europe Venice Commission* <www.venice.coe.int/WebForms/pages/?p=02_WCCJ>.

³⁸ See online: *Commonwealth Magistrates' and Judges' Association* <www.cmja.org/index.html>.

³⁹ See “Welcome Reception for Asia Pacific Judicial Colloquium,” online: <vancouverbar.ca/event/welcome-reception-asia-pacific-judicial-colloquium/>.

⁴⁰ “International Affiliations,” *supra* note 12.

⁴¹ *Ibid.*

Sweden. Later, our Chief Justice went there but that was it.”⁴² This justice also noted that the Supreme Court had a number of such types of occasional exchanges with supranational courts, namely the Court of Justice of the European Union (CJEU). A Supreme Court delegation visited the CJEU in Luxemburg once, but never on a regular basis.⁴³

Other interviewed justices remarked upon visits to or from the highest courts of several countries from almost all continents, including Poland, Hungary, Austria, South Africa, Peru, Venezuela, Mexico, Guatemala, Vietnam, and Japan. Most of these visits were short, with the delegates simply hearing a presentation about the Supreme Court, or sometimes attending a sitting of the host court. One justice referred to these visits as “judicial tourism,” stating, “many times we received delegations from other foreign courts that came here just to visit Ottawa.”⁴⁴ The justice also suggested that the visits to other courts by a few Supreme Court justices fell into this category.⁴⁵

However, occasionally there were longer visits lasting up to a week, with formal sessions focused on specific topics. For instance, a delegation from the Supreme Court of Japan visited the Supreme Court of Canada. The Japanese judges, who were members of a committee for the revision of law in Japan, wanted to know more about the Canadian system of constitutional judicial review under the *Canadian Charter of Rights and Freedoms*,⁴⁶ wondering whether they could adopt such a system in Japan. “On these occasions, we discuss and exchange ideas on very serious stuff,” noted one Supreme Court justice.⁴⁷

The relationship between the Supreme Court of Canada and the Constitutional Court of South Africa is an interesting one. Two of the justices that I interviewed considered it a regular and ongoing bilateral relationship, whereas most others believed it had never risen to this level. The visits were only occasional and usually involved South African judges visiting the Supreme Court, and the association was primarily based on individual relationships among judges. In fact, the archival document confirmed that it never became formally institutionalized.

Most justices noted a difference between the way the Supreme Court regards its regular relationships and the occasional contacts. The ongoing relationships are considered a two-way exchange that is beneficial to both sides. On the other hand, occasional contacts or visits tend to be less formal, less engaging, and consequently less advantageous. The country involved also affects the quality of exchange. With developed countries, the communication was often more reciprocal, whereas with developing countries, as one justice said, “[t]he exchanges tend to be more ad hoc, just a visit or a short presentation about our Court, so it is more of a one-way traffic, where they try to learn from our experience and apply it at home.”⁴⁸

42 Interview with Anonymous Justice 10.

43 *Ibid.*

44 Interview with Anonymous Justice 4.

45 *Ibid.*

46 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

47 Interview with Anonymous Justice 4.

48 Interview with Anonymous Justice 6.

Finally, I sensed that there are concerns among Supreme Court justices regarding the courts with which they choose to engage. All were open to occasional exchanges and even to establishing new ongoing relationships with the highest courts of countries that follow the rule of law and have similar legal and political principles to Canada. However, some justices were skeptical as to the benefit of exchanging with developing countries or countries that belong to other political systems. One asserted:

The risk is that an engagement with a particular court of a developing country may give legitimacy to the political regime that controls that court. Personally, I would not exchange and participate in meetings with foreign judges that come from nations under autocratic regimes.⁴⁹

On the other hand, this justice acknowledged that it is possible the judges are trying to overcome their countries' problems and simply need help. In these circumstances, advised the interviewed justice:

We may want to think about how to give them a hand and to legitimize their disagreements with the regime; but at the same time, you may end up legitimizing the regime. It is tricky; we have to look at each case as it comes, and receive more information about that court or that particular country before entering any kind of relationship.⁵⁰

Each of the three forms of institutional court-to-court exchanges — *regular bilateral relations*, *judicial associations or organizations*, and *occasional exchanges* — are essential to the transnational judicial conversation. It is also important to note that the Supreme Court's international affiliations, as described above, are separate from and unrelated to the international judicial activities of the Office of the Commissioner of Federal Judicial Affairs of Canada (OCFJAC) and the National Judicial Institute (NJI).⁵¹ Finally, such extrajudicial activities show that the Supreme Court plays a broader role, venturing outside the legal realm to participate in the diplomatic arena. The Canadian government typically supports these activities, expressing pride in its Supreme Court's global influence.⁵² Justices of the Supreme Court, however, emphasize that the Supreme Court has retained its independence, and does not take orders from the Canadian government.

However, despite all the three forms of court-to-court relationships of the Supreme Court, this is not all. The Supreme Court has another very powerful set of mechanisms that helps to bring its participation in the global judicial arena to another level: *the foreign relations activities of individual justices*.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Interview with Anonymous Justice 9 and Justice 4.

⁵² The Hon Irwin Cotler, "Speaking Notes for Irwin Cotler, Minister of Justice and Attorney General of Canada, on the Occasion of a Presentation to the Ad Hoc Committee on Supreme Court of Canada Appointments" (25 August 2004), cited in Adam M Dodek, "Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities" (2009) 47 SCLR (2d) 445 at 445. He asserted that the Supreme Court of Canada is appreciated around the world "as a model of what a vital, learned, and independent judicial institution should be ... Supreme Court decisions are constantly cited by courts in diverse jurisdictions across the globe" (*ibid.*).

B. FOREIGN RELATIONS ACTIVITIES OF INDIVIDUAL JUSTICES

Individual judges play a significant role in transnational judicial conversations and exchanges. The interviewed justices confirmed that the Supreme Court generally interacts with foreign and international judges not only within official meetings organized by the Supreme Court, or as part of the Supreme Court's delegation, but also individually.

It is not always easy to distinguish between the Supreme Court's institutional activities and individual justice actions. However, such a distinction is vital for a better comprehension of this development. The archival material from the Supreme Court, and almost every justice interviewed, recognizes such a distinction.⁵³ This distinction between the institution and the individual is also theoretical, and demonstrates the different dimensions of transnational judicial dialogue, which certainly deserves more scholarly attention.

A justice can be said to be engaging in individual justice exchanges when he or she independently decides to become a member of a transnational association of judges, to participate in transnational judicial training activities, to visit a foreign court, or to participate in electronic judicial networks. Moreover, as some of the interviewed Supreme Court justices noted, the interest of individual justices varies. Some justices are regularly engaged, while others have less interest in these interactions. In some instances, the Chief Justice of a certain court may not be interested in a particular type of activity and thus distances the institution from it, while individual judges of that court might hope to become involved — or vice versa. When speaking about the Supreme Court of Canada, one justice said:

I think that the Chief Justice's philosophy on the global conversation that is occurring among courts could make a difference. Our current Chief Justice [referring to Chief Justice Beverley McLachlin] is well aware, very active, and very sensitive to these issues.⁵⁴

Elaborating further, the justice explained:

If you do not have that openness and open-mindset, of course you will limit your international activities. In our case, we are lucky to have a Chief Justice that was and still is open to that, and I am very happy to see that in our Court. Hopefully this tradition will continue with the next Chief Justice, because we really have to.⁵⁵

When discussing Supreme Court justices' desire to interact individually with other judges, one interviewee noted, "what I must say is that, generally speaking, the majority of my colleagues, during the time that I served in the Court, were interested in those contacts."⁵⁶

Their interest is indeed extensive; it is almost impossible to keep track of all the extrajudicial activities of individual Supreme Court justices. The data gathered for this section are certainly not exhaustive. The Supreme Court High Administrator confirmed that while data about the foreign activities of the Supreme Court as an institution is kept, records

⁵³ "International Affiliations," *supra* note 12.

⁵⁴ Interview with Anonymous Justice 7 [emphasis added].

⁵⁵ *Ibid.*

⁵⁶ Interview with Anonymous Justice 10.

of Supreme Court justices' memberships in judicial or legal associations, and of their individual visits and public engagements, are not.⁵⁷ When discussing their individual justice transnational activities, the interviewed justices highlighted their most important experiences and thoughts, but stressed that they were not providing exhaustive lists of these activities.

Despite this limitation, this section provides an overview of judge-to-judge foreign relations activities and identify the primary mechanisms behind them. According to one justice, "we talk, we meet, we go to international conferences and seminars, and we read each other's books and articles and listen to others' speeches. The main form [of interaction] is that we read each other's judgments."⁵⁸ Based on these forms of judge-to-judge interaction, the foreign relations activities of justices of the Supreme Court can be classified into four categories: (1) face-to-face meetings with foreign judges; (2) participation in transnational judicial associations; (3) participation in judicial training and other legal education institutions; (4) participation in electronic judicial networks.

1. FACE-TO-FACE MEETINGS WITH FOREIGN JUDGES

Despite living in this era of ever-increasing technology, judges from around the world, including justices of the Supreme Court, do not only sit at the bench or in front of a computer, passively engaging with their foreign counterparts by simply reading and citing their case law. Judges are also meeting face-to-face.⁵⁹ They are increasingly extending invitations and travelling to other parts of the world to meet colleagues from other nations or justices of international or supranational courts.

My research data reveals that there are two types of face-to-face meetings: *occasional* and *ongoing*. As the labels suggest, occasional meetings occur once or twice, in different settings, and while judges exchange information and ideas, the relationship remains intermittent. Ongoing interactions are continuing judge-to-judge relationships, which make use of various instruments of interaction, and often become personal friendships.

Judges conduct occasional face-to-face meetings in different settings, such as conferences, judicial training sessions, formal delegations, and individual visits. As one justice of the Supreme Court noted, foreign counterparts struggle with the same issues as them, and "in these meetings, you exchange ideas and practices, and can learn about their jurisprudence. You find out about other judicial activities; for example, about judicial seminars or conferences."⁶⁰ Another Supreme Court justice highlighted the importance of face-to-face meetings with other judges, stating:

Sometimes, I think you can get more candour from those foreign judges than from your colleagues in your Court. Why? Because you don't have to have an ongoing relationship with them, or need to try to find common ground with them, so they will be very direct about what they think.⁶¹

⁵⁷ "International Affiliations," *supra* note 12.

⁵⁸ Interview with Anonymous Justice 2.

⁵⁹ Slaughter, "Judicial Globalization," *supra* note 9 at 1120.

⁶⁰ Interview with Anonymous Justice 3.

⁶¹ Interview with Anonymous Justice 6.

The same justice continued, “having a conversation with judges of other nations may provide not just another perspective, but may bring also more frankness to the table.”⁶²

Occasional face-to-face meetings with foreign judges can evolve into an ongoing relationship. As one of the Supreme Court justices acknowledged:

These interactions among judges of different nations, at a personal level, can become ongoing. I had a relationship with a UK Supreme Court Judge . . . He and I had met before in academic settings, and then he came here with the UK Supreme Court delegation last year, and since then he and I occasionally would email each other. For example, he read and commented on something I wrote, or I read something he had written, exchange decisions, or discuss various legal issues.⁶³

Almost all the interviewed justices said that through their occasional face-to-face meetings they have established ongoing relationships, and even friendships, with foreign colleagues. One justice noted, “when the Canadian judges met Aharon Barak, the Former Chief Justice of Israel, we fell in love with his mind; his judgments and academic talks and papers were very influential, and many of us kept an ongoing relationship with him.”⁶⁴ The same justice continued:

There are also other judges, for example, European judges that we have personal relationships with. We send our judgments to each other, read them, and use them. . . . There is always something to learn. Even if it is something that you do not agree with, it can still make you refine your own ideas.⁶⁵

Another Supreme Court justice spoke even more highly about these individual relationships: “[t]he friendship that we create with judges from other nations enhances the dialogue on those issues that come before us or them, which benefits us all.”⁶⁶

A wonderful picture of the interaction between Supreme Court justices and their foreign counterparts was painted by Albie Sachs, a former judge of the South African Constitutional Court, who wrote in a recent newspaper editorial:

We South African judges got to know Claire, Frank, Beverley, Rosie and Charles very well, and our counterparts in turn became friendly with Arthur, Ismail, Sandile, Kate, Pius and Albie — first-name friendships. We visited each other’s courts, met at international colloquia, served on various bodies together. We unconsciously imbibed each other’s styles and modes of comportment and expression.⁶⁷

Indeed, occasional or ongoing face-to-face meetings between judges, including those of the Supreme Court with their fellows from other national or international courts, should not be considered informal or unimportant. At these meetings, judges exchange views on their decisions, they generate substantive, procedural, and court management ideas, and often turn these ideas into action. It is at these meetings that they are planning, and ultimately

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Interview with Anonymous Justice 5.

⁶⁵ *Ibid.*

⁶⁶ Interview with Anonymous Justice 1.

⁶⁷ Albie Sachs, “Judicial Influence, by Osmosis” *The Globe and Mail* (19 May 2016), online: <www.theglobeandmail.com/opinion/judicial-influence-by-osmosis/article30087147/>.

establishing global and regional judicial networks such as formal organizations, judicial training institutions, or electronic networks.

2. PARTICIPATION IN TRANSNATIONAL JUDICIAL ASSOCIATIONS

Another form of transnational judicial dialogue of individual justices is the establishment of and participation in judicial associations. Transnational judicial associations, unlike organizations that are exclusive to courts, accept only individual judges as members. My research data shows that judges are increasingly joining such associations, a trend also evidenced in the Supreme Court justices. Some have even continued their membership in these associations after their retirement. Others admitted that they chose to not participate in transnational judicial associations, for various personal reasons. As noted above, the Supreme Court does not keep records on individual justices' organizational memberships, because such affiliations are considered part of their personal independence.⁶⁸ However, one justice mentioned, "we are very careful about what associations or organizations we join. If these organizations have a public policy, we need to be very careful to stay impartial and to be seen as impartial. We cannot join organizations that have programs for advancing a particular law or a particular agenda."⁶⁹

Surprisingly, academics have rarely focused on the role of such exchanging mechanisms, including judicial associations, as very important tools of foreign judicial relationships. To try to fill this gap in the literature, I have compiled examples of such mechanisms, including associations in which Supreme Court justices actively participate.

a. International Association of Women Judges

One of the most well-known associations that Supreme Court of Canada justices participate in is the International Association of Women Judges (IAWJ). This association is a global network, which as of July 2020 has more than 6,000 judges (not only women) from 100 countries.⁷⁰ The IAWJ may be considered a judicial "network of networks," as it brings together also member associations and chapters from 53 different nations on all continents.⁷¹

The IAWJ was established in 1991 as a non-profit, non-governmental organization, whose members are active at all levels of the judiciary worldwide, and share a commitment to advancing human rights and equal justice for all.⁷² One of the primary goals of the IAWJ and its members is to develop a global network of women judges and create opportunities for judicial exchange through international conferences, trainings, the IAWJ newsletter and website, and an online community to support and promote "the rule of law" and "equal access to justice."⁷³

⁶⁸ "International Affiliations," *supra* note 12.

⁶⁹ Interview with Anonymous Justice 2.

⁷⁰ See online: *International Association of Women Judges* <www.iawj.org>.

⁷¹ See "IAWJ Member Associations," online: *International Association of Women Judges* <www.iawj.org/membership/iawj-member-associations/>.

⁷² See "Who We Are," online: *International Association of Women Judges* <www.iawj.org/about-us/>.

⁷³ *Ibid.*

In 1994, upon the initiative of the Honourable Claire L'Heureux-Dubé—the second woman to be appointed to the Supreme Court — and Beverley McLachlin, until lately Chief Justice, the Canadian Chapter of the IAWJ was created.⁷⁴ Its central mission is “to enhance the work of women judges nationally and internationally in pursuit of equality, judicial independence, and the rule of law.”⁷⁵ Former Justice Marie Deschamps and Justice Andromache Karakatsanis have also been, and still are, members of the IAWJ.

b. International Commission of Jurists

Another organization of global importance is the International Commission of Jurists (ICJ).⁷⁶ As the name suggests, the ICJ is not limited to current judges, but is comprised of senior judges, attorneys, and academics who are dedicated to ensuring respect for international human rights standards through the law. Two former justices of the Supreme Court have been and continue to be active in this organization,⁷⁷ and four of them in the ICJ Canada.⁷⁸ Justice L'Heureux-Dubé was the president of the ICJ whilst she was at the Supreme Court,⁷⁹ and is an honorary member.⁸⁰ Former Supreme Court Justice Ian Binnie also during his tenure served as Commissioner of the ICJ from 2003 and is still a member of the Board of Directors of ICJ Canada.⁸¹ Other Supreme Court justices connected to the ICJ are Justice Bertha Wilson, Justice Gérard La Forest, and Justice Peter Cory, who were long time members and supporters of ICJ Canada.⁸² In 2003, Justice Wilson and Justice Rosalie Abella received the prestigious Justice Prize of the Peter Gruber Foundation in recognition of their commitment to and passion for social justice, equality, and human rights.⁸³

3. ESTABLISHING AND PARTICIPATING IN GLOBAL JUDICIAL TRAINING INSTITUTIONS

Global judicial education and training institutions constitute another means of transnational interaction among individual judges. As scholars rightly observe, the growing support of judges from around the world for global judicial education is a remarkable conscious and psychological indicator of the progress of judicial globalization in general, and judicial dialogue and interaction among judges in particular.⁸⁴ In addition, judges want their judicial education and training sessions to be conducted, to the greatest extent possible, only

⁷⁴ See “About Us,” online: *International Association of Judges, Canadian Chapter* <iawjcc.com/about-us/>.

⁷⁵ See online: *International Association of Women Judges, Canadian Chapter* <http://iawjcc.com/>.

⁷⁶ See online: *International Commission of Jurists* <http://www.icj.org/> [ICJ].

⁷⁷ See “Honorary Members,” online: *International Commission of Jurists* <www.icj.org/commission/honorary-members/> [ICJ, “HM”].

⁷⁸ See “Council Emeritus,” online: *International Commission of Jurists Canada* <www.icjcanada.org/index.php/en/people/council-emeritus.html> [ICJ, “CE”].

⁷⁹ See “Judiciary Compromised by Executive Interference and Corruption,” online: *International Commission of Jurists* <www.icj.org/judiciary-compromised-by-executive-interference-and-corruption/>.

⁸⁰ See ICJ, “HM,” *supra* note 77.

⁸¹ See “The Honourable William Ian Corneil Binnie,” online: <www.scc-csc.ca/judges-juges/bio-eng.aspx?id=william-ian-corneil-binnie>; “Board of Directors,” online: *International Commission of Jurists Canada* <http://www.icjcanada.org/index.php/en/people/board-of-directors.html>.

⁸² See ICJ, “CE,” *supra* note 78.

⁸³ See “Peter Gruber Justice Prize Won by Two Canadian Jurists,” online: *International Commission of Jurists* <www.icj.org/peter-gruber-justice-prize-won-by-two-canadian-jurists/>.

⁸⁴ Anne-Marie Slaughter, “A Brave New Judicial World” in Michael Ignatieff, ed, *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005) 250 at 253.

by judges. According to one Supreme Court justice, “it is well known in the judiciary that judges are the best and most effective teachers of judges, as opposed to professional professors or lecturers, who are often perceived as outsiders. Besides, judges are very jealous of their independence, which is not a problem from peer to peer.”⁸⁵ Indeed, even from my judicial experience, I can confirm that judges are more comfortable with other judges, making it more likely they will open up and share their views and concerns.⁸⁶ This is a crucial factor in why transnational judicial training is increasingly becoming one of the most important mechanisms of judicial interaction in the modern world.

After the end of the Cold War, the resulting political and legal changes that occurred created a growing need for judicial training and judge trainers in many countries. The Canadian government became very active in not only funding such trainings, but also contacting and convincing Canadian judges of all levels, including justices of the Supreme Court, to participate. As at least two interviewed justices confirmed, the involvement of Supreme Court and its justices gave more credibility to some of these programs, particularly larger players in the global arena, such as China and Russia.⁸⁷

A few justices spoke about other public international institutions, and even private transnational actors, who were assembling transnational training programs. Their attempts to recruit Canadian judges actually raised concerns. According to one interviewed justice:

Private enterprise was organizing educational missions to other countries, that were in fact business development initiatives, or they were bidding on contracts for CIDA [Canadian International Development Agency] to put on these trainings, and they would recruit or try to recruit judges, including from the Supreme Court. That was generating some concerns about judicial independence, because judges were involved in something that was essentially a commercial matter. So, the National Judicial Council developed some principles to guide the participation of Canadian judges in such transnational judicial involvements.⁸⁸

With these principles in mind, Supreme Court justices became leaders of many transnational judicial training programs across the globe, and participated in numerous sessions and conferences on almost every continent.⁸⁹ The participation of Supreme Court justices in transnational judicial training activities is made possible through the contribution and involvement of several public and private actors. The institutions that have initiated or supported such transnational judicial training or educational sessions fall into three categories: *Canada Government Institutions*, *Judicial Associations*, and *Universities and Non-Governmental Organizations (NGOs)*.

a. Canada Government Institutions

As stated above, the Canadian government is a significant supporter of transnational judicial training programs, particularly in developing countries. Several Canadian institutions were involved in these developments, including the NJI, the Canadian International

⁸⁵ Interview with Anonymous Justice 1.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*; Interview with Anonymous Justice 4.

⁸⁸ Interview with Anonymous Justice 9.

⁸⁹ Interview with Anonymous Justice 1.

Development Agency (CIDA), the Department of Justice, and OCFJAC. All these institutions contacted distinguished Canadian judges of all levels. However, to increase the credibility of such programmes, the government institutions were particularly interested in involving justices of the Supreme Court. Almost all interviewed justices noted this fact in their discussions with me. One emphasized their involvement in such training activities in Russia and China, where the participation of the Supreme Court justices was necessary to establish these judicial training projects, as otherwise would have been impossible to make the Russian and Chinese judges interested.⁹⁰

In the beginning, these meetings with foreign judges and courts funded by the Canadian government involved a basic exchange of experiences, such as, “tell me what you do in your country and we will tell you how we do things here. This was usually one-day meeting or something very short. There was no real sharing of information that you would consider to be relevant to decision-making.”⁹¹ Then, as one justice noted, “the Office of the Commissioner for Federal Judicial Affairs Canada decided that we should share some of our experience in training judges in Canada, and make that available to foreign judges, especially in developing countries.”⁹² As stated above, the two most noticeable examples are the training sessions with the judges of the Constitutional Court of the Russian Federation (1999–2009) and the National Judges College in China (2002–2003; 2005–2009). Other nations that received judicial trainings funded by Canadian government institutions, very often through the expertise of Supreme Court justices, include South Asia (Bangladesh, India, Sri Lanka, Nepal, and Pakistan) (2003–2008), Ethiopia (2000–2005), Ghana (2010–2013), Palestine (2012–2013), Ukraine (1996–2002, 2006–11, 2012–14, 2015–2020), Jamaica (2010–2014), Mexico (2010–2012), and Peru (2010–2013).⁹³

Through the NJI, one Supreme Court of Canada justice participated in judicial education all over the world, including the above countries, Eastern Europe, and Vietnam. This justice emphasized that several other Supreme Court justices were involved with similar training activities across the globe, referring to them by name. According to this justice, such training activities “are one of the key factors that made the Supreme Court much more known to the world, and helped the dissemination of the case law of the Supreme Court everywhere.”⁹⁴

The role of the Canadian government in transnational judicial training was not limited to the agreements with developing countries. A few justices remarked that Supreme Court justices participated in such activities in developed countries, including Australia, New Zealand, and Scotland.⁹⁵ The purpose of these types of trainings was to introduce new ideas and methods on how to achieve more effective judicial trainings, and to discuss the better administration.

Another remarkable example of the collaboration between the Supreme Court of Canada and the Canadian government is the establishment of new transnational judicial training

⁹⁰ Interview with Anonymous Justice 4.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ See “A Map of International Judicial Cooperation Initiatives,” online: *Office of the Commissioner for Federal Judicial Affairs Canada* <www.fja.gc.ca/cooperation/index-eng.html> [FJA].

⁹⁴ Interview with Anonymous Justice 1.

⁹⁵ *Ibid.*; Interview with Anonymous Justice 9.

institutions. The NJI, which is chaired ex-officio by the Chief Justice of the Supreme Court, has been particularly involved with the creation of these institutions. The most well-known are the International Organization for Judicial Training (IOJT)⁹⁶ and the Commonwealth Judicial Education Institute (CJEI).⁹⁷

In March 2002, judges from 24 countries, including Canada, created the IOJT “to promote the rule of law by supporting the work of judicial education institutions around the world.”⁹⁸ Exchanges, including international and regional conferences, help the organization realize its mission, and as of July 2020, the IOJT includes 125 member institutes from 77 countries.⁹⁹ In addition to the NJI, four other Canadian institutions — OCFJAC, the Federation of Law Societies of Canada, the Commonwealth Judicial Education Institute, and the Canadian Institute for the Administration of Justice — have joined the IOJT.¹⁰⁰

Canadian judges, including Supreme Court justices, are also heavily involved in the CJEI. Former Chief Justice McLachlin was part of the governance of this institute.¹⁰¹ The CJEI is a “network of Commonwealth judicial educators knowledgeable in judicial education techniques and methodology,” whose goal is to “create and deliver judicial education curricula supportive of contemporary judicial reform.”¹⁰²

Despite all this, two of the justices that I interviewed mentioned that Canadian government funding for transnational judicial training activities has decreased recently. Yet, they noted that regular bilateral relationships with foreign courts and judicial organization activities were continuing as normal. A senior official of the Supreme Court confirmed, “the trend is clearly towards more transnational activities, and this includes particularly the Supreme Court involvement in international organizations as well as bilateral events involving the Supreme Court.”¹⁰³ Yet one justice acknowledged, “there were some foreign courts that were less able to visit or receive visits from as a result of budget difficulties.”¹⁰⁴

b. Judicial Associations

Several judicial organizations, with which Supreme Court of Canada justices are associated, are involved in transnational judicial training. Two interviewed justices of the Supreme Court confirmed that at least three transnational judicial associations, the ACCF, the AHJUCAF, and the CMJA, conduct trainings sessions for their members, particularly in developing countries.¹⁰⁵ However, one justice states that judicial trainings with some developing countries were not very effective, as it is difficult “to work with them because

⁹⁶ See online: *International Organization for Judicial Training* <www.iojt.org>.

⁹⁷ See online: *Commonwealth Judicial Education Institute* <cjei.org/index.html> [CJEI Index]; see also “Governance,” online: *Commonwealth Judicial Education Institute* <cjei.org/governance.html> [CJEI Governance].

⁹⁸ See “About IOJT,” online: *International Organization for Judicial Training* <www.iojt.org/about-us>.

⁹⁹ *Ibid.*

¹⁰⁰ See “Members,” online: *International Organization for Judicial Training* <www.iojt.org/Members.aspx>.

¹⁰¹ CJEI Governance, *supra* note 97.

¹⁰² CJEI Index, *supra* note 97.

¹⁰³ Interview with an anonymous Senior Official of the Supreme Court of Canada who agreed to be interviewed under anonymity.

¹⁰⁴ Interview with Anonymous Justice 9.

¹⁰⁵ *Ibid.*; Interview with Anonymous Justice 4.

their local conditions were such that they would recognize the principles but they could not put them into effect.”¹⁰⁶

c. Universities and NGOs

The interviewed justices noted that universities and NGOs have become increasingly important in facilitating transnational judicial conversations. Indeed, Harvard Law School, Yale Law School, New York University School of Law, University of Cambridge, Brandeis University,¹⁰⁷ and many others around the world, including Canada (a typical example is McGill University Faculty of Law),¹⁰⁸ are increasingly opening their doors to a considerable number of seminars, trainings, conferences, and other research programs to help judges and other interested actors create networks and channels that have the power to foster the process of transnational judicial dialogue and globalization of courts.¹⁰⁹ Ongoing transnational judicial seminars, hosted by universities, bring together not only judges, but also distinguished academics and lawyers from around the world. Several Supreme Court justices participate in these events.

Global Constitutionalism Seminar, Yale Law School: One of the most highly anticipated ongoing transnational judicial forums is the Global Constitutionalism Seminar.¹¹⁰ This yearly event dates back to 1996, and brings together Supreme Court and Constitutional Court judges from more than 25 nations.¹¹¹ In this intensive seminar-style setting, which lasts several days, justices discuss critical legal issues with distinguished professors from Yale Law School. Both Justice Frank Iacobucci and Justice Abella have participated regularly in this global seminar of constitutional judges.

The Cambridge Lectures: This seminar was established by the Canadian Institute for Advanced Legal Studies in 1979.¹¹² Former Chief Justice McLachlin has attended almost every biannual session, and three to four other Supreme Court justices have participated in each event, including Justice Iacobucci, Justice Binnie, Justice Louise Charron, Justice Marshall Rothstein, Justice Morris Fish, Justice Abella, Justice Russell Brown, Justice

¹⁰⁶ Interview with Anonymous Justice 4.

¹⁰⁷ The judicial dialogue occurs not just among national courts; in fact judges of several international courts carry out a similar exercise. The events are organized by the International Center for Ethics, Justice and Public Law of Brandeis University: see “A Forum for International Judges,” online: <www.brandeis.edu/ethics/internationaljustice/bijj/index.html>.

¹⁰⁸ A typical example is the McGill University Faculty of Law, which implemented a unique polyjurial and trans-systemic curriculum. See Shauna Van Praagh, “Navigating the Transsystemic: A Course Syllabus” (2005) 50 McGill LJ 701. Another example is Osgoode Hall Law School which in one of the recent events included the participation of foreign judges, several academics, and legal practitioners, including Justice Abella of the Supreme Court, and which I personally attended: “Institutions, Constitutions Symposium: The Judiciary’s Role in the 21st Century,” Osgoode Hall Law School, Osgoode Professional Development, Toronto, 26–27 September 2016.

¹⁰⁹ Slaughter, “Judicial Globalization,” *supra* note 9 at 1122; Thomas M Franck, “NYU Conference Discusses Impact of International Tribunals,” *International Judicial Observer* No 1 (September 1995) at 3; James G Apple, “British, U.S. Judges and Lawyers Meet, Discuss Shared Judicial, Legal Concerns,” *International Judicial Observer* No 2 (January 1996) at 1; “Yale Law School Establishes Seminar on Global Constitutional Issues,” *International Judicial Observer* No 4 (June 1997) at 2.

¹¹⁰ See “Global Constitutionalism Seminar,” online: <law.yale.edu/centers-workshops/gruber-program-global-justice-and-womens-rights/global-constitutionalism-seminar>.

¹¹¹ Interview with Anonymous Justice 3 and Justice 5.

¹¹² See online: *Canadian Institute for Advanced Legal Studies* <www.canadian-institute.com/english/home-e.html> [CIALS].

Karakatsanis, and the current Chief Justice Richard Wagner have all participated.¹¹³ The seminar is notable because it is attended not only by justices from various nations, but also by prominent academics and lawyers, opening up new venues of conversation between them. Indeed, academics are becoming increasingly important in facilitating transnational judicial conversations and generally in the globalization of the judiciaries, including the Supreme Court.

Les Journées Strasbourgeoises: The Canadian Institute for Advanced Legal Studies established a similar series of lectures held in Strasbourg, France, every four years. “Les Journées Strasbourgeoises” are conducted in French, but their purpose parallels the Cambridge Lectures.¹¹⁴ Although this is a somewhat smaller forum, both Justice Binnie and the current Chief Justice Wagner have attended.¹¹⁵

Universities have also conducted smaller, occasional transnational judicial seminars. One of the best examples is a joint initiative of the University of Windsor Faculty of Law, Birzeit University’s Institute of Law, and the Palestinian Judicial Institute, supported by CIDA, called “The Project on Judicial Independence and Human Dignity.”¹¹⁶ This judicial education program promoted the principles of judicial independence and human dignity. Justice L’Heureux-Dubé and other Canadian judges assisted in training Palestinian judges.¹¹⁷

Scholars recognize that NGOs and universities support the globalization, interaction, and the foreign relationships of judiciaries in several ways. They do so through their organization and participation in transnational judicial seminars; some scholars suggest that NGOs sponsor seminars, conferences, trainings, and workshops in hopes of turning judges into globalists or cosmopolitanists.¹¹⁸ Meanwhile, universities in Canada and across the globe have recognized the importance of international and comparative law in the judicial decision-making process, and therefore have added more courses in these subjects, thus “globalizing” their curricula.¹¹⁹ Describing “law and learning in the era of globalization,” Professor Harry Arthurs writes:

Some law schools have declared themselves “global law schools,” adopted a “global curriculum,” hired a “global faculty,” established research centres on “global law” and entered “global partnerships” with foreign institutions. Others have begun to offer courses on globalization and the law, on global governance, global lawyering and global security — amongst many other “global” offerings. Many have introduced global

¹¹³ The names of participating Supreme Court justices for sessions between 2007 and 2019 can be found by viewing the program for each lecture. See “The Cambridge Lectures,” online: *Canadian Institute for Advanced Legal Studies* <www.canadian-institute.com/english/speakers-e.html>.

¹¹⁴ See CIALS, *supra* note 112.

¹¹⁵ The names of participating Supreme Court justices for sessions between 2008 and 2016 can be found by viewing the program for each lecture. See “Des Journées Strasbourgeoises,” online: *Canadian Institute for Advanced Legal Studies* <www.canadian-institute.com/french/strasbourg-f.html>.

¹¹⁶ See “Karamah – The Project on Judicial Independence and Human Dignity,” online: <www.uwindsor.ca/law/rbahdi/3/karamah-project-judicial-independence-and-human-dignity>.

¹¹⁷ Interview with Anonymous Justice 1.

¹¹⁸ Richard Price, “Transnational Civil Society and Advocacy in World Politics” (2003) 55:4 *World Politics* 579; Tamir Moustafa, “Law Versus the State: The Judicialization of Politics in Egypt” (2003) 28:4 *Law & Soc Inquiry* 883.

¹¹⁹ For a detailed understanding of how deep international and comparative law courses are offered in various law schools, refer to the websites and official programs of study of various law schools in Canada and across the globe. See e.g. “Juris Doctor Program,” online: <www.osgoode.yorku.ca/programs/jd-program/>.

perspectives into conventional courses, acting either on the initiative of interested faculty members or as the result of explicit academic planning decisions. Law school conferences, books written by legal academics, even legal periodicals published by law schools are devoted entirely to exploring the impact of globalization on law.¹²⁰

Another distinguished scholar, William Twining, writing on globalization and legal scholarship, asserts, “today no scholar, or even student, of law can focus solely on the domestic law of a single jurisdiction.”¹²¹

4. PARTICIPATION IN ELECTRONIC JUDICIAL NETWORKS

We live in a connected era, drawn together through the Internet and technology. Judges, like most others, use these tools for personal reasons, but also for professional purposes, including judicial conversation and networking. Each interviewed justice acknowledged that these electronic instruments have become influential tools, increasing transnational judicial dialogue and interaction. One said, “electronic interaction is indeed becoming the most important form of communication, and electronic networks the most important tools of networking; Canadian judges are active participators and contributors.”¹²² The circulation of information through electronic networks is increasingly becoming a powerful force of judicial conversation, enabling the Supreme Court justices and their fellows in other countries to draw inspiration from each other’s practice. In addition, electronic data has become fundamental not only of individuals, but also of public institutions, including courts. When speaking to a group of academics and judges, Justice Michel Bastarache acknowledged that the “internet has played an important role in the process of judicial internationalization.”¹²³

The *electronic databases* used by judges can be of a *general nature* or a *specific legal nature*. Similarly, *electronic communication systems* and networks can be of *general type*, or *exclusive only to judges*. All forms of electronic databases or electronic communication systems are undoubtedly powerful tools for fostering the transnational judicial conversation, and the process of judicial globalization as a whole.

Legal electronic databases: In addition to search engines like Google and Yahoo, which are routinely used by almost everyone, including judges, there are many exclusive legal databases used by lawyers, judges, academics, and law students worldwide.¹²⁴ These include LexisNexis Quicklaw, Westlaw, HeinOnline, World Legal Information Institute (WorldLII), EUR-Lex, Constitutions of the World, Asian Legal Information Institute (AsianLII), Lexis China, HUDOC, and CODICES, which provide international and comparative legislation and court decisions from almost every country. For example, as of July 2020, WorldLII is

¹²⁰ See Harry W Arthurs, “Law and Learning in an Era of Globalization” (2009) 10:7 *German LJ* 629 at 630–31.

¹²¹ William Twining, *Globalisation and Legal Scholarship* (Nijmegen: Wolf Legal, 2011) at 30.

¹²² Interview with Anonymous Justice 1.

¹²³ Michel Bastarache, “How Internationalization of the Law Has Materialized in Canada” (2009) 59 *UNBLJ* 190 at 203. This article is largely based on a speech delivered during the conference *Law of the Future 2008* at the Peace Palace, The Hague, under the auspices of the Hague Institute for the Internationalization of Law, 23–24 October 2008.

¹²⁴ For a fairly long list of such legal databases see “Law Databases: A-to-Z List,” online: <guides.library.cornell.edu/onlinelegalresources/AlphabeticalDatabases>.

comprised of 1,834 databases from 123 jurisdictions via 14 Legal Information Institutes.¹²⁵ As confirmed by the interviews, Supreme Court justices and their clerks, when dealing with human rights or other constitutional cases, use WorldLII to help them develop a global perspective. The Canadian Legal Information Institute (CanLII)¹²⁶ provides the Canadian databases searchable via WorldLII.¹²⁷

Another example is CODICES, an electronic system established and operated by the Venice Commission that as of July 2020 collects and summarizes decisions from over 100 constitutional courts and courts of equivalent jurisdiction worldwide, including the Supreme Court of Canada.¹²⁸ Its primary languages are English and French, but information is available in many other languages, and the entire database can be searched using a keyword or phrase, allowing judges and other researchers to quickly find information on human rights and constitutional issues.¹²⁹ CODICES contains the full texts of over 10,000 decisions, as well as summaries, and is updated several times a year.

Courts and associations of courts have also created judicial electronic databases. AHJUCAF created one such database, of case law in French, and the network currently has almost 50 members, including the Supreme Court.¹³⁰ The ICJ developed a database of decisions related to human rights and the independence of the judiciary from jurisdictions all over the world, including global and regional reports, bulletins, and journals on human rights.¹³¹ Supreme Court justices have been very active in this organization.¹³²

Electronic communication systems and networks: Electronic communication is one of the most popular forms of communication nowadays. In addition to email, which has become the standard form of communication, numerous other programs and networks have made possible bilateral or multilateral communication, in all forms, writing, audio, or video. The judiciary is no exception. Courts and judges from across the globe have joined social media networks such as Twitter, Facebook, and LinkedIn.¹³³ The Supreme Court of Canada has Twitter,¹³⁴ Facebook,¹³⁵ and LinkedIn¹³⁶ pages, and occasionally the judicial conversation revolves around the use of such electronic systems.¹³⁷

Electronic networks and systems exclusively for judges: General electronic communication systems and social media tools are increasingly transforming the world, including the

¹²⁵ See online: *World Legal Information Institute* <www.worldlii.org>.

¹²⁶ See online: <www.canlii.org/>.

¹²⁷ See “WorldLII Stakeholders,” online: *World Legal Information Institute* <www.worldlii.org/worldlii/sponsors/#supporting_liis>.

¹²⁸ See “Publications of the Venice Commission,” online: *Council of Europe Venice Commission* <www.venice.coe.int/WebForms/pages/?p=03_Publications>.

¹²⁹ See “Constitutional Justice – Cooperation between the Venice Commission and Constitutional Courts,” online: *Council of Europe Venice Commission* <www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice>; see also online: <www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.

¹³⁰ Interview with Anonymous Justice 10. See AHJUCAF, *supra* note 33.

¹³¹ See ICJ, *supra* note 76.

¹³² See ICJ “CE,” *supra* note 78; ICJ, “HM,” *supra* note 77.

¹³³ See “Stay Connected,” online: <www.scc-csc.ca/connected-branches/index-eng.aspx>.

¹³⁴ See “Supreme Court of Canada,” online: <twitter.com/sec_eng>.

¹³⁵ See “Supreme Court of Canada,” online: <www.facebook.com/supremecourtofcanada>.

¹³⁶ See “Supreme Court of Canada,” online: <www.linkedin.com/company/supreme-court-of-canada-court-supreme-du-canada/>.

¹³⁷ Interview with Anonymous Justice 7.

judiciary, and have brought the justices of the Supreme Court closer to their counterparts from all over the globe. However, the public, and most academics, are unaware that judges are able to communicate through electronic networks and systems exclusively for judges. Justice Bastarache appeared to be referring to this type of communication when he declared, “the Internet has provided a means for continuous direct contact between judges, a sort of international chat room, that, for some, has created a break in isolation and an opportunity to consult on ways of dealing with common issues.”¹³⁸

My research revealed that there are two principal transnational judicial electronic networks that are even unknown to the public. The French-speaking world uses *LOINET*,¹³⁹ while English speakers use *LAWNET*.¹⁴⁰ From my interviews, I got the sense that each network has over 500 judges from over 50 countries. The interviewees disclosed that anywhere from six to eight Supreme Court justices have participated in either *LOINET* or *LAWNET*, and some continue to do so. However, of the ten justices I interviewed, only three were members, and only one, a member of both electronic networks, agreed to provide details:

[These networks are] informative, interesting for the subjects discussed, and for interpersonal relationships. Some of the main topics of our exchange are on jurisprudence, process, other management issues within the judiciary, and other more general legal conversations. Through this setting, judges, often from different countries, who have never met, organize dinners or other gatherings specially to meet.... I should admit, these online conversations among judges are unique and facilitate judicial globalization to a great extent.¹⁴¹

When speaking about *LOINET*, the justice remarked:

LOINET is a Canadian creation.... Rightly, it is a source of pride for us Canadians, and it deserves to be supported. Yet, the Canadian judges are not using it sufficiently. Perhaps because it is not well known in Canada. I encourage new generations of judges to register to this network.¹⁴²

It is likely that only one justice agreed to talk about these networks because their crucial characteristic is that they are *confidential*. Therefore, only by speaking with judges, or the administrators (who are also judges), can one learn more about these networks. Through the intervention of one of the Supreme Court justices, the founder and administrator of *LOINET* agreed to speak with me. The former lower court judge shared information only after he had consulted with network members.

When asked why he founded *LOINET*, he said:

I decided to start this electronic network for judges back in 1995 — at the beginning of the Internet — for three reasons. First, to address the loneliness of judges; second, to advocate for the presence of the French

¹³⁸ Bastarache, *supra* note 123 at 203.

¹³⁹ This is not the real name of the French-speaking electronic network. For security reasons, the name was changed in order to preserve the anonymity of the network.

¹⁴⁰ This is not the real name of the English-speaking electronic network. For security reasons, the name was changed in order to preserve the anonymity of the network.

¹⁴¹ Interview with Anonymous Justice 1.

¹⁴² *Ibid.*

language in the then-English-only Internet; and third, to tame the differences in the legal profession by mingling with different law cultures.¹⁴³

Expanding upon the first reason, he explained, “judges are all alone with their conscience and their backgrounds in a constant evolving society. Well, private networking among judges doesn’t leave you alone anymore.”¹⁴⁴

The founder of *LOINET* said that its members are from all three levels of the judiciary; however, “in addition to justices of Constitutional or Supreme Courts, we have many judges from the appeal court level in different countries, but the core of the network is made up of first level judges.”¹⁴⁵ Several members of the highest courts of several African countries are part of the network, and “the Chief Justice of the *Court de Cassation* in France was a member of *LOINET*.”¹⁴⁶ He revealed that three or four Supreme Court justices have been or are members.

In response to a question about why these electronic networks are not known to the public, he answered, “for security reasons. Judges expect complete privacy. We don’t want hackers to access our emails. We don’t want to attract prying eyes. If nobody knows about it, nobody is going to look for it.”¹⁴⁷ Comparing these private networks with classic social media networks, he said:

Judges are skeptical about the use of social media, mainly because those are still public places. Judicial bodies have stated that judges may open a Facebook or Twitter account to stay in touch with family and friends, but they have to be very careful of their writings because those are public spaces. That’s why we have these private electronic networks, which are private electronic spaces for judges where they can keep in touch and exchange ideas without worrying. And that’s why we are very careful that these electronic networks remain private.¹⁴⁸

The justices stressed that these electronic judicial networks are not only a great venue for social interaction among judges, but can also be beneficial when their distant counterparts are in trouble. Both the *LOINET* administrator and one of the Supreme Court justices shared a story about a judge in ill health and the network’s generosity:

A judge of a Court of Cassation in Africa suffered from a lung disease that leaves a breathing capacity of about ten per cent. He did not have the financial means to buy a mobile respirator, so he was suffering from this disease, his life was in danger, and he had a horrible quality of life. The members of *LOINET* were mobilized. A fundraiser, discreet and exclusively voluntary, made it possible to raise the necessary money to buy a respirator for this African colleague. Over the past year, he had to go to the hospital and, had it not been for the respirator, he could not have done so safely.¹⁴⁹

¹⁴³ Interview with Anonymous Provincial Court Judge.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ Interview with Anonymous Justice 1.

Referring to the above story, and also to other similar occasions, according to its administrator, *LOINET* “is not only about laws and social fun, it is also about helping people.... Once you have done that in your personal life, you bring that state of mind into your courtroom.”¹⁵⁰ In his view, “*LOINET* can make you a better person and probably a better judge as well.”¹⁵¹

Electronic judicial networks are indeed revolutionary for the transnational judicial dialogue and foreign affairs of courts. Most forms of institutional or even individual conversation are more formal, and generally require an institutional action. In addition, they are usually expensive, and happen only occasionally. Electronic networking, on the other hand, is free, fast, and continuous, making bilateral or multilateral judge-to-judge contact much easier and more readily available. The advent of the Internet, and particularly the exclusive electronic judicial networks, means that the opportunity to establish personal or professional contacts with other judges is no longer solely the prerogative of formal institutions. This has enabled transnational conversation to flourish, as evidenced by the remarks of the administrator of *LOINET*:

The globalization of the judiciary definitely started with the Internet, and it has built up from there. The Internet allowed the creation of private chat rooms or forums; in other words, permanent vehicles dedicated to the judiciary. That was a novelty and it opened the door to judicial conversation and globalization of courts, on a permanent basis.¹⁵²

IV. THE IMPACT OF JUDICIAL DIPLOMACY ON THE DECISION-MAKING OF THE SUPREME COURT OF CANADA

As exposed in the previous sections, the Supreme Court and its justices are extensively engaged in conversation, exchanges and relations with foreign counterparts in various settings. This section will explore whether such interactions have any influence on the Supreme Court as an institution or its justices. According to current scholarship, the process of transnational judicial dialogue may affect judicial decision-making and generally judicial behaviour; yet, the study of the relationship between the existing theories of judicial behaviour and transnational judicial dialogue is beyond the scope of this article. The most comprehensive way of analyzing judicial behaviour and judgment, are the nine theories of judicial behaviour developed by the American judge, Richard Posner.¹⁵³ Emmett Macfarlane, a Canadian political scientist that analyzed the judicial behaviour the Supreme Court and its justices also develop almost similar theories. According to him, there are many factors that contribute to the work of the Supreme Court, yet many of his findings “not only support the underlying theories of the attitudinal and strategic approaches but also demonstrate how judicial policy preferences become influential in certain stages of the Court’s decision-making process.”¹⁵⁴

¹⁵⁰ *Ibid.*

¹⁵¹ Interview with Anonymous Provincial Court Judge.

¹⁵² *Ibid.*

¹⁵³ Richard A Posner, *How Judges Think* (Cambridge, Mass: Harvard University Press, 2008) at 19. According to him, the nine theories are: the attitudinal, the strategic, the sociological, the psychological, the economic, the organizational, the pragmatic, the phenomenological, and the legalist theory.

¹⁵⁴ Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013) at 38.

The question of whether such interactions have any influence on the Supreme Court as an institution or its justices was put to current and former justices of the Supreme Court, almost all confirmed that such activities are not unimportant, and do have several effects. However, their views varied. One justice asserted, “extrajudicial activities of judges are of great importance,”¹⁵⁵ while a more skeptical justice argued that the effect of such activities is difficult to determine, but is sure they influence the Supreme Court “in some ways.”¹⁵⁶ This justice explained further:

We go to these conferences, and we have these conversations with other judges to get perspective. Around the world, judges are facing the same problems. So when we are grappling with these difficult issues, we can find it useful to listen to the perspectives of someone else. It is not that we are going to just adopt that, or that is going to directly change our decision. But we hope that it enriches our thinking, the way we think about our problems. We may accept some new ideas, we may reject them, or we may use and adopt them in a different form. But we are basically looking for new perspectives on problems that we might face (substantive or organizational), and then what we do with them, well, it depends on the nature of the problem or the case.¹⁵⁷

The majority of the other justices also acknowledged the difficulty in assessing the impact of foreign relations activities, particularly in comparison with discerning the influence of non-domestic legal instruments on the Supreme Court. According to the justices, this is because the impact of such interaction activities is less visible on the decision-making of the Supreme Court, whereas on management matters, these effects are more direct.

This section examines the main effects of both forms of foreign relations activities explained above, *court-to-court* (institutional) and *judge-individual interactions*.

A. COURT-TO-COURT ACTIVITIES

As noted above, there are at least three forms of court-to-court transnational judicial interactions: *regular bilateral relationships with foreign courts*, *transnational judicial associations and organizations*, and *occasional contacts*.

As noted, the Supreme Court has built official and ongoing relationships with at least nine courts, eight of which are the highest courts of foreign nations (the UK, the US, France, Australia, New Zealand, Germany, India, and Israel), and one of which is a supranational court (the ECtHR). The main purpose of such exchanges is to share information and best practices, whereas the range of topics discussed is quite broad, ranging from substantive legal principles to more administrative issues.¹⁵⁸

In fact, as mentioned above, all interviewed justices emphasized that foreign relations activities create two types of impacts: a) *substantial*, on the decision-making of the court; and b) *managerial*, on court administration and internal procedures. Court management issues

¹⁵⁵ Interview with Anonymous Justice 8.

¹⁵⁶ Interview with Anonymous Justice 2.

¹⁵⁷ *Ibid.*

¹⁵⁸ See Rado, *Judicial Dialogue*, *supra* note 19 at 212 for plaque text.

will be discussed in the subsequent section;¹⁵⁹ here the focus is on the effects of extrajudicial activities on the decision-making of the Supreme Court.

The interviewed justices note that judges share information and best practices about substantive legal principles, exchanging views on case law related to almost every field of law. However, the justices added that the *substantive* legal issues discussed most often in these official meetings are human rights or other important constitutional principles. Speaking about these regular court-to-court exchanges, one justice remarked:

We would take three cases from one country and three cases from the other on the same subject and then we would have presentations. Judges would make presentations and then we would compare our methods, our use of precedents, our results, and so on. The exchange was really a debate about best practices, the way we deal with the questions that are common to our courts.¹⁶⁰

It appears the central goal of these formal meetings is for judges to discuss and debate ideas to better prepare them for the substantive issues they face daily. However, this does not imply that such best practices or foreign judgments will be implemented. As one of the interviewed justices explained:

It is not that we are going to just adopt that, or that is going to directly change our decision. But we hope that it enriches our thinking, the way we think about our problems. We may accept some new ideas, we may reject them, or we may use and adopt them in a different form.¹⁶¹

Even if the Supreme Court does not change its practices, such meetings allow for the sharing of information, the understanding of foreign judgments, and the exchange and cross-fertilization of jurisprudence. Most justices that I interviewed agreed.

It is interesting to note that a correlation exists between foreign relationship activities with a specific court and the citation of judgments of that particular court. The list of foreign national courts with which the Supreme Court is currently in a regular court-to-court relationship,¹⁶² and the list of courts that the Supreme Court cited in the last 17 years, are remarkably similar.¹⁶³ The Supreme Court has cited almost each of these nine courts. The connection is strengthened when the four most cited foreign courts are examined: the Supreme Court of the United States (cited 270 times), the Supreme Court of the United Kingdom (240), the High Court of Australia (61), and the Supreme Court of New Zealand (36).¹⁶⁴ Each of these courts is a foreign highest national court with which the Supreme Court is in a regular bilateral relationship.

¹⁵⁹ See Part V, below.

¹⁶⁰ Interview with Anonymous Justice 4.

¹⁶¹ Interview with Anonymous Justice 2.

¹⁶² See Part III.A.1, above. This list contains nine courts, eight highest national courts and one supranational court: the Supreme Court of the United Kingdom, the Supreme Court of the United States, the *Cour de Cassation* (and *Conseil d'État*) of France, the High Court for Australia, the Supreme Court of New Zealand, the Federal Constitutional Court of Germany, the Supreme Court of India, the Supreme Court of Israel, and the ECtHR.

¹⁶³ For a list of all highest courts cited by the Supreme Court of Canada, see Table 1.

¹⁶⁴ See Table 1.

**TABLE 1: SUPREME COURT OF CANADA
COMPARATIVE CASE LAW AND THE HIGHEST COURTS OF OTHER NATIONS**

COURT	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
US	17	44	24	13	23	5	10	16	16	21	17	13	6	19	9	13	4	270
House of Lords /UKSC	13	16	19	16	9	10	9	14	27	14	16	14	7	20	19	9	8	240
Australia	3	4	10	1	3	1		2	7	3	4	8	8	4	3			61
New Zealand	3		13	2		1		3	1	2	2	1	2		6			36
UK Privy Council		2	1	3	2	1		3	5	6	2	3		2				31
South Africa	2	2	1					1		5	2				1	2		16
France			1			1		7										9
Ireland		1	2												2	2		7
Israel			1			1		2								3		7
Germany												1			2			3
The Netherlands			1								1							2
Hong Kong							1		1									2
Switzerland								1										1

Similarly, the ECtHR, with which the Supreme Court is in such a formal bilateral relationship, is the most cited international court, cited almost as often as the other international courts combined.¹⁶⁵ Hence, the empirical data, reinforced by the interviews with justices, confirm the strong relationship between interaction activities among courts (particularly in the form of bilateral relationships), and the citation of their judgments in Supreme Court of Canada decisions.

¹⁶⁵ See Table 2.

TABLE 2: INTERNATIONAL COURTS CITED BY
THE SUPREME COURT OF CANADA¹⁶⁶

INT/NL COURTS	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	TOTAL
ECtHR		8	4		1			3		4	7	2			3	9		41 (32.5%)
ICTY			1			6					1			3	2			13 (10.3%)
ICJ						1		1						1	7			10 (7.9%)
CJEU						2									6			8 (6.3%)
ICTR						5												5 (3.9%)
ICC														4				4 (3.2%)
IACHR															4			4 (3.2%)
PCA								1							1			2 (1.5%)
ECHR								1										1 (0.8%)
PCIJ								1										1 (0.8%)
CEU					1													1 (0.8%)
EPO			1															1 (0.8%)
UNHRC																1		1 (0.8%)
JCPC		3	1	3	2	1		4	5	6	3	3		2		1		34 (27%)

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With regard to Table 2, the court names in full are:

ECtHR – European Court of Human Rights.

ICTY – International Criminal Tribunal for the Former Yugoslavia.

ICJ – International Court of Justice.

CJEU – Court of Justice for the European Union.

ICTR – International Criminal Tribunal for Rwanda.

ICC – International Criminal Court.

IACHR – Inter-American Court of Human Rights.

PCA – Permanent Court of Arbitration (League of Nations).

ECHR – European Commission of Human Rights.

PCIJ – Permanent Court of International Justice (predecessor of the ICJ).

CEU – Commission of the European Union.

EPO – European Patent Office. It is one of the two organs of the European Patent Organisation, which acts as the executive body of the Organisation, online: *European Patent Office* <www.epo.org/index.html>.

UNHRC – United Nations Human Rights Council.

JCPC – Judicial Committee of the Privy Council.

B. INTERACTION ACTIVITIES OF INDIVIDUAL JUSTICES

These contacts, which fall into four categories as identified above,¹⁶⁷ arguably influence the decision-making of the Supreme Court of Canada. Such individual contacts can be developed in different settings. The majority of the interviewed justices acknowledged that their contacts with individual judges of foreign or international courts enable them to exchange ideas and learn about different jurisprudence. Hence, extrajudicial activities at the individual judge level, alongside those at the institutional level, are essential mechanisms that indirectly affect the decision-making of the Supreme Court, exposing it to more “foreign” ideas.

One of the justices spoke about the impact of such meetings:

Face-to-face meetings with foreign judges in different settings are very, very important venues, where we speak about our case law.... It is important to note that generally a lot of it has to do with the judges we have met with and respect.¹⁶⁸

Another justice conveyed a similar message:

Yes, these meetings with foreign judges do play a role in referring more to international or transnational legal sources.... Such meetings with foreign colleagues open up my mind to what is going on in other countries.¹⁶⁹

Another justice also mentioned that these meetings are critical venues for learning about other courts’ cases, emphasizing that foreign judges struggle with the same issues, and noting, “in these meetings, we exchange ideas and practices, and can learn about their jurisprudence.”¹⁷⁰ As explained above, some of these individual judge contacts may become ongoing relationships, and even friendships. Hence, one of the effects of such individual connections is that they not only bring into attention new case law, but they bring much more information about it, provide more background on the circumstances of the case, and most importantly, increase the trust among judges and their confidence to use each other’s case law.

Indeed, the majority of interviewed justices acknowledged the existence of a correlation between the extrajudicial interaction activities of judges with their foreign counterparts, and their reference to non-domestic legal sources.¹⁷¹ Such a correlation is affirmed by the data of this study, as the justices with the highest number of references to non-domestic legal sources are often the same justices that have been more active in such activities and have a more “globalist” profile. As the interviewed justices themselves recognize, such interactions allowed them to develop personal relationships with foreign judges, to be more informed about each other’s jurisprudence, to become aware of new ideas and solutions, and to trust

¹⁶⁷ See Part III.B, above. The four categories of individual-judge interaction are: (1) Face-To-Face Meetings with Foreign Judges; (2) Participation in Transnational Judicial Associations; (3) Establishing and Participating in Global Judicial Training Institutions; and (4) Participation in Electronic Judicial Networks.

¹⁶⁸ Interview with Anonymous Justice 5.

¹⁶⁹ Interview with Anonymous Justice 8.

¹⁷⁰ Interview with Anonymous Justice 3.

¹⁷¹ *Ibid*; Interview with Anonymous Justice 1, Justice 2, Justice 5, Justice 9, and Justice 10.

and rely on the judge behind the decision.¹⁷² “Building trust” is a vital element in judge-to-judge relationships, which then influences the general transnational judicial dialogue at both the institutional and individual levels, and further influences the decision-making process. As one of the justices of the Supreme Court explained, “the friendships that we create with judges from other nations enhance the dialogue on those issues that come before us or them, which benefits us all.”¹⁷³

Another benefit of contacts with foreign judges is that they have more information about the context of such foreign judgments, including the socio-legal, historical, and political background, which enables them to use these cases much more appropriately. One justice reinforced that finding:

The importance of these meetings is that you not only get informed about such foreign sources, but you get also to know and understand more about their judicial culture, and the historic or political background of such cases. I have been obviously sensitized to international law, through my participation in such meetings, where I was often invited to speak.¹⁷⁴

It is fair to say that social or extrajudicial judicial interaction at both the institutional and judge-individual levels has an impact on the decision-making of the Supreme Court. As demonstrated above, it is through these kind of activities that the Supreme Court and its justices are brought into conversation with foreign counterparts, allowing them to exchange ideas and best practices, refer to the judgments of each other, learn more about the context of such decisions, and build trust with each other. Yet it must be noted that the impact of foreign interaction activities on the decision-making of the Supreme Court is non-direct. As one justice stated:

I think that the impact of such activities on the decision-making of the Supreme Court is probably indirect.... I can't think of an instance where I was in some sort of international exchange with foreign judges, and learned something, and the next day it happened that I needed to use the foreign decision that I learned. I mean, that's not how the judiciary works. These meetings certainly give you new ideas, and you can learn and exchange best practices there, which later can be of use, as it has been in many instances.¹⁷⁵

Although the effect of foreign relationship activities is often not visible to the public, several justices indicate that such interactions prompt the Supreme Court to reference both a greater number and higher quality of non-domestic legal sources.

Finally, transnational judicial interactions, through both legal and extrajudicial mechanisms, not only influence when the Supreme Court elects to adopt such ideas and

¹⁷² *Ibid*; Interview with Anonymous Provincial Court Judge. Here is how this judge, as the administrator of one of the transnational electronic networks, puts it:

Before getting an idea from a colleague from another country or citing case law from other countries, these face to face meetings helps to know the judge on personal level. You end up understanding more the judges behind their decisions and say: “OK, I can trust him and I can rely to the man behind the decision, and that decision is not that foreign anymore”. So, relating to the man behind the decision is certainly a plus. When I started practicing law, we did not have such opportunities to meet the man behind the decision.

¹⁷³ Interview with Anonymous Justice 1.

¹⁷⁴ Interview with Anonymous Justice 8.

¹⁷⁵ Interview with Anonymous Justice 9.

practices, but also when it decides to avoid them. These interactions expose justices to a vast number of ideas and practices from around the world, and some, as many justices note, would be unacceptable in Canada. As one elegantly remarked:

International legal sources or practices of other countries are helpful not only when you want to adopt them, but also when you don't want to adopt them.... Hence, even when you don't cite them you still learn from them, because it is a decision you want to avoid in Canada.¹⁷⁶

As in other areas of life, learning what needs to be avoided is as important as learning what should be emulated. While foreign decisions that have been followed can be found in the text of Supreme Court decisions, it is impossible to know which judgments were avoided without speaking with justices. However, the latter have certainly shaped Supreme Court judgments through their absence.

V. THE IMPACT ON THE SUPREME COURT OF CANADA MANAGEMENT AND PROCEDURES

The extrajudicial conversation of the Supreme Court and its justices with foreign counterparts does not only affect the decision-making of the Supreme Court. Several justices believe that such extra-curial interactions may influence Supreme Court management more than substantive cases.¹⁷⁷ One justice asserted, “these extrajudicial networking activities and meetings with foreign counterparts may have an even greater impact on court management matters.”¹⁷⁸ One reason, according to the High Administrative Officer of the Supreme Court, is, “court management issues are less political and controversial, hence the exchange on these matters is more acceptable and maybe easier to adapt from one court to the other.”¹⁷⁹

In addition to the senior official of the Supreme Court, almost all interviewed justices (nine out of ten) noted that transnational judicial dialogue affects court organization and management, or institutional arrangements and internal procedures. As one justice emphasized, “these extrajudicial activities, such as face-to-face meetings, associations, and judicial organizations, bring many changes, particularly to the operation of the Court.”¹⁸⁰

Speaking about court management and internal procedures, one justice stated, “we can get good ideas everywhere and on every matter. There is always somebody who has a good idea about something. The smartest thing you can ever learn as a judge is to have an open mind.”¹⁸¹ With this universal statement in mind, this section will provide examples of the effects of transnational judicial conversation on court management, most of which fall into one of three categories: (1) specific occasional effects; (2) development of universal guidelines; and (3) continuous checking process.

¹⁷⁶ Interview with Anonymous Justice 3.

¹⁷⁷ Interview with Anonymous Justice 6, Justice 7, Justice 8, and Justice 10.

¹⁷⁸ Interview with Anonymous Justice 9.

¹⁷⁹ Interview with a High Administrative Officer.

¹⁸⁰ Interview with Anonymous Justice 7.

¹⁸¹ Interview with Anonymous Justice 5.

A. SPECIFIC OCCASIONAL EFFECTS

These effects may occur as a result of a specific exchange of a practice with one or more foreign courts around a particular issue concerning court management and internal practices. Several interviewed justices provided examples of these type of effects. For instance, one said:

Let me give you an example how judicial administration ideas can travel and be of great help. We have a practice here that we developed, I guess, the last 3–4 years, to not circulate drafts of judgments in the month of August. The rationale is that it allows us, and our staff, to take a real holiday. This idea came from our meetings with the judges of the US Supreme Court.... These meetings are very important not just for the law, but also about how we operate as judges, how our collegial practices can be improved.”¹⁸²

Another justice noted this example and added that this imported practice is prompting the Supreme Court to make changes in the way it schedules appeals, saying, “there are discussions to move in that direction and organize our cases in that way,” referring to the US Supreme Court.¹⁸³ He further explained the influence of this foreign custom on the internal practice of the Supreme Court:

One example is the practice of the US Supreme Court that all hearings of judgments are to be completed by the end of June. I think they have to issue all the judgments by the end of June, and if they don’t, they have to rehear the case. We don’t have any such rule, but that practice made us think that it would be in the interest of the Court to have a period where everybody closes what they are doing and gets a real holiday. And the idea was that it would serve our legal staff who are extremely busy, trying to get the judgments translated, and some working on the holidays, and so on. In our view, it would be good if there was a slowdown. That led us to some changes of practice, in terms of both scheduling appeals and an informal rule among colleagues that they wouldn’t circulate any memos during summertime. I would say those changes in our internal practices and procedures were a direct result of discussions that we had with our US colleagues.¹⁸⁴

These changes indicate that the conversation with the US Supreme Court has not only influenced the Supreme Court of Canada’s appeals schedule, but also its internal procedures on the drafting of judgments. During summer, justices do not circulate memos and draft judgments. Other justices clarified the importance of the issue, noting that the drafting of judgments was also discussed in other bilateral and multilateral transnational venues.¹⁸⁵ They acknowledged that such interactions helped them improve their writing abilities, which affects both the form and substance of the judgments.

Another oft-mentioned example involves the relationship of the Supreme Court with the public, particularly in the digital age. Judges are aware that social media plays a central role

¹⁸² Interview with Anonymous Justice 6.

¹⁸³ Interview with Anonymous Justice 9.

¹⁸⁴ *Ibid.*

¹⁸⁵ Interview with Anonymous Justice 7 and Justice 4.

in their communication with the public, and as these platforms are constantly developing, judges seek to adopt new ways to enter into conversations. One remarked:

Before we would rely on traditional media to report our decisions and legal affairs, but now things have changed and the traditional media does not play that unique and important role. So, how do we react to that? We need to think on how to react on that, and communicating with other courts is always a great way to improve things home.¹⁸⁶

The Supreme Court of Canada looked to the UK Supreme Court for help resolving this issue. One justice noted:

In the UK, we learned that when an important decision of the Supreme Court is delivered, they will prepare a short summary of the judgment, and they will publish on YouTube a video of a judge reading this summary of the judgment.¹⁸⁷

Another justice mentioned the same discussion:

In our meeting with the UK Supreme Court judges, we spent quite a bit of time talking with them about the presentation of our judgments to the wider public. . . . After some discussion with our colleague justices of the Supreme Court of the UK, we are actively thinking about ways on how to do it here, in order to improve our relationship with the public.¹⁸⁸

These meetings prompted the Supreme Court to implement several internal organizational changes, by even creating new offices and hiring new staff. A current justice provides further details on new developments related to improving the Supreme Court's relationship with the public:

We recently advertised that the Court is hiring a media relations officer who will write summaries of our decisions for the media, which I will expect will also be tweeted, because the Court now has Twitter and Facebook accounts. This practice allows us to put our voice, in explaining our decisions directly to the public, in very short and more understandable terminology. This entire development is not all attributable to our discussions with our UK peers, but it has certainly been an important part. That's another fairly concrete example of how our conversation with the UK Supreme Court led to improvements in our Court.¹⁸⁹

B. DEVELOPMENT OF UNIVERSAL GUIDELINES

Another important effect caused directly from the exchanges with foreign counterparts is the development and establishment of universal guidelines. Court management issues are often discussed in multilateral settings. In such meetings, the participants exchange their experiences and may agree to develop general guidelines or best practices of the management of highest courts. A few years ago, several courts, including the Supreme Court, decided to put forward a set of norms, principles, guidelines, and best practices, which can be of great

¹⁸⁶ Interview with Anonymous Justice 7.

¹⁸⁷ *Ibid.*

¹⁸⁸ Interview with Anonymous Justice 6.

¹⁸⁹ *Ibid.*

help not just to the participant courts, but also to international courts or highest courts of other countries that want to improve their court management.

In 2008, the Commonwealth Meeting of Justices and Registrars of Final/Appellate Courts and Regional Courts highlighted the importance of convening a transnational meeting to “discuss issues and exchange information about best practice in registries.”¹⁹⁰ As a result of this recommendation, court administrators from across the Commonwealth were invited to submit detailed written papers and attend a meeting in Ottawa hosted by the Supreme Court of Canada. The outcomes of the conference were outlined in a user-friendly, practical manual: *Handbook of Best Practice for Registrars of Final/Appellate, Regional and International Courts and Tribunals*.¹⁹¹ This *Handbook* was later published, and as one senior official of the Supreme Court mentions, it serves not only the courts who participated in constructing it, but has become essential for many courts across the globe. The issues the *Handbook* addresses are: *institutional matters* (such as budget, security, court governance, media relations, and recruitment of administrative staff); *information and document management* (such as e-filing, the judiciary and technology, and moving to an IT-based system); *the needs of court and tribunal users* (such as legal aid, witness and victim support, and areas of state responsibility); and *eradicating inefficiencies and abuses of process*.¹⁹²

The creation of the *Handbook* suggests transnational judicial conversations surrounding management issues have been much more effective than those relating to substantive decision-making. Exchanges regarding substantive matters have led to cross-fertilization and the development of various legal tests and principles, but have never prompted a multilateral gathering of judges, who come together and discuss substantive issues, and then develop global guidelines on various substantive legal topics that concern the majority of courts across the globe. Speaking about the future of transnational judicial conversation, one justice explains why it is unlikely a formal process that provides homogenous laws or principles will be implemented:

If there was a sort of formal process saying: we are going to put forward an idea where we can get more homogenous laws or principles, in a very formal sense, that somehow would be binding on us, or even presumptively “the right answer”; but I don’t see us going that way at all. Because each court has to be and remain independent, and develop its jurisprudence in conjunction with the laws and constitution, and culture of its own country. All this is very valuable, but formalizing it, I do not know how it can happen. If, for example, there would be a sort of commission from the global community of judges that would say, “Let’s go for solution, a, b, or c,” towards some sort of omnipresent international law, but we are not there and I do not see how it would work in our legal framework.¹⁹³

As mentioned above, the Supreme Court justices acknowledge that it is difficult to find global common ground on substantive cases, as they are more political and controversial. Court management, on the other hand, is much smoother. The exchanges between several highest courts in the Commonwealth have led to the establishment of a set of global

¹⁹⁰ Commonwealth Secretariat, *Handbook of Best Practice for Registrars of Final/Appellate, Regional and International Courts and Tribunals* (London, UK: Commonwealth Secretariat, 2012) at iii [*Handbook*].

¹⁹¹ *Ibid.*

¹⁹² *Ibid* at 1.

¹⁹³ Interview with Anonymous Justice 2.

guidelines that address almost all issues regarding court management. This development directly stems from the transnational judicial conversations that have occurred over the last two or three decades.

C. CONTINUOUS CHECKING PROCESS

Beyond the singular occasional effects and the establishment of universal guidelines analyzed above, the court management of the Supreme Court is influenced also by a *continuous checking process*. Unlike the previous two categories, this type of process, as the label itself suggest, is a development that occurs through a checking process, which is continuous and leads to changes and effects that are more gradual, often minor, and much more difficult to notice. Certain interviewed justices and the High Administrative Officer described this as a “confirmation of views” process.¹⁹⁴ By definition, courts are very sensitive to legal rules, and operate cautiously, gradually, and thoughtfully. Hence, as a rule, modifications in their institutional arrangements are very gradual. The High Administrative Officer of the Supreme Court explained the process:

The interchange is a two-way traffic, and we certainly learn from each other. But I would say that is more sometimes just checking how we do it, and whether what we are doing make sense. For example, we look at the websites of other courts, and by looking at it, it gives us new ideas, and maybe it causes us to change our own. We also ask questions of our counterparts, and learn from them. For example, “have you ever faced this type of situation, and if yes, how do you handle it?” One example is the funding.... So, we check with other courts, and try to improve our system. For sure, we are in conversation with other courts, sharing our experiences, and for sure, we are interested to know what they do. This conversation helps our own thinking. It is mostly practical, instrumental. In other words, is a process of learning from others; we learn from others but we also share our own experience with our counterparts.¹⁹⁵

Another justice also mentioned exchanging ideas regarding funding:

In almost every country, the government does not invest enough in the justice system. So the issue of a limited budget in the justice system is a global issue. It is the same in Canada, and in other countries in Europe, and you realize this when you speak with foreign colleagues, that the budgets are not there anymore, and we have to work with means that are less available, and we have to work in new ways to shorten delays, as we do not have the same facilities anymore. These problems are the same across the democratic nations and beyond. So we compare notes, and we look at each other and see how we can do things with a lower budget, and we try to deal with what we have, and how to use facilities and resources that are more limited. That’s only one example, which is shared by many countries from all over the world, but we can certainly expand the examples to other areas of judicial administration. And when you discuss with this people, I can tell you, they live the same problems as we do.¹⁹⁶

¹⁹⁴ Interview with Anonymous Justice 6, Justice 7, and Justice 9.

¹⁹⁵ Interview with a High Administrative Officer.

¹⁹⁶ Interview with Anonymous Justice 7.

The continuous checking process also occurs in multilateral venues, such as organizations or associations of which the Supreme Court is a member. As one justice stated:

Within the organization of ACCPUF [Association of Constitutional Courts Sharing the Use of French], we compared notes with the *Conseil Constitutionnel* of France and the Constitutional Court of Switzerland, and it was very interesting and we learned from each other. The way we deliberate is different, the means that we give to the media people to help them to inform the public about our decisions are different, and we tried to learn from each other in this aspect, in order to improve our own system.¹⁹⁷

However, although less controversial than substantive matters, even court management exchanges are not without challenges. One interviewed justice explained:

The main difficulty in exchanges of ideas regarding court management is that each court has its own structures and challenges. Obviously, we do not have the same structure and number of appeals as the Indian Supreme Court or the ECtHR, which have tens of thousands of cases on backlog. Yet, some supreme courts, like the US Supreme Court or the Supreme Court of the UK, are closer to our Court, in terms of the number of judges and number of cases, so we can have pretty useful discussions about the management of the Court.¹⁹⁸

The senior official of the Supreme Court expressed a similar view:

Every supreme court is different. Yes, we are all supreme or constitutional courts, but none does exactly the same thing, because of history, culture, legal system, and so on. In other words, we need also to be aware of our differences. Yet we do try to learn as much as we can from each other and from the experience of others.¹⁹⁹

Despite the fact that court management exchanges appear to be less political and controversial, the various differences among the highest courts make this process challenging.

As with the exchanges on case law, conversations on court administration and management expose judges not only to ideas that they want to follow, but also to practices they wish to avoid. An interviewed justice offered two examples:

I remember in one of our meetings with the Mexican Supreme Court, we were hearing about how this Court deliberates in public, and we discussed the pros and cons of such a practice, and about another practice, that it is the Secretariat who drafts judgments rather than the judges themselves. And we thought this is something that we want to avoid... . Another interesting example was when we discussed with the Supreme Court of the US about the way they distribute cases, and again we thought that it is something that we may not want to follow.²⁰⁰

197

Ibid.

198

Interview with Anonymous Justice 10.

199

Interview with a High Administrative Officer.

200

Interview with Anonymous Justice 8.

The same justice continued:

There are also a number of other instances where we learn about other processes or court management issues from other courts, and often we say that we do not want that in our Court. In other words, it is not just learning what you want to adopt at home, but also sharing of experiences of other courts, which are important to teach us about what we may want to avoid.²⁰¹

Other justices explicitly reference the benefits of learning about “bad” practices.²⁰² Indeed, the benefits of such interactions occur not only when the Supreme Court adopts such practices or ideas, but also when the Supreme Court decides to avoid them, learning from the experience of other courts. Another justice succinctly stated, “there is always something to learn. Even if it is something that you do not agree with, it can still make you refine your own ideas.”²⁰³

Although it is beyond the scope of this article, it should be noted that like judges, court administrators also network and share their best practices with one another, and their exchanges are significant for the administration of courts.²⁰⁴ As one senior official of the Supreme Court explained: “[t]here are two types of exchanges between courts: (1) exchanges between the Court as institution or between judges focusing on case law, and (2) exchanges focused on Court administration, on how we can be helpful to other court officials in order to better manage their court.”²⁰⁵

The second category of exchanges goes beyond judges and often involves administrative staff of courts, particularly registrars and other high administrative officers.

To conclude, as demonstrated above, transnational judicial conversations of the Supreme Court and its justices have a noticeable impact on court management and other internal practices. As one interviewed justice of the Supreme Court rightly noted:

All kinds of aspects of our work can be influenced by our conversation with foreign courts. It could be on the substance, but also on procedures and practices on how to draft judgments.... In other words, this process and influence is very open to all kinds of aspects. We are always looking to adapt new best practices in every aspect. Always, because all is changing so fast and we need to adapt in the best way possible.²⁰⁶

Although the Supreme Court is considered to be an institution that handles its management issues well, “the Supreme Court does not come into these meetings with the idea of teaching other courts how to do it.”²⁰⁷ Even when it is not embracing an instant “good practice” from another court, or not following a universal guideline, or simply checking the

²⁰¹ *Ibid.*

²⁰² Interview with Anonymous Justice 3.

²⁰³ Interview with Anonymous Justice 5.

²⁰⁴ See e.g. International Association for Court Administration (IACA) in which Canadian high administrators, like the Registrar of the Supreme Court are members. See online: *International Association for Court Administration* <www. iaca.ws>. IACA was “created in 2004 by court system executives and managers. Its founding principles envision a global association of professionals collectively engaged in promoting the effective administration of justice.”

²⁰⁵ Interview with an anonymous Senior Official of the Supreme Court of Canada.

²⁰⁶ Interview with Anonymous Justice 7.

²⁰⁷ Interview with Anonymous Justice 9.

practices of other courts, still this development has its own significant effects in shaping the Supreme Court. However, the greatest impact is felt in the cross-fertilization of court management practices, where courts, including the Supreme Court, continuously check their best practices, comparing them with one another and implementing any needed adjustments. Moreover, this process also shapes the thinking of the Supreme Court administrators and judges and allows them to make further improvements in court management and their internal procedures.²⁰⁸

VI. CONCLUDING REMARKS

As demonstrated throughout this article, the “globalist” or “localist” profile of a court cannot be evaluated solely by its engagement with foreign judgments or other non-domestic legal sources, be it international or comparative. The data reveals that foreign relationships and interaction activities of courts and judges are even more essential to developing networks with foreign courts and building a globalist profile. The Supreme Court of Canada and its justices certainly understand the importance of these activities, which is why they have been so engaged, particularly over the last 20 years. The data show that the Supreme Court and its justices are highly committed to establishing institutional and judge-individual relationships with foreign and transnational courts and judges from various parts of the globe, using several conversation mechanisms.

The judicial conversation occurring among the highest courts is one element of the “globalization” of courts, which in turn is part of the wider globalization process in both the legal and political realms. Several justices perceived the participation of the Supreme Court in the transnational judicial conversation as part of Canada’s foreign policy. One justice remarked, “often, the judicial collaboration and dialogue of the Supreme Court with foreign counterparts is one piece of the larger engagement strategy that Canada wishes to have as a country in the global arena.”²⁰⁹ In fact, as the above data shows, the NJI, CIDA, OCFJAC, and the Department of Justice have often initiated or supported many transnational judicial training activities in developing countries.²¹⁰ In other words, it seems that such data, including the views of several justices of the Supreme Court, are suggesting that from time to time the Government of Canada has promoted these transnational judicial exchanges as part of its foreign policy. In turn, the Supreme Court and its justices have played a key role in giving more credibility to Canadian projects in the international arena. This two-way relationship improved the international reputation of both, the Government of Canada and the Supreme Court. On the one hand, Canadian governmental agencies were supported by the intervention of the Supreme Court, and on the other hand, the Canadian government supported the international activities of the Supreme Court.

²⁰⁸ Interview with Anonymous Justice 10.

²⁰⁹ Interview with Anonymous Justice 9.

²¹⁰ See FJA, *supra* note 93.

However, one justice made it clear that this does not mean that the Canadian government orchestrates the external engagements of the Supreme Court or Canadian judges.²¹¹ The justice emphasized:

It is important to understand that the Court certainly doesn't take any direction from the government on how it engages in interactions with foreign courts. In any case, the Supreme Court would not do something that would be contrary to Canada's foreign relations. The judicial exchange may be a useful adjunct to other pieces of the puzzle, and the Court wants to engage in ways that furthers Canada's national interests, but it still very much insists on its own independence, in the way these meetings occur. There is never any sort of political involvement; the sessions and everything about them are designed by the judges.²¹²

It appears that the justices are suggesting that a bigger picture exists: the Supreme Court, through its participation in external exchanges and relationships with courts of other nations, and sometimes even through the signing of bilateral agreements, is in fact contributing to Canada's international relations. In addition, as stated above, they emphasize that the Supreme Court maintains its own independence in its external engagements, and does not take any directions from the Canadian government. Such a belief echoes Slaughter's *global government networks theory*.²¹³ According to this theory, states are disaggregated into at least three fragments: legislative, executive, and judicial. States interrelate with each other not as unitary entities, but in a disaggregated modus, establishing global or regional government networks of legislators, administrators, and judges. In other words, today international relations are exercised not only through official governments, but also through a web of horizontal, diagonal, or vertical global networks of national and supranational judges, legislators, and regulators.²¹⁴ The regular bilateral relationships of the Supreme Court with other foreign or supranational courts, and its membership in multilateral transnational judicial organizations, provide excellent examples. Through these engagements, the Supreme Court is participating in a form of external relations, or what I would call "judicial diplomacy" which is exercised in a relatively autonomous manner by the Supreme Court.

However, the desire of most nations of the world to come together, to further build international organizations and treaties, and to promote common values — which began as a reaction to World War II and particularly flourished after the end of Cold War — seems to be losing momentum. As evidenced by recent political movements in Western and Central Europe and the United States, the "slowbalization" is becoming the new trend of

²¹¹ Interview with Anonymous Justice 9.

²¹² *Ibid.*

²¹³ Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) at 1, 4–6, 261. At page 5, she powerfully argues and urges us to:

Stop imagining the international system as a system of states — unitary entities like billiard balls or black boxes — subject to rules created by international institutions that are apart from, "above" these states. Start thinking about a world of governments, with all the different institutions that perform the basic functions of governments — legislation, adjudication, implementation — interacting both with each other domestically and also with their foreign and supranational counterparts. States still exist in this world; indeed, they are crucial actors. But they are "disaggregated." They relate to each other not only through the Foreign Office, but also through regulatory, judicial, and legislative channels.

²¹⁴ *Ibid.* at 13–14.

globalization.²¹⁵ Apex courts, including the Supreme Court, as the empirical data suggest, seem to have entered into a phase that I call “judicial slowbalization.”²¹⁶

I asked the Supreme Court justices about the Supreme Court’s transnational judicial relationships in this new global political climate. Most acknowledged the change, and agreed that it may affect the transnational conversation among courts in several ways, such as lack of budgetary support, or through judicial appointments that are more skeptical of these judicial exchanges. However, several remained optimistic, and at least one explained that the importance of conversation among courts is even more important now:

Although the latest political movements in different nations have shown that it is not the same momentum any more, the good news is that the judiciary has taken over. Executive and legislative branches are no longer the main actors of globalization or of the legal harmonization among nations. Nowadays, a lot of these rest on the judiciaries’ shoulders. And that’s why is very important to have independent judiciaries, who are not and should not be influenced by such political skepticism. So, courts are becoming even more important actors ... because very often the judiciary will have to make decisions that the executive branch may not like at all.²¹⁷

To conclude, despite the “slowbalization” phase that could be worsened by the COVID-19 pandemic, judicial dialogue is an important way in which the world can maintain its connectedness. Although extra-curial activities may first appear less important than the citation of foreign legal sources, the reality is very different. The data of this research demonstrates that through these extrajudicial conversations, judges and courts exchange not only ideas, but also substantive and court management best practices. At judge-individual level, transnational dialogue fosters the evolution of the role of judges from interpreters of the law, to policy-makers, and finally to their modern role as diplomats, roles that certainly cannot continue without debate. The effects of these interactions and exchanges extend also at court-institutional level, by affecting not just the case law and court management matters; in fact, as demonstrated above, they have even a greater impact on Canada’s global reputation and foreign policy, transforming apex courts into important actors of modern diplomacy.

²¹⁵ Barret Kupelian, “Global Economy Watch: Predictions for 2020: ‘Slowbalisation’ is the New Globalisation,” online: <www.pwc.com/gx/en/issues/economy/global-economy-watch/assets/pdfs/predictions-2020.pdf>; Luca D’Urbino, “Slowbalisation – The Steam Has Gone Out of Globalisation,” online: <www.economist.com/leaders/2019/01/24/the-steam-has-gone-out-of-globalisation>.

²¹⁶ For an exhaustive empirical study on the extent of all forms of foreign citations used by the Supreme Court of Canada, see: Klodian Rado, “The Use of Non-Domestic Legal Sources in Supreme Court of Canada Judgments: Is This the *Judicial Slowbalization* of the Court?” (2020) 16:1 *Utrecht L Rev* 57.

²¹⁷ Interview with Anonymous Justice 8.

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