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COMPLEXITY OF TRANSNATIONAL SOURCES

LA COMPLEXITÉ DES SOURCES TRANSNATIONALES

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HELGE DEDEK (WITH ALEXANDRA CARBONE)

COMPLEXITY OF TRANSNATIONAL SOURCES
CANADA

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COMPLEXITY OF TRANSNATIONAL SOURCES
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HELGE DEDEK** (WITH ALEXANDRA CARBONE***)

1. Introduction: A National Report on Transnational Law

For its eighteenth international congress, held in Washington D.C. in the summer of 2010, the International Academy of Comparative Law solicited national reports on the phenomenon of the "complexity of transnational law". In a time-honoured ritual, after such a call is issued, national societies of scholars specialized in comparative law formally appoint "national reporters". This cohort of "national reporters" from several jurisdictions then report to a "general reporter" who, in turn, juxtaposes (and "compares") the national reports for the sake of creating an overview of the responses of different "legal systems" to certain "problems". This strategy is rooted in the premises of a certain – one might say: classical

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* The author served as reporter for the Common law provinces and Quebec, appointed by both the Canadian Association of Comparative Law and the Association québécoise de droit comparé

** Ph.D., LL.M., Asst. Professor of Law, Faculty of Law, McGill University, Montreal, Canada; helge.dedek@mcgill.ca. I would like to thank Frédéric Bachand, Jaye Ellis, Fabien Gélinas, H. Patrick Glenn, Lionel D. Smith and Peer Zumbansen for their suggestions and helpful comments. For financial support, I would like to thank Nathalie Vézina and the *Association québécoise de droit comparé*. I am grateful to Andrei Molchynsky for editing assistance.

*** B.Eng., B.C.L./LL.B. Candidate, Faculty of Law, McGill University, Montreal, Canada.

denomination of "functionalist"[1] comparative law. On the basis of this epistemology, "national reporters" would be traditionally charged with the task to inquire into questions such as: how does the private law of different jurisdictions treat pre-contractual agreements[2] or "gentlemen's agreements"[3]?—or similar questions typical of the preoccupations of 20th century comparative scholarship with its bias towards doctrinal topics, most often in a private law context. According to its statutes, the purpose of the venerable International Society is indeed "the comparative study of legal systems."[4] "Legal system", as conceptualized by this classical version of comparativism, is, first and foremost, the entirety of positive law in a certain jurisdiction, in most cases: a nation state. Transnational law, however, is, even and particularly in a private law context, by its very definition "beyond",[5] some might even say "after"[6] or "without",[7] the state. Does it make sense to approach through a national lens a discourse whose subject is, by its very nature, meta-jurisdictional?

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[1] *See, e.g.*, Michele Graziadei, *The Functionalist Heritage*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 100, 103ff. (Pierre Legrand & Roderick Munday eds., 2003).

[2] *See, e.g.*, EWOUD H. HONDIUS, PRECONTRACTUAL LIABILITY: REPORTS TO THE XIIITH CONGRESS, INTERNATIONAL ACADEMY OF COMPARATIVE LAW, MONTREAL, CANADA, 18-24 AUGUST 1990 (1991).

[3] *See* Bernard Rudden, *The Gentleman's Agreement in Legal Theory and in Modern Pratice*, 7 EUR. REV. OF PRIVATE L. 199 (1999) (a general report for the 1998 Bristol Congress of the International Academy of Comparative Law).

[4] INTERNATIONAL ACADEMY OF COMPARATIVE LAW http://www.iuscomparatum. org/141_p_1556/statutes. html. (last visited Jan. 17, 2011).

[5] *Cf.* Nils Jansen and Ralf Michaels, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843 (2006); Nils Jansen and Ralf Michaels, *Beyond the State? Rethinking Private Law*, 56 AM. J. COMP. L. 527 (2008).

[6] Peer Zumbansen, Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law, 56 AM. J. COMP. L. 769 (2008).

[7] *Global Law*, *supra* note 11. *But see*, Gralf-Peter Calliess & Peer Zumbansen, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW 19ff. (2010).

Indeed, much has been written about the fragmentation of transnational law[8], and about the complexity resulting from the proliferation of normativities that transcend the borders of the nation-state. Particularly scholarship that draws on transdisciplinary, mostly socio-legal perspectives, has developed a highly sophisticated account of the fragmentation of transnational law. Well-known, for example, is the thesis put forward by Teubner and Fischer-Lescano that "the fragmentation of global law is more radical than any single reductionist perspective—legal, political, economic or cultural—can comprehend. Legal fragmentation is merely an ephemeral reflection of a more fundamental multi-dimensional fragmentation of global society itself."[9] Not only do such grave, all-encompassing implications call for a trans-disciplinary approach, but they also make it necessary "to give up the idea that a legal system in a strict sense exists only at the level of a Nation-State."[10] In a reality of radical social differentiation, unity of law is but a dream. This "global legal pluralism"[11] projects the theoretical postulates of legal pluralism scholarship on a transnational, global level;[12] a scholarship that displays most divergent phenotypes,

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[8] See, on the terminology, Phillip C. Jessup, *The Concept of Transnational Law: An Introduction*, 3 COLUM. J. TRANSNAT'L L. 1 (1963); HENRY STEINER AND DETLEV VAGTS, TRANSNATIONAL LEGAL PROBLEMS (1968). *See also* Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 YALE L.J. 2599, 2626 (1997) and Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305, 306 (2001).

[9] Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1004 (2004). For background information regarding the growing concern with fragmentation, see also Martti Koskenniemi & Pävi Leino, *Fragmentation of International Law? Postmodern Anxieties,* 15 LEIDEN J. INT'L L. 553, 560f. (2002).

[10] Fischer-Lescano and Teubner, *supra* note 9, at 1007.

[11] Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1169ff. (2006); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION AND EMANCIPATION 89ff. (2nd ed., LexisNexis Butterworths 2002) [hereinafter *Global Law*]; Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE 3, 3-28 (1997) [hereinafter Teubner, *Global Bukowina*].

[12] See Peer Zumbansen, *Transnational Legal Pluralism*, TRANSNAT'L LEGAL THEORY 141, 141-189 (2010), for the detailed theoretical account.

whose common denominator, however, has been the de-construction of traditional understandings of positive law deriving its legitimacy from the state.

Unsurprisingly, however, the discourse on the fragmentation and complexity of transnational law is fragmented itself. Indeed, the complexity of transnational law is the focal point of many different discourses that partly overlap and intertwine.[13] In addition to the law and social science discourse on transnational law, there is a less interdisciplinary, one might say, more traditionally "legal" discourse in legal academia that tries to capture the phenomenon of globalized law in the terms of a legal "system", or "order", that has expanded beyond the nation states.[14] Furthermore, there is, of course, the discourse of the practitioners of state law: lawyers and judges who have to cope with the phenomenon of transnationality while working *within* the institutional framework of the exercise of state power. While theoretical pluralism tells us to let go of the traditional preoccupation with state law, the participants of the actual state law discourse, those involved in the official machinery of "lawyer's law",[15] have to reconcile such transnational influx with the task of upholding and enforcing state law; non-state "law" in the pluralist sense has to be translated back into the language of "law" understood as the order posited (or at least: endorsed) by the sovereign, represented by the judge.

It is when these national and transnational concepts of legality collide that the comparatist re-enters the scene, yet now necessarily equipped with a more sophisticated methodological arsenal that is sensitive to the bias created by a tradition of seeing law necessarily as

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[13] *See* Craig Scott, *'Transnational Law' as Proto-Concept: Three Conceptions*, 10 GERMAN L.J. 859, 864ff. (2009) (discussing the plurality of discourses on transnational law as well as their interaction and overlaps).

[14] *See, e.g.*, Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 793 (1999) (building on a definition of a "legal order" taken from H.L.A. Hart's CONCEPT OF LAW and thus employing the language of positivism).

[15] Sally Engle Merry, *Legal Pluralism*, 5 LAW & SOC'Y REV. 869, 875 (1988).

the positive law of the nation state.[16] Is it not to be expected that the reaction to the challenge transnational law poses to "traditional", state-based conceptualization of law and administration of justice varies according to the respective institutional framework in different jurisdictions, but also according to more elusive factors such as tradition and legal culture? The "foreign law debate"[17] in the United States illustrates how the discourse on the response to the transnational challenge is shaped by parameters of legal (and political) culture. In this paper, which is based on our report to the Academy, we will describe the response that one particular aspect of the transnational challenge, the *complexity* of transnational law, has met in Canada, taking into account the varieties of discourses, which are fragmented (one might say: horizontally) according to the degree of theoretical abstraction and (one might say: vertically) along substantive sectoral lines.

We will divide our inquiry into two major sections. We will first set out on a quest to find a trace of a specific "Canadian legal culture" in response to the challenge such global legal pluralism poses to national legal discourse (Part B). In doing so, we will, firstly, outline the reactions to the complexity of transnational law in academia and legal education. Then, we shall proceed to the responses of the judiciary; we will give some examples of what we think of as a general "pluralist" tendency among Canadian judges, indicative of a willingness to embrace complexity as part of a societal and legal reality.

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[16] *See, e.g.*, Patrick H. Glenn, *The Nationalist Heritage*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 76 (Pierre Legrand & Roderick Munday eds., 2003).

[17] *See, e.g.*, Vlad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 UTAH L. REV. 167 (2007); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Harold H. Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L. L. 43, 45ff. (2004); Mark Tushnet, *When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2005). See Eric D. Blumenson, *Constitutional Kabuki: Fidelity and Opportunism in the Foreign Law Debate*, 43 SUFFOLK U. L. REV. 136 (2009), for a concise summary. *See also* GLENN, *id.*

In the second major part of our inquiry (Part C), however, we will turn to the *technical* complexity of transnational law as a matter of legal "craftsmanship". We will first outline the intricacies involved in the process of implementation of international instruments in Canadian law, which in the past has been a source of insecurity for judges in regard to which laws they are supposed to apply. Finally, we will discuss in more detail the problematic repercussions of the technical complexification of law in core areas of private law, focusing on what might be called the "plight" of the *United Nations Convention on Contracts for the International Sale of Goods*[18] (hereinafter CISG or "the Convention") in Canada.

2. Canada and the Complexities of "(Global) Legal Pluralism"

2.1 The Theory of Transnational Complexity: Scholars, Schools and "Global Legal Pluralism"

2.1.1 Socio-legal Theory: (Global) Legal Pluralism & Transnational Law

As already pointed out, the theoretical perception of the transnationalization of law, as a process that renders questionable the traditional jurisdictional approach to positive state law, is closely linked to the legal pluralism school of thought, that has long made the argument that state law is but one form of law that exists in one given place at a certain time. In its "classic" form, "legal pluralism" has been associated with anthropological studies of colonialism, constellations of an imported Western "law" colliding with the indigenous systems of normativity—law, custom, religion.[19] "Legal pluralism", however, has long moved beyond this initial very specific field of application and has developed into a discourse that inquires into the general phenomenon of the multiplicity of normative orders in societies, with or without a colonial past.[20] In an age of global migration, legal

[18] United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (entered into force Jan. 1, 1988) [hereinafter *CISG*].
[19] BERMAN, *supra* note 11, 1158.
[20] MERRY, *supra* note 15, 873f.

pluralism has been connected with the concepts of multiculturalism and diversity.[21]

In the light of Canada's past and present social reality, it almost seems a matter of course that Canadian scholars have been attracted to this denomination of legal thought. As a former colony, Canada has experienced the clash between Western law and the laws of its aboriginal peoples.[22] With a long history of liberal immigration policies, modern Canadian society is arguably one of the most diverse in the world,[23] which brings up numerous questions of—from the perspective of state law—the necessary and permissible degree of "accommodation"[24]. At the same time, even the "official" legal system

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See, e.g., TIE WARWICK, LEGAL PLURALISM: TOWARD A MULTICULTURAL CONCEPTION OF LAW *passim* (1999).

[22] John Borrows, *With or Without You: First Nations Law (in Canada)*, 41 MCGILL L.J. 629 (1996); Peter H. Russell, *Indigenous Self-Determination: Is Canada as Good as it Gets?*, *in* Barbara A. Hocking, UNFINISHED CONSTITUTIONAL BUSINESS? RETHINKING INDIGENOUS SELF-DETERMINATION 170 (Barbara A. Hocking ed., 2005); Rennie Warburton, *Status, Class and the Politics of Canadian Aboriginal People*, 54 STUD. POLITICAL ECONOMY 119 (1997).

[23] An analysis of Canadian "multiculturalism" that would do the issue justice is obviously beyond the ambit of this paper. The body of scholarship on the topic is vast and rapidly growing. In Canada, multiculturalism is an official government policy since 1971: "[C]ultural pluralism is the very essence of Canadian identity" (Canada House of Commons, 1971:8580). For an informative overview, *see e.g.*, Patricia K. Wood, & Liette Gilbert, *Multiculturalism in Canada: Accidental Discourse, Alternative Vision, Urban Practice* 29 INT'L J. OF URBAN AND REGIONAL RESEARCH 679 (2005); Evelyn I. Légaré, *Canadian Multiculturalism and Aboriginal People: Negotiating a Place in the Nation*, 1 IDENTITIES 347 (1995); STEPHEN TIERNEY, MULTICULTURALISM AND THE CANADIAN CONSTITUTION (2007). See CHARLES TAYLOR, MULTICULTURALISM AND THE POLITICS OF RECOGNITION: AN ESSAY (1992), for the "Canadian School" of theoretical approaches based on liberal theory. *But see, e.g.*, for a critical assessment, GERALD KERNERMAN, MULTICULTURAL NATIONALISM (2005).

[24] Compare in this context the report of the Quebec "Consultation Commission on Accommodation Practices Related to Cultural Differences" (CCAPRCD), chaired by Gérard Bouchard and Charles Taylor, entitled "Building the Future: A Time for Reconciliation", which inquires into "accommodation practices" (including "legal" practices) in the province of Quebec, available at http://www.

that is rooted in Western European law is plural in itself, characterized by the co-existence of common law and civil law—another residue of Canada's colonial past. Unsurprisingly, Canadian legal scholars are among the pioneers of legal pluralism theory, including Professor Harry W. Arthurs[25] (Toronto, Ontario) or Professor Roderick A. Macdonald[26] (teaching in Montreal, Quebec). Another trailblazer is Professor Jean-Guy Belley (Montreal, Quebec), who has championed legal pluralism as the "paradigm of legal science" since the late 1970s[27] and who has earned recognition particularly by propelling the idea of legal pluralism among the *Francophonie*.

It is, then, a small step to transpose the pluralist epistemology to the global setting and to theorize a universal pluralism that is a transnational, or "cosmopolitan"[28] multiplicity of normative orders that fundamentally calls into question the jurisdictional, positivist approach to law—in the words of Professor Arthurs, "to use the insights of legal pluralism to help us understand the complex and ubiquitous phenomenon we call globalization as a proliferation of contending of legal orders".[29] Professor Robert Wai (Toronto) sees "global legal pluralism" as offering "an excellent conceptual framework for understanding normative contestation among the different state and non-state normative orders of contemporary global

accommodements.qc.ca/ documentation/rapports/rapport-final-integral-en.pdf (last visited Jan. 17, 2011).

[25] *See, e.g.,* HARRY W. ARTHURS, WITHOUT THE LAW: ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN MID-19TH CENTURY ENGLAND (1985).

[26] Roderick A. Macdonald, *Pour la reconnaissance d'une normativité juridique implicite et «inférentielle»*, 18 SOCIOLOGIE ET SOCIÉTÉS 47 (1986); Roderick A. Macdonald & Martha-Marie Kleinhans, *What is Critical Legal Pluralism?*, 12 CAN. J.L & SOC. 25 (1997).

[27] Jean-Guy Belley, Conflit Social et Pluralisme Juridique en Sociologie du Droit (1977) (unpublished LL.D. thesis, Université de droit, d'économie et de sciences sociales de Paris (Paris II)) (on file with author).

[28] Richard Janda, *Toward Cosmopolitan Law*, 50 MCGILL L.J. 967, 981 (2005).

[29] Harry W. Arthurs, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*, 12 Can. J. L. & Soc. 219, 221 (1997).

society."[30] Professor Peer Zumbansen (Toronto) has called the phenomenon "a radical challenge to all theorizing about law as it reminds us of the very fragility and unattainedness of law."[31] Zumbansen's theory, in a manner that displays some affinity to Teubner's version of "global pluralism", describes the complexity of transnational law as an inevitable implication of a complex social reality. According to this view, uttering concern about too much complexity reveals first and foremost the inadequacy of traditional legal discourse, centered upon an "impoverished and internally decaying conceptual body."[32] Transnational law, therefore, should be seen as a heuristic tool to better understand this complexity: "The fruitful dynamic of Transnational Law lies in its capacity for illuminating the overwhelming complexity of decentred and highly fragmented socio-legal and political discourses around transnational activities."[33] The methodological thrust of the legal pluralism scholarship is to embrace—and study—legal diversity; the socio-legal scholarship on transnational law transfers this approach on the global level. The complexity of transnational law is part of its very definition.

The sociological theoretical appropriation of the phenomenon, however, is not to be confused with an uncritical embrace of "globalization". It is rather the epistemological basis to discuss the merits and dangers of transnational activities. Of course, Canada, just as any other place, experiences the concern about the effects of global and domestic pluralism, and the dangers of relativism and globalization. Legal scholar Stepan Wood (teaching in Toronto, Ontario) and political economist Stephen Clarkson (Toronto), for example, have repeatedly warned against the effects of the

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[30] Robert Wai, *The Interlegality Of Transnational Private Law*, 71 LAW & CONTEMP. PROBS. 107, 110 (2008).

[31] Peer Zumbansen, *s.v. Transnational Law*, *in* ENCYCLOPAEDIA OF COMPARATIVE LAW 738, 739 (Jan Smits ed., 2006) [hereinafter Zumbansen, *Transnational Law*]. *See also* ZUMBANSEN, *supra* note 12; CALLIESS & ZUMBANSEN, *supra* note 7, 19ff., *passim*.

[32] Zumbansen, *Transnational Law*, *supra* note 31, 739.

[33] *Id.* at 743ff.

internationalization of trade on domestic constitutional values.[34] Transnational law, in that sense, re-opens and enlarges onto a global scale the ideological battles long fought in the domestic legal orders:[35] for example, the struggle of the autonomy of the market versus regulation as well as consumer and labour rights. Yet, the concern is with the loss of what has been achieved in these domestic struggles; with a loss of identity. The *complexity* of transnational law does indeed figure in this discourse, yet not simply as a concern with the proliferation of transnational "sources" of law or the growing number of dispute resolution bodies that make dispute resolution difficult to handle for legal actors, but in the sense that the transnationalization of law is a process that is indeed so complex that it might obscure its own massive influence and far-reaching implications—a process that is, furthermore, taking place beyond the forum of "official" norm production, *within* the legal actors themselves, by means of an unconscious "globalization of the mind".[36]

2.1.2 The "Transnationalization" of Legal Education

Given the awareness of the role of the *legal actor* and her mindset in this reality of complexity, its implications for modern legal education—as one of the most important means to shape the consciousness and *habitus* of legal actors—have to be considered. Since the different phenotypes of transnational complexity have long ceased to be only of concern to those working in international law, "any assessment of current developments in core fields of a law school curriculum will inevitably be informed by 'outside' influences of

[34] *See* STEPAN WOOD & STEPHEN CLARKSON, A PERILOUS IMBALANCE: THE GLOBALIZATION OF CANADIAN LAW AND GOVERNANCE (2010); STEPAN WOOD & STEPHEN CLARKSON, *NAFTA Chapter 11 as Supraconstitution*, *available at* http://ssrn.com/abstract=1500564.
[35] Zumbansen, *Transnational Law*, *supra* note 31, 741f.
[36] ARTHURS, *supra* note 29, 222ff.

international, transnational and comparative law."[37] As Professor Craig Scott (Toronto) has underlined, out of this triptych, "transnational law" is the idea that may have the largest potential to push "the boundaries of the legal imagination in such a way that, at the very least, legal theory and legal education based entirely on the 'domestic' (state) and 'international' (interstate) constructs of law must be open to developing in ways that might take us all out of current conceptual comfort zone."[38] This perception of the phenomenon of (global) legal pluralism as a challenge to traditional ways of teaching and thinking about law has been implemented through real-life attempts to reform legal education and to prepare law students for the new complex reality of a globalized legal world. Particularly ambitious[39] is the effort undertaken by the Law Faculty of McGill University (Montreal, Quebec), which, since 1998, has offered an integrated, comparative, four-year curriculum, known as the McGill Programme, that teaches even first-year introductory courses, such as Contracts and Torts, from a "trans-systemic" perspective.[40] The ultimate aspiration of this programme, however, is to transcend the fixation on the study of law as the study of "legal systems"—to overcome the traditional Western bias of conceptualizing law as nothing but a "system" that is enacted by a state, and to free the educational discourse about law from its positivistic constraints.[41] The programme attempts to understand global legal diversity as a cultural plurality by, for example, using the heuristic tool of the "tradition", as most notably suggested by Professor H. Patrick Glenn. Conceptualizing "law" as "tradition" allows, according to Glenn, for a "normative engagement" with otherness (as opposed to the hierarchic

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[37] Zumbansen, *Transnational Law*, *supra* note 31, 748. *See also* Harry W. Arthurs, *Law and Learning in an Era of Globalization*, 10 GERMAN L.J. 629 (2009) [hereinafter Arthurs, *Law and Learning*].

[38] SCOTT, *supra* note 13, 876.

[39] ARTHURS, *supra* note 37, 636ff.

[40] See Helge Dedek and Armand De Mestral, *Born to be Wild: The 'Trans-systemic' Programme at McGill and the De-Nationalization of Legal Education*, 10 GERMAN L.J. 889 (2009), for an introduction.

[41] H. Patrick Glenn, *Doin' the Transsystemic*, 50 MCGILL L.J. 863 (2005).

dominance of the positivist, "systemic" approach), while explaining, at the same time, the necessity to sustain diversity.[42] Again, it is necessary to point out that this epistemology should not be misunderstood as an uncritical embrace of "globalization".[43]

It has been pointed out many times, particularly by former Dean Nicholas Kasirer, that the pluralist philosophy behind this experiment is very closely linked to the particular legal consciousness of Quebec as a mixed jurisdiction, a mindset that Kasirer described as characterized by the experience of being "mixed", interstitial, and in flux.[44] The underlying understanding of a "mixed legal system", however, goes beyond the traditional definition of a jurisdiction whose "official" law derives from different legal traditions; for Kasirer, the term "mixed jurisdiction" rather serves as a label for a discourse that by its nature transcends the image of positive, jurisdiction-bound legality: "a mixed legal system is not so much a place as a nomadic way of knowing law."[45]

2.2 Judges and the Complexity of a Plural (Global) Society

Unlike the academic challengers of the jurisdiction-based approach to law as a system posited by the sovereign, the main protagonists of state law—that is, judges—operate within a specific set of constraints; they have to cope with the phenomenon of transnational law from within the "system" of state law they are supposed to represent. This implies that the conceptual nature of the task of a judge necessitates the operation within a binary mode of differentiation between the legal/non-legal, binding/non-binding, state/non-state—the very thinking in terms of on/off-binaries that the legal pluralism movement has attempted to replace with the image of a sliding scale. How do judges react to the challenge posed by the factual

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[42] *See* H. Patrick Glenn, *A Concept of Legal Tradition*, 34 QUEEN'S L.J. 427, 440-445 (2008) [hereinafter Glenn, *Concept*]; H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD, 358-365 (3d ed. 2007) [hereinafter Glenn, *Legal Traditions*].

[43] *See, e.g.*, ARTHURS, *supra* note 37, 634ff.

[44] Nicholas Kasirer, *Legal Education as Métissage*, 78 TUL. L. REV. 481 (2003).

[45] *Id.* at 485.

proliferation of transnational law? How far has the "pluralist" approach, which is so influential in Canadian academic discourse, affected judicial reasoning?

It can be stated from the outset that judges in Canada have shown great openness to the idea of considering different phenotypes of "transnational law". Canada's debate around the relevance of "transnational" or "foreign" law has taken a path different from the American "foreign law debate"[46]: judges, within their constraints as the representatives of state law, have even been open to considering technically "non-binding" sources of law, conceptualized as "persuasive authority".[47] In 2008, retired Supreme Court Justice Michel Bastarache, when describing the policy pursued by the Supreme Court of Canada, summarized the attempt to balance the openness towards transnational influences and the concern with the loss of sovereignty and identity as follows:

> The Supreme Court of Canada is still very much animated by respect for Canadian sovereignty and what I might call *internal judicial security*. It wants to develop the law cognizant of other nations' views, but does not believe fairness requires that the treatment of citizens of one country must mirror the treatment of citizens in any other particular nation. The confrontation of ideas is an enrichment but competition between legal systems is not. Diversity is also an important value and we therefore want to borrow or share what will help us make better decisions. Most often, we will be inspired by legal methodology and choice of criteria, but we will be careful in borrowing whole solutions that are often developed in an entirely different environment.[48]

However, we will see that the necessity of determining whether a rule falls into the category of binding state law has lead to insecurities

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[46] *See* sources cited *supra* note 17.

[47] H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987).

[48] Michel Bastarache, *How Internationalization of the Law Has Materialized in Canada*, 59 U.N.B.L.J. 190 (2009).

among judges as to the application of transnational law. Yet, the efforts of the Canadian judiciary in the fields of international human rights have been generally commended. We shall, in contrast, focus on the sphere of private law, where transnational implications might be said to be less visible. Particularly in the context of the application of the CISG, transnational law has been continuously ignored by Canadian—common and civil law—judges. The transnational *technical* complexification of disputes in a core area in private law thus, eventually, takes its toll.

2.2.1 Colliding, Conflicting, Borrowing: Embracing Pluralist Complexity in Private Law?

The image of a complex reality of national and transnational, state and non-state normative orders implies tensions between competing claims of validity. As a means to resolve such tensions, conflict-of-laws mechanisms become crucial—in a way, all law becomes conflict of laws.[49] State courts have to approach conflicts by qualifying the normative claim colliding with state law, employing the binary mode of law/non-law and binding/non-binding.

2.2.1.1 Collision of State Laws

If a competing legality can be identified as the "official" legal order of another jurisdiction, "regime collisions" are to be resolved through private international law. In this classic field of "regime-collisions", the influx of the transnational has been particularly visible.[50] Professor Robert Wai (Toronto), in particular, has diagnosed a concerted effort of the Supreme Court of Canada since the early

[49] See Teubner, *Global Bukowina*, *supra* note 11. *See also* Ralf Michaels, *The True Lex Mercatoria: Global Law Beyond the State*, 14 IND. J. GLOBAL LEG. STUD. 447 (2007); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).
[50] *Id.* at 195ff.

1990s to "internationalize" Canadian common law of conflicts.[51] In four decisions, stemming from different areas of private international law *(Morguard Investments Ltd. v. De Savoye,*[52] *Amchem Products Inc. v. British Columbia (WCB),*[53] *Hunt v. T&N plc,*[54] *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*[55]), according to Wai,[56] a new internationalist, cosmopolitan policy emerged that promoted a greater deference to foreign law and processes.[57] This cosmopolitan, anti-parochial policy seems to be willing to accept the decreasing importance of the nation-state as producer of normativity—as Justice La Forest put it in *Morguard:*

> The world has changed since the above rules (sc.: the traditional rules regarding the recognition and enforcement of foreign judgments) were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.[58]

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[51] Robert Wai, *In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private Law*, 39 CAN. Y. B. INT'L L. 117 (2001).
[52] [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256 [*Morguard*].
[53] [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96.
[54] [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16.
[55] [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289.
[56] WAI, *supra* note 51, 158.
[57] See Geneviève Saumier, *The Recognition of Foreign Judgments in Quebec: The Mirror Crack'd?*, 81 CAN. BAR REV. 677 (2002), for discussion on several implications for international private law in Quebec.
[58] *Morguard*, *supra* note 52, 1095-96.

The programmatic character of this remarkable statement is underlined by the fact that the judgment did not deal with an international, but with an inter-provincial conflict, the enforcement of an Alberta judgment in British Columbia. LaForest's call for the acceptance of a "world community" and a more cosmopolitan understanding of the law—which he later repeated in different contexts[59]—implies a toleration of the necessary increase in complexity. Only the academic observer is concerned with this elevated degree of complexity: "A sophisticated understanding of the international requires recognition of complexity", writes Wai, "[t]he international rarely simplifies; it usually adds complexity to the analysis." While Wai acknowledged the Supreme Court of Canada was "informed", yet not "overwhelmed" by its "internationalist vision", he feared the "naïve interpretation" of the judgment by lower courts. He remained vague, however, as to whether the subsequent application of *Morguard* to cases that involved the recognition and enforcements of judgments from non-Canadian jurisdictions could be seen as such examples of a judicial failure in the face of complexity.[60]

2.2.1.2 State Law and "Non-Legal" Normativities

If the "official" legal order collides with a non-state order of normativity, the conflict is traditionally not conceptualized as a conflict of laws, given that, perceived through the binary *modus operandi* of a state court, law is colliding with non-law. In the forum of the state court, "legal pluralism" has to take a different form and is continued in the discourse of "rights". In order to determine how to react to the challenge of "non-legal" norms, the "official" legal system has to translate what is external into its own language, that is, the language of

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[59] Gérard V. La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues*, 34 CAN. Y.B. INT'L L. 89 (1996).

[60] See Joost Blom, *The Enforcement of Foreign Judgments: Morguard Goes Forth into the World*, 28 CAN. BUS. L.J. 373 (1997), for discussion of the subsequent developments; Jean-Gabriel Castel, *The Uncertainty Factor in Canadian Private International Law*, 52 MCGILL L.J. 555 (2007); Tanya J. Monestier, *A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada*, 33 QUEEN'S L.J. 179 (2008).

laws and rights. Thus translated into legal terms, the legal system can comfortably deal with the challenge on its own turf.

Religious law is, in the pluralist sense, such a non-state normative order, and a transnational one *par excellence*. Heated debates, such as the discussion about the toleration of Shari'a-based arbitration in Ontario,[61] have exposed concern that "Canadian values" may be the victim of multiculturalism and (political) pluralism when (non-Christian) religious norms seek recognition. In the recent case of *Bruker v. Marcovitz,* which turned upon the possible enforcement of a contract made under Quebec civil law that obligated Mr. Marcovitz to grant a *get*, a letter of divorce in compliance with Jewish law rules, Justice Rosalie Abella, speaking for the majority of the Supreme Court, made a statement that addresses the tension inherent in the collision of the two regimes:

> Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the Canadian *Charter of Rights and Freedoms*, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.
>
> The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and,

[61] Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy – Another Perspective*, *in* DOING JUSTICE: DISPUTE RESOLUTION IN THE COURTS AND BEYOND 229 (Patrick A. Molinari and Ronalda Murphy, eds., 2009); Lorraine E. Weinrib, *Ontario's Sharia Law Debate: Law and Politics under the Charter*, *in* LAW AND RELIGIOUS PLURALISM IN CANADA 239, 260 (Richard Moon, ed., 2008).

> accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.[62]

This statement is surely remarkable for its strong commitment towards "multiculturalism" and diversity that could be called "typically Canadian". For our inquiry, it is remarkable that the Court, again, embraces complexity rather than eschews it; while the Quebec Court of Appeal and the—Civilian—dissenters on the Supreme Court of Canada avoided the conflict by declining jurisdiction over what they deemed a religious obligation, the majority decided to engage in a difficult—and potentially politically divisive—balancing act. Despite the fact that this balancing is conceptualized as an internal legal balancing of rights and not as a regime collision in the pluralist sense, it shows a general willingness to engage with pluralism in a modern society and its inevitable complexity.

2.2.1.3 State Law and "Tradition": The Use of "Persuasive Authority"

Particularly frequently in *Charter* litigation,[63] but also in the context of the interpretation of domestic private law, Canadian courts draw on legal materials from other jurisdictions. This phenomenon has been referred to as "judicial borrowing".[64] We will focus, for now, on the use of foreign materials for the adjudication of cases involving domestic private law, and return later to the use of foreign materials in

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[62] 2007 SCC 54 at ¶ 1-2, [2007] 3 S.C.R. 607, 288 D.L.R. (4th) 257. See Rosalie Jukier and Shauna van Praagh, *Civil Law and Religion in the Supreme Court of Canada: What Should We Get Out of Bruker v. Marcovitz?*, 43 S.C. L. REV. (2d) 381 (2008).

[63] *See* Bijon Roy, *An Empirical Survey of Foreign Jurisprudence and International Instruments in Charter Litigation*, 62 U.TORONTO. FAC. L. REV. 99 (2004).

[64] See BASTARACHE, *supra* note 48, 196.

the interpretation of international law that has been implemented into Canadian law.[65]

To call this integration "judicial borrowing" does not do the process justice; it is not just an argument, a trope that is "borrowed" as one would borrow a phrase or a quote. Since legal reasoning is a rhetorical exercise in justification through the invocation of authority, judges have to clarify the authoritative weight of "foreign" materials. From the perspective of a strict positivist theory of law, only law posited (or endorsed) by the sovereign can, in a technical sense, be a *binding* authority. Applying the binary qualification filter of law/non-law and binding/non-binding, materials stemming from other jurisdictions fall in the latter categories and could therefore be neglected. A judge who "borrows" must justify *why* the borrowed foreign material would be significant, and the more heavily this judge wants to rely on the foreign materials, the heavier the burden of justification. A link must be established between the foreign materials and the court's home jurisdiction: a link that explains the pertinence of foreign materials for the judicial interpretation of the binding materials that the judge has to "apply". Such a link can be established, for example, for doctrinal writing that elucidates the authoritative materials—not a source of law proper, it still can be, due to its immediate connection with the "binding" law, conceptualized as "persuasive authority".[66]

In the case of foreign legal materials, establishing the justifying connection is less obvious. Particularly in the private law context, the link with the court's domestic jurisdiction is established through a—mostly tacit—invocation of the concept of tradition. The perception that separate jurisdictions can share a common tradition creates a sense of a perpetual link of a common origin and a shared past that makes materials from foreign lands appear less "foreign"; it even endows them with intrinsic heuristic value for the judge's own interpretative task. Such a sense of togetherness beyond the borders of a jurisdiction or a nation-state softens the harsh contrast between

[65] See discussion *infra* Parts C.I.3, C.II.

[66] See GLENN, *supra* note 47, for discussion of persuasive authority.

"official" state-law on the one hand and non-state-non-law on the other. Traditions,[67] "legal families", are *transnational*. Arguing from the authority of tradition is a subtle, yet significant refutation of the positivist paradigm of national state law.

In the common law tradition, this is a well-known phenomenon. There is a vivid intellectual exchange between jurisdictions of the Commonwealth that share a common foundation of English law and whose common laws have not experienced the same degree of national consolidation and isolation as the U.S. In civil matters, Canadian common law courts, including the Supreme Court of Canada,[68] frequently cite decisions from Australia, New Zealand, and, most notably, the United Kingdom—although the Supreme Court of Canada was established in 1875, the British Judicial Committee of the Privy Council served as a court of final appeal for private law cases until 1949. Canadian courts thus still follow the development of English case law in private law matters closely, even though non-Canadian precedents have ceased to be binding in the technical sense of *stare decisis*.[69]

More remarkable, however, is the use of tradition in Quebec civil law.[70] The rift between civil law jurisdictions is much deeper, their degree of separation much higher than between the jurisdictions of the

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[67] See Glenn, *Legal Traditions*, *supra* note 42, 32-57 *et passim*, for discussion on tradition.

[68] *See, e.g.*, Fidler v. Sun Life Insurance Co. of Canada [2006] 2 S.C.R. 3 (damages for mental distress in case of breach of contract—citing English and Australian cases); London Drugs Ltd. v. Kuehne & Nagel International Ltd. [1992] 3 S.C.R. 299 (privity of contract—English, Australian and N.Z. cases). See Donald Casswell, *Doctrine and Foreign Law in the Supreme Court of Canada: A Quantitative Analysis*, 2 S.C. L.REV. 435 (1981), for a comprehensive overview of older Supreme Court of Canada cases.

[69] *See* George F. Curtis, *Stare Decisis at Common Law in Canada*, 12 U.B.C. L. REV. 1 (1978) (Curtis describes the development of the Canadian *stare decisis* doctrine after the Supreme Court of Canada eventually became a final court of appeal even in civil matters in 1949).

[70] See GLENN, *supra* note 47, 294.

Commonwealth.[71] Codification has "nationalized" the civil law to a degree that has interrupted a common (private law) discourse for more than a century—only very recently, when projects of European harmonization began to invoke the spirit of the *ius commune*, have attempts been made to resuscitate the common discourse of the past. Codification has also, on a theoretical level, imbued modern Continental civil law with a stricter and purer form of positivism than the version of positivism known in the common law world, which (despite Austin's positivism) always struggled with the idea of a coherent legal system posited by one legislator.[72]

In Quebec civil law, however, appropriating civil law heritage and re-claiming being part of the civilian tradition has been of increasing importance. A striking example is the resurrection of "good faith". The Civil Code of Lower Canada of 1866, child of the liberal nineteenth century and influenced by common law sobriety,[73] had not adopted the famous good faith provision of the French Code Napoléon (article 1134). Inspired (among other factors) by the promulgation of a consumer protection law in 1970, Quebec courts and legal scholars have since postulated and promoted a *"nouvelle moralité contractuelle"*.[74] This movement coincided with the project of re-codification in Quebec, which, among other goals, aimed at defining more clearly and reinforcing the civilian character and origin of Quebec civil law.[75]

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[71] *See, e.g.*, Helge Dedek, *Border Control – Some Comparative Remarks on the Cartography of Obligations*, *in* EXPLORING CONTRACT LAW 25, 31ff. (Jason Neyers et. al. eds., 2009).

[72] A.W.B. Simpson, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 359 (A.W.B. Simpson, ed., 1987).

[73] See, *e.g.*, JOHN E.C. BRIERLEY & RODERICK A. MACDONALD, EDS., QUEBEC CIVIL LAW – AN INTRODUCTION TO QUEBEC PRIVATE LAW 39ff. (1993).

[74] PIERRE-GABRIEL JOBIN, LES OBLIGATIONS at § 13 (6th ed. 2005).

[75] Paul-André Crépeau, *La réforme du Code civil du Québec*, R.I.D. COMP. 269 (1979); PAUL-ANDRÉ CRÉPEAU, LA RÉFORME DU DROIT CIVIL CANADIEN. UNE CERTAINE CONCEPTION DE LA RECODIFICATION. 1965-1977 (2003).

In two landmark decisions, *B.C.N. v. Soucisse*[76] and *Houle v. CNB,*[77] the civilian justices of the Supreme Court of Canada established "good faith" as part and parcel of Quebec civil law, invoking the longstanding civilian tradition of *"bona fides"* in the law of obligations. In *Soucisse,* Justice Beetz thoroughly reviewed materials from other francophone civilian jurisdictions:

> [T]he court was referred to a number of French and Belgian precedents. These judgments have appreciable weight because the Napoleonic law which they apply is the same as our own. Additionally, there are judgments of appellate courts and of the *Cour de cassation*. I feel it is necessary to review them.[78]

He goes on to review these materials in great detail and concludes that, in particular two "decisions by the Court of Appeal of Paris and the *Cour de Cassation* carry great weight"—even though these cases might be said to have chosen a doctrinal approach that is "questionable", they expound a principle that could be "implemented" in Quebec.[79] It is very telling that Justice Beetz even speaks of "distinguishing" the case at bar from the French cases.[80]

We are never told exactly whence the "appreciable" or even "great weight" of foreign authorities derives, except the statement that the "Napoleonic law which they apply it the same as our own"—which is, of course, a statement that is factually only partly accurate. Tradition serves tacitly as synecdoche for an explicit justification that links foreign and domestic authoritative materials. The underlying assumption is that the francophone civil law tradition transcends the borders of the nation-state, conceptualizing law rather like a discourse than a command of the national sovereign—how could Quebec law otherwise be "the same [*sic!*] Napoleonic law" as applied in Belgium

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[76] [1981] 2 S.C.R. 339, 43 N.R. 283 [*Soucisse* cited to S.C.R.].
[77] [1990] 3 S.C.R. 122, 74 D.L.R. (4th) 577.
[78] *Soucisse*, *supra* note 76, 351.
[79] *Id.* at 354.
[80] *Id.* at 356.

and France? Law is thus seen as a discourse of a transnational epistemic community bound together by tradition. Tradition is hypostasized as a transnational normative order in its own right that does not fit the classic positivist grid of law/non-law, binding/non-binding. The materials derived from the tradition are technically only "persuasive", but carry "great weight" and are being almost treated like (common law!) precedents that need to be "distinguished".

It is, finally, even more remarkable to witness how even the concept of tradition is complexified. The condition of *mixité* in Quebec law defies the clear-cut categorization as belonging to one of the Western traditions, common or civil law. In its state of *bricolage*, Quebec law is a mirror of the complex modern social condition. It was a practice, however, to avoid references to the common law as far as possible. A recent decision of the Court of Appeal could be read as a harbinger of change—maybe due to consolidation of a self-confident and self-assured civilian identity in a mixed jurisdiction. While the Court of Appeal, in 1998, still explicitly warned against borrowing from the common law doctrine of fiduciary duties,[81] ten years later, in *Gravino v. Enerchem Transport inc.,*[82] the court obviously saw no difficulty in expanding on common law equity and drawing on a recent House of Lords decision[83] in order to analyse the content of the obligation *"d'agir avec honnêteté et loyauté"* deriving from article 322 of the Quebec Civil Code.

Embracing such additional levels of normativity enhances the choice and variety of legal arguments. Courts deliberately complexify their decision-making; the addition of complexity provides for additional latitude in judicial reasoning and thus is an empowering exercise.

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[81] Provigo Distribution Inc. v. Supermarché A.R.G. Inc. (C.A.) [1998] R.J.Q. 47 at 58.

[82] 2008 QCCA 1820 at ¶ 38ff., [2008] R.J.Q. 2178, EYB 2008-148063.

[83] Bristol and West Building Society v. Mothew, [1997] 2 W.L.R. 436, [1996] 4 All E.R. 698.

2.2.2 Preliminary Observations

So far, we have seen that Canadian courts, particularly the Supreme Court of Canada, have displayed what one might call a "pluralist" tendency: a certain willingness to engage with the realities of a plural society, and an awareness of the implications for positive state law as a tool of governance. From the invocation of tradition as a means to justify recourse to foreign "persuasive authorities" to Justice La Forest's foundational statements on a new legal "world community", all these are instances of judges insisting less on the paradigm of the monopoly of the nation-state on law. All this can be read as an openness towards the fact that the increase in complexity, in the national as well as in the global context, also necessitates an increase in legal complexity—a fact that has to be accepted or can even be used advantageously to widen the range of arguments available in judicial reasoning.

However, "complexity of transnational law" has another, if you will, less lofty aspect: besides the implications for the traditional notions of state-law based legality, the application of law is simply made technically more difficult by the proliferation of transnational law and transnational legal "sources", particularly the multiplicity of international instruments. We will now turn to the technicalities of transnational "complexity"—the challenges judges face when confronted with the "transnational" in everyday adjudication. Being still tied to the binary scheme of differentiating between binding and non-binding law, we will see that it is a source of insecurity for Canadian judges that it remains at times unclear whether international law has indeed been validly implemented into Canadian law. Therefore, we shall look first at the intricacies of treaty implementation in Canada. As probably the most prominent example in private law, we will, finally, give a detailed account of the application of the CISG by Canadian judges.

3. The Realities of Technical Complexity: Transnational Law and Judicial Insecurity

3.1 Treaty Implementation and the Domestic Application of International Law

3.1.1 Uncertain Implementation as a Source of Insecurity

In Canada, conventional international law is received into domestic law through the process of implementation.[84] Once the treaty has entered into force, and Canada has ratified it, the treaty is binding on Canada as a matter of international law. However, for it to become effective within the domestic legal system, an international treaty must be transformed, which occurs once there is implementing legislation in the appropriate jurisdiction.[85] Multiple scholars have pointed to the fact that this "dualist" system is at the heart of many complications in applying international law in domestic courts. Because implementation is required, but there are no specific guidelines on when a treaty has been implemented, "courts struggle not only to determine when international *norms* require implementation through legislation but also to determine whether implementation has actually occurred."[86]

Professors Fox-Decent and de Mestral echo the opinion of many international law scholars when they state that, "despite considerable judicial consideration in recent years, the relationship between

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[84] GIB VAN ERT, USING INTERNATIONAL LAW IN CANADIAN COURTS 5 (2d ed. 2008). Customary international law, on the other hand, is generally viewed as being part of the law of Canada so long as it does not conflict with existing Canadian case law. *See also* Jutta Brunnée & Stephen J. Toope, *A Hesitant Embrace: The Application of International Law by Canadian Courts* 40 CAN. Y. B. INT'L L. 3, 14 (2002) "In Canada, the executive controls both the signature and the ratification of international treaties" .

[85] *See* Armand De Mestral & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law, 53 MCGILL L.J. 573, 578 (2008) (authors estimate that 40% of Canadian federal statutes implement international law in whole or in part).

[86] BRUNNÉE AND TOOPE, *supra* note 84, 21.

international law and domestic law in Canada remains uncertain."[87] The main complaint among scholars is that the courts do not go far enough in giving recognition to the force of international law in Canadian courts. In spite of recent advances by the courts in applying international law, there is concern that Canadian courts continue to treat international law as persuasive and influential, rather than obligatory.[88] Indeed the Supreme Court of Canada has described international law as "relevant and persuasive."[89] With regard to human rights law, they have held that: "the values reflected in international human rights law may help inform the contextual approach by statutory interpretation and judicial review."[90] Brunnée and Toope identify this global approach to international law as a way for Canadian courts to avoid the more difficult questions of implementation and transformation.[91]

3.1.2 Excursus: Treaty Implementation in Canada

3.1.2.1 The Necessity of Implementation and the "Dualist" Approach

The question of whether or not an international treaty has been implemented into domestic legislation is a source of confusion for Canadian courts, as there are different *degrees* of implementation.[92] At one end of the spectrum is explicit implementation—that is obvious instances of implementation, whereby the international agreement is incorporated directly into the legislation either in the body or as a schedule. Alternatively, implementing legislation may contain a preamble signalling that its purpose is to fulfill a treaty obligation. However, "there is no rule that Parliament or legislature must

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[87] DE MESTRAL AND FOX-DECENT, *supra* note 85, 573.
[88] BRUNNÉE ANDTOOPE, *supra* note 84, 54.
[89] *Id.* at 5.
[90] Baker v. Canada (Minister of Citizenship and Immigration) [1999] 2 S.C.R. 817 at 70, 174 D.L.R. (4th) 193.
[91] BRUNNÉE AND TOOPE, *supra* note 84 at 7.
[92] *Id.* at 22.

expressly refer to a treaty in legislation implementing it"[93] and other, less obvious forms of implementation are possible. For example, implementation may be "inferred" by implementing new legislation, or amending existing legislation such that it complies with new international commitments, but without it being explicitly stated. Finally, the least obvious end of the spectrum, some argue that transformation has occurred by virtue of existing legislation being in compliance with new international obligations.[94] The Canadian courts have yet to make a definitive statement of when treaties can be considered properly implemented.[95]

It should be further noted that Canada's federal system requires that each province implement a treaty individually when the subject matter falls within the province's jurisdiction. In these cases, the federal government may enter into an international agreement, but cannot guarantee that it will properly be implemented into domestic law by the provinces.

3.1.2.2 Keeping Track: The Treaty Section

Canada's Department of Foreign Affairs and International Trade contains within its Legal Affairs Bureau, the Treaty Section. The Treaty Section has multiple functions. Notably, it provides legal advice to government departments with respect to the drafting, interpretation and application of international treaty law. Second, the Treaty Section is responsible for the actual procedures relating to the making of treaties. Its function is to make sure international agreements entered into by Canada conform both to the principles of international law and to Canadian practices. Finally, one of the most important functions of the Treaty Section is the maintenance of up-to-date records of all pertinent information relating to the status of treaties

[93] VAN ERT, *supra* note 84, 246.
[94] BRUNNÉE AND TOOPE, *supra* note 84, 26. For example, Parliament has often left the status of human rights treaties unclear, but they are often presumed to be implemented through the *Canadian Charter of Rights and Freedoms*. *See* discussion *infra*.
[95] *Id.* at 28. All indications are, however, that Canadian courts continue to struggle with their role in these types of cases.

affecting Canada, including their relation to other treaty instruments, as well as judicial interpretations and references to published texts.[96]

As of January 2008, the Canadian government implemented the "Policy on Tabling of Treaties in Parliament." The Policy's objective is "to ensure that all instruments governed by public international law, between Canada and other states or international organizations, are tabled in the House of Commons following their signature or adoption by other procedure and prior to Canada formally notifying that it is bound by the Instrument."[97] This policy presumably adds legitimacy to Canada's international engagements by involving the legislative branch in what is otherwise an executive function.[98]

3.1.2.3 Judicial Insecurity and Doctrinal Reactions

The hesitation and, at times, reluctance of Canadian judges to apply international treaties conclusively in the Canadian context is likely due to the lack of guidance the courts receive from the legislature when determining whether or not an international treaty has been properly transformed such that it is fully integrated into Canadian law.[99] Furthermore, treaties are entered into by the executive, and not the legislature, thereby undermining the democratic aspect of law-making.[100] Without explicit or recognizable acceptance of the treaty by

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[96] Treaty Section (2009), Canada Treaty Information, *available at* http://treaty-accord.gc.ca/section.asp (last visited Jan. 17, 2011).

[97] (2008), Canada Treaty Information, *available at* http://www.treaty-accord.gc.ca/procedure.asp (last visited Jan. 17, 2011).

[98] DE MESTRAL & FOX-DECENT, *supra* note 85, 612.

[99] Stephen J. Toope, *Inside and Out: The Stories of International Law and Domestic Law*, 50 U.N.B.L.J. 11, 15 (2001).

[100] VAN ERT, *supra* note 84, 5-11 (author describes the Canadian reception system as a balancing of two competing principles: respect for international law and self-government. "[...] [T]he two principles are ultimately at odds with each other. A thoroughgoing application of the principle of respect for international law would apply international law in the domestic sphere in spite of inconsistent domestic laws. Similarly, an out-and-out application of the principle of self-government would not trouble itself to ensure the respect for international law in the face of seemingly inconsistent domestic provisions. [However], respect for international

the legislative branch through some form of enactment, it is understandable that the Courts exhibit some reservation as to the force of the international agreement in domestic law.[101] Canadian courts are criticized as having a narrow understanding of when an international treaty has been implemented into Canadian law, thereby restricting its role in Canadian domestic law.[102] As a result of this narrow interpretation, Canadian courts continue to put Canada in conflict with public international law.[103]

When domestic courts are faced with the applicability of an international agreement, they sometimes employ the "doctrine of legitimate expectations" or the "presumption of conformity" to temper the ambiguity that surrounds the domestic application of international law.

The "doctrine of legitimate expectations" is based on the idea that, when a state commits itself to an international treaty, it creates an expectation among its citizens that it will comply with the international undertaking. The doctrine of legitimate expectations is underdeveloped in Canada, but it is suggested as a possible way by which courts can bring international law into the domestic sphere.[104]

The "presumption of conformity" requires the courts to interpret domestic law in a manner that is consistent with Canadian treaty obligations.[105] The presumption is based on the idea that Canada's legislature does not purposefully or lightly violate its international obligations.[106] The presumption of conformity thus

law is granted the default position in the reception system [...] self-government operates as the exception to the rule [.]").

[101] RENÉ PROVOST, *Judging in Splendid Isolation*, 56 AM. J. COMP. L. 125, 143 (2008).

[102] See BRUNNÉE AND TOOPE, *supra* note 84; DE MESTRAL & FOX-DECENT, *supra* note 85.

[103] DE MESTRAL AND FOX-DECENT, *supra* note 85, 598.

[104] PROVOST, *supra* note 101, 159; DE MESTRAL & FOX-DECENT, *supra* note 85, 643.

[105] VAN ERT, *supra* note 84, 130.

[106] PROVOST, *supra* note 101, 153.

creates a framework in which Canadian courts can apply treaties that have not been implemented, but have been ratified.[107]

3.2 Domestic Application of International Law

Compliance with international treaties and undertakings has been especially important to the judiciary in the area of human rights, which has largely been achieved through the application of the *Canadian Charter of Rights and Freedoms*. As Justice La Forest put it: "In the field of human rights and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe."[108] Unsurprisingly, it is in this field that we find the most frequent examples of the phenomenon we already addressed above as "judicial borrowing".[109] Not only is the Supreme Court of Canada aware of the need to carefully apply international law in a manner which can be followed in other countries, it also looks to its sister courts in other countries for their treatment of certain issues.[110] Bastarache reports that while La Forest counted fifty Supreme Court decisions between 1984 and 1996 that make use of important international human rights instruments in construing the *Charter*,[111] the number since then has doubled.[112]

In spite of the Supreme Court of Canada's efforts to apply international law in a consistent and uniform manner, there are still many challenges faced by Canadian courts, particularly in the area of public international law with respect to constitutional questions. In

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[107] *Id.* at 157; DE MESTRAL & FOX-DECENT, *supra* note 85, 598, 630.
[108] LA FOREST, *supra* note 59, 100.
[109] See BASTARACHE, *supra* note 48, 196. *See also* Roy, *supra* note 63, *passim*, for the detailed study.
[110] LA FOREST, *supra* note 59, 100.
[111] *Id.* at 90-91.
[112] Michel Bastarache, *The Honourable Justice G.V. La Forest's Use of Foreign Materials in the Supreme Court of Canada and His Influence on Foreign Courts*, *in* GÉRARD V. LA FOREST AND THE SUPREME COURT OF CANADA: 1985-1997 433 (Rebecca Johnson & John P. McEvoy, eds., 2000).

their article on the rise of international law in Canadian courts[113], Justice Lebel and Chao discuss the increased use of international law in constitutional cases coming before the Supreme Court of Canada over the preceding decade, and how the Court has dealt with it. The authors cite three main challenges before the Court: (1) principles of public international law are difficult to define; (2) there are questions of legitimacy and the place of international principles alongside domestic law; (3) the value-laden terms attached to international principles do not translate easily into legal principles.[114] As the number of international law questions coming before Canadian courts will only increase in the future, the authors suggest that the challenges listed above can only be fully addressed with the cooperation of legal counsel and ask for "more guidance from counsel with respect to the scope and limitations of international law."[115]

The intersection between international law and the *Charter* is of particular interest because the Court may be called upon to consider human rights treaties to which Canada is a party, but which have not been explicitly implemented. As a result, the *Charter* is the primary vehicle through which international human rights law is given effect in domestic courts.[116] In this context, the courts must struggle with the binding authority of international human rights law as a result of ambiguous implementation.[117] The general attitude in Canadian courts is that international human rights law should be treated as "relevant

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[113] Louis Lebel & Gloria Chao, *The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law*, 16 S.C.L. REV. (2d) 23 (2002).

[114] *Id.* at 63.

[115] *Id.*

[116] Anne Warner La Forest, *Domestic Application of International Law in* Charter *Cases: Are we there yet?*, 37 U.B.C. L. Rev. 157, 168 (2004) [hereinafter Warner La Forest, *Domestic Application*]. *See also* BRUNNÉE & TOOPE, *supra* note 84, 23, 24 "For example, in its report to the Human Rights Committee under the international Covenant on Civil and Political Rights (ICCPR), Canada has claimed implementation primarily through the Charter and related constitutional jurisprudence " .

[117] *See* discussion *supra.*

and persuasive" in deciding *Charter* cases.[118] This is an approach compatible with the "presumption of conformity" whereby the courts interpret legislation so as not to put Canada in violation of its international agreements. However, Brunnée and Toope are concerned that this approach is actually a weakening of the "presumption of conformity", as the Supreme Court does not strive to interpret the *Charter* consistently with international human rights law, but is content to allow international law to "inform" its interpretation of the *Charter*.[119] In spite of the criticism or scrutiny[120] that Canadian courts face in their approach toward applying international human rights law in light of the *Charter*, at the very least, the Supreme Court exhibits a consciousness as to the potential relevance of international law in deciding domestic cases in this area of law.

4. Lex Mercatoria's Ugly Stepchild: The Application of the CISG in Canada

4.1 Transnational Law and the Rise of the New Lex Mercatoria

We will now, in particular, focus on the role of international instruments in a private and commercial law context. Two prominent examples come to mind: the *Convention on the Recognition and Enforcement*

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118 Warner La Forest, *Domestic Application*, *supra* note 116, 168. *See also* BRUNNÉE & TOOPE, *supra* note 84, 33. This attitude is reflected in Reference Re Public Service Employee Relations Act (Alta), [1987] 1 S.C.R. 313 at ¶ 57 (Chief Justice Dickson (dissenting but not on this point) writes: "The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, *be relevant and persuasive sources for interpretation of the Charter's provisions*" [emphasis added]). *See also* R. v. Keegstra, [1990] 3 S.C.R. 697, [1991] 2 W.W.R. 1; R. v. Sharpe, 2001 SCC 2 at ¶ 175, [2001] 1 S.C.R. 45, [2001] 6 W.W.R. 1.

119 BRUNNÉE AND TOOPE, *supra* note 84, 33.

120 Warner La Forest, *Domestic Application*, *supra* note 116, 158 "While the use of international law by the Supreme Court of Canada has been lauded outside Canada, in the last few years, there has been a developing academic discourse about the parameters of the use of international law and comparative law before the domestic courts and conferences, and presentations as of late have been dedicated to a discussion of the use of these 'sources' before Canadian courts".

of Foreign Arbitral Awards (the so-called "New York Convention") and the *United Nations Convention on Contracts for the International Sale of Goods*[121] (CISG or "Convention").

International commercial law is, of course, one of the fields that is at the heart of transnational law discourse; globalized commerce has created its own form of legal governance "beyond the state", a phenomenon mostly addressed as the rise of a new *"lex mercatoria."* The phenomenon inspired many of the theoretical writings about transnational law, since it is paradigmatic of the conflict between an (at least to certain degree) autonomous order of self-governance and the law of the nation-state.[122] The theoretical complexity inherent in this constellation is mirrored, on a practical and technical level, by the difficulties judges face when adjudicating cases involving the global *lex mercatoria* in a domestic court.

Professor Fabien Gélinas has recently pointed out the notorious problems that arise in the context of "incorporating" international uniform laws into the decision-making process of domestic courts, particularly in the field of international arbitration.[123] Judges have to navigate a normative order that comprises written law as well as unwritten general principles which are, as Professor Frédéric Bachand put it, "intrinsically transnational".[124] International arbitration law poses additional challenges, since it has, as Gélinas puts it, "but a weak connection to domestic law"[125]; developed exclusively to meet the requirements of international trade, it is far removed from domestic paradigms. One would therefore expect that the CISG has fared better than the New York Convention, given that it bears a strong

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[121] *CISG*, *supra* note 16.

[122] See Zumbansen, *Transnational Law*, *supra* note 31, 741; *see also,*for an overview, Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L.J. 400 (2002).

[123] Fabien Gélinas, *Peeking Through the Form of Uniform Law: International Arbitration Practice and Legal Harmonization* 16, *available at* http://ssrn.com/abstract=1353803.

[124] FRÉDÉRIC BACHAND, L'INTERVENTION DU JUGE CANADIEN AVANT ET DURANT UN ARBITRAGE COMMERCIAL INTERNATIONAL § 143 (2006).

[125] *Id.*; GÉLINAS, *supra* note 123.

resemblance with well-known domestic sales laws. Intriguingly, the opposite is the case.

The New York Convention came into force in Canada on August 10, 1986 together with the UNCITRAL Model Law. Legislation adopting the New York Convention was enacted at the federal level,[126] as well as by all provinces and territories, except for Quebec, which instead amended its Civil Code and Civil Code of Procedure to be in conformity with the Convention.[127] Canadian courts are viewed as treating the New York Convention favourably,[128] respecting their obligation to enforce foreign arbitral awards under this convention.[129] Whatever is left to be desired in regard to the treatment of the New York Convention by Canadian judges—the fate the CISG suffered at the hands of Canadian judges is, at any rate, a more deplorable one. Therefore (and since the General Reporter suggested using the judicial treatment of the CISG as an example of how the national judiciary copes with the "complexity of international law"), we will now explore in more depth the applicationof the CISG—or, as we will see, the lack thereof— in Canada.

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126 United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985 (2nd Supp.), c.16.

127 However, Quebec's Civil Code of Procedure does provide that the New York Convention is to be considered in recognition and execution of arbitration awards made outside Quebec. *See* art. 948 C.C.P.: "This Title applies to an arbitration award made outside Québec whether or not it has been ratified by a competent authority. The interpretation of this Title shall take into account, where applicable, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as adopted by the United Nations Conference on International Commercial Arbitration at New York on 10 June 1958."

128 See Henri C. Alvarez, *The Implementation of the New York Convention in Canada*, 25 J. INT. ARB. 669 (2008), *available at* http://www.kluwerlawonline.com, for a more complete analysis of the New York Convention's application in Canadian courts.

129 *Id.* at 672. *See also* Robert Wai, *In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private Law*, 39 CAN. Y. B. INT'L L. 117, 139 (2001).

4.2 The Implementation of the CISG in Canada

The *United Nations Convention on Contracts for the International Sale of Goods* was first introduced in Canada in 1981 at a meeting of the Uniform Law Conference of Canada (ULCC).[130] At this meeting, Jacob Ziegel and Claude Samson presented a report to the commissioners "assessing [the Convention's] suitability for adoption by Provinces accompanied by a section by section analysis of the Convention."[131] The report listed three main reasons why it was in Canada's interest to adopt the Convention. The first was the "desirability of promoting greater uniformity and progressive harmonization of the private law rules governing commercial transactions in the international arena." The second reason was that Canada should support UNCITRAL's work, considering the large amount of time and effort that had been invested in the CISG project. The final reason given by Samson and Ziegel in favour of adopting the Conventions was the "need for an 'impartial' legal regime to govern contractual trading relationships [...] between countries with widely divergent social, economic and legal systems."

The matter of the CISG was next raised at the ULCC in 1984 as part of a report on "Canadian Activities in the Area of Private International Law," stating that the Convention was of limited scope, reflecting the linguistic and legal duality of Canada, and most importantly, was likely to be adopted in the United States.[132] Finally, in 1985, the Conference adopted a report recommending that the

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[130] At the same meeting, the commissioners had adopted a report on reform of domestic sale of goods legislation and recommended the enactment of a new (domestic) Uniform Sale of Goods Act. *See* John P. McEvoy, *Canada*, *in* THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS 33, 34 (Franco Ferrari, ed., 2008).

[131] JACOB S. ZIEGEL & CLAUDE SAMSON, REPORT TO THE UNIFORM LAW CONFERENCE OF CANADA ON CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1981), *available at* http://www.cisg.law.pace.edu (last visited Jan. 17, 2011) (Report presented to the Uniform Law Conference of Canada in July 1981).

[132] MCEVOY, *supra* note 130, 35.

"draft Uniform International Sale of Goods Act be adopted [...] as a uniform Act." [133]

In 1988, four jurisdictions enacted CISG legislation[134], followed by seven more provinces, as well as the federal government between 1989 and 1991.[135] Canada acceded to the CISG on April 23, 1991, a little over a year before it would take effect on May 1, 1992.

4.3 The Neglect of the CISG in Canadian Case Law

In recent years, there has been an increasing show of concern by scholars and CISG analysts about the application (or lack thereof) of the CISG in Canadian courts. The general consensus is that the treatment and application of the CISG in Canadian courts has been lamentable, the courts always deferring back to a homeward trend. It has either been the case that the CISG has been overlooked altogether, or that, when it has been considered, it has been interpreted in light of

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[133] *Id.*

[134] International Sale of Goods Act, S.N.S. 1988, c. 13 (Nova Scotia); International Sale of Goods Act, S.O. 1988, c. 45 (Ontario); International Sale of Goods Act, S.P.E.I. 1988, c. 33 (Prince Edward Island); International Sale of Goods Act, S.N.W.T. 1988 (2), c. 9 (Northwest Territories, which later divided to create Nunavut).

[135] International Sale of Goods Act, S.N. 1989, c. 29 (Newfoundland and Labrador); International Sale of Goods Act, S.N.B. 1989, c. I-12.21 (New Brunswick); International Sale of Goods Act, S.M. 1989-90, c. 18 (Manitoba); International Sale of Goods Act, S.B.C. 1990, c. 20 (British Columbia); International Conventions Implementation Act, S.A. 1990, c. I-6.8, s. 2 (Alberta); International Sale of Goods Act, S.S. 1990-91, c. I-10.3 (Saskatchewan); An Act Respecting the UN Convention on Contracts for the International Sale of Goods, S.Q. 1991, c. 68 (Quebec); International Sale of Goods Contract Convention Act, S.C. 1991, c. 13 (Canada). International Sale of Goods Act, S.Y. 1992, c. 7 (The Yukon Territory, which was the final jurisdiction to enact CISG legislation in 1992). Art. 93 of the CISG allows federal states to have the Convention apply only to certain provinces or territories. This is essential, as provincial governments are not bound by international agreements that fall within their exclusive areas of competence, such as sales law.

common law principles, thus undermining the international character and goal of uniformity the Convention seeks to achieve.[136]

Up to now, there are approximately nineteen Canadian cases which mention the CISG in some capacity. Of these cases, eight mention the CISG, but in no significant manner.[137] Two of the cases consider the CISG in determining *forum conveniens*.[138] One case finds the CISG inapplicable because it had not yet been implemented in the province at the time of purchase.[139] There are two instances in which the Convention should have applied, and while the court briefly refers to the Convention, it is ultimately overlooked.[140] In another decision, while the applicability of the CISG was not at issue, commentators believe that because it did apply, the court should have referred to

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[136] *CISG*, *supra* note 18, art. 7(1).

[137] Aubut v. Martel, [1999] J.Q. no 6464, J.E. 99-2089, [1999] R.D.I. 697, REJB 1999-15126; Paré v. Francoeur, [2000] J.Q. no 1480, J.E. 2000-1079, REJB 2000-18921; UL Canada Inc. v. Québec (Procureur Général), [1999] J.Q. no 1540, [1999] R.J.Q. 1720, J.E. 99-1298; Compagnie d'Assurance ING du Canada v. Goodyear Canada Inc., [2007] J.Q. no 1532, 2007 QCCQ 1356, J.E. 2007-854, EYB 2007-115754; STMicroelectronics inc. v. Matrox Graphics inc., **[**2007] J.Q. no 14364, 2007 QCCA 1784, [2008] R.J.Q. 73, J.E. 2008-116, 166 A.C.W.S. (3d) 1067, EYB 2007-127613; Ford Aquitaine Industries SAS v. Canmar Pride (The), [2005] F.C.J. No. 535, [2005] A.C.F. no 535, 2005 FC 431, 2005 CF 431, [2005] 4 F.C.R. 441, [2005] 4 R.C.F. 441, 271 F.T.R. 224, 138 A.C.W.S. (3d) 469; Multiactive Software Inc. v. Advanced Service Solutions Inc., [2003] B.C.J. No. 945, 2003 BCSC 643, 48 C.P.C. (5th) 125, 121 A.C.W.S. (3d) 843; Beechy Stock Farm (1998) Ltd. v. Managro Harvestore (1997) Systems Ltd., [2002] S.J. No. 240, 2002 SKQB 120, 114 A.C.W.S. (3d) 51.

[138] Shane v. JCB Belgium N.V. (2003) CanLII 49357 (ON S.C.); Chateau des Charmes Wines Ltd. v. Sabate, USA, Inc. et. al., (2005) CanLII 39869 (ON S.C.).

[139] General Refractories Co. Of Canada v. Venturedyne, Ltd., [2002] O.J. No. 54, [2002] O.T.C. 10, 110 A.C.W.S. (3d) 1157, ¶ 101.

[140] Brown & Root Services Corp. v. Aerotech Herman Nelson Inc., 2002 MBQB 229, [2003] 10 W.W.R. 339, 167 Man. R. (2d) 100, aff'd 2004 MBCA 63 (CanLII), 238 D.L.R. (4th) 594, [2004] 11 W.W.R. 23, 184 Man. R. (2d) 188.; Dunn Paving Ltd. v. Aerco Trading Inc., 2001 O.J. No. 1736, 2001 WL 449852 (Ont. S.C.J.), 2001 CarswellOnt 1574.

international CISG case law and commentary on the issue.[141] There is only one decision from an administrative tribunal, in which the CISG was used to supplement the tribunal's analysis.[142] Of the four remaining cases, one is the first Canadian decision dealing with the CISG, and the other three deal with the CISG in some substantive manner. They are discussed below.

Aside from the nineteen cases referred to above, there are four cases identified in Canadian CISG literature in which the Convention was not mentioned or referred to in any capacity, but which commentators believe should have been decided based on the Convention. [143]

Nova Tool & Mold Inc. v. London Industries Inc.,[144] is the first Canadian decision dealing with the CISG, and merits mentioning as it seems to set the tone for the following decade of CISG jurisprudence in Canada. It was released in December 1998, approximately six and a half years after the Convention officially came into force in Canada. *Nova Tool* was deemed a poor precedent for the future treatment of the CISG in Canadian jurisprudence.[145]

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[141] Sonox Sia v. Albury Grain Sales Inc., [2005] Q.J. No. 9998, J.E. 2005-1732, EYB 2005-93270, 2005 CanLII 26784, aff'd 2005 QCCA 1193, [2005] Q.J. No. 17960.

[142] Cherry Stix Ltd. v. President of the Canada Borders Services Agency, [2005] C.I.T.T. No. 71**,** [2005] T.C.C.E. no 71 (Canadian International Trade Tribunal).

[143] NRF Distributors Inc. v. Starwood Manufacturing Inc., [2009] O.J. No. 448, aff'd 2009 ONCA 596, [2009] O.J. No. 3212; Unique Labelling Inc. (International Private Beverage) v. Gerling Canada Insurance Company, [2008] O.J. No. 4090, 67 C.C.L.I. (4th) 105, [2008] I.L.R. I-4750, 2008 CarswellOnt 6098, 2008 CanLII 53846 (Ont. S.C.J.); Guiliani, a Division of IGM U.S.A. Inc. v. Invar Manufacturing, a Division of Linamar Holdings Inc., [2007] O.J. No. 3591, 52 C.P.C. (6th) 129, 160 A.C.W.S. (3d) 633, 2007 Carswell Ont 5922, aff'd [2008] O.J. No. 1303, 2008 ONCA 256, 235 O.A.C. 202, 165 A.C.W.S. (3d) 82; Grecon Dimter Inc. v. J.R. Normand Inc., 2005 SCC 46, [2005] 2 S.C.R. 401, rev'g [2004] J.Q. no 173, [2004] R.J.Q. 88 (QCCA) [hereinafter *Grecon Dimter*].

[144] Nova Tool & Mold Inc. v. London Industries Inc., [1998] O.J. No. 5381 (Ont. Ct. Gen. Div.).

[145] Jacob S. Ziegel, *Canada's First Decision of the International Sales Convention: Case Comment on Nova Tool & Mold Inc. v. London Industries Inc.*, 32 CAN. BUS. L.J. 313 (1999).

Nova Tool involved an Ontario manufacturer of steel molds (Nova Tool & Mold) that provided defective molds to an Ohio company (London) that was in the business of manufacturing plastic auto parts. After several unsuccessful attempts to correct the molds, London was forced to hire another mold-maker to correct the defects so that it could meet the scheduling needs of an important client. As a result of having to hire another mold-maker, London did not complete their payments to Nova. Nova brought a claim against London seeking full payment for the molds, and London responded with a counterclaim for damages, alleging the molds in question were defective and not delivered on time.

In rendering his decision, Justice Zalev mentioned the CISG, but ultimately relies on Ontario domestic sales law, despite the fact that the CISG was the applicable legislation in this case. In addressing London's claim of breach of warranty, he writes: "London relies on this contractual warranty and also relies on the implied warranties under the International Sale of Goods Act R.S.O. 1990 c. I.10. London relies particularly on Article 1(1)(a) and (1)(b), 35(1), 36(1), (2), 45(1)(a), (1)(b) and 74 all of which follow as Schedule 'B'."[146] This is the first and last we see of the CISG in this case.

In his case commentary, Ziegel speculates that only one party, London, sought to invoke the Convention in its pleadings,[147] but did not even go as far as to argue it at trial. As a result of the parties' decision not to argue the CISG, Justice Zalev may not have felt it was his place to raise the Convention where the parties chose not to. Ziegel is critical of Justice Zalev, believing that the judge should have recognized this as an important opportunity to set precedent in Canada for cases falling under the CISG.

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[146] *Nova Tool, supra* note 144, 61.

[147] Ziegel, *Canada's First Decision*, *supra* note 145, 317-318. Based on the written judgment, it seems that London only invoked the CISG in support of their counterclaim for breach of warranty. There is no explanation as to why they did not plead the CISG on any of their other counterclaims.

> (...) Zalev J. could have insisted on counsel reviewing all relevant aspects of the Convention or on his not relying on the Convention at all. Since the judge chose not do this, all we are left with is a diminutive precedent providing little guidance as to how the Convention is likely to be applied in future Canadian cases.[148]

After *Nova Tool*, the status of the CISG in the Canadian legal community only improved marginally, and somewhat inconsistently. In his report for Professor Ferrari's book on the CISG, Professor McEvoy considers that only three Canadian cases until now have dealt with the CISG in any substantive manner: *La San Giuseppe v. Forti Moulding Ltd., Mansonville Plastics (B.C.) Ltd. v. Kurtz GmbH,* and *Diversitel Communication Inc. v. Glacier Bay Inc.*[149]

La San Giuseppe v. Forti Moulding Ltd. was the first Canadian case after *Nova Tool.* Forti (the Ontario buyer) became delinquent in its payments to La San Giuseppe (an Italian seller). LSG instituted proceedings, and Forti counterclaimed, alleging that some of the products were defective and that there had been over shipments. None of the agreements in dispute appear to have been in writing.

The decision in *La San Giuseppe* evoked mixed criticisms; there was some improvement from *Nova Tool,* but the decision was in no way exemplary in its application or interpretation of the CISG. While Justice Swinton properly established that the CISG is the governing legislation, her application of the law was somewhat questionable. She interpreted the CISG as though it were ordinary domestic law, without referring to foreign jurisprudence, which is inconsistent with the Convention's international character.[150] Ziegel speculates that in certain instances, her deference to Ontario sales legislation is likely her

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[148] *Id.* at 318.

[149] MCEVOY, *supra* note 130, 54. Since the publication of Professor John McEvoy's report, there have been other cases mentioning the CISG, but none have dealt with the Convention in any substance.

[150] *Id.* at 55. The international character of the CISG is expressed in Art. 7 of the Convention.

response to the buyer invoking the Ontario *Sale of Goods Act*.[151] Nonetheless, despite certain inconsistencies, observers were relieved to see the Ontario court recognize the applicability of the CISG to this case and the decision was considered a positive step forward for the CISG in Canadian jurisprudence.[152]

The second case to treat the CISG with a degree of sophistication is *Mansonville Plastics (B.C.) Ltd. v. Kurtz GmbH*.[153] Mansonville, a Canadian Styrofoam manufacturer, purchased equipment for the production of Styrofoam from a German company named Kurtz. The conflict arose when Kurtz delayed the delivery of the equipment purchased by Mansonville. Furthermore, Mansonville alleged that the equipment was defective, taking approximately one year of repairs and adjustments before it produced a suitable Styrofoam product. Mansonville brought an action against Kurtz claiming a breach of contract and breach of statutory warranty of fitness. In response to the claim for breach of contract, Kurtz invoked article 71[154] of the CISG in its defense, arguing that the purchaser had failed to provide a timely letter of credit after the order had been confirmed. Justice Tysoe finds that, for the period within which Mansonville had not yet provided a letter of credit, Kurtz had properly suspended the fulfillment of their contractual obligations, but any delay after that could not be justified under the CISG.[155]

In addressing the claim of breach of statutory warranty, Justice Tysoe began by reproducing article 35 of the CISG, which deals with warranties of fitness. He then states: "Sections 17 and 18 of the B.C.

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[151] ZIEGEL, *Canada's First Decision*, *supra* note 145, 322.

[152] *Id.* at 320.

[153] *See also* Rajeev Sharma, *The United Nations Convention on Contracts for the International Sale of Goods: The Canadian Experience*, 36 VICTORIA U. WELLINGTON L. REV. 847, 852 (2005).

[154] *CISG*, *supra* note 18, Art. 71 ("A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations . . . .").

[155] Mansonville Plastics (B.C.) Ltd. v. Kurtz GmbH, 2003 BCSC 1298, [2003] B.C.J. No 1958, 123 A.C.W.S. (3d) 922, 82 [hereinafter *Mansonville*].

Sale of Goods Act, R.S.B.C. 1996, c. 410 are to like effect"[156] and continues his analysis by consulting case law based on domestic sales legislation. Once again, there is no indication that either counsel presented foreign jurisprudence or sources relevant to CISG interpretation, and this seems to be another case of courts following the lead of the parties.[157] Justice Tysoe's decision on this issue is ultimately based on domestic case law, and apart from the reproduction of article 35, the CISG is not referred to for the remainder of the judgment, even though it could have equally guided him in this matter.[158]

With respect to CISG jurisprudence in Canada, *Mansonville Plastics* represents a step in the right direction; the Court applied provisions of the Convention where appropriate and provided more in-depth analysis and reasoning than had been seen in previous cases. Nonetheless, in spite of these promising improvements, the troubling fact remains that Justice Tysoe unnecessarily and improperly applied the British Columbia *Sale of Goods Act* and Canadian common law to assist in interpreting and applying the CISG provisions.[159]

Diversitel Communication Inc. v. Glacier Bay Inc. is the third Canadian decision in which the CISG finds itself substantively at issue.[160] This case is especially notable because it is the first instance in Canadian jurisprudence where international decisions and sources are considered in interpreting the provisions of the CISG.[161] In this instance, a Canadian purchaser, Diversitel, had specified a precise delivery

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[156] *Id.* at 83.

[157] MCEVOY, *supra* note 130, 56.

[158] Peter J. Mazzacano, *Canadian Jurisprudence and the Uniform Application of the U.N. Convention on Contracts for the International Sale of Goods*, *in* PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 2005-2006 85 (Pace Int'l L. Rev. ed., 2006), *available at* http://www.cisg.law.pace.edu.

[159] SHARMA, *supra* note 153, 853.

[160] Diversitel Communications Inc. v. Glacier Bay Inc., [2003] O.J. No. 4025, 42 C.P.C. (5th) 196, 126 A.C.W.S. (3d) 348, aff'd [2004] O.J. No. 1702, 130 A.C.W.S. (3d) 23 [hereinafter *Diversitel*].

[161] SHARMA, *supra* note 153, 854.

schedule for some vacuum panel insulation it had purchased from California vendor Glacier Bay, and with their purchase order, had forwarded a $40,000 deposit. Glacier Bay ultimately did not meet Diversitel's schedule, and Diversitel commenced an action to retrieve the $40,000 deposit, arguing fundamental breach. Counsel for Diversitel relied on article 25 of the CISG, submitting that, in combination with articles 33 and 49, the Convention established a lower threshold for fundamental breach than that required by common law.[162] The plaintiffs supported their position with a "bundle of case law on UNCITRAL texts which reflects how a number of European Courts have construed late delivery under article 33 as tantamount to fundamental breach of contract, pursuant to article 49 of the *Act*."[163] Justice Roccamo took the foreign case law into consideration, placing a special emphasis on a German decision,[164] but eventually reverts back to an analysis of common law principles in deciding the issue. In addition, Diversitel's counsel submitted that fundamental breach had also occurred under the common law. As Mazzacano notes, Diversitel's counsel, "perhaps becoming aware that the court was not agreeable to legal issues concerning the CISG, . . . capitulated to the homeward trend." This case is resolved no differently from the other cases examined above—with the judge basing his finding of fundamental breach on common law principles, and not on the relevant CISG articles.

By examining the case law, it is obvious that the CISG has been marginalized by Canadian judges and lawyers alike. Even in the few cases where the CISG managed to enter into the realm of consideration by the courts, judges and consequently lawyers, eventually referred back to domestic law in order to resolve the dispute.

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[162] *Diversitel, supra* note 160, 27.
[163] *Id.* at 28.
[164] MCEVOY, *supra* note 130, 57.

4.4 Excursus: Quebec and the CISG

After surveying literature and case law on the CISG, it seems that there is no marked difference in the way the CISG has been treated in Quebec when compared to the common law jurisdictions in Canada. Of the cases mentioning the CISG, seven are from Quebec: five of them do not refer to the CISG in any significant way, and one has been heard at the Supreme Court of Canada level.[165] Overall, there is no more deference to the CISG in these cases than there is in those originating from common law provinces. The only Quebec case that has received any scholarly attention[166] has been *Sonox Sia v. Albury Grain Sales inc. et al.,* and the criticisms are in line with those found in other case commentary.[167]

The CISG has received interesting treatment in Quebec in that it is the inspiration behind five articles in the new Civil Code, which came into force in Quebec in 1994.[168] Aside from being a direct inspiration, the Convention is considered to be in harmony with the new Civil Code on matters of contract formation, specific

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[165] *Grecon Dimter*, *supra* note 143.

[166] Aside from *Grecon Dimter*, but most of the attention for this case has been directed at the SCC decision, and not those in the lower courts. *See* Antonin I. Pribetic, *The (CISG) Road Less Travelled: Case Comment on Grecon Dimter Inc. v. J.R. Normand Inc.*, 44 CAN. BUS. L.J. 92 (2006-2007).

[167] *See* Antonin I. Pribetic, *Arbitration and Fraudulent Misrepresentation: Another Canadian Court Overlooks the CISG: Case Comment on Sonox Sia v. Albury Grains Sales Inc.*, *The Globetrotter*: OBA Newsletter 10:3 (January 2006) 6 ("As is so often the case in Canadian jurisprudence, the court failed to refer to any CISG case law or scholarly commentary [...] Nor did the court consider the contract formation rules under the CISG.").

[168] 1 Gouvernement du Québec, Ministère de la justice, *Commentaires du ministre de la justice* (1993) [hereinafter *Minister's Comments*]. Art. 1456, 2 C.C.Q is inspired by Art. 69 CISG (Minister's Comments at 884); Art. 1736 C.C.Q. is inspired by Art. 49 CISG (Minister's Comments at 1083); Art. 1738 C.C.Q. is inspired by art. 43 CISG (Minister's Comments at 1085); Art. 1739 C.C.Q. is inspired by Arts. 39 and 40 CISG (Minister's Comments at 1085); Art. 1740 C.C.Q. is inspired by art. 71 CISG (Minister's Comments at 1087).

performance, revocability of an offer, and good faith.[169] Professor Jobin has even suggested that the Convention can be of use to Quebec courts in interpreting the new code.[170] In general however, literature originating from Quebec on the subject is scarce.[171]

4.5 Possible Reasons for the Poor Treatment of the CISG in Canadian Jurisprudence

A number of reasons have been given in an effort to explain the general attitude among Canadian jurists toward the CISG. Professor McEvoy points to four events at the time of the CISG's arrival in Canada to explain its poor reception into the Canadian legal world.[172] He first notes that the CISG was initially introduced to the ULCC as it was adopting recommendations for reform of domestic sale of goods legislation, leaving little interest in re-examining sale of goods legislation in light of the CISG. Second, the CISG was initially associated with the discrete area of Private International Law. Third, the recommended Uniform Act "merely adopted the CISG as domestic law with the Convention text appended as a Schedule", giving jurists little guidance or assistance in understanding the CISG. Fourth, it took nearly four years for the CISG to officially come into force in Canada; the lengthy process tempered any sense of urgency or importance attached to the Convention in the mind of the Canadian legal community. Professor McEvoy also believes that this delay sent a negative message to jurists about the necessity for understanding the new international sales regime.

The first two reasons offered by Professor McEvoy give some insight into the general attitude of the ULCC with regard to the CISG

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169 Claude Samson, *L'harmonisation du droit de la vente: l'influence de la Convention de Vienne sur l'évolution et l'harmonisation du droit des provinces canadiennes*, 32 C. DE D. 1001, 1025 (1991).

170 PIERRE-GABRIEL JOBIN, LA VENTE 190 (3rd ed. 2007).

171 After conducting research using online databases and a variety of texts on sales law and international law in Quebec, only brief, unsubstantial, mentions of the CISG were found.

172 MCEVOY, *supra* note 130, 37.

and help explain the lack of treatment and consideration given to the Convention at the implementation stage. These last two points link the initial reception of the CISG by the ULCC to its subsequent (and current) treatment in Canadian law and offer some explanation as to why lawyers and the Courts would eventually have such a difficult time recognizing the applicability of the CISG.

Following the release of the *Nova Tool* decision, commentators began to speculate on the status of the CISG in Canadian law; this case was the first indication they were given as to the level of awareness of the Convention among Canadian jurists—which was not very encouraging. In his case commentary, Ziegel observes: "It is safe to assume that the level of consciousness about the Convention is very low among commercial lawyers in Canada."

Commentators have identified two main areas of concern when it comes to the CISG in Canadian law. The first is that the case law is sparse. This deficiency is especially surprising and concerning when we consider that both Canada and the United States are signatories to the Convention and, taking into account the volume of trade between the two countries, the Convention therefore has the potential to apply to millions of transactions.[173] The second aspect of CISG case law which has troubled scholars and commentators is the consistently cursory or non-existent application of the Convention in cases where it is clearly the governing law. Several factors have been considered by CISG commentators to account for the lack of Canadian jurisprudence:

1. Lawyers routinely exclude the CISG in sales contracts. Commercial lawyers drafting the international contracts may be unfamiliar with the CISG and prefer to include their own domestic sales legislation in the choice of law clauses. In analyzing the outcome of *Nova Tool*, Professor Ziegel commented that North American lawyers were understandably more comfortable excluding the CISG,

[173] Geneviève Saumier, *International Sale of Goods Law in Canada: Are We Missing the Boat?*, 7 CANADIAN INT'L LAWYER 1, 1 (2007).

considering that both Canada and the U.S. are predominantly common law jurisdictions with similar sales laws.[174]

2. There is a lack of familiarity of the CISG among contracting parties. In trying to understand or explain the discrepancy in the amount of CISG jurisprudence from common law countries (U.S., Canada, Australia, New Zealand) when compared to other jurisdictions (namely Germany), Professor Ziegel considers, among other factors, that the level of awareness of the CISG among legal practitioners in common law jurisdictions is much lower than the perceived level of awareness in other jurisdictions.[175]

3. Some contracting parties may not wish to disturb their already well-established relationship under domestic rules by imposing the new rules of the Convention.[176] Furthermore, the lawyers themselves likely feel it is more efficient for sales contracts to be governed by established law, rather than the new and evolving CISG.[177]

4. Many routine sales disputes are resolved without going to court.[178]

5. When disputes are heard in court, there is a failure to recognize the default applicability of the CISG in international commercial transactions.[179] In dealing with CISG claims, Canadian

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[174] Jacob S. Ziegel, *Canada and the Vienna Sales Convention*, 12 CAN. BUS. L.J. 366, 371 (1986-1987). Note that, Professor Ziegel had previously advocated for a joint declaration between Canada and the United States under Art. 94 of the CISG, which enables contracting states with closely related sales rules to exclude the Convention from the sales contracts concluded between the parties having their business in those states.

[175] Jacob S. Ziegel, *The Future of the International Sales Convention from a Common Law Perspective*, 6 N.Z.B.L.Q. 336, 343-344 (2000).

[176] J. Anthony Van Duzer, *The Adolescence of the United Nations Convention on Contracts for the International Sale of Goods In Canada* (2001), *available at* http://www.cisg.law.pace.edu (Report presented at the Canadian Bar Association's International Law Section Annual Conference).

[177] ZIEGEL, *supra* note 145, 319.

[178] SAUMIER, *supra* note 173, 2.

[179] Antonin I. Pribetic, *An 'Unconventional Truth': Conflict of Laws Issues Arising under the CISG*, 1 NORDIC J. OF COM. L. 3 (2009), *available at* http://www.ncjl.utu.fi/index.php.

courts exhibit a homeward trend that leads them to avoid, downplay, or ignore the CISG.[180] As Antonin Pribetic put it: "Canadian judges are not yet as familiar with the CISG as their international counterparts, particularly European judges, who benefit from a wealth of CISG case law, the Principles of European Contract Law (PECL), UNIDROIT Principles and other international legal instruments."[181] The end result is that lawyers are reluctant to argue the CISG before a court when they have little case law to support their arguments, and when there is a very real chance that the judge will ultimately defer back to domestic law in making a decision.[182] Lawyers are less and less likely to argue the Convention, and judges thus lose the opportunity to become familiar with the law and contribute to an international CISG jurisprudence.

In Canadian common law jurisdictions, judicial notice is taken of international law, and thus it need not be directly pleaded.[183] In Quebec, the matter is governed by article 2807 of the Civil Code of Quebec,[184] which provides that international law must be pleaded. This rule exists as a way to facilitate matters for the judge by providing him or her with sources of law that are otherwise not readily available.[185] Taking these rules into consideration, one would assume that once counsel has raised the CISG in its pleadings, the courts would have no trouble ascertaining the situations in which it is in fact applicable law. As the jurisprudence shows, this is not the case.

The CISG has been in Canada for over seventeen years, and yet, there is no evidence that it has had a significant impact on Canadian legal practice.[186] Seeing as how there has been ample literature on the CISG since its first Canadian appearance in *Nova Tool*, it is becoming

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[180] SAUMIER, *supra* note 173, 4.
[181] PRIBETIC, *supra* note 179, 3.
[182] *See* discussion of *Diversitel*, above.
[183] VAN ERT, *supra* note 93, 71. Note that, while judicial notice is taken of international law, counsel is advised to "plead the general sources of laws on which they rely".
[184] Art. 2807 C.C.Q.
[185] VAN ERT, *supra* note 93, 72.
[186] MCEVOY, *supra* note 130, 57.

increasingly difficult to defend the failure of Canadian jurists to acknowledge the CISG. In addition, English translations of foreign case law are readily available, and thus, as Mazzacano notes, "the blame for any lack of international case law to assist in an interpretation of the Convention lies squarely with legal practitioners."[187]

5 Conclusion

Up to now, the Canadian legal community has done little to ensure the proper application of the CISG and has not contributed to the Convention's ultimate goal of uniformity and harmonization in international commercial sales law. In the case of the CISG, judges have not only been eschewing complexity; they might not even be aware of it. If any positive changes in Canadian CISG jurisprudence are to take place, there must be an increase in awareness of the Convention among both counsel and judges. In Canada, it is the mission of the National Judicial Institute (NJI)[188] to develop and deliver "educational programs for all federal, provincial and territorial judges" in a way that reflects the "changing demands on the judiciary in a rapidly-evolving society." The NJI indeed has offered, in 2001, a training workshop under the motto: "Emerging Challenges: Applications of International Law in Canadian Courts", which addressed issues of international commercial law, including the CISG. Despite the effort to gather renowned scholars and practitioners from all over the world to pass on their knowledge to the judiciary, it remained a one time effort. More needs to be done.

Let us return to the starting point of our inquiry. Contributing to a comparative endeavour, it has been our task, as we put it, to paint a picture of the particular Canadian response to the complexity of transnational law. We have worked from the assumption that mapping out a national response to the transnational challenge is a valuable enterprise, given that, as Harry W. Arthurs put it, "globalization

[187] MAZZACANO, *supra* note 158.
[188] http://www.nji.ca/nji/index.cfm.

cannot exist without the state."[189] We have also posited, in addition, that transnational law is but one phenotype of an encompassing normative plurality and stratification rooted in the inside and the outside of the state, and that calls into question state law's claim to unitary validity. In the forum of the domestic judge, these normative orders collide. "Complexity of transnational law" describes, therefore, not only the proliferation of transnational "sources of law", but in particular the struggle of the domestic judge to cope with a novel, transnational normativity employing the tools of a positivistic conceptualization of law.

We have divided our inquiry into two major sections. As comparatists, we first set out on a quest to find a trace of a specifically Canadian "legal culture" in response to the challenge such global legal pluralism poses to national legal discourse. And indeed, not only among scholars, but also among judges we have been able to diagnose an understanding of the implications of a social reality that is growing more complex on a global scale. We have seen remarkably strong statements made by the country's most influential legal actors who acknowledge the pluralistic character of modern Canadian society, as well as the repercussions of globalized commerce for the decline of the nation-state as unitary norm-producer. Without jumping to generalizations, this seems to be indicative of a legal culture that somewhat identifies with Canada's self-image as a diverse and liberal society, and as a tradition in which nation-state-centered legal positivism never took as strict a form as in the countries that considered themselves the original pacemakers of the civil or common law traditions.[190] In combination, these cultural traits seem to be the ideal breeding ground for a progressive and open attitude towards the challenging complexity of transnational law.

However, given the all-too-elusiveness of the concept of legal culture, we are well aware that our painting remains necessarily impressionistic. In the second part of our inquiry, we have analyzed the technical realities of the judicial responses to the complexities of

[189] ARTHURS, *supra* note 29, 221.
[190] GLENN, *supra* note 47, 292ff.

transnational law. Particularly when it came to the application of the CISG, we have seen a different—and less rosy—picture; a somewhat grayish realism came to replace our impressionistic water lilies. Understanding and sympathizing with the complexities of transnational law presupposes, first and foremost, awareness and education. It is almost ironic that we can, on the one hand, diagnose a remarkable willingness to tolerate the impact of transnational law, even if that implies softening the paradigm of supremacy of national positive law; and on the other hand, witness the neglect of the CISG, which is, after its implementation, Canadian national law proper.[191] The idiosyncrasies of a particular national response to the transnational challenge add, at times, a whole new level of complexity to the already intricate reality of global normativity.

[191] *See, e.g.*, PRIBETIC, *supra* note 179, 47, who warns against "dubious precedents based upon the application of the wrong law".