Do Pre-1970 Precedents Still Matter? An Empirical Analysis of Legal Submissions and Court Decisions

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TOPIC AND IMPORTANCE

Prior to 1970—the year the Supreme Court of Canada began providing official translations for all its judgments—Supreme Court decisions were only issued in the language in which they were originally delivered. Given these decisions are still only available in one language, this presents a barrier for lawyers and litigants who may not be fluent in both English and French when older cases remain relevant to current legal arguments. However, in June 2024, when asked whether the Supreme Court would produce official translations of its pre-1970 judgements, Chief Justice Richard Wagner dismissed the idea, explaining that there was very minimal legal interest in these historical decisions. With legal commentators disagreeing, the following question was raised: How often do lawyers and judges use decisions from before 1970?

Through an analysis of over 76,000 citations within three datasets—namely, decisions of the Supreme Court, appeal factums submitted to the Supreme Court, as well as decisions of Canadian courts and tribunals posted to CanLII—this paper argues that pre-1970 Supreme Court decisions are still relevant in today's legal world.

MAIN ARGUMENTS

Firstly, pre-1970 cases are actively cited across all levels of contemporary Canadian legal practice. Over half of the Supreme Court decisions and one quarter of all factums filed between 2015 and 2024, as well as thousands of lower court decisions every year, reference pre-1970 precedents. Additionally, instead of being concentrated among a handful of landmark decisions, evidence suggests a sustained engagement with a broad spectrum of over 2000 historical decisions. Even the most frequently cited pre-1970 decision—*Roncarelli v. Duplessis*—averages just over one citation per year. This points to a comprehensive reliance on older jurisprudence, not just a handful of "eternal stars."

This paper also conducts a qualitative analysis (i.e., looking at the way these decisions are used by courts, as opposed to just how much they

are used) to argue that these precedents serve as binding legal authority rather than solely secondary historical context. Other relevant findings include:

- Commercial and civil matters demonstrate the highest rates of citation;
- Citation rates varied depending on the subject matter of the case, the judge writing the opinion, and the court being cited;
- French-language factums were more likely to cite pre-1970 cases than English ones, despite most of these rulings only being available in English; and
- Though all precedents experience some decline in use over time, pre-1970 decisions demonstrate greater long-term durability than the average.

CONCLUSION AND ADDITIONAL CONSIDERATIONS

This evidence therefore contradicts Chief Justice Wagner's remark about the supposed irrelevance of pre-1970 Supreme Court decisions. The sustained engagement with such precedent is observed throughout all levels of Canadian legal practice, including in the Chief Justice's own judgements. These findings support the case for comprehensive translation of these foundational decisions, removing linguistic barriers to all actors in the Canadian legal system, ensuring transparency and consistency in legal reasoning, and full participation in the justice system across both official languages.