Extraordinary Offenders in Our Midst: An Evaluation of an American Interpretive Solution and Its Application to Section 745(b) of Canada's Criminal Code

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Engaging a mandatory sentencing regime based on a foreign predicate conviction is a concept that likely will become increasingly topical as the mass exodus of people from various countries becomes more commonplace and the general tendency toward global population migration continues to rise. With such movements, prideful nationalistic stances are often pitted against more realistic, but sometimes opportunistic, notions regarding the responsibilities that come with global citizenship. In the following Article, the author will explore ex juris predicate sentencing jurisprudence, with a particular emphasis on the offense of murder. Ultimately a workable solution will be proposed for the Canadian legal profession born out of the American experience.

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I. INTRODUCTION

Abraham Froesse-Friessen, a two-time murderer, could certainly be described as an extraordinary offender, at least by Canadian standards.

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He was also a well-traveled offender, having spent portions of his life living in Mexico, the United States of America, and Canada.[1] Now that sub judice concerns and appeal periods have passed, the story of his journeys and his ghastly conduct along the way can be told and assessed without reservation.

By way of background, on July 21, 1994, Froesse-Friessen pleaded guilty, in the state of Texas, United States, to the first-degree murder of Antonio Monzon Montecillo, having shot him to death with a gun.[2] Shelby County District Court Judge Bennie Boles sentenced him, as a result of a plea bargain, to imprisonment for fifteen years.[3] Froesse-Friessen did not leave prison until after he served his entire sentence. Almost immediately thereafter, U.S. officials deported him to Mexico.[4]

After spending approximately one year living in Mexico, Froesse-Friessen moved to Canada because he enjoyed dual citizenship status in both countries.[5] He took up residence in Kingsville, Ontario, Canada.[6] On January 25, 2011, he shot defenseless Bridie Fanning to death in her apartment, point blank with a shotgun.[7] On that fateful day, Froesse-Friessen achieved the dubious distinction of taking a second life after the Texas courts had convicted and fully sentenced him for doing essentially the same thing less than two decades prior. In Canada, second time or repeat murderers, as distinguished from those who commit multiple murders before being apprehended, are rare birds.[8]

According to section 745(b) of the Criminal Code of Canada (Criminal Code):

> [T]he sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be . . . in respect of a person who has been convicted of second degree murder where that person has previously been convicted of culpable homicide that is murder, however described in this Act, that that person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence.[9]

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1. R. v. Froesse-Friessen, [2011] O.J. No. 6101, paras. 11-13 (Can. Ont. Sup. Ct. J.).
2. Factum of the Crown para. 3, R. v. Froesse-Friessen, [2011] O.J. No. 6101 (No. CR-11-2351).
3. *Id.* app. B.
4. *Froesse-Friessen*, [2011] O.J. No. 6101, para. 12.
5. *Id.* paras. 11, 13.
6. *Id.* para. 13.
7. *Id.* para. 18.
8. However, one of the most famous murder cases in Canadian history, *R. v. Corbett*, [1988] 1 S.C.R. 670, 670-71 (Can.), involved a second-time murderer who committed both murders in Canada.
9. Criminal Code, R.S.C. 1985, c. C-46, § 745(b) (Can.).

Section 745(b) appears to apply prima facie to Froesse-Friessen's conduct. He had previously been convicted of murder and had murdered yet again. His first murder conviction came as a result of a guilty plea as opposed to a verdict rendered after a trial. The question that loomed large for the Canadian trial judge in the matter was whether an *ex juris* conviction for murder could, or even should, engage the mandatory sentence envisaged by section 745(b). Although Froesse-Friessen had some desire to resolve the Canadian murder charge with a guilty plea to second-degree murder, he first wanted to know the sentencing jeopardy that he faced. Would the sentencing judge still have some discretion in determining the parole ineligibility period for second-degree murder,[10] or would the exercise be reduced to nothing more than a mandatory proclamation?

II. THE LAW OF HOMICIDE AS BETWEEN THE COUNTRY OF CANADA AND THE STATE OF TEXAS

Unlike in the United States, where individual states have the right to promulgate their own individual penal statutes,[11] there is only one criminal code in Canada.[12] The definitions of homicide in the two jurisdictions bear some facial similarities, but also some obvious dissimilarities. Section 229 of the Criminal Code defines murder in the following ways:

> Culpable homicide is murder
> (*a*) where the person who causes the death of a human being
> (i) means to cause his death, or
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
> (*b*) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death,

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10. *Id.* Note that section 745.4 of the Criminal Code pertains to orthodox sentencing hearings for second-degree murder and states:

> Subject to section 745.5, at the time of the sentencing under section 745 of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.2, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.

11. For an excellent discussion on how the United States Constitution allocates federal and state criminal powers, see Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 523-32 (2010).

12. *See* Constitution Act, 1867, 30 & 31 Vict., c. 3, § 91(27) (U.K.).

> and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
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> (*c*) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.[13]

Under section 19.02(b) of the Texas Penal Code, a person commits murder when they:

> (1) intentionally or knowingly causes the death of an individual;
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
> (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.[14]

Both subsections 19.02(b)(2) and 19.02(b)(3) of the Texas statute portray a certain vulnerability by Canadian constitutional standards. A bald reading of each suggests a loosening of mens rea standards to something less than a subjective foreseeability of death.[15] Indeed, subsection (b)(3) seems to flirt directly with the concept of felony-murder liability, which gasped its last breath in Canada more than twenty years ago.[16] However,

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13. Criminal Code, R.S.C. 1985, c. C-46, § 229 (Can.). It should be underscored that paragraph (c), which allows Canadian courts to convict an accused person when they "ought to have known" that death was likely to result, has not passed Canadian constitutional muster because nothing less than the subjective foresight of death can support liability for murder in Canada. *See* R. v. Martineau, [1990] 2 S.C.R. 633, 644 (Can.); R. v. Shand, [2011] O.J. No. 25 (Can. Ont. C.A.); R. v. Haché (2007), 832 A.P.R. 247, 254 (Can. N.B.C.A.). As explained by Professor Kent Roach in his article *The Problematic Revival of Murder Under Section 229(c) of the Criminal Code*, 47 ALBERTA L. REV. 675, 700 (2010):

> The idea that unintentional harm is less serious than harm that is caused intentionally makes intuitive sense. As Oliver Wendall [sic] Holmes famously stated, "even a dog distinguishes between being stumbled over and being kicked." The principle that the causing of unintentional harm is less blameworthy than the causing of intentional harm is a manageable and traditional legal principle. It has appropriately been recognized as a principle of fundamental justice.

14. TEX. PENAL CODE ANN. § 19.02(b) (West 1994).

15. *Id.*

16. In *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 653-54 (Can.), Justice Lamer, writing for the majority, explained the dangers associated with legislating culpability for murder simply as a result of death occurring, albeit unintentionally, while committing a lesser offense (i.e., the felony-murder rule):

when one compares section 229(a)(i) of the Canadian statute with section 19.02(b)(l) of the Texas statute, the laws appear to be functionally identical. They employ similar language and text, and they both integrate the essential elements of knowledge and intent.[17] This can lead to a deceptive argument that the respective codes share a common understanding of what constitutes murder. Accordingly, it is essential that the reader appreciates that mere words may belie any meaningful statutory congruence. This is particularly true when one does not fully grasp the nuanced differences between each jurisdiction's criminal law.

III. THE CONSTRUCTION OF STATUTES

The Supreme Court of Canada has recognized, "Today there is only one principle or approach [to statutory interpretation], namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[18] Additionally, the author Ruth Sullivan underscores, "The words of the text must be read and analyzed in light of a purposive analysis, a scheme analysis, the larger context in which the legislation was written and operates and the intention of the legislature, which includes implied intention and the presumptions of legislative intent."[19] Finally, section 12 of the Interpretation Act confirms, "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[20]

It is important to realize that the ordinary meaning of legislation is not necessarily the same as the dictionary meaning. The meaning of

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> The punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme. In addition, murder is distinguished from manslaughter only by the mental element with respect to the death. It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction. I am presently of the view that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight.

For a more fulsome critical analysis of the felony-murder rule, see George P. Fletcher, *The Meaning of Innocence*, 48 U. TORONTO L.J. 157 (1998).

17. TEX. PENAL CODE ANN. § 19.02(b); Criminal Code, R.S.C 1985, c. C-46, § 229 (Can.).

18. *See* ELMER A. DRIEDGER, CONSTRUCTION OF STATUTES 87 (2d ed. 1983). The Supreme Court of Canada cited this passage with approval in *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 580 (Can.).

19. RUTH SULLIVAN, STATUTORY INTERPRETATION 42 (2d ed. 2007).

20. Interpretation Act, R.S.C. 1985, c. I-12 (Can.).

legislation is usually affected by the reader's knowledge, the words before and after a specific clause, the reader's personal values, common sense, and the wherewithal to appreciate the shared values affecting the community.[21] As such, a provision's ordinary meaning, more times than not, would be misunderstood without context. What animates the proper understanding of an act's specific section is the reader's ability to appreciate the larger contextual perspective that considers the act as a whole, the social norms, and the realities in which the act operates.[22]

For many years, it was unacceptable to attempt to divide an act's statutory meaning and purpose from the originating legislative debates. For example, the Hansard[23] debates were afforded but a modicum of evidentiary value because it was thought that the members of Parliament would inaccurately represent the intent of the statute.[24] However, under the more contemporary and now accepted view, one may consider the discourse offered by elected officials as a bill passes through its various readings:

> In determining the "purpose" of a statute in this special sense, there is no doubt as to the propriety of reference to the state of law before the statute and the defect in law (the "mischief") which the statute purports to correct. These may be referred to under ordinary rules of statutory interpretation. Until recently, there was doubt about the propriety of reference to parliamentary debates (Hansard) and other sources of the "legislative history" of the statute. The relevance of legislative history is obvious: it helps to place the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it. Legislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the characterization of the entire statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose, and, despite some earlier authority to the contrary, it is now established that reports of royal commissions and law reform

21. SULLIVAN, *supra* note 19, at 50-51.

22. DRIEDGER, *supra* note 18, at 128.

23. Hansard is "[t]he official report of the proceedings and debates of the Houses of Parliament." THE OXFORD UNIVERSAL DICTIONARY ON HISTORICAL PRINCIPLES 864 (C.T. Onions ed., 3d ed. 1955).

24. R. v. Morgentaler, [1993] 3 S.C.R. 463, 484 (Can.). Equivalent sentiments can be found in *Oklahoma v. New Mexico*, 501 U.S. 221, 234-37 (1991); *United States v. Nelson*, 277 F.3d 164, 186-87 (2d Cir. 2002), *cert. denied*, 537 U.S. 835 (2002); and *Cheung v. United States*, 213 F.3d 82, 92-93 (2d Cir. 2000).

> commissions, government policy papers and even parliamentary debates are indeed admissible.[25]

The effect a statute has can be further divided into two categories: its legal effect and its practical effect.[26] The former concerns how the legislation as a whole affects the rights and liabilities of those subject to its terms, whereas the latter focuses on the legislation's predicted operational effect.[27]

While the foregoing provides a useful blueprint with which one may build an impressive argument for a certain statutory construction, any uncertainty in a penal statute will result in the impugned passage being read *contra proferentem* the interpretation requested by the state. "[P]rovisions in penal statutes, when ambiguous, should be interpreted in a manner favourable to the accused."[28] However, the question herein remains whether section 745(b) of the Criminal Code is truly equivocal. As will be seen as this Article progresses, there does not appear to be a uniformly applied bright-line standard as to when creeping ambiguity will obscure legislative intent.

IV. PROVING CRIMINAL ANTECEDENTS AT TYPICAL TRIALS AND SENTENCING HEARINGS

As global citizens, we all have a vested interest in not only keeping track of the criminal convictions that occur on our own soil, but also those that occur elsewhere in the world. When considering *ex juris* criminal records, what must be of paramount concern for Canadians and Americans alike is whether the record was born out of a system of criminal justice that generally embraced the same core values as those held in our free and democratic societies.

Assuming that the prosecution is able to convince the court that a foreign conviction is sound, Canadian jurists may consider foreign convictions as aggravating factors in determining an individual's sentence.[29] In the context of a trial, prosecutors are entitled, subject to the

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25. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 384-85, 1285 (3d ed. 1992) (footnotes omitted). Note that Justice Sopinka cites this passage with approval in *Morgentaler*, [1993] 3 S.C.R. at 485. For further discussion on the issue, see *In re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, 317-19 (Can.).

26. *Morgentaler*, [1993] 3 S.C.R. at 482.

27. *Id.* at 482-83.

28. R. v. Wust, [2000] 1 S.C.R. 455, 473-74 (Can.); *see also* R. v. McIntosh, [1995] 1 S.C.R. 686, 702 (Can.).

29. *See, e.g.*, R. v. Hammond, [2000] B.C.J. No. 1476 (Can. B.C.C.A.); R. v. Yourofsky, [1999] O.J. No. 1901 (Can. Ont. Sup. Ct. J.); R. v. D.H. (1999), 176 Sask. R. 235, 241 (Can. Sask. Q.B.).

overarching discretion of the court, to cross-examine an accused person regarding previous convictions in foreign jurisdictions in order to better assess the individual's credibility.[30] In *R. v. Stratton*, the Court of Appeal for Ontario articulated that a prosecutor can cross-examine with respect to convictions from non-Canadian jurisdictions as long as the conviction comes from a common law jurisdiction.[31] The court interpreted "any offence" broadly while still respecting the importance of context:

> I cannot assent, however, to the proposition that whenever the word "offence" is used in federal legislation it invariably means an offence created by Parliament or that the word "convicted" when so used necessarily refers to a conviction registered in Canada. Whether those words should be so construed depends entirely on the context in which they are found. Clearly, the word "convicted" in s. 535(5)(*a*) of the *Code* and the word "conviction" in s. 535(5)(*b*) include foreign convictions, although not expressly so stated . . . . A judgment of conviction or acquittal by a Court of competent jurisdiction in a foreign country will sustain a plea of *autrefois convict* or *acquit* if an accused is charged with the same offence in this country. We are not here concerned with the principles upon which the Courts in this country would act in deciding whether the foreign Court had jurisdiction over the offence. It would be surprising if a conviction in another country could provide a defence for an accused, but could not be used to impeach his credit as a witness.
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> . . . .
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> On the other hand, the criminal conduct of a witness, as evidenced by a conviction, is relevant to his credibility and a conviction in another country, *prima facie*, impairs the credibility of a witness no less than a conviction in Canada for the same conduct.[32]

R. v. Perera is a related Canadian case that underscores the relevance of exposing foreign criminal convictions.[33] In *Perera*, the prosecutor cross-examined the accused person in line with section 12 of the Canada Evidence Act regarding his criminal record in England. Here, the Court of Appeal for British Columbia held that English offenses were offenses known to Canadian law and that both jurisdictions

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30. The "overarching discretion of the court" reference alludes to the specific wording of section 12 of the Canada Evidence Act, which begins, "A witness *may* be questioned as to whether he has been convicted of any offence . . . ." Canada Evidence Act, R.S.C. 1985, c. C-5, § 12(1) (emphasis added).

31. (1978), 90 D.L.R. 3d 420, 425-26 (Can. Ont. C.A.).

32. *Id.* at 428-29 (citations omitted). Compare the views taken by the Court of Appeal for Ontario with comments made by the United States Supreme Court in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991): "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"

33. (1991), 14 W.C.B. 2d 395 (Can. B.C.C.A.).

defined extortion, the offense with which the accused person was charged, similarly.[34] Indeed, the foreign convictions came from a judicial system similar to Canada's judicial system.[35]

Although courts may use a foreign conviction to elevate a sentence or impeach an accused person's credibility during cross-examination, jurisprudential comity between nations does not necessarily mean that courts can or should use a foreign conviction to trigger a mandatory sentence. A deeper analysis must be embarked upon to understand the true similarities and differences between the judicial systems in question. In this regard, macro-level comparisons of statutes, treaties, and constitutional imperatives between Canada and the United States can be useful.

V. THE INTERNATIONAL LANDSCAPE UNIQUE TO NORTH AMERICA

"Canada and the United States not only have the world's longest shared border, they enjoy the world's largest bi-lateral trading agreement."[36] Numerous reciprocal and legal agreements between Canada and the United States bespeak an undeniable friendship between the two nations. Canada and the United States have signed treaties that involve the administration and mutual assistance of their shared border,[37] as well as extradition treaties.[38]

The 1990 Treaty with Canada on Mutual Legal Assistance in Criminal Matters[39] was perhaps the single most significant agreement between the two countries on criminal matters. The treaty contemplated the nature, scope, and conditions applicable to both investigative and legal assistance between the two countries, including:

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34. *Id.*

35. *Id.* For similar sentiments, see *United States v. Atkins*, 872 F.2d 94, 96 (4th Cir. 1989), where Judge Murnaghan observed:

> However, Atkins suffered the misfortune of violating foreign law in England, the country which provides the origin or antecedent of the jurisdictional system employed in the United States of America. We here deal with a system of common law and statutes refining it which obtains in England and America alike.

36. *The Canada-U.S. Border: By the Numbers*, CBC NEWS (Dec. 7, 2011, 3:22 PM), http://www.cbc.ca/news/canada/story/2011/12/07/f-canada-us-border-by-the-numbers.html.

37. *See* Agreement Between Canada and the United States of America Regarding Mutual Assistance and Co-operation Between Their Customs Administrations, U.S.-Can., June 20, 1984, 1469 U.N.T.S. 319.

38. Second Protocol Amending the Treaty on Extradition Between the Government of Canada and the Government of the United States of America, U.S.-Can., Jan. 11, 1988, 1853 U.N.T.S. 407.

39. Treaty with Canada on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Mar. 18, 1985, S. TREATY DOC. No. 100-14 (1988) (entered into force Jan. 25, 1990).

(a) examining objects and sites;
(b) exchanging information and objects;
(c) locating or identifying persons;
(d) serving documents;
(e) taking the evidence of persons;
(f) providing documents and records;
(g) transferring persons in custody; [and,]
(h) executing requests for searches and seizures.[40]

In addition to international agreements between the two countries, Canadian provincial governments have reached reciprocal agreements with their U.S. state counterparts.[41] Given the largely continuous land mass between the countries, both Canada and the United States would benefit from maintaining controls over delinquent drivers who can easily cross their shared border. As such, the two countries now partake in reciprocal suspension of driver's licenses as a result of similar highway traffic laws and a common awareness that dangerous drivers, whether sober or intoxicated, harm both countries' citizens.[42]

Common law examples of judicial cooperation between countries are also not difficult to find. One of the best examples of courts working together for common and just determinations can be found when letters rogatory[43] are issued. As explained by the Supreme Court of Canada in *R. v. Zingre*, the root of the procedure is founded in a concurrence of justice-driven philosophies:

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40. *Id.* art. 2. Note that soon after this treaty was signed, the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (Can.), was given Royal Assent, and it gave Canadian courts the power to issue compulsory measures, such as search warrants and evidence-gathering orders, to obtain evidence in Canada on behalf of a foreign state for use in criminal investigations and prosecutions conducted by that state.

41. *See, e.g.*, Reciprocal Suspension of Driver's Licence Regulation, O. Reg. 37/93 (Can.).

42. *See id.*; Highway Traffic Act, R.R.O. 1990, c. H. 8 (Can.).

43. BLACK'S LAW DICTIONARY 815 (5th ed. 1979) defines "letters rogatory" as "[a] request by one court of another court in an independent jurisdiction, that a witness be examined upon interrogatories sent with the request." See also section 46(1) of the Canada Evidence Act, R.S.C. 1985, c. C-5, which states:

> If, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or their discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.

> It is upon this comity of nations that international legal assistance rests. Thus the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect unless it be contrary to the public policy of the jurisdiction to which the request is directed or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction.[44]

Another example of cross-jurisdictional recognition is when courts cite to another country's jurisprudence to highlight sound or unsound judicial thinking.[45] Given that the United States is the elder country, with a significantly senior constitution,[46] Canadian jurists might use American approaches when developing rights-based jurisprudence from a constitutional law perspective.[47] However, any tendency of Canada to cherry-pick from south of the border must always be done cautiously and with an appreciation of some of the fundamental differences between the cultures and values of the two nations.[48] The United States Supreme Court has also utilized foreign judgments and foreign legislation to help shape its decisions.[49]

Although introspection is essential for countries to develop a coherent common law, it is also important for them to appreciate the vistas between countries when they are considering issues of comparable

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44. [1981] 2 S.C.R. 392, 401 (Can.) (citations omitted).

45. *See, e.g.*, Hunter v. Southam Inc., [1984] 2 S.C.R. 145 (Can.).

46. 1787 as compared to 1982. *See* U.S. CONST.; Constitutional Act, 1982, *being* Schedule B to the Canada Act, 1982 (U.K.).

47. See, for example, *Hunter v. Southam Inc.*, [1984] 2 S.C.R. at 145, wherein Justice Dickson considers search and seizure protections for Canadians with the benefit of American case law at his side.

48. See, for example, *R. v. Sinclair*, [2010] 2 S.C.R. 310, 333 (Can.), where the majority of the Supreme Court of Canada refused to transplant the rule in *Miranda v. Arizona*, 384 U.S. 436 (1966), to Canadian soil.

49. Consider the words of Justice Breyer in *Printz v. United States*, 521 U.S. 898, 977 (1997) (citations omitted), where he observed, albeit in dissent:

> Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent government entity.

See also the reference to the Canada Elections Act by Justice Scalia, also in dissent, in the case of *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 381 (1995), where he addressed, inter alia, "whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections." However, also consider Justice Scalia's dissenting views some seven years later in the case of *Lawrence v. Texas*, 539 U.S. 558, 586-605 (2003), where he generally warns throughout his judgment about the ill fit that often results from incorporating the views of a foreign court.

importance. At the same time, they must balance creativity with caution in such circumstances. As the authors Sir Markesinis and Fedtke underscore:

> [W]e caution against the attempt to try to "transplant" or use foreign notions and concepts. We do this for two reasons. First, concepts and notions are often radically different and can, thus, discourage the natural idea of an intellectual dialogue. Indeed, concepts and notions attract definitional and linguistic difficulties, especially as one tries to find the foreign equivalent for one's own notion or concept. Secondly, the idea of transplantation, though successful in some systems and at some times, itself carries with it the danger of subsequent "rejection" and is perhaps one of the most difficult operations lawyers can attempt to perform. . . . [W]e are not recommending that foreign law should be used as *binding precedent* by judges, but rather as a source of *inspiration*, especially when national law is dated, unclear, or contradictory.
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> . . . [I]n times of rapid social change, life is constantly producing new problems (or placing old solutions under investigation), and it is here, once again, where comparison is most likely to offer maximum benefit. . . . This means that much of what we say about the utility of studying foreign law may be appropriate not only for the new democratic states and their constitutional courts (which are often starving for inspiration or legitimisation), but also for those systems which have respectable histories to look back upon.[50]

VI. THE AMERICAN INTERPRETIVE SOLUTION

The United States Supreme Court has addressed whether a foreign conviction can serve as a predicate offense to potentially trigger a more severe sentencing regime, at least as far as this issue applies to firearm offenses.[51] In *Small v. United States* (*Small II*), the United States Supreme Court held that foreign convictions fall outside the ambit of federal felon-in-possession liability for firearm possession under 18 U.S.C. § 922(g)(1).[52] The road to this decision was fraught with divergent opinions from various circuits of the U.S. courts of appeals.[53] An analysis of three of the circuits' rationales will help the reader appreciate the

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50. Sir Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11, 17-18 (2005).

51. *See* Small v. United States (*Small II*), 544 U.S. 385 (2005).

52. The United States Code (U.S.C.) is comprised of the general and permanent federal laws of the country, of which Title 18 pertains to Crimes and Criminal Procedure.

53. *Compare* United States v. Atkins, 872 F.2d 94 (4th Cir. 1989), *and* United States v. Winson, 793 F.2d 754 (6th Cir. 1986) (recognizing foreign convictions), *with* United States v. Concha, 233 F.3d 1249 (10th Cir. 2000) (refusing to recognize foreign convictions).

competing issues that the United States Supreme Court ultimately had to reconcile.

In the 1989 case *United States v. Atkins*, the United States Court of Appeals for the Fourth Circuit embraced a general recognition of *ex juris* convictions.[54] The Crown Court in Croyden, England, convicted Atkins in 1981 for unlawfully possessing a firearm with the intent to endanger life, a crime which resulted in the court imposing a five-year jail sentence.[55] Seven years later, Atkins was arrested in Arlington, Virginia.[56] A search incidental to that arrest uncovered that he possessed a firearm and was thus, prima facie, in contravention of 18 U.S.C. § 922(g)(1), which renders possession of a firearm unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.[57] The court saw the statute as an easily understood articulation of congressional intent and, as such, found no need to assess the legislative history.[58] The court held that the phrase "convicted in any court" meant just that and extended at least to the shores of England, a country whose legal history underpins the American common law and legislative systems.[59]

Fourteen years later, in *United States v. Gayle*, the United States Court of Appeals for the Second Circuit grappled with 18 U.S.C. § 922(g)(1) and the vexing "convicted in any court" language that animates the statute's application.[60] The defendant's predicate conviction happened to be of Canadian origin. A Canadian court convicted him in 1996 for using a firearm in the commission of an indictable offense, a crime that carried a maximum sentence of fourteen years' imprisonment.[61] Five years later, law enforcement in the United States arrested the defendant in Plattsburgh, New York, in a hotel where authorities found a cache of firearms in his room.[62] Authorities based the defendant's original arrest "upon suspicion that he had entered illegally [into] the United States from Canada."[63] Thus, not only did the court have to deal with a foreign conviction entered previously in a country with arguably similar legal and constitutional values, but the proximity of the state of

54. 872 F.2d at 95.
55. *Id.*
56. *Id.*
57. *Id.* at 95-96 (quoting 18 U.S.C. § 922(g) (2012)).
58. *Id.*
59. *Id.*
60. 342 F.3d 89 (2d Cir. 2003).
61. *Id.* at 91.
62. *Id.* at 90.
63. *Id.*

New York to the Canadian border provided an exquisite example of when sovereignty notions become somewhat illusory.[64]

Unsatisfied with a bald reading of the impugned words "in any court," Judge Katzmann, writing for the panel in *Gayle*, assessed the statutory scheme as a whole so that the provision in question could be understood on the backdrop of the legislation.[65] The court held that the phrase is ambiguous and explained its reason for uncertainty by using the following analogy:

> [I]t is not unreasonable to understand statutory references to officers, officials, and acts of government as meaning those of the particular government. Just as a state statute authorizing "a police officer" to make an arrest probably means a police officer of that state and does not include police officers from foreign nations, so it is reasonable to read § 922(g)(1)'s reference to convictions as referring to convictions by courts in the United States. On the other hand, there are legitimate reasons why, depending upon the crime, Congress might have wished to include foreign convictions. For example, Congress might well have intended that a violent crime committed abroad such as murder qualify as a predicate offense under § 922(g)(1).
>
> To resolve this textual ambiguity, we may consult legislative history and other tools of statutory construction to discern Congress's meaning.[66]

After considering the relevant Senate Judiciary Committee Report and Conference Report, the court ultimately concluded that "Congress did not intend foreign convictions to serve as a predicate offense for § 922(g)(1)."[67] However, in recognizing the societal dangers that are posed when firearms find their way into the hands of previously convicted felons, the court concluded its judgment with the following observation that speaks to scenarios where governmental intent in legislation remains uncertain or difficult to divine:

> In reaching our decision, we note that Congress may seek to enact gun control legislation that criminalizes firearm possession by individuals with foreign felony convictions. If Congress were to do so, however, it would need to speak more clearly than it has in § 922(g)(1). Today, we only choose not to write into a statute a meaning that seems contrary to what Congress intended.[68]

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64. For example, the drive from Niagara Falls, Ontario, to Plattsburgh, New York, takes just over seven hours to complete, assuming a smooth border crossing.

65. 342 F.3d at 93-94.

66. *Id.* at 93.

67. *Id.* at 95.

68. *Id.* at 96.

Furthermore, the 2003 case *United States v. Small* (*Small I*) involved a predicate offense conviction originating from the Naha District Court in Japan[69]. Instead of engaging in a debate between plain language and legislative intent, the United States Court of Appeals for the Third Circuit focused on ensuring that the conviction in question emanated from a juridical environment that "comports with our notions of fundamental fairness required by the U.S. Constitution."[70] In formulating this standard, the court relied on section 482 of the Restatement (Third) of Foreign Relations Law of the United States, which reads:

> (1) A court in the United States may not recognize a judgment of the court of a foreign state if:
> (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
> (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.
> (2) A court in the United States need not recognize a judgment of the court of a foreign state if:
> (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;
> (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;
> (c) the judgment was obtained by fraud;
> (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;
> (e) the judgment conflicts with another final judgment that is entitled to recognition; or
> (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.[71]

In finding that there were insufficient grounds for not recognizing the Japanese conviction as a predicate offense, the Third Circuit nonetheless appeared curiously unconcerned over the fact that the trial court had not convened an evidentiary hearing to determine whether Japanese concepts of fundamental fairness accorded with the American

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69. 333 F.3d 425, 426 (3d Cir. 2003).

70. *Id.* at 428.

71. *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987)).

view.[72] The difficulties inherent in mastering one's own national laws are daunting enough and illustrate the folly in dispensing with formal proof of, or argument on, the foreign law in question. What hangs in the balance is too important to the liberty of the subject to be left to passing familiarities or fixed recognitions. Thus, in this case, the testimony of a witness with expertise in the relevant foreign law should have been an essential ingredient in the court's analysis, and its absence undermines the soundness of the ratio decidendi.[73]

When the circuit courts finally called upon the United States Supreme Court to untie the Gordian knot of conflicting lower-court decisions, a stark encampment of philosophies unfortunately ensued, with the legislative intent camp prevailing in the end.[74] While the majority did recognize the extraterritorial significance of misused firearms, it, like many of the circuit courts, simply invited Congress to craft the remedy:

> The statute's purpose *does* offer some support for a reading of the phrase that includes foreign convictions. As the Government points out, Congress sought to "keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society." And, as the dissent properly notes, one convicted of a serious crime abroad may well be as dangerous as one convicted of a similar crime in the United States.
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> . . . .
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> . . . Given the reasons for disfavoring an inference of extraterritorial coverage from a statute's total silence and our initial assumption against such coverage, we conclude that the phrase "convicted in any court" refers

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72. *See id.*

73. The general rule is that foreign law must be proven as a matter of fact by the evidence of persons who are experts in the law. Allen v. Hay (1922), 64 S.C.R. 76, 80-81 (Can.). For a general discussion of the law as it relates to foreign law expert testimony, see *Washington v. Johnson*, [1988] 1 S.C.R. 327 (Can.); *Xiao Zi Qi v. Canada*, [2009] 4 F.C.R. 510 (Can. F.C.); and *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289 (H.L.) (appeal taken from Eng.). Despite the potential difficulties, the law suggests that when the evidence of foreign law experts conflicts, is obscure, or is generally unhelpful to the court, the court may examine for itself the decisions of the foreign courts, the foreign legislation, and the foreign text-writers, to arrive at a satisfactory conclusion on the question of the foreign law. *See Allen*, 64 S.C.R. 76; Lind v. Sweden (1987), 40 C.R.R. 250 (Can. Ont. C.A.); Rice v. Gunn (1884), 4 O.R. 579 (Can. Ont. Q.B.). If the court is unable to ascertain the pith and substance of the foreign law, the applicant's case would accordingly fail on that issue. Finally, for a discussion on the dangers of using literature unsupported by a foundation of expert testimony, see Brian Manarin, *Keeping Transcience at Bay: Making an Argument That Speedy Trials May Be More Important Than Interviewing and Statement-Taking Processes*, 4 INVESTIGATIVE INTERVIEWING: RES. & PRAC., no. 2, 2012, at 14, 19-20, http://www.iiirg.org/journal (subscription only).

74. *See Small II*, 544 U.S. 385 (2005).

> only to domestic courts, not to foreign courts. *Congress, of course, remains free to change this conclusion through statutory amendment.*[75]

VII. THE CANADIAN RESPONSE

It would appear that, save for the case of *Froesse-Friessen*, there has never been a reported case in Canada involving the issue of whether a murderer previously convicted by a foreign nation and sentenced on foreign soil, who later murders on Canadian terra firma, engages section 745(b) of the Criminal Code. It is possible that there is such a dearth of jurisprudence and scholarly opinion on the topic because the empirical significance of the occurrence was heretofore considered so miniscule that no one really cared. In a February 7, 1965, address advocating for the abolition of the death penalty, Professor Thorsten Sellin of the University of Pennsylvania made the following point:

> But, say the supporters of the death penalty, what of life imprisonment? There is none, they say. Lifers get paroled and are allowed to roam freely again. This is true, but only in part. A considerable number of lifers do serve their sentences. In 1957, in Ohio, for instance, one prisoner was executed but eleven who were serving definite life sentences died from natural causes. However, a large percentage of lifers do receive paroles after terms of varying length. In Pennsylvania, the average time spent in prison before parole is now somewhat over twenty years. In some States this figure is lower, in others higher. What is important is that paroled murderers everywhere have the best record of all parolees. Very few of them are again convicted and then usually of relatively minor offence. Of a hundred and sixty-nine first-degree murderers paroled in Ohio in the fifteen years between 1945 and 1960 only two were returned to prison—for a robbery and an assault. Therefore, paroled murderers are not a special menace to the community.[76]

The Correctional Service Canada has released similar figures pertaining to the recidivism rates among homicide offenders:

> Between 1 January 1975 and 31 March 1990, 658 murder offenders were released on full parole. Some of these offenders were released more than once for a total of 752 full-parole releases . . . . [M]ore than three quarters of released murder offenders (77.5%) were not reincarcerated while on parole. Of those who were reincarcerated, 13.3% had their release revoked for a technical violation of their parole conditions and 9.2% for an indictable offence.
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> . . . .

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75. *Id.* at 394 (emphasis added) (citations omitted).
76. Thorsten Sellin, *Capital Punishment*, 8 CRIM. L.Q. 36, 50 (1965-66).

> Five released murder offenders (of a total of 658) were convicted of having committed a second murder while they were on full parole. Three of these were convicted of first-degree murder and two of second-degree murder. All five offenders had originally been convicted of non-capital murder. Besides these, no released murderer has been convicted of attempted murder or any other offence causing death.[77]

Thus, the likelihood that a convicted murderer, whether foreign or domestic, will commit another murder upon their release from prison appears to be statistically low. Nonetheless, in the rare case where a convicted murderer commits a second murder, opportunistic journalists tend to distort public perception of the number of repeat murderers.[78]

The scarcity of repeat murderers in Canada translates into a correspondingly small body of case law applicable to section 745(b) of the Criminal Code.[79] Importantly, however, the case of *R. v. Falkner* concluded that the section withstands constitutional scrutiny, at least when challenged under Sections 7 (fundamental justice) and 9 (arbitrary detention/imprisonment) of the Canadian Charter of Rights and Freedoms.[80] Although the decision has limited precedential value, the case nonetheless remains the standard by which courts will measure other prosecutions under this section.

Other significant common law guidance concerning what is required for a court to engage section 745(b) comes from a trilogy of similarly decided cases.[81] The most recent of the three, *R. v. Cousins*,

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77. *FORUM on Corrections Research*, CORRECTIONAL SERV. OF CAN., http://www.csc-scc.gc.ca/text/pblct/forum/e042/e042c-eng.shtml (last updated Dec. 18, 2012). A further Correctional Service of Canada study of the period between 1998-2010, which involved 3032 males who had served a penitentiary sentence for some form of homicide, revealed, inter alia, that "10 (0.3%) were under supervision and had previously been sentenced for another homicide." Philippe Bensimon, *Profile of Convicted Murderers Who Reoffend with a Similar Crime While Under Supervision in the Community*, CORRECTIONAL SERV. CAN. (May 2011), http://www.csc-scc.gc.ca/text/rsrch/smmrs/rg/rg-b50/rg-b50-eng.shtml. For an interesting study of recidivism while in prison, comparing those who are incarcerated for their natural life versus those who are on death row awaiting execution, see J. Keith Price et al., *Criminal Acts of Violence Among Capital Murder Offenders in Texas*, 3 J. CRIMINOLOGY & CRIM. JUST. RES. & EDUC. 1 (2009).

78. *See, e.g.*, *A Short List of Murderers Released To Murder Again*, WESLEY LOWE, http://www.wesleylowe.com/repoff.html (last visited Nov. 22, 2013); Jennifer Emily, *Man Pleads Guilty Killing Former Girlfriend While on Parole for Two Murders*, DALLAS NEWS (July 28, 2009, 5:59 PM), http://crimeblog.dallasnews.com/2009/07/man-pleads-guilty-killing-form.html; Paul Stokes, *Man Who Killed Again While on Parole for Murder Will Die in Prison*, TELEGRAPH (Mar. 29, 2010, 5:45 PM), http://www.telegraph.co.uk/news/uknews/crime/7535795/Man-who-killed-again-while-on-parole-for-murder-will-die-in-prison-html.

79. R. v. Froesse-Friessen, [2011] O.J. No. 4595, para. 13 (Can. Ont. Sup. Ct. J.).

80. (2004), 188 C.C.C. 3d 406, paras. 30-35 (Can. B.C.S.C.).

81. R. v. Cousins (2004), 234 Nfld. & P.E.I.R. 195 (Can. N.L.S.C.C.A.); R. v. Okkuatsiak (1994), 91 C.C.C. 3d 83 (Can. N.L.S.C.C.A.); R. v. Harris (1993), 86 C.C.C. 3d 284 (Can. Que. C.A.).

decided by the Supreme Court of Newfoundland and Labrador (Court of Appeal), reiterated the position of the other two courts "that section 745(b) only applied to a case where the second murder was committed after the conviction for the first."[82]

Given the limited precedent, it is perhaps not surprising that the court in *Froesse-Friessen*, at the urging of counsel, was favorably inclined to consider adopting, at least in part, an American interpretive solution.[83] There was no reason for the court to believe that casting an extrajurisdictional net would not make for a better-rounded decision. Indeed, "the Canadian experience shows that what may have started as a need—looking at foreign law—has now become a habit, and one which not only is accepted locally but also lends to Canadian case law an international aura and appeal."[84]

Justice Thomas in *Froesse-Friessen* employed his section 745(b) analysis with the knowledge that, should the court find that the section was inapplicable to a previous foreign murder conviction, "a guilty plea to second degree murder, if offered, would be acceptable to the Crown."[85] While finding the relevant sections of the Texas Penal Code and the Criminal Code very similar in certain respects, Justice Thomas was initially concerned that a sentencing judge would still be obliged to "wander through the laws of foreign jurisdictions and the circumstances surrounding the conviction in a comparative study of penal statutes."[86] Although expert evidence regarding Texas' criminal law could have been made available to the court, Justice Thomas further observed, "This would not seem to be a particularly palatable way to impose a mandatory sentencing penalty."[87] Ultimately, the court analyzed the section's legislative history, as well as the governmental comments that had been made about the section. Hansard transcripts and parliamentary discussions at the time the legislation was passed were less than illuminating; however, certain remarks made by Conservative Minister of Justice Rob Nicholson in 2010 gave the court some important insight:

> "Section 745 of the Criminal Code provides that convictions for first- and second-degree murder carry mandatory terms of life imprisonment, with mandatory periods of parole ineligibility. For first-degree murder that period is 25 years. It's also 25 years for anyone convicted of second-degree

82. 234 Nfld. & P.E.I.R. 195, para. 22.
83. *See* [2011] O.J. No. 4592, para. 7.
84. Markesinis & Fedtke, *supra* note 50, at 160.
85. [2011] O.J. No. 4592, para. 1.
86. *Id.* para. 13.
87. *Id.*

> murder who was previously convicted of either first- or second-degree murder *under domestic law* or an intentional killing under the Crimes Against Humanity and War Crimes Act."[88]

The Minister's use of the phrase "under domestic law" was telling for Justice Thomas particularly when juxtaposed with section 745(b.1) of the Criminal Code, which specifically focuses on the use of convictions that involved individuals perpetrating genocide, war crimes, and crimes against humanity outside of Canada.[89]

The use of governmental commentary to aid in statutory interpretation after legislation has been passed is a slippery slope, particularly when the enacting government is no longer in power.[90] As such, courts should use this approach sparingly, with the support of more reliable indicators of legislative intent. The factors considered in understanding help animate an appreciation of legislative context in its entirety and are typically restricted to the history of the provision at issue, its place in the overall scheme of the act, the object of the act itself and the legislature's intent in enacting the act as a whole, and the particular provision at issue.[91] However, having been provided with the United States Supreme Court decision in *Small II*, Justice Thomas was thereby reminded of the intraterritorial backdrop against which most legislation is passed: "In determining the scope of the statutory phrase we find help in the 'commonsense notion that Congress generally legislates with domestic concerns in mind.' This notion has led the Court to adopt the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application."[92] Justice Thomas in *Froesse-Friessen* appears to echo the sentiments of Justice Breyer in *Small II* by underscoring that courts should prefer a purposive approach to statutory interpretation, even when the natural reading of a phrase is intuitively

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88. *Id.* para. 14 (quoting from comments made when Minister Nicholson appeared before the Standing Committee on Justice and Human Rights during the 40th Parliament, 3rd Session House of Commons Debates, No. 033 (Nov. 2, 2010) at 1530).

89. *Id.* para. 15.

90. Section 745(b) was born out of Bill C-45, when a liberal government was in power. The Minister of Justice Allan Rock, at the second reading of the Bill, puts forward the government's rationale for aspects of the proposed legislation. *Allan Rock on Criminal Code in the House of Commons*, OPEN PARLIAMENT (June 14, 1996), http://openparliament.ca/debates/1996/6/14/?SinglePage=1.

91. Wawanesa Mut. Ins. Co. v. Axa Ins. (2012), 112 O.R. 3d 354, para. 35 (Can. Ont. C.A.) (citing PIERRE-ANDRÉ CÔTÉ, THE INTERPRETATION OF LEGISLATION IN CANADA 387 (3d ed. 2000)).

92. *Small II*, 544 U.S. 385, 388-89 (2005) (citations omitted); *see also* Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949). Canada, too, recognizes that the sovereign equality of states generally prohibits the application of domestic law elsewhere. *See* R. v. Cook (1998), 164 D.L.R. 4th 1, para. 139 (Can.); R. v. Greco (2001), 159 C.C.C. 3d 146 (Can. Ont. C.A.).

attractive and even where restrictive modifiers are not patent in the language.[93] Certainly, a healthy bit of skepticism must always accompany any suggestion that the court should adopt a bald and expansive reading of a penal statute, given liberty considerations.[94] As both Justices alluded to in their respective decisions, it is not difficult for a government to send a clearer message to trial courts, particularly now that both courts have put their imprimaturs on what are clearly domestically driven interpretations of the relevant statutes.

VIII. A SUGGESTED STATUTORY AMENDMENT TO SECTION 745(b) AND A CORRESPONDING COMMON LAW PROCEDURE TO BE ADOPTED

Some have argued that it is fundamentally unfair to use foreign convictions unsparingly, and the collateral sanctions that flow therefrom, on individuals because it can "destroy any aspirations an ex-offender may have to participate fully in American society."[95] Certainly there is merit in such a proposition, generally speaking, for even a scarlet letter fades with time. However, certain transgressions in life are bound to follow the transgressors to the grave. As David K. Linnan explains:

> [I]n recent years some jurisdictions have excluded the use of foreign convictions under habitual-offender statutes. Such a result is unsatisfactory, however, since it will regularly subordinate the interests that the criminal justice system has in acquiring probative evidence to the often diaphanous concerns over foreign relations in cases in which, by hypothesis, no due process problems exist. By elevating form over substance, this solution threatens to allow a guilty defendant to mitigate his punishment or to escape conviction altogether upon exclusion of reliable evidence.
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> Ultimately, some middle course is necessary between the extremes of a strong presumption in favor of the reliability of a foreign conviction, with all of the due process problems it creates, and that of total exclusion of foreign convictions, with the unnecessary harm it might do to the criminal justice system generally.[96]

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93. *See* Froesse-Friessen, [2011] O.J. No. 4592, para. 22.

94. *Id.* However, when the issue is more procedural in nature, Canadian courts have been willing to occasionally adopt "bald reading" reasoning. See, for example, how the Ontario Court of Appeal treated the statutory phrase "for any reason" when interpreting section 669.2(1) of the Criminal Code in *R. v. Leduc* (2003), 176 C.C.C. 3d 321, paras. 65-66 (Can. Ont. C.A.), *leave to appeal denied*, [2003] S.C.C.A. No. 411.

95. Nora V. Demleitner, *Thwarting a New Start? Foreign Convictions, Sentencing, and Collateral Sanctions*, 36 U. TOL. L. REV. 505, 523 (2005).

96. David K. Linnan, *The Collateral Use of Foreign Convictions in American Criminal Trials*, 47 U. CHI. L. REV. 82, 108-09 (1979) (citations omitted).

What is suggested by the author is a middle ground involving some tweaking of the subject legislation and the formulation of a rigorous, yet flexible, common law test to introduce a foreign murder conviction as a triggering offense under section 745(b) of the Criminal Code.[97] The statutory revision must be unambiguous as to the will of Parliament. As such, the following simple addendum would suffice: "For greater clarity, a previous conviction for culpable homicide includes a foreign conviction, so long as the circumstances surrounding the foreign conviction and the fundamental values of the foreign criminal justice system are consistent with those that would be required to support such a conviction in Canada."[98]

Similarly, the common law procedure the courts will utilize at the evidentiary hearing need not be remarkable. Courts are perfectly suited to craft a template for testing the evidence, within the sanctity of a voir dire, to determine whether it generally satisfies Canadian fundamental justice standards.[99] In such an endeavor, the concept of due process will loom large.[100] While it is substantially more difficult for courts to determine whether fundamental fairness safeguards were in place for a

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97. *See id.*

98. No national criminal justice system will ever totally mirror the justice system of another country. "American courts confronted with the attempted collateral use of a foreign conviction should evaluate the foreign procedures in light of American notions of truthfulness and fairness of result rather than blindly require that foreign criminal procedure be identical to that provided in American trials." *Id.* at 96. Canadian courts have held similar views. In *R. v. Harrer*, [1995] 3 S.C.R. 562, 589 (Can.), the Supreme Court of Canada stated at paragraph 51:

> It may be that the procedures accepted in the foreign country fall so short of Canadian standards that the judge concludes that notwithstanding the suspect's submission to the law of the foreign jurisdiction, to admit the evidence would be so grossly unfair as to repudiate the values underlying our trial system and condone procedures which are anathema to the Canadian conscience. Or it may be that the law of the foreign jurisdiction has been abused by the authorities, again rendering it unfair to receive the evidence. But in most cases of evidence taken abroad in conformity to laws generally recognized as just, mere dissimilarity between the foreign legal rules and those required by the *Charter* does not establish that admission of the evidence would render the trial unfair.

99. Cases like *R. v. O'Connor*, [1995] 4 S.C.R. 411 (Can.) (discussing the production and disclosure of therapeutic records); *R. v. Garofoli*, [1990] 2 S.C.R. 1421 (Can.) (discussing challenges to wiretap authorizations); and *R. v. Khan* (1990), 59 C.C.C. 3d 92 (Can.) (discussing the principled approach to hearsay evidence), are examples of the court's ability to craft workable evidentiary procedures to resolve complex legal and policy issues.

100. In *Burgett v. Texas*, 389 U.S. 109 (1967), Justice Douglas, in delivering the opinion of the Court in a case involving Texas Recidivist Statutes, grappled with the fact that the predicate conviction from Tennessee was registered as a result of a trial where the defendant was not represented by counsel. The Court found that to use a conviction founded on a right to counsel violation to, inter alia, enhance the punishment for a subsequent offense was not only impermissible, but it caused renewed suffering tied directly to the original deprivation of his Sixth Amendment right.

previous foreign conviction emanating from "a different linguistic, procedural, or constitutional environment,"[101] the task is not so daunting as to be insurmountable. Were it otherwise, the rule of law would have to countenance what amounts to judicial surrender.

A prototypical approach that remains as viable today as it did when it was first proffered over thirty years ago suggests the following:

> At that hearing, the proponent of the prior-conviction evidence should have the burden of production and persuasion in proving the existence of a foreign conviction. The first substantive discussions should address the general reliability of the procedures of the foreign country. Here the party opposing introduction should have the burden of production in challenging the foreign legal system and the proponent should have the burden of persuasion in establishing its general reliability, probably with experts or treatises. A finding that the foreign legal system lacks sufficient guarantees of reliable verdicts should end the matter, precluding introduction of the conviction.
>
> If, on the other hand, the foreign system meets the test of general procedural guarantees of reliability, investigation of the specifics of the particular conviction at issue becomes appropriate. At this point, the opponent has the burden of production in specifying the defects in the criminal procedures leading to his conviction abroad. These allegations, which may focus either on the ways in which the foreign conviction was insufficient under the foreign jurisdiction's own standards or those aspects of the foreign procedure that can be said to shock the conscience, will narrow considerably the range of issues to be investigated. Once these allegations are properly before the court, the proponent will have the burden of rebutting them by proving that the foreign jurisdiction provided the safeguards necessary for reliable results by following its normal procedure.[102]

The author commends the foregoing procedure to Canadian jurists. It is a blueprint that incorporates all of the requisite constitutional, evidentiary, and procedural safeguards that Canada's free and democratic society has come to demand.

IX. CONCLUSION

On December 15, 2011, Froesse-Friessen was sentenced to life imprisonment, without eligibility to apply for parole for twenty years, for the brutal murder of Bridie Fanning.[103] It was the second time in the

101. Demleitner, *supra* note 95, at 518.
102. Linnan, *supra* note 96, at 109-10 (citations omitted).
103. R. v. Froesse-Friessen, [2011] O.J. No. 6101, paras. 11-13 (Can. Ont. Sup. Ct. J.).

defendant's life that he had committed murder with the aid of a firearm.[104] Both murder convictions came by way of guilty pleas, with the assistance of counsel, in jurisdictions that take immense pride in their relatively similar constitutional values.[105]

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[106] To describe Froesse-Friessen as a not very nice person would be a grotesque understatement. His kind of evil is rarely seen in Canadian society. However, the rarity of his Mephistophelian conduct should not be seen as being so obscure that it could not happen again. No doubt it will. It is for this reason that this Article was written. A modest statutory amendment, harnessed to some judicial ingenuity, would go a long way in dealing with the extraordinary offenders who occasionally make their way into our midst.

104. *Id.* paras. 18-20, 40.

105. *See* Factum of the Crown, *supra* note 2; R. v. Froesse-Friessen, [2011] O.J. No. 4592 (Can. Ont. Sup. Ct. J.).

106. Justice Frankfurter famously made this comment in dissent (joined by Justice Jackson) in *United States v. Rabinowitz*, 339 U.S. 56, 69 (1949).