Revue générale de droit

Growing Pains and Other Things: The Supreme Court of Canada and the Supreme Court of the United States

Edward G. Hudon

Volume 17, numéro 4, 1986

URI : https://id.erudit.org/iderudit/1059229ar
DOI : https://doi.org/10.7202/1059229ar

Aller au sommaire du numéro

Éditeur(s)

Éditions de l'Université d'Ottawa

ISSN

0035-3086 (imprimé)
2292-2512 (numérique)

Découvrir la revue

Citer cet article

Hudon, E. G. (1986). Growing Pains and Other Things: The Supreme Court of Canada and the Supreme Court of the United States. *Revue générale de droit*, *17*(4), 753–796. https://doi.org/10.7202/1059229ar

Résumé de l'article

Cet article est à la fois une recension et une étude sur deux tribunaux supérieurs. L'auteur compare en effet l'origine et le développement de la Cour suprême du Canada et ceux de la Cour suprême des États-Unis. Il prend comme point de départ le volume *The Supreme Court of Canada: History of the Institution* écrit par les professeurs James G. Snell et Frederick Vaughan et examine différents aspects de ces deux tribunaux. Il montre combien les problèmes auxquels ceux-ci eurent à faire face dès le début se ressemblent et il indique les moyens qu'il fallu prendre pour résoudre ici et là ces difficultés.

Growing Pains and Other Things : The Supreme Court of Canada and the Supreme Court of the United States

EDWARD G. HUDON *

RÉSUMÉ

Cet article est à la fois une recension et une étude sur deux tribunaux supérieurs. L'auteur compare en effet l'origine et le développement de la Cour suprême du Canada et ceux de la Cour suprême des États-Unis. Il prend comme point de départ le volume The Supreme Court of Canada : History of the Institution *écrit par les professeurs James G. Snell et Frederick Vaughan et examine différents aspects de ces deux tribunaux. Il montre combien les problèmes auxquels ceux-ci eurent à faire face dès le début se ressemblent et il indique les moyens qu'il fallu prendre pour résoudre ici et là ces difficultés.*

ABSTRACT

This article is in part a book review and in part a study of two institutions. In it, the author compares the origin and growth of the Supreme Court of Canada and of the Supreme Court of the United States. He uses Professors James G. Snell and Frederick Vaughan's The Supreme Court of Canada : History of the Institution *as a starting point, and he compares various aspects of the two Supreme Courts. He points out similarities in the problems that the two have confronted since the beginning, and he indicates the manner in which these problems have been resolved by each.*

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* Former Librarian, Supreme Court of the United States; former Professor of Law, Faculté de Droit, Université Laval; Member of the Bars of the Supreme Court of the United States, the District of Columbia, and the State of Maine.

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I. Introduction

This paper is some form of a hybrid. In part, it is a book review; in part, it is something else, but what else is hard to define. Whatever it is was inspired by the appearance of the book, *The Supreme Court of Canada : History of the Institution*,[1] which is the finest and the most informative work ever written about Canada's highest court. The authors, Professors James G. Snell[2] and Frederick Vaughan,[3] have given us a well researched, well documented, and well written history of

1. The Osgoode Society, Toronto, Univ. of Toronto, 1985, xv, 219 pp.
2. Professor, Dept. of History, Univ. of Guelph.
3. Professor, Dept. of Political Studies, Univ. of Guelph.

the Supreme Court of Canada. They trace the history of the institution from its conception and establishment in the early days following Confederation to the present day.

As Professors Snell and Vaughan develop their history of the Supreme Court of Canada, they point out very vividly the growing pains that that court has suffered through the years, particularly during the early years, and especially until 1949 when its judgments were subject to review by the Judicial Committee of the Privy Council of the British Parliament. However, the Supreme Court of Canada is not the only such court that has suffered such pains. The Supreme Court of the United States has been beset by the same malady, also during its early years, and even later. It too, has had its share of growing pains, some similar to those of the Supreme Court of Canada.

It is to a discussion and a comparison of the development and growth of these two institutions, the Supreme Courts of Canada and the United States, that this paper is devoted. *The Supreme Court of Canada : History of the Institution* will serve as the source of material relevant to the Canadian Supreme Court; various American publications of a similar nature will serve as the source of material about the Supreme Court of the United States.[4] During the process, differences as well as similarities between the two institutions will be pointed out.

II. CREATION OF THE TWO INSTITUTIONS

The principal distinction between the Supreme Court of Canada and the Supreme Court of the United States is the manner in which each was created. The former was created in 1875,[5] eight years after the adoption of Canada's constitution, and at a time when Canada already had a judicial system.[6] It was done by an Act of the Parliament of Canada, pursuant to section 101 of the *British North America Act of 1867*,[7] now called the *Constitutional Act, 1867*,[8] an Act of the British

4. Among others, see the following : Charles P. CURTIS, Jr., *Lions Under the Throne*, Boston, Houghton Mifflin Co., 1947; Felix FRANKFURTER and James M. LANDIS, *The Business of the Supreme Court, A Study in the Federal Judicial System*, New York, MacMillan, 1928; Charles WARREN, *The Supreme Court in United States History*, Boston, Little, Brown & Co., 1937. In addition, see The Oliver Wendell Holmes DEVISE *History of the Supreme Court of the United States*, Paul A. FREUND, General Editor, of which five volumes have been published. (MacMillan).

5. 38 Vict., c. 11.

6. *The British North America Act, 1867*, carried forward the courts that already existed. 30 & 31 Vict., c. 3, art. 96 *et seq.* (U.K.).

7. 30-31 Vict., c. 3 (U.K.).

8. *The Constitutional Act, 1982*, art. 60.

Parliament which authorizes the Parliament of Canada to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada". The Supreme Court of the United States was provided for by the Constitution of the United States. It came into existence when the country did. Article III, Section I, of the Constitution of the United States provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish".

Thus, it would appear that the Supreme Court of Canada depends on the will of the Parliamant of Canada for its continued existence, but that the Supreme Court of the United States exists independent of the will of the Congress of the United States. However, it should not be assumed from this that the latter enjoys much more independence than does the former. Under the American system, not only does the Congress determine how many Justices of the Supreme Court of the United States there shall be and how much they shall be paid, but the Congress has complete control over the enforcement of the Court's judgments, defines its jurisdiction, and even sets the times when the Court will sit.[9] It is an annual affair for the Court to send two of its members (more often than not, one a Democrat and the other a Republican) to appear before the Appropriations Committees of the Congress to plead its case for money with which to operate the Court for the ensuing fiscal year.[10]

Although the Congress of the United States can regulate the appellate jurisdiction of the Supreme Court of the United States,[11] it cannot touch the Court's original jurisdiction which is spelled out in the Constitution.[12] Nor can the compensation of the Justices of the Court be diminished during their continuance in office.[13] By statute, the Justices of the Supreme Court of Canada must now retire at age 75;[14] the Constitution of the United States provides that the Justices of the Supreme Court of the United States "hold their Office during good Behavior".[15] Thus far, no Justice of the Supreme Court of the United States has had his office terminated for bad behavior and, once appointed, they can serve for life.

In Canada, subsection 92(14) of the *Constitutional Act, 1867*, gives the Provinces exclusive power to make laws relative to "The

9. See Charles P. CURTIS, Jr., *op. cit.*, pp. 36-37.
10. Personal knowledge of the author of this article.
11. *Constitution of the United States of America*, art. 3, sec. 2.
12. *Ibid.*
13. Art. 3, sec. 1.
14. R.S.C. 1970, chap. S-19, sec. 9(2).
15. *Constitution of the United States of America*, art. 3, sec. 1.

Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in these Courts". However, section 96 of the *Constitutional Act, 1867*, provides that "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick". That is, under the Canadian system, the Provinces control the courts, but the central government has authority over the judiciary.[16]

In the United States, there are two judicial systems that exist side by side, one state and the other federal. The States have control of both the courts and the judiciary of the state systems; the federal government has control of the courts and the judiciary of the federal system.[17] Each system is independent of the other, except that the Supreme Court of the United States hovers over them all, and matters can be taken to that Supreme Court from the courts of both systems.[18]

As Professors Snell and Vaughan point out in the first chapter of their book, in Canada steps were taken for the creation of a supreme court less than a year after Confederation.[19] Discussions on the matter were initiated during the summer of 1868 under the leadership of Sir John A. Macdonald, the Prime Minister and Minister of Justice. By February 1869 a bill had been drafted and submitted to the second session of the First Parliament in May of that year.[20] Although there was bi-partisan support for the creation of a supreme court, it was not until 1875 that a bill sponsored by the Liberal party became law and the Supreme Court of Canada a reality.[21] However, as Snell and Vaughan point out, "if the measure was Liberal in its final initiation, it was Conservative in its base".[22]

In the American system, though the Supreme Court of the United States was provided for by the Constitution brought forth from the Constitutional Convention of 1787,[23] the actual mechanics of setting

16. SNELL & VAUGHAN, *The Supreme Court of Canada : History of the Institution*, p. 3.

17. For a short discussion of both systems, see *The United States Courts : Their Jurisdiction and Work*, Committee Print, Committee on the Juridiciary, House of Representatives, United States Congress, 1975.

18. See Reynolds ROBERTSON and Francis R. KIRKHAM, *Jurisdiction of the Supreme Court of the United States*, revised edition of WOLFSON and KURLAND, New York, Matthew Bender & Co., 1951.

19. "1. The Founding of the Court, 1867–1869", p. 5.

20. *Id.*, p. 6.

21. 38 Vict., c. 11. The bill was introduced by Telesphore Fournier, Justice Minister, in February, 1875.

22. SNELL & VAUGHAN, *op. cit.*, note 16, p. 10.

23. For the proceedings of the Convention of 1787, see Max FARRAND, ed., *The Records of the Federal Convention of 1787*, New Haven, Yale Univ., 4v. (1911–1937).

up the Court was accomplished by an Act of Congress, *The Judiciary Act of 1789*.[24] According to this Act, the Supreme Court was to consist of a Chief Justice and five Associate Justices, any four of whom would constitute a quorum. Annually, it was to hold two sessions at the seat of government, one commencing the first Monday of February, and the other the first Monday of August.[25] Now there is one term per year which starts on the first Monday of October.

III. Composition of the Courts

Through the years, the number of Justices authorized for the Supreme Court of the United States has varied, just as has the number of Justices authorized for the Supreme Court of Canada. In 1801 the number of Associate Justices for the American court was decreased to four,[26] only to be returned to five two years later.[27] In 1807 the number of Associate Justices was increased to six,[28] in 1837 to eight,[29] and in 1863 to nine.[30] In 1866 it was enacted that no vacancies among the Associate Justices would be filled until the number had been reduced to six, which number would be maintained when attained.[31] However, in 1869 the number of Associate Justices was once more raised to eight,[32] where it has remained ever since in spite of President Franklin D. Roosevelt's ill-fated attempt in 1937 to raise the membership of the Court to a maximum of fifteen.[33] President Roosevelt was unhappy with the Court because it had declared too much of his New Deal legislation unconstitutional.[34] He sought to isolate the so-called "nine old men"[35] by proposing that whenever a Justice of the Supreme Court reached the

24. 1 Statutes at Large 73.
25. Sec. 1.
26. 2 Statutes at Large 89.
27. 2 Statutes at Large 132.
28. 2 Statutes at Large 420.
29. 5 Statutes at Large 176.
30. 12 Statutes at Large 794.
31. 14 Statutes at Large 209.
32. 16 Statutes at Large 44.
33. The plan was launched two weeks and two days after President Roosevelt took the oath of office as President the second time. See Fred RODELL, *Nine Men : A Political History of the Supreme Court from 1790 to 1955*, New York, Random House, 1955, p. 245; Jerre S. WILLIAMS, *The Supreme Court Speaks*, Austin, Univ. of Texas, 1956, chap. 4.
34. Fred RODELL, *op. cit.*, note 33, chap. 7; Jerre S. WILLIAMS, *op. cit.*, note 33, chap. 4.
35. For a not particularly friendly account of the Court at that time, see Drew PEARSON and Robert S. ALLEN, *The Nine Old Men*, New York, Doubleday, 1936.

age of seventy but failed to retire, another Justice would be appointed to supplement him, with the top membership limited to fifteen. Known as Roosevelt's "Court-packing plan", the proposal was rejected. [36]

In a similar manner, the number of Justices on the Supreme Court of Canada has been increased as the case load of that Court has increased. At the start there were six seats (the Chief Justice and five Puisne Justices), two of which were allocated by law to the Province of Québec.[37] Because of regional attitudes, Ontario was deemed entitled to at least as many seats on the Court as Québec, though this was not provided for by law. That left two seats for the remainder of Canada, but with no thought given to appointing anyone from the western part of the country.[38] In 1927 the number of Justices was increased from six to seven (the Chief Justice and six Puisne Justices),[39] and in 1949 from seven to nine (the Chief Justice and eight Puisne Justices), with three required by law to be from Québec.[40]

IV. THE COURTS AS UNIFYING INSTITUTIONS

In both Canada and the United States, from the beginning the thought behind one general court of appeal for the entire country was that such a court would serve as a unifying influence. Snell and Vaughan express this as follows in their book : [41]

> Such a court was seen as an essential element in establishing the credibility, authority, and status of the policy of the new nation [...] It would force the membership of the country's legal fraternities to shift their focus beyond provincial boundaries to a new central court, located in the capital, which would establish a common body of jurisprudence for the whole dominion. Such a court was part of the trappings of nationhood, a means of emphasizing the legitimacy and the power of the young central government.

Or, as Alexander Hamilton expressed it in one of the *Federalist Papers* written to explain the new Constitution of the United States to the people : [42]

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36. Fred RODELL, *op. cit.*, note 33, p. 245. President Roosevelt's plan has also been referred as "the Court-unpacking plan", *id.*, p. 245.
37. *Supreme and Exchequer Courts Act, 1875*, S.C. 1875, c. 11.
38. SNELL & VAUGHAN, *op. cit.*, note 16, p. 12.
39. *Ibid.*
40. R.S.C. 1970, chap. S-19, sec. 4, 6.
41. SNELL & VAUGHAN, *op. cit.*, note 16, p. 5.
42. Papers by Alexander HAMILTON, James MADISON, and John JAY. See no. LXXXII, "A further view of the judicial department, in reference to some miscellaneous questions". See edition published by The Heritage Press, New York, 1945,

> The constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated.

In the American system, the Supreme Court was to serve as a unifying influence and more. The Justices of the Supreme Court were to serve as the "salesmen" for the American experiment in self-government. In addition to their duties as Justices of the Supreme Court, as circuit-riding judges they could explain the new system of government to the people throughout the three circuits into which the country was divided (the eastern, the middle, and the southern).[43]

Since the beginning, the Supreme Court of Canada has been strictly an appellate court.[44] Its original jurisdiction in revenue matters was made the responsibility of the Exchequer Court (now the Federal Court[45]) which was created at the same time the Supreme Court was, and on which the Justices of the Supreme Court also served.[46] In the United States, the Supreme Court has an original, as well as an appellate jurisdiction. Not only is this provided for in the Constitution,[47] but it was also implemented by *The Judiciary Act of 1789.*[48] It extends to "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party".[49] However, the XI Amendment to the Constitution (adopted in 1795) excluded from the judicial power of the United States "any suit in law or equity, commenced or presented against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State".

Unlike the Supreme Court of Canada, the Supreme Court of the United States has held jury trials. This happened on three occasions : once in 1794 in *State of Georgia* v. *Brailsford,*[50] an action by the State of Georgia for debt; a second time in 1795 in *Oswald* v. *State of New*

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pp. 551, 553-554. For an excellent work on the creation of the American federal system in general, see *Creation of the Federal Judiciary : A Review of the Debates in the Federal and State Constitutional Conventions; and and Other Papers*, Senate Document 91, 75th Congress, 1st Session (Washington, G.P.O., 1938).

43. *The Judiciary Act of 1789*, sec. 4.
44. SNELL & VAUGHAN, *op. cit.*, note 16, p. 8.
45. *Federal Court Act*, R.S.C. 1970, chap. 10 (2nd Supp.).
46. SNELL & VAUGHAN, *op. cit.*, note 16, p. 8.
47. Article III, sec. 2.
48. Sec. 13.
49. Article III, sec. 2.
50. 3 Dallas 1 (1794).

York;[51] and a third time, two and one-half years later, in *Catlin* v. *State of South Carolina.*[52]

V. COURTS OF LAST RESORT?

In Canada, even after the Supreme Court of Canada became a reality in 1875, there could still be an appeal to the Judicial Committee of the Privy Council in England. That lasted until 1949.[53] As long as it did last, the mere fact that such an appeal could be taken tended to relegate the Supreme Court of Canada to a subordinate status. To make matters worse, it was even possible to by-pass the Supreme Court of Canada completely and go directly to the Judicial Committee from a Provincial court. In Québec, where, during the early years, there was serious dissatisfaction with the Supreme Court of Canada, it is reported that "lawyers in the province had long been unwilling to take any case to Ottawa that could possibly be carried to the Judicial Committee".[54]

Though one had to have leave to appeal to the Judicial Committee of the Privy Council, Snell and Vaughan report that "In the first two decades of the twentieth century, Canadian appeals to the Judicial Committee increased noticeably".[55] They give as one reason the fact that the Committee "was becoming more lenient in granting leave to appeal".[56] Actually, Snell and Vaughan state that the Judicial Committee was laying down rules whereby an appeal to London was perhaps encouraged as an alternative to the Supreme Court of Canada.[57] However, with the advent of the 1920's and increased dominion nationalism following Canada's participation in World War I, the judicial tie to Great Britain "came to be viewed as a sign of inferiority, a colonial fetter".[58]

Then came the 1926 imperial declaration of equality among the dominions of the United Kingdom,[59] and the *Statute of Westminster of 1931*[60] which required a dominion's consent before the British

51. Hampton L. CARSON, *The History of the Supreme Court of the United States*, Philadelphia, P. W. Ziegler, 1902, v. 1, p. 155 *et seq.*
52. *Ibid.*
53. SNELL & VAUGHAN, *op. cit.*, note 16, chap. 7, "Supreme at Last, 1949."
54. *Id.*, p. 30.
55. *Id.*, p. 183.
56. *Ibid.*
57. *Ibid.*
58. *Ibid.*
59. See Report of the Imperial Conference, 1926, referred to in *British Coal Corp.* v. *The King*, [1935] A.C. 500.
60. 22 George V, c. 4 (U.K.).

Parliament could legislate with respect to that dominion.[61] These cleared the way and provided the means that made it possible to break the judicial "fetter".

First to go were appeals to the Judicial Committee in criminal cases. An attempt to abolish such appeals had failed earlier in 1926 when, in *Nadan* v. *The King*,[62] the Judicial Committee held that the Parliament of Canada did not have the authority to end such appeals. However, the *Statute of Westminster* removed the hurdles that existed.[63] A 1933 re-enactment of the statute ending such appeals was upheld in 1935 by the Judicial Committee in *British Coal Corporation* v. *The King*.[64] Finally, a bill to end all appeals to the Judicial Committee was referred to the Supreme Court of Canada by the Canadian Parliament.[65] Not only did that court hold that Canada's Parliament had authority to enact such a bill,[66] but so also did the Judicial Committee once the reference reached that tribunal.[67] The termination of such appeals was held to be *intra vires* under section 101 of the *British North America Act*. Wrote the Lord Chancellor in behalf of the Judicial Committee : "It is [...] a prime element in the self-government of the Dominion that it should be able to secure through its own courts of justice that the law should be one and the same for all its citizens".[68]

In the American system, the Supreme Court of the United States has been a court of last resort since the beginning. However, the Supreme Court can overturn its own rulings and Congress can, and on occasion has, enacted legislation the effect of which is to nullify a Supreme Court decision. Indeed, at least on one occasion the Supreme Court has overturned one of its earlier rulings in a matter of one year less one day. That happened in *Kinsella* v. *Krueger*,[69] a case that was originally decided on June 11, 1956,[70] but on rehearing was overruled on June 10, 1957 in *Reid* v. *Covert*.[71] The question presented was whether two wives with their husbands on active duty overseas, one in England and the other in Japan, could be tried before military tribunals for the alleged murders of their husbands. When the cases were first decided by

61. Sec. 4.
62. [1926] A.C. 482.
63. SNELL & VAUGHAN, *op. cit.*, note 16, p. 185.
64. [1935] A.C. 500, 523.
65. SNELL & VAUGHAN, *op. cit.*, note 16, pp. 186-189.
66. [1940] S.C.R. 76.
67. [1947] A.C. 127.
68. *Ibid.*
69. 351 U.S. 470 (1956).
70. *Ibid.*
71. 354 U.S. 1 (1956).

the Supreme Court the answer was "yes", on rehearing the answer was changed to "no".

The *Portal-to-Portal Act of 1947*[72] represents an instance in which Congress has enacted legislation that nullified the effect of a Supreme Court decision. The case nullified was *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123*[73] in which the Supreme Court held that underground travel by iron ore miners to and from the "working face" of mines constituted work entitled to compensation under *The Fair Labor Standards Act*.

VI. THE WORK OF THE TWO SUPREME COURTS

1) The Early Years—Court Attire and Lack of Business

At the start, the Supreme Court of Canada and the Supreme Court of the United States both suffered from the same problem — the lack of business. The first order of business for both Supreme Courts was to decide how the Justices should be attired. The Supreme Court of Canada appears to have had less difficulty in disposing of this question than did the Supreme Court of the United States. It seems to have been assumed that each Justice would have one set each of scarlet and black robes, and a three-cornered hat. The only question appears to have been the design of the robes — should British court robes serve as the model, and should the Chief Justice's robes be the same as the others? Apparently these questions were quickly decided, each Justice measured, and orders sent to London to be fitted by the Robe Makers to Her Majesty.[74]

There appears to have been a difference of opinion on how the Justices of the Supreme Court of the United States should be attired. Thomas Jefferson is reported to have opposed any needless official apparel. If there was to be a gown, he is quoted as having said : "For Heaven's sake, discard the monstrous wig which makes the English Judges look like rats peeping through bunches of oakum!".[75] Alexander Hamilton is reported to have favored the English wig and the English gown; Burr to have favored the English gown, but to have opposed "the inverted wool sack termed a wig".[76] The English gown was adopted, but the wig rejected. However, at the first sitting of the Court, Chief Justice

72. 61 Statutes at Large 84; 29 U.S.C.A. § 251.
73. 321 U.S. 590 (1944).
74. SNELL & VAUGHAN, *op. cit.*, note 16, p. 18.
75. Charles WARREN, *op. cit.*, note 4, v. 1, p. 42, note 1.
76. *Ibid.*

John Jay wore "an ample robe of black silk with salmon colored facings", the gown of a Doctor of Laws of the University of Dublin were Jay had been conferred a degree.[77]

The gowns selected and rules of court agreed upon, both Supreme Courts appear to have had similar experiences at their first sittings. When the Supreme Court of the United States first met on Monday, February 1, 1790, letters patent appointing the four Justices present (Chief Justice John Jay, Associate Justices William Cushing, James Wilson and John Blair) were read, as were letters patent appointing Edmund Randolph Attorney General of the United States.[78]

During this first term which lasted ten days, there were no cases on the Court's docket, and therefore no arguments. During the second term of the Court held on August 2, 1790, which lasted two days, no cases were ready and again no arguments. The February Term, 1791, was the same — no cases and no arguments. In August, 1791, one case was called for argument, but, upon motion that the case was not properly before the Court, it was dismissed. Again at the February Term, 1792, no cases were ready for argument. About the only thing of note that happened during these first four terms was the admission of attorneys to practice before the Court, among which there were a number of Senators and Members of the House of Representatives.[79] However, the Justices were busy riding circuit which, if one considers the means of travel of the day, was arduous enough.[80]

The Supreme Court of Canada had its first official sitting on January 17, 1876. There, too, there was nothing to do at this first sitting and the Court rose immediately.[81] The first case was heard in April, 1876, before four Justices, a bare quorum.[82] In June, three appeals were heard before five Justices during a term that lasted one week.[83] It was not until January 1877, that all six Justices were present for the first time. Eleven appeals were heard.[84] In June of that year, twelve cases were heard.[85] During the Winter Term, 1878, twenty-one appeals were heard during a term that lasted three weeks.[86] Indeed, the work of the Court was increasing. Forty-seven appeals were heard by the time the

77. *Id.*, v. 1, p. 48, note 1.
78. *Id.*, p. 47.
79. *Id.*, pp. 50-57.
80. *Id.*, pp. 57, 58.
81. SNELL & VAUGHAN, *op. cit.*, note 16, p. 19.
82. *Ibid.*
83. *Id.*, p. 20.
84. *Ibid.*
85. *Ibid.*
86. *Ibid.*

June, 1878, Term started. However, the Court was slow in handing down its judgments — by that time, in only thirteen of the forty-seven cases.[87]

Then there was the language problem. Although it was understood that in any case from the Province of Québec either French or English could be used, the language of administration was English. This was true even between French-speaking personnel.[88] There was neither enough staff nor enough money to hire a translator. The reasoning of the Courts in its judgments were published only in the language that they were written.[89] This made the judgments less useful than they would have been had they been translated and published in both official languages as they now are.

2) Changeover in the Personnel of the Courts

During the early years, both the Supreme Court of Canada and the Supreme Court of the United States were plagued by frequent changes in membership. Neither court had yet acquired any appreciable prestige. Consequently, appointments to the Supreme Court of either country were not as sought after as they might have been. Indeed, in Canada, when one of the two original Québec seats was offered to A. A. Dorion, a brilliant lawyer who was Chief Justice of his Province's Court of Queen's Bench, he declined, apparently because he felt that to accept would mean a decline in status.[90] In the United States, the arduous duty of riding circuit on horseback or by horse and buggy made appointment to the Supreme Court less attractive than it would otherwise have been.[91] In Canada, Justices of the Supreme Court of Canada were required to live in Ottawa, or within five miles of it (now forty kilometers), which did not appeal to some considered for appointment to the Court.[92]

J. T. Taschereau, one of the two original Québec appointments to the Supreme Court of Canada, was the first to resign from the Court. He talked of resigning in 1876, but was induced to stay longer by the Minister of Justice. Taschereau was told by the Minister of Justice :

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87. *Ibid.*
88. *Id.*, pp. 20, 21.
89. *Id.*, p. 21.
90. *Id.*, p. 14.
91. *Id.*, p. 18, quoting from the E. BLAKE papers, p. 266.
92. SNELL & VAUGHAN, *op. cit.*, note 16, p. 25. The residency requirement still exists, though it has been extended to within 40 kilometers of the Capital : S.C. 1976-77, chap. 25, s. 19.

"The Council are hopeful that the comparative ease which may be expected in your new position [at the Supreme Court] will act favourably upon your health.".[93] He finally left the Court in the summer of 1878, using ill health as his reason for leaving. It is more likely that he did not particularly like the job of a Puisne Justice, and like others, did not care for the Ottawa residency requirement.[94]

After J. T. Taschereau left the Court, Chief Justice W. B. Richards was the next to go. He retired under pressure from the government within two months after he had been called back from Europe to administer the oath of office to H. E. Taschereau, J. T. Taschereau's successor. The Chief Justice had gone to Europe to regain his health. While he was there, after J. T. Taschereau resigned there were not enough Justices present for a quorum with which to open the Fall 1878 Term, which had to be delayed.[95]

In 1884, two members of the Supreme Court of Canada received leaves at different times; in 1888, H. E. Taschereau had to be called back from France because of the lack of a quorum on the Court; in 1889, two members of the Court were away; in 1880, 1885, and 1890, Justice Strong was granted leaves after having been denied one in 1879. Between 1884 and 1888, Justice Strong tendered his resignation several times, but stayed on at the Prime Minister's request.[96] And so it went, perhaps because of the low salaries paid to the Justices ($8,000. for the Chief Justice, and $7,000. for the others).[97]

In the United States, John Rutledge was the first to resign from the Supreme Court. He left in 1791 to become Chief Justice in his native State, South Carolina. Thomas Johnson resigned less than eighteen months after confirmation because of ill health. John Jay resigned in 1795 to become Governor of New York; John Blair resigned in 1795 to return to private life; Chief Justice Oliver Ellsworth resigned in 1800 after he had been commissioned one of three envoys extraordinary and ministers plenipotentiary to France.[98]

In all, fifteen members of the Supreme Court of the United States have resigned.[99] Of the four who have resigned since 1900, Charles Evans Hughes resigned his position as an Associate Justice in

93. SNELL & VAUGHAN, *op. cit.*, note 16, p. 18.
94. *Id.*, p. 25.
95. *Id.*, p. 26.
96. *Id.*, p. 45.
97. *Ibid.*
98. See *Creation of the Federal Judiciary*, *op. cit.*, note 42, p. 275, "Justices of the Supreme Court of the United States who Resigned from Office".
99. See table, "Members of the Supreme Court of the United States", Revised 1984, prepared by the Office of the Marshal, Supreme Court of the United States.

1916 to become an unsuccessful candidate for the office of President of the United States. He later became Chief Justice of the United States.[100] Arthur Goldberg resigned his position as an Associate Justice in 1965 to become United States Ambassador to the United Nations; Abe Fortas, the last to resign, left the Court in 1969 to return to the private practice of law.

3) The Passage of Time and Increased Caseloads

In the early years of its existence, not only did the Supreme Court of Canada have little to do,[101] but it also was not a very popular institution. Perhaps that was in part due to the fact that the work that the Justices did in these early years was said "not [to have been] done impressively".[102] Then there was the necessity of bilingualism to which the Court did not seem able to adjust. The outcome was a bill to abolish the Supreme Court. This was first introduced in 1879 by Joseph Keeler, a Conservative member of Parliament from Ontario.[103] The bill was defeated in 1880, only to be revived in 1881 and 1882 by Auguste Landry, a Conservative member from Québec.[104]

Ontario opposition to the Supreme Court centered around dissatisfaction with reversals of the decisions of the Ontario Court of Appeal by "three outsiders" (Ritchie from New Brunswick, Henry from Nova Scotia, and Fournier from Québec).[105] Québec opposition had as its base the reluctance to have Québec appeals passed upon by anyone not well versed in the civil law.[106]

As serious as this opposition was, the Supreme Court weathered the storm and its caseload increased. Between 1879 and 1892 it rendered decisions in 1,007 cases, an average of 71.9 appeals annually;[107] between 1893 and 1902, the Court dealt with 875 cases, an average of 87.5 cases annually.[108] By 1913 the number had risen to 176 and by the fall of 1918 the number of cases inscribed stood at 74, a number reported by Snell and Vaughan as having been considered alarming by the Chief Justice.[109]

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100. He served as Chief Justice from 1930 until 1941, when he retired at the age of 79.
101. SNELL & VAUGHAN, *op. cit.*, note 16, p. 19.
102. *Id.*, p. 20.
103. *Id.*, p. 29.
104. *Id.*, pp. 30, 31.
105. *Id.*, pp. 29, 30.
106. *Id.*, p. 30.
107. *Id.*, p. 44.
108. *Id.*, p. 75.
109. *Id.*, p. 100.

During the 1920's the number of cases brought before the Court remained steady,[110] but during the 1930's and 1940's the caseload decreased.[111] However, by the 1970's the caseload became overwhelming. In 1970 alone, judgments in 137 cases were handed down compared with 62 twenty years earlier.[112] Snell and Vaughan report that in the fall of 1971 there were 115 cases on the Court's docket.

This ever increasing caseload led to a search for ways to limit access to the Court at least in less important cases.[113] There was talk of ending appeals as a matter of right and of abolishing money criteria for access to the Court.[114] However, the means decided upon was to give the Court authority to limit leave to appeal to cases considered by the Justices to involve issues of public importance or of legal significance.[115] Requests for leave to appeal are now heard by panels of three Justices, with arguments of counsel in such requests limited to fifteen minutes on either side.[116] A recent interesting innovation has been the use of television so that requests can be argued from distant points in Canada without having to travel to Ottawa.[117]

In 1970-71 there were 158 motions for leave to appeal,[118] but by 1983 the number had risen to 501.[119] In 1984 the number had tapered off to 479, and in 1985 to 415.[120] Since the new system of hearing motions for leave to appeal has been in effect, the number granted has

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110. *Id.*, p. 141.
111. *Id.*, p. 162.
112. *Id.*, p. 238.
113. *Id.*, p. 239.
114. *Ibid.*
115. *Ibid.*
116. At the time this is written, an amendment to the *Supreme Court Act* has been proposed which would provide in part as follows :

"45. (1) Notwithstanding any other Act of Parliament, all applications to the Supreme Court for leave to appeal shall be determined by the Court on consideration of the written submissions of the parties unless the Court orders an oral hearing.

(2) Where the Court orders an oral hearing, it shall be held within thirty days after the date of notice that a hearing has been ordered or such further time as the Court orders."

See Bill C-105 which had its first reading on April 25, 1986. In addition, see paper entitled "Modernizing the Supreme Court", delivered by Peter H. RUSSELL at the 1985 Conference on the Supreme Court of Canada, University of Ottawa, Faculty of Law, Ottawa, Canada, October 2-4, 1985.

117. Personal observation by the author of this article during a visit to the Supreme Court of Canada.
118. SNELL & VAUGHAN, *op. cit.*, note 16, p. 257.
119. Appendix A, Statistics furnished by the Registrar, Supreme Court of Canada.
120. *Ibid.*

varied from term to term.[121] In 1976, 105 were granted, it reached 123 in 1984, and a low of 64 in 1985.[122] The danger now is that too much of the Court's time will be taken up in hearing these motions, leaving too little time for anything else.[123]

The story of the caseload of the Supreme Court of the United States resembles that of the Supreme Court of Canada, except that the caseload reached the crisis stage much sooner in the American court, and that it continues to rise at a much more alarming rate.

If, during the first few terms of the Supreme Court of the United States, there was little for the Justices to do except to admit attorneys to practice before the Court, business soon picked up. By 1825 the Court was averaging 24 cases a year; from 1826 to 1830 the average was 58 cases. In 1836 it disposed of 37 cases, and in the five year period from 1846 to 1850 the average per year was up to 71.[124]

In 1890, one hundred years after the Court first met, it had 1816 cases on the docket for the October Term of that year, of which it disposed of 496.[125] The following term, the October Term, 1891, there were 1589 cases on the docket, of which it disposed of 496. By then it took three years to reach a case for argument.[126]

In the October Term, 1913, the first term for which full statistics are readily available, the Court had 1142 cases on the docket, of which it disposed of 595 and carried over 545 to the next term. During that term 292 opinions were written. During the period from 1913 to 1926, except for two October terms, 1919 and 1921 during which there were 178 and 172 opinions respectively, the Court wrote over 200 opinions each term. Since 1926 when there were 199 opinions, and 1927 when there were 175, in only eleven terms have there been more than 150 opinions and in only six have there been less than 100 (see Appendix B). However, the number of opinions does not tell the whole story. As it has already been noted, in 1913 when there were 1142 cases on the docket of which 542 were disposed of, there were 292 opinions; in the 1984 Term with 5006 cases on the docket of which 4084 were disposed of, there were 139 opinions.[127] The difference has been the greater extent to which the Court has had control of its docket since 1925.

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121. *Ibid.*
122. *Ibid.*
123. Peter H. RUSSELL, *loc. cit.*, note 116.
124. Charles WARREN, *op. cit.*, note 4, v. 2, p. 727, note 3.
125. *Ibid.*
126. *Ibid.*
127. Appendix B, Statistics for the October Terms, 1913, to date, supplied by Edward Schade, Assistant Clerk, Supreme Court of the United States.

The Supreme Court of the United States was first given discretionary jurisdiction in 1891 when the Courts of Appeal were created. [128] Although that Act provided for direct review by the Supreme Court of certain classes of cases in the District Courts, most cases had to go to the Circuit Courts of Appeal instead of directly to the Supreme Court. Before 1914, no case from a State court could be reviewed by the Supreme Court except under its obligatory jurisdiction. However, in 1914 the Supreme Court was given discretionary jurisdiction to review on certiorari cases coming from State courts of last resort where federal rights or claims were sustained. [129] In 1916, certain classes of cases from State courts were shifted by Act of Congress from the obligatory to the discretionary jurisdiction of the Supreme Court. [130]

The effect of the 1916 Act was to shift to the discretionary jurisdiction of the Supreme Court about one-half of the cases from State courts that would otherwise have fallen within the Court's obligatory jurisdiction. It left the following two classes of cases within the obligatory jurisdiction of the Court : [131]

1. Cases "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision against their validity";
2. Cases "where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity".

Review in these two classes of cases in the Supreme Court was by writ of error as a matter of right.

The 1916 Act placed the following three classes of cases within the discretionary jurisdiction of the Supreme Court : [132]

1. Cases "where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is in favor of their validity";
2. Cases "where is drawn in question the validity of a statute, or an authority exercised under any State, on the ground of their

128. 26 Statutes at Large 826, c. 517.
129. 30 Statutes at Large 790, c. 2.
130. 39 Statutes at Large 726, c. 448.
131. See Statement of Justice Willis Van Devanter before the Committee on the Judiciary of the House of Representatives, 68th Congress, Second Session, on H.R. 8206, December 18, 1924, p. 9 (Serial 45 with Supplement).
132. 39 Statutes at Large 726, c. 448.

being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity";

3. Cases in which any other Federal right or claim is advanced and the decision is "either in favor of or against" such right or claim.

In 1925 the Supreme Court sought from Congress a further definition of, and greater discretion in, its jurisdiction. It sought the elimination of the confusion that existed because of the accumulation of statutes applicable to the Supreme Court since the enactment of the Revised Statutes of 1878, the last complete revision that superseded all previous statutes. There had been an attempt to bring together in *The Judicial Code of 1911*[133] all statutes applicable to the Supreme Court, but that had not been a complete revision, some statutes remained untouched, and it was not reliable. The outcome was that in 1925 some of the statutes applicable to the jurisdiction of the Supreme Court were in the Revised Statutes of 1878,[134] some in *The Judicial Code of 1911*, and some in the accumulation of statutes enacted since 1911.[135] The objective as stated by Justice Van Devanter was "to bring together and correlate the statutes relating to the appellate jurisdiction of the Supreme Court and the circuit courts of appeals; to adapt these statutes to present conditions and needs, and to make them plain".[136]

During his 1924 testimony before the Committee on the Judiciary of the House of Representatives, Justice Van Devanter estimated that one-third of the business that then came to the Supreme Court resulted in no advantage to litigants or to the public. He pointed out that the number of cases coming to the Court under then existing statutes was increasing constantly, that the docket of the Court was overcrowded, and that existing statutes permitted some cases that had no place in the Supreme Court to come up as a matter of right.[137] The outcome was the Act of February 13, 1925, that amended the Judicial Code and further defined the jurisdiction of the circuit courts of appeals and the Supreme Court.[138]

The Jurisdiction of the Supreme Court of the United States Today

The jurisdiction of the Supreme Court of the United States as it exists today includes its original and exclusive jurisdiction of all

133. Statement of Justice Willis Van Devanter, p. 6.
134. 18 Statutes at Large, p. 1. See statement of Justice Van Devanter, p. 6.
135. Statement of Justice Van Devanter, p. 6.
136. *Ibid.*
137. *Id.*, p. 10.
138. 43 Statutes at Large 936.

controversies between two or more states; its original, but not exclusive, jurisdiction of (1) all actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) all controversies between the United States and a State; (3) all actions or proceedings by a State against the citizens of another State or aliens.[139]

Direct appeals to the Supreme Court are permitted from decisions invalidating Acts of Congress as provided for by Title 28 United States Code § 1252, and from decisions of three-judge courts as provided for by Title 28 United States Code § 1258.

Cases in the United States courts of appeals may be reviewed by the Supreme Court by writ of certiorari, appeal, or as certified questions as provided for in Title 28 United States Code § 1254.

Cases from State courts and the District of Columbia, and from the Supreme Court of Puerto Rico, may reach the Supreme Court by appeal or by writ of certiorari according to the provisions of Title 28 United States Code §§ 1257, 1258.

When review on certiorari is sought, it is by a written petition for a writ of certiorari. This petition is considered by the entire Court and it will be granted if four justices of the Court vote that it should be. The Supreme Court sets out in its rule 17 the following general considerations that govern whether or not such a writ will be granted :

> Rule 17
>
> CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

139. Title 28 United States Code § 1251.

> 17.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

By rule 18 of the Supreme Court, a petition for a writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, "will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice as to require immediate settlement [by the Supreme] Court".

Different Justices of the Supreme Court have different ways of coping with the tremendous volume of cases that they must pass on even before the Court decides to hear them. Some (notably the late Justice Frankfurter and Justice William Brennan) pass on the papers submitted themselves, others rely on "cert. memos." prepared by either their own law clerks or by a pool of law clerks from the offices of several Justices.

Under Chief Justices Charles Evans Hughes and Harlan F. Stone, each Associate Justice of the Supreme Court had one law clerk and the Chief Justice had two; under Chief Justice Fred Vinson the number of law clerks was increased to two for each Associate Justice and three for the Chief Justice; now there are thirty-five law clerks and two legal officers. Justice William O. Douglas got along with one law clerk until the last few terms before he retired for disability when he used two clerks and then, during the last year or so, three clerks.[140] One Justice of the Court (deceased for some years), relied on the summaries of cases in the *CCH Supreme Court Bulletin* for "bench memos".[141] The Court now has 318 employees; in 1956 it had 162.

VII. THE SELECTION OF JUSTICES

1) Geography

Geography has been a factor in the selection of Supreme Court Justices in both Canada and the United States, but more so in the former than in the latter. In Canada, since the beginning a certain number of Justices of the Supreme Court have been required by law to be from the Province of Québec. At first it was two, but now that the

140. Personal knowledge of the author of this article.
141. *Ibid.*

Court has nine Justice, it is three.[142] If Québec has three, then Ontario must have three also, though this is not required by law.[143]

On the initial Supreme Court of Canada there were two Justices from Québec, two from Ontario, one from New Brunswick, and one from Nova Scotia.[144] Today, with nine Justices on the Supreme Court, three are from Québec, three from Ontario, one from New Brunswick, one from Manitoba, and one from British Columbia.[145] Care has always been exercised to maintain the traditional regional balance on the Court.[146] Thus, the appointment of Lyman Poore Duff from British Columbia to the Court in 1906 in response to western pressure for representation on the Court, meant the "reassignment" to the west of one of the two maritime posts.[147] Snell and Vaughan interpret this to mean that there never again will be more than one Justice on the Supreme Court from the Maritime provinces, and never less than one from the West.[148] There never has been a Justice appointed to the Court from Newfoundland.[149]

In the United States, geography was an important consideration throughout the nineteenth century.[150] Perhaps the best example of this is what was referred to as the "New England seat". This seat was traditionally held by a New Englander, usually from Massachusetts. The tradition started when William Cushing was appointed to the Court by George Washington in 1789. It continued until 1932 when Justice Oliver Wendell Holmes of Massachusetts was succeeded by Benjamin N. Cardozo of New York. Cardozo was succeeded by Felix Frankfurter of Massachusetts, but apparently not because of the tradition of the "New England seat".

In addition to the "New England seat", there was the tradition of a "New York seat". That started in 1806 when President Thomas Jefferson appointed Henry Brockholst Livingston from New York to the Court. That lasted until 1893 when, due to a quarrel between New Yorkers, President Gover Cleveland appointed Senator

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142. R.S.C. 1970, chap. S-19, sec. 6.

143. SNELL & VAUGHAN, *op. cit.*, note 16, p. 12.

144. *Id.*, pp. 12-14.

145. For short biographical sketches, as well as photos, of the present members of the Supreme Court of Canada, see pamphlet published by the Supreme Court of Canada under the authority of the Chief Justice.

146. SNELL & VAUGHAN, *op. cit.*, note 16, p. 197.

147. *Id.*, pp. 91, 97.

148. *Ibid.*

149. *Id.*, p. 257.

150. For a more detailed discussion of regional representation on the Supreme Court of the United States, see *Congressional Quarterly's Guide to the U.S. Supreme Court*, Washington, 1979, p. 786.

Edward Douglas White of Louisiana to the Court. White later became Chief Justice.

A third tradition, the "Virginia-Maryland seat", started in 1789 with the appointment of John Blair of Virginia to the Court. This tradition lasted until the Civil War when the desire to appoint more northeners and westeners to the Court brought it to an end.

Today, geography does not appear to be particularly important in appointments to the Supreme Court of the United States. On the Burger court there were two Justices from Virginia or Minnesota, depending on which State Chief Justice Burger is considered to have been appointed from (Burger and Powell from Virginia, or Burger and Blackmun from Minnesota), and two from Arizona (Rhenquist and O'Connor).[151]

2) Religious and Ethnic Considerations

Religion appears to have played a greater part in the selection of Supreme Court Justices in Canada than in the United States. The same is true of ethnic considerations.

In 1949 the membership of the Supreme Court of Canada was increased from seven to nine Justices, with Québec now entitled to three. When it came time to fill this added Québec seat, English Canadian representatives in Québec pressured Prime Minister Louis St. Laurent to have one of their own selected. They argued for a two francophones to one anglophone ratio to assure that there would always be one English speaking Québec Justice on the Supreme Court. St. Laurent rejected the idea by pointing out that it is only from Québec that French speaking lawyers can be expected to be appointed to the Court. He wanted to create the impression that there can be three French speaking Justices on the Court, though there need not always be; he did not want to create a precedent that one of Québec's three members on the Court should be English speaking.[152]

In 1954, Chief Justice Thibaudeau Rinfred, a Catholic French-Canadian from Québec, reached mandatory retirement age. If tradition was to be followed, Patrick Kerwin, the senior Puisne Justice, was entitled to the post. However, Kerwin was a Roman Catholic, and only once in the history of the Supreme Court had a Roman Catholic followed a Roman Catholic as Chief Justice. That had happened in 1906 when Charles Fitzpatrick had followed Henri Elzéar Taschereau as

151. "Members of the Supreme Court of the United States", *supra*, note 98.
152. SNELL & VAUGHAN, *op. cit.*, note 16, p. 198.

Chief Justice. It was feared that there might be Protestant resentment if that were done again.[153] The problem was solved by following tradition and promoting Kerwin to be Chief Justice, then filling the vacancy among the Puisne Justices thus created with the appointment of Douglas Charles Abbott, an English-speaking Anglican from Québec. That way, Protestant resentment was mollified,[154] though it meant possible French-Canadian resentment at having their representation on the Court reduced.[155]

In the United States, membership on the Supreme Court has been overwhelming Protestant — 91 out of 103 Justices. There have been seven Roman Catholics : Chief Justices Roger Taney and Edward Douglas White; Associate Justices Joseph McKeenna, Pierce Butler, Frank Murphy, William J. Brennan, Jr. and Antonin Scalia. There have been five Jewish Justices : Justices Louis D. Brandeis, Benjamin M. Cardozo, Felix Frankfurter, Arthur J. Goldberg, and Abe Fortas.[156]

In only one instance has it been said that religion played a part — the appointment of Justice Brennan in 1956 by President Eisenhower. Though Justice Brennan's appointment was non-controversial, it was made during an election year at a time when there were no Roman Catholics on the Court. It was said, though denied, that President Eisenhower wanted to attract the normally Catholic Democratic voters of the big cities.[157]

3) Sex

Recently, in both Canada and the United States, sex has become an element to be taken into consideration in the appointment of Justices to the Supreme Court. That happened first in the United States. Even before Justice Potter Stewart retired on July 3, 1981, it was anticipated that the next vacancy on the Court would be filled by a woman. Indeed, during the October Term, 1980, the Court made it known that the members of the Court were no longer to be addressed as "Mr. Justice", but simply as "Justice". Therefore, it was no surprise that a woman, Sandra Day O'Connor, should succeed Justice Stewart. In 1981 the appointment of a woman to the Court was as inevitable as

153. *Id.*, p. 199.
154. *Ibid.*
155. *Id.*, p. 200.
156. "Catholic and Jewish Judges", *Congressional Quarterly's Guide to the U.S. Supreme Court*, p. 788.
157. *Ibid.*

was the appointment of a black to the Court in 1967 when Justice Thurgood Marshall took his seat.[158]

Pressure for the appointment of a woman to the Supreme Court of Canada came to a head in 1982 when Justice Ronald Martland retired. A woman had been appointed to the Supreme Court of the United States one year earlier. The effect of that was for media pressure to develop for the appointment of a woman as soon as Justice Martland left the Court. The outcome was the appointment of Bertha Wilson who had served on the Ontario Court of Appeal since 1975.[159]

VIII. MANNER OF APPOINTMENT, LENGTH OF SERVICE, RETIREMENT, AND CONFLICTING PERSONALITIES

1) Manner of Appointment

In Canada, "Any person may be appointed a Judge [of the Supreme Court] who is or has been a judge of a superior court of any of the provinces of Canada, or a barrister or advocate of at least ten years standing at the bar of any of the provinces".[160] In the United States, there is nothing that requires that a Justice of the Supreme Court of the United States be a member of the bar anywhere, though they all have been.[161] The manner of appointment in Canada is different from the manner of appointment in the United States.

In the United States, Article II, Section 2, of the Constitution gives the President the power to appoint the Justices of the Supreme Court, "by and with the Advice and Consent of the Senate". In other words, the President names the person to be a Justice of the Supreme Court, and then that person's nomination is sent to the Senate of the United States for confirmation.

The confirmation process by the Senate generally means that when the nomination reaches the Senate it is referred to the appropriate Senate committee (in this case, the Senate Committee on the Judiciary) which holds public hearings during which the person's qualifications to be a Justice of the Supreme Court are examined. Once the hearings have been held, the Committee generally votes on whether or not the nomination should be approved. Once that has been done, the Committee's decision whether or not to recommend confirmation is referred to the full Senate, which then votes. A majority vote in favor of the

158. Author of this article's personal opinion.
159. SNELL & VAUGHAN, *op. cit.*, note 16, pp. 235, 236.
160. R.S.C. 1970, chap. S-19, sec. 5.
161. Personal knowledge of the author of this article.

nomination means confirmation, a majority vote against the nomination means rejection.[162]

The confirmation process can vary. There have been instances of confirmation by acclamation when, for instance, a member of the Senate is named to the Court.[163] It can also happen that the Senate may send the nomination to the floor of the Senate without a recommendation. That can happen when a nomination is controversial and the Senate Committee does not wish to pronounce itself one way or another.[164]

On occasion, confirmation hearings can be acrimonious, to say the least. An example of such a hearing is the one which took place on the nomination of Louis D. Brandeis, the first Jew to be named to the Supreme Court.[165] His views on social and economic matters were such that his nomination provoked bitter conservative opposition. It has even been written that some of the opposition was just plain anti-semitism.[166] Once on the Court, Justice Brandeis went on to become one of the most respected and capable Justices ever to sit on the Court.[167]

In Canada, persons named to the Supreme Court are not subjected to such scrutiny. Once they are named by the Governor in Council — in reality, by the federal cabinet — that is all there is to it.[168]

2) Length of Service and Retirement

Until 1927, the Justices of the Supreme Court of Canada served during good behavior, just as the Justices of the Supreme Court

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162. The earliest rejection of a nomination to the Supreme Court took place in 1795 when John Rutledge's appointment to succeed John Jay as Chief Justice was rejected by the Senate. His appointment was made while the Congress was in recess which meant that his appointment was "till the end of the next session of Congress". See note, 3 Dallas 121. His Chief Justiceship, during which he sat on at least one case, ended with the rejection of his nomination, December 15, 1795. See *Creation of the Federal Judiciary*, pp. 276, 277.

163. Senator Edward Gouslass White of Louisiana was appointed and confirmed as an Associate Justice of the Supreme Court on the same day, February 19, 1894. See 26 *Congressional Record* 2291. White later became Chief Justice.

164. At the present moment, a nomination to a lower federal court judgship has been sent to the Senate in this manner.

165. See Alpheus Thomas MASON, *Brandeis, A Free Man's Life*, New York, The Viking Press, 1946, chap. 31, "The Supreme Court Fight".

166. See "Catholic and Jewish Justices", *Congressional Quarterly's Guide to the U.S. Supreme Court*, p. 788.

167. For Justice McReynolds' reaction to Justice Brandeis' appointment, see "Catholic and Jewish Justices", cited *supra*, note 166.

168. Peter W. HOGG, *Constitutional Law of Canada*, Toronto, Carswell, 1985, p. 170.

169. R.S.C. 1970, chap. S-19, sec. 9.

of the United States do. They were, and still are, removable by the Governor General on address of the Senate and the House of Commons.[169]

On occasion, the lack of an adequate retirement system led to situations in which the Court was handicapped with Justices who stayed on the Court too long. That became evident within a few years of the creation of the Court. However, nothing was done about it until 1927 when retirement at age 75 was made mandatory. Meanwhile, on occasion measures had to be taken to force Justices who were no longer able to do their work to retire. A classic example of this took place in 1895 when the Justice Minister sought information as to the ages, the attendance record, and cases delayed by the absences of the two oldest Justices on the Court. As it turned out, during 1893 and 1894 one of the Justices had been absent from the Court for twenty days due to illness and on leave for five and one-half months; the other Justice had only been absent on official leave. When the carrot of a lifetime pension at full salary after fifteen years service did not work, the stick was used and they were in effect "pushed" off the bench.[170] Actually, the problem was that Supreme Court salaries on which pensions were based were too low and some could not afford to retire.[171]

The retirement problem was resolved in 1927 when retirement for Supreme Court Justices was made mandatory at age 75. Since it was adopted, the compulsory retirement law has been waived only once. That happened in 1940 when Chief Justice Sir Lyman Duff reached compulsory retirement age. Compulsory retirement was waived and his term extended by the government for three years.[172]

In the American system, Justices of the Supreme Court serve during "good behavior" and there is no compulsory retirement law.[173] Until 1937, there was not even a law that assured retirement benefits for Justices of the Supreme Court, though there was a law that assured retirement benefits for lower Federal court judges.[174] Whenever a Justice of the Supreme Court retired, Congress voted him a pension at full salary. That happened until Justice Oliver Wendell Holmes retired on January 1, 1932, after one of the most distinguished judicial careers in the history of the Supreme Court. In his case, Congress voted him an annual pension like the others, but at less than his annual salary.[175]

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170. SNELL & VAUGHAN, *op. cit.*, note 16, p. 55.
171. *Id.*, p. 65.
172. *Id.*, p. 151.
173. Article III, sec. 1, of the *Constitution of the United States.*
174. See Merlo J. PUSEY, *Charles Evans Hughes*, New York, MacMillan, 1952, v. 2, pp. 760, 761.
175. *Id.*, p. 760.

Since 1937, the Justices of the Supreme Court have been assured retirement benefits just as other members of the federal judiciary are. At age 70 they can retire at full salary after ten years of service on the federal bench; at age 65 they can retire at full salary after fifteen years service on the federal bench.[176]

The lack of a compulsory retirement law in the American system has, on occasion, led to distressing situations just as it did in the Canadian system. The classic situation is the one that involved Justice Stephen J. Field who served on the Supreme Court from 1863 until 1897.[177] During the winter of 1896-97 the state of his mind caused concern. At times he voted on cases and then forgot how he had voted. He asked questions in the courtroom that indicated that he had no idea of the argument that was being made before him. Years earlier, Field had served on a committee to suggest to Justice Robert Grier that it was time for him to retire. When Justice Field was gently reminded of this by others on the Court with the hope that he might take the hint and decide to retire, he is reported to have burst out with fire in his eyes :[178] "Yes! And a dirtier day's work I never did in my life!". That is said to have ended the effort of the Justices to induce Justice Field to retire. Later, in April, 1897, he submitted his letter of resignation to take effect on December 1.

3) Conflicting Personalities

Supreme Court Justices are human beings, whether they are Canadian or American. Some have short fuses just as others do. In the Canadian system the prime example is Samuel Henry Strong who served as a Puisne Justice from 1875 until 1892, and as Canada's third Chief Justice from 1892 until 1902. Snell and Vaughan give an interesting account of his abrasiveness and of his domineering personality in their chapter entitled "The Strong Court, 1892-1902".[179] His temper was described as "quick and at times uncontrollable"; he was said to overshadow everybody on the bench, but to dominate without leading.[180]

Strong's personality caused instability on the Court, and created problems in and for the Court. There were complaints about his courtroom behavior to the point that an Ottawa laywer laid assault

176. Act of March 1, 1937, 50 Statutes at Large 24; 28 U.S.C. § 371.

177. For a biography of Justice Field, see Carl Brent SWISHER, *Stephen J. Field, Craftsman of the Law*, Washington, Brookings Institution, 1930.

178. *Id.*, p. 444.

179. SNELL & VAUGHAN, *op. cit.*, note 16, chap. 3, p. 52 *et seq.*

180. *Id.*, p. 59.

charges against him, alleging that Strong had used violent language against him in court, and had later assaulted him in the hallway outside the courtroom. Another lawyer made a written complaint alleging that the "conduct of the Chief Justice, silently acquiesced in by the rest of the Court, was brutally despotic".[181] Not content with that, the lawyer even went so far as to inform the Colonial Secretary at Westminster of Strong's behavior, all of which came to naught.[182]

Perhaps Chief Justice Strong's American counterpart might be said to be Justice James Clark McReynolds who served on the Supreme Court of the United States from 1914 to 1941. McReynolds was described by Chief Justice Taft as "a continual grouch" who "seems to delight in making others uncomfortable [...] always offended because the court is doing something that he regards as undignified".[183] If anyone tried to smoke in the Supreme Court Conference, McReynolds would announce : "Tobacco smoke is personally objectionable to me".[184] Once, when McReynolds found the Court messenger assigned to him with nothing to do, he put him to work ironing shoelaces with a flatiron.[185] Perhaps Justice McReynolds' problem was that he was just a little ahead of his time. He would have fitted very well in today's anti-smoking world.

IX. EXTRAJUDICIAL FUNCTIONS OF JUSTICES

Throughout the history of the Supreme Court of Canada, its Justices have been called on to perform extra-judicial functions. On occasion, this has made it difficult for the Court to muster a quorum.[186] One such function that is always present is the responsibility that the Chief Justice has to assume the duties of the Governor General of Canada if the latter dies, becomes incapacitated, or is absent from Canada for more than a month. Should that eventuality happen, the Chief Justice or, if that post is vacant, the senior Puisne Justice on the Court, becomes the Administrator of Canada. As Administrator, the Chief Justice (or the senior Puisne Justice) exercises all of the powers and duties of the Governor General.[187]

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181. *Id.*, pp. 59, 60.
182. *Ibid.*
183. Charles P. CURTIS, Jr., *Lions Under the Throne*, p. 91.
184. William O. DOUGLAS, *The Court Years, 1939-1975*, New York, Random House, 1980, p. 13.
185. Personal knowledge of the author of this article.
186. SNELL & VAUGHAN, *op. cit.*, note 16, p. 66.
187. *The Supreme Court of Canada*, official pamphlet published under the authority of the Chief Justice, p. 12.

In addition, the Chief Justice of Canada acts as Chairman of the committee that advises the Governor General on awards of membership in the Order of Canada. He and other Justices of the Court serve as Deputies of the Governor General in the giving of Royal Assent to bills passed by the Parliament of Canada, the signing of official documents, and receiving the credentials of newly appointed High Commissioners and Ambassadors.[188]

In the past, Justices of the Court have been called upon to do such things as serve on various boards and commissions.[189] In 1903, Justice John Armour was named to the Alaska Boundary Commission;[190] in 1906 Chief Justice Fitzpatrick was appointed to the Pecuniary Claims Arbitration Commission of Great Britain and the United States.[191] The Chief Justice was active in the settlement of Canadian-American disputes until 1912.[192] This, in turn, led to the appointment of the Chief Justice to the International Claims Commission involving the United States and France,[193] and in 1915 to his appointment as the Canadian representative to the International Peace Commission.[194] In 1942 Chief Justice Duff chaired the Royal Commission on the dispatch of Canadian troops to Hong Kong.[195]

The extra-judicial duties of Justices of the Supreme Court of Canada have even included giving political and legal advice to the political executive of the country.[196] On one occasion, Justice Mignault was asked to prepare a memorandum on an article of the Boundary Waters Treaty;[197] in 1923 the Attorney-General of Ontario sought the then Justice Duff's views on proposed legislation;[198] and the views of the Chief Justice have been sought on a vacant Lieutenant-Governorship.[199]

The Justices of the Supreme Court of the United States have also performed extra-judicial duties, but not to the extent that the Justices of the Supreme Court of Canada have. The first instance of such an extra-judicial duty took place early in the history of the United States. In 1794 Chief Justice John Jay went to England to negotiate the

188. *Ibid.*
189. SNELL & VAUGHAN, *op. cit.*, note 16, pp. 96, 156-159, 170.
190. *Id.*, pp. 86, 96.
191. *Id.*, p. 96.
192. *Ibid.*
193. *Id.*, p. 96.
194. *Ibid.*
195. *Id.*, p. 157.
196. *Id.*, p. 134.
197. *Ibid.*
198. *Ibid.*
199. *Ibid.*

treaty between the United States and England.[200] More recent examples of such extra-judicial functions have been the Roberts Commission headed by Justice Owen J. Roberts that investigated the attack on Pearl Harbor at the start of World War II;[201] and the Warren Commission headed by Chief Justice Earl Warren that investigated the assassination of President John F. Kennedy.[202] While still in office, Chief Justice Burger was named Chairman of the Bicentennial Commission on the Constitution.[203] He retired at the end of the October Term, 1985, to devote his full time to the Commission. Also, the Chief Justice of the United States serves as a member of the Board of Regents of the Smithsonian Institution.[204]

Chief Justice Harlan Fiske Stone, who served on the Supreme Court of the United States first as an Associate Justice (1925–1941), and then as Chief Justice (1941–1946), had definite views on the propriety of extra-judicial work for Justices of the Court. He considered the duties of a Justice of the Supreme Court as "difficult and exacting" — "in a very real sense a 'full-time job'".[205] That is why he headed off a Congressional move to make him head of the Atomic Energy Commission, and why he declined President Truman's offer to appoint him to a panel of judges of the "Hague arbitrations".[206]

When it became a question of Justice Robert H. Jackson's role as the American Prosecutor at the Nuremburg War Crime Trials, Chief Justice Stone had even more definite ideas. He had so little use for the trials themselves that, when former Attorney General Francis Biddle was named to the panel of judges to try the war criminals, he refused Biddle's personal request to swear him in. "I do not wish", he explained, "to appear, even in that remote way, to give my blessing or that of the Court on the proposed Nuremburg trials".[207] As for Justice Jackson's absence from the Court as the American Prosecutor at Nuremburg, he

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200. WARREN, *The Supreme Court in United States History*, v. 1, pp. 124, 125; Frank MONAGHAN, *John Jay*, New York, Bobbs-Merrill, 1935, chap. 18, "Jay's Treaty with Great Britain".

201. For the Report of the Presidential Commission appointed to investigate the Japanese attack on Pearl Harbor, see Senate Document 159, 77th Congress, 2nd Session.

202. See Report of the President's Commission on the Assassination of President John F. Kennedy, Washington, G.P.O., 1964.

203. See Public Law 98-101, to provide for the establishment of a Commission on the Bicentennial of the Constitution, 97 Statutes at Large 719 (September 29, 1983).

204. 20 U.S.C. § 42.

205. Alpheus Thomas MASON, *Harlan Fiske Stone : Pilar of the Law*, New York, Viking Press, 1956, p. 714.

206. *Ibid.*

207. *Id.*, p. 715.

once commented : "Jackson is away conducting a high-grade lynching party in Nuremburg".[208]

X. References-Advisory Opinions

Under the Canadian system, there are references to the Supreme Court. These require the Justices of the Supreme Court to give their opinions on abstract legal questions that lack the normal adversarial and factual context of regular cases. As enacted, the 1875 *Supreme Court Act*[209] gave the Governor in Council authority to refer to the Supreme Court "any matters whatsoever as he may think fit" on which he wishes their opinions.[210]

Such references were not particularly favored by the Court during its early years. Reference questions were answered without reasons given for the Justices' conclusion[211] which rendered them of little use. Perhaps because of that and perhaps because of the lack of stature of the court, there were few references during the early years.[212] Then, in 1891 the *Supreme Court Act* was amended to make the reference system more effective.[213] The Justices were required to give reasons for their judgments, provision was made for a hearing during which the representation of different interests could be made, and the right of appeal to the Judicial Committee made explicit. References were authorized on the constitutionality of any provincial or federal statute, or "any other matter".[214]

The Justices continued to balk at the references system in spite of the explicit nature of the 1891 amendment to the *Supreme Court Act*.[215] In 1894 Elzéar Taschereau challenged the constitutionality of the idea of making an advisory board of the Supreme Court;[216] in 1903 the Judicial Committee refused to comment on "hypothetical questions" in a reference.[217] In 1910, the question of the validity of references was itself referred to the Supreme Court and upheld.[218] However, the Court

208. *Id.*, p. 716.
209. 38 Vict., chap. 11.
210. *Id.*, sec. 52.
211. SNELL & VAUGHAN, *op. cit.*, note 16, pp. 135, 136.
212. *Id.*, p. 136.
213. 54-55 Vict., chap. 25, sec. 4.
214. *Id.*, sec. 4.
215. SNELL & VAUGHAN, *op. cit.*, note 16, p. 136.
216. *In re Certain Statutes of the Province of Manitoba Relating to Education*, [1894] 22 S.C.R. 677.
217. *Attorney-General of Ontario* v. *Hamilton Street Railway*, [1903] A.C. 524.
218. *In re Reference by Governor-General in Council*, [1910] 43 S.C.R. 516.

was careful to point out that reference decisions are opinions only, not to be treated as binding on any courts. In 1922 the *Supreme Court Act* was amended to permit provincial references to be appealed to the Supreme Court from provincial courts of appeal.[219]

Regardless of the Supreme Court's admonition of the non-binding nature of its reference judgments, the system has become an important part of the Canadian constitutional system. It has been used repeatedly, and it has become an effective political instrument.[220] Its effectiveness is amply demonstrated by its use in an increasing number of instances ranging from the 1913 *Insurance Reference*[221] to the 1976 *Anti-Inflation Act Reference*,[222] and the *1981 Constitutional Act Reference*.[223]

In the United States, references, *i.e.*, advisory opinions, are not permitted in the federal system. They may exist in the state court systems if state law permits,[224] but in the federal system there must be a justiciable case and controversy for a matter to be submitted to a federal court. That was established in 1793 when Chief Justice John Jay refused President Washington's request for an opinion on matters relating to the Neutrality Proclamation of that year. Jay's reply was that he felt that it would be improper for the Justices of the Court to pass extra-judicially on such matters, "especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments".[225]

XI. SUPREME COURT HOUSING

The Supreme Court of Canada and the Supreme Court of the United States appear to have shared similar experiences in so far as housing is concerned. Until they both occupied their own buildings, they appear to have had to be satisfied with what was left over after the other two branches of the government were made comfortable.

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219. 12-13 George V, chap. 48.

220. SNELL & VAUGHAN, *op. cit.*, note 16, pp. 136, 137, 164–170.

221. *In the Matter of Sections Four and Seventy of the Canadian "Insurance Act, 1910"*, [1913] 48 S.C.R. 260.

222. [1976] 2 S.C.R. 373.

223. *Re : Resolution to Amend the Constitution*, [1981] 1 S.C.R. 754.

224. Such advisory opinions are permitted in states such as Maine where they are used to test the validity of proposed legislation just as they are in the Canadian system.

225. Richard V. MORRIS, *John Jay : The Nation and the Court*, Boston University Press, 1967, pp. 45, 46.

When plans were being made for quarters for the Supreme Court of Canada it was allocated four rooms in the Parliament building : a courtroom, a judges consulting room, an office for the staff, and a room for counsel.[226] What it actually got were a few rooms situated around the House of Commons : a converted reading room to serve as a courtroom, and a few offices for the Justices and the Court staff.[227]

After the Court had spent five years in these "temporary" accomodations, it was given more pretentious permanent accomodations. A building formerly used as stables and workshops was remodled for the use of the Court.[228] It had the use of the entire second floor of this building, but it had to share the first floor with the national art gallery.[229] The courtroom, offices for the Justices, a judicial conference room, and consulting and waiting rooms were localted on the second floor; offices for the staff, rooms for counsel, and the "Picture Gallery" occupied the first floor.[230]

No sooner had the Supreme Court moved into this building in 1882 than there were complaints about the "dreadful" smell in the building, the lack of privacy, the lack of proper ventilation, the lack of space, the lack of comfort, and a leaky roof. The Registrar of the Court gained access to the attic to store his Reports, but this could be reached only by the use of a ladder. The "Picture Gallery" moved out in 1887, but most of that space was taken over by the now separate Exchequer Court.[231]

The Court's accommodations were improved in 1890 when the building was doubled in size by an addition. The Justices were given offices in the new section, they were provided with a private entrance, a room was provided for a library, and the ladder to the attic was replaced with stairs.[232] Yet, the basic complaint still remained : the courthouse did not reflect "the high status that the Supreme Court deserved".[233]

Though refurbished by the 1890 expansion, the old Supreme Court building was soon considered inadequate. By 1897 the Registrar was complaining about the filthy condition of the building, cracks in the walls, and walls that had never been whitewashed.[234] There were

226. SNELL & VAUGHAN, *op. cit.*, note 16, pp. 17, 18.
227. *Id.*, p. 18.
228. *Id.*, p. 49.
229. *Ibid.*
230. *Ibid.*
231. *Id.*, p. 50.
232. *Id.*, p. 51.
233. *Ibid.*
234. *Id.*, p. 171.

complaints about the lack of fire walls, crowded conditions in the library, and sanitary conditions, bad odors, bad plumbing, furniture that was said to be moth-eaten, and pests that were spreading throughout the building.[235]

Then there was the Exchequer Court which was considered to be inferior to the Supreme Court. There was one courtroom for the two courts, crowded facilities had to be shared, and occasionally there was friction because of the situation in general.[236]

Renovations were made in 1906 which included a one-story extension to the library; more renovations were made in 1925, 1927, and 1930 to repair warped floors, unpainted walls, and deterioration in the structure.[237] Fire escapes were added and more office space was provided in the attic, but the condition of the building was still anything but satisfactory. Finally, in 1935 building and health inspectors examined the building. They submitted a report that documented fire hazards, rotting floors, deteriorating library books, cramped quarters, shocking sanitary conditions, and rodent and insect infection. The recommendation was made that the building be condemned as injurious to the health of the occupants and inadequate for the purpose for which it was used.[238]

Finally, early in 1936 the Justice Minister requested cabinet approval for a new building for the Supreme Court. The motivating forces were the report of the building and health inspectors, the changing role of the Supreme Court now that an end of appeals to the Judicial Committee was being talked about, the opening of the new building for the Supreme Court of the United States in 1935, and a new Prime Minister who was interested in the development of Ottawa as the national capital.[239]

Now things started to move. In June, 1936, the Prime Minister and seven cabinet ministers took a tour of proposed sites on Parliamentary Hill;[240] in 1937 an architect was hired to work on a new building;[241] in 1939 the foundation stone was laid for the building by Queen Elizabeth;[242] in 1941 approval for the completion of the building was given, but only on condition that space in the building be made

235. *Id.*, p. 172.
236. *Ibid.*
237. *Id.*, pp. 173, 174.
238. *Id.*, p. 174.
239. *Id.*, p. 175.
240. *Ibid.*
241. *Id.*, pp. 175, 176.
242. *Id.*, p. 177.

available to war-related bureaucracy for the duration of World War II;[243] and in January, 1946, the Supreme Court moved into the building. However, it still had to share the building with war-related agencies.[244] It was not until 1949 that the Supreme Court had the building by itself — together with the Exchequer Court.[245]

The story of housing for the Supreme Court of the United States is not quite as depressing as that for the Supreme Court of Canada. That is true even though the American court on occasion had to sit in a tavern and a rented house.[246] While the seat of the Government of the United States was in New York, the Supreme Court sat in the Royal Exchange;[247] when the seat of government moved to Philadelphia, the Court sat in Independence Hall and the Old City Hall of that city;[248] when the seat of government moved to Washington in 1800, at first nothing had been provided for the Supreme Court. Finally a room located over the basement entrance hall to the Capitol was assigned to the Court. At a time when the executive and the legislative branches were housed in buildings which were criticised in Congress as "much to extravagant, more so than any place in Europe",[249] the Supreme Court sat in a "small and undignified chamber", 24 feet wide, 30 feet long, and 21 feet high. It sat there for eight years.[250]

Due to renovations, in 1808 and 1809 the Supreme Court sat in a second room in the basement of the Capitol.[251] This second room was turned over to the Senate at the end of the 1809 Term, and the Court moved to a third courtroom underneath the new Senate Chamber.[252] After the British burned the Capitol in 1814, the Court sat in temporary quarters in a large double house on Pennsylvania Avenue, S.E.[253] It spent the 1817 and 1818 Terms back in the Capitol in temporary rooms in the less ruined portions of the Capitol. These quarters have been described as "a mean apartment of moderate size", "a mean and dingy building", "little better than a dungeon".[254]

By 1819 the rebuilding of the Capital was well enough along for the Court to move back to the room below the Senate where it stayed

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243. *Ibid.*
244. *Id.*, p. 178.
245. *Ibid.*
246. WARREN, v. 1, p. 457, footnote 2.
247. *Id.*, p. 46.
248. *Id.*, p. 53.
249. *Id.*, p. 169.
250. *Id.*, p. 171.
251. *Id.*, pp. 456, 457. It is during this period that it is reported that the Court sat in a tavern. See WARREN, v. 1, p. 457, note 2.
252. *Id.*, p. 457.
253. *Id.*, pp. 458, 459.
254. *Id.*, p. 459.

until 1860. In 1824, at the time the argument in *Gibbons* v. *Ogden*[255] took place, this room was described as follows by a New York newspaper correspondent :[256]

> The apartment is not in a style which comports with the dignity of that body, or which wears a comparison with the other Halls of the Capitol. In the first place, it is like going down cellar to reach it. The room is on the basement in an obscure part of the north wing. In arriving at it, you pass a labyrinth, and almost need the clue of Ariadne to guide you to the sanctuary of the blind goddess. A stranger might traverse the dark avenues of the Capitol for a week, without finding the remote corner in which Justice is administered to the American Republic [...] a room which is hardly capacious enough for a ward justice. The apartment is well finished; but the experience of this day has shown that in size it is wholly insufficient for the accommodation of the Bar, and the spectators who wish to attend.

In 1860 the Court moved to the chamber that the Senate used from 1808 to 1860.[257] It stayed there until it moved into its own building in 1935. There the Court had the use of the former Senate chamber as a courtroom, and the use of twelve other rooms for its officers and records.[258]

As long as the Justices of the Supreme Court rode circuit, they did not live in Washington. During their short stays there for the sessions of the Court, they generally lived in rooming houses. Chief Justice Marshall tried to have them stay in the same rooming house so that the conferences of the Court could be held after the evening meal.[259] Later, after the Justices no longer rode circuit and all of them lived in Washington, they worked in their homes. This lasted even later than 1935 when the move to the new Supreme Court building took place. The first Justices to work in the new building were those appointed after the move was made.

As long as the Justices worked in their homes, the records and briefs of the Court were sent out to them. In later years, the Court pages, boys who were generally hired at the age of fourteen, were given streetcar tokens and sent on their way to the homes of the Justices with bundles of records and briefs under their arms.[260] Many of these pages became the career employees of the Court.

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255. 22 U.S. 1 (1824).
256. WARREN, v. 1, pp. 460, 461.
257. WARREN, v. 2, p. 362.
258. *Ibid.*
259. *Ibid.*
260. Personal knowledge of the author of this article.

XII. Of Books and Libraries

The Supreme Court of Canada and the Supreme Court of the United States both had library problems at the beginning. Although books were provided for the Supreme Court of Canada from the very beginning,[261] there was inadequate space to shelve them until the 1891 addition to the Court's first permanent home in the converted stable. Before that, the walls and windows of the conference room had to be used as shelf space, to the inconvenience of both the Justices and readers.[262] There was access to the Parliamentary library, but that was at some distance and not particularly convenient.[263]

Once the Court was in its expanded facilities in its first own building, library facilities were vastly improved.[264] By the turn of the century the book collection numbered 20,000 volumes, with 1000 volumes added annually. The book budget was then $4,000.; by the end of the next decade this had been increased to $10,000.[265] This, in turn, led once more to crowded conditions, lack of shelf space, and the need for more rooms in which to shelve books.[266]

When the Supreme Court of Canada moved into its new building in 1946, it was soon discovered that the library had been poorly designed and located. This led to the library being moved to the third floor of the building where the Supreme Court of Canada finally has an adequate library that is reflective of its role and position.[267]

During its first one hundred and forty-five years, the Supreme Court of the United States lived on borrowed premises and depended on borrowed books.[268] Until 1812 Congress failed to provide any library facilities for the Supreme Court. During this period Congress would not even permit the Court to use the library facilities that it provided for itself. Indeed, in 1801, during a debate in the House of Representatives on the bill to create the Library of Congress, there was objection when a move was made to give the Supreme Court access to this proposed library. One member of the House objected and stated that "He hoped the Congressional Library would never be subjected to the abuse books

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261. Snell & Vaughan, *op. cit.*, note 16, p. 17.
262. *Id.*, pp. 49, 50, 74.
263. *Id.*, p. 49.
264. *Id.*, p. 100.
265. *Id.*, pp. 112, 172.
266. *Id.*, pp. 172-174.
267. *Id.*, p. 178.
268. For a more detailed discussion of the library facilities of the Supreme Court of the United States, see Edward G. Hudon, "The Library Facilities of the Supreme Court of the United States : A Historical Study", (1966) 34 *University of Detroit Law Journal*, 181, 317.

in courts of justice were too liable to".[269] Meanwhile, the Justices of the Court were left to depend on their own libraries until 1812 when Congress relented and granted the members of the Court access to the Library of Congress "at the times, and on the same terms, conditions and restrictions, as members of Congress are allowed to use said books".[270]

Unsuccessful attempts were made in 1816,[271] 1826,[272] and 1830[273] to either establish a law library for the Supreme Court, or to separate the law books in the Library of Congress and place them under the control of the Supreme Court. Finally, on January 14, 1832, a resolution was agreed to in the Senate which directed the Committee on the Judiciary "to inquire into the expediency of providing a law library for the Supreme Court of the United States".[274] On January 20, 1832, the Judiciary Committee reported a bill "to increase and improve the law department of the Library of Congress".[275] When this became law on July 14, 1832, the law collection of the Library of Congress was segregated and placed under the direction of the Court.[276]

The 2,011 law volumes that were segregated from the remainder of the Library collection were placed in a room north of the main library.[277] They remained there until 1842 when they were moved to an apartment near where the Court met in the basement of the north wing of the Capitol.[278] In 1860 the law collection was again moved when the old Senate chamber was converted into a courtroom and the old courtroom into a law library.[279] The law library was now conveniently located below the new Court chamber where it remained even after the Supreme Court left for its own building in 1935.[280] Officially designated the "Law Library in the Capitol", it became popularly known as the "Supreme Court Library".

From the original 2,011 volumes, the book collection of the Law Library in the Capitol grew to 101,868 volumes in 1898 when the

269. 11 Annals of Congress 349 (1801-1802).
270. 2 Statutes at Large 786.
271. 29 Annals of Congress 139, 140, 143, 167, 181, 184, 1202, 1207 (1815-1816).
272. House Journal, 19th Congress, 1st Session 285 (1826-1827).
273. House Journal, 21st Congress, 1st Session, 276, 418, 511, 513 (1829-1830).
274. Senate Journal, 22nd Congress, 1st Session, p. 26 (1831-1832).
275. *Id.*, 90, 187, 189, 190, 476, 481, 482, 486.
276. 4 Statutes at Large 579.
277. JOHNSTON, *History of the Library of Congress*, 1904, v. 1, pp. 129, 130.
278. Senate Journal, 27th Congress, 2nd Session 177 (1841-1842); House Journal, 27th Congress, 2nd Session 416 (1841-1842).
279. 12 Statutes at Large 104, 110.
280. Reports of the Librarian of Congress for the fiscal years ending June 30, 1935 and 1936.

new Library of Congress building opened across the Capitol plaza.[281] After that, the Law Library in the Capitol became a branch of the Library of Congress and its book collection was reduced to 34,860 volumes. The collection in the Capitol was now made up of books of active use to the Supreme Court, the Supreme Court Bar, and members of Congress.[282] Books needed by the Court or others at the Capitol, but not found there, could be transmitted from the main building of the Library of Congress by a mechanical carrier that operated between the two buildings.[283]

When the Supreme Court moved into its own building, it started off with a library of about 75,000 volumes.[284] That has grown to a library of about 200,000 volumes. This library serves the Court itself, members of the Supreme Court Bar, members of Congress, and government attorneys. The Court still has ready access to the Library of Congress, as well as easy access to the vast library resources located throughout the Washington area.[285]

XIII. Summary and Conclusion

Until Professors James G. Snell and Frederick Vaughan's *The Supreme Court of Canada : History of the Institution* appeared, no basic history of Canada's highest court had been written. In the preface to their book, the authors write that their book "is an attempt to fill the gap".[286] How well they have filled the gap becomes evident even before one has finished reading the first or second chapters. The authors have thoroughly researched, documented, and told the story of an institution which, if one may once more use the words of the authors, "the Canadian public and political leaders neither expected nor allowed [for decades]... to become a conspicious and influential institution".[287]

The authors have told the story of the Supreme Court of Canada from the time when it was viewed "as a body subsidiary to the legislature and the political executive",[288] to the point when it is now in a

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281. Report of the Librarian of Congress, 1898, Senate Misc. Document No. 24, 55th Congress, 3rd Session (1897-1898).

282. Report of the Librarian of Congress for the Fiscal Year ending June 30, 1904, at 77.

283. See Oscar D. Clarke, "The Library of the Supreme Court of the United States", (1938) 31 *Law Library Journal* 89.

284. Personal knowledge of the author of this article.

285. *Ibid.*

286. Snell & Vaughan, *op. cit.*, note 16, p. xi.

287. *Id.*, p. 258.

288. *Ibid.*

position to become a "truly significant participant in the Canadian polity".[289] Just as in the case of the Supreme Court of the United States, the extent to which it will become such a participant will, to a considerable measure, depend on the manner in which it deals with the impact of Charter-related cases that it now faces.

As one passes from one chapter to another of Professors Snell and Vaughan's book, one cannot help but be struck by the similarity between the growing pains that the Supreme Court of Canada and the Supreme Court of the United States have both experienced. They are all there : inadequate courtroom facilities at the beginning, inadequate library facilities during the early years, early turnover in the membership of the two Courts, lack of cases to start off with, too many cases later on, and so on *ad infinitum.*

The Supreme Court of Canada has never had to cope with the rigors of riding circuit as the Justices of the Supreme Court of the United States did, but it has had other problems such as the extensive demands made on it for extrajudicial functions. In its own way, each Supreme Court has met its problems, and coped with them as they have arisen in a manner consistent with whatever was needed to assure an orderly development of the institution.

Now that the Supreme Court of Canada enters a new era that will no doubt be dominated by an avalanche of Charter cases, it will unquestionably be confronted with new and different problems. As it solves these problems, it will continue to make history as any supreme court must if it is to uphold its role as the ultimate guardian of democratic institutions. Indeed, one day perhaps it will be said of the Supreme Court of Canada as it was said of the Supreme Court of the United States by then Governor of New York, later Chief Justice of the United States, Charles Evans Hughes :[290]

> We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution.

Meanwhile, the Supreme Court of Canada has its work cut out for it in Charter-related cases, just as the Supreme Court of the United States continues to have its work cut out for it in Bill of Rights cases. In the years ahead, it will be interesting to compare the results achieved by both.

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289. *Ibid.*

290. Speech before the Elmira Chamber of Commerce, May 3, 1907, *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908*, New York, G. P. Putnam's Sons, 1908, p. 103 at 139.

APPENDIX A

STATISTICS — SUPREME COURT OF CANADA

Appeals	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985
Total nb. of appeals heard	160	152	120	115	107	113	124	129	89	89	88
As of right	24	11	25	32	14	21	15	11	7	9	14
References (fed. and prov.)	1	0	0	0	1	0	1	2	2	3	1
By leave of Prov. C.A. or FCA	—	—	—	—	—	—	8	1	1	2	1
Motions for leave to appeal											
Total nb. of motions heard	—	333	329	366	401	395	440	419	501	479	415
Granted	—	105	94	98	111	115	122	95	117	123	64
% granted	—	31.5	28.6	26.8	27.7	29.1	27.7	22.7	23.4	25.7	4 reserved

APPENDIX B

SUPREME COURT OF THE UNITED STATES
October Terms 1913–1985

prepared by Edward C. SCHADE,
Assistant Clerk

Cases docketed, opinions, disposed of and carried over from 1913

Year	Cases on dockets	Opinions	Cases disposed of	Cases carried over	Number of filings
1913	1142	292	595	545	—
1914	1075	273	539	536	530
1915	1093	239	551	542	557
1916	1200	213	645	555	658
1917	1145	216	626	519	590
1918	1112	225	680	432	593
1919	1019	178	609	410	587
1920	975	218	608	367	565
1921	1040	172	603	437	673
1922	1157	221	765	392	720
1923	1023	212	655	368	631
1924	1277	232	758	519	909
1925	1309	209	844	465	790
1926	1183	199	885	298	718
1927	1049	175	857	192	751
1928	968	129	822	146	776
1929	984	134	790	194	838
1930	1039	166	893	146	845
1931	1023	150	883	140	877
1932	1037	168	910	127	897
1933	1132	158	1029	103	1005
1934	1040	156	931	109	937
1935	1092	146	990	102	983
1936	1052	149	942	110	950
1937	1091	152	1013	78	981
1938	1020	139	923	97	942
1939	1078	137	946	132	981
1940	1109	165	985	124	977
1941	1302	151	1168	134	1178
1942	1118	147	997	121	984
1943	1118	130	962	156	997
1944	1393	156	1249	144	1237
1945	1329	136	1161	168	1185
1946	1524	142	1366	158	1356
1947	1470	110	1331	131	1312
1948	1605	114	1434	171	1474
1949	1448	87	1308	140	1277
1950	1335	99	1216	119	1195
1951	1368	96	1222	146	1249
1952	1437	113	1286	151	1291

APPENDIX B (suite)

SUPREME COURT OF THE UNITED STATES
October Terms 1913-1985

prepared by Edward C. SCHADE,
Assistant Clerk

Cases docketed, opinions, disposed of and carried over from 1913

Year	Cases on dockets	Opinions	Cases disposed of	Cases carried over	Number of filings
1953	1463	76	1303	160	1312
1954	1566	80	1361	205	1406
1955	1856	94	1637	219	1651
1956	2052	109	1701	351	1833
1957	2008	117	1783	225	1657
1958	2062	118	1781	281	1837
1959	2178	117	1822	356	1897
1960	2313	129	1928	385	1957
1961	2585	102	2157	428	2200
1962	2824	129	2350	474	2396
1963	2779	131	2412	367	2305
1964	2662	108	2180	482	2295
1965	3284	105	2693	591	2802
1966	3356	115	2903	453	2765
1967	3586	127	2973	613	3133
1968	3918	113	3151	767	3305
1969	4202	108	3409	793	3435
1970	4212	129	3422	790	3419
1971	4533	149	3645	888	3743
1972	4640	157	3748	892	3752
1973	5079	148	3876	1203	4187
1974	4668	123	3947	721	3465
1975	4761	138	3806	955	4040
1976	4731	126	3918	812	3776
1977	4704	129	3878	826	3892
1978	4731	130	3782	949	3905
1979	4781	130	3814	960	3832
1980	5144	123	4255	889	4184
1981	5311	141	4433	878	4422
1982	5079	151	4202	877	4201
1983	5100	151	4029	960	4222
1984	5006	139	4084	745	4047
1985	5158	146	4275	883	4413

Revised : July 17, 1986