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Jurisdiction of the Court
The Supreme Court of Canada

*by Professor Peter W. Hogg**

I. Establishment of Court

THANK YOU PROFESSOR Jacoby. The Supreme Court of Canada was not established by Canada's Constitution, which is the British North America Act, 1867 (B.N.A. Act). The Canadian framers of the B.N.A. Act assumed that after confederation (union) the Privy Council in England would continue to serve as the final court of appeal for Canada, so that there was no pressing need for a Canadian court of final appeal. The Supreme Court of Canada was established in 1875—eight years after confederation—by a statute of the federal Parliament. The constitutional authority for this statute is discussed later in this paper.[1]

The Court originally comprised six Judges; a seventh Judge was added in 1927; and two more Judges were added in 1949, bringing the number up to its present figure of nine. There is a statutory requirement that three of the nine Judges must be appointed from Quebec.[2] The purpose of this requirement is to ensure that there will be some Judges on the Court versed in the civil law. Although there are no statutory requirements as to the origin of the remaining six Judges, in fact from 1949 until 1978 a pattern of regional representation was consistently maintained under which three Judges were appointed from Ontario, two were appointed from the four western provinces, and one was appointed from the four Atlantic provinces. In 1978 this pattern was broken when a Judge from Ontario (Spence J.) retired and was replaced by an appointment from British Columbia (McIntyre J.). There are now only two Judges on the Court from Ontario, and there are three from the western provinces.[3]

The Court is not required, either by the B.N.A. Act or by statute, to sit as a full bench of nine Judges. On the contrary, the Supreme Court Act specifically provides that any five Judges shall constitute a quorum.[4] This quorum has remained unchanged despite the increases in the number of Judges from the original six to the present nine. The composition of the bench for each case is determined by the Chief Justice. Most cases have been heard by the bare quorum of five. However, constitutional cases have usually been heard by more than five Judges and often by the

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[1] Page 41, below.

[2] Supreme Court Act, Rev. Stats. Can. 1970, c. s-19, s.6.

[3] One of the two Ontario judges, Estey, J., was also born and raised in the west.

[4] Supreme Court Act, s.25. Contrast the position in the United States, where the reference in art. III, § 1 of the Constitution to "one supreme Court" is regarded as requiring the participation of all Justices in all decisions.

full Court. Full Court sittings have become much more common for all classes of cases under the present Chief Justice (Laskin C.J.).

The Judges of the Court are appointed by the federal executive.[5] The provinces have no role in the selection of Judges, and are not in practice consulted before an appointment is made. Nor is there any requirement that appointments be ratified by the Senate or the House of Commons or by a legislative committee. In practice there is some confidential consultation with the organized bar, but no public scrutiny of appointments.

These basic facts about the Supreme Court of Canada reveal a number of differences between it and the Supreme Court of the United States. Perhaps the most remarkable point is the fact that the Canadian Court's jurisdiction and composition—and indeed its very existence—depend upon an ordinary federal statute, the Supreme Court Act. The Court's jurisdiction or composition could be radically altered—in fact, the Court could be abolished—by the unilateral action of the federal Parliament. It must be remembered too that in Canada's system of parliamentary government, the federal Parliament is effectively controlled by the federal executive (the Prime Minister and his cabinet). Canada is therefore in the curious situation that the Court which now has the final power of decision in controversies between the central government and the provinces exists by the grace of the central government. In fact, of course, the Court has now won a highly respected place in the scheme of Canadian government, and no federal government would ever contemplate the abolition or diminution of the Court. Nevertheless, there is widespread agreement that the Court should be entrenched in the constitution by an amendment to the B.N.A. Act, and that the provinces should play a role in the selection of the Judges. Constitutional amendments to accomplish these objectives have been agreed to by the central and provincial governments, but have always foundered because of the existence of more controversial constitutional amendments in the same package.

II. Abolition of Privy Council Appeals

Before the Supreme Court of Canada was established in 1875 the Privy Council in England served as a final court of appeal for Canada—as well as for other British colonies. This role continued even after the establishment of the Supreme Court of Canada. Not only was there an appeal from the Supreme Court of Canada to the Privy Council, there was also a "per saltum" appeal from the provincial courts of appeal directly to the Privy Council which by-passed the Supreme Court of Canada altogether. In 1888 an attempt was made by the federal Parliament to abolish appeals to the Privy Council in criminal cases, but this was later held to be unconstitutional,[6] and appeals in criminal cases were not validly abol-

[5] *Id.* s.4.

[6] Nadan v. The Queen [1926] A.C. 482 (P.C.).

ished until 1933.[7] Appeals in civil cases, including the per saltum appeals, were proposed to be abolished in 1939 by the federal Parliament. The bill to accomplish this result was "referred" to the courts (references are discussed later in this paper)[8] and held to be constitutional.[9] The bill was enacted in 1949, and it cut off appeals for all cases commenced after December 23, 1949. Only since then has the Supreme Court of Canada been the final court of appeal for Canada.

III. Constitutional Authority for Court

The constitutional authority for the establishment by the federal Parliament of the Supreme Court of Canada is s.101 of the B.N.A. Act:

> The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

There are two branches to the authority conferred by s.101. The first branch authorizes the establishment of "a general court of appeal for Canada," and that is the constitutional basis for the establishment of the Supreme Court of Canada. The second branch authorizes the establishment of "any additional courts for the better administration of the laws of Canada," and that is the constitutional basis for the establishment of a system of federal courts (the second branch of s.101 will be briefly discussed later in this paper.)[10]

As the first branch of s.101 stipulates, the Supreme Court of Canada is "a general court of appeal for Canada." This phrase contemplates a court with a jurisdiction which is not confined to matters within federal jurisdiction. Now that Privy Council appeals have been abolished, the Supreme Court of Canada stands at the top of the hierarchy not only of federal courts, but of provincial (state) courts as well. It hears appeals from both classes of courts, and those appeals may raise questions of constitutional law, of federal law, or of provincial (state) law, or of some mixture of the three. The Supreme Court of Canada is therefore the final authority on the interpretation of the entire body of Canadian law: federal constitutional law, provincial constitutional law, federal statutes, provincial statutes, federal common law, provincial common law, and (in appeals from the province of Quebec) provincial civil law. Thus, the Supreme Court of Canada is a "federal" court only in the formal sense that it is established by federal law. From the standpoint of its plenary jurisdiction it is as much a provincial court as a federal court. The fact

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[7] British Coal Corp. v. The King [1935] A.C. 500 (P.C.).

[8] Page 44, below.

[9] A.-G. Ont. v. A.-G. Can. (Privy Council Appeals) [1947] A.C. 127 (P.C.).

[10] Page 45, below.

that a case raises only a question of provincial law does not affect the right of appeal, and a large number of such cases are in fact appealed to and disposed of by the Court.

When the Supreme Court has to determine a question of provincial law it might perhaps be expected that it would defer to the decisions of the courts of that province (or at least decide the question as a court of that province would have done), and that it would tolerate divergent doctrine which had been developed in different provinces. This is not what has happened at all. *Erie Railroad Co.* v. *Tompkins*[11] has no place in the law or practice of the Supreme Court of Canada. The Supreme Court of Canada always makes its own determination of any question before it, even if it is a question of provincial law, and it does not hesitate to reverse a decision rendered by a provincial court of appeal in a case raising only questions of provincial law. The Supreme Court of Canada does not tolerate divergences in the common law from province to province, or even divergences in the interpretation of similar provincial statutes. Such divergences do develop from time to time, of course, but they are eventually eliminated by the Supreme Court of Canada. The assumption of the Court, which is shared by the Canadian bar, is that, wherever variations can be avoided, Canadian law, whether federal or provincial, should be uniform.[12] Needless to say, each province has a distinctive body of statute law, and Quebec also has a distinctive body of civil law (instead of common law); but the final interpretation of even these unique provincial laws lies with the Supreme Court of Canada.[13] Of course, even the overriding jurisdiction of the Supreme Court of Canada cannot make these distinctive bodies of law uniform. But, apart from distinctive provincial statute law and Quebec's civil law, the law in Canada is generally uniform across the country, and does not differ from province to province.[14] This makes the body of judge-made law in Canada much less complex than equivalent doctrine in the United States, where discrepancies between the laws of various states have usually developed.

If a province would prefer that litigation in a field within provincial jurisdiction be finally disposed of at the level of the provincial court of appeal, it cannot constitutionally give effect to that preference. It has

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[11] (1938) 304 U.S. 64.

[12] For a heretical argument to the contrary, *see* A.S. Abel, *The Role of the Supreme Court in Private Law Cases* 4 ALTA. L. REV. 39 (1965); P.H. RUSSELL, THE SUPREME COURT OF CANADA AS A BILINGUAL AND BICULTURAL INSTITUTION 218 (Information Canada, Ottawa, 1969).

[13] We shall later note that the court may refuse leave to appeal a decision raising a question of law particular to a single province, but its power to grant leave and to hear the appeal is not in doubt, and is in fact exercised from time to time. Appeals in civil law cases are quite common, for example.

[14] J. Willis, *Securing the Uniformity of Law in a Federal System—Canada* 5 U. TORONTO L.J. 352 (1944); P.W. HOGG, CONSTITUTIONAL LAW OF CANADA 123 (Carswell Co., Toronto, Ont., 1977).

been held that the power to appeal to the Supreme Court of Canada cannot be limited by provincial legislation. Two reasons have been advanced: (1) that such a law is in relation to "a general court of appeal for Canada" and therefore within exclusive federal legislative competence under s.101 of the B.N.A. Act; and (2) that such a law is inconsistent with the terms of the Supreme Court Act which as a federal law prevails over the inconsistent provincial law.[15]

IV. Subject Matter of Court's Case-Load

What kinds of cases does the Supreme Court of Canadá actually end up deciding?

First in importance, but not in numbers, are constitutional cases. In Canada the term "constitutional case" usually means a controversy about the distribution of legislative competence between the federal Parliament and the provincial Legislatures. It is the federal-provincial distribution of powers which constitutes the only important limitation on the competence of the federal Parliament and provincial Legislatures, and therefore it is the only important ground of judicial review.

The B.N.A. Act did not include a bill of rights, and none has subsequently been added by amendment. In 1960 the federal Parliament enacted the Canadian Bill of Rights,[16] which contains many provisions similar to the American Bill of Rights, but the Canadian instrument was never added to the B.N.A. Act by constitutional amendment, and was never made applicable to provincial laws. Even so, the Supreme Court of Canada in *R.* v. *Drybones* (1969)[17] held that the Canadian Bill of Rights did have overriding effect on other federal statutes which violated its precepts. But this doctrine has not actually been applied in any case other than the *Drybones* case itself, which struck down a drunkenness law which was applicable only to "Indians." The Canadian Bill of Rights has not therefore become an important tool of judicial review. The provinces of Saskatchewan, Alberta and Quebec have also enacted their own bills of rights,[18] but they too are ordinary statutes and they have not yet had the effect of actually invalidating an inconsistent statute. Prime Minister Trudeau has consistently attempted to secure agreement from the provinces to a constitutional amendment adding a bill of rights to the B.N.A. Act and making it applicable to provincial as well as federal laws, but this initiative, along with all the other proposals for constitutional reform which have been put forward in the last ten years, has never come to fruition.

Constitutional cases (meaning distribution-of-powers cases) consti-

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[15] Crown Grain Co. v. Day [1908] A.C. 504 (P.C.), striking down a Manitoba statute purporting to abolish appeals from decisions relating to mechanics' liens.

[16] Rev. Stats. Can. 1970, Appendix III.

[17] [1970] S.C.R. 282.

[18] Hogg, *supra* note 14, at 432.

tute only a small proportion of the Canadian Court's work. From 1950 (following the abolition of Privy Council appeals) to 1974, the Supreme Court of Canada disposed of fifty-nine constitutional cases, an average of only 2.5 per year. Since 1975 the number of constitutional cases has risen somewhat, as can be seen by the following figures:

Reported in [1975] S.C.R.	5
Reported in [1976] S.C.R.	5
Reported in [1977] S.C.R.	9
Reported in [1978] S.C.R.	14
To be reported in [1979] S.C.R. (estimate)	8

It is too early to tell whether these figures presage a permanently larger volume of constitutional litigation. Even if they do, it is obvious that constitutional cases will still not dominate the Court's docket.[19]

The subject matter of the remainder of the cases decided by the Supreme Court of Canada has been analyzed every year since 1961 by the editors of the Osgoode Hall Law Journal. Each annual volume of the Journal contains a statistical analysis of the work of the Court in the previous year. For details these tables should be examined. However, I shall attempt to describe the case-load in general terms. The single largest category of reported cases[20] is tort cases (12 in 1961; 19 in 1976). They are closely followed by criminal cases (11 in 1961; 10 in 1976); review of administrative agencies (12 in 1961; 11 in 1976); and taxation (8 in 1961; 7 in 1976). Then every year there is a large variety of cases covering most of the other fields of the law, including wills and trusts, contracts, commercial law, bankruptcy, debtor-creditor, insurance, corporations, partnerships, family, intellectual property, real estate, municipal law, governmental liability, expropriation (eminent domain), civil procedure and evidence.

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[19] The Court has heard the following numbers of appeals and references:

1975	160
1976	152
1977	120
1978	124

These figures include unreported decisions, but not applications for leave to appeal. The figures for applications for leave to appeal are displayed at p. 50 *infra*. All these figures were supplied to me by Bernard C. Hofley, Registrar of the Supreme Court of Canada.

[20] Criminal cases are the largest category if unreported cases are also counted. The large number of criminal cases is probably explained by the mandatory jurisdiction over many criminal appeals (p. 48, below) and by the availability of legal aid. *See generally* W. J. Braithwaite, *Developments in Criminal Law and Procedure: The 1978-79 Term* 1 S.C.L.R. 187 (1980).

Federal Courts

It will be recalled that the second branch of s.101 of the B.N.A. Act authorizes the federal Parliament to establish "any additional courts for the better administration of the laws of Canada." This branch of s.101 authorizes the establishment of a system of courts which are "federal" in the traditional American sense of that term. No federal courts were in fact established immediately after confederation in 1867. In 1875, at the same time as the Supreme Court of Canada was established, a federal court called the Exchequer Court of Canada was established. As its name implied, this court had a very limited jurisdiction over questions involving federal revenue and the federal Crown (government). Over the years this jurisdiction was increased to cover copyright, trademarks, patents, admiralty, tax, citizenship and a few other matters regulated by federal laws. In 1971 the Exchequer Court was abolished and replaced by the Federal Court of Canada.[21] The new court inherited the jurisdiction of the former Exchequer Court, but it was also given additional jurisdiction, including the power to review the decisions of federal agencies and officials. Not only is the jurisdiction of the Federal Court somewhat broader than that of the Exchequer Court, its structure is more elaborate. Whereas the Exchequer Court consisted only of a trial division (from which an appeal could be taken directly to the Supreme Court of Canada), the Federal Court has a trial division, called the Federal Court Trial Division, and an appeal division, called the Federal Court of Appeal (from which a further appeal may be taken to the Supreme Court of Canada).

The Federal Court of Canada (or any other federal court) cannot be granted plenary powers akin to those of the Supreme Court of Canada. The B.N.A. Act nowhere defines the "judicial power of Canada" in terms similar to Article III, § 2, of the Constitution of the United States. But s. 101 stipulates that federal courts may be established "for the better administration of the laws of Canada." It has been held that this phrase defines the limits of federal jurisdiction. The Federal Court of Canada can be given jurisdiction only over questions arising out of "the laws of Canada," meaning federal law. It was recently decided that the Federal Court Act was unconstitutional to the extent that it purported to confer on the Federal Court jurisdiction over a dispute governed by Quebec's civil law[22] and over a dispute governed by Alberta's common law.[23] The Canadian courts have so far made little progress in developing doctrines akin to the American doctrines of pendent and ancillary jurisdiction. These recent decisions of the Supreme Court of Canada offer no solutions

[21] Federal Court Act, STATS. CAN. 1970-71-72, c.1.

[22] Quebec North Shore Paper Co. v. Canadian Pacific [1977] 2 S.C.R. 1054.

[23] McNamara Construction v. The Queen [1977] 2 S.C.R. 655.

to the problems of joining claims and parties where some are governed by provincial law and some by federal law and some by both.[24]

The reason why Canada does not have a well developed body of law defining the limits of federal jurisdiction is that until recently it has not been needed. In the absence of any contrary provision, the provincial courts have plenary jurisdiction over all classes of cases, whether governed by provincial law, federal law, or a mixture of the two. From all accounts it appears that the administration of justice proceeded perfectly satisfactorily from 1867 to 1875 when there were no federal courts at all. After the Exchequer Court was established in 1875 its jurisdiction was so narrow and specialized that most issues arising under federal law continued to be resolved in the provincial courts, and the opportunities for jurisdictional conflict were limited. The establishment of the Federal Court of Canada with its broader jurisdiction is an important step in the direction of the dual court system of the United States. While opinions differ on the desirability of this development, my own view is that it is a retrograde step. Already, as one would expect, there has been a considerable volume of litigation on whether a particular action, or a particular claim, or a particular party, is in the right court; and the courts have so far been resolving these cases without any recourse to the American doctrines of pendent and ancillary jurisdiction so that multiple litigation of a single controversy is often going to be necessary.

It is perhaps worth repeating, however, that the broadening or narrowing of federal jurisdiction affects only the jurisdiction of the Federal Court of Canada. The Supreme Court of Canada is not confined to federal jurisdiction. It is a "general court of appeal for Canada."[25]

V. Appellate Jurisdiction of Court

A. *Scope*

The jurisdiction of the Supreme Court of Canada is defined in the federal Supreme Court Act. Section 35 of the Act fully reflects the breadth of jurisdiction permitted by the B.N.A. Act. It provides:

> The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada.

B. *Civil Matters*

In civil matters, before 1975 there was an appeal as of right in cases where the amount in controversy exceeded $10,000. This loaded the Court's docket with cases which were unimportant except to the parties. In 1975 this appeal as of right was abolished.[26] Most civil appeals now

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[24] P.W. Hogg, *Case Comment* (1977) 55 Can. Bar Rev. 550.

[25] Page 41 above.

[26] Stats. Can. 1974-75-76, c. 18, proclaimed in force January 27, 1975.

require leave.[27]

In the case of appeals from provincial courts of appeal, leave can be granted by the provincial court of appeal itself "where, in the opinion of that court, the question involved in the appeal is one which ought to be submitted to the Supreme Court of Canada."[28] The Federal Court of Appeal has an identically expressed power to grant leave to appeal from its own decisions.[29] The Federal Court of Appeal recently emphasized that its power to grant leave should be exercised only when the question was one which "obviously" ought to be submitted to the Supreme Court of Canada for decision. The court suggested three cases where that test would be satisfied: (1) where the question was one of the constitutional validity of a statute under the B.N.A. Act; (2) where the question was one of the overriding application to a statute of the Canadian Bill of Rights; and (3) where the question had been the subject of inconsistent decisions of the Supreme Court of Canada (or Privy Council) or of provincial courts of appeal.[30] In practice leave to appeal to the Supreme Court of Canada is rarely granted by either a provincial court of appeal or the Federal Court of Appeal.[31]

The important power to grant leave is the power possessed by the Supreme Court of Canada itself. It has this power:

> where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it. . . .[32]

Because the Court does not give reasons for the grant or denial of leave to appeal, and because the process has not been systematically studied, there is not yet any body of jurisprudence on the kinds of considerations which the Court takes into account in determining applications for leave. Generally speaking, however, the broader the significance of the case the more likely it is that leave will be granted. Appeals raising constitutional

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[27] So far as I can work out, the only exceptions are (1) an appeal from the decision of a provincial court of appeal on a "reference" (references are discussed later in this paper, p. 50, below) by the provincial government: Supreme Court Act, s.37; and (2) an appeal from the decision of the Federal Court of Appeal in the case of a controversy between Canada and a province or between two or more provinces: Federal Court Act, s.32. In these two cases the appeal lies as of right.

[28] Supreme Court Act, s.38.

[29] Federal Court Act, s.31(2).

[30] Minister of National Revenue v. Creative Shoes [1972] F.C. 1425, 1428 (F.C.A.).

[31] B.A. Crane, *Practice Note: Civil Appeals to the Supreme Court of Canada*, 15 OSGOODE HALL L.J. 389, 390 (1977).

[32] Supreme Court Act, s.41(1) (as substituted by the 1975 amendment); Federal Court Act, s.31(3) (as substituted by the 1975 amendment); the quoted language is identical in each of the two provisions.

or civil liberties issues are likely to receive leave. The interpretation of an important federal statute, or of a statute which has its counterparts in other provinces, or of an important point of common law, or of a will or contract which is a standard form, are more likely to receive leave than a unique statute or contract or unusual problem or a fact-dominated case which may lack the element of public importance even if a large sum of money is at stake.[33] It is generally understood that a denial of leave to appeal does not imply that the leave-denying panel of the Supreme Court thought that the lower decision was rightly decided.

C. *Criminal Matters*

Criminal cases in Canada are tried in the provincial courts, despite the fact that the "criminal law" is a federal responsibility under the B.N.A. Act, s.91(27). There is a federally-enacted Criminal Code[34] which enacts a uniform body of criminal law for the entire country. The Criminal Code makes provision for appeals in criminal matters from the provincial courts of appeal to the Supreme Court of Canada. There is an appeal as of right in the following cases:

(1) a person denied habeas corpus by the provincial court of appeal may appeal to the Supreme Court of Canada;[35]
(2) a person acquitted of an indictable offence whose acquittal is set aside by the provincial court of appeal (or a person tried jointly with such a person and convicted) may appeal "on a question of law";[36]
(3) a person convicted of an indictable offence whose conviction is affirmed by the provincial court of appeal may appeal "on any question of law on which a judge of the court of appeal dissents";[37]
(4) a person found not guilty on account of insanity or unfit to stand trial on account of insanity may appeal "on any question of law on which a judge of the court of appeal dissents";[38] and
(5) the Attorney General has the right to appeal from decisions of the provincial court of appeal, setting aside a conviction, or affirming an acquittal, or affirming a verdict of unfitness to stand trial on account of insanity, "on any question of law on which a judge of the court of appeal dissents."[39]

It will be noticed that the right of appeal in cases (3), (4) and (5), above, depends upon the existence of a dissenting opinion on a question of law in the provincial court of appeal. Where the question of law exists, but it has not attracted a dissenting opinion in the provincial court of

[33] B.A. Crane, *supra* note 31 at 390-92.
[34] Criminal Code, REV. STATS. CAN. 1970, c. C-34.
[35] *Id.* s.719(3).
[36] *Id.* s.618(2).
[37] *Id.* s.618(1)(a).
[38] *Id.* s.620.
[39] *Id.* s.621.

appeal, then an appeal lies only with the leave of the Supreme Court of Canada.[40] This appeal with leave lies only in the three cases stipulated ((3), (4) and (5), above) and only on a "question of law." Needless to say, there is a body of jurisprudence on what constitutes a "question of law."[41] These provisions (unlike the—admittedly vague—provisions regarding civil appeals)[42] do not stipulate the grounds upon which leave should be granted or denied, and the court does not give reasons for a grant or denial of leave, so that there is no case law on the point.

D. *Leave Applications*

The foregoing account shows that the bulk of the Supreme Court of Canada's appellate jurisdiction in civil matters, and much of its jurisdiction in criminal matters, is now discretionary. The Court's discretion is not exercised on a petition for certiorari, as is the discretion of the American Court. The Canadian Court's discretion is exercised on an application for leave to appeal. The application takes the form of a notice of motion, which is a short simple document requesting the Court to grant leave to appeal, and briefly stating the grounds for the request.[43] The notice of motion is often accompanied by an affidavit in which facts which do not appear in the record of the courts below, but which bear on the public importance of the case, are brought out, for example, the fact that a contract in issue is a standard form which will affect a number of commercial transactions. The record of proceedings in the courts below, including the opinions rendered, also accompanies the notice of motion. Finally, counsel for the applicant will file a factum (or brief) summarizing the legal argument.[44] Sometimes a factum in reply is filed by the respondent, although this is not required by the rules. The factum is usually short—about twenty letter-sized, double-spaced pages would be typical.

The application for leave to appeal is heard by a panel of three of the Court's nine Judges. I have already explained that the Court is not obliged to sit as a full bench of nine Judges, and that ordinarily five Judges constitute a quorum.[45] However, three Judges constitute a quorum to dispose of applications for leave to appeal,[46] and the practice is to sit in panels of three Judges for that purpose. The panel will hear oral argument by counsel for the parties, but each counsel is limited to fifteen

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[40] *Id.* ss.618, 620, 621.

[41] MARTIN'S ANNUAL CRIMINAL CODE 1978, 529-31 (Canada Law Book, Agincourt, Ont. 1978).

[42] Page 47, above.

[43] Rules of the Supreme Court of Canada, R. 552.

[44] *See generally id.* at R. 55.

[45] Page 39, above.

[46] Supreme Court Act, s.45. Contrast the position in the United States where petitions for certiorari are considered by all Justices, although there is no oral hearing, and a petition is granted on the affirmative votes of four of the nine Justices.

[47] Rules of the Supreme Court of Canada, R. 56(5).

minutes, with the applicant allowed a further five minutes for reply.[47] This contrasts with the complete absence of time limits on counsel for the oral argument of an actual appeal (or reference). In practice, however, the fifteen-minute time limit is not strictly enforced.

Since the amendment to the rules in 1975, which abolished most mandatory appeals in civil cases (although not in criminal cases), the numbers of applications for leave to appeal have been as follows:

Year	*Dismissed*	*Granted*	*Total Heard*
1975	198(69.7%)	86(30.3%)	284
1976	228(68.5%)	105(31.5%)	333
1977	235(71.7%)	93(28.3%)	328
1978	265(73.2%)	97(26.8%)	362

These figures, which were supplied to me by the Registrar of the Court, indicate that there has been an increase in the number of applications for leave, and a decline in the proportion of applications granted. However, it will require the passage of a few more years before any trends can be noted with confidence. I have already mentioned that reasons are not given for the disposition of an application for leave to appeal, and that no systematic body of jurisprudence has developed on the grounds upon which leave will be granted.[48]

VI. Reference Jurisdiction

A. *Federal References*

The Supreme Court Act imposes on the Court the function of giving advisory opinions on questions referred to the Court by the federal government. The relevant provision is s.55(1):

> Important questions of law or fact concerning
> (a) the interpretation of the *British North America Acts;*
> (b) the constitutionality or interpretation of any federal or provincial legislation;
> (c) the appellate jurisdiction as to educational matters, by the *British North America Act, 1867,* or by any other Act or law vested in the Governor in Council;
> (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised; or
> (e) any other matter, whether or not in the opinion of the Court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;
>
> may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question concerning any of the mat-

[48] Pages 47, 49 above.

ters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question.

It will be noticed that the enumerated questions mainly contemplate constitutional questions, but are not limited to constitutional questions. In practice references of non-constitutional questions are very rare. The questions which may be referred are not confined to issues concerning federal legislation or federal powers. The constitutionality of a provincial statute could be referred, for example, and this happens from time to time.

The only body which can direct a reference to the Court is the "Governor in Council." This phrase means Canada's Governor General and Privy Council, which stand at the formal apex of Canada's federal government; in practice, these bodies are only ceremonial; executive power is wielded by the Prime Minister and his cabinet—the government of the day. A reference to the Governor in Council is therefore legislative jargon for the federal executive. The reference procedure is therefore a privilege open only to government. A private individual or corporation or other body cannot direct a reference to the Court.[49]

B. *Provincial References*

A provincial government has no power to direct a reference to the Supreme Court of Canada. However, each of the ten provinces has enacted legislation permitting the provincial government to direct a reference to the provincial court of appeal.[50] Each provincial law is broadly framed, allowing the constitutionality of federal laws as well as provincial laws to be referred, as well as nonconstitutional questions. Following the pattern of the federal legislation, each provincial law confines the power to direct a reference to the provincial government. A provincial reference will secure an advisory opinion from the provincial court of appeal. However, when the provincial court of appeal has rendered an opinion on a reference (as opposed to an actual case), there is an appeal as of right to the Supreme Court of Canada.[51] This right to appeal without leave means in effect that the provincial governments enjoy the same privilege as the federal government in being able to secure a ruling from the Supreme Court of Canada on a controverted point.

C. *Constitutionality*

The rendering of advisory opinions to government is not traditionally a judicial function for two reasons. First, it lacks the adversarial and con-

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[49] A second kind of reference, authorized by the Supreme Court Act, s.56, is the reference of a private bill by the Senate or House of Commons of the federal Parliament. I do not know of any instance of this power being exercised.

[50] For details, see B.L. STRAYER, JUDICIAL REVIEW OF LEGISLATION IN CANADA ch. 7 (University of Toronto Press, Toronto, Ont., 1968).

[51] Note 27 *supra*.

crete character of a genuine controversy; and, secondly, it is a function normally undertaken by the executive branch of government, specifically, the Attorney General. In Australia the High Court of Australia has refused to render advisory opinions on the ground that it is a non-judicial function.[52] And the Supreme Court of the United States has informally indicated a similar constitutional objection to the function—an objection which is undoubtedly consistent with the case law which surrounds the requirement of a "case" or a "controversy" in Article III, § 2 of the Constitution of the United States.[53]

It would not have been surprising if the Canadian courts had held that the rendering of advisory opinions was precluded by the B.N.A. Act's description of the Court in s.101 as "a general court of appeal for Canada." When the point was litigated up to the Privy Council in the *Reference Appeal* (1912)[54] the reference statute was upheld. Their Lordships acknowledged that the function was not a judicial one, and emphasized that "the answers are only advisory and will have no more effect than the opinions of the law officers," but their Lordships held nevertheless that the function could be conferred by statute on the Court. This decision is often taken as authority for the proposition that no separation-of-powers doctrine is to be read into the B.N.A. Act.[55] The provincial reference statutes seem never to have been squarely challenged, but have always been accepted as valid.[56]

D. *Advisory Character*

If the Court's answer to a question posed on a reference is "advisory" only, then it is not binding even on the parties to the reference, and it is not of the same precedential weight as an opinion in an actual case. This is certainly the blackletter law which is repeated from time to time. But there do not seem to be any recorded instances where a reference opinion was disregarded by the parties, or where it was not followed by a subsequent court on the ground of its advisory character. In practice reference opinions are treated in the same way as other judicial opinions.

E. *Constitutional Adjudication by Reference*

As noted earlier, the reference procedure is used mainly for constitutional cases. The majority of constitutional cases decided by the Supreme Court of Canada still arise out of a concrete case or controversy, but the reference procedure accounts for a significant minority. From the time of

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[52] Re Judiciary and Navigation Act, 29 C.L.R. 257 (1921).

[53] L. H. TRIBE, AMERICAN CONSTITUTIONAL LAW 56 (Foundation Press, Mineola, New York, 1978).

[54] A.-G. Ont. v. A.-G. Can. (Reference Appeal) [1912] A.C. 571 (P.C.).

[55] HOGG, *supra* note 14, at 129, although, as there noted, separation-of-powers values underlie other judge-made doctrines of Canadian constitutional law.

[56] *Id.* at 130 n.81.

confederation (1867) to 1966 one-third of all distribution-of-powers cases decided by the Privy Council (up to 1949) or Supreme Court of Canada originated as references.[57] Since 1966 by my count this proportion has declined to one-tenth.[58] It is possible to speculate that the decline in the proportion of references is caused at least in part by increased resort by federal and provincial governments to direct intergovernmental negotiations as the means of settling constitutional disputes. Another factor is the increase in the number of constitutional challenges brought by private parties,[59] a development which has been facilitated by the Canadian courts' acceptance of the action for a declaratory judgment as a means of constitutional challenge, and by liberal rules as to standing.[60]

F. *Early Resolution of Constitutional Doubt*

The primary advantage of the reference procedure is that it enables a government to obtain an early and (for practical purposes) authoritative ruling on the constitutionality of a legislative programme. Sometimes questions of law are referred in advance of the drafting of legislation; sometimes draft legislation is referred before it is enacted; sometimes a statute is referred shortly after its enactment; often a statute is referred after several private proceedings challenging its constitutionality promise a prolonged period of uncertainty as the litigation slowly works its way up the provincial or federal court system. The reference procedure enables an early resolution of the constitutional doubt.

G. *Abstractness*

The primary disadvantage of the reference procedure is that it often presents the Court with a relatively abstract question divorced from the factual setting which would be present in a concrete case. It has been a common and justified complaint that some of the opinions rendered in references have propounded doctrine which was too general and abstract to provide a satisfactory rule. A number of the most important Canadian cases are open to criticism on this ground.[61]

The most recent reference decided by the Supreme Court of Canada provides a simple example. The case concerned the validity of a complex scheme for regulating the market in eggs which had been enacted by complementary federal and provincial legislation. Large quantities of factual information were placed before the Court in the "case."[62] Oral argument

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[57] The exact figure is 68 out of 197: STRAYER, *supra* note 50, at 182.

[58] Distribution-of-powers cases reported from [1967] S.C.R. to [1978] 2 S.C.R. inclusive numbered 50 and only 5 were references.

[59] Page 44, above.

[60] Thorson v. A.-G. Can. [1975] 1 S.C.R. 138; Nova Scotia Bd. of Censors v. McNeil [1976] 2 S.C.R. 265.

[61] See the analysis by STRAYER, *supra* note 50 at 194-199.

[62] Page 54, below.

occupied four days. The Court took six months to write two concurring opinions. But when the opinions are analyzed, they are found to be unclear as to whether or not the levies imposed on egg producers by a federal agency were wholly valid.[63] Since this was one of the main points in dispute, which had led the Ontario government to direct the reference in the first place, the opinions were seriously deficient. An action by the federal agency to collect unpaid levies, or a suit by a dissident producer to enjoin their collection, would have yielded a forthright outcome.[64]

H. *Proof of Facts*

It goes without saying that in constitutional cases factual issues often have to be resolved by the Court. Some constitutional powers are exercisable only if certain factual preconditions are present, for example, federal power is more extensive in an emergency, and over matters which are national rather than local in their dimensions, and over trade which is interprovincial rather than intraprovincial. In addition, it is often difficult to understand a piece of legislation, and therefore to characterize it for distribution-of-powers purposes, unless its actual effects are understood. Also, the factual issues which have been raised in applying the Fourteenth Amendment in the United States, for example, to determine whether the provision of separate facilities for blacks and whites is in compliance with equal protection, are potentially applicable in Canada too, although the Canadian Bill of Rights applies only to federal laws and has not yet accumulated a very sophisticated jurisprudence.

Proof of facts in constitutional cases is often difficult—in the United States as well as in Canada—especially where the facts are of a "legislative" as opposed to an "adjudicative" character.[65] But in a reference the difficulty is compounded by the fact that a reference originates in a normally appellate court: there is no trial, and no other procedure enabling evidence to be adduced. A statement of facts is sometimes included in the "order of reference," which is the document which poses the questions which the government wishes the Court to answer. Sometimes, too, other material of a factual character is filed as part of the "case" which consists of the documents which are filed for consideration by the Court. Most often, however, no facts are recited in the order of reference, and no other factual material is filed as part of the case; when such facts are recited or factual material filed, the facts are open to the criticism that they have been selected by only one of the parties, namely, the party which drafted the order of reference (always the referring government) or the party which prepared the case (usually the referring government). It would be possible for the Supreme Court of Canada (or a provincial court of ap-

[63] Reference re Agricultural Products Marketing Act [1978] 2 S.C.R. 1198.

[64] The former proceeding has now been commenced.

[65] K.C. DAVIS, ADMINISTRATIVE LAW TREATISE vol. 2 s.12:3 (K.C. Davis Pub. Co., San Diego, Calif., 2d ed., 1979).

peal) to direct that oral testimony be given before it, and the court has once, sitting as a full bench, heard oral testimony.[66] More practical is the method employed by the Supreme Court of the United States, when exercising original jurisdiction, of delegating the task of hearing oral testimony to a hearing officer,[67] but this device seems to have been used only once in the Supreme Court of Canada.[68] A final possibility is the introduction of factual material in the factums (or briefs) of counsel. Traditionally (and according to the Rules of the Supreme Court of Canada, rule 29) the factums are summaries of legal argument, not vehicles for the introduction of new facts, but from time to time "Brandeis briefs" have been filed in which empirical data has been included in or appended to the factum. The occasions on which this has occurred have mostly been unremarked by the Court and unnoticed by scholars, but in the recent *Anti-Inflation Reference* (1976),[69] where one of the issues was whether inflation in the 1970s had become an emergency justifying the exercise of special federal emergency powers, the Court gave formal approval, in advance of the hearing, to the inclusion in the factums of economic evidence on the nature and gravity of inflation, and the Court referred to the evidence in the opinions which were written. The use of the factums as the means for introducing facts in references may become more prevalent as a result of this case.[70]

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[66] Re Truscott [1967] S.C.R. 309 (a reference, but not a constitutional reference).

[67] *E.g.*, Arizona v. California 373 U.S. 546 (1963).

[68] Re Eskimos [1939] S.C.R. 104 (the issue being whether "Eskimos" (Inuit) fell within the word "Indians" in the B.N.A. Act).

[69] Re Anti-Inflation Act [1976] 2 S.C.R. 373.

[70] For fuller discussion, see STRAYER, *supra* note 50, ch. 6; P.W. Hogg, *Proof of Facts in Constitutional Cases*, 26 U. TORONTO L.J. 386 (1976).

I am indebted to my colleague Professor W.J. Braithwaite for reading and commenting on an earlier draft of this paper.

Questions for the Panel on Jurisdiction

William Harwick: Professor Gressman, is there a conceptual jurisdictional problem with the Court mandating upon the general population which is not a party to the case or controversy, compliance with the broad remedy employed for historically established discrimination? I am asking the question with reference to court ordered busing. Professor Hogg, I believe you indicated that the Canadian Court would have power to review such a question by reference. Is this correct?

Professor Gressman: I understand your question to be whether it is consistent with the Court's jurisdiction to render broad decisions with respect to large groups of the public that are not actually represented before the Court. The answer depends upon how the issue is framed, particularly whether the case comes before the Court in the form of a class action or whether a party such as a Board of Education, or a city or a state government which presumably represents a large mass of individuals is the named party. In other words, I think as long as the case technically sits within the requirements of a case or controversy, the fact that it may affect thousands if not millions of citizens by virtue of the decree that is rendered does not present a jurisdictional problem.

It may be a matter of policy or constitutional judgment but I do not see any jurisdictional problem other than whether the particular matter comes up in the context of a justiciable controversy.

Professor Hogg: It is correct that in Canada the reference procedure would overcome any problems of standing that might otherwise arise in enabling private litigants to raise the question which has been referred. Of course the reference procedure may only be initiated by the government. If the government does not see fit to refer the question there will be no resolution of the issue for a group that is trying to obtain a constitutional ruling.

Sometimes by a series of nuisance litigations the government may be persuaded to direct a reference in order to obviate the possibility of thirty or forty cases milling around through the various court systems and creating a lot of uncertainty and difficulty. I think one could add to that the proposition that the Supreme Court of Canada has, in a series of recent cases, greatly liberalized the requirements for standing for a private party in which the only relief sought is a declaratory judgment that a statute is unconstitutional. The Court has accepted private causes of action in cases where the party is raising an issue which otherwise could not be litigated. In other words, if there is no person with obvious standing in the suit, a general member of the public, but essentially a member of the public who is affected by the statute in the same way as many other people, will have standing to sue. The standing question rarely defeats constitutional challenge in Canada.

Bryan Gray: My question is to Professor Gressman. When Canadian lawyers read America Supreme Court cases we are sometimes bewildered by the Court's application of the the Constitution to matters which do

not really seem to fall within the subject matter of the United States Constitution. It seems that the Court occasionally stretches the Constitution to decide a question of tort law, such as libel and slander in the case of *New York Times v. Sullivan*, because the only way it can do so is to find a constitutional issue. From a Canadian lawyer's standpoint, this jurisdictional position has posed difficult restraints upon the United States Court which the Canadian Court has been spared because the Canadian Supreme Court can review general questions of law. And because the Canadian Court can do this, it can leave the Constitution to the interpretation of true constitutional questions. Is this thesis correct?

Professor Gressman: It is a complicated problem. One response is that the manner in which the Supreme Court addresses a constitutional problem is dependent in part upon how the issue was presented by the parties. The Court is not free to go out and make a declaration about tort law or about any constitutional proposition if the parties have not properly raised the issue in constitutional terms with sufficient facts on which to base a decision on that issue. This is part of the judicial process.

Mr. Sullivan: The issue has to be raised in constitutional terms for the Court to hear it and if the Supreme Court of the United States wants to hear it they will have to find a constitutional question.

Professor Gressman: The Court does not find constitutional questions. The Court decides questions that are raised and presented to it. The Court does not go looking for constitutional questions. There is a long tradition that the Court will not decide a constitutional question until it is absolutely forced to by the facts and by the parties. They do not have freedom to go looking for decisions to make without a case properly having been presented in a concrete controversy.

Professor Hogg: I think perhaps the question reflects a difference in the perceived limits of the judicial process between the two countries, a difference which springs from the fact that the United States has always had, or at least since the first ten amendments were ratified, a Bill of Rights. This has made a number of issues matters for constitutional determination in the United States which have never been matters for constitutional determination in Canada, England, Australia or New Zealand. For example, decisions like apportionment cases, school desegregation cases leading to busing and abortion cases simply have no counterparts in any of those common law countries. I think it is probably the presence of the Bill of Rights rather than any special difference in the reasoning process of the Supreme Court of the United States which makes its decision perhaps a little odd to the non-American observer.

Mr. McFadden: With the explosion in the number of proposals for a National Court of Appeals, which solution would you advocate?

Professor Gressman: These proposals have been discussed as you doubtlessly know for the last ten years. They seem to be coalescing at the present time around the plan which I believe Senator Kennedy has proposed in the Senate for the creation of a new kind of intermediate Court of Appeals which is described variously as a National Court of Appeals or

a Federal Circuit Court of Appeals. The court would have jurisdiction over a combination of certain specialized subject matter cases such as tax cases, claims against the United States, customs cases, patent cases, perhaps some administrative law cases and administrative review proceedings. The proposal would combine review of all of these subjects in a specialized Federal Court and take jurisdiction away from the other circuit courts that presently exist. This centralization of review would eliminate one of the problems that critics of the system have seen. The problem is that at present by dispersing many of these matters among the various circuit courts of appeals a number of conflicts of decisions are created from time to time and many of those conflicts do not have sufficient importance beyond the conflict itself to warrant attention and correction by the Supreme Court. This is felt to be a serious defect in our system. Therefore I think it would be quite satisfactory to my way of thinking to create the specialized court in the areas where conflicts have arisen. The federal system would thereby attain a uniform single court interpretation of these often difficult and complex matters with no possibility of conflicts with any other court. The decision of the specialized court would, of course, be left subject to certiorari review by the Supreme Court. That essentially is what Senator Kennedy has proposed and the way in which the problem is presently being addressed. I think it is the best way.

Seth Jacobs: Professor Hogg, if reference cases are truly only advisory and carry no precedential value, what sort of deference would be given to the Canadian Supreme Court's determination in a reference case when and if another issue involving the case previously addressed comes before the Supreme Court on appeal?

Professor Hogg: The hypothetical thesis is not really correct in that the original 1912 decision of the Privy Council which accepted the reference procedure held the reference opinion will have no more weight than the opinion of a law officer of the Crown. Just the same kind of weight that is given an internal opinion in government. Nevertheless, in fact, the reference cases have not had that effect at all. No one would consider relitigating a question which had only a few years earlier been determined by the Supreme Court of Canada on a reference because obviously they are going to decide the question the same way.

Moreover, in practice they do treat the opinion as having the same weight as an opinion in a concrete controversy. In argument there is never any emphasis placed on the fact that a decision is a reference, suggesting it should be given less weight. Canadian lawyers do not think in those terms.