Law Clerking at the Supreme Court of Canada

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There are ordinarily nine legal secretaries (law clerks) at the Supreme Court of Canada, allotted one per Justice, serving either one or two year terms. The relationship between Judge and clerk is usually informal; the dialogue is candid. Naturally, they discuss the merits of the cases coming up for hearing; but, additionally, the conversation can be about more general jurisprudential themes, such as the appropriate role for the Supreme Court of Canada, or the quality of the judgments emanating from the Court. Accordingly, all communications are confidential. The clerk is administered an oath of office and acts on the implicit understanding that the Judge's words are meant for the clerk's ears alone.

Let me impose one qualification. The Judges promote the clerks' practice of discussing cases amongst themselves. Indeed, the working quarters encourage this flow of ideas: all the desks are situated in a single, large, high-ceilinged room, separated only by book shelves acting as partitions. These collaborations inevitably cause the clerks to reveal approaches suggested by or concerns voiced by the Judges. But the employers' thoughts are disclosed only to aid the fuller discussion of the case and the better formulation of a legal solution. This limited sharing of the judicial confidence is ordinarily permissible.

American journalists have complained that the law clerks at the Supreme Court of the United States are unnecessarily aloof and secretive: "This group of Government employes [sic] shows little willingness to discuss the work that they do or even to throw light on their own backgrounds." Since the date of this criticism, legal periodicals in the United States have boasted a

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1 "The question just what to call the law clerk has always been troublesome. The terms 'secretary' and 'clerk' suggest a typist or file clerk, and at one time there may have been good reason to use this designation since the tasks in the beginning were indeed on the secretarial side." P. Baier, The Law Clerks: Profile of an Institution (1973), 26 Vand. L. Rev. 1125 at 1130. Other appellations include "law assistant", "research aid" and "legal assistant". The official title at the Supreme Court of Canada is "legal secretary", but the phrase "law clerk", although a misnomer, is widely used, probably because it conveys a sense of institutional tradition.

2 Mr. Justice Judson did not have a law clerk during the 1974-75 year.

3 The Bright Young Men Behind the Bench, U.S. News and World Report 45 (July 12, 1957).
series of articles on clerking, some describing the clerk's role,4 others assessing the institution's juridical contribution,5 and many, replete with anecdotes, simply reflecting on a memorable year.6

Contrariwise, the Canadian public is uninformed about the performance and the function of the law clerks at the Supreme Court of Canada. Journalists have not publicized the institution; the professional literature does not abound in expositions by either legal academics or former clerks.7 At best, the occasional job-seeking student will ask a clerk to explain the nature of the employment.

It is time that someone impressed on the public, and on the legal community in particular, the existence and potential of the clerkship institution. My present purpose, a modest one,8 is to detail briefly the services that the clerk actually does perform, and to urge recognition for and expansion of the institution.

A. THE ROLE OF THE LAW CLERK

1. Preparation of “bench memoranda”

Each Justice uses his law clerk differently. Some Judges prefer to have their clerks do in-depth research on a limited number of cases after (or before) oral hearing. Others, however, solicit the clerk's impressions of each case prior to the hearing. Ordinarily, this latter group of clerks will prepare a memorandum of fact and law, which is known informally as a “bench memo” since the Justice will carry it with him onto the bench for purposes of reference.

Certain materials are filed with the Court for the scrutiny of the Justices and the clerks. The Case on Appeal is a bound volume containing all relevant pleadings and orders, evidence, exhibits and judgments from the courts below. Each party to the appeal also files a factum which contains a concise statement of facts, an identification of the issues in dispute, and the legal argument supported by legal authority. The facta average about thirty pages in length. The clerk begins by reading the lower court judgments which detail the facts and

5 E.g., G. Braden, The Value of Law Clerks (1953), 24 Miss. L.J. 295 and particularly Baier, supra, note 1.
7 In fact, the only Canadian article I could find was a three page paper by Brian Crane entitled Law Clerks for Canadian Judges (1966), 9 Can. B.J. 373.
8 Others have exhaustively detailed the history and etiology of the institution: C. Newland, Personal Assistants to Supreme Court Justices: The Law Clerks (1961), 40 Oregon L. Rev. 299 and Baier, supra, note 1 at 1129-36.
which usually advance the competing legal theories vying for judicial recognition. Then the clerk turns to the parties' facts, critically examining the authorities and arguments urged by the litigants, trying to assess their relative cogency and to identify any flaws. The equities of the case must also be appreciated. Where an important fact is still in dispute, the clerk will have to pore over the evidence and exhibits found in the Case on Appeal. In a criminal jury trial the addresses and charge to the jury often merit close attention.

The "bench memo" itself will commence with a precis of the lower court judgments and the contentions of the appellant and respondent. It will thereafter proceed to identify and enunciate the essence of the dispute, analyzing the competing positions of the parties. The memorandum will suggest approaches that counsel have failed to develop and will cite cases that the adversaries have neglected to consider. The length of the memorandum is variable, depending on the complexity and importance of the case, and the number of issues raised by counsel in their facts. It can run anywhere from two to twenty foolscap pages. Legal research at this stage is usually confined to a reading of the main authorities cited in the facts and referred to in the lower court judgments. There is no time to compose a thorough, scholarly brief: the Court hears an average of 1.25 appeals per Court day. The clerk cannot possibly read all the authorities relied on by the parties, often upwards of fifty, or conduct any extensive independent research. Further, it is often unprofitable to engage in time-consuming research at this early date: "During this initial contact with the case, it may appear to the clerk that the issues are complicated... and... that some research in depth is required... Often a clerk will be surprised to see an appeal that seemed to him to be of considerable moment dismissed out of hand as frivolous by the judge."

2. Attendance at the oral hearing

Most of the clerks go to Court fairly regularly to hear renowned counsel present their arguments. Having prepared the "bench memo", the clerk comprehends the nature and significance of the case and senses the apparent strengths and weaknesses of the competing positions. The clerk's observation of counsel does not contribute significantly to the Judge's work although "when the clerk does attend orals, he should be responsible for noting any new citations or authorities not referred to in the briefs, the substance of any new argument not well articulated in the briefs, and any concessions made by

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9 Unfortunately for their cases and clients, counsel repeatedly fail to ascertain the limited jurisdiction of the Supreme Court. Peter Russell quite properly states that "jurisdictional issues are likely to be a threshold question in almost every Supreme Court case". *The Jurisdiction of the Supreme Court of Canada: Present Policies and A Programme For Reform* (1968), 6 Osgoode Hall L.J. 1 at 35.

10 Dorsen, *supra*, note 4 at 268.

11 This is my estimate: M. Herman, *Report to The Chief Justice of Canada*, (unpublished, March 24, 1975).

However Llewellyn notes optimistically that the juridical returns lie in the future:

ex-law clerks ... come out equipped far better than most to build a good appellate argument, with judgment also far better than most about when they lack a reasonable chance to win. Such judgment spells, over the years ahead, a slackening of time-consuming futilities; ... and to the appellate court ... the pleasure of fingering and shaping craftsmanlike materials, and a consequent speeding and smoothing of judicial labors.14

Therefore, for the clerk hoping to practice appellate litigation the exposure is of inestimable value. They formulate strategies which are compared with counsel’s presentation of the case. The clerk tries to anticipate the questions from the bench and the likely response of counsel. They learn from their own miscalculations — and from the mistakes of the barristers.

3. Participating in the judicial decisions

Following oral argument, the Justices usually meet to give the case preliminary assessment, often reaching tentative conclusions and assigning one or more of their number to prepare draft reasons. The law clerks have no knowledge about the method of proceeding at the Judicial Conference, the Judges maintaining complete secrecy on that score.15 However, it does appear that the Judicial Conference at the Canadian Supreme Court is more casual and less regularized than its American counterpart. This may be partially attributable to two factors. First, the Canadian Supreme Court usually sits in panels of less than nine judges; consequently, the participants at the Judicial Conferences often vary. Group dynamics, compounded by the absence of the Chief Justice, militates against any effective systematization of procedure. Second, the Canadian judicial tradition does not pressure the members of the Court to produce a single, comprehensive majority judgment. There are no institutional expectations that force the majority and minority camps to collaborate with those similarly disposed to fashion a compromised or encompassing opinion.16

Often the Judge is dissatisfied with his own perception or evaluation of a particular case, and will call on his clerk. If the clerk has any advance warning of the meeting with his Judge, he or she will reread the “bench memo” and perhaps attempt some further research. The format of the ensuing discussion between Judge and clerk will depend primarily on the temperament and work habits of the Judge. The Justice may simply ask the clerk to defend the position taken in the “bench memo”, the Judge interrupting to pose questions...
or offer criticism. Alternatively, the Justice may assume the posture of one of the litigants, requesting the clerk to do likewise for the other party: re-enacting the adversarial contest often helps the Judge reach a realistic appreciation of the case. Or, frequently, the Judge will narrate his perceptions of the case, having the clerk act as sounding board and critic. Of course, these techniques are complementary, and during the course of a session, they may all be employed. On occasion, these exchanges will become quite heated; the clerk will stoutly defend his or her view although realizing that the Judge always has the final word.

Formulating legal principles and assessing factual equities with the Justice is an exhilarating experience for the clerk. Watching an accomplished jurist treat and fashion the legal materials in coming to a judicial determination is a revelation: "... You come face to face with the sublime truths of this law job. ... 'Justice is a method; justice is a method by which results are reached. And when that method is followed ... then you have Justice as perfect as man can ever give.'"17

Two precepts remain with the clerk after leaving the Court. First, in virtually all appellate adjudication, there is a very real choice of result. Were the law certain and preordained, counsel would not waste their own effort and their clients' resources by appealing to the Supreme Court of Canada.18 Second, the Judge is often plagued by anxieties and uncertainties in deciding the merits of an appeal. Cardozo, with his customary flair, highlights both these observations in describing his own discovery of the dynamic quality of the law:

I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile.... As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind ... in which principles that have served their day expire, and new principles are born.19

4. **Legal research**

The Justices require their law clerks to conduct in-depth research for two reasons: to satisfy themselves on a point of law, and to gather materials from which to forge a draft opinion. The library facilities at the Canadian Supreme Court are good. The store of primary sources is complete, although the collection of secondary materials is deficient. The clerk starts with the

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17 Baier, *supra*, note 1 at 1162.  
18 K. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed* (1950), 3 Vand. L. Rev. 395 at 396: "The question is: 'Which of the available correct answers will the court select — and why? For since there is always more than one available correct answer, the court always has to select.'"

authorities listed in the facta, but the clerk’s forays inevitably lead him or her farther afield. The Judge’s preferences for certain non-Canadian primary and secondary sources direct the clerk’s research efforts. Legal periodical material is readily received by the Justices, and American case law is considered and applied more often than in the past. The cardinal sin is to omit reference to a pertinent authority of the Supreme Court itself. An inquisitive Judge can make the research job quite time-consuming:

In general, it is the job of the clerk to be eyes and legs for his judge, finding and bringing in useful materials. This can involve an immense amount of work, depending upon how curious the Justice is. It is a legend that Justice Brandeis once asked a clerk to look at every page of every volume of the United States Reports looking for a particular point.

The amount of time that the clerk spends on legal research varies according to the other tasks assigned. Obviously, those clerks who prepare “bench memos” in every case find that they do not have as much time as they would like in doing this research. On the other hand, for those clerks who work on a limited number of appeals only after the oral argument, it is not unusual to spend two or three weeks researching a single case.

Often, this research is quite different than that done by the detached academic. One former clerk has commented: “At first you may find these research demands strange. This is research like no other you have experienced. It follows the decision, not the other way round — you seek out precedent sustaining the judgment, not determining it.”

5. Opinion writing: Preparing draft reasons

Whether the clerk participates in the preparation of the draft judgment depends, once again, on the inclination and the work habits of the Judge, and, to a lesser extent, on the particular Judge-clerk relationship. John Frank’s amusing anecdotes underline the discrepancies in clerk involvement:

The function of the clerks in relation to the writing of the opinions also varies widely. In the early 1940’s, at least, Justice Black wrote the first draft of all his opinions, except that towards the end of the year he would let the youngster try his hand at one first draft of something extremely unimportant. In my own case, the day of glory came when I did the first draft of a lone dissent on a minor point of statutory construction, which the Justice then revised and which no one has ever noticed since. . . . On the other hand, there were rumors that the excellent clerks of Justice Murphy did more of the office writing than was commonly thought proper; . . . The most notorious rumors concern Chief Justice Vinson, who is said to have done all his “writing” with his hands in his pockets,
outlining to his clerks generally what he wanted, and then criticizing this bit or that in a clerk's draft.23

The practice at the Supreme Court of Canada is equally variable. While I was clerking at the Court, one of my colleagues wrote a number of first drafts. However, at the other extreme, some of the Justices did not even submit their draft reasons to their clerks for scrutiny or comment. An interesting technique has on occasion been employed by members of the American Supreme Court. The Judge and the clerk will both prepare draft opinions which are then exchanged and reworked by the other party. Ultimately these efforts are synthesized into a single judgment.24

Pride of authorship and the search for the felicitous phrase prevent extensive delegation of the opinion writing to the law clerks. The Judges' reluctance is not founded solely on aesthetic considerations; they are worried about the accuracy of the judgment and the implications that it may contain. Language itself is protean: diction, syntax and even sentence rhythm can crucially affect the meaning. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."25

6. Editing the draft judgment

This is perhaps the most valuable service that the clerk can perform. As a critical professional reader, the clerk is in an excellent position to assess whether the Judge has clearly and cogently conveyed his meaning:

A well-trained law clerk, especially one who has had considerable law journal experience, can aid his judge in polishing the language of opinions and in spotting ambiguities and other slips that may return to plague the court later. Even a judge who is a precise and clear drafter can use an editor, for the best of us can be misled by our own words and feel sure that what is crystal clear to us is equally clear to all who read.26

Where a clerk has worked closely with the Judge in the preparation of the draft judgment, the clerk's value as a detached and objective reader and critic may be lost. Consequently, some of the Judges at the American Supreme Court call in a second clerk to perform the editing function.27 The clerk as editor eliminates any errors of punctuation and grammar, and will indicate authorities that ought to be included in or deleted from the draft. Suggestions for re-organization of the reasons or for reworking difficult passages are made.

Many hours are spent reading and rereading draft judgments with painstaking care, searching for errors and formulating improvements. Only in the rare instance will the clerk return the draft to the Judge without any recom-

24 *Supra*, note 15.
26 Braden, *supra*, note 5 at 297-98.
27 *Supra*, note 15.
mendation for change. The Justices are quite amenable to the clerks' criticisms and suggestions. In fact, some Judges at the Canadian Supreme Court will not allow their drafts to be circulated to other members of the Court until the reasons have been subjected to the scrutiny of their clerks.

7. Applications for leave to appeal

Appeals come to the Supreme Court of Canada both as of right and by the leave of that Court, the Federal Court and the provincial appellate courts. Applications requesting the leave of the Canadian Supreme Court are heard every other Monday during "Motion Day". On a typical Motion Day, the Court, divided into panels of three, disposes of roughly fifteen applications. Thus, each Justice considers five such motions. Recently, civil appeals as of right were abolished; therefore, in the future there should be substantially more civil leave applications.28

By way of contrast, the United States Supreme Court is inundated weekly with 110 applications for leave to appeal (known as certiorari petitions30). It is physically impossible for each Justice to give full consideration to each petition, yet each Judge must vote on each one. The overwhelming number prevents any oral argument before the Court. In consequence the American law clerks play an indispensable role in screening out the frivolous petitions and directing the Court in choosing those cases which merit close consideration.

The relatively modest number of applications for leave before the Canadian Supreme Court allows each Judge to scrutinize each request without relying on his clerk too heavily. Indeed, the Judge's general juridical experience and sense of the Court give them a decided advantage over the clerk in determining whether leave ought to be granted. Nonetheless, most of the Justices give their clerks the Motion papers to read (consisting of the judgments below, the applicant's Memorandum of Argument and the respondent's Reply) and solicit their opinions. While some of the Justices like to receive a memorandum on these applications, most seem content with their clerks' oral evaluation. Where necessary, the clerk will study the authorities cited by counsel, but the amount of research seldom equals that expended in the preparation of a full "bench memo".

The importance of the process of granting leave to appeal has not yet been fully appreciated:

For a court such as the Supreme Court as the apex of authority in the Canadian judicial system, but with a capacity to adjudicate but a tiny fraction of the country's legal disputes, the selection of the cases it does hear is very nearly as

29 However, preliminary indications, based on statistics available in the office of the Clerk of Process, are that the number of applications for leave to appeal will not increase dramatically in the near future: Herman, supra, note 11 at 4.
30 Based on my conversation with the Clerk of the United States Supreme Court on February 25, 1975.
important as the Court's decisions on the merits. For this gatekeeping activity will
be a prime factor in determining the usefulness of the Court's substantive work.31

The American Supreme Court carefully selects the cases that it will hear, as a
conscious method of controlling and directing the development of the law.32

Of course, the large number of certiorari petitions allows the American Su-
preme Court this opportunity to change the law deliberately and increment-
tally. Additionally, there are still too many cases that come to the Canadian
Supreme Court as of right.

The above list comprehends the main services that the law clerks at the
Supreme Court of Canada perform. There are no "baggage tasks"33 such as
washing cars, procuring food and drink, or assisting in tedious clerical or
secretarial work. Many of the clerks, however, do help their Judges in the
preparation of speeches or manuscripts, usually by collecting data or selecting
law review articles relevant to the given topic. Occasionally there are special
projects assigned. For example, during my clerkship the Chief Justice sent me
to Washington to study the operations and structure of the American Supreme
Court.

Having read of the law clerk's involvement in the many aspects of the
judicial process, the reader may wonder whether the clerk is in fact "in the
category ... of a 'gray eminence' a sort of judicial Rasputin, indeed the
veritable power behind the throne!"34 The clerk does supply the Judge with
a "bench memo", discusses the case with the Judge, engages in extensive post-
hearing research, helps prepare the draft judgment and edits the final product.
Frank, former clerk to Justice Black, overstates the case in asserting: "My
Justice made approximately one thousand decisions, and I had precisely no
influence on any of them."35 A more accurate statement is that of one of the
very first law clerks, serving Justice Grey, who carefully delimited the modest
scope of the influence:

I would also frequently be asked to write an opinion on the cases that had been
assigned to the Judge. I do not wish, however, to give the impression that my work
served for more than a stimulus for the judge's own mind .... my work served
only as a suggestion.36

The "bench memo" and the discussion with the Judge may elicit new ap-
proaches or arguments that had not occurred to the Judge and were not
presented by counsel. But the clerk is certainly not deciding the case; he or
she is merely adding to the mound of judicial data that the Judge must weigh
in reaching a determination.

31 Supra, note 9 at 27.
32 C.f., for example, D. Fowler, The Canadian Bill of Rights — A Compromise
Between Parliamentary and Judicial Supremacy (1973), 21 Amer. J. of Comparative
Law 712 at 736.
33 The expression is that of Baier, supra, note 1 at 1149.
34 H. Abraham, Outside Influences on the Supreme Court of the United States of
35 Frank, supra, note 23 at 118.
In the role of researcher, opinion writer and editor the clerk probably has a more direct influence. But this influence is salutary and above suspicion. A competent law clerk feels responsible for the intellectual rationality of the judicial product.7 The actual decision-making, the quality of the justice, is exclusively for the Judge; but the clerk is concerned with the quality of the judgment, the judicial pronouncement which is the articulation and the embodiment of the judicial decision. The reasons for judgment are, at best, a collaborative effort between Judge and clerk: “The law is not made by judge alone, but by judge and company.”38

There is another type of beneficial influence which the clerks can exert. Young clerks may keep the Judges “rationally responsive to the needs of the day”,60 bringing with them the most recent pedagogy from the law schools. Llewellyn quips: “the recurring and unceasing impact of a young junior in the task is the best medicine yet discovered by man against hardening of a senior’s mind and imagination.”40

In the United States, the clerks, by screening and directing the Court’s attention to certain certiorari applications, are in a position of influence. Justice Rehnquist, while a clerk to Justice Jackson, warns of this “unconscious slanting of materials by clerks”41 according to their political outlooks. Yet Rehnquist himself sees this influence as minor and confined to the certiorari petitions.42 On the other hand, the Canadian law clerks have minimal effect on the decision whether to grant the application for leave to appeal. Clerks lack the Judges’ experience, and knowledge of the Court’s operations. They find it difficult to evaluate the relative importance of many of the applications.

B. THE OPERATION AND EXPANSION OF THE INSTITUTION

1. Selection, training and tenure

Very few law school graduates apply for clerking positions at the Supreme Court of Canada. The total number of persons applying to the six common law Judges for the 1975-76 year was 29 (which number included four applications directed to the Court at large), an average of under five per Justice.43 This number is artificially depressed since the Judges use the law school Deans and the law societies to sound out interested students and to

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7 Baier, supra, note 1 at 1135-36 has similar perceptions. He suggests that the superior quality of judgments emanating from the California and the New York courts is partially attributable to the phalanx of clerks who assist in the drafting.
9 Id.
10 Id., note 14 at 322.
12 Id.: “The spectre of the law clerk as a legal Rasputin, exerting an important influence on the cases actually decided by the Court, may be discarded at once.”
43 I was unable to calculate the number of applications to the civil law Justices with any degree of accuracy.
submit names. These institutions perforce assume a screening function. Nonetheless, the interest shown appears surprisingly low and is probably attributable to the fact that the possibility of clerking at the Supreme Court has not been well publicized. The institution is quite new, the first clerks serving in 1967, which may account for the lack of public knowledge. The American scene provides a graphic contrast: "Many appellate judges have received this year in excess of 100 applications for clerkships, coming from more than 20 schools." This spate of applications has taxed the ingenuity of the judiciary. Chief Justice Warren Burger uses a National Search Committee composed of former clerks and professional friends to choose his clerks. Many judges merely accept the recommendation of the Dean of their favourite law school. Judge Wright of the U.S. Court of Appeals, 9th Circuit, has suggested the creation of a Central Clerkship Bank as a nationwide recruitment service.

As I indicated, the Canadian problem is not screening, but recruitment of highly qualified applicants. The Executive Secretary of the Supreme Court has recently publicized the position by sending to each law school a circular to be posted for student information. Potential clerks may now apply to the Court (and thereafter be assigned to a Judge) or write to a particular Justice about prospective employment. Unfortunately, amelioration is hampered by the failure of some of the provincial law societies to recognize the Supreme Court clerkship as sufficient to satisfy the period under articles. Ontario, Quebec and Nova Scotia accept the clerkship as a complete fulfilment of the articling requirements; the other provinces will only credit the clerk with a percentage of the period required under articles: British Columbia, Alberta, Saskatchewan and New Brunswick with 50%; Manitoba, Prince Edward Island and Newfoundland with 33%. It is difficult to understand why these seven provinces have withheld full accreditation for the year spent clerking. The job offers a unique opportunity to observe and participate in the judicial process, and is invaluable experience for any aspiring litigation lawyer. Admittedly, the clerk is not exposed to many of the realities of the practice of law and is not taught such practicalities as office management or interviewing skills. But it is unfair to view the clerking experience as purely a theoretical and rarified intellectual experience. Adjudication is a practical endeavour. From the documentation in the Case on Appeal and the arguments in the facta, from the admissions and general candour of counsel, and from observing the Judges’ approach to the problem at hand, the clerk gleans a great deal of practical knowledge. Nor is the experience narrow: the clerk is forced to digest both the common and statutory law of numerous Canadian and other jurisdictions on questions of civil and criminal, public and private, and na-

44 Judge E. Wright, Selection, Training and Use of Law Clerks in the United States Courts of Appeal, 63 F.R.D. 464 at 466.
45 Judge Wright observed that "Young contemporaries already in the judge's employ want him to obtain well qualified successors. Often they can make a better analysis of qualifications and personal qualities than can the judge himself." Id. at 470.
46 Id. at 468.
47 The accreditation is given in different fashions in different provinces, including the exercise of a statutory discretion by and special petition to the provincial governing body.
tional and international law. Few articling students can claim that breadth of exposure. Finally, provincial law societies must be made to see that as the profession specializes and diversifies, it is unnecessary to insist on a uniformity of articling experience.

What graduates are most likely to be chosen as clerks at the Supreme Court of Canada? "Some judges ... select their clerks from a particular law school or from one geographic area of the country. Others are more eclectic and do not employ such standards."48 The breakdown at the Supreme Court over the last three years (1973-1976) follows:49

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On the common law side, certain trends are discernible. Mr. Justice Martland seems to take his clerks in rotation from the four established Western law schools. Mr. Justice Ritchie draws all his clerks from Dalhousie. The three Ontario Justices pick exclusively from the Ontario law schools, the Chief Justice confining himself to the two Toronto schools at which he taught. Mr. Justice Dickson is the most eclectic: his three clerks have been from the University of Ottawa (civil law division), the University of Manitoba and Osgoode Hall. Geographic ties obviously exert a strong pull, and many of the Judges appear to confine their selection to one or two law schools. There are four women clerks for the 1975-76 year, while only one woman was so employed in each of the two preceding years. These statistics are not meant to suggest that the Judges will continue to choose their clerks according to the same pattern in the future. Two members of the Court have stressed to me that they will consider applicants from all schools and provinces.

Once the clerk has been selected, there is only on-the-job training. In

48 Dorsen, supra, note 4 at 266.
49 "The Harvard Law School has furnished more law clerks to the Supreme Court and other appellate courts than any other. Over the years it has consistently supplied about one-third of the law clerks to the United States Supreme Court." Id. at 266. The statistics reveal that in Canada there is no comparable hegemony. The relatively large number of University of Ottawa (civil law) clerks is probably attributable to the Institution's combined LL.B.-LL.L. degree. All the Quebec Justices' University of Ottawa (civil law) clerks over the past three years have graduated from the combined program.
the United States, a national training programme, the Law Clerk Institute, was established recently in the School of Law at Louisiana State University. The only session to date, held in August 1972, attracted almost 70 clerks from federal and state appellate courts. A Circuit Training Program has also been suggested for the American federal appellate clerks. Sometimes the American courts stagger the clerking terms, thus ensuring continuity and the presence of a mentor for the novitiate. For these reasons Chief Justice Burger and Justice Powell each have a fourth permanent clerk (the other American Supreme Court Judges have three only). In the absence of these American devices the Canadian clerks initially feel apprehensive and uncertain; but they soon find the way and adjust to the pressures and the pace of the job.

Finally, there is the question of tenure. The Supreme Court Justices from Quebec keep their clerks for two years; the other Judges take on a new clerk each year. The advocates of two year clerkship advance sound arguments. It takes time for the clerk to gain confidence and experience, to adjust to the habits of the Judge and to develop a suitable working relationship with him. Only through time will the Justice acquire confidence in the abilities of the clerk, and allow the clerk to assume greater responsibilities. Only at this point will the clerk begin to be of maximum aid to the employer.

Despite these contentions, the one year clerkship remains preferable. The new clerk is enthusiastic and eager, and may give a fresh perception to the case that the experienced clerk, attuned to the way in which the Judge is likely to approach the immediate case, will gloss over or miss. Relatedly, the clerk, direct from law school, may rejuvenate the Judge, keeping him abreast of the latest academic speculations. And, most importantly, the experience of being a clerk at the Supreme Court of Canada is invaluable and ought to be afforded to as many law graduates as possible.

2. Expanding the institution

The number of clerking posts presently available in Canada is paltry: the Supreme Court of Canada offers nine, while Ontario has eleven (including four at each of the Court of Appeal and the High Court), British Columbia has six (three in each of the Court of Appeal and the Supreme Court), the Quebec Court of Appeal two and Alberta one. The situation in the United States is radically different. For instance, the United States Supreme Court itself employs 29 clerks — equal to the total number of all Canadian posts. "Over 30 clerks serve the California Supreme Court alone.... New York is next with sixteen clerks authorized for the seven judges of the Court of Appeals." The question is, of course, whether more clerks are required in Canada.

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60 Under the aegis of the official consultant to the Institute, Chief Justice Lesinski of the Michigan Court of Appeals, a manual on clerking was prepared. Baier, supra, note 1 at 1127.
61 Supra, note 44 at 471.
62 Limited time and facilities hampered my attempt to gather all the needed information; the statistics may understimate the number of Canadian clerkships.
63 Baier, supra, note 1 at 1134-35.
Clerking spread in the United States as a response to the caseload crisis. It has been a ubiquitous American administrative aid in the attempt to attain the espoused managerial ideal: "the function of judges is to deliver the best quality of justice at the least cost in the shortest time."\(^4\) The institution is now indispensable:

> We have come a long way since Justice Holmes first started the practice of picking a clerk, or secretary as he then was called, each year from the top graduates of the Harvard Law School. The number of courts, state and federal, now following Holmes' custom increases year by year. Considering the value of the institution, this is not surprising, for it is one from which the bench, the bar, the law schools, and the public all profit.\(^5\)

One can only wonder why the Canadian courts have been so slow to realize the value of the clerking institution. The volume of litigation swells each day; the pressures on judicial time are already acute, particularly in the larger urban communities. Certain administrative expedients have helped,\(^6\) but others are required. If the quality of the judicial product is to be maintained, and if the judges are to be left sufficient time to guarantee the calibre of their justice, clerkship programmes must be implemented in other Canadian courts, and those in existence must be expanded.

C. CONCLUSION

I conclude by emphasizing the mutual advantages of the clerkship. For the clerk, the joy and the satisfaction are unparallelled:

> Nothing more delightful than the association and work for a young lawyer interested in the intellectual side of the profession can be imagined. The secretary was asked to do the highest work demanded of a member of the legal profession — that is the same work which a judge of the Supreme Court is called upon to perform.\(^5\)

And the administration of justice receives equal benefit. Consider the tribute to Felix Frankfurter, who popularized the clerkship in the American Supreme Court:

> I should be inclined to rate it as Frankfurter's greatest contribution to our law that his vision, energy and persuasiveness turned this two-judge idiosyncrasy [employing a law clerk] into what shows high possibility of becoming a pervasive American legal institution.\(^6\)

The symbiosis is established: the clerk and the court can both flourish. Let us hope that the Canadian judiciary and legal profession will make up for their tardiness in recognizing and exploiting the relationship.

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\(^5\) Braden, supra, note 5 at 299.
\(^6\) For example, on December 20, 1974 and January 16, 1975, four new Justices were appointed to the Ontario Court of Appeal, increasing the number of positions to 14.
\(^5\) S. Williston, "Horace Gray" in *Great American Lawyers*, (1909) 139 at 158.
\(^6\) Supra, note 14 at 321.