THE TRANSFORMATION OF CANADA'S SUPREME COURT: SIMILARITIES AND CONTRASTS TO THE UNITED STATES

For replication to succeed, the comparisons have to be both similar and different in significant ways. The final courts of appeal in Canada and United States do in fact share certain fundamental characteristics in common, but they also have important procedural differences. The role of Canada's Supreme Court in the public policy process has changed over the past fifty years to the point that its policy importance now approaches that of the U.S. Supreme Court. Three events brought about this change in Canada's Court and heighten the need to understand how it sets its agenda.

First, in 1949, appeals from the Court to Britain's Privy Council were ended. This change affirmed the Court's role as Canada's ultimate appellate court and its authority in developing Canadian law. The second event occurred in 1975 when Parliament amended the Supreme Court Act to limit the right to appeal in civil cases and with a couple of exceptions in criminal cases. For the first time the Court had substantial control over the kinds of cases it wished to hear.[2] The 1975 amendment, analogous to the Judges' Bill of 1923 in America, has not been followed by subsequent extensions of judicial discretion in Canada, however. The Court's agenda authority is not as complete as the U.S. Supreme Court's control over its agenda.[3]

With the advent of the 1975 amendment, applications for leave to appeal quickly became the primary route to the Supreme Court's agenda. In the term prior to 1975, leaves to appeal accounted for 29 percent of the cases heard by Court. Following the reform, in 1976-77, the proportion rose to 60 percent;

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[2] The act eliminated monetary thresholds on the Court's jurisdiction and required leave to appeal in civil cases. In criminal cases, the right to appeal was retained in criminal cases involving indictable offenses when either a court of appeal overturned an acquittal or a court of appeal divided on an issue of law. See Crane and Brown (1993) and Sopinka and Gelowitz (1993) for more technical discussions of the 1975 amendment. Lederman (1979) reviews other proposals under consideration at the time of the reform. The political background of the amendment is described by Snell and Vaughan (1985), Russell (1987) and Bushnell (1992).

[3] An attempt in 1986 to remove the automatic right of appeal in criminal cases which would have given the Court virtually complete authority over its agenda failed in Parliament. See Russell (1987, 345) for a brief sketch of the events surrounding this second reform which did succeed in eliminating the need for oral arguments in leave to appeal applications. Justices may still call for an oral hearing on an application although this is now fairly infrequent. More recently, an omnibus crime bill introduced by the Minister of Justice Rock included an amendment giving the Court discretion to dismiss criminal appeals based on lower court dissents on the law after an oral hearing.