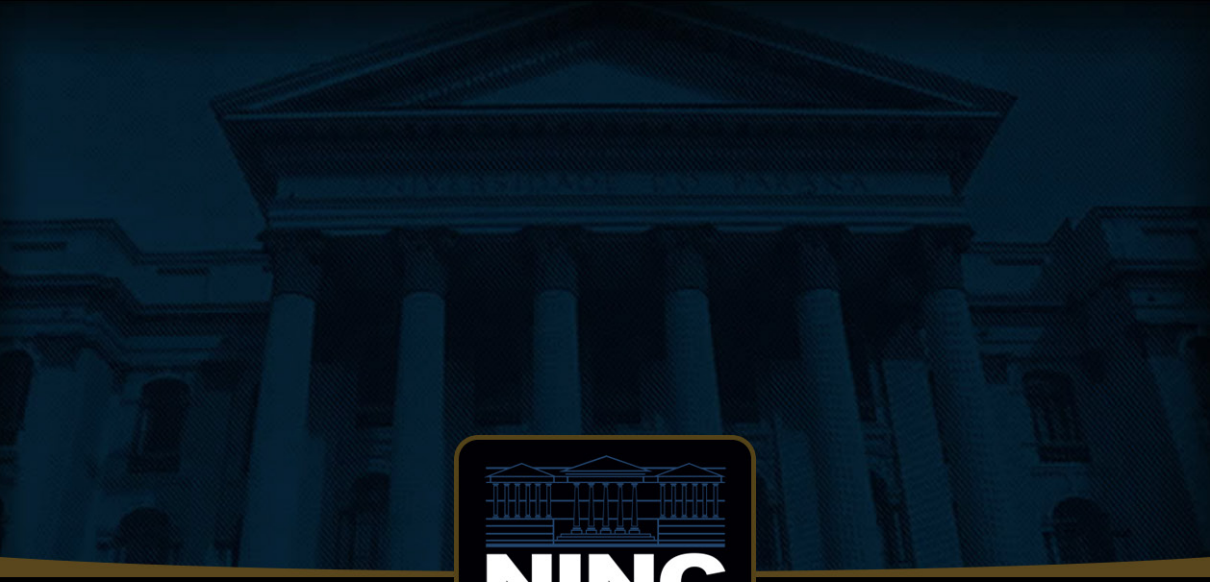

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Articles

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Constitutional Law around the globe: judicial review in Canada and the "leave to appeal" to the Supreme Court

Direito Constitutional ao redor do globo: o controle judicial de constitucionalidade no Canadá e o "leave to appeal" para a Suprema Corte

LUIZ HENRIQUE DINIZ ARAÚJO [I, *]
[I] Universidade Federal de Pernambuco (Recife-PE, Brasil)
luizdinizaraujo@hotmail.com
http://orcid.org/0000-0001-7682-0038
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Abstract

This paper exploring the *leave to appeal* in Canadian Constitutional Law is the third of the series "Constitutional Law Around the Globe". This section of the series focuses on "Judicial Review and the Filters to Access Supreme and Constitutional Courts". The first paper in the row, published in the year 2019, analyzed the Constitutionality Priority Question (Question Prioritaire de Constitutionnalité – QPC) in France. In a second paper, we analyzed the *writ of certiorari* of the U.S. Supreme Court. In this third text, we approach the process according to which the Supreme Court of Canada picks cases from hundreds that reach it every year and the strategies that the Court adopts to select these cases. The paper focuses specifically on Section 41(1) of the Supreme Court Act

Resumo

Este artigo, analisando o leave to appeal no Direito Constitucional Canadense, é o terceiro da série "Direito Constitucional ao Redor do Globo". Esta parte da série tem por foco "O Controle Judicial de Constitucionalidade e Filtros de Acesso a Cortes Constitucionais e Supremas". O primeiro trabalho, publicado no ano de 2019, tratou da Questão Prioritária de Constitucionalidade na França (Question Prioritaire de Constitutionnalité – QPC). Em um segundo artigo, analisou-se o writ of certiorari da Suprema Corte dos Estados Unidos. Neste terceiro texto, aborda-se o processo segundo o qual a Suprema Corte do Canadá seleciona casos entre as centenas que lhe chegam todos os anos, bem como as estratégidas que a Corte adota para filtrar esses casos. O artigo tem por foco específico a Seção 41(1) do Supreme

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[*] Professor de Direito Constitucional da Universidade Federal de Pernambuco (Recife-PE, Brasil). Doutor e Mestre pela Universidade Federal de Pernambuco. Visiting Researcher University of California, Berkeley (California, EUA), com bolsa CAPES. Estágio Pós-Doutoral Université Paris 1 Panthéon-Sorbonne, França (2017). Estágio Pós-Doutoral University of British Columbia, Canadá (2019). Procurador Federal. Professor de Direito Constitucional e Direito Processual Civil da Escola da AGU. Membro do Grupo REC de Estudos Constitucionais. Membro da Associação Norte e Nordeste de Professores de Processo-ANNEP.

(amended in 1975), the *leave to appeal* and their operation in practice.

Court Act (com emenda de 1975), o leave to appeal e a sua utilização na prática constitucional canadense.

Keywords: judicial review; Supreme Court of Canada; selection of cases; Canada Supreme Court Act; leave to appeal.

Palavras-chave*: controle judicial de constitucionalidade; Suprema Corte do Canadá; filtros de acesso; Regulamento da Suprema Corte Canadense; leave to appeal.*

CONTENTS

1. INTRODUCTION

This paper exploring the leave to appeal in Canadian Constitutional Law is the fourth of a series named "Constitutional Law Around the Globe".[1] This section of the series focuses on Judicial Review and the Filters to Access Supreme and Constitutional Courts. The first paper in the row, published in the year 2019, analyzed the Constitutionality Priority Question (Question Prioritaire de Constitutionnalité – QPC) in France[2] and the second one approached the writ of certiorari in the United States.[3]

The intention of this chapter on filters to Constitutional and Supreme Courts is shed light on specifics of the systems under scrutiny, as well as their apex courts and how a case can be granted permission to be decided, in a time when judicial review is an important feature within many contemporary democracies.

This research is particularly fascinating in our times because the ways and filters to a case up to a Supreme or Constitutional Court can define the extent and shape of constitutional and fundamental rights in a specific jurisdiction. If in one hand the existence of filters is necessary in order to keep away from supreme courts trivial cases, on the other hand they cannot be so restrictive that keep relevant constitutional cases away from the courts of last resort.

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1 ARAÚJO, Luiz Henrique Diniz. Constitutional Law around the globe: judicial review in the United States and the "writ of certiorari". **Revista de Investigações Constitucionais**, Curitiba, vol. 7, n. 1, p. 189-204, jan./abr. 2020; ARAÚJO, Luiz Henrique Diniz. Constitutional Law around the globe: selection of justices for the Supreme Court of Canada**. A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 22, n. 89, p. 57-73, jul./set. 2022; ARAÚJO, Luiz Henrique Diniz. Constitutional Law Around the Globe: Fundamental Rights, the Freedom of Speech and "Hate Speech" in Canada. **Revista de Investigações Constitucionais**, Curitiba, vol. 10, n. 2, e243, maio/ago. 2023.

2 ARAUJO, Luiz Henrique Diniz. Filtros de acesso às Cortes Constitucionais: a Questão Prioritária de Constitucionalidade e os filtros de acesso ao Conselho Constitucional Francês. **Revista de Investigações Constitucionais,** Curitiba, vol. 6, n. 2, p. 405-422, maio/ago. 2019.

3 ARAÚJO, Luiz Henrique Diniz. Constitutional Law around the globe: judicial review in the United States and the "writ of certiorari". **Revista de Investigações Constitucionais**, Curitiba, vol. 7, n. 1, p. 189-204, jan./abr. 2020.

From the 20th century on, courts (specially Supreme and Constitutional Courts) have gained power in deciding constitutional and even political cases, such as in South Korea, South Africa, New Zealand, U. S., the European Court of Justice and the European Court of Human Rights.[4]

In recent decades, also Latin America has experienced the empowerment of courts. Within this broader context, Constitutional Courts have been adopted (Chile in 1981; Colombia in 1991; Peru in 1993; Equador in 1996; Bolívia in 1998) or have gained power (Brazil in 1988; Costa Rica in 1989). As a consequence, judicialization of constitutional fundamental rights and judicial review have been in a rise.[5]

In this broad context, Brazilian Supreme Court (and also the lower courts and judges) has been playing a very important role in the democratic process. This has led to many important decisions involving gay marriage, abortion, assisted suicide, the reform of the social security system, the reform of the political system, all sorts of environmental cases, tax matters, educational matters, criminal law matters, among others.

However, there is a claim among scholars, attorneys, justices, judges and lawyers in general that the growth in importance and number of cases in Brazilian Supreme Court demands reforms in order to block "unimportant" or trivial constitutional matters from reaching the High Court. One of these proposals is to rebuild the filters to access the Highest Cout in the diffuse model of brazilian judicial review[6]. These measures would require an improvement on the legal device to select cases ("repercussão geral").

In this series, our aim is to proceed with coming papers exploring filters in other constitutional systems, culminating with the analysis of the filters in Brazilian Constitutional Law in comparative perspective with the other systems composing the series.

In this specific paper, we will be analyzing how the Canadian Supreme Court picks cases from thousands that reach it every year and the strategies that the Court adopts to select these cases. It will be demonstrated how the conception of judicial review and the Supreme Court changed radically in recent decades in Canada. In 1975, the Supreme Court act was amended and the leave to appeal was created, giving Canadian Supreme Court an almost absolute control over its docket size and quality.

The *problem* under scrutiny is the issue of filters to access Supreme and Constitutional Courts. In one hand scholars argue that these filters should not be so strict

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4 KAPISZEWSKI, Diana; SILVERSTEIN, Gordon; KAGAN, Robert A. **Consequential Courts. Judicial Roles in Global Perspective**. New York: Cambridge University Press, 2013, p. 1.

5 COUSO, Javier A.; HUNEEUS, Alexandra; SIEDER, Rachel. **Cultures of Legality. Judicialization and Political Activism in Latin America**. Cambridge: Cambridge University Press, 2010. p. 142.

6 The model of brazilian judicial review adopted by the Constitution-1988 combines the United States model (diffuse model) and the European model (abstract model). As a result, in brazilian system, every judge is entitled to declare a statute unconstitutional in the case to be decided. These decisions are appealable to lower courts and in last resort to the Supreme Court. In addition to that, there are direct actions (or direct constitutional lawsuits) that are decided exclusively by the Supreme Court in an abstract fashion (with general effects). A wide range of public and private actors is entitled to file these lawsuits directly into the Supreme Court.

that block or make too difficult a decision in a case; on the other hand, they cannot be excessively loose in order to vulgarize the decisions of apex courts or even allow the size of their docket to an almost unmanageable point.

The *aim* of the section Judicial Review of the Series Constitutional Law Around the Globe is to analyse filters in different constitutional systems in order to identify some of its vices and virtues and, in the end, produce a final paper approaching the theme of the filters to Supreme and Constitutional courts in a comparative perspective.

The *hypothesis* of the series is that the filters of access are important legal devices to be used aiming to balance the access to courts of last resort with the goal of permiting constitutional and supreme courts to decide on constitutionally important matters in a number that allows a manageable docket size, in order to preserve the quality of decisions and the system integrity.

The *methodology* used is consultation of references.

2. THE CONSTITUTION ACT 1982 AND JUDICIAL REVIEW IN CANADA

Canada's Constitution has become worlwide known and admired for its constitutional success and it is recognized as a model for other democratic jurisdictions.[7]

The law that created the country of Canada was called the British North America Act, 1867. It is normally refered to as "BNA Act". In 1982, it was renamed the Constitution Act, 1982. The BNA Act was passed by the British Parliament (Westminster) because Canada was still a British Colony at the time. As Canada was founded in 1867, there was no Canadian citizenship and Britain was still in charge of foreign affairs. There was no mention of a Supreme Court of Canada. Appeals were headed to the Judicial Committee of the Privy Council in London[8]. This state of affairs (the post-colonial legal age) lasted until the late 1940's.

The post-colonial legal age ended in 1949 and was followed by a transitional moment, during which Canada progressively changed into a legal system that was genuinely Canadian. In 1960, Parliament enacted the Canadian Bill of Rights Act, an ordinary law that applied only to the federal government protecting freedom of speech, freedom of religion, and other rights.[9]

During those transitional times, the Supreme Court decided that the federal government had the strict legal right to engage in unilateral constitutional patriation[10].

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7 ALBERT, Richard. The Challenges of Canadian Constitutionalism. **ELTE Law Journal**, Budapest. Available at https://eltelawjournal.hu/wp-content/uploads/2019/02/05_Albert.pdf. Access on: October 28th 2019.

8 DODEK, Adam. **The Canadian Constitution**. 2. ed. Toronto: Dundurn, 2016.

9 DODEK, Adam. **The Canadian Constitution**. 2. ed. Toronto: Dundurn, 2016.

10 Political process that led to full canadian sovereignity and culminated with the enactement of the Constitution Act, 1982.

However, it would need some degree of provincial support – less than unanimity but more than two provinces – to proceed.[11]

The Canadian constitutional reforms were then sent to the British Parliament for passage as the Canada Act 1982. That was a necessary legal step as the Canadian Constitution had until then consisted of laws passed by the British Parliament. This final act was required ir order to legally liberate the Canadian Constitution from Great Britain. In April 17, 1982, the Constitution Act, 1982, came into effect and the BNA Act was officially renamed the Constitution Act, 1867. The first 34 sections of the Constitution Act, 1982, contain the Canadian Charter of Rights and Freedoms, simply known as The Charter.[12]

Since that year of 1982, legislatures and the executive branch should comply with the division of powers stated in the 1867 *BNA Act*, as well as to the *Charter* (1982) and other new guarantees. From that year on, citizens could challenge the constitutionality of laws before courts and the role of the judicial branch was highly enhanced.

Truly, the proposal of entrenching fundamental rights into a constitution was strongly favoured by the canadian public support for negotiations lead by then Prime Minister Pierre Trudeau, who considered the Charter the major legacy of his fifteen years in power. Nevertheless, the Charter faced harsh opposition from almost all the provincial government leaders, who spoke out in practical grounds theoretical criticisms developed by a number of serious constitutional scholars.[13]

Finally adopted the Charter, the legitimacy of judicial review came to the agenda in Canadian Constitutional Law. From the enactement of the Constitution Act, 1982, judicial review has necessarily involved judges in scrutinizing the substance of legislative and governmental initiatives for their compliance with the constitution semantically open text. Not surprisingly, the scope of judicial activity expanded and has risen concerns about the exercice of judicial power interpreting and enforcing the Constitution. Academic and judicial constitutional discourse has focused on methods of interpretation that can legitimize the exercise of judicial review.[14]

The adoption of the Charter entrenching rights to which the legislative and executive branches are subject and constrained by judicial review completely changed the role of judges in Canada. Indeed, judges have been called upon for a much more public-facing role than ever. Thus, since 1982 judges in Canada are no more mere legal

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[11] ROY, Marc-André; BROSSEAU, Laurence. The notwithstanding clause of the Charter (background paper). **Library of Parliament**, Ottawa. Available at https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2018-17-e.pdf. Access on: November 17th 2019.

[12] DODEK, Adam. **The Canadian Constitution**. 2. ed. Toronto: Dundurn. 2016.

[13] WEILER, Paul C. Rights and Judges in a Democracy: A New Canadian Version. *University of Michigan* **Journal of Law Reform**, Ann Arbor, vol. 18, issue 1, p. 51-92, 1984.

[14] BAKAN, Joel. **Just words. Constitutional rights and social wrongs**. 1st ed. Toronto. Buffalo. London: University of Toronto Press, 2012.

technicians, but they are also political actors who naturally perform their duties with their personal experiences and preferences.[15] Since then, the participation of courts in general and of the Supreme Court in canadian political life has been raising charges of judicial activism and a claim for dialogue between courts and the other branches of government.[16]

Canada has a Parliamentary system, but its Supreme Court is functionally detached from Parliament. The power of judicial review assigned to the Supreme Court is well established and it plays a similar role to the U.S. Supreme Court, with a great influence on the public policy process. Canada's Supreme Court picks the cases it will decide in a similar way to the U.S. Supreme Court.[17] The selection of cases is subject to a process named leave to appeal with a broad share of discretion by the Court.

3. THE LEAVE TO APPEAL PROCESS

Since the enactement of the Canadian Charter of Rights and Freedoms (1982), the Supreme Court of Canada has become an increasingly important policy maker. A 1975 amendment to the Supreme Court Act had given the Court wide discretion over which cases to review by banning most mandatory appeals. As the U.S. writ of certiorari, the criteria for granting a leave to appeal by the Supreme Court of Canada are elastically worded and vaguely defined. In Canada, the Supreme Court Act states that the decision to grant litigants leave to appeal lower court decisions rests on the Supreme Court's determination of the "public importance" of the issues raised by the appeals.[18]

The 1975 amendments responded to the growing workload of the Court. Other measures had been put forward to address this issue, such as the increase of the monetary limit of the Court's jurisdiction and the establishment of the Federal Court of Appeal as an intermediate court of appeals. Nevertheless, neither of these measures could cope with the problem of the growing litigation that ended up to the Supreme Court.[19]

Until 1975's amendments, appeals in civil cases were heard as of right when the amount at stake was over $10,000. This created serious workload issues (in 1974, the

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[15] ALBERT, Richard. The expositor and guardian of our constitutional values. In: MOORE, Marcus; JUSTRAS, Daniel (coor.). **Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership**. Austin: University of Texas Public Law & Legal Theory, Research Paper Series, 2018. p. 193-212.

[16] McLACHLIN, Berveley. **Canada's Legal System at 150**: Democracy and the Judiciary. Supreme Court of Canada, Ottawa. Available at https://www.scc-csc.ca/judges-juges/spe-dis/bm-2016-06-03-eng.aspx**.** Access on: July 25th 2019.

[17] FLEMMING, Roy B.; KRUTZ, Glen S. Repeat Litigators and Agenda Setting on the Supreme Court of Canada. **Canadian Journal of Political Science / Revue canadienne de science politique**, Port Hope/Canada, vol. 35, n. 4, p. 811-833, dec. 2002. p. 815.

[18] FLEMMING, Roy B.; KRUTZ, Glen S. Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses. **Journal of Politics**, v. 64, issue 1, p. 232-248, feb. 2002. p. 232.

[19] WILSON, Bertha. Leave to Appeal to the Supreme Court of Canada. **Advocates' Quarterly**, v. 4, n. 1, p. 1-9, mar. 1983. p. 1.

Court heard 173 cases, including 63 in its October term alone). In addition to that, there was a growing consensus that the monetary amount should not be the basis for the jurisdiction of Canada's final appellate Court.[20]

The amendment clearly represented much more than a device to help the Court to manage its docket. It certainly is a way of balancing workload flow with workload capacity. But it is also and perhaps more importantly a device for the Court to select qualitatively the cases it is willing to decide, like a "screening" mechanism to keep away "unimportant" matters.[21]

It is probably easy to identify cases that clearly should not be heard by the Supreme Court. But how to decide which cases to decide among those that in thesis would deserve a final decision by the apex Court? How can the Court select the right cases among a large set of them?[22]

It is fundamental to first of all understand that according to the 1975 amendment, the nature of the Supreme Court is a "supervisory" one and not an appellate one. This means that an important function of the Supreme Court of Canada should be to oversee the development of the law in the courts of Canada. The issue is how can the leave process be a tool to this end? How can the leave process allow the selection of cases vested of public importance?[23]

Section 41(1) of the Supreme Court Act (amended in 1975) governs the consideration of motions for leave to appeal:

> *41.(1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, 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 wason, of such a nature or significance as to warrant decision by it, and ledve to appeal from such judgment is accordingly granted by the Supreme Court.*

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[20] COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012. p. 44.

[21] WILSON, Bertha. Leave to Appeal to the Supreme Court of Canada. **Advocates' Quarterly**, v. 4, n. 1, p. 1-9, mar. 1983. p. 2.

[22] WILSON, Bertha. Leave to Appeal to the Supreme Court of Canada. **Advocates' Quarterly**, v. 4, n. 1, p. 1-9, mar. 1983. p. 2-3.

[23] WILSON, Bertha. Leave to Appeal to the Supreme Court of Canada. **Advocates' Quarterly**, v. 4, n. 1, p. 1-9, mar. 1983. p. 3-5.

As it can be easily noticed, the terms of the rule are quite broad and end up giving the Supreme Court a wide discretion on selecting the cases it will hear. "Public importance" is of course not defined. It is assessed in each case by the Supreme Court. There is no jurisprudence of the Canadian Supreme Court delineating the meaning of "public importance."[24]

The Supreme Court of Canada chooses which cases it will hear and it does not give reasons or more specific guidelines that justify its choices. Thus its benchmark for granting leave is enigmatic and uncertain.[25]

The Court functions as a law-making court as a consequence of its leave to appeal process. There is still a tiny number of mandatory classes of cases that the Court has to hear. These are some criminal cases, in which the unsuccessful party at the appellate level has a right to appeal to the Supreme Court of Canada. In all other cases, the Court must grant an unsuccessful party leave to appeal before hearing the case.[26]

Granting the Court increased control over its own docket has made its workload more manageable. In addition, it also reshaped the Constitutional Court's institutional role. Before 1975, the Court worked more like a final appellate court than a law-making one.[27]

An application, almost always in writing, is submitted to a panel of three judges, who vote by written memorandum on granting or not granting leave. These three Justices consider every application in detail, articulating their thoughts in writing, and vote on whether or not leave to appeal should be granted.[28]

As many as 600 applications for leave to appeal are filed each year and the Supreme Court of Canada grants only approximately 80 of them. One curiosity is that the party does not need a lawyer to represent herself before the Supreme Court of Canada, however it is recommended to hire one, once the procedure in naturally quite complex and even complicated.[29]

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[24] FLEMMING, Roy B.; KRUTZ, Glen S. Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses. **Journal of Politics**, v. 64, issue 1, p. 232-248, feb. 2002. p. 233.

[25] COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012. p. 43.

[26] COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012.

[27] COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012. p. 45.

[28] COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012. p. 48-9.

[29] Supreme Court of Canada. **Guide**. Available at https://www.scc-csc.ca/unrep-nonrep/res-int/guide-eng.aspx#q1. Access on June, 15th, 2020.

After the applicant has filed an application for leave to appeal, the decision being appealed remains in effect. Nevertheless, Section 65.1 of the Supreme Court Act allows the applicant to apply for a "stay" of the judgment until the application for leave to appeal is decided.[30]

4. CRITERIA FOR GRANTING LEAVE TO APPEAL

There is a great share of confusion surrounding the procedure for applying for leave to appeal to the Supreme Court of Canada. The 1975 amendments to the Supreme Court Act eliminated mandatory civil appeals and made the problem even more complicated.[31]

Applications for leave to appeal exist within a set of contexts in civil cases. The most remarkable cases are appeals from provincial appellate courts and from the Federal Court of Appeal to the Supreme Court of Canada.[32] Practical criteria for granting leave for appeal are still a secret and of course personal predilections and inclinations of the judges affect their votes on which cases are of public importance or not.[33] Nevertheless, members of the Court have seldom commented on how they decide about granting or not leave to appeal.[34]

Preparing an application for leave to appeal or a response to it is no easy task because the Supreme Court does not adopt explicit and precise criteria for that. The context is even harder because applications for leave to appeal are normally brought to appreciation in writing, without an oral hearing that could give room to feedback from justices. It is also worth noting that the merits of the case seem to play a minor role.[35] Therefore, it is not a good strategy for a counsel to simply repeat the arguments made in the lower court trying to convince the justices that a leave to appeal should be granted in order to correct judgment errors.[36]

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30 Supreme Court of Canada. **Guide**. Available at https://www.scc-csc.ca/unrep-nonrep/res-int/guide-eng.aspx#q1. Access on June, 15th, 2020, p. 47.

31 WALLACE, Jill Wallace; ORCHARD, Vincent Orchard. Leave to Appeal to the Supreme Court of Canada: Procedural Aspects. **Advocate (Vancouver Bar Association)**, v. 34, n. 1, p. 11-18, 1976.

32 HALL, Geoff R. Applications for Leave to Appeal: The Paramount Importance of Public Importance. **Advocates' Quarterly**, v. 22, n. 1, p. 87-101, sept. 1999. p. 88.

33 RICHARD, Robert G. Motions for Leave to Appeal to the Supreme Court of Canada. **Advocates' Quarterly**, Toronto, v. 2, n. 4, p. 460-463, mar. 1981. p. 461.

34 COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012.

35 HALL, Geoff R. Applications for Leave to Appeal: The Paramount Importance of Public Importance. **Advocates' Quarterly**, v. 22, n. 1, p. 87-101, sept. 1999. p. 88-89.

36 HALL, Geoff R. Applications for Leave to Appeal: The Paramount Importance of Public Importance. **Advocates' Quarterly**, v. 22, n. 1, p. 87-101, sept. 1999. p. 89.

The understanding of the Supreme Court of Canada about its own role as a supervisory tribunal in the judicial hierarchy is central. As such, it has the duty to oversee the development of law and to be a reference to lower courts, avoiding to interfere on simply local or private issues. Public importance is the only real criteria, save if the context is of somebody seeking to appeal a wrongful conviction for first degree murder.[37]

Some criteria can be raised by lawyers: significant federal statute of general application; provincial statute similar to legislation in other provinces; conflicting decisions in the provincial courts of appeal; the need to revisit an important theme of law.[38]

Data suggest that the Supreme Court was more likely to grant leave if there were conflicting lower court decisions, if there was a dissenting vote in the lower appellate court, if the application urged the Court to revisit past decisions, or if the application demonstrated that lower court decisions affected provincial or federal interests. The litigants` status also play a role, but it is not a relevant one[39]. Therefore, if a government or a governmental agency is a party does not necessarily mean that leave has big chances to be granted.[40]

Succeed in a leave to appeal to the Supreme Court of Canada is one of the most challenging tasks to a counsel. Since the 1975 amendments to the Supreme Court Act the chances are not promising.[41] Counsel should take as a first key step to try to find conflicting decisions from other appellate courts. If the context involves a provincial state, as a second key step counsel should try to find likewise statutes in other provinces in order to make the case that the decision in the case can have effects on other jurisdictions. If the case is about a federal statute counsel should stress that the decision on the appeal will have effects all over the country.[42]

Counsel should not focus on whether the Court of Appeal was correct or not. The question of whether the issue of law presented is one of public importance is difficult and intractable. Cases heard by the Supreme Court most frequently involve issues which bear on the Canadian public at large, such as constitutional law issues,

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37 HALL, Geoff R. Applications for Leave to Appeal: The Paramount Importance of Public Importance. **Advocates' Quarterly**, v. 22, n. 1, p. 87-101, sept. 1999. p. 94-95.

38 FLEMMING, Roy B.; KRUTZ, Glen S. Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses. **Journal of Politics**, v. 64, issue 1, p. 232-248, feb. 2002. p. 234.

39 COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012. p. 47.

40 HALL, Geoff R. Applications for Leave to Appeal: The Paramount Importance of Public Importance. **Advocates' Quarterly**, v. 22, n. 1, p. 87-101, sept. 1999. p. 94.

41 COWPER, Geoffrey Cowper. Motions for Leave to Appeal to the Supreme Court of Canada, **Advocate (Vancouver Bar Association)**, v. 41, n. 1, p. 15-18, jan. 1983. p. 15.

42 HALL, Geoff R. Applications for Leave to Appeal: The Paramount Importance of Public Importance. **Advocates' Quarterly**, v. 22, n. 1, p. 87-101, sept. 1999. p. 93-94.

administrative law issues, civil rights issues, for instance. Cases granted leave to appeal on private law frequently involve a legal issue that is unsettled or was innapropriately addressed in the jurisprudence.[43]

The status of the appelant's attorney also seems to play a relevant role. A lawyer can be granted the status of Queen's Counsel, a disctinction that vestes the legal profession with large prestige. The proportion of applications granted leave to appeals from attorneys who are Queen's Counsel when the appellees' lawyer is not is greater than when neither lawyer is a QC, or when the opposing attorney is a QC but the applicant's attorney is not. Therefore, it seems that a leave to appeal requested by a Queen's Counsel has advantages before the Supreme Court advocacy in Canada.[44]

So does the size of a lawyer's firm. Big lawfirms have great intellectual and infrastructural resources, conducting seminars, establishing profitable professional connections with governments, political parties and courts, for instance. This seems to give an advantage at the leave to appeal context.[45]

Another interesting aspect is that the Court does not give reasons for dismissing a leave to appeal. There are two primary justifications for this practice: issuing reasons (i) would be a burden on the Court's judicial resources and (ii) could fetter the Court's discretionary control over its own docket.[46]

Undue fetters on the Court's discretion would indeed be problematic because this could foster the loss of control by the Court on it docket. This could compromise the Court's ability to play its intended function.[47]

In order to give reasons for dismissing a leave for appeal the Supreme Court would have to decide on a legal basis and this legal basis would foster a rule to be followed in subsequent cases. What if the Court decided to grant a leave in a second similar case? It would have to distinguish the second case from the previous one. In order

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43 COWPER, Geoffrey Cowper. Motions for Leave to Appeal to the Supreme Court of Canada, **Advocate (Vancouver Bar Association)**, v. 41, n. 1, p. 15-18, jan. 1983. p. 16.

44 FLEMMING, Roy B.; KRUTZ, Glen S. Repeat Litigators and Agenda Setting on the Supreme Court of Canada. **Canadian Journal of Political Science / Revue canadienne de science politique**, Port Hope/Canada, vol. 35, n. 4, p. 811-833, dec. 2002. p. 815.

45 FLEMMING, Roy B.; KRUTZ, Glen S. Repeat Litigators and Agenda Setting on the Supreme Court of Canada. **Canadian Journal of Political Science / Revue canadienne de science politique**, Port Hope/Canada, vol. 35, n. 4, p. 811-833, dec. 2002. p. 822.

46 COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012. p. 48.

47 COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012. p. 49.

to distinguish the Court would have to give reasons. This would irremediably reduce its discretion, what seems not to be desirable by the system.[48]

In spite of that, there is a set of arguments supporting that the Supreme Court should issue reasons for not granting a leave for appeal. It asserts that the Court's own jurisprudence supports its obligation to provide reasons for dismissing an application for leave to appeal. According to this argument, the Court has asserted that in some specific contexts, decision-makers have to give reasons for a decision, for instance, in the criminal context the verdict must be supported by legal reasons.[49]

Motivation thus is an imperative to explain the affected parties the reasons that support the outcome, an imperative of public accountability and a necessary feature in order to permit appellate review. It is also necessary in administrative law and other branches of law.[50] As there is no appellate review regarding the leave for appeal, the last rationale for requiring reasons is not applicable. Nonetheless, the other two rationales do apply to the leave process.[51]

As is has been demonstrated so far, it is no easy task to establish which types of cases are to be picked by the Supreme Court for a decision. On one hand, it is possible on relative safe grounds to assert that cases involving mainly a question of fact, civil cases concerning exclusively the parties involved or controversies on the interpretation of particular contracts are unlikely to be granted a leave to appeal. On the other hand, a case involving issues of constitutional law, the Bill of Rights, major statutory provisions or principles of common law have a good share of chances to be granted leave.[52]

5. CONCLUSION

As it was asserted in the introduction of this paper, this text is part of a series that analyzes Constitutional and Supreme courts around the globe specially focusing on the filters and procedures raised in order to allow (or rather impede) a case to reach the apex courts of a legal system.

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48 COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012.

49 COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012.

50 COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012.

51 COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012. p. 52.

52 RICHARD, Robert G. Motions for Leave to Appeal to the Supreme Court of Canada. **Advocates' Quarterly**, Toronto, v. 2, n. 4, p. 460-463, mar. 1981. p. 463.

Following this path, this is the third paper of the series and sheds light on the leave to appeal of the Supreme Court of Canada. This paper was preceded by two other texts: (i) the fist one exploring the filters to the Constitutionality Priority Question in the French Constitutional System and (ii) the second one the writ of certiorari of the United States Supreme Court. At the end of the series, a final paper will compare most important issues among the systems under scrutiny.

In this perspective, this paper has demonstrated that since the enactement of the Canadian Charter of Rights and Freedoms (1982), the Supreme Court of Canada has become an increasingly important policy maker. A 1975 amendment to the Supreme Court Act gave the Court wide discretion over which cases to review by banning most mandatory appeals. As the U.S. writ of certiorari, the criteria for granting a leave for appeal by the Supreme Court of Canada are elastically worded and vaguely defined. In Canada, the Supreme Court Act states that the decision to grant litigants leave to appeal lower court decisions rests on the Supreme Court's determination of the "public importance" of the issues raised by the appeals.[53]

The 1975 amendments responded to the growing workload of the Court. Other measures had been put forward to address this issue, such as the increase of the monetary limit of the Court's jurisdiction and the establishment of the Federal Court of Appeal as an intermediate court of appeals. Nevertheless, neither of these measures could cope with the problem of the growing litigation that ended up to the Supreme Court.[54]

The amendment clearly represented much more than a device to help the Court to manage its docket. It certainly is a way of balancing workload flow with workload capacity. But it is also and perhaps more importantly a device for the Court to select qualitatively the cases it is willing to decide, like a "screening" mechanism to keep away "unimportant" matters.[55]

It is probably easy to identify cases that clearly should not be heard by the Supreme Court. But how to decide which cases to decide among those that in thesis would deserve a final decision by the apex Court? How can the Court select the right cases among a large set of them?[56]

Some criteria can be raised by lawyers: significant federal statute of general application; provincial statute similar to legislation in other provinces; conflicting

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53 FLEMMING, Roy B.; KRUTZ, Glen S. Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses. **Journal of Politics**, v. 64, issue 1, p. 232-248, feb. 2002. p. 232.

54 WILSON, Bertha. Leave to Appeal to the Supreme Court of Canada. **Advocates' Quarterly**, v. 4, n. 1, p. 1-9, mar. 1983. p. 1.

55 WILSON, Bertha. Leave to Appeal to the Supreme Court of Canada. **Advocates' Quarterly**, v. 4, n. 1, p. 1-9, mar. 1983. p. 2.

56 WILSON, Bertha. Leave to Appeal to the Supreme Court of Canada. **Advocates' Quarterly**, v. 4, n. 1, p. 1-9, mar. 1983. p. 2-3.

decisions in the provincial courts of appeal; the need to revisit an important theme of law.[57]

Data suggest that the Supreme Court was more likely to grant leave if there were conflicting lower court decisions, if there was a dissenting vote in the lower appellate court, if the application urged the Court to revisit past decisions, or if the application demonstrated that lower court decisions affected provincial or federal interests. The litigants` status also play a role, but it is not a relevant one[58]. Therefore, if a government or a governmental agency is a party does not necessarily mean that leave has big chances to be granted.[59]

The status of the appelant's attorney also seems to play a relevant role. A lawyer can be granted the status of Queen's Counsel, a disctinction that vestes the legal profession with large prestige. The proportion of applications granted leave to appeals from attorneys who are Queen's Counsel when the appellees' lawyer is not is greater than when neither lawyer is a QC, or when the opposing attorney is a QC but the applicant's attorney is not. Therefore, it seems that a leave to appeal requested by a Queen's Counsel has advantages before the Supreme Court advocacy in Canada.[60]

Over time, there has been a claim that a decision by the Supreme Court of Canada should be given when an overarching motive is present, stressing its power to rule on issues of large legal or policital significance and to supervise the federal courts. This would assert it as an actual Constitutional Court and the leave to appeal is a central device in this context.

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57 FLEMMING, Roy B.; KRUTZ, Glen S. Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses. **Journal of Politics**, v. 64, issue 1, p. 232-248, feb. 2002. p. 234.

58 COONEY, Denise Cooney. An Absence of Reason: Why the Supreme Court of Canada Should Justify Dismissing Applications for Leave to Appeal. **University of Toronto Faculty of Law Review**, v. 70, no. 1, p. 41-58, Winter 2012. p. 47.

59 HALL, Geoff R. Applications for Leave to Appeal: The Paramount Importance of Public Importance. **Advocates' Quarterly**, v. 22, n. 1, p. 87-101, sept. 1999. p. 94.

60 FLEMMING, Roy B.; KRUTZ, Glen S. Repeat Litigators and Agenda Setting on the Supreme Court of Canada. **Canadian Journal of Political Science / Revue canadienne de science politique**, Port Hope/Canada, vol. 35, n. 4, p. 811-833, dec. 2002. p. 815.

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