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Judicial Review and Agenda Setting: American Accounts and the Canadian Setting

In December 2002 the provincial court of appeals for Newfoundland and Labrador released a blistering opinion aimed directly at the Supreme Court of Canada.¹ The case involved a pay equity suit filed by women employed by the province after the government, facing a budget crunch, reneged on a settlement to which it had agreed earlier. The judgment upholding the government ran to more than 230 pages. The opinion in lengthy and considerable detail accused the Supreme Court of “undue incursions” into policy domains rightfully under the prerogatives of Parliament and of the provincial assemblies. It specifically challenged the method developed by the justices and used by them to interpret the Canadian Charter of Rights and Freedoms.

Feelings often run high about judicial review and the power courts display when they exercise this authority. For many observers of Canada’s Supreme Court, judicial activism has become the sine qua non of judicial review since the Charter of Rights and Freedoms was constitutionally entrenched in 1982. For example, in 1999 the Globe and Mail announced, “Ottawa to Enshrine Same-Sex Rights.”² The Supreme Court set the stage for the government’s actions in Egan v. Canada (1995), a case in which Canada’s Old Age Security Act was challenged on the grounds that its allocation of benefits favoured heterosexual married couples. Although the Court rejected the challenge by a 5-4 vote, it nevertheless ruled for the first time that the Charter of Rights and Freedoms prohibited discrimination based on sexual orientation. Egan v. Canada encouraged numerous lawsuits, including one that challenged fifty-eight federal statutes. In February, a month after the Globe and Mail story, the Reform Party of Canada held its “United Alternative” convention, which led to the formation of the Canadian Alliance. Criticism of the Supreme Court crackled throughout the convention as delegates decried “judicial activism.” The National Post reported: “No issue touched the emotions
and united the delegates ... more than calls to rein in the power of Canada’s judges and human-rights bureaucrats.”

The Supreme Court’s selection of cases and the issues raised by them clearly has far-reaching effects. Which cases are heard mould the development of the law, but equally important, as Egan v. Canada shows, the choice of cases and the Court’s emphasis on particular areas of the law can lead to major public policy changes. When placing appeals for judicial review on its plenary docket, the Court also creates winners and losers, as some lower court decisions are left to stand while others become subject to judicial review and possibly to being overturned. At the same time, the decision to hear some cases and not others imposes the Court’s priorities on the politics of the country and its government. As the news stories from the “United Alternative” convention suggest, many politically active Canadian citizens do not share the Supreme Court’s priorities. By setting its agenda, then, high courts elevate the public visibility of issues of concern to some groups while downplaying issues of interest to other groups. For the Supreme Court in Canada, an important ancillary step toward the Court’s independence in interpreting the Charter’s provisions came seven years earlier, when Parliament expanded the Court’s discretion in selecting cases for judicial review. Parliament’s only stipulation was that the Court’s decisions would be governed by whether the appeals involved issues of “public importance.” The content of this standard was left in the hands of the justices to determine, however, as well as the procedures they would follow when exercising this new grant of authority.

As the provincial appellate judges in Newfoundland and Labrador made very clear in their complaints about the Supreme Court, how courts make decisions is often as important as what decisions they make. Indeed, the power to decide what to decide, which is at the heart of setting a court’s agenda, carries with it in most instances the freedom to choose how to choose. In other words, the ways in which judges on high courts or courts of final appeal arrange their decision-making processes may fundamentally affect the array of choices they consider and perhaps the nature of the choices itself. There is a very limited literature that explains how high courts other than the United States Supreme Court grant judicial review and construct their agendas. What literature exists outside the United States is formalistic and descriptive.

This book is the first systematic investigation of agenda setting in Canada’s Supreme Court and perhaps the only study to understand agenda setting in any high court that empirically tests American findings to determine whether they can be extended to explain the behaviour of
high courts in other countries. Despite the Court’s emergence as an influential policy maker, little attention has been paid to the way in which the Court selects cases for review. The first survey of the Supreme Court’s application for leave to appeal process appeared in 1982 in the *Supreme Court Law Review*. The *Review* continues to publish these annual surveys, but they are primarily “practice notes” addressed to the legal profession and are of limited analytical value. At present, social science research on agenda setting in Canada’s Supreme Court does not exist. The rest of this chapter outlines and compares the processes in Canada and the United States as a prelude to the subsequent chapters.

**American Accounts of Granting Judicial Review**

How can agenda setting in Canada be explained? What goes into the decision to grant judicial review to one appeal but not another? Tentative answers to this question can be found in the literature on the writ of certiorari process in the United States Supreme Court. Certiorari, or “cert,” is the means by which the Supreme Court grants judicial review to applicants appealing lower court decisions. The American literature offers three accounts or general hypotheses to explain how the Court exercises its discretion when granting judicial review.

The first and most developed account is *litigant-centred*. In the United States, the type of litigant – that is, whether “upperdog” or “underdog” – is related to the voting behaviour of justices in the agenda-setting process. Higher-status litigants, the upperdogs, more often gain access to the Supreme Court’s docket than underdog or low-status litigants, although this relationship depends in part on the Court’s ideological preferences (Ulmer 1978, 1981). Other studies show that the presence of interest groups supporting the parties influences the selection of cases for judicial review (Caldeira and Wright 1988, 1990a). The US Supreme Court grants certiorari more often to parties backed by organized interests than to parties lacking this support. The growth in interest group participation in litigation before the US Supreme Court and its impact on the Court’s certiorari process is well documented (Epstein 1991; Caldeira and Wright 1988, 1990a; McGuire 1993, 1994). A similar development has occurred in Canada, where the Supreme Court has relaxed its rules on standing (Bogart 1994; Gertner 1988; Sossin 1999) and rarely declines requests by groups to intervene at the merits stage when the Court reviews appeals (Brodie 2002; Lavine 1992; Welch 1985). Organized interests are thus increasingly common participants in Supreme Court cases and have received financial support from the federal government to encourage their activities (Brodie 2002; Epp 1998). Finally,
parties represented by lawyers who are repeat players with experience and expertise before the US Supreme Court have an edge over opponents with counsel who are less experienced in the Court’s agenda-setting decisions (McGuire and Caldeira 1993; McGuire 1995a, 1995b). Experienced lawyers may also recruit interest group support (McGuire 1994).

A jurisprudential account comprises the second approach. In this account, justices apply legal considerations to requests for judicial review, and legal factors weigh heavily in their deliberations (Perry 1991; Provine 1980; Stern et al. 1993; Ulmer 1984). This hypothesis does not mean that the process is mechanical or rigidly rule-dominated. Instead, legal factors prompt justices to give certiorari applications a second look in a process otherwise strongly governed by the presumption that few requests for review warrant approval. Perry (1991) offers the most thorough exploration of this account based on his interviews with several Supreme Court justices and over fifty clerks in the Court. His itemization of the various factors included in the jurisprudential account is the source for this book’s test of the account in Canada.

The third account focuses on the strategic choice behaviour of the justices as they construct their agenda. In broad terms, this hypothesis suggests that justices anticipate the likely outcomes of cases if they are heard on the merits; the justices then cast their votes on whether to grant judicial review according to whether these expected outcomes coincide with their policy views. Recent elaborations of this hypothesis argue that justices pursue particular strategies, such as “aggressive grants” or “defensive denials” (Boucher and Segal 1995; Perry 1991; Caldeira et al. 1999). The question that immediately comes to mind, of course, is whether Canada’s justices play a similar “leave to appeal game.”

While individual pieces of the literature in the US gravitate toward one or the other of the three accounts, the three hypotheses are not mutually exclusive. For example, Perry (1991, 278) argues that certiorari decisions may reflect both jurisprudential and strategic considerations. Moreover, the “indices” and “signals” that he says lead the justices to take closer looks at petitions for judicial review include elements from the litigant-resources hypothesis such as the identities of the litigants or their counsel (Perry 1991, 113-39). A comprehensive understanding of agenda setting in Canada’s Supreme Court and how it picks appeals from the lower courts for judicial review clearly requires consideration of all three hypotheses.

The value or utility of these three accounts undoubtedly varies with the institutional characteristics of particular high courts. Canada’s Supreme
Court shares many similar features with the US Supreme Court but there are important differences that will be noted later in this chapter. As a consequence, this comparison between the two courts can test the generality of the American accounts while providing new perspectives on agenda setting in Canada’s Supreme Court.

On one very important matter the two high courts are almost identical; both have wide sway over the appeals they choose to hear. In 1975 Canada’s Parliament amended the *Supreme Court Act* to limit the right to appeal in civil cases and, with a couple of exceptions, in criminal cases as well. The 1975 amendment, analogous to the “Judges’ Bill of 1925” that gave the US Supreme Court discretion over what to hear, freed the hands of Canada’s justices so that they could select appeals for judicial review according to their “public importance.” When Parliament limited the right of appeal, it made the discretionary leave to appeal process the main avenue to judicial review. For the first time, Canada’s Supreme Court held substantial control in its hands over the kinds of cases it wished to hear.

The 1975 reform gave Canada’s Supreme Court wide latitude, declaring that the decision to grant leave to appeal rested on the Court’s determination of the “public importance” of issues raised by an application. According to Section 40(1) of the *Supreme Court Act*, applications would be granted leave if

> 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.

This section does not define “public importance,” and it is as vaguely phrased as Rule 10 governing writ of certiorari decisions in the United States. Certiorari, or “cert” in the vernacular, is an order to the lower court to forward the record of the case to the Court. Rule 10, written by the Supreme Court to its own specifications, reads as follows:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons the Court considers:
(a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; or has decided an important federal question in a way that conflicts with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s power of supervision.

(b) When a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with applicable decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.7

Rule 10 underscores and emphasizes the US Supreme Court’s discretion. While it appears to stress conflicting lower court decisions as the chief criterion governing certiorari decisions, for instance, this interpretation is immediately undercut by the declaration that the criterion, and indeed even Rule 10 taken as a whole, is neither controlling nor a full measure of the Court’s discretion. Like their Canadian peers, the American justices do not identify what “compelling reasons” would lead to grants of certiorari, nor did they define “compelling” or “important.” As one eminent scholar of the certiorari process put it: “In short, the rule is almost a tautology: cases are important enough to be reviewed by the justices when justices think they are important” (Perry 1992).8

One Docket, Three Agendas: Pathways to the Supreme Court

An agenda focuses attention on particular issues or concerns to the exclusion of others. At a minimum, the ability to place issues before decision makers means that other issues may go unattended, perhaps against the preferences of the decision makers themselves. Institutions influence the agenda access of actors. In contrast to the situation in the United States, Canada’s Supreme Court does not have complete control over the appeals or issues it hears. Instead, it is useful to think of the Court’s docket as being made up of three agendas, only one of which is under full control of the justices. The first agenda consists of cases over
which the Court has discretion to grant leave to appeal. The second agenda is made up of residual “appeals as of right” in criminal cases, over which the Court has less control. The third includes reference questions put to the Court by the federal government or the Governor-in-Council. As a general matter, the justices feel compelled to hear references because of their importance, although the Court may decline to address some issues if they are too vaguely phrased or too hypothetical. This mix of agendas means that the Court impresses its priorities on only a portion of its docket. Figure 1.1 diagrams the three streams of cases or questions for which the Court renders judgments and opinions.

Requests for leave to appeal and those granted leave have been the wellspring for judicial review since 1975. Parliament’s amendment dramatically changed the balance between the discretionary and non-discretionary sides of the Court’s docket. During the term prior to 1975, cases granted leave to appeal accounted for 29 percent of the Court’s
docketed caseload. One year later, the proportion rose to 60 percent, and by 1980-81 the proportion was 74 percent (Bushnell 1982). During the 1990s, applications for leave to appeal ranged from a low of 445 in 1991 to a high of 637 in 1997; the annual volume averaged 526 applications per year (Supreme Court of Canada 2001).

Cases appealed as a matter of right constitute a smaller but nonetheless sizable part of the Court’s docket; the number of notices to appeal as of right averaged forty-five a year during the 1990s, although it dropped by over half in the last three years of the decade (Supreme Court of Canada 2001). Because many of these notices fall by the wayside, the actual size of this agenda shrinks to about twenty-five appeals as of right per year, still a significant portion of the justices’ workload. For example, 29 of the 110 opinions published by the Supreme Court in 1994 were appeals as of right placed directly on the Court’s docket by criminal defendants or by the Crown. In general, appellants in criminal cases whose acquittals at trial are overturned by appellate courts as a result of appeals by Crown prosecutors have an automatic right of appeal. Similarly, the Crown has a right of appeal if the appellate court overturns a trial conviction. Appeals as of right also occur when an appellate judge dissents on any question of law. Since these appeals force the Supreme Court to review cases it might otherwise ignore or leave undisturbed, the justices often render brief judgments from the bench after frequently truncated oral arguments. The following two cases are typical of the brief judgments made in other appeals as of right.

In the first case, the justices issued a judgment from the bench in a case from Nova Scotia that dismissed an appeal of a conviction for second-degree murder. A dissenting opinion opened the Supreme Court's doors for this appeal.

This is an appeal as of right. The basis of the dissent of Jones J.A. in the Court of Appeal is whether a warning pursuant to *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, was appropriate in the circumstances of this case. This [appeal] does not raise a question of law although failure to give a warning in some circumstances may constitute a miscarriage of justice. The appellant, therefore, does not have an appeal as of right to this Court. Having heard the appellant on the merits, however, we are of the view that, even if the Court had jurisdiction to entertain the appeal, we would dismiss it. In the circumstances of this case, failure to give a *Vetrovec* warning to the jury did not result in a miscarriage of justice. The appeal is, therefore, dismissed.
Another appeal as of right came from the New Brunswick Court of Appeal when the majority on the bench overturned a trial conviction, allowing the Crown to bring the case to the Supreme Court for review. The Supreme Court’s bench opinion included the following comment. The comment also shows that appeals as of right are not necessarily futile efforts for the parties who take advantage of them, which explains why attempts to eliminate them entirely from the Court’s docket have been unsuccessful.

[A]lthough the trial judge erred with regard to the requisite intent required for the section, the error benefited the respondent [the trial defendant] in that it was more onerous than required. We respectfully disagree with the majority of the Court of Appeal [citation deleted] regarding the issue of the burden of proof. The trial judge merely placed an evidentiary burden on the respondent. The ultimate burden remained on the appellant throughout. The trial judge carefully reviewed the evidence and properly concluded that the respondent should be convicted. The appeal is therefore allowed. The order of the Court of Appeal is set aside and the conviction is restored.

The Court generally handles these appeals in an expeditious manner. These appeals nonetheless take up time and attention the justices could devote to matters of greater public importance.

The Supreme Court Act requires Canada’s high court to give advisory opinions on constitutional questions put to it by the federal government (Hogg 1996, 209). Advisory opinions are consistent with Canada’s Westminster parliamentary system, which does not separate legislative, executive, and judicial powers in the same ways as in the United States. Canada’s courts are considered to have non-judicial functions, and reference questions are seen as part of the Supreme Court’s executive function. It is worth noting that when Canada’s Court sat for the first time in 1876, the question before it was a reference from the Senate asking the Court’s opinion on a private bill dealing with a divisive religious issue (Crane and Brown 2002, 394). The Court usually receives one or two references a year.

A steady flow of references over the years since Confederation has contributed substantially to Canada’s constitutional development. Between 1867 and 1966, references amounted to roughly 35 percent of all constitutional cases; more recently, the proportion has dropped to about 15 percent for the period 1967-86 (Hogg 1996, 210). The small number
of references the Court hears in a year disguises the fact that they are among the most politically volatile and potentially explosive decisions the Court makes and that they often put the Court in the middle of political controversies it might avoid if it could. Few high courts have been asked to rule, for example, on whether a state, province, or region has the constitutional right to secede from a country, as Canada’s Supreme Court did in the Quebec Secession Reference in 1998, which established Quebec’s right to separate from Canada as well as the ground rules for the process.

The Lamer Court and Its Political Context
This book focuses on the years 1993-95, when Chief Justice Antonio Lamer led Canada’s Supreme Court. Justice Lamer was appointed in 1980 by Liberal Prime Minister Pierre Elliott Trudeau. After defeating the Liberals in 1984, the Progressive Conservatives won one more election in 1988 before their massive losses in 1993 nearly swept them completely out of Parliament. By 1990, when Prime Minister Brian Mulroney promoted Lamer to chief justice, Lamer was the lone surviving Liberal appointment on the bench. Lamer retired in 2000. During his ten years as chief justice, changes in the Court’s composition continued. Mulroney made two appointments before the Tories’ 1993 electoral rout; subsequently, Liberal Prime Minister Jean Chrétien made three.

The departure and replacement of justices created six intervals or periods when the composition of the bench was stable. One of these “natural courts” lasted roughly seventy months, from November 1992 until September 1997; the next longest survived about twenty months. The study period of this book extends from January 1993 through December 1995, the first three years of the longest natural court. Since the number of leave applications averaged around 500 a year during the early half of the decade, a natural court that lasted more than two years was important so that the same set of justices reviewed enough applications to generate a large enough dataset for statistical analyses. Another advantage of focusing on one natural court is that it ruled out changes in the mix of justices as a factor in the decision-making process.

The ten years of the Lamer Court were a time of political upheaval and intense constitutional turmoil in Canada. The 1993 election saw the demise of the Progressive Conservatives and the weakening of the New Democratic Party, the emergence of the Bloc Québécois and the Reform Party, and the first of three election victories by the Liberals under the leadership of Prime Minister Chrétien. For scholars of Canadian
politics, the 1993 election marked the end of a party system that had lasted nearly thirty years and the beginning of a new “fourth party system” (Carty et al. 2000). This new party system lacks the national focus of its predecessor as support for the parties has become heavily regionalized. Even the Liberal Party, which claims to be a national party, has won only plurality victories at the polls and relies greatly on Ontario for roughly two-thirds of its seats in Parliament.

These political changes were entwined with the constitutional crises that centred on Quebec, its position within Confederation, and its demand for sovereignty and secession from Canada. On 23 June 1990, roughly two weeks before Lamer became chief justice, the deadline for ratifying the Meech Lake Accord, which among other things would have recognized Quebec as a “distinct society,” passed without the approval of two provinces, and the accord was defeated. Mulroney, keen on solidifying the Progressive Conservatives’ electoral position in Quebec and eager to resolve the constitutional anomaly of Quebec’s self-imposed exclusion from the constitutional deal of 1982, made what he referred to as a “roll of the dice” (Monahan 1991, 236) but his luck failed him. Mulroney nevertheless persisted in his efforts and two years later, in October 1992, after extensive public hearings and consultations across the country, Canadians went to the polls to resoundingly reject the more sweeping constitutional proposals known as the Charlottetown Accord (Johnston et al. 1996).

These debacles in “mega-constitutional” politics (Russell 1993) in no small measure led to the near-destruction of the Progressive Conservatives in 1993. They also provoked the 1995 referendum in Quebec that brought Canada to the brink of dissolution. If 30,000 voters out of more than 4,671,000 (nearly 94 percent of eligible voters turned out) had cast oui instead of non ballots, the proposal would have been approved (Young 1998). Ottawa, stung by the closeness of the vote, instituted what became known as Plan A to accommodate some of Quebec’s demands, while Plan B laid out a more confrontational approach in dealing with the ruling provincial Parti Quebecois. A central stratagem of Plan B was the Quebec Secession Reference, heard by the Supreme Court in 1998. This decision established Quebec’s democratic right to secede while spelling out the conditions for what would be a legitimate referendum and the federal government’s role in the process. The governments and citizens of Quebec and the rest of Canada, weary and wary of further constitutional imbroglios, increasingly turned their attention to other, more mundane political questions as the nineties drew to a close.
Granting Judicial Review in Canada

During Lamer’s decade as chief justice, the number of applications for leave to appeal rose more or less steadily, from 424 in 1990 to 642 in 2000. At the same time, the success rate of applications declined from 22 percent at the beginning of the decade, which was unusually high compared with preceding years, to 13 percent by its conclusion. The Court granted leave to appeal to an average of 15 percent of applicants. In these two respects the Canadian Supreme Court differs from the US Supreme Court. For one thing, the volume of leave applications is considerably smaller than the over 9,000 writs of certiorari reviewed by the US Supreme Court in 2001 (Epstein et al. 2003, 71). A second and more telling difference is that the chances for judicial review in Canada are much higher than in the United States. Canada’s Supreme Court grants leave to appeal to an average of 15 percent, or one out of six or seven, of the applications it receives, while the United States Supreme Court grants certiorari to fewer than one out of a hundred of all the writs it receives. Canada’s justices not only consider far fewer requests for judicial review but also place a much higher proportion of the leave applications on their docket, which means that their agenda is much more accessible to litigants than that of the US Supreme Court.

Shortly after Lamer became chief justice, he commented during an interview with *Law Times*, a Canadian professional weekly newspaper, that *Charter* appeals had overshadowed commercial law cases, with the consequence that provincial courts were resolving legal issues of concern to the business community. Lamer, claiming that several justices agreed with him, thought the occasion had arrived to “reaffirm a national perspective in private law.” According to the *Law Times*, the chief justice added:

> It is important that there be some national uniformity in how principles of commercial law are interpreted. I’m mainly aware of these concerns because I’ve frequently had lawyers up to my chamber for a coffee to ask them about how we could improve things. This kept coming up.

The chief justice’s concerns were not enough to overcome the inertia of the process. Moreover, despite the concerns of some lawyers, public law matters had not squeezed commercial matters off the Court’s docket. By one reckoning, the mix of applications granted leave by the justices during the nineties divided along the following lines: civil or private law cases accounted for about half of all the applications granted leave; criminal appeals (which included both *Charter* and non-*Charter* issues)
made up roughly one-third of the docket, with non-criminal constitutional appeals comprising the remaining one-sixth of cases. These proportions varied from year to year during the decade but there was no inversion of the Court’s long-standing priorities. Another close observer of the Court who classified the cases differently also found more signs of continuity than change during the Lamer years compared with the Court’s priorities during the preceding decade (McCormick 2000, 131).

Lamer’s comment about the commercial bar’s concerns about the Court’s docket being dominated by Charter cases raises an important contrast between the agenda processes in Canada and the United States. Interest group participation in litigation before the United States Supreme Court and the presence of organized interests in the Court’s agenda-setting process are well-documented facts (Caldeira and Wright 1988, 1990a; McGuire 1994). The amicus curiae or “friend of the court” brief provides groups or associations that are not direct parties to the cases with a way to express their views about the issues being raised. In Canada, organized interests file motions with the Court to become interveners in cases, which is directly analogous to the American amici curiae. The justices rarely decline these motions (Brodie 2002). Nevertheless, interest group participation is not as widespread as in the United States (Flemming 2000). Not only are interveners typically few in number, but their involvement focuses exclusively on the stage after leave applications are granted. The Court’s rules do not forbid or preclude such briefs at the leave stage but they are rare. To the extent that amicus curiae briefs provide the US Supreme Court with some independent measures of public interest in cases, the justices in Canada have set aside interveners as a possible aid in their deliberations. Unless they are direct parties in the cases, interest group interveners are conspicuously absent in the Canadian agenda-setting process. The implications of this difference for the Canadian Supreme Court will be explored later in this book.

Selecting cases for judicial review is constrained in some measure by how the Court allocates its time among its various tasks and by how many cases the justices feel they can or should decide over the course of a year. Their time is not their own, however, as appeals as of right and reference questions force themselves onto the Court’s docket, which means they reduce the time the justices might give to other cases. Canada’s justices typically set aside two weeks a month from October through June to hear oral arguments. Within this weekly block of time, they normally hear one or two cases a morning, four days of the week. During 2001, for instance, the Court scheduled ninety-six oral arguments over sixty-three days, or roughly a case and one-half for each day. Figure 1.2
steps back from these details to outline the steps of the agenda-setting process in Canada, which also provide the sequence of chapters in this book.

The first step in the process, of course, is the decision to file an application for leave to appeal. Surprisingly little research focuses on this decision in either the United States or Canada (cf. Songer et al. 1995). Chapter 2 attempts to fill this gap by constructing a statistical model based on the notion that attorneys can improve their professional standing or reputation through the leave process. This “status-seeking” model claims that, setting aside whatever legal issues or other concerns may affect decisions to participate in the leave process, professional ambition is an independent factor prompting involvement in the agenda-setting process.

The applications are filed with the Process Clerk of the Registrar’s Office, which certifies whether the applications conform to Court rules. This is a ministerial function of little substantive import and is directly analogous to the procedure in the United States where the Clerk of the
Court reviews writs of certiorari to see that they meet the Court’s rules. The second step, however, is strikingly different from the American process and is a major institutional difference between the two courts.

In Canada, leave applications meeting the format requirements are forwarded to the Law Branch (Registrar’s Legal Services before 1999) section. The section’s attorneys prepare “objective summaries” of the applications. Each summary provides a history of the case, outlines the facts, and lists the legal issues raised by the applicant. Since 1994-95, the summaries also include the staff attorneys’ recommendations on whether leave should be granted or denied. This stage is roughly similar in function to the “cert pool” in the United States, in which the clerks for all but one justice share the task of writing short assessments of the writs; these memoranda are then circulated among the justices and other clerks. The cert pool in essence is a division of labour intended to cope efficiently with the thousands of writs that flow into the US Supreme Court every year. The memos are also used by the chief justice to prepare a “discuss list” of writs he feels the Court should review when all nine justices meet in conference to vote on whether to grant or deny certiorari. This list helps reduce the workload of the justices, who can, however, add cases to the list should they choose to do so.

Canada does things differently. It has decentralized the review process through the use of three-justice panels. The supervisor of Legal Services distributes the applications and summaries among the panels. The panels receive roughly equal numbers of applications with some exceptions. Applications from Quebec are sent to the justices from Quebec because of the province’s civil code, while those raising special issues are sometimes forwarded to a panel with a justice with expertise in the area. In the United States, all writs on the discuss list or those added to it by the associate justices are reviewed by the nine justices sitting en banc in conference. In Canada, the primary responsibility for deciding whether to grant or deny leave rests in the hands of the three panel justices. The panels do not meet face-to-face to make their decisions. Instead they vote by written memorandum (Crane and Brown 2002, 398). Although only two votes are needed for a decision, the published votes in the Supreme Court’s Bulletin of Proceedings are almost always unanimous; a mere thirty judgments coded for this study had a dissent. The panels notify the other justices of their decisions prior to conference, the next step in the process.

Panels place applications on one of three lists after their review. If a panel wishes to defer an application because the Court is currently hearing a case raising similar issues, the application is placed on a “C” list
pending the outcome of the case. Applications approved for leave are placed on a “B” list for consideration at conference. This list is similar to the American discuss list and reflects the decentralized deliberations of the panels. If the panel decides to dismiss an applicant and deny leave, the panel notifies the other members of the Court of its decision. If a panel member dissents, the justice may place the application on the “D” list for reconsideration at conference. The “D” list is comparable to what was once called the “dead list” in the United States. If a justice who is not on the panel disagrees with a dismissal, the decision is deferred until the conference can reconsider it. A similar procedure takes place on the US Supreme Court when a justice asks that a certiorari petition not on the discuss list be reviewed by the justices when they meet in conference.

As in the United States, conference votes in Canada are not public information. Unlike their American peers, however, Canadian justices do not keep records of conference votes, or at least they have not released them to the public when they retire or resign from the bench. This means that the panel and conference votes are conflated in this study; no case-level data are available that show in a systematic fashion whether votes in conference alter or reverse panel recommendations. Nor is it possible to determine how often voting divisions occur in conference even if the divisions do not change panel recommendations. Although conference discussions reportedly “can get quite spirited” (Crane and Brown 2002, 398), the common view is that the panel recommendations are the final word.

In sum, the selection of appeals for judicial review in Canada moves through a process that differs markedly from the one in the United States. The Canadian process is more decentralized as leave decisions rest in the hands of the justices on the panels. This delegation of responsibility may lead to different standards of review or criteria for leave unless the justices share a common perspective of what cases should be granted access to the Court’s agenda. It is also possible the panels may grant leave at different rates. The conference may correct or modify panel decisions as other justices voice their opinions and urge panels to change their minds.

**Tournament of Appeals as a Metaphor for the Process**

This study uses the notion of a tournament as a metaphor for the process of granting judicial review. The metaphor provides a way of fitting the various pieces of the empirical puzzle together under a single rubric. Tournaments pit numerous contestants against one another in a series
of competitive trials or rounds of play. Access to the Supreme Court’s agenda is limited; it is the prize for leave applicants and their attorneys in this particular tournament. The rules of tournaments, of course, dictate the nature of the contest and presumably the outcomes of the contest. And, of course, there are referees to enforce the rules and make sure they are followed. The tournament of appeals differs from the standard tournament, however, in that the “referees” in the leave tournament are the justices, who are not neutral enforcers of the rules since they decide based on their own interpretation of the rules whether the applicant or the respondent “wins” a round.

Tournaments put contestants competing for prizes through a series of rounds of play. Repeated play of any kind over time may produce a hierarchy of players or teams. Each application for leave to appeal can be considered a separate round; typically there are roughly several hundred rounds of leave applications a year in Canada. The Supreme Court’s decision to grant or deny leave is a reward or penalty (depending on the party) that has both tangible and intangible payoffs for the lawyers. The rules of this tournament are uncertain and kept deliberately vague by the justices. When all is said and done, “public importance” is a term of art that conceals as much as it reveals. If attorneys have only vague intuitive notions of the rules the Court follows when picking lower court decisions for judicial review, repeated play by some attorneys may give them an advantage vis-à-vis the Court. Since the attorneys must make guesses about these rules and how they apply to their cases, the likelihood of mistakes when they draft their arguments for leave is probably higher because of their relative ignorance of what the justices want. As there is no a priori reason to expect that the lawyers’ guesses are not randomly distributed, the lawyers’ chances of winning may also be randomly distributed.

The metaphor is intended to portray the dynamics of the leave process but it also goes beyond this purpose in that, like other tournaments, this one is expected to generate both patterns of outcomes and hierarchies of players. As the metaphor is adapted to the empirical realities of the leave process, other distinctions will emerge that will underscore the uncertain and contingent nature of this particular tournament for the players.

Data Sources and Outline of the Book
A brief description of the empirical foundation of this book is in order at this point. This study relies on two major datasets. The first dataset drew information about the applications for leave for 1993-95 from the
Supreme Court of Canada Bulletin of Proceedings, which is the Court’s official record of its actions and decisions. Every application filed with the Court for this period was included; a total of slightly more than 1,250 applications with judgments as to the Court’s leave decisions are part of this dataset. Information from the Bulletin was supplemented with information from the factums or briefs filed by the applicant attorneys; the arguments in the factums were coded, plus the identities of the lawyers involved in the leave process, since the latter cannot be found in the Bulletin. The Supreme Court Reports, the official publication of the Court’s decisions in cases for which it grants judicial review, were combed for the outcomes of cases decided during 1975-92 plus the identities of the attorneys in these cases; the latter information was used to calculate the frequency with which attorneys argued the merits of cases before the Court.

The second dataset was generated through a bilingual questionnaire mailed to the attorneys involved in the leave process during the study period. The purpose of the questionnaire was to collect information about the backgrounds and professional status of the attorneys. A total of 552 attorneys returned completed questionnaires. As the study unfolds, further details about the research design and data sources will be discussed.

The following chapters follow the steps in the Canadian sequence of granting judicial review and are organized according to the three agenda-setting accounts drawn from the American literature on the writ of certiorari. Chapter 2 concentrates on two concerns of the litigant-centred account. One is whether there is an identifiable “Supreme Court Bar” in Canada similar to the one McGuire found in the United States. The second issue, as mentioned earlier, is whether requests for judicial review reflect the professional ambitions of attorneys. Chapter 3 elaborates on the litigant-centred account by turning to the question of “who wins?” to see whether repeat players and litigants with superior status or resources are more likely to be granted leave than one-shot players or litigants with inferior status or capabilities. Chapter 4 takes up the jurisprudential account and develops a statistical model of the factors associated with the Supreme Court’s decisions to grant leave. It takes into account the decentralized nature of Canada’s process by looking at the individual panel decisions to determine the consistency of the criteria used by the panels. Chapter 5 develops a strategic account to gain an understanding of why leave to appeal decisions by the justices are almost always unanimous. The concluding chapter places these findings in a comparative and theoretical context.