Tournament of Appeals: Granting Judicial Review in Canada

By Roy B. Flemming


As the Supreme Court of Canada’s influence has increased, both nationally and internationally, it has become the subject of increasing public and academic scrutiny. While the majority of this attention has focused on the Court’s decisions and decision-making on appeals, rather less analysis has been undertaken of the leave to appeal process by which the majority of cases are placed on the Court’s docket. Given the importance of the leave to appeal process in setting the Supreme Court’s legal agenda—and thus the scope and nature of its influence in the legal, political, social and economic lives of Canadians—the leave to appeal stage of appeals to the Court is a significant and potentially fruitful area of analysis, of interest as much to academics and Supreme Court watchers as to parties and lawyers seeking access to the highest court. Roy B. Flemming’s brief but concentrated Tournament of Appeals: Granting Judicial Review in Canada is an important and useful addition to this area, as the first book that undertakes a thorough statistical analysis of leave to appeal applications and results in order to empirically assess the influences and outcomes in the Court’s agenda-setting process.

Flemming, a professor of political science at Texas A&M University, collected extensive data from applications for leave to appeal during the period from January 1993 to December 1995, the first three years of the “natural court” (i.e., with no judicial turnover) that lasted from the appointment of Justice Major in November 1992 through the retirement of Justice LaForest in September 1997. The leave applica-

1. The Supreme Court of Canada does not control its agenda entirely. The Court hears appeals "as of right" in certain criminal cases (Criminal Code, R.S.C. 1985, c. C-46, ss. 691-93) and in certain inter-governmental disputes (Supreme Court Act, R.S.C. 1985, c. S-26, s. 35.1), and also hears references made to it by the Governor in Council and appeals of references to provincial courts of appeals by lieutenants governor in council (Supreme Court Act, ss. 36, 53). However, the number of these hearings has declined over the past decade, from approximately a third of the Court's hearings in 1994 (40 of 119) to less than one sixth of the hearings in 2004 (13 of 83), making the leave to appeal process increasingly important in setting the Court's hearing agenda: Supreme Court of Canada, Bulletin of Proceedings, Special Edition, Statistics 1994 to 2004, at 4.


4. Flemming, supra note 2 at 10. The use of data from within the time period of a natural court permits the analysis of leave to appeal applications that have been considered by the same overall set of justices (recognizing that leave to appeal decisions are made by three-member panels), and thus the exclusion of any variability in the dataset arising from different justices participating in the decision-making.
tions were reviewed and coded based on such straightforward matters as the court appealed from and whether leave was obtained, but also on significantly more detailed factors such as the nature of the parties, the identity of counsel, and substantive legal elements identified in the application for leave itself. These data were then supplemented by a survey of counsel involved in the leave to appeal applications, giving information about such matters as their experience and firm size.

In analyzing the resulting dataset, Flemming uses as a launching point the more extensive literature on the agenda-setting process of the United States Supreme Court (which had a 50-year head start on the Supreme Court of Canada in controlling its own docket). That literature puts forward three hypotheses as to what influences the decision to grant judicial review in one case but not another: a "litigant-centred" account based on the status of the parties to the proceeding (and their counsel); a "jurisprudential" account based on the substantive legal elements of the application; and a "strategic choice" account that considers the possibility of strategic voting by judges on leave applications having regard to anticipated outcomes of the appeals themselves. Flemming uses extensive and thorough statistical analysis of his dataset to assess the applicability of each of the models in Canada, including interactions between the first two in particular.

Flemming's discussion uses the metaphor of a "tournament" in which the "players"—litigants and their counsel—are pitted against one another in a repeated series of contests, with a winning result in the contest in question being obtaining leave to appeal. While this "tournament" metaphor may be somewhat unnecessary for an understanding of the results of his analysis, it helps provide a framework for discussion and a narrative context in which to present the data, models and results.

As Flemming notes, one significant distinction between the leave to appeal context and the typical "tournament" is in the specificity of the rules that govern the players and the outcome. Section 40 of the Supreme Court Act indicates that leave will be granted where the Supreme Court considers that the matter is:

5. The "Judges' Bill of 1925" granted the United States Supreme Court control over its docket, whereas the Supreme Court of Canada did not have the same control until the 1975 amendments to the Supreme Court Act: ibid. at 5.

6. The term "judicial review" used in the title and throughout the book is used in the broader sense of the Supreme Court of Canada granting leave to appeal, rather than in the narrower administrative law context in which the term is typically used in Canada. The use of the term in this context no doubt draws from the agenda-setting process in the United States Supreme Court (the subject of extensive comparison in the book), where leave to appeal is effected through the writ of certiorari.

it selects for hearing. Since the rules of the leave to appeal game are "uncertain and kept deliberately vague by the justices" in contrast to those of a sporting tournament, Flemming uses an analysis of the results over a multiplicity of contests to assist in casting light on what the "rules of the game" are in the leave to appeal process.

After introducing the reader to the American literature on Supreme Court agenda-setting, and to the processes in place at the Supreme Court of Canada for review of leave to appeal applications, Flemming dedicates the second and third chapters of the book to consideration of the "litigant-centred" model of agenda-setting. This account focuses on the identity of litigants before the Court and their counsel, and has shown in the United States that "upperdog" litigants more often gain access to the Supreme Court than "underdog" litigants, and that parties represented by counsel with experience before the US Supreme Court also have an advantage in seeking review by the Court.9

The results of Flemming's analysis of Canadian leave to appeal applications are perhaps gratifying to those who hope and assume that the Supreme Court of Canada sets its agenda on the basis of the legal issues involved rather than on the identity or status of the parties or their lawyers. While certain criteria show statistically significant advantages, the overall conclusion is that "repeat player" lawyers with Supreme Court experience do not hold any significant advantages over less experienced lawyers in applications for leave to appeal to the Supreme Court of Canada; nor does the status of the party litigant—except where the party is a government—matter greatly in the Court's decision-making.10 This difference compared to the American experience is attributed to a number of institutional aspects, including the comparatively low number of leave applications in Canada (and the correspondingly high percentage of cases granted leave), the greater degree of scrutiny of each application for leave, and the practice of leave applications being determined by three-member panels rather than the full Court.11

The fourth chapter of the text turns to the "jurisprudential account" of agenda-setting, seeking to assess whether particular substantive aspects of an application for leave to appeal result in a greater likelihood of leave being granted. Here, Canadian litigants and lawyers are not without some guidance from the Supreme Court of Canada. While, as noted above, the discretion given to the Supreme Court of Canada through the "public importance" language of section 40 of the Supreme Court Act results in there necessarily (and deliberately) being no fixed and specific rules that govern applications for leave to appeal, the Supreme Court has on occasion given indications as to the factors that it considers in determining whether to grant leave. Notably, in a speech given in 1997,12 the late Justice Sopinka set out a number of

8. Flemming, supra note 2 at 17.
9. Ibid. at 3-4.
10. Ibid. at 57-58.
11. Ibid. at 58-60.
12. Reproduced, with Justice Sopinka's permission, since 1998 in Crane and Brown's Supreme Court of Canada Practice, and currently in Brian A. Crane and Henry S. Brown, Supreme Court of Canada Practice, 2005 (Toronto: Thomson Canada Limited, 2004), at 379-387 [Crane and Brown].
“broad principles and guidelines” useful in attempting to answer the question “what are matters of public importance?” Factors favouring leave in Justice Sopinka’s account included the presence of a constitutional challenge; a conflict between courts of appeal; a novel point of law; the interpretation of an important federal statute or a statute existing in several provinces; or an issue of aboriginal rights.13

Flemming’s statistical analysis of the leave applications in the 1993 to 1995 time period shows that, perhaps not surprisingly, applications with certain jurisprudential aspects had a statistically significant advantage in obtaining leave. The existence of a novel issue, the existence of conflict in lower courts and the presence of federal or provincial interests being affected by the lower court decision all do in fact significantly favour the granting of leave, while applications that are fact-specific have a significantly lower chance of obtaining leave to appeal.14 On this issue again, therefore, the results are gratifying to those who hope that the leave to appeal process is governed by the merits of applications for leave.15 At the same time, however, breaking the decisions down to a panel-by-panel analysis shows that different factors were significant as criteria for different panels, while certain leave panels showed no significant relationship between the factors and granting leave.16

Flemming addresses the third model posited in the American literature—that of the potential for strategic voting—in the fifth chapter of the book. After providing a useful background discussion of the American experience, including consideration of “defensive denials” and “aggressive grants” described in the American literature, Flemming discusses what he describes as the “puzzle” of consensus in decision-making on leave to appeal in Canada. In the approximately 1,200 applications studied by Flemming from the 1993 to 1995 time period, there were only 30 decisions on leave in which a dissent was recorded, in contrast to the more frequent occurrence of dissents at the certiorari stage in the United States Supreme Court.17 This consensus in Supreme Court of Canada leave to appeal decision-making continues to exist, and indeed has increased: a review of the Court’s Bulletin of Proceedings during the period from November 18, 2005 to January 27, 2006 shows no recorded dissent in over 120 decisions on applications for leave to appeal in that time frame.

13. Crane and Brown, supra at 382; Flemming, supra note 2 at 63.
14. Flemming, supra note 2 at 69. The fact that Justice Sopinka’s speech was given a year after Flemming’s data collection appears to account for the fact that the existence of an aboriginal rights issue was not analyzed as a factor in granting leave: Flemming, supra note 2 at 64-65.
15. As Flemming notes, the jurisprudential variables were assigned on the basis of the arguments raised in the application, necessarily avoiding a substantive analysis of the value of those arguments. As a result, the data likely understate the impact of these jurisprudential factors when they are found to exist by the reviewing panel. Flemming, supra note 2 at 69-70.
16. Ibid. at 75.
17. Ibid. at 83.
Flemming explains this consensus on a number of bases, related in large part to the difficulty that a Supreme Court of Canada justice has in predicting the outcome of appeals: strategic voting on leave to appeal applications becomes more difficult when the ultimate outcome of appeals is more variable. An additional theory is also posited that a dissent on an application for leave may lead to the dissenting judge not being assigned to the coram hearing the appeal. Both of these explanations, however, are put forth in the context of data from 1986 to 1997 regarding coram sizes on appeals. During that time frame, 29 percent of cases were heard by five-judge panels, 48 percent by seven-judge panels and only 23 percent by the full Court. By contrast, today's Court under Chief Justice McLachlin hears appeals with a full panel of nine justices much more frequently, and in five-judge panels very rarely. For example, the Supreme Court has rendered decisions in 87 of the cases heard by the natural court that began with the appointment of Justices Abella and Charron in August, 2004 and ended with the retirement of Justice Major in December, 2005. Of these, 46 appeals (53%) were heard by a nine-member panel and 38 (44%) were heard by a seven-member panel, while only one appeal (<1%) was heard by a five-member panel. As a result, the "uncertainty" regarding the prediction of outcomes based on coram size may arguably have decreased based on the theory, as would any hypothetical concern about losing a seat on the merits coram by virtue of having dissented on the leave to appeal decision; yet as seen above, this has not resulted in any increase in dissents at the leave to appeal stage. Thus, while Flemming's conclusion that consensus in the Canadian leave to appeal process is driven by the institutions and procedures used by the Supreme Court of Canada is no doubt true, further consideration and analysis may be required to adequately explain which institutional aspects underlie the differences between consensus levels in Canada and the United States. No doubt the principles of reciprocity described by Flemming—as well as the simple but less quantifiable issues of personality, leadership and collegiality—have influence in the consensus that is seen.

Having put his dataset through its paces, Flemming concludes in his final chapter that the institutional differences between the agenda-setting of the United States Supreme Court and that of the Canadian Supreme Court results in the three accounts proposed by the American literature appearing rather differently in the Canadian perspective. The litigant-centred account is of limited utility in Canada, while the jurisprudential and strategic accounts take different turns than are seen in the United States.

*Tournament of Appeals* is an interesting and important contribution to scholarship on the Canadian Supreme Court. While the dataset analyzed for the purposes

18. Ibid. at 85.
20. The remaining appeal was heard, unusually, with a panel of eight judges.
of the study is already dated (Chief Justice McLachlin is now the only remaining member of the Court who was sitting when the leave applications under analysis were filed), and the conclusions appear in large part to simply reinforce existing expectations about the leave to appeal decision-making process, it is to be hoped that this work will act as a catalyst for further empirical study of this important aspect of the Court's decision-making process, so as to permit both further international comparison and assessment of changes in the influences on the Court's agenda-setting over time.

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*The views expressed herein are those of the author and not necessarily those of Stikeman Elliott LLP.