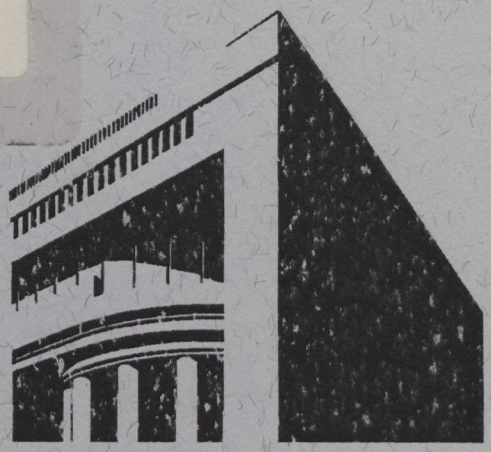

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Agenda Setting in the Supreme Court of Canada: A Report and Overview of a Project in Progress

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AGENDA SETTING IN THE SUPREME COURT OF CANADA: A REPORT AND OVERVIEW OF A PROJECT IN PROGRESS

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INTRODUCTION

The evolution of courts of final appeal into major policy making bodies depends critically on whether they can free themselves from the generally parochial demands and issues raised by litigants dissatisfied with the outcomes of their cases in the lower courts. Once high courts have discretion to pick and choose cases involving issues of interest to them, the courts have the ability to address more global legal questions of import to society at large. Agenda setting thus becomes a significant act of political authority. Agendas constitute a list of concerns and the priorities constrained by the need to ration time and resources. In assembling their agendas, a high court thus necessarily create winners and losers in this process. At the same time, the decision to hear some cases and not others imposes the court'a priorities on the politics of the country and its governmental institutions. A recent example in Canada illustrates the point. When the Supreme Court struck down a law passed by Parliament restricting cigarette advertising, it set off a sequence of actions and reactions that still reverberates over two years after the justices handed down their decision.

Research on agenda setting in the United States Supreme Court is extensive and rich. It began with a series of articles in the *Harvard Law Review* by then professor of law, Felix Frankfurter, who later became an Associate Justice of the Court, after the Judges' Bill of 1925 granted the Court control over its docket. Social scientists began to investigate the process in the late 1950s and there has been a steady stream of research since then.[1] Comparable research does not exist in Canada even though Canada's

[1] Useful surveys of this research can be found in Provine (1980) and in Perry (1991).

Supreme Court has become an important influence on public policy since the entrenchment of the Charter of Rights and Freedoms in 1982. This report outlines a major project on agenda setting in Canada's Supreme Court that is designed to do two things: (1) establish systematic empirical explanations for how Canada's Court selects cases for review; and (2) to replicate the American research to determine whether this research can be used as a foundation in developing more general understandings of how courts of final appeal "decide to decide."

This report is organized in the following ways. First, the American research on agenda setting is reviewed. Second, the American and Canadian Supreme Courts are compared and contrasted. Third, the research project and its revisions are discussed and the "Canada Database" is described. Fourth, the process of selecting cases for review in Canada is sketched based on interviews with attorneys and former clerks.

FOUR PERSPECTIVES ON AGENDA SETTING IN COURTS OF FINAL APPEAL: THE AMERICAN LITERATURE

American research perspectives on agenda setting in the U.S. Supreme Court cluster around four broad points of view. Borrowing from Perry (1991a), the first perspective is ***jurisprudential choice***. From this perspective, the selection of cases reflects the justices' application of legal considerations to requests for review. These legal considerations pertain to such matters as jurisdiction, standing, ripeness or mootness and to other elements of the Court's Rule 10 such as conflicting lower court decisions.

The jurisprudential choice perspective posits that legal factors dominate the early stages of the agenda process as petitions are reviewed and narrowed down to a "discuss list" and to a lesser but still important degree later on when justices deliberate in conference (e.g., Provine 1980; Ulmer 1984; Perry 1991a; Stern *et al* 1993). This perspective does not assume the process is rule-bound, however. Instead legal considerations may prompt justices to give petitions a second look in a process strongly governed by the assumption that few petitions warrant approval. As Provine (1980) cautions and Perry (1991) shows, the jurisprudential perspective is alert to subtleties in the process while taking into account the legal constraints on the justices' behavior. Still, it must be stressed that legal factors are the first hurdle for

applicants seeking review and failure to clear them generally leads to denial of certiorari without regard to the substance or policy merits of the petitions.

The second major perspective centers on ***litigant resources***. It suggests that petitions for certiorari succeed according to the status, resources, and expertise of petitioners vis-a-vis respondents, the support their positions attract from interest groups, plus whether the lawyers representing the parties make frequent appearances as "repeat players" before the Supreme Court. For example, numerous studies starting with the "cue theory" of Tanenhaus *et al* (1963) show that the Office of the Solicitor General is very successful before the Court in having petitions granted or denied depending on Solicitor General's position as a direct party or amicus curiae (Ulmer *et al* 1972; Segal 1988, 1990; Salokar 1992).

More generally, the status of the parties, i.e., whether "upperdog" or "underdog," is related to the voting behavior of justices in the agenda setting process. Higher status litigants, the upperdogs, generally are more likely to gain access to the Court than underdogs or lower status litigants although this relationship depends in part on the ideological makeup of the Court (Ulmer 1978, 1981; Sheehan, Mishler, and Songer 1992). Other studies reveal the presence of amici curiae briefs filed by interest groups in support of the petitioning party increases the likelihood of petitions being placed on the discuss list and of being granted at conference (Caldeira and Wright 1988, 1990). Parties represented by lawyers who are repeat players with expertise before the Court also have an edge over opponents with less experienced counsel in affecting favorable certiorari decisions (McGuire and Caldeira 1993; McGuire 1995). Experienced lawyers may also recruit interest group support (McGuire 1994).

The third perspective views justices' agenda setting decisions as a matter of ***strategic choice***. This view was first explored by Schubert (1958, 1959, 1962) in his seminal pieces on the "certiorari game" and in subsequent findings that justices' ceritiorari votes are related to their final votes on the merits of cases (Ulmer 1972, 1973; Songer 1979). More generally, justices are seen as anticipating the outcomes of cases and then casting their certiorari votes according to whether these expected outcomes were consistent with their policy views (Brenner 1979).

In later versions of this perspective, justices pursue particular strategies, i.e., either "aggressive grants" or "defensive denials," when casting their agenda votes (Perry 1991; Brenner and Krol 1989; Krol

and Brenner 1990; Boucher and Segal 1995; Segal, Boucher, and Cameron 1995). While conclusions from this research are not always consistent, it seems that justices more often vote strategically when they wish to affirm lower court decisions than if they want to reverse the decisions because of the Court's traditionally high reversal rates on the merits. Brenner (1979) suggests and Boucher and Segal (1995) agree that in the United States voting to grant certiorari with the intent of affirming a lower court decision is riskier than voting to grant with the goal of reversing the decision. This reflects the Court's high reversal rate. Justices hoping to affirm, therefore, need to pay more attention to the odds of success, since they are lower, than justices planning to reverse.

These three hypotheses lack an explicit temporal dimension; that is, they do not take into account trends or cycles in the issues selected by the Court for review or long-term shifts in priorities. The fourth perspective, ***agenda dynamics***, corrects this myopia. Pacelle (1991; 1995) shows how the agenda of the U.S. Supreme Court has shifted over the sixty years since the start of the New Deal to emphasize civil rights and civil liberties issues while de-emphasizing questions involving federalism and regulation of the economy. This shift was signaled by "footnote 4" in *U.S. v. Carolene Products Co.* (304 U.S. 144 (1938)) in which Justice Stone enunciated a "preferred position" doctrine declaring that laws affecting "discrete and insular minorities" demanded the Court's "strict scrutiny" while issues of government policies affecting the economy warranted attention only if they lacked some "rational basis." Pacelle's analyses highlights the importance of understanding the historical roots of current priorities in the Court's agenda setting process and how these priorities change over time.

The American literature on the certiorari process is not without contradictions, weaknesses, and ambiguities. It is not an easy task to isolate jurisprudential factors from the policy concerns of justices (Baum 1993). Furthermore, the findings dealing with litigant resources or the effectiveness of interest groups are not duplicated at the merits stage or in other courts (e.g., Sheehan, Mishler, and Songer 1992; Epstein and Rowland 1991; Olson 1990). Moreover, while the literature tends to gravitate toward one or the other of these perspectives for analytical purposes, the perspectives are not mutually exclusive. Perry's (1991, 278) model of how U.S. justices "decide to decide," for example, while stressing the jurisprudential aspects of the certiorari decisions nevertheless includes an "outcome mode" that incorporates aspects of

the strategic choice hypothesis. His discussion of "indices" and "signals" that alert justices and their clerks to look more closely at petitions includes not only such jurisprudential matters as circuit conflict but elements from the litigant resource hypothesis such as the identities of the litigants or their counsel (Perry 1991, 113-139). Setting these issues aside, clearly a comprehensive understanding of agenda setting in courts of final appeal requires consideration of all four perspectives.

At present, comparable social science research on agenda setting in Canada's Supreme Court does not exist. Reviews of the leave to appeal process first appeared in Canada's *Supreme Court Law Review* in 1982 (Bushnell 1982) and have continued annually since then (see Bushnell, Crane and Brown, and Brown and Crane, various dates). These articles are primarily "practice notes" for the legal profession with discussions of the cases the Court accepted for appeal. They provide some statistical information but the data are descriptive and confined to breakdowns of the legal subject matter of the applications, the court and province of origin, and the proportions of applications granted leave by these categories.

The objective of this project is to replicate in the Canadian context the research on the certiorari process in the U. S. Supreme Court. Replication of this research will generate several benefits. First, it opens up a new line of empirical inquiry on Canada's Supreme Court that so far has been ignored. Second, a better understanding of agenda setting in Canada will help determine whether the American literature reflects the institutional features of the U.S. Supreme Court. For example, there may be little support for the strategic choice perspective in Canada because the Court's institutional arrangements do not foster the conditions needed to create a "leave to appeal game." Similarly, the absence of interest group involvement in the leave to appeal process weakens expectations that this aspect of the litigant resources perspective will be supported. Other aspects of this perspective, however, may be relevant to the Canadian court. For example, McCormick (1993) found a long term relationship between success in Canada's Supreme Court and high status or high resource litigants in decisions on the merits. In light of Atkin's (1991) findings for the English Court of Appeal, a further test of this perpective for Canada's leave process would represent a valuable addition to this body of literature. On the other hand, the Court's agenda has undergone a shift in priorities and kinds of cases it selects that reflects the Court's discretion in picking cases of "public importance" and the impact of the Charter of Rights and Freedoms.

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

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

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

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

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

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

by 1980-81, five years after the amendment was adopted, the percentage had grown to 74 percent (Bushnell 1982, 497). The proportion of cases on the Court's agenda that arrive there through leaves to appeal applications averaged 66 percent for the period 1987-1992. (In contrast, virtually all cases heard by the U.S. Supreme Court appear on its docket through petitions for certiorari.) Appeals as a matter of right in criminal cases thus continue to be an important segment of the Court's docket. Each term of the Court will also include one or two reference questions as well.

Entrenchment of Canada's Charter of Rights and Freedoms in 1982 further elevated the importance of the Court's decisions in the eyes of the public, the media, legal profession, and politicians (Knopff and Morton 1992). The Charter hastened the Court's transformation from an institution that for most of its existence had dealt with private law matters and "basked in relative obscurity" (Russell 1975) into an institution dealing primarily with public law matters.[4] Appeals involving the Charter of Rights and Freedoms generally come to the Court through the leave to appeal process, adding further saliency to the Court's agenda-setting process.

Canada's Supreme Court no longer can be described as a "captive court," tightly bound by tradition, precedent, and institutional restraints on its authority and autonomy (Bushnell 1992). Instead its position in Canada's legal system now approximates in many ways the more active, free-ranging role played by the Supreme Court in the United States. In both courts, deciding what to decide is pivotal to the policy process, and in both courts the discretion to choose is relatively unfettered by statutory restrictions or injunctions.

The 1975 amendment expanding the Court's discretion over the selection of appeals allows the Court generous room in making these decisions. According to the amendment, the decision depends on

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[4] According to Russell (1975), the Court's caseload prior to 1949 consisted primarily of tort, contract, and property cases with criminal and constitutional appeals making infrequent appearances before the Court. The caseload began to shift by the time of the Supreme Court Act was amended in 1975. The Court's current caseload is a mirror image of the 1949 docket with public law cases predominant. For example, in 1994, the Supreme Court's *Bulletin* reported that 24 percent of the appeals before the Court involved cases involving the Charter of Rights and Freedoms, 42 percent involved criminal law matters, and 3 percent pertained to constitutional questions, for a total of 69 percent of all of the appeals heard by the Court.

the Court's determination of the "public importance" of the issues raised by an application for leave to appeal. Section 40(1) of the Supreme Court Act states that applications are to be granted 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 is even more broadly phrased than Rule 10 regarding certiorari decisions in the United States (Stern *et al* 1993). Like the U. S. Supreme Court, Canada's Supreme Court refuses to develop a jurisprudence that delineates the meaning of "public importance." The Court does not explain except in very rare instances the reasons for its decisions. As one justice remarked from the bench (Crane and Brown (1993, 21):

> There is no practice on the question of importance of a case. The Court will not create a jurisprudence. We have a discretion which is unfettered by anything we have previously decided. It is only a question of what we think in each case.

Despite the Court's reticence and its insistence on a case-by-case assessment of the public importance of applications, Justice Sopinka, who currently sits on the Court, in his co-authored book on appeals in Canada offers several general indicators of "public importance" that are similar to the elements of Rule 10 in the United States. Leave applications raising these issues, Justice Sopinka advises, stand a "better chance" of being granted by the Court than those that do not (Sopinka and Gelowitz 1993, 167). According to Justice Sopinka, "public importance" involves one or more of the following matters:

- a novel constitutional issue;
- the interpretation or application of a significant federal statute of general application;
- interpretation of a provincial statute with corresponding similar legislation in other provinces;
- an issue in respect of which there are conflicting decisions in the provincial courts of appeal;
- an issue which requires revisitation by the Supreme Court on an important question of law.

The two courts therefore are very similar with regard to their public policy importance and their discretion over the selection of cases. There are also important differences, however. In Canada, there is

a significant stream of criminal cases over which the Court has little control. Over the past ten years, "appeals as of right" constituted roughly 10-15 percent of the cases on the Court's docket. Canada's Court also must hear "reference" questions (Hogg 1996). Although there are typically no more than one or two a term, references often raise fundamental political issues as exemplified by the current reference regarding the constitutionality of Quebec's secession from Canada. The United States Court does not render advisory opinions, and virtually its entire docket is now discretionary.

Table 1 summarizes these and other differences between the two courts. The jurisdiction of Canada's Court is much broader than the U.S. Supreme Court, for example (Hogg 1996, 204). This means the range and impact of cases decided by the Canadian Court is potentially greater than that of the American Court. At a minimum, the Canadian agenda could be more diverse. There are several other differences between the two courts that are important. The volume of discretionary appeals is smaller and more stable in Canada than in the United States.

TABLE 1 ABOUT HERE

For the past 10 years, an average of about 475 leave to appeal applications were filed with Canada's Supreme Court (Supreme Court of Canada 1997, 6). In the United States, petitions for certiorari dealing with non-criminal cases averaged about 2,500 per year from 1985-1995 while the number of criminal petitions roughly doubled from 2,577 in 1985 to 5,098 in 1995 (Epstein etal 1996, 82-83). Acceptance rates also differ. Although both courts deny most applications, the acceptance rate in Canada is higher than in the United States. On the average, Canada allows leave to about 15 percent of the applicants in sharp contrast to the United States where the acceptance rate is generally around 4 percent for civil petitions and a mere .003 for criminal appeals.

The growth of interest group participation in litigation before the United States Supreme Court and its impact on the Court's certiorari process are well-documented phenomena (Epstein 1991; Caldeira and Wright, 1988a, 1988b, 1990; McGuire 1994). A similar development has occurred in Canada where the Court has relaxed its rules on standing (Bogart 1987, 1994; Gertner 1988) and it rarely declines requests by groups to intervene in cases (Welch 1985; Brodie 1992; Lavine 1992). Interest group involvement is focused exclusively on the stage *after* leave applications are granted, however (Brodie 1995; Epp 1995).

Interest groups rarely appear as intervenors in the leave process even though the Court's rules do not forbid or preclude such briefs. To the extent amicus briefs provide the U.S. Supreme Court with a measure of the public interest in cases, comparable indicators of public importance are not available to the panels reviewing leave to appeal applications in Canada. Interest groups or intervenors unless they are direct parties in the cases are conspicuously absent in the Canadian agenda setting process.

Three other procedural features distinguish Canada from the United States. First and perhaps most important are the rules affecting the linkage between agenda setting decisions and decisions on the merits of cases. The American literature suggests that strategic considerations play a part in the justices' votes on certiorari. Strategic behavior in the United States reflects the fact all nine justices participate in both decisions. With few exceptions, after conference, the justices sit *en banc* when deciding the merits of cases. The American norm is not followed in Canada. Not only are leave decisions made by three justice panels, but decisions on the merits are customarily made by panels of five and seven justices. It is a relatively rare occasion for the present court to sit *en banc* to decide appeals. In 1991, for example, only 13 of the 110 cases decided by Canada's Court were heard by all nine justices; the vast majority of the other cases were decided by panels of either five or seven justices (Osgoode Hall Law Journal 1994).

At the time leave to appeal applications are considered, the justices do not know with any certainty what the size and composition of the panels deciding the merits of the appeals will be. Unlike their peers on the American court, they cannot anticipate with any assurance what the probable voting alignment of the panel might be. Some of this uncertainty might be mitigated if justices on the leave panels expect that the chief justice will appoint them to the panel to decide the merits of the cases for which they recommended leave to appeal. They will not know, however, what the size of the panel will be or the identity of the other justices except for appeals from Quebec where the francophone justices will be assigned to hear the cases. At present there is no empirical evidence on the overlap between the two sets of panels.

The strategic context of the Canadian justices differs in two other ways from their American peers. First, Canada's Supreme Court typically is more likely to affirm lower court decisions than the United States Supreme Court. During the 1991 term, for instance, Canada's Court affirmed 66 percent of the

decisions it reviewed (Osgoode Hall Law Journal 1994, 173; see also Russell 1992). In the United States, the comparable percentage was 36 percent (Epstein *et al* 1996, 212). A second contrast is that unanimous decisions on the merits are much more common in Canada than in the United States where there is a tradition of dissent. In 1991, roughly 70 percent of the cases in Canada's Court were unanimously decided (Osgoode Hall Law Journal 1994, 180; see also Russell 1992). For this same year, the proportion was 40 percent in the United States (Epstein *et al* 1996, 194). To the extent the Canadian justices try to anticipate the outcomes of cases, they can expect that the applications they approve for leave to appeal are more likely to be affirmed than reversed, and that the historical odds favor a unanimous decision rather than a divided one.

THE "CANADA DATABASE," MODIFICATIONS IN THE RESEARCH DESIGN, AND OPERATIONALIZATION OF KEY VARIABLES

Extensive modifications have been made to the original research design. While additional support from the National Science Foundation made these changes feasible, the modifications are consistent with the four theoretical perspectives that inform the American literature of agenda setting in courts of final appeal. Table 2 summarizes the changes in the project's research design and the data that have been or are being collected for this project. The heavily shaded cells indicate the scope of the original research design. The more lightly shaded cells show the expansion of the project's focus from a single year, 1995, to a three-year period, plus the enlargement of the data collection phase to include the "public importance" arguments made by appellants' attorneys. Data collection was completed in 1996 in all of these shaded cells; the unshaded cells indicate data collection is currently underway.

TABLE 2 ABOUT HERE

The project now has a multiple-year focus. The original "focal" year, 1995, was expanded to a three year focus, 1993-1995, and then further enlarged to include two succeeding years. In effect, the study period covers five years, 1993-1997. In addition, case-based data from the Court's merits or final decisions between 1975-1992 provide a historical dimension to the Court's agenda process. Data collection, however, could not be extended to the years prior to 1975 because the Court did not report a substantial proportion of its decisions, nearly a third each term on the average; presumably these cases were not sufficiently important to warrant publication of the opinions. One of the effects of the reform in

1975 was a change in the Court's reporting practices. Beginning in 1975, the Court reported all of its decisions which facilitates an accurate measure of changes in its docket.

Four specific reasons lay behind the decision to lengthen the project's temporal perspective. First, by extending the data collection to include 23 years of merits and leave decisions long-term trends in the Court's agenda can be determined as well as short-term "issue cycles." Second, the five-year study period coincides with the start of the current "natural court" that began with Justice Major's appointment in November 1992; since the justice's appointment, the Court's composition has remained unchanged. Third, enlarging the study period increases the number of different leave panels, an important distinguishing feature of the agenda process in Canada. The existence of a natural court and stable panels minimizes the problems of insufficient numbers of applications for analysis that would arise from including short-lived, unstable panels and courts with frequent replacement of justices.

A longer study period, finally, facilitates multivariate analyses by including a greater number of leave decisions and merits cases. While this is a general benefit for the project since it increases the likelihood of stable quantitative findings, it is especially important in exploring the strategic choice perspective. A smaller data set would impede the modeling of strategic behavior by the justices similar to what has been done by Boucher and Segal (1995) and by Segal, Boucher, and Cameron (1995) which requires both agenda and merit votes of justices. As the table indicates, the Canada database now involves approximately 2400 leave applications instead of 445 as in the original proposal. A larger number of observations creates more analytical opportunities for the strategic choice perspective. In particular it overcomes the problem of the limited number of merits panels per term and, the fluctuating composition of these panels that would have constrained the original research design.

The project's database was expanded in still other ways. The attorneys' factums on file at the Supreme Court were coded during the 1996 data collection phase so that the analysis could determine the weight, if any, given to the attorneys' "public importance" arguments. These data roughly correspond to the criteria Justice Sopinka suggests tip the scales in favor of granting leave applications in Canada and to the factors Perry identified as important in his interviews with justices and clerks in the United States.

The inclusion of this information greatly enhances the project's capacity to test hypotheses that are part of the jurisprudential choice perspective.

Access to the attorneys' factums stored in the Supreme Court created another important advantage. The factums are the *only* source for identifying attorneys who file leave applications with the Court. If the litigant resource perspective is to be thoroughly explored, it is important to determine whether attorneys are repeat players, whether as in the United States (McGuire 1995) there is a "Supreme Court Bar" in Canada, and to collect information about the backgrounds of attorneys through mail questionnaires. All of this requires a complete and accurate list of the attorneys . The *Bulletin* and *Supreme Court Reports* are inadequate for this purpose. The *Bulletin* does not identify the attorneys at the leave stage, and *Supreme Court Reports* only includes attorneys in cases where leave was granted. To understand the process as thoroughly as possible, the attorneys involved in applications that were *denied* by the Court must be part of the database. Expansion of the Canada Database in this way offers new opportunities for testing the analytical value of the litigant resource perspective.

A final addition to the research design in the inclusion of attention to legal issues that are part of the public and elite agendas. Their attention will be measured using citations in the *Canadian Newspaper Index* and the *Index to Canadian Legal Periodicals*. These data will be used in an analysis of the impact of Supreme Court actions on public attention similar to a forthcoming study of the U.S. Supreme Court (Flemming and Wood 1997). The data also can be used to trace the ebb and flow of attention to legal matters that help create a climate of opinion to which the Court may be sensitive.

The revised research design will generate a wealth of data to explore the leave to appeal process. For example, Caldeira and Wright (1994) reveal that the criteria related to certiorari decisions vary considerably across the individual justices on the U.S. Supreme Court. No research on the leave process at the individual justice level has been done in Canada, although there is empirical evidence on the role of judicial backgrounds, attitudes, and voting bloc behavior at the merits stage (Heard 1991; McCormick 1992, 1993, 1994; Morton, 1992; Morton *et al* 1992, 1994; Peck 1967, 1969; Tate and Sittiwong 1989). The identities of the justices on the leave panels and their votes are public information. Data on the backgrounds of the individual justices (e.g., age, sex, provincial origin, tenure on bench) have been

gleaned from archival records. Their policy orientations on the bench will be determined through standard scaling techniques using final vote data. The common criticism that scales based on votes on the merits to explain judicial behavior is circular is avoided here because the scales will be used to predict leave decisions not the final decisions.

The unanimity norm, however, stands in the way of modeling individual justices' votes on leave applications since the recorded votes reveal few instances of dissenting votes. The unanimity norm does not stand in the way, however, of determining the extent to which acceptance rates vary across the panels and whether these variations can be explained in terms of the composition of the panels. A "two against one" game may occur when two members of the panel are ideologically close or have similar voting patterns on the merits, for example, and proceed to vote on leave applications as a "coalition" while the third member acquiesces as a matter of conformity in a small group setting. The expectation would be that panels with liberal or conservative biases, i.e., where two justices have more similar policy views with one another than either does with the third, will grant leaves to appeal accordingly (cf., Lamb 1986; Dudley 1986).

Case-level data drawn from the *Bulletin*, *Supreme Court Reports*, the attorney factums, and mail questionnaires to attorneys constitute the bedrock of this project. All four perspectives require information about the characteristics and outcomes of the leave to appeal applications and in the instance of the strategic choice hypothesis the final decisions on the merits. The following table offers some examples of the independent variables for testing three of the perspectives. The agenda dynamics perspective is not shown as it depends primarily on measures of the subject matter of merits decisions over time.

Most of these variables are self-explanatory, but a few words of explanation for some are in order. With regard to the subject matter of appeals, i.e., the legal issues or substance involved in the cases, Spaeth's (1993) coding rules are being followed to make the Canadian leave to appeal database as compatible with the U.S. Supreme Court Database as possible. Modifications, of course, are necessary to take into account Quebec's civil law code as well as other features of Canadian law.

Conflicting court of appeal decisions substantially increase the likelihood that certiorari will be granted in the United States. Lawyers consequently make claims about conflicting decisions that often do

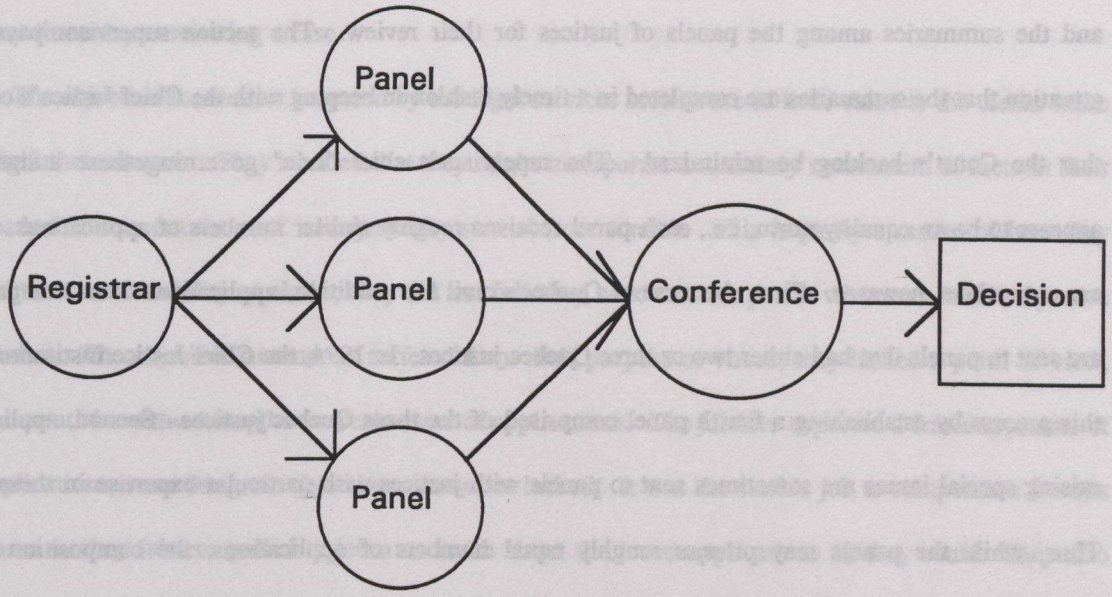
not stand up under close inspection. A distinction must be made therefore between alleged conflicts and real conflicts; the former may put a petition on the discuss list but the latter matters more with regard to whether the petition is granted (Ulmer 1984; Estreicher and Sexton 1986; Caldeira and Wright 1990). In Canada, one of the items coded from the attorneys' factums were arguments alleging conflicts among the lower courts .

Operationalization of the litigant status variable follows the coding rules used by McCormick (1993) in his test of the "party capability theory" in Canada and by Sheehan, Mishler, and Songer (1992) in the United States. These rules rank categories of direct parties in terms of their presumed resources and expertise. Indicators of whether attorneys are repeat players will rest on their frequency of appearance at the lower court, leave, and merit stages. Data from the applications and merits decisions are being used to developed indicators of frequency of appearance. Further information is being collected through a mail questionnaire to attorneys. The questionnaire replicates McIntyre's (1993) questionnaire with suitable modifications for the Canadian context. Information from the questionnaires will assist in operationalizing lawyer-related variables in testing the litigant resource hypothesis, and contribute to the comparison with the United States. In particular, the questionnaire in conjunction with the interviews will help in delineating the characteristics of the Canada's Supreme Court bar.

THE AGENDA SETTING PROCESS IN CANADA: A PRELIMINARY OVERVIEW

In October 1996, interviews with 30 "repeat player" attorneys and former clerks to the Supreme Court were conducted in Toronto. The purpose of these interviews was to develop a better understanding of the process from the point of view of the attorneys and clerks. They also provided a foundation for developing more detailed interviews later in the project as well as for preparing the mail questionnaires that will be sent to all attorneys who filed leave applications during 1992-1995. What follows is a preliminary sketch of the process based in part on these interviews and on limited analysis of the case-level data dealing with the panel decisions. The basic steps making up the process are illustrated in Figure 1.

FIGURE 1: STAGES IN AGENDA SETTING PROCESS



The review process begins with the Registrar where the applications are certified as to whether they meet various formal requirements outlined in the Court's Rules. This stage is directly analogous to the first step in the United States where the Clerk of the Court reviews the certiorari petitions to determine whether they meet certain standards set by the Court's rules (Perry 1991; O'Brien 1996). Leave applications satisfying the requirements are then forwarded to the legal services section of the Court which in 1988-1989 assumed the task of preparing "objective summaries" of the applications. The purpose of this change was to reduce the burden on the justices' clerks who until then drafted "bench memos" for the justices when oral hearings were part of the leave to appeal process.[5] The section normally has half a dozen full-time attorneys, including a supervisor, with tenures between five and six years. The summaries review the lower court decisions, present the facts of the cases, and list the legal grounds or issues raised by the appeal. Since the start of the 1994-1995 term the summaries have also included the staff attorneys' recommendations as to whether the applications should be granted. With the exception of these recommendations and some other material, the nature of the case and its procedural history are extracted from the summaries and reported in the *Bulletin*.

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[5] Justice Sopinka does not mention this change in his book on the appeal process. See Sopinka and Gelowitz (1993, 171) for a description of how the process presumably operated before the change. Oral hearings are no longer a routine part of the process. The Court may conduct hearings under certain circumstances at its discretion, but they are rare.

When the objective summaries are completed, the section supervisor distributes the applications and the summaries among the panels of justices for their review. The section supervisor pays close attention that the summaries are completed in a timely fashion in keeping with the Chief Justice's concern that the Court's backlog be minimized. The supervisor's chief "rule" governing these assignments appears to be an equality norm, i.e., each panel receives roughly similar numbers of applications. There are exceptions, however. First, because of Quebec's civil law tradition, applications from this province are sent to panels that had either two or three Quebec justices. In 1994, the Chief Justice institutionalized this process by establishing a fourth panel comprised of the three Quebec justices. Second, applications raising special issues are sometimes sent to panels with justices with particular expertise in these areas. Thus, while the panels may process roughly equal numbers of applications, the composition of the applications may be dissimilar. Clerks volunteered, for instance, that it seemed that the more challenging criminal cases found their way to the panel on which the Chief Justice sat because he has a keen concern for this area of the law.

Although the summaries were supposed to relieve the clerks' burden of processing leave applications, the clerks nevertheless still prepare memos on each application. In this sense, the clerks' perform a function that is similar to the clerks in the "cert pool" in the United States who also write brief assessments for the eight justices who participate in the pool and which facilitate the Chief Justice's preparation of the "discuss list," a preliminary list of petitions the nine justices will consider in conference. Clerks in the American cert pool, however, handle many more cases than their peers in Canada, and the American process is both more centralized while also being more "chambers-oriented" than in Canada.

A striking difference between Canada and the United States is the contrast in the clerks' workloads. A Canadian clerk on the average is responsible for between 20-25 applications during the year or roughly one leave application every two weeks. Each pool clerk in the United States handles at least ten times that number or about 5 petitions a week. The Canadian clerks consequently have plenty of time to review leave applications, and it shows up in the length of their bench memos. While American clerks usually prepare one page memos, clerks in Canada report their memos range between 5 and 10 pages (sometimes

longer if the case is complicated and sometimes shorter if it is simple). They claimed they might spend as many as three days reviewing a case.

The objective summaries prepared by the legal services section are of little value to the clerks when they draft their memos. They recalled that they might incorporate a summary's statement of facts in their memos but "threw out the rest" and generally started from scratch. This is partly a matter of how they viewed their responsibility as clerks; they did not feel they were there to parrot what was in the objective summaries. The objective summaries suffered from their purpose or virtue; they lacked a point of view, an argument about the strengths or weaknesses of applications. The justices expected a frank appraisal of the applications, something the objective summaries lacked. It was the clerk's job to compensate for this weakness so they felt compelled to learn as much about the leave applications as they could. They also viewed their relationship with the justice for whom they worked as dependent in part on the quality of the memo they prepared. Similarly, the recommendations made by the staff attorneys in the objective summaries were of little help to the clerks. In very many instances, a recommendation as to whether leave should be allowed or dismissed is obvious. At the extremes, the choice is simple: many applications are clearly "frivolous" and a few transparently warrant review. It is the gray area between these extremes that creates problems for clerks. Their task is not made easier by the objective summaries in these cases since the summaries also did not always include recommendations in these instances. Thus, when the clerks needed help it was not available.

Each Canadian justice has three clerks (the U.S. justices have four clerks except for Chief Justice Rehnquist who prefers three) whose stay with the justice lasts a year, although the start of their terms is staggered during the summer so that turnover in clerks will not be abrupt. Overlapping terms means experienced clerks can teach new clerks the ropes; informal rules and expectations are thus transferred from one generation of clerks to the next. Once applications are assigned to a panel, the nine clerks assigned to the three justices informally distribute the applications among themselves. No formal rules govern this process, nor is it random. Clerks look for cases that interest them or those for which they feel they have some professional expertise; the two concerns generally overlap, although eventually each clerk must work on dull applications or those involving unfamiliar legal issues. (Attorneys complained that the

success of their applications depended in some unknown measure on how keen or skilled the clerk was with regard to the issues raised in an application.)

The panel clerks form three work groups with the clerks assigned to the Quebec justices forming an overlapping fourth group. Unlike clerks in the United States whose work on certiorari petitions and cases to be decided on the merits is coterminous, clerks in Canada discharge their duties in different overlapping groups. The group of clerks created by the composition of the leave panels will not necessarily be the same group that will work on cases heard by the Court. This reflects the fact that the merits corams vary in size and may not include the justices who sat on the leave panel. At the same time, however, Canada's clerks work in a separate space in the Supreme Court Building and not in the chambers of the justices to whom they are assigned unlike clerks in the United States. In this sense the ecology of work differs for clerks in the two courts with Canada's clerks less chambers-oriented than American clerks.

Each leave group of clerks selects a leader to oversee the leave process so that applications are not ignored and the memos are completed expeditiously. Clerks confessed they found leave applications to be a chore and less exciting than their work involving cases heard by the Court. The group leaders reported they occasionally rode herd on their peers to make sure that leave applications were not ignored for more glamorous tasks. The clerks, however, do not routinely discuss leave applications among themselves; their memos are not a joint product of the work group but normally a solo effort. For one thing leave applications do not involve the kinds of complicated questions that arise if the Court decides to hear a case or when it prepares an opinion. Leave applications are less interesting, less demanding; clerks prefer to complete them with as little fuss as necessary. The other reason is that when clerks are working on bench memos for cases that will be heard or helping to draft an opinion, they can approach their fellow clerks in chambers and those assigned to other justices who are involved in the case to discuss knotty questions. This is not true of leave applications. Thus, it is time-consuming to "bring up to speed" another clerk in order to hash over a problem. Consultation with other clerks tends to be infrequent and ad hoc.

Until recently the clerks received little direction from the Court as to what criteria to apply when they reviewed the applications. About 1994 Justice Sopinka began conducting informal seminars at the

start of the Court's term as part of the clerks' orientation in which he explained what the clerks should look for in the applications. Soon after, checklists were tacked on the clerk's work cubicles as reminders of the criteria. New clerks also learn from older clerks as they are leaving the Court what standards they should apply. As in the United States, the clerks presume that most applications should be denied. One clerk recalled that out of the 22 applications he reviewed he did not recommend one of them to be allowed.

The presumption that leave should be rationed raises a dilemma on occasion for clerks. There are times when clerks feel that the merits of a case deserve attention but for one reason or another the leave application is inadequate or fails to identify or raise the issues clearly. To recommend that leave be allowed, however, could mean that the attorney may not properly or adequately argue the issue. Clerks recognize the possible injustice that denying leave may impose on the appellant but they also recognize that other cases will probably come along with similar issues. More important than this, however, they realize that a poorly presented case may be even a greater injustice. A final and related point is that clerks are tempted on occasion to serve as advocates on particular issues. Some succumb, others do not. Within the constraints imposed on them by their position and their relationship with their justice, clerks may push hard to have an application granted leave. Most clerks readily recalled clerks who rather routinely adopted this posture and others who did not. Attorneys who were repeat players before the Court knew their arguments had to attract the interest of the clerks and felt their chances of success were greater if they succeeded.

Memos prepared by clerks in the cert pool in the United States circulate to all eight of the justices in the pool. They provide the basis for "marking up" petitions when the justices and their clerks review them prior to conference. In Canada, clerks' memos are sent to the three justices on the panel with single page summaries forwarded to the other six justices. This represents a considerable reduction in information to the process in Canada. It means that a single clerk and two or three justices more or less determine the outcome of leave applications. One justice, however, routinely assigns his clerks to review leave applications even when they are not assigned to his panel. This means that the other five justices depend on the one-page cover sheets to the memos to alert them to what is happening on the other panels.

The use of panels by Canada's Supreme Court has no parallel in the American court. In the United States, the nine justices sitting in conference vote on whether to grant certiorari or not. In Canada, panels of three justices make these decisions prior to conference which may ask a panel to reconsider a decision; however, the panel has the final say over its actions. The use of panels arose out of a 1956 amendment to the Supreme Court Act that required a quorum of three justices for the review of leave to appeal applications.[6] The Chief Justice appoints the panels generally for the length of the Court's term, but the tenure of the panels varies as illness, resignations or retirements, appointments, or special needs prompt reorganizations. Table 4 shows the panels for 1993-1997. As this table indicates, the panels were not changed in 1995; instead the Chief Justice carried them over for another year. For the three focal years, 1993-1995, there were ten panels (including the Quebec panel formed in 1994) that decided whether to allow or deny leave to the vast majority of applications filed during in these years.

TABLE 4 ABOUT HERE

The panels, it appears, do not routinely meet as a collective body to make their decisions.[7] Instead the justices communicate their votes with the other members of their panels through memos. Since only two votes are required to grant a leave, a justice needs only one other vote to muster a majority. The general view, however, is that most panel decisions are unanimous. Indeed, a preliminary look at the data indicates that virtually all leave decisions are unanimous. The meaning of these data is ambiguous, however. The problem resides in the fact the vote reported in the *Bulletin* may be the final vote after conference and not the panel vote. A justice on the panel who disagrees with the panel decision may change his or her vote after discussion at conference.

Panels notify the non-panel justices of their decisions prior to conference by placing them on an "appendix." If a panel chooses to defer an application because the issues raised by it are already before the Court, the application is placed on "Appendix C" pending the outcome of the Court's actions.

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[6] Prior to this time, leaves to appeal were relatively infrequent and decided by a single justice. The change was introduced in 1956 after considerable criticism of a justice who denied leave in 1954 in a highly publicized criminal case (Crane and Brown 1993, 6).

[7] Justice Sopinka is vague on this point. He and his co-author write: "The panel seized of the application processes it with each member of the panel voting either to grant leave or dimiss" (Sopinka and Gelowitz 1993, 171).

Applications approved by a panel either unanimously or by a majority are placed on "Appendix B" for consideration by the conference. Appendix B is analogous to the discuss list in the United States. However, the American chief justice draws up the discuss list (Perry 1991) while Appendix B reflects the decentralized deliberations of the panels. If a panel decides to dismiss an application, the application is placed on "Appendix D," a date is set for the application's dismissal, and the other justices are notified accordingly. If a justice not on the panel disagrees with the dismissal, the dismissal is deferred until the matter can be considered by the full Court sitting in conference. A comparable procedure takes place on the U.S. Supreme Court when a justice asks that a certiorari petition be placed on the "discuss list" for review by the justices when they meet in conference (Perry 1991).

Unlike their peers in the United States who vote in conference and where the "Rule of Four" determines which petitions will be granted, the justices in Canada do not take a formal vote in conference, nor are their actions binding on the panels. There is no published record of the conference's position. Justices in conference may urge a panel to reconsider a decision but other than courtesy or reciprocity among the justices, a panel is not compelled to change its vote. The common view is that panels' decisions amount to the final word, although no empirical evidence exists to support this view. It is not known how often the panel changes its decision as a result of being asked to reconsider its recommendation. After conference, the decisions of the panels are final.

Table 5 shows the decisions of the ten panels during the three focal years. The panels are ordered according to the proportion of leave applications they allowed. The panels clearly behaved differently; the proportion of leave applications granted ranged from a low of 11.2 percent to a high of 20.1 percent. For preliminary purposes the panels were clustered into two groups according to the proportion of applications granted. An analysis of variance was conducted to determine whether the difference in the percentages of allowed leaves for the two clusters was statistically significant. The analysis indicated that the null hypothesis of no difference could be rejected at a .001 level of confidence.

TABLE 5 ABOUT HERE

The basic purpose of this project is to determine in an empirically systematic way why these differences occurred. The explanation is likely to be complex. One thing this table suggests is that the

conference does not even out differences among the panels. The conference does not operate as a check or guide on the panels. If it did, the outcomes of the panels' deliberations would not be significantly different. This appears to an important difference between Canada and the United States, a difference that reflects the institutional arrangements adopted by Canada's Court. By devolving leave decisions to panels, the Court has created a situation in which the outcomes of leave to appeal applications varies according to the panel to which they are assigned.

But before this conclusion can be accepted, explanations for these differences must be considered. For example, did the panels review dissimilar kinds of applications? Is the explanation for different grant rates due solely to differences in the substance or issues raised in the applications? If so, it would appear that the distribution of leave applications to the panels is not random. It is also possible, however, that the applications are similar in substance but the panels apply different jurisprudential standards when reviewing them. Alternatively the ideological composition of the panels may matter. As the panels are reformed or rearranged, new combinations of policy outlooks or judicial preferences emerge and thus produce higher or lower rates of leave being allowed.

These are only a few of the many questions that will be addressed by this project. Using the four key perspectives from the American literature to the guide the analysis, this project has collected a substantial mass of data to test whether these perspectives can help explain how the Supreme Court of Canada decides to decide. In the end, the hope behind the project is to better understand the agenda setting process in Canada and to develop a theoretical framework of this process that can be extended to include other high courts in developed democracies.

Table 1
AGENDA SETTING IN CANADA AND IN THE UNITED STATES

PROCEDURAL FEATURES	*CANADA*	*UNITED STATES*
DISCRETION OVER AGENDA	Broad: some mandatory appeals and Reference questions	Broader: very few mandatory appeals and no advisory opinions
JURISDICTION	Broader: both federal and provincial laws, plus constitutional and Charter questions	Narrower: federal law only; diversity, plus constitutional questions
VOLUME OF DISCRETIONARY APPEALS AND ACCEPTANCE RATE	Much smaller volume; higher rate of acceptance	Much larger volume; very low acceptance rate
INTEREST GROUP INVOLVEMENT?	Rare before merits	Frequent before merits
WHO SETS THE AGENDA?	Three panels of three justices each; followed by conference of nine justices as needed to add or delete cases	Chief Justice prepares "Discuss List" followed by conference vote by all nine justices who may add cases
AGENDA DECISION RULE?	Unanimity Norm	"Rule of Four" and "Join Three"
ARE AGENDA VOTES PUBLIC?	Yes; panel only	No
WHO DECIDES ON MERITS?	Panels of 5, 7, or 9 justices	All 9 justices sitting *en banc*
REVERSAL RATE OF APPEALS?	Lower	Higher
DISSENTS ON FINAL OPINION?	Less Frequent	Very Frequent

Table 2
COMPONENTS OF THE "CANADA DATABASE"
(n = approximate number of cases or files)

ACCESS FILE	DATA SOURCES	PRE-FOCAL YEARS	*FOCAL YEAR: 1993*	*FOCAL YEAR: 1994*	*FOCAL YEAR: 1995*	POST-FOCAL YEARS	TOTAL
***Decisions*: Leave applications and judgments**	*Bulletins of Supreme Court*; Registrar Summaries	N/A	N = 513	N = 496	N = 445	N = 950 (1996-1997)	2404
***Agenda*: Merits decisions**	*Supreme Court Reports*	N = 2550 (1975-1992)	N = 150	N = 120	N = 103	N = 225 (1996-1997)	3148
***"Public importance" arguments* by attorneys**	"Memo of Argument" in Factum of Applications	N/A	N = 513	N = 496	N = 445	N/A	1454
"Supreme Court Bar"	Mail question-naires (N = 1330)	N/A	N/A	N/A	N/A	N/A	1330
Elite and mass attention to legal issues	*Canadian Newspaper Index; Index to Canadian Legal Periodicals*	1977-1992	N/A	N/A	N/A	N/A	N/A

Table 3
EXAMPLES OF INDEPENDENT VARIABLES FOR TESTING MAJOR PERSPECTIVES

JURISPRUDENTIAL CHOICE PERSPECTIVE	LITIGANT RESOURCE PERSPECTIVE	STRATEGIC CHOICE PERSPECTIVE
Subject matter of appeal	Litigant status	Panel size and composition
Constitutional/Charter claim	Attorney repeat player?	Justice votes on merits
Conflict (recorded and alleged) among lower courts of appeal	Intervenor status at merits	Author(s) of opinions
Conflicting outcomes between trial and appeal courts	Amicus curiae brief	Vote split
Ideological outcome of appellate court decision	Status of amicus curiae	Ideological outcome of final vote
Dissent in lower court, panel, author of lower court opinion		
Provincial/court of origin		
Intervenor presence at lower court		

Table 4
LEAVE TO APPEAL PANELS, 1993-1997

YEAR OF PANELS	PANEL	PANEL	PANEL
1993	*Lamer*, McLachlin, Major	LaForest, Cory, Iacobucci	*Gonthier, L'Heureux-Dube*, Sopinka,
1994	*Lamer*, Iacobucci, Cory,	LaForest, Major, Sopinka,	*Gonthier, L'Heureux-Dube*, McLachlin
1995-96	*Lamer*, Iacobucci, *Gonthier*	LaForest, Major, Cory,	*L'Heureux-Dube*, Sopinka, McLachlin
1997	*Lamer*, Cory, McLachlin	LaForest, Gonthier, Major	*L'Heureux-Dube*, Sopinka, Iacobucci

Source: *Bulletin of Proceedings of the Supreme Court of Canada.*

Notes: (1) The names of justices from Quebec are italicized. (2) A fourth panel was established in 1994 comprised of the three Quebec justices to review civil code appeals from Quebec.

Table 5
LEAVES TO APPEAL ALLOWED BY PANEL

PANEL	LEAVES ALLOWED	NUMBER OF APPLICATIONS	PERCENT OF APPLICATIONS ALLOWED
1	18	161	11.2
2	16	141	11.3
3	21	176	11.9
4	22	169	13.0
5	14	93	15.1
6	21	135	15.6
7	24	141	17.0
8	23	122	18.9
9	32	162	19.7
10	29	144	20.1

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