As a sometime practitioner before the Supreme Court of Canada, I have tried for the benefit of my client in advance of the event to fathom the “black box”, that is the panel of three judges who will open the gate — or not — to the final day in court my client seeks. All of us as counsel and as observers of the work of the Court are familiar with the test of “public importance” independent of or – all the better for the applicant — in conjunction with a serious constitutional issue. We also search for conflicting rulings between provincial jurisdictions to match the parameters of the case at bar, persuading ourselves and our clients that their case is one the Court should hear. Nevertheless, the black box remains essentially impenetrable up front and, of course, no reasons are provided on the other side.

Our understanding and appreciation of the Supreme Court has been fuelled over the last two decades or so with an increasing volume of some practitioner-focussed\(^2\) and more extensive scholarly analysis and commentary on the decisions of the court,\(^3\) in particular as a result of its


\(^{**}\) H. Scott Fairley of Theall and Associates, Toronto, Ontario.

\(^{1}\) *Supreme Court Act, R.S.C. 1985, c. S-26 (as amended) S.40. The first systematic analysis of the Court’s leave process was by S.I. Bushnell, “Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance” (1982) 3 Sup. Ct. L. Rev. 479.


exercise of broadened powers of judicial review under the *Canadian Charter of Rights and Freedoms*. The Supreme Court has become a primary focus of concern for increased judicial influence over the present and future direction of Canadian political, social and economic life. With that realization – perception or fixation – Canada in yet another aspect, has become more American, echoing the rich and controversial history of the Supreme Court of the United States as the third branch of government and the focus of a perennial legitimacy debate over the anti-democratic objection to judicial review.4

Because of the foregoing, not simply the curiosity of counsel who fail to garner the nod of the panel, agenda setting by the Supreme Court – what cases it chooses to hear and why – assumes critical importance, merits critical inquiry and hopefully some objectively verifiable findings of what is really going on. What better starting point then, than to enlist well-honed American social science methodology, grounded in hard statistical data and massaged by game theory, to open the Canadian black box in much the same way that the United States Supreme Court has been exposed to public scrutiny. Claiming a first with regard to his subject, that is exactly what Professor Roy Flemming purports to do in *The Tournament of Appeals*.5

The book begins with statements of the obvious that nevertheless bear repetition here:

—“[w]hich cases are heard mould the development of the law, but equally important,… can lead to major public policy changes”;

—“the Court also creates winners and losers, as some court decisions are left to stand while others become subject to judicial review and possibly to being overturned”;

—“[b]y setting [their] agenda, then, high courts elevate the public visibility of issues of concern to some groups while downplaying issues of interest to other groups”;

—“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”.6


6 *Ibid.* at p. 2. The same power may also be exercised on the merits.
This last statement, given the societal consequences suggested by his previous ones, stakes out the relevance of Flemming’s inquiry into the Court’s exercise of its “freedom to choose how to choose”.

The inquiry is guided by the methodology, experience, results – and one surmises the established credibility – of American accounts of granting judicial review. Three of these accounts have been developed in the American social science literature over time, each of which Flemming applies to the leave process of the Supreme Court of Canada. The first account, encompassing two of the book’s six chapters is litigant-centred, exploring the extent to which court behaviour is influenced by the status, resources and legal abilities of the parties before it. The second is a jurisprudential account, where legal considerations arising from requests for judicial review loom largest as the motivating concerns for the justices. And the third offers a focus on strategic choice, an account of judicial behaviour shaped by anticipating outcomes of cases that the court chooses to hear, prompting the justices to “then cast their votes on whether to grant judicial review according to whether these expected outcomes coincide with their policy views.”

The first and third accounts applied by Flemming are perhaps distinctly American in flavour, and potentially controversial applied elsewhere, while the second offers more familiar terrain to a Canadian legal audience. However, Flemming stresses that the three accounts are not mutually exclusive in application and the comprehensive understanding he seeks of agenda setting by the Canadian Supreme Court “clearly requires consideration of all three hypotheses”.

The balance of the opening chapter of the book explains “pathways” to the agenda of the Court, taking account of the fact that, unlike its neighbour to the south, our Court must deal with appeals as of right in criminal cases, as well as reference cases and therefore does not have the same breadth of freedom as the United States Supreme Court justices have in setting their agenda. Flemming also sets out the applicable period for the data he employs: January 1993 through December 1995 of the Lamer Court, 1990 to 2000. This period is chosen for its “stability” in terms of the departure and replacement of judges, generating a large enough dataset for valid statistical analysis. During this time, applications for leave averaged 500 per year, a considerably lower volume than that of the United States Supreme Court, which disposed of over 9000 writs of certiorari in 2001 compared to our Court’s cited high of 642 applications.


7 Tournament, ibid. at p. 4.
8 Ibid.
for leave in the year 2000. Drawing from other studies, and the Supreme Court Bulletin, Flemming informs us that, given the very different volume of petitions facing the two courts, leave applications in Canada have a 15 percent success rate compared to less than one percent in the United States. We also learn that the resulting docket was relatively consistent for Canada’s Court over the period analyzed, with private law cases amounting to approximately half of all applications granted leave, non-criminal constitutional cases comprising one-sixth of the docket, and the remaining third consisting of both constitutional and non-constitutional criminal appeals, reflecting a commitment of the Chief Justice to “reaffirm a national perspective in private law”.  

In setting the stage, Flemming provides a useful thumbnail review of previous Canadian domestic insights on the work of the court and a basic overview of how the leave to appeal process works. The author’s governing metaphor will appeal to litigators: “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…” And again, “[e]ach application for leave to appeal can be considered a separate round…The Supreme Court’s decision to grant or deny leave is a reward or penalty…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.”

Flemming’s goal is to flesh out the dynamics of the leave process, but also to “generate both patterns of outcomes and hierarchies of players.” The image of winners and losers is a recurrent theme throughout the book and features prominently in two of the three accounts of the black box that Flemming seeks to pry open.

The Litigant-Centred Account

Flemming begins with the United States model of an elite United States Supreme Court Bar that plays a major role in funnelling cases to the Court because of who they are and the resources they command. Some readers will be relieved to know that, on Flemming’s findings, this account does not appear to have much explanatory value for the resulting docket in Ottawa. Nevertheless, one has the sense that the author did his best to statistically demonstrate otherwise. This is the rump of the book, the chief

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9 Ibid. at p. 12.
11 Tournament, ibid. at pp. 16-17.
12 Ibid.
value of which lies in its illumination of how profoundly different the dynamics of the current Canadian process are. In Canada, we learn that, much to the chagrin of Bay Street, no statistical premium attaches to that address or to competing addresses in Montreal, Vancouver, Calgary, Ottawa or Halifax. Those lawyers who vie for the privilege of arguing a case on the merits before our court of last resort are a diverse and generally unstratified lot. The model’s basic assumption of repetitive status-seeking for “tournament play” is not statistically borne out in Chapter Two, although “lawyers perceived as skilful by their peers played more rounds than lawyers lacking this reputation for expertise”.13

Chapter Three asks the further question of whether stratification among attorneys has weight as a success factor in determining the Court’s agenda. Much of this chapter is engaged in quantifying the stratum, or defining players’ capabilities based on attorney experience, firm size/resources and the like, before turning to results. Again, there is little conformity with the much more extensively documented American example. “Attorneys with less experience than their opponents appear to fare as well as those who are more experienced vis-à-vis their opponents.”14 At the same time, there is mixed support in the data for the proposition that better results are obtained in the hands of larger law firms with a correspondingly broader intellectual infrastructure.15

The sophisticated social science tools that Flemming employs to generate these results are sometimes rather opaque to the reader, as are some of the tables presenting the hard numbers. As a general matter, however, enough plain English accompanies the quantitative analysis to render it penetrable. Not content with his preliminary findings, Flemming attempts “a more complicated second look”. Those results become a little confusing, and the author slips into some subjective explanations for statistical results that undercut the model.16 At the end of the day, Flemming is left with a conclusion in the form of a question: “a Tournament Where Resources Don’t Matter?”17 The author leaves us with informed speculation,

that the institutional features of the Canadian agenda-setting process – a low volume of requests for judicial review, more liberal access to the Supreme Court’s plenary docket, abundant information, and a decentralized review of leave to appeal applications – diminish the advantages of repeat players…18

13 Ibid. at p. 38.
14 Ibid. at p. 49.
15 Ibid. at pp. 50-51, Table 3.5.
16 Ibid. at pp. 52-57.
17 Ibid. at p. 57.
18 Ibid. at pp. 59-60.
The Jurisprudential Account

This model is perhaps less appealing from the social science perspective, but more readily appreciated by lawyers, as the account remits much of its explanatory power to traditional - and subjective - legal criteria. Drawing from similarly traditional leading Canadian legal sources\(^{19}\) the ‘jurisprudential’ guidelines for success in commanding the Court’s attention focus on:

- A constitutional challenge to statutory or common law rule or government practice,
- Conflicting decisions of lower courts where there should be uniformity between provinces,
- A novel point of law the Court should rule on for the benefit of lower courts,
- Interpretation points for federal law or provincial laws that exist in a number of provinces, and
- Defining Aboriginal rights.

Flemming’s model takes these variables and, through an analysis of the factums filed in the leave applications over his chosen three year period, subjects them to objective scrutiny based on the results. Into this analysis the author also factors in the litigant and attorney indicators from the previous two chapters, as well as the identities of the panels responsible for processing the applications. This latter aspect is particularly interesting, since the panel process employed by Canada’s court becomes a major distinguishing factor from the United States certiorari process which is conducted entirely en banc.

What do we learn? Flemming’s model encounters a lot of difficulty with the panel process, recalling that its original United States subject did not have to deal with the additional hurdle of essentially autonomous decision-making by three judge panels that shift over time. The result is that “no single set of criteria establishes itself in the panels’ deliberations.”\(^{20}\) Thus, Flemming concludes that the Court does a good job of maintaining the opacity of its black box through a decentralized decision-making process that the Court has itself devised:

> [T]he prominence of jurisprudential considerations in the selection of cases for judicial review, whether by design or default, are an endogenous characteristic determined by the Court itself. The status of parties and whether or not their lawyers

\(^{19}\) Ibid. at pp. 63-64, citing Crane and Brown, supra note 2 at p. 397, and John Sopinka and Mark A. Gelowitz, The Conduct of An Appeal (Toronto: Butterworths, 1993) at p. 167.

\(^{20}\) Tournament, ibid. at p. 75.
are repeat players influence the odds of leave being granted, but they take a backseat to the jurisprudential factors derived from the Court’s interpretations of the public importance criterion embedded in the *Supreme Court Act* of 1975. Placing leave decisions exclusively in the hands of several leave panels, however, appears to lead to different standards for leave among the panels. In sum, the tournament rules are the structurally induced consequences of how Canada’s Supreme Court has designed its leave to appeal process and the selection of cases for judicial review.21

On the one hand, Flemming appears stymied by conflicting data, especially when compared to the United States benchmark; but, on the other, his results are incredibly reassuring – at least for this writer. While objective explanatory value may be lacking for selected criteria, Flemming’s analysis does tend to confirm that Canada’s Supreme Court justices are primarily guided by their view of the law and what issues should command their attention for its proper development, and not by the identity of interests or of counsel before them.

*The Strategic Account*

In this last account, game theory comes to the fore, a tool that is now being employed by lawyers from time to time in projecting alternative outcomes in complex disputes,22 and here, in attempting to divine “whether there is an ‘agenda game’ in Canada’s Supreme Court...The impetus for this question comes from evidence that an agenda game does exist in the United States.”23 The American example suggests that the justices will vote for *certiorari* when they think their own views will carry the day on the merits, but not if their personal policy preferences are likely to be defeated. Under this model, strategic concerns trump jurisprudential ones.

Again, the assumption of the strategic account is not borne out when applied to the Canadian example of decentralized decision-making, and it is virtually impossible to see the ideology of individual justices emerging in the context of how the Court’s docket is shaped. We do learn that the Canadian approach respects the autonomy of panel decisions that are seldom upset at conference, that strong feelings of a particular justice with regard to a particular case are heeded by the other justices, and that a general atmosphere of consensus pervades agenda setting. A by-product of that consensus is that the panels granting leave have a strong likelihood of sitting on the merits, where again, unlike its United States counterpart, the Court disposes of cases in panels of less than the full court. Here, Flemming provides genuine insight into a process which differentiates

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21 *Ibid.* at 76.


23 Tournament, *supra* note 5 at p. 77.
itself from the American example with “a more uncertain institutional context that encourages consensus or at least discourages dissent.”  

The strategic account for Canada is one of inclusiveness where the justices apparently avoid disagreement at the agenda-setting stage to assure themselves a role on the merits corams. The agenda-setting consensus is apparently weak, a conclusion borne out by no corresponding consensus among panel members when they get to the merits, and one that belies a judicial strategy that is result-oriented. Whether or not Flemming’s analysis speaks well for the model’s assumptions or its validity, it would appear to speak well for Canada’s Court.

The concluding chapter of the book ties together the results of the three models as applied, from which the jurisprudential account clearly emerges as the most cogent description of how and why the Court sets its agenda. Ergo, Flemming does not entirely succeed in his stated goal of “generat[ing] both patterns of outcomes and hierarchies of players.” At the same time, however, he implicitly suggests that a less competitive environment for the Court’s agenda may go a long way to explain the negligible value of the litigant-centered and strategic accounts for the Canadian institution. The numbers facing the courts in Washington and Ottawa are still vastly different in scale, but increased competition for the Canadian Court’s agenda would support the relevance of later studies replicating Flemming’s work.

Similarly instructive, if also essentially anecdotal, is a brief comparison of the Canadian Court’s agenda setting process with other courts of last resort beyond the U.S. example which points out that “the Canadian process is not unique, although the American style of granting judicial review may be.” We may therefore ask, who should be learning from whom? The fact remains, however, that there has been far less scrutiny of judicial processes in Canada altogether. The richness of the American example provides an irresistible starting point, even if the story ends differently.

Professor Flemming does illuminate the workings of Canada’s highest court from a perspective grounded in a scientific method and statistical tools that – if read carefully and digested slowly by an audience not used to this sort of thing – helps observers of and participants before the Court better understand an increasingly important institution of government in Canadian society. The unfamiliar, but richly informative

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24 Ibid. at p. 94
25 Ibid. at pp. 95 (see table 5.1), 96.
26 Ibid. at p. 17 and accompanying text.
27 Ibid. at p. 102.
terrain that Flemming explores is also the best reason this writer can provide for a rather long review of such a short book.

“Uncertainty” is a word that appears frequently and looms large in the insights that Professor Fleming offers, which leaves the book open to the critique that much vaunted quantitative analysis falls short of the mark for its intended target; in short, that the black box remains unopened. The better view, however, is that we can take comfort from the fact that mathematical tools have tested the black box and found that, at least for the present, it remains secure. For that conclusion alone, Professor Flemming has performed a worthwhile exercise. It suggests the merit of similar efforts in future as the analytical tools improve – which they most assuredly will – and the Court as an institution of government continues to evolve – as it most assuredly will.