Repeat Litigators and Agenda Setting on the Supreme Court of Canada

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Introduction

The evolution of law and the priorities placed on socio-legal issues in many nations reflect the decisions of their high courts to selectively review lower court cases. If the process through which a high court places cases on its plenary docket is shaped or influenced by the political and economic inequalities of its society, then those parties in positions of power and privilege will have a hand in directing the path of the law. This means that clients with strategic interests and the resources to achieve them can be expected to seek out experienced attorneys who can improve the clients' chances that their cases will be placed on a high court's plenary docket or, alternatively, stymie their opponent's efforts to get the court to hear an appeal. The impact of superior status and resources of the parties involved in cases and the role of experienced, skilled attorneys in affecting the outcomes of litigation in high courts raises critical concerns about the increasing

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prominence of high courts in shaping public policies. This study addresses these concerns by looking at the status of the parties and the prominence of their attorneys in the leave-to-appeal process leading to judicial review in the Supreme Court of Canada.

In the United States, Kevin McGuire argues there is an elite bar of attorneys with significant influence on how the US Supreme Court selects cases for judicial review from the thousands of petitions requesting certiorari, or "cert," virtually the only legal avenue to the Court's plenary docket.[1] Experienced hands, McGuire suggests, have an edge over neophyte lawyers in this process. Attorneys with extensive litigation backgrounds make persuasive legal arguments and have the credibility needed to overcome the scepticism of justices and clerks pressed for time as they review "cert" petitions. As one lawyer told McGuire, "Hiring a lawyer at the cert stage who has a reputation at the Supreme Court for playing by the Court's rules is one of the most important things a client can do in terms of getting attention paid to his cert petition."[2] He quotes another attorney as saying, "I've often wondered whether lawyers make a difference. Well, I'll put it this way: I can't imagine a brief signed by Rex Lee or Erwin Griswold or Larry Tribe that would ever make the 'dead' [rejected certiorari] list.[3] I just think they would say, 'Wait a minute. We've got to take a look at it.' "[4]

Marc Galanter's exposition of "party capability theory" ground the conceptual prism for McGuire's research.[5] Galanter's analysis of the structural limitations of litigation as a means of promoting social change is one of the most frequently cited articles in the social science and legal literature.[6] Nevertheless, Galanter's doubts about the success of parties with either low status or resources ("have-nots") or with no experience in litigation ("one-shotters") has received mixed empirical confirmation. Until McGuire's work, moreover, no scholar has teased apart the conflation of party and attorney that formed a central ambiguity in Galanter's argument.[7]

When Galanter's hypothesis is tested in the United States Supreme Court, many studies establish that the Office of the Solicitor

1 Kevin T. McGuire, *The Supreme Court Bar: Legal Elites in the Washington Community* (Charlottesville: University Press of Virginia, 1993).
2 Ibid., 184.
3 Rex Lee and Erwin Griswold are former United States solicitors general. Larry Tribe is a Harvard University constitutional scholar and litigator.
4 Ibid., 180.
5 Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9 (1974), 95.
6 Joel B. Grossman, Herbert M. Kritzer and Stuart Macauley. "Do the 'Haves' Still Come Out Ahead?" *Law and Society Review* 33 (1999), 803.
7 Richard Lempert, "A Classic at 25: Reflections on Galanter's 'Haves' Article and Work It Has Inspired," *Law and Society Review* 33 (1999), 1099.

Abstract. The expanding public policy role of high courts heightens concerns over whether societal and political inequalities affect the outcomes of litigation. However, comparative research on this question is limited. This article assesses whether status inequalities between parties and differences in the experience and resources of attorneys influence the selection of cases for judicial review in the Supreme Court of Canada. A series of statistical models reveal that governments are more likely than other parties to influence whether leave is granted but that the experience and resources of lawyers, unlike in the United States, have little impact. The decentralized, low volume and high access features of the Canadian process may explain this finding.

Résumé. Le rôle croissant des Cours supérieures en matière de politiques publiques augmente la crainte que les inégalités politiques et sociales affectent les jugements rendus. La recherche comparative sur ce point est cependant limitée. Cet article évalue si les inégalités de statut entre les parties et les différences d'expérience et de ressources entre les avocats ont une influence sur les causes qui sont retenues ou non pour révision judiciaire par la Cour suprême du Canada. Une série de modèles statistiques révèle que les gouvernements sont plus enclins que les autres parties à influencer ces décisions, mais que l'expérience et les ressources des avocats, contrairement aux États-Unis, ont peu d'impact. Le caractère décentralisé de la façon de faire canadienne, de même qu'un volume de causes moins important et une très grande accessibilité peuvent expliquer cette conclusion.

General, which represents the federal government in the Court, regularly wins on the merits and exercises considerable influence on the Court's certiorari decisions.[8] However, studies of civil liberties cases over most of the past century point to complexities that Galanter ignores in his analysis. For several decades prior to 1970, have-nots or "underdogs" increasingly won their cases against governments.[9] After 1970, this trend began to wane.[10] A persuasive explanation for this change appears to be in shifts in the Court's ideological make-up and not changes in asymmetries in resources between litigants.[11]

Studies of the Supreme Court's other certiorari or agenda-setting decisions reveal a similarly mixed pattern; the haves are not invariably winners when they seek judicial review, nor are have-nots consistent losers. During the 1947-1957 terms, the Court routinely favoured the US government when granting certiorari. During this same time, though, the Court was also more sympathetic to labour unions, the underdogs, than to corporations, the unions' upperdog opponents.[12] A

8 Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* (Philadelphia: Temple University Press, 1992)

9 S. Sidney Ulmer, "Governmental Litigants, Underdogs, and Civil Liberties in the Supreme Court: 1903-1968 Terms," *Journal of Politics* 47 (1985), 899.

10 Reginald S. Sheehan, "Governmental Litigants, Underdogs, and Civil Liberties: A Reassessment of a Trend in Supreme Court Decision-Making," *Western Political Quarterly* 45 (1992), 27.

11 Reginald S. Sheehan, William Mishler and Donald R. Songer, "Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court," *American Political Science Review* 86 (1992), 464.

12 Doris Marie Provine, *Case Selection in the United States Supreme Court.* (Chicago: University of Chicago Press, 1980.)

comparison of the liberal Warren and later, more conservative, Burger Courts confirms this pattern for the Warren years but then finds that upperdog parties fared better during the Burger era.[13] A tracing of the Court's certiorari decisions in obscenity cases for the period 1955-1987 discovered that most businesses and state and local governments failed to gain access regularly to the Court's plenary docket. More to the point, success depended on the policy views of the Court; resources or status, per se, contrary to Galanter's argument, are not pivotal to the outcome of a party's petition for certiorari.[14]

The attorneys who draft the petitions, prepare the briefs and argue the cases before the Supreme Court were ignored by this research. McGuire, however, claims that attorney experience before the Court matters more than the type of client in affecting the outcome of a case.[15] His research also questions the customary explanation that the Solicitor General's ''special relationship'' with the Supreme Court explains the Office's success before the Supreme Court. Instead, he shows it is the litigation experience of the assistant solicitors general, not the status of the Office, that counts most.[16] His study of the certiorari process reveals that attorneys with previous litigation experience before the Court are more likely to have their petitions accepted than attorneys lacking this experience.[17] McGuire does not dismiss the status of the parties as a factor; his data show that party status can make a difference. The important point is that the lawyers and their clients, that is, the agents and their principals, can independently affect the progress of litigation.

Galanter's party capability theory has seldom been tested empirically in other countries, and McGuire's work on repeat player counsel has not yet been replicated. When we turn to this handful of studies, the relationship between party status and court decisions is supported by research in the English Court of Appeal.[18] In the Phillipines, however, party status matters in Supreme Court decisions, but not in the

13 S. Sidney Ulmer, ''Selecting Cases for Supreme Court Review: Litigant Status in the Warren and Burger Courts,'' in S. Sidney Ulmer, ed., *Courts, Law, and Judicial Process* (New York: Free Press, 1981).

14 Kevin T. McGuire and Gregory A. Caldeira, ''Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court,'' *American Political Science Review* 87 (1993), 717.

15 Kevin T. McGuire, ''Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success,'' *Journal of Politics* 57 (1995), 187.

16 Kevin T. McGuire, ''Explaining Executive Success in the US Supreme Court,'' *Political Research Quarterly* 51 (1998), 505.

17 McGuire, *The Supreme Court Bar*, 180-87.

18 Burton M. Atkins, ''Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal,'' *American Journal of Political Science* 35 (1991), 881.

way Galanter expected: have-not parties with few resources prevail over the haves.[19] In Israel's High Court, haves hold a limited advantage but it depends on whether the have-nots opposing them employ lawyers; when they do, the haves do not come out ahead.[20] Finally, in the Supreme Court of Canada, high status or upperdog parties, mostly governments, especially the federal government, won more often than have-nots or underdog parties during the period 1949-1992.[21] At present there is no study of agenda setting in national high courts other than the US court informed either by Galanter's theory or by McGuire's analysis of repeat player attorneys.

This study seeks to fill this gap by assessing whether experienced attorneys representing clients seeking access to the plenary docket of the Supreme Court of Canada have an advantage over less experienced lawyers. The Supreme Court of Canada offers an excellent opportunity for testing his argument. While Canada has a parliamentary system, its Court is functionally separate from Parliament, unlike the Law Lords in Britain. Equally important, the Court's power of judicial review is well established, and its influence in Canada's public policy process approximates that exerted by the US Supreme Court.

With regard to its agenda setting authority, Canada's Supreme Court is very similar to the US court. In 1975, Parliament amended the *Supreme Court Act* to limit the right to appeal in civil cases and in most criminal cases.[22] With this amendment, applications for leave to appeal became the primary route to the Supreme Court's agenda. For the first time in its history, the Court had control over the kinds of cases it wished to hear, and the 1975 amendment, analogous to the Judges' Bill of 1925 in the United States, provides the Canadian court with ample discretion to set its own agenda. According to the amendment, the decision to accept a case for review depends on 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

19 Stacie L. Haynie, "Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court," *Journal of Politics* 56 (1994), 752.

20 Yoav Dotan, "Do the 'Haves' Still Come Out Ahead? Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice," *Law and Society Review* 33 (1999), 1059.

21 Peter McCormick, *Canada's Courts* (Toronto: James Lorimer, 1994), 152-67.

22 Brian A. Crane and Henry S. Brown, *Supreme Court of Canada Practice 2002* (Scarborough: Carswell, 2002).

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> other reason, of such a nature or significance as to warrant decision by it.

The wording of this section is broadly stated, as is Rule 10 in the United States regarding certiorari decisions.[23] Also, like the US Supreme Court, Canada's Supreme Court refuses to develop a jurisprudence delineating the meaning of "public importance." In a 1995 opinion, then Chief Justice Antonio Lamer summed up the Canadian position:

> The ability to grant or deny leave represents the sole means by which this Court is able to exert discretionary control over its docket. In order to ensure that this Court enjoys complete flexibility in allocating its scarce judicial resources towards cases of true public importance, as a sound rule of practice, we . . . do not produce written reasons for grants and denials of leave.[24]

Data Sources and Variables

During the 1990s, the Supreme Court of Canada typically received each year 450-475 applications requesting leave to appeal. To generate enough applications for analysis, applications were identified for 1993-1995. This study period includes the first three calendar years of a "natural court" that lasted from November 1992 through October 1997. The *Bulletin of Proceedings of the Supreme Court of Canada* was the source of information regarding leave applications. This publication provided information on the parties, issues and histories of the cases in the lower courts as well as the Supreme Court's judgments on the applications. All applications filed during the study period for which there were judgments either to grant or deny leave are included in this analysis.

A second key source of data is the factums, or briefs, filed by the appellants to support their applications. No published document comparable to the US *Bulletin of Proceedings* exists in Canada that can be used to identify all of the attorneys involved in the leave process. Only the factums on file at the Court have the information needed to identify the lawyers whose applications are granted as well as those attorneys whose requests for leave are denied. A third source, the *Supreme Court Reports*, which records the Court's decisions, was used to determine how often attorneys appeared before the Court to argue the merits of cases prior to the study period. A total of 1,265 applications (1,133 with complete information and final judgments) constitutes the

23 Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, *Supreme Court Practice* (Washington: Bureau of National Affairs, Inc, 1993).

24 Crane and Brown, *Supreme Court of Canada Practice*, 25.

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empirical foundation for this analysis. Our dependent variable is whether the Court granted leave or not; the indicator is a dummy variable with 1 equal to "granted" and 0 equal to "denied." Table 1 describes the variables we will use in this analysis.

When constructing our independent variables we generally followed the templates cut by previous researchers, albeit with minor alterations, so that we could replicate as best as possible their findings (see Table 1). To identify attorneys who were repeat players, the *Supreme Court Reports* for 1975-1992 were culled for information. We recorded the attorneys in the cases during this period and counted the number of times they argued the merits of cases before the Court. This list was then matched with the roster based on the factums of the attorneys representing the applicants and respondents involved in the leaves to appeal. Leave attorneys not on the merits list were classified as one-shot players and given an experience score of 0, while those attorneys on the list were classified as repeat players and given experience scores corresponding to their number of appearances before the Court. This indicator of attorney experience is similar to McGuire's measure except that our measure rests on the years prior to the study period whereas his is coterminous with the years of his study.

TABLE 1

Variable Definitions and Characteristics

Variable	Value or range	Mean	*N*
Leave granted?	1,0	.189	1265
Attorney experience:	0-22		
Applicant attorney		1.352	1157
Respondent attorney		1.125	1218
Attorney Queen's Counsel?	1,0		
Applicant attorney		.197	1265
Respondent attorney		.185	1265
Private attorney firm size	0-550		
Applicant attorney		58.315	572
Respondent attorney		63.063	558
Party resources/status	1-9		
Applicant status		2.587	1265
Respondent status		5.470	1265

The assumption underlying this measure, of course, is that attorneys who frequently argue cases before the Court are likely to be

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skilled litigators capable of crafting convincing arguments that sway the justices to grant or deny leave in accordance with the attorneys' wishes. For private attorneys, we also constructed a variable for the size of the firm for which they worked. Solo practitioners were coded 1 while the values for the other private attorneys equaled the number of attorneys in their firms as listed in the *Canadian Law List 1996*, an annual compilation of attorneys and firms practising in Canada. We assume that the larger the firm for which the lawyers works the more resources the lawyer has at hand to prepare persuasive arguments for leave-to-appeal applications or, alternatively, strong briefs against leave to appeal.

A frequent honorific title bestowed on lawyers by the provincial governments is "Queen's Counsel." This adds another dimension to the background of Canadian attorneys. Attorneys who are "QC" presumably have stature in the legal profession that makes them more formidable than lawyers without this credential. Six of the nine justices during the time of this study, for instance, were Queen's Counsel. According to one survey of the Canadian legal profession, however, Queen's Counsel "does not signal preeminence in advocacy (as it does in England) but merely some degree of seniority and professional or public repute—if anything."[25] Queen's Counsel, therefore, may be nothing more than a surrogate for experience. If this is so, it will have little independent effect when experience is taken into account. We identified attorneys who were Queen's Counsel using the *Supreme Court Reports*, the factums and the *Canadian Law List*. Queen's Counsel lawyers were coded 1 while attorneys who were not Queen's Counsel were coded 0.

Party capability theory suggests that parties with greater resources are more successful litigants than parties with few or meagre resources. The effects of these resources are separate from the skills or experience of the attorneys representing the parties. A major hurdle to testing the party capability hypothesis is developing direct indicators of resources or status. Previous research ranks in ordinal fashion the presumed status or resources of parties; a solution we adopted for this replication. Parties were categorized in ascending order of presumed status or resources: individual, groups/associations, unions, business, crown corporations, municipal government, provincial government and federal government. Our classification and ordering, with some slight modifications, are very similar to those previously used in Canada.[26] We used

25 Harry W. Arthurs, Richard Weisman and Frederick H. Zemans, "Canadian Lawyers: A Peculiar Professionalism," in Richard L. Abel and Philip S.C. Lewis, eds., *Lawyers in Society: The Common Law World* (Berkeley: University of California Press, 1988)

26 McCormick, *Canada's Courts*, 156.

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this classification either as a set of dummy variables or as an ordinal indicator of party status to determine whether party status or resources influenced the leave-to-appeal process.

These basic measures are part and parcel of the literature on party capability theory and the repeat player hypothesis. While we present models that use separate indicators for the parties and their attorneys, we believe the most appropriate indicators should be measures of *inequality* between attorneys or parties involved in cases in order to test properly whether repeat players and haves triumph over one-shotters and have-nots. The crux of the question, in other words, is whether an imbalance in experience or status between attorneys or the status of the parties affects agenda setting on the Canadian Court. McGuire recognized this when he constructed a three-level variable indicating when there was a disparity in Supreme Court experience between attorneys in the United States. We follow McGuire's approach, but feel his operationalization loses information. Instead, we use the actual numeric difference in the frequencies of appearances by the two attorneys before the Supreme Court of Canada to create a "lawyer experience advantage" variable. The number of appearances for the respondent's attorney was subtracted from the number of appearances for the applicant's attorney to create this advantage variable; a positive number indicates an advantage for the applicant's attorney while a negative number indicates an edge for the respondent's lawyer. We took the same tack with the Queen's Counsel, law firm size, and party status measures to create variables tapping the asymmetries in status or resources between the attorneys or between the parties.

We utilize cross-tabulations and multivariate analysis. The dependent variable is dichotomous (leave granted or not). The multivariate model, therefore, lends itself to logistic regression. We use logit analysis because of ease of computation and presentation. To show the substantive effect of a variable, we present the change in probability under different values of the variable.[27] For dummy independent variables (for example, Queen's Counsel or not), we report the change in probability from .50 if the variable goes from zero to one. For interval variables (for example, attorney experience) we report the change in probability from .50 if these variables change from one standard deviation. Since the logit curve is steepest at .50 probability, these estimates indicate the maximum impact of these variables.

27 William H. Greene, *Econometric Analysis* (Saddle River, NJ: Prentice-Hall, 1997).

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Results and Findings

Before proceeding to the multivariate analysis, a consideration of how these indicators of inequality or imbalance between direct parties or between lawyers are related to leave-to-appeal rates is in order. Table 2, panel A compares the proportions of applications granted leave by the Canadian Court and the relative imbalance in status between the applicant and respondent.

When an applicant has a status advantage relative to the respondent, the variable has a positive sign; otherwise the sign is negative. The bivariate relationship is statistically significant with a gamma of .15, a moderately strong association between the two variables. Three aspects of this table warrant attention. First, only about 20 per cent of the applications involve cases that pitted parties of roughly equal status or resources against one another. Second, the likelihood that leave is granted improves as the status of applicants rises relative to the respondents. This is consistent with previous analyses of cases decided on their merits in Canada.[28] Third, nearly 60 per cent of the leave applications involve imbalances favouring respondents. In most instances this reflects individual applicants asking for leave in order to appeal lower court losses to governments or businesses.

Table 2, panel B portrays the proportions of applications granted according to the relative imbalance in Supreme Court experience between attorneys. The pattern in this table is less clear than in the instance of the party status variable, and offers unpromising support for the repeat litigator hypothesis. The measure of association, gamma, is very weak and not statistically significant. Applicants with attorneys who have less experience in arguing cases before the Supreme Court than the lawyers representing the respondents seem to fare as well as applicants with more experienced attorneys relative to their opponents. The number of observations, however, is small toward the ends of this distribution. In the middle, where there are substantial numbers of cases, there is very little difference between the proportions. This rough equality between most of the attorneys seems to blunt whatever advantage individual prior experience before the Supreme Court might have on the leave process.

Table 2, panel C presents the data regarding attorneys who are Queen's Counsel and those who are not. The proportion of applications granted leave to appeal filed by attorneys who are Queen's Counsel when the opposing lawyer is not, is greater than when neither lawyer is a QC, or when the respondent's attorney is a QC but the applicant's attorney is not. In the latter two instances, the proportions are lower and similar to one another. Overall, the differences are not

28 McCormick, *Canada's Courts*.

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TABLE 2

Applicant Success Rates, Leaves to Appeal, 1993-1995

A. Applicant Success Rates by Party Advantage

Index of party advantage	Proportion of wins by applicant	Number of applications
-8	18.0	361
-7 to -5	13.4	201
-4 to -3	15.5	155
-2 to -1	18.9	74
0	16.1	261
1 to 2	24.3	37
3 to 4	24.3	74
5 to 7	37.0	27
8	40.0	75

Chi-Square = 53.201 (Sig.<.000); Gamma = .153 (Sig.<.01).

B. Applicant Success Rates by Lawyer Experience Advantage

Lawyer experience advantage	Proportion of wins by applicant	Number of applications
≤-8	42.3	26
-7 to -5	17.6	34
-4 to -2	26.5	102
-1	18.4	114
0	16.1	498
1	16.1	155
2 to 4	26.4	129
5 to 7	31.1	45
≥8	23.3	30

Chi-square = 70.940 (Sig.<.000); Gamma = .009 (Sig. = .425).

C. Applicant Success Rates by Queen's Counsel Advantage

Queen's Counsel advantage	Proportion of wins by applicants	Number of applications
-1	18.1	160
0	18.0	930
1	24.6	175

Chi-Square = 4.276 (Sig. = .059); Gamma = .114 (Sig. = .063).

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TABLE 2 (CONTINUED)

D. Applicant Success Rates by Law Firm Advantage

Index of firm advantage	Proportion of wins by applicant	Number of applications
-549 to -201	19.2	26
-250 to -71	29.0	69
-70 to -26	11.3	71
-25 to -10	9.2	65
-9 to -2	16.7	54
-1 to 1	8.3	48
2 to 9	23.5	51
to 25	17.6	34
to 70	27.7	47
to 200	17.1	35
1 to 549	16.2	37

Chi-Square = 18.683 (sig.<.05); Gamma = .153 (Sig.<.496).

striking, even though gamma is .11 and nearly reaches the .05 level of statistical significance. It should be noted, though, that while the vast majority of leave applications do not involve Queen's Counsel, when the applicants' attorney is a QC, the applicant gains an advantage over the respondent. It appears that being a Queen's Counsel has consequences for Supreme Court advocacy in Canada.

The size of a lawyer's firm also may be an important resource. Major law firms in Canada, like McCarthy Tetrault with over 500 lawyers, have the staff and intellectual infrastructure to support the firm's litigators. Large firms publish in-house analyses of court decisions from throughout the country. They conduct seminars on emerging areas of the law. They are professionally and politically well-connected within the legal profession, political parties, the provincial and federal governments and, of course, the courts (a former litigator at McCarthy Tetrault, for example, currently serves on the Supreme Court). These advantages, we expect, will show up in the leave process. Attorneys from larger firms presumably have an edge over solo practitioners or lawyers from smaller firms. Table 2, panel D provides mixed support for these expectations.

The index of firm advantage is the absolute difference between the firm size of the applicant and the firm size of the respondent. The differences are grouped in Table 2, panel D so the index's relationship with applicant success rates can be shown. The index has a gamma of .15 but this measure is not statistically significant, although the chi-

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square is significant at the .05 level. The pattern in Table 2, panel D is neither orderly nor uniform. We expected the applicant's success rate, the percentage of applications granted leave for each level of the index, would increase or decrease in a regular fashion with each increment of the index depending on whether the applicant's attorney worked in a larger or smaller firm than the respondent's attorney. The pattern generally follows this expectation, but there are exceptions or irregularities.

Bivariate analyses, of course, may conceal important relationships. In the rest of this section we present a series of logit models to assess the relative impact of the independent variables measuring attorney resources and party status on the dummy variable, leave granted or denied. We begin with an additive logit model that ignores, for the moment, inequalities between parties and attorneys. This model assumes the individual levels of experience for attorney experience, whether the attorneys are Queen's Counsel and the status of the parties separately affect the outcomes of the leave process without regard to the experience, credentials, or status of the opposing lawyer or party involved in the application. Table 3 presents the results for this model.

Attorneys and parties have different goals depending on the side they take in cases. Applicants and their attorneys hope to have leave granted so they can argue the lower-court decision against them should be overturned. Conversely, respondents and their attorneys prefer that leave not be granted lest their victories in the lower courts be jeopardized by judicial review. We expect those applicant attorneys with prior experience before the Court succeed more often in persuading the justices to grant leave than those with less or no experience. Similarly, we think repeat player attorneys for the respondents convince the Court that leave is unwarranted more often than one-shot attorneys. We hold similar expectations regarding attorneys who are or are not Queen's Counsel. And, of course, we feel that higher status or resource-rich litigants get their way more often in the leave process than parties lacking resources or status.

The results in Table 3 contradict and fail to support some of our expectations. There is no statistically significant relationship between leave decisions and the amount of prior experience the applicants' attorneys have before the Supreme Court. Yet, when we turn to the respondents' attorneys, we find a significant association between their experience and the Court's leave decisions, which confirms one suspicion. However, at the same time, there is a positive sign not the anticipated negative sign attached to this relationship, which confounds expectations. When respondent attorney experience moves from the mean by one standard deviation, the odds of the appeal being granted increase 9 per cent. How can this finding be explained? The robustness

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TABLE 3

Logit Models of Leaves-to-Appeal Outcomes, Supreme Court of Canada, 1993-1995

Independent variable	Expected direction	*b*	S.E.	Δ*p*
Applicant lawyer				
Experience	+	.017	.027	
Queen's Counsel?	+	.338[a]	.186	.08
Respondent lawyer				
Experience	-	.103[c]	.027	.09
Queen's Counsel?	-	-.052	.201	
Appellant party type	+	.150[c]	.032	.18
Respondent party type	-	-.008	.028	
Constant		-2.022[c]	.233	
Per cent in Modal Category			80.14	
Per cent Correctly Predicted			80.67	
Proportional Reduction in Error			.03	
Nagelkerke Pseudo R^2			.07	
Model C^2 (6 d.f.)			47.584[c]	
N of cases			1,133	

The dependent variable is coded 1 if the appeal was accepted (appellant wins) and 0 if not. [a]p≤.05, [b]p≤.01, [c]p≤.001, one-tailed; two-tailed test used for constant.

of the finding suggests we cannot easily dismiss it as a statistical fluke or artifact. And, even if that were the case, why does this finding only occur for respondents' attorneys and not for the applicants' lawyers as well? Surely it is not something that is wanted by the respondents and their attorneys, except under special circumstances. That is to say, a plausible explanation rooted in the goals of the respondents is hard to discern.

We feel an explanation can be found in the decisional tendencies of the Supreme Court of Canada. The Canadian justices are more likely to affirm lower-court decisions than overturn them. In contrast to the United States Supreme Court, which affirms about one third of the cases to which it grants certiorari, the Canadian Supreme Court affirms nearly twice that proportion. From 1989-1998, Canada's Court affirmed an average of 57 per cent of the cases it heard on the merits.[29] Of course, parties and their lawyers hoping the Supreme Court will overturn the lower-court rulings against them initiate the leave process. This fundamental feature of the process cuts across the Court's

29 Supreme Court of Canada, *Bulletin of Proceedings: Special Edition, Statistics—1988-1998* (Ottawa: Supreme Court of Canada, 1999).

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grain. Attorneys making arguments in favour of judicial review are, ultimately, asking the Court to do something it generally does not do.

On the other side, attorneys for respondents address the reasons why there is no need to review a lower-court ruling and why it should be left standing. For an affirmance-minded Court, the respondents' arguments may well provide justification for taking up the lower-court ruling and extending it nationwide rather than letting it stand only as provincial law. While rebutting the applicant's request for leave, a skillful and experienced lawyer may draw attention to issues that persuade the justices there is good reason to take up the lower-court decision to see if it should become the law of the land. This is not necessarily a defeat for the respondent or for the attorney. Indeed, it could be just the reverse, particularly in a country where the high court affirms more often than it overturns the lower courts.

The other findings in Table 3 are somewhat more consistent with our initial expectations. Attorneys who are Queen's Counsel make a difference to the outcomes of the process, but only in the instance of applicants. Applicants with QC attorneys are 8 per cent more likely to have their applications granted than applicants whose attorneys lack this credential. No statistically significant relationship seems to exist for respondents' attorneys who are Queen's Counsel. Finally, the status of the applicants has a statistically significant relationship with leave outcomes but not the status of the respondents. When applicant status increases by one standard deviation, the application is 18 per cent more likely to be granted. In conclusion, the findings in Table 3 are mixed at best, and the model's overall performance, as indicated by the diagnostics in the table, is not impressive.

Another way of looking at these relationships is to put them into an interactive context. The attorney-related variables may interact with the party resource variables so that the impact of the attorney variables become conditional on the status or resources of the parties they represent, and vice versa. Table 4 presents the results of this interactive model.

This model offers a different view of the relationship between the experience of a respondent's lawyer and the leave process. The experience variable standing alone no longer is statistically significant. Instead, the interactive term including this variable and the status of the respondent party becomes statistically significant. As in the non-interactive model, applicant party status remains statistically significant in the interactive model. This is also the case when applicants have attorneys who are Queen's Counsel. In both models, this variable is statistically significant. The other variables and interactive terms are not statistically significant. The interactive model described by Table 4 qualifies the relationships found in the simpler model but does not dramatically alter our earlier finding.

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TABLE 4

Interactive Logit Model of Appeal Outcomes, Supreme Court of Canada, 1993-1995

Variable	Expected direction	*b*	S.E.	Δ*p*
Applicant lawyer				
Experience	+	-.022	.047	
Queen's Counsel	+	.621[a]	.314	.15
Respondent lawyer				
Experience	-	-.112	.108	
Queen's Counsel	-	.097	.392	
Applicant party type	+	.159[c]	.038	.19
Respondent party type	-	-.016	.032	
App. lawyer exp. X				
App. party	+	.012	.009	
App. lawyer exp. X				
Queen's Counsel	+	-.002	.059	
Applicant party type X				
Queen's Counsel	+	-.088	.074	
Resp. lawyer exp. X				
Resp. party	-	.027[a]	.013	.19
Resp. lawyer exp. X				
Queen's Counsel	-	-.003	.063	
Resp. party type X				
Queen's Counsel	-	.024	.066	
Constant		-1.990[c]	.251	
Per cent in Modal Category			80.14	
Per cent Correctly Predicted			80.58	
Proportional Reduction in Error			.05	
Nagelkerke Pseudo R^2			.07	
Model X^2 (12d.F.)			54.754[c]	
N of Cases			1,133	

[a]p≤.05, [b]p≤.01, [c]p≤.001, one-tailed; two-tailed test used for constant.

We mentioned earlier the central idea behind the presumed advantage of repeat players over one-shotters and the edge that haves hold over have-nots pivots on the relational inequalities or imbalances between the lawyers and between the parties. Litigation is a two-person game. Experience and resources most shape the game's result when they create privileges for one party relative to the other. Equality neutralizes the benefits that experience, credentials or resources might bestow on a party or its lawyer. To test Galanter's argument and its

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progeny, the variables should tap these asymmetrical relationships and interactions between the variables should be included in our models. Accordingly, we first constructed an additive model including only the three inequality variables between parties and lawyers. Table 5 offers the results of this model.

TABLE 5

Logit Model of Leaves-to-Appeal Outcomes, Supreme Court of Canada, 1993-1995

Independent variable	Expected direction	*b*	S.E.	Δ*p*
Lawyer experience advantage	+	-.338[a]	.023	-.29
Queen's Counsel advantage	+	.199	.150	
Status of party advantage	+	.064[c]	.015	.12
Constant		-1.245[c]	.081	
Per cent in Modal Category			80.14	
Per cent Correctly Predicted			80.14	
Proportional Reduction in Error			.00	
Nagelkerke Pseudo R^2			.03	
Model C^2 (3 d.f.)			20.897[c]	
N of cases			1,133	

The dependent variable is coded 1 if the appeal was accepted (appellant wins) and 0 if not. [a]p≤.05, [b]p≤.01, [c]p≤.001, one-tailed; two-tailed test used for constant.

Once again the results are not encouraging for the repeat-player hypothesis. Party capability theory receives a boost from the finding that status inequalities are statistically significant with a positive sign that matches expectations. Applicants with resource advantages over respondents are more likely to be granted leave than when applicants are disadvantaged vis-à-vis respondents. When we turn to the variable with the most bearing on the repeat-player hypothesis, the results are disappointing. As we found in the preceding model, they also run counter to what the hypothesis predicts. The relationship, although statistically significant at the .05 level, has the wrong sign. The expectation was that applicants with more experienced attorneys than respondents would have an edge. The sign therefore should have been positive. The fact that it is negative, we feel, can be explained by the larger context of the process, namely, the tendency of the Court to affirm appeals more often it overturns them. In addition, no statisti-

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cally significant relationship was found for the Queen's Counsel variable. The diagnostics included in Table 5 show that although the overall equation is statistically significant, its predictive and explanatory powers are weak.

Influence is both relational and contextual in nature. Indicators of asymmetrical resource advantages may interact with one another to produce more complex relationships. In the model described in Table 6 we include interaction terms for each of the inequality variables.

TABLE 6

Interactive Logit Model of Leaves-to-Appeal Outcomes, Supreme Court of Canada, 1993-1995

Independent variable	Expected direction	*b*	S.E.	Δ*p*
Lawyer experience advantage	+	-.005	.028	
Queen's Counsel advantage	+	.038	.161	
Status of party advantage	+	.059[c]	.016	.11
Lawyer exp. adv. X Queen's Counsel adv.	+	.047	.032	
Lawyer exp. adv. X Status of party adv.	+	.012[b]	.005	.08
Queen's Counsel adv. X Status of party adv.	+	-.075[b]	.086	-.05
Constant		-1.330[c]	.086	
Per cent in Modal Category			80.14	
Per cent Correctly Predicted			80.41	
Proportional Reduction in Error			.02	
Nagelkerke Pseudo R^2			.06	
Model C^2 (6 d.f.)			39.619[c]	
N of cases			1,133	

The dependent variable is coded 1 if the appeal was accepted (appellant wins) and 0 if not. [a]p≤.05, [b]p≤.01, [c]p≤.001, one-tailed; two-tailed test used for constant.

The inclusion of interaction terms in this model does not alter the statistical significance of the party status advantage variable, nor does this alteration in the preceding model change substantially the parameter estimates for this variable. The model diagnostics also are slightly improved over the previous model. However, the interaction terms render the lawyer experience advantage variable statistically non-signifi-

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cant. Two interaction terms pass standard statistically significant thresholds: both terms combining the lawyer experience advantage variable or the Queen's Counsel advantage variable with the party advantage variable. The interaction term between lawyer experience and Queen's Counsel fails this test. It appears, therefore, the advantage repeat-player attorneys may have over their less experienced or non-QC opponents is conditional on the status advantage their clients hold over the opposing party.

TABLE 7

Logit Model of Leaves-to-Appeal Outcomes, Private Attorneys Only, 1993-1995

Independent variable	Expected direction	*b*	S.E.	Δ*p*
Lawyer experience advantage	+	.026	.054	
Queen's Counsel advantage	+	.079	.220	
Lawyer firm advantage	+	-.001	.001	
Status of party advantage	+	.083[a]	.041	.09
Constant		-1.471[c]	.122	
Per cent in Modal Category				82.18
Per cent Correctly Predicted				82.18
Proportional Reduction in Error				.00
Nagelkerke Pseudo R^2				.02
Model C^2 (4 d.f.)				5.57
N of cases				522

The dependent variable is coded 1 if the appeal was accepted (appellant wins) and 0 if not. [a]p≤.05, [b]p≤.01, [c]p≤.001, one-tailed; two-tailed test used for constant.

We want to attach an important caveat to this conclusion. Governments, as elsewhere, are major litigators before the Supreme Court of Canada. Researchers who test Galanter's hypothesis overlook important differences between governments and other "haves."[30] When governments, which in almost every study on the topic are the most likely winners in courts, are included as haves, the analyses may distort and magnify the impact of party status and imbalances between parties. In the instance of the leave process, more than half of the

30 Lempert, "A Classic at 25," 1,103.

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applications involved governments as either applicants or respondents. Our party status variable, following previous research, weighs governments more heavily than other parties in its ranking. If applications involving governments are taken out of the model, leaving only those applications where private attorneys and private parties face each other, would our findings change? To the extent that government parties and their attorneys hold a privileged status before the Court, a model without government involvement in the applications might offer a purer assessment of the hypothesis. Table 7 above presents the results for this model, which includes the variable for the relative imbalance in firm resources between the opposing lawyers.

With governments and their attorneys left out of the model, the party status advantage still manages to reach statistical significance, though at a lower level than in the previous models. None of the other variables attain statistical significance. The model diagnostics are equally unimpressive. We conclude, then, that much of the impact of party status in the various models in this analysis is due to the involvement of government as a party to the proceedings, in particular in those applications where individual applicants confront governmental respondents.

Conclusions

Overall, we find repeat lawyers who have argued cases before the Supreme Court of Canada do not hold any advantages over less experienced lawyers in the leave-to-appeal process. Nor do asymmetries in the status or resources of the parties involved in the disputes matter greatly in the Court's decisions to grant or deny leave, with the important exception of when government is one of the parties. McGuire's finding that repeat player lawyers shape the agenda of the US Supreme Court and Galanter's argument postulating that haves come out ahead make the results of this replication in Canada surprising, even though tests of Galanter's hypothesis have been mixed. What kind of explanation can be offered for these seemingly anomalous results?

From a methodological standpoint, the models may be underspecified. They do not include some variables, such as conflicting lower-court opinions that have been found to be important in studies of agenda setting by the US Supreme Court.[31] Although, if repeat-player attorneys are more skillful at ferreting out legitimate conflicts than their less-experienced peers, the experience advantage variables might have picked up some of this effect. Another variable of signifi-

31 S. Sidney Ulmer, "Conflict with Supreme Court Precedents and the Granting of Plenary Review," *Journal of Politics* 45 (1983), 474.

cance in the United States, briefs filed by organized interests as *amici curiae* (analogous to interveners in Canada) often at the instigation of repeat player lawyers, is not germane to the Canadian case. Organized interests do not participate in the leave process and are discouraged from doing so by the Court, although interveners do appear at the merits stage.[32] Even with these qualifications, the possibility exists that the inclusion of other variables might alter the relationships found in our models, although statistical models of agenda setting in the US Supreme Court do not include fundamentally different variables beyond those used in this analysis.[33] Finally, while the diagnostics for the logit models are not impressive, they are consistent with other work.[34]

Substantive questions, of course, also come to mind. Why does experience not count in Canada? Why do repeat players fail to win the leave-to-appeal game? To what extent do institutional arrangements in the Supreme Court of Canada provide an answer to these questions? McGuire argues that the reputation and credibility of attorneys attract the attention of law clerks and justices in the US certiorari process. Many of the lawyers he quotes stress the importance of being known and experienced because of the large volume of cert petitions and the limited time needed to process them. In effect, these attorneys feel their identity as repeat players is an important cue for clerks or justices. Finally, the US Supreme Court handles requests for judicial review in a different way than in Canada; its process is more centralized and involves all of the justices plus their clerks.

The US Supreme Court receives a large volume of petitions for writs of certiorari, and it grants these writs to a relative handful of applicants. During the sampled years in McGuire's study, for example, the number of "paid" petitions, which are usually civil cases, rose from 2,341 in 1977 to 2,710 in 1982, while the proportion granted certiorari fell from 10 per cent to 6 per cent.[35] The number of criminal law petitions was roughly the same as for civil cases, which, when the two are combined, nearly doubles the total volume to around 5,000 petitions a year. However, the proportion of criminal cases granted cert was substantially lower at 1 per cent in 1977 and fell sharply to 0.4 per

32 F. L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: Broadview, 2000).

33 H. W. Perry, "Agenda Setting and Case Selection," in John B. Gates and Charles A. Johnson, eds., *The American Courts: A Critical Assessment* (Washington: CQ Press, 1991).

34 For example, Farole, "Reexamining Litigant Success in State Supreme Courts," *Law and Society Review* 33 (1999), 1043.

35 Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions, and Developments* (Washington: CQ Press, 1996), 82.

cent in 1982. The volume of petitions for leave was markedly smaller in Canada for these same years; the Canadian Court received 377 leave applications in 1977 and 416 in 1982. And, in contrast to the United States, Canada's plenary docket is more accessible to litigants and their lawyers; the Supreme Court granted leave to 17 per cent of the applications and 14 per cent, respectively, during these years. In 1993-1995, the period of this study, the number of leave applications averaged about 475, of which roughly 15 per cent were granted leave.[36]

In brief, the nine Canadian justices and their 27 law clerks review far fewer applications and grant leave more often each year than their US counterparts and clerks. This lower volume allows the Canadian Court more time to consider each application. At the time of this study, the law clerks read roughly 20 applications a year. As a consequence, the memos they drafted averaged 15 pages in length compared to the generally one-page memos written by the clerks in the United States.[37] These memos, moreover, were follow-ups to the "objective summaries" drafted by the staff attorneys in the Legal Affairs Department of the Registrar's Office. The amount of attention an application receives in Canada may well dilute the value of a well-known name as a shortcut to identifying a worthy application; alternatively, this attention increases the chances that a solid case made by a lesser-known name will be recognized.

Another reason why the experience or reputation of repeat players may be discounted in the Canadian Court is that the law clerks lack the knowledge about repeat players that their American counterparts have. Law clerks in Canada are recruited during their senior year in law school to serve the justices.[38] Law clerks in the US Supreme Court typically have clerked for a year or two in the lower courts, where they are likely to see and learn more about lawyers through observation and through the grapevine that winds through the legal system. Aside from knowing, perhaps, the names of those attorneys who attract media attention, the Canadian clerks while in law school are less likely to be aware of, or pay much attention to, which attorneys were appearing before the Supreme Court. And, of course, they are not yet privy to the

36 Roy B. Flemming, "Processing Appeals for Judicial Review: The Institutions of Agenda Setting in the Supreme Courts of Canada and the United States," in Hugh Mellon and Martin Westmacott, eds., *Political Disputes and Judicial Review: Assessing the Work of the Supreme Court* (Scarborough: ITP Nelson, 1999).

37 Lorne Sossin, "The Sounds of Silence: Law Clerks, Policy Making, and the Supreme Court of Canada," *University of British Columbia Law Review* 30 (1996), 279.

38 Mitchell McInnes, Janet Bolton and Natalie Derzko, "Clerking at the Supreme Court of Canada," *Alberta Law Review* 33 (1994), 58.

gossip and tales carried by the grapevine. What knowledge they may have, moreover, may be particularistic, in that different attorneys may attract the attention of some clerks but not others. What this means is that the purchasing power of experience in gaining access to the Court varies with the clerks' knowledge of the attorneys' track records.

Fluctuations in the value of this currency may be exacerbated by the institutional arrangements the Canadian Court has developed to review leave applications. The applications are processed through a decentralized system of three-justice panels. With this in mind, the benefit of experience could depend on the lottery of the assignment process. The chief attorney of the Legal Affairs Department assigns applications to the staff attorneys to prepare the objective summaries as the applications are submitted to the Court. When the staff attorneys finish their summaries, which include recommendations for whether leave should be granted, the chief counsel then assigns the applications to the individual leave panels in a roughly equal fashion. At the time of this research, the clerks for each of the justices on a panel selected applications primarily on a rotating basis, and prepared a memo, which could also include recommendations, before sending it to the panel justices. This means that the decision in an application for leave to appeal could depend on the views of a staff attorney, one clerk and two of the three justices on the panel. Although all nine justices meeting in conference review the panel recommendations, there is no evidence the conference routinely or regularly overturns panel recommendations. The leave decision for an experienced attorney or one with an edge over an opponent, therefore, may well reflect the luck of the draw, which reduces the statistical significance and impact of being a repeat player.

It appears, then, that the institutional features of the Canadian agenda setting process, which include a low volume of requests for judicial review, more liberal access to the Supreme Court's plenary docket, and a decentralized review of leave-to-appeal applications, diminish the impact of repeat players in placing cases on the agenda of the Supreme Court of Canada.