David Asper Centre for Constitutional Rights
UNIVERSITY OF TORONTO

More than Busybodies

Report of a Workshop on the Status of Public Interest Interveners in Canadian Courts

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Acknowledgements

The David Asper Centre for Constitutional Rights is a centre within the University of Toronto, Faculty of Law devoted to advocacy, research and education in the area of constitutional rights in Canada. It is also a frequent intervener at the Supreme Court of Canada and other courts across the country in cases involving the Canadian constitution. In the summer of 2024, we were approached by counsel who also frequently represent public interest interveners to consider convening a discussion about the state of interventions and the relationship between public interest interveners and the courts. While our views on the issue cannot be seen as impartial given our advocacy work in the courts, our location within an academic institution and our dedication to research and education leant itself to the task.

It was our aim with the workshop to invite a relatively small group of frequent interveners to facilitate a lively discussion while trying to be as representative as possible of public interest groups that are impacted by the kinds of court cases that attract a broader range of interventions. Not all invitees were able to attend. Attempts were made to include Attorneys General in the discussion, but without success. We hope that subsequent work can be done to include their voices, particularly the counsel who have considerable experience with interventions.

A working group of law students was convened to conduct background research and to assist with the organization of a workshop devoted to this discussion. They acted as the rapporteurs at the workshop and the primary authors of this report. In particular, I wish to thank the working group leaders, who organized the law students and shepherded their work including pulling it all together in this report: Sakina Hasnain, Akash Jain, Kate Shackleton and Navya Sheth. Finally, I wish to thank lawyers Anita Szigeti, Jonathan Rudin, Sarah Rankin, Pamela Hrick and Sandra Ka Hon Chu who served as an ad hoc steering committee. While our meetings were infrequent, their guidance on issues and identification of key stakeholders were invaluable.

The title of this report uses a term that courts have used to refer to third parties seeking to be either parties or interveners in litigation to which they have little or no connection. The rules of interventions have become more flexible in constitutional and other public interest cases such that the organizations represented by the participants in this workshop have frequently demonstrated their usefulness to the courts and their interests in cases that have broad societal impact. It is our hope that the recommendations made here can assist in making such contributions more effective.

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Executive Summary

The following report was prepared as part of ongoing research being conducted by the David Asper Centre for Constitutional Rights into the role and treatment of interveners by courts across the country.

The report contains independent research into trends in interventions conducted by Asper Centre students and staff, as well as a review of academic commentary. It also summarizes the topics discussed and opinions shared at a roundtable of frequent interveners, which was hosted by the Asper Centre in March 2025. It is organized into four sections: the role of interveners, intervention procedure, variations between courts, and recommendations for the future.

In terms of the role of interveners, the roundtable conversation centred around two main themes: the provision of diverse perspectives to inform judicial decision-making and the reframing of legal issues to acknowledge concerns beyond the scope of litigating parties. Participants also shared concerns on common obstacles faced by interveners, particularly a perception of the court's lack of unanimity regarding the expected contribution of interveners and a perceived coolness towards them.

When discussing intervention procedure, participants emphasized the desirability of intervening at lower courts. They also canvassed concerns associated with the process of applying for leave, which is perceived as inconsistent and opaque. Participants did not reach unanimity on whether in-person appearances should be permitted over the Supreme Court of Canada (SCC)'s virtual participation model, but a majority supported it. Likewise, a minority only suggested that aspects of the American system for interventions, which is more permissive of interventions in writing only, should be adopted.

With intervening at different levels of court, discussion focused particularly on the SCC and Federal Courts. The Federal Court and the Federal Court of Appeal received considerable criticism for their restrictive approach, which has yielded a "chilling" effect disincentivizing interventions. Roundtable participants noted the lack of clarity with respect to procedural requirements at the federal and provincial courts. Participants also shared their frustration with the seemingly arbitrary approach to granting and dismissing applications for leave to intervene, and the accompanying lack of adequate reasons.

The report concludes by offering recommendations to improve the ability of interveners to contribute to the development of the law. First, roundtable participants suggested that there should be more transparency about leave decisions, especially through reasons. Second, procedural modifications with respect to draft facta and costs were suggested to decrease the burden on interveners, especially those representing clients with limited resources. Third, modifications were suggested to appearance rules, both with respect to time allotments and in-person appearances. Finally, interveners suggested other solutions focused on allocation of resources, including coordination between interveners and a request to lower courts to publicize upcoming appeals. The list of recommendations is as follows:

1. Courts should be required to provide reasons when denying applications for leave to intervene;
2. Draft facta should not be required for leave applications;
3. Interveners should be shielded from costs awards;
4. Interveners should have additional time for oral argument at the Supreme Court;
5. Interveners should be permitted to appear in person at the Supreme Court;
6. Interveners who share similar goals should be encouraged to coordinate voluntarily, but not forced to do so; and
7. Lower courts should publicize upcoming appeals to their Courts of Appeal to ensure interveners have the opportunity to address issues of importance to them.

The David Asper Centre for Constitutional Rights acknowledges the Interventions Student Working Group, who helped prepare this report along with background memoranda on intervention procedures, the recent history of interventions and academic commentary on the role of interveners. Members of the working group are listed in Appendix B.

Introduction

Public interest interventions serve as a critical tool in Canadian constitutional litigation, allowing stakeholders outside of the immediate parties to a case to provide courts with broader perspectives on legal issues that have far-reaching societal implications. These interventions enable marginalized communities, advocacy organizations, and experts to contribute specialized knowledge, ensuring that judicial decisions account for a diverse range of viewpoints. However, recent judicial trends indicate an increasing tension between recognizing the benefits of public interest interventions and addressing concerns about procedural efficiency, judicial discretion, and the perceived burden that interventions place on court resources.

Interveners traditionally play a unique role in litigation by offering legal, policy, and social context arguments that may not be presented by the parties involved in a case. They serve to bridge gaps in legal reasoning by introducing perspectives informed by expertise, lived experience, and research.

In recent years, the SCC has seen a steady rise in the number of interventions, with nearly seventy percent of cases from 2020-2024 featuring interveners. Further, though interveners were not always explicitly mentioned, interveners' arguments are often cited favourably in Supreme Court decisions, particularly when they advocate for interpretations consistent with constitutional protections, individual rights, or legal precedents. The data also reveals that a critical part of their role is narrowing or clarifying precedent.[1]

While many groups are regularly granted leave to intervene, the SCC has increasingly restricted the scope and frequency of interventions. Though this principle is meant to ensure judicial focus and procedural integrity, it has led to significant inconsistencies in how intervention applications are evaluated. The result has been a growing perception that interventions are becoming an afterthought rather than an integral part of legal proceedings.

This perception was crystallized in summer 2024 when the Supreme Court of Canada issued their decisions on leave to intervene in two cases: *Kloubakov* and *Wilson*.[2] In both cases,

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[1] The Asper Centre's research into recent trends in interventions is attached as Appendix C.

[2] *R v Kloubakov*, 2025 SCC 25; *HMK v Wilson* [SCC No.40990]; this appeal has not yet been decided at time of writing, but the case information can be found here.

advocacy groups representing communities who would be directly impacted by the outcome of the case were denied leave to intervene.[3]

On March 7, 2025, the Asper Centre convened a Roundtable with expert academics and practitioners with a wealth of collective experience intervening at all levels of court, including the Supreme Court of Canada. A full list of participants can be found at Appendix A.

Under Chatham House Rules[4], participants discussed some of their most pressing concerns with the intervention process, their views on the value added by interveners, and their opinions on the future of interventions. The discussion was organized broadly into four sections:

1. Identifying the Issues
2. The Role of Interveners
3. Procedural Issues
4. Moving Forward

Based on the Roundtable, the following Report was prepared. The Report seeks to synthesize the key themes and issues which arose at the Roundtable, as well as provide recommendations for how the intervention process might be improved going forward.

In generating this Report, the Asper Centre's hope is that practitioners and members of the judiciary alike will reflect not only on current procedural challenges associated with interventions, but – more generally – on the proper role of interveners and what steps can be taken to ensure that role is best fulfilled. Above all, our hope is to facilitate more dialogue and a greater understanding of how lawyers and courts, respectively, view interventions.

Role of Interveners

The Supreme Court's View

There is no consensus—either in the case law or from academic commentators—about the purpose and proper role of interveners. According to the Supreme Court in a November 2021

[3] It should be noted that subsequent to our roundtable discussion, the SCC granted intervener standing to over 40 interveners in *English Montreal School Board, et al. v. Attorney General of Quebec, et al.* [SCC No. 41231] and approximately 22 interveners in *Attorney General of Quebec v. Bijou Cibuabua Kanyinda* [SCC No. 41210].

[4] Chatham House Rule: When a meeting, or part thereof, is held under the *Chatham House Rule*, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.

Notice to the Profession, "interveners serve an important role in bringing broader perspectives before the Court than those advanced by appellants and respondents."[5] Additionally, the Court provided the following guidelines regarding interventions:

1. The Court expects all intervener submissions to be useful to the Court and different from those of the parties.
2. The purpose of an intervention is not to support a party but to advance the intervener's own view of a legal issue before the Court. Despite the participation of interveners, the case remains a dispute between its parties. However, the fact that an intervener's submission aligns it generally with one party over another does not, without more, make the submission inappropriate.
3. Interveners should not take a position on the outcome of an appeal, whether in written or oral argument.
4. Interveners must not challenge findings of fact, introduce new issues, or try to expand the case.
5. In considering applications to intervene, the Court will be mindful of the need not to unduly imbalance the arguments before it.
6. The Court always retains a discretion to take any steps it sees fit to prevent an unfairness to the parties arising from an intervener's participation in an appeal.

The Court also recently commented on the role of interveners in *R v McGregor*.[6] In *McGregor*, the majority held that it is inappropriate for interveners to adduce new evidence or supplement the evidentiary record at the appellate level.[7] Further, interveners cannot ask courts to overrule a precedent without having been asked to do so by a party directly involved in the litigation.[8] However, the concurring judgments of Rowe J., on one hand, and Karakatsanis and Martin JJ., on the other, reveal differences of opinion within the Court about the extent to which interveners should influence decisions. Per Rowe J.:

> The purpose of an intervention is to "present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal." [They] provide additional perspectives on the legal issues raised by the parties and on the broader implications of the Court's decision. [. . .] Interveners may also enhance accuracy by representing diverse cross-sections of the Canadian public and furnishing an analysis informed by their particular experience or specialized expertise. [. . .] such experience and expertise can "assist the court in deciding complex issues that have effects transcending the interests of the

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[5] Supreme Court of Canada, "November 2021 - Interventions" (November 2021), online: <https://scc-csc.ca/parties/arf-lrf/notices-avis/21-11/>.

[6] 2023 SCC 4 [*McGregor*].

[7] *Ibid*, at paras 23-24.

[8] *Ibid*, at paras 23, 100.

> particular parties before it." [. . .] In this way, interveners can often make important contributions. In order to do so, however, interveners must operate within recognized limits.[9] [citations omitted]

Karakatsanis and Martin JJ. agreed that interventions are intended to add a new perspective. They observed that "bringing broader perspectives before the Court than those advanced by appellants and respondents" helps the Court fulfill its institutional role.[10] Unlike the majority, however, Karakatsanis and Martin JJ. would have allowed interveners to criticize existing precedents, considering such criticism as part and parcel of their mandate "to provide their own view of the legal issues by providing useful and different submissions" from the parties.[11]

In response, Rowe J. warned that this approach risks "ill-advised decisions, as they would be made without the benefit of lower court analysis, a proper evidentiary record, or submissions from those who would be affected (including vulnerable groups) but who had no notice that the issue would be placed before the Court."[12]

Overall, *McGregor* illustrates that the Court does not have a uniform perspective on the purpose and scope of interventions. In particular, *McGregor* highlights the tension between ensuring the Court is aware of broad perspectives with the need for efficiency and fairness when adjudicating cases.

Academic Commentary

Academic commentators stress that intervener participation facilitates more informed decisions.[13] Nicolaidas points out that by drawing attention to the impact of a decision on non-parties, "intervener participation can increase the legitimacy of judicial decisions by creating more acceptable decisions based on a wide range of viewpoints."[14]

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[9] *Ibid*, at para 103.
[10] *Ibid*, at para 82.
[11] *Ibid*, at para 81.
[12] *Ibid*, at paras 101, 111.
[13] Eleni Nicolaidas, "Constitutional Interventions: Constitutional Litigation, Third-Party Interventions, The Supreme Court of Canada, and Mobilization in Legislative Replies" (2023) Doctoral Thesis, University of Guelph [Nicolaidas] at 81.
[14] *Ibid*.

Meanwhile, Alarie and Green outline three potential functions of interveners.[15] Firstly, they propose that interveners could provide "objectively useful information to the Court."[16] Second, they suggest that by allowing interest groups to intervene, interveners are able to "provide the 'best argument' for certain partisan interests that judges may want to 'affiliate' with."[17] Lastly, they propose that interventions ensure that intervening parties feel their voices have been heard by the "Court and the greater public, including Parliament, regardless of the effect on the outcome of the appeal."[18]

Academic commentators also point to the role interveners may play in adducing new evidence or raising issues for the court not touched on by either party, notwithstanding the Court's recent clear directives against both. Weaver & Orkin emphasize that without the assistance of interveners, non-state parties "may bear the unfair burden of having to adduce massive amounts of evidence concerning very broad social issues, when his or her concern may be with one discrete incident".[19] Further, Weaver & Orkin draw attention to *R v Sioui*, as "at least one constitutional rights case in which the Supreme Court specifically held that sources of historical facts adduced by an intervener should be treated in precisely the same manner as those independently identified by the Court."[20] They also draw attention to various cases where the court implicitly accepted legislative facts introduced by interveners, such as *Moge* and *Le.* Additionally, in *Kirkpatrick,* the Court "stressed the usefulness of the credible, comprehensive and current information [interveners] provided."[21]

Roundtable Perspective

At the Roundtable, the participants first considered the goal of intervening. While the group did not reach a consensus on the answer to this question, two key themes emerged: the

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[15] Benjamin Alarie & Andrew Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48:3&4 Osgoode Hall LJ 381 [Alarie & Green] at 383.
[16] *Ibid.*
[17] *Ibid.*
[18] *Ibid.*
[19] Adriel Weaver & Jessica Orkin, "Demonstrating Discrimination: Judicial Notice, Legislative and Social Framework Facts and the Politics of Intervention" in Cheryl Milne & Sophia Moreau, eds, *Litigating Equality* (Toronto: LexisNexis, 2024) 111 at 128.
[20] *Ibid*.
[21] *Ibid*, at 129.

bringing of diverse perspectives to inform judicial decision-making and the reframing of legal issues to acknowledge concerns beyond the scope of the litigating parties.

In addition, roundtable participants shared their concerns regarding the increasing adversity endured by interveners in attempting to fulfill these roles. Throughout the discussion, two concerns recurred most often: the perceived lack of unanimity at the court regarding the expected contribution of interveners and a perceived negative attitude towards interveners.

The Value of Diverse Perspectives

Participants agreed that one central role of interveners is to bring new and different perspectives to the court that are not adequately represented by the main parties. By sharing these perspectives, interveners can provide the court with a more comprehensive understanding of the issues, and real-world impact, of their potential judgments. Participants emphasized that the perspectives of those who may be impacted by a law should, in an ideal system, influence and potentially augment the court's understanding and application of that law. Similar to the rationale for a “diverse bench,” interveners may be seen as a mechanism for improving judicial decision-making by broadening and diversifying the perspectives considered by the bench.

Reframing Legal Issues

A second significant role of interveners, in the view of Roundtable participants, is to reframe legal issues before the court, so as to draw attention to the broader scope and implications of judicial decisions, potentially challenging the way the parties have framed their legal questions. While the case law is clear that interveners should not introduce *entirely new* legal issues, interveners may nonetheless offer new insights, prompting a broader understanding and application of the law. The challenge identified by participants lies in being "new, but not too new,” or, offering a perspective which does not impermissibly expand the scope of the case. By focusing on how the law affects specific communities, interveners can push the court to consider alternative interpretations and practical consequences of its rulings.

Unclear Expectations

One key concern raised by participants was the conflicting and inconsistent views of the role and value of interveners by the SCC. Participants noted a lack of coherence in the theory and rationale behind interventions, with uncertainty about what constitutes an acceptable contribution. They also observed a tension around the introduction of new issues and evidence, particularly social science authorities, with a perceived inconsistent application of the principle that interveners should not introduce new evidence. The perception that the court sometimes welcomes new information while at other times reacting negatively creates unpredictability, making it difficult for interveners to prepare effective arguments. The failure to give reasons for denying leave also contributes to this uncertainty. This ambiguity extends to the weight given to experience based arguments as opposed to *doctrinal* arguments, causing confusion about when and how it is appropriate for interveners to raise the unique lived experiences of communities they represent.

How Interveners are Perceived

Another significant concern expressed by participants is the growing sense of antipathy, or in other terms, the perceived “devaluation”, of interveners by the SCC in particular. This view stems from mandating virtual appearances only for interveners, a reduction in time for oral submissions and length of written factums, and a general feeling that judges pay less attention to brief, virtual submissions. The “devaluation” perception is further fueled by the arbitrariness in leave decisions and the sense, shared by some Roundtable participants, that the court views the intervention process as a mere "PR exercise,” rather than a substantive contribution to a court’s legal reasoning. In essence, the concern is that the potential value and unique perspectives that interveners can bring are not being fully appreciated by the judiciary.

Procedure

Current Context Under Court Rules

The *Rules of the Supreme Court of Canada* lay out the requirements of who may make a motion to intervene and how to do so.[22] Under Rule 55, "any person interested in an application for leave to appeal, an appeal, or a reference may make a motion for intervention to a judge," intervention itself is still up to the discretion of the court.[23] Rule 57 then lays out specific requirements for a motion for intervention:

> **57 (1)** The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.
> **(2)** A motion for intervention shall
>> **(a)** identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and
>> **(b)** set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.[24]

Amongst other powers, Rule 59 outlines how in an order granting intervention, a judge sets out the limits of interveners.[25] Rule 59(1)(b) dictates that a judge may "impose any terms and conditions and grant any rights and privileges that the judge may determine, including whether the intervener is entitled to adduce further evidence or otherwise to supplement the record."[26] Notably, rule 59(1)(3) also explicitly states that "[a]n intervener is not permitted to raise new issues unless otherwise ordered by a judge."[27]

While parties interested in intervention must file a motion and be granted leave, there is an exception under rule 33(4) for attorneys general.[28] On constitutional questions, rather than

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[22] *Rules of the Supreme Court of Canada*, SOR 2002-156 [*Rules of SCC*].
[23] *Ibid*, at s 55.
[24] *Ibid*, at s 57.
[25] *Ibid*, at s 59.
[26] *Ibid*, at s 59(1)(b).
[27] *Ibid*, at s 59(1)(3).
[28] *Ibid*, at s 33(4).

filing a motion for intervention, they may simply file a service of notice and are not required to obtain leave to intervene.

Interveners who are granted leave are limited to 10-page factums (aside from attorneys general).[29] Oral arguments are typically restricted to five minutes.[30] Since 2022, it has also been the Court's practice to limit interveners to virtual appearances only.[31]

Roundtable Discussion

Roundtable participants highlighted various procedural issues and concerns associated with interventions. When discussing the ideal level to intervene, many emphasized the strategic advantages of lower court interventions, but noted a lack of awareness of such cases in their early stages. Participants also raised concerns about the application for leave process, particularly the Court's general practice of not providing reasons for denying leave.

Participants disagreed on whether the SCC's virtual participation policy should be maintained. Likewise, they disagreed on whether the American system for interventions should be adopted.

Participants also questioned whether attorneys general should continue to be automatically granted leave for appeals involving constitutional questions.

Finally, participants discussed the limitations imposed on prospective interveners by the risk of adverse cost awards.

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[29] *Ibid*, at s 42(5).

[30] Supreme Court of Canada, "March 2017 - Allotting Time for Oral Argument", online: <https://www.scc-csc.ca/parties/arf-lrf/notices-avis/17-03/#:~:text=A%20judge%20determining%20time%20allotments,will%20be%20the%20usual%20allotment>.

[31] See, e.g.: LAW360 Canada, "SCC's move to limit interveners' counsel to Zoom in fall sparks questions, concerns within bar," online: <https://www.law360.ca/ca/articles/1759003/-scc-s-move-to-limit-interveners-counsel-to-zoom-in-fall-sparks-questions-concerns-within-bar>.

Intervening at Lower Courts

Attendees emphasized the strategic benefits that exist when interest groups are able to intervene at first instance or at intermediate appellate courts. One benefit is that it may alleviate the need to request leave if the case is appealed. Furthermore, the intervening party can more readily introduce evidence. Finally, the intervener can impact how the legal questions are framed on appeal, which can draw the Supreme Court's attention to issues they may not otherwise have considered.

Participants viewed it as advantageous that the rules for granting leave have not been formalized at trial and intermediate appellate courts to the same extent as at the SCC. While this presents a lack of clarity on the timing for submissions, it offers prospective interveners more flexibility in obtaining leave in comparison to the relatively restrictive rules currently employed by the SCC.

However, intervening at earlier stages presents its own set of challenges. Trial level cases are typically not publicized, making it more difficult for potential interest groups to be aware of cases which may be worth intervening in. One participant noted that they rely primarily on defence counsel to notify them of cases that have constitutional significance. However, as another participant noted, many such cases are liable to go unnoticed via this method, as the defence lawyer's primary focus will be their client's immediate interests rather than the broader impact of the case.

Applying for Leave

Draft Memorandums of Argument

Participants questioned the utility of the current rule mandating submission of draft memos of argument at the application for leave stage. While some acknowledged its importance in screening out unserious or irrelevant interventions, others felt it imposes an unnecessarily high barrier. They expressed concern that the draft memo requirement prevents the participation of serious interest groups who lack the capacity to draft a memo for each important case.

Draft Facta

Some participants recounted being asked, particularly at intermediate appellate courts, to submit a draft factum as part of their leave to intervene applications. Participants agreed that draft facta at the leave stage were very labour intensive and imposed a prohibitive burden on prospective interveners, particularly those with limited resources. They also stressed that their ability to produce draft facta was severely constrained by the fact that the parties had often not yet filed any materials, making it difficult to predict what to argue without duplicating the parties' arguments or expanding the issues.

The Lack of Reasons

Another profound concern raised by participants was the lack of written reasons for denying leave, with many expressing frustration over being denied leave without any explanation. Furthermore, participants explained that this left them without guidance about how they might increase their chances of a successful leave application in future. Although participants recognized that issuing written reasons for these decisions would increase the burden on judges, it would provide much needed insight into the Court's rationale for granting or denying leave.

Virtual Submissions

One of the more controversial points between Roundtable attendees was the Supreme Court's shift to virtual attendance for interveners.[32] Several participants shared the sentiment that virtual attendance is a stark manifestation of the court's indifference to interveners. Furthermore, there was general agreement that virtual attendance makes it more difficult for interveners to meaningfully participate in the hearing. For example, counsel appearing virtually are not able to see the justices' body language, which normally can give counsel a sense of whether or not their arguments are taking hold. Participants also described poor logistics associated with virtual attendance. For example, one participant recounted that after being dropped from the Zoom call, they were locked out and unable to rejoin.

[32] See a recent opinion by Frank Addario and Lisa Kerr, "It's time to let lawyers come back to the Supreme Court of Canada." Opinion, *Globe & Mail* (July 22, 2025).

On the other hand, some participants stressed that the shift to virtual benefited their groups. These groups—many based in Western Canada and/or facing financial barriers—shared that the shift to a virtual setting leveled the playing field. It enabled them to participate in interventions that would otherwise be dominated by better-funded and more centrally located organizations. Their concern was that a mix of in-person and virtual attendance would create an implied hierarchy of interveners.

The American Approach

One participant favoured adopting the Supreme Court of the United States' approach to granting leave, which grants leave to 'intervene' through written argument to virtually any intervening third party. The written submissions are then triaged based on merit and the interveners with the most valuable submissions are given time for oral arguments.[33] Other participants criticized this approach. They feared that it would overwhelm judges with written materials, and that the written submissions might be triaged not by merit but based on prestige of the author or organization. In defence of the first point, one participant argued that written submissions are primarily read by clerks and thereby do not impose an undue burden on judges. Overall, while borrowing from the United States model was intriguing to some participants, support was not widespread.

Attorney General Interventions 'As of Right'

Participants also discussed the role of attorneys general as interveners. In their view, their interventions substantially contribute to intervener "pile-ons." Indeed, an analysis by the working group into judicial trends from 2020-2024 had found that the most common interveners overall were the attorneys general, whose interventions made up approximately 20% of the total case interventions surveyed and were often cited as persuasive by the court.[34] Some participants observed that their privilege of intervening as of right is an unnecessary holdover from the pre-*Charter* era when federalism was the main constitutional concern. It was not clear to many

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[33] An intervener, called *amicus curiae* (friend of the court) in the U.S. context, must obtain permission from all parties filing to submit its brief - or obtain leave through the court. Generally, these are not practical barriers for those attempting to intervene, though there is significantly more restriction for the admission of oral arguments. See Rules of the Supreme Court of the United States, r 28.7 and 37.2.

[34] Appendix C. Note this was also the finding of Eleni Nicolaidas, *supra* note 13.

participants that provincial attorneys general had any special interest or expertise in criminal appeals raising Charter concerns (for example).

Costs

Smaller interest groups who work on behalf of specific communities were the most concerned about the costs of intervening, though all participants did emphasize the high cost and time commitment that go into interventions. These concerns primarily related to effective resource allocation given the necessity of submitting a detailed application for leave paired with the unpredictability of the court's decision to grant leave. One participant felt that low-funded groups face a sort of psychological barrier to intervening, given the risk of dedicating resources to leave applications which could very well be denied. It was noted that counsel who do the work for non-profit organizations representing marginalized communities generally provide their services pro bono and invest their time heavily in these cases. The uncertainty and burden of preparing exhaustive leave application materials can have a chilling effect on some community's participation. Additionally, participants drew attention to the negative impact on interveners when opposing parties fail to indicate whether they will seek costs against interveners.

Intervening at Different Levels of Court

The Supreme Court of Canada

Participants generally agreed that the SCC provides clear notice of upcoming cases, especially through its bulletin. However, one participant noted that the current process does not incentivize coordination between interveners because the SCC has taken a permissive approach to many intervener groups (particularly frequent interveners like civil liberties associations). In contrast, the SCC has forced other interveners (especially those representing groups with various lived experiences) to collaborate, which has also created challenges in coordinating oral arguments among interveners.

There was also discussion about the Supreme Court's position as a policy court and how this should inform its relationship with interveners. One participant stated that the SCC's fundamental role is to engage in long, deep thought about serious and complicated questions. Interventions at the SCC provide context, analytical tools, and perspectives to ensure that rules

do the most justice and serve the public most effectively in the pursuit of shared values. The court should thus use interventions as an opportunity to consider issues from all angles compared to the narrower focus of lower courts. Attendees noted, however, that the SCC did not seem to share this view of interventions.

Federal Courts

The Federal Courts (i.e., the Federal Court and the Federal Court of Appeal) faced considerable criticism for their inconsistent and dismissive approach to interveners. Many Roundtable participants stated that they were fearful and hesitant to intervene at the Federal Courts, particularly at the Federal Court of Appeal. Indeed, the Federal Court of Appeal was often cited as "the most hostile appellate court" regarding interveners. This hostility is problematic, as it creates a "chilling" effect that disincentivizes interventions on important social issues.

Participants explained that, at the application stage, the Federal Courts have offered little assistance in clarifying procedural requirements, particularly regarding the timing of intervention applications. As a result, many interveners were unsure when or how to apply to intervene. When seeking clarification on these rules, participants received little to no advice from the courts. Furthermore, costs were often imposed against interveners who failed to comply with procedural requirements, notwithstanding the ambiguous nature of the Federal Courts' rules. To this end, participants called for a reform of the Federal Courts' procedural framework concerning interveners. Roundtable participants perceived the lack of assistance and clarity towards interveners as a manifestation of the Federal Courts' negative attitude towards interveners.

The lack of procedural clarity is exacerbated by the Federal Courts' apparently arbitrary approach to granting and dismissing applications for leave to intervene, which are often made without providing adequate reasons. As the participants highlighted, this unpredictability makes potential interveners apprehensive about investing resources in an intervention application, as there is little certainty regarding whether the court will allow them to participate in proceedings.

The perception of the Federal Courts' coolness towards interveners was reinforced by their recent decision in *Canada (Attorney General) v Kattenburg*,[35] which was raised in the Roundtable

[35] 2020 FCA 164; see also *Le-Vel Brands, LLC v. Canada (Attorney General)*, 2023 FCA 66 (CanLII) and *Talukder v. Canada (Public Safety and Emergency Preparedness)*, 225 FCA 132.

discussion. In *Kattenburg*, Stratas JA denied twelve applicants, including various civil rights organizations, leave to intervene. Applying his newly formulated test for assessing the usefulness of an intervener's submissions,[36] Stratas JA dismissed *all* the motions to intervene on the basis that the proposed interveners raised issues not central to the appeal.[37]

Kattenburg was cited as a prime example of how the Federal Courts' recent jurisprudence has itself become a barrier to intervening. In *Kattenburg*, Stratas JA went further than merely denying leave. He voiced deep concern about what he saw as a "growing, regrettable tendency" for organizations to view courts as ideological arenas for political or social reform rather than legal forums restricted to resolving disputes brought by parties.[38] He criticized how intervener submissions were transforming court proceedings into something resembling a "parliamentary committee," marked by "loose policy talk" that was out of place in a courtroom.[39] Some participants view his sentiments as deeply troubling, and demonstrative of how the Federal Courts can be resistant, if not outright hostile, to the presence and role of interveners. Roundtable participants suggested that many individuals fear intervening at the Federal Court of Appeal because they worry that their efforts will be castigated and, as a result, lead to the development of "bad law." This is concerning, especially considering that many cases heard by the Federal Courts concern legal issues that would benefit from the diverse perspectives of interveners.

Other Courts

As with other courts, there were issues identified with respect to provincial courts' attitude towards interveners. One participant noted that lower courts' responses to interventions depended on their particular attitude towards interveners. The participant observed, for example, that the Alberta Court of Appeal has shown disinterest in using the courts to generate legal reform, equity, or change, which made building legitimacy as an intervener different than in other courts.

However, the more major concerns voiced by participants regarding provincial courts were difficulties with timelines, resources, and processes. For example, at the Court of Appeal for Ontario (ONCA), interveners are required to seek leave before parties file materials. This

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[36] *Ibid*, *Kattenburg* at paras 8-9.
[37] *Ibid*, at paras 6, 52.
[38] *Ibid*, at para 43.
[39] *Ibid*, at para 44.

creates difficulty in drafting applications that are responsive to parties' positions on core issues. Similarly, participants identified that requirements for leave factums have become more rigorous, moving closer towards full factums, which has forced interveners to expend significant resources even at the leave stage.

Participants also discussed issues with notice at the lower courts. One stated that *Kloubakov*, a case where interveners could have played a significant role in shaping the law around sex work, was an appeal as of right that passed largely unnoticed until it reached higher levels of court. Without accessible notice, potential interveners or interest groups impacted by the decision may not learn about such cases until they reach the Supreme Court of Canada, at times leaving important legal issues unaddressed. This is problematic because getting leave at the trial level can increase interveners' chances of being granted leave on appeal: one person commented favourably on jurisprudence at the Ontario Court of Appeal, which has held that if a group intervened as an added party, they would not have to apply at the Court of Appeal for leave to intervene and would remain an added party intervener.[40]

Moving Forward: Recommendations

As discussed earlier in this report, the discussion at the workshop revealed several pressing concerns related to the role of interveners. These concerns included the judicial arbitrariness in granting leave, the impact of restrictive procedural rules, and the challenges in balancing judicial efficiency with meaningful participation in constitutional litigation. This section outlines recommendations for improving the intervention process and responding to critical questions regarding the fairness and effectiveness of current intervention procedures. To be clear, these recommendations were not necessarily universally accepted by the Roundtable attendees.

[40] *Dorsey v. Canada (Attorney General)*, 2022 ONCA 762 (CanLII).

1. Courts should be required to provide reasons when denying applications for leave to intervene

Courts should be required to provide reasons when denying leave applications. At present, many denials are issued either without explanation or with vague language such as "expanding the issues," leaving advocacy groups without guidance on how to tailor future applications. Requiring judges to justify their decisions would enhance transparency and allow interveners to better understand and address judicial concerns. More robust explanations in leave decisions may also help interveners and judges develop a shared understanding of what aspects are most valued in interventions, thereby allowing for more effective and efficient interventions in the future.

This recommendation was widely supported by Roundtable participants and has also been echoed by academic commentators. For instance, Nicolaides argues that further elaboration by the Courts may be required, particularly when interveners are represented by the same counsel. She contends that "if the Supreme Court is to play a democratic role in hearing from interveners about the legal impacts of its decisions, providing brief reasons seems to be an appropriate response to these criticisms."[41]

2. Draft Facta Should Not Be Required for Leave Applications

To address barriers faced by equity-seeking groups, courts should eliminate the requirement for draft factums at the leave stage, particularly in the provincial appellate courts and the Federal Court of Appeal. This requirement disproportionately affects organizations with limited resources and discourages their participation in important cases. Participants generally agreed that a draft factum was too onerous, but there was no consensus on what level of detail is ideal at the leave stage.

3. Interveners Should Be Shielded From Cost Awards

Courts should also implement clear policies to protect interveners from adverse cost awards, unless there are exceptional circumstances, ensuring that financial concerns do not deter public

[41] Nicolaidas, *supra* note 13 at 144.

interest litigation. Costs were a significant concern to many interveners and there appeared to be general agreement amongst participants that costs should not be awarded against interveners.

4. Interveners Should Have Additional Time for Oral Argument at the Supreme Court

Five minutes is insufficient for interveners to meaningfully express their positions, especially when accounting for the time occupied by questions from the bench. Courts should consider extending oral argument time to allow interveners to present their positions effectively while maintaining reasonable page limits for written submissions to ensure conciseness without sacrificing substance.

5. Interveners should be permitted to appear in person at the Supreme Court

Interveners should also be given the option to appear in person rather than being restricted to virtual hearings. The current policy of mandatory virtual submissions diminishes the impact of oral advocacy and limits the ability of interveners to engage meaningfully with the court. In-person appearances allow for greater interaction between interveners and judges, fostering a more engaged and responsive judicial process. That said, we acknowledge that some participants noted that allowing for in-person submissions by interveners is inequitable from an access to justice perspective as certain organizations are resource-strapped and may have difficulties travelling to Ottawa.

However, if virtual attendance remains the standard practice, we recommend more immersive technologies should be explored and better rules established to enhance the interaction between intervener counsel and the bench.

6. Interveners who share similar goals should be encouraged to coordinate voluntarily, but not forced to do so

Voluntary coordination among interveners should be encouraged to avoid duplication and provide emerging organizations with greater opportunities to participate in the intervention process. When an intervener observes that other groups are already effectively presenting similar

arguments, it may better serve the judicial process to step aside rather than pursue an additional, potentially redundant intervention. While Workshop participants generally agreed that collaboration is important to avoid redundancy, some stressed that repetition can be useful in reinforcing key points and ensuring that the court takes notice of such points.

While coordination can help ensure that interventions are efficient and not redundant, courts should not impose mandatory collaboration requirements, as doing so can undermine the independence of individual organizations. Encouraging interveners to coordinate their submissions can be beneficial in streamlining arguments but requiring them to consolidate their positions may result in the dilution of distinct and valuable perspectives. It was widely agreed amongst participants that forced collaboration should be avoided.

7. Lower Courts Should Publicize Upcoming Appeals

Participants generally agreed it would be useful for lower courts to provide lists of upcoming appeals, as does the Supreme Court. This would make it easier for prospective interveners to become aware of significant cases at the earliest opportunity, thereby enabling interveners to play a more significant role in shaping the issues and the record (at the trial level). Roundtable attendees generally agreed with this Recommendation.

Conclusion

All things considered, the evolving landscape of judicial interventions reflects a fundamental tension between efficiency and access to justice. While courts face legitimate concerns about managing their caseloads, restricting public interest interventions risks narrowing the perspectives that inform the development of law. A legal system that values substantive justice must recognize that interventions enrich decision-making by ensuring that legal rulings are grounded in broader societal realities. Moving forward, courts and policymakers must take deliberate steps to enhance procedural clarity, reduce barriers for equity-seeking groups, and restore the role of interveners as meaningful contributors to legal discourse. By doing so, the legal system can strike an appropriate balance between procedural efficiency and the democratic necessity of inclusive advocacy.

To reiterate, the goal of this Report is to generate discussion and encourage reflection on how best to approach interventions – from the perspective of litigants, interveners, and the courts. As one Roundtable participant put it, the objective of doing justice is best achieved by "good rules that do good."

Appendix A – Workshop Participants

Raj Anand – retired (formerly Weir Foulds LLP)
Prasanna Balasundaram – Downtown Legal Services, University of Toronto
Mary Birdsell – Justice for Children and Youth
Christopher Bredt – retired (formerly Borden Ladner Gervais LLP)
Sandra Ka Hon Chu – HIV Legal Network
Abby Deshman – Canadian Civil Liberties Association
Mary Eberts – Eberts Law
Ga Grant – British Columbia Civil Liberties Association
Emily Hill – Aboriginal Legal Services
Pam Hrick – Women's Legal Education and Action Fund, Inc. (LEAF)
Rosel Kim - Women's Legal Education and Action Fund, Inc. (LEAF)
Ewa Krajewska – Heinin Hutchison LLP
Roberto De Luca – David Asper Centre for Constitutional Rights
Cheryl Milne – David Asper Centre for Constitutional Rights
Naseem Mithoowani – Canadian Muslim Lawyers Association
Eleni Nicolaides – King's University College at Western
Kat Owens - Women's Legal Education and Action Fund, Inc. (LEAF)
Jessica Orkin – Goldblatt Partners LLP
Sarah Rankin – Rodin Law Firm
Kent Roach – University of Toronto
Jonathan Rudin – Aboriginal Legal Services
Cee Strauss - Women's Legal Education and Action Fund, Inc. (LEAF)
Anita Szigeti – Anita Szigeti Advocates
Adriel Weaver – Goldblatt Partners LLP
James Yap – International Human Rights Program, University of Toronto

Appendix B – Student Working Group Members

Leaders:

- Sakina Hasnain
- Akash Jain
- Kate Shackleton
- Navya Sheth

Members:

- Lakshmi Anandaraj
- Lauren Cristoforo
- Juliano Gaglione
- Jack Gangbar
- Moshe Kanofsky
- Charna Perman
- Mobina Rismanchi-Mohammadi
- Sasha Steeves

Appendix C

Asper Centre Interventions Workshop

Friday, March 7, 2025

Background Research Memo

Contents

I. Introduction

Interveners play an important role in constitutional litigation in Canada as they offer valuable insight into what impact decisions will have beyond the parties involved and provide considerable expertise in areas like civil liberties, youth rights, and Indigenous experiences. But whether interveners are able to properly fulfill their role, the impact they have, and when they *should* be granted leave is unclear. The Supreme Court has engaged with interveners at various levels, from being cited within decisions to denying leave altogether. The Court's restrictive attitude towards interveners in several recent cases, as well as the converse extreme of granting leave to dozens of groups, raises pressing concerns about whether the Charter rights of affected communities are being meaningfully accounted for or being lost in the shuffle.

II. The Role of Interveners

Under the Court Rules

The *Rules of the Supreme Court of Canada* lay out the requirements of who may make a motion to intervene and how to do so.[1] Though under rule 55, "any person interested in an application for leave to appeal, an appeal, or a reference may make a motion for intervention to a judge," intervention itself is still up to the discretion of the court.[2] Rule 57 then lays out specific requirements for a motion for intervention:

> **57 (1)** The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.
>
> **(2)** A motion for intervention shall
>
> **(a)** identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and
>
> **(b)** set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.[3]

Amongst other powers, rule 59 outlines how in an order granting intervention, a judge sets out the limits of interveners.[4] Rule 59(1)(b) dictates that a judge may "impose any terms and conditions and grant any rights and privileges that the judge may determine, including whether the intervener is entitled to adduce further evidence or otherwise to supplement the record."[5] Notably, the rule 59(1)(3) also explicitly states that "An intervener is not permitted to raise new issues unless otherwise ordered by a judge."[6]

While parties interested in intervention must file a motion and be granted leave, there is an exception under rule 33(4) for attorney generals.[7] On constitutional questions, rather than filing a motion for intervention, they may simply file a service of notice and are not required to obtain leave to intervene.

Within Jurisprudence

According to the Supreme Court of Canada, "interveners serve an important role in bringing broader perspectives before the Court than those advanced by appellants and respondents."[8] In a November 2021 Notice to the Profession,[9] the Court provided the following guidelines regarding interventions:

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[1] *Rules of the Supreme Court of Canada*, SOR 2002-156 [*Rules of SCC*].
[2] *Rules of SCC, supra* note 1 at s. 55.
[3] *Rules of SCC, supra* note 1 at s. 57.
[4] *Rules of SCC, supra* note 1 at s. 59.
[5] *Rules of SCC, supra* note 1 at s. 59(1)(b).
[6] *Rules of SCC, supra* note 1 at s. 59(1)(3).
[7] *Rules of SCC, supra* note 1 at s. 33(4).
[8] Supreme Court of Canada, "November 2021 - Interventions" (November 2021), online: <https://scc-csc.ca/parties/arf-lrf/notices-avis/21-11/>.
[9] *Ibid*.

1. The Court expects all intervener submissions to be useful to the Court and different from those of the parties.
2. The purpose of an intervention is not to support a party but to advance the intervener's own view of a legal issue before the Court. Despite the participation of interveners, the case remains a dispute between its parties. However, the fact that an intervener's submission aligns it generally with one party over another does not, without more, make the submission inappropriate.
3. Interveners should not take a position on the outcome of an appeal, whether in written or oral argument.
4. Interveners must not challenge findings of fact, introduce new issues, or try to expand the case.
5. In considering applications to intervene, the Court will be mindful of the need not to unduly imbalance the arguments before it.
6. The Court always retains a discretion to take any steps it sees fit to prevent an unfairness to the parties arising from an intervener's participation in an appeal.

Recently, in *R v McGregor*, 2023 SCC 4, the Supreme Court of Canada provided instructive guidance on the role of interveners. Rowe J., concurring, stated the following:

> The purpose of an intervention is to "present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal." Interveners provide additional perspectives on the legal issues raised by the parties and on the broader implications of the Court's decision. Depending on the context, interveners might highlight relevant jurisprudence, present insightful arguments, or clarify the potential analytical paths to resolving the issues placed before the Court. Interveners may also enhance accuracy by representing diverse cross-sections of the Canadian public and furnishing an analysis informed by their particular experience or specialized expertise. Since the cases heard by this Court are frequently matters of public importance, such experience and expertise can "assist the court in deciding complex issues that have effects transcending the interests of the particular parties before it." Through their submissions, interveners inform the Court of the direct and indirect consequences of the dispute on various stakeholders and on other areas of law. In this way, interveners can often make important contributions. In order to do so, however, interveners must operate within recognized limits.[10] [citations omitted]

In *McGregor*, the majority held that it is inappropriate for interveners to adduce new evidence or supplement the evidentiary record at the appellate level.[11] Additionally, the majority, along with Rowe J., held that interveners cannot ask courts to overrule a precedent without having been asked to do so by a party directly involved in the litigation.[12] According to the majority, doing so would "mean deciding an issue that is not properly before [the Court]".[13]

Karakatsanis and Martin JJ., concurring, disagreed, contending that the interveners in *McGregor* did not stray beyond their proper role. Specifically, they noted that the interveners were granted leave to

[10] *R v McGregor*, 2023 SCC 4 at para 103 [*McGregor*].
[11] *Ibid* at paras 24, 108.
[12] *Ibid* at paras 23, 100.
[13] *Ibid* at para 23.

intervene on the basis of criticizing existing precedent and suggesting revisions.[14] For Karakatsanis and Martin JJ., "to hold that we cannot engage with this different view, simply because the parties themselves did not propose it, ignores the purpose of intervener submissions";[15] "bringing broader perspectives before the Court than those advanced by appellants and respondents" helps the Court fulfill its institutional role.[16] Despite Karakatsanis and Martin JJ.'s more generous attitude towards interveners, the Court in *McGregor* was clear -- interveners cannot ask courts to overturn or otherwise to revisit one of its prior decisions if none of the parties has made this request.

Rowe J. cautioned that if a more generous approach were taken, any time a governing precedent is relevant to deciding a case, interveners could insert themselves before the Court and call for it to be overturned, thereby "piggy-backing" onto the parties' dispute.[17] Furthermore, according to Rowe J., such an approach could lead to "ill-advised decisions, as they would be made without the benefit of lower court analysis, a proper evidentiary record, or submissions from those who would be affected (including vulnerable groups) but who had no notice that the issue would be placed before the Court."[18]

In Academic Commentary

Academic commentators have noted the centrality of interveners and suggest that their participation assists the court in reaching more informed and acceptable decisions.[19] Nicolaidas highlights how academic commentators like Welch have noted that "the pluralistic participation of interest groups in Charter litigation is essential to the meaningful delineation of our rights and freedoms."[20] Further, she notes that by allowing for the protection of the interests of non-parties, " intervener participation can increase the legitimacy of judicial decisions by creating more acceptable decisions based on a wide range of viewpoints."[21] Conversely, denying leave to interest groups would exclude minority views and "leave their rights at the discretion of political majorities."[22]

Similarly, Alarie and Green outline three broad functions of interveners.[23] Firstly, they propose that interveners could provide "objectively useful information to the Court."[24] Second, they suggest that by allowing interest groups to intervene, interveners are able to "provide the 'best argument' for certain partisan interests that judges may want to 'affiliate' with."[25] Lastly, they propose that interventions ensure

[14] *Ibid* at para 81.
[15] *Ibid.*
[16] *Ibid* at para 82.
[17] *Ibid* at para 101.
[18] *Ibid* at paras 101, 111.
[19] Eleni Nicolaidas, "Constitutional Interventions: Constitutional Litigation, Third-Party Interventions, The Supreme Court of Canada, and Mobilization in Legislative Replies" (2023) Doctoral Thesis, University of Guelph [Nicolaidas] at page 81.
[20] Nicolaidas, *supra* note 19 at 81 citing Jillian Welch, "No Room at the Top: Interest Group Interveners and Charter Litigation in the Supreme Court of Canada," University of Toronto Faculty Law Review 43, no. 2 (1985): 204-232.
[21] *Ibid.*
[22] *Ibid.*
[23] Benjamin Alarie and Andrew Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48:3&4 Osgoode Hall LJ 381 [Alarie and Green] at 383.
[24] *Ibid.*
[25] *Ibid.*

that intervening parties feel their voices have been heard by the "Court and the greater public, including Parliament, regardless of the effect on the outcome of the appeal."[26]

Interveners and Evidence

Academic commentators also point to the role interveners may play in adducing new evidence or raising issues for the court not touched on by either party. In particular, Weaver and Orkin point to *R v Sharma* to demonstrate the debate that can arise on the role of interveners and their ability to adduce further evidence. In applying the section 15(1) framework, the Ontario Court of Appeal "recounted and ultimately relied on not only the expert evidence that Ms. Sharma had adduced, but also what the majority of the Supreme Court characterized as "fresh evidence, adduced by interveners."[27] While the Court of Appeal found that the material adduced supported the conclusion urged by the interveners,the majority of the Supreme Court "paused to express 'serious concern with interveners supplementing the record at the appellate level' which 'undermines the trial process' and 'is *not* how our system of justice, including constitutional adjudication, is designed to work."[28] Conversely, Weaver and Orkin highlight that the dissenting judges in *Sharma* "accused the majority of 'diminishing the role of interveners' and 'critiquing their use of social science and other legislative fact evidence that this Court has regularly relied upon."[29] In the dissent's view, "this was yet another of many ways in which the majority's approach would effectively rewrite the section 15(1) analysis and increase the burden on equality rights claimants."[30]
(Page 113-114).

Commenting on this debate, Weaver and Orkin emphasize how "even impeccable counsel-work . . . cannot and should not purport to give voice to all of the varied persons and interests that will be affected by the outcome of the case."[31] They echo other commentators that without the assistance of interveners, non-state parties "may bear the unfair burden of having to adduce 'massive amounts of evidence concerning very broad social issues, when his or her concern may be with one discrete incident".[32] Further, Weaver and Orkin draw attention to *R v Sioui,* as "at least one constitutional rights case in which the Supreme Court specifically held that sources of historical facts adduced by an intervener should be treated in precisely the same manner as those independently identified by the Court."[33] They also draw attention to various cases where the court implicitly accepted legislative facts introduced by interveners, such as *Moge* and *Le.* Additionally, in *Kirkpatrick,* the Court "stressed the usefulness of the credible, comprehensive and current information [interveners] provided."[34]

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[26] *Ibid.*
[27] Adriel Weaver & Jessica Orkin, "Demonstrating Discrimination: Judicial Notice, Legislative and Social Framework Facts and the Politics of Intervention" in Cheryl Milne & Sophia Moreau, eds, *Litigating Equality* (Toronto: LexisNexis, 2024) 111 at 113, citing *R v Sharma*, 2022 SCC 39 at para 74.
[28] *Ibid* at 113, citing *Sharma*, *supra* note 27 at para 75.
[29] Sharma, supra note 27 at para 205 [citations omitted].
[30] Weaver & Orkin, *supra* note 27 at 113-114.
[31] Weaver & Orkin, *supra* note 27 at 128.
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid* at 129.

"Social fact" evidence (social science research that frames an issue or provides background context) is particularly relevant to adjudicating public interest cases.[35] According to Raji Mangat, "public interest interveners occupy an uncomfortable space in discussions about the use of social science evidence" -- it is unclear whether the "facts" that interveners rely on are in the nature of facts or evidence.[36] For Mangat, "courts' divergent and sometimes contradictory approaches to engaging with "social fact" or "social context" materials will continue to vex interveners."[37] It has become clear since the decision of *Canada (Minister of Citizenship and Immigration) v Ishaq* that courts will not take at face value social science facts that public interest organizations may see as "obvious or indisputable."[38]

III. Interveners Today

Intervention Trends - Academic Commentary

Table 4.1: Comparisons to Previous Studies on Number of Interventions

Author	Years Measured	Type of Cases	Overall Number of Interventions	Number of Interveners per Case	Percentage of Cases with Interventions
Radmilovic	1982-2008	SCC *Charter* cases reviewing statutes/regulations (250 cases)	1215	4.9[4]	Unavailable
Alarie and Green	2000-2008	SCC decisions (674 appeals, 330 with interveners)	1583	2.3[5] (all appeals)	49.0
			1583	4.1 (just appeals with interveners)[6]	
	1983-2008	SCC *Charter* appeals	Unavailable	5.7	Unavailable
	2000s	SCC *Charter* appeals	Unavailable	7.6	Unavailable
	1983-2008	SCC criminal appeals	Unavailable	2.6	Unavailable
Callaghan	2000-2008	SCC appeals	1641	Unavailable	55.0[7]
	2015-2018	SCC appeals	1009	Unavailable[8]	63.0
Nicolaides	2009-2019	SCC constitutional law cases reviewing statutes/regulations (71 cases)	581	8.2	97.2

In her doctoral thesis on constitutional interventions, Nicolaides studies 71 constitutional law cases decided by the Supreme Court of Canada from 2009-2019 with 581 interventions by 256 unique interveners. She then compared her analysis with previous studies by academic commentators.[39]

The Observed Role of Interveners

To examine trends in interventions, we reviewed all SCC cases with decisions delivered between 2020-2024. Each case was reviewed, with all interveners listed. We then reviewed all listed interveners to determine trends in the frequency of interventions overall, trends in the intervention of specific groups and any other observable trends.

[35] Raji Mangat, "Interveners, Public Interest Litigation and Social Context: Advancing Equality Rights on Uneven Terrain" in Cheryl Milne & Sophia Moreau, eds, *Litigating Equality* (Toronto: LexisNexis, 2024) 135 at 143.
[36] *Ibid* at 152.
[37] *Ibid* at 168.
[38] *Ibid* at 159.
[39] Nicolaidas, *supra* note 19 at 82.

In assessing over two hundred SCC cases from 2020 to 2024, nearly seventy percent (67%) included interveners. Within the twenty-four SCC cases featuring interveners in 2024, 191 different groups were granted intervener status.

Amongst the most frequent were the Attorney Generals of the various provinces and of Canada. Even qualitatively, interventions by the Attorney Generals are often cited when there is a dispute about the scope or interpretation of legislative powers, separation of powers, or constitutional rights. For example, in *Canada (Attorney General) v. Power*, the arguments put forth by various provincial AGs, including Ontario and Alberta, helped clarify issues related to interpretations concerning the separation of powers within the Constitution.[40] Attorney Generals typically advocate for broad interpretations and the Court often considers their arguments to clarify or define legal standards, especially in cases involving statutory or constitutional issues.

Further, Indigenous organizations, such as the Assembly of First Nations, Metis National Council, First Nations Child & Family Caring Society of Canada, and other regional Indigenous governments, are increasingly prominent in cases involving the interpretation of Indigenous rights, lands, treaty obligations, and resources, especially when relating to section 35 of the *Constitution Act*.[41] The Court often cites their arguments, acknowledging the nuances of Indigenous legal perspectives. For example, in *Dickson v. Vuntut Gwitchin First Nation*[42] and *Ontario (Attorney General) v. Restoule*[43], the various intervening Indigenous groups ensured the Court accounted for various perspectives.

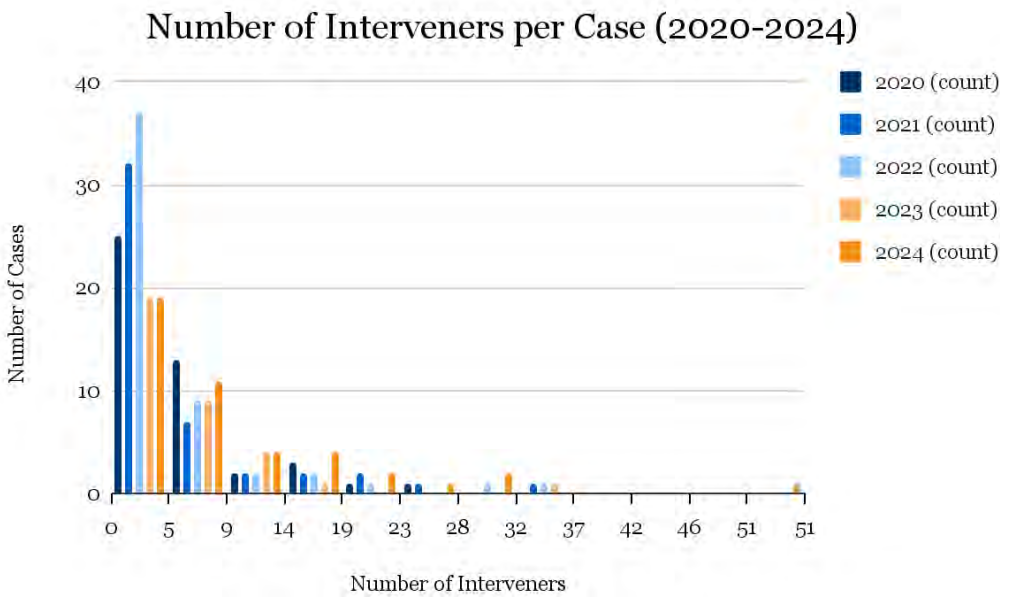
Of the cases featuring interveners from 2021 to 2024, eighty-two explicitly mentioned or referenced at least one intervener in the decision. In majority of the cases, interveners' arguments are cited favourably and aligned with the Court's reasoning, particularly when they advocate for interpretations consistent with constitutional protections, individual rights, or legal precedents. The data also reveals that a critical part of their role is narrowing or clarifying precedent. For instance, in *Power*, interveners took issue with a previous case, causing the Court to clarify its decision in a more explicit and narrow manner.[44] However, there are various instances where the Court dismisses or does not heavily rely on interveners' arguments, especially when their positions are considered overly restrictive or outside the scope of the case.

Trends from 2020-2024

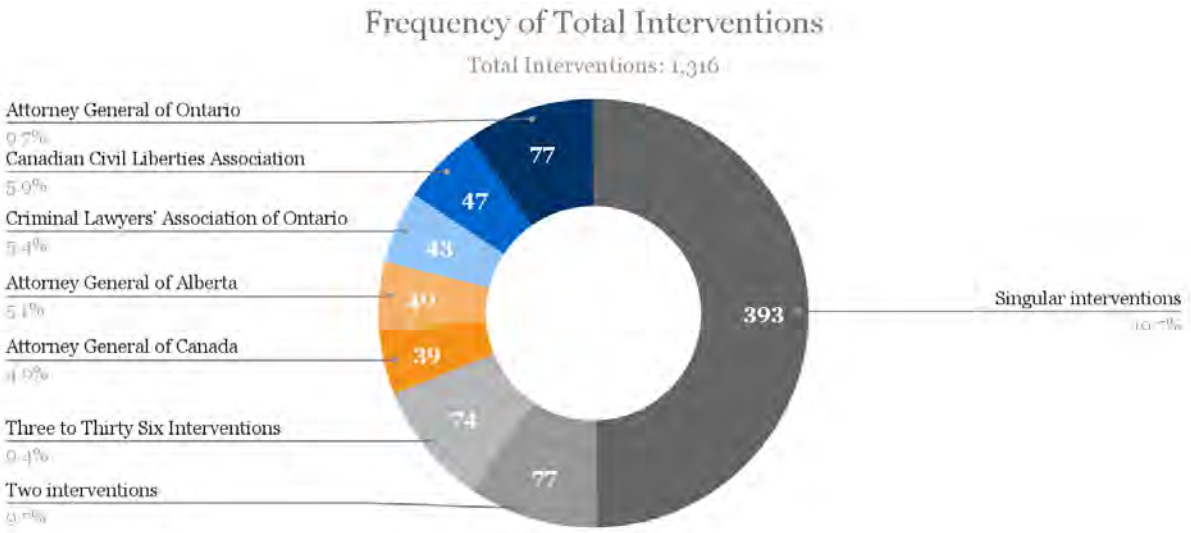
	2020	2021	2022	2023	2024	Total
Total Number of Cases	45	54	54	34	44	231
Cases with Interveners	31	32	34	26	33	156
Cases with Interveners (%)	68.89	59.26	62.96	76.47	75	67.53

In an analysis of Supreme Court of Canada cases from 2020-2024, the Court has seen a steady rise in the number of interveners accepted before the Supreme Court.

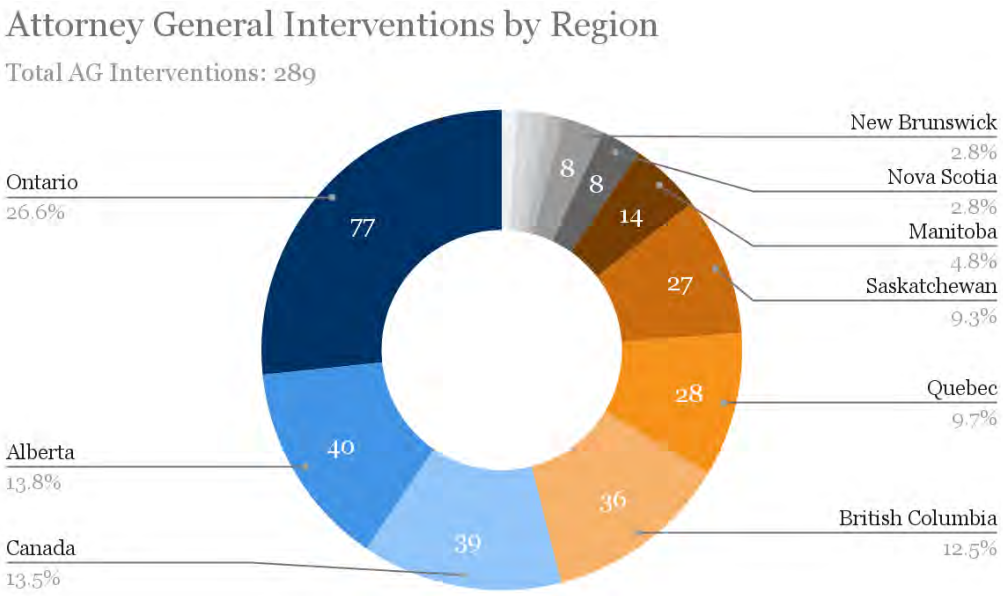
[40] *Canada (Attorney General) v. Power* 2024 SCC 26 [*Power*] at para 245, 319.
[41] *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5. *Constitution Act*, 1982, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
[42] *Dickson v. Vuntut Gwitchin First Nation* 2024 SCC 10.
[43] *Ontario (Attorney General) v. Restoule* 2024 SCC 27.
[44] *Power*, *supra* note 28 at para 351.



Cases involving Indigenous law tend to have a greater number of interveners. Of the 550 interveners documented in this five year span, 125 were Indigenous (~23%); however, out of the total 1,316 case interventions only 183 were submitted by Indigenous organizations (~14). This signals the court perhaps having an openness to receiving input from diverse Indigenous stakeholders, and a recognition of the various perspectives of Indigenous groups.



The most common interveners overall were the Attorney Generals, who appeared most often in criminal proceedings. Their interventions made up approximately 20% of the total case interventions surveyed. Notably, their interventions were often cited as persuasive by the court.



The top five interveners, the Attorney General of Ontario, the Canadian Civil Liberties Association, the Criminal Lawyers Association of Ontario, the Attorney General of Alberta, the Attorney General of Alberta and the Attorney General of Canada were responsible for about 18.7% of total interventions, whereas single-time interveners made up half of all interventions.

IV. Evolving Jurisprudence & The Granting of Leave

The Supreme Court of Canada's perception of interveners can be better understood by analyzing recent decisions on motions for leave to intervene. Two decisions are analyzed in this memo: *Mikhail Kloubakov, et al. v His Majesty the King* ("*Kloubakov*") and *His Majesty the King v Paul Eric Wilson* ("*Wilson*").

Kloubakov

Mikhail Kloubakov and Hicham Moustaine (the appellants), drivers for a Calgary escort business, were arrested in 2018 and faced multiple charges. They were acquitted of the most serious charges they faced, including human trafficking, but convicted of receiving a material benefit from sexual services (s. 286.2) and aiding the procurement of sexual services (s. 286.3) under the *Criminal Code*. They challenged the constitutionality of these provisions, claiming violations of their section 7 *Charter* rights. The appellants also argued that economic rights (specifically their ability to earn a living) should fall within the ambit of section 7 protection.

Several interveners were granted leave to intervene, including the Women's Equality Coalition, Christian Legal Fellowship, Women's Legal Education and Action Fund (LEAF), the Sexual Health Coalition, the Canadian Civil Liberties Association, the David Asper Centre for Constitutional Rights, the British Columbia Civil Liberties Association, the Ontario Coalition of Rape Crisis Centres, and the Evangelical Fellowship of Canada and the Association for Reformed Political Action (ARPA) Canada (jointly), and the former operator of an escort service.

These inclusions enable the Court to hear a wide variety of perspectives pertaining to sex work, including the impact on women's rights and sexual health, the religious and moral framework underpinning sex work, and the on-the-ground, practical reality of escort services. However, by denying the Canadian Alliance for Sex Work Law Reform, along with the Migrant Workers Alliance for Change and the Canadian Association of Refugee Lawyers, leave to intervene, the Supreme Court of Canada was criticized for ignoring the views of sex workers themselves.[45] According to Justice Rowe, these organizations were denied leave to intervene primarily because they introduced new issues or evidence not brought forward by the parties. For instance, Justice Rowe contended that the Migrant Workers Alliance for Change raised new issues regarding the application of the Immigration and Refugee Protection Act and its impact on migrant sex workers, which would have introduced complexities unrelated to the original focus of the case, expanding it unnecessarily. A similar reason was advanced in relation to the Canadian Association of Refugee Lawyers.

The Raoul Wallenberg Centre for Human Rights, Defend Dignity, AWCEP Asian Women for Equality Society, and Pivot Legal Society were also denied leave to intervene. While the Raoul Wallenberg Centre for Human Rights and AWCEP Asian Women for Equality Society were denied leave because they introduced new legal issues, Justice Rowe held that Defend Dignity and Pivot Legal Society failed to provide submissions that were distinct than those on the record or tendered by other interveners.

Wilson

In September 2020, an individual overdosed on fentanyl in Saskatchewan. Paul Wilson and others performed CPR and called emergency services under the *Good Samaritan Drug Overdose Act* (the "*GSDOA*"). When the RCMP constable arrived, he observed drug-related evidence, and detained Wilson and the others. They were arrested for possession after further evidence was found, and later re-arrested for trafficking and firearms offenses following a truck search. Wilson argued that his detention and arrest were unlawful under the *GSDOA*, which provides immunity to individuals assisting in an overdose emergency, and violated his section 8 and 9 *Charter* rights. Furthermore, Wilson submitted that if his *Charter* rights are violated, the evidence against him should be excluded pursuant to section 24(2) of the *Charter*.

Several interveners were granted leave to intervene, including the Director of Public Prosecutions, Pivot Legal Society, the Canadian Civil Liberties Association, the Criminal Lawyers' Association (Ontario), La Coalition canadienne des politiques sur les drogues, l'Association des intervenants en dépendance du Québec and Harm Reduction Nurses Association (jointly), and the John Howard Society of Saskatchewan (submissions restricted to the issue of s. 4.1(5) of the *Controlled Drugs and Substances Act* (the "*CDSA*")).

[45] Vicent Wong and Jamie Liew, "R v. Kloubakov: Supreme Court of Canada Ignores Sex Workers in Case on Sex Work" (October 2024), online: <https://theconversation.com/r-v-kloubakov-supreme-court-of-canada-ignores-sex-workers-in-case-on-sex-work-240417>.; Canadian Alliance for Sex Work Law Reform, "Press Release: Sex Workers Denied Day in Court: The Injustice of Litigating Sex Work Law Without Sex Workers" (May 2024), online: <https://sexworklawreform.com/press-release-sex-workers-denied-day-in-court-the-injustice-of-litigating-sex-work-law-without-sex-workers/>.

Empowerment Council, the HIV Legal Network and HIV & AIDS Legal Clinic Ontario, Canadian Students for Sensible Drug Policy, and Community & Legal Aid Services Program were all denied leave to intervene by Justice Côté, primarily because they raised new legal issues which, if permitted, would have the effect of expanding the scope of the case. This rationale aligns with the Court's preference for maintaining a focused, streamlined approach in complex legal matters, particularly those involving constitutional questions like the interpretation of the *CDSA* and its relationship to drug policy and *Charter* rights. Although denying these interventions presumably streamlines the legal analysis, it arguably risks omitting nuanced perspectives on how these laws affect marginalized communities, particularly those impacted by the intersection of drug policy, healthcare, and legal enforcement. Interestingly, and perhaps puzzlingly, the John Howard Society of Saskatchewan was directed not to raise the perspectives of people exiting custody, notwithstanding the clear relevance of the scope of police arrest and search powers in a drug overdose situation to individuals exiting custody who may be subject to probation orders or parole conditions (as explicitly identified in ss 4.1(4) and (5) of the *GSDOA*).

These leave decisions are two contemporary examples of how the Supreme Court of Canada treats interveners, highlighting some of the potential problems associated with these determinations.

Academic Commentary

In her review, Nicolaides found that "third-party interventions are far more common than interest groups seeking standing as parties in cases."[46] Accordingly, there is a clear group of the most frequent and most successful interveners, which includes "attorney generals, civil liberties association, 20 lawyers' groups and legal clinics."[47] The presence of the attorney generals as one of the most common interveners can be explained by what academic commentators refer to as an "institutional advantage" given that under the *Rules of the Supreme Court of Canada*, on constitutional issues, they only need to file a service of notice and do not require obtaining leave.[48]

Further, in her analysis of frequent interveners and their 'wins,' Nicolaides found that in line with academic theories, "interveners who are able to intervene repeatedly are also more likely to win most frequently in general, and interveners such as attorneys general, legally-dominated rights associations, and lawyers' associations tend to win most frequently in particular."[49]

That being said, Nicolaides' analysis notably found that "while the records of attorneys general and lawyers' groups tends to affirm expectations concerning the success of these top repeat players, their overall percentages of success are lower than expected."[50] Similarly, though "civil liberties associations are the most common non-government interveners, other equality-seeking members of the Court Party—particularly LEAF and Egale—played a lesser role in constitutional litigation in the dataset."[51] In explaining why LEAF's success in particular may have decreased, Nicolaides points to a study which

[46] Nicolaidas, *supra* note 19 at 20.
[47] Nicolaidas, supra note 19 at 21.
[48] Nicolaidas, supra note 19 at 81.
[49] Nicolaidas, supra note 19 at 88.
[50] Nicolaidas, supra note 19 at 125.
[51] *Ibid.*

suggested "[LEAF has] exhausted their jurisprudential limits in achieving victories that advanced their goals of substantive equality."[52]

Academic commentary also highlights how recent more restrictive approaches by the Court have resulted in "in dismissals of motions for leave to intervene, particularly by interveners that have sought to introduce new issues or expand the record."[53] This has had varying impacts on intervening groups. In interviewing various groups, Nicolaidas reported that most groups interviewed about the more restrictive approach had not seen a difference in terms of leave to intervene, but had seen impacts on the allocation of oral arguments.[54]

V. The Future of Interventions

Academic Commentary

Given the increasing trend in denying motions for leave to intervene, Nicolaides argues that further elaboration by the Courts may be required, particularly when interveners are represented by the same counsel. She states that "if the Supreme Court is to play a democratic role in hearing from interveners about the legal impacts of its decisions, providing brief reasons seems to be an appropriate response to these criticisms."[55]

Practitioners are also calling for the SCC to increase the page limit for intervener factums.[56] Bredt, Krajewska and Chowdhury also propose a two-stage screening process for interventions, with any interested party being allowed to file a factum but time for oral arguments allocated "in proportion to the merits of the perspectives pleaded in their facta."[57] The merits would be determined based on whether the argument is duplicative and the extent to which the submissions inform the legal issues under consideration.[58] Barry Bussey echoes the call for a permissive attitude towards written submissions but a more selective one towards oral arguments.[59] As Daniel Sheppard notes, this proposal mirrors the Court's approach from 2000 to 2017.[60] Shepppard agrees with Bredt, Krajewska and Chowdhury that the Court's

[52] Nicolaidas, supra note 19 at 116 citing Danielle McNabb and Shauna Hughey, "Where Have the Women Gone? An Exploratory Study of the Women's Legal Education and Action Fund's Retreat from the Legal Arena," Paper presented at the 2023 annual meeting of the Canadian Political Science Association, May 31, 2023.
[53] Nicolaidas, supra note 19 at 143.
[54] Nicolaidas, supra note 19 at 144.
[55] *Ibid.*
[56] Christopher D. Bredt, Ewa Krajewska, & Mannu Chowdhury, "With a Little Help from Too Many Friends? Lessons from *TWU* and *Comeau* on Intervening Before the Supreme Court" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis, 2019) 315 at 319.
[57] *Ibid* at 320.
[58] *Ibid*.
[59] Barry W. Bussey, "The Law of Intervention After the TWU Law School Case: Is Justice Seen to Be Done?" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis, 2019) 265 at 273.
[60] Daniel Sheppard, "Just Going Through the Motions: The Supreme Court, Interest Groups and the Performance of Intervention" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis, 2019) 187 at 203.

current process "ultimately undercuts the chance that any given intervener could actually provide a useful set of submissions."[61]

[61] *Ibid* at 205.