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RESEARCH NOTE/NOTE DE RECHERCHE

Who Intervenes in Supreme Court Cases in Canada?

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Abstract

With the patriation of the Constitution in 1982, the Supreme Court of Canada (SCC) inherited extraordinary political powers. In response to the Court's expanded power of judicial review, there was a sizeable increase in the number of political actors "intervening" in SCC cases. Scholars of Canadian law and politics are deeply divided on whether civil society participation in the courts—particularly as intervenors—is democratically legitimate. This important debate cannot be settled without an empirical evaluation of *who intervenes*. This research note provides an analysis of all the Charter cases heard by the SCC between 2013 and 2021. In contrast to the field's dominant theory on interest-group legal mobilization—the Court Party thesis—the findings reveal that equity-deserving interest groups, such as those representing women, have an irregular presence in Court. Instead, powerful actors such as governments and legal associations make up a majority of the "repeat player" intervenors. While further research is warranted, the research note concludes that without the maintenance of sufficient support structures, intervention may be unable to perform a democratizing function.

Résumé

Avec le rapatriement de la Constitution en 1982, la Cour suprême du Canada (CSC) a hérité de pouvoirs politiques extraordinaires. En réponse au pouvoir élargi de contrôle judiciaire de la Cour, le nombre d'acteurs politiques « intervenant » dans les affaires de la CSC a considérablement augmenté. Les spécialistes du droit et de la politique au Canada sont profondément divisés sur la question de savoir si la participation de la société civile aux tribunaux - notamment à titre d'intervenants - est démocratiquement légitime. Ce débat important ne peut être tranché sans une évaluation empirique des intervenants. Cette note de recherche fournit une analyse de toutes les affaires relatives à la Charte entendues par la CSC entre 2013 et 2021. Contrairement à la théorie dominante du domaine sur la mobilisation juridique des groupes d'intérêt - la thèse du « parti de la Cour » - les résultats révèlent que les groupes d'intérêt qui méritent l'équité, tels que ceux qui représentent les femmes, ont une présence irrégulière à la Cour. Au lieu de

cela, des acteurs puissants tels que les gouvernements et les associations juridiques constituent la majorité des intervenants « récidivistes ». Bien que des recherches supplémentaires soient nécessaires, la note de recherche conclut que sans le maintien de structures de soutien suffisantes, l'intervention peut être incapable de remplir une fonction de démocratisation.

Keywords: legal mobilization; Supreme Court of Canada; civil society; democracy; constitutional law

Mots-clés: mobilisation juridique; Cour suprême du Canada; société civile; démocratie; droit constitutionnel

Introduction

Following the patriation of the Constitution in 1982, which included the introduction of the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada (SCC) inherited a more prominent role in shaping public policy (Morton, 1987; Hirschl, 2004; Hiebert, 1996; Macfarlane, 2018). With the power to judicially declare government action and laws unconstitutional, the Court became an increasingly desirable arena for the lobbying efforts of civil society organizations and governments.[1] "Intervention" is the most commonly used mechanism to lobby the Court: a process by which "interested" parties apply to make arguments in legal cases that they are not directly involved in.[2] If granted permission by the Court, intervenors are typically permitted to provide a concise oral argument and written factum that outlines their position on the legal question(s) at hand. In the past decade, the Court has allowed record high numbers of intervenors to participate in cases. Undoubtedly, this growth of intervention symbolizes what Peter Russell (1983: 52) famously described as the "politicization of the judiciary and the judicialization of politics." Civil society organizations and governments routinely participate in Court—a politicization of the judiciary. And "questions of social and political justice" are increasingly resolved by way of "technical legal questions"—a judicialization of politics.

In the early 2000s, there was significant debate among political scientists about whether intervenor participation was good or bad for democracy (Smith, 2005; Hein, 2000; Morton and Knopff, 2000; Brodie, 2002a). The contours of this debate were largely premised on the theory of democratic pluralism. Scholars believed that intervention would enhance democracy if the actors using the process appeared to represent the diversity of interests that exist across Canadian society—including interests that are marginalized through popular politics (Smith, 2005). In contrast, scholars such as Morton and Knopff (2000) perceived intervention as damaging to democracy, arguing that intervention under the Charter allowed for "elite" left-leaning interests to dominate the judicial arena. Very few studies have evaluated this important normative debate through empirical analysis, with the last substantive study providing coverage up to 2012 (Hausegger et al., 2015). The objective of this research note is to pick up where Hausegger and colleagues left off and update the empirical research by addressing the following two questions:

1. Who intervenes in Charter cases at the SCC?
2. Who are the repeat players?

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To answer these questions, a content analysis was conducted on all of the cases heard by the SCC between April 2013 and December 2021 that involve at least one Charter challenge.[3] The dataset consists of 103 cases, composed of 675 applications to intervene, and includes a number of descriptive variables about the cases and the participating intervenors. The findings reveal that the economy of repeat intervenors at the SCC is not representative of the plurality of interests across Canadian society and that, instead, the process is dominated by elite, powerful interests. This work provides an important counter to the field's dominant theory of civil society participation in Court—the Court Party thesis (Morton and Knopff, 2000). In contrast to Morton and Knopff's theory, this study shows that civil society organizations representing equity-deserving constituencies have an irregular and limited presence in Charter disputes. Instead, powerful actors such as governments and legal associations overwhelmingly constitute the repeat and routine intervenors. While further research is needed to contextualize why there is an imbalance in the interests represented in Court, the empirical record may suggest that intervention cannot perform a democratizing function without structures in place to better support the participation of groups lacking in power (Epp, 1998).

Context and Literature Review

The practice of intervening in court cases has a long-standing history in Canada. Indeed, intervention has been legally available to governments since 1878 (Bussey, 2019: 295), and the first recognized instance of an interest group intervening in a court case was in 1945 (Brodie, 2002b: 295). While intervenors were somewhat active in the Court prior to the Charter, its entrenchment in the Constitution, in conjunction with statutory changes to the Supreme Court Act in 1983, led to a significant increase in the number of intervenors participating in SCC cases. In fact, by the late 1980s, the SCC was accepting 85 per cent of requests to intervene (Brodie, 2002b: 297), and since then, there has been consistent growth in the number of nongovernmental intervenors appearing before the Court. The rate of intervenors reached an all-time high in the 2000s, with more than half of all cases containing one or more intervenors and with a 90 per cent acceptance rate by the Court (Hausegger et al., 2015; Songer, 2008).

Alongside the growth of intervenor participation at the SCC, scholarly interest in the phenomenon flourished, particularly among political scientists and legal scholars. Much of the scholarship has centred on the important question of whether intervention enhances or damages democracy (for example, Hein, 2000; Smith, 2005; Brodie, 2002a; Morton and Knopff, 2000; Callaghan, 2020). Participation in the legal arena is expensive, time consuming and resource intensive (Epp, 1998), raising questions about whether intervention is accessible to those actors lacking in power and resources. If we find that only wealthy and powerful elites can access the Court or exert influence through intervention, this may suggest that the practice represents a hollow mechanism for democratic input. At worst, a dominance of elite intervenors could be damaging for democracy by further subduing the voices of less powerful actors.

It is this question of differential access to justice through the courts that motivated Marc Galanter's (1974) famous "haves and have-nots theory." The theory

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sought to understand why organizations, corporations and governments were more successful at lobbying the Supreme Court of the United States, when compared to individual litigants. The theory suggests that those actors who have the most experience litigating in court cases ("repeat players") tend to be the most successful at influencing judicial decision making and case outcomes, when compared to "one-shot" litigants, who tend to be inexperienced and have fewer resources. According to Galanter, repeat players tend to be wealthier, and through repetitive litigation, they develop highly effective strategies to shape precedent and case outcomes, making them the "haves" of the legal system (1974: 98).

Galanter's theory has motivated a growing empirical literature in Canada on intervenors, aimed at identifying the repeat players (see, for example, Brodie, 2002a; Callaghan, 2020; Hausegger et al., 2015; Songer, 2008; Alarie and Green, 2010). This scholarship suggests that governments, both at the federal and provincial levels, are the most frequent intervenors at the SCC in any given year. In fact, between 1998 and 2012, the five most frequent intervenors were all governments (Ontario, Canada, Quebec, British Columbia and Alberta—in this order) (Hausegger et al., 2015: 230). Moreover, the literature has identified the Canadian Civil Liberties Association, the Criminal Lawyers' Association, the British Columbia Civil Liberties Association and the Women's Legal Education and Action Fund (LEAF) as the four most prominent nongovernmental intervenors (Hausegger et al., 2015; Manfredi, 2004; Alarie and Green, 2010). In *The Charter Revolution and the Court Party*, which is arguably the most influential text to date on intervenor participation at the SCC, Morton and Knopff (2000) argue that civil libertarian groups and equity-deserving groups, who make up a "loose coalition" referred to as the Court Party, are among the most successful and frequent actors before the Court. These authors suggest that left-leaning, equity-deserving interest groups such as those representing women and LGBTQ+ people have been among the biggest repeat players in Court and have achieved "significant victories and policy changes [through intervention]" (67). This argument, however, is not substantiated by an empirical, systematic analysis of SCC cases.

Although past empirical literature has made important contributions to our collective understanding of intervention and its relationship to democracy, the majority of studies adopt case study approaches that only consider the experiences of individual interest groups during specific political junctures. For instance, most studies have focused on the repeat interventions of LEAF during the 1980s and 1990s (for example, Hausegger, 1999; Morton and Allen, 2001; Manfredi, 2004). However, we know that during this time, LEAF was the most frequent nongovernmental intervenor (Hausegger et al., 2015: 228), making it unlikely that their repeat interventions are representative or generalizable to the wider population of equity-deserving organizations. While there have been several studies that do adopt a broader approach to identifying repeat players through the analysis of descriptive trends (for example, Alarie and Green, 2010), these studies do not consider how the composition of intervenors might vary across cases depending on the area of law or policy.

Finally, there has been minimal scholarly attention given to intervenors over the past decade. This is particularly troubling, as there have been numerous measures of austerity and funding cuts targeted toward interest groups since the mid-1990s,

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including the slashing of the Court Challenges Program between 1992 and 1994 and then again in 2006 (Jenson and Phillips, 1996; Laforest, 2011; Dobrowolsky, 2009).[4] This important context suggests that the composition of intervening actors, including the repeat players, has likely changed since the 1990s and early 2000s, which is when most of the literature is situated.

Overall, there are significant gaps in our collective understanding of who intervenes and who the repeat players are. The generalizability of findings in the existing intervenor literature is uncertain because of the dominant case study approach, while at the same time, there has been inadequate qualitative attention given to varying case contexts. To respond to these important gaps and to update research in this area, this research note adopts a methodological approach that evaluates the entire population of intervenors in Charter cases over the past decade and considers whether differences exist across discrete areas of Charter litigation.

Sources of Data and Methodology

This research note provides an empirical account of intervenor participation in all of the Charter cases heard by the SCC over the past decade; its central aim is to identify the repeat players. The focus is on Charter cases, since these cases tend to be higher profile and policy oriented (Hennigar, 2007). A content analysis was conducted on the written decisions of the 103 cases under study. The names of intervenors were recorded, as well as contextual information about cases, such as the Charter area(s) in question, the number of submitted intervenor applications (both accepted and rejected by the Court), the outcome of the case, and the year the decision was published. In light of prior findings in the literature that governments are the biggest repeat players at the SCC, each intervention was coded as either representing a governmental or nongovernmental interest.[5] To assess whether there is an imbalance in the types of interests that are represented as repeat players, the most prominent repeat intervenors were categorized into a typology of collective interests. This typology was adapted from Collins' (2008) categories of amici curiae at the Supreme Court of the United States and from the Court Party typology developed by Morton and Knopff (2000). I draw from submitted intervenor briefs, as well as information available online about organizations, to situate repeat intervenors within the typology.

Findings

General patterns of intervention

Among the 103 Charter cases heard by the SCC between April 2013 and December 2021, 83.5 per cent had intervenors participate (86 cases).[6] The Court received a total of 675 applications to intervene and accepted 91 per cent of these requests. This rate is consistent with the findings of past empirical studies, which report a 90 per cent overall acceptance rate (see, for example, Alarie and Green, 2010: 383; Songer, 2008). The majority of accepted intervenors were nongovernmental actors (74 per cent). Commonly, however, civil society organizations submitted joint applications to intervene. In fact, nearly 20 per cent of all applications to

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intervene were signed on by two or more parties, a strategy that was deployed exclusively by nongovernmental actors. In this way, although governments appear to constitute a small proportion of participating intervenors, their solo interventions constitute 30 per cent of all written submissions.

During the period under study, the Court denied leave to 58 intervenor applications, four of which were submitted by governments.[7] The majority of denied applications were from individuals and interest groups. Additionally, there were 17 cases (16.5 per cent) that did not have any intervenors participate. Most of these cases involved criminal proceedings and legal rights contained in the Charter and did not receive any applications to intervene, though there were three cases in which six outside parties applied to intervene but were ultimately rejected by the Court.[8]

As seen in Table 1, Charter cases as a whole had an average of seven intervenors participate, with significant variation across different sections of the Charter. Cases involving fundamental freedoms (section 2) attracted the most outside participation, with an average of 17 intervenors per case. Although section 2 cases have historically attracted significant intervenor participation, the exceptionally high average and high standard deviation reported here are, at least in part, reflective of the period under study. Over the past 10 years, the Court has made a handful of landmark decisions involving fundamental freedoms, such as in the *Trinity Western* saga in 2018 (*Law Society of British Columbia v. Trinity Western University*, 2018 2 S.C.R. 293.; *Trinity Western University v. Law Society of Upper Canada*, 2018 2 S.C.R. 453), a freedom of religion case that saw 31 different actors apply to intervene in one or both of the case's appeals. In that same year, the Court also heard *R. v. Vice Media Canada Inc.* (2018), a case that dealt with the freedom of expression, and had 23 intervenors make arguments) (*R. v. Vice Media Canada Inc.*, 2018 3 S.C.R. 374). Indeed, the case with the largest number of intervenors in the entire dataset (34), *Saskatchewan Federation of Labour v. Saskatchewan* (2015), concerned the fundamental freedom of association (*Saskatchewan Federation of Labour v. Saskatchewan*, 2015 1 SCR 245).

Despite constituting a small proportion of the dataset, cases involving language rights, specifically sections 19 and 23 of the Charter, retained significant intervenor

Table 1. Number of Cases and Average Number of Participating Intervenors across Charter Areas (n = 103)

Charter area	No. of Cases	Average no. of intervenors	Standard deviation
Democratic rights	1	7.00	N/A
Fundamental freedoms	14	17.07	8.931
Life, liberty and security of person	23	8.13	6.152
Legal rights	53	4.47	4.003
Right to equality	8	6.00	3.742
Language rights	5	9.40	7.162
Remedies	9	6.33	8.588
All Charter	**113**	**7.10**	5.366

Note: During the period under study, cases involving Indigenous rights under section 25 were noticeably absent. However, the Court has seldom made rulings on section 25, with the last major decisions in 2008 in *R. v. Kapp*, [2008] 2 SCR 483. Although section 7 is formally part of the legal rights category of the Charter, it is conventional in the law and politics literature to treat section 7 as a distinct category. Thus, section 7 was separated from other legal rights within the analysis. Ten cases dealt with two broad areas of the Charter, which is why the total number is 113.

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participation (average of 9.40). Section 7 cases (Life, liberty and security of person) similarly attracted higher-than-average numbers of intervenors (8.13). Akin to the fundamental freedoms' cases, the high average of intervenor participation in sections 19, 23 and 7 cases likely reflects the saliency of issues covered by these sections of the Charter. For instance, in 2015, a key section 7 case heard by the Court was *Carter v. Canada (Attorney General)* (2015), where the Court unanimously ruled that the prohibition of medical assistance in dying (MAID) found in the Criminal Code of Canada violated Canadians' right to life, liberty and security of person. In this case, a wide range of intervenors were compelled to intervene, arguably because of the crucial human rights and public policy implications the decision would ultimately have.

In contrast, although cases involving legal rights make up the largest category of the Court's docket and of this dataset, these cases attract the fewest number of intervenors. On average, legal cases only have four intervenors participate. This finding is consistent with Alarie and Green's (2010) study that found intervenors participate the least in SCC cases involving criminal appeals. Surprisingly, equality rights cases also had slightly lower-than-average numbers of intervenors participate, notwithstanding that these cases often hinge on important questions relating to the fair and equal treatment of citizens across various lines of identity.

Who are the repeat players?

There were 268 unique intervenors identified in the dataset, made up mostly of civil society organizations and governments, although there were exceptional occasions where individuals were granted permission to intervene. Sixty-one per cent of these intervenors were "one-shotters," actors who only participate in one case. The vast

Table 2. Top 20 Intervenors in Charter Cases, April 2013–December 2021 ($n = 103$ cases)

Actor	No. of interventions	% of all cases
Attorney General of Ontario	46	44.7
Criminal Lawyers' Association (Ontario)	40	38.8
British Columbia Civil Liberties Association	34	33.0
Canadian Civil Liberties Association	34	33.0
Attorney General of Quebec	27	26.2
Attorney General of Alberta	24	23.3
Attorney General of Canada	22	21.4
Attorney General of British Columbia	17	16.5
David Asper Centre for Constitutional Rights	14	13.6
Director of Public Prosecutions	13	12.6
Attorney General of Saskatchewan	11	10.7
Aboriginal Legal Services Inc.	10	9.7
Canadian Bar Association	9	8.7
Director of Criminal and Penal Prosecutions of Quebec	8	7.8
Advocates' Society	7	6.8
Christian Legal Fellowship	7	6.8
Evangelical Fellowship of Canada	7	6.8
Canadian Constitution Foundation	6	5.8
Catholic Civil Rights League	6	5.8
Public Service Alliance of Canada	6	5.8

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majority (98 per cent) of these one-shot intervenors were nongovernmental actors, with the exception of the attorneys general of Prince Edward Island and the Yukon.

As seen in Table 2, there are eight governments and justice departments among the twenty most frequent intervenors in Charter cases. The attorney general of Ontario is the most active intervenor, participating in nearly 45 per cent of all Charter cases heard by the Court. Contrary to the findings of Hausegger and colleagues (2015), who report the five most frequent intervenors to all be governments (between 1998 and 2012 and across all kinds of cases), there are a handful of interest groups—including the Criminal Lawyers' Association and the Canadian Civil Liberties Association, as well as the latter's provincial counterpart, the British Columbia Civil Liberties Association—who outpaced the interventions of most governments. In reflecting on who the dominant intervenors are in Charter cases, it is also necessary to consider which organizations or interests are absent among the repeat players. In spite of significant past scholarly attention given to the interventions of women's organizations and LEAF in particular, not a single women's organization is represented among the top repeat players. As discussed earlier, LEAF has been described by multiple commentators as the most frequent and successful nongovernmental intervenor during the 1980s and 1990s (Hausegger et al., 2015; Morton and Knopff, 2000; Manfredi, 2004). Within this dataset, LEAF only intervened in four cases, all of which involved section 15 (Right to equality) (see Table A1 in Appendix for a breakdown).

The rate at which individual organizations intervene does not, on its own, indicate whether certain collective interests are overrepresented or underrepresented in Charter cases. This is a central aspect to understanding the democratic implications of intervention. If the composition of intervening actors is inequitable, where certain interests are disproportionately represented as the repeat players in Court, this could suggest that intervention is not a democratizing force. As seen in Table 3,

Table 3. Typology of Repeat Intervenors

Governments	Attorney General of Ontario
168 interventions	Attorney General of Quebec
	Attorney General of Alberta
	Attorney General of Canada
	Attorney General of British Columbia
	Director of Public Prosecutions
	Attorney General of Saskatchewan
	Director of Criminal and Penal Prosecutions of Quebec
Civil libertarian organizations	Canadian Civil Liberties Association
74 interventions	British Columbia Civil Liberties Association
	Canadian Constitution Foundation
Legal organizations	Criminal Lawyers' Association
70 interventions	David Asper Centre for Constitutional Rights
	Canadian Bar Association
	Advocates' Society
Religious organizations	Christian Legal Fellowship
20 Interventions	Evangelical Fellowship of Canada
	Catholic Civil Rights League
Equity-deserving organizations	Aboriginal Legal Services
10 interventions	
Unions	Public Service Alliance of Canada
6 interventions	

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Table 4. Top 5 Intervenors across the Four Major Charter Areas

Equality rights ($n = 8$ cases)	Count	% (within case area)
Women's Legal Education and Action Fund	4	50
Attorney General of Ontario	3	37.5
Criminal Lawyers' Association (Ontario)	3	37.5
Aboriginal Legal Services	2	25
Attorney General of Canada	2	25
Fundamental freedoms ($n = 14$ cases)		
Attorney General of Ontario	9	64.3
British Columbia Civil Liberties Association	7	50
Canadian Civil Liberties Association	7	50
Attorney General of Canada	6	42.9
Attorney General of Quebec	5	35.7
Legal rights ($n = 53$ cases)		
Criminal Lawyers' Association (Ontario)	25	47.2
Attorney General of Ontario AG-ON	21	39.6
Attorney General of Alberta	17	32.1
British Columbia Civil Liberties Association	16	30.2
Canadian Civil Liberties Association	15	28.3
Life, liberty and security ($n = 23$ cases)		
Criminal Lawyers' Association (Ontario)	13	56.5
British Columbia Civil Liberties Association	12	52.2
Canadian Civil Liberties Association	10	43.5
Attorney General of Ontario	9	39.1
Aboriginal Legal Services	7	30.4

when we situate the top 20 intervenors into the broader interests they represent, there appears to be an imbalance in the kinds of constituencies that are most represented in Court (at least as repeat players). Governments, civil libertarian organizations and legal organizations make up a much greater proportion of all repeat interventions, when compared to equity-deserving organizations and unions. Religious groups are somewhere in the middle. Ultimately, the economy of repeat players presented here looks starkly different than the composition of Morton and Knopff's (2000) Court Party, which posits equity-deserving organizations to be dominant and routine players in Court.

Not only is there an asymmetry in which collective interests are represented as repeat intervenors in Charter litigation as a whole, there is also a silo effect, where the composition of intervening actors varies considerably across Charter areas (see Table 4 for a preview, and see Table A1 in the Appendix for a more detailed breakdown). For instance, public advocacy law groups and legal profession associations are disproportionately active in cases involving legal rights and section 7 (life, liberty, security of person). Indeed, the Ontario Criminal Lawyers' Association intervenes in half of all cases concerning these Charter sections (47.2 per cent to 56.5 per cent). Yet there are no legal organizations represented among the repeat players in fundamental freedoms' cases (see Table 4). Equity-deserving interest groups have also siloed their interventions to solely sections 7 and 15, and religious groups disproportionately intervene in cases dealing with fundamental freedoms. The least siloed organizations are civil libertarian organizations and governments. Both sets of actors are involved in a large proportion of cases involving fundamental freedoms, yet they maintain a presence in other kinds of Charter disputes as well.

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Concluding Remarks and Avenues for Future Research

These findings reveal a number of representation gaps in Charter interventions. While there is significant intervenor activity in Charter cases at the SCC, there is a silo effect, where certain types of Charter appeals do not equally benefit from a diversity of intervenor perspectives. Even more, in contrast to the Court Party thesis, there is a dominance of powerful interests—most prominently, governments and legal organizations—that constitute a majority of the repeat player interventions. The empirical record produced here raises a number of questions that are worthy of future research: What, for example, might explain the imbalance in representation? And what consequences might these representation gaps have on Canadian democracy writ large?

Although future research should aim to expand to cases beyond the Charter, the variance identified in the volume of intervenors and the kinds of interests that are reflected (or not) across cases are notable. The dearth of intervenors in cases involving legal rights was perhaps expected. Criminal law is adversarial in nature, and so these cases may reasonably be perceived by prospective intervenors to narrowly involve a defendant and the state and to be private rather than public matters. At the same time, however, the ways in which the SCC interprets legal rights have societal implications that go well beyond the accused in a particular case. Legal rights arguably have the most tangible, real-world consequences for citizens. These are the rights that constrain the day-to-day powers of the police and, in a material way, protect people who are charged with criminal offences. For this reason, when the SCC rules on legal rights, these cases often have direct and immediate human rights implications. In recent years, there has been increased public recognition of the pervasive problem of over-policing and over-criminalizing Black Canadians and Indigenous peoples. This context suggests that legal rights' decisions by the SCC have a particular salience for the human rights of our most marginalized communities, making it especially troubling that so few intervenors are participants in these cases. A lack of participation from equity-deserving organizations specifically may further entrench the gendered and racialized effects of the criminal justice system. Ultimately, in the post-Charter era, where the Court has a de facto and substantive role in the development of law and policy, it is imperative that the justices are exposed to the multitude of voices that are impacted by its decision making. Future research that employs direct methods such as interviews with equity-deserving civil society organizations could help us to better understand the conditions that lead these groups to become involved (or not) in the legal arena.

Equity-deserving organizations are evidently not the dominant repeat players, as the Court Party thesis posits. Although there are a number of one-shot interventions by equity-deserving organizations, their presence in Court, in Charter cases, is not routine or systematic. If there is indeed a Court Party, it is a made up of governments, civil libertarian groups and legal organizations. The prominence of government intervenors in particular, such as the attorney general of Ontario who intervened in nearly half of all cases in the dataset, likely reflects the heightened capacity of governmental actors to participate in the legal arena. With greater budgets and in-house legal expertise, governments are able to develop highly sophisticated expertise in Charter litigation—an affordance that is not available to a

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majority of civil society groups. Governments also have an automatic right to intervene in certain constitutional matters, and there is a higher incentive for them to participate, as it provides a concrete strategy for protecting their legislative agendas and shaping intergovernmental relations (Radmilovic, 2013; Hennigar, 2007).

The institutional context that shapes the intervening behaviour of government is in stark contrast to that of civil society groups. Equity-deserving organizations such as LEAF, who were once among the most frequent intervenors, have been subjected to chronic measures of austerity since the 1990s, forcing them to adapt their operations to meet slimmer budgets. Indeed, LEAF's website validates this reality, clearly stating that "our limited resources allow us to intervene in only a small number of cases per year" (LEAF, 2022). While further research is certainly needed to understand why equity-deserving organizations are less active in Court, the findings might suggest that without the maintenance of sufficient funding mechanisms and structures to support the interventions of less powerful groups (Epp, 1998), intervention cannot perform a democratizing function or provide an avenue for social justice for marginalized communities. Unfortunately, an absence of equity-deserving perspectives in Court could further entrench existing hierarchies of inequality that exist in Canadian society.

Overall, this study sought to fill an important empirical gap in our understanding of interventions at the SCC during the last decade. It provided a novel methodological approach to studying intervenors in Canada. Past case study approaches have somewhat lacked in breadth; unable to provide an overarching account of intervenors writ large, many of the quantitative studies failed to closely examine trends of intervention based on varying legal and policy contexts. By focusing broadly on all of the interventions in Charter cases, while maintaining a sensitivity to the specific areas of Charter litigation, this study allowed for a better balance between depth and breadth of analysis. As with any study, there are also limitations that might pave the way for future research.

Understanding who intervenes at the SCC is only one step toward understanding the democratic implications of intervention. Future studies should attempt to evaluate the influence of intervenors. Projects that explore the extent to which interventions shape judicial decision making and case outcomes would help us to understand the substantive effects of this practice beyond its symbolic value. It would also be valuable to analyze the content in intervenor briefs. Although equity-deserving groups are less present in Court, it is possible that other kinds of actors, such as legal organizations and civil libertarian organizations, are making arguments that support the interests of marginalized communities. This would add nuance to debates around intervenor representation. Likewise, it would be interesting to speak directly with the organizations and governments who intervene to learn what their goals and motivations are when intervening. Finally, this study adopted a strict interpretation of the Charter and thus did not include important sections of the 1982 Constitution, such as the Indigenous rights contained in section 35. Considering that the Court seldom deals with section 25 of the Charter (the main section containing Indigenous rights), expanding to section 35 to examine the interventions of Indigenous peoples could be a fruitful path for future research, in light of wider decolonizing efforts.

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Notes

1 While the Court has long exercised its power to rule laws unconstitutional, particularly in cases involving federalism and intergovernmental conflict (Schertzer, 2016; Cairns, 1971), the patriation expanded the power of judicial review.

2 Intervenors must simply show the Court that they have an interest in the case and that they will say something that is both useful and distinct from the direct parties.

3 April 2013 is a logical starting point because that is when the SCC began regularly publishing intervenor briefs to its website. The year 2013 is also the starting point because the objective of this note is to update the research in this area, as the extant literature only provides systematic coverage of intervenors up to 2012.

4 See Brodie (2001) for a discussion on the cancellation of the Court Challenges Program between 1992 and 1994.

5 Following the methodology of other empirical studies of intervenors, such as Hausegger et al. (2015), I adopt a narrow approach in defining who is a government intervenor. This category includes only attorneys general and departments of justice.

6 Four 2013 cases heard after April were excluded from this study, as the SCC website did not have published intervenor briefs on these cases: *R. v. Levkovic*, 2013 SCC 25; *R. v. Vu*, 2013 SCC 60; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47; and *R. v. MacKenzie*, 2013 SCC 50.

7 Two of these were from the attorney general of Ontario, one from the deputy attorney general of Canada and one from the director of criminal and penal prosecutions for Quebec.

8 The three cases were *R. v. G.T.D.*, 2018 SCC 7, [2018] 1 S.C.R. 220; *R. v. Hunt*, 2017 SCC 25, [2017] 1 S.C.R. 476; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548.

References

Alarie, Benjamin and Andrew Green. 2010. "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance." *Osgoode Hall Law Journal* **48** (3–4): 381–410.

Brodie, Ian. 2001. "Interest Group Litigation and the Embedded State: Canada's Court Challenges Program." *Canadian Journal of Political Science* **34** (2): 357–376.

Brodie, Ian. 2002a. *Friends of the Court: The Privileging of Interest Group Litigants in Canada*. Albany: State University of New York Press.

Brodie, Ian. 2002b. "Intervenors and the Charter." In *Law, Politics, and the Judicial Processes*, ed. F. L. Morton. Calgary: University of Calgary Press.

Bussey, Barry W. 2019. "The Law of Intervention after the TWU Law School Case: Is Justice Seen to Be Done?" *Supreme Court Law Review* **90**: 265–96.

Cairns, Alan C. 1971. "The Judicial Committee and Its Critics." *Canadian Journal of Political Science* **4** (3): 301–345.

Callaghan, Geoffrey. 2020. "Intervenors at the Supreme Court of Canada." *Dalhousie Law Journal* **43** (1): 1–29.

Collins, Paul. M., Jr. 2008. *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*. New York: Oxford University Press.

Dobrowolsky, Alexandra. 2009. *Women and Public Policy in Canada: Neo-liberalism and After?* Don Mills, Ontario and New York: Oxford University Press.

Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.

Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* **9** (1): 95–160.

Hausegger, Lori. 1999. "The Impact of Interest Groups on Judicial Decision Making: A Comparison of Women's Groups in the United States and Canada." PhD diss., Ohio State University. https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=osu1488191124571516&disposition=inline.

Hausegger, Lori, Matthew Hennigar and Troy Riddell. 2015. *Canadian Courts: Law, Politics and Process*. 2nd ed. New York: Oxford University Press.

Hein, Gregory. 2000. "Interest Group Litigation and Canadian Democracy." *Institute for Research on Public Policy* **6** (2): 1–30.

Hennigar, Matthew. 2007. "Why Does the Federal Government Appeal to the Supreme Court of Canada in Charter of Rights Cases? A Strategic Explanation." *Law and Society Review* **41** (1): 225–50.

Hiebert, Janet. 1996. *Limiting Rights: The Dilemma of Judicial Review*. Montreal and Kingston: McGill-Queen's University Press.

Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press.

Jenson, Jane and Susan D. Phillips. 1996. "Regime Shift: New Citizenship Practices in Canada." *International Journal of Canadian Studies* **14**: 11–36.

Laforest, Rachel. 2011. *Voluntary Sector Organizations and the State: Building New Relations*. Vancouver: UBC Press.

LEAF (Women's Legal Education and Action Fund). 2022. FAQs. https://www.leaf.ca/faqs/.

Macfarlane, Emmett. 2018. *Policy Change, Courts, and the Canadian Constitution*. Toronto: University of Toronto Press.

Manfredi, Christopher. 2004. *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund*. Vancouver: UBC Press.

Morton, F. L. 1987. "The Political Impact of the Canadian Charter of Rights and Freedoms." *Canadian Journal of Political Science* **20** (1): 31–55.

Morton, F. L. and Avril Allen. 2001. "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada." *Canadian Journal of Political Science* **34** (1): 55–84.

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

Radmilovic, Vuk. 2013. "Governmental Interventions and Judicial Decision Making: The Supreme Court of Canada in the Age of the Charter." *Canadian Journal of Political Science* **46** (2): 323–44.

Russell, Peter. 1983. "The Political Purposes of the Canadian Charter of Rights and Freedoms." *Canadian Bar Review* **61** (1): 30–54.

Schertzer, Robert. 2016. *The Judicial Role in a Diverse Federation: Lessons from the Supreme Court of Canada*. Toronto: University of Toronto Press.

Smith, Miriam. 2005. "Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada." *Politics & Society* **33** (2): 327–53.

Songer, Donald R. 2008. *The Transformation of the Supreme Court of Canada: An Empirical Examination*. Toronto: University of Toronto Press.

Cases Cited

Carter v. Canada (Attorney General), [2015] 1 S.C.R. 331.

Law Society of British Columbia v. Trinity Western University, [2018] 2 S.C.R. 293.

R. v. Vice Media Canada Inc., [2018] 3 S.C.R. 374.

Saskatchewan Federation of Labour v. Saskatchewan, [2015] 1 S.C.R. 245.

Trinity Western University v. Law Society of Upper Canada, [2018] 2 S.C.R. 453.

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Appendix

Table A1 Top 12 Intervenors across Main Areas of the Charter

Equality rights ($n = 8$ cases)			Fundamental freedoms ($n = 14$ cases)		
Intervener	Count	(%)	Intervener	Count	(%)
LEAF	4	50	AG-ON	9	64.3
AG-ON	3	37.5	BCCLA	7	50.0
CrimLawyersON	3	37.5	CCLA	7	50.0
ALS	2	25	AG-Can	6	42.9
AG-Can	2	25	AG-QC	5	35.7
BCCLA	2	25	Christian Legal	5	35.7
ElizabethFry	2	25	Evangelical Fellowship	5	35.7
David Asper Centre	2	25	AG-BC	4	28.6
Equal Pay Coalition	2	25	AG-SK	4	28.6
NWAC	2	25	Can Labour Congress	4	28.6
NB Pay Equity	2	25	Catholic Civil Rights	4	28.6
PSAC	2	25	PSAC	4	28.6

Legal rights ($n = 53$ cases)			Life, liberty and security ($n = 23$ cases)		
Intervener	Count	(%)	Intervener	Count	(%)
CrimLawyersON	25	47.2	CrimLawyersON	13	56.5
AG-ON	21	39.6	BCCLA	12	52.2
AG-AB	17	32.1	CCLA	10	43.5
BCCLA	16	30.2	AG-ON	9	39.1
CCLA	15	28.3	ALS	7	30.4
AG-QC	12	22.6	AG-Can	7	30.4
Director of Pub Prosecution	10	18.9	AG-QC	7	30.4
AG-BC	9	17.0	David Asper Centre	5	21.7
AG-Can	9	17.0	AG-BC	4	17.4
Director of Crim and Penal	7	13.2	CBA	4	17.4
Advocates' Society	5	9.4	Canadian HIV/AIDS	4	17.4
Chiefs of Police	4	7.5	HIV & AIDS Legal Clinic	4	17.4

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