

## Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance

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Interveners make submissions in about half of the cases heard by the Supreme Court of Canada, but the motivations for and consequences of the practice are not clearly understood. Considered broadly, there are at least three functions that the practice of intervention might perform. The first possibility is that hearing from interveners might provide objectively useful information to the Court (*i.e.*, interveners might promote the “accuracy” of the Court’s decision making). A second possibility is that the practice of intervention allows interveners to provide the “best argument” for certain partisan interests that judges might want to “affiliate” with. A third possibility is that interventions are allowed mainly (if not only) so that intervening parties feel they have had their voices heard by the Court and the greater public, including Parliament, regardless of the effect on the outcome of the appeal (*i.e.*, the Court might be promoting the “acceptability” of its decisions by allowing for an outlet for expression). We examine empirically the role of interveners in all the cases decided by the Supreme Court of Canada from January 2000 to July 2009 and find statistical evidence that interveners matter.

Les intervenants font des soumissions dans environ la moitié des causes entendues par la Cour suprême du Canada, mais les motivations et les conséquences de la pratique ne sont pas comprises clairement. Dans l’ensemble, il y a au moins trois fonctions que la pratique de l’intervention pourrait accomplir. Premièrement, l’audition des intervenants peut procurer objectivement des renseignements utiles au tribunal (*c.-à-d.* que les intervenants peuvent promouvoir l’« exactitude » de la prise de décision du tribunal). Une deuxième possibilité est que la pratique de l’intervention permet aux intervenants de fournir le « meilleur

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argument » à l'égard de certains intérêts partisans auxquels les juges pourraient souhaiter s'« affilier ». Une troisième possibilité est que les interventions sont essentiellement autorisées (sinon uniquement), de sorte que les intervenants sentent qu'ils ont pu faire entendre leur voix auprès de la Cour et du grand public, y compris le Parlement, sans égard à l'effet du résultat de l'appel (*c.-à-d.* que le tribunal pourrait faire la promotion de l'« acceptabilité » de ses décisions en autorisant une avenue pour l'expression). Nous examinons de façon empirique le rôle des intervenants dans tous les cas pour lesquels la Cour suprême du Canada a rendu une décision de janvier 2000 à juillet 2009, et nous avons constaté une évidence statistique de l'importance des intervenants.

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**OVER THE PAST DECADE**, interveners have been active at an unprecedented level at the Supreme Court of Canada. Under Chief Justice McLachlin, the Court has allowed an average of 176 interventions per calendar year,<sup>1</sup> and interveners have made submissions in almost half of the cases heard by the Court.<sup>2</sup> Despite the frequency of activity and the resources contributed to the collective intervention effort, the effects on the Court's decision making are poorly understood. A growing body of empirical literature examines the effects of *amicus curiae* at the US Supreme Court.<sup>3</sup> The empirical literature is not as developed regarding the effects of intervention on the decision making of the Supreme Court of Canada, although interventions at the Court have been repeatedly discussed in the literature.<sup>4</sup> This article aims to expand the understanding of the consequences of the

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1. There were a total of 1,583 interventions allowed by the Court from cases with neutral citations from 2000 SCC 1-2008 SCC 69.
  2. Including cases with neutral citations from 2000 SCC 1-2008 SCC 69, there were 330 appeals in which interveners were heard, out of a total of 674 appeals.
  3. Joseph D. Kearney & Thomas W. Merrill, "The Influence of Amicus Briefs on the Supreme Court" (2000) 148 U. Pa. L. Rev. 743 (amicus briefs were filed in approximately 85 per cent of appeals before the US Supreme Court in the period from 1986-1995); Paul M. Collins Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision-Making* (New York: Oxford University Press, 2008).
  4. The Canadian literature on interveners tends not to be empirical and focuses on discussing issues surrounding the practice of intervention and the role of interveners. See Bernard M.

practice of intervention at Canada's highest court through a systematic empirical analysis of the effects of interveners.

While the effects of interventions on the Court's decision making have not been explored through empirical analysis until now, it is relatively clear how the mechanism of intervention itself operates in practice.<sup>5</sup> The Court has developed its own rules for determining whether an intervention ought to be allowed. Generally speaking, according to these rules, interveners before the Supreme Court of Canada (other than the attorneys general in certain cases) have to seek leave to intervene and, when leave is granted, interveners are limited to a brief factum and an appearance at the hearing of the appeal. Under this process, the Court typically grants more than 90 per cent of the requests to intervene.

Notwithstanding the clarity of this practice on its face, it is considerably less clear what is motivating the Court to allow intervention and what (if any) impact interventions ultimately have on the Court's decision making. Consider first what the Court may be intending to achieve by allowing interveners to make submissions in an appeal. There are at least three functions that the practice of intervention might satisfy. The first possibility is that hearing from interveners might provide objectively useful information to the Court (*i.e.*, interveners might promote the "accuracy" of the Court's decision making). A second possibility is that the practice of intervention allows interveners to provide the "best argument" for certain partisan interests that judges might want to "affiliate" or be associated with. A third possibility is that interventions are allowed mainly (if not only) so that intervening parties feel they have had their voices heard by the Court and

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Dickens, "A Canadian Development: Non-Party Intervention" (1977) 40 Mod. L. Rev. 666; Jillian Welch, "No Room at the Top: Interest Group Intervenors and *Charter* Litigation in the Supreme Court of Canada" (1985) 43 U.T. Fac. L. Rev. 204; Kenneth P. Swan, "Intervention and Amicus Curiae Status in Charter Litigation" in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987) 27; Philip L. Bryden, "Public Interest Intervention in the Courts" (1987) 66 Can. Bar Rev. 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U.T. Fac. L. Rev. 151; Eugene Meehan, "Intervening in the Supreme Court of Canada" (1994) 16 Advocates' Q. 137; Gregory Hein, "Interest Group Litigation and Canadian Democracy" in Paul Howe & Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 214; Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002); and Donald R. Songer, *The Transformation of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2008) (particularly chapter 5, "Understanding the Decision-Making Process").

5. For a historical review, see Koch, *ibid.* at 155-60.

the greater public, including Parliament, regardless of the effect on the outcome of the appeal (*i.e.*, the Court might be promoting the “acceptability” of its decisions by allowing for an outlet for the expression of strongly held views for or against a certain outcome). Of course, it would be naive to think that taken on its own any one of these three functions could provide a complete explanation for the heterogeneous practice of intervening at the Supreme Court of Canada. It is easy to imagine circumstances in which each of the three accounts of intervention finds a degree of fit.

With the foregoing caveat in mind, the purpose of this article is to identify, to the extent possible, the mix of functions interveners played at the Supreme Court of Canada from 2000 to mid-2009. In part, this analysis involves examining the extent to which interveners during this period have had an impact on the decision making of the Court and, in particular, of individual judges. In pursuit of this end, Part I of the article examines and elaborates upon the three theoretical core justifications—accuracy, affiliation, and acceptability—that the Court may have in mind when allowing interventions. Part II summarizes the descriptive data that were developed for this article. The data encompass all cases decided by the Supreme Court of Canada from January 2000 to July 2009. Part II also sets out the method for the coding of the cases and provides some descriptive statistics on the extent and types of interventions before the Court in this period. Part III then uses these data to examine the impact of interventions before the Court. It discusses whether the fact that there is an intervener (or a particular type of intervener) affects whether the appeal is allowed or not, or is decided conservatively or liberally. It also examines whether there is a connection between particular judges and particular types of interveners. Part IV concludes.

## I. WHY MIGHT INTERVENERS MATTER?

The practice of intervention represents a departure from the general idea in our adversarial legal tradition that a case should be resolved through the presentation of competing arguments to the adjudicator by the parties directly involved in a discrete legal dispute. In recognition of the fact that intervention is a departure from the norm, interveners must, in general, obtain some form of permission to intervene in a case—whether they seek to intervene before a lower court or the

country's highest court.<sup>6</sup> The Supreme Court of Canada has established its own rules governing interventions. The rules have historically been imprecise, allowing any party interested in an appeal to seek leave to intervene, with the Court imposing terms and conditions as it deems appropriate in the circumstances.<sup>7</sup> The Court briefly expanded the rules permitting interveners in the mid-1980s, but by the end of the 1980s a new practice was established.<sup>8</sup> It is now the case that any party interested in an appeal before the Supreme Court is permitted to bring a motion for leave to intervene.<sup>9</sup> The motion is generally heard by a single judge of the Court or, in circumstances when a motions judge is not available, by the registrar of the Court.

As mentioned above, there are three broad types of explanations for why a court may wish to allow interventions: accuracy, affiliation, and acceptance. Before going on to explain in more detail what lies behind each of these motivations, consider the following example, which will provide the intuition behind the three motivations we identify. Suppose that a judge with environmentalist leanings is faced with deciding whether to allow interventions by two parties: (1) an environmental group and (2) an organization representing a consortium of mining companies. The accuracy rationale would suggest allowing both interventions if there is a prospect that new information or arguments would be presented by the parties. The affiliation rationale would suggest to the judge that he or she might want to allow the environmental group to intervene because he or she is more likely to sympathize with and identify with the environmental group, whereas this is less likely to be the case with the organization representing the consortium of mining companies. The acceptance rationale is the broadest of the three rationales. It would suggest hearing from both interveners, even if they are not likely to add any information or arguments to the appeal, on the

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6. As discussed below in Part II, there are exceptions to the need to seek leave to intervene. The most important for our purposes is that the attorneys general have a right to intervene in cases where the constitutionality of a statute is challenged.
  7. The rule used to state that "any person interested in an appeal may, by leave of the Court or a Judge, intervene therein upon such terms and conditions and with such rights and privileges as the Court or Judge may determine." See Rule 60 of the *Rules of the Supreme Court of Canada* (1977), quoted by Welch, *supra* note 4 at 215.
  8. See Brodie, *supra* note 4 at 17-18; Swan, *supra* note 4 at 32-35.
  9. Rules 55 to 59 of the current *Rules of the Supreme Court of Canada* address interventions and govern motions for leave to intervene. See *Rules of the Supreme Court of Canada*, S.O.R./2002-156, as am. by S.O.R./2006-203.

basis that giving the interveners the chance to air their views will mean that the Court's ultimate decision will be accorded more respect than it would receive otherwise. It should be obvious from this example that a judge's decision to allow interventions can be over-determined; that is, a judge may well find that the accuracy rationale is sufficient to allow both interventions but, at the same time, remain moved by the affiliation and acceptance rationales in the case of the environmental group, and by the acceptance rationale in the case of the organization representing the consortium of mining companies.

Of the three rationales for permitting interventions, accuracy is probably the most widely accepted basis for granting intervener status to a party.<sup>10</sup> The accuracy rationale for permitting interventions is that the court will allow a party to intervene if it believes that the party has some information or arguments that would enable the court to make a better or more accurate decision. The idea is that, by hearing from the intervener, the Court will learn information or be exposed to arguments that it would not otherwise be exposed to, and this will increase the probability that an optimal disposition of the appeal will be reached.<sup>11</sup> The new information or arguments presented by interveners may, *inter alia*, address the impacts of the decision on parties not before the court (with respect to the externalized costs and benefits of the Court's decision not borne directly by the parties to the appeal). For example, where a dispute concerns the permissibility of a certain land development proposal between a township and

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10. See *e.g.* Dickens, *supra* note 4 at 674; Bryden, *supra* note 4 at 507-08; and Koch, *supra* note 4 at 152. For a comparative perspective, see George Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 Fed. L. Rev. 365 at 366. Williams states that "[i]n courts that deal with complex matters that can have far-reaching implications beyond the settlement of the particular dispute, assistance can be gained from more wide-ranging argument, such as on underlying policy choices, or on how the court's decision might affect society more generally."

11. Accuracy in this context does not necessarily imply that there is a single correct answer to each appeal. The information from the intervener may simply improve the ability of the Court to understand the issues surrounding the appeal. See Lewis A. Kornhauser, "Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System" (1994-1995) 68 S. Cal. L. Rev. 1605 (examining optimal judicial structure and refusing to define the meaning of a "correct" judgment, arguing that "correct" could refer to the welfare maximizing decision or some other notion of correctness); Lewis A. Kornhauser, "Modeling Collegial Courts I: Path-Dependence" (1992) 12 Int'l Rev. L. & Econ. 169 (arguing that, on appeal, most legal decisions are dichotomous—*i.e.*, have a "yes" or "no" answer).

a developer, an intervener might bring arguments surrounding the negative effects of the development on a downstream community. Interveners may also provide information about the impact of the decision in other cases or in circumstances beyond the appeal directly before the Court, in the hope that the Court will avoid (or make) *obiter* statements that may be damaging (or beneficial) to other interests.

A desire to improve the accuracy of the decision through the provision of information by the intervener seems to underlie and motivate the Court's current rules regarding interventions. Although the rules do not explicitly set out the grounds on which a motion for leave to intervene is to be allowed, the materials furnished to the Court in support of a motion for intervener status are required to include certain information. It is reasonable to assume from this required information that it encompasses information that will be relevant to adjudicate the merits of the motion for leave to intervene. The required information includes:

- the party's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied;
- the position the party intends to take;
- the submissions the party will advance and their relevance to the proceeding; and
- the party's reasons for believing that the submissions will be useful to the Court and be different from those of other parties.<sup>12</sup>

The materials supporting the motion, therefore, centre on how the party seeking to intervene may assist the Court by providing information that is relevant and non-duplicative of that provided by the other parties.

As Joseph D. Kearney and Thomas W. Merrill note, in order to understand the reasons behind interventions, a model of what judges are actually doing in deciding appeals is essential. They argue that the idea that interveners provide desirable information is connected with the "legal" model of judicial decision making.<sup>13</sup> The legal model assumes that judges vote in accordance with legal

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12. Rules 55 to 59 of the current *Rules of the Supreme Court of Canada* address interventions and govern motions for leave to intervene. See *supra* note 9.

13. *Supra* note 3. They also specify three explanations for courts permitting interventions. Their explanations are similar, but slightly different, from the three discussed in this article. They

principles and accepted norms of statutory interpretation and precedent.<sup>14</sup> In the case of ambiguity, judges attempt to interpret the case law or statute in the manner most consistent with the aims of the statute or case law as a whole. This view of judicial decision making also assumes that the judges are in some sense attempting to reach the “best” or “most defensible” decision in each particular case, regardless of their own particular preferences. Paul M. Collins refers to this role of interveners as “legal persuasion”—the ability of the intervener to persuade a judge that a particular decision is correct.<sup>15</sup> The legal model suggests that interveners can improve the accuracy of the decision and, therefore, judges will, all else the same, wish to have interveners provide information where it is germane, probative, and non-duplicative.

A second reason for courts to allow interventions is to promote affiliation or a sense of identification of purpose between the court (or, more commonly, particular judges) and intervening interest groups with similar policy preferences. It would not be surprising if judges enjoyed hearing from groups whose arguments matched their own policy preferences and, correspondingly, that judges would find it harder to refuse leave to intervene to such groups. The affiliation explanation posits that a version of the well-known psychological phenomenon of confirmation bias applies to judges considering whether or not to hear from would-be interveners.<sup>16</sup>

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argue that courts may allow interventions (1) to provide valuable assistance to the court, an explanation they connect with the legal model; (2) for no apparent purpose other than, perhaps, a connection to how other bodies will react to the decision, which they connect with the attitudinal model of judicial decision making (and perhaps to the strategic model of judging); and (3) to identify how interested groups want the case decided, which they connect to a “interest group” model of decision making that posits that judges decide in accordance with the interests of the most influential groups in society (at 745-48). We argue that the latter two explanations can be grouped together, while a third explanation is required, relating to the impact of allowing interveners on the acceptance of the court’s decisions (either in this particular decision or more generally).

14. For a discussion of the different models of judging, see Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002) [Segal & Spaeth, *Revisited*].

15. *Supra* note 3 at 89-92.

16. There is clear evidence that judges are biased in other ways, so it would not be surprising if a confirmation bias was present as well. See e.g. Stephen J. Choi & G. Mitu Gulati, “Bias in Judicial Citations: A Window into the Behavior of Judges?” (2008) 37 J. Legal Stud. 87. Choi and Mitu Gulati report that “[j]udges are less likely to cite judges of the opposite



The affiliation explanation is consistent with the attitudinal and strategic models of judging. Judges wish to have information about the policy implications of a decision so they can vote directly in accordance with their preferences (the attitudinal model) or strategically such that their policy preferences are met when the actions of the other judges (or other policy-makers such as the legislature) are taken into account. It is also consistent with a less influential model of judging—that judges make decisions because of how they will be perceived by others (the court’s “audience”).<sup>17</sup> Judges would allow interveners to ensure they got accurate information about how the groups they care about would view them (the judges) if they voted in a particular fashion, rather than to get information about the policy implications per se. Based on this view, another important reason to allow interventions is to permit interveners to communicate the strongest possible legal arguments for judges to justify their preferred outcome from a policy preference perspective. Finally, and perhaps more benignly, Collins suggests that ideology may mediate how judges view or interpret the information in interventions, such as by making judges more accepting of information that is congruent with their policy preferences.<sup>18</sup>

A final reason for courts to permit parties to intervene is to promote the acceptance of that court’s decisions through increased legitimacy.<sup>19</sup> As a consequence of intervening, it is possible that parties may feel that their voices have been heard by the court and be more willing to accept its ultimate decision as legitimate irrespective of whether it is consistent with the view that they have presented for the court’s consideration. Judges may, therefore, allow parties to intervene to have them “buy into” a particular decision. They may also allow interventions in order to increase the sense of the legitimacy of the process as a whole and increase acceptance of the decisions of the Court in general or in a particular area. For example, a strong form of this explanation is advanced by Ian Brodie in his discussion of why the Supreme Court appeared to allow more interest groups to intervene starting in the late 1980s:

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political party than they are to cite judges of their own party. Moreover, the tendency not to cite opposite-party judges is greater in high-stakes circumstances” (at 91).

17. See Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton: Princeton University Press, 2006) at 21-22.

18. *Supra* note 3 at 93-94.

19. See e.g. Bryden, *supra* note 4 at 509; Koch, *supra* note 4 at 152.

During the early and mid-1980s the Supreme Court used its power of judicial review more actively than it ever had before. It staked out bold new ground using the *Charter*, placing no significant limits on its own powers to review government actions and replace the judgment of government officials with its own. No court can do such a thing for long without support of political interests. Just as the Trudeau government found civil liberties and rights oriented groups [to be] useful allies for legitimating its patriation project, so the Supreme Court found these groups to be useful allies in legitimating its extraordinary activism. By accommodating interest groups, the Court blunted their potentially damaging criticism. Allying itself with "disadvantaged groups" furthermore provided a justification for what otherwise might appear to be an unconscionable power grab.<sup>20</sup>

This "acceptance" explanation is consistent with the legal model of judging along with the other two primary models of judging (the attitudinal and strategic models), although perhaps more so with the strategic model of judging. Under the attitudinal and strategic models of judging, judges vote at least in part to further their own policy preferences. The attitudinal model of judicial decision making posits that judges vote in each case directly for the result that is most in accordance with their policy preferences. It has been subject to empirical testing in the literature on US courts. The existing literature generally supports the attitudinal model, particularly in civil rights and civil liberties cases.<sup>21</sup> The strategic model of judicial decisions assumes that judges do not "sincerely" or directly vote for their preferred policy outcome in each case but, instead, shrewdly take into account how their votes in a particular case will affect and be affected by other actors, such as other judges on the court and other institutions (including the legislature and judges on other courts).<sup>22</sup>

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20. *Supra* note 4 at 47-48.

21. See e.g. Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993); Segal & Spaeth, *Revisited*, *supra* note 14; Cass R. Sunstein *et al.*, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Washington: Brookings Institution Press, 2006); and Andrew D. Martin *et al.*, "Competing Approaches to Predicting Supreme Court Decision Making" (2004) 2 *Perspect. on Politics* 761. In Canada, see Benjamin Alarie & Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada" (2009) 47 *Osgoode Hall L.J.* 1 [Alarie & Green, "Policy"]; C.L. Ostberg & Matthew E. Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: University of British Columbia Press, 2007).

22. See e.g. Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington: CQ Press, 1998) (arguing that justices should be viewed as voting strategically); Thomas H. Hammond, Chris W. Bonneau & Reginald S. Sheehan, *Strategic Behaviour and Policy Choice on the US Supreme Court* (Stanford: Stanford University Press, 2005) (presenting a formal model of

Judges may be acting in accordance with the legal or the attitudinal model but still wish to allow interveners, even if they add no useful information, if they believe there is a need to ensure that whatever the “correct” answer is, it requires that the parties feel it is legitimate. However, the acceptance explanation seems to accord most closely with a strategic view of judicial behaviour. Judges make decisions (including whether to allow parties to intervene) in order to further their policy preferences in light of the actions of all other parties that may be interested in the decision. In this case, they allow parties to intervene not to obtain information, but to gain some added ability to ensure that their policy preferences prevail in the short, as well as in the medium-to-long, term.

Each of these three explanations for why judges allow interventions (accuracy, affiliation, and acceptance) is associated with some predictions about how judges will react to parties seeking intervention and providing information. For example, in terms of leave to intervene, a judge may be slightly less likely to grant leave if the accuracy model prevails over the acceptance model, because not all groups will have relevant information, but all groups will be more accommodating of an adverse decision if they have been heard from. A more general desire to have more voices heard, on the other hand, may be revealed in a broad policy of allowing all (or nearly all) interventions. It is more difficult to determine if the affiliation explanation holds in decisions on leave, as judges may wish to allow interveners on both sides whenever they allow one in with which they have an affiliation in order to maintain an appearance of neutrality and balance.

Another possible indicator (on which we will focus in this article) is how judges vote in particular cases. The connection between why a court may allow a party to intervene and judicial decision making may be found in the relationship between the position of particular interveners and how a judge votes in a particular appeal. Suppose we can categorize votes by judges in particular appeals as “liberal” or “conservative” (setting aside for now the definition of what constitutes a liberal or conservative vote). Judges can then be generally categorized as liberal (or conservative) to the extent they vote in a liberal (or conservative) direction in a high (or low) percentage of appeals. Intervenors

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strategic decision making by judges); Forrest Maltzman, James F. Spriggs II & Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge, U.K.: Cambridge University Press, 2000); and Segal & Spaeth, *Revisited*, *supra* note 14.

may shift judges away from their long-run average liberal or conservative voting patterns, and, if so, this influence may provide us with information about the role the interveners are playing. If, for example, in cases involving liberal interveners, a liberal judge tends to have a higher liberal voting percentage than in other cases, it may be evidence that the affiliation model is in play—for instance, that the liberal judges are receiving information that accords with their policy preferences or bolsters their desire to vote in accordance with their preferences.<sup>23</sup> This relationship can be seen in the upper right quadrant of Figure 1. The same is true for a conservative judge who becomes more conservative in cases involving conservative interveners, as seen in the lower left quadrant in Figure 1.<sup>24</sup>

Finally, to the extent that the acceptance explanation is predominant, there should be very little or no correlation between the presence of a particular type of intervener and how judges vote. In Figure 1, this would mean that each judge's voting percentage is the same despite the presence of either a liberal or conservative intervener—that is, their voting remains near the notional vertical line representing their mean liberal voting percentage in all cases. In this case, there would be no statistically significant relationship between interveners and judges' voting percentages. In the acceptance case, the purpose of intervention is not to gain information, but to garner acceptance for the position (legal or policy) that the judge would espouse irrespective of the form or extent of intervention.<sup>25</sup>

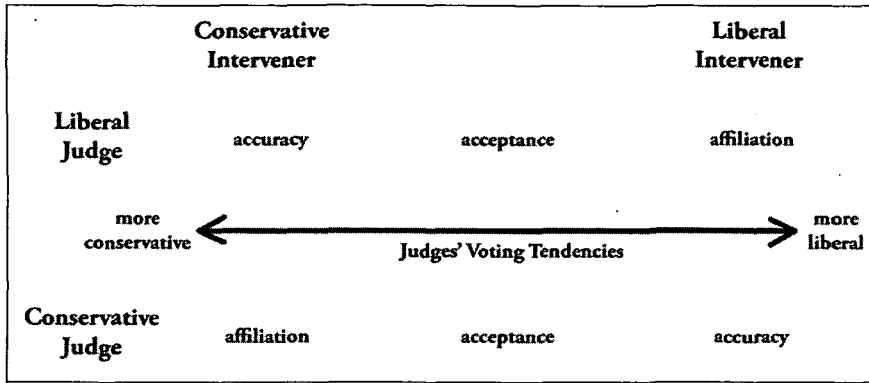
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23. See Collins, *supra* note 3 at 94.

24. Kearney & Merrill, *supra* note 3. They argue that there should be no connection between votes in the ideological model and intervener groups, as the judges will vote their policy preference regardless: "To the extent that amicus briefs provide additional information and factual background, under [the attitudinal] model they offer information of no relevance to judges" (at 748). However, we argue that there is information on either the policy implications or the preferences of particular groups that is relevant to the judge in determining the outcome that satisfies his or her policy preferences. See also Collins, *ibid.* at 93.

25. Another connection, which we will not examine, involves the judge who sat on the motion to intervene. A judge may have a different voting pattern in cases where he or she sits on the motion and where he or she does not. There may be a pull towards accepting the arguments of an intervener that has been recognized as having useful information for the court. The connection may arise because the particular judge is anchored to the arguments already provided by the intervener in the motion, such that even under the legal model the judge may not vote in an entirely "rational" fashion. Similarly, the connection may arise under the attitudinal or strategic models of judging where the judge anchors to the policy position

FIGURE 1: INTERVENERS, JUDICIAL IDEOLOGY, AND MODELS OF INTERVENTION



There remain, however, considerable difficulties in sorting all these stories out. For example, the endogenous nature of some of these decisions makes it hard to determine which explanation is operative. There is a complex relationship between who decides to attempt to intervene, the rules on who gets intervener status, and the use judges make of intervener submissions. For example, to the extent that the acceptance model prevails and the information that interveners provide makes no difference to the ultimate decision, there will be an impact on whether interveners will wish to attempt to intervene (assuming they can properly anticipate whether their submissions will have any effect on the voting patterns of the judges).<sup>26</sup> Further, in order to assess which story explains how interveners affect a judge's decision, we need a measure of the counterfactual—how the judge would have voted if the intervener had not been present. It is unfortunately very difficult, if not impossible, to establish this counterfactual empirically. We will discuss these issues more in Parts II and III, below. Part II describes the data and reports general information on interventions. Part III discusses the statistically derived connection between judges' votes and interveners.

presented by the particular intervener. It may be hard to determine this effect given that judges often allow interveners on both sides of an issue.

26. Intervenors may still wish to intervene even if they have no effect on the particular decision. For example, they may hope that they can get publicity for their cause or provide evidence of how active they are to potential donors.

## II. INTERVENTIONS DURING THE MCLACHLIN ERA

In order to analyze the role of interveners, we created a database that includes all judgments decided by the Supreme Court of Canada from January 2000 to July 2009.<sup>27</sup> For each appeal, a broad range of information was recorded, including data about the identities of the parties,<sup>28</sup> the outcome of the appeal,<sup>29</sup> the classification of the appeal into an area of law,<sup>30</sup> the justices on the panel hearing the appeal, the vote of each justice and whether he or she authored an opinion, and the presence and identity of the interveners, if any, on each appeal. Additional information was gathered for each intervener. The data collected specific to each intervener included the lawyers and firms representing the intervener, the position of the intervener at the appeal,<sup>31</sup> the number of times the court cited the intervener in its judgment, whether the intervener appeared in the same case at the Court of Appeal, the identity of the motions judge allowing

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27. The appeals were accessed through LexisNexis and the Supreme Court of Canada's website. Nearly all of the data collected are directly verifiable from reference to the Supreme Court Reports. Some of the data collected was partially subjective and subject to the judgment of the coder, such as the position of the intervener at the appeal and the appeal's classification.

28. The category "aboriginal group" includes both individuals and groups of aboriginal descent involved in aboriginal disputes. The category "business" includes private entities (including both provincially- and federally-incorporated companies), individuals represented by corporations, and government-owned businesses (such as Crown corporations) that participate in open competition with other companies. Those government-owned businesses that provide services, such as education and health care, are not included, nor are those that are essentially monopolies (*e.g.*, Canada Post). The category "government" includes all government ministries, departments, agencies, tribunals, and bodies, such as police, school boards/schools, agents of the Crown, worker's compensation boards, Canada Post, prisons, child and family services, hospitals, and universities. The category "individual" includes estates, residents' associations, community groups and societies, and committees of individuals. The category "self-regulated organization" includes the provincial law societies and the College of Dentistry. The category "non-governmental organization" includes churches, such as the Canadian Council of Churches, and not-for-profit organizations, such as the Boys and Girls Club and Children's Foundation.

29. The outcome of an appeal was classified as "allowed," "dismissed," or "mixed" (*i.e.*, allowed in part). References were assigned to an independent category.

30. See the description in Part III, below.

31. The position of the intervener was classified as "supporting the appellant," "supporting the respondent," "neutral," or "unknown." It was determined by taking into account citations by the court, information the intervener published in regard to their participation, and logical inferences when the intervener's purpose would coincide with one of the parties.

the application for leave to intervene, and the nature of the constraints put on the intervener's appearance at the appeal.<sup>32</sup>

The lifecycle of an intervention has three main stages. The first stage is the threshold point at which the Court decides whether to hear from a particular intervener or not. At this point, as explained above, a single motions judge hears the would-be intervener's explanation of why it is seeking to make submissions in an appeal. At this first stage, a very high proportion—well over 90 per cent—of parties seeking leave to intervene is successful.<sup>33</sup> At the second stage of the lifecycle of an intervention, the Court actually hears from and considers the submissions of an intervener, usually both in writing in the form of a *factum* submitted to the Court and through an appearance at the hearing of an appeal.<sup>34</sup> At the third and final stage of an intervention, the Court issues its reasons in the appeal. We focus on this stage as this is the point at which we can most effectively examine the consequences of interventions on the decision making of the Supreme Court of Canada.

As outlined in Table 1, below, there was a total of 674 appeals decided during the McLachlin era from 1 January 2000 to 31 December 2008.<sup>35</sup> Of these 674 appeals, 330 had submissions by interveners. In Table 1, reference is made to only those interventions that we coded as either conservative or liberal. The "success rate" column reflects the rate at which the Court decided consistently with the orientation of each non-neutral intervention. Figure 2 shows that the proportion of appeals with interveners increased in the mid-1990s from 20 to 30 per cent to over 60 percent at the high point in 2007. While this is quite a dramatic increase in intervener activity, the intervention rate in Canada still pales in comparison to that at the US Supreme Court. By the 1990s, approximately 90 per cent of appeals to the US Supreme Court had at least one amicus brief filed.<sup>36</sup>

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32. Not all of these data are reported here for the purposes of concision and clarity. The data are on file with the authors.

33. From 2000 SCC 1-2009 SCC 38, we recorded 1280 instances of parties seeking leave to intervene. Of these instances, 1170 were successful, representing a success rate of 91.4 per cent. In addition, on 361 occasions there were interventions by way of notice by attorneys general in cases involving statutory constitutionality.

34. A party granted leave to intervene must make a decision about whether they will submit a *factum* and appear before the Court. In most cases, interveners do take up the opportunity to present information to the Court.

35. The appeals heard in the first half of 2009 are ignored so that only decisions for the full calendar years available at the time of writing are included.

36. See Collins, *supra* note 3.

TABLE 1: APPEALS AND INTERVENTIONS, 2000–2008

Year	Appeals	No. with Interveners	Fraction with Interveners	Non-Neutral Interventions	Success Rate
2000	69	31	44.9%	131	58.0%
2001	94	33	35.1%	169	66.9%
2002	86	39	45.3%	128	64.8%
2003	75	42	56.0%	159	52.2%
2004	82	43	52.4%	140	54.3%
2005	85	46	54.1%	205	66.3%
2006	59	28	47.5%	118	59.3%
2007	55	34	61.8%	141	58.9%
2008	69	34	49.3%	123	61.8%
Total	674	330	49.0%	1314	60.6%

FIGURE 2: SCC INTERVENTIONS, 1983–2008

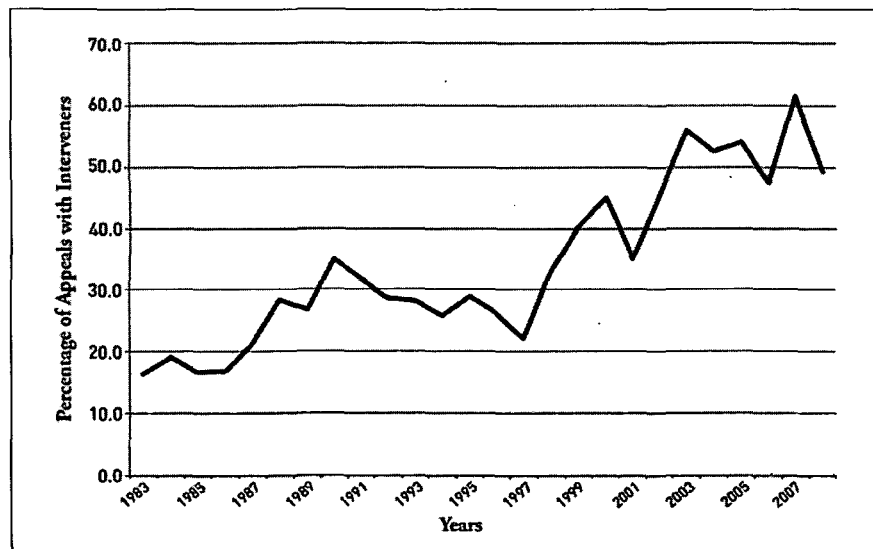




FIGURE 3: APPEALS WITH INTERVENERS, 1984-2008

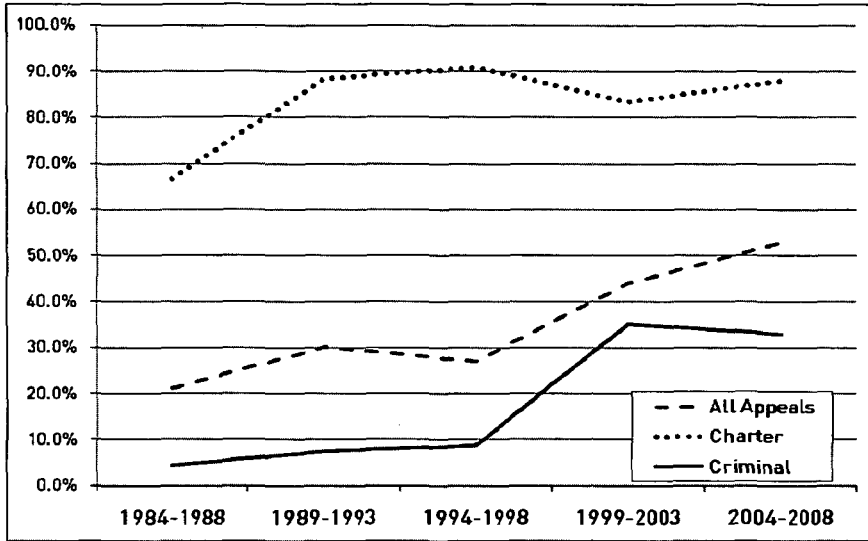


FIGURE 4: VOLUME OF INTERVENTIONS, 1983-2008

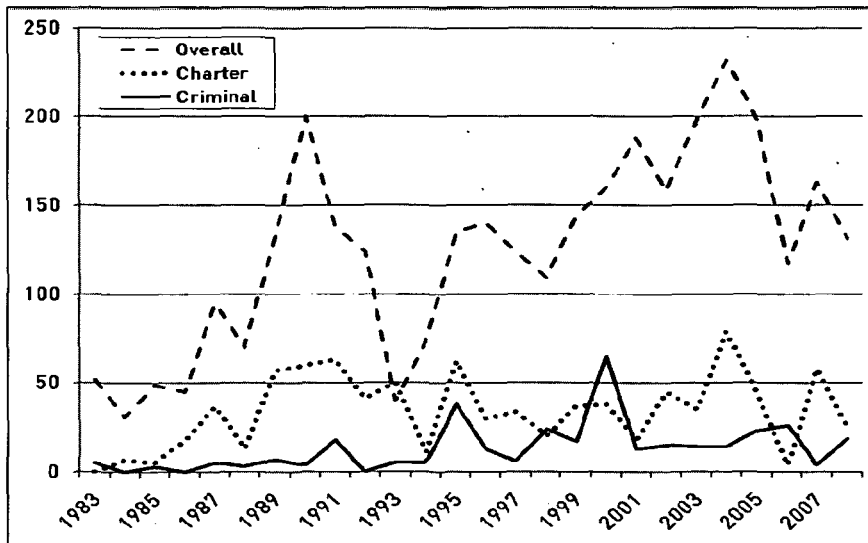


TABLE 2: LEAVE TO INTERVENE, 2000–2008

Intervener	Granted Leave	Denied	Success Rate
Attorneys General (by notice)	361	0	100%
Attorneys General (by leave)	253	6	98%
Public Interest Groups	217	32	87%
Trade Associations	190	10	95%
Financial Interests	131	15	90%
Aboriginal Groups	125	9	93%
Government Interests	113	4	97%
Religious Groups	46	7	87%
Individuals	45	14	76%
Environmental Groups	44	1	98%
Unions	39	6	87%
Public Advocacy Law	34	4	89%
School Boards	25	0	100%
Other	18	2	90%
Total	1641	110	94%

The rate of interventions has varied considerably by area of law. A little over 50 per cent of the appeals with interventions in the period from 1983–2008 were either *Charter* or criminal cases. *Charter* appeals were the most intervener intensive (see Figure 3), with a rate of intervention approaching 90 per cent throughout the 1990s and 2000s. The rate for criminal appeals was lower than the average for other appeals. The percentages for other areas of law were fairly consistent with the average overall level of interventions, albeit with some exceptions (e.g., aboriginal law, which tends to exhibit relatively high rates of intervention).

The proportion of appeals with interveners rose more quickly than did the average number of interveners per appeal (see Figure 4). In fact, this rate of interventions per appeal did not vary much from 1983–2008. The appeals with interveners had an average of 4.1 interveners. The highest number of interveners was in *Charter* cases, which had on average 5.7 interveners per case, with the average increasing over time (from an average of 5.6 interveners per case in the 1990s to 7.6 per case in the 2000s). Criminal cases had a much lower number of interveners per appeal, with just 2.6 interveners per appeal.

**TABLE 3: SUCCESS RATES BY INTERVENER, 2000–2008**

Intervener	Interventions	Success Rate
Religious Groups	46	94%
Attorneys General (by notice)	360	79%
Environmental Groups	44	70%
Individuals	45	68%
Government Interests	113	66%
Public Interest Groups	215	63%
Trade Associations	190	55%
Other	18	54%
Public Advocacy Law	34	54%
Aboriginal Groups	125	54%
Attorneys General (by leave)	252	53%
Unions	39	47%
Financial Interests	131	40%
School Boards	25	16%

Table 2 shows the success rates of parties seeking leave to appeal to the Supreme Court of Canada. As noted above, the Court granted a little over 90 per cent of the applications for leave to appeal. In terms of who is intervening, about a third of all interventions were by attorneys general, either by notice or by leave. Public interest groups and trade interests were the next largest groups of interveners. When seeking leave to appeal, attorneys general had a very high rate of success (approximately 98 per cent). Individuals had the lowest success rate, with only slightly over 75 per cent obtaining leave.

The final column in Table 1, above, reveals another interesting aspect of the data. For interveners for which we could identify a particular position, the decision was in line with that position about 61 per cent of the time. This success rate was relatively constant over the period from 2000–2008. However, the success rate did vary significantly by intervener type. As can be seen from Table 3, religious groups had the highest success rate, followed by attorneys general that were intervening by notice (that is, an intervention addressing the constitutionality of legislation, which can be done as of right). School boards and financial interests had the lowest success rates over the period.

Most parties that seek permission of the Court to intervene are allowed to intervene. Interventions have increased over time both in terms of the number of appeals with interveners and the total number of interveners. If there is an intervention in an appeal, the number of interveners per appeal for all types of appeals has not changed significantly over time on average, although the number of interveners per *Charter* appeal has increased. About 60 per cent of the time, the final result of the appeal is in line with the position of any given intervener. While these figures do seem to imply an increasing and successful role for interveners at the Supreme Court of Canada, they do not provide us with information about the actual effect, if any, of interventions on the decisions of the Court or of the judges. Indeed, it may simply happen to be the case that interveners tend to exhibit a tendency to want to bolster relatively strong cases as compared to relatively weak cases.

To rule out other possible explanations for the observed patterns of intervener success in the McLachlin era, we need to adopt more sensitive methodologies. In Part III, we deploy several sophisticated statistical methodologies to control, in a variety of ways, for other influences and isolate the apparent influences of interveners on judicial decision making at the Supreme Court of Canada. The next Part therefore analyzes the extent to which this increasing level of intervention is actually having an impact on the votes of the justices and the decisions of the Court.

### III. DO INTERVENTIONS AFFECT HOW JUDGES VOTE?

An initial determination of the potential impact of interveners on the Court could be made by examining whether the Court or particular judges vote differently in the presence of interveners. This approach is somewhat naive as it assumes that any difference in voting between cases with and without interveners is attributable entirely to the presence of the interveners rather than to the differences in the types of cases in which an intervener may seek to be present. A controlled experiment would be the ideal way to study the difference interveners make, since it would allow for sound inferences regarding how judges would have voted in a similar case with and without interventions. However, such an experiment is unlikely as it would require random assignment of interveners to appeals, which would presumably be objectionable to the Court, the parties, and the interveners.

One method of ascertaining how judges decide cases is an indirect method of analysis. This indirect method uses an item response theory model with a Monte Carlo Markov chain Bayesian estimation method.<sup>37</sup> This approach has been popularized in the study of the US Supreme Court by political scientists Andrew Martin and Kevin Quinn, and it is one that we have adopted in earlier studies of the decision making of the justices of the Supreme Court of Canada.<sup>38</sup> The indirect approach assumes that justices are at least partly influenced by policy preferences in deciding cases and that these preferences are one-dimensional (that is, could in theory be arrayed along a line).<sup>39</sup> Its principal advantage over other more direct ways of measuring or assessing judicial decision making is that the estimation results are driven by the votes of the judges. More specifically, there is no need to claim that any given judgment is conservative or liberal, and all the votes of all the judges can be used.

As a first step then, we deploy this indirect method on data of judge votes on all the appeals in an extended dataset, starting with cases heard at the outset of the 1982–1983 term of the Supreme Court of Canada and ending with the cases with judgments released up to July 2009. We then split the data into two sets. The first set includes only appeals that included submissions from at least one intervener and had at least one dissenting opinion ( $n = 291$ ). The second set includes only appeals that did not include any submissions from interveners and had at least one dissenting opinion ( $n = 363$ ). These two sets of cases were then analyzed separately using the indirect method. Figure 5 depicts the results of this indirect method for justices with votes recorded in at least 100 of the appeals that had at least one dissenting opinion from 1982–2009.<sup>40</sup> A quick glance at Figure 5 clearly suggests that there is a remarkably high correlation

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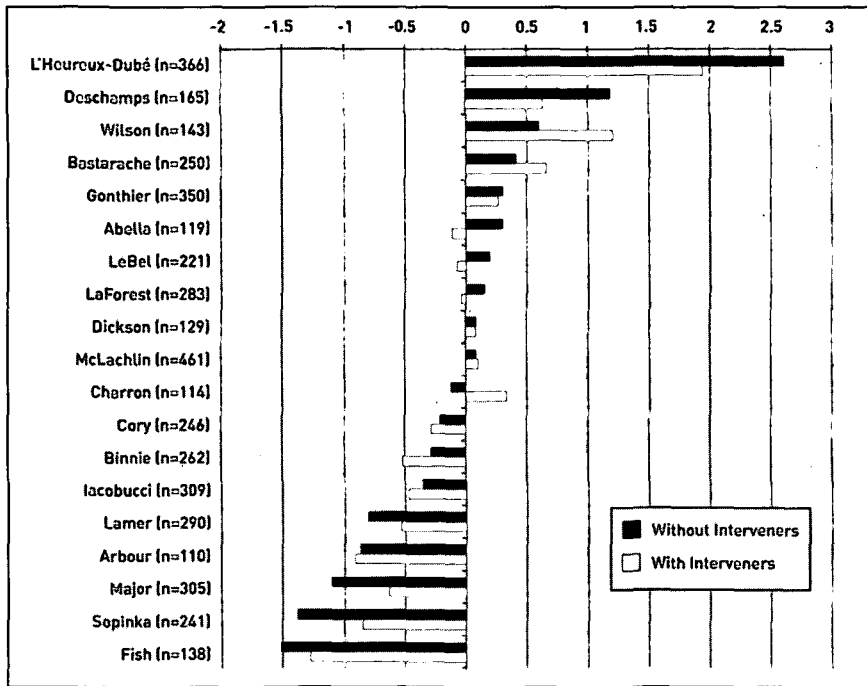
37. See Andrew D. Martin & Kevin M. Quinn, "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US Supreme Court, 1953-1999" (2002) 10 *Pol. Analysis* 134.

38. See Benjamin Alarie & Andrew Green, "The Reasonable Justice: An Empirical Analysis of Frank Iacobucci's Career on the Supreme Court of Canada" (2007) 57 *U.T.L.J.* 195; Alarie & Green, "Policy," *supra* note 21; and Benjamin Alarie & Andrew Green, "Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada" (2009) 47 *Sup. Ct. L. Rev.* (2d) 475.

39. For a more detailed treatment of the problems with the assumptions made in the use of this method, see Alarie & Green, "Policy," *ibid.*

40. The estimation procedure included all of the justices who sat on these appeals. Several of the omitted judges were on so few appeals that their estimates are not worth reporting. The full results of the indirect analysis are available upon request from the authors.

FIGURE 5: IDEAL POINT ESTIMATES, 1982–2009



between the mean of the ideal point estimates with and without interveners for these nineteen justices; indeed, the correlation is a robust 0.93.

What does this suggest about the effect of interveners? One interpretation could be that this result shows that interveners have little or no effect on the voting behaviour of the justices. However, the indirect method results in an ordinal ranking of justices from one pole of the policy space to another—in one case with interveners and, in the other, without interveners. A more careful conclusion, therefore, is that whatever effect interveners are having on the justices appears not to be, affecting judicial voting differentially across judges. In other words, interveners appear to affect each of the judges consistently and in a way that does not appear to result in significant changes to the ordering of the judges' revealed policy preferences.

To move beyond this tentative conclusion from the indirect method, we shift analytical techniques. We begin by characterizing the cases according to whether the decision of the Court or the vote by a particular judge is liberal or

conservative. In order to make this categorization plausible, we examined only five areas of law: “*Charter*,” “criminal,” “labour,” “tax,” and “aboriginal rights” appeals. This coding was not mutually exclusive and allowed each appeal to be classified as two different appeal types; for example, an appeal could be considered as involving both the *Charter* and criminal law. We then classified each vote and the resulting judgment as conservative or liberal according to the system used in our previously published work.<sup>41</sup> In *Charter* appeals, a vote in favour of the claimant is considered to be liberal, and a vote in favour of the government is considered to be conservative. In criminal appeals, a vote in favour of the defendant is considered to be liberal and a vote in favour of the prosecution is considered to be conservative. In labour appeals, a vote in favour of a union, labour organization, or worker is considered to be liberal, and a vote in favour of an employer or business interest is considered to be conservative. In tax appeals, a vote in favour of the government is considered to be liberal and a vote in favour of the taxpayer is considered to be conservative. Finally, in aboriginal rights appeals, a vote in favour of an aboriginal group or individual is considered to be liberal, and a vote in favour of the government is considered to be conservative.

The first question we address using the direct method is similar to the question asked using the indirect method: is there any difference in how the Court as a whole votes in appeals in which an intervener is present as opposed to appeals where there is no intervener? The dependent variable used in this analysis is the Court’s decision—that is, whether the Court’s decision in the appeal was liberal or conservative. We assume (naively) that we can simply discern the impact of interventions on the Court’s decision making by examining the difference in how the Court decides when an intervener is or is not present. In order to examine the possibility that the Court is voting differently in cases simply because appeals are in different areas of law, we included control variables for the five areas of law. The results suggest that, if an intervener is present, the liberality of the Court’s decision does not change in a statistically significant way.<sup>42</sup>

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41. For a description of this methodology, see Alarie & Green, “Policy,” *supra* note 21.

42. We ran a probit regression with the Court vote (liberal or conservative) as the dependent variable. The control variables were the areas of law (*Charter*, criminal, tax, and labour, with aboriginal rights omitted), along with a dummy variable for whether an intervener is present. The intervener variable suggested a small pro-liberal effect on the outcome, but was not statistically significant.

These regressions use the rate of the Court reaching a liberal outcome as the dependent variable and the presence of an intervener as the independent variable of interest. Progressing in this way can easily mask changes that may be important, such as how certain types of interventions (*i.e.*, one that is liberal versus one that is conservative or “neutral”) affect the disposition of the appeal by the Court.<sup>43</sup> In other words, the regressions treat as equivalent the presence of any intervention, regardless of whether the intervener was in favour or against the demands of a rights claimant. This is obviously problematic.

For this reason, we also categorized the type of intervention in each appeal and ran regressions to examine the effect of each intervention on the probability of the Court reaching a liberal outcome, while at the same time controlling for the type of case. In this case, statistically strong results emerged. We found that the addition of each liberal intervener increased the probability of the Court reaching a liberal outcome by 4.3 per cent and the addition of each conservative intervener increased the probability of the Court reaching a conservative outcome by 5.2 per cent.<sup>44</sup> The effect of the addition of each neutral intervener was not statistically significant. The estimated rate of liberal outcomes for the Court as a whole in *Charter* cases was 46.2 per cent without an intervener and, therefore, the presence of one liberal intervener would tend to lead the Court to vote in favour of the rights claimant 50.5 per cent of the time.

The results for the form of intervention and the disposition of the appeal by the Court considered as a whole are statistically significant, have the correct sign, and suggest strongly that interveners affect, to a limited but significant extent, how the Court decides appeals. However, the above regressions continue to mask an issue that may be of considerable interest—how does the presence of interveners affect how individual judges vote, rather than simply how the Court as a whole disposes of an appeal?<sup>45</sup>

To address this question, we used the votes of individual judges as the dependent variable instead of the judgment of the Court as a whole. We continued to use controls for the case type and added interaction terms between judges and the

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43. See Collins, *supra* note 3 at 97-114 (examining the impact of different categories of interveners on decision making).

44. With the exception of the number of neutral interveners, each of these estimates was statistically significant (at a greater than 99 per cent confidence level).

45. See Collins, *supra* note 3 at 9-10 (arguing that judge votes are a better variable of analysis than court votes).



form of intervention as independent variables in order to determine how judges respond to the presence of interveners of different types. The results appear in Table 4, below.<sup>46</sup>

TABLE 4: INTERVENER INFLUENCE BY JUSTICE

Justice	Estimated Liberal Voting, <i>Charter</i> Appeals with No Intervenors	+1 Liberal Intervener	+1 Conservative Intervener	+1 Neutral Intervener
L'Heureux-Dubé**	33.9%	+7.0% **	-6.8% **	-0.4%
Gonthier**	38.5%	3.9%	-5.0% **	5.0%
McLachlin	49.9%	+5.0% ***	-6.1% ***	+8.0% *
Iacobucci	54.1%	1.9%	-3.8% *	7.8%
Major	52.2%	1.6%	-3.7% **	+7.5% *
Bastarache	42.4%	+3.5% **	-4.0% **	+7.0% *
Binnie	51.6%	+2.6% **	-3.1% **	5.3%
Arbour	56.6%	2.8%	-3.8% *	7.3%
LeBel	49.5%	+2.1% *	-3.3% **	5.9%
Deschamps	47.8%	2.3%	-3.4% *	+8.2% *
Fish ***	63.3%	1.6%	-4.6% **	1.7%
Abella	48.4%	+9.6% ***	-7.8% ***	11.3%
Charroñ	53.2%	+4.5% **	-9.3% ***	10.7%
Rothstein**	34.7%	+4.2% *	-6.6% *	+37.8% *

There are a number of striking results from this analysis. The most important finding is that all of the judges appear to be susceptible to at least one kind of intervener influence at a statistically significant level. Thus, we cannot say that even one of the judges is impervious to the effects of interveners at the Supreme

46. In Table 4, one asterisk indicates statistical significance at a 90 per cent confidence level, two asterisks indicate statistical significance at a 95 per cent level, and three asterisks indicate statistical significance at a 99 per cent level. Statistical significance in the first column, indicates that a judge votes more or less liberally than Chief Justice McLachlin, since she is used as the baseline. Statistical significance in the other columns of Table 4 indicates that a judge departs from his or her voting in "no intervener" appeals in a statistically significant manner.

Court of Canada over this period. It appears that conservative interveners significantly affect all the judges. All of the signs are negative for all of the judges across both specifications, and all are statistically significant. The judges have been responding to the presence of conservative interveners by voting more conservatively on average than they otherwise would when no conservative intervener is present. Another striking finding is that all of the judges respond to the presence of an additional liberal intervener by voting on average more liberally, but at a rate that is less (with the exception of Justice L'Heureux-Dubé) than the amount by which each would vote more conservatively with the addition of another conservative intervener. That is, the absolute value of the effect of an additional conservative intervener is greater than the absolute value of the effect of an additional liberal intervener. Finally, there is a mystery that emerges from the results—neutral interveners appear to make the judges vote more liberally (again, with Justice L'Heureux-Dubé as the sole exception) on average than do liberal interveners.

The advantage of conducting the empirical analyses at the level of the individual judge is that it allows us to control to the maximum extent possible for the idiosyncratic responses to interveners that judges might exhibit. One of the drawbacks is that, in some sense, we might have taken the controls too far. That is, there may be certain traits or previous experiences judges have—such as having been legal academics (or not), being female or male, being appointed as a judge from a common law province or a province with a civil code (*i.e.*, Quebec), or having been on the Court for varying amounts of time—that might systematically affect the response of judges to interveners in a non-idiosyncratic way. In order to see whether the judge-by-judge estimation skipped over some interesting cross-judge traits that may predict, in a general way, how judges respond to interveners, we ran a variety of regressions with judge votes as the dependent variable and various non-judge specific traits as the independent variables. The independent variables include factors such as gender, whether the judge was from Quebec or not, experience prior to joining the Court, and, as a measure of ideology, the party of the appointing prime minister.

We found that two of these non-judge specific traits were statistically significant. The party of the appointing prime minister appeared to increase the probability of a judge voting in a liberal direction by just under 4 per cent. This result was statistically significant at a 90 per cent confidence level. We found that gender was also significant, with female justices (all else the same) voting in a

liberal direction at a rate about 4 per cent higher than male justices. This result was statistically significant at a 95 per cent confidence level. Although this is in some sense a judge-specific trait, it bears mentioning that in the same regression, each additional unit of the ideal point score for a judge increased the tendency for a judge to vote conservatively by 7.6 per cent. This result was significantly different from zero at a 99.9 per cent level of confidence.

For our purposes, it is also important to examine whether the ideology of a given judge as measured by the party of the appointing prime minister or by their estimated ideal point score (from the indirect method) impacts the influence of different interveners. Under the affiliation story, for example, we would see judges appointed by Liberal prime ministers or those with negative ideal point scores particularly influenced by liberal interveners. However, when we include interaction terms between the party of the appointing prime minister and the number of different types of intervention (liberal, conservative, or neutral), the interaction terms are not significant. A similarly insignificant outcome results when we include interaction terms between a judge's ideal point and the number of different types of intervention (liberal, conservative, or neutral).<sup>47</sup> This result indicates that liberal or conservative judges (as measured by whether they were appointed by Liberal or Conservative prime ministers or by their estimated ideal point score in cases without interventions) are not impacted differentially by interveners with similar policy inclinations.

Notably, in each of the regressions that included judicial traits as independent variables, liberal interveners continued to have a statistically significant liberal influence on liberal voting rates, but this effect was not as strong in absolute value terms as the conservative influence exerted by conservative interveners. The mystery, too, remained regarding neutral interveners having a liberal influence on voting by members of the Court.

One final thing we checked is how significant the threshold issue of discriminating between those appeals that have at least one intervener and those that have no interveners is in its influence on our results. To do this, we repeated our analysis using judge votes as the dependent variable only on those cases with at least one intervener. The results are consistent in pattern with the earlier results. A liberal intervener has a liberal effect of 2.9 per cent, a conservative intervener

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47. We used the estimated ideal point scores from the "without interveners" category, reported in Figure 5.

has a conservative effect of 5 per cent, and a neutral intervener has a liberal effect of 6.4 per cent. All of these coefficients are statistically significant.

#### IV. SOME CONCLUDING OBSERVATIONS ON THE IMPACT OF INTERVENTIONS

There appear to be several regularities that emerge from these analyses of the intervener data. From the indirect analysis, the lesson that emerges is that interveners have little or no effect on how judges sort themselves in policy space. That is, if interveners are shifting judges in a more conservative or more liberal direction, it appears that interveners are shifting the members of the Court as a bloc or, alternatively, not so far or so differentially as to cause judges to occupy a different ranking in policy space vis-à-vis his or her colleagues on the Court.

From the direct analysis, we learn that the presence of an intervener does have a modest effect in increasing the liberality of the decisions of the Court, even when one does not control for the type of intervener. Once controls are used for the identity of the intervener and the form of each intervention (liberal, conservative, or neutral), this effect is disaggregated into a moderate liberal boost of about 3 to 4 per cent for each liberal intervener, a more significant conservative boost of 4 to 6 per cent for each conservative intervener, and an equally significant liberal boost of about 4 to 6 per cent for each neutral intervener. Further, while it appears that some judges are more affected by certain types of interveners than other judges, the result from the indirect method that the members of the Court appear to be affected en masse is consistent with these results from the direct analysis.

We also learned that all judges are susceptible to intervener influence in a statistically significant way. Two measures of ideology appear to affect the liberality or conservatism of judicial voting. The first is the party of the appointing prime minister and the second is the judge's estimated ideal point. Gender also matters. But a judge's province of origin, the length of time a judge has been at the Court, or the nature of the judge's legal career prior to joining the Court (*i.e.*, academic, practitioner, appellate judge, et cetera) are all statistically insignificant.

What do these results tell us about our three stories of why the Court may allow interventions? First, the acceptance story would have required there to be no statistically significant relationship between the presence of interveners (or particular types of interveners) and the decision making of the Court or

particular judges. The modest but significant impact of interveners on voting by the Court as a whole and by individual judges cuts against the acceptance story. There may be instances where particular parties are granted leave to appeal on acceptance grounds, but the evidence suggests that acceptance is not the sole determinant of a decision to grant leave to intervene.

Second, in terms of the accuracy story, the results from the individual judges indicate that in the presence of interveners judges in some cases vote in a direction different than would be predicted from general indicators of their ideology. The clearest example is that judges with high liberal voting percentages (such as Justices Arbour and Fish) tended to vote more conservatively in the presence of conservative interveners. Moreover, if the party of the appointing prime minister is taken as an indicator of ideology, liberal judges (judges appointed by Liberal prime ministers) vote more conservatively in the presence of conservative interveners and some conservative judges (such as Justice L'Heureux-Dubé, who was appointed by a Conservative prime minister) vote in a more liberal direction in the presence of a liberal intervener. The same results hold when the ideal point of the judge is used instead of the relatively crude "party of the appointing prime minister" measure of ideology.

Finally, we found little support for the affiliation story, particularly given the difficulties of separating it from the accuracy story. For example, there is clear evidence that conservative judges (judges with low liberal voting rates) vote conservatively in the presence of conservative interveners, but so too do liberal judges. It may be that they are all getting useful information from these interveners. As noted above, when the cross-judge characteristics were included rather than the judges themselves, the party of the appointing prime minister had a small, but statistically significant, impact on how judges voted. However, the key is how ideology impacts the way in which particular judge votes in the presence of a similarly inclined intervener. Our results indicate that liberal or conservative judges (as measured by the party of the appointing prime minister or by the judge's ideal point score) are not particularly affected by interveners with similar policy inclinations.

The number of interveners before the Supreme Court of Canada has increased rapidly in recent years. On one view this increase could be concerning—it could indicate that judges of the Court are merely trying to justify or bolster their pre-existing policy inclinations by allowing submissions from interveners with similar views. Alternatively, the Court may be granting interventions to try

to gain acceptance of its decisions by a larger community, but without any observable benefit in terms of the accuracy of the Court's decisions. However, our results are consistent with a more optimistic story. The Court is allowing a higher number of intervening parties and appears to be using the interventions to better understand the impacts of its decisions. This optimistic story is similar to what Collins found in examining the impact of interveners in the United States.<sup>48</sup> In contrast, however, far fewer appeals have interveners at the Supreme Court of Canada. This result may also be consistent with the optimistic story. The Court here is particularly willing to hear from interveners if there is a possibility of gaining some valuable information—and potential interveners understand this. For that reason, there may be a feedback effect on the willingness of would-be interveners to attempt to obtain leave to intervene. The increase in the number of interveners, so far at any rate, seems to be a positive development in the practice of the Court.

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48. See Collins, *supra* note 3.