File Number: 36167

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JESSICA ERNST

Applicant
(Appellant)

-and-

ALBERTA ENERGY REGULATOR

Respondent
(Respondent)

REPLY TO RESPONSE
DONNA FRANCES DAHM and ROBERT PIUS PLOWMAN
Rule 50 of the *Rules of the Supreme Court of Canada*

October 5, 2015

MINTZ LAW
400 10357, 109 St NW
Edmonton, Alberta
T5J 1N3

Avnish Nanda
Dev S. Nanda

Telephone: (780) 425-2041
Facsimile: (780) 425-2195
Email: avnish@nandalaw.ca

Counsel to Donna Frances Dahm and Robert Pius Plowman

ORIGINAL TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

COPIES TO:

KLIPPENSTEINS
Suite 300
160 John Street
Toronto, Ontario M5V 2E5

Murray Klippenstein
W. Cory Wanless

Telephone: (416) 598-0288
FAX: (416) 598-9520
E-MAIL:
Murray.Klippenstein@Klippensteins.ca

Counsel for the Appellant.

NELLIGAN O'BRIEN PAYNE LLP
1500-50 O'Connor Street
Ottawa, Ontario K1P 6L2

Christopher Rootham

Telephone: (613) 231-8311
FAX: (613) 788-3667
E-mail: christopher.rootham@nelligan.ca

Agent for the Appellant.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP
Suite 800
304-8 Avenue SW
Calgary, Alberta T2P 1C2

Glenn Solomon, QC
Christy Elliott

Telephone: (403) 571-1520
FAX: (403) 571-1528
E-MAIL: GSolomon@JSSBarristers.ca

Counsel for the Respondent.

GOWLING LAFLEUR HENDERSON LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario K1P 1C3

Jeffrey W. Beedell

Telephone: (613) 786-0171
FAX: (613) 788-3587
E-MAIL: Jeff.Beedell@gowlings.com

Agent for the Respondent.

ATTORNEY GENERAL OF CANADA
Suite 500
50 O'Connor Street,
Ottawa, Ontario K1A 0H8

Christopher M. Rupar

Telephone: (613) 670-6290
FAX: (613) 954-1920
E-Mail: Christopher.Rupar@justice.gc.ca

Agent for the Attorney General of Canada.

ATTORNEY GENERAL FOR SASKATCHEWAN
820-1874 Scarth Street
Regina, Saskatchewan S4P 4B3

Graeme G. Mitchell, Q.C.

Telephone: (306) 787-8385
FAX: (306) 787-9111
E-MAIL: Graeme.Mitchell@gov.sk.ca

Counsel for the Attorney General for Saskatchewan.

GOWLING LAFLEUR HENDERSON LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt

Telephone: (613) 786-8695
FAX: (613) 788-3509
E-mail: Lynne.Watt@gowlings.com

Agent for the Attorney General for Saskatchewan.

ATTORNEY GENERAL OF BRITISH COLUMBIA
6th Floor
1001 Douglas Street
Victoria, British Columbia V8W 9J7

Jonathan G. Penner

Telephone: (250) 952-0122
FAX: (250) 356-9154
E-Mail: Jonathan.Penner@gov.bc.ca

Counsel for the Attorney General of British Columbia.

BURKE-ROBERTSON
Suite 200
441 MacLaren Street
Ottawa, Ontario K2P 2H3

Robert E. Houston, Q.C.

Telephone: (613) 236-9665
FAX: (613) 235-4430
E-Mail: RHouston@burkerobertson.com

Agent for the Attorney General of British Columbia.

ATTORNEY GENERAL OF QUEBEC
2e étage
1200, route de l'Église
Québec, Quebec G1V 4M1

Robert Desroches
Carole Soucy

Telephone: (418) 643-1477
FAX: (418) 644-7030
E-Mail: Robert.desroches@justice.gouv.qc.ca

Counsel for the Attorney General of Quebec.

NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, Quebec J8X 3R1

Pierre Landry

Telephone: (819) 771-7393
FAX: (819) 771-5397
E-Mail: P.Landry@noelassocies.com

Agent for the Attorney General of Quebec.

CHERNOS FLAHERTY SVONKIN LLP
Suite 710
40 University Avenue
Toronto, Ontario M5J 1T1

Stuart Svonkin
Brendan Brammall
Michael Bookman

Telephone: (416) 855-0404
FAX: (647) 725-5440
E-mail: ssvonkin@cfscounsel.com

Counsel for the Canadian Civil Liberties Association.

BORDEN LADNER GERVAIS LLP
Suite 1300
100 Queen Street
Ottawa, Ontario K1P 1J9

Nadia Effendi

Telephone: (613) 237-5160
FAX: (613) 230-8842
E-mail: neffendi@blg.com

Agent for the Canadian Civil Liberties Association.

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PART I: OVERVIEW

A. OVERVIEW

1. Donna Frances Dahm ("Dahm") and Robert Pius Plowman ("Plowman") filed a Motion for Leave to Intervene in *Jessica Ernst v Alberta Energy Regulator* (Supreme Court of Canada File No.: 36167) on September 18, 2015, pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*.

2. On October 1, 2015, pursuant to Rule 49 of the *Rules of the Supreme Court of Canada*, the Respondent, Alberta Energy Regulator ("AER"), filed and served a Response to the Motion for Leave to Intervene filed by Dahm and Plowman.

3. Pursuant to Rule 50 of the *Rules of the Supreme Court of Canada*, Dahm and Plowman submit this memorandum of argument as a Reply to the Response filed by the AER.

4. Dahm and Plowman submit that the allegations contained in the AER's Response are unsubstantiated and without merit, and should be dismissed in their entirety. Dahm and Plowman have a direct interest in the question being decided on appeal, and will make submissions that will be helpful and useful to this Honourable Court.

PART II: STATEMENT OF ARGUMENT

A. DAHM AND PLOWMAN ARE NON-PARTISAN AND NOT ALIGNED WITH EITHER PARTY

5. Dahm and Plowman reject the AER submission that they do not satisfy the requirements of Rule 57 of the *Rules of the Supreme Court of Canada*.

6. Dahm and Plowman take a position on the question on appeal, but are neither "partisan" nor "wholly aligned" with the Appellant.

7. The question on appeal is:

> Is s. 43 of the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, constitutionally inapplicable or inoperable to the extent that it bars a claim against the regulator for a breach of s. 2(b) of the *Canadian Charter of Rights and Freedoms* and an application for a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms*?

8. Dahm and Plowman's position is that s. 43 should be rendered inapplicable or inoperative to the extent that it bars **all** claims seeking remedies under section 24(1) of the *Charter*. Holding otherwise would render the AER immune from any *Charter* liability, and curtail the ability of individuals and organizations to hold the AER accountable for *Charter* violations.

9. Dahm and Plowman do not take a position on whether s. 43 is constitutionally inapplicable or inoperable to the extent that it bars a claim for a breach of s. 2(b) of the *Charter*, or whether the **specific remedy** sought under s. 24(1) by the Appellant should be granted on the facts at hand.

10. Dahm and Plowman clearly highlight this distinction at various points in their Motion for Intervention, including at paragraph 21(b) (emphasis added):

> The court has a variety of *Charter* remedies available to it under section 24(1). The consequences and considerations of each remedy differ from one another. **For instance, *Charter* damages may impose financial liabilities on administrative bodies that undermine the administrative process, constituting policy reasons to bar such a remedy.** However, declaratory statements also constitute section 24(1) remedies, and do not carry with it the financial liabilities that correspond with damage awards. Declaratory statements act as judicial notice on the constitutionality of the state's conduct, and provide clarity with respect to *Charter* rights and cause the state to engage in corrective action or behaviour. **The policy considerations that make *Charter* damages against administrative bodies unsustainable do not correspond with granting declaratory statements on the constitutionality of the state's conduct under section 24(1). Therefore, the policy rationale that may be the basis to bar *Charter* damages under section 24(1) against administrative bodies should not be used to bar other or all remedies available to the court under the provision.** A more contextual approach should be adopted to determine the suitability of section 24(1) *Charter* remedies against administrative bodies.

11. Dahm and Plowman propose that this Honourable Court engage in a contextual analysis of which s. 24(1) *Charter* remedies should be barred against the AER as a result of the statutory immunity clause. Dahm and Plowman neither support the Appellant nor the AER in the respective outcome they seek in this appeal, but have crafted their own nuanced position, reflecting their own unique interests. They do not take a position on how this Honourable Court should treat the specific remedy sought by the Appellant in this case, and even acknowledge the rationale that undergirds the AER's position.

12. Dahm and Plowman are not proposing to "descend into the arena," and are neither submitting a position that is "wholly aligned" with the Appellant. Interveners frequently appear before this Honourable Court and take positions such as Dahm and Plowman that answer a portion of the questions on appeal, while remaining agnostic to the rest and indifferent to how the question applies to the specific facts on appeal. This is not being "partisan," but rather, is consistent with Major J's statement that the AER provides on page 1 of its Response, which states that interveners should strive to maintain objectivity and neutrality.

B. DAHM AND PLOWMAN HAVE A DIRECT INTEREST IN THE OUTCOME OF THE APPEAL

13. The AER concedes that Dahm and Plowman have a direct interest in the outcome of this appeal, yet object because it is "personal" in nature. The AER fails to clearly define what is meant by "personal," provide any authority as to why a direct interest for the purposes of Rule 57 precludes interests that are "personal," or explain why a direct interest cannot relate to how the question on appeal impacts another party's ability to exercise their legal rights.

14. Dahm and Plowman's legal rights are directly impacted by the outcome of this appeal. This Honourable Court routinely grants leave to intervene to individuals whose interest in the question on appeal is how its determination will impact their legal rights.[1] Dahm and Plowman's interest in this appeal is neither novel, nor is there any authority that bars interests of this nature under Rule 57.

C. OTHER OBJECTIONS TO THE AER'S RESPONSE

15. The AER alleges that Dahm and Plowman seek to raise new evidence in this appeal. This is not true. The exhibits attached to Dahm and Plowman's Affidavits are included to support their submissions in the Motion for Intervention, and not to supplement the appeal record.

16. The AER provides no supporting evidence to the claim that a limitations bar defeats Dahm and Plowman from asserting the legal rights that form the basis of their interest in this appeal. Dahm and Plowman became aware of the source of their harms and the AER's involvement on March 31, 2014 with the release of the inquiry's findings. Alberta's limitations law provide them two years from that date to file their claim.

D. FACTUM LENGTH AND HEARING APPEARANCE

17. Interveners are generally granted a factum length of ten (10) pages and ten (10) minutes of speaking time before this Honourable Court. It is respectfully submitted that nothing in the AER's response warrants this Honourable Court from deviating from this practice.

18. Dahm and Plowman understand that this Honourable Court's time and resources are limited, and in the interest of judicial efficiency, have already combined their positions to make a joint submission.

19. Dahm and Plowman also raise two novel arguments that will be beneficial to this Honourable Court in its determination of the question on appeal. The first examines the s. 24(1) *Charter* remedies available against administrative bodies, the unique considerations of

[1] See Benjamin R.D. Alarie and Andrew J. Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation,

each remedy in terms of policy consequences and impacts, and how the considerations of one remedy cannot be used to impose a blanket prohibition on all remedies.

20. The second argument relates to whether the *Charter* violation alleged by the Appellant could be addressed through Judicial Review, and the remedies of mandamus and certiorari. The AER alleged this to be the case before the Alberta Court of Appeal, which that court accepted in its judgment as an alternative way to raise *Charter* arguments and a reason to uphold the statutory immunity clause.[2] We respectively disagree with this assessment, and will demonstrate that the AER's empowering statute would not permit a Judicial Review of the conduct that led to the alleged *Charter* violation.

21. The intricacies of these arguments require space to develop, and cannot be adequately addressed in 5 pages, as requested by the AER. As submitted in the Motion for Intervention, 10 pages provide sufficient space to set out and develop these arguments.

22. Moreover, given the uniqueness of these arguments, oral submissions are essential to provide the Justices of this Honourable Court clarity and depth of the positions outlined in the factum. We respectfully submit that the Justices of this Honourable Court will benefit immensely from having counsel for Dahm and Plowman make oral submissions at the hearing.

PART III: RELIEF SOUGHT

23. For the reasons outlined above, Dahm and Plowman respectfully submit that the Response of the AER should be dismissed, and that they should be granted leave to intervene along the relief plead in their Motion for Intervention.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 5th DAY OF OCTOBER 2015.

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Avnish Nanda
Dev S. Nanda

Counsel to Donna Frances Dahm and Robert Pius Plowman

[2] *Ernst v Alberta (Energy Resources Conservation Board)*, 2014 ABCA 285 at para 30(c).

PART VI: TABLE OF AUTHORITIES

Jurisprudence
Ernst v Alberta (Energy Resources Conservation Board), 2014 ABCA 285.
Secondary Sources
Alarie, Benjamin R. D. and Green, Andrew J. "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance." OHLJ, 48.3/4 (2010) : 381-410.

PART VII: STATUTES AND REGULATIONS

Rules of the Supreme Court of Canada, SOR/2002-156

49. (1)Within 10 days after service of the motion, a respondent to the motion may respond to the motion by:

(a) serving on all moving parties and other respondents to the motion
  i. a copy of the electronic version of a response, and
  ii. a copy of the printed version of the response; and

(b) filing with the Registrar
  i.a copy of the electronic version of the response, and
  ii.the original and a copy of the printed version of the response.

…

50. (1) Within five days after service of the response to the motion, an applicant may reply by

(a) serving on all parties to the motion
  i. a copy of the electronic version of a reply, and
  ii.a copy of the printed version of the reply; and

(b) filing with the Registrar
  i.a copy of the electronic version of the reply, and
  ii.the original and a copy of the printed version of the reply.

…

57. (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.

(2) A motion for intervention shall

(c) identify the position the person interested in the proceeding intends to take in the proceeding; and

(d) set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

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

BENJAMIN R.D. ALARIE* & ANDREW J. GREEN**

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

* Associate Professor, Faculty of Law, University of Toronto.

** Associate Professor, School of Public Policy and Governance and Faculty of Law, University of Toronto. Both authors thank Charlotte McDonald, JD Candidate, 2011, for excellent research assistance. For constructive comments and feedback, the authors would like to thank Shai Dothan, David Gilo, Edward Iacobucci, Ehud Kamar, Cheryl Milne, Michael Trebilcock, Albert Yoon, attendees of the Asper Centre conference on The Role of Interveners in Public Interest Litigation in November 2009, and those attending the law and economics workshop at the University of Toronto Faculty of Law in December 2009.

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.

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,[1] and interveners have made submissions in almost half of the cases heard by the Court.[2] 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.[3] 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:[4] This article aims to expand the understanding of the consequences of the

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.[5] 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.[6] 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.[7] The Court briefly expanded the rules permitting interveners in the mid-1980s, but by the end of the 1980s a new practice was established.[8] 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.[9] 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

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.[10] 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.[11] 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

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.[12]

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.[13] The legal model assumes that judges vote in accordance with legal

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.[14] 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.[15] 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.[16]

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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").[17] 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.[18]

A final reason for courts to permit parties to intervene is to promote the acceptance of that court's decisions through increased legitimacy.[19] 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.[20]

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.[21] 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).[22]

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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. Interveners

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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.[23] 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.[24]

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.[25]

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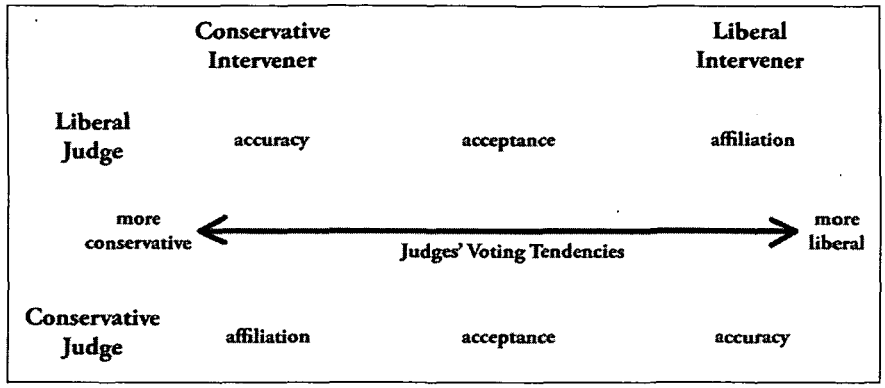
23. See Collins, *supra* note 3 at 94.

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).[26] 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. Interveners 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.[27] For each appeal, a broad range of information was recorded, including data about the identities of the parties,[28] the outcome of the appeal,[29] the classification of the appeal into an area of law,[30] 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,[31] 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

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.[32]

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.[33] 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.[34] 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.[35] 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.[36]

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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

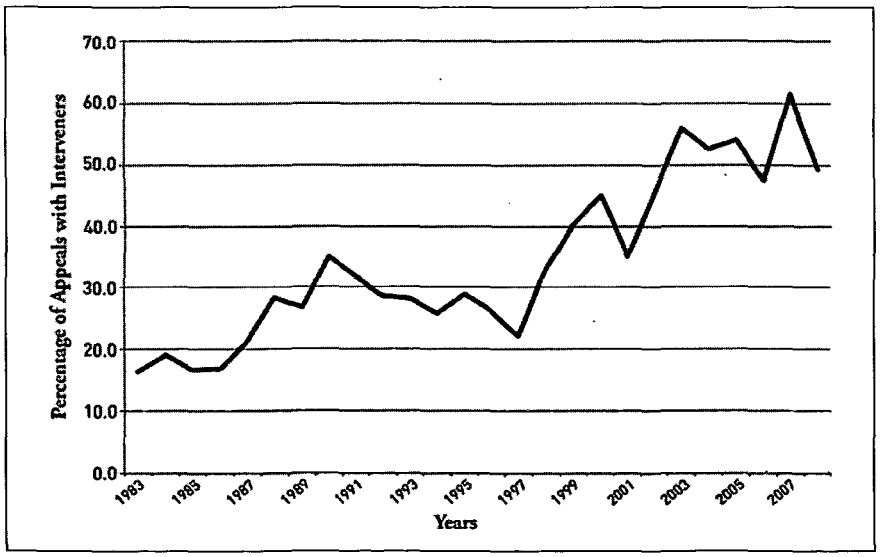


FIGURE 3: APPEALS WITH INTERVENERS, 1984–2008

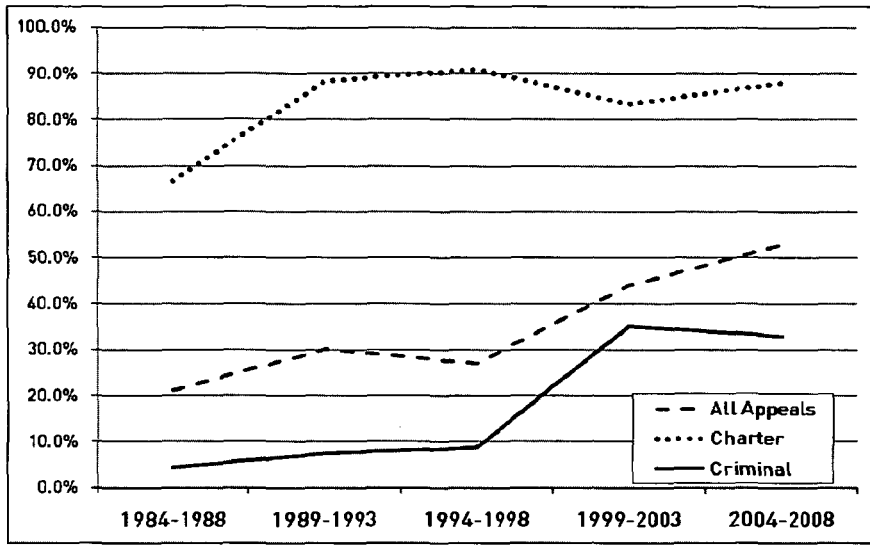


FIGURE 4: VOLUME OF INTERVENTIONS, 1983–2008

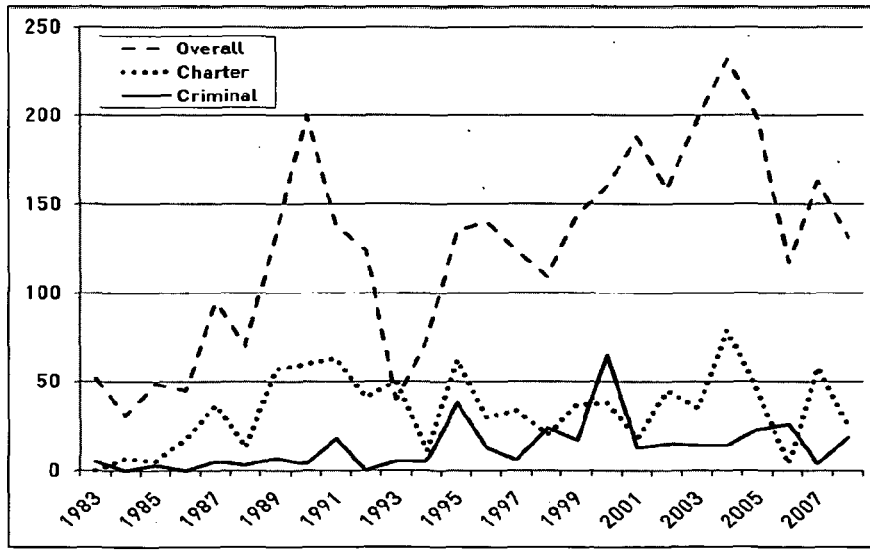


TABLE 2: LEAVE TO INTERVENE, 2000–2008

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.[37] 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.[38] 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).[39] 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.[40] A quick glance at Figure 5 clearly suggests that there is a remarkably high correlation

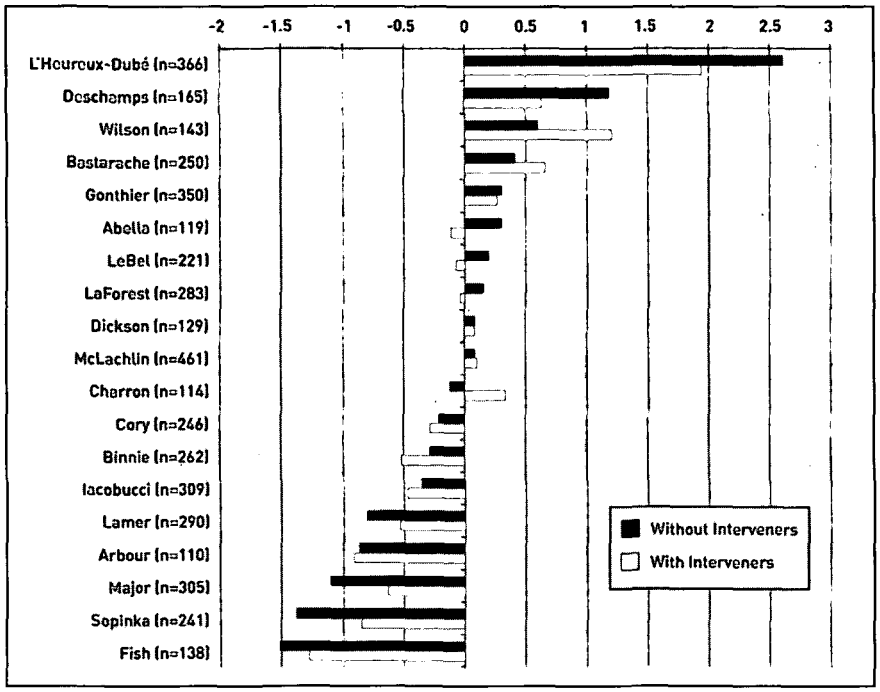
37. See Andrew D. Martin & Kevin M. Quinn, "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US Supreme Court, 1953-1999" (2002) 10 Pol. Analysis 134.

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.[41] 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 is 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.[42]

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.[43] 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.[44] 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?[45]

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.[46]

TABLE 4: INTERVENER INFLUENCE BY JUSTICE

Justice	Estimated Liberal Voting, *Charter* Appeals with No Interveners	+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%
Charron	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).[47] 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

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.[48] 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.

48. See Collins, *supra* note 3.

In the Court of Appeal of Alberta

Citation: Ernst v Alberta (Energy Resources Conservation Board), 2014 ABCA 285

Date: 20140915
Docket: 1301-0346-AC
Registry: Calgary

Between:

Jessica Ernst

Appellant
(Plaintiff)

- and -

Energy Resources Conservation Board

Respondent
(Defendant)

- and -

EnCana Corporation and Her Majesty the Queen in Right of Alberta

Not Parties to the Appeal
(Defendants)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Reasons for Judgment Reserved

Appeal from the Order by
The Honourable Chief Justice N.C. Wittmann
Dated the 13th day of November, 2013
Filed on the 2nd day of December, 2013

(2013 ABQB 537, Docket: 0701 00120)

Reasons for Judgment Reserved

The Court:

[1] The appellant appeals from the decision of a case management judge, who struck out certain portions of her claim because they failed to disclose a reasonable cause of action: ***Ernst v EnCana Corporation,*** 2013 ABQB 537, 85 Alta LR (5th) 333.

Facts

[2] The appellant owns land near Rosebud, Alberta. She has sued the defendant EnCana Corporation for damage to her fresh water supply allegedly caused by EnCana activities, notably construction, drilling, hydraulic fracturing and related activities in the region. The respondent Energy Resources Conservation Board has regulatory jurisdiction over the activities of EnCana, and the appellant has sued it for what was summarized as "negligent administration of a regulatory regime" related to her claims against EnCana. The appellant also sued the defendant Alberta, alleging that it (through its department Alberta Environment and Sustainable Resource Development) owed her a duty to protect her water supply, and that it failed to respond adequately to her complaints about the activities of EnCana.

[3] In addition, the appellant alleges in her claim that she participated in many of the regulatory proceedings before the Board, and that she was a "vocal and effective critic" of the Board. She alleges that between November 24, 2005 to March 20, 2007 the Board's Compliance Branch refused to accept further communications from her. For this she advances a claim for damages for breach of her right to free expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Board defends its actions as being a legitimate response to what it perceived to be threats in her communications.

[4] The Board applied to strike out certain portions of the appellant's pleadings for failing to disclose a reasonable cause of action. The case management judge found that the proposed negligence claim against the Board was unsupportable at law (reasons, paras. 17-30). He applied the three-part analysis relating to foreseeability, proximity, and policy considerations set out in cases such as ***Cooper v Hobart***, 2001 SCC 79, [2001] 3 SCR 537 and ***Fullowka v Pinkerton's of Canada Ltd***, 2010 SCC 5, [2010] 1 SCR 132. He found no private law duty of care was owed to the appellant by the Board.

[5] In the alternative, the case management judge found (reasons, paras. 52-8) that any claim against the Board was barred by s. 43 of the *Energy Resources Conservation Act*, RSA 2000, c. E-10:

> 43 No action or proceeding may be brought against the Board or a member of the Board or a person referred to in section 10 or 17(1) in respect of any act or thing done purportedly in pursuance of this Act, or any Act that the

> Board administers, the regulations under any of those Acts or a decision, order or direction of the Board.

(That section was repealed and replaced by s. 27 of the *Responsible Energy Development Act*, SA 2012, c. R-17.3). This conclusion, if correct, meant that the duty of care analysis was largely moot.

[6] The Board argued that the *Charter* right of "freedom of expression" did not extend so far as to create a "right to an audience". It argued that the appellant's right to express her views was never impeded, and that it had no duty under the *Charter* to accommodate whatever form of expression the appellant chose. The chambers judge concluded, however, that the damages claim for breach of the *Charter* was not so unsustainable that it could be struck out summarily (reasons, paras. 31-43). In an application to strike pleadings the court could not analyze the validity of the Board's argument that it was responding to what appeared to be threats. However, he concluded that s. 43 also barred the appellant's *Charter* claim for a "personal remedy" of $50,000 (reasons, paras. 59-89).

[7] The appellant then launched this appeal. The Minister of Justice and Solicitor General of Alberta intervened on the appeal arguing that proper notice had not been given (under s. 24 of the *Judicature Act*, RSA 2000, c. J-2) of the constitutional challenge to s. 43 of the *Energy Resources Conservation Act*. The Minister of Justice took the position that the appellant was attempting to raise a new argument on appeal, and that Alberta had been denied the opportunity to call evidence on the topic.

Issues and Standard of Review

[8] The appellant Ernst raises only three discrete issues:

a) Do the pleadings disclose a private law duty of care on the Board?

b) Does s. 43 of the *Energy Resources Conservation Act* bar a claim for negligent omissions?

c) Can s. 43 of the *Energy Resources Conservation Act* bar a *Charter* claim?

[9] To clarify, there was no appeal or cross-appeal on a number of other issues, such as:

a) whether the pleadings disclose a sustainable claim for a breach of the *Charter*;

b) whether sufficient notice of the constitutional attack on s. 43 of the *Energy Resources Conservation Act* was given under s. 24 of the *Judicature Act*, RSA 2000, c. J-2;

c) whether the pleading against the defendant Alberta could be struck as being frivolous or vexatious;

d) whether the action had been brought within the time limits in the *Limitations Act*, RSA 2000, c. L-12.

It is not necessary to address these other issues in order to resolve this appeal.

[10] The standard of review for questions of law is correctness: ***Housen v Nikolaisen***, 2002 SCC 33 at para. 8, [2002] 2 SCR 235. The findings of fact of the trial judge will only be reversed on appeal if they disclose palpable and overriding error, even when the chambers judge heard no oral evidence: ***Housen*** at paras. 19, 24-25; ***Andrews v Coxe***, 2003 ABCA 52 at para. 16, 320 AR 258.

[11] Whether a pleading discloses a cause of action is a question of law that is reviewed for correctness: ***Housen*** at para. 8; ***O'Connor Associates Environmental Inc. v MEC OP LLC***, 2014 ABCA 140 at para. 11, 95 Alta LR (5th) 264. The application of the *Rules* to a particular set of facts is a mixed question of fact and law, and the standard of review is palpable and overriding error: ***Housen*** at para. 36. If the law is correctly stated, then to the extent that there is a discretion involved in the decision to strike, the decision must be reasonable: ***O'Connor Associates*** at para. 12.

[12] The interpretation of a statute is a question of law reviewed for correctness. The interpretation of the Constitution is a question of law reviewed for correctness, and its application to a fixed set of facts is also reviewed for correctness: ***Consolidated Fastfrate Inc. v Western Canada Council of Teamsters***, 2009 SCC 53 at para. 26, [2009] 3 SCR 407.

The Test for Striking a Claim

[13] Any pleading can be struck out under R. 3.68(2)(b) if it discloses no reasonable claim or defence to a claim. On such an application, no evidence is admitted, and the pleaded facts are presumed to be true: R. 3.68(3).

[14] The modern test for striking pleadings is to be found in ***R. v Imperial Tobacco Canada Limited***, 2011 SCC 42 at paras. 19-21, [2011] 3 SCR 45:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> This promotes two goods -- efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be -- on claims that have a reasonable chance of success. ...

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. (emphasis added)

The test is therefore whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed.

[15] The appellant relied on an earlier statement of the test in ***Hunt v Carey Canada Inc.***, [1990] 2 SCR 959. ***Hunt*** at p. 980 used a more emphatic statement of the test, being whether it was "plain and obvious" that the action is "certain to fail because it contains a radical defect". That statement can be understood having regard to the unusually complex factual and legal issues underlying the ***Hunt*** claim. In any event, the law has evolved over the last 24 years, and the present formulation of the test found in ***Imperial Tobacco*** is whether there is a reasonable prospect of the claim succeeding. It is particularly unhelpful to characterize the test as being whether it has been shown "beyond a reasonable doubt" that the plaintiff's claim will fail. The test of "beyond a reasonable doubt" is a factual and evidentiary test that is unsuited to determining questions of law, and in any event it is inapplicable in civil proceedings: ***F.H. v McDougall***, 2008 SCC 53 at para. 49, [2008] 3 SCR 41.

The Cause of Action in Negligence

[16] In a long line of cases starting with ***Cooper v Hobart***, the Supreme Court has established a test for determining whether a regulator owes a private law duty of care to plaintiffs who might be damaged by activities of regulated parties. Generally speaking, there is insufficient foreseeability and proximity to establish a private law duty of care in these situations. The regulatory duties involved are owed to the public, not any individual. There are also strong policy considerations against finding regulators essentially to be insurers of last resort for everything that happens in a

regulated industry. The only anomaly is ***Fullowka***, in which sufficient proximity was found between injured mineworkers and mine safety inspectors.

[17] The numerous authoritative decisions in this area disclose a number of reasons why a duty of care is not generally placed on a regulator:

a) Policy decisions should not readily be questioned by subjecting them to a tort analysis, and the distinction between policy and operating decisions is difficult to make: ***Imperial Tobacco*** at paras. 86-90.

b) Were the law to impose a duty of care, very difficult issues then arise as to how one decides the standard of care to be applied. Exactly "how much regulation" satisfies the duty? See ***Fullowka*** at para. 89.

c) All regulators have public duties owed to the community at large, so recognizing private law duties may place the regulator in a conflict: ***Syl Apps Secure Treatment Centre v B.D.***, 2007 SCC 38 at paras. 28, 41, 49, [2007] 3 SCR 83; ***783783 Alberta Ltd. v Canada***, 2010 ABCA 226 at paras. 44-6, 482 AR 136.

d) The source of the supposed private law duty is a purely statutory obligation to perform a public duty, but the law is clear that a breach of a statute is not *per se* negligence: ***Canada (A.G.) v TeleZone Inc.***, 2010 SCC 62 at paras. 28-9, [2010] 3 SCR 585.

e) Because of the large number of persons that may be affected by the decision of a regulator, ". . . the fear of virtually unlimited exposure of the government to private claims, which may tax public resources and chill government intervention" are particularly acute: ***Alberta v Elder Advocates of Alberta Society***, 2011 SCC 24 at para. 74, [2011] 2 SCR 261.

f) It is primarily the function of the Legislature to determine the scope of civil liability. Where a regulatory statute provides a number of administrative and quasi-criminal remedies, but does not provide for any civil remedies, that strongly indicates that the statute contemplates no private civil duty. In that regard the *Energy Resources Conservation Act* can be compared with provisions (like Part 17 of the *Securities Act*, RSA 2000, c. S-4) which do contemplate civil remedies. Further, the very existence of s. 43 preludes any inference that the statute contemplates a private law duty of care: ***Edwards v Law Society of Upper Canada***, 2001 SCC 80 at paras. 16-7, [2001] 3 SCR 562. If the *Energy Resources Conservation Act* had contemplated a civil duty, it would undoubtedly have put the duty on EnCana, the regulated person who allegedly caused the damage in issue. The common law should not relocate the obvious target of liability.

g) To the extent that administrative tribunals perform judicial or quasi-judicial functions, it is contrary to long standing common law traditions to expose them, as decision-makers, to personal liability for their decisions: ***Welbridge Holdings Ltd. v***

> ***Greater Winnipeg***, [1971] SCR 957 at pp. 968-9; ***Slansky v Canada (A.G.)***, 2013 FCA 199 at paras. 135-7, 364 DLR (4th) 112; ***Butz v Economou***, 438 US 478 (1978) at pp. 508 ff. Exposing tribunal members to personal liability also undermines the testimonial immunity which they have traditionally enjoyed with respect to their decision making process: ***Ellis-Don Ltd v Ontario (Labour Relations Board***), 2001 SCC 4 at paras. 36, 52, [2001] 1 SCR 221.

Many of these considerations are at play in this appeal.

[18] Forcing the Board to consider the extent to which it must balance the interests of specific individuals while attempting to regulate in the overall public interest would be unworkable in fact and bad policy in law. Recognizing any such private duty would distract the Board from its general duty to protect the public, as well as its duty to deal fairly with participants in the regulated industry. Any such individualized duty of care would plainly involve indeterminate liability, and would undermine the Board's ability to effectively address the general public obligations placed on it under its controlling legislative scheme.

[19] The case management judge correctly applied the test for determining whether the Board owed a private law duty of care to the appellant. No error has been shown in the decision to strike out these portions of the pleadings.

The Immunity Clause: Section 43

[20] The Board argued in the alternative that even if there was a private law duty of care, any action was foreclosed by s. 43. The appellant replies that s. 43 does not cover her claim, because it protects the Board only from claims arising from "any act or thing done". She argues that the section does not cover "omissions", something specifically mentioned in the new s. 27 of the *Responsible Energy Development Act*.

[21] The case management judge correctly concluded that such a narrow interpretation of the section is inconsistent with its broader purpose within the legislation. As he pointed out, the distinction between acts and omissions is, in any event, illusory:

> 57 I do not accept the argument that the lack of the words "or anything omitted to be done" in section 43, render its interpretation as providing statutory immunity to the ERCB only in situations where it has acted, as opposed to failing to act. A decision taken by a regulator to act in a certain way among alternatives inherently involves a decision not to act in another way. Picking one way over another does not render the ERCB immune from an action or proceeding, depending on its choice. This construction would result in an irrational distinction and lead to an absurdity. Moreover, to the extent that the other statutes providing statutory immunity to the regulator are relevant in that they contain the additional phrase "or anything omitted to be done", I regard those words

> as mere surplusage in the circumstances. Therefore, I hold that section 43 bars any actions or proceeding against the ERCB, in terms of both its decisions to act and the acts done pursuant to those decisions, and its decisions not to act. (emphasis added)

For example, the appellant pleads that the Board did not respond "reasonably" to EnCana's activities, and failed to conduct a "reasonable investigation". These pleadings can be read as alleging either a wrongful act, or an omission.

[22] The case management judge correctly concluded that any tort claim was barred by s. 43. Interpreting the section so that the Board and its members would only be protected for about half of their conduct would be absurd. The inclusion of "omissions" in the *Responsible Energy Development Act* should be seen as an effort to provide certainty in this area, and does not declare the previous state of the law: *Interpretation Act*, RSA 2000, c. I-8, s. 37.

The *Charter* Claim

[23] The case management judge declined to strike out the claim for damages as a result of the alleged breach of the *Charter* right to freedom of expression. He found that this area of the law was sufficiently novel and undeveloped to preclude striking out at this stage. He went on, however, to conclude that even if such a claim was potentially available, it too was barred by s. 43. The appellant argues that a provision like s. 43 cannot bar a claim under the *Canadian Charter of Rights and Freedoms*.

[24] The appellant's argument that s. 43 is inapplicable to *Charter* claims arises from the text of the *Charter*:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. . . .
>
> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The argument is that s. 24 entitles a citizen to a remedy for a *Charter* breach that is "appropriate and just in the circumstances". Since s. 52 provides that any law that is inconsistent with the Constitution is of no force and effect, any limits on the remedies available under s. 24 are of no force and effect.

[25] These two sections of the Constitution should not, however, be read that literally. The law of Canada on the availability of specific remedies is well developed. While individual judges may have a wide discretion in selecting a remedy, that selection is guided by long-standing rules and

principles. The law has always recognized that to be "appropriate and just", remedies must be measured, limited, and principled.

[26] For example, every common law jurisdiction has one or more statutes of limitation. Those statutes have been studied by many law reform commissions, and while they have often recommended improvements, no such commission has ever suggested abolishing the laws of limitation because they are unjust or inappropriate. Statutes of limitation are reflections of important and valid public policy considerations. Thus, it has been recognized that limitation laws of general application apply to constitutional claims: ***Kingstreet Investments Ltd. v New Brunswick***, 2007 SCC 1 at paras. 59-60, [2007] 1 SCR 3; ***Ravndahl v Saskatchewan***, 2009 SCC 7 at paras. 16-7, [2009] 1 SCR 181; ***Manitoba Metis Federation v Canada (A.G.)***, 2013 SCC 14 at para. 134, [2013] 1 SCR 623; ***United States v Clintwood Elkhorn Mining Co.***, 553 U.S. 1 (2008) at p. 7. Limitations on the time to launch an appeal, or to seek judicial review, are virtually universal. If a citizen who experienced a *Charter* breach fails to seek a remedy within the specified time, the remedy is lost. Sometimes leave is required to launch an appeal. It cannot be suggested that those sorts of limits on remedies are unconstitutional.

[27] As a further example, s. 24 and s. 52 of the Constitution would not have the effect of abolishing long-standing common law limitations on the availability of remedies against public officials, such as the immunity extended to those performing quasi-judicial functions discussed *supra*, para. 17(g). Notice requirements such as those found in s. 24 of the *Judicature Act* are also legitimate limits on *Charter* remedies. Many common law causes of action are subject to preconditions of some kind (e.g., malice: ***Miazga v Kvello Estate***, 2009 SCC 51, [2009] 3 SCR 339), and failure to establish the precondition essentially bars any remedy. Even if that would bar an action for a *Charter* breach, the precondition would not offend s. 24 and s. 52 of the Constitution; any purported distinction between "liability" and "remedy" is illusory.

[28] In determining whether a *Charter* remedy is "appropriate and just" in the circumstances, individual judges, and the court system as a whole, will have regard to these traditional limits on remedies. The legislatures have a legitimate role in specifying the broad parameters of remedies that are available: ***Ontario v Criminal Lawyers' Association of Ontario***, 2013 SCC 43 at paras. 26-31, [2013] 3 SCR 3; ***Doucet-Boudreau v Nova Scotia (Minister of Education)***, 2003 SCC 62 at para. 56, [2003] 3 SCR 3. Having well established statutory rules about the availability of remedies is much more desirable than leaving the decision to the discretion of individual judges. Any such *ad hoc* regime would be so fraught with unpredictability as to be constitutionally undesirable. If the availability of a remedy were only known at the conclusion of a trial, it would defeat the whole point of protecting administrative tribunals from the distraction of litigation over their actions, and the consequent testimonial immunity.

[29] The law recognizes that moving from a *Charter* breach to a monetary damages remedy is not automatic or formalistic, but requires a careful analysis of whether that remedy is legitimate within the framework of a constitutional democracy, as one which vindicates the *Charter* right

through an appropriate invocation of the function and powers of a court: ***Vancouver (City) v Ward***, 2010 SCC 27 at para. 20, [2010] 2 SCR 28. As noted in ***Ward***:

> 33. However, even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance. . . .
>
> 40. The *Mackin* principle [*Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 SCR 405] recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion.

Protecting administrative tribunals and their members from liability for damages is constitutionally legitimate.

[30] Just as there is nothing illegitimate about time limits to seek constitutional remedies, so too there is nothing constitutionally illegitimate about provisions like s. 43:

(a) such provisions are general in nature, and not limited to *Charter* claims, nor impermissibly applied to select groups of litigants: ***Alexis v Toronto Police Service Board***, 2009 ONCA 847 at paras. 19-21, 100 OR (3d) 232;

(b) provisions immunizing decision makers from liability are not so uncommon or unusual in free and democratic societies as to render them constitutionally unreasonable: *supra*, para. 17(g);

(c) limits on remedies do not offend the rule of law, so long as there remain some effective avenues of redress: ***Ward*** at paras. 34-5, 43. The long standing remedy for improper administrative action has been judicial review. There is nothing in s. 43 that would have prevented the appellant from seeking an order in the nature of *mandamus* or *certiorari* to compel the Board to receive communications from her. Further, she could have appealed any decisions of the Board to this Court, with leave;

(d) remedial barriers that are well established in the common law have not been swept away by s. 52: ***Islamic Republic of Iran v Kazemi***, 2012 QCCA 1449 at paras. 118 to 120, 354 DLR (4th) 385, leave to appeal granted March 7, 2013, SCC #35034.

The conclusion of the case management judge that s. 43 bars the appellant's *Charter* claim (reasons, paras. 81-3) discloses no reviewable error.

Conclusion

[31] The appeal is dismissed.

Appeal heard on May 8, 2014

Reasons filed at Calgary, Alberta
this 15th day of September, 2014

Côté J.A.

Watson J.A.

Slatter J.A.

Appearances:

M. Klippenstein and W.C. Wanless
for the Appellant

G. Solomon, Q.C. and C. Elliott
for the Respondent

L.H. Riczu
for the Intervener