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## Intervenors at the Supreme Court of Canada

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*My aim in this paper is to offer a normatively attractive and explanatorily sound interpretation of the Supreme Court of Canada's approach to third party intervention. The crux of my interpretation is that the policy the Court has developed on intervenors allows it to strike a reasonable balance among a number of competing democratic considerations, all of which have value in the context of judicial decision making. In this respect, the Court should be commended for identifying a way to liberalize a practice that possesses many democratically-attractive features, but also the inherent capacity to undermine the democratic standing of the Court. I buttress my argument against early literature on the subject, and use more recent works by Ian Brodie and Benjamin Alarie and Andrew Green as argumentative foils.*

*Mon but dans cet article est d'offrir une interprétation normative attrayante et explicative de l'approche de la Cour suprême du Canada en matière d'intervention des tiers. L'essentiel de mon interprétation est que la politique que la Cour a élaborée à l'égard des intervenants lui permet d'établir un équilibre raisonnable entre un certain nombre de considérations démocratiques concurrentes, qui ont toutes une valeur dans le contexte du processus décisionnel judiciaire. À cet égard, il convient de féliciter la Cour d'avoir trouvé une façon de libéraliser une pratique qui possède de nombreuses caractéristiques attrayantes sur le plan démocratique, mais en même temps la capacité inhérente de miner la position démocratique de la Cour. J'étaye mon argument contre la littérature ancienne sur le sujet, et j'utilise les travaux plus récents de Ian Brodie et de Benjamin Alarie et Andrew Green comme contrepoids argumentatif.*

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\* Instructor, Laurier University, Law and Society Program. Thanks to Kim Brooks for her incisive comments on earlier drafts of the paper. The usual caveats apply.

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### *Introduction*

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### *Introduction*

Over the past few decades, intervenor participation has become a routine part of the Supreme Court of Canada's (SCC) hearing process. Since 2000, the percentage of appeals featuring at least one intervenor factum has not dropped below 35 per cent (in 2001), and was on average 55 per cent.<sup>1</sup> What is more, the presence of intervenors appears to be trending upward: the last four years (2015–2018) have been marked by a 63 per cent rate of intervenor participation, with the total number of intervening parties during that period sitting at 1009 (an average of 252 per year).<sup>2</sup> This

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1. The numbers from 2000–2008 can be found at Benjamin Alarie & Andrew Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48:3&4 *Osgoode Hall LJ* 381 at 396. I have personally compiled the numbers for the years 2009–2018, which were accessed through LexisNexis and the Supreme Court of Canada website, online: <[www.scc-csc.ca](http://www.scc-csc.ca)> [perma.cc/8JV6-9QQF].

The relevant statistics from 2009–2018 are as follows:

2009: 37 of 62 appeals (60 per cent) featured at least one intervenor.

2010: 39 of 67 appeals (58 per cent) featured at least one intervenor.

2011: 37 of 66 appeals (56 per cent) featured at least one intervenor.

2012: 46 of 75 appeals (61 per cent) featured at least one intervenor.

2013: 45 of 73 appeals (62 per cent) featured at least one intervenor.

2014: 46 of 78 appeals (59 per cent) featured at least one intervenor.

2015: 41 of 66 appeals (62 per cent) featured at least one intervenor.

2016: 31 of 56 appeals (55 per cent) featured at least one intervenor.

2017: 42 of 64 appeals (66 per cent) featured at least one intervenor.

2018: 40 of 60 appeals (67 per cent) featured at least one intervenor.

2. 319 intervening parties made submissions in 2018; 222 intervening parties made submissions in 2017; 177 made submissions in 2016; 291 made submissions in 2015.

represents a significant increase from the 1641 that participated between 2000 and 2008 (an average of 182 per year).<sup>3</sup>

Based on these numbers, one would think the SCC would be relatively transparent about its views on intervention. A practice as deeply entrenched in the procedural makeup of the Court should be a prime candidate for its reflective scrutiny. But the opposite is the case. We have little information about the role the justices at the SCC think intervenors play in its adjudicative process, and the information we do have is conflicting.<sup>4</sup> This state of affairs is troubling for a few reasons, most notably because the question of whether, when, and which third parties ought to be granted leave to intervene at the highest judicial level remains unsettled. Some have suggested that interventions further entrench what Morton and Knopff disparagingly call “the Court party”<sup>5</sup>—a coalition that “represents a horizontal transfer of power to a new elite, not a vertical transfer of power to the people.”<sup>6</sup> Others view interventions in a more positive light, arguing that they allow the SCC to increase its democratic legitimacy and safeguard the independence it enjoys from the wider political sphere at the same time.<sup>7</sup> Which of these interpretations is the more plausible depends largely on the way the practice is understood and used by the Court, and because the legitimacy of the Court is bound up in the answer we accept, it is no small matter that a genuine attempt be made to hit on the right one.

This paper argues that the policy the Supreme Court has adopted on intervention is democratically appropriate. Given that the practice has the

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3. Alarie, *supra* note 1 at 398.

4. Compare, for instance, Beverley McLachlin’s suggestion that “it’s only just and fair that we allow those [who will be affected by our decisions] to present their viewpoints.” The statement was made during an interview with Luiza Chwialkowska, “Rein in lobby groups, senior judges suggest,” *National Post* (6 April 2000), online: <[www.fact.on.ca/news/news0004/np000406.htm](http://www.fact.on.ca/news/news0004/np000406.htm)> [perma.cc/CZ5J-R5KF]) with a recent Notice to the Profession reminding intervenors that “the purpose of an intervention is to provide relevant submissions that will be useful to the Court and different from those of the other parties”: Supreme Court of Canada, Notice to the Profession “Allotting Time for Oral Argument” (March 2017), online: *Supreme Court of Canada* <[www.scc-csc.ca/ar-lr/notices-avis/17-03-eng.aspx](http://www.scc-csc.ca/ar-lr/notices-avis/17-03-eng.aspx)> [perma.cc/8H5U-MNJW] [*Notice to Profession*].

5. This is expressly the position endorsed by Ian Brodie in his book Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002).

6. F L Morton, “The Charter Revolution and the Court Party” (1992) 30:3 Osgoode Hall LJ 627 at 649.

7. Jillian Welch, “No Room at the Top: Interest Group Intervenors and Charter Litigation in the Supreme Court of Canada” (1985) 43:2 UT Fac L Rev 204; Philip Bryden, “Public Interest Intervention in the Courts” (1987) 66:3 Can B Rev 490; Kenneth P Swan, “Intervention and Amicus Curiae Status in Charter Litigation” in Robert J Sharpe, ed, *Charter Litigation*, (Toronto: Butterworths, 1987) 27; John Koch, “Making Room: New Directions in Third Party Intervention” (1990) 48:1 UT Fac L Rev 151; Sharon Lavine, “Advocating Values: Public Interest Intervention in Charter Litigation” (1992) 2 NJCL 27.

capacity to both undermine and strengthen the democratic legitimacy of the Court, the careful, and sometimes discordant, approach the Court employs can be interpreted as an effective balancing of competing democratic considerations, all of which have value in the context of judicial decision-making.

Before I engage the argument directly, a prefatory remark is in order. As will soon become evident, my interpretation takes leave from those who wrote on the subject early in the *Charter* era. As a result, one might get the impression that my argument pertains only to cases that feature a *Charter* challenge. While there is prima facie sense to a suggestion of this kind—a few former Supreme Court Justices even having appeared to accept some version of it<sup>8</sup>—there is no reason to think that it follows directly. Although the *Charter* did present a clear opportunity for advocates of intervention to discuss the democratic potential it held out, that potential is in no strict sense tethered to the *Charter*. To the extent that the Court's decisions in non-*Charter* cases share the relevant features highlighted by early arguments on the practice—in particular, that interests that stand to be affected by those decisions may not be adequately represented by the direct parties to the case—the same reasoning that pertains to the Court's decision-making in *Charter* cases pertains as well to its non-*Charter* adjudication.

The article proceeds as follows. In part I, I outline the basis of early arguments on intervention, drawing attention to what was perceived to be a democracy deficit facing the Court in the new *Charter* era. Part II details the two prominent later conceptions of intervention—the first offered by Ian Brodie, the second by Benjamin Alarie and Andrew Green—and questions the viability of each as providing comprehensive answers to the Court's fuller approach to the practice. Part III offers a critique of those later accounts by proposing an alternative, which I construct largely from the democratic concerns that fueled earlier contributions to the literature. As mentioned above, my suggestion is that intervention is a mechanism by which the Court may balance a number of competing democratic considerations, none of which are more essential than any other in the

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8. In a 2000 interview with the National Post, Michel Bastarache J (1997–2008) contended that “because of the fact that we have lived with the *Charter* for 18 years and we have a lot of experience in interpreting the *Charter*...[t]here isn't the same need there was in 1982 to obtain help from intervenors” (Chwialkowska, *supra* note 4). Later that same year, in an interview with the *Globe and Mail*, Frank Iacobucci J (1991–2004) expressed the same sentiment: “...it's now getting on to be 18 years or so later. Should we be looking at the question [of intervenor participation] in different ways?” (Kirk Makin, “Intervenors: How Many Are Too Many?,” *The Globe and Mail* (10 March 2000), online: <[www.theglobeandmail.com/news/national/intervenors-how-many-are-too-many/article1037654/](http://www.theglobeandmail.com/news/national/intervenors-how-many-are-too-many/article1037654/)> [perma.cc/Z5ED-X643]).

context of judicial decision-making. In this respect, the Court should be commended for cultivating an approach to intervention that is sensitive to both the nature of its own institutional responsibilities and to democratic shortcomings the practice can help to address.

### I. *Early writings on intervention*

Although a handful of authors wrote on intervention in the pre-*Charter* era,<sup>9</sup> a relative explosion occurred around the time the British Parliament agreed to a proposal by the Canadian government that a *Charter of Rights and Freedoms* be incorporated into the Canadian Constitution. The surge can be traced to a few different sources,<sup>10</sup> but none were as obvious as the modified role the Court would take on as a result of that constitutional moment. Generally speaking, judicial bodies are thought to serve either one of two functions in the wider political order: the first is an adjudicative function, where the task is to resolve conflicts between disputing parties by invoking a set of established legal norms and applying them to the case at hand; the second is an oversight function, where they are asked to review government action to ensure that it is in compliance with the constitutional commitments of a polity. While it would be misleading to suggest that Canadian courts only discharged the first function in the pre-*Charter* era, the authority they would enjoy under the second was significantly enhanced post-*Charter*. Peter Russell explains the shift in constitutional focus following the *Charter*'s enactment:

Whereas [prior to the Charter] the courts in assessing constitutionality focused almost exclusively on the division of powers between the two levels of government, [in the post-Charter era] they are at least equally concerned with the constitutional rights of citizens against both levels of government. The consequences of finding legislation unconstitutional because it violates an individual's constitutional rights would appear to be more drastic than finding legislation unconstitutional because it violates the federal division of powers. The former means that, unless the constitution is amended, no government may legislate in the proscribed area, whereas with the latter, what is excluded from one level of government will normally be within the jurisdiction of the other.<sup>11</sup>

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9. See Paul Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Methuen, 1974); Bernard M Dickens, "A Canadian Development: Non Party Intervention" (1977) 40 Mod L Rev 666; James V West, *Public Interest Groups and the Judicial Process in Canada: The Need for a More Realistic Jurisprudence* (Thesis Dissertation, Carleton University, 1979).

10. I am thinking in particular of the changes that had been introduced in the mid-1970s in respect of the composition of the Court, as well as to the standards by which it would operate. For more on these changes see Brodie, *supra* note 5 at 25-28.

11. Peter H Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1982) 25:1 Can Pub Ad 1 at 14.

The decision to constitutionalize a rights document had the effect of significantly broadening the scope of the judicial oversight function. Not only would that function be to oversee (and resolve) constitutional disputes between the federal and provincial governments, but also it would extend to overseeing (and resolving) those disputes as they arose between the government and the individual citizen. This in turn greatly enhanced the ability of the courts to influence policy-related decisions. By having the power to invalidate a policy initiative undertaken by the government—specifically through a declaration that it stood in violation of an individual’s (or group’s) *Charter* right—courts could issue determinations not only on which level of government had the authority to implement that initiative but also on the acceptability of the initiative itself. This was so even if a judicial determination stood contrary to the will of the provincial and/or federal legislatures.<sup>12</sup>

Naturally this transfer of political power caused an uproar in the legal community. While proponents celebrated the fact that minority groups would no longer be subject to the excessive forces of majority sentiment, critics denounced the move as an affront to democracy. Their concern was that because the will of the people could be usurped by the opinions of a few elite judges, the decision-making of the courts could no longer be considered democratically legitimate.

It was as a response to this concern that a number of authors began to focus their attention on the merits of intervention. The structure of their arguments rested on two complementary claims. The descriptive claim, just reviewed in some detail, was that the Canadian political landscape was fundamentally altered by the *Charter* in a way that would allow the decisions of the courts to have a more profound and enduring influence. The prescriptive claim was that a shift in the procedure by which the courts rendered their decisions was not only appropriate, but imperative.

There is little doubt as to the validity of the descriptive claim. Section 52 of the *Charter* provides that the Constitution has legal supremacy over all other law making devices in Canada,<sup>13</sup> and section 24 identifies

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12. One important aspect in the debate over the legitimacy of the Canadian version of judicial review invokes s 33 of the *Charter* (‘the notwithstanding clause’) which holds that “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.” This provision, at least facially, seems to preserve ultimate authority over law-making in Canada in Parliament (or the legislature of a province). I will not engage this debate here, except to note that many scholars consider s 33 to be at best a nominal feature of the *Charter*, both sparingly used and politically hazardous.

13. *Canadian Charter of Rights and Freedoms*, s 52, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

the judiciary as the relevant authority to determine whether a particular constitutional right has been infringed or denied.<sup>14</sup> These devices together establish the kind of power discussed above: the Court has the authority to declare any law or government action to be “of no force and effect,” which in turn increases the influence the Court has over the political landscape.<sup>15</sup>

There is good reason to think the prescriptive claim is defensible as well. Although the notion of democracy is notoriously difficult to pin down, it requires a level of responsiveness on the part of a decision-making body to the will (or interests) of those who will be affected by its decisions. In this respect, democratic decision-making aligns closely with the idea of popular sovereignty, which holds that “the will of the people is distinct from and superior to the ordinary actions of government.”<sup>16</sup> This presents a problem for judicial decision-making since courts are for the most part unelected and, in some senses at least, unaccountable to the public for the decisions they make. Framed in the context of the descriptive claim then—namely, that under the constitutionalization of a charter of rights many of those decisions will have direct ramifications over policy-related matters—the problem becomes acute. Given that questions of policy are inherently open to debate—being, as Robert Dahl says, “an effective choice among alternatives about which there is, at least initially, some uncertainty”<sup>17</sup>—placing judicial bodies in a position where they have the power to unilaterally resolve such questions seems to undermine notions of popular sovereignty, and in turn the wider commitments of a democratic polity.

The public stake in the outcome of judicial decisions generated commentary on intervention as a procedural mechanism to ensure the voices of those affected by the court’s decision might be heard. As Philip Bryden noted in an article written around that time, just as “politicians, government departments, and administrative agencies have created a wide range of formal and informal mechanisms for consulting those who are most substantially affected by their decisions,” intervention holds out the

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14. *Ibid* s 24.

15. The argument I am making here is of course not dependent on the existence of these provisions in particular; nor is it dependent on the constitutionalization of a charter of rights. The point is simply that the introduction of the *Charter*, and especially the powers outlined by ss 52 and 24, gave early writers on intervention an explicit and stable target to frame their democratically-inspired concerns.

16. Kurt T Lash, “Originalism, Popular Sovereignty, and Reverse Stare Decisis” (2007) 93:6 *Va L Rev* 1437 at 1444. For more on the connection between democracy and popular sovereignty, see Andreas Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power” (2005) 12:2 *Constellations* 223.

17. Robert A Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker” (1957) 6:2 *J Pub L* 279 at 279.



same kind of promise for judicial bodies.<sup>18</sup> What it provides, Alan Borovoy added, is a means by which “larger sectors of the community [will] be able to participate in the process which produces those decisions,”<sup>19</sup> offering the judiciary a way to countenance the democratic concerns the *Charter* seems to invoke. Of course, none of this is to say that these writers advocated that courts become Royal Commission-type bodies or that they issue determinations on the basis of popular sentiment alone. They merely suggested that courts should be willing to hear from those who stand to be affected by some judicial decision, with the aim of addressing the democracy deficit that might flow from the Court’s new role under the *Charter*.

## II. *More recent contributions to the literature*

The two studies that explicitly focus on the Court’s use of intervention in the years following the post-*Charter* upsurge are those produced by Ian Brodie (in his book *Friends of the Court*) and Benjamin Alarie and Andrew Green (in their article “Interventions at the Supreme Court of Canada”). Unlike the earlier contributions to the literature, these works enjoyed a certain distance from the original “experimenting” the Court did with the practice, and in this respect are more grounded in empirical reasoning than earlier contributions. Nevertheless, the picture of intervention advanced by each work ends up being highly divergent. What led to the disparity? In what follows, I begin by looking at the paper by Alarie and Green (which is the more empirically-grounded of the two), and then at the theory developed by Ian Brodie (which paints a negative picture of the Court’s use of interventions).

### 1. *Alarie and Green: the service interpretation*

Alarie and Green begin their examination by posing three candidate rationales that could account for the Court’s policy on intervention—rationales they call “accuracy, affiliation, and acceptance.” The “accuracy rationale” maintains that the information provided by intervening parties “will increase the probability that an optimal disposition of the appeal will be reached.”<sup>20</sup> On this rationale, intervenors are considered valuable to the extent that the Court can derive some assistance from them in executing its decision-making function. The “affiliation rationale,” on the other hand, takes an instrumental perspective of intervenors, seeing them as a means

18. Bryden, *supra* note 7 at 506.

19. Alan Borovoy, “Interventions and the Public Interest (Open Letter to the Supreme Court of Canada)” in F L Morton, ed, *Law, Politics and the Judicial Process in Canada*, 3rd ed (Calgary: University of Calgary Press, 2002) at 290.

20. Alarie, *supra* note 1 at 386.

by which Justices may “vote directly in accordance with their [policy] preferences.”<sup>21</sup> Here, the value of intervenors is the cover they provide for what might be considered a neglect of the Court’s function. Finally, the “acceptance rationale” holds that intervenor participation is a way that the Court can “promote the acceptance of [its] decisions through increased legitimacy.”<sup>22</sup>

In order to arrive at the likeliest candidate to explain the Court’s behaviour, the authors use two highly speculative methods of analysis based on the voting patterns that particular judges (and the Court as a whole) have developed over time. Since the acceptance rationale “would have required there to be no statistically significant relationship between the presence of intervenors (or particular types of intervenors) and the decision-making of the Court or particular judges”<sup>23</sup> (which there was); and since “liberal or conservative judges are not particularly affected by intervenors with similar policy inclinations”<sup>24</sup> (which cuts against the presuppositions of the affiliation rationale), the authors deduce that “the Court...appears to be using interventions to better understand the impacts of its decisions.”<sup>25</sup> In other words, the conclusion the authors reach is that the accuracy rationale provides the best explanation for the liberal approach the Court has adopted in granting leave to interveners.

Even if the many inferences Alarie and Green rely on to arrive at this conclusion are accepted, two problems remain. The first relates to how the authors choose to frame their inquiry. Alarie and Green invoke data related exclusively to how intervention has affected the decision-making habits of Supreme Court Justices.<sup>26</sup> This would indicate that the relevant question to be answered is not “why has the Court taken the particular tack it has on intervention?” but rather “how has the presence of intervening parties affected the decision-making of judges?” The latter is a perfectly legitimate question on its own (a number of comparable studies in the

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21. *Ibid* at 389.

22. *Ibid*.

23. *Ibid* at 408.

24. *Ibid* at 408-409.

25. *Ibid* at 410.

26. *Ibid* at 391.

U.S.<sup>27</sup> and elsewhere<sup>28</sup> have been designed on the basis of this question specifically); but more importantly, it is a conceptually distinct question from the one the authors claim to address in their paper.<sup>29</sup> We can see this most clearly if we consider the different epistemic states that follow from each inquiry. Judges may only obscurely be aware of the effect intervening parties have over their voting behavior (the latter question), but they would surely be cognizant of their reasons for granting leave to such parties (the former question). For this reason, there is cause to challenge whether the purported target of Alarie and Green's study is in fact the appropriate one.

What is more, there is a worry about how the accuracy rationale itself should be interpreted. Sometimes the authors describe the accuracy rationale in terms of "objectively useful information to the Court"<sup>30</sup> from which the Court may produce "a better or more accurate decision,"<sup>31</sup> in other cases the focus shifts to "the impacts of the decision on parties not before the court,"<sup>32</sup> particularly in the service of increasing "the probability that an optimal disposition of the appeal will be reached."<sup>33</sup> These two senses of how intervenors may improve the accuracy of the Court's decisions can be pulled apart, and this muddies the waters with respect to the conclusion the authors defend. On the former description, the impression is that the information intervenors provide can be used to improve the objective nature of the Court's decisions, allowing it to dispense more accurate judgments "in the manner most consistent with the aims of the statute or case law as a whole."<sup>34</sup> On the latter description, there is at least a possibility that the nature of the information provided by intervenors will be used more expansively—in the vein, for instance, of giving the Court an indication of the subjective impact its decision will have over various

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27. See Paul M Collins, Jr, Pamela C Corley & Jesse Hammer, "The Influence of Amicus Curiae Briefs on US Supreme Court Opinion Content" (2015) 49:4 Law & Soc'y Rev 917; Paul M Collins, Jr, "Lobbying Before the US Supreme Court: Investigating the Influence of Amicus Curiae Briefs" (2007) 60:1 Pol Research Q 55; Paul M Collins, Jr, "Friends of the Court: Examining the Influence of Amicus Curiae Participation in US Supreme Court Litigation" (2004) 38:4 Law & Soc'y Rev 807; Joseph D Kearney & Thomas W Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court" (2000) 148:3 U Pa L Rev 743.

28. See Lorne Neudorf, "Intervention at the UK Supreme Court" (2013) 2:1 Cambridge J Int'l & Comp L 16; Andrea Kupfer Schneider, "Unfriendly Actions: The Amicus Brief Battle at the WTO" (2001) 7 Widener L Symp J 82; George Williams, "The Amicus Curiae and Intervenor in the High Court of Australia: A Comparative Analysis" (2000) 28:3 Fed L Rev 365.

29. While there is some variability to the way Alarie and Green frame their study, their interest at bottom appears to be what their "results tell [them] about...why the Court may allow interventions" (Alarie, *supra* note 1 at 408).

30. Alarie, *supra* note 1 at 383.

31. *Ibid* at 386.

32. *Ibid*.

33. *Ibid*.

34. *Ibid* at 388.

non-implicated parties to the proceeding. So while the accuracy rationale can certainly be reduced to what Joseph Kearney and Thomas Merrill have called the “legal model of judicial decision-making”<sup>35</sup>—a reduction Alarie and Green appear ready to accept<sup>36</sup>—there is no reason to think that it must. On its face at least, the rationale can apply to both a legalistic conception of judicial decision-making, and to a conception that is more open to policy-responsiveness on the part of the Court. Quite probably, it is a rationale that is best explained as involving a blend of both—especially when the common law framework the Court uses to render its judgments is factored in. And while it is perfectly acceptable to adopt a composite view of how the Court receives information that is provided by intervenors, it is also something that ought to be addressed if the aim is to advance a normative understanding of the Court’s approach to the practice.

I explain in short order the fuller rationale behind this assertion, but before I do, I describe the competing account Ian Brodie advances in his book on intervention, as it relies quite heavily on the distinction Alarie and Green eschew in their paper.

## 2. *Brodie: the strategic interpretation*

Brodie’s explanation for why the SCC has taken the tack it has on intervention arises from the same post-*Charter* tension that fueled much of the early writing on the subject. Unlike the favourable assessment those authors offered, Brodie is more hostile to the practice. At the center of his assessment is a “conundrum” he claims the Court faced in the light of the increased policy-making role it took on as the final arbiter of rights claims—one that forced it to choose between either (1) “the legalistic argument,” which holds that “courts do not make law when they interpret the Constitution [but are rather] engaged in a mechanical process of ‘discovering’ principles of constitutional law that already exist in the document itself,”<sup>37</sup> or (2) “the political disadvantage theory,”<sup>38</sup> which holds that without the protection of a superior adjudicative body operating above the fray of majoritarian politics, the rights belonging to historically disadvantaged groups are vulnerable to being trampled upon. In response to this conundrum, Brodie explains the Court’s approach to intervention as strategically motivated:

Why did the Court adopt the position of lobbyists so decisively?...It is important to recall the broader background to this development. During

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35. Kearney, *supra* note 29.

36. Alarie, *supra* note 1 at 387-388.

37. Brodie, *supra* note 5 at 59.

38. *Ibid* at ch 1.

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 the support of political interests. Just as the Trudeau government found civil liberties and rights oriented groups useful allies for legitimating its patriation project, so the Supreme Court found these groups to be useful allies in legitimating its extraordinary activism. By accommodating interest groups, the Court blunted their potentially damaging criticism. Allying itself with ‘disadvantaged groups’ furthermore provided a justification for what otherwise might appear to be an unconscionable power grab.<sup>39</sup>

Brodie interprets the SCC’s decision to liberalize the practice of intervention as a means by which it could bolster the legitimacy of its activist turn. Because the only available justification for the “unconscionable power grab” the Court initiated in the post-*Charter* era was to draw attention to its role as “defender of disadvantaged groups,” it was thereby impelled to win the support of those groups, which it ultimately did by capitulating to pleas that the practice of intervention be made more accessible.

Brodie’s analysis emerges from a particular way of interpreting the historical circumstances around the Court’s decision to liberalize the practice of intervention. Earlier arguments drew attention to the democratic appropriateness of the Court adopting a more liberal approach to the practice; in contrast, Brodie suggests that the Court’s decision is explained by a questionable anti-democratic agenda. His claim is that by choosing to increase interest group involvement in its decision-making process, the Court at best substituted the will of the Canadian people for a discrete and insular sample of it (what I will call “the weaker iteration” of Brodie’s narrative), and at worst erected a smokescreen by which it could conceal its policy-making activities from the wider population (what I will call “the stronger iteration” of that narrative). Both of these allegations are troubling and, if true, present ample reason to question just how viable the Court’s increasingly liberal approach to intervention really is.<sup>40</sup>

I suggest an alternative that puts the historical record on which Brodie relies in a more sympathetic light. This requires focusing on three aspects

39. *Ibid* at 47-48.

40. Of note is that Brodie remains agnostic on which of these iterations is more credible. His official position is that: “By importing the concept of disadvantaged groups into its jurisprudence, [the Court] gained those groups as allies. Whether this maneuver was deliberate or the inadvertent byproduct of the Court’s decisions, the rhetoric of the disadvantaged group insulates the Court from criticisms of its activism.” (*Ibid* at xvii).

of Brodie's story in more detail. For the first, I return to why Alarie and Green's use of the accuracy rationale is not as straightforward as presented. Although it is of course possible that, as the authors claim, the Court uses intervention primarily to improve the accuracy of its decision-making, I earlier highlighted an equivocation that surfaces when applying that rationale in the context of judicial decisions. The question was whether the information provided by intervenors should be thought to contribute to (1) the Court's ability to render a more accurate legal judgement, understood from the point of view of legal principles; or instead as contributing to (2) its ability to deliver a better legal judgment, understood from the point of view of the ramifications the judgment will have for stakeholders. It is this very distinction that Brodie seems to embrace as the grounding insight for his negative assessment of the Court's use of intervention. His work suggests that if the Court were really committed to restricting its role to (1)—what he calls “the legalistic argument”—there would be little reason to allow intervenor participation at all. His suggestion is that “[a]n adjudicative court can depend on the [litigating] parties to bring any relevant information to its attention,”<sup>41</sup> and that any information that might “slip through the cracks” will be caught by “the services of a reasonably competent bar and clerks.”<sup>42</sup> On the other hand, if the Court were to take a broader view of its place in the political order—one that accepts its role as policy-maker, for instance—it could not similarly “trust the parties to the case to bring forward all the types of information that it needs.”<sup>43</sup> Instead, and for the reasons outlined by early writers on the subject, it would have to rely on the same range of procedural resources that are available to more typical policy-making bodies (e.g., committee hearings, fact finding missions, etc.).

Brodie's line of reasoning on this score captures well my reservations about the reliability of the conclusion reached by Alarie and Green. The distinction that seems to be operating in the background of what they call “the accuracy rationale” calls into question just how robustly that rationale can be used toward a meaningful assessment of the Court's approach to the practice. One would think, for example, that a court that believes intervenors serve it in the legalistic sense depicted by (1) would restrict access to only those parties whose intervening briefs could be said to introduce new and useful information to the legal dispute in question, as well as prohibit intervening parties from straying even minimally from

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41. *Ibid* at 53.

42. *Ibid* at 61.

43. *Ibid* at 54.

the core of that dispute. A court that believed intervenors serve it in the canvassing way depicted by (2), on the other hand, would be far more open to any kind of intervening submission, provided of course that it did not deviate too widely from the issue at hand. As a matter of fact, the SCC's rules and conduct concerning intervention betray elements of both tendencies, and this undermines the value we can glean from Alarie and Green's blanket conclusion that the Court uses intervention as a means to arrive at more accurate decisions. Unless we can distinguish the sense in which a decision is understood to be "accurate" in the first place, the conclusion the authors reach tells us little about whether the specific way the practice is being implemented is a genuine reflection of the Court's aims.

So there are problems with embracing Alarie and Green's assessment as it stands. A convincing account of why the accuracy rationale is the likeliest candidate to explain the Court's approach to intervention would at the very least require a more thorough discussion of what it implies. But Alarie and Green's study does give us reason to reject the stronger iteration of Brodie's narrative, which is that the Court uses intervention as a cover to implement its own policy-making agenda. As the authors convincingly explain, for the stronger iteration of Brodie's narrative to be true one would expect to see the voting patterns of partisan judges align with intervening submissions of the same general type. In other words: "if...in cases involving liberal intervenors, a liberal judge tends to have a higher liberal voting percentage than in other cases, it may be evidence... that the liberal judges are receiving information that accords with their policy preferences..."<sup>44</sup> But this is simply not the case. The results of Alarie and Green's research indicate rather "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 intervenors with similar policy inclinations,"<sup>45</sup> and this strongly suggests that there is no veiled intent behind the Court's approach to or use of intervenor participation.

So there are challenges with accepting the stronger iteration of Brodie's narrative as well. But these same considerations cannot be used to repudiate the weaker version of that narrative, which is that by embracing a policy-making role at all, the SCC risks a legitimacy crisis.<sup>46</sup> The way

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44. Alarie, *supra* note 1 at 392.

45. *Ibid* at 409.

46. Brodie writes: "the Court cannot [both] admit its political role [and avoid] a loss in its legitimacy." (Brodie, *supra* note 5 at 51).

Brodie frames this weaker iteration is to place it in the context of interest group–Court relations, his suggestion being that the Court’s acquiescence to certain left-leaning groups early in the *Charter* era has resulted in a stratified, and thus undemocratic, influence within that particular decision-making arena.<sup>47</sup> On this weaker iteration, intervention is not viewed as a cover by which the Court executes its own policy-making agenda, but as a means by which special interest groups—specifically those that promote a liberal agenda—can utilize the Court to execute theirs.

If this weaker version of Brodie’s narrative is indicative of the way the Court has designed its approach to intervention, it would be just as problematic as the stronger version. However, there is reason to question its viability. To ground his argument, Brodie cites a trilogy of cases<sup>48</sup> (where leave was granted by one intervenor-friendly justice Sopinka) and four other cases<sup>49</sup> to demonstrate the unwillingness of the Court to apply the same rules to their conservative counterparts. Choosing such a small sample risks skewed results. What is more, when one takes a broader view of the facts around which groups have and have not been granted leave to intervene, the position Brodie advocates turns out to be baseless. According to Alarie and Green’s research,<sup>50</sup> for example, from 2000 to 2008 no discrete group suffered a success rate at obtaining leave below 76 per cent, and most enjoyed a success rate in excess of 90 per cent. And although school boards (100 per cent) and environmental groups (98 per cent) did enjoy the highest success rates of all, the next highest rate (outside of attorneys general) belonged to government interests (97 per cent)—scarcely a progressive faction. Furthermore, public interest groups (87 per cent), unions (87 per cent), religious groups (87 per cent) and public advocacy law (89 per cent)—all of which align across partisan lines—enjoyed among the lowest rates of success, eclipsed only by individuals (76 per cent). One can speculate as to why the Court treated each of these groups as it did (both in the individual cases and as a general trend), but the fuller numbers do not support the view that the Court privileges liberal

47. As Brodie writes: “it is hard to escape the conclusion that the Court plays favorites with interest groups. Favored groups can intervene when they wish and bend cases to raise the issues they want raised. Other groups have difficulty getting in the door.” (*ibid* at 71).

48. Namely, *Reference re Worker’s Compensation Act, 1983 (Nfld) (Application to Intervene)*, [1989] 2 SCR 335, [1989] SCJ No 113 (QL); *M(K) v M(H)*, [1992] 3 SCR 3, 1991 CanLII 13 (SCC); and, *Norberg v Wynrib*, [1992] 2 SCR 224, 1991 CanLII 7424 (SCC).

49. Namely, *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 81 DLR (4th) 545; *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202; *R v Finta*, [1993] 1 SCR 1138, 1993 CanLII 132 (SCC); and, *R v Morgentaler*, [1993] 1 SCR 462, 1993 CanLII 158 (SCC).

50. The statistics can all be found at Alarie, *supra* note 1 at 399.



intervenor over conservative ones. Instead, the evidence suggests that, from a partisan standpoint, the Court is even with its grants of leave.

Brodie's narrative on intervention seems to reflect his more general repudiation of the Court's policy-making role under the *Charter*. But whether the Court is justified in embracing this role is open to debate. Brodie interprets the Court's relationship to intervention as betraying either deception (the stronger iteration) or partiality (the weaker iteration), but there is another interpretation available that would view that relationship in a more favourable light. Indeed, by using the same set of facts upon which Brodie relies, one can imagine the Court's intervention decisions not as an attempt to legitimate its political activism, nor even as a promotion of one partisan cause over another, but rather as an attempt to strike the best or most reasonable balance among competing democratic considerations. Too often Brodie's narrative implies that the Court was given a choice between the diametrically opposed roles of 'legalistically' interpreting existing law and 'politically' making new law, and that whichever choice the Court embraced would preclude the other. But there is no reason to think that these were the terms upon which that choice was made. In theory, a wide spectrum exists between the two roles for a constitutional court. Attempting to strike a reasonable balance between those poles might appear to be an appropriate course for the Court to take, especially considering the practical realities under which such courts are bound to operate.

### III. *The democratic balancing interpretation*

Though available to the Court as early as 1900,<sup>51</sup> intervention was seldom used as a procedural device until the mid-1970s when new rules that had been applied to the Court<sup>52</sup> precipitated a substantial shift in the Court's attitude toward the practice. In particular, a decision by the Trudeau government to abolish the right of appeal clause for cases involving more than \$10,000 gave the Court far more control over its docket, which led to an increasing focus on public law disputes.<sup>53</sup> Between 1976 and 1982 thirty-five non-government intervenors were granted leave to participate in appeals before the SCC—a number that exceeded the total in the category prior to that date.<sup>54</sup> The trend continued in the first two years

51. Martin L. Friedland, *A Century of Criminal Justice: Perspectives on the Development of Canadian Law* (Toronto: Carswell, 1984).

52. Russell, *supra* note 11 at 98-99.

53. For a good summary of this period in the Court's relationship to intervenors see Brodie, *supra* note 5 at 22-28.

54. *Ibid* at 27.

of the *Charter* era—the Court granting an additional thirty-three parties leave to intervene<sup>55</sup>—but took an unexpected turn after that. Instead of expanding its approach to intervention further, or even adhering to the same gradual pattern it had established over the prior decade, the Court appeared to recoil from the practice altogether, allowing only nine non-government intervenors to participate in the crucial formative years of 1985 and 1986.<sup>56</sup> It wasn't until a court-appointed liaison committee, specifically assembled to investigate the matter, returned its report that the number of intervenors began to increase again.<sup>57</sup> The upshot of that report, as committee chairman, Brian Crane, wrote in a memo at the time, was that the Court ought to modify its rules on intervention “so that public interest groups will have an opportunity to put forward their views.”<sup>58</sup> From 1987 onwards intervenor participation increased at an impressive rate—both in respect of the amount of applications filed with the Court, as well as the percentage of applicants granted leave<sup>59</sup>—and, as stated in the Introduction, today nearly 60 per cent of appeals feature at least one nongovernment intervenor, with the Court granting leave almost 90 per cent of the time.

On its face, this record seems to support the weaker iteration of Brodie's narrative on intervention. After all, it was only subsequent to interest group lobbying that the Court appeared interested in appointing a liaison committee to investigate the matter,<sup>60</sup> and this suggests that the catalyst for that decision was specifically to assuage interest group concern. But what a general account of the events around intervention ignores are the many nuances that attended each phase of this development, and these serve to complicate Brodie's story significantly.

### 1. *Incompatibility and disparity in the Court's early actions on intervention*

Consider first the noticeable incompatibility between the rules the Court used to regulate the practice of admitting intervenors early in the post-

55. *Ibid* at 37.

56. *Ibid*.

57. Report of the Canadian Bar Association—Supreme Court of Canada Liaison Committee, 22 October 1986, vol 142, file 12.

58. More specifically, the committee “reached a consensus that the rules should be modified to permit written interventions, by leave of a judge, so that public interest groups will have the opportunity to put forward their views in writing. Oral participation by intervenants should still be allowed in special circumstances where the participation of an intervenant is especially important for the hearing of the appeal.” (Brian Crane, “CBA Supreme Court of Canada Liaison Committee Mid-Winter Report” (Paper delivered to the Canadian Bar Association's Governing Council, February 1987)).

59. Brodie, *supra* note 5 at 37 table 2.1.

60. *Ibid* at 32-36.

*Charter* period and the way it behaved on the basis of those rules. In 1983, for example, after making no changes to the practice of intervention in the previous 76 years,<sup>61</sup> the Court instituted two new rules,<sup>62</sup> one of which gave parties that had intervened in a court below an immediate grant of leave to appear before the SCC. This rule seemed to indicate a change of approach for third party intervenors, perhaps even to the point where they were considered an important feature of the SCC's wider adjudicative process. But the Court's subsequent behavior did not bear this impression out. Almost immediately after the rule came into effect, a modification was issued by Ritchie J in *Ogg-Moss v The Queen*<sup>63</sup> that excluded its application to criminal proceedings, and this was followed a few weeks later by a complete moratorium on the rule.<sup>64</sup>

A few years later, the Court once more adjusted the formal rules around intervention, only this time in the direction of making them more rigid.<sup>65</sup> Two additions were introduced, the first requiring that an applicant state their interest in the appeal as well as the grounds "for believing that the submissions will be useful to the Court and different from those of the parties,"<sup>66</sup> and the second imposing limits on both the length of intervening factums (20 pages) and the conditions under which an intervening party may make an oral argument (exclusively by judicial order).<sup>67</sup> In reverse fashion to the earlier change, these modifications suggested that the Court was interested in cutting down access to third party intervenors, viewing their participation as more peripheral to its decision-making. Once again, however, the Court's subsequent behaviour did not bear this impression out. After instituting these modifications, the Court became increasingly permissive with respect to intervenors, granting access to 88 per cent of all nongovernment applications between 1987 and 1991,<sup>68</sup> which is a trend that has continued.

Consider next the disparity the Court demonstrated concerning which parties were granted leave in the early *Charter* years, as well as the types of cases in which intervenors were permitted.<sup>69</sup> In *Guerin v The Queen*,

61. *Ibid* at 32.

62. *Rules of the Supreme Court of Canada, amendment*, SOR/1983-74: Rule 32 entitled attorneys-general to intervene in constitutional cases as of right, while Rule 18(2) extended that same entitlement to nongovernment intervenors who had intervened in a court below.

63. *Ogg-Moss v The Queen*, [1984] 2 SCR 171, 1983 CanLII 139 (SCC).

64. *Notice to the Profession*, [1984] SCCB 24; *Rules of the Supreme Court of Canada, amendment*, SOR/1983-930.

65. *Rules of the Supreme Court of Canada, amendment*, SOR/87-292.

66. *Ibid* at r 18(3)(c).

67. *Ibid* at r 18(5).

68. Brodie, *supra* note 5 at 37.

69. Katherine Swinton goes so far to call the Court's policy on intervention during this period

a case about Indigenous treaty rights, Laskin CJ permitted the National Indian Brotherhood to participate as an intervening party,<sup>70</sup> but denied leave to the Treaty 8 Trial Association.<sup>71</sup> In *Law Society of Upper Canada v Skapinker*, the first *Charter* case to feature an intervenor application, Beetz J granted leave to the Federation of Law Societies of Canada,<sup>72</sup> but denied it to the Canadian Civil Liberties Association<sup>73</sup> (CCLA) in the second case (*R v Marlene Moore*). Wilson J granted leave to various provincial commissions<sup>74</sup> in *Canadian Human Rights Commission and Bhinder v CNR* but not to the Canadian Association of Provincial Judges in *R v Valente*.<sup>75</sup> Perhaps most strikingly, Dickson CJ denied leave to the Seventh Day Adventist Church in one of the first freedom of religion cases (*R v Big M Drug Mart*),<sup>76</sup> while Estey J denied leave to the CCLA in an important freedom of expression case (*Re Ontario Film and Video Appreciation Society v Ontario Board of Censors et al*)<sup>77</sup> and LeDain J denied leave to both the Maritime Employers Association and Western Terminals Ltd in a landmark freedom of association case (*Retail, Wholesale and Department Store Union Local 580 et al v Dolphin Delivery Ltd*).<sup>78</sup>

These disparities of application suggest that the Court was using a pigeon-hole approach to determine who was and was not fit to intervene, seeming once more to align with the strategic narrative defended by Brodie. However, I want to suggest a different theory. My hypothesis is that the uneven behaviour the SCC exhibited in the early *Charter* years is not evidence of a predetermined agenda on its part, nor even of a Court that lacked a sense of purpose with respect to the practice, but rather a predictable, and even fitting, response to an instrument that of its own nature generates two important democratic concerns—the first to do with the procedural efficiency of the Court, and the second with the Court’s accountability to the public. When we factor in these considerations, an

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“both erratic and arbitrary.” in Katherine E Swinton, *The Supreme Court of Canada and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) at 72. A fuller account of the history is available in Welch, *supra* note 7 at 217-223.

70. *Guerin v The Queen*, [1983] SCCB 307 (motion for leave to intervene).

71. *Guerin v The Queen*, [1983] SCCB 323 (motion for leave to intervene).

72. *Law Society of Upper Canada v Skapinker*, [1983] SCCB 437 (motion for leave to intervene).

73. *R v Marlene Moore*, [1983] SCCB 439 (motion for leave to intervene).

74. *Canadian Human Rights Commission and Bhinder v CNR*, [1983] SCCB 756 (motion for leave to intervene).

75. *R v Valente*, [1983] SCCB 837 (motion for leave to intervene).

76. *R v Big M Drug Mart*, [1984] SCCB 79 (motion for leave to intervene).

77. *Re Ontario Film and Video Appreciation Society v Ontario Board of Censors et al*, [1984] SCCB 788 (motion for leave to intervene).

78. *Retail, Wholesale and Department Store Union Local 580 et al v Dolphin Delivery Ltd*, [1984] SCCB 912 (motion for leave to intervene).

equally plausible explanation for the Court's unpredictable behaviour in the early *Charter* years has less to do with justifying its new role as policy-maker than it does with an attempt to strike a reasonable balance between the conflicting aspects internal to the practice of intervention itself.

## 2. *Balancing democratic considerations*

Consider first how the incompatibility between the rules the Court instituted on intervention and its subsequent behaviour could be interpreted as an attempt to address certain democratic tensions inherent to the practice. Jillian Welch suggests that the 1983 rule change that gave intervening parties in lower courts immediate permission to intervene before the SCC was likely instituted as a time-saving measure;<sup>79</sup> Brodie offers a second explanation, which is that the change was due to the Court's uneasiness with the policy-making role it had adopted as a consequence of the *Charter*.<sup>80</sup> These explanations are not incompatible in theory, as both allude to the reservations the Court would have had concerning the influence intervention might carry over the efficiency of its operating procedure. As former Chief Justice of the US Supreme Court, Warren Burger, declared: if confidence in the court system is eroded, then confidence in societal order follows:

A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law—in the larger sense—cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets.<sup>81</sup>

The general thrust of Burger's argument is that unless citizens can be assured that justice will be administered in a timely and effective manner, confidence in the system will begin to wilt. And since democracy is more or less based on the people's enduring confidence in the institutions that

79. Welch, *supra* note 7 at 216-217.

80. Brodie writes that: "[a]nother possible explanation [to Welch's] is that the Court's reluctance to hear intervenors in these early *Charter* years also flowed from its own conception of judicial supremacy." (*supra* note 5 at 59).

81. Warren E Burger, "What's Wrong With the Courts: The Chief Justice Speaks Out" (1970) 69 US News & World Report (Address to American Bar Association meeting, 10 August 1970).

govern them,<sup>82</sup> a crisis in one could translate to a crisis in the other.<sup>83</sup> In this sense, it is only natural that the SCC would have taken a cautious, and even a provisional, attitude toward the rules around intervention in the early *Charter* years. At the time, the Court would have been only beginning to be aware of the implications intervention would have on both its time and effectiveness, and thus a “learning phase,” where the Court would try to discover the best or most efficient way to utilize that tool, was to be both expected and desired.

The same kind of reasoning can be used to explain the disparity in how the Court chose to administer grants of leave, only this time with respect to the idea of accountability. The relationship between judicial accountability and judicial independence is a complex one. Although there is truth to the view that, as former Chief Justice Beverley McLachlin once noted, “any system of accountability for judges must take judicial independence as a necessary condition,”<sup>84</sup> a rather deep tension lies at the core of each concept. Judicial independence is about keeping the judiciary free of any undue pressure from outsiders; judicial accountability is about the judiciary’s ultimate responsibility to the public. The question is: how can a judiciary free of any outside influence ultimately be said to be accountable to the public?

The answer lies in the instrumental value promoted by each concept—both aim to ensure that the judiciary is beholden to the rule of law rather than to its own, or to another’s, partisan agenda. This offers the salient link between judicial accountability and judicial independence. Being accountable to the public requires issuing decisions in a way that responds to the function the judiciary is intended to serve in a liberal democratic order. Discharging that function successfully is conditional on the judiciary’s ability to apply the law impartially and fairly. This in turn requires a degree of independence from the other branches of government

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82. As Hannah Arendt reminds us, “it is the people’s support that lends power to the institutions of a country” (Hannah Arendt, *On Violence* (New York: Harcourt, 1970) at 41). For a broad defense of this general idea, see Sonja Zmerli, Kenneth Newton, & Jose Ramon Montero, “Trust in People, Confidence in Political Institutions, and Satisfaction with Democracy” in Jan W van Deth, Jose Ramon Montero & Anders Westholm, eds, *Citizenship and Involvement in European Democracies: A Comparative Analysis* (London: Routledge, 2007) at 35.

83. Beverley McLachlin CJ recently said as much, noting that “if people do not have confidence in the courts, they will not support them.” (Beverley McLachlin, “The Decline of Democracy and the Rule of Law: How to Preserve the Rule of Law and Judicial Independence?” (Remarks at Saskatchewan and Manitoba Courts of Appeal Joint Meeting, 28 September 2017), online: *Supreme Court of Canada* <[www.scc-csc.ca/judges-juges/spe-dis/bm-2017-09-28-eng.aspx](http://www.scc-csc.ca/judges-juges/spe-dis/bm-2017-09-28-eng.aspx)> [perma.cc/V85T-RKZS]).

84. Beverley McLachlin, “Judicial Accountability” (Remarks at the Conference on Law and Parliament, 2 November 2006), online: *Supreme Court of Canada* <[www.scc-csc.ca/judges-juges/spe-dis/bm-2006-11-02-eng.aspx](http://www.scc-csc.ca/judges-juges/spe-dis/bm-2006-11-02-eng.aspx)> [perma.cc/7VBP-TPZ2].

which, as elected bodies, are more likely to make decisions on the basis of popular sentiment or interest group pressure. In this sense, as Stephen Burbank has noted, the two concepts are but “different sides of the same coin.”<sup>85</sup>

The relationship between judicial accountability and judicial independence appears to challenge even the limited role intervenors might serve in judicial proceedings, and this could well have played some part in the uneven behaviour exhibited by the Court in the early *Charter* period. The concern would have been that granting too many (or any) outside parties participatory access to court proceedings was a slippery slope toward undermining the impartiality of the Court, and this in turn would have weakened the Court’s democratic responsibilities to the public from an accountability standpoint. Chabot J’s strong words in the 1988 decision *Imperial Tobacco Ltd. v Canada (A.G.)* capture this concern: “[i]t is fundamentally repugnant to this Court to import into judicial proceedings even the concept of the legitimacy of judicial decisions, which in the end could not but sap judicial authority in its most fundamental democratic guarantee, the independence of the judiciary.”<sup>86</sup> Just as the Court showed unease in regulating the practice of interventions to ensure procedural effectiveness, a degree of inconsistency was bound to surface in how it dealt with intervening parties on a case-by-case basis. As its task was to find the best balance concerning a practice that possessed opposing features to its own unique institutional responsibilities, a learning phase was to be expected whereby the Court could come to better understand how the relatively unknown practice of intervention would impact that balance.

Interpreting the Court’s early actions around intervention as an attempt to balance competing democratic considerations presents a viable alternative to Brodie’s suggestion that the practice was used as a way to legitimate the Court’s policy-making agenda. Where the interpretation I have provided becomes especially compelling however is when we consider it in the context of more recent Court behaviour, which I argue reflects a tension between the rules by which the practice of intervention is designed and the practical way the Court has chosen to implement those rules. My suggestion is that this tension makes better sense if conceived as an exercise in democratic balancing.

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85. Stephen B Burbank, “The Architecture of Judicial Independence” (1999) 72:2&3 S Cal L Rev 315 at 339.

86. *Imperial Tobacco Ltd v Canada (AG)*, [1988] 55 DLR (4th) 555 at 571, 1988 CanLII 5719 (QC CS).

### 3. *Rule creation versus rule application*

Four rules have governed the practice of third party intervention for the past several decades. Potential intervenors must:

- (1) describe their interest in the proceeding, as well as any prejudice they would suffer if their intervention were denied;<sup>87</sup>
- (2) identify the position they wish to support with respect to the proceeding, and explain how their submissions are uniquely relevant to it;<sup>88</sup>
- (3) not raise any new issues to the proceeding (unless otherwise ordered by a judge);<sup>89</sup> and
- (4) not make any statement concerning the outcome of the appeal (unless otherwise ordered by a judge).<sup>90</sup>

On paper, these rules set a high bar for being granted leave to intervene. The rule that seems particularly onerous is the one that would have intervening parties explain how their submissions are uniquely relevant to the proceeding, coupled with a restriction on the opportunity to raise any new issues. As Brodie explains in his book, one would think that modern courts of law should be able to “depend on the parties to bring any relevant information to its attention,”<sup>91</sup> and thus that successful grants of leave would be a rare occurrence. But precisely the opposite is the case. Parties seeking leave to intervene are usually successful, and this implies that either: (1) the vast majority of intervening submissions add something new and useful to the proceeding (all the while staying well within the boundaries of the issues at hand); or (2) the Court allows a good deal of leeway when enforcing the rules in practice.

There is reason to believe (2) provides a much better explanation for the Court’s behaviour than (1). Notwithstanding the intuitive plausibility of Brodie’s claim about the resources available to modern courts, when we turn to the cases themselves—in particular, to the similarities that exist between intervening submissions in highly represented cases—the point becomes compelling. Take, for instance, the factums prepared by the Shibogama First Nations Council, the Central Coast Indigenous Reserve Alliance, and the Alberta Muslim Public Affairs Council in *Ktunaxa Nation v British Columbia*<sup>92</sup>—a case about indigenous land use rights for spiritual

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87. *Rules of the Supreme Court of Canada*, SOR/2002-156, r 57(1).

88. *Ibid* at r 57(2)

89. *Ibid* at r 59.

90. *Ibid* at r 42.

91. Brodie, *supra* note 5 at 53. “Parties” can include both litigating parties as well as the services of a reasonable competent bar and clerks (*ibid* at 61).

92. *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017



purposes. Each of these factums was organized around the importance that non-traditional sacred spaces play in the robust enjoyment of one's religious practice, and ultimately advanced the position that section 2(a) of the *Charter* should be read in that light. Similarly in *Carter v Canada*,<sup>93</sup> where a challenge was issued to Canada's criminal prohibition against assisted dying, the factums prepared by the Catholic Health Alliance, the Christian Medical and Dental Society of Canada, and the Catholic Civil Rights League all focused on the legal claim that a decision to invalidate the prohibition would trench on the protected rights of faith-based healthcare providers. The same trend is repeated in *Loyola High School v Quebec*,<sup>94</sup> *Google v Equustek Solutions*,<sup>95</sup> *British Columbia Teachers' Federation v British Columbia*,<sup>96</sup> and in a number of other high-profile cases. In each instance, trying to discern how the arguments presented by certain factums differed in any significant sense from those presented by others would be an exercise in mental gymnastics—and this is to say nothing of whether they introduced perspectives or points of law not already represented by either party to the case.

The overlap featured in these and other cases invites us to ask the following question: why does the Court continue to operate under the strict formal conditions it does when in practice they seem only nominally relevant to its decision to grant leave? I believe the democratic balancing interpretation offers an especially good explanation. Retaining rules that are formally strict enough should the practice of intervention begin to compromise the procedural values lying at the core of the judicial institution has given the Court license to adopt a strikingly liberal approach to how those rules are applied. This in turn allows the Court to pay heed to different rationales for granting participatory leave depending on the type of fact pattern or situation on appeal, as well as the implications it believes its decision will have for society. It may be the case, for instance, that, as Alarie and Green posit, the Court considers an intervening submission valuable because it increases the likelihood that a judgment will better

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SCC 54.

93. *Carter v Canada (AG)*, 2015 SCC 5.

94. *Loyola High School v Quebec (AG)*, 2015 SCC 12. Among others, there was significant overlap in the factums prepared by the Christian Legal Fellowship, the Evangelical Fellowship of Canada, the Catholic Civil Rights League, the Canadian Council of Christian Charities.

95. *Google Inc v Equustek Solutions Inc*, 2017 SCC 34. There was significant overlap in the factums prepared by the Wikimedia Foundation, the Electronic Frontier Foundation, OpenMedia Engagement Network, and the Canadian Civil Liberties Association.

96. *British Columbia Teachers' Federation v British Columbia*, 2016 SCC 49. There was significant overlap in the factums prepared by the Coalition of Ontario Teacher Affiliates, the Public Service Alliance of Canada, and the Canadian Labour Congress.

reflect the relevant legal principles. This might arise when the Court believes it could use assistance in making sense of highly technical fact patterns, as may be the case in disputes over intellectual property, data security, and the like. Alternatively, and harkening to earlier literature on the subject, it may grant leave simply because it believes there is an all-things-considered democratic benefit to doing so. We witness a perfect example of this latter rationale in the Court's recent decision to reverse Wagner J's order to deny leave to a number of LGBTQ groups in a pair of Trinity Western cases that touched on the issue of sexual-orientation-based discrimination.<sup>97</sup> Although Wagner J went on record to confirm that he "was convinced that some intervenors for which I accepted the application in fact will convey the interests, preoccupations and concerns of members of the LGBTQ," after discussing the issue with then Chief Justice Beverly McLachlin, the Court "decided that it would be best to add another day, and have all the applications granted."<sup>98</sup>

If we were to assess this reversal against the strategic narrative proposed by Brodie, we would likely regard the move as more evidence that the Court uses intervention as a means to promote its own institutional legitimacy. But for the reasons already expressed, this seems an unlikely explanation for the Court's behaviour. The alternative I have proposed suggests Wagner J's reversal is instead an acknowledgment that in this particular instance the initial decision failed to strike a suitable balance between the democratic value of granting participatory leave versus the cost to other relevant values that would be suffered on the basis of not doing so. Or to put the point slightly differently, even though the LGBTQ groups in question did not meet the formal criteria set out by the Court with respect to obtaining intervenor status, the fact that their participation would not have unduly affected the Court's impartial judgement, nor have been an excessive strain on the Court's effective operation, meant that the balance of democratic values was in this case best struck on the side of allowing participation.

The democratic balancing interpretation I have proposed is fundamentally grounded on the value inherent to participation itself, and it vindicates early arguments that called for just this kind of approach to intervention. It also impugns how that value is represented in the two

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97. The cases in question are *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32; and *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33. The order to deny leave was issued on 27 July 2017.

98. Sean Fine, "Supreme Court justice offers explanation for LGBTQ decision," *The Globe and Mail* (2 August 2017), online: <[www.theglobeandmail.com/news/national/supreme-court-justice-offers-explanation-for-lgbtq-decision/article35870614/](http://www.theglobeandmail.com/news/national/supreme-court-justice-offers-explanation-for-lgbtq-decision/article35870614/)> [perma.cc/N4UN-E295].

later works on the practice. Consider, for instance, how Alarie and Green represent the value of participation. Although the authors recognize that judges may “wish to allow intervenors, 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,” they also assert that, “[this kind of] explanation seems to accord most closely with a strategic view of judicial behavior [whereby] judges make decisions (including whether to allow outside parties to intervene) in order to further their policy preferences...”<sup>99</sup> In other words, to Alarie and Green, the notion that the Court may grant intervenor status on any basis other than a belief that the submissions will help to bring about a more accurate decision collapses into the kind of strategic narrative advanced by Brodie. But for the reasons I have outlined, there is no reason to think that such a conflation is necessary. Rather than viewing participation through the skeptical lens that both Alarie and Green and Brodie employ, we may interpret it instead as a nod to the democratic value earlier writers on intervention considered so compelling. Philip Bryden’s view reflects the importance those authors placed on participation:

...the willingness of courts to listen to intervenors is a reflection of the value that judges attach to people. Our commitment to a right to hearing and public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.<sup>100</sup>

Bryden makes two points in this passage, and both are vital to a non-strategic way of viewing the participatory role intervenors may play in a court proceeding. The first and more obvious is to draw attention to the inherent value in the act of participating itself—a value that extends beyond any instrumental or strategic ends that might be served by such participation. The second and more crucial point is that the reason judges might allow intervenor participation in the first place is precisely because they acknowledge the normative significance of this value. This shifts the focus away from the kind of strategic motivation Alarie and Green attach to the rationale toward a normative grounding for it. Why would the SCC allow intervenor participation even in circumstances where such participation is likely to have little to no effect over the ultimate decision it will render? It is not necessarily to ensure that intervening parties will

99. Alarie, *supra* note 1 at 391.

100. Bryden, *supra* note 7 at 509.

“‘buy into’ a particular decision,”<sup>101</sup> nor even “to increase the sense of the legitimacy of the process as a whole,”<sup>102</sup> but because the Court has itself “bought into” the argument that there is inherent value to allowing such participation to proceed.

In this respect, there are both normative and descriptive reasons to believe that the Court might defer to the kind of participatory argument made by early writers when deciding whether to allow an intervention to proceed. But this is only one side of the coin. On the other side, and as I explained above, considerations exist that could serve to undermine the democratic standing of the Court—whether it be the Court’s efficient operation, its accountability to the public, or a mixture of both. The crux of the analysis I have provided is that if the Court is confident that the values that stand to be compromised through the participation of outside parties are relatively safeguarded—a confidence I have suggested is first and foremost secured by the strict formal conditions pertaining to the practice—it may at that point turn its attention to other values that may be at stake, the most significant of which seems to be the value in participation itself. This is the essence of the democratic balancing interpretation I have defended in this paper and, if correct, it is an important consideration toward fully understanding the Court’s approach to intervention.

### *Conclusion*

My argument in this paper defends the SCC’s approach to intervention. The crux of the argument I have advanced is that the Court’s approach to intervention allows it to strike a reasonable balance among competing democratic considerations, none of which are automatically more valuable than any other in the context of judicial decision-making. Although I make no definitive claims about the accuracy of my account, it is one that is both normatively attractive and able to explain the historical record of granting interventions at the Supreme Court. The Court should be commended for identifying a way to liberalize a practice that possesses many democratically-attractive features but also the inherent capacity to undermine the democratic standing of the Court.

A recent statement issued by the Supreme Court lends weight to my interpretation of the Court’s policy on intervention. In a Notice to the Profession issued in March 2017, the Court made clear that “the purpose of an intervention is to provide relevant submissions that will be useful to the Court and different from those of the other parties. Intervenors shall

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101. Alarie, *supra* note 1 at 389.

102. *Ibid.*

not make any statement with respect to the outcome of the appeal in their factum”<sup>103</sup>—which was a not-so-subtle reminder of the rules that had been in effect for decades. In addition to this, two minor adjustments were announced concerning those rules, both of which addressed time sensitive aspects of the practice.<sup>104</sup>

To understand what may have caused the Court to make these adjustments, it is important to note that nine months prior a decision was rendered in the *R v Jordan* appeal, a case that focused specifically on the right to due process and the responsibility of the courts to ensure that justice is carried out in a timely and efficient manner. In its judgment in that appeal, the SCC declared that the (criminal) justice system in Canada had “come to tolerate excessive delays,” which, it said, could be attributed to a “culture of complacency.”<sup>105</sup> Remedial actions were taken and the Court created a new framework to judge whether a citizen’s due process rights had been infringed or denied, imposing a presumptive ceiling on how long the state had to bring an accused person to trial (18 months for trials going to a provincial court; 30 months for trials going to a superior court).<sup>106</sup> This in turn caused some uncertainty within the bar as to what those limits would mean for the proper dispensation of justice.<sup>107</sup>

It is of course possible to read the dovetailing of the *Jordan* decision with the Court’s opting to adjust various aspects of its procedural guidelines as a simple coincidence. But this is unlikely. The more plausible explanation suggests that *Jordan* was a salient indicator that the efficient administration of justice in Canada was under siege, and that modifications to the processes by which courts operate would likely have to be put to effect. Chief Justice McLachlin suggested as much in a speech delivered just after *Jordan* was released, her claim being that by “improving and coordinating the administration of justice” the “serious problem that imperils the public’s confidence in the justice system” could be mitigated.<sup>108</sup>

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103. *Notice to Profession*, *supra* note 4.

104. The first was a reduction in time allotted to intervenors for making an oral argument (*ibid*); and the second a reduction in time to file an intervening factum (Supreme Court of Canada, “Guide to the 2017 Amendments to the Rules of the Supreme Court of Canada” (2017), online: *Supreme Court of Canada* <[web.archive.org/web/20171212191039/https://www.scc-csc.ca/ar-lr/amend-modif2017-01-01-eng.aspx](http://web.archive.org/web/20171212191039/https://www.scc-csc.ca/ar-lr/amend-modif2017-01-01-eng.aspx)> [perma.cc/UC3G-D3AY] [2017 Guide].

105. *R v Jordan*, 2016 SCC 27 at para 4 [*Jordan*].

106. *Ibid*.

107. Maxime Charron-Tousignant, “Unreasonable Delays in Criminal Trials: the Impact of the *Jordan* Decision” (11 December 2017), online: *Hillnotes* <[hillnotes.ca/2017/12/11/unreasonable-delays-in-criminal-trials-the-impact-of-the-jordan-decision/](http://hillnotes.ca/2017/12/11/unreasonable-delays-in-criminal-trials-the-impact-of-the-jordan-decision/)> [perma.cc/R9UV-WTF6].

108. Beverley McLachlin, “Remarks to the Council of the Canadian Bar Association at the Canadian Legal Conference” (11 August 2016), online: *Supreme Court of Canada* <[www.scc-csc.ca/judges-](http://www.scc-csc.ca/judges-)

The Court may therefore be understood to have recognized that the problem of the efficient administration of justice has come to a boil. Its latest changes to the intervention procedure address that mechanism to ensure it does not exacerbate administrative inefficiency and delay. And while the target of this effort has by no means been limited to intervention,<sup>109</sup> for the reasons mentioned earlier, it would surely be considered one of the marks. In this respect, a gentle reminder to the profession about the rules around intervention, as well as a slight adjustment to the time-related elements of those rules, play some part toward rebalancing a scale the Court may believe is out of alignment. If the analysis I provide in this paper is an accurate rendering of the Court's behaviour, these recent actions should not be read as a change of course concerning the Court's fuller approach to intervention, but rather as a perfectly predictable—and normatively fitting—instantiation of it.

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[judges/spe-dis/bm-2016-08-11-eng.aspx](https://www.scc-csc.gc.ca/juges/spe-dis/bm-2016-08-11-eng.aspx) > [perma.cc/BV5X-JH8C].

109. 2017 *Guide*, *supra* note 106.

