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Divine Intervention, Part II: Narratives of Norm Entrepreneurship in Canadian Religious Freedom Litigation

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Divine Intervention, Part II: Narratives of Norm Entrepreneurship in Canadian Religious Freedom Litigation

Constitutional litigation has become a central arena for debate about human rights. Groups from all points on the political spectrum have turned to legal advocacy, "intervening" in judicial proceedings in an effort to advance their preferred interpretations of particular rights.

Judges and scholars remain divided on whether and how interveners are valuable. This paper evaluates a main rationale for intervention: interveners improve adjudication by enriching courts' understandings of the issues before them. We use qualitative analysis to examine the extent to which interveners in Canada have succeeded in contributing to judicial pronouncements on the scope and meaning of religious freedom.

We find that interveners have been modestly successful in influencing religious freedom doctrine. While the doctrine has not shifted radically in response to intervener submissions, interveners have impacted several SCC decisions. Interveners have had a more pronounced impact on a few minority judgments that could one day become law.

Le contentieux constitutionnel est devenu une arène centrale du débat sur les droits de la personne. Des groupes de tous les horizons politiques se sont tournés vers le plaidoyer juridique, en « intervenant » dans les procédures judiciaires afin de faire valoir leurs interprétations préférées de certains droits.

Les juges et les universitaires demeurent divisés sur la question de savoir si et comment les intervenants sont utiles. Dans le présent article, nous évaluons l'une des principales justifications de l'intervention: les intervenants améliorent la prise de décision en enrichissant la compréhension qu'ont les tribunaux des questions qui leur sont soumises. Nous utilisons une analyse qualitative pour examiner dans quelle mesure les intervenants au Canada ont réussi à contribuer aux prises de position judiciaires sur la portée et la signification de la liberté de religion.

Nous constatons que les intervenants ont réussi de façon modeste à influencer la doctrine de la liberté de religion. Bien que la doctrine n'ait pas changé radicalement en réponse aux déclarations des intervenants, ces derniers ont influencé plusieurs décisions de la Cour suprême du Canada. Les intervenants ont eu un impact plus prononcé sur quelques jugements minoritaires qui pourraient un jour devenir loi.

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Introduction

A growing body of literature documents the involvement of civil society organizations in national and trans-national debates about the protection of human rights.[1] Rights discourse has become "a central site of normative contestation over the implications of modernity," with groups from all

1. See e.g. Christopher McCrudden, "Transnational Culture Wars" (2015) 13:2 Int J Constitutional L 434; Clifford Bob, *The Global Right Wing and the Clash of World Politics* (New York: Cambridge University Press, 2012); David Cole, *Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law* (New York: Basic Books, 2016); William N Eskridge, "Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century" (2002) 100:8 Mich L Rev 2062.

points on the political spectrum "claiming to interpret human rights in the 'right' way."[2] While civil society organizations have historically turned to *political* advocacy to further their normative positions, they are increasingly engaging in *legal* advocacy in the courts. In this context civil society organizations seek to function as "norm entrepreneurs,"[3] putting forward their preferred interpretations of particular human rights to the courts with the power to define them.

Canada has experienced its share of norm entrepreneurship in human rights litigation. Since the enactment of the *Canadian Charter of Rights and Freedoms,* the legal procedure of intervention has allowed a steady stream of organizations and individuals to participate in judicial proceedings to which they are not formally parties. Apart from a short period in the 1980s, the practice of the Supreme Court of Canada (SCC) has been to allow almost unlimited intervener participation.[4] This permissive practice has facilitated the presentation of a wide range of arguments to Canada's highest court. Religious freedom litigation is one area where civil society interveners are consistently present. In a previous study, we found that interveners participated in all but one of twenty SCC cases addressing religious freedom arguments between 2001 and 2018, with an average rate of 6 interveners per case.[5]

Despite the high rates of intervention at the SCC, judges and scholars remain divided on whether and how interveners are valuable to the adjudication of constitutional and other legal claims.[6] There are two principal theories supporting intervener participation. One is that interveners promote the *legitimacy* of judicial decisions by making the court process more "open and accessible."[7] The other is that interveners

2. McCrudden*, ibid* at 435.
3. *Ibid*.
4. Benjamin Alarie & Andrew Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48:3/4 Osgoode Hall LJ 381 at 395, noting a success rate of 91.4 % for potential interveners between 2000 SCC 1 and 2009 SCC 38; Daniel Sheppard, "Just Going Through the Motions: The Supreme Court, Interest Groups and the Performance of Intervention" in Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis Canada, 2019) 187, noting the success rate for intervention motions at the SCC between 2009 and 2017 ranged from 80 to 96%; see also Ian Brodie, *Friends of the court: the privileging of interest group litigants in Canada* (Albany: State University of New York Press, 2002).
5. Kathryn Chan & Howard Kislowicz, "Divine Intervention: A Study of the Operation and Impact of NGO Interveners in Canadian Religious Freedom Litigation" (2019) 90 SCLR (2nd) 219, Table 2 [*Chan & Kislowicz*]. In this paper, our sample covers the same time period but includes only the 16 cases where the Court addressed religious freedom in its reasons. We consolidated the two appeals involving Trinity Western University in 2018 as the interventions were similarly consolidated.
6. See *Chan & Kislowicz*, *ibid* and the literature cited therein.
7. Bertha Wilson, "Decision-Making in the Supreme Court" (1986) 36:3 UTLJ 227 at 243. See also Omari Scott Simmons, "Picking Friends From the Crowd: Amicus Participation as Political

improve the *quality* of judicial decisions by expanding or enriching the court's understanding of the issues before it.[8]

This paper forms part of a broader project that aims to evaluate the strength of each of these rationales for intervener participation in cases involving section 2(a) of the *Charter*. Our initial paper offered observations on patterns of intervention in religious freedom cases at all levels of court.[9] We developed an initial typology of interveners and recorded the numbers and kinds of interveners in these cases. Here, we undertake a more granular inquiry into the extent of interveners' influence on religious freedom doctrine. Unlike previous work which has used quantitative analysis to assess the impact of interventions on the *outcome* of particular cases, we rely primarily on qualitative analysis to examine the impact of interventions on *doctrinal development*. We ask: to what extent have interveners in Canadian religious freedom litigation succeeded in being "norm entrepreneurs" that contribute to judicial pronouncements on the meaning and relative importance of section 2(a)?

Our analysis proceeds as follows. In Part I, we summarize the claims of those who assert that interventions improve the quality of judicial decisions. We consider the relationship between improving quality and wielding influence, and outline our methods of measuring how interveners have influenced the Court's section 2(a) jurisprudence. In Part II, we identify certain general indicators of intervener influence and apply them to our dataset. We then undertake a granular, qualitative analysis of one strong theme of the religious freedom case law—collective religious freedom—in interventions and related SCC decisions (Part III), before offering some concluding thoughts.

Overall, we find that interveners have been modestly successful in influencing the development of Canada's religious freedom doctrine. We offer a number of observations to support this conclusion. First, the SCC directly referenced intervener submissions or materials cited only by interveners in a substantial number of the cases in our sample. Second, the SCC directly referenced case law that was cited only by interveners in *Amselem v Syndicat Northcrest* and relied on that case law to modify the basic doctrinal framework for assessing religious freedom claims. Third,

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Symbolism" 42:1 Conn L Rev 185 at 190. *Cf* Callaghan advances a somewhat nuanced version of this theory, arguing that the democratic benefits of participation itself outweigh the risks to judicial legitimacy: Geoffrey D Callaghan, "Intervenors at the Supreme Court of Canada" (2020) 43:1 Dal LJ.

8. Chan & Kislowicz, *supra* note 5, crediting Alarie & Green. A third theory is that interventions allow judges to seek out arguments that support their partisan preferences: Alarie & Green, *supra* note 4. We leave this theory aside on the basis that it explains a phenomenon but does not provide a reason for valuing interventions.

9. See Chan & Kislowicz, *ibid*.

in a number of section 2(a) decisions, there is inferential evidence that interveners influenced some of the reasoning in the majority decision of the SCC. Fourth, in a few section 2(a) decisions, a concurring minority of the Court directly reproduced intervener submissions on collective religious freedom. Based on this evidence, we suggest that interveners have enjoyed some success as norm entrepreneurs in section 2(a) litigation. While the Court has sometimes been influenced by interveners, however, it has also occasionally developed legal principles that neither interveners nor the principal parties to the appeal addressed in written argument. This reminds us that, despite our legal system's adversarial nature and its accommodation of multiple participants, courts retain control over the development of our constitutional narrative.

I. *Testing intervener influence at the Supreme Court of Canada*

1. *The relationship between quality and influence*

Jurists who support intervener participation often argue that interventions improve the quality of judicial decisions. The general idea of the quality theory 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."[10] The SCC rules generally prohibit interveners from taking a position on the outcome of the appeal.[11] However, there are a number of ways in which interveners might affect the Court's consideration of the issues before it, thus "improving the quality" of its judgments. One possibility is that interveners draw a court's attention to relevant precedents that it might otherwise have overlooked.[12] Another is that interveners add nuance to the dispute by "introducing subtle variations of the basic argument," or making emotive arguments that the principal litigants are hesitant to embrace.[13] Proponents of intervention argue that interveners can help the court understand the potential impact of its decision on parties not before the court.[14] They can expose the Court to views from marginalized or disadvantaged actors that would not themselves have the capacity to initiate constitutional litigation.[15]

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10. Alarie & Green, *supra* note 4 at 386.
11. *Rules of the Supreme Court of Canada,* SOR/2002-156, r 42(3)
12. Bernard Dickens, "A Canadian Development: Non-Party Intervention" (1977) 40:6 Mod L Rev 666.
13. Samuel Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy" (1963) 72:4 Yale LJ 694 at 711.
14. See e.g. Philip L Bryden, "Public Interest Intervention in the Courts" (1987) 66 Can Bar Rev 490 at 507-508.
15. LEAF, "Interventions at the Supreme Court of Canada" (1986) at para 4, online (pdf): <www.

The quality theory assumes the existence of some "optimal disposition" of an appeal. This assumption makes it difficult to evaluate the quality theory's strength, since whether an appeal has been optimally decided is ultimately a normative question upon which reasonable people are likely to disagree. For this reason, we take no position here on whether interveners have moved the SCC closer to "optimal" dispositions of religious freedom conflicts. Instead, we ask whether the interventions within our data set *influenced* the resultant decisions at all.

We assess intervener influence by (a) identifying how Canada's religious freedom doctrine has developed over time, and (b) analyzing the extent to which interveners' arguments are reflected in those developments. Apart from instances where a Court attributes a point to an intervener specifically or where judgments borrow directly from intervener's arguments, it may not be possible to prove that an intervention "caused" a court to decide a dispute in a certain way. However, if judicial reasons contain ideas that are present in intervener factums (especially if those ideas are not present in the parties' factums), it seems reasonable to infer that the interventions influenced the resultant judicial decision. If intervener submissions on a particular theme are largely *not* reflected in the doctrine, on the other hand, it seems reasonable to infer that those submissions did not influence the court.

2. *Methods*

Our project sought to measure intervener influence in the sixteen religious freedom cases decided by the Supreme Court of Canada between 2001 and 2018.[16] We included both government and non-governmental interveners in our dataset.[17] Our research team analyzed the factums submitted by the principal parties and interveners in each case, as well as the resultant decisions. We limited our analysis to SCC cases because SCC decisions make the most lasting changes to legal doctrine and because factums filed in SCC cases are easy to obtain. We limited our analysis to written submissions because of resource constraints. Future research that analyzed interveners' oral arguments, press releases and public commentary could enrich our understanding of the function and value of interventions.

We applied two principal qualitative analysis methods to the documents in our dataset. First, we searched for *general indicators of intervener*

leaf.ca> [perma.cc/549A-P2YD].

16. Appendix 1 lists the cases.

17. As we noted in our earlier work, there are important differences between government interveners and non-governmental interveners, which are particularly relevant to whether and how interveners promote the *legitimacy* of judicial decisions: Chan and Kislowicz, *supra* note 5 at Part V.

influence, including whether and how often interveners are specifically mentioned in judicial decisions. We also tracked the judicial citation of case law and scholarship referenced only by interveners, and highlighted the citations that most clearly influenced the resultant decisions. Part 3 summarizes the results of these general inquiries. Second, we took an in-depth look at intervener submissions on a common theme in our data set: collective religious freedom. Part 4 summarizes the results of this detailed qualitative analysis.

II. *General indicators of influence*

1. *Direct references to interveners*

In the 16 religious freedom cases heard by the SCC between 2001 and 2018, 103 unique interveners made 190 separate interventions. Interveners took varying positions on the scope and meaning of section 2(a). Some interveners addressed other issues, such as the interpretation of the *Charter*'s equality guarantee and the appropriate standard of review.

In six of the 16 SCC cases in our dataset, the Court made direct reference to interventions.[18] The Court referred to 10 of 56 interventions in the course of those six cases. This rate of direct references to interventions supports the view that interveners are more than occasionally influencing the SCC.

Multani, Bruker, and *TWU 2018* provide examples of directly traceable intervener influence. The issue in *Multani* was whether a school board that prohibited a Sikh child from wearing a kirpan to school unjustifiably violated the child's religious freedom. The intervener Canadian Human Rights Commission submitted that the relevant schools observed a standard of "reasonable" (rather than "complete" or "perfect") safety.[19] The SCC accepted this submission, which supported its conclusion that prohibiting the kirpan without evidence of dangerousness was inconsistent with the school board's own policies. In *Bruker*, a dispute about a Jewish divorce, the SCC endorsed the intervener Canadian Civil Liberties Association's articulation of a legal principle allowing the adjudication of civil disputes that involve religious obligations.[20] Finally, in *TWU 2018*, the majority

18. *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at paras 15, 69, 86 [*TWU v BCCT*]; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 46 [*Multani*]; *Bruker v Marcovitz*, 2007 SCC 54 at para 43; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at paras 119, 228-229, 236 [*AC*]; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paras 88, 93, 105 [*Whatcott*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at paras 96, 251 [*LSBC v TWU*].

19. *Multani*, *ibid* at para 46.

20. *Bruker v Marcovitz*, *supra* note 18 at para 43.

attributed to interveners Egale Canada Human Rights Trust, Start Proud, and OUTlaws the finding that attending TWU's law school would require LGBTQ students "to deny a crucial component of their identity in the most private and personal of spaces for three years in order to receive a legal education."[21] This finding supported the conclusion that the law society's decision not to accredit TWU was reasonable.

2. *Intervener citations to case law and international law*

Materials cited only by interveners accounted for about 13.5% of all judicial citations of primary law materials in the cases in our dataset. The Court made 703 citations to cases and international legal documents; 95 of these citations referred to cases and documents that appeared in intervener factums only. 71 of the 95 citations appeared in majority judgments.[22] We find intervener influence here, in the sense that the SCC engaged with or relied upon resources that likely would not have been part of the court record in the absence of interventions. However, the "success" of the interventions appears more variable.

The influence of intervener-only cited case law is most clearly discernible in *Syndicat Northcrest v Amselem,* the current leading case on freedom of conscience and religion in Canada. In *Amselem*, a majority of the SCC held that, in adjudicating alleged violations of section 2(a), a court should focus on the sincerity of the claimant's belief rather than the belief's consistency with religious doctrine. The SCC quoted from two US Supreme Court cases in justifying this focus,[23] cases that had been put before the Court only by the intervening Ontario Human Rights Commission.[24] The *Amselem* majority also held that religious freedom encompasses both mandatory and voluntary "expressions of faith."[25] In doing so, it quoted from *R v Laws*,[26] a decision cited only in the joint intervention of the Evangelical Fellowship of Canada and the Seventh-Day Adventist Church in Canada.[27] Both of these holdings have become important tenets of the section 2(a) jurisprudence.

Intervener-cited legal materials impacted the disposition of several other cases within our dataset. In *TWU v BCCT*, for example, the majority

21. *LSBC v TWU*, *supra* note 18 at para 96.
22. Table of citations to intervener-only materials on file with authors.
23. *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 45 [*Amselem*]. The two cases were *Thomas v Review Board of the Indiana Employment Security Division* 450 US 707 (1981) and *Frazee v Illinois Department of Employment Security* 489 US 829 (1989).
24. *Ibid* (Factum of the Intervener, Ontario Human Rights Commission at para 23).
25. *Ibid* at para 47.
26. (1998), 165 DLR (4th) 301, 41 OR (3d) 499.
27. *Ameslem*, *supra* note 23 (Factum of the Intervener, EFC and Seventh-Day Adventist Church in Canada at para 17).

held that because BC's human rights legislation exempted a religious school from discrimination claims on associational grounds, there was a corollary duty to treat the school's graduates as worthy of participating in public activities.[28] In support of this reasoning, the majority quoted from *Ontario Human Rights Commission v Simpsons-Sears Ltd*,[29] a case that only the intervener Evangelical Fellowship of Canada had cited for the same point.[30] In *Bruker*, the Court cited one Canadian and two Australian cases that had been put to it only by the intervener Canadian Civil Liberties Association.[31] The Canadian case was used to justify the Court's enforcement of an agreement with religious and civil aspects,[32] while the Australian cases were used to justify the Court's use of civil remedies to encourage a spouse to provide a religious divorce.[33] Similarly, in *Whatcott*, the SCC quoted from two decisions of the Canadian Human Rights Tribunal to add substance to its understanding of hate speech.[34] The intervener LEAF had cited both cases in its written submissions,[35] and the intervener Canadian Human Rights Tribunal had cited one.[36]

Interveners have also promoted their preferred interpretations of religious freedom by putting international legal documents before the Court. This strategy met with some success in *Loyola High School v Quebec (AG)*.[37] In offering its most thorough account of collective religious freedom to date, the majority of the SCC stated that "an essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children, whether through instruction in the home or participation in communal institutions."[38] In support of this conclusion, the court cited Article 18(4) of the *International Covenant on Civil and*

28. *TWU v BCCT*, *supra* note 18 at para 35.
29. *Ibid* citing *Ontario Human Rights Commission v Simpsons-Sears Ltd*, [1985] 2 SCR 536 at 554, 23 DLR (4th) 321.
30. *TWU v BCCT*, *supra* note 18 (Factum of the Intervener, EFC at para 15).
31. *Bruker v Marcovitz*, *supra* note 18 (Factum of the Intervener, CCLA at paras 26, 36-38). The SCC also referred to a case cited only by interveners in *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 124 [*Saguenay*].
32. *Bruker v Marcovitz*, *supra* note 18 at para 45 citing *Lakeside Colony of Hutterian Brethren v Hofer,* [1992] 3 SCR 165, 97 DLR (4th) 17.
33. *Bruker v Marcovitz*, *supra* note 18 at para 87. The Court cited *In the Marriage of Shulsinger* (1977), 13 ALR 53; *In the Marriage of Steinmetz* (1980), 6 FLR 554.
34. *Whatcott*, *supra* note 18 at para 44 citing *Warman v Kouba*, 2006 CHRT 50 and *Warman v Tremaine (No 2)*, 2007 CHRT 2, 59 CHRR D/391.
35. *Whatcott*, *supra* note 18 (Factum of the Intervener, LEAF at para 19).
36. *Ibid* (Factum of the Intervener, CHRC at para 26).
37. See also *AC*, *supra* note 18 at para 93, where the SCC cited the *Convention on the Rights of the Child* in a way suggested by the intervening AG Alberta.
38. *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 64 [*Loyola*].

Political Rights,[39] a provision that several interveners (but none of the principal parties) had cited for the same principle. [40]

Our analysis of intervener-cited legal materials suggests that norm entrepreneurship can sometimes produce ambiguous or unintended results for interveners.[41] This was clearly demonstrated in *TWU v BCCT*.[42] In that case, the Secondary School Teachers' Federation relied on *P(D) v S(C)*[43] to argue (1) that equality values are interpretive aids for the *Charter*,[44] and (2) that the "best interests of the child" principle supported the College of Teachers' refusal to accredit a free-standing teacher education program at the private university.[45] A majority of the SCC relied on the case but for two quite different propositions: (1) that "[n]either freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute," and (2) that the College's decision should be quashed since there was no evidence of discrimination that affected children's best interests.[46]

3. *Intervener citations to academic texts*

Academic texts cited only by interveners comprised about 7.5% of all academic texts cited by the SCC in the cases in our dataset. The SCC cited intervener-cited academic texts, including 16 texts not cited by a principal party, in 10 of 16 religious freedom cases.[47] As in the case of primary legal materials, we may infer intervener influence from this evidence. However, we found no case in which the SCC directly reproduced language from an academic text in articulating a doctrinal test.

Indeed, in most cases within our dataset, intervener-cited scholarship had no discernible impact on majority decisions. Majority judgments occasionally referred to intervener-cited scholarship, either to approve

39. 999 UNTS 171.

40. *Loyola*, *supra* note 38, (Factum of the Intervener, Christian Legal Fellowship [CLF] at para 34; Factum of the Intervener, WSO at para 10; Factum of the Intervener, Home School Legal Defence Association at para 32).

41. For a similar conclusion in the equality rights context, see Jennifer Koshan "International Law as a Strategic Tool for Equality Rights Litigation: A Cautionary Tale" in Fay Faraday, Margaret Denike & Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006) 443 at 444-445.

42. *TWU v BCCT, supra* note 18. See also *AC, supra* note 18, where several interveners cited the SCC's decision in *Young v Young*, [1993] 8 WWR 513, 108 DLR (4th) 193, for varying purposes, and the SCC interpreted it in quite a different fashion.

43. [1993] 4 SCR 141, 108 DLR (4th) 287.

44. *TWU v BCCT*, *supra* note 18 (Factum of the Intervener, Secondary School Teachers' Federation at para 40).

45. *Ibid* (Factum of the Intervener, Secondary School Teachers' Federation at para 80).

46. *Ibid* at paras 29-32, 62.

47. Table of citations to intervener-only materials on file with authors.

it[48] or refute it.[49] More often, however, it was the dissenting or minority judgments that engaged with intervener-cited scholarship.[50] Some of these engagements were relatively insignificant, in the sense that they served only to confirm general and uncontroversial principles of constitutional law.[51] Some were more substantial. For example, in her dissenting opinion in *TWU 2001*, L'Heureux-Dubé J cited and quoted from six texts noted in the factums of the interveners Egale and The Ontario Secondary Schools Teachers Federation, mostly to emphasize the dangers of homophobia.[52]

Intervener-cited scholarship appears to have influenced the thinking of a majority of the SCC on at least one topic: state religious neutrality. In outlining the state's duty of religious neutrality in *Lafontaine*, Justice LeBel quoted from an article by José Woehrling that the Evangelical Fellowship of Canada and the Seventh Day Adventist Church in Canada had cited in their joint factum.[53] Though LeBel J was in dissent, both his opinion and the Woehrling article were later relied upon by the majority of the court in *Saguenay*.[54] Work by Richard Moon, which was cited by interveners the Canadian Secular Alliance in *Saguenay* and the Trustees Coalition in *des Chênes*, was relied upon by the majorities in those two cases to support the developing doctrine of state religious neutrality.[55] In *Saguenay*, the influence of the Moon article is quite clear. The Court relies on Moon's assertion that the state's treatment of individual religious practices implicates individual identity to distinguish religious neutrality from viewpoint neutrality, and to justify a constitutional duty of religious neutrality on the state.[56] On this topic, then, interveners appear to have

48. See e.g. *Whatcott*, *supra* note 18 at para 72 where the SCC cites the Cohen Committee Report for the same purpose as does the intervening NWT and Yukon Human Rights Commission.
49. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 75-76 [*Hutterian Brethren]*.
50. See e.g. *Ktunaxa Nation v British Columbia (Forests Lands and Natural Resource Operations)*, 2017 SCC 54 at para 127 [*Ktunaxa*]; *AC*, *supra* note 18 at para 229; *Hutterian Brethren*, *supra* note 49 at paras 186, 191.
51. See e.g. *LSBC v TWU*, *supra* note 18 (where Rowe J cited passages from the textbook of leading constitutional law scholar Peter Hogg that had been cited by several interveners at paras 183-184, 191).
52. *TWU v BCCT*, *supra* note 18 at paras 71, 79, 81-82, 85-86, 90-91.
53. *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48 at para 76. The source is José Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse" (1998) 43:2 McGill LJ 325.
54. *Saguenay, supra* note 31 at paras 69, 71.
55. *Ibid* at para 73; *SL v Commission scolaire des Chênes*, 2012 SCC 7 at para 30 [*des Chênes*].
56. *Saguenay*, *supra* note 31 at para 73, quoting Richard Moon, "Freedom of Religion Under the Charter of Rights: The Limits of State Neutrality" (2012) 45 UBC L Rev 497 at 507 (emphasis added by Gascon J).

succeeded in influencing religious freedom doctrine by putting academic scholarship before the Court.

We observed that, as with intervener-cited case law, interveners' invocation of scholarship sometimes produced unintended results. In *Loyola*, the intervening Seventh-Day Adventist Church in Canada and Seventh-Day Adventist Church-Quebec Conference relied on the scholarship of Benjamin Berger to support their argument that the Minister of Education had "disparaged" a religious tradition by refusing to exempt a Jesuit high school from teaching the Ethics and Religious Culture curriculum in the ordinary way.[57] The majority of the SCC relied on this scholarship in holding that the state "has a legitimate interest in ensuring that students in all schools are capable, as adults, of conducting themselves with openness and respect as they confront cultural and religious differences."[58] This led to the conclusion that the Minister could legitimately require religious schools to teach about other religious traditions,[59] a result that seems at odds with the interveners' argument. This highlights that even where interveners succeed in drawing a court's attention to relevant precedents and scholarship, they may fail to achieve their strategic, norm-entrepreneurial goals.

III. *Intervener influence on collective religious freedom doctrine*

Assessing the extent to which interveners have influenced our constitutional jurisprudence is a complex task that requires a variety of research methods. Beyond identifying and tracking general indicators of intervener influence, we compared the arguments of interveners and parties with jurisprudential developments, seeking to identify noticeable similarities from which we might infer intervener influence. There are limitations to this type of qualitative analysis. It is often impossible, as we noted in Part 1, to prove that an intervention caused a court to decide a dispute in a certain way. In addition, significant time and resources are required to code legal arguments. We analyzed a limited number of religious freedom cases in this project and coded only one of several reoccurring themes in our data set, leaving open questions about whether interveners were more or less influential in other thematic areas. Despite these limitations, qualitative analysis provides a rich set of insights that cannot be accessed other than by systematic investigation.

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57. *Loyola*, *supra* note 38 (Factum of the Intervener, Seventh-Day Adventist Church in Canada and Seventh-Day Adventist Church – Quebec Conference at para 22).
58. *Loyola*, *supra* note 38 at para 48. See also Benjamin L Berger, "Religious Diversity, Education, and the Crisis in State Neutrality" (2014) 29 CJLS 103 at 115.
59. *Loyola, supra* note 38 at para 48.

In this section, we summarize our qualitative analysis of how intervener submissions have influenced the SCC's collective religious freedom jurisprudence. We identified a large number of arguments on this theme, coding over 500 references to collective religious freedom across 72 of the 204 factums in our data set.[60] We begin by outlining the case law addressing collective religious freedom, highlighting substantive doctrinal changes and areas of ambiguity or disagreement. We then compare the case law with the intervener submissions in our data set. We conclude that the dominant narrative is one of modest intervener influence, comprised primarily of instances where distinct and non-distinct (or "echo") intervener arguments find themselves reflected in passages from minority and concurring judgments. However, there are a number of counter-narratives that render the picture more complex.

1. *Collective religious freedom in the SCC*

The issue of collective religious freedom arose early in the SCC's section 2(a) jurisprudence.[61] However, questions regarding collective religious freedom's nature and practical consequences have received only sporadic attention in Canada, and many remain unanswered. In our review of the SCC cases in our dataset, we identified six sub-themes or questions related to collective religious freedom.

- First, does religious freedom have collective dimensions?
- Second, at what stage of the section 2(a) analysis should the collective dimensions of religious freedom be addressed?
- Third, can institutions be the bearers of religious freedom?
- Fourth, is collective religious freedom a freedom possessed by a group *qua* group, or by the aggregate of its individual members?
- Fifth, what is the relationship between religious freedom and freedom of association?
- Sixth, do religious groups have a claim to autonomy from the state in cases where the *Charter* does not apply directly?

Here, we briefly outline whether and how the SCC has addressed each sub-theme.

60. These numbers include references in party factums. Some other themes occurred across more factums, but we found fewer references to these overall and none of these were specific to the doctrine of religious freedom. They related to: balancing rights, equality-based arguments, the relation to other constitutional provisions, and references to international law. We address the international law references within our discussion of case law citations in Part 3.2.

61. *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at para 145, 35 DLR (4th) 1.

a. *Does religious freedom have collective dimensions?*

The SCC has consistently held that religious freedom has collective dimensions.[62] However, the definition of religion adopted by the majority in *Amselem* (2004) has been seen to privilege the individual aspects of religious freedom.[63] In contrast, Bastarache J's dissenting judgment emphasized that "although private beliefs have a purely personal aspect, the other dimension of the right has genuine social significance and involves a relationship with others."[64] Although the majority's test for establishing a religious freedom infringement continues to dominate the 2(a) analysis, Bastarache J's point about the collective nature of religious practice has also proved influential.[65]

The SCC's most thorough discussion of religious freedom's collective dimensions to date is in *Loyola* (2015). The case involved a Catholic school that objected to teaching a mandatory curriculum on ethics and religious culture in the way the provincial government envisaged. In finding for the school, the majority held that the *Charter*'s protection of religious freedom "must…account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions."[66] A concurring minority also highlighted the importance of religious freedom's collective aspects, stating:

> The individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith.[67]

b. *At what stage of the section 2(a) analysis should the collective dimensions of religious freedom be addressed?*

The SCC divided on this issue in *Hutterian Brethren* (2009).[68] The majority held that the impugned law's impact on a religious community

62. *Ibid*.
63. *Amselem*, *supra* note 23 at para 39. See Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at ch 2; Howard Kislowicz, "Religious Freedom and Canada's Commitments to Multiculturalism" (2012) 31:1 NJCL 1; Victor M Muñiz-Fraticelli and Lawrence David Lawrence, "Religious Institutionalism in a Canadian Context" (2015) 52:3 Osgoode Hall LJ 1049.
64. *Amselem*, *supra* note 23 at para 137 (Bastarache J, dissenting).
65. *Loyola*, *supra* note 38 at para 92 (McLachlin CJ & Moldaver J).
66. *Ibid* at para 60.
67. *Ibid* at para 94 (McLachlin CJ & Moldaver J).
68. *Hutterian Brethren*, *supra* note 49.

was relevant only in assessing the law's proportionality, while a dissenting minority held that the communal impact was relevant at the infringement stage. This division was arguably prompted by disagreement over the proper characterization of the Hutterite Colony's claim and has not re-emerged in the same way since. The majority understood the protected religious practice to be the prohibition of any individual Colony member being photographed, and held that the "the broader impact of the photo requirement on the Wilson Colony community is relevant at the proportionality stage of the section 1 analysis."[69] However, had the majority understood the protected religious practice to be the Wilson Colony's collective lifestyle (as Abella J asserted in dissent),[70] then the majority may have addressed the collective aspects of the claim in the infringement stage of the *Charter* analysis. We discuss *Hutterian Brethren* in section 4.b.

c. *Can institutions be the bearers of religious freedom?*

The case law has been persistently ambiguous about whether institutions enjoy religious freedom. In *Edwards Books* (1986), Dickson CJ raised the issue of "whether a corporate entity ought to be deemed in certain circumstances to possess the religious values of specified natural persons", but declined to address it.[71] In *Loyola* (2015) and *TWU* (2018), a majority of the SCC again declined to address the question of institutional or corporate religious freedom.[72] The concurring minority in *Loyola*, on the other hand, was ready to recognize the religious freedom of certain institutions. It held that an institution meets the requirements for section 2(a) protection "if (1) it is constituted primarily for religious purposes and (2) its operation accords with these religious purposes."[73]

d. *Is collective religious freedom a freedom possessed by a group qua group?*

Collective religious freedom claims also raise difficult questions about whether collective religious freedom should be understood as a freedom possessed by a group *qua* group, or by the aggregate of its individual members. The SCC has not answered this question definitively. However, one justice spoke to the issue in *TWU* (2018), asserting that collective religious freedom is best understood as an aggregate of individual rights. In Rowe J's view, institutions do not possess religious freedom, but if they

69. *Ibid* at para 31.
70. *Ibid* at para 130.
71. *R v Edwards Books and Art Ltd*, *supra* note 61 at para 153.
72. *Loyola*, *supra* note 38 at para 34; *LSBC v TWU, supra* note 18 at para 61 (majority).
73. *Loyola*, *supra* note 38 at para 100 (McLachlin CJ & Moldaver J).

do, their freedoms do not extend further than the individual freedoms of community members.[74]

e. *What is the relationship between religious freedom and freedom of association?*

The SCC divided on this question in *TWU* (2018), with the majority largely subsuming the claimants' associational freedom into their religious freedom claim, and several judges relying on freedom of association to demonstrate a deeper *Charter* violation. The majority judgment alluded to the often-mentioned links between collective religious freedom and freedom of association,[75] but ultimately held that, regardless of whether the decision was characterized as a violation of religious or associational freedom, the decisions of the law societies were justified. Chief Justice McLachlin's concurring opinion parted ways with the majority on this point. In her view, the majority's treatment of expressive and associative freedom was underdeveloped. "TWU's insistence on its Community Covenant Agreement *expresses* its believers' religious commitment and their desire to associate with people who commit to practices that accord with their religious beliefs."[76] McLachlin CJ relied directly on this holding in asserting that the infringement of TWU community's rights was not minor, as the majority had held.[77] Justices Brown and Côté offered a similar analysis in dissent.[78]

f. *Does religious freedom protect religious institutional autonomy in cases where the Charter is not directly applicable?*

The SCC has recently held on two occasions that decisions of religious voluntary associations are not subject to judicial review unless there is an underlying legal right in issue,[79] but it is unclear to what extent religious institutional autonomy is protected by religious freedom.

2. *Intervener submissions on collective religious freedom*

Interveners in Canadian religious freedom litigation have sought to be norm entrepreneurs on the issue of collective religious freedom, making arguments across the six sub-themes identified. In Table 1, we detail the *number of interveners* who made arguments on each sub-theme in those

74. *LSBC v TWU, supra* note 18 at paras 217-220 (Rowe J).
75. *Ibid* at paras 76, 78 (Majority).
76. *Ibid* at para 122 (McLachlin CJ, emphasis in original).
77. *Ibid* at para 134 (McLachlin CJ).
78. *Ibid* at para 319 (dissent).
79. *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall,* 2018 SCC 26 [*Wall*]; *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22.

cases where the issue of collective religious freedom arose. An extended version of this table, which includes pinpoint references to the arguments, is included as Appendix 1.

Table 1: Intervener Collective Religious Freedom Arguments by Sub-Theme

Case	# of Interveners	ST1	ST2	ST3	ST4	ST5	ST6
Trinity Western University v British Columbia College of Teachers, 2001 SCC 31	8	2	0	3	0	0	0
Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village), 2004 SCC 48	3	3	0	3	0	1	0
Reference re Same-Sex Marriage, 2004 SCC 79	30	2	0	3	0	1	1
Bruker v Marcovitz, 2007 SCC 54	1	0	0	0	0	0	0
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37	8	2	0	1	1	0	0
SL v Commission scolaire des Chênes, 2012 SCC 7	8	1	0	0	0	1	0
Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11	26	0	0	0	0	0	0
Loyola High School v Québec (Attorney General), 2015 SCC 12	16	7	0	10	1	4	0
Mouvement laïque québécois v Saguenay (City), 2015 SCC 16	7	1	0	0	0	2	0
Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54	18	5	2	2	0	0	0
Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall, 2018 SCC 26	12	6	0	2	1	6	10
Law Society of British Columbia v Trinity Western University, 2018 SCC 32 *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33	24	6	0	8	1	3	2

ST1: # Interveners Makings arguments re: Collective Aspects sub-theme
ST2: # Interveners Makings arguments re: Infringement/Proportionality sub-theme
ST3: # Interveners Makings arguments re: Institutional Religious Freedom sub-theme
ST4: # Interveners Makings arguments re: Aggregate vs Group Right sub-theme
ST5: # Interveners Makings arguments re: Freedom of Association sub-theme
ST6: # Interveners Makings arguments re: Church Autonomy sub-theme
Grey shading = Principal party/ies also made argument on sub-theme

3. *Intervener influence on collective religious freedom doctrine: the dominant narrative*

The dominant narrative that emerges from our analysis of party submissions, intervener submissions, and judicial reasons on collective

religious freedom is one of modest intervener influence. In no case did an intervener's written submission on collective religious freedom have a clear effect on the legal tests adopted by the majority of the SCC. However, certain ideas that interveners put forward for the Court's consideration can be identified in passages in the correlating decisions.

Our analysis distinguishes "distinct" intervener arguments from "echo" (or non-distinct) intervener arguments, since only the former category of arguments are permitted by the rules governing intervention.[80] Consistently with the SCC rules governing intervention, we define distinct arguments as arguments that are (entirely or substantially) "different from those of the other [principal] parties."[81] We define "echo" arguments as arguments that are not substantially different from those of the principal parties, but rather repeat, amplify or offer subtle variations of those arguments. Adopting this terminology, we identify three patterns that together constitute the dominant narrative of modest intervener influence. First, in a few cases within our dataset, interveners made distinct arguments that appear to have influenced the resultant decisions. Second, in a number of cases, interveners made echo arguments that appear to have contributed to elements of the Court's reasoning. Third, in a few cases, interveners made distinct arguments that the SCC did not address.

a. *Distinct arguments with modest influence*

In some of the cases within our sample, interveners made arguments, different from those of the parties, that appear to have modestly influenced the resultant judicial decision. The 2004 *Same-Sex Marriage Reference* provides a first example. While the Attorney General who initiated the reference made no specific submissions on institutional religious freedom,[82] several interveners did. The Seventh Day Adventist Church submitted that the *Charter* required "a respectful distance from state interference in the religious institutions of our faith communities,"[83] and identified the rental of church buildings for wedding ceremonies as one way that the new definition of marriage would "conflict with the Church."[84] The Church of Jesus Christ of Latter Day Saints submitted

80. We discuss those rules in our first paper: *Chan & Kislowicz*, *supra* note 5 at 225-226.
81. *Rules of the Supreme Court of Canada,* SOR/2002-156, r 57(2)(b).
82. *Reference Re Same-Sex Marriage*, 2004 SCC 79 (Factum of The Attorney General of Canada: the AG focused its submissions on the rights of religious officials, not religious institutions. The closest the factum comes to addressing collective religious freedom is a sub-heading that reads: "Religious freedom does not entitle one group to demand state endorsement of its beliefs to the exclusion of others" at 16) [*Same-Sex Marriage Reference*].
83. *Ibid* (Factum of the Intervener, Seventh Day Adventist Church in Canada at para 3).
84. *Ibid* (Factum of the Intervener, Seventh Day Adventist Church in Canada at para 8).

that section 2(a) must be interpreted to protect the Church's right to deny access to Temples and other facilities for the solemnization of same-sex marriages. It also referred extensively to First Amendment case law on the protection of religious institutional autonomy, arguing for the extension of US constitutional law's "Church Autonomy" principles to Canadian religious organizations.[85]

It is plausible to conjecture that these intervener arguments on the protection of religious institutional autonomy influenced the unanimous opinion of the Court. The SCC's discussion of religious freedom focused primarily on the rights of religious officials not to be compelled to perform marriages contrary to their religious beliefs. The SCC did briefly opine, however, that just as compelling religious officials to perform marriage would "almost certainly run afoul" of section 2(a),[86] so would compelling the use of "sacred places for the celebration of such marriages."[87] This statement closely tracks the intervener submissions on the control of church property as a function of institutional autonomy. However, the opinion does not specify *how* the compelled use of sacred places would infringe religious freedom, leaving it unclear whether the court is concerned with the protection of individual religious autonomy, institutional religious autonomy, or both.[88]

Ktunaxa offers a second example of distinct intervener arguments modestly influencing a judicial opinion. The case involved a decision by the Government of British Columbia to approve the construction of a ski resort on Qat'muk, one of the Ktunaxa people's most sacred sites. The Ktunaxa believed that the proposed resort would drive Grizzly Bear Spirit from the territory, depriving them of access to an important spiritual presence,[89] and rendering their spiritual practices futile.[90] The individual and institutional appellants that represented the Ktunaxa people[91] argued that the Ministerial approval breached both their freedom of religion and section 35 Aboriginal rights. The party submissions identified "the Ktunaxa" as the subject(s) of the alleged infringement of section 2(a), but did not directly address the implications or nature of their collective religious freedom claim.[92]

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85. *Ibid* (Factum of the Intervener, Church of Jesus Christ of Latter Day Saints at para 53).
86. *Ibid* at para 56.
87. *Ibid* at para 59.
88. In any event, this holding has arguably been overtaken by *Ktunaxa*, *supra* note 49, though the passage is not cited in that case.
89. *Ibid* at para 59.
90. *Ibid* (Factum of the Appellant at para 67); *Ibid* at para 59.
91. *Ibid* at para 2.
92. The appellants did include affidavit evidence that emphasized the links between the protection

A diverse group of governments and associations intervened in *Ktunaxa*, exposing the Court to a range of arguments about the value of religious communities[93] and the scope of the *Charter*'s protection of communal religious practice.[94] While many of these echoed or elaborated the submissions of the principal parties, interveners made at least one distinct argument that is reflected in Moldaver and Côté JJ's concurring minority judgment. Three interveners, the Alberta Muslim Public Affairs Council, the Shibogama First Nations Council and the BCCLA, all emphasized the importance of ensuring that the protections of section 2(a) extend equally to non-Western religious traditions. The Alberta Muslim Public Affairs Council submitted that an overly individualistic approach to religious freedom would privilege Western approaches to religion over others,[95] and "[denigrate] religious traditions that emphasize communal worship or other communal religious activities."[96] The Shibogama First Nations Council and the BCCLA emphasized the importance of equality with respect to the enjoyment of freedom of religion, and cited secondary literature on the unique role of sacred sites within traditional Indigenous spiritualities.[97] The minority judgment indicated an attentiveness to this literature, and a conscientiousness of understanding religious commitments in their own terms.[98]

b. *"Echo arguments" with modest influence*

While interveners occasionally make distinct arguments, our analysis of the collective religious freedom doctrine suggests that interveners more often offer "subtle variations" or more emotive versions of party arguments.[99] Such "echo arguments" are arguably inconsistent with the established purpose of intervention, which is to provide the court with

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of Qat'muk and the collective cultural security of Ktunaxa citizens: *Ktunaxa*, *supra* note 50 (Factum of the Appellant at para 27).

93. *Ibid* (Factum of the Intervener, Evangelical Fellowship of Canada [EFC] at para 7); *Ibid* (Factum of the Intervener, Alberta Muslim Public Affairs Council at para 18-19).

94. See for example, *Ibid* (Factum of the Intervener, Alberta Muslim Public Affairs Council at para 1, 43); *Ibid* (Factum of the Intervener, EFC at para 10).

95. *Ibid* (Factum of the Intervener, Alberta Muslim Public Affairs Council at para 9).

96. *Ibid* (Factum of the Intervener, Alberta Muslim Public Affairs Council at para 16). The Council illustrated its point with examples of communal practices from the intervener group's faith tradition, such as the Muslim practice of "Jumu'ah", a congregational prayer that is performed every Friday afternoon: para 22.

97. *Ibid* (Factum of the Intervener, Shibogama First Nations Council at paras 24); *Ibid* (Factum of the Intervener, BCCLA at paras 7-13).

98. *Ibid* at para 127 ("The connection to the physical world, specifically to land, is a central feature of Indigenous religions… Unlike in Judeo-Christian faiths, for example, where the divine is considered to be supernatural, the spiritual realm in the Indigenous context is inextricably linked to the physical world…").

99. Samuel Krislov, *supra* note 12.

submissions different from those of the other parties to the appeal.[100] Because echo arguments are at least partially duplicative, it is difficult to measure the contribution that they make to judicial norm-generation. Nevertheless, there are a number of cases where echo arguments appear to have contributed to the SCC's pronouncements on collective religious freedom. We discuss two of these cases here: *Loyola High School v Quebec (AG)*, and *Wall v Highwood Congregation of Jehovah's Witnesses.*

In *Loyola* (2015), a Jesuit boys' high school challenged the constitutionality of a Ministerial decision that the school was required to teach Quebec's mandatory Ethics and Religion Culture curriculum in a non-sectarian way. The parties addressed collective religious freedom briefly in their factums, focusing largely on whether Loyola, as a religious corporation and a religious school, could possess religious freedom rights.[101] The Attorney General of Quebec argued that Loyola was not a rights-holder under section 2(a) of the *Canadian Charter* or its analog in Quebec. In its submission, a moral person lacked the cognitive and emotional resources to hold a sincere belief, and therefore could not benefit directly from the protection of section 2(a).[102] Loyola and the parents of one of its students, disputed the Attorney General's view.[103] However, their factum did not address the ontological objections the Attorney General had raised to the corporation's status as a rights-holder. Rather, in asserting Loyola's right to claim religious freedom as a corporate entity, the appellants submitted that Canadian law had protected the corporate dimensions of religious practice for some 250 years,[104] and that it had done so "not to protect idiosyncratic religious claims, but rather to address the concerns of religious Canadians as members of their religious groups and communities."[105]

There were 16 interveners in *Loyola*, most of them Christian organizations supporting Loyola's section 2(a) claim. Many of these interveners amplified and elaborated the appellants' submissions on the nature and importance of collective religious freedom. Interveners emphasized the importance of religious freedom's collective and associational aspects,[106] characterizing the freedom to manifest one's

100. See *Rules of the SCC,* SOR/2002-156, r 57(2)(b); *R v Morgentaler*, [1993] 1 SCR 462 at para 9, 1993 CarswellNS 429.
101. *Loyola High School c Quebec (Ministre de l'Éducation, du Loisir et du Sport)*, 2010 QCCS 2631 at para 213-261.
102. *Loyola, supra* note 38 (Factum of the Respondent at para 61).
103. *Ibid* (Factum of the Appellants at para 43).
104. *Ibid* (Factum of the Appellants at para 58).
105. *Ibid* (Factum of the Appellants at para 53).
106. *Ibid* (Factum of the Intervener, CCLA at paras 8, 13, 16).

religion in community with others as a freedom "at the 'heart'" of section 2(a).[107] They also identified reasons why collective religious rights deserved "robust protection."[108] The Canadian Council for Christian Charities (CCCC) submitted that religious freedom is "the primary condition" for community life,[109] and characterized religious communities as "societal structures" within which "we share common perspectives of life's purpose and meaning."[110] Other interveners argued that the protection of religious communities furthers diversity, pluralism, and multiculturalism.[111] Still others cited their own religious principles to illustrate the importance of faith's collective dimension. For example, the World Sikh Organization submitted that both individual and collective religious activity are "indispensable and crucial elements of Sikh practice,"[112] while a coalition of Catholic and Orthodox Christian charities (the "Catholic Civil Rights League Coalition") referred to the Christian belief that "'where two or three are gathered' Jesus Christ is with them."[113]

The *Loyola* interveners also expanded the party submissions on whether institutions themselves enjoy religious freedom. Most of the interveners argued in favour of corporate or institutional religious freedom. The EFC urged the SCC to "clarify the place of religion, religious individuals, communities and corporations within Canada's free and democratic society," and argued that Loyola as a corporation held religious freedom rights.[114] The CCCC submitted that the protection of the religious rights of institutions has been part of "our political and philosophical tradition" since "the early beginnings of our modern age," linking the protection of corporate religious freedom back to the 11th century Papal revolution and its doctrine of the "freedom of the Church."[115] The Catholic Civil Rights League Coalition argued that "[i]f religious communities manifest their religious belief through a corporation that has, as its purpose, the exercise

107. *Ibid* (Factum of the Intervener, Catholic Civil Rights League [CCRL] at para 13). At para 96, the minority cites the *Universal Declaration of Human Rights* regarding the right to manifest religion "either alone or in community with others" (emphasis by the minority).
108. *Ibid* (Factum of the Intervener, Canadian Council for Christian Charities [CCCC] at paras 7, 29).
109. *Ibid* (Factum of the Intervener, CCCC at para 12).
110. *Ibid* (Factum of the Intervener, CCCC at para 29).
111. *Ibid* (Factum of the Intervener, Association of Christian Educators and Schools Canada at para 37)*; Ibid,* (Factum of the Intervener, CCRL at paras 14, 17).
112. *Ibid* (Factum of the Intervener, WSO at para 19; see also para 24: "In an important sense…it is impossible to be a Sikh by oneself—one can only be a Sikh by acting with other Sikhs in the collective of the Khalsa and Panth.")
113. *Ibid* (Factum of the Intervener, CCRL at para 18).
114. *Ibid* (Factum of the Intervener, EFC at para 2, 12). See also *Ibid* (Factum of the Intervener, CCRL at para 3); *Ibid* (Factum of the Intervener, CCLA at para 22).
115. *Ibid* (Factum of the Intervener, CCCC at para 5, 9).

of religion, then that corporation also enjoys freedom of religion."[116] A number of interveners referred to comparative and international legal sources to support the existence of corporate religious freedom.[117]

The interveners also went further than the parties in offering reasons for the protection of institutional religious freedom. The CCLA and the Association of Christian Educators and Schools Canada both characterized religious institutions as manifestations of religious communities, with the latter association arguing that "[t]here is no meaningful difference between the religious freedom of the individuals that establish and operate a confessional school (e.g. the teachers, parents, and students) and that of the school itself." [118] Several interveners focused on the function of religious institutions, arguing that they existed "to complement and facilitate the exercise and manifestation of a particular religious culture, practice and identity."[119] Still others focused on the logistical necessity of religious corporations, arguing that it was "practically impossible" for a religious group of individuals to manifest their legal beliefs without the legal personality that allowed them to "enter into contracts, own land or operate a bank account."[120]

The extensive intervener submissions on the nature and importance of collective religious freedom appear to be reflected in the majority judgment of Abella J. The majority described collective practices and beliefs as "a crucial part of Loyola's claim,"[121] a move that distinguished the judgment from previous decisions where the Court had addressed collective religious claims through individual religious freedoms.[122] The majority declined to decide whether corporations enjoy religious freedom. However, it recognized the logistical necessity of incorporation, writing that "individuals may sometimes require a legal entity" to give effect

116. *Ibid* (Factum of the Intervener, CCRL at para 33). See also *Ibid* (Factum of the Intervener, CCCC at para 4).
117. *Ibid* (Factum of the Intervener, CCCC at para 19); *Ibid* (Factum of the Intervener, WSO at paras 11-13); *Ibid* (Factum of the Intervener, CCLA at para 27).
118. *Ibid* (Factum of the Intervener, CCLA at para 28); *Ibid* (Factum of the Intervener, Association of Christian Educators and Schools Canada at paras 19, 20; see also para 32 "any intrusion on confessional teaching is an intrusion on the rights of each parent and their organization, the school.")
119. *Ibid* (Factum of the Intervener, EFC at para 21). See also *Ibid* (Factum of the Intervener, CCRL at para 4); (Factum of the Intervener, Corporation Archiepiscopale Catholique Romaine de Montréal et al at para 16-18 religious corporations are "themselves created by law simply to manifest and ensure the exercise of freedom of conscience and religion, through their association.").
120. *Ibid* (Factum of the Intervener, CCRL at para 21). See also *Ibid* (Factum of the Intervener, WSO "schools and other institutions are almost exclusively registered corporate legal persons like the Appellant Loyola in this case" at para 23). See also *Ibid* (Factum of the Intervener, Corporation Archiepiscopale Catholique Romaine de Montréal et al at paras 16-18).
121. *Ibid* at para 61.
122. *Hutterian Brethren, supra* note 49 at para 31.

to the communal aspects of their religious beliefs and practice.[123] The majority also acknowledged that its interpretation of section 2(a) must "account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions."[124] While this specific wording is not traceable to a particular intervener submission, it seems likely that the emotive intervener arguments contributed to the majority's recognition of the important collective aspects of religious freedom claims.

Wall provides a different, thought-provoking context within which to consider the effect of intervener echo arguments on judicial decisions. The SCC was asked to decide whether a superior court had jurisdiction to review a religious association's decision to remove one of its members from fellowship. The Court held unanimously that it did not. While the reasons for judgment focus on limiting the scope of public law remedies to exercises of state authority,[125] one may speculate that the forceful religious freedom arguments made by both the appellants and the interveners contributed to the strong decision in favour of the Congregation.

The appellants in *Wall*, the Highwood Congregation and its Judicial Committee of Elders, cast the issue of the reviewability of the Committee's decision primarily as an issue of religious freedom. Their factum identified four "fundamental constitutional principles" that militated against review.[126] One of these principles was that religious freedom protects the autonomy of religious communities. The appellants cited Canadian and European case law establishing that religious freedom guarantees communities the freedom to associate freely and to organize their churches and communities.[127] They argued that the constitutional freedom to organize must protect their autonomy with regard to membership and the enforcement of religious norms.[128] They argued that public law concepts of fairness should not apply to private organizations based on mutual religious belief,[129] and that protecting the Congregation's right to exist as an autonomous religious community would benefit not only the Congregation, but society at large.[130]

There were ten interveners in *Wall*, all of whom directly or indirectly supported the Highwood Congregation's position that the Committee's

123. *Loyola*, *supra* note 38 at para 33.
124. *Ibid* at para 60.
125. See, in particular, *Wall, supra* note 79 at paras 14-17.
126. *Ibid* (Factum of the Appellant at para 39)
127. *Ibid* (Factum of the Appellant at para 63) (citing *Lafontaine)*.
128. *Ibid* (Factum of the Appellant at para 64).
129. *Ibid* (Factum of the Appellant at para 99).
130. *Ibid* (Factum of the Appellant at para 67).

decision to expel Mr. Wall was not subject to judicial review. Many of these interveners reiterated, elaborated and offered subtle variations of the appellants' arguments on the protected autonomy of religious groups. For example, the Christian Legal Fellowship and the CCCC both reiterated the appellants' submission on the importance of membership decisions to religious group autonomy, citing a common text that describes self-regulation of membership as a "group's foremost freedom."[131] The Seventh-Day Adventist Church in Canada submitted that the common law and section 2(a) provided independent bases for a court to refrain from adjudicating church membership,[132] while the EFC and the Catholic Civil Rights League submitted that religious freedom permits religious communities to self-define.[133] The Association for Reformed Political Action Canada went one step further, arguing that the Preamble's reference to the Supremacy of God signified that "the state is neither the highest authority nor the ultimate source of rights."[134]

The SCC did not base its decision in *Wall* on religious freedom principles, but on a strict demarcation of the boundaries of public law.[135] Religious freedom arguments register only at the periphery of the Court's judgment.[136] However, if one steps back from the details of *Wall*, one can sense the impact of the united block of interveners that supported the appellants' claim. The SCC delivered a unanimous decision in favour of the appellants in *Wall*—a notable exception to a long line of divided opinions on judicial review during the period in which the decision was rendered. It also delivered a rather black-and-white decision, which arguably oversimplified the issue of how to demarcate the public law-private law divide.[137] Finally, whatever the details of the judgment, the foreseeable effect of the decision in *Wall* was to safeguard a substantial measure of autonomy for religious institutions. While it is difficult to identify specific instances of intervener influence in *Wall*, the decision suggests that forceful, united intervener arguments that support the position of one principal party may contribute to that party's success.

131. *Ibid* (Factum of CLF at para 1); *Ibid* (Factum of the Intervener, CCCC at para 4). Both citing Jane Calderwood Norton, *The Freedom of Religious Organizations* (Oxford: OUP, 2016) at 29 [Norton].
132. *Ibid* (Factum of the Intervener, Seventh-Day Adventist Church in Canada at paras 2-7).
133. *Ibid* (Factum of the Intervener, EFC/CCRL at para 24).
134. *Ibid* (Factum of the Intervener, ARPA at para 4).
135. *Ibid* at para 12-23.
136. For example, the Court acknowledged the particular justiciability concerns raised by theological disputes, and briefly mentioned section 2(a) in the final paragraph of the decision: *ibid* at para 39.
137. Paul Daly, "Right and Wrong on the Scope of Judicial Review: Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall" (2018) 31:3 Can J Admin L & Prac 339.

c. *Distinct arguments with no apparent influence*

We have so far identified instances where interveners modestly influenced judgments of the Supreme Court of Canada, either by offering distinct perspectives or by echoing the submissions of the parties. However, interveners are not always successful norm entrepreneurs. In our analysis, we identified at least three instances where interveners made submissions on collective religious freedom that were different from those of the principal parties but had no demonstrable impact on the resultant SCC decision. A first instance occurred in *Ktunaxa*, where the BCCLA made a novel argument about the relationship between religious freedom violations and the section one proportionality analysis.[138] Two further instances occurred in *Loyola* and *TWU*. In these cases, two interveners that participate frequently in section 2(a) litigation, CLF and CCCC, raised the controversial question of whether collective religious freedom should be understood as a freedom possessed by the aggregate of its individual members, or, as they claimed, as a freedom possessed by a group *qua* group.[139]

The majority of the SCC did not address the intervener submissions on the corporate nature of religious freedom in either *Loyola* or *TWU*. However, the argument does appear to have piqued the interest of some members of the Court. In *Loyola*, as we shall see in more detail below, the minority outlined a test to determine whether a corporation could claim religious freedom on its own behalf.[140] In *TWU* (2018), Rowe J's concurring judgment rejected the view that institutional religious freedom could "extend beyond [the rights] held by the individual members of the faith community."[141] By contrast, the dissenting judges suggested that collective religious freedom "requires more" than the aggregation of individual rights claims, but stopped short of offering a full view on the matter.[142]

4. *Intervener influence on collective religious freedom doctrine: The counter-narratives*

While the dominant narrative in the collective religious freedom jurisprudence is one of modest intervener influence, a number of significant

138. *Ktunaxa*, *supra* note 50 (Factum of the Intervener, BCCLA at para 26-28).
139. *Loyola, supra* note 39 (Factum of the Intervener, CLF at para 4); *Ibid* (Factum of the Intervener, CCCC at para 6); *LSBC v TWU, supra* note 18 (Factum of the Intervener, CCCC at para 34).
140. *Loyola*, *supra* note 38 at para 100.
141. *LSBC v TWU, supra* note 18 at para 219 (per Rowe J).
142. *Ibid* at 315 (citing *Loyola* in claiming that ensuring full protection for the "constitutionally protected communal aspects of religious beliefs and practice" requires more than simply aggregating individual rights claims under the amorphous umbrella of an institution's "community").

counter-narratives render the picture more complex. At one end of the spectrum, we see a few cases in which interveners succeeded in having turns of phrase from their written submissions reproduced in minority SCC judgments, planting specific normative and rhetorical "seeds" that may be harvestable in a later case. At the other end of the spectrum, we see a few cases in which the SCC developed the section 2(a) doctrine in the absence of *any* on-point submissions by either the interveners or the principal parties. We discuss instances of the former phenomenon in this section, and instances of the latter in the next.

a. *Court reproduces intervener language*

We have seen that, in *Loyola*, interveners elaborated the submissions of the principal parties on collective religious freedom generally, and on whether institutions enjoy religious freedom in their own right. While these intervener submissions only modestly influenced the majority judgment, two interventions had a more direct impact on the concurring minority judgment of McLachlin CJ and Moldaver J.

Table 2 details two instances where the concurring judgment reproduces language from the intervener factums of the Catholic Civil Rights League Coalition, and, to a lesser extent, the CCLA. The first instance addresses the relationship between the collective and individual aspects of religious freedom. The second addresses the (proposed) modified test for an alleged violation of the section 2(a) freedoms of a corporation.

The parties to *Loyola* did not address the issue of a "corporate" section 2(a) test before the SCC. However, the Catholic Civil Rights League Coalition did, arguing that while the standard section 2(a) test asks whether the claimant sincerely holds a belief that has a nexus with religion, the "corporate" section 2(a) test should ask whether the "corporation's purpose includes the exercise of that religious belief."[143] The Coalition proposed that this assessment be based on several non-exhaustive criteria, "such as the corporation's mandate or purpose, its functions and the faith of its officers or directors."[144] The CCLA offered a similar argument, submitting that "Courts should focus on the existence of evidence as to the primary or overriding object of the corporation."[145] As Table 2 demonstrates, these submissions bear a very strong resemblance to the minority's holding. Since the parties made no submissions on this point, we may identify these arguments as instances of successful norm entrepreneurship: distinct

143. *Loyola*, *supra* note 38 (Factum of the Intervener, CCRL at para 32).
144. *Ibid* (Factum of the Intervener, CCRL at paras 31-32).
145. *Ibid* (Factum of the Intervener, CCLA at para 29); see also *ibid* (Factum of the Intervener, CCLA at paras 24-25).

intervener arguments that substantially influenced a concurring minority judgment of the Court.

Table 2: Intervener Submissions and Minority Loyola Judgment Compared

Intervener Submissions		**Minority judgment**
Catholic Civil Rights League Group	"the collective aspects of the freedom of religion are intertwined with its individual aspects" (para 18)	the "individual and collective aspects of freedom of religion are indissolubly intertwined" (para 94)
Catholic Civil Rights League Group	A corporation can claim section 2(a) protection where the "corporation's purpose includes the exercise of a belief having a nexus with religion" (para 32)	an organization can claim section 2(a) protection "if (1) it is constituted primarily for religious purposes, and (2) its operation accords with these religious purposes" (para 100)
Cdn Civil Liberties Association	"Courts should focus on the existence of evidence as to the primary or overriding object of the corporation" (para 29)	

The recent *TWU* (2018) decision offers a second (counter-)example of significant intervener influence on a minority decision. In this case, intervener submissions addressing institutional religious freedom substantially influenced the concurring decision of Justice Rowe. The parties in *TWU* (2018) did not fully canvass the question of whether and on what basis corporate institutions enjoy religious freedom. TWU and its co-litigant simply asserted that TWU enjoyed such freedom, and that its membership criteria were an expression of its institutional beliefs.[146] The Law Society of British Columbia did not directly challenge the appellants' argument that institutions can themselves enjoy religious freedom, even referring to "TWU's sincere religious beliefs" in its written submissions.[147]

A number of interveners stepped into the void left by the principal parties, making detailed submissions on the existence and nature of institutional religious freedom. Several interveners argued in favour of institutional religious freedom.[148] However, others opposed the extension of religious freedom to institutions. The BC Humanist Association, for example, asserted that such an extension would have "significant and deleterious effects on Canadians and Canadian society" including "state-tolerated religious preferences for access to such necessities as education, medical care and employment."[149] It submitted that organizations cannot

146. *Trinity Western University v Law Society of Upper Canada,* 2018 SCC 33 (Factum of the Appellant at paras 66-67, 78).
147. *LSBC v TWU, supra* note 18 (Factum of the Appellant at para 163, 165).
148. *Ibid* (Factum of the Intervener, CCCC at paras 7, 17-18, 31, 34). See also *ibid* (Factum of the Intervener, International Coalition of Professors of Law at para 4); *Ibid* (Factum of the Intervener, EFC et al at para 12).
149. *Ibid* (Factum of the Intervener, BC Humanist Association at para 4).

logically possess rights of religious freedom, that allowing leadership of religious organizations to define the group's religious interests would result in a "*Charter*-protected religious oligarchy," and that individual religious and associative freedoms are sufficient to meet the goal of protecting collective aspects of religious freedom.[150] The United Church of Canada and Faith Fealty and Creed Society similarly submitted that freedom of conscience and religion belongs to individuals, not institutions.[151] The Canadian Secular Alliance submitted that if institutions enjoy freedom of religion, then they do so "only to the extent that it gives effect to individual religious freedom."[152]

We have seen that the majority of the SCC did not resolve the debate about the religious freedom of institutions in *TWU*, leaving aside the university's constitutional status and proceeding on the basis that the decision of the law societies limited the religious freedom of "members of the TWU community."[153] By contrast, Rowe J specifically declined to find that TWU, as an institution, possessed section 2(a) rights.[154] In his concurring judgment, he also noted that even if TWU did possess such rights, "these would not extend beyond those held by the individual members of the faith community."[155] Since only interveners made arguments *against* recognizing institutional religious freedom, it is reasonable to infer that interveners influenced Rowe J's judgment on this point.

This inference is strengthened by the degree of similarity between Rowe J's judgment and the factum of the Canadian Secular Alliance. The Alliance made submissions on the scope of the protection provided by section 2(a), the proper characterization of the religious belief for which the claimants were seeking protection, and the nature of institutional religious freedom. Justice Rowe accepted several of these submissions in whole or in part, as illustrated by Table 3. Within the cases in our sample set, this is the most striking instance of a distinct intervener argument substantially influencing a concurring judgment of the Court.

150. *Ibid* (Factum of the Intervener, BC Humanist Association at para 12, 38, 26 respectively).
151. *Ibid* (Factum of the Intervener, United Church of Canada at para 24). The FFC submitted that the protection extended to "individuals and groups": see *ibid* (Factum of the Intervener, FFC at paras 25-33).
152. *Ibid* (Factum of the Intervener, CSA at paras 21 [emphasis in original]).
153. *Ibid* at para 61.
154. *Ibid* at para 219.
155. *Ibid*.

Table 3: Intervener Submissions and Concurring TWU 2018 Judgment Compared

Submissions of the Intervener, Canadian Secular Alliance	**Judgment of Rowe J**
"Where the protection of s 2(a) is claimed for an activity or practice that restrains or prescribes the conduct of non-believers, or otherwise involves a belief that others must behave in a certain way, it falls outside the scope of the right" (para 11)	"Where the protection of s 2(a) is sought for a belief or practice that constrains the conduct of nonbelievers…the claim falls outside the scope of the freedom" (para 239)
"a right designed to shield individuals from religious coercion cannot be used as a sword to coerce religious practice" (para 11)	"a right designed to shield individuals from religious coercion cannot be used as a sword to coerce [conformity to] religious practice" (para 251 – direct quote of CSA factum)
"[Religious freedom] does not extend to allow a person to impose on the personal choices and religious beliefs of another… It would be antithetical to the philosophy underlying s. 2(a) to recognize a claim that requires non-believers to adhere to or refrain from a particular set of religious beliefs or to act contrary to their own beliefs." (para 13)	"Section 2(a) [does not protect] such a right to impose adherence to religious practices on those who do not voluntarily adhere thereto" (para 242) "[Section 2(a)] does not protect measures by which an individual or faith community seeks to impose adherence to their religious beliefs or practices on others who do not share their underlying faith" (para 251)
"If institutions enjoy freedom of religion, then they do so only to the extent that it gives effect to individual religious freedom" (para 21)	"If TWU did possess [section 2(a) rights as an institution], these would not extend beyond those held by the individual members of the faith community."
"The study of secular, Canadian law is not a religious activity" (para 22)	"The religious education of children involves the transmission of religious beliefs; the legal education of adults does not". (para 250)

b. *Court develops new test on something no one argued*

A different type of counter-narrative about the relationship between interventions and judicial decisions emerges from the SCC decisions in *Hutterian Brethren* and *Ktunaxa*. We have seen that it is not uncommon for parties and interveners to make submissions on a point that the Court declines to address. Sometimes, the Court makes an important holding on a point that was not addressed by any intervener or party.

We have noted that *Hutterian Brethren* produced a significant development in the doctrine of collective religious freedom, with the majority holding that a law's effects on a community should be considered in the proportionality analysis rather than in the initial analysis of whether there was a violation of section 2(a). The respondents in *Hutterian Brethren* had challenged Alberta legislation that implemented a mandatory photo requirement for all driver's licences. The Hutterian Brethren of Wilson Colony argued that the requirement interfered with their belief that the Second Commandment prohibits the capture of one's image, and with their communal way of life. The appellant, Alberta's Attorney General, had conceded throughout the litigation that the legislation infringed the Colony's religious freedom. Accordingly, the arguments mainly focused on whether the infringement was justified. However, no party made specific submissions addressing which stage of the doctrinal analysis was appropriate for the consideration of the law's effects on a religious collectivity.[156] The closest argument on point is by one set of interveners,

156. *Hutterian Brethren, supra* note 49 (Factum of the Appellant at para 96-97). Essentially, the AG argued that the burdens the law imposed on the community were not religious burdens, and thus should be considered apart from the right of any member of the community to object to having their

which argued that once a communal religious freedom infringement is found, this should infuse the section 1 analysis.[157]

Despite the absence of argument directly on point, both the majority and the dissenting opinions addressed the relevance of the individual and collective aspects of religious freedom at different stages of the *Charter* analysis.[158] The majority judgment that upheld the legislation, characterized the essential claim as one by "individual claimants for photofree licences," not as an assertion of a group right.[159] The majority concluded that the law's impact on the Hutterian Brethren community was relevant, but only in connection with the court's assessment of the law's proportionality, not in connection with the infringement of religious freedom.[160] Justice Abella dissented, finding that the initial section 2(a) claim engaged both the individual and group aspects of religious freedom.[161]

The absence of party and intervener submissions on important doctrinal matters is even more striking in *Ktunaxa*. In Part 4.a, we suggested that intervener submissions on the collective dimensions of non-Western religions modestly influenced the concurring judgment of Moldaver J. However, the majority judgment shows no comparable signs of intervener influence on this theme. Indeed, an important lesson from *Ktunaxa* concerns the limits of intervener influence (and, indeed, party influence), as the majority judgment turns on a novel point of law not addressed in any participant's written argument.

The claimants in *Ktunaxa,* as we have seen, argued that a ministerial decision to approve the construction of a ski resort on lands occupied by Grizzly Bear Spirit would drive the Spirit from their territory. The governmental decision would constrain or destroy a communal dimension of their religion, and thereby violate their section 2(a) rights.[162]

The majority accepted that freedom of religion has a communal aspect. However, the majority stated that those communal aspects "do not, and should not, extend s. 2(a)'s protection beyond the freedom to have beliefs and the freedom to manifest them."[163] Specifically, the protection

photo taken. This is consistent with the doctrinal outcome of the case, but does not go so far as to make the categorical argument that communal impacts should only be considered at the justification stage of analysis for all cases.

157. *Ibid* (Factum of the Intervener, EFC at para 27).

158. *Ibid* at para 31.

159. *Ibid*.

160. *Ibid*.

161. *Ibid* at para 130 (Abella J, dissenting). See also the dissenting opinion of LeBel J, which focused on the importance of religions relationships.

162. *Ktunaxa*, *supra* note 50 at paras 73.

163. *Ibid* at paras 74-75.

of section 2(a) of the *Charter* did not extend to the "spiritual focal point of worship." Since the Ktunaxa were asking the Court to protect the presence of Grizzly Bear Spirit rather than their freedom to believe in Grizzly Bear Spirit or pursue practices related to it, their claim fell outside the parameters of section 2(a).[164]

This aspect of the majority's reasoning significantly alters the religious freedom terrain, in ways that have generated discussion and criticism from multiple quarters.[165] The holding that section 2(a) does not protect the spiritual focal point of worship is likely to have important implications, particularly for Indigenous spirituality. In this context, it is striking that there were no written submissions on point, such that the argument was not subject to the full force of the adversarial process. Alison Latimer argues that courts should refrain from commenting on issues that are not framed by the parties.[166] *Ktunaxa* reminds us that courts do not always limit themselves in this way and that the participants in these constitutional conversations do not all have an equal voice. Courts retain the power to base their rulings on arguments not raised by litigants. This limits interveners' (and parties') influence, though it may also free interveners to make bolder arguments, since it reinforces that they are not ultimately responsible for the outcome of the case or the shape of the law.

Conclusion

Interveners have had modest success in influencing the development of Canada's religious freedom doctrine. While the doctrinal framework for section 2(a) has not shifted radically in response to intervener submissions, interveners have impacted several SCC decisions—either by exposing the Court to novel materials or ideas, or by elaborating and reinforcing the submissions of the principal parties. Interveners have had a more pronounced impact on a few minority judgments, in particular contributing to the formulation of a "corporate" religious freedom test that could one day become the law. Our findings are generally consistent with Alarie and Green's quantitative findings; they too found that interveners had a measurable, but far from overwhelming, influence on the Court.

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164. *Ibid*.

165. Howard Kislowicz & Senwung Luk, "Ktunaxa Nation: On the 'Spiritual Focal Point of Worship' Test" (7 November 2017), online (blog): *ABlawg* <ablawg.ca> [perma.cc/6JC2-Q9HL]; Kent Williams, "How the Charter Can Protect Indigenous Spirituality; Or, the Supreme Court's Missed Opportunity in Ktunaxa Nation" (2019) 77:1 UT Fac L Rev 1; Kristopher Kinsinger, "Ktunaxa Nation v British Columbia (Part 1): Religious Freedom and Objects of Worship" (16 November 2017), online (blog): *TheCourt.ca* <www.thecourt.ca> [perma.cc/S8PD-9M24].

166. Alison Latimer, "Constitutional Conversations" (2019) 88:1 SCLR (2d) 231 at 231-232.

A significant finding of this study is that intervener submissions are not always consistent with the established purpose of intervention. The SCC Rules require interveners to make arguments that they believe will be different from those of the principal parties and prohibit interveners from taking a position on the outcome of an appeal. Despite these rules, we observed a high rate of intervener submissions that echoed or elaborated the party arguments. We also observed that such echo arguments can be influential. Echo arguments appear to be particularly effective where all the interveners line up on one side of the dispute, and where there are no competing rights to be balanced.

While interveners have enjoyed some success as norm entrepreneurs in religious freedom cases, our study also highlights that courts enjoy a great deal of control over the development of constitutional norms. We see this in the modesty of most of the intervener contributions to the section 2(a) case law and in the Court's occasional practice of developing legal doctrine in the absence of any adversarial argument. Interveners have a seat at the table in conversations about constitutional norms. Ultimately, however, they are like other entrepreneurs: the Court may choose to accept or reject their wares.

Finally, our study points to questions that call for further research and consideration. Do non-governmental interveners influence courts in a different way than government interveners? Do interveners play a different role in religious freedom cases than in other *Charter* cases? Do interveners improve the legitimacy of constitutional litigation, even where their submissions have little influence on the decision that results? Further research on these questions will help us to assess the extent to which the benefits of intervener participation outweigh its costs.

Appendix 1: Number of Interveners by Case and Sub-Theme

Case	# of Interveners	ST1	ST2	ST3	ST4	ST5	ST6
Trinity Western University v British Columbia College of Teachers, 2001 SCC 31	8	2[1]	0	3[2]	0	0[3]	0
Syndicat Northcrest v Amselem, 2004 SCC 47	4	0	0	0	0	0	0
Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), 2004 SCC 48	3[4]	3[5]	0	3[6]	0	1[7]	0
Reference re Same-Sex Marriage, 2004 SCC 79	30	2[8]	0	3[9]	0	1[10]	1[11]
Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6	4	0	0	0	0	0	0
Bruker v Marcovitz, 2007 SCC 54	1	0	0	0	0	0	0[12]
AC v Manitoba, 2009 SCC 30	4	0	0	0	0	0	0
Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37	8	2[13]	0	1[14]	1[15]	0	0
S.L. v. Commission scolaire des Chênes, 2012 SCC 7	8	1[16]	0	0	0	1[17]	0
R v NS, 2012 SCC 72	9	0	0	0	0	0	
Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11	26	0[18]	0	0	0	0	0
Loyola High School v. Quebec (Attorney General), 2015 SCC 12	16	7[19]	0	10[20]	1[21]	4[22]	0
Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16	7	1[23]	0	0	0	2[24]	0
Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54	18	5[25]	2[26]	2[27]	0	0	0
Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 SCC 26	12	6[28]	0	2[29]	1[30]	6[31]	10[32]
Law Society of British Columbia v. Trinity Western University, 2018 SCC 32 *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33	24	6[33]	0	8[34]	1[35]	3[36]	2[37]

1. Cdn Conference of Catholic Bishops Factum at para 8; CCLA Factum at para 68 TWU v BCCT.
2. EFC Factum at paras 8, 16, 17; CCLA Factum at para 68; Cdn Conf of Catholic Bishops Factum at para 8, TWU v BCCT; Respondent Factum para 54.
3. Respondent Factum at para 107, TWU v BCCT.
4. 2 interveners, the EFC and the Seventh-Day Adventist Church in Canada, submitted a joint factum.
5. EFC & Seventh Day Adventist Church in Canada Factum at paras 15, 21, 32; CCLA Factum at paras 14, 23, 28, Lafontaine.
6. CCLA Factum at para 23; EFC & Seventh Day Adventist Church in Canada Factum at para 33, Lafontaine; Appellant Factum at para 72, Resp Lafontaine Factum at para 71.
7. CCLA Factum at para 23, Lafontaine; Appellant Factum at para 32.
8. CCLA Factum at paras 29-30, Same-Sex Marriage Ref; United Church of Canada Factum at para 29; AG Canada Factum at para 59
9. Seventh Day Adventist Church in Canada factum at 3; The Church of Jesus Christ of Latter Day Saints factum at paras 34-35; CCLA factum at paras 29-30, Same-Sex Marriage Reference.

10. CCLA Factum at paras 29-30, Same-Sex Marriage Ref.
11. The Church of Jesus Christ of Latter Day Saints factum at paras 35, 39-53.
12. Appellant Factum at paras 58-61; Respondent Factum at paras 3, 69, 105; Respondent Reply Factum at paras 3, 14.
13. CCLA Factum at para 15; EFC Factum at paras 14, 15-26, Hutterian Brethren; Appellant Factum at para 96, Respondent Factum at paras 2, 3, 5, 14, 15, 17, 24, 28, 102, Hutterian Brethren.
14. EFC Factum at para 17, Hutterian Brethren.
15. EFC Factum at para 24, Hutterian Brethren.
16. CCCC Factum at paras 9, 11, SL.
17. CCCC Factum at para 9, SL.
18. Respondent Factum at para 77, Whatcott.
19. Loyola, CLF Factum at paras 3, 6, 27, 29; Association of Christian Educators and Schools Canada Factum at paras 27, 34, 37; EFC Factum at para 2; Catholic Civil Rights League et al at paras 4, 11-13, 17-18, 27; CCCC Factum at paras 1, 5, 6, 8, 11-13, 14-15, 17, 18, 20, 21, 26-27, 29, 30; WSO Factum at paras 9, 10, 19-24, 33; CCLA Factum at paras 8, 11, 12, 13, 16; Appellant Factum at para 13.
20. CLF Factum at paras 4, 6, 29; Association of Christian Educators and Schools Canada Factum at paras 19, 20, 34, 38; EFC Factum at paras 2, 12, 14, 21, 50; Corporation Archiépiscopale Catholique Romaine de Montréal & L'Archeveque Catholique Romain de Montreal Factum at paras 1, 4-6, 9, 16-18; CCCC Factum at paras 3, 4, 5, 7, 9, 16, 19, 20, 23, 26-27, 30; WSO Factum at paras 6, 11-14, 19-24, 26-28; Faith Fealty and Creed Society Factum at paras 1, 3, 4, 7, 8, 10-19, 20-22, 23-24, 25-33; Home School Legal Defence Association of Canada at para 28; CCLA Factum at paras 1, 3, 6, 19-22, 25-30; Appellant Factum at paras 46-66, 91, 95, 112; Respondent Factum at paras 99-111, 117, 119, 121, 122-125.
21. Loyola, CCCC Factum at para 23.
22. CCLA Factum at paras 8, 11, 13, 14, 15, 16, 18; Association of Christian Educators and Schools Canada Factum at paras 27, 32; CCCC Factum at para 8; Corporation Archiepiscopale Catholique Romaine de Montréal et al Factum at para 18, Loyola.
23. Catholic Civil Rights League et al Factum at para 12, Saguenay.
24. Canadian Secular Alliance Factum at para 7; Catholic Civil Rights Leage et al Factum at para 12.
25. EFC Factum at paras 7, 10, 28-30; Alberta Muslim Public Affairs Council at paras 15-19, 22, 25-29, 33-48; AG Canada at para 20; Canadian Muslim Lawyers Association et al at para 11; Central Coast Indigenous Resource Alliance at para 1, Ktunaxa; Appellant at paras 27, 41, 65.
26. Ktunaxa, BCCLA Factum at paras 26, 28; AG Canada at para 20.
27. Ktunaxa, EFC Factum at paras 28-30; Cdn Muslim Lawyers Association et al factum at para 16.
28. EFC Factum at paras 2, 3-14, 17, 19-20, 23, 30, 34-35; CCCC Factum at paras 18-21, 28-29; Canadian Muslim Lawyers Association at para 8; CLF Factum at para 13, Seventh-Day Adventist Church in Canada Factum at para 17; WSO Factum at paras 35-39, Wall; Appellant Factum at paras 13, 14, 23, 47, 63, 71, 76.
29. EFC Factum at para 27; CLF Factum at paras 8, 10, Wall.
30. Wall, CCCC Factum at para 25.
31. EFC Factum at paras 13, 24, 32, 43; Justice Centre for Constitutional Freedoms Factum at paras 5, 8-9; BCCLA Factum at paras 43-51; Canadian Constitution Foundation at paras 2, 13023, 27-29; CCCC Factum at paras 18-21; CLF Factum at paras 1, 9, 15, Wall; Appellant Factum at para 75.
32. EFC Factum at paras 2, 31; Justice Centre for Constitutional Freedoms Factum at para 13; Association for Reformed Political Action Canada Factum at paras 4, 10-11, 13, 19, 29; BCCLA Factum at paras 4-5, 8-12, 17, 27, 32. 43-48, 49-51; Canadian Constitution Foundation at paras 2, 24-26, 30-31; Canadian Constitution Foundation Factum at paras 4, 7, 12, 26; Canadian Muslim Lawyers Association Factum at paras 36-37; CLF Factum at paras 1, 3, 14, 16, 18-32; Seventh Day Adventist Church in Canada Factum at para 10; WSO Factum at paras 2, 5, 42-43, 45, Wall. Appellant Factum at paras 54, 56, 61, 63, 64, 65, 67, 75, 76, 99; Respondent Factum at paras 31, 33, 51-58, 74-81, Wall.
33. BC Humanist Association Factum at para 9; CCCC Factum at paras 7, 12, 29, 30, 32; EFC Factum at paras 2, 7, 10, 11; International Coalition of Professors of Law Factum at para 4; National Coalition of Catholic Trustees Association at paras 26, 27-31, 35; Roman Catholic Archdiocese of Vancouver et al Factum paras 10, 21. Appellants TWU Factum at paras 72, 165; Respondents LSUC Factum at paras 80-81, 125, 133; Appellants TWU Reply Factum at paras 33, 39, 45, 46, 63; Appellant

LSBC Factum at paras 21, 165, 168; Respondent TWU Factum at paras 8, 11, 104, 109, 110, 112-115.
34. BC Humanist Association Factum at paras 3, 4, 5, 9 -17, 21-27, 28-39, 40-48; CCCC Factum at paras 17, 18, 23-27, 31, 32, 36; Canadian Secular Alliance Factum at paras 20-21; EFC Factum at paras 12, 28, 29, 31; Faith, Fealty & Creed Society Factum at paras 8, 17-24, 25-37; International Coalition of Professors of Law Factum at para 24; National Coalition of Catholic Trustees Association at paras 29-31; Roman Catholic Archidiocese of Vancouver et al Factum at paras 10, 22; Appellants TWU Factum at paras 66-67; 78, 91, 165; Appellants TWU Reply Factum at paras 3, 33, 39, 46, 63; Respondents TWU Factum at paras 8, 11, 96, 104, 110, 112-115, 162.
35. CCCC Factum at para 34.
36. EFC Factum at para 6; International Coalition of Professors of Law Factum at paras 18-24; National Coalition of Catholic Trustees Association at paras 30, 35; Appellants TWU Factum at para 95; Appellants TWU Reply Factum at para 45; Appellant LSBC Factum at para 21; Respondents TWU Factum at para 104;
37. CCCC Factum at paras 7, 12, 17, 18, 35; EFC Factum at para 8; Respondents LSUC Factum at paras 125, 133; Appellants TWU Reply Factum at para 3; Respondents TWU Factum at paras 107, 162.