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The SCC's Dilemma: What to Do with Interveners?

Richard Haigh [a1] [d1]

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At a conference in 2016, Osgoode Hall Law School Dean Lorne Sossin made the following offhand comment: “I think it is possible to tell the most important Supreme Court of Canada cases by the number of interveners that were involved.” I assume what he meant--and granted, it was somewhat tongue in cheek--that the more interveners there are in a case, the more important the case.

The comment intrigued me. Is it true? It is such a simple proposition. Intuitively, it seems right: more parties would wish to involve themselves in those cases that have larger impacts, or that represent more important state matters. But it seemed such a throwaway line at the time ...

Answering this question became part of a larger, ongoing project to assess the importance of interveners at the Court, from the very first intervention in the 19th century to the present day. It attempts to assess the actual role interveners may play by posing a series of questions. What effect, if any, do interveners have on the judges' decisions? How can these effects be measured? Quantitatively? Qualitatively? Since there may be dozens of interveners in any given case, it means, over the years, more interveners have appeared than ***80** parties. And yet their role is not well understood; interveners operate largely in the shadows of a case, known mainly to a few lawyers and scholars who follow the Supreme Court's jurisprudence. Surprisingly little analysis on them has been done or written. [1]

1. THE SUPREME COURT'S MOST IMPORTANT CASES

Shortly after Dean Sossin's comment, Osgoode's alumni magazine published a piece in which faculty member Philip Girard was asked to list the top ten Canadian legal cases (as part of an issue celebrating Canada's 150th anniversary). It couldn't have been more serendipitous! This was the starting point; I decided to randomize the sample a little more by asking other scholars for their top ten, and finishing it off with my own list. (In order to ensure the most accurate results, none of us were fully aware of the others' lists.) Out of 80 votes cast, 32 unique cases were chosen. It is worth pointing out that the only case chosen by all six participants, *R. v. Oakes*, had no interveners.

Table 1 shows the complete results. [2]

Table 1: “Most Important” Cases

Number	Case Name	No. of Interveners	Votes
1.	R. v. Oakes (1986)	0	8
2.	Roncarelli v. Duplessis (1959)	0	6
3.	Reference re Secession of Quebec (1998)	14	7
4.	Andrews v. Law Society (1989)	10	6
5.	Patriation Reference (1981)	11	5
6.	R. v. Big M Drug Mart (1985)	3	4
7.	Carter v. Canada (2015)	26	4

8.	R. v. Sparrow (1990)	20	3
9.	Reference re Senate Reform (2014)	15	3
10.	Reference re Supreme Court Act, ss. 5 and 6 (2014)	6	3
11.	Ref re Anti-Inflation Reference (1976)	13	2
12.	Reference re B.C. Motor Vehicle Act (1985)	5	2
13.	R. v. Stinchcombe (1991)	0	2
14.	Baker v. Canada (1999)	5	2
15.	Gosselin v. Quebec (2002)	9	2
16.	Dunsmuir v. New Brunswick (2008)	0	2
17.	Canada (A.G.) v. Bedford (2013)	24	2
18.	Tsilhqot'in Nation v. B.C. (2014)	28	2
19.	Edwards v. Canada (1928)	2	1
20.	Reference re Alberta Statutes (1938)	9	1
21.	Christie v. York Corporation (1939)	0	1
22.	Murdoch v. Murdoch (1973)	0	1
23.	Hunter v. Southam (1984)	0	1
24.	Guerin v. R. (1985)	1	1
25.	Reference re Public Service Employee Relations Act (Alta.) (1987)	9	1
26.	R. v. Keegstra (1990)	10	1
27.	Eldridge v. British Columbia (A.G.) (1997)	10	1
28.	Delgamuukw v. B.C. (1997)	6	1
29.	R. v. Morgentaler (1988)	1	1
30.	R. v. Ewanchuk (1999)	4	1
31.	Syndicat Northcrest v. Amselem (2004)	4	1
32.	Haida Nation v. B.C. (Min. of Forests) (2004)	21	1
33.	Chaoulli v. Quebec (2005)	32	1
34	Doré v. Barreau du Québec (2012)	3	1
35.	Bhasin v. Hrynew (2014)	0	1
36.	Mouvement laîque Québécois v. Saguenay (City) (2015)	7	1
37.	Reference re Securities Act (2011)	15	1

***82** I then went through the Supreme Court of Canada database to determine those cases where intervener numbers were significant. Table 2 shows a similar number of cases (37) ranked in terms of numbers of interveners. [3]

Table 2: Intervener-Ranked Cases

Number	Case Name	No. of Interveners
1.	Google v. Equustek Solutions (2015)	35
2.	Saskatchewan Federation of Labour v. Saskatchewan (2015)	34
3.	Chaoulli v. Quebec (2005)	32
4.	Reference re Same-Sex Marriage (2004)	28
	Tsilhqot'in Nation v. B.C. (2014)	28
6.	Saskatchewan Human Rights Commission v. Whatcott (2013)	26
	Carter v. Canada (2013)	26
8.	Delgamuukw v. B.C. (1997)	25
9.	Canada (A.G.) v. Bedford (2013)	24

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10.	R. v. Nova Scotia Pharmaceutical Society (1992)	23
11.	Canadian Western Bank v. Alberta (2007)	22
12.	Reference re Firearms Act (2000)	21
	B.C. (Min. of Forests) (2004)	21
14.	R. v. Sparrow (1990)	20
	R. v. Sappier; R. v. Gray (2006)	20
	Rio Tinto Alcan v. Carrier Sekani Council (2010)	20
17.	R. v. Kapp (2007)	18
	Quebec v. Canadian Owners and Pilots Association (2010)	18
	Alberta v. Canadian Copyright Licensing Agency (2012)	18
	Moore v. B.C. (Education) (2012)	18
	Communications, Energy and Paperworkers Union of Canada, Local 20 v. Irving Pulp and Paper (2013)	18
22.	Vriend v. Alberta (1998)	17
	Barrie Public Utilities v. Canadian Cable Television Assn (2003)	17
	R. v. Powley (2003)	17
	R. v. Marshall; R. v. Bernard (2005)	17
	Charkaoui v. Canada (Citizenship and Immigration) (2007)	17
	Quan v. Cusson (2009)	17
	Ontario (Public Safety and Security) v. Criminal Lawyers' Ass'n (2010)	17
	Ontario (AG) v. Fraser (2011)	17
30.	Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services) (2006)	16
	Loyola High School v. Quebec (Attorney General) (2015)	16
	Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.) (1997)	16
33.	Auton (Guardian ad litem of) v. British Columbia (Attorney General) (2004)	15
	NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union (2010)	15
	Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44 (2011)	15
	Reference re Securities Act (2011)	15
37.	Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence	15

***83** It is safe to say that on this admittedly subjective, unscientific and imperfect poll, there is a large difference between Dean Sossin's comment and ***84** the truth. What eight scholars think are the important cases does not correspond to those cases with the most interveners. Of the few cases that appear on each list--*Sparrow, Tsilhqot'in Nation, Carter, Haida Nation, Bedford, Delgamuukw* and *Reference re Securities Act*--only *Carter* makes it into the top ten on the actual list. Or, to look at it from another angle, the five cases that were considered the most important, garnering five or more votes--*Oakes, Roncarelli, Secession Reference, Andrews* and the *Patriation Reference*--are nowhere near the top of the interveners listings (the case with the most interveners in that group--the *Secession Reference*--if ranked, would be just outside the top 40 cases). Interesting as well is the fact that the case with the most interveners, *Google v. Equustek*, is not one of the foundational constitutional law

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cases that are typically thought to be the most important. All of this returns us to the questions posed at the beginning: if not highlighting the most important cases, what do interveners contribute? A revealing episode from the summer of 2017 may provide some insight into this question.

2. TRINITY WESTERN UNIVERSITY: THE DISAPPEARING AND REAPPEARING INTERVENERS

In a rare occurrence in Canadian law, interveners became headline news in the S.C.C. cases involving Trinity Western University's proposal to start a law school. [4] In particular, who gets to be an intervener, and how they are chosen, were subject to scrutiny in the summer of 2017.

Without going into too much detail regarding the case itself, the Supreme Court agreed to hear two appeals arising out of conflicting decisions from the British Columbia and Ontario courts of appeal. The case involves a number of topical issues such as freedom of religion, freedom of association, equality rights and administrative law. Once the Court granted leave to appeal--in February of 2017--the process of accepting interveners began.

The Court received applications from 26 different interveners during the month of June. The initial decision regarding which interveners could participate occurred on July 27. Justice Wagner dismissed eighteen applications, allowing only nine to take part. The official case docket states:

> The said nine interveners are each granted permission to present oral argument not exceeding five minutes at the hearing of the appeal.
>
> The Attorney General of Ontario is named as an intervener as of right in the appeal ... and shall be granted permission to present oral argument not exceeding five minutes at the hearing.
>
> ***85** The motions for leave to intervene of the Canadian Council of Christian Charities; the Canadian Conference of Catholic Bishops; the Canadian Association of University Teachers; the Law Students' Society of Ontario; the Seventh-day Adventist Church in Canada; the Evangelical Fellowship of Canada and the Christian Higher Education Canada (jointly); the British Columbia Humanist Association; the Canadian Secular Alliance; the Egale Canada Human Rights Trust; the Faith, Fealty & Creed Society; the Roman Catholic Archdiocese of Vancouver, the Catholic Civil Rights League and the Faith and Freedom Alliance (jointly); the World Sikh Organization of Canada; the Lesbians Gays Bisexuals and Trans People of the University of Toronto (LGBTOUT); the United Church of Canada; the Start Proud and OUTlaws (jointly); the West Coast Women's Legal Education and Action Fund; and the BC LGBTQ Coalition are dismissed. [5]

The uproar was immediate. Over the next few days (which included a weekend) disappointed groups took to social media with a vengeance, claiming that the decision was discriminatory, unfair and biased. [6] It put the Court in an unusual, and difficult, position. Then, on July 31, in an extraordinary move, the Court agreed to review Justice Wagner's decision. It released--under Chief Justice McLachlin's name--a revised list, which included all of the original 26 applicants. The Court's official position was that the Chief Justice's decision was "a variation of Justice Wagner's order and did not overrule his order, which remains in place." [7] As one applicant described it, the Chief Justice herself decided to intervene in the case.

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The docket entry for the change reads as follows:

> Order by, CJ ... THAT:
>
> ***86** 1. The hearing of these appeals, previously set down for one day, will occupy two days. The hearing is tentatively scheduled for November 30 and December 1, 2017.
>
> 2. The Order of Justice Wagner, dated July 27, 2017, is varied as follows:
>
> (a) The motions for leave to intervene of: the Canadian Council of Christian Charities ... and the World Sikh Organization of Canada are *granted* and the said interveners are each entitled to serve and file a single factum common to both appeals not to exceed 10 pages, on or before September 11, 2017.
>
> (b) The motions for leave to intervene of: Lesbians Gays Bisexuals and Trans People of the University of Toronto (LGBTOUT); the United Church of Canada; and Start Proud and OUTlaws (jointly) are *granted* ...
>
> (c) The motions for leave to intervene of West Coast Women's Legal Education and Action Fund and the BC LGBTQ Coalition are *granted* ... [8]

Put differently, Chief Justice McLachlin succumbed to public pressure, revised Justice Wagner's decision and allowed the complete list of interveners. Unfortunately, the practice of the Court is not to explain or provide reasons for allowing or disallowing interveners, so it remains that the ostensible reason for the change was the extra hearing day added after the weekend's flurry of activity. What is not known, as is the case for all failed interventions, is why the 17 groups added later were initially precluded from attending.

In any event, the change of heart was unheard of: from an initial hearing of one day with nine interveners, the “found” day allowed the Court to hear all 26 interveners over two days. On the basis of this incident alone, it might be surmised that interveners *do* have a role to play in Supreme Court jurisprudence. The controversy made national news. It was obvious that for many groups it was crucial that their opinions be heard. In any case, probably for the first time in its history, the focus was not on a Supreme Court's ultimate decision, but on the leave application process and the role of interveners. And given the number of interveners ultimately allowed to participate, *Trinity Western University II* will likely sit at number six on the all-time listing once the decision is released. [9]

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3. WHAT DO WE KNOW ABOUT INTERVENERS?

The place of interveners in appellate jurisprudence at the Supreme Court has changed over the course of its history. Now, they are considered a fixture at most Court hearings, yet it was not always this way. In its early days, there ***87** were very few interveners at the Court; in fact, in the early formative federalism cases, the only parties involved were the litigants. Even Attorneys-General from other jurisdictions would not participate. For instance, in the case of *A.G. Canada v. AG. Ontario* [the *Executive Power* case [10] only the two Attorneys-General were involved. Later, the Court would allow Attorneys-General from non-parties to participate--early examples include *Smith v. Provincial Treasurer for Nova Scotia and Quebec* and *Boyd v. Attorney-General of British Columbia* where the court heard from the Province of Quebec and the Province of Ontario, respectively, as "intervenants." [11] After the development of Brandeis briefs in the U.S., the Canadian Supreme Court slowly began to accept outside interveners, particularly in reference cases. In the *Alberta Statutes Reference*, for example, the chartered banks, the Canadian Press and the Alberta newspapers were each allowed to participate in the hearing. [12] Through the mid-20th century, the practice became more common, as private party interveners began appearing in non-constitutional cases. [13] Once the *Charter* came into force, the steady stream became a torrent. It is rare now for Supreme Court cases not to have an intervener: for example, of the 67 decisions released in 2017, 42 had interveners, or nearly two-thirds. [14]

Despite their near-ubiquity in the post-*Charter* era, interveners have not always been welcome. Shortly after the *Charter* came into force, for example, Justice Estey remarked of interveners: "this Court no longer has time to fritter away sitting and listening to repetition, irrelevancies, axe-grinding, cause advancement and all the rest of the output of the typical intervener." [15] This mirrors an oft-quoted denial for leave made by Justice **Richard** Posner of the Seventh Circuit, who wrote:

> After 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, indeed a fish-eyed fashion.
>
> The vast majority of amicus briefs are filed by allies of the litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigants' brief. Such amicus briefs should not be allowed. [16]

***88** So why allow them? Interveners themselves have an interest in the broad parameters of the dispute in issue, and have some credibility which allows them to access the court, but is this sufficient reason? Different rationales are commonly cited for why an appellate court should allow their participation:

> • interveners represent the idea that some cases involve broad matters of public interest which have significant and widespread societal impact;
>
> • they give voice to those groups/interests that judges would like to hear from (as opposed to the parties, which they *must* hear from)

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- they provide information which is different from the positions advocated by the parties;

- their submissions are useful to a court; and

- they raise the profile of an issue.

But they may also have objectives beyond the instant case as well, where they hope to turn their policy objectives into law. For all these reasons, interveners ramify a traditional appellate court into something more complicated--a dispute-resolving body that oftentimes resembles a policy debating forum. Put another way, interveners can both enrich and legitimize appellate decisions by increasing their reach and accessibility to more actors, and by inspiring the judges to reach better decisions. [17] At their best, interveners represent, as argued by Nathalie Des Rosiers and Christian Pearce, a form of democratic empowerment--they are a form of public participation, particularly in public litigation, where public policy can be developed. [18]

Scholars have, for the most part, analyzed interveners by presenting theories of intervener impact based on their informational value. In any given dispute for example, interveners could be influential because they provide judges with new or different perspectives on the legal issues facing the Court. Or, they might focus on wide-ranging economic, legal, and social policy implications of a dispute, giving judges information regarding the preferences of outside actors, such as the public, various legislatures, or federal, provincial or local governments, or corporations, NGOs, and others. [19]

Up until the summer of 2017 and the Trinity Western University example, most Supreme Court commentators would have lamented the opacity of the intervener leave process, reluctantly accepting it, however, because the end result was that most leaves to intervene were accepted. Published surveys bear this out. Gary Magee found that over 80% of interveners were accepted in the period he studied, and those denied were for "good reasons." [20] Ian Brodie ***89** reports that in 1999, 93% of applicants were accepted. [21] And in the most comprehensive statistical examination of interveners at the Supreme Court, Andrew Green and Benjamin Alarie recorded 1280 leave attempts from January 2000 to July 2009, of which 1170 were successful, for a rate of 91.4%. [22] This brings us back to July 31, 2017 and Trinity Western.

4. TRINITY WESTERN REDUX

The uproar over the Supreme Court's initial decision allowing only nine of 26 applicants was framed as a problem of under-representation. Dean Sossin, quoted in the Toronto Star, noted that the initial decision "could have deprived the court from having the fullest possible array of perspectives for a case that has and will generate significant scrutiny." [23] The Catholic Civil Rights League noted that "the change in the court's position is certainly a recognition of the significance of the importance of the case." [24] The Supreme Court of Canada itself issued an unusual news release two days after its July 31 reversal, in which it claimed that "the Court always strives to ensure it will hear a wide range of views" when considering interventions. [25]

Nobody could recall the Court ever having done any of this before. Not disallowing a majority of interveners. Not reversing itself shortly afterward. Not offering up a reason for the change. It put in stark relief some of the problems with the approach taken towards interveners at the Supreme Court. The "variation" order turned the mirror toward the inner workings of the Court, raising significant questions before the case was even heard. How does it assess adequate representation? What does it

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mean to "assist the court"? What goes into a decision to allow or not allow an intervention? Should reasons be given for these decisions? The entire episode may, ironically, become just as important to our understanding of *Trinity Western University II* as its ultimate decision.

In the United States, there is a distinction made between interveners and amici (known as "friends of the court."). American interveners are rare, and may be allowed to participate as of right or by application, but once granted, are treated as a full blown participant in the litigation, including the right to participate in any future cases involving the same cause of action. [26] Amici, in ***90** contrast, are more like interveners in Canadian courts. At the U.S. Supreme Court, amici are admitted to file briefs either by mutual consent of the parties, or alternatively, where consent is denied, by permission of the Court on leave. Given that virtually all motions to file in the early history were granted, consent to admit is now the norm, as there is thought to be little point in burdening the Court with the need to rule on a motion. [27] This is a significant difference between the two jurisdictions.

Possibly even more significant, however, is that the Canadian Supreme Court allows nearly all interveners to participate in the oral hearing, whereas amici at the U.S. Supreme Court generally file only written briefs. [28]

Perhaps it will provide an opportunity for reform. One approach that our Supreme Court of Canada could adopt is to follow the U.S. model and dispense with the leave requirement--thus giving something to the parties--while severely restricting the right to an oral hearing for interveners--giving something to the Court. Allow the parties to control some aspect of the litigation by giving them the ability to consent to interventions (if the U.S. model is followed, and its history matched, refusing consent would likely become rare). At the same time, take away the privilege of an oral hearing or restrict it dramatically (to Attorneys-General, for example). If we accept that interveners have a role to play in many, if not most, apex court appellate litigation, the former change would open up the process, avoid the difficulties (and accusations of unfairness) that became evident in the Trinity Western situation and resolve the concern over transparency. [29] The latter change would ***91** reflect the general focus on written advocacy, and free up valuable court time by alleviating resources required for examining intervener leave applications. [30] Since interveners are now entitled to only five minutes of oral argument, my guess is that the loss would be marginal. [31] Instead of having to make difficult choices as to which interveners to allow, and once allowed, limiting them to a near frivolous appearance, it seems that the time is ripe for the Supreme Court to rethink its approach to interveners. Regardless of what happens in the *Trinity Western II* case, that could be one of its lasting legacies.

Footnotes

a1 Assistant Professor, Osgoode Hall Law School and Director of the York Centre for Public Policy and Law. This article is part of a much larger project, examining interveners for the entire history of the Supreme Court. I would like to thank all of the research assistants involved: Trevor Fairlie, Rima Halabi, Zakiyya Karbani, Meghan King, Alysha Li, Celeste Matthews, Julie McArthur, and Benjamin McLaughlin for all their work combing through the Supreme Court website and files, and especially Victoria Peter, who co-ordinated much of the work, and was always ready to accede to some of my demands. Also, thanks to the library staff at Osgoode who arranged for us to spend countless hours in the rare book room reviewing old court records. Thanks also to the helpful comments from those who attended the conference, particularly Jean Leclair who connected me with his doctoral student Claude Boulay, whose empirical work on interveners was invaluable. Finally, to my academic colleagues who were kind enough to indulge in my request for their top ten Supreme Court of Canada cases.

d1 **Richard Haigh** is an Assistant Professor at Osgoode Hall Law School and Director of York's Centre for Public Policy and Law and Co-Director of the Part-Time LLM in Constitutional Law at Osgoode. He has a doctorate from University of Toronto in the area of freedom of conscience and religion. He was until 2007, the Associate Director, Graduate Program at Osgoode Professional Development. He has been a Senior Lecturer at Deakin University in Melbourne, a Senior Advisor at the National Judicial Institute in Ottawa, and a Legal Research and Writing Lecturer at Osgoode. His research and teaching interests include Constitutional Law, Public Law, and Equity and Trusts. His recent talks and published works relate to the Alberta Press Case, s. 15 of the Charter, privacy and religion, the Supreme Court's use of metaphor, division of powers in freedom of expression cases, freedom of conscience and whistleblowing, freedom of religion, dialogue theory and noise by-laws; he also contributed a chapter to the State and Citizen casebook on *Public Law*.

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1 A number of works have discussed interveners at the Supreme Court of Canada but these tend not to be empirical nor attempt to assess their effects, rather examining the role of interveners and the kinds of intervention they involve themselves in. A brief sample includes: Jillian Welch, "No Room at the Top: Interest Group Intervenors and *Charter* Litigation in the Supreme Court of Canada" (1985) 43 U.T. Fac. L. Rev. 204; Kenneth Swan, "Intervention and Amicus Curiae Status in Charter Litigation" in Robert Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987); Philip Bryden, "Public Interest Intervention in the Courts" (1987) 66 Can. Bar Rev. 490. The few attempts to analyze effects of interveners include F.L. Morton and Avril Allen "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada," (2001) 34 Cdn. J. Political Sci. 55; Christopher Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Toronto: UBC Press, 2004); and Benjamin Alarie and Andrew Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 Osgoode Hall L.J. 381.

2 Those contributing were Bruce Ryder, Philip Girard, Craig Scott, Carissima Mathen, Emmett Macfarlane, Howard Kislowicz, Wade Wright and myself. I subsequently learned that Professor Hugo Cyr carried out a similar survey of six legal academics (Hugo Cyr, Dwight Newman, Peter Hogg, Jean Leclair, Adam Dodek and Maxime Saint-Hilaire) (his was based on the "top 40 Canadian judgments."). There are a number of overlaps--the cases that show up with more than five votes on each list include *Roncarelli, Reference re Secession of Quebec, Patriation Reference*, and *Oakes*. For purposes of this article, it is clear that both surveys show marked differences between "important" or "top" cases and the numbers of interveners. (Cyr's unpublished survey is on file with the author.)

3 The count was based on the total number of interveners participating, either by written submissions only, or both written and oral. The methodology was to count each intervening party as provided for in the online judgment by examining the listing of counsel (appearing directly before the start of the official judgment) and tallying up the numbers of parties given the title "intervener" by the Court. It should be noted that sometimes a single counsel may represent more than one party (in the decision, this may be listed as "X for the interveners A, B and C." We count this as three interveners, although the Court usually means that the three interveners were entitled to file only one factum. Note also that there are three other cases with 15 interveners which were not included (just to keep the two lists the same total length). The list is chronological so the three excluded are the most recent cases: *Reference re Senate Reform* (2014); *British Columbia Teachers' Federation v. British Columbia* (2016) and *Stewart v. Elk Valley Coal Corp.* (2017).

4 *Trinity Western University et al. v. Law Society of Upper Canada; Law Society of British Columbia v. Trinity Western University*, SCC Court File 37209 and 37318. Since this is the second case involving Trinity Western University at the Supreme Court on not dissimilar issues--see *Trinity Western University v. British Columbia College of Teachers* (2001), 199 D.L.R. (4th) 1, [2001] 1 SCR 772 2001 SCC 31--the case will be referred to hereafter as *Trinity Western University II*.

5 See *Trinity Western University v. Law Society of Upper Canada*, case 37209, "Docket". Online: https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?-cas=37209. The very same language is found in the companion case, *Trinity Law Society of British Columbia v. Trinity Western University*, found at https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37209.

6 Some examples: "Supreme Court Justice Offers Explanation for LGBTQ Decision", the *Globe & Mail* (July 31, 2017) at A4; "Did the Chief Justice Make an Illegal or Questionable Order?"; "After a Weekend of Outrage, LBGTQ Groups Allowed"; Jacques Gallant, "Supreme Court Reversal allows LGBTQ groups to take part in case involving B.C. Christian university", the *Toronto Star* (August 1, 2017). Online: https://www.thestar.com/news/gta/2017/08/01/supreme-court-reversal-allows-lgbtq-groups-to-take-part-in-case-involving-bc-christian-university.html; Leslie MacKinnon, "SCC issues rare press release explaining decision in Trinity Western University case", *iPolitics* (August 3, 2017). Online: https://ipolitics.ca/2017/08/03/scc-issues-rare-press-release-explaining-decision-in-trinity-western-case/; and Kristopher Kinsinger, "SCC Interveners Order Raises Questions Ahead of Trinity Western Hearing", *the Court.ca* (October 5, 2017). Online: http://www.thecourt.ca/scc-interveners-order-raises-questions-ahead-of-twu-hearing/.

7 Supreme Court of Canada, News Release (August 2, 2017). Online: https://scc-csc.lexum.com/scc-csc/news/en/item/5590/index.do.

8 *Supra* note 5 (emphasis added).

9 Both Table 1 and 2 are based on cases determined as of November 2017. Given that *Trinity Western II* was still on reserve at the time of writing, Table 2 does not include the case.

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10 (1894), 23 S.C.R. 458, 1894 CarswellOnt 23.

11 (1919), 47 D.L.R. 108, 58 S.C.R. 570; (1917), 36 D.L.R. 266, 54 S.C.R. 532.

12 *Reference re Alberta Statutes--The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] 2 D.L.R. 81, [1938] S.C.R. 100.

13 The first case I could locate where a private party intervened is *Dansereau v. Berget*, [1951] S.C.R. 822, 1951 CarswellQue 34, where Dame Fanny Irénée Colin intervened (on what basis, it is unclear).

14 And of the 25 cases where no interveners participated, nine were either oral decisions or decisions of four or fewer paragraphs.

15 Cited in Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press for the Osgoode Society of Canadian Legal History, 2003) at 385.

16 *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062 at 1063 (7th Cir. 1997; Posner J. in chambers).

17 Nathalie Des Rosiers and Christian Pearce, "Interventions", unpublished paper from the Interventions Symposium (November 6, 2009), David Asper Centre for Constitutional Rights, University of Toronto. Online: http://aspercentre.ca/resour-ces/publications/conference-reports-and-papers/.

18 *Ibid.*, at 4-5.

19 See generally works cited at note 1, *supra*.

20 Gary Magee, "Trends in Applications for Leave to Intervene in the Supreme Court of Canada", CBA Ontario, CLE Program, September 2008, unpublished. His analysis covers the period 2005 to 2007 and excludes interventions by Attorneys-General.

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

22 Alarie and Green, *supra* note 1 at n. 33.

23 Gallant, *supra* note 6.

24 "The CCRL Initially Denied, then Granted Leave to Intervene in Trinity Western at the Supreme Court of Canada", Catholic Civil Rights League (August 4, 2017). Online: https://ccrl.ca/2017/08/twusccleave/.

25 *Supra*, note 7.

26 See Paul Collins, Jr., "Interest Group Participation in the United States Supreme Court" 2009, unpublished paper from the Interventions Symposium (November 6, 2009), David Asper Centre for Constitutional Rights, University of Toronto. Online: http://aspercentre.ca/resources/publications/conference-reports-and-papers/. The Supreme Court of Canada does contemplate appointing amicus curiae under Rule 92, but these are not considered the same as amici in the United States.

27 U.S.S.C. Supreme Court Rules, Rule 37.3(a) and (b). See Joseph Kearney and Thomas Merrill, "The Influence of Amicus Curiae Briefs on the Supreme Court" (2000) 148 Univ. Pennsylvania L.R. 743, at 762.

28 The U.S.S.C. allows amici to participate in the oral hearings but these are generally limited to state and federal Attorneys-General. The move toward written only amici was a relatively early development in the U.S. and it coincided with a more general movement towards written advocacy: see Stuart Banner, "The Myth of the Neutral Amicus: American Courts and Their Friends, 1790-1890" (2003) 20 Constitutional Commentary 111 (Banner notes that the myth that amici in the past were neutral was largely a reflection of the fact that litigation was mainly an oral practice, and the so-called neutral amici (and the biased belief of such) was largely a result of happenstance--lawyers who were basically milling around in court were able to offer assistance to judges and then became listed as

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amici. As Banner observes, "aspiring lawyers were advised that the best way to learn the law quickly was to go to court and listen, advice that is virtually never given today." (at 121).

29 It is worth noting, despite their prevalence, that there remain a significant minority of cases at the S.C.C. without interveners. For example, of the 67 cases handed down in 2017, 27 had none, giving a rate of intervention around 60%. Even this number is misleading, however, as many of the interventions are Attorneys-General, not the typical public interest applicant. In contrast, virtually all cases at U.S.S.C. have amici. There are differences in the jurisdiction of the two courts, admittedly, but given that most S.C.C. cases have wide repercussions beyond the individual litigants, the percentage still seems low.

30 Mention should be made of the recent change of practice at the SCC regarding interveners. It used to deal with interventions at two stages: first, to decide who gets in; second, after all factums are filed, decide who gets speaking rights. Now, the practice is to grant speaking rights at the same time as the application for intervention status is granted.

31 In watching and listening to the oral arguments for the *Trinity Western II* appeal, it is striking how often the Chief Justice interrupts interveners asking them to turn to points of law related to their broader perspective, not interpreting matters regarding "what Trinity Western does or does not do" or tackling the lower appellate court's decision which are matters for the parties. Clearly frustrated, at one point (at 1:10:12) she says: "We have to say this over and over again, but you're not here to argue against the B.C. Court of Appeal's decision. If you want to discuss aspects of that decision and give us your particular insight and point of view, that's fine." Many interveners found it difficult to so limit their discussion--see webcast of the Hearing on 2017-12-01, online: https://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=37209&id=2017%2f2017-12-01--3720937318&date=2017-12-01&audio=n. This is not to say that oral argument has no place; on the contrary, I believe that oral argument remains crucial to the advocacy process. It might be most appropriate to expand the "written argument only" interventions but retain a place for limited oral appearances.

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