Indigenous Interveners at the Supreme Court of Canada

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ABSTRACT

This article is one of the first comprehensive quantitative and qualitative analyses of Indigenous interveners at the Supreme Court of Canada. I argue that Indigenous nations who intervene at Canada's highest court are innovative legal actors in their unique use of the factum format. This is shown first through a qualitative analysis of both the substance and form of a sample of factums taken from Supreme Court decisions over a 10-year span. In the second half of the paper, I then argue that the incremental nature of the Supreme Court of Canada makes it institutionally resistant to the methods of Indigenous interveners. This is shown through a quantitative analysis of the kinds of sources used by Indigenous interveners that are eventually adopted into the Supreme Court's final decisions. Ultimately, I analyze what, if any, impact these interveners had on the Court's reasons in each of these cases. The article addresses the relevant topic of how much an intervener can or should contribute to a case, especially in light of the particular barriers that Indigenous nations experience in their interactions with Canada's legal system.

Keywords: Indigenous, intervener, qualitative, quantitative, Supreme Court of Canada.

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I. INTRODUCTION

In oral arguments for *R v Desautel* before the Supreme Court of Canada (SCC), the Peskotomuhkati nation were given five minutes to make their contributions as an intervening party.[1] The Peskotomuhkati were in a factual situation much the same as the respondent, as both were Indigenous nations whose territories were split by the United States-Canada border.[2] Rather than speak at length about the West Coast-based Sinixt nation at the centre of the appeal, however, the intervener's counsel instead spoke of the waterway at the heart of Peskotomuhkati territory which now marks the border between Maine and New Brunswick.[3] They elaborated on themes of respect and identity, spoke of the arbitrariness of colonial borders, and likened the Peskotomuhkati's situation to the Sinixt as a point of reference for the SCC.[4] On its face, the oral argument seemed different from those advanced by other interveners. This is particularly true compared to the many provincial attorneys-general, whose five minutes consisted of incremental arguments observers come to expect in a precedent-based system.[5] Noticeably, unlike the other parties and interveners, no one on the bench asked a single question of the Peskotomuhkati.[6] When the SCC released its decision a few months later, it incrementally expanded section 35 rights with little mention of the big-picture arguments the Peskotomuhkati put forward.[7]

This observation spurred the question of how different kinds of interveners interact with the Canadian judicial system. The nature and role of interveners at the SCC has changed over the years.[8] With more

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1 *R v Desautel*, 2021 SCC 17 (Oral argument, Intervener, Peskotomuhkati Nation). The oral argument begins at 2h:55m:12s in the archived webcast. Webcast available at <https://www.scc-csc.ca/cases-dossiers/search-recherche/38734/> [https://perma.cc/45MM-FKKA] [*Desautel* Hearing].

2 *R v Desautel*, 2021 SCC 17 (Factum, Intervener, Peskotomuhkati Nation at para 17) [Peskotomuhkati].

3 *Desautel* Hearing, *supra* note 1.

4 *Ibid*.

5 *Ibid*.

6 *Ibid*.

7 See generally *R v Desautel*, 2021 SCC 17 [*Desautel*].

8 In many early cases, only attorneys-general were permitted to intervene. Interveners began to appear more throughout the mid-20th century, as private parties appeared in public law and non-constitutional cases. The introduction of the *Charter* in 1982 saw a

jurisprudence on Indigenous rights issues in the past few decades, the SCC has increasingly faced a new kind of intervener: Indigenous nations. A number of diverse interveners have appeared over the past 10 years in SCC decisions dealing with legal issues impacting Indigenous peoples. In light of this development, the question arises: who are these interveners and in what ways are they potentially impacting SCC decisions and the ensuing development of Canadian law?

In response to this query, this paper analyzes a selection of recent SCC appeals and the factums of Indigenous parties that intervened in them. Broadly, I make the normative argument that Indigenous nations are a unique form of intervener and deserve special attention. Often unfairly characterized in legal literature as just one more interest group, Indigenous interveners instead bring innovative arguments that are difficult to sort neatly into any one broad narrative. Each nation is a distinct cultural and legal entity independently informed by jurisdictional, historical, economic, and geographical relationships to the lands, resources, and rights often at issue in these cases. While many Indigenous nations may face similar legal issues, their factums reveal their understandings and solutions to these issues are not homogenous. Rather, Indigenous interveners have constructed factums that, when compared among one another, are both contextual and unconventional in their approaches.

Correspondingly, this paper also takes a critical look at the very functioning of the SCC itself. The change-oriented arguments Indigenous interveners put forward are often at odds with the incremental nature of SCC decisions. Much like the SCC's lack of engagement with the arguments of the Peskotomuhkati nation in *Desautel*, I argue that the logics of the SCC and Indigenous interveners are akin to ships passing in the night.[9] This second normative claim is explored through a comparison of the sources cited in intervener factums and final SCC decisions. I theorize that the SCC is resistant to expansive and unorthodox arguments made by Indigenous interveners, demonstrated through minimal engagement with the unconventional sources utilized in their factums.

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huge uptick in interveners. For more, see generally Richard Haigh, "Does it Need an Intervention? An Examination of Interveners in Business Cases at the Supreme Court of Canada" in Todd L. Archibald, ed, *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2019) [Haigh, "Business Cases"].

9 The term 'ships passing in the night' comes from English poet Henry Wadsworth Longfellow and is often meant to connote a transitory or brief interaction between two parties with no meaningful follow up.

The first section of this paper sets out the argument as to why Indigenous interveners should be considered distinct, engaging with previous literature on both interveners and Indigenous peoples' experiences with the courts. The second section explains the methodology behind the selection of the SCC appeals and factums analyzed. The third section argues that Indigenous interveners are unique and innovative legal actors, shown through parsing examples from factums themselves. The fourth section explores the perceived failure by the SCC to address legal arguments put forward by Indigenous interveners, as seen through a qualitative tally of unconventional factum sources cited in final decisions. This data is considered in reference to Daniel Sheppard's theory of performativity in engagement with interveners and Justice Malcolm Rowe's writings on the role of precedent in the common law.[10] The final section concludes by suggesting areas for future research.

II. INDIGENOUS INTERVENERS AS MORE THAN INTEREST GROUPS

In the small pool of literature concerning interveners at Canada's Supreme Court, the focus has largely been on public law cases.[11] Much attention has gone towards "interest groups" and their attempts at influencing court decisions on relevant social issues.[12] In particular, early literature focused on cases involving the *Charter of Rights and Freedoms*.[13] While there have been writings on feminist and environmental activist interveners, very little attention has been paid to interventions by Indigenous parties.[14] Often, Indigenous interveners are simply mentioned

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10 See generally Daniel Sheppard, "Just Going Through the Motions: The Supreme Court, Interest Groups and the Performance of Intervention" (2018) 82 SCLR 179; The Honourable Justice Malcolm Rowe & Leanna Katz, "A Practical Guide to *Stare Decisis*" (2020) 41 Windsor Rev Legal Soc Issues 1.

11 Haigh, "Business Cases," *supra* note 8. That article spoke to the lack of literature on interveners in private law cases. For a list of literature on this topic so far, see Richard Haigh & Thaddeus Hwong, "Indexing Influences of Supreme Court of Canada Interveners: A Preliminary Examination" in Todd L Archibald, ed, *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2022) 63 at 64–65, specifically footnote 7.

12 For example, see Jillian Welch, "No Room at the Top: Interest Group Intervenors and *Charter* Litigation in the Supreme Court of Canada" (1985) 43 UT Fac L Rev 204; Philip Bryden, "Public Interest Intervention in the Courts" (1987) 66 Can Bar Rev 490.

13 *Ibid*.

14 For example, see generally FL Morton & Avril Allen, "Feminists and the Courts:

among a long list of other public interest groups that commonly participate in *Charter* and other public law appeals. For example, books and articles on interveners by Benjamin Alarie and Andrew Green, Gregory Hein, Donald Songer, and Chris Tollefson all lump Indigenous interveners in with other groups.[15]

The common classification of Indigenous interveners as simply another public interest group obscures both the context within which Indigenous parties are participating in the legal process as well as the unique and innovative ways they advance legal arguments. While there is a dearth of literature on Indigenous interveners specifically, broader literature on Indigenous peoples' experiences in Canadian common law courts provides points of comparison.

First, the tendency in the literature to group all types of Indigenous interveners together is pan-Indigenous and uninformative. There are numerous Indigenous nations spread throughout Canada, each with distinct languages, legal orders, and relationships informing their outlook.[16] Pivotally, each nation's legal relationship with the Crown can be drastically different. For instance, while the East Coast of Canada is covered by historic treaties signed with Indigenous nations in the 1700s, these agreements differ in substance greatly from the treaties that were eventually made throughout the Canadian Prairies a century later.[17] In the past few decades, nations have completed numerous modern treaties with federal and provincial counterparts, each with differing arrangements and defined

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Measuring Success in Interest Group Litigation in Canada" (2001) 34:1 Can J of Political Science 55; Chris Tollefson, "Advancing an Agenda – A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation" (2002) 51 UNBLJ 175.

15 See Benjamin Alarie & Andrew Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 Osgoode Hall LJ 381 at 399; Gregory Hein, "Interest Group Litigation and Canadian Democracy" in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 214 at 215; Donald Songer, *The Transformation of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2008) at 124. See also Tollefson, *supra* note 14 at 176.

16 For more on the diversity of Indigenous legal systems, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

17 These treaties are referred to as the Peace and Friendship Treaties and the Numbered Treaties, respectively. For more, see Government of Canada, "Treaties and agreements" (2023), online (webpage): <www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231> [perma.cc/QYM3-452A].

rights.[18] Some nations have yet to complete a treaty with the Crown at all.[19] In terms of land, some nation's territories are split between two or more provinces, while others have territory stretching into the United States.[20] While many Indigenous interveners may take interest in a particular legal issue, they may not approach that issue in the same way. Experiences vary widely and the factums examined for this paper demonstrate that the approaches of Indigenous interveners are incredibly diverse.

Second, Indigenous interveners are qualitatively different than other groups given the settler colonial context within which they operate. This is evident in the experiences of Indigenous parties in Canadian courts. For example, Professor Val Napoleon writes about the difficulties that have arisen as Indigenous parties attempt to prove Aboriginal title claims.[21] In the landmark 1997 *Delgamuukw v British Columbia* appeal, she remarks the Gitksan and Wet'suwet'en nations faced pushback when they presented a different form of evidence to establish possession of land at trial. The courts had difficulty cognizing *adaawk*, an oral history detailing the nations' presence on their territory, as a valid representation of a legal relationship.[22] It is important to note that these nations were not interveners, but instead the main parties placing their oral histories before a judge to meet a common law test for possession. Nevertheless, the point still stands. Indigenous interveners often must communicate their own complex connections to sacred rights or land in their factums. Significant hurdles remain in translating these relationships into a standardized and restrictive common law format of a few written pages and a short oral argument slot. Despite not being at the centre of an appeal's factual and legal issues themselves, many Indigenous interveners bring their own personalized experiences and understandings of the issue to their factums. This tension between format and substance helps explain why these factums often advance comparatively different methods of argumentation.

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18 *Ibid*. Examples of modern treaties include the agreements between Inuit and the Crown covering regions across the North.

19 *Ibid*. Examples of this include parts of North-Eastern Ontario, much of Québec, and almost all of British Columbia.

20 See *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 [*Innu*]. This case involves the unique experiences of Indigenous nations divided between two provinces, which will be explored later in this paper. Nations split by the US-Canada border are at issue in *Desautel*, *supra* note 7.

21 See generally Val Napoleon, "Delgamuukw: A Legal Straitjacket for Oral Histories?" (2005) 20:2 CJLS 123.

22 *Ibid* at 126.

III. METHODOLOGY

A. *Selecting the Appeals and Factums*

With an understanding of the unique positionality of Indigenous interveners, we can now turn to the selection of SCC appeals and factums used in this paper. It is important to first define who is and who is not considered an Indigenous intervener for the purposes of this analysis. The first criterion is that the intervening party in question must self-identify as an Indigenous collective. Second, the intervener must either be a recognized community within a larger nation or a nation itself. The lines between this distinction are sometimes blurred and it falls to the intervener to define itself. For example, the Inuvialuit Regional Corporation is a constitutional rights-holding entity that represents Inuit living in the Western Arctic region, although they do not represent the entire collective of Inuit across the North.[23] On the other hand, the Peskotomuhkati nation intervened and advanced arguments on behalf of the entire collective of people identifying as Peskotomuhkati.[24]

Pan-Indigenous organizations, such as Aboriginal Legal Services or the Assembly of First Nations, were avoided. This is because, as organizations created to represent a number of diverse voices across various Indigenous nations and communities, their factums may not contain the same level of localized legal arguments that are at the centre of this paper's analysis. Following a brief review of some factums submitted by pan-Indigenous organizations, their analyses were qualitatively different and bore more resemblance to the structure and methods of interveners like attorneys-general.[25] As a result, it did not seem fair to include those factums in this analysis. There are nevertheless some organizations included in this analysis, but they do not fall under the pan-Indigenous classification. For example, the Te'mexw Treaty Association, despite being an organization, represents five Coast Salish First Nations and thus has a unified factual and legal status similar to other Indigenous interveners this paper will explore.[26] As discussed in the final section, the differences in legal arguments between

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23 *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 (Factum, Intervener, Inuvialuit Regional Corporation at para 1) [IRC].

24 Peskotomuhkati, *supra* note 2 at para 13.

25 See generally *R v Desautel*, 2021 SCC 17 (Factum, Intervener, Assembly of First Nations) as an example.

26 *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (Factum, Intervener, Te'mexw Treaty Association at para 2) [TTA].

pan-Indigenous interveners and community or nation-based interveners would be a novel and informative area of research to pursue.

Next, I turn to the methodology used for selecting the SCC appeals and intervener factums to be analyzed. I chose the appeals based on several requirements. First, they had to involve an issue pertaining to Indigenous peoples. This could be a modern or historic treaty, section 35 rights, a provision in the *Indian Act*, or a similar topic. Second, the appeal had to have at least two interveners of the kind defined above. Having multiple interveners is always a good sign that a legal issue is a live one and allows for analysis based on a diversity of perspectives. Third, the interveners' factums had to be accessible on the SCC's website. Some factums were unavailable for "contain[ing] personal information, information that is subject to a publication ban, or any other information that is not part of the public record."[27] The analysis was capped at 10 cases total for manageability, as it is only meant as a small exploratory sample to be considered in conjunction with the qualitative portion of the paper.[28]

Once the SCC appeals were chosen on the above criteria, two factums were selected at random from each appeal. Two factums per appeal ensured the scope of the analysis remained practicable, particularly given the numerous sources used in each intervener factum. Even with this number of factums, there was a lot of content. As an example, there could be up to 60 sources per factum.[29] 20 factums were selected in total.[30]

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27 Supreme Court of Canada, "Factums on Appeal," online (webpage): <www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=38734>.

28 These cases, from newest to oldest, consist of: *Southwind v Canada*, 2021 SCC 28 [*Southwind*]; *Desautel*, *supra* note 7; *Innu*, *supra* note 20; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 [*Mikisew*]; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*]; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 [*Thames*]; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa*]; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 [*Daniels*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*]; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy*].

29 See *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 (Factum, Intervener, Makivik Corporation) [Makivik]. The Makivik factum, for example, has 60 sources.

30 The factums consist of: Elsipogtog First Nation and Chemawawin First Nation for *Southwind*; Nuchatlaht First Nation and Peskotomuhkati Nation for *Desautel*; Kitigan Zibi Anishinabeg and the Algonquin Anishinabeg Tribal Council as well as Tsawout First Nation for *Innu*; Manitoba Métis Federation and Gitanyow Hereditary Chiefs for *Mikisew*; Makivik Corporation and Inuvialuit Regional Corporation for *Clyde River*; Mississaugas of the Credit First Nation and Mohawk Council of Kahnawà:ke for

B. *Using Algorithms to Assess Intervener Engagement*

One basic goal of this paper is to analyze and compare ideas. The first part of this paper consists of purely qualitative analysis, achieved through a manual dissection of factums and decisions. In an effort to look at the engagement between Indigenous interveners and the Supreme Court from additional vantage points, I thought it useful to utilize computer science algorithms to produce a quantitative result as well.[31]

I chose to evaluate the sources used in the factums and final SCC decisions, as this provides both a countable data set as well as a telling indicator of the SCC's engagement with a factum's legal arguments. As will be explained in greater detail, the factum sources were categorized as either conventional or unconventional. Conventional sources include the basic case law and statutes pertaining to the legal issues in the decision. These are generally sources that all interveners and the final decision will reference. On the other hand, the unconventional sources category consists of novel or unorthodox sources used by Indigenous interveners, including international case law, policy papers, and more. A proxy to measure engagement with a factum's unique arguments is by calculating how often the SCC endorsed or rejected these sources. Seeing as this is a normative, rather than an empirical analysis, a control group is not necessarily required to measure engagement. Although comparing source engagement with non-Indigenous intervener factums would also be revealing, a straight measure of how many unconventional sources were cited in final decisions is a telling starting point for research.

In terms of the technical details, the list of sources in each decision and corresponding two factums were copied and pasted into a pure text file. Then, my colleague applied a natural language processing algorithm to the data set, where the pure text files of each decision and factum were matched

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Thames; Katzie First Nation as well as West Moberly First Nations and Profit River First Nation for *Ktunaxa*; Gift Lake Métis Settlement and Te'mexw Treaty Association for *Daniels*; Office of the Wet'suwet'en Chiefs and Gitxaala Nation for *Tsilhqot'in*; Fort McKay First Nation along with Blood Tribe, Beaver Lake Cree Nation, Ermineskin Cree Nation, Siksika Nation, and Whitefish Lake First Nation #128 for *Grassy*.

[31] This was accomplished with the assistance of my friend Josh Katofsky, who holds a degree and now works in the field of computer science. We initially had an idea to use a natural language processing algorithm to scan each decision and factum to look for similar words and phrases. This was abandoned due to too much overlap of irrelevant words. We had an additional plan to use a large language model, such as ChatGPT, to run a more advanced scan of the documents and report on the similarity of their ideas. However, we found uninspiring initial results. Nevertheless, both of these methods hold promise if more time and planning could be afforded to them.

to find any sources cited in both.[32] Then, I manually went through each list of factum-decision matches and non-matches to determine if the sources were either conventional or unconventional.[33] If the unconventional source was not referenced in the final decision, then this would be an example of lack of engagement and the analysis stopped there. However, if an unconventional source was cited, then the factums of other interveners and the main parties were consulted to ensure this source was unique to that factum.[34] If the source was found to be unique to an Indigenous intervener, there would then be additional qualitative analysis to determine how the SCC treated the cited source, whether that be faithfully applying it as the intervener suggested, mentioning it to disregard, or somewhere in between. This research is then analyzed using literature on the function of the common law and theories of intervener treatment at the SCC.

IV. INDIGENOUS INTERVENERS AS CONTEXTUAL AND INNOVATIVE

I begin with a qualitative analysis of the factums' contents. To do so, it is helpful to first contextualize Indigenous interveners within the long history of intervention at the Supreme Court. Although the SCC does not provide their reasons for granting interveners, the case law indicates interveners are expected to make useful and different submissions on the appeal's issues without raising new issues or supplementing the evidentiary record.[35] Throughout the SCC's history, there have been discussions as to the kind of role interveners should play.[36] The Supreme Court itself has increasingly clarified its view on the role of interveners not only through

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32 This data was presented in separate files divided per appeal on GitHub. A more in-depth explanation of the process can be found here: <github.com/jkatofsky/indigenous-interveners-NLP/blob/main/README.md#references-comparison> [perma.cc/X4G9-M8UK]. Additionally, the data files themselves can be found here: <github.com/jkatofsky/indigenous-interveners-NLP/tree/main/results/reference-analysis> [perma.cc/3L98-TUWP].

33 The details of this categorization will be expanded upon in the later analysis section.

34 This analysis is subject to the availability of those factums on the Supreme Court of Canada's website.

35 *R v McGregor*, 2023 SCC 4 at paras 24, 81.

36 Eugene Meehan, "Intervening in the Supreme Court of Canada" (1994) 16:2 Adv Q 137 at 146–149.

case law, but also official rules and notices fleshing out those rules.[37] In 2021, the Court released a detailed notice directly addressing the role of interveners.[38] Among other things, it mentioned that intervener submissions must be "different from those of the parties," they must "advance the intervener's own view of a legal issue," and they should not "introduce new issues," "facts," or "try to expand the case."[39] Even this detailed guidance leaves a subtle grey area in the assertion that interveners must be different and give their own view, but may not expand an appeal's considerations. It is within this grey area that Indigenous interveners push the boundaries by making arguments using their own factual contexts and by changing the factum format in unorthodox and innovative ways.

A. *Informing Factums with Individualized Context*

First, it is regular practice for all interveners to make some note of their relation to an appeal's legal issues.[40] In fact, it is required for a party to make clear their "relevance to the proceeding" in their motion for intervention.[41] Therefore, all interveners provide some context as to who they are and why they are there. However, due to Indigenous interveners' unique cultural and legal relationships to Indigenous rights issues, I argue that this takes on a special flavour in their factums. The factual circumstance of each intervener often plays a role in how they formulate their arguments on the relevant issues.

For example, consider treaty relationships. Depending on a nation's treaty relationship, or lack thereof, with the Crown, their collective rights under section 35 can look very different. The Peskotomuhkati nation's factum takes time to outline their own interpretation of their treaty relationship, which dates to 1725.[42] Arguing their treaty terms provide for "peaceful coexistence" and "expansive" use of land, they use this understanding of the Crown's legal obligations to argue the Crown has

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37 See generally *Reference re Workers' Compensation Act 1983 (Nfld) (Application to intervene)*, 1989, CanLII 23 (SCC); *R v Finta*, 1993 CanLII 132 (SCC). See also *Rules of the Supreme Court*, SOR/2002-156, rs 55–59 [SCC Rules].

38 David Power, "November 2021 - Interventions" (November 2021), online (notice): <https://www.scc-csc.ca/parties/arf-lrf/notices-avis/21-11/> [perma.cc/4X8S-42L3].

39 *Ibid*.

40 *R v Desautel*, 2021 SCC 17 (Factum, Intervener, Attorney General of New Brunswick at para 8). For example, in the Attorney General of New Brunswick's factum, they note the case's impact on the "Maritime region."

41 SCC Rules, *supra* note 37, r 57(2)(b).

42 Peskotomuhkati, *supra* note 2 at para 14.

similar obligations in the present case.[43] Compare this with the factum of Nuchatlaht First Nation, another intervener from the *Desautel* case. Nuchatlaht First Nation is located in British Columbia (BC) and has not signed a historic treaty, although it has an ongoing Aboriginal rights claim.[44] In its arguments, the Nuchatlaht invoke BC's *Declaration on the Rights of Indigenous Peoples Act*, classifying the legislation as a "promise" made to their First Nation.[45] They use their interpretation of the *Act* to then argue for broader section 35 rights in the case at bar. These factual and legal backdrops similarly inform each factum's framing, despite these nation's relationships with the Crown being centuries apart and rooted in different legal sources.

In contrast, communities within the same nation may take differing approaches to a legal issue. In *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, the Inuit of Clyde River, signatories of the *Nunavut Land Claims Agreement* (NLCA), challenged the National Energy Board for inadequately consulting them on a development project.[46] Two interveners in the case, the Makivik Corporation and the Inuvialuit Regional Corporation (IRC), represent Inuit in two separate regions of the North who are signatories of modern treaties comparable to the NLCA.[47] Even within this shared context, however, differences are apparent. Makivik's factum notes they represent Inuit under the 2006 *Nunavik Inuit Land Claims Agreement* (NILCA).[48] Drawing on this, they reference animal harvesting terms of their own treaty to compare and advocate for a more generous interpretation of the treaty covering Clyde River.[49] While the Makivik Corporation seeks to draw direct comparison between their own treaty and the one at issue, the IRC instead draws on international law.[50] Referencing their own experiences fighting for Inuit rights, the IRC argue consultation should follow the principle of free, prior, and informed consent under the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[51] They observe that, having gone through multiple negotiations with the Crown

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43 *Ibid*.

44 *R v Desautel*, 2021 SCC 17 (Factum, Intervener, Nuchatlaht First Nation at para 35).

45 *Ibid* at paras 36–40.

46 *Clyde River*, *supra* note 28 at paras 1–4.

47 Makivik, *supra* note 29; IRC, *supra* note 23.

48 Makivik, *supra* note 29 at para 2.

49 *Ibid* at para 12.

50 IRC, *supra* note 23 at para 6.

51 *Ibid* at paras 14–19.

and oil and gas proponents regarding their own treaty rights, they view a consent-based relationship as the best way to preserve Inuit interests.[52] Both factums demonstrate that communities within the same nation and with similar legal contexts can nevertheless employ different tactics.

In addition to relationships with the Crown, we can also consider relationships that interveners have with their lands and waters. In *Southwind v Canada*, Lac Seul First Nation asked the Court to consider compensation owed to them resulting from a government-initiated dam project that flooded parts of their reserve land.[53] The factum submissions reveal that interveners were able to relate to this problem. Elsipogtog First Nation's factum recounts how 90% of their reserve land was taken two centuries ago and they are also now currently negotiating a claim for compensation.[54] Elsipogtog's resulting familiarity with the "mechanics" of the *Specific Claims Tribunal Act*, which governs compensation proceedings, allows them to focus their arguments on the *Act*'s implementation.[55] They also mention that Lac Seul First Nation's success in the present case would positively impact their own negotiations.[56] Chemawawin Cree nation, another intervener who also had their reserve flooded by a dam, spoke to the different kind of relationship their community has to land.[57] They explain their "cultural" and "spiritual" connections to land, which the current common law notion of expropriation compensation fails to account for.[58] Be it an articulation of spiritual connections or merely technical advice on navigating a statue, Elsipogtog and Chemawawin use their similar dilemmas to highlight different aspects of the larger issue of Crown compensation for damaged territory.

Another revealing legal relationship seen in the factums is that of the Crown and Hereditary Chiefs. Hereditary Chiefs differ from Chiefs elected under the band council system imposed under the *Indian Act*, as they gain authority from the internal Indigenous laws of the nation itself.[59]

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52 *Ibid* at para 4.

53 *Southwind*, *supra* note 28 at paras 1–9.

54 *Southwind v Canada*, 2021 SCC 28 (Factum, Intervener, Elsipogtog First Nation at para 2).

55 *Ibid* at para 2.

56 *Ibid* at para 24.

57 *Southwind v Canada*, 2021 SCC 28 (Factum, Intervener, Chemawawin Cree Nation at para 1).

58 *Ibid* at para 3.

59 Whether that be alongside *Indian Act* Chief and Councils or some other configuration

Depending on the community or nation, these Chiefs often still hold positions of authority.[60] In *Mikisew Cree First Nation v Canada (Governor General in Council)*, the Gitanyow Hereditary Chiefs submitted a factum on behalf of their community.[61] The main issue of *Mikisew* considers the exclusion of Indigenous nations from the legislative drafting process.[62] Given their position as leaders unrecognized by Canadian statute, the Chiefs' factum ties this issue directly to the maintenance of their internal authority within their community.[63] For example, their definition of a reconciliatory relationship with the Crown entails the protection of their internal "social, political and governing system."[64] The unique submission by the Hereditary Chiefs brings a new factual angle to the multifaceted concept of Indigenous interveners, revealing different reasons why a certain party may choose to intervene.

Another unique flavour of factum comes from Métis nation communities, who bring their own distinct histories and relationships. Unlike those who signed treaties, the Métis were historically unrecognized by Canada, leaving them in legal limbo.[65] As a result, the legal status of Métis varies widely province to province.[66] This lack of recognition was acknowledged by the Manitoba Métis Federation (MMF) in their intervener factum for the aforementioned *Mikisew* case.[67] The struggle for recognition was similarly documented by the Gift Lake Métis community in Alberta in their factum for *Daniels v Canada (Indian Affairs and Northern Development)*.[68]

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depends on many complex historical and socio-political factors. For more, see Maham Abedi, "Band councils, hereditary chiefs — here's what to know about Indigenous governance" (10 January 2019), online (news article): <https://globalnews.ca/news/4833830/band-councils-hereditary-chiefs-indigenous-governance/> [perma.cc/HT7U-Y8HK].

60 *Ibid*.

61 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 (Factum, Intervener, Gitanyow Hereditary Chiefs).

62 See generally *Mikisew*, *supra* note 28.

63 *Ibid* at para 37.

64 *Ibid* at para 13.

65 See Jean Teillet, *The North-West is Our Mother: The Story of Louis Riel's People, the Métis Nation* (Toronto: HarperCollins, 2019). This book documents the uncertain legal status of Métis through history. Some Métis have signed treaties, however.

66 *Ibid*.

67 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 (Factum, Intervener, Manitoba Métis Federation at para 14) [MMF].

68 *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (Factum, Intervener, Gift Lake Métis Settlement at para 1).

Métis communities in Alberta differ from their Manitoba counterparts in that they have legislatively-enshrined land rights.[69] Gift Lake takes roughly one third of their submission to outline the special history of Métis in Northern Alberta, which they assert is rife with unfulfilled promises of land and recognition.[70] This is done to address one of the primary issues in *Daniels*: if Métis are covered under the constitution.[71] Gift Lake makes reference to their legal fights over land with the Crown, using this account to demonstrate the Crown did recognize their existence and claims at one point in history.[72] Gift Lake thus utilizes their past difficulties by weaving them in to support their legal arguments.

Finally, the issue in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* provided an opportunity for Indigenous interveners to submit factums on the topic of spiritual beliefs.[73] The case centred around a *Charter* freedom of religion claim concerning imminent development on a piece of territory spiritually significant to the Ktunaxa nation.[74] Indigenous interveners gave submissions on their own spiritual practices and how they tie to physical spaces. Katzie First Nation's factum points out their creation site, Sheridan Hill, is similarly threatened by development.[75] They use this backdrop to define their religion as a "different kind of belief," one that is "inextricably connected" to the preservation of a particular site.[76] Due to this interconnectedness between their spiritual beliefs and their creation site, they contend that their "belief and the land are one and the same."[77] West Moberly and Prophet River First Nations' factum takes a different angle. They assert Indigenous spiritual views are "manifestations of Indigenous [l]aws … themselves," which are protected under section 35.[78] Their factum highlights their beliefs

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69 *Ibid* at paras 1–15.

70 *Ibid* at paras 6–15.

71 *Ibid* at para 16; see generally *Daniels*, *supra* note 28. Specifically, the *Constitution Act, 1867*.

72 MMF, *supra* note 67 at paras 17–23.

73 See generally *Ktunaxa*, *supra* note 28.

74 *Ibid*.

75 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 (Factum, Intervener, Katzie First Nation at para 3).

76 *Ibid* at para 8.

77 *Ibid*.

78 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 (Factum, Intervener, West Moberly First Nations and Profit River First Nation at para 2).

as comparatively different from western religions, including such practices as avoiding certain sacred sites.[79] The factums display the diverse spiritual beliefs Indigenous interveners may use to build their arguments.

Taken together, these factums illustrate how Indigenous interveners' factual backgrounds are consistently deployed for context and legal arguments. Whether it be invoking their own treaty relationship, relations with land and spirituality, or the unique status of Hereditary Chiefs, Inuit, or Métis in the Canadian legal landscape, interveners are qualitatively unique in comparison to one another and other non-Indigenous interveners.

B. *Using Factums in Innovative Ways*

Second, we can also look at how Indigenous interveners alter the format of the factum itself. Most interveners format their factum similarly. This includes addressing one or more of the relevant issues in the case, engaging the facts, and making arguments as to how they feel the SCC should decide. Despite their propensity to draw on their factual circumstances, many factums analyzed for this paper still followed this pattern. However, some factums went one step further by changing the configuration and purpose of the factum itself. As seen in the following examples, these factums advance unique legal approaches compared to the traditional idea of an intervener's role. This entails not only inventively responding to new substantive issues being defined in the rapidly evolving Indigenous rights jurisprudence, but also stepping further into the grey area of introducing new arguments and facts into a legal case.

This can be first illustrated in Kitigan Zibi's factum for *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*.[80] The Innu nation, who has territory in Québec and Labrador, launched an Aboriginal title claim that asked if provincial courts could rule on section 35 claims in other provinces.[81] Kitigan Zibi and its larger Tribal Council is part of the Algonquin Anishinabeg nation, whose territory is similarly split between Ontario and Québec.[82] Instead of

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79 *Ibid* at para 21.

80 *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (Factum, Intervener, Kitigan Zibi Anishinabeg and the Algonquin Anishinabeg Nation Tribal Council) [Kitigan].

81 *Ibid* at paras 2–6.

82 For more, see generally Lynn Gehl, *The Truth that Wampum Tells: My Debwewin on the Algonquin Land Claims Process* (Halifax: Fernwood Publishing, 2014).

touching on the title claims in the case, the interveners state they "do not take a position on the disposition of th[e] appeal."[83]

Rather, they address their entire submission towards the "practical barriers" faced by nations advancing multijurisdictional section 35 claims and posit possible solutions.[84] Noting the "rare" and "valuable opportunity" the SCC has to address these concerns, they insist creative solutions are needed to ensure access to justice and reconciliation.[85] The interveners suggest holding multijurisdictional hearings with judges from multiple provinces, increasing coordination between counsel in different regions, or consolidating court procedures to ensure there is no overlap or extra expense.[86] Kitigan Zibi's approach substantively addresses this novel issue by targeting their submissions at a narrow problem that also benefits their own factual circumstances. Suggesting larger structural changes, some of which may fall outside the SCC's ability to implement, also shows a clear alteration of the purpose of a factum.

Another example of an intervener explicitly advancing issues pertaining to their interests is seen in the Te'mexw Treaty Association's (TTA) factum in the *Daniels* case.[87] While the TTA do engage the case's main issue more than Kitigan Zibi, they still outwardly ground their intervention in their concern for the "final stage of treaty negotiations" being held between the Crown and their member nations.[88] They express concern that, if the SCC were to narrowly read certain constitutional provisions, it would exclude non-status members of their communities from the soon-to-be-completed modern treaties.[89] As a result, they argue a broader definition would be beneficial for their nations' self-determination. While the *Daniels* case is unrelated to modern treaties, the TTA's factum inserts this issue for consideration. They argue the process of ratifying a treaty takes the ability to define rights-holding citizens away from the Canadian government and gives it to the nations themselves.[90] By providing analysis on the administration of treaty rights, an issue absent from the main considerations in *Daniels*, the factum unmistakably expands the factual and

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83 Kitigan, *supra* note 80 at para 3.

84 *Ibid* at para 4.

85 *Ibid* at paras 4, 17, 21.

86 *Ibid* at paras 23–29.

87 TTA, *supra* note 26.

88 *Ibid* at paras 2–3.

89 *Ibid* at paras 6–9. Non-status as in not covered under the *Indian Act*.

90 *Ibid* at paras 18–19.

legal considerations at play.[91] However, the submission is even more interesting given the context of the TTA's ongoing treaty negotiations. The intervener can be seen to transform the Supreme Court into an additional venue for the TTA to air concerns and grievances about the implementation of agreements under negotiation with the Crown.

Indigenous interveners have similarly used their factums to advance issues directly pertaining to the interpretation of their historic treaties, even if these treaties are not at issue in an appeal. *Grassy Narrows First Nation v Ontario (Natural Resources)* provides two instances.[92] The case deals with the province of Ontario's ability to "take up" land under a provision of Treaty 3, which was signed in 1873 between the Crown and the Ojibway.[93] First, the intervener factum by the Blood Tribe and other First Nations, all of whom are signatories of Treaties 6 and 7 located in Alberta, use their factum to outline the antagonistic relationship they have with the Alberta government.[94] The interveners assert Alberta has consistently neglected to consult them when approving resource development, threatening their treaty right to harvest.[95] They detail their frustration with Alberta's administrative tribunals, all while maintaining they do not wish "to add to the record" or "make factual findings about activities … in Alberta."[96] Rather, they frame their grievances as a warning that "foreshadows" what may occur in Ontario.[97]

While the Blood Tribe's factum purports not to expand the case, it nevertheless demonstrates a clear shift in the focus of issues. The intervener Fort McKay First Nation takes this even further by explicitly "not tak[ing] a position on the primary issue," and instead directs their submission entirely towards land and rights under their own Treaty 8.[98] They justify this by stating that the case will have ramifications far broader than Treaty 3 in Ontario, so it is relevant to raise their unique context.[99] Fort McKay is

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91 *Ibid* at paras 16–26. See generally *Daniels*, *supra* note 28.

92 *Grassy*, *supra* note 28.

93 *Ibid* at paras 1–4.

94 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 (Factum, Intervener, Blood Tribe, Beaver Lake Cree Nation, Ermineskin Cree Nation, Siksika Nation, and Whitefish Lake First Nation #128 at paras 6–7).

95 *Ibid* at paras 9–12.

96 *Ibid* at paras 13–14.

97 *Ibid* at paras 6–7.

98 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 (Factum, Intervener, Fort McKay First Nation at paras 1–2).

99 *Ibid* at para 1.

particularly concerned with how land may be taken up given the *Natural Resource Transfer Agreements* that apply across the prairie provinces.[100] They go on to parse the promises, both written and oral, exchanged during Treaty 8's creation and how the *Agreements* later altered their treaty rights.[101] Once again, Fort McKay demonstrably departs from the SCC's guidance on intervener protocol in order to address local concerns likely to be impacted by jurisprudential developments.[102]

Finally, one more unique style of submission can be seen in the factum of the Office of the Wet'suwet'en Chiefs for the case *Tsilhqot'in Nation v British Columbia*.[103] In order to fully understand the novelty of this factum however, some background is required. 2014's *Tsilhqot'in* decision was the first time the SCC recognized Aboriginal title, confirming its scope and building on jurisprudence that had initially established the test for title years earlier in the 1997 *Delgamuukw* decision.[104] As previously mentioned, the trial was a landmark event in which the Gitksan and Wet'suwet'en nations gave evidence in various untraditional forms to communicate their relationship with their territory.[105] With the SCC ultimately sending the nations back to trial, it would not be until 2014 that the Tsilhqot'in nation would meet the requirements of the Aboriginal title test.[106] When the Wet'suwet'en Chiefs, a primary party in *Delgamuukw*, were admitted as interveners during the *Tsilhqot'in* proceedings, it provided an unprecedented opportunity for the SCC to receive input on the court process nearly 17 years later.

In their factum, the Wet'suwet'en Chiefs utilized their experiences to tell a story. The first third of their submission is a detailed recollection of the events leading up to, as well as the aftermath of, the seminal *Delgamuukw* case.[107] It details everything from the hurdles they faced in the lower courts to the stalemate in treaty negotiations that occurred in the years after the

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100 *Ibid*.

101 *Ibid* at para 5.

102 *Ibid* at para 11.

103 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 (Factum, Intervener, Office of the Wet'suwet'en Chiefs) [Wet'suwet'en].

104 See generally *Tsilhqot'in*, *supra* note 28; *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC).

105 See Napoleon, *supra* note 21.

106 See generally *Tsilhqot'in*, *supra* note 28.

107 Wet'suwet'en, *supra* note 103 at paras 1–12.

decision.[108] The Chiefs speak of the "substantial costs" endured as a result of the litigation and ensuing failed negotiations.[109] They close their story by saying that the treatment they received exemplifies the need to rectify inadequacies of unequal resources and difficulties in meeting the Aboriginal title test.[110] The factum is a rare attestation to the legacy of one of the most consequential Indigenous rights cases ever to come out of Canada. It also stands as a novel use of intervener status, with the Chiefs compiling their experiences and feedback into a set of legal arguments.

In summation, these Indigenous intervener factums demonstrate novel and innovative tactics of advancing legal arguments before the Supreme Court.[111] Once again drawing upon their relevant connections and contexts to buttress their arguments, they push the boundaries of what form or purpose a factum may serve. In even more explicit ways, the interveners challenge the notion that appeals are not to be expanded by overtly introducing new issues or facts.

V. THE ADOPTION OF FACTUM SOURCES IN SCC DECISIONS

Moving on to the quantitative analysis, a related consideration is whether the SCC has been adopting, rejecting, or engaging with these arguments at all. As argued in the "Methodology" section, Indigenous intervener's factums tend to use unorthodox legal sources to support their unorthodox style of argumentation. Therefore, a dual qualitative and quantitative analysis was conducted on the sources cited in the 10 appeals and 20 factums selected.

To screen out unhelpful results, the factum sources were broken down into two categories: conventional and unconventional. Conventional sources are those expected to be cited by all parties and in the Supreme Court's decision. For example, all parties in a case dealing with the duty to consult under section 35 can essentially be guaranteed to reference the foundational decision *Haida Nation v British Columbia (Minister of Forests)*,

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108 *Ibid*.

109 *Ibid* at para 31.

110 *Ibid* at para 39.

111 Of all the factums looked at, very few did not fit into the analysis provided in this section and the last. Interveners with less unique factums were Gitxaala Nation, Tsawout First Nation, and Mohawk Council of Kahnawà:ke. Mississaugas of the Credit First Nation's factum did provide unique arguments around pipelines being built in the Greater Toronto Area, but this was left out of the analysis for length purposes.

which first established this duty.[112] Unconventional sources, however, are those that fall outside of the regular set of relevant case law, statutes, and often-cited reports and academic authors found in SCC decisions on Indigenous issues. An illustration of an unconventional source can be seen in the Peskotomuhakati's factum. It cites the 1794 "Jay Treaty," an agreement not officially recognized as a binding treaty in Canada that many Indigenous peoples nevertheless still argue provides them undisturbed passage over the Canada-US border.[113] After scanning the factums, the unconventional category was broken down into the following subcategories of sources:

Figure 1: Subcategories of Unconventional Sources

Source Category	Number of Sources Found Across Factums
International legal documents	3[114]
International case law	24[115]
Historic and modern treaties not at issue in the case	14[116]
Treaties or legal documents whose status in Canadian law is unrecognized or uncertain	2[117]

112 2004 SCC 73.

113 Peskotomuhkait, *supra* note 2 at para 24; *Francis v The Queen*, [1956] SRC 618.

114 Peskotomuhkati cited 1 United Nations report. IRC cited 2 international agreements.

115 Peskotomuhkati cited 2 international cases. Nuchatlaht cited 1 international case. Makivik cited 4 international cases. Kitigan Zibi cited 1 international case. MMF cited 1 international case. Gitxaala cited 12 international cases. Blood Tribe cited 3 international cases.

116 Makivik cited 5 modern treaties. IRC cited 1 modern treaty. MMF cited 1 agreement. Mississaugas cited 1 historic source concerning their own treaty. TTA cited 3 modern treaties. Fort McKay cited 1 historic treaty and 2 historic constitutional documents unrelated to the case.

117 Peskotomuhkati cited 1 treaty. Fort McKay cited 1 historic order related to Rupert's Land.

Academic literature	41[118]
Reports by governments or organizations	36[119]
Oral speeches, debates, and testimonies	8[120]

Domestic case law is not listed here. While it is entirely possible for an intervener to employ domestic case law in an unconventional way, this would require a deeper qualitative analysis outside the scope of this paper. As for sorting international documents, their domestic status in Canada was considered. For example, any citation of UNDRIP after it was endorsed by the Canadian government is considered conventional.[121] Additional care was also paid towards reports, which were generally classified as unconventional unless they were one of a handful of reports often referenced in Indigenous rights litigation.[122] Most academic literature was considered unconventional, save for generic sources like textbooks.[123]

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118 Chemawawin cited 2 academic sources. Makivik cited 11 academic sources. IRC cited 2 academic sources. Tsawout cited 2 academic sources. MMF cited 1 academic source. Katzie cited 2 academic sources. West Moberly cited 4 academic sources. Mohawk Council cited 6 academic sources. Gitxaala cited 10 academic sources. Blood Tribe cited 1 academic source.

119 Elsipogtog cited 4 reports. Makivik cited 4 reports. IRC cited 9 reports and government documents. Wet'suwet'en Chiefs cited 2 reports. MMF cited 2 reports. Katzie cited 5 documents, including minister mandate letters and government reports. Mississaugas cited 7 National Energy Board documents related to their territory. Mohawk Council cited 1 report. TTA cited 2 policy papers.

120 Nuchatlaht cited 1 parliamentary inquiry transcript. IRC cited 1 speech. MMF cited 2 parliamentary debates. Katzie cited 4 parliamentary debates.

121 Indian and Northern Affairs, News Release, 2-3429, "Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: <www.canada.ca/en/news/archive/2010/11/canada-endorses-united-nations-declaration-rights-indigenous-peoples.html>. UNDRIP was endorsed in 2010, before any of these selected cases were decided.

122 These often-cited reports are the 2015 Truth and Reconciliation Commission of Canada's Final Report and the 1996 Report of the Royal Commission on Aboriginal Peoples. These were classified as conventional.

123 For example, Jack Woodward's loose-leaf text on Aboriginal Law or any textbooks by Peter Hogg were considered conventional given they are general-purpose informational texts.

A. *Comparison of Decision and Factum Source Overlap*

Figure 2 displays basic information on each factum, their corresponding decision, and the total number of all sources found in that factum. Then, the unconventional sources are shown, categorized via the above criteria.[124] Finally, using a code that identifies overlapping sources, the total number of all shared sources between the factum and decision are displayed. This is followed by a tally of unconventional sources from the factum that appeared in the final decision.[125]

Figure 2: Unconventional Sources Shared Between Intervener Factums and SCC Decisions

Intervener Factum	SCC Decision	Total Sources in Factum	Unconventional Sources in Factum	Total Shared Sources	Shared Unconventional Sources
Elsipogtog First Nation	*Southwind*	17	4	1	0
Chemawawin First Nation	*Southwind*	18	2	6	1
Peskotomuhkati Nation	*Desautel*	26	4	8	0
Nuchatlaht First Nation	*Desautel*	14	2	7	1
Kitigan Zibi et al.	*Innu*	37	1	16	0
Tsawout First Nation	*Innu*	23	2	12	1
MMF	*Mikisew*	37	7	16	1

[124] These were tallied through manually counting and categorizing sources in the factums.

[125] These were tallied through manually counting sources that appeared as matches in the code.

Gitanyow Hereditary Chiefs	*Mikisew*	14	0[126]	5	0
Katzie First Nation	*Ktunaxa*	33	11	7	0
West Moberly First Nations et al.	*Ktunaxa*	29	4	4	0
Makivik Corporation	*Clyde River*	60	24	11	0
IRC	*Clyde River*	33	15	5	0
Mississaugas of the Credit First Nation	*Thames*	20	8	2	0
Mohawk Council of Kahnawâ:ke	*Thames*	27	7	5	0
Gift Lake Métis Settlement	*Daniels*	15	0	7	0
TTA	*Daniels*	15	5	1	0
Wet'suwet'en Chiefs	*Tsilhqot'in*	14	2	2	0
Gitxaala Nation	*Tsilhqot'in*	31	22	8	3

126 This is deceiving as the Gitanyow Hereditary Chiefs do not formally cite the Rights and Reconciliation Agreements they discuss in their factum. The agreements are not cited in the final decision.

Fort Mckay First Nation	*Grassy*	33	4	5	0
The Blood Tribe et al.	*Grassy*	15	4	2	0

As observed in column five, shared sources between the factums and final decisions are consistently observed. These shared sources were almost exclusively conventional case law, relevant statutes, and commonly cited reports. In column six, there is a noticeable drop in the number of unconventional sources cited in final decisions.

While most decisions cited no unconventional sources from these factums, there were seven unconventional sources total that did receive engagement from the SCC. First, in *Southwind* the Court cited a scholarly book by Robert Mainville to reject a Crown argument that expropriation principles be applied to reserve land.[127] The Mainville text was used by Chemawawin First Nation, and although other Indigenous interveners similarly cited the text, neither main party did.[128] Next, the Court in *Desautel* cited the minutes of a 1980 committee meeting on constitutional reform that was found in Nuchatlaht First Nation's factum.[129] However, this source was also cited by the Crown and is nevertheless rejected as unhelpful by the SCC majority.[130] A Kent McNeil text referenced by Tsawout First Nation is cited in the *Innu* appeal, with Tsawout being the only party to cite this source.[131] However, it is cited by the dissent to argue for a less expansive definition of Aboriginal title, running opposite of Tsawout's point that title includes governance rights.[132] In *Mikisew*, the Court cited a Manitoba

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127 *Southwind*, *supra* note 28 at para 105.

128 The other Indigenous interveners to cite the source were the Assembly of First Nations of Québec-Labrador and the Mohawk Council of Kahnawà:ke.

129 *Desautel*, *supra* note 7 at paras 41, 116.

130 *Ibid* at para 41. It is also referenced in Justice Coté's dissent. It is used to justify a restrictive interpretation of section 35, unlike how Nuchatlaht First Nation uses it.

131 *Innu*, *supra* note 20 at paras 147, 155.

132 *Ibid*. See also *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (Factum, Intervener, Tsawout First Nation at para 11).

government policy paper used by the MMF.[133] The SCC acknowledges that the source shows how governments have consulted Indigenous peoples before creating legislation in the past, but ultimately rejects it as proof this consultation is a constitutional right.[134] Finally, in *Tsilhqot'in* the SCC cites three academic texts also cited by the Gitxaala nation.[135] However, all three are cited by the main appellant and are used mainly for informational purposes.[136]

In the end, out of the seven unconventional sources adopted, only one source was taken solely from an Indigenous intervener's factum and treated in a manner consistent with the intervener's argument.[137] It should be acknowledged that the results do not necessarily paint a comprehensive, empirical picture. Seeing as this paper's thesis is a normative one, there is no control group comparison to non-Indigenous interveners. Likewise, a lack of citing a source does not provide a perfect one-to-one indication of engagement with or rejection of an idea. Nevertheless, the data gives a broad indicator of the SCC's interaction with Indigenous intervener's factums over the past decade.

B. *The Contradictory Nature of the Supreme Court of Canada and Indigenous Interveners*

Any apparent lack of engagement between final SCC decisions and the unconventional sources used by Indigenous interveners may be explained in reference to the fundamental role that appeal courts play in the common law legal system. Justice Malcolm Rowe has stated the role of courts is to "keep to the sort of incremental changes … necessary to keep the common law in step with the dynamic and evolving fabric of our society."[138] A foundational aspect of the common law that ensures incrementalism is *stare decisis*. Justice Rowe continues that "[a] judge should be guided by precedent

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133 *Mikisew*, *supra* note 28 at para 155. It should be noted that, although it appears that MMF were the only party to cite this source, a few intervener factums were not available on the Supreme Court website.

134 *Ibid*.

135 *Tsilhqot'in*, *supra* note 28 at paras 35, 39, 43, 47.

136 *Ibid*; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 (Factum, Appellant, Roger William).

137 This is Chemawawin First Nation's citation of Robert Mainville. Once again, they were not the only Indigenous intervener to cite this source.

138 Rowe & Katz, *supra* note 10 at 25. The thoughts of Justice Rowe provide particularly useful insight given his presence on the Supreme Court when some of this jurisprudence was produced.

... rather than striking out unpredictability with a new approach of their own."[139] As Canada's highest appeal court, the SCC is predisposed to aim for certainty in its decisions. The SCC's tendency to rely on precedent results in less sources outside of core case law or statutes garnering attention from the Court, let alone impacting a decision.

On the other hand, Indigenous interveners appear to push against this institutional design. A near consistent theme across the studied factums were arguments in favour of expanding rights, giving broader interpretations, and other change-oriented positions one would expect to see from public interest interveners in SCC appeals. However, Indigenous interveners also drew upon their unique legal systems, cultures, and geographies to distinctly articulate how they understand their collective rights. Consequentially, their factums often cite less conventional legal sources to make these points, especially if the current jurisprudence does not provide the necessary resources to build their arguments. On a related point, SCC decisions usually have far-reaching legal consequences for factual situations beyond the case before them. Interveners have raised concerns about this, noting the uncertain impact these decisions may have on their diverse rights. For example, this concern is evident in the factums from the Blood Tribe and Fort McKay First Nation, who essentially ignored the SCC's request to stay planted on the facts and issues of the case by raising their own treaty contexts. The data suggests the SCC may not be prioritizing these arguments or concerns.

If the arguments of Indigenous interveners are not being engaged by the Court, it raises questions as to the purpose of accepting these interveners at all. Daniel Sheppard theorizes that, when it comes to public law appeals, the SCC is willing to accepted a broad array of interveners, but is less willing to engage them deeply.[140] Commenting specifically on *Charter* litigation, Sheppard suggests there is a performative aspect to selecting interveners.[141] He argues the SCC invites many interveners to prevent charges of illegitimacy as it makes decisions impacting many citizen's rights with very few stakeholders actually present in the process.[142] A parallel can be drawn between the wide-reaching cases involving the *Charter* and those involving Indigenous rights. Sheppard's performativity theory is not raised here as a

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139 *Ibid* at 26.

140 Sheppard, *supra* note 10 at 179.

141 *Ibid*.

142 *Ibid* at 180.

definitive explanation as to why Indigenous interveners are admitted in large numbers and yet potentially have their ideas ignored. This would amount to speculation at most, as it is impossible to pin the exact motivations of admitting any kind of intervener to make submissions in an appeal.[143]

What can be said, however, is that these factums show Indigenous interveners provide indispensable insight to the Court on how their decisions may proliferate across the country. If the Court is not taking full advantage of this insight, it is a setback in their goal of administering justice (if the administration of justice includes thoughtfully calibrating how precedent will impact the stability of the law in various parts of the country). While *stare decisis* may aim for predictability, the Court must ask if this principle applies when their decisions hold implications for the wide variety of legal contexts experienced by Indigenous nations. Put another way, could a narrow consideration of issues and facts in one case thereby create uncertainty in others? The Court may have to re-evaluate its understanding of interveners in the Indigenous rights context. Given a lack of uniformity across Indigenous nations and the high stakes of rights litigation, perhaps an expansion of an appeal's considerations is necessary. Relatedly, if other branches of government abdicate the Crown's role to negotiate a solution, the SCC may expect further instances of Indigenous nations using the factum format to address their concerns.[144] At the very least, these findings should provide for more scrutiny as to how the Supreme Court draws on intervener factums in the Indigenous rights context. It may also provide guidance for Indigenous interveners themselves by shedding light on the successes and drawbacks of their tactics.

VI. CONCLUSION AND SUGGESTED AREAS OF FUTURE RESEARCH

In sum, the factum analysis indicates Indigenous interveners deserve more consideration from lawyers, researchers, and indeed, courts. The first portion of this paper looked at why Indigenous interveners deserve to be viewed as distinct legal actors. Their factums contained stories of local experiences and perspectives that uniquely textured their connections to the issues and informed their arguments. The next section argued further that

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143 The SCC does not normally provide reasons for admitting or not admitting interveners in a case. For more, see Barry W Bussey, "The Law of Intervention After the TWU Law School Case: Is Justice Seen to Be Done?" (2019) 90 SCLR 265 at 266–267.

144 As see in the factum for Fort McKay First Nation.

Indigenous interveners have altered the format of the factum itself, redefining the role interveners can play and the way arguments are advanced. In doing so, they have pushed boundaries as to how much an appeal may be expanded. Lastly, the SCC's apparently limited engagement with unconventional sources may be indicative of their rejection of Indigenous interveners' methods. Whether the SCC's invitation to interveners can be considered performative or not, a noticeable trend in the data provides for a fresh area of study on how our highest court functions. Together, more quantitative and qualitative data is needed to assess if differences in goals and structure indicate the Supreme Court and Indigenous interveners are truly like ships passing in the night.

This paper only begins to explore this important relationship. Future research should more comprehensively consider the engagement of Indigenous interveners on a qualitative level, such as looking at how often explicit legal arguments are adopted in final decisions. This analysis should widen the scope of what constitutes an unconventional source by studying how domestic case law and statutes are used to bolster intervener's arguments, especially considering these were the most common intervener source cited in final decisions. While this paper focused on community and nation-specific interveners, it would also be insightful to compare engagement with pan-Indigenous interveners. Finally, comparisons between Indigenous interveners and non-Indigenous interveners would be the most revealing. Research should explore if other interveners augment their factum format or use similarly unconventional sources, and if so, how much engagement they get. This would situate Indigenous nations in a larger ecosystem of interveners at the Supreme Court of Canada.