

# Intervention and Judicial Accountability

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G E O F F R E Y D . C A L L A G H A N \*

## I. INTRODUCTION

Intervention is a practice that allows non-parties to participate in court proceedings provided that they explain how their submissions are uniquely relevant to the court,<sup>1</sup> refrain from raising any new challenges to the proceeding,<sup>2</sup> and avoid making any statements regarding the proceeding's outcome.<sup>3</sup> Interveners may submit a written account of their position to the court (called a *factum*),<sup>4</sup> present their position orally,<sup>5</sup> or both. The practice has gradually become an entrenched part of court proceedings at all levels in Canada,<sup>6</sup> but most especially at the Supreme Court (SCC).<sup>7</sup>

The routine involvement of intervening parties in court proceedings is a relatively modern development. For most of the twentieth century, intervention featured sparingly in such proceedings – by and large reserved for provincial and/or federal Attorneys General who wished to weigh in on disputes related to federalism.<sup>8</sup> This all changed around the time that Canada added a Charter of Rights and Freedoms to its Constitution. Not

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<sup>1</sup> Rules of the Supreme Court of Canada, SOR/2002-156, r 57.

<sup>2</sup> *Ibid*, r 59.

<sup>3</sup> *Ibid*, r 42.

<sup>4</sup> *Ibid*, r 37(1)(a).

<sup>5</sup> *Ibid*, r 59(2).

<sup>6</sup> C.f., Thomas Slade, “Rule 13 (Intervention)” (2022) CanLIIDocs 993 at 12.

<sup>7</sup> Geoffrey D Callaghan, “Intervenor at the Supreme Court of Canada” (2020) 43:1 Dal LJ 1 at 2.

<sup>8</sup> See Bernard M Dickens, “A Canadian Development: Non-Party Intervention” (1977) 40:6 Mod L Rev 666 (UK) at 668.

only has intervener participation increased throughout the Charter era,<sup>9</sup> the type of party seeking leave to intervene has greatly diversified.<sup>10</sup> Neither is a coincidence. As those who wrote on the practice early in the Charter era noted, intervention possesses a unique democratizing potential – one that was especially salient at that particular constitutional moment. The general thrust of the argument was captured most succinctly by Alan Borovoy, who at the time was acting as general counsel for the Canadian Civil Liberties Association. In a letter written to the SCC, Borovoy explained that:

The effective transfer of so much power to the judiciary [by way of the constitutionalization of a rights document] raises issues of fundamental fairness. Since the entire community will be increasingly affected for substantially longer periods by the decisions of the Court, larger sectors of the community should be able to participate in the process which produces those decisions. It is simply not fair to limit such participation on the basis of the coincidence of which parties litigate first. Public respect for both the *Charter* and the Court will require a more inclusive process.<sup>11</sup>

Borovoy's argument relies on the plausibility of three propositions. The first is that by constitutionalizing a rights document significant political power would be transferred to judicial decision-makers. The thought here is that, to the extent that rights carve out spaces within which governments are prohibited to act, they are putatively political in nature. A decision on what a given right means, or how a given right should be interpreted, is at bottom a *political* decision – one that will influence the range of policy choices available to a government. Consider, for instance, section 7 of the *Charter of Rights and Freedoms*, which provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>12</sup> To the extent that the rights captured by this provision, either individually or jointly, are declared by a court to extend to matters such as one's choice to receive an abortion or to seek medical assistance in dying, the policy options

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9 See Geoffrey D Callaghan, “The Democratizing Influence of Intervention” (2023) 39 *Windsor Y B Access Just* at 497.

10 Danielle McNabb, “Who Intervenes in Supreme Court Cases in Canada?” (2023) 56:3 *CJPS/RCSP* at 715.

11 Alan Borovoy, “Interventions and the Public Interest (Open Letter to the Supreme Court of Canada)” in FL Morton, ed, *Law, Politics and the Judicial Process in Canada*, 3rd ed (Calgary: University of Calgary Press, 2002) at 263.

12 Canadian Charter of Rights and Freedoms, s 7, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

available to governments regarding those areas of social concern specifically will have been narrowed. And although certain safeguards were added to the *Charter* to dilute the force that this shift in power would generate,<sup>13</sup> the transfer was nonetheless extraordinary.

The second proposition supporting Borovoy's argument is related to this. Borovoy declares that "[i]t is simply not fair to limit...participation on the basis of the coincidence of which parties litigate [*Charter* provisions] first." Although he doesn't come right out and say it, Borovoy was clearly drawing attention to a concern that, because the courts, and the Supreme Court in particular, would have no choice but to be *selective* in which interpretive approach they would adopt concerning *Charter* provisions, there was a strong likelihood that the approach they actually chose would have been reached in an undemocratic fashion. Importantly, the concern on this score wasn't that judges were assigned the power of selection over the correct interpretive approach to the *Charter* instead of the people's elected representatives, but that the nature of the legal process itself would distribute the ability to influence a judge's power of selection across members of Canadian society in an arbitrary and unfair way. By erecting tight restrictions over the participation of outside parties in court proceedings, the effective monopolization of a court's attention by direct parties to the case would all but be assured. Counsel for those parties would gain an exclusive audience with the court, allowing them to explain why a given right should be interpreted one way rather than another, while the rest of Canadian society would have to sit on the sidelines, watching as important decisions were being made for them.

Although the third proposition supporting Borovoy's argument is merely implied, it remains vital to understanding the broader point he wanted to defend. Borovoy clearly saw that there was special importance to gaining a court's audience at the *outset* of its deliberations on *Charter* provisions. This is so because, as a common law jurisdiction, Canadian courts are restrained in their decision-making by the manner in which previous courts at the same or a higher level have reasoned on relevantly similar legal disputes in the past. The presence of *stare decisis* therefore becomes a material consideration for why it would be unfair "to limit...participation on the basis of the coincidence of which parties litigate

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<sup>13</sup> Canadian Charter of Rights and Freedoms, ss 1 & 33, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[*Charter* provisions] first.” Were courts unfettered by the way previous decisions were made, any Canadian would in theory have an opportunity to petition for their preferred approach to the interpretation of a right each time a new dispute regarding that right arose. But this is not the way jurisprudence develops in Canada. Because jurisprudence emerges *incrementally*, there is a meaningful first mover advantage to that development. And, *pace* the first proposition supporting Borovoy’s argument, because the constitutionalization of the *Charter* bore the result of transferring significant policy-making power from the people’s elected legislatures to the courts, it only made sense that this first-mover advantage be mitigated by allowing increased participatory access to all members of society in that all-important development phase.

It is within the context of these considerations that I have previously argued that “[while] early arguments in favour of courts adopting a large and liberal attitude on intervention were compelling at the time they were written...this is arguably no longer the case.”<sup>14</sup> A plausible counterargument exists to the kind of participation-based rationale embraced by Borovoy and others early in the *Charter* era that as courts transitioned away from the selection phase concerning the proper interpretive approach to *Charter* provisions toward a phase where that approach would be applied in a manner consistent with Canada’s common law heritage, continuing to allow the general public to participate in *Charter*-related proceedings would begin to encroach on the principles underlying democracy. This is the line that Ted Morton and Rainer Knopff traced in their Court Party theory of intervention,<sup>15</sup> and it seems to me that it gains plausibility the more established *Charter* jurisprudence becomes.

There are different ways one could respond to this kind of counterargument. One could, like Morton and Knopff, cast suspicion over the democratic appropriateness of the practice of intervention altogether. As their student, Ian Brodie put it: “The [Supreme Court of Canada] uses the legitimacy supplied by interest groups that participate repeatedly in its work to expand its power...[putting it] well on the road to establishing itself as a legislative, rather than a judicial, institution.”<sup>16</sup> Alternately, one could

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<sup>14</sup> Callaghan, *supra* note 9 at 497.

<sup>15</sup> See F L Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: University of Toronto Press, 2000).

<sup>16</sup> Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: SUNY Press, 2002) at 124.

search for a different way to explain why intervention is a democratically appropriate practice – one that does not rely on the participatory reasoning used to buttress early arguments in its defense. This is the tack I have adopted in previous papers.<sup>17</sup> Most recently, I have argued that at least two alternative bases exist to ground the democratizing potential of intervention: one based on the practice’s capacity to bolster public deliberation on vital policy-related questions; the other on facilitating trust in judicial decision-makers and the judicial institution.<sup>18</sup>

My aim in this paper is to expand on the abbreviated treatment I gave to the second of these two alternatives, but from a novel perspective. Whereas most of the work that has been done on the relationship between intervention (or *amicus curiae* as it is called in the United States) and the facilitation of public trust has been carried out at the empirical level,<sup>19</sup> the argument I will defend is grounded on a substantive claim. My position is that, if designed and implemented in an appropriate manner, the practice of intervention has the potential to facilitate public trust by increasing the legitimacy of courts *specifically by helping them to more fully execute their duty of accountability*. I will begin by clarifying what the duty of accountability means in the context of judicial institutions.

## **II. JUDICIAL ACCOUNTABILITY**

Depending on the jurisdiction, judges acquire their position in one of three ways.<sup>20</sup> The most common is for a judge to acquire their position through an appointments process. In Canada, for example, the federal government has the authority to appoint judges to the SCC, to federal

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<sup>17</sup> See Callaghan, *supra* note 7 & *supra* note 9..

<sup>18</sup> See Callaghan, *supra* note 9.

<sup>19</sup> See Joseph D Kearney & Thomas W Merrill, “The Influence of Amicus Curiae Briefs on the Supreme Court” (2000) 148:3 U Pa L Rev at 787-89; Paul M Collins Jr, *Friends of the Supreme Court: Interest Groups and Judicial Decision-Making* (Oxford: Oxford University Press, 2008) at 28-29; and, Ronald J Fisher, “Methods of Third-Party Intervention” in Luc Reychler & Thania Paffenholz, eds, *Peacebuilding: A Field Guide* (Boulder: Lynne Rienner, 2001) 157 at 172-73.

<sup>20</sup> It is important to keep in mind that the three methods for selecting judges are often mixed, where different jurisdictions and courts adopt a blend of two, and sometimes even all three, methods. See Federal Judicial Appointments – Canada, “Appointments and Nominations,” online: <<https://www.fja-cmf.gc.ca/appointments-nominations/index-eng.html>>.

courts, and to the superior courts of both the provinces and the territories. Provincial and territorial governments, on the other hand, have the authority to appoint judges to lower courts within their own jurisdiction. The appointments process varies across both courts and governments, but it typically includes an advisory phase (which comprises non-partisan experts and laypeople) and a selection phase (which falls to the authority of the applicable first minister).<sup>21</sup>

A less common way to select judges is through popular election. In the United States, for example, twenty-one states use either partisan or non-partisan elections to select members of their Supreme Court, while fully half of the states use popular elections to select judges to intermediate appellate and general jurisdiction courts.<sup>22</sup>

A third way that judges can be selected is by way of a competitive exam. This is typical in civil law jurisdictions, where practical knowledge of codified law is an essential feature of successful judicial performance.<sup>23</sup>

Controversies around judicial accountability arise with varying force depending on a jurisdiction's method of selection. Within jurisdictions that rely on an electoral method of selection, accountability concerns are more or less neutralized. Just as constituents hold representatives in government to account through their voting power, constituents of juridical jurisdictions that adhere to this method hold judges to account on the very same basis. Indeed, it is widely accepted among American legal historians that the move from appointed to elected judiciaries in the United States was primarily to assuage accountability concerns.<sup>24</sup>

Judicial accountability becomes more controversial in jurisdictions that practice either of the two remaining methods of selection. In both cases, judges do not seem to be accountable to anyone at all, and the reason is

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<sup>21</sup> See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Carswell, 2007) (loose-leaf updated 2024, release 1), ch 17 at §17.2 and §7.3.

<sup>22</sup> See 'Judicial Selection in the United States' at Ballotpedia, online: <[https://ballotpedia.org/Judicial\\_selection\\_in\\_the\\_states](https://ballotpedia.org/Judicial_selection_in_the_states)>.

<sup>23</sup> See John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed (Stanford: Stanford University Press, 2007).

<sup>24</sup> See Charles Gardner Geyh, "Why Judicial Elections Stink" (2003) 64:1 *Ohio St LJ* 43 at 499-500.

intimately bound to what has often been described as a counter-desire to safeguard their independence.<sup>25</sup>

The benefit of safeguarding judicial independence relates to the role that courts are thought to play in the broader political scheme. As Christopher Larkin explains: “Judicial independence is related to the notion of conflict resolution by a “neutral third”...by someone who can be trusted to settle controversies after considering only the facts and their relation to relevant laws.”<sup>26</sup> We want judges to be independent of both government and the public at large to ensure they are at liberty to adjudicate disputes in a fair and unbiased manner. Their independence, in other words, establishes the proper conditions for their impartiality, and this increases the likelihood that they will perform the constitutional role they have been assigned in the intended way.

It is easy to see why judicial accountability and judicial independence are often considered to be rivals. If a jurisdiction believes that in order to successfully perform the constitutional role they have been assigned courts should be insulated from public input or sanction, then their accountability to the public is to that extent neutralized. Conversely, if the public wishes to hold courts accountable for their actions, then their insulation from public input or sanction must be severed (e.g., by introducing an electoral element to the selection process). The thought here is that because you can’t have it both ways, each jurisdiction must choose for itself which of the two competing values – independence or accountability – it should prioritize.

Many have come to recognize that understanding the relationship between accountability and independence in the manner just described is a mistake. As Sandra Day O’Connor put the point: “This simplistic understanding of accountability – judicial accountability for the majority’s desired substantive outcomes – ignores the role of the judiciary and indeed the very structure of our democratic governments.”<sup>27</sup> While this is an important point to keep in mind, the way I would like to explain the

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<sup>25</sup> Although my analysis of judicial accountability in this section focuses exclusively on how accountability functions in systems that use an appointments process to select judges, much of what I say is applicable to systems that select judges by way of competitive exams.

<sup>26</sup> Christopher M Larkins, “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis” (1996) 44:4 *American Journal of Comparative Law* 605 at 608.

<sup>27</sup> Sandra Day O’Connor, “Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction” (2008) 86:1 *Denver UL Rev* 1 at 3.

misunderstanding arises from the false assumption that accountability necessarily involves an element of sanction.

Jeremy Waldron distinguishes two kinds of accountability relationships. The first – what he calls ‘forensic accountability’ – “denotes the liability of a person to have his actions assessed by a tribunal on the basis of some established norm, such liability being predicated on the availability of a process, formal or informal, to assess his actions in that way.”<sup>28</sup> The sanctioning feature related to accountability on this description is clear and is one that applies to judges regardless of the manner in which they were selected. The Canadian Judicial Council, for example, is a body that, under the Judges Act,<sup>29</sup> has the authority to investigate complaints of misconduct against federally appointed judges. This body, and indeed the process by which it acquires its authority, serves as an accountability measure for the conduct of individual judges and does so specifically through the power of sanction.

Waldron then describes a second form of accountability – one he calls ‘agent accountability’. Unlike forensic accountability, agent accountability depends on a particular relationship holding between a principal and an agent. On this conception, “accountability denotes the duty owed by an agent to his principal, whereby the principal may demand from the agent an account of the work that the agent has been doing in the principal’s name or on the principal’s behalf, enabling the principal if she sees fit to sanction or replace the agent or even to terminate the agency relationship.”<sup>30</sup> We can see that Waldron includes a sanctioning element in his description of this form of accountability as well, but what I now want to argue is that it was not strictly speaking necessary for him to have done so. Although many forms of agent accountability will include a sanctioning element, not all will; and this is reflected in the manner in which the idea operates in environments that prioritize the independence of the respective agent.

Let me begin by considering Waldron’s description of agent accountability without the bit about sanctioning. On this reformulated

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<sup>28</sup> Jeremy Waldron, *Political Political Theory* (Cambridge, Mass: Harvard University Press, 2016) at 167.

<sup>29</sup> Judges Act, RSC 1985, c J-1, s 63, online: <<https://laws-lois.justice.gc.ca/eng/acts/j-1/page-9.html#h-337708>>.

<sup>30</sup> Waldron, *supra* note 28 at 168.

version, agent accountability “denotes the duty owed by an agent to his principal, whereby the principal may demand from the agent an account of the work that the agent has been doing in the principal’s name or on the principal’s behalf.” This sounds a lot like the accountability that holds between courts of law and the public. The first part of the description specifies that a duty exists which flows from an agent to a principal. In the case of the judiciary, the duty that the agent (court) has to the principal (public) is specified by the role it plays in the broader constitutional scheme. That role, you will recall, is to provide a forum for “conflict resolution by a ‘neutral third’...by someone who can be trusted to settle controversies after considering only the facts and their relation to relevant laws.”<sup>31</sup> The argument is that an independent judiciary has the best chance of executing this role specifically.

But we’re not out of the woods yet. Specifying that a duty exists between courts of law and the general public is not yet enough to establish a relationship of accountability between the two. The second part of our reformulated version of Waldron’s description indicates that “the principal may demand from the agent an account of the work that the agent has been doing in the principal’s name and on the principal’s behalf.” To my mind, the core of judicial accountability is captured here. For courts to be accountable to the public, it isn’t enough that they perform the duty they have been constitutionally assigned to perform; the public must also enjoy an associated right to demand from courts an account of the work they have been doing on the public’s behalf. And yet, due to the role that judicial independence plays in facilitating the proper performance of judicial duty, the public does not enjoy a concomitant power to sanction courts should it deem the account provided to be unsatisfactory. This is the modified way that agent accountability operates in the judicial context, but it is by no means unique to that context — it appears in all contexts where independence is a prized quality of the principal-agent relationship.

Consider, for instance, the relationship between a student and their professor. Students enjoy a right to request an explanation for the grades they receive; and correspondingly, professors have a duty to provide that explanation. This comprises part of the professor’s role-related duties to her students, and it helps to explain the manner in which she is accountable to them. It is not that students have the power to sanction the professor should

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<sup>31</sup> Larkins, *supra* note 26.

they deem the explanation she provides to be unsatisfactory. The professor's accountability to her students is captured by the student's right to request, and indeed to receive, just such an explanation. This allows the student to 'pull back the veil', as it were – to see first-hand the rationale that led to the assigned grade. And while the student may of course disagree with the rationale the professor provides, they may not ask that the professor be sanctioned for that reason alone. The best the student can do is exercise the institutional right of appeal they enjoy concerning grade disputes, which shifts the analysis back to the first form of accountability described by Waldron – 'forensic accountability'. But while under that form of accountability the professor is liable "to have their [evaluation] assessed by a tribunal on the basis of some established norm," any sanction the professor receives on the basis of the appeal will have been due to their having deviated from the established norm rather than because their explanation was considered unsatisfactory by the student in question.

Now at this point, one might ask: Is it then the case that, in environments that prize independence, Waldron's agent-accountability is only meaningful in the work it does toward establishing a baseline from which to investigate whether those in positions of authority have failed to comply with an established norm of their institutional setting? My argument is that it is not. Any number of reasons exist for why professors or judges are duty-bound to provide an account of the work they are doing on a principal's behalf, and only some of them relate to sanctioning repercussions. In the case of a judge, for example, one reason is that it reinforces the expectations that bear on a vital branch of government. A second reason is that it treats members of the public with the dignity and respect they deserve. A third reason – and this is the one most relevant to how I wish to discuss judicial accountability in what follows – is that the duty-to-provide-an-account establishes the proper conditions to facilitate a relationship of trust between courts and the public.

To summarize my argument to this point then: In a democracy, courts are responsible for executing the role they have constitutionally been assigned to serve. That role, at least in part, is to act as a neutral arbiter such that disputes that arise on the basis of clearly defined rules can be adjudicated in a fair and impartial manner. And yet, to perform that duty well courts must enjoy independence from the public, which restricts opportunities to sanction them for failure to perform their duty in a manner the public deems satisfactory. Some have concluded that courts cannot then

be said to be accountable to the public at all. I have joined others in arguing that this is a mistake. Their accountability to the public is demonstrated in part by the right the public enjoys to demand an explanation of the work that courts are doing on its behalf and in its name. Why is this right important in the absence of a sanctioning power? As I will now explain, one reason is that it provides the proper environment for the facilitation and maintenance of trust between courts and the public. In this way, the accountability of the judiciary is instrumental in securing its legitimacy.

### **III. TRUST AND LEGITIMACY**

Honore de Balzac once declared that “[t]o distrust the judiciary marks the beginning of the end of society. Smash the present patterns, rebuild it on a different basis...but don’t stop believing in it.”<sup>32</sup> What was it exactly that led Balzac to single out the judiciary in this regard? Is it not the case that distrust in any branch of government would mark ‘the beginning of the end of society’? In a very general sense, yes. To the extent that a collective loses faith in the institutions that make and enforce law on its behalf, one of two possibilities remain: the institutions could attempt to reestablish that loss of faith with the aim of restoring the public’s confidence in their legislative and executive capabilities; or the institutions could continue performing their legislative and executive functions in the absence of securing public confidence, which would increase the likelihood that the public rises up in revolt against those institutions.

But while all levels of government are at risk from a loss of public faith, because courts are not accountable to the public in the same way that elected bodies are, they are especially vulnerable in this regard. When the public is given regular electoral opportunities to replace those whose judgment it no longer trusts, the transition toward revolt is forestalled precisely because each administration is incentivized to opt for restorative measures rather than a coercive enforcement of its mandate. Indeed, due to the stabilizing influence that elections have over a polity, it is even the case that mistrust of the legislative and executive branches can become a strong legitimating force in and of itself.<sup>33</sup>

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<sup>32</sup> Honoré de Balzac, quoted in Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961) at 175.

<sup>33</sup> C.f., Pippa Norris. *Critical Citizens: Global Support for Democratic Governance* (New York: Oxford University Press, 1999).

Things are different with the judicial branch. If the public were to lose confidence in the ability of courts to execute their function, it would have little recourse but to either demand that change be imposed on them externally (e.g., through court-packing schemes) or simply defy their orders. For this reason, and as Balzac identified, the facilitation of public trust becomes a central feature of the capacity for courts to execute their mandate. Indeed, that defiance of judicial decision-making occurs so rarely in modern democracies is a testament to just how implicitly courts accept this truth.<sup>34</sup>

I should pause here to explain more fully how all of this relates to judicial legitimacy. Although some accounts of legitimacy are filtered through objective criteria pertaining to how well or poorly an institution is performing its function,<sup>35</sup> most accounts would insist that a relational dimension be added to the picture. According to these accounts, the proper object of a legitimacy assessment is not the nature and/or content of the work an institution is doing, but the response the institution elicits in the relevant group. Consider, for instance, how Richard Fallon describes legitimacy. According to Fallon, an institution is legitimate if “the relevant public regards it as justified, appropriate, or otherwise deserving support for reasons beyond fear of sanctions or mere hope for personal reward.”<sup>36</sup> If we take this as our image of legitimacy, then legitimacy cannot intelligibly be

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<sup>34</sup> This feature can of course be weaponized. Ran Hirschl, for example, draws the following conclusion from a study he conducted on four states that had recently undergone significant constitutional changes regarding an increase in powers granted to judicial review bodies:

The constitutionalization of rights and the establishment of judicial review is therefore not driven solely, or even primarily, by politicians’ genuine commitment to progressive notions of social justice or to an elevated vision of universal rights. It is driven in many cases by attempts to maintain the social and political status quo and to block attempts to seriously challenge it through democratic politics (Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004) at 213-14.

The idea here is that power-holders can leverage the general willingness of the public to trust judicial institutions to their benefit.

<sup>35</sup> See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) at 46; and, David Estlund, *Democratic Authority* (Princeton: Princeton University Press, 2008) at 117.

<sup>36</sup> Richard H Fallon, “Legitimacy and the Constitution,” (2005) *Harv Law Rev* 118:6 1787 at 1795.

discussed outside of how an institution is perceived by some person or group, which implies that accountability and legitimacy can be pulled apart. It is perfectly conceivable that an institution could be viewed as legitimate in the eyes of some group without being accountable to them at all. This could happen, for instance, if a group were to believe that an authority was fulfilling its role in the intended way despite not being under any duty to provide evidence in support of that belief.

Be that as it may, from a practical point of view, the legitimacy of a court would not last long in the absence of fulfilling some duty of accountability to the public. Indeed, it is precisely for this reason that those who have written on the topic have focused so intently on increasing the legitimacy of courts through accountability measures.<sup>37</sup> What I have tried to explain in this section and the last is what the relationship between those two concepts entails. By being accountable to the public in their own unique way, courts stand to bolster public confidence in the constitutional role they serve, which in turn stands to increase their legitimacy in the eyes of the public.

With all of this in mind, I now turn to the question of whether intervention has any role to play in this dynamic. If we can locate such a role, we will have hit on a strong democratic reason in support of the practice – one that has nothing to do with the public’s right to participate in court proceedings. But before I get to that question specifically, I will take a short detour to examine the relationship between judicial accountability and the open court principle. I do this for the following reason: If the duty that bears on courts to provide an account of the work they are doing on the public’s behalf can be discharged entirely by observing the open court principle, an argument claiming that intervention has a supporting role to play will have been substantially weakened. I will resist this conclusion in the final section of the paper by suggesting that courts have democratic reason to be responsive to the public, and that this is something the open court principle cannot satisfy all on its own.

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<sup>37</sup> See Trace C Vardsveen & Tom R Tyler, “Elevating Trust in Prosecutors: Enhancing Legitimacy by Increasing Transparency Using a Process-Tracing Approach” (2023) 50:5 *Fordham Urb L J* 1153 at 1181; Mark H Moore, “Accountability, Legitimacy, and the Court of Public Opinion” in Michael D Dowdle, ed, *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge University Press, 2006) 636-38; Francesco Contini & Richard Mohr, “Reconciling Independence and Accountability in Judicial Systems” (2007) 3:2 *Utrecht L Rev* 26 at 30-32.

#### IV. THE OPEN COURT PRINCIPLE

The unique nature of judicial accountability in systems that prioritize judicial independence is partially characterized as a duty bearing on courts to provide the public with an account of the work they are doing on the public's behalf.<sup>38</sup> The most familiar way that courts discharge this duty is by observing the open court principle. According to that principle, the default posture for all court proceedings is that they, and the documents bearing on them, be made accessible to the public.<sup>39</sup> This can either happen directly (e.g., the careful cataloging of court dockets; by granting the public permission to view proceedings; etc.) and/or indirectly (e.g., by allowing broad access to media reporting). Concomitant to this principle is the custom that courts deliver their judgements in written form, where the reasoning used to arrive at a judgment is laid bare and situated in the context of existing law or legal principles.

Each of these devices assist courts in executing the duty they have to provide the public with an account of the work they are doing on the public's behalf. By inviting members of the public into the courtroom, the public may observe first-hand how courts work; by allowing broad access to documents that have been submitted to the court, the public acquires a means to review those submissions and to scrutinize their use and/or interpretation; by delivering judgments in written form, courts justify the rationale used to reach a decision, providing assurances that the rule of law has been observed.

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<sup>38</sup> There are other elements to consider in a full-throated description of judicial accountability. For a comprehensive summary of those elements, see Charles Gardner Geyh, "Rescuing Judicial Accountability from the Realm of Political Rhetoric," (2006) *Case W Res L Rev* 56:4 at 911.

<sup>39</sup> The principle is of course not absolute. There are myriad reasons for why applying the principle in the context of specific courts (e.g., youth courts) or specific hearings (e.g., hearings that include sensitive information bearing on national security interests) would on balance be antagonistic to the overall interests of justice (NB: For a helpful list of the kinds of exceptions to the open court principle that exist in the Canadian legal system, see Jane Bailey & Jacquelyn Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016) *Ottawa L R* 48, 143). Nevertheless, even in cases where the principle is overridden, the rationale for doing so is set against the presumed authority of the principle itself.

The connection between the open court principle and judicial accountability is well understood by Canadian courts. The SCC, in *Vancouver Sun (Re)*, explained the connection thus:

Public access to the courts guarantees the integrity of judicial processes by demonstrating that justice is administered in a non-arbitrary manner, according to the rule of law. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.<sup>40</sup>

Four overlapping reasons are cited by the Court to explain why the open court principle is central to the overall administration of justice. First, it provides a check on arbitrary judicial decision-making. When a judge is aware that their work is subject to public scrutiny, they will be less likely to decide cases in a partial manner, incentivized instead to rely on established law to guide their deliberations. Second, the open court principle maintains the independence of the judiciary in precisely the way I described earlier in the paper – it provides an accountability measure that, because it functions outside of the electoral context most familiar to citizens of democratic states, protects the role that courts play in the broader constitutional scheme. Third, the open court principle bolsters public confidence in the justice system by in fact providing this unique accountability measure. Fourth, by bolstering public confidence in the justice system members of the public are more likely to view the court system generally, and court decisions specifically, as legitimate. This then results in an increased likelihood that the general public will abide by those decisions into the future.

The remainder of the paper will focus on the final two reasons cited by the Court. My aim is to explore the role that intervention might serve in helping the open court principle bolster public confidence in the justice system and, as a result, lead to an increase in the legitimacy of courts. My argument will be that if designed and implemented in the appropriate way, intervention does indeed have a role to play in this regard. By the same token, however, if the practice is designed and implemented inappropriately, the opposite result could obtain.

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<sup>40</sup> *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43 at 346.

## V. INTERVENTION AND AN ATTITUDE OF RESPONSIVENESS

We have just seen that the SCC is keenly aware of the special importance placed on maintaining public confidence in the justice system. Like all other democratic institutions, judicial authority is ultimately tied to the public's approval. And yet, unlike other democratic institutions, maintaining this approval cannot be established directly through responsive criteria such as voting procedures. From this it does not follow, however, that courts can then be said to operate in an environment of *unresponsiveness*. An important consequence of the duty bearing on courts to provide the public with an account of the work they are doing on the public's behalf is that a frame of reference is established that makes responsiveness not just a recognizable but an expected element of the relationship.

Now, for all the reasons I have explained to this point the kind of responsiveness that features in the relationship between courts and the public will not present as a sanctioning power that the latter enjoys over the former. Nor will it convert courts into deliberative forums whereby the public is granted an equal voice in the decision-making process. Both kinds of responsiveness would be democratically inappropriate given the role that courts serve in the broader constitutional scheme. The responsiveness that functions in the context of the judiciary presents instead as a *willingness of courts to listen to the public* out of a recognition that, as a public institution, its decisions stand to impact public affairs in meaningful and far-reaching ways.

This is where intervention becomes a relevant consideration in the maintenance of public confidence. If judges were to simply shut out the views of the public, the public would have reason to question the legitimacy of their decisions.<sup>41</sup> There is of course a psychological element to all of this — the frame of reference described above weighs in favour of a responsiveness that the public has come to expect from its democratic institutions. But there is a normative element to it as well. Democratic institutions *should* facilitate a relationship of responsiveness to the public as part of the broader set of responsibilities they inherit in virtue of their institutional status. This is so even, and maybe especially, in the context of institutions that place a premium on their independence (I will say more on

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<sup>41</sup> See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).

this below). For present purposes, the important thing to note is the modification that responsiveness makes to the way that judicial accountability is understood under the open court principle. Even if courts were to grant complete access to the public – to their proceedings, their records, and their decision-making rationales – that access could in theory be administered in a way that kept courts unresponsive to the public. It would be as if judicial hearings were carried out behind a one-way mirror, the public having unfettered access to observe the goings-on of the proceedings but no available avenues to engage with them. While the public could learn much about how courts operate through the exercise, it would only be from the perspective of an external observer – a positionality that, as H. L. A. Hart reminds us, minimizes the obligation-imposing aspect of a practice.<sup>42</sup> By expanding the public’s role from that of mere observer to participant, courts may vindicate the expectation that democratic institutions should, where possible and appropriate, make attempts to be responsive to the public.

Allowing outside parties to participate in court proceedings is not the only way for courts to vindicate this expectation. Judicial bodies are increasingly becoming aware of the vital role that responsiveness plays in shoring up a perception of their legitimacy and are taking steps to ensure that it is observed in practice. As an example, consider the cross-country tour that members of Canada’s highest court recently embarked on, which was intended to “bring the Supreme Court closer to Canadians.” As Wagner CJ explained in a media appearance during that tour: “It’s very difficult for people to have trust if they don’t understand something.” To remedy for this, the Court opted to engage with the Canadian public directly, aspiring to “increase, improve, or maintain the trust of the people in our institution.”<sup>43</sup>

The SCC’s cross-country tour reflects an appreciation of the symbiotic relationship that exists between judicial accountability, judicial legitimacy, and a willingness on the part of courts to be open and responsive to the public. Courts have a duty to provide the public with an account of the work they are doing on the public’s behalf; this is how they are accountable to the public. Through that accountability, the groundwork has been laid

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<sup>42</sup> See H.L.A. Hart, *The Concept of Law*, 3rd ed (Oxford: Oxford University Press, 2012) at 88-91.

<sup>43</sup> Supreme Court of Canada, *2019 Year in Review* (Ottawa: Supreme Court of Canada, 2019) at 4, online: <<https://www.scc-csc.ca/review-revue/2019/yr-ra2019-eng.pdf>>.

for the public to regard both the decisions that courts make, and the broader constitutional role they serve, as legitimate. This groundwork is upset, however, if the duty of accountability is carried out in a manner that remains unresponsive to the public. To correct for this, courts have reason to engage with the public, which can be accomplished in a variety of ways – one of which is the practice of intervention. By elevating the public’s role in court proceedings from that of mere observer to participant, courts may exhibit their accountability to the public by being responsive to its members.

Now importantly, because the democratic function played by intervention is filtered through an assessment of legitimacy, we are precluded from making any generalizable claims about its suitability as a democratic practice. To the extent that intervention improves the legitimacy of courts, it can be of much value to democracy; to the extent that it has the opposite effect, that value is lost – even to the point of becoming democratically harmful. Which direction intervention goes depends entirely on how the practice is designed and implemented by a court. And since evaluating these matters calls for a context-sensitive assessment, any recommendations of the generalizable sort are limited.<sup>44</sup> There are a few considerations that can, however, help to navigate the kind of assessment that ought to be made.

One such consideration was flagged by Daniel Sheppard in a relatively recent paper on intervention. After assessing some of the trends that had developed around the practice at the SCC, Sheppard concludes that “[t]he Supreme Court’s attitude towards interveners appears in many respects to be a kind of performance.” According to him, “it is the presence of interveners, not their participation, that meets the Court’s interests in maintaining a positive image of its role in society through modelling forms of accessible, participatory democracy.”<sup>45</sup> The upshot of Sheppard’s review is that the Supreme Court uses the practice of intervention as a kind of

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<sup>44</sup> I am suspicious of the institutional appropriateness of establishing a determinate test for granting leave to intervene, such as the one put forward by Stratus J in *Canada (AG) v Pictou Landing Band Council*, 2014 FCA 21. The alternative approach I recommend – what I have elsewhere called ‘the Democratic Balancing Interpretation’ (see Callaghan, *supra* note 7) – appears to be a far more fitting reflection of the dynamic values that feed into the practice, and is one that requires that rota judges enjoy broad discretion over whether to grant intervener status in any given case.

<sup>45</sup> Daniel Sheppard, “Just Going Through the Motions: The Supreme Court, Interest Groups and the Performance of Intervention,” in Cheryl Milne & Kent Roach (eds), *Public Interest Litigation in Canada* (Toronto: LexisNexis, 2019) 187 at 217.

window-dressing — a way to convince the public that it cares about what citizens have to say without actually caring about what they have to say.

Now in some ways, the conclusion Sheppard reaches could be viewed as favourable to my argument: the SCC uses intervention as a mechanism to exhibit its responsiveness to the public even when it is wholly uninterested in what interveners have to say. But implementing this approach across the board could quickly become harmful to the legitimacy aims of the Court. If interveners begin to question the sincerity of the Court's attitude towards them, a cascading effect could result, impacting a perception of the Court's authenticity in general. This would represent the worst of two possible worlds: not only would the presence of interveners in court proceedings be a harbinger for a lack of judicial authenticity, their presence might at the same time weaken a perception of judicial independence. The upshot is that responsiveness cannot simply become a posture for courts to adopt, but rather an attitude. Courts must be willing to hear interveners in addition to allowing their participation.

The latter concern just mentioned — the potential for intervention to weaken a perception of judicial independence — is far and away the most common democratic concern expressed about the practice, and it provides another general warning to courts. By attempting to use intervention as a means to be more responsive to the public, courts could easily overshoot their target and compromise a perception of their impartiality in turn. This might happen, for instance, if a court were to routinely allow a disproportionate number of interveners to participate in proceedings whose submissions aligned with one party's argument over the other, risking the "appearance of an ancient jousting contest, with each side gathering up as many spear bearers as they can."<sup>46</sup> While such instances would confirm the court's willingness to be responsive to the interests of those seeking leave to intervene, the particular way that responsiveness is exhibited would be out of place in an institutional context that prioritizes neutrality above all else.

The crux of this concern was expressed forcefully by Chabot J in his judgement in *Imperial Tobacco Ltd. v. A-G Canada*, where he took aim at a piece written by Philip Bryden defending intervention on the same legitimacy grounds I have been tracing.<sup>47</sup> According to Chabot J: "[I]t is

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<sup>46</sup> An anonymous judge, cited in Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: University of Toronto Press, 2002) at 294.

<sup>47</sup> Philip Bryden, 1987. "Public Interest Intervention in Courts," 66 *Canadian Bar Review* 490.

fundamentally repugnant...to import into judicial proceedings even the concept of the legitimacy of judicial decisions, which in the end could not but sap judicial authority in its most fundamental democratic guarantee, the independence of the judiciary.”<sup>48</sup> I have attempted to provide some clarity as to why severing judicial independence from judicial legitimacy in the manner Chabot J does in this passage is misguided. But his issue with Bryden’s article in particular is not altogether unjustified. In that article, Bryden offers two legitimacy-based arguments in defense of intervener participation. The first is a form of the standard participatory-rights rationale that lies at the bedrock of democratic governance. Bryden writes that:

Our commitment to a right to a hearing and public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.<sup>49</sup>

I have raised a concern with this form of argument elsewhere,<sup>50</sup> my claim being that by grounding an argument for intervention on dignity and self-respect we risk over-inflating, and indeed misrepresenting, the democratic role that the practice plays in a judicial context. If what is at stake in a decision to allow outside parties to participate in a court proceeding is their dignity and self-respect, then surely the bar for denying such participation should be set very high. This is not a practicable view of intervention.

The second argument Bryden advances is directed toward legitimacy concerns specifically. His claim is that:

...participation by public interest intervenors in litigation creates a moral obligation on their part to respect the outcome of the litigation. It is inevitable that some people will be dissatisfied with the decisions that courts make about contentious issues, just as it is inevitable that some people will be disappointed by the outcome of a hotly contested election. But a willingness to take part in these processes is generally thought to imply a willingness to abide by the result.<sup>51</sup>

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<sup>48</sup> *Imperial Tobacco Ltd v Canada (AG)*, [1988] 55 DLR (4th) 555 (Que Sup Ct), per Chabot J.

<sup>49</sup> Philip L Bryden, “Public Interest Intervention in the Courts” (1987) 66:3 *Can Bar Rev* 490 at 509.

<sup>50</sup> See Callaghan, *supra* note 9..

<sup>51</sup> Bryden, *supra* note 46 at 509.

Here, Bryden once again fails to attend carefully enough to the distinction between courts and other responsive institutions, transposing arguments that work perfectly well in legislative environments to the judicial arena. The question is how involved one must be in a decision-making process before a duty to abide by its outcome can be said to materialize. My own impression is that the very limited role played by interveners in court proceedings falls well short of that threshold. More importantly, however, the implication that if certain members of the public were to be denied intervener status by a court – even if for valid reason – they would somehow be less morally obligated to abide by its result is democratically dubious.

Bryden's arguments for intervention make it seem that, because courts are democratic institutions, they are under the same kind of participation-based obligations that fall to all democratic institutions. But this picture is far too simplistic to be of any use. Although courts do have reason to adopt an attitude of responsiveness with respect to the public, the manner in which that attitude is exhibited will be radically different to how it is exhibited in other institutional contexts – notably those that are not characterized by independence and thus include a sanctioning element to their accountability measures.

So what have we learned? First, overt window-dressing – of the sort discussed by Daniel Sheppard – is a risky policy for courts to adopt concerning intervention. Allowing the public to participate for the sake of participation alone could threaten judicial legitimacy from two directions: It could undermine a perception of impartiality as viewed from the perspective of the direct parties to the case; and it could cast suspicion over whether the court's commitment to responsiveness as viewed from the perspective of intervening parties is genuine. In this respect, construing the value of intervention for its participatory qualities alone may end up causing more democratic harm than good.

On the other hand though, reducing the value of intervention to its potential instrumental benefits would be equally dubious from a democratic perspective. Since like all democratic institutions courts have reason to adopt an attitude of responsiveness to the public, where that attitude can be expressed in a manner that does not unduly threaten other democratic commitments (e.g., the timely execution of justice, the observance of strict standards of neutrality, etc.) courts ought to seize on the opportunity. Intervention provides one such avenue. It is not to be valued merely for its participatory features, nor exclusively for the assistance it can offer towards

“enabl[ing a] court to make a better or more accurate decision,”<sup>52</sup> but for the opportunity it provides to courts to exhibit the unique way that they are accountable to the public.

## VI. CONCLUSION

In a somewhat circuitous way, the argument I have defended in this paper endorses the familiar viewpoint that intervention can have a democratizing influence over court proceedings. But it does not achieve this spontaneously. The idea that because courts are democratic institutions they are under some kind of duty to allow the public to participate in their decision-making processes is overly simplistic. Courts do have reason to allow the public to participate in proceedings that come before them – but this is not because the public has a right to be heard in that institutional setting or anything else resembling standard arguments for political participation. The constitutional role that courts serve in a democracy keeps us from substituting these arguments in a one-to-one way. The argument I have defended concerning the potential democratizing influence of intervention arises from the duty bearing on courts to provide the public with an account of the work they are doing on the public’s behalf and in the public’s name. While this duty is to a large extent discharged by adhering to the open court principle, what that principle cannot accomplish on its own is a demonstration that courts are willing to be *responsive* to the public, which stands to strengthen the account they provide. In this respect, intervention can increase the legitimacy of judicial institutions precisely by adding an element of responsiveness to the manner in which they perform their duty of accountability.

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<sup>52</sup> Benjamin R D Alarie & Andrew J Green, “Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance,” (2010) *Osgoode Hall LJ* 48:3/4 at 386.