ARTICLES

The Role of Interveners in Constitutional Litigation After *Sharma* and *McGregor*

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The appropriate role of interveners in constitutional litigation has proven controversial since the adoption of the Charter. Commentators consistently maintain that the legitimacy of the judiciary hinges upon its willingness to engage with intervener arguments because the adversarial system cannot guarantee that the views of marginalized populations will otherwise be represented. Others express concern that permitting interveners to make submissions as a matter of course would unduly hinder the judiciary's ability to decide cases expeditiously. This criticism is increasingly salient as judges require less help resolving legal disputes due to many foundational interpretations of rights now being settled. The evolving nature of Charter jurisprudence should nevertheless continue to impact judicial willingness to hear from interveners. The structure of analysis under sections 7 and 15 of the Charter in particular make social science evidence often determinative of whether a violation occurred. The difficulties judges face in understanding social science evidence and its prominent role in Canadian constitutional litigation should result in appellate justices exercising their discretion under the Rules of the Supreme Court of Canada or similar provincial legislation to regularly permit interveners to supplement factual records in cases implicating complex social science evidence. Efficiency concerns can be addressed by requiring interveners to submit leave applications explaining why the proposed evidence fills an important evidentiary gap that the interests of justice require to be considered before deciding a constitutional issue.

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I. Introduction

In *R v Sharma*,[1] ("*Sharma*") the Supreme Court of Canada sharply divided on whether various restrictions on the ability of judges to grant conditional sentence orders under section 742.1 of the *Criminal Code of Canada*[2] violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[3] While the case is most notable for its divisive application of the equality right to sentencing law,[4] the majority's brief comments on the appropriate role of interveners in *Charter* litigation also polarized the court.[5] Justices Brown and Rowe observed, for a narrow majority, that they harboured "serious concern with interveners supplementing the [factual] record at the appellate level."[6] Citing the Court's decision in *R v Morgentaler*,[7] they affirmed that "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."[8] In providing submissions, however, interveners must "accept the record as defined by the parties in first

1 *R v Sharma*, 2022 SCC 39 [*Sharma*].

2 *Criminal Code*, RSC 1985, c C-46 at s 742.1.

3 *Canadian Charter of Rights and Freedoms* at ss 7, 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c 11 (UK) [*Charter*].

4 For my initial commentary on the case, see C. Fehr, "Reflections on the Supreme Court of Canada's Decision in *R. v. Sharma*" (2023) 60 Alberta Law Review (discussing the relationship between the right to equality and the substantive criminal law).

5 *Sharma* at paras 75, 205.

6 *Sharma* at para 75.

7 *R v Morgentaler*, 1993 CanLII 158, [1993] 1 SCR 462 at p 463 [*Morgentaler*].

8 *Sharma* at para 75; *R v Barton*, 2019 SCC 33 at paras 52-53 [*Barton*].

instance."[9] This follows because "[i]nterveners creating a new evidentiary record at the appellate level undermines the trial process" which, the majority observed, "is *not* how our system of justice, including constitutional adjudication, is designed to work."[10]

Building on *Sharma*, and two earlier practice directives,[11] the Supreme Court further clarified the role of interveners in appellate litigation in *R v McGregor* ("*McGregor*").[12] Several interveners in *McGregor* sought to overturn a prior Supreme Court precedent.[13] The majority concluded that the interveners' submissions were outside the scope of the appeal as the litigants at no point raised this issue at the lower courts or before the Supreme Court.[14] In so concluding, the majority briefly affirmed that "it is inappropriate for interveners to supplement the evidentiary record at the appellate level."[15] Concurring with the majority, Justice Rowe nevertheless provided a more detailed defence of the Court's approach to interveners. His comments on the issue of whether interveners are permitted to supplement the appellate record are particularly salient as they imply

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9 *Sharma* at para 75; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew*]; *R v Marshall*, 1999 CanLII 666 at para 9, [1999] 3 SCR 533 (SCC); *R v Mabior*, 2012 SCC 47 at para 59.

10 *Sharma* at para 75.

11 Supreme Court of Canada, "November 2021 - Interventions" (November 2021) https://www.scc-csc.ca/parties/arf-lrf/notices-avis/21-11/ [2021 Notice]; Supreme Court of Canada, "March 2017 - Allotting Time for Oral Argument" (March 2017) https://www.scc-csc.ca/parties/arf-lrf/notices-avis/17-03/ [2017 Notice].

12 *R v McGregor*, 2023 SCC 4 [*McGregor*].

13 *R v Hape*, 2007 SCC 26.

14 *McGregor* at paras 21-23, 99-101.

15 *McGregor* at para 24.

a compromise position for engaging with intervener submissions relating to factual records: permitting such submissions with leave under paragraph 59(1)(b) of the *Rules of the Supreme Court of Canada*,[16] and other similar provincial rules.[17] However, Justice Rowe did not elaborate on this specific aspect of his proposal.

A discretion-based approach to determining whether interveners should be permitted to supplement the factual record is prudent. In my view, such discretion should be routinely exercised in constitutional cases. A similar approach proved persuasive during the early days of the *Charter* as a means to aid courts in providing foundational interpretations of *Charter* rights.[18] Although the judiciary requires less help interpreting rights today, more recent judicial experience raises a distinct issue with which courts struggle immensely: interpreting social science evidence. Since the Supreme Court acknowledges that social science evidence frequently drives the conclusion as to whether a rights breach occurred,[19] it should follow that courts ought to be willing to hear arguments from interveners that attempt to fill gaps in the evidential record. This is especially so in criminal law cases, as the typically impecunious litigant is often incapable of providing trial courts with a robust evidentiary record.

The article unfolds as follows. In Part II, I review the conflicting viewpoints on the merits of allowing interveners to supplement the record on appeal. Many of the arguments made by applicants in the

16 *Rules of the Supreme Court of Canada*, SOR/2002-156 [*Supreme Court Rules*].

17 *McGregor* at para 108.

18 I review this history below in Part II.

19 *R v Spence*, 2005 SCC 71 at para 64 [*Spence*].

early days of the *Charter* persuaded the Supreme Court that the interests of justice required substantial intervention despite efficiency concerns. As foundational *Charter* issues became increasingly settled, efficiency concerns resulted in several prominent justices re-emphasizing their opposition to the practice. In Part III, I set out the evolving context within which constitutional litigation takes place in Canadian courtrooms. In particular, I highlight how the structure of constitutional analysis under sections 7 and 15 of the *Charter* ensures that social science evidence will feature prominently in constitutional litigation. I conclude in Part IV by contending that efficiency and fairness concerns should be balanced on a case-by-case basis to determine whether interveners should be permitted to supplement the factual record. As Justice Rowe observes in *McGregor*, this can be done by requiring interveners to seek leave to file supplementary social science evidence.

II. Intervention at the Supreme Court

While judges in Canada today frequently permit interventions, the Supreme Court historically applied a much stricter policy.[20] Many justices were concerned that allowing non-parties to intervene would open a floodgate of "unnecessary litigation that would politicize the judicial process."[21] Justice Beetz's response to a request for

20 R. Sharpe & K. Roach, *Brian Dickson: A Judge's Journey* (University of Toronto Press, 2003) at p 383; *Supreme Court Rules* at ss 55-59.

21 Sharpe & Roach at p 382; T. Morton, "The *Charter* Revolution and the Court Party" (1992) 30 *Osgoode Hall Law Journal* at p 649 (a coalition that "represents a horizontal transfer of power to a new elite, not a vertical transfer of power to the people"); I. Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (University of New York Press, 2002).

intervention by the Canadian Civil Liberties Association (the "CCLA") is illustrative. As he observed, "given the purposes and objectives of the [CCLA], there would hardly be any serious *Charter* case in which the Applicant would not be interested" which would result in the CCLA becoming "more or less [a] permanent[] fixture of the Court."[22] For Justice Beetz, providing such status to interveners would result in the Court being "perceived by the public as some sort of royal commission."[23] Justice Estey was more blunt, suggesting that permitting interveners resulted in the Court "sitting and listening to repetition, irrelevancies, axe-grinding, [and] cause advancement."[24] These and other judges feared that interveners would prejudice the parties to a proceeding "by delaying their case and increasing costs as legal counsel and courts [would] have to deal with the intervener submissions."[25] For these reasons, the early experience with intervention was practically restricted to other government representatives in constitutional cases.[26]

It was only during Chief Justice Laskin's tenure that the Supreme Court began regularly allowing broader non-party submissions in constitutional cases.[27] His successor, Chief Justice Dickson, was also

22 Sharpe & Roach at pp 384-385.

23 Sharpe & Roach at pp 384-385.

24 Sharpe & Roach at p 385.

25 B. Bussey, "The Law of Intervention After the TWU Law School Case: Is Justice Seen to be Done?" (2019) 90 (2d) *Supreme Court Law Review* at p 269.

26 Bussey at p 270; Brodie at pp 22-37.

27 Bussey at p 270; P. Girard, *Bora Laskin: Bringing Law to Life*, (University of Toronto Press, 2005) at p 491; Sharpe & Roach at pp 383-385; *Morgentaler*; *Nova Scotia Board of Censors v McNeil*, 1975 CanLII 14, [1976] 2 SCR 265 (SCC); *Miller and Cockreill v The Queen*, 1976 CanLII 12, [1977] 2 SCR 680 (SCC).

eventually persuaded to permit increasingly more intervention despite dissenting views from other members of the Court.[28] The latter Chief Justice's change of heart arose from a new-found recognition that interveners could be of "great help to the Court" and "vastly change the nature of the representations, and the materials available to the Court in its law-making role."[29] Justice Wilson also supported a more generous approach toward permitting intervener submissions during her tenure on the Court. As she observed, the traditional legal education received by lawyers did not prepare them to litigate the broader social issues inherent to rights litigation.[30] A liberal approach to intervention would ensure a broader set of views were heard, which in turn would provide judges with the diversity of perspectives needed for resolving difficult rights questions. Allowing for broad intervention would also "assist in legitimizing the Court's new role [under the *Charter*] through a more open and accessible court process."[31]

Other organizations that commonly intervene before appellate courts have also influenced the Supreme Court's decision to permit more intervener submissions. The CCLA, for instance, argued that intervention increases the legitimacy of the Court. In its view, "as the entire community will be increasingly affected… by [*Charter*] decisions of the Court, larger sections of the community should be

28 Sharpe & Roach at pp 383-389.

29 Sharpe & Roach at pp 384, 387; B. Alarie & A. Green, "Intervention at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 *Osgoode Hall Law Journal* at p 386.

30 B. Wilson, "Decision-Making in the Supreme Court" (1986) 36:3 *University of Toronto Law Journal* at pp 242-243.

31 Wilson at p 243; Alarie & Green at p 389.

able to participate in the process which produces those decisions."[32] Only a "more inclusive process," the CCLA wrote, would ensure "public respect for both the *Charter* and the Court."[33] Similarly, the Women's Legal Education Action Fund ("LEAF") observed that unduly limiting intervention would "effectively deny the poor and disadvantaged sectors of society, who are least able to initiate the litigation themselves, access to a process which will have a significant impact on their rights."[34] James MacPherson, responding to a query from Chief Justice Dickson, further justified intervention by appealing to the limits of the profession. In MacPherson's view, allowing intervention ensured access to "creative research and thinking that major civil liberties organizations are conducting… that lawyers in private practice may not have the time or skill to prepare."[35]

The internal debate between Supreme Court members and the lobbying undertaken by societal groups initially resulted in the Court granting automatic leave for interested governments and any applicant granted intervener status at the lower court. This approach was nevertheless restricted to the civil context,[36] and eventually

32 Sharpe & Roach at p 386; P. Brayden, "Public Interest Intervention in the Courts" (1987) 66 *Canadian Bar Review* at p 506.

33 Sharpe & Roach at p 386; G. Callaghan, "Intervenors at the Supreme Court of Canada" (2020) 43 *Dalhousie Law Journal* at pp 58-59. For a similar argument relating to the value of participation in the broader democratic balancing that goes into making leave decisions on interventions.

34 Sharpe & Roach at p 387.

35 Sharpe & Roach at p 388.

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

rescinded altogether due to efficiency concerns.[37] In its place, the Court settled on allowing intervention in any case—including constitutional cases—if the submissions are different from the parties and useful to the Court.[38] Importantly, this approach did not require that interveners raise a distinctive legal argument, a much higher threshold to meet. The submission must simply be unique and considered useful to the justices hearing the particular leave application. In making submissions, however, the Court retained discretion as to whether submissions would be written only (typically ten pages), or whether the intervener would also be allowed to make an oral argument (typically five minutes).[39]

As litigation concerning the interpretation of *Charter* rights settled, several justices renewed their criticism of the Supreme Court's approach towards granting intervener status in constitutional cases. At the turn of the century, Justice Bastarache maintained that "because of the fact that we have lived with the *Charter* for 18 years and we have a lot of experience in interpreting the *Charter*...[t]here isn't the same need there was in 1982 to obtain help from interven[e]rs."[40] Justice Iacobucci made similar comments later that year, querying whether the passage of time required the Court to "[look] at the question [of intervener participation] in different

37 Notice to the Profession, [1984] SCCB 24; *Rules of the Supreme Court of Canada, amendment*, SOR/1983-930; J. Wench, "No Room at the Top: Interest Group Intervenors and *Charter* Litigation in the Supreme Court of Canada" (1985) 43 *University of Toronto Faculty of Law Review* at p 204.

38 Sharpe & Roach at p 389; *Supreme Court Rules* at s 57(1)(b).

39 Sharpe & Roach at p 389.

40 L. Chwialkowska, "Rein in lobby groups, senior judges suggest" *The National Post* (6 April 2000) http://www.fact.on.ca/news/news0004/np000406.htm.

ways."[41] In Justice Iacobucci's view, there was "a tremendous need for something that would be beyond the purely adversarial system" when the *Charter* was first adopted.[42] However, the passage of time resulted in judges receiving a firm legal foundation upon which to base their decisions and therefore no longer requiring the far-reaching submissions of various interveners when deciding a rights issue.[43]

During the period leading up to the Supreme Court's decisions in *Sharma* and *McGregor*, justices of the Court made relatively few comments about the role of interveners in appellate hearings.[44] Most notably for present purposes, the Court refrained from commenting

41 K. Markin, "Intervenors: How Many Are Too Many?" *The Globe and Mail* (10 March 2000) https://www.theglobeandmail.com/news/national/intervenors-how-many-are-too-many/article1037654.

42 Markin.

43 Markin.

44 *Mikisew* at para 40 ("[i]t is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal argument that it ought to have raised earlier in the proceedings but did not"); *Barton* at paras 52-53 ("interveners play a vital role in our justice system by providing unique perspectives and specialized forms of expertise that assist the court in deciding complex issues that have effects transcending the interests of the particular parties before it. […] However, interveners must not overstep their proper role, particularly in criminal appeals. In fairness to the accused, they must not assume the role of third-party Crown prosecutors […] particularly where doing so would widen or add to the Crown's grounds of appeal from an acquittal").

on the increasingly pressing issue directly before it in *Sharma*: whether interveners still "play a vital role" when supplementing the *factual* record.[45] While interveners may always provide novel legal arguments, raising new facts on appeal more directly implicates the efficiency-based arguments raised by earlier judicial commentators on the appropriate role of interveners. At the same time, however, the nature of constitutional adjudication was shifting. As I explain below, reconciling the majority's reasons in *Sharma* and Justice Rowe's reasons in *McGregor* is only possible if viewed through the lens of this shift and the accompanying difficulties appellate courts encounter when deciding constitutional issues that implicate complex social science evidence.

III. Social Science Evidence and the *Charter*

Over the last several decades, commentators have observed a significant increase in the use of social science evidence in Canadian courtrooms. Benjamin Perryman summarizes this development well when he observes that "judicial reference to facts derived from [social science] evidence has transitioned from distrust or hostility to something that is 'firmly established' to the point of being unremarkable."[46] In admitting social science evidence, Perryman is not concerned with the common practice in the United States of relying upon "Brandeis' Briefs" to aid in establishing social facts.[47]

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45 *Barton* at para 52.

46 B. Perryman, "Adducing Social Science Evidence in Constitutional Cases" (2018) 44 *Queen's Law Journal* at p 124; J. Monahan & L. Walker, "Twenty-Five Years of Social Science in Law" (2011) 35 *Law and Human Behavior* at p 80.

47 *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at paras 106-127. A Brandeis brief is a written submission referring to

Instead, he is addressing the use of expert witnesses to provide opinions on social phenomena. While courts in Canada now frequently rely on such evidence, Perryman also observes that courts have understandably become "increasingly guarded against 'junk science' and are demanding that expert evidence be rigorous and reliable, especially when it goes to an issue that is dispositive of a case." [48] Accordingly, courts "have moved from a constitutional jurisprudence that could find… harm on the basis of a brief affidavit of the applicant, to a [constitutional] jurisprudence that frequently relies on, if not requires, massive social science records."[49]

Judges often encounter numerous and conflicting expert witnesses in both criminal and constitutional cases due to the vast amounts of social science evidence submitted during many constitutional challenges.[50] Justice Doherty disparagingly commented on this trend in *R v Abbey*.[51] As he observed, "a deluge of experts has descended on the criminal courts ready to offer definitive opinions to explain almost anything." [52] In his academic writing, Justice Paciocco provides a similarly pessimistic view. Citing the work of Steven Skurka and Elsa Renzella, he agrees that "our courtrooms have

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relevant scientific evidence. Such a brief was first filed in *Muller v Oregon*, 208 US 412 (1908). The evidence is not, however, provided by way of an expert at trial.

48 Perryman at p 124; *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 at para 18.

49 Perryman at p 124.

50 G. Conrad & J. Lazare, "The Lawyer in Context: Toward an Integrated Approach to Legal Education" in R. Sefton-Green, ed, *Démoulages: du carcan de l'enseignement du droit vers une éducation juridique* 38 (Société de Législation comparée, 2015) at pp 50-53.

51 *R v Abbey*, 2009 ONCA 624 [*Abbey*].

52 *Abbey* at para 72.

become 'the showcase for the latest syndromes and theories offered by the scientific community.'"[53] The result often being "a legion of experts" descending on the courts, "all bringing distinct and contrasting points of view on the questions before the court."[54] Judges operating within the limits of the adversarial justice system are therefore left to resolve these competing views before applying the evidence to the issue before them.[55]

The dramatic increase in the use of social science evidence in constitutional cases is concerning because any benefits derived from the increased reliance on social science evidence must be considered alongside its increasing influence on constitutional jurisprudence. In particular, it is notable that "legislative facts"—which include facts established by social science evidence—are increasingly dispositive of constitutional challenges.[56] As the Supreme Court observed in *R v Spence* ("*Spence*"),[57] "[t]he reality is that in many *Charter* cases… [i]t is the legislative facts or social facts that are likely to prove

53 D. Paciocco, "Coping with Expert Evidence About Human Behaviour" (1999) 25 *Queen's Law Journal* at pp 306-307 citing S. Skurka & E. Renzella, "Misplaced Trust: The Courts' Reliance on the Behavioural Sciences" (1998) 3 *Canadian Criminal Law Review* at p 270.

54 J. Lazare, "Judging the Social Sciences in *Canada v Carter (AG)*" (2016) 10:1 *McGill Journal of Law and Health S35* at p 50.

55 A. Young, "Proving a Violation: Rhetoric, Research, and Remedy" (2014) 67 *Supreme Court Law Review* at pp 641-42 ("[w]hen operating within the current legal framework of an adversarial approach to proof, there is greater risk that the legislative fact evidence could lead to a badly informed decision despite the appearance of being fully informed").

56 For the seminal review of this distinction, see K. C. Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 *Harvard Law Review* at pp 402-403.

57 *Spence*.

dispositive."[58] This point is apparent from a general view of the jurisprudence cited in *Spence*,[59] and also more recent jurisprudence concerning issues like the constitutionality of closing safe injection sites,[60] restricting sex work[61] or euthanasia,[62] and the use of solitary confinement.[63] As opposed to deciding whether a general moral principle imposes a duty on the state to provide safe injection sites or access to euthanasia, or whether the state must legalize aspects of sex work or prohibit the use of solitary confinement, the dominant constitutional principles focus on the impact of a law when compared to its objective.[64]

The jurisprudence under the two most popular *Charter* provisions is illustrative. Section 7 of the *Charter* provides that "[e]veryone has

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58 *Spence* at para 64. See also P. Hogg, *Constitutional Law of Canada*, 5:2 (loose-leaf release 2014-1) (Thomson Carswell, 2014) at ch 38, pp 8-9.

59 *Spence* at para 64 citing *R v Sharpe*, 2001 SCC 2; *R v Butler*, 1992 CanLII 124, [1992] 1 SCR 452; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69.

60 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

61 *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*]; *R v Boodhoo*, 2018 ONSC 7205; *R v Anwar*, 2020 ONCJ 103; *R v NS*, 2021 ONSC 1628; *R v NS*, 2022 ONCA 160; *Canadian Alliance for Sex Work Law Reform v Attorney General*, 2023 ONSC 5197.

62 *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*]; *Truchon c Procureur général du Canada*, 2019 QCCS 3792.

63 *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228; *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243.

64 I have documented this shift from relying on moral philosophical principles to means-ends rationality analysis at book length elsewhere. See C. Fehr, *Constitutionalizing Criminal Law* (UBC Press, 2022).

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." Interpreting the latter phrase, the Supreme Court has developed a variety of principles to restrain state intrusions onto the interests protected by this provision. It has been clear, however, that "three have emerged as central in the recent s. 7 jurisprudence: laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object." [65] These principles generally test a law's means-ends or "instrumental rationality."[66] In their "individualistic form,"[67] they require that a law be declared contrary to fundamental justice if it has an illogical or unduly harsh effect on an individual.[68] After defining a law's objective, evidence of the impugned law's effects deriving from social science evidence can effectively determine whether a constitutional violation is established.

A similar approach may be deduced from the application of section 15 of the *Charter* which states that:

> "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without

65 *Carter* at para 72.

66 *Bedford* at para 107 citing H. Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Irwin Law, 2012) at p 151.

67 I provide a review and broader critique of these principles elsewhere. See e.g., Fehr 2022 at 58-101; C. Fehr, "The 'Individualistic' Approach to Arbitrariness, Overbreadth, and Gross Disproportionality" (2018) 51:1 University of British Columbia Law Review.

68 *Bedford* at paras 110-123.

> discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[69]

The right serves to ensure "the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[70] To further this end, section 15 requires the applicant to demonstrate that the challenged law or state action: "(a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[71] The emphasis of the analysis on a law's impact on a social group that is baked into the right to equality provides a clear avenue for social science evidence to drive legal conclusions.

While not objectionable on its own, the ability of social science evidence to be dispositive of a constitutional issue becomes problematic for a separate reason: judges typically lack the expertise necessary to resolve debates between competing experts. In the American context, judges have been described by scholars as lacking "even a minimum acquaintance"[72] with social science evidence and have been observed to interpret social science evidence with

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69 *Charter* at s 15.

70 *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143 at p 171.

71 *Sharma* at para 27 citing *R v CP*, 2021 SCC 19 at paras 56, 141; *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19-20.

72 P. Sperlich, "Social Science Evidence and the Courts: Reading Beyond the Adversary Process" (1980) 63:4 *Judicature* at p 282.

"incompetence."[73] Similar concerns were raised more recently in Canada by Justice Goudge in his famous inquiry relating to numerous wrongful convictions caused by undue reliance on expert evidence.[74] Other scholars have made similar observations and documented the clear implications of judicial difficulties in interpreting and resolving conflicts inherent to many forms of social science evidence.[75] As Jodi Lazare observes, unfamiliarity with social science methods often results in judges "fall[ing] prey to the 'mystique of science,' and in turn struggl[ing] in their determination of what constitutes expert evidence, ultimately accepting too much potentially unreliable empirical evidence."[76] Lazare further concludes that "limited capacity to critically evaluate social science data in the courtroom means that judges may misinterpret the

73 J. Acker, "Social Science in Supreme Court Criminal Cases and Briefs: The Actual and Potential Contribution of Social Scientists as Amici Curiae" (1990) 14:1 *Law & Human Behaviour* at p 40.

74 Ontario, Ministry of the Attorney General, *Report of the Inquiry into Pediatric Forensic Pathology in Ontario: Policy and Recommendations* (2008) at pp 500-502.

75 I. Binnie, "Science in the Courtroom: The Mouse That Roared" (2007) 56 *University of New Brunswick Law Journal* at 309; R. Sharpe & V.-J. Proulx, "The Use of Academic Writing in Appellate Judicial Decision-making" (2011) 50 *Canadian Business Law Journal* at p 569. See also D. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009) 34:2 *Queen's Law Journal* (describing generally how different forms of bias inherent to expert testimony is likely to lead to skewed results and difficulties interpreting expert evidence).

76 Lazare at p 48 citing *R v Mohan*, 1994 CanLII 80, 1994 2 SCR 9 at para 21; citing *R v Bé-land*, 1987 CanLII 27, 1987 2 SCR 398 at para 434.

evidence or prefer evidence from one witness over another for reasons unrelated to the validity or reliability of the evidence."[77]

The problematic nature of social science evidence driving the application of constitutional rights must also be viewed in light of other evidentiary rules. In particular, there is a distinction when reviewing adjudicative facts—"what the parties did, what the circumstances were, what the background conditions were"—and legislative facts—those relevant to questions of law and policy.[78] For efficiency reasons, adjudicative facts can only be overturned if the appellant establishes that the trial judge committed a "palpable and overriding error."[79] Historically, legislative facts were similarly "entitled to little deference" from appellate courts, which in turn provided judges with significant leeway to overturn legal conclusions based on problematic social science evidence.[80] In *Canada (Attorney General) v Bedford* ("*Bedford*"),[81] however, the Supreme Court held that legislative facts are subject to the same standard of review as adjudicative facts.[82] While I criticize this rule elsewhere,[83] its current status is relevant to determining whether interveners ought to be allowed to challenge legislative facts. Given the difficulties posed by

77 Lazare at pp 48-49.

78 Davis at pp 402-403.

79 *Stein et al. v 'Kathy K' et al. (The Ship)*, 1975 CanLII 146 (SCC), [1976] 2 SCR 802 at p 808. See also *Housen v Nikolaisen*, 2002 SCC 33 at para 10.

80 *Harper v Canada*, 2004 SCC 33 at para 99 citing *RJR-Macdonald Inc. v Canada (Attorney General)*, 1995 CanLII 64, 1995 3 SCR 199 at paras 285-289.

81 *Bedford.*

82 *Bedford* at paras 51-52.

83 See C. Fehr, *Judging Sex Work: Bedford and the Attenuation of Rights* (UBC Press, 2024) at pp 81-94.

social science evidence, the potential for incorrect legal conclusions is heightened by increasing the deference afforded to findings of social fact by trial judges.[84] Allowing greater opportunity for parties to submit social science evidence on appeal—parties who may have more resources than the often-impecunious applicant—could serve to alleviate any negative impact of the *Bedford* rule.

It may be nevertheless retorted that my argument is contradictory because it relies on judges interpreting more social science evidence to cure the ails created by a judicial inability to interpret social science evidence. Any such objection should be considered in light of the Supreme Court's clear commitment to relying on social science evidence when resolving constitutional issues. It accordingly must be remembered that appellate justices are more numerous—and even more numerous at the apex level—than at the trial level. The more judges interpret social science evidence, the more likely it is that errors will be detected.[85] Where social science evidence proposed by an intervener could plausibly reveal an error, it is therefore prudent for the evidence to be admitted and evaluated by the appellate courts.

As with the early *Charter* litigation, it should be acknowledged that it may come to pass that judges become well-equipped to resolve disagreements arising from social science evidence.[86] As Justices Bastarche and Iacobucci observed, a similar phenomenon arose after

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84 Fehr 2024 at pp 81-94.

85 See Lazare at p 45; Fehr 2024 at pp 88-94.

86 It is notable that scholars have devised a variety of policy proposals to aid in this regard. I summarize these and the vast applicable literature elsewhere. See Fehr 2024 at pp 88-94 (noting the ability of judges to alleviate these difficulties by more broadly relying on Brandeis briefs, mandating relevant legal education, recruiting scientifically trained judges, and other modifications to the adversarial system).

several decades of judicial engagement with *Charter* doctrine.[87] The arguments from an efficiency standpoint for reducing the role of interveners become much stronger in that circumstance. Until that day comes, the dispositive nature of social science evidence in constitutional challenges combined with its less than confidence-inspiring use by the judiciary should require that corrective intervention on constitutional issues relating to the evidentiary record be approached more flexibly. As I explain below, Justice Rowe's reasons in *McGregor* point towards a procedure to facilitate this approach: requiring interveners to submit an application for leave to supplement the factual record.[88]

IV. A Principled Approach to Intervention

As mentioned in the introduction, the categorical statements of Justices Brown and Rowe in *Sharma* should be read in light of the latter justice's concurring opinion in *McGregor*. In his reasons, Justice Rowe built on the existing jurisprudence in two main ways. First, he contended that allowing the interveners in *McGregor* to argue for a new legal framework despite the litigants expressly accepting the relevant framework from a leading Supreme Court decision fell outside the appropriate role of interveners. As Justice Rowe observed, accepting the interveners' approach would mean that "any time a governing precedent is relevant to deciding a case, interveners could insert themselves before this Court to call for it to be overturned, thereby 'piggy-backing' onto the parties' dispute what amounts to a reference on a judicial decision which the interveners wish to

87 Chwialkowska; Markin.

88 *McGregor* at para 108.

overturn."[89] Such an approach risks the Court making "ill-advised decisions, as they would be made without the benefit of lower court analysis, a proper evidentiary record, or submissions from those who would be affected (including vulnerable groups) but who had no notice that the issue would be placed before the Court."[90]

Second, and more importantly for present purposes, Justice Rowe pointed to a principled middle ground for determining whether interveners ought to be permitted to supplement the factual record on appeal. In particular, Justice Rowe concluded that interveners "must not adduce further evidence or otherwise supplement the record *without leave*."[91] In an initial application to intervene in a case, Justice Rowe noted that interveners can seek permission to provide "supplementary legislative facts or contested studies."[92] This is possible under Rule 59(1)(b) of the *Supreme Court Rules* which states as follows: "[i]n an order granting an intervention, the judge may… impose any terms and conditions and grant any rights and privileges that the judge may determine, including whether the intervener is entitled to adduce further evidence or otherwise to supplement the record." Relying on an earlier notice to the legal profession, Justice Rowe nevertheless warns that the "Court, as always, retains a discretion to take any steps it sees fit where an intervener presents new evidence without leave."[93]

The latter approach to intervention was applied strictly in the *Sharma* case. Decided mere months before *McGregor*, the accused

89 *McGregor* at para 101

90 *McGregor* at para 101.

91 *McGregor* at para 108 (emphasis added).

92 *McGregor* at para 108.

93 *McGregor* at para 108 citing 2021 Notice.

challenged the constitutionality of certain restrictions (now repealed) on the use of conditional sentence orders or "jail in the community" provisions.[94] Justices Brown and Rowe for the majority disagreed with the accused's argument that these restrictions violated the right to equality and concluded that there was insufficient evidence to establish that the impugned law created or contributed to a disproportionate impact on Indigenous people.[95] At the Ontario Court of Appeal, a host of interveners provided considerable empirical evidence to establish this point in response to the trial judge's rejection of the equality claim for lack of evidence.[96] In upholding the trial judge's decision, the majority of the Court pointed to their "serious concern with interveners supplementing the record at the appellate level."[97] While this may seem harsh, two facts mitigated the effect of the majority's decision: the challenged laws were all but certainly going to be repealed by Parliament,[98] and the accused was unlikely to serve any further time in prison.[99] The *Sharma* case therefore afforded the majority an opportunity to provide a stern

94 Bill C-5, *An Act to amend the Criminal Code and Controlled Drugs and Substances Act*, 1st Sess, 44th Parl, 2022 at cl 10.2(1) (as passed by the House of Commons 17 November 2022).

95 *Sharma* at paras 66-83. See para 205 for the dissent's disagreement with this view.

96 *R v Sharma*, 2020 ONCA 478 at paras 95-97.

97 *Sharma* at para 75.

98 Bill C-5. The Supreme Court's decision in *Sharma* was decided on 4 November 2022. At that time, Bill C-5 passed through the House of Commons and was awaiting third reading in the Senate.

99 *R v Sharma*, 2018 ONSC 1141 at para 145 (sentencing the offender to an 18-month sentence of imprisonment which would have been served by the time of the appeal).

lesson for future interveners in constitutional cases without prejudicing the applicant.

This lesson was nevertheless properly qualified by Justice Rowe in *McGregor*. While his reasons are brief, Justice Rowe's conclusion that applicants should seek leave from an appellate court before attempting to supplement the record with novel social science evidence should be endorsed. In considering such applications, the broader observations underlying the intervener debate reviewed in Part I provide a set of considerations to balance in deciding when leave to supplement the evidentiary record is appropriate. Judges must first consider the need for judicial economy. Justice Beetz's comments cited earlier are particularly salient as it is inappropriate to turn a judicial hearing into anything resembling a "royal commission." [100] Instead, judges should decide issues properly appearing before them within the confines of the adversarial system of justice. This critique must nevertheless be viewed in light of the changed nature of constitutional litigation and in particular the increasing relevance of social science evidence to constitutional challenges.

Sacrificing the efficiency gained by prohibiting interveners from supplementing the record on appeal may also be necessary to advance a broader goal: protecting the reputation of the justice system. That reputation will be negatively impacted if the strict application of evidentiary rules leads to the perception that relevant parties, such as the CCLA and LEAF, have been denied an adequate voice in constitutional cases. This is especially true to an informed observer who is aware of the institutional limitations that judges face when engaging with social science evidence and other inherent

100 Sharpe & Roach at pp 384-385 citing a letter from Justice Beetz to the Court dated 10 May 1983.

limitations of the adversarial system of justice.[101] Most notably, any concern about fair opportunity will be accentuated when the applicant is impecunious as they likely could not afford to call all of the relevant evidence. Oversights that can be attributed to the different skillsets of trial vis-a-vis constitutional lawyers, or from counsel's relative inexperience with social science evidence,[102] may also warrant leeway when permitting intervention. Finally, in considering whether to grant a leave application, appellate judges should be cognizant of the far-reaching implications of a constitutional decision (as contrasted with scientific evidence relevant only to an individual charge) on individuals who are not before the court on appeal.

V. Conclusion

The judiciary has persistently disagreed about the appropriate role of interveners in appellate litigation since the adoption of the *Charter*. While that debate originally took place within the context of a new bill of rights, the passage of time resulted in much clearer legal doctrine and therefore less judicial demand for intervener submissions. The shifting nature of constitutional jurisprudence

101 Young at pp 641-642 (identifying the limits of the adversarial system in the confines of finding social facts).

102 Wilson at pp 242-243. While she identified lawyers' being ill-equipped to interpret a bill of rights at that time, the same criticism is apparent from a review of legal education and the proper understanding, presentation, and use of social science evidence. Perryman makes this point more directly. See Perryman at p 175 ("[t]here is an important role here, currently under-realized, for law schools and professional development organizations to train future lawyers and current lawyers to become literate and effective consumers of social science research").

nevertheless brought new challenges. The increased relevance and use of social science evidence to constitutional challenges raises the question: are judges now in a similar position as when the *Charter* was adopted due to their struggles interpreting social science evidence? In my view, this question should be answered in the affirmative. Justice Rowe's observation that interveners can apply for leave to supplement the factual record nevertheless provides a useful starting point for balancing the efficiency and fairness concerns relevant to determining the appropriate role of interveners. This is especially necessary for constitutional challenges given the increasingly dispositive nature of social science evidence in those cases and the broader interest of the public in ensuring that constitutional cases are decided with an informed evidentiary record.