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HEARING FRIENDLY VOICES: A CASE FOR INCREASED INDIGENOUS CONSTITUTIONAL INTERVENTION BEFORE THE HIGH COURT OF AUSTRALIA

Abstract

Amidst heightened contemporary debate over mechanisms to improve Indigenous democratic engagement, the vehicle of constitutional intervention warrants study. This article proposes that increased Indigenous intervention in constitutional litigation may prove a valuable tool for increased Indigenous influence over Indigenous affairs. Given the scarcity of empirical scholarship in this field, quantitative and qualitative analysis is undertaken on the High Court's approach to Indigenous interventions in constitutional cases between January 2012 and June 2023. Despite historic criticism of the High Court's reluctant and inconsistent approach towards non-party intervention generally, this analysis suggests the Court may hold a larger-than-anticipated appetite to hear from Indigenous voices in constitutional litigation. Subsequently, by drawing on the expansive constitutional intervention practice by Aboriginal Canadians in the Supreme Court of Canada, an argument is advanced for increased Indigenous interventions in the High Court. Three distinct advantages are identified from such practice: (1) the clarification of 'constitutional facts'; (2) the provision of pertinent 'social facts'; and (3) its normative value. This article concludes with consideration of the divergent constitutional frameworks and procedures between Canada and Australia as potential — but arguably not fatal — impediments to increased Indigenous constitutional intervention in Australia.

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I Introduction

As the 'existential prayer' to better engage and amplify Indigenous voices within Australia's democratic system continues unfulfilled,[1] the potential for increased constitutional intervention by Indigenous Australians in the High Court of Australia warrants study. Intervention is a legal procedure through which non-party individuals or groups may seek the leave of the court to be heard in proceedings — either as an 'amicus curiae' (literally, 'friend of the court') or 'intervener'.[2] Historically, influenced by the predominant paradigm of legal formalism and the strictures of the adversarial litigation tradition, the High Court has displayed reluctance to permit non-party participants in constitutional proceedings.[3] This practice contrasts starkly with the permissive intervention attitudes of final courts of other jurisdictions, including the Supreme Court of Canada, which has enabled increased influence by native groups in constitutional rights adjudication.[4]

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1 Noel Pearson, 'A Rightful Place: Race, Recognition and a More Complete Commonwealth' (2014) 55 (September) *Quarterly Essay* 1, 2. See also: Kirstie Parker, 'Building a New, Better Legacy' in Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Publishing, 2016) 76, 77–9; Shireen Morris, '"The Torment of Our Powerlessness": Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs' (2018) 41(3) *University of New South Wales Law Journal* 629, 632–5 ('The Torment of Our Powerlessness'); Melissa Castan, 'Constitutional Recognition, Self-Determination and an Indigenous Representative Body' (2015) 8(19) *Indigenous Law Bulletin* 15, 15–17.

2 Dorne J Boniface, 'More Changes Proposed in Addition to the Changes Already Proposed: The Human Rights and Responsibility Commission — a Friend in Need?' (1999) 5(1) *Australian Journal of Human Rights* 235, 237–8, 247–8; Patrick Keyzer, 'Participation of Non-Party Interveners and *Amici Curiae* in Constitutional Cases in Canadian Provincial Courts: Guidance for Australia?' in Linda Cardinal and David Headon (eds), *Shaping Nations: Constitutionalism and Society in Australia and Canada* (University of Ottawa Press, 2002) 273, 274–81. See generally Macy Mirsane, 'The Roles of Amicus Curiae (Friend of the Court) in Judicial Systems with Emphasis on Canada and Alberta' (2022) 59(3) *Alberta Law Review* 669, 670–7.

3 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 331 (Dixon J); *Bropho v Tickner* (1993) 40 FCR 165, 172 ('*Bropho*'); Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13(3) *Monash University Law Review* 149, 156–8; Ernst Willheim, 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' (2011) 22(3) *Bond Law Review* 126, 127–34 ('Amici Curiae and Access to Constitutional Justice'); Benjamin Robert Hopper, '*Amici Curiae* in the United States Supreme Court and the Australian High Court: A Lesson in Balancing Amicability' (2017) 51(1) *John Marshall Law Review* 81, 82.

4 See: Jillian Welch, 'No Room at the Top: Interest Group Intervenors and *Charter* Litigation in the Supreme Court of Canada' (1985) 43(2) *University of Toronto Faculty of Law Review* 204, 221; Benjamin RD Alarie and Andrew J Green, 'Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance' (2010) 48(3–4) *Osgoode Hall Law Journal* 381, 398–9; Kathryn Chan and Howard Kislowicz, 'Divine Intervention: Narratives of Norm Entrepreneurship in Canadian Religious Freedom Litigation' (Pt 2) (2021) 44(2) *Dalhousie Law Journal* 509, 527–8 ('Divine Intervention (Pt 2)').

In the contemporary context, while the High Court's relatively low[5] and inconsistent intervention rates continue to be criticised,[6] its attitude towards Indigenous interveners and amici in constitutional litigation is uncertain. The High Court rarely provides reasons for granting (or refusing) discretionary leave to non-party participants to constitutional intervention.[7] Moreover, unlike well-established practices in the United States[8] and Canada,[9] empirical study of non-party intervention in Australia is nascent.[10] Consequently, notwithstanding a breadth of valuable academic commentary on non-party intervention generally, there exists little quantitative basis from which to ascertain the High Court's appetite for Indigenous constitutional intervention and undertake qualitative analysis to explore its reasoning.

This article seeks to provide a modest contribution to this lacuna in literature. In doing so, it argues that increased Indigenous intervention in constitutional litigation

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5 Enid Campbell, 'Intervention in Constitutional Cases' (1998) 9(4) *Public Law Review* 225, 258; George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28(3) *Federal Law Review* 365, 386–7 ('The Amicus Curiae and Intervener'); Jason Pierce, 'The Road Less Travelled: Non-Party Intervention and the Public Litigation Model in the High Court' (2003) 28(2) *Alternative Law Journal* 69, 71; Jason L Pierce, David L Weiden and Rebecca D Wood, 'The Changing Role of the High Court of Australia' (Conference Paper, Research Committee on Comparative Judicial Studies, International Political Science Association, 22 June 2010) 3, 30; Hopper (n 3) 85; Ruth Parsons and Darren R Halpin, 'Organised Interests and the Courts: Non-Party Access to the High Court of Australia between 2012 and 2017' (2022) 68(4) *Australian Journal of Politics and History* 544, 552.

6 See, eg: Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 (October) *Law Quarterly Review* 537; Pierce (n 5); Hopper (n 3); Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3); Williams, 'The Amicus Curiae and Intervener' (n 5).

7 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing To Sue for Public Remedies*, (Report No 78, 1996) 70–1 [6.36]; MG Sexton, 'Intervention' in Graeme Blank and Hugh Selby (eds), *Appellate Practice* (Federation Press, 2008) 107, 108; Pierce, Weiden and Gill (n 5) 6; Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 127; Williams, 'The Amicus Curiae and Intervener' (n 5) 376–7.

8 See, eg: Joseph D Kearney and Thomas W Merrill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' (2000) 148(3) *University of Pennsylvania Law Review* 743; Linda Sandstrom Simard, 'An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism' (2008) 27(4) *Review of Litigation* 669; Ronald Mann and Michael Fronk, 'Assessing the Influence of Amici on Supreme Court Decision Making' (2021) 18(4) *Journal of Empirical Legal Studies* 700.

9 See, eg: Alarie and Green (n 4); Donald R Songer, John Szmer and Susan W Johnson, 'Explaining Dissent on the Supreme Court of Canada' (2011) 44(2) *Canadian Journal of Political Science* 389.

10 A total of six empirical studies have been identified which capture *any* data on non-party intervention in Australia to date: see above n 5. Only Williams, 'The Amicus Curiae and Intervener' (n 5) and Enid Campbell (n 5) distinguish intervener participation in constitutional and non-constitutional cases.

may not only be more feasible than presumed, but desirable on pragmatic and normative bases.

Part II distinguishes the roles and rights of the Australian amicus curiae and intervener, and the legal tests for, and judicial attitudes towards, their appearance before the High Court. Thereafter, empirical analysis is undertaken on all prospective and successful Indigenous amici and interveners to constitutional proceedings in the High Court between January 2012 and June 2023. Notably, the results of this research contrast with existing criticism of the Court's generally reluctant intervention practice, and as such, offer tentative encouragement for increased Indigenous intervention applicants in future constitutional litigation.

Part III considers the potential benefits from bolstered Indigenous interventions in Australia, by critically examining the comparative role of Aboriginal[11] interventions in constitutional cases before the Canadian Supreme Court. The Supreme Court serves as an ideal comparator, given among other practices, its permissive approach[12] and well-developed procedures[13] regarding Aboriginal constitutional intervention. Three benefits are identified and examined in further detail. First, as demonstrated in the case studies of *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* ('*Ktunaxa*')[14] and *R v Sharma* ('*Sharma*'),[15] Aboriginal interveners can enhance the quality of constitutional adjudication through the clarification of 'constitutional facts'. Further, as observed in *R v Boudreault* ('*Boudreault*'),[16] it is demonstrated how Aboriginal intervener submissions (ie 'factums') can enrich judicial deliberation through the provision of germane 'social facts',[17] alerting the Court to potentially detrimental constructional choices. Finally, Aboriginal interventions can offer distinct normative benefits, publicly signalling judicial respect for the principle of democratic inclusion and reinforcing the dignity and self-respect of those permitted to intervene.

Part IV engages with notable distinctions between the Canadian and Australian constitutions and procedural practices as potential impediments to the benefits of an enhanced Indigenous intervention practice in the High Court. First, the deliberately scarce substantive individual and Indigenous rights prescribed under the *Australian Constitution* as distinguished from the *Canadian Charter of Rights and Freedoms*

11 'Aboriginal peoples' includes the 'Indian, Inuit and Métis peoples of Canada': *Canada Act 1982* (UK) c 11, sch B s 35(2) ('*Constitution Act 1982*').

12 Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (State University of New York Press, 2002) 39; Alarie and Green (n 4) 399.

13 Gary Magee, 'Trends in Applications for Leave To Intervene in the Supreme Court of Canada' (2009) 25(1) *National Journal of Constitutional Law* 205, 208.

14 [2017] 2 SCR 386 ('*Ktunaxa*').

15 420 CCC (3d) 1 ('*Sharma*').

16 [2018] 3 SCR 599 ('*Boudreault*').

17 For discussion on the definition of 'social facts' and examples, see below Pt III(C).

('*Charter*')[18] and *Constitution Act*[19], may constrain the functional role of Indigenous interventions. Second, in contrast to the Canadian practice, the lack of procedural clarity in the tests governing admission for intervention to the High Court has the potential to impede the Court's appropriate use and evaluation of information from Indigenous submissions. Finally, there is uncertainty whether and on what basis the High Court may ascertain and rely on social facts provided by interveners in its constitutional adjudication.

There are important implications for examining this topic. It is widely recognised that proper Indigenous representation and consultation are necessary to close the gap and effect legitimate and sustainable Indigenous policy.[20] More substantive mechanisms to this end will and must continue to be agitated.[21] However, constitutional intervention may provide a valuable accompaniment with which to amplify Indigenous voices in future constitutional rights adjudication affecting Indigenous affairs.

II Interventions before the High Court of Australia

Non-parties without a statutory right to intervene in constitutional litigation before the High Court of Australia[22] may seek discretionary leave to appear via the procedures of amicus curiae or intervener.[23] However, the High Court's purported reluctance to

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18 *Canada Act 1982* (UK) c 11, sch B pt I ('*Charter*').

19 *Constitution Act 1982* (n 11).

20 See, eg: Commonwealth, *Closing the Gap Report 2020* (Report, 2020) 9–10; Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament To Consult with Indigenous Peoples When Making Laws for Indigenous Affairs' (2015) 26(1) *Public Law Review* 166, 170–3 ('The Argument for a Constitutional Procedure'); MC Dillon, 'Co-Design in the Indigenous Policy Domain: Risks and Opportunities' (Discussion Paper No 296/2021, Centre for Aboriginal Economic Policy Research, Australian National University, 2021) 7–10.

21 See, eg: National Indigenous Australians Agency, 'Referendum on an Aboriginal and Torres Strait Islander Voice' (Web Page) <https://www.niaa.gov.au/indigenous-affairs/referendum-aboriginal-and-torres-strait-islander-voice>; Referendum Council, 'Uluru Statement from the Heart' (First Nations National Constitutional Convention, 26 May 2017); Asmi Wood, 'Australia and Pandemics v BLM: No, *Love* Lost (at the High Court)' (Pt 2) (2021) 46(4) *Alternative Law Journal* 314, 316–19; Shireen Morris and Harry Hobbs, 'Imagining a Makarrata Commission' (2022) 48(3) *Monash University Law Review* 19.

22 Cf Commonwealth, State and Territory Attorneys-General: *Judiciary Act 1903* (Cth) s 78A(1). Further, special-purpose Commissioners including the Human Rights Commissioner may seek leave to appear before the Federal Court and Federal Circuit and Family Court of Australia (Division 2) as amicus curiae per s 46PV of the *Australian Human Rights Commission Act 1986* (Cth). The Australian Human Rights Commission ('AHRC') may seek the leave of a court to intervene in proceedings involving human rights issues: at s 11(1)(o).

23 *Levy v Victoria* (1997) 189 CLR 579, 603–5 (Brennan CJ) ('*Levy*'); Sexton (n 7) 108.

exercise discretionary grants of leave to permit non-party intervention has been the subject of sustained criticism.[24] While such critique finds some support in earlier empirical research, the methodology of existing studies limits insight into the High Court's contemporary attitude towards *Indigenous* constitutional intervention. In addressing this gap, empirical analysis is undertaken on prospective and successful non-party Indigenous interventions before the High Court between 1 January 2012 and 12 June 2023.[25] Notably, the results of this analysis depart from longstanding critiques of the High Court's aversion to non-party constitutional intervention generally. Accordingly, it is proposed that the High Court holds a wider-than-anticipated appetite to hear from Indigenous voices in constitutional adjudication.

A *Distinguishing the Australian Amicus Curiae and Intervener*

Contrasting the contemporary trend across many common law jurisdictions to blur the historically discrete concepts of intervener and amicus curiae,[26] the Australian practice has been to maintain some doctrinal distinction between their roles, rights and rules to participation.[27]

1 *Amicus Curiae: Roles, Rights and Tests for Entry*

The amicus curiae in early English common law was typically a 'disinterested bystander', counsel appointed to assist the court by providing relevant information on law or fact overlooked or otherwise unavailable to the parties.[28] In contrast, the modern Australian iteration of the amicus curiae can engage in partisan advocacy[29] and typically seeks to be heard on the basis that the general issues as identified by the parties 'may indirectly affect it, or those associated with or like it'.[30] While the modern amicus may lack the impartial neutrality of its predecessors, its role is

24 *Levy* (n 23) 650–1 (Kirby J); *A-G (Cth) v Breckler* (1999) 197 CLR 83, 135–6 [106] (Kirby J); Kirby (n 6); Pierce (n 5); Hopper (n 3); Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3); Williams, 'The Amicus Curiae and Intervener' (n 5); Boniface (n 2) 252–3.

25 For comments on methodology, see below Part II(B)(1).

26 Philip L Bryden, 'Public Interest Intervention in the Courts' (1987) 66(3) *Canadian Bar Review* 490, 496; Edward Clark, 'The Needs of the Many and the Needs of the Few: A New System of Public Interest Intervention for New Zealand' (2005) 36(1) *Victoria University of Wellington Law Review* 71, 81; S Chandra Mohan, 'The *Amicus Curiae*: Friends No More?' [2010] (2) *Singapore Journal of Legal Studies* 352, 353.

27 Kirby (n 6) 543–4.

28 Williams, 'The Amicus Curiae and Intervener' (n 5) 368. See also Samuel Krislov, 'The Amicus Curiae Brief: From Friendship to Advocacy' (1963) 72(4) *Yale Law Journal* 694, 694–5.

29 Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20(1) *Adelaide Law Review* 159, 161 ('Interveners and Amici Curiae'); Williams, 'The Amicus Curiae and Intervener' (n 5) 368.

30 Kirby (n 6) 543.

frequently confined to assisting the court by drawing attention to some aspect of a case otherwise not presented by parties.[31]

Procedurally, amici appearing before the High Court are not joined as parties,[32] and therefore lack the accompanying rights and liabilities — including leading evidence, calling and examining witnesses and subjection to costs orders.[33] Their appearances are highly circumscribed, ordinarily limited to written submissions or, in exceptional circumstances, time-limited oral arguments on discrete issues.[34] Moreover, as non-parties, principles of natural justice do not apply to amici, and the High Court is not obliged to consider submissions they place before the Court.[35]

The common law test for granting discretionary leave for an amicus curiae is articulated in *Levy v Victoria* ('*Levy*').[36] There, Brennan CJ observed that an amicus curiae must satisfy the Court that 'it will be significantly assisted' by the amicus's submissions, and that 'any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected'.[37] The threshold of 'significant assistance' appears to require that the amicus curiae provide a distinct submission from those arguments already before the Court.[38] In *Wurridjal v Commonwealth* ('*Wurridjal*'), French CJ stated that the Court

> may be assisted where a prospective amicus curiae can present arguments on aspects of a matter before the Court which are *otherwise unlikely to receive full or adequate treatment by the parties* because (a) it is not in the interests of the parties to present argument on those aspects or (b) one or other of the parties lacks the resources to present full argument to the Court on them.[39]

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31 *Bropho* (n 3) 172; Boniface (n 2) 248; Ronnit Redman, 'Litigating for Gender Equality: The Amicus Curiae Role of the Sex Discrimination Commissioner' (2004) 27(3) *University of New South Wales Law Journal* 849, 851; Christopher Staker, 'Application To Intervene as Amicus Curiae in the High Court' (1996) 70(5) *Australian Law Journal* 387, 387–9.

32 *Re Medical Assessment Panel; Ex parte Symons* (2003) 27 WAR 242, 250 [19]–[20] (Heenan J); Andrea Durbach, Isabelle Reinecke and Louise Dargan, 'Enabling Democracy: The Role of Public Interest Litigation in Sustaining and Preserving the Separation of Powers' (2020) 26(2) *Australian Journal of Human Rights* 195, 203.

33 Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 135; Sexton (n 7) 109–10; Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Discussion Paper No 80, March 2014) 227–8 [15.38].

34 Sir Anthony Mason, 'Interveners and Amici Curiae in the High Court: A Comment' (1998) 20(1) *Adelaide Law Review* 173, 174 ('Interveners and Amici Curiae'); Kirby (n 6) 543–4.

35 Mason, 'Interveners and Amici Curiae' (n 34) 174; Angel Aleksov, 'Intervention in Constitutional Cases' (2012) 86(8) *Australian Law Journal* 555, 555.

36 *Levy* (n 23).

37 Ibid 604–5.

38 Transcript of Proceedings, *Clubb v Edwards* [2018] HCATrans 181.

39 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 312 (emphasis added) ('*Wurridjal*').

His Honour further observed that '[i]n some cases it may be in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer'.[40] However, the parameters of such a larger view remain untested.[41]

The degree of difference required of a prospective amicus' submissions from those of parties to meet the threshold of 'significant assistance', or afford the Court a 'larger view', appears substantial in practice. Commentators have varyingly characterised the High Court's policy towards amici as 'anaemic',[42] 'conservative',[43] and 'ad hoc'.[44] Justice Kirby has characterised the High Court's amicus policy as 'hostile',[45] while Jason Pierce suggests the Court's view of an amici's prospective input to its adjudicative task is an 'unnecessary distraction'.[46] The resultant effect of the Court's approach has been to 'place formidable obstacles in the way of' amici interventions.[47]

Such criticisms appear supported by quantitative data. Pierce found that in the fifty-year period between 1947 and 1997, amici were granted leave to appear in a mere 15 cases before the High Court.[48] Further, notwithstanding a marginal increase in admissions in the subsequent period, Benjamin Hopper has observed that amicus curiae have 'remain[ed] largely unwelcome at the High Court'.[49] Between 2010 and 2017, successful amicus curiae applications were made in only 24 cases, equating to appearances in just 5.5% of the Court's total case load.[50] Consistent with this low trend, only three amici applications were successful in 2018.[51]

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40 Ibid.

41 See Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 134. This has not prevented counsel relying on this basis to seek admission as an amicus, for example, see: The National Congress of Australia's First Peoples Ltd, 'Submissions of the National Congress of Australia's First Peoples Ltd Seeking Leave To Intervene as an Amicus Curiae', Submission in *Maloney v The Queen*, B57/2012, 28 November 2012, 1 [5].

42 Pierce (n 5) 70.

43 Christopher Goff-Gray, 'The Solicitor-General in Context: A Tri-Jurisdictional Study' (2012) 23(2) *Bond Law Review* 48, 78–9.

44 Henry Burmester, 'Interveners and *Amici Curiae*' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 356, 357.

45 Kirby (n 6) 537.

46 Pierce (n 5) 70.

47 Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 137.

48 Pierce (n 5) 70.

49 Hopper (n 3) 85.

50 Ibid.

51 *AB (a Pseudonym) v CD (a Pseudonym)* (2018) 362 ALR 1; *Republic of Nauru v WET040* (2018) 361 ALR 405; *Republic of Nauru v WET040 [No 2]* (2018) 362 ALR 235.

2 *Interveners: Roles, Rights and Tests for Entry*

In contrast to the amicus curiae, prospective interveners granted discretionary leave to appear before the High Court are joined as parties to proceedings.[52] Reflecting the common law tradition characterising litigation as a private controversy between those with a 'genuine grievance',[53] an intervener participates on the basis that their interests would be directly, or 'indirect[ly] and contingent[ly]' but 'substantial[ly]', affected by the decision.[54]

Here, it is necessary to distinguish non-parties seeking to intervene as 'of right', and those joined at the discretion of the court. As Brennan CJ stated in *Levy*, prospective interveners whose legal interests would be *directly* affected have an absolute right to intervene on natural justice principles, which entitles their appearance to protect their interest liable to be affected.[55] Thus interventions by parties directly affected by a constitutional proceeding are not reliant on the High Court's grant of discretionary leave.[56]

In contrast, the following commentary guides grants of discretionary leave for prospective interveners with an 'indirect' but substantial affectation of interest. The High Court has stated that a prospective intervener will meet the requisite interest in a High Court matter if that matter determines legal principles or law governing pending proceedings in a lower court to which the intervener is a party.[57] Further, in addition to the requisite interest, the prospective intervener must show that the existing parties 'may not present fully the submissions on a particular issue'.[58] That is, the intervener applicant must provide information which the Court 'should have to assist it to reach a correct determination' or 'prevent an error that would affect the interests of the intervener'.[59] Subsequently, submissions 'merely repetitive' of those provided by parties[60] or those seeking 'to expand the scope of the issues in contest' will be denied.[61]

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52 Kenny, 'Interveners and Amici Curiae' (n 29) 159.

53 *A-G (The Gambia) v N'Jie* [1961] AC 617, 634 (Lord Denning).

54 *Levy* (n 23) 602.

55 Ibid 601.

56 Ibid 601, 603; Michael Douglas, 'The Media's Standing To Challenge Departures from Open Justice' (2016) 37(1) *Adelaide Law Review* 69, 91–2. Similarly, those with a statutory right to intervene have an automatic, non-discretionary right of intervention, for example in the case of Commonwealth and State Attorneys-General in constitutional matters: *Judiciary Act 1903* (Cth) s 78A.

57 *Levy* (n 23) 602.

58 Ibid 603.

59 Ibid.

60 Ibid 603–4.

61 Aleksov (n 35) 562.

If no terms are imposed on the scope of their involvement as parties, the rights and liabilities of an intervener can be expansive. Interveners may properly engage with and seek to influence the legal process by filing pleadings, adducing evidence, calling and examining witnesses, presenting extensive oral arguments and exercising their rights to appeal.[62] Further, interveners will be subject to costs orders and are bound by the Court's judgment.[63]

However, notwithstanding some reported increase of discretionary interventions before the High Court in the last two decades,[64] a more liberal approach to permitting interventions has not been found in the Court's contemporary practice.[65] Scholars have characterised the Court's approach to interveners as remaining very 'restrictive',[66] and 'reluctant',[67] where a 'negative judicial approach has substantially persisted'.[68] Pierce notes that only 'a paltry number of discretionary interventions' have been granted.[69] As such, the High Court's broader pattern towards discretionary interveners has 'not encouraged [their] wider participation in cases in which constitutional issues are raised'.[70] The ultimate effect has been to 'den[y] the intervener … meaningful function'.[71]

Limited empirical research exists on the High Court's grants of discretionary leave towards interveners.[72] Moreover, the methodological design of existing studies prevents more specific inferences being drawn on the Court's attitude towards Indigenous interveners and amici. Studies to date have overwhelmingly aggregated data on successful amici and intervener rates, rather than isolating data on successful interveners alone.[73] No research has assessed successful Indigenous amici and intervener rates as a proportion of the total number of Indigenous amici

62 Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 135.

63 Ibid; *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534–5; Sexton (n 7) 109.

64 Parsons and Halpin (n 5) 550. See generally: Pierce (n 5) 70; Williams, 'The Amicus Curiae and Intervener' (n 5) 365.

65 Kirby (n 6) 547–9.

66 Clark (n 26) 89. See also Burmester (n 44) 356.

67 Sexton (n 7) 107.

68 Kirby (n 6) 544.

69 Pierce (n 5) 70. See also Parsons and Halpin (n 5) 555.

70 Enid Campbell (n 5) 263.

71 Williams, 'The Amicus Curiae and Intervener' (n 5) 365.

72 See above n 10.

73 For example, Williams categorises both amici and interveners as 'interveners' to evaluate their overall presence in constitutional and non-constitutional cases between 1980 and 1989: Williams, 'The Amicus Curiae and Intervener' (n 5). Similarly, Pierce identifies both amici and interveners under the term 'non-party intervention'/'private intervention' to assess the average annual rates of intervention in the High Court between 1946 and 2001: Pierce (n 5).

or intervener applicants before the High Court.[74] Existing scholarship does suggest an overall year-on-year growth in the total discretionary interventions permitted before the High Court from the latter half of the 20th century.[75] However, the extent to which this increase is attributable to the rise in the number of intervener and/or amici applicants or the High Court's greater permissiveness of each mode of intervention remains unclear.

B *Indigenous Amici Curiae and Interveners before the High Court, 2012–23*

1 *Methodology*

The below discussion provides an empirically grounded analysis of the High Court's discretionary grants of leave for Indigenous interventions in constitutional litigation between January 2012 and June 2023. To do so, all constitutional cases[76] in which an Indigenous amicus or intervener application was made within the selected date range were identified, and the outcome of that application recorded. Pragmatic considerations informed the selected date range for this study to commence in 2012. Most significantly, the necessary records (including transcripts and submissions) to identify relevant constitutional cases involving Indigenous intervention applicants pre-2012 are only held in hard copy in archives and registries around Australia.[77]

To identify all relevant Indigenous amici and intervener applications, every case record reported on the High Court's website[78] was reviewed to determine whether a s 78B 'Notice of a Constitutional Matter' had been filed. For cases meeting this criterion, a text search with the operators 'amic!', 'interven!', 'Aborigin!' and 'Indigen!' was conducted against the case record and its accompanying judgments and transcripts. Case transcripts were reviewed out of an abundance of caution given the Court rarely mentions unsuccessful amicus curiae or intervener applicants in judgments proper. For constitutional cases in which an Indigenous amicus curiae or intervener application was filed, the accompanying application, transcript and judgment were read, and the outcome of the application recorded as a grant or refusal of leave. For the purposes of this study, 'Indigenous amicus curiae' or 'Indigenous interveners' were defined as any individual or group seeking intervention to

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74 Most relevantly, Ruth Parsons and Darren R Halpin's study does not distinguish Indigenous amici and intervener applicants from other non-party participants: Parsons and Halpin (n 5).

75 Pierce (n 5) 71; Williams, 'The Amicus Curiae and Intervener' (n 5) 387, 389.

76 Proceedings involving a matter arising out of the *Australian Constitution* or involving its interpretation within the meaning of ss 78A–78B of the *Judiciary Act 1903* (Cth).

77 Parsons and Halpin (n 5) 560. The High Court website is intermittently updated with filed documents from earlier constitutional cases. At the time of publication, the submissions and transcripts of matters heard from February 2011 were accessible on the 'Cases Decided' page: 'Cases Decided', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/cases/cases-heard>.

78 'Cases Decided', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/cases/cases-heard>.

represent the views of any Aboriginal and Torres Strait Islander community, or provide any relevant information to protect and/or advance Aboriginal and Torres Strait Islander rights.[79] The results of this study are examined below.

2 *Amicus Curiae: Four Applications, Two Allowances*

Between 2012 and 2023, only six Indigenous amicus curiae applications were made to the High Court,[80] of which four were made in a case involving a constitutional issue.[81] Notably, all four applicants were granted leave to appear as a non-party participant in some form (ie discretionary intervener or amicus curiae), however only two applicants were granted leave to appear as amicus curiae.[82]

In *Maloney v The Queen* ('*Maloney*'),[83] the High Court was required to consider whether s 168B of the *Liquor Act 1992* (Qld) in its application to Aboriginal persons on Palm Island was inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth) ('*Racial Discrimination Act*'), and to that extent of the inconsistency, invalid under s 109 of the *Australian Constitution*.[84] The effect of sch 1R of the *Liquor Regulation 2002* (Qld) was to restrict the nature and quantity of liquor that persons could have in their possession in public areas on Palm Island — a community almost entirely comprised of Indigenous people.[85] In this matter, the National Congress of Australia's First Peoples Ltd ('National Congress') sought and was granted leave to appear as amicus curiae.[86]

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79 This definition captures the AHRC, an independent statutory body initially established under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), as enacted. Cf Parsons and Halpin (n 5), who categorise the AHRC as a 'quasi-government interest' given its 'existence … depends on the continued support of the government': at 553. Given the explicit statutory functions of the AHRC in the *Australian Human Rights Commission Act 1986* (Cth) to seek the leave of the court to intervene in any proceedings involving human rights issues (s 11(1)(o)), and 'to promote discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders' (s 46C(1)(b)), the AHRC has been considered an 'Indigenous intervener' for the purposes of this article.

80 *Maloney v The Queen* (2013) 252 CLR 168 ('*Maloney*'); *Western Australia v Brown* (2014) 253 CLR 507; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 ('*NAAJA*'); *Singh v The Queen* (2020) 381 ALR 198 (heard together with *Nguyen v The Queen* (2020) 269 CLR 299); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* (High Court of Australia, S192/2021, commenced 29 November 2021) ('*Montgomery*'); *BDO v The Queen* (2023) 409 ALR 152.

81 *Maloney* (n 80); *NAAJA* (n 80); *Montgomery* (n 80).

82 In *Montgomery*, the AHRC applied to be heard as amicus curiae and was granted leave to appear as intervener, while the Northern Land Council sought leave to be heard as intervener or alternatively as amicus curiae, and was accepted as an intervener.

83 *Maloney* (n 80).

84 Ibid 176–7 [1]–[6].

85 Ibid 176 [2].

86 Transcript of Proceedings, *Maloney v The Queen* [2012] HCATrans 342.

Absent reasons for its decision,[87] the High Court's motivation for admitting the National Congress as amicus curiae is uncertain. However, insight may be gleaned from the National Congress' submissions. In addressing the requirement for amici to offer 'significant assistance' to the Court to be admitted, the National Congress stressed its role as 'the national representative body' for the 'political, social, cultural and environmental interests of Aboriginal and Torres Strait Islander peoples'.[88] Further, in seemingly addressing the latter elements of the amici admission test, it proposed that it could provide distinct perspective on the legal issues at hand from a 'broader range of potentially affected people'.[89] Further, it emphasised its possession of 'specialist subject matter expertise' to enable a 'larger view of the matter', including through its knowledge of international instruments as applicable to the impugned provisions of the *Racial Discrimination Act*.[90] Evidently, the Court was persuaded by one or more of these arguments.

North Australian Aboriginal Justice Agency Ltd v Northern Territory ('*NAAJA*') involved a constitutional challenge to div 4AA of pt VII of the *Police Administration Act* (NT).[91] The plaintiffs were the North Australian Aboriginal Justice Agency, and Maria Bowden, the latter of whom had been held in custody for nearly twelve hours under div 4AA and issued a substantial infringement notice on release.[92] Section 133AB of div 4AA empowered a member of the Northern Territory Police Force, who had arrested a person without warrant, on the basis of an offence for which an infringement notice can be issued, to hold that person in custody for up to four hours, or longer if the person is intoxicated.[93] The section also provided 'for the person to be released unconditionally, released and issued with an infringement notice, released on bail or brought before a justice or court for the offence for which he or she was arrested or any other offence allegedly committed by the person'.[94] The plaintiffs sought a declaration of invalidity of div 4AA on the basis that, inter alia, it conferred on the executive of the Northern Territory a power of detention

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87 The full exchange below between the amicus applicant and the High Court typifies recorded reasons provided by the Court for a grant of leave:

> Ms MJ Richards: May it please the Court, I appear with my learned friend, Ms SM Fitzgerald, for the National Congress of Australia's First Peoples Limited, seeking leave to appear as amicus.
>
> French CJ: Ms Richards, you will have leave on the same basis as I have indicated to Ms Eastman in relation to any oral submissions you might wish to put.
>
> Ms Richards: May it please the Court.

88 The National Congress of Australia's First People Ltd (n 41) 1 [6].

89 Ibid 2 [8].

90 Ibid 1–2 [5]–[6].

91 *NAAJA* (n 80) 579 [4].

92 Ibid 578–9 [3].

93 Ibid 578 [2].

94 Ibid.

which undermined or interfered with the institutional integrity of the Northern Territory courts in a manner contrary to the *Australian Constitution*.[95]

In *NAAJA*, the Australian Human Rights Commission ('AHRC') sought and was granted leave to appear as amicus curiae.[96] While the Court did not provide reasons for its decision, in addressing the test for admission, the AHRC emphasised its distinct expertise to provide unique insights from international human rights jurisprudence regarding the importance of the judicial role in protecting the right to liberty.[97] Such insights, it proposed, were relevant to the Court's deliberations insofar as they were consistent with the common law concepts of judicial power, process and the institutional integrity of courts for the purpose of ch III of the *Australian Constitution*.[98]

Limited inference can be drawn on the High Court's attitude towards Indigenous amici admissions in constitutional cases from its decisions in *Maloney* and *NAAJA* alone. However, the Court's approach in *Maloney* and *NAAJA* does challenge critics who have explicitly or impliedly attributed the limited appearances of amici before the High Court to the Court's reluctance to permit amicus curiae.[99] To this end, the above findings raise the prospect that the low record of successful Indigenous amici in constitutional proceedings in the studied period is at least in part attributable to the low rates of Indigenous amici applicants.

3 *Interveners: Five Applicants, Five Allowances*

Between 2012 and 2023, Indigenous interveners applied to be joined as parties in six matters before the High Court,[100] of which four matters involved a constitutional issue.[101] Significantly, all but one Indigenous intervener applicant in the four constitutional cases was granted discretionary leave to appear.[102]

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95 Ibid 579–80 [8].

96 Australian Human Rights Commission, 'Proposed Submissions of the Australian Human Rights Commission Seeking Leave To Intervene (Annotated)', Submission in *North Australian Aboriginal Justice Agency Ltd v Northern Territory*, M45/2015, 13 July 2015, 2 [9]. The AHRC sought leave for discretionary intervention or appearance as amicus curiae in the alternative.

97 Ibid 3 [10]–[11].

98 Ibid [20]–[51].

99 Cf: Hopper (n 3) 85; Pierce (n 5) 70.

100 *Akiba v Commonwealth* (2013) 250 CLR 209; *Karpany v Dietman* (2013) 252 CLR 507 ('*Karpany*'); *Maloney* (n 80); *Northern Territory v Griffiths* (2019) 269 CLR 1.

101 *Karpany* (n 100); *Maloney* (n 80); *NAAJA* (n 80); *Montgomery* (n 80).

102 The AHRC in *Maloney* (n 80); the National Native Title Council ('NNTC'), and the Northern Land Council ('NLC') in *Montgomery* (n 80); South Australian Native Title Services Ltd in *Karpany* (n 100); the AHRC sought leave as an amicus and was accepted as intervener in *Montgomery* (n 80); the AHRC in *NAAJA* sought leave as an intervener or amicus and was accepted as amicus: see above n 96 and accompanying text.

The High Court provided no substantive reasons on record for granting leave for each of the Indigenous intervener applicants. Subsequently, reliance must again be had on the interveners' submissions to draw insight into the practical application of the test guiding their admission. Notably, the Court appears to have flexibly applied the requirement for applicants to demonstrate their 'substantial affectation' of interest when seeking discretionary leave to intervene.

For example, in both of its submissions, the AHRC articulated its interest at a high level of generality. In *Maloney*, the AHRC submitted that the proceedings involved 'issues of general principle and public importance that may affect, to a significant extent, persons other than' the parties.[103] Similarly, in *Montgomery*,[104] the AHRC argued that their 'participation [wa]s particularly apt here given that … the scope of any Commonwealth "power to determine who is a member of the Australian body politic", involves issues of public importance which may significantly affect individuals other than the Respondent'.[105]

The level of affectation as articulated by the AHRC is contrasted with the two other intervener applicants in *Montgomery*. In that matter, the Court was invited to consider, inter alia, whether its earlier decision in *Love v Commonwealth* ('*Love*')[106] should be overturned, including the ruling that 'Aboriginal Australians' (as understood under the tripartite test in *Mabo v Queensland [No 2]*[107]) were beyond the reach of the 'aliens power' under s 51(xix) of the *Australian Constitution*. If *Love* were not overruled, the Court was asked to consider the outer bounds of the test for an 'Aboriginal Australian' for the purpose of s 51(xix), including the relevance and scope of an individual's biological descent from Aboriginal and Torres Strait Islander persons.[108]

In seeking intervention, the National Native Title Council ('NNTC'), 'the national peak body for Aboriginal and Torres Strait Islander organisations operating in the native title sector', submitted a 'direct and substantial interest' in the proceedings.[109]

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103 Australian Human Rights Commission, 'Australian Human Rights Commission's Submissions Seeking Leave To Intervene', Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 1 [3] ('AHRC's Submission in *Maloney*').

104 *Montgomery* (n 80).

105 Australian Human Rights Commission, 'Submissions of the Australian Human Rights Commission Seeking Leave To Appear as Amicus Curiae', Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, S192/2021, 9 March 2022, 3–4 [7] ('AHRC's Submission in *Montgomery*') (citations omitted).

106 (2020) 270 CLR 152 ('*Love*').

107 (1992) 175 CLR 1.

108 Transcript of Proceedings, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* [2021] HCATrans 201.

109 National Native Title Council, 'Submissions of the National Native Title Council Seeking Leave To Intervene', Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, S192/2021, 9 March 2022, 3 [6], 5 [11] ('NNTC's Submission in *Montgomery*').

This was on the basis that the High Court's decision in *Montgomery* with respect to *Love* could remove the constitutional protections for its native title-holder constituents, if they were found to be aliens under s 51(xix).[110] Further, the NNTC stressed their interest in ensuring any development of the test characterising an 'Aboriginal Australian' should not occur without representative Indigenous voices.[111] At an equally detailed level of affectation, the Northern Land Council ('NLC') sought intervener status on the basis that the Court's determination on the importance of genetic or biological Aboriginal descent could indirectly affect how native title claims by Aboriginal Australians would be decided.[112]

A heightened degree of affectation was also argued in *Karpany v Dietman* ('*Karpany*').[113] In that matter, separate from the constitutional issue at hand, the Court was required to consider the scope of an existing Aboriginal right (including native title rights and interests to fish in South Australia).[114] Subsequently, South Australian Native Title Services Ltd applied for, and was granted intervener status on the basis that its native title-holder constituents would be affected by any determination regarding traditional practices to hunt and fish.[115]

In applying the latter elements of the intervener test for admission, the High Court accepted a wide array of material advanced by the applicants as 'distinct' information that the Court should have in either reaching a correct determination or preventing an error affecting the intervener's interests.[116] Such material may be practically categorised as providing specialist expertise or representative value.

For example, in all cases in which it sought intervention, the AHRC stressed its particular skill involving human rights issues given its statutory remit. In *Maloney* and *Montgomery*, respectively, the AHRC proposed it could provide expertise in the interpretation on the impugned provisions of the *Racial Discrimination Act*,[117] and the application of human rights instruments for Aboriginal and Torres Strait Islander peoples.[118]

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110 Ibid 2–3 [4], 5 [10], 6 [13].

111 Ibid 4–5 [7]–[9].

112 Northern Land Council, 'Proposed Submissions of the Northern Land Council', Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, S192/2021, 9 March 2022, 3 [6]–[7] ('NLC's Submission in *Montgomery*').

113 *Karpany* (n 100).

114 Ibid 513–15 [1]–[6].

115 South Australian Native Title Services, '(Proposed) Intervener's Submissions', Submission in *Karpany v Dietman*, A18/2012, 9 October 2012, 1–2 [3], [5].

116 *Levy* (n 23) 602–4; Aleksov (n 35) 562.

117 AHRC's Submission in *Maloney* (n 103) 1 [2]–[5].

118 AHRC's Submission in *Montgomery* (n 103) 3–5 [7]–[10].

With similar success, other intervener applicants emphasised their unique representative capacities to highlight the distinctiveness of their submissions otherwise unable to be presented by existing parties. In *Montgomery*, the NNTC highlighted its role as the 'only national and coordinated voice for Aboriginal and Torres Strait Islander peoples' interests in the native title sector' and its ability to speak through its board on behalf of its extensive membership base regarding the challenges of a unified position on tests of Aboriginality.[119] In a similar vein, the NLC emphasised its representative capacity as a registered Aboriginal and Torres Strait Islander body under the *Native Title Act 1993* (Cth).[120] In doing so, it submitted that it could present the viewpoint of Indigenous peoples on the potential ramifications of the inclusion of biological descent in tests of Aboriginality, for both prospective and current native title holders.[121]

The above results stand apart from wider criticisms regarding the Court's purportedly restrictive or inconsistent practice towards non-party intervention generally. Instead, it may be suggested that between 2012 and 2023, the Court demonstrated a real willingness to permit Indigenous interventions in constitutional cases. This may be evidenced in its broad interpretation of the principles guiding admissions for amici and interveners, and the high Indigenous applicant success rates. These results provide tentative encouragement for increased Indigenous intervention applications in future constitutional litigation.[122] As shown in Part III, such increased practice has the potential to provide real pragmatic and normative benefits for Indigenous applicants, the High Court and the wider Australian polity.

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119 NNTC's Submission in *Montgomery* (n 109) 5–6 [11]–[12].

120 NLC's Submission in *Montgomery* (n 112) 1 [2].

121 Ibid 4 [9].

122 Noting that such practice may be ultimately contingent on the type of constitutional case listed before the Court rather than the reluctance of intervention applicants per se. For example, Indigenous interveners are not uncommon in native title cases in the High Court, see: *Gerhardy v Brown* (1985) 159 CLR 70 ('*Gerhardy*') (intervener Anangu Pitjantjatjaraku); *Wik Peoples v Queensland* (1996) 187 CLR 1 (intervener Kimberley Land Council among others); *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677 (interveners Elizabeth King and Beryl Booth); *Fejo v Northern Territory* (1998) 195 CLR 96 (intervener Yorta Yorta Aboriginal Community among others); *Yanner v Eaton* (1999) 201 CLR 351 (intervener Miriuwung and Gajerrong People among others); *Commonwealth v Yarmirr* (2001) 208 CLR 1 (intervener Mirimbiak Nations Aboriginal Corporation among others); *Western Australia v Ward* (2002) 213 CLR 1 (intervener Yamatji Barna Baba Maaja Aboriginal Corporation among others).

III Intervention before the Supreme Court of Canada

Coinciding with the Supreme Court's acceptance of its law-making role in the post-*Charter* era,[123] Canada's well-developed system of procedural rules[124] and permissive approach to non-party intervention[125] affords rich jurisprudence from which to examine the benefits of interveners in constitutional adjudication. Combined with its model of best practice for Aboriginal rights,[126] and high rates of Aboriginal constitutional intervention,[127] a critical analysis of the Supreme Court's Aboriginal intervention[128] practice illustrates the potential utility of enhanced Indigenous interventions for the Australian context.

To this end, three distinct benefits are identified from Aboriginal amici and intervener appearances before the Supreme Court. First, Aboriginal interventions appear to have attuned the Court to Aboriginal perspectives on the operational effect of impugned laws, and in doing so clarified the constitutional facts to enhance the overall quality of adjudication. Second, Aboriginal factums have enriched judicial deliberations by providing 'social facts' which have alerted the Court to the potential detriment from constructional choices. Finally, Aboriginal interventions afford important normative benefits, by signalling judicial respect for the principle of democratic inclusion and reinforcing the dignity of Aboriginal participants in Canada's constitutional deliberations.

A *Roles, Rules and Attitudes to Entry towards Non-Party Interventions before the Supreme Court of Canada*

Before examining the comparative benefits of Aboriginal interventions in the Canadian practice, it is prudent to briefly distinguish the terminological, conceptual

123 Brodie (n 12) 17–48; Geoffrey D Callaghan, 'Intervenors at the Supreme Court of Canada' (2020) 43(1) *Dalhousie Law Journal* 33, 48–55.

124 Kathryn Chan and Howard Kislowicz, 'Divine Intervention: A Study of the Operation and Impact of Non-Governmental Interveners in Canadian Religious Freedom Litigation' (Pt 1) (2019) 90(1) *Supreme Court Law Review* (2d) 1, 4–8 ('Divine Intervention (Pt 1)'); Michelle Campbell, 'Re-Inventing Intervention in the Public Interest: Breaking Down Barriers to Access' (2005) 15(2) *Journal of Environmental Law and Practice* 187, 189–91.

125 Brodie (n 12) 47; Callaghan (n 123) 50; Magee (n 13) 206.

126 Megan Davis and Marcia Langton, 'Constitutional Reform in Australia: Recognizing Indigenous Australians in the Absence of a Reconciliation Process', in Douglas Sanderson and Patrick Macklem (eds), *From Recognition to Reconciliation* (University of Toronto Press, 2016) 449, 449–450.

127 Brodie (n 12) 39; Alarie and Green (n 4) 399.

128 Consistent with the definition adopted for 'Indigenous interveners/amici' in Part II above, 'Aboriginal interventions' have been defined in this article to include any individual or group proposing to represent the views of any Canadian Aboriginal community or provide any relevant information to protect and/or advance Canadian Aboriginal rights.

and practical dimensions of the Canadian intervention procedure from the Australian context.

Two primary types of intervention enable individuals or groups to appear in constitutional proceedings before the Supreme Court.[129] The first type, frequently dubbed 'party interveners',[130] seeks intervention to protect a direct[131] or more general (including mere precedential or public) interest in a case.[132] Added party interveners are entitled to the associated traditional rights and liabilities of parties.[133] In contrast, while the amicus curiae, or 'friend of the court interveners' may also seek to protect or advocate a partisan position,[134] they are ordinarily appointed by the Court or admitted on application, to provide information on law or fact[135] for the purpose of ensuring justice is done in the proceedings.[136] Friend of the court interveners do not receive party status, and their rights and liabilities are dictated by the Court's discretion.[137]

In practice, the distinctions between the added party and friend of the court intervener are frequently blurred, as reflected in their combined procedural rules for admission.[138] Under the *Rules of the Supreme Court of Canada* ('*Supreme Court Rules*'), intervener applicants are not distinguished, and the Supreme Court will assess both types of intervener[139] on the basis of their interest in proceedings, the position they intend to take, and their reasons for believing their submission will be 'useful to the Court and different from those' provided by other parties.[140]

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129 Michelle Campbell (n 124) 189–90. See John Koch, 'Making Room: New Directions in Third Party Intervention' (1990) 48(1) *University of Toronto Faculty of Law Review* 151, 155–8.

130 Michelle Campbell (n 124) 189–90. This kind of intervener is also termed: an 'added party': at 190; a 'public interest intervenor': FL Morton, 'The Political Impact of the Canadian Charter of Rights and Freedoms' (1987) 20(1) *Canadian Journal of Political Science* 31, 43; 'third party intervention': Koch (n 129) 152; and an 'interest group intervenor': Welch (n 4) 205.

131 Shai Farber, 'The Amicus Curiae Phenomenon: Theory, Causes and Meanings' (2019) 29(1) *Transnational Law and Contemporary Problems* 1, 9; Sarah Hannett, 'Third Party Intervention: In the Public Interest?' [2003] (Spring) *Public Law* 128, 130.

132 Hannett (n 131) 131, 145; Farber (n 131) 9; Lorne Neudorf, 'Intervention at the UK Supreme Court' (2013) 2(1) *Cambridge Journal of International and Comparative Law* 16, 21; Clark (n 26) 84.

133 Michelle Campbell (n 124) 190.

134 Ibid; Mirsane (n 2) 682–5.

135 *Ontario v Criminal Lawyers' Association of Ontario* [2013] 3 SCR 3, 42 [108] (Fish J).

136 *Morwald-Benevides v Benevides* [2019] ONCA 1023, [21]–[40] (Lauwers JA).

137 Michelle Campbell (n 124) 190.

138 Bryden (n 26) 496–7; Mirsane (n 2) 675–6; Williams (n 5) 400.

139 *Rules of the Supreme Court of Canada*, SOR/2002-156, rr 55–9 ('*Supreme Court Rules*').

140 Ibid r 57(2)(b).

Moreover, even after an intervention applicant is admitted, the Supreme Court has exercised its discretionary remit to expand or contract the traditional roles and rights of amici and interveners.[141] The resultant effect has led commentators to observe that 'distinctions between the types can sometimes be difficult to delineate'[142] and that the 'Canadian approach' to non-party intervention is in effect, 'one category of intervener rather than separate categories of intervener and amicus curiae'.[143]

However, whether admitted as a friend of the court or added party intervener, it is widely accepted that the Supreme Court has taken an expansive contemporary approach[144] to non-party interventions generally in constitutional proceedings.[145] One flow-on effect of this has been the increased rates of Aboriginal interventions in constitutional litigation. As Ian Brodie notes, between 1985 and 1999, of all intervention applicants had more than a 50% success rate to appear before the Supreme Court, and of the 60 applications made by Native Groups, 73% were accepted.[146] Benjamin Alarie and Andrew Green's research also found that of the 1751 intervener applicants to Supreme Court appeals between 2000 and 2008, intervener applicants from Aboriginal Groups had a success rate of 93% (equating to 125 interveners granted leave).[147] From the range of benefits reported from increased non-party intervention,[148] three are examined in detail below.

B *Enhancing the Quality of Adjudication through the Clarification of Constitutional Facts*

Aboriginal interventions can enhance the quality of constitutional adjudication by providing distinct cultural perspectives which assist courts to clarify the 'constitutional facts' at hand. Here, 'constitutional facts' refer to the 'facts upon which

141 For example, friend of the court interveners have on occasion been granted more expansive rights than added party interveners, and in other circumstances, been subject to liabilities ordinarily limited to litigating parties, see: Michelle Campbell (n 124) 191; Bryden (n 26) 523.

142 Michelle Campbell (n 124) 191.

143 Williams, 'The Amicus Curiae and Intervener' (n 5) 400.

144 Callaghan (n 123) 34–5; *Levy* (n 23) 651 (Kirby J); Burmester (n 44) 356–7; Andrea Durbach, 'Interveners in High Court Litigation: A Commentary' (Conference Paper, CIPL Annual Public Law Weekend, November 1997).

145 Chan and Kislowicz, 'Divine Intervention (Pt 2)' (n 4) 511. See: Keyzer (n 2) 279; Clark (n 26) 83.

146 Brodie (n 12) 39.

147 Alarie and Green (n 4) 398–9.

148 See, eg: the enhanced legitimisation of judicial decisions: see Richard Haigh, 'The SCC's Dilemma: What To Do with Interveners?' [2018] (1) *Journal of Parliamentary and Political Law* 79, 88–9; and judicial democratic arguments: see Gregory Hein, 'Interest Group Litigation and Canadian Democracy' in Paul Howe and Peter H Russell (eds), *Judicial Power and Canadian Democracy* (McGill-Queen's University Press, 2001) 214, 237.

constitutional validity may depend'[149] including those central to the construction of constitutional provisions and those justifying the exercise of executive power or general law.[150] This argument accords with the 'quality theory' of judicial deliberation, namely that by hearing from an intervener, the court will have brought to its attention relevant information it would otherwise lack exposure to, increasing the probability that an 'optimal' or 'accurate' decision will be reached.[151]

Invariably, there is difficulty empirically assessing whether an intervener's submissions have in fact assisted a court to reach an optimal or accurate disposition, given the fundamentally normative grounds on which such an assessment may be made.[152] However, a reasonable mechanism to demonstrate the enhanced quality of constitutional adjudication from Aboriginal intervention is the qualitative influence of an intervener's factum on the ultimate constitutional facts identified by the court. Applying Kathryn Chan and Howard Kislowicz's reasoning, the underlying presumption here is that where intervener arguments or information can be identified in a court's reasons for judgment, such intervention is more likely than not to have had a persuasive influence on the quality of a court's deliberations than if the intervention had not occurred.[153]

1 *Clarifying Constitutional Facts in the Construction of Constitutional Provisions*

The influence of Aboriginal submissions clarifying the constitutional facts applicable to the construction of a constitutional provision is observed in *Ktunaxa*. There, the Supreme Court was asked to consider, inter alia, whether the Ktunaxa community's constitutional right to religious freedom under s 2(a) of the *Charter* was infringed by the Government of British Columbia's development approval of a ski resort in Qat'muk.[154] The second limb of the test to establish a s 2(a) infringement requires a determination 'that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to *act* in accordance with that practice or belief'.[155] The Ktunaxa submitted that Qat'muk was a body of sacred land inhabited by the Grizzly Bear Spirit.[156] Consequently, it was argued that the resort development would abrogate the s 2(a) right by desecrating the land and

149 Justice Michelle Gordon, 'Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law' (2023) 49(1) *Monash University Law Review* (advance), 17. See also Susan Kenny, 'Constitutional Fact Ascertainment (With Reference to the Practice of the Supreme Court of the United States and the High Court of Australia)' (1990) 1(2) *Public Law Review* 134, 135.

150 *Thomas v Mowbray* (2007) 233 CLR 307, 482 [526] (Callinan J) ('*Thomas*').

151 Chan and Kislowicz, 'Divine Intervention (Pt 1)' (n 124) 9; Alarie and Green (n 4) 386–7.

152 Chan and Kislowicz, 'Divine Intervention (Pt 2)' (n 4) 514.

153 Ibid.

154 *Ktunaxa* (n 14) 398 [7].

155 *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 279–80 [34] (Charron J) (emphasis added).

156 *Ktunaxa* (n 14) 399 [11], 425 [84].

driving the Spirit from the territory, thereby preventing the Ktunaxa to access the Spirit and act in accordance with their spiritual practices.[157]

Aboriginal interveners in support of the Ktunaxa provided nuanced arguments alerting the Court to the factual indivisibility of the Indigenous land-spiritual relationship. For example, the West Moberly and Prophet River and Katzie First Nations interveners emphasised land as not only the site of spiritual practices akin to a church or mosque, but the source in which the divine manifested.[158] In doing so, they distinguished traditional practices of Western faiths which conceive the divine as supernatural, in contrast to many First Nations religions, where the spiritual realm was indivisible from the physical world.[159]

The majority was not persuaded by the Ktunaxa's argument, identifying s 2(a) protections extended only to 'the freedom to worship' as distinct from 'the spiritual focal point of worship' as sought by the Ktunaxa.[160] However, intervener submissions appear to have played a persuasive role in the minority's construction of the s 2(a) right. Notably, in their dissenting judgment, Moldaver and Côté JJ reiterated intervener arguments differentiating Western conceptualisations of spirituality from First Nations' religious connections to land.[161] Their Honours observed that this identified 'feature of Indigenous religions … [was] critical in assessing whether there ha[d] been a s 2(a) infringement'.[162] Further, their Honours found that construing s 2(a) protections without an appreciation of the inextricable centrality of land to Indigenous culture 'risks foreclosing the protections of s 2(a) of the *Charter* to substantial elements of Indigenous religious traditions'.[163] This, their Honours determined, would be an abrogation of 'the true purpose of' the s 2(a) protection: to 'guard … against state conduct that interferes with "profoundly personal beliefs"'.[164]

157 Ibid 397–8 [6], 406–7 [36], 438 [118].

158 West Moberly First Nations and Prophet River First Nation, 'Factum of the Interveners, West Moberly First Nations and Prophet River First Nation', Submission in *Ktunaxa v British Columbia (Forests, Lands and Natural Resource Operations)*, 36664, 24 October 2016, 4–5 [19]–[21], 7 [30]; Katzie First Nation, 'Factum of the Intervener Katzie First Nation', Submission in *Ktunaxa v British Columbia (Forests, Lands and Natural Resource Operations)*, 36664, 25 October 2016, 2–3 [8]–[9].

159 West Moberly First Nations and Prophet River First Nation, 'Factum of the Interveners, West Moberly First Nations and Prophet River First Nation', Submission in *Ktunaxa v British Columbia (Forests, Lands and Natural Resource Operations)*, 36664, 24 October 2016, 4–7 [16]–[30]. See also Katzie First Nation, 'Factum of the Intervener Katzie First Nation', Submission in *Ktunaxa v British Columbia (Forests, Lands and Natural Resource Operations)*, 36664, 25 October 2016, 2–3 [8]–[11].

160 *Ktunaxa* (n 14) 418–9 [71] (McLachlin CJ and Rowe J).

161 Ibid (n 14) 441 [127] (Moldaver J for Moldaver and Côté JJ).

162 Ibid 441–2 [128].

163 Ibid 443 [131].

164 Ibid 442–3 [130], quoting *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 759.

2 *Clarifying Constitutional Facts Relevant to the Constitutional Validity of Laws*

Aboriginal interveners can also assist courts to clarify constitutional facts where the operational effect of an impugned law is central to assessing its constitutional validity. This is observed in the minority judgment of *Sharma*. Cheyenne Sharma, a member of the Saugeen First Nation, had been convicted of a first-time drug offence and subsequently sought a 'conditional sentence'[165] under s 742.1 of the *Criminal Code*, RSC 1985, c C-46 ('*Criminal Code*').[166] However, s 742.1 prevented courts from imposing conditional sentences for prescribed offences (including the drugs offence for which Sharma had been convicted).[167] This was despite the ordinary requirement for courts under the *Criminal Code* when sentencing offenders to apply the Gladue Principles (a discrete sentencing methodology taking account of the historical and systemic factors mitigating an Aboriginal offender's conduct), to impose a culturally appropriate sentence.[168] Sharma unsuccessfully challenged ss 742.1(c), (e)(ii) on grounds including constitutional invalidity with s 15 of the *Charter*, alleging that the impugned provisions deprived Aboriginal offenders convicted of certain offences of the remedial benefit of the Gladue framework.[169]

Section 15 states that '[e]very individual … has the right to the equal protection and equal benefit of the law without discrimination … in particular, without discrimination based on race' (among other factors).[170] The second element of the test to establish the invalidity of an impugned law under s 15 requires claimants to show that the law imposes a burden, or denies a benefit with the effect of reinforcing, perpetuating or exacerbating disadvantage.[171] It is here that the influence of intervener submissions is most evident.

For example, the minority discussed the factum of the Legal Services Board of Nunavut, which observed that given the remote geographical location of the Nunavut in the Canadian arctic archipelago, preventing conditional sentences for Nunavut offenders disproportionately restricted their access to their community networks.[172]

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165 A form of incarceration permitting sentences to be served in communities: *Criminal Code*, RSC 1985, c C-46, s 742.1 ('*Criminal Code*').

166 *Sharma* (n 15) [5]–[7], [15].

167 *Criminal Code* (n 165) ss 742.1(e), (e)(ii), as at 23 March 2022. On November 17 2022, *An Act To Amend the Criminal Code and the Controlled Drugs and Substances Act*, SC 2022, c 15 commenced, which amended s 742.1(c) and repealed s 742.1(e) of the *Criminal Code*.

168 *Criminal Code* (n 165) s 718.2(e).

169 Cheyenne Sharma, 'Factum of the Respondent, Cheyenne Sharma', Submission in *R v Sharma*, 39346, 9 February 2022, 22 [54].

170 *Charter* (n 18) s 15(1).

171 *Fraser v A-G (Canada)* [2020] 3 SCR 113, 141–2 [27] (Abella J), cited in *Sharma* (n 15) [188] (Karakatsanis J for Karakatsanis, Martin, Kasirer and Jamal JJ).

172 Legal Services Board of Nunavut, 'Factum of the Intervener, Legal Services Board of Nunavut', Submission in *R v Sharma*, 39346, 2 March 2022, 6 [13]–[14], discussed in *Sharma* (n 15) [240].

This, in turn, weakened their prospects for rehabilitation and the effectiveness of Nunavut community-based restorative justice measures.[173] Also cited was the Federation of Sovereign Indigenous Nations' factum, which had stressed that Aboriginal offenders dislocated from their communities were deprived of culturally and spiritually appropriate practices intended to serve '"on the land" or "bush" healing' rehabilitation.[174]

Consistent with these considerations, the minority found that ss 742.1(c), (e)(ii) had the effect of prohibiting 'an important tool, and sometimes the only tool, for judges … to craft a fair sentence for Indigenous offenders'.[175] Their Honours held that where the effect of ss 742.1(c), (e)(ii) impaired courts from being able to apply the Gladue framework for the prescribed offences, it left certain offenders with 'no other realistic option but prison'.[176] Subsequently, the minority concluded that ss 742.1(c), (e)(ii) perpetuated Aboriginal overrepresentation, cultural loss, dislocation and community fragmentation,[177] reinforcing, perpetuating and exacerbating the disadvantages for an Aboriginal offender, to the ultimate effect of limiting the s 15 *Charter* right.[178]

C *Enriching the Quality of Constitutional Adjudication through the Provision of Social Facts*

Aboriginal interventions can also enhance the quality of judicial deliberation through the provision of 'social facts', particularly in constitutional cases which have broad-reaching effects beyond non-Aboriginal disputants. Kylie Burns defines 'social facts' as information 'about the nature and behaviour of people and institutions and the nature of the world and society'[179] as drawn from 'judicial common sense' or empirical or other research.[180] By recognising the function of constitu-

173 Legal Services Board of Nunavut (n 172) 6 [14].

174 Federation of Sovereign Indigenous Nations, 'Factum of the Intervener Federation of Sovereign Indigenous Nations', Submission in *R v Sharma*, 39346, 1 March 2022, 8 [32], cited in *Sharma* (n 15) [240]. See also Ontario Native Women's Association, 'Factum of the Intervener, Ontario Native Women's Association', Submission in *R v Sharma*, 39346, 2 March 2022, 7–8 [19]–[20].

175 *Sharma* (n 15) [241], quoting Federation of Sovereign Indigenous Nations (n 174) 1 [5].

176 *Sharma* (n 15) [241].

177 Ibid.

178 Ibid [242], [250].

179 Kylie Burns, 'The Australian High Court and Social Facts: A Content Analysis Study' (2012) 40(3) *Federal Law Review* 317, 317–18.

180 Ibid 318–20. The term 'social facts' is not yet consistently understood or applied in Australia: Carolyn Sutherland, 'Interdisciplinarity in Judicial Decision-Making: Exploring the Role of Social Science in Australian Labour Law Cases' (2018) 42(1) *Melbourne University Law Review* 232, 247–53. Some commentators propose the term is too broad to reconcile with traditional understandings of adjudicative fact-finding: see, eg, Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Bloomsbury Publishing, 2022) 55.

tional courts in resolving 'complex questions of legal principle and legal policy',[181] this argument departs from declaratory theories of the judicial role[182] to highlight the desirability of constitutional adjudication sensitive to the wide-reaching social, economic, legal and political implications of constitutional questions for the public as a whole.[183]

For example, Aboriginal interveners in *Boudreault* raised social facts in their factums to alert the Court to the detrimental effect of a constructional choice on Aboriginal Canadians.[184] In that matter, the Supreme Court considered whether the 'victim fine surcharge' mandated under s 737 of the *Criminal Code* infringed the constitutional prohibition against cruel and unusual punishment under s 12 of the *Charter*.[185] Section 737 required courts in sentencing to impose a mandatory surcharge of 30% of any fine imposed — or where no fine was imposed, $100 for each summary conviction count and $200 for each indictable count — in addition to any other punishment set by the court.[186] Failure to pay the surcharge could result in a defendant's detention before their committal hearing, or imprisonment or debt collection if found in default.[187]

Assessments of constitutional invalidity with s 12 engage a gross proportionality analysis.[188] Subsequently, the Court considered whether the application of s 737 was 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable'

181 *Levy* (n 23) 651.

182 Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 130–1; Kirby (n 6) 562–3. See generally Brian Zamulinski, 'Rehabilitating the Declaratory Theory of the Common Law' (2014) 2(1) *Journal of Law and Courts* 171.

183 This argument has had limited influence in encouraging non-party interventions more generally before the High Court: see Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 3) 130–4. It has most notably been championed by Kirby J: see, eg: *Levy* (n 23) 651; *Breckler* (n 24) 134–7 [104]–[109]; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, 29–30 [77]–[81]; *Wurridjal* (n 39) 408–9 [260]–[263]. Cf practices in other jurisdictions, for example, the South African Constitutional Court, during the infancy of which Chaskalson J invited potential interveners including academics to invoke the intervener provisions and assist the Court assess the social consequences of its decisions: see Andrea Durbach, 'Amicus Curiae — Still Stinging from the Rebuff' (Seminar Paper, Public Interest Advocacy Centre, 8 August 1995) 8–9.

184 Aboriginal Legal Services, 'Factum of the Intervener Aboriginal Legal Services', Submission in *R v Boudreault*, 37427, 27 March 2017 2–3 [6]–[11].

185 *Boudreault* (n 16) 611–13 [1]–[6].

186 *Criminal Code* (n 165) ss 737(1)–(2) as at 23 March 2022; ibid 613 [7].

187 *Boudreault* (n 16) 633–6 [69]–[74].

188 Ibid 624–6 [45]–[49] (Martin J for Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Brown and Martin JJ).

to society to be unconstitutional.[189] In stressing the surcharge's disproportionately detrimental effect on Aboriginal offenders unable to pay the surcharge due to financial hardship, the intervener Aboriginal Legal Service ('ALS') provided empirical research to the Court regarding the relative socio-economic disadvantage of Aboriginal Canadians.[190] In particular, it emphasised the considerable poverty gap between Aboriginal and non-Aboriginal Canadians, particularly Aboriginal youth, and the heightened number of Aboriginal people involved in criminal incidents flowing from colonial legacies.[191]

The Supreme Court's decision evidences sensitivity to the social facts as raised by ALS, holding that courts forced to impose the surcharge by virtue of s 737 amounted to the 'grossly disproportionate public shaming' of marginalised offenders, including the hypothetical Aboriginal offender.[192] In its reasoning, it held that s 737 prevented courts from taking into account a marginalised offender's likely inability to pay the surcharge, the subsequent likelihood of repeated deprivations of their liberty before committal hearings, and the de facto indefinite criminal sanction for those never able to pay.[193] Subsequently, it found that s 737 had cruel and unusual effects on offenders including those of Aboriginal descent, in abrogation of the constitutional protection under s 12.[194] ALS' intervention then, demonstrates how Aboriginal interveners can provide social facts to warn courts against constructional choices with potentially unforeseen and disproportionately undesirable consequences for Aboriginal Canadians.[195]

D *Normative Benefits to First Nations Interventions: Democratic Inclusion and Participatory Value*

Constitutional intervention can also have a valuable normative function, signalling judicial respect for the principle of 'democratic inclusion'[196] and the value of Aboriginal participation in constitutional justice as a matter of human dignity.[197] This argument imbues the judicial role with a 'law-making' function, thus departing from strictly formalist understandings of adjudication which confine the court's function to the resolution of justiciable matters between private disputants.[198] Through this lens, constitutional deliberation requires more than the mere

189 Ibid 624–5 [45]–[61], quoting *R v Lloyd* [2016] 1 SCR 130, 149 [24] (McLachlin CJ for McLachlin CJ, Abella, Cromwell, Moldaver, Karakatsanis and Côté JJ).

190 Aboriginal Legal Services (n 184) 2–3 [7]–[11].

191 Ibid.

192 *Boudreault* (n 16) 650 [110].

193 Ibid 644–5 [94].

194 Ibid.

195 Bryden (n 26) 507–8; Farber (n 132) 33; Clark (n 26) 93–4; Mohan (n 26) 372.

196 Omari Scott Simmons, 'Picking Friends from the Crowd: Amicus Participation as Political Symbolism' (2009) 42(1) *Connecticut Law Review* 185, 197–9.

197 Bryden (n 26) 509.

198 Hopper (n 3) 87, 95.

mechanical process of 'discovering' principles of constitutional law to resolve the discrete disputes of litigants.[199] Instead, courts may be understood as making law each and every time they interpret a constitution[200] or 'extend, qualify or re-shape a principle of law'.[201] In doing so, each constitutional dispute involves deliberating on the future operation of the *Australian Constitution* and the formulation of 'legal principle and legal policy'[202] relevant to the broader community.[203] This in turn, prompts a responsive judicial shaping of constitutional rights and protections with input from those affected.[204]

Permitting Aboriginal interventions provides 'symbolic reassurance' to the community of courts' awareness of the impact of constitutional law-making on Aboriginal communities, and their 'receptiveness to the norm of democratic inclusion'.[205] Central to this norm is the premise that persons impacted by decisions in a democracy should be able to participate in courts' lawmaking process.[206] By virtue of their limitation on government power,[207] constitutional laws carry significant 'political, social, economic, security, and ecological implications', beyond 'the narrow interests of formal litigants',[208] with the ability to affect all members of the public.[209] Subsequently, Aboriginal interventions in constitutional litigation can publicly signal that courts appreciate the wide-reaching impacts of their decisions, and 'create … the impression, whether actual or perceived, that groups have the opportunity to weigh in on judicial decisions that have broad social and political ramifications'.[210]

In a similar vein, Aboriginal interventions can also reinforce the dignity and self-respect of those permitted to access constitutional justice through their participation

199 *Levy* (n 23) 651; Brodie (n 12) 59.

200 FL Morton and Avril Allen, 'Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada' (2001) 34(1) *Canadian Journal of Political Science* 55, 65; Mason, 'Future Directions in Australian Law' (n 3) 158.

201 Mason, 'Future Directions in Australian Law' (n 3) 158.

202 *Levy* (n 23) 651.

203 Ernst Willheim, 'An Amicus Experience in the High Court: Wurridjal v Commonwealth' (2009) 20(1) *Public Law Review* 104, 105 ('An Amicus Experience in the High Court'); Farber (n 132) 20; Bryden (n 26) 505.

204 Hopper (n 3) 87–8. See Williams, 'The Amicus Curiae and Intervener' (n 5) 394.

205 Simmons (n 196) 197.

206 Clark (n 26) 72; ibid 197–8.

207 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 24 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) ('*Graham*').

208 Farber (n 132) 58.

209 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 217 [113] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

210 Simmons (n 196) 198.

in constitutional litigation.[211] Scholars have posited that the very willingness of courts to hear from interveners by enabling them to voice their views in constitutional proceedings can publicly signal the value that judges attach to them,[212] and the social desirability of their input in such proceedings.[213] Consequently, intervention by First Nations in constitutional litigation can foster and preserve 'dignitary values' when permitting those taking part in constitutional deliberations to shape the legal rights and obligations affecting them.[214]

There is a reasonable argument to be made that the Supreme Court's intervention practice evidences the Court's appreciation of the distinct normative dimension associated with Aboriginal interventions. As Geoffrey Callaghan notes, notwithstanding the relatively strict literal rules permitting intervention in constitutional proceedings before the Supreme Court, the overwhelming majority of applicants are successful.[215] For example, between 2000 and 2009, 91.4% of intervener applicants before the Supreme Court were granted intervener status,[216] and between 2009 and 2017, the applicant success rate did not fall below 80%.[217] It is improbable that every successful intervener in these cases added something 'new and useful' to proceedings in accordance with the Supreme Court's rules for admission.[218] Subsequently, Callaghan proposes the more likely explanation for the Court's practice is its acceptance of the 'normative grounding' of participation, particularly in circumstances where intervention was permitted notwithstanding 'such participation [was] likely to have little to no effect over the ultimate decision'.[219]

This argument also finds some support in Chan and Kislowicz's research on constitutional matters regarding religious freedom, which found that a 'high rate' of interveners admitted in constitutional matters before the Supreme Court merely elaborated or 'echo[ed]' party arguments (ie repeating, amplifying, or offering subtle variations of party arguments).[220] Other commentators have observed that interventions have been permitted in Canadian courts although they may provide weak legal,

211 See Elisa Arcioni, 'Some Comments on Amici Curiae and "the People" of the Australian Constitution' (2010) 22(3) *Bond Law Review* 148, 148.

212 Bryden (n 26) 509; Callaghan (n 123) 58–9.

213 John Basten, 'Amicus Curiae in Practice: A Response' (Seminar Paper, Public Interest Advocacy Centre, 8 August 1995) 11; Durbach, Reinecke and Dargan (n 32) 203.

214 Bryden (n 26) 509; See also Jerry L Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985) 182–201.

215 Callaghan (n 123) 55.

216 Alarie and Green (n 4) 395.

217 Daniel Sheppard, 'Just Going through the Motions: The Supreme Court, Interest Groups and the Performance of Intervention' (2018) 82(1) *Supreme Court Law Review* (2d) 179. See also Magee (n 13) 208.

218 Callaghan (n 123) 55.

219 Ibid 58.

220 Chan and Kislowicz, 'Divine Intervention (Pt 2)' (n 4) 528–9, 540.

but important moral or emotive arguments.[221] Given the strict procedural threshold under the *Supreme Court Rules* for interveners not to merely repeat arguments already advanced by parties or expand the scope of existing issues submitted by parties,[222] the Court's admissions practice is curious. In such circumstances, it may be posited that the Supreme Court's flexible application of the intervention procedure demonstrates its appreciation of the distinct normative value in allowing such interventions to proceed.

IV Further Considerations for the Australian Context

Despite the demonstrated value of Aboriginal interventions before the Supreme Court, Australia's distinct constitutional framework and divergent intervention procedure require pause when considering the merits of increased interveners in Australian constitutional adjudication.[223] Two issues warrant particular discussion. First, unlike Canada, given Australia's deliberately narrow constitutional rights model,[224] and the subsequent absence of routine adjudication over individual or Indigenous constitutional rights provisions, the appropriateness of increased Indigenous interventions may be queried. Second, in contrast to the Supreme Court's relatively settled practice, the High Court has yet to develop the necessary procedural clarity in its tests for intervention admissions to manage numerous Indigenous intervention applicants, and establish the legal basis on which social facts may be ascertained and evaluated.[225]

A *Australia's Dearth of Individual and Indigenous Rights Clauses*

The scarcity of individual or Indigenous rights protections under the *Australian Constitution* stands in stark contrast to the Canadian constitutional framework, prompting query as to the appropriateness of enhanced Indigenous intervention in the Australian context. In Canada, heightened intervention in the Supreme Court coincided with the introduction of the *Charter*,[226] which deliberately ascribed

221 See: Krislov (n 28) 711–12; Magee (n 13) 213–14; ibid.

222 *R v McGregor* [2023] 422 CCC (3d) 415 [103]–[109] (Rowe J); Supreme Court of Canada, *Notice to the Profession November 2021: Interventions*, 15 November 2021; Supreme Court of Canada, *Notice to the Profession March 2017: Allotting Time for Oral Argument*, 2 March 2017.

223 See also Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13(1) *Indiana Journal of Global Legal Studies* 37, 65–7.

224 Rosalind Dixon and Gabrielle Appleby, 'Constitutional Implications in Australia: Explaining the Structure' in Rosalind Dixon and Adrienne Stone (eds), *The Invisible Constitution in Comparative Perspective* (Cambridge University Press, 2018) 343, 361.

225 See generally Kenny, 'Interveners and Amici Curiae' (n 29).

226 Brodie (n 12) 55–6; Chan and Kislowicz, 'Divine Intervention (Pt 2)' (n 4) 511.

substantive individual[227] and Indigenous[228] constitutional protections, alongside an expanded role for courts to interpret and enforce such protections across both levels of government.[229] Relevantly, in addition to the four 'fundamental freedoms',[230] the *Charter* inserted democratic,[231] mobility,[232] legal,[233] equality,[234] and language rights[235] into the Canadian constitutional framework. Further, clear additional protections were provided to preserve the 'existing aboriginal and treaty rights of the aboriginal peoples of Canada'.[236] Moreover, courts of competent jurisdiction were enabled to actively engage in a constitutional 'law making' process when adjudicating over the *Charter*'s provisions.[237]

Jillian Welch observes that while pre-*Charter* constitutional litigation had focused on the '"demarcation" between federal and provincial spheres of activity', *Charter* litigation shifted the 'new line between … governments' and personal spheres of freedom'.[238] In order for courts to define and delineate the scope of each constitutional right, interventions by 'individual[s] writ large', including Aboriginal interveners, became a necessary feature of *Charter* litigation.[239] Therefore, notwithstanding an early learning phase of inconsistent admissions practice,[240] as Canadian courts embraced their constitutional law-making role, an accompanying rise of interventions became appropriate to bring forth the breadth of information courts required to fulfil effectively their transformed judicial function.[241]

In contrast, Australia lacks equivalent substantive rights protections through a bill of rights or charter. Rosalind Dixon and Gabrielle Appleby have previously

227 Peter H Russell, 'The Political Purposes of the Canadian Charter of Rights and Freedoms' (1983) 61(1) *Canadian Bar Review* 30, 32–3, 43; Brodie (n 123) 24–5.

228 John Borrows, 'Contemporary Traditional Equality: The Effect of the *Charter* on First Nation Politics' (1994) 43(1) *University of New Brunswick Law Journal* 19, 28–33; John Borrows, 'Frozen Rights in Canada: Constitutional Interpretation and the Trickster' (1997) 22(1) *American Indian Law Review* 37, 37–8; *Constitution Act 1982* (n 11) ss 25, 27.

229 *Charter* (n 18) s 24(1).

230 Ibid ss 2(a)–(d).

231 Ibid s 3.

232 Ibid s 6.

233 Ibid ss 7–14.

234 Ibid s 15.

235 Ibid ss 16–23.

236 Ibid s 25; *Constitution Act 1982* (n 11) s 35.

237 *Charter* (n 18) s 24(1); Peter W Hogg, 'The Law-Making Role of the Supreme Court of Canada: Rapporteur's Synthesis' (2001) 80(1–2) *Canadian Bar Review* 171, 172–4, 179–80.

238 Welch (n 4) 225.

239 Ibid.

240 Callaghan (n 123) 53; Brodie (n 12) 25–74.

241 Brodie (n 12) 53–7.

observed that Australia's narrow constitutional rights model limits the High Court's capacity to take an active role in safeguarding individual or Indigenous rights.[242] Express, but highly circumscribed individual constitutional protections exist in relation to the right to vote,[243] the acquisition of property on just terms,[244] trial by jury,[245] religious freedom,[246] and freedom from discrimination on the basis of state residency.[247] A further implied freedom of political communication has been identified from Australia's constitutionally enshrined system of representative and responsible government.[248] There are no constitutional rights protections specifically for Indigenous Australians in the *Australian Constitution*.[249]

The scarcity of substantive rights protections contained in the *Australian Constitution* is in part, a legacy of the federation movement,[250] and contrasts the deliberate human rights protections enshrined under the *Charter*.[251] Among the predominant concerns of colonies in the formation of the Australian federation were their distinct geographical, historical and political affiliations to be represented through state rights vis-à-vis the federal Parliament.[252] 'There was no desire to assert against government generally … [the] rights and freedoms for colonists'.[253] Instead, the constitutional compact placed faith in the primacy of democratic procedures and federal power-sharing rather than judicially adjudicated rights clauses in regulating

242 Dixon and Appleby (n 224) 360–1. See also Simon Evans, 'Standing to Raise Constitutional Issues: Reconsidered' (2010) 22(3) *Bond Law Review* 38, 49–52.

243 *Australian Constitution* s 41.

244 Ibid s 51(xxxi).

245 Ibid s 80.

246 Ibid s 116.

247 Ibid s 117.

248 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Levy* (n 23); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

249 Previously, the 'Aboriginal race' was explicitly referred to in s 51(xxvi) of the *Australian Constitution*, while '[A]boriginal natives' were referenced in s 127. Two significant textual amendments to the *Australian Constitution* were made following the 1967 referendum, repealing s 127 and removing the words 'aboriginal race' from s 51(xxvi): *Constitution Alteration (Aboriginals) Act 1967* (Cth); Indigenous Australians alongside persons 'of any race' continue to be implicitly referred to under ss 25 and 51(xxvi): Hilary Charlesworth and Andrea Durbach, 'Equality for Indigenous Peoples in the Australian Constitution' (2011) 15(2) *Australian Indigenous Law Review* 64, 64–5.

250 Morris, 'The Argument for a Constitutional Procedure' (n 20) 167–8; Chief Justice Robert French, 'The Constitution and the Protection of Human Rights' (Speech, Edith Cowan University Vice-Chancellor's Oration, 20 November 2009) 7–10.

251 Russell (n 227) 43.

252 French (n 250) 7; Morris, 'The Argument for a Constitutional Procedure' (n 20) 167.

253 French (n 250) 7.

fair future relations.[254] As for Indigenous Australians, the *Australian Constitution*'s drafting against a backdrop of racism resulted in its text and operation running 'counter to the idea of Aboriginal Australians as equal members of the community'.[255]

Yet despite the intentional scarcity of individual and Indigenous rights protections under the *Australian Constitution*, the impact of contemporary constitutional adjudication on Indigenous Australians is unquestionable. Justice Gordon has observed extra-curially that constitutional law cannot but affect all members of the Australian polity as it 'fundamentally shapes the way that society functions by ensuring that "all power of government is limited by law"'.[256] Against this backdrop, Shireen Morris argues that Indigenous Australians are a 'uniquely vulnerable constitutional constituency' to the abuse of their rights by Australian governments.[257] As an extreme minority demographic, Indigenous Australians comprise just '3.8% of the total Australian population'[258] and as such, Indigenous issues are subject to the political whims of legislation affecting Indigenous rights[259] and the 'harsh majoritarian tendencies of minimalist ballot box participation'.[260] Further, Indigenous Australians are unlike any other group given their distinct historical relationship with the colonising state — the effects of which, by way of extreme social and economic disadvantage, continue to exacerbate and perpetuate their disempowerment.[261]

There is some suggestion that the High Court is not immune to the value of a more expansive intervention procedure in recognition of the wide-reaching effect of its constitutional adjudication. In *Wurridjal*, the majority declined two academics seeking amicus status to bring international Indigenous rights materials to the Court's attention.[262] However, Kirby J, with whom Crennan J agreed, was persuaded otherwise. In his Honour's reasons for decision, Kirby J observed that given 'the special role played by … [the] Court, in expressing the law, especially in constitutional cases in a way that necessarily goes beyond the interests and submissions of the particular parties to litigation', a widening of circumstances in which amici and

254 Morris, 'The Argument for a Constitutional Procedure' (n 20) 167.

255 George Williams, 'Recognising Indigenous Peoples in the Australian Constitution: What the Constitution Should Say and How the Referendum Can Be Won' (2011) 5(1) *Land, Rights, Laws: Issues of Native Title* 1, 3–4.

256 Gordon (n 149) 1, quoting *Graham* (n 207) 24 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

257 Morris, 'The Torment of Our Powerlessness' (n 1) 635–40.

258 Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians* (Catalogue No 3238.0.55.001, 31 August 2023).

259 Morris, 'The Torment of Our Powerlessness' (n 1) 638–42.

260 Megan Davis, 'Competing Notions of Constitutional "Recognition": Truth and Justice or Living "Off the Crumbs that Fall Off the White Australian Tables"?' (Papers on Parliament No 62, Department of the Senate, October 2014) 113, 127.

261 Morris, 'The Torment of Our Powerlessness' (n 1) 637–8, 642–3.

262 Willheim, 'An Amicus Experience in the High Court' (n 203) 104.

interveners should be admitted was warranted.[263] More recently in *Love*, Gageler J highlighted the importance of Indigenous voices in the constitutional adjudication of Indigenous issues:

> The limits of judicial competence are reinforced by the limits of judicial process. … Noticeably absent from the viewpoints represented at the hearing has been the viewpoint of any Aboriginal or Torres Strait Islander body representing any of the more than 700,000 citizens of Australia who identify as Aboriginal or Torres Strait Islander. On the basis of the case as presented, I cannot presume that the political and societal ramifications of translating a communal, spiritual connection with the land and waters within the territorial limits of the Commonwealth of Australia into a legislatively ineradicable individual connection with the polity of the Commonwealth of Australia are able to be judicially appreciated.[264]

To this end, notwithstanding the divergent constitutional protections of individual and Indigenous rights intended under the Canadian and Australian constitutional frameworks, rigid adherence to earlier procedural restrictions of a bygone era is arguably inappropriate for the High Court's contemporary intervention practice.[265] In light of the potentially broad effect of the Court's deliberations on uniquely vulnerable Indigenous rights and protections, increased Indigenous intervention in constitutional adjudication may be considered a legitimate and desirable development.

B *Procedural Opacity as an Impediment to the Effective Use of Indigenous Submissions*

Contrasting the Supreme Court's relatively settled approach to constitutional intervention, the High Court's lack of procedural clarity guiding intervention admissions may limit the Court's capacity properly to take notice of and utilise the submissions of Indigenous intervention applicants.

1 *Evaluating Distinctiveness*

As observed in Part I, the High Court's tests governing the admission of non-party intervention require applicants to provide an element of distinctness from submissions already before the Court. That is, the Court will consider whether a prospective amicus 'can present arguments on aspects of a matter before the Court which are otherwise unlikely to receive full or adequate treatment by the parties',[266] and whether prospective interveners 'can show that the parties … may not present fully the submissions on a particular issue'.[267]

263 *Wurridjal* (n 39) 313 (Kirby J, Crennan J agreeing at 314).

264 *Love* (n 106) 211 [134].

265 *Levy* (n 23) 650–1 (Kirby J).

266 *Wurridjal* (n 39) 312–13 (French CJ).

267 *Levy* (n 23) 603 (Brennan CJ) .

Problematically, as Kenny J has identified extra-curially, in circumstances involving multiple intervention applicants before the High Court, a real procedural advantage applies to the applicant who is first able to make submissions.[268] This is because each subsequent applicant is increasingly less likely to be able to offer distinct information not already available to the Court from earlier applicants' submissions.[269] However, notwithstanding the diversity of histories, experiences and cultural traditions between the myriad of Indigenous groups within Australia,[270] Indigenous intervention applicants will undoubtedly share common information and interests in constitutional proceedings engaging human rights and Indigenous issues. In such circumstances, the existing admission procedures require the High Court to engage in the complex task of evaluating which applicants warrant admission at the expense of others.

This evaluative process is fraught with difficulty. For example, as evidenced in Part I, there is some suggestion that the High Court has viewed the representative capacities of prospective Indigenous interveners as a relevant consideration in assessing the distinctiveness element of the test for admission. However, it is unclear how the Court intends to assess the capacity of the Indigenous intervener to speak for the Indigenous interest. Moreover, as Carol Harlow notes, in the case of conflicting views between Indigenous intervener applicants, the existing admissions procedure provides no clarity as to how the Court will determine who is the 'more' accurately representative of those individuals whose views they claim to represent — such as to merit successful intervention.[271]

This issue has been previously encountered in the Supreme Court. For example, in *Reference Re Secession of Quebec*,[272] Bruce Clark's motion to intervene on behalf of the Algonquin and Micmac groups was contested by another Algonquin group who argued that Mr Clark only represented a minor 'breakaway group of chiefs' and not the officially elected leaders.[273] However, in such cases,[274] Canada's relatively

268 Kenny, 'Interveners and Amici Curiae' (n 29) 165. See also Rosemary J Owens, 'Interveners and Amicus Curiae: The Role of the Courts in a Modern Democracy' (1998) 20(1) *Adelaide Law Review* 193, 196–7.

269 Owens (n 268) 196; Lindy Willmott, Ben White and Donna Cooper, 'Interveners or Interferers: Intervention in Decisions To Withhold and Withdraw Life-Sustaining Medical Treatment' (2005) 27(4) *Sydney Law Review* 597, 614.

270 See generally: Gawaian Bodkin-Andrews and Bronwyn Carlson, 'The Legacy of Racism and Indigenous Australian Identity within Education' (2016) 19(4) *Race Ethnicity and Education* 784; Minette Salmon et al, 'Defining the Indefinable: Descriptors of Aboriginal and Torres Strait Islander Peoples Cultures and Their Links to Health and Wellbeing' (Literature Review, Mayi Kuwayu and The Lowitja Institute, September 2019).

271 Carol Harlow, 'Public Law and Popular Justice' (2002) 65(1) *Modern Law Review* 1, 4–5. See generally Bryden (n 26) 520.

272 [1998] 2 SCR 217.

273 Hannett (n 132) 136.

274 Ibid.

permissive intervention procedure appears to have enabled the Court to balance the complexities associated with Indigenous representation whilst maintaining the informational benefit from a wide range of First Nations interveners.[275] In practice, this means that while applicants seeking intervention with entirely repetitive submissions will be rejected, Aboriginal groups that offer even subtle variations in argument or information will ordinarily be granted leave to intervene, even if limited to written factums on discrete issues.[276]

For the High Court to similarly benefit from the informational contributions of Indigenous interventions, further refinement of the Court's admission procedures will be required. However, as Mona Arshi and Colm O'Cinneide observe, while the Canadian experience demonstrates the complexity of this exercise, it is not an impossibility.[277] As evidenced in the Supreme Court's practice, while strict procedural rules permit the Court to prevent 'officious busybodies' and 'meddlesome interloper[s]' from appearing in proceedings, a permissive application of such procedures ensures interveners with real value to assist the Court will not be impeded from participation.[278]

2 *Evidentiary Issues: Evaluating Social versus Constitutional Facts*

Further contrasting the Supreme Court's practice, the High Court's comparatively underdeveloped procedures to evaluate social facts may impede the Court's taking account of Indigenous intervention submissions. Accordingly, despite the High Court's broad capacity to ascertain constitutional facts from interveners or amici, greater procedural clarity for how social facts may be ascertained and evaluated is desirable to properly justify the High Court's use of Indigenous intervention submissions.

As Burns observes, Australia's adversarial litigation system is underpinned by the principle that judicial reasoning is based on 'admissible (relevant and reliable) evidence and legal precedent'.[279] However, contrasting a strict adversarial model which constrains courts from referring to materials outside those raised by parties,[280] the High Court has consistently stated that questions of constitutional validity cannot be made to depend upon the conduct of parties to private litigation.[281] To this end, there appears to be no constitutional impediment for the High

275 See also: Mona Arshi and Colm O'Cinneide, 'Third-Party Interventions: The Public Interest Reaffirmed' [2004] (Spring) *Public Law* 69, 71; Chan and Kislowicz, 'Divine Intervention (Pt 1)' (n 124) 18–20.

276 Chan and Kislowicz, 'Divine Intervention (Pt 2)' (n 4) 16.

277 Arshi and O'Cinneide (n 275) 71.

278 *Levy* (n 23) 651 (Kirby J); Bryden (n 26) 492–3.

279 Burns (n 179) 333.

280 See Clark (n 26) 71.

281 *Gerhardy* (n 123) 141–2 (Brennan J); *Maloney* (n 80) 193 [45] (French CJ); *Thomas* (n 150) 481–3 [523]–[526] (Callinan J).

Court acting in its original jurisdiction to be limited to constitutional facts as proven or agreed between parties.[282] Even in the exercise of its appellate jurisdiction, the High Court's overriding role and function to enforce the *Australian Constitution* has historically enabled it to inform itself of constitutional facts beyond those submitted by litigants.[283]

Then-Solicitor-General Stephen Gageler stated that for material to be taken into account it 'would need to tend logically to show the existence' (or not) of a fact in issue, and '[a]s with any material probative of any fact, the weight to be accorded … must be assessed in the light of that party's knowledge and ability to prove', and beyond that, it is impossible to be more prescriptive of the material from which constitutional facts may be sourced.[284] Subsequently, as Patrick Brazil has surmised, the basic rule underpinning the High Court's determination of constitutional facts is that the Court must 'ascertain the facts as best it can' and has 'no *a priori* limits on the ways in which [it] … may acquaint itself with the necessary information', including through information received through interveners and amici.[285]

There is, however, less clarity on the High Court's legal basis to take cognisance of social facts as provided by interveners in constitutional proceedings where such facts have not been previously proven in evidence at trial.[286] This uncertainty may reflect the procedural reality that the High Court rarely directly engages in fact-finding, and typically relies on agreed statements of facts, or findings of facts made by lower courts.[287] Nonetheless, when the High Court has ventured to source social facts from amici or intervener submissions, it is uncertain on what grounds it does so.[288] For example, the doctrine of judicial notice or its legislative equivalent,[289] may facilitate judicial use of social facts which form constitutional facts and are 'open and notorious', and those in the 'common knowledge of educated men' as collected in 'accepted writings', 'standard works' and 'serious studies and inquiries' even if they have not been proved in evidence.[290] However, where social facts are

282 Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129, 135.

283 Ibid 138.

284 Stephen Gageler, 'Fact and Law' (2009) 11(1) *Newcastle Law Review* 1, 25–6, 28.

285 Patrick Brazil, 'The Ascertainment of Facts in Australian Constitutional Cases' (1970) 4(1) *Federal Law Review* 65, 84; *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292 (Dixon CJ).

286 Burns (n 179) 319.

287 Carter (n 180) 145–6.

288 Burns (n 179) 319.

289 See, eg: *Evidence Act 1995* (Cth) s 144; *Evidence Act 2011* (ACT) s 144; *Evidence Act 1995* (NSW) s 144; *Evidence (National Uniform Legislation) Act 2011* (NT) s 144; *Evidence Act 2008* (Tas) s 144; *Evidence Act 1995* (Vic) s 144.

290 Christopher Tran, 'Facts and Evidence in Litigation under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT)' (2012) 36(1) *Melbourne University Law Review* 287, 297.

not in such form of common knowledge, including those that may be reasonably anticipated from culturally specific information, or experiences from Indigenous interveners or amici, it is questionable whether judicial notice can justify the Court's ascertainment of such material.

In contrast, in Canada, as constitutional and social facts have become increasingly relevant to the constitutionality of legislation,[291] the Supreme Court has made clear that 'simply categorizing an issue as "social fact" or "legislative fact" does not license the court to put aside the need to examine the trustworthiness of the "facts"'.[292] Instead as Christopher Tran observes, the Supreme Court's principled approach has been to prefer evidence of facts to be adduced through expert testimony that may be subject to cross-examination, or through the legislated procedure for a fresh evidence motion provided it meets the prescribed requirements.[293] However, if parties seek to rely on judicial notice to have recognised any type of fact, thus dispensing with the need for formal proof,[294] the Supreme Court will begin with the 'Morgan criteria' articulated in *R v Find* ('*Find*').[295] That is, judicial notice may be taken of facts which are 'so notorious or generally accepted as not to be the subject of debate among reasonable persons' or 'capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy'.[296]

As the Supreme Court stated in *R v Spence* ('*Spence*'), the rigorous application of the Morgan criteria will depend on how significant the fact is to the disposition of the case. At the 'high end', 'the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria'.[297] Conversely, at 'the low end of background facts … the court will likely proceed …

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291 Tran (n 290) 299–300; *R v Gladue* [1999] 1 SCR 688, 731–2 [83] (Cory and Iacobucci JJ for the Court) ('*Gladue*'); *R v Spence* [2005] 3 SCR 458, 488–9 [57] (Binnie J for the Court) ('*Spence*').

292 *Spence* (n 291) 489 [58] (Binnie J for the Court). The Supreme Court adopts a similar, but not identical definition of 'social fact' adopted in this article. In *Spence*, Binnie J for the Court defined 'social fact' as 'social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case' which are 'general', and 'not specific to the circumstances of a particular case, but if properly linked to the adjudicative facts, … [can] help to explain aspects of the evidence': at 488–9 [57]. Relevant examples of social facts as understood by the Supreme Court have included the 'systemic or background factors that have contributed to the difficulties faced by aboriginal people in both the criminal justice system and throughout society at large'. See also: *R v Wells* [2000] 1 SCR 207, 234 [53] (Iacobucci J for the Court); *Gladue* (n 291) 731–2 [83].

293 Tran (n 290) 300–1.

294 Dana Phillips, '*Ishaq v Canada*: "Social Science Facts" in Feminist Interventions' (2018) 35(1) *Windsor Yearbook of Access to Justice* 99, 110.

295 [2001] 1 SCR 863, 886–7 [48] (McLachlin CJ for the Court) ('*Find*'); *Spence* (n 291) 490 [61].

296 *Find* (n 295) 886–7 [48].

297 *Spence* (n 291) 490–2 [61]–[65].

on the basis that the matter is beyond serious controversy'.[298] The ongoing consideration for the Court when taking judicial notice of facts between the high and low end of the spectrum is whether a fact

> would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.[299]

This absence of a principled approach to evaluating and accepting social facts also has implications for the High Court's proper use of submissions from Indigenous amici and interveners. For example, Allison Larsen refers to the worrying practice of amici briefs in the United States containing incorrect, politically-biased factual claims, to argue that facts not subject to cross-examination or other reliability assessments could mislead courts and infect judicial reasoning with unreliable information.[300] Even absent deliberate bias, in circumstances where interveners submit lived experiences or culturally specific views which can provide important social facts to proceedings, submissions which advance one community member's views on cultural practices as authoritative have the capacity to mislead.[301] As Matthew Fletcher notes, even '[r]easonable minds may differ on customs and traditions'.[302]

The High Court's further development of a principled approach to the procedures guiding the admission of interventions and evaluation of social facts is important to effectively defend the Court's notice of and reliance on information received from Indigenous interveners and amici. However, it is unlikely these concerns are critical obstacles to the admission of increased Indigenous interventions before the High Court. As Kirby J observed in *Levy*, the Court 'retains full control over its procedures' and is eminently capable of discouraging busybodies while encouraging the useful voices of desirable interveners.[303] While a granular examination of the precise form and merits of such procedures is beyond the scope of this article,[304] the Supreme Court's approach, which is discussed above, offers a potential model for the High Court's management of Indigenous interventions and submissions in constitutional litigation.

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298 Ibid 491–2 [65].

299 Ibid (emphasis omitted).

300 Allison Orr Larsen, 'The Trouble with Amicus Facts' (2014) 100(8) *Virginia Law Review* 1757, 1762–4. See also: Phillips (n 294) 111–12; Hopper (n 3) 96–8; Farber (n 132) 51.

301 Matthew LM Fletcher, 'Rethinking Customary Law in Tribal Court Jurisprudence' (2007) 13(1) *Michigan Journal of Race and Law* 57, 92.

302 Ibid.

303 *Levy* (n 23) 651.

304 See proposals raised in: Kenny, 'Interveners and Amici Curiae' (n 29) 169–70; Williams, 'The Amicus Curiae and Intervener' (n 5) 399–402; Enid Campbell (n 5).

V Conclusion

Compelling pragmatic and normative bases support increased Indigenous amici and interveners in constitutional litigation before the High Court. There is some suggestion that the High Court is not immune to this view. In Part II it was observed that few Indigenous amici and intervener applications were made in constitutional cases between January 2012 and June 2023. However, the Court has consistently and widely interpreted the rules to *admit* Indigenous amici and interveners, as evidenced in the high success rates for Indigenous intervention applicants. Such results provide tentative encouragement for bolstered Indigenous intervention applications in future constitutional cases.

Real pragmatic and normative benefits may be realised from such practice. As illustrated in Part III through the case studies of *Ktunaxa*, *Sharma* and *Boudreault*, Aboriginal interventions can enhance the quality of constitutional adjudication by assisting the Court to clarify pertinent constitutional facts in the construction of constitutional rights and alerting the Court to pertinent social facts when assessing an impugned law's constitutional validity. Additionally, Aboriginal interventions can play an important normative function, publicly signalling judicial respect for the principle of democratic inclusion and reinforcing the human dignity of those permitted to participate in constitutional proceedings.

Due sensitivity to the divergent constitutional frameworks and court procedures in Canada is apropos when contemplating the comparable benefit of increased Indigenous intervention in the Australian context. Accordingly, in Part IV, it was observed that Australia has distinct, and deliberately narrow substantive constitutional protections — in contrast to the *Charter*. However, given the broad impact of constitutional adjudication, on a uniquely vulnerable Indigenous constitutional constituency, this argument fails to provide a compelling justification to deny Indigenous intervention. Further, unlike the Supreme Court's relatively settled intervention procedures and practice, there is uncertainty in Australia as to the applicable principles guiding intervention admissions to the High Court. Namely, it is unclear how the High Court will approach the task of evaluating the representative status of Indigenous interveners and determining the legal basis on which social facts may be ascertained and utilised. The development of a principled approach to intervention admissions to clarify such uncertainties is desirable. However, in light of the High Court's ultimate ability to control its procedures, these issues are unlikely to be critical practical impediments to an increased Indigenous intervention practice. Subsequently, it is concluded that real benefits await from increased Indigenous voices in Australian constitutional litigation — if only the High Court is willing to hear from them.