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Intervention at the UK Supreme Court

Lorne Neudorf[*]

1 Introduction

This article examines the role of interveners before the UK Supreme Court. Interveners are persons who, while neither appellant nor respondent, participate in the litigation process and make submissions to the court in much the same way that either of those parties would. Interveners assist judicial decision-making by providing supplemental information that gives a broader economic and social context to the legal issues in dispute. Through a comparative study of the experience of intervention at the supreme courts of the United States and Canada, this article seeks to provide insights as to how the practice of intervention might develop at the UK Supreme Court in the years to come. It also identifies a number of issues to lay a foundation for further scholarly study in the field.

In the first section, intervention is placed in a comparative context by looking to the supreme courts of the United States and Canada. The second section provides an overview of the purpose and procedure of intervention at the UK Supreme Court. In the third section, a numerical analysis of intervention at the UK Supreme Court since it began hearing cases in 2009 (with reference to the House of Lords since 2005) identifies trends that may suggest future developments. The conclusion sets out that intervention before the UK Supreme Court offers a number of benefits if the process is carefully regulated.

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2 Intervention in comparative context: United States and Canada

Intervention is a standard feature of apex appellate courts in common law jurisdictions. In the United States, for example, a tremendous number of special interest groups participate in cases before the Supreme Court as *amici curiae* or 'friends of the court'. This form of intervention in the United States presents an opportunity for interest groups to advance their policy preferences by influencing the judiciary at the highest level in key cases. The Rules of the Supreme Court of the United States set out that individuals or groups who bring relevant information to the attention of the judges, which might otherwise escape their attention, are of 'considerable help' to the Supreme Court's decision-making process.[1] Rule 37 establishes that *amici* may participate in proceedings by filing legal briefs (and occasionally making oral arguments) with the consent of the parties or, if consent is not forthcoming, by leave of the Supreme Court.

In terms of their substantive content, legal briefs set out arguments to persuade the judges to reach the outcome desired by each group. Legal arguments are often supported by reference to scientific evidence derived from studies funded by the *amicus curiae* or citations to scholarly publications in a form resembling a 'Brandeis brief', named after Louis Brandeis who, as a young lawyer, referred to social science evidence in arguing constitutional cases.[2]

It is clear that interest groups see value in intervening. An astonishing 597 legal briefs were filed by *amici curiae* in the 85 cases decided by the Supreme Court of the United States in 2012. According to my study of the docket database, *amici* participated in more than three-quarters of the total number of cases decided by the Supreme Court, with 65 percent of those cases involving a significant number of interventions.[3] Interest groups included non-governmental organisations, corporations, academics, private citizens, and participants from all three branches of government. For example, in *American*

[1] Rule 37 of the Rules of the Supreme Court of the United States, adopted 12 January 2010, effective 16 February 2010, <http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf> [accessed 4 February 2013].

[2] M Rustad & T Koenig, 'The Supreme Court and junk social science: selective distortion in *amicus* briefs', (1993-94) 72 *N Car L R* 91, 104-106.

[3] Out of the 66 Supreme Court of the United States cases decided in 2012 that included legal briefs filed by *amici curiae*, 43 involved five or more *amici*: see Supreme Court of the United States, 'Docket system', <http://www.supremecourt.gov/docket/docket.aspx> [accessed 4 February 2013]. Throughout this article 'significant' refers to cases with five or more interveners.

Tradition Partnership, Inc v Bullock,[4] a case in which the Supreme Court considered the constitutionality of a state law restricting corporate donations to political candidates, legal briefs were filed by 17 different *amici*, including, among others, freedom of speech organisations, several US senators, a group of retired judges, a law school, two private citizens, and the State of New York.

Perhaps unsurprisingly, the flurry of intervention activity at the Supreme Court of the United States has produced a cottage industry of specialist *amicus curiae* lawyers. The Washington DC office of one international law firm markets its intervention services by noting that *amici curiae* can play a pivotal role in Supreme Court decision-making, pointing to one tax case in which the judges 'rejected the positions of both the Government and the taxpayer, and accepted the solution proffered by [our] *amicus* client'.[5]

While the Supreme Court of Canada hears from considerably fewer interveners than its United States counterpart, intervention is still a well-utilised process in that appellate court. The Rules of the Supreme Court of Canada require any person interested in making submissions to apply for intervention status and set out why their submissions will be useful and different from those of the other parties.[6] According to my analysis of Supreme Court judgments, 221 interveners participated in the 75 cases decided in 2012. Interveners participated in 60 percent of the total number of cases decided by the Supreme Court, with 40 percent of those cases involving a significant number of interventions.[7] While the types of interest groups appearing before the Supreme Court of Canada are broadly similar to those appearing before the Supreme Court of the United States, there tend to be fewer interventions by organisations having express political leanings. Canadian interveners are often organisations claiming to represent a particular social collective, such as an occupational class. For example, in *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*,[8] a case considering whether photocopying of copyrighted materials by a teacher fell within the 'fair dealing' exemption of the copyright statute, 19 interveners participated in the pro-

[4] Supreme Court of the United States, Docket no 11-1179, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-1179.htm> [accessed 4 February 2013].

[5] Steptoe & Johnson LLP, 'Appellate & Supreme Court', <http://www.steptoe.com/practices-37.html> [accessed 4 February 2013].

[6] Rules 55-57 of the Rules of the Supreme Court of Canada, SOR/2002-156, <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-156/page-17.html#h-68> [accessed 4 February 2013].

[7] Out of the 45 Supreme Court of Canada cases decided in 2012 that involved an intervention, 18 involved five or more interveners: see CanLII, <http://www.canlii.org/en/ca/scc/> [accessed 4 February 2013].

[8] 2012 SCC 37.

ceedings including associations of authors, publishers, students, and teachers.

Table 1: Comparison of intervention activity at the Supreme Court of the United States and the Supreme Court of Canada over the 2012 calendar year.[9]

	Supreme Court of the United States	Supreme Court of Canada
Total number of judgments decided (A)	85	75
Number of judgments involving interveners (B)	66	45
Percentage of total judgments decided involving interveners (B/A)	77.6%	60 %
Number of judgments involving a significant number of interveners (C)	43	18
Percentage of total judgments involving a significant number of interveners (C/A)	50.6%	24%
Percentage of judgments involving interveners having a significant number (C/B)	65.2%	40%
Total number of interventions in all judgments decided (D)	597	221
Mean interventions per judgment decided (D/A)	7.0	2.9

Scholarly study of intervention is well-developed in the legal and political science literature of both the United States and Canada. Caldeira and Wright argue that the diverse range of interest groups represented at the Supreme Court of the United States make the Court 'very much a representative institution'.[10] Others have found interveners to have a less favourable effect on courts, arguing that interveners distort social science evidence and generate questionable research specifically geared to their legal briefs. In one study, Rustad and Koenig

[9] Decimal places have been truncated and not rounded in all calculations.

[10] G A Caldeira & J R Wright, '*Amici Curiae* before the Supreme Court: who participates, when, and how much?', (1990) 52 *J of Politics* 782, 803.

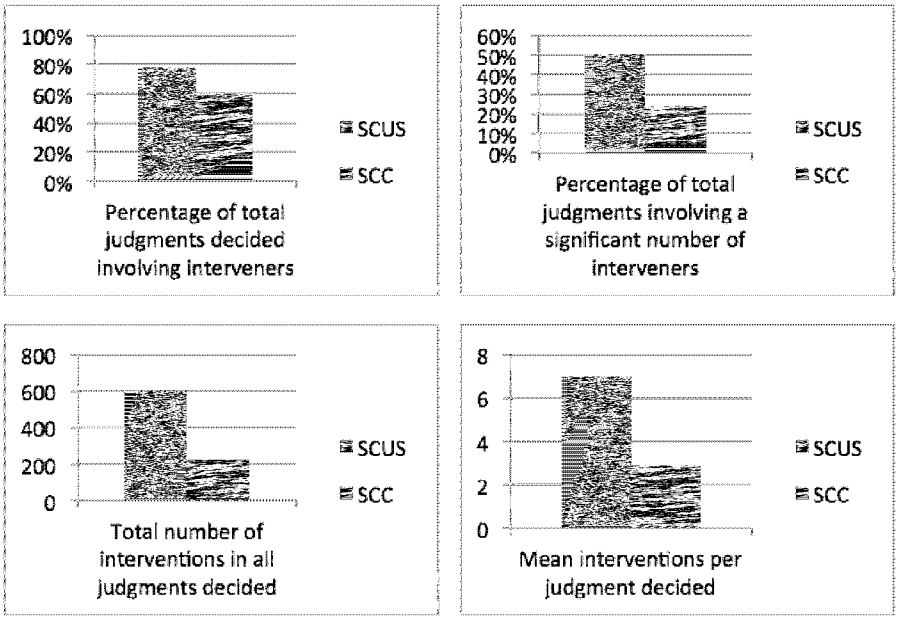

Figure 1: Comparison of intervention activity at the Supreme Court of the United States and the Supreme Court of Canada over the 2012 calendar year.

observe that scientific evidence put before the Supreme Court of the United States through *amicus curiae* participation is not subject to the same procedural safeguards, such as cross-examination, as ordinary evidence introduced by the litigation parties.[11]

Collins has published extensively on special interest groups appearing before the Supreme Court of the United States. In his book, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*, Collins draws upon an extensive dataset of special interest participation in Supreme Court cases to evaluate the influence of *amici curiae* on judicial decision-making.[12] Collins demonstrates that *amicus* legal briefs affect judicial policy choices by providing important contextual information, often in the form of scientific evidence, and arguments to supplement what is provided by the litigation parties. It is also interesting that

[11] Rustad & Koenig, above n 2, 95.

[12] P M Collins, *Friends of the Court: Interest Groups and Judicial Decision Making* (2008). See also P M Collins, 'Friends of the court: examining the influence of *amicus curiae* participation in US Supreme Court litigation', (2004) 38 *L & Society R* 807.

intervention tends to increase the number of dissenting opinions as the appellate process becomes transformed into a public-policy battleground.[13] Collins's conclusions are supported by other large-scale empirical studies, such as one conducted by Kearney and Merrill that documents an explosion in the number of *amici curiae* briefs filed at the Supreme Court over a half-century.[14]

In *Friends of the Court: The Privileging of Interest Group Litigants in Canada*, Brodie analyses various kinds of groups acting as interveners and their relationship with the Supreme Court of Canada.[15] Brodie theorises that the Supreme Court supports its activist policy-making agenda through a mutually beneficial relationship with certain groups who intervene to provide a foundation for pre-existing judicial policy preferences. Alarie and Green's detailed statistical study shows that intervention at the Supreme Court of Canada matters: the presence of an intervener boosts the likelihood of outcome success in favour of the liberal or conservative orientation of the interest group and 'all judges are susceptible to intervener influence in a statistically significant way'.[16] Echoing the findings of Collins, Alarie and Green take the view that the Supreme Court encourages intervention when it seeks to better understand the context of its decision-making through additional information. The supplemental role of interveners and the increase in intervention activity over the past several years are positive developments so far.[17]

3 Intervention at the UK Supreme Court: purpose and procedure

One of the principal reasons third parties are permitted to intervene in proceedings at the UK Supreme Court is that it is in the public interest for them to do so. This can be understood in at least two senses. First, it is in the public interest that the dispute at hand is resolved in a way that best serves the parties affected by the decision. Second, it is in the public interest that appellate courts make decisions based on the best available information. In this sense, the public is not just those

[13] See P M Collins, '*Amici curiae* and dissensus on the US Supreme Court', (2008) 5 *J of Empirical Legal Studies* 143.

[14] J M Kearney & T W Merrill, 'The influence of *amicus curiae* briefs on the Supreme Court', (1999-2000) 148 *U of Penn L R* 743.

[15] I Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (2002).

[16] B R D Alarie & A J Green, 'Interventions at the Supreme Court of Canada: accuracy, affiliation, and acceptance', (2010) 48 *Osgoode Hall L J* 381, 408.

[17] Ibid, 410.

who are immediately affected by a decision, but the citizenry as a whole given that the law decided by the upper courts binds the lower courts (and the populace). The underpinning rationale is the ability of interveners to furnish the court with information that it might otherwise not have.

Although a laudable principle, the public interest rationale is not without potential problems. In the modern era, judges may be connected to pressure and agenda-driven groups. There is a risk, even if minimal, that the impartiality of judges could be drawn into question as a result of these connections. Within the operation of the rule against bias, it must be considered whether a perception of bias could arise as it 'is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[18] This is not a fanciful risk as *Re Pinochet*[19] demonstrates. In that case, the House of Lords decided that its judgment had to be set aside because of Lord Hoffmann's links to Amnesty International, which had intervened. Moreover, judges might not only have direct links with interveners—that may or may not qualify as 'bias'—they are likely to be exposed to a growing number of interveners in hearing their cases. Decisions in past cases may give rise to perceptions of a given disposition towards certain interveners or other pressure groups.

Extra-judicial connections are important as well. *Re Pinochet* stands as a precedent for a formal extra-judicial connection: Lord Hoffmann was a director and chairperson of Amnesty International Charity Limited.[20] However, adjudicators may meet members of pressure groups in many informal contexts (at dinner or receptions, for example).[21] These cases are less than straightforward because the rule against bias might not apply in such a case. As a result, English substantive law on bias may have to develop in order to accommodate the issues emerging with increasing number of interveners at the UK Supreme Court.

The procedure for intervening at the UK Supreme Court is governed by the Supreme Court Rules 2009. In particular, Rule 26(1) states that:

> After permission to appeal has been granted by the Court or a notice of appeal has been filed, *any person* and in particular–

[18] *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, 259.

[19] [2000] 1 AC 119.

[20] Although Amnesty International consists of numerous (technically distinct) legal entities, they were treated as one and the same legal person for the purposes of the appeal: ibid, 139 (Lord Goff of Chieveley).

[21] A possibility touched upon by Deane J in the Australian case of *Webb v The Queen*, (1994) 181 CLR 41, 74.

> (a) any official body or non-governmental organization seeking to make submissions in the public interest,
>
> (b) any person with an interest in proceedings by way of judicial review,
>
> (c) any person who was an intervener in the Court below or whose submissions were taken into account under rule 15,
>
> may apply to the Court for permission to intervene in the appeal.[22]

The rule is drafted widely to include 'any person', albeit with a special emphasis on those with an 'interest in proceedings' in the judicial review context, or who seek to make submissions 'in the public interest'. The Supreme Court is left with discretion under Rule 26(1) to self-regulate as to who may intervene.

A recent decision of the UK Supreme Court, *R (on the application of Prudential plc) v Special Commissioner of Income Tax*,[23] offers an interesting study of intervention. The case concerned the application and scope of legal advice privilege to advice given by accountants on a tax avoidance scheme. Five interveners participated in the case: The Law Society, The Bar Council, the Institute of Chartered Accountants, AIPPI UK Group, and the Legal Services Board. *Prudential* was unusual because the majority and minority judges 'agree[d] what the common law is or should be if the issue is treated as one of principle'.[24] What they differed on was how that principle should be applied. The majority relied heavily on the arguments advanced by interveners, while the minority fashioned their dissent almost exclusively from first principles.

While there were interveners on either side of the dispute in *Prudential*, those who supported the respondent did so on the ground that the 'effect of extending [legal advice privilege] would involve a potentially nuanced policy decision [...] which is therefore best left to Parliament'.[25] Yet it is clear that the minority had no such qualms about the UK Supreme Court extending legal advice privilege. Lord Sumption stated that 'we are not here concerned with social or economic issues or other issues of macro-policy which are classically the

[22] Emphasis added. Rule 15 provides that parties (like those in Rule 26) may make written submissions to the Court in support of an application for permission to appeal.

[23] [2013] UKSC 1.

[24] Ibid, para 140 (Lord Clarke, diss).

[25] Ibid, para 28 (Lord Neuberger). The same point is alluded to by Lord Reed in paragraph 101: 'More fundamentally, it is necessary to give consideration to the respective roles, in relation to the development of this area of the law, of the courts, the executive and the legislature.'

domain of Parliament'.[26] The division between the majority and minority reveals a problem of characterisation: what is to be considered a social or economic issue or an issue of macro-policy best left to Parliament? A divisive intervener could leverage the potential in characterising an issue one way over another. This is particularly problematic where, due to time constraints or the availability of information, there is no counterargument to be heard (e.g., from another intervener).[27] Moreover, in some cases, extensive social or economic evidence put before the court by an intervener may contribute to judicial comfort in deciding issues traditionally seen as the domain of Parliament.

It remains to be seen how the UK Supreme Court will regulate the process of intervention. Judicial discretion in the broad wording of Rule 26(1) provides the Supreme Court with sufficient flexibility in developing its approach to ensure that it can obtain important and relevant information from interveners. The newly established Supreme Court has the opportunity to charter a course which can be informed by the experience of other jurisdictions: although each has its own intervention rules and different constitutional roles for its respective supreme court, the United States and Canada both offer lessons in how interveners can be fruitful contributors to judicial decision-making at the appellate level if the process is sufficiently regulated. Striking a balance between the benefits offered by interveners while avoiding the problems they present is not an easy task, which is why more work needs to be done to better explore intervention before the Supreme Court.

4 Intervention at the UK Supreme Court: the numbers

While there is much less intervention activity at the UK Supreme Court compared to the supreme courts of the United States and Canada, the findings demonstrate that intervention has generally increased over the past eight years, with a significant expansion following the creation of the Supreme Court as an institution distinct from the House of Lords.[28]

[26] Ibid, para 131 (Lord Sumption, diss).

[27] See the discussion by M Fordham, 'Public interest interventions in the Supreme Court: ten virtues', <http://www.blackstonechambers.com/document.rm?id=331> [accessed 4 February 2013] 2.

[28] A note on the methodology: I counted cases and interveners in the judgments of the UK Supreme Court appearing on its website <http://www.supremecourt.gov.uk/decided-cases/index.html> [last accessed 4 February 2012] in the calendar years 2009 through to the end of 2012 and in

Table 2: Comparison of intervention activity at the UK Supreme Court from its establishment in 2009 through to the end of the 2012 calendar year.

	2009 UKSC	2010 UKSC	2011 UKSC	2012 UKSC
Total number of judgments decided (A)	17	58	60	63
Number of judgments involving interveners (B)	6	17	24	23
Percentage of total judgments decided involving interveners (B/A)	35.2%	29.3%	40.0%	36.5%
Number of judgments involving a significant number of interveners (C)	1	0	0	0
Percentage of total judgments involving a significant number of interveners (C/A)	5.8%	0%	0%	0%
Percentage of judgments involving interveners having a significant number (C/B)	16.6%	0%	0%	0%
Total number of interventions in all judgments decided (D)	13	21	46	33
Mean interventions per judgment decided (D/A)	0.76	0.36	0.77	0.52

For example, at its peak in 2011, 40 percent of the Supreme Court's cases involved at least one intervener as compared to the House of Lords in 2005 where only 12 percent of its cases involved intervention. From its inception in 2009 to the end of 2012, the Supreme Court heard more than 35 percent of its cases in the

the judgments of the House of Lords appearing on its website <http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm> [last accessed 4 February 2012] in the calendar years 2005 through to the end of 2009. Case listings were also supplemented with reference to the electronic subscription service Westlaw UK <http://www.westlaw.co.uk/> [last accessed 4 February 2012]. Each neutral citation was counted as a single case and interveners were counted when they appeared on the header of the judgment as having made oral arguments or written submissions. Joint submissions by multiple organisations were counted as a single intervener.

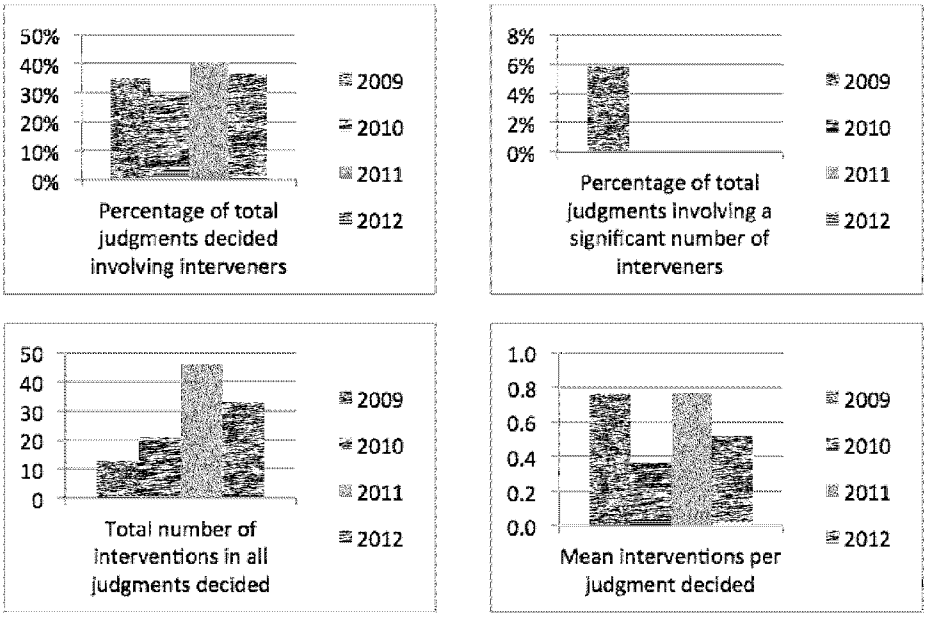

Figure 2: Comparison of intervention activity at the UK Supreme Court from its establishment in 2009 through to the end of the 2012 calendar year.

presence of an intervener in contrast to less than 24 percent at the House of Lords in the period from 2005 to the cessation of its judicial function in 2009: a relative increase of intervention in the total judicial case-load of nearly 50 percent.

Despite the increasing incidence of intervention in cases before the UK Supreme Court, there remain few cases with a significant number of interveners. During the period studied, there was only a single case involving at least five interveners, being the 2009 judgment of the Supreme Court in *R v Governing Body of JFS and the Admissions Appeal Panel of JFS and others*.[29] In that case, the Court was called upon to consider who is 'Jewish' for the purpose of deciding whether an admissions policy at a Jewish secondary school infringed the Race Relations Act 1976. Interveners in the case included the Board of Deputies of British Jews, the Equality and Human Rights Commission, the Secretary of State for Children, Schools and Families, the United Synagogue, and the British Humanist Association. Lord Phillips' judgment referred to extensive

[29] [2009] UKSC 15.

social science information presented to the Supreme Court, including statistics on denominations of persons identifying as Jewish and the accepted process of conversion in the context of a child who was refused admission to the school on the basis that he was not recognised as Jewish by the Orthodox denomination.[30]

Table 3: Comparison of intervention activity at the UK House of Lords from 2005 through to the cessation of its judicial function in 2009.

	2005 UKHL	2006 UKHL	2007 UKHL	2008 UKHL	2009 UKHL
Total number of judgments decided (A)	74	56	58	74	45
Number of judgments involving interveners (B)	9	15	18	22	9
Percentage of total judgments decided involving interveners (B/A)	12.1%	26.7%	31.0%	29.7%	20.0%
Number of judgments involving a significant number of interveners (C)	0	0	0	0	0
Percentage of total judgments involving a significant number of interveners (C/A)	0%	0%	0%	0%	0%
Percentage of judgments involving interveners having a significant number (C/B)	0%	0%	0%	0%	0%
Total number of interventions in all judgments decided (D)	12	22	22	28	13
Mean interventions per judgment decided (D/A)	0.16	0.39	0.38	0.38	0.29

The lack of cases with a significant number of interveners stands in sharp contrast to the Supreme Courts of the United States and Canada, where key cases

[30] Ibid, paras 3-6, 40.

commonly attract a large number of interveners. However, there may be a change on the horizon as indicated by the Supreme Court's first delivered case in 2013 of *Prudential*, discussed above.

Interestingly, there is also a correlation between the size of the panel hearing the case and the presence of interveners and their number. A larger panel size may be a way for the UK Supreme Court to send a signal, even if passively, to potential interveners of the importance of the case. When the Supreme Court sat with seven judges, for example, the likelihood of an intervention jumped by nearly five percent. The average number of interveners in cases with seven judges also increased. When nine judges sat on a case, the effect was even more significant: the likelihood of an intervention on a nine-judge panel jumped by nearly 50 percent, with an average of 1.53 interveners in such cases compared to an overall average of 0.57.

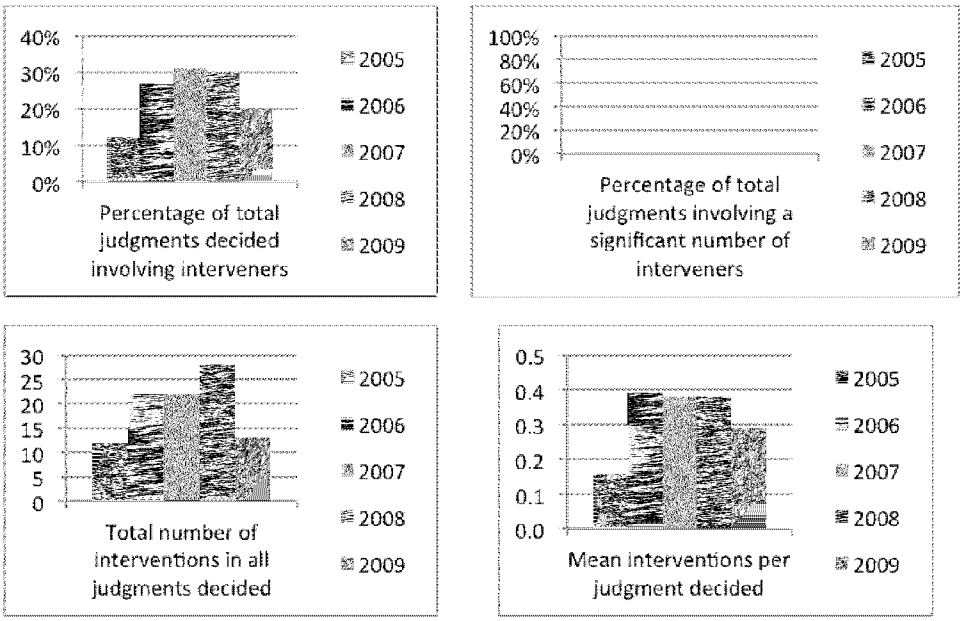

Figure 3: Comparison of intervention activity at the UK House of Lords from 2005 through to the cessation of its judicial function in 2009.

Table 4: Comparison of aggregate intervention activity at the UK House of Lords from 2005 through to the cessation of its judicial function in 2009 with the aggregate intervention activity at the UK Supreme Court from its establishment in 2009 through to the end of the 2012 calendar year.

	2005-2009 UKHL	2009-2012 UKSC
Total number of judgments decided (A)	307	198
Number of judgments involving interveners (B)	73	70
Percentage of total judgments decided involving interveners (B/A)	23.7%	35.3%
Number of judgments involving a significant number of interveners (C)	0	1
Percentage of total judgments involving a significant number of interveners (C/A)	0%	0.5%
Percentage of judgments involving interveners having a significant number (C/B)	0%	1.4%
Total number of interventions in all judgments decided (D)	97	113
Mean interventions per judgment decided (D/A)	0.31	0.57

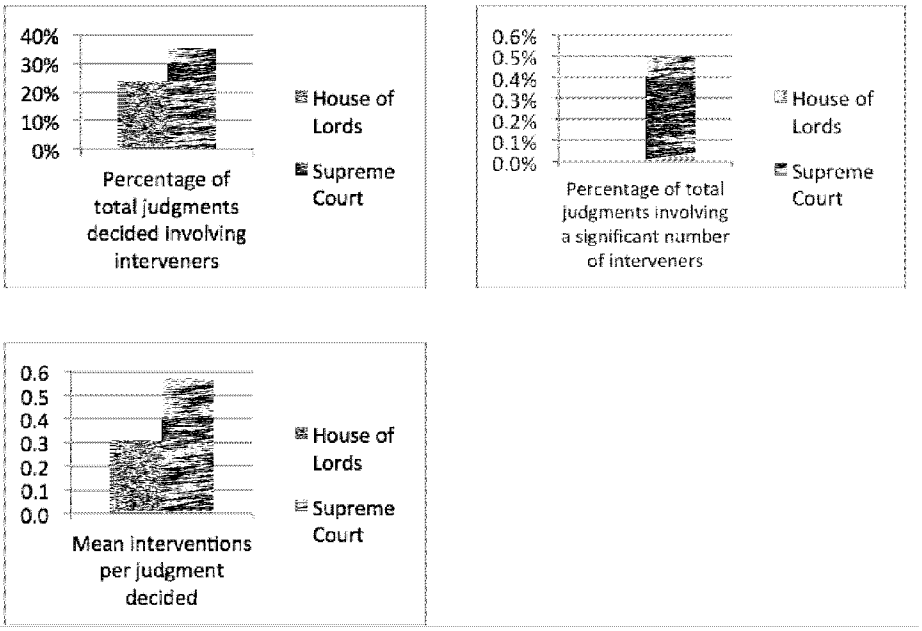

Figure 4: Comparison of aggregate intervention activity at the UK House of Lords from 2005 through to the cessation of its judicial function in 2009 with the aggregate intervention activity at the UK Supreme Court from its establishment in 2009 through to the end of the 2012 calendar year.

Table 5: Comparison of intervention activity in seven- and nine-judge panels at the UK Supreme Court from 2009 through to the end of the 2012 calendar year with the overall numbers from the UK Supreme Court during the same period.

	7 judge panels 2009-2012 UKSC	9 judge panels 2009-2012 UKSC	All cases 2009-2012 UKSC
Total number of judgments decided (A)	37	13	198
Number of judgments involving interveners (B)	15	11	70
Percentage of total judgments decided involving interveners (B/A)	40.5%	84.6%	35.3%
Number of judgments involving a significant number of interveners (C)	0	1	1
Percentage of total judgments involving a significant number of interveners (C/A)	0%	7.6%	0.5%
Percentage of judgments involving interveners having a significant number (C/B)	0%	9.0%	1.4%
Total number of interventions in all judgments decided (D)	32	20	113
Mean interventions per judgment decided (D/A)	0.86	1.53	0.57

5 Conclusion

As this study demonstrates, intervention at the UK Supreme Court is emerging as an important part of the litigation process. Where this may lead is not entirely clear. What can be drawn from the comparative and numerical analysis is that intervention has the capacity to enrich the judicial decision-making process. However, there remains a risk of transforming the highest judicial institution

into a forum for specialised interests if this tool is not carefully utilised. An immoderate approach may encourage the Supreme Court to make decisions that are better made by more representative institutions and could threaten public perceptions of judicial impartiality.

Further scholarly study of intervention at the UK Supreme Court, both qualitative and quantitative, is necessary to fully understand the process as it develops and more data becomes available. Who are interveners and what are their policy preferences? What kinds of cases tend to attract intervention? Why is there an overall trend toward increased intervention? What are the effects of intervention in influencing judicial choice? Is the evidence presented by interveners reliable or does it tend to distort the decision-making process? Is the litigation process, as traditionally understood, in a state of flux? These questions are all worthy of consideration. It is hoped that this study provides a useful starting point to answering these questions as well as stimulating further debate in this promising field as the Supreme Court matures.

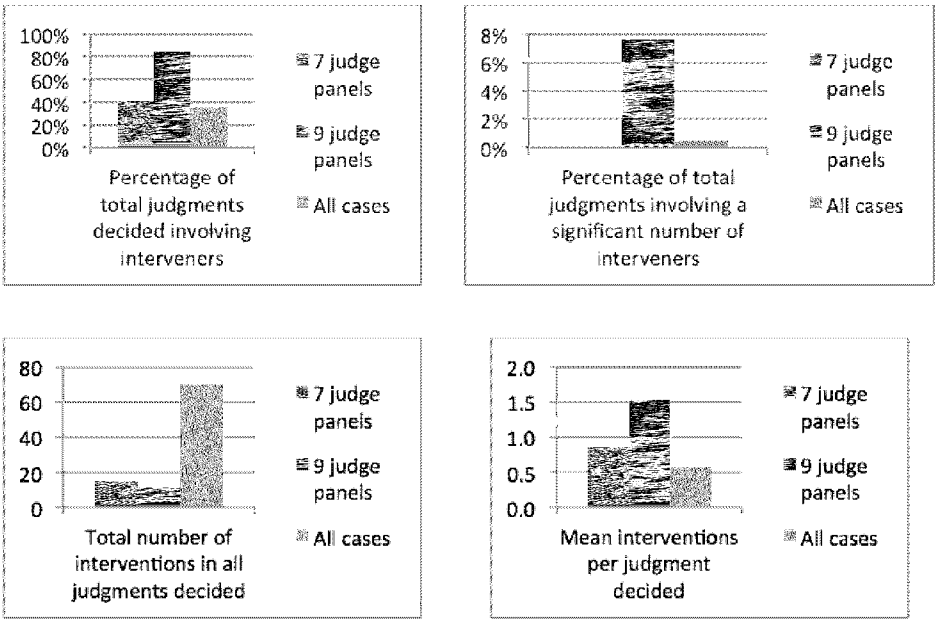

Figure 5: Comparison of intervention activity in seven- and nine-judge panels at the UK Supreme Court from 2009 through to the end of the 2012 calendar year with the overall numbers from the UK Supreme Court during the same period.