THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

CBA INTERVENTION POLICY REVIEW COMMITTEE
Report to the Board of Directors

May 2015

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I. Mandate

In November 2014, CBA President Michele Hollins established this Committee to review the CBA Intervention Policy. The purpose of the review is to ensure that the Intervention Policy serves the advocacy goals and objectives of the CBA and presents a clear and unambiguous process that reflects applicable CBA standards.

CBA members must have confidence in the principles and processes used in selecting and conducting interventions. While concerns surrounding the decision to approve, and then reject, a proposed intervention in *Chevron Corporation et al v. Yaiguaje et al* were the impetus for the review, our mandate was not limited to addressing the issues raised in a single case. Rather, we were tasked with reviewing every aspect of the Intervention Policy having regard to the range of interventions approved and refused under the Intervention Policy since its initial adoption in 1991.

II. Members of the Review Committee

Chair: Tom Irvine, SK
Vice Chair: Pascale Giguère, ON
David Cameron, NS
Aimée Craft, MB
Margaret Mereigh, BC
Cheryl Milne, ON
Frédéric Pérodeau, QC
Bill Veenstra, BC
Elizabeth Hall, OBA Director of Policy and Public Affairs
Tamra Thomson, CBA Director of Legislation and Law Reform

III. Input

The Review Committee informed its work with a research plan and consultations.

The research comprised two elements:

1. an analysis of the disposition of 70 intervention proposals dealt with by the CBA from 1992 to 2014; and
2. a review of changes to the SCC Rules that have an impact on interveners.

The consultation plan comprised three elements:

1. reaching out to members through representative CBA structures – Sections, Conferences, Branches and selected Standing Committees – that can garner the views of their constituencies and present a useful reflection of the input they received;
2. reaching out to the CBA membership directly to gather ideas and points of view; and
3. gathering insights from selected key informants – those who have argued CBA interventions and former Supreme Court of Canada judges who have heard the CBA's arguments.

A. Research Findings

The Committee reviewed the SCC Rules since 1991 (when the CBA Intervention Policy was first adopted) that have an impact on interveners: deadlines for filing intervention applications; the onus interveners must meet on the application for leave; orders relating to oral argument; timing for filing intervener factums; and the page limit for the factum. The findings are at Schedule A. The conclusion was that we have gone from an era where the involvement of SCC interveners was much

like the involvement of the principal parties to one in which interveners' involvement is more circumscribed, with limitations on written factums and oral argument.

The Committee analysed the disposition of 70 intervention proposals dealt with by the CBA from 1992 to 2014. Of the 70 proposals, 43 (61%) were accepted. Of these, 7 (16%) were approved as regional issues appropriate for Branch interventions. In some cases, approval was sought only after the Branch intervened. At least three other Branch interventions that proceeded were not approved in accordance with the Policy.

For the most part, the types of cases approved for interventions match the consultation feedback about where the CBA should be intervening.

SUBJECT OF INTERVENTION REQUESTS ACCEPTED AS NATIONAL	
Solicitor/client privilege	9
Access to Justice	5
Equality and human rights	4
Criminal justice (constitutional issues)	3
Judicial or administrative independence	3
Application of international treaties in Canadian law	3
Legal ethics	2
Right to counsel	2
Administration of justice	2
Unauthorized practice of law	2
Independence of legal profession	1

SUBJECT OF CBA BRANCH INTERVENTIONS (not all approved in accordance with Intervention Policy)	
Real Property	3
Access to justice	3
Administrative independence	1
Equality and human rights	1
Court rules	1
Confidentiality in mediation (national if appealed to higher court)	1

SUBJECT OF REFUSED INTERVENTION REQUESTS	
Access to Justice (lower court) x 3	Solicitor-client privilege (lower court)
Administration of justice x 3	Solicitors liens (lower court)
Right to counsel (lower court) x 2	Mandatory retirement
Independence of legal profession (lower court)	Corporate law
Admin independence (lower court)	Family Law (no consensus in Section)
Right to be tried in reasonable time	Language rights in criminal trial
Constitutional law (conflicting proposals)	Tax law (no consensus outside Section)
Lawyer liability to non-client (lower court)	Insurance law
Equality rights (lower court)	Right to die (late, incomplete proposal)

B. Red Flags: Where things are most likely to go wrong

We noted some common themes amongst the proposals that cause more problems.

Timing

Many proposals are made late in the game, leaving little time for consultations and decision-making. Decision-makers are reluctant to reject a proposal based solely on timing concerns. As a result, steps in the process are either rushed or skipped. Decisions are made without full information.

The problem is more acute with proposals to intervene at trial level or a Court of Appeal. They are more difficult to monitor systematically, court rules for interveners are less defined and deadlines are less predictable. In some cases, there may be as little as one week to respond when a court asks the CBA to intervene at first instance.

In these cases there is less likely to be a formal intervention proposal on which to seek input, assess the request and instruct counsel. If the decision is to intervene, counsel needs time to prepare the court documents.

Branches ignore the Intervention Policy

The file review reveals several interventions where a CBA Branch intervened at the trial level or in a Court of Appeal without seeking approval from the CBA Board of Directors, or by circumventing some steps in the process. The Intervention Policy permits Branch interventions only on regional or local issues. It requires CBA Board approval of Branch interventions as the safeguard mechanism to ensure consistency with CBA policy and reflection of a wide range of views from across the country, and to avoid the possibility of conflicting interventions from different CBA groups.

The cases where a Branch failed to obtain CBA Board approval in accordance with the Intervention Policy yield several lessons:

- Even with informal consultations, other Branches may still have unaddressed concerns that an argument or decision on what seems like a province-specific issue may, in fact, have an effect in other jurisdictions;
- A communications strategy around the Intervention Policy is likely warranted to ensure Branches are aware of the policy and its provisions; and
- Where a case has been argued in the name of the Branch in the courts of one province but is of sufficiently national importance to be heard by the SCC, provision must be made for the CBA national to assume the case in its name. Our national presence is undermined by having cases argued in the SCC in the name of a Branch. This arrangement should be made when CBA Board approval is sought for a Branch intervention.

Counsel has subject expertise, but firm lacks appellate litigation infrastructure and support

These are the cases where counsel looks to staff lawyers and the Legislation and Law Reform Committee (L&LR Committee) for more support in putting together a complete proposal, providing research, fact-checking affidavits, editing the factum, engaging an Ottawa agent and so on. Bottom line: the court gets the benefit of counsel's expertise, but there's a bigger impact on CBA resources and volunteer time.

Counsel for one of the parties suggests a CBA intervention

These suggestions usually move forward only with a champion within the CBA to make a formal proposal. In cases where one of the principal parties suggests an intervention, it is important to sedulously ensure that the interests of CBA and CBA's advocacy goals (outlined below) are the only interests and goals sought to be advanced by the intervention. Where a determination is made that an intervention is appropriate to advance the goals and interest of the CBA, careful communications should be developed to negate any appearance of a conflict of interest. In all cases, choice of counsel to act for the CBA should be carefully considered.

C. Consultation Feedback

A questionnaire was sent to all CBA Branches, 40 CBA Sections and Conferences, and the nine CBA standing committees with a policy mandate (Access to Justice, Equality, Ethics, International

Initiatives, Judicial Compensation, Legal Aid Liaison, Legislation and Law Reform, Pro Bono and SCC Liaison).

We received responses from:

- All Branches except Newfoundland and Nunavut
- 18 CBA Sections and Conferences – Aboriginal, Admin, ADR, CCCA, Charities, Civil Litigation, CJEF (French-Speaking Members), Constitutional and Human Rights, Family, Immigration, Labour, Municipal, NEERLS (Environment), Privacy, Small and Solo Practitioners, SOGIC, Women Lawyers and Young Lawyers
- Four standing committees – Access to Justice, Equality, Ethics, and Legislation and Law Reform.

The manner in which Branches, Sections and Conferences prepared their responses ranged from simply compiling input from individuals to developing a consensus position.

In addition, a survey sent to all members elicited 45 responses.

Analysis of the consultation feedback is detailed in Schedule B (CBA Branches), Schedule C (CBA Sections and Conferences), Schedule D (CBA Committees) and Schedule E (member survey).

IV. Recommendations

A. Objectives of the CBA Intervention Policy

Court interventions are an arrow in the quiver of strategies that the CBA can use to advance its advocacy objectives, along with legislative-reform initiatives, government relations and media relations. Given resource limitations, the CBA has limited its intervention strategy to appellate level cases that can result in the greatest precedent value.

In our view, the intervention strategy is most effective when employed judiciously. The current requirements that CBA interventions constitute a "significant contribution to consideration of the issues" and "not restate arguments of the parties" are good practices that should be retained.

B. Criteria for CBA Interventions

The current policy permits interventions where the position is:

- consistent with previously adopted CBA policy;
- a matter of compelling public interest which the Board of Directors adopts as CBA policy; or
- a matter of special significance to the legal profession.

While responders described it in different ways, a clear consensus emerged in our consultations: the greatest support is for interventions related to issues that have a bearing on the legal profession, the core values of the profession or the practice of law. The further away an issue moved from this centre, the less member support it garnered. This "hierarchy of issues" or "core" approach was both an explicit concept articulated by responders and a conclusion implicit in their ranking of the sample intervention issues presented to them. Aggregating the responses from Branches, Sections, Conferences and Committees ranked the issues in three broad clusters:

Highest Cluster

→ Preventing government incursion on solicitor-client privilege
→ Defending the independence of the legal profession
→ Matters having an impact on lawyers in the practice of law
→ Defending judicial independence

Second Cluster

→ Promoting ethical standards of lawyers
→ Improving access to justice
→ Improving the administration of justice
→ Promoting equality in the legal profession
→ Promoting equality in the justice system

Lowest Cluster
→ Matters that protect the public interest
→ Improving the law in a specific area of practice

This is consistent with feedback from our interviews with former SCC judges and intervention counsel. CBA interventions were said to be most valuable when they dealt with the core issues of importance to the profession. The further CBA ventured from this core, the higher the risk of brand dilution.

While interventions on matters of substantive law and the more amorphous "public interest" had less support, the majority of responders advised against categorically prohibiting interventions on these issues. Many Sections and Conferences have strong views on issues of law in their area of expertise that need clarification or change. This merits some support as a benefit of membership. In some subject areas, the CBA is the most sophisticated, established organization that brings together different segments of the sector and perspectives on legal issues. Members count on the CBA to be the neutral voice of "good law" that assists Canadian lawyers in attracting and serving clients.

To balance these differing interests and recognize the "hierarchy of issues" or "core values" concept that emerged from the consultations, we suggest a sliding scale approach to intervention approval, based on three categories:

- Issues addressing the core principles* of the legal profession[1];
- Issues of importance to the legal profession generally; or
- Substantive legal issues of relevance to lawyers in a particular practice area.

Matters in the first category are most likely to be of high priority for CBA members, but no category of cases would get a free pass: proponents would always have to demonstrate a significant contribution to consideration of the issues, find a basis in CBA policy and propose arguments that were not simply a restatement of the arguments of other parties. As matters move down the list, however, proponents would have to clear a higher hurdle to the point where approval of interventions in the third category would be rare. In such a case, the proposal would be required to strictly demonstrate consistency with CBA policy, broad-based support, a significant contribution and arguments unique from the other parties. The proponent would also have to indicate why their case is sufficiently exceptional to justify intervention in this rare category.

We encourage Sections and Conferences to plan well in advance to meet these requirements. The Criminal Justice Section's strategy is a good example. The Section closely follows developments in criminal law, with a view to identifying issues that are working their way to the Supreme Court of Canada. The Section then lays a foundation for an eventual intervention application by bringing resolutions to CBA Council to form a sound policy base. They focus on issues such as access to

[1] The CBA Council endorsed an IBA statement in 1996, defining the core principles as follows:
The legal profession, in the public interest, is committed to these core principles:
- An impartial and independent judiciary, without which there is no rule of law;
- An independent legal profession, without which there is no rule of law or freedom for the people;
- Access to justice for all people, which is only possible with an independent legal profession and an impartial and independent judiciary.

And these core principles shall not yield to any emergency of the moment.

justice, right to counsel, judicial independence and discretion, and rule of law, rather than general improvement of the law.

As noted by some responders, the existence of a CBA resolution on a topic is a good indicator as to policy on that matter – but the policy reflected in some older resolutions may be out of date and no longer receive broad member support. The consultation process discussed later should assist in clarifying any issues as to currency of CBA policy.

Appropriately, the three categories of intervention cases align with the Advocacy Policy adopted by the Board of Directors in 2010, which states that priority will be given to the following issues:

- Issues of importance to the legal profession generally;
- Issues of direct relevance to lawyers in their practice area; and
- Issues addressing the core principles* of the profession.

Some responders suggested aligning the criteria for interventions with the CBA's Mission Statement, Strategic Plan or Advocacy Policy. These would lend a consistency of purpose. However, the Mission Statement and the Strategic Plan both address broader objectives of the organization beyond advocacy.

RECOMMENDED POLICY

Interventions by the CBA will be authorized only on:

- **Issues addressing the core principles* of the legal profession;**
- **Issues of importance to the legal profession generally; or**
- **Substantive legal issues of relevance to lawyers in a particular practice area.**

Interventions by the CBA must constitute a significant contribution to consideration of the issues and should not merely restate arguments advanced by the parties. The position proposed to be advanced must be supported by, and consistent with, previously adopted policy of the CBA or broad-based support throughout the Association.

Interventions dealing solely with substantive legal issues of relevance to a particular practice area will be approved only in exceptional cases where the proponent strictly demonstrates consistency with CBA policy, broad-based support, a significant contribution and arguments unique from the other parties.

**** The legal profession, in the public interest, is committed to these core principles:***

- ***An impartial and independent judiciary, without which there is no rule of law;***
- ***An independent legal profession, without which there is no rule of law or freedom for the people;***
- ***Access to justice for all people, which is only possible with an independent legal profession and an impartial and independent judiciary.***

And these core principles shall not yield to any emergency of the moment.

C. Level of Court

The current policy provides that interventions must be at the appellate level, usually at the Supreme Court of Canada.

In the consultation feedback, a strong majority of responders favoured expanding CBA interventions beyond the SCC, but limiting them to appellate courts. Some felt strongly that the CBA should be more open to interventions at courts of first instance, especially where the court itself invited the CBA to intervene. The rationale for first-instance interventions included:

- Where a case raises issues of significant concern to the bar, locally or nationally, the CBA's relevance and commitment to protecting lawyers may be questioned if it is not seen to be leading the way. This is particularly true where competing organizations have taken up the cause;

- CBA members may be subject-matter experts whose involvement would assist in assembling the necessary evidence and create a trial record that will assist the CBA in advancing its advocacy goals at higher levels of court (eg. on the issue of hearing fees, lawyers are not just legal experts but experts on the effect such fees have on their clients and on access to justice); and

- The CBA may be shut out at later stages if competing organizations have already stepped in to represent the position of the bar.

The Committee supports interventions at the appellate level, to maximize the precedent value of decisions. While we do not recommend completely foreclosing interventions at courts of first instance, they should be rare and justified only by exceptional circumstances, including, possibly, a court invitation. We recognize the need to be, and appear to be, relevant to the bar, particularly on issues of regional importance. We can point to a valuable first-instance intervention that was subsequently taken to the SCC: in *AG Canada v. Federation of Law Societies*, law societies and the CBA formed a united front on behalf of the legal profession to defend solicitor-client privilege. The Committee also recognizes that lawyers may be factual experts who contribute the necessary evidentiary basis for the CBA's legal arguments.

On the other hand, we do not share all of the concerns raised by the responders who favoured lower court interventions. Those who have broad experience with CBA interventions are not concerned that the CBA would be denied leave to join the intervener ranks at the SCC merely because other legal organizations had already gained intervener status at the lower courts. The SCC has never refused the CBA leave, even in the presence of similar, pre-existing interveners.

More significantly, Committee members who have dealt extensively with intervention proposals were very concerned that the short timelines often inherent in lower court interventions would compromise the commitment to robust consultation that was almost universally demanded in the consultation feedback.

Where a case in which the CBA or a Branch intervenes is appealed to a higher court, it is good practice to seek the advice of counsel and decide whether the advocacy goals of the CBA continue to be served by an intervention in the higher court, and not just assume that the intervention will carry on as a matter of course.

RECOMMENDED POLICY

Interventions by the CBA or its Branches are limited to the Supreme Court of Canada and Courts of Appeal except, in rare cases, the CBA or a Branch may be authorized to intervene or seek leave to intervene where:

- **An intervention proposal demonstrates exceptional circumstances that justify intervention at a lower court, including, without limitation, an invitation from that court or where lawyers' factual expertise is necessary to create a trial record that supports CBA's legal position;**
- **The intervention proposal provides a feasible plan for robust consultation consistent with the consultation requirements in the Intervention Policy; and**
- **The consultation reveals an appropriate level of broad-based support among the membership that intervention at that level is appropriate.**

D. Branch Interventions

The current policy provides that interventions must be in the name of the CBA, except if the CBA Board of Directors authorizes a Branch intervention on a local or regional issue.

We agree with the broad consensus among responders: that the Intervention Policy should provide the flexibility for CBA Branches to intervene in appropriate cases, subject to the following:

- The matter is of local or regional concern;
- The Branch Executive Committee or Board of Directors AND the CBA Board must approve the intervention. The CBA Board's authorization is an important step to ensure that Branches do not take positions in interventions that are inconsistent with one another and to ensure consistent application of the Intervention Policy across the country.
- The requirements to inform and consult with Sections, Conferences, Committees and Branches, as set out in the Intervention Policy, must be satisfied before the CBA Board of Directors makes its decision on the Branch intervention;
- The same restrictions apply on interventions at courts of first instance that are outlined above;
- While the policy will not provide timelines for approval by the Branch, timelines for approval by the CBA Board must be adhered to as though the matter was a national intervention proposal.

We did not reach a consensus on one aspect of the scope of Branch interventions. Some believed they should be limited to matters *only* of local or regional concern: if there is any national importance to the issue, an intervention should be carried by the CBA and not one of its constituent parts. This strict standard is seen as the best way to ensure that the perspectives of other jurisdictions are taken into account. In practice, the CBA Board has had no problem in applying the stricter standard and authorizing Branch intervention for things that truly touch only one province. Some others would relax this strict standard to permit Branch interventions on matters *primarily* of local or regional concern. In either case, the CBA Board would decide whether the matter met the "local or regional" criteria. If a matter in which a Branch has intervened is appealed to the Supreme Court of Canada, the intervention at that level should be by the CBA and not the Branch.

E. Committee, Conference and Section Interventions

Consultation responders were overwhelmingly of the view that individual Sections, Conferences and Committees should not be permitted to be an intervening party. These were seen as antithetical to the CBA's "one voice" approach. We agree. As Sections, Conferences and Committees are not legal entities, the rules of standing would likely prevent their interventions in any case. This does not prevent the CBA or a Branch from intervening based on a proposal made by a Section, Conference or Committee, provided it meets the criteria and garners the appropriate level of broad-based support outlined in the policy. Nor does it prevent the intervening party from being represented by counsel from the Section, Conference or Committee, where appropriate. This distinction should be clear in the CBA's communications about the new policy, to avoid giving Section, Conference or Committee members the false impression that issues of importance to them cannot be the subject of CBA advocacy in appropriate circumstances.

RECOMMENDED POLICY

An intervention proposal must name either the CBA or a CBA Branch as the proposed intervener.

Sections, Conferences and Committees are not permitted to intervene but they may propose an intervention to the CBA or their Branch. The proposal will be subject to this policy.

Any Branch intervention is subject to the following:

- **The matter must be of local or regional concern, as determined by the CBA Board of Directors;**
- **The CBA Board may, in its sole discretion, permit a Branch to intervene on a matter of local or regional concern;**
- **Branch intervention proposals must first be approved by the Branch Executive or Board of Directors (as the case may be), and then by the CBA Board of Directors;**
- **The requirements to inform and consult with Sections, Conferences, Committees and Branches, as set out in the intervention policy, must be satisfied before the CBA Board of Directors makes its decision on the Branch intervention;**
- **Timelines for approval by the CBA Board of Directors must be adhered to as though the Branch proposal were a national proposal;**
- **If a matter on which a Branch has intervened at a Court of Appeal proceeds to the Supreme Court of Canada, any intervention at the Supreme Court will be in the name of the CBA.**

F. Consultation and Input

The current policy provides that the proposing body should consult and ascertain views of other interested CBA bodies before making the proposal. It also directs CBA staff to send a copy of the proposal to every Section, Committee or other CBA body that appears to have an interest in the subject matter of the proposed intervention.

A requirement for broader consultation on proposed interventions was the most consistent recommendation made to the Committee. Support for a flexible approach on issues such as types of cases, Branch interventions and level of court was to some extent contingent on a consultative process that would ensure reliable information on the level of support for the intervention. In other words, bright-line rules on substantive issues were not seen as necessary as long as there was a commitment to, and a mechanism for, determining the membership's views on each proposal.

A vast majority of respondents recommended that all CBA Sections, Conferences and Committees be consulted on intervention proposals, as well as Branches uniquely affected. Very few identified a need to consult all Branches.

The Committee considered an approach that would:

- engage the membership;
- garner reliable information on member's views to allow for targeted communications, issues management and good decision making by the Board of Directors; and
- provide an opportunity to communicate CBA's advocacy goals and successes to members by engaging them in issues early and keeping them informed.

We concluded that these goals would be best achieved by informing all CBA Sections, Conferences, policy Committees and Branches about proposed interventions and allowing them to identify an interest in putting forth a position. The communications protocols should be sufficiently robust to ensure that the issue came to the attention of all the groups, so absence of a response could be safely taken to mean a lack of interest in the issue. The protocols should also respect the varying triage and decision-making structures put in place by different groups. Those interested in taking a position would be given the opportunity to provide input along the timelines discussed below.

The member engagement would continue, particularly for those groups that provided input. Members would be informed of the decision made on the intervention proposal and, ultimately, of the Court's decisions on leave to intervene and on the substantive underlying case.

Given that:

- timelines for interventions are inherently short (relative to, for example, many legislative submission timelines); and
- a very broad consultation process is expected,

we suggest that some guidance and other assistance be provided to the parties being consulted. The guidance could include a form outlining the possible responses to the intervention proposal, and some suggested processes for those groups without a system in place. The appropriate guidance would have to be developed after further consultation and based on experiences with the broad-based consultation recommended in the new Intervention Policy.

While the Intervention Policy has been under review, the CBA has considered two intervention requests. In each case, the L&LR Committee undertook more extensive consultations – once involving Sections, Conferences and interested policy Committees, once involving Sections, Conferences and Branches. These experiences yielded some valuable lessons:

(a) To meet the time constraints inherent in intervention proposals, it would be best to take a formulaic approach, particularly for Branches with many practice Sections. Possible responses should be outlined. These would include:
    - taking no position as the group has no particular interest or expertise;
    - taking no position based on a failure to reach consensus (either because of opposing views or insufficient time);
    - opposing the intervention;
    - supporting the intervention and the proposed position; or
    - providing caveats on support for the intervention or nuances on the proposed position.

(b) Broad consultation involves a lot of effort and brings significant attention to the matter, both among the membership and even by the media and others outside the organization. This means at least three things:
    1) Where Branches are consulted, the Branch Presidents will often come to the CBA Board with a clear mandate on the issue, before the L&LR Committee reports its recommendations. If the L&LR Committee's recommendations are to be valuable, they will have to address the input provided and explain the reasons for any divergence from the views of the membership;
    2) A broad consultation creates expectations among the members that their views will be implemented. Problems will arise if the L&LR Committee recommendation or the CBA Board decision is divorced from a consistent view garnered from the membership. Any divergence requires a clearer explanation than has often been given. To avoid alienating members who took time to provide input, a sophisticated method of decision making needs to be employed. At a minimum, in making its

recommendation to the CBA Board, the L&LR Committee should outline the extent to which its decision accords with, or differs from, the input from Branches, Conferences, Committees and Sections and the reason for that difference.

3) A communications strategy should be prepared prior to the CBA Board decision on the intervention proposal.

(c) Some members found significant duplication and some confusion when they were consulted as part of a national Section and as part of a Branch consultation. Some discretion needs to be exercised in undertaking a sweeping consultation.

(d) A consultation that engages all of the CBA's governance structures – from national Sections, Committees, Conferences and the Board to Branches and their Sections, Committees, Conferences and Boards – is a significant undertaking in and of itself. If the governance structures are not employed to try to bring consensus advice, the undertaking is of limited value. Individual input should be encouraged through the appropriate governance structure rather than being provided directly to the L&LR Committee or the Board.

RECOMMENDED POLICY

The Legislation and Law Reform Committee will provide intervention proposals to each CBA Section, Conference and policy Standing Committee (to the Chair or in a manner used by the group to identify advocacy issues and priorities) and to the President and Executive Director of each CBA Branch, as soon as it receives a complete proposal.

CBA Sections, Conferences, Committees or Branches that wish to comment on the proposal shall do so in writing to the Legislation and Law Reform Committee in the time set out by the Legislation and Law Reform Committee.

G. Review and Authorization

The current policy outlines several steps to review and authorize an intervention proposal and factum:

- The Legislation and Law Reform Committee (L&LR) recommends to the Board of Directors whether interventions should be authorized.
- The Board of Directors authorizes interventions, or Executive Officers if the Board cannot act in time. The Board is not bound by the L&LR recommendation.
- The L&LR Committee reviews the factum on behalf of the Board and certifies that it is of high quality and a fair representation of CBA policy. The Board of Directors (or Executive Officers) approves the factum.

The consultation feedback revealed a consistent and strongly-held view that the full CBA Board should approve interventions and ensure they are conducted in a way that accords with CBA policy and standards. Approval by the Executive Officers was not seen as sufficient and, while the L&LR Committee's review of the factum was considered useful, responders recommended that the Board be ultimately accountable for this critical manifestation of the CBA's policy and position. A small contingent suggested that CBA Council should approve the Board's intervention decision at Council's next meeting. However, no suggestion was made as to the effect of a negative decision by Council on an ongoing or completed intervention.

To ensure that the Board is the ultimate decision maker and remains accountable to ensure that the intervention itself and the positions taken are consistent with CBA policy and its expectations of quality, we recommend that review and authorization provisions should follow a more standard governance model.

The L&LR Committee should review the intervention proposal and the advice from the CBA bodies that provided input in accordance with the consultation rules discussed above. The L&LR Committee should then make a non-binding recommendation to the CBA Board, consistent with the function of the CBA standing committees generally.

Some consultation responders raised issues around the choice of counsel noting that counsel should not automatically be the person or group preparing the intervention request. We agree. First and foremost, counsel representing the CBA must be of high calibre. Second, there is the need to avoid any conflict of interest (or appearance of conflict) by counsel representing the CBA. The current policy requires disclosure of any personal or professional interest by any of the proponents. The CBA Board must ensure that counsel's sole interest is to represent the CBA, and not to use the CBA to advance counsel's own personal or professional interest. Third, some suggested that the choice of intervention counsel may be an opportunity for the CBA to promote equality and diversity in the profession, by giving younger or more diverse counsel an opportunity to participate in a CBA intervention.

If the intervention is approved, the L&LR Committee should review the factum and work with counsel to make mutually agreeable changes to the factum. It should then make a recommendation to the Board on:

- any changes to the factum that were not agreed to by counsel but still deemed advisable by the committee; and
- approval or rejection of the factum.

RECOMMENDED POLICY

The Legislation and Law Reform Committee will review all intervention proposals and provide a non-binding recommendation to the CBA Board on whether the proposed intervention should be approved.

The CBA Board shall determine whether or not a proposed intervention should proceed to court.

Regardless of the proponent of the intervention, the CBA may retain counsel based on expertise, the need to avoid conflicts of interest (or the appearance thereof), and consideration of the CBA's commitment to promote equality and diversity in the legal profession.

The L&LR Committee should review all intervention factums and provide a non-binding recommendation to the Board as to whether a factum should be approved and any required changes to the factum.

The CBA Board should approve all intervention factums before they are given to the other parties to the matter, filed with a court or otherwise released to the public.

H. Timelines

The current policy states that every effort should be made to ensure sufficient time for thorough consideration of requests and factums. Requests should be made at least three weeks before the application for leave to intervene is due, and factums must be delivered for review no later than three weeks before it is filed.

The review of past intervention proposals showed timing to be one of the greatest challenges in reviewing and approving intervention proposals. Committee members who have participated in the interventions process – as a Section member asked for input, an L&LR Committee member

reviewing the proposal or a Board member making the decision – can all attest to this. Three weeks is insufficient for thorough consideration, and it is a timeline respected more often in the breach.

The CBA has a culture of not wanting to say no and just wanting to get things done. We saw in the review of past intervention proposals that a reluctance to say no to late requests results in rushing or skipping steps, and decisions made without full information.

For SCC appeals, the progress of cases is easily monitored and timelines are set in the Court rules (although the Court is inclined to order shorter timelines). At lower courts, cases are harder to monitor, timelines unpredictable, and invitations from the Court random.

The clear message from the consultation feedback is that none of these challenges should obviate the need for robust consultation. To meet this need, a fixed time of at least four weeks should be required to consider an intervention proposal. Proponents should be strongly encouraged to submit proposals at the earliest possible time, and proposals should include a consultation plan.

We would not go so far as to reject any proposal solely because it failed to meet the four-week rule. At the same time, we are aware that our recommendation to expand the scope of CBA interventions to Courts of Appeal and (in rare cases) trial courts will amplify the timing challenge.

Changes to Supreme Court of Canada rules and practice have generally reduced the time for filing a factum after leave to intervene in granted. Counsel giving three weeks for the CBA's review would often have less than that to actually prepare the factum. Counsel should have more time to write the factum than is needed to get it approved. We recommend reducing the review period for the factum to two weeks. If the rules or a Court order make that two week deadline impossible, counsel should say so when leave to intervene is granted and agree on a reasonable deadline.

RECOMMENDED POLICY

Intervention requests must be submitted at least four weeks before the application for leave to intervene is due.

Intervention requests must provide a feasible plan for robust consultation.

Counsel must provide the factum for review at least two weeks before it is due to be filed. If the rules or a Court order make that two week deadline impossible, counsel must say so when leave to intervene is granted and agree on a reasonable deadline.

I. Where the Policy Should Live

The Committee's mandate asked whether the Intervention Policy belongs in CBA Bylaw 1.

A policy of this sort is not normally in an organization's bylaws. The current Policy is in the CBA Regulation. It is the only CBA policy elevated to that status. Council placed it into the Regulations in the mid-1990s, when it saw a need to give it more gravitas and visibility. We see no harm in keeping it in the Regulations, for the same reason. We would not elevate it to be part of CBA Bylaw 1.

Throughout this report, we have outlined recommended principles, but have not drafted these in the exact words of a comprehensive policy resolution to Council. If the CBA Board deliberates on our recommendations and decides that amendments to the Intervention Policy are in order, we believe the Resolutions Committee is well placed to draft the amendments in a form consistent with language of the Regulations.

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L'ASSOCIATION DU BARREAU CANADIEN

Memo / Note de service

DATE :	**November 19, 2015**
FROM/DE :	**Kerri Froc**
TO/À :	**Tamra Thomson and Elizabeth Hall**
CC :	
RE/OBJET :	**Supreme Court of Canada Rules Affecting Interveners – 2001 to Present**

Appendix A

You have asked me to research on changes to the SCC Rules since 1991 (when the CBA Intervention Policy was first adopted) that have an impact on interveners. For the following, I am focusing on ordinary interventions according to CBA processes (that is, intervention obtained through application for leave to intervene, not as a party intervener, etc). I am also focusing on rules that are critical for interveners in making their case before the Court, rather than every rule that mentions an intervener. I researched the following:

- the deadline for filing intervention applications
- onus for the intervener to meet on the application for leave
- orders that judges may make incidental to the grant of intervener status (i.e. orders relating to oral argument)
- timing for filing of the intervener's factum and
- the page limit for the factum.

As you might have sensed, we have gone from an era where interventions were much like the involvement of parties to one in which their involvement has been much more circumscribed, with limitations on their written facta and oral argument. Time lines for intervention applications and filing facta have become less predictable and usually more abbreviated. For detailed commentary on this phenomenon, I would commend to you, Sanda Rodgers, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" (2010) 50:2 *Supreme Court Law Review* and in Sanda Rodgers & Sheila McIntyre, eds., *The Supreme Court of Canada and the Achievement of Social Justice: Commitment, Retrenchment or Retreat* (Markham: Lexis-Nexis Canada, 2010), a copy of which is attached. She states that, "Arguably, the changes to the rules since 1983 [regarding interventions] have been relatively frequent, effectually substantive, more than occasionally arbitrary, and hostile" (at p.22).

I have summarized the rule changes below, with the actual rules from each time period following at the end.

1. Timing for Filing an Intervention Application

With the 2002 amendments to the Rules, this rule changed from requiring interveners from filing their application for intervention within 60 days from the filing of the notice of appeal to four weeks after the filing of the appellant's factum.

2. Onus for Intervener to Meet on Leave Application

In 2006, the rules were changed to require the intervener describe its interest in the proceeding and any prejudice that would be suffered if the application was denied. In 2002, the rule was changed to require interveners to set out their submissions. This was recently revised to make reference to submissions only "with respect to the questions on which they propose to intervene" (which makes explicit that interventions may be confined to certain questions at issue in the appeal).

3. Incidental Aspects of Order (including oral argument).

In the pre-2002 rules, the rule respecting interventions (Rule 18) was very general. Oral argument was not specifically mentioned (rather it appeared to be presumed that interveners would present argument at the hearing). With the 2002 changes, explicit mention was made for the first time of a judge's power to "impose any terms and conditions and grant any rights and privileges that the judge may determine, including whether the intervener is entitled to adduce further evidence or otherwise to supplement the record." As well, oral argument (and its length) was explicitly described as subject to a judge's discretion. Sanda Rodgers notes that shortly after 2000, the Court began deferring decisions on whether to grant an intervener the right to oral argument until all written argument had been received (*supra* at p.22).

In 2006, there were rules changes to give the option of the judge making the order granting leave to intervene, to address oral argument at the same time. As well, in 2006, a provision was added to state, "An intervener is not permitted to raise new issues unless otherwise ordered by a judge."

4. Timing for Filing Intervener's Factum

This changed from the per-2002 rule requiring facta to be filed within four weeks from the date of service of the respondent's factum to the post-2002 rule requiring it to be filed eight weeks from the order granting leave to intervene. The pre-2002 rule meant that an intervener could have as long seven months from the date of the notice of appeal to apply for leave to intervene, obtain the order, and file its factum. The experience under the post-2002 rules have been much shorter time lines.

5. Page Limits for Intervener's Factum

This changed from 20 pages to 10 pages (unless otherwise ordered) in 2011, although judges were regularly ordering interveners not to exceed 10 pages for some years prior to the official change in the Rules (see Rodgers, *supra* at 22).

SUPREME COURT OF CANADA RULES

1. TIMING FOR FILING AN INTERVENTION APPLICATION

- **SOR/83-74 – In force until April 15, 2002**

  18(2) A motion for intervention shall be filed and served within 60 days after the filing of the notice of appeal or the reference.

- **SOR 2002-156 – In force April 15, 2002 until March 22, 2006**

  56. A motion for intervention shall be made in the case of

  …

  (b) an appeal, within four weeks after the filing of the factum of the appellant.

- **SOR/2002-156 – In place Mar 22, 2006 and Oct 12, 2006**

  No change.

- **SOR/2002-156 – In force between Oct 13, 2006 and Apr 10, 2011**

  56. A motion for intervention shall be made in the case of

  …

  (b) an appeal, within four weeks after the filing of the factum of the appellant; and

  (c) a reference, within four weeks after the filing of the Governor in Council's factum.

- **SOR 2002-156– In force between Apr 11, 2011 and Dec 31, 2013**

  No change.

- **Present Rule**

  No change.

2. ONUS FOR INTERVENER TO MEET ON LEAVE APPLICATION

- **SOR/83-74 – In force until April 15, 2002**

  No special rules as to what the proposed intervener's affidavit should contain.

- **SOR 2002-156 – In force April 15, 2002 until March 22, 2006**

  57. (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that persons interest in the proceeding, including any prejudice

  that the person interested in the proceeding would suffer if the intervention were denied.

  (2) A motion for intervention shall

  (a) identify the position the person interested in the proceeding intends to take in the proceeding; and

  (b) set out the submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

- **SOR/2002-156 – In place Mar 22, 2006 and Oct 12, 2006**

  No change.

- **SOR/2002-156 in force between Oct 13, 2006 and Apr 10, 2011**

  No change.

- **SOR 2002-156 in force between Apr 11, 2011 and Dec 31, 2013**

  No change.

- **Present Rule**

  57. (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.

  (2) A motion for intervention shall

  (a) identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and

  (b) set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

3. INCIDENTAL ASPECTS OF ORDER (INCLUDING ORAL ARGUMENT)

- **SOR/83-74 – In force until April 15, 2002**

  18(1) Any person interested in an appeal or reference may, by motion made in accordance with Rule 22, apply to a judge for leave to intervene upon such terms and conditions as the judge may determine.

  18(6) In the order granting leave to intervene, the judge may specify the filing date for the factum of the intervener but shall, unless there are exceptional circumstances, make provisions as to additional disbursements incurred by the appellant or respondent as a result of the intervention.

- **SOR 2002-156 In force April 15, 2002 until March 22, 2006**

  59. (1) In an order granting an intervention, the judge may

  (a) make provisions as to additional disbursements incurred by the appellant or respondent as a result of the intervention; and

  (b) impose any terms and conditions and grant any rights and privileges that the judge may determine, including whether the intervener is entitled to adduce further evidence or otherwise to supplement the record.

  (2) After all of the memoranda of argument on an application for leave to appeal or the facta on an appeal or reference have been filed and served, a judge may, in his or her discretion, authorize an intervener to present oral argument at the hearing of the application for leave to appeal, if any, the appeal or the reference, and determine the time allotted for oral argument.

- **SOR/2002-156 In place Mar 22, 2006 and Oct 12, 2006**

  59. (1) In an order granting an intervention, the judge may

  (a) make provisions as to additional disbursements incurred by the appellant or respondent as a result of the intervention; and

(b) impose any terms and conditions and grant any rights and privileges that the judge may determine, including whether the intervener is entitled to adduce further evidence or otherwise to supplement the record.

(2) In an order granting an intervention or after the time for filing and serving all of the memoranda of argument on an application for leave to appeal or the facta on an appeal or reference has expired, a judge may, in their discretion, authorize the intervener to present oral argument at the hearing of the application for leave to appeal, if any, the appeal or the reference, and determine the time to be allotted for oral argument.

(3) An intervener is not permitted to raise new issues unless otherwise ordered by a judge.

- **SOR/2002-156 in force between Oct 13, 2006 and Apr 10, 2011**

  No change.

- **SOR 2002-156 in force between Apr 11, 2011 and Dec 31, 2013**

  No change.

- **Present Rule**

  No change.

4. TIMING FOR FILING INTERVENER'S FACTUM

- **SOR/83-74 – in force until April 15, 2002**

  38(3) The factums shall be served

  (c) in the case of an intervener, within four weeks after the date of service of the respondent's factum, unless otherwise ordered under Rule 18.

  42(3) Where an intervener under subsection 32(4) does not file a factum within the time required by subsection 38(3), the appellant or the respondent may move before a Judge for directions regarding production of the factum.

- **SOR 2002-156 In force April 15, 2002 until March 22, 2006**

  37. Within eight weeks of the order granting leave to intervene or within 20 weeks of the filing of a notice of intervention under subrule 61(4), as the case may be, an intervener shall

  (a) serve on all other parties a copy of the interveners factum and book of authorities; and

  (b) file with the Registrar the original and 23 copies of the factum and 14 copies of the book of authorities.

- **SOR/2002-156 In place Mar 22, 2006 and Oct 12, 2006**

  No change excepting reference to also providing an electronic version of the intervener's factum.

- **SOR/2002-156 in force between Oct 13, 2006 and Apr 10, 2011**

  No change.

- **SOR 2002-156 in force between Apr 11, 2011 and Dec 31, 2013**

  No change.

- **Present Rule**

  No change.

5. PAGE LIMITS FOR INTERVENER'S FACTUM

- **SOR/83-74 – In force until April 15, 2002**

  18(5) Unless otherwise ordered by a Judge, an intervener

  (a) shall not file a factum that exceeds 20 pages;

  (b) shall be bound by the case on appeal and may not add to it; and

  (c) shall not present oral argument.

- **SOR 2002-156 In force April 15, 2002 until March 22, 2006**

  42(5) Parts I to V of the factum of an intervener other than an attorney general referred to in subrule 61(4) shall not exceed 20 pages unless a judge or the Registrar, on motion, otherwise orders.

- **SOR/2002-156 In place Mar 22, 2006 and Oct 12, 2006**

  42(6) Parts I to V of the factum of an intervener, other than an attorney general referred to in subrule 61(4), shall not exceed 20 pages, unless a judge or the Registrar, on motion, otherwise orders.

- **SOR/2002-156 in force between Oct 13, 2006 and Apr 10, 2011**

  42(6) Parts I to V of the factum of an intervener, other than an attorney general referred to in subrule 61(4), shall not exceed 20 pages, unless a judge or the Registrar, on motion, otherwise orders.

- **SOR 2002-156 in force between Apr 11, 2011 and Dec 31, 2013**

  42(6) Parts I to V of the factum of an intervener, other than an attorney general referred to in subrule 61(4), shall not exceed 10 pages, unless a judge or the Registrar, on motion, otherwise orders.

- **Present Rule**

  42(6) Parts I to V of the factum of an intervener, other than an attorney general referred to in subrule 61(4), shall not exceed 10 pages, unless a judge or the Registrar, on motion, otherwise orders.

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Appendix B

CBA INTERVENTION POLICY REVIEW
Consultation with CBA Branches

The questionnaire was sent to all CBA Branches. We received responses from all branches except Newfoundland and Nunavut.

The manner in which groups prepared their responses ranged from simply compiling input from individuals to a consensus position. Manitoba and Ontario each provided a consensus but did not follow the questionnaire. Their responses were not inconsistent with the data garnered from the questionnaire. Nova Scotia provided 4 separate answers, which were usually, but not always, fairly consistent with one another. Where the data is numerical, each of the four Nova Scotia responses were given ¼ weight (so where there are ratings, their 4 answers were averaged and where we calculated how many picked a particular option, one individual in Nova Scotia counts for 0.25. You will see that 9 is the denominator in some of the numerical answers because Ontario and Manitoba did not provide numerical answers.

Objectives of the CBA Intervention Policy

Current Intervention Policy
- CBA interventions are limited to appellate level to advance advocacy goals with greater precedent value, recognizing limited resources.

1. Should the Intervention Policy serve other CBA objectives? If so, which ones?

The Goals

The responses manifest a range of views. Some favoured an intervention policy that served a narrow set of goals closely related to lawyers' own interests, while others advocated for the ability to serve broader goals, as long as they were well-defined.

Saskatchewan, PEI and one of four Nova Scotia respondents preferred a narrow scope for CBA interventions. All four of these respondents accepted an intervention role for issues directly affecting lawyers. Some of the four expanded the scope to include the administration of justice but all stopped short of a public-protection mandate or the ability to assist in clarifying substantive legal issues. Those who focussed on limiting the scope of potential interventions either sited no reasons or sited limitations on CBA's resources.

Among the other Branches, there was a tolerance for flexibility in the goals that could be achieved through interventions. The focus was not generally on rigidly limiting the goals but, instead, on:
(a) better defining or outlining the objectives to be served by the intervention policy; and
(b) A democratic decision-making process for determining what constitutes a CBA "policy" on which an intervention position could be based. In particular, ensuring the policy was established by council or, at a minimum, the full board.

More than one Branch introduced a hierarchy of issues with a corresponding sliding-scale approach to intervention approval. The hierarchy of issues is as one would expect: The clearest mandate to intervene exists in cases involving the interests of the profession, followed by cases that involve the administration of justice and finally cases involving improvement of the substantive law in which CBA sections are expert. Some would eliminate public protection issues completely. As the issue veers from protection of the profession into administration of justice issues and then substantive issues, the intervention proposal should receive greater scrutiny. While this is not made clear in the responses, increased scrutiny could mean a broader consultation process and an increase in the number of bodies required to approve the intervention.

Level of Court

The prevailing view seemed to be that interventions should be limited to the appellate level. However, there were two arguments against a hard limit in this regard. These include:

(a) Competing Organizations - Modern proceedings, particularly constitutional proceedings, attract interventions at lower courts. If CBA does not become involved at early stages:
- the organization risks looking irrelevant in comparison to other organizations who have taken up the cause at the often-high-profile earlier stages; and
- The CBA may be shut out at later stages as competing organizations have already stepped in to represent the position of the bar. (We note that the CBA's experience at the SCC does not support this argument. The SCC has always granted leave to the CBA, even in cases with several interveners from lower levels where the CBA enters the race only at the SCC.)

(b) Branches may be invited by a court to intervene and it would not serve the association well to refuse.

Criteria for CBA Interventions

Current Intervention Policy
- Permits interventions that would constitute a significant contribution to the consideration of the issues involved, where the position sought to be advanced is:
  - consistent with previously adopted CBA policy of the Canadian Bar Association
  - a matter of compelling public interest which the Board of Directors then adopts as policy of the Association
  - a matter of special significance to the legal profession.
- The CBA should not merely restate arguments advanced by the parties.

2. How would your Branch define the criteria for CBA interventions in court proceedings?

The following were listed as criteria:
(a) A matter that affects the interests of, or is of special significance to, the profession;
(b) Rule of Law issues broadly where precedents will be set;
(c) A matter of compelling Public Interest (Alberta added caveat: only where one of the above two are met and, as noted above, some branches would eliminate this criterion and PEI would remove this option altogether);
(d) Limited to matters with an impact on the integrity of the justice system, including role of lawyers, particularly where the CBA's intervention could assist in correcting a power/resource imbalance between the parties;
(e) Advancing equality;
(f) Advancing principles of fundamental justice; and
(g) Should bring an important unique perspective rather than a restatement of the arguments advanced by one of the parties.

With respect to the "existing policy" criterion, it is considered a useful guide in determining whether a proposed intervention reflects the values of the membership. However, the following concerns were expressed about allowing reliance on this factor alone to justify an intervention:

(i) There are sometimes competing policies and an intervention is not necessarily justified if it is consistent with one policy and inconsistent with another;
(ii) Policies may be outdated and no longer reflect the views of the membership; and
(iii) Significant issues may arise that have not yet been the subject of CBA Policy.

The presence or absence of a policy should not take the place of adherence to an appropriate consultation process, membership buy-in and communication with the membership in each case. One Branch sites sign off by a majority of all "CBA bodies" as the necessary level of buy-in but does not define the term in a meaningful way, allow for weighing of views based on how expert in, or effected by, the intervention issues each body would be or provide advice on the practicalities garnering these "votes" within a realistic timeframe. Fortunately, this view was not widely held.

3. Please rate the importance of the CBA intervening in each of the following types of cases from 1 to 10 (with 1 being the least important and 10 being the most important). Average score shown for each:

TYPE of CASE	AVERAGE	RANGE	RANK
Matters having an impact on lawyers in the practice of law	9.6	8.5-10	1
Promoting equality in the legal profession	8.1	5-10	6
Promoting equality in the justice system	8.1	5-10	6
Preventing government incursion on solicitor-client privilege	9.2	8-10	3
Defending the independence of the legal profession	9.4	8-10	2
Defending judicial independence	9.1	6-10	4
Matters that protect the public interest	5.4	3-8	9
Improving the law in a specific area of practice	4.5	1-7	10
Improving access to justice	8	6-10	7
Improving the administration of justice	8.3	5-10	5
Promoting ethical standards of lawyers *	6.1	2.5-10	8

4. Are there other types of court cases where you think important for the CBA to intervene?

The vast majority of branches left the question blank or explicitly said "No"

Two additional responses were:

- Advocating for lawyers in a way that adds value to the membership; and, similarly,
- Each case should be viewed in terms of how it will impact on members not what "type of case" it is.

5. Are there types of court cases where you think it is important for the CBA not to intervene?

No respondent listed categories of cases in which the CBA should not intervene (except New Brunswick which listed "where litigation may result in an impact on how we practice", which I assume was an error)

The concerns raised dealt more with factors surrounding the case, such as controversy within the organization.

Scope of CBA Interventions

Current Intervention Policy

- Interventions must be at appellate level, usually at the Supreme Court of Canada.
  - Rationale: leverage limited resources to maximize precedent value of interventions.
- Interventions must be in name of CBA, except if the CBA Board of Directors authorizes a Branch intervention on a local or regional issue.
  - Rationale: CBA and Branches are legal entities with standing to seek leave to intervene. Clear message to the courts that the CBA speaks with one voice.

6. On what types of cases should CBA Branches be authorized to intervene in a court proceeding? (Please indicate all that apply)Why?

- Matters before the trial courts in their province or territory → **.25 out of 9 – 2.78%**
- Matters before the appellate court in their province or territory → **7 out of 9 – 77.78%**
- Local or regional matters before the courts in their province or territory → **3 out of 9 – 38.89%**
- Matters before the courts in their province or territory, where invited by the Court → **7.5 out of 9 – 83.33%**
- Matters before the courts in in their province or territory, where other lawyer organizations may be intervening → **6.5 out of 9 – 72.22%**
- None → **0 out of 9 – 0%**

7. Who should decide whether a CBA Branch can intervene? Why?

- Branch Executive → **0.25 out of 9 – 2.78%**
- CBA Board of Directors → **1.25 out of 9 – 13.89%**
- Both → **8 out of 9 – 88.89%**

8. On what types of cases should CBA Sections, Conferences or Committees be authorized to intervene? (Please indicate all that apply)Why?

- Matters before the trial courts on that area of law → **0 out of 9 - 0%**
- Matters before the appellate courts on that area of law → **2 out of 9 - 22.22%**
- Matters before the courts with a unique impact on the members of the CBA Section, Conference or Committee → **3.25 out of 9 - 36.11%**
- Matters before the courts, where invited by the Court → **4 out of 9 - 44.44%**
- Matters before the courts, where other lawyer organizations may be intervening → **3 out of 9 - 33.33%**
- None → **4.75 out of 9 - 52.78%**

9. What mechanism should exist to avoid potentially conflicting interventions by different CBA bodies (in similar cases before courts in different jurisdictions, or before the same court)?

It is a general consensus in the responses that the Board of Directors should make the decision in all cases and, where Branches will be pursuing an intervention on matters that are not of a purely provincial nature, CBA (national) should establish an appropriate consultation involving the Bbranches and bodies that would be effected.

The CBA should speak with one voice but there may be a process to allow for reconciliation of initially opposing views.

Many of the responses to this question dealt with issues in Question 11. See below.

Consultation and Input

Current Intervention Policy
- proposing body should consult and ascertain views of other interested CBA bodies before making the proposal
- CBA staff sends copy of request etc to every Section, Committee or other CBA body that appears to have an interest in the subject matter of the proposed intervention

10. Who should be consulted about potential CBA interventions? (Please indicate all that apply)

(where the respondents selected both bullet 1 and bullet 3, it is counted under bullet 3 only (given that if you chose 3, 1 is *ipso facto* included))

- Sections, Conferences and Standing Committees that appear to have an interest in the subject matter of the intervention. → **2.75 out of 9 – 30.5%**
- Branches uniquely impacted by the intervention. → **6 out of 9 – 66.67%**
- All Sections and Conferences. → **6.5 out of 9 – 72.22%**

11. Would you suggest any changes to the consultation process for CBA interventions?

The changes suggested by vast majority of Branches can be generally summarized as: consult earlier and more broadly. There were two responses that added the caveat that people who would have input should have some credentials for doing so.

In Ontario and Nova Scotia, there was a feeling that the existing policy was sufficient if followed.

Some responses revealed a preference for consulting everyone rather than applying the expertise of CBA staff to determine the most efficient and effective consultation process and most considerate use of volunteer time (NWT, BC). Ontario and Nova Scotia, however, saw a role for staff and the Legislation and Law Reform Committee in making an educated decision as to whose interests and expertise would be engaged by a particular issue.

A few responses (BC, Yukon, NWT) favoured running a parallel branch consultation for every national intervention decision, in addition to consulting the national sections, conferences and committees, which are themselves made up of provincial representatives. Others, however, indicated that the national decision-making structure should be used (i.e. consultation with conferences, committees and sections).

One response that stood alone was the idea of a full member vote where opinion appeared to be divided on an issue.

Review and Authorization

Current Intervention Policy
- Proposals made to President and Senior Director, Legal and Governmental Affairs (L&GA)
- Proposing body should consult and ascertain views of other interested CBA bodies before making the proposal
- Legislation and Law Reform Committee (L&LR) recommends to the Board of Directors whether

intervention should be authorized. Board not bound by L&LR recommendation.
- Board of Directors authorizes intervention, or Executive Officers if the Board cannot act in time
- L&LR Committee reviews the factum on behalf of the Board; certifies that it is of high quality and a fair representation of CBA policy
- Board approves factum (Executive Officers between meetings of the Board)

12. Would you suggest any changes to the process for reviewing and authorizing CBA interventions?

As indicated above, the suggestion around which there was the most significant consensus was that the full Board of Directors should ultimately make the decision on intervention. There was no objection and even some support for the continued role of the Legislation and Law Reform Committee in reviewing the factum. However, there was a suggestion that a new committee be established specifically to look at interventions, as part of a scheme to insulate the Board from external lobbying on intervention issues.

Timelines

Current Intervention Policy
- Every effort should be made to give sufficient time for thorough consideration of requests and factums
- Requests should be submitted at least three weeks before the application for leave to intervene must be filed.
- Factums must be submitted at least three weeks before it must be filed.

13. What would constitute "sufficient time" for thorough consideration of intervention requests at the Supreme Court of Canada? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

a. Three weeks
b. Two weeks
c. Another period (please specify)

(see below)

14. What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial Courts of Appeal? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

a. Three weeks
b. Two weeks
c. Another period (please specify)

(see below)

15. What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial trial courts? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

a. Three weeks
b. Two weeks
c. Another period (please specify)

For each of the three questions, all respondents indicated 3 weeks or more. About half thought 4 weeks was more appropriate and a few indicated that up to six weeks should be provided. Some respondents (Particularly, Nova Scotia, Ontario and B.C.) did recognize the necessity for flexibility. An "early warning" case-monitoring process was mentioned in relation to this question. This involves monitoring cases of potential interest from the earliest possible stage so that the decision can be made over time, rather than when the case reaches the higher courts.

General

16. Any other thoughts you would like to share?

Some respondents expressed gratitude for the opportunity to provide input. British Columbia provided extensive comments on the overall role of CBA interventions in the CBA advocacy scheme and as a membership driver. Along those holistic lines, one respondent indicated that the submissions policy should be reviewed along with the interventions policy. Other respondents noted that their experience was not sufficiently broad to provide additional comments. Most did not reply

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Appendix C

CBA INTERVENTION POLICY REVIEW
Consultation Responses from CBA Conferences and Sections

The questionnaire was sent to 40 CBA Sections and Conferences, of which 18 responded: Aboriginal; Admin; ADR; CCCA; Charities; Civil Litigation; CJEF (French-Speaking Members); Constitutional and Human Rights; Family; Immigration; Labour; Municipal; NEERLS (Environment); Privacy; Small and Solo Practitioners; SOGIC; Women Lawyers and Young Lawyers.

The manner in which groups prepared their responses ranged from simply compiling input from individuals to extensive discussions to come to a consensus within the group. Two groups (Aboriginal and NEERLS) did not follow the questionnaire, but made suggestions on what they thought were critical issues.

Objectives of the CBA Intervention Policy

Current Intervention Policy
- CBA interventions are limited to appellate level to advance advocacy goals with greater precedent value, recognizing limited resources.

1. Should the Intervention Policy serve other CBA objectives? If so, which ones?

Goals

Some groups suggested alignment with the CBA's mandate, mission statement, resolutions or Advocacy Policy. Others wondered what the "advocacy goals" were.

Level of Court

Seven groups commented here on the appellate level limitation. Opinion was split about this being reasonable or too limited.

Some noted that lower level interventions may be needed to ensure a complete or favourable trial record. In some practice areas, "trial level" is judicial review of an administrative tribunal, with greater precedent value. The need for the CBA to intervene must be clearly demonstrated at the trial level or on local issues.

Criteria for CBA Interventions

Current Intervention Policy
- Permits interventions that would constitute a significant contribution to the consideration of the issues involved, where the position sought to be advanced is:
  - consistent with previously adopted CBA policy of the Canadian Bar Association
  - a matter of compelling public interest which the Board of Directors then adopts as policy of the Association
  - a matter of special significance to the legal profession.
- The CBA should not merely restate arguments advanced by the parties.

2. How would your Section or Conference define the criteria for CBA interventions in court proceedings?

Four groups would make no change to the current criteria. Three groups suggested that "public interest" be defined. Several others outlined "public interest" criteria to be included.

Most frequently mentioned suggestions: Access to justice, Rule of Law, equality/constitutional values/ principles of fundamental justice/linguistic rights (as an element of access to justice), impact on profession/professional issues. One group suggested adding clarification of legal or substantive issues.

The group that would add "advancement of principles of fundamental justice" suggested that it have the three characteristics defined in the recent SCC decision in *AG Canada v. Federation of Law Societies*: there must be a legal principle; significant societal consensus that they are fundamental to the way the legal system ought fairly to operate; and must be sufficiently precise.

Note that the frequency of mentions here does not match the ranked responses in Q3.

One group suggested that there should be a broad consensus amongst Sections (more than 2/3), while another wanted openness to a diversity of views. One group said not to confuse a Section's interest with those of their clients.

3. Please rate the importance of the CBA intervening in each of the following types of cases from 1 to 10 (with 1 being the least important and 10 being the most important):

TYPE of CASE	AVERAGE	RANGE	RANK
Matters having an impact on lawyers in the practice of law	9.6	8-10	1
Promoting equality in the legal profession	8.7	5-10	3
Promoting equality in the justice system	8.4	5-10	4
Preventing government incursion on solicitor-client privilege	9.6	8-10	1
Defending the independence of the legal profession	9.6	8-10	1
Defending judicial independence	8.0	5-10	2
Matters that protect the public interest	6.4	1-10	7
Improving the law in a specific area of practice	5.1	1-10	8
Improving access to justice	8.3	6-10	5
Improving the administration of justice	8.1	6-10	6
Promoting ethical standards of lawyers *	8.8	5-10	2

* Based on 9 responses. Apparent glitch did not save response on all forms.

Tom and Pascale did an informal poll at the National Sections and Conferences meeting at the midwinter meeting in February. They used some examples from the member questionnaire. The purpose was to gather "gut reactions" rather than considered and debated views.

Comparing these results to the member survey, professional issues (privilege, unauthorized practice, right to counsel) are consistently high and area of practice issues are consistently lower. Human rights issues (hate speech, voting rights, same-sex marriage), court invites and matters of disagreement ranked higher in the member survey than this informal poll.

TYPE of CASE	***RESPONSE***
Challenge to search warrant and police seizure of privilege-protected client documents from a law office	*overwhelming, virtually unanimous support*

Constitutional challenge of hate speech provisions in human rights law	*about ½ support*
Constitutional challenge of law limiting voting rights of prisoners in federal penitentiaries	*about ⅓ support*
Injunction against immigration consultant for unauthorized practice of law.	*about ¾ support*
Appeal where some members have stated objections to established CBA policy supporting the proposed arguments in a CBA intervention	*minimal support, less than any prior item*
Reference on same-sex marriage. CBA has policy in favour of sexual orientation as a prohibited ground of discrimination	*about ¼ support.*
Family estate law matter. Family Law Section and Wills Law Section disagree on proper interpretation of the law	*no support in show of hands, one person said it would depend on how case was dealt with and how argument was made.*
Whether security certificate process under the Immigration and Refugee Protection Act is consistent with right to counsel and independence of the judiciary	*about ¾ support*
Statutory interpretation of Pensions Benefits Act, where counsel for main parties lack expertise in pension law	*no support*
Superior Court in a province has invited the CBA and other lawyer groups to intervene in a case before it	*¼ support*

4. Are there other types of court cases where you think important for the CBA to intervene?

Most suggestions here repeated the responses in Q2. Additional suggestions (each noted once):

- When parties aren't addressing larger issues, to ensure that hard cases do not make bad law
- CBA should be able to intervene notwithstanding opposition from a member firm acting for one of the parties.
- Ethical standards should include lawyer wellness and right to private life for lawyers and judges.
- Appellate cases where lawyers face disciplinary sanctions unrelated to criminal, fraudulent or dishonest acts.

The Immigration Section suggested offering assistance short of intervening (monetary or otherwise) where counsel for the parties is a leading expert in the field.

5. Are there types of court cases where you think it is important for the CBA not to intervene?

Several responses reflected the ratings in Q3, the most frequently mentioned being substantive matters of interest to a particular Section or area of practice. Put another way: avoid cases that do not impact the legal profession, access to justice or Rule of Law.

Several groups would exclude cases with differing views within the CBA, where there is no consensus amongst CBA members or no agreement amongst Sections or interested Sections.

Other responses:

- Where there is no CBA policy
- Where L&LR recommends against it
- Where the case entails no clarification of law, process or principles; narrow legal issues
- Never when it would go against linguistic duality or constitutional or quasi-constitutional language rights

Scope of CBA Interventions

Current Intervention Policy

- Interventions must be at appellate level, usually at the Supreme Court of Canada.
  - Rationale: leverage limited resources to maximize precedent value of interventions.
- Interventions must be in name of CBA, except if the CBA Board of Directors authorizes a Branch intervention on a local or regional issue.
  - Rationale: CBA and Branches are legal entities with standing to seek leave to intervene. Clear message to the courts that the CBA speaks with one voice.

6. On what types of cases should CBA Branches be authorized to intervene in a court proceeding? (Please indicate all that apply)Why?

Matters before the trial courts in their province or territory	9
Matters before the appellate court in their province or territory	15
Local or regional matters before the courts in their province or territory	6
Matters before the court in their province or territory, where invited by the Court	13
Matters before the court in their province or territory, where other lawyer organizations may be intervening	13
None: CBA should speak with one voice	1

Most groups gave no reasons.

Several groups noted that any Branch intervention must be consistent with CBA policy. Some noted the need for a process to assure that consistency, that they meet constitutional standards and ensure no conflict between CBA groups. Limit to issues of significant consequence to the practice or the public. One group's answers were not necessarily to give favour to a Branch intervention, but to indicate the appropriate venues for CBA interventions.

7. Who should decide whether a CBA Branch can intervene? Why?

Branch Executive only	2
CBA Board of Directors only	0
Both	14

CCCA response seems to count it as a Branch for this purpose.

8. On what types of cases should CBA Sections, Conferences or Committees be authorized to intervene? Why?

Matters before the trial courts on that area of law	5
Matters before the appellate courts on that area of law	7
Matters before the courts with a unique impact on the members of the CBA Section, Conference or Committee	7
Matters before the courts, where invited by the Court	7
Matters before the courts, where other lawyer organizations may be intervening	6
None	8

Opposition here was significantly greater than for Branch interventions. The groups opposed to Section/Conference/Committee interventions mostly said the reason was that the CBA should speak with one voice.

The groups supporting Section/Conference/Committee interventions mostly gave no reasons. Some saw it as a way to recognize diverse interests in the CBA. In keeping with its suggestion in Q4, the Immigration Section suggested that Sections be permitted to use deferred revenue to pursue interventions or otherwise assist counsel for the parties.

9. What mechanism should exist to avoid potentially conflicting interventions by different CBA bodies (in similar cases before courts in different jurisdictions, or before the same court)?

Several groups suggested that broad consultation would avoid most conflicts. Four groups suggested a dispute resolution mechanism of some kind. Three groups noted that an oversight body would have this task, two suggesting the Board of Directors and one the L&LR Committee.

This is consistent with the responses in Q6, where several groups said that any Branch intervention must be consistent with CBA policy. Some noted the need for a process to assure that consistency, that they meet constitutional standards and ensure no conflict between CBA groups.

Two groups specifically noted the importance of the CBA speaking with one voice in interventions. Two others thought this should be reconsidered, to reflect that the CBA is not a homogeneous organization.

Consultation and Input

Current Intervention Policy

- proposing body should consult and ascertain views of other interested CBA bodies before making the proposal
- CBA staff sends copy of request etc to every Section, Committee or other CBA body that appears to have an interest in the subject matter of the proposed intervention

10. Who should be consulted about potential CBA interventions?

Sections, Conferences and Standing Committees that appear to have an interest in the subject matter of the intervention (i.e. not all Sections and Conferences)	8
Branches uniquely impacted by the intervention	15
All Sections and Conferences	11

11. Would you suggest any changes to the consultation process for CBA interventions?

Eight groups suggested more transparent notice to or consultation with Sections. Five groups would make no change.

Specific suggestions on the consultation process:

- Put the burden on the person or group proposing the intervention to consult
- L&LR should be responsible for consultations, not the group or person proposing the intervention
- Have a mechanism to ensure that the proper groups have been identified and consulted.
- Have Branches consolidate input from their Branch
- Notify all Sections and give them a week to say whether they wish to be consulted
- Use polling tools

Review and Authorization

Current Intervention Policy

- Proposals made to President and Senior Director, Legal and Governmental Affairs (L&GA)
- Proposing body should consult and ascertain views of other interested CBA bodies before making the proposal
- Legislation and Law Reform Committee (L&LR) recommends to the Board of Directors whether intervention should be authorized. Board not bound by L&LR recommendation.
- Board of Directors authorizes intervention, or Executive Officers if the Board cannot act in time
- L&LR Committee reviews the factum on behalf of the Board; certifies that it is of high quality and a fair representation of CBA policy
- Board approves factum (Executive Officers between meetings of the Board)

12. Would you suggest any changes to the process for reviewing and authorizing CBA interventions?

Seven groups made no comment, or stated that they would not change the process. Several groups mentioned consultations here. Those comments are consolidated under Q11.

In the remaining comments, the prevailing issue was the relationship between the L&LR Committee recommendation and the Board decision. Some said that Board of Directors should give deference to the L&LR recommendation unless there is a strong compelling reason. If the Board disagrees, NEERLS suggested that it should discuss the issues with the L&LR Committee, rather than substituting its own decision.

That said, once the Board has decided to intervene, the L&LR Committee should not have power to veto the factum.

Timelines

Current Intervention Policy

- Every effort should be made to give sufficient time for thorough consideration of requests and factums
- Requests should be submitted at least three weeks before the application for leave to intervene must be filed.
- Factums must be submitted at least three weeks before it must be filed.

13. What would constitute "sufficient time" for thorough consideration of intervention requests at the Supreme Court of Canada? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

One group suggested giving all groups a week to say if they wished to be consulted. Several noted the need for flexibility, especially at the lower courts where matters can move quickly.

Two weeks	1
Three weeks	4
Four weeks	2
Six weeks	2
As much as possible, flexible	3

14. What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial Courts of Appeal?

Two weeks	1
Three weeks	6
Four weeks	3
Six weeks	1
As much as possible, flexible	3

15. What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial trial courts?

Two weeks	1
Three weeks	5
Four weeks	3
Six weeks	1
As much as possible, flexible	3

General

16. Any other thoughts you would like to share?

Seven groups made no comments. Two groups voiced appreciation for the consultation on these issues. Two groups raised the need for better communication once interventions are approved.

Some groups summarized or repeated points made in earlier responses. These are reflected in the appropriate question above.

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Appendix D

CBA INTERVENTION POLICY REVIEW
Consultation with CBA Standing Committees

The questionnaire was sent to the nine CBA standing committees with a policy mandate: Access to Justice; Equality; Ethics and Professional Responsibility; International Initiatives; Judicial Compensation; Legal Aid; Legislation and Law Reform; Pro Bono and Supreme Court of Canada Liaison.

The following four committees responded: Access to Justice; Equality; Ethics; and Legislation and Law Reform. They all used the questionnaire effectively. The answers are summarized below.

Objectives of the CBA Intervention Policy

Current Intervention Policy
- CBA interventions are limited to appellate level to advance advocacy goals with greater precedent value, recognizing limited resources.

1. Should the Intervention Policy serve other CBA objectives? If so, which ones?

The Goals

None of the Committees took issue with the goals identified in the current policy. Two explicitly indicated that there were fine and two did not address the issue.

Level of Court

The responses from the two committees who addressed this issue appear to be at odds – with one favouring a restrictive approach and the other articulating a tolerance for interventions at lower level of court. The positions may, however, be reconciled to produce the following rule:

> Interventions should be limited to the appellate court level except in exceptional circumstances, which can be defined as those in which a national interest is reflected in a local issue.

As was the case in the branch submissions, "limited resources" was cited as the primary reason for a restrictive approach.

Criteria for CBA Interventions

Current Intervention Policy
- Permits interventions that would constitute a significant contribution to the consideration of the issues involved, where the position sought to be advanced is:
  - consistent with previously adopted CBA policy of the Canadian Bar Association
  - a matter of compelling public interest which the Board of Directors then adopts as policy of the Association
  - a matter of special significance to the legal profession.
- The CBA should not merely restate arguments advanced by the parties.

2. How would your Committee define the criteria for CBA interventions in court proceedings?

There was significant consensus on several issues in the Committee responses. Even those responses identified as antithetical can be reconciled fairly easily. The following advice can be discerned:

(a) Limiting interventions to a strict list of topics or categories is not necessary or desirable. As was the case with the majority of branch submissions, the more important considerations were:

i. **Transparency.** CBA policies on which interventions are based must be clear, particularly where the policy is established quickly and contemporaneously with the intervention decision. A policy on which an intervention is based must be established before the intervention decision is made, not established after the approval to retrospectively justify an existing intervention decision;

ii. **An appropriate process.** The full Board of Directors should determine policies justifying intervention and they should be approved at the next council meeting. The Board should also have the responsibility for determining when a proposed intervention is consistent with CBA policies or mandates and otherwise meets the intervention criteria; and

iii. **Communication.** It is important for the board to be able to communicate the clear, distinct policy on which the intervention is based;

(b) As was raised in the branch responses, consistency with an existing CBA policy was considered to be both a potentially over-inclusive and potentially under-inclusive criterion that should not necessarily be used as the sole factor in accepting or rejecting an intervention proposal. Existing policy could be outdated and no longer reflect the views of the membership and, on the other side of the coin, there may be a critical issue on which no policy yet exists; and

(c) There was a suggestion that consistency with the CBA mandate as another factor that would justify interventions. This is somewhat consistent with the suggestion in the branch responses that less scrutiny would have to attach to interventions that were consistent with the essential mandates of the organization.

Committees were largely satisfied with the existing criteria. The Legislation and Law Reform Committee included in their response the views of an unnamed individual that a matter of compelling public interest should not be permitted to independently ground a CBA intervention.

3. Please rate the importance of the CBA intervening in each of the following types of cases from 1 to 10 (with 1 being the least important and 10 being the most important).

Given the limited number of responses and the wide range of answers on some issues, the average score would not be as useful as a quick view of the full range of scores (eg. responses on "matters having an impact on the profession" were at the extremes - from 1 to 10, which would make the average 7 but the mode is 10). In addition, it is, in some cases, important to consider the mandate and perspective of particular committees in assessing their responses. The averages from the branch, section and conference responses have been provided for comparison.

Issue	A2J	Equality	Ethics	L&LR	Branch Average	Section/ Conf Av
Matters having impact on profession	1	10	7	10	10	9.6
Promoting equality in the profession	7	10	10	8	8	8.7
Promoting equality in justice system	8	10	10	8	8	8.4
Protecting privilege	6	10	10	10	9	9.6
Defending independence of profession	2	4	10	10	9	9.6
Defending judicial independence	5	10	10	9	9	8.0
Protecting the public interest	9	4	10	8	5	6.4
Improving law in specific practice area	3	3	10	7	5	5.1

Improving access to justice	10	7	10	8	8	8.3
Improving administration of justice	5	7	10	7	8	8.1
Promoting ethical standards for lawyers	n/a	9	n/a	n/a	6	8.8

4. Are there other types of court cases where you think important for the CBA to intervene?

As was the case with branch responses, the vast majority of the committees either left this question blank or explicitly said there were no other types of cases in which it is important for CBA to intervene.

The Equality Committee added cases that have an impact on the law related to human rights and equality.

5. Are there types of court cases where you think it is important for the CBA not to intervene?

As was the case with the branch responses, committees were not concerned with eliminating certain ***types*** of cases. In fact, one committee strongly discouraged eliminating types or categories of cases. Instead of the categorical approach, the committee responses supported a case-by-case analysis that takes into account issues such as:

(a) The breadth of support and depth of objections to the intervention among CBA's constituent groups. The Legislation and Law Reform Committee outlined its discussions on the issue of what level of support would justify intervention. However, there is no clear advice provided on the issue, as the opinions of that committee ranged from those who would require unanimous support for an intervention to those who felt that such a requirement would be detrimental to the CBA's influence. In between are those who felt only "significantly differing" views (undefined) should result in rejection of an otherwise appropriate intervention;
(b) whether there is a "new or novel" position to be argued; and

(c) whether the court would benefit from our intervention.

Scope of CBA Interventions

Current Intervention Policy

- Interventions must be at appellate level, usually at the Supreme Court of Canada.
  - Rationale: leverage limited resources to maximize precedent value of interventions.
- Interventions must be in name of CBA, except if the CBA Board of Directors authorizes a Branch intervention on a local or regional issue.
  - Rationale: CBA and Branches are legal entities with standing to seek leave to intervene. Clear message to the courts that the CBA speaks with one voice.

6. On what types of cases should CBA Branches be authorized to intervene in a court proceeding? (Please indicate all that apply)Why?

→number out of 4, followed by (percentage) for some comparison with branch submissions

- Matters before the trial courts in their province or territory → **2 (50%)**
- Matters before the appellate court in their province or territory → **4 (100%)**
- Local or regional matters before the courts in their province or territory → **3 (75%)**
- Matters before the courts in their province or territory, where invited by the Court →**3 (75%)**

- Matters before the courts in their province or territory, where other lawyer organizations may be intervening → **2 (50%)**
- None → **0**

7. Who should decide whether a CBA Branch can intervene? Why?

→actual number out of 4, followed by (percentage) for some comparison with branch submissions

- Branch Executive → **1 (25%)**
- CBA Board of Directors → **0**
- Both → **3 (75%)**

8. On what types of cases should CBA Sections, Conferences or Committees be authorized to intervene? (Please indicate all that apply)Why?

The Equality Committee saw a broader scope for sections, conferences and committees to intervene in cases within their expertise and mandates. The other 3 committees saw no place for section, committee and conference intervention.

→actual number out of 4

- Matters before the trial courts on that area of law → **1**
- Matters before the appellate courts on that area of law → **1**
- Matters before the courts with a unique impact on the members of the CBA Section, Conference or Committee → **1**
- Matters before the courts, where invited by the Court → **1**
- Matters before the courts, where other lawyer organizations may be intervening →**1**
- None → **3**

9. What mechanism should exist to avoid potentially conflicting interventions by different CBA bodies (in similar cases before courts in different jurisdictions, or before the same court)?

The three committees that saw no scope for separate interventions by sections, conferences or committees, indicated that final intervention decisions should always be in the exclusive purview of the Board of Directors (national and, where appropriate, provincial), who would have the responsibility to avoid potential conflicts.

The Equality Committee, which contemplated a role for separate section, committee or conference interventions, suggested that there be a clear policy for consulting to gather positions and for analysing varying positions on the relevant issue (including written comments).

Consultation and Input

Current Intervention Policy

- proposing body should consult and ascertain views of other interested CBA bodies before making the proposal
- CBA staff sends copy of request etc to every Section, Committee or other CBA body that appears to have an interest in the subject matter of the proposed intervention

10. Who should be consulted about potential CBA interventions?

- Sections, Conferences and Standing Committees that appear to have an interest in the subject matter of the intervention. → **3 (75%) – (EQ, ETHICS, L&LR)**
- Branches uniquely impacted by the intervention. → **2 (50%) (EQ, L&LR)**
- All Sections and Conferences. → **2 (50%)(L&LR, A2J)**

11. Would you suggest any changes to the consultation process for CBA interventions?

Each committee made a different suggestion on improvements to the consultation process. These included:

(a) Clearly set out the process for consultation, as well as how to provide input and how the decision will be made.

(b) More time should be given to provide input. Those sections, conferences and branches whose input will be sought should be advised as soon as the intervention is proposed and there is a decision to be made.

(c) The L&LR Committee, which currently plays a role in the decision-making process, advises that consultation should be as broad as possible in order to fully understand and anticipate interests and potential objections. The bodies involved in the decision-making process should be given all the information garnered from the consultations. There is recognition that time constraints raise potential issues for a broad consultation scenario. The L&LR Committee's suggestion for ensuring timely input from a broad range of constituents is a "you snooze you lose" approach. [It should be noted that if a party within the organization strongly objects to an intervention, the fact that they were invited to voice those objections and missed the deadline will not be a guarantee that the objections will not continue and be voiced publically]; and

(d) Consistent with the broader consultation suggestion, there was a specific suggestion to add national standing committees to the consultation process.

Review and Authorization

Current Intervention Policy

- Proposals made to President and Senior Director, Legal and Governmental Affairs (L&GA)
- Proposing body should consult and ascertain views of other interested CBA bodies before making the proposal
- Legislation and Law Reform Committee (L&LR) recommends to the Board of Directors whether intervention should be authorized. Board not bound by L&LR recommendation.
- Board of Directors authorizes intervention, or Executive Officers if the Board cannot act in time
- L&LR Committee reviews the factum on behalf of the Board; certifies that it is of high quality and a fair representation of CBA policy
- Board approves factum (Executive Officers between meetings of the Board)

12. Would you suggest any changes to the process for reviewing and authorizing CBA interventions?

There were suggestions that garnered the support of more than one committee, including:

(a) The Board of Directors should make the final decision regarding whether or not to intervene, rather than the executive officers alone. There was a suggestion that where the executive officers do make the final decision, the full Board should be involved in approving the factum. [It is not clear whether this suggestion implies that an intervention approval can be appropriately reversed at the factum-approval stage but there are no suggestions for

mitigating the effects of such a reversal including alienating intervention counsel and members who supported the intervention; subjecting the organization to unfavourable press; and undermining the organization's reputation as a sophisticated party in the justice sector]; and

(b) Consultations should be broader and garner input from bodies other than the proposing party. It should include, among other things, providing intervention proposals to sections, conferences and standing committees for review and comment. Their input should be considered by the Board and other decision makers involved in the process;

Each of the following suggestions was made by only one committee:

(a) The Legislation and Law Reform Committee's role should be to certify the factum's quality and its fair representation of the CBA position. The Board should always make the decision as to whether the intervention is based on CBA's mandate or policies;

(b) The Legislation and Law Reform Committee suggested that:
   a. The Board should have to explicitly explain any difference between its decision on intervention and the decision of the Legislation and Law Reform Committee on that intervention;
   b. The Legislation and Law Reform Committee should be involved in choosing intervention counsel.

Timelines

Current Intervention Policy

- Every effort should be made to give sufficient time for thorough consideration of requests and factums
- Requests should be submitted at least three weeks before the application for leave to intervene must be filed.
- Factums must be submitted at least three weeks before it must be filed.

13. What would constitute "sufficient time" for thorough consideration of intervention requests at the Supreme Court of Canada? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

The Equality Committee did not take a position, so there were **only three (3) total responses.**

a. Three weeks **→3 (100%) (with one suggestion that there be flexibility where 3 weeks is not feasible given applicable time constraints)**
b. Two weeks**→0**
c. Another period (please specify)**→0**

14. What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial Courts of Appeal? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

The Equality Committee did not take a position, so there were only three total responses

a. Three weeks **→3 (100%) (with one suggestion that there be flexibility where three weeks in not feasible given applicable time constraints)**
b. Two weeks**→0**
c. Another period (please specify)**→0**

15. What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial trial courts? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

a. Three weeks **→3 (100%)(with one suggestion that there be flexibility where three weeks in not feasible given applicable time constraints)**

b. Two weeks**→0**

c. Another period (please specify) **→0**

General

16. Any other thoughts you would like to share?

The calls for transparency that appeared throughout the above answers were reiterated here.

The Legislation and Law Reform Committee reported difficulties with the quick turnaround that is often required and with fact that are not always presented in court-ready form and require copyediting etc. They suggest facta should be provided in court-ready form.

The Legislation and Law Reform Committee suggested eliminating or reducing the power of the Board to make CBA policy "on the fly" without the benefit of full council debate. Policies should be approved by council at its next meeting. It was not made clear what would happen to an on-going intervention that is based on a policy that council does not subsequently approve.

Appendix E

CBA Intervention Policy Review: Feedback from Member Survey

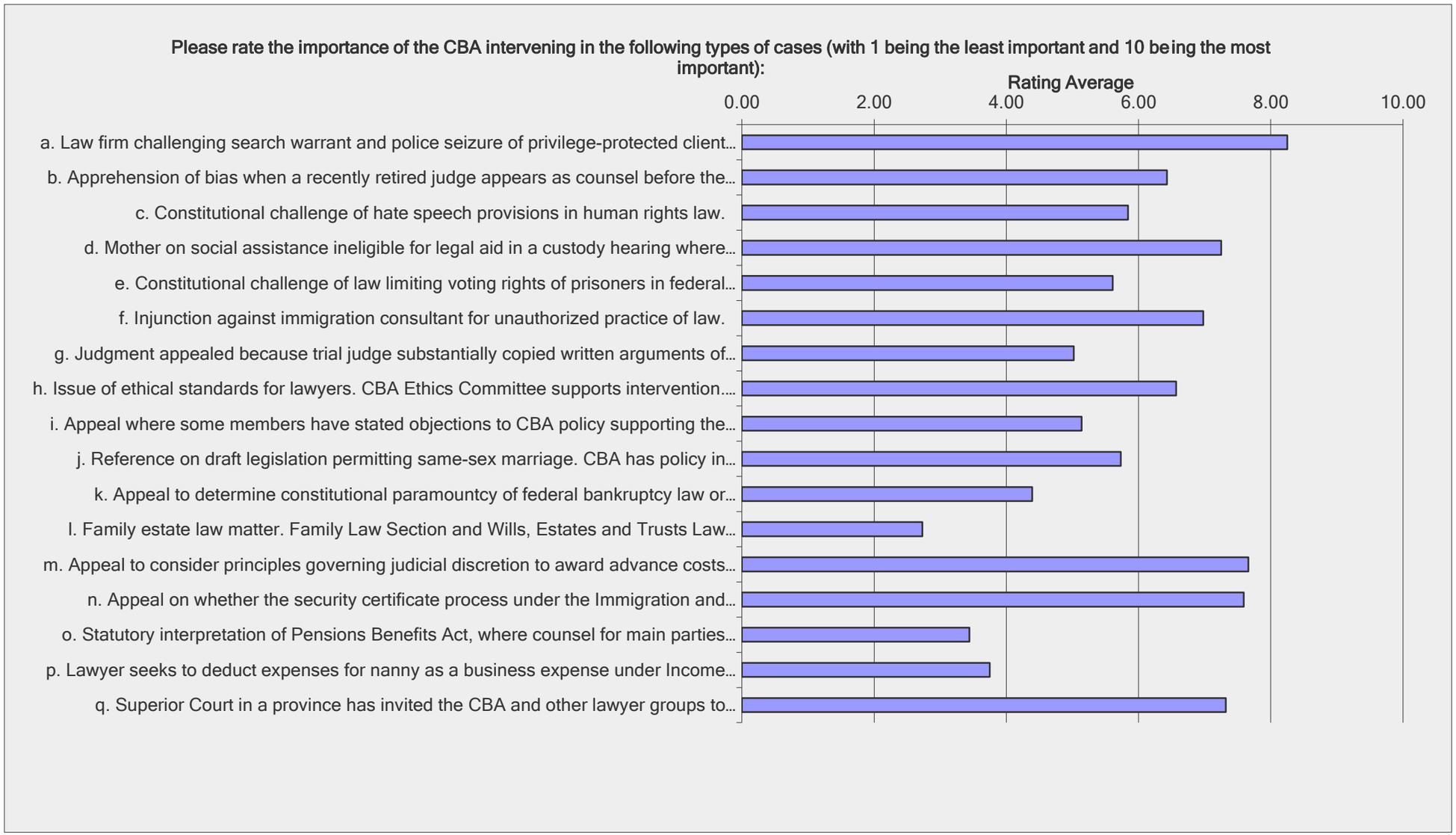
Question 1

CBA Intervention Policy Review

Please rate the importance of the CBA intervening in the following types of cases (with 1 being the least important and 10 being the most important):

Answer Options	1	2	3	4	5	6	7	8	9	10	Rating Average	Response Count
a. Law firm challenging search warrant and police	3	1	1	0	3	0	3	5	1	27	8.25	44
b. Apprehension of bias when a recently retired judge	3	3	2	1	7	4	5	8	4	7	6.43	44
c. Constitutional challenge of hate speech provisions	7	5	2	1	4	3	5	4	5	8	5.84	44
d. Mother on social assistance ineligible for legal aid	2	3	0	2	0	5	7	10	6	9	7.25	44
e. Constitutional challenge of law limiting voting rights	6	5	2	0	6	5	6	7	3	4	5.61	44
f. Injunction against immigration consultant for	2	2	3	2	5	2	5	6	6	11	6.98	44
g. Judgment appealed because trial judge	10	4	2	3	3	5	8	2	2	5	5.02	44
h. Issue of ethical standards for lawyers. CBA Ethics	4	3	1	3	4	4	5	2	4	12	6.57	42
i. Appeal where some members have stated	6	3	3	4	10	2	6	2	1	5	5.14	42
j. Reference on draft legislation permitting same-sex	8	3	2	1	5	6	2	6	5	6	5.73	44
k. Appeal to determine constitutional paramountcy of	9	7	1	4	9	3	6	2	0	3	4.39	44
l. Family estate law matter. Family Law Section and	22	8	1	2	4	1	4	1	1	0	2.73	44
m. Appeal to consider principles governing judicial	3	1	2	0	2	4	5	2	9	16	7.66	44
n. Appeal on whether the security certificate process	3	0	3	2	2	2	3	7	5	17	7.59	44
o. Statutory interpretation of Pensions Benefits Act,	18	2	2	4	7	5	2	2	1	0	3.44	43
p. Lawyer seeks to deduct expenses for nanny as a	20	2	2	2	5	1	3	7	1	1	3.75	44
q. Superior Court in a province has invited the CBA	1	4	0	1	4	4	5	7	6	12	7.32	44
											answered question	44
											skipped question	1

Question 1 (chart)



Question 2

CBA Intervention Policy Review

Are there other types of court cases where you think it is important for the CBA to intervene?	
Answer Options	Response Count
	22
answered question	22
skipped question	23

Number	Response Date	Response Text	Categories
1	Feb 25, 2015 4:30 AM	Too general a question to provide a specific answer	
2	Feb 25, 2015 2:04 AM	As a general rule, we should favour interventions in cases that directly involve lawyers and notaries, their independence and their ethical duties, as well as cases dealing with the judiciary, legal privileges, rules or practice and procedure, access to justice, the fundamentals of the justice system as well as upholding the rule of law.	
3	Feb 24, 2015 9:16 PM	I believe the current policy is reasonable with the over-riding caveat that CBA not restate arguments	
4	Feb 24, 2015 6:11 PM	Cases that involve the independence of the legal profession and its regulation. Cases that deal with basic human rights. Cases where there is an identified need for law reform or clarification. Cases that have borad application or that could be disruptive to a practice area without all issues being thoroughly canvassed and understood. Access to justice and protection of democratic rights. Judicial independence cases. Access to information.	
5	Feb 24, 2015 2:10 PM	As a government lawyer I have difficulty with many of the cases the CBA supports as it would cause me to be in a conflict of interest. Where I think the CBA can and MUST intervene are those cases that involve the legal profession and the regulations governing layers like legal aid, solicitor-client privilege, access to justice, etc. These may still cause a conflict but not in the same way.	
6	Feb 24, 2015 12:12 PM	rule of law	
7	Feb 23, 2015 7:40 PM	Constitutionnal challenges, Rule of Law related issues,	
8	Feb 23, 2015 6:55 PM	The CBA should foucs its interventions on issues of public importance and/or access to justice for vulnerable persons and groups - or in cases where the role and scope of lawyers' activities are at risk.	
9	Feb 23, 2015 6:22 PM	Rule of law cases.	

10	Feb 23, 2015 6:06 PM	Any case involving any one of the provincial law societies
11	Feb 23, 2015 5:33 PM	The CBA should intervene where it has something to offer the Court as the voice of the profession. Matters affecting the practice of law and the rule of law rank particularly high for me as priority areas. Also, the CBA might intervene where the expertise of one or more sections is likely to be of assistance to the Court, but only provided that the organisation as a whole can support the intervention. Where there is significant disagreement between sections, the intervention should not proceed, as a rule.
12	Feb 23, 2015 12:38 PM	Protections of civil liberties/freedoms
13	Feb 22, 2015 11:00 PM	Where solicitor client privilege is at issue, when independence of the bar or judiciary is at issue, access to justice issues, when the business of law issues are at issue
14	Feb 22, 2015 9:43 PM	Where issues directly relating to lawyers are involved. CBA should not be a diffuse social interest advocacy group - there are other non- profits out there to carry that ball. CBA members could be involved as pro bono counsel but CBA as organization should not be funding it.
15	Feb 20, 2015 6:33 PM	Cases where the law is being changed or impacted.
16	Feb 6, 2015 12:27 PM	The examples listed above do not represent categories of types of interventions - the CBA should focus intervention on the principles of fundamental justice related to the administration of justice, access to counsel, and access to justice in Canada.
17	Feb 5, 2015 4:53 PM	where the rule of law or access to justice are at issue
18	Feb 4, 2015 5:36 PM	Cases where both government barristers and plaintiffs lack an appropriate understanding of all the issues in a constitutional challenge (e.g. Hillis challenging the validity of Part XVIII of the ITA)
19	Feb 4, 2015 3:37 PM	Cases relating to solicitor-client privilege. Cases which would have a significant impact on lawyers and the practice of law. Cases which could result in a major change of the law in a given area. Cases in which legislation is being challenged, where the legislation represents a deterioration of access to justice, reduction of individual rights, or is detrimental to lawyers. Cases which deal with the practice of law by non-lawyers. Cases in which the lower court decisions cause significant concerns for the bar, such as the recent ON SCJ case in which the trial judge attempted to unreasonably limit lawyers' interaction with experts (reversed at the ONCA). The CBA should be intervening if the proposed position represents the interests of lawyers as a group, or justice, or fairness, or Canadian values, or liberties, or freedoms, or sectors of society that need our assistance. We should also be supportive of the interests of the judiciary, since the judiciary are limited in what they can advocate. Interventions should be considered if the public interest, the interests of justice, or the interests of the legal profession are in play.

20	Feb 4, 2015 3:06 PM	The main types of cases in which the CBA should intervene would involve: (a) ethics and legalities pertaining to the practice of law and (b) access to justice. The hypothetical above at (i) is impossible to assess given that the nature of the appeal is not described. I suspect this is meant to encompass situations such as the Chevron intervention but the description does not adequately reflect the problems associated with that intervention. That case involved serious access to justice issues and other public interest considerations (e.g. environmental) that were contrary to the CBA's support for Chevron. That is, the reason not to intervene in that case was not merely that some members stated objections.
21	Feb 4, 2015 2:49 PM	Issues around access to justice.
22	Feb 4, 2015 2:13 PM	Issues that are significant to the legal profession *as a profession*

Question 3

CBA Intervention Policy Review

Are there types of court cases where you think it is important for the CBA not to intervene?	
Answer Options	Response Count
	26
answered question	26
skipped question	19

Number	Response Date	Response Text	Categories
1	Feb 25, 2015 4:30 AM	No ...latitude and policy should be flexible not restrictive	
2	Feb 25, 2015 2:04 AM	Unless there are compelling reasons to do so, we should avoid interventions on substantive law issues, which are fraught with the risk of pitching one group within the CBA against another, even when Council has adopted a resolution on the issue.	
3	Feb 24, 2015 9:16 PM	those like Chevron that have apparent personal issues and agendas	
4	Feb 24, 2015 6:11 PM	Private disputes that are unlikely to determine major issues of law. General pro bono matters.	

5	Feb 24, 2015 12:12 PM	-where sections have divergent views
6	Feb 24, 2015 7:16 AM	Cases where the membership have diverse opinions or divided opinions and there is no policy or directive already in place in the CBA that would clearly require intervention.
7	Feb 23, 2015 7:40 PM	Substantive law.
8	Feb 23, 2015 6:55 PM	The CBA should not intervene on issues that involve corporations or purly financial issues or private finanicial rights. The CBA has to maintain the role of protecting the public, access to justice and equality.
9	Feb 23, 2015 6:22 PM	private disputes between litigants
10	Feb 23, 2015 5:33 PM	The CBA likely should not intervene where the organisation cannot speak with one voice, i.e. where sections take opposing views on the substance of the intervention. I would suggest that if the CBA has not articulated a position on the matter in dispute prior to considering an intervention, it should be rare for the organisation to intervene. Generally, I would think that interventions will support the CBA's advocacy efforts as the voice of the profession.
11	Feb 23, 2015 5:25 PM	Where there is no particular point of view or expertise that the legal profession as a profession can bring to bear on the case.
12	Feb 23, 2015 4:27 PM	The CBA should not intervene in cases where there is strong disagreement by a branch or section until it has clarified the rules for their consultation and participation. No one expects unanimity but there should be a clear and well defined opportunity for interested sections/branches to be heard, and a clear and well defined process for ensuring that such interested sections/branches are identified in the first place.
13	Feb 23, 2015 4:12 PM	Cases which do not involve CBA's core mission. Cases in the CBA cannot represent lawyers as a whole (e.g. if lawyers might reasonably have a difference of opinion). Cases which require the CBA to make a value judgment on behalf of its members.
14	Feb 23, 2015 3:18 PM	Where issues are not directly to do with the legal profession (ie impact of case is on advice lawyers may give clients - all cases impact that) and there are string divergent opinions within the association.
15	Feb 23, 2015 12:38 PM	Mainly for smaller matters - the Interventions are useful but should be done in cases of strong significance, and not necessarily for smaller matters of things like privilege.

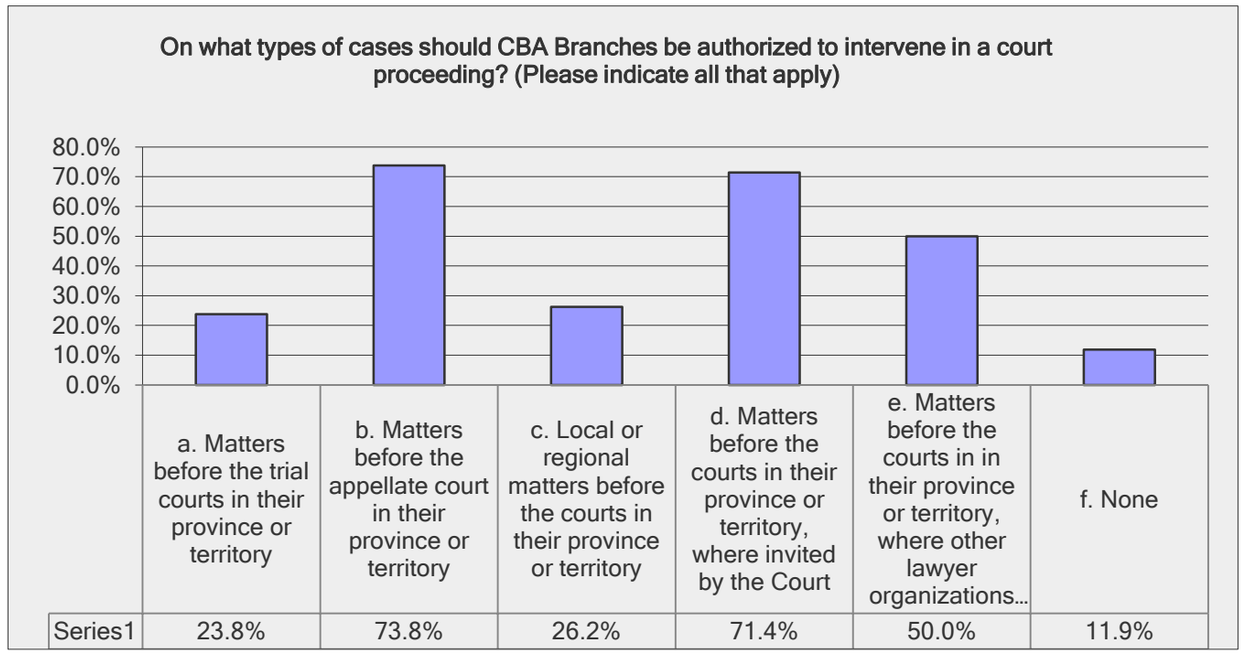
16	Feb 22, 2015 11:00 PM	Anything without a direct relevance to the practice of law, also where there is not a clearly obvious position where you honestly say you are speaking for the bar (ie speaking against twu accreditation, too much dissagreement among the bar)
17	Feb 22, 2015 9:43 PM	Yes - where our members are on opposite sides of the issue, as counsel , because of their section interests or simply because of different philosophical perspectives. We cannot be "speaking with one voice" if we are at odds with each other. It also undermines both the credibility of our intervention and the weight which will e given to our submissions.
18	Feb 6, 2015 12:27 PM	Cases where the public will have the impression lawyers' interests are opposed to the public interest. Cases that make lawyers look money grabbing, privileged, uncaring and self-centered.
19	Feb 5, 2015 4:53 PM	where there is significant disagreement among CBA members with knowledge of the subject matter
20	Feb 4, 2015 5:41 PM	Trinity Western University and similar cases where freedom or religion and equality rights are in conflict
21	Feb 4, 2015 5:36 PM	Cases where the CBA is not internally in agreement as to a position unless of a significant constitutional or independence of the profession matter and even then only if both positions could be adequately addressed in the intervention.
22	Feb 4, 2015 3:37 PM	Cases such as the Chevron case, in which the optics were terrible, and in which the stalling/evasion/starvation tactics of the defendant raise significant fairness and other issues. The CBA must be constantly vigilant and aware that interest groups will sometimes attempt to get the CBA to intervene because (a) the CBA is likely to be granted intervenor status and (b) to trade off the good name of the CBA in order to advocate a particular position. When a non-CBA entity such as "corporate counsel for large companies" (Chevron), or "the Barreau of Quebec" (wanting the CBA to oppose Justice Nadon's appointment to SCC), etc., wants the CBA to intervene -- one must ask why should the CBA intervene rather than these other bodies which have significant resources of their own. The answer is probably either because they are aware that the CBA is likely to be granted intervenor status, or because the CBA's arguments will have weight when every submission starts with "The CBA represents XX,XXX lawyers across Canada". The CBA should not be taking positions in which the bar is significantly divided such as the poorly thought out Chevron matter. Unanimity is never possible, but if large parts of the bar is against a particular intervention, it is not appropriate for the CBA to intervene.
23	Feb 4, 2015 3:06 PM	Where the CBA's intervention could adversely affect the public interest including access to justice.
24	Feb 4, 2015 2:49 PM	The CBA should be careful when it intervenes in cases that go beyond process issues. If there is a substantive issue, there must be a broad consensus in the CBA supporting its position.
25	Feb 4, 2015 2:18 PM	Where the sections take different positions on an issue. Where the intervention can be seen as supporting corporate interests.

26	Feb 4, 2015 2:13 PM	If inadequate consultation with the membership has not occurred

Question 4

CBA Intervention Policy Review

On what types of cases should CBA Branches be authorized to intervene in a court proceeding? (Please indicate all that apply)		
Answer Options	**Response Percent**	**Response Count**
a. Matters before the trial courts in their province or	23.8%	10
b. Matters before the appellate court in their province	73.8%	31
c. Local or regional matters before the courts in their	26.2%	11
d. Matters before the courts in their province or	71.4%	30
e. Matters before the courts in in their province or	50.0%	21
f. None	11.9%	5
answered question		42
skipped question		3



Question 5

CBA Intervention Policy Review

What mechanism should exist to avoid potentially conflicting interventions by different CBA Branches (in similar cases before courts in different jurisdictions, or before the same court)?	
Answer Options	Response Count
	23
answered question	23
skipped question	22

Number	Response Date	Response Text	Categories
1	Feb 25, 2015 10:27 PM	Coordination among branches to perhaps present both arguments, even if conflicting in some ways. CBA presents one position but which simply presents the relevant perspectives rather than advocating a specific result. Court will benefit from hearing all sides of relevant CBA policy.	
2	Feb 25, 2015 4:32 AM	mechanism should start with discussion with object of collaboration if possible A Branch should only be allowed to intervene at the provincial or territorial level if: 1) No other similar case is currently pending in another province or territory; or	
3	Feb 25, 2015 2:17 AM	2) Another similar case is pending, but the local Branch has decided not to intervene.	
4	Feb 24, 2015 9:19 PM	all should go through National and the CBA Branch should first determine and confirm to National that there are no potentially conflicting interventions. If so, the intervention should go to the SCC level only	
5	Feb 24, 2015 6:12 PM	Vet through the national L&LR Committee and CBA Executive as necessary, possibly wth Board input if time permits.	
6	Feb 24, 2015 2:12 PM	waiting until appeal is important as it should narrow and clarify the issues. some conflicting interventions may be necessary because of the difference in the law in those jurisdictions.	
7	Feb 24, 2015 12:12 PM	paramountcy	

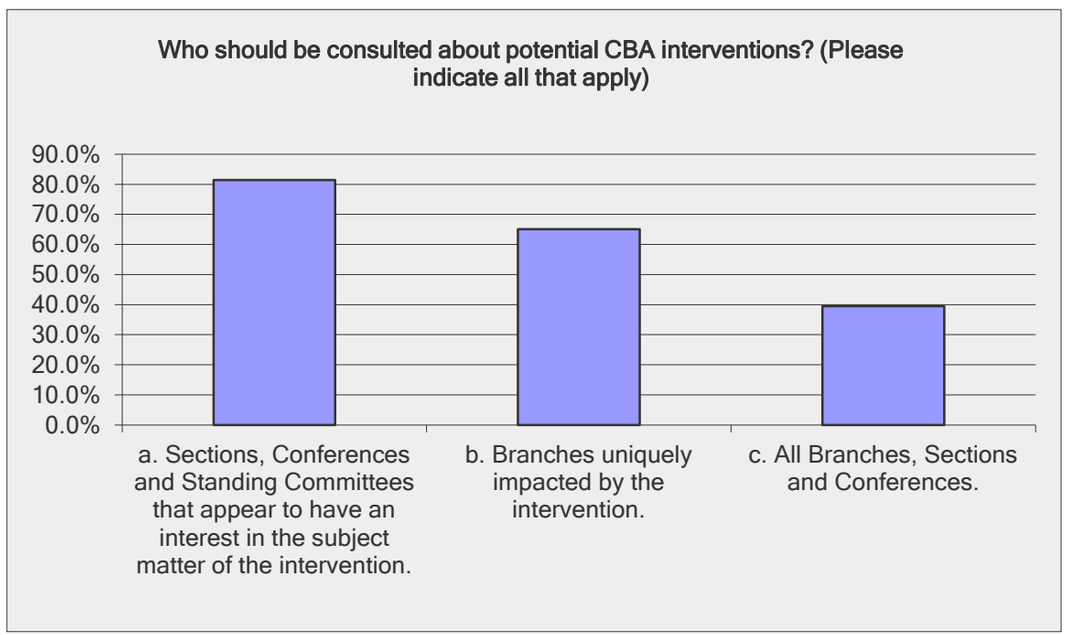
8	Feb 24, 2015 7:17 AM	Use should take place in rare cases, for novel situations or where highly connected to CBA mandate - some sort of national consensus building may be required first.
9	Feb 23, 2015 6:56 PM	All branches should be informed of any branches intent to interevene and time be provided to deal with any objections or concerns.
10	Feb 23, 2015 6:23 PM	Final determination by CBA National
11	Feb 23, 2015 6:08 PM	National should have final decision-making authority. Branches are too susceptible to the demands of local, vocal minorities, whose position on matters is not in the interest of the profession or public.
12	Feb 23, 2015 5:34 PM	Liaison between branches and the national office.
13	Feb 23, 2015 5:26 PM	Require approval by CBA as a whole.
14	Feb 23, 2015 4:28 PM	I agree with the current policy. When I checked "None" above, I assume the question is whether they should be authorized to intervene without CBA Board authorization.
15	Feb 23, 2015 4:27 PM	Where the CBA is unable to speak with one voice, it should not intervene.
16	Feb 23, 2015 4:11 PM	Branches should not intervene.
17	Feb 23, 2015 3:21 PM	Be forward looking and have Branches work together to ensure they are singing from the same song book (ie same counsel). If they cannot or will not do this then no interventions.
18	Feb 22, 2015 11:04 PM	If the national bar is seeking to argue a position opposing a position being argued by a provincial bar then I would suggest the national bar is not accurately representing its constituents
19	Feb 22, 2015 9:46 PM	Earlier time frames for intervention approval, no role for Board of Directors or Pres to circumvent the process arms' length committee including academics who are given criteria to apply. All sections and councils to be consulted.

20	Feb 6, 2015 12:30 PM	The Branches and the CBA should agree on interventions and should not waste membership dollars mounting multiple interventions. If the branches and the CBA cannot agree then let one of the two form a group of litigants separate from the CBA/branches to intervene and let them fund it out of their private pockets - don't waste our membership dollars with infighting most members do not want to bank-roll. You need to be smart about how you spend our money - CBA membership is very expensive and entirely optional. I hate saying the OBA do wasteful things or make idiotic public statements on my behalf... we need to be a respected professional body - if we cannot agree it is likely something we should not comment on as the CBA+branches.
21	Feb 5, 2015 4:54 PM	consultation amongst sections/branches before filing leave applications
22	Feb 4, 2015 3:37 PM	The committee that reviews these proposals should keep this in mind. Interventions should not become common-place, lest they lost their impact.
23	Feb 4, 2015 2:51 PM	The CBA should make an effort to find a consensus position. There is nothing to be gained by conflicting interventions. If no agreement can be reached, likely it is not an appropriate case for CBA participation.

Question 6

CBA Intervention Policy Review

Who should be consulted about potential CBA interventions? (Please indicate all that apply)		
Answer Options	**Response Percent**	**Response Count**
a. Sections, Conferences and Standing Committees	81.4%	35
b. Branches uniquely impacted by the intervention.	65.1%	28
c. All Branches, Sections and Conferences.	39.5%	17
	answered question	**43**
	skipped question	**2**



Question 7

CBA Intervention Policy Review

Would you suggest any changes to the process for consulting, reviewing and authorizing the process for CBA interventions?	
Answer Options	Response Count
	21
answered question	21
skipped question	24

Number	Response Date	Response Text	Categories
1	Feb 25, 2015 4:37 AM	Do not see why L&LR Committee should be able to trump a decision of the Board of Directors as this makes no sense from a governance perspective. CBA should have a flexible not a restrictive policy on interventions. Argument that interventions should be limited to SCC appellate cases is not valid, nor is rationale that there are limited resources given such cases are always pro bono . . . if intervention is important to rule of law or a precedent what difference does it make and why should such be limited to SCC cases	
2	Feb 25, 2015 2:27 AM	Approval of an intervention by the Executive Directors only should be limited to situations where it is based on a clear pre-existing policy of the CBA. Where no such pre-existing policy exists, a special Board meeting should be convened and a formal resolution proposing the adoption of the policy underlying the intervention put to Board members for consideration. Only if the resolution is adopted should the intervention go ahead.	
3	Feb 24, 2015 9:19 PM	No	
4	Feb 24, 2015 6:36 PM	Upon receipt of notice that someone wants to intervene, all CBA bodies are notified and asked to express an interest, as the case may be.	
5	Feb 24, 2015 6:13 PM	By consultation, I see a two-stage process. First notice and some opportunity for comment. Second, some attempt to reslove any strong differences of opinion. Then it should be up to CBA Executive to decide, perhaps on recommendation of the L&LR Commitee.	
6	Feb 24, 2015 12:12 PM	none come to mind	
7	Feb 23, 2015 6:09 PM	Branch consultation does not mean giving the branch a veto power over CBA interventions. This lacks transparency and gives undue influence to special interests at the branch level who, for instance, threaten to leave the CBA if the organization does not bend to their position.	

8	Feb 23, 2015 6:08 PM	Yes. First, the CBA should err on the side of caution in consultations with potentially affected sections/conferences. This is clearly not being done. Despite the matters at issue in Chevron, the International Law Section was not consulted. This is rather astonishing. I would suggest that if the L&LR is in doubt about which sections may be affected, it should be over-inclusive in consultations. Second, the role of the L & LR committee needs to be reviewed. In the one intervention in which I was involved (Kazemi), one of the members of the committee was counsel for the appellant in the matter. He recused himself from consideration of the applications put forward. Two other members of the committee proposed that the CBA intervene on grounds and to make arguments different from that put forward by the International Law Section. Those people were not required to recuse themselves from consideration of the competing proposal. The process of approval of the proposal was opaque and frustrating. I would suggest that members of the L&LR committee should not be permitted to submit intervention proposals while sitting on the L&LR committee. Further, where there are competing proposals from a directly affected section and CBA members not representing a section, but acting on an ad hoc basis, the CBA should give automatic preference to the section's proposal, provided that there is no disagreement with existing CBA policy or disagreement between sections.
9	Feb 23, 2015 5:35 PM	1. The CBA Board needs to realize and admit mistakes were made in Chevron case. Continuing to pretend that the proper process was followed is wrong, and will result in mistakes in future. This is fundamental. The mistakes made include (a) too narrowly consulting sections and branches in considering the intervention; (b) reversing the committee's decision not to intervene without engaging in some dialogue with the committee (as it is possible/likely the committee rejected it at a preliminary stage without doing full investigation for all reasons not to intervene); (c) individual members of the board should have exercised more restraint before overruling the committee's decision. While I can understand the need for the Board to have ultimate control, individual board members should as a practice except in exceptional circumstances defer to the committee set up to study issues, instead of listening to representations from influential former CBA chairs.
10	Feb 23, 2015 4:32 PM	Consultations should take place before the decision to intervene is made. If this is not possible, there should be no intervention. There is plenty of time between the Court's authorization for leave to appeal and the deadline for asking the Court for leave to intervene - there is no excuse for not consulting before the decision to intervene is made.

11	Feb 23, 2015 4:29 PM	"appears to have an interest" is too vague and subjective. Best to advise all of intended interventions, which are a relatively rare and serious event.
12	Feb 23, 2015 4:13 PM	Current system works, no need to change it.
13	Feb 23, 2015 3:28 PM	There must be sufficient notice to allow for meaningful consultation and transparent decision making within CBA. If the timing does not permit this to occur there should be no intervention.The timelines are not as tight as sometimes suggested. On Chevron, for example, those following the case closely knew early in 2014 that the case was tracking to SCC (and the issues involved).. There was ample opportunity for consultation prior to July 2014. This last minute request should not have been permitted to proceed. End runs around consultation with all CBA groups should not be approved.
14	Feb 22, 2015 11:08 PM	Perhaps implementing a process whereby the individual members can provide input ... Even a simple survey like this
15	Feb 22, 2015 9:47 PM	Better and wider consultation.
16	Feb 20, 2015 6:44 PM	Final decision by Board. L & LR should not have last word. It's the creation of the board.
17	Feb 20, 2015 6:35 PM	Remove review of factum by LLR committee

18	Feb 6, 2015 12:40 PM	I used to work on Parliament Hill and the impression of CBA submissions was that they were always last-minute and varried widely in quality and partisan perspective depending on which section wrote them. Most importantly, this meant that some parliamentarians who failed to take the time to distinguish between written or oral submissions from the CBA from different authors would paint the entire CBA with one brush and would quickly write the organization off as supporting one party or another. The CBA needs to more carefully review the partisan nature of its spokespersons - a strategy of strict non-partisan presentations should be maintained for the credibility of the organization. In addition, CBA submissions were often very late - coming in only shortly before the CBA was set to appear before a committee. This was a foolish thing for the CBA to do - parliamentarians' staff do not have time to review last minute submissions so they will have much less sway and frankly that is far too late for effective advocacy. On specific issues strategically selected by the CBA (i.e. conserve political capital here) well in advance of a parliamentary committee appearance (which is often a pro-forma exercise) the CBA needs to be making its often very important arguments public, needs to be mounting a public media campaign and needs to be actively lobbying. The CBA's important policy interventions need to be professionalized. On key issues the CBA needs to have visible and consistent public campaigns - these key issues need to be pushed well in advance of a bill being tabled or a committee appearance when the political parties have often already been positioned on an issue. The most important issues need to be identified and moved forward consistently at Parliament and during all those stakeholder, liaison and consultation meetings the CBA has. A strategic plan setting out the key issues the CBA will lobby on for the next three years needs to be voted on and then the plan needs to be professionally implemented. The policy issues that come up over and over again are not a surprise and can be planned for and lobbied against/for well in advance of parliamentary action.
19	Feb 4, 2015 3:39 PM	It should be less passive and more active. By this I mean, the CBA should be keeping an eye our for cases in which the CBA should consider intervening, and what position the CBA would take. This is opposed to the current approach which leaves it to a particular lawyer, firm, or group to propose an intervention and also the substance of the intervention.
20	Feb 4, 2015 3:08 PM	ensure all sections with an interest are consulted and that where there is a significant difference of opinion the intervention is not pursued given that the intervention would not actually reflect the views of the CBA. If the dispute could not be resolved it may be that for the instance two different sections should be permitted to intervene even if their positions are at odds.
21	Feb 4, 2015 2:14 PM	Yes - more input is required, which is why I chose option c. above

Question 8

CBA Intervention Policy Review

What would constitute "sufficient time" for thorough consideration of intervention requests at the Supreme Court of Canada? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

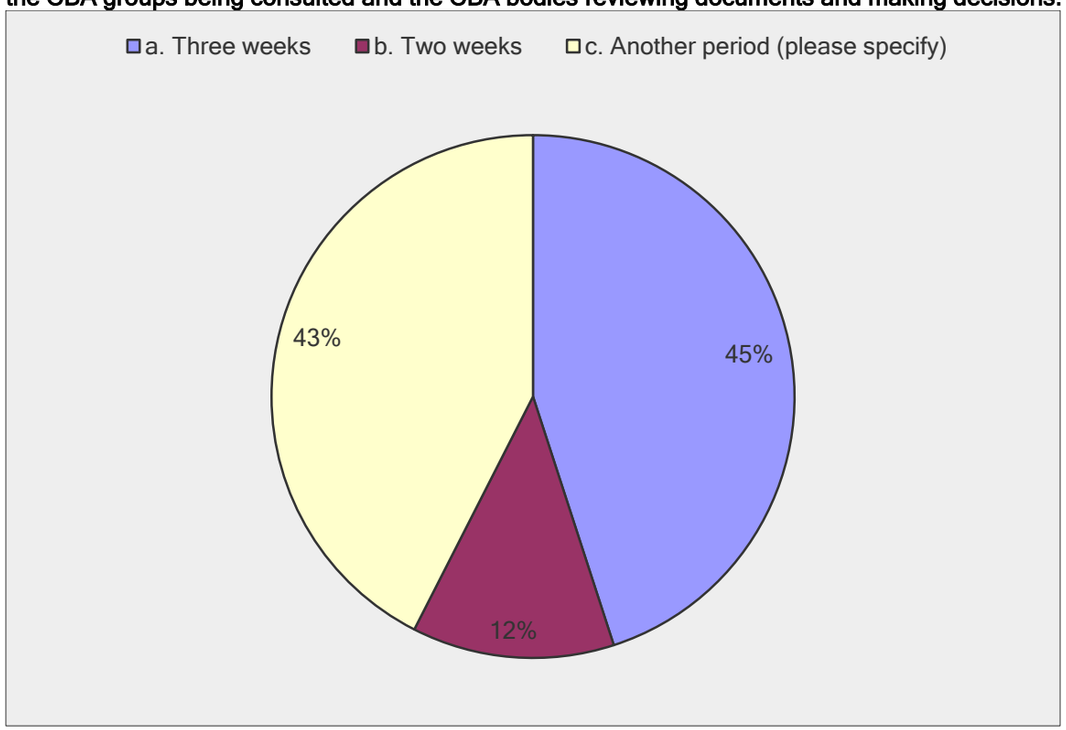
Answer Options	Response Percent	Response Count
a. Three weeks	45.0%	18
b. Two weeks	12.5%	5
c. Another period (please specify)	42.5%	17
answered question		40
skipped question		5

Number	Response Date	c. Another period (please specify)	Categories
1	Feb 25, 2015 10:30 PM	one month	
2	Feb 25, 2015 4:38 AM	this depends on circumstances ...there should be no artificial time period imposed	
3	Feb 24, 2015 9:21 PM	One month	
4	Feb 24, 2015 6:15 PM	Three weeks unless urgent.	
5	Feb 24, 2015 7:19 AM	1 week notice for broad exposure, more for the specifically interested groups.	
6	Feb 23, 2015 5:36 PM	Two months	
7	Feb 23, 2015 4:30 PM	One month.	
8	Feb 23, 2015 4:15 PM	Current policy works, no need to change it.	
9	Feb 23, 2015 3:42 PM	At least a month - CBA Sections are operated by volunteers & must consult with members before providing feedback	
10	Feb 23, 2015 3:30 PM	a minimum of 6 weeks	
11	Feb 22, 2015 11:10 PM	Don't know I am not an apple at lawyer, but this does not seem to be a hugely relevant issue	

12	Feb 22, 2015 9:48 PM	1 month
13	Feb 20, 2015 6:37 PM	Depending on the issue and the timeline a very short time should be allowed to ensure CBA is relevant.
14	Feb 6, 2015 12:42 PM	I have no idea - this is an internal management decision. Whatever time is needed to make the decision and have sufficient time to make a quality intervention.
15	Feb 5, 2015 4:56 PM	3-4 weeks
16	Feb 4, 2015 2:20 PM	4 weeks minimum
17	Feb 4, 2015 2:15 PM	6 weeks

Question 8 (chart)

What would constitute "sufficient time" for thorough consideration of intervention requests at the Supreme Court of Canada? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.



Question 9

CBA Intervention Policy Review

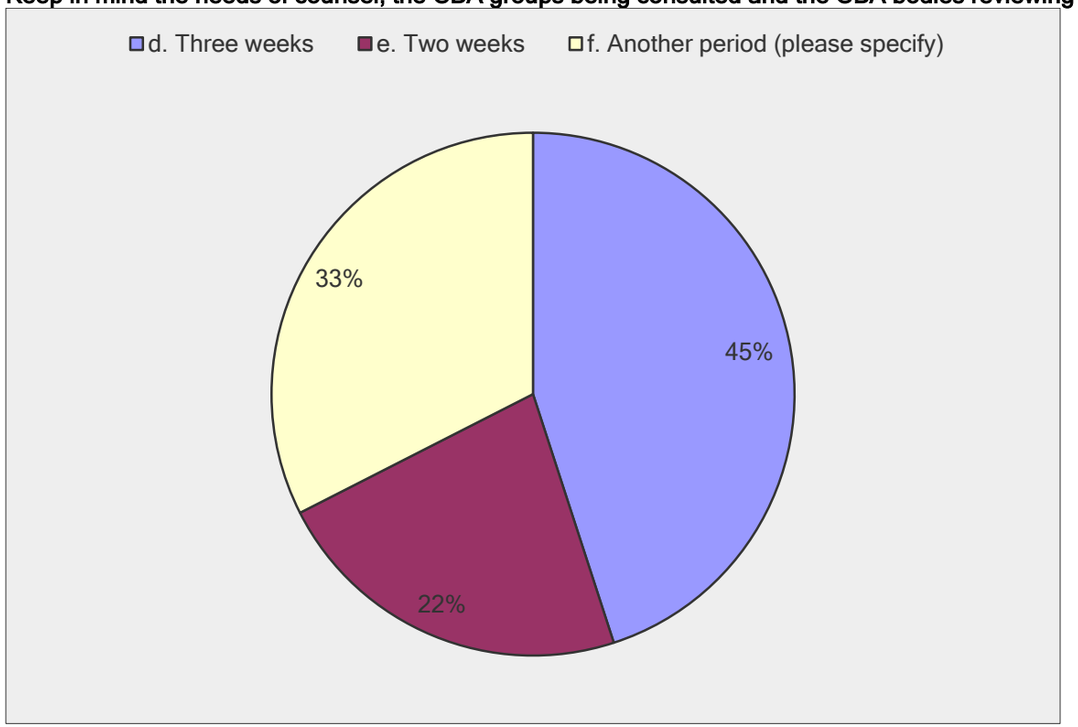
What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial Courts of Appeal? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

Answer Options	Response Percent	Response Count
d. Three weeks	45.0%	18
e. Two weeks	22.5%	9
f. Another period (please specify)	32.5%	13
	answered question	40
	skipped question	5

Number	Response Date	f. Another period (please specify)	Categories
1	Feb 25, 2015 10:30 PM	one month	
2	Feb 25, 2015 4:38 AM	this depends on circumstances ...there should be no artificial time period imposed	
3	Feb 24, 2015 9:21 PM	One month	
4	Feb 24, 2015 6:15 PM	Three weeks unless urgent.	
5	Feb 23, 2015 5:36 PM	two months	
6	Feb 23, 2015 4:15 PM	Current policy works, no need to change it.	
7	Feb 23, 2015 3:42 PM	See above	
8	Feb 23, 2015 3:30 PM	a minimum of 6 weeks	
9	Feb 22, 2015 11:10 PM	See prior answer	
10	Feb 20, 2015 6:37 PM	Same as above	
11	Feb 6, 2015 12:42 PM	I have no idea - this is an internal management decision. Whatever time is needed to make the decision and have sufficient time to make a quality intervention.	
12	Feb 5, 2015 4:56 PM	3-4 weeks	
13	Feb 4, 2015 2:15 PM	6 weeks	

Question 9 (chart)

What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial Courts of Appeal? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.



Question 10

CBA Intervention Policy Review

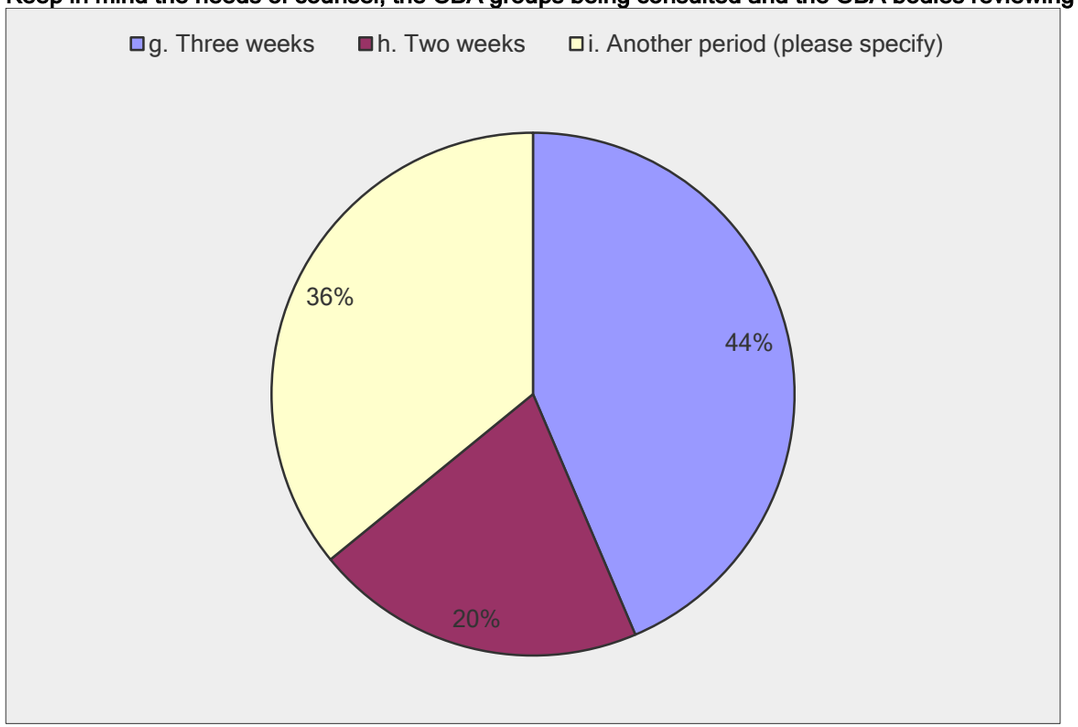
What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial trial courts? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.

Answer Options	Response Percent	Response Count
g. Three weeks	43.6%	17
h. Two weeks	20.5%	8
i. Another period (please specify)	35.9%	14
	answered question	39
	skipped question	6

Number	Response Date	i. Another period (please specify)	Categories
1	Feb 25, 2015 10:30 PM	one month	
2	Feb 25, 2015 4:38 AM	this depends on circumstances ...there should be no artificial time period imposed	
3	Feb 24, 2015 6:15 PM	Three weeks unless urgent.	
4	Feb 23, 2015 6:08 PM	One month	
5	Feb 23, 2015 5:36 PM	two months	
6	Feb 23, 2015 4:15 PM	Current policy works, no need to change it.	
7	Feb 23, 2015 3:42 PM	See above	
8	Feb 23, 2015 3:30 PM	a minimum of 6 weeks	
9	Feb 22, 2015 11:10 PM	See prior answer	
10	Feb 20, 2015 6:37 PM	Same as above	
11	Feb 6, 2015 12:42 PM	I have no idea - this is an internal management decision. Whatever time is needed to make the decision and have sufficient time to make a quality intervention.	
12	Feb 5, 2015 4:56 PM	3-4 weeks	
13	Feb 4, 2015 3:40 PM	Two weeks but this should be very rarely considered	
14	Feb 4, 2015 2:15 PM	6 weeks	

Question 10 (chart)

What would constitute "sufficient time" for thorough consideration of intervention requests in provincial and territorial trial courts? Keep in mind the needs of counsel, the CBA groups being consulted and the CBA bodies reviewing documents and making decisions.



Question 11

CBA Intervention Policy Review

Any other thoughts you would like to share?	
Answer Options	Response Count
	9
answered question	9
skipped question	36

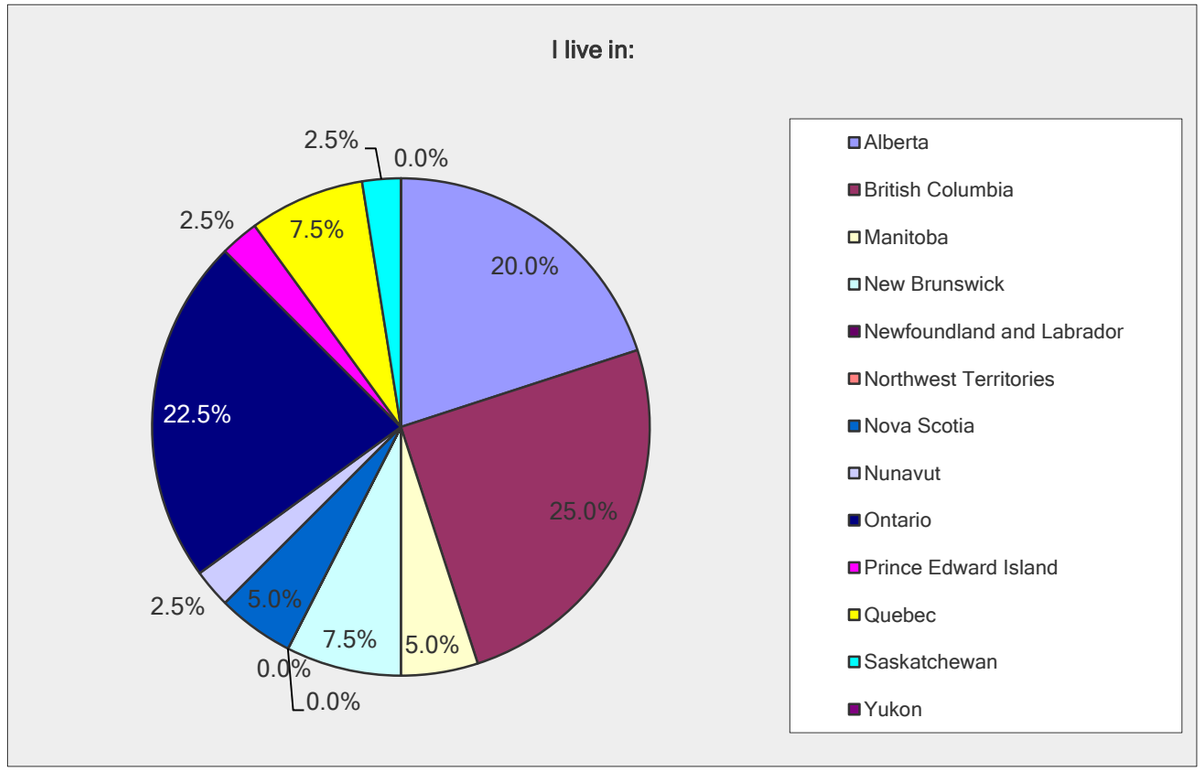
Number	Response Date	Response Text	Categories
1	Feb 25, 2015 4:48 AM	- the current intervention policy is a strategic weakness of the CBA - whether a factum is appropriate or not should not be solely determined by L&RC nor should L&RC have ability to trump Board decisions - Board of Directors and Council should have final say - Sections should be disciplined for speaking out against CBA as was done in Chevron matter - Policy on statements being made only by CBA President or her/his delegate should also be reinforced by Intervention Policy - CBA's flip flopping on the Chevron intervention was a colossal public embarrassment and at end of the day the CBA decision's concerning having no voice on such a significant case on material issues was very wrong (and again evidenced a strategic weakness with the CBA)	
2	Feb 24, 2015 6:39 PM	CBA will survive if it communicates more often, more succinctly.	
3	Feb 24, 2015 6:16 PM	Disagreement among sections or threats of resignations of membership should not be a bar to internventions.	
4	Feb 23, 2015 6:13 PM	The CBA is conspicuously absent in interventions at the trial and appellate levels, where interventions are only increasing. The CBA ought to be at the forefront of intervenors where a decision is made that the matter is of importance to members and improvement of the law. The CBA is going through a Re-think to be relevant to members and prospective members. Leading on interventions at the trial and appellate level would send a strong message that the CBA is still relevant.	

5	Feb 23, 2015 4:38 PM	The CBA is strongest when it speaks with one voice. There should not be multiple interventions from different groups within the CBA - that essentially nullifies the credibility of the CBA. If there is insufficient time to consult properly, there should be no intervention. The CBA has credibility because it represents lawyers from many different practice areas and it does not intervene often. This helps to underline the importance of an issue when it does choose to intervene. Any appearance of self-interest, or conflict of interest, on the part of the lawyers carrying forward the intervention should be avoided at all costs.
6	Feb 23, 2015 4:13 PM	The CBA should not be in the business of intervening to support a particular point of view or set of values (no matter how noble).
7	Feb 23, 2015 3:31 PM	CBA should not be intervening in substantive cases not having a direct bearing on the practice of law as often as we have been of late.
8	Feb 22, 2015 11:14 PM	Represent your members we pay a lot of money to be members of the cba so don't spend it recklessly
9	Feb 6, 2015 12:46 PM	Once the strategic plan is set by the volunteer representatives the staff should be left to implement the strategic plan and create/implement the kind of public persuasion campaigns I discussed previously (of course drawing on volunteers as needed) - this needs to be much more professionalized so the CBA can demonstrate some victories on some key policy campaigns, building momentum and membership support along the way.

Question 12

CBA Intervention Policy Review

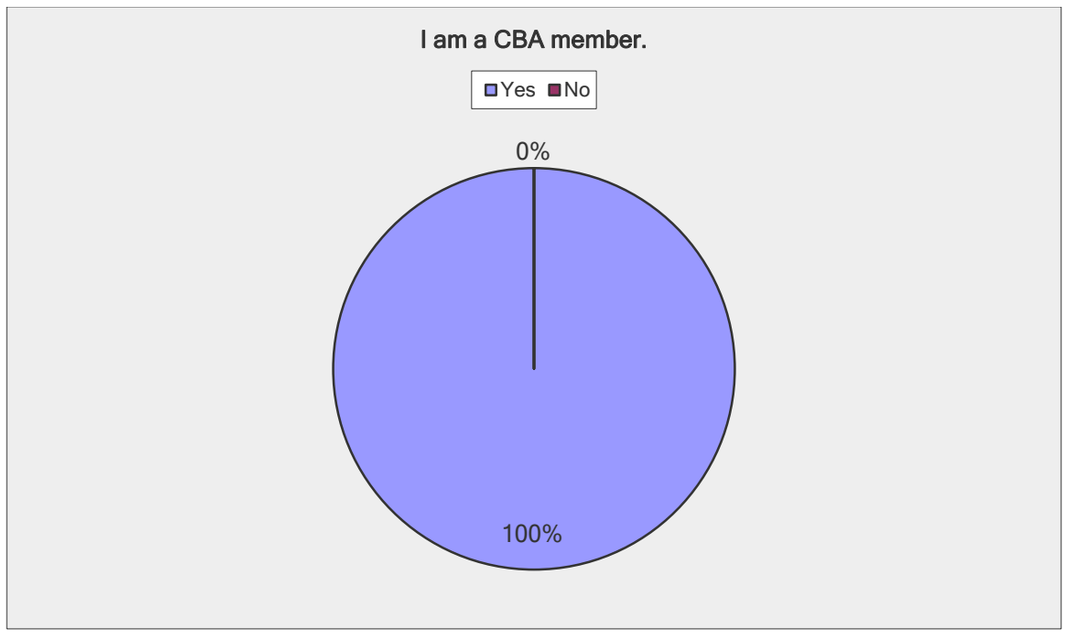
I live in:		
Answer Options	**Response Percent**	**Response Count**
Alberta	20.0%	8
British Columbia	25.0%	10
Manitoba	5.0%	2
New Brunswick	7.5%	3
Newfoundland and Labrador	0.0%	0
Northwest Territories	0.0%	0
Nova Scotia	5.0%	2
Nunavut	2.5%	1
Ontario	22.5%	9
Prince Edward Island	2.5%	1
Quebec	7.5%	3
Saskatchewan	2.5%	1
Yukon	0.0%	0
answered question		40
skipped question		5



Question 13

CBA Intervention Policy Review

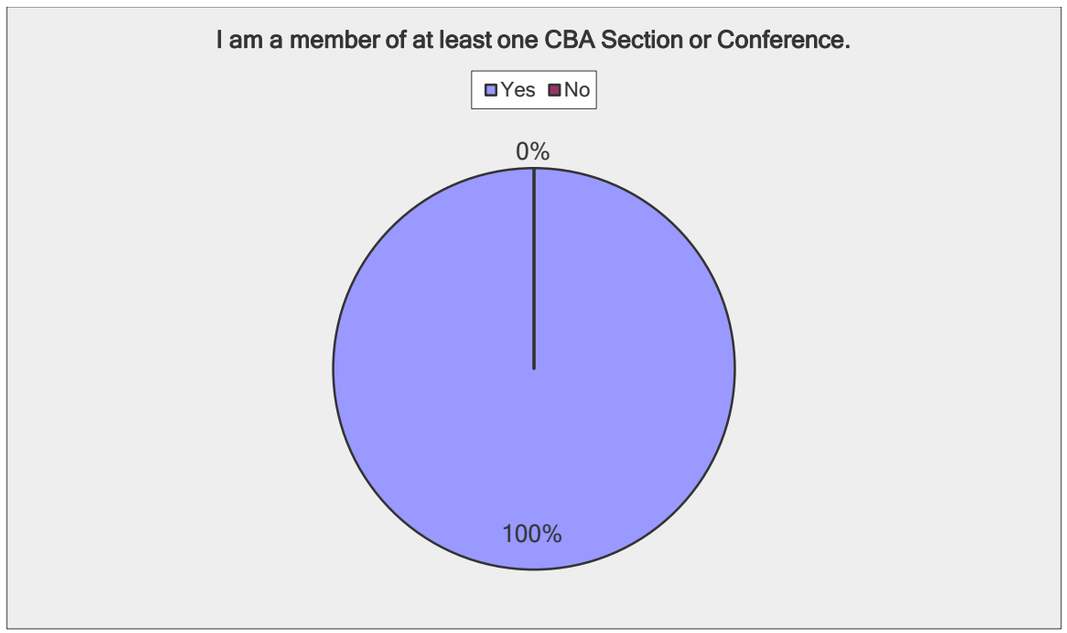
I am a CBA member.		
Answer Options	**Response Percent**	**Response Count**
Yes	100.0%	43
No	0.0%	0
	answered question	**43**
	skipped question	**2**



Question 14

CBA Intervention Policy Review

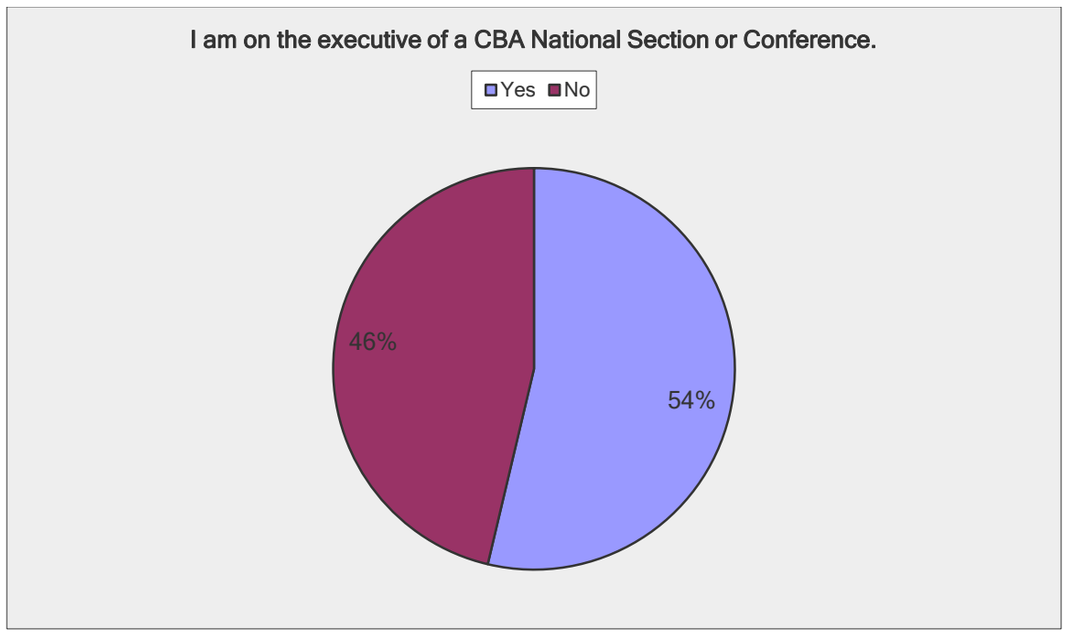
I am a member of at least one CBA Section or Conference.		
Answer Options	**Response Percent**	**Response Count**
Yes	100.0%	43
No	0.0%	0
	answered question	**43**
	skipped question	**2**



Question 15

CBA Intervention Policy Review

I am on the executive of a CBA National Section or Conference.		
Answer Options	**Response Percent**	**Response Count**
Yes	53.7%	22
No	46.3%	19
	answered question	**41**
	skipped question	**4**



Question 16

CBA Intervention Policy Review

I am on the executive of a Section or Forum in my Branch.		
Answer Options	**Response Percent**	**Response Count**
Yes	48.8%	20
No	51.2%	21
	answered question	**41**
	skipped question	**4**