SUBMISSIONS TO Supreme Court of Canada

RE Interventions in Public Interest Litigation

FROM Canadian Civil Liberties Association
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In the era of the Charter of Rights and Freedoms, the issue of participation in the cases before the Supreme Court of Canada has acquired a new significance. It is likely that a great many Charter cases will be determining issues of fundamental principle affecting the very nature of Canadian democracy. Moreover, the impact of the Court's judgments will be far less vulnerable than ever to abridgement or amendment at the hands of the political authorities. It is significant that in the more than two hundred years of American history, the political authorities in that country have enacted fewer than twenty-five amendments to their Constitution. In many ways, the new Canadian Constitution will be even harder than its American counterpart to amend at the political level.

While it is possible, of course, for Parliament and the provincial legislatures to invoke the override in section 33 against the application of key Charter provisions, that is likely to be a relatively rare event outside the Province of Quebec. As a result of the widespread public participation in the Joint Parliamentary hearings and their aftermath, the Charter has acquired enormous prestige throughout much of the country. In every jurisdiction apart from Quebec, the ousting of Charter protections will entail a substantial political price. During all the years that such overrides have existed in both the federal Bill of Rights and a number of its provincial counterparts, they have been invoked in a relatively infinitesimal number of cases - and, so far, not once to overcome the impact of a judicial decision.

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

The peculiar position of government serves to strengthen these considerations. In many cases, government will be a party. In criminal matters, for example, the federal or a provincial government will be prosecuting. But, even when they have not been parties, governments seeking to intervene have usually been allowed to do so. The frequency of such involvement in Charter cases will enable governments in a systematic

way to put before the Court their various theories of what the Charter provisions mean. This gives the governments a special advantage over every other interest in the community. The party against which a government is litigating in any particular case might well not have any interest in addressing the long-term implications of whatever interpretation may be at issue. Indeed, the limited interest of a particular party might be better served by making certain tactical concessions to the government's long-term point of view. If no one else but the immediate parties regularly participate, the Court and the community will likely be deprived of countervailing long-term theories for interpreting the Charter.

Suppose, for example, section 7 were to become an issue in the context of a criminal case? It may well be in the interest of the prosecuting government to argue for the narrowest interpretation possible. The accused, on the other hand, might wish to argue that the concluding words in the section must have a substantive as well as a procedural impact. He might consider it tactically wise, therefore, to concede to the government that the word "liberty" is restricted to physical freedom. But there may be a number of free enterprise groups which would agree with the substantive interpretation of the concluding words but would argue that "liberty" includes freedom of contract. There may also be some social democratic groups which would argue that "liberty" means something more than physical freedom and something less than contractual freedom but would urge nevertheless that the concluding words should receive a procedural construction only.

Or, suppose the leaders of a pressure group were charged with a breach of the Election Expenses Act? The accused might believe that it is in their interest to argue that no such restriction on interest group advocacy is compatible with the Charter's protections for "freedom of expression". On the other hand, it might be in the interests of the prosecuting government to argue that its goal of financial equity during election campaigns constitutes a reasonable limit on Charter freedoms and the restriction at issue is the only way to achieve such a goal. But there may be other groups in the community which differ with both litigants. They may believe that the government's goal is legitimate but not its means. They may wish to demonstrate to the Court how a less restrictive means could adequately achieve the same goal.

The examples go on and on. Suffice it, for present purposes, to acknowledge how both the quality of jurisprudence and the appearance of fairness can be undermined by restricting participation in court to the principal litigants.

In this regard, it would be helpful to consult the experience of the common law democracy which has developed the most sophisticated adjudication in the area of constitutional rights - the United States. Both at the appellate level and in the U.S. Supreme Court, there has been a growing receptivity to the participation of third parties. While amicus counsel are rarely heard during the course of oral argument, they are frequently permitted to file written briefs. In the Supreme Court, the inclusion of an amicus brief is virtually automatic on the written consent of the principal parties.[1] And, if such consent is not forthcoming, there are special provisions for obtaining leave directly from the Court itself.

What is most significant about the American situation, however, is not simply the rules but also the actual experience. With the passage of time, the rules have been applied in an increasingly liberal fashion. Indeed, in cases of crucial public importance, the principal parties rarely object to amicus participation. There is reason to believe that the attitude of the Court itself paved the way for this development.

As long ago as 1952, the late Mr. Justice Felix Frankfurter cricitized the U.S. Solicitor General for refusing too often to grant such consent.

> "For the Solicitor General to withhold consent automatically in order to enable this Court to determine for itself the propriety of each application is to throw upon the Court a responsibility that the Court has put upon all litigants, including the government,..."[2]

Two years later, a similar observation was made by the late Mr. Justice Hugo Black.

> "Most of the cases before this Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against amicus curiae briefs"[3]

A recent survey illustrates the growing liberalism of the American practice. During the period from 1941 until 1952, fewer than 19% of the cases in the U.S. Supreme Court involved the participation of amicus curiae.[4] From 1953 until 1966, this participation

rose to 23.8%[5] And, during the period 1970 until 1980, amicus involvement had increased to more than 53% of all cases in the U.S. Supreme Court[6] These statistics produced the following remark in a journal of legal scholarship.

> "It seems fair enough to conclude,....that amicus curiae participation by private groups is now the norm rather than the exception"[7]

When the kind of cases is examined, the statistics acquire an even greater significance, During the period between 1970 and 1980, there was amicus participation in more than 62% of the cases involving church-state issues.[8] The free press cases recorded more than 66% amicus participation[9] and in race discrimination matters, such involvement had climbed to more than 67%.[10] Union cases revealed a remarkable 87.2% participation by amicus curiae.[11] Moreover, there is also a growing number of cases in which there is multiple amicus participation. In those cases during the 1970 - 1980 period which featured the involvement of at least one amicus brief, as many as 26.7% included the participation of four or more such interventions.[12] In the famous Bakke case involving affirmative action for Blacks in university enrolment, there were more than 50 amicus briefs.[13]

The American experience suggests also that these amicus briefs have played a vital role in a number of important cases. Consider, for example, the brief of the American Civil Liberties Union in the famous case of Miranda v Arizona.[14] Samuel Dash, counsel to the Senate Watergate Committee and Director of the Institute of Criminal Law and Procedure at Georgetown University Law Centre, made the following comment.

> "Perhaps the most striking lesson to learn from these materials is the role an amicus brief can play in shaping a majority opinion, even without oral argument. Undoubtedly, the most effective presentation to the Court was the amicus brief of the American Civil Liberties Union... It is clear that it presented a conceptual legal and structural formulation that is practically identical to the majority opinion - even as to use of language in various passages of the opinion. Also, it is from this brief and its appendix that the Court apparently draws its lengthy discussion of the contents of leading and popular police interrogation manuals. Both the ACLU brief and the Court explain that resort to the manuals is necessary because of the absence of information on what actually goes on in the privacy of police interrogation rooms"[15]

In the case of Mapp v Ohio,[16] the issue was whether unlawfully seized evidence could be introduced against an accused in a state trial. Although such evidence had for some years been rendered inadmissible in federal prosecutions, the 1949 case of

Wolf v Colorado[17] had held that this principle did not extend to state prosecutions. Although counsel for the accused in Mapp attempted to distinguish the Wolf case, an amicus brief filed by the ACLU urged the court to over-rule the earlier case. The majority of the court accepted the ACLU argument and over-ruled Wolf. As lawyer Ernest Angel commented in a subsequent law journal article, "the amicus scored an important victory".[18]

In Poe v. Ullman,[19] a majority of the U.S. Supreme Court held that a prohibition on the distribution of birth control information was not justiciable. But the dissent of Mr. Justice Douglas argued that the law was unconstitutional on a ground raised by the amicus brief of the ACLU - the right to privacy. Four years later, in Griswold v Connecticut,[20] the Court majority adopted a position closer to that of Justice Douglas and the ACLU. According to Ernest Angel,

> "The case is noteworthy for the....invalidation of of the statute...for the part played by the amicus and for the formulation of a right of privacy doctrine"?[21] (underlining ours)

There is some suggestion that the amicus brief of the National Association for Advancement of Coloured People played an important role[22] in the case of Furman v Georgia[23] where the U.S. Supreme Court held that the death penalty constituted "cruel and unusual punishment" in the circumstances at issue. In the famous Bakke case, the Court included as an appendix to its judgment the joint amicus brief which had been filed by Columbia, Harvard, Stanford, and Pennsylvania Universities.[24]

While such non party interventions have not arisen often in Canada, they are nevertheless rooted in our legal history. Apart from those few cases where it may have been considered equitable to accommodate certain private interests, most of the interventions in recent Canadian history have been prompted by broad and fundamental issues of public policy. As far back as 1945, for example, in the case of Re Drummond Wren,[25] the Supreme Court of Ontario permitted the Canadian Jewish Congress to argue, amicus curiae, that racially restrictive covenants were not legally enforceable. During the last decade, however, the number of such interventions has increased significantly. On at least a dozen occasions during this period, Canadian tribunals have permitted the involvement of strangers to the litigation.[26] In a good number of these cases, the matter at issue concerned an interpretation of our quasi constitutional statute,

the Canadian Bill of Rights. Whatever considerations have motivated this and other courts to permit such interventions in cases involving the Bill of Rights, the argument will be even stronger when the document at issue is the new Canadian Charter.

It is our view, therefore, that the Supreme Court of Canada should develop a rule on interventions which broadens the effective right of constituencies other than the immediate parties to participate in important public interest litigation. We recognize, of course, that these considerations must be balanced against the concerns of efficiency. Among the consequences accompanying the advent of the Charter is an increased workload for the Supreme Court of Canada. Understandably, therefore, the Court will feel obliged to avoid, where possible, the prospect of unduly long and repetitive hearings. We believe, however, that the valid interests of efficiency can coexist with an expanded role for intervenors.

This objective can be accomplished by permitting a wide latitude for partial interventions i.e. interventions primarily through written briefs rather than oral argument. A liberal rule for the inclusion of such briefs would broaden the right to participate and permit the judges to obtain an ever expanding amount of assistance without in any way increasing the amount of time allocated for the Court's hearings.

While the practice in the U.S. Supreme Court is a possible model, we believe that some reasonable modifications are in order. Instead of foreclosing almost automatically on the oral participation of intervenors, our Court might adopt the practice of selectively inviting their counsel to appear for the purpose of speaking to whatever limited issues would assist in the disposition of the cases at Bar. From their advance reading of the briefs and factums, the judges could decide which, if any, of the intervenors' counsel they may wish to hear and on what issues. Such invitations to counsel could range from involvement on one or more limited points to virtually full-scale participation in certain special cases. Even at that, the presentations of such counsel could be subject to abridgement at the hearing itself to whatever extent it became evident that they were not contributing significantly beyond what had already been advanced on behalf of the parties. In all of these ways, the Court could still control its processes and prevent any undue prolongation of the oral hearings.

The adoption of this approach should also help to overcome some of the concerns that have been expressed about interventions in criminal cases. To whatever extent there were several interventions on the side of the Crown, it has been said that the situation might look like a "ganging up" on the accused. It will be appreciated, however, that such an appearance is rendered far less likely when the interventions are handled primarily through written briefs rather than oral argument. In any event, such interventions would be addressed, not to the guilt or innocence of a particular accused, but rather to the resolution of a question of law or the interpretation of a section of the Charter. All of these considerations should militate against prohibiting interventions in criminal cases.

Moreover, there is no reason why this approach should not apply equally to the proposed interventions of the various attorneys general. Governmental intervenors are no more likely (and may well be less likely) than non government intervenors to adopt arguments which are significantly different from those of the immediate parties. Upon meeting whatever liberal threshold test is adopted, government intervenors, like their non government counterparts, should be able to participate. But they too should do so subject to the rules applying to everyone - usually through partial rather than full intervention.

In the submission of the Canadian Civil Liberties Association, it is essential to continue and expand the role of intervenors before the Supreme Court of Canada. The Charter of Rights and Freedoms has launched a new era in the relationship between the judicial and political processes of this country. Ever since the Joint Parliamentary hearings on the Constitution, there has been a heightened public awareness and concern about Charter developments in particular and public interest law in general. Indeed, one of the consequences of the constitutional deliberations has been a raised public consciousness with respect to a wide spectrum of public law issues. Many of the processes of the Court, therefore, will be the subject of increased scrutiny. Thus, it is more important than ever that those processes conform to public perceptions and expectations of fairness. On the basis of all these considerations, the Canadian Civil Liberties Association respectfully urges the adoption of an approach which is hospitable to non party interventions in public interest litigation.

NOTES

1. SUP. CT. R. 36.
2. On Lee v. United States, 343 U.S. 924 (1953).
3. Order Adopting revised rules of the Sup. Ct., 346 U.S. 945, 947 (1954).
4. O'Connor and Epstein, Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore", 16 Law & Soc. R. 311, 315 (1981-82).
5. Ibid.
6. Ibid.
7. Ibid., 317.
8. Ibid.
9. Ibid.
10. Ibid.
11. Ibid.
12. Ibid.
13. Ibid.
14. Miranda v. Arizona, 384 U.S. 436 (1966).
15. Angell, The Amicus Curiae: American Development of English Institutions, 16 I.C. Law Q. 1017, 1044 (1967).
16. Mapp v. Ohio, 367 U.S. 643 (1961).
17. Wolf v. Colorado, 388 U.S. 25 (1949).
18. Supra fn. 15.
19. Poe v. Ullman, 367 U.S. 497 (1961).
20. Griswold c. Connecticut, 381 U.S. 479 (1965).
21. Supra fn. 15, 1041.
22. Supra fn. 4, 313.
23. Furman v. Georgia, 92 S. Ct. 2726 (1972).
24. Bakke v. Regents University of California, 98 S. Ct. 2733 (1978).
25. Re Drummond Wren, [1945] 4 D.L.R. 674.
26. The following is a list of certain key cases.

a) Morgentaler v. The Queen, [1976] 1 S.C.R. 616.
A number of intervenants appeared before the Supreme Court of Canada, including the Foundation for Women in Crisis, the Canadian Civil Liberties Association, The Alliance for Life, the Association des medecins du Quebec and the Front Commun pour le Respect de la Vie, and the Foundation pour la Vie.

b) A.G. Canada v. Lavell (1973), 38 D.L.R. (3d) 481 (SCC).
A number of intervenants appeared before the Supreme Court of Canada, including, for example, the Indian Association of Alberta, the Union of Ontario Indians, the National Indian Brotherhood, the Native Council of Canada, University Women's Club of Toronto, University Women Graduates Ltd., and the North Toronto Business and Professional Women's Club Inc.

c) Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265.
Nova Scotia Board of Censors v. McNeil, [1978] 2 S.C.R. 662.
The CCLA intervened in both cases - on the issue of standing and subsequently on the merits relating to the powers of the Nova Scotia Board of Censors.

d) Miller and Cockriell v. The Queen, [1977] 2 S.C.R. 680.
The CCLA appeared as intervenants in the capital punishment case.

e) The Queen v. Saxell (1980), 59 CCC (2d) 176 (Ont.C.A.)
The CCLA appeared before the Ontario Court of Appeal to challenge the validity of the Lieutenant-Governor's warrants for committal of persons found not guilty by reason of insanity.

f) Re Fraser and Treasury Board (1982), 5 L.A.C. (3d) 193.
The CCLA intervened before the arbitrator in the grievance filed by the civil servant who had been fired for publicly denouncing metrication.

g) A.G. Nova Scotia et al v. MacIntyre, [1982] 1 S.C.R. 175.
The CCLA intervened before the Supreme Court of Canada in this challenge of the Nova Scotia government's refusal to allow access to the informations upon which search warrants are based.

h) Dowson v. R (1983), 49 N.R. 57.
In both the Ontario Court of Appeal and Supreme Court of Canada, CCLA intervened in a challenge of a stay of proceedings filed by the Ontario Attorney General against a citizen's attempt to prosecute certain RCMP officers.