

## **An Updated Rationale for Interventions in Public Law Litigation**

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In a 1998 paper, Ian Binnie and Jeff Hall commented that the law surrounding interventions depended on the “vagaries of the judicial calendar”<sup>1</sup>. The expression evokes an area rife with unprincipled rulings, whimsical approaches, and unfettered discretion.

Not so, argues Gary Magee of Toronto’s Street Youth Legal Services, who analysed the situation with interventions in 2008<sup>2</sup>. Magee calculated that more 80 per cent of the applications to intervene at the Supreme Court of Canada are granted, and concluded that the unsuccessful applications were denied for “good reasons”<sup>3</sup>. While the court articulates no reasons when it dismisses an application for leave to intervene, the grounds on which applications are denied are nonetheless solid, because, comments Magee, they are consistent with well-respected principles of appellate advocacy. In his assessment, requests are denied when they would expand unwisely the scope of the case or when the application does not disclose how the potential intervener would shed new light on the case and avoid redundancies.

Magee gives several examples. Among them, the refusal to grant intervener status to two legal clinics – the Aboriginal Legal Services of Toronto and the African Canadian Legal Clinic – in the 2007 *Clayton*<sup>4</sup> case, and the denial to some unions in the *BC Health Service and Support*<sup>5</sup> case.

Despite some dissatisfaction with regard to the limits for interveners on the number of pages for facta and time allotted for oral arguments, Magee otherwise presents a relatively bright picture of the law surrounding interventions. It is quite well established that the criteria are:

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<sup>1</sup> W. Ian Binnie, Q.C., & Jeff Hall, “Charter Litigation: Interventions”, CBA Ontario, CLE Program, January 1998 (unpublished article).

<sup>2</sup> Gary W.D. Magee, “Trends in Applications for Leave to Intervene in The Supreme Court of Canada”, CBA Ontario, CLE Program, September 2008 (unpublished article).

<sup>3</sup> Magee surveyed SCC dockets during the years 2005 to 2007, producing a sample of 285 applications of which 237 were granted (83 percent). This number does not include interventions by the Attorneys-General from the different provinces.

<sup>4</sup> *R. v. Clayton*, [2007] 2 S.C.R. 725, 281 D.L.R. (4th) 1

<sup>5</sup> *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 283 D.L.R. (4th) 40, [2007] 7 W.W.R. 191

- 1) that the submissions of the intervener be useful to the Court;
- 2) different from the ones presented by the parties;
- 3) and that the intervener have an interest or credibility to argue the case.<sup>6</sup>

Underlying these criteria is a concern with striking a balance between the efficiency of the court process and the potential usefulness or added benefit of the intervener's contribution. This approach to interventions is shared by lower courts and justice analysts across the country.

In this paper, my goal is to unpack the interests that are being “balanced” against the time and efficiency concerns. In the process, I review the different rationales for the role of interveners with a view to identifying the weight that needs to be given to the different interests on the side of granting intervention status. I first canvass the traditional instrumentalist rationales: 1) that interveners are there to “help” the Court's thinking; and 2) that they are there to “legitimize” the Court's process. Both rationales are well developed in the literature and suggest different limitations on the granting of intervener status. I also want to put forward another rationale: one that I call the “democratic empowerment” rationale, which speaks to the necessity of encouraging civil society's participation in public interest litigation—not from the point of view of courts or institutions, but from the perspective of citizens. To illustrate this point, I draw on ideas about civil participation. There is no doubt that this latter rationale has limitations and begs for more research – both theoretical and empirical – and I will try to advance a couple of hypotheses in this regard.

#### 1) The first instrumentalist argument: The enrichment rationale

This rationale is generally well understood, and implies that courts need to be exposed to different points of view in order to reach “better” decisions. To avoid doing so may be dangerous. To borrow the words of the Canadian Civil Liberties Association's Alan Borovoy in a 1984 paper: “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

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<sup>6</sup> Supra note 2 at 5.

no one else but the immediate parties regularly participates, the court and the community will likely be deprived of countervailing long-term theories for interpreting the *Charter*<sup>7</sup>.

Examples abound of interveners who were able to provide a vision of the law that inspired the court: the majority decision of the United States Supreme Court in *Miranda v. Arizona*<sup>8</sup> drew heavily from the American Civil Liberties Union's factum. Samuel Dash was quoted as saying that the brief from ACLU «shaped» the majority opinion even without an oral argument. The brief was said to have «presented a conceptual legal and structural formulation that is practically identical to the majority opinion».<sup>9</sup>

The enrichment rationale suggests that scarce judicial resources are conserved when a committed intervener can do the research, the thinking, and the presenting to a court, which can then adopt, reject, and nuance at its rational pleasure. New concepts, new understandings and new arguments can be heard through this method and adopted or rejected.

The “help” rationale explains well the current limitations: Any intervention that is not squarely within the four corners of the case appears unhelpful to the Court, and it makes sense to allow only interveners that present an original position, different from what will be argued by the parties, as redundancies waste time. If we adopt this rationale, we should be comfortable with the refusal to grant intervener status to legal clinics – the Aboriginal Legal Services of Toronto and the African Canadian Legal Clinic – in the *Clayton* case dealing with racial profiling, and the denial to some unions in the *BC Health Service and Support* case, because as Magee suggests their intervention would arguably have been outside the boundaries of the case or redundant.

The second instrumentalist point of view, however, may suggest a different result.

## 2) The second instrumentalist argument: the legitimacy rationale

This represents a slightly different way of seeing the enrichment argument. Justice Bertha Wilson, an early proponent of open intervention standards, stated as far as 1986, “Liberalized

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<sup>7</sup> A. Alan Borovoy, “Canadian Civil Liberties Association’s Submissions to the Supreme Court of Canada Re: Interventions in Public Interest Litigation”, July 17, 1984

<sup>8</sup> 384 U.S. 436 (1966)

<sup>9</sup> E. Angell, “The Amicus Curiae: American Development of English Institutions” (1967) 16 I. C. Law Q. 1017, at 1044, quoted in K. Swan, *infra*, note 12.

intervention... [would] assist in legitimizing the Court's new role through a more open and accessible court process, and it would go part way to solving the counter-majoritarian problem which some see as inherent in judicial power"<sup>10</sup>. Australia's Justice Kenny echoed these words, arguing that liberalized intervention decisions may lead to "greater acceptance in the community". Justice Lebel, as he then was, also suggested that the concern for legitimacy is crucial.

Taken further, this rationale suggests that where a particular group faces a deficit in representation on the Court or within the Bar – aboriginal peoples, for example – a more welcoming attitude towards interventions by that group would be appropriately entertained. Hearing from groups that will be affected by an issue in the short to long term is also certainly compatible with principles of fundamental justice. As Alan Borovoy submitted to the SCC in 1984: "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... Public respect for both the *Charter* and for the Court will require a more inclusive process"<sup>11</sup>. Indeed, the added "perspective" of a group that will be directly impacted by the decision is often welcome under the current rules, reflecting critical access to justice concerns. This rationale could justify welcoming the perspective from the Aboriginal Legal Services of Toronto and the African Canadian Legal Clinic in the *Clayton* case, for example.

Concluding with the instrumentalist viewpoint, I would quote Kenneth Swan, who maintains that liberal intervention rules are crucial to a "mature constitutional adjudication system"<sup>12</sup>. For a legitimate decision to be taken, the Court must first be informed of all relevant legal arguments and viewpoints.

### 3) The democratic empowerment rationale

The democratic empowerment rationale suggests that interventions are necessary as a mechanism for accessing justice. This argument is grounded in the following basic assumptions:

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<sup>10</sup> Bertha Wilson, "Decision-Making in the Supreme Court" (1986) 36 *University of Toronto Law Journal*, 227 at 243

<sup>11</sup> *Supra* note 7

<sup>12</sup> Kenneth Swan, "Intervention and Amicus Curiae status in Charter Litigation", in Gerald Beaudoin ed., *Charter Cases 1986-87* (Cowansville, Quebec: Les Éditions Yvon Blais Inc., 1987) at 110.

- 1) A democracy embraces the role of residents in debates about its governance and about the society in which they live;
- 2) The participation of individuals in their own governance is inherently good, however costly and time-consuming it may be, compared with the swift decision-making structures of autocratic regimes;
- 3) Participation in a law-based dispute resolution process is a service to one's community attractive;
- 4) There is a public duty to fight injustice, to denounce it in all its forms, and strive to remedy it;
- 5) Constitutional litigation is one of the ways in which public policy is being developed. The decision-making forum includes the court process where the arguments are about aligning choices—private, and most often in constitutional cases, public—with values, expressed or implied. The alignment is what a rule of law-based system is seeking: coherence between what the law says and what the policy and social actors do. If we allow broad public participation in parliamentary hearings, why should we not do the same in the courts?

We are a mature democracy that recognizes that injustice and inequality are lived in complex ways: partly internalized, partly accepted, partly condoned, partly wished away. Lord Denning's worry that an intervener could be a "mere busybody who is interfering in things which do not concern him (sic)"<sup>13</sup>, seems part of this strange mythology of the trial where "one", psychologically, financially, socially and politically able, having suffered a legal wrong, calls upon a barrister to seek reparation in a court of law. This mythological litigant would not wish nor need the help or support of a busybody: he is perfectly capable of deciding whether and how to protect his interests. It is a private matter.

We know that the workings of injustice are more subtle than this, however, and many people who suffer injustices are unable, psychologically, financially, socially and politically, to fight, let alone be aware that they have suffered an injustice. For many decades now, some would say for centuries, we have recognized the crucial role that collective rights play to advance social justice and individual fulfillment: there is no possibility of equality for aboriginals without a recognition of their collective ancestral rights and rights to self-government, no real

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<sup>13</sup> *Attorney General Gambia v. N'Jie* [1961] 2 All E.R. 504

rights for individual workers without the necessary support of a collective entity that can negotiate for all, and no real ‘épanouissement’ of linguistic rights without institutional support. Support to the collective can be a source of empowerment of the individual, and the best prevention mechanism to continuing and enduring discrimination and injustices.

A civil society that does not give itself mechanisms to empower its citizens to recognize and challenge injustice is doomed to democratic attrition. Denouncing injustice at the political level and in the courts is a civil duty and an act of citizenship.

Our standing rules since *Canadian Council of Churches*<sup>14</sup> seem to continue to require us to put a face, a body, and a name on injustice. Media prompt us to do the same. We know that the costs, time, money and stress of litigation are enormous to individuals. WE need to support this access to justice by sharing the burden.

We need to support and encourage the process of debating and articulating what the law should be and of participation in the courts. This process belongs to all and indeed the importance for a group to debate, disagree, formulate their argument and assess where the law should go should not be dismissed. It is part of political and democratic participation.

In our assessment as to whether human rights matter, whether they are to be given substance, we require an internalization not of injustice but of the promises of law, and hence a demand that they be translated throughout our society. It is not acceptable to stand idle and deprive citizens of the ability to express their sense of injustice in every place where it may matter, whether it be a parliamentary committee, the media, the streets, or the courts. That is what intervention opportunities provide: the ability to be heard and to articulate one’s place.

The participation of groups in defining the content and the limits to rights and freedoms in legal arguments is helpful in a society. In a way, as we accept that the participation of different political parties to the debate adds to the quality of our democratic decisions and process, we should accept that participation of different voices is in itself a benefit. Where does such a theory leave us? First, one could argue that it is implicitly recognized by of the

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<sup>14</sup> *Canadian Council of Churches v. R.* (1992), 16 Imm. L.R. (2d) 161, 2 Admin. L.R. (2d) 229

courts. Since the Court has granted almost 80 per cent of demands for intervener status, it has accepted its role in allowing different groups to demystify the law by arguing where it should go. However, research questions remain as to whether indeed civil society groups are empowered by their participation, whether in Parliamentary committee or in the courts. In addition, since I am not suggesting that courts should accept all interventions, how then to choose who should be heard and who should not?

It seems to me that a democratic empowerment rationale builds on the previously identified criteria but could add to them: it may welcome newcomers and be concerned about the scope of the membership and its representativeness. It could indeed be concerned about whether the group has indeed democratic processes that support its position, whether its governance model is appropriate, whether they are seriously engaged in democratic participation.

## Conclusion

We are a long way from the dire indictment that Justice Estey made of interveners in the early days of the Charter: “This Court no longer has the time to fritter away sitting and listening to repetition, irrelevancies, axe-grinding, cause advancement, and all the rest of the output of the typical intervenant.”<sup>15</sup> A mature democracy values the long term involvement of civil society’s groups in governance, not only for their usefulness but for the celebration of this engagement. And since interveners must agree not to delay the process, must agree to write only 20 pages and to speak only if permitted, and only for 10 minutes..., the costs to efficiency seem minimal.

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<sup>15</sup> Robert J. Sharpe & Kent Roach, *Brian Dickson : A Judge’s Journey* (Toronto: University of Toronto Press for the Osgoode Society of Canadian Legal History, 2003) at 385.