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INTERVENTIONS

AT THE SUPREME COURT OF CANADA

JUNE, 1986.

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I THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

1. The Women's Legal Education and Action Fund was created in April, 1985, when the new constitutional guarantees of equality came into effect. LEAF is a national, non-profit organization with three objects: to undertake test case litigation which will advance the equality of women, choosing cases where important legal principles can best be developed and reinforced; to conduct research on equality rights and other legal issues affecting women; to make this information available to women, women's groups and the general public. LEAF women were active in lobbying for strong equality rights guarantees in the Charter and were active participants in the formulation of the language of sections 15 & 28.

LEAF's present role is to undertake litigation interpreting these provisions and women's legal rights. LEAF has successfully represented women in Charter litigation before the Supreme Courts of Ontario and the Yukon, and is currently involved in cases before the Supreme Courts of British Columbia and Prince Edward Island. LEAF was recently granted intervenor status by the British Columbia Court of Appeal in Shewchuk v. Ricard[1] a case involving the constitutionality of the Child Paternity and Support Act of British Columbia. The Ontario Court of Appeal has recently given LEAF leave to intervene in the case of The Queen v. Seaboyer & Gayme,[2] which involves a constitutional challenge to provisions of the Criminal Code respecting sexual assault. As an organization dealing exclusively with the legal rights of women, LEAF represents a unique

aspect of the public interest, and has specialized knowledge to contribute to litigation arising under the Charter.

II NEED FOR PARTICIPATION

2. Traditionally, the adversarial system of dispute settling has relied on the parties to an action to serve many important functions: to define the issues in the litigation, and inform the court through the presentation of evidence and legal argument. Participation by the parties has also increased public confidence in the proceedings, thereby enhancing the legitimacy of the final decision, and of the judicial process itself. The rules of procedure at all judicial levels reflect the importance of the participation of the parties in the dispute-settling process.

3. With the increased importance of constitutional law, the Supreme Court of Canada has ceased to be a private dispute-settling body. Entrenchment of the Charter has ensured that the Court has become the arbiter of broader issues. It is now asked to determine and delimit the economic, social, and political impact of public policy on the country and its citizens. It is now frequently required to assess, or even create, policies that have a significant impact on the structure of society.

4. Participation in the judicial process by those affected by the court's decisions is equally important in this new context. The

traditional two party model of litigation is, however, structurally inadequate to respond to the diversity of interests arising in this type of "public interest" litigation. Particularly in cases where the Court must determine the scope of civil liberties or minority rights, there are significant groups of people whose interests will not be represented by the parties to the action, but who will be affected by the decision, often more fundamentally than the litigants themselves. A rule restricting participation to the parties who first bring an action will effectively deny the poor and disadvantaged sectors of society, who are least able to initiate the litigation themselves, access to a process which will have a significant impact on their rights.

5. The involvement of these groups in the litigation process would ensure that the court is exposed to information from a wide variety of sources and viewpoints, and that it is therefore better equipped to assess policies that have a significant impact on the structure of society. Moreover, the participation of a wide variety of interest groups in a process which has an increased political content would improve the legitimacy of the decisions rendered by the court.

6. It is natural that as the role of the court is changing, new rules of procedure are required to deal with the different kinds of issues coming before it. It is time for the court to broaden the rules governing the intervention of public interest groups in Charter litigation, in order to allow the benefits of increased participation

to enhance its decision-making process. Furthermore, because of their importance to the public, intervention applications should be heard in open court, and reasons for the court's decision to either allow or deny the application should be given.

III PAST PRACTICE

7. It is submitted that receptiveness by the Court to the concept of intervention in Charter litigation would not involve a major deviation from established practice. The court has already recognized the need for greater rights of participation in constitutional litigation and has expressed this recognition in a more lenient approach to intervention in several contexts.

Canadian Bill of Rights Cases:

8. Several decisions of the Supreme Court under the Canadian Bill of Rights indicate a recognition by the court of broader intervention rights. In Attorney General of Canada v. Lavell,[3] a case decided in 1973 involving sexual discrimination under the Federal Indian Act, the court allowed argument from a variety of native Indian and women's organizations. Similarly, in Morgentaler v. The Queen,[4] decided in 1975, the court extended this approach to criminal cases, allowing argument on constitutional points by the Canadian Civil Liberties Association and several other associations.

9. The Canadian Civil Liberties Association was also granted leave to intervene in Nova Scotia Board of Censors v. McNeil,[5] which involved the constitutionality of film censorship, and in Miller & Cockriell v. The Queen,[6] which dealt with the question of whether the death penalty was cruel and unusual punishment under the Bill of Rights. Leave to intervene was granted in Re Dawson & The Queen[7] involving a prosecutor's right to enter a stay of proceedings. The association was also allowed to intervene in Attorney General of Nova Scotia v. MacIntyre,[8] which dealt with the examination of search warrants by journalists as members of the public.

10. In Bilodeau v. Attorney General of Manitoba,[9] involving the validity of English language legislation in Manitoba, leave was granted to the Societé Franco-Manitobaine and to the Positive Action Committee to intervene. In the reference Attorney General of Quebec v. Attorney General of Canada[10], intervenor status was granted to L'Association Canadienne Francaise de l'Ontario and to the Grand Council of Crees of Quebec. In British Columbia Development Corp. v. Friedman[11], a case involving the Ombudsman, the court granted leave to intervene to the Ombudsman of Ontario, Saskatchewan and Quebec. Similarly The Human Rights Commissions of Alberta, Saskatchewan and Manitoba were granted leave in Ontario Human Rights Commission and O'Malley v. Simpson's Sears.[12] The arguments in favour of allowing these interventions under the Bill of Rights will be more compelling when dealing with the guarantees of The Charter of

Rights and Freedoms.

Status Granted to Attorneys General:

11. Governments, either the federal or provincial Attorney General are almost always granted leave to intervene in constitutional cases, as repesentative of the public interest. Mr. Justice Dickson articulated the justification for this permissive approach in Northern Telecom Ltd. v. Communications Workers of Canada:[13]

> "One must keep in mind that it is not merely the private interests of the two parties before the court that are involved in a constitutional case. By definition, the interests of two levels of government are also engaged."

12. This is a clear recognition by the court that the interests of the private parties to constitutional litigation are not the only interests requiring representation. Since the Charter, however, constitutional cases engage the interests not only of the two levels of government, but of the individuals to whom the rights and freedoms are granted. As many of the provisions of the Charter now regulate the relationship between the government and individuals, the government itself may not in all cases be the best representative of the particular interest affected. The rationale for allowing the government to intervene is equally applicable to public interest groups who represent a particular aspect of the public interest

affected by the Charter litigation.

Constitutional Reference Cases:

13. Another context in which the court actually encourages the participation of a wide variety of interest groups is a constitutional reference. In a reference case the court relies on the intervenors, who represent differing perspectives and points of view, to determine the scope of the inquiry and to present evidence from many different sources.

14. A constitutional reference is unique because there are no private parties to the litigation. However, the intervenors are allowed to participate because of the broad impact the decision will have on various interests. The role of the intervenor is to assist the court in understanding what this impact will be. In this regard, public interest litigation, and Charter litigation in particular, share the attributes of a reference. The decision has an impact that extends far beyond the actual parties to the action. The parties in many cases will be unwilling or unable to adequately represent the various interests affected. The participation of interest groups through broadened intervention rules would, it is submitted, assist the court by exposing to it the full ramifications of its decision.

Rules of Court in Provinces:

15. A more permissive approach to intervention would also be in line with the rules of procedure in most Canadian provinces. In Ontario, the new rules provide broader grounds for intervention either as a party or as a friend of the court and expressly contemplate that "without becoming a party to the proceeding" a party may be granted leave to "intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument[14]." This basis for intervention appears in the rules of every province but Quebec, and expands the potential for intervention considerably.

American Experience:

16. The American Courts have allowed public interest groups to intervene at the Supreme Court level through the device of the amicus curiae brief. This technique has been used extensively in complex cases; in the 1980 term 71% of all cases decided by opinion involved amici briefs[15]. The participation of more than one amicus is common and in one case the number of briefs received by the court reached fifty-seven[16]. The frequent use by American courts of amicus briefs has caused one legal commentator to state that "it is quite possible that the Supreme Court has received more briefs from amici than from parties[17]". That the American courts have found amici briefs very useful and informative can be seen from the judgments, which often reflect the information contained in the briefs

received by the court.

IV CRIMINAL CASES

17. Traditionally intervenors in criminal cases have supported the position of the accused, however, periodically the intervenor will be in support of the Crown's position. For example in the case of R. v. Seaboyer and Gayme, referred to above, the defence has raised a Charter argument, and LEAF is intervening to argue in support of the legislation in question.

18. The right of the accused to a fair trial is not affected by the presence of an intervenor who takes an opposing position, provided that the accused is adequately represented. The usual type of criminal case in which an intervention is allowed is also a constitutional case. As such, it is likely to entail complex and lengthy argument, whether or not an intervenor is involved. In any complicated and lengthy criminal case the accused may have legitimate concerns about competing with the Crown's resources. It is submitted that, the solution to these concerns is not to shut the door on intervenors but to ensure that the defence has adequate resources. Governments have a responsibility to provide legal aid funding in cases of need, and should be prepared to provide additional funding in cases requiring extensive research and preparation.

V INTERESTS OF EFFICIENCY

19. The advantages of intervention must be weighed against the disadvantages of increased public involvement in the decision making process. Clearly the court must be able to maintain control over the proceedings and prevent unduly long, repetitive, or irrelevant submissions. With an increased workload for the Supreme Court of Canada under the Charter, the court must impose some limitations on public participation in the cases which come before it.

20. The interests of efficiency, however, can be accommodated without restricting intervention completely. This could be accomplished by allowing intervenors to submit written briefs to the court, rather than allowing full scale oral argument in every case. In this way the court would obtain the value of the intervenor's submissions without causing any delay in the actual hearing of the case.

21. Furthermore, having read written submissions before the hearing, the court would be in an advantageous position to direct oral argument on specific issues, coordinate any potentially overlapping submissions from various intervenors, and abridge repetitious or irrelevant presentations.

V CONCLUSION

22. In an era where the Supreme Court of Canada is forced to analyze complex economic, social and political issues, the participation in the judicial process of interest groups which possess unique and specialized knowledge on these issues will be of invaluable assistance to the court. LEAF, as an organization representing women and their legal rights, has a contribution to make to litigation defining the equality rights guaranteed by the Charter. Broader rights of intervention will ensure that the court has access to information from a wide variety of sources before it makes decisions which will have a significant impact upon the structure of society.

FOOTNOTES

1. Shewchuk v. Ricard, (B.C.C.A. Vancouver Registry #C.A.-004826), appeal heard 20 March, 1986).

2. R. v. Seaboyer and Gayme (Ont. C.A. Registry #985/85, 986/85, under appeal).

3. A-G Canada v. Lavell (1973) 38 D.L.R. (3d) 481.

4. Morgentler v. The Queen (1975) 20 C.C.C. (2d) 449.

5. Nova Scotia Board of Censors v. McNeil (1976) 55 D.L.R. (3d) 632.

6. Miller and Cockriell v. The Queen [1977] 2 S.C.R. 680.

7. Re Dowson and The Queen [1983] 2 S.C.R. 144.

8. A-G Nova Scotia v. McIntyre, [1979] 1 S.C.R. 183.

9. Bilodeau v. A-G Manitoba [1982] S.C.R. 322.

10. A-G Quebec v. A-G Canada [1982] S.C.R. 425.

11. B.C. Development Corporation v. Friedman [1982] S.C.R. 1093.

12. Ont. Human Rights Commission & O'Malley v. Simpsons Sears (Dec. 17, 1985 Supreme Court of Canada).

13. Northern Telecom Ltd. v. Communications Workers of Canada (1980) 98 D.L.R.(3d) 1.

14. Ontario Rules of Civil Procedure, Rule 13.

15. Laren O'Connor and Lee Epstein, "Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's Folklore" (1981), 16 Law & Society Review 311 at 317.

16. Regents of the University of California v. Bakke 438 US 265 (1978).

17. Bruce Ennis, "Effective Amicus Briefs" (1984), Catholic U.L. Review 603 at 604.

APPENDIX "B"

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