Court File No. 37769

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

BRADLEY DAVID BARTON

APPELLANT
(Appellant)

AND:

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE INTERVENER
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PART 1 – OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. The David Asper Centre for Constitutional Rights (the Asper Centre) intervenes in this appeal to address the important role that interveners play in litigation that has a broad societal impact. Although not a constitutional case, the issues it raises include the treatment of Indigenous women in our criminal justice system and society more broadly, the over-representation of indigenous persons as victims of crime and the significance of prosecutorial conduct that can alleviate or perpetuate victimization by the criminal justice system. Within this context, interveners can play a crucial role by bringing the perspective of non-parties to the litigation, who can be significantly impacted by its outcome.

2. As is the traditional role of an intervener, the Asper Centre takes no position on the facts of the case where the evidence is in dispute; nor does it take a position on the outcome of the appeal. However, and consistent with the requirement that an intervener be useful to the Court in deciding the case, we will make reference to the facts that are not in dispute as they relate to and support the legal arguments.

PART II – STATEMENT OF POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

3. The Asper Centre' submissions address the issue raised by the Appellant in respect of the impact of the interveners on the fairness of the appeal at the Court below. In particular, the Asper Centre's submissions focus on the role of interveners in cases that have a broader societal impact, including criminal prosecutions, and the importance of the participation of civil society in such cases on all sides of the issues.

PART III – STATEMENT OF ARGUMENT

4. The Appellant, quite rightly cites *Borowski* for the axiom that our criminal justice system is an adversarial process between parties who have a stake in the proceedings,[1] and *Swain* for the tenet that this adversarial system is "founded on respect for the autonomy and dignity of human beings."[2] Neither case speaks to the function of interveners to bring the perspectives of the victims of crime or members of society who are impacted by the criminal law, whose dignity might also be at stake before the court. In *RJR MacDonald*, McLachlin J., while acknowledging that the criminal law is generally seen as a contest between the individual and the state, went on to state that "it also involves an allocation of priorities between the accused and the victim, actual or potential."[3]Indeed, in *Borowski*, interveners represented both sides of the debate about abortion.[4] It is within this broader context that the role and importance of public interest interveners must be examined.

A. Legitimacy And Perspective

5. While much of the literature has been written about interveners at the Supreme Court of Canada, and more often in respect of constitutional cases, much of what follows is equally applicable to the provincial and territorial appeal courts across the country. Alarie and Green[5] identified the three functions that the practice of intervention might satisfy: accuracy through the provision of objectively useful information; affiliation or a sense of identification of purpose between the court and interveners with similar policy preferences; and acceptance of that's court's decisions through increased legitimacy. Rodgers notes that "interveners embody democratic empowerment of individuals and groups who would

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[1] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 358.
[2] *R v Swain*,[1991] 1 SCR 933 at 972.
[3] *RJR-MacDonald v Canada (Attorney General)*, [1995] 3 SCR 199, para. 135. See also Kent Roach, *Due Process and Victims Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 311-312.
[4] *Borowski, supra* note 1.
[5] Benjamin R. D. Alarie & Andrew J. Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 Osgoode Hall L.J. 381.

otherwise be excluded, and thus provide a mechanism for accessing justice.[6] Whereas Mathen states,

> The role of interveners, I would argue, is substantive, procedural and symbolic. In a substantive sense, interveners can elaborate certain points of law, or point out jurisprudential patterns, in a way that most parties are not equipped to do. In a procedural sense, the intervener functions as an intermediary between the parties and the court, in the sense that the intervener reminds the courts that its decision has a broader impact than might be suggested by the parties before it. Finally, in a symbolic sense, the interveners' presence suggests that the judicial process can accommodate, perhaps even welcome, diverse views.[7]

6. It is often stated that standing to intervene in criminal proceedings should be granted sparingly due to the adversarial nature of the proceedings and the significance of the potential outcome for the accused person.[8] However, there has been a long history of Canadian courts granting intervener standing in criminal appeals that address issues which are not constitutional. And while many intervener groups seek to intervene in such a way as to support arguments made by the defence (particularly when constitutional arguments are put forward), intervening groups that seek to reflect the interests of others who do not have a traditional role in criminal proceedings, but who can be negatively impacted by such proceedings, play a particularly important function.[9] Examples include Indigenous women and women in general, people with disabilities, groups that are the target of hate speech and children who are impacted by criminal defences.

7. In these and other cases, interveners can play a vital role in balancing the process to reflect the broader community and maintain the perception of fairness. Indeed, in *R v Murdoc*, cited by the Appellant, the Nova Scotia Court of Appeal granted standing to an intervener organization because of concerns that the "Mi'kmaq perspective, may not be adequately addressed in the appeal"[10] due to the lack of counsel for one of the accused. Such

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[6] Sanda Rodgers, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" (2010), 50 SCLR (2d) 1.

[7] Carissima Mathen "The Expanding Role of Interveners: Giving Voice to Non-Parties" in The 2000 Isaac Pitblado Lectures: "Competence & Capacity: New Directions" (Manitoba: Law Society of Manitoba, 2000) 85, at 105.

[8] *R v Seaboyer and Gayme* (1986), 16 W.C.B. 36, 1986 CarswellOnt 104 (WL Can), para 8.

[9] Mathen, *supra*, note 7 at 101.

[10] *R v Murdock*, 1996 CanLII 5588 (NSCA), 148 NSR (2d) 183.

interveners also recognize that prosecutors have distinct obligations to represent the general public interest and not necessarily distinct and disadvantaged segments of the public. Interveners allow those segments of society to speak for themselves. Appeals of important criminal matters have benefited from submissions on both sides from multiple interveners representing those distinct segments of society, including *R v Latimer*,[11] *R v Seaboyer*,[12] *R v O'Connor*,[13] *R v Keegstra*,[14] *R v Zundel*,[15] and *R v Gladue*.[16]

8. Academics and courts alike have commented on the positive benefits of intervener contributions. Interveners and, indeed some courts, have recommended interventions at earlier stages of hearings to have participation that is more robust.[17] While a more focused engagement might be warranted at the highest levels of appeal when the legal issues have more clearly crystallized, the participation of interveners ought to allow for flexibility for robust interventions at all stages. Examples of such robust participation in criminal cases at courts of appeal include *R v Daniel (No.1)*, *R v O'Connor*, *R v Watson and Spratt*, *R v N.S.*, *R v Spratt*, *R v Al-Rawi*, *R v L.B.*, *R v Fearon*, and *R v A.M.*, to name a few.[18]

B. Balancing Role Played By Interveners

9. Trial fairness from the perspective of the accused is an important protected right. It is essential to the conduct of our criminal justice system. However, the overall perception of a just and fair trial is not a one-sided concept. For example, a number of decisions examining the concept of consent, particularly within the context of sexual offences, have clearly noted the importance of fairness to the complainants in the process including the

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[11] *R v Latimer*, 2001 SCC 1, [2001] SCR 3.
[12] *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577.
[13] *R v O'Connor*, [1995] 4 SCR 411.
[14] *R v Keegstra*, [1990] 3 SCR 697.
[15] *R v Zundel*, [1992] 2 SCR 731.
[16] *R v Gladue*, [1999] 1 SCR 688.
[17] *Canada (Citizenship and Immigration) v Ishaq, 2015 FCA 151 (CanLII), [2016] 1 FCR 686, at para 16.*
[18] *R v Daniel (No.1)*, 1991 CanLII 7954 (SK CA); *R v O'Connor*, 1993 CanLII 9389 (BC CA); *R v Watson and Spratt*, 2006 BCCA 234 (CanLII); *R v N.S.*, 2010 ONCA 670 (CanLII), *R v Spratt*, 2008 BCCA 340 (CanLII); *R v Al-Rawi*, 2018 NSCA 10 (CanLII); *R v L.B.*, 2011 ONCA 153 (CanLII); *R v Fearon*, 2013 ONCA 106 (CanLII); and *R v A.M.*, 2006 CanLII 13550 (ON CA).

application of myths and stereotypes and the unfair treatment of complainants in respect of their privacy rights. As L'Heureux-Dubé J. noted in *R v Ewanchuk*, "Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions."[19] It has often been through the submissions of interveners such as LEAF that the biases respecting women, youth and sexual assault complainants have been brought to the attention of the courts and the appropriate balance, including the overall fairness of the proceedings, has been reinforced.

C. Different Legal Perspective

10. Criminal law and criminal proceedings should be open to the arguments of intervener groups to the extent that a particular case might involve the interpretation of the *Criminal Code* or possible change to the common law that would have a broad impact on behaviour and the application of the law to new circumstances.[20] By confining such cases to the arguments of the parties only, the Court might fail to see these broader implications that might also not occur to the parties or be in their interests to advance.

11. That an intervener would advance an argument that differs from a party, including the Crown, is to be expected of their role and consistent with the understanding that an intervener is permitted to participate because they have a different role to play in the proceeding that would not be repetitious of the parties. Different perspectives on the argument are indeed required by an intervener[21] and can appropriately include different legal reasoning on an issue before the court.[22] But perspective alone, while possibly fulfilling a legitimizing role, would fail to fulfil the expectation that an intervener make a

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[19] *R v Ewanchuk*, [1999] 1 SCR 330 at para 95. See also, *R v JA*, 2011 SCC 28, [2011] 2 SCR 440; and *R v Seaboyer, supra* note 12.

[20] *R v Finta*, [1993] 1 SCR 1138. Note that the Appellant in his factum cites the Ontario Court of Appeal dismissal of the intervention motion rather than the Supreme Court of Canada's granting of intervener standing in the appeal. *Appellant's Factum*, para. 39.

[21] *R v LePage*, 1994 CanLII 7394, 23 CRR (2d) 81, (ON SC) at para 22; *Canada (Justice) v. Khadr*, 2008 SCC 29, [2008] 2 SCR 143 at para 18.

[22] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388, at para 40.

worthwhile contribution to the ultimate decision on the issue.[23] Sheppard comments that the traditional role of interveners as helpful to the Court in arriving at 'good' decisions can only be met with "an engagement with interveners that [is] both quantitatively broad, and qualitatively deep."[24] In other words, it must allow for diverse perspectives in a manner that fully engages with the legal arguments.

D. Reference To The Facts

12. The Appellant argues that the interveners, the Institute for the Advancement of Aboriginal Women (IAAW) and the Women's Legal Education and Action Fund (LEAF), were permitted to make arguments that improperly waded into the facts of the case. IAAW and LEAF assert that they properly provided the Court with legal analysis and arguments on particular grounds of appeal within the context of the trial record. In respect of this issue, the Asper Centre asserts the need for a principled approach to an intervener's ability to reference facts, particularly where they are not in contention.

13. It is artificial to draw a firm line against an intervener making any mention of the facts of the case because legal rules and procedures are fundamentally connected to the factual foundation of any particular case. The law depends on the facts and the facts that are relevant depend on the law. Interveners who are unable to make any reference to the facts would be less useful to the Court, which after all is their purpose. While there are many instances where an intervener can keep clear of mentioning the facts in order to put forward the intended legal arguments, some arguments cannot be made so abstractly and are permissible so long as the argument does not rely on "additional facts not proven in evidence at trial."[25] One such example was noted by Stratas J. in *Canada v Ishaq*, "… [The court] may have multiple options in applying the law to the facts – options with different implications on which interveners, taking the evidentiary record as it is, may have useful

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[23] Mathen, *supra*, note 7 at 88.
[24] Daniel Sheppard, "Just Going Through the Motion: The Supreme Court, Interest Groups and the Performance of Intervention" (2018) 82 SCLR (2d) 179 at 181.
[25] *Mikisew Cree First Nation, supra* note 22.

insights and perspectives."[26] At times, an intervener with significant history and experience in respect of an issue, can be helpful in applying the evidence as the factual basis for the legal arguments to follow.[27]

14. There is a fundamental difference between an intervener referring to the facts to illustrate and support a legal argument and taking a position where the facts are contested. Indeed, where an intervener is required to accept the factual record as established by the trial court, their legal arguments must be founded upon that record but can involve alternative interpretations of the application of those facts.[28] Where the legal issue is the application of an evidentiary rule designed to protect further victimization through the application of negative stereotypes and myths to the actions of a person who is not a party to the litigation, such as s.276 of the *Criminal Code*, it is inconceivable how an intervener could adequately address the legal arguments in any way helpful in the particular case without referring to the evidence that might have wrongly been admitted. Further, the myths and stereotypes that animate the rationale for s.276 applications, relate to the evidence of the case, and are inextricably linked to the prejudice that s.276 seeks to prevent.[29]

15. The interveners, both at the Court of Appeal and before this Honourable Court, ought to be able to refer to the evidence in the record including the transcripts of the proceedings, as well as the evidence that this Honourable Court has accepted through judicial notice. It is within this body of evidence that the myths and stereotypes pertaining to women who are victims of sexual assault,[30] and the racial prejudice acknowledged by this Court against Indigenous persons[31] (and, in this case, against Cindy Gladue, an Indigenous woman) were arguably on display in this case.

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[26] *Ishaq, supra* note 17.
[27] See for example, *Lameman v. Canada (Attorney General)*, 2006 ABCA 392 (CanLII) at paras 98-101.
[28] *R v Mernagh*, 2012 ONCA 199 (CanLII) at para 14.
[29] *Seaboyer, supra* note 12 at 665; *R v Darroch*, 2000 SCC 46, [2000] 2 SCR 443 at para 33.
[30] *Ewanchuk, supra* note 19; *Darroch, ibid.*
[31] *R v Williams*, [1998] 1 SCR 1128 at para 58; *Ewert v Canada*, 2018 SCC 30 at para 57; and *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 at para 67.

E. Conclusion

16. Interveners provide an essential access to justice mechanism by which the Court might gain meaningful exposure to the issues experienced by marginalized groups which experience exclusion, exploitation and discrimination including in the criminal justice system.[32] However, in order to guard against token participation that only achieves arguably superficial goals of affiliation and acceptance,[33] Mathen notes that "intervention must be visible, not hidden, and interveners must have a reasonable opportunity to be heard."[34]This must include leeway to engage with the factual basis for the arguments found in the established record of the case and to proffer alternative arguments derived from the issues identified by the parties, as well as legal errors that are evident from the record that call out for all litigants and the Court to correct in order to correct serious injustice.

PART IV – SUBMISSIONS ON COSTS

17. The Asper Centre does not seek costs and requests that none be awarded against it.

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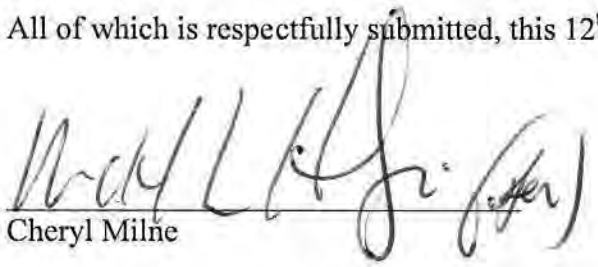
[32] Rodgers, *supra* note 6 at para 66.
[33] Sheppard, *supra* note 24 at 197.
[34] Mathen, *supra* note 7 at 115.

PART V – NATURE OF THE ORDER REQUESTED

18. The Asper Centre respectfully requests that it be allowed 5 minutes to provide oral argument at the hearing of the appeal. The Centre takes no position on the outcome of the appeal but asks that the intervener issue be determined in accordance with the foregoing submissions.

All of which is respectfully submitted, this 12th day of September, 2018.



Cheryl Milne

Counsel for the Asper Centre

PART VI – TABLE OF AUTHORITIES

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