

PUBLIC INTEREST INTERVENTION IN THE COURTS

Philip L. Bryden*
Vancouver

Public interest intervention is the participation by non-parties in litigation in order to influence the judicial law-making process in a way the intervenor considers to be in the public interest. Canadian law has taken an erratic approach to public interest intervention, partly because of the inadequacy of the legal concepts used to confront the issues raised by this type of non-party participation in litigation, and partly because of the ambivalence of the courts towards public interest intervention itself. This article advocates an expansive approach to public interest litigation, especially in the context of Charter litigation, and sets out proposals for a policy on public interest intervention that is designed to address the legitimate concerns of those who wish to limit non-party participation in litigation.

L'intervention d'intérêt public est la participation à un procès de personnes qui ne sont pas les parties en cause mais qui cherchent à influencer le développement du droit dans ce que ces personnes considèrent être l'intérêt public. Le droit canadien dans ce domaine est erratique, en partie parce que les concepts de droit utilisés pour répondre à cette question n'étaient pas appropriés, et en partie parce que les tribunaux n'étaient pas sûrs que cette intervention se justifiait. L'auteur de cet article recommande une acceptation plus générale de cette intervention, en particulier dans le contexte de la Charte, et propose des principes directeurs destinés à apaiser les inquiétudes légitimes de ceux qui veulent limiter l'intervention d'intérêt public.

Introduction

One of the side effects of the introduction of the Canadian Charter of Rights and Freedoms¹ into our law has been a heightened awareness on the part of the general public of the impact that courts have on the way we govern ourselves. When people in a democratic society perceive that a public body has significant governmental authority over them, it is natural for them to try to influence the exercise of that authority. In so doing they usually appeal to some more or less clearly defined sense of the public interest or common good and seek to impress upon the governmental decision-maker the desirability of giving effect to whatever their conception of the public interest may be.² It is often true, of course,

*Philip L. Bryden, of the Faculty of Law, University of British Columbia, Vancouver, British Columbia.

¹ Constitution Act, 1982, Part I, hereafter the Charter.

² Aristotle drew a distinction between political persuasion, in which the speaker's object is to urge the audience either to do or not to do something, and forensic persuasion, in which the speaker's object is to attack or defend somebody. He associated the

that people's conception of the public interest coincides conveniently with their own private economic or other interests, and a lively debate can be conducted on the question of whether there is such a thing as a "public" interest that is distinct from the "private" interests of the members of society.³ Generally speaking, however, the opportunity to develop a sense of the public interest and urge it on those who wield governmental power is regarded as one of the most important, and most desirable, features of life in a democracy.⁴ If all this is true, it should not surprise us to find that individuals, and more particularly organizations made up of people with similar interests, have as much desire to influence the exercise of governmental authority by judges as they have to influence the decisions of politicians or administrative agencies.

To accept the idea that it is a healthy thing for people in a democratic society to seek to influence the exercise of governmental authority is not to condone every means by which people might be able to gain

former, naturally enough, with the political forum and argued that the speaker in such circumstances would always try to establish the goodness or expediency of the course of action he or she proposed. The latter type of speech was associated with the lawsuit, and Aristotle argued that the speaker in these circumstances would always try to establish the justice or injustice of some action that was taken in the past. Aristotle, *Rhetoric*, Book I, Ch. 3, in R. McKeon (ed.), *The Basic Works of Aristotle* (1941), pp. 1335-1337. Persuasion that is based on some definition of the public interest would seem to fall into the former category, and it might therefore appear that it would be inappropriate in a court of law. In my view, persuasion that is based on an appeal to the public interest is appropriate in a judicial forum if it is addressed to the judge in his or her capacity as a law-maker. It is acceptable, for example, to try to persuade a court that it would be good for our society to adopt a rule excluding the use of illegally obtained evidence in a criminal prosecution, even if this enables a malefactor to escape punishment (or to argue that the converse is true); it is not acceptable to argue to a court that it would be good for our society to ignore the evidence that a particular hockey player was guilty of drunk driving because we need him in the lineup for tonight's game against the Russians.

³ See C.J. Friedrich (ed.), *Nomos V: The Public Interest* (1966), especially G. Niemeyer's essay, *Public Interest and Private Utility*.

⁴ A number of important democratic theorists, including Rousseau and John Stuart Mill, have observed that public participation in the shaping of governmental decisions is beneficial not only because people's own interests are best protected when they are able to advocate them themselves, but also because the process of participation educates people in their responsibilities as citizens to other members of the community. See C. Pateman, *Participation and Democratic Theory* (1970), pp. 22-44. Perhaps the most eloquent statement of the value of free exchange of political ideas to be found in Canadian law is the following comment by Rand J. in his decision in *Switzman v. Ebling*, [1957] S.C.R. 285, at p. 306, (1957), 7 D.L.R. (2d) 337, at p. 358:

Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree of individual liberation from subjective as well as objective shackles. . .

This constitutional fact is the political expression of the primary condition of social life, thought and its communication in language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence.

that influence. Most people would agree, for example, that bribery and blackmail are not acceptable means by which to gain the ear of public officials, though they might differ about such issues as the extent to which large political campaign contributions ought to be considered an illicit means of advancing an organization's conception of the public interest. Likewise there are many means of seeking to influence the courts that are undoubtedly considered proper in our society, some that are undoubtedly considered improper, and others that are likely to be the subject of debate.

In deciding that we approve of a particular means of influencing judicial opinion it is not necessary to believe that the consequences of allowing the exercise of influence in this manner will always be beneficial. Few would disagree, for example, with the proposition that it is entirely proper for academic writers to seek to influence legal development through the publication of scholarly articles that may be relied upon by judges in the process of adjudication. The idea that the views of some academic writers may have managed to persuade the courts to render judgments that we now regard as misguided does not cause us to reject out of hand the use of scholarly publications as an aid to judicial decision-making.

The latter point is sometimes overlooked when consideration is given to the most obvious mechanism for influencing the judicial exercise of governmental authority, which is to commence a lawsuit. Historically, our law has not found favour with the idea that members of the general public should be entitled to invoke the aid of the courts whenever they perceive a wrongful invasion of public as opposed to private rights. Notionally at least, we have invested exclusive authority to act as guardian of the public interest in the office of the Attorney General.⁵ The spectre of the "busybody" or "meddlesome interloper" has loomed large in the justification of our reluctance to create generalized opportunities for people to engage in litigation in what they believe to be the public interest.⁶ The prospect of the abuse of any system of judicial procedure must be given serious consideration, but this concern should

⁵ See T. Cromwell, *Locus Standi*, A Commentary on the Law of Standing in Canada (1986), pp. 9-11; Law Reform Commission of British Columbia, Report on Civil Litigation in the Public Interest (1980), p. 7; *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, [1977] 3 All E.R. 70 (H.L.); compare *Attorney General of British Columbia v. Couillard* (1984), 11 D.L.R. (4th) 567, 59 B.C.L.R. 102 (B.C.S.C.) with *Stein v. Gonzales* (1984), 14 D.L.R. (4th) 263, 58 B.C.L.R. 110 (B.C.S.C.). In the *Couillard* case the Attorney General of British Columbia successfully applied for an injunction to restrain activity by Vancouver prostitutes on the ground that it constituted a public nuisance; in the *Stein* case a similar application by local merchants was dismissed because the applicants lacked standing.

⁶ See, for example, Cromwell, *ibid.*, pp. 10, 191-192; J. Evans (ed.), *DeSmith's Judicial Review of Administrative Action* (4th ed., 1980), p. 409.

not be allowed to mask whatever virtues the proper functioning of the system has to offer.

In point of fact, the principle that the Attorney General is the sole representative of the public interest in our courts has been circumscribed greatly by a set of exceptions that have enabled private parties to advance their conception of the public interest by engaging in litigation. For example, a private plaintiff has long been able to sue to prevent interference with a public right if the interference with that right entails an interference with the plaintiff's private rights, or if the plaintiff suffers special damage as a result of the interference with the public right.⁷ Generous construction of these and other exceptions has on occasion enabled individuals,⁸ and sometimes even public interest organizations,⁹ to bring many issues of public importance into the judicial arena. In some areas, most notably standing to challenge the constitutional validity of laws, the exception has all but swallowed the rule.¹⁰ It is understood, of course, that submissions made to the courts must focus on legal issues rather than on what broadly might be termed political matters. Our courts have not, however, been prepared to dismiss actions that raise valid questions of law solely on the ground that the litigants are using the courts as a vehicle for the advancement of their own political agenda.¹¹ The courts may not feel completely comfortable with the idea of individuals or organizations using litigation as a means of advancing their particular conception of the public interest, but it is difficult to detect signs of any serious judicial desire to cut off the access to the courts that public interest litigants have come to enjoy over the course of the past decade. If anything, the trend is in the opposite direction, with the Supreme Court of Canada's most recent decision on the subject, *Minister of Finance of Canada v. Finlay*,¹² expanding the opportunities available to public

⁷ *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109 (Ch. D.); see Cromwell, *op. cit.*, footnote 4, pp. 9-11; Law Reform Commission of British Columbia, *op. cit.*, footnote 4, pp. 32-36.

⁸ E.g., *Dyson v. Attorney General*, [1911] 1 K.B. 410 (C.A.); *Stein v. City of Winnipeg* (1974), 48 D.L.R. (3d) 223, [1974] 5 W.W.R. 484 (Man. C.A.); see Law Reform Commission of British Columbia, *op. cit.*, footnote 4, pp. 31-47.

⁹ E.g., *Energy Probe v. Atomic Energy Control Board*, [1984] 2 F.C. 138, (1984), 8 D.L.R. (4th) 716 and 735, (T.D.). Aff'd with variation [1985] 1 F.C. 563, (1984), 15 D.L.R. (4th) 48 (Fed. C.A.); *Re Saanich Inlet Preservation Society and The Cowichan Valley Regional District* (1983), 147 D.L.R. (3d) 174, 44 B.C.L.R. 121 (B.C.C.A.).

¹⁰ *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575 (1981), 130 D.L.R. (3d) 588; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 215, (1975), 55 D.L.R. (3d) 632; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, (1974), 43 D.L.R. (3d) 1.

¹¹ See *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at pp. 471-474, (1985), 18 D.L.R. (4th) 481, at pp. 503-505 (per Wilson J.).

¹² [1986] 2 S.C.R. 607.

interest litigants to make legal challenges of a non-constitutional nature to government administration.

Another mechanism that is used to bring before the courts the ideas of people who seek to articulate some conception of the public interest is for those individuals or organizations to participate in litigation that has been commenced by someone else. Ordinarily these people are not interested simply in bringing to the court's attention what they perceive to be relevant information about the issues before it; rather, they seek to play an active advocacy role by persuading the court to resolve one or more of the issues raised in the litigation in a manner that they consider desirable. This means of influencing judicial decisions, which I will refer to as public interest intervention, has received a very mixed response from the judiciary in recent years.¹³ In this article I seek to justify an expansive approach to public interest intervention in the process of judicial law-making. My observations are not addressed solely to public interest group participation in cases involving the interpretation of the Canadian Charter of Rights and Freedoms, though they do have a special significance in the context of Charter litigation.

The article is in four parts. The first is a sketch of the confused state of the law presently governing public interest intervention. The second part presents a general discussion of why public interest intervention is justified and sets out what is in effect a *prima facie* case in favour of public interest intervention. The third section is an analysis of what I perceive to be the most important criticisms of public interest intervention and a response to those criticisms. The fourth part presents a concrete set of proposals for the exercise of judicial authority to permit public interest intervention.

I. *The Present Law of Public Interest Intervention*

The law relating to public interest intervention at the present time is best described as being in a state of flux. Part of this confusion arises because the law usually fails to draw distinctions among three different but closely related situations. The first type of situation occurs when individuals or organizations perceive that the outcome of a particular lawsuit is likely to have a direct impact on their well-being, usually but not always in some economic sense. Take, for example, a recent case in the Federal Court of Appeal, *Fishing Vessel Owners' Association of British Columbia v. Attorney General for Canada*.¹⁴ At trial, British Columbia seine fishermen had succeeded in obtaining an injunction preventing the federal Department of Fisheries from granting gillnetters two extra days of fishing for Pacific salmon stocks during the 1984 season. An appeal by the

¹³ See the text *infra*, at footnotes 42 to 52.

¹⁴ (1985), 1 C.P.C. (2d) 312 (Fed. C.A.).

Department was not being pursued with a great deal of vigour and two gillnet fishermen and the Pacific Gillnetters Association sought to be joined either as parties or as intervenors in order to prosecute the appeal. The court held that the gillnetters could not be joined as parties under Rule 1716 of the Federal Court Rules because there was neither a cause of action nor a triable issue as between the gillnetters and the seiners. Given the obvious economic interest which the gillnetters had in the outcome of the appeal, however, the court was prepared to exercise a general jurisdiction to allow them to be heard as intervenors.¹⁵

The second type of situation occurs when the individual or organization seeking to participate in a lawsuit is interested less in the outcome of the particular case before the court than in the legal principles applied to resolve one or more of the issues that are raised by the case. In *Re Canadian Labour Congress and Bhindi*,¹⁶ the Congress sought to take part in the trial of an action in which it was argued that the closed shop provisions of the British Columbia Labour Code violated the Charter. The Chambers Judge refused to allow the Congress to be added as a party under Rule 15 of the British Columbia Supreme Court Rules and the British Columbia Court of Appeal agreed that since the Congress' interest was in the answer to the legal question in dispute rather than in the precise outcome between the parties, Rule 15 was inapplicable. Once again, however, the court was prepared to exercise an inherent jurisdiction to allow the Congress to participate as an intervenor.¹⁷

¹⁵ For other examples of what I would describe as party intervention, see *Re Hirt and College of Physicians & Surgeons of British Columbia* (1985), 17 D.L.R. (4th) 472, 60 B.C.L.R. 273 (B.C.C.A.); *Pitzel v. Children's Aid Society of Winnipeg* (1984), 45 C.P.C. 313 (Man. Q.B.); *Re Ontario Securities Comm'n and Electra Investments (Canada) Ltd.* (1983), 44 O.R. (2d) 61 (Ont. C.A.); *Wotherspoon v. C.P. Ltd.* (1981), 20 C.P.C. 72 (Ont. C.A.); *Re Starr and Township of Puslinch* (1976), 12 O.R. (2d) 40 (Ont. Div. Ct.); *Re Multi-Malls and Minister of Transportation & Communications* (1975), 7 O.R. (2d) 717 (Ont. Div. Ct.); *Re Association of Parents for Fairness in Education, Grand Falls District 50 Branch and Société des Acadiens du Nouveau-Brunswick Inc.* (1984), 8 D.L.R. (4th) 238, 140 A.P.R. 198 (N.B.C.A.); *Re Maritime Telegraph & Telephone Co. Ltd. and Board of Commissioners of Public Utilities* (1981), 125 D.L.R. (3d) 252, 90 A.P.R. 90 (N.S.C.A.); *Halifax Flying Club v. Maritime Builders Ltd.* (1973), 5 N.S.R. (2d) 364 (N.C.S.C.); *Nicholson v. Maritime Electric Co. Ltd.* (1979), 24 Nfld. & P.E.I.R. 283 (P.E.I.S.C.). A good survey of the existing case law surrounding party intervention is provided in P. Muldoon and D. Scriven, *Intervention as Added Party: Rule 13 of the Ontario Rules of Civil Procedure* (1985), 6 *Advocates' Quarterly* 129. The authors of this article accept the descriptions of party and non-party intervention that are found in Rule 13 of the new Ontario Rules of Civil Procedure and therefore they do not draw the same conceptual distinctions that I do among party intervenors, public interest intervenors and *amici curiae*. While I believe that the work done by Muldoon and Scriven is very valuable, readers must employ caution in transferring their observations into the conceptual framework I am using in this article.

¹⁶ (1985), 17 D.L.R. (4th) 193, 61 B.C.L.R. 85 (B.C.C.A.).

¹⁷ *Ibid.*, at pp. 200-203 (D.L.R.), 93-96 (B.C.L.R.) (per Anderson J.A.). Lambert J.A. concurred with Anderson J.A., and Taggart J.A., who dissented, agreed with the

The third type of situation arises when a disinterested person acts as an *amicus curiae* or friend of the court in order to bring to the attention of the court some point of law that has been overlooked or some error in the proceedings. The *amicus curiae* has its origins in English law and the term has traditionally carried with it a connotation of neutrality which is inconsistent with the advocacy role that public interest intervenors (in the sense in which I have used the term) normally seek to play.¹⁸ It must be recognized, however, that in the United States the term is no longer used in its original sense and that *amici curiae* in that country ordinarily seek to advocate a particular resolution of the issues before the court.¹⁹

It is not particularly surprising that courts should blur the distinctions among what I will call party intervenors, public interest intervenors, and *amici curiae*. As the *Fishing Vessel Owners' Association* and *Bhindi* cases illustrate, the rules of court dealing with the joinder of third parties which often are invoked in support of intervention are seldom designed with these distinctions in mind, so judges and lawyers are forced into makeshift solutions.²⁰ Even where rules of court do make express provision for intervention the status of public interest intervenor

observations of Anderson J.A. on these points but would have permitted the trial judge to exercise discretion over whether the intervenors should be allowed to take part in the case at Bar; see *ibid.*, at pp. 194-195 (D.L.R.), 87-88 (B.C.L.R.). For other examples of successful public interest intervention in the provincial superior courts, see *Shewchuk v. Ricard*, Unreported judgment of Taggart J.A. dated December 19, 1985 (Vancouver Registry CA004826) (B.C.C.A.); *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 380, (1985), 66 B.C.L.R. 207 (B.C.C.A.); *Re Ontario Energy Board Act* (1985), 2 C.P.C. (2d) 226 (Ont. Div. Ct.); *Regional Municipality of Hamilton-Wentworth v. Hamilton-Wentworth Save the Valley Committee Inc.* (1985), 2 C.P.C. (2d) 117 (Ont. Div. Ct.). Public interest intervenors have participated at the provincial court of appeal level in criminal as well as civil cases. See *R. v. Seaboyer* (1986), 50 C.R. (3d) 395 (Ont. C.A.) (decision of Howland C.J.O. permitting the Women's Legal Education and Action Fund (LEAF) to intervene in a Crown appeal against the quashing of charges of sexual assault against the accused on the ground that ss. 246.6 and 246.7 of the Criminal Code were rendered inoperative by the Charter); *R. v. Oakes* (1983), 40 O.R. (2d) 660 (C.A.) (Canadian Civil Liberties Association as intervenor); *R. v. Ogg-Moss* (1981), 60 C.C.C. (2d) 127 (Ont. C.A.) (Ontario Association for the Mentally Retarded as intervenor).

¹⁸ See *Re Clark and Attorney General of Canada* (1977), 81 D.L.R. (3d) 33, at p. 38, 17 O.R. (2d) 593, at p. 598 (Ont. H.C.); *Re Pehlke* (1939), 20 C.B.R. 415, at pp. 421-422 (Ont. H.C.); S. Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy* (1963), 72 Yale L.J. 694, at pp. 694-697; D. Scriven and P. Muldoon, *Intervention as a Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure* (1985), 6 *Advocates' Quarterly* 448, at pp. 450-452 and 464-466.

¹⁹ See Krislov, *ibid.*, at pp. 702-720; K. O'Connor and L. Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Analysis of Hakman's "Folklore"* (1982), 16 *Law and Soc. Rev.* 311; Scriven and Muldoon, *ibid.*, at pp. 452-456.

²⁰ See e.g., *Pitzel v. Children's Aid Society of Winnipeg*, *supra*, footnote 15.

is not recognized, often being assimilated with the status of *amicus curiae*.²¹ In Nova Scotia, for example, Rule 8.02 of the Rules of Practice states: "Any person may, with the leave of the court and without becoming a party to the proceeding, intervene in the proceeding as a friend of the court for the purpose of assisting it."²² The courts of Nova Scotia have not, however, been willing to construe Rule 8.02 as authorizing the kind of *amicus curiae* participation that is common in the United States. Thus in *Attorney General of Nova Scotia v. Beaver*²³ the court denied an application by the Nova Scotia Civil Liberties Association to intervene pursuant to Rule 8.02, with the observation that:

The concerns of the Association as set forth in their brief in support of the application are similar to those expressed by the respondents in their respective defences.

²¹ Six provinces make provision in their rules of court for participation by intervenors. The three Maritime provinces and Ontario have very similar rules that draw a distinction between participation by intervenors as parties and participation by non-party intervenors as *amici curiae*. See Rule 8, Rules of Court (P.E.I.); Rule 8, Civil Procedure Rules (N.S.); Rule 15, Rules of Court (N.B.); Rule 13, Rules of Civil Procedure (Ontario). Public interest intervenors have had some success in Ontario in using both rules, with the result that "the line between an intervenor as added party and an *amicus curiae* is often blurred": Scriven and Muldoon, *loc. cit.*, footnote 18, at p. 462. The Quebec Code of Civil Procedure has had for many years rules governing intervention but these have been interpreted as authorizing only a fairly restrictive form of party intervention. See Quebec Code of Civil Procedure, Articles 208-215; *Commission des accidents du travail v. Lacroix*, [1976] C.A. 490 (Que. C.A.). The Saskatchewan rules of practice make specific provision for intervention by *amici curiae* (Rule 75, Queen's Bench Rules (Saskatchewan)) but that province does not have a rule authorizing party intervention that is distinct from its normal rule for the joinder of parties. None of the rules just mentioned draws an explicit distinction between the *amicus curiae* and the public interest intervenor.

²² Rule 8.01(1) of the Nova Scotia Civil Procedure Rules states: "Any person may, with leave of the court, intervene in a proceeding and become a party thereto where, (a) he claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the judgment therein, or otherwise; (b) his claim or defence and the proceeding have a question of law or fact in common; (c) he has a right to intervene under an enactment of rule." This rule has been construed generously to authorize a broad range of what I would describe as party intervention. See *Halifax Flying Club v. Maritime Builders Ltd.*, *supra*, footnote 15. It has not been employed, however, by public interest intervenors and I believe that whatever accommodation for public interest intervention has been made in the rules is to be found in Rule 8.02. Muldoon and Scriven, on the other hand, maintain that the Ontario analogue to Rule 8.01(1) of the Nova Scotia Rules (Rule 13.01(1) of the Ontario Rules of Civil Procedure introduced in 1985) is suitable for use by public interest intervenors: *loc. cit.*, footnote 15, at pp. 157-158; Scriven and Muldoon, *loc. cit.*, footnote 18, at pp. 461-462. See *Re Ontario Energy Board Act*, *supra*, footnote 17, at p. 228.

²³ (1984), 66 N.S.R. (2d) 419, at p. 421 (N.S.S.C.). This was a case in which the Attorney General of Nova Scotia sought an injunction to prohibit Halifax prostitutes from engaging in activities associated with the plying of their trade that were alleged to constitute a public nuisance.

To allow a non-party to attempt to influence the court's decision would damage at least one of the parties' conception of the court's impartiality and objectivity.

There is, moreover, often a close relationship between the interests of those who are likely to be affected by the decision in a particular case and those who are concerned about the impact of the legal rules that may be developed in order to decide the case. For example, in *Re Association of Parents for Fairness in Education, Grand Falls District 50 Branch and Société des Acadiens du Nouveau-Brunswick Inc.*,²⁴ an organization of parents, whose children would be affected directly by the legal obligations imposed on their local school board in the area of language instruction, successfully applied to the New Brunswick Court of Appeal for leave to intervene and appeal a judgment obtained by a minority language society and a francophone teachers' association.²⁵ The parents' organization should properly be classified as a party intervenor since its real interest was in the resolution of the actual dispute before the court.²⁶ If the shoe had been on the other foot, however, and the parents' association had commenced an action against the school board, any participation by la Société des Acadiens du Nouveau-Brunswick or l'Association des Conseillers Francophones du Nouveau Brunswick in such a lawsuit would best be described as public interest intervention, since one suspects that these organizations are interested primarily in the development of the legal principles governing minority language rights rather than in the result of the application of these principles in any particular school district.

Finally, it should be noted that sometimes people who wish to participate in litigation in order to influence the development of legal principles are concerned not with the advancement of some generalized view of the public interest but with the potential significance of the case as a precedent in a pending lawsuit. In *Re Schofield and Minister of Consumer and Commercial Relations*,²⁷ for example, the applicant for intervention under Rule 504a of the former Ontario Rules of Practice was a solicitor with two clients whose cases involved the same legal issue that was raised in the *Schofield* case that was pending before the Ontario

²⁴ *Supra*, footnote 15.

²⁵ The parents' organization had in fact failed in its attempt to intervene at trial: see *ibid.*, at pp. 245 (D.L.R.), 209 (A.P.R.).

²⁶ This is not to say that the parents had no interest as members of the public in the development of appropriate legal principles governing the exercise of minority language education rights. In the context of the litigation at hand, however, their general interest as members of the public in such questions was subsumed by their specific interest as parents of children whose educational opportunities would be affected directly by the court's ruling. For another case where the line between party intervention and public interest intervention is a fine one, see *Attorney General of Canada v. Aluminum Company of Canada Ltd.*, [1987] 3 W.W.R. 193 (B.C.C.A.).

²⁷ (1980), 112 D.L.R. (3d) 132, 28 O.R. (2d) 764 (Ont. C.A.).

Court of Appeal. A majority of the court ruled that the application should be dismissed on the ground that in cases that do not affect the public interest, a concern over the significance of a particular decision as a precedent in future litigation is an insufficient foundation for the grant of leave to intervene.²⁸ This is a sensible decision since there is little to be said for attempting to resolve one's own legal dispute in the procedural context of someone else's lawsuit. Any legal system that values precedent carries with it the possibility that the result in a particular action will be governed by the decision in an earlier case. But there is as little point in allowing counsel to litigate other people's cases in order to build up a suitable base of precedent for their own as there is in permitting them to relitigate the decisions of a century ago in order to show that they should have been decided in some other way. The distinguishing feature of public interest intervention is that the public interest intervenor is pursuing the establishment of a particular legal principle for its own sake rather than as a collateral means of achieving other litigation objectives.²⁹

The value of drawing distinctions among party intervenors, public interest intervenors and *amici curiae* lies less in the conceptual neatness of the distinctions themselves than in their usefulness in illuminating the expectations of those who are seeking to participate in litigation. Because party intervenors are interested primarily in the outcome of a particular lawsuit they will want to be entitled to participate fully in any aspect of

²⁸ One of the solicitor's clients had a pending lawsuit that involved the same issue that was being appealed in the *Schofield* case but the second had made a contractual arrangement that tied the amount of the settlement of a legal dispute to the outcome in *Schofield*. Wilson and Thorson J.J.A. agreed, though for somewhat different reasons, that the application for leave to intervene should be dismissed. Zuber J.A. dissented on the ground that the interest of the second client, though not that of the first, was sufficient to warrant the grant of leave to intervene.

²⁹ It is not always easy to separate the position of the public interest intervenor from that of the litigant who wants to create a favourable climate of precedent for his or her own pending litigation, as can be illustrated using a case such as *MacMillan Bloedel Ltd. v. Mullin*, *supra*, footnote 17. In the *Mullin* case the Union of B.C. Indian Chiefs and a number of other native organizations sought leave to intervene in an appeal in which it was being argued that MacMillan Bloedel should not be permitted to carry out logging operations on Meares Island because of the aboriginal rights that the appellants claimed in the lands in question. Esson J.A., I think correctly, found that the applicants had a special interest and expertise in the important public law area of aboriginal rights and their extinguishment and therefore granted leave to intervene. One can easily imagine a situation, however, in which one or more of the prospective intervenors would have lawsuits pending in which the same issues that arose in *Mullin* were being raised. Assuming that consolidation of such cases was impractical, a court that was facing a similar application for leave to intervene would have to decide whether or not it should, in effect, force the applicants to confine their submissions to their own litigation. My own view is that it is preferable for courts to refuse to allow litigants to carry on their battles on several fronts at the same time unless the issues they are raising as intervenors are distinct from those raised in their own litigation. See *infra*, footnote 111.

the case that is likely to have an impact on them. Public interest intervenors, on the other hand, will usually be content to make submissions on the legal issues raised by the case since those issues constitute the focus of their interest in the litigation.³⁰ Public interest intervenors will not, however, be prepared to relinquish their role as advocates for the principles in which they believe. In modern litigation it will be a rare situation indeed in which a public interest group would want to play the part of a neutral legal adviser to the court. Such a role, to the extent it is occupied at all, is played nowadays by a judge's law clerk. Yet, if judicial expectations are conditioned by the perception that non-parties wishing to intervene should adopt the neutral advisory posture of the traditional *amicus curiae*, it is not surprising that many judges fail to find much merit in public interest group participation in litigation.³¹

The absence of an adequate vocabulary with which to discuss public interest intervention complicates matters but it is not the only reason a commentator faces difficulty in describing the existing law governing public interest intervention. The root of this difficulty is in the deep ambivalence of the attitude of the courts toward public interest intervention. Nowhere is this ambivalence better exhibited than in the Supreme Court of Canada itself.

After some expression of public dissatisfaction with the court's recent handling of applications for leave to intervene,^{31a} the Supreme Court of

³⁰ This does not mean that it will never be useful for public interest intervenors to take part at the trial level rather than on appeal where the focus of the inquiry is likely to be on purely legal issues. As the *Bhindi* case illustrates, there will be occasions on which the resolution of legal issues (issues relating to the application of s. 1 of the Charter, for example) will involve factual questions that are best dealt with at trial and upon which it will be appropriate to allow public interest intervenors to present evidence: see *supra*, footnote 16, at pp. 203-205 (D.L.R.), 96-98 (B.C.L.R.).

³¹ See, e.g., *Borowski v. Minister of Justice of Canada* (1983), 144 D.L.R. (3d) 657, [1983] 3 W.W.R. 505 (Sask. Q.B.); *Re Clarke and Attorney-General of Canada*, *supra*, footnote 18, at pp. 36-38 (D.L.R.), 596-598 (O.R.); *Attorney-General of Nova Scotia v. Beaver*, *supra*, footnote 23, at p. 421; *Solosky v. The Queen*, [1978] 1 F.C. 609 (Fed. C.A.); cf., *TAS Communications Systems Ltd. v. Newfoundland Telephone Co. Ltd.* (1981), 22 C.P.C. 97 (Nfld. S.C.). An example of judicial recognition of the significance of the distinction between the *amicus curiae* and the public interest intervenor can be found in the decision of the British Columbia Court of Appeal in *Attorney General of Canada v. Aluminum Company of Canada Ltd.*, *supra*, footnote 26, at pp. 203-208 (per Seaton J.A.).

^{31a} Dissatisfaction with the system was evident from submissions made to the Supreme Court of Canada by a number of public interest organizations, beginning with a brief from the Canadian Civil Liberties Association in July, 1984. The British Columbia Civil Liberties Association sent an earlier version of this article as its submission to the court in June, 1986, and the court also received submissions from the Women's Legal Education and Action Fund (LEAF) and the Canadian Labour Congress. The court referred the matter to the Supreme Court of Canada Liaison Committee of the Canadian Bar Association for its advice, and the Committee's recommendations appear to have formed the basis of the recent revision to Rule 18.

Canada introduced a new system for dealing with intervenors on May 21, 1987.^{31b} The cornerstone of this system is Rule 18(1) of the Rules of the Supreme Court of Canada, which states:

Any person interested in an appeal or a reference may, by leave of a judge, intervene therein upon such terms and conditions, and with such rights and privileges, as the judge may determine.

While the new system introduces some important innovations, Rule 18(1) is virtually identical to its predecessor, Rule 18(1) of the Supreme Court Rules, introduced in 1983. This rule, in turn, was a slightly modified version of Rule 60 of the Rules of the Supreme Court of Canada promulgated in 1907.³² As an early commentator has pointed out, Rule 60 was adapted from the provisions of the Quebec Code of Civil Procedure³³ and it is reasonable to expect that the original object of the rule was to provide a means of authorizing the participation of persons whose "interest" in an appeal was based on "some real legal connection or *lien de droit*" as opposed to a "mere collateral interest in the result".³⁴ In *Norcan Ltd. v. Lebrock*,³⁵ however, the Supreme Court rejected the notion that intervention under Rule 60 was restricted by the principles applied by the courts of Quebec in deciding whether or not to permit an applicant to intervene. Speaking for the court, Pigeon J. observed:³⁶

Having now made a review of past decisions under rule 60, I have come to the

^{31b} SOR/87-292, Canada Gazette Part II, Vol. 121, no. 12.

³² As set out in the 1907 Rules of the Supreme Court of Canada, Rule 60 read in relevant part: "Any person interested in an appeal between other parties may, by leave of the court or a judge, intervene therein upon such terms and conditions and with such rights and privileges as the court or judge may determine." It survived in that form until the 1983 Supreme Court Rules introduced Rule 18(1), which stated: "Any person interested in an appeal or reference may, by leave of the court or a judge, intervene therein upon such terms and conditions and with such rights and privileges as the court or judge may determine." The 1983 rules also eliminated Rule 60(2), a provision dealing with costs, and replaced it with Rule 18(2), which stated: "Any intervenor in the courts below, who is not a party before the court, shall be considered an intervenor in an appeal before the court unless, within thirty days from the filing of the notice of appeal, he indicates that he does not wish to be considered as such." In *Ogg-Moss v. The Queen*, [1984] 2 S.C.R. 171, (1984), 11 D.L.R. (4th) 549, the court decided that Rule 18(2) should not be used to allow an automatic right of intervention in "purely criminal appeals", and on December 28, 1983, Rule 18(2) was revoked: see [1984] S.C.B. 24. The 1987 version of Rule 18 has introduced a system in which intervenors are provided with a limited period of time in which to seek leave to intervene (Rule 18(2)) and successful applicants normally will be restricted to the filing of factums that do not exceed twenty pages in length. The discretion of the judge who hears the application for leave to intervene is central to the operation of the new rules, as it has been in the past.

³³ E. Cameron, *The Rules of the Supreme Court of Canada* (1907), p. 113.

³⁴ *C.N.R. v. Crelisten* (1937), 63 Que. K.B. 537, at p. 540 (C.A.) (per Bond J., commenting on the type of interest needed to support an intervention under the Quebec Code of Civil Procedure).

³⁵ [1969] S.C.R. 665, (1969), 5 D.L.R. (3d) 1.

³⁶ *Ibid.*, at pp. 666 (S.C.C.), 2 (D.L.R.).

conclusion that it should not be narrowly construed. It seems clear that any interest is sufficient to support an application under that rule subject always to the exercise of discretion.

It seems likely that the type of "interest" Pigeon J. had in mind in *Norcan* was a financial one. In that case the persons seeking leave to intervene were bondsmen who had a financial stake in the outcome of the appeal, and the successful interventions Pigeon J. gave as examples of the application of the broad principle he set out were ones in which the intervenors had a concrete financial interest in the result.³⁷

Intervention under Rule 60 was not, however, restricted to situations in which the financial interests of the intervenor were directly at risk. As early as 1963 the Lord's Day Alliance of Canada had appeared as a public interest intervenor in *Robertson and Rosetanni v. The Queen*.³⁸ By the mid-1970s, the expansive approach exhibited by the Supreme Court of Canada to public interest intervention in cases such as *Attorney General of Canada v. Lavell*³⁹ and *Morgentaler v. The Queen*⁴⁰ was being described as a signal of "the emergence of an authentic North American procedural jurisprudence uniting Canada and the United States of America".⁴¹

More recently, however, the Supreme Court's attitude toward public interest intervention seems to have become much more circumspect. In an extremely valuable article surveying the history of public interest intervention in the Supreme Court of Canada, Jillian Welch observed:⁴²

The Supreme Court appears to have backtracked significantly from decisions of a decade ago which permitted intervention by interest groups in both civil and criminal litigation. In the period canvassed from January, 1982 until December, 1984, only a handful of intervenors, other than attorneys general, were permitted to appear before the court in either *Charter* or non-*Charter* appeals. It will be argued that the pattern of granting and denial of leave applications reveals not only a concern for the original parties within a traditional model of litigation, but an arguably anachronistic view of the Supreme Court's role.

³⁷ Pigeon J. makes reference to two unreported decisions in which leave to intervene was granted. One was a copyright infringement case in which persons against whom similar actions were pending were permitted to intervene, and the other was an appeal involving the constitutional validity of provincial regulation of the interprovincial operations of motor carriers in which a number of railway companies were allowed to intervene.

³⁸ [1963] S.C.R. 651, (1963), 41 D.L.R. (2d) 485.

³⁹ [1974] S.C.R. 1349, (1973), 38 D.L.R. (3d) 481.

⁴⁰ [1976] S.C.R. 616, (1975), 53 D.L.R. (3d) 161.

⁴¹ Bernard Dickens, *A Canadian Development: Non-Party Intervention* (1977), 40 Mod. L. Rev. 666, at p. 666.

⁴² J. Welch, *No Room at the Top: Interest Group Intervenors and Charter Litigation in the Supreme Court of Canada* (1985), 43 U. T. Faculty L. Rev. 204, at pp. 213-214.

Because the court has never given reasons for its grant or denial of applications for leave to intervene it is not easy to confirm or refute the explanations put forward by Welch for the court's decisions.⁴³ Certainly it is difficult to reconcile the court's decision to grant the Canadian Civil Liberties Association leave to intervene in a Bill of Rights⁴⁴ case like *R. v. Miller and Cockriell*⁴⁵ in 1976 with its refusal to allow the same organization to intervene in Charter cases such as *R. v. Oakes*⁴⁶ in 1983 and *R. v. Hamill*⁴⁷ in 1985. Likewise it is tempting to use the contrast between the denial in 1984 of an application by the Seventh Day Adventist Church for leave to intervene in *R. v. Big M Drug Mart*⁴⁸ and its acceptance of the Lord's Day Alliance's intervention in *Robertson and Rosetanni* more than twenty years earlier as evidence of a retrenchment in the court's attitude toward public interest intervention. Yet one is equally struck by the court's recent willingness to allow a variety of public interest groups to intervene in cases involving minority language rights,⁴⁹ the powers of human rights commissions,⁵⁰ and the rights of

⁴³ See Welch, *ibid.*, at pp. 221-222 where the author makes a similar comment about her own observations.

⁴⁴ R.S.C. 1970, App. III.

⁴⁵ [1977] 2 S.C.R. 680, (1976), 70 D.L.R. (3d) 324. This case involved a challenge based on the Canadian Bill of Rights to the imposition of the death penalty for the murder of a police officer in the course of his duties. The Canadian Civil Liberties Association intervened in order to support arguments made by the defendants.

⁴⁶ [1983] S.C.B. 1097. In this case a challenge was made under the Charter to the reverse onus provisions contained in s. 8 of the Narcotic Control Act, R.S.C. 1970, C. N-1. The Canadian Civil Liberties Association had been allowed to intervene in the Ontario Court of Appeal and had presented arguments which supported the position taken by the accused but on different grounds. See *R. v. Oakes*, *supra*, footnote 17, at p. 669; Welch, *loc. cit.*, footnote 42, at pp. 213 n.17 and 218.

⁴⁷ [1985] S.C.B. 381. This case involves a Charter challenge to the use of writs of assistance by the R.C.M.P. under the authority of s. 10 of the Narcotic Control Act, *ibid.*

⁴⁸ [1984] S.C.B. 79. The case involved a challenge to the federal Lord's Day Act, R.S.C. 1970, c. L-13, based on the guarantees of freedom of religion found in the Charter. As such, it raised issues that were strikingly similar to those canvassed in the context of the Bill of Rights in *Robertson and Rosetanni*, *supra*, footnote 38.

⁴⁹ For example, the court allowed all the parties and intervenors in *Bilodeau v. Attorney-General of Manitoba* to intervene in the *Manitoba Language Reference*, (this included the Société Franco-Manitobaine, the Alliance Quebec, Alliance for Language Communities in Quebec and Bilodeau himself), and also permitted interventions by La Fédération des Francophones hors Québec, the Freedom of Choice Movement/Le Mouvement de Libre Choix, and by a group of individuals. Leave to intervene was denied, however, to l'Association des Pro-Canadiens du Manitoba: [1984] S.C.B. 404, 467, 488, 490 and 611. See Welch, *loc. cit.*, footnote 42, at pp. 215 and 220.

⁵⁰ In *Ontario Human Rights Commission and O'Malley v. Simpson's Sears and Canadian Human Rights Commission and Bhinder v. C.N.R.* a number of provincial human rights commissions were given leave to intervene: [1983] S.C.R. 1; [1983] S.C.B. 756. In addition, the Canadian Association for the Mentally Retarded, the Coalition of

claimants to refugee status.⁵¹ If the court is now showing less enthusiasm for public interest intervention than it once did, it clearly is not yet prepared to jettison intervention altogether. Whether the court will use the opportunity of its introduction of a new system for dealing with intervention to develop a more consistent approach to intervention applications remains to be seen.

Needless to say, counsel who seek to advise public interest groups on their chances of success in an application for leave to intervene are in an unenviable position. If they turn to the lower courts for guidance they at least have the benefit of reasoned decisions, but the views on public interest intervention expressed by these courts run the gamut from enthusiastic endorsement to grave suspicion. At one end of the spectrum is the following observation made by Anderson J.A. of the British Columbia Court of Appeal in the *Bindhi* case:⁵²

I would add on this point that it is important in dealing with Charter issues raised for the first time that the courts have the assistance of argument from all segments of the community. The courts should not resist but should welcome such assistance.

At the other end are the concerns raised by Matheson J. in rejecting intervention by a variety of public interest organizations in *Borowski v. Minister of Justice of Canada*:⁵³

One may very well accept the proposition that publicly organized bodies may be more concerned than specific litigants with the development of laws related to general social interests, particularly when moral questions are interwoven with a challenge to existing laws, but it is still necessary to question whether a trial in a properly constituted court is the proper forum to permit such concerns to be expressed, particularly when expressed by counsel in the guise of *amicus curiae*.

Doubtless there is something to be gained from a careful review of the existing rules and case law concerning public interest intervention, but I do not propose to conduct such a review in this article. Even if all the decided cases could be analyzed within the framework of a suitably consistent set of classifications the problem of the background attitude of the courts toward public interest intervention would have to be resolved. For present purposes I think it is most useful to confront this issue directly at the level of principle, and this is what I propose to do in the next two parts of this article.

Provincial Organizations for the Handicapped and the Canadian Jewish Congress were granted intervenor status: [1983] S.C.B. 778; [1985] S.C.B. 8, 9. An application by the Retail Council of Canada to intervene in *O'Malley* seems to have been rejected: [1984] S.C.B. 254. See Welch, *loc. cit.*, footnote 42, at pp. 216-221.

⁵¹ In *Singh v. Minister of Employment and Immigration* leave to intervene was granted to the Canadian Council of Churches and the Federation of Sikh Societies: [1984] S.C.B. 488.

⁵² *Supra*, footnote 15, at pp. 204 (D.L.R.), 97 (B.C.L.R.).

⁵³ *Supra*, footnote 31, at pp. 667 (D.L.R.), 518 (W.W.R.).

II. Why Public Interest Intervention Is Justified

Fundamental to the belief that public interest intervention is justified is the proposition that judges make law. Lord Reid observed more than a decade ago that "we must accept the fact that for better or for worse judges do make law and tackle the question how do they approach their task and how should they approach it".⁵⁴ It is true, of course, that Canadian courts make law primarily in the course of adjudicating concrete disputes between parties.⁵⁵ It is also true that in many (perhaps in most) instances the fundamental interest of all concerned is the resolution of the dispute, not the making of law. In an ideal world I suppose that we would like to achieve a complete separation between law-making and dispute resolution, and in such a world public participation could be confined appropriately to a non-judicial forum. The fact remains, however, that in our legal system courts are called upon to make law in the resolution of disputes, and with a fair degree of frequency the establishment of a particular legal rule or principle itself is becoming the objective sought by the litigants.

The ability of judges to make law in the course of carrying out their adjudicative functions raises a fundamental problem in a democracy. That problem is that, in a democracy, we tend to believe that all laws ought to emanate from the democratically elected representatives of the citizenry, not from appointed officials, no matter how high the regard in which we hold those officials.⁵⁶ This problem was keenly understood by early commentators on the common law such as Blackstone, who responded by asserting that judges do not make law but only declare it.⁵⁷ There are doubtless self-defined limitations on judicial law-making power,⁵⁸ but once we acknowledge that judges are shaping the law as well as being bound by it we have to recognize that affected members of the public have a legitimate interest in influencing the way in which this law-making power is exercised.

In the modern bureaucratic state we have come to realize that some measure of effective law-making authority rests not only in the hands of

⁵⁴ Lord Reid, *The Judge as Law Maker* (1972), 12 J.S.P.T.L. 22, at p. 22.

⁵⁵ In Canada courts also make law from time to time in the course of answering questions of law referred to them by a federal or provincial government. In such instances the case for public interest intervention may be enhanced significantly, as is pointed out *infra*; see the text, at footnotes 121, 122.

⁵⁶ See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., by E.C.S. Wade, 1965), especially pp. 406-414; R.M. Dawson, *The Government of Canada* (5th ed. revised by N. Ward, 1970), pp. 73-74.

⁵⁷ See Blackstone's *Commentaries on the Laws of England* (15th ed., by E. Christian, 1829), Vol. I, pp. 67-73.

⁵⁸ See *Harrison v. Carswell*, [1976] S.C.R. 200, at pp. 218-219, (1975), 62 D.L.R. (3d) 68, at pp. 82-83, per Dickson J.

politicians and judges, but also in the hands of administrative tribunals, self-governing professional bodies and law enforcement officers.⁵⁹ But despite the extent to which our traditional conceptions of representative democracy have been modified in order to take into account the size and complexity of our governmental apparatus, we continue to cling to the idea that citizens are entitled to participate in the process whereby the rules that govern their lives are formulated. Political actors realize the importance of public participation in decision-making even where such participation is not required by law.⁶⁰ Thus politicians, government departments, and administrative agencies have created a wide range of formal and informal mechanisms for consulting those who are most substantially affected by their decisions, and there is considerable pressure on them to make those mechanisms more effective.⁶¹

In the traditional litigation context, where those most substantially affected were presumed to be the litigants themselves, this participation value was satisfied by the hearing rights that the litigants were accorded by the courts. Indeed, where the important interests of individuals are put in jeopardy in an adjudicative context, the courts have established that as a matter of natural justice or fundamental fairness we must presume that those individuals are entitled to be heard in defence of their interests,⁶² and we have been prepared to elevate this presumption in at least some cases to a constitutional requirement under section 7 of the Charter.⁶³ Yet, when the range of persons who are affected substantially by a legal rule proposed in order to resolve a particular dispute has extended significantly beyond the immediate parties to the dispute, courts

⁵⁹ See R. Macdonald, *Understanding Regulation by Regulations*, in I. Bernier and A. Lajoie (eds.), *Regulations, Crown Corporations and Administrative Tribunals* (1985); K.C. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969).

⁶⁰ Courts in Canada, the United States and the United Kingdom all have been reluctant to impose hearing obligations on administrators who are operating in a rulemaking context. See *Attorney-General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, (1980), 115 D.L.R. (3d) 1; *Bi-Metallic Investment Co. v. State Board of Equalization* 239 U.S. 441 (1915); *Bates v. Lord Hailsham of St. Marylebone*, [1972] 1 W.L.R. 1373, [1972] 3 All E.R. 1019 (Ch. D.). This has not, however, inhibited the development by government of devices enabling those who are affected by regulation to make their views known. See J. Evans, H. Janisch, D. Mullan and R. Risk, *Administrative Law, Cases, Text, and Materials* (2d ed., 1984), pp. 209-212.

⁶¹ Numerous government studies have proposed mechanisms for the improvement of citizen participation in administrative decision-making. A recent example is Law Reform Commission of Canada Report Number 26, *Independent Administrative Agencies, A Framework for Decision Making* (1985), pp. 17-19; 53-60.

⁶² See *L'Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board*, [1953] S.C.R. 140, [1953] 4 D.L.R. 161; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, (1978), 88 D.L.R. (3d) 671.

⁶³ See *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, (1985), 17 D.L.R. (4th) 422.

have tended to be reluctant to expand the opportunity to participate in the litigation to everyone so affected.

One does not have to search far for the reasons for judicial hesitation in expanding participation rights. While this reluctance may be rooted in traditional English procedural notions that the parties to the litigation are entitled to control the range of issues put before the court in the resolution of their dispute, a much deeper concern is that in seeking to deal with issues of broad interest to the population at large, a court that adopted a generous attitude to participation by non-parties might find itself engaged in a proceeding that was more akin to a Royal Commission than to a traditional judicial hearing. Those concerns cannot be dismissed lightly, and I will deal with them in the third part of this article. Nevertheless, I believe that public participation in the judicial law-making process serves two important functions in our society that should not be overlooked.

The first of these is that a variety of inputs is likely to make for more informed and, one hopes, better judicial decision-making. In the United States, where participation by public interest groups in litigation is a common occurrence,⁶⁴ the value of submissions made by *amici curiae* has been the subject of commentary on numerous occasions.⁶⁵ The United States Supreme Court ordinarily confines *amici curiae* to the filing of written briefs, Rule 38.7 of the Supreme Court Rules providing that consent for the presentation of oral argument by counsel for an *amicus curiae* will be given "only in the most extraordinary circumstances".⁶⁶ Nevertheless, public interest groups sometimes have been able to bring to the attention of the court background information (what often are described as "legislative facts"⁶⁷) that has revealed in a particularly telling manner the impact that a legal doctrine has on the people the

⁶⁴ Between 1970 and 1980 *amicus curiae* briefs were filed in 53.4% of the non-commercial cases decided by the United States Supreme Court; see O'Connor and Epstein, *loc. cit.*, footnote 19, at p. 316.

⁶⁵ To give just one example, in commenting on the new rules adopted by the United States Supreme Court in 1954, Justice Hugo Black observed, 346 U.S. at p. 947 (1954): "... I have never favored the almost insuperable obstacles our rules put in the way of briefs sought to be filed by persons other than the actual litigants. 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."

⁶⁶ To keep this in perspective, it should be recognized that the United States Supreme Court is much less generous in allocating time for oral argument to the parties to cases before it than is the Supreme Court of Canada. Rule 38.3 of the Rules of the Supreme Court of the United States provides that normally each side is allowed only one-half hour for oral argument.

⁶⁷ See K.C. Davis, *Administrative Law Text* (3d ed., 1972), pp. 291-317; Peter Hogg, *Proof of Facts in Constitutional Cases* (1976), 26 U. of T. L.J. 386.

group represents. Thus in the lawsuits that eventually resulted in the ending of judicial enforcement of racially restrictive housing covenants, a variety of organizations that submitted *amicus curiae* briefs were able to provide especially persuasive accounts of the pernicious effects of discrimination in the provision of housing.⁶⁸ On other occasions *amicus curiae* submissions have raised legal issues or ideas that have not been developed by the parties, and these ideas have influenced the way in which judges have formulated their decisions. For example, the *amicus* briefs of the American Civil Liberties Union supporting the notion of a constitutional right to privacy⁶⁹ are considered to have had a substantial impact on the development of that doctrine.⁷⁰

It is, of course, true that the "different perspective"⁷¹ that a public interest intervenor brings to a lawsuit may lead the court to decide the case differently than it might have otherwise. This, after all, is what the intervenor hopes to achieve. In such circumstances the losing party in the litigation may well feel some initial sense of grievance at being deprived of a victory, but it is difficult to believe that such a sense of grievance ought to force courts to refuse to accept submissions by public interest intervenors. The same objection could be raised if the court found itself persuaded by arguments advanced in a scholarly article or by a decision that was unearthed through the research of a law clerk; yet we are reluctant, and I think rightly so, to deprive courts of the benefits of these sources of assistance in performing the difficult task of making law in the course of adjudication.

The second value served by public interest participation is less obvious but perhaps more important, and that is the value of legitimization of the eventual decision rendered by the court. Everyone knows that judicial decisions create winners and losers. And nobody likes to lose. At the same time we have a strong sense that losing is not quite so bad if we have had a fair chance at playing the game. Sir Robert Megarry has observed that the most important person in a courtroom is the litigant who is about to lose, and it is the primary duty of the court to convince that person that his or her point of view has been heard and understood, even if the court has found it necessary to reject it.⁷² The same observation can be made at the level of judicial law-making. Thus Judge Jack

⁶⁸ See Clement Vose, NAACP Strategy in the Covenant Cases (1955), 6 Western Reserve L. Rev. 101, at pp. 133-144.

⁶⁹ See, for example, *Poe v. Ullman*, 367 U.S. 497 (1961); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁷⁰ See Ernest Angell, *The Amicus Curiae*, American Development of English Institutions (1967), 16 I.C.L.Q. 1017, at pp. 1040-1041.

⁷¹ *Re Schofield*, *supra*, footnote 27, at pp. 139 (D.L.R.), 771 (O.R.) (per Wilson J.A.).

⁷² Sir Robert Megarry, V.C., *The Judge* (1983), 13 Man. L.J. 189, at pp. 193-194.

Weinstein, a highly regarded United States District Court judge who has been involved in much important public law litigation, has commented.⁷³

Widespread access to the courts for *people* as well as ideas is desirable. Generally, all those who may be affected by judicial decisions which are quasi-legislative in character should have some channel of communication with the court. Based on my own experience, I doubt that liberality . . . [in creating opportunities for participation] . . . will produce costs in terms of complexity that outweigh the advantage of access to the courts by those who may be affected by the judicial decisions.

Public interest intervention helps to legitimize judicial decisions in two ways, even when it does not appear that the intervenors have had a significant impact on the outcome of the decision-making process. First of all, the willingness of courts to listen to intervenors is a reflection of the value that judges attach to people. Our commitment to a right to a hearing and public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.⁷⁴ Scholars often disagree about the extent to which "dignitary values" require us to afford people the opportunity to take part in the process of defining our legal rights and obligations,⁷⁵ but I think that few would deny that our respect for courts and other governmental institutions is enhanced by their willingness to have regard for these values. Secondly, participation by public interest intervenors in litigation creates a moral obligation on their part to respect the outcome of the litigation. It is inevitable that some people will be dissatisfied with the decisions that courts make about contentious issues, just as it is inevitable that some people will be disappointed by the outcome of a hotly contested election. But a willingness to take part in these processes is generally thought to imply a willingness to abide by the result.⁷⁶ If public interest intervenors are shut out from the courts' decision-making processes, their legal obligation to accept such decisions will doubtless remain but their

⁷³ Judge Jack Weinstein, *Litigation Seeking Changes in Public Behavior and Institutions—Some Views on Participation* (1980); 13 U.C. Davis L. Rev. 231, at p. 246. (Emphasis added).

⁷⁴ See J. Mashaw, *Due Process in the Administrative State* (1985), pp. 177-180; cf., Pateman, *op. cit.*, footnote 4, who argues that participation is a form of civic education that enhances the dignity of the citizen.

⁷⁵ See Mashaw, *ibid.*, pp. 158-171, 182-201.

⁷⁶ See P. Singer, *Democracy and Disobedience* (1974), pp. 45-59. Singer illustrates this point by referring to a campaign, run by Americans who were opposed to the war in Vietnam, urging their fellow citizens not to vote in the 1968 Presidential election because both major candidates had taken positions supporting the war. It was not proper for them to take part in a decision-making process when they were not willing to abide by the result of that process. In Singer's words, p. 55: "To vote, and yet refuse to be in any way obliged by the result of the vote, is to take an advantage over those who are prepared to accept the majority decision."

moral obligation to do so will be subtly undermined. And in a society in which the power of courts rests as much on their moral authority as on their ability to invoke the coercive power of the state, this is not a matter to be taken lightly.⁷⁷

Two additional factors make it especially important that courts take an expansive approach to public interest intervention at this time. The first of these is the advent of the Charter. My observations thus far do not apply only to lawsuits in which there is a constitutional issue at stake, but they are peculiarly important in the Charter context. The reason for this importance is that access to other legal arenas (in particular, legislatures) that have been available traditionally to those who are dissatisfied with a judge-made rule of law is significantly restricted by the Charter. It is essential that this be the case. The whole point of a constitutionally entrenched charter of rights and freedoms is that there are principles that we regard as so fundamental that we want to place restraints on our ability collectively to interfere with them. There is, nevertheless, a price to be paid in so doing. As political scientist Peter Russell has pointed out:⁷⁸

... transferring the policy-making focus from the legislative to the judicial arena also has a negative side. It represents a further flight from politics, a deepening disillusionment with the procedures of representative government and government by discussion as a means of resolving fundamental questions of political justice. The attempt to settle differences in our society on issues such as obscenity, Sunday closing, abortion, the rights of the elderly and the benefits available to the disabled through the judicial process entails the danger, however the courts resolve those issues, of transforming these matters into technical legal questions and of making the answers to these questions hinge on the outcome of a contest between legal adversaries rather than on a political process more likely to yield a social consensus.

I do not think that we need to regard this as a counsel of despair. The political commitment that the Charter represents was based on a belief that it is possible to discuss these issues and find principled ways to resolve them that rest on our best aspirations as a society rather than

⁷⁷ The creation of a moral commitment to respect judicial decisions is especially important in the area of entrenched constitutional rights where public feeling runs high and where governments as well as individuals are tempted to refuse to give effect to the orders of the courts. Such a commitment will only be created if members of the public are able to engage themselves in the process of arriving at these decisions. As Peter Russell observed (*The Political Purposes of the Canadian Charter of Rights and Freedoms* (1983), 61 Can. Bar Rev. 30, at pp. 53-54):

It must be remembered that what is at stake in applying the norms of a constitutionally entrenched charter of rights to the ever-changing details of our public life is the balance to be struck among our fundamental political values. In a democracy the public should not be disenfranchised from this area of decision-making.

⁷⁸ P. Russell, *The effect of a Charter of Rights on the policy-making role of Canadian courts* (1982), 25 Can. Public Admin. 1, at p. 32.

on our worst fears. Although our experience to date has been rather limited, I think it would be wrong to assume that our courts are incapable of functioning as a forum in which that process can take place. If our courts are to succeed in playing the difficult role we have assigned them, however, they will have to be sensitive to the interests and points of view of all who are likely to be affected by their decisions, not merely those who happen to be parties to the litigation. Indeed, making the courts more accessible to public interest intervenors may in some measure assuage judicial concerns about the courts' lack of political accountability in the constitutional review process.⁷⁹

Governments have acknowledged the importance of non-party participation in constitutional cases by passing laws that require that the provincial and federal Attorneys General be notified of litigation in which a constitutional challenge to legislation is being made, and entitle the Attorneys General to participate in such litigation.⁸⁰ Similar procedural rights are accorded to Attorneys General by Rule 32 of the Rules of the Supreme Court of Canada.⁸¹ There is a certain irony to this in the context of Charter litigation, since the participation of Attorneys General, who will normally (though not always) be united in seeking to uphold the constitutional validity of the challenged legislation, tends to "stack the deck" in favour of government. If the primary purpose of the Charter is to give Canadians a vehicle for asserting rights *against* government, it seems strange that governments that were not initially parties to the litigation should be provided with an automatic vehicle for conveying their message to the courts, while those interested in presenting a non-governmental perspective must depend on the willingness of the courts to let their voices be heard.⁸²

The second development that makes a broad approach to public interest intervention critical at this time is the general relaxation of the

⁷⁹ See Madam Justice Bertha Wilson, *Decision Making in the Supreme Court of Canada* (1986), 36 U.T.L.J. 227, at pp. 238-244.

⁸⁰ See British Columbia Constitutional Question Act, R.S.B.C. 1979, c. 63, s. 8, as amended by the Constitutional Question Amendment Act, 1982, S.B.C. 1982, c. 5; Alberta Judicature Act, R.S.A. 1980, c. J-1, s. 25; Saskatchewan Constitutional Questions Act, R.S.S. 1978, c. C-29, s. 8; Manitoba Court of Queen's Bench Act, R.S.M. 1970, c. C-280, s. 73; Ontario Judicature Act, R.S.O. 1980, c. 223, s. 35; New Brunswick Judicature Act, R.S.N.B. 1973, c. J-2., s. 23, as amended by An Act to Amend the Judicature Act, S.N.B. 1980, c. 28, s. 5.

⁸¹ Rule 32 requires that a party who wishes to raise a constitutional question before the court must apply to the Chief Justice or a member of the court to state a constitutional question. When the question is stated, notification is given to each Attorney General, who may intervene upon filing a notice of his intention to do so. An amendment to Rule 32, brought forward at the same time as the recent amendments to Rule 18, requires Attorneys General to specify whether they wish to file a *factum* and participate in oral argument or simply to file a *factum*.

⁸² See Welch, *loc. cit.*, footnote 42, at pp. 223-227.

rules governing standing, especially (though not exclusively) in constitutional cases.⁸³ Broad access to the legal system for those who wish to raise legal issues of public importance brings with it the possibility that the issues will be presented to the court in a way that may be both rather abstract and excessively one-sided. This is a concern that Laskin C.J.C. raised in his dissenting judgment in the *Borowski* case, and he suggested that if Mr. Borowski were to be accorded standing to challenge Canada's abortion laws, others with an opposite point of view ought to be allowed to intervene in order to achieve some degree of balance in the ensuing battle.⁸⁴ The decision of the Saskatchewan Court of Queen's Bench to refuse to allow a number of organizations (including the Canadian Civil Liberties Association, Campaign Life Canada and the Canadian Abortion Rights League) to intervene at trial in Mr. Borowski's latest challenge to the abortion laws⁸⁵ simply highlights the problem to which Laskin C.J.C. referred. In the *Bindhi* case, the British Columbia Court of Appeal found that the principles governing standing were useful in assisting a court in the exercise of its discretion to permit a public interest group to intervene in litigation,⁸⁶ and it seems intuitively sensible that a person who has standing to raise an important issue by commencing a lawsuit should be able to make the same point by intervening in a lawsuit commenced by someone else.

As a final point, the observation made by Anderson J.A. in *Bhindi* that public interest intervention is a form of assistance that should be welcomed by the courts⁸⁷ bears repetition. It is doubtless true that public interest groups intervene in litigation with the objective of influencing the judicial decision-maker in order to attain what they perceive to be a favourable outcome, and in this sense the provision of assistance to the court is probably a secondary concern. In a larger sense, however, the object of public interest intervention is to improve the process of judicial law-making—by ensuring that courts understand the point of view of those who will be affected by their decisions, and by ensuring that those

⁸³ See cases cited *supra*, footnote 10.

⁸⁴ Laskin C.J.C. observed, *supra*, footnote 10, at pp. 587 (S.C.R.), 598 (D.L.R.): . . . it appears to me that to permit the issue to be litigated in as abstract a manner as would be the case in having the plaintiff alone carry it against two ministers of the Crown would hardly do justice to it, absent even any interveners who might, with the same obsessiveness on the opposite side of the issue, argue for the valid operation of the challenged provisions. Even accepting, as is probable, that if standing was accorded to the plaintiff, other persons with an opposite point of view might seek to intervene and would be allowed to do so, the result would be to set up a battle between parties who do not have a direct interest, to wage it in a judicial arena.

⁸⁵ *Borowski v. Attorney General of Canada*, *supra*, footnote 31.

⁸⁶ *Supra*, footnote 16, at pp. 194 (D.L.R.), 87 (B.C.L.R.) (per Taggart J.A.), and at pp. 207-208 (D.L.R.), 100-101 (B.C.L.R.) (per Anderson J.A.).

who will be affected perceive that the courts understand their point of view even if they disagree with it. It seems to me that this constitutes a very real form of assistance to the courts, and the burden ought to be on those who would deny our courts the benefit of this assistance to show why a generous approach to public interest intervention is unjustified.

III. *Arguments Against Public Interest Intervention*

Three types of argument can be advanced against those who advocate a broad approach to public interest intervention. The first are what might be described as arguments of principle. What is considered objectionable about public interest intervention is that it is believed to be incompatible with the proper functioning of the judicial system, or that it is unfair to the parties, who may be deprived of control over the litigation. The second type of objection can be termed arguments of practicality. Public interest intervention is not considered undesirable in and of itself, but only to the extent that it represents an unproductive use of the court's time and energy. The third type of argument is one of balance. The concern here is not that intervention is wrong or impractical but that it will not work well enough, so that the courts will be presented with an unequal or unrepresentative sample of the views of members of the public. I do not think that these objections can be dismissed out of hand, but I do believe that they must be weighed carefully in light of the positive contribution that public interest intervention can make to the process of judicial law-making.

A. *Arguments of Principle*

The idea that public interest intervention is incompatible with the proper functioning of the courts rests on certain assumptions about the nature of litigation and the role of the judge in the litigation process. There is a tendency in English law to think of the judge as a neutral arbiter weighing the arguments presented by counsel in order to arrive at the resolution of a dispute. The active participants in this process are counsel, who may choose to advance or refrain from advancing such arguments as they see fit. In this type of legal framework it is considered inappropriate for judges to base their decisions on arguments that were not advanced by counsel; it is considered equally inappropriate for judges to do independent legal research or to make reference to authorities not cited by counsel.⁸⁷

⁸⁷ *Supra*, footnote 16, at pp. 204 (D.L.R.), 97 (B.C.L.R.).

⁸⁸ See Alan Paterson, *The Law Lords* (1982), pp. 38-45. Compare this conception of the role of the courts with that put forward in A. Chayes, *The Role of the Judge in Public Law Litigation* (1976), 89 *Harv. L. Rev.* 1281.

This system has much to recommend it if the entire object of the exercise is the resolution of disputes. On the whole it is not excessively disturbing to imagine that the outcome of a contest between two litigants should be determined, in part at least, by the skill of their advocates. If, however, we believe that the making of law in the course of the resolution of the dispute is a major part of the exercise, our attitude is likely to change quite considerably. The idea that the quality of our legal rules might depend on the relative abilities of counsel in a given lawsuit is one that gives rise to at least some measure of concern. Likewise it would seem that if the independent research of judges and their law clerks results in better, or at least better informed, legal development, we ought to want to see this type of thing encouraged.

I do not believe that the recognition of interests extending beyond those of the parties to litigation forces the courts to transform their proceedings into something akin to legislative hearings. Courts are not equipped to act as roving commissions established for the improvement of our legal system, nor does anyone want them to be. There is some value in attempting to come to grips with difficult and complex issues in the context of a concrete situation, and our courts wisely have been reluctant to attempt to resolve points of law in a factual vacuum, even when such issues have been referred to them by government.⁸⁹ Once a court is confronted with a situation in which it must make an important legal choice, however, it seems to me that it ought to use whatever assistance is available in order to make that choice a wise one. I would not seek to deny the value of the traditional English system of litigation in ensuring the fair and just resolution of disputes, but I think it would be regrettable if we considered ourselves unable to modify that system in order to reflect the increasingly important law-making functions that we have imposed on the judiciary.

At the same time, it must be acknowledged that allowing intervenors to take part in litigation can impose a significant burden on the parties, and it is appropriate to consider whether the imposition of such a burden is unfair. People have a right to come to court to resolve disputes expeditiously and at a minimum cost. Accordingly it is inappropriate for intervenors to expand the range of issues before the court if the dispute between the parties may be resolved on a narrow ground.

This concern is reflected in existing decisions dealing with public interest intervention. For example, in *Attorney General of Canada v. Aluminium Company of Canada Ltd*⁹⁰ a majority of the British Columbia

⁸⁹ See *McEvoy v. Attorney-General of New Brunswick*, [1983] 1 S.C.R. 704, (1983), 138 D.L.R. (3d) 25; *Re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54, (1979), 102 D.L.R. (3d) 1.

⁹⁰ *Supra*, footnote 26. The band had been added as a party by the trial judge, Cumming J., pursuant to Rule 15(5)(a)(ii) of the British Columbia Supreme Court Rules.

Court of Appeal denied intervenor status to members of the Carrier Indian Band and the British Columbia Wildlife Federation in a case in which Alcan had raised a challenge to the federal government's constitutional authority to regulate the flow of water released from the company's dam on the Nechako river. The Indian band sought to participate in the case in order to assert fishing rights that it claimed were protected as incidents of aboriginal title, and the British Columbia Wildlife Federation sought to raise a constitutional challenge to the British Columbia Development Act under which Alcan had been given authority to build its dam on the Nechako river in the first place. The court decided that the effect of allowing the introduction of these new issues into the case would be "to take the litigation away from those directly affected by it"⁹¹ and that this should not be allowed. Similarly in *R. v. Morgentaler*⁹² the Ontario Court of Appeal refused to allow a number of "right to life" groups to intervene in a Crown appeal of the acquittal of Dr. Morgentaler and his colleagues on charges of conspiracy to procure illegal abortions because the groups wanted to raise a new ground of appeal that had not been put forward by the Crown. As Howland C.J.O. pointed out:⁹³

To permit a third party to intervene to raise an additional ground of appeal would enlarge the scope of a Crown appeal from an acquittal beyond that contemplated by Parliament. . . . It is very different from granting a third party a right to intervene to throw light on a pending issue between the Crown and the accused because of special expertise or knowledge possessed by the third party.

There may also be elements of a dispute that are not appropriate subjects for intervention, and it is perfectly sensible for the courts to confine an intervenor's comments to those elements of the lawsuit upon which intervention is acceptable. Thus, in the context of a criminal case that raises issues of interpretation of the Charter, it would be appropriate for intervenors to comment on the question of how the Charter affects

On appeal, it was argued that if it was not appropriate to add the band as a party, it should still be entitled to participate as an intervenor. Cumming J. granted the Wildlife Federation intervenor status as opposed to party status.

⁹¹ *Supra*, footnote 26, at p. 206 (per Seaton J.A., Hickson J.A. concurring). MacFarlane J.A. dissented because he believed that the arguments raised by the British Columbia Wildlife Federation would not expand significantly the range of issues to be determined in the case, and it would accordingly be inappropriate to interfere with the exercise of discretion by Cumming J. With respect to the Indian band, MacFarlane J.A. agreed that it was inappropriate to allow the complex issue of aboriginal title to be added to the litigation, but he felt that the band had a legitimate interest in participating, either as a party or as an intervenor, on the more restricted range of issues raised by the case. For another decision in which intervention was refused on the ground that it would expand unacceptably the range of issues to be canvassed in the litigation, see *British Columbia Telephone Co. v. Telecommunications Workers Union* (1985), 65 B.C.L.R. 96 (B.C.S.C.).

⁹² (1985), 19 C.C.C. (3d) 573 (Ont. C.A.).

⁹³ *Ibid.*, at p. 576.

the Criminal Code⁹⁴ provisions at issue, but the intervenors should not discuss the guilt or innocence of the individual accused. This is the practice that has been adopted on those occasions when the courts have permitted public interest intervention in criminal cases.⁹⁵ Similar restrictions can be applied to public interest intervenors in civil cases. For example, the British Columbia Court of Appeal confined the participation of the intervenors in the *Bhindi* case to certain issues involving the impact of the Charter on collective agreements.⁹⁶ For public interest intervenors these restrictions are not burdensome because their interest lies in the legal principles at stake in the dispute between the parties rather than in the dispute itself. Different considerations would, of course, apply to party intervenors.

These observations having been made, however, if an important legal issue is raised squarely by a lawsuit, I believe that public interest intervenors ought to be able to participate with respect to that issue even if this gives rise to some degree of expense and inconvenience to the parties. Certainly one must be concerned about the possibility of well-organized and well-financed interest groups raising the cost of litigation in a way that might deter individuals from seeking to vindicate their rights in court.⁹⁷ It is, of course, true that this can also occur in lawsuits where only two parties are involved if one of the participants has significantly greater resources to devote to the litigation than the other.⁹⁸ This is usually considered one of the vices of our legal system, however, and it does not seem to justify a change that might make the situation worse rather than better. On the other hand, we should not discount the possibility that intervention might tend to redress an existing imbalance between the resources of the parties rather than create problems for an impecunious litigant.

In an ideal world, the appropriate solution for this problem would be the provision of financial assistance to litigants rather than the foreclosure of opportunities for participation by those affected by judicial decisions. The federal government offers financial aid to some litigants in cases involving the Charter through the Court Challenges Program

⁹⁴ R.S.C. 1970, c. C-34.

⁹⁵ See *Re Schofield and Minister of Consumer and Commercial Relations*, *supra*, footnote 27, at pp. 138 (D.L.R.), 770 (O.R.), where this point is made by Wilson J.A.

⁹⁶ *Supra*, footnote 16, at pp. 211 (D.L.R.), 104 (B.C.L.R.). See also the dissenting judgment of MacFarlane J.A. in *Attorney General of Canada v. Aluminum Company of Canada Ltd.*, *supra*, footnote 26, at pp. 213-215.

⁹⁷ See J. Friedenthal, *Increased Participation by Non-Parties: The Need for Limitations and Conditions* (1980), 13 U.C. Davis L. Rev. 229 and the response to this concern set out in Welch, *loc. cit.*, footnote 42, at p. 231 n.112.

⁹⁸ See M. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change* (1974), 9 Law & Soc. Rev. 95.

administered by the Canadian Council on Social Development under the auspices of the Department of the Secretary of State.⁹⁹ Likewise there will be times when litigants receive support directly from sympathetic individuals or public interest organizations, as in the case of Mr. Mervyn Lavigne whose challenge to the spending of compulsory union dues for political purposes was financed by the National Citizens Coalition.¹⁰⁰ Not every litigant will have recourse to such sources of assistance, of course, and in the end there will undoubtedly be situations where litigants face substantially increased costs as a result of public interest intervention. While every effort should be made to minimize these costs, it seems to me that they are justified by the tendency of public interest intervention to improve the confidence of society as a whole in our legal system.^{100a}

B. Arguments of Practicality

To state that we are prepared to incur some degree of cost and inconvenience in order to enable public interest groups to participate in important litigation does not imply that unlimited cost and inconvenience is justified. Some opposition to public interest intervention is undoubtedly due to the belief that it represents a waste of resources, in particular the court's time. It would be foolish to be insensitive to the demands placed on the judiciary's time by ever-expanding litigation dockets, and if it is desirable to minimize the burden that public interest intervention places on the parties, it is equally important to minimize the burden it is likely to place on our courts. It does not follow, however, that judicial economy requires the elimination of public interest intervention altogether.

Undoubtedly some degree of economy can be achieved with the co-operation of all concerned. To quote once again from Judge Weinstein's remarks:¹⁰¹

My experience. . . in handling at least a score of cases that might be characterized as public litigations is that granting an opportunity to be heard in such cases at the district court level is entirely practicable. The number of those who will want to appear in court is generally quite small in proportion to those who might be affected.

⁹⁹ *Globe & Mail* (Toronto), September 25, 1985, at p. 1.

¹⁰⁰ *Globe & Mail* (Toronto), July 6, 1986, at p. A3.

^{100a} In its recent revision to Rule 18 the Supreme Court of Canada has taken a position more protective of the original parties to the litigation. Rule 18(6) states that: "The order granting leave to intervene. . . shall, unless there are exceptional circumstances, make provisions as to additional disbursements incurred by the appellant or the respondent as a result of the intervention." It is interesting to note that the court's solicitude for the parties does not extend to increased expenses incurred as a result of interventions by Attorneys General, since Rule 18(7) expressly exempts Attorneys General from the operation of Rule 18(6).

¹⁰¹ Weinstein, *loc. cit.*, footnote 73, at p. 246.

Moreover, most people are quite sensible—they understand the burdens on court time and will accede to reasonable requests to limit participation.

In this context it is worth noting that intervenors with similar interests have been prepared to make a joint submission to the court, and this is a practice that is deserving of encouragement. In *Shewchuk v. Ricard*,¹⁰² for example, five public interest organizations seeking leave to intervene adopted a common position on the legal issues raised by the case and agreed to be represented by the same counsel. The *Shewchuk* case is especially noteworthy because the intervenors were seeking to bring to the court's attention arguments that were not advanced by the parties themselves, and it is certainly desirable that intervenors bring a fresh perspective to the case rather than simply reinforcing points that have been made by others.

In the end, however, the courts cannot be forced to rely exclusively on self-restraint by intervenors as a means of controlling the burden that public interest intervention may impose on them and they are justified in taking some measures of their own. The rule changes that are suggested in the fourth part of this article would, in my view, assist substantially in reducing this burden. What we need to do, however, is employ controls on public interest intervention that do not undermine the rationale for according intervention rights in the first place.

I do not believe, for example, that it is useful to insist that public interest intervenors have interests that are distinct from those of the parties.¹⁰³ Nor do I think that public interest intervention implies a lack of confidence in the abilities of counsel for the parties or any suggestion that the representation afforded to the parties by counsel is inadequate.¹⁰⁴ An attempt to constrain public interest intervention by focusing on the adequacy of the representation afforded to certain points of view ignores the value that participation itself has for the intervenors. A mere endorsement by an intervenor of the views expressed by a party may have little significance from the point of view of the court, but the importance to the intervenor of putting those views on record must not be overlooked.¹⁰⁵

¹⁰² *Supra*, footnote 17; see also *MacMillan Bloedel Ltd. v. Mullin*, *supra*, footnote 17, at pp. 386 (W.W.R.), 210 (B.C.L.R.), in which a number of native bands and organizations intervening in the litigation were represented by one set of counsel; *Singh v. Minister of Employment and Immigration*, *supra*, footnote 63, at pp. 185 (S.C.R.), 442 (D.L.R.), in which the Canadian Council of Churches and the Federation of Sikh Societies made a joint submission to the court.

¹⁰³ See *Bhindi*, *supra*, footnote 16, at pp. 203-204 (D.L.R.), 96-97 (B.C.L.R.).

¹⁰⁴ See *Re Schofield and Minister of Consumer and Commercial Relations*, *supra*, footnote 27, at pp. 142-143 (D.L.R.), 774-775 (O.R.) (per Thorson J.A.).

¹⁰⁵ See the text, *supra*, at footnotes 72 to 77. The new Supreme Court of Canada Rule 18(3)(c) requires applicants for intervention briefly to "set out the submissions to be advanced by the intervenor, their relevancy to the appeal or reference and the reasons

On the other hand, the courts have a legitimate interest in limiting the amount of time that is spent on cumulative presentations. More effective tools for litigation management would help the courts to achieve an appropriate balance between public participation and the effective use of court time. It would be useful, for example, if courts could deal with all the prospective intervenors in a particular lawsuit collectively, rather than ruling on individual applications for leave to intervene without knowing who else is interested in participating. This could be arranged without prejudice to the potential intervenors if reasonable time limits were set for the filing of applications for leave to intervene. If the numbers of public interest intervenors threatened to make litigation unmanageable the courts could then select representative intervenors on the basis of the knowledge and expertise that the intervenor has to offer the court, or the distinctive perspective the intervenor provides on the issues before the court.¹⁰⁶

Should participation by intervenors become burdensome, however, it would be preferable that courts limit the scope of participation by intervenors rather than deny intervenor status altogether. I have commented already upon the desirability of limiting the subject matter upon which intervenors are entitled to express their views, but it should be possible to restrict the means of their participation as well. The most obvious mechanism for so doing is to confine intervenors to written submissions, at least at the appellate level. Like other litigants, intervenors generally understand that the opportunities they are afforded to influence the courts are not limitless. Each court is the master of its own procedures, and if the court considers itself able to obtain adequate benefit solely through written submissions by intervenors, it is difficult for an intervenor to quarrel with that assessment. On the other hand, it makes sense for courts to remain receptive to the possibility of allowing intervenors to make oral submissions in situations where the members of the court would find it useful.^{106a}

for believing that the submissions will be useful to the Court and different from those of the other parties'. (Emphasis added). It is not apparent that the grant of intervenor status must depend upon the judge being satisfied that the applicants' submissions are different from those of the other parties, since Rule 18(3) is not expressed as a limit on the general discretion of the judge under Rule 18(1). The view that each applicant must put forward a unique position in order to be entitled to intervene seems to me to represent an unnecessarily restrictive approach to intervention, especially in light of Rule 18(5) which will normally prevent an intervenor from filing a factum of more than twenty pages, from adding to the case on appeal and from presenting oral argument.

¹⁰⁶ See *MacMillan Boedel Ltd. v. Mullin*, *supra*, footnote 17; *R. v. Seaboyer*, *supra*, footnote 17, at p. 398; *Re Schofield and Minister of Consumer and Commercial Relations*, *supra*, footnote 27, at pp. 138-139 (D.L.R.), 770-771 (O.R.) (per Wilson J.A.), and at pp. 141 (D.L.R.), 773 (O.R.) (per Thorson J.A.).

^{106a} The major innovation found in the new version of Rule 18 of the Supreme Court of Canada Rules is the principle that, while an intervenor has the right to file a

C. *Arguments of Balance*

Finally, it is necessary to address the criticism that public interest groups that intervene in litigation are themselves unrepresentative of the public whose interests they claim to be protecting, or that public interest intervention presents the courts with an unbalanced or unreliable picture of the world that will be affected by a particular judicial decision. At one level my response to these criticisms is simply that even if they are true, it is difficult to see how the alternative, which would be to make no attempt to allow for the representation of different groups' perceptions of the public interest, would produce a more accurate or representative picture of society.¹⁰⁷ If anything, our present system of allowing Attorneys General to have an automatic right of intervention in constitutional cases itself presents the courts with an unbalanced sample of views on where the public interest lies.¹⁰⁸ At another level, however, it seems to me that the process of self-selection of those who will use the instruments afforded for influencing the decisions of those who make public policy is the best that we can offer in a democracy. Our society is justifiably concerned that some of its members find themselves systematically under-represented in our political institutions, and the desire to give minorities a more effective means of making their voice heard in the formulation of our laws was one of the things that prompted the introduction of the Charter.¹⁰⁹ It would be ironic indeed if we sought to give further protection to those who find themselves unable or unwilling to make use of the opportunities for the advancement of their interests that are afforded through access to the courts by denying access to those who do wish to use such opportunities.

The importance that courts will attach to submissions made by public interest intervenors undoubtedly will vary considerably. The credibility that different organizations have with the courts is likely to depend on such things as the history of the organization, the quality of its submissions,

factum (Rule 18(4)), intervenors will not be allowed to present oral argument unless otherwise ordered by a judge (Rule 18(5)(c)). It is to be hoped that this restriction on the manner of participation by intervenors will be balanced by a greater willingness on the part of the court to grant applications for leave to intervene.

¹⁰⁷ See *Welch, loc. cit.*, footnote 42, at pp. 230-231.

¹⁰⁸ See the text, *supra*, at footnotes 80-82.

¹⁰⁹ Observations to this effect are to be found frequently in the testimony given by public interest groups before the Special Joint Committee on the Constitution. Typical is the following statement by Mary Eberts, legal counsel to the Advisory Council on the Status of Women:

Protection of minorities against the actions of the majority is the very cornerstone of our civil liberties and it was enunciated as such by John Stuart Mill when he cautioned that we should guard against the tyranny of the majority.

Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons of Canada, Issue No. 9, November 20, 1980, at p. 129.

and the extent to which it can make a plausible claim to represent a large number of people. I do not believe, however, that the courts should apply an initial litmus test of credibility (at least beyond the dismissal of those submissions that clearly are frivolous) before allowing individuals or organizations to intervene in litigation that affects them in an important way. To draw an analogy from the law of evidence, the factors mentioned above ought to go to the weight of the intervenor's submission, not its admissibility.

In conclusion, it seems to me that none of the arguments advanced against public interest intervention reach the heart of the case in favour of it, which is that people in a democracy ought to be allowed to try to influence the decisions of those who exercise power over them. As I have noted, however, there are some ways in which it is appropriate to limit public interest intervention in litigation. I will now go on to make a series of specific proposals for the exercise of the court's authority to grant intervenor status.

IV. Proposals for a Policy on Public Interest Intervention

I would like to put forward the following five proposals for a policy on public interest intervention that could be adopted in Canadian courts, both at the trial level and in the appellate courts. In some instances these proposals reflect existing practice (at least in some provinces) and would simply involve a formal affirmation of this practice; in other instances changes to existing practices would have to be made. The proposals are, briefly stated:

- (1) A clear statement of the status of public interest intervenors should be adopted in the relevant rules of court, along with rules governing the procedures for application for leave to intervene;
- (2) Individuals and organizations that are affected by or have a reasonable concern with a matter to which litigation relates should be entitled to apply to the court before which the litigation is pending for permission to intervene;
- (3) If necessary to keep proceedings manageable, the court may have regard to the questions of whether the proposed intervenor is specially affected by the decision facing the court or has some special insight or expertise to bring to bear on the issues before the court in determining whether or not to grant leave to intervene;
- (4) The court should confine intervenors to presentations on appropriate legal issues, but given the existence of that limitation, intervention should be available in criminal as well as civil cases;

- (5) The courts may confine the manner of participation by intervenors in order to achieve effective use of judicial time and resources.

I will discuss each of these proposals in turn.

A. *Public Interest Intervenor Status*

As I pointed out in the first part of the article, much of the difficulty with public interest intervention arises because the intervenor has no clear status within the normal rules of court procedure. In my view it is preferable not to adopt the American practice of assimilating the position of the public interest intervenor with that of the *amicus curiae* since this can lead to confusion and also tends to undermine the original status of the *amicus curiae*. Likewise I believe that it is desirable to draw a distinction between the party intervenor, whose interest is in the outcome of the dispute between the parties, and the public interest intervenor, whose interest is in the legal rules that may be adopted in the course of resolving the dispute between the parties.¹¹⁰ In their comments on Rule 13 of the new Ontario Rules of Civil Procedure, Paul Muldoon and David Scriven have suggested that it might be desirable for public interest groups to have a choice between intervening as parties under Rule 13.01 or intervening as what are now described as non-party friends of the court under Rule 13.02.¹¹¹ The difference between party and non-party status can be significant because it may have an impact on such matters as the scope of intervenor participation, liability for costs, the right to settle litigation and the right to appeal. I think it is preferable to draw such distinctions clearly at the time an application for leave to intervene is made so that the expectations of all concerned are the same. The drawing of such distinctions would not, of course, prevent an organization that might qualify either as a party intervenor or as a public interest intervenor from deciding which role it would prefer to play in the litigation.¹¹²

¹¹⁰ See the text, *supra*, at footnotes 14 to 31.

¹¹¹ Muldoon and Scriven, *loc. cit.*, footnote 15, at pp. 157-158; Scriven and Muldoon, *loc. cit.*, footnote 18, at p. 462.

¹¹² As my observations in the first part of this article indicate, (see the text, *supra*, at footnotes 14 to 31) I believe that the most important and difficult distinction for the courts to draw is not the one between party intervenors and public interest intervenors, but the one between public interest intervenors and people who want to take part in litigation in order to establish what they consider to be a desirable precedent for use in a pending lawsuit of their own. The central justification that I offer for allowing public interest intervenors to participate in litigation in order to establish desirable legal rulings or precedents is that in so doing they are exercising their rights as citizens in a self-governing society rather than simply pursuing their own private interests. As I pointed out in the introduction, however, it is not an easy matter to create a neat theoretical separation between public and private interest. At a practical level I think that the most

As a general rule, I do not think that public interest intervenors have the same rights or responsibilities as parties. In particular, they should not have the right to appeal a decision nor the right to prevent a lawsuit from being settled out of court. If an organization feels it needs to have control over appeals or settlements in order to give adequate protection to its interests in the subject matter of the dispute, it ought to seek status as a party rather than as a public interest intervenor. Public interest intervenors should be responsible for their own costs regardless of the outcome of the litigation but, barring unusual circumstances, they should not be responsible for the costs of any of the other participants in the litigation.¹¹³

Finally, I believe that a procedural system for managing applications for leave to intervene ought to be adopted. This may be more important at the appellate level where public interest intervenors are likely to concentrate their resources, but it can be a useful discipline for intervention at the trial level as well. I would suggest that time limits be established within which all applications for leave to intervene would have to be filed. After this time limit had expired, the court would be in a position to deal with all applications for leave to intervene together, rather than being forced to address the applications on a piecemeal basis. Knowing the number of potential intervenors and the general nature of

useful way to draw this distinction is to consider whether the prospective intervenor is seeking to participate in order to make an independent comment on an issue of public importance rather than trying to gain a strategic advantage in other litigation.

¹¹³ By an award of costs, I mean a payment from one participant in the litigation to another. Whether public support ought to be offered to public interest intervenors or to parties to litigation in which intervention takes place involves different considerations. See K. Englehart and M. Trebilcock, Economic Council Working Paper #17, *Public Participation in the Regulatory Process: The Issue of Funding* (1981). As is generally the case in matters dealing with intervention, current practice in the area of costs is far from uniform. In the *Fishing Vessel Owner's* case, *supra*, footnote 14, at p. 320, for example, the court granted the gillnetters the right to intervene on the understanding that they would neither be entitled to costs nor liable to have costs awarded against them. In *Wotherspoon v. C.P. Ltd.*, *supra*, footnote 15, at p. 76, on the other hand, intervention rights were granted on the condition that the intervenor could not seek costs but might be liable for them, depending on the outcome of the litigation. These were both cases involving party intervenors, but I am not aware of a more consistent approach being taken to public interest intervenors. The basis for my proposal is that public interest intervenors are making use of their rights as citizens to influence the exercise of governmental authority and they should not expect to be rewarded if they succeed or penalized if they fail. Indeed, in some instances it may not be completely clear whether they have succeeded or failed. The award of costs may be an appropriate sanction if public interest intervenors unnecessarily prolong the hearing of a case, and thereby increase the cost of litigation for the parties, but as a general matter I think that increases in cost to the parties that are incidental to acceptable public interest intervention should not be subject to compensation. See Scriven and Muldoon, *loc. cit.*, footnote 18, at pp. 471-472.

their proposed submissions, the court would be in a position to take whatever steps are necessary in order to keep the proceedings manageable.¹¹⁴

The object of this proposal is to create an acceptable balance between the ability of the parties themselves to control the status of their dispute and the ability of those substantially affected by a legal ruling to influence the court's decision. Whether the particulars of the proposal are accepted or not, it is important that the status of public interest intervenors be acknowledged expressly in the appropriate Rules of Court and that the legal profession be made aware of the principles upon which decisions to grant or deny intervenor status are made, in order to enable counsel to advise and assist clients. A system for controlling public interest intervention that is based on seemingly unstructured judicial discretion is bound to create unnecessary expense and frustration.¹¹⁵

B. *Standing to Intervene in Litigation*

As a general rule, individuals and organizations that would have standing to raise legal issues of public importance before the courts ought to be entitled, with the court's permission, to intervene in order to comment on those issues when they are brought before the courts by other litigants. The British Columbia Court of Appeal took this view in the *Bhindi* case, being prepared to grant leave to intervene where the applicant "is not a 'busybody' and is 'affected by and has a reasonable concern with the matter to which the proceedings relate'".¹¹⁶ As the British

¹¹⁴ In cases where it appeared to the court that public interest groups probably would want to participate, it would be desirable that they be notified of the deadline for applications for leave to intervene. Such notification could be given directly to a selected number of organizations, or it could be provided more generally through advertisement. The new Rule 18(2) of the Supreme Court of Canada Rules requires applications for intervention to be served and filed within thirty days after the filing of the notice of appeal or reference. While this attempt by the court to manage the flow of intervention applications is to be commended, one wonders if a thirty day limitation period is not unnecessarily short. Certainly it will behoove those interested in intervention to pay close attention to the Supreme Court Bulletin in order to ascertain when appeal notices have been filed.

¹¹⁵ As noted above, the perception that the unstructured exercise of discretion by the Supreme Court of Canada was producing an inconsistent and excessively restrictive approach to intervention appears to have contributed to the recent revision of Rule 18 of the Supreme Court Rules. See *supra*, footnote 31a. I believe that the new rules have the potential to represent a significant improvement in this situation since the court has afforded itself an opportunity to strike a balance between its need to take control over growing pressures on the use of its time and its need to demonstrate a greater degree of openness to public input into the court's increasingly important law-making functions. The real measure of success of the reforms will be whether the court will resist the temptation to use the new rules to isolate itself even further from participation by public interest intervenors.

¹¹⁶ *Supra*, footnote 16, at pp. 208 (D.L.R.), 101 (B.C.L.R.).

Columbia Court of Appeal has observed in the context of standing, organizations ought to be able to intervene as representatives of the interests of their members, and should not be required to demonstrate an independent "organizational" interest in the matter at issue.¹¹⁷

I recognize that this represents a very broad test for public interest intervention and if everyone satisfying the test chose to make use of the opportunity to intervene, litigation quickly could become unmanageable. I take some comfort in Judge Weinstein's belief that the likelihood of this happening is remote,¹¹⁸ and I think that there are ways to deal with the problem if it should arise. I would emphasize, however, that courts ought to start from the position that everyone who has a legitimate interest in participating in litigation ought to be able to do so to the extent that this is compatible with the effective management of litigation. Courts should be reluctant to erect initial barriers to participation; rather they should seek first to confine the scope and manner of intervenor participation to manageable limits.

C. *Restricting Numbers of Intervenors*

Should the court decide that the number of prospective intervenors or the complexity of their proposed submissions is such that participation by all of them would render the proceedings unmanageable or inefficient, the court may find it necessary to refuse to allow some individuals or organizations to intervene. This step should be taken with reluctance, but if it is necessary I would suggest that courts have regard to the questions of whether the proposed intervenor is specially affected by the decision facing the court or has some special insight or expertise to bring to bear on the issues raised by the litigation in determining whether or not to grant leave to intervene in particular cases. These criteria have appeared to be relevant to the courts in at least some of the existing cases on the granting of leave to intervene.¹¹⁹

At the risk of repetition, I would emphasize that it is desirable that the courts err on the side of allowing participation even if the value of the contribution that the intervenor is proposing to make is doubtful. Generally speaking it is preferable to limit the scope and manner of an intervenor's participation (for example, by confining the intervenor to written submissions) rather than to exclude participation altogether. It is, of course, true that as opportunities for public participation expand, we take a risk that the cloistered atmosphere of the courtroom will be subtly replaced by the less imposing air of the legislative committee hearing.

¹¹⁷ *Re Saanich Inlet Preservation Society and Cowichan Valley Regional District*, *supra*, footnote 9, at pp. 180 (D.L.R.), 128 (B.C.L.R.).

¹¹⁸ Weinstein, *loc. cit.*, footnote 73, at p. 246.

¹¹⁹ See the text, *supra*, footnote 105.

As we impose more overt law-making functions on the courts it is probably inevitable that some of the awe with which we surround judicial office should diminish. But it seems to me that it is better to accept this as a reality in our modern legal and political system rather than to seek to preserve the majesty of our courts at the expense of public disaffection and judicial isolation.

D. *Restricting the Scope of Intervention*

The purpose of public interest intervention is to allow those who are affected by the exercise of judicial law-making authority to attempt to influence the exercise of that authority. It is not designed to entitle people to interfere in the private disputes of others, though it may inevitably have that consequence. It is desirable to minimize this consequence by confining intervention to those areas where the exercise of judicial law-making authority is raised squarely in the litigation before the court.¹²⁰

Nobody, however, is entitled to preserve as a matter of purely private interest the legal rules and principles by which we are governed. This is as true of criminal law as it is of civil law. In our legal system the guilt or innocence of a person accused of a crime is determined in a legal contest in which the public is represented by the Crown and by the Crown alone. In so far as what is at issue is the guilt or innocence of the accused in the light of accepted legal standards, this is as it should be. But where the issue is what those legal standards ought to be found to be, neither the Crown nor the accused is entitled to assert a monopoly on the range of inputs a court should consider in making its determination. This is especially true where what is at issue is the impact of the Charter on our criminal law. Those who are interested in criminal law developments may include people who want to preserve the possibility of certain types of legislative change to the Criminal Code,¹²¹ as well as those who wish to attack or defend the *status quo*. While it is true that special care must be taken to ensure fairness to the accused, it seems to me that a procedural system that allowed for no possibility for public interest intervention in criminal matters would be an unnecessarily impoverished one.

E. *Restricting the Manner of Participation by Public Interest Intervenors*

Participation in litigation by public interest intervenors need not entail the ineffective use of judicial time and resources. When there are many participants in a lawsuit, however, some degree of repetition and wasted effort may be inevitable, and courts are entitled to take steps to minimize this inefficiency. I have acknowledged that public interest inter-

¹²⁰ See the text, *supra*, at footnotes 89 to 96.

¹²¹ *Supra*, footnote 94.

venors should not be treated as parties to the litigation, and it would seem to follow that intervenors should bear a greater share of the burden of judicial efforts at efficient litigation management than the parties themselves. I believe that this can be done without jeopardizing the ability of intervenors to make effective submissions to the court.

By dealing with applications for leave to intervene on a collective basis, the court might be in a position to suggest that some intervenors with similar views combine their efforts. The court might set out the range of issues upon which it was prepared to receive submissions from intervenors, and it might adopt a rule that intervenors would be entitled to make written submissions only, except in situations where the court made a specific request for oral argument. Rules could be designed to retain a significant measure of flexibility for judges while providing some degree of guidance for counsel.

It may be desirable as well that the manner of participation accorded to intervenors reflect the procedural status of the litigation. Where an issue has been referred to the courts by government, for example, particularly active participation by intervenors may be desirable in order to get a full airing of views on the subject. In the case of the *Ontario Residential Tenancies Act Reference*,¹²² for example, the Ontario Court of Appeal ordered that notice of the reference be sent by mail to a number of tenant and legal services groups and that a notice inviting participation be published in a number of Ontario newspapers. An analogous situation arises where, as in *Borowski*, the basis upon which the plaintiff is granted standing is that he has a genuine interest as a citizen in the validity of legislation rather than that he is affected by the legislation directly.¹²³ In such cases it seems to me that other persons or organizations that could meet the same standing test ordinarily should be permitted to intervene and participate on an equal footing with the original plaintiff. This would eliminate the prospect of an unseemly race to the courthouse determining who is able to bring matters of public importance before the judiciary.

As a final point, it seems to me that the considerations I have articulated with respect to the effective use of judicial time and resources apply not only to public interest intervenors but equally to Attorneys General who are intervening as of right in constitutional litigation. In the Supreme Court of Canada, for example, it is rather doubtful that oral submissions from all eleven Attorneys General, espousing what will often be very similar positions, contribute significantly to the court's appreci-

¹²² (1980), 105 D.L.R. (3d) 193, at p. 195, 26 O.R. (2d) 609, at p. 611 (Ont. C.A.).

¹²³ See *Minister of Justice v. Borowski*, *supra*, footnote 10, at p. 598 (S.C.R.), 606 (D.L.R.) (per Martland J.).

ation of the issues raised in Charter litigation, though such submissions certainly add greatly to the time required to hear each case. Since the Supreme Court of Canada has adopted a rule that public interest intervenors normally are allowed to make only written submissions,¹²⁴ I would suggest that a similar rule be applied to Attorneys General who are intervening pursuant to Rule 32 of the Supreme Court Rules. Thus Attorneys General who are not parties to the litigation would be entitled automatically to make written submissions in constitutional cases, but oral argument from them would be allowed only with the permission of the court. The court has gone part of the way by amending Rule 32(4) to require Attorneys General to indicate whether their interventions will consist of oral as well as written argument or only the submission of a factum,¹²⁵ but the court has left control of this aspect of its proceedings in the hands of the Attorneys General rather than taking control itself as it has in the case of other intervenors. My proposal would not only enable the court to save time in hearings, it would put supporters and attackers of legislation that allegedly violates the Charter on a more even footing.

Conclusion

Public interest intervention represents a major challenge for our system of judicial procedure, but the arguments in favour of some form of public interest intervention are so strong that they cannot be ignored. I am confident in the ability of the judiciary, and of legal counsel, to act creatively to find ways to make public interest intervention work effectively from the perspective of both the courts and those seeking to participate as intervenors. The challenge, as I see it, is to tap that wellspring of creativity rather than to retreat into traditional modes of thought about the nature of litigation.

¹²⁴ Rules of the Supreme Court of Canada, Rule 18(5).

¹²⁵ *Supra*, footnote 81.